

WHAT IS A MERE EQUITY?:  
AN INVESTIGATION OF THE NATURE AND FUNCTION  
OF SO-CALLED 'MERE EQUITIES'

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## Abstract

This thesis will examine the type of equitable claim known as a ‘mere equity’. The basic characteristics of a mere equity are well established. A mere equity is ‘proprietary’ in that it can be enforced against certain third parties and is capable of alienation in favour of certain third parties. Despite its proprietary flavour, however, a mere equity does not amount to an interest in any property to which it relates. The main consequence of this is that a mere equity is postponed to any interest, legal or equitable, subsequently purchased for value and without notice of the mere equity.

While the core features of mere equities are settled, there is much confusion over the underlying legal nature and practical function of these claims. This confusion has produced the criticism that mere equities are an anomalous category, and brought into question whether mere equities should even exist as a juridical concept. This state of affairs is clearly unsatisfactory, especially given that mere equities are the admitted basis of a sizable body of equitable doctrines, including rescission, rectification and proprietary estoppel.

This thesis aims to demystify mere equities. It will show that the existing scholarly literature has not adequately engaged with the concept of a mere equity. It will then look afresh at the primary legal materials in order to fill in the conceptual gaps. In short, the thesis will argue that a mere equity is an equitable right of action: a simple claim to pursue a particular equitable remedy against a particular defendant. A mere equity, therefore, is a right *in personam*—a claim binding on a small and definite class of people—albeit one which has been extended to third parties in accordance with equitable principles. The identification of these principles will be a major concern of the thesis.

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## Author's Declaration

I declare that this thesis is a presentation of original work and I am the sole author. This work has not previously been presented for an award at this, or any other, University. All sources are acknowledged as References.

# Chapter 1

## Introduction

### PART I: INTRODUCTION

This thesis examines the class of equitable claims which are known as ‘mere equities’. The aim of the thesis is to investigate the legal nature and practical function of mere equities as these claims are understood and applied within the English legal system.

Part two of this chapter will introduce the concept of a mere equity and highlight the basic features and consequences of this category of claim. Part three will explain the rationale for investigating mere equities. Part four will clarify the key questions which the thesis will answer and explain why these questions are important. Finally, part five will provide an overview of the subsequent chapters and their findings.

### PART II: THE BASIC FEATURES OF MERE EQUITIES

Mere equities are equitable claims of a particular type. They are recognised in the English legal system and in certain other jurisdictions, notably Australia.<sup>1</sup> From an examination of the cases, it appears that mere equities have two defining characteristics. First, they are what might be described as ‘proprietary’ claims. Second, despite their proprietary character, they do not amount to so called ‘equitable interests’ in property. Each of these features will now be outlined.

#### **1. Proprietary claims**

It is necessary to be clear about our terminology. The terms ‘property’ and ‘proprietary’ are ‘notoriously ambiguous’:<sup>2</sup> a claim can be described as ‘property’ or

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<sup>1</sup> See especially *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265.

<sup>2</sup> RC Nolan, ‘Equitable Property’ (2006) 122 LQR 232, 233.

‘proprietary’ for a number of different purposes depending on the context.<sup>3</sup> Very often, however, these terms are used to describe a claim which is capable of enforcement against at least some third parties, and which may also be capable of alienation in favour of certain third parties.<sup>4</sup> It is for these purposes that mere equities are referred to as ‘proprietary’ here.

It is well established that mere equities possess the qualities of enforceability against, and alienability in favour of, third parties which justify the description of these claims as ‘proprietary’.<sup>5</sup> On the one hand, it has been stated numerous times in the cases that, as a general principle, mere equities are capable of binding successors in title to any land or other property to which they relate.<sup>6</sup> Furthermore, in relation to registered land, the enforceability of mere equities against third parties has been placed on a statutory footing. Thus s 116 of the Land Registration Act 2002 declares that ‘for the avoidance of doubt’ both a mere equity and an equity by estoppel (which is in fact a kind of mere equity, as demonstrated in chapter three<sup>7</sup>) ‘in relation to registered land ... has effect from the time the equity arises as an interest capable of binding successors in title’.<sup>8</sup> This provision codifies the earlier ruling of Mervyn Davies J in *Blacklocks v JB Developments (Godalming) Ltd*<sup>9</sup>—which was approved by Neuberger J in *Nurdin & Peacock plc v DB Ramsden & Co Ltd*<sup>10</sup> and *Holaw (470) Ltd v Stockton Estates Ltd*<sup>11</sup>—that a mere equity in reference to registered land has ‘the quality of being capable of enduring through different ownerships of the land’.<sup>12</sup> On the other

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<sup>3</sup> See *ibid* 236.

<sup>4</sup> See *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1247G-48A (Lord Wilberforce). See also JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2014) ch 4. But see K Gray, ‘Property in Thin Air’ (1991) 50 CLJ 252, 292-93.

<sup>5</sup> See, eg, M Neave and M Weinberg, ‘The Nature and Function of Equities (Part I)’ (1978-1980) 6 University of Tasmania Law Review 24, 24.

<sup>6</sup> *Westminster Bank Ltd v Lee* [1956] 1 Ch 7 (Ch) 19 (Upjohn J); *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 Ch 9 (Ch) 14 (Cross J); *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 Ch 665 (CA) 686 (Lord Denning MR); *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1226D-E (Lord Hodson) 1238B (Lord Upjohn); *Blacklocks v JB Developments (Godalming) Ltd* [1982] 1 Ch 183 (Ch) 195C-F (Mervyn Davies J); *Twinsectra Ltd v Yardley* [1999] All ER (D) 433 (CA) [99] (Potter LJ); *Howlaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P&CR 29 (Ch) [65] (Neuberger J). See below ch 4, pt II, s 1.

<sup>7</sup> Ch 3, pt II, s 2, sub-s i.

<sup>8</sup> See also *Mortgage Express v Lambert* [2016] EWCA Civ 555 [18] (Lewison LJ).

<sup>9</sup> *Blacklocks v JB Developments (Godalming) Ltd* [1982] 1 Ch 183 (Ch) 195C-196F (Mervyn Davies J). But see DG Barnsley, ‘Rectification, Trusts and Overriding Interests’ [1983] Conv 361.

<sup>10</sup> *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 EGLR 119 (Ch) 125 (Neuberger J).

<sup>11</sup> *Howlaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P&CR 29 (Ch) [69] (Neuberger J).

<sup>12</sup> Quoting *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 Ch 665 (CA) 696 (Russell LJ). See also *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216 [68] (Arden LJ). But see *Collings v Lee* (2001) 82 P&CR 3 (CA) [22] (Nourse LJ).

hand, as regards the alienability of mere equities, it is generally acknowledged in the case law that a mere equity may be capable of being assigned or devised by its owner in favour of a third party.<sup>13</sup>

## 2. The distinction between mere equities and equitable interests

Despite the fact that mere equities are proprietary in character, it is well established that these claims fall short of being what are referred to as ‘equitable interests’ in property.<sup>14</sup> It follows that a distinction is to be drawn between two sub-sets of equitable proprietary claims: the first consisting of claims which count as equitable interests; the second consisting of mere equities.

The dividing-line between equitable interests (or ‘equitable estates’ as they are sometimes called) and mere equities (or ‘equities’ as they are sometimes called) has been acknowledged by judges in various cases. The well-known case of *Phillips v Phillips*<sup>15</sup> (see below) appears to be the earliest example. In that case, Lord Westbury LC alluded to the distinction when he made reference to ‘an equity as distinguished from an equitable estate’.<sup>16</sup> Since *Phillips*, the dividing-line between mere equities and equitable interests has been recognised, both expressly and tacitly, in numerous decisions.<sup>17</sup> For example, in *Cave v Cave*,<sup>18</sup> a case where misappropriated trust monies

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<sup>13</sup> *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 290-91 (Menzies J); *Blacklocks v JB Developments (Godalming) Ltd* [1982] 1 Ch 183 (Ch) 195C-F (Mervyn Davies J); *Howlaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P&CR 29 (Ch) [46] (Neuberger J). See below ch 6, pt II.

<sup>14</sup> *Westminster Bank Ltd v Lee* [1956] 1 Ch 7 (Ch) 18 (Upjohn J).

<sup>15</sup> *Phillips v Phillips* (1861) 4 De GF&J 208, 45 ER 1164.

<sup>16</sup> *Ibid* 218; 1167 (Lord Westbury LC).

<sup>17</sup> *Cave v Cave* (1880) 15 Ch D 639 (Ch) 647 (Fry J); *Cloutte v Storey* [1911] 1 Ch 18 (Ch) 24 (Neville J); *Re Clarke’s Settlement Trust* [1916] 1 Ch 467 (Ch) 473 (argument); *Abigail v Lapin* [1934] AC 491 (PC) 505 (Lord Wright); *Westminster Bank Ltd v Lee* [1956] 1 Ch 7 (Ch) 18 (Upjohn J); *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 Ch 9 (Ch) 14 (Cross J); *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 Ch 665 (CA) 686 (Lord Denning MR); *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1238B (Lord Upjohn); *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 277 (Kitto J) 288-89 (Menzies J); *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) 721B (Lord Wilberforce); *Lloyds Bank plc v Rosset* [1991] 1 AC 107 (HL) 112G (argument); *CIBC Mortgages plc v Pitt* [1994] 1 AC 200 (HL) 203 (argument); *Bland v Ingram’s Estates Ltd* (Ch, 13 April 1999) 10-11 (Peter Leaver QC); *Twinsectra Ltd v Yardley* [1999] All ER (D) 433 (CA) [99] (Potter LJ); *Howlaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P&CR 29 (Ch) [65] (Neuberger J); *IRC v Eversden* [2002] EWHC 1360 (Ch) [14] (Lightman J); *Clarke v Meadus* [2010] EWHC 3117 (Ch) [75] (Warren J); *Drayne v McKillen* [2011] EWHC 3326 (QB) [43] (Coulson J); *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2012] 3 WLR 597 [103] (Lloyd LJ).

<sup>18</sup> *Cave v Cave* (1880) 15 Ch D 639 (Ch) 647 (Fry J).

had been used to purchase land, Fry J cited *Phillips* and then formulated the question which he had to decide as follows: ‘[I]s the right of the [beneficiaries] to follow this money into the land an equitable estate or interest, or is it an equity as distinguished from an equitable estate?’. Likewise, in *Westminster Bank Ltd v Lee*,<sup>19</sup> Upjohn J observed that ‘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’. Another case in which the distinction was acknowledged is *Shiloh Spinners Ltd v Harding*.<sup>20</sup> There, Lord Wilberforce observed that ‘There is good authority, which I do not presume to doubt, for a sharp distinction between’ equities and equitable interests.<sup>21</sup> A more recent example is *Drayne v McKillen*,<sup>22</sup> where Coulson J observed that ‘The distinction between equitable interests, on the one hand, and mere equities on the other, is made in a number of the cases’.

The main consequence of the dividing-line between mere equities and equitable interests concerns an equitable rule of priorities which was first systemised in the case of *Phillips*. This rule relates to the circumstances in which a purchaser of a purely *equitable* interest is permitted to raise the plea of *bona fide* purchase for value without notice.

*i. Mere equities and the plea of purchase for value without notice*

The plea of *bona fide* purchase for value without notice is a specialised form of defence.<sup>23</sup> Historically, it defined both the substantive and the administrative divide between the equitable and common law jurisdictions,<sup>24</sup> and in this connection was famously described by Lord Henley LC as ‘the polar star of equity’.<sup>25</sup> Since the

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<sup>19</sup> *Westminster Bank Ltd v Lee* [1956] 1 Ch 7 (Ch) 18 (Upjohn J).

<sup>20</sup> *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL).

<sup>21</sup> *Ibid* 721B (Lord Wilberforce).

<sup>22</sup> *Drayne v McKillen* [2011] EWHC 3326 (QB) [43] (Coulson J).

<sup>23</sup> See generally L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) paras 41-117-41-142; J McGhee (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2015) paras 4-017-4-041.

<sup>24</sup> See D Fox, ‘Purchase for Value without Notice’ in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 53.

<sup>25</sup> *Stanhope v Earl Verney* (1761) 2 Eden 81, 85; 28 ER 826, 828 (Lord Henley LC).

passing of the Judicature Acts 1873 and 1875<sup>26</sup>—and the resultant abolition of the administrative divide between equity and the common law<sup>27</sup>—the plea has inevitably lost some of its historical significance.<sup>28</sup> Today, the main significance of the plea sounds in the equitable rules on priorities.<sup>29</sup> In this connection, as a general rule,<sup>30</sup> the plea can be raised by a purchaser of a *legal* interest in property against an earlier *equitable* claim affecting the same property.<sup>31</sup> The evidential *onus* is on the purchaser to establish all the elements which comprise the plea:<sup>32</sup> in the words of Farwell J in *Re Nisbet and Potts' Contract*,<sup>33</sup> ‘the plea of purchaser for value without notice is a single plea, to be proved by the person pleading it; it is not to be regarded as a plea of purchaser for value, to be met by a reply of notice’. However, if the purchaser successfully maintains the plea, then he acquires ‘an absolute, unqualified, unanswerable defence’ against the earlier equitable claim.<sup>34</sup>

The dividing line between equitable interests and mere equities is significant as regards the plea because it affects the circumstances in which it is allowable for a purchaser of an *equitable*—as distinguished from a *legal*—interest to raise the plea against an earlier *equitable* claim. In this connection, the rule is that if the earlier claim amounts to an equitable interest, then it *is not* allowable for the purchaser to raise the plea of purchase for value without notice; whereas if the earlier claim is a mere equity, then it *is* allowable for the purchaser to maintain the plea.<sup>35</sup> In consequence, mere equities have what may be described as a special vulnerability to the plea of purchase for value without notice: unlike equitable interests—which can only be defeated by a plea of purchase for value of a *legal* interest without notice—mere equities can be defeated by a plea of purchase for value of *either* a legal *or* an equitable interest

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<sup>26</sup> Supreme Court of Judicature Acts 1873 and 1875.

<sup>27</sup> See generally J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) paras 1-015-1-031.

<sup>28</sup> See especially *Ind, Coope & Co v Emmerson* (1887) 12 App Cas 300 (HL) 310-11 (Lord Herschell).

<sup>29</sup> JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2014) ch 8.

<sup>30</sup> In relation to land, the plea has been curtailed by statutory systems of registration, in particular, the systems for registration of title (Land Registration Act 2002) and land charges (Land Charges Act 1972): J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) para 4-019.

<sup>31</sup> See, eg, *Pilcher v Rawlins* (1872) LR 7 Ch App 259 (CA).

<sup>32</sup> *A-G v Biphosphated Guano Co* (1879) 11 Ch D 327 (CA) 337 (Thesinger LJ); *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 (Ch) 402 (Farwell J); C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 8-005.

<sup>33</sup> *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 (Ch) 402 (Farwell J).

<sup>34</sup> *Pilcher v Rawlins* (1872) LR 7 Ch App 259 (CA) 269 (James LJ).

<sup>35</sup> See, eg, *Cave v Cave* (1880) 15 Ch D 639 (Ch) 646-47 (Fry J).

without notice.<sup>36</sup> As Worthington puts it, ‘mere equities are more fragile than Equitable interests. They are defeated by any interest subsequently acquired by bona fide purchasers’.<sup>37</sup>

The consequences for priorities of the distinction between equitable interests and mere equities were originally systemised in the case of *Phillips* mentioned above. In *Phillips*, the owner of the equity of redemption in certain lands first granted a rentcharge issuing out of the land to the plaintiff and then transferred the equity of redemption to the defendants. When subsequently the plaintiff brought an action to enforce his security over the land, the defendants sought to rely on the plea of purchase for value without notice.<sup>38</sup> The Lord Chancellor, Lord Westbury, held that the plaintiff was entitled to enforce his interest against the defendants, ruling that the plea of purchase for value without notice was not available in a case like the present, where the court had to determine the priority between competing equitable interests. This ruling disposed of the case and therefore was the *ratio* of the Lord Chancellor’s decision. However, in the course of his judgment, the Lord Chancellor also outlined *obiter* three situations where the plea of purchase for value without notice was available.<sup>39</sup> Of interest here is the third situation mentioned by the Lord Chancellor, which he described as follows:

Thirdly, 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—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere.<sup>40</sup>

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<sup>36</sup> *Ibid*; *Cloutte v Storey* [1911] 1 Ch 18 (Ch) 24 (Neville J); *Westminster Bank Ltd v Lee* [1956] 1 Ch 7 (Ch) 19 (Upjohn J); *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 Ch 9 (Ch) 14 (Cross J); *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1238C-D (Lord Upjohn); *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 277 (Kitto J); *Voyce v Voyce* (1991) 62 P&CR 290 (CA) 294 (Dillon LJ); *Mid-Glamorgan CC v Ogwr BC* (1994) 68 P&CR 1 (CA) 9 (Hoffmann LJ); *Howlaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P&CR 29 (Ch) [65] (Neuberger J); *Halifax plc v Omar* [2002] EWCA Civ 121, [2002] 2 P&CR 26 [84] (Jonathan Parker LJ). But see *Thompson v Foy* [2009] EWHC 1076 (Ch), [2010] 1 P&CR 16 [134] (Lewison J).

<sup>37</sup> S Worthington, *Equity* (2nd edn, OUP 2006) 97-98.

<sup>38</sup> The defendant’s plea was dismissed at first instance by Sir John Stuart V-C on technical grounds: *Phillips v Phillips* (1861) 3 Giff 200, 66 ER 382.

<sup>39</sup> *Phillips v Phillips* (1861) 4 De GF&J 208, 217-18; 45 ER 1164, 1167 (Lord Westbury LC).

<sup>40</sup> *Ibid* 218; 1167 (Lord Westbury LC).

There is controversy among scholars as to what Lord Westbury LC actually meant by this statement.<sup>41</sup> While interesting from a historical point of view, however, from a *doctrinal* point of view the debate in this area is largely otiose. This is because judges in a long line of cases since *Phillips* have consistently held that the meaning of the above statement—commonly known as the third proposition in *Phillips*—is that it is allowable for a purchaser of an equitable interest to raise the plea of purchase for value without notice against an earlier mere equity as distinguished from an equitable interest.<sup>42</sup> Consequently, *Phillips* is understood today to have systemised the rule of priorities that, whilst it is not permissible for a purchaser of an equitable interest to raise the plea of purchase for value without notice against an earlier *equitable interest* (the *ratio* of *Phillips*), it is allowable for such a purchaser to raise the plea against an earlier mere equity (the so-called third proposition in *Phillips*).

It is necessary to note that if a mere equity relates to *registered* land, then it is irrelevant that this type of claim has a special vulnerability to the plea of purchase for value without notice. As noted above, s 116 of the Land Registration Act 2002 confirms that a mere equity in relation to registered land counts as an ‘interest’ for the purposes of the Act. The result is that, under the priority rules set down in the 2002 Act,<sup>43</sup> the priority of a mere equity affecting registered land is either protected—for instance by notice in the register<sup>44</sup>—or not protected, in which case the mere equity is liable to be postponed to any subsequent disposition of an interest which is made for value and completed by registration.<sup>45</sup> In either case, the plea of purchase for value without notice has absolutely no role to play in determining the priority of the mere equity *vis-à-vis* subsequently created interests.<sup>46</sup> It follows that, when speaking of claims in reference to *registered* land, a mere equity is not treated any differently to an equitable interest—or indeed legal interests.<sup>47</sup> Nevertheless, the dividing-line between mere equities and equitable interests continues to be significant as regards the

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<sup>41</sup> See especially D O’Sullivan, ‘The Rule in *Phillips v Phillips*’ (2002) 118 LQR 296. See also below ch 4, pt III, s 3.

<sup>42</sup> See fn 36 above.

<sup>43</sup> See especially Land Registration Act 2002, ss 28-29.

<sup>44</sup> *Ibid* s 29(2)(a)(i).

<sup>45</sup> *Ibid* s 29(1).

<sup>46</sup> C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 7-067, point (c).

<sup>47</sup> *Ibid*; C Mitchell, P Mitchell and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 37-35.

priority of competing equitable claims to personal property—for instance money, goods or securities—and unregistered land.

### PART III: THE RATIONALE BEHIND THE THESIS

The preceding exposition shows that the basic features and consequences of mere equities can be ascertained from the authorities with relative ease. In other words, the case and statute law present a fairly clear picture of the effect which a mere equity is likely to have on the outcome of litigation in relation to which that mere equity plays a significant role. Despite this apparent clarity, however, there are more fundamental questions about mere equities which remain largely unanswered. In particular, there seems to be great confusion over mere equities' legal nature and practical function—that is to say, what mere equities are and the job which they do. This confusion has given rise to the criticism that mere equities are an anomalous category which largely defies detailed analysis.<sup>48</sup> Indeed, it is not for nothing that one commentator likens the concept of a mere equity to 'a grey and murky fog, consistent in depth of colour, the boundaries hazy and ill-defined'.<sup>49</sup>

It might be argued that since it is generally well understood how mere equities are liable to play out in the resolution of concrete legal problems, the more theoretical investigation proposed by this thesis into the nature and function of mere equities is strictly unnecessary. Such an outlook, however, would be simplistic, since the lack of clarity surrounding mere equities does give rise to genuine problems. For one thing, the consequences of any juridical claim are conceptually a result of—or are justified by reference to—that claim's underlying legal nature. In consequence, the lack of clarity over mere equities' legal nature makes it difficult to assess whether the established features of mere equities are soundly based. This is especially the case as regards the proprietary features of mere equities and the special vulnerability of these

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<sup>48</sup> See especially *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1238B-G (Lord Upjohn); Law Commission, *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 5.35; PH Pettit, *Equity and the Law of Trusts* (12th edn, OUP 2012) 20; S Worthington, *Equity* (2nd edn, OUP 2006) 82; L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) para 33-021.

<sup>49</sup> AR Everton, "Equitable Interests" and "Equities"—In Search of a Pattern' (1976) 40 Conv 209, 209.

claims to the plea of *bona fide* purchase for value without notice.<sup>50</sup> This lack of clarity may also make it more difficult to predict what effect a mere equity is likely to have in novel cases which are not covered by existing precedent. For another thing, uncertainty over the function which mere equities perform means that it is not possible to ask some important qualitative questions about these claims, in particular, the extent to which mere equities are suited to their identified role as compared with other potential categories of equitable response, for instance, the trust.

The present confusion over the nature and function of mere equities is bound to leave a question mark over whether mere equities should even exist as a category of equitable claim. This would not be such an unsatisfactory state of affairs if mere equities were of marginal importance. However, mere equities are far from being a footnote in the wider scheme of equitable doctrines and remedies. As will be demonstrated in chapter three,<sup>51</sup> mere equities are the admitted basis of several very familiar modes of equitable intervention, including rescission in equity, rectification and proprietary estoppel. The concept of a mere equity, therefore, is by no means trivial; it is the substantive foundation for a sizable body of equitable doctrine, touching upon many of the sub-topics into which the private law is traditionally divided, including areas as diverse as property, contract and restitution.<sup>52</sup> Thus mere equities play an important role as an organising concept within the equitable system, a fact which makes the current uncertainty surrounding these claims all the more problematic.

Accordingly, the overarching aim of this thesis is to carry out an investigation that will rectify the present uncertainty over the mere equity's legal nature and practical function. In order to achieve this aim, the thesis will address a number of questions.

#### PART IV: THE QUESTIONS TO BE ANSWERED

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<sup>50</sup> See Law Commission, *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 5.35.

<sup>51</sup> Ch 3, pt II, s 2, sub-s i.

<sup>52</sup> As evidenced by the fact that most textbooks on these subjects contain paragraphs dealing with mere equities: see, eg, C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) paras 8-012-8-013; C Mitchell, P Mitchell and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) paras 37-30, 37-35; H Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) vol 1, para 7-141.

This thesis will address five key questions. The first question is, ‘What are the different claims which are, or might be, mere equities as distinguished from equitable interests?’ This question will be dealt with in chapter three, and will entail an examination of the primary legal evidence in order to ascertain the different claims that are properly classified as mere equities. While the question does not directly address the nature or function of mere equities, it is nevertheless a crucial first step in the subsequent analysis. Simply put, in order to be able to determine the nature and function of mere equities, it is necessary to be able to identify at least the main types of claims which qualify as mere equities. These concrete examples are essential, because they are the raw data against which any theory or proposal regarding the nature or function of mere equities is to be tested.

The second question which this thesis will answer is ‘What is the legal nature of the dividing line between mere equities and equitable interests?’ This question begins to address the legal nature of mere equities, and will also be dealt with in chapter three. Answering the question will require a detailed comparison to be made between the different kinds of ‘mere equities’, on the one hand, and the different types of ‘equitable interests’, on the other hand, so that the likely nature of the dividing line between these two categories can be identified. Clearly, it is important to identify this dividing line if the legal nature of mere equities is to be properly understood. Indeed, the fact that mere equities are proprietary but nevertheless fall short of being ‘equitable interests’ is what makes these claims stand out as a distinct category; it is furthermore the underlying reason that mere equities are treated differently from equitable interests as regards the plea of *bona fide* purchase for value without notice. It follows that a credible account of the distinction between mere equities and equitable interests is central to any attempt at finding a cogent explanation for mere equities and their particular characteristics.

The third question which the thesis will answer is, ‘What is the underlying doctrinal basis for the proprietary features of mere equities?’ This question will be addressed in chapters four, five and six. It concerns *how*, in juridical terms, mere equities exhibit the characteristics of enforceability against, and assignability in favour of, third parties. The question will involve a detailed examination of the rules and principles on which the proprietary features of mere equities are founded.

The proposed examination of these rules and principles is necessary in order to gain a proper understanding of mere equities. Clearly, it would not be sufficient simply to pronounce that these claims are ‘proprietary’ and allow the matter to rest there. Indeed, there are at least three reasons why the proprietary characteristics of mere equities merit detailed analysis. First, locating these characteristics within their proper doctrinal framework should do much to save mere equities from the criticism that they are an anomalous category which defies comprehensive analysis. Second, as suggested above, it is necessary to know what rules and principles underpin the proprietary features of mere equities in order to be able to evaluate whether these features are soundly based, and also to be able to predict whether these features will be in play in cases which are not covered by existing precedent. Third, identifying the doctrinal basis for the proprietary features of mere equities may have wider implications for the law as regards, for example, whether the courts are likely in future cases to take the step of reclassifying mere equities as equitable interests (a possibility that will be discussed in chapter eight<sup>53</sup>).

The fourth and fifth questions which this thesis will answer are respectively ‘What function do mere equities perform?’ and ‘How well do mere equities perform their identified function?’ These questions will be dealt with in chapter seven. They directly address the lack of clarity over the function which mere equities perform by asking what practical role these claims play within the wider socio-economic context. On the one hand, answering the fourth question will entail a close examination of the different situations in which mere equities are known to have arisen in order to infer what function mere equities are likely to be performing in these situations. On the other hand, the fifth question will involve an evaluation of how well adapted mere equities are to the performance of their allocated function given their established legal nature, especially in comparison with other potential categories of equitable response—in particular the trust.

## PART V: OVERVIEW OF THE THESIS

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<sup>53</sup> Ch 8, pt III, s 3.

The chapters which follow will address each of the questions outlined above. Chapter two will establish the necessity for the present thesis by carrying out a full review of the relevant secondary literature. The chapter will show that while various commentators have touched on the questions which this thesis poses, as matters stand, none of these questions has been sufficiently addressed in the existing literature. This finding will justify the subsequent chapters, which will seek to remedy the deficiency in the present scholarly literature by taking a fresh look at the primary legal materials in the light of the questions posed. Finally, having established the necessity for this thesis, chapter two will outline and then justify the predominantly doctrinal methodology which the thesis will use in order to achieve its aims.

Chapter three will consider the dividing line between mere equities and equitable interests. The chapter will first carry out a review of the cases in order to ascertain which equitable claims have expressly been classified by the courts as ‘mere equities’ or ‘equitable interests’. The chapter will then compare the ‘confirmed’ mere equities with the ‘confirmed’ equitable interests in order to evaluate the likely nature of the dividing line between these two categories. Finally, the chapter will apply its definition of the dividing line between mere equities and equitable interests in order to determine what claims, beyond the judicially confirmed examples of mere equities, might also be mere equities.

The findings in chapter three will answer the first and second questions which this thesis poses. In answer to the first question (namely, ‘What are the different claims which are, or might be, mere equities as distinguished from equitable interests?’), the chapter will conclude that (i) equitable claims to have a transaction rescinded, (ii) claims to have a document rectified and (iii) claims to seek relief under the doctrine of proprietary estoppel are judicially confirmed examples of mere equities, while (iv) claims to have a contract specifically performed, (v) claims to seek relief against the forfeiture of a lease and (vi) claims to seek relief against the foreclosure of a mortgage could potentially be mere equities, but have not been judicially confirmed as such. In answer to the second question (namely, ‘What is the legal nature of the dividing line between mere equities and equitable interests?’), the chapter will argue that the dividing line between mere equities and equitable interests is that equitable interests, on the one hand, are composites of juridical claims which include at least some rights *in rem* while mere equities, on the other hand, are equitable rights of action and therefore pure rights *in personam*.

Chapters four, five and six will investigate the doctrinal basis for the proprietary features of mere equities. Chapters four and five will focus on the enforceability of mere equities against third parties, while chapter six will look at the assignability of mere equities in favour of third parties.

Chapter four will critically examine the idea that the enforceability of mere equities against third parties is founded on orthodox conceptions of property. The chapter will show that while a handful of cases do disclose some evidence for a property-based analysis of the third party effects of mere equities,<sup>54</sup> this analysis is not in fact workable within the wider doctrinal framework. Finally, the chapter will critically consider, and ultimately reject, the theory, which has been put forward by certain scholars, that a mere equity to rescind or rectify a transfer is capable of binding third parties because it constitutes an imperfection in the title which the transferee acquires in the affected asset.<sup>55</sup>

These findings will clear the air for chapter five, which will consider the alternative idea that the enforceability of mere equities against third parties is grounded in equitable notions of unconscionability. Chapter five will argue for the existence of a principle, which the chapter will term the conscience-based principle, pursuant to which a right *in personam* may be imposed afresh against the successor in title of the person originally bound by that right. The chapter will support this argument by appealing to historical cases in which courts of equity applied the conscience-based principle in order to enforce what was then a right *in personam* against successors in title. The chapter will then propose that the conscience-based principle is the doctrinal basis for the enforceability of mere equities against third parties, and will outline the advantages of this analysis. In particular, the chapter will argue that this analysis explains why mere equities are treated differently from equitable interests as regards the plea of *bona fide* purchase for value without notice.

As noted above, chapter six will examine the doctrinal basis for the other proprietary feature which mere equities have been known to exhibit, namely, assignability in favour of third parties. The chapter will argue that since mere equities are equitable rights of action (as established in chapter three), the assignment of these

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<sup>54</sup> Ie, *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL); *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265; *Blacklocks v JB Developments (Godalming) Ltd* [1982] 1 Ch 183 (Ch).

<sup>55</sup> See especially D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 21.29-21.30.

claims is governed by the more wide-ranging principles which apply to the assignment of rights of action in general. Having outlined these core principles and demonstrated how they apply to mere equities, the chapter will turn to consider a group of cases which are problematic in light of these core principles.<sup>56</sup> The chapter will then suggest three different ways in which these cases can be explained, before proceeding to evaluate which of these explanations is the most plausible.

Taken together, chapters four, five and six will answer the third question which this thesis poses (namely, ‘What is the underlying doctrinal basis for the proprietary features of mere equities?’). In answer to this question, it will be concluded, firstly, that the underlying doctrinal basis for the enforceability of mere equities against third parties is the conscience-based principle and, secondly, that the underlying doctrinal basis for the assignability of mere equities in favour of third parties is the general principle that a bare right of action cannot be assigned unless it is ancillary to some property right or interest, in which case it can be assigned together with the property right or interest.<sup>57</sup>

Chapter seven will investigate the practical function which mere equities perform. The chapter will begin this investigation by analysing the different kinds of case in which a mere equity has been found to exist in order to ascertain the jointly necessary factual elements of this type of claim. The chapter will then expand on this analysis by taking a normative approach to the question of why these particular factual elements contribute to establishing a mere equity. Finally, the chapter will draw on the foregoing analysis in order to infer what function mere equities perform, before proceeding to evaluate how well mere equities perform their identified function as compared with other potential categories of equitable response, in particular the trust.

The findings in chapter seven will answer the fourth and fifth questions which this thesis poses. In answer to the fourth question (namely, ‘What function do mere equities perform?’), the chapter will conclude that mere equities perform the function of upholding the common interest which all members of a coherent, cohesive society have in affording a measure of protection to persons who have acted in some way to their detriment under the influence of their own honest mistake or one of the species of fraud. In answer to the fifth question (namely, ‘How well do mere equities perform

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<sup>56</sup> *Ie, Gresley v Mousley* (1859) 4 De G&J 78, 45 ER 31; *Dickinson v Burrell* (1866) LR 1 Eq 337; *Melbourne Banking Corp Ltd v Brougham* (1882) 7 App Cas 307 (PC).

<sup>57</sup> See, eg, *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL) 703F-G (Lord Roskill).

their identified function?'), the chapter will conclude that the legal nature of mere equities as bare equitable rights of action means that they are well adapted to the performance of their identified function.

Finally, chapter eight will present a summary of the key findings and arguments which will have been made in the earlier chapters. Chapter eight will then highlight some of the potential implications of these findings for legal practice and doctrine more broadly.

## Chapter 2

# Literature Review and Methodology

### PART I: INTRODUCTION

As seen in chapter one,<sup>1</sup> the overarching purpose of this thesis is to investigate the legal nature and practical function of mere equities. In order to achieve this objective, the thesis aims to answer the following questions: (i) What are the different claims which are, or might be, mere equities as distinguished from equitable interests? (ii) What is the legal nature of the dividing line between mere equities and equitable interests? (iii) What is the underlying doctrinal basis for the proprietary features of mere equities? (iv) What function do mere equities perform? (v) How well do mere equities perform their identified function?

The aim of this chapter is to set out the necessary groundwork for the following chapters. The chapter will begin by carrying out a full review of the relevant literature. It will demonstrate that although various commentators have touched on the questions which this thesis poses, as things stand, none of these questions has been adequately addressed in the existing literature—hence justifying the following chapters’ more detailed investigation into these questions. Next, the chapter will outline and then justify the primarily doctrinal methodology which this thesis will use in order to achieve its aims.

### PART II: LITERATURE REVIEW

While the body of academic literature which touches on mere equities is quite modest, it would be incorrect to say that mere equities have been overlooked. A number of academic articles have been written which either deal with mere equities directly or consider them in connection with some closely related topic.<sup>2</sup> And because, as

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<sup>1</sup> Ch 1, pt I.

<sup>2</sup> See especially HWR Wade, ‘Husband and Wife—Deserted Wife’s Right to Matrimonial Home—Equitable Interests and “Mere Equities”’ [1955] CLJ 158; RE Megarry, ‘Mere Equities, the Bona Fide Purchaser and the Deserted Wife’ (1955) 71 LQR 480; AR Everton, “‘Equitable Interests’ and

observed in chapter one,<sup>3</sup> mere equities are relevant to many of the different sub-topics into which the private law is traditionally divided, these rights find their way into a diverse range of books. Among these books, the most useful for our purposes tend to be books on equity or equity and trusts,<sup>4</sup> as well as a small number of more specialist books, each dealing with one of the doctrines which are generally acknowledged to generate mere equities, such as rescission or rectification.<sup>5</sup> Other books which contain useful discourse on mere equities include works on sub-topics as diverse as land law,<sup>6</sup> contract law,<sup>7</sup> the law of unjust enrichment<sup>8</sup> and the law of assignment.<sup>9</sup>

This part will carry out a review of the existing literature, focusing in particular on how previous academic commentary on mere equities relates to the questions which this thesis is asking. Mostly, this review will deal with secondary sources such as articles and books rather than with primary legal materials like cases and statutes. This makes sense because, since this thesis will take a primarily doctrinal approach (see below), it will be necessary for the chapters which follow to engage with the relevant primary materials in detail.

## **1. What are the different claims which are, or might be, mere equities as distinguished from equitable interests?**

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“Equities”—In Search of a Pattern’ (1976) 40 Conv 209; M Neave and M Weinberg, ‘The Nature and Function of Equities (Part I)’ (1978-1980) 6 University of Tasmania Law Review 24; M Neave and M Weinberg, ‘The Nature and Function of Equities (Part II)’ (1978-1980) 6 University of Tasmania Law Review 115; D O’Sullivan, ‘The Rule in *Phillips v Phillips*’ (2002) 118 LQR 296.

<sup>3</sup> Ch 1, pt III.

<sup>4</sup> See especially PH Pettit, *Equity and the Law of Trusts* (12th edn, OUP 2012) 20-25; JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2014) ch 4; L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) paras 33-020-33-021; J McGhee (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2015) paras 2-006-2-008.

<sup>5</sup> See especially D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010) paras 6-09-6-10; D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 16.12-16.17.

<sup>6</sup> See, eg, C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) paras 8-012-8-013.

<sup>7</sup> See, eg, H Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) vol 1, para 7-141.

<sup>8</sup> See, eg, C Mitchell, P Mitchell and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) paras 37-30, 37-35.

<sup>9</sup> See, eg, M Smith, *The Law of Assignment* (2nd edn, OUP 2013).

Today, most commentators are in agreement that the rights which arise under the equitable doctrines of rescission (ie, undue influence,<sup>10</sup> unconscionable conduct,<sup>11</sup> innocent misrepresentation<sup>12</sup>) and rectification (ie, common mistake,<sup>13</sup> unilateral mistake<sup>14</sup>) are mere equities.<sup>15</sup> And while the term ‘interests’ is also frequently used to describe these rights, it is usually clear from the context that this term is being used in a general sense to describe all rights of a proprietary character, and not in contradistinction to ‘mere equities’.

A few commentators have bucked the general trend, but they are few and far between.<sup>16</sup> Most notably, Chambers has expressed disagreement with what he describes as the ‘common assumption’<sup>17</sup> that the rights which arise under the equitable doctrines of rescission and rectification are always mere equities. According to Chambers, if a transferor conveys property in circumstances of undue influence or mistake, thus entitling the transferor to recover the property by exercising a right to rescind or rectify the conveyance, then the transferee holds the property on resulting trust for the transferor, who accordingly takes an immediate equitable interest in the property, not just a mere equity.<sup>18</sup> It is fair to say, however, that commentators who take the view that rights of rescission or rectification can amount to equitable interests as distinguished from mere equities are clearly in a minority.<sup>19</sup>

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<sup>10</sup> See generally D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 6.75-6.120.

<sup>11</sup> See generally *ibid* paras 7.62-7.96.

<sup>12</sup> See generally *ibid* ch 4.

<sup>13</sup> See generally D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010) ch 3.

<sup>14</sup> See generally *ibid* ch 4.

<sup>15</sup> See, eg, HWR Wade, ‘Husband and Wife—Deserted Wife’s Right to Matrimonial Home—Equitable Interests and “Mere Equities”’ [1955] CLJ 158, 160; RE Megarry, ‘Mere Equities, the Bona Fide Purchaser and the Deserted Wife’ (1955) 71 LQR 480, 482; AR Everton, ‘“Equitable Interests” and “Equities”—In Search of a Pattern’ (1976) 40 Conv 209, 210; M Neave and M Weinberg, ‘The Nature and Function of Equities (Part I)’ (1978-1980) 6 University of Tasmania Law Review 24, 25; PH Pettit, *Equity and the Law of Trusts* (12th edn, OUP 2012) 21-22; C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 8-012; M Smith, *The Law of Assignment* (2nd edn, OUP 2013) para 2.90; JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2014) ch 4; L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) para 33-021; J McGhee (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2015) para 2-006, including fn 22.

<sup>16</sup> See especially JB Ames, ‘Purchase for Value Without Notice’ (1887) 1 Harvard Law Review 1, 2; R Chambers, *Resulting Trusts* (OUP 1997) ch 7.

<sup>17</sup> R Chambers, *Resulting Trusts* (OUP 1997) 184.

<sup>18</sup> *Ibid* ch 7.

<sup>19</sup> Furthermore, Chambers himself appears to have abandoned the theory that a right to rescind or rectify gives the claimant an immediate, automatic equitable interest in any recoverable assets: R Chambers, ‘Resulting Trusts’ in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 256, 261.

Previously, there was disagreement among commentators over the correct classification of the rights which arise under the doctrine of proprietary estoppel.<sup>20</sup> On the one hand, there were commentators who argued that the inchoate status of these rights meant that they were purely personal.<sup>21</sup> On the other, there were commentators who accepted that these rights, despite their inchoate status, were proprietary rights similar to rights of rescission and rectification.<sup>22</sup> However, there have been two developments which have largely taken away the impetus behind the view that rights of proprietary estoppel are purely personal. First, there have been a number of cases where it was decided that rights of proprietary estoppel could be enforced against third parties,<sup>23</sup> thus demonstrating that these rights are capable of being more than purely personal, at least in some circumstances.<sup>24</sup> Second, as explained in chapter one,<sup>25</sup> the Land Registration Act 2002 has declared that ‘equities by estoppel’ in relation to registered land are proprietary in character.<sup>26</sup> The outcome of these developments is that today a majority of commentators accept that the rights which arise under the doctrine of proprietary estoppel are mere equities.<sup>27</sup>

Accordingly, there is a clear consensus among commentators that the rights which arise under the equitable doctrines of rescission, rectification and proprietary estoppel are mere equities as distinguished from equitable interests. As far as the secondary literature is concerned, therefore, these rights can be said to represent the ‘core examples’ of mere equities.

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<sup>20</sup> JE Martin, ‘Casenotes: Editor’s Notes’ [1992] Conv 53, 57; C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 16-028; M Thompson and M George, *Thompson’s Modern Land Law* (6th edn, OUP 2017) 589-90; J-A MacKenzie and A Nair, *Textbook on Land Law* (19th edn, OUP 2018) 420.

<sup>21</sup> D Hayton, ‘Developing the Law of Trusts for the Twenty-first Century’ (1990) 106 LQR 87, fn 26. See also P Critchley, ‘A Via Media for Estoppel and Third Parties’ [1998] Conv 502.

<sup>22</sup> M Neave and M Weinberg, ‘The Nature and Function of Equities (Part I)’ (1978-1980) 6 University of Tasmania Law Review 24, 25; S Baughen, ‘Estoppels over Land and Third Parties: An Open Question?’ (1994) 14 LS 147.

<sup>23</sup> See, eg, *Inwards v Baker* [1965] 2 QB 29 (CA); *ER Ives Investment Ltd v High* [1967] 2 QB 379 (CA); *Voyce v Voyce* (1991) 62 P&CR 290 (CA).

<sup>24</sup> M Thompson and M George, *Thompson’s Modern Land Law* (6th edn, OUP 2017) 590.

<sup>25</sup> Ch 1, pt II, s 1.

<sup>26</sup> Land Registration Act 2002, s 116. But see B McFarlane, ‘Proprietary Estoppel and Third Parties after the Land Registration Act 2002’ (2003) 62 CLJ 661.

<sup>27</sup> See, eg, M Neave and M Weinberg, ‘The Nature and Function of Equities (Part I)’ (1978-1980) 6 University of Tasmania Law Review 24, 25; C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 16-028; J McGhee (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2015) para 2-006, fn 22. See also *Halifax plc v Curry Popeck* [2008] EWHC 1692 (Ch) [26] (Norris J).

Outside of these core examples, there is no consistency of approach in the secondary literature about what other rights might be mere equities, although a few commentators have made *ad hoc* suggestions in this regard. These suggestions include: (i) the rights of mortgagees to consolidation of mortgages;<sup>28</sup> (ii) claims to re-open a foreclosure of mortgaged property;<sup>29</sup> (iii) claims to seek relief against the forfeiture of a lease;<sup>30</sup> (iv) the rights of persons who are entitled to inherit in reference to the unadministered estate of the deceased;<sup>31</sup> (v) the rights of purchasers under estate contracts;<sup>32</sup> (vi) rights to assert an equitable interest in property which has been identified though the equitable tracing rules.<sup>33</sup>

The difficulty is that many of these suggestions are doctrinally questionable or based on arguably impressionistic reasoning. For one thing, certain rights in the above list are protected by remedies which have been made available against a third party purchaser for value of an equitable interest without notice.<sup>34</sup> This is something which ought not to be possible if these rights were mere equities. This is because, as explained in chapter one,<sup>35</sup> one of the key consequences of a right being a mere equity is that that right can be defeated by any third party purchaser for value without notice, including a purchaser of a merely equitable interest.<sup>36</sup>

For another thing, it seems that some rights in the above list may have been classified as ‘mere equities’ solely because they do not confer a present right to the enjoyment of identifiable property and therefore, or so the argument runs, cannot be classified as ‘equitable interests’. Indeed, this is the reason which Virgo gives for

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<sup>28</sup> PH Pettit, *Equity and the Law of Trusts* (12th edn, OUP 2012) 21-22.

<sup>29</sup> HWR Wade, ‘Husband and Wife—Deserted Wife’s Right to Matrimonial Home—Equitable Interests and “Mere Equities”’ [1955] CLJ 158, 160; C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 8-012.

<sup>30</sup> Law Commission, *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 5.33, point (4). See also Explanatory Notes to the Land Registration Act 2002, para 186.

<sup>31</sup> G Virgo, *The Principles of Equity and Trusts* (2nd edn, OUP 2016) 76-78. See also PS Davies, G Virgo and EH Burn, *Equity & Trusts: Text, Cases, and Materials* (2nd edn, OUP 2016) 49, 51.

<sup>32</sup> JE Penner, *The Law of Trusts* (10th edn, OUP 2016) para 4.8.

<sup>33</sup> J McGhee (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2017) para 2-006.

<sup>34</sup> See, eg, *Ireson v Denn* (1796) 2 Cox 426, 30 ER 197: a mortgagee of two distinct estates upon distinct mortgages from the same mortgagor was allowed to enforce his right to consolidate both mortgages against a purchaser of the equity of redemption in one estate without notice of the mortgage of the other estate. See also C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 25-067.

<sup>35</sup> Ch 1, pt II, s 2.

<sup>36</sup> See, eg, *Mid-Glamorgan CC v Ogwr BC* (1994) 68 P&CR 1 (CA) 9 (Hoffmann LJ). See further the authorities cited above at ch 1, fn 36.

suggesting that right (iv) is a mere equity.<sup>37</sup> Yet this reasoning derives from the underlying proposition that the characteristic of conferring a present right to the enjoyment of identifiable property is a necessary feature of all equitable interests. None of the commentators in question, however, supports this proposition with any evidence or discussion. Furthermore, the proposition goes against the grain of recent scholarship, which suggests that the core feature of proprietary interests is not that they confer any particular entitlement to benefit, but that they include the right to *exclude* other people from the enjoyment of identifiable property.<sup>38</sup> It follows that the classification of at least right (iv) as a mere equity is founded on reasoning which is doubtful to say the least.

Therefore it is clear that, beyond the core examples of rights of rescission, rectification and proprietary estoppel, there is confusion in the secondary literature about what rights are properly classified as mere equities as distinguished from equitable interests. This is unfortunate because, as explained in chapter one,<sup>39</sup> different consequences attach to equitable interests and mere equities respectively—the main difference being that an equitable interest can only be defeated by the plea of *bona fide* purchase for value without notice if the interest purchased is *legal*, whereas a mere equity can be defeated by the plea even if the interest purchased is merely *equitable*.<sup>40</sup>

The problem of classification will be addressed in chapter three. As already explained,<sup>41</sup> that chapter will begin by carrying out a full review of the case law in order to identify the various rights which the courts have definitively classified as mere equities or equitable interests. The chapter will then compare the different rights which have been classified in this way in order to define the nature of the distinction between mere equities and equitable interests (see below). Armed with this definition, the chapter will then return to consider the problem of classification. It will look at the various rights which the courts have *not* definitively classified as mere equities or equitable interests and will consider, in the light of the distinction between these categories, into which category each of these rights is likely to fall.

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<sup>37</sup> G Virgo, *The Principles of Equity and Trusts* (2nd edn, OUP 2016) 76-78.

<sup>38</sup> K Grey, 'Property in Thin Air' (1991) 50 CLJ 252, 294; RC Nolan, 'Equitable Property' (2006) 122 LQR 232, 234-35.

<sup>39</sup> Ch 1, pt II, s 2.

<sup>40</sup> See fn 36 above.

<sup>41</sup> See above ch 1, pt V.

## 2. What is the legal nature of the dividing line between mere equities and equitable Interests?

From what has just been said, it is clear that the proper definition of the dividing line between mere equities and equitable interests is central to the problem of classification in cases where the status of a particular equitable proprietary right as a mere equity or an equitable interest is uncertain. Yet this is not the only reason that the distinction between mere equities and equitable interests is, as Megarry puts it, ‘of considerable importance’.<sup>42</sup> It is also important because the mere equity can only be considered a defensible concept if this distinction serves to justify the different consequences that attach to mere equities as compared to equitable interests: in particular the rule that mere equities, unlike equitable interests, can be defeated by all purchasers for value without notice, including purchasers of merely equitable interests.<sup>43</sup>

Given the general importance of the distinction between mere equities and equitable interests, it is not surprising that a number of commentators have sought to explain this distinction.<sup>44</sup> Precisely how much clarity this scholarly attention has brought to this area is questionable: Pettit, for one, complains that ‘it is ... difficult to find two writers who share the same view’.<sup>45</sup> Yet while it is true that academic accounts of the distinction between mere equities and equitable interests differ as to their details, it seems, more often than not, that this lack of congruity is more apparent than real.

Thus it seems that the majority of commentators are in general, albeit unspoken, agreement that the reason mere equities are distinct from equitable interests is that mere equities are, in one sense or another, more susceptible to the discretion of the court than equitable interests. Wade is probably the first commentator to have

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<sup>42</sup> RE Megarry, ‘Mere Equities, the Bona Fide Purchaser and the Deserted Wife’ (1955) 71 LQR 480, 480.

<sup>43</sup> See fn 36 above.

<sup>44</sup> See especially HWR Wade, ‘Husband and Wife—Deserted Wife’s Right to Matrimonial Home—Equitable Interests and “Mere Equities”’ [1955] CLJ 158; AR Everton, “‘Equitable Interests’ and ‘Equities’—In Search of a Pattern’ (1976) 40 Conv 209; M Neave and M Weinberg, ‘The Nature and Function of Equities (Part I)’ (1978-1980) 6 University of Tasmania Law Review 24; M Neave and M Weinberg, ‘The Nature and Function of Equities (Part II)’ (1978-1980) 6 University of Tasmania Law Review 115.

<sup>45</sup> PH Pettit, *Equity and the Law of Trusts* (12th edn, OUP 2012) 22.

expressed this view,<sup>46</sup> suggesting that the supposedly discretionary nature of mere equities may be what distinguishes them from equitable interests:

The dividing line between equitable interests and mere equities is perhaps the discretionary character of the latter. Equitable claims to set aside deeds, or to secure their rectification, or to reopen a foreclosure, are at the discretion of the court in a way which does not apply to equitable titles such as those of beneficiaries under a trust or a mortgagor's equity of redemption.<sup>47</sup>

Everton adopts a slightly different approach.<sup>48</sup> She eschews the expression 'mere equity' to describe a category of equitable proprietary right,<sup>49</sup> distinguishing instead between what she terms 'patent equitable interests' and 'latent equitable interests'. On the one hand, patent equitable interests, which Everton broadly equates with 'equitable interests' traditionally so called, are rights which 'depend for their existence simply upon the act of the parties'.<sup>50</sup> On the other hand, latent equitable interests, which Everton broadly equates with 'mere equities' traditionally so called, are rights which depend for their existence 'upon the successful pursuit of a remedy'.<sup>51</sup>

Everton not only adopts a different taxonomy from Wade, she also criticises elements of his reasoning.<sup>52</sup> Yet, on closer inspection, the variances between these two scholars mask a pronounced similarity in approach. Thus both Wade and Everton concur that the reason 'mere equities' (or 'latent equitable interests') are distinct from 'equitable interests' (or 'patent equitable interests') is that the former, but not the latter, are contingent on the discretion of the court, such that the existence or consequences of the former cannot be predicted with absolute certainty unless and until the court either grants or refuses relief. As Everton herself puts it:

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<sup>46</sup> HWR Wade, 'Husband and Wife—Deserted Wife's Right to Matrimonial Home—Equitable Interests and "Mere Equities"' [1955] CLJ 158.

<sup>47</sup> Ibid 160. Writing together, Megarry and Wade would repeat the suggestion that a mere equity is 'more at the discretion of the court': see RE Megarry and HWR Wade, *The Law of Real Property* (5th edn, Stevens & Sons Ltd 1984) 147. These words are reproduced at C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 8-013.

<sup>48</sup> AR Everton, "'Equitable Interests' and 'Equities'—In Search of a Pattern' (1976) 40 Conv 209.

<sup>49</sup> Everton suggests that the term 'mere equity' might be reserved for rights 'of an exclusively personal nature': see *ibid* 220. However, this would be inconsistent with the ordinary usage of 'mere equity' to describe a type of proprietary claim: see above ch 1, pt II, s 1.

<sup>50</sup> AR Everton, "'Equitable Interests' and 'Equities'—In Search of a Pattern' (1976) 40 Conv 209, 215.

<sup>51</sup> *Ibid* 218.

<sup>52</sup> *Ibid* 212-13.

Unlike ... an interest under a trust, the existence of which in no way depends upon the vindication of an equitable claim, the interest arising from a voidable conveyance cannot be said, in the period between the execution of the conveyance and the awarding of rescission, to enjoy [anything] other than a 'shadow like' existence ...<sup>53</sup>

Other commentators have expressed the same basic idea, albeit using different terminology. A typical formulation is that a mere equity, in contrast with an equitable interest, has an 'inchoate status' which continues up until the point at which the mere equity is successfully enforced, whereupon the mere equity is said to 'crystallise' into a full equitable beneficial or security interest.<sup>54</sup> With respect, this seems to be just another way of saying that a mere equity enjoys nothing more than a 'shadow like' existence in the period from its inception to its enforcement.

Neave and Weinberg warrant a special mention. Writing together,<sup>55</sup> they argue in favour of the thesis that, when the court acknowledges a category of equitable right for the first time, that right begins as a fully discretionary, purely personal right—which Neave and Weinberg term an 'undefined equity'<sup>56</sup>—but that an undefined equity is apt over time to become progressively more defined and to acquire, where appropriate, proprietary characteristics. According to Neave and Weinberg, the distinction between equitable interests and mere equities is best understood in terms of this process. On the one hand, equitable interests are rights which have reached the most advanced stage in their development, having become, Neave and Weinberg allege, strictly non-discretionary and capable of enforcement against all third parties, except for purchasers for value of *legal* interests without notice. On the other hand, mere equities are rights which, although they are no longer fully discretionary and have acquired certain proprietary characteristics, are still at an intermediate stage in their development, and thus are not as 'defined' as equitable interests. However, it is

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<sup>53</sup> Ibid 214.

<sup>54</sup> See especially J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) para 2-006; C Mitchell, P Mitchell and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) paras 37-30-37-31.

<sup>55</sup> M Neave and M Weinberg, 'The Nature and Function of Equities (Part I)' (1978-1980) 6 University of Tasmania Law Review 24; M Neave and M Weinberg, 'The Nature and Function of Equities (Part II)' (1978-1980) 6 University of Tasmania Law Review 115.

<sup>56</sup> M Neave and M Weinberg, 'The Nature and Function of Equities (Part I)' (1978-1980) 6 University of Tasmania Law Review 24, 26.

intrinsic to Neave and Weinberg's thesis that the 'mere equity' label is transient, since the potential exists for even confirmed mere equities to complete their development and become full equitable interests in future cases.<sup>57</sup>

Neave and Weinberg adopt a broadly similar approach to Wade and Everton. Like Wade and Everton, Neave and Weinberg place emphasis on the less defined quality of mere equities as compared with the supposedly non-discretionary character of equitable interests. However, Neave and Weinberg take this basic idea further by attempting to make sense of it within the ambit of their more general theory of how equitable proprietary interests develop. In this way, Neave and Weinberg lend greater weight than Wade and Everton to judicial creativity and decision making as factors underpinning the distinction between mere equities and equitable interests.<sup>58</sup>

Accordingly, although commentators cannot quite agree on exactly what the distinction between mere equities and equitable interests is, it nevertheless seems that the greater part of scholarly opinion is in favour of the view that this distinction has something to do with the supposedly more discretionary character of mere equities. It is important to emphasise, however, that this view is not the only one to have been put forward in the secondary literature.

An alternative line of inquiry which has become apparent only comparatively recently identifies equitable interests with 'duties' and mere equities with 'liabilities'.<sup>59</sup> In broad outline, this view maintains that the basis of an equitable interest is some 'duty' or 'obligation' in reference to the enjoyment of definite property owed by one party to another. In contrast, a mere equity is said not to include any such duty or obligation, but consists of a 'liability' incurred by one party to have his legal rights in reference to definite property 'reduced or extinguished' at the instance of another party,<sup>60</sup> who therefore can be said to have a form of 'power'.<sup>61</sup>

McFarlane, Hopkins and Neild are among the commentators who adopt this analysis.<sup>62</sup> Writing together, they suggest that the reason the doctrine of proprietary estoppel initially generates an 'equity' rather than an 'equitable interest' is that that

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<sup>57</sup> For discussion of this possibility see below ch 8, pt III, s 3.

<sup>58</sup> See PH Pettit, *Equity and the Law of Trusts* (12th edn, OUP 2012) 22.

<sup>59</sup> For discussion of the distinction between a 'duty' and a 'liability' see WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-1914) 23 *Yale Law Journal* 16, 28 et seq.

<sup>60</sup> E McKendrick, *Goode on Commercial Law* (4th edn, LexisNexis UK and Penguin Books 2010) 30.

<sup>61</sup> D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 16.17.

<sup>62</sup> B McFarlane, N Hopkins and S Neild, *Land Law* (OUP 2017).

doctrine does not impose any immediate duty on the defendant, but rather gives the claimant a power to apply to the court for equitable relief against the defendant.<sup>63</sup> Furthermore, these commentators propose that the same analysis is applicable to other situations where the claimant is said to have a ‘mere equity’,<sup>64</sup> and cite rights in rescission as an example:

... if B transfers a right to A as a result of A’s misrepresentation, and B therefore has a power to rescind the transfer and regain the right, it is not true to say that A is under an immediate duty to B: after all, B may decide to let the transfer stand. That does not mean, however, that A’s position is secure: as B may choose to rescind the transfer and regain the right, A is subject to a liability.<sup>65</sup>

McFarlane, Hopkins and Neild are not the only commentators to suggest that the expression ‘mere equity’ signifies a kind of power.<sup>66</sup> Of particular note is Häcker, who posits that where a transferor is entitled to recover property by exercising an equitable right to rescind an earlier conveyance, the transferor has a so called ‘power *in rem*’,<sup>67</sup> which Häcker identifies with the term ‘mere equity’.<sup>68</sup> The concept of a power *in rem* will be critically considered in chapter four.<sup>69</sup> For present purposes, however, it is significant that Häcker concurs with the basic idea that the term ‘mere equity’, when used in contradistinction with ‘equitable interest’, denotes a species of *power*.

The various attempts which previous commentators have made to explain the distinction between mere equities and equitable interests will provide the basis for the discussion in chapter three. As explained above,<sup>70</sup> that chapter will begin by reviewing the case law in order to identify the various rights which the courts have definitively

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<sup>63</sup> Ibid 176-77.

<sup>64</sup> Ibid 177.

<sup>65</sup> Ibid.

<sup>66</sup> See especially P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 299-300; B Häcker, ‘Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model’ (2009) 68 CLJ 324, 351; M Balen, ‘What is the Status of a Restitutionary Power to Revest Title in Insolvency’ (2011) 22 KLJ 85; D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 16.17; C Mitchell, P Mitchell and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) paras 37-30.

<sup>67</sup> B Häcker, ‘Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model’ (2009) 68 CLJ 324, 329-31.

<sup>68</sup> Ibid 351.

<sup>69</sup> Ch 4, pt V.

<sup>70</sup> Ch 1, pt V.

classified as ‘mere equities’ or ‘equitable interests’. This first step is necessary because, without a clear idea of what the established categories of ‘mere equity’ and ‘equitable interest’ are, there is no way of evaluating what the dividing line between mere equities and equitable interests might be. The chapter will then turn to consider the likely nature of this dividing line. It will argue against the leading view that the distinction between mere equities and equitable interests has something to do with the discretionary characteristics of mere equities.<sup>71</sup> The chapter will then put forward an alternative account of this distinction which, it will be argued, is more closely aligned with the view that a mere equity is a form of liability rather than a duty or obligation.<sup>72</sup>

### **3. What is the underlying doctrinal basis for the proprietary features of mere equities?**

As demonstrated in chapter one,<sup>73</sup> mere equities possess two features which justify the description of these claims as ‘proprietary’. First, a mere equity can be enforced against all third parties except for *bona fide* purchasers for value without notice.<sup>74</sup> Second, a mere equity can, in certain circumstances, be assigned or devised in favour of a third party.<sup>75</sup>

It is almost universally accepted in the secondary literature that mere equities have these proprietary features.<sup>76</sup> There are one or two commenters who take the contrary view, arguing that mere equities are incapable of affecting anyone except the original parties,<sup>77</sup> but these commentators are in a very small minority. The following statement by Worthington is typical of mainstream opinion:

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<sup>71</sup> Ch 3, pt III, s 1.

<sup>72</sup> Ch 3, pt III, s 2.

<sup>73</sup> Ch 1, pt II, s 1.

<sup>74</sup> See especially the authorities cited above at ch 1, fn 6.

<sup>75</sup> See especially the authorities cited above at ch 1, fn 13.

<sup>76</sup> See especially S Worthington, *Equity* (2nd edn, OUP 2006) 299; D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010) para 1-46; L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) para 33-021; J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) para 2-007.

<sup>77</sup> See, eg, R Pearce and W Barr, *Pearce and Stevens' Trusts and Equitable Obligations* (7th edn, OUP 2018) 21.

[A mere equity] is the weakest of Equity's proprietary interests, but nevertheless it is an interest that can be transferred to others and enforced against third parties who are volunteers or who have notice of [the claimant's] claim, although not against others.<sup>78</sup>

However, although the majority of commentators agree that mere equities can be enforced against, and assigned to, third parties, very few commentators have given any consideration to the rules and principles on which these proprietary features are founded. This is unfortunate. As explained in chapter one,<sup>79</sup> there are three reasons why, in order to develop a proper understanding of mere equities, it is necessary to go further than merely stating that these rights are proprietary in character and to investigate the doctrinal and theoretical basis of these proprietary features. First, locating these characteristics within their proper doctrinal framework should do much to defend mere equities from the criticism that they are an anomalous category that defies comprehensive analysis.<sup>80</sup> Second, it is necessary to know what rules and principles underpin the proprietary features of mere equities in order to be able to evaluate whether these features are soundly based, and also to be able to predict whether these features will be applicable in cases which are not covered by existing precedent. Third, identifying the doctrinal basis for the proprietary features of mere equities may have wider implications for the law as regards, for example, whether the courts are likely in future cases to take the step of reclassifying mere equities as equitable interests (a possibility that will be considered in chapter eight<sup>81</sup>).

While the existing commentary in this area is exceedingly sparse, there are nevertheless a small handful of commentators who have made some attempt to explain the doctrinal basis on which a mere equity can be enforced against third parties—although these attempts, it is fair to say, are perfunctory at best. Among these commentators, two competing strands of thought can be identified. First, there are some commentators who suggest that the enforceability of mere equities against third parties is founded on the traditional principle of property law that a transferor of property cannot pass to his transferee a greater title than that which he actually

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<sup>78</sup> S Worthington, *Equity* (2nd edn, OUP 2006) 299.

<sup>79</sup> Ch 1, pt IV.

<sup>80</sup> See above ch 1, pt III.

<sup>81</sup> Ch 8, pt III, s 3.

possesses.<sup>82</sup> The authors of *The Law of Rescission* give what is arguably the clearest enunciation of this view:

[A claim to recover property on rescission] is an imperfection in the title of the [original] transferee. *Nemo dat quod non habet* (no one may give a title greater than he has) that imperfection must persist unless and until a subsequent transferee obtains a better title, free from the claim to recover the asset upon rescission. A person taking with notice or as a volunteer from the initial transferee under the voidable transaction does not obtain a better title. They obtain only their predecessor's defeasible title.<sup>83</sup>

Second, there are other commentators who, it seems, tend towards the view that a mere equity is *notionally* a personal claim, but that the courts may nevertheless consent to allow such a claim to be enforced against a volunteer or one taking with notice on equitable grounds of conscience.<sup>84</sup> Unfortunately, however, neither the commentators who appeal to traditional principles of property law, nor those who make reference to equitable grounds of conscience, backs up his or her assertions with any detailed evidence or discussion.

Similar criticisms can be levelled against the existing scholarly accounts of the rules and principles which underlie the assignment of mere equities to third parties. The very few commentators who touch upon this subject seem to be in general agreement that a mere equity can only be assigned together with some property right or interest to which that mere equity is ancillary.<sup>85</sup> None of these commentators, however, explores the meaning and application of this supposed rule in any significant detail. It is hard to say precisely what the reason is for this lack of curiosity, but the most likely cause is that the assignability of mere equities to third parties does not, at first glance, strike one as a subject which is liable to give rise to significant doctrinal or theoretical difficulties. After all, it has long been accepted that even purely personal

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<sup>82</sup> See especially D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 21.29-21.30.

<sup>83</sup> Ibid para 21.29. See also R Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) para 3-05.

<sup>84</sup> See P Critchley, 'A Via Media for Estoppel and Third Parties' [1998] Conv 502, 508. See also K Gray and SF Gray, *Elements of Land Law* (5th edn, OUP 2009) para 3.4.12.

<sup>85</sup> See especially D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010) para 6-05.

rights, such as contractual debts, can be assigned in equity.<sup>86</sup> Nevertheless, it is suggested that, for the three reasons given above, the assignability of mere equities to third parties is a subject which merits a detailed investigation: the sort of investigation which the current body of academic writing fails to deliver.

In summary, it is clear that the rules and principles which underpin a mere equity's proprietary features have not been sufficiently considered in the secondary literature. One of the principal aims of this thesis is to fill this gap.

As already explained,<sup>87</sup> chapters four and five will examine the enforceability of mere equities against third parties. These chapters will build on the two existing stands of academic opinion identified above. Chapter four will consider the approach which appeals to traditional principles of property law, and will argue that this approach, whilst enjoying some support in the case law, is contrary to the weight of modern authority and inconsistent with the established rule that a mere equity cannot be enforced against a purchaser for value of even an equitable interest without notice. This will clear the air for chapter five, which will seek to develop, and then argue in favour of, the view that the enforceability of mere equities is founded on equitable grounds of conscience.

Finally, chapter six will investigate the assignability of mere equities in favour of third parties. The chapter will begin by explaining the core principles which underlie this proprietary characteristic. The chapter will then demonstrate that, while the core principles are reasonably clear in and of themselves, there is an important group of cases which are very difficult to harmonise with the core principles. The chapter will then introduce three alternative approaches to how these cases can be understood, and will evaluate which of these approaches is the most plausible.

#### **4. What function do mere equities perform (and how well do mere equities perform their identified function)?**

The function of mere equities is a subject which very few commentators have considered. Nevertheless, those commentators who have touched on this area seem to

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<sup>86</sup> See generally SJ Bailey, 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1931) 47 LQR 516; (1932) 48 LQR 248; (1932) 48 LQR 547.

<sup>87</sup> Ch 1, pt V.

share substantively the same point of view: that mere equities perform the function of preventing injustice in situations where none of the more traditional forms of equitable response, such as the trust, is available. In other words, mere equities are portrayed as rights which perform a strictly residual function, filling in lacunae which are left over by other more well established, and correspondingly less flexible, categories of equitable claim.

Neave and Weinberg, whose arguments have already been considered, are among the commentators who suggest that mere equities operate to prevent injustice in novel situations.<sup>88</sup> According to them, the concept of an 'equity' is invoked in cases where the claim asserted by the claimant against the defendant does not 'fall within a traditionally defined category'.<sup>89</sup> The ninth edition of *Hanbury's Modern Equity* adopts a similar position, asserting that the phrase 'an equity' is obviously 'not a technical one, but a residual one, used where no more technical phrase is available'.<sup>90</sup> In a similar vein, Hudson suggests that mere equities are *ad hoc* claims which 'arise on a case-by-case basis ... in circumstances in which the courts think it necessary to do justice between the parties'.<sup>91</sup>

Despite this apparent consensus of academic opinion that mere equities serve the function of confronting residual forms of injustice, there is, in the estimation of the present writer, something intellectually lazy about this point of view. For one thing, it is arguably meaningless to say that the function of mere equities is to fill in gaps which are left over by other forms of juridical response, especially since, at bottom, this kind of 'gap filling' is the traditional role of equity<sup>92</sup> and, correspondingly, of all equitable claims, whether they are classified as purely personal equities, mere equities or equitable proprietary interests. For another thing, it is difficult to see how it can be said that mere equities, as a rule, fall outside the 'traditional' range of equitable responses. After all, the equitable remedies of rescission and rectification (claims to which are almost certainly mere equities, as will be demonstrated in chapter three<sup>93</sup>)

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<sup>88</sup> M Neave and M Weinberg, 'The Nature and Function of Equities (Part I)' (1978-1980) 6 University of Tasmania Law Review 24; M Neave and M Weinberg, 'The Nature and Function of Equities (Part II)' (1978-1980) 6 University of Tasmania Law Review 115.

<sup>89</sup> M Neave and M Weinberg, 'The Nature and Function of Equities (Part I)' (1978-1980) 6 University of Tasmania Law Review 24, 26.

<sup>90</sup> RH Maudsley, *Hanbury's Modern Equity* (9th edn, Stevens & Sons Ltd 1969) 697.

<sup>91</sup> A Hudson, *Equity and Trusts* (8th edn, Routledge 2015) 1287.

<sup>92</sup> See *The Earl of Oxford's Case* (1615) 1 Chan Rep 1, 6-7; 21 ER 485, 486 (Lord Ellesmere LC).

<sup>93</sup> Ch 3, pt II, s 2, sub-s i.

are amongst the most well established and time honoured forms of equitable intervention.<sup>94</sup>

Setting these misgivings aside, it is suggested that the real problem with the existing literature in this field is that no commentator has explored the alternative possibility that the various kinds of mere equity, rather than serving a residual role, perform the specific function of remedying one particular type of injustice. It is difficult to say exactly why this possibility has not been considered. The most likely reason, however, is that the wide variability of the cases where mere equities have been held to arise—including, among others, cases of innocent misrepresentation, undue influence, unconscionable dealing, mistake, and equitable estoppel—is liable to give the impression that all mere equities cannot be responses to the same type of injustice, save perhaps at a nonsensically high level of generality. Perhaps it is inevitable, therefore, that many commentators will, either knowingly or unknowingly, dismiss out of hand the idea that all mere equities respond to a uniform species of injustice.

Whatever the reason, it is unfortunate that this idea has not been investigated in the academic literature. After all, such an investigation could reveal that all mere equities do, in actual fact, perform the specialised function of preventing one particular form of injustice. Such a finding could have profound implications, not least in helping to define the mere equity's unique role within the wider scheme of equitable rights and interests. In particular, it could shed light on the vexed problem of explaining why mere equities take the legal form which they do, and not some alternative form, such as a beneficial interest under a trust.<sup>95</sup>

As explained already,<sup>96</sup> the function of mere equities will be addressed in chapter seven. That chapter will begin by considering the different situations in which the core examples of mere equities—ie, rights in rescission, rectification and proprietary estoppel—have been held to exist. It will argue that, in each of these situations, the mere equity is responding to the same basic form of injustice: namely the injustice which exists where a person acts to his detriment in consequence of some vitiating factor, such as mistake or undue influence. The chapter will then argue that

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<sup>94</sup> See DM Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (CUP 1890) 74.

<sup>95</sup> For further discussion see below at ch 7, pt IV.

<sup>96</sup> Ch 1, pt V.

preventing this form of injustice is the proper function of all the core examples of mere equities. Finally, the chapter will consider the secondary, but nevertheless important, question of how well mere equities perform their identified function. The chapter will argue that mere equities are uniquely well adapted to their identified function.

## **5. Literature review: Conclusion**

From the foregoing review, it is clear that a number of other commentators have touched on the questions which this thesis poses. It is also clear, however, that as things stand none of these questions has been sufficiently addressed in the existing literature. The following chapters will remedy this deficiency. They will do this by taking a fresh look at the primary materials in the light of the questions posed, seeking to build on the existing literature where possible and, where this is not possible, filling in the conceptual gaps.

Having concluded our review of the relevant academic literature, the second part of this chapter will now outline and then justify the predominantly doctrinal methodology which the present thesis will employ in subsequent chapters in order to achieve its aims.

### PART III: METHODOLOGY

In answering the various questions which it poses, the present thesis will adopt a mainly doctrinal approach by concentrating on the analysis of primary legal materials, that is to say, cases and statutes.<sup>97</sup> This is appropriate because, as explained in chapter one,<sup>98</sup> the overarching purpose of this thesis is to investigate the nature and function of ‘mere equities’ as these rights are understood and applied within the English legal system. And as Nolan observes:

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<sup>97</sup> See generally S Bartie, ‘The Lingering Core of Legal Scholarship’ (2010) 30 LS 345, 347-50.

<sup>98</sup> Ch 1, pt I.

When analysing concepts from a particular legal system ... it is appropriate to attribute meaning to such terms by reference to sources regarded as authoritative within that system. ... In the English legal system, the authoritative sources are statutes applicable in England and decided court cases of binding (or clearly persuasive) force in English courts.<sup>99</sup>

The sources of authority with which this thesis will be dealing will mainly be cases. These will include certain cases from other jurisdictions, in particular Australia, especially where these sources have been treated as persuasive by the English authorities.<sup>100</sup> This emphasis on cases is appropriate because the concept of a mere equity, like most other equitable rights, interests and entitlements, is primarily a creation of the courts. However, the present thesis cannot, and will not, ignore the role of statute, for, as with numerous other juridical concepts which derive primarily from the cases, the mere equity has been recognised, and for certain purposes modified, by statute: most notably by the Land Registration Act 2002.<sup>101</sup> This thesis will also make use of secondary materials such as books and articles where these provide commentary on the primary materials or serve to explicate key concepts.

However, although the methodology of the present thesis will be primarily doctrinal, the thesis will not shy away from the contextual analysis of the law. On the contrary, the thesis will be mindful throughout of the normative foundations of the different doctrines, principles and concepts which it will inevitably encounter. Furthermore, in order to properly analyse the significance of certain concepts, it will be necessary on occasion for the thesis to adopt a more explicitly contextual approach. For example, chapter seven will not only analyse the likely function which has been conferred on mere equities by the cases; it will also examine how this function relates to wider social objectives, and consider how this may have influenced the form which mere equities take.<sup>102</sup>

In a nutshell, therefore, the methodology of the present thesis will be primarily doctrinal. This is appropriate given the topic and overarching purpose of the thesis. Nevertheless, the thesis will not adopt a purely 'black letter' approach, but will be

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<sup>99</sup> RC Nolan, 'Equitable Property' (2006) 122 LQR 232, 234.

<sup>100</sup> See especially *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265: discussed above at ch 4, pt III, ss 1, 3(i).

<sup>101</sup> See especially Land Registration Act 2002, s 116.

<sup>102</sup> Ch 7, pts III, IV.

mindful throughout of the normative basis of the different doctrines, principles and concepts encountered. Furthermore, it will be necessary on occasion for the thesis to engage in the contextual analysis of legal concepts.

# Chapter 3

## The Dividing Line between Mere Equities and Equitable Interests

### PART I: INTRODUCTION

This chapter aims to answer the first two questions which this thesis asks, namely ‘What are the different claims which are, or might be, mere equities as distinguished from equitable interests?’ and ‘What is the legal nature of the dividing line between mere equities and equitable interests?’

In answering these two questions, the chapter will take an interlinked approach. Part two will review the case law in order to ascertain which equitable proprietary claims have been classified by the courts as mere equities, on the one hand, or equitable interests, on the other. This will provide a *partial* answer to the first question, because it will result in a list of claims whose status as mere equities has been judicially confirmed. Part three will then compare the ‘confirmed’ examples of mere equities with the ‘confirmed’ examples of equitable interests in order to evaluate what the legal nature of the dividing line between these two categories is likely to be. This will provide an answer the second question. Finally, part four will apply the definition (ascertained in part three) of the dividing line between mere equities and equitable interests in order to analyse what claims, besides the judicially confirmed examples of mere equities, might also be mere equities. This analysis will complete the first question.

### PART II: REVIEWING THE CASE LAW

As explained already, this part will carry out a review of the case law in order to ascertain which equitable proprietary rights have been classified by the courts as mere equities, on the one hand, or equitable interests, on the other. A comprehensive review is considered necessary because the relevant cases do not appear to have been drawn

together elsewhere. The part will first explain how the relevant cases were found. It will then present the findings that were made as a result of reviewing these cases.

## 1. Finding the relevant cases

The first step in reviewing the case law was to find the relevant cases. This was achieved through a number of methods. The most fruitful method, in terms of the quantity of data gathered, was carrying out a series of online searches for key terms on the Westlaw UK database.

The first of these searches was for the phrase ‘mere equity’.<sup>1</sup> This returned about 160 cases. Each instance of the term was then examined in order to eliminate all instances where it could positively be established that the term was *not* being used in the relevant sense: ie, to denote a claim that belongs to the subordinate category of equitable proprietary claim which, in contrast with an equitable interest, is incapable of binding purchasers of even equitable interests for value without notice.

About two thirds of the cases were eliminated in this way. The majority of these cases fell into five main groups. First, there were cases where the term ‘mere equity’ was not used to denote any subordinate category of equitable claim, but instead was applied in a much wider sense to mean ‘a claim that is merely equitable’ in contrast with a *legal* claim.<sup>2</sup> Second, there were a high number of cases where a mortgagor was described as having a ‘mere equity’ of redemption.<sup>3</sup> These cases were

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<sup>1</sup> The plural form ‘mere equities’ was included in the search.

<sup>2</sup> See, eg, *Symmes v Symonds* (1703) 4 Brown 328, 328; 2 ER 222, 222 (headnote); *Earl of Pomfret v Windsor* (1752) 2 Ves Sen 472, 478; 28 ER 302, 306 (argument); *Purdew v Jackson* (1824) 1 Russ 1, 70; 38 ER 1, 23 (Lord Gifford MR); *Astley v Milles* (1827) 1 Sim 298, 343; 57 ER 588, 605 (Sir Anthony Hart V-C); *Greenwood v Churchill* (1843) 6 Beav 314, 318, 319; 49 ER 846, 848, 849 (argument); *Fulham v M’Carthy* (1848) 1 HLC 703, 709; 9 ER 937, 940 (Lord Cottenham LC); *Prior v Ongley* (1850) 10 CB 25, 32; 138 ER 11, 14 (Talfourd J); *Rooper v Harrison* (1855) 2 K&J 86, 106; 69 ER 704, 712 (argument); *Heath v Crealock* (1873) LR 18 Eq Cas 215, 229, 231 (argument); *Gordon v James* (1885) 30 Ch D 249 (CA) 256 (Cotton LJ).

<sup>3</sup> See, eg, *The Case of the Creditors of Sir Charles Cox* (1734) 3 P Wms 341, 341; 24 ER 1092, 1092 (headnote); *Fawcett v Lowther* (1751) 2 Ves Sen 300, 303; 28 ER 193, 196 (Lord Hardwicke LC); *Waring v Ward* (1802) 7 Ves Jun 332, 338; 32 ER 136, 138 (Lord Eldon LC); *Carlisle v Blamire* (1807) 8 East 487, 496; 103 ER 430, 434 (Lord Ellenborough CJ); *Scott v Scholey* (1807) 8 East 467, 473, 483; 103 ER 423, 425, 428 (argument); *Earl of Oxford v Rodney* (1807) 14 Ves Jun 417, 424; 33 ER 581, 583 (Sir W Grant MR); *Wilkins v Fry* (1816) 1 Mer 244, 266; 35 ER 665, 673 (Sir W Grant MR); *Wythe v Henniker* (1833) 2 My & K 635, 643; 39 ER 1087, 1090 (argument); *Bandon v Becher* (1835) 9 Blyth NS 532, 564; 5 ER 1388, 1400 (argument); *Moore v Choat* (1839) 8 Sim 508, 515; 59 ER 202, 205 (argument); *Berrington v Evans* (1839) 3 Y & C Ex 384, 388; 160 ER 751, 753 (argument); *Freeman v Edwards* (1848) 2 Ex 732, 737; 154 ER 685, 687 (argument); *Walsh v*

eliminated because an equity of redemption is manifestly not a mere equity: it is an interest in the land enforceable against all persons except a purchaser of a legal interest for value without notice and is not at the discretion of the court in any discernible sense.<sup>4</sup> Third, there were some instances where the term ‘mere equity’ was used synonymously with ‘personal equity’ to mean an equitable claim which is incapable of affecting third parties.<sup>5</sup> Fourth, there were certain cases where ‘mere equity’ was used to describe something which was not an equitable claim *per se*: for example a moral criterion against which the meaning of a contract was to be determined.<sup>6</sup> Fifth, there were a number of cases which had been included in the search results despite the fact that the term ‘mere equity’ did not appear in the case report. In almost all cases, this had happened because the search engine had identified the term ‘mere equity’ in the case analysis documents which are included with every case listed on the Westlaw UK database.<sup>7</sup>

Once all the cases which could be eliminated had been eliminated, there remained a list of around sixty cases which could not positively be excluded from the present review.<sup>8</sup> (Although it was anticipated that at least some of these cases may be of little or no consequence to the eventual findings.)

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*Trevanion* (1850) 15 QB 733, 754; 117 ER 636, 643 (Patteson J); *Flory v Denny* (1852) 7 Ex 581, 584; 155 ER 1080, 1081 (argument); *Rowe v May* (1854) 18 Beav 613, 616; 52 ER 241, 242 (Sir John Romilly MR); *Childers v Childers* (1857) 1 De G&J 482, 491; 44 ER 810, 814 (Knight Bruce LJ); *Cuthbertson v Irving* (1859) 4 H&N 742, 751; 157 ER 1034, 1038 (argument); *Dighton v Withers* (1862) 31 Beav 423, 425; 54 ER 1202, 1203 (Sir John Romilly); *Re Cowbridge Railway Co* (1868) LR 5 Eq 413, 417 (Sir W Page Wood V-C); *London and County Banking Co Ltd v Ratcliffe* (1881) 6 HL 722 (HL) 728 (Lord Selborne LC); *Onward Building Society v Smithson* [1892] 1 Ch 1 (CA) 12 (Lindley LJ); *Copestake v Hoper* [1908] 2 Ch 10 (CA) 15 (argument); *Assaf v Fuwa* [1955] AC 215 (PC) 222 (Lord Porter); *Guiana Industrial and Commercial Investments Ltd v Inland Revenue Commissioner (No 2)* [1971] AC 841 (PC) 850C (Lord Donovan); *Re Bond Worth* [1980] 1 Ch 228 (Ch) 252B, 253B (Slade J); *Northern Bank Ltd v Martin* [2013] NICH 1 [13] (Deeny J). See also AR Everton, “‘Equitable Interests’ and ‘Equities’—In Search of a Pattern’ (1976) 40 Conv 209, 209, fn 1.

<sup>4</sup> See *Casborne v Scarfe* (1738) 1 Atk 603, 605; 26 ER 377, 379 (Lord Hardwicke LC); See also C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 24-011.

<sup>5</sup> See, eg, *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1228B-E (Lord Cohen); *Dolphin Quays Development Ltd v Mills* [2006] EWHC 931, [2007] 1 P&CR 12 [52] (Peter Leaver QC).

<sup>6</sup> See, eg, *Stevenson v Snow* (1761) 1 Black W 318, 319; 96 ER 178, 179 (Lord Mansfield CJ).

<sup>7</sup> There were, however, some genuine flukes. For instance, one report was included in the search results because it contained the passage ‘an Injunction will be granted to stay Waste in Behalf of an Infant *in Ventre sa mere*; Equity will likewise, in some particular Cases, restrain the Tenant from committing Waste, where it is dispunishable by Law’: *Tracy v Tracy* (1744) 1 Eq Ca Abr 399, 399; 21 ER 1131, 1131.

<sup>8</sup> For a full list of the cases that were found as a result of this review, see Appendix A below.

The rest of the online searches centred on the term ‘equity’.<sup>9</sup> These searches were necessary because, as is well known, mere equities are sometimes referred to simply as ‘equities’. In consequence, if just the phrase ‘mere equity’ had been searched for, then the risk would have been run of excluding a significant number of relevant cases. To point out just one aspect of the matter, several of the cases which are generally acknowledged to be among the most important to the concept of a mere equity do not actually contain the phrase ‘mere equity’.<sup>10</sup> For example, in the keynote case of *Phillips v Phillips*,<sup>11</sup> Lord Westbury LC speaks of ‘an equity as distinguished from an equitable estate’,<sup>12</sup> but the phrase ‘mere equity’ does not appear in the case report.

A search for the term ‘equity’ on the Westlaw UK database returned a very high number of results: about 60,000 cases. However, because the word ‘equity’ is notoriously ambiguous—in addition to a ‘mere equity’ it can mean, *inter alia*, the body of rules and principles that derive from the historical Court of Chancery, the moral basis of those rules and principles, an equitable claim other than a mere equity, etc<sup>13</sup>—it was predicted that many instances of the term in the above search would denote something other than a mere equity. This prediction was borne out when the results were partially examined: in the vast majority of instances, it seemed that ‘equity’ was being used generally to mean the system of rules and principles which comprise the equitable jurisdiction.

Ideally, the solution to this problem would have been to examine each of the search results and to ascertain in each case the sense in which the term ‘equity’ was being used. However, given the high number of cases involved, it was felt that this approach would not be practical: quite simply, it would have taken too long to examine every instance of the term, especially in light of the fact that in many of the 60,000 or so cases the word ‘equity’ may have appeared multiple times. Accordingly, it was decided that the search terms would have to be refined in order to produce a more

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<sup>9</sup> Again, the plural form ‘equities’ was included in the searches.

<sup>10</sup> See, eg, *Phillips v Phillips* (1861) 4 De GF&J 208, 45 ER 1164; *Cave v Cave* (1880) 15 Ch D 639 (Ch).

<sup>11</sup> *Phillips v Phillips* (1861) 4 De GF&J 208, 45 ER 1164.

<sup>12</sup> *Ibid* 218; 1167 (Lord Westbury LC).

<sup>13</sup> See *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1253A-B (Lord Wilberforce); AR Everton, “‘Equitable Interests’ and ‘Equities’—In Search of a Pattern” (1976) 40 Conv 209, 209, citing RE Megarry and PV Baker, *Snell’s Principles of Equity* (27th edn, Sweet & Maxwell 1973); JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2014) ch 4.

focused set of results, whilst limiting as far as possible the risk that relevant cases might be excluded.

Two methods for reducing the search results were tested. The first method was to exclude from the search terms certain phrases in which the word ‘equity’ was not likely to denote a mere equity. For example, in phrases like ‘in equity’ or ‘by equity’, the word ‘equity’ is far more likely to be referring to the equitable jurisdiction—for example ‘legal analysis is as important *in equity* as in the common law’<sup>14</sup>; ‘they may be required *by equity* to account as if they were trustees or fiduciaries, although they are not’<sup>15</sup>—than it is to any kind of equitable claim. However, while this method proved successful at reducing the number of search results, it did not reduce them sufficiently to make a full examination of the results practical.

The second method was more successful. This approach was to search for instances of the term ‘equity’ which appeared in close proximity with other words or phrases which are closely associated with the concept of a mere equity. A number of different combinations were tried. For example, a search was made for instances of ‘equity’ within the same paragraph as ‘equitable interest’ or any of a number of analogous phrases, such as ‘equitable estate’, ‘beneficial interest’, ‘proprietary interest’, etc. Another search was made for instances of ‘equity’ within the same sentence as any of a number of words and phrases that related to remedies and doctrines with which mere equities are closely connected—for example, ‘rescission’, ‘rescind’, ‘set aside’, ‘rectification’, ‘rectify’, ‘correct’, ‘estoppel’, etc. With each search that was carried out, the aim was to strike a balance between two conflicting objectives: on the one hand, ensuring that the search terms identified every relevant case; on the other hand, keeping the quantity of search results at a manageable level.

Collectively these searches returned about 2,000 results. Each separate instance of the term ‘equity’ which the search engine had identified was then examined in order to eliminate any results which did not appear to be germane. Because, as noted above, the word ‘equity’ is highly ambiguous, it would not have been practical to eliminate only those instances where it could positively be established that ‘equity’ was *not* being used in the relevant sense—this being the approach that was adopted in

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<sup>14</sup> *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 [95] (Lord Reed JSC) (emphasis added).

<sup>15</sup> *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 [9] (Lord Sumption JSC) (emphasis added).

reference to the term ‘mere equity’. Instead, results were eliminated except where it could be discerned from the context that ‘equity’ may reasonably be referring to a mere equity properly so called.

Following this procedure, the vast majority of the results were eliminated, leaving a list of about thirty cases in which it could reasonably be discerned that at least one instance of the term ‘equity’ was being used to denote a ‘mere equity’.<sup>16</sup> These remaining cases were then added to the sixty or so cases which were identified in the original search.

A separate search for the term ‘equitable interest’ was not carried out. The term ‘equitable interest’ is ambiguous,<sup>17</sup> but in the vast majority of contexts the term is used simply to refer to an equitable claim in relation to property, typically one with proprietary characteristics. Indeed, mere equities are frequently and properly referred to as ‘interests’ in this broad sense.<sup>18</sup> The main context in which it can be said with reasonable certainty that the term ‘equitable interest’ is being used in the more limited sense—ie, to refer to a claim that belongs to the subordinate category of equitable proprietary claim which *is* capable of binding, *inter alia*, purchasers of equitable (but not legal) interests for value without notice—is where that term is being used in contrast with ‘mere equity’ or ‘equity’. Since most (if not all) of these instances had likely already been found in the previous searches for ‘mere equity’ and ‘equity’, it was anticipated that a separate search for ‘equitable interest’ and the consequent examination of the results would have yielded a disproportionately small quantity of fresh data given the amount of time that such an examination would have taken. Another consideration was that the importance of equitable interests to the present thesis is necessarily incidental, the real focus of the thesis being, as explained in chapter one,<sup>19</sup> the legal nature and practical function of mere equities.

In addition to the online searches, the secondary literature was re-examined in order to ascertain which cases had been cited by other commentators for the proposition that a given claim is a mere equity or an equitable interest. It was discovered (reassuringly) that the vast majority of these cases had already been identified in the online searches, although a small number of cases were found which

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<sup>16</sup> For a full list of the cases that were found as a result of this review, see Appendix A below.

<sup>17</sup> *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) 721A (Lord Wilberforce).

<sup>18</sup> See especially Land Registration Act 2002, s 116.

<sup>19</sup> Ch 1, pt I.

had not previously been identified.<sup>20</sup> These cases were then added to the list of potentially relevant cases, bringing the total number of cases to about 100.<sup>21</sup>

The next step was simply to review these cases in order to ascertain which equitable proprietary claims had been identified by the courts as mere equities, on the one hand, or equitable interests, on the other hand. The findings that were made as a result of this review will now be presented.

## **2. The findings**

The findings that were made as a result of reviewing the relevant cases were as follows.

### *i. Confirmed mere equities*

First, it was found that there are certain equitable claims which have been identified as mere equities in a substantial number of cases, and therefore can be said to represent the confirmed examples of mere equities. These claims are (i) all claims to have a

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<sup>20</sup> Eg, *Re Ffrench's Estate* (1887) 21 LR Ir 83; *Fuller v Judy Properties Ltd* (1992) 64 P&CR 176 (CA).

<sup>21</sup> For a full list of the cases that were found as a result of this review, see Appendix A below.

transaction rescinded *in equity* (as opposed to at common law),<sup>22</sup> (ii) all claims to have a document rectified<sup>23</sup> and (iii) all so called equities by estoppel.<sup>24</sup>

Since these claims will be discussed extensively in this chapter and later chapters, it is necessary to briefly outline the circumstances in which they can arise and the incidents of the relief to which they entitle the claimant.<sup>25</sup> (Note that in chapter seven the different circumstances in which these claims can arise will be considered greater detail.<sup>26</sup>)

First, in order for an equitable claim to rescind to arise, it is necessary for a person to enter a transaction in circumstances where his consent to do so is impaired (but not voided) by some vitiating factor: for example the misrepresentation,<sup>27</sup> undue

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<sup>22</sup> *Phillips v Phillips* (1861) 4 De GF&J 208, 218; 45 ER 1164, 1167 (Lord Westbury LC); *Cave v Cave* (1880) 15 Ch D 639 (Ch) 649 (Fry J); *Re Clarke's Settlement Trust* [1916] 1 Ch 467 (Ch) 473 (argument); *Abigail v Lapin* [1934] AC 491 (PC) 505 (Lord Wright); *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 Ch 9 (Ch) 14 (Cross J); *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) 721 (Lord Wilberforce); *CIBC Mortgages plc v Pitt* [1994] 1 AC 200 (HL) 203 (argument); *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 22 (Millett LJ); *Twinsectra Ltd v Yardley* [1999] All ER (D) 433 (CA) [99] (Potter LJ); *Collings v Lee* (2001) 82 P&CR 3 (CA) [22] (Nourse LJ); *Thompson v Foy* [2009] EWHC 1076 (Ch), [2010] 1 P&CR 16 [134] (Lewison J); *Drayne v McKillen* [2011] EWHC 3326 (QB) [43] (Coulson J); *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2012] 3 WLR 597 [103] (Lloyd LJ); *Mortgage Express v Lambert* [2016] EWCA Civ 555 [16] (Lewison LJ); *Mid-Glamorgan CC v Ogwr BC* (1994) 68 P&CR 1 (CA) 9 (Hoffmann LJ); *National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] 3 WLR 23 [44] (Sir Terence Etherton QC); *Re Crown Holdings (London) Ltd (in liq)* [2015] EWHC 1876 (Ch) [38]-[39] (MH Rosen QC); *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch) [24] (Master Matthews).

<sup>23</sup> *Phillips v Phillips* (1861) 4 De GF&J 208, 218; 45 ER 1164, 1167 (Lord Westbury LC); *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 Ch 9 (Ch) 14 (Cross J); *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1238 (Lord Upjohn); *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) 721 (Lord Wilberforce); *Blacklocks v JB Developments (Godalming) Ltd* [1982] 1 Ch 183 (Ch) 195 (Mervyn Davies J); *CIBC Mortgages plc v Pitt* [1994] 1 AC 200 (HL) 203 (argument); *Howlaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P&CR 29 (Ch) [65] (Neuberger J); *Halifax plc v Curry Popeck* [2008] EWHC 1692 (Ch) [26] (Norris J); *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305 [113] (Lewison LJ); *Elwood v Goodman* [2013] EWCA Civ 1103, [2014] Ch 442 [35] (Patten LJ).

<sup>24</sup> *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) 721 (Lord Wilberforce); *Lloyds Bank plc v Rosset* [1991] 1 AC 107 (HL) 112-13 (argument); *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 [37] (Lord Walker); *Powell v Benney* [2007] EWCA Civ 1283 [24] (Sir Peter Gibson); *Halifax plc v Curry Popeck* [2008] EWHC 1692 (Ch) [26] (Norris J); *AIB Group (UK) plc v Turner* [2015] EWHC 3994 (Ch) [47] (Anthony Ellera QC).

<sup>25</sup> See generally D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010); C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) ch 16; D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014); J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2017) chs 12, 15, 16.

<sup>26</sup> Ch 7, pt II.

<sup>27</sup> See, eg, *Redgrave v Hurd* (1881) 20 Ch D 1 (CA).

influence<sup>28</sup> or unconscionable conduct<sup>29</sup> of another person, or his own serious mistake about the legal effect of the transaction<sup>30</sup> or some other matter that is fundamental to the transaction.<sup>31</sup> The equitable claim to rescind gives the person who entered the transaction a right to go to the court to acquire the appropriate remedy. In granting rescission in equity, the court aims to undo the transaction *ab initio* by achieving substantial *restitutio in integrum*—that is to say, restoring the different parties as nearly as possible to their original positions.<sup>32</sup> In order to achieve this aim, the court orders the reciprocal restitution of all assets which have passed under the transaction.<sup>33</sup> In the case of money, restitution will usually be pecuniary<sup>34</sup> while, in the case of other assets such as land, goods or securities, restitution will ordinarily be specific.<sup>35</sup> The court also orders any financial adjustments which are necessary to achieve substantial *restitutio in integrum*.<sup>36</sup> This may involve, for example, the taking of accounts for any benefits which have been derived from the ownership of the assets in question or the making of allowances for the depreciation of such assets.<sup>37</sup>

Second, in order for a person to acquire an equitable claim to have a document rectified, it is necessary for that person to execute a legal document—for example a deed or other legally binding instrument—whilst under a misapprehension about the true meaning of the document. Rectification is an equitable remedy whereby the court changes the wording of the defective instrument in order to make it accord with the meaning which it was intended or presumed to convey.<sup>38</sup> Once the document has been amended in this way, it is automatically treated as if it had originally been executed in

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<sup>28</sup> See, eg, *Allcard v Skinner* (1887) 36 Ch D 145 (CA).

<sup>29</sup> See, eg, *Boustany v Pigott* (1995) 69 P&CR 298 (PC). See also *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87 (Ch) 94H-95C (Peter Millett QC), varied [1985] 1 WLR 173 (CA).

<sup>30</sup> See, eg, *Gibbon v Mitchell* [1990] 1 WLR 1304 (Ch).

<sup>31</sup> See, eg, *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

<sup>32</sup> *Cheese v Thomas* [1994] 1 WLR 129 (CA) 137B (Sir Donald Nicholls V-C); *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [122] (Rimer J); D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 13.01.

<sup>33</sup> *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [122] (Rimer J).

<sup>34</sup> See *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) 102G-103B (Lord Mustill). See generally D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 15.33-15.38.

<sup>35</sup> See, eg, *Nottidge v Prince* (1860) 2 Giff 246, 271; 66 ER 103, 113 (Sir John Stuart V-C): specific restitution of securities obtained by means of undue influence ordered. See generally D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 15.04-15.13. But see *Mahoney v Purnell* [1996] 3 All ER 61 (QB).

<sup>36</sup> See generally D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) ch 17.

<sup>37</sup> *Erlanger v The New Sombrero Phosphate Co* (1878) 3 App Cas 1218 (HL) 1278 (Lord Blackburn).

<sup>38</sup> See *American Airlines v Hope* [1974] 2 Lloyd’s Rep 301 (HL) 307, col 1 (Lord Diplock).

its rectified form, and the rights of the parties to the document are determined accordingly.<sup>39</sup>

Third, an equity by estoppel arises in any case where the doctrine of proprietary estoppel is in play. Proprietary estoppel is a flexible doctrine<sup>40</sup> and hence famously difficult to pin down definitionally.<sup>41</sup> Taking a broad view of the matter, however, it seems that judges and commentators generally agree that cases of proprietary estoppel have the following necessary features.<sup>42</sup> First, one party (A) leads another party (B) to believe that he, B, already has or in future will acquire a particular right to property<sup>43</sup> which A owns. Second, B acts to his detriment in reliance on this belief. Third, this belief is false or turns out to be ill-founded.

An equity by estoppel entitles B to go to the court to seek equitable relief. In granting this relief, the court aims to confer the minimum award which is necessary to avoid an unconscionable outcome.<sup>44</sup> However, the form which this award takes is not defined by any fixed rules or principles, but is at the discretion of the court.<sup>45</sup> Accordingly, the relief which the court awards can take a wide variety of different forms: for example the court may order A, *inter alia*, to convey his entire interest in the property to B,<sup>46</sup> to grant some limited right over the property to B,<sup>47</sup> to pay a particular sum of money to B,<sup>48</sup> or to refrain from exercising his legal rights over the property in a certain way.<sup>49</sup>

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<sup>39</sup> See *Craddock Brothers v Hunt* [1923] 2 Ch 136 (CA) 151 (Lord Sterndale MR), 160 (Warrington LJ); *Dalkia Utilities Services plc v Celtech International Ltd* [2006] EWHC Civ 63, [2006] 2 P&CR 9 [107] (Clarke J). See generally D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010) paras 1-54-1-62.

<sup>40</sup> *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [46] (Lord Walker).

<sup>41</sup> See J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) para 12-032.

<sup>42</sup> See *Re Basham* [1986] 1 WLR 1498 (Ch) 1503H (Edward Nugee QC); *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [29] (Lord Walker); C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 16-001. It is important to note that the elements of proprietary estoppel are not 'watertight compartments': *Gillett v Holt* [2001] Ch 210 (CA) 225C (Robert Walker LJ).

<sup>43</sup> Almost all the reported cases concern rights over land, but in principle proprietary estoppel is equally available in relation to personal property: see *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [14] (Lord Scott).

<sup>44</sup> *Jennings v Rice* [2002] EWCA 159, [2003] 1 P&CR 8 [56] (Robert Walker LJ); *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 [37] (Lord Walker).

<sup>45</sup> See *Campbell v Griffin* [2001] EWCA Civ 990 [36] (Robert Walker LJ). See also C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 16-001, point (iii), para 16-020.

<sup>46</sup> See, eg, *Voyce v Voyce* (1991) 62 P&CR 290 (CA).

<sup>47</sup> See, eg, *Crabb v Arun DC* [1976] 1 Ch 179 (CA).

<sup>48</sup> See, eg, *Jennings v Rice* [2002] EWCA 159, [2003] 1 P&CR 8.

<sup>49</sup> See, eg, *Maharaj v Chand* [1986] 1 AC 898 (PC).

## *ii. Contractual licences and deserved wives' equities*

Second, it was found that, in a series of cases that were decided in the 1950s and 1960s, certain claims began to be enforced in equity against third parties and subsequently were classified as mere equities, only for it to be ruled in later cases that these claims were, in fact, incapable of binding third parties. These claims were (i) the rights of a contractual licensee<sup>50</sup> and (ii) the so called equity of a wife who had been deserted by her husband to remain in occupation of the family home.<sup>51</sup>

Since these claims were eventually ruled to be incapable of binding third parties,<sup>52</sup> they are neither mere equities nor equitable interests properly so called, for these latter claims are proprietary. It follows that the rights of a contractual licensee and the equity of a deserted wife are not directly relevant to the present chapter. Nevertheless, these claims will be discussed extensively in chapter five.<sup>53</sup> As explained already, chapter five will seek to develop, and then to argue in favour of, the view that the enforceability of mere equities against third parties is founded on equitable grounds of conscience. The reason the above claims are relevant to chapter five is that the stated principle according to which these claims were temporarily extended to third parties was, it seems, a conscience-based principle.

## *iii. Outliers*

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<sup>50</sup> *Errington v Errington* [1952] 1 KB 290 (CA).

<sup>51</sup> *Bendall v McWhirter* [1952] 2 QB 466 (CA); *Lee v Lee* [1952] 2 QB 489 (CA); *Ferris v Weaven* [1952] 2 All ER 233 (QB); *Bradley-Hole v Cusen* [1953] 1 QB 300 (CA); *Lloyds Bank Ltd v Trustee of the Property of O— —, a Bankrupt* [1953] 1 WLR 1460 (Ch); *Barclays Bank Ltd v Bird* [1954] 1 Ch 274 (Ch); *Street v Denham* [1954] 1 WLR 624; *Jess B Woodcock & Sons Ltd v Hobbs* [1955] 1 WLR 152 (CA); *Westminster Bank Ltd v Lee* [1956] 1 Ch 7 (Ch); *Churcher v Street* [1959] 1 Ch 251 (Ch); *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 Ch 9 (Ch); *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 Ch 665 (CA). But see *Thompson v Earthy* [1951] 2 KB 596 (KB).

<sup>52</sup> As regards the deserted wife's equity, see *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL). Note that after the decision in *National Provincial Bank* the Matrimonial Homes Act 1967 was enacted to give a husband or wife a statutory right to occupy the matrimonial home. The statutory right has since been recast in the Family Law Act 1996, s 30-32. As regards the contractual licence, see *Ashburn Anstalt v Arnold* [1989] 1 Ch 1 (CA). See also P Sparkes, 'Leasehold Terms and Contractual Licences' (1988) 104 LQR 175, 177-78; J Hill, 'Leases, Licences and Third Parties' (1988) 51 MLR 226.

<sup>53</sup> Ch 5, pt II, s 2, sub-s iii.

Third, it was found that there are certain claims which are almost never given as examples of mere equities in the cases, but which judges in isolated cases have intimated are or might be mere equities. Thus in *Castellan v Hobson*<sup>54</sup> the Vice-Chancellor, Sir William Milbourne James, had to decide who had the beneficial interest in certain shares in the situation where A held the shares on trust for B who, in turn, held his rights on trust for C. The Vice-Chancellor held that C was the real beneficial owner, and characterised B as having a ‘mere equity’.<sup>55</sup> In *Shiloh Spinners Ltd v Harding*<sup>56</sup> the question arose whether an equitable right of entry was capable of being registered under the Land Charges Act 1925. On the one hand, the respondent submitted that all equitable claims to land were capable of being either registered under the Land Charges Act 1925 or overreached under s 2 of the Law of Property Act 1925, and that since a right of entry was not suitable for overreaching, it should be regarded as a registrable charge on land, despite the fact that the right of entry did not obviously fit into any of the classes of registrable charge set out in s 10 of the Land Charges Act 1925. On the other hand, the appellant countered that mere equities were not capable of being either registered as land charges or overreached,<sup>57</sup> and that an equitable right of entry was a mere equity. Lord Wilberforce gave the leading judgment, and although he did not directly approve the submission that an equitable right of entry was a mere equity, he clearly found the appellant’s arguments convincing.<sup>58</sup> In *Fuller v Judy Properties Ltd*,<sup>59</sup> Dillon J suggested that the claim of lessees to seek equitable relief against the forfeiture of their lease after the landlord had re-entered was an ‘equity’ capable in principle of binding third parties. Finally, in *Halifax plc v Curry Popeck*<sup>60</sup> Norris J intimated that a claim to seek the specific performance of a contract was an example of a mere equity.

Thus although there is some evidence that the courts have identified (i) the claims of intermediate trustees, (ii) equitable rights of entry, (iii) claims to seek relief against the forfeiture of a lease and (iv) claims to have a contract specifically

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<sup>54</sup> *Castellan v Hobson* (1870) LR 10 Eq Cas 47.

<sup>55</sup> *Ibid* 51 (Sir William Milbourne James V-C).

<sup>56</sup> *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL).

<sup>57</sup> *Contra Mortgage Express v Lambert* [2016] EWCA Civ 555, [2017] Ch 93. See also E Lees, ‘Overreaching Mere Equities: *Mortgage Express v Lambert*’ [2017] Conv 72.

<sup>58</sup> *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) 720-21 (Lord Wilberforce).

<sup>59</sup> *Fuller v Judy Properties Ltd* (1992) 64 P&CR 176 (CA) 184 (Dillon LJ).

<sup>60</sup> *Halifax plc v Curry Popeck* [2008] EWHC 1692 (Ch) [26] (Norris J).

performed as mere equities, this evidence is limited to a very small number of cases. Accordingly, these claims are best regarded as outliers rather than as confirmed instances of mere equities.

It is necessary to mention *Bland v Ingram's Estates Ltd*.<sup>61</sup> In that case, Peter Leaver QC, sitting as a deputy judge of the Chancery Division, ruled that a plaintiff with an equitable charge over leasehold property had only a 'mere equity' and accordingly did not have a sufficient interest to seek equitable relief against the forfeiture of the lease.<sup>62</sup> However, while the deputy judge may have been correct in holding that the equitable charge did not give the plaintiff a title to the relief which she sought, his assertion that her rights constituted a mere equity should be rejected. This is because, as will presently be demonstrated, the evidence of the cases indicates that equitable charges and all other equitable security interests are 'equitable interests' as distinguished from 'mere equities'.

#### *iv. Equitable interests*

Fourth, it was found that there are a number of cases where the court described a particular class of claim as an 'equitable interest' or 'equitable estate' and the context indicated that the court was using the term 'equitable interest' or 'equitable estate' to the exclusion of 'mere equity' or 'equity'.

The claims which have been classified as equitable interests in this way include the prototypical example of the rights of a beneficiary of a trust in reference to assets which are identifiable as falling within the trust fund.<sup>63</sup> This classification includes the rights of a beneficiary in reference to assets which, having been wrongfully taken from the trust fund, are not currently in the hands of a properly appointed trustee.<sup>64</sup> It also

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<sup>61</sup> *Bland v Ingram's Estates Ltd* (Ch, 13 April 1999).

<sup>62</sup> The decision in *Bland* was reversed on other grounds by the Court of Appeal: see *Bland v Ingram's Estates Ltd* [2001] Ch 767 (CA). The court did not discuss the deputy judge's assertion that an equitable chargee has a mere equity rather than an equitable interest.

<sup>63</sup> *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1238B (Lord Upjohn); *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2012] 3 WLR 597 [104] (Lloyd LJ). For an account of how particular assets are defined as falling within a particular trust fund and why, see RC Nolan, 'Property in a Fund' (2004) 120 LQR 108. See further RC Nolan, 'The Administration and Maladministration of Funds in Equity: Making a Coherent Set of Choices' in PG Turner (ed), *Equity and Administration* (CUP 2016) 74-80.

<sup>64</sup> *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2012] 3 WLR 597 [104] (Lloyd LJ).

includes the right of a beneficiary to assert an equitable interest in assets which are identifiable as the exchange product of assets which have been wrongfully taken from the trust fund. This latter point was established in *Cave v Cave*.<sup>65</sup> In that case, money had been misappropriated from a trust and then used to purchase land, on which money was subsequently raised by way of equitable mortgages. The mortgagees had purchased their equitable interests for value without notice, and the question arose whether the earlier claim of the beneficiaries to trace their money into the estate was an equitable interest (in which case they would enjoy priority over the mortgagees) or a mere equity (in which case they would not enjoy priority). Fry J decided in favour of the beneficiaries, ruling that their claim was an equitable interest.<sup>66</sup>

It is noteworthy that in *Re Ffrench's Estate*<sup>67</sup> the Irish Court of Appeal took the contrary approach by classifying the right of a beneficiary to trace as a mere equity. Thus as Keane notes 'there is a clear divergence between Irish and English law in this area'.<sup>68</sup> However, since the overarching aim of this thesis is to investigate the nature and function of 'mere equities' as these claims are understood and applied within the English legal system,<sup>69</sup> it is necessary to defer to the decision in *Cave* and to hold that the claim of a beneficiary to trace is an equitable interest.

In addition to the rights of a beneficiary of a trust in reference to the trust assets, there are a number of other equitable claims which the courts have identified as 'equitable interests' (or 'equitable estates') as distinguished from 'mere equities' (or 'equities'). These include: (i) all equitable security interests, including equitable mortgages, equitable liens, and equitable charges;<sup>70</sup> (ii) restrictive covenants and estate contracts;<sup>71</sup> (iii) equities of redemption.<sup>72</sup> It is also likely that all equitable claims which take the form of incorporeal hereditaments are classifiable as equitable estates.

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<sup>65</sup> *Cave v Cave* (1880) 15 Ch D 639 (Ch).

<sup>66</sup> *Ibid* 649 (Fry J).

<sup>67</sup> *Re Ffrench's Estate* (1887) 21 LR Ir 83.

<sup>68</sup> R Keane, *Equity and the Law of Trusts in the Republic of Ireland* (2nd edn, Bloomsbury Professional 2011) para 4.18. See also D Sheehan, 'Proprietary Remedies for Mistake and Ignorance: An Unseen Equivalence' (2002) 10 RLR 69, 76.

<sup>69</sup> See above ch 1, pt I.

<sup>70</sup> *Cave v Cave* (1880) 15 Ch D 639 (Ch) 649 (Fry J); *Abigail v Lapin* [1934] AC 491 (PC) 505 (Lord Wright); *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1238B (Lord Upjohn); *Drayne v McKillen* [2011] EWHC 3326 (QB) [43] (Coulson J). See also *Rice v Rice* (1853) 2 Drewry 73, 79; 61 ER 646, 648 (Sir RT Kindersley V-C).

<sup>71</sup> *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1238B (Lord Upjohn), quoting FR Crane, 'The Deserted Wife's Licence' (1955) 19 Conv 343, 346.

<sup>72</sup> *Re Wells* [1933] 1 Ch 29 (CA) 44 (Lord Hanworth MR); *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1259G-1260A (Lord Wilberforce).

Thus in *Phillips v Phillips*<sup>73</sup> Lord Westbury LC held that an equitable rentcharge was an ‘equitable estate’ and not ‘an equity as distinguished from an equitable estate’. And while the courts have not yet expressly confirmed that other analogous rights, such as equitable easements and equitable profits *à prendre*, are equitable estates rather than mere equities, it seems highly unlikely that they would take any other view. Indeed, Pettit argues that equitable easements and profits ought to be added to the list of equitable interests.<sup>74</sup>

#### *v. The findings: Summary*

In summary, the following findings were made as a result of reviewing the relevant case law. First, the confirmed examples of mere equities are (i) all equitable claims to have a transaction rescinded, (ii) all claims to have a document rectified and (iii) all so called equities by estoppel. Second, contractual licences and deserted wives’ equities were identified as mere equities in a series of cases in the 1950s and 1960s, but it was later established that these claims are not capable of binding third parties and hence are neither mere equities nor equitable interests. Third, there is some evidence in the cases that (i) the claims of intermediate trustees, (ii) equitable rights of entry, (iii) claims to seek relief against the forfeiture of a lease and (iv) claims to have a contract specifically performed are mere equities, but since this evidence is very limited these claims cannot be taken as confirmed examples of mere equities. Fourth, the confirmed examples of equitable interests are (i) the claims of beneficiaries of trusts, (ii) all equitable security interests, including equitable mortgages, equitable liens and equitable charges, (iii) restrictive covenants and estate contracts, (iv) equities of redemption and, probably, (v) all equitable claims which take the form of incorporeal hereditaments, including equitable rentcharges, equitable easements and equitable profits *à prendre*.

Having explained how the relevant cases were found and presented the findings that were made as a result of reviewing these cases, the next step is to compare the confirmed examples of mere equities with the confirmed examples of equitable

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<sup>73</sup> *Phillips v Phillips* (1861) 4 De GF&J 208, 218; 45 ER 1164, 1167 (Lord Westbury LC).

<sup>74</sup> PH Pettit, *Equity and the Law of Trusts* (12th edn, OUP 2012) 21, fn 111.

interests in order to ascertain the juridical nature of the dividing line between these two categories of equitable proprietary claim.

### PART III: THE NATURE OF THE DIVIDING LINE

As explained above, this part will evaluate the legal nature of the dividing line between mere equities and equitable interests. It will achieve this aim by investigating the claims which fall within each category in order to identify the characteristics which (i) all these claims have in common and (ii) distinguish them from all the claims which fall within the opposing category.

The part will first consider the theory, which has already been encountered in chapter two,<sup>75</sup> that the discretionary nature of mere equities is what distinguishes them from equitable interests. It will argue that this theory is either too inclusive (ie, that the characteristic of being discretionary accommodates certain equitable interests) or too restrictive (ie, that the characteristic of being discretionary excludes certain mere equities) depending on the meaning which is assigned to the term ‘discretionary’. The part will then formulate, and argue in favour of, an alternative theory which posits that the reason equitable interests are distinct from mere equities is that equitable interests, on the one hand, are combinations of juridical claims which include at least some rights *in rem*, while mere equities, on the other hand, are equitable rights of action and hence are pure rights *in personam*.

#### 1. More at the discretion of the court

As shown in chapter two,<sup>76</sup> while commentators cannot quite agree on precisely what the distinction between mere equities and equitable interests is, it nevertheless seems that the greater part of scholarly opinion is in favour of the view that mere equities are more ‘discretionary’ than equitable interests.<sup>77</sup> It is submitted, however, that this

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<sup>75</sup> Ch 2, pt II, s 2.

<sup>76</sup> Ch 2, pt II, s 2.

<sup>77</sup> See, eg, HWR Wade, ‘Husband and Wife—Deserted Wife’s Right to Matrimonial Home—Equitable Interests and “Mere Equities”’ [1955] CLJ 158, 160-61.

theory is not attractive in light of the claims which, according to the preceding review, have been classified by the courts as either mere equities or equitable interests.

Unfortunately none of the commentators in question is precise about the exact sense in which he or she considers mere equities to be discretionary. Looking that the confirmed examples of mere equities, however, it seems that there are two ways in which a mere equity can be discretionary. First, a mere equity can be discretionary in the weak sense that the court has the power to refuse to award relief on the mere equity on equitable grounds including laches, acquiescence and unclean hands.<sup>78</sup> (In brief outline, ‘laches’ occurs where the claimant delays in exercising the claim and this delay is coupled with some form of related prejudice to the defendant;<sup>79</sup> ‘acquiescence’ occurs where the claimant omits to exercise the claim in circumstances where that omission may reasonably lead the defendant to presume that the claimant never will exercise the claim;<sup>80</sup> ‘unclean hands’ describes the claimant where he is guilty of some misconduct which has ‘an immediate and necessary relation’ to the claim.<sup>81</sup>)

Second, in addition to being discretionary in the weak sense, a mere equity can be discretionary in the strong sense that the court, in awarding relief on the mere equity, has a power to formulate its order in accordance with what it considers to be the minimum award necessary to do justice to the claimant given all the circumstances of the case. This form of discretion is typified by equities by estoppel: in awarding relief on an equity by estoppel, it is necessary for the court to ‘look at the circumstances in each case’<sup>82</sup> in order to ‘analyse the minimum equity to do justice to the plaintiff’.<sup>83</sup>

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<sup>78</sup> Note that the jurisdiction to refuse relief on equitable grounds has been expressly recognised by statute: Limitation Act 1980, s 36(2).

<sup>79</sup> *Transview Properties Ltd v City Site Properties Ltd* [2008] EWHC 1221 (Ch) [149] (Briggs J). See also D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010) para 5-06.

<sup>80</sup> *Transview Properties Ltd v City Site Properties Ltd* [2008] EWHC 1221 (Ch) [149] (Briggs J). See also D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010) para 5-06.

<sup>81</sup> *Dering v Earl of Winchelsea* (1787) 1 Cox 318, 319; 29 ER 1184, 1185 (Sir James Eyre CB). See also *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 1 WLR 3024 [70] (Lord Millett).

<sup>82</sup> *Plimmer v The Mayor, Councillors, and Citizens of the City of Wellington* (1884) 9 App Cas 699 (PC) 714 (Sir Arthur Hobhouse).

<sup>83</sup> *Crabb v Arun DC* [1976] 1 Ch 179 (CA) 198G (Scarman LJ). See also *Gillett v Holt* [2001] Ch 210 (CA) 235E-F (Robert Walker LJ).

All the confirmed mere equities are discretionary in *at least* the weak sense. That is to say, all equitable claims to rescind or rectify and all equities by estoppel may be rejected by the court on equitable grounds. Thus it is well established that the court may withhold an award of rescission or rectification in accordance with equitable principles.<sup>84</sup> The ability of the court to withhold these remedies was demonstrated in *Allcard v Skinner*.<sup>85</sup> In that case, the court dismissed an otherwise valid claim to rescind a gift for undue influence on the ground that the claimant was guilty of laches and acquiescence. Furthermore, it is well established that the court will refuse to grant relief upon an equity by estoppel where the claimant comes to the court with unclean hands.<sup>86</sup> This principle was applied in *J Willis & Son v Willis*.<sup>87</sup> In that case, it was discovered that the claimants, in order to support their claim in proprietary estoppel, had submitted a statement of expenditure on improvements to the land which the claimants knew to be false. In these circumstances, the court did not hesitate to withhold relief on the ground of unclean hands.

However, the characteristic of being discretionary in the sense that the court may refuse to grant relief is not unique to mere equities. It is also a characteristic of at least some equitable interests. Thus estate contracts are confirmed equitable interests, yet the court may nevertheless refuse to grant specific performance of an estate contract on discretionary equitable grounds.<sup>88</sup> This is what occurred in *Hope v Walter*.<sup>89</sup> In that case, a contract was entered for the sale of a house which, unbeknown to the parties, was being used by the tenant as a brothel. The purchaser, on discovering that the house was being used as a brothel, refused to complete the sale and the vendor accordingly sued for specific performance. In these circumstances, the court refused to grant specific performance: Lord Lindley MR asserting that to do so ‘would be contrary to those principles of justice and fairness by which this Court is always guided’.<sup>90</sup> It might be objected that estate contracts are an exceptional case; however,

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<sup>84</sup> *Grand Metropolitan plc v The William Hill Group Ltd* [1997] 1 BCLC 390 (Ch) 395h (Arden J); D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010) paras 5-02-5-05.

<sup>85</sup> *Allcard v Skinner* (1887) 36 Ch D 145 (CA).

<sup>86</sup> See, eg, *Williams v Staite* [1979] 1 Ch 291 (CA); *J Willis & Son v Willis* [1986] 1 EGLR 62 (CA); *Wilkie v Redsell* [2003] EWCA Civ 926. See also C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 16-022-16-023.

<sup>87</sup> *J Willis & Son v Willis* [1986] 1 EGLR 62 (CA).

<sup>88</sup> *Hope v Walter* [1900] 1 Ch 257 (CA).

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid* 259 (Lord Lindley MR).

the evidence suggests that these are not the only equitable interests on which the court may refuse to grant relief. Thus in *Hourigan v The Trustees Executors and Agency Co Ltd*<sup>91</sup> the High Court of Australia dismissed an action by a beneficiary to enforce his interest under a trust on grounds of laches and acquiescence.

In short, while the characteristic of being discretionary in the weak sense accommodates all mere equities, it also accommodates at least some equitable interests. It follows that this characteristic cannot be what distinguishes mere equities from equitable interests.

On the other hand, the characteristic of being discretionary in the strong sense appears to exclude all the equitable interests. At any rate, the present writer does not know of any case where the court, in granting relief on an equitable interest, assumed a power to formulate its order in accordance with what the court considered to be the minimum award necessary to do justice given all the circumstances. Hence it is necessary to presume that the court has not afforded itself any such power and that, accordingly, an equitable interest can never be discretionary in the strong sense.

It is not the case, however, that all mere equities are discretionary in the strong sense. Thus claims to have a document rectified are clearly not at the discretion of the court in the same way that equities by estoppel are. ‘The purpose of rectification,’ as Carnwath LJ said in *KPMG v Network Rail Infrastructure Ltd*, ‘is to ensure that the terms of the written document accurately reflect the state of agreement between the parties.’<sup>92</sup> It follows that the power of the court in granting a claim to rectify is necessarily restricted to amending the instrument in order to make it accord with what the parties actually intended; the court does not have any discretion to analyse the minimum award necessary to do justice and then to formulate an order in accordance with that analysis. The same can probably be said as regards equitable claims to have a transaction rescinded. As explained above, the aim of the court in granting rescission is to undo the transaction *ab initio* by restoring the parties as nearly as possible to their original positions;<sup>93</sup> hence the aim of the court is not to do justice

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<sup>91</sup> *Hourigan v The Trustees Executors and Agency Co Ltd* (1934) 51 CLR 619. See also *Zarbafi v Zarbafi* [2014] EWCA Civ 1267 [70] (Briggs LJ).

<sup>92</sup> *KPMG v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2008] 1 P&CR 11 [16] (Carnwath LJ).

<sup>93</sup> *Cheese v Thomas* [1994] 1 WLR 129 (CA) 137B (Sir Donald Nicholls V-C).

by formulating an order according to what the court considers to be the particular merits of the case.<sup>94</sup>

Thus while the characteristic of being discretionary in the strong sense excludes all equitable interests, it also excludes certain mere equities. It follows that this characteristic cannot be what distinguishes mere equities from equitable interests.

In conclusion, the theory that the gist of the distinction between mere equities and equitable interests is that mere equities are more discretionary than equitable interests does not work. This is because the term ‘discretionary’ either accommodates certain equitable interests or excludes certain mere equities depending on which available meaning is ascribed to that term. In other words, the discretionary character of certain mere equities is virtually indistinguishable from the discretionary character of certain equitable interests. Hence the fact that mere equities are all discretionary claims (at least in the weak sense) does not account for what Lord Wilberforce described as the ‘sharp distinction’ which exists between these claims and equitable interests.<sup>95</sup>

## 2. Equitable rights of action

Accordingly, the prevailing theory that the dividing line between mere equities and equitable interests is the discretionary character of mere equities does not stand up to proper scrutiny and ought to be dismissed. The chapter will now submit an alternative theory which builds on a close examination of the confirmed examples of mere equities and equitable interests. In outline, this theory posits that equitable interests are combinations of juridical claims which include rights *in rem*, whereas mere equities are equitable rights of action and consequently are pure rights *in personam*.

The terms ‘rights *in rem*’ and ‘rights *in personam*’ require clarification. These terms are used in the analysis of juridical claims and are almost always taken to describe mutually exclusive categories. The meanings of these terms can differ

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<sup>94</sup> D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 13.09. Although it seems that the Australian courts in particular may have assumed a more extensive discretion in granting rescission to do justice according to the merits of the case in question: see *ibid* paras 13.14-13.25.

<sup>95</sup> *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) 721B (Lord Wilberforce).

depending on the purpose of the analysis;<sup>96</sup> for most purposes, however, a ‘right *in rem*’ is used to mean a claim which is binding on a large and indefinite class of people,<sup>97</sup> whilst a ‘right *in personam*’ is used to mean a claim which is binding on a small and definite class of people.<sup>98</sup> These are the meanings that will be used in the present analysis.

Although historically a pure right *in personam*,<sup>99</sup> the interest of a beneficiary under a trust is generally regarded today as including rights *in rem*.<sup>100</sup> Thus, in his analysis of a beneficiary’s interest,<sup>101</sup> Nolan shows that this interest is a combination of distinct juridical claims, some of which are binding on a large and indefinite class of people (rights *in rem*), others of which are binding on a small and definite class (rights *in personam*). According to Nolan, the beneficiary’s rights *in rem* ‘consist principally in the beneficiary’s primary, negative, right to exclude non-beneficiaries from the enjoyment of trust assets’.<sup>102</sup> In contrast, the beneficiary’s other rights—including his positive rights to benefit from the trust assets—are rights *in personam*, ‘enforceable only against a very limited class of persons’.<sup>103</sup>

As shown above, the claim of a trust beneficiary is the prototypical example of an equitable interest. It seems likely, therefore, that the other confirmed equitable interests would similarly be regarded as combinations of juridical claims which include at least some rights *in rem*. The case of *Re Nisbet and Potts’ Contract*<sup>104</sup> supports this view. In that case, Farwell J examined the legal nature of another form of equitable interest, the restrictive covenant, in order to ascertain whether that interest was capable of binding a squatter taking the servient land by adverse possession. Farwell J did not in terms describe the restrictive covenant as conferring rights *in rem*;

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<sup>96</sup> See WN Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1916-1917) 26 *Yale Law Journal* 710, 714-15; RC Nolan, ‘Equitable Property’ (2006) 122 *LQR* 232, 254.

<sup>97</sup> Note that for present purposes nothing turns on the fact that certain scholars include in their description of a right *in rem* the condition of being defined by reference to a thing: see P Birks, *An Introduction to the Law of Restitution* (OUP 1985) 49-50; J Penner, *The Idea of Property in Law* (OUP 1997) 25-31; D Sheehan, *The Principles of Personal Property Law* (Hart Publishing 2011) 2. Contra WN Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1916-1917) 26 *Yale Law Journal* 710, 720-33.

<sup>98</sup> See J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (R Campbell ed, 3rd rev edn, J Murray 1869) lecture XIV, 381; WN Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1916-1917) 26 *Yale Law Journal* 710, 718.

<sup>99</sup> For further discussion, see below ch 5, pt II, s 2, sub-s i. But for the classic account, see FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) lecture IX.

<sup>100</sup> See *Re Knox* [1963] IR 263, 289-90 (Kingsmill Moore J).

<sup>101</sup> RC Nolan, ‘Equitable Property’ (2006) 122 *LQR* 232.

<sup>102</sup> *Ibid* 236.

<sup>103</sup> *Ibid* 237.

<sup>104</sup> *Re Nisbet and Potts’ Contract* [1905] 1 Ch 391 (Ch), affd [1906] 1 Ch 386 (CA).

nevertheless, he did express the view that the restrictive covenant was more than a personal right binding the owner of the land, but constituted ‘an equity attached to the property of such a nature that it is annexed to and runs with it in equity’ and which could only be enforced ‘by means of the land itself’.<sup>105</sup> The implication of this language was that the restrictive covenant, like the interest of a beneficiary of a trust, did not consist wholly of rights *in personam*, but included at least some rights *in rem*.

Having concluded that equitable interests are rights *in rem*, it is now necessary to analyse the legal nature of mere equities. It seems that mere equities are essentially rights to obtain equitable relief, that is to say, equitable rights of action.<sup>106</sup> This conclusion is supported by an examination of the confirmed mere equities, namely, equitable claims to rescind a transaction or to rectify a document and equities by estoppel. All of these claims, which have already been outlined, have three common features. First, they arise in circumstances where some form of injustice has occurred or is likely to occur. Second, they allow the injured party to go to the court to acquire the appropriate equitable remedy against the defendant. Third, they necessarily cease to exist once the court has granted that remedy, since from this point onwards the rights of the parties are defined by, and derive from, the order of the court.<sup>107</sup> When considered together, these features are strongly indicative of bare equitable rights of action, for they demonstrate that none of the confirmed mere equities, in and of itself, confers on the claimant any greater or more permanent entitlement than a right to go to the court to obtain a particular equitable remedy. As was submitted in argument in the case of *Lloyds Bank plc v Rosset*,<sup>108</sup> the right of a claimant with a mere equity is ‘to bend the ear of the court of conscience to listen sympathetically to his tale’.

The status of mere equities as bare equitable rights of action is underlined by the case of *Prosser v Edmonds*.<sup>109</sup> The main significance of this case is that it sets down the core principle governing the assignment of mere equities to third parties, and for this reason the case will be discussed in greater detail in chapter six.<sup>110</sup> For present purposes, it suffices to say that in *Prosser* (for reasons that will be fully explained in chapter six) the Chief Baron of the Court of Exchequer, Sir Frederick Pollock, had to

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<sup>105</sup> Ibid 396-97 (Farwell J).

<sup>106</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) 916D (Lord Hoffmann).

<sup>107</sup> See, eg, *Williams v Staite* [1979] 1 Ch 291 (CA).

<sup>108</sup> *Lloyds Bank plc v Rosset* [1991] 1 AC 107 (HL) 115B (argument).

<sup>109</sup> *Prosser v Edmonds* (1835) 1 Y & C Ex 481, 160 ER 196.

<sup>110</sup> Ch 6, pt II.

analyse the rights of a person who had assigned away his interest under the trusts of a will in circumstances which entitled him to rescind the assignment in equity. According to the Chief Baron, the rights of the assignor—that is to say, his equitable claim to have the assignment rescinded—consisted of ‘nothing but a naked right to file a bill [for rescission] in equity’.<sup>111</sup> In other words, the assignor’s mere equity did not constitute any higher right than a bare equitable right of action.

It is significant that mere equities are rights of action because all rights of action are rights *in personam* rather than rights *in rem*. Indeed, the idea that a bare right of action—whether a mere equity or not—could be a right *in rem* seems absurd, since it would imply that a claimant could have a right to litigate against any member of a very large and indefinite class of people. It seems highly improbable that any such right could exist, for while it frequently occurs that a claimant with a right of action is faced with multiple potential defendants—for example under the doctrine of vicarious liability a claim in negligence may be enforceable against both the wrongdoer and his employer,<sup>112</sup> subject to the rule against double recovery—these potential defendants invariably form a relatively small and definite class of people. This is not to suggest that no claim can be a right *in rem* if that claim can confer access juridical relief. Clearly, there are many claims—equitable interests among them—which can confer such access and yet are binding on a large and indefinite class of people. However, these claims are not rights of action *per se*: they are *primary* rights which do not confer any automatic right to litigate, but which are capable of generating *secondary* rights of action if and only if the primary claim is somehow violated.<sup>113</sup> And as Hohfeld observes, these secondary rights are always rights *in personam*, enforceable against the person who violated the primary right.<sup>114</sup>

In short, if a juridical claim is a right of action, then that claim is almost certainly a right *in personam*. As already demonstrated, mere equities are bare rights of action. Therefore it can reasonably be concluded that mere equities are rights *in personam*.

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<sup>111</sup> *Prosser v Edmonds* (1835) 1 Y & C Ex 481, 494-95; 160 ER 196, 202 (Sir Frederick Pollock CB).

<sup>112</sup> See generally WVH Rogers, *Winfield and Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010) ch 20.

<sup>113</sup> WN Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1916-1917) 26 *Yale Law Journal* 710, 752-53.

<sup>114</sup> *Ibid.*

The status of mere equities as rights *in personam* was quite recently illustrated in the case of *Re Crown Holdings (London) Ltd (in liq)*.<sup>115</sup> In that case, two companies had gone into creditors' voluntary liquidation, and the liquidators applied to the court under s 112 of the Insolvency Act 1986 to determine whether certain customers who had made payments to the companies under fraudulently induced contracts could assert an equitable interest in the sums paid. The representatives of the customers submitted that since the contracts were induced by fraud the customers were entitled to rescind them and thereby recover an equitable interest in the sums. However, the liquidators countered that when the companies went into liquidation the customers lost their claim to rescind the contracts.

Murray Rosen QC, sitting as a deputy judge, seems to have accepted that a claim to rescind—being a mere equity—was capable of binding volunteers and purchasers with notice,<sup>116</sup> and may also be capable of enforcement against the estate of a bankrupt individual.<sup>117</sup> Nevertheless, the deputy judge was persuaded by the liquidators' argument that the customers' claim to rescind and thereby recover title to the sums paid under the contracts had been lost when the companies went into liquidation.

The deputy judge based his decision on two points. The first point related to the judge's analysis of the legal nature of a claim to rescind. In this regard, the judge concluded that such a claim was a personal right:

... the 'equity' to rescind a fraudulently induced contract does not give the innocent party any proprietary rights in property which is transferred pursuant to that contract. The equity to rescind is a personal right against the fraudster.<sup>118</sup>

In describing the claim to rescind as a 'personal right', the deputy judge clearly did not mean that this claim was incapable of being enforced against third parties. This would contradict the deputy judge's apparent acceptance that claims to rescind are

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<sup>115</sup> *Re Crown Holdings (London) Ltd (in liq)* [2015] EWHC 1876 (Ch).

<sup>116</sup> *Ibid* [38], point (c) (Murray Rosen QC), quoting *Twinsectra Ltd v Yardley* [1999] All ER (D) 433 (CA) [99] (Potter LJ).

<sup>117</sup> *Re Crown Holdings (London) Ltd (in liq)* [2015] EWHC 1876 (Ch) [43] (Murray Rosen QC). Mere equities almost certainly are enforceable against a trustee in bankruptcy: see *Re Eastgate* [1905] 1 KB 465 (KB). See also RM Goode, 'Ownership and Obligation in Commercial Transactions' (1987) 103 LQR 433, 438.

<sup>118</sup> *Re Crown Holdings (London) Ltd (in liq)* [2015] EWHC 1876 (Ch) [38] (MH Rosen QC).

mere equities and hence capable of binding volunteers and purchasers with notice. It seems likely, therefore, that what the judge actually meant by this description was that a claim to rescind was a right *in personam*: a claim which is binding on a small and definite class of people. As will be explained below, saying that a claim is binding on a definite class of people is not the same thing as saying that a claim is ‘purely personal’ in the sense of being wholly incapable of affecting third parties.

The second point on which the deputy judge based his decision related to his interpretation of the Insolvency Act 1986. In this connection, the judge held that upon the voluntary winding-up of a company all the assets which are beneficially owned by the company fall to be administered for the benefit of the company’s creditors in accordance with s 107 of the 1986 Act.<sup>119</sup> Furthermore, the judge held that any asset which is legally owned by the company falls outside the ‘statutory trusts’ imposed by s 107 *if and only if* that asset ‘is subject to the present ... *proprietary* rights of a third party’.<sup>120</sup>

Having adopted this view of the operation of the 1986 Act, the deputy judge concluded as follows:

[A]t the time of the Companies going into liquidation ... the sums paid by their customers were sums to which the Companies had full legal and beneficial title. The customers’ equity to rescind as the result of any fraudulent misrepresentation was a personal right against the Companies, and did not encumber the sums which had been paid by the customers as against the general body of its creditors. Accordingly, the sums ... paid ... by customers were the Companies’ property as at the date which they went into ... liquidation ... and accordingly fall to be dealt with under section 107 of the Insolvency Act for the benefit of all the Companies’ creditors. To find otherwise, to the detriment of those creditors, would be contrary not just to accepted law, but to basic contract and property principles under established law.<sup>121</sup>

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<sup>119</sup> Ibid [42] (MH Rosen QC).

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

It is fair to say that the judge's conclusions about the operation of the 1986 Act are questionable to say the least.<sup>122</sup> For one thing, it seems highly anomalous that a claim to rescind should be lost on the voluntary winding-up of a company when the same claim would survive the bankruptcy of an individual.<sup>123</sup> For another thing, it is difficult to see how a claim which was binding on a company before the company went into liquidation should cease to bind the company once the company goes into liquidation. In principle, the claim should continue to be enforceable, even if it subjects the company to a liability in respect of specific assets. As Segal observes in his comment on the case:

[T]he statutory trust relied on by the Deputy Judge is irrelevant. In asserting rights in the name of the company, the liquidator stands in no better position than the company itself and therefore the rights to which the statutory trust applies are and remain subject to the limitations ... which are in existence at the commencement of the winding up.<sup>124</sup>

However, these criticisms relate to the judge's interpretation of the 1986 Act rather than his analysis of the legal nature of a claim to rescind. Accordingly, despite the doubtfulness of the actual ruling, *Re Crown Holdings* can be understood as authority that mere equities are rights *in personam*.

Therefore, having examined the available evidence, it is submitted that the reason equitable interests are distinct from mere equities is that equitable interests, on the one hand, are combinations of juridical claims which include at least some rights *in rem*, while mere equities, on the other hand, are equitable rights of action and hence are pure rights *in personam*.

It is noteworthy that, as explained in chapter two,<sup>125</sup> some commentators take the view that a mere equity is a form of power, and is distinguishable from an equitable interest on that basis.<sup>126</sup> While this theory is not equivalent to the view that a mere equity is an equitable right of action, it is not necessarily inconsistent with it. In a

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<sup>122</sup> See N Segal, 'The Impact of Insolvency on the Right to Rescind: The Flaw in the Crown' (2016) 29 *Insolvency Intelligence* 27.

<sup>123</sup> *Re Eastgate* [1905] 1 KB 465 (KB).

<sup>124</sup> N Segal, 'The Impact of Insolvency on the Right to Rescind: The Flaw in the Crown' (2016) 29 *Insolvency Intelligence* 27, 28.

<sup>125</sup> Ch 2, pt II, s 2.

<sup>126</sup> See, eg, B McFarlane, N Hopkins and S Nield, *Land Law* (OUP 2017) 176-77.

manner of speaking, a right of action is a type of power, because it necessarily implies a power in the claimant to go to the court to obtain the relief to which he is entitled.

*i. Addressing a potential objection*

It is necessary to address a potential objection to the view that mere equities are rights *in personam*. In short, it might be argued that if a claim is a right *in personam*, binding on a small and definite class of people, then that claim is necessarily incapable of enforcement against third parties, who, given their status as such, fall outside that small and definite class of people. And since mere equities *are* capable of enforcement against third parties, they cannot, so the argument goes, be rights *in personam*.

This objection is misplaced. A claim may be a right *in personam* and yet capable of affecting third parties for reasons which are external to the legal nature of the claim itself. For example, contractual claims are rights *in personam*: binding on the small and limited class of people who have consented to the agreement.<sup>127</sup> Yet despite its status as a right *in personam*, a contractual claim is nevertheless capable of generating a tortious remedy against a third party who induces one of the contracting parties to breach the agreement.<sup>128</sup> In a sense, therefore, a contractual claim is capable of affecting third parties; these third party effects, however, do not derive from the legal nature of the contractual claim itself, but are the consequence of tortious principles acting on the contractual claim.

This is not to suggest, of course, that the third party effects of mere equities sound in tort. The example of a contractual claim merely serves to demonstrate that the ability of mere equities to affect third parties does not, contrary to the above objection, entail that these claims are not rights *in personam*. The truth of the matter, it is submitted, is that a mere equity, like a contractual claim, is a right *in personam* which is nevertheless capable of affecting third parties because there is some additional factor in play, which factor acts on the mere equity but is external to it.

This raises the question of what this ‘additional factor’ might be. This question will be addressed in chapters four and five which, as explained already, will investigate

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<sup>127</sup> See H Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) vol 1, para 18-139.

<sup>128</sup> See, eg, *Lumley v Gye* (1853) 2 El & Bl 216, 118 ER 749. See generally WVH Rogers, *Winfield and Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010) paras 18-2-18-8.

the rules and principles which underlie the proprietary features of mere equities, including the enforceability of these claims against all third parties except purchasers for value without notice.

#### PART IV: OTHER MERE EQUITIES?

One of the objectives of this chapter has been to define the nature of the dividing line between mere equities and equitable interests. Now that this objective has been achieved, the chapter will now apply the insight which has been gained in order to identify which equitable claims, besides the confirmed examples of mere equities, might also be mere equities.

Outside of the confirmed examples, there are a number of claims which have been identified in the existing literature as mere equities or as potential mere equities. As explained in this chapter, there are a handful of claims which judges in isolated cases seem to have classified as mere equities. These are (i) the rights of intermediate trustees,<sup>129</sup> (ii) equitable rights of entry,<sup>130</sup> (iii) claims to seek relief against the forfeiture of a lease<sup>131</sup> and (iv) claims to have a contract specifically performed.<sup>132</sup> And as explained in chapter two,<sup>133</sup> there are certain claims which commentators have suggested are or might be mere equities. In addition to claims to seek relief against the forfeiture of a lease,<sup>134</sup> these are (v) the rights of mortgagees to consolidation of mortgages,<sup>135</sup> (vi) claims to re-open a foreclosure of mortgaged property,<sup>136</sup> (vii) the rights of persons who are entitled to inherit in reference to the unadministered estate of the deceased,<sup>137</sup> (viii) the rights of purchasers under estate contracts<sup>138</sup> and (ix)

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<sup>129</sup> *Castellan v Hobson* (1870) LR 10 Eq Cas 47, 51 (Sir William Milbourne James V-C).

<sup>130</sup> *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) 720-21 (Lord Wilberforce).

<sup>131</sup> *Fuller v Judy Properties Ltd* (1992) 64 P&CR 176 (CA) 184 (Dillon LJ).

<sup>132</sup> *Halifax plc v Curry Popeck* [2008] EWHC 1692 (Ch) [26] (Norris J).

<sup>133</sup> Ch 2, pt II, s 1.

<sup>134</sup> Law Commission, *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 5.33, point (4). See also Explanatory Notes to the Land Registration Act 2002, para 186.

<sup>135</sup> PH Pettit, *Equity and the Law of Trusts* (12th edn, OUP 2012) 21-22.

<sup>136</sup> HWR Wade, 'Husband and Wife—Deserted Wife's Right to Matrimonial Home—Equitable Interests and "Mere Equities"' [1955] CLJ 158, 160; C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 8-012.

<sup>137</sup> G Virgo, *The Principles of Equity and Trusts* (2nd edn, OUP 2016) 76-78. See also PS Davies, G Virgo and EH Burn, *Equity & Trusts: Text, Cases, and Materials* (2nd edn, OUP 2016) 49, 51.

<sup>138</sup> JE Penner, *The Law of Trusts* (10th edn, OUP 2016) para 4.8.

rights to assert an equitable interest in property which has been identified though the equitable tracing rules.<sup>139</sup>

In light of the foregoing analysis, it is submitted that the only claims in the above list which could potentially be mere equities are the claims falling within categories (iii), (iv) and (vi): viz claims to seek relief against the forfeiture of a lease, claims to have a contract specifically performed and claims to re-open a foreclosure of mortgaged property. Each of the other claims in the above list is excluded from being a mere equity for at least one of the following two reasons.

The first reason is that the claim in question falls within one of the confirmed categories of equitable interest and hence is not a mere equity. The claims which are excluded for this reason are the rights of purchasers under estate contracts (category (viii)) and rights to assert an equitable interest in property which has been identified though the equitable tracing rules (category (ix)). As demonstrated above, estate contracts are confirmed equitable interests,<sup>140</sup> and while rights to trace are treated as mere equities under Irish law,<sup>141</sup> under English law they count as equitable interests.<sup>142</sup>

The second reason is that the claim in question, while not a confirmed equitable interest, is not an equitable right of action and therefore, according to the above analysis, is not a mere equity. Claims which are excluded for this reason are the rights of intermediate trustees (category (i)), equitable rights of entry (category (ii)), the rights of mortgagees to consolidation of mortgages (category (v)) and the rights of persons who are entitled to inherit in reference to the unadministered estate of the deceased (category (vii)). None of these claims is an equitable right of action *per se*: none of them gives the owner an immediate, automatic right to go to the court to obtain an equitable remedy. Thus an intermediate trustee does not have an automatic right to litigate: before he can obtain such a right, it is necessary for his primary rights *qua* beneficiary to be breached. Likewise, an equitable right of entry does not give the lessor a right of action against the lessee unless and until the lessee breaches one of the covenants which are secured by the right of entry.<sup>143</sup> And a right to consolidation of mortgages is clearly not a right to litigate as such: rather, it is a procedural right

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<sup>139</sup> J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2017) para 2-006.

<sup>140</sup> *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1238B (Lord Upjohn), quoting FR Crane, 'The Deserted Wife's Licence' (1955) 19 Conv 343, 346.

<sup>141</sup> *Re Ffrench's Estate* (1887) 21 LR Ir 83.

<sup>142</sup> *Cave v Cave* (1880) 15 Ch D 639 (Ch) 649 (Fry J).

<sup>143</sup> See C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 6-027.

which allows the owner of multiple mortgages by the same mortgagor ‘to refuse to allow one mortgage to be redeemed unless the other or others are also redeemed’.<sup>144</sup> Lastly, a person who is entitled to inherit under a will or the rules of intestacy does not have an automatic right to sue the personal representatives of the deceased: he may acquire such a right, but only if and when the personal representatives commit a breach of duty.<sup>145</sup>

By way of contrast, none of claims falling within categories (iii), (iv) and (vi) is excluded for either of the above reasons. None of them falls within one of the confirmed categories of equitable interest. Likewise, each of these claims can potentially be characterised as an equitable right of action. Thus where a person is said to have a claim to seek the specific performance of a contract or to pursue relief against the forfeiture of a lease or the foreclosure of a mortgage, it is implicit that that person has an automatic right to go to court to pursue the appropriate equitable remedy.

In conclusion, out of the numerous claims which judges and commentators have suggested are or might be mere equities, the only claims which could potentially be mere equities—beyond the ‘confirmed’ cases of equitable claims to have a transaction rescinded or a document rectified and equities to seek relief under the doctrine of proprietary estoppel—are claims to have a contract specifically performed and claims to seek equitable relief against the forfeiture of a lease or the foreclosure of a mortgage. However, whether or not any of these claims actually are mere equities is yet to be definitively confirmed in the cases.

## PART V: CONCLUSION

The aim of this chapter was to answer the first two questions which this thesis asks, namely, ‘What are the different claims which are, or might be, mere equities as distinguished from equitable interests?’ and ‘What is the legal nature of the dividing line between mere equities and equitable interests?’

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<sup>144</sup> Ibid para 25-055.

<sup>145</sup> In this regard, the duties of a personal representative are analogous to the duties of a trustee: *Comr of Stamp Duties (Qld) v Livingston* [1965] AC 694 (PC) 707 (Viscount Radcliffe). See also Trustee Act 2000, s 35(1).

In order to achieve this aim, the chapter carried out a review of the case law in order to ascertain which claims have been classified by the courts as mere equities, on the one hand, or equitable interests, on the other. The findings that were made as a result of this review included, *inter alia*, the finding that equitable claims to have a transaction rescinded or a document rectified and equities by estoppel are confirmed mere equities. The chapter then examined these findings in order to determine the legal nature of the dividing line between mere equities and equitable interests. The predominant theory that the discretionary character of mere equities is what distinguishes them from equitable interests was rejected; and it was shown that the true reason for the distinction is that equitable interests are combinations of juridical claims which include at least some rights *in rem*, while mere equities are equitable rights of action and hence pure rights *in personam*. The chapter then applied this definition of the dividing line between mere equities and equitable interests in order to analyse which equitable claims, other than the confirmed mere equities, might also be mere equities. It was found that, out of the numerous claims which judges and commentators have suggested are or might be mere equities, the only claims which potentially could be mere equities—beyond the confirmed examples—are claims to have a contract specifically performed and claims to seek relief against the forfeiture of a lease or the foreclosure of mortgaged property.

Thus, in answer to the first question, the different claims which are or might be mere equities as distinguished from equitable interests include (i) claims to have a transaction rescinded in equity, (ii) claims to have a document rectified, (iii) claims to seek relief under the doctrine of proprietary estoppel, (iv) claims to have a contract specifically performed, (v) claims to seek relief against the forfeiture of a lease and (vi) claims to seek relief against the foreclosure of a mortgage. In answer to the second question, the legal nature of the dividing line between mere equities and equitable interests is that equitable interests, on the one hand, are composites of juridical claims which include at least some rights *in rem* while mere equities, on the other hand, are equitable rights of action and therefore pure rights *in personam*.

## Chapter 4

# The Enforceability of Mere Equities against Third Parties: A Property-based Analysis

### PART I: INTRODUCTION

This chapter will begin to answer the third question which this thesis asks, namely, ‘What is the underlying doctrinal basis for the proprietary features of mere equities?’ As explained in chapter one,<sup>1</sup> mere equities are said to have two features which can be described as ‘proprietary’. First, mere equities are said to be enforceable against all third parties who are volunteers or purchasers for value with notice.<sup>2</sup> Second, mere equities are said to be capable of being assigned or devised in favour of a third party.<sup>3</sup>

The aim of this chapter and of chapter five is to investigate the doctrinal basis for the first of these proprietary features, namely, the enforceability of mere equities against third parties. As explained in chapter two,<sup>4</sup> while the academic commentary in this area is remarkably sparse, two competing strands of thought can be identified. According to the first, the enforceability of mere equities against third parties is founded on orthodox conceptions of property. According to the second, the enforceability of mere equities against third parties is grounded in equitable notions of unconscionability.

This chapter and chapter five will build on these opposing points of view. The present chapter will consider the evidence for a property-based analysis. The chapter will submit that, in light of the available evidence, a property-based analysis of the third party effects of mere equities is not doctrinally workable. This will clear the air for chapter five, which will formulate, and then argue in favour of, an alternative theory which will build on the general idea that the third party effects of mere equities are based on equitable grounds of unconscionability.

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<sup>1</sup> Ch 1, pt II, s 1.

<sup>2</sup> See the authorities cited above at ch 1, pt II, s 1, fn 6.

<sup>3</sup> See the authorities cited above at ch 1, pt II, s 1, fn 13.

<sup>4</sup> Ch 2, pt II, s 3.

Part two of this chapter will set down the necessary groundwork. It will first examine how the enforceability of mere equities against third parties is demonstrated in the cases. The part will then clarify the point in issue by explaining why the legal nature of mere equities makes the third party effects of these claims *prima facie* problematic. Part three will then investigate the evidence which the authorities disclose for a property-based analysis and will evaluate this evidence in light of the wider doctrinal framework. Part four will then critically evaluate the idea, which is supported by some scholars, that an equitable claim to rescind or rectify is capable of binding third parties because it is an imperfection in the title of the original transferee.

## PART II: BACKGROUND

As explained above, this part will set down the necessary groundwork for the discussion that will follow in this chapter and chapter five. It will begin by examining how the enforceability of mere equities against third parties is demonstrated in the cases. This examination will focus on the ‘confirmed’ examples of mere equities, which were identified in chapter three<sup>5</sup> as equitable claims to have a transaction rescinded, claims to have a document rectified and claims to seek relief under the doctrine of proprietary estoppel. The part will then explain why the legal nature of mere equities makes the third party effects of these claims *prima facie* problematic.

### **1. How the third party effects of mere equities are demonstrated in the cases**

In principle, if a third party takes an interest from a person who is bound by a mere equity, and does so as either a volunteer or a purchaser for value with notice of the facts generating the mere equity, then the mere equity is enforceable against the third party.<sup>6</sup> The ability of the ‘confirmed’ mere equities to bind volunteers and persons taking with notice is well demonstrated in various cases.

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<sup>5</sup> Ch 3, pt II, s 2, sub-s i.

<sup>6</sup> See *Twinsectra Ltd v Yardley* [1999] All ER (D) 433 (CA) [99] (Potter LJ).

For example, in *Addis v Campbell*<sup>7</sup> Addis, who was in destitute circumstances, sold his contingent reversionary interest in a certain estate at a gross undervalue to one Crook. Gosling was the tenant for life in possession of the estate and a relative of Addis. Gosling was aware of the fraudulent nature of the sale to Crook, but nevertheless wished to keep the estate in the family, and so purchased the interest of Crook for its full value. Addis died, and an action was brought by the plaintiff, Addis's successor, to recover the estate. The Master of the Rolls, Lord Langdale, held that the plaintiff was entitled to rescind against Gosling, who being a purchaser from Crook with notice of the fraud which the latter had practiced 'could not place himself in a better situation than Crook stood'.<sup>8</sup>

The case of *Gresley v Mousley*<sup>9</sup> illustrates the assignability of mere equities in favour of third parties, and in this connection will be considered in chapter six.<sup>10</sup> However, the case also demonstrates the enforceability of mere equities against volunteers. In *Gresley* Sir Roger Gresley sold an estate at an undervalue to his solicitor, one Mousley. After Sir Roger Gresley's death, an action was brought by the plaintiff, Sir Roger Gresley's devisee, seeking to rescind the sale and recover the estate. By this point Mousley had died, and the estate was in the hands of the defendants, to whom Mousley had left the estate by his will. Nevertheless, Knight Bruce and Turner LJJ held that the plaintiff was entitled to have the sale rescinded against the defendants, who had acquired their adverse rights as volunteers.

*Craddock Brothers v Hunt*<sup>11</sup> was a rectification case. There, land was sold to the plaintiff, but a mistake in both the contract for sale and the final conveyance meant that a piece of land that should have been included in the sale to the plaintiff was not included. Subsequently, this piece of land was sold by the vendor to the defendant, who purchased with notice of the earlier mistake. In these circumstances, it was held that the plaintiff was entitled to claim rectification of the mistake in the conveyance and thus recover title to the piece of land from the defendant.

The well-known case of *Inwards v Baker*<sup>12</sup> is yet another illustration of the enforceability of mere equities against third parties. In that case, Baker wished to build

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<sup>7</sup> *Addis v Campbell* (1841) 4 Beav 401, 49 ER 394.

<sup>8</sup> *Ibid* 415; 399 (Lord Langdale MR).

<sup>9</sup> *Gresley v Mousley* (1859) 4 De G&J 78, 45 ER 31.

<sup>10</sup> Ch 6, pt III.

<sup>11</sup> *Craddock Brothers v Hunt* [1923] 2 Ch 136 (CA).

<sup>12</sup> *Inwards v Baker* [1965] 2 QB 29 (CA).

a bungalow for himself to live in, and was prevailed upon by his father to build the bungalow on certain land which belonged to the father. Baker then proceeded to build the bungalow on the land in the expectation that he would be allowed to live there for as long as he wished. The father died some twenty years after the bungalow was completed, having left the land by his will to the plaintiffs, who subsequently sought to recover possession of the land from Baker. Applying principles of proprietary estoppel, the court held that the father's actions had generated an 'equity'—a 'mere equity' in other words—entitling Baker to be allowed to continue in occupation. Furthermore, this equity was enforceable against the plaintiffs, who accordingly were not entitled to turn Baker out of possession.

In *Inwards* the third parties were volunteers, but Lord Denning MR intimated that a claim in proprietary estoppel was enforceable against even a purchaser for value who took with notice.<sup>13</sup> The enforceability of this type of claim against such a purchaser was subsequently demonstrated in the case of *ER Ives Investment Ltd v High*.<sup>14</sup> High was the owner of a piece of land which adjoined land that was owned by the Wrights. The Wrights' land included a yard, and High believed that he had a right of way to access his land over the yard. In reliance on this belief, High built a garage on his land that could only be accessed over the yard. The Wrights never objected to the building of the garage, nor to High's use of the yard to access the garage. Subsequently, the Wrights sold the land to the plaintiff. The conveyance expressly stated that High had a right of way over the yard; nevertheless, the plaintiff later argued that since the right of way was never registered as a land charge under the Land Charges Act 1925, the plaintiff was not bound by the right of way. Accordingly, the plaintiff brought an action for an injunction to restrain High from using the yard. The plaintiff's claim and subsequent appeal were dismissed. The court applied principles of proprietary estoppel and found that High had acquired against the Wrights an equity which the court would satisfy by allowing High to continue to have access over the yard. This equity was not registerable as a land charge under the 1925 Act, and bound the plaintiff since the latter had taken from the Wrights as a purchaser with notice of the equity.<sup>15</sup>

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<sup>13</sup> *Ibid* 37F (Lord Denning MR).

<sup>14</sup> *ER Ives Investment Ltd v High* [1967] 2 QB 379 (CA).

<sup>15</sup> See especially *ibid* 394G (Lord Denning MR).

A more recent case which demonstrates the enforceability of mere equities against third parties is *KPMG LLP v Network Rail Infrastructure Ltd*.<sup>16</sup> The case involved a claim by a landlord against his tenant for rectification of a break clause contained in the lease. Both the landlord and the tenant were successors in title; neither of them had been involved in the original grant of the lease. Nevertheless, the court granted rectification. The fact that the claim to rectify was being maintained by a third party against a third party seems not to have given rise to any contention. As Hodges notes in his discussion of the case: ‘No objection was ever taken to the parties’ legal standing, either to sue for rectification, or to be sued for that relief’.<sup>17</sup>

These and other cases<sup>18</sup> clearly demonstrate that in principle a mere equity is capable of enforcement against any third party who takes as either a volunteer or a purchaser for value with notice from the person initially bound by the mere equity. Yet while the enforceability of mere equities against third parties is well demonstrated in the authorities, it is the case nevertheless that the legal nature of mere equities makes the third party effects of these claims *prima facie* problematic.

## 2. The point in issue

In chapter three,<sup>19</sup> it was found that the distinguishing characteristic which sets a mere equity apart from an equitable interest is that a mere equity is a bare equitable right of action and therefore is a pure right *in personam*. So unlike a right *in rem*, which is a claim binding on a large and indefinite class of people,<sup>20</sup> a mere equity, as a right *in*

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<sup>16</sup> *KPMG LLP v Network Rail Infrastructure Ltd* [2006] EWHC 67 (Ch), [2006] 2 P&CR 7.

<sup>17</sup> D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010) para 6-07.

<sup>18</sup> See, eg, *Lansdown v Lansdown* (1729) 2 Jac & W 205, 37 ER 605; (1730) Mosely 364, 25 ER 441; *Small v Attwood* (1832) You 407, 159 ER 1051, revd on other grounds *Attwood v Small* (1838) 6 Clark & Finnelly 232, 7 ER 684; *Hopgood v Brown* [1955] 1 WLR 213 (CA) 224-25 (Evershed MR); *Voyce v Voyce* (1991) 62 P&CR 290 (CA). See also *Bridgeman v Green* (1757) Wilm 58, 64-65; 97 ER 22, 25 (Lord Commissioner Wilmot); *Daly v The Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 387-88 (Brennan J).

<sup>19</sup> Ch 3, pt III, s 2.

<sup>20</sup> See J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (R Campbell ed, 3rd rev edn, J Murray 1869) lecture XIV, 381; WN Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1916-1917) 26 Yale Law Journal 710, 718.

*personam*, binds a small and definite class of people,<sup>21</sup> comprising, at least initially, the parties to the transaction or course of dealing which generated the mere equity.

The fact that mere equities are rights *in personam* is problematic when it comes to explaining the doctrinal basis for the enforceability of mere equities against third parties. If mere equities were rights *in rem*, then there would be no such difficulty: mere equities would bind the world at large, so *a fortiori* they would be enforceable against all successors in title who are volunteers or purchasers with notice. This analysis is not available, however, since mere equities are pure rights *in personam*. The corollary is that one is left having to explain how mere equities, being claims which bind a small and definite class of people, can affect third parties, who, given their status as such, fall outside that small and definite class of people.

This shows that whatever might be the doctrinal basis for the enforceability of mere equities against third parties, it is not sufficiently explained by reference to the underlying legal form which mere equities take. It follows that if a workable analysis of the third party effects of mere equities is to be produced, then that analysis will necessarily draw on doctrinal concepts which are external to the basic legal nature of these claims. In a nutshell, it is the identification of these concepts which is the point in issue in this chapter and chapter five.

### PART III: A PROPERTY-BASED ANALYSIS

As noted above, this part will first review the authorities which disclose evidence for a property-based analysis of the enforceability of mere equities against third parties. It will then critically evaluate this analysis in light of the wider doctrinal framework. The part will argue that while the enforceability of mere equities against third parties could be explained within the ambit of the property-based analysis, this analysis is not workable within the wider doctrinal framework for two reasons. The first reason is that the property-based analysis is inconsistent with the principle that the full beneficial interest in property passes under a voidable transfer. The second reason is that the property-based analysis is inconsistent with the equitable priority rules.

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<sup>21</sup> See J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (R Campbell ed, 3rd rev edn, J Murray 1869) lecture XIV, 381; WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 *Yale Law Journal* 710, 718.

## 1. Reviewing the evidence for a property-based analysis

In general outline, the property-based analysis for which evidence can be found in the cases posits that if a mere equity is capable of binding third parties, this is because that mere equity is conjoined with an equitable interest in the affected asset. Thus a claimant who is entitled to have a transaction rescinded in equity, or to have a document rectified, or to obtain relief under the doctrine of proprietary estoppel, is seen as having two distinct yet interrelated equitable claims. First, the claimant has his mere equity properly so called, which gives him a right *in personam* against the immediate defendant to go to the court to obtain the appropriate remedy. Second, the claimant has an equitable interest, which gives him rights *in rem* in reference to the affected asset. The gist of this analysis is that the ability of the claimant to enforce his mere equity against third parties is attributable to the fact that this mere equity is conjoined with ancillary rights *in rem*, enforceable against a large and indefinite class of people.

The main cases which disclose evidence for this property-based analysis are *National Provincial Bank Ltd v Ainsworth*,<sup>22</sup> *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)*<sup>23</sup> and *Blacklocks v JB Developments (Godalming) Ltd*.<sup>24</sup>

In *National Provincial Bank* a husband deserted his wife and then transferred the family home, which was land registered under the Land Registration Act 1925, to a third party. The court had to decide whether the husband's successor in title was entitled to possession of the home against the wife, who at all material times had been in occupation of the home. Before *National Provincial Bank*, it had been held in a series of earlier cases that when a wife was deserted by her husband she acquired an 'equity' to remain in the family home, and that this equity, although it did not amount to an equitable interest in the land, was capable of binding successors in title.<sup>25</sup> The wife in the present case submitted that she had such an equity, and that this equity

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<sup>22</sup> *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL).

<sup>23</sup> *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1964) 113 CLR 265.

<sup>24</sup> *Blacklocks v JB Developments (Godalming) Ltd* [1982] 1 Ch 183 (Ch).

<sup>25</sup> See the authorities cited above at ch 3, pt II, s 2, sub-s ii, fn 51.

qualified as an overriding interest of a person in actual occupation under s 70(1)(g) of the 1925 Act, and accordingly bound the husband's successor in title.

The House of Lords held that any claim which the wife had in reference to the family home was purely personal between herself and her husband and therefore incapable of binding third parties. It followed that the wife did not have any claim that could qualify as an overriding interest under s 70(1)(g).

Of interest here is the judgment of Lord Upjohn. In short, Lord Upjohn argued that the only equitable claims which could bind third parties were equitable interests, and that since the wife had at best an 'equity' and no equitable interest in the home, it followed that her rights were purely personal.<sup>26</sup> The judge admitted, however, that mere equities were not equitable interests but nevertheless were capable of binding third parties, and hence posed a potential difficulty for his argument.<sup>27</sup> Lord Upjohn got around this difficulty by suggested that the reason mere equities could bind third parties was that these claims were connected with an equitable interest in the affected land:

... 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*. ... [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.<sup>28</sup>

Thus Lord Upjohn reasoned that if a mere equity was capable of binding third parties, this was by reason of the mere equity being conjoined with—or, as Lord Upjohn himself put it, 'ancillary to or dependent upon'—an equitable interest in the affected asset. It follows that Lord Upjohn's judgment in *National Provincial Bank* discloses strong evidence in favour of the property-based analysis.

*Latec Investments* was decided two months before the House of Lords' decision in *National Provincial Bank*. In *Latec Investments*, the mortgagee of a statutory mortgage under the *Real Property Act 1900* (NSW) fraudulently exercised

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<sup>26</sup> *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1237F-38B, 1238G-39B (Lord Upjohn).

<sup>27</sup> *Ibid* 1238B-C (Lord Upjohn).

<sup>28</sup> *Ibid* 1238D-G (Lord Upjohn) (emphasis added).

its power of sale over the mortgaged land. The purchaser, which was the wholly owned subsidiary of the mortgagee and implicated in the fraud, then granted an equitable charge over the land in favour of an innocent third party. The mortgagor then brought an action to have the sale rescinded against the fraudulent parties and against the third party. In its defence, the third party pleaded that it was a purchaser for value without notice.

The High Court of Australia accepted that the mortgagor was entitled to rescind the sale against the fraudulent parties, but nevertheless held that since the third party was a purchaser for value without notice of the mortgagor's rights, the mortgagor was not entitled to rescind against the third party.

It will be necessary to consider *Latec Investments* in detail in the following discussion of the equitable priority rules. However, the judgment of Kitto J is of interest here because in it the judge distinguished between two forms of 'equity': on the one hand, an equity that was 'accompanied by an equitable interest'; on the other, an equity that was 'unaccompanied by an equitable interest'.<sup>29</sup> According to Kitto J, equities which resembled a claim to rescind a transaction or rectify a document—in other words, mere equities—fell within the first category, while personal equities, like the equity of a deserted wife to remain in the family home, fell within the second category.<sup>30</sup> Thus Kitto J appears to have pre-empted the view which Lord Upjohn would express two months later in *National Provincial Bank* that a mere equity was 'ancillary to or dependent upon' an equitable interest in the affected asset.<sup>31</sup> Accordingly, *Latec Investments* can be seen as disclosing further evidence for the property-based analysis.

Finally, in *Blacklocks* a vendor of registered land sought to rectify the sale in order to recover title to a plot of land which the parties had included in the sale by mistake. The judge, Mervyn Davies J, held that the vendor had acquired a claim to rectify the sale, but the case presented the added complication that the original purchaser had since resold the land to a third party. However, it was conceded that at the time of the resale the vendor had been in actual occupation of the disputed land and that the third party had not inquired after the vendor's rights. It followed that the

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<sup>29</sup> *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 277 (Kitto J).

<sup>30</sup> *Ibid.*

<sup>31</sup> Note that *Latec Investments* was not cited in *National Provincial Bank* either in argument or in the judgments.

rights of the vendor would bind the third party as an overriding interest under s 70(1)(g) of the Land Registration Act 1925, but only if those rights were capable of binding successors in title under the general law.<sup>32</sup> In this regard, Mervyn Davies J followed *National Provincial Bank* and *Latec Investments* by holding that the applicable test was whether the vendor's claim to rectify was conjoined with an equitable interest in the land:

In [*National Provincial Bank*] ... Lord Upjohn considered that a mere equity might be either 'naked and alone' or ancillary to or dependent upon an equitable estate or interest in land, and in *Latec Investments* ... Kitto J made a distinction between an equity which is and an equity which is not accompanied by an equitable interest. It is plain that the wife's equity in [*National Provincial Bank*] ... was naked and alone and had not the enduring quality that might render it capable of being a right under section 70. But was the mere equity possessed by the [vendor] of the same kind, or was it an equity ancillary to an interest in land? If the equity was of the latter kind it may ... have the 'quality of being capable of enduring' ...<sup>33</sup>

Mervyn Davies J held that the vendor's claim to rescind the sale was 'ancillary to an interest in land'.<sup>34</sup> It followed that this claim was capable of binding successors under the general law and hence bound the third party as an overriding interest under s 70(1)(g).

Accordingly, Mervyn Davies J was in agreement with the earlier assertions of Lord Upjohn and Kitto J that in order for a mere equity to be capable of binding third parties it was necessary for that mere equity to be conjoined with an equitable interest in the affected asset. Thus Mervyn Davies J's judgment in *Blacklocks* discloses additional evidence for the property-based analysis.

The property-based analysis which these cases support is advantageous for two reasons. First, and most importantly for present purposes, the enforceability of mere equities against third parties can be explained within the ambit of this analysis. This is

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<sup>32</sup> *Blacklocks v JB Developments (Godalming) Ltd* [1982] 1 Ch 183 (Ch) 194D-195D (Mervyn Davies J).

<sup>33</sup> *Ibid* 195D-F (Mervyn Davies J).

<sup>34</sup> *Ibid* 196E (Mervyn Davies J).

because the property-based analysis allows the explanation that a mere equity, despite being a right of action and hence a pure right *in personam*, is enforceable against third parties because it is conjoined with, or engrafted on, an equitable interest which includes rights *in rem* in the affected asset. In this way, the third party effects of mere equities can be attributed to the fact that these claims are combined with additional claims whose legal nature means that they are intrinsically capable of binding third parties. Second, the property-based analysis has explanatory leverage as regards the assignability of mere equities to third parties. The assignment of mere equities will be examined in chapter six. For present purposes, it suffices to say that the core principle is that a mere equity cannot be assigned independently,<sup>35</sup> but is nevertheless capable of passing on the assignment of some property right or interest to which the mere equity is ancillary.<sup>36</sup> Despite this rule, however, there are some problematic cases where an assignment of a mere equity was permitted even though the assignor did not have any obvious property right or interest in the asset to which the mere equity related.<sup>37</sup> Clearly, these cases would be less problematic if it were accepted that mere equities are conjoined with equitable interests in the assets which they affect.

## 2. Voidable transfers

Despite the advantages of the property-based analysis, it is submitted that this analysis is not workable within the wider doctrinal framework. Two arguments will be made in support of this submission.

The first argument relates to cases where assets have been transferred under a transaction which was entered in circumstances that entitle the transferor to rescind in equity. In this situation, the transferor can be described as having a ‘power’ to recover title to the assets.<sup>38</sup> This is because, as explained in chapter three,<sup>39</sup> the object of

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<sup>35</sup> See especially *Prosser v Edmonds* (1835) 1 Y & C Ex 481, 160 ER 196.

<sup>36</sup> See *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL) 703F-G (Lord Roskill).

<sup>37</sup> *Gresley v Mousley* (1859) 4 De G&J 78, 45 ER 31; *Dickinson v Burrell* (1866) LR 1 Eq 337; *Melbourne Banking Corp Ltd v Brougham* (1882) 7 App Cas 307 (PC).

<sup>38</sup> See, eg, *National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] 3 WLR 23 [44] (Sir Terence Etherton C). See also D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 16.17.

<sup>39</sup> Ch 3, pt II, s 2, sub-s i.

rescission is to achieve *restitutio in integrum*,<sup>40</sup> which requires, *inter alia*, the reciprocal restitution of all assets that have passed under the impugned transaction.<sup>41</sup>

These cases are highly problematic for the property-based analysis because of what the courts analyse the transferor's rights to be during period after the assets have been transferred but before rescission has taken place. The predominant view is that the transferor's rights consist in his mere equity to have the transaction rescinded and do not include any interest, legal or equitable, in the assets transferred.<sup>42</sup> In other words, before rescission occurs, the entire beneficial estate in the assets passes to the transferee, leaving the transferor with a bare equitable right of action to rescind.<sup>43</sup>

This analysis is evidenced in various cases. In *Bristol and West Building Society v Mothew*<sup>44</sup> the question arose what was the effect of an innocent misrepresentation in the situation where the representee, acting in reliance on the misrepresentation, advanced money to the representor. At first instance, Chadwick J decided that when the representor received the money he held it on constructive trust for the representee. In the Court of Appeal, however, Millett LJ, who gave the leading judgment, rejected this analysis, holding instead that until the transaction was rescinded the beneficial interest in the money remained vested in the representor:

Misrepresentation makes a transaction voidable not void. It gives the representee the right to elect whether to rescind or affirm the transaction. ... The right to rescind for misrepresentation is an equity. Until it is exercised the beneficial interest in any property transferred in reliance on the representation remains vested in the transferee.<sup>45</sup>

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<sup>40</sup> *Cheese v Thomas* [1994] 1 WLR 129 (CA) 137B (Sir Donald Nicholls V-C); *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [122] (Rimer J); D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 13.01.

<sup>41</sup> *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [122] (Rimer J).

<sup>42</sup> *Banque Belge Pour L'Etranger v Hambrouck* [1921] 1 KB 321 (CA) 332 (Atkin J); *Daly v The Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 389-90 (Brennan J); *Lonrho plc v Fayed* [1992] 1 WLR 1 (Ch) 11H-12A (Millett J); *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 22F-H (Millett LJ); *Twinsectra Ltd v Yardley* [1999] All ER (D) 433 (CA) [99] (Potter LJ); *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [108], [119], [126] (Rimer J); *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2012] 3 WLR 597 [103] (Lloyd LJ); *AC v DC* [2012] EWHC 2032 (Fam) [29] (Mostyn J); *National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] 3 WLR 23 [44] (Sir Terence Etherton C); *Re Crown Holdings (London) Ltd (in liq)* [2015] EWHC 1876 (Ch) [38] (MH Rosen QC).

<sup>43</sup> See *Prosser v Edmonds* (1835) 1 Y & C Ex 481, 494-95; 160 ER 196, 201-02 (Sir Frederick Pollock CB).

<sup>44</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA).

<sup>45</sup> *Ibid* 22F-H (Millett LJ).

Likewise, in *Twinsectra Ltd v Yardley*<sup>46</sup> Potter LJ had to analyse the rights of the parties in the situation where a lender had been induced by the fraud of the borrower to lend money to the latter. The judge held that until the contract was rescinded the rights of the lender consisted in a mere equity and included no equitable interest in the loan money:

[In the case of a transfer pursuant to a contract which is voidable for misrepresentation] the transferor may elect whether to avoid or affirm the transaction and, until he elects to avoid it, there is no constructive (resulting) trust ... The result ... is that, before rescission, the owner has no proprietary interest in the original property; all he has is the ‘mere equity’ of his right to set aside the voidable contract.<sup>47</sup>

And in *Independent Trustee Services Ltd v GP Noble Trustees Ltd*<sup>48</sup> Lloyd LJ distinguished the situation where a person disposed of his own property under a transaction which he was entitled to rescind from the situation where a trustee disposed of trust property in breach of trust. In the first situation, Lloyd LJ maintained that ‘until rescission ... the original owner has no proprietary interest in the subject matter of the dealing, but has only a “mere equity” consisting of his right to set aside the transaction’.<sup>49</sup> This was distinct from the second situation because, as the judge pointed out, ‘the beneficiaries have more than a mere equity; they still own their beneficial interests in the trust property unaffected by the disposition made without authority under the trust’.<sup>50</sup>

These and other cases<sup>51</sup> support the analysis that unless and until a voidable transaction is rescinded the full beneficial interest in any assets transferred pursuant to that transaction vests in the transferee, while the transferor has only a mere equity in the form of his claim to have the transaction rescinded.

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<sup>46</sup> *Twinsectra Ltd v Yardley* [1999] All ER (D) 433 (CA).

<sup>47</sup> *Ibid* [99] (Potter LJ).

<sup>48</sup> *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2012] 3 WLR 597.

<sup>49</sup> *Ibid* [103] (Lloyd LJ).

<sup>50</sup> *Ibid* [104] (Lloyd LJ).

<sup>51</sup> See the authorities cited above in fn 42.

The principle that the full beneficial interest passes under a voidable transaction appears to refute the property-based analysis. According to the property-based analysis, where a transferor of property has a mere equity to rescind the transaction and thus recover title, the transferor's mere equity is conjoined with an equitable interest in the affected property, and for this reason is capable of binding third parties. This analysis is clearly incorrect. As the above cases demonstrate, the correct understanding of this situation is that the transferor has a mere equity only, and no equitable interest in the affected property unless and until rescission occurs. It follows that the property-based analysis is inconsistent with how the courts approach cases where property has passed under a voidable transaction.

It might be objected that the courts have not always adhered to the view that a transferor under a voidable transaction retains no equitable interest in the subject of the transfer.<sup>52</sup> Indeed, there were several cases in the latter half of the nineteenth century where the court expressed the opposite view.<sup>53</sup>

The first case was *Stump v Gaby*.<sup>54</sup> In *Stump*, one White conveyed an estate to the defendant in circumstances which entitled White to rescind the conveyance on grounds of undue influence. Subsequently, in order to prevent the conveyance from being disputed, White, by his will, confirmed the conveyance and, for additional confirmation, devised the estate to the defendant. The plaintiff, who was the heir at law of White, sought to have the conveyance rescinded. The defendants argued that since White had confirmed the conveyance and devised the estate the plaintiff had no title to the relief which he claimed. The plaintiff countered, firstly, that after the conveyance the rights of White regarding the estate were not capable of being devised and, secondly, that the confirmation was not valid.

The Lord Chancellor, Lord St Leonards, rejected both arguments. As regards the first argument, he asserted that after White had made the conveyance his rights constituted an equitable interest in the estate which was capable of being devised under the subsequent will:

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<sup>52</sup> See especially R Chambers, *Resulting Trusts* (OUP 1997) 172-74.

<sup>53</sup> *Stump v Gaby* (1852) 2 De GM&G 623, 42 ER 1015; *Gresley v Mousley* (1859) 4 De G&J 78, 45 ER 31; *Dickinson v Burrell* (1866) LR 1 Eq 337; *Melbourne Banking Corp Ltd v Brougham* (1882) 7 App Cas 307 (PC).

<sup>54</sup> *Stump v Gaby* (1852) 2 De GM&G 623, 42 ER 1015.

[W]hat then is the interest of a party in an estate which he has conveyed ... under circumstances which would give a right in this Court to have the conveyance set aside? In the view of this Court he remains the owner ... and the consequence is that he may devise the estate, not as a legal estate, but as an equitable estate, ... leaving the conveyance to have its full operation at law, but looking at the equitable right to have it set aside in this Court. The testator therefore had a devisable interest.<sup>55</sup>

As regards the second argument, the Lord Chancellor held that the confirmation was valid, asserting that it was ‘beyond dispute that a man may, if he pleases, confirm a voidable conveyance’.<sup>56</sup> Significantly, the Lord Chancellor made it clear that the confirmation was independently sufficient, exclusive of the devise, to dispose of the case:

[T]he testator has devised the estate in express terms, and my opinion is, that if he had not so devised it, but had simply said, referring to the prior conveyance, ‘I confirm it,’ that alone would have been a valid confirmation.<sup>57</sup>

The manner in which the Lord Chancellor disposed of the first argument was clearly at odds with the principle established in *Bristol and West Building Society* and the other cases mentioned above. In contrast with what was said in these cases, the Lord Chancellor’s comments in *Stump* suggest that if property is transferred under a transaction that the transferor is entitled to rescind, then the transferor continues to have an equitable interest in the property; not a mere naked right to litigate in equity.

The other cases were *Gresley v Mousley*,<sup>58</sup> *Dickinson v Burrell*<sup>59</sup> and *Melbourne Banking Corp Ltd v Brougham*.<sup>60</sup> These cases establish a rule in relation to the assignment of mere equities which is highly problematic from a doctrinal perspective; in this connection, they will be considered in greater detail in chapter six.<sup>61</sup> For present purposes, it suffices to say that in each of these cases, which were

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<sup>55</sup> Ibid 630; 1018 (Lord St Leonards LC).

<sup>56</sup> Ibid 631; 1018 (Lord St Leonards LC).

<sup>57</sup> Ibid 632; 1019 (Lord St Leonards LC).

<sup>58</sup> *Gresley v Mousley* (1859) 4 De G&J 78, 45 ER 31.

<sup>59</sup> *Dickinson v Burrell* (1866) LR 1 Eq 337.

<sup>60</sup> *Melbourne Banking Corp Ltd v Brougham* (1882) 7 App Cas 307 (PC).

<sup>61</sup> Ch 6, pt III.

all decided within the thirty years following *Stump*, the judge concurred with Lord St Leonards LC in maintaining that if a conveyance was voidable at the instance of the transferor, then the transferor retained an equitable interest in the subject of the conveyance, which interest could be assigned or devised.<sup>62</sup>

It is submitted, however, that the cases in the *Stump* line do not seriously challenge the principle that upon a voidable transfer the full beneficial interest passes to the transferee, leaving the transferor with only a mere equity to rescind. This is the case for at least three reasons.

The first reason is that, in *Stump* itself, White, the transferor, had validly affirmed the transaction.<sup>63</sup> This fact, as Lord St Leonards LC acknowledged, was independently sufficient to dispose of the case, for it meant that any claim which White may have had to rescind the conveyance was barred and that, accordingly, it was not possible for the plaintiff to stand in the right of White to rescind the conveyance. In these circumstances, it was beside the point to ask whether an equitable claim to rescind a conveyance of land was devisable or automatically descended to the heir at law: the effect of the confirmation had been to nullify any claim to rescind that White may have had, so that even if White had *not* made the devise, the plaintiff still would not have been able to claim a right to rescind through White. It follows that when Lord St Leonards LC portrayed White as having retained an equitable interest that was capable of being devised, the Lord Chancellor's comments were strictly *obiter dicta*.<sup>64</sup>

The second reason is that, in suggesting that White had retained an equitable interest, Lord St Leonards LC went against the *ratio decidendi* of the earlier case of *Prosser v Edmonds*.<sup>65</sup> This case—which was not referred to in *Stump* either in the judgment or in argument—has already been encountered in chapter three.<sup>66</sup> As explained in that chapter, in *Prosser* Sir Frederick Pollock CB had to analyse the rights of a person who had transferred his interest under the trusts of a will in circumstances which entitled him to rescind the transfer in equity. According to the Chief Baron, the

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<sup>62</sup> *Gresley v Mousley* (1859) 4 De G&J 78, 89; 45 ER 31, 35 (Knight Bruce LJ); *Dickinson v Burrell* (1866) LR 1 Eq 337, 342 (Lord Romilly MR); *Melbourne Banking Corp Ltd v Brougham* (1882) 7 App Cas 307 (PC) 311 (Lord Selborne LJ).

<sup>63</sup> For a discussion re the affirmation of voidable transactions, see generally D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) ch 23.

<sup>64</sup> Interestingly, this point is one which other scholars always seem to overlook when discussing *Stump*: see, eg, R Chambers, *Resulting Trusts* (OUP 1997) 172; D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 3.45-3.51.

<sup>65</sup> *Prosser v Edmonds* (1835) 1 Y & C Ex 481, 160 ER 196.

<sup>66</sup> Ch 3, pt III, s 2.

assignor had ‘a naked right to file a bill in equity’—that is to say, a mere equity—and no additional interest in the subject of the transfer.<sup>67</sup> Therefore the Chief Baron adopted the same analysis that would subsequently find support in *Bristol and West Building Society* and the other cases in that line.

The third reason is that after the decisions in *Bristol and West Building Society* and the subsequent cases, it is highly unlikely the courts today would accept the submission that a transferor of property under a voidable transaction retains an equitable interest in that property. That is to say, *Bristol and West Building Society* and the other cases seem to have decisively confirmed that the correct analysis is that before rescission takes place the transferor has a mere equity only, and no equitable interest in the transferred property. As the authors of the second edition of *The Law of Rescission* note:

Although the point was formerly the subject of some uncertainty, it is now settled that title to property passes at law and in equity under a voidable contract, and that a claim to recover title upon equitable rescission is properly described as an ‘equity’ or ‘mere equity’.<sup>68</sup>

It is necessary to add one caveat: in several relatively recent cases, judges have seemingly maintained that if a transaction is procured by the actual fraud<sup>69</sup> of one party, than any property which is received by the fraudulent party from the innocent party under that transaction is held by the fraudulent party on constructive trust for the innocent party, who correspondingly has an equitable beneficial interest in the property from the outset.<sup>70</sup> These cases, however, do not present a serious obstacle for the present argument. For one thing, the view that a transferor of property under a fraudulently induced transaction takes an immediate equitable interest in the property

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<sup>67</sup> *Prosser v Edmonds* (1835) 1 Y & C Ex 481, 494-95; 160 ER 196, 201-02 (Sir Frederick Pollock CB).

<sup>68</sup> D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 16.12 (footnotes omitted).

<sup>69</sup> Ie, fraud as defined in *Derry v Peek* (1889) 14 App Cas 337 (HL) 374 (Lord Herschell).

<sup>70</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 716C (Lord Browne-Wilkinson); *Collings v Lee* [2001] 2 All ER 332 (CA) 337G (Nourse LJ); *Halley v The Law Society* [2003] EWCA Civ 97 [47], [54] (Carnwath LJ).

is controversial: it is inconsistent with what judges have said in earlier cases,<sup>71</sup> and has been severely criticised by both judges and academic writers alike.<sup>72</sup> It seems unlikely, therefore, that the constructive trust analysis will be followed in future cases; as Sir Terence Etherton C observed quite recently in *National Crime Agency v Robb*:

The overall consensus, both judicial and academic, is that where a transaction is not void but is voidable for fraud, the fraudster acquires legal and beneficial title to the victim's property and when the transaction is rescinded or set aside, but not before then, the equitable title to that property re-vests in the victim ...<sup>73</sup>

For another thing, if, contrary to the balance of the existing evidence, the constructive trust analysis were to attain general acceptance, this analysis would still only apply in cases where a transaction is procured through fraud. Hence the analysis would not apply in cases where a transferor is entitled to rescind on purely equitable grounds such as innocent misrepresentation or undue influence. In these cases, the orthodox view—namely that before rescission takes place the transferor has only a mere equity and no equitable interest in the subject of the transfer—would continue to hold sway.

### 3. Equitable priorities

The second argument which is advanced in support of the submission that the property-based analysis, despite its explanatory advantages, is not workable within the wider doctrinal framework relates to the consequences for priorities of the distinction between equitable interests and mere equities.

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<sup>71</sup> *Banque Belge Pour L'Etranger v Hambrouck* [1921] 1 KB 321 (CA) 332 (Atkin J); *Lonrho plc v Fayed* [1992] 1 WLR 1 (Ch) 11H-12A (Millett J); *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 (Ch) 734D (Millett J), revd [1994] 2 All ER 685 (CA).

<sup>72</sup> *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [111]-[119] (Rimer J); *National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] 3 WLR 23 [43]-[44] (Sir Terence Etherton C); HW Tang, 'Proprietary Relief without Rescission' (2004) 63 CLJ 30; D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 1.84.

<sup>73</sup> *National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] 3 WLR 23 [43] (Sir Terence Etherton C).

As discussed in chapter one,<sup>74</sup> these consequences were originally systemised in the case of *Phillips v Phillips*.<sup>75</sup> To recapitulate, in *Phillips* the owner of the equity of redemption in certain lands granted a rentcharge to the plaintiff and then transferred the equity of redemption to the defendants. Subsequently, when the plaintiff brought an action to enforce his security over the land, the defendants sought to rely on the defence of purchase for value without notice.<sup>76</sup> The Lord Chancellor, Lord Westbury, held that the defence of purchase for value without notice was not available in a case where the court had to determine the priorities between competing equitable interests and that, accordingly, the defence was not available to the defendants in the present case. Furthermore, the Lord Chancellor outlined, *obiter*, three situations where the defence was available, the third of which was the following:

Thirdly, 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—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere.<sup>77</sup>

Judges in subsequent cases have consistently held that the effect of this statement—the so called third proposition in *Phillips*<sup>78</sup>—is that where the court has to determine the priorities between an equitable interest and an earlier mere equity, the defence of purchase for value without notice is available to the owner of the equitable interest.<sup>79</sup> In actual fact, Lord Westbury LC did not specify whether he was describing a situation where a purchaser of an equitable interest could raise the defence, or whether his comments were limited to a purchaser of a legal interest. This point has not escaped the attention of O’Sullivan, who argues that Lord Westbury LC did not actually intend to describe a situation where the defence was generally available even to a purchaser of an equitable interest.<sup>80</sup> However, while this argument is interesting from a historical

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<sup>74</sup> Ch 1, pt II, s 2, sub-s i.

<sup>75</sup> *Phillips v Phillips* (1861) 4 De GF&J 208, 45 ER 1164.

<sup>76</sup> For a general description of the plea of *bona fide* purchase for value without notice, see above ch 1, pt II, s 2, sub-s i.

<sup>77</sup> *Phillips v Phillips* (1861) 4 De GF&J 208, 218; 45 ER 1164, 1167 (Lord Westbury LC).

<sup>78</sup> See *Cloutte v Storey* [1911] 1 Ch 18 (Ch) 24 (Neville J).

<sup>79</sup> See the authorities cited above at ch 1, pt II, s 2, sub-s i, fn 36.

<sup>80</sup> D O’Sullivan, ‘The Rule in *Phillips v Phillips*’ (2002) 118 LQR 296, 304-16.

point of view, from a doctrinal perspective it is largely otiose, for since *Phillips* there has been a long line of cases which has invested the third proposition with the particular meaning described above.<sup>81</sup> Furthermore, the argument will be advanced in chapter five<sup>82</sup> that, despite what O’Sullivan himself argues,<sup>83</sup> the orthodox interpretation of the third proposition makes theoretical sense, given the legal nature of mere equities as pure rights *in personam*.

The fact that it is not allowable for a purchaser of an equitable interest to raise the defence of purchase for value without notice against an earlier equitable interest, but that it is allowable for him to raise the defence against an earlier mere equity, is problematic for the property-based analysis. As explained above, this analysis maintains that a mere equity is enforceable against third parties because it is conjoined with, or engrafted on, an equitable interest which includes rights *in rem* in the affected asset. Yet if it really were the case that the third party effects of a mere equity derive from an underlying equitable interest, then it is difficult to see why a mere equity would be treated any differently from an equitable interest *in re* priorities. Hence the fact that different consequences for priorities *do* attach to equitable interests and mere equities respectively proves that the enforceability of a mere equity against third parties does not, in actual fact, derive from some underlying equitable interest.

It seems that there are two main objections that might be raised against this argument. The first appeals to how the case of *Latec Investments* was reasoned. The second invokes the principle, established in the case of *Rice v Rice*,<sup>84</sup> that an earlier equitable interest will be postponed to an later equitable interest if the owner of the later interest is found to have the superior ‘equity’. Each of these potential objections will now be dealt with in turn.

#### *i. Objection 1: Latec Investments*

The facts of *Latec Investments* have already been outlined. In that case, all three High Court Justices—Kitto, Taylor and Menzies JJ—agreed that the rights of the mortgagor

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<sup>81</sup> See the authorities cited above at ch 1, pt II, s 2, sub-s i, fn 36.

<sup>82</sup> Ch 5, p III, s 3, sub-s ii.

<sup>83</sup> D O’Sullivan, ‘The Rule in *Phillips v Phillips*’ (2002) 118 LQR 296, 316-22.

<sup>84</sup> *Rice v Rice* (1853) 2 Drewry 73, 61 ER 646.

(who was claiming to rescind the fraudulent sale of the mortgaged land) fell within the ambit of the third proposition in *Phillips*. This meant that the third party (who, after the sale, had purchased an equitable charge over the land) was entitled to raise the defence of purchase for value without notice, despite the fact that the third party's interest was purely equitable. Hence the outcome of the case was that the equitable interest of the third party took priority over the earlier equitable rights of the mortgagor.

According to the argument which the present author is making, the fact that the third party, being a purchaser of an equitable interest, was able to invoke the defence of purchase for value without notice proves that the mortgagor's mere equity to rescind the fraudulent sale was not conjoined with an equitable interest in the land. This is because, if it had been the case that the mortgagor's mere equity was conjoined with an equitable interest, then this mere equity would have been treated like an equitable interest for the purpose of priorities, in which case the third party would not have been able to invoke the defence: *as per* the main ruling in *Phillips*.

The reason *Latec Investments* is potentially problematic is that, out of the three judges who decided the case, Kitto and Taylor JJ expressly held that the mortgagor had held an equitable interest in the land since the fraudulent sale occurred. (The third judge, Menzies J, adopted the orthodox view that a 'relation back of the equitable interest' could only occur once the fraudulent sale was rescinded.<sup>85</sup>) Kitto and Taylor JJ gave different reasons for adopting this analysis of the mortgagor's rights. On the one hand, Kitto J suggested that the effect of the fraudulent sale had been to give the mortgagor a true equity of redemption in the land.<sup>86</sup> On the other hand, Taylor J, referring to the *Stump* line of cases (see above), invoked the supposed principle that 'where the owner of property has been induced by fraud to convey it the grantor continues to have an equitable interest therein'.<sup>87</sup> Despite their different lines of argument, however, both judges were in agreement that, when the fraudulent sale took place, the mortgagor acquired, in addition to his claim to rescind, an equitable interest in the land.

The judgments of Kitto and Taylor JJ are a potential basis for objection to the above argument. This is because these judgments seemingly show that a mere equity

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<sup>85</sup> *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 290 (Menzies J).

<sup>86</sup> *Ibid* 274-75 (Kitto J).

<sup>87</sup> *Ibid* 284 (Taylor J).

can, in fact, be conjoined with an equitable interest in the affected asset, but nevertheless be treated differently from an equitable interest *in re* priorities. If this were the case, then the fact that different consequences for priorities attach to equitable interests and mere equities respectively would not, contrary to the above argument, prove that the third party effects of a mere equity do not derive from an underlying equitable interest.

It is suggested, however, that a close reading of Kitto and Taylor JJ's decisions reveals that these judges were not justified in holding that the mortgagor's mere equity was conjoined with an equitable interest in the land. The root of the problem lies in the fact that both judges treated *Phillips* as a binding authority. This meant that, in order for Kitto and Taylor JJ to be warranted in asserting that the mortgagor had an equitable interest in the land which predated the equitable interest of the third party, it was necessary for these judges to give a credible account of why, taking into account the main ruling in *Phillips*, the third party nevertheless could raise the defence of purchase for value without notice. This is something which Kitto and Taylor JJ attempted but failed to achieve, for in each case the judge adopted an account that was either falsifiable or, if true, defeated the purpose of the hypothesis that the mortgagor's mere equity was conjoined with an equitable interest. It follows that Kitto and Taylor JJ were not justified in holding that the mortgagor had an earlier equitable interest in the land and that, accordingly, their judgments do not present a serious basis for objection to the above argument.

In order to substantiate this criticism of Kitto and Taylor JJ's reasoning, it is necessary to investigate their respective judgments in some detail. The judgment of Taylor J will be considered first.

#### Taylor J

According to Taylor J, since the mortgagor had continued to have an equitable interest in the land from when the fraudulent sale occurred, the case was to be treated as a contest between adverse equitable interests, not as a contest between an equitable interest and an earlier mere equity. As Taylor J put it:

... where a grantor is entitled to set aside a conveyance for fraud he has ... an equitable interest in the subject land ... if he is to be postponed to an equitable interest acquired without notice at some later time it is not because it can be said ... that he has a mere equity as distinguished from an equitable estate; if he is to be postponed then there must be some other reason.<sup>88</sup>

In arguing that the contest was between adverse equitable interests, Taylor J seemed to have been driving towards the conclusion that the third party could not raise the defence of purchase for value without notice, *as per* the main ruling in *Phillips*. However, Taylor J did not let the matter rest there, but devised a way of avoiding what was arguably the natural result of his analysis. The judge noted that Lord St Leonards, writing extra-judicially in the year following *Phillips*,<sup>89</sup> had argued that before *Phillips* a purchaser of an equitable interest had always been allowed to raise the defence of purchase for value without notice against an earlier equitable interest.<sup>90</sup> Taylor J then formulated an interpretation of the third proposition in *Phillips* which drew heavily on this supposed antecedent context:

Yet that case, which Lord *St Leonards* thought departed from the earlier law, did not deny the availability of the defence to a subsequent purchaser of an equitable interest without notice of an earlier interest which was of the character under consideration in the present case. It cannot, of course, be disputed at the present time that the defence of purchaser for value without notice of a prior equitable interest cannot be generally maintained but it does appear that it has always—that is to say, both before and after *Phillips v Phillips*<sup>91</sup>—been allowed to prevail *where the person entitled to the earlier interest required the assistance of a court of equity to remove an impediment to his title as a preliminary to asserting his interest*.<sup>92</sup>

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<sup>88</sup> *Ibid* 284-85 (Taylor J).

<sup>89</sup> E Sugden, *A Concise and Practical Treatise of the Law of Vendors and Purchasers or Estates* (14th edn, 1862) reproduced in JC Perkins (ed) (8th American edn, Kay and Brother 1873) 591-93.

<sup>90</sup> *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 285 (Taylor J).

<sup>91</sup> *Phillips v Phillips* (1861) 4 De GF&J 208, 45 ER 1164.

<sup>92</sup> *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 285-86 (Taylor J) (emphasis added).

In short, Taylor J maintained that, before the decision in *Phillips*, the defence of purchase for value without notice had always been available to a purchaser of an equitable interest against an earlier equitable interest. According to Taylor J, while *Phillips* changed the law by denying that the defence was generally available in these circumstances, the third proposition preserved the old rule in the situation where ‘the person entitled to the earlier interest required the assistance of a court of equity to remove an impediment to his title as a preliminary to asserting his interest’. Therefore, in Taylor J’s opinion, the third proposition in *Phillips* did not refer to cases where the prior claim was a mere equity; rather, it related to cases where the prior claim was an equitable interest, but where that interest could not be asserted unless and until the owner had obtained the assistance of the court—presumably by having an earlier transaction rescinded or rectified. In this way, Taylor J sought to account for why the defence of purchase for value without notice was available, despite his contention that the mortgagor had an equitable interest in the land which predated the equitable interest of the third party.

Taylor J’s suggestion that *Phillips* was a watershed case which departed from previously accepted doctrine is not entirely without historical support. It is certainly true that before *Phillips* judges’ understanding of the ambit of the defence of purchase for value without notice had not ossified,<sup>93</sup> and there are examples of cases in which it was intimated that the defence was generally available to purchasers of equitable interests.<sup>94</sup> For example, in *Penny v Watts*<sup>95</sup> the Vice-Chancellor, Sir James Knight-Bruce, held that a purchaser of land, the legal title to which was outstanding in mortgagees, could maintain the defence against an earlier estate contract. Thus *Phillips* did, as Taylor J suggested, mark a breaking point from earlier doctrine, for the case decisively confirmed, seemingly for the first time, that the defence could not be admitted in a competition between adverse equitable interests.<sup>96</sup>

Nonetheless, while Taylor J may derive some support from the historical background against which *Phillips* was decided, his interpretation of that case is not particularly convincing. Simply put, it is highly unlikely that Lord Westbury LC, in

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<sup>93</sup> D O’Sullivan, ‘The Rule in *Phillips v Phillips*’ (2002) 118 LQR 296, 303-304.

<sup>94</sup> *Penny v Watts* (1950) 2 De G&SM 501, 521; 64 ER 224, 233 (Sir James Knight-Bruce V-C); *Lane v Jackson* (1855) 20 Beav 535, 539; 52 ER 710, 711 (Sir John Romilly MR). See also *A-G v Wilkins* (1853) 17 Beav 285, 51 ER 1043.

<sup>95</sup> *Penny v Watts* (1950) 2 De G&SM 501, 521; 64 ER 224, 233 (Sir James Knight-Bruce V-C).

<sup>96</sup> D O’Sullivan, ‘The Rule in *Phillips v Phillips*’ (2002) 118 LQR 296, 304.

articulating the third proposition, intended to establish an exception to his general ruling that it was not allowable for a purchaser of an equitable interest to maintain the defence of purchase for value without notice against the owner of an earlier equitable interest. It is submitted that there are two main reasons for rejecting Taylor J's interpretation of *Phillips*.

First, the idea that *Phillips* did not exclude the defence of purchase for value without notice from *all* contests between adverse equitable interests is inconsistent with what Lord Westbury LC actually said in that case. Significantly, the Lord Chancellor described the defence as a 'the creature of a Court of Equity' which could 'never be used in a manner at variance' with the usual order of equitable priorities.<sup>97</sup> Given the emphatic nature of this language, the gloss which Taylor J sought to place on the decision in *Phillips* does not seem plausible. Clearly, Lord Westbury LC meant to lay down an absolute rule that the defence of purchase for value without notice could not be admitted in a contest between adverse equitable interests. The corollary is that when Lord Westbury LC admitted that the defence was available in cases that fell within the third proposition, the reason the Lord Chancellor did so was that he did not consider such cases to raise a question of priorities between equitable interests (as opposed to a question of priorities between an equitable interest and an earlier mere equity).

Second, the very idea that the defence of purchase for value without notice can be admitted in a contest between adverse equitable interests seems contrary to the basic legal nature of that defence.

As is well known, the defence of purchase for value without notice takes the form of a plea.<sup>98</sup> A plea is a specialised form of equitable defence. In short, a plea is an allegation by the defendant of some fact or combination of facts which, if subsequently proved by the defendant,<sup>99</sup> is independently sufficient to bar the claimant's cause of action.<sup>100</sup> It follows from the legal nature of a plea that the effects

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<sup>97</sup> *Phillips v Phillips* (1861) 4 De GF&J 208, 216; 45 ER 1164, 1167 (Lord Westbury LC).

<sup>98</sup> See D Fox, 'Purchase for Value without Notice' in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 53.

<sup>99</sup> The evidential *onus* is on the defendant to establish all elements of the plea: see *A-G v Biphosphated Guano Co* (1879) 11 Ch D 327 (CA) 337 (Thesinger LJ); *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 (Ch) 402 (Farwell J); [1906] 1 Ch 386 (CA) 404 (Collins MR); C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 8-005.

<sup>100</sup> See J Mitford, 'A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill' in S Tyler (ed), *Mitford's and Tyler's Pleadings and Practice in Equity* (Baker, Voorhis & Co 1876) 312.

of a successful plea are necessarily negative: a successful plea does not establish that the defendant has any right to receive equitable relief *per se*; it merely establishes that that claimant has no right of action—ie, no equity—to pursue the equitable relief which he is seeking against the defendant.<sup>101</sup> Hence the gist of the court’s response to a successful plea is simply to do nothing: the court refuses to assist the claimant by intervening against the defendant, but equally the court does not intervene in any positive sense in the defendant’s favour. As O’Sullivan pithily summarises it: ‘[t]he party pleading bona fide purchase does not ask for relief, but only to be left alone’.<sup>102</sup>

That the defence of purchase for value without notice operates in this way does not cause any theoretical difficulties when the defence is raised in the context in which it is most familiar. This is where the claimant is seeking to enforce an equitable interest against a subsequent purchaser of a *legal* estate in the property.<sup>103</sup> In this situation, if the defendant successfully raises the defence, then the court simply refuses to intercede in the claimant’s favour against the defendant.<sup>104</sup> As Lord Hatherley put it in *Pilcher v Rawlins*: ‘equity declines all interference with the purchaser, having ... no ground on which it can affect his conscience’.<sup>105</sup> The practical result is that the parties are left to enforce their rights at common law,<sup>106</sup> which generally favours the defendant because he is the one with the legal estate.

By way of contrast, the idea that the defence of purchase for value without notice could be raised in a contest between adverse equitable interests generates considerable theoretical difficulties.<sup>107</sup> In such a contest, each party is claiming, as against the other party, the superior right to have his equitable interest satisfied out of the asset which is the subject of that interest. In other words, the parties are seeking to enforce mutually inconsistent rights. In these circumstances, a court of equity cannot decline all interference between the parties, which would be the usual response to a

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<sup>101</sup> *Ind, Coope & Co v Emmerson* (1887) 12 App Cas 300 (HL) 305 (Earl of Selbourne), 307 (Lord Watson); D O’Sullivan, ‘The Rule in *Phillips v Phillips*’ (2002) 118 LQR 296, 298-99.

<sup>102</sup> D O’Sullivan, ‘The Rule in *Phillips v Phillips*’ (2002) 118 LQR 296, 299.

<sup>103</sup> See *London and South Western Railway Co v Gomm* (1882) 20 Ch D 562 (CA) 583 (Sir George Jessel MR).

<sup>104</sup> *Jerrard v Saunders* (1794) 2 Ves Jun 454, 458; 30 ER 721, 723 (Lord Loughborough LC); *Pilcher v Rawlins* (1872) LR 7 Ch App 259 (CA) 266 (Lord Hatherley LC); J Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (4th edn, Charles C Little & James Brown 1846) vol 1, 74.

<sup>105</sup> *Pilcher v Rawlins* (1872) LR 7 Ch App 259 (CA) 266 (Lord Hatherley LC).

<sup>106</sup> *A-G v Wilkins* (1853) 17 Beav 285, 293; 51 ER 1043, 1046 (Sir John Romilly MR).

<sup>107</sup> D O’Sullivan, ‘The Rule in *Phillips v Phillips*’ (2002) 118 LQR 296, 302-04.

successful defence of purchase for value without notice.<sup>108</sup> This is because non-interference would entail the absurd result that neither party would be able to enforce his equitable rights against the other. Clearly, the situation is different from a case where a subsequent purchaser acquires a legal estate and the common law is allowed to reassert itself, for neither party has a legal estate: their respective rights are purely equitable and thus cognisable only by a court of equity.

Consequently, in order to support his argument that in certain cases the defence of purchase for value without notice could be admitted in a dispute between equitable interests, Taylor J engaged in an extensive reading-down of the principles established in *Phillips*. He argued that *Phillips* did not, in actual fact, bar the defence from all contests between adverse equitable interests, but retained the defence in cases where the earlier interest required assistance from a court of equity. However, there are two reasons why this interpretation of *Phillips* is not convincing. First, the interpretation is inconsistent with what Lord Westbury LC actually said in *Phillips*. Second, the idea that a purchaser of an equitable interest can maintain the defence of purchase for value without notice against an earlier equitable interest is inconsistent with the basic legal nature of that defence. It is necessary to conclude, therefore, that Taylor J failed to harmonise his view that the mortgagor could assert an earlier equitable interest in the land with the decision in *Phillips* and that, accordingly, Taylor J's judgment cannot be regarded as a sound basis for objection to the above argument.

#### Kitto J

We turn now to Kitto J. As explained above, Kitto J was also of the opinion that the mortgagor had continued to have an equitable interest in the land from when the fraudulent sale took place. However, Kitto J gave a different account of why the third party could raise the defence of purchase for value without notice in these circumstances. Unlike Taylor J, Kitto J appeared to accept the orthodox view that a purchaser of an equitable interest is unable to invoke the defence against an earlier equitable interest. Rather, Kitto J approached the problem by arguing that, in a contest of priorities where the earlier incumbrancer has an equity which is accompanied by an

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<sup>108</sup> See the sources cited above in fn 104.

equitable interest, the defence relates to the mere equity rather than to the equitable interest. As Kitto J himself put it:

... 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*. That the defence of purchase for value without notice (in the absence of the legal estate) is a good defence against the assertion of the equity in such a case had been established long before Lord *Westbury's* time. ... The reason of the matter ... 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 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 finds himself unable to set up as against the other the equitable interest which 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.*<sup>109</sup>

Thus Kitto J reasoned that, in a competition between a subsequent purchaser of an equitable interest and an earlier incumbrancer whose mere equity is conjoined with an equitable interest in the affected asset, it is allowable for the subsequent purchaser to invoke the defence of purchase for value without notice, since in these circumstances the defence is not directed against the earlier equitable interest, but against the mere equity. This analysis is not vulnerable to the criticisms which have been levelled against Taylor J's judgment, for Kitto J was not suggesting that the defence could be available in a contest between adverse equitable interests *per se*. Instead, Kitto J's proposal was that, where a mere equity is conjoined with an equitable interest, the mere equity is 'logically antecedent' to the equitable interest, by which the judge seems to have meant that the claimant is unable to assert the equitable interest while the earlier transaction to which the mere equity relates continues on foot. If a purchaser subsequently acquires an equitable interest in the affected asset and successfully raises

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<sup>109</sup> *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 277-78 (Kitto J) (emphasis added).

the defence of purchase for value without notice, the purchaser defeats the mere equity only, but in doing so he renders the impugned transaction immutable as between himself and the claimant, with the result that the claimant is barred from asserting his equitable interest against the purchaser. In this situation, any question of priorities between the parties' respective equitable interests is nugatory: to all intents and purposes, the claimant's equitable interest perishes together with his mere equity.

The problem with Kitto J's analysis is that it largely defeats the purpose of his argument that the mortgagor's rights included an equitable interest in the land. As explained above, the main advantage of the analysis that a mere equity is conjoined with an equitable interest in the affected asset is that the enforceability of the mere equity against third parties can be attributed to the equitable interest. According to Kitto J, however, a claimant with a mere equity cannot assert the attendant equitable interest unless and until he has exercised his mere equity. This would mean that, pending the grant of equitable relief, the only right which the claimant would be able to assert against a third party would be the mere equity. The necessary implication, of course, is that the mere equity is capable of enforcement against a third party without assistance from the underlying equitable interest. And once it is accepted that a mere equity can bind third parties in and of itself, the primary rationale for the theory of an underlying equitable interest disappears.

Therefore, while both Kitto and Taylor JJ attempted to give a credible account of why, despite their analysis of the mortgagor's rights, the third party could nevertheless raise the defence of purchase for value without notice, their respective arguments were not satisfactory. It follows that Kitto and Taylor JJ were not justified in holding that the mortgagor had, in addition to his mere equity, an earlier equitable interest in the land and that, accordingly, their judgments do not present a serious basis for objection to the present writer's argument.

#### *ii. Objection 2: The principle in Rice v Rice*

There is a second objection which could be made against the argument that the different consequences for priorities which attach to equitable interests and mere equities respectively indicate that the third party effects of mere equities do not derive

from some underlying equitable interest. This objection relates to the principle which appears first to have been established in *Rice v Rice*.<sup>110</sup>

In *Rice*, a purchaser of land procured a conveyance of the estate which he then used to secure an advance by way of equitable mortgage. The purchaser then absconded without having paid either the vendor or the mortgagee. In these circumstances, the vendor could assert an equitable security interest in the land—namely an equitable lien for the unpaid purchase money—which predated the equitable mortgage. Nevertheless, the Vice-Chancellor, Sir Richard Kindersley, held that the equitable mortgage had priority over the vendor's interest. According to the Vice-Chancellor, in a contest between adverse equitable interests, priority goes to the earlier interest only if the relative merits of the parties are equal in all other respects.<sup>111</sup> In the present case, the relative merits were not equal because the vendor had endorsed the receipt of the purchase money on the deed and then delivered the title deeds to the purchaser, thus enabling the purchaser to present himself to the mortgagee as the absolute owner.

Thus *Rice* established the principle that, in a competition between adverse equitable interests, the court will postpone the earlier interest to the subsequent interest if the court is satisfied that the owner of the subsequent interest has the superior equity—that is to say, the greater merit. This principle has been applied most frequently in cases where the owner of the earlier interest was guilty of inequitable conduct<sup>112</sup> such as failing to retain title deeds,<sup>113</sup> failing to register the earlier interest,<sup>114</sup> or making representations or misstatements of a sufficiently tangible and distinct nature.<sup>115</sup> However, the principle has also been applied in cases where the earlier owner was innocent: for example, in *Taylor v London and County Banking Co*<sup>116</sup> the owner of the earlier interest had not behaved inequitably, yet the owner of the subsequent interest was found to have the superior equity, the reason being that the latter was a purchaser for value while the former was a volunteer. In any event, it

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<sup>110</sup> *Rice v Rice* (1853) 2 Drewry 73, 61 ER 646.

<sup>111</sup> *Ibid* 78; 648 (Sir RT Kindersley V-C).

<sup>112</sup> J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2017) para 4-047.

<sup>113</sup> *Rice v Rice* (1853) 2 Drewry 73, 61 ER 646.

<sup>114</sup> *Abigail v Lapin* [1934] AC 491 (PC).

<sup>115</sup> *Shropshire Union Railways and Canal Co v R* (1875) LR 7 HL 496 (CA) 506-07 (Lord Cairns LC).

<sup>116</sup> *Taylor v London and County Banking Co* [1901] 2 Ch 231 (CA) 263 (Stirling LJ).

has been said that ‘a strong case’ is required in order to justify the court postponing an earlier equitable interest.<sup>117</sup>

In *Rice*, Sir Richard Kindersley V-C described the general approach which the court takes in deciding whether the owner of the subsequent equitable interest has the better equity. He stated that the court does not apply ‘any technical rule or any rule of partial application’, but refers to ‘broad principles of right and justice which a Court of Equity applies universally’.<sup>118</sup> In particular, the Vice-Chancellor emphasised that the court is required to have regard to three factors:

... the nature and condition of their [the parties’] respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto.<sup>119</sup>

The fact that the Vice-Chancellor identified the ‘nature and condition’ of the respective interests as a factor which could affect priorities is significant.<sup>120</sup> It presents a possible basis for objection to the argument that the property-based analysis is falsified by the different consequences for priorities which attach to mere equities and equitable interests respectively. In short, it might be countered that a mere equity does indeed derive its third party effects from an underlying equitable interest, but that since this interest is tied to the mere equity, it is necessarily inferior, as regards its ‘nature and condition’, to a freestanding equitable interest. Accordingly, an equitable interest which is tied to a mere equity is intrinsically more susceptible than a freestanding equitable interest to being postponed under the principle in *Rice*. And this greater susceptibility—or so the argument goes—manifests itself in the rule that the defence of purchase for value without notice can be maintained even by a purchaser of an equitable interest against an earlier mere equity.

It seems that several scholars have found this line of argument persuasive, most notably Everton.<sup>121</sup> Everton maintains that the third party effects of a mere equity are

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<sup>117</sup> *Cory v Eyre* (1863) 1 De GJ&S 149, 167; 46 ER 58, 65 (Turner LJ).

<sup>118</sup> *Rice v Rice* (1853) 2 Drewry 73, 78-79; 61 ER 646, 648 (Sir RT Kindersley V-C).

<sup>119</sup> *Ibid* 78; 648 (Sir RT Kindersley V-C).

<sup>120</sup> In *Rice* itself, the Vice-Chancellor held that the competing interests were equal in this respect: *ibid* 79-80; 648-49 (RT Kindersley V-C).

<sup>121</sup> AR Everton, “Equitable Interests” and “Equities”—In Search of a Pattern’ (1976) 40 Conv 209. See also C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 8-013.

attributable to an underlying equitable interest, which she terms a ‘latent’ equitable interest.<sup>122</sup> She argues that since latent equitable interests depend for their existence ‘upon the successful pursuit of a remedy’,<sup>123</sup> they are inferior in quality to ‘patent’ equitable interests, which ‘depend for their existence simply upon the act of the parties’.<sup>124</sup> According to Everton, it is this difference in quality which accounts for the different consequences for priorities which attach to mere equities (ie, latent equitable interests) and equitable interests (ie, patent equitable interests) respectively. As Everton herself puts it:

In a competition between what have been called ‘patent’ equitable interests ... the earlier prevails, but in a competition between these and ‘latent’ equitable interests ... the plea of bona fide purchase for value without notice operates. Inasmuch as the general rule affording priority to the earlier of two equitable interests is said to rest on the principle ‘*where the equities are equal, the first in time prevails*’ it is suggested that this approach is sound, for surely an equitable interest which comes into existence through the act of the parties is by no means so frail a creature as the equitable interest which depends for its very existence upon the successful pursuit of a remedy, and, this being so, it is hard to see how ‘*the equities are equal*’ ...<sup>125</sup>

Despite this scholarly support, the property-based analysis cannot be salvaged by appealing to the principle in *Rice*. The problem with this line of argument is that it depends on the view that the principle in *Rice* and the defence of purchase for value without notice are mutually inclusive doctrines, when this is not in fact the case.<sup>126</sup> On the one hand, the principle in *Rice* requires the court to have regard to ‘all the circumstances’ in order to determine which party has the better equity.<sup>127</sup> This is different from how the defence of purchase for value without notice works. As explained above, this defence takes the form of a plea, which means that it ‘reduces

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<sup>122</sup> AR Everton, “‘Equitable Interests’ and ‘Equities’—In Search of a Pattern’ (1976) 40 Conv 209, 215.

<sup>123</sup> Ibid 218.

<sup>124</sup> Ibid 215.

<sup>125</sup> Ibid 218.

<sup>126</sup> See D O’Sullivan, ‘The Rule in *Phillips v Phillips*’ (2002) 118 LQR 296, 302-04.

<sup>127</sup> *Rice v Rice* (1853) 2 Drewry 73, 83; 61 ER 646, 650.

the cause ... to a single point, and from thence creates a bar to the suit'.<sup>128</sup> Hence in a case where the defence is validly raised, the court does not have regard to all the circumstances in order to determine who has the better equity, but limits its analysis to the question of whether each element of the plea has been proved. In these circumstances, the conceptual room does not exist for the principle that priority goes to the party with the greater merit to operate. In the words of O'Sullivan, who makes the same argument:

The decision that the purchaser has a superior equity follows from an assessment of the merits of the competing claims, whereas that inquiry is excluded on a plea of bona fide purchase.<sup>129</sup>

#### **4. A property-based analysis: Summary**

In summary, the cases of *National Provincial Bank*, *Latec Investments* and *Blacklocks* disclose evidence in favour of the analysis that a mere equity is conjoined with an equitable interest in the affected asset. While the enforceability of mere equities against third parties can be explained within the remit of this analysis, there are at least two reasons why this analysis is not workable within the wider doctrinal framework. The first reason is the principle, established in the *Bristol and West Building Society* line of cases, that the rights of a person who transfers property under a transaction which he is entitled to rescind consist in his mere equity only, and do not include any equitable interest in the property transferred. While there are some older authorities which challenge this analysis—principally the case of *Stump*—it is highly unlikely that these cases can be said to represent the modern law. The second reason is that different consequences for priorities attach to mere equities and equitable interests respectively, seeming to falsify the idea that a mere equity derives its third party effects from an underlying equitable interest. There are two objections that might be levelled against this argument, the first appealing to how the case of *Latec Investments* was

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<sup>128</sup> J Mitford, 'A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill' in S Tyler (ed), *Mitford's and Tyler's Pleadings and Practice in Equity* (Baker, Voorhis & Co 1876) 312 (footnotes omitted).

<sup>129</sup> D O'Sullivan, 'The Rule in *Phillips v Phillips*' (2002) 118 LQR 296, 303.

decided, the second invoking the equitable principle of priorities which was established in the case of *Rice*. However, a close examination reveals that neither of these potential objections is a plausible answer to the argument that the property-based analysis is disproved by the fact that mere equities are treated differently from equitable interests as regards priorities. In conclusion, despite the body of evidence presented by *National Provincial Bank, Latec Investments* and *Blacklocks*, the property-based analysis is not doctrinally workable.

This dismissal of the property-based analysis clears the way for the next chapter, which will seek to build on the general idea that the enforceability of mere equities against third parties is founded on equitable grounds of unconscionability. However, before this line of inquiry can be pursued, it is necessary to evaluate the idea, which is supported by various scholars, that an equitable claim to rescind or rectify a transfer of property is capable of binding third parties because it constitutes an imperfection in the title of the original transferee.

#### PART IV: THE IMPERFECT TITLE ANALYSIS

A number of scholars maintain that a mere equity to rescind or rectify constitutes an imperfection in the title which the defendant acquires in the affected asset.<sup>130</sup> According to this view, where a person transfers an asset to another person in circumstances which entitle the transferor to rescind or rectify the transfer, the title which the transferee acquires under the transfer is affected *ab initio* by some inherent limitation or innate status of defeasibility. This imperfection is initially inchoate, but it is capable of crystallising into an equitable beneficial interest which vests in the transferor if and when the transferor exercises his mere equity to rescind or rectify.<sup>131</sup> Unless and until rescission or rectification occurs, the transferor has no interest, legal

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<sup>130</sup> See B Häcker, 'Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324, 329-31; R Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) para 3-05; D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 21.29-21.30.

<sup>131</sup> This interest then gives the claimant the right to call for a reconveyance of the legal title in accordance with the rule in *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282, affd (1841) Cr & Ph 240, 41 ER 482. See B Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324, 330.

or equitable, in the affected asset, but only a so called ‘power *in rem*’ to enforce his mere equity and thereby become the beneficial owner of the asset.<sup>132</sup>

The advantage of this analysis is that it can potentially explain why a mere equity to rescind or rectify is capable of binding the successors in title of the original transferee. This is because, if the transferee is analysed as having acquired a title which is defined from the outset by an innate status of defeasibility, than any successor in title of the transferee—other than a purchaser for value without notice—will necessarily take subject to the same imperfection, for no person can give a better title than he himself actually has.<sup>133</sup> In this way, the imperfection will continue to subsist unless and until either the original transfer is rescinded or rectified or the asset is acquired by a purchaser for value without notice. It is noteworthy that this analysis is expressly adopted by the authors of *The Law of Rescission*:

The claim to recover property on rescission ... is an imperfection in the title of the transferee. *Nemo dat quod non habet* (no one may give a title greater than he has) that imperfection must persist unless and until a subsequent transferee obtains a better title, free from the claim to recover the asset upon rescission. A person taking with notice or as a volunteer from the initial transferee under the voidable transaction does not obtain a better title. They obtain only their predecessor’s defeasible title. Rescission crystallizes the imperfection in the title obtained by the remote recipient so as to re-vest ownership in the rescinding party. The right to rescind where property ... is transferred to a third party therefore derives from an application of the *nemo dat* principle, and is in substance a rule of property law.<sup>134</sup>

Thus for those who support the idea that the enforceability of mere equities is founded on orthodox rules of property, the theory of imperfect title presents another possible line of argument. Furthermore, this theory is not affected by the failings which define the analysis that a mere equity is conjoined with an equitable interest in the relevant

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<sup>132</sup> See P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 183-84, 299-300; B Häcker, ‘Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model’ (2009) 68 CLJ 324, 329-31; C Mitchell, P Mitchell and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) paras 37-30.

<sup>133</sup> See *Phillips v Phillips* (1861) 4 De GF&J 208, 215; 45 ER 1164, 1166 (Lord Westbury LC).

<sup>134</sup> D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 21.29-21.30.

asset. On the one hand, the theory is fully consistent with the cases in the *Bristol and West Building Society* line which, as explained above, state that a transferor under a voidable transaction does not retain any legal or equitable interest in the subject of the transaction.<sup>135</sup> On the other hand, since the theory of imperfect title does not assert that the third party effects of a mere equity derive from some underlying equitable interest, the theory is not disproved by the fact that different consequences for priorities attach to mere equities and equitable interests respectively.<sup>136</sup>

Despite these advantages, however, it is submitted that the theory of imperfect title, like the property-based analysis, is not workable within the wider doctrinal framework. The reason why this is the case relates to the very idea of an ‘imperfect’ title.

The source of the difficulty is that, in many cases where a transferee acquires title to an asset which the transferor is entitled to recover by exercising an equitable claim to rescind or rectify, the title of the transferee will be both legal and indefeasible at common law. This is because there is no jurisdiction to rectify for mistake at common law,<sup>137</sup> and while there is a common law jurisdiction to rescind, this jurisdiction is far more limited than its equitable counterpart, for, with some limited exceptions, it does not extend beyond cases of actual fraud or duress.<sup>138</sup> Thus in the common situation where a transferor is entitled to recover some asset by exercising a mere equity to rescind or rectify an earlier transaction on equitable grounds—such as innocent misrepresentation, undue influence or mistake—his rights to challenge that transaction are necessarily exclusively equitable.<sup>139</sup> From the point of view of the common law, the transaction is unimpeachable, and title to the asset has vested in the transferee indefeasibly, that is to say, freely of any imperfection which the transferor can crystallise by exercising a power *in rem*.

The reason this poses a problem for the above theory is that courts of equity do not assume the power to define the nature of common law ownership. As Maitland demonstrates in his *Lectures*, while courts of equity have, from a very earlier stage, assumed the authority to engraft their own unique system of rights and interests onto

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<sup>135</sup> See the authorities cited above in fn 42.

<sup>136</sup> See *Cave v Cave* (1880) 15 Ch D 639 (Ch) 646-47 (Fry J). See further above ch 1, pt II, s 2, sub-s i.

<sup>137</sup> Rectification is an exclusively equitable remedy: see D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010) para 1-09.

<sup>138</sup> D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 10.23.

<sup>139</sup> J O’Sullivan, ‘Rescission as a Self-help Remedy: A Critical Analysis’ (2000) 59 CLJ 509, 518.

the legal estate, they have never proposed to delineate the incidents of the legal estate itself.<sup>140</sup> It follows that in the situation posed above—ie, where the transferee has acquired the *legal* ownership of the asset in question, but the rights of the transferor to disturb that ownership by having the transaction rescinded or rectified are purely *equitable*—the transferor’s power to recover ownership in equity cannot derive from some innate status of defeasibility which affects the transferee’s title. This is because the transferee has a legal title which is perfect and indefeasible at common law, and a court of equity would not presume to contradict this proposition.

A possible objection to this argument is that, in the situation just described, it is not the transferee’s dry legal title which is defeasible, but rather his underlying beneficial ownership. In other words, while the transferee may have an indefeasible title at common law, his corresponding title in equity is imperfect, and it is this imperfection, rather than any fault in the legal title, which will crystallise into an equitable interest vested in the transferor if and when the transferor exercises his equitable claim to rescind or rectify the earlier transaction. The well-known cases of *Allcard v Skinner* discloses evidence in favour of this argument.<sup>141</sup> In *Allcard*, the claimant sought to rescind a gift of shares which she had made in favour of the defendant in circumstances which raised a presumption that the gift had been procured through undue influence. In the Court of Appeal, all three Lord Justices of Appeal held that the claimant had obtained a claim to rescind in equity when she made the gift, but a majority, consisting of Lindley and Bowen LJJ (Cotton LJ dissenting), held that this claim had since become barred by the claimant’s laches and acquiescence. For present purposes, the interesting point about *Allcard* is that, although the disputed gift transferred the legal ownership in the shares, Lindley LJ characterised the defendant as having received an imperfect *equitable* title under the gift:

A gift made by [the claimant] under these circumstances to [the defendant] cannot in my opinion be retained by the donee. The equitable title of the donee is imperfect by reason of the influence inevitably resulting from her position, and which influence experience has taught the Courts to regard as undue.<sup>142</sup>

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<sup>140</sup> See FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 17-20.

<sup>141</sup> *Allcard v Skinner* (1887) 36 Ch D 145 (CA).

<sup>142</sup> *Ibid* 184 (Lindley LJ).

Despite this statement from Lindley LJ, however, the argument that the transferee has, in addition to his legal title, an imperfect equitable title cannot succeed. The argument relies on the view that the rights of the transferee are composed of two separate estates, namely a legal estate and a corresponding equitable estate. Yet this is an impossible suggestion, for it contradicts the fundamental rule that if the owner of the legal title is the only person who is beneficially interested in the asset in question, then the beneficial estate is absorbed into the legal estate unless and until a person other than the legal owner becomes beneficially entitled, in which case that person acquires an equitable title which did not exist previously.<sup>143</sup> To adopt the contrary view is to assume the theory of dual estates, namely the proposal that there are always two titles to property, the legal and the equitable, and that these titles exist concurrently unless and until they become vested in different parties.<sup>144</sup> The theory of dual estates, however, is a fallacy, and has been dismissed as such in several important cases.<sup>145</sup>

In actual fact, there are only two situations where the theory of imperfect title might be workable. The first is where the earlier transaction is voidable on grounds which are recognised at common law—namely fraud or duress—but due to the stricter approach which the common law takes to the *restitutio in integrum* requirement,<sup>146</sup> the transferor is unable to rescind at common law, meaning that he is compelled to seek rescission in equity. In this situation, it may be possible to argue that equity is responding to an imperfection which the common law recognises as persisting in the legal title of the transferee, although it is doubtful whether any such imperfection could, in fact, continue to exist at common law after the intercession of the *restitutio in integrum* impossible bar. The second situation is where the transferee acquired a purely equitable title under the earlier transaction. In these circumstances, the transferee's title is not a creature of the common law but of equity and therefore is capable of being defined as an inherently defeasible title in accordance with equitable principles.

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<sup>143</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 706E-F (Lord Browne-Wilkinson).

<sup>144</sup> See generally JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2014) ch 4.

<sup>145</sup> *Comr of Stamp Duties (Qld) v Livingston* [1965] AC 694 (PC) 712B-E (Viscount Radcliffe); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 706E-F (Lord Browne-Wilkinson). See also JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2014) ch 4.

<sup>146</sup> See generally D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 18.17-18.32.

Accordingly, if the theory of imperfect title has any scope of application, it cannot extend beyond these two categories of case. In particular, the theory cannot apply in the common situation where a transferee acquires the legal title to an asset which the transferor is entitled to recover by exercising a claim to rescind or rectify on purely equitable grounds, such as innocent misrepresentation, undue influence or mistake. It follows that, as a generalised account of why mere equities are capable of enforcement against third parties, the theory of imperfect title necessarily fails.

#### PART V: CONCLUSION

This chapter began to investigate the doctrinal basis for the enforceability of mere equities against third parties. It aimed to critically consider the evidence in favour of the general idea that this proprietary characteristic is founded on orthodox conceptions of property.

In order to achieve this aim, the chapter first set down the necessary groundwork by demonstrating how the enforceability of mere equities against third parties is established through the cases and by clarifying why the legal nature of mere equities as rights *in personam* makes the third party effects of these claims *prima facie* problematic.

The chapter then turned to investigate the evidence which the authorities disclose for a property-based analysis of the enforceability of mere equities against third parties. It was found that the cases of *National Provincial Bank*, *Latec Investments* and *Blacklocks* disclose evidence in favour of the analysis that the reason a mere equity is capable of binding third parties is that the mere equity is conjoined with, or engrafted on, an equitable interest, which includes equitable rights *in rem* in the affected asset. It was then argued, however, that while the third party effects of mere equities could be explained within the ambit of this property-based analysis, there were two reasons why the analysis was not workable within the wider doctrinal framework. The first reason was that the analysis was inconsistent with the principle, established in the *Bristol and West Building Society* line of cases, that a person who transfers an asset under a transaction which he is entitled to rescind does not retain any legal or equitable interest in the asset. The second reason was that the different consequence for priorities which attach to mere equities and equitable interests

respectively falsifies the idea that a mere equity derives its third party effects from an underlying equitable interest.

Finally, the chapter critically considered the theory, which is proposed by certain scholars, that a mere equity to rescind or rectify constitutes an imperfection in the title which the defendant acquires in the affected asset, and therefore binds successors in title in accordance with the maxim *nemo dat quod non habet*. It was argued that since courts of equity have never assumed a power to define the incidents of common law ownership, the potential scope of application of this theory is limited to cases where the earlier transaction is voidable on *legal* grounds, or the title acquired by the defendant under that transaction is *equitable*. It followed that this theory necessarily failed as a generalised explanation of why mere equities are capable of enforcement against third parties.

In conclusion, while there is a substantial body of evidence in favour of the general idea that the enforceability of mere equities against third parties is founded on orthodox conceptions of property, this evidence breaks down under critical scrutiny. This conclusion clears the air for chapter five, which will formulate, and then argue in favour of, an alternative theory which will build on the general proposition that the third party effects of mere equities are founded on equitable grounds of unconscionability.

## Chapter 5

# The Enforceability of Mere Equities against Third Parties: A Conscience-based Analysis

### PART I: INTRODUCTION

This chapter continues the investigation, which began in the previous chapter, into the doctrinal basis for the enforceability of mere equities against third parties. As noted in chapter two,<sup>1</sup> while the academic literature in this area is remarkably sparse, two competing strands of thought can be identified. According to the first, the enforceability of mere equities against third parties is grounded in orthodox conceptions of property. According to the second, the enforceability of mere equities against third parties is founded on equitable notions of unconscionability.

The previous chapter critically considered the evidence for the first of these opposing points of view. That chapter found that while the authorities do disclose evidence in favour of the idea that the enforceability of mere equities against third parties is based on traditional conceptions of property, this evidence breaks down under critical scrutiny. This finding clears the air for the present chapter, which will advance an analysis that builds on the alternative proposal that the third party effects of mere equities are founded on grounds of unconscionability.

Part two will argue for the existence of a principle, which this chapter will term the conscience-based principle, in accordance with which a right *in personam* may be imposed afresh in equity against a successor in title of the person originally bound by that right. The part will support this argument by appealing to historical cases in which courts of equity applied the conscience-based principle in order to enforce what was then a right *in personam* against successors in title. Part three will then argue in favour of the analysis that the conscience-based principle is the doctrinal basis for the enforceability of mere equities against third parties. Finally, part four will highlight the explanatory advantages of this analysis, which include the ability to explain why

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<sup>1</sup> Ch 2, pt II, s 3.

mere equities are treated differently from equitable interests as regards the plea of *bona fide* purchase for value without notice (as discussed in chapter one<sup>2</sup>).

## PART II: THE CONSCIENCE-BASED PRINCIPLE

As explained above, this part will argue for the existence of a principle according to which a right *in personam* may be imposed afresh in equity against a successor in title of the person originally bound on grounds of conscience. The part will begin by outlining this conscience-based principle in the abstract. It will then demonstrate that this principle was the theoretical basis on which courts of equity initially began to enforce the historical use, the restrictive freehold covenant and the erstwhile deserted wife's equity against successors in title.

### 1. Outlining the conscience-based principle

In chapter three,<sup>3</sup> it was argued that a claim may be a right *in personam*, binding on a small and definite class of people,<sup>4</sup> but nevertheless capable of affecting third parties for reasons which are external to the legal nature of the claim itself. The example was given of a contractual claim, which is a right *in personam*—exigible against the small and definite class of people who have consented to the agreement<sup>5</sup>—but which can generate a tortious remedy against a third party who induces one of the contracting parties to breach the agreement.<sup>6</sup> In a manner of speaking, therefore, a contractual claim is capable of affecting third parties, despite its status as a right *in personam*. It was observed, however, that these third party effects do not derive from the legal nature of the claim itself, but are the consequence of tortious principles acting upon the contractual claim.

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<sup>2</sup> Ch 1, pt II, s 2, sub-s i.

<sup>3</sup> Ch 3, pt III, s 2, sub-s i.

<sup>4</sup> See J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (R Campbell ed, 3rd rev edn, J Murray 1869) lecture XIV, 381; WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 *Yale Law Journal* 710, 718.

<sup>5</sup> See *Clore v Theatrical Properties Ltd* (1936) 3 All ER 483 (CA); H Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) vol 1, para 18-139.

<sup>6</sup> See, eg, *Lumley v Gye* (1853) 2 El & Bl 216, 118 ER 749. See generally W VH Rogers, *Winfield and Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010) paras 18-2-18-8.

The conscience-based principle contended for here is loosely analogous to the doctrine of interference with contract: it elevates a right *in personam* to a species of proprietary claim by allowing that right to affect third parties. Unlike the doctrine of interference with contract, however, the conscience-based principle is exclusively equitable. Furthermore, the principle is not restricted to one particular category of claim, but has been applied by courts of equity in a range of different contexts. In terms of historical examples, the principle appears to have been especially pronounced in contexts where a claim has been in the early stages of its development into an equitable proprietary claim.<sup>7</sup> In this connection, it was the theoretical basis on which courts of equity first began to enforce the historic use, the restrictive freehold covenant, and the erstwhile deserted wife's equity against successors in title. The question of how the conscience-based principle is represented in these three contexts will be examined presently. Before doing this, however, it will be helpful to give a summary of the general principle which, it is argued, can be distilled from the discrete examples.

The conscience-based principle does not rely on orthodox conceptions of property and ownership, but appeals to quintessentially equitable notions of moral fraud and good conscience.<sup>8</sup> Under the conscience-based principle, a claim in relation to property which bound the original owner *in personam* may be treated as having been *imposed afresh* on his successor in title. It is the essence of the conscience-based principle, therefore, that it explains the empirical phenomenon of equitable property as a series of personal claims rather than as a single claim which binds the property *in rem* and accordingly imposes an automatic, general liability on the entire world.<sup>9</sup>

In outline, there are two main strands to the conscience-based principle, although each of these strands appears to be founded on the same implicit proposition, namely, that any intention on the part of the original owner that his successor in title should take freely of the claim *in personam* subject to which he, the original owner,

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<sup>7</sup> Interestingly, some commentators characterise mere equities as developing or embryonic forms of equitable proprietary interest: see especially M Neave and M Weinberg, 'The Nature and Function of Equities' (1978-1980) 6 *University of Tasmania Law Review* 24; (1978-1980) 6 *University of Tasmania Law Review* 115. But see the discussion below at ch 8, pt III, s 3.

<sup>8</sup> For a discussion of the concept of fraud in equity, see generally JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2014) ch 12.

<sup>9</sup> See J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (R Campbell ed, 3rd rev edn, J Murray 1869) lecture XIV, 381; WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 *Yale Law Journal* 710, 718.

held the property would be a fraudulent or an unconscionable intention *vis-à-vis* the holder of the claim *in personam*.<sup>10</sup> This proposition underlies certain presumptions about the intentions of the original owner and his successor in title which, in turn, provide a court of equity with a sufficient *raison d'être* to treat the personal claim as having been imposed afresh on the successor in title. It is these presumptions which form the two strands of the conscience-based principle.

According to the first strand of the principle, there is a *prima facie* presumption that the original owner was innocent and therefore intended that his successor in title should take subject to the claim *in personam*.<sup>11</sup> If this presumption of innocence holds in light of the surrounding facts, then a court of equity will give effect to it by treating the personal claim as continuing against the successor in title. The presumption of innocence will not hold, however, if the successor took as a purchaser for valuable consideration. This is because the provision of valuable consideration is presumed to evince that the original owner, in actual fact, did intend that his successor in title should take freely of the personal claim.<sup>12</sup> It is here that the second strand of the principle comes in. According to this strand, if the successor in title was a purchaser for value but nevertheless took with notice of the personal claim, then the court will take the view that he was privy to the fraudulent or unconscionable intention of the original owner to defeat the personal claim. In this situation, the court will *constructively* treat the transaction between the parties as having re-imposed the claim *in personam* on the successor in title on equitable grounds of conscience.<sup>13</sup> The net result of these two strands, of course, is that, in equity, even a 'personal' claim may be capable of binding the successor in title of the original owner if said successor took as a volunteer or as a purchaser for value with notice.

The conscience-based principle contended for here is not an *ex post facto* rationalisation on the part of the present writer. As already stated, this principle was the theoretical foundation on which courts of equity first began to enforce the erstwhile use, the restrictive freehold covenant, and the former deserted wife's equity against successors in title. The assertion that the conscience-based principle played this

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<sup>10</sup> See *Tulk v Moxhay* (1848) 2 Ph 774, 777-78; 41 ER 1143, 1144 (Lord Cottenham LC).

<sup>11</sup> See *Phillips v Phillips* (1861) 4 De GF&J 208, 215; 45 ER 1164, 1166 (Lord Westbury LC).

<sup>12</sup> See D Fox, 'Purchase for Value without Notice' in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 57-59.

<sup>13</sup> See K Gray and SF Gray, *Elements of Land Law* (5th edn, OUP 2009) para 3.4.12.

historical role is borne out by a closer examination of the various claims in question, commencing with the use.

## 2. Historical examples of the conscience-based principle

### *i. The use*

The historical use was the forerunner of the modern trust.<sup>14</sup> Very broadly, the use was an arrangement whereby one party, the feoffor, conveyed an estate in land to another party, the feoffee, on condition that the feoffee would hold the land to the use (ie for the benefit) of the *cestui que use*. The main incidents of the use were, firstly, that the *cestui que use* would take the profits of the land and, secondly, that the feoffee would convey the land according to the direction of the *cestui que use*.<sup>15</sup> Originally viewed as a kind of extra-legal arrangement,<sup>16</sup> within the fifteenth century the enforcement of uses on behalf of the *cestui que use* became a prominent aspect of the judicial work of the Chancery.<sup>17</sup> The jurisdiction over uses was always the concern of the Chancery exclusively of the courts of common law, although the precise reasons for this are somewhat obscure.<sup>18</sup> As Baker remarks, ‘it was not impossible to conceive of an action of *assumpsit* to enforce a use of land’.<sup>19</sup> The likely reason for the dominance of the Chancery in this area seems to be that the more rigid strictures of the courts of common law, as embodied in their forms of action and procedures, made these courts less suitable for the enforcement of uses.<sup>20</sup> In addition to the general unsuitability of the

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<sup>14</sup> See generally KE Digby, *An Introduction to the History of the Law of Real Property* (5th edn, Stevens & Sons Ltd 1897) ch 6; FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) lectures 3, 9; J Baker, *The Oxford History of the Laws of England*, vol 6 (OUP 2003) ch 35; D Fox, ‘Purchase for Value without Notice’ in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 54-64.

<sup>15</sup> E Coke, *The First Part of the Institutes of the Laws of England or a Commentary upon Littleton: Not the Name of the Author only, but of the Law Itself* (F Hargrave and C Butler eds, 16th rev edn, E Brooke and others 1809) [272b]; D Fox, ‘Purchase for Value without Notice’ in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 55.

<sup>16</sup> JH Baker, *The Oxford History of the Laws of England*, vol 6 (OUP 2003) 654-55.

<sup>17</sup> DM Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (CUP 1890) 78.

<sup>18</sup> FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 28.

<sup>19</sup> JH Baker, *An Introduction to English Legal History* (4th edn, OUP 2007) 362. See also FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 28.

<sup>20</sup> FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 27.

common law processes that existed at the time, there may also have been a sense that the personal confidence reposed by the feoffor in the feoffee made uses the natural concern of a court of conscience.<sup>21</sup>

From an early period, the Chancery began to model the rights of the *cestui que use* upon the estates and interests that already were recognised and enforced at common law.<sup>22</sup> As a result of this process of analogy, the use came to partake of an estate in land as regards its ostensible characteristics. As Maitland observes:

The beneficiary was treated as having an estate in fee simple, or in fee tail or for life in the use or trust, an equitable estate; or as having a term of years in the use or trust. These estates and interests were to devolve and be transmitted like the analogous estates and interests known to and protected by the common law.<sup>23</sup>

Although the Chancery took inspiration from the legal estate in developing the incidents of the use, the two categories of right remained fundamentally different. On the one hand, a legal interest or estate was conceptualised as a right against the land itself—a right *in rem*. On the other hand, a use was always regarded as a right against the person of the feoffee<sup>24</sup>—a right *in personam*—to insist that the feoffee perform the duty which he had undertaken, namely, to hold the land for the benefit of the *cestui que use*. The use was never conceptualised as a right *in rem*. On the contrary, judges and commentators were generally careful to observe a strict distinction between the use and the established categories of real right. Such a distinction was indicated by Coke when he characterised the rights of a *cestui que use* as ‘not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land’.<sup>25</sup> Coke’s contemporary, Bacon, was even more categorical

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<sup>21</sup> JH Baker, *The Oxford History of the Laws of England*, vol 6 (OUP 2003) 655. See also FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 30.

<sup>22</sup> FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 107. See also KE Digby, *An Introduction to the History of the Law of Real Property* (5th edn, Stevens & Sons Ltd 1897) 327-28.

<sup>23</sup> FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 107-08.

<sup>24</sup> As Digby observes, ‘The earliest conception of a use was ... a trust binding on the conscience of the feoffee, a personal obligation upon him’: KE Digby, *An Introduction to the History of the Law of Real Property* (5th edn, Stevens & Sons Ltd 1897) 326.

<sup>25</sup> E Coke, *The First Part of the Institutes of the Laws of England or a Commentary upon Littleton: Not the Name of the Author only, but of the Law Itself* (F Hargrave and C Butler eds, 16th rev edn, E Brooke and others 1809) [272b].

when he stated that a use was neither *jus in re* (which he equated with an estate in the land) nor *jus ad rem* (which he identified as a demand to be enforced against the land).<sup>26</sup>

As its conceptual form as a right *in personam* would suggest, the use initially was enforceable only against the feoffee. In the mid-fifteenth century, however, the Chancery began, on a case by case basis, to give a *cestui que use* a remedy against a third person who came into the land as a successor in title from the feoffee. This was the beginning of an incremental process by which, over the course of the next two centuries, the Chancery gradually extended the use to an ever widening class of persons in privity of estate with the original feoffee, until eventually the use was enforceable against any person who claimed through the feoffee as a volunteer or as a purchaser for value with actual or constructive notice of the use. This historical process of piecemeal extension is well-documented in the literature,<sup>27</sup> the classic account being that of Maitland in his *Lectures*.<sup>28</sup> The eighth edition of *Megarry & Wade* features a concise statement of the different stages that were involved:

As case followed case the extensions became very wide. In 1465 it was laid down that a trust would be enforced against anyone who took a conveyance of the land *with notice of the trust*. In 1483 the Chancellor said that he would enforce a trust against the trustee's heir. In 1522 it was said that a trust would be enforced against anyone to whom the land had been conveyed as a gift. It was later decided that others such as the executors and execution creditors of the trustees would be bound by the trust.<sup>29</sup>

At this point, it is important to be clear about what the extension of the use to successors in title actually signified. The extension was not the result of any reconceptualisation of the use as a right *in rem*, nor did the extension immediately result in any reconceptualisation of the use as a right *in rem*. On the contrary, the use

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<sup>26</sup> F Bacon, *Reading upon the Statute of Uses* (E Brooke 1785) 5.

<sup>27</sup> See KE Digby, *An Introduction to the History of the Law of Real Property* (5th edn, Stevens & Sons Ltd 1897) 326-27; FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 112-14; AWB Simpson, *A History of the Land Law* (2nd edn, OUP 1986) 179-81; C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 5-010; J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) para 2-005.

<sup>28</sup> FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 112-14.

<sup>29</sup> C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 5-010.

continued, as it had before, to be regarded as a right *in personam*, albeit a right *in personam* which in many respects had a misleading resemblance to a right *in rem*.<sup>30</sup> The proposition that the extension of the use to successors in title had little or no effect on its basic conceptual form is easily proved. For one thing, it emerges from the writings of Coke and Bacon that have already been mentioned. Coke and Bacon were writing in the seventeenth century; nearly two centuries had passed since the Chancery first began to enforce uses against successors in title, yet both men could confidently state that the use was not a right *in rem*. For another thing, and more fundamentally, despite the use's extension to almost every class of successor in title, the enforceability of the use was nevertheless more restricted than would have been the case if the use had been a true right *in rem*. If the use had been a right *in rem*, then it would have been enforceable against all persons taking a subsequent interest or estate in the land, including persons who did not derive title through the feoffee.<sup>31</sup> This was not the case, however. The use bound the feoffee and was capable of binding his successors in title, but nevertheless 'was unenforceable against those holding an estate or interest that did not depend on privity with the original feoffee to use'.<sup>32</sup> This 'privity limitation'<sup>33</sup> had empirical consequences. One consequence was that, until statutory reform in the nineteenth century,<sup>34</sup> a trust was unenforceable against a lord who came into the land by escheat.<sup>35</sup> Another consequence was that a trust was unenforceable against a squatter who took the land by adverse possession.<sup>36</sup> Indeed, this latter aspect of the privity limitation survived until 1906 when, in the case of *Re Nisbet and Potts'*

<sup>30</sup> See especially FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 23, 107, 115.

<sup>31</sup> Cf *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 (Ch), affd [1906] 1 Ch 386 (CA).

<sup>32</sup> D Fox, 'Purchase for Value without Notice' in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 56. See also AWB Simpson, *A History of the Land Law* (2nd edn, OUP 1986) 181.

<sup>33</sup> D Fox, 'Purchase for Value without Notice' in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 56

<sup>34</sup> Trust Property, Escheat Act 1834 (4 & 5 Will 4 c 23).

<sup>35</sup> *Peachy v Duke of Somerset* (1720) 1 Strange 447, 93 ER 626 (Lord Macclesfield LC); KE Digby, *An Introduction to the History of the Law of Real Property* (5th edn, Stevens & Sons Ltd 1897) 327; C Sweet, *Challis's Law of Real Property: Chiefly in Relation to Conveyancing* (3rd edn, Butterworth & Co 1911) 36; FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 115; D Fox, 'Purchase for Value without Notice' in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 56.

<sup>36</sup> EB Sugden, *Gilbert: The Law of Uses and Trusts* (3rd edn, W Reed and P Phelan 1811) 429, fn 6; FA Lewin, *Lewin: A Practical Treatise on the Law of Trusts* (8th edn, Blackstone Publishing Co 1888) 364; FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 116; D Fox, 'Purchase for Value without Notice' in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 56.

*Contract*,<sup>37</sup> it was held that an equitable interest was enforceable against a successful squatter.

These observations ought to dispel any suspicion that the extension of the use to successors in title was achieved through the reconceptualisation of the use as a right *in rem*—at the time, legal interests and estates were the only claims that were perceived as affecting property *in rem*. In actual fact, the extension of the use to successors in title was achieved by means of something very close to the conscience-based principle contended for here. This emerges from a recent article by Fox.<sup>38</sup> The article considers the historical evolution of the plea of *bona fide* purchaser for value without notice. Of interest here is the discussion in the first half of the article, which deals with the development in the late sixteenth and early seventeenth centuries of the rules which determined when a use bound a third person who claimed an estate in the land through the original feoffee.

In broad outline, it would appear that the original basis for the extension of the use to successors in title was the express intention of the feoffor to bind the original feoffee and his heirs and assigns to hold the land for the benefit the *cestui que use*.<sup>39</sup> At some early stage, this intention came to be *prima facie* imputed to the original feoffee and all persons who claimed an estate in the land through him. As Fox observes, ‘privity raised a presumption that the feoffees for use intended to preserve the trust and confidence imposed on them’.<sup>40</sup> The normative justification for this presumption seems obvious: any alternative intention would have been inconsistent with the original feoffment to use and would have amounted to an intention to defraud the feoffor and the *cestui que use*. Accordingly, upon any subsequent conveyance or grant of the estate, the court would presume that the feoffee was acting innocently and therefore intended his conveyance or grant to preserve the personal confidence which he had voluntarily undertaken. If this presumption held, then the court would give effect to it by treating the subsequent conveyance or grant as having re-established the use. The general effect is described by Fox as follows:

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<sup>37</sup> *Re Nisbet and Potts’ Contract* [1905] 1 Ch 391 (Ch), affd [1906] 1 Ch 386 (CA).

<sup>38</sup> D Fox, ‘Purchase for Value without Notice’ in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018).

<sup>39</sup> Vide the restrictive freehold covenant in *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143, which was expressed as being entered by the covenantor on behalf of himself and his heirs and assigns.

<sup>40</sup> D Fox, ‘Purchase for Value without Notice’ in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 61.

The use lay outside any formal conception of property recognized at common law. The explanation for the ‘running’ of the use lay partly in the intention of the original feoffor to use to bind his heirs and assigns, and partly in the intention of each subsequent feoffee or grantee. The personal confidence was re-imposed with each new transaction. So far as default rules figured at all, they were only standard presumptions about the party’s intentions as to the running of the confidence, which necessarily confined them to transactions linked by privity.<sup>41</sup>

The extension of the use to successors in title, therefore, was achieved through a presumption that each successive feoffee or grantee who succeeded to the estate was a conscientious person who intended, as against his own heirs and assigns, to preserve the personal obligation to hold the land for the benefit of the *cestui que use*. The flip side, of course, was that each successor in title could seek to rebut this presumption by establishing that his predecessor in title did, in actual fact, intend that he should take freely of the use.<sup>42</sup> At least initially, evidence that would suffice to rebut the presumption may not have been limited to any definite criteria. As it happened, however, ‘the consideration for a transaction evolved as a key reason determining whether the use still bound the estate after the original feoffee had conveyed it to a stranger’.<sup>43</sup>

Fox demonstrates how the role of consideration in evidencing transactive intention developed out of the early sixteenth century rules that determined which party took the use of land upon its conveyance.<sup>44</sup> On the one hand, if the conveyance was for valuable consideration, then this was seen evidencing an intention that the use of the land was to pass from the feoffor to the feoffee along with the legal estate. The reason for this was that the intention to bargain away the land was regarded as inconsistent with any intention on the part of the feoffor to retain the use of the land.<sup>45</sup> On the other hand, if the conveyance was not for value, and if the conveyance itself was silent about the location of the use, then this was seen as evidencing an intention

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<sup>41</sup> Ibid 57.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid 57-59. See generally FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 75-78; AWB Simpson, *A History of the Land Law* (2nd edn, OUP 1986) 177-79.

<sup>45</sup> D Fox, ‘Purchase for Value without Notice’ in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 58-59.

that the conveyance was to the use of the feoffor and that, accordingly, the feoffee was to hold the legal estate for the feoffor. Fox shows how in the sixteenth century these presumptions were applied *mutatis mutandis* to the situation where a feoffee to use wrongfully conveyed the land to a third person. If the conveyance was for valuable consideration, then this was seen as establishing that the feoffee intended ‘the stranger to hold to his own use rather than for the original *cestui que use*’.<sup>46</sup> If, however, the conveyance was not for value, then the court would assign to the feoffee an innocent intention that the conveyance was to be made to the original use.<sup>47</sup> In this way, purchase for valuable consideration emerged as the sole means available to a successor in title of proving that the real transactional intention of his predecessor in title was that he, the successor, should take the land freely of the personal confidence that previously had been undertaken to the *cestui que use*. In other words, the presence of value proved that the predecessor in title, in actual fact, was fraudulent.

A purchase for valuable consideration, however, did not necessarily mean that the successor in title took freely of the original use. As Fox explains in his article, the rules on consideration coalesced with another rule which had developed separately. This rule, whose evolution can be traced as far back as the mid-fifteenth century,<sup>48</sup> was that a purchaser who took with notice of a use subject to which his predecessor in title had held the land was ‘*particeps criminis*’ in the fraudulent or unconscionable intention of the predecessor to defeat the use.<sup>49</sup> Such a purchaser was accordingly to be treated as having taken subject to the personal undertaking to the *cestui que use* which had bound the estate in the hands of the predecessor. As can be seen, this rule worked very differently from the rules on consideration: the rule did not purport to ascertain, and then to give effect to, the intention of the parties as regards the running of the use; instead, the rule purported to operate in spite of, and in opposition to, the fraudulent or unconscionable intention of the parties to defeat the use. In short, the rule was founded on the notion that it would have been unconscionable for the successor in title to benefit from the wrongdoing in which both he and his predecessor

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<sup>46</sup> Ibid 59. See also AWB Simpson, *A History of the Land Law* (2nd edn, OUP 1986) 180.

<sup>47</sup> D Fox, ‘Purchase for Value without Notice’ in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 61, referring to *Gervys v Cook* (2002) 119 Selden Society 108.

<sup>48</sup> AWB Simpson, *A History of the Land Law* (2nd edn, OUP 1986) 180; C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 5-010.

<sup>49</sup> D Fox, ‘Purchase for Value without Notice’ in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 62. See also AWB Simpson, *A History of the Land Law* (2nd edn, OUP 1986) 180.

in title were implicated. Maitland captures the basic principle with the pithy remark that, ‘If you buy with notice, then in conscience it is my land’.<sup>50</sup> The net effect of the rule was that even a purchaser for valuable consideration would take subject to the personal confidence that bound his predecessor in title provided that he was a purchaser with notice. The corollary, of course, was that a purchaser for valuable consideration *without* notice took freely of the original use. Such a purchaser was not *particeps criminis* in the wrongdoing of the feoffee to use; against such a purchaser, therefore, there was no justification for treating the conveyance as having re-imposed the earlier use of the land.<sup>51</sup>

From this account, it is clear that the theoretical basis on which the use was extended to successors in title corresponds with the conscience-based principle the existence of which was suggested above. All the rudiments of the principle were present. To begin with, there was the foundational premise that any intention on the part of the feoffee to use that his successor in title should take freely of the personal rights of the *cestui que use* was a fraudulent or unconscionable intention. Furthermore, this premise formed the rationale for two rules which were close parallels of the two strands of the conscience-based principle. The first was the *prima facie* presumption, which could be rebutted by a purchase for valuable consideration, that the feoffee to use was innocent and therefore intended that his successor in title should take subject to the rights of the *cestui que use*. The second was the rule that if the successor in title was a purchaser with notice of the rights of the *cestui que use*, then the court would consider that he was privy to the unconscionable intention of his predecessor in title to defraud the original feoffor and the *cestui que use*, and on this ground would treat the conveyance as having re-established the earlier use. Consequently, it is possible to conclude that the theoretical foundation on which courts of equity first began to enforce the historical use against successors in title corresponded with the conscience-based principle contended for here.

## *ii. The restrictive freehold covenant*

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<sup>50</sup> FW Maitland, *Equity: A Course of Lectures* (2nd edn, CUP 1936) 32.

<sup>51</sup> *Ibid* 114.

The extension of the use to successors in title may be the earliest example, but is by no means the only historical context in which the conscience-based principle played a key role. As already stated, the conscience-based principle was the theoretical basis on which the restrictive freehold covenant was initially held to be capable of binding a successor in title of the covenantor. This occurred in the mid-nineteenth century, some four hundred years after the Chancery first began to enforce the use against persons who were in privity of estate with the original feoffee to use.

In broad outline, a freehold covenant is an undertaking in a deed by which the owner or the purchaser of land promises that a particular form of activity will or will not be carried out on that land.<sup>52</sup> A covenant that a particular form of activity *will* be carried out on the land is called a ‘positive covenant’. Examples of positive covenants include a covenant to carry out repairs on the land and a covenant to supply water to neighbouring land. On the other hand, a covenant that a particular form of activity *will not* be carried out on the land is termed a ‘restrictive covenant’. Examples of restrictive covenants include a covenant not to erect buildings on the land and a covenant not to carry on a particular trade on the land. Unless a contrary intention is expressed, a freehold covenant is deemed to be made by the covenantor on behalf of himself and his successors in title.<sup>53</sup> The covenant is enforceable by the covenantee against the covenantor just like any other contract. The remedies that are available to the covenantee are damages at common law for breach of the covenant<sup>54</sup> and an injunction in equity to restrain breach<sup>55</sup> or to compel performance<sup>56</sup> of the covenant.

Until the mid-nineteenth century, a freehold covenant was considered to be a purely contractual arrangement, its benefits and burdens defined and confined by orthodox principles of contractual privity.<sup>57</sup> A necessary corollary was that a freehold covenant did not give the covenantee a remedy against a person who came into the land as a successor in title of the covenantor and subsequently proceeded to use the land in a manner that was inconsistent with the covenant.<sup>58</sup> The covenantee had a claim

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<sup>52</sup> K Gray and SF Gray, *Elements of Land Law* (5th edn, OUP 2009) para 3.3.1.

<sup>53</sup> Law of Property Act 1925, s 79.

<sup>54</sup> See *Jaggard v Sawyer* [1995] 1 WLR 269 (CA) 276D (Sir Thomas Bingham MR).

<sup>55</sup> See, eg, *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143. See also *Jaggard v Sawyer* [1995] 1 WLR 269 (CA) 276E (Sir Thomas Bingham MR).

<sup>56</sup> See, eg, *Achilli v Tovell* [1927] 2 Ch 243 (Ch) 248 (Astbury J). But see *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch) 810H-11C (Brightman J).

<sup>57</sup> K Gray and SF Gray, *Elements of Land Law* (5th edn, OUP 2009) para 3.4.7.

<sup>58</sup> See, eg, *Keppell v Bailey* (1834) 2 My & K 517, 39 ER 1042. See also *Austerberry v Corp of Oldham* (1885) 29 Ch D 750 (CA) 781-82 (Lindley LJ).

to damages against the covenantor, but he did not have any claim to damages against the successor nor, crucially, any equity to seek an injunction to restrain the successor from breaching the covenant. Thus freehold covenants were vulnerable to subsequent dealings with the land, a fact which greatly lessened their practical utility. Despite these problems, the common law continued, and to this day continues, to regard the burden of freehold covenants as incapable of ‘running with the land’.<sup>59</sup> At first, courts of equity followed the common law by refusing to grant an injunction against a successor in title of the covenantor.<sup>60</sup> This approach changed abruptly when, in the well-known case of *Tulk v Moxhay*,<sup>61</sup> a *restrictive* freehold covenant was held for the first time to be enforceable in equity against a purchaser of the land with notice of the covenant.

In *Tulk*, the plaintiff was the owner of an area of open ground in Leicester Square and of several houses that adjoined the square. The plaintiff sold the area of open ground to one Elms. The deed of conveyance contained a covenant by Elms that he and his heirs and assigns would ‘keep and maintain the said piece of ground ... in an open state, uncovered with any buildings’. The land then passed through several conveyances before eventually it was sold to defendant, who purchased with notice of the covenant. The defendant indicated that he intended to build on the land in contravention of the covenant and the plaintiff sought an injunction to restrain the defendant from doing so. An injunction was granted by Lord Langdale MR and upheld by Lord Cottenham LC on appeal.

As already stated, *Tulk* was the first case where a court of equity enforced a restrictive freehold covenant against a successor in title of the covenantor.<sup>62</sup> A close reading of that case reveals that this extension to a successor in title, as with the use four centuries earlier, was not initially achieved through the elevation of the restrictive covenant to the status of a right *in rem*. On the contrary, Lord Cottenham LC was careful to state that ‘the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased’.<sup>63</sup> These

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<sup>59</sup> *Rhone v Stephens* [1994] 2 AC 310 (HL) 321D-G (Lord Templeman); K Gray and SF Gray, *Elements of Land Law* (5th edn, OUP 2009) para 3.3.24.

<sup>60</sup> *Keppell v Bailey* (1834) 2 My & K 517, 39 ER 1042.

<sup>61</sup> *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143.

<sup>62</sup> Albeit ‘after some doubts and precursors’: C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 32-032.

<sup>63</sup> *Tulk v Moxhay* (1848) 2 Ph 774, 777-78; 41 ER 1143, 1144 (Lord Cottenham LC).

words are revealing, because if the Lord Chancellor had considered that the covenant created an equitable right *in rem*, then, *a fortiori*, the case would have been decided on the footing that the covenant ‘ran’ with the land. Clearly, the Lord Chancellor was not basing his decision on this line of reasoning. Instead, he appears to have been assuming as an initial premise that the rights created by the covenant were personal and did not give the plaintiff any equitable estate or interest in the land.

In actual fact, Lord Cottenham LC seems to have rested his decision on the conscience-based principle. This emerges from his remark that, ‘nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken’.<sup>64</sup> These words are indicative of the second strand of the conscience-based principle. This is hardly surprising: the defendant in *Tulk* was a purchaser for value with notice of the covenant, and the second branch of the principle, it will be recalled, holds that if a purchaser for value takes with notice of a personal claim that relates to the property, then a court of equity will *constructively* treat the transaction as having re-imposed the personal claim on the purchaser. The justification for this, as previously explained, is conscience: the successor in title, in purchasing with notice, is treated as being *particeps criminis* in the fraudulent or unconscionable intention of his predecessor in title to defeat the personal claim subject to which he held the property. Clearly, this kind of reasoning directed the Lord Chancellor, hence his observation that ‘nothing would be more inequitable’ than if the original purchaser were to have sold the land ‘in consideration of’ the next purchaser ‘being allowed to escape from’ the *personal* rights which the covenant had created.

Accordingly, the conscience-based principle appears to have been the original theoretical basis on which the restrictive freehold covenant was extended in equity to a successor in title of the covenantor. That extension, however, was achieved within a doctrinal setting which antecedently assumed the proposition that a restrictive covenant did not create an equitable interest or estate in the land. That proposition would not be regarded as good law today. After the decision in *Tulk*, the restrictive covenant gradually came to be recognised as generating an equitable right *in rem*. The first clear indication that the restrictive covenant was being reconceptualised in this

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<sup>64</sup> Ibid 778; 1144 (Lord Cottenham LC).

manner seems to have been in *London and South Western Railway Co v Gomm*.<sup>65</sup> There, Sir George Jessel MR considered *Tulk* and suggested, in direct contrast to the basis on which that case was actually decided, that ‘notice was required merely to avoid the effect of the legal estate, and did not create the right’ of the covenantee against the subsequent purchaser.<sup>66</sup> Any ambiguity about the conceptual form of the restrictive covenant was finally resolved in the case of *Re Nisbet and Potts’ Contract*.<sup>67</sup> There, it was held that a restrictive covenant was an equitable interest in the land and was capable, as a result, of binding a subsequent owner even if said owner did not derive title through the original covenantor, having come into the land by adverse possession.

The reclassification of the restrictive covenant as an equitable right *in rem* was probably the result of the way in which judges initially applied the rule in *Tulk*. To begin with, judges took a very expansive view of the rule. *Tulk* was regarded as having established a general principle that was not confined to any particular class of covenant. The mere fact of purchase with notice was considered to be sufficient to bind a successor in title to a freehold covenant which had been entered by his predecessor in title.<sup>68</sup> In the immediate aftermath of *Tulk*, therefore, a *positive* covenant was held to be enforceable in equity against a successor in title of the covenantee,<sup>69</sup> as was a covenant that did not confer any identifiable benefit on land that had been retained by the covenantee.<sup>70</sup> In one notorious example, it was held that even a simple contract in reference to the user of a chattel might be capable of binding a subsequent owner.<sup>71</sup> In short, it looked at one point as though any agreement in relation to property, real or personal, might be capable of binding a successor in title. These developments engendered concerns that the rule in *Tulk* was getting out of hand, so the courts began to adopt a more restrictive approach to the rule. The first step was

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<sup>65</sup> *London and South Western Railway Co v Gomm* (1882) 20 Ch D 562 (CA).

<sup>66</sup> *Ibid* 583 (Sir George Jessel MR).

<sup>67</sup> *Re Nisbet and Potts’ Contract* [1905] 1 Ch 391 (Ch), *affd* [1906] 1 Ch 386 (CA).

<sup>68</sup> K Gray and SF Gray, *Elements of Land Law* (5th edn, OUP 2009) para 3.4.16. See also *Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* (1996) 70 FCR 328, 339D-E (French J).

<sup>69</sup> See, eg, *Cooke v Chilcott* (1876) 3 Ch D 694.

<sup>70</sup> See, eg, *Catt v Tourle* (1869) LR 4 Ch App 654 (CA); *Luker v Dennis* (1877) 7 Ch D 227 (Ch).

<sup>71</sup> See, eg, *De Mattos v Gibson* (1858) 4 De G & J 276, 45 ER 108; *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108 (PC). See also *Swiss Bank Corp v Lloyds Bank Ltd* [1979] 1 Ch 548 (Ch) 569E-575H, especially 575B-E (Browne-Wilkinson J).

to exclude positive covenants from the operation of the rule;<sup>72</sup> the second was to limit the application of the rule to covenants which benefitted land that had been retained by the covenantee.<sup>73</sup> In this way, the modern rule emerged that a freehold covenant can run with the land in equity only where that covenant is restrictive in character and there is both a dominant tenement and a servient tenement.<sup>74</sup> The reclassification of the restrictive covenant as an equitable interest in the land is likely to have been just one stage in the wider process of bringing the rule in *Tulk* to heel. The effect of the reclassification was to transmute the rule from the field of contract to the arena of real property rights. The necessary result, in accordance with the principle of *numerus clausus*,<sup>75</sup> was to make it harder for contracting parties to use the rule as a means of creating novel forms of property. The elevation of the restrictive covenant to the status of an equitable interest, therefore, was consistent with what, at the time, was the dominant judicial policy towards the rule in *Tulk*.

The reclassification of the restrictive covenant as an equitable interest in land is not problematic for the present argument. It is clear that when Lord Cottenham LC decided *Tulk* he did not consider that the covenant in question created any equitable interest or estate in the land. Of course, if one examines the decision in *Tulk* in the light of modern understanding of restrictive covenants, then one might be tempted to say that the Lord Chancellor invented or discovered a novel category of equitable right *in rem*. Yet while such an approach might be retrospectively valid from a doctrinal point of view, from a historical perspective it would be anachronistic. As far as the Lord Chancellor was concerned, the rights of the covenantee were personal contractual rights that did not run with the land as an inherent characteristic, but which were to be treated as binding the subsequent purchaser on grounds of conscience. Accordingly, despite the subsequent reclassification of the restrictive covenant as an equitable interest in land, the fact remains that the theoretical basis on which the restrictive

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<sup>72</sup> *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403 (CA) 408 (Brett LJ), 409 (Cotton LJ), 410 (Lindley LJ); *London and South Western Railway Co v Gomm* (1882) 20 Ch D 562 (CA) 583 (Sir George Jessel MR), 586-87 (Sir James Hannen), 587-88 (Lindley LJ).

<sup>73</sup> *London CC v Allen* [1914] 3 KB 642 (CA) 654-55, 660 (Buckley LJ), 672-73 (Scrutton J). See also *London and South Western Railway Co v Gomm* (1882) 20 Ch D 562 (CA) 583 (Sir George Jessel MR).

<sup>74</sup> C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 32-036.

<sup>75</sup> See generally W Merrill and HE Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 *Yale Law Journal* 1, 9-24.

covenant was *initially* extended to a successor in title was the conscience-based principle.

### *iii. The deserted wife's equity*

The so called deserted wife's equity, already encountered in chapter three,<sup>76</sup> was a notorious if short-lived judicial creation.<sup>77</sup> It was said to arise when a husband, who was the sole owner of the home in which he and his wife lived together, left the home and deserted his wife, who for her part continued to live in the home. The equity existed for the wife's benefit; its function was to safeguard her continued occupation of the matrimonial home against both the husband and the husband's creditors and successors in title. An innovation of Denning LJ in the 1952 case of *Bendall v McWhirter*,<sup>78</sup> the equity was abruptly terminated thirteen years later by a unanimous House of Lords in *National Provincial Bank Ltd v Ainsworth*.<sup>79</sup> Despite the brevity of its existence, however, the deserted wife's equity is a vivid and comparatively recent example of how the conscience-based principle can be used to extend a personal claim in reference to property to a successor in title of the original owner.

Before the decision in *Bendall*, there were two principal ways in which the marital status protected a deserted wife's continued occupation of the matrimonial home.<sup>80</sup> The first was the old common law rule that as between husband and wife neither could have an action in tort against the other.<sup>81</sup> This rule prevented a deserting husband from bringing an action to recover possession of the matrimonial home from his wife.<sup>82</sup> The only legal means available to the husband of recovering possession was to make an application under s 17 of the Married Women's Property Act 1882,<sup>83</sup> which allowed 'any question between husband and wife as to the title to or possession

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<sup>76</sup> Ch 3, pt II, s 2, sub-s ii.

<sup>77</sup> See generally C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 34-021.

<sup>78</sup> *Bendall v McWhirter* [1952] 2 QB 466 (CA).

<sup>79</sup> *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL).

<sup>80</sup> See *Thompson v Earthy* [1951] 2 KB 596 (KB) 599 (Roxburgh J).

<sup>81</sup> This rule has since been abolished by the Law Reform (Husband and Wife) Act 1962, s 1(1). See generally WVH Rogers, *Winfield and Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010) para 24-19.

<sup>82</sup> See *Bramwell v Bramwell* [1942] 1 KB 370 (CA) 374 (Goddard LJ); *Bendall v McWhirter* [1952] 2 QB 466 (CA) 475 (Denning LJ).

<sup>83</sup> See *Bramwell v Bramwell* [1942] 1 KB 370 (CA) 374 (Goddard LJ).

of property' to be decided in a summary way.<sup>84</sup> This route, however, was generally less advantageous to the husband, for it was accepted that under s 17 the court had 'a discretion to be exercised in the interest of the parties to restrain or postpone the enforcement of legal rights'.<sup>85</sup> The second way in which the marital status protected a deserted wife was the husband's general duty to provide his wife with a suitable place to live.<sup>86</sup> The protection afforded by this duty was evidenced in *Lee v Lee*.<sup>87</sup> There, the Court of Appeal upheld an injunction which required a deserting husband to allow his wife and children to occupy the matrimonial home and prohibited the husband from selling or assigning any right, title or interest which he had in the home 'unless and until he shall first have provided reasonably suitable alternative accommodation ... for his wife and children'.<sup>88</sup>

There are three points to note about the rights of a deserted wife before the decision in *Bendall*. First, the bare fact that she had been deserted by her husband did not give the wife any additional legal or equitable right in the matrimonial home. Even before the desertion had taken place, the husband could not have treated his wife as a trespasser; equally he owed her a duty to provide her with a suitable place to live. These incidents were necessary to the marital status; they did not arise as a result of the husband's desertion. Accordingly, a deserted wife did not have any greater right to occupy the matrimonial home than a wife who had not been deserted. Second, while the wife had a right to be provided with a suitable home, her right did not automatically attach to any particular property.<sup>89</sup> This fact was demonstrated by the injunction which was upheld in *Lee*: that injunction did not give the wife an unqualified right to occupy any particular property, it merely secured her right against her husband to be provided with suitable accommodation. The third point is arguably a necessary corollary of the second. It is that the marital status did not confer on a deserted wife any legal or equitable interest in the matrimonial home which she could enforce against the husband's creditors and successors in title. This point was illustrated by the case of *Thompson v Earthy*.<sup>90</sup> There, a husband deserted his wife and then sold the

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<sup>84</sup> Married Women's Property Act 1882, s 17.

<sup>85</sup> *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1220G (Lord Hodson). See also *Stewart v Stewart* [1948] 1 KB 507 (CA).

<sup>86</sup> See *Old Gate Estates Ltd v Alexander* [1950] 1 KB 311 (CA) 319 (Denning LJ).

<sup>87</sup> *Lee v Lee* [1952] 2 QB 489 (CA).

<sup>88</sup> *Ibid* 490 (headnote).

<sup>89</sup> See *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1220C (Lord Hodson), 1257C (Lord Wilberforce).

<sup>90</sup> *Thompson v Earthy* [1951] 2 KB 596 (KB).

matrimonial home to a purchaser who then brought an action to recover possession from the wife. Roxburgh J held that since the wife had ‘no estate or interest, legal or equitable, in the land’ the purchaser was entitled to an order for possession.<sup>91</sup>

*Bendall* was the first time that the rights of a deserted wife were extended to a successor in title. In that case, a husband left the matrimonial home, of which he was the freehold owner, and deserted his wife. Subsequently, the husband was adjudicated bankrupt, causing the freehold estate in the home to become vested in his trustee in bankruptcy. The trustee then obtained an order for possession against the wife who, at all material times, had continued in occupation of the home. However, the wife successfully appealed against that order. The Court of Appeal held that the trustee’s right to recover possession of the home against the wife was no greater than that which had resided in the husband up until his bankruptcy. Accordingly, the trustee was not entitled to sue the wife as if she were a trespasser on the land, as this was something which the husband had not been entitled to do. In order to recover possession against the wife, it was necessary for the trustee to obtain an order of the court under, or in accordance with, s 17 of the Married Woman’s Property Act 1882.

The majority opinion came from Romer LJ, with whom Somervell LJ agreed. Romer LJ rested his decision solely on ‘the general rule ... that a trustee [in bankruptcy] takes no better title to property than the bankrupt had’.<sup>92</sup> Romer LJ held that owing to this rule the present trustee was ‘no more entitled than was the ... [husband] before his bankruptcy to revoke the wife’s licence on his own authority and to sue her for possession of the property’.<sup>93</sup> It was implicit in Romer LJ’s reasoning that the rights of a deserted wife bound her husband’s trustee in bankruptcy only by virtue of the trustee’s special position as the husband’s personal representative and that, by further implication, her rights ought not be construed as capable of binding a purchaser from the husband.

The minority view, which was advanced by Denning LJ, was far more circuitous and wide-ranging. As regards the final result, Denning LJ agreed with Romer LJ that the trustee took subject to the wife’s rights. Nevertheless, Denning LJ said that he felt it necessary ‘to go further and inquire what is the quality of the wife’s

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<sup>91</sup> *Ibid* 600 (Roxburgh J).

<sup>92</sup> *Bendall v McWhirter* [1952] 2 QB 466 (CA) 487 (Romer LJ).

<sup>93</sup> *Ibid*.

right that it should lead to this result'.<sup>94</sup> Denning LJ's judgment consisted of two main elements. First, he explained what he considered to be the general nature of a deserted wife's rights in reference to the matrimonial home. Second, and most interestingly for our purposes, he outlined what he regarded to be the theoretical basis on which these rights were to be extended to a trustee in bankruptcy.

As regards the first element of his judgment, Denning LJ expressed the view that a deserted wife had a positive right to stay in the home where she had lived with her husband. Echoing an observation which he had made *obiter* in an earlier case,<sup>95</sup> he asserted that the wife was a licensee of the husband 'with a special right under which her husband cannot turn her out, except by an order of the court'.<sup>96</sup> Clearly, Denning LJ understood this 'special right', or 'equity' as he would later call it,<sup>97</sup> to be binding on the husband *in personam*, for he described it alternately as 'purely personal' and 'a personal privilege with no legal interest in the land'.<sup>98</sup> According to Denning LJ, the special right or equity of a deserted wife arose upon her being deserted by her husband. This emerges from his observation that the equity flowed 'from the status of marriage, coupled with the fact of separation owing to the husband's misconduct'.<sup>99</sup> Furthermore, because the equity could not be revoked by the husband at will, it was, in Denning LJ's view, 'analogous to a contractual licence to occupy land ... so closely analogous that ... no valid distinction can be made between them'.<sup>100</sup>

Denning LJ depicted his account of a deserted wife's rights as a rationalisation of the existing law. In actual fact, his account was a significant departure from accepted doctrine. For one thing, Denning LJ considered that the so called 'special right' or 'equity' of a deserted wife to stay in the matrimonial home only vested in the wife if and when her husband deserted her. This was a departure from the existing law, for, as explained already, none of the cases which were decided before *Bendall* had given a deserted wife any higher right to remain in the matrimonial home than a wife who had not been deserted. For another thing, Denning LJ considered the equity of a deserted wife to attach specifically to the matrimonial home. This, too, was a departure from existing doctrine: before *Bendall*, a deserted wife did not have a right to remain

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<sup>94</sup> *Ibid* 478 (Denning LJ).

<sup>95</sup> *Errington v Errington* [1952] 1 KB 290 (CA) 298 (Denning LJ).

<sup>96</sup> *Bendall v McWhirter* [1952] 2 QB 466 (CA) 478 (Denning LJ).

<sup>97</sup> *Ibid* 484 (Denning LJ).

<sup>98</sup> *Ibid* 477 (Denning LJ).

<sup>99</sup> *Ibid*.

<sup>100</sup> *Ibid* 478 (Denning LJ).

in any particular property that belonged to her husband; her rights consisted in the fact that her husband could not sue her as a trespasser and that he owed her a general duty to provide her with a suitable place to live. Denning LJ's only concession to doctrinal orthodoxy was that, by classifying a deserted wife's equity as a personal right, he denied her any interest or estate in the matrimonial home. This may have been a nod to the earlier case of *Thompson v Earthy*. However, even this concession was rendered otiose by the second element of Denning LJ's judgment, where he considered the basis on which this new-fangled deserted wife's equity was to be extended to a trustee in bankruptcy.

Denning LJ had no hesitation extending the deserted wife's equity to the husband's trustee in bankruptcy. He had already maintained that a near perfect analogy existed between the deserted wife's equity and a contractual licence, and the Court of Appeal had recently decided in *Errington v Errington*<sup>101</sup> that a contractual licence bound the devisee of the licensor. This decision departed from the orthodox principle that a contractual licence is a personal transaction which is incapable of binding successors in title.<sup>102</sup> Nevertheless, the decision in *Errington* allowed Denning LJ to argue that since a contractual licence bound the devisee of the licensor, then, *a fortiori*, a contractual licence must also bind the licensor's trustee in bankruptcy.<sup>103</sup> It followed, in light of the analogy for which Denning LJ had contended, that the deserted wife's equity also bound the husband's trustee in bankruptcy—and in addition his devisee and, presumably, other successors in title.

Denning LJ might have left his decision there. However, he noted that the decision in *Errington* had been called into question on the basis that 'a contractual licence only gives rise to contractual obligations and not to any proprietary rights or interests, and that the burden of it does not therefore run with the land'.<sup>104</sup> Thus Denning LJ proceeded to defend *Errington* by explaining what he considered to be the theoretical basis on which a contractual licence was capable of binding the successors in title of the licensor. The principle which he enunciated was a direct importation of the conscience-based principle as espoused by Lord Cottenham LC in the earlier case

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<sup>101</sup> *Errington v Errington* [1952] 1 KB 290 (CA).

<sup>102</sup> See especially *King v David Allen and Sons, Billposting Ltd* [1916] 2 AC 54 (HL); *Clore v Theatrical Properties Ltd* (1936) 3 All ER 483 (CA).

<sup>103</sup> *Bendall v McWhirter* [1952] 2 QB 466 (CA) 478-79 (Denning LJ).

<sup>104</sup> *Ibid* 479 (Denning LJ).

of *Tulk*. *Tulk* has already been discussed at length. The reliance which Denning LJ placed on the reasoning in that case is apparent from the following passage:<sup>105</sup>

Every contractual licence imports a negative covenant that the licensor will not interfere with the use and occupation of the licensee in breach of the contract. This negative covenant is binding on the successors in title of the licensor in the same way as is a restrictive covenant. It does not run with the land so as to give a cause of action in damages for breach of contract against the successor; but it is binding in equity on the conscience of any successor who takes with notice of it. He cannot therefore eject the licensee in disregard of it. It is an equity within the words of Lord Cottenham LC in *Tulk v Moxhay*,<sup>106</sup> when he said: "If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the person from whom he purchased."

As explained already, the theoretical basis on which Lord Cottenham LC extended the restrictive covenant to a successor in title of the covenantor was the conscience-based principle which has been contended for here. It is clear from the above passage that Denning LJ considered that the same principle was behind the decision in *Errington* to extend a contractual licence to a successor in title of the licensor. Furthermore, it is clear that, given the near perfect analogy which he held to exist between a contractual licence and the deserted wife's equity, Denning LJ thought that the deserted wife's equity was to be extended to the husband's trustee in bankruptcy on the same footing. According to Denning LJ, therefore, although the equity which arose in favour of the wife was a purely personal right against her husband, this equity was nevertheless to be extended to the husband's successors in title in accordance with the conscience-based principle. Consequently, Denning LJ's decision in *Bendall* is a recent example of how the conscience-based principle can be used to extend a personal right in reference to property to a successor in title of the original owner.

Admittedly, Denning LJ's decision in *Bendall* was the minority view. According to the majority, as explained already, the trustee took subject to the wife's

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<sup>105</sup> Ibid 480-81 (Denning LJ).

<sup>106</sup> *Tulk v Moxhay* (1848) 2 Ph 774, 778; 41 ER 1143, 1144 (Lord Cottenham LC).

rights by virtue of his special position as the husband's personal representative. Thus a year later, in the case of *Bradley-Hole v Cusen*,<sup>107</sup> the Court of Appeal applied the reasoning of the majority and ignored that of Denning LJ.<sup>108</sup> Nevertheless, subsequent cases would follow Denning LJ's view by enforcing the 'equity' of a deserted wife against the husband's other successors in title, including a purchaser for value with notice of the equity.<sup>109</sup> The result was that twelve years after his decision in *Bendall*, shortly before the decision of the House of Lords in *National Provincial Bank*, Lord Denning, now the Master of the Rolls, was able to describe a deserted wife as having 'no legal estate or equitable interest in the land' but 'an equity which the court will enforce against any successor except a purchaser for value without notice'.<sup>110</sup>

In *National Provincial Bank*, the House of Lords terminated the deserted wife's equity. The facts of this case have already been outlined in chapter four.<sup>111</sup> To recapitulate, the case involved a husband who left the matrimonial home, of which he was the owner, and deserted his wife, who remained in occupation of the home. The husband then charged the home to a bank to secure his indebtedness to the bank. When the husband defaulted, the bank sought to enforce its charge and brought an action against the wife for possession of the home. The home was registered land, and the question arose whether a deserted wife had a right to stay in the matrimonial home which was capable of being an overriding interest of a person in actual occupation under s 70(1)(g) of the Land Registration Act 1925. The House of Lords accepted that the wife had, at all material times, been in actual occupation of the home; accordingly, if the above question was to be answered in the affirmative, then she would have a right to remain in the home which she could raise against the bank's claim for possession.

The House of Lords decided the case in the bank's favour. The court held that in order for a right to be capable of being an overriding interest under s 70, that right must 'have the quality of being capable of enduring through different ownerships of

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<sup>107</sup> *Bradley-Hole v Cusen* [1953] 1 QB 300 (CA).

<sup>108</sup> *Ibid* 306 (Jenkins LJ).

<sup>109</sup> See especially *Ferris v Weaven* [1952] 2 All ER 233 (QB); *Street v Denham* [1954] 1 WLR 624; *Jess B Woodcock & Sons Ltd v Hobbs* [1955] 1 WLR 152 (CA). Cf *Westminster Bank Ltd v Lee* [1956] 1 Ch 7 (Ch).

<sup>110</sup> *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 Ch 665 (CA) 686 (Lord Denning MR).

<sup>111</sup> Ch 4, pt III, s 1.

the land'.<sup>112</sup> The supposed equity of a deserted wife did have this quality, being capable of binding the husband's successors in title. However, the House of Lords held, unanimously, that no such equity in fact existed. The rights of a deserted wife were enforceable only against her husband; she had no equity that was capable of binding his successors in title, including his trustee in bankruptcy.<sup>113</sup> Thus the House of Lords returned the law to the state in which it had been before 1952. *Bendall* and the cases which had followed it were overruled.<sup>114</sup> The deserted wife's equity was no more.<sup>115</sup>

The deserted wife's equity was a short-lived judicial innovation. Nevertheless, it is yet another example of a personal claim in reference to property which was extended to the successors in title of the original owner in accordance with the conscience-based principle. Thus the deserted wife's equity can be added to the other examples of such rights which have already been considered, namely, the historical use and the restrictive freehold covenant. These examples are important to the present thesis. Collectively, they establish that the conscience-based principle contended for here is not an *ex post facto* rationalisation on the part of the present writer. On the contrary, they show that the conscience-based is a true doctrine of equity: the admitted basis of decision in a significant number of cases and hence capable of empirical proof.

### PART III: THE CONSCIENCE-BASED PRINCIPLE AND MERE EQUITIES

Thus the conscience-based principle is a confirmed part of the doctrinal landscape. The principle explains how a mere equity, despite its status as a right *in personam*,<sup>116</sup> can be enforced against third party volunteers and purchasers for value with notice.<sup>117</sup> A mere equity, therefore, is analogous to the historical use, the restrictive freehold

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<sup>112</sup> *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1226F-G (Lord Hodson), 1228E (Lord Cohen), quoting *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 Ch 665 (CA) 696 (Russell LJ).

<sup>113</sup> *Ibid* 1226D-E (Lord Hodson), 1233F-G, 1239A-B (Lord Upjohn), 1257C (Lord Wilberforce).

<sup>114</sup> With the exception of *Ferris v Weaven* [1952] 2 All ER 233 (QB), the court holding that the decision in that case could be supported by reference to the case's particular facts: *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1223B (Lord Hodson), 1240B (Lord Upjohn), 1257E (Lord Wilberforce).

<sup>115</sup> Note that a husband or wife now has a statutory right to occupy the matrimonial home: Family Law Act 1996, s 30-32. Also see above, ch 3, pt II, s 2, sub-s ii, fn 52.

<sup>116</sup> See above, ch 3, pt III, s 2.

<sup>117</sup> See above, ch 4, pt II, s 1.

covenant before it was reclassified as an equitable interest, and the erstwhile deserted wife's equity. Indeed, the deserted wife's equity was said to be 'a mere "equity," analogous to a right to set aside or rectify a conveyance for fraud or mistake'.<sup>118</sup> In consequence, it was held in *Westminster Bank Ltd v Lee*<sup>119</sup> that the deserted wife's equity could not be enforced against a purchaser of a merely equitable interest for value without notice.<sup>120</sup>

It seems that there are three main objections which might be raised against the theory that the conscience-based principle is the doctrinal basis for the enforceability of mere equities against third parties. The first objection concerns the House of Lords' decision in the *National Provincial Bank* case. The second objection concerns the burden of proof as regards notice in cases where a claimant asserts a mere equity against a purchaser for value from the original owner. The third objection holds that there is no practical reason to distinguish between a right *in rem* and a right *in personam* which nevertheless can bind a successor in title by means of the conscience-based principle. Each of these objections will now be dealt with in turn.

### **1. The effect of *National Provincial Bank***

It is arguable that in *National Provincial Bank* the House of Lords, in addition to terminating the deserted wife's equity, dismissed the theoretical basis on which that equity had been extended to successors in title, viz the conscience-based principle. Indeed, Lord Upjohn and Lord Wilberforce were critical of the view that a right which does not bind property *in rem* may nevertheless be capable of binding a person who takes with notice of that right. Thus Lord Upjohn remarked that, 'in principle ... to create a right over the land of another that right must in contemplation of law be such that it creates a legal or equitable estate or interest in that land and notice of something though relating to land which falls short of an estate or interest is insufficient'.<sup>121</sup> In similar vein, Lord Wilberforce rejected as fallacious the view that, 'because an

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<sup>118</sup> *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 Ch 9 (Ch) 14 (Cross J). See also *Westminster Bank Ltd v Lee* [1956] 1 Ch 7 (Ch) 20 (Upjohn J).

<sup>119</sup> *Westminster Bank Ltd v Lee* [1956] 1 Ch 7 (Ch) 20-21 (Upjohn J).

<sup>120</sup> See further above, ch 1, pt II, s 2, sub-s i.

<sup>121</sup> *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1237F (Lord Upjohn).

obligation binds a man's conscience, it therefore becomes binding on the consciences of those who take from him with notice of the obligation'.<sup>122</sup>

Lord Upjohn's and Lord Wilberforce's comments are clearly unfavourable to the conscience-based principle. Nevertheless, one would be placing too much weight on these comments if one were to suggest that their effect was to retrospectively invalidate that principle. Indeed, there are at least two reasons to oppose the drawing of strong conclusions from the apparent hostility to the conscience-based principle which Lord Upjohn and Lord Wilberforce exhibited in *National Provincial Bank*.

The first reason is that the Law Lords were presented with an incomplete picture of the conscience-based principle. They appear to have assumed, incorrectly, that the conscience-based principle, like the deserted wife's equity, was a comparatively recent innovation. The probable reason for this mistake was that Denning LJ based his decision in *Bendall* on the case of *Tulk* and the later cases which adopted its reasoning. As a result, the Law Lords appear to have assumed that the conscience-based principle was derived from *Tulk*. Indeed, neither the judgments nor the submissions of counsel showed any awareness that the conscience-based principle was, in actual fact, the theoretical basis on which the first kind of equitable proprietary right, the historical use, was originally extended in the mid-fifteenth century to successors in title. It seems, therefore, that the Law Lords who decided *National Provincial Bank*—Lord Upjohn and Lord Wilberforce included—were under the false impression that the conscience-based principle was an early Victorian innovation rather than a doctrine whose antecedents reach back at least to the late medieval period.

The second reason is that, in the deserted wife's equity, the Law Lords were faced with what arguably was a flagrant misuse of the conscience-based principle. The basis on which Denning LJ reached his decision in *Bendall* was difficult to justify. As explained already, before *Bendall*, the mere fact of her desertion did not give a wife any extended right in reference to the matrimonial home, nor did a wife, deserted or otherwise, have any necessary right to stay on any specific land which belonged to her husband. In *Bendall*, Denning LJ disregarded each of these limiting factors when he asserted that a wife, upon her desertion, gained a special right or equity to stay in the home where she had lived with her husband. To make matters worse, Denning LJ went on to assert that this completely novel category of right should be extended to the

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<sup>122</sup> Ibid 1253F (Lord Wilberforce).

husband's successors in title by means of the conscience-based principle. Clearly, this was sufficient to give the conscience-based principle a bad name when the House of Lords came to review the deserted wife's equity in *National Provincial Bank*.

In short, unfamiliarity with the conscience-based principle, combined with a natural desire to comprehensively dismantle the basis on which Denning LJ reached his decision in *Bendall*, were the real reasons that Lord Upjohn and Lord Wilberforce spoke critically of that principle. With respect, however, the mere fact that an established principle was misapplied by one, idiosyncratic judge is not a sufficient reason to call its continued existence into question, especially when that principle is one of considerable longevity. To put it bluntly, to take their Lordships too literally is to throw the baby out with the bathwater. At the end of the day, equity is a flexible, discretionary jurisdiction: almost all of its core principles have the potential to be misused. This does not mean that all equitable principles are bad, merely that the judge who applies them is expected to show proper restraint and due regard for precedent—qualities which Lord Denning arguably lacked. It does not follow, of course, that *National Provincial Bank* has no relevance to the conscience-based principle. *National Provincial Bank* was a clear signal that the courts ought to take a conservative rather than a liberal approach to the extension of new categories of right to successors in title.<sup>123</sup> However, to the extent that they might be taken to support the view that the conscience-based principle was no longer valid, Lord Upjohn and Lord Wilberforce went too far.

## 2. The burden of proof *re* notice

As explained in chapter one,<sup>124</sup> a mere equity—provided it does not relate to registered land—is liable to be defeated by any successor in title who successfully maintains the plea of *bona fide* purchase for value without notice. However, if a successor in title should wish to raise the plea against an earlier mere equity, then he bears the evidential *onus* of proving all the elements which comprise the plea, including purchase for value

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<sup>123</sup> See A Dunn, 'National Provincial Bank Ltd v Ainsworth (1965)' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012) 571-72.

<sup>124</sup> Ch 1, pt II, s 2, sub-s i.

and purchase without notice.<sup>125</sup> The corollary is that when a claimant brings an action to enforce a mere equity against the successor in title of the original defendant, there is no *onus* on the claimant of proving that the successor took as a volunteer or as a purchaser for value *with* notice; rather, it is for the successor to prove the contrary.<sup>126</sup>

This is arguably problematic for the hypothesis that the conscience-based principle is how a mere equity binds successors in title. In order to see why, it is necessary to reconsider the elements of that principle.

As explained above, there are two strands to the conscience-based principle. Each of these strands derives from the same normative foundation, namely, that any intention on the part of the original owner that his successor in title should take freely of the personal claim subject to which he, the original owner, held the property would be an unconscionable intention *vis-à-vis* the holder of the personal claim. Despite this shared normative basis, however, the two strands of the conscience-based principle are fundamentally distinct. The first strand of the principle appeals to *intention*. It generates a *prima facie* presumption that the original owner was innocent and therefore intended that his successor in title would take subject to the personal claim. This presumption of innocence can be rebutted by evidence that the successor in title took as a purchaser for value, in which case, the second strand of the principle comes into play. In marked contrast to the first strand, the second strand does not appeal to intention, but to *wrongdoing*. It holds that if the successor in title was a purchaser for value but nevertheless took with notice of the personal claim, then the court will view him as *particeps criminis* in the fraudulent or unconscionable intention of the original owner to defeat that claim.

The distinct philosophies which underpin the two strands of the conscience-based principle have implications for what one *initially* might expect to be the rules regarding the evidential *onus* in cases where the principle applies. As regards the first strand of the principle, it makes sense that the *onus* should be on the successor in title to prove that he took as a purchaser for value and thereby rebut the presumption of

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<sup>125</sup> See *A-G v Biphosphated Guano Co* (1879) 11 Ch D 327 (CA) 337 (Thesinger LJ); *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 (Ch) 402 (Farwell J); [1906] 1 Ch 386 (CA) 404 (Collins MR); C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 8-005.

<sup>126</sup> See especially *Mid-Glamorgan CC v Ogwr BC* (1994) 68 P&CR 1 (CA) 10 (Hoffmann LJ). See also *Thompson v Foy* [2009] EWHC 1076 (Ch), [2010] 1 P&CR 16 [135] (Lewison). But see D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 21.71-21.76.

innocence. Clearly, as the starting presumption is that the original owner was innocent, the *onus* should be on the party who seeks to challenge that presumption, viz the successor in title. As regards the second strand of the principle—which comes into play only if the successor in title establishes purchase for value—it would make *intuitive* sense for the *onus* to be on the holder of the personal claim to prove that the successor purchased with notice of the personal claim. This is because the existence of notice makes the successor in title a participant in the equitable fraud which the original owner has committed against the holder of the personal claim, and it is axiomatic that the burden of proving fraud ‘rests upon the person who claims to have been wronged’.<sup>127</sup>

The above analysis does not sit comfortably with the rules on pleading which have developed in reference to mere equities. In a case where the holder of a mere equity brings an action against the successor in title of the original owner, the analysis would predict that if the successor proved purchase for value, then the *onus* would shift to the holder of the mere equity to prove purchase with notice.<sup>128</sup> As explained already, however, mere equities do not follow this pattern: it is never necessary for the holder of a mere equity to assert that a successor in title of the original owner was a purchaser with notice; the *onus* is always on the successor to assert and then to prove that he is *both* a purchaser for value *and* a purchaser without notice. This indicates a departure from the axiom that, in cases where wrongdoing is in issue, the evidential *onus* is on the complainant rather than the potential wrongdoer.

It is by no means fatal to the present hypothesis, however, that the evidential *onus* as regards notice is on the successor in title rather than the holder of the mere equity. It is true that the burden of proving fraud is ordinarily on the complainant. Nevertheless, there are situations where equity presumptively infers that wrongdoing has occurred from indirect evidence and thereby shifts onto the defendant the *onus* of proving that no wrongdoing has, in actual fact, taken place. An example of this shifting of the evidential *onus* is the doctrine of so called presumed undue influence.<sup>129</sup> Undue influence is a species of equitable fraud.<sup>130</sup> In broad outline, it occurs where one party

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<sup>127</sup> *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 [13] (Lord Nicholls).

<sup>128</sup> *Contra Re Nisbet and Potts' Contract* [1905] 1 Ch 391 (Ch) 402 (Farwell J).

<sup>129</sup> See generally *Allcard v Skinner* (1887) 36 Ch D 145 (CA); *Barclays Bank plc v O'Brien* [1994] 1 AC 180 (HL) 189B-90B (Lord Browne-Wilkinson).

<sup>130</sup> See especially *Allcard v Skinner* (1887) 36 Ch D 145 (CA) 183 (Lindley LJ).

vests trust and confidence in another party and the other party proceeds to take unfair advantage of that relationship in order to procure from the first party a transaction.<sup>131</sup> Undue influence can be proved directly.<sup>132</sup> However, a presumption that undue influence had occurred will arise if, given the nature of the relationship that existed between the parties, the transaction cannot ‘be reasonably accounted for’ in reference to ‘ordinary motives on which ordinary men act’.<sup>133</sup> The evidential *onus* then shifts to the ascendant party to prove that, in actual fact, he did not take unfair advantage of his relationship with the weaker party.

It is proposed that a shift in the evidential *onus* is the reason that the holder of a mere equity does not have to assert that a successor in title of the original owner took with notice. According to this analysis, *purchase for value* is a double-edged sword in the hands of the successor in title. As explained already, it is necessary for the successor in title to prove that he purchased for value because this is the only way in which he can rebut the presumption that the original owner was innocent. In rebutting this presumption, however, the successor in title necessarily proves that he took under a transaction which constituted a species of fraud against the holder of the mere equity. This fact—while not direct proof—is indirect evidence that the successor in title was privy to an unconscionable intention to defeat the mere equity. Consequently, purchase for value, in addition to proving that the original owner is guilty of wrongdoing *vis-à-vis* the holder of the mere equity, is apt to raise a presumption that the successor in title was *particeps criminis* in that wrongdoing. It is then necessary for the successor to rebut this second presumption by proving that, in addition to being a purchaser for value, he purchased without notice of the mere equity and so could not have been privy to an unconscionable intention to defeat it.

The cases on presumed undue influence show that the shifting of the evidential *onus* onto the potential wrongdoer is a purely ‘forensic tool’<sup>134</sup> whose justification lies in public policy.<sup>135</sup> It might be asked, therefore, what is the policy behind the evidential presumption that a purchaser for value was privy to the unconscionable intention of his predecessor in title to defeat a mere equity. It seems that there are two main

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<sup>131</sup> See *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 [8] (Lord Nicholls).

<sup>132</sup> See, eg, *Norton v Relly* (1764) 2 Eden 286, 28 ER 908.

<sup>133</sup> *Allcard v Skinner* (1887) 36 Ch D 145 (CA) 185 (Lindley LJ).

<sup>134</sup> *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 [16] (Lord Nicholls).

<sup>135</sup> *Allcard v Skinner* (1887) 36 Ch D 145 (CA) 171 (Cotton LJ).

possibilities. The first is that the court is concerned to harmonise the rules of pleading which apply to mere equities with those that apply to equitable interests. As a general rule, it is not necessary for the owner of an equitable interest to assert that a purchaser for value took with notice of that interest; the *onus* is on the purchaser of proving that he purchased without notice.<sup>136</sup> The reason for this is that, as explained in chapter three,<sup>137</sup> an equitable interest includes rights *in rem*: it binds the entire world, so naturally the evidential *onus* is on the person who alleges that he took freely of it. A mere equity, on the other hand, is not a right *in rem*. Nevertheless, it may be the case that the courts have taken the view that the burden of proof as regards notice should be the same for mere equities as it is for equitable interests. The second possibility is simply that equity will not allow the successor in title to take advantage of the fact that the original owner has committed a species of fraud against the holder of the mere equity unless the successor can first prove that he was not involved in that fraud.

### **3. A distinction without a difference?**

The third objection is that the distinction between a true equitable right *in rem*, on the one hand, and a right *in personam* which nevertheless binds successors in title, on the other, is a distinction without a difference. When all is said and done, both rights serve the same proprietary function: they operate ‘to exclude any one of a very large and indefinite class of people from access to some enjoyment of the asset, whether or not those people have in fact consented to such exclusion’.<sup>138</sup> Arguably, it is of purely theoretical significance that some proprietary rights can bind a successor in title because they are rights against the entire world, whereas other proprietary rights can bind a successor in title because of the conscience-based principle. Once it has been judicially determined that a particular right is proprietary, the doctrinal question of *how* that right is proprietary, it might be argued, has little or no relevance to the resolution of concrete legal problems. For all practical purposes, all rights which can

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<sup>136</sup> *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 (Ch) 402 (Farwell J).

<sup>137</sup> Ch 3, pt III, s 2.

<sup>138</sup> RC Nolan, ‘Equitable Property’ (2006) 122 LQR 232, 235. See also K Gray, ‘Property in Thin Air’ (1991) 50 CLJ 252, 294.

bind successors in title in equity, including mere equities, may as well be characterised as equitable rights *in rem*.

This objection is misplaced, however. It may indeed be the case that the distinction between a true equitable right *in rem*, on the one hand, and a right *in personam* which nevertheless can bind successors in title *via* the conscience-based principle, on the other hand, is largely theoretical in nature. The distinction, however, can still have important practical consequences. Two such consequences will now be identified.

#### *i. The privity limitation*

The first concerns cases where the right in question relates to property which is acquired by a subsequent owner who does not derive his interest or estate through the original owner. An example of such a case is where the right relates to land over which a squatter subsequently acquires a paramount legal estate through adverse possession.<sup>139</sup>

In this type of scenario, it is arguably a question of decisive importance whether the prior right is an equitable right *in rem* or a right *in personam* which nevertheless can bind successors in title through the conscience-based principle. On the one hand, if the prior right is an equitable right *in rem*, then it necessarily binds the subsequent owner.<sup>140</sup> This is because the right is enforceable against the entire world, so, *a fortiori*, it is necessarily enforceable against the subsequent owner.<sup>141</sup>

On the other hand, if the prior right is a right *in personam* which nevertheless can bind successors in title *via* the conscience-based principle, then that right, in all probability, does not bind the subsequent owner. In order to see why this is the case, think back to the historical use. The use, it will be recalled, bound the original feoffee to use and was capable of binding his successors in title, but nevertheless was incapable of binding a subsequent owner who did not derive his title through the

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<sup>139</sup> See, eg, *Re Jolly* [1900] 2 Ch 616 (CA): a party in adverse possession acquired an absolute title to land by virtue of the Real Property Limitation Act 1874, s 1.

<sup>140</sup> *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 (Ch), affd [1906] 1 Ch 386 (CA).

<sup>141</sup> Clearly, there is no question of the subsequent owner raising the plea of purchase for value without notice because he is not a purchaser, having taken by operation of law rather than by act of the parties.

original feoffee.<sup>142</sup> In other words, the use was subject to a ‘privity limitation’:<sup>143</sup> its enforceability was limited to persons who were in privity of estate with the original feoffee to use. This privity limitation was a direct consequence of how the Chancery enforced the use against successors in title. As already explained, the reason that the use was capable of binding successors in title was that, upon each successive devolution of the land, the Chancery was willing to presume, or otherwise to act as if it were the case, that the predecessor in title intended that his successor in title would take subject to the use. Clearly, this approach did not translate to the case where a person—for example, a successful squatter—acquired an original interest or estate which did not derive through any person who was bound to the use. This is because, in this situation, the intention of the previous owner—presumed or otherwise—could not have played any role in defining the nature of the interest or estate that was acquired by the subsequent owner. As a result, the subsequent owner took freely of the original use.

The privity limitation was a necessary consequence of the doctrinal basis on which the use was extended to successors in title. As explained already, the basis on which this extension was achieved corresponded to the conscience-based principle. It follows that the privity limitation should, in principle, apply to other rights *in personam* which rely on the conscience-based principle to bind successors in title. This includes mere equities, although the point does not seem to have arisen in any decided case so far.

#### *ii. The plea of purchase for value without notice*

The second practical consequence of the distinction concerns the circumstances in which a purchaser of an equitable, as distinguished from a legal, interest can raise purchase for value without notice in the form of a plea. The general nature of a plea, and the circumstance in which purchase for value without notice can be raised in the

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<sup>142</sup> D Fox, ‘Purchase for Value without Notice’ in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 56. See also AWB Simpson, *A History of the Land Law* (2nd edn, OUP 1986) 181.

<sup>143</sup> D Fox, ‘Purchase for Value without Notice’ in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 56.

form of a plea, have already been touched on in chapter four.<sup>144</sup> To reiterate, a plea is an equitable defence of a particular kind. In essence, a plea does not deny the truth of the facts which the claimant alleges in support of his action, but alleges some additional fact which, if proved, necessarily operates to bar the action.<sup>145</sup> The effect of a plea, therefore, is that it ‘reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit, or to the part to which the plea applies’.<sup>146</sup> A plea is ordinarily contrasted with the form of equitable defence known as a demurrer. A demurrer is like a plea in that it does not deny the truth of the facts which the claimant alleges.<sup>147</sup> A demurrer differs from a plea, however, in that it does not allege any additional fact, but asserts that the facts which the claimant alleges are insufficient to support his action.<sup>148</sup>

In modern times, the plea of purchase for value without notice is generally raised in cases where the holder of an earlier equitable proprietary right over certain property asserts that right against a subsequent purchaser of an interest in the same property.<sup>149</sup> In this situation, whether or not the purchaser can raise the plea depends on the nature of the subsequent interest and, to an extent, on the nature of the earlier equitable proprietary right. If the subsequent interest is legal—this is, of a kind that can be recognised and enforced at common law—then the purchaser can raise the plea of purchase for value without notice.<sup>150</sup> If, on the other hand, the subsequent interest is purely equitable, then the picture is less clear. The general rule is that the purchaser cannot raise the plea in this situation.<sup>151</sup> As explained in previous chapters,<sup>152</sup> however, the cases acknowledge at least one exception to this rule, namely, that if the earlier equitable right constitutes a *mere equity*—for instance, an equitable right to recover property which has passed under a transaction that is liable to be rescinded or rectified—then even a purchaser of a purely equitable interest can raise the plea of purchase for value without notice.<sup>153</sup>

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<sup>144</sup> Ch 4, pt III, s 3, sub-s i.

<sup>145</sup> J Mitford, ‘A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill’ in S Tyler (ed), *Mitford’s and Tyler’s Pleadings and Practice in Equity* (Baker, Voorhis & Co 1876) 311-12.

<sup>146</sup> *Ibid* 312.

<sup>147</sup> *Ibid* 204.

<sup>148</sup> *Ibid*.

<sup>149</sup> Cf *Bassett v Nosworthy* (1673) Rep Temp Finch 102, 23 ER 55.

<sup>150</sup> See, eg, *Pilcher v Rawlins* (1872) LR 7 Ch App 259 (CA).

<sup>151</sup> *Phillips v Phillips* (1861) 4 De GF&J 208, 45 ER 1164.

<sup>152</sup> See above, ch 1, pt II, s 2, sub-s i; ch 4, pt III, s 3.

<sup>153</sup> See the authorities cited above, ch 1, pt II, s 2, sub-s i, fn 36.

It is proposed that the distinction outlined above is the real factor which determines whether a subsequent purchaser of a purely *equitable* interest can raise the plea of purchase for value without notice against an earlier *equitable* proprietary right. On the one hand, if the earlier right takes the form of a true equitable right *in rem*, then in principle the purchaser should not be able to raise the plea. On the other hand, if the earlier right takes the form of a right *in personam* which relies on the conscience-based principle to bind a successor in title, then the purchaser should be able to raise the plea.

In order to explain why this is the case, the situation where the earlier equitable right takes the form of an equitable right *in rem* will be considered first. In this situation, the point in issue clearly is not whether the earlier right has been imposed afresh against the subsequent purchaser. This is because the earlier right belongs to a class which operates against persons generally, so *a fortiori* its enforceability against subsequent purchasers is not contingent on it being imposed afresh with each successive transaction. This does not mean, of course, that the prior right is *necessarily* enforceable against a subsequent purchaser of an equitable interest. On the contrary, as noted in chapter four,<sup>154</sup> it is well-known that equitable rights are subject to the inherent infirmity that they can be postponed in priority to a competing equitable interest which arose subsequently.<sup>155</sup> It follows that if the earlier equitable right takes the form of a right *in rem*, then the point in issue is one of equitable priorities: that is to say, the court has to decide whether the earlier equitable right is postponed to the subsequent equitable interest, or *vice versa*.

It is highly significant that the question which faces the court in this situation is one of priorities. The basic principles of equitable priorities have already been considered.<sup>156</sup> In brief outline, where there are competing equitable interests in the same property, the general rule is that priority goes to the interest with the better equity, that is to say, with the greater merit in the contemplation of a court of equity.<sup>157</sup> There is no hard and fast rule that determines which interest has the greater merit. Rather, it is necessary for the court to examine the case contextually, taking into account ‘the nature and condition of ... [the] respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party

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<sup>154</sup> Ch 4, pt III, s 3, sub-s ii.

<sup>155</sup> See, eg, *Rice v Rice* (1853) 2 Drewry 73, 61 ER 646; *Abigail v Lapin* [1934] AC 491 (PC); *Taylor v London and County Banking Co* [1901] 2 Ch 231 (CA).

<sup>156</sup> Ch 4, pt III, s 3, sub-s ii.

<sup>157</sup> *Rice v Rice* (1853) 2 Drewry 73, 78; 61 ER 646, 648 (Sir Richard Kindersley V-C).

with respect thereto'.<sup>158</sup> The temporal order in which the competing equitable interests came into existence is relevant if and only if they have equal merit in every other respect.<sup>159</sup> In this situation, temporal order is decisive, with priority going to whichever interest was the first to arise in point of time.<sup>160</sup>

It is significant that the point in issue is one of priorities because the wide range of factors which the court takes into account to determine priority means that the purchaser cannot raise purchase for value without notice in the form of a plea. It is true that when the court evaluates the relative merits, purchase for value and purchase without notice weigh in favour of the purchaser.<sup>161</sup> However, these factors do not, either collectively or individually, exhaust the range of factors which the court is bound to take into account in its evaluation. Accordingly, although the purchaser can allege purchase for value without notice as a part of his general defence, this is not an allegation which, if proved, will operate as a necessary bar to the action, which, as explained above, is the essence of a plea. On the contrary, there are cases where the court concluded that a prior equitable interest took priority over a subsequent equitable interest *despite* the fact that the subsequent interest was purchased for value and without notice.<sup>162</sup> Consequently, the assertion that was made above is correct: if the earlier right takes the form of an equitable right *in rem*, then in principle the purchaser of the subsequent equitable interest should not be able to maintain a plea of purchase for value without notice.

On the other hand, if the earlier right takes the form of a right *in personam* which relies on the conscience-based principle to bind a successor in title, then the situation is arguably a very different one. In this scenario, the question of whether the earlier right takes priority over the subsequent equitable interest is logically posterior to the question of whether the earlier right has been imposed afresh on the purchaser *as per* the conscience-based principle. In contrast to the situation where the earlier right is a right *in rem*—and therefore inherently capable of enforcement against the purchaser—the earlier right in this case, being a right *in personam*, is inherently *incapable* of enforcement against the purchaser *unless* the conscience-based principle

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<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> See, eg, *Phillips v Phillips* (1861) 4 De GF&J 208, 45 ER 1164; *Cave v Cave* (1880) 15 Ch D 639 (Ch).

<sup>161</sup> See *Taylor v London and County Banking Co* [1901] 2 Ch 231 (CA) 263 (Stirling LJ); D O'Sullivan, 'The Rule in *Phillips v Phillips*' (2002) 118 LQR 296, 301.

<sup>162</sup> See, eg, *Cave v Cave* (1880) 15 Ch D 639 (Ch).

operated to preserve the earlier right against him. It follows that if the case falls outside the scope of the conscience-based principle, then the earlier right is, in essence, a non-right so far as the purchaser is concerned. In this situation, it is clearly not possible that the earlier right could have taken priority over the purchaser's subsequent equitable interest. Accordingly, it is not necessary for the court to evaluate the relative merits; the case is decided on the simple footing that the earlier right, by its very nature as a right *in personam*, is incapable of enforcement against the purchaser.

Since the earlier right, if it is a right *in personam*, has to be imposed afresh *as per* the conscience-based principle before any question of priorities can arise, it follows that a subsequent purchase of an equitable interest for value without notice will have a more conclusive effect than would be the case if the earlier right were an equitable right *in rem*. This is because purchase for value and purchase without notice collectively prove that the case falls within neither of the two strands of the conscience-based principle. If the subsequent purchaser was a purchaser for value, then the first strand of the conscience-based principle cannot apply, because, as explained already, the provision of valuable consideration disproves the *prima facie* presumption that the predecessor in title was innocent. Similarly, if the purchaser was a purchaser without notice of the earlier right, then the second strand of the conscience-based principle cannot operate, because in this situation there are no grounds for holding that the purchaser was privy to an unconscionable intention to defeat the earlier right. It follows that if the purchaser maintains and proves that he purchased his subsequent equitable interest for value and without notice of the earlier right, he thereby proves the earlier right cannot have been imposed afresh against him in accordance with the conscience-based principle; he proves, in other words, that the earlier right is a non-right so far as he is concerned.

It follows that if the earlier right is a right *in personam*, then 'purchase for value' and 'purchase without notice' collectively operate as a necessary bar to the claimant's cause of action. This must be the case, for if the earlier right is a non-right so far as the purchaser is concerned, then obviously the claimant cannot assert that right in any action against the purchaser. In marked contrast to the situation where the earlier right is an equitable right *in rem*, therefore, it is competent for the purchaser of a subsequent equitable interest to raise purchase for value without notice in the form of a plea. Consequently, as suggested above, if the earlier right takes the form of a right *in personam* which relies on the conscience-based principle to bind a successor

in title, then in principle the purchaser should be able to set up a plea of purchase for value without notice.

#### PART IV: EXPLANATORY ADVANTAGES OF THE CONSCIENCE-BASED ANALYSIS

Hence the proposed analysis that the conscience-based principle is the doctrinal basis for the enforceability of mere equities against third parties is capable of withstanding critical scrutiny. However, this analysis also has considerable explanatory leverage. The chapter will now highlight three areas in which this explanatory leverage is most apparent.

First, and most obviously, the proposed analysis explains how, in principle, a mere equity can be enforceable against third parties, despite the fact that a mere equity, being a bare right of action, is a right *in personam*. In short, when a mere equity first comes into existence, it is a personal claim *vis-à-vis* the claimant and the original defendant, entitling the claimant to pursue a specific equitable remedy against the defendant. *Ceteris paribus*, the mere equity would be unenforceable against any third party whose rights would be adversely affected by the grant of that remedy. However, if the third party derives his adverse rights through the original defendant, then the court, in accordance with the conscience-based principle, may nevertheless treat the transaction between the third party and the original defendant as having imposed the mere equity afresh against the third party. In this situation, the mere equity is enforceable against the third party, but nevertheless continues in its character as a pure right *in personam*, binding on a small and definite class of people—all that has happened is that this small and definite class has been extended on grounds of conscience to include the third party.

Second, the proposed analysis is consistent with the cases outlined in chapter four<sup>163</sup> which demonstrate the enforceability of mere equities against third parties.<sup>164</sup>

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<sup>163</sup> Ch 4, pt II, s 1.

<sup>164</sup> *Addis v Campbell* (1841) 4 Beav 401, 49 ER 394; *Gresley v Mousley* (1859) 4 De G&J 78, 45 ER 31; *Craddock Brothers v Hunt* [1923] 2 Ch 136 (CA); *Inwards v Baker* [1965] 2 QB 29 (CA); *ER Ives Investment Ltd v High* [1967] 2 QB 379 (CA); *KPMG LLP v Network Rail Infrastructure Ltd* [2006] EWHC 67 (Ch), [2006] 2 P&CR 7. See also, eg, *Lansdown v Lansdown* (1729) 2 Jac & W 205, 37 ER 605; (1730) Mosely 364, 25 ER 441; *Small v Attwood* (1832) You 407, 159 ER 1051, revd on other grounds *Attwood v Small* (1838) 6 Clark & Finnelly 232, 7 ER 684; *Voyce v Voyce* (1991) 62 P&CR 290 (CA).

In each of these cases, the third party derived his adverse interest through the original defendant, either by operation of law or under a subsequent transaction. Furthermore, the third party acquired his interest either as a volunteer or as a purchaser for value with notice of the facts generating the mere equity. Hence all the requirements for the application of the conscience-based principle were present: the third party was in privity of estate with the original defendant, and since he took either as a volunteer or with notice, the case was capable of falling within the first or the second strand of the conscience-based principle respectively.

Third, the proposed analysis accounts for the main consequence of the dividing line between equitable interests and mere equities: namely the rule (introduced in chapter one<sup>165</sup>) that it is not allowable for a purchaser of an equitable interest to invoke the plea of purchase for value without notice against an earlier equitable interest, but that it is allowable for him to invoke the plea against an earlier mere equity.<sup>166</sup> As explained above, in a contest between an earlier equitable claim and a subsequent equitable interest, if the earlier claim is an equitable right *in rem*, binding on persons generally, then, in principle, the owner of the subsequent interest should not be able to raise the plea of purchase for value without notice. This would explain why a purchaser of an equitable interest is unable to raise the plea against an earlier equitable interest, for, as explained in chapter three,<sup>167</sup> an equitable interest is a combination of juridical claims which includes rights *in rem* over the asset which is the subject of the interest. On the other hand, if the earlier claim is a right *in personam* that nevertheless is capable of binding successors in title *as per* the conscience-based principle, then, in principle, the owner of the subsequent interest should be able to raise the plea. Accordingly, if the proposed analysis is accepted, then the different consequences for priorities which attach to mere equities as compared with equitable interests can be rationalised as the corollary to the fact that the doctrinal basis for the enforceability of mere equities against third parties is the conscience-based principle.

Hence the analysis that the conscience-based principle is the doctrinal basis for the enforceability of mere equities against third parties, in addition to withstanding

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<sup>165</sup> Ch 1, pt II, s 2, sub-s i.

<sup>166</sup> *Cave v Cave* (1880) 15 Ch D 639 (Ch) 646-47 (Fry J). See also the other authorities cited above, ch 1, pt II, s 2, sub-s i, fn 36.

<sup>167</sup> Ch 3, pt III, s 2.

critical scrutiny, has considerable explanatory force. For these reasons, it is concluded that this analysis is probably correct.

#### PART V: CONCLUSION

Both chapter four and the present chapter have been investigating the doctrinal basis for the enforceability of mere equities against third parties. In chapter four, the suggestion that the third party effects of mere equities are based on orthodox conceptions of property was considered and ultimately rejected. In the present chapter, the aim has been to recommend an alternative analysis which builds on the general idea that the third party effects of mere equities are founded on equitable notions of unconscionability.

In order to achieve this aim, the chapter began by arguing for the existence of a conscience-based principle, according to which a right *in personam* may be imposed afresh against a successor in title of the party originally bound by that right. This argument was supported by appealing to the historical examples of the former use, the restrictive freehold covenant and the erstwhile deserted wife's equity. It was shown that the theoretical basis on which these claims were (at least initially) extended to third parties was the conscience-based principle.

The chapter then argued in favour of the analysis that the conscience-based principle is the doctrinal basis for the enforceability of mere equities against third parties. The main objections to this analysis were dealt with. It was demonstrated that neither the House of Lords' decision in *National Provincial Bank* nor the burden of proof as regards notice presents a convincing ground for objection to the proposed analysis. Furthermore, it was shown that practical consequences attach to the distinction between an equitable right *in rem* and a right *in personam* which is capable of binding third parties in accordance with the conscience-based principle. Two such consequences were identified: first, that rights *in rem* are capable of binding all successive owners, while rights *in personam* which bind third parties in accordance with the conscience-based principle should be subject to a privity limitation; second, that while a purchaser of an equitable interest should not be allowed to raise the plea of purchase for value without notice against an earlier equitable right *in rem*, he ought

to be allowed to raise the plea against an earlier right *in personam* which depends on the conscience based principle to bind third parties.

Finally, the chapter argued that its proposed analysis has significant explanatory leverage, and that this is most apparent in three areas. First, it was shown that this analysis explains how, in principle, mere equities can be enforced against third parties despite the fact that these claims are pure rights *in personam*. Second, it was shown that the analysis is consistent with the cases, outlined in chapter four,<sup>168</sup> which demonstrate the enforceability of mere equities against third parties. Third, it was shown that the proposed analysis accounts for why mere equities are treated differently from equitable interests as regards the plea of *bona fide* purchase for value without notice (as discussed in chapter one<sup>169</sup>).

In conclusion, it seems from the available evidence that the doctrinal basis for the enforceability of mere equities against third parties is the conscience-based principle. This conclusion represents a *partial* answer to the third question which this thesis asks, namely, ‘What is the underlying doctrinal basis for the proprietary features of mere equities?’ However, the enforceability of mere equities against third parties is only one of the proprietary features which are associated with this category of claim: in addition to being enforceable against third parties, mere equities are said to be capable of being assigned or devised in favour of a third party (as noted in chapter one<sup>170</sup>). Thus before a full answer can be given to the above question, it will be necessary first to consider the doctrinal basis for the assignability of mere equities to third parties. The assignment of mere equities will be examined in the next chapter.

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<sup>168</sup> Ch 4, pt II, s 1.

<sup>169</sup> Ch 1, pt II, s 2, sub-s i.

<sup>170</sup> Ch 1, pt II, s 1.

# Chapter 6

## The Assignability of Mere Equities to Third Parties

### PART I: INTRODUCTION

This chapter concludes the investigation, which began in chapter four, into the doctrinal basis for the proprietary features of mere equities. Whereas chapters four and five considered the enforceability of mere equities against third parties, the present chapter will examine the doctrinal basis for the assignability of mere equities in favour of third parties. As explained in chapter two,<sup>1</sup> the assignment of mere equities is an area which, at first glance, does not appear to give rise to any significant doctrinal or conceptual difficulty. After all, courts of equity have long accepted that even purely personal claims, such as contractual claims, may be capable of assignment.<sup>2</sup> Nevertheless, if the case law on the assignment of mere equities is examined closely, what appear to be substantial doctrinal inconsistencies are revealed. It is important that these apparent inconsistencies are addressed if the doctrinal basis for the assignment of mere equities is to be properly understood.

Part two will outline the core principles which govern the assignment of mere equities in favour of third parties. Part three will then examine a group of well established cases<sup>3</sup> which seem to permit a mere equity to be assigned in circumstances where, according to the core principles, such an assignment should not be allowed. Parts four, five and six will then consider three different ways in which this group of cases can be explained and will evaluate which of these approaches is the most plausible.

### PART II: THE CORE PRINCIPLES

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<sup>1</sup> Ch 2, pt II, s 3.

<sup>2</sup> See generally SJ Bailey, 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1931) 47 LQR 516; (1932) 48 LQR 248; (1932) 48 LQR 547.

<sup>3</sup> *Gresley v Mousley* (1859) 4 De G&J 78, 45 ER 31; *Dickinson v Burrell* (1866) LR 1 Eq 337; *Melbourne Banking Corp Ltd v Brougham* (1882) 7 App Cas 307 (PC).

As explained above, this part will outline the core principles which govern the assignment of mere equities in favour of third parties. In order to avoid confusion, it is necessary to be clear that the assignability of mere equities is the exception rather than the rule. As a *general* rule, a mere equity is not capable of assignment, but is a claim which can properly be described as being personal to the person in whose favour it first arises.<sup>4</sup> The general rule against the assignment of mere equities is tied in with the more wide-ranging principles which govern the assignment of rights of action. In this regard, it continues to be a fundamental principle of English law that a bare right to litigate cannot be assigned because such an assignment savours of maintenance or champerty.<sup>5</sup> The normative justification for this principle is grounded in the perceived public interest in discouraging so called ‘trafficking in litigation’:<sup>6</sup> a practice which would be encouraged if the law were to facilitate the assignment of bare rights of action. This general prohibition on the assignment of bare rights of action has been held to apply in a number of cases:<sup>7</sup> for example in *Hill v Boyle*<sup>8</sup> it was held that a simple right to sue a trustee for breach of trust could not be assigned by the beneficiaries to a third party. Likewise, the same general prohibition has been held to apply in cases involving an alleged assignment of a mere equity.<sup>9</sup> This stands to reason because, as was demonstrated in chapter three,<sup>10</sup> one of the defining characteristics of mere equities is that they are equitable rights of action, being simple claims to pursue a specific equitable remedy.

The general rule that a mere equity is not capable of being assigned was established in *Prosser v Edmonds*.<sup>11</sup> This case has already been considered briefly in chapters three and four.<sup>12</sup> In *Prosser*, one Robert Todd, the assignor, made two successive assignments to different assignees of his interest under the trusts of his father’s will. The second assignee brought an action to have the first assignment rescinded in equity on the ground of an alleged fraud committed by the first assignees against the assignor. The assignor refused to be joined as a plaintiff to the suit; however, the second assignee argued that he was entitled under the second assignment

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<sup>4</sup> See *Bendall v McWhirter* [1952] 2 QB 466 (CA) 477 (Denning LJ).

<sup>5</sup> *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL) 703C (Lord Roskill).

<sup>6</sup> *Ibid* 694G (Lord Wilberforce).

<sup>7</sup> See generally *Halsbury’s Laws of England* (5th edn, 2017) vol 13, para 98.

<sup>8</sup> *Hill v Boyle* (1867) LR 4 Eq 260, 263-64 (Sir John Stuart V-C).

<sup>9</sup> See especially *Prosser v Edmonds* (1835) 1 Y & C Ex 481, 160 ER 196, discussed below.

<sup>10</sup> Ch 3, pt III, s 2.

<sup>11</sup> *Prosser v Edmonds* (1835) 1 Y & C Ex 481, 160 ER 196.

<sup>12</sup> Ch 3, pt III, s 2; ch 4, pt III, s 2.

to the relief which he sought. The first assignees demurred on the ground that that the second assignee had no cause of action.<sup>13</sup> The suit was heard in the Court of Exchequer by the Chief Baron, Sir Frederick Pollock. The Chief Baron held that the first assignment had divested the assignor of his entire interest in the property that was the subject of the assignment. In consequence, even if the assignor did acquire a claim to rescind the first assignment, that claim was not coupled with any interest in the property, but was ‘a mere naked right to file a bill in equity’.<sup>14</sup> In the opinion of the Chief Baron, the law of maintenance and champerty meant that such a claim was not capable of being assigned either at law or in equity. The result was that the second assignee could not have acquired, under the second assignment, any right or interest that would have enabled him to maintain an action to have the first assignment set aside. The Chief Baron allowed the demurrer accordingly.

The rule which was established in *Prosser* continues to apply today. Thus in the comparatively recent case of *Investors Compensation Scheme Ltd v West Bromwich Building Society*<sup>15</sup> Lord Hoffmann maintained that a claim to rescind a mortgage was a right of action and therefore incapable of being assigned by the mortgagor as an independent right.<sup>16</sup>

As noted above, the rule that mere equities are not assignable is one aspect of the general approach which the courts take to the assignment of rights of action. In order to properly understand the rule, therefore, it is necessary to consider it in the context of the more general trends which have occurred in this area. In this regard, while it continues to be the case today that a bare right of action cannot be assigned,<sup>17</sup> it is also true that over the course of the twentieth century the courts adopted a more liberal stance about when a third party assignee would be permitted to stand in the right of his assignor to litigate.<sup>18</sup> This process was recognised and confirmed by the House of Lords in *Trendtex Trading Corp v Credit Suisse*.<sup>19</sup> Lord Roskill gave the

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<sup>13</sup> For discussion on the nature of a demurrer, see generally J Mitford, ‘A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill’ in S Tyler (ed), *Mitford’s and Tyler’s Pleadings and Practice in Equity* (Baker, Voorhis & Co 1876) 203-05. See also above, ch 5, pt III, s 3, sub-s ii.

<sup>14</sup> *Prosser v Edmonds* (1835) 1 Y & C Ex 481, 496; 160 ER 196, 202 (Sir Frederick Pollock CB).

<sup>15</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL).

<sup>16</sup> *Ibid* 916D-E (Lord Hoffmann).

<sup>17</sup> *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL) 703C (Lord Roskill).

<sup>18</sup> See *ibid* 702C-E (Lord Roskill), referring to *Martell v Consett Iron Co Ltd* [1955] 1 Ch 363 (CA).

See also *Halsbury’s Laws of England* (5th edn, 2017) vol 13, para 99.

<sup>19</sup> *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL).

following summary of the circumstances in which the law of maintenance and champerty would not prevent a right of action from passing on assignment:

If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.<sup>20</sup>

In the *Trendtex* case itself, Trendtex purported to assign its right of action against a Nigerian bank, CBN, to Credit Suisse. Credit Suisse was a substantial creditor of Trendtex and had guaranteed Trendtex's legal costs in connection with its action against CBN. In these circumstances Credit Suisse was held to have a sufficient commercial interest in the success of the litigation to support an assignment to it of Trendtex's right of action. However, the agreement between Trendtex and Credit Suisse was problematic because it manifestly involved the likelihood that a third party with no genuine commercial interest in the litigation would make a profit out of the cause of action against CBN. This likelihood meant that the assignment amounted to trafficking in litigation; hence the assignment was void under the English law of maintenance and champerty.<sup>21</sup>

The above citation from Lord Roskill's judgment is relevant to the present discussion because it encapsulates the main exception to the general rule that mere equities are not assignable. It is settled that if a mere equity is ancillary to some property right or interest which is vested in the person who holds the mere equity, then it is allowable for that person to assign the mere equity together with that property right or interest to a third party.<sup>22</sup> Such an assignment is not objectionable under the law of maintenance and champerty because, as opposed to being an assignment of a naked right of action, it is predominantly an assignment of a property right or interest: the mere equity being purely 'incidental and subsidiary' to the enjoyment of that

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<sup>20</sup> Ibid 703F-G (Lord Roskill).

<sup>21</sup> See especially ibid 694F-G (Lord Wilberforce).

<sup>22</sup> In addition to the cases discussed below, see D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010) para 6-05.

property right or interest.<sup>23</sup> The situation is easily distinguished from what occurred in the case of *Prosser*. In *Prosser*, as already explained, the assignor parted with his entire interest in the contested property under the first assignment. Accordingly, even if, as the second assignee argued, the assignor acquired a mere equity to rescind the first assignment, the assignor retained no right or interest in the contested property to which his mere equity could have been ancillary. It followed that the second assignee was bound to fail, because the only right which the second assignment could have purported to pass to him was a mere naked right of action.

There are various cases where it was held that the assignee of some property right or interest succeeded to the mere equity of his assignor to obtain equitable relief in reference to that property right or interest. *Jalabert v Duke of Chandos*<sup>24</sup> is an early example. In that case, the Duke of Chandos granted the lease of a lodge to Moore, who subsequently assigned part of his interest to Jalabert, the claimant. Afterwards, a mistake was discovered in the original grant, and the claimant brought a bill to be relieved of that mistake in equity. The Lord Keeper, Sir Robert Henley, held that the claimant was permitted to stand in the right of Moore to have the original grant rectified.<sup>25</sup>

In the case of *Boots The Chemist Ltd v Street*,<sup>26</sup> a mistake had occurred in the drafting of the rent review provisions of a lease. It had been the common intention of the original landlord and tenant that a rent review could take place in every fifth year of the term, but by mistake the lease referred to rent reviews at the end of the seventh and fourteenth years. The original landlord sold and transferred his freehold reversion to the claimant, who then brought an action to have the mistake in the lease rectified. The claim was upheld by Falconer J. According to the judge, it did not matter that the claimant was not one of the original parties because the transfer of the freehold reversion was ‘effective to pass such interest as there ... may have been in the original landlords to have the lease rectified’.<sup>27</sup> In the later case of *Nurdin & Peacock plc v DB Ramsden & Co Ltd*, Neuberger J referred to *Boots The Chemist Ltd* and remarked *obiter* that ‘it seems to me pretty plain that the right of a landlord to rectify a lease

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<sup>23</sup> *Dawson v Great Northern and City Railway Co* [1905] 1 KB 260 (CA) 271 (Stirling LJ); *Ellis v Torrington* [1920] 1 KB 399 (CA) 407 (Banks LJ).

<sup>24</sup> *Jalabert v Duke of Chandos* (1759) 1 Eden 372, 28 ER 729.

<sup>25</sup> *Ibid* 377; 731 (Sir Robert Henley LK).

<sup>26</sup> *Boots The Chemist Ltd v Street* [1983] 2 EGLR 51 (Ch).

<sup>27</sup> *Ibid* 52 (Falconer J).

must be assignable together with the reversion'.<sup>28</sup> This is consistent with the case of *KPMG LLP v Network Rail Infrastructure Ltd*,<sup>29</sup> where it was held that a landlord was entitled to rectify a mistake in the tenant's break clause, despite the fact that both parties were successors in title who had not been involved in the original grant of the lease.

In *Berkeley Leisure Group Ltd v Williamson*,<sup>30</sup> Stone was the registered proprietor of a parcel of land which included Shenley Villa, a concrete forecourt which adjoined the Villa, and certain other land which could only be accessed over the concrete forecourt. Stone sold and transferred part of this parcel of land to the defendants. The intention of the parties had been that the sale would comprise the Villa only; however, the concrete forecourt was mistakenly included in the sale and transfer to the defendants. Stone then sold his entire residual interest in the parcel of land to the plaintiff. The plaintiff then brought an action against the defendants to have the first transfer rectified so that it did not include the concrete forecourt. In the Court of Appeal, Morritt and Bedlam LJ upheld the plaintiff's claim, with the result that the concrete forecourt retrospectively vested in the plaintiff under the second transfer. In reaching their decision, the Lord Justices rejected the contention that because the plaintiff was not a party to the first transfer he did not have standing to claim rectification of the mistake in that transfer.<sup>31</sup> According to Lindsey J in the subsequent case of *Harbour Estates Ltd v HSBC Bank plc*,<sup>32</sup> *Berkeley Leisure Group Ltd* decided 'that a right to claim rectification of the boundary of the land conveyed passed with the conveyance of the land itself'.<sup>33</sup>

The facts of *Holaw (470) Ltd v Stockton Estates Ltd*<sup>34</sup> were similar to *Berkeley Leisure Group Ltd*. *Holaw (470) Ltd* involved a transfer of land to the defendant which, by mistake, failed to reserve to the transferor a right of way over the transferred land for the benefit of adjoining land which remained vested in the transferor. The transferor then transferred the adjoining land to the claimant, who then brought an action against the defendant to have the first transfer rectified. The claim for rectification failed on the facts; however, Neuberger J was careful to observe that it

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<sup>28</sup> *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 EGLR 119 (Ch) 124 (Neuberger J).

<sup>29</sup> *KPMG LLP v Network Rail Infrastructure Ltd* [2006] EWHC 67, [2006] 2 P&CR 7.

<sup>30</sup> *Berkeley Leisure Group Ltd v Williamson* [1996] Lexis Citation 3168 (CA).

<sup>31</sup> *Ibid* 6 (Morritt LJ).

<sup>32</sup> *Harbour Estates Ltd v HSBC Bank plc* [2004] EWHC 1714 (Ch), [2005] Ch 194.

<sup>33</sup> *Ibid* [29] (Lindsey J).

<sup>34</sup> *Holaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P&CR 29 (Ch).

was ‘beyond doubt’ that if the transferor had been entitled to rectify against the defendant, then the claimant would have been entitled to the same relief.<sup>35</sup>

All of these cases involved a mere equity to have a transaction rectified. However, other kinds of mere equity are capable of passing together with a transfer of some property right or interest to which they are ancillary or incidental. Thus in *Earl of Ardglass v Muschamp*<sup>36</sup> T granted to the defendant a rentcharge over certain land in circumstances where T was entitled to rescind the grant on equitable grounds. T subsequently conveyed the land to the plaintiff, who afterwards brought a successful action to rescind the earlier grant, thereby freeing the land from the rentcharge.

Although these cases provide isolated examples, they do not explain in general terms what kind of connection between a mere equity and a property right or interest is necessary in order for the mere equity to be capable of assignment together with the property right or interest. Broadly speaking, however, in all of the cases where a mere equity was held to have passed upon the assignment of a property right or interest, the mere equity provided access to relief which functioned to support or enhance in some way the practical enjoyment of the property right or interest.<sup>37</sup> It is therefore a reasonable interpretation that in order for a mere equity to be sufficiently incidental or ancillary to a property right or interest so that the mere equity can be assigned together with the property right or interest, the mere equity must support or enhance in some way the property right or interest.

The case of *Gross v Lewis Hillman Ltd*<sup>38</sup> seems to confirm this analysis. In *Gross*, the defendants sold the freehold reversion in certain shop premises to G, which subsequently transferred its interest in the premises to the plaintiff. The plaintiff then alleged that the sale to G had been procured by the defendants by means of misrepresentation, and on that footing sought to have the original sale rescinded. Cross LJ handed down the leading judgment. Significantly as regards the present discussion, the judge held that even if G had been entitled to rescind the sale for misrepresentation (which, according to Cross LJ, G had not been entitled to do), the mere equity to rescind would not have passed together with the reversion upon the subsequent transfer to the plaintiff, who accordingly was not entitled to the relief which she

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<sup>35</sup> Ibid [46] (Neuberger J).

<sup>36</sup> *Earl of Ardglass v Muschamp* (1684) 1 Vern 237, 23 ER 438.

<sup>37</sup> *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL) 703A-B (Lord Roskill).

<sup>38</sup> *Gross v Lewis Hillman Ltd* [1970] 1 Ch 445 (CA).

sought.<sup>39</sup> This ruling is consistent with the above argument, for if G had held a mere equity to rescind the original sale, then that mere equity would not have functioned to support or enhance G's interest in the shop premises. On the contrary, the mere equity would only have entitled G to recover the purchase money, subject to G executing a reconveyance of the shop premises to the defendants. Accordingly, the mere equity would not have been 'ancillary to' the freehold reversion which G acquired under the sale, and therefore would not have been capable of passing together with the reversion upon the subsequent transfer by G to the plaintiff.

In summary, the core principle which governs the assignment of mere equities is that a mere equity is not assignable *unless* the mere equity is 'incidental' or 'ancillary' to some property right or interest which itself is capable of being assigned, in which case the mere equity may be assigned together with the property right or interest. This rule is demonstrated in various cases, although none of these cases makes it explicitly clear what connection between a mere equity and a property right or interest is necessary in order for the former to pass upon the assignment of the latter. In light of the available evidence, however, it seems generally to be the case that in order for a mere equity to be sufficiently ancillary to a property right or interest, it is necessary for the mere equity to give access to relief which supports or enhances in some way the practical enjoyment of the property right or interest.

### PART III: THE DIFFICULT CASES

Now that the core principles which govern the assignment of mere equities have been outlined, the chapter will examine the cases of *Gresley v Mousley*,<sup>40</sup> *Dickinson v Burrell*<sup>41</sup> and *Melbourne Banking Corp Ltd v Brougham*,<sup>42</sup> which are often said to exemplify the assignability of mere equities in appropriate circumstances,<sup>43</sup> but which on closer consideration are highly problematic from a doctrinal point of view. In broad outline, these cases establish that if A transfers property to B in circumstances which

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<sup>39</sup> Ibid 460E-F (Cross LJ).

<sup>40</sup> *Gresley v Mousley* (1859) 4 De G&J 78, 45 ER 31.

<sup>41</sup> *Dickinson v Burrell* (1866) LR 1 Eq 337.

<sup>42</sup> *Melbourne Banking Corp Ltd v Brougham* (1882) 7 App Cas 307 (PC).

<sup>43</sup> See, eg, *Dawson v Great Northern and City Railway Co* [1905] 1 KB 260 (CA) 271 (Stirling LJ); J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) para 2-007, fn 27. See also *Halsbury's Laws of England* (5th edn, 2017) vol 13, para 99, fn 2.

give A an equitable claim to rescind, and A, instead of claiming rescission, afterwards purports to dispose of his entire interest in the same property in favour of C, then it is allowable for C to bring an action against B (or B's successor in title) to rescind the transfer by A to B.<sup>44</sup> Thus in *Gresley v Mousley* Sir Roger Gresley sold an estate to his solicitor at an undervalue and afterwards devised the same property to the plaintiff. Knight Bruce and Turner LJJ held that the plaintiff was entitled to rescind against the defendants, who were the persons claiming under the conveyance to the solicitor. In *Dickinson v Burrell* James Dickinson sold and conveyed his interest in the estate of one George Whitehead to the defendant. Subsequently, Dickinson executed a voluntary deed which, after reciting that he disputed the validity of the conveyance to the defendant, conveyed his entire interest in Whitehead's estate on trust. The plaintiffs, who were beneficiaries under the trusts thus established by Dickinson, claimed to have the conveyance to the defendant set aside on equitable grounds. The defendant demurred on the ground that the plaintiffs, being third parties to the original conveyance, could have no title to claim rescission. The Master of the Rolls, Lord Romilly, dismissed the demurrer. Finally, in *Melbourne Banking Corp Ltd v Brougham* the plaintiff became bankrupt and the official assignee of his estate proceeded to release the plaintiff's equity of redemption in a sheep station in favour of the defendant mortgagees. Afterwards, the plaintiff took a conveyance of the official assignee's entire remaining interest in the plaintiff's own estate. The plaintiff then brought an action against the defendants to have the release set aside on grounds of misrepresentation or mutual mistake. The defendants maintained that the conveyance to the plaintiff could not have given the plaintiff a right to claim the relief which he sought. However, the Privy Council (speaking through Lord Selbourne LC) rejected this argument and advised that the plaintiff had the same *locus standi* as the official assignee to set aside the release.<sup>45</sup>

The difficulty with these cases arises from the fact that they were decided in the aftermath of the earlier decision in *Stump v Gaby*.<sup>46</sup> In *Stump*, which has already been discussed in chapter four,<sup>47</sup> Lord St Leonards LC suggested that where a

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<sup>44</sup> See generally D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 22.09-22.14.

<sup>45</sup> *Melbourne Banking Corp Ltd v Brougham* (1882) 7 App Cas 307 (PC) 311 (Lord Selbourne LC). Although the action failed on other grounds.

<sup>46</sup> *Stump v Gaby* (1852) 2 De GM&G 623, 42 ER 1015.

<sup>47</sup> Ch 4, pt III, s 2.

conveyance is voidable at the instance of the grantor, the grantor retains an equitable interest in the property conveyed which he can assign.<sup>48</sup> This view subsequently formed an integral part of the reasoning in the later cases mentioned above; hence these cases were all decided on the footing that when A executed the conveyance to B he retained an equitable interest in the property conveyed which he was then able to transfer under the subsequent disposition to C. Thus in *Gresley Knight Bruce and Turner LJJ* accepted that Sir Roger ‘had after the sale [to the solicitor] a devisable interest in the property sold’.<sup>49</sup> In *Dickinson* Lord Romilly MR seems to have taken it for granted that if the sale by Dickinson to the defendant was voidable, then Dickinson retained an interest in the property sold which he was then able to convey under the subsequent deed.<sup>50</sup> And in *Melbourne Banking Corp Ltd* the Privy Council were of opinion that

if that release was voidable in equity, it is clear, both on principle and on authority, that there was an equitable interest in the ... station, which ... continued to be part of the estate vested in the official assignee, and that the deed executed by ... [the official assignee] was sufficient to pass that interest [to the plaintiff].<sup>51</sup>

If, as Lord St Leonards LC proposed, it were the case that a grantor under a voidable conveyance retains an equitable interest in the subject of the conveyance, then the decisions in these cases would have been wholly consistent with the core principles considered above on the assignment of mere equities. In short, after the voidable conveyance by A to B, A would have held, in addition to his mere equity to rescind the conveyance and thus recover the legal title to the property conveyed, an equitable interest in that property which he could assign. A’s mere equity would almost certainly have been ancillary to this equitable interest, because the enforcement of the mere equity would have been a necessary step in the recovery of the property which was the subject of the equitable interest.<sup>52</sup> Accordingly, *as per* the core principles outlined above, it would have been allowable for A to assign his mere equity together with his

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<sup>48</sup> *Stump v Gaby* (1852) 2 De GM&G 623, 630; 42 ER 1015, 1018 (Lord St Leonards LC).

<sup>49</sup> *Gresley v Mousley* (1859) 4 De G&J 78, 89; 45 ER 31, 35 (Knight Bruce LJ).

<sup>50</sup> *Dickinson v Burrell* (1866) LR 1 Eq 337, 342 (Lord Romilly MR).

<sup>51</sup> *Melbourne Banking Corp Ltd v Brougham* (1882) 7 App Cas 307 (PC) 311 (Lord Selbourne LC).

<sup>52</sup> See *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (in liq) (1965) 113 CLR 265, 290 (Menzies J).

equitable interest to C, who then would have been able to enforce for his own benefit the cause of action which had previously vested in A. It is clear that this sort of reasoning underpinned Lord Romilly MR's decision in *Dickinson*:

... if James Dickinson had sold or conveyed the right to sue to set aside the indenture ... without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the [plaintiffs] ... to maintain this bill; but if [the plaintiffs] had bought the whole of the interest of James Dickinson in the property, then it would. *The right of suit is a right incidental to the property conveyed ...*<sup>53</sup>

The difficulty with this analysis is that its foundational premise is false. It is untrue to say that a transferor of property under a voidable conveyance retains an equitable interest in that property; instead, the doctrinally correct view is that the transferor generally does not retain any interest, legal or equitable, in the property transferred. This point was argued for extensively in chapter four.<sup>54</sup> In summary, it was shown in that chapter that what Lord St Leonards LC said in *Stump* was both strictly *obiter* and inconsistent with the earlier case of *Prosser*, the *ratio decidendi* of which was that even if a transfer of property is voidable the transferor retains no equitable interest in that property (see above). In addition, it was demonstrated that the understanding of the law which was upheld in *Prosser* has since been re-affirmed in a series of comparatively recent cases and appears now to represent the consensus view.<sup>55</sup> Finally, reference was made to the general rule that purchase of a merely equitable interest for value without notice can be raised by way of plea against a transferor who asserts a mere equity to rescind or rectify his conveyance.<sup>56</sup> It was shown that this rule only makes sense if it is accepted that the transferor's mere equity is not conjoined with any equitable interest in the property conveyed.<sup>57</sup>

The decisions in *Gresley*, *Dickinson* and *Melbourne Banking Corp Ltd* were therefore based on an erroneous analysis of what the rights of the respective parties

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<sup>53</sup> *Dickinson v Burrell* (1866) LR 1 Eq 337, 342 (Lord Romilly MR) (emphasis added).

<sup>54</sup> Ch 4, pt III, s 2.

<sup>55</sup> See *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 22F-H (Millett LJ) and the other authorities cited above at ch 4, pt III, s 2, fn 42.

<sup>56</sup> See *Cave v Cave* (1880) 15 Ch D 639 (Ch) 646-47 (Fry J) and the other authorities cited above at ch 1, pt II, s 2, sub-s i, fn 36.

<sup>57</sup> See above, ch 4, pt III, s 3.

were. The doctrinally correct analysis was that the conveyance by A to B divested A of his entire beneficial interest in the property transferred; after the conveyance, the only right which A had with which he could have disturbed the title acquired by B was a bare right of litigation to have the conveyance set aside. Consequently, when A afterwards purported to dispose of his interest in the same property in favour of C, A was not, in actual fact, entitled to any interest in the property which could pass under that disposition. It follows that, contrary to what a number of commentators and some judges have assumed,<sup>58</sup> *Gresley, Dickinson* and *Melbourne Banking Corp Ltd* are not analogous to cases such as *Boots The Chemist Ltd* and *Berkeley Leisure Group Ltd*; they are not, in other words, cases where a mere equity was assigned together with some property right or interest to which that mere equity was ancillary.

It is suggested that the cases of *Gresley, Dickinson* and *Melbourne Banking Corp Ltd* leave the law on the assignment of mere equities in a highly unsatisfactory state. These cases establish a definite rule, but they support this rule by resorting to a legal argument which relies on a proposition of doctrine that was disproved decades before in the case of *Prosser v Edmonds*. As a result, when the cases are examined in the light of the true rights of the parties involved, the cases seem to envisage that A can do something which, according to the core principles that have already been considered, he ought not to be able to do, namely, assign a mere equity to rescind as an independent right. In conclusion, the cases of *Gresley, Dickinson* and *Melbourne Banking Corp Ltd* give rise to doctrinal difficulties which, for reasons that are not entirely clear, have largely gone unmentioned in the literature and hence continue to be unresolved. The remainder of this chapter will aim to shed some light into this area by looking at the different ways in which the decisions in the above cases could be explained and by evaluating which of these explanations is the most plausible.

It seems that there are three main ways in which the cases of *Gresley, Dickinson* and *Melbourne Banking Corp Ltd* can be explained. The first approach is simply to say that the cases are inconsistent with the core principles on the assignment of mere equities and therefore must have been wrongly decided. By contrast, the second and third approaches aim to harmonise the cases with the core principles, although they do so in different ways. On the one hand, the second approach argues

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<sup>58</sup> See, eg, *Dawson v Great Northern and City Railway Co* [1905] 1 KB 260 (CA) 271 (Stirling LJ); *Majestic Homes Pty Ltd v Wise* [1978] Qd R 225, 232-33 (Stable SPJ).

that the cases can be understood in reference to concepts which fall *outside* the remit of the core principles. It does so by appealing to the idea that in certain situations equitable title is retrospectively deemed to have reverted in the transferor before the formal order for rescission had been made. On the other hand, the third approach argues that the cases are explicable *within* the remit of the core principles. This approach appeals to the *Trendtex* case by arguing that, in the cases in question, it was allowable for A to assign his mere equity to C because C had ‘a genuine commercial interest’ in taking the assignment and enforcing the mere equity.<sup>59</sup> Each of these possible approaches will now be considered. It will be argued that, on balance, the second approach is the most plausible.

#### PART IV: THE CASES WERE WRONGLY DECIDED

The first possibility to be considered is that *Gresley*, *Dickinson* and *Melbourne Banking Corp Ltd* were wrongly decided. On the face of it, there is much that can be said for this approach. As explained already, the decisions in these cases were founded on the mistaken premise that a person who transfers property under a conveyance which he is entitled to rescind retains an equitable interest in that property. In short, the cases were badly reasoned, and this is enough to cast the decisions in those cases into doubt. Nevertheless, the argument that the cases were wrongly decided is not as attractive as it may at first appear. While it is true that recent cases have rejected the premise that a transferor under a voidable conveyance retains an equitable interest in the property transferred,<sup>60</sup> none of these cases has called into question the actual decisions in *Gresley*, *Dickinson* or *Melbourne Banking Corp Ltd*.<sup>61</sup> Likewise, when the secondary literature discusses the assignment of mere equities, these cases are generally treated as an accepted element of the law in this area. Consequently, despite the problematic way in which the cases were originally reasoned, the basic rule which the cases establish appears to have been approved in the literature. Given this general acceptance, it follows that an approach which simply dismisses the cases as wrongly

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<sup>59</sup> *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL) 703F (Lord Roskill).

<sup>60</sup> See *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 22F-H (Millett LJ) and the other authorities cited above at ch 4, pt III, s 2, fn 42.

<sup>61</sup> On the contrary, one judge has stated that the authority of these cases is ‘beyond question’: *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (in liq) (1965) 113 CLR 265, 289 (Menzies J).

decided is bound to be less attractive than an approach which can harmonise the decisions in these cases with the available doctrinal framework. Thus the view that the cases were wrongly decided must be viewed as the least favoured option.

## PART V: RETROSPECTIVE EQUITABLE TITLE

As indicated above, the second approach to the rule in *Gresley, Dickinson* and *Melbourne* appeals to the principle that, when rescission occurs, an equitable title is retrospectively deemed to have vested in the transferor *ab initio*. The general nature and functions of the retrospective equitable title which arises upon rescission will be discussed first. The role which this principle could play in accounting for the cases of *Gresley, Dickinson* and *Melbourne* will then be considered. The advantages of this analysis will then be highlighted, and potential objections to it dealt with.

### 1. Retrospective equitable title and its functions

It is well established that when a voidable transfer of property is rescinded at the instance of the transferor, the transferor is treated as having had an equitable interest in that property which dates back to the time when he made the conveyance.<sup>62</sup> In other words,

When a decree is made for setting aside a conveyance it relates back, and the grantee is to be treated as having been, from the first, a trustee for the grantor, who, therefore, has an equitable estate, not a mere right of suit.<sup>63</sup>

The retrospective equitable title which arises on rescission is an instrumental device which serves two main functions. The first is to enable the transferor to take advantage of the equitable tracing rules in circumstances where the property transferred has since

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<sup>62</sup> See, eg, *ibid* 290 (Menzies J); *Daly v The Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 389 (Brennan J); *Lonrho plc v Fayed* [1992] 1 WLR 1 (Ch) 12A (Millett J); *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [122] (Rimer J).

<sup>63</sup> *Gresley v Mousley* (1859) 4 De G&J 78, 86; 45 ER 31, 34 (argument), quoted in *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 290 (Menzies J).

been exchanged for other property.<sup>64</sup> Thus in *El Ajou v Dollar Land Holdings plc*<sup>65</sup> the victims of a fraud sought, by rescinding their contracts with the fraudster, to claim an equitable interest in certain land which represented the money that the victims had paid to the fraudster under the contracts. This required the victims to have had an equitable interest in the money which they could then trace into the land.<sup>66</sup> According to Millett J, this was no obstacle to the victims of the fraud because, once the contracts had been rescinded, the victims were to be treated as having had an equitable interest in the money from the outset:

[I]f the ... victims of the fraud can trace their money in equity it must be because, having been induced to purchase the shares by false and fraudulent misrepresentations, they are entitled to rescind the transaction and revest the equitable title to the purchase money in themselves, at least to the extent necessary to support an equitable tracing claim ...<sup>67</sup>

The second function of the retrospective equitable title which arises on rescission is best illustrated by considering the scenario which is contemplated by the rule in *Gresley, Dickinson and Melbourne*. As indicated above, this scenario is where A makes a voidable conveyance of property to B and subsequently purports to make a disposition of the same property in favour of C. In this situation, the disposition to C is initially ineffective at law and in equity. This is because A has already transferred all his legal and beneficial interest in the property to B,<sup>68</sup> hence A does not retain any interest in the property which he can dispose of in favour of C. However, this analysis only holds for as long as the conveyance to B is not rescinded. Once the conveyance to B is rescinded (for these purposes it does not matter whether it is A or C who brings the action to rescind), A is retrospectively deemed to have acquired, at the time when

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<sup>64</sup> *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 (Ch) 734C-D (Millett J); *Lonrho plc v Fayed* [1992] 1 WLR 1 (Ch) 12A (Millett J); *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 22H-23B (Millett LJ). But see D Fox, *Property Rights in Money* (OUP 2008) para 6.58; D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 16.40.

<sup>65</sup> *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 (Ch), revd on other grounds [1994] 2 All ER 685 (CA).

<sup>66</sup> It was necessary to establish an equitable interest because there was no pre-existing fiduciary relationship between the victims and the fraudster: see A Televantos, 'Losing the Fiduciary Requirement for Equitable Tracing Claims' (2017) 133 LQR 492, 493-94.

<sup>67</sup> *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 (Ch) 734C-D (Millett J).

<sup>68</sup> *Prosser v Edmonds* (1835) 1 Y & C Ex 481, 160 ER 196.

he made the conveyance to B, an equitable title to the property. It follows that the subsequent disposition by A to C becomes retrospectively effective to transfer A's equitable title to C. The practical outcome of this is that when the court orders B (or B's successor in title) to reconvey the *legal* title to the property, the reconveyance ought to be in favour of C instead of A.

Thus the retrospective equitable title which arises when rescission occurs also serves to give effect in equity to dispositions which, before rescission, were ineffective due to the existence to the prior voidable conveyance. The function which the retrospective equitable title plays in this regard was indicated by Menzies J in *Latec Investments Ltd v Hotel Terrigal Pty Ltd*:

[T]he result of the eventual avoidance of the conveyance upon the position *ab initio* and throughout of the persons by whom and to whom the conveyance of property was made ... [is that], in the event of a successful suit (which may be maintained by a devisee), the conveyor had an equitable estate capable of devise ...<sup>69</sup>

It is important to emphasise that since the retrospective equitable title arising on rescission is essentially instrumental in character, its effects do not exceed its identified functions. Thus in the case of *Lonrho plc v Fayed* Millett J confirmed that, when rescission takes place, the court will not treat equitable title as having vested in the transferor *ab initio* in order to retrospectively impose on the transferor the duties and obligations of a trustee.<sup>70</sup> This seems to be the correct approach, for potentially exposing the transferor to retrospective liability for breach of trust would exceed the fundamental aim of the equitable remedy of rescission, which, as explained in chapter three,<sup>71</sup> is to terminate the transaction *ab initio* by restoring the parties as nearly as possible to their original positions.

## 2. When the retrospective equitable title arises

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<sup>69</sup> *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 290-91 (Menzies J).

<sup>70</sup> *Lonrho plc v Fayed* [1992] 1 WLR 1 (Ch) 11H-12C (Millett J).

<sup>71</sup> Ch 3, pt II, s 2, sub-s i.

It is suggested that the principle that rescission causes equitable title to vest in the transferor retrospectively could play a role in harmonising the rule in *Gresley*, *Dickinson* and *Melbourne* with the rule that a mere equity cannot be assigned as an independent right. Whether or not the principle can play this role, however, depends on a preliminary question of equitable doctrine. The question is essentially one of timing, namely, at what point does a voidable conveyance count as having been ‘rescinded’ for the purpose of causing an equitable title in the property conveyed to vest retrospectively in the transferor *ab initio*? Unfortunately, this question is not an easy one to answer: the case law in this area is ambiguous—described by one set of commenters as ‘enormously confused’<sup>72</sup>—and support can be found in different cases for two seemingly contradictory points of view.<sup>73</sup>

The first point of view holds that the retrospective vesting of equitable title results from the actions of the court. According to this view, the point from which an equitable title is retrospectively deemed to have vested in the transferor *ab initio* is when the transferor has brought an action to rescind the voidable conveyance and the court has decided in his favour to order rescission. In short, a retrospective equitable title arises only once the court has formally adjudicated that the transferor has a good claim to the relief which he seeks. The view that it is the action of the court which generates a retrospective equitable title is intimated in the above quotation<sup>74</sup> which states that the relation back of equitable title occurs when ‘a decree is made for setting aside a conveyance’.

The premise that the retrospective vesting of equitable title does not take place unless and until the court decides to grant rescission reflects the traditional view that rescission in equity is effectuated by the court’s actions in granting the decree rather than by the actions of the rescinding party.<sup>75</sup> This general philosophy is implicit in various judicial statements, many of which emphasise the fact that the grant of rescission in equity is implemented and controlled by the terms of the court’s decree.<sup>76</sup>

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<sup>72</sup> D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 11.56.

<sup>73</sup> See generally *ibid* paras 16.23-16.38.

<sup>74</sup> See above, fn 63.

<sup>75</sup> See generally J O’Sullivan, ‘Rescission as a Self-help Remedy: A Critical Analysis’ (2000) 59 CLJ 509, 518-20.

<sup>76</sup> See, eg, *Cheese v Thomas* [1994] 1 WLR 129 (CA) 137B-C (Sir Donald Nicholls V-C); *Erlanger v The New Sombrero Phosphate Co* (1878) 3 App Cas 1218 (HL) 1278 (Lord Blackburn); *Spence v Crawford* [1939] 3 All ER 271 (HL) 288B-C (Lord Wright). See also D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 11.83.

The following observations by Lord Wright in *Spence v Crawford*<sup>77</sup> are a typical example:

The remedy [of rescission] is equitable. Its application is discretionary, and, where the remedy is applied, it must be moulded in accordance with the exigencies of the particular case. ... The court must fix its eyes on the goal of doing 'what is practically just.' How that goal may be reached must depend on the circumstances of the case, but the court will be more drastic in exercising its discretionary powers in a case of fraud than in a case of innocent misrepresentation.<sup>78</sup>

The second point of view for which support can be found in the cases is that the retrospective vesting of equitable title results from the actions of the transferor independently of the court.<sup>79</sup> According to this view, the point from which an equitable title retrospectively vests in the transferor *ab initio* is when the transferor has personally elected to disaffirm the voidable conveyance. Crucially, the transferor may do this *before* he has brought an action to have the conveyance formally rescinded by order of the court. This view, therefore, is different from the alternative view that a retrospective equitable title only arises once the court has decided to order rescission, for in that case there can be no relation back of the equitable title until *after* the transferor has brought his action to rescind.

The proposition that an equitable title retrospectively vests in the transferor *ab initio* from when the transferor makes an election to disaffirm the voidable conveyance departs somewhat from the traditional view that rescission in equity is effectuated by order of the court. Nevertheless, there are various cases which contain statements in favour of this proposition. For example, in *Lonrho plc v Fayed*<sup>80</sup> Millett J was clearly of the opinion that the retrospective vesting of equitable title occurred when the transferor elected to rescind: 'A contract obtained by fraudulent misrepresentation is voidable, not void, even in equity. ... [I]f the representee elects to avoid the contract

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<sup>77</sup> *Spence v Crawford* [1939] 3 All ER 271 (HL).

<sup>78</sup> *Ibid* 288B-F (Lord Wright).

<sup>79</sup> See, eg, *Lonrho plc v Fayed* [1992] 1 WLR 1 (Ch) 11H-12A (Millett J); *Twinsectra Ltd v Yardley* [1999] All ER (D) 433 (CA) [99] (Potter LJ); *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2012] 3 WLR 597 [53] (Patten LJ); *National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] 3 WLR 23 [47] (Sir Terence Etherton C).

<sup>80</sup> *Lonrho plc v Fayed* [1992] 1 WLR 1 (Ch).

and set aside a transfer of property made pursuant to it the beneficial interest in the property will be treated as having remained vested in him throughout'.<sup>81</sup> Likewise in *Twinsectra Ltd v Yardley*<sup>82</sup> Potter LJ said that where a transfer is voidable for misrepresentation 'the transferor may elect whether to avoid or affirm the transaction and, until he elects to avoid it, there is no constructive (resulting) trust'.<sup>83</sup> And in *Independent Trustee Services Ltd v GP Noble Trustees Ltd*<sup>84</sup> Patten LJ also expressed the view that the beneficial interest revested retrospectively when the transferor elected to disaffirm the transaction: 'Rescission [for misrepresentation] avoids the contract ab initio. In relation to assets transferred to the representor, ... title revests in the representee retrospectively once the election to rescind the contract is made'.<sup>85</sup>

*i. Comparison with rescission at common law*

In order to avoid confusion, it is necessary to clarify that even if it is true that an election to disaffirm is effectual in equity, it does not follow that the equitable remedy of rescission should be equated with rescission at common law. At common law, rescission is essentially a 'self-help' remedy:<sup>86</sup> the act of the rescinding party in the strictest sense. Thus where a transaction is voidable at common law, the rescission of that transaction is fully effectuated if and when the injured party makes a personal election to disaffirm the transaction.<sup>87</sup> Thus the process of rescission occurs independently of any orders of the court; for instance, it is not necessary for the court to order the revesting of legal title because this is an automatic consequence of the election to disaffirm. The role of the court is limited to enforcing the rights which have

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<sup>81</sup> Ibid 11H-12A (Millett J).

<sup>82</sup> *Twinsectra Ltd v Yardley* [1999] All ER (D) 433 (CA).

<sup>83</sup> Ibid [99] (Potter LJ).

<sup>84</sup> *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2012] 3 WLR 597.

<sup>85</sup> Ibid [53] (Patten LJ).

<sup>86</sup> See J O'Sullivan, 'Rescission as a Self-help Remedy: A Critical Analysis' (2000) 59 CLJ 509, 511-12.

<sup>87</sup> *Abram Steamship Co Ltd (in liq) v Westville Shipping Co Ltd (in liq)* [1923] AC 773 (HL) 781 (Lord Atkinson); *Halpern v Halpern (No 2)* [2006] EWHC 1728 (Comm), [2007] QB 88 [26] (Nigel Teare QC).

been secured as a result of the rescission which has already taken place.<sup>88</sup> As the authors of the second edition of *The Law of Rescission* observe:

Rescission at common law is effected by the rescinding party's election to disaffirm the voidable transaction, in the sense that all the constituent elements that make up rescission follow from that election. After the election, and if necessary a tender of benefits received, the transaction is completely rescinded, and the judicial process need be invoked only for the purpose of declaring or enforcing the rights secured.<sup>89</sup>

In a handful of cases, judges have suggested that rescission is always a self-help remedy, the implication being that rescission in equity is also effectuated by the act of the rescinding party.<sup>90</sup> This view is clearly mistaken, however; rescission in equity is never a self-help remedy in the true sense of the word. Even if it is correct that an election to rescind a transaction which is voidable on equitable grounds can take effect in equity, the effect of that election is necessarily restricted to causing an equitable title to vest retrospectively in the transferor *ab initio*. The *legal* title to property which has passed under the transaction and any other legal rights which have been created by the transaction are not affected by the election to disaffirm, for in the eyes of the common law these rights are indefeasible.<sup>91</sup> Accordingly, even after he has elected to disaffirm, it is still necessary for the transferor to apply to the court for a decree which formally rescinds the transaction by, for instance, ordering a reconveyance of the legal title.<sup>92</sup> Thus while the idea that an equitable title retrospectively vests in the transferor when he elects to disaffirm the transaction may be reminiscent of the approach to rescission at common law, it would be a mistake, nevertheless, to confuse the equitable and common law remedies. In equity, 'rescission' in the full sense of the word is never the independent act of the transferor.

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<sup>88</sup> *Abram Steamship Co Ltd (in liq) v Westville Shipping Co Ltd (in liq)* [1923] AC 773 (HL) 781 (Lord Atkinson).

<sup>89</sup> D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 11.50.

<sup>90</sup> See especially *Reese River Silver Mining Co Ltd v Smith* (1869) LR 4 HL 64 (HL) 73 (Lord Hatherley LC); *Abram Steamship Co Ltd (in liq) v Westville Shipping Co Ltd (in liq)* [1923] AC 773 (HL) 781 (Lord Atkinson); *Alati v Kruger* (1955) 94 CLR 216, 224 (Dixon CJ and Webb, Kitto and Taylor JJ). See also D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 11.64-11.81.

<sup>91</sup> See J O'Sullivan, 'Rescission as a Self-help Remedy: A Critical Analysis' (2000) 59 CLJ 509, 518.

<sup>92</sup> See *Clark v Malpas* (1862) 4 De GF&J 401, 45 ER 1238, varying (1862) 31 Beav 80, 54 ER 1067.

### 3. Application to the rule in *Gresley, Dickinson and Melbourne*

It remains to be explained what kind of role the concept of a retrospective equitable title could play in explaining why, according to the rule in *Gresley, Dickinson and Melbourne*, A can apparently, by purporting to execute in favour of C a disposition of the property which he has already conveyed to B, assign to C his mere equity to rescind the conveyance to B, despite the general rule that a mere equity cannot be assigned. As intimated above, whether or not the concept can play such a role depends on the view which one takes of *when* the retrospective vesting of equitable title occurs. In this regard, there are two possibilities which have already been outlined. According to the first, the point from which A is deemed to have acquired an equitable title to the property *ab initio* is when the court formally decides that the conveyance to B ought to be rescinded. Significantly, this will be *after* C has brought the action to rescind and *after* the court has found that C can assert a mere equity to the relief which he seeks. According to the second possibility, an equitable title retrospectively vests in A *ab initio* when A makes a personal election to disaffirm the voidable conveyance to B.

From the outset, it is possible to say that if the first view is the correct one, then the concept of retrospective equitable title cannot play any role in explaining why C, by virtue of the subsequent disposition by A to C, is able to assert a mere equity to rescind the earlier conveyance by A to B. This is because, in this situation, the retrospective equitable title would derive from the decision of the court to decree the rescission of the earlier conveyance, and therefore would be a *consequence* of C successfully asserting a mere equity to rescind. And if the retrospective equitable title is a *consequence* of C successfully asserting a mere equity to rescind, then clearly the retrospective equitable title cannot play any role in explaining why C is able to assert a mere equity to rescind the earlier conveyance. Any such explanation would be highly circular and unlikely to win acceptance.

Things are different, however, if the second view is considered the correct one. In this situation, it is possible to explain the rule in *Gresley, Dickinson and Melbourne* on the basis that the subsequent disposition to C amounted to a personal election by A to disaffirm the earlier conveyance to B. According to this analysis, the process of logic which underlies the rule can be expressed in the following stages. (i) A conveys

property to B in circumstances which give A an equitable claim to rescind. (ii) Subsequently, A purports to dispose of his entire interest in the same property in favour of C. (iii) The purported disposition by A to C amounts to an election by A to disaffirm the earlier conveyance to B. (iv) From this point onwards, equity retrospectively considers that when A made the conveyance to B A acquired an equitable title to the property conveyed. (v) As a result, the subsequent disposition of the property by A to C becomes retrospectively effective to transfer A's equitable title to C (*as per* the second function of the concept of a retrospective equitable title, discussed above). (vi) The equitable title thus acquired by C gives him a sufficient interest to enforce the cause of action which previously had vested in A to apply to the court to have the earlier conveyance to B formally rescinded, hence the rule in *Gresley, Dickinson and Melbourne*.

In a nutshell, therefore, this analysis posits that it is the action of A in making the purported disposition to C that brings the backdated equitable interest into existence. The purported disposition by A to C then operates retrospectively to have carried from A to C the backdated interest together with A's mere equity to rescind the earlier conveyance to B.

#### **4. Advantages of this analysis and potential objections to it**

The above analysis of the rule in *Gresley, Dickinson and Melbourne* has four main advantages. First, as indicated above, the analysis accounts for the rule itself. Second, the analysis accounts for this rule in a way which is consistent with the core principle that a mere equity cannot be assigned as an independent right. According to the analysis, although the subsequent disposition by A to C is *initially* ineffective due to A having previously conveyed his entire legal and beneficial interest in favour of B, that disposition *almost instantly* becomes retrospectively effective to transfer an equitable title from A to C. As a result, the mere equity of A to apply to the court to have his earlier conveyance to B formally rescinded can legitimately be treated as having passed under the disposition to C together with the equitable title, *as per* the principle that a mere equity can be assigned in conjunction with a property right or interest to which it is ancillary. Third, the analysis does not depend on the fallacious

view propagated by *Stump v Gaby* that when A makes the voidable conveyance to B A acquires an automatic and immediate equitable interest in the property conveyed.

The fourth advantage is that it is possible, within the ambit of the analysis, to harmonise the rule in *Gresley*, *Dickinson* and *Melbourne* with the decision in *Prosser*. This advantage is an important one, and it will be discussed in greater detail below.

Despite these advantages, however, there seem to be two main objections which could be raised against the above analysis. The first concerns the conventional principles which have developed on how an election to rescind is made. The second relates to the argument that the very notion of an election to disaffirm is a common law concept whose apparent translocation into equitable doctrine is misconceived. Each of these potential objections will now be considered. It is suggested that neither of them is fatal to the above analysis.

#### *i. Objection 1: Making an election to rescind*

It is admittedly the case that stage (iii) in the above analysis is based on a presumption that the conduct of A in making the subsequent disposition to C is independently sufficient to qualify as an election by A to disaffirm the earlier conveyance to B. However, it might be objected that this presumption is not plausible in light of the conventional principles on how an election to rescind is made.<sup>93</sup>

It is well-established that in order for there to be an effective election to rescind a voidable transaction, it is generally necessary for the rescinding party ‘by express words or by act’ to communicate to the counterparty that he, the rescinding party, intends to disaffirm the transaction.<sup>94</sup> The communication by the rescinding party of his intention to disaffirm the transaction must be unequivocal,<sup>95</sup> although it is not necessary for this communication to take any particular form.<sup>96</sup> Thus in *Abram*

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<sup>93</sup> See generally D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 11.03-11.49.

<sup>94</sup> *Clough v The London and North Western Railway Co* (1871) LR 7 Ex 26, 34 (Mellor J). See also *Abram Steamship Co Ltd (in liq) v Westville Shipping Co Ltd (in liq)* [1923] AC 773 (HL) 781 (Lord Atkinson).

<sup>95</sup> *Clough v The London and North Western Railway Co* (1871) LR 7 Ex 26, 34 (Mellor J); *Abram Steamship Co Ltd (in liq) v Westville Shipping Co Ltd (in liq)* [1923] AC 773 (HL) 781 (Lord Atkinson); *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (CA) 551A-B (Sellars LJ).

<sup>96</sup> D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 11.04.

*Steamship Co Ltd (in liq) v Westville Shipping Co Ltd (in liq)*<sup>97</sup> it was held that an effective election to disaffirm occurred when the rescinding party wrote a letter to the counterparty informing the latter of his intention to repudiate the voidable contract.<sup>98</sup> By contrast, in *Clough v The London and North Western Railway Co*<sup>99</sup> it was held that a rescinding party could make an election to rescind by bringing legal proceedings if he included an appropriately worded statement in his pleadings.<sup>100</sup> *Re Eastgate*<sup>101</sup> is another example. There, a fraudster purchased and took possession of certain goods with the intention of not paying for them, and the defrauded vendor later retook possession of the goods. Bigham J held that the actions of the vendor amounted to an effective election by him to disaffirm his contract with the fraudster.<sup>102</sup>

There are two things to note about how these principles apply to the conduct of A in making the subsequent disposition to C. The first thing to note is that A's conduct could plausibly be said to evidence the necessary intention to disaffirm the earlier conveyance to B. This is because A, in making the subsequent disposition to C, is clearly asserting rights of alienation over the property which are inconsistent with the continued existence of the earlier conveyance.<sup>103</sup> The second thing to note is that A's conduct, despite evidencing the necessary intention to disaffirm, would not be independently sufficient to qualify as an election by A to rescind the conveyance to B. It would also be necessary for A to communicate his intention in some unequivocal manner to B: hence the possible objection that the presumption in stage (iii) of the above analysis is not plausible.

It seems that there are two possible responses to this objection. The first is to read into the rule in *Gresley, Dickinson and Melbourne* the proviso that it is necessary for A to inform B of the subsequent disposition to C before A's conduct in making that disposition can qualify as an election by A to disaffirm his earlier conveyance to B. However, although this response would meet the objection, it would not present a particularly appealing solution. Neither the judges who decided these cases nor counsel seemed to attach any importance to the question of whether A had

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<sup>97</sup> *Abram Steamship Co Ltd (in liq) v Westville Shipping Co Ltd (in liq)* [1923] AC 773 (HL).

<sup>98</sup> *Ibid* 784-85 (Lord Atkinson).

<sup>99</sup> *Clough v The London and North Western Railway Co* (1871) LR 7 Ex 26.

<sup>100</sup> *Ibid* 36 (Mellor J). See also *Nicholas v Thompson* [1924] VLR 554, 582 (McArthur J).

<sup>101</sup> *Re Eastgate* [1905] 1 KB 465 (KB).

<sup>102</sup> *Ibid* 467 (Bigham J).

<sup>103</sup> See D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 11.04.

unequivocally communicated to B that he intended to disaffirm the earlier conveyance. Indeed, in *Gresley* it is not clear whether B, who had died by the time that C brought his action to rescind, was ever made aware of the subsequent disposition by A to C. It is therefore suggested that this response would constitute too extensive a gloss on the rule established in *Gresley*, *Dickinson* and *Melbourne*.

The second response to the above objection is more appealing. It is to call attention to the fact that the requirement that the rescinding party communicate his intention to disaffirm to the counterparty is only a general rule and not an absolute necessity. Even at common law, there are situations where an election to disaffirm a contract obtained by fraud can be effective to rescind that contract, despite there not having been any communication by the rescinding party to the fraudulent party of the former's intention to disaffirm the contract. This point is illustrated by the well-known case of *Car and Universal Finance Co Ltd v Caldwell*.<sup>104</sup> There, Caldwell sold his car to a fraudster, who took the car and absconded after giving Caldwell a cheque for £965. Soon afterwards, Caldwell discovered that the cheque was in fact worthless, and immediately informed the police and the Automobile Association about the fraud. The car subsequently passed through several hands until eventually it was sold to a *bona fide* purchaser for value without notice of the fraud. In these circumstances, the court decided that Caldwell was entitled as against the innocent purchaser to possession of the car. The court held that Caldwell, by his actions after discovering the fraud, had rescinded the sale to the fraudster at common law, and therefore had recovered the ownership of the car before the subsequent sale to the innocent purchaser. Significantly, the fact that Caldwell had not been able to communicate to the fraudster his intention to disaffirm the original sale did not, given the exceptional circumstances of the case, prevent Caldwell from evincing an election to rescind. As Upjohn LJ observed:

If one party, by absconding, deliberately puts it out of the power of the other to communicate his intention to rescind ... I do not think he can any longer insist on his right to be made aware of the election to determine the contract. In these circumstances communication is a useless formality. I think that the

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<sup>104</sup> *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (CA).

law must allow the innocent party to exercise his right of rescission otherwise than by communication or repossession.<sup>105</sup>

The decision in *Caldwell* has been criticised by some scholars.<sup>106</sup> Nevertheless, the case was applied in very similar circumstances by the Court of Appeal in *Newtons of Wembley Ltd v Williams*,<sup>107</sup> and continues to be regarded as good law in England and Wales.<sup>108</sup> Furthermore, the rule in *Caldwell* has been codified in other jurisdictions.<sup>109</sup>

*Caldwell* demonstrates that where a contract is voidable for fraud the rescinding party can, in exceptional circumstances, evince an intention to rescind which is effective at common law, even if the rescinding party does not communicate that intention to the counterparty. Admittedly the *ratio* of *Caldwell* is restricted to cases where the voidable contract was procured by a rogue who later absconds and thereby makes it impracticable for the rescinding party to communicate his election to rescind.<sup>110</sup> Thus the *ratio* has no direct application to the situation which occurred in *Gresley and Dickinson*, where the conveyance by A to B was voidable on purely equitable grounds and B had not absconded. Nevertheless, *Caldwell* is significant because the case shows that it is not an absolute rule at common law that the rescinding party communicate his election to rescind to the counterparty. And if it is not an absolute rule at common law that the rescinding party communicate his election to rescind, then this is highly unlikely to be an absolute rule in equity either.

Furthermore it is likely that the exceptions to the general rule that an election to rescind ought to be communicated by the rescinding party to the counterparty are considerably wider in equity than at common law. In other words, it is probable that an election to rescind is far less likely to be ineffective in equity than at common law by reason of the rescinding party not having communicated his election to the

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<sup>105</sup> Ibid 555D-E (Upjohn LJ).

<sup>106</sup> See, eg, WR Cornish, 'Rescission without Notice' (1964) 27 MLR 472. But see FJ Odgers, 'Contract—Voidable for Misrepresentation—Meaning of Rescission' [1963] CLJ 180.

<sup>107</sup> *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560 (CA). In this case, however, the rescinding party failed despite having validly elected to disaffirm the fraudulent sale, it being held that the fraudster was to be treated as a mercantile agent in possession with the consent of the rescinding party under s 9 of the Factors Act 1889, and accordingly as having the powers of such an agent with respect to disposition under s 2 of the 1889 Act.

<sup>108</sup> See, eg, *Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] 1 QB 929 (CA).

<sup>109</sup> Contractual Remedies Act 1979 (NZ), s 8(1)(b); Australian Consumer Law and Fair Trading Act 2012 (Vic), s 26(1)(b).

<sup>110</sup> *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (CA) 555F-G (Upjohn LJ). See also D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 11.36; E Peel, *Treitel: The Law of Contract* (13th edn, Sweet & Maxwell 2011) para 9-088.

counterparty. The reason for this concerns the fundamental distinction between rescission at law and rescission in equity and the different policy considerations which arise from that distinction.

As explained above, rescission at common law is fully the act of the rescinding party.<sup>111</sup> Thus if the rescinding party successfully disaffirms the voidable contract, he thereby extinguishes the contract and reverts in himself the legal ownership of any property which he has transferred under the contract. This automatic and immediate reversion of the legal title can have serious consequences. For one thing, it can expose the counterparty to liability for strict liability torts such as conversion or trespass to goods.<sup>112</sup> For another thing, and more importantly, if the counterparty subsequently purports to sell the property to a third party, then the third party may not acquire a good title,<sup>113</sup> even if he is a *bona fide* purchaser for value without notice of the fraud.<sup>114</sup> Indeed, this is precisely what happened to the innocent purchaser in *Caldwell*.<sup>115</sup> In light of these consequences, it is to be expected that the courts would take a comparatively strict approach to rescission at common law by insisting that, save in exceptional circumstances like those which occurred in *Caldwell*, it is necessary for the rescinding party to communicate to the counterparty his election to disaffirm the contract.

Rescission in equity is different. As demonstrated above, in equity, ‘rescission’ in the full sense of the term is formally effectuated by order of the court; it is never the fully independent act of the rescinding party. If an election to rescind is effectual in equity, then its effect is limited to causing an equitable title to vest retrospectively in the rescinding party *ab initio*. This retrospective vesting of equitable title does not entail such potentially serious consequences for the counterparty and for third party purchasers as does the automatic and immediate reversion of legal title which results from a successful election to rescind at common law. As regards the counterparty, he is far less likely to incur personal liability following an effectual election to rescind in equity. For one thing, the counterparty will not assume liability to the rescinding

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<sup>111</sup> *Halpern v Halpern (No 2)* [2006] EWHC 1728 (Comm), [2007] QB 88 [26] (Nigel Teare QC); D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 11.50.

<sup>112</sup> See D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 16.41.

<sup>113</sup> Cf *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560 (CA).

<sup>114</sup> *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (CA).

<sup>115</sup> For criticism of this aspect of the case, see Law Reform Committee, *Twelfth Report: Transfer of Title to Chattels* (Cmnd 2958, 1966) para 16; J O’Sullivan, ‘Rescission as a Self-help Remedy: A Critical Analysis’ (2000) 59 CLJ 509, 532.

party's equitable title unless and until his conscience is affected by knowledge of the fact that he holds subject to that title.<sup>116</sup> For another thing, even once the counterparty's conscience is affected, the extent of his personal liability to the rescinding party is likely to be limited. As Millett J observed in *Lonrho plc v Fayed*:

It is a misake [sic] to suppose that in every situation in which a constructive trust arises the legal owner is necessarily subject to all the fiduciary obligations and disabilities of an express trustee. Even after the [rescinding party] has elected to avoid the contract and reclaim the property, the obligations of the [counterparty] would in my judgment be analogous to those of a vendor of property contracted to be sold, and would not extend beyond the property actually obtained by the contract and liable to be returned.<sup>117</sup>

As regards the position of a third party who purchases from the counterparty following the election to rescind but before the rescinding party recovers the legal title, if the third party takes as a *bona fide* purchaser for value of a legal interest without notice, then in principle he will take freely of the rescinding party's equitable title.<sup>118</sup> Accordingly, the consequences of an election to rescind are on the whole less detrimental to the other interested parties if that election takes effect in equity exclusively of the common law. There is correspondingly less of a requirement for the equitable rules on rescission to insist that the rescinding party communicate his election to rescind to the counterparty in order for that election to be effectual.

It is difficult to say whether or not the equitable doctrine of rescission actually does take a less strict approach than the common law to the rule that an election to rescind be communicated to the counterparty. The cases do not seem to offer any guidance on this question. Despite the lack of guidance in the cases, however, the fact remains that, given the fundamental differences between the common law and equitable doctrines of rescission, it would be highly surprising if equity did not take a more liberal approach to the rule that an election to rescind be communicated to the counterparty. It would make far more sense for the equitable doctrine of rescission to

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<sup>116</sup> See proposition (ii) of Lord Browne-Wilkinson's summary of the principles of trust law at *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 705C-F.

<sup>117</sup> *Lonrho plc v Fayed* [1992] 1 WLR 1 (Ch) 12B-C (Millett J).

<sup>118</sup> See *Pilcher v Rawlins* (1872) LR 7 Ch App 259 (CA).

look past the formulaic issue of whether the rescinding party has communicated an election to rescind to the counterparty and instead focus on the evaluative question of whether the rescinding party by his words or conduct has sufficiently demonstrated an intention to disaffirm the voidable transaction.

In conclusion, the apparent rule that in order for an election to rescind to be effectual it is necessary for the rescinding party to communicate his intention to the counterparty is not an absolute requirement even at common law. Furthermore—although the cases admittedly do not provide any guidance on this point—given the way in which rescission works in equity, it is at least arguable that an election to rescind is far less likely to be ineffectual in equity than at common law by reason of the rescinding party not having communicated his election to the counterparty. On the contrary, it seems more probable that the equitable doctrine of rescission places greater emphasis on the evaluative question of whether or not the rescinding party, by his words or conduct, has made it sufficiently clear that he no longer intends to treat the voidable transaction as binding on him.

What do these conclusions mean for the above analysis? They mean that the presumption in stage (iii) of the analysis—that the conduct of A in making the subsequent disposition to C is independently sufficient to qualify as an election by A to rescind the earlier conveyance to B—is a plausible presumption. As indicated above, A's conduct in this regard manifests a clear intention to disaffirm the earlier conveyance, for it entails the assertion by A of rights of alienation which are inconsistent with the continued existence of the earlier conveyance. Accordingly, A's conduct should, in principle, be independently sufficient to qualify as an election to rescind the earlier conveyance, provided that A is not affected by the rule that an election to rescind must be communicated by the rescinding party to the counterparty. In light of the above discussion, however, it appears unlikely that this rule is observed by equity as strictly as it is observed by the common law; hence it is by no means unreasonable to suggest that A is not affected by the rule. Thus the presumption in stage (iii) of the analysis is a perfectly plausible one, and the potential objection that it is not can be dismissed.

*ii. Objection 2: A common law concept*

The second potential objection directly attacks the foundational premise in the present analysis of the rule in *Gresley, Dickinson and Melbourne*, namely the proposition that an election to disaffirm a transaction which is voidable on equitable grounds can operate to immediately trigger the retrospective vesting of equitable title in the rescinding party *ab initio*. As noted above, the cases of *Lonrho*, *Twinsectra* and *Independent Trustee Services* can be cited in support of this proposition.<sup>119</sup> Nevertheless, it might be objected that the notion of ‘an election to disaffirm’ is not in origin an equitable concept, but is a mechanism which was developed at common law and was only translocated into the equitable doctrine of rescission because of a mistaken analogy with common law principles.

It is conceded that there is a lot that can be said in favour of this objection. An election to disaffirm has always been the mechanism by which rescission is effectuated at common law.<sup>120</sup> By way of contrast, before the mid-nineteenth century, there was no suggestion in the case law that if a transaction was voidable on *equitable* grounds, then the personal election of the rescinding party to disaffirm that transaction had any immediate effect on the rights of the parties.<sup>121</sup> On the contrary, it seems to have been universally accepted that, in equity, the entire process of rescission was effectuated and controlled by judicial decree.<sup>122</sup> Then, from about 1870 onwards, cases such as *Reese River Silver Mining Co Ltd v Smith*<sup>123</sup> and *Abram Steamship Co Ltd (in liq) v Westville Shipping Co Ltd (in liq)*<sup>124</sup> began to confuse the common law and equitable doctrines of rescission by suggesting that rescission in equity was a self-help remedy.<sup>125</sup> It has already been demonstrated that the analogy which these cases unthinkingly drew between the common law and equitable doctrines was false: rescission in equity is never a self-help remedy, and this so whether or not an election to disaffirm can have the limited effect of immediately vesting a retrospective equitable title in the rescinding party. Despite its falsity, however, it is highly probable that this analogy was the principal factor which subsequently gave rise to the proposition, supported in *Lonrho*, *Twinsectra* and *Independent Trustee Services*, that a personal election to disaffirm a transaction which is voidable on equitable grounds

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<sup>119</sup> See above, fn 79.

<sup>120</sup> J O’Sullivan, ‘Rescission as a Self-help Remedy: A Critical Analysis’ (2000) 59 CLJ 509, 517.

<sup>121</sup> D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 11.59.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Reese River Silver Mining Co Ltd v Smith* (1869) LR 4 HL 64 (HL).

<sup>124</sup> *Abram Steamship Co Ltd (in liq) v Westville Shipping Co Ltd (in liq)* [1923] AC 773 (HL).

<sup>125</sup> See above, fn 90.

can effectuate a *partial* rescission by causing the backdated equitable title to vest immediately in the rescinding party.

Consequently, it would seem that the basic assertion underlying the above objection is probably true. It does indeed appear to be the case that the notion of electing to disaffirm a voidable transaction was originally an exclusively common law concept whose translocation into equitable doctrine was the result of an unthinking analogy with common law principles. Nevertheless, while this objection may be correct in its underlying assertions, it is not necessarily fatal to the above analysis.

Simply put, although the idea that an election to disaffirm can operate to vest an equitable title in the rescinding party may derive from the mistaken view that rescission in equity is a self-help remedy, it does not follow that this idea is necessarily bad in and of itself. In principle, there is no reason why the modern authorities ought not to take the view that the rescinding party acquires a backdated equitable title when he elects to disaffirm the transaction, rather than when the court decrees rescission. On the contrary, such an approach seems to be justified with reference to both basic equitable principle and policy considerations. In terms of principle, it is well established that equity sees as done that which ought to be done.<sup>126</sup> It is on this basis, for example, that equity pre-empts the execution of a specifically enforceable contract for sale by giving the purchaser an immediate equitable title to the subject of the sale.<sup>127</sup> Arguably, the idea that an equitable title vests in the rescinding party when he elects to disaffirm the transaction could be regarded as another manifestation of the same principle: in a similar way to how equity anticipates the execution of a contract for sale, equity is anticipating the enforcement by the rescinding party of his mere equity to go to court and acquire an order for the reconveyance of legal title.<sup>128</sup> Indeed, this analogy is lent further credence by the observations of Millett LJ in the case of *Lonrho*, where, as noted above, the judge likened the obligations of the counterparty when rescission occurred to the obligations of ‘a vendor of property contracted to be sold’.<sup>129</sup> In terms of policy, there are good reasons for allowing the rescinding party to secure a limited equitable title before he enforces his right to an order formally rescinding the voidable transaction. For one thing, it would give the rescinding party

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<sup>126</sup> JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2014) ch 3.

<sup>127</sup> *Lysaght v Edwards* (1876) 2 Ch D 499 (Ch) 506 (Sir George Jessel MR).

<sup>128</sup> Cf R Chambers, *Resulting Trusts* (OUP 1997) 174-75.

<sup>129</sup> *Lonrho plc v Fayed* [1992] 1 WLR 1 (Ch) 12B-C (Millett J).

an equitable interest in the property and thereby help to secure his right to relief against any third party who purchases an equitable interest from the counterparty, for while such a third party would be able to raise the plea of purchase for value without notice against a mere equity,<sup>130</sup> he would not be able to do so against a prior equitable interest.<sup>131</sup> For another thing, allowing the rescinding party to secure a limited equitable interest should make it easier for him to obtain interim relief against the counterparty, in particular to obtain an interim injunction restraining the counterparty from dealing with the subject of the voidable transaction (something which would be in the best interests of innocent third parties as well as the rescinding party).<sup>132</sup>

In conclusion, the original translocation into equitable doctrine of the concept of an election to rescind was almost certainly founded on the patently mistaken view that rescission in equity is a self-help remedy. This confusion created the conditions which subsequently gave rise to the idea that an election to disaffirm could be effectual in equity in the limited sense of causing the backdated equitable title to vest immediately in the rescinding party. Nevertheless, the simple fact that this idea emerged from a mistaken analogy between the common law and equitable doctrines of rescission does not make that idea inherently bad. On the contrary, the view which was expressed in *Lonrho*, *Twinsectra* and *Independent Trustee Services* can be justified with reference to basic equitable principle and policy considerations. Therefore, while the above objection is correct in its underlying assertion that an unthinking analogy gave rise to the idea that the backdated equitable title vests in the rescinding party when he elects to disaffirm, that idea can adequately be supported on independent grounds. It follows that this objection is not fatal to the above analysis of the rule in *Gresley*, *Dickinson* and *Melbourne*.

### *iii. Prosser v Edmonds distinguished*

Having examined the potential objections to the above analysis of the rule in *Gresley*, *Dickinson* and *Melbourne*, it is now necessary to consider the additional advantage,

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<sup>130</sup> See *Cave v Cave* (1880) 15 Ch D 639 (Ch) 646-47 (Fry J) and the other authorities cited above at ch 1, pt II, s 2, sub-s i, fn 36.

<sup>131</sup> *Phillips v Phillips* (1861) 4 De GF&J 208, 45 ER 1164; *Cave v Cave* (1880) 15 Ch D 639 (Ch).

<sup>132</sup> See D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 16.21.

which has already been flagged up, of this analysis. This advantage is that it is possible, within the ambit of the analysis, to harmonise the rule in *Gresley, Dickinson* and *Melbourne* with the decision in *Prosser v Edmonds*.<sup>133</sup> This matters because, for reasons that have already been discussed, *Prosser* is of fundamental importance to the principles on the assignment of mere equities. It follows that the cogent account of these principles which the present chapter aims to achieve will require some explanation of the doctrinal relationship between *Prosser* and the rule established in *Gresley, Dickinson* and *Melbourne*.

The facts in *Prosser* have already been considered and they are very similar to the facts that were in issue in *Gresley, Dickinson* and *Melbourne*. Looking at the cases closely, however, it seems that there is one potentially significant criterion of difference: in *Prosser* the assignor (A) appears to have been hostile to the action brought by the second assignee (C) against the first assignee (B). Thus A had refused to join with C as a plaintiff to the action and so had been made a defendant along with B; furthermore, Sir Frederick Pollock CB was careful to note that A ‘had no complaint to make’ about the first assignment.<sup>134</sup> This apparent hostility of A to the action brought by C distinguishes *Prosser* from both *Gresley* and *Melbourne*, where A was dead by the time that C commenced proceedings against B. The case of *Dickinson*, on the other hand, shares a number of features in common with *Prosser*. Thus in *Dickinson* A was still alive when C brought the action against B; A did not join with C as a plaintiff to that action; and A was accordingly made a defendant to the action. Nevertheless, *Dickinson* is distinguishable from *Prosser* in that, in *Dickinson*, A was not a hostile defendant, and did not deny the allegation that his conveyance to B had been procured by equitable fraud. On the contrary, in the deed by which A purported to effect the subsequent disposition to C, A made an express declaration that he disputed the validity of the earlier conveyance to B.<sup>135</sup>

It is suggested that this criterion of difference serves to harmonise *Prosser* (where it was decided that C could not stand in any right which A may have had to rescind the earlier conveyance to B) with *Gresley, Dickinson* and *Melbourne* (where it was decided that, in principle, C could enforce any right which A may have had to rescind the earlier conveyance to B). It should be clear at this point that, according to

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<sup>133</sup> *Prosser v Edmonds* (1835) 1 Y & C Ex 481, 160 ER 196.

<sup>134</sup> *Ibid* 491, 495; 200, 202 (Sir Frederick Pollock CB).

<sup>135</sup> *Dickinson v Burrell* (1866) LR 1 Eq 337, 338.

the above analysis, whether C can bring a claim to rescind the earlier conveyance to B depends on whether the conduct of A in making the subsequent disposition to C qualifies as an election by A to disaffirm the earlier conveyance (as per stage (iii) in the analysis). It has been argued that, so far as equity is concerned, the conduct of A in this regard generally ought to qualify as an election by A to disaffirm: hence the rule in *Gresley, Dickinson and Melbourne*. However, it is necessary to stress that this rule can only be a general one, for the fact remains that the question of whether a rescinding party has elected to disaffirm ‘is to be determined in the circumstances of each case’.<sup>136</sup> This is significant for the decision in *Prosser*, for if the particular circumstances of that case are examined, and the unusual feature that A seems to have been hostile to the proceedings taken into account, then it is feasible that the conduct of A in making the subsequent assignment to C did not, in the circumstances, qualify as an election by A to disaffirm his earlier assignment to B. This is not to suggest that the apparent hostility of A to the proceedings had the effect of invalidating what beforehand had been a valid election to disaffirm; such an argument would necessarily fail because of the established rule that once an election to disaffirm has been made it is irrevocable.<sup>137</sup> It is rather the case that the apparent hostility of A to the action brought by C against B is indirect evidence that A, at the time when he made the subsequent assignment to C, did not intend by his actions to call into question the earlier assignment to B. In this way, *Prosser* can be interpreted as falling outside of the rule in *Gresley, Dickinson and Melbourne* on the basis that, in *Prosser*, A never elected to disaffirm his transaction with B.

In conclusion, the above analysis is attractive for the additional reason that it allows the decision in *Prosser* to be harmonised with what was said in *Gresley, Dickinson and Melbourne*. As indicated above, this is not a trivial advantage, especially in light of the general importance of these cases to the principles governing the assignment of mere equities.

## PART VI: GENUINE COMMERCIAL INTEREST

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<sup>136</sup> D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 11.04, citing *Boynton v Monarch Life Insurance Co of New Zealand Ltd* [1973] 1 NZLR 606.

<sup>137</sup> *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (CA) 551B (Sellers LJ); D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 11.54-11.55.

The third approach to rule in *Gresley, Dickinson and Melbourne* appeals to the exception that was established in *Trendtex Trading Corp v Credit Suisse*<sup>138</sup> to the basic rule that a bare right of action cannot be assigned. The case of *Trendtex* has already been considered. In short, it was held in that case that an assignment by Trendtex to Credit Suisse of Trendtex's right to claim damages against CBN could have been supported on the basis that Credit Suisse had 'a genuine commercial interest' in the outcome of the litigation between Trendtex and CBN.<sup>139</sup> According to the third approach, the rule in *Gresley, Dickinson and Melbourne* can be understood as another manifestation of the exception that was established in *Trendtex*. Simply put, this analysis maintains that the reason C is entitled to claim rescission against B is that C had a 'genuine interest' in the enforcement of A's mere equity to rescind the earlier conveyance to B, which meant that A's mere equity, despite its being a naked right to litigate, was capable of passing by assignment under the subsequent disposition by A to C, thus allowing C to stand in the right of A to rescind the earlier conveyance to B.

This analysis enjoys some advantages over the alternative approach considered above which appeals to the retrospective equitable title that arises when rescission occurs. For one thing, the current analysis certainly has the advantage of relative simplicity. For another, it can account for the rule in *Gresley, Dickinson and Melbourne* within the ambit of the core principles considered above on the assignment of mere equities. In other words, the analysis does not have to appeal to superadded concepts, such as the notion of a backdated equitable title, in order to make sense of the rule.

Nevertheless, the view that A can assign his mere equity to C because C has a genuine interest in the enforcement of that mere equity is problematic for at least two reasons. The first reason is that it is difficult to say precisely what 'genuine interest' C could assert in the enforcement of such a mere equity. In the *Trendtex* case itself, Credit Suisse had quite an obvious interest in taking an assignment of Trendtex's claim against CBN: Credit Suisse was a substantial creditor of Trendtex, which itself was in financial difficulties and unlikely to be able to meet its obligations to Credit Suisse unless its claim against CBN were successfully enforced. By way of contrast, in the

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<sup>138</sup> *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL).

<sup>139</sup> *Ibid* 703C-D, F (Lord Roskill).

situation to which the rule in *Gresley, Dickinson and Melbourne* applies, it is difficult to identify any comparable interest that C could assert in taking an assignment of a mere equity to set aside the earlier conveyance by A to B. Admittedly, C will acquire a genuine interest in the enforcement of such a mere equity *after* the subsequent disposition by A to C has taken place. This is because, as explained above, one of the consequences of rescission is that it gives effect in equity to dispositions which, before rescission, were ineffectual due to the existence of the voidable transaction. However, it would be absurd to suggest that this ‘genuine interest’ is the reason that A can assign his mere equity to C under the rule in *Gresley, Dickinson and Melbourne*. To put it briefly, since this interest does not arise until *after* the subsequent disposition by A to C, then it would be highly circular to argue that this interest could play any role in supporting the assignment of A’s mere equity to C under that very same disposition.

The second reason the present analysis of the rule in *Gresley, Dickinson and Melbourne* is problematic is that it cannot feasibly be harmonised with the case of *Prosser*. In *Prosser*, it was decided that C could not take an assignment of any mere equity to rescind which A may have been able to assert against B. It follows that, if the present analysis were adopted, it would be necessary to explain why, in *Prosser*, C did not have a genuine interest in taking an assignment of a mere equity to rescind the earlier transaction between A and B while, in *Gresley, Dickinson and Melbourne*, C presumably did have a genuine interest. There is no clear solution to this problem. It has already been argued that, for the purposes of the rule, the only significant distinction between *Prosser*, on the one hand, and *Gresley, Dickinson and Melbourne*, on the other, is that, in *Prosser*, A was actively hostile to the action brought by C to rescind the earlier transaction. Yet this criterion of difference does not have any discernible relevance to the question of whether or not C had a sufficient ‘genuine interest’ for the exception that was recognised in *Trendtex* to apply. Accordingly, it is not possible, within the ambit of the present analysis, to harmonise *Prosser* with the rule in *Gresley, Dickinson and Melbourne*.

In summary, three different approaches to the rule in *Gresley, Dickinson and Melbourne* have been considered. The first approach holds that the cases were wrongly decided. The second and third approaches seek to harmonise these decisions within the available theoretical framework: the second does so by appealing to the backdated equitable title which arises when rescission occurs; the third does so by referring to the exception that was established in the case of *Trendtex* to the rule that a bare right

to litigate cannot be assigned. It has been argued already that the first approach ought to be considered the least favoured option. As between the second and third approaches, while the third approach has the advantage of relative simplicity, the second approach is, on balance, the preferable option. For one thing, the third approach runs into the intractable difficulty of identifying what ‘genuine interest’ C could have in taking an assignment of A’s mere equity. This is not an issue for the second approach. For another thing, it is possible within the ambit of the second approach, but not within the ambit of the third approach, to harmonise the decision in *Prosser* with what was said in *Gresley, Dickinson and Melbourne*—as explained above, this is a significant advantage of the second approach. Therefore, out of the various options that have been considered, the second approach provides, on balance, the most convincing theoretical explanation for the rule in *Gresley, Dickinson and Melbourne*.

### **1. Where C would have taken in default of the voidable conveyance**

For the sake of completeness, it should be noted that there is one category of case—closely analogous to, but nevertheless distinct from, the situation to which the rule in *Gresley, Dickinson and Melbourne* applies—where the exception that was recognised in the *Trendtex* case has a much higher degree of explanatory value. This category of case is where A was the owner of property which—either by operation of law or under some earlier transaction, and in default of A exercising his power of alienation over that property—would have descended to C on the death of A. However, before his death, A transferred the property to B under a conveyance which was voidable at the instance of A. A then died, having not exercised his right to rescind the conveyance to B. In these circumstances, it seems that, in equity, it is generally allowable for C to enforce the right which had vested in A to rescind the conveyance to B, and thereby recover for his own benefit the property transferred.

There have been a number of cases which fit within this general pattern. For example, there were various cases decided before 1926 where a freehold estate in land had been transferred under a voidable conveyance and the transferor had subsequently died. In these circumstances, it was held that the heir at law of the transferor was

entitled to stand in the right of the transferor to set aside the voidable conveyance.<sup>140</sup> For the most part, the rule established by these cases no longer exists, since the Administration of Estates Act 1925 abolished the concept of heirship except in certain limited situations.<sup>141</sup> In principle, however, a similar rule ought to operate in favour of a person who is entitled to succeed under the current rules of intestacy,<sup>142</sup> although this proposition does not appear to have been tested in any case so far. In addition to the heir at law cases, there have also been cases where the effect of the voidable conveyance was to prevent the descent of property from the transferor to the claimant under the terms of a settlement which predated the voidable conveyance. Again, it was held that the claimant was entitled to enforce the right of the transferor to rescind the voidable conveyance.<sup>143</sup>

Another category of case which at first glance may appear to fall within the general pattern observed above is where the transferor initially devises certain property to a devisee and afterwards transfers the same property under a voidable conveyance. Despite some contrary authority from the late eighteenth century,<sup>144</sup> it has been held that in these circumstances it is not allowable for the devisee to enforce the right which had vested in the transferor to rescind the voidable conveyance.<sup>145</sup> These cases, however, do not seriously controvert the above observations, since they were decided on the highly specific ground that even a voidable conveyance can operate to revoke a previous will.<sup>146</sup>

In cases which fall within the above pattern, the notion that a backdated equitable title vests in A when he elects to disaffirm the voidable conveyance to B has no explanatory value. This is because, between A making the voidable conveyance and his subsequent death, A generally did not engage in any conduct which could be construed as evidencing an intention to disaffirm. This is to be contrasted with the situation to which the rule in *Gresley, Dickinson* and *Melbourne* applies, where A,

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<sup>140</sup> See, eg, *White v Small* (1682) 2 Chan Cas 103, 22 ER 867; *Coleby v Smith* (1683) 1 Vern 205, 23 ER 416; *Clark v Ward* (1700) Prec Ch 150, 24 ER 72; *Clarkson v Hanway* (1723) 2 P Wms 203, 24 ER 700; *Bennet v Vade* (1741) 2 Atk 324, 26 ER 597; *Clark v Malpas* (1862) 31 Beav 80, 54 ER 1067, varied (1862) 4 De GF&J 401, 45 ER 1238.

<sup>141</sup> Administration of Estates Act 1925, s 45.

<sup>142</sup> D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 22.05.

<sup>143</sup> *Englefeild v Englefeild* (1686) 1 Vern 444, 23 ER 575; *Addis v Campbell* (1841) 4 Beav 401, 49 ER 394.

<sup>144</sup> *Hawes v Wyatt* (1790) 3 Bro CC 156, 29 ER 463, reversing (1790) 2 Cox 263, 30 ER 122.

<sup>145</sup> *Hick v Mors* (1754) 3 Keny 117, 96 ER 1329; (1754) Amb 216, 27 ER 143.

<sup>146</sup> See also D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) para 22.06, fn 9.

after making the voidable conveyance to B, makes a second disposition of the same property in favour of C, and thereby asserts rights of alienation which are inconsistent with the existence of the earlier conveyance.

In contrast with the situation to which the rule in *Gresley, Dickinson* and *Melbourne* applies, it seems that the present category of case is sufficiently explained with reference to the rule recognised in *Trendtex* that even a bare right of action can be assigned if the assignee has a ‘genuine interest’ in enforcing that right of action for his own benefit.<sup>147</sup> Thus it is clear that, once A has made the voidable conveyance to B, C has a genuine interest in the enforcement of A’s mere equity to rescind against B. This is because, if A were to enforce his mere equity, then the conveyance to B would be terminated *ab initio*, thus restoring a state of affairs whereby, *ceteris paribus*, the property would descend to C on the death of A. It follows that, under the rule in *Trendtex*, it would be allowable for A to assign his mere equity to C *inter vivos*. *A fortiori*, A’s mere equity should be capable of descending to C upon A’s death in a similar manner to how, but for the voidable conveyance to B, C would have succeeded to the property in question. Consequently, it stands to reason that, on the death of A, C should acquire the necessary *locus standi* to have the conveyance to B set aside.

Accordingly, while the approach which appeals to the backdated equitable title which arises when rescission occurs is the best way to account for the rule in *Gresley, Dickinson* and *Melbourne*, that approach does not have any explanatory value in the situation where C claims under the rules of intestacy or under a transaction which predates the voidable conveyance. In these cases, the alternative approach, which appeals to the *Trendtex* case, is the preferred option.

## PART VII: CONCLUSION

The aim of this chapter was to conclude the examination, which began in chapter four, into the doctrinal basis for the proprietary features of mere equities by investigating the doctrinal basis for the assignability of mere equities in favour of third parties. The chapter achieved this aim as follows.

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<sup>147</sup> *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL) 703C-D, F (Lord Roskill).

The chapter began by outlining the core principles which govern the assignment of mere equities to third parties. It was established that the prevailing rule is that a mere equity, being a mere equitable right of action, is not capable of assignment as an independent right, but that a mere equity may nevertheless be assigned together with some property right or interest to which the mere equity is ancillary. The cases which illustrate this principle were then examined, and it was inferred from these cases that in order for a mere equity to be sufficiently ancillary to a property right or interest so that the mere equity may be assigned together with the property right or interest, it is necessary for the mere equity to enhance in some way the practical enjoyment of the property right or interest.

The chapter then turned to consider the cases of *Gresley*, *Dickinson* and *Melbourne*. It was explained these cases establish a rule which is problematic in light of the core principles already discussed, for this rule seems to envisage that a mere equity to rescind can be assigned as an independent right. Three different ways in which *Gresley*, *Dickinson* and *Melbourne* could be explained were then outlined. The first approach was simply to maintain that these cases were wrongly decided. By way of contrast, the second and third approaches aimed to harmonise these cases with the core principles on the assignment of mere equities, although they did so in different ways. Thus the second approach appealed to the notion that a backdated equitable title vests in the rescinding party when rescission takes place, while the third approach invoked the rule, which was established in the case of *Trendtex*, that an assignment of a bare right of action is allowable if the assignee has a ‘genuine commercial interest’ in the enforcement of the right of action.

The chapter then turned to evaluate which of these three approaches was the most plausible. It was argued that, since the rule in *Gresley*, *Dickinson* and *Melbourne* appears to have gained general acceptance in the primary and secondary literature, the first approach must be the least preferable. The second approach was then outlined and potential objections to it dealt with. It was shown that this approach not only explained the rule in *Gresley*, *Dickinson* and *Melbourne*, but also allowed these cases to be harmonised with the factually similar case of *Prosser*. The third approach was then considered. It was argued that while the third approach had the advantage of relative simplicity, this approach nevertheless ran into difficulty as regards the identification of a ‘genuine commercial interest’. Furthermore, it was observed that the third approach, unlike the second approach, did not allow the rule in *Gresley*,

*Dickinson* and *Melbourne* to be harmonised with the decision in *Prosser*. Therefore it was concluded that, out of the three approaches considered, the second approach was the most plausible.

The purpose of this chapter and of the previous two chapters (chapters four and five) has been to answer the third question which this thesis asks, namely, ‘What is the underlying doctrinal basis for the proprietary features of mere equities?’ It is now possible to answer that question. As explained in chapter one,<sup>148</sup> mere equities are said to have two features which can be described as ‘proprietary’. First, mere equities are said to be capable of enforcement against all third parties except for *bona fide* purchasers for value without notice. Second, mere equities are said to be capable of being assigned or devised in favour of third parties. In answer to the above question, the doctrinal basis underlying the enforceability of mere equities against third parties (the first proprietary feature of mere equities) is the so called conscience-based principle (which, as argued in chapter five,<sup>149</sup> allows a right *in personam* to be imposed afresh against the successor in title of the party originally bound); while the doctrinal basis underlying the assignability of mere equities in favour of third parties (the second proprietary feature of mere equities) is the rule that if a right of action is ancillary to some property right or interest, then the right of action can be assigned together with the property right or interest.

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<sup>148</sup> Ch 1, pt II, s 1.

<sup>149</sup> Ch 5, pt II, s 1.

## Chapter 7

### The Function of Mere Equities

#### PART I: INTRODUCTION

This chapter aims to answer the fourth and fifth questions which this thesis asks, namely, ‘What function do mere equities perform?’ and ‘How well do mere equities perform their identified function?’

The function of mere equities has not been investigated sufficiently in the literature. In chapter two,<sup>1</sup> it was posited that few scholars have touched on this area, while those who have adopt the arguably wholly uninformative standpoint that the function of mere equities is to fill in gaps which are left over by other, more traditional forms of equitable response, such as the trust. In particular, it was observed that no scholar has explored the alternative possibility that the different kinds of mere equity—rather than serving a purely residual role—perform the function of remedying one particular form of injustice. It was argued that this possibility is worth investigating, for if it were found that mere equities do, in fact, respond to a specific conception of injustice, then this could have implications for explaining the mere equity’s unique role within the wider scheme of equitable rights and interests.

The present chapter will seek to remedy this oversight in the literature by investigating the idea that mere equities perform the specialised function of remedying a definite form of injustice. Part two will commence this investigation by analysing the different situations in which mere equities have been held to exist in order to ascertain the necessary factual ingredients of this type of claim. Part three will then flesh out this analysis by taking a normative approach to the question of why these particular factual ingredients contribute to establishing a mere equity. Part four will then draw on the foregoing analysis in order to infer what function mere equities are likely to perform, before proceeding to evaluate how well mere equities perform their identified function as compared with other potential categories of equitable response.

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<sup>1</sup> Ch 2, pt II, s 4.

### 1. Detrimental action and vitiated intention

In order to ascertain whether mere equities perform the specialised function of remedying a particular conception of injustice and, if so, what this conception of injustice might be, it will be necessary to analyse the different situations in which mere equities have been held to exist and thereby determine the necessary factual ingredients of this category of claim. The analysis will focus on the claims whose status as mere equities has been confirmed in the authorities. As demonstrated in chapter three,<sup>2</sup> these ‘confirmed’ mere equities are (i) all equitable claims to have a transaction rescinded, (ii) all claims to have a document rectified and (iii) all claims to seek relief under the doctrine of proprietary estoppel. The particular circumstances in which these mere equities arise, and the form of the remedies to which they entitle the claimant, have already been outlined in chapter three.<sup>3</sup>

The results of this analysis are interesting. The cases where mere equities are held to exist are diverse, yet there are certain features that recur between them with sufficient regularity to suggest that the mere equity does, in fact, respond to a coherent conception of injustice. Hence, in any case where a mere equity arises, it seems that the jointly necessary factual ingredients of that case include the following two elements: first, the claimant must have acted to his own detriment; second, the claimant’s intention to do that act must have been induced by some vitiating factor.

In order to avoid confusion, it is necessary to clarify our terminology, beginning with the term ‘detriment’. ‘Detriment’ is capable of two overlapping but nevertheless distinct meanings. The first meaning describes a factual element which a case either does or does not present. The second meaning is a subset of the first, and describes a necessary element of a cause of action in proprietary estoppel.<sup>4</sup> Clearly, the present writer is using the term in the first sense. This is because ‘detriment’ in the second sense would exclude cases in which a mere equity to rescind or rectify has been

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<sup>2</sup> Ch 3, pt II, s 2, sub-s i.

<sup>3</sup> Ch 3, pt II, s 2, sub-s i.

<sup>4</sup> *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [29] (Lord Walker).

held to exist, for while ‘detriment’ is a necessary factual ingredient of such cases (see below), it does not have to be specifically pleaded by the claimant as an element of his cause of action.

In terms of substantive meaning, ‘detriment’ is given the same meaning here as it is given under the doctrine of proprietary estoppel. In this connection, detriment is not an *a priori* concept; it is an empirical conception and therefore incapable of rigid definition.<sup>5</sup> As Robert Walker LJ remarked in *Gillett v Holt*, detriment ‘is not a narrow or technical concept’ and ‘need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial’.<sup>6</sup> Detriment that is sufficient for the purposes of proprietary estoppel has classically been found where the claimant built or carried out improvements on land belonging to someone else,<sup>7</sup> but it has been found in a wide range of other contexts as well, such as where the claimant built on his own land,<sup>8</sup> where he sold part of his land without reserving a right of way in favour of the retained land,<sup>9</sup> and where he carried out work for another for many years and substandard remuneration.<sup>10</sup> The concept of detriment is certainly wide enough to encompass a case where the claimant entered a legal contract or disposition, thereby incurring obligations to his counterparty and/or divesting himself of rights in favour of another.

A ‘vitiating factor’ refers to any of the circumstances that are recognised at law and in equity, or in equity exclusively of the common law, as having the legal effect of impairing but not voiding the intention of the claimant to do a particular act.<sup>11</sup> Examples of vitiating factors include actual fraud, innocent misrepresentation, mistake, duress, undue influence and unconscionable conduct.<sup>12</sup>

It is not difficult to demonstrate that the confirmed examples of mere equities arise in cases where the claimant has acted to his detriment in circumstances where his

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<sup>5</sup> See *Gillett v Holt* [2001] Ch 210 (CA) 232D (Robert Walker LJ). See generally C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) paras 16-012-16-017.

<sup>6</sup> *Gillett v Holt* [2001] Ch 210 (CA) 232D (Robert Walker LJ).

<sup>7</sup> See, eg, *Inwards v Baker* [1965] 2 QB 29 (CA).

<sup>8</sup> *ER Ives Investment Ltd v High* [1967] 2 QB 379 (CA).

<sup>9</sup> *Crabb v Arun DC* [1976] 1 Ch 179 (CA).

<sup>10</sup> *Jennings v Rice* [2002] EWCA 159, [2003] 1 P&CR 8.

<sup>11</sup> See M Chen-Wishart, ‘The Nature of Vitiating Factors in Contract Law’ in G Klass, G Letsas and P Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014) 295-98. See also P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 106.

<sup>12</sup> See generally D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) pt 2.

intention to do so was impaired by some vitiating factor. As explained in chapter three,<sup>13</sup> where a claimant alleges a claim to have a contract or disposition rescinded, it is necessary for him to establish that he entered the contract or disposition in consequence of some vitiating factor: such as the misrepresentation<sup>14</sup> or undue influence<sup>15</sup> of another, or because of his own serious mistake as to the legal effect of the transaction<sup>16</sup> or some other matter that was fundamental to it.<sup>17</sup> Detriment, therefore, is a necessary feature of any case where a claim to rescind arises, because in all such cases the claimant acted to his detriment by entering the contract or disposition in question. Likewise, the intention of the claimant to enter the contract or disposition was vitiated either by the misrepresentation or undue pressure that was directed against him, or by his own serious mistake about the effect of the transaction.

Where, on the other hand, the claimant asserts a claim to have the instrument that embodies a contract or disposition rectified, it is necessary for him to establish that the instrument does not incorporate the terms which he intended it to incorporate when he executed it.<sup>18</sup> Yet again, the claimant acted to his detriment in entering the contract or disposition in question. Furthermore, his intention to enter the contract or disposition was vitiated by mistake: the mistake in this case being the claimant's false belief when he executed the instrument that the instrument embodied the terms which he intended.

Finally, where a claimant alleges a claim to seek equitable relief via the doctrine of proprietary estoppel, it is necessary for him to establish (i) that the owner of property caused him to believe that he had or would acquire a certain right in that property, (ii) that he acted to his detriment in reliance on this belief, and (iii) that his belief turned out to be ill-founded.<sup>19</sup> In a case, therefore, where a right to seek relief via proprietary estoppel arises, the claimant necessarily acted to his detriment. This detriment will not, in contrast to a case where a right to seek rescission or rectification arises, necessarily take the form of the claimant having entered a contract or

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<sup>13</sup> Ch 3, pt II, s 2, sub-s i.

<sup>14</sup> See, eg, *Redgrave v Hurd* (1881) 20 Ch D 1 (CA).

<sup>15</sup> See, eg, *Allcard v Skinner* (1887) 36 Ch D 145 (CA).

<sup>16</sup> See, eg, *Gibbon v Mitchell* [1990] 1 WLR 1304 (Ch).

<sup>17</sup> See, eg, *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

<sup>18</sup> *Chartbrook Ltd v Persimmon Homes Ltd* [2008] EWCA Civ 183, [2008] 2 All ER (Comm) 387 [134] (Lawrence Collins LJ).

<sup>19</sup> See generally *Re Basham* [1986] 1 WLR 1498 (Ch) 1503H (Edward Nugee QC); *Thornor v Major* [2009] UKHL 18, [2009] 1 WLR 776 [29] (Lord Walker); C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 16-001.

disposition; as explained above, detriment that is sufficient for the purpose of proprietary estoppel has been found to exist in a variety of different forms. In addition, the claimant's intention to do the detrimental act was vitiated by the mistake underlying his ill-founded belief that he had or would acquire rights in the property.

Therefore there is a strong case to be made that the mere equity responds to the injustice that results from the claimant having acted to his detriment in circumstances where his intention to do so was induced by some vitiating factor. The analysis would not be complete, however, without considering how this interpretation of the cases compares with the main alternatives.

### *i. Wrongdoing*

One possible alternative is that mere equities respond to wrongdoing. Wrongdoing is certainly a feature of many cases where a mere equity was held to have arisen. It is a feature of cases where the court granted rescission of a contract or disposition which the claimant was induced to enter by actual fraud, duress, or one of the species of equitable fraud such as innocent misrepresentation or undue influence.<sup>20</sup> Wrongdoing is also a feature of many cases where the court granted relief via the doctrine of proprietary estoppel. A necessary feature of such cases is that the owner of the property encouraged the claimant's ill-founded belief that he, the claimant, had or would acquire a certain right in the property.<sup>21</sup> Encouragement can take many forms, but has typically involved conduct that could be said to amount to equitable wrongdoing, such as where the owner made a false representation to the claimant as to the claimant's rights in the property,<sup>22</sup> or where the owner was aware of the claimant's mistake but stood by and allowed the claimant to act to his detriment.<sup>23</sup>

The theory that mere equities respond to wrongdoing cannot, however, account for the fact that mere equities have been found to arise in cases where the vitiating factor was mistake and wrongdoing was not an established feature of the case. An

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<sup>20</sup> See, eg, *Norton v Rely* (1764) 2 Eden 286, 28 ER 908: gift procured by undue influence set aside; *Redgrave v Hurd* (1881) 20 Ch D 1 (CA): contract procured by misrepresentation set aside.

<sup>21</sup> *Re Basham* [1986] 1 WLR 1498 (Ch) 1503H (Edward Nugee QC); C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 16-007.

<sup>22</sup> See, eg, *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133 (Ch).

<sup>23</sup> See, eg, *Munt v Beasley* [2006] EWCA Civ 370.

example of such a case is where the court held that the claimant had a right to seek rescission of a voluntary transaction which he entered in consequence of his own serious mistake.<sup>24</sup> Another example is where the court found that the claimant had a right to pursue rectification of a unilateral instrument that did not accord with his intention.<sup>25</sup> A third example is where the court held that the claimant had a right to compel rectification of a contract that the parties executed in the mistaken belief that it embodied their intended agreement.<sup>26</sup> If mere equities did respond to wrongdoing *per se*, then they would be incapable of arising in cases such as these where wrongdoing has not occurred. The fact that they are so capable indicates that mere equities do not, in actual fact, respond to wrongdoing.

## *ii. Unjust enrichment*

Another possibility is that mere equities respond to unjust enrichment. It is true that where a mere equity arises, it frequently will be the case that the claimant, in acting to his detriment, has enriched someone else and that this enrichment can be considered unjust given the claimant's vitiated intention. There are, however, two problems with the theory that mere equities respond to unjust enrichment.

The first problem is that the remedies to which a mere equity entitles the claimant are not necessarily restitutionary remedies, which they would be if they were founded on the reversal of unjust enrichment.<sup>27</sup> A remedy is restitutionary if its basic function is to restore to the claimant property or the value of property that has been received from him by the defendant.<sup>28</sup> Out of all the remedies a right to which constitutes a mere equity, rescission is capable of having the most restitutionary flavour, for where title to money or property has passed from the claimant under the transaction to be rescinded, the remedy will involve the restitution of those benefits to the claimant.<sup>29</sup> Nonetheless, it would be a mistake to think of rescission as a

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<sup>24</sup> *Gibbon v Mitchell* [1990] 1 WLR 1304 (Ch). See also *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

<sup>25</sup> *Re Butlin's Settlement Trusts* [1976] 1 Ch 251 (Ch).

<sup>26</sup> *Joscelyne v Nissen* [1970] 2 QB 86 (CA).

<sup>27</sup> G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 9.

<sup>28</sup> *Ibid* 3.

<sup>29</sup> See especially *Smith New Court Securities Ltd v Scrimgeour* [1994] 1 WLR 1271 (CA) 1280D (Nourse LJ).

necessarily restitutionary remedy, for rescission does not always involve the restitution of money or property.<sup>30</sup> For example, where the court rescinds a purely executory contract, the relief will not involve the restitution of money or property to the claimant; it will merely involve the extinguishment of any choses in action that have arisen under the contract.<sup>31</sup> As for rectification, while this remedy often has restitutionary consequences in that it operates to restore title to a provider of property,<sup>32</sup> this is not universally the case, as, for example, where rectification is awarded for the benefit of a donee under a voluntary disposition.<sup>33</sup> Finally, proprietary estoppel manifestly is not a restitutionary remedy because the admitted aim of the court in granting the relief is to do the minimum necessary to prevent an unconscionable result;<sup>34</sup> the relief, therefore, is by no means restricted to depriving the defendant of what he has gained.<sup>35</sup>

The second problem with the theory that mere equities respond to unjust enrichment is that mere equities have been held to arise in cases where the defendant was not enriched at the expense of the claimant. Such cases are admittedly rare, for ordinarily the claimant, in acting to his detriment, will have caused some kind of legal or economic benefit to accrue to the defendant. The fact that such cases are capable of existing at all, however, is inconsistent with the theory that mere equities respond to unjust enrichment. Thus, for example, in *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan CC*<sup>36</sup> the defendant informed the claimant that the defendant would exercise its power to compulsorily purchase from the claimant the site of the claimant's meeting hall and the claimant, in reliance on that representation, constructed a new hall on a different site. Here, it cannot be said that the defendant was enriched as a result of the claimant building the new hall. Nonetheless, the court found a mere equity, holding that the claimant was entitled to seek equitable relief on principles of proprietary estoppel.

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<sup>30</sup> G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 22.

<sup>31</sup> D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 1.14-1.19. See also G Virgo, *The Principles of the Law of Restitution* (2nd edn, OUP 2006) 26. But see Nahan NY, 'Rescission: A Case for Rejecting the Classical Model?' (1997) 27 *University of Western Australia Law Review* 66, 72-73.

<sup>32</sup> See, eg, *Blacklocks v JB Developments (Godalming) Ltd* [1982] 1 Ch 183 (Ch).

<sup>33</sup> See, eg, *Wright v Goff* (1856) 22 Beav 207, 52 ER 1087.

<sup>34</sup> *Jennings v Rice* [2002] EWCA 159, [2003] 1 P&CR 8 [56] (Robert Walker LJ).

<sup>35</sup> G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 521.

<sup>36</sup> *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan CC* (1981) 41 P&CR 179 (QB).

### *iii. Summary*

In summary, the theory that mere equities respond to wrongdoing and the theory that they respond to unjust enrichment are the main alternatives to the interpretation advanced here. Neither of these theories, however, can account for all of the cases where mere equities are held to arise. Furthermore, the theory that mere equities respond to unjust enrichment is inconsistent with the fact that the main examples of mere equities entitle the claimant to remedies that are not necessarily restitutionary. By way of contrast, the interpretation advanced here—that mere equities respond to the injustice that results from the claimant having acted to his detriment in circumstances where his intention to do so was impaired by some vitiating factor—is capable of explaining all of the cases where the main examples of mere equities are found to exist. It must be accepted, therefore, that this interpretation represents the better theory of the conception of injustice to which the mere equity responds.

## **2. Detrimental action and vitiated intention not sufficient**

Accordingly, in a case where a claimant asserts one of the confirmed examples of a mere equity against a defendant, the necessary factual ingredients of the claimant's claim include the following two elements. First, the claimant must show that he acted to his detriment, for example, by entering a contract or disposition or by building on land that does not belong to him. Second, the claimant must prove that his intention to do that act was induced by some vitiating factor such that his intention cannot, in fairness to the claimant, be characterised as a product of his autonomous will.

While the elements of detrimental action and vitiated intention are necessary for the claimant to establish a mere equity against the defendant, it is important for the purposes of the present argument to appreciate that these elements are never sufficient. The premise that the elements of detrimental action and vitiated intention are insufficient to found a mere equity can be supported in two ways. First, the premise can be deduced as a logical consequence of the elements themselves. Second, the premise can be supported with empirical evidence from the cases.

The first line of reasoning holds that the elements of detrimental action and vitiated intention cannot be sufficient to support a mere equity given the traditionally equitable character of that class of claim. The confirmed examples of mere equities are rights to remedies that are equitable in the quintessential sense that they operate upon the conscience of the defendant.<sup>37</sup> It is not necessary at this stage to consider what it means for a mere equity to operate upon the conscience of the defendant;<sup>38</sup> suffice it to say, the fact that a mere equity does so operate indicates that the necessary ingredients of a mere equity must include at least one element that relates in some way to the defendant's conduct or state of mind. The elements of detrimental action and vitiated intention, however, do not relate to the defendant's conduct or state of mind; these elements relate specifically to the conduct and state of mind of the claimant and therefore, as a necessary corollary, cannot relate to the conduct or state of mind of any other person, the defendant included. Accordingly, the elements of detrimental action and vitiated intention cannot be jointly sufficient to support a mere equity; the necessary ingredients of a mere equity must include at least one additional factor that relates in some way to the conscience of the defendant.

The argument that the elements of detrimental action and vitiated intention cannot be sufficient to support a mere equity is corroborated by empirical evidence from the cases. The cases in the *Barclays Bank plc v O'Brien*<sup>39</sup> line of authority provide a good illustration.<sup>40</sup> These cases classically involve the following facts.<sup>41</sup> A wife initially agrees with a lender to stand as surety for her husband's indebtedness to the lender but subsequently seeks to have her contract with the lender rescinded on the ground that she was induced to enter it by her husband's undue influence. In this factual scenario, the general rule established by Lord Browne-Wilkinson in *O'Brien* and developed in later cases is that the court will not rescind the contract unless the wife can establish, in addition to her husband's undue influence, that the lender was

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<sup>37</sup> See *Clough v The London and North Western Railway Co* (1871) LR 7 Ex 26, 33 (Mellor J); *Ward v Kirkland* [1967] 1 Ch 194 (Ch) 235E (Ungoed-Thomas J); *Crabb v Arun DC* [1976] 1 Ch 179 (CA) 195D-E (Scarman LJ); *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87 (Ch) 95C (Peter Millett QC); *KPMG LLP v Network Rail Infrastructure Ltd* [2006] EWHC 67 (Ch), [2006] 2 P&CR 7; D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell 2010) para 1-09.

<sup>38</sup> Although see generally W Ashburner, *Principles of Equity* (Butterworth & Co 1902) 51-53.

<sup>39</sup> *Barclays Bank plc v O'Brien* [1994] 1 AC 180 (HL).

<sup>40</sup> See also, eg, *Barclays Bank plc v Boulter* [1999] 1 WLR 1919 (HL); *Wright v Cherrytree Finance Ltd* [2001] EWCA Civ 449, [2001] 2 All ER (Comm) 877; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773.

<sup>41</sup> But see *Barclays Bank plc v O'Brien* [1994] 1 AC 180 (HL) 198C-F (Lord Browne-Wilkinson).

put on inquiry but had failed to take reasonable steps to ensure that the contract was not being induced by undue influence. This general rule was usefully summarised in *Royal Bank of Scotland plc v Etridge (No 2)*<sup>42</sup> by Lord Hobhouse as follows:

[Lord Browne-Wilkinson's] speech thus provides a structured scheme for the decision of cases raising the issue of enforceability as between a lender and a wife. It can be expressed by answering three questions: (1) Has the wife proved what is necessary for the court to be satisfied that the transaction was affected by the undue influence of the husband? (2) Was the lender put on inquiry? (3) If so, did the lender take reasonable steps to satisfy itself that there was no undue influence?<sup>43</sup>

If the elements of detrimental action and vitiated intention were jointly sufficient to found a mere equity, then, in the factual scenario in question, it would not be necessary for the wife to establish that the lender was put on inquiry but subsequently failed to take reasonable steps. These elements relate to the conduct and state of mind of the lender; they do not contribute to proving that the wife acted to her detriment, nor that her intention to do so was induced by a vitiating factor. The fact, therefore, that the rule in *O'Brien* does require the wife to prove that the lender was put on inquiry but failed to take reasonable steps entails that detrimental action and vitiated intention are not jointly sufficient to support a mere equity. The rule also corroborates the argument that the necessary ingredients of a mere equity must include, in addition to detrimental action and vitiated intention, at least one element that relates to the conduct or state of mind of the defendant.

### **3. The three defendant-related factors**

Consequently, while the elements of detrimental action and vitiated intention are *jointly necessary* to establish a mere equity, they nevertheless are *jointly insufficient*. They must be jointly insufficient because they relate exclusively to the conduct and

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<sup>42</sup> *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773.

<sup>43</sup> *Ibid* [101] (Lord Hobhouse).

state of mind of the claimant whereas, for the reasons already provided, the necessary elements of a mere equity must include at least one additional factor that relates to the conduct or state of mind of the defendant so as to justify intervention of a quintessentially equitable kind against him. It is now necessary to consider what this additional factor might be.

As a first step, it is necessary once again to analyse the different factual scenarios where mere equities have been held to exist, only this time the purpose of the analysis will be to ascertain the various ways in which the established facts related to the defendant's conduct or state of mind. As before, the analysis will focus on the confirmed examples of mere equities, these being an equitable claim to have a contract or disposition rescinded, a claim to have a document rectified and a claim to seek equitable relief under the doctrine of proprietary estoppel.

The analysis discloses a strong pattern. In every instance where the claimant established a mere equity against the defendant (subject to one exception that will be discussed below), at least one (and in some cases more than one) of the following three defendant-related factors was an established feature of the case. First, the defendant acquired the rights that were adversely affected by the finding of the mere equity (a) from the claimant (b) as a consequence of the claimant having acted to his detriment and (c) without paying consideration to the claimant. Second, the defendant, by words or conduct, materially contributed to the vitiating factor. Third, the defendant (a) knew about, or was put on inquiry as to the existence of, the vitiating factor but (b) nevertheless elected to stand by and allow the claimant to act to his detriment.

The first defendant-related factor is most obviously capable of existing as a feature of cases involving voluntary transactions. It was a feature of cases like *Huguenin v Baseley*<sup>44</sup> and *Gibbon v Mitchell*<sup>45</sup> where the claimant, having previously made a voluntary disposition, established a right to have the disposition rescinded on the ground that he was induced to make it either by the undue influence of a third party,<sup>46</sup> or by his own serious mistake about its effect.<sup>47</sup> It was also a feature of cases

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<sup>44</sup> *Huguenin v Baseley* (1807) 14 Ves Jun 273, 33 ER 526.

<sup>45</sup> *Gibbon v Mitchell* [1990] 1 WLR 1304 (Ch).

<sup>46</sup> See, eg, *Bridgman v Green* (1755) 2 Ves Sen 627, 28 ER 399, affd (1757) Wilm 58, 97 ER 22; *Huguenin v Baseley* (1807) 14 Ves Jun 273, 33 ER 526; *Bainbrigge v Browne* (1881) 18 Ch D 188 (Ch).

<sup>47</sup> See, eg, *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476 (Ch); *Gibbon v Mitchell* [1990] 1 WLR 1304 (Ch); *Wolff v Wolff* [2004] EWHC 2110 (Ch), [2004] STC 1633; *Re Griffiths* [2008] EWHC 118 (Ch), [2009] Ch 162 (Ch); *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

like *Re Butlin's Settlement Trusts*<sup>48</sup> where the claimant initially executed a voluntary deed or other unilateral instrument but subsequently established a right to have that instrument rectified on the ground that it did not accord with his donative intention.<sup>49</sup> In each of these cases, the defendant was the person who, having taken under the transaction, was interested in opposing the rescission or rectification of that transaction.<sup>50</sup> In each case, therefore, the defendant acquired his opposing rights from the claimant, as a direct consequence of the claimant acting to his detriment by entering the transaction, and without giving the claimant consideration (the transaction being a voluntary one).

The first defendant-related factor is also, albeit less obviously, capable of existing in certain cases involving contracts and other multilateral transactions. It was a feature of cases like *Joscelyne v Nissen*<sup>51</sup> where the claimant, having entered a written contract with the defendant, established a right to have the instrument rectified on the ground that it did not express the common intention of the parties.<sup>52</sup> In these cases, the defendant acquired his opposing rights through the instrument; he therefore acquired them from the claimant as a consequence of the claimant acting to his detriment by executing the instrument. Furthermore, to the extent that the defendant's rights under the instrument were opposed to the rectification of the instrument, they were acquired by the defendant without his giving the claimant consideration for them. The defendant, it is true, was not a volunteer. It must be remembered, however, that the aim of rectification is to make the instrument accord with the actual agreement between the parties,<sup>53</sup> so *a fortiori* any rights that would be adversely affected by an order for rectification cannot form any aspect of the parties' actual bargain. It follows that the opposing rights acquired by the defendant under the instrument cannot have been included in the actual bargain between himself and the claimant. These rights were *dehors* the agreement and therefore any consideration given by the defendant to the claimant cannot have extended to them.

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<sup>48</sup> *Re Butlin's Settlement Trusts* [1976] 1 Ch 251 (Ch).

<sup>49</sup> See also, eg, *James v Couchman* (1885) 29 Ch D 212 (Ch).

<sup>50</sup> *Gibbon v Mitchell* [1990] 1 WLR 1304 (Ch) 1310A-B (Millett J).

<sup>51</sup> *Joscelyne v Nissen* [1970] 2 QB 86 (CA).

<sup>52</sup> See also, eg, *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71 (CA).

<sup>53</sup> See especially *Mackenzie v Coulson* (1869) LR 8 Eq 368, 375 (Sir WM James V-C): 'Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts'.

The second defendant-related factor—that the defendant by his words or conduct materially contributed to the factor that vitiated the claimant’s intention—is a feature of a wide variety of factual scenarios where the claimant was held to have a mere equity. It is a feature of cases like *Redgrave v Hurd*<sup>54</sup> and *Allcard v Skinner*<sup>55</sup> where the claimant initially entered a contract or disposition but subsequently established a right to rescind against the defendant (the counterparty or disponee under the transaction) on the ground that the defendant induced him to enter the transaction by means of conduct amounting to misrepresentation, undue influence, or unconscionable conduct.<sup>56</sup> In this class of case, the defendant’s wrongdoing was always a material contributing factor in vitiating the claimant’s intention to enter the contract or disposition: indeed, in most instances, the defendant’s wrongdoing was the primary reason that the claimant’s intention was vitiated.

The second defendant-related factor was also a feature of cases like *Lovesy v Smith*.<sup>57</sup> These were cases where the claimant, having entered a *multilateral* instrument whilst labouring under a *unilateral* mistake as to the terms of that instrument, established a right to have the instrument rectified on the ground that the defendant (the counterparty to the instrument) induced the claimant’s mistake by fraudulent means. In this factual scenario, the defendant materially contributed to the vitiating factor because his fraudulent conduct was the principal reason that the claimant was mistaken.

The second defendant-related factor was also a feature of many cases where the court granted relief under the doctrine of proprietary estoppel. As already explained, where a claimant brings a claim in proprietary estoppel, it is necessary for him to prove that the defendant (the owner of the property) encouraged the claimant in his ill-founded belief that he, the claimant, had or would acquire a certain right over the property.<sup>58</sup> In cases where the claimant’s claim succeeded, the necessary encouragement frequently involved some affirmative conduct on the part of the defendant.<sup>59</sup> For instance, in cases like *Hopgood v Brown*<sup>60</sup> the defendant encouraged

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<sup>54</sup> *Redgrave v Hurd* (1881) 20 Ch D 1 (CA).

<sup>55</sup> *Allcard v Skinner* (1887) 36 Ch D 145 (CA).

<sup>56</sup> See also, eg, *Boustany v Pigott* (1995) 69 P&CR 298 (PC).

<sup>57</sup> *Lovesy v Smith* (1880) 15 Ch D 655 (Ch).

<sup>58</sup> *Re Basham* [1986] 1 WLR 1498 (Ch) 1503H (Edward Nugee QC).

<sup>59</sup> See generally C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 16-008.

<sup>60</sup> *Hopgood v Brown* [1955] 1 WLR 213 (CA) 223-24 (Evershed MR).

the claimant to believe that that he, the claimant, had a certain right over the property by representing to the claimant that such was in fact the case.<sup>61</sup> Alternatively, in cases like *Gillett v Holt*,<sup>62</sup> *Jennings v Rice*<sup>63</sup> and *Thorner v Major*<sup>64</sup> the defendant made assurances to the claimant, and thus encouraged the claimant to believe, that he, the claimant, would acquire a certain right over the property in the future.<sup>65</sup> In all cases that involved these forms of affirmative conduct, the second defendant-related factor was present: the defendant materially contributed to the vitiating factor because his representation or assurance encouraged the claimant in his ill-founded belief as to his present or future rights over the property.

Finally, the third defendant-related factor—that the defendant had actual or constructive notice of the vitiating factor but nevertheless stood by and allowed the claimant to act to his detriment—is a feature of several factual scenarios where a mere equity was held to exist. It was a feature of cases like *Barclays Bank plc v O'Brien*<sup>66</sup> where the claimant, having entered a contract with the defendant, established a right to rescind against the defendant on the grounds (i) that the claimant was induced to enter the contract by the misrepresentation or undue influence of a third party and (ii) that before the contract was entered the defendant had notice of the misrepresentation or undue influence.<sup>67</sup> Notice was either actual, as where the defendant was taken to have actually known about the misrepresentation or undue influence,<sup>68</sup> or constructive, as where the defendant knew about facts that were sufficient to put him on inquiry as to the possibility of misrepresentation or undue influence but nevertheless failed to take reasonable steps.<sup>69</sup> In cases that fall within this fact pattern, the third defendant-related factor was present because the defendant, being fixed with notice of the vitiating factor, stood by and allowed the transaction to proceed to the detriment of the claimant.

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<sup>61</sup> See also, eg, *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133 (Ch).

<sup>62</sup> *Gillett v Holt* [2001] Ch 210 (CA).

<sup>63</sup> *Jennings v Rice* [2002] EWCA 159, [2003] 1 P&CR 8.

<sup>64</sup> *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776.

<sup>65</sup> See also, eg, *Pascoe v Turner* [1979] 1 WLR 431 (CA).

<sup>66</sup> *Barclays Bank plc v O'Brien* [1994] 1 AC 180 (HL).

<sup>67</sup> See generally D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) ch 9.

<sup>68</sup> See, eg, *Kempson v Ashbee* (1874) LR 10 Ch App 15 (CA) 21 (Sir WM James LJ).

<sup>69</sup> See, eg, *Wright v Cherrytree Finance Ltd* [2001] EWCA Civ 449, [2001] 2 All ER (Comm) 877.

The third defendant-related factor was a feature of cases like *Thomas Bates and Sons Ltd v Wyndham's (Lingerie) Ltd*.<sup>70</sup> These are cases where the claimant, having executed a multilateral instrument whilst labouring under a unilateral mistake about the terms of that instrument, established a right to rectify the instrument on the ground that before the instrument was executed the defendant (the counterparty to the instrument) had actual knowledge of the claimant's mistake but nevertheless failed to tell the claimant about the mistake. In this factual scenario, third defendant-related factor applied because the defendant, being privy to actual knowledge of the mistake that vitiated the claimant's intention, stood by and allowed the claimant to act to his detriment.

The third defendant-related factor was also a feature of cases where the claimant established a right to relief under the doctrine of proprietary estoppel on the ground of acquiescence.<sup>71</sup> In cases of acquiescence, the defendant knew about the claimant's ill-founded belief that he, the claimant, had a certain right in the defendant's property.<sup>72</sup> Furthermore, the defendant encouraged that belief not by actively representing to the claimant that such was the case, but by passively standing by and allowing the claimant to act in reference to the property as if the claimant were, in actual fact, the owner of the right in question.<sup>73</sup> In cases falling within this factual scenario, the third defendant-related factor was present because the defendant knew about the claimant's mistake but nevertheless stood passively by and allowed the claimant to act to his detriment.

The various cases where a mere equity has been held to exist do not appear to include any cases where the established facts did not present at least one of the defendant-related factors already discussed. The only exception seems to be a line of cases where the claimant established a right to have a contract rescinded in equity on the ground that both he and the defendant entered the contract whilst labouring under the same fundamental mistake as to the facts or their respective rights.<sup>74</sup> These cases do not present any of the three defendant-related factors: they do not present the first

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<sup>70</sup> *Thomas Bates and Sons Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 (CA) See also, eg, *A Roberts & Co Ltd v Leicestershire CC* [1961] 1 Ch 555 (Ch).

<sup>71</sup> See generally C Harpum, *S Bridge and M Dixon, Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 16-009.

<sup>72</sup> *Willmott v Barber* (1880) 15 Ch D 96 (Ch) 105-06 (Fry J).

<sup>73</sup> See, eg, *Watson v Goldsbrough* [1986] 1 EGLR 265 (CA); *Munt v Beasley* [2006] EWCA Civ 370.

<sup>74</sup> *Solle v Butcher* [1950] 1 KB 671 (CA); *Grist v Bailey* [1967] 1 Ch 532 (Ch); *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 (CA).

factor because, the transaction being a contract, the defendant necessarily acquired his opposing rights from the claimant for consideration; they do not present the second factor because the defendant's conduct did not materially contribute to the mistake that vitiated the claimant's intention; nor do they present the third factor because the defendant, being equally mistaken, necessarily did not have notice of the mistake when the contract was entered. These cases, however, were effectively overruled in the *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*,<sup>75</sup> where the Court of Appeal established that common mistake cannot operate as a ground for rescission, although it may operate to make a contract void at common law.<sup>76</sup> Accordingly, the cases that permitted rescission for common mistake do not seriously challenge the present argument; on the contrary, the fact that these cases were effectively overruled supports the argument that the three defendant-related factors define the proper limits of the mere equity claim.

#### **4. The role of the defendant-related factors**

To summarise, in every case where the existence of a mere equity was established, there was at least one of the following defendant-related factors in play. First, the defendant acquired his adverse rights (a) from the claimant (b) as a consequence of the claimant having acted to his detriment and (c) without paying consideration to the claimant. Second, the defendant, by words or conduct, materially contributed to the vitiating factor. Third, the defendant (a) knew about, or was put on inquiry as to the existence of, the vitiating factor but (b) nevertheless elected to stand by and allow the claimant to act to his detriment.

It would appear that these defendant-related factors assume, both individually and collectively, a particular role in reference to unconscionability. In order to avoid confusion, it is necessary to clarify how the term 'unconscionability' is being applied here. Unconscionability is a fundamental organising principle in equitable doctrine.<sup>77</sup> Indeed, it was said by one judge to be 'the first principle upon which all courts of

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<sup>75</sup> *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679.

<sup>76</sup> *Ibid* [157] (Lord Phillips).

<sup>77</sup> *Gillett v Holt* [2001] Ch 210 (CA) 225D (Robert Walker LJ).

equity proceed'.<sup>78</sup> The term describes a characteristic of a person's actual or proposed conduct. Broadly speaking, the characteristic which the term describes is one of wrongfulness or unethicalness, although it is difficult to be precise about what form of wrongfulness or unethicalness is being referred to in this context. There are at least two factors which contribute to this lack of precision. First, judges are not precise in how they use the term 'unconscionability'; the expression is something which judges appear to have kept loose in order to ensure that equitable doctrine remains adaptable to the particular facts of each case.<sup>79</sup> Second, the emphasis of the term does not seem to have remained entirely constant, but appears to have changed to some extent over time. Thus there are some earlier decisions where the judge made appeal to spiritual norms: most famously in *The Earl of Oxford's Case* where Lord Ellesmere LC sought to characterise 'Equity and good Conscience' as running parallel with 'the Law of God'.<sup>80</sup> In more recent decisions, by way of contrast, judges are far more likely to place emphasis on secular norms of social interaction and 'fair play'.<sup>81</sup> In light of these factors, it should come as no surprise that the meaning of 'unconscionability' is difficult to pin down definitionally. Nevertheless, the term is not so malleable as to defy description,<sup>82</sup> for the fact remains that throughout all cases and times the judicial application of the term has stood, in a broad sense, for the quality of wrongfulness or unethicalness that attaches to forms of conduct which are generally regarded, either implicitly or explicitly, as a violation of moral or social norms of obligation or necessity.<sup>83</sup> It is within these parameters that the term 'unconscionability' is to be understood for the purpose of the present discussion.

It appears that the role played by the defendant-related factors is to satisfy a court of equity that the defendant would be acting unconscionably if he were to insist on his formal rights in opposition to the mere equity asserted by the claimant. This view is supported in the cases.

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<sup>78</sup> *Crabb v Arun DC* [1976] 1 Ch 179 (CA) 187H-88A (Lord Denning MR), quoting *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 (HL).

<sup>79</sup> See *South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provinciën' NV* [1987] 1 AC 24 (HL) 41C-D (Lord Brandon): 'It is difficult, and would probably be unwise, to seek to define the expression "unconscionable conduct" in anything like an exhaustive manner'.

<sup>80</sup> *The Earl of Oxford's Case* (1615) 1 Chan Rep 1, 4; 21 ER 485, 486 (Lord Ellesmere LC).

<sup>81</sup> *Allcard v Skinner* (1887) 36 Ch D 145 (CA) 190 (Bowen LJ).

<sup>82</sup> Cf P Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' (1999) 23 Melbourne University Law Review 1, 17-27.

<sup>83</sup> See A Hudson, *Equity and Trusts* (6th edn, Routledge-Cavendish 2010) 1172-75.

For example, *Gibbon v Mitchell*<sup>84</sup> is evidence that if the established facts of a case present the first defendant-related factor (ie not paying consideration), then the defendant cannot conscionably oppose the finding of a mere equity by insisting that his formal rights ought to be protected. The facts of *Gibbon* were these. Mr Gibbon, the claimant, executed a deed by which he purported to surrender his protected life interest under a previous settlement in favour of his two children, Jane and David. The claimant executed this deed with the intention that Jane and David should take immediate beneficial interests in the settlement fund. However, the actual effect of the deed was to cause a forfeiture of the claimant's life interest and thereby bring into operation the discretionary trusts under s 33 of the Trustee Act 1925. In these circumstances, Millett J found that the claimant had executed the deed under a mistake as to its legal effect. On this ground, the judge held that the claimant was entitled to have the deed rescinded as against the beneficiaries of the discretionary trusts.

For present purposes, it is significant that Millett J justified his decision in reference to grounds of unconscionability. This emerges clearly from the following quotation:

Equity acts on the conscience. The parties whose interest it would be to oppose the setting aside of the deed are the unborn future children of Mr Gibbon and the objects of discretionary trust to arise on forfeiture, that is to say his grandchildren, nephews and nieces. They are all volunteers. In my judgment they could not conscionably insist upon their legal rights under the deed once they had become aware of the circumstances in which they had acquired them.<sup>85</sup>

These words support the present argument. As Millett J made clear, the parties whose rights stood to be harmed as a result of the court finding a mere equity in favour of the claimant were the various beneficiaries of the discretionary trusts which had mistakenly been brought into operation by the deed. The beneficiaries acquired their opposing rights as a result of the claimant executing the deed; that is to say, they acquired their opposing rights from the claimant as a consequence of the detrimental

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<sup>84</sup> *Gibbon v Mitchell* [1990] 1 WLR 1304 (Ch).

<sup>85</sup> *Ibid* 1310A-B (Millett J).

action by the claimant. Furthermore, because the deed was a voluntary one, the beneficiaries acquired their opposing rights without paying consideration to the claimant. Accordingly, the established facts in *Gibbon* related to the beneficiaries *as per* the first defendant-related factor. The effect was, as Millett J indicated in the above quotation, to satisfy the court that the beneficiaries would be acting unconscionably if they were on insist on their legal rights.

As regards the second defendant-related factor (ie materially contributing to the vitiating influence), the case of *Redgrave v Hurd*<sup>86</sup> is evidence that the role played by this factor is to establish grounds of unconscionability against the defendant. The facts of the case were these. Redgrave was a solicitor with a small practice. He arranged with another solicitor, Hurd, that he would accept Hurd as a partner of the practice on condition that Hurd would agree to purchase Redgrave's house. At an earlier meeting, Redgrave had represented to Hurd that the practice was worth about £300 per year. It was in reliance on this representation that Hurd, assenting to the arrangement, entered a contract with Redgrave for the purchase of the house. Hurd refused to complete the purchase, however, upon discovering that the practice was, in actual fact, worth significantly less than the £300 which Redgrave had suggested. In these circumstances, the Court of Appeal, reversing the decision of Fry J, held that Hurd was entitled as against Redgrave to have the contract rescinded on the ground that Redgrave had induced Hurd to enter the contract by the innocent but material misrepresentation that the practice was worth about £300.

The leading judgment was handed down by the Master of the Rolls, Sir George Jessel. In it, his Lordship made the following remark:

Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements.<sup>87</sup>

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<sup>86</sup> *Redgrave v Hurd* (1881) 20 Ch D 1 (CA).

<sup>87</sup> *Ibid* 12-13 (Sir George Jessel MR).

The case of *Redgrave* supports the argument that the presence of the second defendant-related factor is to establish grounds of unconscionability. In *Redgrave*, the detriment incurred by Hurd in entering the contract could not, in fairness to Hurd, be characterised as the product of his autonomous will. This was due to the vitiating factor in the form of the false impression that was created in the mind of Hurd by the misrepresentation that the practice was worth £300. Redgrave was directly responsible for this misrepresentation and, by extension, the false impression which it created in the mind of Hurd. It follows, *a fortiori*, that Redgrave materially contributed to the vitiating factor. Accordingly, the established facts of the case related to Redgrave *as per* the second defendant-related factor. The result, according to the Sir George Jessel MR, was that Redgrave would be guilty of ‘moral fraud’ or ‘moral delinquency’ if he were to insist on keeping the contract. This is equivalent to saying that Redgrave would be acting unconscionably if he were to insist on his formal rights in opposition to the mere equity asserted by Hurd.

The role played by the third defendant-related factor is also to establish grounds of unconscionability against the defendant. This is demonstrated by cases in the *O’Brien* line of authority.<sup>88</sup> These cases and the rule which they established have already been outlined. To reiterate, the cases typically involved a wife who, having initially agreed with a lender that she would stand as surety for the indebtedness of her husband to the lender, subsequently sought to rescind her contract with the lender on the ground that she was induced to enter it by the undue influence of her husband. In these circumstances, the rule established by the cases is that the court will refuse to rescind the contract unless the wife can prove that the lender was put on inquiry as regards the undue influence but nevertheless failed to take reasonable steps. For present purposes, it is necessary to observe that the accepted effect of the wife satisfying this evidential burden is that she thereby establishes grounds of unconscionability against the lender. As Lord Hobhouse explained in *Etridge*:

... the wife is seeking to use the undue influence of her husband as a defence against the lender and therefore has to show that the lender should be affected

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<sup>88</sup> *Barclays Bank plc v O’Brien* [1994] 1 AC 180 (HL) and the other cases cited above at fn 40.

by the equity—that it is unconscionable that the lender should enforce the secured contractual right against her.<sup>89</sup>

This principle supports the present argument. In the class of case under consideration, the vitiating factor takes the form of the undue influence of the husband. It follows that where the wife proves that the lender was put on inquiry as to the existence of the undue influence but nevertheless failed to take reasonable steps, the significance of her doing so is to bring the case within the application of the third defendant-related factor. The effect, as indicated by Lord Hobhouse in the above quotation, is that the lender would be acting unconscionably if it were to insist on its formal rights under the contract.

### **5. Unconscionability: The third necessary element**

It has already been argued that the jointly necessary factual ingredients of a mere equity must, in addition to the claimant-related factors of detrimental action and vitiated consent, include at least one additional factual element that relates to the conduct or state of mind of the defendant. Exactly what this element might be has deliberately been left open until now. In light of the available evidence, however, it can reasonably be inferred that this element relates to unconscionability.

It has been demonstrated that, in every class of case where one of the main examples of a mere equity has been held to exist, the established facts presented at least one of the three defendant-related factors which have already been outlined. Furthermore, it has been demonstrated that these factors assume, both individually and collectively, a particular role as regards unconscionability: they operate to satisfy a court of equity that the defendant would be acting unconscionably if he were to insist on his formal rights in opposition to the mere equity which the claimant alleges. It follows that in every case where one of the main examples of a mere equity has been held to exist, grounds of unconscionability necessarily existed against the defendant.

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<sup>89</sup> *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 [101] (Lord Hobhouse).

The necessary implication is that unconscionability is the third factual element which, in addition to the claimant-related elements of detrimental action and vitiated intention, is jointly necessary to establish a mere equity. It can be concluded, therefore, that where a claimant asserts a mere equity against any particular defendant, the jointly necessary ingredients of the claim include the following elements. First, the claimant must show that he acted to his detriment, for instance, by entering a contract or by building on land that does not belong to him. Second, the claimant must show that, because of the presence of some vitiating factor such as mistake or undue influence, the detriment thus incurred by the claimant cannot, in whole or in part, be characterised as the product of his autonomous will. Third, the claimant must show that the defendant would be acting unconscionably if the defendant were to insist on his formal rights in opposition to the mere equity which is asserted by the claimant.

This analysis might raise the question of *why* the joint presence of these three factual elements contributes to establishing a mere equity in favour of the claimant against the defendant. In response to this query, it is necessary to assume a normative approach to the issue.

### PART III: THE NORMATIVE FOUNDATION OF MERE EQUITIES

It is said to be one of the characteristics of equity that it will interfere with strict rights where the justice of the case demands it.<sup>90</sup> This statement is true, though it is subject to a major caveat. In general, equity recognises that it would be contrary to the common good for it to interfere with rights that have been formally created under contracts, deeds, or statutes.<sup>91</sup> It is easy to see why this is the case. If equity did interfere with strict rights as a matter of course, then the consequences would be detrimental for society as a whole. Simply put, people would not be able to depend on what is theirs today being theirs tomorrow. Commerce and general wellbeing would clearly suffer in such an environment. Thus it should come as no surprise that, as a general rule, equity will ‘follow the law’ by refusing to disturb established rights,

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<sup>90</sup> *Crabb v Arun DC* [1976] 1 Ch 179 (CA) 187G-88A (Lord Denning MR).

<sup>91</sup> See *Willmott v Barber* (1880) 15 Ch D 96 (Ch) 105 (Fry J). See also *Shaw v Applegate* [1977] 1 WLR 970 (CA) 977H-78A (Buckley LJ).

interests, and entitlements.<sup>92</sup> It follows that the cases where equity will proceed against the grain of the strict rights which exist between the parties are the exception and not the rule.

As explained in chapter three,<sup>93</sup> mere equities are personal claims to equitable relief; they bind a particular defendant, and operate adversely against the rights of that defendant in some way. Cases in which mere equities arise are therefore ‘exceptional’ cases where equity will depart from the general principle of non-interference with strict rights. The justification for equity doing this seems obvious given the foregoing analysis. As already shown, in order for a claimant to establish that he has a mere equity against a certain defendant, it is necessary for him to show, in addition to the claimant-related elements of detrimental action and vitiated intention, that it would be unconscionable of the defendant to object to the appropriate remedy on the ground that that remedy would interfere with his strict rights. To put it another way, it is incumbent upon the claimant to prove that it would be contrary to received notions of the common good if the defendant were to attempt to frustrate the remedy by appealing to the general principle of non-interference.

The cases in which the requisite grounds of unconscionability exist have already been outlined and empirically proved. These, it will be remembered, are the cases whose facts present any, or any combination of, the three defendant-related factors, namely, lack of consideration, material contribution, and standing by. So far, however, we have not given any consideration to the question of why, in these particular cases, it is unconscionable of the defendant to appeal to the general principle of non-interference. In other words, why is it the case that lack of consideration, material contribution, or standing by establish the grounds of unconscionability that are necessary to found a mere equity against the defendant. That question will be considered here.

It is necessary from the outset to emphasise a point that may appear obvious but nevertheless is important to the present discussion. This is that it is generally in the common interest for persons to be protected from the detrimental consequences of their honest mistakes and the numerous species of fraud. People, after all, are inherently fallible, prone to be deceived, and subject to the influence of others. These

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<sup>92</sup> See generally J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2017) paras 5-005-5-006.

<sup>93</sup> Ch 3, pt III, s 2.

are qualities, moreover, which the less scrupulous are prepared to exploit. In a coherent cohesive society, therefore, it is, by and large, conducive to the common good for there to be safeguards in place to relieve the individual who has acted upon a honest misapprehension of the facts or who has been cheated or unfairly imposed upon. This principle has long been recognised and applied by the courts, especially courts of equity.<sup>94</sup> As Lindley LJ remarked in *Allcard v Skinner*:

... to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws ...<sup>95</sup>

This conception of the common good is in play in cases where the *claimant*-related elements are an established feature of the facts. In such a case, as already explained, the claimant acted in some way to his detriment under the influence of a serious mistake or one of the species of fraud, with the result that the detriment thus suffered by the claimant cannot, in whole or in part, be characterised as the product of his autonomous will. In these circumstances, the courts, in their capacity as custodians of a coherent cohesive society, have an interest in relieving the claimant from the detrimental consequences of his own actions insofar as those consequences are attributable to the fraud or mistake, and not just to the claimant's own imprudence.<sup>96</sup> To adopt the traditional phraseology of courts of equity, the situation is one that 'shocks the conscience of the court',<sup>97</sup> thus allowing the claimant to 'bend the ear of a court of conscience to listen sympathetically to his tale'.<sup>98</sup>

It follows that where the claimant-related elements are present, equity recognises that, in an ideal world, it would be able to assist the claimant. In other words, these elements are jointly sufficient to arouse the sympathy of a court of equity for the claimant and, as it were, to give the claimant a *moral* title to receive an equitable remedy. Be this as it may, however, it has already been pointed out that the claimant-

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<sup>94</sup> See *Blenkinsopp v Blenkinsopp* (1850) 12 Beav 568, 586; 50 ER 1177, 1185 (Lord Langdale MR): 'it is no new law to use the authority of a Court of Equity to prevent fraud, or to relieve from the effect of fraud'.

<sup>95</sup> *Allcard v Skinner* (1887) 36 Ch D 145 (CA) 183 (Lindley LJ).

<sup>96</sup> See *ibid* 182-83 (Lindley LJ).

<sup>97</sup> *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87 (Ch) 95C (Peter Millett QC).

<sup>98</sup> *Lloyds Bank plc v Rosset* [1991] 1 AC 107 (HL) 115B (argument).

related factors are neither singly nor jointly sufficient to generate a mere equity against any particular defendant. The real reason for this, of course, is that the defendant is protected by the general principle of non-interference that has already been discussed. To put it another way, the claimant's moral title to equitable relief is *prima facie* deferred to a countervailing conception of the common good, namely that the courts ought not to interfere with the enjoyment of strict rights.

Accordingly, in a case where the claimant-related elements are jointly present, there are two competing notions of the common good in play. The first directs that the court ought not to relieve the claimant because this would have harmful consequences for the strict rights of the defendant. The second directs that the claimant ought to be relieved from the detrimental consequences of the mistake or inequitable conduct of which he complains. *Ceteris paribus*, the court gives priority to the first principle. In this way, the strict rights of the defendant are protected.

However, things are different if, in addition to the *claimant*-related elements being jointly present, the established facts are characterised by any, or any combination of, the three *defendant*-related factors. This changes things because these factors, whether they appear singly or in combination, indicate that something has happened which weakens any appeal that the defendant might make to the general principle of non-interference with strict rights. The effect is to tip the balance in favour of the conception of the common good on which the claimant relies, namely, that the courts ought to relieve people from the effects of their honest mistakes and the multifarious manifestations of fraud. In these circumstances, a court of equity will intervene on behalf of the claimant by, for instance, rescinding a transaction or rectifying a document, even if in doing so the court will necessarily override some right, interest, or title that belongs to the defendant. The outcome is that the claimant has not only a *moral title* to an equitable remedy, but *an actual right of action* which binds the defendant *in personam*, that is to say, a mere equity.

The question now is why do the defendant-related factors weaken any appeal that the defendant might make to the general principle of non-interference with strict rights? Looking at the matter broadly, it appears that the majority of the cases can be explained on the basis that the defendant cannot insist on his strict rights if he is somehow culpable for the mistake or wrongdoing of which the claimant complains.<sup>99</sup>

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<sup>99</sup> See *Clough v The London and North Western Railway Co* (1871) LR 7 Ex 26, 33 (Mellor J).

In these circumstances, the defendant has behaved in a way that is detrimental to the common good, either directly, such as where the defendant is himself the wrongdoer, or indirectly, such as where the defendant wilfully turned a blind eye to the likely existence of the mistake or wrongdoing. Having behaved detrimentally to the common good, it would be the height of hypocrisy for the defendant then to turn around and appeal to the common good in order to protect his strict rights from the remedy that is asserted by the claimant. The outcome is that any such appeal by the defendant would necessarily fail; the claimant thereby wins hands down.

This explains why the second and third defendant-related factors (material contribution and standing by) tip the balance of in favour of the conception of the common good on which the claimant relies, since both of these factors constitute a form of wrongdoing<sup>100</sup> on the part of the defendant. However, cases whose facts present the first defendant-related factor (lack of consideration) exclusively of the other two are ostensibly more difficult. In such cases, the defendant is innocent in the sense that he did not resort to any kind of fraud, cheating, or unfair imposition in order to obtain his disputed rights. This is demonstrated by the case of *Gibbon v Mitchell*,<sup>101</sup> where, as explained above, Millett J rescinded a voluntary deed against the interests of certain unborn beneficiaries. Clearly, these beneficiaries, being unborn, could not possibly be characterised as wrongdoers in any sense of the word.

These kinds of case can be explained on the following basis. The principle of non-interference with strict rights is of universal application; however, it applies more strongly in some cases than in others. In particular, the principle applies more strongly in cases where the rights in question were the product of a bargain than in cases where those rights were acquired either for no consideration or *dehors* the true agreement between the parties. This is because the notion of the common good that is supported by non-interference is generally more pronounced in cases where the defendant bargained for the security of his strict rights than in cases where, as it were, the defendant has gained something for nothing. Now, in cases where the first defendant-related factor is in play, as already explained, the defendant acquired his strict rights from the claimant either as a volunteer<sup>102</sup> or, having acquired them under a contract,

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<sup>100</sup> Note that even ‘innocent’ misrepresentation connotes a species of moral fraud: see *Redgrave v Hurd* (1881) 20 Ch D 1 (CA) 12-13 (Sir George Jessel MR).

<sup>101</sup> *Gibbon v Mitchell* [1990] 1 WLR 1304 (Ch).

<sup>102</sup> See, eg, *Huguenin v Baseley* (1807) 14 Ves Jun 273, 33 ER 526; *Gibbon v Mitchell* [1990] 1 WLR 1304 (Ch).

did so in circumstances where the actual bargain between the parties did not extend to the rights in question.<sup>103</sup> The first defendant-related factor, therefore, is an instance where the principle of non-interference with strict rights applies less strongly, with the result that any appeal that the defendant might make to this principle is necessarily attenuated. The final outcome is similar to what it would have been if the defendant had been a wrongdoer: the balance of the common good is tipped in favour of assisting the claimant.

Consequently, the individual or combined effect of the three defendant-related factors is to weaken any appeal that the defendant might make to the principle of non-interference with strict rights. That is to say, where any one, or any combination, of these factors is present, a court of equity recognises that the principle of non-interference with strict rights is attenuated and that, accordingly, the common good will be better served by relieving the claimant from the effects of the mistake or wrongdoing of which he complains. In these circumstances, the defendant would be behaving *unconscionably*—that is to say, he would be behaving contrary to the common good—if he were to insist on his strict rights in opposition to the remedy. The result is that a court of equity will not permit the defendant to oppose the remedy, but will, in effect, proceed against the defendant as if he were a willing participant in the decree. In other words, the court will treat the defendant as if he were a conscionable person who would want to act in accordance with the common good.

Having analysed the likely normative reason that the necessary factual elements of mere equities contribute to establishing this category of claim, the chapter now proposes to draw on this analysis in order to ascertain what function mere equities are likely to perform, and then to evaluate how well mere equities perform their identified function.

#### PART IV: THE FUNCTION OF MERE EQUITIES

Clearly, the function of any juridical claim is determined by the reason that that claim was called into existence. The mere equity is no exception. Thus, in light of the

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<sup>103</sup> See, eg, *Joscelyne v Nissen* [1970] 2 QB 86 (CA); *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71 (CA).

foregoing analysis, it seems that the function which mere equities perform is to uphold the common interest which all members of a coherent, cohesive society have in affording a measure of protection to persons who have acted in some way to their detriment under the influence of their own honest mistake or one of the species of fraud. This function brings mere equities into conflict with a competing notion of the common good, which directs that the court refrain from interfering with the strict rights of the defendant. It is for this reason that mere equities are limited to cases where at least one of the three defendant-related factors is present, for the effect of these factors, whether singly or in combination, is to weaken any appeal which the defendant might make to the general principle of non-interference with strict rights. In the language of courts of equity, it would be unconscionable in these circumstances for the defendant to set up his formal rights as a reason that the court should refuse to grant relief to the claimant.

Now that the function which mere equities perform has been identified, it is necessary to consider how well mere equities perform this function. It is proposed that the legal nature of mere equities means that they are well suited to their allocated role.

The legal nature of mere equities was investigated in chapter three,<sup>104</sup> in relation to the dividing-line between mere equities and equitable interests. There, it was shown that mere equities are bare equitable rights of action. It follows that mere equities are what can be described as a ‘minimalist’ form of equitable response: they consist in nothing more than a basic, single claim to go to court to apply for a particular equitable remedy against a particular defendant, who correspondingly assumes a liability to have his rights interfered with pursuant to the grant of that remedy.<sup>105</sup> Significantly, mere equities, while they continue to be unenforced, do not subject the defendant to any fiduciary or other obligation in reference to any particular assets;<sup>106</sup> mere equities, therefore, are not trusts in any sense of the word, for a trust would imply that the defendant owed the claimant some form of obligation or duty in reference to specific property.<sup>107</sup> In short, the legal nature of mere equities indicates that they are purely and simply a means of giving the claimant access to equitable relief.

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<sup>104</sup> Ch 3, pt III, s 2.

<sup>105</sup> See B McFarlane, N Hopkins and S Nield, *Land Law* (OUP 2017) 176-77.

<sup>106</sup> *Lonrho plc v Fayed* [1992] 1 WLR 1 (Ch) 11H-12A (Millett J).

<sup>107</sup> *Green v Russell* [1959] 2 QB 226 (CA) 241 (Romer LJ), quoting a passage which appears in A Underhill, *The Law Relating to Private Trusts and Trustees* (8th edn, Butterworth & Co 1926) 3.

The legal nature of mere equities is appropriate given the allocated function of this class of claim. There are two main reasons that this is the case. First, and most obviously, since mere equities give the claimant access to an appropriate equitable remedy, these claims do what is strictly necessary in order to perform their function: they uphold the common, social interest in affording a measure of protection to persons who have acted to their detriment under the influence of their own honest mistake or the wrongdoing of another. Second, because of the minimalist nature of mere equities as bare equitable rights of action, these claims do not *exceed* what is strictly necessary to perform their allocated function. In particular, it is appropriate that the *burden* of a mere equity consists wholly in the liability of the defendant to have his rights interfered with pursuant to the grant of the equitable remedy, and does not impress any obligation or duty on the defendant. It would be difficult to justify the imposition of such an obligation or duty on the defendant given that the function of a mere equity is, in essence, to save the claimant from the detrimental consequences of his own, albeit unsoundly engendered, action. In other words, since the function of a mere equity does not *specifically* relate to anything that the defendant has done, a mere equity cannot, in fairness to the defendant, impose on him any greater burden than that which is strictly necessary in order to give the claimant access to a suitable equitable remedy.

In answer to this latter point, it might be objected that mere equities do not focus solely on the actions and state of mind of the claimant, for, as demonstrated previously, the necessary factual ingredients of a mere equity include at least one of the defendant-related factors outlined above. However, it has already been demonstrated that these factors serve a very specific role in the formation of a mere equity. The defendant-related factors do not supply the *raison d'être* of a mere equity *per se*; they are not, as it were, the *active* ingredient. Rather, the defendant-related factors, whether they appear singly or in combination, are necessary solely because they cancel out any appeal which the defendant might make to the principle of non-interference with strict rights. Accordingly the defendant-related factors, while essential to establish a mere equity, are not an aspect of the function which mere equities perform. These factors cannot, therefore, justify the extension of the burden of a mere equity beyond what is strictly necessary to give the claimant access to an appropriate equitable remedy.

Consequently, the legal nature of mere equities as bare equitable rights of action means that these claims are well adapted to their allocated function. This should come as no surprise: just as the function of a juridical claim is determined by the reason that that claim was called into existence, so too is the legal nature of a juridical claim determined by the function which that claim performs. This finding has significant implications for understanding the mere equity's unique role within the wider scheme of equitable rights and interests. In particular, it resolves the problem of precisely *why* mere equities take the legal form which they do, and do not take the alternative form of a beneficial interest under a resulting or constructive trust, which, as noted in chapter two,<sup>108</sup> some commentators have suggested ought to be the case.<sup>109</sup> In a nutshell, because mere equities are a minimalist form of equitable response, they are better adapted than a trust for responding to a conception of injustice whose underlying basis concerns the conduct and state of mind of the claimant, and does not relate specifically to anything that the defendant himself has done.

#### PART V: CONCLUSION

The aim of this chapter was to answer the fourth and fifth questions which this thesis asks, namely, 'What function do mere equities perform?' and 'How well do mere equities perform their identified function?'

In order to achieve this aim, the chapter began by analysing the different fact patterns in which mere equities have been held to exist in order to ascertain the necessary factual ingredients of this category of claim. It was found that the jointly necessary factual ingredients of mere equities include two claimant-related elements: first, the claimant acted to his detriment by, for instance, entering a transaction or building on land which belongs to someone else; second, the claimant's intention to do that act was procured by some vitiating factor, such as undue influence or mistake. In addition to these claimant-related elements, it was shown that the necessary factual ingredients of mere equities must include *at least one* of the following three defendant-related factors: first, the defendant acquired his adverse rights (a) from the claimant

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<sup>108</sup> Ch 2, pt II, s 1.

<sup>109</sup> See especially R Chambers, *Resulting Trusts* (OUP 1997) ch 7.

(b) as a consequence of the claimant having acted to his detriment and (c) without giving a reciprocal consideration to the claimant; second, the defendant, by words or conduct, materially contributed to the vitiating factor; third, the defendant (a) knew about, or was put on inquiry as to the existence of, the vitiating factor but (b) nevertheless elected to stand by and allow the claimant to act to his detriment. Finally, it was demonstrated that the defendant-related factors, both individually and collectively, assume a particular role as regards unconscionability: they lead the court to conclude that the defendant would be acting unconscionably if he were to reference his own rights as a reason that the court should not relieve the claimant from the detriment which he has incurred.

The chapter then investigated the likely normative reason that these factual elements contribute to establishing a mere equity. It was argued that in a case where the claimant-related elements are present, there are two competing conceptions of the common good in play. The first directs that the claimant should not be relieved because this would entail interference with the formal rights of the defendant. The second directs that the claimant should be relieved from the consequences of the honest mistake or inequitable conduct of which he complains. It was suggested that the role of the defendant-related factors, whether they appear singly or in combination, is to weaken any appeal that the defendant might make to the principle of non-interference with strict rights, thereby tipping the balance in favour of the conception of the common good on which the claimant relies. The result is that the claimant is given a mere equity entitling him to obtain an appropriate equitable remedy against the defendant.

Finally, the chapter drew on this analysis in order to ascertain what function mere equities are likely to perform, and then evaluated how well mere equities perform this function. The argument was made that the function of any juridical claim is determined by the reason that it was called into existence. Thus, in line with the above analysis, it was submitted that the function which mere equities perform is to uphold the common, social interest in granting a measure of protection to persons who have acted to their detriment under the influence of their own honest mistake or the inequitable conduct of another. It was then suggested that mere equities are well adapted to their allocated role. In particular, it was argued that the 'minimalist' nature of mere equities as bare equitable rights of action is appropriate given the fact that the

function of this category of claim is, fundamentally, to save the claimant from the consequences of his own actions.

Thus, in answer to the fourth question which this thesis asks, the function which mere equities perform is to uphold the common interest which all members of a coherent, cohesive society have in affording a measure of protection to persons who have acted in some way to their detriment under the influence of their own honest mistake or one of the species of fraud. In answer to the fifth question which this thesis asks, the legal nature of mere equities as bare equitable rights of action means that these claims are well adapted to the performance of their identified function.

## Chapter 8

### Conclusion

#### PART I: INTRODUCTION

This chapter concludes the thesis. Part two will present a summary of the key arguments and findings that were made in earlier chapters. Part three will highlight some of the potential implications of the thesis for legal practice and doctrine more broadly.

#### PART II: SUMMARY OF KEY ARGUMENTS AND FINDINGS

This thesis has examined the legal nature and practical function of mere equities as these claims are understood and applied within the English legal system. As explained in chapter one, the basic features and consequences of mere equities are generally well established in the authorities. Thus it is settled that mere equities are proprietary claims—they can be enforced against third parties and can be assigned to third parties—but that mere equities nevertheless fall short of equitable interests in property, the main consequence of which is that a mere equity can be defeated by a plea of *bona fide* purchase for value of an *equitable* interest without notice.<sup>1</sup> Despite this clarity over the basic features and consequences of mere equities, the underlying legal nature and practical function of these claims are insufficiently understood. This lack of clarity gives rise to genuine analytical problems, and brings into question whether mere equities should even exist as a category of equitable response. This state of affairs is clearly unsatisfactory, especially in light of the fact that mere equities are the foundational organising concept for a large body of equitable doctrines, including the equitable remedies of rescission and rectification and the equitable doctrine of proprietary estoppel.

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<sup>1</sup> Note that the special vulnerability of mere equities to the plea of *bona fide* purchase for value without notice is of no consequence in the context of registered land: see above, ch 1, pt II, s 2, sub-s i.

The investigation into the legal nature of mere equities began in chapter three. In chapter three, a full review of the cases was carried out in order to ascertain which equitable claims have been classified by the courts as either mere equities or equitable interests. The different instances of mere equities were then compared with the different instances of equitable interests in order to evaluate the likely nature of the dividing line between these two categories. It was found that the dividing line between mere equities and equitable interests is not that mere equities are more ‘discretionary’ than equitable interests, as many scholars have claimed.<sup>2</sup> Rather, the real reason mere equities are distinct from equitable interests is that equitable interests are combinations of juridical claims which include at least some rights *in rem*, whereas mere equities are equitable rights of action and therefore are pure rights *in personam*.

The finding that mere equities are rights of action which bind the defendant *in personam* may be surprising given the proprietary features of these claims. However, the doctrinal basis for these features has been investigated in chapters four, five and six.

In chapter four, the general idea that the enforceability of mere equities against third parties is grounded on orthodox conceptions of property was considered. It was found that there is a handful of cases which disclose evidence for a ‘property-based analysis’.<sup>3</sup> The property-based analysis holds that the reason a mere equity can bind third parties is that the mere equity is ‘ancillary to or dependant upon’<sup>4</sup> an equitable interest, which includes equitable rights *in rem* in the affected asset. The property-based analysis has the advantage that it can explain the third party effects of mere equities; however, it was shown that the analysis is not workable within the wider doctrinal framework. For one thing, the analysis is inconsistent with the principle that a person who transfers an asset in circumstances which entitle him to rescind acquires a mere equity only, retaining no interest, legal or equitable, in the asset.<sup>5</sup> For another thing, the idea that a mere equity derives its third party effects from some underlying equitable interest is falsified by the fact that mere equities are treated differently from equitable interests as regards the plea of *bona fide* purchase for value without notice.

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<sup>2</sup> See above, ch 2, pt II, s 2.

<sup>3</sup> Ie, *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL); *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265; *Blacklocks v JB Developments (Godalming) Ltd* [1982] 1 Ch 183 (Ch).

<sup>4</sup> *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1238D (Lord Upjohn).

<sup>5</sup> See, eg, *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 22H (Millett LJ).

Another theory that was evaluated in chapter four was that a mere equity to rescind or rectify a transfer constitutes an imperfection in the title which the defendant acquires in the affected asset. The imperfect title analysis is supported by several scholars.<sup>6</sup> Moreover, the analysis potentially explains why mere equities to rescind or rectify can bind third parties, and does not encounter the doctrinal problems which affect the theory that mere equities are ancillary to equitable interests. Nevertheless, the imperfect title analysis was decisively rejected. In brief, the analysis fails because it relies on the premise that courts of equity assume a power to define the incidents of ownership at common law, when in fact courts of equity have never assumed any such power.

The investigation into the doctrinal basis for the enforceability of mere equities against third parties which began in chapter four carried over into chapter five. In chapter five, however, a different line of inquiry was pursued, namely, that the third party effects of mere equities, rather than being founded on orthodox conceptions of property, are instead predicated on equitable notions of conscience. It was argued that, in equity, there is a principle, referred to in this thesis as the ‘conscience-based principle’, in accordance with which a right *in personam* may be imposed afresh against a successor in title of the person originally bound by that right. The conscience-based principle is not an *ex post facto* rationalisation by the present writer; it was the theoretical foundation on which courts of equity first began to enforce a range of claims against successors in title. It was shown that the claims which historically were extended to successors in title in this way include the use (the forerunner to the modern trust), the restrictive freehold covenant and the erstwhile deserted wife’s equity.

In chapter five, it was proposed that the conscience-based principle is the doctrinal basis for the enforceability of mere equities against third parties. Objections to the proposed analysis were dealt with, and the explanatory advantages of the analysis were highlighted. In particular, it was demonstrated that the proposed analysis accounts for the main consequence of the dividing line between mere equities and equitable interests, namely, the rule that while it is not allowable for a purchaser of an equitable interest to raise the plea of *bona fide* purchase for value without notice

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<sup>6</sup> See, eg, D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) paras 21.29-21.30.

against an earlier equitable interest, it is allowable for him to raise the plea against an earlier mere equity.<sup>7</sup>

In chapter six, the thesis turned to investigate the doctrinal basis for the other proprietary feature of mere equities, namely, the assignability of these claims in favour of third parties. The argument was made that since mere equities are rights of action (as established in chapter three) the assignment of mere equities is tied in with the more wide-ranging principles governing the assignment of rights of action in general. In this connection, it was shown that the doctrinal basis for the assignability of mere equities is the core principle that a right of action cannot be assigned as an independent right, but if a right of action is ancillary to some property right or interest, then the right of action can be assigned together with the property right or interest. Examples of cases which illustrate the application of this core principle to mere equities were outlined. It was inferred from these examples that in order for a mere equity to be sufficiently ancillary to a property right or interest so as to permit the assignment of the mere equity together with the property right or interest, the mere equity must support or enhance in some way the property right or interest.

Having outlined the doctrinal basis for the assignability of mere equities in favour of third parties, chapter six turned to consider the cases of *Gresley v Mousley*,<sup>8</sup> *Dickinson v Burrell*<sup>9</sup> and *Melbourne Banking Corp Ltd v Brougham*.<sup>10</sup> These cases are problematic given the core principles outlined above, for the cases establish a rule which at first glance seems to envisage that a mere equity to rescind can be assigned as an independent right. Three different ways in which *Gresley*, *Dickinson* and *Melbourne* can be understood were proposed. The first approach simply asserts that the cases were wrongly decided. By way of contrast, the second and third approaches seek to harmonise the cases with the core principles on the assignment of mere equities, although they do so in different ways. On the one hand, the second approach appeals to the well established principle that when a transaction is rescinded a backdated equitable title vests in the rescinding party. On the other hand, the third approach appeals to the rule, set down in *Trendtex Trading Corp v Credit Suisse*,<sup>11</sup>

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<sup>7</sup> See *Cave v Cave* (1880) 15 Ch D 639 (Ch) 646-47 (Fry J) and the other cases cited above at ch 1, pt II, s 2, sub-s i, fn 36.

<sup>8</sup> *Gresley v Mousley* (1859) 4 De G&J 78, 45 ER 31.

<sup>9</sup> *Dickinson v Burrell* (1866) LR 1 Eq 337.

<sup>10</sup> *Melbourne Banking Corp Ltd v Brougham* (1882) 7 App Cas 307 (PC).

<sup>11</sup> *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL) 703F-G (Lord Roskill).

that a right of action can be assigned independently if the assignee has a ‘genuine commercial interest’ in enforcing the right of action. The three approaches to the rule in *Gresley, Dickinson and Melbourne* were evaluated and it was concluded that, on balance, the second approach is the most plausible.

The practical function of mere equities was investigated in chapter seven. A review was carried out of the different fact patterns in which any of the confirmed examples of mere equities—ie, claims to rescind a transaction in equity, claims to rectify a document and claims to relief under the doctrine of proprietary estoppel—was held to exist. From this review, it was found that there are three factual elements which are jointly necessary in order to establish a mere equity, two of which relate to the claimant, one of which relates to the defendant. On the one hand, the two claimant-related elements are, first, that the claimant acted to his detriment and, second, that the intention of the claimant to so act was induced by some vitiating factor. On the other hand, the defendant related-element consists in any one, or any combination, of three potential factors. The first is that the defendant acquired his adverse rights (a) from the claimant, (b) as a consequence of the claimant having acted to his detriment and (c) without paying a reciprocal consideration to the claimant. The second is that the defendant materially contributed to the vitiating factor. The third is that the defendant (a) knew about, or was put on inquiry as to the existence of, the vitiating factor but (b) nevertheless stood by and allowed the claimant to act to his detriment.

Having ascertained the jointly necessary factual ingredients of a mere equity, the chapter turned to consider the normative question of *why* these factual elements contribute to establishing a mere equity. It was found that where the claimant-related elements are jointly present, equity recognises that there are two opposing conceptions of the common interest in play, one directing that the claimant should be relieved, the other directing that the formal rights of the defendant should not be interfered with. *Prima facie*, the second conception of the common interest takes precedence; however, if the case presents any, or any combination, of the three defendant-related factors, the effect is to weaken any appeal that the defendant might make to this notion of the common good. As a result, the balance is tipped in favour of the conception of the common interest on which the claimant relies, with the result that his is given a mere equity entitling him to an appropriate remedy.

Once the normative foundation of mere equities had been established, the argument was made that the function of any juridical claim, including a mere equity,

is determined by the reason that that claim was called into existence. Accordingly, it was concluded that the function which mere equities perform is to uphold the common interest which all members of a coherent, cohesive society have in affording a measure of protection to persons who have acted in some way to their detriment under the influence of some vitiating factor, such as one of the species of fraud or their own honest mistake. Finally, the question of how suited mere equities are to the performance of their identified function was considered. It was argued that the ‘minimalist’ nature of mere equities as bare equitable rights of action means that these claims are well suited to their allocated role, which fundamentally is about saving the claimant from the detrimental consequences of his own, albeit unsoundly engendered, actions.

### PART III: IMPLICATIONS

In defining the legal nature and practical function of mere equities, the present thesis has shed light on a significant juridical concept which previously was insufficiently understood. The immediate effect of this enhanced understanding is to deliver mere equities from the criticism that they are an anomalous category which defies comprehensive analysis. However, the thesis may have additional implications for legal practice and doctrine which are not so immediately obvious. It is now proposed to draw the thesis to a close by highlighting some of these potential implications.

#### **1. A category of unthinking reference**

One implication of the thesis is potentially to constrain the unfortunate habit exhibited by scholars and lawyers alike of referring unthinkingly, and often inaccurately, to the concept of a mere equity in legal discourse. There are various examples in the literature which demonstrate this tendency. Thus in chapter two it was shown that there are instances in the secondary literature where a commentator has suggested *ad hoc* that a particular claim is a ‘mere equity’ but has not backed up that suggestion with any

real evidence or argument.<sup>12</sup> Practising lawyers too are guilty of the same tendency. For instance, in the case of *Shiloh Spinners Ltd v Harding*,<sup>13</sup> already encountered in chapter three,<sup>14</sup> the appellant argued that an equitable right of entry was a ‘mere equity’ and therefore not capable of registration under the Land Charges Act 1925.<sup>15</sup> The submission that an equitable right of entry was a mere equity was a purely tactical one, being wholly unsupported by evidence or substantive legal argument. Nevertheless, Lord Wilberforce, who gave the leading judgment, seems to have been broadly in agreement with the appellant’s reasoning.<sup>16</sup> The case of *Drayne v McKillen*<sup>17</sup> is a more recent example of how in legal argument largely unfounded references can be made to mere equities. In *Drayne*, Coulson J had to consider the submission that an option to purchase shares was a ‘mere equity’ and accordingly did not give the grantee any beneficial interest in the shares. The basis for this submission was unclear to say the least, described by the judge as a ‘loose analogy’ with cases of misrepresentation.<sup>18</sup>

The reason mere equities are so frequently used as a category of unthinking reference is that the legal nature of these claims has previously not been sufficiently explored in the literature. As a result, mere equities have come to be seen as a vague, undefined concept which can easily be manipulated to the exigencies of the present argument. However, this thesis has investigated the legal nature of mere equities. It has shown that the concept of a mere equity is not vague or undefined, but refers to something very specific. In essence, a mere equity is a bare right to claim an equitable remedy; it binds the defendant *in personam*, but nevertheless may be imposed afresh on a successor in title in accordance with the conscience-based principle. This being so, it is obvious that neither an equitable right of entry nor an option to purchase shares is a mere equity, since neither of these claims can be described as a bare right to obtain a remedy. Accordingly, the thesis acts as a discouraging influence on the present tendency in legal discourse to use mere equities as a category of uncritical reference, pointing the way instead to a more analytical approach to the classification of equitable claims.

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<sup>12</sup> Ch 2, pt II, s 1.

<sup>13</sup> *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL).

<sup>14</sup> Ch 3, pt II, s 2, sub-s iii.

<sup>15</sup> *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) 715E (argument).

<sup>16</sup> *Ibid* 721A-D (Lord Wilberforce).

<sup>17</sup> *Drayne v McKillen* [2011] EWHC 3326 (QB).

<sup>18</sup> *Ibid* [46] (Coulson J).

Indeed, this more analytical approach has already been demonstrated. In chapter three,<sup>19</sup> a number of ‘outlying claims’ were analysed and it was concluded that, out of the nine claims considered, only three of them could potentially be mere equities. These potential mere equities were (i) claims to have a contract specifically performed, (ii) claims to seek relief against the forfeiture of a lease and (iii) claims to seek relief against the forfeiture of a mortgage.

## 2. Enforcement against third parties

From a doctrinal standpoint, the thesis has implications for the enforceability of mere equities against third parties. In particular, the thesis has the effect of restricting the circumstances in which mere equities can be enforced against third parties. This is because the thesis establishes that the doctrinal basis for the third party effects of mere equities is the conscience-based principle. Thus a mere equity does not automatically bind the world as right *in rem*; a mere equity is a right *in personam* which depends for its proprietary effects upon the court treating every sequential dealing with the affected asset as imposing the mere equity afresh on the transferee. A consequence of this is that, in terms of enforceability against third parties, mere equities are affected by certain limitations that have no application to equitable interests, which, unlike mere equities, contain rights *in rem*.

Two of these limitations have already been identified. The first is that a mere equity is incapable in principle of enforcement against a third party who takes even an *equitable* interest as a purchaser for value without notice. The second is that a mere equity is subject to a privity limitation, meaning that it cannot be enforced against a third party who does not derive his adverse interest through the person against whom the mere equity initially arose. In chapter five,<sup>20</sup> it was demonstrated that each of these limitations on the enforceability of mere equities is the necessary corollary of mere equities being rights *in personam* which rely on the conscience-based principle to affect third parties. The first limitation is well established in the authorities: it is the basis for the rule that in a competition between an equitable interest and a prior mere

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<sup>19</sup> Ch 3, pt IV.

<sup>20</sup> Ch 5, pt III, s 3, sub-ss i, ii.

equity, the plea of *bona fide* purchase for value without notice is available to the owner of the equitable interest.<sup>21</sup> The second limitation, by contrast, seems not to have been tested in any case so far, nor has it been noted before in the secondary literature.

However, the finding that mere equities are rights *in personam* whose third party effects depend on the conscience-based principle may affect the enforceability of these claims in other, more subtle ways. In this regard, it is significant that the enforceability of a mere equity against a successor in title is contingent on what the court is willing to presume about the effect of the transaction under which the successor in title claims. This suggests a role for judicial creativity in the operation of the conscience-based principle. In particular, it may be the case that the court is not necessarily obliged to assume that the successor in title is bound by the mere equity in exactly the same degree as the person against whom the mere equity first arose. In other words, within the framework of the conscience-based principle, the potential exists for the court to recognise that the liability of the successor in title is more attenuated or fragile than that of his predecessor in title. One practical result of this approach could be to give the successor in title access to discretionary equitable defences which are not necessarily available to the predecessor in title.

Cases involving innocent volunteers are a good example of how the court's theoretical power to attenuate the liability of a successor in title may operate in practice. In principle, a mere equity binds any third party who takes as a volunteer, regardless of whether the third party took with or without notice of the facts generating the mere equity.<sup>22</sup> Nevertheless, if the third party is an innocent volunteer, then a strong case arguably exists for allowing the third party to raise a defence of change of position in appropriate circumstances,<sup>23</sup> despite the fact that such a defence may not be available to the person originally bound by the mere equity.<sup>24</sup> As the above analysis demonstrates, this kind of protection could be extended to an innocent volunteer within the ambit of the conscience-based principle.

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<sup>21</sup> See *Cave v Cave* (1880) 15 Ch D 639 (Ch) 646-47 (Fry J) and the other cases cited above at ch 1, pt II, s 2, sub-s i, fn 36.

<sup>22</sup> See *Bridgeman v Green* (1757) Wilm 58, 64-65; 97 ER 22, 25 (Lord Commissioner Wilmot).

<sup>23</sup> See *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 (HL).

<sup>24</sup> The scope of the defence of change of position is uncertain: G Virgo, *The Principles of the Law of Restitution* (2nd edn, OUP 2006) 690. Yet it is highly unlikely that the defence would be made available where the defendant is guilty of fraud or unconscionable conduct.

### 3. The evolution of mere equities into equitable interests

The thesis has implications for the future development of doctrine, especially for the question of whether a mere equity one day could be reclassified as a kind of equitable interest. The possibility that claims which are currently ‘mere equities’ could prospectively become ‘equitable interests’ is broached by Neave and Weinberg,<sup>25</sup> who, as noted in chapter two,<sup>26</sup> argue that even confirmed mere equities—such as equitable claims to rescind or rectify—could develop into equitable interests in future cases. In short, Neave and Weinberg considered that the ‘mere equity’ label was a transient one—a kind of holding category for emerging forms equitable proprietary interest.

As to whether the thesis makes it more or less likely that the kind of taxonomic shift envisioned by Neave and Weinberg will happen, it is difficult say. In some respects the thesis increases the likelihood that such a development could eventually take place; while in other respects the thesis has the opposite effect.

In one sense, the thesis clearly opens the way for mere equities to be reclassified as equitable interests. In chapter five,<sup>27</sup> the former use and the restrictive freehold covenant were cited as examples of claims which, although initially pure rights *in personam*, were nevertheless enforced by the courts against third parties by means of the conscience-based principle. Yet, as discussed in that chapter, both of these categories of claim were subsequently reclassified as equitable interests in property.<sup>28</sup> Quite clearly, therefore, the thesis does raise the possibility that mere equities—which, like the early use and restrictive freehold covenant, are rights *in personam*—could travel along the same evolutionary path and similarly be reclassified in some future case as equitable interests.

In another sense, however, the thesis precludes the possibility that in the future the confirmed examples of mere equities could be reclassified as equitable interests. In chapter seven,<sup>29</sup> it was concluded that the function which mere equities perform is to uphold the common, social interest in granting protection to persons who act to their

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<sup>25</sup> M Neave and M Weinberg, ‘The Nature and Function of Equities (Part I)’ (1978-1980) 6 University of Tasmania Law Review 24; ‘The Nature and Function of Equities (Part II)’ (1978-1980) 6 University of Tasmania Law Review 115.

<sup>26</sup> Ch 2, pt II, s 2.

<sup>27</sup> Ch 5, pt II, s 2, sub-ss i, ii.

<sup>28</sup> See *Re Nisbet and Potts’ Contract* [1905] 1 Ch 391 (Ch), affd [1906] 1 Ch 386 (CA).

<sup>29</sup> Ch 7, pt IV.

detriment under the influence of their own honest mistake or one of the species of fraud. Furthermore, it was proposed that the legal nature of mere equities as bare equitable rights of action means that they are signally well adapted to the performance of their allocated function. Mere equities, it was explained, are a ‘minimalist’ form of equitable response: they consist wholly in a single claim to apply for an equitable remedy against the defendant, who correspondingly assumes liability to have his rights interfered with pursuant to the grant of that remedy. Significantly, mere equities are quite dissimilar to trusts, for, unlike trusts, mere equities do not subject the defendant to any fiduciary or other obligation in reference to any particular property.<sup>30</sup> It was submitted that the minimalist character of mere equities is appropriate in light of the fact that the allocated function of these claims is, in essence, about protecting people who are adversely affected by their own actions. In other words, since the function of mere equities does not *specifically* relate to anything that the defendant has done, a mere equity cannot, in fairness to the defendant, impose any greater burden than whatever is strictly necessary to give the claimant access to equitable relief.

These arguments show that if mere equities were to be reclassified as equitable interests, they could not, consistently with their allocated function, take the form of trusts. Such a development would result in the defendant being subject to the duties and obligations of a trustee, thereby exceeding what is strictly necessary to give the claimant access to equitable relief. This is significant to the present discussion, because in the past when judges and scholars have contemplated the possibility of mere equities being organised as equitable interests, they have generally presumed that they would take the form of beneficial interests under constructive or resulting trusts.<sup>31</sup>

If mere equities were reclassified as equitable interests, then their allocated function would seem to require that they adopt a form which could not easily be identified with any established category of equitable interest in English law. The most appropriate form would probably be something akin to an equitable security interest. Unlike other security interests, however, a ‘mere equity’ interest would secure the appropriation of specific property not to the performance of a particular obligation,<sup>32</sup> but to the grant of a particular equitable remedy. So, for instance, in a case where the claimant has a mere equity to rescind a transaction in equity and thereby recover a

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<sup>30</sup> *Lonrho plc v Fayed* [1992] 1 WLR 1 (Ch) 11H-12A (Millet J).

<sup>31</sup> R Chambers, *Resulting Trusts* (OUP 1997) ch 7.

<sup>32</sup> See J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) para 36-001.

specific asset, it is potentially conceivable—in line with the established function of mere equities—that the claimant could be analysed as having an equitable interest consisting of equitable rights *in rem* to have that asset appropriated to the grant of rescission. Admittedly, such an interest would be consistent with the basic function of mere equities: it would be directed solely at giving the claimant access to the appropriate remedy, and would not impose any greater judicial burden on the defendant. Nevertheless, a ‘mere equity’ interest clearly would not fall within any of the categories of equitable interest which were listed in chapter three;<sup>33</sup> it would be a novel category, as yet unknown to the English legal system.

It is for this reason that this thesis arguably makes it less likely that mere equities will be reclassified as equitable interests in future cases. Simply put, it is doubtful to say the least that the English courts today would be willing to acknowledge for the first time the existence of what would be a completely novel category of equitable proprietary interest.<sup>34</sup>

Consequently, while the thesis clearly has implications for the question of whether mere equities one day could be reclassified as equitable interests, these implications point in opposite directions. As a result, it is difficult to say whether the ultimate effect of the thesis is to make it more or less likely that such a development will take place. On the one hand, the analogy with the early use and restrictive freehold covenant would suggest that mere equities are liable to be reclassified in time as equitable interests. On the other hand, the juridical function which has been assigned to mere equities—and the consequences which this function would have for the legal nature of any prospective ‘mere equity’ interest—would tend to indicate that the current dividing-line between mere equities and equitable interests is here to stay.

It is far from clear which of these considerations would be likely to have the greatest weight should the question of reclassification ever arise. If this were to happen, then a range of possible arguments and counterarguments would potentially be in play.

For example, a proponent of the view that mere equities should be reclassified as equitable interests might argue that the courts would, in actual fact, be willing to recognise the existence of a novel category of ‘mere equity’ interest, especially in light

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<sup>33</sup> Ch 3, pt II, s 2, sub-s iv.

<sup>34</sup> Cf Law of Property Act 1925, s 4(1).

of the fact that s 116 of the Land Registration Act 2002 declares that a mere equity ‘in relation to registered land ... has effect from the time the equity arises as an *interest* capable of binding successors in title’.<sup>35</sup> However, an advocate of the contrary view might counter that the purpose behind s 116 is merely to confirm the applicability to mere equities of the rules in the 2002 Act governing the priority of competing interests in registered estates,<sup>36</sup> and that s 116 accordingly cannot be interpreted as altering in any sense the fundamental legal nature of mere equities as bare equitable rights of action. On the contrary, the explanatory notes to the 2002 Act appear to confirm this understanding by stating that the expression ‘a mere equity’ appears to denote ‘a claim to discretionary equitable relief’.<sup>37</sup>

Furthermore, an opponent of the view that mere equities should be reclassified as equitable interests might attack the apparent analogy between the early use and the restrictive freehold covenant, on the one hand, and the modern mere equity, on the other. Arguably, this analogy is less convincing than it may at first sight appear, for although the early use and restrictive freehold covenant were, like the modern day mere equity, pure rights *in personam*, the function of these claims was to secure to the *cestui que use* or covenantee long term access to the benefits inherent in particular assets. This is quite dissimilar to the juridical role of the contemporary mere equity, which, as explained already, is to provide the claimant with access to an appropriate equitable remedy; not to secure to the claimant beneficial enjoyment of assets over an extended period of time

Unfortunately, within the confines of the present thesis, space does not permit a proper evaluation of these different arguments. The aim throughout this thesis has been to fill in the many conceptual gaps in the scheme of the law as regards mere equities—a scheme which unambiguously includes the proposition that a ‘sharp distinction’ exists between mere equities and equitable interests.<sup>38</sup> To venture upon a critique of whether an alternative scheme would be more suitable, therefore, would be inconsistent with the overarching purpose of this thesis. It is worthwhile mentioning, however, that the view that mere equities will or should be reorganised as equitable

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<sup>35</sup> Land Registration Act 2002, s 116 (emphasis added).

<sup>36</sup> See Law Commission, *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 5.36.

<sup>37</sup> Explanatory Notes to the Land Registration Act 2002, para 186.

<sup>38</sup> *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) 721B (Lord Wilberforce).

interests may to a degree reflect the traditional uncertainty, noted in chapter one,<sup>39</sup> over the juridical nature and function of mere equities. To the extent that this is the case, the present writer submits that this thesis, in going some way towards dispelling this traditional uncertainty, would tend to favour the continuation of the *status quo*.

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<sup>39</sup> Ch 1, pt III.

## Appendices

### APPENDIX A: CASES FOUND BY MEANS OF THE METHODOLOGY DESCRIBED IN CHAPTER THREE

In chapter three, a review of the case law was conducted in order to ascertain which claims have been classified by the courts as mere equities. In part two, section one of that chapter, a description was given of the methodology which was applied in order to find the potentially relevant cases. The following is a list of the cases that were found by means of this methodology.

Abigail v Lapin [1934] AC 491 (PC)  
AC v DC [2012] EWHC 2032 (Fam)  
AIB Group (UK) plc v Turner [2015] EWHC 3994 (Ch)  
Bainbridge v Bainbridge [2016] EWHC 898 (Ch)  
Barclays Bank plc v Boulter [1999] 1 WLR 1919 (HL)  
Bendall v McWhirter [1952] 2 QB 466 (CA)  
Blacklocks v JB Developments (Godalming) Ltd [1982] 1 Ch 183 (Ch)  
Bland v Ingram's Estates Ltd (Ch, 13 April 1999)  
Bristol and West Building Society v Mothew [1998] Ch 1 (CA)  
Cave v Cave (1880) 15 Ch D 639 (Ch)  
Chaudhary v Yavuz [2011] EWCA Civ 1314, [2013] Ch 249  
Cherry Tree Investments Ltd v Landmain Ltd [2012] EWCA Civ 736, [2013] Ch  
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Churcher v Street [1959] 1 Ch 251 (Ch)  
CIBC Mortgages plc v Pitt [1994] 1 AC 200 (HL)  
Clarke v Meadus [2010] EWHC 3117 (Ch)  
Cloutte v Storey [1911] 1 Ch 18 (CA)  
Collings v Lee (2001) 82 P&CR 3 (CA)  
Croydon (Unique) Ltd v Wright [2001] Ch 318 (CA)  
Day v Tiuta International Ltd [2014] EWCA Civ 1246  
Dolphin Quays Development Ltd v Mills [2006] EWHC 931, [2007] 1 P&CR 12

Drayne v McKillen [2011] EWHC 3326 (QB)  
Eagle Star Insurance Co Ltd v Karasiewicz [2002] EWCA Civ 940  
Elwood v Goodman [2013] EWCA Civ 1103, [2014] Ch 442  
Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 86 (Ch), [2013] 1 P&CR  
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Fuller v Judy Properties Ltd (1992) 64 P&CR 176 (CA)  
Ghazaani v Rowshan [2015] EWHC 1922 (Ch)  
Gross v Lewis Hillman Ltd [1970] 1 Ch 445 (CA)  
Halifax Joint Stock Banking Co v Gledhill [1891] 1 Ch 31 (Ch)  
Halifax plc v Curry Popeck [2008] EWHC 1692 (Ch)  
Halifax plc v Omar [2002] EWCA Civ 121, [2002] 2 P&CR 26  
Halley v The Law Society [2003] EWCA Civ 97  
Herbert v Doyle [2010] EWCA Civ 1095  
Hodgson v Marks [1971] 1 Ch 892 (CA)  
Howlaw (470) Ltd v Stockton Estates Ltd (2001) 81 P&CR 29 (Ch)  
Independent Trustee Services Ltd v GP Noble Trustees Ltd [2012] EWCA Civ 195,  
[2012] 3 WLR 597  
IRC v Eversden [2002] EWHC 1360 (Ch)  
Isaaks v Charlton Triangle Homes Ltd [2015] EWHC 2611 (Ch)  
Jess B Woodcock & Sons Ltd v Hobbs [1955] 1 WLR 152 (CA)  
Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq) (1965) 113 CLR 265  
Lictor Anstalt v Mir Steel UK Ltd [2014] EWHC 3316 (Ch)  
Lloyds Bank plc v Rosset [1991] 1 AC 107 (HL)  
London Allied Holdings Ltd v Lee [2007] EWHC 2061 (Ch)  
Malory Enterprises Ltd v Cheshire Homes (UK) Ltd [2002] EWCA Civ 151, [2002]  
Ch 216  
Maynard v Maynard [1969] P 88  
Melbourne Banking Corp Ltd v Brougham (1882) 7 App Cas 307 (PC)  
Mid-Glamorgan CC v Ogwr BC (1994) 68 P&CR 1 (CA)  
Midland Bank Trust Co Ltd v Green [1981] AC 513 (HL)  
Mortgage Express v Lambert [2016] EWCA Civ 555  
National Bank of Canada v Hughes (CA, 25 March 1991)  
National Crime Agency v Robb [2014] EWHC 4384 (Ch), [2015] 3 WLR 23  
National Provincial Bank Ltd v Ainsworth [1965] AC 1175 (HL)

National Provincial Bank Ltd v Hastings Car Mart Ltd [1964] 1 Ch 665 (CA)  
National Provincial Bank Ltd v Hastings Car Mart Ltd [1964] 1 Ch 9 (Ch)  
National Provincial Bank of England v Jackson (1886) 33 Ch D 1 (CA)  
Phillips v Phillips (1861) 4 De GF&J 208, 45 ER 1164  
Powell v Benney [2007] EWCA Civ 1283  
Preedy v Dunne [2015] EWHC 2713 (Ch)  
Q v Q [2008] EWHC 1874 (F)  
Anstis, Re (1886) 31 Ch 596 (CA)  
Clarke's Settlement Trust, Re [1916] 1 Ch 467 (Ch)  
Crown Holdings (London) Ltd (in liq), Re [2015] EWHC 1876 (Ch)  
Ffrench's Estate, Re (1887) 21 LR Ir 83  
Moon, Re [1907] 2 Ch 304 (Ch)  
North East Property Buyers Litigation, Re [2010] EWHC 2991 (Ch)  
North East Property Buyers Litigation, Re [2012] EWCA Civ 17, [2012] 1 WLR  
1521  
North East Property Buyers Litigation, Re [2014] UKSC 52, [2015] AC 385  
Secretary of State for the Environment Transport and the Regions v Walton Group  
plc (Ch, 13 February 2001)  
Shiloh Spinners Ltd v Harding [1973] AC 691 (HL)  
Smith v Jones [1954] 1 WLR 1089 (Ch)  
Stack v Dowden [2007] UKHL 17, [2007] 2 AC 432  
Funding Corp Block Discounting Ltd v Lexi Holdings plc [2011] EWHC 3101 (Ch)  
Thompson v Foy [2009] EWHC 1076 (Ch), [2010] 1 P&CR 16  
Twinsectra Ltd v Yardley [1999] All ER (D) 433 (CA)  
Twinsectra Ltd v Yardley [2002] UKHL 12, [2002] 2 AC 164  
Voyce v Voyce (1991) 62 P&CR 290 (CA)  
Weddell v JA Pearce & Major [1988] 1 Ch 26 (Ch)  
Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669 (HL)  
Westminster Bank Ltd v Lee [1956] 1 Ch 7 (Ch)  
Wiggins v Regent Wealth Ltd [2014] EWCA Civ 1078, [2015] 1 WLR 1188  
Williams & Glyn's Bank Ltd v Boland [1981] AC 487 (HL)  
Williams v Staite [1979] 1 Ch 291 (CA)  
Zarbafi v Zarbafi [2014] EWCA Civ 1267

## APPENDIX B: TABLE OF CASES

The following is a table of the cases that have been referenced in this thesis.

A Roberts & Co Ltd v Leicestershire CC [1961] 1 Ch 555 (Ch)  
Abigail v Lapin [1934] AC 491 (PC)  
Abram Steamship Co Ltd (in liq) v Westville Shipping Co Ltd (in liq) [1923] AC 773  
(HL)  
AC v DC [2012] EWHC 2032 (Fam)  
Achilli v Tovell [1927] 2 Ch 243 (Ch)  
Addis v Campbell (1841) 4 Beav 401, 49 ER 394  
A-G v Biphosphated Guano Co (1879) 11 Ch D 327 (CA)  
A-G v Wilkins (1853) 17 Beav 285, 51 ER 1043  
AIB Group (UK) plc v Mark Redler & Co Solicitors [2014] UKSC 58, [2015] AC  
1503  
AIB Group (UK) plc v Turner [2015] EWHC 3994 (Ch)  
Alati v Kruger (1955) 94 CLR 216  
Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd [1983] 1 WLR 87 (Ch)  
Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd [1985] 1 WLR 173 (CA)  
Allcard v Skinner (1887) 36 Ch D 145 (CA)  
American Airlines v Hope [1974] 2 Lloyd's Rep 301 (HL)  
Anstis, Re (1886) 31 Ch 596 (CA)  
Ashburn Anstalt v Arnold [1989] 1 Ch 1 (CA)  
Assaf v Fuwa [1955] AC 215 (PC)  
Astley v Milles (1827) 1 Sim 298, 57 ER 588  
Attwood v Small (1838) 6 Clark & Fennelly 232, 7 ER 684  
Austerberry v Corp of Oldham (1885) 29 Ch D 750 (CA)  
Bainbridge v Bainbridge [2016] EWHC 898 (Ch)  
Bainbrigg v Browne (1881) 18 Ch D 188 (Ch)  
Bandon v Becher (1835) 9 Bligh NS 532, 5 ER 1388  
Banque Belge Pour L'Etranger v Hambrouck [1921] 1 KB 321 (CA)  
Barclays Bank Ltd v Bird [1954] 1 Ch 274 (Ch)  
Barclays Bank plc v Boulter [1999] 1 WLR 1919 (HL)

Barclays Bank plc v O'Brien [1994] 1 AC 180 (HL)  
Basham, Re [1986] 1 WLR 1498 (Ch)  
Bassett v Nosworthy (1673) Rep Temp Finch 102, 23 ER 55  
Bendall v McWhirter [1952] 2 QB 466 (CA)  
Bennet v Vade (1741) 2 Atk 324, 26 ER 597  
Berkeley Leisure Group Ltd v Williamson [1996] Lexis Citation 3168 (CA)  
Berrington v Evans (1839) 3 Y & C Ex 384, 160 ER 751  
Blacklocks v JB Developments (Godalming) Ltd [1982] 1 Ch 183 (Ch)  
Bland v Ingram's Estates Ltd [2001] Ch 767 (CA)  
Blenkinsopp v Blenkinsopp (1850) 12 Beav 568, 50 ER 1177  
Bond Worth, Re [1980] 1 Ch 228 (Ch)  
Boots The Chemist Ltd v Street [1983] 2 EGLR 51 (Ch)  
Boustany v Pigott (1995) 69 P&CR 298 (PC)  
Boynton v Monarch Life Insurance Co of New Zealand Ltd [1973] 1 NZLR 606  
Bradley-Hole v Cusen [1953] 1 QB 300 (CA)  
Bramwell v Bramwell [1942] 1 KB 370 (CA)  
Bridgeman v Green (1757) Wilm 58, 97 ER 22  
Bridgman v Green (1755) 2 Ves Sen 627, 28 ER 399  
Bristol and West Building Society v Mothew [1998] Ch 1 (CA)  
Butlin's Settlement Trusts, Re [1976] 1 Ch 251 (Ch)  
Campbell v Griffin [2001] EWCA Civ 990  
Car and Universal Finance Co Ltd v Caldwell [1965] 1 QB 525 (CA)  
Carlisle v Blamire (1807) 8 East 487, 103 ER 430  
Casborne v Scarfe (1738) 1 Atk 603, 26 ER 377  
Case of the Creditors of Sir Charles Cox (1734) 3 P Wms 341, 24 ER 1092  
Castellan v Hobson (1870) LR 10 Eq Cas 47  
Catt v Tourle (1869) LR 4 Ch App 654 (CA)  
Cave v Cave (1880) 15 Ch D 639 (Ch)  
Chartbrook Ltd v Persimmon Homes Ltd [2008] EWCA Civ 183, [2008] 2 All ER  
(Comm) 387  
Chaudhary v Yavuz [2011] EWCA Civ 1314, [2013] Ch 249  
Cheese v Thomas [1994] 1 WLR 129 (CA)  
Cherry Tree Investments Ltd v Landmain Ltd [2012] EWCA Civ 736, [2013] Ch 305  
Childers v Childers (1857) 1 De G&J 482, 44 ER 810

Churcher v Street [1959] 1 Ch 251 (Ch)  
 CIBC Mortgages plc v Pitt [1994] 1 AC 200 (HL)  
 Clark v Malpas (1862) 31 Beav 80, 54 ER 1067  
 Clark v Malpas (1862) 4 De GF&J 401, 45 ER 1238  
 Clark v Ward (1700) Prec Ch 150, 24 ER 72  
 Clarke v Meadus [2010] EWHC 3117 (Ch)  
 Clarke's Settlement Trust, Re [1916] 1 Ch 467 (Ch)  
 Clarkson v Hanway (1723) 2 P Wms 203, 24 ER 700  
 Clore v Theatrical Properties Ltd (1936) 3 All ER 483 (CA)  
 Clough v The London and North Western Railway Co (1871) LR 7 Ex 26  
 Cloutte v Storey [1911] 1 Ch 18 (CA)  
 Cobbe v Yeoman's Row Management Ltd [2008] UKHL 55, [2008] 1 WLR 1752  
 Coleby v Smith (1683) 1 Vern 205, 23 ER 416  
 Collings v Lee [2001] 2 All ER 332 (CA)  
 Comr of Stamp Duties (Qld) v Livingston [1965] AC 694 (PC)  
 Cooke v Chilcott (1876) 3 Ch D 694  
 Copestake v Hoper [1908] 2 Ch 10 (CA)  
 Cory v Eyre (1863) 1 De GJ&S 149, 46 ER 58  
 Cowbridge Railway Co, Re (1868) LR 5 Eq 413  
 Crabb v Arun DC [1976] 1 Ch 179 (CA)  
 Craddock Brothers v Hunt [1923] 2 Ch 136 (CA)  
 Crown Holdings (London) Ltd (in liq), Re [2015] EWHC 1876 (Ch)  
 Croydon (Unique) Ltd v Wright [2001] Ch 318 (CA)  
 Cuthbertson v Irving (1859) 4 H&N 742, 157 ER 1034  
 Dalkia Utilities Services plc v Celtech International Ltd [2006] EWHC Civ 63, [2006]  
     2 P&CR 9  
 Daly v The Sydney Stock Exchange Ltd (1986) 160 CLR 371  
 Dawson v Great Northern and City Railway Co [1905] 1 KB 260 (CA)  
 Day v Tiuta International Ltd [2014] EWCA Civ 1246  
 De Mattos v Gibson (1858) 4 De G & J 276, 45 ER 108  
 Dering v Earl of Winchelsea (1787) 1 Cox 318, 29 ER 1184  
 Derry v Peek (1889) 14 App Cas 337 (HL)  
 Dickinson v Burrell (1866) LR 1 Eq 337  
 Dighton v Withers (1862) 31 Beav 423, 54 ER 1202

Dolphin Quays Development Ltd v Mills [2006] EWHC 931, [2007] 1 P&CR 12  
Drayne v McKillen [2011] EWHC 3326 (QB)  
Eagle Star Insurance Co Ltd v Karasiewicz [2002] EWCA Civ 940  
Earl of Ardglass v Muschamp (1684) 1 Vern 237, 23 ER 438  
Earl of Oxford v Rodney (1807) 14 Ves Jun 417, 33 ER 581  
Earl of Oxford's Case (1615) 1 Chan Rep 1, 21 ER 485  
Earl of Pomfret v Windsor (1752) 2 Ves Sen 472, 28 ER 302  
Eastgate, Re [1905] 1 KB 465 (KB)  
El Ajou v Dollar Land Holdings plc [1993] 3 All ER 717 (Ch)  
El Ajou v Dollar Land Holdings plc [1994] 2 All ER 685 (CA)  
Ellis v Torrington [1920] 1 KB 399 (CA)  
Elwood v Goodman [2013] EWCA Civ 1103, [2014] Ch 442  
Englefield v Englefield (1686) 1 Vern 444, 23 ER 575  
ER Ives Investment Ltd v High [1967] 2 QB 379 (CA)  
Erlanger v The New Sombrero Phosphate Co (1878) 3 App Cas 1218 (HL)  
Errington v Errington [1952] 1 KB 290 (CA)  
Fawcett v Lowther (1751) 2 Ves Sen 300, 28 ER 193  
Ferris v Weaven [1952] 2 All ER 233 (QB)  
French's Estate, Re (1887) 21 LR Ir 83  
Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 86 (Ch), [2013] 1 P&CR

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Flory v Denny (1852) 7 Ex 581, 155 ER 1080  
Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd (1996) 70 FCR 328  
Freeman v Edwards (1848) 2 Ex 732, 154 ER 685  
Fulham v M'Carthy (1848) 1 HLC 703, 9 ER 937  
Fuller v Judy Properties Ltd (1992) 64 P&CR 176 (CA)  
Funding Corp Block Discounting Ltd v Lexi Holdings plc [2011] EWHC 3101 (Ch)  
Gervys v Cook (2002) 119 Selden Society 108  
Ghazaani v Rowshan [2015] EWHC 1922 (Ch)  
Gibbon v Mitchell [1990] 1 WLR 1304 (Ch)  
Gillett v Holt [2001] Ch 210 (CA)  
Goldcorp Exchange Ltd, Re [1995] 1 AC 74 (PC)  
Gordon v James (1885) 30 Ch D 249 (CA)  
Grand Metropolitan plc v The William Hill Group Ltd [1997] 1 BCLC 390 (Ch)

Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2002] EWCA Civ 1407, [2003] QB 679

Green v Russell [1959] 2 QB 226 (CA)

Greenwood v Churchill (1843) 6 Beav 314, 49 ER 846

Gresley v Mousley (1859) 4 De G&J 78, 45 ER 31

Griffiths, Re [2008] EWHC 118 (Ch), [2009] Ch 162 (Ch)

Grist v Bailey [1967] 1 Ch 532 (Ch)

Grobbelaar v News Group Newspapers Ltd [2002] UKHL 40, [2002] 1 WLR 3024

Gross v Lewis Hillman Ltd [1970] 1 Ch 445 (CA)

Guiana Industrial and Commercial Investments Ltd v Inland Revenue Commissioner (No 2) [1971] AC 841 (PC)

Halifax Joint Stock Banking Co v Gledhill [1891] 1 Ch 31 (Ch)

Halifax plc v Curry Popeck [2008] EWHC 1692 (Ch)

Halifax plc v Omar [2002] EWCA Civ 121, [2002] 2 P&CR 26

Halley v The Law Society [2003] EWCA Civ 97

Halpern v Halpern (No 2) [2006] EWHC 1728 (Comm), [2007] QB 88

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#### APPENDIX C: TABLE OF LEGISLATION

The following is a table of the legislation that has been referenced in this thesis.

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