



- LAW OF EQUITY
- GENERAL PRINCIPLES OF EQUITY
- TEXTS
- Fabunmi: Equity and Trust in Nigeria
- Jegede: The principles of Equity
- WHAT IS EQUITY?

- A discussion of equity necessitates a consideration of the various conception of the term 'equity'
- To a layman or in its most popular sense, it means doing right, good faith, honest and ethical dealings in transactions or relationship between man and man, or whatever is right and just in all human transactions and transactions.
- However, a 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
- The juristic sense of the term 'equity' may be subdivided into two, one complementary to the other and both affecting administration of law and justice by recognised judicial tribunals

General Juristic Sense

It 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 applicable rules of law so as to adapt the relief to the circumstances of the particular case, or

A *liberal or humane interpretation* of the law in general, so far as that is possible without *actual antagonism to the law itself*

Equity in this sense is synonymous with **JUSTICE**

Narrow and Technical Juristic Sense of Equity

This is peculiar to the English legal system and to the legal systems of many other countries that inherited the English system

Here, equity consists of a body of rules *created and developed* by the Court of Chancery in England

ORIGIN AND NATURE OF EQUITY

General juristic sense of equity is manifestly visible in any legal system in which the recognised judicial tribunals place *emphasis on the elementary principles of justice and fair play in their administration of law*

Law has never been perfect whether in modern time, primitive society nor would it be perfect for an unforeseeable length of time

It is generally accepted that the aim of law is to maintain social justice, a fundamental ideal in any society

If law had been able to achieve this end, there would have been no need for the development of equity jurisdiction as a corrective measure where strict of law occasioned injustice

The failure of law to fulfil its aim can be traced to the inherent nature of law and variety of other factors

- **Uniformity** is an essential ingredient of law i.e. the essential meaning and intention of a rule must be uniform
 - Hence, a law may be expressed in different forms but having the same meaning
 - This is to ensure that the law affecting any given situation may be reasonably predictable.
 - However, a strict adherence to the uniformity rule may unavoidably lead to certain occasions of injustice in the administration of law by making no provision for unforeseen cases, nor does it permit any variation in peculiar circumstances
 - every case presents different problems.
 - The resultant injustice from the strict application of law cannot be reconciled with the objective which the law sets for itself.
 - Hence, equity becomes one of the most important instrumentalities to satisfy the average man's feeling for common justice visibly done
 - In civil law countries, equity and law operate in a fused form
 - In common law, although there was integration of common law and equity, the two systems were later separated.
 - The dualism was due to early common law courts' refusal to elevate the law to meet the social needs of the people
- **DEVELOPMENT OF EQUITY IN ENGLAND**
 - **The King as the Fountain of Justice**
 - From the early part of the Norman conquest, common law courts applied principles of equity to cases before them. Equity and law were regarded as inseparable, and hence, it formed an integral part of the law
 - Litigants' access to the royal court was through the obtaining of appropriate Writ issued by the Chancellor who is the King's first secretary and keeper of the great seal
 - Hence, the power of the courts to dispense justice was directly linked with the royal prerogative
 - Since justice was being administered under the wide and royal prerogative of the King, whenever a novel cause of action arose, the chancery was empowered to provide a new writ
 - There was no need for a separate equity jurisdiction as the early common law judges in addition to being ecclesiastics, exercised wide judicial discretion
 - Hence, the view that 'common law and equity originated together as one undifferentiated system in the effort of the King to carry out his duty of furnishing security to all in the community by making use of his prerogative power through his prerogative machinery'
 - However, the power of the chancellor to invent new writs to meet the needs of changing society received a radical check in the latter half of the 13th century
 - **Rising Power of Parliament and Rigidity of Judges**
 - This was due to the rising power of the Parliament and the realisation that the chancellor's power of indirectly making law by inventing new writs challenged its own power to legislate.
 - hence, the development of common law by the issuing of writs was frozen by the provisions of Oxford 1258

- This was exacerbated by the anachronistic attitude of common law judges to wit:
- Placing too much emphasis on forms thereby relegating the merits of cases to a secondary position. In essence, they can only exercise jurisdiction in cases where there had been existing remedies
- Rigid distinction between law and equity/ethics
- Hence, the creative era of common law was halted and consequently, the law fell behind the society's needs and expectations
- The Parliament tried to remedy the situation by passing the Statute of Westminster II in 1285
- It empowered the chancery to modify existing writs to accommodate new cases (*in consimili casu* clause)
- However the efforts of the chancellor to make flexible use of the provision were frustrated by the common law judges who have assumed an inflexible jurisdiction to determine the validity of issued writs and would therefore quash any writ that was different from any of the existing writs
- The rigid position of the judges produced hardship and injustice
- **Petition to the King's Council/Chancery Jurisdiction**
- Many injuries could not be redressed because they didn't fit into the existing forms of action (defectiveness)
- Also where the common law purports to give remedies, such remedies were inadequate and hence, could not serve the end of justice
- Litigants began to send petitions to the King-in-Council for reliefs
- The jurisdiction to grant such reliefs was based on the power and prerogative of the King to administer justice among the citizens
- Petitions were first dealt by the King-in-Council and later transferred to the Chancellor as the chief executive of the King's administration
- Later, petitions were sent directly to the chancellor, hence the active participation of the chancellor in the dispensation of justice as the keeper of the King's conscience
- The system of justice administered by the early chancery was based on common law rules, though *administered in a more liberal and human manner with a view to achieving the end of justice*
- This is due to the fact that early petitions were in respect of legal wrongs recognised under common law courts
- But were presented before the chancery because of the inflexible position of the common law courts
- And because of certain ills of the society which made it difficult for commoners and people of poor means to obtain justice before the courts
- For instance, written instruments had to stand or fall as written
- Common law courts did not permit any corrections or alteration of their terms even if there was clear evidence that the agreed intention of the parties was not accurately expressed by the written instrument
- The jurisdiction of the chancery in granting such reliefs was based on *reason, conscience and good faith* in the administration of law. Note that early chancellors were ecclesiastics
- This entailed a wide and flexible jurisdiction which was in contrast to the rigidity of the common law courts.

- It attracted litigants whose rights to redress either were not recognised at common law, or the redress provided was inadequate or incapable of enforcement because of the poor machinery of the common law courts regarding the enforcement of their judgements
- Consequently the expansion of equity jurisdiction leading to the recognition of the chancery as a separate court administering different rules. It was headed by the chancellor and vice-chancellors that are appointed under him to do justice
- However, early chancellors unlike the common law judges were not bound by previous decisions particularly when no definite rules had as yet been made or settled
- The basis of this vague jurisdiction was the varying dictates of the successive chancellors' conscience and their individual notions of rights and wrongs
- Hence, the famous statement that equity varies according to the conscience of the individual chancellor in the same way as the length of their feet
- **Systematisation of Equity**
- The principles of conscience were 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
- Appointment of common law lawyers as chancellors
- Through their influence and improved reports of equity cases in the middle of the 17th century, chancery jurisdiction lost its flexibility
- Hence, instead of abiding by the dictates of conscience and the society's notions of justice and fair play in the exercise of its jurisdiction, the chancery adopted the common law doctrine of precedent
- This started with the chancellorship of Lord Ellesmere, who began to apply the doctrine of precedent, and crystallised during the chancellorship of Lord Eldon. See *Davis v. Duke of Marlborough; Gee v Pritchard*
- However, unlike the position under common law, Lord Eldon emphasised that in laying down fixed principles, care must be taken to ensure that they are applied to the circumstances of each case. See *Gee v Pritchard* at 414
- The systematisation led to the creation of modern rules of equity
- This led to criticisms that the Courts of Chancery are no longer Courts of Equity because they are as fixed and immutable as the courts of law ever were (Lord Denning). See also *Chichester Diocesan Fund v Simpson* (1944) AC 341, and *National Provincial Bank v Ainsworth* (1965) AC 1175
- **CONTENT OF EQUITY JURISDICTION (CONTRIBUTION OF EQUITY)**

EXCLUSIVE: CREATION OF NEW RIGHTS

- This included cases in which common law courts could not recognise new rights and give adequate protection to such rights
- Divided into two branches vis-a-vis one dependent on the subject matter, and the other, the nature of remedy to be administered
- the former comprehends the doctrine of trust in the widest sense of it

- Under common law, the trustee is regarded as the legal owner of the trust property, and the beneficiary's interest was not recognised
- Equity while recognising the trustee as the legal owner of the trust property, regarded the beneficiary as the equitable owner as it would be unjust for the trustee to enrich himself with the property belonging to another
- The latter comprehends processes and remedies peculiar and exclusive to the courts of equity and through the instrumentality of which they endeavour to reach the purposes of justice in a manner unknown or attainable at law. Examples include equitable reliefs against penalties and forfeitures for breaches of conditions and covenants. E.g. the mortgagor's equitable right to redeem mortgaged property after the contractual date of redemption has passed
- The exclusive jurisdiction therefore involved the creation of new rights and the enforcement of these rights by the courts of equity prior to 1873

➤ CONCURRENT: CREATION OF NEW REMEDIES

- The rights were cognizable and enforceable at common law, but the remedies provided did not give complete or best justice required in the circumstances
- The concern of equity was to provide better and more just remedies in substitution for the remedies provided at law
- Example include specific performance of a contract, injunction to restrain the commission of a continuing trespass or any other injury, etc
- The important thing in the exercise of this jurisdiction is that equity would not intervene where there was no breach of a legally enforceable right, or where the remedy at law was adequate and complete

AUXILIARY: CREATION OF NEW PROCEDURE

- Created merely to assist the defective procedure at common law so that common law courts could give a better and more effective remedial justice
- CONTENT OF EQUITY JURISDICTION (CONTRIBUTION)**
- Examples of such new procedures include interrogatory, discovery of documents, perpetuation of testimony, tracing, etc
- In cases where equity exercised its auxiliary jurisdiction, the nature and extent of rights and remedies depended on legal principles.
- Equity merely intervene for want of power in the common law courts to compel discovery of material documents or to compel interrogatory: matters necessary for a just and efficient administration of justice.
- RECEPTION OF EQUITY AND THE INFLUENCE ON CUSTOMARY LAW IN NIGERIA**
- TEXT**
- FABUNMI: CHAPTER IV**
- RECEPTION**
- Equity is used in both the narrow and general juristic sense in Nigeria
- In the former, it means the technical doctrines of equity (see s 28 Kaduna State High Court Law, s 2 Lagos State Law (Miscellaneous Provisions) Law Cap 113).

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- In the latter, it means equity in the broad sense of what is fair which includes the phrase 'natural justice, equity and good conscience'

RECEPTION

- This has two aspects vis-a-vis the repugnancy doctrine and residual justice clause.
- The repugnancy doctrine is the means by which the rules of customary law are tested, while the residual justice clause enables the court to fill in any gaps in the law.
- Equity was received into Nigerian law mostly by the enactments of the local legislature starting from 1863 although it has been suggested that prior to that, British and African traders administered equity in the consular courts of equity in the South-East of Nigerian

RECEPTION

- For instance, Ordinance No 3 of 1863 broadly introduced English law into the territory of Lagos by stipulating that all laws and statutes which were in force in England on the 1st day of January 1863 are applicable in the colony. It didn't specifically refer to the doctrine of equity but it is assumed that the term 'laws' included the doctrine
- Ordinance No. 4 of 1876 clearly and formally introduced the doctrine of equity as part of the English Law to be applied in Nigeria.

RECEPTION

- Ordinance No 17 of 1906 adopted consequent to the 1900 merger of Lagos with the Protectorate of Southern Nigeria made applicable to the new Protectorate the provisions of Ordinance 4 of 1876. see also Ordinance No 3 of 1908
- Following the amalgamation of northern and southern Nigeria, the unification of the legal systems was achieved by the promulgation of Supreme Court of 1914. The Ordinance introduced subject to existing local laws and in so far as local circumstances would permit, the rules of English Common law, the doctrine of equity, and statutes of general application in force in England on 1 January 1900

RECEPTION

- Note that by virtue of the 1863 Ordinance, the dual administration of common law and equity, which to a large extent paralysed the efficient administration of justice in England before the Judicature Acts, was not introduced into the Nigerian Legal system
- This is due to the fact that the Supreme Court of Her Majesty Settlement of Lagos was established as 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. It was further empowered by Ordinance No 9 of July 1864 as a court of equity with powers corresponding to that of the Lord Chancellor

RECEPTION

- Furthermore, section 18 of Ordinance No 4 of 1876 provided in a clear 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 that of common law with reference to the same matter, the rules of equity should prevail.
- This is now provided under the high court laws of various states in Nigeria. See s 13, Law High Court law , etc

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INFLUENCE OF EQUITY ON CUSTOMARY LAW

- Despite the introduction of the English law into Nigeria, the native laws and customs of the people were not abolished
- Rather, the Ordinances expressly made provision to the effect that the British established courts in Nigeria should observe and enforce the observance of the people's native laws and customs. See s 18, Ordinance No 4 of 1876.
- Subsequent local legislations enacted by the colonialist continued to retain these provisions. See s 19 Supreme Court Ordinance of 1914
- **INFLUENCE OF EQUITY ON CUSTOMARY LAW**
- Presently, every High Court in Nigeria is enjoined to observe and enforce the observation of the native laws and customs of the people in the area of its jurisdiction. See s 34 (4) of the Northern Nigerian High Court Law, s 26, Lagos State High Court Law, s 34 Kaduna State High Court Law, s 22(1) Anambra State High Court Law
- This is subject to the proviso that the native law and custom must not be repugnant to natural justice, equity and good conscience; nor incompatible either directly or by implication with any law for the time being in force. s 19 Supreme Court Ordinance of 1914

INFLUENCE OF EQUITY ON CUSTOMARY LAW

- Also '...in cases where no express rule is applicable to any matter in controversy, the court shall be governed by the principles of natural justice, equity and good conscience'. s 19 Supreme Court Ordinance
- The law establishing customary (or native) courts in all states in Nigeria also enjoins the courts to administer the customary law prevailing in their jurisdictions in so far as it is not 'repugnant to natural justice, equity and good conscience'

INFLUENCE OF EQUITY ON CUSTOMARY LAW

NATURAL JUSTICE, EQUITY AND GOOD CONSCIENCE

- The expression 'natural justice, equity and good conscience' implicating equity in the broad sense of fairness or justice, has a negative and positive aspect. In the former, it is referred to as the repugnancy doctrine and in the latter, it is called the residual justice clause

REPUGNANCY DOCTRINE

- This doctrine is the means by which the validity of the rules of customary law is tested
- **INFLUENCE OF EQUITY ON CUSTOMARY LAW**
- The application of the doctrine can be broadly divided into application in relation to substantive law and procedural law

Substantive Law

- Customs are usages and conceptions of rights and duties which must reach a certain standard of application before they can be accepted as forming part of the law of the land. See *Owonyin v Omotosho* (1961) All NLR 304 at 309 (per Bairamian F.J.)

- **INFLUENCE OF EQUITY ON CUSTOMARY LAW**

- Regarding the application of the repugnancy clause to substantive customs, the Privy Council expressed a strict legal interpretation in *Eshubayi Eleko v Officer Adm.*, the Government of Nigeria & Ors (1931) A.C. 662 that customary law is either good or bad, there is no half-way house.
- However, Judges seem to have adopted a more liberal interpretation of the wording of the ordinance and are willing to retain the good aspect of any custom while eliminating the bad aspect except where the custom is bad *intoto*. See *Re White* (1946) 18 NLR 70

- **INFLUENCE OF EQUITY ON CUSTOMARY LAW**

- A rule of customary law which has the effect of giving the paternity of a child to a person who is not his natural father, but to a stranger is considered barbaric and has been rejected as being repugnant to natural justice, equity and good conscience. See *Edet v Essien* (1932) 11 NLR 47. See also *Mariyama v Sadiku* (1961) NRNLR 81.
- Also the rule of customary law which seeks to perpetuate the institution of slavery is considered repugnant to natural justice, equity and good conscience.
- The same applies to Widows or female children inheritance. *Anekwe v Nweke*; *Okonkwo v Okagbue*; *Ukeje v Ukeje*

- **INFLUENCE OF EQUITY ON CUSTOMARY LAW**

- However, the court is reluctant to render an established rule of customary law void if it is basically good. Hence, it has upheld the 'idi-igi' custom (*Dawodu v Danmole* (1962) 1 WLR 1053); and the rule of levirate marriage despite the implication on the right of the widow(*Re Agboruja* (1949) 19 NLR 38)

Procedural Law

- The doctrine has played a major role in watering down many harsh rules of procedure in customary law

- **INFLUENCE OF EQUITY ON CUSTOMARY LAW**

- Although customary courts have provisions for regulating their practice and procedure, yet resort is frequently had to rules of procedure under customary law where the statutory rules of court are silent. See s 18 of the Customary Courts law 1966 of Eastern Nigeria
- For such rules of procedure under customary law to pass the repugnancy test, it must pass the two basic principles of natural justice regulating procedure in developed legal systems vis-a-vis no one shall be a judge in his own case, and no one shall be condemned unheard. See *Earl Of Derby's case*; *R v Chancellor of Cambridge*

- **INFLUENCE OF EQUITY ON CUSTOMARY LAW**

- Hence, a rule of procedure which does not allow an accused to put forward his defence failed the repugnancy test. See *Gari v Hadejia N.A* (1959) 4 FSC 44; *Nwaezuoke v COP* (1949) 19 NLR 57, *Ozako v Tiv N.A* (1958) NRNLR 135
- Similarly, a procedure which allows an interested or biased party to adjudge upon matters which affect him has been rejected. See *Modibbo v Adamawa N.A* (1956) NRNLR 101, *Adeniran v the Caretaker Committee of Ife Divisional Council & ors* (1963) 1 All NLR 39

- **INFLUENCE OF EQUITY ON CUSTOMARY LAW**

- Note that English law is not necessarily the test for the validity of customary law except if it can be a useful guide to Nigerian courts in determining whether a rule of customary law satisfies the requirement of natural

justice. See Mbi v Numan (1959) NRNLR 11; Bukar of Kaligari v Bornu N.A (1953) 20 NLR 159; and s 65 of the Northern Nigeria High Court Law

- **INFLUENCE OF EQUITY ON CUSTOMARY LAW**

- Residual Justice Clause

- The inclusion of this clause is due largely to the fact that no matter how perfect a legal system may be, it cannot take account of all human transaction. There is therefore a necessity for a residual form of law to which judges can resort when existing law is of no avail
 - Section 34 (4) of the Northern Nigerian High Court Law '...when none of these rules is applicable, the court is to be guided by the principles of natural justice, equity and good conscience'.

- **INFLUENCE OF EQUITY ON CUSTOMARY LAW**

- Note that the clause was added in the ordinance in the early period of Nigerian legal system because at that time, the extent of the customary law was unknown. Also unknown was the fact that customary law is comprehensive and in many respects, sophisticated.
- hence, as soon as these facts were known, the residual justice clause which formed part of the pre-1955 Supreme Court Ordinance was dropped from the High Court Laws on the ground that it was unnecessary except in the North

- **INFLUENCE OF EQUITY ON CUSTOMARY LAW**

- In states where the residual justice clauses apply, it is expected that judges should refer to any developed system of law which is accessible to the practitioners as well as to the court in filling the gaps in their own system
- The residual justice clause was applied in Andre v Johnson (1931) 10 NLR 79, to distribute property equitably amongst contending beneficiaries. See also Re White (1946) 18 NLR 70, Ajayi v White (1946) 18 NLR 41

EQUITY

RELATIONSHIP BETWEEN EQUITY AND COMMON LAW

INTRODUCTION

- At the early stage, the early chancellors would have flatly denied any intention on their part to set up a separate court in opposition to the common law courts
- Rather the chancellor would state that their objective was to grant relief where the common law denied one, as well as in cases where the common law was defective
- Such power being exercised under the King's prerogative power to administer justice. A prerogative power that was recognised by the common law courts

OPPOSITION TO THE CHANCERY JURISDICTION

- However, by the end of the 14th Century, the Chancery became separate and distinct from the King and his Council, and was recognised as a separate court administering different rules
- As the Chancellor extended and consolidated his jurisdiction which was more progressive and realistic, inevitably conflict between the Chancery and the Common Law courts could not be avoided
- indeed, the common law judges became hostile to the Chancery's jurisdiction on the basis that it was unknown to the common law of the land

OPPOSITION TO THE CHANCERY JURISDICTION

- Such hostility became more intensified towards the latter part of the 16th century particularly due to the Chancery's power to issue common injunction to restrain the enforcement of judgements obtained from the common law courts
- The common law judges detested such prerogative powers. From the tenure of Chief Justice Coke, they began to issue a writ of prohibition against any interference with their decisions by the Chancery court. See Neath v Rydley; and Courtney V Glanvil

OPPOSITION TO THE CHANCERY JURISDICTION

- On the other hand, the Chancery firmly maintained that it has long been within its jurisdiction to set aside common law judgements and to grant a more equitable relief where such judgements were devoid of conscience or appeared oppressive
- The conflict came to a head in Earl of Oxford's case (1615) 1 Rep. Ch. 1, where Lord Ellesmere claimed the power to set aside a judgement of the Common Law Court where such judgement was obtained by oppression, wrong and hard conscience.

REFERENCE TO THE KING AND EFFECT OF THE KING'S DECISION

- Soon after the case, the Common Law judges led by Chief Justice Coke in order to end the Chancery's interference, referred the conflict to King James I, who resolved it in favour of the Chancery
- Implicit in his ruling is that in any situation where there is a direct clash between the two systems, the rules of equity would prevail

REFERENCE TO THE KING AND EFFECT OF THE KING'S DECISION

- The King's decision had a twin effect on the nature and character of chancery jurisdiction

The now extensive jurisdiction of the court led to the clogging of the system and which ultimately caused unnecessary delay in the administration of justice

the official of the court became corrupt and incompetent. The power of the court to issue injunctions became a source of iniquity

19th CENTURY REFORMS

- The above issues as well as the fact that the area within which each of the two superior courts were to operate was not clearly defined, necessitated the need for reform and simplification of legal procedure
- For instance, if a litigant required redress in both in equity and common law, distinct actions in each jurisdiction were necessary

Again, there are cases at the frontier of both jurisdiction

Thus, the mere existence of two distinct court systems within one legal system worked greater hardship upon large classes of litigants

19th CENTURY REFORMS

- The Common Law Procedure Acts of 1852, 1854 and 1860 empowered common law courts to exercise certain jurisdiction peculiar and exclusive to the Chancery such as compelling discovery and interrogatories in certain instances and a limited power to grant injunction
- The Chancery Amendment Act of 1852 empowered the Chancery to exercise certain common law powers including taking oral evidence in open court. They also could award damages in addition or in lieu of injunction, specific performance, etc

JUDICATURE ACT 1873-79

- The above legislative interventions were not enough in ameliorating all the evils inherent in the dual system of administration of justice.
- This led to the enactment of the Judicature Acts
- The Acts were enacted following the recommendations of the Royal Commission that was appointed in 1867 to inquire into the system of administration of justice and suggest necessary reforms

JUDICATURE ACT 1873-79

- The Act merged the administration of justice by the consolidation of all the superior courts into 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, the King's Bench division, the Chancery division, and the Probate, Divorce and Admiralty division with each division having both legal and equitable jurisdiction. See also s 13 High Court Law Cap 52 of Lagos State

EFFECTS OF THE JUDICATURE ACTS

- In essence, it created a single system of courts (in 3 divisions) administering both law and equity concurrently. Therein lies the fusion of the administration of law and equity
- Furthermore, it sought to settle the conflict between equity and law. S 25 attempted to resolve certain cases of conflicts between equity and law which existed before the Act. S 25(1)-(10) dealt with particular conflicts such as effects of stipulation of time in contracts, custody and education of infants, etc

EFFECTS OF THE JUDICATURE ACTS

In some cases, rules of equity were made to prevail, while in others, common rules (neither equity or common law) were evolved

In addition, S 25 (11) contained a general provision. it provides that in all matters in which there is **any conflict** between the rules of equity and that of the common law with reference to the same matter, the rules of equity shall prevail. See s 25(11).

APPLICATION OF S 25(1) JUDICATURE ACT

1) Effects of a written Lease not under seal

- S 1, Statute of Fraud 1677; s 3 Real Property Act; and s 77 (1) Property & Conveyancing Law, Cap 100 Laws of Ogun State
- Leases which are more than 3 years must be made by deed
- At common law, a tenant who held under a written lease and **had gone into possession** and had paid rent on a **yearly basis**, was regarded as a tenant from year to year

• APPLICATION OF S 25(1) JUDICATURE ACT

- Such a tenant was regarded as holding on such terms in his written lease as were not inconsistent with the common law rules relating to yearly tenancies
- If tenant was not paid yearly, the tenant was a mere tenant at will
- On the other hand, equity regarded a written lease as an agreement for a lease, thereby enabling either party to call at any time for specific performance, so that a formal lease under seal would be executed upon terms corresponding with those in the written lease.

• APPLICATION OF S 25(1) JUDICATURE ACT

- The equitable position was upheld in the leading *Walsh v Lonsdale* (1882) 21 Ch.D. 9.
- the Court accepted the argument of the Landlord that in equity, the written lease could be turned into a lease by specific performance. Thus making the provision for rent in advance fully payable.
- The rule in *Walsh v Lonsdale* was applied in *Savage v Sarrough* (1937) 13 NLR 141; *Tottenham Hotspur v Princegrove publishers Ltd* (1974) WLR 113

• APPLICATION OF S 25(1) JUDICATURE ACT

- An agreement for a lease is now an estate contract which is registrable. If registered, it binds all the assignees of the lessor whether the lessee has gone into possession or not
- The decision in *Walsh v Lonsdale* in making an agreement for a lease almost as effective as a duly sealed lease itself, has made the equitable interest existing under the agreement as good as a legal estate
- However, such agreement is not the same thing as a lease as there are limitations on the application of the rule in *Walsh v Lonsdale*

• APPLICATION OF S 25(1) JUDICATURE ACT

- For instance, the agreement must be one of which the court is both able and willing to grant an order of specific performance. Where such order cannot be granted due to the plaintiff breaching a term of the

agreement, the Rule is not applicable. See *Swain v Ayres* (1888) 21 Q.B.D 289; *Coatsworth v Johnson* (1886) 55 L.J.Q.B 220; *Manchester Brewery Co v Combs* (1901) 21 Ch. 608

APPLICATION OF S 25(1) JUDICATURE ACT

Also, a lease is a legal interest whereas an agreement for a lease gives rise to an equitable interest

A legal interest binds the whole world, notice or no notice

An equitable interest is binding against the whole world except the bona fide purchaser of the legal estate for value and without notice

Except if it was registered

APPLICATION OF S 25(1) JUDICATURE ACT

a) VARIATION OF DEED

- At common law, a contract made by deed could only be varied by deed
- In equity, a simple contract varying the terms of a contract made by deed is valid. This was upheld in *Berry v Berry* (1929) K.B. 316

b) EXECUTOR'S LIABILITY FOR ASSETS

- Under the common law, an executor was liable for the loss of any assets of his testator when they have come into his hand irrespective of whether the loss was wilful or accidental

APPLICATION OF S 25(1) JUDICATURE ACT

- In equity, the executor was not liable for such assets if they were accidentally lost without fault on his part. This was upheld in *Job v Job* (1877) 6 Ch.D. 562.

d) JOINT UNDERTAKING

- 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 his share of the liability

APPLICATION OF S 25(1) JUDICATURE ACT

- On the contrary, in equity, the solvent sureties are in addition to their share of the liability, also liable for the share of the insolvent co-surety. This was upheld in *Lowe v Dixon* (1885) 16 Q.B.D 455

E) CONCEALED FRAUD

- S 7 of the Limitation Act 1966 provides that in respect of certain actions arising from contract or tort, action must be brought within 6 years from the time the cause of action arose, otherwise the right is lost. See also *Limitation Law, Ogun State*

APPLICATION OF S 25(1) JUDICATURE ACT

- At common law, the rule was strictly applied so that an injured person might lose his right to sue without knowing that he has ever enjoyed it, if the guilty party concealed the facts from him for 6 years after the cause of action arose. See *Imperial Gas Light & Coke Co. v London Gas Light Co* (1854) 10 Ex. 39
- The only mitigation was if the concealment of the fraud was itself an actionable wrong. Then, time ran from the discovery of the fraud

APPLICATION OF S 25(1) JUDICATURE ACT

In equity, the plea of concealed fraud would be a good reply to the Statute of limitation, so that time will begin to run from the moment when the plaintiff actually discovered or ought to have reasonably discover the fraud. See s 57 (1) limitation Act; and Arowolo v Ifabiyi (2002) 2 SCNJ 65.

Concealed fraud includes wrongful acts which the defendant took active steps in concealing, as well as wilful wrongdoing, which is unknown to the plaintiff at the time when it was committed.

APPLICATION OF S 25(1) JUDICATURE ACT

I) LICENCES

- A Licence is a permission, which enables the licensee to enter into the land of the licensor for a specific purpose, which would otherwise be a trespass. See Thomas v Sorrel (1930) 1 Ch 493, per Vaughan C.J.
- Licences can be divided into 3 categories vis-a-vis bare, licence coupled with an interest, and a contractual licence

APPLICATION OF S 25(1) JUDICATURE ACT

- A bare licence is a licence granted otherwise than for valuable consideration which is revocable.
- It occurs when a person enters or uses the property of another with the express or implied permission of the owner or under circumstances that would provide a good defense against an action for trespass. E.g. a person entering a gas/filling station to ask for directions is a licensee

APPLICATION OF S 25(1) JUDICATURE ACT

- A licence coupled with an interest is a license which empowers the licensee not only to enter, but also to enjoy or destroy something situated on the land. Such licence is irrevocable even though granted orally provided the formality for granting the interest is complied with.
- It usually arises when a person acquires the right to take possession of property located on someone else's land

APPLICATION OF S 25(1) JUDICATURE ACT

- A contractual Licence is a licence unconnected with any proprietary interest but is one given for valuable consideration.
- provides an express or implied permission to enter or use the property in exchange for some consideration. E.g. the purchase of a movie ticket allows the ticket holder a license to enter the theatre at a particular time

APPLICATION OF S 25(1) JUDICATURE ACT

- At common law, a mere licence whether gratuitous or for valuable consideration could be revoked at any time, and the licensee could be ejected by the licensor who had given his permission to him to come on the land before the end of the period of the licence. See Wood v Leadbitter (1845) 13 M&W 833
- he had no remedy but if given for valuable consideration, there is a breach of contract which entitles the licensee to damages. Kerrison v Smith (1897) 2 Q.B. 445

APPLICATION OF S 25(1) JUDICATURE ACT

- In equity, the approach differs in two respects:

Equity can in appropriate case, grant an injunction to prevent revocation of the licence by the original grantor. See *Hurst v Picture Theatres Ltd* (1915) 1 K.B. 149

If the subject matter of a licence has been transferred, equity will sometimes prevent the 3rd party transferee from disregarding the licence. See *Errington v Errington* (1952) 1 K.B. 290.

APPLICATION OF S 25(1) JUDICATURE ACT

most of the decisions protected the right of a deserted wife to continue to live in the matrimonial home. See *Westminster Bank v Lee* (1959) Ch. 7; *Nat. Provincial Bank Ltd v Ainsworth* (1965) A.C. 1175; *Ogedengbe v Ogedengbe*, Unreported Suit No LD/102/62 High Court of Lagos State

EQUITY

MAXIMS OF EQUITY

INTRODUCTION

- The exercise of equitable jurisdiction by the Court of Chancery was based upon certain general principles, many of which are now embodied in the maxims of equity
- These maxims have played an important role in the development of equity in the past and if properly handled, can still play an important role in their development of equity in the future
- They do not however cover the whole of the ground and sometimes do overlap

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

- Certain wrongs which are incapable of being remedied in a court of law will not be allowed to go unremedied
- It is the duty of the court of equity to provide a remedy for a plaintiff even if none had been prescribed in the statute book for where there is a right, there must be a remedy. Ubi jus ibi remedium
- This underlies the whole jurisdiction of equity

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

- However, such a wrong must be suitable for judicial enforcement so that not every wrong were remedied by the Court of Chancery.
- Instances of the application of the maxim include:

The enforcement of trust (exclusive jurisdiction): equity recognises the rights of beneficiaries under a trust and hence, compelled the trustees to hold the property for the benefit of the beneficiaries. The beneficiaries can enforce the right against not only the trustees, but also the third party into whose hand, the trust property has come unless he is a bona fide purchaser

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

The auxiliary jurisdiction: at common law, discovery of facts within the knowledge of the defendant or plaintiff or of document or other things in his possession or power, could not be ordered. But the Chancery court could order either party to make discovery on his oath.

- The court can now give an order for discovery even in an action for ejection (Lyell v Kennedy (1883) 4 A.C 217), but not in an action to forfeit, as a lesser cannot challenge the title of his lessor. See Seadon v Commercial Salt Co (1925) Ch. 187

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

- Appointment of receiver by way of equitable execution: equitable interest is not recognised in common law and hence, a judgement creditor cannot levy execution on any property in which the judgement debtor had only an equitable interest.

Examples of such equitable interests include the equity of redemption, and the beneficial interest in trust fund

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

- In equity, a judgement creditor could levy execution on equitable interest

This is done by the court appointing a receiver of the equitable interest, and if it became necessary, this was supplemented by an injunction restraining the judgement debtor from disposing of his interest. See Alaka v Alaka (1904) 1 NLR 44, Martins v Martins (1940) 15 NLR 126

(2) EQUITY FOLLOWS THE LAW

- Rules of equity were developed to supplement the rules of common law and sometimes to mitigate the harshness of the common law rules. See Adecentro v OAU (2005) 15 NWLR 290
- The Court of Chancery in developing rules of Equity never claimed to override the courts of common law. Hence, Equity respects a man's legal right unless it would be unconscionable on his part to take advantage of them. See Archibong v Duke (1923) 4 NLR 92, Chidiak v Coker 14 WACA 506

(2) EQUITY FOLLOWS THE LAW

- For instance, the conception of trust does not mean that there is one owner at common law and another in equity. Hence, equity accepts the common law ownership of the trustee but compels him to exercise that legal ownership for the benefit of the beneficiary (cest tui trust), by engraving the equitable obligations upon him.
- Equity interferes if common law ignores certain rights

(2) EQUITY FOLLOWS THE LAW

- Equity in dealing with equitable estates in land adopted many technical rules of common law so that equity follows the law. Hence, estates and interests in land which exist at common law also exist in equity. Examples include fee simple, fee tail, life interest and a term of years. But equity refused to apply some excessively technical rules such as contingency remainder rules to equitable estates
- However, Equity was not free to accept or reject provisions of statute. Here also, equity followed the law and a court of equity is bound by a statute as a court of common law.

(2) EQUITY FOLLOWS THE LAW

- Note that there are occasions where equity has refused to follow the law. For instance, though bound by statute, equity will not allow such a statute to be used as an instrument of fraud. This has given rise to the doctrines of concealed fraud, part performance and secret trust
- In any case, equity is part of the legal system whose objective is attainment of justice. See Transbridge Co Ltd v Survey Int. Ltd (1986) 2 NLWR (pt37) 576

WHERE THE EQUITIES ARE EQUAL, THE LAW PREVAILS

- The maxim governs the priority of competing interests in property, one of which is legal and the other one equitable.
- If two competing interests are equal in the eye of the law, the legal interest takes priority over the equitable interest.
- For instance, if an equitable charge is created over Blackacre in favour of A, and later, a legal mortgage was created over the same Blackacre in favour of B, who obtained the title deed and had no notice of A's equitable charge at the time the mortgage was created, and the Blackacre was insufficient to satisfy A and B, B would be entitled to be paid in full before A, because B has legal interest. See Pilcher v Rawlins (1872) L.R. Ch.App 259, Joseph v Lyon (1884) 15 QBD 28

WHERE THE EQUITIES ARE EQUAL, THE LAW PREVAILS

The application of this maxim is predicated on the doctrine of notice and statutory enactments affecting such doctrine (*infra*)

Suffice it to mention that in the development of the doctrine of notice, equity has modified the conditions governing the transfer of interest in land.

Hence, a purchaser is required to investigate the title of his vendor before accepting a conveyance and parting with his money

WHERE THE EQUITIES ARE EQUAL, THE LAW PREVAILS

- Consequently, a purchaser is bound by all equities which he discovers on investigation or which he would have discovered if he had been diligent.

- His notice is either actual or constructive

- Where chattel is involved, constructive notice is inapplicable as it has not been extended to it.

- The maxim is also relevant to the application of the doctrine of tacking in connection with the mortgages of real property

(4) WHERE THE EQUITIES ARE EQUAL, THE FIRST IN TIME PREVAILS

- This maxim means that where a question of priority as between competing equitable interests arises, and the two or more of the competing interests are equally meritorious in the eyes of equity, the first in point of time will have priority over the others. See *Cave v Cave* (1880) 15 Ch.D 639

- It will not apply where the first equitable encumbrancer *has been guilty of misconduct* which is considered in equity as giving the subsequent equitable encumbrancer priority over the earlier one. See *Rice v Rice* (1853) 2 Drew 73, *Dearle v Hall*

(5) HE WHO SEEKS EQUITY MUST DO EQUITY

- This means equity in the general sense of what is fair and just.

- A plaintiff who wishes to obtain an equitable relief or remedy must be prepared to do what is fair and just towards the person against whom he is seeking a relief or remedy, otherwise equity will not come to his aid. See *Brown v Adebanjo* (1986) 1 NWLR 383

- The maxim can be illustrated as follows:

(5) HE WHO SEEKS EQUITY MUST DO EQUITY

a) Election

- The rationale of election is that no person shall be allowed to claim a benefit under a document but repudiate an obligation imposed by the document. See *Taylor v William* (1935) 12 NLR 67

- But a person entitled to avoid the transaction cannot do so after he has adopted it. See *Johnson v Onisowo* (1943) 9 WACA 189

(5) HE WHO SEEKS EQUITY MUST DO EQUITY

b) **Consolidation:** it may happen that a person becomes entitled to two or more mortgages made by the same mortgagor. Such a person may consolidate the mortgages and refuse to permit the exercise of the equitable right to redeem the mortgage unless the other is redeemed as well.

(c) **Equitable lien**

➤ A lien is a right over a property

• **(5) HE WHO SEEKS EQUITY MUST DO EQUITY**

➤ It does not follow that any expenses incurred in respect of another person's property necessarily gives rise to a lien. So if A spends money on X's property, he normally has no lien over the property. See *Falck v Scottish Imperial Insurance Co* (1886) 34 Ch.D. 234

➤ However, a lien exists where there is a contract to that effect (*Re Leslie* (1883) 23 Ch.D 552), or under a trust (*Struth v Tippet* (1889) 62 LT 475), or under a mortgage, or by subrogation (*The Nig. Loan & Mortgage Co v Ajetunmobi* (1944) 17 NLR 136

➤ It may also arise where A believes that the property was his own and Y, knowing himself to be the true owner and knowing also of A's mistake nonetheless stood by and allowed A to develop the property. See *Re Leslie*

• **(6) HE WHO COMES TO EQUITY MUST COME WITH CLEAN HANDS**

➤ A person seeking an equitable relief must show that he has conducted himself in a fair and proper manner vis-a-vis the third party in relation to the transaction giving rise to the relief sought.

➤ He must also show that his past record in the transaction is clean, for he who has committed iniquity, shall not have equity.

➤ Thus, an infant who received money from a trustee, having fraudulently misrepresented his age was not entitled to be repaid on reaching the age of 21. See *Overton v Bannister* (1844) 3 Hare 503

(6) HE WHO COMES TO EQUITY MUST COME WITH CLEAN HANDS

➤ A party is not required to lead a blameless life but his record must be clean. Hence, a sale of mortgaged property was set aside because the mortgagee in exercising his power of sale, did not act bona fide. See *Viatonu v Odutayo* (1950) 19 NLR 119. In *Craig v Craig* (1942) 16 NLR 103, divorce petition was not granted as the petitioner was equally guilty of adultery which she did not disclose.

(6) HE WHO COMES TO EQUITY MUST COME WITH CLEAN HANDS

➤ Also, equity will not assist a party who has benefited from a transaction to plead the illegality of such transaction to prevent the other party from benefiting from same. See *Oilfield Supply Centre Ltd v Joseph Lloyd Johnson* (1986) 2 NWLR 681

DELAY DEFEATS EQUITY OR EQUITY AID THE VIGILANT AND NOT THE INDOLENT

• Vigilantibus non dormientibus jura subveniunt

• A person who sleeps on his rights or acquiesces for a long time cannot obtain redress in equity.

• For the Court of Chancery can only be brought into activity by conscience, good faith and reasonable diligence

The delay that will bar a litigant from evoking equitable jurisdiction is technically called 'laches'

DELAY DEFEATS EQUITY OR EQUITY AID THE VIGILANT AND NOT THE INDOLENT

- Three broad instances could be considered;

a) Express Application of the Statutes of Limitation

- The statutes which were originally applicable only to Courts of Common law had been extended and made applicable to equitable claims.
- For example, See s 24 of the English Real Property Limitation Act 1833 provided that an action to recover land or rent in equity must be brought within the same time as a legal claim. See also s 8 English Trustees Act 1888. Both Laws are preserved by s 4(a) of the Limitation Act 1966

• DELAY DEFEATS EQUITY OR EQUITY AID THE VIGILANT AND NOT THE INDOLENT

- S 31 of the Limitation Act provides a limitation period of 6 years for the recovery of money or other property or in respect of any breach of trust.

- This limitation does not apply to an action against trustee or any person claiming through him where the claim is founded on any fraud or fraudulent breach of trust to which the trustee was party or privy, or the claim is to recover trust property or the proceeds still retained by the trustee and converted to his own use.

• DELAY DEFEATS EQUITY OR EQUITY AID THE VIGILANT AND NOT THE INDOLENT

- Redemption of mortgaged property is limited to 16 years (s 27), and action to recover principal money secured by mortgages or charge must be brought within 12 years (s28).

- In determining whether an action is statute barred, the question must be asked 'when does time begin to run'. In *Board of Trade v Cayner, Irvine and Co Ltd* (1937) AC 610. See *Fadare v A-G Oyo State* (1982) NSCC 52 'time begins to run when there is in existence a person who can sue and another who can be sued, and when all facts have happened which are material to be proved to entitle the plaintiff to succeed'.

• DELAY DEFEATS EQUITY OR EQUITY AID THE VIGILANT AND NOT THE INDOLENT

(b) Application of Statute by Analogy

- If a claim is not expressly covered by statutory provision but it is analogous to a claim, which is expressly covered, equity will act by analogy and apply the statutory provision
- It seems that action for an account is not covered by express terms of the limitation legislation, the statutory period of 6 years will be applied to them by analogy

• DELAY DEFEATS EQUITY OR EQUITY AID THE VIGILANT AND NOT THE INDOLENT

(c) Claims outside the Statutes

- Equity applies the doctrine of laches to cases not covered by a statutory period.
- The Doctrine was stated by Lord Selborne L.C. In *Lindsay Petroleum Co v Hurd* (1874) LR 5 p.c. 221 at p 239-240 with 'lapse of time and delay most material'
- Laches essentially consist of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim.

DELAY DEFEATS EQUITY OR EQUITY AID THE VIGILANT AND NOT THE INDOLENT

- But there cannot be an abandonment of a right without *full knowledge, legal capacity and free will*, so that *ignorance or disability or undue influence* will be a satisfactory explanation for a delay
- Laches unlike estoppel, is a personal disqualification and will not bind successors-in-title. See Nwakobi v Nzekwu (1964) 1 All ER 1019.
- Customary law has no period of limitation (A-G v John Holt), and the statute of limitation does not apply to customary law. S1(2), Limitation Law Ogun
- **DELAY DEFEATS EQUITY OR EQUITY AID THE VIGILANT AND NOT THE INDOLENT**

- Hence, the doctrine of laches has been applied to customary law to limit the period within which actions can be brought in matters governed by customary law.
- But the statute of limitation is inapplicable to customary tenancy and the doctrine of laches and acquiescence is also not available to a customary tenant. See Akinloye v Eyiola (1968) NWLR 92, Jinadu V Esuvombi-Aro (2005) 14 NWLR (pt944) 202

EQUALITY IS EQUITY

- Unless there is sufficient reason to the contrary, people who are entitled to property should have the certainty and fairness of equal division for 'equity did delight in equality'. The maxim has been applied in many ways:

(a) Presumption of tenancy in common

- Equity prefers tenancy in common because of the inequitable effect of the application of the doctrine of survivorship – *jus accrescendi*, which operates in cases of joint tenancy

EQUALITY IS EQUITY

- In three cases, equity prefers tenancy in common notwithstanding that by virtue of the instrument creating their interest, the parties are joint tenants-

i) **Purchase in unequal shares**

- Under common law, when A and B purchase property with purchase money provided unequally and the property is conveyed to them jointly, on A's death, B becomes entitled to the whole of the property
- But in equity, B is treated as a trustee for A's representatives proportionately to the share of the purchase money advanced by A.

EQUALITY IS EQUITY

- But if the purchase money had been advanced by them equally, B would be entitled to the property both at law and equity because where two purchasers advance the money equally, they may be presumed to have purchased with a view to the benefit of survivorship

(ii) Loan on mortgage

- Where property is mortgaged to A & B jointly, it is not material that the money is advanced equally or unequally

EQUALITY IS EQUITY

- Since the transaction is a loan, the presumption of an intention to hold the mortgage on a joint tenancy does not arise, and the survivor is a trustee for the representative of the deceased mortgagee to the extent of the proportion of his loan

iii) Partnership

- Two or more persons may form partnership to engage in business, and may invest the partnership money in property with a view of making profit

• EQUALITY IS EQUITY

- At law, the partners are regarded as joint tenants, but in equity, they are deemed to hold such property as beneficial tenants in common. See *Lake v Craddock*

- Hence, the *jus accrescendi* is excluded and the property is divided among the partners proportionately according to their shares in the partnership

• EQUALITY IS EQUITY

(b) Severance of joint tenancy

- Even where there is a clear evidence of joint tenancy as where two people advance money equally for the purchase of property, equity will treat such tenancy as severed in order to exclude the incident of survivorship

- For example, an actual alienation of a tenant's share by him severs the joint tenancy just as a mere agreement to alienate the share will have the same effect provided consideration is furnished. See *Iipaye v Aribisala, Jones V Maynard*

• EQUALITY IS EQUITY

(c) Equal division

- The principle will apply where property is to be divided among certain people and there is no basis for such a division.

- Hence, the balance in joint account of husband and wife will be divided equally between the two spouses. See *Jones v Maynard; Dawodu v Danmole; Taiwo v Lawani*

- Similarly, where husband, wife and mother contribute towards the purchase and equipment of a house, the same principle will apply

• EQUITY LOOKS ON THE INTENT RATHER THAN THE FORM

- Equity makes a distinction between a matter of substance and a matter of form

- Equity insists that what is important is the substance and not the form, and will therefore not allow a matter of form to defeat that of substance. See *Parkin v Thorold* (1852) 16 Beav 59 (per Romilly, MR)

- For instance, in a contract of sale of land, once the completion date expires, there is a breach of contract in law if the contract is not completed. But equity allows completion within a reasonable time.

• EQUITY LOOKS ON THE INTENT RATHER THAN THE FORM

- Similarly, equity allows a mortgagor to redeem his mortgaged property even though the redemption date has passed, for once a mortgage, always a mortgage

- Furthermore, equity does not favour technicalities and so may refuse to decree specific performance of a voluntary agreement even under seal and so enforceable at law. See *Ben Warri v Onwuchekwa; Balogun v Balogun*
- Note also that at common law, stipulation as to time is always of the essence of contract. Thus leading to repudiation and/or entitlement to damages on the part of the aggrieved party

EQUITY LOOKS ON THE INTENT RATHER THAN THE FORM

- In equity, specific performance could be ordered notwithstanding failure to perform the contract by the time specified.
- But equity regards time as of essence in 3 cases:

When parties expressly agree that time should be of essence;

When the nature of the property so requires (*Lock v Bell* (1931) 1 Ch 35);

When time is made essential by notice. See *Mustapha v S.C.O.A* (1955) 21 NLR 69

- **(10) EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO BE DONE**

- The importance of this maxim lies more in the areas of property law
- The division of property into personality and realty is important when question of distribution arises
- For instance, if property is directed to be converted from one form to another, the property in equity is regarded as converted in form from the moment the direction becomes effective

- **(10) EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO BE DONE**

- Hence, if there is a trust for sale of real property and the settlor directs the trustees for sale to invest the proceeds of the sale in shares of a company, the real property is regarded as converted into personality from the moment the trust becomes operative. The result is that the party who is entitled to personality on distribution, immediately becomes entitled

- This is the doctrine of conversion. See *Fletcher v Ashburner* (1779) 1 Bro. CC 499 (per Sir Thomas Sewell M.R.)

- **(10) EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO BE DONE**

- Also, equity treats a contract to do a thing as if the thing were already done, though only in favour of a person entitled to enforce the contract specifically and not in favour of a volunteer. See *Iragunima v RSHPDA & Ors.*

- The rule in *Walsh v Lonsdale* is another example of the contract

- **(11) EQUITY INPUTS AN INTENTION TO FULFIL AN OBLIGATION**

- If a person is under an obligation to do a certain thing, and he does some other act which is capable of being regarded as a fulfilment of that obligation, what he does will be regarded as a fulfilment of his obligation

- This is the basis of the doctrine of performance and satisfaction

- **(12) EQUITY ACTS IN PERSONAM**

- This maxim is the foundation of all equitable jurisdiction

For instance, since trust was an equitable invention, the rights of the beneficiary were not recognised at common law. The Court of Chancery however compelled the trustees to carry out the trust. So the beneficiary under a trust could compel the trustees to carry out the terms of the trust by action in the Court of Chancery.

In this way, equity acts against the person and his conscience

(12) EQUITY ACTS IN PERSONAM

Hence, the cestui qui trusts right in respect of his interest as a beneficiary is primarily against the trustee. This is a right in personam, a right against the person, as against a right in rem, which is a right against the whole world

➤ Although sometimes, the right of a beneficiary under a trust goes beyond the person particularly in instances of tracing

• (12) EQUITY ACTS IN PERSONAM

➤ It should be noted that the right of a cestui que trust to follow trust property is the right of an equitable owner to assert his equitable ownership over the property which has come to represent the property.

➤ Consequently, he can trace the trust property into whatever hands it may have come, until it gets into the hands of a bona fide purchaser of the legal estate for valuable consideration without notice.

➤ In essence, he is allowed to assert his proprietary right, not to the original res, which has disappeared and cannot be identified, but to a different res, which represents it. See *Re Diplock* (1948) Ch. 465

• (12) EQUITY ACTS IN PERSONAM

➤ 3 main reasons are accountable for the liberal view adopted by equity:

-) The non-recognition by common law of equitable claim to property whether money or any form of property
-) The refusal to grant specific relief as distinct from damages
-) The limited range of remedies which are available at common law and which prevented common law from identifying money in a mixed fund. In equity, mixed funds can, in proper cases, be resolved into its component parts

• (12) EQUITY ACTS IN PERSONAM

➤ This maxim finds practical application in the methods of enforcing judgements and the jurisdiction over property abroad

METHODS OF ENFORCING JUDGEMENT

(a) Common Law:

➤ Judgement obtained from the Common Law Courts was enforced by writ of execution by which the plaintiff was forcibly put into possession of the property to which he was entitled under the judgement

➤ This method is not only inadequate, but also, ineffective as the successful party may soon discovered that the possession for which he obtained through force could not be sustained for long

(12) EQUITY ACTS IN PERSONAM

b) Equity

- Because the common law methods of enforcing judgements were ineffective, equity developed other methods which are:

Order of Attachment or Committal for Contempt

- Here, the Court made an order against the defendant personally, in that the defendant was committed to prison. But in some cases, imprisonment proved ineffectual to compel compliance with its orders

(12) EQUITY ACTS IN PERSONAM

ii) Writ of Sequestration

- The court appointed a sequestrator to take possession of the property in dispute and eventually of all the defendant's property until he did the act which he had been ordered to do

iii) Statutory Provisions

- Common law and equitable efforts at ensuring enforcement of judgements have been supplemented by statutory provisions providing for the court to make vesting orders or appointment of a person to execute a transfer (see s 31 Trustees Act); and the nomination of some person to comply with the judgment or with any order. See 26 High Court Law Ogun State

(12) EQUITY ACTS IN PERSONAM

Jurisdiction over property abroad

- Because equity acts in personam, Courts of Equity have been able to recognise and enforce trusts, mortgages and contracts relating to land situated abroad, if the defendant is within the jurisdiction of the court. See *Ex Parte Pollard* (per Lord Cottenham)
- Hence in *Penn v Baltimore*, where the agreement relates to land in America, the English court decreed specific performance.
- Also in *Ayinule v Abimbola*, a Nigerian Court granted an injunction to restrain a defendant within its jurisdiction from doing an act outside its jurisdiction

(12) EQUITY ACTS IN PERSONAM

- However, the plaintiff must prove an equitable right against the defendant (*Penn v Baltimore*), and the defendant must be within the jurisdiction of the court or he can be served with process abroad
- The equitable decree is served against the defendant personally, and it is not a determination of title to foreign land. See *Ex parte Pollard*
- But the jurisdiction will not be exercised if the lex situs prohibits the enforcement of the decree, or if the court cannot effectively supervise the decree and if the decree would for any other reason be in vain. See *Ex parte Pollard, Adesokan v UAC, Re Liddlells S.T.*

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FIRST SEMESTER

EQUITY LECTURE

MORTGAGES

INTRODUCTION: UNDERSTANDING THE TERM 'MORTGAGE'.

A mortgage may be described as a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given.

The inference from this is that a mortgage is a security, which may be used for purposes other than security of a money debt.

A mortgage is either legal or equitable. A legal mortgage is when a legal interest in property is validly transferred as a security for a loan.

INTRODUCTION contd

An equitable mortgage is when the mortgagor has only an equitable interest in the property or if the legal interest is transferred in a form insufficient to transfer a legal interest.

The essential characteristics of a mortgage is that it is a conveyance of a legal or equitable interest in property with a proviso for redemption.

Thus, on repayment of the loan or the performance of obligation, the conveyance becomes void and the interest is reconveyed. See Santley v Wilde (1899) 2 Ch. 474.

INTRODUCTION contd

Note that before any interest in land can be transferred under the LUA, government's consent must be obtained. S 22, LUA. Non-compliance renders the transaction null and void. S 26. See Savannah Bank v Ajilo & Ors (1989) A.N.L.R. 26; Awojubade Light Industries Ltd v Chinukwe (1995) 4 NWLR (pt 390) 379.

• However, where the governor's consent has been obtained in respect of a mortgage transaction, further consent is not required to upstamp or increase the amount of loan or create further or additional mortgage over the same property and between the same parties. See Owoniboye Tech Services Ltd v Union Bank of Nigeria Ltd (2003) 7 SCNJ 177.

• CREATION OF MORTGAGES

(a) Legal Mortgages

- A legal mortgage is now created in Nigeria by virtue of the LUA either by a demise for a term of years absolute subject to a provision for cessation on redemption or by a charge by deed expressed by way of legal mortgage. S 108 PCL.
- A mortgage of leaseholds can only be effected by a sub-demise for a term of years absolute less one day at least than the term vested in the mortgagor and subject to a provision for cessation on redemption, or by a charge by deed expressed to be by way of legal mortgage. S 109 (1) PCL.
- The effect of the LUA is that the mortgagor retains the legal estate or the leasehold reversion as well as the equity of redemption.

(b) Equitable Mortgage



Sometimes, a legal mortgage is created without sufficient formalities, this gives rise to an equitable mortgage. In addition, equitable mortgage can be created in the following ways:

Deposit of title deeds

An equitable mortgage may be created by deposit of title deeds by the owner of the property to which the deeds relate with the intention that the document be held as security for a loan. See Russel v Kussel (1783) 1 Bro.C.C.269.

Equitable mortgage contd

In so far as the intention is clear, it does not matter whether the deposit is accompanied by a memorandum.

Indeed, it is a well-established rule that deposit of a document of title without either writing or word of mouth showing that it is deposited as security, will nonetheless create, in equity, a charge over the property to which the document relates, to the extent of the interest of the person who makes the deposit. See Bank of New South Wales v O'Connor (1889) 14 App. Cas. 273.

Equitable Mortgage (deposit) contd

Such deposit of the title deed is construed in equity as an agreement to create a mortgage and the deposit is treated as an act of part performance.

In the case of banks where documents are commonly deposited for safe custody, proof of such intention is essential. See Desalu v Akapo (1967) 1 A.L.R. Com 201.

The deposit is effective to make the depository an equitable mortgagee with all the rights and remedies of a mortgagee except power to sell the security since he has no legal title, which he can convey to the purchaser.

Equitable mortgage

ii) Mortgages of equitable interests

A beneficiary under a trust or the owner of an equity of redemption may mortgage his interest and such a mortgage can only be equitable since the interest itself is equitable.

The mortgage must either be writing signed by the mortgagor or his agent authorised in writing or made by will.

Further, equitable mortgages can be created by way of equitable charge.

Equitable mortgage contd

This arises where property is specifically charged in equity with the discharge of a debt or discharge of an obligation.

The position in Nigerian law with regard to the creation of equitable mortgages is the same as in English Law except that consent is required in transaction involving natives and aliens. See Native Lands Acquisition Ordinance 1903. Re-enacted in most states of the federation.

The consequences for non-compliance with these statutory requirement may be very serious. See British and French Bank Ltd v Akande (1961) All NLR 820.

EQUITY OF REDEMPTION

DISTINCTION BETWEEN THE EQUITY OF REDEMPTION AND EQUITABLE RIGHT TO REDEEM.

'the equity to redeem, which arises on failure to exercise the contractual right of redemption, must be carefully distinguished from the equitable estate, which from the first, remains in the mortgagor, and is sometimes referred to as equity of redemption.' see Lord Parker in Kreglinger v New Patagonia Meat and Cold Storage Co. Ltd (1914) A.C. 25 at 48.

Equity of Redemption contd

Note that the legal right to redeem which is specifically reserved in mortgage deed, usually expires once the contractual date of redemption has elapsed.

It is therefore apparent that while the Equitable right to redeem does not arise until the contractual date for redemption has passed, equity of redemption arises immediately the mortgage is made.

Equity of redemption contd

Equity of redemption is an equitable interest which is the sum total of the interest that the mortgagor has in the mortgaged property.

Hence, despite the conveyance of the right of property to the mortgagee, the mortgagor remains the real owner of the mortgaged property and has an estate in the form of an equity of redemption which entitles him to not only redeem the property after the contractual date has passed, but also, to deal with the beneficial ownership by selling, charging or leasing the property subject only to the mortgagee's encumbrance. See Lord Hardwicke in Osborne v Scarfe (1737) 1 Atk. 603 at 605.

Equity of redemption contd

On the other hand, the introduction of equitable right to redeem was an attempt to prevent injustice to the mortgagor.

Hence, certain rules were evolved to strengthen the mortgagor's protection as conveyancers sought to defeat his equity of redemption by various conveyancing devices. These include:

Once a mortgage, always a mortgage.

• Equity of redemption contd

This maxim means that once a transaction, on proper construction, is seen to be a mortgage, equity will not allow the introduction of any clause which will render the mortgagor's equitable right to redeem property ineffective. see Samuel v Jarrah Timber Co (1904) AC 323, Lewis v Frank Love Ltd (1961) 1 WLR 261

(ii) Undue contractual postponement of the right to redeem. See Fairclough v Swan Brewery Co Ltd (1912) AC 565. But see Knightsbridge Estate Ltd v Bryne (1939) Ch 441. Affirmed on other grounds by the H.L. (1940) A.C. 613.

• Equity of Redemption

(iii) Collateral advantage in favour of the mortgagee.

A collateral advantage in favour of the mortgagee intended to continue even after redemption is regarded as a clog on the equity of redemption. Thus, 'a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption by any by-agreement.' per Trevor M.R. in Jennings v Ward 23 ER 935.

• Equity of redemption

However, by virtue of *Biggs v Hoddinot* (1898) 2 Ch 307, such contract is valid and enforceable provided that: (a) they do not make the bargain harsh and unconscionable, or (b) they do not clog the equity of redemption. See also *Kregliner case; Ogunro v Ogunro & Ors* (1960) LLR 20.

Note that the right to redeem may be lost by lapse of time. S 27 of the Limitation Act provides that when a mortgagee has been in possession of the mortgaged property for a period of 16 yrs, no action to redeem the land of which the mortgagee has been so in possession shall be brought thereafter by the mortgagor or any person claiming through him. See *John Mills v Awooner* (1940) 6 N.L.R. 144.

Rights of Parties to a Mortgage

So long as the mortgage subsists, equity regards the mortgagor as the real owner of the mortgaged property subject to the rights of the mortgagee.

Both the mortgagor and mortgagee in possession may in certain cases, grant lease of the mortgaged property which are effective against both parties. See s 18 Conveyancing Act; s 21 PCL.

Furthermore, a legal mortgagee, being the first or the only mortgagee is entitled to an estate in possession and may retain possession until the mortgagor redeems his security. See *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* (1957) Ch. 317.

Rights contd

An equitable mortgagee cannot take possession because he has no legal estate that will entitle him to do so unless such a right is expressly conferred by the mortgage deed, or by an order of court or with the permission of the mortgagor.

However, a mortgagor in possession is entitled to enjoy the mortgaged property in the ordinary way and may bring an action in certain cases in respect of the mortgaged property. See s 35(5) Judicature Act.

Rights contd

While the mortgagee in possession, by virtue of his legal or equitable interest, is entitled to rents and profits accruing from the mortgaged property, and has the same statutory power of leasing as the mortgagor. However, such a benefit is without burden.

The mortgagee is therefore liable to account strictly to the mortgagor for the rents and profits as well as for any wilful defaults on his part. See *Nigerian Loan and Mortgage Co. Ltd v Ajelumobi* (1944) 17 NLR 136; *Aderoku v U.A.C.* (1941) 7 W.A.C.A. 39.

Rights contd

- While it is legitimate for the mortgagee in possession to improve the property, such improvements must be reasonable and properly undertaken to avoid increasing the value of the property purposely to cripple the mortgagor's power of redemption. See *Saunders v Hooper* (1843) 6 Beav. 246.
- Once the amount expended has been proved and it is established that the value of the property is proportionally increased, it is immaterial that....
- Rights contd
- ..whether the mortgagor has notice of expenditure provided that the improvement is reasonable.
- It makes no difference also that at the time the improvement is undertaken, the party believes that the property is his own.

However, a mortgagor who remains in possession after the mortgagee has exercised his power of sale is liable to pay mesne profits calculated from the date on which notice to give up possession is given. See *Idowu V Onashile* (1969) L.L.R. 76.

REMEDIES OF THE MORTGAGEE

A mortgagee has certain standard remedies for securing the repayment of his loan. They consist of the following:

An action on the covenant for repayment of the loan.

A mortgage deed usually contains a covenant for the repayment of the loan for which the mortgagor is personally liable and upon which the mortgagee can sue on and after the contractual date for redemption.

REMEDIES contd

This liability being personal does not bind the successor-in-title to the mortgagor. See *Re Errington* (1894) 1 Q.B. 11.

| Power of sale

A mortgagee may also exercise his power of sale which is now implied in all mortgages made after 1881 but subject to any variation or extension contained in the mortgage deed. See s 19 CA, s 123 PCL.

Remedies contd

The power of sale becomes exercisable when (i) notice requiring payment of the mortgage money has been served on the mortgagor and default in payment of part or all of it has been made for three months afterwards. See *Baker v Illingworth* (1908) 1 Q.B. 11; (ii) some interest is in arrears and unpaid for two months afterwards.; or (iii) the mortgagor has broken some contractual or statutory provision other than the covenant for payment of the mortgage money or interest. S 20 CA; s 125 PCL.

Remedies

It is common in Nigeria for conveyancers to insert a clause in the mortgage deed that the mortgagee must serve a written notice of demand on the mortgagor. See *Bokini v John Holt & Co Ltd* (1937) 13 NLR 109; *Allen v John Holt & Co Ltd* (1955) 12 NLR 14.

However, a writ of summons claiming the amount due and served on the mortgagor is sufficient notice to satisfy the terms of a mortgage deed requiring one month's notice before realisation of security. see *Bokini* case.

- Remedies contd
- Service of such notice on a solicitor acting for the mortgagor in another matter and shown to the mortgagor is sufficient. See *Allen* case.
- A mortgagee must not sell the mortgaged property until his power to do so has arisen and become exercisable. See *Raji v Williams* (1941) 16 N.L.R. 14.
- Note that any irregularity in the exercise of the power of sale cannot vitiate the sale unless fraud is established. See *Sanusi v Daniel* (1956) 1 FSC 93; *Ibiyeye v Fojule* (2006) 2 SCNJ 1.
- Remedies contd

If fraud is committed in the sale of the mortgaged property, the sale may be set aside provided the property has not in the meantime got into the hands of a bona fide purchaser of the legal estate without notice. See *Yilgora v Osholere* (1950) 19 NLR 119.

Only a valid and effectual exercise of the power of sale can extinguish equity of redemption in the land. See *Williams v Cole & Ors* (1952) 14 WACA 129.

Remedies contd.

Similarly, where a mortgage is no longer valid because of non-compliance with the Registration of Title Ordinance, a subsequent sale of the mortgaged property under power conferred by the CA 1881, is also void and ineffective. See *Oreshile v Mewu*.

A purchaser of mortgaged property must ascertain whether the power of sale has arisen, but need not enquire whether the power has become exercisable. *Ojikutu v Agbonmagbe Bank Ltd & Ors* (1966) 2 ALR Comm. 433; *Oguchi v F.M.B. (Nig) Ltd* (1990) 6 NWLR (pt 156) 335; *Salako v Federal Loans Boards & Ors* (1967) 1 ALR Comm. 137.

Remedies contd.

The mortgagee is not a trustee of the mortgagor in exercise of his power of sale. Thus, a mortgagor cannot impeach the sale on the ground that a higher price could be obtained since the sale is usually conducted by a public auction and it is the highest bidder who eventually purchases the property.

But a mortgagee should endeavour to obtain a fair price for the mortgaged property. See *Simon U. Ihekwoaba v African Continental Bank Ltd & ors* (2003) 6 SCNJ 327.

Remedies contd

i) Foreclosure

It is a judicial process by which the court orders the termination of the mortgagor's equity of redemption.

By this order, the mortgagee's interest ceases to be a security and becomes absolute. The court issues a foreclosure order, which may be absolute after six months.

Remedies contd

ii) Appointment of a receiver

The mortgagee may appoint a receiver to take over the administration of the property.

His appointment and the exercise of his power is subject to the same statutory provisions as governing the power of sale. See ss 19 & 24 CA, ss 125 & 131 PCL.

A receiver when appointed is deemed to be the agent of the mortgagor who is responsible for his acts and defaults unless the mortgage deed provides otherwise.

ASSIGNMENT OF CHOSES IN ACTION

Prescribed texts:

Fabunmi, Chapter 5

Jegede, Chapter 10

DEFINITION OF 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.

DEFINITION

Examples of choses in action include rights to debts; shares in a joint stock company and in/or 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; 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.

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*

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. E.G. Tables, chairs, cars, etc

DISTINCTION BETWEEN A CHOSE IN ACTION AND A CHOSE IN POSSESSION

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 *fieri facias* or *levavi fucias*'

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. E.g. 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, etc

CLASSIFICATION OF CHOSES IN ACTION

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.

ASSIGNABILITY

WHAT IS ASSIGNMENT

Simply put, It 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.

ASSIGNABILITY

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 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.
See G.B. Ollivant & Co. v. Effioms Transport (1934) 2 W.A.C.A. 91

ASSIGNABILITY

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 debts and other choses in action were regarded as involving strictly personal obligations, and hence their 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) 77 E.R. 994.

ASSIGNABILITY

Another ground for non-recognition and non-enforcement of assignment was to avoid the risk of maintenance and champerty. See *Farewell*, L.J. in *Defries v. Milne* (1913) 1 Ch. 98 at 110-111.

however, that 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

Also, 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.

ASSIGNABILITY

Hence, '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.

But assignment were recognised in certain exceptional circumstances:

The King could assign or receive a chose in action by way of assignment

The evolution of English banking accompanied by merchantile customs whereby rights in merchantile choses in action such as bills of exchange, were not only assignable, but also negotiable

• ASSIGNABILITY

- Note also that the personal nature of choses in action no longer invalidates all assignments, but continues to do so in respect of those, which involve personal skill or confidence, or the assignment of which will prejudice the debtor. See *Griffith v Town Publishing Co* (1897) 1 Ch 21; *Tolhurst v Association Portland Cement manufacturers* (1903) 4 All E.R. 628

• ASSIGNABILITY

TYPES OF ASSIGNMENT-EQUITY

- Here equity did not follow the law. Hence, from the early times courts of equity gave effect to assignments of both equitable and legal choses.
- 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'.

• ASSIGNABILITY

- An assignee of an equitable chose could bring an action in his name in the Court of Chancery to recover the chose.

But if it was a legal chose, he could only bring an action in the Common Law court in the name of his assignor, since the assignment was not recognised at Law. This may lead to instances where the assignor would make use of this right to defeat the right of property conferred on the assignee. Hence, to give effect to the assignment of a legal chose, equity compelled the assignor to give the use of his name to the assignee either as co-plaintiff or co-defendant, subject to the assignee giving a proper indemnity against cost. See *Re Steel Wing* (1912) 1 Ch 349; *Performing Right Society v London Theatre of Varieties Ltd* (1924) AC 1

ASSIGNABILITY

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.

ASSIGNABILITY

CATEGORIES OF ASSIGNMENT:

There are 4 categories of assignment

i) An assignment, the subject matter of which is a legal chose and which satisfies the legal formalities, is a legal (statutory) assignment of a legal chose. S 26 (6) Judicature Act, s 150 PCL

ii) It is a legal (statutory) assignment of an equitable chose, if the subject matter is an equitable chose.

If the legal formalities for creating an assignment are not complied with, and the subject matter is a legal choose, the assignment is an equitable assignment of a legal chose

ASSIGNABILITY

v) If the subject matter is an equitable chose, it is an equitable assignment of an equitable chose

Note also that certain choses are not assignable on grounds of public policy. These include salaries and pensions of public officers as it is in public interest that public servants should not suffer from financial embarrassment (see Pension Reform Act); alimony or maintenance granted to a wife by a court; a bare right not coupled with interest in property such as right to sue for libel.

VALIDITY OF AN EQUITABLE ASSIGNMENT

a) Intention to assign

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 *Gorrige v. Invell India Rubber v Works* (1886) 34 Ch.D. 12; *William Brandts Sons and Co. v. Dunlop Rubber Co. Ltd.* (1905) A.C 454; *London and Yorks Bank v. White* (1895) 11 T.L.R. 570

VALIDITY OF AN EQUITABLE ASSIGNMENT

The exception is the assignment of an equitable interest under a trust when writing is required. See s 9 of the Statute of Fraud 1677, and S 78(1)(c) PCL; *Grey v. L.R.C* (1959) 3 W.L.R. 758; *Oughtred v. I.P.C.* (1959) 3 W.L.R. 898

Identified Chose

The chose which is being assigned must be sufficiently identified

Hence if A merely directs B to pay a specified sum to C, this will not assign any money, which B in fact owes A. But it will if payment is directed to be made 'out of money due from you to me'. See Brice v Bannister

VALIDITY OF AN EQUITABLE ASSIGNMENT

Notice to the Debtor

It is not essential that an assignee gives notice to the debtor or trustee but it is desirable for the following reason

To ensure payment to the assignee

To protect against new rights arising between debtor and assignor. The assignee takes subject to equities (right of set off, or to set aside the transaction for fraud) existing between the debtor and the assignor as he cannot be in a better position than the assignor. This applies irrespective of whether the assignment is equitable or legal.

However, He is not affected by any such equities arising after the debtor has received notice of the assignment. See Roxburge v Cox (1881) 17 ChD 520

VALIDITY OF AN EQUITABLE ASSIGNMENT

ii. To preserve priority against subsequent assignees under the rule in Dearle v Hall

v. To take advantages associated with notice in writing. A notice in writing may convert an otherwise equitable assignment into statutory assignment thus giving the assignee, the status of a person entitled to the debt at law

Note that notice when given is effective from the date of receipt by the debtor, trustee or on his behalf. See Holt v Heaterfield Trust Ltd (1942) 2 KB 1

EFFECTS OF EQUITABLE ASSIGNMENT

- Equity will permit the assignee to sue in his own name without joining the original creditor, if the whole interest in the chose is assigned.
- But where part of the chose is assigned or it is an equitable assignment of a legal chose, the assignee or the original creditor cannot sue for the chose without joining the other either as plaintiff, if he consents, or as DEFENDANT IF HE DOES NOT. See Holt v Heaterfield Trust Ltd
- This is because all the parties interested in the chose must be before the court so that there can be a final adjudication binding on all of them. See Re Steel Wing

CONSIDERATION

- Generally, CONSIDERATION is not essential for the assignment of equitable or legal chose. See Re Wale (1956) 1 WLR 1346; Harding v Harding
- However, in the case of an equitable assignment of a legal chose, consideration is required since it involved the joinder of the assignor as co-plaintiff, so that he could enforce the claim at law, and equity will not so compel him, in favour of a volunteer
- Since 1875, statutory assignment requires no consideration. See Holt v Heaterfield Trust Ltd

STATUTORY ASSIGNMENT

S 25 (6) Judicature Act, and S 150 PCL recognises statutory assignment of choses in action

The assignment which must be in writing, must be signed by the assignor, but it need not be by deed nor need it be for value. See Udukason Ent v Olisa (1972) 11 ECSLR 171

Also, the assignment must be absolute not purporting to be by way of charge only. In essence, the entire chose must be assigned, (see Onasile v Idowu). But where a part of a chose is assigned, the assignment is not statutory but equitable. See Western Nig. Finance Corp. V West Coast Builders Ltd (1971) 1 UILR 93; Accra Perfumery Co v Thomas (1947) 12 WACA 160

GENERAL COMMENTS

There must be express notice in writing. This notice may be given either by the assignor or the assignee, (See Udukason Ent v Olisa). Before notice is given, an assignment may be valid as an equitable assignment. See Holt v Heaterfield Trust Ltd.

Finally, note that the provisions of the Judicature Act (s 25(2), and PCL (s 152), do not restrict the operation of equitable assignment. They merely improves the machinery of assignment by allowing the assignee to sue in his own name. Hence, an assignment which fails to qualify as a statutory assignment may operate in equity according to the same rule, which applied to and independently of the statutes. See Laibru Ltd v Building & Civil Engineering Contractors (1962) 1 All NLR 387

• PRIORITY OF SUCCESSIVE ASSIGNMENT

The Rule in Dearle v Hall

- Where there are successive interests in pure personality, their priority will be determined by what is generally known as the rule in Dearle v Hall.
- It states 'where the owner of an equitable interest in pure personality creates more than one encumbrance on it, the priority of the encumbrancers does not depend on the dates of the creation of their respective incumbrances, but on the dates on which the trustees received notice of the encumbrances, subject to the qualification that a later encumbrancer who has notice of an earlier encumbrance at the date of taking his security, cannot obtain priority by being the first to give notice to the trustees.'

• PRIORITY OF SUCCESSIVE ASSIGNMENT

- The rationale of the rule is that the assignee by failing to give notice left the assignor in a position to make subsequent assignment, and since the debtor or trustee is unaware of the first assignment, the assignor is put in the position of an apparent beneficial owner. Hence, the 1st assignee by enabling the fraud to be committed on the 2nd assignee, it is equitable that he should be postponed.
- But if the 2nd assignee does not give value, the 1st assignee will not be postponed since as a volunteer, the 2nd assignee cannot take more than the assignor is able to give

• PRIORITY OF SUCCESSIVE ASSIGNMENT

- Although priority will depend upon the order of notice received by the debtor or trustee, if notice is received substantially simultaneously, priority will depend upon the order in which the interests were created.
- Note also that notice can be given orally. LIKEWISE, Notice received through newspaper has been held to be sufficient. See Lloyd v Bank.

Hence apart from s 152 (1) PCL requiring notice in writing, notice required under the rule can be in any form whether the subject of the assignment is legal or equitable

PRIORITY OF SUCCESSIVE ASSIGNMENT

Where there are several trustees, notice given to one of them is deemed to be notice to all of them as regards all transactions effected while he remains a trustee. See Ward v Duncombe.

Such notice is not effective in relation to transaction effected after the death or retirement of the trustee unless he had communicated it to one or more of the trustees in office at the time of those transactions. See Re Philips Trust

PRIORITY OF SUCCESSIVE ASSIGNMENT

However, an assignee that gives notice does not lose priority if all the trustees die or retire. He does not need to give notice to the new trustees. See Re Wasdale

But the new trustees will not be liable for mispayment if, unaware of his assignment, they pay later assignee. See Hallow v Lloyd.

Negligence of the competing assignees is irrelevant to the application of the rule. See Re Dallas

Note the Dearle rule has been held to apply to successive equitable assignment of legal choses in action. See Gorringe v Irwell Works Ltd

PRIORITY OF SUCCESSIVE ASSIGNMENT

The rule is preserved under s 152 PCL. Under the law, any other form of notice except in writing, will not affect priority.