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MODULE 1 General Principles of Equity I

Unit 1	History of equity
Unit 2	Introduction of the doctrines of equity into Nigeria
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UNIT 1 HISTORY OF EQUITY

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1.0 INTRODUCTION

This is an introductory unit. It introduces us to the law of equity and how it was developed in the court of Chancery in England. There is a wealth of literature on equity jurisprudence; its origin, development and the part it has played in those countries having the common law as the foundation of their legal systems. From its origin to the present period, equity has been kept under strict and constant surveillance. Its origin and development have been emphasized and its main principles have been amplified all in a determined attempt to ensure that the principles of equity do not fall behind society's immediate needs and aspirations. Equity came to mitigate the rigours of the common law.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Trace the origin of equity;
- (ii) Explain the notions of conscience; and
- (iii) Differentiate Equity from the common law.

3.0 MAIN CONTENT

3.1 Law and equity

Definition

The word 'equity' literally means fairness. Equity is defined in the *Oxford Advanced Learner's dictionary 6th edition* as "a system of natural justice allowing a fair judgment in a situation where the existing laws are not satisfactory". To a layman, the question 'what is equity?' does not create any difficulty. It simply means right doing, good faith, honest and ethical dealings in transactions and relationships. Conception of the term 'equity' in this sense is usually classified as equity in its most popular sense, which is of no juristic significance.

According to Jegede, for obvious reasons, no municipal legal system, however highly developed can take cognizance of or regulate all acts that may be inconsistent with this broad conception of equity. Moreover, the demands of the term equity in this sense are not capable of enforcement, for they do not create or produce any legal obligation. Yet the use of the term equity in this sense is not peculiar to the unlearned in the science of law. However, the lawyer takes a different and more cautious view of the term 'equity' when it is used in a limited but legal sense and clothed with the cloak of juristic significance.

Juristic Sense of Equity

The juristic sense of the term 'equity' may be subdivided into two, one complementary to the other and both affecting the administration of law and justice by recognized judicial tribunals.

In the first place, there is the general juristic sense of the term 'equity'. Here 'equity' means the power to meet the moral standards of justice in a particular case by a tribunal having discretion to mitigate the rigidity of the application of strict rules of law so as to adapt the relief to the circumstances of the particular case or a liberal and humane interpretation of law in general, so far as that is possible without actual antagonism to the law itself.

In the second place, there is the technical sense of the term 'equity'. Equity in this sense means a special and peculiar department of the English legal system which was created, developed and administered in the Court of Chancery. This may be a satisfactory definition of English equity before the Judicature Act of 1875 which provides for the administration of law and equity by the same tribunal. According to Maitland, in his book "*Equity (Brunyate Ed.) 1949*," prior to 1875, 'Equity is that body of rules which is administered only by those courts which are known as Courts of Equity.'

But after 1875, it is no longer satisfactory to define equity in terms of a court, that is, the Court of Chancery as distinct from the other superior courts. The Judicature Act of 1875 has amalgamated all the superior courts into a Supreme Court of Judicature administering both the rules of equity and the rules of common law. Thus, 'Equity now is that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity.' The extent to which the same definition may be applied to the technical rules of equity received into the Nigerian Legal System will be discussed later.

At the beginning of the nineteenth century, the court structure in England and Wales was in a mess. The population was subject to the jurisdiction of a dual system of superior courts. On the one side were the three 'common law' courts, viz – the Common Pleas, the Queen's Bench and the Exchequer of Pleas. On the other hand was the Court of Chancery. The three common law courts had grown up under the authority of the English kings during the Middle Ages. They were known as courts of 'common' law because according to royal propaganda, that law applied to all

subjects and the whole realm.

Only an historical explanation can be offered for why there were three such common law courts with substantially overlapping jurisdictions. They could and often did give different answers to the same questions and there was no reliable method of ironing out those differences. But rules based on judgments given in these common law courts and even the judgments themselves were in some cases being denied or added to in the Chancery. This was not by way of appeal. The common law judgment was not formally set aside or reversed; the Chancery, while leaving it intact, simply issued an order which was inconsistent with that of the common law judges. The constitutional position was that this second order prevailed, leaving the common law answer as an overshadowed solution to the problem.

These Chancery orders had come to be made by applying a body of doctrine and principles invented initially by the Chancellor and later by his subordinate the Master of the Rolls. These rules, principles and doctrines of the Court of Chancery, bearing this complex relationship with the doctrines of the common law, were to be known as Equity. This body of law did not, however, cover the entire area of business which the common law courts had taken as their jurisdiction. It was essentially a 'private law' jurisdiction, dealing with matters raised by private individuals, protecting their private interests. There was no involvement with the common law of crime.

The principal focuses of attention were the laws of property and contract. Only incidentally to these was it to develop a law of private wrongs. Equity was not the only jurisdiction exercised in the Chancery, but it was the one which was to leave the greatest impression on the development of the legal system.

The system of justice administered by the early Chancery was based on common law rules, though the rules were administered in a more liberal and more humane manner with a view to achieving the end of justice. This is borne out of the fact that early petitions were in respect of indubitable legal wrongs, assaults, batteries, imprisonments, disseisins and a variety of outrages inherent in the feudal society.

These wrongs were cognisable in the common law courts, but were presented before the Chancery in form of petitions because of the inflexible position of the common law courts in respect of writs; and because of certain ills of the society which made it difficult for commoners and people of poor means to obtain justice from the common law courts.

3.2 Conscience

Jurisdiction

The jurisdiction of the Chancery in granting reliefs to the various petitions was based on reason, conscience and justice in the administration of law. Chancery had a reputation as a court administering an individual discretionary justice in contrast to the inflexible monoliths of the common law. Whether this was perceived by all litigants in Chancery (or even common law) may be doubted.

Much of the jurisprudence of the court has been concerned with working out the detailed administrative implications of having taken an earlier moral stance. Many of these decisions, like much administration, have little reference to individuated notions of right and wrong. But the tradition is fundamentally well based and it is impossible to read Equity cases of any

period without being aware of it.

Pre-17th century Chancery jurisdiction was vague and elastic. As noted earlier, Chancery jurisdiction originated in the prerogative of the King to dispense extra-ordinary justice on the grounds of reason and conscience, where the ordinary processes of common law were inadequate or defective. The suitor or the petitioner humbly prayed in his petition to the Chancellor for the exercise of the 'King's Grace'. The early Chancellor was a church-man, versed in both the canon and the Roman law. From his training and background, he was well qualified to deal with appeals to 'Grace, Charity and Conscience'; it was an elastic jurisdiction, the limit of which was difficult to define.

The early history of the jurisdiction is obscure. The history which leaves traces began at the end of the Middle Ages in the early 16th century. By that date, it can be said that the common law courts had in some areas become inadequate. Outside the law of tort, they had shown an insufficient ability to adapt to new claims, and the set forms of writs particularly restricted the development of new issues and defences.

There was also dissatisfaction with common law remedies. Despite having taken the inspired decision to enforce rights of property in land by actually delivering it up by force, if need be, to its owner, it enforced other rights, including property in chattels, as well as all contract and tort claims by a money judgment.

Finally, common law pleading had become both overly complex and also a monument to single mindedness in its stubborn refusal to allow more than one issue to be tried at a time. Reform of these defects by statute was not seen to be an answer. Disappointed parties petitioned the King to get them out of the mess into which his common law courts had put them, and to receive the ordinary justice, the fair and commonsense solution, the equity, which they were otherwise denied.

According to Jeffrey Hackney in his book "*Understanding Equity and Trusts*", p.17-18, these petitions came to be heard by the King's greatest officer of state, the Chancellor. By the early 16th century, he was giving decisions in his own name and had established a jurisdiction over freehold land. It soon became a trademark of Chancery thinking to emphasize 'good faith' and to appeal to notions of 'conscience'. The avoidance of unconscionability may be the central informing idea. These notions of conscience which do not figure prominently in the articulation of common law rules are familiar in the canon law. It is possible that the ecclesiastical background of early Chancellors accounts for this emphasis.

He explained that, Step by step they set about plugging the loopholes left by the common law's shortcomings. Their pleadings were more flexible. They gave orders to parties to do things other than deliver up land or pay sums of money and so laid the foundation of the modern law of specific performance of contracts and of injunctions. They relieved against accidental hardship and certain kinds of oppressive behaviour. They allowed the creation and transfer of a new kind of intangible property, the right to payment of a debt, which developed into the branch of law known to us by the archaic name of the assignment of *choses in action* ('things protected only by litigation'). Most dramatically of all, they invented the 'use', later to be reborn as the modern trust. By this device, they would order that property held on a common law title by Y, as his own, should rather be administered by Y only for the benefit of X, the beneficiary of the use.

This would often be in consequence of a voluntary undertaking by Y, but sometimes it would not. Of greater significance still is that even if there were a voluntary undertaking, it need not have been to X herself, but to a third party, often a relative of X, who had conveyed the property to Y. Uses were not contract. In this way, Chancellors supported, supplemented and corrected the common law.

The principles of conscience are, however, vague and uncertain and unless they are guided within well-defined limits, they may soon lead to a system of justice based solely upon individual and autocratic discretion. The vague and extensive jurisdiction of the early Chancery could not for long resist some of the inflexible attitude of the common law lawyers, some of whom later presided over the Chancery. Through their influence and the improved reports of equity cases in the middle 17th century, Chancery division lost its flexibility and adopted the common law system of precedent.

Henceforth, equitable rules have since become as fixed and systemized as the common law rules. Instead of abiding by the dictates of conscience and the society's notions of justice and fair play in the exercise of its equity jurisdiction, the Chancery, from the Chancellorship of Ellesmere (1595-1617), began to apply the doctrine of judicial precedent.

SELF ASSESSMENT EXERCISE 1

What do you understand by the term 'equity'?

3.3 Difference and conflict

According to Jeffrey Hackney (*op.cit.*), pp. 18-19, the Chancellor's decisions had begun as individual decisions solving individual grievances or simply dilemmas posed by conscientious trustees wanting to know what to do. There were 'suits' in the Chancery, not actions, and the Chancellor gave 'decrees' not judgments. The contrast with the regular court system was enhanced by the absence of a jury and by the Chancellor's practice of not taking oral evidence. But a combination of repeated circumstance and a desire to treat like cases alike was ultimately to drive the Chancellor into developing a system of rules: equity was to become Equity.

The early days of this development were not marked by hostility from the common lawyers, but in the 16th century it began to brew. Cardinal Wolsey, one of Henry VIII's powerful Chancellors, had in the 1520's caused much resentment by his encroaching and aggressive behaviour. The so-called 'common' injunctions denying litigants even the right of access to common law courts were also a cause of much friction. Matters came to a head in the early 17th century when Coke, then Chief Justice of the King's Bench, challenged the right of the Chancellor, Ellesmere, to override common law results. Coke's appeal to the King in 1616 failed. From that date it has not been questioned that when the rules of Equity and common law conflict, it is the rules of Equity which shall prevail. This will be considered in detail in Unit 3 of this Module.

3.4 Equity and the common law in the narrow sense

There are two usages of 'common law': the wider usage, meaning the whole of the royal law, includes Equity; the narrower usage, focusing on the contrast, excludes it. If there was resentment about the divergence after 1616, it did not surface. Relations between the two systems were on the surface amicable, much aided by the diplomatic formulations of equitable rules which hid the substance of what was going on: 'we are not overturning the common law rules;

all we are saying is that while Y may own at common law, X owns in Equity', so disguising the fact that X may be happy – Y may not.

Equally effectively, decisions were often attributed to the demands of Equity as if it were some creature with a will of its own, some personified virtue, some Marianne, pulling the strings of the judicial marionettes.

Marianne is an image of a woman personifying the French republic, e.g. on French coins, usually depicted in a light flowing robe and wearing the Phrygian cap of liberty. (Marionette is a puppet operated by means of strings attached to its hands, legs, head, and body).

4.0 CONCLUSION

The early history of the jurisdiction of equity is obscure. The history which leaves traces began at the end of the Middle Ages in the early 16th century. By that date, it can be said that the common law courts had in some areas become inadequate. Outside the law of tort, they had shown an insufficient ability to adapt to new claims, and the set forms of writs particularly restricted the development of new issues and defences. Equity, therefore, came to relieve the rigours of the common law.

5.0 SUMMARY

This unit has introduced you briefly to the law of equity. You should now be able to: trace the origin of equity; explain the notions of conscience; and differentiate Equity from the common law.

6.0 TUTOR-MARKED ASSIGNMENT

How is the conflict between common law and equity resolved?

7.0 REFERENCES / FURTHER READING

Oxford Advanced Learner's Dictionary, 6th edition

Hackney Jeffrey, (1987) *Understanding Equity and Trusts*; London: Fontana press

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UNIT 2 INTRODUCTION OF THE DOCTRINES OF EQUITY INTO NIGERIA

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1.0 INTRODUCTION

In the previous unit, we traced the origin of equity, explained the notions of conscience and differentiated equity from common law in the narrow sense. In this unit, we will consider how the doctrines of equity were introduced into Nigeria.

The modern technical rules and doctrines of equity which originated from the early English Chancery were formally received into the Nigerian legal system through various statutory enactments. These technical rules and doctrines of equity are the outcome of many ancient and modern English judicial decisions, established and ascertainable in the same manner as the common law rules. It seems to follow that any technical rule of equity in force in Nigeria must have its foundation or its 'ancestry' in an English case law. This is the focus of this unit.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Explain how the doctrines of equity were introduced into Nigeria; and
- (ii) Explain the repugnancy doctrine.

3.0 MAIN CONTENT

3.1 Ordinances

English law and doctrines of Equity were introduced into Nigeria by means of local legislation. The first of such legislations was Ordinance No. 3 of 1863.

Ordinance No. 3 of 1863

This enactment broadly introduced English law into the territory of Lagos without any further analysis. In the absence of any information or record as to the interpretation of the laws so introduced, it is reasonable to assume that the introduced laws had been those administered in the practice of the English courts. As such, any reference to the laws of England will, by necessary implication be interpreted to include not only the rules of common law but also the rules of eq-

uity as developed respectively in the English common law courts and the English Chancery Courts.

Section 1 of this Ordinance No. 3 of 1863 introduced all laws and statutes, which were in force in England on the 1st day of January, 1863, and made them part of the laws of the Colony of Lagos. The only limitation was that such laws and statutes must not be inconsistent with any Ordinance in force in the Colony; and that they must be applied in the administration of justice so far as local circumstances would permit.

Ordinance No. 4 of 1876

Section 14 of this Ordinance introduced more clearly, the English common law, the doctrines of equity and statutes of general application which were in force in England on the 24th day of July, 1874, to be in force within the jurisdiction of the courts in the Colony of Lagos. Because of the inclusion of the phrase, 'doctrines of equity,' in this Ordinance, it is tempting to argue that this Ordinance is the forerunner of the introduction into Nigeria of the doctrines of equity.

Therefore, it can be reasonably asserted that the technical principles of equity as developed by successive Chancellors in England were incorporated into the laws of the Colony of Lagos for the first time only in 1876. Section 17 of this Ordinance made the application of Imperial Laws subject to local circumstances and to any existing or future Ordinance of the colonial legislature.

Section 18 of the same Ordinance also enjoined the British established courts in the Colony to observe the observance of the native laws and customs of the people of the Colony; such laws and customs not being 'repugnant to natural justice, equity and good conscience.' This doctrine will be considered later on at the end of this unit.

Ordinance No. 17 of 1906

Consequent upon the merger of the Colony of Lagos with the Protectorate of Southern Nigeria on the 1st of January, 1900, this Ordinance No. 17 of 1906 was passed in order to make applicable to the new Protectorate the provisions of Ordinance No. 4 of 1876. Similar steps had earlier been taken in respect of the Protectorate of Northern Nigeria by means of Proclamations. See section 4 of the Protectorate Courts Proclamation, No. 4 of 1900.

Ordinance No. 3 of 1908

This Ordinance repealed all existing enactments and re-enacted their provisions with minor alterations. The Ordinance remained in force until it was finally superseded by the Supreme Court Ordinance, 1914, which became applicable to the whole of Nigeria on the amalgamation of Northern and Southern Nigeria on the 1st day of January, 1914.

The Supreme Court Ordinance 1914

One of the objectives of the amalgamation in 1914 was the unification of the legal systems of the two administrations of Northern and Southern Nigeria. This objective was achieved by the promulgation of the Supreme Court Ordinance which replaced all the laws pre-existing in the amalgamated units. The Ordinance introduced into the country, subject to the usual reservation of their being applied subject to existing local laws and in so far as local circumstances would

permit, the rules of the English common law, the doctrines of equity and statutes of general application which were in force in England on the 1st day of January, 1900.

In this way, the rules of the English common law, the principles of English Equity and Statutes of general application which were in force in England on the 1st day of January, 1900 were introduced into the whole of Nigeria.

In 1952, the country adopted a quasi-federal Constitution whereby the country was divided into three regions – Eastern, Northern and Western Regions, with three legislative houses and a central Legislature in Lagos. This was followed up in 1954 with the regionalisation of the judiciary to accord with the new constitutional arrangements which came into operation since 1952.

In pursuance of this regionalisation of the judiciary, a Federal Supreme Court, replacing the West African Court of Appeal was set up by the Federal Constitution of 1954. A High Court and Magistrates' Courts were established in each of the three regions of Eastern, Northern and Western Regions. The Federal Territory of Lagos (separated from the Western Region) was also provided with a High Court and Magistrates' Courts and thus treated as though it were a region.

Provisions were also made in the Supreme Court Act, the High Court Laws and the Magistrates' Courts Laws of the regions and Lagos incorporating the rules of the English common law and the doctrines of equity among other things, into the respective laws to be administered not only in the Federal Supreme Court, but also in the regional High Courts and the Magistrates' Court. (In the Northern States, however, when the Magistrates sit in their civil jurisdiction they are designated as 'District Judges'. See sections 3-7 of the District Courts' Law (N.R. No. 15 of 1960). Note that the word 'Law' is the designation for a regional legislation, while the word 'Ordinance' was still retained for a federal legislation. Since independence, however, all Ordinances enacted by the federal legislature became known as 'Acts'.

Also, when the Mid-Western Region was carved out of the former Western Region and constituted into a separate region in 1963 by the Federal Parliament, Section 2 of the Mid-Western Region (Transitional Provisions) Act, 1963, expressly made all existing law which were in force in the Western Region immediately before the creation of the new region to be the law in force in the new region until changed by the new Midwestern authority. The effect of this is the direct absorption of the provisions of section 13 of the High Court Law, 1955 (W.R) and those of section 13(1) of the Magistrates' Courts Law, 1955 (W. R.) into the law (that is to say the rules of common law, the doctrines of equity and the statutes of general application which were in force in England on the 1st day of January, 1900) to be administered in the new Mid-Western Region High Court and the Magistrates' Courts.

Nigeria divided into 12 states

With effect from the 27th of May, 1967, the country was divided into twelve separate autonomous States by the States (Creation and Transitional Provisions) Decree No. 14. Three of these new States, the East-Central, the South-Eastern and the Rivers States, were carved out of the former Eastern Nigeria. While six others, the North-Western, the North-Central, Kano, the North-Eastern, the Benue-Plateau and Kwara States were carved out of the former Northern Nigeria. The former three administrative divisions of Badagry, Epe and Ikeja in the former Western Nigeria were also carved out of the former Western Nigeria and merged with the Federal Territory of Lagos to form the new Lagos State. The other two were the Western and the

Mid-Western States.

Section 15 of the Decree No. 14 provides that “all existing law in the region out of which a state under this Decree is created shall have effect, subject to the modifications necessary to bring it into conformity with the provisions of this section”. Section 2(1) of the same Decree as amended by Section 2 of the Constitution (Miscellaneous Provisions) Decree, 1967, also provides as follows:

“(1) Without prejudice to the provisions of this Decree relating to the existing law, every local authority, court and other public body which immediately before the commencement of the Decree exercised its functions within a state as herein constituted shall continue to exercise those functions in the State.”

The combined effect of these provisions in relation to the law to be administered within the jurisdiction of the courts in the new states is two-fold: (i) In relation to the law to be administered within the jurisdiction of the High Courts and the Magistrates’ Courts in the Western and Mid-western States, it is the law as contained in the High Court Laws and the Magistrates’ Courts Law respectively in those two States prior to the creation of new States. (ii) In relation to the laws to be administered within the jurisdiction of the High Court and the Magistrates’ Courts in each of the three Eastern and each of the six Northern States, it is the law respectively being administered within the jurisdiction of the High Courts and the Magistrates’ Courts in the former Eastern and former Northern Nigeria.

The position of the High Court and the Magistrates’ Courts in Lagos State is somewhat peculiar. In the case of the nine new states created from the former Eastern and Northern Nigeria, each of the new states was an off-shoot of an existing region and carries with it to the new state, the laws being administered within the jurisdiction of the High Court and the Magistrates’ Courts in its former region of origin, to the High Court and the Magistrates’ Courts of the new State.

But in the case of Lagos State, Lagos was already a federal territory being administered by the Federal Government and already had its own High Court and Magistrates’ Courts before the creation of states. The direct effect of this is that the judicial divisions of the High Court and the Magistrates’ Courts functioning in the three administrative divisions of Badagry, Epe and Ikeja, which were carved out of the former Western Nigeria and merged with the federal territory of Lagos to form Lagos State, carried the law being administered within the jurisdiction of their courts to their new Lagos State. The High Court of Lagos Act and the Magistrates’ Courts Act now applied throughout the State. See section 2 of the Lagos State (Applicable Laws) Edict 1968 (No. 2 of 1968).

The country was further divided into 19 states by the States (Creation and Transitional Provisions) Decree, 1976 and later into 21, 30 and now 36 states. Thus, we now have in Nigeria as against the former five jurisdictions which exercised judicial functions, 37 (including Abuja) separate jurisdictions performing the same functions.

SELF ASSESSMENT EXERCISE 1

How were the doctrines of Equity introduced into Nigeria?

3.2 Local Legislation in Nigeria dealing with Conflicts between customary law and equity

Despite the introduction of the English law into Nigeria, the native laws and customs of the people were not abolished. Rather, the Ordinances introducing such English law into Nigeria expressly made provisions to the effect that these British established courts in Nigeria should observe and enforce the observance of the people's native laws and customs as contained in the provisions of section 18 of Ordinance No. 4 of 1876. Subsequent local legislations since then have continued to retain those provisions.

Now, every High Court in the country is enjoined to observe and enforce the observance of the native laws and customs of the people in the area of its jurisdiction. There are, however, two pre-requisites to be fulfilled before the court can observe and enforce the observance of any native law and custom.

1. The native law and custom must not be repugnant to natural justice, equity and good conscience.
2. Such native law and custom must not be incompatible either directly or by implication with any law for the time being in force. For a detailed study of the second pre-requisite, see Park AEW: *The Sources of Nigerian Law* (1963) pp. 77-80.

The first pre-requisite is our focus here and will now be examined in detail.

3.2.1 Repugnancy doctrine and customary law

Origin

The origin of the doctrine appears obscure. It has been suggested that the origin of the doctrine has little connection with English Law. Nor would it be correct to say that it is of Roman origin. It has been further suggested that it did not originate from either Aristotle or Cicero. Rather, its origin has been traced to the Roman-canonical law, which had been prevalent in most of the medieval European States. See Derrett, *Justice, Equity and Good Conscience (Changing Law in Developing Countries)*, edited by J. N. D. Anderson, p. 114.

However, the idea of the repugnancy doctrine was known to the early common law judges, although they were primarily concerned with adjudicating in accordance with the common law and statutes. In many cases, they did not modify and supplement common law and statutes by the exercise of judicial discretion or judicial equity (equity in the sense of what is fair and just in the circumstances).

The early Chancery Court introduced equity and developed the technical rules of equity. However, the exercise of the early Chancery Jurisdiction was premised on equity, natural justice and good conscience. Consequently, the British introduced the doctrine to their dependent territories and particularly those territories where the English common law, doctrines of equity had to be administered side by side with local laws and customs. In this way, the 'repugnancy doctrine' became part of our system through various local enactments.

The doctrine is of much importance in the ascertainment and application of our customary law. Our courts are under a duty to enforce customary law so far as it is not repugnant to natural justice, equity and good conscience. In some cases, courts are empowered to apply rules of natural justice, equity and good conscience where the common law, statutes, doctrines of equity and

local laws are inapplicable. See for example, section 34(4) High Court Law, No. 8 of 1955 (N. R.)

It has been argued that the phrase 'natural justice, equity and good conscience' is capable of being interpreted in two ways. (See Daniels, *The Common Law in West Africa*, p.267; Park, A.E.W., (1963) *The Sources of Nigerian Law*, p. 69.) The first possible approach is to view the phrase in totality as having only one meaning. The second possible approach is to split the phrase into three and consider each part separately. (See Speed Ag. C.J. in *Lewis v. Bankole* (1908) 1 N.L.R. 81.) However, attempt to examine the impossibility implicit in the second approach seems to be a fruitless academic exercise.

From all indications, it is clear that the phrase can only mean one thing, in that there is only one common idea, which is expressed in three different phrases. The three phrases had sometimes been used separately but they all originated from a common idea and they have all been used to achieve the same result – social justice in the administration of law.

The practical application of the doctrine in our system has not evinced any generally agreed test. It is therefore futile to examine judicial decisions in which the operation of the doctrine has been considered. One of the most authoritative pronouncements on the application of the doctrine does not seem to have offered any satisfactory solution. See *Eshugbayi Eleko v. Government of Nigeria* (1931) A. C. 662 at 673. It does not go beyond stating that 'the court cannot itself transform a barbarous custom into a milder one.' If it still stands in its barbarous character, it must be rejected as repugnant to 'natural justice, equity and good conscience.'

However, the test for the application of the doctrine cannot mean a reference to foreign law; for 'it is the assent of the native community that gives a custom its validity, and therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.' See *Eshugbayi Eleko v. Government of Nigeria* (*supra*).

Perhaps an agreeable test in the application of the doctrine may be found if the purpose, which the doctrine is meant to serve, is considered. The introduction of the doctrine into our system is to remind the judges of their obvious duty, which is to accept such customary law as will promote, without being inconsistent with the economic, political and social developments of the community within which the customary law is to operate.

These factors must necessarily be the condition precedent to the ascertainment and application of any alleged rules of customary law. This brings us to a consideration of Park's view that: 'there is no provision in the enactments which authorises the courts to look beyond the rule to the results of its application in specific situations. (See *The sources of Nigerian law*, p. 73.)

This is suggestive of a mechanistic approach to the ascertainment and application of our customary law, particularly where as in many cases, it is almost impossible to determine whether a rule of customary law is repugnant to natural justice, equity and good conscience without assessing the result of its operation within the community.

The basic idea behind the introduction of the 'repugnancy doctrine' into our system is that the court, in the process of ascertaining and applying an alleged rule of customary law, should recognise and apply equity in its broad sense. That is, giving humane and liberal interpretation to any alleged rule of customary law. It is through the recognition and application of such broad principles of equity that English judges have been able to develop the common law to meet the

various needs of successive generations of English people.

Thus, in *Emmens v. Pottle* (1885) 16 Q.B.D. 354 at pp. 357, 358 Lord Esher said: 'In my opinion, any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust, cannot be part of the common law of England.' This proposition was cited with approval in the celebrated decision in *Donoghue v. Stevenson* (1931) A.C. 562 at pp.608, 609. A decision that revolutionised the English law of negligence.

Thus, an alleged rule of common law cannot be part of the common law if the result of its application is wholly unreasonable and unjust. Therefore, it seems to follow that the result of the application of an alleged rule of customary law would first have to be examined; and if such an examination of the result reveals unreasonableness and injustice, then the alleged rule is no part of the common law.

4.0 CONCLUSION

In conclusion, section 32 subsections (1) to (3) of the Interpretation Act (cap. 123 Laws of the Federation of Nigeria, 2004) provides that:

(1) Subject to the provisions of this section and except in so far as other provision is made by any Federal Law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria.

(2) Such Imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit and subject to any Federal law.

(3) For the purpose of facilitating the application of the said Imperial laws they shall be read with such formal verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.

Subject to local circumstances and to any local statute, the entire English Common Law and Equity forms part of Nigerian Law. There is, however, a controversy as to whether the limitation to pre 1900 laws refers only to statutes of general application or whether it applies also to the rules of Common Law and Equity. Clearly, only the pre 1900 English statutes are in force in Nigeria.

5.0 SUMMARY

In this unit, we have discussed how the doctrines of equity were introduced into Nigeria through various ordinances and the controversy generated by the repugnancy doctrine in relation to customary law. In unit 3, we shall treat the relationship between equity and common law.

6.0 TUTOR-MARKED ASSIGNMENT

Explain what you understand by the repugnancy doctrine and its effects on customary law.

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

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UNIT 3 THE RELATION BETWEEN EQUITY AND COMMON LAW

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
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1.0 INTRODUCTION

In the previous unit, we considered how the doctrines of equity were formally received into the Nigerian legal system through various statutory enactments.

The early Chancellors would have flatly denied any intention on their part to set up a separate court in opposition to the courts of law. As we have seen, the rise of the Chancery as a separate court administering different rules was purely accidental. Had the common law courts been able to adapt common law rules to meet the social needs and expectation of the people, the Chancellors would have been confined to their traditional administrative duties and would not have altered the original course of English legal history. However, by default on the part of the common law courts and a variety of other factor, the Chancellor and his original administrative functions emerged as a separate court with a separate jurisdiction administering different rules. In this unit, we will look at the relation between equity and common law.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- (i) outline the opposition to the Chancery Jurisdiction;
- (ii) explain the Judicature Acts; and
- (iii) explain the conflicts between law and equity.

3.0 MAIN CONTENT

3.1 Opposition to the Chancery Jurisdiction

14th Century

Towards the end of the fourteenth century, the court of Chancery became separate and distinct from the King and his Council. Opposition to Chancery's 'extra-ordinary' jurisdictions (because it was neither supported by statutes nor by the common law of the land) came from both the Parliament and the common law courts. At that time, parliament had gained its independence from the King and his Council to become a law-making institution. Jealous of its newly acquired law-making power, Parliament naturally resented the extra-ordinary jurisdiction exercised by the Chancery in the sense that such jurisdiction was neither supported by statutes nor by the common law of the land.

On the other hand, common law courts became hostile to the Chancery jurisdiction on the pretext that the jurisdiction being exercised by the Chancery was unknown to the common law of the land. However, it is clear that the hostility from the common law courts sprang from the fact that their jurisdiction was being progressively eroded by the Chancery whose jurisdiction was more progressive and more realistic.

For example, it was at this period that the Chancery devised a useful means for the enforcement of trusts, the popularity of which over-shadowed the clamour for the abolition of Chancery jurisdiction.

It may be remarked here that common law courts did not take cognisance of the trusts on the pretext that it might be used for fraudulent purposes and for the evasion of the law of the land. On the contrary, Chancery's recognition and enforcement of the trust was in accord with human progress and aspirations at a time the English people were determined to move away from the feudal age and its unpleasant incidents.

Coke and Ellesmere – 16th Century

In the latter part of the sixteenth century, the rivalry between the common law courts and the Chancery had reached a second and was nearing a decisive stage. The existence of the Chancery as a separate court administering rules of equity had become a *fait accompli*. Opposition from the common law courts became more intensified particularly because of the Chancery's power to issue common injunction to restrain the enforcement of judgments obtained from the common law courts.

The decisive stage came when Coke became the Chief Justice of the King's Bench. He loathed Chancery jurisdiction and the jurisdiction of other prerogative courts that stood in opposition to the jurisdiction of the common law courts. He claimed for the common law courts the power to issue a writ of prohibition against Chancery jurisdiction for any interference with the judgments or decisions of the common law courts. On the contrary, the Chancery firmly maintained that it had long been within its jurisdiction to set aside common law judgments and to grant a more equitable relief where such judgments were devoid of conscience or appeared oppressive.

The effect of these conflicting positions of the two courts of rival jurisdictions operating within one legal system is not difficult to foresee in the administration of justice. The imminent anarchy that would have resulted if the situation were not arrested became real in the *Earl of Oxford's case* (1615) 1 Rep. Ch. 1.

The Chancellor, Lord Ellesmere, claimed the power to set aside common law judgments on the ground of equity and good conscience. Chief justice Coke of the common law courts insisted

that the Chancery had no right, either by statute or by any other law of the land, to set aside common law judgments and that he would issue writ of prohibition against Chancery's interference with common law judgments. The matter in controversy came before James I, who after consulting with many other learned lawyers of the period, (including Bacon, who later became Lord Chancellor), decided in favour of Chancery jurisdiction.

Henceforth, the legal supremacy of equitable rules as administered by the Chancery court over common law rules became a significant feature of the English legal system.

The common law lawyers did not take kindly to the legal supremacy of the court of Chancery over the courts of common law and did not hesitate to initiate or support any move for the abolition of the Chancery court. Twice in the 17th century, the period of the commonwealth and the period immediately after the revolution of 1688, the common law lawyers made abortive attempts to curtail Chancery jurisdiction and to revive the conflict hitherto resolved in favour of the Chancery by James I.

SELF ASSESSMENT EXERCISE 1

Why was there so much opposition to the jurisdiction of the court of Chancery by the courts of common law?

Effect of the King's Decision

The king's decision in favour of the Chancery had a two-fold effect on the nature and character of Chancery jurisdiction. In the first place, the jurisdiction of the court became more extensive. Many litigants were attracted by the flexible and speedy judicial policy of the Court of Chancery. In course of time, the court was so much hard-pressed that it could not adequately cope with its business. The court was poorly staffed and poorly organised; its procedure had become complex and inefficient. The result was unnecessary delay in the administration of justice.

In the second place, the officials of the court became corrupt and incompetent. The power of the court to issue injunctions became a source of iniquities. Litigants, with the active assistance of the court made use of the power as delay tactics and to pervert the course of justice. Various but unsuccessful attempts to reform the Chancery jurisdiction and its procedure were made before the later piecemeal reform of the 19th century. The position of the Chancery court and its jurisdiction in the English legal system before the 19th century reform was neatly described by Sir Carleton Allen in his book *Law in the Making*, 7th Ed. (1964) p.420 thus:

‘While ...equity (in the technical sense) has made important contribution to our law, there is another and a darker side of the picture. The history of the Court of Chancery is one of the least credible in our legal records. Existing nominally for the promotion of liberal justice, it was for long corrupt, obstructive and reactionary, prolonging litigation for the most unworthy motives and obstinately resisting all efforts at reform.’

See further Potter's *Historical Introduction to English Law* (4th Ed.) pp. 160-165.

19th Century Reforms

In the early part of the 19th century, two important factors called for reform and simplification of legal procedure.

- (i) The decadent and the unsatisfactory procedure and organisation of the Court of Chancery; and
- (ii) The area of jurisdiction within which each of the superior courts, namely; court of common law and the court of Chancery was to operate, was not clearly defined. See *marquis of Waterford v. Knight* (1844) 11 C. 1. F. 653; 8 E.R. 1250.

If a litigant required redress both in equity and at common law, distinct actions in each jurisdiction were necessary. Again, there were cases lying on the frontier of both jurisdictions. If an action was brought in one jurisdiction, it might be fought up to the House of Lords, only for parties to discover that the action should have been brought in the other jurisdiction. Thus, litigation became expensive and there was unnecessary delay in the administration of justice. Certainly, such a situation is not a credit to any legal system.

Procedural Reforms

Before the statutory reforms of the second half of the 19th century, common law courts attempted some minor reforms of the conflicting system of procedure with a view to mitigating the attendant hardships. They would apply rules of equity to cases before them whenever those rules were in conflict or different from common law rules. This was to prevent separate proceedings, one in equity and the other at common law, from being brought in respect of the same cause of action and thereby save litigants time and unnecessary expense. The bold attempt to combine the administration of both rules into one system of procedure was a step in the right direction. However, not much was achieved by this unification policy of the common law courts since the attitude of the Chancery to matters before common law courts might not be easily predictable.

The Common Law Procedure Acts of 1852, 1854 and 1860 empowered common law courts to exercise certain jurisdictions originally peculiar and exclusive to the Chancery. For example, common law courts were empowered to compel discovery of documents and interrogatories in certain cases. They had a limited power to grant injunction and some other equitable reliefs when such reliefs might have been granted by the Court of Chancery. On the other hand, the Chancery Amendment Act of 1852 empowered the Courts of Chancery to exercise certain common law powers. Thus in an equity suit, any relevant common law matters could be decided by the Chancery Courts. Before the Act, such matters would have been sent to the common law courts. In addition, the Court of Chancery was enabled to take evidence orally in the open court. Originally, evidence in the Chancery was by bill. Lord Cairn's Act, 1858, also empowered the court of Chancery in cases of contracts or torts to award damages in addition to or in lieu of injunction, specific performance or any relevant equitable remedy.

The foregoing series of Acts did not go far enough to ameliorate all the evils inherent in the dual system of administration of justice. This was clearly pointed out in the first report of the Royal Commission that was appointed in 1867 to inquire into the system of administration of justice and to suggest necessary reforms. According to the report, the alterations made by this series of acts,

have no doubt introduced considerable improvements into the procedure both of the common law and equity courts; but after a careful consideration of the subject, and judging now with the advantage of many years' experience of the practical working of the system actually in force, we are of the opinion that 'the transfer or blending off jurisdiction' attempted to be carried out by recent Acts of Parliament, even if it had been adopted to the full extent recommended by the Commissioners,

is not a sufficient or adequate remedy for the evils complained of, and would at best have mitigated but not removed the most prominent of those evils.

In the light of the above, the Royal Commission recommended a complete fusion of the administration of justice. This was to be done by a consolidation of 'all the superior courts of law and equity, together with the Courts of Probate, Divorce and Admiralty, into one court, to be called 'Her Majesty's Supreme Court,' in which Court shall be vested all the jurisdiction which is now exercisable by each and all the courts so consolidated.'

3.2 Judicature Acts 1873-1875

The recommendations of the Royal Commission were substantially enacted as the Judicature Acts 1873-1875. The Acts abolished all the existing superior courts and in their place, created a Supreme Court of Judicature consisting of the High Court of Justice and the Court of Appeal. The High Court of Justice consists of three divisions –

- (i) The King's Bench Division
- (ii) The Chancery division; and
- (iii) The Probate, Divorce and Admiralty Division.

The following causes and matters, hitherto within the exclusive jurisdiction of the Chancery, were assigned by section 34 of the Judicature Act, 1873, to the Chancery division because of the long and expert experience of the Chancery in dealing with these matters. These are:

- (i) The administration of the estates of deceased persons
- (ii) The dissolution of partnerships or the taking of partnership or other accounts
- (iii) The redemption or foreclosure of mortgages
- (iv) The raising of portions or other charges on land
- (v) The sale and distribution of the proceeds of property subject to any lien or charge
- (vi) The execution of trusts, charitable or private
- (vii) The rectification or setting aside or cancellation of deeds or other written instruments
- (viii) The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases
- (ix) The partition or sale of real estates
- (x) The wardship of infants and care of infants' estates.

In addition to the above specific cases, Parliament may also from time to time, assign any other causes and matters to the Chancery division. *See section 63, Conveyancing Act 1881; section 49 Settled Land Act 1882; and section 2 Guardianship of Infants Act, 1886.*

The far-reaching effect of the Judicature Acts, 1873-1875 on the administration of justice is that, since 1875 there is no longer dualism of courts exercising separate and conflicting jurisdictions. Instead, there has been a single system of courts (in three divisions) administering both law and equity. Each division exercises all jurisdictions which is vested in the High Court of Justice, thus every judge of the High Court of Justice, sitting in Chancery or King's Bench, is ordained to administer both equity and law concurrently.

All claims, obligations, defenses whether legal or equitable are cognisable in each of the three divisions of the High Court of Justice. *See section 24, Judicature Acts 1873 and 1875.* In addition, the common injunction by means of which the Chancery Court used to exercise its supremacy over the court of common law is no longer relevant and was expressly abolished.

Section 24(5) of the Judicature Act, 1873 provides that no cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by prohibition or injunction, but every matter of equity in which an injunction against the prosecution of any cause or proceeding might have been obtained before the passing of this Act may be relied on by way of defence thereto. Each of the divisions of the High Court of Justice is also empowered to stay, by injunction, proceedings in any matter or cause before it. The most significant effect of the Judicature Acts is the consolidation of all the superior courts and the fusion of the administration of law and equity.

SELF ASSESSMENT EXERCISE 2

What is the effect of the Judicature Acts, 1873-1875 on the administration of justice?

Equity in the Nigerian Legal System

We have seen in the preceding unit the manner in which the English common law, doctrines of equity and statutes of general application which were in force in England on the 1st of January, 1900 were incorporated into the Nigerian legal system. Note that the dual administration of law and equity, which largely extent paralysed efficient administration of justice in England before the Judicature Acts, was not introduced into the Nigerian legal system.

Though Nigeria adopted the English common law and the doctrines of English Chancery Court, Nigeria antedated England in reforming the machinery to enforce them. The Supreme Court Ordinance No. 11 of 9th April, 1863 established the Supreme Court of Her Majesty's Settlement of Lagos, as a court of jurisdiction to be presided over by a Chief Magistrate or his duly appointed deputy. It was a court of record empowered to exercise the same civil and criminal jurisdiction and competence as Her Majesty's Court of Queen's Bench, the common pleas and Exchequer in England. By Ordinance No. 9 of July 1864, the Court of Her Majesty's Settlement of Lagos was also made a court of equity with powers corresponding to that of Lord Chancellor in England.

Section 18 of the Ordinance No. 4 of 1876 also provided in a clearer term that law and equity were to be administered concurrently so as to avoid any multiplicity of legal proceedings; and in cases of conflict or variance between the rules of equity and the rules of common law with reference to the same subject matter, the rules of equity should prevail. In this way, the Nigerian legal system was saved from the unhealthy rivalry between equity and common law which characterised the English legal system for centuries.

Notwithstanding Nigeria's later political and constitutional developments, the regional High Courts (now State High Courts) are obliged to administer law and equity concurrently. See *Law of England (Applicable) Law; sec. 3 (cap. 60) 1959 of (Western Nigeria); High Court Law, No. 27 of 1955, sec. 14 of (Eastern Nigeria) now applicable in all the Eastern States; High Court Law No. 8 of 1955, sections. 29-31 of (Northern Nigeria) now applicable to all the Northern States. See also Supreme Court Ordinance sec. 18, (1943) Laws of Nigeria.*

Under the Nigerian Constitution, the Supreme Court has original jurisdiction in certain matters. With respect to the exercise of this original jurisdiction, the Federal Supreme Court Act, 1960 provides that the Supreme Court shall administer law and equity concurrently and in the same manner as they are administered by Her Majesty's High Court of Justice in England. Section 16(b) of the Act is similar in substance to section 24(5) of the Judicature Act 1873. It provides

that in every cause or matter pending before it, the Supreme Court shall grant, either absolutely or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided. Section 16(c) of the Act provides that in all matters in which there was formerly or is in any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.

The above provision extends concurrent power to cases in law and equity but does not blur the distinction between the principles of law and the rules of equity. While law and equity are to be administered concurrently, the distinction between equity and common law is given firm recognition, hence the provision for the settlements of conflict that might have been existing in the past or that may arise in the future between common law and equity. It is in this context and that of the relevant provisions of the Judicature Acts 1873-1875 (the Act is a statute of general application and therefore in force in Nigeria) that the settlement of conflicts between law and equity will be examined.

4.0 CONCLUSION

Opposition to Chancery's jurisdictions came from both the Parliament and the common law courts. The recommendations of the Royal Commission were substantially enacted as the Judicature Acts, 1873-1875. The Acts abolished all the existing superior courts and in their place created a Supreme Court of Judicature. Though Nigeria adopted the English common law and the doctrines of English Chancery Court, Nigeria antedated England in reforming the machinery to enforce them.

5.0 SUMMARY

In this unit, we have considered the opposition to the jurisdiction of chancery and the enactment of the Judicature Act. You should now be able to outline the opposition to the Chancery Jurisdiction; and explain the Judicature Acts.

6.0 TUTOR-MARKED ASSIGNMENT

Outline the opposition to the Chancery Jurisdiction.

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

Jegede M. I. (2007rep.) *Principles of Equity*; Ibadan: Unique Design/Prints

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- 4.0 Conclusion
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1.0 INTRODUCTION

In the previous unit, we considered the relation of equity and common law. In this unit, we will further consider the conflict between equity and the common law and the effect of the passage of the Judicature Acts 1873-1875.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Explain the effect of the Judicature Acts 1873-1875; and
- (ii) Explain how law was fused with equity.

3.0 MAIN CONTENT**3.1 Effect of the Judicature Acts, 1873-1875**

Before the Judicature Act of 1873, there had been certain practical cases in which the application of common law rules and the application of rules of equity with reference to the same matter produced conflicting results. For example, before the Act, the attitude of equity with regard to the effect of stipulations as to the time in contracts could not be reconciled with that of the common law. Similarly, equity rules as to the custody and education of infants were different from relevant common law rules. In addition, equity and common law had long maintained a different attitude to the important question of assignments of choses in action. These and some other particular types of conflict were resolved by section 25, sub-sections 1-10 of the Act. In some cases, rules of equity were made to prevail over those of the common law (subsections 2, 7, 10), in others, common rules (neither those of equity nor common law) were evolved. See subsection 8.

In addition to the settlement of particular conflicts, section 25(11) of the Judicature Act also provides in a general term, for the settlements of conflicts which may arise in the fused administration of common law and equity. Generally in all matters not here-in-before particularly mentioned, in which there is conflict between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.' This provision is very much similar to section 16(c) of the Federal Supreme Court Act and other similar High Court Laws of the various States.

The scope of the section has come for judicial consideration in the following cases.

(i) Liability of an Executor for assets

Before the Judicature Act of 1873, the common law rule was that an executor was liable for the loss of his testator's assets when they had come into his hands. Whether the loss was accidental or as a result of wilful default was immaterial. See *Crosse v. Smith* (1806) 7 East. 246. On the contrary, equity took a more lenient view; an executor would not be liable for the loss of the testator's assets, without default in him.

These two varying positions of common law and equity with reference to the same matter came for consideration in *Job v. Job* (1877) 6 Ch.D. 562. Referring to the common law position, Jessel M.R. said: "The rule there laid down is, however, as I have already intimated, not the rule now, even at law, for the Judicature Act, 1873, provides by section 25 subsection 11, that where 'there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.'"

The rule at law as well as in equity now is that, an executor or administrator is in the position of gratuitous bailee who cannot be charged with the loss of his testator's assets without wilful default. Though the Master of the Rolls adopted a 'common rule', this common rule was in fact a rule of equity which was held to have prevailed over the common law rule because of the Judicature Act of 1873.

(ii) Agreement for a lease

The meaning of 'conflict or variance' within section 25(11) of the Judicature Act is also illustrated by the decision in *Walsh v. Lonsdale* (1882) 21 Ch.D. 562. By a written agreement, Lonsdale agreed to grant a seven years' lease of a cotton mill to Walsh. The rent was to be payable in advance if demanded. Walsh entered and took possession without any lease having been granted. Walsh, however, for some time, paid the rent in arrear. Later, Lonsdale, in accordance with the agreement, demanded a year's rent in advance. Walsh refused to meet this demand. Lonsdale thereby distrained. Walsh brought an action claiming damages for unlawful distress and for an injunction and for specific performance.

Walsh's claim or damages for unlawful distress was on the ground that he was a yearly tenant at law, having paid his rent with reference to a year and that 'to justify a distress there must be a legal tenancy and rent in arrear. There can be no such thing as an equitable distress. Distress is a legal remedy, and here the payment of rent is evidence of a legal tenancy with a rent not payable by anticipation. The provision in the written agreement, as to rent being paid beforehand is not 'applicable to the tenancy hereby created,' since the rent is at so much per loom run, and it cannot be told till the end of the year what is that number of looms run.

In other words, since the rent can be assessed only after ascertaining the number of looms used, the yearly tenancy created by the act of the parties cannot be with rent payable in areas, non-payment of which would justify the legal remedy of distress. On the contrary, Lonsdale contended in his defence that the provision in the written agreement for the payment of rent in advance was enforceable since the written lease was one of which equity would decree specific performance, the effect of which would convert the written lease to a formal lease as if the lease had been granted at law. Delivering the judgement of the Court of Appeal, Jessel M.R. said:

'There is an agreement for a lease under which possession has been given. Now since the

Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court and the equity rules 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 a case in which both parties admit that relief is capable of 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. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say, 'I have a lease in equity, and you can only re-enter if I have committed such breach of covenant as would if a lease had been granted have entitled you to re-enter according to the terms of a proper proviso for re-entry. That being so, it appears to me that being a lessee in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed.'

In *Savage v. Sarrough* (1937) 13 N.L.R. 141, the plaintiffs were the owners of land and buildings situate at 6 Balogun Square, Lagos. The defendant obtained from the plaintiffs a written agreement, not under seal, of lease of property for five years. The plaintiffs, on receiving a higher offer for the lease of the property brought this action to set aside the agreement, contending, *inter alia*, that the agreement for the lease not being under seal, was void. Adopting the rule in *Walsh v. Lonsdale* that since 1873 where there is conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity should prevail. Kingdom, C.J. at page 145 said: 'In equity, the lease is deemed to have been effectively granted, and for practical purposes, the parties are in the same position as if the lease were valid at law.'

Similarly, in *Chidiak v. Coker* (1954) 14 WACA 506, the West African Court of Appeal observed that: 'since the Judicature Act, 1873, the lessee may be liable upon an implied tenancy on the like terms and conditions as those expressed in the lease, if the incompletely executed lease is capable of operating as an agreement for a lease which could be specifically enforced, and the tenant who had entered thereunder would be bound in equity by the covenant to repair.'

However, as Maitland remarked in his lecture,

'an agreement for a lease is not equal to a lease. An equitable right is not equivalent to a legal right; between the contracting parties an agreement for a lease may be as good as a lease; just so between the contracting parties an agreement for the sale of land may serve as well as completed sale and conveyance. But introduce the third party and then you will see the difference. I take a lease; my lessor then sells the land to X; notice or no notice my lease is good against X. I take a mere agreement for a lease, and the person who has agreed to grant the lease then sells and conveys to Y, who has no notice of my merely equitable right. Y is not bound to grant me a lease.' See Maitland's *Equity* (Brunyate Ed.) 1949, pp.156-159.

In *Ibeziako v. Chinekwe* (1972) 2 E.C.S.L.R. 71 at 79, though *Walsh v. Lonsdale* (supra) was followed, Egbuna J., did not lose sight of the fact that it is an essential condition that the agreement be found to be an agreement of which a court of Equity would decree specific performance. For example, specific performance of such agreement will not be granted where the plaintiff is guilty of laches or where he has not come to equity with clean hands.

(iii) **Joint Undertaking**

The supremacy of equitable rules over common law rules under section 25(11) of the Judicature

Act, is also illustrated by the decision in *Lowe v. Dixon* (1885) 16 QBD 455. At common law, where two or more persons jointly undertook to be sureties of a debt, and one of them became insolvent, the remaining solvent sureties were not bound to pay the share of the liability which the insolvent surety would have had to pay had he been solvent. On the contrary, the rule in equity is that the solvent sureties are in addition to their own share of the liability, also liable for the share of the insolvent co-surety. The conflicting rules came for consideration in *Lowe v. Dixon* (supra) and it was held that the equitable rule now prevails in accordance with the Judicature Act.

(iv) Variation of Deed

Another illustration of the effect of section 25(11) of the Judicature Act 1873 on the conflict between law and equity is the decision of Swift, J. in *Berry v. Berry* (1929) 2 KB 316. In that case, there was a deed of separation in which the husband covenanted to pay a monetary allowance to his wife. Later there was another agreement in writing, but not under seal, by which the parties agreed to vary the terms of the deed regarding the allowance. The wife brought this action claiming arrears of allowance under the original terms of the deed. The court accepted the claim of the plaintiff that at common law a covenant in a deed cannot be varied by a subsequent written agreement not under seal. See also *West v. Blakeway* (1841) 10 LJ (CP)173, 177.

However, the Courts of equity have always allowed the rescission or variation by a simple contract of a contract under seal and such variation or rescission is good defence to an action on the deed. That being the state of the law and of the equitable practice, section 25(11) of the Judicature Act, 1875 provides that the rule of equity should now prevail and the action was dismissed. This 'variation rule' was extended in the *High Trees Case* (1947) KB 130 and in *Ajayi v. Briscoe* (1964) 3 All ER 556.

SELF ASSESSMENT EXERCISE 1

At common law, can a covenant in a deed be varied by a subsequent written agreement?

3.2 Fusion

The effect of the Judicature Acts on the relation between law and equity is not free from controversy. With effect to the provision of the Acts dealing with settlement of conflicts between law and equity, there are two views of the matter.

- (i) That there is no appreciable conflict between law and equity and therefore section 25(11) of the Judicature Act 1873 is redundant.
- (ii) That rules of equity do conflict with rules of common law and that such cases of conflict are to be settled in accordance with section 25(11).

Maitland, the chief exponent of the 'no conflict view' argues forcefully that the conflict between law and equity was only jurisdictional and has never been of any vital functional significance. He observes that:

“it is important that even at the very outset...we should form some notion of the relation which existed between law and equity in the year 1875. And the first thing that we have to observe is that this relation was not one of conflict. Equity had come not to destroy the law, but to fulfil it. Every jot and every title of the law was to be obeyed, but when all this had been done something might yet be needful, something that equity would require.”

See *Lectures on Equity op.cit.* at 16-18, 153.

It is his view that since the jurisdictional conflict had been removed by the Judicature Acts, 'the day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law: suffice it that it is a well established rule administered by the High Court of Justice.' See further Langdell, *Brief Survey of Equity Jurisdiction* 1 Harv.L.Rev. 58 (1887); Classification of Rights and Wrongs, 13 Harv. L. Rev. 673 (1900).

On the contrary, Hohfeld maintains that 'while a large part of the rules of equity harmonise with the various rules of law, another large part of the rules of equity, more especially those relating to the so-called exclusive and auxiliary jurisdiction of equity, conflict with legal rules and, as a matter of substance, annul or negative the latter *pro tanto*.' See Fundamental Legal Conceptions – 'The relation Between Equity and Law' 11 Mich. L.Rev. 537 (1913).

Chief Justice Stone, sometime the Chief Justice of the United States Supreme Court is also of the view that:

"When one reflects that equity often restrained the prosecution of actions at law, and that the exercise of a large part of its jurisdiction involved for all practical purposes a negation of the rights of the legal owner, it seems extra-ordinary that any writer should ever have asserted broadly that there was no conflict between the doctrines of law and equity, and that anyone should have found it necessary or desirable to have written a book to assert the contrary doctrine... That there was a conflict in that equity often adopted a different doctrine other than that of the law courts and based its action upon it, does not now seem fairly open to question." See Book Review; 18 Col. L. Rev. 97 (1918). See further, Spence, *The Equitable Jurisdiction of the Court of Chancery* (1846) p.326.

It is true that the Judicature Acts removed the jurisdictional conflict between law and equity, it is also true that section 25 goes further to settle both particular and general conflicts between the rules of law and the rules of equity. Section 25 (11) which deals with the settlement of general conflict is rarely resorted to, but, as Maitland himself admitted, the provision had been applied to settle some substantive conflicts and variance between the rules of equity and the rules of common law.

Thus, the provision becomes operative where the application of the equitable rule deprives the legal rule of some material effect. In addition, the provision becomes operative when the remedy provided in equity involves a negation of the exercise of a right or power which would otherwise be exercisable at law. This is illustrated by a string of cases on the revocability of licences at law and in equity. See the following: *Hurst v. Picture Theatres Ltd.* (1915) 1 KB 1; *Winter Garden Theatre (London) Ltd. v. Millenium Productions Ltd.* (1948) AC 173; *Thompson v. Park* (1944) KB 408, and Evershed, 'Equity after Fusion – Federal or Confederal', JSPTL 171, (1948).

The premise of the argument in favour of 'no conflict doctrine' is that equity has never been a self-sufficient system of law. 'It is a collection of appendixes between which there is no very close connexion, at best equity is supplementary to law.' It is further argued that when the application of a rule of equity brings about a result the effect of which renders ineffective the enforcement of common law rule, there is no conflict in the sense that the rule of equity becomes the operative law. This does not appear to be a realistic approach to the conflict between law and equity. For example where the existence of a right depends on law, equity does not destroy the legal right so granted, but equity can prevent the exercise of this right which would otherwise be exercisable at law. In this case, there is conflict and equity prevails.

SELF ASSESSMENT EXERCISE 2

Equity had come not to destroy the law, but to fulfil it. Discuss.

3.2.1 Fusion of Rules or Fusion of Administration

It remains to mention the perennial controversy on the full effect of the Judicature Acts on the relation between common law and equity. The view is widely held that since the Judicature Acts, there has been only one system of courts administering a common rule which is neither rule of equity nor rule of common law. In essence the exponents of this view claim that, in addition to the fusion of administration of justice, the acts also blurred the distinction between rules of common law and rules of equity and that these two systems of rules have been replaced by a 'common rule'. In *Nelson v. Larholt* (1948) 1 KB 339, 343; Denning, J. (as he then was) said: 'It is no longer appropriate ... to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect.' See similar pronouncement of Denning L.J. in *High Trees Case* (1947) KB 130, 135; *Errington v. Errington* (1952) 1 KB 290 and Hanbury, *Modern Equity* (8th Ed.) 1962, pp. 19-21.

On the contrary, there is the view that the effect of the Judicature Acts is merely the creation of a common court for the administration of law and equity and not a fusion of law and equity; and that where the principles of the two conflicts, the principles of equity prevail. In *Pugh v. Heath* (1882) 7 App. Cas. 235, 237 (one of the earliest decisions on the effect of the Judicature Acts on the relation between law and equity) Lord Cairn's observes: 'The court is now not a court of law or a court of equity; it is a court of complete jurisdiction, and if there were a variance between what, before the Judicature Act, a court of law and a court of equity would have done, the rule of the court of equity must now prevail.'

Much as it is desirable to have a body of common rules from the amalgams of the principles of law and of equity, it is preposterous now to suggest that there has been a fusion of the two systems since the Judicature Acts. The distinction between the equitable ownership of a beneficiary and the legal ownership of a trustee under a trust is still well recognised. The maxim that 'where equities are equal the law prevails' is of great significance in the determination of priority between a legal and an equitable interest in the same property. See *Ajose v. Harworth* (1925) 6 NLR 98; *Lydia Erinsho v. Owokoniran* (1965) NMLR 479; *Folashade v. Durosola* (1961) 1 All NLR 87; *Barclays Bank v. Olofintuyi* (1961) WNLR 252.

There may be cases where the application of the conflict or variance provision would give rise to common rules. (Such as in *Job v. Job* (supra); *Lowe v. Dixon*, (supra). This is not a sufficient justification for the view that there has been a fusion of law and equity. See further, a scholarly discussion of this topic in Nathan's *Equity Through the Cases* (4th Ed.) 1960, pp. 17-20.

The provision of section 16 of the Federal Supreme Court Act, No. 12 of 1960, unlike its counterpart in section 25(11) of the Judicature Act 1873 gives a clear recognition to the distinction that would continue to exist between the rules of law and the rules of equity. Among other things, it provides that 'in all matters in which there was formerly or is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.' This provision anticipates the development of new equities which may conflict or be at variance with law. However, this does not mean that judges should consciously 'invert new rules of equity for the purpose of superseding the old established rules of law.' See Evershed, 'The Influence of Remedies on Rights' 6 CLP 1,12 (1953).

The observation of Lord Evershed on the full effect of the Judicature Acts on the relation between law and equity is instructive. He said 'when you speak of 'fusion' you may mean one of two things. You may mean that the component parts disappear altogether in the new entity that is created, or you may mean that they have combined for particular purposes or have become subject to some single control, though retaining their separate and original individualities. See 'Equity After Fusion, Federal or Confederal,' (1948) JSPTL (NS) Vol. I p. 171 at 175.

Evidently, experience and realities are in favour of the latter meaning of 'fusion' in the context of the relation between law and equity since 1873. In *Joseph v. Lyons* (1884) 15 QBD 280, Cotton L.J. disagreed with the view that the Judicature Acts 1873-1875 abolished the distinction between legal and equitable principles. In the same case, Lindley L.J. observed as follows: '...Reliance was placed upon the provisions of the Supreme Court of Judicature Acts 1873, 1875 and it was contended that the effect of them was to abolish the distinction between law and equity. Certainly that is not the effect of those statutes; otherwise they would abolish the distinction between trustee and cestui que trust.'

In the circumstance it is difficult to resist the view of Lord Watson that '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 are entitled in respect of any legal or equitable claim or defence properly advanced by them, so as to avoid a multiplicity of legal proceedings ... The Act of 1873 deals with the remedies and not with rights of parties litigant. It was not intended to affect and does not affect the quality of the rights and claims which they bring into court and submit to the judgment of the court, whether as plaintiffs or as defendants.' See *Ind, Coope and Co. v. Emmerson* (1887), 12 App. Cas. 300 at 308.

Thus, as Ashburner put it, the Acts conferred upon one and the same tribunal the jurisdiction which, before the Act, was exercised separately by the Courts of Equity and the Courts of Common Law. The provisions of the Act prevent any collision between the principles by which these courts before the Act were respectively guided. A cause of action which before the Act was an exclusive preserve of the Chancery jurisdiction, can now be lawfully adjudicated upon by any division of the unified High Court of Justice; the apportionments of suits between the different divisions is based upon considerations of convenience and not upon differences of jurisdiction. See *Ashburner's Principles of Equity* (2nd Ed.) p. 17.

Where a man before the Judicature Act became entitled by the same cause of action to two distinct remedies, one of which he could only pursue in a Court of Common Law and the other only in Chancery, he can and must since the Act pursue both his remedies in one proceeding; and if the remedies are cumulative (for example, damages for trespass and an injunction) the same court in one proceeding will give him both, while, if they are alternative, the court will give him that remedy which is adapted to the circumstances of his case.

But the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters. The distinction between legal and equitable claims-between legal and equitable defences-and between legal and equitable remedies-has not been broken down in any respect by recent legislation. The requirements necessary to sustain before the Act, legal and equitable claims, legal and equitable defences, legal and equitable remedies, are not altered or affected in any way by the Act.

4.0 CONCLUSION

In addition to the settlement of particular conflicts, section 25(11) of the Judicature Act also provides in a general term, for the settlements of conflicts which may arise in the fused administration of common law and equity. The provision becomes operative where the application of the equitable rule deprives the legal rule of some material effect and when the remedy provided in equity involves a negation of the exercise of a right or power which would otherwise be exercisable at law.

5.0 SUMMARY

In this unit, we have considered the conflicts between equity and common law. You should now be able to: enumerate the effect of the Judicature Acts 1873-1875; and explain how law was fused with equity.

6.0 TUTOR-MARKED ASSIGNMENT

Briefly explain how law was fused with equity.

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

Jegede M. I. (2007rep.) *Principles of Equity*; Ibadan: Unique Design/Prints

UNIT 5 NATURE OF EQUITABLE RIGHTS I

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main content
 - 3.1 Equitable Rights
 - 3.2 Enforcement of judgements
- 4.0 Conclusion
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- 6.0 Tutor-Marked Assignments
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1.0 INTRODUCTION

In the last unit, we considered the conflict between equity and the common law and the effect of the passage of the Judicature Act 1873-1875. The nature of equitable rights which evolved from the recognition of equity jurisdiction as a second force in the Nigerian legal system will be considered in this unit.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Define equitable rights;
- (ii) Differentiate between rights in *personam* and rights in *rem*; and

- (iii) Explain how judgements are enforced.

3.0 MAIN CONTENT

3.1 Equitable Rights: Rights in *Personam* or in *Rem*

The early development of equity jurisdiction owes much to the maxim 'Equity acts in personam'. Of all the maxims, none has a more interesting history, none speaks more eloquently of the vortex of jealousy, antagonism and rivalry in which Chancery first formulated its doctrines, than 'Equity acts in personam'. The influence of this maxim upon commentators on equity has been profound. It is the cornerstone of the theory which treats equitable interests as purely in personam; naturally enough, Ames regarded it as the key to the mastery of equity. See Barbour, *The Extra-Territorial Effect of the Equitable Decree* (1918-19) 17 Mich. L. Rev. 527-528.

While it is too late to explain modern equity jurisdiction on the basis of the medieval maxims of equity because of the marked differences in the society that gave birth to these maxims and that of today, yet the nature of equitable rights and interests is buried in the interstices of the maxim 'Equity acts in personam', hence an attempt to discuss the nature of equitable rights and interests in the light of modern development may not be intelligible if adequate reference is not made to the maxim in so far as the maxim affects both the origin and the later development of Chancery jurisdiction.

The early Chancellors emphasised the theory of the maxim for two reasons.

- (i) To prevent a real conflict between the Chancery and the common law courts.
- (ii) To avoid a rivalry that might have otherwise resulted in the abolition of the Chancery jurisdiction which was then in its very early stage of development.

The chancellors employed the maxims in two ways both complementary to the development of Chancery jurisdiction, but at the expense of the already established common law jurisdiction. With regard to the equity jurisdiction being exercised by the Chancery, the Chancellors maintained that unlike the common law jurisdiction which proceeded upon set and fixed principles, equity proceeded upon the conscience of litigants in the exercise of their common law rights. The aim of the Chancery's equitable jurisdiction was not to override common law rights. On the contrary, it was to ensure that common law rights were not exercised in an unconscionable manner.

However, it must be noted that the Chancery would not hesitate to invoke this same maxim 'Equity acts in *personam*' (to ensure that common law rights were exercised in accordance with equitable principles) even if the ultimate result of such invocation would be to deprive common law rights of their material and legal effects. On the strength of this maxim, the chancery enforced rights created later under its exclusive jurisdiction as well as other equitable remedies classified as either concurrent or auxiliary jurisdiction in absolute defiance of corresponding remedies at law. Nevertheless, the emphasis on the theory of the maxim seems to have given much support and credence to the much contested proposition that equitable rights and interests are merely rights in *personam*.

It would serve no useful purpose to engage in this perennial controversy. It is now a matter of practical reality that equitable rights may either be in *personam* or in *rem*, depending on whether the emphasis is on the substance of the equitable rights in question or on the means or procedure by which these equitable rights are enforced. In the words of Barbour,

“The paradoxical contradiction between the substance of the rights equity en-

forces and the means of their vindication is misleading. When a judge sitting in equity today declares that a foreign decree ordering the conveyance of land creates no obligation but merely a duty owed by the defendant to the court, he is assuming that equity has made no progress since the time of Coke.” See Barbour, *op.cit* at 528.

Furthermore, the controversy is no longer of such significance because of the fusion of the administration of the rules of common law and rules of equity.

The Traditional View

There is an element of truth in the traditional view that because of the maxim, ‘Equity acts in personam’ which underlies the fabric of early equity jurisdiction, equitable rights are logically (not necessarily) rights *in personam* in the sense that they are enforceable only against the conscience of specified persons.

Long ago, Knightly, sergent-at-law said- ‘A decree is not like a judgment in the King’s Bench or Common Bench, for such a judgment binds the right of the party; but a decree does not bind the right, but only the person to obedience, so that if the party will not obey, then the Chancellor may commit him to prison until he will obey, and this is all that the Chancellor can do.’ See Y.B. 27 Hen. VIII 15, p1. 6 (Ch. 1536).

In 1883, Lord Selbourne emphasised that the Courts of Equity in England are and always have been, Courts of conscience, operating in *personam* and not in *rem*. See *Eving v. Orr Eving* (1883) 9 App. Cas. 34 at 40. See also *Hart v. Sansom* (1884) 10 U.S. 151, 154. The import of these pronouncements is to circumscribe equitable jurisdiction and the nature of equitable rights and interests in terms of the means by which these rights and interests can be enforced. See *J.R. v. M.P.* (1459) Y.B. 37. In essence, since equitable rights and interests are in *personam*, equitable decree binds the person to obedience on pains of imprisonment, the decree does not operate on the subject matter in dispute.

3.2 Enforcement of judgements

At common law, whenever a judgement was given for damages for a tort or a breach of contract and the defendant refused to pay, one of the writs of execution could be issued against the property of the defendant. The effect was either to put the plaintiff into possession or to have the property sold and the proceeds paid to the plaintiff in satisfaction of his claims against the defendant. The title so obtained by the purchaser was good against the defendant. Thus, the procedure for the enforcement of a judgment of the common law courts was *in rem*.

In equity, if the defendant failed or refused to comply with an equitable decree, all that the Chancellor could do was to order the imprisonment of the defendant for contempt. The Chancery had no power to deprive the defendant of his property, because courts of equity have always operated on ‘conscience’ and not on subject-matter in dispute. In this manner, equitable decree of specific performance would operate only upon the person of the defendant and not upon the property that was the subject-matter in dispute.

For example, where in an equitable action for specific performance of contract for the sale of land, the defendant was ordered to convey the piece of land to the plaintiff, and he refused to comply with the order, the Chancery would proceed to imprison the defendant for contempt. The

Chancery would not by itself execute the conveyance.

Jurisdiction Over Property Situated in a Foreign Country

The rule is well established that no court in Nigeria has jurisdiction to entertain an action in which the matter in dispute is to determine the title to, or ownership of land which is situated outside the court's jurisdiction.

In *Jadesola v. Akinola* (1932) 11 NLR 108 at 109, Webber J. said: I can find no authority for the proposition that proceedings dealing with the ownership of land consequent upon execution, such land being outside this Court's jurisdiction, can be dealt with by this court issuing the execution, nor in my opinion can any rule of court confer such jurisdiction.

The limitation on the jurisdiction of the court in this matter can be explained on the basis of principle of effectiveness. First, the physical control of the land is within the power of the country in which the land is situated. Secondly, it is the *lex situs* of the land which determines the title to or ownership of the land. See *Hicks v. Powell* (1869) 4 Ch. App. Cas. 741; *Norton v. Florence* (1877) 7 Ch.D 332. *Re Hawthorne* (1883) Ch.D. 743. *B.SA Co. v. Companhia de Mocambique* (1893) A.C. 602.

A court of Equity will, however, in certain cases, exercise its jurisdiction in respect of matters affecting foreign land or land situated outside its jurisdiction. The basis for the exercise of this jurisdiction is to be found in the maxim 'Equity acts *in personam*'. See *Penn v. Baltimore* (1750) 27 ER 847. Specific performance was decreed in respect of articles executed in England concerning boundaries of two provinces in America, because 'the conscience of the party was bound by this agreement; and being within the jurisdiction of the court, which acts *in personam* the court may properly decree it as an agreement'. The relevant equitable decree is enforceable against the person of the defendant who must be within the jurisdiction of the court.

In *British Bata Shoe Co. v. Melikan* (1956) 1 FSC 100, the proceedings concerned an appeal from an order of a Judge of the High Court of Lagos striking out the plaintiff's action seeking specific performance of a contract for the assignment of the respondent's leasehold property situated at Aba in the former Eastern Region, on the ground that the High Court of Lagos had no jurisdiction to try the case. This action was filed in the former Supreme Court in December 1954. At that time there was only one Supreme Court, constituting one jurisdiction for the whole of Nigeria.

The action came on for trial on the 9th of January, 1956. On the 1st of January, 1956, the Supreme Court of Nigeria had ceased to exist and was replaced by five independent High Courts, each exercising jurisdiction within its own territorial limits. The two High Courts concerned were the High Court of Lagos exercising jurisdiction within the former Federal Territory of Lagos where the parties to this action were residing and the High Court of the former Eastern Region of Nigeria where the property in dispute was situated. It was evident that each of the regions of the Federation, with its separate High Courts, was like a foreign country to other regions.

The counsel for the appellant/plaintiff submitted that the action being one for specific performance of a contract which calls upon the court to act *in personam* in equity against the respondent/defendant, the High Court of Lagos had jurisdiction as the parties were residing within its jurisdiction. Jibowu, Ag. FCJ, delivering the judgment of the court agreed that the claim for specific performance of a contract is an action calling upon the court to exercise its equitable juris-

diction *in personam* over persons who are resident within its jurisdiction. He observed that the position of the High Court of Lagos must be likened to that of the English High Court of Justice with regard to land outside its territorial jurisdiction. Since the High Court of Lagos is empowered to administer law and equity, it has jurisdiction in cases of specific performance of contracts between persons resident within its jurisdiction. Although the land to which the contracts relate may be outside its territorial jurisdiction.

Similarly, the court will entertain jurisdiction to administer foreign assets, real or personal, of a testator who died domiciled in a foreign country, provided the executors or trustees are within the jurisdiction of the court. See *Ewing v. Ewing* (supra). The jurisdiction also covers the enforcement of a trust the subject matter of which is foreign land. See *Rochefoucauld v. Boustead* (1897) 1 Ch. 196.

In *Ayinule v. Abimbola* (1957) LLR 41, the High Court of Lagos in the exercise of its equitable jurisdiction restrained the defendant, who was within the jurisdiction from doing an act outside the jurisdiction. In that case, the plaintiff alleged that the defendant was making use of his (plaintiff's) Registered trade name in Ghana. He sought an injunction to restrain the defendant from repeating this alleged unlawful act. The question was whether the court had jurisdiction to restrain a defendant who was within the jurisdiction from doing an act outside the jurisdiction.

It was evident that the defendant's action clearly threatened legal injury to the plaintiff's business interests, and that an injunction would issue in terms of the plaintiff's application if the acts complained of were committed in this country. The court held that an order of injunction is directed to the person to be restrained and is an order *in personam*. In *Ijaola v. Banjo* (1958) LLR 58, Dickson J. said:

In my view the present action concerns land, and as we have already seen, the land is situated in the Western Region. This being so, has this court jurisdiction to hear and determine the claim? It is hardly necessary for me to say that the jurisdiction of the High Court of Lagos is confined only to the Federal Territory of Lagos. Equity acts *in personam* over persons resident within its jurisdiction, and in certain cases the court would entertain an action respecting foreign land.

It therefore follows that if the person to be restrained is within the reach and amenable to the processes of the court, an injunction may be ordered regardless of the locality of the act to be restrained.

The principle requiring the presence of the defendant within the jurisdiction has been further explained in *Tozier v. Hawkins* (1885) 15 QBD 680, and in *In re Liddell's Settlement trusts* (1936) 1 Ch. 365. Physical presence of the defendant within the jurisdiction may not be necessary where the defendant has been properly served in accordance with the relevant rules of court. Once this is done, so far as the jurisdiction of the court is concerned, the defendant, who need not be resident within the jurisdiction, is precisely in the same position as a person who is physically present within the jurisdiction. See Romer LJ in *In re Liddell's Settlement Trusts* (supra) at 374.

Generally, the exercise of this jurisdiction depends on the existence between the parties to the suit of some personal obligation. Such personal obligation may arise out of contract, (express or implied), fiduciary relationship or fraud, or other conduct which, in the view of a court of equity would be unconscionable. The question of jurisdiction in these matters does not depend on the *lex situs*, where immovable property is involved, or on the law of the place where the act, restrained or commanded, is to be effected. See *Dechamps v. Miller* (1908) 1 Ch. 856 at 863.

Modern Development

The foregoing bears apparent testimony to the view that an equitable decree is directed against the person and that it only binds the person to obedience, it does not operate upon the subject matter in dispute. See *J.R v. M.P.* (1459) Y.B. 37 Hen. VI. fol. 13. pl.3. From this standpoint, equitable rights are said to be rights *in personam*. This proposition may not be challenged in as much as the methods of enforcement of equitable decrees are not to be related to the principal or essential objects of the decrees.

An examination of the main or principal object of an equitable decree which compels or induces a person, on pains of imprisonment, to comply with the terms of the decree, reveals that equity in fact, operates upon the subject matter in dispute. Where a vendor complies with a decree of specific performance of a contract for the sale of land, although the decree was directed against the person of the vendor, it has, in fact, operated upon the subject matter in dispute. The vendor has been compelled to convey the land, the subject matter of the contract, to the purchaser in accordance with the terms of the decree.

Furthermore, subsequent developments, judicial and statutory, affecting equity jurisdiction has enlarged the functional significance of the maxim 'Equity acts *in personam*.' As Timlin J., observed: 'In the early stages of equity jurisprudence decrees were enforced only *in personam*... This rule has long since given way to the paramount rule that equity may in all cases frame its decrees as to make them effective to do equity, and now the forms of equitable relief are as various as the transactions investigated and regulated in equity. See *McMillan v. Berber Asphalt Co.* (1912) 151 Wis. 48.

Writs of Assistance

In order that equitable decrees should not be rendered illusory, the Chancery introduced various equitable writs, the principal object of which was to get at the specific *res*, that is, the subject matter in dispute. About the middle of the seventeenth century, the developed equity system introduced writs of assistance by which a court of equity empowered the sheriff to put the plaintiff into possession of the subject matter in dispute. See *Vanlore v. Lidall* (1624), Equity, Cases and Materials; Chafee and Re (1958, 4th Ed.) p.41.

If the decree were for land, and the party remained obstinate in prison, the court granted an injunction for yielding up possession to the party for whom the decree was made. If this were disobeyed, the court granted a commission to justices of the peace to put the party in possession; and in case of need, a writ of assistance was awarded, directed to the plaintiff, commanding him to be aiding and assisting the justices with the *posse comitatus*, to putting the party in possession, and to apprehend the contemners of the court; so that though the court could not bind the right it secured the possession, as the Praetors did under their extra-ordinary jurisdiction. See Spence, *The Equitable Jurisdiction of the Courts of Chancery*, (1846) Vol. 1, 392.

At that stage, equitable rights could not be said to be merely rights *in personam* for the real object of the writs of assistance was to deprive the defendant of the possession of a specific *res*, for the benefit of the plaintiff. See generally, Cook, *The powers of Courts of Equity* (1915) 15 Col. L. Rev. 37.

Writs of Sequestration

There was also the Writ of sequestration which, in effect, was similar to the writ of assistance. Where a defendant, who had been committed to prison for his refusal to comply with an equitable decree continued to be recalcitrant, the Court of Chancery would issue a writ of sequestration whereby a sequestrator would be appointed to take possession of the defendant's property pending the time the defendant would comply with the terms of the decree. It is not certain whether the purchaser under the sale by the sequestrators got title.

In *Shaw v. Wright* (1795) 3 Ves. 22, Loughborough L. C. said: 'The difficulty is this: if the sequestrators sell, and the purchaser should be brought before this court to complete their contracts, I could not compel them to pay the money. I cannot make a man take a title, which he is to support a bill for an injunction. You will not find any instance of any order to sell under a sequestration a subject which passes by title and not by delivery.' But see Cook, *op. cit.*, at 113-114; *Pegge v. Skynner and Richardeon* (1784) Ch. 1 Cox Eq. Cas. 23.

However, where a writ of assistance of sequestration order began, equitable rights in respect of the property in dispute ceased to be mere rights *in personam*. In the words of a learned writer:

Originally the Chancellor could not act *in rem* in the sense of passing the legal title to property of any kind; but, in the development of our judicial system, he asserted successfully the power to do this in the case of chattels, by means of a sale under a writ of sequestration. Even if this is denied, it by no means follows that equity acts only *in personam*. If we recall that *in personam* means in reference to procedure, nothing but bringing pressure to bear upon the defendant's physical person, it is clear that equity has done something which goes far beyond that. It has given the purchaser from the sequestrator: (1) full 'equitable title' to the chattels; (2) possession of the chattels; (3) the right to use all the powers of the court of equity to protect the possession and 'equitable title'. As a consequence of the possession, the purchaser thus becomes, according to the common law, owner as against all the world except the defendant. On the other hand, the plaintiff having received money, has, and may of course transfer, an indefeasible title to it, and is a swell off as the judgment creditor in the legal action.' See Cook, *op. cit.*, at 114-115.

The inadequate or limited power of a court of equity to transfer property through its writs of assistance and sequestration, has been remedied by statutory provisions. See section 14 Judicature Act 1884; section 31 Trustee Act 1893. The extended powers are both vesting and appointive. Section 31 of the Trustee Act, 1893 empowered the court to make a vesting order in respect of the property in dispute. The effect of a vesting order is the transfer of the property from one party to the other. Where a vesting order could be made, the court may, if it is more convenient, appoint a person to execute conveyance, contract or other instruments on behalf of the party who had refused to comply with the order.

SELF ASSESSMENT EXERCISE 1

What is the effect of a vesting order?

Foreclosure Order

Whenever it is proper and equitable, a court of equity will decree a strict foreclosure of a mortgagor's equity of redemption in favour of the mortgagee. See Maitland, *Equity* (Brunyate Ed.) 1949, p. 183. in *Toller v. Carteret* (1705) 2 Vern. 494; 23 ER 916, the Court of Chancery decreed foreclosure of an equity of redemption to land situated outside jurisdiction on the ground that equity acts *in personam*, and since the defendant was properly served within the jurisdiction, the court had jurisdiction to entertain the action. In view of the full effect of this decision, can it truly be said that equity acts *in personam* in decreeing a strict foreclosure of an equity of redemption?

In the words of the defence counsel in *Paget v. Ede* (1874) LR 18, Eq. Cas. 118, 'We dissent from the proposition that a foreclosure decree is merely a personal decree. In as much as it deprives the mortgagor of his estate, and operates to vest the estate, in the mortgagee, it is a direct proceeding *in rem*. It is a decree *in personam* in form only, the gist and essence being in the consequences, which are, that if the mortgagor do not pay, the estate will be taken out of him and transferred to the mortgagee, and his equity of redemption are wholly inconsistent with its being a mere personal right.'

Similarly, action for delivery up and cancellation of documents obtained by fraud falls in the same category in that the principal object of the action is the surrender of a specific *res*. So is the equitable decree for the appointment of a receiver whose function is to take charge of the property in dispute and preserve such property for the benefit of the person in whose favour the order was made. See Spence, *Equitable Jurisdiction* (1846) Vol. 1, p. 378.

4.0 CONCLUSION

On the strength of the maxim, 'Equity acts *in personam*', the chancery enforced rights created later under its exclusive jurisdiction as well as other equitable remedies classified as either concurrent or auxiliary jurisdiction in absolute defiance of corresponding remedies at law.

5.0 SUMMARY

In this unit, we have considered the nature of equitable rights. You should now be able to define equitable rights; differentiate between rights in *personam* and rights in *rem*; and explain how judgements are enforced.

6.0 TUTOR-MARKED ASSIGNMENT

Discuss the procedure for the enforcement of a judgment of the common law courts.

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

Jegede M. I. (2007rep.) *Principles of Equity*; Ibadan: Unique Design/Prints

UNIT 6 NATURE OF EQUITABLE RIGHTS II

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main content
 - 3.1 The nature of the Rights of a Beneficiary under a Trust
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignments
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1.0 INTRODUCTION

This unit is a continuation of the last unit. In the last unit, we considered the nature of equitable rights which evolved from the recognition of equity jurisdiction as a second force in the Nigerian legal system. In this unit, we will consider the nature of the rights of a beneficiary under a trust.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Describe the nature of the rights of a beneficiary under a trust.

3.0 MAIN CONTENT

3.1 The nature of the Rights of a Beneficiary under a Trust

The nature of the right of a beneficiary under a trust raises yet another controversy as to whether such right is a right *in personam* or *in rem*. See Scott, *The Nature of the Rights of the Cestui que Trust* (1917) 17 Col. L. Rev. 269; Cook, *Powers of Courts of Equity* (1915) 15 Col. L. Rev. 37; Maitland, *Equity (Brunyate Ed.)* 1949, pp. 110-116; Harlan Stone, *The Field of Modern Equity* (1929) 45 LQR 196.

However, the fact is that the determination or classification of this right should not depend exclusively on the consideration of abstract jurisprudence. A thorough examination and analysis of the practical issues involved in both the enforcement of this right and the extent to which this right confers proprietary right on the beneficiary is a *sine qua non*.

It will not be wholly correct to classify the right as merely right *in personam* nor will it be absolutely true to classify it as right *in rem*. A right *in personam* is of a definite kind enforceable against specifically determinate person(s) and a right *in rem* is a right residing in a person, which he can enforce against indeterminate number of persons. See Nathan & Marshall, *A Casebook on Trusts* (5th Ed.) p.1.

The equitable doctrine of tracing trust property permits the beneficiary to follow the trust property, either in its original or converted form into the hands of the trustee and into the hands of anyone except the *bonafide* purchaser for value without notice. See *Re Hallett's Estate* (1880) 13 Ch. D. 696; *Re Diplock* (1948) Ch. 465. This is because 'Equity has regarded trust money as a sort of inanimate Proteus, who must at all costs be retained through all his metamorphosis. It can

be followed into the hands of a banker, into whatever investment it may be put, provided it can be identified, and even, as in *Sinclair v. Brougham*, beyond the range of actual identification... This high place into which the *cestui que trust* is pitchforked is what marks him as holding far more than a mere *ius in personam*.’

This shows the flexible manner in which the equitable doctrine of tracing could be employed. It is therefore possible for the beneficiary under a trust to enforce his equitable right and interest against an indeterminate number of persons except the singular case of the bonafide purchaser for value of the legal estate. Nevertheless, the view is widely held that because the equitable right of a beneficiary succumbs to the bonafide purchaser for value of the legal estate, the right is merely in *personam* and not in *rem*. See Harlan Stone, *op. cit.* At p. 467; Maitland, *op. cit.* at pp.110-116.

According to a protagonist of this view, the effect of the equitable doctrine of tracing, which in fact raises the status of the right of the beneficiary under a trust far beyond ordinary right *in personam*, has been minimised on the ground that ‘where equity imposes a trust upon third persons, it does so upon the theory that a new right *in personam* has been created against the third person, and that what equity actually does in following trust property into the hands of strangers, is to create successive rights *in personam* against successive takers of the trust res not essentially different in character from the right which is asserted against the original trustee, although they differ from it in their origin’. See Harlan Stone, *op. cit.* at 476.

No doubt, the above is a meaningful argument which serves as a reminder of the theory employed by the early Chancellors to keep the doctrine of ‘uses’ alive. The medieval Chancellors emphasised the notion that the enforcement of ‘uses’ by the Chancery was based purely upon conscience and that the Chancellor never intended to create any new system of priority interest in property. But once the institution of trust had gained universal recognition and acceptance, it became clear that a new proprietary interest in property had evolved, an interest which has all the characteristics of a legal interest except that it cannot be enforced against a bonafide purchaser for value of the legal estate for the simple reason, though convenient and expedient, that where the equities are equal the law prevails.

In the circumstance, the argument in favour of the view that the right of the beneficiary under a trust is a right *in personam* is merely explaining the origin of the beneficiary’s right: it would not appear to have taken into consideration the subsequent development regarding the enforcement of equitable rights. Hence, the argument may be valid only in the context of abstract jurisprudence. For, ‘the whole doctrine of the following of trust funds by a beneficiary shows that equitable rights are a great deal higher than mere *iura in personam*, for the beneficiary emphatically claims a proprietary right, and will recover the trust proprietary right, and will recover the trust property in specie; he will not be relegated to a mere right to a dividend like an ordinary creditor of the trustee. Equitable rights and interests must, then, be regarded as hybrids, standing midway between *iura in personam* and *iura in rem*.’ See Hanbury, *The Field of Modern Equity* (1929) 45 LQR 196, 199.

It is now well established that the equitable doctrine of tracing which permits the beneficiary to follow the trust property into the hands of anyone except the bonafide purchaser for value of the legal (see *Re Hallett’s Estate* (1880) 13 Ch. D. 696; and *Re Diplock* (1948) Ch. 465.) confers some sort of proprietary right in the *trust res* upon the beneficiary. Harlan Stone, who holds the dissenting view that the right of a beneficiary under a trust is a mere right *in personam*, conceded ‘that the ultimate effect of enforcing a trust in equity, where the court makes its decree directing

the turning over of trust property to the *cestui que trust*, is, in a great number of cases, the same as though the *cestui que trust* possessed a right in the property itself, cannot of course be questioned.' The nature of the Rights of the Cestui que Trust; (1917) 17 Col. L. Rev. 467, 468.

This proprietary right is further strengthened by the fact that the beneficiary is not only entitled to recover the trust property in specie, he can also recover the proceeds of the sale of trust property even where the proceeds are no longer identifiable. See *Sinclair v. Brougham* (1914) AC 855. There are other cases in which the right of a beneficiary under a trust has been given far more recognition than a mere right *in personam*. In *Williams v. Cole* (1952) 14 WACA 129, the West African Court of Appeal held that the beneficiaries of a trust have a better right to the possession of the trust property as against the trustee's successors in title. Similarly, under the rule in *Saunders v. Vautier* (1841) LJ Ch. 354, a beneficiary, who is *sui juris* and absolutely entitled under the trust, can put an end to the trust by calling for the immediate transfer of the corpus of the trust either to himself or according to his direction. See further *Jones v. Nichols* (1938) 4 WACA 58.

For the purposes of income tax, the beneficiary may also be regarded as the real owner of the trust property. In *Baker v. Archer-Shee* (1927) AC 844 at 866, the majority opinion of the House of Lords held that the income of a trust fund belonged to the beneficiary so that the beneficiary is chargeable as if the fund accrued to him directly. Lord Wrenbury stated that the right of the beneficiary under the will in question was an equitable right in possession to receive during her life the proceeds of the shares and stocks of which she was a tenant for life. Her right was not to a balance sum, but to the dividends subject to certain deductions. His Lordship concluded that her right under the will was 'property' from which income was derived.

The decision has been criticised. (See Hanbury, *A Periodical Menace to Equitable Principles* (1928) 44 LQR 468). It has been suggested that the majority opinion in the House of Lords which recognised the proprietary claim of a beneficiary under a trust should be limited entirely on the widening interpretation of the Income Tax Act 1918; otherwise it would blur the distinction between legal and equitable interest. But recognition of the proprietary claim of a beneficiary under a trust is realistic assessment of the modern nature of equitable interests in property. Such recognition need not create any confusion between the ownership of the trustee and that of the beneficiary. On the contrary, it would appear unrealistic to deny a proprietary claim to an interest that can be alienated, assigned, mortgaged or disposed of by will in the same manner as a legal interest, merely because of the fear (which is unfounded) that such a recognition between the legal ownership of the trustee and the equitable ownership of the beneficiary.

In *Senior v. Braden* 295 US 422, 791 Ed. 1520, the United States Supreme Court reiterated its earlier opinion (see *Brown v. Fletcher* 235 US 589; 59 L. ed. 374) that the beneficiary under a trust had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognised fixed right to the present enjoyment of the estate with a right to the corpus itself. His estate in the property thus in possession of the trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession. See *Senior v. Braden* 295 US 422, 433.

In *Balir v. Commissioner of Internal Revenue* 300 US 5 at 13-14, Chief Justice Hughes of the United States Supreme Court stated that the will creating the trust entitled the beneficiary during his life to the net income of the property held in trust. He thus became the owner of an equitable interest in the corpus of the property; and by virtue of that interest he was entitled to enforce the trust, to have a breach of trust enjoined and to obtain redress in case of breach. The interest was present property alienable like any other, in the absence of a valid restraint upon alienation. The

beneficiary may thus transfer a part of his interest as well as the whole. Assignment of the beneficial interest by the beneficiary is not an assignment of a chose in action but of the right, title and estate in and to property.

The relationship between the dual ownership existing in trust property has been clearly stated:

The trustee is a buffer between the *cestui que trust* and the world; as against the rest of the world he has the rights of an owner, and he has the duties of an owner; but these rights he holds for the benefit of the *cestui que trust*, and the burden of the duties he can, by the aid of a court of equity, shift to the trust property and even, in some cases, to the *cestui que trust* himself. But when it is necessary for the protection of the *cestui que trust*, equity will recognise that he is in very truth beneficial owner of the trust property. See Scott, *The Nature of the Rights of the Cestui que Trust* (1917) 17 Col. L. Rev. 269, 290.

However, it should be noted that there are a few other cases in addition to the doctrine of bonafide purchaser for value of the legal estate which deny the beneficiary of the claim to proprietary ownership of the *trust res*. In *Schalit v. Nadler* (1933) 2 KB 79, the court held that a beneficiary of a trust property cannot sue or distrain for rent due from a tenant to whom a lease or tenancy of the trust property has been granted by the trustee. The trustee is the only person who can take such action, and his right to do so arise from the fact that he alone is the lessor. (A beneficiary can sue, though he is obliged to bring such action in the name of the trustee who has the legal estate. See *Ojikutu v. Fela* (1954) 14 WACA 628).

The court further stated *obiter* that, the right of the beneficiary whose trustee has leased the trust property, is not to the rent, but to an account from the trustee of the profits received from the leasehold transaction. He has no right to demand a direct payment of rent from the trustee nor can he insist that the cheque received from the tenant or lessee be endorsed to him.

The ratio of this decision is not so much that the right of a beneficiary is merely a right *in personam*; for, had the decision been different, a tenant who is already accustomed to paying his rent to the person appearing in his lease as lessor, might be faced with a demand, without previous notice, from the beneficiary; and it is possible that before he, the lessee had had time to interplead, a distress might be levied at the instance of both the beneficiary and the trustee, and apparently neither would be wrongful. See *Schalit v. Nadler* (supra) at 84. Surely it would be inequitable to the extreme to put a lessee of a trust property into such an unenviable position.

For a similar reason, a beneficiary cannot maintain an action for account against a debtor to the trust estate. In *Ojikutu v. Fela* (supra) at 630, the plaintiffs sued as beneficiaries under a will for an account of rents and profits collected by the defendant in respect of certain premises described as No. 39 Agarawu Street, Lagos. It was evident that the defendant was not a trustee under the will. Cousey, JA, delivering the judgment of the West African Court of Appeal said that if the will upon which the plaintiffs sued was of effect, the legal estate in the property mentioned vested in the trustees of the will. Therefore, the plaintiffs had no interest in the legal estate; it was not within their right to bring an action for account against a debtor to the trust estate.

Although a beneficiary may not institute legal proceedings in respect of the trust property in the name of the trustee without his authority, he may however file a bill against the trustee for the execution of the trust in accordance with the trust instruments, if the trustee would not take proper steps to enforce a claim due to the trust property.

SELF ASSESSMENT EXERCISE 1

What do you understand by the equitable doctrine of tracing?

4.0 CONCLUSION

Although a beneficiary may not institute legal proceedings in respect of the trust property in the name of the trustee without his authority, he may however file a bill against the trustee for the execution of the trust in accordance with the trust instruments.

5.0 SUMMARY

In this unit, we have considered the nature of the rights of a beneficiary under a trust. You should now be able to describe the nature of the rights of a beneficiary under a trust.

6.0 TUTOR-MARKED ASSIGNMENT

What do you understand by a bonafide purchaser for value?

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

Jegede M. I. (2007rep.) *Principles of Equity*; Ibadan: Unique Design/Prints

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UNIT 1 MAXIMS OF EQUITY**CONTENTS**

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1.0 INTRODUCTION

In the last module, we considered the history of equity, how the doctrines of equity were introduced into Nigeria, the relation between Equity and Common Law and the nature of equitable rights. In this unit, we will consider the maxims of equity. These are guidelines of the jurisdiction of Equity which have been developed throughout its history. They should not be regarded as rigid formulae for the application of equitable rules, but rather as a collection of general principles which can be moulded or adapted to suit the circumstances of the individual case.

The maxims have two main purposes:

- (i) To show the historical development of equitable rules and procedure;
- (ii) To guide the application of those rules at the present and in the future.

Furthermore, as far as the study of equity is concerned, they are a convenient and meaningful way of classifying equitable principles and the many varied areas in which they are to be

found. Since many of the maxims overlap, each should not be considered in isolation from the others.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) List the maxims of equity; and
- (ii) Explain each maxim of equity.

3.0 MAIN CONTENT

3.1 PARTICULAR MAXIMS

There are twelve generally accepted maxims. They are as follows:

1. Equity will not suffer a wrong to be without a remedy
2. Equity follows the law
3. Where there is equal equity, the law shall prevail
4. Where the equities are equal, the first in time prevails
5. He who seeks equity must do equity
6. He who comes to equity must come with clean hands
7. Delay defeats equities or equity aids the vigilant and not the indolent
8. Equality is equity
9. Equity looks to the intent rather than to the form
10. Equity looks on that as done which ought to be done
11. Equity imputes an intention to fulfil an obligation
12. Equity acts “in Personam”

We will now consider each one of the maxims in detail.

3.1.1 Equity will not suffer a wrong to be without a remedy

This maxim is at the root of all equitable jurisdiction. It should not be interpreted as meaning that every moral wrong was remedied by Equity. It means that, in certain circumstances, where the Common Law failed to recognise a right or to provide a remedy for a wrong, Equity would not stand by and see a party suffer an injustice, but would grant a remedy, provided it was suitable for judicial enforcement. The operation of the maxim may be seen in relation to the three types of equitable jurisdiction; original, concurrent and auxiliary.

Original jurisdiction - Trusts

At Common Law, the trustee was the absolute owner of the trust property and could deal with it as he pleased; the rights of the beneficiaries were not recognised. Equity, however, conceiving this to be a wrong, compelled the trustee to hold the property for the benefit of the beneficiaries, whose rights Equity enforced not only against the trustee but also against any transferee from him with notice of the trust.

Concurrent jurisdiction - Equitable Remedies

At Common Law, the only remedy for a breach of contract was damages. Where this remedy

would be insufficient for the plaintiff (e.g. in the case of breach of a contract for the sale of land), Equity would grant specific performance. Thus compelling the defendant to perform the contract. Similarly, where damages would be insufficient redress for a tort (e.g. nuisance), Equity would grant an injunction to restrain further invasion of the plaintiff's rights.

Auxiliary jurisdiction - Equitable Procedure

The Common Law courts had no power to order discovery of documents in the possession of a party to an action; the Court of Chancery did make such orders, without which many wrongs would have been remediless. Another example of the maxim is equitable execution. At Common Law, a judgment creditor could not levy execution on any property of the judgment debtor in which the latter had only an equitable interest. Thus, for instance, an equity of redemption or a beneficial interest in a trust could not be touched at Common Law.

The Court of Chancery thus evolved a procedure whereby equitable execution could be levied on the equitable interest. This was done by the appointment of a receiver of the equitable interest, supplemented in appropriate cases by an injunction restraining the judgement debtor from disposing of the interest.

Limits to the maxim

The maxim must not be taken too widely. First, there are many wrongs which cannot be remedied in Equity any more than at Common Law. Thus, for instance, 'unfair' trade competition which does not come within the definition of any Tort cannot be remedied either at law or in Equity. Secondly, even where Equity does provide a remedy, it may stop short of applying it in certain defined situations. For instance, although specific performance is a general remedy for breach of contract where damages would be inadequate, there are some instances where damages would not be adequate and yet specific performance will not be granted.

Thus, contracts for personal services and contracts requiring the constant supervision of the court cannot be specifically enforced. It may thus be said that the application of the maxim is limited by what is realistic, practicable and convenient for the court.

3.1.2 Equity follows the law

Equity never challenged the Common Law as the basis of all the laws of the land. Indeed, Equity could not have existed without the Common Law, since the Chancellor originally merely interfered here and there in order to do justice between the parties where the Common Law failed to provide a remedy. It was only later that Equity developed into a distinct body of rules and principles. Most of these principles would be meaningless if divorced from the rules of Common Law on to which they are engrafted and supplement.

Thus, for instance, whilst regarding the beneficiaries under a trust as the equitable owners of the property, Equity never denied the legal title of the trustee and, therefore, stops short of enforcing the trust against a bonafide purchase of the legal estate from the trustee without notice of the trust, thereby acknowledging the paramountcy of the legal estate.

- (i) Equity adopted the Common Law doctrine of estates. Any estate or interest known at law (e.g. fee simple, fee tail and life interest) can exist as an equitable interest under a trust.
- (ii) Equitable interests devolve on intestacy in the same way as legal estates, so that the eld-

est son takes all the land as heir, to the exclusion of his younger brother and sisters.

- (iii) Equity follows the Common Law rules governing joint tenancies.
- (iv) Equity follows the Common Law rules relating to mistake in the formation of contracts (whilst supplementing these by means of equitable remedies).

But where Common Law rules were archaic or excessively rigid, Equity refused to follow them. Thus, for instance, the technical rules relating to legal contingent remainders were never applied to equitable interests; nor was there escheat of equitable interest on intestacy.

The meaning of the maxim may be summed-up by saying that Equity has never disturbed Common Law rules, nor claimed to override them. Equity only interferes where there is some important circumstance disregarded by the Common Law and where the lack of a remedy at law will cause injustice to a party. Thus, wherever equitable principles are at variance with legal ones, this is due not to Equity's denial of the validity of the legal rule, but rather to Equity's assertion that a gap exists in the law which it is Equity's duty to fill.

3.1.3 Where there is equal equity, the law shall prevail

This maxim governs the position where there are competing interests in property, one of which is a legal interest, the other equitable. Where the claims of both parties are equally fair and meritorious, precedence will be given to the legal interest. The operation of the maxim may be seen in the following hypothetical illustration:

A acquires an equitable charge over Blackacre (worth N4million) as security for a loan of N1.5 million. B later takes a legal mortgage of Blackacre (still worth N4million), also to secure a loan of N1.5 million. B had no notice of A's equitable charge when he lent the money, and now the value of Blackacre has dropped to N2 million. Here B is entitled to be paid the full amount of his loan (N1.5 million) from the proceeds of sale of Blackacre. A must be content with what is left (N500,000.00), since B's legal estate takes priority over A's equitable interest.

If, on the other hand, before he lent the money, B had received notice of A's equitable charge, B would not gain priority over A, and the position would be reversed, since there would not be equal equity. Equity will not allow the carelessness or imprudence of B in lending the money, knowing of a prior charge on the property, to defeat the interest of A, the innocent party.

3.1.4 Where the equities are equal, the first in time prevails

This maxim concerns priority between two competing equitable interests in property. The general rule is that equitable interests rank according to the order of their creation. A well-known example is *Cave v. Cave* (1880) 15 Ch. D. 639. In this case, a sole trustee in breach of trust used trust money in the purchase of land, and had the land conveyed to his brother. The brother then mortgaged the land to A by way of legal mortgage, and then to B by way of equitable mortgage. Neither A nor B having notice of the trust.

It was held that:

- (i) A's legal mortgage took priority over the equitable interests of the Beneficiaries ("where there is equal equity the law shall prevail"), but
- (ii) The interests of the beneficiaries had priority over B's mortgage, since they were earlier in time ("where the equities are equal, the first in time prevails").

There are occasions, however, where the equities are not equal. Thus, for instance, where the holder of the prior equitable interest has been guilty of fraud or gross negligence, he will be postponed to a later equitable incumbrancer. In *Rice v Rice* (1854) 2 Drew. 73, a vendor conveyed land to the purchaser without receiving the purchase money, yet signed a conveyance containing a receipt for the money. It was held that the vendor's equitable lien for the unpaid purchase-money was postponed to a subsequent equitable mortgagee with whom the purchaser had deposited the title deeds, the mortgagee having no notice of the lien. Compare with *Ayorinde v. Scott*, CCCHCJ/2/72, p.149.

The maxim does not apply where there are successive assignments or mortgages of an equitable interest in pure personalty; for under the rule in *Dearle v. Hall* (1828) 3 Russ. 1, priority is here determined not by the order in which the assignments were created, but by the order in which the successive assignees gave notice of their assignments to the debtor, trustee or other person liable to pay.

3.1.5 He who seeks equity must do equity

The basis of this maxim is that if the plaintiff seeks an equitable remedy or wishes to obtain any equitable relief, he must be prepared to act fairly towards the defendant. The following examples may be given:

The doctrine of election

Where a donor by deed or will gives his own property to E and in the same instrument purports to give E's property to X, E will not be able to claim the whole of the gift to him unless he allows the gift to X to take effect. See Snell, *Principles of Equity*, 26th ed., (1960) pp. 532-542.

Notice to redeem a mortgage

If a mortgagor wishes to exercise his equitable right to redeem, he must give reasonable notice of his intention to the mortgagee.

Consolidation of mortgages

This is the right of a person in whom two or more mortgages are vested to refuse to allow one mortgage to be redeemed unless the other(s) are also redeemed. This may be seen from a hypothetical illustration: X has made two loans of N2,000 to Y, the first loan being secured by a mortgage of Blackacre (worth N3,000). The second by a mortgage of Whiteacre (also worth N3,000). If the value of Blackacre subsequently decreased to N1,000 while Whiteacre increased to N5,000, it would be unfair to allow Y to redeem Whiteacre and leave Blackacre unredeemed. Equity will thus allow X to consolidate and will not permit Y to redeem Whiteacre unless he is prepared to redeem Blackacre also.

Illegal loans

The application of the maxim to illegal loans is exemplified by the case of *Lodge v. National Union Investment Co.* (1907) 1 Ch. 300. X borrowed money from Y, a moneylender and mortgaged certain securities to him. The contract was illegal and void since the moneylender was not registered under the English Moneylenders Act 1900. When X sued Y to recover the securities, it was held that an order for delivery up would only be made if X were prepared to "do equity" by repaying the amount of the loan.

In *Kasumu v. Baba-Egbe* (1956) AC 539, however, both the West African Court of Appeal and

the Privy Council declined to follow Lodge's case. The facts were that the plaintiff mortgaged leasehold land to the defendant, a licensed moneylender as security for a loan. The moneylender had kept no book recording the transaction as required by section 19 of the Nigerian Moneylenders Act (Cap. 136, Laws of Nigeria 1948), the agreement was therefore unenforceable under that section. The plaintiff instituted proceedings claiming possession of the property, cancellation of the mortgage, and delivery up of the title deeds.

It was held that he could so recover. The principle in Lodge's case was not applicable to a transaction declared unenforceable by section 19 of the Moneylenders Act. The Act in enacting that no loan which failed to satisfy the statutory requirements was to be enforced, meant that no court of law was to recognise the lender as having any right to recover his money. To impose terms of repayment as a condition for making the order sought by the plaintiff would be in direct conflict with the policy of the Act. Accordingly, the plaintiff was entitled to recover the property without having to repay the loan.

3.1.6 He who comes to equity must come with clean hands

This maxim means that a plaintiff who seeks an equitable remedy or other equitable relief must show that his past conduct in the transaction has been fair, honest and above board. It may be distinguished from the previous maxim in that it refers to behaviour prior to the suit, as opposed to future conduct.

Illustrations

(i) A tenant whose lease has been forfeited for non-payment of rent cannot expect equitable relief against forfeiture if he has been using the premises for immoral purposes. See *Gill v. Lewis* (1956) 2 QB 1 at pp. 13, 14, 17.

(ii) An equitable tenant under an agreement for a lease cannot expect to obtain a decree of specific performance of the legal lease if he has been in breach of the covenants to be contained in that lease. See *Coastworth v. Johnson* (1886) 54 LT 520.

(iii) Where an infant beneficiary, by fraudulently representing himself to be of age, obtained from the trustees a sum of money to which he was not entitled until he came of age, neither he nor his assigns could compel the trustees to pay the sum over again when he attained his majority. See *Overton v. Bannister* (1844) 3 Hare 503.

It is important to note that the maxim does not refer to any conduct of the plaintiff other than that which is connected with the transaction in question. As one American Judge put it: "Equity does not demand that its suitors shall have led blameless lives." See Brandeis J. in *Loughran v. Loughran*, 292 US 216 at 229 (1934). It is only conduct which has "an immediate and necessary relation to the equity sued for" that will bar the plaintiff's claim. See *Dering v. Winchelsea* (1787) 1 Cox Eq. 318 at 319, 320.

SELF ASSESSMENT EXERCISE 1

Explain the maxim "He who comes to equity must come with clean hands".

3.1.7 Delay defeats equities or equity aids the vigilant and not the indolent

It is a general principle of Equity that a person will not be granted an equitable remedy if he has been guilty of undue delay in bringing his action. Such delay is known as "laches". A court of

Equity “has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing.” Per Lord Camden LC in *Smith v. Clay* (1767) 3 Bro.C.C 639 n. at 640 n.

The doctrine of laches does not apply to cases governed by the Statutes of Limitation such as claims to redeem or to foreclose mortgages of land, or a claim by a beneficiary against a trustee for a non-fraudulent breach of trust. Wherever the Statutes apply, no delay short of the limitation period will bar the claim.

Application of the doctrine

The principles governing the doctrine of laches were stated in the well-known dictum of Lord Selborne in *Lindsay Petroleum Co. v. Hurd* (1874) L.R. 5 P.C. 221 at 239, cited with approval by the Privy Council in *Nwakobi v. Nzekwu* (1964) 1 WLR 1019. The doctrine applies

“where it would be practically unjust to grant a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waving 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.”

Further, it was emphasised by Ademola, CJN in *Fagbemi v. Aluko* (1968) 1 All NLR 233 at 237, that “in considering the equitable doctrine of laches, the court does not act only on the delay by the plaintiff, but must also consider (1) acquiescence on the plaintiff’s part and (2) any change of position that has occurred on the defendant’s part.” Thus there will be laches where the plaintiff has so acted as to induce the defendant to alter his position in the reasonable belief that the claim has been abandoned, or where the delay amounts to evidence of an agreement by the plaintiff to abandon his right.

In *Aganran v. Olushi* (1907) 1 NLR 66, land held by a family under customary law was sold in 1902 to the defendants by certain members of the family whose assent was necessary to the validity of the sale. The sale was therefore voidable by the plaintiff. The plaintiff took no steps to set aside the sale until 1905, when he commenced the present action. The court found (i) that the plaintiff had at one stage agreed, for a consideration, to ratify the sale (though he subsequently resiled from his promise); (ii) that the defendants had at one stage sued as owners of the land to eject trespassers, and the plaintiff knew of this but did not interfere; (iii) that the defendants had erected houses on the land and the plaintiff did nothing to stop them.

It was held that all these circumstances, coupled with the three-year delay in bringing the action, amounted to laches, and the plaintiff had lost his right to set aside the sale. Winkfield J. at p. 68 said: ‘I think that the actions of the plaintiff amounted to an expression of intention or a promise not to exercise the right which he possessed.’

Another example of the application of the doctrine in Nigeria is *Ibeziako v. Abutu* (1954) 3 ENLR 24. In this case, A in 1949 was granted for value the lease of a plot of land by L. B alleged that the same plot formed the subject-matter of a grant to him by L’s predecessor-in-title in 1942. It was held that if B could prove that A had notice of his (B’s) interest when he acquired the lease, prima facie B would be entitled to a decree of specific performance of his equitable interest to convert it into a legal estate. But since he took no steps to enforce his rights until the time of the present action in 1954, B was guilty of laches and had therefore lost what-

ever rights he may have had. Reynolds J. quoted a passage from Halsbury's Laws of England (3rd ed. Vol. 14 at p.646);

In certain classes of claim, the claim to relief in Equity must be made with special promptitude. In claims for specific performance and for rescission of contracts, the special relief in Equity is only given on condition of the plaintiff coming with great promptitude ... Any substantial delay after negotiations have terminated-such as a year, or probably less-will be a bar.

But the doctrine of laches is certainly not confined to specific performance and rescission of contracts. In *Ephraim v. Asuquo* (1923) 4 NLR 98, for instance, the plaintiff sought to have a grant of letters of administration set aside. It was held that as nearly two years had elapsed since the grant, and the administrator had in all probability completed distribution of the estate, there had been laches, and the plaintiff's claim failed.

Finally, it may be noted that any reasonable explanation for the delay, such as the plaintiff's ignorance of the facts on which the claim is based, infancy or other disability of the plaintiff, or fraud on the part of the defendant, will absolve the plaintiff. Also, in actions concerning rights to land, the rights of the present plaintiff over the land will not be affected by the laches of the predecessor-in-title. See *Nwokobi v. Nzekwu* (1964) 1 WLR 1019.

3.1.8 Equality is Equity

The application of this maxim may be considered under the following heads –

- (i) presumption of tenancy in common;
- (ii) severance of joint tenancy;
- (iii) equal division by the court; and
- (iv) the doctrine of satisfaction.

1. Presumption of Tenancy in Common

“Equity leans against joint tenancies.” Equity dislikes the joint tenancy, for in it the right of survivorship (the *jus accrescendi*) operates – i.e. the survivor of two joint tenants is entitled to the whole property, and the estate of the deceased tenant takes nothing. Where there are more than one joint tenants, on the death of one, the whole property vests in the survivors. This process continues until there is only one survivor, who then holds the land as a sole tenant. For a detailed account, see Megarry and Wade, *Law of Real Property*, 3rd ed. Pp. 403 *et seq.*

In a tenancy in common, on the other hand, the share of a deceased tenant passes not to the survivor but to those entitled under the deceased's will or intestacy, for a tenant in common has a distinct share in the property which is his to dispose of as he wishes.

In three instances Equity treats joint tenants at law as tenants in common of the beneficial interest, so that although at law the survivor is entitled to the whole property, in Equity he will be regarded as trustee of the deceased's share for the benefit of those entitled under the latter's will or intestacy. These instances are:

(a) Where property is purchase in unequal shares

Where two persons, X and Y, purchase property, providing the purchase money in unequal shares, and have the property conveyed to them as joint tenants, on the death of X, Y becomes entitled to the whole property at law, but in Equity he becomes trustee for X's estate of the share

of the property proportionate to the amount advanced by X (Y being of course beneficially entitled to his own share).

But where the money is advanced in equal shares, Y is entitled to the whole property both at law and in Equity, for it is presumed that when two persons advance equal amounts, they intend the *jus accrescendi* to operate. See *Lake v. Gibson* (1729) 1 Eq. Ca. Abr. 290.

(b) Loan on Mortgage

Where two persons, X and Y, lend money to Z who then mortgages his property to them jointly, it is immaterial whether the amounts lent were equal or unequal; since the transaction is a loan, a tenancy in common will be implied, so that the surviving mortgage will be a trustee for the estate of the deceased mortgagee of that part of the property which is proportionate to the sum lent by the deceased.

(c) Partnerships

It is presumed that any property acquired by partners in their business is held by them as beneficial tenants in common – *jus accrescendi inter mercatores locum non habet* (meaning “the right of survivorship has no place in business”).

2. Severance of Joint Tenancy

The term ‘severance’ is here used to describe the process whereby a joint tenancy is converted into a tenancy in common. A joint tenant may convert a joint tenancy into a tenancy in common by severance. Where there is a joint tenancy both at law and in Equity (e.g. where two joint purchasers advance equal amounts), Equity will readily treat the joint tenancy as severed and thus converted into a tenancy in common, thereby excluding the right of survivorship.

Any alienation of his interest by a joint tenant will bring about severance. Even an agreement to alienate suffices, provided it is made for value. See *Brown v. Raindle* (1796) 3 Ves. 256. Alienation may be by outright sale or gift or by mortgage. In *Ipaye v. Aribisala* (1930) 10 NLR 10, the point in issue was whether a merely equitable mortgage of his interest by a joint tenant sufficed to bring about severance.

The facts were that the plaintiff and his brother were joint tenants under a settlement of land. The deed of settlement was kept in the brother’s custody. After the death of the brother it was discovered that he had, without the consent of the plaintiff, deposited the deed with the defendant as security for a loan, thus creating an equitable mortgage of his (the brother’s) interest in the property.

The question was, did this operate to sever the joint tenancy? If the answer were in the affirmative, the brother would have become a tenant in common and the mortgage to the defendant would be a valid alienation of the brother’s interest, thus entitling the defendant to retain possession of the deed. On the other hand, if there had been no severance, the right of survivorship would operate to vest the whole property in the plaintiff, both in law and Equity, and the defendant would have no right to possession of the deed. The Divisional Court adopted the latter view, but the decision was reversed by the Full Court which held that the equitable mortgage, just as a legal one, did bring about a severance, the legal joint tenancy being converted into a tenancy in common in Equity. It made no difference that the mortgage was without the knowledge or consent of the plaintiff, for one joint tenant may validly sever without the concurrence of the other. Accordingly, the defendant was entitled to possession of the deed.

3. Equal Division

Whenever there is no other fair and practicable basis upon which property may be distributed amongst two or more rival claimants, the court will apply the maxim and divide the property equally between them. This may be seen in the following examples:

- (i) Where trustees fail to exercise a trust power, the court will divide the trust property equally amongst all the members of the class of beneficiaries, even though the trustees might have given unequal shares.
- (ii) Where there is a settlement including a direction (a) that the fund shall be held on trust for certain persons in unequal shares and (b) that any share which fails to vest shall accrue to the other shares by way of addition, the accrue will be in equal shares and not in the proportions laid down for the original shares. See *Re Bower's Settlement Trusts* (1942) Ch. 197.
- (iii) Where a husband and wife divorce or separate, both having contributed to the purchase of the matrimonial home, or having operated a joint bank account, the court will not, in the absence of any contrary arrangement between the parties, inquire into what was contributed by each, but will divide the property equally between the two. See *Jones v. Maynard* (1951) 1 Ch. 572. The rule is applicable even where husband and wife both contribute to the running of a business. (See *Landsman v. Landsman* (1961) 105 S.J. 988.

4. The Doctrine of Satisfaction

Equity considers that if a father has more than one child, it is unlikely that he would wish to provide for one child twice over to the detriment of the others, hence the sub-maxim "Equity leans against double portions" founded on the present maxim.

3.1.9 Equity looks to the Intent rather than to the Form

At Common Law, observance of the correct forms or proceedings in relation to any transaction was all-important. Failure to do so often rendered a transaction invalid or led to a total loss of the legal rights of a party. Conversely, if the due forms were employed in a transaction there was often no possibility of challenging its validity or tempering its rigours. Equity, however, looking to the intent rather than the form of words, considered it unfair for one party to insist on strict observance of form and thereby defeat the substance of a transaction and the true intention of the parties. This may be seen in the following examples.

(i) *Time Clauses*

If a party to a contract for the sale of land fails to complete on the date stipulated in the agreement, at Common Law he is in breach of contract, and the other party may repudiate the transaction. But, in Equity, time is generally not of the essence of a contract, and breach of a time clause will not be ground for repudiation by the other party, provided the party in default is ready and able to complete within a reasonable time.

(ii) *Covenants*

Equity may regard a covenant as negative in substance (though positive in form) so as to enable an injunction to be granted to restrain its breach; as where an injunction was granted to enforce a "tied-house" covenant, whereby the owner of a public house agreed that a certain brewery should have the exclusive right of supplying beer to him. See *Catt v. Tourle* (1869) 4 Ch. App. 654.

(iii) *Mortgages*

In determining whether a transaction is a mortgage or not, Equity looks at the substance and not merely the form. Thus, e.g. parol evidence is admissible to show that what appears on its face to be an absolute conveyance was in fact intended to be by way of security only.

The maxim is also exemplified by Equity's attitude to redemption of mortgages. At Common Law, if the mortgagor failed to repay the loan on the date fixed by the mortgage, he lost for ever his right to redeem the property. Equity, however, always considered a mortgage to be a mere security, and regarded the provision for repayment on the day stated in the mortgage covenant to be a mere formality. Equity thus allowed a mortgagor to redeem his property after the redemption date had passed.

(iv) *Penalties and Forfeitures*

In determining whether a clause in a contract is a penalty or liquidated damages, Equity looks to the intent of the parties rather than to the form of words used. Thus, the fact that the expression "liquidated damages" as used will not be conclusive of the effect of the clause, and it will be treated as a penalty if it is found that it was not a genuine pre-estimate of the loss likely to be suffered in the event of a breach, but merely a stipulation *in terrorem* to induce performance of the contract. If the clause is found to be a penalty, Equity will grant relief to the promisor by reducing the amount to be paid by him to the actual loss suffered by the promisee as a result of the promisor's default.

On the same principle, Equity granted to a tenant relief against forfeiture of his lease for non-payment of rent. This is now a statutory right. See Section 210, Common Law Procedure Act 1852; also provided for by the various High Court Laws, viz., Lagos, Cap. 80, s.22; East, Cap. 61, s.29; North, Cap. 49, s. 20; West, Cap. 44, s.21. The court will restore the lease if the tenant pays all arrears of rent and the landlord's costs within six months after the forfeiture.

(v) *Equitable Assignment*

For an assignment of a chose in action to be valid at law it must comply with the provisions of the Judicature Act 1873, section 25(6), which require it to be in writing, to be absolute, and notice to be given to the debtor or trustee. But an assignment which is not in the form required by the statute is quite valid in Equity. The classic dictum on this point is that of Lord MacNaghten in *Brandt's Sons and Co. v. Dunlop Rubber Co.* (1905) A.C. 454 at p. 462, "the language is immaterial if the meaning is plain. All that is necessary is that the debtor be given to understand that the debt has been made over by the creditor to some third person."

(vi) *Deeds*

At Common Law a promise under seal is enforceable even though unsupported by consideration. Equity however, will normally refuse to grant specific performance of a purely voluntary agreement even though it is made by deed. See *Jefferys v. Jefferys* (1841) Cr. & Ph. 138. This is expressed in the sub-maxim, "Equity will not aid a volunteer."

3.1.10 Equity looks on that as done which ought to be done

Two examples of this maxim may be given –

(i) Under the doctrine in *Walsh v. Lonsdale* (1882) 21 Ch. D. 9, one who enters into possession of land under an agreement for a lease of which the court will grant specific performance, is in the same position (as between himself and the landlord) as if the lease had actually been granted to him. In other words, "an agreement for a lease is as good as a lease." The

leading Nigerian case is *Savage v. Sarrough* (1937) 13 N.L.R. 141, the facts of which may be stated simply. The plaintiff and his brother and sister were owners of certain land and buildings. The defendant obtained from the plaintiff's brother a written agreement, not under seal, for a lease for five years. The plaintiff claimed recovery of possession of the property. It was held that in Equity the lease, though not under seal, must be deemed to have been effectively granted and that for practical purposes the parties were inter se in the same position as if the lease were valid at law, and that the claim for recovery of possession, therefore, failed.

(ii) The Doctrine of Conversion

If a trustee or other person is under a binding obligation to sell land and convert it into money, or to invest a sum of money, in the purchase of land, Equity regards that as done which ought to be done and treats the property as being in its converted state from the time when the duty to convert arose. See Snell, 26th ed., (1960) pp. 513-527.

In *Iragunima v. R.S.H.P.D.A.* (2003) 12 NWLR Pt. 834 p.427, the 2nd respondent's vendor applied for a renewal of the lease which was assigned to him by the original lessee. The evidence on record shows that approval was given by the Governor for the renewal of the lease in favour of the 2nd respondent's vendor for a term of 60 years from 1/1/64 the date the original lease expired. There was also evidence that the 2nd respondent's vendor was called upon to pay all necessary fees relating to the new lease, that is, arrears of rent from 1964-1973, the preparation, execution and registration of the new lease which he did and obtained receipts which were tendered in evidence. What remained was for the 1st respondent to execute the new lease in favour of the 2nd respondent's vendor. This was not done. Since the 2nd respondent's vendor was in possession under the agreement for a new lease for a term of 60 years from 1/1/64, he and the 2nd respondent were, in equity, in the same position with respect to their respective rights as if a lease had been granted. Consequently, he had at least an equitable interest in the property in dispute.

3.1.11 Equity Imputes an Intention to Fulfil an Obligation

Where a person is obliged to do an act, whether by law (in the wide sense) or by moral obligation, and he does an act which could be taken as fulfilling that obligation, Equity will put the most favourable construction on his motives, and he will be deemed to have done the act in performance of his duty. This maxim is the foundation of the doctrines of performance and satisfaction.

3.1.12 Equity Acts "in Personam"

One of the most important characteristics of the jurisdiction of the Court of Chancery was that its decrees were directed in *personam*, *i.e.* against the defendant personally. Thus, Lord Ellesmere in the Seventeenth Century could justifiably claim that the controversial common injunction issued by the Chancellor was not an interference with the due processes of the Common Law courts, but merely a direction in *personam* to the individual that, on equitable grounds, he must not sue at Common Law. The maxim also meant that in property matters the Court of Chancery would act against the person of the defendant by committing him to prison for contempt if he failed to obey a decree, rather than in *rem*, *i.e.* against the property involved in the dispute.

Later Equity developed the alternative method of sequestration of the defendant's property until he obeyed a decree, and today, whilst still retaining the powers of committal and sequestration, the court has numerous more convenient methods of enforcing its decrees. Thus, if a defendant

fails to convey land to the plaintiff as ordered by a decree of specific performance, the court, instead of merely imprisoning him or sequestering his property, may appoint another person to execute the transfer on his behalf; or it may make a vesting order, which has the effect of transferring the property from one person to another without the need for a conveyance. Furthermore, since the Judicature Acts 1873 to 1875, equitable decrees are enforceable by any appropriate legal writ; thus, e.g. an order for the repayment of money can be enforced by a writ of *fiery facias*.

The maxim has thus lost some of its earlier importance, but its survival may be seen in the rule that the court may make an equitable decree relating to property situated outside the jurisdiction, as an exception to the general jurisdictional limits of the courts. Thus, the court may enforce a trust relating to land abroad where the trustees are present within the jurisdiction (see *Rochefoucauld v. Boustead* (1897) 1 Ch. 196), or similarly, where the executors are present, administer assets abroad. See *Ewing v. Orr-Ewing* (1883) 9 App. Cas. 34. In the leading case of *Penn v. Lord Baltimore* (1750) 1 Ves. Sen.444, it was held that the English court could decree specific performance of a contract to sell land in America, since the defendant was within the jurisdiction.

This latter case was followed in *Bata Shoe Co. v. Melikian* (1956) 1 FSC 100, where the Supreme Court held that the High Court of Lagos had jurisdiction to order specific performance of a contract to assign a lease of land situated at Aba, in the then Eastern Nigeria, which was outside the jurisdiction of the Lagos Court, on the ground that the defendant resided in Lagos. Another interesting illustration of the maxim is afforded by *Ayinule v. Abimbola* (1957) LLR 41. In this case, the defendant had been employed as agent by a Lagos firm, Jones Commercial Services. After leaving his employment, he held himself out as still acting for the firm by writing from Accra, Ghana, to a firm in Germany, using his former employers' notepaper and signing "for Jones Commercial Services." Onyeama J. granted an injunction against the defendant restraining him from so acting in Ghana, on the ground that he was present in Nigeria. Since Equity acts *in personam*, it was immaterial that the acts complained of were being committed abroad.

Lastly, it is a controversial point whether the beneficiary's right under a trust is a right *in personam*, since the beneficiary may not only sue the trustee personally to recover the trust property or its value, but may also trace the property and recover it or its proceeds from any other person into whose hands it has come. The right to trace thus resembles a right *in rem*, attaching itself to the property. However, because the beneficiary has no right to trace against a bona fide purchaser of the property without notice of the trust, his interest cannot be said to be a full right *in rem* (unlike a legal interest). It has thus been suggested by many writers that these equitable rights are hybrids, being technically rights *in personam*, but bearing more resemblance to rights *in rem*.

4.0 CONCLUSION

The maxims are to show the historical development of equitable rules and procedure; and guide the application of those rules at the present and in the future.

5.0 SUMMARY

In this unit, we have considered the maxims of equity. You should now be able to explain each of the maxims and distinguish them even though they overlap.

6.0 TUTOR-MARKED ASSIGNMENT

Briefly explain the application of the maxim 'equality is equity'.

7.0 REFERENCES / FURTHER READING

Kodilinye Gilbert (2005 Rep.) *An Introduction to Equity in Nigeria*; Ibadan: Spectrum Books Ltd.

Nwagbara Chigozie (2004 Rev.Ed.) *Selected Cases on Land Law, Equity, Trusts, Taxation, Banking and Conflict of Laws*; Lagos: CI Publications.

UNIT 2 PRIORITY AND THE DOCTRINE OF BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main content
 - 3.1 Priority
 - 3.2 Bonafide purchaser for value without notice
 - 3.3 Definition and meaning of notice
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- 5.0 Summary
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1.0 INTRODUCTION

In the last unit, we examined the maxims of equity, which are guidelines of the jurisdiction of Equity which have been developed throughout its history. In this unit, we will examine priority and the doctrine of bona fide purchaser for value without notice. The question of priority becomes important when there are two or more competing interests in property, more so, when the various competing interests cannot be satisfied by the total value of the property that is subject to these interests.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Explain Priority;
- (ii) Discuss the doctrine of bona fide purchaser for value without notice; and
- (iii) Define notice.

3.0 MAIN CONTENT

3.1 Priority

According to Maitland (*Equity (Brunyate 2nd Ed.) 1949 p.125*), 'It happens with unfortunate fre-

quency that a man having title to land contrives by means of fraudulent concealment to get money from a number of different persons on the security of the land - then disappears - and the lenders are left to dispute among themselves as to the order in which they are to be paid out of the value of the land which is insufficient to pay all of them.'

There is a similar situation with regard to dealings with family property. It is a notorious fact that a piece of family land is being sold at different times to different persons. As Verity, Ag. P. observed in *Ogunbambi v. Abowab* (1951) 13 W.A.C.A. 222 at 223,

“The case is indeed in this respect like many which come before this court: one in which the Oloto family either by inadvertence or design sell or purport to sell the same piece of land at different times to different persons. It passes my comprehension how in these days, when such disputes have come before this court over and over again, any person will purchase land from this family without the most careful investigation, for more often than not they purchase a law suit, and very often that is all they get.”

We shall see that many of these cases raise the problem of priority: two informal sales of the same property at different times to two different persons would, *prima facie*, create equitable interests in the property in favour of the purchasers, while an informal sale followed by a formal sale would respectively create an equitable interest and a legal interest. In both cases, as between the rival claimants, priority will be determined by the relevant rules of law and equity.

3.1 Priority: The Temporal Order Rule

(i) Competing Legal Interests: Subject to some statutory provisions relating to registration of certain interests in land and some other rules which owe their origin and development to the Court of Chancery, the general principle is that priority is to be determined by the order in which the competing interests are created: *Qui prior est tempore, potior est jure*: he who is first in time is stronger in law. This temporal order of priority is equally recognised both at law and in equity. As between adverse claimants of a legal interest, he who is prior in time is stronger in law. The conflict in this case is, however, more apparent than real, for, where a legal mortgage has been created by the grant of a lease (see *Jones v. Rhind* (1869) 17 W.R. 1091), a subsequent legal mortgage of the same property can take effect only in the reversion, that is, after the expiration of the earlier mortgaged lease. See *Mason v. Rhodes* (1885) 53 L.T. 322.

Or, as was the case in *Adu Kofi v. G. A. Adjei* (1942) 8 WACA 198, where a landed property was sold at two different auctions under two different writs issued by different Tribunals of competent jurisdictions. The court held that the plaintiff who bought the landed property in the earlier auction which was a day before the second auction had, in point of time, obtained a better title and that the subsequent sale to the defendant had no effect. In this case, it is obvious that the decision could not be otherwise unless the defendant could establish the invalidity of the earlier auction sale.

(ii) Competing Equitable Interests: Where each of the rival claimants has only an equitable interest in the property, provided the equities are equal, the basic rule '*Qui prior est tempore potior est jure*' applies.

In *Cave v. Cave* (1880) 15 Ch. D. 69, a trustee, in breach of trust, purchased land with trust fund and the conveyance was made in his brother's name. However, the equitable right of the beneficiaries under the trust attached to the land. The brother made a legal mortgage to X and later an equitable mortgage in favour of Z. Neither X nor Z had notice of the beneficiaries right under

the trust. As between the equitable rights of the beneficiaries and the equitable interest of Z, the former prevailed being earlier in time. But as between the beneficiaries' right and X's claim, the latter prevailed in accordance with the maxim that where the equities are equal the law prevails. Thus, equity not only follows the law, it also gives recognition to the superior strength of the law.

Similarly, in *Assaf v. Fuwa* (1954) 13 W.A.C.A 232, where each of the rival claimants had only an equitable interest, the Judicial Committee of the Privy Council upheld the temporal order of priority.

Modifications of the Rule

Qui Prior Est Tempore Portior Est Jure

- (i) Where there is equal equity the law prevails.
- (ii) As between equal equities, the first in time shall prevail.

Two maxims of equity are of great importance in the determination of priority between rival adverse claimants to the same property. First, where there is equal equity, the law shall prevail. The import of this maxim is that as between adverse claimants, where one has the legal interest and the other has an equitable interest, the claimant of the legal interest will be preferred provided there is 'equal equity'. Equality in this context does not mean or refer to priority in point of time, it means the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other. See *Bailey v. Barnes* (1894) 1 Ch. 25, 36.

Thus, in *Ajose v. Harworth* (1925) 6 N.I.R. 98, the plaintiff who had earlier on obtained an equitable interest in the property in dispute, brought this action asking for a declaration that the property belonged to him as against the defendant who had subsequently obtained the legal estate in the property. Van Der Meulen J. found that the defendant's conscience was clear and that there was nothing in the conduct of the defendant which made his claim, in the transaction, less meritorious than that of the plaintiff, since the equities were equal, the claim of the defendant, who had subsequently acquired the legal estate was held to prevail over that of the plaintiff whose claim was equitable. See further, *Pilcher v. Rawling* (1871-72) 7 Ch. Ap. Cas. 256.

The other maxim of equity which may modify the temporal order of priority is: 'as between equal equities the first in time shall prevail.' The rule applies as between rival claimants of equitable interests in the same property. However, the maxim as stated does not sufficiently explain its practical operation, all it does is to confirm the general principle. '*Qui prior est tempore portior est jure*'. In this connection, the exposition of the rule by Kindersley V-C in *Rice v. Rice* (1853) 2 Drewry 73 at 78; 61 E.R. 646, is instructive. He said 'in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; that is, that a Court of Equity will not prefer the one to the other, on the mere ground of priority of time, until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or, in other words, that their equities are in all other respects equal; and that, if the one has on other grounds a better equity than the other, priority of time is immaterial.' (See also, *Latec Investments Ltd v. Hotel Terrigal Property Ltd.* (1965) 113 C.L.R. 265).

In the above case, a vendor of a leasehold property issued and endorsed receipt for the payment of the purchase money in the deed of conveyance, when in actual fact, no money had been paid; and, the title deeds in respect of the property were delivered to the purchaser, who, subsequently

deposited it with the defendant to secure an advance, thus creating an equitable mortgage in favour of the defendant who had no notice of the want of payment. The purchaser then absconded without paying either the plaintiff-vendor or the defendant-equitable mortgagee. The question was Who should be preferred: the vendor's equitable lien for the unpaid purchase money or the equitable mortgage of the defendant, it being established that the total value of the leasehold property was not sufficient to satisfy the respective claims of the vendor and the equitable mortgagee.

No doubt, the two competing equitable interests, abstractedly considered, are of equal value in respect of their nature and quality. However, the question, whether their equities are in other respects equal, or whether the one or the other has acquired the better equity, must depend upon all circumstances of each particular case, and especially the conduct of the respective parties. In this regard, the fact of the possession of the deeds, which the mortgagee acquired with perfect *bona-fides*, and without any wrong done to the vendor gave him, the equitable mortgagee a better equity than that of the vendor, therefore, the equitable interest of the mortgagee was held to prevail. The decision will, however, be different if upon a comparison of the conduct of the two parties and a close examination of all the circumstances of the case there is nothing to give to the one a better equity than the other. The general principle governing determination of priority, *qui prior est tempore portior est jure*, can then be applied, that is, priority of time in terms of creation will give the better equity.

In *Re King's Settlement* (1931) 2 Ch. 294 at 301, the settlor made a conveyance to his son and daughter-in-law. The deed of conveyance stated that they took as absolute beneficial owners in consideration of his love and affection for them. The son and the daughter-in-law at the same time executed a deed poll declaring trusts of the property in favour of the settlor and other beneficiaries. The conveyance and the title deeds were handed to the Son and the daughter-in-law, who purported to be absolute owners, created incumbrances on the property in favour of certain incumbrancers for value and without notice of trusts. The plaintiffs, who were beneficiaries under the trust, brought this action against the defendant equitable mortgagee, the defendant trustee, asking for a declaration that the defendant had no enforceable lien or charge on the property. The competition was, therefore, between the prior equitable interests of the beneficiary under the trust and the subsequent equitable lien of the mortgagee.

Farewell J. decided in favour of the equitable mortgagee. In the course of his judgement, he observed:

“I have now to decide between the equities of the beneficiaries, and of the incumbrancers, treating them both for the moment as equitable incumbrancers. *Prima facie*, the beneficiaries' equity, being earlier in date, ought to prevail. But when I find that their title is based on a document in a form wholly misleading and resulting necessarily in third parties being wholly misled as to the character in which the defendants (Trustee) take the property, I should be going against all equitable principles if I were to hold that the beneficiaries' equity prevailed over that of other persons acting in complete innocence and misled by the settlor (one of the plaintiffs) through whom alone the beneficiaries claim, and I should be wrong if I allowed the equity of the settlor and his beneficiaries to prevail.”

The unusual form for the creation of the trust made the beneficiaries' equity less meritorious. The deed of conveyance indicated an absolute gift, there was nothing on the face of it to show that a 'secret trust' had been engrafted. The case is, however, different from that where a trustee, in order to raise money for his own purposes, fraudulently creates an equitable mortgage in the trust property and deposit deeds of title with the equitable mortgagee who had no actual or construc-

tive notice that any breach of trust had been committed and was not guilty of any conduct which would make his equity inferior to the equity of the beneficiaries. Here the equities are equal in every respect, that being so, that of the beneficiaries which is prior in point of time will prevail. See *Capell v. Winter* (1907) 2 Ch. 376, 381.

Fraud and Negligence

Fraud and negligence may, in certain cases, affect the above stated rules of priority. In *Northern Counties of England Fire Insurance Company v. Whipp* (1884) 26 Ch. D. 482 at 482, Fry L.J. stated the following relevant principles. First, the court will postpone the prior legal estate to a subsequent equitable estate where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate. Such assistance or connivance may be inferred from an omission on the part of the prior legal owner to use ordinary care in inquiring after or keeping title deeds, especially where such conduct cannot otherwise be explained. Second, where the mortgagee of the legal estate has constituted the mortgagor his agent with authority to raise money on the security of the mortgage, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate.

However, a prior legal estate will not be postponed to a subsequent equitable estate on the ground of mere carelessness or want of prudence on the part of the legal owner. In *Northern Counties' case* (supra), C, the manager of a company had mortgaged his freehold estate to the company and handed over the title deeds to them. The deeds were kept in a safe of the Company. The safe had only one lock having duplicate keys, one of which was entrusted to C in his capacity as manager. Some time afterwards C took the deeds out of the safe without the mortgage, and handed them to W, to whom at the same time he executed a mortgage for money advanced to him by W who had no notice, actual or constructive, of the company's security.

The court noted that though there was great carelessness in the manner in which the company dealt with their securities, the carelessness was no evidence of any fraud as to postpone their prior legal estate to subsequent equitable estate of W. It was a carelessness likely to injure and not to benefit the company. Had the company combined with their manager to induce W to lend her money, the company's *prior* legal estate would have been postponed. Furthermore, the company did not constitute C as their agent with authority to raise money on the company's securities. It was, therefore, held that the mortgage of the company had priority over the mortgage to W.

Gross negligence may deprive a legal owner of his priority. In *Oliver v. Hinton* (1899) 2 Ch. 264 at 273, the purchaser for value of the legal estate without notice of the prior equitable mortgage by deposit of the title deeds was postponed on the ground that his failure to ask for and obtain the title deeds which would have fixed him with notice, amounted to gross negligence sufficient to deprive him of the protection of the legal estate.

Similarly, in *Akingbade v. Elemesho* (1954) 1 All N.L.R 154, a purchaser who was in a position to know of the prior equitable interest but for his gross negligence in finding out the relevant facts was postponed. (See further, *Ogunbambi v. Abowab* (1951) 13 W.A.C.A. 222 at 225; *Walker v. Linom* (1907) 2 Ch. 264, in this case, the trustees failed to obtain the title deeds to the trust property, the prior interest of the beneficiaries under the trust was, therefore, postponed to that of the subsequent equitable incumbrancer without notice). Thus, it is not essential that a purchaser for value without notice should have been guilty of fraud before he is deprived of the protection of the legal estate; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority. (*Oliver v. Hinton* at 274)

SELF ASSESSMENT EXERCISE 1

Define notice.

3.2 Bona Fide Purchaser for Value Without Notice

The doctrine of *bonafide* purchaser for value without notice provides the most fundamental distinction between legal and equitable rights in property. The doctrine is equally important in the determination of priority between rival claimants of interests in property. The essence of the doctrine is that where a defendant has a better equity or a superior title, a court of equity will not deprive such defendant of any right of property, whether legal or equitable, for which he has given value without notice of the plaintiff's equity. See the following cases, *Ajose v. Harworth* (1925) 6 N.L.R. 98; *Griffin v. Talabi* (1948) 12 W.A.C.A. 370; *Martins v. Molade* (1930) 9 N.L.R. 53.

The plea of purchaser for value without notice becomes relevant where there is competition between –

- (i) legal and equitable interests,
- (ii) two equitable interests, and
- (iii) equitable interest and mere equity.

3.2.1 Bona Fide Purchaser of the Legal Estate for Value Without Notice

Much 'as Courts of Equity break in upon the common law, when necessity and conscience require it, still they allow superior force and strength to a legal title to estates.' Per Lord Herdwick L.C. in *Wortley v. Birkhead* (1754) 2 Ves. Sen. 571 at 574. See further, *L. & S.W. Railways v. Gomm* (1882) 20 Ch.D. 562, 586. Once the plea of *bona fide* purchaser of the legal estate for value without notice is sustained by the court, any other incumbrancers' claims or interests will be postponed.

Both the test and the strength of the plea are illustrated by the decision of James L.J. in *Pilcher v. Rawlins* (1872) 7 Ch. App. 259 at 268.

"I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and, according to my view of the established law of this court, such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this court. Such a purchaser, when he has once put in that plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the *bona fide* or *mala fides* of his purchaser, and also, the presence or absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgement, this court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him."

In *Folashade v. Duroshola* (1961) 1 All N.L.R. 87, the Federal Supreme Court reiterated that where an estate is affected by an equitable interest, a subsequent purchaser for value will not be affected by that equitable interest provided he obtained the legal estate, he gave value for the

property and he had no notice of the equitable interest at the time (when) he gave his consideration. See further *Cole v. Folami* (1956) 1 F.S.C. 16; *Griffin v. Talabi* (1948) 12 W.A.C.A. 370; *Okunubi v. Assaf* (1951) 13 W.A.C.A. 226.

The fact that a purchaser had the legal estate conveyed to him is not sufficient to give him priority. In equity, the claim of the prior equitable owner would be preferred if the purchaser of the legal estate had bought the property in dispute with knowledge of the prior equitable interest affecting the property. See *Cole v. Folami* (supra). However, where the purchaser claims to have bought the property for value without notice of any equities attaching to the land and such claim is not disproved, the legal title so obtained by the purchaser will not be disturbed; he takes free from any prior equitable interest affecting the property.

The following analysis of the plea is instructive:

1. **BONAFIDE:** For the plea to succeed, the purchaser must establish his good faith. It is essential that he must be innocent of any equity attaching to the property in dispute; that is, he must not be affected by any notice, actual, constructive or imputed, of a prior equity affecting the property.

2. **PURCHASER FOR VALUE:** Since equity will not assist a volunteer, a purchaser who has not given value for the property takes subject to all prior equitable rights affecting the property. Value means money or money's worth. See *Thorndike v. Hunt* (1859) 3 De G. & 1. 563. Marriage consideration is of the very highest value; higher than that of money paid on a purchase. See *Salih v. Archi* (1961) A.C. 778, 793. A transfer of property in satisfaction of a pre-existing debt confers on the transferee the title of a purchaser for value. Such transferee gives valuable consideration just as much as if he had actually part with money; for, he has given up or parted with the right to sue in respect of the debt. See *Taylor v. Blakelock* (1886) 32 Ch.D. 562, 568. The mere fact that the value given by a purchaser is not adequate is not sufficient to defeat the plea of *bonafide* purchaser; it may, however, cast some doubt on the proprietary of the transaction.

3. **LEGAL ESTATE:** The doctrine requires that the purchaser must have obtained a legal estate. Having obtained the legal estate for value without notice, the purchaser takes free from all prior equities affecting the property. See the following cases *Cole v. Folami* (1956) 1 F.S.C. 66; *Okunubi v. Assaf* (1951) 13 W.A.C.A. 226; *Johnson v. Onisiwo* (1943) 9 W.A.C.A. 189. The position may be contrasted with that of the purchaser of an equitable interest for value without notice of prior equities. In this case, the temporal order of priority applies; provided the equities are equal. See the following: *Assaf v. Fuwa* (1954) 13 W.A.C.A. 232; *Phillips v. Phillips* (1862) 4 De G.F. & J. 208; *Cave v. cave* (1880) 15 Ch.D.639.

The strength of the doctrine lies in the acquisition of the legal estate. See *Soremekun v. Sodipo* (1959) L.L.R. 32. If the purchaser is in the process of acquiring the legal estate at the time he receives notice of prior equitable interest affecting the property, he will be bound by such interest. The position is the same even if the purchaser has completed negotiation and offered or paid the purchase money but the legal estate has not been conveyed to him. See *Allen v. Knight* (1846) 5 Hare 272.

Modifications

The emphasis on the acquisition of the legal estate is however subject to qualifications.

1. Better or Superior right to Legal Estate:

Where a purchaser acquires an equitable interest without notice of the prior equitable interest affecting the property, and he, by virtue of his equitable interest, subsequently acquires a superior right to call for the legal estate, he takes precedence over the prior equitable interest. Acquisition of a superior right to legal estate may arise where a third party without notice of the prior equity, acquires the legal estate as trustee for the subsequent purchaser who must have had no notice of the prior equity. See *Stanhope v. Earl Verney* (1761) 2 Eden 81. This qualification may be justified on two grounds –

- (i) The beneficiaries and trustees of a trust are one;
- (ii) Where the equities are equal, the law prevails.

In *Taylor v. London and County Banking Co.* (1901) 2 Ch. 231 at 262-263, Stirling L.J. said 'Now, a purchaser for value without notice is entitled to the benefit of a legal title, not merely where he had actually got it in, but where he has a better title or right to call 'for it. This rule was laid down in *Wilkes v. Bodington* (1707) 2 Vern. 599. It has accordingly been held that if a purchaser for value takes an equitable title only, or omits to get in an outstanding legal estate, and a subsequent purchaser for value without notice procures, at the time of his purchase, the person in whom the legal title is vested to declare himself a trustee for him., or even to join as a party in a conveyance of the equitable interest (although he may not formally convey or declare a trust of the legal estate), still the subsequent purchaser gains priority.'

The above proposition was approved in *Assaf v. Fuwa* (supra). In that case, the Judicial Committee of the Privy Council stated that before the claim of a better right to call in the legal estate' can displace the operation of the principle '*qui prior est tempore portior est jure*' the claimant must show that the owner of the legal estate either (i) had declared an express trust of the legal estate in his favour or (ii) had joined in the conveyance to him of the legal estate, or (iii) had lodged the title deeds with him. If there is no such positive act by the owner of the legal estate, a claim to a better right to call for the legal estate cannot be sustained; mere inertia or passivity on the part of the owner of the legal estate will not be a substitute.

However, an established better or superior right to legal estate will not avail against a purchaser for value of the legal estate without notice of prior equitable interest. The right to call for the legal estate is, no doubt, inferior to the actual purchase for value of the legal estate without notice. An agreement by A to sell to B creates an equitable interest in favour of B who, by virtue of the agreement, has the right to call for the legal estate. But if C, for value and without notice of B's prior equitable interest, acquires the legal estate from A, he takes free from the prior equitable interest of B. See *Garnham v. Skipper* (1885) 55 L.J. Ch. 263.

2. Subsequent Acquisition of Legal Estate. Where a purchaser of an equitable interest in property that is affected by a prior equitable interest subsequently acquires the legal estate, he takes free from the prior equitable interest provided at the time he obtains the equitable interest he had no notice of the prior equitable interest, and that the legal estate so obtained is not in breach of trust. See *Bailey v. Barnes* (1894) 1 Ch. 25, 26. Notice of the prior equitable interest at the time he obtains the legal estate is immaterial.

The position is clearly illustrated by Lindley L.J. in *Bailey v. Barnes* (supra at 36). 'The maxim *Qui prior est tempore portior est jure* is in [favour of a prior equitable owner], and it seems strange that they should, without any default of their own, lose a security which they once

possessed. But the above maxim is, in our law, subject to an important qualification, that where equities are equal, the legal title prevails. Equality, here does not mean or refer to priority in point of time, as is shown by the cases on tacking. Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other. Equitable owners who are upon equality in this respect may struggle for the legal estate, and he who obtains it, having both law and equity on his side, is in a better situation than he who has equity only.

This doctrine is not confined to tacking mortgages. It also applies in favour of all purchasers of equitable interests for value without notice of prior equitable interests, who get in the legal estate. It does not however apply to an equitable owner who gets in the legal estate from a trustee who conveys the legal estate in breach of trust. See, *Taylor v. London and County Bank Company* (supra).

3. Mere Equities: The distinction between a mere equity and an equitable interest is tenuous, hence the difficulty in ascertaining whether a right in property is an equitable interest or a mere equity. Yet the distinction cannot be avoided because of the attendant consequences. An equitable interest is an established interest in property while a mere equity is a property right inferior to an equitable interest. See *Phillips v. Phillips* (1862) 4 De O.F. & J. 208; *Latec Investments Ltd. v. Hotel Terrigal Property Ltd.* (1965) 113 C.L.R. 265.

A mere equity is binding on a purchaser only if such mere equity is ancillary to or dependent upon the equitable interest acquired by the purchaser in the property. See *National Provincial Bank Ltd. v. Ainsworth* (1965) A.C. 1175. A purchaser of an equitable interest in land need not obtain the legal estate before he takes free from prior mere equity affecting the property provided he is a *bonafide* purchaser for value without notice just in the same way as a purchaser for value of the legal estate without notice takes free from prior equitable interest. See *Phillips v. Phillips* (*op. cit.*).

Examples of equitable interests are: estate contracts, a vendor's lien for unpaid purchase-money; equitable mortgages; restrictive covenants; interests of beneficiaries under trusts. Mere equities that will succumb to subsequent equitable interests include the right of a mortgagor to reopen a foreclosure order, the right to set-aside a conveyance for fraud, the right to set aside a deed for fraud or undue influence and the right to have documents rectified or set aside for mistake. See the following cases: *Wright v. Dean* (1948) Ch. 686; *Mackreth v. Symmons* (1808) 15 Yes. 329; *Rice v. Rice* (1853) 2 Drew 73; 61 E.R. 646; *Re Nisbet and Potts' Contract* (1905) 1 Ch. 391; *Cave v. Cave* (1880) 15 Ch.D. 639; *Latec Investments Ltd. v. Hotel Terrigal Property Limited* (1965) 113 C.L.R. 265; *Bainbrigge v. Browne* (1881) 18 Ch.D. 118; *Garrard v. Frankel* (1862) 30 Beav. 445; and *Smith v. Jones* (1954) 1 W.L.R. 1089.

Notice

The function of notice is not to create a property right, it is to prevent the holder of a superior title from using such title for a purpose that is inconsistent with good faith and honest dealings. See *Re Nisbet and Potts' Contract* (1905) 1 Ch. 391; *Barker v. Stickney* (1919) 1 K.B. 121. The importance of notice therefore is that it enables a court of equity to bind the conscience of a purchaser of a superior title and forbid him to set up his superior title against prior owners of inferior interest affecting the property. (Lord Westbury L.C. in *Buckland v. Gibbins* (1863) 32 L.J. Ch. 391, 395). It is clear therefore that a purchaser of legal estate with notice of prior equitable interest affecting property takes subject to the prior equitable interest. See *Assaf v. Oyinloye* (1951) 20 N.L.R. 1.

Basis of the Doctrine

The doctrine of notice is relatively free from artificiality or technicality. Questions and problems arising from the doctrine have always been decided with reference to simple common sense, justice and fairplay. As Rhodes J., observed: 'The rules in respect to notice to purchasers of adverse titles or claims, other than such as is imparted by the records, are not founded upon any arbitrary provisions of law, but have their origin in the considerations of prudence and honesty which guide men in their ordinary business transactions.' See *Lawton v. Gordon* (1869) 37 Cat. 202, 206.

Indeed, it is very much true to say that the doctrine of notice is one of many cases in which equity has placed high premium on substance and in which, in the accomplishment of its ultimate purpose to do justice, brushes aside all matters of form or technically except when controlled by statutory requirements. (Lord Cranworth in *Ware v. Egmont* (1854) 4 De. G: M. & G. 460).

3.3 Definition and Meaning of Notice

Simply put, notice in equity is knowledge of existing fact. It may take one of three forms, viz, actual, constructive or imputed.

(i) Actual Notice:

This kind of notice speaks for itself. A purchaser has actual or express notice of prior interest, if, at the time when value was given by him, or at any time before the completion of the transaction, he was in fact aware of the existence of such interest. See Joyce, J. in *Perham v. Kempster* (1907) 1 Ch. 373 at 379; *Hummani Ajoke v. A.Y. Oba* (1958) W.N.L.R. 208, 210. Thus, actual notice consists of such personal knowledge of a prior equity affecting property which a purchaser intends or proposes to buy.

The source of a purchaser's knowledge does not seem to be material: it may be direct or indirect. See *Lawton v. Gordon op. cit.*; *Lloyd v. Banks* (1868) 3 Ch. App. 488. The important thing to establish before a purchaser is fixed with notice of prior equity is that the purchaser had actual notice of such equity before he acquires his superior title. Notice acquired in a previous and distinct transaction is valid and binding provided it is not too distant to have escaped the memory of a prudent man of business. However, a purchaser will not be bound by notice whose source is wholly unreliable and would have been treated as such, by a reasonable and prudent man of business.

(ii) Constructive Notice:

The practical operation of constructive notice is consistent with the basis of equitable jurisdiction which is to prevent parties exercising their legal rights in an unconscionable manner. See *G.B. Ollivant Ltd. v. Alakija* (1950) 13 W.A.C.A. 63 at 67. The rule of equity is that

“where a purchaser has knowledge of any fact, sufficient to put him on enquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a *bona fide* purchaser. The presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right not-

withstanding the exercise of proper diligence on his part.” Per Selden J., in *Williamson v. Brown* (1857) 15 N.Y. 354, 362. See further Joyce J. in *Berwick v. Price* (1905) L.R. 1 Ch. 632.

Constructive notice is founded on the assumption that the purchaser had no personal knowledge of the prior interest or equity affecting the property which he proposes to buy. It is enough if it can be established that he, the purchaser, would have had notice had he made reasonable inquiry required in the circumstance of the transaction. Where there are sufficient facts calling for an enquiry which would have disclosed the incumbrances affecting the property, and such enquiry is not made, the purchaser is bound by constructive notice of the incumbrances. Failure to make such inquiry is attributed to want of good faith or gross negligence on the part of the purchaser, which in each case, destroys his *bonafide*.

First, a prudent purchaser will call for and investigate the title of his vendor. A purchaser who fails to make such inquiries will be fixed with notice of all incumbrances affecting the title, for, such incumbrances would have come to his notice had he made necessary inquiries. In *Oliver v. Hinton* (1899) 2 Ch. 264, the proceedings arose from an action to determine the priority of an equitable mortgagee by deposit of title deeds and a subsequent purchaser for value without notice of the mortgage. The purchaser, who had no notice of the prior equitable mortgage, had bought the property from the mortgagor. He did not ask for production of the title deeds; there was no inquiry as to the abstract of title which would have fixed him with notice of the equitable mortgage.

The court held that the purchaser's title should be postponed on the ground that where no inquiry as to title is made and no production of the deeds is asked for, the purchaser acquiring the legal estate cannot claim in priority to a prior equitable mortgage. It is settled law that a purchaser for value of the legal estate without notice or a prior incumbrance will be postponed if it is established that either he deliberately abstains from making investigation as to the deeds, or he is guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority. See *Akingbade v. Elemesho* (1964) 1 All N.L.R 154. A purchaser need not be guilty of any fraud or dishonest conduct before being postponed to a prior equitable incumbrancer.

In *Labinjo v. Olufunmise* Suit No. LD/355/68 (unreported), the trustees of a trust under which the plaintiff was a beneficiary, sold in breach of trust, the trust property situated at 20 Glover Street, Lagos, to the defendant who claimed that he was a *bona fide* purchaser for value of the legal estate without notice. He, however, admitted under cross-examination by the plaintiff's counsel that he made no enquiries or caused any investigation to be made as to the interests (if any) which affected the title of his vendor. The court held that in accordance with section 3(1) of the Conveyancing Act 1882, the defendant had constructive notice of the plaintiff's prior equitable interest. It was clear that the defendant would have had notice of the plaintiff's equitable interest had he made such inquiries and investigations which ought reasonably to have been made by a prudent man of business. Thus, the purchaser's claim of *bona fide* was destroyed by his failure to investigate. Therefore, he was held to be constructive trustee of the legal estate for the benefit of the plaintiff.

Second, where there is sufficient evidence disclosing that the purchaser of the legal estate had knowledge of facts which would enable him to acquire notice of prior equitable interest and which he could have acquired had he made further investigation, the purchaser will be deemed to have had notice. It will not be sufficient for the purchaser to show that he had no actual no-

tice. See *Ware v. Lord Egmount*, *op. cit.*

In *Ogunbambi v. Abowab* (1951) 13 W.A.C.A. 222, the defendant claimed that he was a purchaser of the legal estate for value and without notice of the plaintiff's prior equity affecting the property. It was, however, established in evidence that he had, earlier on, sought to purchase the property from the plaintiff and that, upon his offer being refused, he sought and obtained a conveyance from another party, whom he knew to be out of possession. He did not make any enquiry or investigation which would have disclosed to him the nature of the interest which he had himself believed to be vested in the plaintiff from whom he had sought to purchase. It was held that the defendant could have acquired knowledge of the prior equitable interest of the plaintiff but for his gross or culpable negligence, he was, therefore, presumed to have had notice of the plaintiff's equitable interest.

Occupation of land by a person other than the vendor constitutes notice to the purchaser. See the following cases: *Kabba & Anor v. D. S. Young* (1944) 10 W.A.C.A. 135; *Daniels v. Davison* (1809) 33 E.R. 978; and *Omosanya v. Anifowoshe* (1959) 4 F.S.C. 94. Reason and common-sense demand that a purchaser should inspect land he intends to buy with a view to ascertaining (i) if there is any person in occupation, and (ii) the rights or interests which such person may have or possess in the land. In *Hunt v. Luck* (1902) 1 Ch. 428 at 433, Vaughan Williams L.J. described the position as follows: 'It means that, if a purchaser or a 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 title or right of the tenant in possession.' A tenant in possession under an informal lease has equities which he could enforce against the vendor as well as against the purchaser from the vendor, (see *Kabba & Anor v. D. S. Young*, (supra)). Therefore, a person purchasing when there is a tenant in possession, if he neglects to inquire into the title or to inspect the land must take, subject to such right as the tenant may have. See *Olowu v. Oshinubi* (1958) L.L.R. 21.

In *Sanusi Imam v. Sanni Dawodu* (1960) W.N.L.R. 150, the plaintiff had been digging and carrying away sand from the land since 1948 under a licence granted by one Onikoro family, the owners of the land. In 1956, the same family granted, in respect of the same land, similar licence to the defendant. In 1957, the plaintiff obtained a deed of grant of a lease from the same family under which the plaintiff could continue to dig and carry-away sand from the land. The plaintiff brought this action claiming exclusive right to dig and carry away sand from the land. He contended that the grant of 1957, gave him absolute legal estate in the land. In the course of his judgment, Duffus J., observed: 'The lease does in my view grant the plaintiff an exclusive right to dig sand in this river. This grants the plaintiff a legal estate but it must be subject to any existing tenancy or equitable rights of which he had notice. I am satisfied that the plaintiff had actual notice of the defendant's occupation ... Apart from this, the defendant's possession and use of his rights to dig sand has been openly carried out, and possession of a tenant is notice to a purchaser of the actual interest he may have.'

The equity of the tenant in possession extends not only to interests connected with his tenancy, but also to interests under collateral agreements. See (*G. B. Ollivant Ltd. v. Alakija* (1950) 13 W.A.C.A. 63, 67; *Barnhart v. Greenshields* (1893) 9 Moo P.C.C. 18). Thus, where a purchaser is presumed to be affected with constructive notice of the tenant's possession, he is further presumed to have had the notice of the contents of the instrument (if any) under which the tenant occupies the property. A purchaser who proposes to buy the reversion of a lease is bound to inquire on what terms the lessee is in possession. The mere fact that he is misinformed as to

the contents of the lease may not be sufficient to relieve him of the duty imposed on a purchaser to make enquiry as may be reasonably necessary in the circumstance.'

In *Patman v. Harland* (1881) 17 Ch.D. 353, Jessel, MR. said:

“Now it has been argued before me that if the lessee, having this constructive notice, be told by the lessor that there is no restrictive covenant, that that representation will in equity do away with the effect of constructive notice. I entirely dissent from that proposition. Constructive notice of a deed is constructive notice of its contents If therefore you have notice of a deed relating to the title, and forming part of the chain of title, you have notice of the contents of that deed, and it is no excuse for not asking to look at it to say that you were told that the deed contained nothing which it was necessary for you to look at. Otherwise, in every case, you might be satisfied with a statement of the contents of the deed without going to look at it. Of course, there may be cases when the deed cannot be got at or for some other reason where, with all the exercise of prudence in the world, you cannot see it, and then there may be no constructive notice; but that is another question; Where you know, it is no answer at all to be told that it does not prejudicially affect your title.”

In *Crayen v. Consolidated African Selection Trust Ltd* (1949) 12 W.A.C.A. 443 at 448, the plaintiffs took a lease of a property that was subject to an equitable lease of the defendant who was in possession. The defendant's lease agreement contained an option for renewal. When the defendant proposed to exercise his option to renew in accordance with the terms of his lease, the plaintiffs brought this action claiming possession on the ground that they had no notice of the defendant's option to renew. In support of this contention, they relied on the information given to them by the lessor. Lewey, J.A., delivering the judgement of the West African Court of Appeal said: 'Having regard to the authorities and the circumstances of the present case, we hold that the appellants were put on enquiry by reason of the fact that they had notice of the respondents' lease. Had they inspected it, or made enquiries from the respondents they could have found that it contained an option for renewal. But as they neglected to do this and chose to rely upon the landlord's assurance they must suffer the consequences, for the respondents, being in no fault, cannot be deprived of their rights under their lease.'

Section 70(1) of the Property and Conveyancing Law (W.N.) 1959, requires a purchaser to investigate the root of title of his vendor for the last 30 years, otherwise he is deemed to have notice of all equitable interests affecting the vendor's title to the property within the full statutory period of 30 years. However, where an intended lessee is prevented from calling for the title to the freehold or to the leasehold reversion, he will not be affected with notice of any matter or thing of which he might have had notice, if he had contracted that such title should be furnished. In addition, section 70(6) of the Law provides that a purchaser will not be affected with notice of any matter or thing of which, if he had investigated the title or made reasonable enquiries in regard to matters prior to the period of commencement of title fixed under section 70(1) or by any other statute, or any rule of law, he might have had notice, unless he actually makes such investigation or enquiries.

Section 194(1)(i) and (ii) of the Property and Conveyancing Law (W.N.) 1959, which is a substantial re-enactment of section (3)(1) of the Conveyancing Act 1881, a statute of general application re-stated the equitable doctrine of constructive notice, though in a negative form. According to the provision, a purchaser shall not be prejudicially affected by notice of any instrument or matter or any fact or thing unless it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him.

The general view of the provision seems to be that the doctrine of notice ought, not to be extended. In *English and Scottish Merchantile Investment Company v. Brunton* (1892) 2 Q.B. 700 at 707-708, Lord Esher

M.R said:

“when a man has statements made to him, or has knowledge of facts, which do not expressly tell him of something which is against him, and he abstains from making further inquiry because he knows the result would be- or, as the phrase is, he "wilfully shuts his eyes" - then judges are in the habit of telling juries that they may infer that he did know what was against him. It is an inference of fact drawn because you cannot look into a man's mind, but you can infer from his conduct whether he is speaking truly or not when he says that he did not know of particular facts. There is no question of constructive notice or constructive knowledge involved which is inferred. Constructive notice or knowledge, as I have said, is an equitable doctrine wholly; it is a doctrine not known to the common law, but it must now be dealt with and acknowledged by the courts which administer the common law. It is, therefore necessary for us to see how far the doctrine extends and is to be carried out, and to consider its nature and limits as laid down by the judges who invented and have applied it. Of late years, after the doctrine had been invented and put into form, the Chancery judges saw that it was being carried must farther than had been intended, and they declined to carry it further.”

No doubt, the doctrine of constructive notice is a dangerous one in that it is contrary to the truth; it is wholly founded on the assumption that purchaser does not know the facts; and yet it is said that constructively he does know them. Therefore, the doctrine ought not to be extended further, otherwise, it may defeat the end of justice which the judges who invented it wanted to serve. In *Bailey v. Barnes* (1894) 1 Ch. 25 at 35, Lindley L.J. gave expression to the judicial attitude limiting the application of the doctrine. He said, with reference to section 3 of the Conveyancing Act 1882. 'The Conveyancing Act, 1882, really does no more than state the law as it was before, but its negative form shows that a restriction rather than extension of the doctrine of notice was intended by the Legislature.'

The section is construed not to import a duty or obligation; for a purchaser need not make inquiry. The standard of diligence required of a purchaser is not a very high one, however, his conduct in the transaction must not fall below that of a reasonable man, having regard to what is usually done by men of business under similar circumstances. See further *Taylor v. London and County Banking Company* (1901) 2 Ch. 231, at 258-259.

(iii) Imputed Notice:

This is a kind of notice which is neither actual nor constructive to the purchaser, but which is imputed to him through the actual or constructive knowledge of his agent is a settled principle that notice to an agent is notice to the principal. If we held otherwise it would cause great inconveniences, and notice would be avoided in every case by employing agents. See *Sheldon v. Cox* (1764) 2 Eden 224.

Notice will be imputed to a purchaser only through his *bonafide* agent. See *Orasanmi v. Idowu* (1959) 4 F.S.C. 40 at 42. A purchaser who instructed his agent to purchase a property at an auction sale is affected by notice of an equity which has come to the knowledge of his agent in the course of the transaction. See *G. B. Ollivant Ltd. v. Alakija* (1950) 13 W.A.C.A. 63 at 67. A vendor is not an agent of the purchaser, therefore, notice to the vendor or his agent cannot be imputed to the purchaser since the whole basis of the equitable principle of a *bona fide* purchaser for value without notice is to protect a purchaser from the fraud of his vendor. However, the purchaser will be bound by such notice if there is evidence that he had any such notice, actual or constructive. See *Omosanya v. Anifowoshe* (1959) 4 F.S.C. 94 at 99

Barristers and solicitors are, in most cases, agents of purchasers for the purposes of purchasing

land. 'It has been said over and over again that notice to a solicitor of a transaction, and about a matter as to which it is a part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of.' Per Lord Hatherley in *Rolland v. Hart* (1871) L.R 6 Ch. 678 at 681-2. See further *Jared v. Clements* (1903) 1 Ch.428. Notice or information acquired by a solicitor in a previous transaction used to affect through the doctrine of imputed notice, his principal in a subsequent transaction. See *Okunubi v. Assaf* (1951) 13 W.A.C.A. 226 and *Fuller v. Bennett* (1843) 2 Hare.394. This rule is capable of producing untold hardship if notice in every transaction that comes to the solicitor is imputed to his principals in subsequent transactions. The rule was modified in *Mountford v. Scott*.(1823) Turn & R 275; 37 E.R 1105.

Now, information acquired by a solicitor in one transaction cannot affect, through the doctrine of imputed notice, his principal in a subsequent transaction. Section 136 subsection 1 (ii) of the Conveyancing Act, 1882, (a statute of general application) now provides that a purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless in the same transaction with respect to which a question of notice to the purchaser arises that it has come to the knowledge of his solicitor or other agent, as such, or would yet come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections been made as ought reasonably to have been made by the solicitor or other agent. See similar provision in section 194. (1)(ii)(b) of the Property and Conveyancing Law (W.N.) 1959.

This section has been judicially construed in *In re Cousins* (1886) 31 Ch.D.671 at 677. In the course of his judgment, Chitty J. said: "There must be something which comes to the knowledge of the solicitor as such and in the transactions. The words 'come to the knowledge' are not unimportant and seem to me to afford the answer to the argument that Banks had knowledge because he formerly knew. The section says "come to the knowledge" and I cannot impute to him that the knowledge had come to him in this transaction because he knew it on the former occasion. To do that would destroy the section. Every word of it requires careful weighing and the result is (1) that it must be in the same transaction, (2) the matter must come to the knowledge, and (3) must come to the knowledge of his Solicitor as such viz, as solicitor of the mortgagee."

In *Okunubi v. Assaf* (1951) 13 WACA 226 at 231, the West African Court of Appeal held that notice that comes to the knowledge of a solicitor in a previous transaction cannot be imputed to a purchaser in a subsequent transaction. A solicitor is not under any duty to communicate his knowledge in a previous transaction to the purchaser when the latter subsequently becomes his client. However, when the same solicitor acts for both parties to a transaction, any notice he acquires is imputed to both parties, unless there are facts disclosing that he has conspired with one to the detriment and disadvantage of the other, in which case, that other will have the protection of the doctrine of *bona fide* purchaser without notice. See *Sharpe v. Foy* (1868) 4 Ch. App. 35.

In *Ohiaeri v. Yussuf & Ors.* (2009) 6 NWLR (Pt. 1137) p. 207, the Court held that:

"It is only a subsequent bonafide purchaser of a legal estate for value without notice that can take priority over someone who had acquired a prior equitable interest over the property. And "without notice" means that the purchaser must have no notice of the existence of the equitable interest, that is, he must have neither actual notice nor constructive notice nor imputed notice. If the purchaser employs an agent such as a solicitor, any actual or constructive notice which the agent receives is imputed to the purchaser. In the instant case, there was uncontroverted evidence that the same solicitor who brought the 2nd and 3rd respondents together and facilitated the sale of the property to the 2nd respondent was also the agent of the appellant and facilitated the conveyance of the property by the 3rd and 4th respondents to the appellant. Therefore the notice, actual or constructive, of the prior

equitable interest by the solicitor was imputed to the appellant. The appellant could not claim protection under the doctrine of innocent purchaser for value without notice.”

The equitable doctrine of notice was evolved to prevent parties exercising their legal rights in an unconscionable manner (*Ollivant Ltd. v. Alakija* (1950 13 W.A.C.A. 63), but the doctrine will not be carried to such an extent as to defeat an honest purchaser or prevent a *bona fide* purchaser from dealing freely with his property. See Lord Cranworth in *Ware v. Egmout* (1854) 4 De G., M. & G. 460. Thus a person who derives his title from a purchaser with notice takes free of the equity. Notice to the vendor or his agent is no notice to the purchaser or vendor's successor in title unless the purchaser is himself bound by such notice. See *Onasanya v. Anifowowshe* (supra).

A person who derives title from a *bonafide* purchaser without notice takes free of the equity notwithstanding that he had notice of the equity. See the following cases: *Barrow' case* (1880) 14 Ch. D. 432 at 445; *Experte Sandys* (1889) 42 Ch. D. 98 at 110; and *Wilkie v. Spooner* (1911) 2 KB 475. However, a trustee, who, in breach of trust, sells trust property to a purchaser without notice, and who, subsequently purchases the property from the purchaser, will be deemed to hold the property subject to the trusts. Equity will not allow a person to profit from his own fraud. See *Barrow's case* (supra).

SELF ASSESSMENT EXERCISE 1

Discuss the doctrine of bona fide purchaser for value without notice.

4.0 CONCLUSION

The doctrine of constructive notice is a dangerous one in that it is contrary to the truth; it is wholly founded on the assumption that purchaser does not know the facts; and yet it is said that constructively he does know them. Therefore, the doctrine ought not to be extended further, otherwise, it may defeat the end of justice which the judges who invented it wanted to serve. The equitable doctrine of notice was evolved to prevent parties exercising their legal rights in an unconscionable manner. But the doctrine will not be carried to such an extent as to defeat an honest purchaser or prevent a *bona fide* purchaser from dealing freely with his property.

5.0SUMMARY

In this unit we have considered priority and the equitable doctrine of notice. You should now be able to: explain Priority; discuss the doctrine of bona fide purchaser for value without notice; and define notice.

6.0 TUTOR-MARKED ASSIGNMENT

Explain the doctrine of notice.

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

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1.0 INTRODUCTION

In the last unit, we examined. In this unit, we will consider the assignment of choses in action. The subject, assignment of choses in action, provides another illustration of the distinction between the rigid approach of the common law court and the flexible approach of the Chancery court in the administration of justice before 1873.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Define a chose in action;
- (ii) Distinguish between a chose in action and a chose in possession; and
- (iii) Discuss the various types of Assignment.

3.0 MAIN CONTENT**3.1 Definition of a chose in action**

A chose in action has been defined as 'a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession'. See *Torkington v. Magee* (1902) 2 K.B. 427 at 430. It is a proprietary right in property; a right of recognisable economic value, though it has no tangible or physical existence and therefore not capable of being physically possessed. Being an abstract right in property, if it is infringed or wrongfully or unlawfully detained, it can only be protected, claimed or enforced by action and not by taking physical possession.

Examples of choses in action include rights to debts, shares in a joint stock company and in/partnership property, debentures in a limited company (see *In Re Pryce, Ex Parte Rensburg* (1877) 4 Ch.D. 685), policies of assurance, negotiable instruments, bills of lading, patent rights, copyrights, trade mark, rights of action arising from a contract e.g. right to damages for its breach, rights arising by reason of the commission of tort or other civil wrong e.g. right of liquidator against directors of a company for misfeasance;4 rights of a beneficiary in a trust fund and rights under legacies. Generally the expression 'choses in action' denotes incorporeal personal property. See *Colonial Bank v. Whinney* (1885) 30. Ch.D. 261.

3.2 Distinction between a chose in action and a chose in possession

'All personal things are either in possession or in action. The law knows no *tertium quid* between the two.' See *Colonial Bank v. Whinney* (*supra*) at 285 per Fry, L.J. A chose in possession subsists only where the owner has both the right to enjoy and the occupation of the chose itself. See *Colonial Bank v. Whinney* (*supra*) at 275, 286.

Therefore, choses in possession may be said to consist of corporeal chattels which by their nature can be the subject of physical possession and enjoyment. A chose in possession, being a tangible object, with actual physical existence, its possession and, if intended, ownership will pass by physical delivery. For example, a fountain pen is a chose in possession; if it is wrongfully or unlawfully detained, the owner may recover it *in specie*; similarly furniture, cattle, motor-car; are all choses in possession; possession and ownership in them may pass by physical delivery. Again they may be taken and sold in execution of a judgment in a personal action.

On the other hand, if A lends B N20 and B refuses to repay A, A can no longer seize the N20 in specie, all he can lawfully do is to sue B for the debt. The right to the debt created by the loan transaction between A and B is a chose in action. As Farwell J. pointed out in *British Mutoscope v. Homer* (1901) 1 Ch.671, a chose in action has no physical existence, it cannot be found upon a demised premises, it has no locality and is incapable of manual seizure; thus it could not, at common law, be taken by execution under a writ of *fiery facias* or *levary facias*.

Classification of Choses in Action

A chose in action may be either legal or equitable. A legal chose in action is a right enforceable and recoverable by an action at law e.g. a debt or benefit under a contract.

An equitable chose in action or a chose in equity is a right which owes its existence to a subject matter which before 1873 would have been recognised only by the Chancery Court. Such right was enforceable and recoverable only by what was formally called a suit in equity. Examples are rights and interests of a beneficiary in trust fund, interest under a legacy and right to a relief against forfeiture of a lease for non-payment of rents, beneficial interest in a partnership and, reversionary interest under a will. Generally these choses arise out of proprietary rights in respect of which the Chancery court formally exercised exclusive jurisdiction.

There is also future chose in action. This may either be legal or equitable. It is a right in respect of property which has not fallen into possession but which is to be acquired at a future date. Thus, the interest upon which the chose depends for its existence has not come into possession, for example, right of a beneficiary to a legacy under his father's will when the father is still alive, copyright of a book which is to be written at a future date.

SELF ASSESSMENT EXERCISE 1

How can we classify a chose in action?

3.3 Assignment

Simply put, is a transfer of a right. Where A is indebted to B for a sum of money, B's right to recover the money from A is a chose in action. If B assigns the right to C, B becomes the assignor while C becomes the assignee of the right which C can enforce against A. Such assignment need

not be with the consent of A, who is liable to discharge the liability to C, the assignee.

The question of consent brings out the fundamental distinction between assignment and novation. A valid assignment of a debt may be made between the assignor and the assignee without the consent or even knowledge of the debtor, but in the case of novation, consent of the debtor is a *sine qua non* to its validity, that is, all the parties concerned must give their consent, since the effect of novation which is a tripartite agreement, is to rescind the original agreement between two parties and replace it by a new contract. Thus a new creditor may be substituted for the original creditor or a new debtor for the original debtor. In all cases the original contract will cease to exist.

In *G.B. Ollivant & Co. v. Effioms Transport* (1934) 2 W.A.C.A. 91, the West African Court of Appeal held that the defendants, a party to the original contract, could not be held liable under the contract because there had been novation, a new contract between the plaintiffs and a new firm, (known at first as 'Effioms Transport and Engineering Company' and later, after the necessary formalities had been completed, as 'Effioms Transport and Engineering Co. Ltd.') having been substituted for the original contract between the plaintiffs and the defendants with the consent of all the parties.

SELF ASSESSMENT EXERCISE 2

Distinguish between Assignment and Novation.

3.4 Types of Assignment

Common Law

At common law, no debt or other chose in action could be validly assigned, unless the debtor or the person to discharge the liability assented to the assignment. One of the reasons for the rule against assignment at common law was that assignment 'would be the occasion of multiplying of contentious and suits of great oppression of the people ... and the subversion of the due and equal execution of justice. 'See *Lampet's Case* (1613) 10 Co. Rep. 46(b) at 48(a); 77 E.R. 994.

Another ground for non-recognition and non-enforcement of assignment was to avoid the risk of maintenance and champerty. See Bailey, 'Assignments of Debts in England from the 12th Century to the 20th Century, (1931) 47 L.Q.R. 516; (1932) 48 L.Q.R. 248 and 547. Thus, at common law a debt presently due and payable was looked upon as a strictly personal obligation, and an assignment of it was regarded as a mere assignment of a right to bring an action at law against the debtor. Hence, the assignment was looked upon as open to the objection of maintenance. However, anyone who had a pecuniary interest in the debt was allowed to sue in the name of the creditor. See *Fitzroy v. Cave* (1905) 2 K.B. 364.

Nevertheless, Farewell, L.J. in *Defries v. Milne* (1913) 1 Ch. 98 at 110-111, expressed the risk of maintenance and blackmail in assignment. He said 'It would be exceedingly bad policy to allow a person to sell rights of action for tort which he did not care to run the risk of enforcing himself; as for example to allow a liquidator to put such rights up for auction and sell them to someone who might buy for a small sum of money the chance of recovering a larger sum or possibly of blackmailing.'

The personal nature and character of the obligation upon which the right assigned depends and the fear of the debtor's prison was another reason for the disinclination of the common law to

recognise or enforce assignment. Common law emphasised the possibility of each of the two parties to the obligation having reposed confidence in the personal character of the other and as such might not have envisaged dealings in respect of the obligation with any other party. Thus a debtor usually reposed some confidence in his creditor, believing that the creditor would normally refrain from proceeding to extremities; this accounted for the common law view of a debt as a personal relation. 'In general Common Law uncompromisingly viewed any attempted assignment as an intrusion by a third party into a quarrel between two others.' See Hanbury, *Modern Equity*. (8th Ed.) 1962 p. 73.

Exceptions

The Common Law permitted exception from its general prohibition of assignment. First, the King could assign or receive a chose in action. Second, the common law recognised and adopted the rule of the Law Merchant whereby a negotiable instrument in a negotiable state was assignable. Apparent exceptions were the enforcement of tripartite agreement, that is, novation and, assignment of a debt provided such assignment was coupled with an irrevocable power of attorney to sue for it.

Again, as Ames (*The Disseisin of Chattels* (1890) 3 Harv. L.Rev. 337-339) noted, certain obligations, by the tenor of which the obligor expressly bound himself to the obligee and his assigns, could be enforced at common law, by an assignee or a transferee. In his view, the significance of this exception lies in the fact that it goes to show the reason for the rule which prohibits the assignment of rights action in general. This was to discourage 'the multiplying of contentious and suits'. Bailey also noted that before the 18th century, if a debtor paid his creditor knowing that the latter had assigned the debt, the assignee could sue him, even at law by using the creditor's name, on the ground of fraud.

Assignment in Equity

Here equity did not follow the law. From the early times courts of equity have always permitted and enforced assignments of all kinds of choses in action. Thus in *Rodick v. Gandell* (1852) 1 De G.M. & G. 763 at 777, Lord Truro said 'An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers. '

The reason for the Chancery's flexible attitude towards recognition and enforcement of assignment of choses in action can be seen in the observation of Cozens-Hardy, L.J. in *Fitzroy v. Cave* (1905) 2 K.B. 364 at 372. 'At common law a debt was looked upon as a strictly personal obligation, and an assignment of it was regarded as a mere assignment of a right to bring an action at law against the debtor. Hence the assignment was looked upon as open to the objection of maintenance But the Courts of Equity took a different view. They admitted the title of an assignee of a debt, regarding it as a piece of property, an asset capable of being dealt with like any other asset, and treating the necessity of an action at law to get it in as a mere incident '.

Here equity makes a distinction between matters of substance and matters of form. The transaction between the assignor and the assignee confers right of property on the latter, because in equity an assignment operates by way of agreement binding the conscience of the assignor, and so

binding the property, the subject-matter of the assignment, from the moment when the contract becomes capable of being performed. See *Tailby v. Official Receiver* (1888) 13 App. Cas. 523 at 546.

This right of property is, in equity, a matter of substance to be distinguished from the assignor's common law right of action to get in the right of property assigned. This right of action is, in the eye of equity a matter of form being incidental to the right of property. Much as equity recognises the assignor's right of action at law, it would not permit the assignor to make use of this right to defeat the right of property conferred on the assignee. Thus, the rule is clearly laid down that in a suit to enforce an equitable assignment of a legal chose in action, the assignee must join the name of the assignor as co-plaintiff. This is in recognition of the legal right of the assignor to demand the chose. If the assignor refused his consent, he would be joined as defendant and could be further restrained in equity from exercising his right of action at law. On the other hand where the chose assigned is equitable the assignee could bring the action in his own name.

Assignment and Mandate

Before a transaction can be regarded as an assignment, there must have been a specific direction given as to how a particular subject-matter of the transaction has to be disposed of. Such direction must give right or interest to a third party in the subject-matter of the transaction. On the other hand, a mandate is more of an intimation or the mere giving of an information by one party to the other as to the disposition of a subject-matter. This form of direction merely constitutes a mandate which does not give right or interest to a third party in the subject-matter of the mandate.

In *Scott v. Porcher* (1817) 3 Mer. 652 at 664, H. & Co. made a consignment of pearls to B with directions to sell and pay the proceeds to P on account. B acknowledged the receipt of the consignment and undertook to comply with the directions but no notice was given by either party to P. H. & Co. subsequently wrote to B requesting that the pearls be sent to America, and there disposed of; and afterwards being insolvent H. & Co. made an assignment of all their effects in trust for the benefit of their creditors. The question was whether there was an assignment to P. It was held that the directions accompanying the consignment did not constitute an irrevocable appropriation but amounted to no more than a mere mandate which can give no right or interest to a third party in subject-matter of the mandate. It may also be revoked at any time before it is executed or at least before any engagement is entered into with a third person to execute it for his benefit.

Also in *Watson v. Duke of Wellington* (1830) 1 R. & M. 602, where there was only an intimation that particular persons were claimants upon a fund and not a direction that the debt should be paid, Sir John Leach M.R. held that in order to constitute an equitable assignment, there must be an engagement to payout of a particular fund. Neither will a letter from a banker stating that a special credit for a specified amount had been opened, under instruction, in favour of the person to whom the letter was addressed, constitute an equitable assignment. See *Morgan v. Lariviere* (1875) L.R. 7 H.L. 423. This was nothing but a mere statement by bankers that they have opened a credit, under instructions which they have received, in favour of a particular person.

Form

The validity of an equitable assignment does not depend on any particular form in as much as the intention to assign is clear. Since equity looks on the intent rather than to the form, the form of words used in the transaction is immaterial so long as they show an intention that the assignee is to have the benefit of the right assigned under the transaction. See *Gorringe v. Invell India Rubber*

Works (1886) 34 Ch.D. 128. Once the intent to assign is ascertained such assignment becomes effective in equity even if it is made by word of mouth. It is immaterial whether the subject-matter is a legal or equitable chose.

In *William Brandts Sons and Co. v. Dunlop Rubber Co. Ltd.* (1905) A.C 454 at 462, the Court of Appeal had decided that certain transaction was not an assignment on the ground that the document did not on the face of it purport to be an assignment nor did it use the language of an assignment. The House of Lords took a different view. And in response to the decision of the Court of Appeal, Lord Macnaghten stated that an equitable assignment does not always take that form. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain.

Thus, in *London and Yorks Bank v. White* (1895) 11 T.L.R. 570, where there was a verbal agreement to assign, as security, the assignor's interest in certain goods, such was held to be effective as an equitable assignment. In *Thomas v. Harris* (1947) 1 ALL E.R. 444, Lord Scott, in the Court of Appeal held that under the binding oral contract between the father and the son, the father intended to give to the son a charge on certain life assurance policies and that such a charge amounted to an assignment in equity of the policies to the extent of the charge on them.

However, by statute, disposition of certain interest is required to be in writing. Section 9 of the Statute of Fraud 1677, (a statute of general application) and section 78(1)(c) of the Property and Conveyancing Law (Western Nigeria) 1959 provide that 'A disposition of an Equitable Interest or Trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same or by his agent thereinto lawfully authorised in writing or by will'. This provision is equivalent to Section 53(1)(c) of the United Kingdom Law of Property Act, 1925. Here equity follows the law.

Therefore, an oral assignment of a right or interest arising under a subsisting trust will not be effective as it will offend this statutory provision. In *Grey v. L.R.C* (1959) 3 W.L.R. 758, certain shares in a company were held in trust for B who orally directed that the shares be held for another person. Lord Radcliffe held that the assignment was ineffective because it was a disposition within Section 53(1)(c) of the Law of Property Act 1925 which required such assignment to be in writing. See further *Oughtred v. I.R.C.* (1959) 3 W.L.R. 898.

4.0 CONCLUSION

The validity of an equitable assignment does not depend on any particular form in as much as the intention to assign is clear. Since equity looks on the intent rather than to the form, the form of words used in the transaction is immaterial so long as they show an intention that the assignee is to have the benefit of the right assigned under the transaction.

5.0 SUMMARY

In this unit, we have considered assignment of choses in action. You should be able to define a chose in action; distinguish between a chose in action and a chose in possession; and discuss the various types of Assignment.

6.0 TUTOR-MARKED ASSIGNMENT

- (i) Distinguish between common law assignment and assignment in equity.
- (ii) Distinguish between a chose in action and a chose in possession.

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

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Megarry and Wade, *Law of Real Property*, 3rd edition *et seq.*

UNIT 4 CONVERSION AND RECONVERSION

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main content
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 - 3.2 Types of Circumstances in which the doctrine is operative
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1.0 INTRODUCTION

In the last unit, we examined assignment of choses in action. In this unit, we will consider the doctrine of conversion and reconversion. Bowen, L.J. once said: 'It is an established principle in equity that when money is directed or agreed to be turned into land, or land agreed or directed to be turned into money, equity will treat that which is agreed to be or which ought to be done as done already, and impresses upon the property that species of character for the purpose of devolution and title into which it is bound ultimately to be converted.' *Att. Gen. v. Hubbuck* (1884) 13 Q.B.D. 275, 289.

The equitable doctrine of conversion rests on the maxim that equity regards as done what ought to be done. The doctrine becomes relevant wherever there is an obligation arising under a will, trust, contract or court order, to sell or purchase land. In equity, even though the obligation has not been carried out, the existence of such obligation is sufficient to fix the rights of the parties and to determine the nature and character of such rights as they would have been if the obligation had in fact been performed. This leads to the fictitious and artificial nature of the doctrine.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Explain the importance of the doctrine of conversion;
- (ii) List the types of circumstances in which the doctrine is operative;
- (iii) Discuss Failure of Conversion; and
- (iv) Explain the doctrine of reconversion.

3.0 MAIN CONTENT

In the language of Langdell, 'A direct equitable conversion differs from a direct actual conversion in this, namely, that while the latter is a fact, the former is a pure fiction. To say, indeed, that a direct equitable conversion is other than a pure fiction would be to claim for equity those miraculous powers which the ancient alchemists claimed for themselves The immediate object of the direct equitable conversion is to cause a thing to devolve, on the death of its owner, not according to its true nature and quality, but according to the nature and quality which equity, by a fiction, attributes to it, for example, to cause land to devolve as if it were money or money as if it were land.' (Equitable Conversion (1904) 18, Harv.L.Rev.83 at 245). The notional or fictitious conversion usually become effective at the date of the instrument expressing the intention, if a deed or contract, and if a will, at the date of the testator's death.

In *Fletcher v. Ashburer* (1779) 1 Bro.C.C.497, 28 E.R. 1259, Sir Thomas Sewell M.R. attempted to justify the development of the doctrine when he said that 'nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given: whether by will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually conveyed or only agreed to be conveyed; the owner of the land, or the contracting parties, may make land money or money land. The cases establish this rule universally.'

The practical operation of the doctrine as conceived by Sewell,M.R., may be said to have conditioned the development of the doctrine of conversion. Maitland, in his book '*Lectures on Equity* (2nd Edn.) p.277, was of the view that the equitable doctrine of conversion is the outcome of the fact that England had two systems of intestate succession, the one for realty, the other for personalty; and that but for that unfortunate fact there would have been no need of the doctrine. He went further to say that the doctrine has its root in the simple principle that when property has been given to a trustee it must not be in the power of that trustee to alter the devolution of the beneficial interests by committing a breach of trust. Keeton thought that the development of the doctrine at the beginning of the 18th century can be traced to the unfairness of allowing trustees prejudicially to affect the interests of beneficiaries by postponing sales or purchases of land. No doubt the doctrine is designed to promote justice and also to assist the owner of the subject-matter of conversion in the accomplishment of his objective as regard the ultimate devolution or distribution of his property in accordance with his presumed intention.

3.1 Importance of the Doctrine

Practically, the doctrine is of little significance in Nigeria, hardly can one find a single reported case in which the doctrine has been applied. Even, in England where the doctrine originated, the importance of the doctrine has declined since the property legislation of 1925. As Maitland rightly observed, the doctrine would not have been evolved, but for the fact that before 1926, England had two systems of intestate succession, the one for realty and the other for personalty. Furthermore, the law made and still makes a distinction between what is real property and what is personal property. Before 1926, on intestacy, real property devolved in one way and personalty in another; it was, therefore, important to ascertain by reference to the application of the doctrine of conversion what property of the deceased intestate could be classified as realty and that which could be said to be personalty before the heir's interest and that of the next-of-kin could be accurately determined. By the then applicable law, the heir was entitled to realty while the personalty devolved on the next-of-kin.

The property legislation of 1925 has, however, robbed the doctrine of its importance in relation to intestacies. For example, sections 45 and 46 of the Administration of Estates Act, 1925 abolished descent of realty to the heir, instead, a new form of succession common to both real and

personal property was introduced. Similarly, section 33 of the Act provides that, on intestacy, the personal representatives of the deceased hold on statutory trust from sale so that persons entitled under the Act to the deceased intestate property, will primarily, be entitled to it as personalty. There is a similar provision in Section 37 of the Administration of Estates Law (Western Nigeria), 1959.

Nevertheless, the doctrine has not become totally impotent; there are a number of circumstances in which the question of conversion can still arise and a fair and just settlement of such question can be achieved by reference to the equitable doctrine of conversion. For example, the question of conversion will still arise where a testator disposes of his realty and his personalty respectively to different persons. In that connection, it is necessary if the desired result as between the devisees and the legatees is to be achieved and if the intention, of the testator is to be fully implemented, to determine that which is realty and that which is personalty under the testator's will. For it may be that the testator, in his life time, was under an obligation either to lay money for the purchase of land or to sell land and this obligation was not carried out before his death. Here the doctrine of conversion becomes relevant in the determination of the nature of the testator's rights as regards that obligation and *a fortiori*, the rights of those interested in the realty and personalty under the testator's will. Whenever the doctrine applies, it applies for all purposes.

In *Sweetapple v. Bindon* (1705) 2 Vern. 536, 23 E.R. 947, T. bequeathed £300 to be laid out in the purchase of land and settled to the use of her daughter and her children and that if her daughter should die without issue, the property should go over. The daughter died without issue and no purchase of the land had been made with the £300. The husband of the daughter claimed to be tenant by courtesy of the fund of £300; this was a kind of tenancy by which a widower was entitled to his deceased's wife's realty. The claim was upheld, though the purchase of land had not been made; by the doctrine of conversion, the money was regarded as realty.

As will be seen below, the doctrine can only operate where someone is under an obligation to have carried out certain act and there is someone who is in a position to compel the performance of such obligation.

3.2 Types of Circumstances in which the doctrine is operative

1. Where there is a binding and specifically enforceable contract for the sale or purchase of land

In this case, the doctrine of conversion becomes effective at the date and time of the contract expressing the intention. The land, the subject-matter of the contract of sale is considered and treated as personalty and the purchase-money is considered and treated as land. Thus, where there is contract by A to sell land to B at a certain price, B becomes the owner in equity of the land, subject, however, to B's obligation to perform his part of the contract by paying the purchase-money; but subject to that, the land is the land of B, the purchaser. As regards the position of A, the vendor, he truly has the legal estate in the land, but for many purposes, from the moment the contract is entered into he holds it as a trustee for B, the purchaser. Although A has certain rights in the land remaining all those rights as conditioned and limited by the circumstances that they are all referable to his rights to recover and receive the purchase-money. His interest in the land when he has entered into a contract for sale is not an interest in land; but an interest in personal estate, in a sum of money due under the contract. See Vaisey, J., in *Hillington Estates Co. v. Stonefield Estates Co. Ltd.* (1952) Ch. 627 at 631-632.

The extent of the operation of the doctrine had been stated by Lord Eldon in the early case of *Seton v. Slade* (1802) 7 Ves. Jr. 265, 32 E.R. 108 at 273, when he said: 'The effect of a contract for purchase is very different at Law and in Equity. At Law, the estate remains the estate of the vendor; and the money that of the vendee. It is not so here (in equity). The estate from the sealing of the contract is the real property of vendee. It descends to his heirs. It is devisable by his will; and the question, whose it is, is not to be discussed merely between the vendor and vendee; but may be to be discussed between the representatives of the vendee.' Thus, if a vendor dies before completion of the contract, the question would be whether at the time of his death he was under such an agreement that could have been specifically enforced against him. If the answer is in the affirmative, the land which the vendor had agreed to sell will be treated as personalty and would devolve to the person or persons entitled to personalty under the vendor's will. See *Curre v. Bowyer* (1818) 5 Beav. 6; 49 E.R. 478.

Conversely, on the death of the purchaser before completion, the land will devolve on his devisee who is however bound to pay the purchase-money. But where a testator specifically devises land which is subject to an uncompleted contract of sale owing to his death, but refers to the proceeds, the devisee is entitled to such proceeds. This was the position in *Re Carlow* (1928) Ch. 710 at 714, where the contract preceded the will, the court held that the will having been made after the date of the contract for sale and with full knowledge of that contract on the part of the testator, indicated an intention as shown by the testator's reference to proceeds of sale, to pass whatever estate the testator had in the property to the specific devisees. But where the will precedes the contract, the specific devise will be adeemed by the contract, and the proceeds of sale will go to the person who is entitled to personalty under the testator's will. See *Farrar v. Winterton* (1842) 5 Beav. 1, 49 E.R. 476.

It is a condition precedent to the application of the doctrine that there must be, in every case, a contract binding on the vendor and the purchaser, and capable of being specifically enforced as between the vendor and the purchaser. See *Lysaght v. Edwards* (1876) Ch.n. 499; and *National Bank of Nigeria Ltd. v. Compagnie Frassiniet* (1948) 19 N.L.R. 4 at 6. As regards contract affecting real estate, it is a requirement that the vendor must be in a position to make a title according to the contract; unless he has done this or the purchaser has accepted the title however bad the title may be, the contract will not be valid and, therefore, not specifically enforceable. But where the contract is valid and binding, it has the effect of converting the real estate in equity, making the land a part of the real estate of the purchaser. Indeed, all the cases on the doctrine of constructive conversion are founded on the principle that a valid and specifically enforceable contract actually changes the ownership of the estate in equity. See *Lysaght v. Edwards* (supra).

Thus, in *Re Thomas* (1886) 34 Ch.n. 166; where title was not made out at the time the rights and obligations of the parties ought to have been fixed under the contract and as laid down by Jessell, M.R. in *Lysaght v. Edwards* (supra), Kay, J. held that since specific performance was not possible, there could be no conversion. See further, *Buckmaster v. Harrop* (1802) 7 Yes. 341, 32 E.R. 139. Similarly, conversion does not take place where the vendor-purchaser relationship is absent; and such relationship does not exist where the contract of sale is subject to a condition precedent; conversion will only take place if and when the condition has been performed. See *Renelagh v. Melton* (1864) 2 Dr. SM. 278; 62 E.R. 627.

2. Where there is an Option to Purchase

The Rule in *Lawes v. Bennett* (1785) 1 Cox. Eq. Cas. 167; 29 E.R. 1111. The general rule is that if an owner of a real estate contracts to sell it and dies before the contract is executed, the estate is converted into personalty; and that when a party under an agreement is given unilateral power of mak-

ing an election at a future date, as to whether or not the contract should be carried out, and that party has elected in favour of the contract there is conversion which is related back to the time the power was granted; although the contract which gives rise to the option is never in fact specifically enforceable, there is conversion from the moment the power to elect is exercised and, therefore, becomes a binding contract in the life time of either party.

But a different situation arises where an option is granted and the option is not exerciseable until after the grantor's death; in that case there ought to be no conversion since there cannot be a specifically enforceable contract in existence as from the date and time of the grantor's death. This is the position in most, if not in all, of the American jurisdictions. See the following cases: *Rockland-Rockport Lime Co. v. Leary* 203 N.Y. 469 (1911), *Inghram v. Chandler*; 161 N.W. 434 (1917), *Smith v. Loewenstein* 34 N.E. 159 (1893).

But the rule in *Lawes v. Bennett* (supra) is to the contrary. In that case, W, in 1758 leased a farm to D for 7 years. The leasehold agreement contained an option to D to purchase the freehold for £3,000, if D should give notice in writing before the 29th September 1765, of his intention to purchase the freehold, W would sell at the stated price. W, the lessor died in 1763, having devised all his realty to B and all his personalty to B and M equally. D subsequently exercised the option and M now claimed from B, half of the purchase price. The success or otherwise of M's claim depends on the nature and character of the purchase price. If the purchase price were regarded as personalty, M would succeed, otherwise, the entire purchase price would go to B who was entitled to realty under W's will. Whether the purchase price was realty or personalty would have to be determined by the application or non-application of the equitable doctrine of conversion.

It was contended on M's behalf that at the time of W's death, the freehold land, the subject-matter of the option must be considered as personalty since the exercise of the option related back to the date of the original agreement granting the option and that from that date conversion would operate. This contention was upheld by Sir Lloyd Kenyon M.R., thus the rule in *Lawes v. Bennett* was evolved. That where there is a contract giving an option to purchase real estate, and the option is not exercised till after the death of the person who created the option, nevertheless, the purchase price, if and when the option is exercised, goes as part of the grantor's personal estate and not as part of his real estate. That the exercise of an option to purchase given in a lease has a retroactive effect, in that it relates back to the time the option was granted and, therefore, conversion operates, as between the persons interested in the realty and personalty respectively of the lessor, as from the date the option was granted.

Scope of the rule: The rule applies, as between the real and personal representatives of the person who granted the option, even where the terms of the option stipulate that the option is not exerciseable until after the death of the grantor. In *Re Isaacs* (1894) 3 Ch.D. 506, there was a lease which contained an option to purchase in favour of the lessee. The option was exercisable within 6 months of the lessor's death. The lessor died intestate and the lessee exercised the option; Chitty, J., held that the purchase money devolved not on the person entitled to realty but to the person entitled to personalty under the deceased's intestacy.

Whenever the rule applies, conversion takes place at the time the option is exercised and not that of the creation of the option, thus, it is the time the option is exercised that must be looked at for the purpose of ascertaining the rights of the parties. See *Re Adams & Kensington Vestry* (1884) 27 Ch.D. 394 C.A. The right of the grantor and that of grantee in the subject-matter of the option are contingent upon the exercise of the option, therefore, their respective rights and obligations can only become fixed when the option is exercised. In *Re Marlay* (1915) 2 Ch.D. 264 at 275, it was held that

where an agreement confers an option to purchase, the exercise of the option converts the agreement into an agreement for sale and that the land itself is treated as converted from the date of the original agreement, though the title to the intermediate rents and profits not changed.

This is consistent with the earlier decision of Lord Eldon in *Townley v. Bedwell* (1808) 14 Vts. 591; 33 E.R. 648, that where there is an option to a tenant to purchase the reversion, the rents and profits accruing within the interval, between the date of the lessor's death and the time the option is exercised, would go to the person entitled to realty under the lessor's testacy or intestacy and such persons would not be required to account for these. Suppose, for example, in 1968, D made a will devising his 'Agege Estate' to X and bequeathing all his personalty to Y; and in 1970, D granted a lease of 'Agege Estate' to Z for 8 years with an option to purchase the reversion for N5,000 before the expiration of the lease; D died in 1971, and in 1973 Z exercised the option.

Under the rule in *Lawes v. Bennett*, conversion takes place at the date Z exercised the option and the purchase money would be paid to Y who is entitled to personalty under D's will; however, since it is the exercise of the option that converts the agreement that created the option into an enforceable contract of sale, *a fortiori*, conversion of the realty to personalty, the rents from 'Agege Estate' between the date of D's death and the time the option was exercised would be paid to X who is entitled to realty under D's will. See *Collingwood v. Raw* (1857) 26 L.J. Ch, 649. It is the exercise of the option that adeems the devise of 'Agege Estate.'

The giving of notice to exercise an option is in itself sufficient to make conversion operative once and for all and, the mere fact that the exercise of an option is not followed by completion of the purchase would not prevent conversion, (which had notionally taken place, by the exercise of the option) from continuing to subsist. See *Re Blake* (1917) 1 Ch. 18.

3. Where there is a Binding Trust to Sell or Purchase Land

Whenever there is a direction, contained in a will or settlement, that trustees shall sell or purchase land, there is a trust for conversion which becomes operative from the moment the instrument creating the trust becomes effective. In the case of conversion directed by will, conversion takes place from the time of the testator's death. Thus, in *Beauclerk v. Mead* (1741) 2 Atk. 168 at 170; 26 E.R. 505, the Lord Chancellor stated that while it is a correct rule that a direction under a will that money be invested in the purchase of land must be complete before conversion takes place; since a will is ambulatory in the testator's life time, conversion cannot take place until his death. In the case of conversion directed by deed; a deed differs from a will in the material respect that a will speaks from the death of the testator while a deed speaks from the date of its delivery or execution. See Wigram, V.C. in *Griffith v. Ricketts* (1849) 7 Hare 299. 311; 68 E.R. 122.

There can only be a trust for conversion where the direction to convert is imperative and definitive. As Parker, J. observed in *Re Walker* (1908) 2 Ch. 705 at 712, it is possible for the legislature by a simple enactment, to make personalty devolve and pass to a series of persons successively for the same interests as if it had been realty; but the only manner in which an individual can achieve similar objective is by the creation of an imperative trust for its conversion into realty. Where the words in the settlement are sufficient to create an imperative and definitive trust to sell or purchase, there will be conversion; a counsel's submission to this effect was upheld by Pollock, M.R in *Re Twopeny's Settlement* (1924) 1 Ch. 522 at 529. The counsel had relied on a doctrine established by authorities that -

'where the quality of real estate is imperatively and definitively fixed upon personalty or vice versa, equity will treat the personalty or realty as the case may be as having acquired

the quality indicated even though it is not found to have been actually turned into realty or personalty; this being that equity treat is what ought to have been done as done and will not allow the rights of the beneficiaries to be altered by a failure on the part of trustees to carry out their trusts.'

A mere declaration that personalty shall devolve or pass to persons successively as realty is in itself inoperative since the whole doctrine of conversion turns on the maxim that equity considers to have been done what ought to have been done pursuant to the trust. See *Re Walker* (supra). Considering the principle upon which the doctrine of conversion is founded, it is obvious that there must be a paramount obligation contained in the trust instrument, and binding the trustees to invest in the purchase of land; but if such investment is optional only so that the trustees may completely perform their duty by investing in some form of personal security, there would be no conversion and the rights of the parties would depend on the actual nature or state of the property at the material time. See Warrington, L.J. in *Re Twopeny's Settlement* (1924) 1 Ch. 522 at 533. Thus, nothing short of an absolute and effective trust for sale or purchase can in equity create a conversion of realty into personalty or vice versa. See Stirling, J. in *Goodier v. Edmunds* (1893) 3 Ch. 455, 462.

In the earlier case of *Curling v. May* (1734) 3 Atk. 255n, T by his will gave £500 to his trustees with a direction that the money be laid out for the purchase of land *or* put the same out on good securities for the separate use of his daughter D. D survived T but the money was not invested in any purchase until after D's death. The question was, as between D's administrator and her heir, who was entitled to the purchase. If the trust under which D was a beneficiary was imperative, then there would be conversion as from the moment of T's death, and the purchase would devolve on the person entitled to realty under T's intestacy otherwise it would devolve as personalty. It was argued that when it is doubtful whether a bequest ought to be considered as money or land the court of chancery will not interfere because of the element of doubt involved. This submission was upheld by Lord Talbot who stated that there could be no conversion on the ground that the direction in the trust instrument was discretionary; there was no sufficient indication in the will as to what was the testator's principal intention since the direction was one of investing in land or securities.

Where settlor or testator directs trustees to sell or purchase land and such direction is to take place with the consent or at the request of some named persons, such qualification is not sufficient to prevent the direction from being imperative. See *Re Ffennell's Settlement* (1918) 1 Ch.91. In *Attorney-General v. Dodd* (1894) 2 Q.B. 150 at 154, where the direction to sell was subject to the qualification that the sale should take place at the request of certain specified persons, Matthew, J., rejected the contention that the qualification necessarily prevented the direction from being imperative; such clauses; he stated, are only intended to give directions as to the time and circumstances under which the sale is to take place and do not necessarily indicate that the sale must not take place ultimately.

Sometimes, however, it may be a question of construction whether the qualification is such that it imports an element of discretion enabling the specified person to prevent conversion, in which case there will be no conversion. For example, where the direction to sell is to be 'with the consent of A and not without' there is no conversion for, here the discretion is not imperative. But as Morton, L.J. put it in *Duke of Marlborough v. Attorney-General* (1945) Ch. 145 at 154, it is well settled that if real property is vested in trustees upon trust for sale with the consent of a named person, the consent is treated as intended to regulate the exercise of the trust for sale but not to prevent the trust for sale from being an immediate trust for sale, whether subject to consent or not,

the trust operates at once to effect a conversion. This is consistent with the earlier opinion of Grant, M.R in *Thornton v. Hawley* (1804) 10 Ves. 129 at 137; 32 E.R 793, where he said that 'nothing is more common than to direct money to be laid out upon request. The object of that is only to ensure that the act shall be done when the request is made-not prevent it until request.'

4. Under a Statutory Trust for Sale - Applicable only in the Former West and Mid-West States Under the Property & Conveyancing Law, 1959 and the Administration of Estates Law, 1959

The following provisions statutorily create trusts for sale *a fortiori*, the consequences are automatic conversion. Section 61(2) of the law provides that where, after the commencement of the law, land is expressed to be conveyed to any persons in undivided shares and those persons are of full age, the conveyance shall (notwithstanding anything to the contrary in the law) operate as if the land had been expressed to be conveyed to the grantees ... as joint tenants upon the statutory trusts hereinafter mentioned and so as to give effect to the rights of the persons who would have been entitled to the shares had conveyance operated to create those shares.

Section 61(3) provides that a devise, bequest or testamentary appointment, coming into operation after the commencement of the law, of land to two or more persons in undivided shares shall operate as a devise, bequest or appointment of the land to the personal representatives of the testator, and (but without prejudice to the rights and powers of the personal representatives for the purposes of administration) upon the statutory trusts hereinafter mentioned.

Section 64(1) provides that any disposition purporting to make a settlement of an undivided share in land shall only operate as a settlement of a corresponding share of the net proceeds of sale and of the rents and profits until sale of the entirety of the land. Section 62, which defines 'statutory trusts' provides that, for the purposes of the law, land held upon the 'statutory trusts', shall be held upon trusts for sale. Section 63(1) provides that where a legal estate is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity.

Section 37(1) of the Administration of Estates Law, 1959 also provides that on the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives:

- (a) as to the real estate upon trust to sell the same; and
- (b) as to the personal estate upon trust to call in, sell, and convert into money such part thereof as may not consist of money.

The general effect of the foregoing provisions which create automatic trust for sale and conversion in circumstances falling within any of the provisions is best illustrated by English decisions on similar provisions in the English Law of Property Act, 1925. Generally, where there is statutory imposition of a trust for sale, the effect is, as far as beneficiaries are concerned, to convert land into money.

Thus, in *Re Kempthorne* (1930) 1 Ch. 268 at 290, it was held that the statutory imposition of a trust for sale operated to convert an undivided share of real estate into a corresponding share of the proceeds of sale of the entirety; and that as from the passing of the Law of Property Act, 1925, the interest of the owner of an undivided share in real estate became personal estate and passed as such. In that case, a testator was, in his life time, entitled to an undivided share in freehold property. By his will made before 1925, he gave all his freehold property to A and all his personal estate to B. The testator died in 1928, and the question was, as between A and B, who was entitled to the undivided share under the testator's will. It was held that as from the 1st January

1926, the Act of 1925 operated to convert the undivided share into personalty which accordingly passed to B. The decision would not have been different if the will had been made after the commencement of the Act. (See further *Re Price* (1928) Ch. 579).

The full effect of the Act where it operates seems to be that a devise of undivided share in realty will be adeemed since the devise would be of land which the imposition of trust for sale notionally converts into personalty and as such there will be nothing upon which the devise will operate. Thus, in *Re Newman* (1930) 2 Ch. 409 at 413, a devise of an undivided share in land was held adeemed by the imposition of statutory trust for sale and conversion because there was nothing left for the devise to operate on; the undivided freehold moiety having been impressed with statutory trust for sale, had become a moiety of the proceeds of sale.

However, the court would give effect to the substance of the devise of an undivided share in land and preclude ademption where the testator sufficiently indicated a contrary intention. For example, ademption would be precluded where the testator had used such words as to demonstrate his intention to benefit the devisee in whatever form his interest in the property might take. The use, by a testator, of the words 'all my share of interest' in devising his interest in an undivided land, has been held sufficient to preclude ademption. See *Re Mellish* (1929) 2 K.B. 82. Similarly, a contrary intention, precluding ademption, would be shown if the testator either confirmed (*Re Warren* (1932) 1 Ch. 42) or merely republished (*Re Harvey* (1947) Ch. 285) his will by codicil.

In *Re Harvey* (supra) at 293-295, a testator, by his will made in 1912, devised his undivided shares to his trustees for his daughter for life. The Law of Property Act, 1925 converted the shares into personal property. In 1927, the testator made a codicil which merely recorded the destruction of the earlier codicils but without any confirmation or reference to the contents of any preceding testamentary document. It was argued, among other things, that the quality and whole nature of the property had fundamentally changed by the imposition of the statutory trust for sale so that that which the testator purported to dispose of, had previously to the death of the testator been taken away from him and that there was nothing left upon which the disposition would operate. But Vaisey J. held that since the fifth codicil, that is, that of 1927, referred expressly to the will, the codicil had sufficiently republished the testator's will constructively so as to preclude ademption of the gift in question and that absence of express confirmation of the will was immaterial.

It would appear that the court has taken this flexible approach so as to ensure that statutory imposition of trust for sale which is designed principally to make conveyancing easy, does not defeat testators' intentions or, destroy or alter substantive rights in the process. See *Re Warren* (supra). It should, however, be noted that the foregoing cases were decided in the context of the English Law of Property Act, 1925, but the relevant provisions of the Act, Section 34-36, have been substantially re-enacted by the Property and Conveyancing Law (Western Nigeria), 1959, Sections 61-63 respectively.

5. Where Land is Partnership Property

Where land is partnership property, such land has always been treated in equity as personalty. As Bowen, L.J. explained in *Attorney-General v. Hubbuck* (1884) 13 Q.B.D. 275 at 289, the doctrine of conversion necessarily affects partnerships- 'partnership property is that which is held by the partners as such for the purposes of the partnership; it is held for the purpose of carrying on the adventure of the partnership, and may be wanted for that purpose, and moreover, at the time of winding up of the partnership the debts of the partnership will have to be paid, the question of their amount settled between the partners and then the unexhausted assets divided between them'.

To achieve the various purposes of a partnership and upon dissolution to ensure equitable division of partnership property among the partners, partnership property must be treated in the end as subject to a trust for sale and conversion. This is the basis of the rule which has now been made statutory: Section 22 of the Partnership Act 1890, a statute of general application and section 23 of the Partnership Law Cap. 86, Laws of the Western Region of Nigeria, 1959, provides that where land or any interest therein has become partnership property, in the absence of any contrary expression or a contrary intention, it is to be treated as personalty, not only as between the partners (including the representatives of a deceased partner) but also as between the beneficiaries who are entitled in the real and personal estate of a deceased partner.

6. Where Court Directs a Sale

Where a court of competent jurisdiction directs a sale of realty, conversion becomes operative from the date of the order. In *Fauntleroy v. Beebe* (1911) 2 Ch. 257 at 263, an absolute order for sale made by a court of competent jurisdiction in an administration action was held to operate as a conversion from the date of the order and, the interest of the joint-owners were no longer in the land but in the proceeds to be derived from the sale. Where conversion is rightfully directed, it is for all purposes and all the consequences of conversion must follow, thus there is no equity in favour of any beneficiary, either under a will, settlement or intestacy to take the property, the subject-matter of conversion, in any other form than in its converted form.

The mere fact that the order was made for a purpose which does not exhaust the proceeds of sale does not prevent conversion. In *Burgees v. Booth* (1908) 2 Ch. 648 at 651, the question was whether the surplus of proceeds of sale of an infant's real estate which had been directed by an order of the court to be sold for payment of costs, descended on the infant's heir-at-law or went as personalty to his next-of-kin. Cozens-Hardy, M.R. held that 'there are no trusts for reconversion into real estate, and there is no equity between heir-at-law and next-of-kin, and there is no ground for holding that this is anything else than what it professes to be and is in fact, namely cash.'

The court may, however, order that there should be no conversion, which may mean that the property would retain its original nature and character either for all purposes or for purposes of devolution only. Such order is, perhaps, usually made where the property ordered to be sold or to be purchased is owned by someone suffering under certain incapacity. In *Attorney-General v. Marquis of Ailesbury* (1887) 12 App. Cas. 672 at 687-688, Lord Fitzgerald said that 'it seems that for a great length of time a theory has existed in equity, which has been carried into effect in practice, that an investment of the money of a lunatic in the purchase of land under such conditions as are now before us does not change its character or its destination... it remains 'money' for all intents and purposes'.

As Lord Macnaghten pointed out in this case, in the ordinary course of managing a lunatic's estate, the court pays no regard to the interests or expectations of those who may succeed him, but that it is equally well settled that in matters outside the ordinary course of management, such as an order for sale and conversion of a lunatic's property, the court has a duty so far as may be possible not to alter the character of the lunatic's property or to interfere with any rights of succession. See also *Re Searle* (1912) 2 Ch. 365.

Whenever it becomes necessary for the court to order the nature and consequent devolution of the estate of a lunatic, the paramount consideration, the controlling factor, is always what in the circumstance, is in the best interest of the lunatic. See *Re Silva* (1929) 2 Ch. 198. The court may also direct that there should be no conversion where conversion has been effected by parties who have no lawful authority to effect such conversion; it is immaterial that the result of conversion may have been beneficial. See *Taylor v. Taylor* (1853) 10 Hare 475; 68 E.R. 1014.

SELF ASSESSMENT EXERCISE 1

List the circumstances in which the doctrine is of conversion operates

3.3 Failure of Conversion

Failure of conversion may be either total or partial.

Total failure

Whether a conversion is directed by a Deed or by a Will, if the objects for which the conversion has been directed totally fail before the will or the deed becomes operative there is no conversion. A number of reasons may be responsible for total failure of conversion; for example where all the beneficiaries under a trust for sale die before the trust instrument comes into operation for example, death of legatees or devisees in the life time of the testator in the case of conversion directed by will, or death of all the beneficiaries before a deed, directing conversion in their favour, becomes inoperative. Similarly there will be total failure of conversion where the beneficiaries failed to obtain vested interest because the instrument directing conversion offends the rule against perpetuity or that the disposition is otherwise illegal. See *Goodier v. Edmunds* (1893) 3 Ch.D. 455; and *Re Appleby* (1903) 1 Ch. 565.

Effect

Whatever reason that brings about a total failure of objects for which conversion was directed and whether the direction was by Will or by Deed, the effect is the same and that is there is no conversion, the reason being that the equitable doctrine of conversion can only operate where there is a human being who is able to insist that the nature and character of the subject matter for conversion shall be altered. See *Smith v. Claxton* (1820) 4 Madd. 484; 56 E.R 784. As Cozens-Hardy, M.R. stated in *Re Lord Grimthorpe* (1908) 2 Ch. 675 at 679, 'when once you get to this fact, that there was no human being who, from the first moment when the trust came into operation ... could have enforced the trust for sale' there is no conversion.

In that case, the direction was to sell at a future date, but the purposes having totally failed before that date, there was no conversion. In the case of total failure of conversion directed by deed, the property results back to the settlor if he is alive; if not it would pass under his will or intestacy as the case may be. See *Re Lord Grimthorpe* (supra). But where the direction is by will, the property would pass into the testator's residue: and would devolve on the residuary devisee or legatee depending on the nature of the property. For example a testator devised 'Agege Estate' upon trust to sell and the proceeds of sale to be divided between A and B. A and B died in the lifetime of T and T did not change his will. On the death of T the gift of 'Agege Estate' would lapse. Suppose P is the testator's residuary legatee and R is the testator's residuary devisee; 'Agege Estate' being realty, would devolve on R because the objects for which conversion was directed having totally failed, there is no conversion.

However, where there is no residuary bequest or devise under the testator's will, the property would devolve on intestacy. See *Smith v. Claxton* (1820) (supra) at 494; and *Re Walpole* (1933) Ch. 431, 437. Thus, in *Re Hopkinson* (1922) 1 Ch.D. 65, 69, the ultimate gift of property, the subject-matter of conversion, having totally failed, Sargant J., held that an intestacy resulted as to the property.

Partial Failure

There is partial failure of conversion where, for example, if A devises 'Ikeja Estate', upon trust to

sell and the proceeds to be divided between X and Y, and X pre-deceased A; there is a lapse of the gift to X while that of Y is good. However it is necessary to distinguish between conversion directed by deed and that directed by will since the consequences of partial failure of objects of conversion differ from one to the other. The basis for this distinction as explained by Wigram V.C. in *Griffith v. Ricketts* (1849) 7 Hare 299, 311, is that a will speaks from the death of the testator while a deed takes effect from the date of its execution.

Furthermore, a deed converts the property in the lifetime of the author or settlor, whereas, in the case of a will, the conversion does not take place until the death of the testator. More importantly however, is the marked distinction between the effect of partial failure of conversion directed by a deed and will respectively; the basis of this distinction is that where a conversion is directed by deed, the effect is an out and out conversion, a conversion for all purposes, whereas a conversion directed by will is a conversion for the purposes of the will only. See *Ackroyd v. Smithson* (1780) 1 Bro. C.C. 503; 28 E.R 1262. The validity of this statement is to be seen in the discussion following.

Deeds: Effect of Partial Failure

Where there is a partial failure of the purposes of a conversion directed by deed, the property not required for the objects stated in the deed reverts to the settlor; if he is dead, it reverts to those claiming under him—in both cases, the property reverts in its converted form. Thus, where the direction is to turn land into money, the lapsed part of the land reverts to the settlor or those claiming under him as personalty. Similarly, money directed to be laid out in land reverts, on a partial failure of the direction, to the settlor or those claiming under him, as land.

For example, if A conveyed 'Home Estate' to trustee upon trust to sell and divide the purchase-price between his two friends C and D; but D died before the conveyance was executed, here the purposes for which conversion was directed fail in part, the lapsed share of D in 'Home Estate' reverts to A, the settlor as personalty. Suppose the trust had been settled upon A for life and on his death upon trust to sell and divide the purchase price between C and D contingently on surviving A. A by his will gives his residuary personalty to P and his residuary realty to R. D pre-deceased A but C survived him, hence, there is partial failure of objects of conversion, in which case conversion is operative, but the lapsed share of D is treated as personalty and goes to P, who is entitled to residuary personalty under A's will.

Will: Effect of Partial Failure

(a) Land into Money: Where land is the subject matter of a conversion directed by will, and there is a partial failure of the purposes for which conversion has been directed, the trust for conversion has been directed, the trust for conversion becomes operative, and though, so far as the purposes have failed, land directed to be sold and converted into money would go to the person entitled to realty under his intestacy, but that person would take it as personalty.

This would seem to be the decision reached in the celebrated case of *Ackroyd v. Smithson* (supra) at 506, where it was stated that 'it is admitted, and cannot be denied that where a testator directs real estate to be sold for special purposes, if any of those purposes became incapable of taking effect, the heir-at-law shall take; because there is an end of the disposition, when there is an end of the purposes for which it was made.' In *Re Richerson* (1892) 1 Ch.D. 379 at 381, Chitty J. held that where real estate is devised upon trust for conversion into per-

sonalty and the objects for conversion partially fail, the lapsed share of the proceeds of land sold or of the land (if any) unsold results to the heir (or the person entitled to realty under the testator's residuary gift if none or intestacy) but he takes it as personalty.

Thus, where there is a partial undisposed interest of real estate directed to be sold, that interest results to the residuary devisee (or person entitled to realty) of the testator and it becomes personal estate in his hands. But where the testator's residuary devisee, (or the person entitled to realty if there is no residuary devisee) survived the testator, but died before he received the ineffectually disposed of share in the purchase price, though the share had devolved on him as land, he would receive it as personalty and it would be treated as part of his personalty for purposes of devolution.

It is immaterial whether or not the trustees of the will for conversion had sold the realty in his life time. Thus, in *Re Walpole* (1933) Ch. 431, Farwell J. stated that if there is a partial intestacy and the trust for conversion is a valid trust, this undoubtedly affects the position of the heir (the person entitled to realty) to the extent that although it does not defeat his right as the heir-at-law to whatever is real estate undisposed of, for the purpose of the devolution of his estate, it is treated as personalty and passes as such, the reason being that, under the rule in *Ackroyd v. Smithson* (supra), the lapsed share of the object that fails (that is, land directed to be converted into money) passes to the testator's residuary devisee (if none, the person entitled to realty) who, of course, must have survived the testator; however, since the failure of objects is partial only, and therefore, to satisfy the part that has not failed, the trustees are under an enforceable duty to sell; in this regard, the conversion is effective and although the lapsed share, devolves as land on the residuary devisee who takes it in its converted form. If he dies before receipt of the proceeds of sale, the proceeds of sale would go to his residuary legatee since his residuary devisee has no equity to reconversion. See *Re Walpole* (supra) at 437.

The position is the same where the purpose of a trust for sale of land and conversion cannot exhaust the proceeds of sale. In *Dixon v. Dawson* (1825) 2 Sim & S. 327; 57 E.R. 371, by her will, the testatrix directed her trustees to sell land to satisfy certain specified charges; the property having been sold and the charges met, there was a surplus. It was held that the surplus belonged to the heir-at-law but that since the property was sold in the lifetime of the heir-at-law, he would take it in its converted form and it would devolve as such on his personal representative.

(b) Money into Land: Where money is laid out for the purchase of land and there is a partial failure, the same rule and reasoning apply as in *Ackroyd v. Smithson* (supra). Thus in *Cogan v. Stephens* (1835) 5 L.J. Ch. 17 at 20, Lord Langdale MR. stated that if a testator devises land for purposes which are in part illegal, or which partially fail or which require part only of the land devised, the person entitled to realty in that circumstance takes the part which fails; or which is not required for the purposes of the will; and that conversely in the case of money laid out for the purchase of land, the Person entitled to personalty in the circumstances would take.

Where, for example, before 1959 in the Western and Mid-Western States, and Presently in some other states in the Federation where the Pre-1900 English law applies, T, by his will, gave N500 to trustees to purchase land for the benefit of X and Y in equal share, and Y died before the testator, there is partial failure of the purposes for which conversion was directed; consequently there is a lapse of X's share which would pass to T's next-of-kin (the person entitled to T's personalty on intestacy) and not to the heir at law. But if testator had made residuary gifts, the lapsed share passed to the residuary legatee; though the lapsed share results in its unconverted form, the residuary legatee or the next-of-kin takes it as real estate.

In *Curteis v. Wormald* (1878) 10 Ch.D. 172, Jessel M.R. stated that if Personal estate is bequeathed upon trusts for conversion into land to be held on trusts the purpose of which partially fail, the lapsed part of land purchased before or after the failure goes to the next-of-kin as real estate. If, then the question of subsequent devolution arises, the same Principle and reasoning apply as in *Re Richerson* (supra) at 381. In that case, Chitty J. observed that whatever the trusts of the will are, whether it is an absolute conversion or not, 'all you have to do to ascertain the rights of the real and personal representatives of the heir is merely to look to the actual state in which the Property is, and there is an end to the question. Although the lapsed share of the trust of money for the purchase of land devolves, in unconverted form, on the person (next-of-kin) entitled to personalty under the testator's will, he takes it as land, which is the actual state the Property is, and it would devolve as such that is, in its converted form, under the will or intestacy of the next-of-kin.

3.4 Reconversion

Whenever the equitable doctrine of conversion operates, though the subject-matter for conversion has not in fact been converted, in the eye of equity there is notional conversion of that subject-matter, because equity looks on that as done which ought to be done. Again in certain circumstances, the notional or fictitious and artificial character, which equity has imposed on the subject-matter, is annulled yielding place to the actual state of the property; the state in which it was, before being impressed by the equitable stamp of conversion. At this state there is reconversion.

3.4.1 Definition of reconversion

Reconversion has been defined as that imaginary process by which a prior notional conversion is reversed or discharged, and the notionally converted property restored in contemplation of equity to its original actual quality. (See Snell's *Principles of Equity* (27th Ed.) 1960 p.480). There are two ways by which reconversion may be effected. These are: by act of the Parties or by operation of law. The former depends on the manifestation of intention by the party or parties entitled to reconvert; while the latter reconversion is automatic.

3.4.2 Reconversion by act of parties

It frequently happens that the beneficial ownership of subject-matter for conversion is vested in one person who is *sui juris*, not being under any disability and absolutely entitled in that case, he is entitled to take the property in its actual state. Thus, if money is laid out for the purchase of land, the party who would have the sole and absolute interest in the land when bought, may elect to have the money paid to him and that the money, the subject-matter for conversion, shall not be used for the purchase of land; in that case, a court of equity will not order a contrary decree which might be annulled or rendered vain by the act of the absolute owner. See *Benson v. Benson* (1710) 1 P. Wms. 130 at 131; 24 E.R. 324. For if the purchase were to be enforced, he might at the same moment sell the land and convert it into money, thereby stultifying the court order, and 'equity like nature does nothing in vain.' See *Seeley v. Jago* (1717) 1.p. Wms. 389; 24 E.R. 438; and *Saunders v. Vautier* (1841) 10 L.J. Ch. 354.

In *Harcourt.v. Seymour* (1851) 2 Sim (NS) 12 at 46; 61 E.R.244, Lord Cranworth V.C. observed that where by a settlement land has been directed to be converted into money, or money to be converted into land, a character is thereby imposed upon it until somebody entitled to take it in either form chooses to elect that, instead of its being converted into money, or instead of its being converted into land, it shall remain in the form in which it is actually found. The only question in each particular case is whether the person entitled to reconvert has manifested acts sufficient to enable the court to say that he has so elected.

Where more than one person are interested in the subject-matter of conversion, the same principle applies as in the case of an absolute beneficial owner. For example where land is held on trust for sale for the benefit of A and B in undivided shares and they are both of full age and absolutely entitled, provided they agree they can effect a reconversion. See *Re Daveron* (1893) 3 Ch. 421, 425. However, the case is different where one of the several beneficiaries is not willing to reconvert. In *Holloway v. Radcliffe* (1857) 23 Beav. 163 at 172; 53 E.R. 64, Lord Romilly M.R states that where the undivided shares relate to money to be laid out in land, a co-beneficial owner who wishes to elect to reconvert his share may do so without the concurrence of the other co-owners; the reason being that such course of action will not in any way be detrimental to the interest of the other co-owners who are not willing to reconvert.

Where, however, the undivided shares relate to land directed to be laid out into personalty, if there is to be any reconversion, at all, it must be total, which means all the beneficiaries must concur; a co-owner cannot effect a partial reconversion. As Lord Romilly observed, it would be repugnant to the principles on which the doctrine of conversion and reconversion rest to hold that one of the legatees of an undivided share in the proceeds of real estate directed to be converted into personalty could without the assent of the others, elect to take his share as unconverted and in the shape of real estate.

A more potent reason against partial reconversion in this case seems to be that it is more profitable to all the beneficiaries to have the land sold in its entirety than to have one part sold and the other part retained which would be the effect if one co-owner is permitted to reconvert his undivided share. However, the validity of this observation may depend on the size of the land laid out for conversion. If it is of such a size that the part sought to be reconverted would not *pro tanto*, make the remaining part less marketable than the entirety, on principle a co-owner, wishing to reconvert, ought to be allowed to do so.

Remainder man

The question has arisen as to whether a remainder man can reconvert. In *Meek v. Devenish* (1877) 6 Ch.n. 566, Malins V.C. held that a person contingently entitled absolutely to the proceeds of real estate directed to be sold, may, pending the contingency, elect to take the estate as realty and such election will become operative upon the contingency happening before his death. Prima facie a remainder man may reconvert, but his election to reconvert is only operative when his interest falls into possession and if before then, the property is in fact unconverted. See *Re Duke of Cleveland's Estates* (1893) 3 Ch.n. 244 at 248.

A person who is absolutely entitled under a settlement of land upon trust for sale may by his will elect to take the property in its unconverted state, which election would operate as a reconversion of the personalty into realty; he cannot however do so if he is a remainder man whose interest is still contingent at his death. See *Re Sturt* (122) 1 Ch. 416. Furthermore, the interests of prior owners are not bound or affected in any manner whatsoever, by any election made by a remainder man.

Infants and Persons of Unsound Mind

Ordinarily, it would appear that an infant cannot elect to reconvert. *Robinson v. Robinson* (1854) 19 Beav. 494; 52 E.R. 442. In certain circumstances, the court may elect for him (See *Burgess v. Booth* (1908) 2 Ch. 648) or sanction his election where he has already elected. The court will only exercise this power after an enquiry has been directed as to what is most beneficial to the infant in the circumstance. In the case of persons of unsound minds, the same principle applies as in the case of infants. See *Re Douglas and Powell's Contract* (1902) 2 Ch. 296.

Evidence of Election to Reconvert

Election presupposes a clear intention to take the property 'in specie' free from a trust or direction to convert. In order to establish an election, there must be sufficient evidence of the election; such evidence may be by express declarations or inferred from acts or conduct of the party or parties entitled to elect. See *Re Douglas and Powell's Contract* (supra) at 312. Where a party's right to elect is subject to the right of another person to prevent reconversion, it is not enough for the party entitled to elect to show evidence of his intention to elect; in addition, it must also be shown that the person who can prevent reconversion has assented to an election.

In *Re Douglas and Powells Contract* (supra), Byrne J., could not find that there ever was a valid and effectual election to take in 'specie' because one of the persons interested in the matter had not been competent to give assent to an election. In the case of a direction to convert land into money, it is easier to infer intention to reconvert; circumstantial evidence such as the retention of the land for a reasonable length of time and expending money on its improvement may be sufficient. (*Mutlow v. Bigg* (1875) 1 Ch.D.385).

Thus in *Re Gordon* (1877) 6 Ch.D. 531 at 534, evidence of election to take land as real estate was inferred where the person entitled to elect received the rents of the land for a long time though he did not exercise any other act of ownership. It was the view of Jessel M.R. that the fact that the person had received rents from the land and also the fact that after his death his agent continued to receive rents from the land were sufficient evidence of election to retain the land in 'specie'.

However, where the direction is to layout money for the purchase of land a stronger and more direct evidence of an intention to reconvert is required. Thus a receipt of the income from the money for a long period of time may not be enough; there must be, in addition, a more positive manifestation of intention to reconvert. See *Re Pedder's Settlement* (1854) 5 De G.M. & G. 890; 24 L.J. Ch. 313; 43 E.R. 1116.

SELF ASSESSMENT EXERCISE 2

When does reconversion arise?

3.4.3 Reconversion by Operation of Law

In certain circumstances property which has been notionally converted in equity becomes reconverted without any declaration or act of the party entitled to reconvert. This usually occurs either where the duty to convert and the right to call for the subject-matter in 'specie' are vested in the same person; or where both the legal interest and the equitable interest are vested in the same person; in both cases the obligation to convert is extinguished, and the property is said to be 'at home'.

Thus where money directed to be laid out for the purchase of land actually comes into the hands of the person who would be entitled to dispose of the land if purchased, the money is his absolute property and will pass under a general bequest of his personal estate. As Thurlow L.C. observed in *Pulteney v. Earl of Darlington* (1783) 1 Bro. C.C. 223 at 238; 28 E.R. 1095, If AB has in his possession £20,000 to be laid out in land for his use, he has nobody to sue; the right and the thing centering in one person, the action is extinguished... Where a sum of money is in the hands of one without any other use but for himself, it will be money and the heir cannot claim'. See also *Wheldale v. partridge* (1803) 8 Ves. Jun 228 at 235; 32 E.R. 341.

In *Chichester v. Bickerstaff* (1693) 2 Vern 296; 23 E.R. 791, H covenanted under a marriage settlement to advance 1500 pounds within a specified period, to be laid out in land to be held on trusts for H

for life and for his wife for life, remainder to H's heirs. The wife died without issue. By his will H bequeathed his residuary personal estate to Y. The 1500 pounds was never invested in land. On the death of H., his heir-at-law claimed the £1500 contending that the marriage settlement had, in equity, converted the money into land. In the opinion of Lord Chancellor Somers, 'This money, though once bound by the articles, yet when the wife died Without issue, became free again, and was under the power and disposal of the testator, as the land would likewise have been, in case a purchase had been made pursuant to the articles.'

In *Re Cook* (1948) Ch. 212, a freehold land was conveyed to H and W as joint tenants. H pre-deceased W. By her will, W gave all her personal estate to A and B. W died possessed of the freehold land. The question was whether there had been a reconversion of the land so as to make it real estate at the death of W since the land was subject to a statutory trust for sale and had devolved on W absolutely at the death of H or whether it passed under W's will as personal estate. Harman J. held that after the death of H, .the entire interest in the land both legal and equitable devolved on W and that no trust for sale could subsist thereafter; W's beneficial interest became automatically reconverted, by operation of law, from money into land which accordingly was vested in W at her death as real estate. Therefore, the bequest of personal estate under W's will could not and did not give any interest in the land to A and B.

4.0 CONCLUSION

Whenever the equitable doctrine of conversion operates, though the subject-matter for conversion has not in fact been converted, in the eye of equity there is notional conversion of that subject-matter, because equity looks on that as done which ought to be done. Practically, the doctrine is of little significance in Nigeria, hardly can one find a single reported case in which the doctrine has been applied. Even, in England where the doctrine originated, the importance of the doctrine has declined since the property legislation of 1925.

5.0SUMMARY

In this unit, we have considered the doctrine of conversion and reconversion. You should now be able to: explain the importance of the doctrine of conversion and reconversion; list the types of circumstances in which the doctrine is operative; and discuss failure of Conversion.

6.0 TUTOR-MARKED ASSIGNMENT

How important is the doctrine of conversion?

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

Jegede M. I. (2007rep.) *Principles of Equity*; Ibadan: Unique Design/Prints

UNIT 5 ELECTION

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1.0 INTRODUCTION

In the last unit, we considered the doctrine of conversion and reconversion. In this unit, we will consider the doctrine of election. The doctrine of election is yet another curious and artificial doctrine developed and nurtured by the learned and unpredictable minds of the English Chancery judges. As to the basis for its development, it was stated in the leading case of *Noys v. Mordaunt* (1706) Vern 581 at 583; 23 E.R. 978, that the general principle governing election was evolved to prevent a person claiming under a will from contravening it.

Of the doctrine of election Lord Eldon observes in *Ker v. Wanchope* (1819) 1 Bli. 1; 4 E.R. 1 at 22, that no person can accept and reject the same instrument. 'If a testator gives his estate to A and gives A's estate to B, Courts of Equity hold it to be against conscience that A should take the estate bequeathed to him, and at the same time refuse to effectuate the implied condition contained in the will of the testator. The court will not permit him to take that which cannot be his but by virtue of the disposition of the will; and at the same time to keep what by the same will is given or intended to be given to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift.'

The doctrine was originally confined to gifts arising under a will, but it was later extended to gifts under deed. This could be seen in the dictum of Sir Richard Arden M.R., in *Freke v. Barrington* (1791) 3 Bro. C.C. 274 at 285; 29 E.R. 533; while commenting on the doctrine, he observed that he did not mean, in that case, to 'intrench on the rule that no man can take an interest under a deed or will, without confirming the deed or will'. See further *Anderson v. Abbot* (1857) 23 Beav. 457; 53 E.R. 180.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Explain the doctrine of election;
- (ii) Enumerate the judicial basis of the doctrine; and
- (iii) List the essentials of the doctrine.

3.0 MAIN CONTENT

3.1 The Guiding Principle

The guiding principle is that if a donor, either by mistake or by design, gives property which is not his to give, and gives at the same time to the real owner of it other property, such real owner cannot claim the property given to him by the donor and at the same time retain his own property of which the donor sought to dispose. See James V.C. in *Wollaston v. King* (1869) 20 L.T. 1003, 1005. This was further elaborated upon by Lord Cairns in *Codrington v. Codrington* (1875) L.R. 7 H.L. 854 at 861, when he said that 'It is a well settled doctrine of the courts that where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them.'

Thus in *Taylor v. Williams* (1935) 12 N.L.R. 67 at 68, one of the very few cases on the doctrine to come before the Nigerian Court, Graham Paul J., said, 'The law as to election under a will is clear enough in its main principles. Where a testator under his will disposes or professes to dispose of property not his to dispose of, the disposition is of course of itself void and of no effect. But if the person to whom the property wrongly disposed of in fact belongs and who has the power to dispose of it, is a beneficiary under the will he is put to his election, that is to say he must refuse the benefit he gets under the will or allow his property to go under the testators devise of it, or compensate the devisee thereof for the failure of the devise'.

The doctrine is based on the principle which the courts apply in the exercise of an equitable jurisdiction enabling them to secure a just distribution in substantial accordance with the general scheme of the instrument. See Lord Haldane in *Brown v. Gregson* (1920) A.C. 860, 868. The doctrine, which can be explained on the basis of the maxim that 'he who seeks equity must do equity', in practice means that equity will not allow a person to approbate and reprobate and, that if he approbates he shall do all in his power to confirm the instrument which he approbates. See Chitty J. in *Re Lord Chesham* (1886) 31 Ch. D. 466. The essence of it all is that equity will not allow a person to take a benefit under an instrument and at the same time assert a right which is inconsistent with the provision of the instrument.

3.2 Operation of the Doctrine

The doctrine applies where for example, A by his will gives to B "Agege Estate" which in fact belongs to C, and by another provision in the will, A gives his own property 'Ikeja Estate' to C. In this case, the gift of 'Ikeja Estate' to C has conferred a benefit on him, but at the same time an obligation is imposed on him which is that he should allow his own 'Agege Estate' to pass to B as directed by the Provisions of the will.

Both at law and in equity, a person has no right to dispose of another person's property; thus, prima facie, in the illustration given above, C can keep his 'Agege Estate' and at the same time claim 'Ikeja Estate' under A's will; the result will be that B takes nothing. But the court of equity says it is inequitable for C to take a benefit under an instrument and at the same time refuse to discharge the obligation imposed by the instrument, if he accepts the benefit he cannot reject the burden; he who wants equity must be prepared to do equity. C cannot be compelled to transfer his 'Agege Estate' to B as directed by A's will since A has no power to dispose of C's property, nevertheless C would be called upon to elect, in which case C has one of two alternatives:

- (i) To elect in favour of the instrument;
- (ii) To elect against the instrument.

If he elects in favour of the instrument, he takes the benefit conferred on him by the instrument, but he must relinquish his own estate which was wrongfully disposed of by the instrument, and make it available to the person to whom it was given by the instrument in conformity to the intention of the donor. It is clear that the instrument per se cannot pass a good title in the elector's own property to the person to whom the property is purportedly given under the instrument; in that wise, the court imposes an implied condition that if the elector-donee accepts the benefit which the donor had power to give, he shall convey his own property over which the donor had no power, to the individual whom it is actually but ineffectually given. See *Gretton v. Howard* (1819) 1 Swanst. 433; 36 E.R. 443; *Douglas v. Douglas* (1871) L.R. 12 Eq. Cas. 617. 637.

If, in the alternative, he elects against the instrument, he, keeps his own property and at the same time claims the benefit conferred on him by the instrument but he must compensate the disappointed beneficiary (that is, the person who would have been entitled to the elector's own property had the elector elected in favour of the instrument) out of the benefit conferred on him by the instrument and to the extent of the value of the elector's own property which the elector has decided to retain. This brings out the distinction between equitable doctrine of election which is based on compensation and conditional gift which is based on forfeiture.

Compensation not Forfeiture

Where the elector takes against the instrument there is no question of his forfeiting the benefit conferred on him by the instrument. See *Ker v. Wauchope* (1819) 1 Bli 1 at 25. In other words it does not follow that he will be precluded from taking the benefit conferred on him by the donor. He is, however required in equity to compensate the disappointed person to the equivalence of that benefit which the donor intended the disappointed person to take. As stated by Jessel, M.R., in *Pickersgill v. Rodger* (1877) 5 Ch.D. 163 at 173, the disappointed person may, in that case say to the elector 'You are not allowed by a Court of Equity to take away out of the testatrix's estate that which you would otherwise be entitled to, until you have made good to me the benefit she intended for me'.

The equity of the court is not to forfeit the elector's benefit under the instrument but that as between the elector-beneficiary and the disappointed-beneficiary, the latter is entitled to sequester or to keep back from the former the property so devised or bequeathed until compensation is made. The essence of the doctrine, therefore, is that the elector takes against the instrument subject to an obligation to make good to the disappointed legatee the sum he is disappointed of.

Conditional Gift

In contrast, the case of conditional gift attracts forfeiture in that the beneficiary is put to his choice between the two properties, he cannot have both. For example, where a father gives away property belonging to his eldest son to another person and he also devises a piece of his own property to the eldest son stating that it should be in lieu of his property which he purports to take away from him. In such a situation the eldest son is merely put to his choice; the doctrine of election is excluded by the apparent expression of intention by the testator that the gift to the eldest son is conditional on his giving up what the testator purports to take from him. See *Wilkinson v. Dent* (1871) 6 Ch. App. 339 at 341-342.

3.3 Judicial Basis of the Doctrine

The juridical or the theoretical basis of the doctrine is not free from confusion. 'The principle is, that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming to all its provisions and renouncing every right inconsistent with it.'

Per Lord Chelmsford in *Codrington v. Codrington* (1875) L.R. 7H.L. 854 at 866. In a narrow sense, the doctrine may be said to be based on the implied intention of the donor; ordinarily a donor is presumed to have intended to dispose of all the property, including the one not belonging to him, contained in the instrument, or that the instrument shall take effect as a whole. See Lord Hatherley in *Cooper v. Cooper* (1874) L.R. 7 H.L. 53 at 71.

Thus, the person against whom the case of election arises is bound to give effect to the whole instrument, and there is an implied condition arising out of the dispositions that the person who takes under the instrument should renounce any independent title that he has and could set up against the instrument. Per Chitty J. in *Re Wheatley* (1884) 27 Ch.D. 606 at 612. But the basis of the doctrine involves more than merely resting it on the presumed intention of the donor. 'It is clear that such a basis, if pushed to its logical conclusion, can result in difficulties.' See Keeton; *An Introduction to Equity* (6th Ed.) p.189.

For example, it is not a requirement for the operation of the doctrine that the person making the disposition should have intended that the elector-beneficiary should take upon condition, for this would be inconsistent with the doctrine of election where the elector can keep both properties and then compensate the disappointed person. Secondly, it is immaterial, for the purposes of the doctrine, whether or not the donor gives away, by mistake or by design the property which does not belong to him. See *Cooper v. Cooper* (supra) at 67.

However, in *Cooper v. Cooper* (supra), Lord Cairn appreciated the difficulty in explaining the doctrine on the basis of the presumed intention of the donor. In his opinion the rule of election does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity, and as to which the court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the instrument.

As was stated by Buckley J. in *Re Mengells Will Trusts* (1962) Ch. 791 at 797. 'For myself I should prefer to say that it is a doctrine by which equity fastens on the conscience of the person who is put to his election and refuses to allow him to take the benefit of a disposition contained in the will, the validity of which is not in question, except upon certain conditions.' The doctrine enables the court to secure a just distribution in substantial accordance with the general scheme of the instrument; it is a means of doing justice as between the elector-beneficiary and the disappointed person. See Lord Haldane in *Brown v. Gregson* (1920) A.C. 860 at 868.

3.4 Essentials of the Doctrine

The essentials of election are firstly that there should be an intention on the part of the donor to dispose of certain property; secondly, the property should not in fact be the donor's own property; and thirdly, a benefit should be given by the disposing instrument to the true owner of the property. (Per Jenkins L.J. in *Re Edwards* (1958) Ch. 168, 175 C.A.). The following analysis will illustrate the requirements for establishing a case of election.

1. The donor must have given his own property to the elector; it is out of this property that the elector would compensate the disappointed person where the elector has elected against the instrument.

In *Bristow v. Warde* (1794) 2 Ves. 336; 30 E.R. 660. F had a power of appointment over stock in favour of his children. He appointed by his will part of the stock to the children and part to stran-

gers, that is, persons who were not objects of the power. The children were entitled in default of appointment. The court held that the children could take both, that is, the part appointed to them and also the part that was ineffectively appointed to strangers; they being entitled to it in default of appointment. Here there was no case of election because the donor gave no property of his own to the children. The part which was improperly appointed to strangers, belonged to the children being the persons entitled in default of appointment and also the part appointed to them did not belong to F and therefore F could not dispose of it as if it were his own property. The decision would have been different if F had given some of his own property by the will to his children.

Thus in *Whistler v. Webstern* (1794) 2 Ves. 367; 30 E.R. 676., where the facts were the same as above except that F by his will gave some legacies out of his own property to the children, the court held that the children must elect. If they elect in favour of the instrument, that is, the will, they would keep the legacies bequeathed to them and allow the property wrongfully appointed to strangers to pass in conformity with the will; but if they elect against the will, they would keep the property wrongfully appointed to strangers and also take the legacies given to them by F, but they must compensate the disappointed strangers out of the legacies given to them by F. The principle is that there must always be some free disposable property given to the elector so that if he elects against the instrument he can take out of it to compensate the disappointed person and also if he elects in favour of the instrument the property would be a compensation for what the donor has taken away from him.

In *Taylor v. Williams* (1935) 12 N.L.R. 67, where the donor purported to devise her undivided share in a family property, which she had no power to do under customary law, the court held that there was no case for election, for the donor had not given his own property to the person who was being called upon to elect. Under customary law family property is indivisible and a member has no alienable interest in the family property. See *Ogunmefun v. Ogunmefun* (1931) 10 N.L.R. 82.

2. The donor must have given the elector's property to another person.

The principle is that the donor must have taken away some of the elector's property for which the elector has been compensated by the donor's gift to him. See James V.C. In *Wollaston v. King* (1869) L.R. 8 Eq. Cas. 165, 173; Romily M.R. in *Box v. Bartett* (1866) L.R. 3 Eq. Cas. 244, 248.

Thus, where an appointor under special power of appointment, wrongfully appoints the property to a stranger and gives his own property to the object of the power who also is entitled in default of appointment, the object of the power would have to elect; he owns the improperly appointed property being the person entitled to it in default of appointment and the appointor has also given his own property to the object of the power. See *Re Fletcher* (1936) 2 All E.R. 236. But a mere object of a special power of appointment, who per se is not entitled in default of appointment, cannot be called upon to elect though the subject-matter of the power is appointed to another person and the appointor gives his own property to the mere object of the power, the reason being that no property of the mere object of the power is given to a stranger; the subject-matter of the power is not that of the mere object until it is appointed to him and cannot be his if it is appointed to a stranger.

Where an appointor makes an appointment in favour of a stranger which appointment is invalid because it offends the rule against perpetuities there is no case of election even though the object

of the power is entitled in default of appointment and also the appointor has given some of his own property to him. In *Re Nash*(1910) 1 Ch. 1, the appointor by his will made an appointment in favour of a non object; the appointment was held void because it offended the rule against perpetuities; it was further held that there was no case for election even though the appointor gave his own property to the object of the power who was also entitled in default of appointment. (See further *Wollaston v. King* (supra)). Similarly, an appointment in favour of the object of a power who is also entitled in default of appointment, will not be a proper case of an election where the appointor imposes a trust or a wholly ineffective condition in favour of a stranger. See *Re Neave* (1938) Ch. 793; *Blackett v. Lamb* (1851) 14 Beav. 482; 51 E.R. 311.

In *Wooldridge v. Wooldridge* (1859) Johns 63 at 69; 70 E.R. 340, it was stated that 'where there is an absolute appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will not allow, the court reads the will as if all, the passages in which such attempts are made were swept out of it, for all intents and purposes, that is, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election.' Thus, there must be some disposition of property which the donor had no right to dispose of to make it a case of election. See *Box v. Barrett* (1866) L.R. 3 Eq. Cas. 244 at 248.

3. The Two Gifts must have been Made in the Same Instrument

The doctrine of election can only apply when it arises within the document which raises the case of election, for example, where a will contains a gift of property not within the testator's disposing power and a gift of the testator's own property to the owner of the property which the testator purports to dispose of to another person. In *Gibson v. Gibson* (1852) 1 Drew 42 at 51-52; 61 E.R. 367, Kindersley V.C. observed: 'The doctrine of election, as applicable equally to all cases, is that a person who is entitled to any benefit under a will or other instrument, must, if he claims that benefit, abandon every interest the assertion of which would defeat, even partially, any of the provisions of the will or instrument that in no case is a person to be put to election, unless it is clear that the provisions of the instrument, under which he is entitled to a benefit, would be in some degree defeated by the assertion of his other right.'

In *Re Edwards* (1958) Ch. 168 at 177, T by her will devised Blueacre and some other properties to E and six others. Later, T entered into an oral agreement with E whereby Blueacre was given away to E for valuable consideration. T died without having altered her will. The question was whether E should be put on election. On the face of the will it is clear that T had disposed of certain property belonging to E and had also conferred certain benefits on E. But the Court of Appeal held there was no case for election on the ground that the consequence of the inter vivos disposition of Blue acre was that at T's death there was no intention on his part to make a testamentary gift of Blueacre. The devise of Blueacre under the will had been revoked by reason of its disposition inter vivos, so that at T's death Blueacre was adeemed. Jenkins L.J. observed: 'The true position in such a case is, as it seems to me, that the testamentary disposition has clearly gone, and the person in whose favour the disposition of the property inter vivos is made simply takes it under that disposition without any question of his or her thereby taking against the will, and thus, being disqualified from receiving any benefit under the will.'

The gift of Blueacre under T's will was not an effective gift to anyone. 'There was, therefore, no beneficial interest on which the gift in the will could operate, and it was for all material purposes as though the gift had been struck out of the will.' Per Romer L.J., *Ibid.*, at 179. Thus, in this case, no property of the person who would have been called upon to elect was in fact given away by the will upon which the plaintiff rested his case for election.

4. The donor's property which is given to the elector must be freely alienable so that it could be available for compensation if the elector elects against the instrument.

It is settled that the doctrine of election does not involve forfeiture, but involves compensation out of the property which is given to the elector by the instrument, so that in the event of an election against the instrument, the elector could freely alienate that property for the purpose of making compensation to the disappointed person. See *Re Wheatley* (1884) 27 Ch.D. 606 at 612. It follows that if the property is not freely alienable, there is no case for election.

In *Re Wheatley* (supra), the donor's property was given to a married woman subject to a restraint upon anticipation. The property was given by the same instrument as that which gives rise to the question of election. Chitty J. held that the woman could not be called upon to elect, as the property given to her has, by the terms of the instrument, been made inalienable and, therefore, there was no property out of which compensation could be made to the disappointed person in the event of an election against the instrument. Where property is given in such a manner, the donor is presumed to have intended it as a personal provision and for the donee's inalienable use; to imply a condition of election in that circumstance would be to imply a condition of election against the express language of the instrument.

Thus, in *Re Vardon's Trusts* (1885) 31 Ch.D. 275, a marriage settlement settled a fund for the separate use of the wife for life subject to a restraint upon anticipation; the effect of it was that the income of the fund should be paid to the Wife for her sole and separate use and that she should not have power to dispose or deprive herself of the benefit thereof: the settlement also contained a covenant by the wife to settle after-acquired property. The court held that the settlement contained a declaration of a particular intention inconsistent with the doctrine of election and therefore the wife could not be compelled to elect between after-acquired property and her interest in the settled fund, but was entitled to retain both as her income from the settled fund had been made inalienable by the terms of the settlement.

The principle is that the property must be freely alienable for purposes of making compensation as at the time the donee is called upon to elect. In *Haynes v. Foster* (1901) 1 Ch.361, Kekewich J., held that the restraint on anticipation did not become wholly inoperative against alienation if, at any time during her enjoyment she had become discoverd by reason of the death of her husband; therefore, she could not be called upon to elect. The rationale of this decision is that the restraint on anticipation was operative as at the time she was being called upon to elect. But in *Re Tongue* (1915) 1 Ch.390, followed in *Re Hargrove* (1915) 1 Ch.398, it was held that the presumed intention of the donor was that the restraint on anticipation should be limited to the period under coverture, so that a spinster to whom an interest with a restraint on anticipation during coverture had been given by the same instrument which gave rise to the question of election, must elect.

Even in *Re Hargrove* (supra) at 407, where the restraint on anticipation was not in terms confined to coverture, the spinster was put to election. As Astbury J. observed in that case 'the imposition of a mere future restraint on anticipation is no bar for their doing so, and does not, therefore, prevent the doctrine of election from applying to them'.

5. The Elector's Property which the Donor Purports to Dispose of must be Freely Alienable

The principle on which the doctrine is based is that a man shall not be allowed to approbate and

reprobate, and that if, he approbates he shall do all in his power to confirm the instrument which he approbates. See *Re Lord Chesham* (1886) 31 Ch.D. 466 at 473. Therefore, where the elector takes in favour of the instrument he must transfer his own property which the donor purports to dispose of, in accordance with the wishes of the donor. Election in this respect presupposes that the person who is being called upon to elect has a freely disposable interest in his own property which he can alienate in compliance with the donor's wishes, otherwise there is no case for election.

Thus, there is no case for election where the property sought to be disposed of is a family member's interest in a family property. This is because under customary law a family property is indivisible and a member of the family has no alienable interest in the family property; (*Ogunmefun v. Ogunmefun* (1931) 10 N.L.R. 82) or where the property is owned by a married woman subject to an operative restraint upon anticipation. See *Re Wheatley* (1884) 277 Ch.D. 606. Election means free choice, it follows that the doctrine cannot be introduced where it is impossible for the person against whom it is pleaded effectively to exercise the election demanded.

In the leading case of *Re Lord Chesham* (supra) at 472, T by his will gave certain chattels upon trust for sale for the benefit of A and B and gave the residue of his estate to C. The chattels were in fact to be enjoyed by C with a land the subject-matter of a trust of which C was a tenant for life. The question was whether C could be called upon to elect. The court found that if C elected in favour of the will as he was entitled to do under the doctrine of election, he had no disposable interest in the chattels which he could make over to A and B it was, therefore, held that C could not be put to his election.

Chitty J. said-

“In effect it is the paramount title of the trustees, who are not affected by any question of election, rather than the restricted interest of C, which prevents effect being given to the bequest of the chattels. A court of Equity never decrees an act to be done which is a breach of trust, or a mere idle act which could only lead to litigation. And inasmuch as no assignment by C of his interest could be framed which would not be a breach of trust, or which could confer any benefit on A and B, it would not order him (C) to execute any assignment of the chattels for the purpose of confirming the will.”

C, not being able to make an assignment of the chattels because he had no assignable interest in them, took the residue given to him by the donor without compensating A and B.

Similarly, in *Brown v. Gregson* (1920) A.C. 860, the property of the person being called upon to elect was foreign land and by the *lex situs*, the owner of the land could not deal with it in the manner directed by the donor; the House of Lords held that in that circumstance there was no case for election; election does not arise where the donee cannot give effect to the instrument. There is no question of compensation since compensation is only made where it is possible to elect (*Re Lord Chesham* (supra) at 476; otherwise it would amount to an application of the doctrine of cypres to the doctrine of election. See *Brown v. Gregson* (1920) A.C. 860 at 877; per Viscount Finlay.

In *Re Dicey* (1951) 1 Ch. 145 at 154, the defendant objected to election on the ground that the obligation to elect is limited to cases in which the party so bound, if he elects in favour of the instrument is able to make the other relevant provisions take effect precisely accordingly to their terms. In that case the defendant, who had received some benefit under the donor's will, was only a part-owner of the property which the donor purported to give to the plaintiff so that if he the

defendant elected in favour of the instrument he would have been able to benefit the plaintiff only in respect of his own share of the property while the other part would remain outstanding in his co-owner who was not affected by the question of election.

Romer L.J. held that the defendant must elect. The court observed that the obligation to elect does not depend upon the power of the elector to secure that the other relevant disposition in the instrument takes effect according to its exact terms. The principle of election is that if the elector elects in favour of the instrument he shall do all in his power to confirm the instrument which he approbates; he is not required to conform to all the relevant provisions, in as much as he confirms the instrument so far as he can and gives up to the disappointed person any of his own beneficial interest that he can freely dispose of in the property which the donor sought to give away. See *Re Lord Chesham* (supra) at pp. 472-473.

Thus, a testator gives Blackacre or the proceeds of its sale to A. Blackacre in fact belongs to B, C and D as joint tenants and the testator gives legacies to each of these persons. Each of them has a separate and individual right and obligation to elect for or against the will, notwithstanding that the gift to A can only take full effect according to its terms if B, C and D all elect in favour of the will. In other words, a class is not exempted from the principle of election merely because each can contribute only a part of the total subject-matter of the gift which the testator-donor has purported to effect. *Re Dicey* (supra) at pp. 158-159. See further *Fytche v. Fytche* (1868) 7 Eq. Cas. 494.

The principle is to secure a just distribution not necessarily in the precise terms of the instrument but in substantial accordance with the general scheme of the instrument. Per Viscount Haldane in *Brown v. Gregson* (1920) AC. 866 at 868.

6. The Donor must Manifest a Clear Intention on the Face of the Instrument to Dispose of the Elector's Property

Where the instrument manifests an intention on the part of the donor to dispose of the elector's property, the doctrine operates and it is immaterial that the disposition was by mistake or by design. See *Welby v. Welby* (1813) 2 V. & B. 187, 199; 35 E.R. 296. The principle is that the donor intends that his instrument shall take full effect. Thus, in *Cooper v. Cooper* (1874) L.R. 7 H.L. 53 at 78, T, by her will gave Blackacre to X and at the same time gave a legacy to Y. At the time the will was made Z was entitled to the proceeds of Blackacre. Z predeceased T; on Z's intestacy, Y became his sole next-of-kin and, therefore, entitled to Blackacre. On T's death the question was whether Y should elect between Blackacre and the legacy. It was held that he must elect. In that case, Lord Moncreiff said 'It is quite fixed that it is wholly immaterial whether the testator thought that he had the power to convey the property, or knowing that he had not the power, usurped it. The rule in regard to election is in either case precisely the same'.

The general scheme of disposition as contained in the instrument must be capable of raising a general intention on the part of the donor that effect shall be given to every part of the instrument. Thus, the doctrine of election rests, not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the maker of an instrument that effect shall be given to every part of it. See *Re Vardon's Trusts* (1885) 31 Ch.D. 275 at 279. The mere fact that the circumstances which give rise to election could not have been in the contemplation of the maker of the instrument is not sufficient to repel the general and presumed intention. Thus, in *Cooper v. Cooper* (supra), the elector's property which was given away was not owned by the elector at the time the instrument which gave rise to election was made

and, the circumstances, and the events which subsequently vested the ownership of the property in the elector were such that could not have been contemplated by the maker of the instrument.

However, the general and presumed intention is conclusively repelled by an expressed declaration, contained in the instrument, that in no case should the doctrine of election be applied to the provisions of the instrument. *Re Vardon's Trust* (supra) at 279. Similarly the doctrine of election is excluded where the instrument itself merely denotes of a particular intention which is inconsistent with the general and presumed intention which is the foundation of the doctrine. For example, if an instrument contains a provision such that, if the donee were put on his election and by electing he would be doing precisely what the instrument prohibits him from doing, such a provision denotes a particular intention inconsistent with the general and presumed intention which gives rise to election, and therefore excludes the doctrine. Such is the case where a married woman is given property in restraint on anticipation. See *Re Vardon's* (supra) at 280.

The general and presumed intention of the donor to dispose of property over which he had no control must appear on the face of the instrument which is alleged to have made such disposition. There is no law which entitles a person to dispose of the property of another without his consent. No one can give what he does not own. However, for the purposes of election, whether or not there is such intention depends on the construction of the instrument. Once it is clear from the instrument itself that the author of the instrument intends to dispose of property which does not belong to him, that is sufficient for purposes of election. Where the donor employs general words in describing the subject-matter of the property and thereby creating some uncertainty as to the property he intended to dispose of, parol evidence is admissible with a view to identifying the property; parol evidence is, however, not admissible to show that the donor employed general words in disposing of the property because he believed himself to be the owner-this is to prevent evidence of intention that is not raised by the instrument itself. See *Doe d. Oxenden v. Chichester* (1816) 4 Dow. 65 at 90; 3 E.R. 1091.

Where a donor, by an instrument purports to dispose of property, it is presumed that he intends to dispose of property over which he has control. A man must be presumed to have intended to give what he actually possessed. The onus of proof lay on the person who alleged the contrary. See Turner, L.J. in *Evans v. Evans* (1863) 2 New. Rep. 408, 410. Accordingly, where a donor has a limited interest in property forming the subject-matter of a gift the presumption is that he intends to dispose only of that interest; and the court will construe the instrument in the light of this intention, for, the intention to make a disposition extending beyond that interest cannot be made sufficiently clear to raise a case of election by anything short of positive declaration. See *Wintour v. Clifton* (1856) 8 De G.M. & G. 641 at 650-651; 44 E.R. 537.

However, in certain circumstances particularly in the case of a will, the court may gather an intention by the testator to include property belonging to another in a gift of residue. Thus, in *Re Allen* (1945) 2 All E.R. 264 at 267-268, the testator made a general gift of residue in which he only had a limited interest, in that he held it jointly with his widow who was a beneficiary under the will. The question was whether the gift of 'the residue of my property' was limited to the testator's own share of the joint estate or was intended to include the widow's share so as to put the widow on her election. Cohen J., in the course of his judgment in which the widow was put to election, said - 'I readily accept that a mere general devise or bequest would not of itself raise a question of election, but I cannot regard this passage as concluding the matter. The question whether a beneficiary under a will is put to his election depends on whether the testator has purported to dispose of his or her property. This must depend on the construction of the will as a whole, and if I am satisfied that upon the proper construction of the will as a whole the residuary

gift included property of a beneficiary, it must follow that the beneficiary is put to his election.'

SELF ASSESSMENT EXERCISE I

List the essentials of the doctrine of election.

Other Relevant Points

Derivative Interests:

(1) Where a testator sought to dispose of property which does not belong to him and that property was derivatively acquired through some one who could not be put to election, there will be no case for election. Thus in *Grissell v. Swinhoe* (1869) L.R. 7 Eq. Cas. 291, T, by his will sought to dispose of a married woman's property and at the same time conferred some benefits on her husband, who subsequently on the death of his wife became entitled to his wife's property including the one T sought to dispose of. The court held that there was no case for election against the husband; the wife, through whom he derived title to the property which T sought to dispose of, could not be put to her election, because she did not receive any benefits under T's will, and secondly, the property was not his at T's death when T's will became operative.

(2) Where a person who had the obligation to elect had elected such election would be binding on him and whosoever takes under him. But there may be difficulties if he dies without having elected. If the elector's property devolved in one direction, his successor would be standing in his shoes and would be called upon to elect. See *Fytche v. Fytche* (1868) L.R. 7 Eq. 494. In *Cooper v. Cooper* (supra), T gave property to A and devised A's property to C. A died without having elected and all his property devolved on B. It was held that B, being the person standing in A's place, must elect. But where the elector's properties devolve in different directions, there is no case for election; however, the obligation to compensate the disappointed person falls on the person who succeeds to the benefits out of which compensation would have been made to the disappointed person if he had elected against the instrument in his life time.

In *Pickersgill v. Rodgers* (1876) 5 Ch.D. 163 at 173, the donor, by her will, bequeathed J's money to X and gave her own property Blueacre to J who died without having elected. By his will, J gave his personalty to A and devised to Y. The question was whether the duty to pay compensation to X, the disappointed legatee under the donor's will, fell on Y to pay it out of the Blueacre or whether it was to be paid by A from J's personal estate bequeathed to him. Jessel M.R. held that (on the principle that the person taking the property so devised or bequeathed takes it subject to an obligation to make good to the disappointed legatee the sum he is disappointed of) the duty to pay compensation to X, the disappointed legatee fell on Y, being the beneficiary of Blue acre out of which compensation, would have been paid by J had he elected in his lifetime. 'The very instrument which gives him (Y) the benefit, gives him the benefit burdened with the obligation. X, the disappointed person, had an equitable charge or right to realise out of that property the sum required to make the compensation.

It follows that the estate of the elector who died without having elected, is not exonerated from the payment of compensation for which the elector would have been liable had he elected in his life time. The value of that liability would have to be ascertained by an inquiry as to the amount of benefits which the elector received in his lifetime under the will of the donor, and the liability is to be discharged only to the extent of the benefit derived by the elector under the donor's will.

Thus, if the value of elector's property of which the donor sought to dispose exceeds the benefit conferred on the elector by the donor's will, the elector's successor in title to such benefit is not under any obligation to pay more than the value of that benefit even though he received some other benefits out of the elector's estate. See *Rogers v. Jones* (1876) 3 Ch.D. 688. For example, if the elector's property of which the donor sought to dispose is valued N1000 and the benefit conferred on the elector under the donor's will is worth N500, the amount of compensation payable to the disappointed person will not exceed N 500.

Time to Assess the Value of the Property of the Elector for the Purposes of Compensation

Where a donee under a will is put to his election and he elects to take against the instrument, he has a duty to compensate the legatee or beneficiary who is disappointed by such election. The amount of compensation payable is the value of the elector's property of which the testator sought to dispose, and, the value of the property is to be ascertained as at the date of the testator's death and not when the election is made. See *Re Hancock* (1905) 1 Ch. 16.

Satisfaction and Election:

A beneficiary under a will is put to his election, that is, to give effect to the will as a whole, on the principle that the testator has conferred some benefits on the beneficiary and at the same time attempted to dispose of the beneficiary's property. Where the benefit or legacy given to the beneficiary is in satisfaction of a debt, there can be no election, for, no benefit has in fact, been conferred on him. But if the legacy was in satisfaction of a statute-barred debt, such legacy is generally regarded as a bounty, for the testator has no legal obligation to pay the debt, therefore, the beneficiary is bound to elect. *Re Fletcher's Settlement Trusts* (1936) 2 All E.R. 236, 239.

Rights of Elector:

Whenever a person is put to his election, the court has jurisdiction in equity to compel a final election 'so as to quiet the title of those interested in the objects of which one is to be chosen.' See *Douglas v. Douglas* (1871) L.R. 12 Eq. Cas. 617 at 637; See further, *Gretton v. Howard* (1819) 1 Swans. 409; 36 E.R. 443. However, as a condition precedent to the exercise of this jurisdiction, the court will secure to the elector, the right to all information necessary to guide him in his choice. *Douglas v. Douglas* (supra). He must be given a genuine opportunity of ascertaining the relative values of the properties before electing in favour or against the instrument. He is even entitled to bring an action with a view to knowing the nature and extent of his rights and to ascertain the relative values of the properties between which he is called upon to elect. See *Buttricke v. Broadhurst* (1790) 1 Ves. Jun. 171; 30 E.R. 286; *Worthington v. Wiginton* (1855) 20 Beav. 67, 74; 52 E.R. 527. In *Kidney v. Coussmaker* (1806) 12 Yes. 136 at 153; 33 E.R. 53, a widow-electress was held not bound by an election made under a mistaken impression of the extent of the claim against her.

Election may be Express or Implied:

Election may be express or may be implied from the acts or conduct of the person bound to elect; whether or not a person bound to elect has elected is a question of fact. In the case of express election, a communication by the elector to the affected party of his intention to pay compensation is a sufficient evidence of his election against the instrument. Similarly, there would seem to be an express election where an elector transfers, in accordance with the directions in the instrument that gives rise to election, his own property of which the donor sought to dispose, to the

person to whom the property was purportedly given by the instrument, and he at the same time accepts the benefit conferred on him by the instrument.

It is more difficult to establish implied election since the fact of election must be clearly established; moreover, there does not seem to be any general principle indicating all the circumstances necessary to prove or constitute an election. However, to infer an election, there must be clear proof that the person called upon to elect knew that the donor had not the power to give the property which he purported to dispose of, and that he the elector is the owner of that property. There must be evidence that the elector was aware of the gift made to him by the donor; also he must know the relative values of the properties between which he is called upon to elect; he must know that in equity he must have to elect between the two; and that having that knowledge the elector made a deliberate choice with the intention of making it. See *Dillon v. Parker* (1818) 1 Swanst, 359; 36 E.R. 422; *Sweetman v. Sweetman* (1868) 2 I.R. Eq. 141; *Spread v. Morgan* (1865) 11 H.L.C. 588.

It follows that the mere fact that a person, who is bound to elect, continues to enjoy the two properties may not be a conclusive inference that he intends to elect against the instrument if he was not aware of his rights. See *Padbury v. Clarke* (1850) 2 Mac. & G. 298, 306; 42 E.R. 115. Nevertheless, 'from a long course of leading, from a series of acts, the court is at liberty, as an inference of fact, to conclude that the party called upon to elect knew his rights, knew the value of both estates, and knew the rule of equity, that he was bound to elect, and had, with the full knowledge, made his choice, with the intention of making it, and of electing between the two estates'. Per Chatterton V-C, in *Sweetman v. Sweetman* (supra). The series of acts or dealings from which election is to be implied must be consistent only with that of an elector who was fully aware of his rights. *Dillon v. Parker* (1818) 1 Swanst. 359 at 380. The burden of proof is on the party who alleges implied election. See *Sweetman v. Sweetman* (supra); *Spread v. Morgan* (1865) 11 H.L.C. 588.

Time to Elect:

Prima facie, there is no time limit within which election is to be made; but a time limit may be specified or imposed by the instrument or by the court. Where there is such time limit, a person who is bound to elect but fails to elect within the time stipulated is deemed to have elected against the instrument, and will be under a duty to compensate the disappointed person. See *Streatfield v. Streatfield* (1735) 1 Swanst. 447; 36 E.R. 459.

Where there is no time limit for electing, failure to elect for a considerable length of time per se will not imply an election, thus a person bound to elect may continue with the enjoyment of the property given from him, as he had been doing before the operative date of the instrument by which the donor purports to dispose of the property to another; but if by such continuous act of his, so long a time has elapsed that it can reasonably be inferred that he has acquiesced in the other's enjoyment of the property given to him by the instrument and that it would be inequitable to disturb such other's enjoyment, he may be said to have elected to take, not his own property and making compensation, but what the will gives to him, that is permitting the specific enjoyment of his own property under the will. See *Tibbits v. Tibbits* (1816) 19 Ves. 656 at 663-664; 34 E.R. 659.

Who may elect:

Any person who is sui juris, and who is mentally sound is capable of electing. Where an infant is

bound to elect, the court usually elects for him after an enquiry as to what is best for the infant in the circumstance. See *Seton v. Smith* (1840) 11 Sim 59 at 66; 59 E.R. 796. A similar course of action is followed in the case of a person of unsound mind. See *Wilder v. Piggott* (1883) 22 Ch.D. 263 at 269.

4.0 CONCLUSION

Election may be express or may be implied from the acts or conduct of the person bound to elect. The essentials of election are firstly that there should be an intention on the part of the donor to dispose of certain property; secondly the property should not in fact be the donor's own property; and thirdly, a benefit should be given by the disposing instrument to the true owner of the property.

5.0 SUMMARY

In this unit, we have considered the doctrine of election. You should now be able to: explain the doctrine of election; enumerate the judicial basis of the doctrine; and list the essentials of the doctrine.

6.0 TUTOR-MARKED ASSIGNMENT

Enumerate the judicial basis of the doctrine of election.

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

Jegede M. I. (2007rep.) *Principles of Equity*; Ibadan: Unique Design/Prints

UNIT 6 SATISFACTION

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1.0 INTRODUCTION

In the last unit we considered the doctrine of election. In this unit we will consider the doctrine

of satisfaction. Equitable doctrine of satisfaction is said to be founded on the maxim that equity imputes an intention to fulfill an obligation. That may be so, but there are one or two heads of satisfaction whose operation can, in addition, be explained on the basis of one or two other maxims. For example, the heads of satisfaction which operate in the narrow area of relationship of father and child or one in loco parentis and a child may also be explained on the basis of the rule that equity leans against double portions or equality is equity. As Lord Cranworth observed in *Chichester v. Conventry* (1867) L.R. 2 H.L. 71, the rule against double portions is a useful rule which carried into effect the intention of parents and others *in loco parentis*, making provisions for those for whom they are bound to provide.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Define satisfaction;
- (ii) Explain satisfaction of debt by legacy;
- (iii) Explain how legacy can be used to satisfy a legacy.

3.0 MAIN CONTENT

3.1 Definition of satisfaction

Satisfaction is the gift or donation of a thing with the intention that it shall be taken either wholly or partly in extinguishment of some prior claim of the donee. Thus, the doctrine becomes relevant where X, who had been under a certain obligation to give something to Z, donates a thing (which is not directly connected with the discharge of his obligation) to Z; such a donation, subject to the fulfillment of some other attendant requirements, raises a presumption that the intention of X in making the donation is to satisfy or discharge his prior obligation to Z.

Before a presumption of satisfaction can be raised, two basic requirements must be met: first the donation must have been made in such circumstances that an intention on the part of the donor to satisfy an obligation can be presumed since the essence of the equitable doctrine of satisfaction is to carry into effect the presumed intention of the donor. See Cranmer's case (1702) 2 Salk 508; 91 E.R. 434. In *Goldsmid v. Goldsmid* (1818) 1 Wils. Ch. 140, 149, Plumer M.R. said "where there is a question of satisfaction, there must be a reference to the intention. Satisfaction is a substitution of one thing for another; and the question in cases of that kind is whether the substituted thing was given for the thing proposed." 37 E.R. 63.

Second, there must be some prior and existing claim of the donee; cases of genuine equitable satisfaction presuppose an existing obligation which the donor is presumed to have intended to satisfy. See *Re Fletcher* (1888) 38 Ch. D. 373. While all heads of satisfaction must necessarily satisfy the former requirement, as will be seen below, not all satisfy the latter requirement. For this reason it may not be all that correct to classify as cases of equitable satisfaction those heads of satisfaction that cannot meet the two requirements.

SELF ASSESSMENT EXERCISE 1

Define satisfaction.

3.2 Satisfaction of Debt by Legacy

Where a testator gives a legacy to his creditor without any reference to the debt, such legacy, (subject to the fulfillment of the requirements discussed below), will be presumed to be a satisfaction of the testator's indebtedness to the donee. In other words, the intention of the testator, in that circumstance, is presumed to be that his creditor/donee shall not have both the debt and the legacy, and if the presumption is sustained, the legacy discharges the testator's prior obligation to pay the debt.

The rule was stated by Sir J. Trevor M.R in *Talbott v. Duke of Shrewsbury* (1714) Prec. Ch. 394 at 395; 24 E.R. 177. 'If one, being indebted to another in a sum of money, does by his will give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, this shall, nevertheless, be in satisfaction of the debt, so that he shall not have both the debt and the legacy. The rule may be said to have been founded on the maxim '*debitor non praesumitur donare*', a debtor is not presumed to give; he is presumed to intend to be just before being generous. As stated above, the rule is a mere presumption and can, therefore, be rebutted.

Circumstances Rebutting the Presumption

(i) The presumption is rebutted where the legacy is smaller than the debt. In *Coates v. Coates* (1898) 1 I.R. 258, the Vice-Chancellor observed that the nature of the legacy must correspond with the nature of the obligation to be conclusive satisfaction. In that case it was held that the legacy of 12/- a week could not operate as a satisfaction of the testator's liability under the separation deed of the greater amount of 15/-. 'That which is less is not to be presumed in satisfaction of that which is greater'; see *Atkinson v. Webb* (1704) 2 Vern. 478, 479; 23 E.R. 907; *Crichton* (1895) 2 Ch. 853. Furthermore there is no *pro tanto* satisfaction of a debt by a legacy. See *Atkinson v. Webb* (supra). The whole essence of the doctrine therefore, is that the debtor can be held to have offered the creditor something equivalent to his debt or greater than it. See Stirling J. in *Re Horlock* (1895) 1 Ch. 516 at 518.

In *Fitzgerald v. National Bank* (1929) 1 K.B. 394. Talbot J., held that a debt of £100 which carried an interest of 5% was satisfied by a legacy of £100; the mere fact that the interest on the debt was in arrears at the time of the testator's death was immaterial. It was argued that the sum due in respect of the debt must necessarily be different from the legacy by reason of the fact that the debt carried interest; the contention seems to be that *prima facie* the legacy is equal to the debt but when the interest due on the debt is added, the legacy is less than the debt and, therefore, there cannot be presumption of satisfaction. The court could not find any authority for this proposition. Talbot J., decided in favour of presumption of satisfaction because the legacy was equal to the debt and the presumption was not thereby rebutted by the mere fact that debt carried interest from day to day.

(ii) There is no presumption of satisfaction where the debt was contracted subsequently to or even contemporaneously with the making of the will; there cannot be an intention to satisfy a non-existing obligation. In *Cranmer's Case* (1702) 2 Salk. 508; 91 E.R. 434, the testator, who was indebted to C for a sum of £50, thereafter proceeded to make a will by which he gave C £500. Subsequently, he borrowed £150 from C and died.

The Master of Rolls decreed that the legacy was a satisfaction of both debts but Harcourt L.C. reversed the decree 'because a Court of Equity ought not to hinder a man from disposing of his own as he pleases; and when he says he gives a legacy, we cannot contradict him, and say he pay a debt;' therefore, the debt contracted subsequently to the making of the will could not raise a case of satisfaction. If the doctrine of satisfaction is truly based on the presumed intention of the testator, it is impossible for the testator to have intended to satisfy an obligation that was not in existence at the time of making the will. For the same reason there may not be presumption of satisfaction where the debt was contracted contemporaneously with the making of the will.

In *Wiggins v. Horlock* (1888) 39 Ch.D. 142, the legatee claimed to be entitled to £100 under a deed and to a legacy of £100; both the deed and the will were made substantially contemporaneously. Cotton L.J. found that there was no evidence to presume that one gift was intended to be in satisfaction of the other. 'I do not say that in no case can a presumption of satisfaction arise where the documents are contemporaneous; but their being so is an important consideration.' (*Ibid.*, at 146) 'The language of this will did not show that the testator intended by his will the same £100 as was mentioned in the covenant.' (*Ibid.*, at 147 per Bowen, L.J.) In cases where the debt is contracted contemporaneously with the making of the will, presumption of satisfaction depends on the intention of the testator as could be gathered from the language of his will.

(iii) There is no presumption of satisfaction where the legacy is not in every way as beneficial and advantageous as the debt. It is a settled principle that if the legacy is less than the debt there is no satisfaction even *pro tanto*. The same principle applies where the debt is certain and the legacy is contingent or uncertain, even though the legacy is of greater amount than the debt. As North J., observed in *Crichton v. Crichton* (1895) 2 Ch. 853 at 858, 'I cannot understand how the father's debt or liability to the son could be satisfied by investments in the joint names which ultimately survived to the father, the debtor; nor how the son's certainty of succeeding ultimately to one moiety of the settled funds could be satisfied by giving him a chance of succeeding to something else.' Uncertainty of a legacy makes it less beneficial and less advantageous than the debt which is certain.

Contingency of legacy as a bar to satisfaction was emphasised in the early case of *Talbott v. Duke of Shrewsbury* (1794) Pre. Ch. 394 at 395; 24 E.R. 177 where the Master of Rolls said 'but if such a legacy were given upon a contingency which if it should not happen, the legacy would not take place, in that case though the contingency does actually happen and the legacy thereby became due, yet it shall not go in satisfaction of the debt because a debt, which is certain shall not be merged or lost by an uncertain and contingent recompense, for whatsoever is to be a satisfaction of a debt, ought to be so in its creation and at the very time it is given which such contingent provision is not .. if the provision be absolute and certain, it shall go in satisfaction of the debt; but if it be uncertain, and contingent, it can be no satisfaction because it could not be so in its creation and the happening of the contingency afterwards will not alter the nature of it.'

Whether a legacy is not as beneficial and advantageous as a debt is a question of fact to be determined with reference to the facts of each case. In *Re Haves* (1951) 2 All E.R. 928, the testator, in his lifetime, covenanted with his former wife to pay her the sum of £3 a week. He subsequently bequeathed the sum of £3 a week to her. The question was whether the will, being later than the deed of covenant, operated in satisfaction of the covenanted annuity. Harman J. held that there was presumption of satisfaction as the gift by will was found to be as advantageous as the covenanted sum and that the testator intended to satisfy his obligation by the disposition in his will.

But on a similar fact, in *Re Van den Bergh's Will Trust* (1948) 1 All E.R. 935, Romer J. held that there could not be presumption of satisfaction on the ground that the provision by the will was different from the covenanted annuity and was also less advantageous to the person concerned. The servant who was entitled to the annuity under the deed could dispose of the annuity as he wished under the deed, but he would lose the annuity completely if he attempted to do so under the will.

The position is not clear whether a legacy for which no time of payment is fixed in the will is less advantageous to the creditor than a debt which is owing and due at the time of the testator's death. In *Re Horlock* (1895) 1 Ch. 516 at 522, Stirling J., held that such a legacy is less beneficial;

a finding that rebuts presumption of satisfaction. He approved of the statement made by Lord Hardwicke in *Clark v. Sewell* (1744) 3 Atk. 86 at 98; 26 E.R. 858 that 'a legacy that ought to be deemed a satisfaction must take place immediately after the death of the testator'.

Where there is a difference, in any circumstance between a legacy and the debt which makes the latter less beneficial than the former, there will be no presumption of satisfaction. A difference in time is material in rebutting the presumption that the rule of satisfaction applies even in cases where no time has been fixed by the testator for the payment of the legacy. See *Clark v. Sewell* (supra). Furthermore, a legacy directed to be paid six months after the testator's death is not immediately as beneficial to the creditor as the payment of debt to which he is entitled before or at the death of the testator. See *Haynes v. Mico* (1781) 1 Bro. C.C. 129; 28 E.R. 1031.

However, in *Re Rattenbury* (1906) 1 Ch. 667, Swinfen Eady J. held that the legacy was to be in satisfaction of the debt despite the fact that the legacy was not payable until a year after the death of the testator. He qualified Lord Harwicke's observation in *Clarke v. Sewell* as meaning that the payment of the legacy must not be postponed by the testator; therefore, if it should be payable in due course of administration and if the legacy carries interest from the death of the testator, it is as beneficial as the debt and, therefore, a satisfaction of the debt. See further *Re Sibbe* (1946) 175 L.T. 198, 201.

(iv) There is no presumption of satisfaction where there is contrary intention (express or implied) in the will of the testator.

Where there is an express direction in a will for payment of debts and legacies, such direction is sufficient to rebut presumption of satisfaction and it will be assumed that prima facie both will be payable. See *Chancey's Case* (1725) 1 P. Wms 408; 24 E.R. 448. In *Bradshaw v. Huish* (1889) 43 Ch. 260 at 264, Kay J. stated that 'it has long been settled that in the case of a debt owing by a testator, if the testator afterwards makes a will and gives a legacy of the same or a greater amount to the creditor and then in his will directs that his debts and legacies shall be paid, that direction rebuts the presumption of satisfaction of the debt by the legacy. The position is the same where the will merely contains a direction to pay debts. There is no difference between a direction to pay debts and legacies because the gift of a legacy is in itself a direction that the legacy shall be paid. Therefore, all that is material is that there should be a direction that debts should be paid. It is not necessary in a will to give a direction to pay debts at all. If such a direction is inserted it may be assumed to be there for some purpose.

Similarly, in *Re Manners* (1949) Ch. 613 at 618, Evershed M.R. said 'I think from a consideration of other cases and of the textbooks, that it seems tolerably clear that a direction for payment either of debts and legacies, or of debts simpliciter, is treated as being something which prima facie takes the case altogether out of the rule'. In that case a mere direction by the testator for payment of his debts was held sufficient to rebut the presumption that a covenant made by him during his lifetime for a payment of life annuity was satisfied by a direction in his will to purchase out of part of his estate a like annuity for the same person.

A contrary intention will also be implied where the testator states a particular motive for the legacy other than in satisfaction of the debt. For example where the legacy is stated to have been given for the 'useful assistance' he received from the creditor; this indicates a contrary intention and will be sufficient to rebut presumption of satisfaction.

(v) There is no presumption of satisfaction where the legacy is not of the same nature as the debt. A bequest of the life use of a house and furniture could not be treated as a satisfaction of debt.

See *Coates v. Coates* (1898) 1 I.R. 258. In *Barret v. Beckford* (1750) 1 Yes. Sen. 519 at 521; 27 E.R. 1179, a testator who was under an obligation to pay an annuity of £300 per annum to his aunt bequeathed the residue of his estate for the benefit of his mother and aunt for life. The Lord Chancellor held that 'it is a general rule of satisfaction that the thing to be considered as a satisfaction should be exactly of the same nature and equally certain, here, it is not of the same nature'.

A devise of land would not be presumed to be a satisfaction of debt. But, suppose a testator-debtor devised land upon trust to sell with a direction that the proceeds be given to his creditor as a beneficiary. In that case, there is conversion which becomes operative at the death of the testator, in which case the legacy is of the same nature as the debt. Nevertheless, on principle there cannot be a presumption of satisfaction because the value of the legacy is uncertain at the time of its creation, 'for whatsoever is to be a satisfaction of a debt, ought to be so in its creation and at the very time it is given.' See *Talbott v. Duke of Shrewsbury* (supra) at 395. It would equally appear that there would be no presumption of satisfaction where the amount of debt due is uncertain.

(iv) Payment of Debt in the Lifetime of the testator: In that case the rule as to satisfaction does not apply even if, but for the payment of the debt in the lifetime of the testator, the legacy would have been held to be a satisfaction of the debt.

In *Re Fletcher* (1888) 38 Ch.D. 373 at 376, a testator at the date of his codicil owed his wife £625 and by his codicil he gave her that precise amount. North J., said 'I cannot imagine any reason for his giving that exact sum except to provide for the payment of the debt. Afterwards the debt was paid off and the purpose for which the legacy was given, I am convinced, was satisfied. The testator, having paid off the debt in his lifetime, his estate is relieved from the payment of the legacy.' In such a case, the legacy is adeemed by the payment of the debt; the creditor is not entitled to take it in that it was originally given in discharge of an obligation which existed before the will was made but which had been subsequently discharged before the will became operative.

3.3 Satisfaction of Portion debts by legacies or by subsequent portions

Satisfaction (or Ademption) of Legacies by Portions: There is much similarity of circumstance between these two heads of satisfaction hence the traditional tendency of considering both together. Both operate within a narrow area of the relationship between father and child or a person *in loco parentis* and another. Both are premised on the rule that 'equality is equity' and therefore lean against double portions. However, while the first head is a case of genuine satisfaction which presupposes an existing obligation intended to be satisfied, there is no such obligation in the second head; at best it can only be explained as an equitable devise to give effect to the true intention of the testator, a common element to all cases of satisfaction.

For clarity, the two heads may be treated under the following subheads-

(a) Satisfaction of Portion-debt by Legacy:

The rule here is where a father or a person *in loco parentis* is under a covenant to provide a portion for a child and the father or the person *in loco parentis* subsequently gives a legacy to the child, a presumption arises that the legacy was intended as a satisfaction of the portion-debt. Equity is not in favour of the child or quasi-child claiming the legacy and at the same time insisting on enforcing his rights under the covenant. Where the legacy is equal to or greater than the portion-debt, there is satisfaction in toto, but if the legacy is less valuable than the portion-

debt, there is satisfaction *pro tanto*. See *Re Blundell* (1906) 2 Ch. 222.

As Cotton, L.J. said in *Montagu v. Earl of Sandwich* (1886) 32 Ch.D. 525 at 534-535, “as between father and son the presumption arises that a father does not intend to give double portions to his children; that is to say, if a father has made a provision by way of covenant in favour of his child before the date of his will; then unless it appears upon the will or by parol testimony ... that he intends to give the benefit conferred by will in addition to that which is already secured to the child by covenant, then the child will not take both”.

In *Re Blundell* (supra), Swinfen Eady J., held that the devise and bequest of one-third share of the testator's residuary real and personal estate to his daughter operated as a satisfaction of the testator's covenant in his daughter's marriage settlement.

(b) Satisfaction of Portion-Debts by Subsequent Portions: Where a father or a person in loco parentis had agreed to give a portion to a child and subsequently makes some other provision *inter vivos* which has the character of a portion, the second provision is deemed to be a satisfaction either wholly or in part of the agreed or covenanted provision. In *Lawes v. Laes* (1881) 20 Ch.D. 81, F bound himself by a bond to pay S, his natural son, £10,000 by a named date. Before that date F took S into partnership as a result of which £19,000 credited to the partnership account would be owned by S as his share. Jessel M.R. held that the rule against double portions applied and that the benefit given to S under the partnership articles must be taken in satisfaction of the sum due under the bond.

Satisfaction (or Ademption) of Legacy by Portion:

In this case, the rule has been clearly stated by Lord Selbourne L.C. in *Re Pollock* (1885) 28 Ch.D. 552 at 555:

“When a testator gives a legacy to a child or to any other person towards whom he has taken on himself parental obligations and afterwards makes a gift or enters into a binding contract in his lifetime in favour of the same legatee, then (unless there be distinctions between the nature and conditions of the two gifts) there is a presumption prima facie that both gifts were made to fulfill the same natural or moral obligation of providing for the legatee, and consequently, that the gift *inter vivos* is either wholly or in part a substitution for, or an 'ademption' of the legacy.”

If the amount of the subsequent gift is less than that of the legacy, the presumption does not go beyond an ademption *pro tanto*. As Lord Cottenham explained in *Pym v. Lockyer* (1841) 5 My & Cr. 29 at 34-35; 10 L.J. Ch. 153; 4 E.R. 283

“all the decisions upon the question of double portions depend upon the declared or presumed intention of the donor. The presumption of equity is against double portions because it is not thought probable, when the object appears to be to make a provision; and that object has been effected by one instrument that a repetition of it in a second should be intended as an addition to the first. The second provision, therefore, is presumed to be intended as a substitution for, and not as an addition to that first given; but when the gift is a mere bounty, there is no ground for raising any presumption of intention as to its amount although such amount be comprised in two or more gifts.”

In all the foregoing heads of satisfaction the common elements are; the relationship of father and child (or a person *in loco parentis*) which relationship carries along with it a moral or natural

obligation on the part of the father or a person in loco parentis to provide portion for the child; existence of circumstances in which the child is entitled to a portion and at the same time claiming another gift conferred upon him by his father or a person *in loco parentis* to him. In that case the father is not to be presumed to have intended that the child should have both; equity leans against double portion, and, provided the second gift (which might be inter vivos or under a will) constitutes a portion, it is deemed to be a satisfaction of the child's prior entitlement. Then, the important question, what is a portion?

3.2.1 What is a Portion?

It is natural for a father either in his lifetime or at different times or by will to make various gifts to his child. This is to be expected in the context of the relationship existing between a father and a child or between a person in loco parentis and a quasi-child. However, not every such gift is a portion, and yet it must be established that a gift is by way of portion before a presumption of satisfaction can be sustained.

As to what is a portion, the authorities seem to have established that a portion is something given by a father to his child with a view to establishing the child in life. See *Taylor v. Taylor* (1875) L.R. 20 Eq. 155. Examples of gifts by way of portions include, marriage portion; money laid out either for the training of the child into a profession or setting him up in business; paying for his commission, paying for the goodwill of child's business and giving him stock-in-trade. As Romer J. stated in *Re Lacon* (1891) 2 Ch. 482, cases show that gifts of shares of residue, of shares in partnership property and of real estate have been considered and treated as portions. Whether or not a gift is to be regarded and treated as a portion depends on the intention of the donor which may be drawn from the circumstances in which the gift was made. See *Re Georges Will Trust* (1948) 2 All E.R. 1004 at 1009.

There is no difficulty where the purpose for which the gift is made is expressly stated, but where in the absence of such evidence a father gives a large sum of money to a child in one payment, the presumption is strengthened that the money is intended to start him in life or make a provision for him; but if it is a small amount that is so given, it requires strong evidence to show that it is intended to be a portion. See *Taylor v. Taylor* (supra). However, there is presumption of a portion where the purpose for which the payment was made has been shown to be that which every one would recognise as being for establishing the child or making a provision for the child.

It is not an overstatement that it is not every payment made or gift to a child that is to be regarded as advancement by way of portion. This point was emphasised by Jenkins J., in *Re George's Will Trusts* (supra), when he said, quoting the Master of Rolls in *Re Vaux* (1939) Ch. 465, 'when the words "portion" is used in reference to a gift *inter vivos*, it has a qualitative significance, in this sense, that it is not every gift *inter vivos* that will cause the rule to come into operation. Similarly, there may be various reasons why the testator should give property to a child. He may wish to free him from some embarrassment, or something of that kind. In cases of that sort upon the facts a gift may not be a portion at all, in which case, of course, the rule does not apply'. *Re George's Will Trust* (supra) at 1008. In that case, the testator left substantial part of his residuary estate to his son. Later he gave live and dead farm stock and assigned leases to the same child. Jenkins J., held that a gift by a farmer to his son of live and dead stock with which to set up in business as a farmer may be in the nature of a portion and in the absence of circumstances tending to show the contrary, would generally be regarded as such.

In *Re Scott* (1903) 1 Ch. 1, it was held that a sum expended by a father in paying his son's debts is not necessarily an advance to the son by way of portion but may be regarded as a tem-

porary assistance. Casual or occasional gifts of no qualitative significance will not be regarded as portions, neither would the aggregate of such gifts; 'the court has never added up small sums in order to show that if the child claims those sums as well as the larger provision made for him by the parent, he would be taking a double portion.' See Wigram V.C. in *Suisse v. Lowther* (1843) 2 Hare 424, at 434, 67 E.R. 175; *Re Peacock's Estate* (172) L.R. 14 Eq. 236.

Where the father is a donee of a special or general power of appointment and he exercises it by appointing the property to a child, the gift will be regarded as a portion just as much as if the property were the father's own. In *Re Peel* (1911) 2 Ch. 165 at 170, a testator, who had a special power under a marriage settlement to appoint certain funds, exercised it by will appointing it among his seven children equally. Later, he exercised it by deed appointing a seventh share of the funds to each of two of these children. Joyce J. held that the two children could not claim to share in the appointment under the will. 'In popular language, the sums appointed by deed, as also bequeathed by the will, are portions properly so called in legal language'; a portion includes a sum of money secured to a child out of property either coming from or settled upon its parents, it does not cease to be a portion because it is given to all the children.

4.0 CONCLUSION

It is not every payment made or gift to a child that is to be regarded as advancement by way of portion. Where the father is a donee of a special or general power of appointment and he exercises it by appointing the property to a child, the gift will be regarded as a portion just as much as if the property were the father's own. Where a testator gives a legacy to his creditor without any reference to the debt, such legacy will be presumed to be a satisfaction of the testator's indebtedness to the donee.

5.0 SUMMARY

In this unit we have considered the doctrine of satisfaction. You should now be able to: define satisfaction; explain satisfaction of debt by legacy and how legacy can be used to satisfy a legacy.

6.0 TUTOR-MARKED ASSIGNMENT

- (i) What do you understand by portion? Expantiate.
- (ii) Explain satisfaction of portion debt by legacies or by subsequent portions.

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

Jegede M. I. (2007rep.) *Principles of Equity*; Ibadan: Unique Design/Prints

MODULE 3

Equitable Remedies

Unit 1	Injunction
Unit 2	Specific performance
Unit 3	Rescission
Unit 4	Rectification, delivery up and cancellation of documents

UNIT 1

INJUNCTION

CONTENTS

1.0	Introduction
2.0	Objectives
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5.0	Summary
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1.0 INTRODUCTION

In Modules 1 and 2, we considered a number of issues under the general principles of equity. In this module 3, we will look at equitable remedies and particularly in this unit, we will consider the remedy of injunction. Under the English legal system the award of a decree of injunction was, for centuries, exclusive to the Chancery Court. The reason for this exclusive jurisdiction of Chancery is to be found in the peculiar history of the English legal system whereby law and equity were, for a considerable length of time, administered in separate courts administering separate jurisdictions. The unpleasant situation resulting from the dual administration of justice led to the merging (by series of enactments in the 19th century) of both jurisdictions into the Supreme Court of Judicature.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Explain the remedy of injunction;
- (ii) List the legally enforceable rights; and
- (iii) Differentiate the types of injunction

3.0 MAIN CONTENT

3.1 The position in Nigeria

With regard to the award of injunction, the starting point for the merger was the Common Law Procedure Act of 1854 which empowered the Common Law Courts to grant injunction in certain cases; and finally the Judicature Acts, 1873-75 which abolished the old system of courts and in its place, created the Supreme Court of Judicature with power to administer law and equity. By

the provisions of section 16 of the Act of 1873 the Supreme Court of Judicature was vested with all the jurisdiction hitherto exercised by both the common law and the Chancery Courts. Section 25(8) of the Act specifically provides that 'the High Court may grant... an injunction ... by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do ... either unconditionally or on such terms and conditions as the court thinks just.'

The above provisions did not materially affect the grant of an injunction by a Nigerian Court. Before and after the passing of the Act, there has always been one system of court administering rules of law and of equity, although both the Supreme Court and the States High Courts are now enjoined by the statutes to administer law and equity concurrently and in the same manner as they are administered by Her Majesty's High Court of Justice in England. Furthermore, section 16(b) of the Federal Supreme Court Act, 1960 empowered the Supreme Court to grant, in every cause or matter pending before it, either absolutely or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter.

Similarly, section 19 of the High Court of Lagos Ordinance empowered the High Court to grant an injunction in all cases in which it appears to the court to be just or convenient so to do. The combined effect of the above provisions is to confer on both the Supreme Court and the High Courts a wide discretion in the award of injunctions. The exercise of this discretion must, however, be consistent with what is reasonable and just in the circumstance. This means that the court ought to be satisfied that the injunction which is being granted is as to its terms considering all the circumstances of the case as affecting both parties, reasonable and just. See *Leslie F. Tate v. The Senior Immigration Officer* (1962) L.L.R. 73, 76.

The jurisdiction of the court to grant injunction is not limited to any particular cause or matter. Contra Lord Esher in *North London Railway Co. v. Great Northern Railway Co.* (1883) 11 Q.B.D. 30, C.A. The court may exercise its jurisdiction in novel cases provided it is just and reasonable and that the right sought to be protected is one recognised and enforceable either at law or in equity. The principle with regard to injunction is that the court would grant an injunction for the protection of legally enforceable rights or the prevention of injury according to legal principles. See *Martins Properties Ltd. V. Albert Anthony Coury* (Unreported) Suit No. LD/690.1968 (Lagos High Court 24/3/69).

General Principles

Though the Nigerian legal system did not inherit the problem of dual jurisdiction it did inherit the general principles regarding the grant of an injunction.

3.2 Legally Enforceable Rights

The grant of the remedy depends on the existence of a legally enforceable right. A plaintiff seeking the remedy must first establish a right recognised and enforceable either at law or in equity. See *Odunuwe v. Uduaga* (1952) 14 W.A.C.A. 187; *Onayemi v. Bouari* (1954) 14 W.A.C.A. 597; *Gottschalk v. Spruce* (1956) 1 F.S.C. 42. In *Adam v. Duke* (1927) 8 N.L.R. 88 at 91, Webber J. said 'I am ... unable to find any substance in the statement of claim, nor can I find that any legal demand or claim was made for subscriptions or tribute or contributions as alleged. On these findings there would appear to be no legal cause of action ... The claim for an injunction must fail. There is nothing to restrain, nor does any reason exist for an injunction. The court will not restrain the defendant from making assertions. There must be a violation, a real and substantial violation of some right, before a court grants an injunction. As far as I am to judge on the facts, it is difficult to understand what relief is sought in respect of any cause of action. I am unable to trace any cause of action; there seems to be an absence of such facts as would give rise

to an enforceable claim. What has been interfered with or even threatened'. See also *Aileru v. Beinin* (1961) L.L.R. 45, 55.

It is now settled that the court will not grant an injunction where the plaintiff is unable to show an actionable wrong. The fact that the act of the defendant is injurious to the plaintiffs not sufficient so long as such act does not constitute an infringement of a legally enforceable right (*Day v. Brownrigg* (1878) 10 Ch. D. 294; *Webster v. Webster* (1916) 1 K.B. 715) nor will injunction be granted where it has not been clearly established that the defendant has infringed or threatened to infringe the plaintiff's right. See *Braide v. Adoki* (1931) 10 N.L.R 15; *Pattison v. Gilford* (1874) L.R. 18 Eq. 259.

In *Wey v. L.E.D.B* (1957) L.L.R. 20-21, the plaintiffs sought an interlocutory injunction to restrain the defendant from pulling down the houses of the plaintiffs and ejecting the plaintiffs or any occupier therefrom. The plaintiffs alleged that the defendants had threatened to pull down the plaintiffs' houses. The remedy was refused on the ground that the allegations of threats were based on the bare word of the plaintiffs unsupported by any other evidence. 'Even if the threats were made, it seems to me that the demolition and forcible ejection are still only in prospect; It may be that, from their observation of what has been going on around them, the plaintiffs think or anticipate that their houses may be pulled. That is not enough. The mere prospect of injury does not give a right to the relief asked for here and I am not satisfied that the injury, if it be done, is anything more than in prospect at the moment.'

The fact that the nature or character of the right sought to be protected is tenuous is not a sufficient defence if it is established that there is an enforceable right which has been substantially violated. In *Umana v. Ewa* (1923) 5. N.L.R. 25 at 28, the plaintiff who was a mere occupier of a piece of land, brought an action for an injunction to restrain the defendant for an unlawful interference with the plaintiff's use and enjoyment of the land. The trial court held that, as the plaintiff and the persons whom he represented had been permitted by the owners of the land, whoever they might be, to live on the land and to use the land for fanning and other purposes, they had acquired a right under native law and custom which the court must recognise and if necessary protect by injunction addressed to persons who without any lawful authority interfered With their use and enjoyment of the land. On appeal, the defendant/appellant contended that as the plaintiff/respondent had not proved that the land belonged to the House of Family of which he was a member and that even if he had proved it, he was not in a position to ask for a declaration to that effect; therefore, he had not proved any right in the land in respect of which an injunction could be granted.

Rejecting this contention, Combe, C.J. delivering the judgment of the court said 'Whether the land is owned by the house of which he is a member or is owned by the Ntiero family the plaintiff has acquired a right under native law and custom to continue to use the land which he has been permitted by the owners to use, without any unlawful interference, and if it is proved that there has been a persistent unlawful interference with such use by a stranger the court would be fully justified in granting an injunction to restrain such interference.' See further, *Orku Sowa v. Amachree* (1933) 11 N.L.R. 83

Certainty of Rights to be Protected

The right sought to be protected by a decree of injunction must be clearly defined and ascertainable. See *Karama v. Aselemi* (1938) 4 W.A.C.A. 150. In *Cother v. Midland Railway Co.* (1848) 2 P.R. 470 at 472; 41 E.R. 1025, Cottenham L.C., in the course of his judgment dissolving injunction granted by Vice-Chancellor said 'I think the right should be declared, and the injunction

founded upon such declaration that the order may inform the defendant what the opinion of the court is as to the limits of his right, and not expose him, in the exercise of such right, to the consequences violating so vague an injunction.'

The court will grant an injunction only at the suit of a party having sufficient interest in the right sought to be protected. See *Maxwell v. Hogg* (1867) 2 Ch. App. 307, 317; *Akerele v. Awolowo* (1962) W.N.L.R. A mere declaration of intention to do something without any further positive act on the part of the declarant will not constitute sufficient right capable of being protected injunction. Though injunction is available in variety of cases, it will not be granted if the claim for it is not put before the Court. However, where the court allows the plaintiff's claim to be amended by adding a claim for an injunction and the court is entitled to allow such amendment, on the amendment having been made, the injunction may be granted if the facts proved were such as to justify the court in granting an injunction.

Injunction will not be granted in favour of a volunteer. In *Akenzua II Oba of Benin v. Benin Divisional Council* (1959) W.R.N.L.R. 1, the plaintiff, the Oba of Benin and President of the defendant council, sought to recover damages for breach of contract, alleging that the council, having granted to him a concessionary right to exploit timber exclusively in a certain area, withdrew the right without cause and without notice. In the alternative, the plaintiff claimed a declaration of his rights, an injunction and damages.

The consideration for the alleged contract was founded in services alleged to have been rendered by the plaintiff to the council by using his influence as Oba to secure the release by the United Africa Company Limited, the holder of certain rights of exclusive exploitation of a larger area including that in respect of which this action was brought. The defendant contended, *inter alia*, that the plaintiff gave no consideration for the alleged contract and that being a volunteer and not a purchaser for value, the plaintiff could not be granted equitable relief.

Thomas, J., found as a fact that the resolution of the council which the plaintiff alleged to have given him the right claimed was never made before the areas in dispute were released by the United Africa Company Ltd. nor was the promise by the plaintiff to get the areas released. His Lordship observed that it was rather odd, in the circumstances of the case, that the plaintiff could imagine that he would become a licensee in perpetuity of a very vast area of land within which to exploit timber by the passing of the council's resolution, *simpliciter*, and without giving any valuable consideration whatsoever. It was, therefore, clear that the plaintiff had no enforceable contract, the claim for injunction was accordingly refused; the plaintiff being a volunteer and equity will not assist a volunteer but a purchaser for value.

The remedy will not be granted where its effect will be valueless or ineffective. 'Equity like nature does nothing in vain.' See *Eshugbayi Eleko v. Frank Morrish Baddeley* (1925) 6 N.L.R. 65 and *Joshua Awopeju v. Madam Eleke* CCHCJ/9172, 76.

3.3 Types of Injunction

An injunction is an equitable remedy granted by the court compelling a party to do or to refrain from doing an act. The order is mandatory or positive where it compels a party to do an act; it is prohibitory or restrictive where it prohibits the doing of an act. The various types of injunction are:

1. Mandatory and Prohibitory Injunction
2. Perpetual Injunction
3. Interlocutory Injunction

4. Quia Timet Injunction
5. Exparte Injunction

Let us briefly consider each one.

Mandatory and Prohibitory Injunction

The essence of a mandatory injunction is to compel a party to restore things to the condition in which they were at the time the plaintiff's complaint was made or before the defendant committed the act complained of. See *Isenberg v. East India House Co.* (1863) 3 D.J. & S 263 at 272. 32 and *Smith v. Smith* (1875) L.R 20 Eq. 500. For reasons of history and convenience, judicial attitude tends to favour the grant of prohibitory rather than mandatory injunction. For a long period, most injunctions were (and still are) prohibitory both in form and substance. The reason being that the remedy of injunction is essentially restrictive.

Secondly it was much easier to restrain a party from doing an act than to compel him to perform a positive act, since the Court of Equity will not grant a remedy, the enforcement of which will require the supervision of the court. Thus, the general restrictive character of injunction and the drastic effect of mandatory injunction in particular favoured the disinclination of the court to grant mandatory injunction. If and when it is granted, greater caution is exercised, and for a long period of time a mandatory injunction was always granted in negative terms when it was obvious that its effect was positive.

There is no longer any distinction in principle between granting a prohibitory injunction restraining a party from interfering with a right and granting a mandatory injunction in a positive term, compelling a party to grant a right. See *Davies v. Gas Light and Coke Co.* (1909) 1 Ch. 708. The merits of an injunction are the overriding consideration; whether an injunction is mandatory or prohibitory in form or substance is of little significance provided the effect of the order does not impose an impossible or unenforceable or unlawful obligation. See *Pride of Derby v. British Celanese* (1953) 1 Ch. 149, 181.

Buckley J. in *Charington v. Simons & Co. Ltd.* (1970) 1 W.L.R 725 at 730, stated the principles governing the issue of a mandatory injunction. He said: 'the court must, take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant. A plaintiff should not, of course, be deprived of relief to which he is justly entitled merely because it will be disadvantageous to the defendant. On the other hand, he should not be permitted to insist on a form of relief which will confer no appreciable benefit on himself and will be materially detrimental to the defendant.'

SELF ASSESSMENT EXERCISE 1

Define injunction.

Perpetual Injunction

Perpetual injunction is based on a final determination of the rights of the parties, and is intended permanently to prevent infringement of a right, and obviate the necessity of bringing an action after every such infringement. See *Odunuwe v. Uduaga* (1952) 14 W.A.C.A. 187 at 188. The order does not necessarily last for ever contrary to what the description or terminology of the order implies. It, however, settles permanently, the existing dispute between the parties being an order that is made only after both parties to the dispute have been given the opportunity of being heard

and the merits and demerits of disputants' contentions considered. The order is appropriate and usually made to prevent a continuous infringement of a right and the continuous injury that flows from such infringement. See *Ojiako v. Ogueze* (1962) 1 AllNLR 58.

It is equally appropriate in the application for *quia timet* injunction where the plaintiff shows a genuine and reasonable fear that a violation of his right is threatened and that damages would not be an adequate compensation for the imminent injury that would result from such infringement. Furthermore, a perpetual injunction is granted in order to prevent multiplicity of suits. The court *prima facie* would however not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. See *Martins Properties Ltd. V. Albert Anthony Coury* (supra). This is the very first principle of injunction law.

§.

The award of the remedy is discretionary, though this discretion is not to be arbitrarily exercised. See *Adeyeye v. Adewoyin* (1960) 5 F.S.C. 146. By and large, it is a settled principle that the award of injunction is discretionary and that the exercise of this discretion must be guided by established principles and practice having regard to the surrounding circumstances of each case. In the process, various matters are taken into consideration. Such as -

- (i) Temporary Nature of the Infringement
- (ii) Minor Damage
- (iii) Limited Owner
- (iv) The Problem of Compliance
- (v) Undertaking

Interlocutory Injunction

An application for an interlocutory injunction postulates that the applicant has a right, the violation of which he seeks to prevent and in order to do so effectively to ensure at that stage of the proceedings that the subject-matter of the right be maintained in status quo. Therefore, an interlocutory injunction is that kind of equitable remedy which is only granted at the discretion of the court in order to nullify an actual or anticipated alteration of the 'status quo' or to prevent the commission of some act or the taking of some steps which will be impossible to reverse if done or taken. Interlocutory injunction is granted before the final determination of the substantive issue between the parties. When granted, the effect may be mandatory or prohibitory.

See *Duvin Pharmaceutical and Chemists Co. Ltd. v. Beneks Pharmaceuticals and Cosmetics Ltd. & 2 ors.* (2008) 1-2 SC 68. Where the Supreme Court held that the issuance of order of Interlocutory Order is at the discretion of a court which discretion must be exercised judicially and judiciously and once an appellate court is satisfied that this principle of law has been met, it will hesitate to interfere with the exercise of such discretion by the trial court.

In *Akinpelu v. Adegboire & 3 ors.* (2008) 4-5 S.C. (pt.II) p. 75, the Supreme Court held that:

“... an application for an Interlocutory Injunction is procedurally between Interim Injunction and Perpetual Injunction and is usually granted by the court pending the determination of the case. For such an applicant to succeed the applicant must show as decided by the Supreme Court in *Kotoye v. Central Bank of Nigeria* (1989) 2 S.C. (Pt. 1) 1, (1989) 1 NWLR (Pt.98) 419 that;

- (a) There is a serious issue to be tried and that the applicant has a real possibility, not probability of success at the trial;
- (b) The balance of convenience is on the applicant's side;
- (c) Damages cannot be an adequate compensation;
- (d) The applicant's conduct is not reprehensible e.g. that he is not guilty of delay;

- (e) That the applicant has given satisfactory undertaking as to damages save in recognized exceptions.”

In *Kotoye v. CBN* (supra), by a letter dated 14 April, 1987 to the Societe de Generale Bank by the CBN, the CBN ordered certain steps to be taken and nullified certain decisions reached by the bank. The said letter affected both the interests of the bank and those of some of its directors including the plaintiff. Consequently, on 22 April, 1987 the plaintiff filed an action in the Federal High Court, Lagos against the CBN, Att-General of the Federation, Societe de Generale Bank, challenging the directives contained in the letter of 14 April, 1987. On that same day (i.e 22 April, 1987), the plaintiff filed an ex parte praying for an order:

- (1) Restraining the first and second defendants and their servants/agents from in any way obstructing or frustrating the holding of the annual general meeting of the third defendant bank until the final determination of this suit;
- (2) For an order of injunction that until the pending of the suit, the defendants be restrained from appointing or re-organising the appointment of any person(s) as director of the bank other than such of them as are or may be duly appointed in accordance with the provisions of the articles of association of the bank’

No motion or notice was filed to the same effect. On the same day, the Federal High court granted reliefs sought in the application and more. The first defendant (CBN) and the fourth defendant who later joined the suit appealed against the ruling on the ex parte application to the Court of Appeal. The Court of Appeal allowed the appeal and set aside the orders. The plaintiff thereupon appealed to the Supreme Court against the decision of the Court of Appeal.

The Supreme Court held that:

- (1) An interlocutory injunction is one made pending the determination of a suit;
- (2) An interim injunction is one granted to last until a named or definite or until further order or pending the hearing of a motion on notice between the parties;
- (3) An ex parte injunction which is either interim or interlocutory is granted where there is a real urgency and it is one of the inherent powers of a court of law for the enhancement of the administration of justice;
- (4) An interlocutory injunction being an injunction granted after due contest *inter partes* cannot be made unless there is an application on notice duly served on the other side and the evidence for the determination of the application is by affidavit evidence.

The applicant must establish a probability or a strong prima facie case that he is entitled to the right of whose violation he complains. See *Kufeji v. Kogbe* (1961) 1 All NLR 113; and *Donmar Productions Ltd. V. Barr & ors.* (1967) 1 WLR 740, 742. It is not necessary that a plaintiff or applicant should make out a case as he would on the merits, it being sufficient that he should establish that there is a substantial issue to be tried at the hearing.

An interlocutory injunction will be granted to restrain an apprehended or threatened injury where such injury is certain or very imminent, or mischief of an overwhelming nature is likely to be done. See *Mbonyi & Or. v. Dadzie* (1940) 6 WACA 125. The remedy will not be granted when the wrong which it is sought to restrain thereby is only in prospect. See *E.O. Wey v. L.E.D.B.* (1957) L.L.R. 20. It is a settled law that an interlocutory injunction will not be granted when the injury complained of can be fairly compensated in pecuniary damages. Thus the applicant must show that he will suffer irreparable injury that which is not prevented by injunction cannot be afterwards compensated for by any decree which the court can pronounce in the result of the case. See *Akinlose v. A.IT. Ltd.* (1961) W.N.L.R. 116; and *Attorney-General v. Hallett* (1847) 16 M. &

W. 569. Whether an injury complained of is irreparable or not depends on the facts and circumstances of each case. See *Saunders v. Smith* (1838) 3 My & Cr. 711 at 728.

Balance of Convenience is another important consideration in the granting or withholding an interlocutory injunction. Such consideration is predicated on the relative convenience or inconvenience to the parties of granting or withholding an injunction. See *Republic of Peru v. Dreyfus Bros. & Co.* (1888) 38 Ch. 348, 362; and *Ladunni v. Kukoyi* (1972) 1 All N.L.R 133. Infact, the over-riding consideration prescribed by law for granting of an interlocutory injunction apart from establishing that there is a matter for determination is that the action must appear to the court to be just or convenient so to do. See *Leslie F. Tate v. Senior Immigration Officer* (1962) L.L.R. 73, 76; and *Ayo Arubi v. Ewere & Ors.* (1971) 1 UILR 50, 52.

Thus, where the plaintiff has made out a probable case for ultimate relief or where the evidence leaves this so much in doubt that the court must see there is a serious question of difficulty to try, then this matter of balance convenience becomes a paramount importance. See *Ladunni v. Kukoyi* (supra). At all times the burden of a *prima facie* case and also the proof on balance of convenience, lies in favour of a person applying for injunction.

Since the jurisdiction to grant interlocutory injunction is equitable, the court must consider the behaviour or conduct of the parties both before and at the time of the application and the decision whether to grant the order sought must be related to actual and ascertained facts of the current situation. Similarly, interlocutory injunction being an equitable relief, he who wants it must come with clean hands. See *Blakemore v. Glamoganshire Canal Navigation* (1832) 1 My & K 154, 168. Interlocutory injunction may be prohibitory or mandatory although mandatory injunction is rarely granted.

Quia Timet Injunction

This is a kind of injunction sought by a person to restrain the doing of an apprehended mischief. Unlike perpetual and interlocutory injunctions which are sought to restrain infringement or alleged infringement of rights, a *quia timet* injunction is sought before the mischief is done. Thus the exercise of the equitable jurisdiction is predicated on the fact that a person is entitled to take action *quia timet* before he is actually injured. See *Niger Chemists Ltd. v. Nigeria Chemists Ltd.* (1961) 1 All N.L.R. 171; See James L.J. in *Hendricks v. Montagu* (1881) 17 Ch.D. 638, 65 where he said 'No doubt the application is an application *quia timet*, that is to say, it is to prevent something ... which is being threatened and intended - to prevent something which the defendant is threatening and intending to do.'

Because of the drastic effect of injunction in general, and the fact that *quia timet* injunction is in particular, meant to restrain an act that has not been done, courts are always wary and reluctant to grant *quia timet* injunction. See *Graigola Merthyr Company Ltd. v. Corporation of Swansea* (1929) A.C. 344; *Crowder v. Tinkler* (1816) 19 Ves 617; *Emmanuel Ojo Wey v. L.E.D.B.* (1957) L.L.R. 20. Therefore, to succeed in an action for a *quia timet* injunction, the plaintiff must establish a clear and convincing evidence of probability of irreparable injury; or that injury must necessarily and inevitably follow if the apprehended or the threatened act is not restrained. See *Crowder v. Tinklerop.cit* and *Pattison v. Gilford* (1874) L.R. 18 Eq. 259.

Ex Parte Injunction

Normally, an applicant for an injunction must serve upon the defendant, a notice of the motion; this is to avail the defendant an opportunity of preparing his defence, and of being heard. But in

certain cases, because of the urgency of the matter, which require speedy procedure, an *ex parte* injunction (that is an injunction that is granted before the defendant has had time or opportunity to defend or oppose the application and, or before the notice of the motion is served upon the defendant) may be granted. This type of injunction is granted for a very short period because it is granted solely on the evidence produced by the applicant. See *In re: F. R A. Williams* (1962) 1 All N.L.R 324. The defendant is, however, expected to be served before the next motion day when he would be expected to make a case for the discontinuance of the injunction before the trial of the substantive action.

In *Group Danone & Anor. V. Volvic (Nig.) Ltd.* (2008) 3-4 S.C. 32, the Supreme Court held:

“That it is inappropriate *vide Odogwu v. Odogwu* (1992) 2 NWLR (Pt. 225) 539 at 554, to have commenced contempt proceedings , against the respondent who have severally challenged the court on the validity of the ex-parte order for which it is being proceeded against and when such legal challenge has not being resolved one way or the other.

That the circumstances whereby the respondent had to file the application for determination by the lower court, clearly constitute exceptional circumstances, as things stood before the trial court. The trial court was obliged in the circumstances, to have postponed the hearing of the contempt application till after it would have disposed with Respondent’s application before it for the discharge of its ex-parte order of injunction.”

Damages in Lien of Injunction

It is settled law that if a plaintiff applies for an injunction to restrain a violation of a right, be it a common law right or an equitable right, and if either the existence of the right or the fact of its violation be disputed, the onus of establishing that right and its violation is on the plaintiff. But once the onus is discharged, the plaintiff is, *prima facie*, entitled to an injunction to prevent the recurrence of the violation. See *Imperial Gas Light and Coke Company v. Broadbent* (1859) 7 H.L. 600, 612.

From the time of the passing of Lord Cairn's Act in 1858, the jurisdiction to award damages in addition to or in lieu of injunction has been given to the court. The exercise of this jurisdiction is discretionary; it will not be exercised if the result of its exercise will tend to turn the court into a tribunal for legalising wrongful acts; or where it will allow a wrong to continue simply because the wrong-doer is able and willing to pay for the injury he may inflict. See *Shelfer v. City of London Electric Lighting Company* (1895) 1 Ch. 287, 315.

In *Maxwell Egbugara v. Nigerian Coal Corporation* (2206) 4 FWLR pt. 345 p. 7396, the Court of Appeal held that:

“No order for interlocutory or interim injunction shall be made ex-parte or by motion on notice except upon condition that the appellant gives a satisfactory undertaking as to damages. For the applicant to succeed, even if he has shown that he has a good case and that the balance of convenience is on his side, he must show that damages cannot be an adequate compensation for his injury if he succeeds at the end of the day.”

The case of *Globe Fishing Industries Ltd. v. Coker* (1990) 7 NWLR (Pt.162) p.265 clearly distinguishes between perpetual, interlocutory and interim injunction. The court held:

“(1) that the purpose of an application for an interlocutory injunction pending the determination of the substantive suit is to keep the parties in status quo in which they were before the judgement or act complained of;

(2) an injunction sought pending the determination of the substantive suit can only be in-

terlocutory and not interim as an interim injunction is one that can be discharged during the pendency of the substantive action;

(3) an application for an interlocutory injunction is not the same as that for a perpetual injunction. Whereas a perpetual injunction can only be granted after a trial and the applicant has established his right and an actual infringement of it, an interlocutory injunction is granted pending the trial of the action in order to keep matters in *status quo* until the issues in controversy between the parties can be tried and determined. ...”

The remedy of injunction is available in a variety of cases and for the protection of innumerable rights at law and in equity.

4.0 CONCLUSION

The jurisdiction of the court to grant injunction is not limited to any particular cause or matter. The court may exercise its jurisdiction in novel cases provided it is just and reasonable and that the right sought to be protected is one recognised and enforceable either at law or in equity. The principle with regard to injunction is that the court would grant an injunction for the protection of legally enforceable rights or the prevention of injury according to legal principles.

5.0 SUMMARY

In this unit, we studied the equitable remedy of injunction. We considered legally enforceable rights, types of injunction and circumstances when damages can be awarded in lieu of injunction. You should now be able to: explain the remedy of injunction; list the legally enforceable rights; and differentiate the types of injunction.

6.0 TUTOR-MARKED ASSIGNMENT

- (i) Differentiate between mandatory and perpetual injunction.
- (ii) When can damages be awarded in lieu of injunction?

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

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UNIT 2 SPECIFIC PERFORMANCE

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1.0 INTRODUCTION

In the last unit, we considered the equitable doctrine of injunction. In this unit, we will consider another equitable remedy – specific performance. The equitable doctrine of specific performance is particularly important in the realm of the law of contract. The exercise of the jurisdiction to grant the remedy dates back to the reign of Edward IV. See Story on Equity (3rd ed.) p.305. It may be stated that the development of the remedy by the Chancery Court is, perhaps, one of the earliest forays made by the court in its bid to provide a better and more remedial justice where the remedy provided at common law was found defective or inadequate.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Describe the nature of the remedy;
- (ii) List the circumstances in which the remedy will be granted or refused;
- (iii) Explain the doctrine of part performance; and
- (iv) List the grounds for refusal of the remedy.

3.0 MAIN CONTENT

3.1 Nature of the Remedy

There is no right, either at law or in equity, which permits a party to a contract to breach the contract, though the power to do so is not so much denied. However, whenever this power is exercised or resorted to by a contracting party, the attendant consequences at law may be different from those in equity if it is a contract in which specific performance is the appropriate remedy. At common law contract is a 'personal agreement' between two parties, and because of the personal nature and character of the relationship thus evolved, in the eyes of the common law, either of the contracting parties may unilaterally decide to breach the contract. The only remedy provided at common law, for such course of conduct is payment of damages by the guilty party to the innocent party. Whether damages are adequate for the wrongful act is not within the consideration of the common law.

On the contrary Courts of Equity deemed such a course in many instances inadequate for the purposes of justice; and, considering it a violation of moral and equitable duties, they did not hesitate to interpose, and require from the conscience of the offending party a strict performance of what he could not, without manifest wrong or fraud, refuse. Therefore, the position in equity is that the court, in the exercise of its equitable jurisdiction, will in certain circumstances compel parties to a contract freely entered into, to perform their obligations according to the terms of the contract and to respect the sanctity of the contractual relationship created by their acts. If equity had not interfered in this way, it would have been possible in many cases for parties to a contract to buy off their duties under the contract to the detriment of innocent parties.

In *Greene v. West Cheshire Rly. Co.* (1871) L.R. 13 Eq. Cas. 44 at 50-51. James Bacon V. C. observed:

'The plaintiff has performed his part of the contract; the company have made and opened their railway, and they now refused to perform the other part of that contract, by force of which alone they acquired possession of the plaintiffs land. A more direct, wilful, and determined violation of a plain contract cannot be suggested. No excuse is offered for it, no suggestion that it is impracticable, or even that it is inconvenient', for the company to perform their part of the contract of which the plaintiff has performed his; but what they say is, that the plaintiff may, by an action at law, recover against them in money such amount of damages as a jury may think he has sustained by their wilful breach of their contract; and that, therefore, a Court of Equity will not entertain his complaint. I do not understand that the law, as administered in this court, countenances any such defence. If that were the law, the great majority of the cases in which this court has exercised its authority for the purpose of compelling specific performance of contracts might be readily disposed of, because in the great majority of cases a payment in money might satisfy the wrong which the breach of such contracts inflicts.'

Thus, specific performance is an order of the court by which a party to a contract is compelled to specifically fulfil his obligations in accordance with the terms of the contract. As will be seen below, the remedy 'shows the extent of the power of equity to assist the common law, limited only by canons of common sense and the practical limitations on the power to oversee and administer specific performance decrees.' Per Lord Upjohn in *Beswick v. Beswick* (1967) 2 All E.R. 1197 at 1220.

The Question of Damages

Courts of equity do not profess to decree specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective that it becomes necessary for Courts of Equity to interfere. See *Flint v. Brandon* (1803) 8 Ves 159. Thus, the equitable remedy of specific performance was invented to meet cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract. See *Ryan v. Mutual Tontine Association* (1893) 1 Ch. 126; *Williams v. Smith & Ors.* (1948) 19 N.L.R. 21.

In *Greene v. West Cheshire Rly. Co.* (1871) L.R. 13 Eq. 44, the court decreed specific performance of an agreement although it was clear that the plaintiff had a concurrent remedy in damages. In *Hutton v. Watling* (1948) Ch. 26, Jenkins J. observed that the jurisdiction to grant specific performance of a contract for the sale of land is to be founded not on the equitable interest in the land which the contract is regarded as conferring upon the purchaser, but on the simple ground that damages will not afford an adequate remedy.

There are certain classes of contracts which by statute, must be in writing otherwise, such contracts are

unenforceable and, therefore, no action for damages will lie at law for a breach of such contracts. But in equity, specific performance of such contracts may be granted provided there is sufficient act of part-performance. Similarly, stipulation as to time in contracts provides another illustration where the common law will recognize the right of a party to repudiate a contract or claim damages for its breach, but, on the contrary, equity may grant specific performance of the same contract in favour of the other party to the contract. At common law, time is of the essence of the contract. If a party to a contract fails to perform his obligation under the contract within the time stipulated in the contract, the other party is entitled to repudiate the contract or claim damages; but in equity, time is not of essence of the contract and equity may grant specific performance of the contract in favour of the party against whom an action for damages may lie at law. Thus a guilty party at law may, in certain circumstances, be entitled to specific performance in equity.

3.2 Discretionary nature of the remedy

'Indeed, the dominant principle has always been that equity will only grant specific performance if under all the circumstances, it is just and equitable so to do.' Per Lord Parker of Waddington in *Stickney v. Keeble* (1915) A.C. 386 at 419. This brings out the discretionary nature of the remedy. As stated by Rigby L.J. in *Scott v. Alvarez* (1895) 2 Ch. 603 at 615 C.A, from the very first, when specific performance was introduced it has been treated as a question of discretion whether it is better to interfere and give a remedy which the common law knows nothing at all about, or to leave the parties to their rights in a court of law.

Unlike the common law remedies, specific performance cannot be claimed as of right; this is true of the early development of equity jurisdiction but, for a long time now, the correctness of the statement is no longer absolute. In many cases, the circumstances and the rules under which specific performance will be decreed are so well established that the court, exercising equitable jurisdiction, cannot afford to exercise any inconsistent judicial discretion. See *Behnke v. Bede Shipping Co.* (1927) 1 K.B. 649. In *Smith v. Colbourne* (1914) 2 Ch. 533 at 541, it was argued that specific performance should not be granted in respect of a contract for the sale of certain building because the title was too doubtful to be forced upon the purchaser. Cozens-Hardy, M.R observed that the courts have in modern times not listened with favour to such a defence. 'It is the duty of the court, unless in very exceptional circumstances, to decide the rights between the vendor and the purchaser, even though a third person not a party to the action will not be bound by the decisions'.

In general, the exercise of the jurisdiction is still subject to the overriding inherent discretion of the court which must be judiciously exercised.

3.3 Circumstances in which the remedy will be granted or refused

The remedy is available in a variety of contractual relationships; whether or not it will be granted depends on the nature and character of the contract, its subject-matter and other numerous but varying factors which the Courts of Equity have established purposely to ensure that the exercise of the jurisdiction meets with the requirements of rational justice and fair-play.

1. Existence of Valid Contract

The grant of the remedy presupposes a valid contract; where this is non-existent the remedy will not be granted. See *Geore Mitchell v. Sherriff J. Charaff* (1942) 8 W.A.C.A. 99, 102. In *Tella v. Akere* (1959) W.N.L.R. 26, it was clear from the evidence before the court that the alleged contract for the sale of land, for which specific performance was being sought, did not in fact exist.

Similarly in *Savage v. Uwechia* (1961) 1 All E.R. 830, the Privy Council allowed the appeal against the decision of Federal Supreme Court granting specific performance of a contract on the ground that the agreement upon which the order of specific performance was based was not sufficient to constitute a contract for the sale of land. See further, *Bansedun v. Iyabo* (1962) 2 All N.L.R. 7.

Neither will the court grant specific performance of a contract whose terms are inconclusive, uncertain or ambiguous. See *Bansedun v. Iyabo* (supra); *Johnson v. Humphrey* (1946) 1 All E.R. 460. For, it is not within the jurisdiction of the court to make a contract for parties. See *Stimpson v. Gray* (1929) 1 Ch. 629. However, where the alleged inconclusiveness or uncertainty can be understood by reference to the context of the agreement, specific performance of the agreement may be granted. See *Jojo v. Cole* (1939) 5 WACA 99.

In *Ohiaeri v. Yussuf & Ors.* (2009) 6 NWLR (Pt. 1137) p. 207, the court held that:

“An action for specific performance arises once there exists a contract coupled with circumstances which make it equitable to grant a decree of same. A contract for the sale of land attracts a greater justification for a decree of specific performance because as opposed to other types of contract, the land may have a special and peculiar value to the purchaser. In the instant case, the 1st and 2nd respondents had every justification to claim for specific performance.”

2. Illegality

Equity will not decree specific performance of a contract that is void for illegality. Here, equity follows the law. In *Canfailla v. Chahin* (1939) 5 W.A.C.A 104, the West African Court of Appeal held that a contract to erect a building contravening the provisions of a legal enactment was illegal and could not be enforced. Nor will the court decree specific performance of a contract that affects adversely the public morality or general policy of the law of the land. See further *Stevens v. Gourley* (1859) 7 C.B. (N.S.) 99; 141 E.R 752; *Barclays Bank D.C.O. v. Hassan* (1961) All NLR. 836; *Corbett v. S.E. & Chatham Rly.* (1906) 2. Ch. 12.

It must be noted that where a party claiming specific performance relies on a document or memorandum which is merely unenforceable but not illegal, such unenforceability is not a bar to a decree of specific performance unless the invalidity or unenforceability is pleaded by the defendant. See *Barclays Bank D.C.O. v. Hassan* (supra) at 840. But where document is void for illegality the court will refuse to give effect to it although illegality has not been pleaded; the court cannot close its eyes to a transaction if it is illegal. See *Banwo v. A. G. Leventis* (1960) L. L. R. 78, 86.

3. Consideration

Since equity will not assist a volunteer, want of consideration is a complete bar to a decree of specific performance. See *Kuri v. Kuri* (1923) 4 N.L.R. 78. As Lord Hardwicke stated in *Penn v. Lord Baltimore* (1750) 1 Ves. Ser 444, 'the court never decrees specifically without a consideration.' Consideration is an essential requirement for the validity of a simple contract, absence of it renders such contract void at law and in equity. See *Savage v. Uwechia* (1961) I All E. R. 830, 832, P.C. Here, equity follows the law and will not grant a decree for specific performance. Even where the contract is under seal, being a voluntary contract, specific performance will not be decreed and parties will be left to their legal remedies. See *Earl of Aylesford v. Morris* (1873) L.R. 8 Ch. App 484, 490.

It is a settled rule of equity that inadequacy of consideration is not a bar action for specific performance although equity regards a gross inadequacy of consideration as an indication that the parties were not at arms' length. See *Earl of Aylesford v. Morris* (1873) L.R. 8 Ch. App 484,

490. Earlier authorities tended to accept the view that inadequacy of consideration is a ground for refusing specific performance. However, Lord Eldon in *Coles v. Trecothick* (1804) 9 Ves. 234, 236 and the House of Lords in *Callaghan v. Callaghan* (1841) 8 Ch. & Fin. 374, laid down the rule that before inadequacy of consideration could operate as a bar, the inadequacy must be so great as to prove or constitute evidence of fraud or that the consideration is so grossly inadequate as to lead to the inference that the parties could not have intended to execute the contract. Such circumstances could also raise a presumption of undue influence, a branch of equitable fraud, as to render enforcement of the contract inequitable.

In *Mia Sons Ltd. v. Afrotec* (1991) 5 MWLR (Pt. 194) p.724, it was held that a collateral contract for which valuable consideration has been given and which is different, distinct and severable from a main contract between the parties, is one on which the court can make an order of specific performance.

SELF ASSESSMENT EXERCISE 1

List the circumstances in which the remedy of specific performance will be granted or refused.

3.4 Doctrine of Part Performance

At law, certain contracts are required to be in writing; non-compliance with this requirement renders such contracts unenforceable. However, equity takes a more flexible view and will enforce a contract within this class by an order of specific performance, if the contract is one to which the equitable doctrine of part-performance applies. The exercise of this jurisdiction provides an illustration for the maxim that 'equity looks at the intent rather than the form.'

Basis of the Doctrine

Section 67(1) of the Property and Conveyancing Law (Western Nigeria), 1959 provides that 'no action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised.' Section 67(2) of the Law recognises the existence of the doctrine of part-performance by providing that 'this section applies to contracts whether made before or after the commencement of this law and does not affect the law relating to part performance, or sales by the court.'

The above provision in 'form' and substance is a re-enactment of Section 4, Statute of Frauds 1677 (an English Statute of general application, applicable in Nigeria, except in the Western and the Mid-western States). The Lagos State has similar provision in Section 5 of the Law Reform (Contracts) Act, 1961. It is evident, from the above statutory requirements that a contract relating to sale of land or to the disposition of any interest in land is not enforceable at law by either party to the contract unless the contract is evidenced in writing.

The effect of non-compliance with the statutory requirement is not to avoid the contract. In 1883, Lord Blackburn in *Maddison v. Alderson* (1883) 8 App. Cas. 467 at 488 said: 'It is now finally settled that the true construction of the Statute of Frauds is not to render the contracts within it void, still less illegal but is to render the kind of evidence required indispensable when it is sought to enforce the contract.' In the same case, Lord Selbourne observed as follows: 'it has been determined at law (and in this respect there can be no difference between law and equity)

that the 4th section of the Statute of Frauds does not avoid parol contracts but only bars the legal remedies by which they might otherwise be enforced. The object of the statute is to prevent the fraudulent setting-up of pretended agreements, and then supporting them by perjury.' See Story on Equity (3rd ed.) p.317.

To this extent, equity follows the law, and regards itself as bound by the provisions of the statute. But at the same time equity will not allow the statute to be used as an engine for fraud; therefore, in certain cases equity would decree specific performance of a contract for the sale or other disposition of interest in land, even if the contract is not in writing as required by the statute provided there is sufficient act of part-performance. For, it is possible for two parties to have freely entered into an oral agreement for the sale of land, and for one of the parties to rely on the statute as a defence if and when called upon to perform his own part of the contract.

Application of the Doctrine

A party relying on the doctrine of part performance must plead such facts and circumstances which will bring his case within it and must show by oral testimony or otherwise that the acts alleged by him amount in law to part performance. Before the application of the doctrine the following well-established conditions must be satisfied.

(i) The acts of part performance must be unequivocally and exclusively referable to, and denote the existence of, the alleged tract. See the following cases: *Maddison v. Alderson* (1883) 8 App. Cas. 467 at 475; *Rawlinson v. Ames* (1925) Ch. 96; and *Wusamotu Shelle v. Kaletu Rossek* (1938) 14 N.L.R. 80.

(ii) The Acts must be such as to render it a fraud in the Defendant to take advantage of the contract not being in writing. Much as equity follows the law it will not allow a statute designed to prevent fraud to be used as an instrument for fraud. However, the act of part-performance relied upon must show the equities arising from the relationship of the parties subsequent to the contract and that if specific performance of the oral contract is not granted, such equities will render it a fraud in the defendant to take advantage of the contract not being in writing. The equities arise not out of the contract itself but out of the altered position caused by the acts of the parties done in execution of the contract. See *Maddison v. Alderson* (supra) at 475; *Chaproniere v. Lambert* (1917) Ch. D. 356 at 359.

(iii) The contract to which the Acts of Part Performance denote must be capable of being enforced by a decree of specific Performance

This condition exemplifies the limit of equitable remedy of specific performance in general and that of the doctrine of part-performance in particular. The doctrine of part performance is confined to contracts relating to disposition of land or interest in land. It has no application either to contract of service or contract of guarantee; such contracts are not capable of being specifically performed and equity does not act in vain. See *Britain v. Rossiter* (1879) 11 Q.B.D. 123; and *Apara v. United Africa Company Ltd.* (1951) 20 N.L.R. 17.

(iv) The parol evidence which is let in by the act of Part Performance must establish a finally concluded contract

The equities resulting from the acts of part performance done in execution of the oral contract are the factors compelling the court to decree specific performance of the contract; therefore, such acts of part performance upon which the equities are premised, must let in proper parol evi-

dence of a concluded contract for which specific performance is sought. See *Maddison v. Alderson* (supra) at 475. The parol agreement need not set out the terms so long as the minds of the parties are at one upon matters which are essential and are cardinal to every agreement in relation to land.' See Adefarasin, J. in *African Coastal Shipping Service Ltd v. Nigerian ports Authority* (supra). However, the parties must have gone beyond the stage negotiation. See *Rossiter v. Miller* (1878) 3 App. cas. 1124; and *Marshall v. Berridge* (1881) L.R. 19 Ch.D. 233.

(v) The Act of Part Performance relied upon must have been done by the plaintiff and not by the defendant. See *Caton v. Caton* (1865) L.R. 1 Ch. app. 137. In *Ekpanya v. Akpan* (1989) 2 NWLR (Pt. 101) p. 86, it was held that the basis of the doctrine is that the plaintiff having altered his position on the faith of the contract, acquires an equity against the defendant. Thus, the part-performance must be by the plaintiff. Therefore, for the plaintiff to rely on part-performance, he must have been allowed to alter his position for the worse by carrying out acts in performance of the contract. Equity will then come to his aid arising from the changed position.

3.5 Grounds for refusal of the Remedy

There are certain contracts whose performance will not be compelled by a decree of specific performance. This is not because the court lacks jurisdiction to award the decree in these cases, but because the contracts by their nature are not enforceable by a decree of specific performance. Contracts falling within this class are those whose performance or execution requires the court's constant and continuous supervision; thus, imposing too great a burden upon the court if the court is to ensure that compliance with its orders is not stultified. Therefore, the court will not ordinarily decree specific performance of a contract the prosecution of which it cannot supervise. See *Blackett v. Bates* (1865) L.R. 1 Ch. 124; *Powell Duffryn Steam Coal Co. v. TaffVale Railway Col.* (1874) L.R. 9 Ch. 331.

Thus, specific performance will not be granted in contracts involving the construction of a railway, the management of a brewery, the management of a colliery or the construction of a waterway; or any contract of similar nature. See *Wheatley v. Westminster Brynibo Coal Co.* (1869) 9 Eq. Cas. 538 at 552. Generally, specific performance will not be granted in the following cases.

1. Contract to build
2. Contracts of personal service
3. Contracts determinable at will
4. Contracts to refer to arbitration
5. Contracts specifically enforceable only in part
6. Contracts relating to real and personal property
7. Contracts lacking in mutuality
8. Misrepresentation and mistake
9. Misdescription
10. Compensation and condition of sale
11. Lapse of time
12. Unclean hands
13. Hardship

See the case of *Ohiwerei v. Okosun* (2003) 11 NWLR (Pt. 832) p.463 where it held as follows:

1. Specific performance is a decree issued by a court which compels a contracting party to do that which he has promised to do. It is a remedy for breach of contract provided by equity to meet those cases where the common law remedy of damages is inadequate.

2. The equitable doctrine of specific performance is discretionary because the dominant principle has always been that equity will only grant if under all circumstances, it is just and equitable to do so. The remedy is available in a variety of contractual relationships. Whether or not it will be granted depends on the nature of the contract. Before the remedy of specific performance can be granted, there must be a valid contract. The court will not grant specific performance on a contract whose terms are inconclusive, uncertain or ambiguous. Also, a court will not decree specific performance of a contract that is void for illegality. Where no consideration is furnished, specific performance of the contract will not be granted.

3. A court cannot decree specific performance until a contract would form the basis of the decree of specific performance.

4. The doctrine of part-performance will only apply upon fulfilment of the following conditions:

(a) The act of part performance must be definite and refer exclusively to and denote the existence of the alleged contract.

(b) The act must be such as to render it a fraud on the part of the defendant to take advantage of the contract not being in writing.

(c) The contract to which the acts of part performance denote must be capable of being enforced by a decree of specific performance.

(d) The parol evidence which is let in by the act of part performance must establish a finally concluded contract.

(e) The act of part performance relied upon must have been done by the plaintiff and not by the defendant.

5. Under the doctrine of part-performance, a party who has partly performed a contract can enforce it, notwithstanding the fact that there is no written evidence of the contract. The doctrine is based on the principle that the plaintiff having altered his position on the faith of the contract, acquires an equity against the defendant. Thus, part performance must be by the plaintiff. Therefore, for the plaintiff to rely on part-performance, he must have been allowed to alter his position for the worse by carrying out acts in performance of the contract. Equity will now come to his aid, arising from his changed position.

4.0 CONCLUSION

The position in equity is that the court, in the exercise of its equitable jurisdiction, will in certain circumstances, compel parties to a contract freely entered into, to perform their obligations according to the terms of the contract and to respect the sanctity of the contractual relationship created by their acts. If equity had not interfered in this way, it would have been possible in many cases for parties to a contract to buy off their duties under the contract to the detriment of innocent parties.

5.0 SUMMARY

In this unit, we looked at the remedy of specific performance. You should now be able to: describe the nature of the remedy; list the circumstances in which the remedy will be granted or refused; explain the doctrine of part performance; and list the grounds for refusal of the remedy.

6.0 TUTOR-MARKED ASSIGNMENT

What do you understand by the doctrine of part performance?

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

Jegede M. I. (2007rep.) *Principles of Equity*; Ibadan: Unique Design/Prints

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UNIT 3 RESCISSION

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1.0 INTRODUCTION

In the last unit, we considered the equitable remedy of specific performance. In this unit, we will look at the rescission of contract. Where a contract is voidable, but not void, such a contract is valid until rescinded. The right to rescind, which may arise in certain circumstances, is exercised where a party to a contract expresses by word or act in an unequivocal manner, that he is no longer willing or that he refuses to be bound by the contract. That course of conduct or action, if justified by the circumstances or by the facts of the case, puts an end to the contract and restores the parties as between them, to the position in which they were before the contract was entered into. The full effect of rescission, therefore, is to treat the contract as though it had never been entered into.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Determine whether rescission can be accomplished by the act of a party;
- (ii) List the grounds for rescission;
- (iii) Determine the instances when the right to rescind is lost; and
- (iv) Explain the consequence of rescission.

3.0 MAIN CONTENT

3.1 Act of a party or a judicial remedy

Resitutio in integrum is a fundamental feature of the remedy of rescission; where this is not possible, the right cannot be validly exercised. Therefore, where the circumstances of the case impose upon a party desiring to rescind the duty of making *resitutio in integrum*, until he discharges that duty rescission cannot be accomplished. See the following cases:

1. *Clough v. London and North Western Rly. Co.* (1871) L.R. 7. Exch. 26.
2. *Abram Steamship Co. v. Westville Shipping Co.* (1923) A.C. 773.
3. *Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218,1278.
4. *Newbigging v. Adams* (1886) 34 Ch.D. 582 at 592.

It is a settled law that a contract cannot be rescinded by one party for the default of the other unless both can be put in *status quo* as before the contract. See *Hunt v. Silk* (1804) 5 East, 449. In *Blackburn v. Smith* (1848) 2 Ex. 783, 792, there was a contract for the sale of a piece of land between the plaintiff and the defendant. The plaintiff, having paid a deposit, went into possession. He later gave notice to rescind the contract on the ground of certain events which had occurred and brought an action to recover his deposit. Parke, B. delivering the judgment of the Court said that inasmuch as the plaintiff had or retained the possession of the property the parties could not be placed in *status quo* and, therefore, the action for the recovery of the deposit could not be maintained. Thus the fact of possession of the land by the plaintiff, made impossible for the act of rescission to have its natural effect.

If rescission can be accomplished by the act of a party, the question as to whether the right to rescind is in fact a judicial remedy becomes relevant. Surely the assistance of a court of equity is dispensed with where the act of rescission is not challenged by the other party to the contract. But a different situation may arise where for example there remain some question to be settled as between the parties such as taking account of property which might have passed between them with a view to restoring the parties to *status quo* as before the contract, or where the other party to the contract challenges the right of the first to rescind. See *Erlanger v. New Sombrero Phosphate Co.* (supra) at 1278.

In such cases, the assistance of a court of equity becomes indispensable; it would have to decide whether the act of rescission relied upon was in itself effect. Nevertheless, 'it is an entire mistake to suppose that it is this verdict which by itself terminates the contract and restores the antecedent status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective; and put an end to the contract.' See *Abram Steamship Co. v. Westville Shipping Co.* (supra) at 781. See further, *Reese River Silver Mining Co. v. Smith* (1869) L.R. 4 H.L. 64. 73; *Oakes v. Turquand* (1867) L.R. 2 H.L. 325.

3.2 Grounds for Rescission

1. Mistake:

Where the two parties laboured under a common or mutual mistake, rescission may be granted. Lindley, L.J. said: in *Huddersfield Banking Co. v. Henry Lister & Son* (1895) 2 Ch. 273 at 281, 'An agreement founded upon a common mistake, which mistake is impliedly treated as a consideration which must exist in order to bring the agreement into operation, can be set aside, formally if necessary, or treated as set aside and as invalid without any process or proceedings to do so.'

In *Solle v. Butcher* (1950) 1 K.B. 671 at 693 C.A, the Court of Appeal held that a contract is liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension

was fundamental and that the party seeking to set it aside was not himself at fault. See Lord Westbury in *Cooper v. Phibbs* (1867) L.R 2 H.L. 149, 170. In *Abraham v. Oluwa* (1944) 17 N.L.R. 123 at 126, the plaintiff at the time he purchased the property was labouring under the mistaken idea that he had either a defective title or no title at all. Similarly, the defendant possessed the mistaken idea that the property belonged to the judgement creditor. In an action brought by the plaintiff to recover the purchase money which he had paid to the defendant, Banker J. said: 'if parties enter into an agreement with reference to a supposed actual state of things does not in fact subsist, the consideration for the agreement fails and the agreement is consequently void.

The principle is that equity would relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. This is, however, on the supposition that the mistake renders the contract void *ab initio* and a mistake which renders a contract not void, but voidable. The position seems to be that contracts will be void for mistake if the mistake is such as to prevent the formation of any contract at all. See *Solle v. Butcher* (supra) at 690-692. It is, however, clear that rescission will be granted for mutual mistake whether the mistake be one of fact or one of law.

2. Misrepresentation:

A contract that is induced by a material misrepresentation made either fraudulently or innocently cannot stand; such misrepresentation is a ground for rescission.

(a) Fraudulent Misrepresentation:

There is fraudulent misrepresentation when it is shown that a false representation has been made knowingly and intentionally or without belief in its truth or recklessly without caring whether it is true or false and with the intention that the other party should act on it and has been so acted upon by the other party. At law and in equity such misrepresentation renders the contract induced by it voidable. See the following cases:

Derry v. Peek (1889) 14 App. Cas. 337.

Peek v. Gurney (1873) L.R. 6 H.L. 377.

Horsfall v. Thomas (1862) 1 H. & C. 90; *Smith v. Chadwick* (1884) 9 App. Cas. 187 at 196.

In *Sule v. Aromire* (1951) 20 N.L.R 20 at 21-22, the defendant put up for sale by auction a piece of land and the poster advertising the sale mentioned that the defendant had obtained a court judgment in respect of the land. The defendant went further to give the plaintiff a copy of the judgment which showed that the plaintiff was the owner. But in truth, the judgment did not relate to the piece of land. The plaintiff, having bought the land on the strength of the misrepresentation made to him by the defendant, made unsuccessful attempt to obtain possession; he therefore brought this action claiming annulment of the conveyance and damages. The court agreed with the submission of the defendant that where there has been a conveyance no rescission is possible unless there has been fraud. However, the court rejected the submission that the defendant had hidden nothing and that the principle *caveat emptor* applies. The principle is that if the plaintiff had acted on the faith of a false representation made to him by the defendant, it is no defence for the latter that the plaintiff might have found out the truth if he had made enquiry. See *Redgrave v. Hurd* (1881) 20 Ch.D. 1.

The court found that the defendant knowingly made a false representation which was a material one and it was designed to, and did put the plaintiff off his guard and that the fraudulent misrepresentation entitled the plaintiff to annul the sale and a refund of the purchase price. It is sufficient if a course of action or conduct satisfies the definition of fraudulent misrepresentation; the

motive for making such misrepresentation is completely irrelevant. See *Pasley v. Freeman* (1739) 3 T.R. 51; *Polhill v. Walter* (1832) 3 B. & Ad. 114.

(b) Innocent Misrepresentation:

Though innocent misrepresentation cannot support an action at law for damages²⁶ it is, in equity, a ground for rescission. See *Derry v. Peek* (supra); *Newbigging v. Adam* (1886) 34 Ch.D. 582; *Heilbit Symons & Co. v. Buckleton* (1913) AC. 30 at 49. Where rescission of a contract is claimed on the ground of innocent misrepresentation it is sufficient if the plaintiff can prove that there was misrepresentation which induced him to enter into the contract. However, honestly, such misrepresentation might have been made and however free from blame the person who made it, the contract having been obtained by misrepresentation cannot stand. See *Redgrave v. Hurd* (1881) 20 Ch.D. 1 at 12; *Derry v. Peek* (supra); *Low v. Bouverie* (1891) 3 Ch.D.82 at 100. The Court of Equity has power to set aside contracts whenever the court is of the opinion that it would be unconscientious for a party to avail himself of a legal advantage which he had obtained. See *Torrance v. Bolton* (1872) L.R. 8 Ch. 118, 124; see generally, the recent changes made in the law of England by the Misrepresentation Act, 1967.

3. Mere silence and Non-Disclosure:

A party to a contract is generally not under a duty to make any disclosure regarding the transaction unless where non-disclosure may amount to misrepresentation of material facts capable of inducing the other party to enter into the contract or where the circumstances of the particular transaction impose a duty to make disclosure. In *Oakes v. Turquand* (1867) L.R. 2 H.L. 325 at 342, the court held that where a person has been, by the fraudulent misrepresentations of directors of a company or by their fraudulent concealment of facts, drawn into a contract to purchase shares in the company the directors cannot enforce the contract against him but he may rescind it. In that case Lord Chelmsford said: 'it is said that everything which is stated in the prospectus is literally true and so it is, but the objection to it is not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told, the character of falsehood.

Secondly, non-disclosure in contracts *uberrimae fidei* is a ground for rescission of such contracts. This class of contracts includes contracts of insurance of all kinds, family settlements or arrangements. A party to a contract of this class is under a duty to make full disclosure of all facts within his knowledge; there must not only be good faith and honest intention, but also full disclosure; and without full disclosure, honest intention is not sufficient. See *Harvey v. Cooke* (1827) 4 Russ. 34 at 53; 38 E.R. 717, 725. Thus, a transaction purported to be family arrangement was set aside on the ground that the doubts existing as to the rights alleged to be compromised by the transaction were not presented to the party interested.

In *Gordon v. Gordon* (1821) 3 Swans. 400; 36 E.R. 910, there was an agreement between two brothers as to the division of an estate. The younger brother had obtained an advantage because of the erroneous belief that the elder brother was illegitimate, when in truth the younger brother knew all along that his elder brother was legitimate which fact he failed to disclose. The agreement was later set aside when it became known that the elder brother was legitimate and that the younger brother knew of the true position.

What is required however is full disclosure; the court is not concerned with the attendant consequences of such disclosure. Thus an agreement of compromise, the very object of which is to avoid the necessity of having the exact relative legal rights determined by litigation, and which was entered into after the parties have had full consultation with the family solicitor, will not be

set aside even though the agreement may not be quite in accordance with the right of parties. What is essential is that there should be no fraud or improper conduct on the part of the party or parties under a duty to make full disclosure. But where full disclosure is required as to the exact legal rights and the person under a duty to make such disclosure concealed the facts because he thinks that it is for the advantage of all parties to compromise, and that if they knew their exact rights there would be no chance of compromise, the court will set aside a compromise which proceeded on that basis, since the very object of the compromise is to ascertain what the respective legal rights of the parties are. See *Roberts v. Roberts* (1905) 1 Ch. 704, 710, 771.

4. Constructive Fraud

Constructive fraud consists of a variety of unconscientious conduct which, if made use of to induce a party to enter into a transaction, may constitute a ground for rescinding such transaction. Undue influence is a common example of constructive fraud. There is undue influence when the will of a party coerced into a transaction which he does not desire to enter into. See *Wingrove v. Wingrove* (1885) 11 P.O. 81; *Johnson & Or. v. Maja & Or.* (1951) 13 W.A.CA 290, 295. If the party has only been persuaded or induced by consideration which may be condemned or disapproved, this may not amount to undue influence, if the party is not coerced into doing that which he does not desire to do; thus undue influence is an influence exercised either by coercion or fraud. See *Boyse v. Rossborough* (1856-57) 6 H.L.C. 1 at 48-49; 10 E.R 1192.

The onus of proof lies on the person who alleges undue influence. See *Johnson v. Maja* (1951) 13 W.A.C.A. 290; *Johnson v. Aderemi* (1955) 13 WACA 297, P.C. To discharge this onus, it would not be sufficient merely to establish that a person has the power to unduly coerce a party to enter into a transaction; it is also necessary to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power that the transaction which the plaintiff sought to rescind has been produced. See *Wingrove v. Wingrove* (1885) 11 P.O. 81.

However, if certain relationships, such as a doctor and patient, solicitor and client, etc., existed at the time of the transactions, such relationship creates a presumption of undue influence and the onus is upon the defendant to rebut such presumption. In *Johnson v. Williams* (1935) 2 W.A.C.A. 248 at 250, a deed of conveyance in which certain property was conveyed by a patient to her medical adviser was set aside on the ground that it was obtained from her by undue influence arising from the fact that the defendant was her medical adviser. Strother Stewart, J. said that such relationship creates a presumption of undue influence, and the onus is upon the defendant to rebut such presumption.

In *Taylor v. Brew* (1942) 2 W.A.C.A. 201; Cf. *Erhumwunse v. Omoregbe* (1961) W.N.L.R 301, 305, a trust deed by which property was to be conveyed to the settlor's father and solicitor was set aside on the ground that the deed was executed whilst the settlor was unduly under the influence of her parent/solicitor and with that influence operating on her mind (at the time) she executed the trust deed.

5. Misdescription:

The right to rescind is an appropriate remedy where one of the parties to the contract has misdescribed property, the subject matter of the contract. However, misdescription that would sustain an action for rescission must be substantial. In *Smith v. Land and House Property Corporation* (1884) 28, Ch.D. 7 at 13, the plaintiffs put up an hotel for sale stating in the particulars that it was let to 'F, a most desirable tenant, at a rental of £400 for an unexpired term of 27½ years.' The defendants entered into the contract of sale in reliance upon these particulars. But the truth of the matter was that the tenant did not pay his rent properly. When this became known, the defendant

refused to complete. In a counter claim by the defendant for rescission. Baggaly, L.J. said that it is material representation for the vendors to describe a tenant who did not pay his rent properly as a very desirable tenant.

In *Sodipo v. Coker* (1932) 11 N.L.R. 138, the plaintiff purchased certain land at an auction sale held by the defendant who had described the land as about 50 acres whereas it measured 22.2 acres in reality. The plaintiff brought an action to set aside the sale on the ground of the defendant's misdescription of the extent of the land. Kingdon, C.J. took the view that the misdescription was in a material and substantial point and that it was calculated to deceive and it did deceive the purchaser. He therefore held that the plaintiff was entitled to have the sale set aside on the ground of misdescription.

6. Conditional Terms in Contract:

It is not unusual for parties to a contract to include in the terms of the contract a provision empowering either of the parties to rescind the contract on the occurrence of certain events. Prima facie, the right to rescind becomes exercisable on the occurrence of the stipulated events; but the courts have placed some limitation on the exercise of this right purposely to prevent fraudulent and arbitrary exercise of the right. Thus a condition giving a vendor the right to rescind in the event of his willingness to comply with an objection to the title is not to be considered as giving the vendor an arbitrary power to rescind the contract. See *In re Jackson and Haden's Contract* (1906) 1 Ch.D. 412, 420.

Before he can lawfully exercise that power, he must establish to the satisfaction of the court, some reasonable grounds for his unwillingness to meet the purchaser's objection; for instance, that compliance with the objection would involve him in litigation and expenses far beyond what he ever contemplated, (see *Duddell v. Simpson* (1866) L.R. 2 Ch. 102.) or that at the time the contract of sale was entered into, the vendor reasonably and honestly, though erroneously, believed that he was or that he should be in a position to make a complete title to the property he purported to sell. In addition, the conduct of the vendor in the transaction must not have fallen below that of a prudent man of business, having regard to his contractual relations with other persons. See *Re Jackson and Haden's Contract* (supra) at 421.

As Collins M.R. stated in *Re Jackson and Haden's Contract* (supra) at 422, in all cases in which the vendor was allowed to avail himself of such condition, nothing in the nature of recklessness or dishonesty must be imputed to him. Thus, where knowing the exact facts, the vendor has recklessly made a description of them which would mislead another person who did not know as much as himself (even though he thought that person might know as much as himself), there is a clear failure of duty on the part of the vendor which fairly disentitles him to say that a clause introduced to meet a reckless disregard by the vendor of his duty as to accuracy of statement when he is making a statement with a view to other people acting on it as correct.

In *re Des Reaux and Setchfield's Contract* (1926) Ch.D. 178 at 189-190, the vendor knew at the time he entered into the contract, that he had no title to the property and did not avail himself the opportunity of taking advice from a competent legal adviser as to the title to the property. When he was required to take certain steps that would put him in a position to make title in favour of the purchaser, he refused and decided to rescind the contract under the conditions of sale. Romer, J. held that the vendor was reckless in entering into the contract, and moreover, the vendor's unwillingness to comply with the requisition being unreasonable and arbitrary disentitled him the benefit of the conditions of sale. See also *Re Deighton and Harris's Contract* (1898) 1 Ch.D. 458. Where Lindley L.J. held that the ordinary condition of sale giving the power of rescission

applies only where the vendor has some title and not where he has none.

A vendor's power under the terms of the contract to rescind the contract may be exercised only in good faith and with promptitude and must not be used as an engine for fraud. Thus, where a vendor having such power under the contract took advantage of it for purposes of delay while he opened negotiations, unknown to the purchaser for a better bargain with a third person, thus putting the purchaser in an uncertain position, the court held that by his conduct he deprived himself of his election to affirm the contract and the purchaser was entitled to treat the contract as rescinded. See *Smith v. Wallace* (1895) 1 Ch.D. 385.

In all cases, the vendor must do his best to comply with the obligations which by contract he has undertaken towards the purchaser; the vendor would not be allowed to ride off upon a condition to rescind which was obviously not framed with reference to the circumstances under which the vendor claims to exercise the power. See *Re Des Reaux and Setchfields Contract* (1926) Ch.D. 178 at 190; and Rigby L.J. in *Re Deighton and Harris's Contract* (supra).

SELF ASSESSMENT EXERCISE 1

Enumerate the grounds for rescission of a contract.

3.3 Loss of the Right to Rescind

The right to rescind is not indefeasible, and therefore, it may be lost in certain circumstances.

1. Affirmation of the Contract and Acquiescence:

Where there are circumstances upon which a party to a contract may rescind or avoid the contract and those circumstances are known to the party, the contract continues to be valid till the party has determined his election by avoiding the contract. See *Clough v. London and N.W. Rly. Co.* (1871) L.R. 7 Ex. Ch. 26, 34. But if it can be shown that he has at any time after notice of these circumstances either by express words or by unequivocal acts, affirmed the contract, then his election has been determined for ever and can no longer avoid the contract. Since the party has the right to elect either way, he may keep the question open so long as he does nothing to affirm the contract. However, lapse of time without rescinding the contract will furnish evidence of acquiescence and that he has elected to affirm the contract. Furthermore, when the lapse of time is great, it would, in practice, be treated as conclusive evidence to show that he has affirmed the contract. See Denning, L.J. in *Leaf v. Intemational Galleries* (1950) 2 KB. 86, 91.

The length of time that would constitute a conclusive evidence of affirmation may depend on the nature of the contract. See *Senanayake v. Cheng* (1965) 3 All E.R. 296. In a contract for the sale of goods, lapse of a reasonable time will be a bar to rescission. For instance, where five years have elapsed without any notice of rejection, the buyer cannot claim to rescind. See *Leaf v. Intemational Galleries* (supra) 2 K.B. 86, 90-91. In the case of repudiating shares in a company, the shareholder must act with promptitude; he must have done more than mere repudiation as is the case in ordinary voidable contracts; he must ensure that his name is removed from the register of the company before the commencement of winding up. See *Re Scottish petroleum Co.* (1883) 23 Ch.D. 414 at 437; *First National Ins. Co. Ltd. v. Greenfield* (1921) 2 K.B. 260. It has been held that a delay of a fortnight in repudiating the shares makes it doubtful whether the repudiation in the case of a going concern would have been in time. See *Re Scottish Petroleum Co.* (supra) at 234. Except where investigation is necessary to enable the shareholder to be fully informed, he ought to lose no time in repudiating.

The right to rescind may also be lost where the party entitled to the right does any act that is inconsistent with avoiding the contract. In *Taiwo v. Princewill* (1961) 1 All N.L.R. 240, the defendant had refused to complete a building under a building contract with the plaintiff on the ground that the plaintiff, contrary to the building contract had failed to make certain payments to him. It was, however, shown in evidence that the defendant later continued to work and received some payments from the plaintiff. Affirming the decision of the trial court, the Federal Supreme Court held that because the defendant had later continued with the work and accepted further installments under the contract, he had lost the right to repudiate the contract for failure on the plaintiff's part to pay the agreed sum though he retained the right to recover the sum due by action. See further, *Erhumwunse v. Omoregbe* (1961) W.N.L.R. 301, 305.

2. Impossibility of Restitutio in Integrum:

It is a settled principle of general justice that rescission will not be granted where the parties cannot be restored into their original state before the contract. See *Blackburn v. Smith* (1848) 2 Ex. 783, 792. See also Lord Blackburn in *Erlanger v. New Sombrero Phosphate* (1878) 3 App. Cas. 1218, 1278. Thus, where a contract is voidable at the option of a party, it follows that when that party exercises his option to rescind the contract, he must be in a state to rescind, that is, he must be in such a situation as to be able to put the parties into their pre-contract position. See *Clarke v. Dickson* (1858) E.B. & E. 148 cited with approval by the Privy Council in *Urquhart v. Macpherson* (1878) 3 App. Cas. 831, 838; *Western Bank of Scot. v. Addie* (1867) LoR 1 Sc. & Div. 145 at 164.

As Lord Blackburn observed in *Erlanger's case* (supra) at 1278, 'it would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration.'

If a contract cannot be rescinded *in toto* it cannot be rescinded at all; the reason for not directing rescission in such a case is that the parties, or one of them, cannot be restored to their *status quo*. See *Thorpe v. Facey* (1949) Ch. 649, 664; *Hunt v. Silk* (1804) 5 East. 449. Thus, a plaintiff who has taken the whole benefit of a contract so far as it was beneficial to him, without at any time attempting to repudiate it, would not be allowed to rescind one particular part of the contract for it would be impossible to restore the defendant to his pre-contract position. See *Urquhart v. Macpherson* (supra).

However, it would appear that the doctrine of *restitutio in integrum* may not be applied literally since the larger basis of the doctrine is to maintain fairness and justice between the parties; thus, the practice had always been for a court of equity to grant the relief of rescission whenever by the exercise of its powers, it could do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. See *Erlanger.v. New Sombrero Phosphate Co.* (supra) at 1278-1279.

In *Spence v. Crawford* (1939) 3 All E.R 271 at 283, repayment of the price of shares, the subject-matter of the contract, with interest was held to satisfy the doctrine of *restitutio in integrum*, as what is ordered to be restored is fair and just and substantially identical to the subject-matter of the contract. This flexible approach to the application of the doctrine is, however, limited to cases where rescission is the result of innocent misrepresentation and not where there is proof of

fraud. See *Lagunas Nitrate Co. v. Lagunas Syndicate* (1899) 2 Ch. 392, at pp. 456-57; *Adam v. Newbigging* (1888) 13 App. Cas. 308.

3. Completion of Contract:

Generally, completion of a contract constitutes a bar to the relief of rescission. A court of equity will not grant rescission of an executed lease on the ground of innocent misrepresentation. See *Brownlie v. Campbell* (1880) L.R. 5 App. Cas. 925; *Long v. Lloyd* (1958) 7 W.L.R. 753, 756. The lessee would have gone into possession under the lease and nothing remained to be done and therefore there is nothing to rescind. See Darling, J. in *Angel v. Jay* (1911) 1 K.B. 666 at 672.

As Carey, J. said in *Bada v. The Premier Thrift Society* (1938) 14 N.L.R. 20 at 83, because the contract must have been merged in the conveyance and therefore there is no longer anything to rescind, there is no existing executory contract or transaction which is binding on the parties; the court does not make unnecessary orders nor rescind what is non-existent. The position is the same where there had been a part execution of an agreement; for, the contract could no longer be rescinded *in toto* and the parties placed in their pre-contract position. See *Spence v. Crawford* (1939) 3 All E.R. 271, 290.

Completion of contract is a bar to rescission only where the contract is voidable for misrepresentation that is not fraudulent. See *Long v. Lloyd* (supra); *Brownlie v. Campbell* (1880) L.R. 5 App. Cas. 925. Lord Campbell stated the general position in *Wilde v. Gibson* (1848) 1 H.L.C. 605 at 632-633; 9 E.R. 897, where he said: 'in the court below the distinction between a bill to set aside a conveyance that had been executed has not been distinctly borne in mind; with regard to the first, if there be misrepresentation or concealment which is material to the purchaser a court of equity will not compel him to complete the purchase; but where the conveyance has been executed..... a court of equity will set aside the conveyance only on the ground of actual fraud; and there would be no safety for the transaction of mankind if, upon discovery being made at any distance of time of a material fact not disclosed to the purchase of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside.' See also, *Seddon v. North Eastern Salt Co.* (1905) 1 Ch. 326.

Therefore, proof of actual knowledge of a defect, amounting to fraud, is essential before an executed contract could be set aside. But there seems to be an exception in contracts for the taking of shares in companies. Even though the shares have been allotted and the shareholder's name has been placed on the company's register, it is not necessary for a shareholder who desires to avoid the contract to take shares to prove fraud; it is enough if he proves a misrepresentation of fact. See *First National Reinsurance Co. v. Greenfield* (1921) 2 K.B. 260 at 272.

4. Acquisition of Rights by Third Parties:

The right to rescind is lost where third parties have, *bona fide* and for value acquired rights or interests under the contract. Where the party entitled to rescind has made no election he retains the right to determine the contract either way. This is, however, subject to the important condition that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the subject matter of the contract, or if as a result of his delay the position even of the wrongdoer in relation to the subject-matter is affected, such will preclude him from exercising his right to rescind. See *Clough v. London and North Western railway Co.* (1871) 7 Ex. Ch. 26, 35.

Thus, where a contract to purchase shares in a company has been induced by fraud, the defrauded purchaser cannot rescind after the commencement of the winding up of the company, since the creditors of the company have, thereby *bonafide*, acquired an interest in the shares of the company. See *Oakes v.*

Turquand (1867) L.R 2 H.L. 325.

A person who derives title to the subject-matter of the contract from the wrongdoer takes subject to the right of third parties. Therefore, a trustee of goods which have been obtained by the purchaser under a contract that is voidable acquired the property subject to the rights of third parties. One of these rights is the right of the defrauded vendor of the goods to disaffirm the contract and to retake the possession of the goods. See *In re Eastgate, Ex parte Ward* (1905) 1 K.B. 465, 467. See further, *Tilley v. Bowinan Ltd.* (1910) 1 K.B. 745, 758.

3.4 Consequence of Rescission

The condition for granting the relief is that the parties, as between them, be restored to their pre-contract position. Therefore, where the relief is granted, the contract is no longer in existence, thus the question of claiming damages for its breach does not arise since the full effect of rescission is to treat the contract as if it had never been entered into. As was stated by Romer, J. in *Barber v. Wolfe* (1945) Ch. 187 at 189-190, where a party entitled to rescind elects that course of action, he cannot at the same time obtain damages for a breach of the contract which he is asking the court to rescind. See further *Henry v. Schroder* (1879) 12 Ch. 666, 667; *Hall v. Burnell* (1911) 2 Ch. 551.

4.0 CONCLUSION

It is a settled law that a contract cannot be rescinded by one party for the default of the other unless both can be put in *status quo* as before the contract. Where the relief of rescission is granted, the contract is no longer in existence, thus the question of claiming damages for its breach does not arise since the full effect of rescission is to treat the contract as if it had never been entered into.

5.0 SUMMARY

In this unit, we have considered the remedy of rescission. You should now be able to: determine whether rescission can be accomplished by the act of a party; list the grounds for rescission; determine the instances when the right to rescind is lost; and explain the consequence of rescission.

6.0 TUTOR-MARKED ASSIGNMENT

The right to rescind is not indefeasible. Discuss.

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

Jegede M. I. (2007rep.) *Principles of Equity*; Ibadan: Unique Design/Prints

UNIT 4 RECTIFICATION, DELIVERY UP AND CANCELLATION OF DOCUMENTS

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- 2.0 Objectives
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1.0 INTRODUCTION

In the previous unit we considered rescission. In this unit we will look at rectification, delivery up and cancellation of documents. Sometimes there is variance between the agreed intention of the parties to a transaction and the document or instrument that is intended to give expression to the agreed intention; in such a case, the equitable remedy of rectification is proper and is often resorted to since the sole purpose of the relief is to make the written instrument conform with the true and agreed intention of the parties to the transaction. Thus rectification is an equitable remedy to correct a verbal error in a written instrument so as to make it conform with the previously agreed intention of the parties.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Describe the scope and Nature of the Remedy;
- (ii) Enumerate the grounds for Rectification;
- (iii) Explain the situations when the remedy will be refused; and
- (iv) Explain Delivery up and cancellation of documents.

3.0 MAIN CONTENT

3.1 Scope and Nature of the Remedy

In *Lavell Christmas Ltd. v. Wall* (1911) 104 L.T. 85, Cozen-Hardy M.R observed that the essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement. The remedy presupposes an antecedent contract; also there must be proof that by common mistake of the parties the final completed instrument as executed fails to give proper effect to the antecedent contract.

The remedy is available to rectify various kinds of instruments provided the conditions necessary for its grant are satisfied. No doubt, it covers various conveyancing documents. In *White v. White* (1872) L.R. 15 Eq. 247, an executed conveyance purported to convey a moiety only of

real estate when the agreed intention of parties was to pass the whole estate. Bacon, V.C. ordered that the deed of conveyance be rectified so as to conform with the agreed intention of the parties. Documents or instruments relating to leasehold agreements, building contracts, various kinds of insurance policies, bills of exchange may be proper subject-matter for rectification. So is marriage settlement.

See the following cases:

Murray v. Parker (1854) 19 Beav. 305; *Oyadiran v. Baggett* (1962) L.L.R. 96; *Roberts & Co. Ltd. v. L.C.C.* (1961) Ch. 555; *Motteux v. London Assurance Co.* (1739) 1 Atk. 545; *Collett v. Morrison* (1851) 9 Hare 162; *Spalding v. Crocker* (1897) 2 Comm. Cas. 189; and *Druiff v. Parker* (1868) L.R. 5 Eq. 131 at 139.

Thus, in *Welman v. Welman* (1880) 15 Ch.D. 570 at 578-579, Malins, V.C. stated that it is the rule of the court that where a marriage settlement or any other contract is in an improper form and not in accordance with the intention of the parties, then the intention of the parties would be carried out by putting the instrument into that form which will effectuate the intention. See further *Wollaston v. Tribe* (1869) L.R. Eq. 44.

However, a will is not a proper subject-matter for rectification unless there is fraud. See *Collins v. Elstone* (1893) P.1 at 4. Thus where a testator employs another to convey his meaning in technical language, and that other person makes a mistake in doing it, the mistake is the same as if the testator had employed that technical language, equitable remedy of rectification will not be available to correct the error. Similarly, the court has no justification to rectify articles of association of a company, even if those articles do not accord with what is proved to have been the concurrent intention of all the signatories therein, at the moment of signature. See *Scott v. Scott* (1940) Ch. 794 at 801-802. Incorporation of a company is governed and regulated by statute; once the statutory requirements are complied with and the company is duly registered by the registrar, a court of equity has no power to rectify the memorandum and articles of association of the company.

The articles and memorandum of the company had thereby acquired a statutory effect and can only be rectified by statutory authority. See *Evans v. Chapman* (1902) 86 L.T. 381 at 382. The equitable jurisdiction of the court to grant rectification is strictly limited to harmonisation of the written instrument, which is intended to give expression to the contract, with the previously-agreed intention of the parties to the contract; it does not include power to alter the intentions of the parties or to make a new contract for them.

Thus, in *Mackenzie v. Coulson* (1869) L.R. 8 Eq. 368 at 375. James V.C. stressed the point that Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. It is, therefore, necessary for a plaintiff seeking rectification to show that there was an actually concluded contract antecedent to the instrument which is sought to be rectified; and that such contract inaccurately represented in the instruments. In *F.E. Rose Ltd. v. Wm. H Pim Ltd.* (1953) 2 All E.R. 739 at 375, although there was a mutual mistake as to the meaning of the words used in describing the subject-matter of the contract, there was no doubt that the written contract correctly expressed the oral agreement antecedent to the contract. In that case, the contract could not be rectified since rectification is concerned with contracts and documents, and not with intentions.

Thus a mistake in the terms of the agreement will not be rectified if the mistake is intended by the parties to the agreement. Where a vendor and a purchaser agreed that certain property should

be the subject-matter of a contract of sale and the property is so accurately described by the deed of transfer, there will be no rectification if it happened that the parties had entered into the contract of sale on the common though erroneous supposition that the property was much larger and valuable than it turned out to be. The deed have conveyed what the parties intended. Misdescription of the subject-matter of a contract may be a ground for rescission but will not support an action for rectification. The sole purpose of rectification is to correct verbal errors in the document which is intended to give expression to the true intention of the parties; it is not to rectify the intention or make new contracts for the parties. Therefore, the common intention of the parties at the moment of execution is the controlling factor and not what would have been their intent if, when they executed it, the results of what they did had been present in their minds. See *Tucker v. Bennett* (1888) 38 Ch. 1 at 16.

3.2 Grounds for Rectification

(i) Existence of a Finally-Concluded Contract:

A fundamental requirement for the grant of the remedy is that the plaintiff must establish a finally concluded contract antecedent to the instrument which is sought to be rectified. Where such agreement is non-existence, rectification will not be granted. In *Mackenzie v. Coulson* (supra), a claim for rectification, founded upon a slip which did not form part of the alleged concluded contract, was rejected on the ground that the slip did not amount to more than terms of negotiation or mere talk between the parties which usually preceded agreements. Thus, Denning, L.J. stated in *Rose v. Pim* (supra) at 747, that in order to get rectification, it is necessary to show that the parties were in complete agreement on the term of their contract, but by an error, wrote them down wrongly.

The antecedent agreement need not be a legally enforceable contract. See *Shiple U.D.C. v. Bradford Corporation* (1936) Ch. 375, 395. The fact that the antecedent agreement is oral when it is required by law to be in writing is not sufficient bar to a claim for rectification, if the existence of the oral agreement is established. See *Craddock v. Hunt* (1923) Ch. 136; *United States v. Motor Trucks Ltd.* (1924) A.C. 196; *Johnson v. Bragge* (1901) 1 Ch. 28. Equity is concerned with the intention and not with the form. Thus where parties who can be bound only by their respective seals have altered into an antecedent agreement not under seal, the subsequent document which is intended to record the antecedent agreement but failed by mutual mistake to record it will be rectified so as to conform with the antecedent agreement notwithstanding that the antecedent agreement is not legally enforceable. See *Shiple U.D.C. v. Bradford Corporation* (supra).

It is, however, vital to prove prior agreement as mere intention will not suffice. Nor will mere steps taken in the course of negotiation suffice. Similarly, there can be no rectification in equity if the only agreement which is proved is that which is contained in or evidenced by the document as executed. See *Lovell and Christmas Ltd. v. Wall* (1911) 104 L.T. 85, 88.

(ii) Common Mistake:

The exercise of the jurisdiction depends on proof of common mistake of the parties in recording their antecedent agreement. As Romilly, M.R. stated in *Murray v. Parker* (1854) 19 Beav. 305 at 308, in matters of mistake, the court undoubtedly has jurisdiction. Though this jurisdiction is to be exercised with great caution and care, it still has to be exercised in all cases where an instrument as executed is not according to real agreement between the parties. But in order to justify the court in reforming an executed deed, it must appear that there has been a mistake common to both the contracting parties and that the agreement has been carried into effect by the deed in a

manner contrary to the intention of both. Therefore, if the antecedent contract is reasonably ascertained and that contract is, by a common mistake wrongly expressed in the document signed by the parties, then the court can rectify the document so as to be in harmony with the antecedent contract. See *Rose v. Pim* (supra) at 347.

(iii) Continuing Intention of the Parties:

The concurrent intention of the parties must remain unaltered up till the moment of execution of the document which must have been intended to effect the antecedent agreement. However, the concurrent intention of the parties at the time of execution is the contract to which the document sought to be rectified is to be made to conform. Therefore, it is to this intention of the parties at the moment of execution that the attention of the court will be directed. See Cozens-Hardy J. in *Johnson v. Bragge* (1901) 1 Ch. 28.

The parties may, by agreement but before the execution of the contract, alter their position as regards the contract; provided the altered position forms part of their concurrent intention (which was intended to be carried out by the executed document but which had been given wrong expression to the concurrent intention), rectification will be granted. In *Gilhespie. v. Burdis* (1943) 769 L.T. 91 at 92, the court stated that in order to establish the claim for rectification it must be shown beyond all reasonable doubt that up till the moment of execution, of the agreement, it was the common intention of the parties that something should find a place in the agreement which is not there as expressed by the agreement.

In order to ascertain what the concurrent intentions of the parties were, the court must look at the intention of the parties at the time when the instrument sought to be rectified was executed. See *Tacker v. Bennett* (1888) 38 Ch. 1 at 16. In all cases, the concurrent intention or the real agreement of the parties must be established by evidence whether parol or written. See *Murray v. Parker* (1854) 19 Beav. 305; *Lovell mid Christmas v. Wall* (1911) 104 L.T. 85 at 88 where Cozens hardy, M.R. said that evidence of what took place prior to the execution of the antecedent agreement is admissible and essential.

In the process, the court will look at the parties' outward acts, i.e. at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the documents, then you rectify the document. But nothing else will suffice. See Denning, L.J. in *Rose v. Pim* (supra) at 747.

Thus, in *Oyadiran v. Baggett* (1962) L.L.R. 96 at 100, the plaintiff brought an action to have a sub-lease to which he was a party rectified so as to give effect to what he alleged was the true contract between him and the defendant. The plaintiff alleged that as a result of a mistake common to both parties an agreed covenant by the defendant to build a factory to be used for the manufacture of footwear and to develop the rest of the land (the subject-matter of the sub-lease) into industrial units similar to the industrial estate at Yaba was omitted in the deed of the sub-lease which they both signed. The defendant denied the allegation. Bellamy, J. admitted and considered parol and written evidence of what transpired between the parties before the deed was executed. He found that up to the moment of the execution of the deed it was the common intention of the parties that the covenant should find a place in the deed but because of a fundamental mistake, common to them both, the deed as executed did not express the covenant. He, therefore, directed that the deed of sub-lease in question should be rectified so as to conform with the common intention of the parties.

In *Olubowale v. Manliki* (1971) 1 U.I.L.R. 145, where rectification was refused on the ground

that the written instrument sought to be rectified was never the act of the two parties and therefore, there could be no common mistake between the two parties to give rise to rectification, Adefarasin, J. said: 'For rectification to be ordered it must be shown by clear and unambiguous evidence not only that the document does not accurately represent the true agreement between the parties at the time of its execution but that the proposed alterations do accord with their intentions at the time. See Evershed, M.R. in *Whiteside v. Whiteside* (1950) Ch. 65 at 76. It is essential that the instrument, as rectified, should put the parties in the same position *vis-a-vis* each other as they intended.

(iv) Burden of Proof:

The burden of proof is on the party seeking rectification and a clear and high standard of proof is required in rectification cases. See *Fowler v. Fowler* (1859) 4 De G. & J. 250, 265; *Oyadiran v. Baggett* (1962) L.L.R. 96, 97. In *Crane v. Hegeman-Harris Co. Inc.* (1939) 1 All E.R. 662 at 664, Simonds J. said that it is a jurisdiction which is to be exercised only upon convincing proof that the concluded instrument does not represent the common intention of the parties. On appeal Greene, M.R. reiterated the high degree of conviction which unquestionably is to be insisted upon in cases of rectification.

The basis for this requirement is that parol evidence is being admitted to vary a written instrument: rectification may be granted solely on parol evidence contrary to the rule that oral evidence is not generally admissible to vary a written instrument. See *Murray v. Parker* (1854) 19 Beav. 305, 308. Thus, situations in which a written agreement granting a lease may be rectified so as to conform with an antecedent oral lease contrary to the rule that oral evidence is not generally admissible to vary a written instrument. Thus, situations in which a written agreement granting a lease may be rectified so as to conform with an antecedent oral lease certainly require a strict proof of the prior oral lease. See *Cowen v. Truefitt Ltd.* (1899) 2 Ch. 309; *Lovell and Christmas Co. v. Wall* (1911) 104 L.T. 85.

(v) Mistake of Law:

A common mistake that will sustain an action for rectification must be of facts and not of law. As Chelmsford, L.C. said in *Midland G.W. Rly. v. Johnson* (1858) 6 H.L.C. 798; 10 E.R. 1509 at 1514, mistake is undoubtedly one of the grounds for equitable interference and relief; it must, however, be mistake not in matters of law but a mistake of facts. For example, construction of contracts is clearly a matter of law, if, therefore, a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be at law. Therefore, where the common mistake is to the legal effect or consequences of the contract rectification will not be granted. Ignorance of law is no excuse.

Thus, rectification will not be granted, where owing to the common mistake of the parties as to the general law applicable to the transaction, the agreed terms of the contract operate differently from what the parties intended. *Napier v. William* (1911) 1 Ch. 361 at 367, Warrington, J. stated that where a lease is drawn in accordance with the intention of the parties, its defect arising from a mistake as to its legal effect will not be a ground for rectification. A document is to be rectified so as to conform with the intention of the parties at the time when it was executed and not what would have been their intent if, when they executed it, the effect of what they did had been present to their minds. See *Tucker v. Bennett* (supra).

However, it appears that rectification may be granted where the mistake arose from the legal effect of the language or words used; the parties must have intended the same legal effect but that

they used words or language whose legal effect did not conform with their intent. See *Whiteside v. Whiteside* (1950) Ch. 65,674; See further, *Burroughes v. Abbott* (1922) 1 Ch. 86; *Jervis v. Howle and Talke Colliery Co.* (1937) Ch. 67.

(vi) Unilateral Mistake:

The general rule is that rectification will not be granted for a unilateral mistake. See *Fowler v. Fowler* (1859) 4 De G. & 1. 250; Kerr on Fraud and Mistake (2nd ed.) p. 498. There is unilateral mistake where the plaintiff is mistaken and the defendant is wholly and completely innocent. The true intention of one of the parties was to do one thing, and he by mistake has signed an agreement to do another. Thus, if the owner of two adjoining properties agrees to sell one of them to a purchaser for an agreed sum and the one to be sold is correctly described to the purchaser, but when the purchaser inspects the properties, he erroneously believes that the contract of sale covers both properties for the agreed sum and after the execution of the deed of conveyancing the purchaser discovers that only one of the properties is included, if he brings an action for rectification of the deed, he would not succeed on the ground that the mistake is unilateral; there is no equity which empowers the court to deprive the innocent vendor of his benefit and entitlements he had bona fide acquired under the contract. See Kerr on Fraud and Mistake (2nd Ed.), p. 498. *Fowler v. Scottish Equitable Insurance Soc.* (1858) 20 L.J. Ch. 225; *Gilhespie v. Burdies* (1943) 169 L.T. 91.

However there are few cases in which rectification may be granted on the basis of unilateral mistake.

1. Where one of the parties to the transaction sought to be rectified is mistaken and the other party is fraudulent, rectification may be granted, for equity will not allow a person to profit from his fraud. Thus a party to a contract may mistakenly believe that the written document accurately represents the agreed intention of the parties, but in fact the other party has through his machination and in fraud (actual or constructive) of the first party, caused the written agreement to be drawn in a manner beneficial and advantageous to him to the detriment and at the expense of the first party. See *Clark v. Girdwood* (1877) 7 Ch. D. 9 C.A.; *Lovesy v. Smith* (1880) 15 Ch.D. 655; *Hoblyn v. Hoblyn* (1889) 41 Ch.D. 200; *Awgu v. Nazianya* (1949) 12 W.A.C.A. 450 at 452. In such cases, rectification may be granted though the mistake is unilateral.

2. A party is entitled to rectification of a contract if he can establish beyond reasonable doubt that he believed a particular term to be included in the contract and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed that term to be included. This proposition which is not premised on any kind of fraud or dishonesty was formulated by Pennycuik, J. in *Roberts & Co. Ltd. v. Leicestershire C.C.* (1961) Ch. 555 at 573. In that case, the plaintiffs' company agreed to erect a school for the defendant and the parties agreed that the building was to be completed in eighteen months. But the contract which was submitted to and executed by the plaintiff, contained a completion period of 30 months which the officials of the defendant had substituted for the agreed period of eighteen months. This substitution was not brought to the notice of the plaintiff before the execution of the contract. Later when the plaintiffs learnt that the defendant was working on the basis of 30 month period of completion, they brought an action for rectification which was granted on the basis of the above proposition.

Snell premised the principle on a species of estoppel. 'By what appears to be a species of equita-

ble estoppel, if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he (and those claiming under him) will be precluded from resisting rectification on the ground that the mistake is unilateral and not common.' See Snell's *Principles of Equity* (27th Ed.) 1973, p.614.

As stated by Pennycuik, J. in *Roberts & Co. Ltd. v. Leicestershire* (supra) at 570-571, the exact basis of the principle appears to be in some doubt. 'If the principle is correctly rested upon estoppel it seems to me that it is not an essential ingredient of the right of action to establish any particular degree of obliquity to be attributed to the defendants in such circumstances. If, on the other hand, the principle is rested on fraud, obviously dishonesty must be established. It is well established that a party claiming rectification must prove his facts beyond reasonable doubt; and I think this high standard of proof must equally apply where the claim is based on the principle indicated above. See *Roberts & Co. Ltd. v. Leicestershire C.C.*, *op. cit.*, at 570-71.

3. In certain cases of unilateral mistake, a defendant resisting rectification may be put on his election, either to submit to rectification or have the agreement annulled. In *Paget v. Marshall* (1885) 2 Ch.D. 255, 266 at 267, the plaintiff agreed to lease a portion of a block of three houses to the defendant at a rent of £500 a year. The block was to consist of the first, second, third and fourth floors of all the three houses. The defendant wrote to accept the offer and a lease was executed. The plaintiff alleged that the first floor of one of the houses was included in the offer and in the lease by mistake. The defendant denied that he accepted the offer, or executed the lease under any mistake.

The evidence before the court was not sufficient to establish a common mistake upon which rectification would have been premised, but it was quite clear that the plaintiff was mistaken. Bacon, V.C. said: 'Upon that ground, therefore, I must say that the contract ought to be annulled. I think it would be right and just and perfectly consistent with other decisions that the defendant should have an opportunity of choosing whether he will submit, as the plaintiff asks that he should submit, to have the lease rectified whether he will choose to take the lease with that rectification, or whether he will choose to throw up the thing entirely, because the object of the Court is, as far as it can, to put the parties into the position in which they would have been if the mistake had not happened.

From the point of view of logic and principle, rescission ought to have been the appropriate remedy because the parties did not appear to have agreed on the same thing. Rescission assumes no contract. The court was more concerned with the justice of the case, hence it decided to give the defendant an option of either rectification or rescission. See further, *Gerrard v. Frankel* (1862) 30 Beav. 445, 457; *Harris v. Pepperell* (1867) L.R. 5 Eq. 1; *Bloomer v. Spittle* (1872) L.R. 13 Eq. 427.

The decision is a deviation from both principles and logic, though there is no doubt about the justice of the decision; it is one of the cases in which established principle will not coincide with justice and the latter would have to prevail.

3.3 When the Remedy will be Refused

(i) Rectification will be refused where the contract is no longer capable of performance; equity like nature does nothing in vain. See *Borrowman v. Rossell* (1864) 16

C.B.N.S. 58. The relief is equally no longer available where a bona fide purchaser for value without notice has acquired an interest in the subject matter of the contract. In *Smith v. Jones* (1954) 2 All E.R. 823 at 827. Upjohn, J. stated that a purchaser is not only entitled but bound to assume, when he is looking at the agreement under which the tenant holds, that that agreement correctly states the relationship between the tenant and the landlord, and he is not bound to ask or to make enquiry whether the tenant has any rights which would entitle him to have the agreement rectified. It is even doubtful whether an equity of rectification is an equity which is enforceable against a purchaser of an interest under a contract for which the relief is sought.

(ii) The sole purpose of equitable intervention by way of rectification is to ensure that an instrument which is intended to give expression to the intention of parties is in fact in conformity with that intention, therefore, if there is a more flexible and convenient way of achieving this purpose, rectification may be refused. For example, where there is a collateral agreement the enforcement of which will cure the same defects as those which rectification is sought to cure in the major contract, in such a case, rectification may be refused. Voluntary rectification *inter partes* is a bar to the relief.

As Evershed, M.R. stated in *Whiteside v. Whiteside* (1950) Ch. 65 at 75: 'The ground, however, upon which I prefer to base my conclusion is that which I have indicated - that, having regard to the rectification deed which followed and was a consequence of the absence of any issue at any time between the parties as to their true rights *inter se*, the necessary condition for the exercise of the reforming powers of the court is really absent. Or where the mistake is so apparent and manifest on the face of the instrument and can be rectified by the application of the usual rules of construction, the equitable relief of rectification may be refused.

In *Wilson v. Wilson* (1854) H.L. Cas. 40 at 67, Lord St. Leonards asserts that it will be a great mistake if it is supposed that even a court of law cannot correct a mistake or error on the face of an instrument. Since there is no magic in words, if there is a clear mistake which admits of no other construction, a court of law as well as a court of equity (without impugning any doctrine about correcting those things which can only be shown by parol evidence to be mistakes), may correct an obvious mistake on the face of an instrument without the slightest difficulty.

In such cases, the manifest errors may have resulted from inadvertent omission or insertion of something or the words in the instrument may have been disarranged. See *Re Bacharach's Will Trusts* (1959) CH. 245. The court may, in construing such instrument, add, substitute, delete or rearrange the words in order to correct the manifest errors and give effect to the intention of the parties as collected from the four corners of the instrument. See the following cases: *Wilson v. Wilson, op. cit.*; *Re Alexander's Settlement* (1910) 2 Ch.D. 225; *Re Smith* (1948) Ch. 49; *Re Whitruck* (1957) 2 All E.R. 467.

The exercise of this jurisdiction does not include power to rectify the instrument or do anything but construe it as it stands. See *Re Bacharach Will Trusts* (supra) at 249. Therefore, it is not enough for the court to be satisfied that there is a manifest error on the face of the instrument; what is intended must also be clear in the context of the instrument without recourse to extrinsic evidence. See *Re Alexander's Settlement* (1910) 2 Ch.D. 225 at 229. This brings out the distinction between the common law power to correct patent error on the face of written instrument and the purely equitable relief of rectification which calls for extrinsic evidence in order to establish the concurrent intention of the parties at the moment the instrument was executed. See *Re Follett*

(iii) Where a contract has been fully and wholly performed, and nothing remains to be done under the contract, there will be no ground for rectification. The object of rectification is to ensure that the true intention of parties to an agreement prevails and that presupposes a subsisting agreement; where the agreement is no longer in existence, rectification will be purposeless and will not be granted.

In *Caird v. Moss* (1886) 33 Ch.D. 22 at 35-36, the agreement sought to be rectified had been constructed by a court of competent jurisdiction and money had passed on the basis of the judicial construction. The action was dismissed on the ground that an attempt to reform a spent agreement and recover the money which has been paid under it cannot be allowed. As Lindley, L.J. observed: 'the court does not rectify agreements except for some legitimate purpose, and here there is no object in rectifying the agreement except in order to defeat a judgment with which the Court has no jurisdiction to interfere.'

Miscellaneous

The remedy may be readily granted in cases of unilateral transactions; thus, where a donor or a settlor has by instrument given two properties when his intention was to give one, the instrument may be rectified at his instance, to conform with his true intention even though the mistake is unilateral. The remedy is discretionary but it is doubtful if it will be granted in favour of a donee or a volunteer especially where the gift is not perfect. See *Van der Linde v. Van Der Linde* (1947) 1 Ch. 306, 310; and *Weir v. Van Tromp* (1900) 16 T.L.R. 531.

Laches or acquiescence is a defence to an action for rectification. However, there must be notice of the error to the plaintiff. Time runs from the date of notice for it is 'inconceivable that on a question of laches time can run from the time when the error is committed.' See *Beale v. Kyte* (1907) 1 Ch. 564 at 566.

SELF ASSESSMENT EXERCISE

Enumerate the grounds for rectification.

3.4 Delivery Up and Cancellation of Documents

An order for delivery up and cancellation of documents is an extension of the equitable jurisdiction founded upon the administration of a protective or preventive justice. (Story on Equity (3rd ed.) p. 294). The exercise of the jurisdiction is to prevent an improper or injurious use of a document which, on the face of it, is apparently valid, but which is latently void or voidable. Thus, the jurisdiction will be exercised where the document in question has become *functus officio*, but its existence is likely to throw some doubts or suspicion on the title or interest of the other party or subject him to the danger of future litigation when the facts are no longer capable of complete proof or have become involved in obscurities of time. See *Flower v. Marten* (1837) 2 My. & Cr. 459. The purpose is not only to protect a party to the document, who invariably will request the relief, but also to prevent the likelihood of its being used in later years to perpetrate fraud against innocent third parties.

The document must be either void or voidable but such defect must not appear on the face of the

document. Thus, where a policy, though good on the face of it, is liable to be completely avoided as on the ground of fraud or misrepresentation, a court of equity has jurisdiction to direct its delivery up and cancellation. See *Duncan v. Worrall* (1822) 10 Price 31. In *Cooper v. Joel* (1859) 27 Beav. 317; affirmed in (1859) 1 De G.F. & J. 240, the defendants claimed the benefits of a guarantee under an agreement which was found to have been obtained by substantial and material misrepresentation. The court held the agreement to be invalid, and as the invalidity did not appear on the face of it, and order was made for delivery up and cancellation of the document.

On the other hand, where the document is not void or voidable and cannot be avoided or there is a good legal defence to an action that may be brought upon it, a court of equity will not grant a relief by way of cancellation; even if there is the danger of the evidence for the defence being lost; in that case the remedy is not an action for cancellation but an action to perpetuate testimony. *Thornton v. Knight* (1849) 16 Sim. 509; and *Brooking v. Maudslay, Son and Field* (1888) 38 Ch.D. 638 at 643.

Similarly relief by way of cancellation will not be granted where the document is void at law and the defect is patent on the face of the document. See *Simpson v. Lord Howden* (1837) 3 My. & Cr. 97. In such a case, no interest is thereby endangered; a patently void document cannot cast any cloud or suspicion on the title or interest of parties to the document, nor could the document be used against a third party. However, the document must not be merely void against certain persons; it must be entirely and completely void. Thus, in *Ideal Bedding Co. Ltd v. Holland* (1907) 2 Ch. 157, it was stated that the relief is not appropriate in the case of a deed of settlement made to defraud creditors on the ground that the document is only void as against the creditors.

The jurisdiction may be exercised in respect of a variety of documents or instruments such as insurance policies, forged or defective negotiable instruments, annuity deed, forged conveyances and even forged bread-wrapper which is likely to pass-off the bread of the defendant as that of the plaintiffs. See the following cases: *Brooking v. Maudslay. op. cit.*; *Kemp. v. Pryor* (1802) 7 Ves. 237; *Earl of Aylesbury v. Morris* (1873) 8 Ch. App. 480; *Bromley v. Holland* (1802) 7 Ves. 3; *Peak v. Highfield* (1826) 1 Russ. 559; and *De Facto Works Ltd. v. Odumotun Trading Co.* (1959) L.L.R. 33.

The remedy is discretionary. A plaintiff seeking the remedy may be placed on terms, for he who wants equity must be prepared to do equity. See *Lodge v. National Union Investment* (1907) 1 Ch. 300. Thus in *Earl of Aylesbury v. Morris* (1873) 8 Ch. App. 484, where an infant, an heir-apparent to a large estate had lodged with the Defendant certain bills and policy of insurance as security for series of loans which the Court found to be extortionate and oppressive, the court ordered the delivery up of the documents on condition that the plaintiff should repay the loans with 5 per cent interest. Furthermore, a plaintiff who seeks the relief must come with clean hands. In *Erhumwunse v. Omoregbe* (1961) W.N.L.R. 301 at 305, the Court refused to order cancellation of a document as the plaintiff had, by his own repeated participation in the illegal transactions, disqualified himself from asking for the relief.

4.0 CONCLUSION

Laches or acquiescence is a defence to an action for rectification. However there must be notice of the error to the plaintiff. The remedy is discretionary. A plaintiff seeking the remedy may be placed on terms, for he who wants equity must be prepared to do equity. Furthermore, a plaintiff who seeks the relief must come with clean hands.

5.0 SUMMARY

In this unit, we have learnt about rectification, delivery up and cancellation of documents. You should now be able to: describe the scope and nature of the remedy; enumerate the grounds for rectification; explain the situations when the remedy will be refused; and explain delivery up and cancellation of documents.

6.0 TUTOR-MARKED ASSIGNMENT

Explain the situations when the remedy of rectification will be refused.

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

Jegede M. I. (2007rep.) *Principles of Equity*; Ibadan: Unique Design/Prints

MODULE 4 Equitable Defences

Unit 1	Estoppel
Unit 2	Proprietary Estoppel
Unit 3	Laches and Acquiescence.

UNIT 1 ESTOPPEL

CONTENTS

1.0	Introduction
2.0	Objectives
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4.0	Conclusion
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1.0 INTRODUCTION

In the last module, we considered equitable remedies. In this module, we will examine equitable defences starting with estoppel. Estoppel as an enforceable right may be validly resisted by a defence based on an earlier representation made by the claimant of the right to the person against whom the right is otherwise enforceable. Similarly a valid defence to an action may cease to be so, on the ground of an earlier representation made by the person entitled to the defence to the person against whom the defence is otherwise available.

In other words, where in an action between two parties, one of the parties had, either by words or conduct, made some representation (in connection with the transaction that gives rise to the cause of action) to the other party, the maker of such representation would be precluded from denying making the representation. The insistence of the court that such representation shall not be denied by the maker may be decisive in the determination of, or fixing the rights of the parties: thus a plaintiff who had made such representation, may fail in an action in which he would have otherwise succeeded; likewise a defendant may not be able to plead a defence that would have otherwise turned the case in his favour.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Define the scope of promissory estoppel; and
- (ii) Describe the effect of promissory estoppel.

3.0 MAIN CONTENT

3.1 Promissory estoppel

Whenever such representation is pleaded and sustained by the court, it constitutes a bar to the claim

of the maker. This is the basis of the doctrine of estoppel by representation, the principle of which was aptly stated in *West v. Jones* (1851), 1 Sim. (N.S.) 205; 61 E.R. 79 at 207. In that case, Lord Cranworth said 'Where a party has, by words or by conduct, made a representation to another leading him to believe in the existence of a particular fact or state of facts, and that other person has acted on the faith of such representation, then the party who made the representation shall not afterwards be heard to say that the facts were not as he represented them to be.'

The doctrine is common to both law and equity though there is evidence that it was earlier recognised in equity. See the following cases: *Montefiori v. Montefiori* (1762) 1 Black W. 363; 96 E.R. 203; *Pickard v. Sears* (1837) 6 Ad. & E. 469; 112 E.R. 179; *Freeman v. Cooke* (1848) 2 Ex. 654; 154 E.R. 652; *Dyer v. Dyer* (1682) 2 Ch. Cas. 108, 22 E.R. 869; and *Hobbs v. Norton* (1683) 1 Vern. 136; 23 E.R. 370. It is, however, certain that there was no distinction between the application of the principle at law and in equity until the *High Trees Case* (1947) K.B. 130. (See also *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873) L.R. 6 H.L. 352 at 360; and *Canadian Pacific Railway v. R.* (1931) A.C. 414 at 429).

Before the decision in the *High Trees Case* (supra), it was believed that the application of the doctrine was limited to representation as to existing fact. In *Jorden v. Money* (1854) 5 H.L.C. 185; 10 E.R. 868, the House of Lords laid it down that the doctrine only applies to representation of existing fact and does not apply to mere declaration of intention or future conduct. But in *Central London Property Trust Ltd. v. High Trees House Ltd.* (1947) K.B. 130 at 134, Denning J. (as he then was) made use of the equitable jurisdiction of the Court to extend the application of the doctrine so as to include representation other than one as to existing fact.

In that case, the plaintiff company leased a block of flats to the defendants at a rent of £2,500 per annum. Later because of the war conditions, many of the flats remained unoccupied and the plaintiff thereby agreed in writing to reduce the rent. The defendants paid the reduced rent up to the end of the war when the plaintiff claimed his full rent both retrospectively and for the future. He brought this action claiming rent at the original rate for the last two quarters of 1945 when the war ended and also to resume his full right to claim rent at the original rate.

It was clear that the defendants could not have sued on the plaintiffs' promise to reduce the rent because the promise was not supported by consideration; as far back as 1884, the House of Lords has decided that payment of lesser sum is not sufficient for the discharge of greater sum unless there is fresh consideration. (See *Foakes v. Beer* (1884) 9 App. Cas. 605). Thus, there could be no estoppel by way of defence in contract, because the promise to accept rent at a reduced rate was not a contract since consideration, an essential element of contract, was lacking; and an ordinary estoppel by way of defence was not available because of the decision in *Jorden v. Money* (supra) which confined the defence of estoppel to representation of existing fact and thereby excluding representation of intention. But Denning J., thought that the doctrine of estoppel had become more elastic than it used to be, he therefore, sustained the defence of estoppel as a bar to the claim for arrears of rent calculated at the original rate. Though the representation was based on a promise as to the future, the promisor was held bound on the ground that he intended to be legally bound because he intended to create a legal relation which to his knowledge would be acted upon and was in fact so acted upon.

In the course of his judgment, Denning J., said –

'But what is the position in view of developments in the law in recent years? The law has not been standing still since *Jorden v. Money*. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppels, but are not really such.

They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said that the promise must be honoured.'

This formulation of a new equitable estoppel termed promissory estoppel or estoppel by waiver was contained in *obiter dicta*, nevertheless, the proposition has been consistently followed though various judges who have applied it have not treated it as a case of estoppel because it was not founded on representation of existing fact. See J.F. Wilson; *Recent Developments in Estoppel* (1951) 67 L.Q.R. 330; *Ajayi v. R.T. Briscoe (Nig.) Ltd.* (1964) 3 ALL ER 556 at 559; and *Tika-Tore Press Ltd. v. Abina* (1973) 1 All N.L.R. (part II) 244. Even Denning J. admitted that it was not a case of estoppel in the strict sense though the result of its application is the same as that of strict estoppel. Indeed, the cases which Denning J. relied upon for his proposition were decided without reference to estoppel.

In *Hughes v. Metropolitan Railway Co.* (1877) 2 App. Cas. 439 at 448, the lessor gave the lessee six months' notice to repair and the lessor would be entitled to an ejectment order if the lessee failed to comply with the notice. Before the expiry of the notice, the lessor entered into negotiation with the lessee for the sale of the reversion but the negotiations subsequently terminated. The lessee did not effect any repair; and on the expiry of the notice, the lessor brought an action seeking an ejectment order against the lessee, claiming that the lease had been forfeited for non-compliance with the notice to repair.

The House of Lords upheld the lessee's contention that the opening of the negotiations amounted to a representation of intention by the lessor that he would not enforce the notice, at least during the currency of the negotiation and that it was that representation that induced the lessee not to comply with the notice to repair. The court held that the representation precluded the lessor from enforcing the notice which would start to run only from the termination of the negotiations. As to the principle upon which the court relied: Lord Cairns L.C. said:

'... It is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.'

The principle could not be explained on the general law of estoppel, nor could it be said to be confined to the equitable jurisdiction of the court to grant relief against forfeiture, what the court relied upon was that it would be inequitable to allow a person who had made such representation as to intention, to retract his position. The principle was further clarified by the Court of Appeal in *Birmingham and District Land Co. v. London and North Western Railway Co.* (1888) 40 Ch.D. 268 at 286. In that case Bowen L.J. said:

'The principle has nothing to do with forfeiture, and everything connected with forfeiture The truth is that the proposition is wider than cases of forfeiture. It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all

events placing the parties in the same position as they were before.'

The principle in *Hughes Case* (supra) has been consistently followed though in cases of lesser authorities. In *Buttery v. Pickard* (1945) 174 L.T. 144; 146, Humphreys J., held that a landlord was precluded from recovering arrears of rent after he had agreed with the tenant to reduce the rent and that the tenancy should continue on the basis of the reduced rent; the agreement was a representation to the tenant that he, the landlord would not claim the balance. In *Salisbury (Marquess) v. Gilmore* (1942) 2 K.B. 38, the defendant was the tenant of the plaintiff; when his tenancy had two years 'to run he asked his landlord for a renewal which was refused and was informed by his landlord that the premises were to be demolished at the expiration of the term. The defendant left the premises unrepaired and the plaintiff brought an action claiming damages for breach of covenant to repair.

The trial court awarded damages to the plaintiff but the decision was reversed by the Court of Appeal. Mackinnon L.J., invoked the principle in *Hughes Case* (supra) as enunciated by Bowen L.J. in *Birmingham and District Land Co. case* (supra). The representation made by the plaintiff to the defendant that the premises would be demolished at the expiration of the term had induced the defendant to leave the premises unrepaired and it would be inequitable to allow the plaintiff to claim damages having regard to the representation which the plaintiff had made to the defendant. See *Salisbury v. Gilmore* (supra) at 51-52.

While the *High Trees case* (supra) can be justifiably explained on the basis of the principle in *Hughes case*, it is an extension of the narrow application of the doctrine of estoppel as stated in *Jorden v. Money*. The *High Trees case* has, in the name of promissory estoppel, given new life to the doctrine of estoppel by representation. It is, indeed, a rewarding new life, at least, in the interest of justice for, it is not difficult to imagine the inevitable and inequitable result if the doctrine of estoppel were to be confined to its traditional and narrow area of operation.

Nigerian courts have approved of and applied the principle in *High Trees case*. In *Ajayi v. R.T. Briscoe (Nigeria) Ltd.* (1962) 1 All N.L.R. 673 at 679, though the defence, based on promissory estoppel, was rejected, on the ground that the defendant had not altered his position on the promise made to him by the plaintiff, the Federal Supreme Court did not doubt that the principle laid down in the *High Trees case* created a new estoppel. The court held that a promise, made without further consideration, to withhold the enforcement of rights already accrued under a contract, is not enforceable, unless it was intended to create legal relations between the parties, and, to the knowledge of the person making it, was going to be acted upon by the person to whom it was made, and was, in fact, acted upon by him; thereby altering his position under the contract, so as to make it unjust for the promisor to enforce the rights accrued.'

On the appeal to the Privy Council, Lord Hodson without expressly referring to the *High Trees case*, gave the most recent formulation of the doctrine of promissory estoppel. He said: 'The principle which has been described as quasi-estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party. See *Ajayi v. R.T. Briscoe (Nigeria) Ltd.* (1964) 3 All E.R 556, 559.

Thus, in *Offiong v. African Development Corporation Ltd.* (1964) 2 All N.L.R. 75 at 79, the appellant who was the Secretary of the respondent-company was indebted to the company in respect of the car given to him by the company when he took up employment with them. The appellant resigned his appointment and requested that the company waived the payment of the balance due on

the car. The company granted the request but later brought an action to recover the balance claiming, inter alia, that the release was not binding on the company because the appellant gave no consideration for it. De Lestang C.J. said 'It is contended that the release is not legally binding because the appellant gave no consideration for it. In my view this case falls squarely within the principles established by *Central London Property Trust Ltd. v. High Trees House Ltd.*, as explained in *Combe v. Combe*. That principle is that where a promise is given without consideration but is intended by the promisor to affect an existing contract between him and the promisee, and is intended to be acted upon by the promisee, and is in fact so acted upon, such a promise may be set up as a defence by the promisee in an action by the promisor to enforce the original contract.

In *Esin v. Matzen & Timm (Nigeria) Ltd.* (1966) 1 All N.L.R. 233 and in *Tika-Tore Press Limited v. Abina* (1973) 1 All N.L.R. (part II) 244, the Supreme Court respectively considered and applied promissory estoppel as a defence. In the former case, the court approved the application of the principles as stated by the Privy Council in *Ajayi v. R. T. Briscoe (Nigeria) Ltd.* In the latter case of *Tika-Tore Press Ltd. v. Abina* (supra) at 252-253, where the representation consist of a promise by the promisor to the promisee that the promisee should pay a lesser sum before certain date, in full and final settlement of a greater sum, in response to the arguments of the plaintiff, the court said,

'All the arguments about whether the evidence was indicative of the defence, either of 'accord and satisfaction' or of 'waiver', or whether there was consideration for the 'waiver' or not merely begged the issue and appear to have been put forward in an abortive effort to sidetrack the defence of estoppel, put forward by the defendants/appellants, and accepted by the learned trial judge who rightly held that it would be inequitable to enforce the claim. As a matter of fact, it may be said, with commendable justification, that the former theoretical view that the fact that there is no consideration or nothing in writing to support the variation of (the) contract no longer nullifies the effect of the defence of estoppel. ... In effect, this defence of estoppel by waiver (if it may be so conveniently described) is always pleaded by way of defence. '

The Supreme Court approved of the decision in *Hughes case* as expanded in the *High Trees case*; it however, implicitly doubted the continuing validity of *Foakes v. Beer* (1884) 9 App. Cas. 605, the equitable defence of promissory estoppel was extolled in a manner that is flexible - so it should be in the interest of justice. A person who modifies his legal relations within the rules of promissory estoppel, must accept the legal relations as modified by himself, even though such modification is not supported in point of law by any consideration, but only by his word or conduct. Per Denning L.J. in *Combe v. Combe* (1951) All E.R. 767 at 770 cited with approval by the Supreme Court in *Tika-Tore Press Ltd. v. Abina* (supra).

3.2 Scope of Promissory Estoppel

(i) Is it Limited to Cases Arising out of Existing Contracts:

It is not certain whether the doctrine of promissory estoppel applies only to obligations arising strictly out of an existing contract. The principle as expanded in the *High Trees case* is wide enough to cover some other cases where the parties are not already contractually bound inter se; for, the emphasis of the learned judge was on the fact that one party had made a promise, intended to be acted upon and was in fact acted upon and was, therefore, precluded from retracting his promise. However, the authorities cited in support of this proposition limited the principle to cases where there had been re-existing contracts between the parties.

In *Hughes case* (supra) at 448, the parties were already contractually bound and Lord Cairns, L.C. envisaged that the principle could only apply where there was a pre-existing contractual relationship. 'If parties who have entered into definite and distinct terms involving certain legal results ... afterwards by their own act or with their own consent enter upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced.' In *Birmingham and District Land Co. v. London and North Western Railway Company* (supra) at 286, Bowen L.J. expressly confined the principle in *Hughes case* to cases where there were contractual relationships. 'If persons who have contractual rights against others induce by their conduct those against whom they have such rights Except in *Robertson v. Minister of Pensions* (1949) 1 K.B. 227, where the principle was applied without a pre-existing contractual relationship between the parties, the cases in which the principle has been said to operate involve pre-contractual relationships between the parties.'

The recent formulation of the doctrine by Lord Hodson in *Ajayi v. R. T. Briscoe* (1964) 3 All E.R. 556 at 559, envisages that the doctrine can only operate in respect of obligation arising out of contract. 'The principle, which has been described as quasi-estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party.' The Supreme Court took a similar view in *Tika-Tore Press Limited v. Abina* (supra) at 253. In that case, Fatayi-Williams J.S.C. said 'It is set up, not as the foundation of an action for breach of contract, but as an answer to the contention of a creditor that the letter of the original contract must be observed.'

But the judgment of Denning L.J. in *Combe v. Combe* (1951) 1 All E.R. 767, which the Supreme Court quoted in support of its proposition, did not limit the application of the doctrine to cases arising ex contractu. Nevertheless, it is reasonably clear that established authorities in support of the doctrine conceive the doctrine as applicable only to obligations arising out of contract. This narrow conception of the application of the doctrine may be due to the fact that the cases in which the doctrine has been invoked and considered, largely involved persons who were contractually bound. Should the mere fact that the doctrine has been applied mostly in cases involving contractual relations be sufficient to exclude its application to obligations arising otherwise than out of contract? What is, however, clear, is that whenever the doctrine applies, it modifies the existing obligations of persons; such obligations need not arise strictly out of contract.

(ii) The Doctrine cannot be used to Create a cause of Action:

The doctrine is limited to matters of defence, it can only be used as a shield and not as a sword. The doctrine may be set up as a defence by the promisee in an action by the promisor to enforce the original right: but it cannot be sued on as a separate cause of action by the promisee. See *Offiong v. African Development Corporation Ltd.* (1964) 2 All N.L.R. 75, 79. 'The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel.' *Central London Property Trust Ltd. v. High Trees House Ltd.* (supra) at 134; *Combe v. Combe* (supra) at 219.

But in *Robertson v. Minister of Pensions* (1949) 1 K.B. 277, it would appear that the doctrine was used to found a cause of action. In that case, the plaintiff had applied to the Minister of Pensions claiming a military pension. The application was rejected by the Pensions Tribunal on the ground

that the plaintiff failed to establish that his disability resulted from military service. On appeal, the plaintiff relied on a letter which he had received from an official of the Ministry and claimed that on the strength of that letter the Ministry was precluded from military service. Denning J. upheld the plaintiff's contention and the appeal was allowed. The letter which generated the estoppel was also the foundation of the cause of action.

Similarly, in *Combe v. Combe* (1950) 2 All E.R. 1115. Byrne J. upheld an action predicated on a promise that was not supported by consideration. The decision was reversed on appeal. The Court of Appeal was unanimous in rejecting the view that promissory estoppel could operate as the basis of the cause of action. 'That principle' observed Denning L.J., 'does not create new causes of action where none existed before.'

Promissory estoppel, as clarified, has since been consistently followed. In *Beesly v. Hallwood Estates Ltd.* (1960) 2 All E.R. 314 at 324. Buckley J. stated that the doctrine may afford a defence against the enforcement or otherwise of enforceable rights; it cannot create a cause of action. The House of Lords in *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* (1955) 2 All E.R. 657, and the Privy Council in *Ajayi v. R.T. Briscoe (Nigeria) Ltd.* (supra) at 559 emphasised that no encouragement was to be given to the view that the principle was capable of extension so as to create rights in the promisee for which he had given no consideration.

Though the principle is limited to matters of defence, it may be invoked by either the defendant or the plaintiff. What is essential to the application of the principle is that there must be an independent cause of action. See *Combe v. Combe* (1951) 2 K.B. 215, 220. Thus, a plaintiff having an independent cause of action may invoke promissory estoppel to preclude a defence otherwise available to the defendant. In *Fenner v. Blake* (1900) 1 Q.B. 426, the defendant, a tenant of the plaintiff was desirous of surrendering his tenancy three months earlier than that for which he could give a valid notice to vacate the premises. He approached his landlord, the plaintiff and entered into an informal agreement with the plaintiff in December to give up possession the following summer.

On the strength of this informal agreement, the plaintiff, with defendant's knowledge and consent, entered into an agreement for the sale of the premises to a third party, with a right to possession at Mid-summer. When the defendant refused to give up possession at midsummer, the landlord/plaintiff sued in ejectment; the Divisional Court held that the tenant/defendant was estopped from saying that his tenancy did not terminate in June. There was a promise made with the intention of being acted upon, and was in fact acted upon.

(iii) Consequent to the Promise, the Promisee must have Altered his position:

In order to establish the defence of promissory estoppel the promisee must have altered his position. This requirement was clearly stated in the leading cases of *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* (1955) 2 All E.R. 657 and *Ajayi v. R.T. Briscoe (Nigeria) Ltd.* (supra) at 559. In the latter case, the defence of promissory estoppel was dismissed by the Federal Supreme Court and on appeal, by the Privy Council, on the ground that the defendant had not altered his position. Lord Hodson, delivering the judgement of the Board said –

'The principle which has been described as quasi estoppel and perhaps

more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other part. This equity is, however, subject to the qualification that the other party has altered his position.'

The precise meaning of this requirement is not free from difficulties. The position is clear in the case of ordinary estoppel, the promisee must have altered his position to his detriment. As Farwell J. stated in *Dixon v. Kennaway & Co.* (1900) 1 Ch. 833 at 836, the phrase 'alter his position' does not mean that an active alteration is necessary, but that it is sufficient if the person to whom the statement is made rests satisfied with the position taken up by him in reliance on the statement, so that he suffers loss. Thus, the phrase imports two forms of action, one positive and the other negative, that is, doing something which he would not have done, or refraining from doing something which he would have done but for his reliance on the promise. In either case, the promisee must have suffered detriment.

But the position is not as explicit in promissory estoppel as formulated by Denning L.J. in *The High Trees Case (supra)*. In that case, the promisee by acting on the promise, did not suffer any detriment; indeed, he paid less, on the strength of the promise made to him, than he was contractually bound to pay. Furthermore, nowhere in the cases cited in support of the doctrine was consideration given to the relevance of detriment to the operation of the doctrine; admittedly, the cases were not expressly decided on estoppel though the conclusions seem to import the doctrine.

In *Hughes case (supra)* at 448, it was stated that a promisor would not be allowed to enforce and otherwise enforceable right where it would be inequitable having regard to the dealings which have thus taken place between the parties. In *Birmingham and District Land Co. case (supra)* at 286, Bowen L.J. stated that promisor will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before. The two judgments envisage change of relations between the promisor and the promisee though it would not appear from the judgments that the change should, necessarily be detrimental to the promisee.

However, the representation must be such that it will be inequitable to enforce the right under the original arrangement or transaction. And it will so be inequitable if the representation was made with the intention of being acted upon and was in fact acted upon; for in such a case, the courts have insisted that the representation must be honoured; to decide otherwise will be to encourage breach of faith, which itself constitutes unconscionable and inequitable conduct. Thus, once the representation is acted upon, on the good faith of the representor, then the representee would have altered his position and the circumstances would be that it would be inequitable if the representor is allowed to retract his promise. See *Foster v. Robinson* (1951) 1 K.B. 149; *Wallis v. Se-mark* (1951) 2 T.L.R. 222.

The extra-judicial opinion of Lord Denning on this aspect is instructive. He wrote - 'There still remains the question, when is it 'inequitable' to allow a person to go back on his promise? The test of what is 'inequitable' may be different when there is a promise from that when there is some other conduct which leads the other to believe that the strict rights will not be enforced. A promise has always been considered to be different in nature and quality from conduct of negligence or omission. A man should keep his word. All the more so when the promise is not a bare promise, but is made with the intention that the other party should act upon it. Just as contract is different from tort and from estoppel, so also in the sphere now under discussion promises may give rise to a different equity from other conduct.

'The difference may lie in the necessity of showing "detriment". Where one party deliberately promises to waive, modify or discharge his strict legal rights, intending the other party to act on the faith of the promise, and the other party actually does act on it, then it is contrary, not only to equity but also to good faith, to allow the promisor to go back on his promise. It should not be necessary for the other party to show that he acted to his detriment in reliance on the promise. It should be sufficient that he acted on it. That is sufficient in the case of promises given on the formation of a contract. It should also be sufficient in the case of a promise given on the modification or discharge of a contract.'

'But where the party has made no promise, express or implied, and all that can be said against him is that he by his conduct has induced the other to believe that the strict rights under the contract will not be enforced or kept in suspense, then the position is different because there is no question of good faith - no question of a man keeping his word. In those circumstances, it may be necessary for the other party to show not only that he acted but also that he acted to his detriment, in the belief that the strict rights would not be enforced. That is what is necessary in the case of an estoppel and there is no good reason why it should not be necessary here.'

'It must be acknowledged that the foregoing distinction has not yet been drawn in the cases, but it is interesting to notice that the actual decisions are all consistent with it.' See *Recent Developments in the Doctrine of Consideration* (1952) 15 M.L.R. 1 at 5-6. Lord Denning insisted that the question is not whether promisee has, by acting on the promise, suffered detriment but whether it is inequitable to allow a promisor to deny his promise made in good faith and with the intention of being acted upon by the promisee and was in fact acted upon. The observations of the House of Lords on the matter in the *Tool Metal Case* (supra) at 686 are not inconsistent with Lord Denning's proposition. 'To make the principle applicable' observed Lord Cohen, 'the party setting up the doctrine must show that he has acted on the belief induced by the other part.' Viscount Simonds emphasised that 'the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position. I lay stress on this, because I would not have it supposed, particularly in commercial transactions, that mere acts of indulgence are apt to create rights.'

The suggestion that a distinction should be drawn between a deliberate promise to waive or modify strict legal rights and a mere conduct that has induced the other to believe that strict legal rights will not be enforced may provide for a more flexible application of the doctrine. In the former case, if the deliberate promise is intended to create legal relation, it is sufficient if the promise is acted upon even though the requirement as to detriment is not satisfied. But in the latter case, where there is no question of good faith, the promisee must show not only that he has acted on the promise but also that he suffers loss.

In Nigeria, the topic has been the subject-matter of some consideration in two leading cases and judicial attitude in both cases tend to favour Lord Denning's view of the matter. In *Ajayi v. R.T. Briscoe (Nigeria) Ltd.* (1962) 1 All N.L.R. 673 at 678-679, the Federal Supreme Court dismissed the defence of promissory estoppel on the ground that the defendant could neither be said to have altered his position nor even to have acted on the promise and thereby altered his position. In that case, the Defendant/Appellant, under a hire-purchase agreement, hired lorries from the plaintiffs/respondents.

The defendant/appellant, having fallen into arrears in his payment of the instalments, wrote to the

plaintiffs/respondents complaining that the vehicles were not in good condition due to lack of proper service and that he had had to withdraw the vehicles from service. In their reply the plaintiffs/respondents stated that they were agreeable to his withholding instalments due on the vehicles as long as they were withdrawn from active service. In fact this letter was written six months after the final instalment was due and the action claiming the balance due was brought two years after the last instalment should have been paid. The trial court gave judgment for the plaintiff/respondent. On appeal, the appellant/defendant raised the defence of promissory estoppel. He contended on the authority of the *High Trees case* that the respondents were estopped from bringing the action by virtue of the letter which the respondents had written to him and that that letter constituted a waiver.

Taylor F.J., delivering the judgment of the court said:

‘It is true that a promise was made, that as long as the lorries were off the road the defendant could withhold the payment of the instalments due. It has not been contended, and indeed it could not be contended that this was a promise which had the effect, in view of the subsequent sale of the lorries, of waiving the payment of the balance of the debit altogether; as distinct from suspending the time for payment. Finally, I cannot see in what way the present appellant altered his position, or can be said to have acted on the promise contained in the letter under consideration, and altered his position. The appellant states that before the letter was received, and ever since its receipt, eight of the lorries were with the respondents, and three in the appellant's garage. There is nothing in the evidence ... to show in what way the appellant having known of the promise acted upon it and thereby altered his position in any way, so as to make it unjust for the respondents to sue for the balance on the hire purchase agreement, two years after the letter was written, and nearly three years after the final instalment was due’.

Assuming that the letter was a deliberate promise intended to create legal relations, it was reasonably clear that the appellant never acted on it so as to alter his position, for his position, at the time of the action, remained as it was before and after the promise was made. The court did not doubt the correctness of the principle in the *High Trees case*; in which there was no question of detriment; the promisee, did act on the promise; as Taylor F.J. observed, in that case the promise to reduce the rent was made in order to enable the defendants to continue to run their business which they continued to do.

In *Esin v. Matzen & Timm (Nigeria) Ltd.* (1966) 1 All N.L.R. 233 at 238-239, the application of the principles stated by the Privy Council upholding the decision of the Federal Supreme Court in *Ajayi v. Briscoe*, was followed. The case concerned another hire-purchase agreement under which the defendant was in arrears in respect of tippers which he purchased from the plaintiffs under the agreement. The plaintiffs seized the tippers and later sued the defendant for arrears of instalments due. Earlier on, in mid-August 1962, the plaintiffs were found to have given an unintended impression that the defendant was given a delay of two months (a moratorium) for payment. The court inferred a promise from this impression on the ground that external approach ought also to be applied in promissory estoppel.

On the strength of this promise, the defendant claimed that the plaintiffs were estopped. The question was whether the defendant had thereby altered his position. His contention was that he must be regarded as having altered his position because, in reliance on the promise, he did not pay and thereby laid himself open to the liability of seizure of the tippers. The Supreme Court found that before the promise in mid-August the defendant had not paid the arrears and the tippers were liable to seizure; and at mid-August the liability to seizure was suspended; but at the

end of August the plaintiffs wrote telling the defendant that he must pay the sum due by the 6th of September.

Thus the suspension was withdrawn and the liability to seizure revived. In essence the defendant's position was again what it had been before and at the time (that is, mid-August) when the promise was made. There was nothing the defendant did after mid-August to alter his position so that he should need an opportunity of resuming his former position. 'It is not suggested that he did anything on the faith of the suspension. He had not the money to pay the arrears he owed before mid-August, and he had it not afterwards. His case is merely this: he had been promised an indulgence, he expected it not to be withdrawn, and he complains that he was disappointed in his expectation.'

The question was not whether the defendant altered his position to his detriment, on the other hand, it was whether he acted on the promise and thereby altered his position. Even though the defence was one of promissory estoppel by conduct, in which case, on the strength of Lord Denning's extra judicial opinion, detriment would have been a requirement, the Supreme Court thought it sufficient merely for the defendant to have acted on the promise.

This judicial attitude was confirmed in *Tika-Tore Press Ltd. v. Abina* ((supra), where the defence of promissory estoppel by conduct was upheld. It was a case of waiver whereby the defendant paid a lesser sum than he was contractually bound to pay. He acted on the representation by the payment of a lesser sum, he thereby altered his position but he did not suffer any detriment yet the Supreme Court stated that it would be inequitable to enforce the plaintiff's claim.

SELF ASSESSMENT EXERCISE

Describe the scope of promissory estoppel.

3.3 Effect of Promissory Estoppel

As a rule, the element of temporariness cannot be divorced from promissory estoppel. See J.F. Wilson, Recent Development in Estoppel (1955) 67 L.Q.R. 330; *Re Venning* (1947) 63 T.L.R. 394. Unlike proprietary estoppels, promissory estoppel does not give rise to permanent estoppel. The promisor can resile from his promise on giving reasonable notice which need not be a formal notice; giving the promisee a reasonable opportunity of resuming his position. See *Ajayi v. R.T Briscoe (Nigeria) Ltd.* (supra). In fact, it is not the promisor alone who can resile from his promise, either party can change his mind, provided adequate or reasonable notice is given, he can thereafter resume his original rights and compel performance in accordance with those rights from the other party. In some cases, giving of notice may not be necessary before either party resumes his original rights; for example, where the condition under which the promise was given no longer exist; this was the position in the High Trees case where the modern doctrine of promissory estoppel was formulated.

Therefore, the effect of the doctrine is to modify or suspend the original rights of the parties inter se until such a time has elapsed, without at all events placing the parties in the same position as they were before. See *Birmingham and District Land Co. v. London and North Western Railway Co.* (supra) at 286. Thus, it will no longer be inequitable to allow a promisor to enforce his original rights if he had given reasonable notice of his intention to do so to the promisee or if certain supervening events had restored the promisee to the position which he was at the time the promise was made.

In the leading case of *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* (supra) at 675, the House of Lords reversed the decision of the Court of Appeal and restored the judgment of Pearson, J. as to what constitutes reasonable notice of the promisor's intention to resume his original rights. Lord Tucker explained the position:

'It is, of course, clear, as Pearson J. pointed out, that there are some cases where the period of suspension clearly terminates on the happening of a certain event, or the cessation of a previously existing state of affairs, or on the lapse of a reasonable period thereafter. In such cases, no intimation or notice of any kind may be necessary. But in other cases, where there is nothing to fix the end of the period which may be dependent on the will of the person who has given or made the concession, equity will, no doubt, require some notice or intimation together with a reasonable period for re-adjustment before the grantor is allowed to enforce his strict rights. No authority has been cited which binds your Lordships to hold that, in all such cases, the notice must take any particular form or specify a date for the termination of the suspensory period. This is not surprising having regard to the infinite variety of circumstances which may give rise to this principle which was stated in broad terms and must now be regarded as of general application. It should, I think, be applied with great caution to purely creditor and debtor relationships which involve no question of forfeiture or cancellation, and it would be unfortunate if the law were to introduce into this field technical requirements with regard to notice and the like which might tend to penalise or discourage the making of reasonable concessions.'

However, much as the element of temporariness is inherent in promissory estoppel, there are cases in which the effect of the application of the doctrine creates permanent estoppel, such cases may therefore be regarded as exceptions to the temporariness and suspensory nature and character of the doctrine. Thus, a promissory estoppel will become final and irrevocable if, by supervening events, the parties cannot resume or be restored to their original positions.' Cases of complete and effective waiver or variation of original contractual rights or arrangements provide ample illustrations. See *Tika-Tore Press Ltd. v. Abina* (1973) 1 All N.L.R. (part II) 244; *Offiong v. African Development Corporation Ltd.* (1964) 2 All N.L.R. 75.

In *Tika-Tore Press Ltd.* (supra), the promisor had agreed to accept a lesser sum in full and final settlement of a greater sum which the promisee then owed the promisor. The amount having been paid as agreed the promisor was held to have waived his right and was, therefore, estopped from claiming the balance from the promisee. Similarly, in *Fenner v. Blake* (1900) 1 Q.B. 426, the tenant was held liable to ejectment, three months before the expiration of his tenancy on the ground that he had earlier on promised the landlord that he would vacate the premises at that time and on the strength of this promise the landlord had sold the premises to a third party, and providing for a vacant possession to be given. In *Salisbury v. Gilmore* (1942) 2 K.B. 38, the tenant, who had vacated the premises was held not liable for breach of covenant to repair on the ground that the landlord had before the expiration of the tenancy, represented to the tenant that the premises would be demolished at the expiration of the tenancy.

4.0 CONCLUSION

It is not certain whether the doctrine of promissory estoppel applies only to obligations arising strictly out of an existing contract. The principle which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is

that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other part. This equity is, however, subject to the qualification that the other party has altered his position.

5.0SUMMARY

In this unit we considered promissory estoppel as an equitable defence. You should now be able to: define the scope of promissory estoppel; and describe the effect of promissory estoppel.

6.0 TUTOR-MARKED ASSIGNMENT

What do you understand by promissory estoppel? Discuss.

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

Jegede M. I. (2007rep.) *Principles of Equity*; Ibadan: Unique Design/Prints

UNIT 2 PROPRIETARY ESTOPPEL

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- 1.0 Introduction
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- 3.0 Main content
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1.0 INTRODUCTION

In the last unit we considered promissory estoppel as an equitable defense. In this unit, we will consider the second aspect which is proprietary estoppel. Where A expends money on land in the erroneous belief that he is the owner and B, the true owner, with the knowledge of A's error, deliberately abstains from asserting his right and thereby encourage A to persist in his error, proprietary estoppel or estoppel by acquiescence will operate and B will not thereafter be allowed to assert his right in the land against A.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Explain the basis of the doctrine of proprietary estoppel;

- (ii) Apply the doctrine of proprietary estoppel;
- (iii) Link Proprietary estoppel and constructive notice; and
- (iv) Explain the effect of the operation of the doctrine.

3.0 MAIN CONTENT

3.1 Basis of the Doctrine

Conduct giving rise to estoppel may be passive or active. First inaction may amount to passive acquiescence upon which proprietary estoppel may be founded. Thus in *Ramsden v. Dyson* (1866)L.R. 1 H.L. 129 at 140-141, Lord Cranworth L.C. said:

'If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land in which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title, and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented. But it will be observed that to raise such an equity, two things are required, first, that the person expending his money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure, made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights.'

Secondly, conduct encouraging such expenditure as referred to in Lord Cranworth's proposition otherwise known as the rule in *Ramsden v. Dyson* may amount to active acquiescence capable of supporting a claim of proprietary estoppel. 'If A puts B into possession of a piece of land, and tells him, 'I give it to you that you may build a house on it', and B on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation that was made.' Per Lord Westbury L.C. in *Dilwyn v. Llewellyn* (1862) 4 De G.F. & J. 517 at 521; 45 E.R. 1285.

It is reasonably clear that the basis of the doctrine is fraud as manifested in the conduct of the owner of the land; for a person is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. See Fry J. in *Willmott v. Barber* (1880) 15 Ch.D. 96 at 105. It is evidently fraudulent for a true owner of land, in the circumstances explained in *Ramsden v. Dyson* and in *Dilwyn v. Llewellyn*, to set up his title with a view to claiming the land with the improvements made on it by the mistaken party to the knowledge and with the passive or active acquiescence of the true owner.

However, for the court to restrain the owner of a legal right from exercising it on the plea of proprietary estoppel by the person who has expended money, certain requisites must be established. These were stated by Fry J., in *Willmott v. Barber* (supra).

(i) First, P who has expended money on the land must have been mistaken as to his legal right in the land; he must have genuinely believed though, erroneously, that he was the owner of the land;

(ii) P, acting on the faith of his mistaken belief, must have expended some money

or must have done some act which will be pre-judicial to him if D the true owner of the land were subsequently allowed to set up his right against P;

(iii) D, the true owner, must have known of the existence of his own right which is inconsistent with the right claimed by P. If D was unaware that he was the owner of the land the plea of proprietary estoppel will not be sustained; see *Armstrong v. Sheppard & Short Ltd.* (1959) 2 Q.B. 384.

There cannot be conduct amounting to acquiescence, an essential element of the doctrine, where the true owner was not aware of his right and, therefore, could not be said to have knowledge of or to have acquiesced to any infringement of such right;

(iv) D must have known of P's mistaken belief of his rights in the land, such knowledge will raise an equity in favour of P and make it inequitable for D to subsequently set up his title against P;

(v) D must have encouraged P in his expenditure of money or in other acts which P has done either directly or by abstaining from asserting his legal rights.

The foregoing elements must co-exist in order to establish a plea of proprietary estoppel.

In *Ozokpo v. Paul* (1990) 2 NWLR (Pt. 133) p.494, the case for the respondent is that, her father made a grant of a piece of land to her. It is part of a portion of land given to her father by her grandfather. The land was given to her in 1956. She and her mother farmed on it planting cassava, vegetables, okro, etc. sometime in the 1950s, she saw one Ogbuka developing the said land. In spite of warnings from her and her father, Ogbuka erected a building on the land. Ogbuka sold the house in 1958 to Ozokpo and Ozokpo moved into the house. He took on tenants and then the civil war broke out.

Ozokpo fled to Portharcourt with his family and abandoned the property leaving behind his personal belongings and documents of title relating to the property. In the absence of Ozokpo, the respondent (Justina Paul) moved into the building and took possession, saying the building was erected on her land without her consent. Ozokpo died before the end of the war. His widow got back from Portharcourt and tried to get the house back. The respondent refused to give up possession. Mrs. Ozokpo applied for and obtained letters of administration to manage the estate of Ozokpo. As the respondent would not give up possession, Mrs. Ozokpo (appellant) took out an action against the respondent for arrears of rent in the Magistrate Court in Portharcourt and she got judgment in her favour. The respondent (Paul) paid up arrears of rent owed.

The Court held that a tenant who pays rent to another as landlord with full knowledge of the fact that he was not the sole owner of the property, is stopped from subsequently denying the landlord's title. It was dishonest of the respondent to move into the house when Ozokpo died reaping where she did not sow. There is even no evidence that the respondent ever protested to Ozokpo in respect of the property when he was alive.

3.2 Application of the Doctrine

The doctrine has found favour in Nigerian Courts though it is sometimes confused with the doctrine of laches. In *Rafat v. Ellis* (1954) 14 W.A.C.A. 430 at 431, a creditor obtained judgment against the plaintiff's sister and attached the judgment debtor's unoccupied family property which was sold under a writ of *fifa* to the defendant. However, the transaction was void since the subject-matter of the sale was family property in which the plaintiff's sister had no alienable interest, and the family never consented to the sale. The plaintiff admitted that he heard of the sale some time in 1942 and alleged

that he promptly instructed his solicitor to investigate and take action. In fact, the solicitor did nothing until September 1945 when he wrote a letter to the defendant asserting the plaintiff's title. By that time the defendant had erected a substantial building on the land. The defendant relied on the conduct of the plaintiff and the members of his family in standing by from 1942 to 1945 and permitting the defendant to erect a substantial building without any indication to him that there was a defect in his title.

Windsor-Aubrey J., delivering the judgment of the West African Court of Appeal, observed that the question the court had to decide was whether the plaintiff was estopped by laches and acquiescence, from claiming the property. It was held that the defendant had successfully raised the defence of estoppel under the rule in *Ramsden v. Dyson*. The principle is that the person expending the money must suppose himself to be building on his own land; in, this case the land in question was unoccupied and it was purchased under an execution sale; the circumstances were such that the defendant could reasonably believe that he was acquiring a good title to the property. Secondly, the plaintiff and members of his family were found to have knowingly acquiesced to the defendant's activities on the land, for, 'there was nothing to prevent them instituting an action for a declaration of title in 1942', since that time 'the members of the plaintiff's family were well aware of the erection of the building by the defendant and deliberately stood by until the building was completed.'

On these facts, the court found that 'This is not a question of the plaintiff and his family simply neglecting to enforce a claim', and therefore, on the principle of *Ramsden v. Dyson*, 'they must, by their conduct, be held to have acquiesced, and knowingly permitted the defendant to incur expenditure on renovating and adding to the building. They have thereby waived and abandoned any rights which they possessed, and cannot now enforce them'.

3.3 Proprietary Estoppel and Constructive Notice

In the earlier case of *Morayo v. Okiade* (1942) 8 W.A.C.A. 46, the West African Court of Appeal approved of the equitable rule as stated in *Caincross v. Lorimer* (1860) 3 L.T. 130, and as expanded in *Ramsden v. Dyson* (supra).

'It is a rule of universal law that if a man either by word or by conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it, although it could not have been lawfully done without his consent and he thereby induces others to do that from which they otherwise might have abstained he cannot question the legality of the act he had so sanctioned to the prejudice of those who have given faith to his word, or to the fair inference to be drawn from his conduct. In such cases, proof of positive assent or concurrence is unnecessary; it is enough that the party had full notice of what was being done and the position of the other party is altered'.

But the question the court had to decide was whether a stranger, who mistakenly incurred expenditure on land with the passive or active acquiescence of the real owner, is precluded from setting up the rule in *Ramsden v. Dyson* on the ground that he had constructive notice of the real owner's title. In that case, there was evidence before the trial court that the plaintiff did all within her power to apprise the defendant of her claim to the property but in spite of that knowledge the defendant embarked on the erection of the building. See *Morayo v. Okiade* (1942) 8 W.A.C.A. 46 at 48.

It was, therefore, clear to the Appeal Court (though this evidence was lost sight of by the trial judge, due to inaccurate exposition of facts) that the plaintiff/appellant ought not to have been estopped in view of the principle in *Rennie v. Young* (1858) 2 De. G. & J. 136.44 E.R 939 which is consistent with the rule in *Ramsden v. Dyson* (supra) that the equitable rule as to the effect of a person's lying by

and allowing another to expend money on his property does not apply when the money is expended with knowledge of the real state of the title.

But the Appeal Court went further to say 'We are unable to reconcile the learned Judge's finding, namely that 'the defendants admit that they made no inquiries as to Oshodi's title and must be held to have had constructive notice of the documents on which their title was based namely the auctioneer's receipt and plaintiff's own conveyance' with his decision that the plaintiff/appellant is estopped. We are of the opinion that having held that the defendant/respondent had constructive notice of the appellant's title he was precluded on the authority of *Rennie v. Young* from finding that acquiescence on the part of the appellant operated as estoppel.' See *Morayo v. Okiade* (supra) at 48.

No doubt, the question of constructive notice is unnecessary for his decision, since it has been found that the defendant/respondent had actual notice of the real owner's title. However, it would appear to be the view of the court that constructive notice as distinct from actual notice precludes the operation of the rule in *Ramsden v. Dyson* (supra) thereby narrowing the area of operation of the rule.

The importance of constructive notice as it affects the operation of the rule in *Ramsden v. Dyson* was further considered by the Supreme Court in *Owodunni v. George* (1967) 1 All N.L.R 177. In that case both plaintiff and defendant claimed to have derived their competing titles from one Eyisha family who originally owned the land in dispute. The defendant denied the earlier title of the plaintiff and claimed that he had been in an undisturbed possession of the land for several years and that he had expended money in erecting buildings on the land. He relied on laches and acquiescence, though the defence was treated as equitable estoppel.

The trial court upheld the superior title of the plaintiff; it, however recognised the equity of the defendant's case; he built without any warning from the plaintiff of his claim to title, nevertheless, it was held that the defendant must lose because he could have found out that the plaintiff had a superior claim to the land. On appeal, the counsel for the plaintiff conceded that the judgment of the lower court recognised the equity of the defendant/appellant's case, but rejected it on the ground of constructive notice, he therefore, sought to support this ground of rejection by citing the earlier decision of the West African Court of Appeal in *Morayo v. Okiade* (supra).

In its judgment, the Supreme Court approved of *Ramsden v. Dyson* (supra) as ably expanded by Fry J., in *Willmott v. Barber* (supra). It, however, rejected the view that constructive notice precludes the operation of the rule. Bairamian J.S.C. said:

'The defendant bought with a conveyance and built at great expense on the land in the belief, here assumed for this aspect of the appeal to have been mistaken, that the land was his; the plaintiff knew about it and regarded the land as his own, but did not warn him, and now wants the land and buildings for himself. The trial judge grants it to him on the basis that the defendant ought not to have made a mistake on the ground of what is usually described as constructive notice, but with respect, that is helping the plaintiff to reap the fraudulent fruit of standing by, and the equity of the defendant's case must prevail.'

See *Owodunni v. George* (1967) 1 All N.L.R. 177, 181-182.

Thus, the Supreme Court refused to follow *Morayo v. Okiade* (supra) on the ground that the observations of Turner L.J. in *Rennie v. Young* (supra) which the West African Court of Appeal relied upon in that case do not warrant the engrafting of 'constructive notice' upon the doctrine of standing by. (See *Owodunni v. George* (supra) at 183). In support of this contention the Supreme Court relied on the view of Fry J., in *Willmott v. Barber* (supra) at 101,106 where he said as follows-

'The equitable doctrine of acquiescence is founded on there having been a mistake of fact; can it be re-

pelled by showing that there was constructive notice of the real facts? In every case in which a man acts under the mistaken belief that he is entitled to land, he might, if he had inquired, have found out that he had no title. And yet the courts appear always to have inquired simply whether a mistake has been made, not whether the plaintiff ought to have made it.'

The position now, with regard to the relevance of constructive notice to the operation of equitable estoppel, is that whenever a person is seeking the relief, not on a contract, but on the footing of a mistake of fact, the mistake is not the less a ground for relief because he had the means of knowledge. As has been stated earlier, the doctrine of constructive notice is a dangerous one, in that it is contrary to the truth; being wholly founded on the assumption that a person does not know the facts; and yet it is said that constructively he does know them; it is a doctrine which ought not to be extended further beyond its traditional area of operation, otherwise, it may defeat the end of justice which the judges who invented it wanted to serve.

SELF ASSESSMENT EXERCISE

What is the importance of constructive notice as it affects the operation of the rule in *Ramsden v. Dyson*?

3.5 The Effect of the Operation of the Doctrine

Proprietary estoppel or equitable estoppel gives rise to a permanent modification of the rights of the parties and those of their successors in title; unlike promissory estoppel whose effect is as a rule, temporary or suspensory. Moreover, proprietary estoppel can be used either as a shield or as a sword. In other words, it is capable of creating substantive rights upon which a cause of action may be founded. See the following: *Dillwyn v. Llewelyn* (1862) 4 De G.F. & J. 517; 45 E.R. 1285. *Thomas v. Thomas* (1956) N.Z.L.R. 785; *Ibadan City Council v. Ajanaku* (1969) N.M.L.R. 32.

Whenever the plea is sustained, it creates an equity in favour of the person who has expended money on the land and, the real owner of the land will henceforth be prevented from exercising or asserting his legal rights in respect of the land. However, the question remains as to whether the person who has expended money will be given compensation for the money so expended or he is entitled to conveyance. There is much uncertainty as to the kind of order the court will make whenever the relief is granted. There does not appear to be any general rule as to the proper order. Thus, the court must look at the circumstances in each case to decide in what way the equity can be satisfied. See Lord Denning MR in *E.R. Investment Ltd. v. High* (1967), 2 Q.B. 379 at 395. It is however, reasonably clear that in giving effect to the kind of equity so created, the courts have exercised a very wide discretion in making such an order as will do substantial justice between the parties and settle all outstanding questions between them. See *Aileru v. Ademuoye* (1967) 1 All N.L.R. 271 at 274.

The matter was considered by the Supreme Court in *Aileru v. Ademuoye* (*supra*). In that case, plaintiffs, representing the Ojuwoye community, were the owners under native law and custom, of the land in dispute. They brought this action claiming, inter alia, a declaration of title to the land. The defendant claimed that he had become the fee simple owner of the land by virtue of a deed of conveyance executed by certain members of the plaintiffs' community; that he had entered the land, expended a large sum in erecting substantial buildings on it to the knowledge of and without any indication of the interest of the plaintiffs in the land.

The trial judge found that the community was the owners of the land and that the vendors had no

authority to sell it. The trial judge held that the plaintiffs were guilty of lying by while the defendant was expending money on the land under the mistaken belief and to the knowledge of the plaintiffs, that he, the defendant owned the land. Nevertheless, the trial judge granted the plaintiffs a declaration of title but dismissed their claim to other forms of relief which in effect confirmed the right of the defendant to possession and prevented the plaintiffs from exercising their legal rights as owners of the land.

On appeal, the question the Supreme Court had to decide was whether the judgment of the lower court as a whole did the fullest possible justice between the parties and whether it should be varied in any way. It was the view of the court that what the defendant had in the events that had taken place was not an equitable interest in the land but an equity and that where such an equity is created by the acquiescence of the owner of the land, the person who has expended money will be entitled to have supposed title confirmed or, at any rate, to be compensated for his outlay.

On this holding the court adjourned the appeal so that the plaintiffs might consider whether to offer the defendant, the owner of the equity, compensation for the expense he had incurred and also that defendant might consider whether to counter-claim for a conveyance of the land and to offer to pay the plaintiffs the value of the land as it was when he took possession of it. It later transpired that the plaintiffs offered the defendant compensation which the defendant rejected claiming that his equity would not thereby be satisfied by the compensation. The Supreme Court held that in the circumstances of the case the defendant's equity would not be satisfied by allowing plaintiffs to pay him compensation.

Enforcement of the equity so created in favour of the person who has expended money on land depends upon the circumstances of each case. See *E.R lves. Investments Ltd. v. High* (supra), *Aileru v. Ademuoye* (supra). Thus, the court has a wide discretion limited only by the circumstances of the case and the duty of the court to ensure substantial justice between the parties. Indeed, the exercise of the jurisdiction is correctly described as equity at its most flexible. See Danckwerts L.J. in *E.R Investments Ltd. v. High* (supra) at 399.

However, the guiding principle seems to be the desire of the court to ensure, as much as possible, the fulfillment of the expectations of the owner of the equity in expending money on the land. 'It is quite plain' observed Lord Denning M.R. in *Inwards v. Baker* (1965) 2 Q.B. 29; (1965) 1 All E.R. 446, 'that if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the person so encouraged such as to entitle him to stay'. (1965) 1 All E.R. 446 at 448.

In *Duke of Beaufort v. Patrick* (1853) 17 Beav. 60 at 79-80; 51 E.R. 954, the equity was satisfied by a conveyance of the land to the owner of the equity on his offer to pay compensation. The court might itself determine the amount of compensation. In *Dillwyn v. Llewelyn* (1882) De G.F. & J. 517 at 522; 45 E.R. 1285, the father placed his son, the plaintiff, in possession of his land and at the same time signed a memorandum presenting the land to the plaintiff so that the plaintiff could build on it a dwelling house of his own. The plaintiff, with the assent and encouragement of the father, built at his own expense, a house upon the land and resided there.

At his father's death, the plaintiff brought this action against the father's personal representatives, claiming to be entitled to a conveyance of the fee simple. His expectations at the time he was building on the land were that he would be allowed to remain on the land and that he would eventually become the absolute owner of it. It was held that he was entitled to call for a conveyance of

the fee simple being the best possible way in which his equity could be satisfied. Lord Westbury L.C. said:

'The equity of the donee and the estate to be claimed by virtue of it depend on the transaction, that is, on the acts done, and not on the language of the memorandum, except as that shows the purpose and intent of the gift. The estate was given as the site of a dwelling-house to be erected by the son. The ownership of the dwelling-house and the ownership of the estate must be considered as intended to be co-extensive and co-equal.'

Here, in *Dillwyn v. Llewelyn*, proprietary estoppel was used as a sword. In the New Zealand case of *Thomas v. Thomas* (1956) N.Z.L.R. 785 at 793, the equity of the wife, who had expended money on her husband's land, was satisfied by an order compelling the husband, the real owner of the land to convey the fee simple to the wife. In the case Gresson J. observed as follows: 'If *Dillwyn v. Llewelyn* in case of equitable estoppel by acquiescence (and it is susceptible of being so regarded) 'it is an authority for the use of that doctrine as a sword and not merely as a shield. The son did not content himself with resisting eviction but asserted a claim which was upheld to the point of holding him entitled to a conveyance.'

In *Attorney-General v. John Holt & Co.* (1910) 2 N.L.R. 1 at 16, the defendants had incurred expenditure in reclaiming the plaintiff's land which defendants were using for their own business to the knowledge and consent of the plaintiffs. Osborne C.J. refused the plaintiffs' claim for an injunction but the defendants were granted a declaration that their rights to remain and use the land for their business was irrevocable and perpetual. In the course of his judgment the Chief Justice said:

' ... On the strength of the understanding the defendants' predecessors in title expended money in reclamation and building ... on the authority of *Plimmer v. Mayor, etc., of Wellington* (1884) 9 App. Cas. 699, that licence of the Crown is now irrevocable, and being of indefinite duration, perpetual. I hold, therefore, that the respective defendants and those claiming under them have acquired, as to so much of the land adjoining that comprised in the respective Crown grants under which they claim, as consisted of foreshore and bed of the lagoon reclaimed by themselves or their predecessors in title, a perpetual right to place and store such things thereon'

The fulfilment of the expectation of the person expending money is an important influencing factor in making an order that will satisfy the equity so created. In *Inwards v. Baker* (1965) 1 All E.R. 446 at 449, the son who had built a bungalow on his father's land with the intention of residing there and making it his home was held entitled to stay there so long as he wished it to remain his home. 'The court will not allow the expectation to be defeated where it would be inequitable so to do. In this case, it is quite plain that the father allowed an expectation to be created in the son's mind that this bungalow was to be his home. It was to be his home for his life, or at all events, his home so long as he wished it to remain his home'.

This was followed by the Supreme Court in *Ibadan City Council & Anor v. Ajanaku* (1969) N.M.L.R. 32 at 37-38. The defendant's predecessor-in-title had purportedly granted a lease of land to the plaintiff's predecessor-in-title free of rent and for such period as he and his successor-in-title should occupy the land. It was a void lease but the plaintiff and his predecessor-in-title had expended money on the land and were in undisturbed possession.

The Supreme Court held that:

'This was sufficient to create an expectation in the minds of the plaintiff's predecessor and his successors-in-title that they are entitled to remain in occupation of the land free of rent for an indefinite period. It seems to us only reasonable to infer that it was on the strength of

this that buildings were erected on the land by the plaintiff. 'In these circumstances, we consider that an equity was created by estoppel to safeguard the plaintiff's interest and protect the buildings he erected on the land. As against the defendant/appellant whose predecessor in title was a party to the purported grant of lease, equity will therefore come to the aid of the plaintiff to ensure that injustice is not perpetrated and that he and his successors are allowed to remain on the land for an indefinite period free of rent.'

In some other cases, the real owner of the land may be ordered to pay compensation in satisfaction of the equity of the person who has expended money on the land (see *Unity Joint-Stock Mutual Banking Association v. King* (1888) 25 Beav. 72; 53 E.R. 563) or in the alternative the person who has made the expenditure may be granted an equitable lien on the property, this would serve as security for the money so expended with the encouragement or acquiescence of the real owner. See *Chalmers v. Pardoe* (1963) 1 W.L.R. 677 at 681-682, where it was stated that:

'There can be no doubt upon the authorities' observed Sir Terence Donovan, 'that where an owner of land has invited or expressly encouraged another to expend money upon part of his land upon the faith of an assurance or promise that that part of the land will be made over to the person so expending his money, a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation; and when, for example, for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended.'

The court must look at the circumstances in each case to decide in what way the equity can be satisfied. See *Plimmer v. Wellington Corporation* (1884) 9 App. Cas. 699, 714 P.C.

4.0 CONCLUSION

Proprietary estoppel or equitable estoppel gives rise to a permanent modification of the rights of the parties and those of their successors in title. Moreover, it can be used either as a shield or as a sword. It is reasonably clear that the basis of the doctrine is fraud as manifested in the conduct of the owner of the land; for a person is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights.

5.0 SUMMARY

In this unit we have considered another equitable defence. You should now be able to: explain the basis of the doctrine of proprietary estoppel; apply the doctrine of proprietary estoppel; link proprietary estoppel and constructive notice; and explain the effect of the operation of the doctrine.

6.0 TUTOR-MARKED ASSIGNMENT

Briefly explain the effect of the operation of the doctrine of proprietary estoppel.

7.0 REFERENCES / FURTHER READING

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

Jegede M. I. (2007rep.) *Principles of Equity*; Ibadan: Unique Design/Prints

UNIT 3 LACHES AND ACQUIESCENCE

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1.0 INTRODUCTION

In the last unit, we considered the doctrine of proprietary estoppels. In this unit, we will look at another equitable defence which is laches and acquiescence. The equitable defence of laches is another important doctrine in the development of equity jurisdiction in the Nigerian Legal System. 'It is no exaggeration to state that of all the equitable rules that have been invoked to mould the application of the indigenous West African laws, the maxim 'equity aids the vigilant' has been the most active.' See Daniels; *The Common Law in West Africa* (1964) p.304.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- (i) Explain the equitable defence of laches and acquiescence;
- (ii) Distinguish between proprietary estoppel and laches;
- (iii) Explain laches and customary law;
- (iv) Describe the maxim 'He who comes to equity must come with clean hands';
- (v) Explain the operation of the doctrine; and
- (vi) Define the scope of clean hands.

3.0 MAIN CONTENT

3.1 Equitable defence of Laches

Under the English legal system, the importance of the doctrine is well recognised. Hanbury conceded that the doctrines of laches and acquiescence run through the whole of equitable doctrine. See *Modern Equity* (7th Ed.) p. 633. This doctrine emanated from the maxim 'delay defeats equi-

ties' or 'equity aids the vigilant'. Simply put, the substance of the doctrine seems to be that a litigant who has unreasonably slept over his right may not be granted equitable relief in respect of this right particularly where the granting of such relief will result in hardship to the other party who has acquired the right. The exercise of this equitable jurisdiction, like all others, is discretionary and, in the usual manner, the discretion may not be exercised arbitrarily.

The doctrine may be invoked where the conduct or neglect of the plaintiff indicates to the defendant a waiver of the plaintiff's rights, which rights have been acquired by the defendant. See *Ibeziako v. Abutu* (1958) II E.N.L.R. 24, 27; *Blake v. Gale* (1886) 32 Ch.D. 571. As Lord Camden put it, a court of equity: 'has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith; and reasonable diligence; where these are wanting, the court is passive and does nothing.' See *Smith v. Clay* (1767) 3 Bro. C.C. 639n at 640n.

In *Eriketola v. Alli & Others* (1941) 16 N.L.R. 56, Butler Lloyd Ag. C.J., delivering the judgment of the Supreme Court, contended that laches consists of standing by while an infringement of one's rights is in progress. In this case, the Supreme Court refused to invoke the doctrine because the owners of the rights in dispute did not stand by but posted caution notices on both occasions when an infringement of their rights by the sale of the property was attempted. See further, *Odunsi v. Kuforiji* (1948) 19 N.L.R. 7.

In *Chukwuma v. Ifeloye* (2008) 12 S.C. (Pt. II) p. 291, the Supreme Court held:

“That since there was no evidence that the Plaintiff/Appellant had been aware of the trespasser’s entry upon her land earlier than the time she caused a “Stop Work Order” to be served on the Defendant/Respondent or that she had caused the “Stop Work Order” to be vacated before she ultimately sued in court. Merely negotiating with the defendant/appellant is not enough evidence to support the conclusion that she had waived the trespass committed on her land. It would have been a different situation if she had, following the negotiation, caused the “Stop Work Order” to be vacated.”

The circumstances in which the doctrine may be invoked were explained by Lord Selbourne, in his often-quoted passage in *Lindsay Petroleum Co. v. Hurd* (1874) L.R. 5 P.C. 221 at 239-240, said,

'The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and 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. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay, of course, not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy'.

The circumstances warranting the invocation of the doctrine were aptly stated by the Supreme Court in the case of *Fagbemi v. Aluko* (1968) 1 All N.L.R. 233 at 237. In considering the equitable doctrine of laches, the court does not act only on the delay by the plaintiff, but must also consider (i) acquiescence on the plaintiff's part, and (ii) any change of position that has occurred on the defendant's part.'

3.2 Distinction Between Proprietary Estoppel and Laches

No doubt, there is much similarity between laches and equitable estoppel; hence, the tendency, on the part of the courts to confuse one with the other. The basis of this confusion seems to be the question of acquiescence which is common to both doctrines. In *Aganran v. Olushi* (1907) 1 N.L.R. 66 at 68, the right of the plaintiff had been infringed by the defendant, but the plaintiff took no steps to assert his right until 3 years after the violation. Winkfield J., delivering the judgment of the Full Court said 'In the absence of any evidence I think that it must be taken that the defendants did not know that the plaintiff had withdrawn his consent to the sale. Although he was aware that the defendants were suing, as owners, to eject the occupiers of the land and knew the terms of the settlement, he permitted the defendants to pay the compensation and to take possession of the land without objection. For nearly three years he took no steps to set the sale aside. During this period he also suffered the defendants to erect the houses on the lands without interference. I think that the action of the plaintiff amounted to an expression of intention or a promise not to exercise the right which he possessed.

The facts of the case could give rise to either estoppel or laches. On the question of estoppel, there was the mistaken belief on the part of the defendants that they were the owners of the land and, on the strength of this belief they proceeded to expend money on the land to the knowledge and acquiescence of the plaintiff, the real owner of the land. Thus, acquiescence of the plaintiff to the defendants' activities on the land created an equity in favour of the defendants which equity could be satisfied by the invocation of the doctrine of proprietary estoppel. Here acquiescence was only relevant as at the time the right was being infringed.

On the other hand, acquiescence in laches means unexplained delay in asserting one's right after infringement of such rights. In this case, for nearly three years after his right had been infringed, the plaintiff took no steps to assert his rights. In the circumstance, his claim might have become stale and therefore could be defeated by delay resulting from his acquiescence. Winkfield J., purportedly decided the case on laches but the learned judge relied on a proposition which is more consistent with proprietary estoppel than with laches. See further, *Ukwa v. Awka Local Council* (1966) N.M.L.R. 41, where laches was confused with estoppel.

Pennigton, J., in his dissenting judgment, attempted to distinguish between acquiescence as integral part of estoppel and acquiescence as an element in laches. He said:

'Acquiescence may be defined as acquiescence under such circumstances as that assent may be reasonably inferred from it and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter is to be determined on very different legal considerations Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under particular circumstances.' See *Aganran v. Olushi* (supra) at 68.

Thus, as Betuel, J. stated in *Nzekwu v. Nwakobi* (1960) IV E.N.L.R. 59 at 69, acquiescence is used in two senses: in one case, it means that a person abstains from interfering while his legal rights are being violated; in another sense, it means he takes no steps to enforce his rights when a violation of his rights, of which he did not know at the time, is brought to his notice. In the first case, the term acquiescence forms an integral part of estoppel; in the second case, the person is said to be guilty of culpable delay, that is, laches of which acquiescence is an important element. Therefore, acquies-

cence in the first sense operates by way an implied waiver resulting from the fact that the owner of the right which has been violated, has failed to assert it with promptitude. See further, *Finn v. Ayeni* (1964) N.M.L.R 130 at 133; *Taiwo v. Taiwo* (1956) 3 F.S.C. 80 at 82.

Acquiescence, as an integral part of proprietary estoppel, implies fraud which is the basis of the equity in favour of the person who has expended money on the land: the owner of the land should not stand by and allow another person who thinks the land is his to make improvements; he wants to take the improvements and thereby cheat the other person of the expense he is making. See *Ukwa v. Awka Local Council* (supra) at 46. But in laches, acquiescence implies negligence or indolence on the part of a person to assert his right with promptitude after such right has been violated. See Lord Camden in *Smith v. Clay* (1767) 3 Bro. C.C. 639n at 40n.

Generally it may be stated that so far, the scope of proprietary estoppel is limited to cases where money is expended on land through the passive or active acquiescence of the true owner of the land; though there is no reason why the doctrine should not be applied to any other type of property on which money has been so expended. Laches, on the other hand, is of a more flexible application in that it applies to a variety of cases and circumstances either to bar claim to specific equitable relief or the exercise of general equitable jurisdiction. See Lord Selbourne in *Lindsay Petroleum Co. v. Hurd* (1874) L.R 5 P.C. 221 at 239-40.

Whenever the defence of proprietary estoppel is sustained, it binds not only the parties to the action but also their successors-in-title. As the Judicial Committee of the Privy Council stated in *Nwakobi v. Nzekwu* (1964) 1 W.L.R 1019 at 1024, estoppel given the words or acts upon which a defendant has relied and altered his position, bars the remedy from that time on, both in the hands of the original actor and in the hands of those who claim title through him, unlike laches which, in essence, is a personal disqualification, binding only the parties to the action and not their successors-in-title.

3.3 Operation of the Doctrine

Circumstances warranting the invocation of the doctrine are not in doubt. Delay in asserting ones right is an important factor though not necessarily the controlling factor; where the defence against the relief sought by the plaintiff is founded upon mere delay and the delay does not amount to a bar of the relief by any statute of limitations, the court will proceed to consider the length of the delay, the inadequacy or unsatisfactory nature of the explanation of the delay, the nature of the acts done during the interval, that is, the degree of change which has occurred and whether in the circumstances the balance of justice or injustice is in favour of granting the remedy or withholding it.

In *Agbeyebe v. Ikomi* (1953) 12 W.A.C.A. 383 at 386, the plaintiff's action to set aside the sale of his property was in 1938 struck out by the Court. He did not take any further proceedings until 1947 when he moved the Supreme Court to re-list the suit which had been struck out in 1938. He gave, as reasons for the undue delay, the death of his legal advisers, his own illness and the difficulties of ascertaining his true position in the matter. But during the interval the defendant had rebuilt and occupied the property. The decision of the Supreme Court in favour of the plaintiff was reversed by the West African Court of Appeal on the ground that the plaintiff was guilty of laches.

On appeal to the Privy Council, the Judicial Committee of the Privy Council agreed with the decision of the West African Court of Appeal. The length of the delay, the inadequacy of the explanation of the delay, and the consequences of setting aside the sale as against the defendant who was a bona fide purchaser for value and who had been in occupation of the land during the whole period of nine years and had apparently altered the buildings thereon caused a balance of justice in favour of the

defendant within the meaning of laches as expanded by Lord Selbourne in *Lindsay Petroleum Company v. Hurd* (1874) L.R. 5 P.C. 221.

The doctrine operates to bar a variety of claims for equitable reliefs, for example, specific performance, injunction, rescission etc. These are special reliefs in equity and will only be given on condition of the plaintiff coming with great promptitude or as soon as the nature of the case will admit. Any substantial delay after negotiations have terminated and the cause of action has arisen - such as a year or probably less may be a bar. Thus, in *Ibeziako v. Abutu* (1959) III E.N.L.R. 24 at 27, a party to an agreement and who was clearly entitled to an order for specific performance of the agreement was denied the remedy because of his failure to claim the remedy with promptitude.

In *Ephraim v. Asuquo* (1923) 4 N.L.R 98 at 99, a claim by the plaintiff to revoke a decree made in favour of the defendant two years after the decree had been made was rejected on the ground that the plaintiff and his people were guilty of laches for they had every opportunity of opposing the grant, of which opportunity they did not avail themselves. 'If they were anxiously desirous of administering the estate, why did they wait a whole year to make the first move, and why did they wait another twelve months before getting the case on the hearing list?' They showed no anxiety to get the hearing expedited, and in the interval the defendant had already administered the estate which was ready for distribution. It would be inequitable if the relief sought were to be granted.

In *T. Taylor & Ors. v. Kingsway & Nigerian Properties* (1965) N.M.L.R. 103 at 105, the plaintiffs brought this action for recovery of possession of a property situate in Lagos. The delay in bringing the action was twentyfive years, during which from time to time, the defendants had spent vast sums of money on building and improving what are now known as the Kingsway Stores, in the belief that they had the fee simple; the plaintiffs knew of that belief as far back as 1938, but they gave no explanation at the trial on why they stood by during those twenty-five years. The Supreme Court held that the defence of laches was sufficiently established to defeat the plaintiffs' claim for recovery of possession. The fact that the plaintiffs were remainder-men at the time the property was acquired by the defendants was not a satisfactory explanation for the delay, since they could have brought an action at that time or thereafter to assert their estate and thereby prevented the defence of laches being set up against them. See *Wheelright v. Walker* (1883) 23 Ch.D. 752.

3.4 Laches and Customary Law

The doctrine has also been invoked to lessen the rigours and hardships which would have resulted in the strict application of certain rules of customary law; otherwise it would have been an intolerable injustice, for example, to deprive a person and his successors in title of a property which they have occupied and developed for half a century or more simply because customary law does not recognise adverse possession.

The general principle was stated by Speed, Ag. C.J. in the early case of *Lewis v. Bankole* (1908) 1 N.L.R. 81 at 83-84. 'The rules of equity are, or ought to be, perfectly well known to this court, and if a native law or custom is found to be repugnant to the fundamental rules of equity it is absolutely the duty of the court to ignore it. Thus, any attempt to revive an obviously stale claim, to constitute a state of affairs which has been openly or tacitly abandoned by all concerned, to upset a settlement which has been acquiesced in by all parties for a long time and upon which all parties have by mutual even though tacit consent acted for a number of years, is repugnant to the fundamental rules of equity and should not be countenanced by this court on the ground that it is in accordance with native law or custom, however harmless and admirable that native law or custom may be. In essence, the courts will not allow the strict rules of customary law to be invoked in cases when the effect is, in

equity, unjust. See *Nchiraheme Kojo Ado v. Buoyemhene Nwandwo Wusu* (1938) 4 W.A.C.A. 96 at 99.

The rule of customary law of property that the original owner of land who has not specifically divested himself of his ownership can, after any length of time and under any circumstances obtain recovery of his land from persons setting up adverse title, whatever may be the detriment caused to such persons by the fact that the original owner chose to sleep on his rights, will not now be applied in its entirety. See *Bokitsi Case* (1902) Sarbah's F.L.R. 159 at 160; (1902) Renner Reports at 239. In *Akpan Awo v. Cookey Gam* (1913) 2 N.L.R. 100 at 101, the Full Court refused to give effect to this rule of customary law because the defendants had been in undisturbed possession for a number of years with the knowledge and acquiescence of the plaintiffs' ... it would be wholly inequitable to deprive the defendants of property of which they have held undisputed possession and in respect of which they have collected rents for so long a term of years with the knowledge and acquiescence of those who now dispute their title, even if it were as clear as it is upon the evidence doubtful that they entered into possession, contrary to the principles of native law.'

The proposition is a modification of the strict rule that there is no prescriptive title known to customary law; the Courts on the grounds of equity will not allow a party to call in aid strict principles of customary law for the purpose of bolstering up a stale claim. See *Rihawi v. Aromashodun* (1952) 14 W.A.C.A. 204 at 207. In *Fiscian v. Nelson* (1946) 12 W.A.C.A. 21 at 22, the plaintiff's claim was for a declaration of title to a land which the defendant had occupied for 30 years during which period he had erected dwelling-houses. It was held by the West African Court of Appeal that a true-owner would not be allowed to claim land where he had stood by for a long time while someone else occupied the land, and incurred pecuniary commitments under the impression that he was entitled to the land, notwithstanding that prescription is unknown to customary law and that no statutory limitation applies to the case.

Surely it is just and equitable to hold it inequitable to deprive persons of property of which they have held undisputed possession for many years and to decide that the knowledge and acquiescence of the person who originally owned the land may fairly be presumed. See *Suleman v. Johnson* (1951) 13 W.A.C.A. 213 at 214. The original owner has created a position in which it would be inequitable to hold that he is now entitled to rely upon customary law to support his claim to any rights of ownership whatever. See *Akuru v. Olubadan-in-Council* (1954) 14 W.A.C.A. 523, 525.

This modification of the strict rule of customary law by the equitable doctrine of laches started in an obiter dictum. See *Bokitsi Case* (supra). It has been followed in many decisions, and the rule it enunciated is now well established. See the following cases: *Akpan Awo v. Cookey Gam* (1913) 2 N.L.R. 100; *Miller v. Kwayisi* (1930) 1 W.A.C.A. 7; *Adu v. Kuma* (1937) 3 W.A.C.A. 240; *Ilori v. Oloto* (1941) 7 W.A.C.A. 154; *Rihawi v. Aromashodun* (1952) 14 W.A.C.A. 204; *Akuru v. Olubadan* (1954) 14 W.A.C.A. 523; *Abey v. Ollenu* (1954) 14 W.A.C.A. 567; *Saidi v. Automobile Co. Ltd.* (1956) 1 F.S.C. 107; *Odutola v. Akande* (1960) 5 F.S.C. 142; *Ogundimu v. Adeoshun* (1964) L.L.R. 233.

Staleness of the real owner's claim after a long period of time during which acquiescence may be express or implied is an important factor grounding the defence of laches, for it would be unreasonable and indeed inequitable after the lapse of so many years to expect the adverse claimant to be able to prove his case. See *Oloto v. Attorney-General* (1957) 2 F.S.C. 74, 83.

Onus of Proof

When the defence pleads acquiescence, it is not for the plaintiff to prove there had been none, but for

the defendant to prove the acquiescence. See *Alade v. Aborishade* (1960) 5 F.S.C. 167, 171; *Odunsi v. Kuforiji* (1948) 19 N.L.R. 7.

3.5 Limit of the Doctrine

Acquiescence is an important factor upon which the doctrine of laches is founded. Therefore, the doctrine will not be applied where there is no acquiescence, express or implied on the part of the true owner in the defendant's assumption of the right in dispute. See *Tobias Epelle v. Ojo* (1926) 7 N.L.R. 96, 97. In *Akeju v. Suenu* (1925) 6 N.L.R. 87, the plaintiff sought to set aside a conveyance of family property which was made without his knowledge or consent. The defence of laches was rejected because the plaintiff took all reasonable and proper steps to protect his interests as soon as he learnt that the property was being dealt with without his authority.

Similarly, the doctrine will not be applied where the defendant had sufficient warning as to the status of the property and the right of the plaintiff therein; in that case the defendant was not led by the conduct of the plaintiff to alter his position with respect to the property. See *Olowu v. Desalu* (1955) 14 W.A.C.A. 662, 664; *Alari v. Oyekunle* (1961) W.N.L.R. 281; *Adeniji v. Ogunbiyi* (1965) N.M.L.R. 395. In *Ukwa & Ors. v. Awka Local Council* (1966) N.M.L.R. 47, the defence was rejected as there was no evidence that the person claiming the defence had changed his position or taken any irrevocable step which would make it inequitable to permit the real owner to assert his title or dominion over the land in dispute.

Acquiescence may also be inferred from long possession of the property in dispute. However, in order to ground a defence of long possession showing acquiescence on the part of the true owner of the property, it is necessary to show that such possession as is relied upon was adverse and of such character that the true owner would be deemed to have actual or constructive notice of the defendant's adverse but long and uninterrupted possession. See *Maji v. Shaft* (1965) N.M.L.R. 33, 36-7.

An uninterrupted possession for a period of five years may not be enough to ground the equitable defence of long possession showing acquiescence unless the defendant had within that period, altered his position that it would be inequitable to permit the true-owner to assert his title. See *Solagbade v. Ayankoya* (1962) W.N.L.R. 85, 87. But an undisturbed possession for upwards of seventeen years is sufficient to ground acquiescence - See *Lateju v. Lanahun* (1958) W.N.L.R. 106 at 108. 'The period of time which will justify the court in inferring acquiescence varies greatly according to the circumstances, including the nature of the improvements effected on the land. Where there are crops naturally a longer period would ordinarily be required than in the case of a substantial building'. See *Fiscian v. Nelson* (1947) 12 W.A.C.A. 21 at 22.

Pledge

Under customary law land subject to pledge is perpetually redeemable; therefore, a pledgee cannot rely on laches for purposes of claiming ownership of the land. See *Kofi v. Kofi* (1933) 1 W.A.C.A. 284. In *Leragun v. Funlayo* (1955-56) W.N.L.R. 167, Irwin J., held that lapse of time for more than 30 years is not a bar to the recovery of land which has been pledged.

Laches and Matrimonial Causes

In a matrimonial cause for divorce, the court is not bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has been guilty of unreasonable delay in

presenting or prosecuting the petition. As Bairamian J.S.C. explained in *Enekebe v. Enekebe* (1964) 1 All NLR 102 at 105, this is intended to make a spouse diligent in presenting his or her petition, for it is in the public interest that he or she should be diligent; and that a husband who is late in petitioning may well give ground for the view that he has acquiesced in the misconduct of his wife or is indifferent to the loss of her company. See sections 26, 28(c) & 37(b) Matrimonial Causes Act, Vol. 8, Cap. M7 Laws of the Federation of Nigeria, 2004.

This shows the extent to which the court can make use of the doctrine of laches with a view to discouraging stale demands which may sometimes be difficult to establish or rebut owing to possible loss or destruction of evidence.

Statutes of Limitation

The Limitation Decree does not derogate from the importance of the doctrine of laches. Indeed, the Decree gives statutory recognition to the jurisdiction of the court to refuse relief on the ground of laches. Section 2 of Decree No. 88 of 1966 provides 'Nothing in this Decree shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.'

In *Muomah v. Spring Bank Plc* (2009) 3 NWLR (Pt. 1129) p. 553, on nature of statute of limitation and rationale therefor, the Court of Appeal held that:

“The law on limitation of actions is the pivot upon which the wheel of litigation rotates and the ruthless watchman that guards the gates to the sanctuary of justice. The Statute of Limitation is therefore an act of peace based on the principle that long dormant claims have more of cruelty than justice in them, as the defendant might have lost the evidence to disprove a statement of claim and that persons with good causes of action should pursue them with reasonable diligence. The reasoning of the statute of Limitation is that greater injustice is likely to be done by allowing stale claims than by refusing them a hearing on the merit.”

On determination of period of limitation, see the case of *Odum v. Ugandan & Ors.* (2009) 9 NWLR (Pt. 1146) 281 where it was held as follows:

“The period of limitation in any statute of limitation is determined by looking at the writ of summons and the statement of claim alleging when the wrong was committed which gave rise to the cause of action, and by comparing that date with the date on which the writ of summons was filed. In the instant case, to determine if the action is statute barred, it is the date the respondents, now possessed of the land, got the land that has to be compared with the date of filing of the case, for the purpose of determining whether or not the said action is statute barred.”

In *Kumaila v. Sheriff & Ors.* (2009) 9 NWLR (Pt. 1146) p. 420, it was held that “time begins to run when there is an existence a person who can sue and another who can be sued, and all facts have happened which are materials to be proved to entitle the plaintiff to succeed. In determining whether an action is statute barred, it is important to first determine when time began to run.”

On what laches denotes and the distinction between laches and statute of limitation, see *Chukwu v. Amadi* (2009) 3 NWLR (Pt. 1127) p. 56, where the Court held as follows:

1. Where a statute prescribes a specific period for the filing of an action in a Court of law, any action filed after the expiration of the period is null and void. Such period of limitation starts to run from the very date the cause of action arose.

2. What determines whether or not a cause of action is statute barred is the writ of summons or statement of claim alluding to the date the cause of action accrued and the date of filing the suit.
3. Laches denotes an equitable principle by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting the claim where the granting of such relief would be unfair or unjust.
4. The difference between laches and statute of limitation is very thin. The doctrine of laches like the statutes of limitation in their conclusive effects are employed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.

See also *Unity bank Plc v. Nwadike* (2009) 4 NWLR (Pt. 1131) p. 352.

3.6 He who comes into Equity must come with Clean Hands

This flexible equitable defence speaks for itself. The early chancery jurisdiction was largely influenced by good faith, clear conscience and honest dealings; hence the Chancery Court of that period was designated as a court of conscience. Reliefs sought from and granted by the Chencery were predicated on and dictated by conscience; correspondingly, a suitor in equity would only be entitled to such reliefs if his conduct in the transaction had not been contrary to equity and good conscience. In spite of the transformation of early flexible equity jurisdiction to that of a rigid system, the 'clean hands doctrine' remains a significant manifestation of the ethical attitude of equity; while equity continues to enforce good faith in defendants, it no less stringently demands the same good faith from plaintiffs. See Chafee C., *Some Problems of Equity* (Cooley Lectures, Univesity of Michigan Law School 1950) p. 1.

3.7 Operation of the Doctrine

The doctrine operates in a variety of legal relationships: for example, enforcement of contracts, trusts, interests in land and even actions founded on torts and matrimonial causes. Indeed, 'the extent of the application of the maxim appears to be limitless - this is only due to its basic character and its value to all phases of equity. Throughout the equitable fields of fraud, illegality, and acts involving unconscionable conduct, the situations are few which cannot be definitely governed by the "clean hands" doctrine.' See 9 Temple L.Q. 220 at 226 (1935).

In the realm of contract, neither at law nor in equity will the court lend its aid in carrying out and completing an illegal contract. The court will not entertain a claim for damages or compensation for the breach of an illegal contract and, of course, no court of equity will decree specific performance of or grant any equitable relief in such contract. As Jessel M.R. explained in *Sykes v. Beadon* (1879) 11 Ch.D. 170 at 196, 'if two persons go partner as smugglers, can one maintain a bill against the other to have an account of the smuggling transaction? I should say certainly not ... It is no part of the duty of a Court of Justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract, between the parties to that illegal contract.'

Equitable relief will be refused if the party seeking the relief is guilty of inequitable conduct with respect to the transaction upon which the relief sought is based, even though the transaction is in itself valid at law. Specific performance of a contract will be denied at the suit of a party who is

guilty of sharp practice in the formation of the contract. In *Cadman v. Horner* (1810) 18 Ves. 10 at 11; 34 E.R. 221, there was a contract for the sale of land between the vendor and the purchaser. The vendor had relied on the purchaser for the proper valuation of the property. The purchaser, who was aware of the trust reposed in him, grossly undervalued the property. In an action for specific performance of the contract it was held that the purchaser had abused his fiduciary position by misrepresenting the value of the property to the vendor and was therefore not entitled to specific performance. The fact that the agreed price was adequate was in itself not sufficient; the purchaser's abuse of his fiduciary position was an inequitable conduct which 'disqualifies him from calling for the aid of a Court of Equity, where he must come, as it is said, with clean hands.'

Similarly, in *Viatonu v. Odutayo and Kuyoro* (1950) 19 N.L.R. 119, the purchaser of a mortgaged property was denied the right to recover possession of the property on the ground that he had been a party to the fraudulent auction sale at which the property was sold at an undervalue.

A beneficiary under a trust and who concurs in a breach of the trust cannot come afterwards to complain of the breach; his right of action against the trustee for the breach is only in equity, and since equity will only grant relief to those who come to it with clean hands, the beneficiary would be denied relief because of his past inequitable conduct in concurring to the breach. See *Re Deane* (1889) 42 Ch.D. 9, 19. In *Pratt v. Haffner* (1959) 4 F.S.C. 82, the trustee of the estate of late Dr. Henry Carr made a voidable lease of the trust property; plaintiff, one of the beneficiaries sought to set aside the lease after he had derived considerable benefit from the lease of which grant he was fully aware. The relief was denied; having derived benefit from the lease and with full knowledge of the transaction, the beneficiary was deemed to have adopted it.

Where a husband purchases property in the name of his wife, there is presumption of advancement in favour of the wife. But this presumption can be displaced by a presumption of a resulting trust in favour of the husband if there is evidence that the husband intends that the property is to be held by his wife on trust for himself. See generally, Snell's *Principles of Equity* (17th Ed.) p. 175. However, where such evidence is based on fraud or inequitable conduct on the part of the husband, equity will not presume a resulting trust in his favour.

In *Gascoigne v. Gascoigne* (1918) 1 K.B. 223 at 226, a husband took a lease of land in his wife's name and built a house upon it with his own money. He used his wife's name in the transaction with her knowledge and connivance because he was in debt and was desirous of protecting the property from his creditors. In an action by the husband against his wife for a declaration that she held the property as trustee for him, it was held 'that he could not be allowed to set up his own fraudulent design to rebut the presumption that the conveyance was intended as a gift to the wife, and that she was entitled to retain the property for her own use, notwithstanding that she was a party to the fraud. But for the clean hands doctrine, a presumption of a resulting trust in favour of the husband would have enabled him to benefit from his fraud. See also, *Re Emery's Investment Trusts.* (1959) Ch. 410; *Kojo Adjepon v. Kwaku Fokuo* (1945) 11 W.A.C.A. 67.

The flexible character of the doctrine can be seen in the variety of inequitable conduct that can give rise to its invocation, thus giving credence to the view that the 'doctrine is rooted in the historical concept of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith.' Per Justice Murphy in *Precesion Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.* 324 U.S. 806 at 814 (1945).

In *Menikiti v. Agina* (1965) N.M.L.R. 127 at 129, plaintiff and defendant were joint beneficiaries of a property under their mother's will. Both agreed to partition the property before the will was

proved. The defendant, who had sold his own portion, contended that the sale was valid since the property had been partitioned. Plaintiff, on the other hand, claimed that there had been no partition and that it was a joint-tenancy under which the defendant had no power to sell any part of the property. He therefore, sought to set aside the sale made by the defendant. It was found by the Court that the property had, in fact, been partitioned illegally because the will had not been proved in accordance with the law; that the plaintiff had agreed to the partition when she thought she could purchase the defendant's share, and that she now brought this action after she had failed to purchase the defendant's share because of the disagreement on the purchase price.

Kaine J., refused to make the order and stated 'I have to say that the plaintiff and the defendant having constituted themselves into *executors de son tort* and after the illegal distribution of the property of the testatrix have now landed themselves in Court seeking for a legal remedy. I am of the opinion that to grant them any remedy would tantamount to a condonation. To set aside a sale and declare a Conveyance null and void is an equitable remedy which cannot be granted if appropriate unless the party seeking the remedy comes with a clean hand.'

The doctrine is equally relevant in matrimonial causes. In *Craig v. Craig* (1942) 16 N.L.R. 103, W sought a dissolution of her marriage with H on the ground of H's adultery and cruelty. W had been guilty of adultery herself but did not confess this in her petition and the Court found that the neglect to do so was a deliberate suppression of the truth. H, in a counter petition based on W's adultery, admitted he had been guilty of adultery and prayed the Court to exercise its discretion in his favour. It was held in the circumstances, the petitioner's action must be dismissed because of his inequitable conduct and that the Court should exercise its discretion in favour of H and H's counter-petition was granted.

In *Kellogg v. Kellogg* 171 Mich. 518 at 520 (1912); 137 N.W. 249 (1912), where W sued for divorce on the ground of extreme cruelty and H crosspetitioned on the ground of extreme cruelty and adultery, Judge Stone, in dismissing both petitions, said: 'Divorce is a remedy for the innocent as against the guilty, and should not be granted where both parties are at fault. This is no more than the application of the equitable rule that one who invokes the aid of a court must come into it with a clear conscience and clean hands'. Though an extreme use of the doctrine, which if pushed to its logical conclusion may tend to perpetuate a relationship which is obviously inimical to the interest of both parties and that of the public, it, nevertheless demonstrates the very flexible character of the clean hands doctrine.

Even in the realm of customary law the efficacy of the doctrine has not been found wanting. In his dissenting judgment in *Eshugbayi v. Dawuda* (1909) 1 N.L.R. 7 at 62, Pennington J., observed that a person seeking to enforce native law and custom in respect of one transaction must himself have carried out native law and custom relating to that transaction; otherwise, his claim may be denied on the basis of 'clean hands doctrine.'

3.8 The Scope of 'Clean Hands'

The rule is that the inequitable conduct that will amount to unclean hands must be related to the transaction involved in the action before the Court; this is similar to the common law principle that the court will not entertain an action that is premised on illegality, though in equity, inequitable conduct which will amount to unclean hands need not be illegal in the strict sense, as required at law, it is sufficient if the conduct is unconscionable and morally reprehensible. The inequitable conduct need not have been to the other party to the action. For example, where a husband conveyed property to his wife so as to protect the property from his creditors, an action by the hus-

band to claim the property back from the wife may be denied on the ground of his inequitable conduct to his creditors. See *Gascoigne v. Gascoigne* (supra).

The position is the same where a partner in crime brought an action seeking the aid of the Court to compel his co-partner to account for the proceeds of their criminal activities. See *Highwayman's Case* (1893) 9 L.Q. Rev. 197. The basis of the doctrine is to prevent a party from employing the machinery of the court to enforce the advantage of his inequitable conduct. However, that a person must come into a Court of Equity with clean hands does not mean that a person seeking relief in court must have a blameless or transparent record; it does not mean general depravity (see *Dering v. Winchelsea* (1787) 1 Cox Eq. 318 at 319); for equity does not demand that its suitors shall have had blameless lives. Per Justice Brandeis in *Loughran v. Loughran* 292 U.S. 216 at 229 (1934). A person does not become an outlaw and lose all rights by doing an illegal act. Per Justice Holmes in *National Bank & Loan Co. v. Petrie*, 189 U.S. 423 at 425 (1903). He is denied relief only if his reproachable or inequitable conduct has an immediate and necessary relation to the relief sought from the Court. See *Dering v. Winchelsea* (supra).

SELF ASSESSMENT EXERCISE

What do you understand by 'the scope of clean hands'?

4.0 CONCLUSION

The exercise of this equitable jurisdiction, like all others, is discretionary and, in the usual manner, the discretion may not be exercised arbitrarily. No doubt, there is much similarity between laches and equitable estoppel; hence the tendency on the part of the courts to confuse one with the other. The basis of this confusion seems to be the question of acquiescence which is common to both doctrines. Equitable relief will be refused if the party seeking the relief is guilty of inequitable conduct with respect to the transaction upon which the relief sought is based, even though the transaction is in itself valid at law. That a person must come into a Court of Equity with clean hands does not mean that a person seeking relief in court must have a blameless or transparent record. He is denied relief only if his reproachable or inequitable conduct has an immediate and necessary relation to the relief sought from the Court.

5.0 SUMMARY

In this unit, we have considered the equitable defence of laches and acquiescence; and the maxim 'He who comes to equity must come with clean hands'. You should now be able to: explain the equitable defence of laches and acquiescence; distinguish between proprietary estoppel and laches; explain laches and customary law; describe the maxim 'He who comes to equity must come with clean hands' and its operation; and define the scope of clean hands.

6.0 TUTOR-MARKED ASSIGNMENT

Explain the maxim 'He who comes to equity must come with clean hands'.

7.0 REFERENCES / FURTHER READING

Cap. M7, Laws of the Federation of Nigeria, 2004.

Hackney J., (1987) *Understanding Equity and Trusts*; London: Fontana press

