

CHAPTER III:

CLASSIFICATION OF EQUITY BEFORE THE JUDICATURE ACTS

This classification was done under three heads: exclusive jurisdiction, concurrent jurisdiction and auxiliary jurisdiction.

3.1 Exclusive Jurisdiction: here, equity was classified in terms of the remedies available under this branch. Usually, it is common to hear people refer to the exclusive jurisdiction as provision of new remedies. Among these remedies, we have specific performance, injunction, rectification and rescission as well as restitution. These remedies will be defined and explained later under the topic consecrated to the study of equitable remedies.

3.2 Concurrent Jurisdiction: he who says concurrent jurisdiction says the availability of new rights. The new rights at equity include the equitable *right of redemption* and the *right of a beneficiary* in a trust relationship. The right of redemption operates to redeem property in a transaction which at common law would otherwise be lost automatically on the basis of an agreement. For example, if one gives collateral to obtain a loan and the time agreed for reimbursement passes without the money refunded, the collateral will become the creditor's property even if it is far more valuable than the money (for instance, a car as collateral for 25,000 FCFA). In equity, such property may be redeemed by a new agreement to pay a little later and on interest or additional interest.

As concerns the right of the beneficiary, at CL, a beneficiary could not bring an action against the trustee who did not give him the property or rights from the trust agreement once the time was due because CL considered that the contract was strictly between the settlor and the trustee and the beneficiary was not privy to the contract (he was not *res inter alios acta*). But under equity, when the intention of the settlor is considered, we realise that he intends the property to end with the beneficiary, not that he gives the property to the trustee for dash. NB: the concept of trust will be discussed later (in Part II of this course) in detail.

3.3 Auxiliary Jurisdiction: this one has to do with the new and less complex procedure at equity. There were hardly any interlocutory procedures at inception like discovery of documents, no bureaucracy and comparatively shortened procedures, an element in common law that discouraged many litigants.

One must not go without laying emphasis on the fact that we have been talking of new remedies and new rights, but in effect, it is not as if to say that these rights and remedies were the exact creations of equity; they existed under common law and equity only modified and developed them the more. Remember equity is not coming to create the law, but to modify it. So equity does not really create rights *de novo*, but develops what she meets under common law.

CHAPTER IV:

THE JUDICATURE ACTS (JA) – 1873-1875

4.1: Administration of Justice after the JA (Fusion of Equity and Common Law)

The Judicature Acts 1873-1875 abolished all equity and common law courts such as the King's Bench, Common Pleas, Exchequer, Chancery, probate, Divorce and Admiralty Division to create a Supreme Court of Judicature consisting of a Court of Appeal and a High Court. The High Court was divided into three divisions namely the Queen's Bench division, the Chancery division and the Family division. Each of these divisions exercises both legal and equitable jurisdictions. Thus, any matter could be adjudicated in any division and any point of law or equity could be raised and determined in any division. So as LORD Cairns could put it in **Pugh v. Heath** "The Supreme Court is neither that of Common law nor equity; it is a complete jurisdiction". But for administrative convenience, cases were located to the divisions according to their general subject matter. Appeals from these divisions were judged by the Court of Appeal which had competence to receive appeals from the Higher Court and other lower courts like the Shire Courts, County Courts and the Boroughs. **Section 25 (11)** of the Supreme Court of Judicature now replaced by **section 49** of the Supreme Court Act 1981 provided that "When there is any conflict or variance between the rules of equity and the rules of common law, with reference to the same matter, the rules of equity shall prevail"

The first effects of the Judicature Acts were best illustrated by two famous cases namely; **Walsh v. Lonsdale** and **Berry v. Berry**. Rights of the parties following the Judicature Acts were resolved in a single judgement regardless of whether they employed equity or common law rules. These laws permitted the courts "To treat what is done as what ought to be done".

Thus the Administration of equity and common law were fused with the creation of a Supreme Court of Judicature exercising both law and equity while giving supremacy to equity in cases of conflicts.

4.2: The Fusion Debate

A debatable issue is whether the fusion between equity and common law courts equally extended to their rules or principles or was it limited only to their administrations?

To that effect some eminent jurists like Sir George Jessel MR, hold that common law and equity are fused. He had this to say in 1881 in **Walsh v. Lonsdale**; “there are no two estates as they were formally; one estate in common law by reason of the payment of rent from year to year and an estate in equity under an agreement. There is only one court and the equity rules prevail in it”. Other less eminent judges (at the time) like Denning J and Lord Evershed supported the completeness of the fusion.

For others, the changes brought about by the Judicature Acts gave right to neither a form of action, nor new reparation nor defence. In a famous survival metaphor, Ash Burner in his book entitled: Principles of Equity, said “*the two streams of jurisdiction though they run in the same channel; run side by side and do not mingle their waters*”. Thus legal rights remained legal rights and equitable rights remained equitable rights though administered in the same court.

In summary, it may be stated that the acts which fused equity and common law acknowledge that the rules are different and that if there is fusion, it is that of administration. Evidence of this is found in section 49 of the Supreme Court Act 1979 which replaced section 25 (11) to the effect that where there is a conflict between the rule of equity and those of common law, the former shall prevail. Maybe we should adhere to the warning of Stevenson J in **Cansen Enterprise V Boughton**; “*I greatly fear that, the talk of fusing law and equity results in confusing and confounding the law*”.

So in final analysis, whether the fusion between equity and common law was a complete one (both their administrations and their principles) remains a question of construction. It means that all depends on the interpretation that we offer to the expression “complete fusion”. If complete is interpreted to mean only the administrations were merged and as **Jessel MR** pointed out, there were no separate administrations after the JA, then one may say, with little fear of contradiction, that there was complete fusion. But of complete fusion means both administrations and their principles were merged, then the conclusion that fusion was complete will not go unmolested. This is even more so since the different Statutes acknowledged the superiority of the rules of equity over those of common law and so the question is if there was really complete fusion which includes both rules and administrations, then sections 25 (11) and 49 above should be ripe for rejection.