

THE NATURE AND FUNCTION OF EQUITIES

(PART I)

by

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A. Introduction

The purpose of this paper is to discuss the function and utility of the concept of the 'equity' as it has been used by courts in a number of diverse areas. The term 'an equity' is often used simply to describe the right of a plaintiff to obtain an equitable remedy against a particular defendant, a right not assignable or enforceable against third parties.¹ For example, the right of a deserted wife to seek an injunction restraining her husband from selling the matrimonial home without providing her with alternative accommodation, would be such a 'personal equity'. But where it appears that the right is enforceable against third parties the expression 'an equity' has come to be used in the sense of a proprietary interest ranking at the bottom of a hierarchy of proprietary interests consisting of legal interests, equitable interests and equities.²

In examining the concept of the equity in this sense it is proposed to discuss:

1. The way in which the equity concept is used as a means of providing a remedy where one would not otherwise be available, and, in that context, the role that the equity plays as a device for supplementing the traditional categories of legal and equitable proprietary interests. In the case of confidential information, which we shall argue is a form of equity, the failure of the courts to employ the equity concept is discussed.

2. The way in which the equity concept is used to give the court flexibility in tailoring the remedy to fit the facts of the case.

3. The way in which the equity classification has been used in priority disputes, and its usefulness in the context of such disputes.

The concept of an equity as a proprietary interest has been used in the following areas:—

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1 See for example R. P. Meagher, W. M. Gummow, and J. F. Lehane, *Equity-Doctrines and Remedies* (1975) at p. 96-98. Snell advises that 'the term "an equity" may have four different meanings, according to the context in which it is used'. R. E. Megarry and R. V. Baker, *Snell's Principles of Equity* (27th edn. 1973) 22. See also A. R. Everton, 'Equitable Interests and Equities — in Search of a Pattern' (1976) 40 *Conveyancer and Property Lawyer* at p. 209.

2 D. C. Jackson, *Principles of Property Law* (1967) at p. 72-77.

1. Where the owner of property has been induced to convey it by fraud or undue influence, the right of the grantor to have the conveyance set aside for fraud, either against the fraudulent grantee or against a third party has been described as an equity.³

2. Where a document incorrectly embodies the agreement between the parties to the document, the equitable right of the parties to have the document rectified has been described as an equity.⁴

3. Where a person expends money with the encouragement or acquiescence of another person, the right which he acquires against that other person and possibly against third parties has been described as 'an equity of acquiescence'.⁵

4. Where the courts have protected licensees (generally contractual licensees) from eviction from the land the licensees have been described as having 'an equity'⁶ coupled with a licence or contractual licence.

5. Where a wife was deserted, her right to remain in the matrimonial home which could be asserted against her husband,⁷ and, until the decision in *National Provincial Bank Ltd. v. Ainsworth*,⁸ against some third parties,⁹ was described as a deserted wives' equity.¹⁰

3 See for example *Phillips v. Phillips* (1862) 4 De G.F. & J. 208, 45 E.R. 1164; *Latec Investments Ltd. v. Hotel Terrigal Pty. Ltd.* (1965) 113 C.L.R. 265; cf. *Stump v. Gaby* (1852) 2 De G.M. & G. 623, 42 E.R. 1015, and see the discussion below. In the *Latec Case* the right in question was the mortgagor's right to set aside a mortgagee's sale for fraud; cf. the right of a beneficiary to have a purchase of the trust property by the trustee set aside.

4 *Smith v. Jones* [1954] 2 All E.R. 823; cf. *Downie v. Lockwood* [1965] V.R. 257. But, as is pointed out in Meagher, Gummow and Lehane, *Equity-Doctrines and Remedies* (1975) at p. 99.

...if rectification or rescission for misrepresentation were sought of contracts which were purely executory and none of which created or were dependent upon an estate or interest in real or personal 'property', the equities involved should be classed as purely 'personal' for, by definition, there would be no assets in respect of which competing claims were asserted.

5 See for example *Inwards v. Baker* [1965] 1 All E.R. 446. For a more detailed discussion of the equity of acquiescence principle see below.

6 This class of case appears to be treated as an example of an equity by academic commentators rather than in the cases. See for example *Errington v. Errington* [1952] 1 All E.R. 149. In that case Lord Denning did not use the expression 'an equity', but spoke of the couple's 'equitable right' to remain. However, Jackson, *Principles of Property Law* (1967) at p. 72 seems to treat it as an equity; cf. R. E. A. Poole, 'Equities in the Making' (1968) 32 *Conveyancer and Property Lawyer* 96, at p. 112. Arguably here the interest is an equitable interest. See G. C. Cheshire, 'A New Equitable Interest in Land', (1953) 16 *Modern Law Review*, 1.

7 *Lee v. Lee* [1956] 2 Q.B. 489 n.

8 [1965] A.C. 1175.

9 See for examples *Bendall v. McWhirter* [1952] 2 Q.B. 466; *Lloyds Bank Ltd. v. Trustees of the Property of O.* [1953] 2 All E.R. 1443; *Jess B. Woodcock & Sons Ltd. v. Hobbs* [1955] 1 All E.R. 445; *Westminster Bank v. Lee* [1956] Ch. 7. The deserted wives' equity never showed signs of being accepted in Australia: *Brennan v. Thomas* [1953] V.L.R. 111; *Maio v. Piro* [1956] S.A.S.R. 233; *Dickson v. McWhinnie* (1958) 58 S.R. (N.S.W.) 179.

10 This is not intended to be an exhaustive list of equities. It excludes, for example, the equity of confidence suggested below. It also excludes such well-established equities as the right of consolidation of mortgages: *Harter v. Colman* (1882) 19 Ch. D. 630.

6. Where adjoining landowners agree to confer reciprocal rights upon each other it has been held that neither landowner can take the benefit of the agreement and refuse to shoulder the burden.¹¹ An interest arising in this manner binds successors in title to the original parties to the agreement. Rights acquired in this manner have sometimes been described as equities.¹²

B. Classification of Equities

The equities described above fall into two groups.¹³ In examples 1. and 2. there is no doubt about the plaintiff's entitlement to a remedy against the other party to the transaction. It can be dogmatically stated that where B fraudulently induces A to convey land to B, A is entitled to have the conveyance set aside against B. The enforcement of A's right against B is no more discretionary than is the right of a purchaser of land to assert his estate contract interest against the vendor. By bringing himself within an established category A has shown his entitlement to a remedy. Moreover the enforceability of A's right against *some* third parties has been settled for a long period. The interest has been accepted into the hierarchy of proprietary interests. Here the 'equity' label is important in the context of priority disputes, but the existence of the above rights as some kind of proprietary interest has not been in question. We propose to call these 'defined equities'.

The equities described in 3. and 4. are at a different stage of development. In these cases the concept of the equity was often first invoked to give the plaintiff a remedy against the other party to the transaction where the case was not clearly covered by existing contractual, or tortious principles, and the interest asserted did not fall within a traditionally defined category of proprietary interest. Example 6. is arguably another example of the problem. The deserted wives' equity was clearly at this stage of development before its final rejection. The court is first confronted with the question whether even a personal equity should be held to exist. After this threshold is passed the next problem is whether the interest should become enforceable against third parties, thus becoming an 'equity' in the proprietary sense.¹⁴ Whenever the court

11 *Hopgood v. Brown* [1955] 1 W.L.R. 213. *Halsall v. Brizell* [1957] Ch. 169. *E. R. Ives Investment Ltd. v. High* [1967] 2 Q.B. 379

12 Such a right could be regarded as an equitable interest *simpliciter*. In *E. R. Ives Investment Ltd. v. High* [1967] 2 Q.B. 379, Winn L.J. appears to have treated it as an equity (at p. 405). Neither Lord Denning M.R., nor Danckwerts L.J. characterise the interest precisely. Some difficulties arise in the characterisation of the interest, since the application of the notice doctrine has not been fully worked out in this area. Moreover, the circumstances giving rise to such a case frequently also give rise to an equity of acquiescence.

13 For a similar analysis see Jackson, *Principles of Property Law* (1967) at pp. 69-70. This analysis seems to solve some of the difficulties outlined by A. R. Everton, 'Equitable Interests and Equities — In Search of a Pattern' (1976) 40 *Conveyancer and Property Lawyer* 209.

14 Assuming, of course, that the personal equity is asserted against some assets in the hands of the defendant.

invokes the equity concept, even in the 'personal equity' sense, the potential exists for the equity later to be converted into a proprietary equity. In this latter group of equities the equity label is first attached for the purpose of producing a remedy. The plaintiff in such a case cannot point to a category and assert his right to a remedy on the basis of such a category. Rather, he must persuade the court to provide a remedy on the basis of the facts of his particular case.¹⁵ In this area the extent of the courts' discretion is wider than in the case of a 'defined equity', but of course, if the court provides a remedy sufficiently frequently the equity in question may be converted into a 'defined equity'. Even after this has occurred the question "equity or equitable interest" may still have to be answered for the resolution of a priorities conflict, and arguably it is not until this point of time that the right becomes established as an equity.

The process described above is clearly illustrated by the development of the now defunct deserted wives equity. The equity of acquiescence may be at the point of becoming a 'defined equity'.¹⁶ The 'equity of confidence' discussed below is in the midst of this process.

C. Undefined Equities

Two lines of cases, one based upon estoppel (*Ramsden v. Dyson*)¹⁷ the other based upon a dubious contractual analogy (*Dillwyn v. Llewellyn*)¹⁸ coalesced to give birth to the modern 'equity of acquiescence' beloved by Lord Denning.

In *Inwards v. Baker*¹⁹ a father suggested that his son erect a bungalow upon the father's land, rather than purchasing other land for this purpose. The son expended £150 in building the bungalow and moved into possession. The father died, leaving the land upon which the bungalow stood to Miss Inwards, with whom he had lived for many years, and to the children of that relationship. After the death of Miss Inwards, the trustees of the father's will sought to evict Baker on the basis that his licence to remain in the bungalow had been revoked.

15 Jackson, *Principles of Property Law*, (1967) at pp. 69-70.

16 It is not suggested that all these themes are dealt with separately. One case may of itself determine that a personal equity exists, create a new category of equity, and ascertain the appropriate priority principles.

17 (1866) L.R. 1 H.L. 129. Many commentators still regard the equity of acquiescence as an example of estoppel, albeit estoppel of a kind recognised only in equity. See for example Meagher, Gummow and Lehane, *Equity-Doctrines and Remedies* (1975) at p. 363-371; Maudsley, *Hanbury's Modern Equity* (9th edn., 1969), at p. 679-683; F. R. Crane, 'Estoppel Interests in Land', (1967) 31 *Conveyancer and Property Lawyer* 332. R. H. Maudsley, 'Licence, to Remain on Land', (1956) 20 *Conveyancer and Property Lawyer* 281. R. E. A. Poole, 'Equities in the Making', (1968) 32 *Conveyancer and Property Lawyer* 96.

18 (1862) 31 L.J. Ch. 658; 45 E.R. 1285. On one view the principle still rests upon an implied contract: see for example, *Canadian Pacific Railway v. The King* [1931] A.C. 414, at p. 428; *N.S.W. Trotting Club v. Glebe Municipal Council* (1937) 37 S.R. (N.S.W.) 288, at p. 308; *Commonwealth of Australia v. Goodwin* [1961] N.S.W.R. 1080, at p. 1088, per Brereton J.

19 [1965] 2 Q.B. 29.

Lord Denning relied upon *Dillwyn v. Llewellyn*²⁰ and the decision of the Privy Council in *Plimmer v. Mayor of Wellington*²¹ in support of the proposition:

... that if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity.²²

Plimmer's Case stood as authority for the proposition that the licensee need have no expectation of a precise legal term. The equity was not defeated by the indefiniteness of the period for which the interest was granted and the court would look at the circumstances in each case to decide how the equity should be satisfied. Baker's interest could be asserted against his father's successor in title.

Danckwerts L.J., while referring to the same cases as Denning L.J., did not rely so heavily upon the concept of the equity. He said:

... this is one of the cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated.²³

An analysis of the cases²⁴ applying the *Inwards v. Baker* principles gives rise to the following propositions:

1. A must expend money or fail to assert some right to his prejudice.
2. A's expenditure, or failure to assert a right must be based upon a belief that the property upon which the expenditure is made is his own,²⁵ (although it is, in fact, the property of B), or that B has given or will give him an interest in the property,²⁶ or permit him to remain on the land indefinitely.²⁷ The maxim that equity will not perfect an imperfect gift does not prevent the application of the *Inwards v. Baker* principle. Nor does it appear that the principle is confined to purported gifts of real property.²⁸

20 (1862) 31 L.J. Ch. 658; 45 E.R. 1285.

21 (1884) 9 App. Cas. 699.

22 [1965] 2 Q.B. 29, 37.

23 [1965] 2 Q.B. 29, 38.

24 For an exhaustive list of the cases applying the equity of acquiescence principle see Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (1975) at p. 364.

25 *Ramsden v. Dyson* (1886) L.R. 1 H.L. 129; *Hamilton v. Geraghty* (1901) 1 S.R. (N.S.W.) Eq. 81.

26 *Dillwyn v. Llewellyn* (1862) 4 De G.F. & J. 517, 52 E.R. 1285; *Cameron v. Cameron* (1892) 11 N.Z.L.R. 642; *Thomas v. Thomas* [1956] N.Z.L.R. 785; *Raffaele v. Raffaele* [1962] W.A.R. 29; *Chalmers v. Pardoe* [1963] 3 All E.R. 552; *E. R. Ives Investment Ltd. v. High* [1967] 2 Q.B. 379; *Ward v. Kirkland* [1967] 1 Ch. 194.

27 *Plimmer v. Wellington Corporation* (1884) 9 App. Cas. 699; *Inwards v. Baker* [1965] 2 Q.B. 29.

28 *Olssen v. Dyson* (1969) 120 C.L.R. 365.

3. B must encourage or acquiesce in the act of A with knowledge of his own property rights and his ability to assert them against A.²⁹

4. The principle applies regardless of the nature of the interest intended to be given. Imprecision in specifying the intended interest does not prevent the principle from operating.³⁰

This lack of definability differentiates the equity from the equitable interest, and flies in the face of the conception of a proprietary interest as an interest with predetermined, fixed characteristics. It was the subject of adverse criticism by the House of Lords in *National Provincial Bank v. Ainsworth*³¹ although the criticism was there directed at the deserted wives' equity.

Although the equity of acquiescence cases are sometimes treated as cases of estoppel³² this analysis is not entirely satisfactory. First, the cases go beyond permitting A to rely upon the acts or undertakings of B as a defence, for example, against eviction from B's land.³³ In *Dillwyn v. Llewellyn*,³⁴ the court ordered the execution of a conveyance of the fee simple in the land to the son who had expended the money. While the court will decide in each case the way in which 'the equity' will be satisfied, it appears that positive action by way of ordering the conferring of a legal interest upon A is available where appropriate. Secondly, there is clear authority for the view that A is not confined to defending himself against B, but may also assert his interest against third parties with notice. If this view is correct A's interest has become proprietary, whether or not the source of the interest is estoppel, and the label 'equity of acquiescence' is as convenient as any other.³⁵ Thirdly, there is some suggestion that A's interest is assignable. If A is simply to be protected

29 *Svenson v. Payne* (1945) 71 C.L.R. 531.

30 *Plimmer v. Wellington Corporation* (1884) 9 App. Cas. 699; *Inwards v. Baker* [1965] 2 Q.B. 29.

31 [1965] A.C. 1175.

32 For example, the estoppel analysis was relied upon in *Wilmott v. Barber* (1880) 15 Ch. D. 96; *Hamilton v. Geraghty* (1901) 1 S.R. (N.S.W.) Eq. 81, 87 per Darley C.J.; *Attorney-General to the Prince of Wales v. Collom* [1916] 2 K.B. 193; *Svenson v. Payne* (1945) 71 C.L.R. 531; *Hopgood v. Brown* (1955) 1 W.L.R. 213; *Commonwealth of Australia v. Goodwin* [1961] N.S.W.R. 1080, 1087 per Brereton J.; *E.R. Ives Investment Ltd. v. High* [1967] 2 Q.B. 379 per Danckwerts L.J.; and see also the comments of Winn L.J. See also D. E. Allan, 'An Equity to Perfect a Gift' (1963) 79 *Law Quarterly Review* 238, 244. F. R. Crane, 'Estoppel Interests in Land', (1967) 31 *Conveyancer and Property Lawyer* 332.

33 Maudsley, *Hanbury's Modern Equity* (9th Edn., 1969) at p. 682 suggests that such a remedy may go too far, if it is to be regarded as founded upon estoppel. Jackson on the other hand argues that the principle that estoppel can act only as a shield, and not as a sword, is ill-founded. D. C. Jackson, 'Estoppel as a Sword'. (1965) 81 *Law Quarterly Review* 84. See also F. R. Crane, (1967) 31 *Conveyancer and Property Lawyer* 332, at p. 339.

34 (1862) 4 De G.F. & J. 517; 52 E.R. 1285.

35 *Duke of Beaufort v. Patrick* (1835) 17 Beav. 60; *Hopgood v. Brown* [1955] W.L.R. 213; *Inwards v. Baker* [1965] 2 Q.B. 29; *E.R. Ives Investment Ltd. v. High* [1967] 2 Q.B. 379; *Ward v. Kirkland* [1967] Ch. 194. This approach appears to have been approved by Kitto J. in *Olssen v. Dyson* (1969) 120 C.L.R. 365, 378-9.

against B resiling from his undertaking the protection provided need only be negative. If A is only to be protected against the loss he will otherwise suffer, there is no need to provide him with something he can sell. But the cases indicate that A's right may on occasion be assignable, which again suggests that it is at the least, something more than a 'personal equity'.³⁶

Why then did the court employ the 'equity' classification, rather than simply stating that expenditure in the circumstances described gives rise to a resulting trust analogous to the resulting trust arising in favour of a person contributing towards the purchase money of property purchased in the name of another?³⁷ This was the solution reached by the Court of Appeal in *Hussey v. Palmer*³⁸ in somewhat similar circumstances. It is suggested that the concept of the equity serves a particular function, and that this function can be observed in the quite distinct areas in which the concept has been employed. It can be illustrated by reference to the equity of acquiescence described above, the now defunct deserted wives' equity, and the doubtful contractual licence coupled with an equity in *Errington v. Errington*.³⁹ In the case of 'undefined equities', the equity concept has the attraction of flexibility. This flexibility has two aspects. First, the use of the equity concept enables the court to tailor the relief given to the plaintiff to fit the facts of the particular case. If, for example, the resulting trust solution had been applied to solve the problem arising when money is expended with encouragement or acquiescence of the defendant, the relief available would have been less adaptable. The plaintiff would presumably acquire an equitable interest in the land equivalent to the proportion of his expenditure to the value of the land. It is likely that, (as in the case of the restrictive covenant) the principles governing the creation of such interest would soon have become well-defined and limiting. In cases like *Inwards v. Baker*⁴⁰ where the nature of the interest intended to be conferred on Jack Baker was not clear, and did not correspond with any recognized equitable interest, the result may have been the rejection of his claim. Similarly, in the case of the deserted wives' equity the discretionary and flexible nature of the relief to be granted had obvious usefulness in the context of the problem to be solved. It may of course be argued, as it was accepted in *National Provincial Bank v. Ainsworth*,⁴¹ that the disadvantage of the uncertainty arising from such flexibility outweighs its obvious attractions.

36 See the comments in Maudsley, *Hanbury's Modern Equity* (9th edn., 1969) at p. 688; *Hamilton v. Geraghty* (1901) 1 S.R. (N.S.W.) Eq. 81; *E. R. Ives Investment Ltd. v. High* [1967] 2 Q.B. 379.

37 This solution to the problem presented by the case was suggested by R. E. A. Poole, 'Equities in the Making', (1968) 32 *Conveyancer and Property Lawyer* 96.

38 [1972] 3 All E.R. 744.

39 [1952] 1 K.B. 290. See also *Tanner v. Tanner* [1975] 3 All E.R. 776 and cf. *Horrocks v. Forray* [1976] 1 All E.R. 737. *Tanner v. Tanner* was followed in *Pearce v. Pearce* [1977]. N.S.W.L.R. 170.

40 [1965] 2 Q.B. 29.

41 [1965] A.C. 1175.

The equity of acquiescence is an excellent example of the adaptability of the equity in producing the appropriate relief. Where such an equity arises the Court must look at the circumstances *in each case* to decide in what way the equity can be satisfied.⁴² This can be contrasted with the approach to the protection of equitable interests such as the restrictive covenant, the equity of redemption and the estate contract. The relief available for the protection of such interests is well-established. In the 'equity of acquiescence' cases the relief ordered by the court has included the following:—

— in the case of a purported gift of the land a decree ordering a conveyance of the fee simple.⁴³

— in the case of a promise to make a gift of the land an order for payment of the market value of the house not supported by a lien on the land.⁴⁴

— in the case where a father permitted his sons to occupy buildings on land and they later erected other buildings, but a purported gift of the property was not alleged, a lien on the land for the outlay.⁴⁵

— in the case where a house was mistakenly erected on the wrong land, the owner of the land being aware of the mistake, a lien on the land for the outlay.⁴⁶

— in the case where a father undertook that his son, who had expended money on a bungalow, could remain on the land for his life, a right to remain on the land for his life which was not assignable and presumably ceased if he ceased to occupy the bungalow.⁴⁷

— in the case where the plaintiff expended money on putting down drains on the defendant's property, a right to leave the drains in position for an indefinite period (but not characterised by the court as an equitable easement).⁴⁸

— in the case where money was expended in building a garage on the defendant's land, which could only be entered from the plaintiff's land, and also in contributing towards the cost of paving a yard on the land owned by the predecessor in title to the plaintiff, an equity entitling the defendant to a right of way (but not characterised by the court as an equitable easement).⁴⁹

42 See comments to this effect in *Plimmer v. Wellington Corporation* (1884) 9 App. Cas. 699, 714; *Inwards v. Baker* [1965] 2 Q.B. 29; *Crabb v. Arun District Council* [1976] Ch. 179, 189 per Lord Denning M.R.

43 *Dillwyn v. Llewellyn* (1862) 4 De G.F. & J. 517, 52 E.R. 1285; *Brogden v. Brogden* (1920) 53 D.L.R. 362; *Thomas v. Thomas* [1956] N.Z.L.R. 785.

44 *Raffaele v. Raffaele* [1962] W.A.R. 29.

45 *Unity Joint Stock Mutual Banking Association v. King* (1858) 25 Beav 72, 53 E.R. 563.

46 *Hamilton v. Geraghty* (1901) 1 S.R. (N.S.W.) Eq. 81. (But the Chief Justice, Darley C.J., took the view that the plaintiff would have been entitled to an equitable fee simple.)

47 *Inwards v. Baker* [1965] 2 Q.B. 29.

48 *Ward v. Kirkland* [1967] 1 Ch. 194.

49 *E.R. Ives Investment Ltd. v. High* [1967] 2 Q.B. 379. Note that in this case the *Halsall v. Brizell* [1957] 1 Ch. 159 principle was also applied. See also *Crabb v. Arun District Council* [1976] Ch. 179 followed in *Jones v. Jones* [1977], W.L.R. 438.

— in the case where a remainderman did not object to the grant of a lease by a life tenant, beyond the powers of the life tenant, and the lessee expended money on the land in reliance on that lease, an order requiring the execution of a new lease by the remainderman, or alternatively requiring the remainderman to compensate the lessee.⁵⁰

— in the case where expenditure was made on Crown land with the permission of the Government, an irrevocable licence to occupy the area amounting to a sufficient interest in land to require compensation if the land was acquired by a statutory authority.⁵¹

Thus the relief available has ranged from the one extreme of the grant of a legal interest in land, to the other of a recognition of an interest described as a 'mere equity' not amounting to an equitable interest. In some cases the recognition of the equity concept has at times been only a stopping point on the route to the creation of a full legal interest. Could such flexibility have been obtained if instead of invoking the 'equity' concept the court had held that expenditure in such circumstances gave rise to a resulting or constructive trust, as was the approach taken in *Hussey v. Palmer*?⁵²

In *Hussey v. Palmer*⁵³ the plaintiff, a widow, was invited to live with her daughter, and son-in-law, the defendant. She paid £607 to a builder for the cost of building an extension to the house which would serve as her bedroom. After 15 months family disputes led to her departure. Later she sued her son-in-law in the County Court for £607 as money lent, but elected to be non-suited when the registrar intimated that he would regard the transaction as a family arrangement rather than a loan. She then began a fresh action, claiming the £607 on a resulting trust. In this action she gave evidence that she had 'lent the money to the son' who said he would build on a bedroom. In cross-examination she said, 'They would give me a home for life, if I wanted it'. The Judge held that there was no case for a resulting trust on the evidence of Mrs. Hussey, and she appealed to the Court of Appeal. Lord Denning took the view that there was no loan, as there was no arrangement that the money should be repaid. However, after referring to a number of cases in which a constructive trust had arisen in favour of a person contributing to the purchase of a property, and also to the equity of acquiescence, he held that there was either a resulting or constructive trust in favour of the plaintiff proportionate to the amount which she had put into the

50 Argued in *Svenson v. Payne* (1945) 91 C.L.R. 531. On the facts the court did not find in favour of the lessee.

51 *Plimmer v. Wellington Corporation* (1884) 9 App. Cas. 690.

52 [1972] 3 All E.R. 944.

53 *Ibid.* Note that the precise issue in this case was anticipated by R. E. A. Poole in 'Equities in the Making', (1968) 32 *Conveyancer and Property Lawyer* 96, at p. 101. Poole argues that a resulting trust should arise in this kind of situation, analogous to the resulting trust arising in favour of a contributor of purchase money of land transferred into the name of another person. He also suggests the resulting trust solution to the equity of acquiescence problem presented in *Errington v. Errington* [1952] 1 K.B. 290.

property. Lord Justice Phillimore agreed that a resulting trust existed and did not regard this as being inconsistent with the existence of a loan. Lord Justice Cairns, the dissident, regarded the relationship as one of debtor-creditor, and accordingly inconsistent with the existence of a resulting trust.

It appears the decision in *Hussey v. Palmer*⁵⁴ could have been reached by means of the concept of the equity of acquiescence. The son-in-law's acquiescence to the payment made by his mother-in-law to be used in building her bedroom, could have raised an equity in her entitling her to remain on the property for her life. This was the solution reached in *Inwards v. Baker*⁵⁵ on rather similar facts, although it is true that in *Hussey v. Palmer* no express undertaking that she might remain in the house for her life was made. Clearly this solution would have been inappropriate, as family relations had deteriorated. Alternatively, in some of the equity of acquiescence cases, compensation for the cost of improvements has been ordered, coupled with a lien on the property for the amount of the expenditure. The resulting or constructive trust approach reached a similar result. But with a line of cases directly in point why was the resulting trust concept used, rather than the concept of the equity? Does *Hussey v. Palmer* represent an implied criticism of the equity and an attempt to find a more conventional solution, or has the equity arising out of acquiescence been transmuted into an equitable interest by means of a resulting or constructive trust? Alternatively is *Hussey v. Palmer* simply another example of the court determining in which way a particular equity will be satisfied? A further hypothesis is that the Court of Appeal, or at least Lord Denning, is beginning to use the equity, the resulting trust and the constructive trust as almost interchangeable remedial devices.

In the field of matrimonial property, and in a number of other areas, there has been a recent tendency for the courts to use the constructive trust as a remedial device designed to prevent unjust enrichment. English law has tended to treat the constructive trust as a substantive trust institution, analogous to the express trust, but it appears that this view may be in the process of changing.⁵⁶ There is clearly a close relationship between the cases in which a constructive trust may be imposed to prevent an unjust enrichment, and the cases in which the court holds that the plaintiff has some kind of 'equity'.⁵⁷ It is argued elsewhere in this paper that the concept of the equity is 'a category of illusory reference'.⁵⁸ A similar argument may be made with respect to the recent

54 [1972] 3 All E.R. 744.

55 [1965] 2 Q.B. 29.

56 See A. J. Oakley 'Has the Constructive Trust Become a General Equitable Remedy?' (1973) 26 *Current Legal Problems* 17.

M. A. Neave, 'The Constructive Trust as a Remedial Device' (1978) 11 *M.U.L.R.* (343) and see *Ogilvie v. Ryan* [1976] 2 N.S.W.L.R. 504.

57 This is demonstrated by *Hussey v. Palmer* [1972] 3 All E.R. 744.

58 J. Stone, *Legal System and Lawyers' Reasonings* (1964) Ch. 7. This will be discussed at length *infra*.

development of the constructive trust as a remedial device. Apart from the priority consequences of the decision, it is not clear why the courts will in one situation choose to provide a remedy by relying upon the constructive trust analysis, and in another situation by discovering the existence of an equity. Obviously the existence of a case with facts similar to the one before the court may influence the mode of analysis which the court adopts. Possibly the 'equity' and the constructive trust will prove to be only two different names for the same phenomenon. Alternatively the court may be influenced by the consequences of the analysis it adopts. For example, if A has an equitable interest by way of a constructive trust, all the normal tracing remedies will be available to him. It is not yet clear whether similar remedies would be available to a person with an undefined equity. If the bungalow and the land had been sold in *Inwards v. Baker*⁵⁹ would Jack Baker have had a right to trace the proceeds of sale in the hands of his father's trustees. How would his right be quantified? Perhaps the court chooses to use the equity, rather than the constructive trust where the claim of the plaintiff is particularly novel or where the relief available for the protection of a full equitable interest is considered unsuitable.

The constructive trust approach offers an alternative means of producing an attractive solution in many (though perhaps not all) of the equity of acquiescence cases.⁶⁰ As already discussed, it would have been difficult for the court to hold that an equitable interest was conferred when the interest intended to be given was never defined, as in *Inwards v. Baker*⁶¹ and *Plimmer v. Wellington Corporation*.⁶² The need for the existence of a sufficiently defined beneficial interest in order to give rise to a resulting or constructive trust was emphasised in *Bannister v. Bannister*,⁶³ a case concerning the right of a purchaser to evict an occupier of a house, when the purchaser had undertaken that she could live in the house rent-free for her life. Moreover, there is some evidence that the courts have been influenced by less legitimate considerations in invoking the equity rather than attempting to find a conventional equitable interest. For example, in *E. R. Ives Investment Ltd. v. High*,⁶⁴ if the court had held that the defendant had acquired an equitable easement (right of way) over the plaintiff's property, the right of way would have been void against the plaintiff because it was not registered under the *Land Charges Act 1925* (U.K.). This conclusion was resisted in varying ways. Lord Denning took the view that an equitable ease-

59 [1965] 2 Q.B. 29.

60 See R. E. A. Poolz, 'Equities in the Making', (1968) 32 *Conveyancer and Property Lawyer*, 96. This article was written before the important New South Wales decisions in *Ogilvie v. Ryan* [1976] 2 N.S.W.L.R. 504 and *Allan v. Snyder* [1977] 2 N.S.W.L.R. 685 in which the constructive trend is explored in detail. For the instruction between constructive trusts and equities see also *Chandler v. Kerley* [1978] 1 W.L.R. 693.

61 [1965] 2 Q.B. 29.

62 (1884) 9 App. Cas. 699.

63 [1948] 2 All E.R. 133.

64 [1967] 2 Q.B. 379.

ment was 'a proprietary interest in land such as would before 1926 have been recognised as capable of being conveyed or created *at law*, but which since 1926 only takes effect as an equitable interest.⁶⁵ In contrast the right in question, arising out of acquiescence, could not ever have been created or conveyed at law and subsisted only in equity. It therefore still subsisted without being registered. Danckwerts L.J. also took the view that this interest did not fall within the scope of the *Land Charges Act*. In contrast Winn L.J. doubted whether 'such equities as arise from merely standing by whilst expenditure is incurred under a mistake of fact, or law, or from attempts both to approbate and reprobate a deed . . . may not survive the lethal effect of the *Land Charges Act*'.⁶⁶ In other words he did not rely on the character of the interest as an equity rather than an equitable interest to save it. However he took the view that the statute did not have any impact upon an estoppel, and treated the facts as giving rise to an estoppel binding the plaintiff.

In the field of contractual licences a similar process of manoeuvring has occurred, and again the equity, and constructive trust armoury of remedial devices has been employed. In a number of English cases the courts rejected exclusive possession as the sole test for the existence of a lease, in order to treat as licensees people who would previously have been regarded as tenants.⁶⁷ The courts were motivated by a desire to avoid the application of the *Rent Acts* where harsh results would be reached,⁶⁸ or alternatively by a desire to avoid the conclusion that an occupier was a tenant at will and had acquired title by operation of limitation of actions legislation.⁶⁹ This left the courts with the problem of protecting the so-called licensee from eviction. Where the licensor attempted to evict the licensee the development of the law relating to contractual licences⁷⁰ sometimes provided protection, but this did not avail the licensee against third parties. However, in *Errington v. Errington*⁷¹ Lord Denning managed to leap the chasm between property and contract,⁷² and hold that because equity would have restrained the licensor from breaking the contract, it would also enforce the licensee's right against successors in title to the licensor, including purchasers with

65 [1967] 2 Q.B. 379, 395.

66 [1967] 2 Q.B. 379, 405.

67 Cf. *Radaich v. Smith* (1959) 101 C.L.R. 209.

68 E.g. *Marcroft Wagons v. Smith* [1951] 2 K.B. 496; *Crane v. Morris* [1965] 1 W.L.R. 1104; *Shell-Mex and B.P. Pty. Ltd. v. Manchester Garages Ltd.* [1971] 1 All E.R. 841.

69 *Errington v. Errington* [1952] 1 K.B. 290; *Cobb v. Lane* [1952] 1 All E.R. 1199.

70 *Hurst v. Picture Theatres Ltd.* [1915] 1 K.B. 1; *Winter Garden Theatre (London) Ltd. v. Millenium Productions Ltd.* [1948] A.C. 173; *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.* [1971] Ch. 233.

71 [1952] 1 K.B. 290.

72 H. W. R. Wade, 'Licences and Third Parties', (1952) 68 *Law Quarterly Review*, 337, 348.

notice. Thus a 'personal equity' of the licensee was apparently converted into a proprietary interest.⁷³ Although Lord Denning did not describe the interest in question as an equity, but rather 'an equitable right to remain', the equity status has been attributed to it by a number of academic commentators.⁷⁴ Presumably this is because the source of the interest was not, in the eyes of Lord Denning, an estate contract, and nor was the licensee specifically treated as having a full equitable interest in the land. Possibly too, the rapid conversion of the personal equity of the licensee into an unclassifiable interest enforceable against third parties, has led to its treatment as an equity.

A similar approach was adopted by Lord Denning in *Binions v. Evans*⁷⁵ where however he also relied upon the constructive trust analysis that, if a purchaser expressly takes subject to a third party's rights, it is unconscionable for him to then seek to defeat these rights, regardless of whether the rights amount to an interest in land at the time of the purchase. Here Lord Denning relied upon the constructive trust analysis. An equity of acquiescence would not have arisen on the facts. To find that a constructive trust arose required some extension of existing cases,⁷⁶ and this approach was less openly creative than the invocation of a new equity.⁷⁷ On the other hand it is somewhat surprising that Lord Denning did not choose to find that an 'equity' arose, given the lack of definability of the interest in question.

Thus it is argued that the protean quality of the equity has been one of its greatest attractions for the courts which have employed it. It was this quality which was one of the reasons that the House of Lords ultimately rejected the 'deserted wives equity' in *National Provincial Bank Ltd. v. Ainsworth*.⁷⁸ In that area too, Lord Denning had attempted to employ the equity as a means of responding to the needs of the particular case. In his view the discretion of the courts under the

73 For criticisms of *Errington v. Errington* and alternative solutions to the problem presented in the case see H. W. R. Wade, 'Licences and Third Parties', (1958) 58 *Law Quarterly Review*, 337; R. E. A. Poole, 'Equities in the Making', (1968) 32 *Conveyancer and Property Lawyer*, 96; D. E. Hargraves, 'Licensed Possessors' (1953) 69 *Law Quarterly Review*, 466; R. H. Maudsley, 'Licence to Remain on Land', (1956) 20 *Conveyancer and Property Lawyer*, 281. Cf. the laudatory approach of G. C. Cheshire, 'A New Equitable Interest in Land', (1953) 16 *Modern Law Review* 1. See also *National Provincial Bank Ltd. v. Ainsworth* [1965] A.C. 1175. For recent extreme examples of the application of the principle see *Hardwick v. Johnston* [1978] 1 W.L.R. 683; *Chandler v. Kerley* [1978] 1 W.L.R. 693. See also *Williams v. Strite* [1978] 2 W.L.R. 825.

74 Jackson, *Principles of Property Law* (1st edn., 1967) 72. D. E. Hargraves, 'Licensed Possessors' (1953) 69 *Law Quarterly Review*, 466.

75 [1972] Ch. 359. The other judges Megaw and Stephenson L.J.J., adopted a different approach.

76 Cf. *Bannister v. Bannister* [1948] 2 All E.R. 133. Note that Lord Denning also used the contractual licence as an interest binding third parties, relying upon *Errington v. Errington* [1952] 1 K.B. 290.

77 For criticisms of this reasoning see R. J. Smith, 'Licences and Constructive Trusts — The Law is What it Ought to Be', [1973] *Cambridge Law Journal* 123. Note the similar problem in *Timber Top Realty Pty. Ltd. v. Mullens* [1974] V.R. 312.

78 [1965] A.C. 1175.

Married Women's Property Act 1882, (s. 17) to permit the wife to remain in the matrimonial home could be exercised not only between husband and wife, but also between wife and a purchaser from her husband who took with notice. Thus the wife's 'personal equity', became transmuted into an equity in the proprietary sense. In every case the court could determine whether, and for what period the wife should be permitted to remain in the matrimonial home. The discretionary nature of the 'interest' was the subject of adverse comment by all the Law Lords. Lord Hodson, for example, commented: 'Equity may not be past the age of child-bearing but an infant of the kind suggested would lack form or shape'.⁷⁹

Following the rejection of the deserted wives equity in *National Provincial Bank Ltd. v. Ainsworth*⁸⁰ and the reiteration in *Pettit v. Pettit*⁸¹ that s. 17 of the *Married Women's Property Act* 1882 was a procedural section only, and did not authorise the court to vary the existing proprietary rights of spouses, it became clear that property disputes were to be determined by application of the same rules as those applying to disputes between strangers.⁸² It is significant that, the Court of Appeal, having failed to provide a remedy for the deserted wife by means of an equity, subsequently resorted to the constructive trust to overcome the constraints placed upon it by *Pettit v. Pettit*⁸³ and *Gissing v. Gissing*.⁸⁴ The history of the Court of Appeal's attempts to grapple with the problem of matrimonial property clearly illustrates the use which the courts have made of both the equity and the constructive trust as devices to achieve fairness and flexibility.

The flexibility achieved by the use of the 'equity' concept has another aspect. In the areas where an undefined equity has been invoked the court has been approached for relief in circumstances not covered by an existing rule, but where merit has clearly rested with the plaintiff. The policy questions raised have concerned the protection of deserted wives, the protection of occupiers, who are not tenants, against eviction, and the prevention of unjust enrichment. In these areas the traditional categories of legal and equitable proprietary interests have not afforded sufficient protection, in some cases because of the maxim that equity does not perfect an imperfect gift, in some cases because of the lack of definability of the interest in question.

A court in this situation is faced with several choices. Apart from the unpalatable one of finding for the defendant, it may give the plaintiff equitable relief, at the same time making it clear that the decision is

79 [1965] A.C. 1175, 1224.

80 [1965] A.C. 1175.

81 [1970] A.C. 777.

82 See for example *Heseltine v. Heseltine* [1971] 1 All E.R. 952; *Hazell v. Hazell* [1972] 1 All E.R. 923. For a detailed analysis of the cases in this area see Neave 'The Constructive Trust as a Remedial Device' (1978) 11 *M.U.L.R.* 343.

83 [1970] A.C. 777.

84 [1971] A.C. 886.

based simply on the situation *inter partes*. For example, such a 'personal equity' exists when the court grants a deserted wife an injunction against her husband restraining him from selling the matrimonial home without providing her with alternative accommodation. At the other extreme the court may be prepared to hold that the circumstances give rise to an equitable interest (for example by extension of the principles relating to constructive trusts). The interest may not in itself be novel, in the sense that it may conform to the characteristics of an existing category of interest such as an equitable fee simple, or an equitable easement, though the circumstances in which it arises may represent some development of existing principles. Alternatively the interest may be quite different from those usually recognised as property interests.

A decision to extend the categories of equitable interests has immediate consequences for the rules relating to priorities. Its repercussions may be difficult to foresee. It produces complications in title investigation and is conducive to rigidity before the implications of such rigidity have been fully explored. Apart from these disadvantages the development of a novel equitable interest requires an open exercise of judicial creativity.

In contrast, the use of the concept of an 'equity' may serve as a kind of 'holding operation', and allow the courts to refine details of the interest over a series of cases. In this way questions as to the assignability of the interest, and as to its enforceability against third parties may be answered. Ultimately it may become apparent that the 'equity' is only a personal equity, as in the case of the deserted wives' equity. Alternatively the equity may graduate into the category of equitable interests.

In other words, the characterisation 'equity or equitable interest' may not be able to be made finally until the court is faced with a conflict between the interest in question, and a later equitable interest. The fact that a court determines that the interest is enforceable against some third parties clearly confirms it as a proprietary interest, but its precise nature is not at that time, ascertained. Nor does the fact that the equity is at present undefined mean that it will remain forever in the equity category of the proprietary hierarchy.

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Ed.)