

THE ILLUSION OF THE MERE EQUITY

LATEC INVESTMENTS LTD. v. HOTEL TERRIGAL PTY. LTD.
(IN LIQUIDATION) AND OTHERS¹

"The distinction between an equitable interest and a mere equity has never been very fully explored, yet it is of considerable importance".²

R. E. Megarry made this statement in an article reviewing two decisions of Upjohn, J. in *Smith v. Jones*³ and *Westminster Bank Ltd. v. Lee*.⁴ In the latter case Upjohn, J. stated that "(t)he Court of Equity has been careful to distinguish between two kinds of equities, first, an equity which creates an estate or interest in the land and, secondly, an equity which falls short of that".⁵

The distinction is of some importance for two reasons; firstly, the dichotomy between equitable interests and mere equities causes considerable difficulty "to those who still hold the view that equitable interests are mere rights *in personam*";⁶ and secondly, the defence of purchaser for value without notice may be available to the holder of a later equitable interest as against a holder of a prior mere equity, providing an exception to the classical doctrine that the defence of purchaser without notice avails only the purchaser of a legal estate.

The mere equity has again attracted judicial discussion in the recent English case of *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.*⁷ (on appeal to the House of Lords entitled *National Provincial Bank Ltd. v. Ainsworth*⁸) and in the High Court decision of *Latec Investments Ltd. v. Hotel Terrigal Pty. Ltd.*⁹ Both the House of Lords and the High Court indicated that the distinction between the mere equity and the equitable estate was not valid.

One of the earlier and often quoted judicial statements in favour of the distinction is that of Lord Westbury in the case of *Phillips v. Phillips*.¹⁰ His Lordship held that the defence of purchaser for value without notice may be available to the holder of an equitable estate or interest as against the holder of a prior interest "where there are circumstances that give rise to an equity as distinguished from an equitable estate—as for example, an equity to set aside a deed for fraud, or to correct it for mistake".¹¹ In these circumstances "the court will not interfere"¹² to enforce the usual rule as to priority of time.

The distinction has been propagated by several text writers, among whom are the editors of the twenty-fifth edition of Snell's *Principles of Equity*:¹³

Equitable interests must be distinguished from mere equities. It is not possible to define these precisely, but an equitable interest is an

¹ (1965) 113 C.L.R. 265; (1965) 39 A.L.J.R. 110.

² "Mere Equities, the Bona Fide Purchaser and the Deserted Wife" (1955) 71 L.Q.R. 480.

³ (1954) 1 W.L.R. 1089.

⁴ (1956) Ch. 7; (1955) 3 W.L.R. 376.

⁵ *Id.* at 18.

⁶ R. E. Megarry, *op. cit.* at 483.

⁷ (1964) 1 Ch. 665.

⁸ (1965) A.C. 1175.

⁹ *Cit. supra* n. 1.

¹⁰ (1861) 4 De G. F. & J. 208; 45 E.R. 1164.

¹¹ (1861) 4 De G. F. & J. at 215-18; 45 E.R. at 1167.

¹² *Ibid.*

¹³ R. E. Megarry and Baber. The work was cited by Lord Upjohn in *National Provincial Bank Ltd. v. Ainsworth* (1965) A.C. 1175 at 1238. See also J. A. Nathan, *Equity Through the Cases* (4 ed. 1961, by O.R. Marshall) at 32.

actual right in property, such as an interest under a trust, whereas mere equities have a procedural flavour, and in the main are rights to equitable relief in respect of property. Thus mere equities include the right to have a transaction set aside for fraud, or undue influence, or to have a document rectified for mistake . . . even the right of a deserted wife to remain in occupation of the matrimonial home has been held to be a mere equity.¹⁴

This definition suggests that mere equities are procedural in nature, the inference being that they are rights as against specific people to rectify an instrument or set aside a deed, and accordingly are rights purely *in personam*. They cannot be enforced against purchasers of later equitable interests without notice, because the equitable interests are partially rights *in rem*.¹⁵ Accordingly the dichotomy between rights *in rem* and *in personam* may be applied as a basis for distinguishing equitable interests and mere equities.

The distinction, as Megarry says,¹⁶ causes difficulty to those who still assert that the equitable interest is merely a right *in personam*. This view appears to have the support of Fullagar, J. and the Privy Council in the case of *Livingstone v. The Commissioner of Stamp Duties* (Queensland).¹⁷

Kitto, J. pointed out the difficulties involved in categorizing equitable rights as *in rem* or *in personam* in *Livingstone's Case*:

I venture to think that for the purpose of solving a concrete legal problem with respect to such a set of rights, more hindrance than help is likely to come from an attempt to classify them according to Austinian terminology as rights *in personam* or rights *in rem*.¹⁸

His Honour concluded¹⁹ that equitable rights were neither wholly *in rem* nor wholly *in personam*, but that in some contexts it was necessary to treat them as if they were one or the other. It appears to have been held in *Livingstone's Case* that the residuary beneficiaries' rights in respect of a deceased estate were purely personal rights as against the executor to have the estate duly administered. In *Horton v. Jones*²⁰ it was held that the beneficiary had an interest *in rem* in the trust assets themselves such as would attract the operation of s. 54A of the Conveyancing Act, 1919-1962 (a re-enactment of the Statute of Frauds) in the case of the sale of trust assets.

On the apparent view of Fullagar, J. and the Privy Council in *Livingstone's Case*, that the rights of the residuary beneficiary in the unadministered estate are rights *in personam* against the executor, one may validly categorize the beneficiaries' interest, being of a procedural nature only, as a mere equity, while the rights of a *Cestui que trust* in an administered estate are undisputedly an equitable interest.²¹

Decided cases have only used the term "mere equity" in two contexts; firstly, with regard to the rights of the deserted wife to remain in occupation of the matrimonial home; and secondly, with regard to the rights outlined by Lord Westbury in *Phillips*, to set aside a deed for fraud, or rectify it for mistake. If the alleged mere equity does exist it may be that the rights of a residuary beneficiary in an administered estate provide a third example. The effect of *Ainsworth* has been to relegate the deserted wife's rights to those of a mere licensee as against the husband. In *Latec* the rights to set aside a deed or to correct an instrument are given the status of a full equitable interest.

¹⁴ At 480.

¹⁵ *Horton v. Jones* (1935) 53 C.L.R. 475. See also A. W. Scott, ". . . the Rights of the *Cestui Que Trust*" (1917) 17 *Columbia L.R.* 269 at 290.

¹⁶ Note *cit. supra* n. 2 at 483.

¹⁷ (1962) 107 C.L.R. 411; (1965) A.C. 694.

¹⁸ (1960) 107 C.L.R. at 448. Kitto, J. also cites R. W. Turner, *The Equity of Redemption* (1931) at 152.

¹⁹ At 450.

²⁰ *Supra* n. 15.

²¹ *Cave v. Cave* (1880) 15 Ch. D. 639.

The case of *Westminster Bank Ltd. v. Lee*²² is usually cited as authority for the proposition that the right of a deserted wife to occupy the matrimonial home is a mere equity. In that case a husband deserted his wife, leaving her in occupation of the matrimonial home. Later in the same year he gave the Westminster Bank Ltd. an equitable mortgage over the home, to secure his overdraft with the bank. The bank had no notice of the split-up between husband and wife. The husband fell in default under the mortgage and the bank attempted to obtain vacant possession of the home prior to sale.

A conflict arose between the bank's equitable interest and the wife's right to approach the Court of Equity and obtain an injunction restraining the husband from ejecting her from the matrimonial home until he had provided her with other suitable accommodation. In fact she obtained such an injunction from the County Court which was upheld by the Court of Appeal. On the weight of previous authority Upjohn, J., in *Lee's Case* felt bound to hold that the deserted wife's rights against her husband gave her "an equity . . . enforceable against purchasers taking with notice".²³

His Honour reasoned as follows:

Now the bank's charge is equitable and therefore it takes subject to all equities affecting the land whether it has notice of them or not, subject only to the following qualification. The Court of Equity has been careful to distinguish between two kinds of equities, first, an equity which creates an estate or interest in the land and, secondly, an equity which falls short of that. An equitable mortgagee takes subject to all prior equitable estates or interests in the land whether he has notice of them or not, but in relation to a mere equity it is otherwise; the defence of purchaser for value without notice may be available to the owner of an equitable estate against the owner of a prior equity.²⁴

Upjohn, J. concluded that the "right of a deserted wife to remain in the matrimonial home, put at its highest, is a mere equity, and no equitable estate or interest in that home is created in her favour upon desertion"²⁵ As the bank could avail itself of the defence of purchase for value without notice, its later equitable interest prevailed. His Honour reached this conclusion after examining numerous authorities of which he considered he ought to follow the decision of Lynskey, J. in *Street v. Denham*.²⁶ Both Lynskey and Upjohn, J.J. were, however, apprehensive in accepting the view that a deserted wife had an equity, and not a mere licence, as against her husband to remain in the matrimonial home.²⁷

Lord Denning, M.R. has been a much more vigorous exponent of the view, although his Lordship has never indicated whether he would classify the wife's rights as an equitable interest or a mere equity. His Lordship (then Denning, L.J.) in *Bendall v. McWhirter*²⁸ asserted that a deserted wife had an equity in the matrimonial home which prevailed over the interest of the trustee in bankruptcy of a husband who had become bankrupt, where the trustee had notice of the wife's occupation of the matrimonial home.²⁹

In the *National Provincial Bank Case*, as Master of the Rolls, his Lordship adhered to the view that the rights of the deserted wife were more than a mere licence. He said:

²² (1956) Ch. 7.

²³ *Id.* at 18.

²⁴ *Id.* at 18-19.

²⁵ *Id.* at 20-21.

²⁶ (1954) 1 W.L.R. 624.

²⁷ Megarry referred to several judges who expressed the view that the deserted wife had no equity in the matrimonial home and commented that it was "a little remarkable that the contrary view should still exhibit so much vitality": (1955) 71 *L.Q.R.* at 481.

²⁸ (1952) 2 Q.B. 466.

²⁹ See also *Errington v. Errington and Woods* (1952) 1 K.B. 290.

There are many cases where the owner of land has granted another a licence to occupy land and execute works upon it, so that the licensee can use them for his own purposes. It has invariably been held that, once the works are executed, the licensee has an "equity" which is binding on the licensor and his successors. . . . There may be no binding contract to grant any particular interest to the licensee, but nevertheless the court will look at the circumstances in each case to decide in what way the equity can be satisfied. . . .³⁰

His Lordship included the deserted wife's rights in the category of those which were a "licence coupled with an equity".³¹

Russell, L.J., who dissented, considered that the deserted wife's rights in respect of the matrimonial home were "rights against her husband, and while he is in desertion, and while he is owner of the house. They are not proprietary rights or estates or interests by virtue of the fact that an injunction will be granted against the husband to prevent him interfering with her right as against him to occupy, whether such interference be direct, or whether it be achieved indirectly by disposing of his interest to another. The fact that in appropriate cases the courts will grant the equitable relief of an injunction to restrain revocation or breach of a licence is not ground for asserting that it is other than a licence".³²

On an appeal from the decision of the Court of Appeal, the House of Lords³³ unanimously favoured the view of Russell, L.J., that a deserted wife did not have an equity of any description in the matrimonial home, nor was any such interest created by virtue of her rights as against her husband: "The wife's claim should have been recognized for what it is, a personal claim to support, which can be satisfied by the provision of a home, and not as something attaching to the property. . . ."³⁴

The most satisfactory exposition of the current position of the law with regard to mere equities in England is found in this case, in the judgment of Lord Upjohn. Because his Lordship's judgment (then Upjohn, J.) in *Lee's Case* has been heavily relied upon by some text writers³⁵ as evidence of the "mere equity", it warrants quotation at length. His Lordship said that the denotation of the phrase "mere equity . . . was illustrated in the case before me of *Westminster Bank Ltd. v. Lee*, where I was constrained in the then state of the authorities to assume that a mere equity might bind successors, yet being at most a mere equity, even subsequent equitable encumbrancers, contrary to the usual rule, could plead purchase for value without notice. But, my Lords, freed from the fetters which there bound me, I myself cannot see how it is possible for a 'mere equity' to bind a purchaser unless such an equity is ancillary to or dependent upon an equitable estate or interest in the land. As Mr. Megarry has pointed out in the *Law Quarterly Review*, Vol. 71 at p. 482, the reason why a mere equity can be defeated by a subsequent purchaser of an equitable estate for value without notice is that the entire equitable estate passes and it is not encumbered or burdened by a mere equity of which he has no notice. For example, a purchaser takes subject to the rights of a tenant in possession whatever they may be. If he sees a document under which the tenant holds, that is sufficient unless he knows, or possibly in some circumstances is put on inquiry to discover, that the tenant has in addition

³⁰ (1964) 1 Ch. at 687.

³¹ *Id.* at 688.

³² (1964) 1 Ch. at 695-96. Russell, L.J. also cited Jenkins, L.J. in *Bradley-Hole v. Cusen* (1953) 1 Q.B. 300, to the effect that a husband's obligation to a deserted wife is a purely personal obligation.

³³ (1965) A.C. 1175.

³⁴ *Id. per* Lord Wilberforce at 1257.

³⁵ E.g., Nathan, *cit. supra* n. 13 at 32.

a mere equity, e.g., a right to rectify the document. If the purchaser knows that, he knows that the document does not correctly describe the estate or interest of the tenant in the land and he takes subject to that estate or interest, whatever it may be. But a mere 'equity' naked and alone is, in my opinion, incapable of binding successors in title even with notice; it is personal to the parties".³⁶

His Honour concluded that, as the deserted wife's "mere equity does not amount to an equitable interest and is not ancillary to or dependent upon an equitable interest, it does not bind purchasers".³⁷

Lord Wilberforce concurred with this exposition of the law. He reasoned as follows:

... an analogy was sought to be drawn with such an equitable claim as one for rectification or rescission on the ground of fraud. But even if such an "equity" can be binding on the purchaser of a legal estate in land, that can only be on the footing that the purchaser taking under an instrument, cannot claim the benefit of it if he knows that there is a good equitable claim to reform it (see *per* Lord Westbury, L.C. in *Phillips v. Phillips*)³⁸

In my opinion, even if one accepts the description of the wife's right as an "equity" that does nothing to elevate the right from one of a personal character, to be asserted against the husband, to one which is binding on successors in title to the land. . . .³⁹

The following conclusions may be drawn from the decision of the House of Lords in *Ainsworth*: (1) The contention that a deserted wife has an equity in the matrimonial home has been rejected. Her rights are of a purely personal nature as against her husband. (2) Where an equity is in the nature of a right to set aside a deed for fraud or correct it for mistake, it is either a full equitable interest, or equal to a full equitable interest by virtue of its being ancillary to an equitable interest although defeasible in certain circumstances by a later equitable interest. As early as 1887, Ames⁴⁰ stated this second proposition as follows: "Every equity attaching to property is an equitable estate. The equity of a defrauded vendor is no less an equitable estate than the interest of a *cestui que trust*. Indeed the fraudulent vendee is constantly called a constructive vendee."⁴¹

Rights hitherto accepted as mere equities have either been relegated to the position of a mere personal licence, or elevated to the position of a full equitable interest.

A consideration of the rights to set aside a deed for fraud or correct it for mistake, was entertained by the High Court in the *Latec Case*. The High Court, consisting of Kitto, Taylor and Menzies JJ., concluded that there was no valid distinction between the equitable interest and the mere equity.

The facts were as follows: T. Ltd. mortgaged certain land at Terrigal and a hotel on it to L. Ltd. T. Ltd. fell into default under the mortgage and L. Ltd., in a purported exercise of its power of sale as mortgagee, effected a sale of the property to a subsidiary company S. Ltd. This sale was found by the Court to be so fraudulently perpetrated as to amount to a foreclosure. Accordingly the Court held that T. Ltd. was entitled to a full equity of redemption. A little more than a year after the sale to S. Ltd. and a considerable time before T. Ltd. made any attempt to bring the matter to litigation, S. Ltd. gave a third company M. Ltd., a security by way of floating charge over

³⁶ (1965) A.C. 1238.

³⁷ *Ibid.*

³⁸ *Cit. supra* n. 10.

³⁹ *Op. cit.* at 1254.

⁴⁰ J. B. Ames, "Purchase for Value Without Notice" (1887) 1 *Harv. L.R.* 1.

⁴¹ *Ibid.*

all its assets, specifically including the Terrigal land, to support a guarantee to M. Ltd. in connection with an issue of debentures by L. Ltd. M. Ltd. acquired from S. Ltd. an equitable mortgage over the Terrigal land *bona fide* and for value and without notice of T's claim to set aside the sale or of any facts from which that right could be inferred. The result was that the full equity of redemption that the Court found T. Ltd. to have, conflicted with the later equitable mortgage acquired by M. Ltd. for value and without notice.

It was argued by counsel for M. Ltd. that the circumstances before the Court fell directly within the exception to the "*qui prior*" rule expounded by Lord Westbury in *Phillips v. Phillips*⁴² T. Ltd. had no more than a "mere equity", the right asserted by it being a right to approach the Court of Equity for an order to "set aside a deed for fraud . . ." It was argued that M. Ltd., having an equitable estate in the land by way of security, thereby took in priority to T. Ltd. being a purchaser of the prevailing interest for value and without notice.

The Court held that the interest of M. Ltd. should take priority over the interest of T. Ltd. for reasons which, it is submitted, invalidate the distinction long recognized between the *mere equity* and the *equitable estate*. It was held that M. Ltd. and T. Ltd. had equal interests in the land, but since the enforcement of T. Ltd.'s interest required interference by the Court, and since M. Ltd. was a *bona fide* purchaser for value without notice, the Court would maintain the *locus standi* by declining to interfere and to give efficacy to T. Ltd.'s interest until M. Ltd.'s interest as trustee for the debenture holders was satisfied.

Kitto, J. laid down the following propositions: (1) Priority between two established equities, all other things being equal, is determined by the "*qui prior . . .*" maxim. (2) The merits of the equities may not be equal if the holder of the prior equity is estopped by his conduct from asserting his interest. Any conduct which leads the holder of the later equitable interest to suppose that the earlier equity does not exist, falls within this category, and constitutes an exception to the rule as to priority by time. (3) The rule as to priority by time can also be displaced if the holder of the later equity can set up the defence of purchase for value without notice. He can do this even though he does not obtain a legal interest if the prior equity is, in Lord Westbury's words, an equity as distinguished from an equitable estate . . ." An "equity" according to Lord Westbury is, *inter alia*, the right, "to set aside a deed for fraud . . ." ⁴³ In the circumstances before his Honour, the prior equity was a right to have the conveyance to S. Ltd. set aside for fraud. The conveyance was set aside, T. Ltd. obtaining a true equity of redemption. This right has long been considered an equitable estate.⁴⁴

It may perhaps be submitted that there are two separate rights involved: T. Ltd.'s right to set aside the conveyance to S. Ltd. for fraud, and T. Ltd.'s right to a true equity of redemption. However, T. Ltd.'s sole right in equity after default under the mortgage but before the fraudulent conveyance is an equity of redemption. This equity is given efficacy by a Court order setting aside a fraudulent deed which acts as a bar to its enforcement. The right to approach the court is merely ancillary to and not separate from the equity of redemption.

His Honour stated that ". . . if the mortgagor in the present case was entitled to have the mortgagee's sale set aside it had more than a mere equity; it had, as I have pointed out, an equity of redemption . . . an equitable estate . . ." ⁴⁵

⁴² 45 E.R. 1164 at 1167.

⁴³ *Op. cit.* at 1167.

⁴⁴ See the *Latec Case per Kitto, J.* at 277, citing Lord Hardwicke in *Casborne v Scarfe* (1737) 1 Atk. 603; 26 E.R. 377.

⁴⁵ At 277. On the one hand his Honour confirmed that T. Ltd.'s interest was an

His Honour came to the conclusion:

. . . the cases to which (Lord Westbury) was referring were not only those in which there is an assertion of an equity unaccompanied by an equitable interest . . . indeed he may not have had them in mind at all—but those in which an equity is asserted which must be made good before an equitable interest can be held to exist. In the latter class of cases the equity is distinct from, because logically antecedent to, the equitable interest, and it is against the equity and not the consequential equitable interest that the defence must be set up.⁴⁶

It is undisputed that in such a case the defence of purchase for value without notice enables the later holder of an equitable interest to defeat the earlier "equity". His Honour continued:

The reason . . . is that the purchaser who has relied upon the instrument as taking effect according to its terms and the party whose rights depend upon the instrument's being denied that effect have equal merits, and the Court, finding no reason for binding the conscience of either in favour of the other, declines to interfere between them. Consequently the party complaining of the fraud or mistake he finds himself unable to set up as against the other the equitable interest he asserts. . . . but the fact remains that it is against the preliminary equity; and not against the equitable interest itself, that the defence of purchase for value without notice has succeeded.⁴⁷

The following conclusions and observations can be drawn from His Honour's judgment: (1) There is still a distinction between an equitable interest, and "an equity unaccompanied by an equitable interest".⁴⁸ (2) The right of a mortgagor to an equity of redemption is distinct from his right to have a deed set aside for fraud, where that deed provides a bar to the mortgagor exercising his equity of redemption. The mortgagor's right to have the deed set aside is termed a "preliminary equity".⁴⁹ (3) The dichotomy proposed by Lord Westbury in *Phillips v. Phillips* is that between a "preliminary equity" and an equitable estate: (a) The preliminary equity is distinct from an equitable estate "because logically antecedent to the equitable interest". In this respect his Honour's views differ from those of Taylor, J., considered below. (b) Although the interest which the prior holder asserts is of equal merit with the later equitable interest, the Courts of Equity will not interfere to give it efficacy if the holder of the later equitable interest can put forward the defence of purchase for value without notice.

Taylor, J., while agreeing with Kitto, J.'s conclusions considered that there was no difference between the "preliminary equity" and the equitable estate where the former was in the nature of a right to have a conveyance which constituted a bar to the enforcement of an equitable interest, set aside. In the *Latec Case*, T. Ltd's right to have the conveyance to S. Ltd. set aside for fraud was the means whereby it enforced its right to an equity of redemption. The former was not distinct from but ancillary to the latter.

equitable estate, but on the other hand by saying that it was ". . . more than a mere equity . . ." he recognized that such an interest exists. One is hard put to find an example of the illusory mere equity. In the *Latec Case*, the interest the subject of the litigation was an equitable interest. So also was the interest before Lord Westbury in *Phillips v. Phillips* (a right to an annuity). See also *Cave v. Cave*, *supra* n. 21; *Stump v. Gaby* 2 De G. M. & G. 623, 42 E.R. 1015; *Gresley v. Mousley* (1859) 4 De G. & J. 78, 45 E.R. 31. His Honour cites *Lee's Case* and *The National Provincial Bank Case* as cases where there existed a mere equity. His Honour, however, did not have the opportunity to consider the views of the House of Lords in the latter case.

⁴⁶ At 277-78.

⁴⁷ At 278.

⁴⁸ At 277.

⁴⁹ At 278.

In considering whether the interests of T. Ltd. or of M. Ltd. should have priority, Taylor, J. reasoned as follows: (1) It is established that a person can only convey in equity "that which he is justly entitled to and no more . . ." ⁵⁰ (2) An exception to this rule arises where a prior interest is an equity set up against a conveyance of a later equitable estate. The Court will not interfere to enforce the first interest where the purchaser of the second interest can maintain the plea of purchase for valuable consideration without notice. (3) There is abundant authority ⁵¹ to the effect that the owner of a legal interest who loses that interest by fraud, nevertheless retains an equitable interest in the land over and above his right to set aside the fraudulent conveyance by which he lost his legal title. ⁵²

His Honour stated this proposition as follows:

I regard these authorities as establishing that where the owner of property has been induced by fraud to convey it the grantor continues to have an equitable interest therein and that that interest may be devised or assigned *inter vivos* and that the grantor's interest in the property does not come into existence only if and when the conveyance is set aside. ⁵³

His Honour concluded that a holder of a later equitable interest can defeat the holder of a prior equitable interest if (a) the prior equitable holder must seek the Court's assistance to enforce his interest; and (b) the later equitable holder can plead the defence of purchase for value without notice.

In such cases it seems that the Court will not interfere and to me it does not seem to matter much whether it be said that this is because, as Lord Westbury's observations suggest, that a plaintiff seeking to set aside a deed for fraud or to reform it for mistake is, at that stage, asserting an equity as distinguished from an equitable estate, or, because a plaintiff in such cases will be denied the assistance of a court of equity to remove the impediment to his title if, before he seeks that assistance, an equitable interest in the subject property has passed to a purchaser for value without notice of the plaintiff's prior interest. I prefer the latter as a more precise statement of the law and, indeed, I think this is the true meaning of Lord Westbury's observations. ⁵⁴

Menzies, J. appeared to concur with the views of Kitto, J., drawing a distinction between the equity that was dependent on the successful exercise of a right to sue, and the equitable interest that was immediately enjoyable.

Considering the traditional view that a distinction can be drawn between the mere equity and the equitable estate by reference to the categorization of rights as *in rem* or *in personam*, it is perhaps remarkable that their Honours in the *Latec Case*, when considering the supposed distinction, did not advert to this categorization. Perhaps the reason why the distinction between the mere equity and the equitable estate is illusory is because the distinction between rights *in rem* and *in personam* is illusory.

In the result, Kitto, J. rejected the distinction between the mere equity and the equitable interest, and proposed instead the dichotomy between the preliminary equity and the equitable estate. Menzies, J. appeared to concur with this division. Taylor, J., on the other hand, denied the existence of the mere equity, and further asserted that there was no difference between an equitable right that required a court order to give it efficacy and any other

⁵⁰ At 281.

⁵¹ His Honour cites *Uppington v. Bullen* (1842) 2 Dr. & War. 184; *Stump v. Gaby* and *Gresley v. Mousley* (last two *cit.* n. 45).

⁵² His Honour cites *Re Garnett, Robinson v. Gaudy* (1886) 33 Ch. D. 300 *per* Cotton, L.J. at 303 *per* Lindley, L.J. at 306. See also *per* Menzies, L.J. citing Knight Bruce, L.J. in *Gresley v. Mousley cit. supra* n. 45 citing Knight Bruce, L.J. at 90 (45 E.R. at 35).

⁵³ At 284.

⁵⁴ At 286.

equitable interest. The interest must preexist the court order. The availability of court intervention did not create an interest.

It is submitted that there is no situation where an application of the views of Kitto, J. and Taylor, J. will produce different results. Both Judges agree that a prior equity, whether it be "preliminary" equity or a full equitable interest, which requires the intervention of the Courts of Equity for enforcement, will be defeated by the holder of a later equitable interest who can assert the defence of purchase for value without notice.

The following conclusions may be drawn from the decision of the House of Lords in the *Ainsworth Case* and from the judgment of Taylor, J. in the *Latec Case*: (1) an equity in the nature of a right to set aside a deed for fraud or correct it for mistake is a full equitable interest; (2) if that interest contrary to the usual rules as to priority between equities, is defeated by a later equitable interest it is submitted that it is for one of three reasons; (a) the prior "equity", as in the case of a deserted wife's interest in the matrimonial home, is in fact a mere personal licence, and therefore not an "equity" or an "equitable interest", (b) if the prior "equity", albeit an equitable estate or analogous thereto, requires the intervention of a Court of Equity before it may be enforced, the courts will decline to interfere where the holder of the later equitable interest may set up the defence of purchase for value without notice; and (c) the holder of the prior interest is estopped from asserting his interest against the holder of a later equitable interest by virtue of his conduct in misleading the holder of the later interest, that the prior interest did not exist.

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