APPLICATION OF SOME EQUITABLE MAXIMS IN NIGERIA

BY

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This thesis is dedicated to my parents, Mr. & Mrs. S.A. ATUM, who laid a concrete foundation for my education and sponsored me up to the beginning of this course and instilled in me the fear of GOD, and to the ENTIRE ATUM FAMILY.

DECLARATION

I, DAVID ITYAVZUA ATUM, declare that this thesis has been written by me and that it is a record of my own research work. It has not been presented in any previous application for a higher degree. All quotations and references are indicated with specific acknowledgements.



D.I. ATUM

CERTIFICATION

This thesis entitled "Application of Some Equitable Maxims in Nigeria" meets the regulations governing the award of the degree of LL.M. of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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ABSTRACT

One of the objectives of law is to achieve or ensure social justice in the society, but law may not necessarily achieve this in every case. Jegede has attributed this inability of law to do justice in every case to the fact that "every case present different problems and law being of rules applicable to certain definate and factual situations, makes no provision for unforeseen cases, nor does it permit any variation in peculiar individual circumstances"[1].

Developed systems of law have often been assisted by judicial discretion to do justice in particular cases where a strict application of rules of law cause hardship. In England this was what gave rise to the evolution of the principles of equity by the chancery Courts to mitigate the harshness of the common law.

The pre-occupation of equity in its formative period was by the chancellors who developed the principles.of equity by their ideas of concerned themselves with working out the details of what has now become English and Nigerian principles of equity. Therefore right from the formative period the principles of equity vary like the chancellor's foot.

1: Jegede (1981) Principles of Equity, Ethiope Publishing Corporation, Ring Road Benin City. Page 9.

The exercise of equitable jurisdiction by the Courts of Chanoery was based on certain general principles. These principles have been embodied into what is know as Maxims of equity. They do not cover the whole ground of equity and each should not be considered in isolation from others, but as an integral part of the whole.

They are principally twelve equitable Maxims applicable in Nigeria. But for the purpose of this research work, the application of the following first four below will be discussed in detail, these are:

(1) Equity Will not suffer a Wrong to be Without a remedy.

(2) Equity Acts in Personam.

(3) He Who Comes to Equity Must Come with Clean Hands.

(A) Delay defeats Equity or Equity Aids the Vigilant and Not the indolent.

The rest of the Maxims are:

(5) Equity follows the law.

(6) He Who Seeks Equity Must do equity.

(7) Equality is equity.

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

(9) Equity looks on that as done which ought to be done.

(10) Equity imputes an intention to fulfil an obligation.

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

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

Kodilinye has rightly submitted that "they should not be regarded as rigid formulae for the application of equitable rules, but rather as a collection of general principles which can be moulded or adopted to suit the circumstances of the individual case[2].

Organisational Structure

This thesis is divided into Five Chapters. Chapter 1 which is the introductory Chapter briefly examines the various objectives of application of law in the society. This leads to the definition, origin and nature of equitable principles evolved by the chancery Court in England and its inter-relationship with the common law which incorporates the equitable Maxim "Equity will not suffer a wrong to be without a remedy". These discussions will form the solid foundation for an examination of the historical background of reception of the principles of equity into the Nigerian legal system. The concluding aspect of the Chapter discusses relationship between equity and the repugnancy doctrine as perceived and applied by the Nigerian Courts.

Chapter 2 makes an analysis of the Maxim "Equity Acts in Personam". By this is meant that equity has jurisdiction over the defendant personally. The Maxim has received a lot of judicial expositions from the courts. Therefore attempt will be made to analyse some of these cases in England and other common law countries with the main focus on Nigeria.

2. Kodilinye (1975) Introduction to Equity in Nigeria, London Sweet and Maxwell. Page 12.

Chapter 3 is devoted to the Maxim " He who comes **to equity** must come With clean hands". By clean hands is meant that the conduct which is regarded as unclean must be related to the case at hand, as it is not a general depravity, if it is not related to the case in hand it is irrelevant.

Chapter 4 discusses the Maxim "Delay defeats equity or Equity Aids the Vigilant and Not the Idolent" (Vigilantibus Non Dormentibus jura subverniant). this means that a person will not be granted an equitable remedy if he has been guilty of undue delay and the other party has altered his position to his detriment. It ends with a brief discussion of application of statutes of limitation.

Chapter 5 which is the last chapter of this thesis will be entirely devoted to suggestions for reforms on the application of some equitable principles.

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ABBREVIATIONS

A.C.	Appeal Cases
A.G.	Attorney-General
All E.L.R.	All England Law Report
A.L.R.	Australia Law Report
All N.L.R.	All Nigerian Law Report
C.A.	Court of Appeal
CCHCJ	Certified Copies of High Court of Lagos Judgements
CH.D.	Chancery Division
C.L.R.	Commonwealth Law Report
EX.D.	Exchequer Division
E.R.	English Reports
E.R.N.L.R.	Eastern Region of Nigerian Law Report
F.C.A.	Federal Court of Appeal
F.N.L.R.	Federation of Nigeria Law Report
F.S.C.	Federal Supreme Court
H.C.	High Court
H.L.	House of Lords
K.B.	Kings Bench Division
L.C.	Lord Chancellor
LloyD. Rep.	LloyD's List Law Reports
L.R. EQ.	Law Report Equity
L.R. EK.	Law Report Exchequer
L.L.R.	Lagos Law Report
L.J.	Law Jiones
N.C.L.R.	Nigerian Constitutional Law Report

N.L.R.	Nigerian Law Report
N.M.L.R.	Nigerian Monthly Law Report
N.N.L.R.	Northern Nigerian Law Reports
N.R.N.R.	Northern Region of Nigeria Law Report
N.S.W.R.	New South Wales Law Report
N.W.L.R.	Nigerian Weekly Law Report
N.Z.L.R.	New Zealand Law Report
P.C.	privy Council
P.D.	Probate Division
Q.B.	Queen's Bench Division
S.C.	Supreme Court
S.C.N.L.R.	Supreme Court of Nigeria Law Report
U.G.L.J.	University of Ghana Law Journal
U.K.	United Kingdom of Great Britain & N. Ireland
U.S. OR U.S.A.	United States of America
Ves.	Vesey Junior Reports
W.A.C.A.	West African Court of Appeal
W.L.R.	Weekly Law Report
W.N.L.R.	Western Nigeria Law Report
W.R.	Weekly Reporter
W.R.N.L.R.	Western Region of Nigeria Law Reports

The enforecement of trust or the protection of the rights of the beneficiary was a creation of rights which equity deem necessary to redress the injustice which has been occasioned by the condition of the trust. Equity compelled the trustees to hold the property for the benefit of the beneficiaries. The beneficiaries can enforce their rights not only against the trustees but also against a third party into whose hands the trust property has passed, unless he is a bonafide purchaser of the legal estate without notice of the trust[3].

The application of this principle in Nigeria can best be illustrated by the case of Fregene v. Awoshika[4] where the plaintiffs sought to remove the defendants from the office of the trustees, on the ground of alleged misconduct. It was established at the trial that the defendants relieved the chief trustee of his post and in his place appointed another person who with them signed cheques withdrawing money from the trust funds banks account, making money gifts to strangers, borrowing money on account of trust fund at one hundred per cent interest, and lending money to the fund at that rate of interest.

The Court held that the defendants having been guilty of acts of misconduct and mismanagement of the trust funds should be removed from the office of trustee and should render account of the trust fund to the beneficiaries.

It is evident here that, equity steps in to mitigate the harsh effects of the common law that the trustee is the owner of the trust property with the rights of beneficiaries not recognised and

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[3] Cave V. Cave. (1880) 15 Ch.D. 639

[4] (1959) WNLR. 156.

> to do anything more than let him depart in possession of that legal estate, that legal rights, that legal advantage which he has obtained whatever it might be. In that case a purchaser is entitled to hold that which without a breach of duty he has conveyed to him.

This means that when a bonafide purchaser of a legal estate for value without notice is tested and he satisfies the court as to the bonafide of his purchase the plea is absolute and unqualified defence. The Court cannot therefore do anything but to allow him to retain the legal advantage he has obtained without a breach of duty whatever it might be.

This plea is only known in equitable rights in property, as it is not available at common law.

Equity has devised three types of notices to ensure the protection of equitable interest in property namely:

(a) Actual

(b) Constructive and

(c) Imputed.

I will discuss them briefly.

Actual notice simply means that the Purchaser is aware of the equitable interest by virtue of facts which actually come to his knowledge. He is also liable on information received or got indirectly, if it is of such a nature that a reasonable man would act upon it. The issue to be determined is the effect such a notice has on the right of the Purchaser.

The effect of application of this notice in Nigeria is in the case of Erinkitola V. Alli and Ors[7]. Where the plaintiffs brought an action for possession of the property which he bought

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[7] 16 N.L.R. 56.

from the first defendant, a domestic of the Onigbale family who was allowed to occupy a portion of the family land. By a deed of gift he purported to convey the property to his son, who by deed of mortgage purported to mortgage it to the first defendant. The first defendant attempted to sell the property as mortgagee but caution notices were pested by the Onigbale family. Nevertheless, the plaintiff bought the property.

The court held that the plaintiff must be deemed to have had notice of the defects of the vendor's (first defendant's) title and he could not therefore take possession of the property which he purchased malafides.

The basis of the decision in this case is that since the plaintiff was aware of the defects of title of the seller by the caution notice pested on the property by the Onigbale family, he acted most unreasonably. The Court could not have therefore aided him in furtherance of his malafide purchase.

Secondly, the second type of notice, which is constructive notice simply means that the facts which a purchaser would have discovered, if he had acted delligently and prudently, he is therefore deemed to have notice of such facts which a reasonable purchaseer could have discovered. This has been explained by ndley L.J. in Baley V. Barnes [8] when he said:

> In dealing with real property as in other matters of business, and a purchaser who wilfully departs from it in order to avoid, knowledge of his vendor's title is not allowed to derive any advantage from wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way.

From the above quotation is clear that if a purchaser purposely or negligently failed to acquire the knowledge of defects of title

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[8] (1894) 1 Ch.D. 25 at 35

Thirdly, imputed notice emanates from the law of agency. By law of agency, the knowledge of an agent is imputed on his principal. Therefore a purchaser who employs an agent to act on his behalf is treated as having notice of all facts in respect of the transaction which comes to the knowledge of the agent.

In Nigeria, this question arose in the case of G.B. Ollivant Ltd V. Alakija[10]. Here, the purchaser having bought the property in dispute from a former land lord at a sale conducted by a sheriff under a writ of fifa became the new landlord of the tenants. It was clearly announced at the sale that the property was subject to three leases and rent had been paid in advance. This announcement was heard by the purchaser's agent who attended the sale on his behalf and bid for him.

When the property had passed to the purchaser he gave notice to the tenants asking them to pay rent forthwith. When they defaulted he brought an action claiming forfeiture of the lease for non-payment of rent.

The trial judge gave judgment for the purchaser, on appeal the appeal court reversed the judgment of the trial judge, and held that a purchaser is affected by notice of an equity which comes to the knowledge of his agent in the course of the transaction. That being so, respondent had notice of the tenant's equity since his agent was present at the sale and was aware of all the facts.

This rule emanates from the fact that a purchaser who empowers another to act on his behalf should not be allowed to

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10 (1950) 12 WACA 63.

deny knowledge of the facts which the agent had notice. But a notice obtained other than by a person appointed by the Purchaser as his agent will not be imputed to him.

From the foregoing it can be seen that the standard of bonafide purchaser for value without notice is very high. Equity has therefore set up such as high standard of delligence that it is difficult for a purchaser to escape from having at least constructive notice of the equitable interest. This doctrine extends to any person who claims through such a bonafide purchaser without notice.

Commenting on this plea, Jegede has stated that:

> The doctrine of bonafide purchaser for value without notice provides the most fundamental distinction between legal and equitable rights in property .... The essence of the doctrine is that where a defendant has a better equity or a superior title, a court of equity will not deprive such a defendant of any right of property, whether legal or equitable for which he has given value without notice of the plaintiff's equity[11].

Here, Jegede has rightly submitted that, it will be inequitable to deprive a bonafide purchaser of his right in property which he acquires without any notice of any defects, which gives him a superior title to it.

1.1.3. Appointment of a Receiver By Way of Equitable Execution

Finally, another example of the supplementary and mitigative role of equity on the common law as earlier stated is the appointment of a receiver by way of equitable execution.

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[11] Jegede (1981) Principles of Equity. Page 47.

The common law did not recognise equitable interest in property such as an interest under a trust or equity of redemption. Consequently at common law a judgement creditor could not levy execution on property of the judgment debtor in which he had only an equitable interest.

Since equity will not suffer a wrong to be without remedy it evolved the remedy of equitable execution by appointing a receiver of the equitable interest. In some cases an injunction was issued to restrain the judgment debtor from disposing of his interest in the property. A receiver is a person appointed to take into possession, get in or recover property for the benefit of persons who are ultimately determined to be entitled to it. Such an appointment does not create a charge on the property, but operates as a bar against the judgment debtor receiving any income on the property or dealing with the property in any way prejudicial to the interest of the judgment creditor.

The principles of equitable interests in property show the corrective, supplementary and mitigative role of equity on the harsh effect or injustice which rigid application of common law produced.

1.2. The Nature and Origin of Equity

During the medieval period[12] the chancellor was next to the King, he was the most important person in England after the King due to his issuance of royal writs which commence an action at law. He therefore had some influence on the development of the law by either varying existing writs or inventing new ones.

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[12] This was the period between 1420 - 1456.

The writ was an important instrument for the litigants could not proceed without it, although the common law could still decided that the writ disclosed nocause of action or claim recognised by law.

For example an injured plaintiff could only sue at common law if his complaint came within the scope of the existing writ. At this time the available writs covered very narrow grounds. Even if the claim came within the scope of an existing writ, due to the influence and power of the defendant, the plaintiff could not obtain justice before a common law court. The King in his council retained wide discretionary powers to do justice among his subjects, but an aggrieved person had to petition to him and the council seeking for a remedy. Petitions were generally addressed to the chancellor when the ordinary mechanisms appeared to have failed for instance where juries were misled, corrupted or intimidated.

Later these petitions were used to obtain reliefs in case where the common law was inflexible and provided no remedy or occasioned injustice to a person. The Chancellor did not regard himself as administering a new body of laws, but giving reliefs in hard cases, the medieval chancellor was well fitted for this kind of work, as he was always an ecclesiastic, generally a bishop and learned in civil and canon law. He could give a refuse a relief, not on the basis of any precedent, but according to the effects produced on his individual sense of conscience by the merits of each case before him. It is due to this discretion that seldom stated that "Equity is a roguish thing. For law we have a measure equity is according to the conscience of him that is a chancellor, and as that is no longer or narrowed, so is equity. It is all one as if they should make the standard for the measure a chancellor's foot"[13].

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[13] Seldon (1972 Table Talk of John Seldom. In: Quoted Holdsworth. ... Pages 467-468

In exercising this jurisdiction the Chancellor was faced with the problem of compelling the attendance of the defendant without the issue of a royal writ. This was overcome by the use of sub-poena which orders a defendant to appear before him to answer the complaint upon the pain of forfeiting a sum of money. This is known as sub-poena centum librarum.

Another difficulty which the chancellor faced was that of enforcement. If the petition was successful the chancellor's relief will usually be different from that which the common law court would have reached, otherwise the matter would have been litigated upon at the common law. This was overcome by the power of the chancellor to back up his orders with threat of imprisonment for those in contempt. There was therefore substantial interference with the common law jurisdiction which was the subject of controversy later on.

The use of injunction brought upon confrontation between common law and equity. In 1615 during the chancellorship of Lord Ellesmere, Chief Justice Coke was not prepared to see the common law modified by equity, consequently he declared in a number of cases the Chancellor's imprisonment of those who disobeyed injunctions to be unlawful. That the injunctions of the chancellor were contrary to the statute of prae munire of 1353[14] and another statute of 1402.

Lord Ellesmere on his part strongly defended the position of the Chancery, contending that his court was not interfering with due

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[14] This is a statute which questioned the judgement of the Kings courts in other Courts.

process of law, but was merely acting in personam against the defendant in equity. King James I finally stepped in to resolve this dispute and he appointed his Attorney-General, Sir Francis Bacon to arbitrate on the matter[15]. Bacon decided in favour of the Chancery. This victory was not without challenges by the common law, but by the end of the seventeenth century the victory of the chancery was completed. "This enable Maitland to say equity had come not to destroy the law, but to fulfill it"[16].

The concept of trust is regarded as perhaps, the most important single contribution of equity to substantive law. Kodilinye has stated that "it is the center piece of equitable rights"[17]. The original form of trust was the "Use". A use or trust may be defined as device whereby property was vested in one person, who was obliged to exercise control of it only for the purpose of permitting him to have the beneficial enjoyment ot it.

For instance if land is given to A and A's understanding to hold the land to the use and benefit of B, then A cannot keep it for his own benefit. B however has no legal claim or title to the land. The conveyance to A gives whatever legal estate was conveyed, and at common law, A can exercise all the rights which that estate gives him. In otherwords A holds the land in trust for B and A has the legal right while B has the equitable right the cestui que use.

But equity has steeped in to soften the rigours of common law which culminated in the abuse of trust and the rights and powers of the trustee as owner shall only be exercised in such a way as

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15 This was in the Earl of Oxford's case (1615) Ch. Rep.1.

16 Hanbury and Maudsley (1981) Modern Equity. London Steven & Sons. Page 11.

17 Kodilinye (1974) An Introduction to Equity in Nigeria. Page 5. London, Sweet & Maxwell.

to conform with the directions of the trust for the benefit of the beneficiaries as we have already seen.

Land was given to A to the use of B for various reasons. If B frequently goes on crusades, then there might be someone to perform and receive the feudal services on his behalf. Secondly if B belonged to a Community like monks which because of the rule of proverty is not capable of holding property, it was necessary for someone to hold the land for his benefit. On the other hand B may be trying to escape from his creditors, or fears that a conviction for felony will result in loss of his lands.

Another advantage of use was that if land was vested in a group of adults, the beneficial owner avoided the burdersome feudal incidents to which the holder of legal estate was subject to. This evasion of feudal incidents lead to a heavy losss of royal revenues. Consequently this promoted Henry VIII to pass the statute of uses 1535, which abolished the use by providing that where land was given to A to the use of B, then B would be deemed to be the holder of the legal estate, which in effect means that A was dropped out as a trustee.

However another means of avoiding the effects of the statute was evolved, this was the introduction of use upon a use. By the seventeenth century if land was given to A to use of B to the use of C, then B, the legal owner under the statute was compelled to hold it to the use of C to give C the beneficial interest. Eventually A was dropped out and the standard form of words used were "unto and to use of B in trust for C". At the end of the seventeenth century due to changes which took place in England, the importance of feudal revenues to the crown greatly reduced and he did not therefore seek to

prevent this evasion[18].

1.2.1. The Judicature Act 1873 and 1875

The Nineteenth century was a period of great development of equity. The tremendous industrial, international and imperial expansion of Britain at this period lend credence to its development to deal with new problems. The expansion of business fortunes required new rules for the administration of companies and partnerships, also the change in emphasis from landed property to stocks and shares necessitated the development of new concepts of property settlements.

It was therefore felt that time has now come for fusion of common law and equity into a single court. This was done by the judicature Act of 1873 and 1875. The Act abolished the old separate courts of Queen's Bench, Exchequer, Common Pleas, Chancery, Probate, the Divorce, Courts and the Courts Admiralty. In their place it created the Supreme Court of Judicature with a High Court divided into divisions known as Queen's Bench division, Chancery Division, Probate, Divorce and Admiralty Division, with each division exercising both legal and equitable jurisdictions. But due to administrative, convenience, cases are allocated to the divisions according to their general subject matter. In case of conflict between common and equity, the rules of equity shall prevail[19].

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18 The Changes that took place in England were, the reduction in the value of money which followed the development of the new world, and the changes in the constitutional and financial structure of the country as well as the freedom to devise all freedom land, whereas previously only two third of land held by Knight Service could be devised.

19 Judicature Act 1873 Section 25(1), Now replaced by Section 49 of the Supreme Court Act 1981.

The effect of the Judicature Act is illustrated by the case of Walsh V. Landsdale[20]. where the land lord (defendant) entered into an agreement in writing (Not by deed) to grant to the tenant (plaintiff) a lease of a mill for seven years. The agreement provided that rent was payable in advance if demanded. No grant by deed of lease as required for grant of a lease exceeding three years at law was ever made.

The tenant (Walsh) however entered into possession and paid his rent quarterly not in advance. He became in arrears and the land lord demanded a year rent in advance. The tenant sought and injunction and damages for illegal distress, on the ground that at (common) law he was a tenant from year to year at a rent not payable in advance and that the legal remedy of distress was therefore not open to Landsdale.

The Court of Appeal dismissed th tenant's action. The action would have been illegal at law, because there was no formal lease agreement as stipulated by Statute of Frauds for grant of lease exceeding three years, and the yearly tenancy which arose because of entering into possession and payment of rent did not include the payment of rent in advance.

In equity however this being an agreement of which specific performance would be granted the rights and liabilities of parties must be ascertained as if the lease had actually been executed containing all the agreed terms, and the tenant was held bound as such.

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[20] (1882) 21. Ch.D. 90.

Since equity treats as done that which ought to be done, the tenant was held liable to pay a year's rent in advance and the distress was held to be lawful.

Also in the case of Berry V. Berry [21]. Under a deed of separation, a husband convenanted to pay his wife a certain allowance. Afterwards, the parties made and agreement in writing (not under seal) reducing the allowance. An action brought by the wife to enforce the terms of the deed was dismissed on the ground that although at law a contract made by deed could be varied only by another deed, in equity a simple contract varying the terms of a deed was good defence to an action brought on deed, and the equitable rule prevailed, therefore only the reduced amount was payable.

Since then equitable principles have prevailed over those of common law in cases of conflict.

1.3. Relationship Between Equity and Common Law

It seems that right from their origin, equity and common law are distinct. Whereas common law is derived from feudal customs, equity on the other hand is derived from Roman and Canon Laws.

The question which arises from their relationship is whether the jurisdiction of Equity and that of common law have been fused. By fusion is meant there is now no distinction or difference between legal rights and remedies, and equitable rights and remedies.

The orthodox view is that there has been merely a fusion of administration of law and equity that "the two streams of

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[21] (1929) 2 K.B. 316.

jurisdiction though they run in same channel run side by side and do not mingle their waters"[22].

More recently the view has been expressed that law and equity themselves are fused[23].

It is humbly submitted that equity and common law have not been fused. The changes made by the Judicature Act gave rise to no new cause of action, remedy or defence which was not available before it. Therefore the view that law and equity themselves have been fused is wrong, as legal rights remain legal rights and equitable rights remain equitable rights, though administered in same Courts.

Section 25 of the Judicature Act 1873, now replaced by Section 49 of the Supreme Court Act 1981, dealt specifically with instances where there is a conflict between common law and equity and stated that in all cases, the rules of equity shall prevail.

It can therefore be seen that the Sections clearly indicate the continues separation of common law and equity and therefore makes provision for the resolution of conflict between them. If they were merged, then there should have been no need for this Section.

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22 Ashburner's Principles of Equity. 2nd Edition London Butter Worths. Page 18. Snell's Principles of Equity. 28th Edition, Page. 17. Megarry and Wade Law of Real Property, 4th Edition Page 129. London Steven & Sons Ltd.

23 Hanbury, Modern Equity. 8th Edition Page 19 Cp. Cited. Perlord Denning in Errington V. Errington (1952) 1 K.B. 290 at 298. Lord Diplock in United Scientific Holdings Ltd V. Burney Borough Council (1977) 2 All E.R. 62 at 68.

Equity built on the common rules and could not exist as an independent system. It is "a body of rules or principles which form an appendage to the general rules of law, or a gloss upon them ... and not a rival or competing system"[24]. Equity without common law would have been a castle in the air an impossibility, nor was the common law complete without it. Equity and common law are therefore supplementary of each other.

An appreciation of the differing approaches of law and equity to legal problems will prove the safest clue to the distinction which still exist between them.

1.3.1. Concurrent Jurisdiction of Equity

Examples of the supplementary role of equity on the common law and the differing approaches of equity to legal problem from the common law, are equitable remedies, which are injuctions and specific performance. These are also known as concurrent jurisdiction of equity. They are based on the maxim that "Equity will not suffer a wrong to be without a remedy."

At common law the general remedy for breach of contract is damages but in cases where damages would not be a sufficient or adequate remedy, Equity will order specific peformance, which will compell the defendant to perform the contract. Also, where damages will not be a sufficient remedy for a tort or a breach of contract, Equity will grant an injunction to restrian the evasion of the plaintiff's rights. These are the most important equitable remedies and are most frequently used in both England and Nigeria.

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[24] Snell's Principles of Equity (1975) 27th Edition P.5

The peculiar nature of these remedies have been stated by Lord Loughborough in the case of Fells V. Read[25] when he said "in all cases where the object of the suit is not liable to a compensation by damages, it would be strange if the law of this country did not afford any remedy".

But equity will not interfere where the wrong can be satisfactorily redressed at common law.

1.3.2. Specific Performance

An order of specific performance compells the person against whom it is made to carry out his obligation under the contract. It enforces the execution of contract according to its terms, where damages may not be adequate compensation for breach of such obligations.

Though this remedy is intended to compel the performance of a contract the cause of action in specific performance is not a breach of contract which alone will give rise to an action at law for damages, but is is a duty considered in equity to be incumbent on the defendant of actually doing what he promised to do. It is therefore based on existence of contract coupled with circumstances which make it equitable to grant it.

It will not be ordered where damages will be adequate compensation. But the express provision for liquidated damages as a term in a contract may not necessarily bar the court from grant of specific performance[26].

The grant of this remedy like all other equitable remedies is discretionary, the exercise of this discretion is not arbitrary, but must be exercised in accordance with settled legal rules and principles. The court will normally take into account circumstances

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[25] (1704) 2 L.D. Ragm. 938.

[26] Achibong V. Duke (1923) 4 N.L.R. 92.

such as the conduct of the plaintiff or the hardship which an order of specific performance would inflict on the defendant and a third party as Lord Chemsfor clearly stated in the case of Leonard V. Dixon[22]

> ... The exercise of this jurisdiction of equity as to enforcing the specific performance of an agreement is not a matter of right in the party seeking the relief, but the discretion in the court - not an arbitrary or capricious discretion but one to be governed as far as possible by fixed rules and principles. The conduct of the party applying for relief is always an important element for consideration ...

For a plaintiff to obtain the remedy he must have shown himself to be ready, desirous, prompt and eager not only to perform the contract but also to sue for the remedy.

Generally, the court will grant specific performance to a vast number of cases, but it is most frequently used to enforce contracts for sale or lease of land as due to its scarcity, it may have peculiar value to the purchaser or leases, and damages would not afford a complete remedy for the plaintif[28].

In Nigeria, this remedy has been applied by the COurts in a number of cases involving land, as can be seen by analysis of some of them below. In Ajoke V. Obasi and Ors[29]. The first defendant obtained a judgement in the High Court of Western Region against the present plaintiff for a declaration of title to, and possession of a piece of land on which she had erected building. Thereafter there was a written agreement by which the first defendant agreed to sell the piece of land to the plaintiff for a certain amount of money part of which was paid. The defendant later sold the plot of

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[27] (1873) L.R. 6 H.L.414 at 423.

[28] Brett. J.S.C. in Fokoya V. St. Paul's Church Shagamu, (1966) 1 A.L.R. Comm. 461.

[29] 4 N.L.R. 80.

land, on the pretence that the plaintiff did not pay the balance at the stipulated time to the second defendant who knew of the existence of the contract.

The plaintiff then brought this action seeking specific performance of the contract with the defendant which was agreed in writing and for which she had paid part of the purchase price.

The court ordered specific performance of the contract between the plaintiff and the first defendant, who was ordered to convey the legal estate to the plaintiff on the ground that equity will treat as done that which ought to be done. That the mere fact that the plaintiff had not paid the balance at the stipulated time was not enought ground for the plaintiff to dispose of the property to the second defendant when the plaintifff's money was still pending on the property with him.

In this case, the purchase by the second defendant was malafides, as he knew of the existing contract between the plaintiff and the first defendant. He could not therefore be protected by the equitable plea of bonafide purchaser for value of the legal estate without notice. It should have been inequitable to let him go with that property which he bought malafides.

Also, in Shelle V. Rossek[30] the defendant had agreed orally to let the plaintiff have a certain piece of land on lease at ten shillings a month for as long as period as she wanted, if she could obtain authority, which was to be given by the municipal authority, to build a shop there. The plaintiff obtained the necessary authority, built and fitted up the shop, occupied it and paid rent to the defendant. The oral agreement did not define the term of the lease.

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[30] 14 N.L.R. 80.

Later the plaintiff submitted to the defendant a deed of lease in the usual terms and at the agreed rent of ten shillings a month for fifty years.

The defendant refused to sign the lease on the ground that the oral agreement had not defined the term thereof. The plaintiff then brought this action for a decree of specific performance of the agreement by execution by the defendant of the deed of lease submitted to him by the plaintiff.

The court ordered specific performance, by ordering the defendant to execute the lease on the ground that the oral agreement was sufficiently complete and certain for the order thereof to be made.

In this case the action of the defendant was fraudulent and inequitable. The plaintiff had altered his position on the property to his detriment by obtaining the necessary authority from the municipal authority, he built up and fitted the shop, occupied it and paid rent to the defendant. Even if the oral agreement had not defined the term thereof, the written one had. One wonders what would have become of the plaintiff's shop, if equity will not suffer a wrong to be without a remedy by ordering specific performance by the defendant.

The court has also recently ordered specific performance where the contract though unwritten, strict compliance with the requirement of the law for it to be in writing will be used as an instrument of fraud and therefore inequitable. This was in the recent case of Jonathan Mba V. Peter Okufo[31] where the appellant claimed against the respondent who was the defendant in the trial court,

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[31] (1990) 2 N.W.L.R. 787, Part 235.

the following reliefs:-

> (I) N50,000 damages for trespass and damages committed by the defendant on the plaintiff's land and building therein, situate lying and being at Anuwo, Off Casco Street Old Ojo Road Lagos.
>
> (ii) A perpetual injunction restraining the defendant, his agent and/or servant from continuing further acts of trespass on the said land with the building thereon. The annual rental value of the said land and the building thereon is N1,200.
>
> (iii) An order that the defendant should forthwith deliver up possession of the said property to the plaintiff.

In the statement of claim the appellant claimed that he erected eight-bedroom bungalow on one of the plots of land leased to him, that some time in 1985, he approached the respondent to ask him if he was interested and thereafter the purchase price of the building was agreed at N40,000. That immediately after the negotiation, he the appellant fell ill, and travelled to his village in Anambra State, having removed the tenants from building and locked up the entire place. On his return in June 1985, he discovered that new tenants had been installed in the house, doors damaged, keys replated and an open space in the building converted to bedrooms.

All these were done by the respondent who promised to pay him (the appellant) the sum of N40,000 in six months, which he failed to do. The respondent on the other hand denied thse averments claiming that he had paid the sum of 19,000 as part payment of the N40,000 agreed on as purchase price of the property. The respondent therefore counter-claimed for specific peformance of the sale agreement or in the alternative the sum of N73,000.

The trial judge dismissed the appellant's claims and granted in favour of the respondent a decree of specific performance on the condition that the respondent pay the purchase price of the property within thirty days from the date of judgement.

Dissatisfied with the judgement the appellant appealed to Court of Appeal.

The Court of Appeal unanimously dismissing the appeal, held that where as in this case, there is a part performance of an unwritten contract, its specific performance will be enforced as if the terms of the contract have been reduced into writing. That the provisions of Sections 22, 26 and 34 of the land Use Act 1978 which prohibit the transfer of land without the consent of the governor does not preclude the court from ordering specific performance of a transaction on land.

The court held further that, although the contract between the appellant and the respondent in this case was never reduced into writing as required by Section 5 of Law Reform contract law 66 of Lagos, it will be inequitable for the appellant not to execute the said contracts, as the law will not allow the provisions of the said law to be used as an instrument of fraud.

In this case also the appellant wanted to take undue advantage because the contract was oral, equity saved the respondent by ordering specific performance of the unwritten contract, since there was part performance already by the respondent. If not because of equity the parties in these cases in whose favour specific performance were ordered should have been hopeless without any remedy and other parties should have perpetuated their fraud by taking undue advantage of the unwritten contracts between them.

The remedy will however not be granted if hardship would be caused to third parties by its grant. In Nigeria the case of Taylor V. Arthur[32] illustrates this. Here the plaintiff claimed for an order of specific performance of an alleged contract of sale of land with the defendant. In fact at the time of this suit the defendant refused to fulfill the obligation and sold the land to a third party who in turn had also sold it to another person. There was no evidence that the subsequent purchaser knew of the alleged contract between the plaintiff and the defendant.

The Court held that specific performance cannot and should not be granted against a third party from whom the legal estate in the land has passed, because it would be impossible for him to carry out the order if made. That specific performance being an equitable remedy will not be granted where it will cause hardship to third parties unless it can be shown that such third parties were aware of the contract of which specific performance is claimed. In such a case as the present one, the plaintiff could seek his remedy in damages.

The above decision was based on the equitable plea of bonafide purchaser of legal estate for value without notice, since there was no evidence that the subsequent purchaser knew of the alleged contract between the plaintiff and the defendant.

The Courts will also not order specific performance in contracts of personal service. This is due to the fact that the enforcement of thecontract will involve the constant supervision of the court, and the undersirability of compelling parties to continue a relationship against their will.

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[32] 12 W.A.C.A. 179.

Neither will it be granted to enforce contracts of sale of chattles. (unless they have a special value and are scarce in the market.[32A] But it will be granted in contract for a loan or stocks and shared since they are not readily available in the market.[32B]

1.3.3. Injunctions

An injunction on the other hand is a two way traffic, it is an order of the Court ordering a person in a proceedings to do or to refrain from doing a particular act. It is mandatory when it compells the doing of an act. It is probibitory when it forbids or prohibits the commission or continuance of an act. It is a remedy in personam, and it can be issued against a defendant who is not within jursidiction of the court provided something out of jurisdiction can be propertly done under the rules of court.

There are various types of injunctions, they may be classified into perpetual, interlocutory or interim, Quia Timet, and rencently two new injunctions of Mareva and Anton Piller were added. I will discuss them briefly.

A perpetual injunction is granted after a judicial trial. It is granted after the plaintiff has established his right which has been infringed by the defendant.

A interlocutory or interim injunction on the otherhand, is granted before the final determination of the case between the parties with the aim of maintaining the status quo until the final determination of the issues in dispute. The court may impose terms as conditions of granting or withholding an interlocutory injunction.

32A Simeon Obi V. J.A. Ohaka (1974) ECSLR. 164.

32B Sullivan V. Henderson. (1973) I.W.L.R. 333.

For example, a plaintiff is normally required to give an undertaking to pay damages for any loss to the defendant, it it appears at the trial that the injunction was wrongly granted the result of which may be due to the fact that the plaintiff has failed to prove at the trial the case he alleged. Or because the Court took a wrong view in granting the injunction. The undertaking is given to the court and it is therefore not a contract between the parties. It can only be enforced if it is established at the trial that the injunction ought not to have been granted.

In Nigeria, the issue of balance of convenience vis-a-vis, the need for the court to extract an undertaking as to damages from an applicant seeking for an injunction was authoritatively made in the recent case of Joe Agbo Anike V. Clement Emeholo and 3 Ors[33] where the paintiffs/respondents sought and were granted and interim injunction against the defendants/appellants in respect of a piece of land situate at Iji Nike which was part of the Umu-eoha family to which both parties belonged. The order of the trial court dated 21 May 1989 was to the effect "that the defendant ... must on no account enter and/or erect any further structure on the land in dispute" pending the determination of the substantive suit.

No undertaking as to damages was made from the respondents in consequence of the interim injunction. Dissatisfied with the ruling of the trial judge, the appellant appealed to the Court of Appeal.

The Court of Appeal held unanimously and dismissing the appeal that subject to known exemptions and undertaking as to damages must

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[33] (1990) 1 N.W.L.R. 603, Part 128.

be extracted from the party in whose favour qn interim injunction is granted as a condition for granting it when a case has been made out for one. However by the extraction of an undertaking does not men that the Court will compell a plaintiff to give such undertaking. What it can do is to refuse to grant an injunction unless an undertaking is given. This means that where in an appropriate case an injunction is considered desirable the Court should not grant it without an undertaking.

The Court held further that the question of the suitability of damages as a remedy, and the ability to pay inmattters of interim injunction, can only be done into when the court is trying to decide where the balance of convenience lies in the exercise of its discretion to grant or refuse such injunction. As to suitability of damages in a given case, the matter of injunction must then be decided solely on the balance of convenience. The question of suitability of damages as a remedy and the ability to pay in matters of interim injunction, has nothing to do with the undertaking as a condition for granting the injunction.

That the realisation of an undertaking to pay damages depend on certain contingencies namely:

(a) If the palintiff ultimately fails, on the merits, or the injunction is dissolved, the defendant is entitled to an inquiry as to damages sustained by reason of interim injunction, unless there are special circumstances warranting the refusal of such inquiry.

(b) The defendant must apply for an inquiry as to the damages he has suffered.

(c) The defendant will have to show a prima facie case sufficient to justify such inquiry.

(d) Regard must be had to the amount of damages and if it is triffling or remote, the court will be justified in refusing an inquiry.

(e) The application must be made speedily and if not made within a reasonable time it may be refused.

(f) If there are facts already known from which the Court can satisfy itself as to the amount of damages without an inquiry, it will be unnecessary to order an inquiry.

The Court stated that an undertaking to pay damages is a precautionary safeguard to pay the defendant what he might suffer by way of damages to be determined at a later stage because of the interim injunction.

From the judgement of the Court of Appeal in this case, it means that an undertaking as to damages and the ability to pay are not grounds for grant or refusal to grant an interim injunction, but this is based on the balance of convenience of the parties. Though in appropriate cases where an undertaking is considered desirable the Court should not grant in injunction without it, in as much as the Court cannot compell a party to give such an undertaking.

A Quia Timet Injunction is issued to prevent a threatened plaintiff's right, which has not occured. Its jurisdiction exist in relation to both perpetual and interlocutory injunctions. Mere apprehension of injuryis not sufficient. The injury must be clearly threatened with serious ensuring irreperable damage.

A case which illustrates the grant of Quia Timet injunction in Nigeria is that of Niger Chemist V. Nigeria Chemists[34]. In this case the plaintiff company had carried on business as chemists and drugists, for some years and had several branches in Onitsha and other towns in the Eastern Nigeria. The firm was well known under the name of Niger Chemist. The second defendant and his partners founded a firm carrying on exactly the same business in Onitsha under the name of Nigeria Chemists. The plaintiff company objected to the use of the name similar to its own, but the defendants refused to change it. The plaintiff brought this action for an injunction to restrain the defendants from using the name and style Nigeria Chemists.

The Court held that in an action to restrain the defendants from using a business name similar to that of the plaintiff it is not necessary to prove either intent to deceive or actual deception. The plaintiff only needs to prove that the name used by the defendants is so similar to his own as to be likely to cause confusion. The plaintiff, it was held, entitled to an injunction restraining the defendants from using that name or any other name closely resembling Niger Chemists.

In the case above the injunction was granted because the injury which the continuous use of that name would cause to the plaintiff's business could be irreparable.

The Anton Piller injunction is of recent origin. It emanated in 1976. It is granted EX-Parte to prevent the removal or destruction of vital documents or evidence before any application or notice to the defendant could be brought before the court. It is primarily designed to secure pending the trial, that the defendant does not dispose of

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[34] (1961) 1 All N.L.R. 171.

any articles in his possession which would be prejudicial to him at the trial of the substantive suit. It enables the plaintiff and his solicitor to go to the defendant's premises to inspect and take away documents or articles specified in the order. It is most useful to plaintiffs who are victims of commercial malpractices such as passing off breach of copy right and breach of confidence. The injunction is granted ex-parte so that the defendant is not forwanded.

This injunction is an illustration of adaptability of equitable remedies to new situations, an innovation which has proved its worth[35].

In Nigeria, this injunction has been applied in the case of Ferodo Limited V. Uni-Bros Stores Ltd[36] where the plaintiffs sought an order ex-parts to compel the defendants to allow their solicitors to inspect all relevant documents in the defendant's custody concerning infringement of their certain registered trade Mark. The plaintiff deposed in their affidavit that if the defendant have notice of their application relevant evidence might disappear, and therefore the application was heard ex-parte and in camera. The court granted the application on the ground that the interest of justice would be served by making the order sought rather than by refusing it.

This case illustrates the flexibility of equitable remedies to new situations, which has been very useful for administration of justice. This equitable remedy helps in preservation of useful documents at the trial, which no doubt help the credibility of the case between parties.

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35 It originated from the case of Anton Piller V. Manufacturing Processes Ltd (1976) 1 Ch. 55. A case involving Secret Communication and Confidential Information which was damaging to plaintiffs business.

36 (1980) Fleet Rep. 489.

The order is not a search warrant and it does not authorise the plaintiff to enter against the defendant's will, but it does order the defendant to permit the plaintiff to enter so that if he fails to comply, he commits contempt and adverse inferencces would also be drawn against him at the trial.

Three essential conditions must exist for the grant of this injunction as follows;

First, there must be an extremely strong prima facie case.

Secondly, the damage, potential or actual must be very serious for the applicant.

Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is real possibility that they may destory such material before any application inter-partes can be made.

Lastly, the Mareva injunction is also of recent origin, which only emanated in 1975[37]. It is also an ex-parte injunction which restrains the defendant from removal or disposal of his assets within jurisdiction of the Court before trial so as to prevent the stultifying of judgement given by the court against the defendant. It may also be granted after final judgement if the plaintiff can show grounds for believing that the defendant would dispose of his assets to avoid execution by the court. By its nature it is normally granted against defendants who are resident abroad. But it is not restricted to only foreign defendants, as it is also granted when the defendant is resident, domiciled, or present within jurisdiction whose conduct gives rise to suspicion that he is likely to remove his assets from jurisdiction or dispose of them unless he is restrained.

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[37] It originated from the case of Mareva (1980) 1 All B.R. 213.

This injunction may be granted wherever it is just and convenient to do so, as it has no limits to its subject matter. The grant of this injunction like any other equitable remedy is at the discretion of the court, as it is not fettered by any rigid rules. Speed is of essence of this injunction. It is designed to prevent the engagement for a sum of money being a mere brutum fulmen.

No action lay at common law against the sovereign personally whether for public or private acts. Also no action lay against the sovereign for breach of contract, or torts committed by ministers, other officers or department acting as servants, or agents of the Crown. Though this was subject to some exceptions, it has been abolished by the Crown Proceedings Act 1947.

In Nigeria, though an injunction cannot be issued against the sovereign entity known as the Federal Republic of Nigeria, and any of the geographical states within it, it may however be issued against the President of Nigeria or Governor of a State and their Officials[38].

An injunction being an equitable remedy is discretionary, and it is not exercised arbitrarily or capriciously but according to well established legal principles, and a court will not allow a wrong to continue simply because the wrong doer is able and willing to pay for the injury he may inflict.

If parties have however specified a sum of money as liquidated damages for breach of contract, then a party can not recover the sum and get an injunction in his favour.

It is sometimes obligatory in nature, as when the court has no option but to grant it to restrain the breach of a negative contract,

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[38] Shugaba Abdurahaman Darman V. The Federal Minister of Internal Affairs. (1981) 1 N.C.L.R. 25 at 29. Shitta Bay V. Federal Public Service Commission (1981) 1.S.C. 40 at 58.

as it was explained by Lord Cains L.J. in Doherty V. All Man[39] that;

> If parties for valuable consideration with their eyes open contract that a particular thing shall not be done, all that a court of Equity has to do is to say, by way of injunction, that the thing shall not be done and in such case the injunction does nothing more than give sanction of the process of the court to that which already is the contract between the parties. It is not the question of balance of convenience or inconvenience or the amount of damage or injury. It is the specific performance by the court of that negative bargain which the parties made, with their eyes open themselves.

An injunction once granted must be observed as long as it has not been set aside whether it was erroneously or irregulary obtained. Failure to observe it is contempt of court which is punishable by committal to pris on, unless special circumstances make it impossible to comply with it.

But if it will be impossible or difficult to comply with it, then it may be granted but suspended for a reasonable period since the defendant will not be made to do the impossible. This is normally done particularly where the plaintiff will not suffer in financial loss. The defendant may be required to pay damages to the plaintiff if any loss is suffered by him.

1.3.4 Auxiliary Jurisdiction of Equity

Another area where Equity supplemented the common law (where no remedy was provided at common law) is an order for discovery of documents, facts, or other things in possession of one of the parties to a suit. This is known in equity as the auxiliary jurisdiction of Equity. This is also based on the maxim: Equity will not suffer a wrong to be without a remedy.

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[39] (1872) 3 App. Cas. 709 at 720.

At common law, the courts had no power to order discovery of documents, facts or other things in possession of one of the parties to a suit which were relevant for just determination of the issues in dispute between the parties before a court. This incapacity by the common law left many wrongs without remedies.

In Equity however, the courts possess the powers to make orders for discovery of documents, facts or things in possession by a party to a suit to help the court for a just determination of a matter before it. This is done by serving the party with notice to produce the said document, fact or thing in his possession.

In Nigeria, whenever a party to an actiondesires to use any document which is inpossession of power of the other party to be produced at the hearing, he should serve the party or his solicitor with a written notice to produce it[40].

However, a mere notice to produce does not compell a party served with it to produce it, as he is compelled by the issuance of a summons against him to produce the document. Once he is served with the summons he is bound subject to certain exceptions like privileged states documents or else he will produce it[41]. Also the Court may compell any compellable witness to produce any document in his possession. Failure to comply with any of these compellable orders may result in committal for contempt.

Once the notice to produce is served and possession is proved to be in the person served or in any other person who is his privy, agent or any other person over whom he has control, then secondary

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[40] Section 97 of Evidence Act.

[41] Section 219 of Evidence Act.

evidence of the document may be given under Section 97 of the Evidence Act.

When a document is produced and it is inspected by the party calling for its production, then he is bound to give it in evidence if the producing party requires him to do so[42]. On the otherhand, a party cannot use a document which he has refused to produce which he was given notice to do so, unless with the consent of the other party or with the order of the court[43].

It is therefore apparent from the foregoing discussion that equity and common law are supplementary to each other in their relationship Sometimes, Equity has supplemented the common law by mitigating harsh effects, or strengthening therules, or by providing remedies which were not available at common law by mitigating harsh effects, or strengthening the rules, or by providing remedies which were not available at common law in order to do justice between parties before the Court.

I will now discuss the historical background of reception of equity in the Nigerian Legal System.

1.4.1 Historical Background of the Reception of Equity in Nigerian Legal System

The history of the reception of equity into Nigeria is traceable to the introduction of English Law into Nigeria. This was done right from the beginning by way of local enactments.

The first of such enactments was ordinance No.3 of 1863 which introduced lawa that were enforced in England on 1st day of January 1863

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[42] Section 220 of the Evidence Act.

[43] Section 221 of the Evidence Act.

to be applicable to the Colony of Lagos. The ordinance provided in Section 1, that "The laws of England shall have the same force and be administered in this settlement as in England, so far as such laws and such administration thereof can be rendered applicable to the circumstances of this settlement".

Jegede is of the opinion that this ordinance did not make the principles of equity as part of the laws of Lagos Colony[44].

It is humbly submitted that this view may not be correct, because the ordinance provided that "The laws of England" and it therefore referred to the entire body of English law, which comprise of common law, Equity and English statutes, which is the normal meaning of the phrase. Moreever the meaning of "law" was not qualified by the word "common" hence by literal meaning rule of interpretation in referred to common law and equity, and in fact the entire body of English law.

The second legislation was ordinance No.4 of 1876 which by section 14 made English law, the doctrines of equity and statutes of general application which were enforced in England on the 24 July 1874 applicable to the Colony of Lagos. Common law and equity were to be administered concurrently, in cases of conflict between the rules of equity and those of the common law, the rules of equity should prevail.

In 1914 the whole of Nigeria was amalgamated and the superme Court Ordinance 1914 was promulgated with the aim of unifying the legal systems of the former Northern and Southern protectorates as well as the Federal Territory of Lagos. This ordinance repealed the pre-existing laws in the amalgamated units. It imported into the country subject to existing laws and in so far as local circumstances would permit, the rules of common law, the doctrines of

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[44] Jegedge (1981) Principles of Equity, Page 1.

Equity and the statutes of general application which were in force in England on 1 January, 1900.

Since then, subsequent legislation in the Federation have continued to make Equity part of the Nigerian law. Presently, this is provided by Section 45(1) of the Interpretation Act[45] as follows:

> Subject to the provision of this Section and except in so far as other provision is made by any Federal law, the common law of England and the Doctrines Equity together with the Statute of general application that were enforced in England, on 1, day of January 1900 shall be enforced in Lagos and in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature shall be in force elsewhere in the Federation.

Identical provisions to the above are also made in the various states laws in the Federation.

This blanket importation of English statutes to Nigeria, whose social, political, economic and cultural background is quite different from that of England is one of the legacies of colonialism in the Nigeria legal system.

1.4.2 Equity And The Repugnancy Doctrine

We have already seen that when English law as introduced into Nigeria by various ordinances, the native laws and customs of the people were not abolished, but the ordinances made provision for the courts to observe and enforce the observance of the native law and customs of the people.

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[45] Cap. 89 Laws of the Federation and Lagos.

Section 27(1) of the High Court of Lagos Act provides that:

> The High Court shall observe and enforce the observance of customary law which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force and nothing in this law shall deprive and person of the benefit of customary law.

Similar provisions are provided in the High Court laws of all the states in the Federation[46]. This is the origin of repugnacy doctrine.

The effect of this provision is that where a rule of customary law passes the repugnancy test it is valid and enforceable, but where it does not pass the test it is invalid, void and unenforceable.

The criterion for applying the repugnancy doctrine is absolute and leaves no room for the exercise of any discretionary power by the Court. Thus in Eleko V. Government of Nigeria[47] where the governor of Nigeria, purporting to act under Section 78 of the Deposed Chiefs Removal Ordinance 1923 as amended by Section 2 of Ordinance No.9 of 1925 ordered appellant to leave Ijebuland upon deportation to another place in Oyo Province.

The appellant applied to the Court for a writ of habeas corpus, contending that under native law and custom only a son of a chief could

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46 Section 20(1) of High Court law cap.61 laws of Eastern Region, 1963 Revised Edition Now applicable to Five Eastern States. Section 34(1) of High Court Law No.8 of Northern Region Now applicable to Eleven Northern States. Section 12(1) of High Court law, cap.44 laws of Western Region 1959 Now applicable to the three Western States. And Section 13(1) of High Court Law No.9 of 1964 of Mid-Western State Now applicable to Bendel State.

47 1931 A.C. 662.

become a chief, and as such he was entitled to the stool. He also contended that there was no native law of custom which required him to leave the area, and consequently the conditions did not exist entitling the governor to make the orders.

The counsel for the government of Nigeria on the otherhand contended that the COurt had no powers to enter upon and investigate as to any of these matters as the election and deposition of Chiefs was an act of state not cognisable by the Courts.

The trial judge who first heard the application agreed with the submissions of counsel to the government and dismissed the application.

On further appeal, the appellate COurt by majority judgement dismissed the appeal on the ground that the COurt could not take cognisance of cases of election or deposition of Chiefs, and that the custom existed entitling the governor to make the orders.

Dissatisfied with the above judgement the applicant/Appellant appealed to the Privy Council.

The privy council held that the opinion that the Courts cannot investigate the whole of the necessary conditions is errorneous. That the governor acting under the ordinance acts solely under executive powers and in no sense a court. As the executive he can only act in persuance of the powers given to him by law.

The Privy Council held that the alleged custom that only the son of a chief could become a Chief was repugnant to natural justice, equity and good conscience as democratically everyone was entitled to become a chief. Lord Atkin commenting on the criterion for applying the repugnancy doctrine said "The Court cannot itself transform a barbarous custom into a milder one. If it still stands in its harbarous character

it must be rejected as repugnant to natural justice, equity and good conscience"[48].

From the above, it means that the court has therefore to reject in totality a custom that does not pass the repugnancy test and therefore inequitable and unenforceable. It cannot accept a watered down version of the custom or what it thinks the correct customary rule should be.

The writer is of the opinion that, it is not right for an English Judge to declare that the above custom is repugnant because even in England there exist royal family.

The standard of the repugnancy test is not English law, neither is it conformity with the local custom; but it is the validity of the custom that is determine. This was stated in the case of Rufai V. Igbirra N.A.[49] Where the appellant had for many years been using a small mosque. By order of the Chief he was forbidden to use it for Friday prayers, and Native Authority Police were sent to the Mosque to ensure that this order was complied with. It was not proved that they entered the Mosque, but it was established that by their presence and actions they prevented any one from entering the Mosque.

The appellant claimed damages for trespass to land, and an injunction to restrain the defendants from repeating and continuing the trespass. He contended that if the order of the Chief was lawful according to Moslem law (which he denied) it was contrary to natural justice, that the Magistrate should have held that it deprived him of a legal right which he had under common law.

The appellate court held that the claim for damages must fail because no physical entery was proved.

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[48] Supra. at 673.

[49] (1957) N.N.L.R. 178.

That an order which is lawful by native law and custom is not contrary to natural justice, equity and good conscience merely because it is contrary to English law.

The writer is of the opinion that the above decision is wrong, the court ought to have held that the action of the Chief deprived the appellant of the right of freedom of worship which he had.

We may now take some decisions which the COurts in Nigeria have invoked the doctrine. In Edet V. Essien[50] the appellant had paid dowry for Inyang Edet when she was still a child and the respondent, having agreed with the girl to marry, obtained the parents consent, paid dowry to them and took Inyang Edet as his wife.

They continued to live together since then, and of the union three children were born of whom the two surviving are the children claimed in the suit.

The claim arises byreason of the children having been handed over to the respondent by the Native Court in a suit which after judgement was transferred to the, provincial Court.

The appellant's case was that having confirmed to the requirements of native law and custom whereby he became the husband of Inyang Edet, he continues to be her husband and he is entitled to any children she may bear to whomsoever until the money he paid as dowry for her is refunded to him. She cannot contract another legal marriage until the dowry is refunded to him.

The respondent resisted the appellant's claim on these grounds, based as he alleges on native law and custom.

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50 (1933) 11. N.L.R. 47.

The Provincial COurt held that the appellant had failed to prove conclusively the alleged custom.

On further appeal by the appellant it was held that even if the alleged custom was established it is repugnant to natural justice, equity and good conscience.

In this case it is inequitable to allow the appellant to claim the children of the respondent merely because the respondent had deprived him of his purported wife without refund of dowry to him. Moreover the respondent had also paid dowry on her. Thought it is the practice in traditional societies to be troth daughters at a very early age when they do not possess the legal capacity to give their consent. Consent becomes implied when the girl, upon attainment of age of puberty, decides to cohabit with the husband, in this case the girl did not even cohabit with the appellant.

In Re Offiong Okon Ata [51] the deceased was slave born and died intestate. His sister, who was also slave born, applied for letters of administration. The head of the house to which the decased belonged resisted the application on the ground that in spite of emancipation the deceased had continued to reside on communal land and therefore remained subject to the head of the house. He also resisted the application on the ground that the property of the deceased being a slave born was the property of his master.

The Court held that the personality of an emancipated slave is his own property and not subject to the head of the house. That the contention may be good in so far as it relates to real property which is the subject of communal ownership and therefore under the control of the head of the house as respresenting the community.

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[51] (1962) W.N.L.R. 48.

The Court held further that the effect of abolition of slave trade was to make all persons equal before the law. Therefore personality acquired by slaves is in their absolute disposition subject to the ordinary rules of law as to dealings with it. To hold that the mere fact of the slave continuing to reside on communal property confers any rights whatever on the head of the house in respect to personal property would be very largely to render nugatory the provisions of the slavery abolition ordinance and to import a native custom to that effect would be repugnant to natural justice.

In this case the alleged custom to the effect that slaves and their personality were their master's chattels and were themselves the objects of inheritance is inequitable and therefore invalid and unenforceable.

Also, in the case of Okoriko V. Otobo[52] where the plaintiff/ respondent commenced an action in Uwerun-Everemi Grade C Customary Court, the claim being for £140 made up of various sums of money paid to the defendant/Appellant and other members of the plaintiff/ respondent wife's family to thetune of £120 altogether before the actual dowry of £20 was fixed and paid. The defendant admitted payment of only £6. After hearing the eviedence of the parties and their witnesses, the Grade C Customary Court was divided in its decision.

The majority found that the plaintiff did not pay £140 as dowry to the defendant in respect of the Woman, and also that on the showing of the plaintiff, only the sum of £20 was actual dowry and the rest were expenses he had incurred. They did not believe the defendant

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52 (1962) W.N.L.R. 48.

that only £6 was paid to him and gave judgement for the plaintiff for the refund of £20 dowry plus £8,14s 6d costs.

THE minority held that the plaintiff's claim for £140 was established beyong doubt and that it was the practice that extra dowry must be demanded before fixing the actual dowry. Such "extra dowry" the minority held was claimable on the dissolution of marriage, but for no stated reason they proceeded to award £70 plus £8 14s 6d as costs to the plaintiff.

The plaintiff appealed to the Central Urhobo Grade 'B' Customary COurt, where the majority upheld the minority decision of the lower Court and the minoirity upheld the majority decision of that court. The defendant then appealed to the High Court.

The High Court held that most of the various sums of money claimed by the palintiff apart from the sums of £15 called "extra-dowry" and £60 called "grand dowry" were not part of the dowry, but were payments to the woman and some members of her family as presents and these could not be claimed back, as property in them had passed to the donees and so they were out and out gifts and as such were irrecoverable in law.

That all the plaintiff/respondent was entitled to was a refund of the sum of £20 actual dowry paid by him.

That any customary law that gives a right to claim back such presents or gifts as mentioned above will be contrary to natural justice and inequitable. That this is also contrary to the provisions of Section 19 of Customary Courts Law.[53]

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[53] Cap. 31.

The appeal was allowed and the majority judgement and order of central Urhobo Grade B customary court were set aside, and the majority judgement and order of the Uwerun-Everemi Grade C Customary Court were upheld.

The rationale behind this decision is that while bride price dowry is an essential element or ingredient of the marriage contracts, presents are ancillary and therefore not refunable.

Finally, on this note is the case of Mariyama V. Sadiku Ejo, [54] Where the appellant was the divorced wife of the respondent. In the native Court of trial the respondent was awarded custody of the appellants child. The child was born about fifteen months after the parties had last intercourse but less than ten months after the divorce. The order for the custody of the child was in accordance with Igbirra Native law and custom applicable in the case, whereby a child born within ten months of a divorce belonged to the divorced husband.

The appellate Court held that in very exceptional circumstances of this special case and considering that the child's benefit was of paramount importance, it would be contrary to natural justice and good conscience to enforce the observance of the native law and custom applicable in this case. The custom was held to be inequitable and the order of the native court was reversed and the custody of the child was returned to the appellant.

From our discussion so far, it does not mean that the Nigerian Courts do not recognise the validity of customary law or that no custom has ever passed the test. There are several decisions which

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54 (1961) N.N.L.R. 81.

the Court have upheld the validity of customary law.

Our starting point is the case of Ogamien V. Ogamien[55] where the respondent was the plaintiff in the High COurt in Benin City where he brought an action against his eledest brother and another challenging the Benin custom that the eldest son succeeds to all the property of the father to the exclusion of other children. In the writ and in the statement of claim it was pleaded that he sued on behalf of himself and members of the family. The claim was for a declaration that the first defendant had no right under Benin Customary law to sell the property of their father situate at Sakoba Road, Benin City, also for an order to set aside the sale made to the second defendant, a relation of the parties.

The first defendant was the first son and heir of one of the senior chiefs in Benin, the plaintifff being eight son. Chief Ogamien died leaving three houses. It was allleged in the case that the deceased had during his life time made a gift intervivous of the property in dispute to his other children as a family house for them to live in, and it was therefore not subject to be inherited by the heir the first defendant.

The above assertion wa denied by the first defendant who called attention to a previous case in respect of same property which was commenced at Benin divisional Court and went on appeal to the Governor.

The learned trial judge dubbed as repugnant to natural justice, equity and good conscience, the alleged Bini Custom and refused to be bound by it. He found in favour of the plaintiff and declared that the first defendant had no right to sell the property without the concurrence of members of his family. He then set aside the sale to

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55 (1967) N.M.L.R. 245.

the second defendant. Consequently the second defendant appealed to Supreme Court.

The Supreme Court held that the plea of res judicata raised before the trial judge should have succeeded and there the matter should have rested. The appeal was allowed and the judgement of the Benin High Court was set aside. The declaration made that the first defendant had no right under Benin Customary law to sell the property in dispute was set aside and so also was the order revoking the sale.

I, prefer the judgement of the trial judge, as though the supreme court was of the opinion that the custom implied responsibility of the eldest son to look after the younger members of the family out of the estate as a kind of paterfamilias. It does not appear that this reasoning is true in all cases, as it is a well known fact that in some cases on the death intestate of a father, the eldest son, makes use of the property of the father, to the exclusion of his other brothers and sisters.

Also, in the case of Amachreev V. Good Head[56] the husband of the mother of the child was deceased and the case revolved on the custody of the child. The family of the mother of the child which were the applicants the Amachrees applied for a writ of habeas corpus in respect of the child due to the fact that the said child did not belong to the family of the deceased good, since the child was born in concubinage.

The native Court awarded the child to the deceased father of the child's family where the mother of the child lived on the ground that contrary was repugnant to natural justice.

The High COurt of Degema and the Supreme Court upheld the decision of the native court on the ground that it was not repugnant or inequitable to do so.

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[56] (1967) N.M.L.R. 245.

In custody cases, the welfare of the child is of paramount importance, since the mother of the child even lived with the family of the deceased father, it should have been inequitable to deny the said family of their child.

Finally, in the case of Bukar of Kaligara V. Borno N.A.[57] the appellant was convicted of murder in the court of Shehu of Borno on clear evidence. The procedure adopted for his trial was as follows, a charge was read out to him in the nature of a summary of the evidence against him and he was asked as to why he was accused of the killing and he gave a statement setting out his defence, which was a denial. He was then asked if he had witnesses and he named a man he had met some days before the relevant day who was useless as a witness. Then the evidence against him, was heard and as each witness finished his evidence the appellant was asked if he had any questions for them, but he did not wish to pay any questions to them.

The court then heard the evidence of the death of the deceased and re-called two of the eye-witnesses, who then sworn on the Koran stated that it was the applicant who shot the deceased with an arrow and killed him, and then the court gave him its verdict and passed a sentence of death on the appellant.

On appeal to the Supreme Court, Counsel for the appicant contended that the procedure had been irregular in that the applicant was asked for his defence before evidence was given against him. Also that after the said evidence he was not given a second opportunity of making a defence.

Another ground of appeal was that, the trial COurt did not call a person whom the appellant mentioned as a person he had meet at a place on his way home.

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[57] (1953) 20 N.L.R. 159.

The judge heard the appeal with two assessors learned in Moslem law, who advised that the procedure followed was right. That had the appellant said anything in regard to any of the evidence it would have been recorded and considered; he was not asked if he had anything more to say because he had put no questions to any witness.

The Supreme Court held that the procedure followed though differing from English Procedure, gave the appellant an opportunity of being heard and putting forward his defence, and satisfied the requirements of natural justice. The appeal was therefore dismissed.

The rationale behind this decision is also that where there is no miscarriage of justice, the mere fact that a Native or customary law procedure of trial does not confrom with English Principles does not make it repugnant and inequitable.

There are also some cases where the courts in Nigeria, have not properly applied this repugnancy doctrine. We shall begin with the case of Inasa V. Oshodi[58] which was an appeal from Provincial Court to the Supreme COurt. The appellants are members of Inasa family who owns Inasa Court at Epetedo, Lagos. Their tenure is under native law and custom, and they hold from the Oshodi family the head of which is the present respondent.

Aworan Inasa, who is the present head of the Inasa family, committed a breach of the tenure under Native law and custom. In consequence of the breach the respondent Oshodi obtained from the Court a declaration that Aworan Inasa had forfeited under native law and custom his right in the property. Aworan Inasa was therefore evicted from the property.

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[58] 10 N.L.R. 4.

The respondent Oshodi without any further order of the court, then proceeded to evict all other members of the Inasa family residing on the property. The family resisted this eviction contending that there was no native law and custom that if the head of the family committed a breach of tenure under native law and custom then he forfeited his right on the property as well as all the other members of the Inasa family residing on the property. That assuming that such native law and custom if it is in existence today it is unreasonable and repugnant to natural justice equity and good conscience.

Counsel for the respondent on the otherhand contended that the action for recovery of possession was misconceived, that the evidence of native law and custom on the point raised shows that if one member of a family misbehaves a chief can evict the whole family. That in any case there was misconduct on thepart of the members of the family to justify eviction.

The Supreme Court held that a breach of tenure under native law and custom committed by the head of the tenant family involves the whole family in the forfeiture of the property. Semble it involves in forfeiture all the descendants of the original grantee.

I do not agree with the above decision, as the customary rule that the sins of the head of the family should be visited on the whole members of the family is repugnant to natural justice, equity and good conscience. The other members of the family did not deserve the eviction because there was no evidence that they collectively took the action with the head of the family.

Another case worth of mention on this point is the case of Dawodu V. Danmole[59] where the deceased died leaving four wives and

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59 (1962) 1 W.L.R. 1053.

nine children, there arose dispute as to the mode of distribution of his estate. While the respondent who was the plaintiff wanted the estate distributed according to Yoruba custom of Ori-Ojori that is Per Capita or according to the number of children of the deceased. The appellant on the other hand wanted it distributed according to Idi-igi or Per Stirpes, that is according to the number of wives.

Jibowu, J; who tried the case held that the Yoruba custom of Idi-Igi was repugnant to natural justice, equity and good conscience and held that the alternative custom of Ori-Ojori which recognises equality of children was better and should be followed.

On appeal to the Supreme Court and on further appeal to the Privy Council, both of them reversed the trial judge's view, on the reasoning that Idi-Igi was still in vigorous operation in Lagos. The Privy Council stated that "The Principle of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by rule of monogamy"[60].

I prefer the judgement of the trial Judge Jibowu, J; that the custom of Idi-Igi is repugnant to natural justice, equity and good conscience, it is inequitable, as it is unfair to a wife who has many children, but advantageous to a wife who has just few. The mere fact that it is of vigorous operation and of universal acceptance is not enough reason to justify its continuous application. The custom of Ori-Ojori is better and ought to be adopted, especially in a monogamous society like ours.

From our foregoing discussion on Equity and the Repugnancy Doctrine, it can be seen that the doctrine is beneficial in so far as

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60 Supra. at page 1060.

it helped in the invalidation of harsh effects of customary law. But on the otherhand it is not fair to use an external test from a different background to validate another people's laws.

CHAPTER TWO

EQUITY ACTS IN PERSONAM

2.1. Introduction

The meaning of this maxim is that equity has jurisdiction over the defendant personally. In Personam means bringing pressure to bear upon the defendant's physical person. A right in personam is of definate kind enforceable specifically against determinate person or persons as against a right in rem which is enforceable against indeterminate number of persons. The personal nature of equitable jurisdiction is illustrated by the fact that equitable jurisdiction is illustrated by the fact that equitable order binds the person to obedience on pains of imprisonment for failure to comply for contempt, provided that the defendant is within jurisdiction or though outside jurisdiction can conveniently be served with Court processes.

This maxim has been described as the foundation of all equitable jurisdiction[1]. The historical sense of this maxim is that it is used in the sense in which rights were originally classified in Roman Law and later adopted by Hohfeld in his jurisprudence as being either in rem or in personam[2]. The maxim was summarised by Lord Selborne in Ewing V. Orr Ewing[3] as follows;

> The Courts of Equity in England, are and always have been, courts of conscience, operating in personam, and not in rem, and in the exercise of this personal jurisdiction they have always been accustomed to compel performance of contracts and trusts as to subject which were not either locally or ratione domicilii within their jurisdication. They have done so to land in Scotland, in Ireland, in the Colonies, in Foreign Countries.

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1 Keeton (1969) Introduction to Equity, Page 89.

2 Nager, Gummow and Lehame (1975) Equity Doctrines and Remedies, Page 79 Butter Worths.

3 (1883) 9 App. Cas. 34 at 40.

The practical application of this maxim is found in the methods of enforcing judgements and jurisdiction over property abroad and outside the jurisdiction of the Court.

2.2. Methods of Enforcing Judgements

At common law, when judgement was given against a defendant to pay damages or to deliver possession of a property to a plaintiff and he refused, neglected or failed to do so, the judgement was enforced by ordinary writs of execution on the property of the defendant.

The effect of the writ was either to forcibly put the plaintiff physically into possession of the property or the property is attached and sold and the proceeds of the sale are paid to the plaintiff in satisfaction of his claim against the defendant. The Purchaser of such attached property obtained a good title against the defendant.

Equity found the methods of enforcing judgement at common law inadequate, as for instance, a plaintiff may not retain possession of the property he obtained through the court by force for long. Originally an order made by the Court of Chancery did not interfere with defendant's property because no property was the subject matter of any dispute cognizable by equity or was the subject of any order made by the Court. Equity made an order of specific performance to compel the defendant to fulfil his obligation under a contract as equity has always acted on the conscience and not on the subject matter in controversy. Where the defendant remained recalcitrant to the equitable order, he was punished for contempt by committal to prison.

Later on at about the seventeenth century the writ of attachment and committal proved insufficient to deal with contempnors of equitable orders, and subsequent judicial and statutory developments affecting equity have enlarged the functional significance of this maxim, and the Court of Chancery in order not to render nugatory the order it made, introduced new equitable writs withthe aim of getting directly at the subject matter in controversy. These are writs of sequestration, writ of assistance, and forcelosure order.

2.2.1. Writ of Sequestration

When a defendant who was committed to prison for failure to comply with an equitable order continued to be contamicous, Equity would issue a writ of sequestration, by which sequestrators were appointed to take possession of the property of the defendant or the property in dispute, and eventually of all the property of the defendant until he complied with the order.

Both in Nigeria and in England the inadequate power of common law and equity to transfer property through enforcement of judgement has been supplemented by statutory provisions[4]. By virtue of which the court may either make vesting order of property from one person to another or appoint a person to execute a transfer.

Also in Nigeria by the provision of various High Court laws in the Federation where any party to a suit refuses, neglects or fails to comply with a judgement of a court or an order of a court which directs him to convey property, or to execute a contract or other documents,

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[4] Administration of Estate law of Western Region, 1959. Section 44 of Trustees Act 1925. Section 14 of the Judicature Act 1884.

agreement or to indorse any negotiable instrument, the court may nominate somebody to do the said act for him[5]. However to my knowledge this provision has actually not come up before any Nigerian court for the determination of its meaning and scope.

2.2.2. Writs of Assistance

This was another writ that was developed by equity. Where a defendant was committed for disobedience of equitable order, the court also granted another order for the given up possession of the property to the plaintiff or the party entitled to it. If this was not complied with, the court granted an order to justices of the Peace to put the party in possession, and in some cases if necessary a writ of assistance was ordered and directed to the sheriff with a command to aid and assist the justices of the Peace to put the entitled party into possession of the property.

2.2.3. Foreclosure Order

In order to protect the interest of the Mortgagor, equity intervened to provide a right of redemption available to the mortgagor even after the date for redemption had elapsed. But equity at the same time provided limit to the equity of redemption which it created.

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5 Section 22 of High Court law of Western Region 1959 now applicable to Ogun, Ondo and Oyo States. Section 23 High Court laws of Lagos State 1973 Cap. 52. Section 40 High Court laws of Eastern Region 1963 now applicable to Akwa Ibom, Anambra, Cross-River, Imo and Rivers States. Section 21 of High Court laws of Northern Nigeria now applicable to Eleven Northern States and Abuja.

Foreclosure is the process where the mortgagor's equitable right to redeem is extinugished and the morgagee is vested the owner of the property both at a law and in equity. Sections 88(2) and 89(2) of the law of property Act provide that a foreclosure decree absolute shall vest the mortgagor's or term of years in the mortgagee. The right to foreclosure does not arise until the legal right to redeem has ceased to exist. Once this has happened the mortgagee can commence an action that the mortgagor shall either pay what is due or be foreclosed, that is to be deprived altogether of his right to redeem.

If the mortagagor does not pay, the court issues an order for foreclosure nisi the effect of which is that the mortgagor loses his property unless he pays on a specified date generally within a period of six months.

The order of the decree nisi is to the effect that an account shall be taken of all that is due to the plaintiff which include the principal amount, costs and interests. It orders that if the total amount of all that is due to the plaintiff is paid within six months, the mortgage term shall be surrendered to the defendant, but if he defaults then he stands absolutely debarred and forcelosed of and from all right, title, interest and equity of redemption in and to the mortgaged property. The Court consequently fixes a date and hour of repayment which is usually within six months thereform, and if the defendant does not appear, an affidavit is sworn to by the plaintiff in proof of non-payment either prior to or at the appointed time, and a motion is made for foreclosure absolute.

Where no redemption date is fixed or the loan is repayable on demand the right arises after a demand has been made but payment has not been made and a reasonable time has elapsed.

A notice of foreclosure once given and received, remains valid and in force until the exercise of the mortgagees' power of sale. In Ojikutu V. Agbonmagbe Bank Ltd and Ors[6]. The plaintiffs brought an action for a declaration that the purported sale of his property at number ten Onikoro Street Lagos by the first defendant was void and should be set aside, and for an injunction to restrain the first defendant fromparting with the said property.

The plaintiff as a customer of the first defendant obtained advances by way of overdraft from it by mortaging three of his properties including the said property. The agreed interest payable was fiften per cent. On June 23, 1965, the plaintiff indebtedness to the first defendant stood at £6,624,9,4d.

The plaintiff then appealed to the first defendant to stop charging him interest as from September 1965 to the end of March 1966, when he promised to settle his account in full, adding that if he defaulted the first defendant should sell his mortgaged property by private treaty to avoid the disgrace of public auction. Although the first defendant accepted his proposals by suspending its powers of sale, it did not stop charging interest. The plaintiff defaulted in the payment and the first defendant thereupon sold the said property to the second and third defendants without given any further notice to the palintiff of the impending sale, but notice of foreclosure dated January 31, 1965 having been previously given to him.

At the trial of the case counsel for the palintiff contended that the earlier notice lapsed as a result of the first defendant's acceptance of his proposals and suspension of its power of sale. He also contended that the rate of interest charged was excessive illegal and contravened Section 13 of Money Lender's Act.

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[6] (1960) 2 All NLR. 277.

The Court held that a notice of foreclosure once given and received, remains valid and in force until the exercise of the mortgagee's power of sale.

That the first defendant was not bound to make concessions or to suspend the exercise of its power of sale since no consideration moved from the plaintiff and there was no binding agreement between the parties in that regard.

This case illustrates the fact that once a notice of foreclosure is given, it remains valid and enforceable and cannot be over-riden by a gentleman's agreement between the parties.

But where the mortgagee gives notice of foreclosure to the mortgagor and the mortgagor gets an extension of time within which he liquidates the debt in full, the mortgagee is bound to accept the payment, as it will be fraud on his part if he goes ahead and sells the property. In Viatonu V. Odutayo and Another[7] the plaintiff had morgaged his property to Odutayo, which Odutayo exercising her powers of sale, and sold by private treaty to Kuyoro. Viatonu sued to set aside the sale, and Kuyoro in turn sued to recover possession of the premises, which Viatonou was still occupying, plus a sum for the use of the said premises by the plaintiff. The Mortgaged debt was £250 the market value of the premises was £1,500.

Upon receiving notice of the foreclosure Viatonu (the mortgagor) went to Odutayo (the mortgagee) and Odutayo agreed to grant an extension of time of two months. Within that period Viatonu tendered the debt in full but Odutayo said it was too late. The property was sold for £600 by private treaty on the day Viatonu tendered the whole sum to liquidate the debt. The mortgagee, the auctioneer, and Purchaser, were all members of the firm of auctioneers which sold the property.

[7] 19 N.L.R. 119.

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The mortgagee gave no evidence incourt at the trial, also when the mortgagor protested against registration of the property in the Purchaser's name, the Purchaser asked the Registrar of Companies to remove his name from the firm of auctioneers.

The court held that in a case of suspicion the onus shifts on to the mortgagee to uphold the sale as having been made bonafide. That in the present case circumstances showed that the sale had not been made bonafide as the sale had been colusive, and the purchaser could not claim the possession under Section 21(2) of the conveyancing Act 1881 and could not recover possession, the sale being void against the mortgagor. The Court ordered that the property should be reconveyed to the plaintiff and the Purchaser who was the second defendant was ordered to join in the reconveyance.

In an foreclosure action the Rule applied is "foreclosure down" by which is meant that if there are more than one mortgagee interested in the same property, an order absolute obtained by the first mortgagee forecloses all subsequent mortgagees interest or incumbrances on the property. While if for instance the second mortgagee obtains such an order its effect is to foreclose the third and later mortgages but to leave the rights of the first mortgagee untouched.

This rule is based on the maxim where the equities are equal the first in time prevails. I am of the opinion that, the rule is inequitable. It ought to be the first mortgagee to obtain an order forecloses all other mortgagees interest or incumbrances on the property since Equity aid the vigilant and Not the Indolent

2.2.4. Revival of Equity of Redemption

A foreclosure absolute does not irrevocably pass the mortgagor's

interest in property to the mortgagee, as there are certain circumstances in which the foreclosure order may be re-opened and the equity of redemption revived. In Campbell V. Holyland[8] Jessel M.R. enumerated factors which might influence the court in re-opening the foreclosure as follows; the prompteness of the mortgagor's application, his failure to redeem being due to an accident which made it impossible for him to raise the money, the difference between the value of the property and the loan, and any special value which the property had to the parties.

The re-opening may also occur if the mortgagee after obtaining an order absolute sues on personal convenant, it may also be re-opened against a person who has Purchased the estate from the mortgagee. Though it is not possible to lay down a general rule as to when this relief will be obtained, but the court has a discretion to do so if it appears in the special circumstances of the case to be due to the mortgagor, but this depends on the facts and circumstances of each case.

2.3. Jurisdiction Over Foreign Property

As a general rule no court in Nigeria has jurisdiction to take cognisance of an action which the subject matter in dispute is situated outside the jurisdiction of such a court[9].

This limitation can be explained on the basis of effectivness, as physical control of the property is within th power of the country or the place where the property is situated. It is place of situation of the land which determines its ownership and title to it[10].

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[8] (1887) 7 Ch.D. 166 at 172.

[9] Jegede (1981) Principles of Equity, Page 35.

[10] Ibid. Page 35.

In Jadesola V. Akinola[11] the claimants took an interpleader action in the provincial Court where the immovable property was situated. It was decided by the full court that the provincial Court had no jurisdiction to deal withthe interpleader action. The claimants then brought this interpleader action in the Supreme Court The property was outside the jurisdiction of the Supreme Court but was attahed under execution process issued from the Supreme Court.

The Supreme Court held that it had no jurisdiction to try the issue of title of land outside its jurisdiction and therefore the interpleader suit was struck out, and execution was stayed for three months to enable the claimants to seek declaration of title in an independent action in a Court having jurisdiction.

Webber J; stated on page 109 of the report as the basis of the decision that:

> Assuming that the rules of our Courts dealing with the execution of Writs of Fifa outside the jurisdiction of the supreme COurt are intra-vires, I can find no authority for the proposition that proceedings dealing with ownership of land consequent upon execution, such land being outside this Court's jurisdiction, can be dealt with by this court issuing the execution, nor in my opinion can any rule of court confer such jurisdiction.

However, in equity, the Courts may exercise its jurisdiction in respect of enforcement of trusts, mortgages and contracts affecting property, situated abroad or out of the Court's jurisdiction provided the defendant or his property is within the court's jurisdiction. This is because equity acts in personam.

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[11] (1932) 11 N.L.R. 108.

In Nigeria the case of Benson V. Ashiru [12] illustrate this, here the palintiff/respondent, for and on behalf of himself and the dependant relatives of the deceased, whom he described as his wife, took an action against the appellants in the High Court of Lagos under Fatal Accidents Act 1846 of England. The action was for recovery of damages representing the pecuniary loss sustained by her death through the negligence driving of the second defendant at Iperu in Western Nigeria.

The trial judge held that the palintiff had proved that death of deceased was caused by the negligence of the second. He held further that the palaintiff had failed to prove that he was married to the deceased, and awarded damages only for the benefit of the children and parents as well as for funeral expenses.

On appeal it was contended that since the accident occured in Western Nigeria, the law applicable was Torts law of Western Nigeria and not the Fatal Accident Act 1846 of England. In reply counsel for the respondent asked for leave to amend the statement of claim by deleting "under the Fatal Accident Act 1846". The appellant also contended that since the judge had made a finding of fact that the plaintiff had failed to prove that he was married to the deceased, that amounted to a finding that the plaintiff had no title to sue and that was fatal to the action.

The Appeal Court held that; the rules of common law of England on questions of Private international law apply in the High Court of Lagos. Under these rules an action of tort will lie in Lagos for a wrong alleged to have been committed in another parts of Nigeria, if:

(a) It must not have been justifiable by the law of the part of Nigeria where it was done. These conditions are

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12 (1967) N.M.L.R. 363.

fulfilled in the present case, and

(b) the wrong was of such a character that it would have been actionable if it had been committed in Lagos.

The court held further that, under the law of England (Application law cap. 60 laws of Western Nigeria) the English Statutes of general application ceased to as such in Western Nigeria from 1st July, 1959.

The appeal was therefore allowed, judgement of the High Court was set aside and the action was dismissed on the ground that, the plaintiff had failed to prove that he was married to the deceased woman. Consequently the action was brought by a person who did not come within either of the classes of persons empowered to bring such an action. In otherwords he had no locus standi, to sue.

Lord Cottenham explained the limit to this equitable jurisdiction in Ex Parte Holland [13] as follows:

> Contracts respecting land in countries not within jurisdiction of these Courts can only be enforced by proceedings in personam, which courts of equity here are constantly in the habit of doing, not hereby in any respect interfering with the lex loci deisitae. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it will be useless and unjust to direct him to do the act, but where there is not such impendiment the courts of this country, in the exercise of their jurisdiction over contracts made here, in administering equities between the parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.

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13 (1840) Mont & Ch. 239 at 250.

The above quotation means that, since Equity Act in personam, it can enforce contracts outside its jurisdiction, if there is no hinderance by the law of the country where the land is situated. In doing so the court acts upon its own rules and it does not take into consideration the effects of what such contracts might be where the land is situated. Neither does it take into account the way and manner in which the courts of such countries would have dealt with such equities.

The leading authority on the exercise of this equitable jurisdiction is the case of Penn V. Lord Baltimore[14] where a contract had been made in England between the plaintiff and the defendant, by which a scheme was arranged for fixing the boundaries of Pennsylvannia and Maryland in United States of America (U.S.A.). When the plaintiff brought an action for specific performance in England, the defendant objected that since the matter in issue was title to foreign land, the proceedings were inrem and therefore the court lacked jurisdiction, since it could neither make an effectual decree nor execute its own judgement.

Lord Hardurclle overruled the objection and granted specific performance on the ground that the primary decree in a court of equity was in personam, since the defendant was properly served with the originating process in England.

The case of Penn V. Baltimore[15] is not without limitations. These limitations had been stated in the case of British South Africa Co. V. Compantia de Nocambique[16]. Where the plaintiff brought an action of trespass against the defendants in England on the

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[14] 1750. Ives. sen. 444. 27, E.R. 1132.

[15] Supra.

[16] (1893) A.C. 602.

ground that they broke into and took possession of their large tracks of land and mines in South Africa.

The Court of Appeal held that, such an action could be properly heard in England. The House of Lords however, reversed this ruling and held that and English Court has some limitations to entertain a suit with respect to foreign inmmovables, such jurisdiction is lacking where the suit raises the issue of title to, or right to posession of foreign immovables.

Lord Herschell stated that;

> I have come to the conclusion that the grounds upon which the courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical, and the rules of procedure under the judicature Acts have not conferred a Jurisdiction which did not exist[17].

The court lack jurisdiction to entertain such sections, where the question involves one or other of two issues namely:

(a) The title to, or right to possession of land abroad.

(b) The recovery of damages for trespass to such land.

The restriction of jurisdiction in the first type of cases above is justified as stated earlier because it is a place of situation of land which determines its ownership and title to it. But where no question of title arises, or only arises as a collateral incidence of the trial of other issues, there is nothing to exclude the jurisdiction[18].

In Nigeria, Section 24 of the Land Use Act 1978 which provides for devolution of rights of occupancy upon death is to the effect that:

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17 Ibid at Page 629.

18 Lord Hershell in Mocambique Case 1893 A.C. 602 at 626. See also Tito V. Wadell No. 2 1977, Ch. 106 at 262 - 264.

(a) The devolution of rights of occupancy of an occupier upon death shall in case of customary right of occupancy unless non customary law or other customary law applies be regulated by the customary law existing in the locality in which the land is situated.

(b) In the case of statutory right of occupancy (unless any non-customary law or other customary law applies) be regulated by the customary law of the deceased occupier at the time of his death relating to distribution of property of like nature to right of occupancy.

From the above provision, it means that in the absence of anything to the contrary, devolution of rights of occupancy in Nigeria upon death of an occupier are to be regulated by the customary law where the land is situated[19].

The second type of cases which exclude the jurisdiction of the court as stated earlier are actions to recover damages for trespass to a foreign land or for loss caused by such acts. Thus in Hesperides Hotels Ltd V. Muftizade[19A]. The plaintiffs owned hotels in Kyrenia on Northern Coast of Cyprus. When Turkish troops occupied that part of Cyprus in 1974, the hotels were taken over under the auspices of the Turkish Federated state of Cyprus. In 1976 the defendants an English travel agency, advertised holidays in the hotels and the plaintiffs claimed damages for conspiracy to procure Acts of trespass to their hotels and also for conspiracy to trespass in respect of the contents of the hotels.

The Court of Appeal found in favour of the plaintiffs. The house of Lords reversed the decision of the Court of Appeal and held

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19 (1979) A.C. 508. (1978) 2 All E.R. 1168.

19A But for instance where a person makes a will, the devolution is taken out of customary law.

English Courts have no jurisdiction to entertain an action of trespass to foreign land and this could not be evaded by framing the action as has been done in this case on conspiracy.

The fundamental requirement for exercise of this jurisdiction is that the defendant should be subject to some personal obligation arising from his own act, for it is only when his conscience is affected that the Court is entitled to interfere.

The exercise of this equtable jurisdiction is not only limited to land. In Ewing V. Orr Ewing No.1[20] the House of Lords held that where some of the executors and trustees of a will were in England, the English Court had jurisdiction to administer the real and personal assets of a testator who died domiciled in Scotland, even though the greater part of the personality and all the reality were situated in Scotland. The High Court of Australia has also exercised the jurisdiction to a foreign patent,[21] and there seems to be no reason why it should not apply to all forms of property.

2.4. Application of the Maxim in Nigeria

some cases while it has declined to do so in other due to lack of jurisdiction.

Our starting point is the case of Ayinule V. Abimbola[22] where Jones Commercial Services instituted this action at the Lagos High Court seeking an injunction to restrain the defendant from trading as Jones Commercial Services with the plaintiff's business associates in West Germany. The action arose due to the fact that the defendant

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20 Supra.

21 Potter V. Broken Hill Co. Property Ltd, (1905) 3 C.L.R. 479.

22 (1957) L.L.R. 41.

had written a letter to the German Associates from Ghana on a paper head with Jones Commercial Services asking the German Associates to pay all commissions due to Jones Commercial Services to him. Though the defendant was served within jurisdiction, the conduct compalined of and sought to be restrained was the defendant's conduct of his business, outisde the jurisdiction of the Court.

The question for determination by the Court was whether it had jurisdiction to restrain a defendant within jursidiction from doing an act outside the jurisdiction of the Court. The Court held that an order of an injunction is directed to the person to be restrained and it is an order in personam. That being so it follows that if the person to be restrained is within jurisdiction and amenable to the process of the Court, an injunction may be ordered to restrain him regardless of the locality of the act to be done. The injunction was granted.

This decision shows the adaptability and flexibility of equity to deal with new situations to soothe the plaintiff by acting in personam against the defendant.

In Aderokun V. United Africa Company Ltd,[23] the plaintiff claimed rent for premises in Zaria which was in the then Northern Province of the Protectorate of Nigeria where the lease was executed. He brought this action of the Supreme Court in Lagos. At this time the Supreme Court had jurisdiction equivalent to the present High Courts in the Federation. But its jurisdiction (Supreme Court) covered the whole of Nigeria.

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[23] (1935) 12 N.L.R. 57.

At the trial of the suit counsel to the plaintiff contended that a firm which made a contract any where in the protectorate could if it had a place of business in the country be properly and compethetly sued under such contract in the Supreme Court. That the general Principles of English Common Law and the English statutes of general application in force on 1st January, 1900, must be applied and under such principles and statutes the plaintiff could sue his defendant where he could find him.

The defendant company by their defence contended that the court had no jurisdiction to try the case.

The Court held that English principles and statutes apply in Nigeria, but it is clearly laid down that their application is subject to the local ordinances, and since Section 10(1) of the Protectorate Ordinance[24] clearly prohibits the Court's jurisdiction in the protectorate no principles of English law or English statutes can be invoked to contradict the specific terms of the Section.

The Court held that it had no jurisdiction to entertain the claim and it was accordingly dismissed for want of jurisdiction.

Also in the case of Ijaola & Others V. Banto & Others[25] the plaintiffs sought a declaration at the Lagos High Court against the defendants that the certificate of incorporation granted under the land Peerpetual Succession Ordinance[26] be declared null and void. He also sought for an order that the said certificate be cancelled on the ground that the defendants in defiance of the judgement of the High Court at Abeokuta had registered the Church and the land as their exclusive properties under the above Ordinance, whereas

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[24] of 1933.

[25] (1958) L.L.R. 56.

26 Cap. 107.

the congregation in trust for whom the property is held is divided into two factions. That nineteen defendants falsely declared themselves as trustees of the Church and twenty defendants falsely declared that the said land was their property.

The Court held that the present action concerns land and the land was situated in the Western region. The question which the Court posed for itself was whether it had jurisdiction to hear and determine the claim. The Court was of the opinion that the jurisdiction of the High Court of Lagos is confirned only to the Federal Capital Territory of Lagos. That equity acts in personam over person resident within its jurisdiction and in certain cases the court would entertain qn action respecting foreign land.

The Court was of the opinion that since it was quite clear that the parties to the action, except the first defendant who lives at Ebutte Metta, are resident beyond the jurisdiction of the Court, namely in the Western Region, the High Court of Lagos, had no jurisdiction to hear the action, and the action was therefore struck out.

In the case of British Bata Shoe V. Melikan[27] the proceedings concerned an appeal from an order of a judge of the High Court of Lagos. The court strike out the plaintiff's action for specific performance of a contract for the assignment of the respondent's leasehold property situated at Aba now in Imo State formerly in the former Eastern Region. This was on the ground that the High Court of Lagos lacked jurisdiction to try the case.

The action was filed in the former supreme COurt in December 1954. But then there was only Supreme Court, with

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[27] (1956) 1 F.S.C. 100.

jurisdiction covering the whole of Nigeria. The case did not come up for trial until on 9 January, 1956, whereas the former Supreme Court of Nigeria had ceased to exist on 1st January, 1956 and was replaced by five independent High Courts, each exercising jurisdiction within its own territorial limits. There was evidence that each of the High Courts of the regions was separate and it has been likened to be "like a foreign Country to other regions"[28].

The Counsel for the appellant/plaintiff submitted that the action being one for specific performance of a contract which calls upon the Court to act in personam in equity against the respondent/ defendant and therefore the High Court of Lagos had jurisdiction as the parties were residing within its jurisdiction.

Jibowu Acting chief Judge held that the claim for specific performance of a contract is an action calling upon the court to exercise its equitable jurisdiction in personam over persons who are resident within its jurisdiction. He linked the position of the High Courts of Lagos to that of English Court of Justice with regard to land outside its territorial jurisdiction. That since the High Court of Lagos is empowered to administer law and equity, it has jurisdiction in cases of specific performance of contracts between persons within its jurisdiction although the land to which the contracts may be outside its territorial jurisdiction.

It seems that the writs of sequestration, the writs of assistance and foreclosure order which operate on the subject matter and put the judgement creditor physically in possession

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[28] Jegede (1981) Principles of Equity Page 36.

of property operates in rem and not in personam against the defendant. Thus it has been submitted that equitable rights and interests are hybrids standing mid way between jura in personam and jura in rem[29].

However, the obligations which the courts would enforce in exercise of this jurisdiction depend on the existence between the parties to the action of such personal obligation, arising out of contract, quasi-contract, fraud, fiduciary relationship or some other conduct which would be unconscionable from the stand point of equity.

The jurisdiction cannot be exercised if the place of situation of the property prohibits the enforcement of the decree, neither can it if the court cannot effectively supervise the execution. It cannot also be exercised against strangers to the equity, unless they have become personally affected by it.

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[29] Lathan (154) Canadian Bar Review, Page 520.

CHAPTER THREE

HE WHO COMES TO EQUITY MUST COME WITH CLEAN HANDS

3.1. Introduction

This is an equally important equitable maxim. Its origin is traceable to the origin of equity in the Court of Chancery which was influenced by good faith, good conscience and honest dealings, hence the court of equity began as a court of conscience. The meaning of the Maxim is that when a plaintiff whose conduct has been improper in a transaction seeks relief in equity, such relief will not be granted to him for "he who has committed - Iniquity shall not have equity"[1].

Jegede has rightly stated what equity regards as unclean hands when he said "inequitable conduct which will amount to unclean hands need not be illegal in the strict sense as required at law, it is sufficient if the conduct is unconscionable and morally reprehensible"[2].

The Maxim is related to the exturpi causa no oritor actio principle of the common law, which means that the court will not entertain an action that is premised on illegality.

The basis and limit to this maxim was stated by Eyre L.C.B. in the case of Dering V. Earl of Winchilsea[3]. Speaking about the conduct of the plaintiff in the case he said:

> ... It is not laying down any principle to say, that his ill-conduct disables him from having any relief in this Court. If this can be found on any principle, it must be that a man must come into a court of equity with clean hands, but when this is said it does not mean a general depravity, it must have an immediate and necessary relation to the equity sued for ...

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1 Jones V. Lenthan (1969) 1 Ch. Cas. 154.

2 Jegede (1981) Principles of Equity, Page 255.

3 29 E.R. 1184.

The above quotation may be illustrated by a hypothetical case as follows, under a term of contract entered between A and B, A is obliged to supply twenty tons of fertilizer to B, on or before 30 May, 1990, which he failed to do without any reasonable cause. A, one month later after the date on the 30 June, 1990, supplied the said twenty tons of fertilizer to B. But B refused to take delivery of the fertilizer.

Consequently A sued B seeking the equitable remedy of specific performance to compell B to take delivery of the said fertilizer. The court refused to grant specific performance. Because A has not come to equity with clean hands. He failed to observe a fundamental term in thecontract by his failure to deliver the said fertilizer on the specified date without any reasonable cause, as he only dleivered it one month after that date. In fact he acted in breach of contract.

In consequence therefore, from the above facts, this will not any way impair or prevent or affect A's possible rights to seek for an equitable remedy in any other case or action unrelated to the above hypotehtical one. In other words the deprivation is not for all purposes but only restricted to the specified case at hand.

3.2. Application of the Maxim in Jurisdictions Other than Nigeria

The extent of application of this maxim seems unlimited. It has therefore been applied to anumber of cases by the Courts.

In Overton V. Banister[4] where the infant plaintiff represented to his trustee that he was full age, and thereby successfully induced his trustee to advance money to him, later when he sought equity to

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[4] 67 E.R. 474.

charge his trustee with the money advanced when he became of age, it was held that he had lost the ordinary protection of infancy and was treated on the sam basis as if he were adult cestuis que trust who had committed a breach of trust.

It has been applied to restrain a breach of confidence in Argyll V. Argyll & Others[5] where the plaintiff and the first defendant were married in March 1957. In 1959 the first defendant presented in the Court of session in Scotland a petition for divorce from the plaintiff on the ground of her adultery. In 1960 the plaintiff filed a cross-petition, in 1962 her cross petition was withdrawn and no evidence was submitted in support of it. In 1963 the divorce proceedings were heard and a decree of dissolution of marriage was made. In the same year articles by the plaintiff were published in a Sundaynewspaper in which certain statements were made in relation to the first defendant's personal conduct and financial affairs.

In 1964 the plaintiff issued a writ and by motion sought interlocutory injunction to restrain the first defendant from communicating to the second and third defendants, the editor and proprietors respectively, of another Sunday newspaper, from publishing information of inter alia, secrets of the plaintiff relating to her private life, personal affairs or private conduct communicated to the first defendant in confidence during the subsistence of their marriage not hitherto made public and any articles relating to the proceedings for divorce in Scotland other than those authorised under Section 1(1) (b) of judicial proceedings (Regulations of Reports) Act, 1962.

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5 (1967) Ch. D. 302.

The grounds of the motion were that publications of statements about the plaintiff contained in certain articles by the first defendant intended for publication in the Sunday Newspaper were in breach of Marital confidence and in contrvention of the Act of 1962.

The Court held that in the exercise of its equitable jurisdiction, it would restrain a breach of confidence independently of any right at law.

That, being the policy of the law to preserve the close confidence and mutual trust between husband and wife, subsequent adultery by one spouse resulting in divorce did not relieve the other spouse from the obligation to preserve their earlier confidences. Accordingly the plaintiff's adultery did not entitle the first defendant to publish the confidences of their married life, and an injunction would be granted restraining him from doing so.

The court held further that an injunction might be granted to restrain the publication of confidential information not only by the person who was a party to the confidence but by other person who into whose possession that information had come and injunctions would be made against the second and third defendants in respect of publication of marital confidences.

The Court stated that though a person coming to equity must come with clean hands, but the cleanliness required is to be judged in relation to the relief sought.

Misrepresentation is a complete defence inan action for specific performance. A plaintiff will not be entitled to specific performance if the contract he seeks to enforce had been

procured by his (fraudulent or innocent) misrepresentation even if the defendant has not availed himself of the right to rescind the contract[6].

The maxim was applied by Lang Innes, J. in Kettles Gas Appliances Ltd V. Anthony Harden and Sons Ltd.[7] where the plaintiffs were the manufacturers of a Kettle which the defendants were innocently passing of as their manufacture. However the plaintiffs always vended their Kettles with the words "patented" "Copyrighted" prominently impressed on them. This was done with the intention of inducing the belief that other persons were debarred by the patent rights and copy rights of the plaintiff from manufacturing or vending Kettles of the same design as plaintiffs, although the plaintiff did not know that letters, patent or copy right relating to their Kettles existed.

The Court held that to grant them a injunction to restrain the defendant's passing off would mean that, the Court had assisted them in their successful campaign to defraud the public and the relief was refused.

In the case of trusts, there is presumption of advancement in favour of a wife in whose name a husband purchases property. This presumption is however rebutted by a presumption of a resulting trust in favour of the husband on the evidence that the husband intended the wife to hold the property in trust for him, however where such evidence is based on inequitable conduct or fraud on the part of the husband, equity will not presume a resulting trust in his favour[8].

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6 Caudman V. Harper 34 E.R. 221.

7 (1934) 35 (S.R.) NSW 108.

8 Gas Coigne V. Gas Coigne (1918) 1K.B. 233.

If the maxim is too remote or indirect to the cause of action which it ispleaded it is irrelevant. In Meyers V Casey[9] the plaintiff who was a member of the victoria racing Club, successfully got an injunction restraining the club from expelling him from membership, which they were threatening to do on the ground that he attended a race meeting while being a disqualified person. He sought an injunctionon the ground that he was not given an adequate opportunity of defending himself against the charge brought against him. The misconduct in which he indulged which led to his disqualification was held by the High Court to be too remote to block his entitlement to the relief.

3.3. Application of the Maxim in Nigeria

This maxim has been applied inNigeria by the Courts in a number of cases.

It has been applied to fraud in sale by Mortgagee in Viatonu V. Odutayo & Kuyoro[10] where Viatonu (plaintiff in the first suit) had mortgaged property to Odutayo, which Odutayo exercising her powers of sale, sold by private treaty to Kuyoro. Viatonu sued to set aside the sale, and Kuyoro sued to recover possession of the premises, which Viatonu was still occupying plus a sum for the use of them. The mortgage debt was £250, the Market value of the premises, £1,500.

Upon receiving notice of foreclosure Viatonu (the mortgagor) went to Odutayo (the mortgagee) and Odutayo agreed to grant an extension of two months. Within that period Viatonu tendered the

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9 (1913) 17 C.L.R. 90.

10 Supra.

debt in full but Odutayo said it was too late. The property was sold for £600 by private treaty on the day that the debt was tendered. The mortgage, the auctioneer, and the purchaser were members of the firm of auctioneers which sold the property, and the judge was of the opinion that the sale had been collusive.

The mortgagee gave no evidence, further when the mortgagor protested against registration of the property in the purchaser's name, the purchaser asked the registrar of companies to delete his name from the form.

The Court held that in a case of suspicion the onus shifts onto the mortgage to uphold the sale as having been bonafide.

That as circumstances in the present case showed that the sale had not been made bonfide, as he was a party to a fraudulent auction sale at which the property was sold at an under value, he did not come to equity with clean hands, he could not claim the protection of Section 21(2) of the conveyancing Act, 1881, and he could not therefore recover possession as the sale was void against the mortgagor.

The maxim has also not been found lacking in matrimonial causes. In Craig V. Craig[11] the petitioner sought a dissolution of her marriage with the respondent on the ground of the latter's adultery and cruelty. She had been guilty of adultery herself but did not confess this in her petition and the circumstances were such that the court found the neglect to do so was a deliberate suppression of the truth.

The respondent in a counter-petition sought a dissolution of his marriage with the petitioner on the ground of the latter's adultery. In his petition the respondent confessed that he had been

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[11]

guilty of adultery and asked the court to exercise its discretion in his favour. The court accepted his plea that this misconduct of his had been induced by the petitioner's desertion of him.

The Court held that in the circumstances the petitioner's petition must be dismissed and that the court would exercise it discretion in favour of the respondent and grant his counter petition, as the petitioner has not come to court with clean hands.

It was applied in sale and conveyance of property in Menkiti V. Agina[12] where the plaintiff and the defendant were joint beneficiaries of a property under their mother's will. Both agreed to partition the property before the will was proved. The defendant who sold his own portion, contended that the sale was valid since the property had been partitioned. The plaintiff on the otherhand, claimed that there had no power to sell any part of the property.

He therefore sought to set aside the sale made by the defendant. The court found that the property had in fact been partitioned illegally because the will had not been proved in accordance with the law, and the plaintiff had agree to the partition when she though she could purchase the defendant's share and she now only brought this action because of the disagreement on the Purchase price.

Justice Kaine, refused to make the order and stated that:

> I have to say that the plaintiff and the defendant having constituted themselves into executors de Son tort, and after the illegal distribution of the property of the testatrix have now landed themselves in court seeking for a legal remedy. I am of the opinion that to grant them a remedy would tantmount to a condonation. To set aside a sale and declare a conveyance null and void is an equitable remedy which cannot be granted if appropriate, unless the party seeking the remedy comes with clean hands[13].

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12 (1965) N.M.L.R. 127.

13 Ibid at Page 128

It is even applicable in the realm of customary law. In the case of Eshugbayi Chief Oloto V. Dawodu and Others[14], the plaintiff brought this action to recover possession of the land in dispute at Mushim near Ebutte Metta, on the ground that the land attached to his (Chief Oloto's) stool. The defendants admitted that these land were formerly the lands of the plaintiff's predecessors who many years ago granted these lands absolutely to them the defendants through their ancestors who was a war Chief at Lagos, and contended that the plaintiff could not disturb them.

The defendants contended further that the plaintiff had no title to sue as he had granted a conveyance of the same lands to one Lawani Giwa by deed of gifts dated 3 June, 1902, and registered in the register of deeds, Lagos (a copy of which was given inevidence). At this juncture the court allowed the plaintiff to give extrinsic evidence to prove the real nature of the transaction between him and Lawani Giwa. It was explained by the plaintiff that though the deed of gift purported to be an absolute conveyance the real nature of the transaction was that Lawani was on the land as a tenant, and people were bothering him, and he (plaintiff) gave him the "Paper" to stop the people from bothering him, and that the relation of landlord and tenant was to continue as in the past, and the deed was not to affect such relationship, as it was not given or accepted as a conveyance of the ownership of the land.

The learned judge in the court below gave judgement for the plaintiff on the ground that the lands in question were not given by the plaintiff's Predecessors in title to the defendants absolutely and the defendants alleged title consisted only of permission to use the lands in accordance with native custom.

The Court held further that the successors of the said grantee required to get permission from the plaintiff to continue the use and that they never got such permission, and the true nature of the transaction between the plaintiff and Lawani was that explained by the plaintiff.

From this judgement the defendant appealed on the grounds that the Court below allowed evidence to be given to contradict or vary the deed between the plaintiff and Lawani Giwa, and that the judgement was against the weight of evidence.

The Appeal Court on a majorityof two to one upheld the judgement of the lower court on the grounds that extrinsic evidence is admissible to show the true nature of the transaction expressed in any document and also the real relationship of the parties thereto, and that the judge of the court below was right in admitting the evidence, and upon such evidence he could have come to no other conclusion than he did, and as the deed was not to affect the relationship at all between Chief Oloto and Lawani as landlord and tenant, as it was not given or accepted as a conveyance of the ownership of the land.

That the second ground of Appeal must also fail as the appellants have asserted their rights inconsistent with those of the respondent, as they claimed ownership of the land, when they knew that their alleged predecessors in title were not the absolute owners of the land. That native law and custom gives the respondent the right to recover possession and the court is bound to administer native law and custom unless it is contrary to natural justice, equity and good conscience, and in the present case it is not, and the appeal was dismissed with costs and the judgement of the court below was affirmed.

Justice Pennington, delivered a dissenting judgement on the grounds inter alia that:

There is no evidence that either the appellants or their predecessors up to Momo Asosi, the Original grantee, ever paid any rents. That theevidence which was put in by the respondent, directly contradicts, any idea that the original grant to Momo Asoh was in consideration of rent. That it seems that the respondent deliberately sold appellant's land from under their feet, then a judgement was got in the court below by which the appellants got their land back from Lawani, then the respondents seek to oust them again. He then stated the application of the maxim in native law and custom as follows, "the respondent whilst seeking to endorse native law has not carried out native law, and the respondent has been no means clean hands in the matter, I cannot agree with the judgement of the Court below"[15].

I agree with the dissenting judgement of Pennington J., as it is more in consonance with the facts of this case than the majority judgement, as the non-payment of rent by the grantees was fatal to the relationship of land lord and tenant between the plaintiff and original granted up to Lawani Giwa to rebutt the presumption that the grant was absolute.

In Saliu V. Balogun[16] the applicants applied for an order of interlocutory injunction restraining the defendants from quarrying sand from Ogun river until the final determination of the action. The Plaintiff's alleged that the defendant had been quarrying sand on the sites contained in their licences by force inspite of several warnings, thereby causing severe financial loses to the applicants

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[15] Ibid. at Page 62.

[16] (1975) 10 CCHCJ. 1583.

and unless restrained would continue to usurp their exclusive rights and impoverish them. The respondent contended that the Quarries Act 1969 makes it obligatory for any licencee conducting quarrying operation to pay the family as owner of the private land, fair and reasonable compensation for disturbance of their rights and that the plaintiff had failed to comply with that provision.

The maxim has also been applied in the recnt cas[illegible] Brown V. Adebanjo[17] where the plaintiff and the defendant were adjoining land owners. While building on his land, the defendant encroached upon a part of the plaintiff's land. The defendant upon realising this, approached the plaintiff for settlement. The plaintiff was agreeable. At first they mutually agreed the Vendors of the defendant would give the plaintiff another land as a substitute for the one trespassed upon by the defendant. However, because the plaintiff had already built on the part of the land, the defendant's vendor changed their mind and instead suggested that the defendants should compensate the plaintiff monetarily. Again, the plaintiff was agreeable.

However, several years after the trespass was committed, and after the defendant had completed his building and started to live in it, he had still not compensated the plaintiff for his acts of trespass, whereupon the plaintiff brought an action against him in the Lagos High Court.

The trial judge dismissed the plaintiff's claim on the ground that he was estopped having elected to settle the matter by agreement. Thereupon the plaintiff appealed to the Court of Appeal.

The Court of Appeal held that the fact that a person against whom a wrong is committed is ready and willing to settle with his

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[17] (1986) 1 N.W.L.R. 383 Part 16.

woring doer without the necessity of legal action, does not mean that he has waived his right of action should settlement be impossible to achieve. That this is especially so where there is no evidence that the wrong doer made an offer of a specific sum which the person wronged has unreasonably refused.

That a party against whose land an act of trespass is committed is entitled to an order of injunction to protect his right to possession of such land. The defendant trespasser in spite of his awareness of his act of trespass on the plaintiff's land continues the trespass by erecting a building on the land, does so at his own risk and must be ready to bear the consequences of his action, and in the present case, the doctrine of estoppel by election cannot operate against the plaintiff as there was no enforceable agreement which he could be said to have gone back on.

The Court held further that a party who seeks equity must do equity, and since the defendant have not paid or agreed to pay a fair and reasonable compensation to the owner of occupier of the land, equitable remedies canot be granted in their aid, as he who comes to equity must come with clean hands.

The court of Appeal gave judgement in favour of the appellant/ plaintiff and awarded general damages to him for trespass committed by the defendant on his land and also awarded damages in lieu of an injunction in respect of the portion of the plaintiff's land occupied by the defendant's building.

Also in the more recent case of Oilfied Supply Centre Ltd V. Joseph Johnson[18] the appellant company was established by the respondent and few other persons, all of whom were co-directors of the Company. The respondent was the Managing Director of the Company.

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[18] (1987) 2 N.W.L.R. 625 Part 58.

Shares were alloted to each of the directors but while others paid up fully in cash, the respondent paid up partly in cash and partly in kind represented by services both before and after the incorporation of the Company the understanding being that whatever salary he ought to have earned as Managing Director could be used in defraying his alloted shares.

After some years there was a dispute amongst the directors. The respondent travelled to his home country Australia. During his absence the Federal Covernment acquired the appellant company and paid compensation of Eight Million Naria to the other directors which they shared to the exclusion of the respondent.

On his return to the country the respondent brought a petition in the Federal High COurt to have the company wound up. The appellant contended that he had no right to seek the winding up of the company because he was neither a shareholder member nor contributory of the company. Appellant also contended that at the time the respondent got involved with the company and was working, he had not obtained an expatriate quota thus claiming that all the contract thereby entered into by him were illegal.

Both the High Court and the Court of Appeal found in favour of the respondent. The appellant dissatisfied with these decisions appealed to the Supreme Court.

The Supreme Court unanimously dismissing the appeal held that:

The respondent in the instant case is not only a share holder, but a member and contributor of the appellant and consequently is entitled to bring a petition to wind up the appellant company as a person is a shareholder of a company once it is shown that shares of that company had been alloted to him and he has paid for them, either in cash or kind.

That a party who has committed an illegality cannot seek to benefit therefrom, and anyone who seeks equity must come with clean hands.

3.4. The Scope of the Maxim

This maxim like any other has limit to its scope and should not be taken too widely as it does not mean a general depravity, but the improprietary compalined of must have an immediate and necessary relation to the equity sued for[19] if the relationship of the unclean hands relied on by the plaintiff is indirect it is irrelevant, as "equity does not demand that its suitors must have lived blameless"[20].

Where a transaction is against public policy a plaintiff cannot withstanding the fact that he has not clean hands in the transaction still obtain the relief, as for instance an action has been successfully maintained for delivery up of an instrument which was void on the ground of public policy, even though the plaintiff was a party to the illegality[21].

Where both parties to the suit are caught by the maxim, none of them will be entitled to the relief sought. In Kellogg V. Kellogg[22] where a wife sued for divorce on the ground of extreme cruelty and the husband cross petitioned on the ground of extreme cruelty and adultery. Judge Stone while dismissing both petitions stated that, since divorce is a remedy for the innocent against the guilty it should not be granted where both parties are at fault.

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19 Dering V. Earl of Winchilsea, Supra.

20 Per Braindes J; in Loughran V. Loughran 292, U.S. 216 at 229. (1934).

21 Lord St. John V. Lady St. John

22 171, Mich. 518 (1912).

He stated that this is no more than the application of the equitable rule that one who invokes the aid of a court must come into it with a clear conscience and clean hands.

Jegede may therefore be correct when he stated that "though an extreme use of the doctrine, which if pushed to its logical conclusion may tend to perpetuate a relationship which is obviously inimical to the interest of both parties and that of the public, it, nevertheless demonstrates the very flexible character of the clean hands doctrine"[23].

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[23] Jegede (1981) Principles of Equity, Page 254.

CHAPTER FOUR

THE MAXIM OF "DELAY DEFEATS EQUITY OR EQUITY AIDS THE VIGILANT AND NOT THE INDOLENT". (Vigilantibus, Non Dormientibus jura Subveniunt).

4.1 Introduction

This is another important equitable maxim. It means that a person will not be granted an equitable relief if he has been guilty of undue delay in bringing his action. The maxim emphasizes the promptitude which equity reserved it assistance to those who were astute to seek it. A delay which is sufficient to prevent a party from obtaining an equitable remedy is called laches.

The basis of the maxim was explained by Lord Camden L.C. in the case of Smith V. Clay[1] as follows:

> A Court of equity has always refused itsaid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable delligence, where these are wanting the court is passive and does nothing.

Lord Blackburn also stated in Erlarger V. New Sembrero Phosphate Co.[2] that "a Court of equity requires that those who come to it to ask its active interposition to give them relief should use due delligence, after there has been such notice or knowledge as to make it inequitable to lie by".

By this maxim a defendant can successfully resist an equitable (and not legal) claim against him if he can show that the plaintiff by delaying the institution or prosecutionof his case, has either acquiesced in the defendants conduct or caused the defendant to alter

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[1] 27, E.R. 419.

[2] (1878) 3 App. Cas. 1218.

his position in a reasonable reliance on the plaintiff's acceptance of the status quo, or the plaintiff's has permitted a situation to arise which it would be unjust or inequitable to disturb.

The principles which govern the defence of laches has been stated by Lord Selborne in the case of Lindsay Petroleum Co. V. Hurd[3] in these words:

> The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted. in either of these cases lapse of time and delay are most material ...

4.2 Delay with Prejudice to Others

The more usual laches which frequently occur consist of delay which will prejudice others. This arises in different situations.

First and foremost there may be loss of evidence, as when there is great delay, witnesses may die, written evidence may get lost and memories may fall.

Secondly, where the delay combined with lapse of time, it is impossible to grant equitable relief on just terms, as for instance the peroperty has passed through many hands and successive owners have spent money on it, even if it is a sale by a trustee in breach of trust a court of equity will not rescind the original worngful sale of the property[4].

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[3] (1874) L.R. P.C. 221 at 239-240.

[4] Boney V. Ridgard (1984) 1 Cox Ex. Cas. 145.

A third situation arises where the transaction which the plaintiff seeks to impugn is at all hazadous or speculative, that is if he has a choice to either rescind or affirm a transaction, he will not be allowed to let time run so that he will determine the profitability or otherwise of the transaction to make his choice.

A fourth instance is cases delaing with claims for recovery of arrears of profits. If a plaintiff who has knowledge stood by while the defendant was making profits from the illicit use of his property, it would be inequitable to allow him to recover those proftis when he recovers his property and treat the defendant as his baillif. If the defendant has spent those profits it would be unjust to compel him to account for what he has spent[5].

Lastly, delay might cause a situation where the defendant or third parties had acted reasonably to their deteriment on the plaintiff's delay. The decision of the High Court of Australia in Lamshed V. lamshed[6] is one of the leading authorities of this type of laches. In that case the plaintiff commenced an action for specific performance of a contract for sale of land in 1956, but let it in abeyance until 1962, during which time the defendant contracted to resell the land to a third party. The Court held that the plaintiff's delay in prosecuting his action constituted laches which disentitled him to the equitable relief sought. Kitto, J. one of the majority of judges in the case stated that:

> The case is therefore not one of bare delay, it is not even one in which all that can be said against the granting of the relief is that the plaintiff's delay has unfairly placed the appellant in a position of uncertainty over a substantial period, it is a case in which a defendant, not precipitately

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[5] See the decision of Upjohn, J. in Re Jarvis (1958) 2 All E.R. 336.

[6] (1963) C.L.R. 440.

> but at length, in circumstances which made it altogether unreasonable to do so, has in any way at fault and not being warned by any caveat on the title, have acquired interests which will be defeated if a decree for specific performance should be made[7].

The person whose right might have been unfairly prejudice need not be the defendant, it can be a third party.

However, the situations discussed above are not exhaustive, as equitable relief will be refused on the ground of laches in any circumstances where the plaintiff's delay makes it unjust to grant the relief sought. The operation of the doctrine various from situation to situation. The Court will normally consider the length of delay, the nature of acts done during the interval, or the property in which the right is claimed.

4.2.1. Acquiescence

Acquiescence is an element in laches. It means that if a party having a right in property stands by and sees another dealing with that property in a manner inconsistent with his right, and makes no objection while the act is in progress he cannot afterwards complain. It is also used in a secondary sense to denote a plaintiff's behaviour inrefraining from seeking redress once he knows his rights have been violated, were he ever so ignorant of their violation while it was in progress to denote his acceptance of the fact that his rights have been violated. This is so in cases where laches consists of a plaintiff's long delay leads to the defendant or some other person to reasonably alter his position to his detriment in reliance thereon, as there seems to be no reason why the fact that the plaintiff is ignorant of his rights should bar a defence of laches.

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[7] 109. C.L.R. at 455.

It would appear that knowledge of the relevant facts gives a presumption of knowledge of one's right. Also the availability of the means of knowledge is as good as knowledge. This is illustrated by the case of AllCard V. Skinner[8], where Miss Allcard, under the influence of her religious adviser, entered into an Anglican Convent and made generous gifts to that convent, the head of which was the defendant, Miss Skinner. Having left the convent some years later and becomeconverted to Roman Catholicism, she was known to have consulted about her affairs generally with her solicitor and her brother, who was a lawyer. Nevertheless, she let six years clapse before trying to recall the gifts, which the court found to have been procured by undue influence. The case was close to a border line. Cotton L.J. was of the view that a defence of laches had not been made out, Lindley L.J. and Bowen L.J. on the otherhand were of the view that the dfence of laches had surely been established. The defendant endeavoured to make out a case that she had acted to her detriment in reasonable reliance on the plaintiff's delay, but this defence was rejected by the court, on the ground that her conduct amounted to confirmation of her gift.

The senses in which acquiescence is applied by the Courts was authoriatively alluded to by Sir Samuel Griffith in the case of Cashman V. 7 North Golden Gate Minning Co.[9] where he said:

> ... It is a well known doctrine of equity that when a person claiming equitable relief has lain by for a long time and so conducted himself that it would be inequitable to permit him to

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[8] (1887) 36 Ch.D. 145.

[9] (1887) 7 QLJ. 152 at 153 - 154.

> complain of the defendant's actions, the court will refuse to grant the relief. The term also bears another meaning. It may be fairly applied to a man, who seeing an act about to be done to his prejudice, stands by and does not object to it. He may be very properly said to be acquiescing in that act being done. But the difference in point of law in the legal consequence of the two kinds of acquiescene is quite clear. A man who stands by and see an act about to be done which wil be injurious to himself, and makes no objection cannot complain of that act as a wrong at all. He never has any right to action, because he stands by and allows the act to be done. Acquescene in the other sense is a defence to an action for specific relief, on the ground that the plaintiff cannot be reinstated in his original position without doing injustice to the defendant,but it is not an answer to a cause of action already accured.

It would seem from decided cases that mere delay in enforcing one's right is not itself a defence. The High Court of Australia granted a decree of specific performance in Fitzgerald V. Master[10] twenty-six years after the cause of action arose.

Also in Morse V. Royal[10A], Erskine L.C., said:

> As to the effect of length of time, where there is no bar by statute of limitation, a court of equity will never lay down as a general proposition that although the fact, that imposition has been practised, is established the party is too late .... The true operation of length of time is by way of evidence.

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10 (1956) 95 LCR 420. See also Cotton L.J. dissenting judgement in AllCard V. Skinner Supra. Fullwod V. Fullwood (1978) 9 Ch.D. 176 where Fry, L.J. held that mere lapse of time affords no bar in equity.

10A 33 E.R. 134.

It therefore means that delay in a situation where no statute of limitation is applicable, could have legal effect only if it amounted to a release implied by conduct or was coupled with detriment to the defendant or a third party.

4.3 Aplication of the Maxim in Jurisdictions Other than Nigeria

The maxim has been applied in a number of jurisdictions in cases involving different subjects matter.

An example of laches in the sense of delay together with acquiescene is the case of Mitechell V. Homfray[11]. Where the Court of Appeal held that a patient's executors could not recall gifts made by the patient to his physician who was the defendant in the circumstances where he delayed for a long time after the undue influence had ceased, knowing that the transactions embodying the gifts were voidable. He was held to have by his conduct affirmed the gifts.

On the otherhand an injunction in aid of a legal right is not refused by a court of equity unless the legal right is itself statute barred, this is not withstanding the fact that laches may well bar an interlocutory equitable relief. In Re. White Bake Well White[12] the Supreme Court of South America held that where a creditor claims against an estate which an administration decree has been made in respect of a legal cause of action, the doctrine of laches does not operate against him. But that is not to say laches does not operate where the plaintiff seeks relief in purely legal right, as the court has times without number held that a plaintiff's right has been barred by laches and remitted him to his remedy of damages at law.

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[11] (1881) 8 CBD 587.

[12] (1917) SALR. 193.

4.4. Application of the Maxim in Nigeria

This Maxim has been applied in Nigeria by the Courts in a number of cases.

In Aganran V. Olushi[14] family land was sold to the defendants by the head of the family and other principal members with exception of the plaintiff whose consent was not obtained. When the sale was brought to the plaintiff's notice, he consented and received five pounds (£5) as his share of the Purchase money, but he later shortly returned this sum and withdrew his consent. The plaintiff did not bring this action to eject the purchasers until after three years during this interval the defendant had erected a building on the land to the knowledge of the plaintiff.

The Court dismissed the action of the plaintiff on the ground that the plaintiff did not take steps to set aside the sale for about three years during which period he permitted the defendant to pay compensation to the occupiers of the land to take possession without objection. Moreover he made the defendant to erect the buildings on the land without intereference, therefore his action amounted to an expression of intention or a promise not to exercise the right which he possessed.

It was also applied in administration of estate in the case of Ephraim V. Asuquo[15] where the plaintiff's claim for grant of letters of administration made to the defendant was dismissed on the ground that plaintiff had waited for two years before he brought this action whereas he had every opportunity of opposing the grant. The Court held that if they were desirous they should not have waited for two years before commencing the proceeding.

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14 (1907) 1 N.L.R. 66.

15 (1923) 4 N.L.R. 98.

The High Court of Australia has rejected the view that laches will never defeat the right of a cestui-qui trust to his entitlement in an express trust in the case of Hourigan V. Trustees Executors and Agency Co. Ltd.[13] A son in 1932 sought a declaration that he was entitled to his father's residuary estate, his father having died in 1873, although he being a solicitor, had in 1895 actually prepared the conveyance of residuary assets from the estate of his rpther.

The Court stated that after 37 years have elapsed from his decision to concede that the property was his mother's he now seek to subvert all these arrangements, on the contention that no laches and acquiescene can anser an express trust, that although he did not think so himself, he says he now discovered that his mother is an express trustee.

The Court held that his contention overlooks some important qualifications of the generality of which he relies. That if a party in a position to claim an equitable right which is not undisputed lies back and acts in such a way as to lead to the belief that he has no such claim, or will not set it up, and thus encourage the party in possession to deal with his affairs it would be unfair to him and others to go back to the position which might originally have obtained, the Court of equity will not even where the claim is that an express trust is created, disregard the election of the party not to institute claim and treat as unimportant the length of time during which he slept over his rights and induced the common assumption that he does not possess. The claim was held to be inequitable and was therefore dismissed.

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13 (1934) 15 CLR, 619.

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14 (1907) 1 N.L.R. 66.

15 (1923) 4 N.L.R. 98.

For the maxim to apply in property cases two things are necessary, firstly, the person expending the money must suppose himself to be building or his own land, and secondly 'standing by' by the real owner. In Rafat V. Ellis[16] the appellant bought an unoccupied and dilapidated house at a sale under a writ against the respondent's sister, and later built on it. The property belonged to the family who never consented to the sale, the respondent heard of it but did nothing, nor did his family do anything while the appellant was building, although they knew he was. It was not until after the appellant had finished building that the respondent sued for recovery of possession. The appellant relied on the family standing by while he built without appraising him of the defect in title.

The Court held that the family knowingly permitted the appellant to incure expenditure on the building on the land and they thereby waived and abandoned any rights they possessed. The Court stated that to sucessfully raise the defence of acquicscene two thing are necessary. Firstly the person expending the money must suppose himself to be building on his own land. Secondly 'standing by' by the real owner and in the instant case it is not a question of a family neglecting to enforce a claim but they must by their conduct, be held to have acquiesced, and knowingly permitted the defendant to incur expenditure on renovating and adding to the building. They have therefore waived and abandoned any rights they possessed and can not now enforce them.

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16 (1954) 14 W.A.C.A. 430.

In Taylor and Ors. V. Kings Way & Nigerian Properties[17] plaintiff brought this action for recovery of possession of property situate at Lagos. The delay in bringing the action was twenty-five years during which period from time to time the defendant spent a lot of money in building what became and known as kingsway stores. They did this on the believe that they had fee simple the palintiff knew of this as far back as 1938 but gave no explanation as to why they remained silent for twenty-five years.

The Supreme Court held that the defence of laches was sufficiently established to defeat the plaintiff's claim for recovery of possession. The fact that the plaintiff remained dormant at the time the property was acquired by the defendant was not a satisfactory explanation for the delay since they could have brought an action to assert their estate and thereby prevent the defence of laches set up against them.

The question of when does the doctrine of laches and acquiescene operate in land cases arose in the more recent case of Sosan V. Ademuyiwa[18] where the respondent (plaintiff in the High Court) for himself and on behalf of Kabiawa family sued the defendants who were the administrators of the estate of late T.K.D. Philips for a declaration of title to a piece of land. He also claimed damages for trespass and an injunction.

Both parties traced their title to Eyisha family, the defendants claiming to have obtained their conveyance directly from the Eyisha family, the acknowledged and undisputed owners of the land, while the plaintiffs based their claim through one

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[17] (1965) N.M.L.R. 103.

[18] (1986) 3 NWLR Part 27 Page 241.

Oseni Falade whose title was declared to be ineffective by the Supreme Court in an earlier case. Both parties had been in physical possession of parts of the land in dispute and had exercised there on various acts of ownership. The defendants had on admission of the plaintiffs erected school building on the land. Both parties had also granted leases of portions of the land to third parties. The defendant pleaded laches and acquiescene, stake claim and limitation Act of 1966.

The High Court of Lagos dismissed the plaintiff's claim. The Court of Appeal by majority decision, reversed the High Court's decision and found for the plaintiff. Being dissatisfied with the Court of Appeal's verdict, the defendants then appealed to the Supreme Court.

The Supreme Court unanimously allowing the appeal held inter alia that:

Where a party has stood by for several years and allowed another party, without any warnings and or protests to build on his land, in the impression that the latter party owns a fee simple on the land, the former party can no longer be heard to complain or to claim ownership of such land, as he would have been caught by the doctrine of laches and acquiescene. That where the real owner of a property knowingly allows another to incur expenses on that property in the belief that he (that other party) owns the property, then the rights of the parties shall be regulated not by the real state of facts but by the conventional state which they have tacitly agreed to make the basis of their action.

The Supreme Court stated that the purpose of equitable doctrine of laches and acquiescene is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which unless the assumption, is adhered to, would operate to that other's detriment. In the instant case, the cause of action having arisen in 1939, and the action having been brought in 1976, the plaintiff's title has clearly become extinguished by virtue of sections 16(2) and 21 of limitation law of Lagos State which provides that such actions must be commenced within twelve years[19].

Where a party has not altered his position to his detriment or taken any irrevocable step which would make it inequitable to permit another party to assert their title or dominion over property the maxim is not applicable. In Ukwa V. Awka Local Council[20]. The land in dispute was granted in 1939 by the plaintiffs to the people of Awka for a Central Market. The site of the market was not popular with sections of Awka, and as a result of another site was chosen and a market was established there in 1949. In 1952, the Awka Local Council began to administer the area granted to them in 1939, and make grants of portions of it and collected rents from the grantees. In an action by the plaintiffs to recover the land on the ground that the purpose of grant had not been met, the defendants raised the defence of laches and acquiescene.

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19 Cap. 70.

20 (1966) N.M.L.R. 41.

The Court held that by laches is meant that a person entitled to land shoul not stand by and allow another person who thinks the land is his to make improvements, and then assert his right to the land, he wants to take the improvements and cheat the other man of the expense he is making.

In this case there is no evidence that the council spent any money before the plaintiff's eyes. It only divided the market area into plots and gave them out to people to build upon a charge of rent. No wrong would be done to the council if the tenants of the plot are told that they should now pay rent to the true owners of the land, since there is no evidence that the council had changed its position for the worse or taken any irrevocable step which would make it inequitable to permit the plaintiffs to assert their title and dominion over the land in dispute.

In considering the equitable doctrine of laches and acquiescene, the court does not act only on the delay by the plaintiff but must also consider acquiescene on the plaintiff's part, and any change of position which has occured on the

The Court held that in considering the equitable doctrine of laches, the court does not only act on delay by the plaintiff but must also consider acquiescene on the plaintiff's part and any change of position that has occured on the drefendant's part. If the plaintiff by his conduct had done what may be regarded as equivalent to a waiver or by his conduct and neglect put the other party in a position which it would be unreasonable to place him if the remedy were afterwards to be asserted, the doctrine of laches would apply.

That on the facts of this case it could not be said that the plaintiff acquiesced in the defendant's act or that he allowed him to take position from which it would be unreasonable to dislodge him. There was no time he gave up or surrendered his rights on the land to the defendant consequently it would not be reasonable to say that laches would apply.

The defence of acquiesence is however not available to a trespasser who knowingly and unlawfully take possession of land in respect of which is aware of an adverse claimant. In the recent case of Morah V. Okwuayanga[22] the plaintiffs/appellants are representatives of the Ubulu family of Onitsha claimed against the defendant/respondent an declaration of title to the piece of land in dispute, general damages for trespass and perpetual injunction. The appellants both in their pleadings and oral evidence led evidence to the effect that their ancestors first settled on the land in dispute and has devolved successively on many generations of the appellants' one Anyanso.

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[22] (1990) I N.W.L.R. 225 Part 125.

The respondent on the other testified that his grand father one (Osuma Udeme) was the first to settle on the land in dispute and that the land now belongs to him personally. The respondent also testified that he began building on the land in dispute and that the land now belongs to him personally. The respondent also testified that he began building on the land in dispute in 1976 and completed the building and moved into it in 1977. However, and second plaintiff/appellant testified to the effect that in 1976 when the respondent cleared the land in dispute for farming he objected and the respondent desisted and that when the respondent again commenced building in 1977 he also warned him. According to the respondent when he started building in 1976, he was not warned or challenged.

The learned trail judge held inter alia that the appellants had slept on their rights by allowing the respondent to commence building on the land in dispute in 1976 and moving into it in 1977 without warning him. The judge made no specific finding as to who settled on the land based on the traditional history before him. The appellants claims were dismissed in its entirety.

On appeal to the Court of Appeal, the appellants contended inter alia that there was no justification for the trial judge to have held that the appellant slept on their rights by allowing the respondent to commence building on the land in dispute in 1976 and moving into it in 1977 without warning him and that trial judge failed to resolve crucial issues as to whether the land is family land of the appellants or the personal property of the respondent or land of his ancestor. It was also contended that the trial judge failed to put the respective cases of the parties on the well known scale of justice, before arriving at a decision.

The Court of Appeal unanimously allowing the appeal and ordering a retrial held inter alia that the basis of the defence of laches or acquiescence in a land case is the mistake of the person who goes upon land innocently to expend money on it on the supposition that it belonged to him and the dishonest attitude of the person who claims ownership of the land by abstanining from stating his adverse title, but rather allowing the other person to persist in his error.

The defence of laches or acquiescene is not available to a trespasser who knowingly and unlawfully take possession of land in respect of which he is aware of an adverse claimant. The court stated that a party in possession of land only has a duty to warn a trespasser of his interest in the land. In the instant case, the appellants had no duty to keep a constant watch on the respondent and warn him each time he tried to violate the right asserted by them to the land having warned him once nor were they any legal compulsion to commence litigation.

4.4.1. Laches and Customary Law

This doctrine is also applicable to customary law in order to mitigate the rigours of hardhsip which would result in strict application of customary law. The Court will not therefore allow strict application of customary law in a case where the result will be inequitable or unjust. The courts on equitable grounds will not allow a party to call in aid strict principles of customary law for the purpose of blotering up a stale claim. In Akuru V. Olubadan-in-Council[23] the plaintiff brought this action for a declaration of title to a piece of land on the ground that his

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[23] (1954) 14 W.A.C.A. 523.

ancestor had settled on the land in 1824 and occupied it until 1900 when the Bale's Council established a Market there with the permission of the plaintiff's family, who collected tolls, but in 1904 the Native authority began to allow Europeans to build on the land and received the rents without giving the family any share. The family did not protest at the time. Later in 1919 a commission was enquiring into the land holdings of non natives. But the family did not air any grievance, nor did they in 1937, claim any compensation in respect of the land acquired compulsority by the Government.

The Court held that a declaration of title is a discretionary remedy, and even if the plaintiff had made out a claim to full ownership up to 1904, the laches and acquiescene of the family since then destroyed any right they may have had to such a declaration.

That where there is adverse possession for a long period, the course of conduct of the former owners not only excludes their right to possession, but also creates a position in which it would be inequitable to hold that they are no entitled to rely upon native law andcustom to support their claim to any rights of ownership whatsoever.

From the above decision it means that laches and acquiescene are applicable even in the realm of customary law and Adigun is of the opinion that they have been part of Yoruba customary law ever before the colonial era, before the influence of English doctrines.

He stated thus:

> It can no longer be denied that equity similar to the imported English doctrines of lachies and acquiescene had not been unknown to customary law before the colonial era, to trace the origin of acquiescene in the realm of customary law to influence of English doctrines is not to give due recognition to our legal history and thus to lose the benefit of an intensive research into our customary law and its administration[24].

4.4.2. Statutes of Limitation

In England the doctrine of laches is applicable to equitable claims which are outside the limitation Act 1980. A claim to set aside a purchase of trust property by a trustee is covered by the Act. An application forvélief against forfeiture for non-payment of rent where the landlord has peacefully re-entered would propbably be held to be statute barred after six months, which is the statutory period applicable where the landlord has obtained an order for possession.

In Nigeria, the limitation Decree No.88 of 1966 is applicable to Lagos State. The Limitation Law 1959 of Western Region is applicable to the States which were created out of the former Western Region and Mid-Western Region. The limitation Act 1623 is applicable to the rest of Nigeria. Wherever the statutes apply, no delay short of the limitation period will bar the claim.

Where a claim is not covered by any of these limitation laws, then it would be dealt with under this Maxim.

Laches is however a personal disqualification and does not bind successors in title.

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[24] Adigun (1968) Cases and Texts on Equity, Trusts and Administration of Estates. Page 47.

CHAPTER FIVE

CONCLUSION AND SUGGESTIONS

5.1. Introduction

We have examined in depth in this thesis the application of some equitable maxims in Nigeria. From our discussion it is apparent that the application of some principles of equity need to be reformed to bring them in tune with contemporary situation.

It seems a bit strange that a system developed with the object of modifying the stringency and rigidity of the common law, with its attendant notions of conscience, good faith and reasonable dellingence should itself be in need for reform. Yet the reason for this paradox has to be sought in the historical development of the system itself.

The pre-occupation of equity in its formative period by the chancellors who maintained their position in the legal firmament by imposing their ideas of conscience and fair dealing on those who sought to enforce their legal rights. Hence at the formative period equity varies according to a chancellor's foot obviously led to some rigidity also the latter chancellors occupied themselves in working out the details of what had now become and essential part of English and Nigerian Equity. In doing this they were influenced by the adaptation of the formal rules of common law to the circumstances of each case.

The development of equity of redemption, the enforcement of trust, the development of equitable remedies of specific performance and injuctions, were some examples of this ameliorating tendency. Equity was therefore not a

self-sufficient system, as at every point it pre-supposed the existence of common law.

The fusion effected by the judicature Acts has not minimised the dependence of equity on common law. As the Acts fused the courts of law and equity, and created a uniform system of procedure and pleading, they also provided that in cases of conflict of variance the rules of equity shall prevail. There was therefore nothing more than the fusion of jurisdiction, procedure and pleading. The substantive rules themselves however remained separate.

Also, the application of the doctrine of precedent to the court of chancery had done much to perpetuate the independent nature of equitable principles, and has also abrogated the fluid nature of the rules. This has made equity to be stereotyped like the common law and is not capable of re-adapting itself to the changing contemporary conditions. May be some legislations would be of assistance.

5.2. Proposals for Reform

The first proposal for reform of application of equitable principles in Nigeria should begin with the receiption clause which is section 45 of the interpretation Act[1], and other similar reception clause laws which provide that:

> (1) Subject to the provisions of this section and except in so far the common law of England and doctrines of equity together with the statutes of general application that were inforce in England on the 1 day of January 1900 shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation.

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1 This is a Federal Enactment.

By this provision the application of statute enforced in England on 1, January 1900 is unsatisfactory as this has led to the application of English laws by the Nigerian courts which are absolete, antiquated and which had been abrogated or modified in England.

This provision should be re-phrased as statute of general application for the time being in force in England.

The writer agrees with the submission by Baade that:

> The repugnancy doctrine is itself repugnant to the development of our laws and values. The doctrine continues with the process of colonization of our thought and in the letter. The repugnancy clause forces our lawyers and judges and enables us to maintain a mental attitude that has lost touch with its cultural inspirations. This is the most important obstacle in the process of decolonization of our laws[2].

The writer suggests that the common law of England and the principles of English law should be the law that should be made applicable to Nigeria in so far as they are not repugnant to natural justice, equity and good conscience.

The obvious domination of English law over our own laws should be removed from our statute books. The writer is of the opinion that what should be good conscience, Equity and Natural justice should be Nigerian, rather than the present situation whereby the test is subjected to English notions of what it should be.

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[2] Baade, H.W. (1978) On New law for New Nations, Library of law and Contemporary Problems, Pages 18 - 19.

Alternatively the writer recommends the position in East Africa to be adopted in Nigeria, whereby the courts in East Africa will generally apply recognised English doctrines of equity unless:

> (a) Either a particular rule was developed in England in the context of distinctively English family and social relationships, institutions, and circumstances, which are not relevant in East Africa.
>
> (b) Or there exist comprehensive local legislative measures, which exlude expressly or by implication the English rules.
>
> (c) If there exist a recognised English doctrine applicable to a given set of facts, it will not be widened, or extended simply because it must be fair or just to do so in any particular case, but English doctrines will (subject to what has been said above) be applied to transactions arising out of local circumstances in the context of which the rule was originally developed[4].

As has been stated earlier, even at the risk of repetition, it is wrong to apply principles of Equity and make the validity of our own customs and laws subject to them, whereas they were devised to suit a society in England whose social and cultural background is different from that of Nigeria. It is high time the Nigerian courts adopt the above attitude or position by the courts in East Africa.

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[4] Cretney, S. (1968) on the Application of Equitable doctrines by courts in East Africa. Journal of African Law.

Another area which deserves a second look is in the realm of company law, which is popularly known as the principle in Kalner V. Baxter[5] where a company can not enter into a contract before it is incorporated since it does not exist as a legal person, in the same way, it is not bound by contracts made by agents purporting to act on its behalf before its incorporation, and it may not therefore ratify such a contract.

The above rule causes serious hardship against promoters, and it was though that equity had successfully invoked the existence of trust in order to give a right of action or at least to allow a person who contracted with a company's promoter before incorporation to enforce his claim against the company by being subrogated to the promoters rights to an indemnity out of the company's assets for the costs of performing the contract. Though the above case was distinguished on the ground that the newly incorporated company had agreed with the promoter that they would pay him a sum of money as trustee for the plaintiff third party.

It is proposed that existence of aremedy by use of the concept would be beneficial. The mere fact that the company was not yet in existence at the time of the contract should not impose a barrier to the presumption, of a trust. The promoter may be in a fiduciary relation to the subscribers. If the promoter contracts as trustee for the unborn company, there seem to be no reason in principle why the contract should not be enforced. In United States there are decisions to this effect[6].

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[6] Gower Modern Company Law, 2nd Edition P.266.

Such a doctrine has in fact been introduced by State in the Union of South Africa[7].

In Nigeria, this has been taken by Section 72 of Company and Allied matters Decree[8] which provides that. Any contract or other transaction entered into by any person on behalf of the company prior to its formation may be ratified by the company on its formation. However prior to ratification, the person who purports to act on behalf of the company in absence of any agreement to the contrary be personally bound by such contract.

Another areas which should be reformed is tracing of assets. Before a right to trace assets from a third party can be granted in equity, there must be a fiduciary relationship between the claimant and the defendant who holds the property, or as a result of fiduciary relationship between the claimant and another person through whose hands the property has previously passed. That is, there must have been attached some equitable proprietary interest to the property[9]. There must therefore exist an initial fiduciary relationship. At common law however, the right to trace does not depend upon theree being a fiduciary relationship between the parties.

Since equity and common law jurisdictions have been combined, there appears to be no justification for insisting on the requirement any longer, because it means that though the legal remedies are in-adequate, yet the equitable remedies which ought to be better in the circumstances cannot be invoked unless a

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7 Companies Act 1926 Section 71 (No.46 of 1926).

8 Decree 1 of 1990.

9 Re Diplock. (1948) 1 Ch.465.

fiduciary relationship exists between the legal owner and the defendant.

It is, therefore, proposed that either the common law should itself allow a plaintiff to trace into a mixed fund or alternatively equity should lift its veil of fiduciary relationship so as to enable a legal owner to take advantage of the equitable right to trace property in a mixed fund.

Alternatively the writer recommends the adoption of the position of American law in Nigeria, where the right to trace in equity arises whereever a person takes the legal title to property but on the ground of unjust enrichment cannot be allowed to claim the beneficial ownership from legal ownership in order to provide a proprietary remedy. As there seems to be no reason why the right to trace in equity can not be rationalised along the lines of unjust enrichment as American courts have done, since the principle behind the grant of right to trace is the remedying or the prevention of unjust enrichment.

Also, in equity, the right to trace property cannot be enforced against a bonafide purchaser for value without notice. There, wehre a trustee in breach of trust sells trust property to a bonafide purchaser for value without notice the said purchaser takes free from encumbrances and cannot be declared a constructive trustee of the property.

At common law on the other hand, the rights of a bonafide purchaser are limited in scope, for a purchaser cannot acquire a better title than that of his seller. This is expressed in the maxim Nemo dat quod nonhabeat. Though this rule like any other has exceptions, like in the case of where money has been the

subject matter, since convenience of business and ordinary affairs of life demand the existence of a medium of exchange freely transferable and since it is impracticable for the receiver to investigate the true title of money, the receiver acquires a good title against the owner who cannot be restituted.

Also, a transferee of goods can only acquire a better title than his transferor's if he can show that he brought in market overt in good faith and without any notice of any defect in title of the seller or that he bought in good faith from a seller who had a voidable title which was not avoided at the time of the sale. Or that he bought the said goods under the order of a court of competent jurisdiction.

The above limitation may be justified on the ground that a person whose goods have for instance been stolen, should be able to retain his title to the goods. On the other hand, it is arguable that a person who has bought in good faith without notice of defect in title of the seller shoud not be deprived of the goods.

I humbly submit that the position in equity is better and there should be uniformity between the common law and equity with regard to tracing of assets into the hands of bonafide purchasers. There seems to be no reason why a bonafide purchaser should not acquire a good title.

I also recommend the adaptation in Nigeria the Yourba custom of distribution of a deceased's intestate's property on the principle of Ori-Ojori (Per Capita) or according to the number of children of the deceased, with some modification to the effect that each wife should also get her share as well as each child from the said estate.

The present custom of Idi-Igi that is distribution (Per Stirpes) or according to the number of wives that is presently used should be abolished. This is because the custom is inequitable and repugnant to natural justice, and good conscience. It places a wife with fewer children on advantage to the detriment of a wife who has many children and therefore needs to get more share of the said estate. The adaptation of the Ori-Ojori custom of distribution should not be subject to any condition as it is the present case that, Idi-Igi custom is subject to a qualification that where dispute arises, the Head of the family may, in the interest of avoiding litigation, decide that a division according to Ori-Ojori should be adopted in lieu of Idi-Igi, rather, Idi-Igi, should be done away with completely.

I am also of the opinion that the present rule of "foreclosure down" where an order absolute obtained by the first mortgagee forecloses all subsequent mortgagees interest or incumbrances on the property is unsatisfactory, as it negates the equitable maxim of vigilance.

I, therefore recommend that this should be reformed and the first mortgagee to obtain an order absolute on the property should be the person to foreclose all other mortgagee's interest or incumbrances on the property, since Equity Aids the Vigilant and Not the Idolent.

Finally, the present position where foreign judgements can only be enforced if the law of the other country affected by it so permitts is unsatisfactory, as it negates the Maxim Equity Acts in Personam.

I, therefore recommend that either a treaty should be signed by Nigerian and all members of the United Nations for reciporocal enforcement of foreign judgements which should be strictly enforced. Or inalternative a body should be set up by the United Nations for judicial enforcement of foreign judgements in all states. Such a body should be vested with all the necessary powers and machinery to enforce foreign judgements in order not to render them nugatory. This will enable equity to act in personam against the defendant so far as he is within the Court's jurisdiction and can be served with the Court's Processes.

5.3. Conclusion

The above are some proposals for reform of some equitable principles applicable in Nigeria, as has been said in some areas, a distinction should no longer be drawn between common law and equity in some cases. The reform must be vigorously pursued by both judges and legislators together. It must be emphasised, however, that judges rather than legislators have the most essential role to play towards achievement of this objective, as legislation is often heavy-handed instrument and law reform should not be left to that body alone.

I, recommend to Nigerian judges the dictum of Lord Denning in Nyali V. A.G.[10] that:

> The common law cannot be applied in a foreign land without considerable qualification. Just as with an English Oak so with the English Common Law. You cannot transplant it to the African Continent and expect it to retain the tough character which it has in England. It will flourish

> indeed, but it will need common law. It has many principles of manifest justice and good sense which can be applied with advantage to people of every race and colour of the world over. but it also has many refinements, subleties and technicalities which are not suited to other folk. These off-shots must be cut away.
>
> The task of making these qualifications is entrusted to the judges of those lands. It is a great task which calls for all their wisdom.

In this passage Lord Denning is considering the provision that common law shall only be applied so far as local circumstances permitt.

But the reasoning is apt here, and the sentiments apply even more forcibly to the doctrines of equity. Judges who are saddled with the task of interpretation of the law should develop and adopt it to the needs of the society where the law is to operate so that it may remain in touch with social realities of our time.

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