

1. COMMON LAW

COMMON LAW

The Relation of Common Law to Equity

1. In the English system, Equity has acquired a technical connotation and we are accustomed to think of it as a whole jurisdiction distinct from Common Law principles.

2. For better or for worse, the stream of English Law divided into two channels, not without considerable disturbance of the soil and morbidity of the waters.

3. But the interdependence of Law and Equity has never wholly disappeared.

4. We ought not to think of Common Law and Equity as rival systems. Equity was not a self-contained system, at every point it presupposed the existence of Common Law.

The principle on which the Court of Equity granted relief

1. If we look for one general principle which more than any other influenced the Equity developed by the Chancery, we find it in a philosophical and theological conception of *conscience*.

2. The English Equity begins to be systematized under the guidance of a governing moral principle of conscience.

3. Not that we can suppose that all the Chancellors were assiduous and consistent in the pursuit of that principle. Under the Tudors, some of them behaved with complete arbitrariness. These occasional aberrations may have inspired Seldon's oft quoted, but probably only half serious quip about the length of the Chancellor's foot. But they were not typical, the 'conscience' which the Chancellor set before him was normally something more constant and imperishable than the mere caprice of his own whim. A 'hardening' process sets in. By 1676 we find Lord Nottingham expressly repudiating the notion that the conscience of the Chancellor is merely *naturalis et interna*, and in 1818, Lord Seldon summarily repudiates any notion of mere

individual discretion being open to an Equity Judge. Equity is a settled system of conscience.

The limits of the Chancellor's authority

1. This prerogative to grant relief had certain limits :—

(i) It could be exercised only where law gave no rights but where conscience required that certain rights should be given—This was known as the *Exclusive* jurisdiction of Equity.

(ii) It could be exercised only where law gave rights required by conscience but the remedies which it gave were insufficient to satisfy justice—This was known as the *concurrent* jurisdiction of Equity.

(iii) It could be exercised in matters in which the law gave rights required by conscience and remedies sufficient to satisfy the ends of justice but as to which its process was too defective to secure the remedies without the assistance of Equity—This was known as the *auxiliary* jurisdiction of Equity.

The nature of an equitable right

1. The nature of an equitable right will be better understood if it was studied in contrast with a moral right and a legal right. A mere definition would be very little use.

2. By way of introduction we may begin by seeking to have a precise conception of a right. What do we mean when we say that any given individual has a right :

(i) If a man by his own force or persuasion can carry out his wishes, either by his own accord or by influencing the acts of others, he has the 'might' so to carry out his wishes.

(ii) If, irrespectively of having or not having this right, public opinion would view with approval or at least with acquiescence, his so carrying out his wishes, and with disapproval any resistance made to his so doing then he has a '*moral right*' so to carry out his wishes.

(iii) If, irrespectively of the approval or disapproval, acquiescence or non-acquiescence of public opinion, the State would support him in carrying out his wishes then he has a '*legal right*' so to carry out his wishes.

3. Whether it is a question of might, depends upon a man's own powers of force or persuasion. Whether it is a question of moral right depends on the readiness of public opinion to express itself on his side. Whether it is a question of legal right, depends upon the readiness of the State to exert its force on his

behalf. A *legal right* exists where one course of action is enforced, and the other prohibited by that organized society which is called the State. A legal right is, therefore, an interest which is recognized and protected by the State. Right is any interest, respect for which is a duty and the disregard for which is a wrong.

The Characteristics of a legal right

1. A legal right is a right which unlike moral right is enforced by the State.

2. A legal right is founded in a title which must be shown to have been acquired in any one of the modes of acquiring title recognized by law—*e.g.* possession, prescription, agreement and inheritance, etc.

3. A vestitive fact which creates a title to a right in one person destroys the title of another to the same right.

4. A legal right creates an obligation which is either an obligation *in rem* or an obligation *in personam*.

In what respects does an equitable right resemble, in what respects does it differ, from a legal right

1. Equitable right is not like a moral right which is not enforced by the State. Equitable right is like a legal right in that it is enforced by the State.

2. A title to an Equitable right need not be created by any one of the recognized modes by which a title to a legal right is created. This is the most important distinction.

Illustration :

(i) A legal mortgage of land must be created by a deed. But an equitable mortgage may be created otherwise than by deed :—

(a) The statute of trade required that no action shall be brought upon any contract or sale of lands or any interest therein unless agreement was in writing and signed by the party or his agent.

But if the title-deeds of an estate are, without even verbal communication, deposited by a debtor in the hands of the creditor, the mere fact of such deposit is enough to constitute the creditor a mortgage of the estate.

(b) An agreement that a creditor shall hold land at a fair rent to be retained in satisfaction of the debt, is a mortgage in equity but not in law.

(ii) **Assignment**—Legal and Equitable.

Legal.: (1) Assignment must be in writing under the hand of the assignor—signature of the agent not sufficient.

(2) The writing must contain a direction or order to the debtor by the creditor to pay the assignee.

(3) There must be express notice of assignment to the debtor.

Equitable.: (1) The mode or form of assignment is immaterial provided the intention of the parties is clear. Assignment may be verbal.

(iii) **Charge**—Legal and Equitable,

(iv) **Lease**—Equitable and Legal,

(v) **Servitude**—Equitable and Legal.

Married Women's Property

This illustrates how an equitable right can arise without the legal formalities of conveyance required for the creation of a legal right.

(1) At Common Law, husband and wife were one person, and the status of the wife merged in that of the husband. The result of this merger was that the husband became the absolute owner of her personal property and acquired the sole right of controlling and managing her real estate.

On her death he became absolutely entitled to any of her personal property that had not already been sold and to a life estate by *courtsey* in her fee provided a child had been born.

(2) Secondly, a husband could not make a grant to his wife directly or enter into a covenant with her, for to allow either of these things would have been to suppose her separate existence.

(3) The effect of marriage at Common Law was to make a man complete master of his wife's property and to deprive her of contractual capacity.

(4) If property was given to a married woman by words which indicated either expressly or by implication that she was to enjoy it “*for her sole and separate use*”. Equity removed that property from the control of the husband by regarding him as a trustee, and conferred upon the wife full powers of enjoyment and disposition.

But equity went even further than this. Perceiving the danger that a husband might persuade his wife to sell her separate property and hand the proceeds to him, it permitted the insertion in marriage settlements of what is known as “*restraint upon anticipation*”. The effect of such restraint, which is still usual, was that a woman while possessing full enjoyment of the income was prevented during her coverture from alienating or charging the corpus of the property. She could devise but could not sell or mortgage it. This was in complete contravention of the Common Law. At Common Law, not only marriage became a vestitive fact giving the husband a title to the property of his wife but no agreement either with the wife or any other person could take away his right to hold and to alienate her property.

This is an illustration which shows that an Equitable right arises in a manner very different from that in which a legal right arises.

(3) Second distinction between a legal right and an equitable right may be formulated thus :

1. A legal right vested in one owner destroys either partially or completely the right vested in its previous owner. The destruction may be complete or may be partial. If it is a lease, it is a partial destruction. If it is a sale, it is a complete destruction. But whether complete or partial, it is destruction. This is what is meant when it is said that a *vestitive fact* is also *divestive fact*.

2. This is not true when there is a competition between a legal right and an equitable right. An equitable right does not destroy a legal right even when it prevails as against the owner of a legal right. In a conflict between a legal and an equitable right, the equitable right does not destroy the legal right, as one legal right does another legal right.

3. *Why is this so?* For this it is necessary to know how an equitable right came to be recognized at the very start by the Court of Chancery. The historical setting may be presented briefly as follows :—

(i) It was a common practice in England before the Norman conquest for one person to do something *ad opus*—on behalf of another. For instance the Sheriff seized lands and held them *ad opus domini Regis* or where a knight went about to go to the crusades, conveyed his property to a friend to hold it on behalf of his wife and children. The word *opus* became gradually transformed into *use* and the land transferred came to be spoken of as land put in use.

(ii) Now if in certain circumstances some persons could deal with land on behalf of or to the use of another, the question that inevitably occurred to men, why one person should not in a general way be allowed to hold land to the use of another. This as a matter of fact was exactly what was done in course of time. The tenant *A* would transfer his land by a Common Law conveyance to *B*, who undertook to hold it on behalf of, or adopting the correct expression, to the use of *A*.

In such cases *B* was called the *feoffee to use*, that is, the person to whom the feoffment had on certain conditions been made, while *A* went by the name of the *Astin que use*, which being interpreted, meant the person on whose behalf the land was held.

(iii) Reasons why this practice grew, are many. There were altogether six reasons why people liked to follow this practice of putting land in use. Of these two are of importance :—

(1) It enabled a party to escape the feudal burdens to which was liable at Common Law. At Common Law the following burdens were placed upon the tenant—

(i) *Relief*—paid by a new tenant upon the death of an old tenant,

(ii) *Aids*—payable in three cases—

(a) to ransom the Lord when imprisoned;

(b) when the Lord desired to make his Lord a knight;

(c) when the Lord was obliged to supply his eldest daughter with a dowry.

(iii) *Escheat*—The commission by a tenant of a crime serious enough to amount to felony caused the land to escheat.

(iv) *Wardship*.—If an existing tenant died leaving as his heir a male under 21 or a female under 14, the Lord was entitled to the wardship of the heir and as a consequence was free to make any use he liked of the lands during the minority without any liability to render accounts.

(v) *Marriage* :—To find a suitable match for an infant ward was the right of the Lord, and if the infant ward refused, the Lord was entitled to compensation.

The feoffor became free by putting his land in use. The burden fell on the person who acquired *Scisin*, namely, the feoffee to uses.

(2) The second advantage was avoidance of forfeiture and escheat.

Land held by tenure at Common Law was forfeited to the Crown if the tenant committed high treason, and upon his conviction or on slavery for felony, it escheated to the Lord. These unpleasant consequences were avoided, if a tenant, before embarking upon some doubtful enterprise, had the prescience to vest his lands in a few confidential friends. The delinquent might possibly suffer the extreme penalty, but at least his family would not be destitute.

4. Legal effect of putting lands in use :—

(i) The legal consequence of this practice of putting lands in use is an important point to note. It was to cut off the *cestui que use* in the eyes of the Common Law from all connection with the land. By a conveyance operative at Common Law, he had conveyed his estate to the *feoffee to uses* and was, therefore, deprived of all Common Law rights over the land. He was nothing, the feoffee was every thing. Instead of keeping *scisin*, he chooses to rely upon the confidence which he reposed in the feoffee.

(ii) If the feoffee failed or refused to carry out the directions imposed upon him or if he deliberately alienated the land for his own purposes, there was no Common Law action by which he could be rendered liable.

(iii) If a *cestui que use* was let into possession of the land by the feoffee to uses, he was regarded as a mere tenant at will of the *feoffee to uses* and could be turned out any moment, and in the event of contumacy could be sued in trespass by the feoffee.

5. The nature of the remedy provided by the Court of Chaucery to protect the feofor must be clearly understood :—

(i) The Chancellor could not interfere with the jurisdiction of the Common Law Courts by proceeding directly against the land itself because the absolute title to the land was vested in the feoffee by the conveyance. The Chancellor could not disregard the fact that a feoffee was absolute owner at Common Law by virtue of the Common Law conveyance called feoffment whereby the land had been transferred to him.

(ii) The Chancellor distinctly recognized the fact that the feoffee was the owner of the land and had a legal right but what he said to the feoffee was this :—

“You have the legal right, I do not take it away from you but I will not permit you to exercise that legal right in such a way as to infringe the understanding on which the feoffor made the feoffment.”

(iii) The Chancery in assuming jurisdiction over the *use* left untouched and inviolate the legal right of owner at Common Law. It exercised no direct control over the land. It only regulated the mode and manner of the legal right by imposing upon the owner of the legal right an obligation to observe the condition. The legal owner retained his legal right to own and to possess the land. The Chancellor gave the feoffor an equitable right to demand observance of the conditions of feoffment.

6. This is the explanation of that difference between a legal right and an equitable right according to which while one legal right destroys another legal, either partially or wholly, an equitable right does not destroy a legal right.

7. This is also the explanation of the proposition enunciated by Strahan in *Article 11*, namely, that a legal right or interest issues *outflows out* of the property itself while equitable right or interest issues or flows out of the legal interest and not out of the property.

This is so because the Chancellor did not recognize the right of the equitable owner to obtain possession of property. That right he retained in the legal owner. What he gave to the equitable owner was the right to impose a duty upon the conduct of the legal owner and he did not give him the right to claim the property itself.

Illustration: (1918). *2K.B. (Ir.) 353—Graham vs. McIlwaine.*

8. The consequences that follow from this fact may be noted :—

(1) Because an equitable right issues out of a legal right and not out of the property :

(i) It cannot be greater than the legal estate out of which it issues.

Illustration :

Land conveyed to *A* for the use of *B* and his heirs. *A* is the legal owner of the land. *B* is the equitable owner.

But land is conveyed to A and not to A and his heirs. Consequently the legal right of A vanishes at his death. As A's legal right vanishes so does B's equitable right.

An equitable interest cannot survive the legal interest out of which it flows, (1914) *i Ch. 300*

(ii) Equitable right will be affected by all the infirmities attaching to the legal right.

A died intestate leaving B and C as his sons, B being the eldest.

B being away C takes possession and transfers it to D for the use of his wife E.

B returns and claims the property. The legal tide of D comes to an end by reason of the flaw in C's title.

The equitable estate of E, the wife of C, also comes to an end.

III. The third difference between a Legal Right and an Equitable Right is that, a legal right may be a right in *rem* or may be a right in *personam*. But an equitable right is always a right in *personam*. Who is bound to respect the right of an Equitable owner? Not the world but the legal owner and no one else.

It is true, the legal owner, who is bound, is not the legal owner against whom the equitable right first arose but includes also every legal owner to whom the right is transferred.

All the same the proposition stands that an Equitable Right is a right in *personam* which binds only the legal owner.

Explain,

“Equitable rights have a resemblance to rights in *rem*.”

(i) It is true that Equitable Rights have a resemblance to rights in *rem*.

(ii) How does this resemblance arise?

(i) An equitable right will be enforced not only against the owner of legal right but it will be enforced against :—

(a) his representatives and volunteers claiming through or under him,

(b) persons who acquire the legal right

(i) with the knowledge of the legal right,

(ii) against those who could have had knowledge.

(iii) The standard of knowledge set up by the Court of Chancery was so high that no one could escape and every purchaser was bound.

Equitable Priorities

1. An equitable right is a right *in personam*—operating against the owner of a legal right out of which it flows.

2. There may be two equitable rights flowing out of one legal right. Both would be rights in *personam* against the owner of the legal right out of which they flow.

3. An equitable right being a right in *personam* arising out of the legal and not out of the property which is the object of the legal right, could be defeated by transferring the legal right to a new owner. Or another equitable right may arise by this transfer which may defeat the prior equitable right.

4. The question to be considered is, in what cases can such a transfer defeat an equitable right ?

5. The subject is discussed generally under the heading of *Equitable Priorities*. It is so designated because the test applied for the determination of the issue is the priority in time. But the real subject matter is the possible cases where an equitable right can be defeated by transfer of a legal right out of which it arises or by the creation of another equitable right out of the same legal right ?

6. Cases to be considered fall under two classes :

(i) Cases where there is a conflict between Legal Right and an Equitable Right

(ii) Cases where there is a conflict between two equitable rights.

7. Under the first class of cases there are two contingencies which must be distinguished :

(a) Where the Equitable Right is prior in existence to the legal right.

(b) Where an equitable right arises subsequently to the legal right.

Mrs. Thorndike was the beneficiary of a certain Trust Fund of which C was a trustee. In a suit by Mrs. Thorndike, the Court directed the Trustee to transfer of the fund into the Court for the purposes of the Thorndyke Trust and was held by the Administrator. It appeared that the Trustees against whom the order was made had provided themselves improperly with the means of discharging themselves from their personal liability to bring the fund into Court and that there are third persons whom

they had injured. The third party so injured filed a suit praying that the fund held in the name of Thorndyke should be transferred to them. *Contention* : Legal title not in Mrs. Thorndyke and therefore, her right could not prevail. *Contention* disallowed. Held, not necessary to acquire legal title personally. Also no notice.

8. Altogether we shall have three questions to consider which may be formulated thus :

(i) Whether a person who acquires a legal right will be subject to a prior equitable right ?

(ii) Whether a person who has acquired a legal right will be postponed to an equitable right arising subsequently.

(iii) Where neither party has a legal right and both have only equitable rights, which of them will have priority ?

(i) Whether a person who has acquired a legal right will be subject to a prior equitable right ?

1. The answer to this question is this :

A purchaser obtaining a legal estate for valuable consideration and without notice of a prior equitable right will not be bound by the equitable right.

2. There are three important elements in this proposition :

(1) *Purchaser must have acquired a legal Estate.*—There is not much to be said about this. But the following points may be noted :

(a) It is not necessary that he should acquire the legal estate personally. It is enough if somebody does it on his behalf.

Thorndike vs. Hunt, (1859) 3 De. G.I.563=44E.R. 1386

(b) The purchaser's title need not be a *perfect title*.

Illus.: If a trustee's title to property is defective, he may never the less convey to a *bona fide* purchaser an interest which will be effective against the beneficiary who is the owner of a prior equitable right.

Jones vs. Powles (1834) 3My & K. 581.

Facts

1. *John Jones* Owner—Mortgaged his house to Holbrook, redeemed it, obtained acknowledgement of payment—but did not

obtain reconveyance. The legal estate remained outstanding in Holbrook.

2. On the death of Jones Meredith, his shop assistant forged a will of Jones and on its vests obtained possession of the house.

3. Meredith mortgaged it to Hall by a conveyance.

4. Meredith died leaving his wife to whom he left the equity of redemption by a will and thereafter to James Jones.

5. James Jones conveyed it to Watkins.

6. James Jones & Watkins became partners and mortgaged the property to *Powles* who acquired possession as mortgagee.

7. Powles died leaving his wife *Sarah*.

8. Sara Powles secured surrender of the estate and full ownership.

9. Sara Jones sued Sara Powles alleging that the will was a forgery and that Sara Powles had notice and that she could not defeat her right to redeem.

(c) The purchaser should obtain a legal right. But this may be:

(i) at the time of his purchase, or

(ii) he may get it subsequently.

(ii) The purchaser must have given valuable consideration for his right.

A volunteer is always subject to an equitable right. The reason is that he does not suffer by being made liable to the prior equitable right not having paid any consideration.

An existing debt is, however, sufficient consideration.

Illus. Thorndike vs. Hunt.

I had paid no consideration. His right was a sort of an existing debt against the trustee.

(iii) The purchaser must have acquired the right without notice of the existence of the prior equitable right.

This is the most (important)* element in the proposition and the question that arises for consideration is: (further portion not found—ed.)

* Inserted—ed

What is Notice ?

1. Notice may be *Direct or Imputed*. Direct notice is notice to the purchaser himself. Imputed notice is notice to the agent of the purchaser.

2. Direct Notice may be *actual or constructive*

(1) Actual notice is where the matter is *within* the knowledge of the purchaser or his agent.

(2) Constructive notice (is)* where it would have come to his own knowledge or to the knowledge of his agent if proper inquiries had been made.

Actual Notice

1. If reliance is placed upon actual notice to defeat a legal right it must be proved that :

- (i) It was given by a person interested in the property;
- (ii) it was given in the course of negotiations;
- (iii) it was clear and distinct.

Constructive Notice

1. Constructive Notice arises where there is notice of a fact or facts from which notice of the existence of an equitable right could be presumed. It is not notice but evidence of notice.

2. There are three varieties of constructive notice :

(i) Where there is actual notice of a fact which would have led to the notice of the existence of the right. *Bisco vs. Earl of Banbury* (1676) (6) 1 Ch. Ca. 287.

The purchaser had actual notice of a specific mortgage but did not inspect the mortgage-deed which referred to other rights and incumbrances.

He was held to be bound by other incumbrances for he would have discovered their existence if he had inspected the deed as any prudent man would have done *Davis vs. Hutchings*. 1907 1 Ch. 356..

A trustee transferred a share of the beneficiary to the Solicitor relying upon the statement made by him that it was assigned. They did not call for the assignment. The assignment was subject to a charge in favour of another. *Held* they had constructive notice of the charge.

* Inserted—ed.

Occupation of tenant as Constructive Notice

Where land is in the occupation of some one other than the vendor, the fact of the occupation gives the purchaser constructive notice of any right of the occupying tenant.

It will not amount to notice of a third person's right—9. *Moo. P. C. 18.*

We now come to the parol evidence of notice. Upon this subject the rule is settled, that a purchaser is not bound to attend to vague rumours about purchaser—to statements by mere strangers, but that a notice in order to be binding must proceed from some person interested in the property—

R. 3 Ch. App. 488 *Lloyd vs. Banks* Carries j—1868

If he attempts to prove knowledge of the trustee *Aliunde*, the difficulty which this Court always feel in attending to what are called casual conversations or in attending to any kind of intimation which will put the trustee in a less favourable position as regards his mode of action than he would have been in if he had got a distinct and clear notice from the incumbrances. At the same time I am bound to say that I do not think it would be consistent with the principles upon which this Court has always proceeded, or with the authorities which have been referred to, if I were to hold that under no circumstances could a trustee without express notice from the incumbrancer be fixed with knowledge of the incumbrance.—*Illus.: 9 Moo. P. C. 18 Barnhart vs. Greenshields.*

Where it was held that vague reports from persons not interested in the property will not affect the purchaser's conscience.

Should notice be directly from the Incumbrancer ?

A purchaser cannot safely disregard information, from whatever source it may come. It is of such a nature that a reasonable man of business would act upon that information even if it came from a news-paper report. *S. R. 3 Ch. App. 488 1868*

Registration

The registration of any instrument or matter required or authorized to be registered by law is to be deemed to constitute

actual notice of such *instrument* or *matter* but not necessarily of its contents.

(ii) Where inquiry is purposely avoided to escape being bound by notice.

1. John Towsey contracted for the purchase of certain property in 1776.

2. He borrowed the amount of purchase money from one Dr. P, and placed the title-deeds in his hands as a security for repayment.

3. In 1790, T was very much indebted to one Ellames in a considerable sum of money and executed a mortgage of the same property to Ellames.

4. Dr. P did not give any information of his claim to Ellames.

5. Ellames said that he made no inquiries after the title-deeds before he took the security, and admitted that upon executing the mortgage he inquired for them, and was informed of their being in the hands of Dr. P. but that he understood them to be so for safe custody only.

6. He received this information from one J. who was his brother-in-law, who had prepared the mortgage and appeared as his agent at the time of the execution of it.

7. Dr. P claimed priority over Ellames. It was granted as Ellames was held to have had notice.

(iii) Where there is gross negligence in not making usual and proper inquiries :

1899. 2 Ch. 264

1921. 1 Ch. 98.

Imputed Notice

1. The underlying theory of agency is that a man can do a thing by an agent which he can do himself. Conversely, what is done by the agent is done by him. This being so, it is open to argument that what is known to the agent must be taken to be known