



Kenya Legal Resources

Maxims of Equity

These maxims of equity are statements which embody rules of equity. They are only guidelines. They are not applied strictly in every case. But they help us to understand what the rules of equity are. No logical sequence and they often overlap. You can have two maxim that actually says the same thing. You can have one equity which is the exact opposite of another maxim:

1. He who seeks equity must do equity
2. He who comes to equity must come with clean hands
3. Equity is equality (Equality is equity)
4. Equity looks to the intent or substance rather than the form
5. Equity looks upon as done that which ought to be done
6. Equity imputes an intent to fulfill an obligation
7. Equity acts in personam
8. Equity will not assist a volunteer (Equity favours a purchaser for value without notice)
9. Equity will not suffer a wrong to be without a remedy (Where there is a wrong there is a remedy for it) *Ibi just ibi remedium*
10. Equity does not act in vain
11. Delay defeats equity
12. Equity aids the vigilant and not the indolent (*Vigilantibus non dorminentibus jura subveniunt*)

Equity follows the law

Where there is equal equity the law shall prevail

Where the equities are equal the first in time shall prevail

He who seeks equity must do equity

This maxim means that a person who is seeking the aid of a court of equity must be prepared to follow the court's directions, to abide whatever conditions that the court gives for the relief. And this is most commonly applied in injunctions. The court will normally impose certain conditions for granting the injunction.

Examples:

Illegal loans. An old case, though overtaken by law, is still important to illustrate this maxim: **Lodge v National Union Investment Company Ltd** 1907] 1 Ch. 300. This is a case in which B had borrowed money from a money lender, M, and B mortgaged some securities to M for the loan. It turned out that M was not a registered money lender by law (the Money Lenders Act of England). B sued M for delivery of his securities (back to him). And here the court refused to grant the order unless B first repays the loan. Today a court cannot enforce an illegal action, such as this one was.

Contrast that case with the case of **Kasumu v Baba Egbe**, 1956] AC 539. Another case: **Barclays v. Prospect Mortgages Ltd** [1974] 2 All ER 672. Said Lodge did not lay a principle for all time.

Another example--consolidation- we say that mortgagee has lent money to a mortgagor has given two mortgages.--on two properties. Under each mortgage there is a loan. And they could have been issued at different times.

A third illustration: notice to redeem a mortgage before the due date. He is required to pay notice to lender or pay the interest remains.

Last example: equitable estoppel. Promisory estoppel. By words or conduct, a representation of promise.

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Equity will preclude the promisor from resigning from the promises. An example from a land lord-tenant relationship. Assume the lease comes to an end to leave the promises in the states in which he found them on excluding fair wear and tear. He can only avoid doing equity if he gives notice that he is not putting up a new flat and therefore he will require painting.

There is also proprietary estoppel --one person conducts himself in such a way that : proprietary estoppel arises where one person (a) knowing that another person B is acting under some mistaken belief that B has some right to A's property passively or actively encourages B's act. So B is the person who is mistaken. A is the person who owns ..such as improving the property, under the mistaken belief that he has an interest/right to A's property. A gets to know this, of B's mistaken belief. But he does not correct B. And equity provides here that A will be estopped: he will be excluded from denying B's interest in the property. An example is the case of *Inwards v Baker*, (1965) 2 QB 29 where B has incurred some expenditure in developing some property.

He who comes to equity must come with clean hands

Take the case of a tenant and a landlord and this tenant defaults in paying rent. The lease will be forfeited. A right of re-entry by the landlord where the lease is deemed to be forfeited. That is the common law position.

Equity gave relief against forfeiture if the tenant was willing to pay the rent that was outstanding. And therefore the lease could continue. But relief could only be given if the tenant had clean hands, i.e. had not breached other terms. The case that illustrate this point is *Gill v Louis* [1956] 2 QB. The tenant had used the premises for a purpose that was not allowed under the lease.

This scenario was summed up in another case: He who has committed inequity shall not have equity. This phrases in the *Jones v. Lenthall* (1669) 1 Ch, Ca 154). There is a limit to this rule. In some cases the court has the discretion whether to apply that maxim. Limit to the extent that maxim can be applied. the limit is this: It is not all unclean hands that will deny a plaintiff his remedy. The conduct must be relevant to the relief being sought.

Duchess of Argyll v Duke of Argyll [1967]

Contrast with *Loughvan v L* (1934) 292 US. Justice Brandeis said equity does not demand that its suitors shall have lead blameless lives. We are not concerned with issues of morality. If the breach is a trifle, a small matter, a minor breach, then that in itself should not deny the plaintiff the remedy.

Besant v. Wood (1979) 12 Ch. D. 605.

Hooper v Bromet (1904) 90 Lt 234.

The first maxim deals with now/future, the second deals with conduct in the past.

Equity is equality (Equality is equity)

1. Presumption of tenancy in common where there is

- purchase in unequal shares. Say two people have unequal shares, there is presumption of tenancy in common
- purchase in equal shares: severance of joint tenancy. To avoid injustice, to achieve equality, there will be assumption of tenancy in common.
- partnership property. Say five partners in a law firm and one of the partners dies. His shares go to his heir: There is presumption that the partners hold a tenancy in common.

It applies to a situation where two or more people are entitled to the same property and there is no other basis for division. Those who are entitled to property should have certainty and fairness of equal division. Equity in this sense does not mean literal equality but proportionate equality.

It applies to the division of property; where there are rival claimants to property and there is no formula for sharing it out, i.e. no will. And so the law steps in and it establishes certain rules that will guide the court. And the first rule is in relation to a presumption of a tenancy in common. That is equity will make a presumption to joint tenancy as opposed to a common tenancy.

[Tenancy in common is a tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right of survivorship.

Joint tenancy is a tenancy with two or more co-owners who take identical interests simultaneously by the same instrument and with the same right of possession. A joint tenancy differs from a tenancy in common because each joint tenant has a right of survivorship to the other's share

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(In some states in the US, this right must be clearly expressed in the conveyance – otherwise, the tenancy will be presumed to be a tenancy in common).

Right of survivorship is a joint tenant's right to succeed to the whole estate upon the death of the other joint tenant.]

Joint tenancy: In certain circumstances the children could inherit, that is, equity will make a presumption of a tenancy in common to avoid injustice.

2. Equal division. Equality is equity. In general the maxim will be applied whenever property is to be distributed between rival claimants and there is no other basis for division. Where the following are involved. For example husband and wife who operates a joint bank account; each spouse may deposit or take out money. Upon divorce, the maxim applies. They share 50-50. The authority is that equity does not want to concern itself with the activities of a husband and wife – to go into the bedroom and make deep inquiries. Hence equal division. If children are involved, that may be considered.

Another example relates to trusts. How do you divide the property? Say there are three beneficiaries, in unequal shares. Then one of the beneficiaries passes away, i.e. one of the shares fails to vest. What should accrue to the surviving beneficiaries? Redistribute equally, applying the rule "Equity is equality". **Re Bowers S.T.** [1942] Ch. 97 discusses this formula.

Another illustration: copyright. You have a situation where you've two people and the author bequeaths the scrip to one person and the copyright to another person. Cannot utilize the manuscript without the copyright. Each requires the other. Where that is situation, the proceeds will be divided equally between the two. The case that illustrates this is **Re Dickens**.

-Husband and wife. E.g. after a divorce the court has refused to dissect meticulously the joint bank account into which the husband and wife paid their income, and upon which they both drew, and instead divided the balance equally between them. See **Jones v Maynard**. The principle does not apply while they are still living together, for then their rights in a joint bank account are not meant to be attended by legal consequences (See **Gage v King**, and each will be sole beneficial owner of any property which he or she buys with money drawn from the joint account, subject to any contrary intention.

The rule of equality has been applied in relation to club property as between the members of a club which has ceased to exist(see *Re Sick and Funeral Society of St. John's Sunday School*); and in relation to commission as between two estate agents who have been instructed in the sale of the same property (See **Hampton & Sons v Garrad Smith (Estate Agents Ltd)**).

It has also been applied when an author bequeaths the manuscript of a work to A and the copyright to B, and the publication of the work is made possible only by using the manuscript, prima facie the proceeds of sale of the copyright will be divided equally between A and B (See **Re Dickens**).

The maxim also appears to be responsible for the decision that where property has been settled in unequal shares with a provision that any share which fails to vest shall accrue to the other shares by way of addition, accrues prima facie takes place in equal shares and not in the proportions laid down by the settlor for the original shares (see **Re Bower's S.T.**), even though equality is attained only at the price of altering the proportions prescribed by the settlor.

When to go for proportionate equality or literal equality: It depends. That is answer to every legal question.

Equity looks to the substance or intent rather the form

This maxim makes a distinction between matters of substance and matters of form. Equity will give priority to substance (intention) as opposed to form, if there is a contradiction. This maxim is normally applied to trusts. There have been cases where the court has inferred a trust even where the word trust does not appear.

Another illustration is the remedy of rectification of contract, where equity looks to the intention, where intention matters.

4. EQUITY LOOKS TO THE INTENT OR SUBSTANCE RATHER THAN FORM

This maxim lies at the root of the equitable doctrines governing mortgages, penalties and forfeitures. Equity regards the spirit and not the letter.

Courts of Equity make a distinction in all cases between that which is a matter of substance and that which is a matter of form; and if it finds that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat substance. Thus if a party to a contract for the sale of land fails to complete on the day fixed for completion, at law he is in breach if his contract and will be liable for damages e.g. for delay. Yet in equity it will usually suffice if he is ready to complete within a reasonable period thereafter, and thus the other party will not be able to avoid performance.

Another aspect of this maxim is shown by equity's impatience with mere technicalities. Equity was never much impressed by a deed, and it will refuse to decree specific performance of a voluntary agreement even if it is made by deed and so enforceable at law.

5. EQUITY REGARDS AS DONE THAT WHICH OUGHT TO BE DONE

This maxim has its most frequent application in the case of contracts. Equity treats a contract to do a thing as if the thing were already done, though only in favour of persons entitled to enforce the contract specifically and not in favour of volunteers. Agreements for value are thus often treated as if they had been performed at the time when they ought to have been performed. For example a person who enters into possession of land under a specifically enforceable agreement for a lease is regarded in any court which has jurisdiction to enforce the agreement as if the lease had actually been granted to him. Walsh v. Lonsdale the agreement for lease was as good as the agreement itself. Souza Figuerido v. Moorings Hotel – held an unregistered lease cannot create any interest, right or confer any estate which is valid against third parties. However, it operates as a contract inter parties, it is valid between the parties and can be specifically enforced. The tenant in this case was therefore liable to pay rent in arrears.

6. EQUITY IMPUTES AN INTENT TO FULFIL AN OBLIGATION

If a person is under an obligation to perform a particular act and he does some other act which is capable of being regarded as a fulfilment of this obligation, that other act will prima facie be regarded as fulfilment of the obligation.

For example suppose that a husband covenants with the trustees of his marriage settlement to pay to them the sum of £50,000, to be laid out by the trustees in the purchase of lands in the county of Devon which are to be settled upon the trusts of the settlement. In fact, the husband never pays the money to the trustees, but after the marriage purchases lands in Devon for £50,000, and has them conveyed to himself in fee simple; and he then dies without bringing the lands into settlement. The purchased lands are in equity presumed to have been purchased by the husband in pursuance of his covenant, and as being in fact his performance of that covenant, so that they become subject to the trusts of his marriage settlement. It is on this maxim that the doctrines of performance and satisfaction are founded.

7. EQUITY ACTS IN PERSONAM

This maxim which is descriptive of the procedure in equity, is of less significance now than formally.

This is a maxim which is descriptive of procedure in equity, is the foundation of all equitable jurisdiction. Courts of law enforced their judgments in rem, e.g. by writs of 'fieri facias or elegit' but the originally equitable decrees were enforced by Chancery acting against the person of the defendant (ie by imprisonment) and not in rem against the property involved in the dispute. Later equity invented the alternative method of sequestrating the defendant's property until he obeyed the decree. These methods can still be used where necessary, but other and more convenient methods are often available today. So

- a. The court can often make a vesting order, by virtue of which property will become transferred to some other person (eg where the court appoints a trustee and it is necessary that the trust property should be vested in him).
- b. Where the court orders a person to execute a document (eg where specific performance is decreed against a vendor or land), the court can appoint some person to execute it on his behalf. Where appropriate, common law writs of execution can be used to enforce equitable decrees. Although the maxim has lost much of its importance, it is responsible for the general rule that English court has jurisdiction in equitable matters, even though the property in dispute may be situated abroad, if the defendant is present in this country = PENN V. BALTIMORE (the Defendant was ordered to perform a contract relating to land in America). But there must be some equitable right arising out of contract, trust or fraud.

8. EQUITY WILL NOT ASSIST A VOLUNTEER

Equity favours a purchaser for value without notice. A volunteer is a person who has not paid consideration. Exception to the application of this maxim is in Trust.

9. EQUITY WILL NOT SUFFER A WRONG TO BE WITHOUT A REMEDY

Ibis jus ibi remedium" if there is a wrong, there is a remedy for it.
He who seeks solace in the arms of equity will not go away broken hearted.

Each party has his or her share at the table of equity.

No wrong should be allowed to go unredressed if it is capable of being redressed by equity.

Not all moral wrongs should be redressed by equity.

The maxim must be taken as referring to rights which are suitable for judicial enforcement, but were not enforced at common law owing to some technical defect. Its meaning can be best explained by taking a few examples of the cases in which the court has acted upon it.

Enforcement of trusts: It was on this maxim that the court of Chancery based its interference to enforce uses and trusts. Where A conveyed land to B to hold to the use of, or on trust for C, and B claimed to keep the benefit of the land for himself, C had no remedy at law. Yet such an abuse of confidence was most distinctly a wrong, and a wrong capable of easy redress in a court of justice.

The auxiliary jurisdiction: Again, to this maxim may be traced the origin of the auxiliary jurisdiction of the Court of Chancery, by virtue of which suitors at law were aided in the enforcement of their legal rights. Without such aid these rights would often have been "wrongs without remedies". For instance, it was often necessary for a claimant in a common law action to obtain disclosure of facts resting in the knowledge of the defendant, or of deeds, writings or other things in his possession or power. The common law courts, however, had no power to order such disclosure, and recourse was therefore had to the Court of Chancery, which assumed jurisdiction to order the defendant to make disclosure on his oath.

Formerly a Lessor was not entitled to disclosure of documents in an action brought to forfeit the lease, as the court leans against penalties and forfeitures. This restriction of the normal rule has now been abrogated.

10. EQUITY DOES NOT ACT IN VAIN:

The court of equity is shy and does not want to be embarrassed by granting remedies that cannot be enforced or issuing orders that cannot be obeyed by the Plaintiff.

11. DELAY DEFEATS EQUITY OR EQUITY AIDS THE VIGILANT AND NOT THE INDOLENT: *Vigilantibus, non dormientibus, jura subveniunt*

A court of equity has always refused its aid to stale demands, where a party has slept on his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing. Delay which is sufficient to prevent a party from obtaining an equitable remedy is technically called "laches".

This maxim, however, has no application to cases to which the Statutes of Limitation apply either expressly or, perhaps, by analogy. There are thus three cases to consider—

- (a) equitable claims to which the statute applies expressly;
 - (b) equitable claims to which the statute is applied by analogy; and
 - (c) equitable claims to which no statute applies and which are therefore covered by the ordinary rules of laches.
- (a) Express Application of the statute. Originally the statute applied only to courts of common law. but then several statutory provisions were enacted which were in terms applicable to equitable claims. Thus the Real Property equity must be brought within the same time as if it were a legal claim, and the Trustee Act 1888 limited the time within which an action must be replaced by the Limitation Act. The principal equitable claims so regulated are as follows:
 - (i) Claim by cestuis que trust to recover trust property or in respect of any breach of trust;
 - (ii) Claims to the personal estate of a deceased person;
 - (iii) Claims to redeem mortgaged land.
 - (iv) Claim to foreclose mortgages of real or personal property.
 - (b) Application of the statute by analogy: where a claim is not expressly covered by any statutory period but is closely analogous to a claim which is expressly covered, equity will act by analogy and apply the same period. This is so not only where equity, exercising a concurrent jurisdiction, gives the same relief as was available in a court of law and to which there is a limitation period prescribed; it applies also where equity affords wider relief than available to a claim for damages for fraud or fraudulent breach of contract is applicable by analogy to a claim to account as constructive trustee.
 - (c) Claims outside statute. The principles which equity applies to cases not covered by a statutory period have been stated thus:

"Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."

12. EQUITY FOLLOWS THE LAW;

The Court of Chancery never claimed to override the courts of common law. "Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law and can as little justify a departure from it. It is only when there is some important circumstance disregarded by the common law rules that equity interferes. "equity follows the law, but not slavishly nor always."

13. WHERE THERE IS EQUAL EQUITY THE LAW SHALL PREVAIL;

this maxim forms the basis of the rules on priority and can be contrasted with the axiom where the equities are equal the first in time shall prevail.

14. WHERE THE EQUITIES ARE EQUAL, THE FIRST IN TIME SHALL PREVAIL;

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