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“EQUITY IS NOT TO BE PRESUMED TO BE PAST THE AGE OF CHILD-BEARING” —Harman J.

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INTRODUCTION: EQUITY WAXED OLD

It is recorded in the eighteenth chapter of the book of Genesis that when the Lord appeared unto Abraham in the plains of Mamre, and informed him that Sarah should have a son, Sarah heard it in the tent door which was behind him and laughed within herself, saying, “After I am waxed old shall I have pleasure, my lord being old also?”

Now, Equity is of much greater years than was Sarah, and any doubts which she entertained as to her continued fecundity might be thought much more pardonable. Nevertheless, if she ever did entertain such doubts, she seems to have merited from Harman J. the same rebuke as was delivered to Sarah.¹

Still, though I rejoiced when I read of the rebuke (as was natural and proper for one nurtured and trained in the Equity side of the profession), I was also a little surprised. Some three years ago, in an address which I gave at Oxford to the Society of Public Teachers of Law, I ventured to express the view that Mr. Gladstone and Lord Selborne, who as Prime Minister and Lord Chancellor respectively introduced the Judicature Act 1873,² would (had they survived today) have been a little disappointed at the ostensible results of three-quarters

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¹ Harman J's aphorism was quoted in the Press but I am now unable (as is the learned Judge) to recall its context. Probably it was spoken during the argument on an interlocutory application. It is perhaps pertinent to this paper to note that the Judge doubts its originality, recalling some similar utterance by Lord Mansfield.

² 36 & 37 Vict. c. 66.

of a century of so-called "fusion" of Law and Equity and the supremacy of the rules of Equity over the rules of Common Law which that far-reaching piece of legislation was supposedly designed to achieve. For I imagine that one of the first characteristics to strike a student of legal institutions upon a visit to England is the organisation of the English High Court with its three Divisions—Chancery, Queen's Bench, and Probate, Divorce and Admiralty. The day-to-day judicial experience of a Judge of one of those divisions is, generally speaking, widely different from that of a Judge of either of the other two: so much so that a Judge who is appointed to the Court of Appeal finds that a high proportion of the work that he is there called upon to do is of a kind of which his previous work on the Bench has given him little or no experience—a point made by Lord Asquith of Bishopstone when he was called upon to address the same formidably learned assembly, the Society of Public Teachers of Law, to which I have already alluded.

Take first the judges of the Queen's Bench Division. A large proportion of their time is spent on circuit, and when on circuit a high proportion again of their time is spent on criminal work. And of the civil work which falls to them in London or on circuit, nearly half the cases are personal injury cases of one kind or another—almost invariably tried without a jury. How different is the lot of the Chancery Judge! Of course he never goes away at all from London: the apocryphal story of the waistcoat attributed to one of the more unworldly Chancery Judges of the past may be kept alive as an insurance against any of them again going on Assize. Certain matters were assigned by the Act to the Chancery division—notably causes and matters for the administration of the estates of deceased persons and for the execution of private and charitable trusts, lineal descendants in large measure of the subjects of the old Equity Bills and now commonly tried without oral evidence upon Originating Summons.³

And though our complex and (from the point of view of social history) immensely important land law was the product of the common law Courts, it had come to be the peculiar province of the Chancery lawyer. The late Mr. Theo Mathew's famous caricature of the promising Chancery junior (of about 80) represents a post-Judicature Act character. A quarter of a century of experience of the Birkenhead Property legislation and a like experience of very heavy taxation have left relatively little scope for the mystic art of the Conveyancer. The background and upbringing of the Chancery Judge has to that extent altered, though in July of this year Roxburg J. (in *Re Williams' Will Trusts*)⁴ had to apply himself to the problem of the Rule in *Shelley's Case*. But other perquisites have come the way of the Chancery Division—for example the considerable administration of the Companies Act,⁵ Patents and Trade Marks, and the special jurisdiction created by the Family Inheritance⁶ and Adoption Acts.⁷

Of the special jurisdiction of the Probate, Divorce and Admiralty Division it cannot be necessary to make any exposition. But it may be worth noting that the differences between the Queen's Bench Division on the one hand and the Chancery and Probate Divorce and Admiralty Divisions on the other comprehend not only jurisdiction but also the not unimportant matter of dress. Only on State occasions do the Judges of the latter Divisions appear like their Queen's Bench brethren clothed in raiments of scarlet: on ordinary working days they

³ Certain matters were also specifically assigned to the Queen's Bench Division, e.g. the supervision of inferior Courts by prohibition and certiorari.

⁴ (1952) 2 A.E.R. 502.

⁵ 11 & 12 Geo. VI c. 38.

⁶ 1 & 2 Geo. VI c. 45.

⁷ 14 Geo. VI c. 26.

appear (like the High Court Judges of Australia but unlike their more colourful colleagues of the Queen's Bench) in sombre black. The sartorial distinction is not, however, to be taken to mark the superiority of the Rules of Equity ordained by the Judicature Act.

II. WHAT HISTORY HAS SET APART STATUTE HAS NOT JOINED

I owe, perhaps, an apology for so long an introduction in regard to what is well known. But the obvious must be stated, or at least remembered, if the point which I am seeking to make in this paper is to be apprehended. And I must therefore add references to two further matters. First, the organisation of the Judges' Chambers differs widely in the three Divisions of the High Court. That of the Probate, Divorce and Admiralty Division is not material to my subject and may be passed over. The difference between the Chancery and Queen's Bench Divisions in this respect may briefly be stated thus: that in the Chancery Division there is a close personal relationship between particular Judges and particular Masters—there is an adjournment to the Judge, not an appeal from the Master; and the Chambers are staffed and organised appropriately for the special purpose of taking accounts and making enquiries. Both these features are foreign to the Queen's Bench Chambers. Moreover, whereas the Queen's Bench Masters are chosen from members of the Bar, the Chancery Masters are recruited from the solicitor's profession. Secondly, the distinctions noted in the jurisdiction and characteristics of the Court itself are reflected in the profession of the Bar and (only to a less extent) in the solicitors' profession. Chancery barristers are, by and large, members of Lincoln's Inn, Common Law barristers of the two Temples (Gray's Inn has more divided loyalties). More important, the chambers of the Chancery practitioners may be said to be found exclusively in Lincoln's Inn, and these barristers rarely belong to any circuit. It must not be forgotten that the Chancery judges are appointed from the Chancery Bar and the Queen's Bench Judges from the Common Law Bar.⁸ As already indicated, a firm of solicitors conducting on its own account or as agents a substantial business in litigation will have Chancery and Common Law managing clerks, each with his different contacts, in Lincoln's Inn and the Temples respectively.

From what has been said it is at least plain that from a professional and an administrative point of view Equity and the Common Law have since 1873 markedly retained their distinct and independent characteristics. The High Court Judge is not, with us, a maid of all work.⁹ Professional susceptibility and the natural loyalties derived from quasi-collegiate bodies such as the Inns of Court not only preserve the separate qualities but in a sense enhance them by a measure of rivalry. I do not suggest that the sponsors of the Act of 1873 contemplated wholly different results. In an old and complex society like that of England and Wales a high degree of specialisation is inevitable and (I will assume) desirable. It may be expected that the business will be more quickly done if judge and counsel are thoroughly familiar with the types of case that are being tried. This last point is, with us, of particular importance. When the Committee on Supreme Court Practice and Procedure, of which I am the chairman, published its First Interim Report in August 1949, we drew attention to the extremely low ratio of judges in England to the total population compared with corresponding figures

⁸ Until fairly recent times the Queen's Counsel in the Chancery Division (save for "Specials") were tied to particular Courts.

⁹ I am not of course forgetting the County Court Judges, who are in very truth maids of all work and hard work at that. But Chancery work as ordinarily understood (in respect to which their jurisdiction is strictly limited) occupies but a small place in their work.

for other countries. Thus, in the year 1873 there were 18 Judges of the Queen's Bench Division, when the total population of England and Wales was approximately 22,700,000. Yet in 1948, when the population had increased to 43,500,000, the number of King's Bench Judges had only increased by two, representing (in all) one King's Bench Judge for every 2.18 million of the population. The figures at least illustrate the industrious qualities of H.M. English Judges.

But if the organisation of the profession of the law (added, no doubt, to the natural conservatism of mankind to which the organisation is in part at least attributable) has tended against fusion and in favour of the continued separate and specialist divisions of the Court, the form of the Statute itself may fairly be said to contemplate the rules of equity as fixed. Where "there is any conflict or variance between the rules of equity and the rules of common law . . . the rules of equity shall prevail in all Courts . . ." The formula appears to regard the Rules of Equity as a known and, *prima facie*, immutable body of doctrine. Parliament in 1873 can hardly have supposed the enunciation of some new principle of equity, the birth of some new *enfant terrible*, for the purpose of correcting or displacing a well-established common law rule. Yet, according to Sir George Jessel in *Re Hallett's Estate*,¹⁰ ". . . it must not be forgotten that the rules of Courts of Equity are not, like the rules of Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented."

I shall return hereafter to this well-known dictum. For the present my point is that the terms of Sec. 25 (11) of the Judicature Act¹¹—the fact, indeed, of the enactment itself—seem to me inevitably to have put a stop to invention. Whatever may be the inventive scope of the Equity Judges of New South Wales (and I express of course no opinion upon it) the wings of the English Chancery Judges have been clipped for three-quarters of a century so far at least as "inventing" rules of Equity is concerned: and the Lord Chancellor (still nominally the head of the Chancery Division) is in no greater position of freedom.

So far, then, the omens do not appear favourable for the interesting condition noticed by Harman J. The truth is that the so-called "fusion" of law and equity was and is referable to matters of procedure rather than substance: to which, however, must be made the important addition that the equitable remedies (particularly those important blood relations specific performance and the injunction) became generally available in all cases and all Courts. And the importance of the addition lies in this, that, as Lord Parker observed in that most difficult case *Sinclair v Brougham*,¹² equity not infrequently started from a personal equity (giving rise to a personal remedy) and "ended in creating what were in effect rights of property".

III. CONFLICTS OF LAW AND EQUITY.

I want to illustrate the point I have made by reference to two recent cases and by some consideration of the impact of equitable remedies upon recent legislation. But before doing so it is of interest to note what was written by a contemporary barrister by way of introduction to the Judicature Act 1873¹³

¹⁰ (1880) 13 Ch. D. 696 at 710.

¹¹ *Supra* n. 2.

¹² (1914) A.C. 398 at 442.

¹³ *Supra* n. 2.

in a series known as "The Practical Statutes". "This," he said, "is the most important statute, not only of this, but of any session of modern times. . . . A separate existence and jurisdiction of the two courts of law and equity has been peculiar to this Country and her Colonies. They were not even [sic] in England in the Saxon and early Norman times, and the Aula Regis was a supreme court administering justice as well according to rules of equity as of law. . . . The great object of modern times has been to do away with this divided jurisdiction and restore us again to one supreme court." Then, later, he says: "With reference to what is popularly called the fusion of law and equity, but which strictly is not fusion, there are the necessary provisions for the administration of law and equity when under the jurisdiction of one and the same court." The last sentence is of course a reference to Secs. 24 and 25. The former provided for the concurrent administration of law and equity. In the latter it recited that "it is expedient to take occasion of the union of the several courts to *amend and declare* the law to be hereafter administered in England as to the matters next hereafter mentioned." There then followed a number of paragraphs in which in truth the law was "amended and declared" so as to resolve "conflicts" between law and equity—e.g., in relation to the administration of the assets of deceased insolvents, the application of the Statutes of Limitation, etc.: and to the list is appended para. (11) already quoted.

If the Reports of the last three-quarters of a century are examined, there will be few cases found in which any "conflict" has arisen the resolution of which has depended on the application of Sec. 25 (11) of the Act. Indeed, in my own experience, recourse to that paragraph is commonly regarded like an invocation of that hard-worked bird the *Moorcock*¹⁴ as a last and forlorn hope when all else is lost. And, again, the contrary should not perhaps have been expected. According to so great an authority as Professor Maitland, the true function of equity has been not so much to correct (or "conflict with") the common law as to fulfil it. In the simplest case the rights given by equity to the cestuis que trust supplement but do not, strictly, qualify the legal rights of the trustee-owner—the conception is indeed in a sense comparable with the scheme of the 1925 Property Legislation.

But if the cases in which Sec. 25(11) of the Judicature Act 1873¹⁵ has played a decisive or important part are few, the case of *Winter Garden Theatre (London) Limited v Millennium Productions Limited*¹⁶ (the first of the two cases to which I referred above) may fairly be said to be one of them. The question involved, as is well known, was whether and in what circumstances a Court will restrain, by injunction, a licensor from determining his licence. Viscount Simon (after observing that the classic case of *Wood v Leadbitter*¹⁷ depended upon its pleadings) said: "It is enough to say that, at any rate since the fusion of law and equity, no court in this country would refuse to a plaintiff in Wood's situation the remedy for which he asked, and the case, in my opinion, should no longer be regarded as an authority."¹⁸ Upon the much discussed question whether *Hurst v Picture Theatres*¹⁹ was rightly decided, it is perhaps a pity that the House made no pronouncement. Lord Simon was of opinion that an affirmative answer should be given to the question: but he was not supported by any other of the noble Lords. Lord Uthwatt reserved his opinion upon it: but in the

¹⁴ (1889) 14 P.D. 64.

¹⁵ *Supra* n. 2.

¹⁶ (1948) A.C. 173.

¹⁷ (1845) 13 M. & W. 838.

¹⁸ *Supra* n. 16 at 191.

¹⁹ (1915) 1 K.B. 1.

course of his speech observed that "the settled practice of the Courts of Equity is to do what they can by an injunction to preserve the sanctity of a bargain"²⁰; and he stated that he could discern no answer to the propositions formulated in the case under appeal by the then Master of the Rolls, Lord Greene. These propositions (having regard to the eminence of their author and Lord Uthwatt's approval) are worth stating, and they are:

"The next question which I must mention is this. The respondents have purported to determine the licence. If I have correctly construed the contract their doing so was a breach of contract. It may well be that in the old days that would only have given rise to a right to sue for damages. The licence would have stood revoked, but after the expiration of what was the appropriate period of grace the licensees would have been trespassers and could have been expelled, and their right would have been to sue for damages for breach of contract, as was said in *Kerrison v Smith*.²¹ But the matter requires to be considered further, because the power of equity to grant an injunction to restrain a breach of contract is, of course, a power exercisable in any court. The general rule is that before equity will grant such an injunction there must be on the construction of the contract a negative clause express or implied. In the present case it seems to me that the grant of an option which, if I am right, is an irrevocable option, must imply a negative undertaking by the licensor not to revoke it. That being so, in my opinion such a contract could be enforced in equity by an injunction. Then the question would arise: at what time can equity interfere? If the licensor were threatening to revoke, equity, I apprehend, would grant an injunction to restrain him from carrying out that threat. But supposing he has in fact purported to revoke, is equity then to say: 'We are now powerless. We cannot stop you from doing anything to carry into effect your wrongful revocation'? I apprehend not. I apprehend equity would say: 'You have revoked and the licensee had no opportunity of stopping you doing so by an injunction; but what the court of equity can do is to prevent you from carrying that revocation into effect and restrain you from doing anything under it'. In the present case, nothing has been done. The appellants are still there. I can see no reason at all why, on general principles, equity should not interfere to restrain the licensors from acting upon the purported revocation, that revocation being, as I consider, a breach of contract."²²

It will be noted that according to this passage (if it be the law) the test for the intervention by way of the equitable remedy of the injunction is the presence in the contract, expressly or by proper implication, of a negative covenant or obligation—the same test whereby in general contracts will, by means of injunction against their breach, be in effect specifically enforceable by the Courts.

Although, therefore, in the event, the *Winter Garden* case²³ was on the construction of the particular instrument of licence decided by the House of Lords in the licensor's favour, it must, as it seems to me, now be treated as established that the right of a licensor to resume unqualified occupation of the licensed property will depend on the terms of the bargain, properly construed according to the ordinary sense of the language, between himself and his licensee. In other words, it seems that an instance is established (illustrative of Lord Parker's

²⁰ *Supra* n. 16 at 202.

²¹ (1897) 2 Q.B. 445.

²² (1946) 115 L.J. (Ch.) 297 at 302-3.

²³ *Supra* n. 16.

statement noticed above) of the process whereby equity by giving effect to a personal equity, viz., the right to have the terms of a contract respected and enforced, has gone at any rate some way towards creating a proprietary right.

IV. "INVENTION" AND "REFINEMENT" OF PRINCIPLES OF EQUITY

But to return to the language of Sir G. Jessel: important though I think to have been the inferences derived from the *Winter Garden* case,²⁴ has some new rule or principle of equity been "invented"? I think not. Perhaps there has been "refinement". The effect of an old-established principle has been formulated anew. In patent law no less than in other branches of the law "invention" may fairly consist in the discovery that some known principle has a particular application not hitherto understood or known. But that is not to say that some entirely novel rule has been "invented", enunciated for the first time to give a remedy for a particular injustice. Indeed, with all deference to so great an authority, I entertain more than a mere shadow of a doubt whether as regards the "rules of equity" Sir G. Jessel's assertion is justified—that we know the Chancellors who "invented" them, at least, in the sense in which I have last used that word. If there was, for the first time, a classic formulation of the principle, the principle still had a remote and respectable ancestry. I do not think that Lord Eldon would have laid claim to be the "inventor" of the equitable rule about undue influence which he expounded—with due regard to the historic speech in reply to Sir Samuel Romilly—in *Huguenin v Baseley*.²⁵

The enquiry is perhaps in any case somewhat futile. Judges of all ages have sought and continue to seek the imprimatur of earlier authority for their most far-reaching pronouncements. In modern times my brother Denning has certainly sought to find applications of equitable principles to modern social conditions: and his *High Trees* decision²⁶ has at least been a godsend to teachers of law. But Denning L.J. would—apart from his natural modesty—be the last to claim to be an "inventor" of rules of equity. And the House of Lords has in recent times emphasised that judicial legislation is apt to be a dangerous usurpation of Parliamentary functions.

I come then to my second case—none other than *In re Diplock*.²⁷ I feel a proper diffidence in introducing this case—partly because I participated in it, partly because of its tremendous length. The latter characteristic may however be a justification for its mention, since few may have had the patience to pursue it to the end. Yet the case is (for present purposes) important. And if further justification be needed for the citation it may be found in the fact that the champion of the next of kin came—as other claimants have done before and will doubtless do again—from New South Wales. (And he was markedly more successful than one of his more celebrated predecessors.)

Two distinct equitable claims were raised in the case, conveniently referred to as the claim *in personam* and the claim *in rem*. Both points were, according to the ordinary acceptance of the word, novel. And though (as I maintain) there was no "invention" in the formulation of either answer, each at least involved a considerable voyage of discovery—into the pronouncements and authorities of the past.

I assume the general nature of the facts to be well known. As regards the claim *in personam*, the Judge at first instance had held that the next of kin had

²⁴ *Supra* n. 16.

²⁵ (1807) 14 Ves. 273 at 284-288.

²⁶ CENTRAL LONDON PROPERTY TRUST LIMITED v. HIGH TREES HOUSE LIMITED (1947) K.B. 130.

²⁷ In the Court of Appeal (1948), Ch. 465.

no equitable right against the persons who had, in good faith, been wrongly paid by the executors. According to him, a next of kin in such circumstances could only recover by an action at law in the name of the executors for money had and received or by analogous proceedings in equity without appointing the executors—having in both cases to found himself on the premise that payment had been made by the executors under a mistake not of law but of fact (as the payments in the instant case had not been). The Court of Appeal concluded (and their decision was affirmed by the House of Lords) that the equitable right of the next of kin was not so confined and (in particular) not so limited by reference to the common law form of action. They held that, provided only that no effective remedy was available against the executors or that any such remedy had been exhausted, the next of kin had an available equity to recover from the “legatee” wrongly paid, and none the less though the payment had been made under a mistake of law and in the absence of administration by the Court. But the conclusion, so far from being an “invention”, was founded on the logical conclusion to be derived from ancient authority, particularly the statement of principle in *Roper on Legacies*,—an auspicious name in New South Wales—and the authorities there referred to beginning with *Nethrop v Hill*²⁸ in 1669. Three sentences from Roper shall be quoted:

With respect to the equity of one legatee to make another refund, it may be stated, as a general rule, that an unsatisfied legatee cannot maintain a suit against another who has been paid by the executor; because the remedy, in the first instance, is against the executor, who, by discharging one legacy, has admitted assets for the payment of all.

But an exception to this rule occurs, when the executor is in insolvent circumstances; for since the unsatisfied legatee can have no redress against him, he would be without a remedy unless permitted to call upon the other legatee to refund.

Still, this permission is qualified, subject to the following distinctions . . . etc.

The claim *in rem* raised the question whether and to what extent the unpaid next of kin could follow or “trace” the payments made out of residue into assets in the hands of the wrongly paid but innocent charities where the payments had been mixed with other receipts or moneys belonging to the latter. In the end, the claim resolved itself into a consideration of the true effect of that most difficult of cases *Sinclair v Brougham*.²⁹ According to the Judge, that decision had in no way extended the principle of *Hallett's case*³⁰—which principle could only operate in cases where the “mixing” took place in breach of trust or other fiduciary relationship and in proceedings against the trustee or fiduciary agent.

The Court of Appeal disagreed with this view—and upon this part of the case there was no appeal to the House of Lords. The present is not the occasion to review the analysis then made of the speeches in *Sinclair v Brougham*,³¹ but the judgment in *Diplock*³² may claim at least the not negligible distinction of making clear the effect of that vexed decision and showing for the first time that *Sinclair v Brougham*³³ (from Lord Parker's speech in which I have earlier made

²⁸ (1669) 1 Ch. Cas. 135. The reference to *ROPER ON LEGACIES* is 4th ed., 1847, vol. i (vii), s. iii.

²⁹ *Supra* n. 12.

³⁰ *Supra* n. 10.

³¹ *Supra* n.12.

³² *Supra* n. 27.

³³ *Supra* n. 12.

a quotation) and *Hallett's* case³⁴ itself were but applications to the respective facts of those cases of a wider or more general equitable principle. (I can make this boast without immodesty since I am able to disclose³⁵ that this part of the Court of Appeal's judgment was the work of my distinguished predecessor Lord Greene.) Two passages from the judgment are pertinent to the present point and should be noted.

"... Before us it was argued . . . that the principle on which *Sinclair v Brougham* was decided was not that applied in *Hallett's* case but a different one altogether, invented with a view to solving a particular problem. We do not agree. The principle was clearly the same; but in its application to new facts fresh light was thrown upon it, and it was shown to have much wider scope than a narrow reading of *Hallett's* case itself would suggest."³⁶

And:

"This explanation appears to us to accord with the fundamental conception which lies at the root of this equitable jurisdiction, i.e. that equity intervenes not to do what might be thought to be absolute justice to a claimant but to prevent a defendant from acting in an unconscionable manner. . . . If this limitation on the power of equity results in giving to a plaintiff less than what on some general idea of fairness he might be considered entitled to, that cannot be helped."³⁷

Again, therefore, no invention, no creation of a new rule to secure, so far as humanly possible, adherence to an absolute standard of fairness or justice: at most the "discovery" and formulation of the equitable principle established from ancient times—and with all its limitations. But it will be observed that in both the *Winter Garden* case³⁸ and in *Re Diplock*³⁹ there was a manifest reluctance to attempt any exhaustive formulation of the principle involved: the general nature of the principle, its scope and purpose, was stated and consideration was then given to the particular problem, whether the case before the Court fell within or was excluded from it. This judicial process is not new—the older Chancery Judges always in terms forbore to define the scope of the rule of undue influence for fear that by so doing they would inevitably put unwanted limitations upon it. But I am inclined to think that there has lately been an increased tendency to this method; and it may well be attributable to the effect of the Act of 1873.⁴⁰ Since its passing all equitable claims and defences must be raised in any suit so that the equitable principles fall to be considered, not only in the well known and more confined context of an equitable proceeding, but (as often as not) in close relation with Common Law claims—and, of course, as often as not also by Common Law judges. In the changed environment there is no doubt, at worst, a danger of imprecise thought and preference for repetitive precedent rather than for application of principle. But at best, the converse is true.

V. EQUITY AND MODERN LEGISLATION

I come then, naturally, to the third matter of illustration to which I referred above—the impact of equity (more particularly of equitable remedies) upon modern legislation. Here is indeed new environment for equity to work in. Modern social and political philosophy has not only ordained (in Chief Judge

³⁴ *Supra* n. 10.

³⁵ Without, I hope, involving myself in any question comparable with that recently raised in England in regard to Cabinet deliberations.

³⁶ *Supra* n. 27 at 526.

³⁷ *Supra* n. 27 at 532.

³⁸ *Supra* n. 16.

³⁹ *Supra* n. 27.

⁴⁰ *Supra* n. 2.

Cardozo's phrase) that property, like other institutions, has a social duty to perform but has imposed statutory duties and restrictions on individuals in every aspect of their lives, not dreamt of when the old established rules of Equity took their early shape. There may be found scope, here, for development and growth—and, if so, it is perhaps less surprising than might at first appear that out of the prolific growth of rent restriction cases there seems indeed to have emerged something like a new equity, a new creature altogether, the "equity" of a married woman to remain in occupation of the matrimonial home.

I have earlier referred to the duty of Judges to avoid usurpation of Parliament's exclusive right of legislation—and (as Chief Judge Cardozo also observed) there is in any case less need to indulge in judicial legislation in modern times when the legislature is in more or less continuous session. Undue enthusiasm must no doubt, then, be restrained. Equally, if the natural growth of living principles is not to be stunted, there is added reason for avoiding also the limiting effect of rash and unnecessary definition. But in this connexion it may be observed that legislative amendment and declaration of the old "rules" seems even more difficult and hazardous with rules of equity than with rules of common law. The latter, having particular regard to the influence of the old forms of action "ruling us from their graves" are, I think, generally narrower and more precise and therefore more amenable to legislative treatment—note the recent English instances as regards the old common law rules of contributory negligence and common employment. Statutory limitation or definition of, say, the principle of "undue influence" is difficult to contemplate: and if attempted, the method of approach would be entirely changed: the argument would no longer be upon logic and principle but—with all the ingenuity and unreality applied to the language of a taxing statute—whether the particular case came within or without the precise terminology of the Act.⁴¹

However that may be, there can, as I think, be no doubt that judicial decisions have contrived to give to the complex and piecemeal legislation in England known as the Rent Restriction Acts a coherence and a degree of elasticity that might well have been found unattainable in a codifying statute. It has been the fashion at times for judges to criticise the language and structure of these Acts. There are, no doubt, inelegancies. But by and large the Acts have, I believe, achieved reasonably well their Parliamentary purpose. I do not, therefore, join the ranks of their more virulent critics. But, as I have already observed, I think much is owed to judicial interpretation. More particularly, Judges have been able, by discerning and formulating principles of general application, to avoid the dangers inherent in the elaborate definitions that might otherwise have been demanded. For the subject matter of the letting of houses, like that of taxation, is one that excites human ingenuity. Ordinary men will be apt to resort to every kind of device to escape the impact of rent restriction no less than that of estate duty or income tax.

But the conception of the so-called "statutory tenancy" to the general characteristics which that great judge, Scrutton L.J. was among the first to give expression is beyond doubt something wholly new—to an eighteenth and even nineteenth century lawyer it would have been indeed a *monstrum horribile*. Conferring as it does upon the persons entitled to the protection of the Acts a

⁴¹ On this ground, I believe, the attempt was recently abandoned of substituting a better definition of "invention" in patent law than the Jacobean "manner of new manufacture". A similar problem has presented itself to the Royal Commission authorities, but they have done no more in their report than suggest the substitution of Lord McNaughten's classification in *Inland Revenue Commissioners v Pemsel* for the original Elizabethan formula.

"personal status of irremovability" it yet involves no kind of proprietary interest and is incapable of transmission by gift, testamentary disposition or assignment.

It is of course entirely a creature of statute. But just as the equitable remedy of injunction will be used, as shown by the *Winter Garden* case,⁴² to enforce and support a "right" conferred by contract, so may it also be available in enforcement of a "mere statutory right". And the Courts so using the universal equitable remedy may come, at least as a practical matter, near to creating in the end (in Lord Parker's language in *Sinclair v Brougham*)⁴³ rights of property.

Advancing thus a further step, we reach the case of the wife of the statutory tenant, deserted by her husband and remaining in the matrimonial home. The latest case upon this topic is that of *Bendall v McWhirter* in the Court of Appeal.⁴⁴ *Bendall v McWhirter* was not in fact a Rent Act case at all—it involved the important decision that the trustee in bankruptcy of a deserting husband had no better right than the husband to evict the wife from the (freehold) matrimonial home. But the Court of Appeal was referred to and followed numerous earlier decisions of its own (such as *Brown v Draper* in 1944)⁴⁵ which were Rent Act cases. *Bendall v McWhirter* may therefore fairly be said to be in the Rent Act line of descent, at least on side of the family, for the significance of the wife's right to continued occupation arose naturally and inevitably out of the Rent Acts and the status of the statutory tenant. Apart from the Rent Acts the determination by forfeiture or otherwise of the lease of the husband's house necessarily determined any rights as regards the house which his deserted wife might have. But a statutory tenancy can only be determined by an order for possession by the Court in accordance with the strict provisions of the Act or by actual delivery up of possession in fact to the landlord—the latter alternative being plainly impossible so long as the tenant's wife remained there.

The subject is one of interest and difficulty and also likely to be controversial. And it is one into which I am not entirely free to enter; for several of the relevant cases in the Court of Appeal are cases in which I have (judicially) participated. In any case the matter has been fully and vigorously dealt with by Mr. R. E. Megarry in the July number of this year's *Law Quarterly Review*⁴⁶ and I could not hope to improve upon Mr. Megarry's performance—still less to suggest answers to all the difficult questions which he asks. I am content to refer my present readers to Mr. Megarry's article and to the full report of *Bendall v McWhirter*.⁴⁷ And this (which is relevant to my purpose) at once emerges from the Report. Whatever may be the true nature (and justification) for the wife's right, the majority of the Court of Appeal were content to describe it as "a clog or fetter" on the husband's interest (to which his trustee in bankruptcy was no less subject) but not conferring any proprietary interest, legal or equitable, on the wife. Denning L.J. went a stage further and defined the wife's right as an "equity".

Upon the divergence in view between the majority of the Court (which has of course binding effect) and Denning L.J. I express no personal opinion. From the argument which I have sought to make in this article the further step taken from an equitable remedy to a proprietary (equitable) right may be thought

⁴² *Supra* n. 16.

⁴³ *Supra* n. 12.

⁴⁴ (1952) 2 Q.B. 466.

⁴⁵ (1944) K.B. 309.

⁴⁶ R. E. Megarry, "The Deserted Wife's Right to Occupy the Matrimonial Home" (1952), 68 *Law Review* 379.

⁴⁷ *Supra* n. 44.

easy and natural. Reverting to the *Winter Garden* case⁴⁸ (which was cited in *Bendall v McWhirter*⁴⁹, if a licensee can restrain by injunction the determination of his contract of licence, it may be thought to be an insignificant and academic point that he has, nonetheless, no proprietary interest of any kind. Yet the distinction may be important. The distinction between personal rights of occupation and proprietary interests having that effect may be said to be a phenomenon of the age. It has still to be determined how far the Courts will or should go in enforcing, by the powerful instrument of the injunction at the suit of a private person in a civil action, the numerous statutory restrictions to which we are now subject. *Prima facie*, if such restrictions are imposed upon one section of the community for the benefit of another, a suitor of the latter class could successfully invoke the equitable remedy—e.g. the Court would restrain an attempted disturbance of the occupation of a statutory tenant (or of his deserted wife) in spite of the absence in him (or her) of any right of property. Another instance of a different kind may be found in the injunction granted to the *British Motor Trade Association v Salvadori*⁵⁰—a case concerning the covenants against early sales of new motor cars—though in that case both contract and conspiracy were involved.

Certain at any rate it is that if in all cases where a statutory right will be enforced by injunction new “equities” in the sense of proprietary interests are to be treated as becoming established, equity so far from having become sterile will have entered upon a new era of prolificacy. But, for my part, I doubt whether these apparently attractive consequences will follow. One of the questions raised by Mr. Megarry in his article (above mentioned) is whether statutory restrictions or prohibitions do, in truth, create a corresponding right—e.g. did the prohibition, under the Courts (Emergency Powers) Act,⁵¹ against a mortgagee starting proceedings to enforce his security give to the mortgagor some new right in the property? In a recent case the Division of the Court of Appeal over which I presided held that the restrictions imposed upon a landlord (by the Rent Acts) against recovering possession did not prevent the running of time in favour of the tenant for the purpose of the Limitation Act, at any rate in a case where time had begun to run before any “statutory tenancy” had arisen—i.e. that such restrictions did not qualify the fact of “adverse possession”.

To my mind, therefore, equities in the sense of equitable rights will not automatically be created by the availability of the equitable remedy of the injunction in support of novel statutory rights. The remedy, though equitable in origin, has become generally available and no longer requires the existence of an equitable right (properly so called) to support it. The old rules and principles of equity may indeed occasionally find new uses in new surroundings, but only by a proper application—as seen in *Re Diplock*⁵²—of the old philosophy of equity and, above all, by a true ascertainment of the principles themselves and the avoidance of unnecessary definition and of what I have called merely repetitive precedent. And I greatly doubt whether the terms of Sec. 25 (11) of the old Judicature Act⁵³ will find much greater scope in the future than it has in the

⁴⁸ *Supra* n. 16.

⁴⁹ *Supra* n. 44.

⁵⁰ (1949) Ch. 556.

⁵¹ 6 & 7 Geo. VI c. 19.

⁵² *Supra* n. 27.

⁵³ *Supra* n. 2.

past—whether many new “conflicts” will arise for its solution and many new “issues” will be born to the old lady.

* * * * *

Still the champions and students of Equity may take comfort from the vigour and social usefulness with which the remedy of the injunction is likely to be armed. And, after all, it was by reference to the remedy that on the 26th July 1616 King James I determined the classic dispute between Coke and Lord Ellesmere. “We do will and command”—so ran the royal decree—“that our Chancellor or Keeper of the Great Seal for the time being shall not hereafter desist to give unto our subjects, upon their several complaints now or hereafter to be made, such relief in equity (notwithstanding any proceedings at the common law against them) as shall stand with the merit and justice of their cause and with the former ancient and continued practice and presidency of our Chancery. . . .”⁵⁴

It remains only for me to express my appreciation of the invitation sent to me to contribute to the *Sydney Law Review*, and to add to my memory of my happy visit to Australia in 1951 my good wishes for the *Review's* success.

⁵⁴ 1 Chan. Rep. App. 49, 21 E.R. 588, quoted 1 Holdsworth, *History of English Law* (6 ed. rev.) 463. There is a slightly different version in Carey 134, 21 E.R. 65.