Chapter I
Equity—Its Nature, History and Courts

"No, we ought to think of the relation between common law and equity not as that between two conflicting systems, but as that between Code and Supplement, that between text and gloss. And we should further remember this, that equity was not a self-sufficient system—It was hardly a system at all—But rather a collection of additional rules. Common Law was, we may say, a complete system—If the equitable jurisdiction of the Chancery had been destroyed, there still would have been law for every case, somewhat rude law it may be, and law imperfectly adapted to the needs of our time, but still law for every case. On the other hand if the Common Law had been abolished equity must have disappeared also, for at every point is presupposed a great body of common law."

—Maitland: *Lectures on Equity*, p. 153, 1969 Edn.

SYNOPSIS

1. HISTORICAL BACKGROUND

England was conquered by the Normans in the year 1066. The period preceding this date is called that of Anglo-Saxon law of which little is known. There was no common law for the whole of England at any time before the Norman conquest.

With the Norman conquest, the period of tribal rule came to an end and feudalism was installed. It prepared and paved the way for the development of the Common Law.

The creation of Common Law (*Comune Ley*) was to be the exclusive work of the Royal Courts of Justice, usually called the courts of the Westminster, after the name of the place where they sat from the thirteenth century.[1] Common Law is that part of the law of England which before the Judicature Acts, 1873-75 was

1. R. David and Brierley: *Major Legal Systems in the World Today*, p. 258.

adjudicated by the Common Law courts (especially the former Courts of Queen's Bench, Common Pleas and Exchequer at Westminster), as opposed to equity, or that part of the law which was administered by the Court of Chancery at Lincoln's Inn.[2]

Blackstone defines Common Law as the municipal law of England or the rule of civil conduct prescribed to the inhabitants of the kingdom.[3] It is "experience expressed in law"[4]. It is composed of established customs, established rules and maxims such as "the King can do no wrong"[5].

In the earlier times the Common Law courts provided no remedy in many cases where one was required. Hence the custom grew of applying for redress to the King in Parliament or to the King in Council, who referred the matter to the Chancellor. In later times petitions were presented to the Chancellor directly. The Chancellor being an ecclesiastic, and keeper of the King's conscience, did not feel bound to follow the rules of Common Law, but gave such relief as he thought the petitioner or plaintiff entitled to "in equity and good conscience"[6]. Equity thus represents the conscience of law, and a moral correction of law in order to accord more with justice.

It is with this "equity" and its principles that we are concerned with in this book.

2. WHAT IS EQUITY

In its primary sense equity is fairness, or that rule of conduct which in the opinion of a person or class ought to be followed by all other persons.[7] According to Osborne[8] it is primarily fairness or natural justice.[9] In the classic words of Sir Henry Maine it is a "fresh body of rules by the side of the original law, founded on distinct principles and claiming to supersede the law by virtue of a superior sanctity inherent in those principles".

"In progressing societies social necessities and social opinions are always more or less in advance of law. The gulf that is thus created between the social opinions and the existing law is bridged by three instrumentalities, namely, (*i*) Legal Fictions, (*ii*) Equity, and (*iii*) Legislation. When law becomes fixed, legal fictions liberalise it, when legal fictions also become outdated, equity softens the rigour of law, till finally a point is reached when expansion of equity ceases."

Derived from the Roman term "aequitas" (aequus-equal) equity means equalization or levelling down any arbitrary preferences or denial of justice. It is a means to reach as near as possible to natural or ideal justice, but one cannot forget that equity is not natural justice. It differs from it. Thus equity means to

2. Jowitt: *Dictionary of English Law*, p. 426
3. Blackstone: *Commentaries on English Law*, 4th Edn. of Chase's Edn., p. 29.
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5. Blackstone: *Commentaries on English Law*, 4th Edn. of Chase's Edn., p. 29.
6. Jowitt: *Dictionary of English Law*, p. 724.
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8. Osborne: *Dictionary of English Law*, p. 124.
9. Walker D.M.: *The Oxford Companion to Law*, 1980 Edn., p. 424.

do unto all men as we would they should do unto us. "Equity is no part of the law, but a moral virtue, which qualifies, moderates and reforms the rigour, hardness and edge of the law, and is a universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of law) and defends the law from crafty evasions, delusions and new subtleties, invented and contrived to evade and delude the Common Law, whereby such, as have undoubted right, are made remediless; and this is the office of equity, to support and protect the Common Law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law nor create it, but assists it.[10] "This new body of rules (or 'equity') is distinguishable from the general body of law, not because it seeks to achieve a different end (for both aim at justice), nor because it relates necessarily to a different subject-matter, but merely because it appears at a later stage of legal development."[11]

In *D.D.A.* v. *Skipper Construction Co. (P) Ltd.*[12], the Supreme Court observed that the jurisdiction and power of Supreme Court to make orders *to do complete justice* is exercised to meet the situations which cannot be effectively dealt with under the existing law. This was a case of fraud committed by public servants. Referring to the case of *A.G. of India* v. *Amritlal Pranjivandas*[13], the Court observed: "After all, all these illegally acquired properties are earned and acquired in ways illegal and corrupt at the cost of the people and the State. The State is deprived of its legitimate revenue to that extent. These properties must justly go back where they belong, i.e., to the State. What we are saying is nothing new or heretical." Approving the observations in *Reid case*[14], the Supreme Court said that absence of provision in law for relief cannot deter the Supreme Court from doing justice between the parties. Doing justice between the parties is a compulsion of judicial conscience on the part of the Supreme Court as a Court of Equity. The fiduciary relationship may not exist as in the present case nor it is a case of a holder of public office, yet if it is found that someone has acquired properties by defrauding the people and if it found that the persons defrauded should be restored to the position in which they would have been but for the said fraud, the court can make all necessary orders. This is what equity means and in India the courts are not only courts of law but also Courts of Equity.[15]

In the area of service law too, for doing complete justice to the parties, the court acts as a Court of Equity. In *Chenga Reddy case*[16] the Court observed that a Court of Equity must so act within the permissible limits so as to prevent injustice. "Equity is not past the age of child-bearing" and an effort to do justice between the parties is a compulsion of judicial conscience. Courts can

10. *Dudley* v. *Dudley*, (1705) Prec Ch 241, *per* Sir Nathan Wright, L.K.
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14. *A.G. for Hong Kong* v. *Reid*, (1993) 3 WLR 1143: (1994) 1 All ER 1.
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and should strive to evolve an appropriate remedy in the facts and circumstances of a given case, so as to further the cause of justice, within the available range and forge new tools for the said purpose, if necessary to chisel hard edges of the law.

However, the power to make orders *to do complete justice*[17] should be left undefined so that it may be flexible enough to be exercised depending upon needs of the particular case. The power has to be used with circumspection.[18]

3. EQUITY AND EQUITABLE: MEANING

Equity

The word equity is used in two senses[19]—one, in a broad popular sense and second, in a narrow technical sense.

In its *popular broad sense* it resembles natural justice or morality. However it is not coextensive with the principles of natural justice in so far as many matters of natural justice are left to the dictates of public opinion or to the conscience of each individual instead of being subject to legal sanctions.

In its *technical narrow sense* it may be said to be "a portion of natural justice which, though of such a nature as properly to admit of being judicially enforced, was, for certain circumstances omitted to be enforced by the Common Law courts—an omission which was supplied by the Court of Chancery".

The broad and popular sense is thus very near to principles of natural justice or morality; the narrow and technical sense is concerned with only a part of the principles of natural justice which the Common Law courts failed to enforce.

Besides these two main senses, the word equity can be viewed from different angles, *e.g.*, in its *primary* sense, it is fairness or justice according to natural law or right; *philosophically* it means to do unto all men as we wish they should do unto us; in a *moral* sense, construing the positive laws not according to their strict letter but in a reasonable and benignant spirit is equity. In this last sense it *corrects mere law, where the mere law fails on account of its universality*. In the *sense of fairness* it is frequently opposed to law and legality, because that which is fair does not always constitute a legal claim or defence. Equity in the *Roman sense*, the details of which we shall see later on, is a body of moral principles introduced in the Roman law by Praetor by the side of civil law (*jus civile*). In the *English sense* it is a system of rules orginating in the English Chancery Courts and comprising a settled and formal body of legal and procedural rules and doctrines that supplement, aid and override common and statute law and is designed to protect rights and enforce duties fixed by substantive law.

Adumbrating the situation one may say that in its basic meaning equity is evenness, fairness, justice and is used as a synonym for natural justice. In a

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17. See *Delhi Administration* v. *Nand Lal Pant*, (1997) 11 SCC 488: AIR 1997 SC 3068.
18. (1996) 4 SCC 622, *supra*.
19. *Snell's Principles of Equity*, 27th Edn., p. 13.

secondary meaning it can be contrasted with strict rules of law (*aequitas* as against *strictum jus* or *rigour juris*): in this sense it is the application to particular circumstance of the standard of what seems naturally just and right, as contrasted with the application to those circumstances of a rule of law, which may not provide for such circumstances or provide what seems unreasonable or unfair... . In a third sense equity is the body of principles and rules developed since mediaeval times and applied by the Chancellors of England and the Courts of Chancery... .[20]

Equitable

In the sense of fairness equity is frequently opposed to law and legality, because that which is fair does not always constitute a legal claim or defence. Hence when a legal rule or remedy is capable of two interpretations or applications, one literal or restrictive and the other iberal (*i.e.*, calculated to make the rule or remedy operate fairly, and to extend its benefit to as many cases as possible), the latter is called an *equitable construction* or application. It is in this sense that the right of stoppage in transit and the old section of ejectment are said to be *equitable remedies*; and the *jurisdiction* of Common Law courts to set aside judgments obtained by default and confession was called an equitable one. And when a statute contains a provision which applies literally to only a particular class of cases but it is clear from the nature of the provision that if another class of cases had been present to the framer's mind, it would have been extended to them; they are said to be *within the equity of the statute*, the reason being that the law-makers could not possibly set down all cases in express terms. Thus an old statute literally applying only to executors was held *to extend by equity* to administrators.[21]

In other words equitable is what is fair, reasonable and right and also what was recognised, regulated and enforced by the Courts of Equity or Chancery in accordance with the principles of equity as developed and understood by those courts with differed in many respects from what was recognised, regulated and enforced by courts of Common Law.[22]

4. NEED FOR EQUITY

Laws are not rules of thumb for the mechanical regulation of society.[23] Every human law contains an aspiration towards ideal justice or an approximation to ideal justice. This presupposes the law to be sufficient unto itself. But it is not so and hence the need for supplementary or residuary jurisdiction.

As cited by Allen,[24] speaking about the aspirations of law and need for equity, Plato said that "... the best thing of all is not that the law should rule, but

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20. Walker D.M.: *The Oxford Companion to Law*, 1980 Edn., pp. 424, 425.
21. Jowitt: *Dictionary of English Law*, p. 724.
22. Walker D.M.: *The Oxford Companion to Law*, 1980 Edn., p. 423.
23. Allen: *Law in the Making*, citing Carlyle, p. 383.
24. *Ibid.*, pp. 387, 388.

that a man should rule, supposing him to have wisdom and royal power''. This is ''because the law cannot comprehend exactly what is noblest or most just, or what is best, for all. The differences of men and actions and the endless irregular movements of human beings do not admit of any universal and simple rule. No art can lay down rule which will last for ever''. But this is exactly what law seeks to accomplish; like an ''obstinate and ignorant tyrant'' it does not yield to circumstances, does not allow anything to be done contrary to his appointment or any question to be asked—not even in sudden changes of circumstances, when something happens to be better than what he commanded for someone. This rigidity and stiffness of law is sought to be softened by using the natural sense of justice.

If truth lies at the bottom of a well, so does justice, and it will be found only by those who know how to swim, not by those who throw themselves in at a venture.

Nevertheless the natural sense of justice—or what has been called ''*vulgaris aequitas*'', is not a meaningless term. All law must postulate some kind of common denominator of just instinct of the community. There is no meaning in any legal system unless this foundation exists. Incalculable though the variations of subjective opinion may be, it needs no subtle dialectic to demonstrate that there is in man at least an elementary perception of justice as a form of the right and the good, which no law, save under an irresponsible tyrant, dare flagrantly transgress.

It is upon some such primary sense of justice that a great deal of early law—not merely what we have come to recognise as equity in a special sense—is founded.

Putting it in a different way, law aims at establishing generalization, uniformity and universality. By *uniformity* we mean that the essential meaning and intention of a rule must be uniform. There can be no exception to it. To the quality of *universality* there may be apparent exceptions but no generalization can be completely general, as no straight line can be perfectly straight. Law and Justice exist for the regulation of rights and duties and the incompleteness of the generalisation which is certain to make itself felt at some point or the other, may produce results which are antithetic to the very purpose of generalization. In many legal systems, therefore, a discretionary or moderating influence has been superadded to the rigour of formulated law. It has assumed different names at different times. When a rule works hardship in a particular case, it is not only permissible but it is necessary to ask, ''Is it not a bad rule?'' Not infrequently it is proved to be so, and in the light of the ''glaring case'' it stands self-condemned. A change must then be made. And it is by this somewhat painful process of trial and error that a great many necessary reforms in all legal systems have been effected, formerly by fiction when legislation was less sensitive to social needs than it is today; in modern times by legislation.[25]

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25. Allen: *Law in the Making*, Chapter V.

5. DESCRIPTIONS OF EQUITY

Per Sir Nathan Wright, L.K.,[26] equity is no part of law, but a moral virtue, which qualifies, moderates and reforms the rigour, hardness and edge of the law, and is a universal truth, it does also assist the law where it is defective and weak in the constitution (which is the life of law) and defends the law from crafty evasions, delusions and new subtleties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. *Equity therefore does not destroy the law, nor create it, but assists it.*

Aristotle speaks about equity in more general and idealistic terms as: "It is equity to pardon human failings and to look to the lawgiver and not to the law; to the spirit and not the letter; to the intention and not to the action; to the whole and not to the part; to the character of the actor in the long run and not in the present moment; to remember good rather than evil, and good that one has received rather than good that one has done; to bear being injured; to wish to settle a matter by words rather than by deeds; lastly to prefer arbitration to judgment, for the arbitrator sees what is equitable, but the judge only the law and for this an arbitrator was first appointed, in order that the equity might flourish." Above all the inelegances of positive law, he says, "the one-remains, the many (laws) change and pass".[27]

As observed by Underhill: "Equity was originally the result of common sense against the pedantry of law and trammels of the feudal system; it became a highly artificial and refined body of legal principles and it is at the present day an amendment and modification of the Common Law." Per Wooddenson: "Equity was a judicial interpretation of laws, which presupposing the legislator to have extended what was just and right, pursued and effectuated that intention."

6. DEFINITIONS OF EQUITY

Plato expressed that "equity is a necessary element supplementary to the imperfect generalization of legal rules".

Aristotle described equity as eternal and immutable and reiterated that "the equitable is just and better than one kind of justice—not better than absolute justice, but better than the error that arises from the absoluteness of the statement;...it is a correction of legal justice".

Blackstone defines equity as the soul and spirit of all law. Positive law is construed and natural law is made by it. In this, equity is synonymous with justice, in that it is the true and sound interpretation of the rule.

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26. *Dudley* v. *Dudley*, (1705) Prec Ch 241, 244.
27. Cited in Allen: *Law in the Making*, p. 391.

West, J., describing equity as "an intellectual energy", expressed that "it moulds its deductions from one set of data as the common law to another into continued adaptation to the growing need of society".[28]

According to Snell, equity is "a portion of natural justice which, although of a nature suitable for judicial enforcement, was for historical reasons not enforced by the Common Law courts, an omission which was supplied by the Court of Chancery".

Story defines it as "that portion of remedial justice which was exclusively administered by a court of equity as contradistinguished from that portion of remedial justice which was exclusively administered by a court of Common Law".

Maitland says that "we ought not to think of Common Law and Equity as of two rival systems" but, "we ought to think of Equity as supplementary law, a sort of appendix added to our code, or a sort of gloss written round our code... which used to be administered by the High Court of Justice as part of the code".

Thus equity is an original attempt to solve the riddles of law, where difficult and complex problems confront a legal system. The general nature that lurks through all the above definitions is that it is founded in natural justice, honesty and right. It is the true and sound interpretation of a rule. We may also say that it existed alongside the original civil law, not to supersede or destroy the law but to assist it. It is the inherent capacity of law to adjust itself and override its hardships and formalities which it acquires in course of time.

7. SUBJECT-MATTER OF EQUITY

Pointing to the field of equity and its subject-matter Snell explains that "although in many cases equity intervened to put right an injustice, it must not be thought that every injustice was the subject of an equitable intervention. In truth, there was no certainty when equity would come into play". He gives two instances for this purpose: Firstly, wherein land devised to the heir was not liable to contract debts of the ancestor where debt was incurred for purchasing that very land and secondly, wherein a father was not allowed to succeed as heir to the real estate of his son. These were subsequently remedied but this proves the above proposition that every injustice was not the subject-matter of equity and it is not possible to define equity solely in terms of natural justice. Thus any definition of equity must take into account not the substance or principle but the form and history of equity because "*equity is a historical accident*".[29]

Morals and ethics though not enforceable as a part of the principles of equity, do play an important role in the procedural matters and decisions of the courts.[30]

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28. *Kahandas Narandas, in re*, (1880) 5 Bom 154, 172.
29. *Snell's Principles of Equity*, 27th Edn., pp. 6-7.
30. *Ibid.*

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secondary meaning it can be contrasted with strict rules of law (*aequitas* as against *strictum jus* or *rigour juris*): in this sense it is the application to particular circumstance of the standard of what seems naturally just and right, as contrasted with the application to those circumstances of a rule of law, which may not provide for such circumstances or provide what seems unreasonable or unfair... . In a third sense equity is the body of principles and rules developed since mediaeval times and applied by the Chancellors of England and the Courts of Chancery... .[20]

Equitable

In the sense of fairness equity is frequently opposed to law and legality, because that which is fair does not always constitute a legal claim or defence. Hence when a legal rule or remedy is capable of two interpretations or applications, one literal or restrictive and the other iberal (*i.e.*, calculated to make the rule or remedy operate fairly, and to extend its benefit to as many cases as possible), the latter is called an *equitable construction* or application. It is in this sense that the right of stoppage in transit and the old section of ejectment are said to be *equitable remedies*; and the *jurisdiction* of Common Law courts to set aside judgments obtained by default and confession was called an equitable one. And when a statute contains a provision which applies literally to only a particular class of cases but it is clear from the nature of the provision that if another class of cases had been present to the framer's mind, it would have been extended to them; they are said to be *within the equity of the statute*, the reason being that the law-makers could not possibly set down all cases in express terms. Thus an old statute literally applying only to executors was held *to extend by equity* to administrators.[21]

In other words equitable is what is fair, reasonable and right and also what was recognised, regulated and enforced by the Courts of Equity or Chancery in accordance with the principles of equity as developed and understood by those courts with differed in many respects from what was recognised, regulated and enforced by courts of Common Law.[22]

4. NEED FOR EQUITY

Laws are not rules of thumb for the mechanical regulation of society.[23] Every human law contains an aspiration towards ideal justice or an approximation to ideal justice. This presupposes the law to be sufficient unto itself. But it is not so and hence the need for supplementary or residuary jurisdiction.

As cited by Allen,[24] speaking about the aspirations of law and need for equity, Plato said that "... the best thing of all is not that the law should rule, but

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20. Walker D.M.: *The Oxford Companion to Law*, 1980 Edn., pp. 424, 425.
21. Jowitt: *Dictionary of English Law*, p. 724.
22. Walker D.M.: *The Oxford Companion to Law*, 1980 Edn., p. 423.
23. Allen: *Law in the Making*, citing Carlyle, p. 383.
24. *Ibid.*, pp. 387, 388.

that a man should rule, supposing him to have wisdom and royal power''. This is ''because the law cannot comprehend exactly what is noblest or most just, or what is best, for all. The differences of men and actions and the endless irregular movements of human beings do not admit of any universal and simple rule. No art can lay down rule which will last for ever''. But this is exactly what law seeks to accomplish; like an ''obstinate and ignorant tyrant'' it does not yield to circumstances, does not allow anything to be done contrary to his appointment or any question to be asked—not even in sudden changes of circumstances, when something happens to be better than what he commanded for someone. This rigidity and stiffness of law is sought to be softened by using the natural sense of justice.

If truth lies at the bottom of a well, so does justice, and it will be found only by those who know how to swim, not by those who throw themselves in at a venture.

Nevertheless the natural sense of justice—or what has been called ''*vulgaris aequitas*'', is not a meaningless term. All law must postulate some kind of common denominator of just instinct of the community. There is no meaning in any legal system unless this foundation exists. Incalculable though the variations of subjective opinion may be, it needs no subtle dialectic to demonstrate that there is in man at least an elementary perception of justice as a form of the right and the good, which no law, save under an irresponsible tyrant, dare flagrantly transgress.

It is upon some such primary sense of justice that a great deal of early law—not merely what we have come to recognise as equity in a special sense—is founded.

Putting it in a different way, law aims at establishing generalization, uniformity and universality. By *uniformity* we mean that the essential meaning and intention of a rule must be uniform. There can be no exception to it. To the quality of *universality* there may be apparent exceptions but no generalization can be completely general, as no straight line can be perfectly straight. Law and Justice exist for the regulation of rights and duties and the incompleteness of the generalisation which is certain to make itself felt at some point or the other, may produce results which are antithetic to the very purpose of generalization. In many legal systems, therefore, a discretionary or moderating influence has been superadded to the rigour of formulated law. It has assumed different names at different times. When a rule works hardship in a particular case, it is not only permissible but it is necessary to ask, ''Is it not a bad rule?'' Not infrequently it is proved to be so, and in the light of the ''glaring case'' it stands self-condemned. A change must then be made. And it is by this somewhat painful process of trial and error that a great many necessary reforms in all legal systems have been effected, formerly by fiction when legislation was less sensitive to social needs than it is today; in modern times by legislation.[25]

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25. Allen: *Law in the Making*, Chapter V.

5. DESCRIPTIONS OF EQUITY

Per Sir Nathan Wright, L.K.,[26] equity is no part of law, but a moral virtue, which qualifies, moderates and reforms the rigour, hardness and edge of the law, and is a universal truth, it does also assist the law where it is defective and weak in the constitution (which is the life of law) and defends the law from crafty evasions, delusions and new subtleties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. *Equity therefore does not destroy the law, nor create it, but assists it.*

Aristotle speaks about equity in more general and idealistic terms as: "It is equity to pardon human failings and to look to the lawgiver and not to the law; to the spirit and not the letter; to the intention and not to the action; to the whole and not to the part; to the character of the actor in the long run and not in the present moment; to remember good rather than evil, and good that one has received rather than good that one has done; to bear being injured; to wish to settle a matter by words rather than by deeds; lastly to prefer arbitration to judgment, for the arbitrator sees what is equitable, but the judge only the law and for this an arbitrator was first appointed, in order that the equity might flourish." Above all the inelegances of positive law, he says, "the one-remains, the many (laws) change and pass".[27]

As observed by Underhill: "Equity was originally the result of common sense against the pedantry of law and trammels of the feudal system; it became a highly artificial and refined body of legal principles and it is at the present day an amendment and modification of the Common Law." Per Wooddenson: "Equity was a judicial interpretation of laws, which presupposing the legislator to have extended what was just and right, pursued and effectuated that intention."

6. DEFINITIONS OF EQUITY

Plato expressed that "equity is a necessary element supplementary to the imperfect generalization of legal rules".

Aristotle described equity as eternal and immutable and reiterated that "the equitable is just and better than one kind of justice—not better than absolute justice, but better than the error that arises from the absoluteness of the statement;...it is a correction of legal justice".

Blackstone defines equity as the soul and spirit of all law. Positive law is construed and natural law is made by it. In this, equity is synonymous with justice, in that it is the true and sound interpretation of the rule.

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6. *Dudley* v. *Dudley*, (1705) Prec Ch 241, 244.
7. Cited in Allen: *Law in the Making*, p. 391.

West, J., describing equity as "an intellectual energy", expressed that "it moulds its deductions from one set of data as the common law to another into continued adaptation to the growing need of society".[28]

According to Snell, equity is "a portion of natural justice which, although of a nature suitable for judicial enforcement, was for historical reasons not enforced by the Common Law courts, an omission which was supplied by the Court of Chancery".

Story defines it as "that portion of remedial justice which was exclusively administered by a court of equity as contradistinguished from that portion of remedial justice which was exclusively administered by a court of Common Law".

Maitland says that "we ought not to think of Common Law and Equity as of two rival systems" but, "we ought to think of Equity as supplementary law, a sort of appendix added to our code, or a sort of gloss written round our code... which used to be administered by the High Court of Justice as part of the code".

Thus equity is an original attempt to solve the riddles of law, where difficult and complex problems confront a legal system. The general nature that lurks through all the above definitions is that it is founded in natural justice, honesty and right. It is the true and sound interpretation of a rule. We may also say that it existed alongside the original civil law, not to supersede or destroy the law but to assist it. It is the inherent capacity of law to adjust itself and override its hardships and formalities which it acquires in course of time.

7. SUBJECT-MATTER OF EQUITY

Pointing to the field of equity and its subject-matter Snell explains that "although in many cases equity intervened to put right an injustice, it must not be thought that every injustice was the subject of an equitable intervention. In truth, there was no certainty when equity would come into play". He gives two instances for this purpose: Firstly, wherein land devised to the heir was not liable to contract debts of the ancestor where debt was incurred for purchasing that very land and secondly, wherein a father was not allowed to succeed as heir to the real estate of his son. These were subsequently remedied but this proves the above proposition that every injustice was not the subject-matter of equity and it is not possible to define equity solely in terms of natural justice. Thus any definition of equity must take into account not the substance or principle but the form and history of equity because "*equity is a historical accident*".[29]

Morals and ethics though not enforceable as a part of the principles of equity, do play an important role in the procedural matters and decisions of the courts.[30]

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28. *Kahandas Narandas, in re*, (1880) 5 Bom 154, 172.
29. *Snell's Principles of Equity*, 27th Edn., pp. 6-7.
30. *Ibid.*

8. EQUITY UNDER THE ROMAN LEGAL SYSTEM

Romans had also evolved an equity jurisprudence. The kings in Rome were the absolute monarchs and held all the reins of religious and temporal powers. There were also forms of action like those under the English Common Law. In course of time the law they administered became hard, formal and arbitrary and many wrongs remained without remedy.

In 366 BC the first praetor was appointed who administered law on behalf of the King and had complete powers to change and modify the law in order to do justice in particular cases. He thus created new rules known as *edictum novum*; consequently, a body of moral principles was introduced to the Roman Law which existed by the side of the original civil law (called *jus civile*).

9. HISTORY OF EQUITY IN ENGLAND

(A) Origin of Common Law

Prior to the Norman conquest in the eleventh century certain customs and usages had become common to almost the whole of England and now and then some of them were also recognised in their 'dooms' issued by kings, with the advent of the Normans they swelled in number in an unwritten form. The kings' judges in the course of hearing a case tried to find out these common customs and based their decisions thereon. The view of one judge was then adopted by another, because that course saved the judges the trouble of ascertaining such customs and usages again and again and in this way grew the precedents and the doctrine of *stare decisis*. In course of time these customs were applied by judges as having the force of law, and thus developed a body of rules which, as Professor Munro says, "had really never been ordained by any monarch or enacted by any legislative body, but which merely represented the crystallization of usages and customs, and these gradually came to be known as the Common Law".[31]

By the time of Edward I, Common Law had taken definite shape. It was administered by King's Justice on circuit and the three Common Law courts, namely, King's Bench, Common Pleas and Exchequer. King's Courts administered equity also but at that time they did not regard themselves as administering a new body of law.[32] They were trying to give relief in hard cases. As noted by Allen[33] and others, Norman and English kings were fountains of justice and the defenders of the poor and defenceless. They themselves dispensed justice under a prerogative of mercy and equity was an essential part of their regal office.

Of the three courts of Common Law, the Exchequer was not only a court of law but was also an administrative department, its secretarial section being called a Chancery. The head of this section was called a Chancellor, whose

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31. Munro: *Government of Europe*, 3rd Edn., (1938), p. 298, cited by H.P. Dubey: *A Short History of the Judicial Systems of India*, (1968), p. 407.
32. Maitland: *Lectures on Equity*, p. 5.
33. Allen: *Law in the Making*, Chapter V.

business was to collect State revenue and to decide disputes concerning the same. The Court of the Exchequer department met thrice a year on the occasion of the three great feasts of the temple. The Chancellor has been described by Maitland as the "King's prime minister".[34]

If a person wanted to start an action at Common Law, he had to obtain a writ on payment of prescibed frees from the Chancery section. The Chancellor issued such writs. It should be noted that in the 13th century the available writs covered a very narrow ground. An injured party could only sue at Common Law if his complaint came within the scope of an existing writ or form of action. Many genuine cases remained unredressed and the plaintiff was without a remedy because his cause of action did not fit into any of the existing forms of action. This position has been expressed as the "dancing of the Common Law round the recognised forms of action". As noted by Snell, a plaintiff was often unable to obtain a remedy in the Common Law courts, even when they should have had one for him. The dictum therefore was that "where there is no writ, there is no remedy". Even when the claim came within the scope of an existing writ, it may have been that due to the power and influence of the defendant, he could intimidate the jury and defy even the court, and the plaintiff could not get justice before a Common Law court. In those rough days of the 13th century, it was the King and the King alone in his council who had wide discretionary powers to do justice among his subjects. The plaintiff therefore had to petition to the King in council praying for a remedy. The Chancellor looked after this aspect and issued new writs. By 1348, the King completely assigned his equity jurisdiction to the Chancellor. This formed a custom and the same was confirmed and recognised by Edward III in 1349 by an order. But the Chancellor's discretion to issue writs was fettered by precedents and provisions of the Oxford, 1258[35] and the Statute of Westminster II, 1258 (called *in consimili casu*). In the 14th century these petitions were addressed directly to him. By the end of the 15th century, the Chancellor heard the petitions and decided them independently without the aid of the council. He made decrees in his own name. This position continued up to 1474. As pointed out by Potter,[36] it is well to remember that the origin of the Common Law courts is to be found in the need to administer the law, while the Chancellor inherited a jurisdiction to do justice where the law gave none. This came to be recognised by the judges themselves. So a Chancellor said: "If a man had nothing in writing and the debtor was dead he would have no remedy at Common Law, and yet here by this court of conscience he will have a remedy."

Thus came into being the equitable jurisdiction of the Chancery.

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34. Hanbury: *Modern Equity*, Chapter I.
35. A plan of reform containing the first constitutional provisions in English history. *See* Walker: Oxford Companion to Law, p. 911.
36. *Butterworth's Dictionary*, Vol. 2, (1969), p. 173.

(B) Deficiencies of Common Law

The special deficiencies or imperfections of medieval Common Law were as to the law itself, that its rules were too strict and that it did not cover the whole field of obligations; as to its administration, that it had no effectual means of extracting the truth from the parties, that its judgments were not capable of being adopted to meet special circumstances; and that they were often unenforceable through the opposition of the defendant, or were turned into a means of oppression.[37]

There were thus three types of major deficiencies:

(*i*) incomplete or no remedies in many cases;

(*ii*) inadequate relief; and

(*iii*) incomplete and defective procedures.

As noted by Pomeroy, (*i*) rigidity of judicial precedents, (*ii*) adherence to feudalistic institutions and technicalities of forms, (*iii*) antipathy towards Roman Law, and (*iv*) the defective and rigid procedure, were the outstanding defects of the Common Law.

Besides this, influence of the defendant enabled him to be get rid of the law.

(C) The Chancellor

In medieval times, the Chancellor was the most important and the most powerful personage in the country next to the King himself. He has been described as 'the King's prime minister', 'the King's secretary of State for all departments' and 'the keeper of the King's conscience'. The Chancery issued royal writs which began an action at law. The Chancellor kept the King's seal and all the writings which were to be in the King's name were done under his supervision. As noted by Snell[38] his jurisdiction was undefined, his powers were wide and vague and co-extensive with the authority that evoked them. He exercised those powers on the ground of conscience which in theory was based on universal and natural justice. As the personal representative of the King he acted entirely to the dictates of his conscience and proceeded by the rules of equity unhampered by any judicial precedent, which gave rise in due course to the well-known legal term, "*rules of equity, justice and good conscience*", which moderated the rigour of the Common Law, considering the intention rather than the words of law.[39]

As said before, due to strict compliance with formalist procedures which were archaic and typically English, the Common Law had become stiff and rigorous and litigants could not get justice at its hands. They had therefore no alternative but to appeal to the King "for the love of God and in the way of charity". In course of time the King in 1348 completely assigned his equity jurisdiction to the Chancellor. Chancellors were mostly drawn from ecclesiastics

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37. *Butterworth's Dictionary*, Vol. 2, (1969), p. 173.
38. *Snell's Principles of Equity*, 27th Edn., p. 8.
39. H.P. Dubey: *A Short History of the Judicial Systems of India*, (1968), p. 410.

and up to the time that they were so drawn equity principles were not systematised and there was nothing like precedents. These Chancellors did not keep proper records and the rules which guided their conscience and good sense of justice and equity were drawn either from the Common Law, or from the Roman Law or from their individual notions of right and wrong.

This state of affairs provoked John Selden to remark that: "Equity is a rougish thing. For law we have a measure...equity is according to the conscience of him that is Chancellor, and as that is longer or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot."[40]

Development of Chancellor's Intervention.—During the wars of Roses[41] (1453-1485) the Chancellor became more and more autonomous deciding in the name of the King and his council upon a delegated authority. Due to procedural difficulties and judicial traditionalism of Common Law, the Chancellor's intervention was more and more required. During the 16th century Sir Thomas Moore (1530-32) was appointed the first lawyer-Chancellor. The Tudor absolutism in this century was based on an extensive use of the royal prerogative. The notorious Star Chamber being a formidable threat to the liberty of the subjects, the Chancellor's equitable jurisdiction was considerably broadened.[42] At the close of the 16th century the increasing popularity of the Chancellor, who by exercise of his unrestrained power made additions or corrections to the 'legal' principles applied by the royal courts, brought him into open conflict.

A decree was obtained before Chief Justice Cock by means of gross fraud. Lord Ellesmere, the Chancellor, therefore gave a permanent injunction against it so that the decree could not be enforced. Cock, C.J., questioned the very validity of such an injunction and declared that anybody obtaining injunctions in this way so as to challenge a decree of the Common Law courts would henceforth be punished. At last in 1616 King James I has to step in and with the help of Bacon, the attorney-general, gave a judgment in favour of the Chancery.[43]

Though the procedure of the Chancery was favoured by the King and was preferred by the people, disputes such as the above were simmering under the surface on account of which litigants had to suffer. A tacit and common understanding was therefore established between the two courts that though the Chancery Court and the Chancellor would remain, they would attempt no new encroachment at the expense of the Common Law courts. Moreover it was to adjudicate according to its precedents and the King would not in future create any new court like the chancery by using his prerogative. (In 1850, a commission was appointed to investigate and suggest ways and means to demarcate the lines of powers for both the courts.)

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40. *Table Talk of John Selden*, p. 43, cited in Hanbury: *Modern Equity*, p. 5.
41. David & Brierley: *Major Legal Systems in the World Today*, p. 273.
42. *Ibid.*, p. 275.
43. Hanbury: *Modern Equity*, p. 11.

As noted by Potter,[44] with the fall of Wolsey the old and vague equitable jurisdiction passed into the hands of lawyer-Chancellors. But they were bred in the stern school of precedents... . They would not be satisfied with 'so indefinite a thing as a man's conscience for guide'. In the course of another century, therefore, two forces of conscience and practice came together[45] in the *Earl of Oxford case*[46]. As Lord Ellesmere said in that case, "the office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs and oppressions, of what nature so ever they be, and to soften and modify the extremity of the law which is called *summum jus*".[47]

From the period of Wolsey to that of Nottingham these principles were consolidated and systematised and in the 16th and 17th centuries this was considered to be the practice of the court. Due to precedents, the discretion of a Chancery Court judge slowly decreased but in cases not covered by the precedents, it remained. In Lord Eldon's period equity ceased to expand. It had turned almost as hidebound by precedent as the Common Law[48]—a *rigour aequitas* had developed. So much so that in 1878, Judge Jessel, M.R., remarked[49] that "this court is not, as I have often said, a court of conscience, but a court of law".[50]

Thus, a history of the Chancellors of England has been the history of equity.

(D) Practice, Procedure and Process of Equity Courts

By filing a bill of complaint in the Court of Chancery the proceedings started. The bill was in the plaintiff's own simple language. It was addressed to the Chancellor. Bona fides of the complaint were to be guaranteed by some persons who were to satisfy the defendant's damages if the petitioner did not succeed. After receiving the complaint, the chancery issued a writ of *subpoena* (summons) calling the defendant to appear personally and to present his reply. If he disregarded the summons and/or remained absent he was imprisoned. If he was unable to appear the court granted a commission to take his answer. At first he was examined viva voce and upon oath. So were the plaintiff and other witnesses. By the middle of the 15th century this used to be in writing. The answer from the defendant, as has been noted by Lord Macclesfield, served two purposes; it supplied the plaintiff with the evidence and the plaintiff could request for discovery of facts and materials for his advantage. A judgment was then given. It would be interesting to note here that the Chancellaria kept no written record of their judgments. The first reports available from the chancery are from 1535. Thus in later times the bill of complaint was indorsed with a note of the decision and the decrees enrolled.

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44. Potter: *Outlines of English Legal History*, p. 251.
45. Potter: *Outlines of English Legal History*, p. 252.
46. (1615) 12 Ch Rep 1.
47. *Ibid.*
48. Potter: *Outlines of English Legal History*, p. 253.
49. *National Funds Assurance Co., re*, (1878) 10 Ch D 118.
50. *Snell's Principle of Equity*, 27th Edn., p. 11.

It should be noted here that the procedure of the chancery was secret, written and inquisitorial while that of Common Law courts was oral and public. In the Common Law courts there were prescribed forms while in the chancery even an oral complaint (in the beginning) was received. The Chancellor was concerned with the substance and not the form.

The decisions and decrees of Chancery Courts were not directly enforceable. Their effectiveness was however assured by the possibility of imprisoning the contravening party or by sequestration of his property, that is to say, its judgments were enforced by a process of contempt against the defendant's person—equity acted *in personam.*

(E) Classification of Equity Jurisdiction

Up to the middle of the 14th century, as seen before, the Common Law courts reigned supreme. In 1349 the Chancellor was empowered to give justice on behalf of the King, and this slowly increased his powers, which culminated into a separate and independent Chancery Court in 1474. A number of subjects fell into the Chancellor's hands. In cases where the Common Law court could not recongise expected rights and therefore could give *no relief*, the Chancellor came to the help of the petitioners. Also in cases where the Common Law afforded *no adequate relief* at least without great delay and circuitry, and in cases where the Common Law courts had *no proper procedure* either to compel the presence of a witness and defendant or to compel the production of a document, the chancery court came forward to the rescue of the petitioner by granting him adequate relief by arrest of the witness and sequestration of the defendant's property in suitable cases.

The jurisdiction of an Equity Court has been classified by Story[51] as exclusive, concurrent and auxiliary. Prior to Judicature Acts the main work of equity could be classified as follows:

1. *Exclusive Jurisdiction*: *New Rights.*—Cases wherein according to conscience there should be a right, but the Common Law courts failed to recognise one or grant relief, were fitting subjects for exclusive equity jurisdiction. Rights of persons claiming under uses and trusts, rights of a married woman in relation to property for her separate use, mortgages, right of redemption of a mortgage, penalties and forfeitures and administration of assets of a testator and intestate were the subjects wherein equity courts recognized the equitable right or interest and granted relief. Over these matters equity had an exclusive jurisdiction and hence the nomenclature "exclusive jurisdiction". These were the matters which the Common Law courts could have dealt with, but did not.

2. *Concurrent Jurisdiction*: *New Remedies.*—Cases wherein the plaintiff at his option could proceed either at the Common Law courts or at the chancery courts and wherein the relief granted to the plaintiff was almost the same but the method and manner in which it was granted by the Common Law courts was

51. *Story on Equity*, 3rd Edn., p. 39 cited by *Snell's Principles of Equity*, p. 13.

not so effective and sweeping as that of the chancery courts were, where equity developed a wide range of remedies for enforcement of Common Law rights which were available in addition to the remedies provided by it. These remedies were not wholly unknown to the Common Law, but it failed to develop them. In cases of actual or express fraud, accident, mistake, partnership, recovery of specific chattels, specific performance of contracts, set-off, partition and dower, it was the novelty and effectiveness of the procedure employed by the chancery court that attracted the petitioners. The remedies successfully tried and effectively employed may be stated as delivery of chattels, specific performance of contracts for sale and purchase of land, injunctions and rectification of instruments. We may thus say that equity jurisdiction in such cases was based on inadequacy of legal remedies employed by the Common Law. In other words an equitable remedy was available only when a legal one could lie.[52]

3. *Auxiliary Jurisdiction: New Procedure.*—Cases wherein the plaintiff sought the help of equity courts to render a relief granted by the Common Law courts more effective became the subject of its auxiliary jurisdiction. Such relief from the Equity Courts could be obtained, as Ashburner points out, either before adjudication in the Common Law courts (thereby maintaining status quo), or even after the decision in the suit was reached. Its main purpose was to prevent transgression of rights of the parties to a suit. The remedies granted under this kind of jurisdiction rested mainly on legal principles; equity intervening merely to supply the defects of the legal process. As pointed out by Ashburner[53] the guiding principle in such cases was prevention of multiplicity of suits or prevention of an irreparable injury. Under this heading fell the following matters: Prevention of waste of property and nuisance, prevention of the breach of patent right or a copyright, injunction in cases of breach of executed contracts and discovery, perpetuation of testimony and examination of witnesses.

Thus, where a contract was broken and the person guilty of its breach held the document production of which was necessary to assess the damage, discovery of the same was ordered by the Chancery Courts. In case of apprehension of danger of losing testimony before it could be produced at the proper time, the court ordered its preservation and perpetuation and in case of old and infirm witnesses and in case of a single valuable witness, equity courts took proper steps to ensure their examination in time. Since the chancery courts aided the Common Law courts its jurisdiction has been named as the auxiliary jurisdiction.

This shows that the procedure in the Common Law courts was defective in so far as it could not compel or even allow a defendant to give evidence and in limiting the inquiry to the parties to the action, however great an interest other persons might have in the result of the action.[54]

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52. *Colls* v. *Home and Colonial Stores Ltd.*, 1904 AC 179.
53. Ashburner: *Principles of Equity*, 2nd Edn.
54. *Snell's Principles of Equity*, p. 14.

This threefold division of the subject was rendered obsolete by the Judicature Acts which removed the necessity for one court to supplement the jurisdiction of another.[55]

(F) Basis of Authority of Equity

As could be observed before, the emergence of equity was due to the incompleteness of the Common Law. The Common Law had become rigid, inflexible and hard in all respects. It had no remedy for genuine grievances, its procedure was faulty and powerless and its judgments were often unenforceable or were turned into a means for oppression. It could do no justice. The aggrieved party, as an alternative, prayed to the King for relief which he gave. In course of time the King delegated his authority or the "prerogative" to the Chancellor who gave relief where needed. Out of this delegation the Chancellor worked wonders. "The royal jurisdiction was converted from a fact to a constitutional fiction."[56]

Equity was a matter of grace, to be prayed and obtained from the Chancellor, and not a matter of right. Moreover equity represented the conscience of law and it acted upon the conscience of the litigants too. As said by Lord Chancellor Hatton: "The Holy conscience of the Queen for the matter of equity is, by Her Majesty's goodness, in some sort committed to me, but the law is the inheritance of every man." Thus the King's prerogative to do mercy and justice could be prayed for and obtained as a matter of grace, which worked on the conscience of the subjects, through the Chancellor.

Snell here has rightly expressed that "what had begun as an irregular process of petitioning the Crown in extraordinary circumstances had become a regular system of courts with a recognised jurisdiction".[57]

Hanbury[58] puts this position very succinctly thus: "Developed systems of law have often been assisted by the introduction of a discretionary power to do justice in particular cases, where the strict rules of law cause hardship. In Roman Law Praetor performed this function." In England this was supplied by the exercise by the Chancellor of the residual discretionary power of the King to do justice among his subjects, where for one reason or another justice could not be obtained in a Common Law court. *Principles of justice and the insistence upon acting according to conscience are the basis of equity jurisdiction.*

10. TRANSFORMATION OF EQUITY INTO A MODERN SYSTEM

To take a bird's eye view of the expansion of equitable jurisdiction, it can be said that in the reign of Edward III, 1349, the Chancellor was empowered to exercise the King's prerogative of mercy and grant relief in extraordinary cases. In 1474, he became an independent judge. On account of the popularity of uses, a "great field of substantive law" fell into the Chancellor's hands. Even the

55. *Ibid.* Also *see* Maitland: *Lectures on Equity*, p. 20.
56. Allen: *Law in the Making*, p. 399.
57. *Snell's Principles of Equity*, p. 10.
58. Hanbury: *Modern Equity*, (1969), p. 4.

Statute of Uses, 1535 failed to stop this abuse and hence the popular equitable jurisdiction broadened and expanded. In the 16th century due to cases of fraud, accident and breach of trust, this jurisdiction broadened still further and the rules of equity, justice and good conscience emerged.

Until 1529 AD Chancellors were drawn from ecclesiastics. Cardinal Wolsey (1515-1529) was one of them. Sir Thomas Moore (1530-1532) was the first lawyer-Chancellor. With Sir Christopher Halton (1587-1591) conscience became the conscience of the Queen. He was designated as the keeper of the Queen's conscience. Lord Ellesmere (1596-1617) instead of following "the inclination of the moment" began to consider the practice of the court and gave momentum to the process of precedents. It has, therefore, been correctly remarked that: "*To ecclesiastical Chancellors Equity owes its formation, to legal Chancellors it owes its transformation.*"

From the beginning of the Chancellorship of Lord Nottingham in 1673 and to the end of that of Lord Eldon in 1827 equity was transformed from a jurisdiction based upon the personal interference of the Chancellor into a system of established rules and principles.[59] Lord Nottingham (1637-1682), who is considered to be the father of equity, systematised the rules of equity and laid the foundations for an intelligent process. As remarked by Strahan, "*he turned equity from matter of chance into matter of principle*".

To him we owe the doctrine that there can be no "clog on the equity of redemption",[60] a classification of trusts[61] and the modern rule against perpetuities.[62] From the end of the 17th century, and throughout the 18th century, equity became the great force that moulded the progress of the law right up to the 19th century. It is during this period that the conflict between the Common Law court judges and a Chancellor came to the surface. It was a period of legislative stagnation. Equity had to struggle for its life with the Common Law in which the latter narrowly escaped death by a common tacit understanding with equity. In this period, as noted by Hanbury,[63] the modern law of trusts developed and was shaped to meet entirely new conditions of social life; equity took in hand the administration of the estates of deceased persons on which depended the doctrines of election, satisfaction, redemption, marshalling of assets and performance.[64] This period saw many great Chancellors, Talbot (1733-37), Hardwicke (1737-60), Camden (1766-71), Thurlow (1778-93), culminating in Lord Eldon (1801-1806, 1807-27), one of the greatest of equity lawyers. His decisions were thorough, painstaking, learned and clear. As Holdsworth said: "He had a thorough grasp of existing rules and principles; but he looks as anxiously into all facts and circumstances of each case... . But it is hardly surprising that the business of the court was scandalously in arrears." The pattern and principles of equity were now

59. Hanbury: *Modern Equity*, p. 11.
60. *Howard* v. *Harris*, (1681) 1 Vern 33.
61. *Cook* v. *Fountain*, (1676) 3 Swan 585.
62. *Duke of Norfolk case*, (1683) 2 Swan 454.
63. Hanbury: *Modern Equity*, p. 12.
64. *Ibid.*, pp. 462, 476, 486, 490, 558.

established. "Nothing would inflict on me greater pain in quitting this place," said Lord Eldon, "than the recollection that I had done anything to satisfy the reproach that the equity of this court varies like the Chancellor's foot."[65] In the 18th century equity was administered as a recognised part of the law of the land. Its reports were regularly published.

The 19th century was a period of enormous industrial, international and imperial expansion of Britain necessitating developments in equity to deal with a number of new problems, like administration of companies and partnerships; and the change in emphasis from landed wealth to stocks and shares. The business of the court had considerably increased and at the end of the third quarter of the century when the chancery courts were abolished, the two courts of Common Law and Chancery were "not rivals but partners in the work of administration of justice".[66] The time for fusion had come.

11. THREE BLOWS TO EQUITY COURTS

By the Common Law Procedure (Amendment) Act, 1854, the Common Law courts were given limited powers to grant injunctions, which increased their powers. They had powers already to grant damages, either instead of, or in addition to, an injunction for specific performance but at the same time some additional powers were given to the Common Law courts.

These piecemeal amendments, however, did not go to the root of the problem and the litigants were driven from one court to another. Justice became very dear and the hardships of the litigants could not be mitigated. The Judicature Acts, 1873 and 1875 (effective from 1-11-1875) were therefore passed and both the courts were merged into one Supreme Court of Judicature which administered both law and equity.

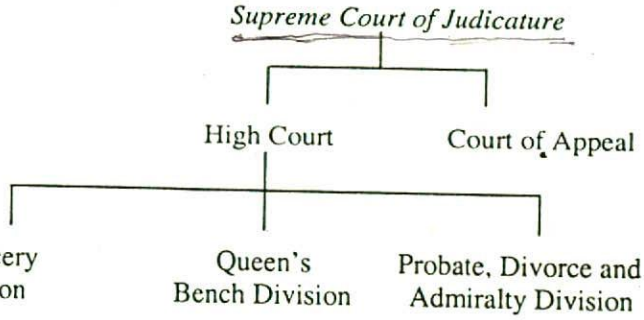
12. THE FUSION AND ITS EFFECTS

To remove the abuses of double administration of justice the Judicature Acts fused law and equity, thereby replacing the court of Chancery and the Common Law courts by the Supreme Court of Judicature. Snell notes that the fusion was not a fusion, or anything of the kind; it was vesting in one tribunal of the administration of law and equity in every cause, action or dispute which should come before it. It was a fusion of administration rather than of principles because the fusion did not necessitate a wholesale modification of the rules either of law or of equity.[67] In other words the principles either of law or of equity did not change but they were now administered by one court which consequently saved time, inconvenience and expense of the litigant public. As has been well said, the two streams have met and now run in the same channel but their waters do not mix.[68] The streams, so to say, run side by side but do not

65. Holdsworth: *History of English Law*, pp. 468-69 cited in Hanbury: *Modern Equity*.
66. Holdsworth: *History of English Law*, pp. 468-69 cited in Hanbury: *Modern Equity*, p. 668.
67. *Snell's Principles of Equity*, p. 17.
68. Hanbury: *Modern Equity*, pp. 462, 476, 486, 490, 558.

mingle their water in so far as the distinction between legal and equitable claims, between legal and equitable remedies, has not been broken down.

The following are the divisions of the Supreme Court:[69]



Effect of fusion

(1) A new and uniform procedure, assimilating the best rules of both the old systems, was established.

(2) Law and equity were administered concurrently but where the rules of Common Law and Equity were in conflict on a particular point, rules of equity prevailed—Section 25(11).

(3) The Judicature Acts [Section 25(11)] have neither made ineffective the principles of equity nor have they superseded the law, but they have sustained the existence of both. In effect they have brought about the fusion without affecting the substantive rights at law and in equity. This is supported by *Britain* v. *Rossiter*[70].

(4) They have done away with the auxiliary jurisdiction and converted the exclusive jurisdiction into a concurrent one, the simple reason as is apparent is, that now a court is capable of granting all the necessary reliefs, be legal or equitable or both. It is now a court of complete jurisdiction.[71]

(5) The distinction between legal and equitable remedies has not been broken down as could be seen from *Joseph* v. *Lyons*[72].

(6) The fact that certain rules (nine in all)[73] of equity contradicted rather than complemented the rules of law came to light; of course they were resolved.[74]

(7) In case of equitable lease,[75] variation of deed,[76] executors' liability for assets,[77] and contribution between sureties[78] the conflict was resolved by

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By an order in Council in 1880.
(1879) 11 QB 123.
Pugh v. *Heath*, (1882) 7 AC 235.
(1884) 15 QBD 280.
See *Snell's Principles of Equity*, pp. 14-15.
Ibid.
Walsh v. *Lonsdale*, (1882) 21 Ch D 9.
Berry v. *Berry*, (1929) 2 KB 316.
Job v. *Job*, (1877) 6 Ch D 562.

allowing rules of equity to prevail. Thus *Joseph case* and *Britain case* explain that there was no conflict, but the latter four cases expose the same.

(1) *Walsh* v. *Lonsdale*[79].—*L* agreed in writing but not by deed, to grant seven years' lease of a mill to *W*. Rent was payable quarterly in arrears but a year's rent was payable in advance if demanded. *W* entered into possession without any lease having been granted and paid his rent quarterly in arrears. Subsequently *L* demanded a year's rent in advance. *W* claimed an injunction and damages for illegal distress. His ground was that in law he was a tenant from year to year at a rent not payable in advance. Legal remedy by distress was therefore not open to *L*. The Court of Appeal decided however that *W* held on the same terms as if a lease had been granted, since the agreement was one of which the court would order specific performance. Jessel, M.R., said: "There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates, as there were formerly, an estate at Common Law by reason of the payment of rent from year to year and an estate in equity under the agreement. *There is only one court and the equity rules prevail in it.* The tenant holds under an agreement for a lease. He holds therefore under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance...that being a lessee in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed."[80]

The principle in *Walsh* v. *Lonsdale*, however, does not apply to India (for details *see* under headline '15. Recognition of Equity under Indian Legal System').

(2) *Berry* v. *Berry*[81].—Under a deed of separation a husband covenanted to pay his wife a certain allowance. Afterwards the parties agreed in writing not under seal to reduce 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 a good defence to an action brought on the deed; and the equity rule now prevailed.

(3) *Job* v. *Job*[82].—An executor of a testator (watch repairer) handed over the stock-in-trade of the testator's shop to his son so that it could be sold. The son who was a jeweller and a watch repairer became insolvent and his receivers sold his property along with the testator's stock-in-trade. On the question whether the executor was liable it was held that, at law, an executor was liable for the loss of any assets of his testator when once they had come into his

78. *Lowe* v. *Dixon*, (1885) 16 QBD 455.
79. (1882) 21 Ch D 9. Before Judicature Act, 1873, equity would intervene by granting an injunction to prevent a landlord evicting the tenant in breach of agreement. *Snell's Principles of Equity*, p. 16.
80. John Tilley: A *Case-book on Equity and Succession*, (1968), p. 13.
81. (1929) 2 KB 316. See also *ibid.*, p. 21 and *Snell's Principle of Equity*, p. 16
82. (1877) 6 Ch D 562. See also *ibid.*, p. 333 and p. 16 respectively.

hands.[83] In equity, however, the executor was not liable for such assets if they were accidently lost without fault on his part. And since the Judicature Act the equitable rule is also the rule of law.

(4) *Lowe & Sons* v. *Dixon & Sons*[84].—*A*, *B* and *C* were sureties for the payment of £3000 and *A* became insolvent. The rule at law was that *B*'s and *C*'s liability to pay £1000 each remained. But in equity those who can pay their shares must also make good the shares of those who cannot and so *B* and *C* were liable for £1500 each. Here, therefore, the rule of equity prevails.

(5) *Britain* v. *Rossiter*[85].—The plaintiff agreed to serve for more than a year. This was not in writing as required by the Statute of Frauds. Thus before the Judicature Act the plaintiff had no remedy at law for want of writing. At equity also a contract of hire and service was not enforceable. But the plaintiff based his case on part performance. As the agreement had been partly performed it could not come within the Statute of Frauds and therefore he could sue for wrongful dismissal. But this argument was rejected and it was held that by virtue of the Judicature Act, the plaintiff did not acquire any right which he did not have prior to the Act of 1873. The true construction of the Judicature Acts is that they confer no new rights, they only confirm the rights which previously were to be found existing in the courts either of law or equity; if they did more they would alter the rights of parties, whereas in truth they only change the procedure... . The different divisions of the High Court may dispose of matters within the jurisdiction of the Chancery and the Common Law court; but they cannot proceed upon novel principles.

As said before, that the distinction between legal and equitable rights is not removed but still persists is apparent from the decision in *Joseph* v. *Lyons*, discussed below:

(6) *Joseph* v. *Lyons*[86].—*A* assigned to *B* "all his stock-in-trade to be acquired during the continuance of the security" as security for money lent. This method of transferring property not in existence or ownership or possession at the date of transfer was not allowed at law, but in equity assignment of after-acquired or future goods *was* possible if it was for value.[87] On the principle that equity looks on that as done which ought to be done, this was treated as a contract to assign when the property comes into existence and the assignment becomes perfect.[88] In this case *A* after acquiring the property pledged it with *C* who took it without notice of prior assignment. *B* sued *C* to recover the goods contending that his equitable right had become a legal one due to Judicature Acts and it was available as against purchasers without notice. This argument was negatived and rejected for it was not intended by the Legislature that legal

83. *Crosse* v. *Smith*, (1806) 7 East 246.
84. (1885) 16 QBD 455, *Snell's Principles of Equity*, p. 16.
85. (1879) 11 QB 123.
86. (1884) 15 QBD 280.
87. *Tailby* v. *Official Receiver*, (1884) 18 AC 523.
88. *Collayer* v. *Isaacs*, (1881) 19 Ch 342.

and equitable rights should be treated at a par and identical, but that the courts should administer both legal and equitable principles.

Thus at appropriate places rules of equity were allowed to prevail but the fusion did not change the nature of the substantive rights at law and in equity. In other words "it is only on matters of principle that the equity rule prevails, and not on matters of practice. Where there was a difference in the practice of the two courts before the Judicature Acts, the more convenient practice is now followed. . . . A legal estate is still a legal estate and an equitable interest is still an equitable interest. It is still of great practical importance whether a right is one which was formerly recognised at law or only in equity.[89] Thus a person who acquires a legal estate in property for value and without notice of another person's equitable interest therein, takes free from that equitable interest; but if he acquires merely an equitable interest, he will usually be subject to the prior equitable interest, in spite of the fact that he has no notice of its existence and that he gives value".[90] *Joseph* v. *Lyons* reiterates this principle.

13. ATTAINMENTS OF EQUITY

It has been the constant aim of a court of equity to do justice, by deciding upon and settling upon the rights and liabilities of all persons interested in the subject-matter of the suit to prevent future litigation. According to Maitland, *equity had come not to destroy the law but to fulfil it.* In order to understand this proposition the achievements of equity shall have to be viewed.

Equity, as has been said often, *is the conscience of law, it corrects law where necessary and softens its rigour.*[91] It did so by creating new rights, new remedies and new procedures.

New Rights.—The Common Law courts failed to enforce many rights which the equity courts enforced. If a right exists, there must be a chance to the public to exercise this right. In that period, to avoid and defeat the Common Law provisions people tried to abuse the 'use of land' by transferring land to somebody else's name. Equity legalised these matters and thus created new rights. *Equity in this sense, therefore, enforced that portion of natural justice which the Common Law courts failed to enforce.*

New Remedies.—To enforce a right under the Common Law, there were, as has been said, set forms of action or writs. If a plaintiff's case did not fit into those writs, he had no remedy. This position was clearly against the rules of natural justice. There should be not only a right to vindicate 'right' but also a remedy against those who hinder its enjoyment, *i.e.*, wherever there is right, there must be a remedy available for its breach. In this sense the equity courts developed new remedies of specific performance of contracts, of injunctions, of

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89. For an interesting discussion about the traditional view (*Snell's Principles of Equity*, pp. 14-15) and the radical view about fusion, *see* Nathan: *Equity Through Cases*, 4th Edn., (1961), pp. 17 to 20.
90. *Snell's Principles of Equity*, p. 17.
91. *Babita Prasad* v. *State of Bihar*, 1993 Supp (3) SCC 268, 285: (1993) 25 ATC 598.

appointment of a receiver and for an order for account. While doing so it considered the conduct of the parties which entitled or disentitled them for these equitable remedies.

New Procedure.—Not only were new rights and new remedies not available at Common Law courts, but the procedure for enforcement of the existing rights was also quite unsatisfactory. A defendant could not be compelled to appear and give evidence in a court of Common Law; and even the parties who were interested in a suit could not be called. Besides this, no discovery of documents could be made. A defendant intimidated the jury and could disregard the summons of the court without any fear of punishment. But equity had the courage to come forward and afford such long-sought remedies as above.

14. NEED FOR A NEW EQUITY

In 1952 Lord Denning[92] wrote: "... I have considered the three ways of filling the gap which Maine suggested, fiction, equity and legislation. If they are exhausted where is a new means to be found? It is at this point that I begin to regret the fusion of law and equity. We have now to call upon natural justice. We have one system of courts and one system of law. We have a Lord Chancellor but we have no overriding equity. The courts of Chancery are no longer courts of Equity. They have no jurisdiction to mitigate harshness or to soften rigidity. They are as fixed and immutable as the courts of law ever were."

Quoting Sir William Holdsworth he explains that in early days the Common Law lawyers were concerned much with the dealings in land and devolution of estates. In those branches of law certainty is, quite rightly, of paramount importance. In this branch of the law words are the masters who must be obeyed. Our real property law was devoid of moral concepts as mathematics. Right and wrong did not enter into it, nor did the redress of grievances. In short they looked for certainty and gave justice a second place. The result was that in their hands the law of contract and torts tended to become as technical and rigid as the law of property. But the Judicature Acts had a beneficial effect and it was due to this that Lord Atkin in his classic judgment in *Donoghue* v. *Stevenson*[93], started with the Christian precept "thou shalt love thy neighbour as thyself", meaning thereby and laying down a rule that "in law you must not injure your neighbour". It is a matter of satisfaction that here the common man has a remedy. But new days bring new wrongs or wrongs of new kind, and the law must be developed so as to provide redress for them.

Explaining this, Lord Denning further writes: "The law, as I see it, has two great objects: to preserve order and to do justice; and the two do not always coincide. Those whose training lies towards order, put certainty before justice,

92. (1952) 5 Current Legal Problems 1, cited in *Lloyd's Jurisprudence*, p. 840.
93. 1932 AC 562, 580.

whereas those whose training lies towards the redress of grievances, put justice before certainty. The right solution lies in keeping the proper balance between the two." He was thus much concerned about the rigidity of equity and therefore expected "another Bentham to rise, to expose the fallacies and failings of the past and to point the way to a new age and a new Equity".

Lord Denning thus rejected the House of Lords as an instrument for producing what he calls the "new equity", as it was then bound by its own decisions. Although, since 1966 it has had the freedom to depart from previous decisions where these are thought to be wrong, it is a power used most sparingly. Nevertheless the House of Lords is a more creative body than it was twenty years ago. The creation of the Law Commission and the prospect of codification may be said to have changed Lord Denning's[1] perspective somewhat.[2]

15. RECOGNITION OF EQUITY UNDER INDIAN LEGAL SYSTEM[3]

Prior to the Anglo-Indian law, that is before 1600, Equity had its place in India in Hindu and Mohamedan law. Hindu legal system or Hindu jurisprudence is embeded in *Dharma* as propounded in The Vedas, Puranas, Smritis and other works on the topic. *Dharma* is an expression of the widest import; it cannot be defined but can be explained. It has wide variety of meanings: it is used to mean justice (*nyaya*), what is right in a given circumstance, moral, religious, pious or righteous conduct, being helpful to living beings, giving charity or alms, natural qualities or characteristics or properties of living beings and things, duty and usage or custom having the force of law and also a valid royal edict (*rajashasana*).[4] In short what sustains is *dharma* and Manu expresses the necessity of scrupulous practice of Dharma.[5] In Hindu law according to jurists like कौटिल्य (Kautilya) and याज्ञवल्क्य (Yagnavalkya) where there was a conflict between Dharma text and reason, the text had to give way and this was on principles of equity which they named as युक्तिविचार (Yukti Vichar).[6]

Yagnavalkya laid down:[7]

स्मृत्योर्विरोधे न्यायस्तु बलवान व्यवहारत: ।

Where there is a conflict between two Smritis the principles of equity as determined by popular usages (व्यवहार) shall prevail. This rule indicates, in the cases of conflict between two Smritis, the King was not given any power or

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1. (1966) 3 All ER 77, a decision declared on July 29, 1966.
2. Based on *Lloyd's Jurisprudence*, (1972), pp. 840-841.
3. Based on M.C. Setalvad: *Common Law in India*, Chapter 1.
4. Rama Jois: *Legal & Constitutional History of India*, Vol. 1, Chap. 1, Concept of Dharma, p. 3
5. *Manusmriti*: VIII—15: Dharma protects those who protect it. Those who destroy Dharma get destroyed: Rama Jois, p. 8.
6. West & Majid: *Hindu Law*, p. 14; K.P. Jaiswal: *Manu & Yagna*, p. 80
7. *Yagnavalkya*, 2: 21.

discretion to make a choice but he was required to apply the law as approved by custom and usage by the people themselves.

धर्मश्च व्यवहारश्च चरित्रं राजशासनम्।
विवादार्थं चतुष्पाद पश्चिमः पूर्वबाधकः।।

Out of these four, Dharmashastra, Economics, Practice or Custom and King's fiats, that which appears last, i.e., राजशासनम् (Rajshasanam) is the most authentic.[8] This is evident from Narad Smriti which explains the method of solving disputes regarding usufruct of the trees grown on a boundary.[9] The methods prescribed for settlement of boundary disputes were four: firstly, by arbitration, secondly, by the residents of the locality, thirdly, by the King on the basis of evidence and on the failure of all these methods, by the King according to his best judgment which is equivalent to decisions given according to Justice, Equity and Good Conscience. Moreover a judge should not rely merely on the text of the Shashtras, for it may work to the detriment of Dharma. Thus,

केवल शास्त्रमाश्रित्य न कर्तव्यो विनिर्णयः।
युक्तिहीन विचारेषु धर्महानि प्रजायते।।

Under Muslim law Abu Hanifa expounded such principles known as *Istihsan* or juristic equity. This could be observed from the decisions of the courts.[10]

One has to note at the same time that under the British rule there never were in India any separate courts administering equity. The Supreme Court had both Common Law and Equity jurisdictions. As courts of equity they had power and authority to administer justice as nearly as may be according to the rules and procedure of the High Court of Chancery in Great Britain. In a sense these courts combining both common law and equity jurisdictions, brought about in advance the fusion of law and equity jurisdictions, which was effected in England by the Judicature Act of 1873. In England the Judicature Act did not fuse the two system of rules.[11] In India, however, law and equity were always treated as part of the same system. But the state of affairs before the Charter Act of 1833 was so sad and perplexing and "widely differing from each other but co-existing and co-equal" that it led to the enactment of the Charter Act of 1833. Slowly and silently the principles of English law came to be administered, particularly in the mofussils as "justice, equity and good conscience". In effect what was applied in India was the Common Law as liberalised by Equity. *In India Equity worked through and not in opposition to the Common Law.*[12]

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8. Kautilya: *Arthashastra*, 1: 2.
9. Quoted by Rama Jois: *Legal and Constitutional History of India*, Vol. 1, Chap. 12, p. 205, Boundary Dispute, *Narad Smriti*, pp. 157-58, 13-14 (*Dharma Kosa*, p. 946).
10. *Hamirabibi* v. *Zubeida*, (1916) 43 IA 294.
11. Holdsworth: *Some Makers of English Law*, p. 208, cited in Setalvad: *Common Law in India*, pp. 58-59.
12. On this point *see* Rama Jois: *Legal and Consititutional History of India*, Vol. 2, Ch. 3, pp. 39, 41, 46.

Thus every court in India is a court of equity as well as of law. It possesses as inherent in its very constitution as such, powers as are necessary to do the right and to undo a wrong in administering justice.[13]

In absence of specific rules of law the court will follow the practice of the English equity courts with required modifications.[14] Such a practice however should be to give full, systematic and uniform effect to the principles of equity and good conscience.[15] Besides where the law exists, it is the law that must prevail and not equitable principles.[16] Section 151 of the Civil Procedure Code is designed to do real and substantial justice and to prevent failure of justice. This power is to be exercised by the court—*ex debito justitiae*—as of right and the court has no discretion to refuse.[17]

In this connection it has to be noted that under Article 372(1) of the Constitution of India the law that was in force in India immediately before the coming into effect of the Constitution, continues in force until it is amended, altered or replaced by a competent authority.

The principles of equity have found statutory recognition in India in:

(*a*) The Specific Relief Act, 1877

(*b*) The Indian Trusts Act, 1882

(*c*) The Indian Succession Act, 1925

(*d*) The Guardians and Wards Act, 1890

(*e*) The Indian Contract Act, 1872

(*f*) The Transfer of Property Act, 1882

(*g*) The Indian Divorce Act, 1869 (Section 7).

Macaulay who spoke in Parliament on Codification, reiterated this simple principle: "*Uniformity when you can have it; Diversity when you must have it, but in all cases Certainty*",[18] and accordingly the Codes and Acts were formed. In applying the principles of equity the Indian courts in their prolonged career of judicial legislation have shown remarkable discrimination.

In England an equitable right or estate is recognised as something different from a legal right or estate. The interest of a beneficiary in trust property is in England an equitable interest while the legal interest in the estate is in the trustee. Again in England if a person agrees to sell land he creates in the buyer an equitable interest in the land. These equitable interests were the creation of the Court of Chancery. The law in India never recognised any distinction between legal and equitable interests. As early as in 1872, the Privy Council

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13. *Varden Seth Sam* v. *Lukhpathy*, 9 MIA 303; *Waghela* v. *Sheikh Masluddin*, (1887) 14 IA 89. *Also see* Section 151 of CPC; *Watson* v. *Ramchand*, (1891) 18 Cal 10 and *Jogesh Chandra* v. *Annada*, 53 Cal 590.
14. *Manchersha* v. *Kamru Begam*, 5 Bom 109.
15. *Shapurji* v. *Dossabhai*, 30 Bom 359.
16. *Mohamed Ahmed* v. *Akhlagurlah*, 1950 RD 165(2).
17. *Hukumchand* v. *Kamalanand*, (1906) 33 Cal 931.
18. Cited by M.C. Setalvad: *Common Law in India*, p. 28.

said: "*The law of India, speaking broadly knows nothing of the distinction between legal and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England.*"[19]

It is not surprising, therefore, that some of the peculiar equitable doctrines were not found acceptable by the Indian courts, they held that provisions in favour of children or other persons for their advancement were unknown among Indians. The general law of Succession in India, the Indian Succession Act, did not enact the rule of English law by which a child who received a benefit must account for it on a distribution when a father dies intestate. The rule has however been held to apply to persons subject to English law in India.[20]

As observed by the Supreme Court[21] the principle, i.e., the equity in *Walsh* v. *Lonsdale* does not apply to India.

A question whether an agreement to lease requires registration came up for discussion before court in *Tiruvenibai* v. *Lilabai*[22]. This case was referred in the *State of Maharashtra* v. *Atur India (P) Ltd. case* wherein a reference to Mulla's *Transfer of Property Act* (7th Edn.), p. 647 was given which specifies distinction between an agreement to lease and an agreement of lease. "An agreement to lease may effect an actual demise in which case it is a lease."

"On the other hand the agreement to lease may be a merely executory instrument binding the parties, the one to grant, and the other, to accept a lease in future."

As to such an executory agreement the law in England differs from that in India. An agreement to lease not creating a present demise is not a lease and requires neither writing nor registration.

As to an executory agreement to lease it was at one time supposed that an intending lessee, who had taken possession under an agreement to lease capable of specific performance, was in the same position as if the lease had been executed and registered. These cases have, however, been rendered obsolete by the decision of the Privy Council that the Equity in *Walsh* v. *Lonsdale*[23] does not apply in India.

The equity of part performance which in England mitigated the rigour of the Statute of Frauds by taking a parole contract out of it when it had been partly performed, seemed at one time to apply to India to the extent of taking away the application of the laws requiring registration and other formalities in such cases.[24] The doctrine has now been in a partial form incorporated into the statute governing transfer of property.[25]

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19. *Ibid.*, p. 60, citing *Tagore* v. *Tagore*, 1872 IA Supp 47, 71; also Lord Davey in *Webb* v. *Macpherson*, (1903) 8 CWN 41 (PC).
20. *Kerwick* v. *Kerwick*, (1920) 47 IA 275.
21. *State of Maharashtra* v. *Atur India (P) Ltd.*, (1994) 2 SCC 497, 505 to 509.
22. 1959 Supp 2 SCR 107: AIR 1959 SC 620.
23. (1882) 21 Ch D. 9.
24. *Mohomed Musa case*, (1914) 42 IA 1.
25. S. 53-A of Transfer of Property Act, 1882.

However, the statute law of India has incorporated in itself to a substantial extent equitable rules and doctrines. The Indian Trusts Act of 1882 embodies in a concise form the whole structure of trusts built up by the Equity Courts in England. The Act also deals with "certain obligations in the nature of trusts". These are attempts to enumerate broadly circumstances under which a person may be placed in the position of a trustee in reference to another. These "obligations in the nature of trusts" are no different from the implied and constructive trusts found in the decisions of the English equity courts.[26]

Another instance of an almost bodily transplantation of the doctrines of the English equity courts is to be found in the Specific Reliefs Act of 1877. It deals with cases in which a court will order restitution of specific property and order contracts to be specifically performed. It also enumerates the circumstances in which the courts will grant the relief of rectification and cancellation of instruments. The Act is in a sense a blend of common law and equity in as much as it also makes provision in a qualified manner for the writ of mandamus in certain cases. This statute powerfully illustrates how those who were charged with the task of drawing suitable codes for India discarded the distinction between law and equity in English jurisprudence, not hesitating to include in the Act dealing mainly with the equitable relief of specific enforcement, a remedy in the nature of the Crown writ of mandamus.[27]

Thus English law and its principles were almost directly introduced in the presidency towns of Calcutta, Madras and Bombay. In the greater part of the country it obtained its sway in the guise of the principles of "equity, justice and good conscience". A prolific source of incorporation of these principles into Indian jurisprudence were the decisions of the Indian courts. In the words of Sir Henry Maine the higher courts openly borrowed the English rules thinking and believing that they were taking them from some abstract body of legal principles which lay behind all law and the inferior judges, no doubt honestly, thinking in many cases that they were following the rule prescribed for them to decide "by equity and good conscience" wherever no native law or usage was discoverable. The process continues to this day.[28] In the case of *Indira Bai* the Supreme Court of India observed to this effect and said that *the courts in this country are primarily the courts of equity, justice and good conscience and they cannot permit the respondent to defeat the right of the appellant and invoke a right (in this case a right of pre-emption) which has been called a weak and inequitable right.*[29]

In England great concern was projected by Lord Denning[30] in 1952, and fortunately in 1966 the House of Lords resolved that it had freedom to depart from previous decisions where they were thought to be wrong; though it is a power used most sparingly. The House of Lords has thus proved its

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26. M.C. Setalvad: *Common Law in India*, pp. 60-61.
27. *Ibid.*, pp. 61-62.
28. M.C. Setalvad: *Common Law in India*, pp. 61-62.
29. *Indira Bai* v. *Nandkishore*, (1990) 4 SCC 668.
30. (1952) 5 Current Legal Problems 1, cited in *Lloyd's Jurisprudence*, p. 840.

creativeness. The Indian Supreme Court has not lagged behind and has expressed the same kind of concern in *Minerva Mills Ltd.*[31] in respect of *stare decisis*, Justice Bhagwati, delivering a separate opinion said:

> "Certainty and continuity are essential ingredients of the rule of law. Certainty in applicability of law would be considerably eroded and suffer a serious setback if the highest court in the land were readily to overrule the view expressed by it in earlier decisions even though that view has held the field for a number of years... and since the decision on many of such questions may depend upon choice between competing values, two views may be possible depending upon the value judgment or the choice of values made by the individual judge. Therefore if one view has been taken by the court after mature deliberation, the fact that another Bench is inclined to take another view would not justify the court in reconsidering the earlier decision and overruling it. It would create uncertainty, instability and confusion if the law propounded by this court on the faith of which numerous cases have been decided and many transactions have taken place is held to be not the correct law after a number of years. *But the doctrine of stare decisis should not be regarded as a rigid and inevitable doctrine which must be applied at the cost of justice. There may be cases where it may be necessary to rid the doctrine of its petrifying rigidity.*"

In *D.S. Nakara case*[32] wherein the *Minerva Mills Ltd. case*[33] and *Randhir Singh case*[34] were relied on the Supreme Court of India through Chandrachud, Tulzapurkar, D.A. Desai, O. Chinappa Reddy and Bahrul Islam, JJ., observed to the same effect in the following words:

> "*Every new norm of socio-economic justice, every new measure of social justice is commenced for the first time at some point of history. If at that time it is rejected as being without a precedent, the law as an instrument of social engineering would have long since been dead and no tears would have been shed. To be pragmatic is not to be unconstitutional.* In its onward march, law as an institution ushers in socio-economic justice. In fact, social security in old age commenced itself in earlier stages as a moral concept but in course of time it acquired legal connotation. The rules of natural justice owed their origin to ethical and moral code. Is there any doubt that they have become the integral and inseparable parts of rule of law of which any civilised society is proud? Can anyone be bold enough to assert that ethics and morality are outside the field of legal formulations? Socio-economic justice stems from the concept of social morality coupled with abhorrence for economic exploitation. And the advancing society converts in course of time moral or ethical code into enforceable legal formulations. Overemphasis on precedent furnishes an insurmountable

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31. *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625, 681.
32. *D.S. Nakara* v. *Union of India*, (1983) 1 SCC 305.
33. (1980) 3 SCC 625: (1981) 1 SCR 206: AIR 1980 SC 1789.
34. *Randhir Singh* v. *Union of India*, (1982) 1 SCC 618: 1982 SCC (L&S) 119: AIR 1982 SC 879: (1982) 1 LLJ 344: 1982 Lab IC 806.

road-block to the onward march towards promised millennium. *An overdose of precedents is the bane of our system which is slowly getting stagnant, stratified and atrophied. Therefore the absence of a precedent on this point need not deter us at all. We are all the more happy for the chance of scribbling on a clean slate.*''[35]

The *aim and object of equity* is to promote honesty and not to frustrate the legitimate rights. Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law.[36]

In a very recent case[37] the court discussed the *role of equity* in field of tort. In this case the building contractor constructed a building in violation of municipal regulations which resulted in demolition of top four floors. The allottee-owners of the demolished flats, having not been informed by the builder about the illegal construction and not given notice of caveat emptor, they suffered loss. On grounds of equity considerations the builder was held liable to pay damages, including the amount paid by the allottees.

In the tort liability arising out of contract, equity steps in and takes over and imposes liability upon the defendant for unquantified damages for the breach of duty owed by the defendant to the plaintiff. Equity steps in and relieves the hardships of the plaintiff in a common law action for damages suffered by the plaintiff on account of the negligence in the case of the duties or breach of the obligation undertaken or failure to truthfully inform the warranty of title and other allied circumstances.[38]

Principles of justice and conscience are the basis of equity jurisdiction, but it must not be thought that the contrast between law and equity is one between a system of strict rules and one of broad discretion. Equity has no monopoly of the pursuit of justice. Equitable principles are rather too often brandied about in common law. Just as the common law has escaped from its early formalism, so over the years equity has established strict rules for the application of its principles. Indeed, at one stage the rules became so fixed that a ''*rigor aequitatis*'' developed: equity itself displayed the very defect which it was designed to remedy. Today some aspects of equity are strict and technical, while others leave considerable discretion to the court.[39]

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35. See also *S.C. Varma* v. *Chancellor, Nagpur University*, (1990) 4 SCC 55; *Punjab Land Development & Reclamation Corporation Ltd.* v. *Presiding Officer, Labour Court, Chandigarh*, (1990) 3 SCC 682 (Case of 17 appeals) (Paras 37, 53, 59).
36. *A.P. State Financial Corpn.* v. *GAR Re-rolling Mills*, (1994) 2 SCC 647, 662: AIR 1994 SC 2151: (1994) 80 Comp Cas 140: (1994) 13 CLA 335.
37. *Manju Bhatia* v. *New Delhi Municipal Council*, (1997) 6 SCC 370.
38. *Ibid.*, p. 377.
39. *Id.*, p. 373.

Chapter II

Equitable Rights and Interests: Nature and Classification

"We must be content to regard equitable interests as hybrids, midway between jura in rem *and* jura in personam. *They are not quite the former, because of the doctrine of bona fide purchaser and they are not quite the latter because of the doctrine of trust funds."*

—Hanbury: *Modern Equity*

"The true way to understand the nature and incidents of equitable ownership is to start with the notion not of real ownership, which is protected only in a court of equity, but of a contract with the legal owner which cannot be enforced at all or cannot be enforced completely except in a court of equity."

—Sir Frederick Pollock;
Principles of Contract, 9th Edn., p. 223.

SYNOPSIS

1. ORIGIN

Owing to defects in Common Law, Equity Courts came into existence and they gave birth to equitable remedies, equitable rights and equitable interests. There was a double system of administration of justice in England prior to the Judicature Acts, 1873-75. Legal rights and interests were those that were recognised and protected by the Common Law courts. Equitable rights and interests were those that found recognition and protection from the courts of equity.

2. EQUITABLE RIGHTS AND INTERESTS

Simple examples of equitable interest and equitable right can be cited as follows:

A mortgages his property with *B* for Rs 5000. It is agreed that *A* should pay back Rs 5000 plus interest to *B* within two years. If not, after two years *A* would lose all his legal interest in the property and *B* will be its legal owner. *A* fails to pay back the amount within two years. After two years therefore *A*'s legal interest in the property is forfeited at law and the property goes to *B*. This might be proper at one time but Equity on the principle of binding the conscience of a person and that "a mortgage cannot be a mortgage on one side only" did not allow this unjust and inequitable state of affairs to continue. It gave a remedy

and consequently *A* could recover his property from *B* if he paid the amount with interest and expenses to *B*, even after the expiry of two years' period. Here *A*'s interest in the property under the forfeited mortgage is an equitable one. Thus interests recognised and enforced by the equity courts are *equitable* interests.

A husband had a right at common law in the property of his wife. Against this the wife had an *equitable right* against the husband for a reasonable provision for her and her children.

English law thus recognised two types of estates, legal and equitable. Law in India recognised no such distinctions.

3. ESTATES AT LAW

An estate is the condition and circumstances in which an owner stands with reference to his property. A legal estate is a limitation of interests in reality. Thereby a party, at law, gets rights of ownership and profits. Equitable estate is an interest recognised by equity only. It arises when a right vested in one person by law, should in view of equity be, as a matter of conscience, vested in another. A trustee has a legal estate vested in him, while the beneficiary has an equitable estate granted to him. Similarly where there is a valid contract for sale of land, the vendor has the legal estate with him till a conveyance has been executed, while the purchaser immediately on the contract, gets an equitable estate in land.

Estates according to English law are of three broad kinds. These divisions are based on (*i*) quality (type) of interest and duration of estate, (*ii*) time of enjoyment, and (*iii*) number of connections of tenants. Each division has sub-divisions. In division one there are: (*a*) freeholds of inheritance, (*b*) freeholds not of inheritance, (*c*) estates less than freeholds, and (*d*) estates upon condition. In division two, there are (*a*) expectancies, (*b*) remainders, and (*c*) reversions. In the third division, there are (*a*) severalty, (*b*) joint tenancy, (*c*) coparcenary, (*d*) tenancy in common, and (*e*) entireties. These sub-divisions have sub-divisions too. As we are not concerned with the details thereof it would suffice here to say that the Law of Property Act, 1925 has cut down the list of legal estates to—

(*i*) fee-simple absolute in possession;

(*ii*) the term of years absolute; and

(*iii*) certain legal interests or charges.[1]

The first is the greatest estate granted to a man and his heirs. A legal estate is one that is valid against the whole world.

4. NATURE OF EQUITABLE RIGHTS AND INTERESTS

As Snell puts it, an infringement of a plaintiff's legal right entitled him to a general and unqualified judgment at law irrespective of the circumstances of the infringement and his own conduct. But in equity there was no right to relief and the plaintiff's conduct or other surrounding circumstances might lead equity to

1. Walker D.M.: *The Oxford Companion to Law*, 1980 Edn., p. 432.

refuse any equitable remedy even though the plaintiff proved his case. Equity does not interfere with a man's legal rights unless it would be unconscionable on his part to take advantage of them. Equity acts on the conscience. The Judicature Acts, 1873-1875 fused the double systems of administration into one but the distinction between legal and equitable rights,[2] and between legal and equitable remedies continue. It is therefore very important from the practical point of view to know whether a right is one which had its origin and recognition at law or only in equity.

Whether jura in personam or in rem.—At their origin, equitable interests were *jura in personam* because their birth can be traced to the doctrine that equity acts on the conscience.[3] In course of time they were enforced not only against persons originally bound but also against their heirs or a donee or a purchaser with notice[4] and finally against all, except a bona fide purchaser for value, without notice. They were thus looked upon as rights *in rem* or proprietory rights; "what began as a mere personal equity has ended as a right of property".[5]

A *controversy*[6] exists on this point whether equitable rights are rights *in personam* or rights *in rem*. A lucid summary of the various conflicting views appears in Winfield.[7]

Legal rights as rights *in rem* are enforced against all but equitable rights will not be enforced against a purchaser without notice of them, and therefore they cannot be regarded as rights *in rem*.

On the point whether equitable rights are *jura in rem* or *jura in personam* there are two schools of thought—one in favour of *jura in personam* called the "personalists" and the other in favour of *jura in rem* called the "realists" by Dr Hanbury. Maitland citing a passage from Austin's *Jurisprudence* sharply remarks,[8] that Austin has failed to bring out the difference between *jura in rem* and *jura in personam* and it is "not merely nonsensical but mischievous". The point that Maitland has to push is that equitable estates and interests are not *jura in rem* but essentially *jura in personam*.

To a certain extent, contrary to the "realists" and contrary to Maitland's view is the view held by Megarry[9] which seems to be a very clear and concise exposition of the position as that expressed by Snell.[10] He says, "it is perhaps best to treat them as hybrids being neither entirely one nor entirely the other. They have never reached the status of rights *in rem*, yet the class of persons against whom they will be enforced is rather large for mere rights *in*

2. *Gentle* v. *Faulkner*, (1900) 2 QB 267.
3. *Joseph* v. *Lyons*, (1884) 15 QBD 280.
4. Maitland: *Lectures on Equity*, p. 112.
5. *Snell's Principles of Equity*, p. 22 citing *Sinclair* v. *Brougham*, 1914 AC 398.
6. H.C. Hanbury, (1929) 45 LQR 199.
7. Winfield: *Province of the Law of Tort*, (1931), pp. 108-112, cited in *Snell's Principles of Equity*.
8. Maitland: *Lectures on Equity*, (1969), pp. 106-107, citing Austin: *Jurisprudence*, p. 388.
9. Megarry & Wade: *Law of Real Property*, (1946), pp. 78-79.
10. *Snell's Principles of Equity*, 27th Edn., p. 23.

personam''. Maitland and Pollock belong to the ''personalist'' school and Professor Scott to the ''realist'' school. Dr Hanbury's view is a compromise between these two extremes. Thus we may consider equitable rights as hybrids occupying a middle position between *jura in rem* and *jura in personam* because they are clearly more than mere rights *in personam*.

5. CHARACTERISTICS

(1) *Recognition by Court of Chancery.*—An equitable interest is an interest recognised as such by the courts of Chancery. It affects the conscience of the legal owner. Thus, ''where a right vested in one person by law, should in the view of equity be vested in another'',[11] an equitable right arises. Equitable rights are therefore merely extensions and modifications of legal rights of property.[12]

(2) *Same Incidents as Corresponding Legal Estate.*—As pointed out by Snell, an equitable interest has generally been treated as having the same incidents as the corresponding legal estate.[13] This is based on the principle of the maxim that equity follows the law. In this respect it holds similarities with legal estate.

(3) *Not Superior to Legal Estate.*—Equitable estate is not superior to legal estate and (unlike legal estate), from equitable estate no other estate can be carved out.

(4) *Jura in Personam.*—Equitable interest is for the use of a person and therefore personal (*jura in personam*).

(5) *Competition between two Equitable Interests.*—Where there are two equitable estates and one is created in point of time prior to the other, they will be governed by the maxim, ''where there are equal equities, the first in time shall prevail'', or in other words, he who is earlier in time is stronger in law.

(6) *Equitable interest and legal interest.*—Where there are two equitable estates and out of them one has a legal estate also, the holder of a legal as well as an equitable estate shall be preferred on the principle ''where there is equal equity, the law shall prevail''. In other words, a legal estate is superior as between two persons having equitable estates because equity follows the law.

(7) *Different from Mere Equities.*—As an equitable interest is different and therefore can be distinguished from a legal interest, it can also be distinguished from mere equities. An equitable interest is an actual right in property e.g., an interest under trust.[14] Mere equities have a procedural flavour and mainly are rights to relief in respect of property e.g. a right to set aside a transaction for fraud,[15] or undue influence,[16] or to have a document rectified for mistake,[17] or

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11. Strahen: *Digest of Equity*, p. 21.
12. *Supra* note 3.
13. *Snell's Principles of Equity*, 27th Edn., p. 23.
14. *Banks* v. *Riplay*, 1940 Ch 719.
15. *Earnest* v. *Vivian*, 1863 Ch 513.
16. *Bainbridge* v. *Brown*, (1881) 18 Ch D 188.
17. *Garrard* v. *Franknell*, (1862) 30 Beav 445.

by inserting a repairing covenant,[18] and even the right of a deserted wife to remain in occupation of the matrimonial house.[19]

(8) *Aim of Equity.*—Defects and deficiencies of the Common Law were the foundation-stones upon which the edifice of equity jurisdiction came to be erected, and the three main purposes for which these equitable rights and interests were created were, protection of confidences, promotion of fair dealings, and prevention of oppression.

6. POSITION IN INDIA

Law in India recognises no distinction between Law and Equity as understood in English law, but in view of the fact that most of the equitable principles have been incorporated in various enactments in India, one cannot appreciate those principles without referring to the English system of law and equity. Similarly, the definition of the interest of the beneficiary rests on the very premises and postulates no less than it provides for double ownership. Moreover, the rights and interests of the beneficiary, though laid down in the statute, retain almost all the characteristics, limitations and flavour of the legal and equitable estates. They therefore deserve, on their own merits, the nomenclature "hybrids under the Indian law".

A similar view of the position seems to have been expressed by Mr M.C. Setalvad:[20]

> " ... the statute law of India has incorporated in itself to a substantial extent equitable rules and doctrines. The Indian Trusts Act of 1882 embodies in a concise form the whole structure of trusts built up by the equity courts in England... . Another instance of an almost bodily transplantation of the doctrines of the English equity courts is to be found in the Specific Reliefs Act of 1877... . In the greater part of the country it obtained its sway in the guise of 'equity , justice and good conscience'... the process continues to this day."

It has therefore been aptly remarked in *Seedee Ali* v. *Raja Ajoodhya*[21], that in India, there is "but one kind of proprietory right , call it legal or equitable you choose, which is recognised by the court, it is an equity, not divisible into parts or aspects".

EQUITABLE JURISDICTION

As held in *Skipper Construction (P) Ltd. case*[22] the jurisdiction and power of Supreme Court is exercised to meet the situations which cannot be effectively dealt with under the existing law. However, the power should be left undefined

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18. *Smith* v. *Jones*, (1954) 1 WLR 1089.
19. *Westminster Bank Ltd.* v. *Lee*, 1956 Ch 7.
20. Setalvad: *Common Law in India*, pp. 61-62.
21. (1867) 8 WR 399.
22. *D.D.A.* v. *Skipper Construction (P) Ltd.*, (1996) 4 SCC 622: AIR 1996 SC 2005. See also *A.G. of India* v. *Amritlal Pranjivandas*, (1994) 6 SCC 54; *Manju Bhatia* v. *New Delhi Municipal Council*, (1997) 6 SCC 370.

so that it may be flexible enough to be exercised depending upon needs of the particular case. But it should be used with circumspection. If there is no provision in law, that will not deter the Supreme Court to proceed under Article 142 *to do complete justice* between the parties.

Equitable jurisdiction of Supreme Court under Article 136 is compared to that of High Court under Article 226 in *Samarendra Kishore case*[23] as under: while Supreme Court could interfere with punishment imposed in a departmental inquiry, there was no corresponding power or jurisdiction with the High Courts/Central Administrative Tribunal for exercising such power or jurisdiction. Further, jurisdiction of Central Administrative Tribunal is analogous to High Court under Article 226.

7. DIFFERENCE BETWEEN LEGAL AND EQUITABLE ESTATE

This difference may be succinctly stated as follows:

(*a*) Legal estate is always superior to equitable estate in a sense that the latter in itself requires something more to fructify itself into a legal estate.

(*b*) From an equitable estate no other estate can be created, but from a legal estate an equitable estate can be carved out.

(*c*) Moreover, legal estate is enjoyed against the whole world and it is governed by Common Law in so far as its creation and transfer are concerned. Legal estate is therefore known as *jura in rem* while an equitable estate, being for the use of a person, is known as *jura in personam*. Of course this point is controversial but a happy compromise can be struck as discussed in this chapter elsewhere.

(*d*) In so far as conflict and competition between these two estates is concerned, it is the legal estate that succeeds because equity follows the law, and because one who has a legal estate as well as an equitable one has naturally a far superior claim than the one who has only an equitable estate. Where there is a competition between two equitable estates, the one created prior or first in point of time prevails. The question of priority depends upon certain rules and principles evolved by the courts of equity.

8. CLASSIFICATION OF EQUITABLE RIGHTS

Although fraud, accident and breach of confidence are considered as the basis of equity jurisdiction, this original or "primitive trio" is merely a convenient way to roughly express the foundations on which the structure stands. It does not connote the exact and exclusive jurisdiction but is a rough and ready estimate thereof. Story has classified these rights into three heads but the same may not be considered to be final, exhaustive and satisfactory:[24]

(A) Equities to protect confidences, i.e., trust.

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23. *State Bank of India* v. *Samarendra Kishore Endow.*, (1994) 2 SCC 537, 543: 1994 SCC (L&S) 687: 1994 (27) ATC 149: (1994) 1 LLJ 872: (1994) 1 SLR 516.
24. *Cf.* Story: *Equity Jurisprudence*, 3rd Edn., pp. 32, 38-39; Ashburner: *Principles of Equity*, 2nd Edn., p. 73.

(B) Equities to prevent oppression. This includes Penalties and Forfeitures, Mortgages and Liens, Married Women, Infants, Idiots and Lunatics.

(C) Equities to promote fair dealings. This includes Conversion, Election, Performances, Satisfaction and Ademption, Administration of Assets, Mistake, Misrepresentation, Fraud and Undue Influence, Accident and Set-off.
