

Law Reform Commission

REPORT 13 (1971) - LAW AND EQUITY

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Preface

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are:

The Honourable Mr Justice Reynolds, Chairman.
Mr R. D. Conacher, Deputy Chairman.
Mr C. R. Allen.
Professor D. G. Benjafield.
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The offices of the Commission are in the Goodsell Building, 812 Chifley Square, Sydney. The Secretary of the Commission is Mr R. J. Watt. Letters should be addressed to him.

This is the thirteenth report of the Commission on a reference from the AttorneyGeneral. Its short citation is L.R.C. 13.

REPORT

Report on Law and Equity

To the Honourable K. M. McCaw, M.L.A.,
Attorney General for New South Wales.

1. We make this report pursuant to your reference to us "To keep under review the Supreme Court Act, 1970, excluding the rules in the Fourth Schedule, and to report thereon and on incidental matters, as occasion arises".

2. Section 64 of the Supreme Court Act, 1970, is as follows-

"In all matters in which there was formerly or is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

The purpose of this report is to recommend the repeal of section 64 and the enactment of a Bill to take its place and to deal with related matters.

3. Section 64 is taken from English legislation embodied at first in section 25 (11) of the Supreme Court of Judicature Act 1873 and now in section 44 of the Supreme Court of Judicature (Consolidation) Act 1925. Section 25 of the Act of 1873 (as amended by the Supreme Court of Judicature Act 1875 (U.K.)) was as follows-

"25. And where as it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the Law to be hereafter administered in England as to the matters next hereinafter mentioned: Be it enacted as follows:

(1) In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Act, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act.

(2) No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations.

(3) An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as

equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

(4) There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

(5) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

(6) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.

(7) Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity.

(8) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such Order should be made; and any such Order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right, to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.

(9) In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail.

(10) In questions relating to the custody and education of infants the Rules of Equity shall prevail.

(11) Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail."

4. It is clear from the recital to section 25 of the Act of 1873 that the section made changes in the general law, as distinct from merely enacting rules to be applied in the High Court of Justice. This is so even in the case of paragraphs (1) and (8): they deal with matters which could arise only in the High Court of Justice. Many of the provisions of the section were afterwards adopted in New South Wales, and the adoption was also, as a rule, by way of change in the general law, as distinct from merely enacting rules to be applied in the Supreme Court. The following table collects the New South Wales legislation-

1873 Act section 25 paragraph	Subject	New South Wales legislation
(1)	Insolvent deceased estates and insolvent companies: application of bankruptcy rules.	Wills, Probate and Administration Act, 1898, s.46c(1), Sch.3 Pt1; Companies Act, 1961, s.291.
(2)	Statutes of limitations as regard express trustees.	Compare Trustee Act, 1925, s.69 (repealed), Limitation Act, 1969, ss.47-50.
(3)	Equitable waste	Conveyancing Act, 1919, s.9.
(4)	Merger of estates	Conveyancing Act, 1919, s.10.
(5)	Proceedings for possession etc. by mortgagor.	Conveyancing Act, 1919, s.11.
(6)	Assignment of debts and choses in action.	Conveyancing Act, 1919, s.12.
(7)	Contractual stipulations as to time etc.	Conveyancing Act, 1919, s.13.
(8)	Mandamus, injunction, appointment of receiver.	Equity Act, 1901, s.16. See Supreme Court Act, 1970, ss.65(2), 66(2), (3), (4), 67.
(9)	Collisions at sea: common law rules to prevail over admiralty rules.	(The English paragraph was displaced by the Maritime Conventions Act 1911, s.1, see also s.9(3). The Navigation Act 1912 (Cth), s.259 adopts s.1 of the U.K. Act of 1911).
(10)	Custody and education of infants	Infants Custody and Settlements Act, 1899, s.10D.
(11)	Conflict between rules of law and rules of equity.	Supreme Court Act, 1970, s.64.

5. A perusal of the New South Wales legislation mentioned in the table (prior to the Supreme Court Act, 1970) shows that, with the exception of items (1) and (8) (see paragraph 4 above) and section 10D of the Infants' Custody and Settlements Act, the legislation alters the general law, not merely the rules applicable in the Supreme Court or any other particular court. Section 10D of the Infants' Custody and Settlements Act is confined to "courts exercising jurisdiction under this Act": the confinement is perhaps anomalous, but it can hardly cause difficulty when read in the context of section 17 of the same Act.

6. Section 64 of the Supreme Court Act also is intended to alter the general law. It is intended, that is to say, to regulate the rights of persons generally, whether or not an occasion for determination by a court arises. One aspect, but only an aspect, of its intended operation is that it should, subject to any other relevant legislation, be applied by any court adjudicating on the rights of persons, where those rights depend on the law of New South Wales. Thus it would be part of the general law of New South Wales to be applied in a proper case not only by the Supreme Court of New South Wales, but also by the High Court of Australia, by a court of another State or other foreign court, and by any court in New South Wales, including for example a district court, a court of petty sessions and a mining warden's court.

7. Section 64 has this extensive operation because it is expressed in terms which are not restricted to the Supreme Court. There is a marked distinction between section 64 and all the other sections in part IV of the Act. All the other sections are expressly addressed in one way or another to the Supreme

Court. This construction of section 64 is supported by the legislative history of similar provisions in England.

8. But it may perhaps be open to argument that section 64 is confined to the rules to be applied in the determination of proceedings in the Supreme Court. Such an argument might be founded on the context provided by Supreme Court Act generally.

9. Further, section 64, having the character which we have described in paragraph 6 above, is out of place in an Act called the Supreme Court Act. Besides, in order that the provision should have its full intended operation, it would be convenient expressly to enlarge the competence of courts other than the Supreme Court to give effect to equitable matters of defence. Finally, as a consequential matter, section 74 of the District Courts Act, 1912, which relates to defences on equitable grounds, ought to be replaced.

10. We therefore recommend the enactment of legislation along the lines of the draft Bill appended (A) to this report.

11. We go on to comment on the draft Bill. The draft section 1, giving a short title, needs no comment. The draft section 2 would make the Act commence on a date to be proclaimed: we suggest that the date be the same as the date of commencement of the Supreme Court Act. We defer comment on the draft section 3(1), repeal of section 74 of the District Court Act: see paragraphs 28 and 29 below. The draft section 3(2) would repeal section 64 of the Supreme Court Act: the place of section 64 would be taken by the draft section 5.

12. The draft section 4 takes the date of commencement of proceedings in any court as the sole event governing the application or non-application of the Act.

13. The draft section 5 re-enacts the substance of the section 64 of the Supreme Court Act. Like section 64, and section 25(11) of the Act of 1873, it differs from section 44 of the Supreme Court of Judicature (Consolidation) Act 1925 in that it is not expressed to be "subject to the express provisions on any other Act". The latter section, however, is concerned particularly with the custody and education of infants as well as generally with the rules of the common law and of equity. We think that the subjection of the section to other Acts is probably concerned with the provision relating to infancy. At all events, the rules of the common law and of equity to which the section applies would necessarily operate in subservience to any relevant Act. We think that the express subjection of other Acts is unnecessary, may be confusing, and ought to be omitted. We defer further comment on the draft section 5 until we have said a word about the draft section 6.

14. The draft section 6 is based on part of section 202 of the Supreme Court of Judicature Act 1925, which itself has its origin in section 89 of the Supreme Court of Judicature Act 1873. The relevant provisions of the English section of 1925 may, for the purpose of the present consideration, be broken up as follows-

"Every inferior court which has jurisdiction in equity, or at law and in equity,

(a) shall, as regards all causes of action within its jurisdiction for the time being, grant in any proceedings before it such relief, redress or remedy, or combination of remedies, either absolute or conditional, and

(b) shall in every such proceeding give such and the like effect to every ground of

(i) defence, and

(ii) counterclaim,

equitable or legal

as ought to be granted or given in the like case by the High Court and in as full and ample a manner."

15. The confinement of the courts to which the English section applies to courts having jurisdiction in equity, or at law and in equity, appears to us appropriate to the provisions of paragraphs (a) and (b) (ii)

in the above breakup: those provisions extend the positive relief available in inferior courts. But the confinement is inappropriate to paragraph (b) (i): the availability of an equitable defence ought not to depend on the power of the court to grant positive equitable relief.

16. Since the draft section 6 is concerned only with defences, we see no need for, and some harm in, confining the section to, courts with power to give equitable relief. The harm in so confining the section is that, if the section does not apply to all inferior courts, the substantive rights of the parties may depend on the plaintiff's choice of the court in which he sues.

17. We contemplate, therefore, that the draft section 6 should apply in all courts.

18. Our terms of reference do not enable us to make any recommendation as to the remedies available in inferior courts, either at the suit of a plaintiff or on counterclaim by a defendant. This report therefore does not propose the adoption of paragraphs (a) or (b) (ii) of the English section.

19. For an example of the working of a section similar to section 202 of the English Act of 1925 (the source of the draft section 6), see *Kingswood Estate Co. Ltd v. Anderson*, ([1963] 2 Q.B. 169).

20. We comment now on the combined effect of the draft sections 5 and 6. The first point is that, though the sections may have important effects on the rights of parties, occasions for their use in inferior courts are likely to be infrequent. The English Supreme Court Practice 1970 has some notes on the English section 44 (compare the draft section 5) at 33723381. A copy of those notes (with the addition of some references to New South Wales legislation) is appended (B) to this report.

21. There are two kinds of case which call for special mention. One concerns the position of a person in occupation of land under an agreement for a lease for a term of years in circumstances in which equity would decree specific performance of the agreement. By sections 57 to 63 of the Supreme Court Act, together with either section 64 of that Act or the draft section 5, the position of such a person would for many purposes be equated by the Supreme Court to the position which he would have if the lease had been granted. See *Walsh v. Lonsdale* ((1882) 21 Ch.D. 9) and *Kingswood Estate Co. Ltd v. Anderson*, ([1963] 2 Q.B. 169).

22. If a person were so in occupation of land in New South Wales today, he would have at law a tenancy determinable on one month's notice under section 127 of the Conveyancing Act, 1919. If his landlord gave due notice to quit and then brought proceedings for possession of the land in the Supreme Court after the commencement of the Supreme Court Act, the existence of the agreement for leave would defeat the claim of the landlord to possession.

23. If the landlord sued for possession in a district court or in a court of petty sessions, the tenant would have to bring proceedings in the Supreme Court for specific performance of the agreement and for an injunction to restrain the prosecution of the proceedings for possession. In the absence of the draft section 6, the position would be the same whether the proceedings were brought before or after the commencement of the Supreme Court Act. The draft section 6, however, would enable the tenant to rely on the agreement by way of defence in the district court or court of petty sessions. Circuitry, delay and expenses would be avoided.

24. The second kind of case concerns the principle of promissory estoppel. That principle is that "when one party to a contract in the absence of fresh consideration agrees not to enforce, his rights an equity will be raised in favour of the other party. This equity is, however, subject to the qualifications (1) that the other party has altered his position, (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, (3) the promise only becomes final and irreversible if the promisee cannot resume his position": *Aiah v. R. T. Briscoe (Nigeria) Ltd* ([1964] 1 W.L.R. 1326, 1330). Thus for example if there were a lease for a term of years reserving a periodical rent, and the landlord agreed with the tenant (without consideration and not by deed) to accept a lesser rent, the principle would not permit the landlord to forfeit the lease for nonpayment of rent at the original rate, at least without giving the tenant an opportunity to pay the rent as originally reserved.

25. The principle of promissory estoppel does not give a defence to an action at law in the Supreme Court today, nor does it give grounds for a suit in equity to restrain the prosecution of an action at law or for relief against a judgment at law: *New South Wales Rutile Mining Co. Pty Ltd v. Eagle Metal and Industrial Products Pty Ltd* ([1960] S.R. 495). But the principle has been held to provide a defence to a legal claim in an action in the High Court of Justice in England: *Central London Property Trust Ltd v. High Trees House Ltd* ([1947] K.B. 130). This operation of the principle appears to depend on the English legislation similar to sections 57 to 63 of the Supreme Court Act, and either section 64 of that Act or the draft section 5. The draft section 6 would enable, and require, the principle to be applied defensively in an inferior court in the same way as it may be held to be applicable in the Supreme Court under the Supreme Court Act. As to the operation of the principle in the county courts in England see *Wallis v. Semark* ([1951] 2 T.L.R. 222), *D. & C. Builders Ltd v. Rees* ([1966] 2 O.B. 617).

26. The first limb of the draft section 7, down to "in that court", is intended merely to negative a possible view that the draft section 5 may enlarge the 'jurisdiction of a court. For example, where equity would remedy a breach of contract by a mandatory injunction to undo what had been done in breach of the contract, it might be argued that the draft section 5 gives to an inferior court jurisdiction to grant such an injunction. Section 44 of the Supreme Court of Judicature (Consolidation) Act 1925 concludes with some words to a similar effect. After provisions similar in material respects to those of the draft section 5, the English section adds after "shall prevail" in all Courts whatsoever in England so far as the matters to which those rules relate are cognisable by those Courts". We think it better that the effect of these words be put in a section separate from the draft section 5, so that the draft section 5 can stand as an alteration of the substantive law, and not merely as a direction for the resolution of a conflict or variance arising in proceedings in a court.

27. The second limb of the draft section 7 spells out one aspect of the operation of the draft sections 5 and 6, that an equitable defence may involve that, while the plaintiff is still entitled to a judgment within the ordinary jurisdiction of the court concerned, the giving of judgment should be postponed until the plaintiff does some act, or the judgment should be subject to terms or conditions.

28. We return to the draft section 3 (1). This subsection would repeal section 74 of the District Courts Act, 1912. The section is as follows-

"74. (1) The defendant or the plaintiff in replevin in any action in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, may rely upon the facts which entitled him to such relief by way of defence.

(2) Notice of such facts, with the words 'for defence on equitable grounds,' shall be given as hereinafter provided, and the plaintiff or defendant (as the case may be) may reply to any such plea facts which avoid the same on equitable grounds."

Section 74 (1) is made unnecessary by the draft section 6. The first limb of section 74 (2), down to "hereinafter provided", is partly covered by section 75 (1) of the District Courts Act. The residue, of the first limb can, if necessary, be replaced by rule of court.

29. The second limb of section 74 (2) of the District Courts Act is implicit in the draft section 6: draft section 6 would not require effect to be given to an equitable defence in a case where the defence would be defeasible on equitable grounds if raised in the Supreme Court.

13th October, 1971.

R. D. CONACHER, Deputy Chairman.

DAVID G. BENJAPIELD, Commissioner.

Appendix A

A BILL

To provide that the rules of equity shall prevail over the rules of the common law in cases of conflict or variance; to extend the defences available in inferior courts; and to repeal certain sections of the District Courts Act, 1912, and the Supreme Court Act, 1970.

Law Reform (Law and Equity)

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

1. This Act may be cited as the Law Reform (Law and Equity) Act, 1971. Short title.
2. This Act shall commence on a day to be appointed by the Governor and notified by proclamation published in the Gazette. Commencement.
3. (1) Section 74 of the District Courts Act, 1912, is repealed, but this repeal does not affect proceedings commenced in a district court before the commencement of this Act. Repeal.
(2) Section 64 of the Supreme Court Act, 1970, is repealed.
4. This Act does not apply in proceedings commenced in any court before the commencement of this Act, but applies in proceedings commenced after the commencement of this Act, no matter when the events happen which give rise to the proceedings. Application.
5. In all matters in which there was before the commencement of this Act or is any conflict or variance between the rules of equity and the rules of the common law relating to the same matter, the rules of equity shall prevail. Rules of equity to prevail.
15 & 16 Geo. 5 c.49, s.44; Act No. 52, 1970,
s.64.
6. Every inferior court shall in every proceeding before it give such and the like effect to every ground of defence, equitable or legal, in as full and ample a manner as might and ought to be done in the like case by the Supreme Court under the Supreme Court Act, 1970. Defence in inferior court.
15 & 16 Geo. 5 c.49, s.202.
7. This Act does not enlarge the jurisdiction of any court as regards the nature or extent of the relief available in that court, but any court may, in pursuance of this Act, postpone the grant of any relief, or grant relief subject to such terms and conditions as the nature of the case requires. Jurisdiction as to relief not enlarged.

Appendix B

Notes on the Prevalence of Equity

(Copy of notes in the English Supreme Court Practice 1970, with the addition of references to New South Wales legislation)

3372 All Matters, etc.

Accord and Satisfaction.- There is no accord and satisfaction binding on the creditor where he merely accepts a lesser sum, whether in cash or by cheque, than the amount of the debt (*D. & C. Builders, Ltd v. Rees*, [1966] 2 Q.B. 617 7; [1966] 2 W.L.R. 288, C.A.), and see *British, etc., Gazette v. Ass. Newspapers*, [1933] 2 K.B. 616, and (n.) "Specialty Debt, etc.", *infra*.

Admissions: Infancy: Patients under mental disorder.- It is a principle of equity that infants and mentally disordered persons cannot make binding admissions. See 0.80, r. 8 (S.C.R. 1970 Pt 63, r. 9). At common law it seems to have been otherwise as to infants. The equity principle, and also the practice founded upon it, of not allowing interrogatories to be administered to an infant, prevailed until recently (*Mayor v. Collins*, 24 Q.B.D. 361; *Curtis v. Mundy*, [1892] 2 Q.B. 178 see now as to discovery and interrogatories by infants and patients, 0.80, r. 9 (S.C.R. 1970 Pt 63, r. 10). As to the guardian *ad litem* of a patient, *cf. Ingram v. Little*, 11 Q.B.D. 251).

Afteracquired Property, Assignment of.- In equity future property has always been assignable if sufficiently described to be identified; *cf. Holroyd v. Marshall*, 10 H.L. Cas. 191. This rule now prevails (*Lazarus v. Andrade*, 5 C.P.D. 318; *Tailby v. Official Receiver*, 13 App. Cas. 523; *Re Clarke*, 36 Ch.D. 348; *cf. Re Lind*, [1915] 2 Ch. 345) as to interests on intestacy, *Vanneck v. Benham*, [1917] 1 Ch. 60.

Assignment, Covenant against, in Lease.- An equitable assignment is not an assignment within the ordinary covenant in a lease not to assign (*Gentle v. Faulkner*, [1900] 2 Q.B. 267); nor, presumably, is a charge by way of legal mortgage, but a licence to assign not acted on may give rise to estoppel against the equitable assignee (*Rodenhurst Estate v. Barnes*, [1936] W.N. 154, C.A.).

3373 Agreement for Lease or Licence.- A tenant in possession holding under an agreement for a lease (of which specific performance would be decreed, *Swain v. Ayres*, 21 Q.B.D., at p. 293) now holds as if a lease had been granted, and there are no longer two estates as formerly (*Walsh v. Lonsdale*, 21 Ch.D. 9; *Lowther v. Heaver*, 41 Ch. D. p. 264. *Coatsworth v. Johnson*, 55 L.J.Q.B. 220; *Re Maughan*, 14 Q.B.D. 956; *Allhusen v. Brooking*, 26 Ch. D. 559; *Pugh v. Heath*, 7 App. Cas., p. 237; *James Jones & Sons, Ltd v. Tankerville*, [1909] 2 Ch. 440, a case of licence to enter and cut timber). But this doctrine applies only to cases where there is a contract to transfer legal title, and an act has to be justified or an action maintained by force of the legal title to which such contract relates. It involves two questions. Is there a contract of which specific performance can be obtained? If yes, will the title so acquired justify at law the act complained of or support at law the action? (*Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. p. 617, Farwell, J.). The equitable assignee of a lease is not, however, entitled to the benefit of an option given to the lessee, his executors and assigns (*Frairy, etc., Breweries v. Singleton*, [1899] 1 Ch. 86; reversed on the facts [1899] 2 Ch. 261; *Manchester Brewery Co. v. Coombs, supra*, p. 618 of report).

Contract for Debentures.- As to voting right before delivery, *cf. Dey v. Rubber, etc., Corp., Ltd*, [1923] 2 Ch. 528.

Contract, Rescission of - Misrepresentation.- There was a difference as to this between the rules of equity and the rules of common law which has now disappeared (*Redgrave v. Hurd*, 20 Ch. D., p. 12; *Smith v. Chadwick*, 20 Ch. D. 27).

3374 *Contracts, Stipulations in.*- As to stipulations in contracts as to time and otherwise, see L. of P. Act, 1925, s. 41, (Conveyancing Act, 1919, s. 13).

Contribution - Joint Adventures.- See *Lowe v. Dixon*, 16 Q.B.D. 455; *White & Tudor, L.C.*, [1928] Vol. 11, p. 503 *Smith's L. Cases*. Vol. 1; (n.) "Contribution and Indemnity", O. 16, r. 1.

Conversion, Equitable.- The doctrine of equitable conversion (*White & Tudor, L.C.*, [1928] Vol. 1, p. 300) is now recognized in all Divisions of the High Court (*Re the goods of Gunn*, 9 P.D. 242; *A.G. v. Dodd*, [1894] 2 (B., p. 156).

"*The Rules of Equity shall prevail.*"- It is now established that this section refers to rules of equity, not to rules of practice. (*La Grange v. McAndrew*, 4 Q.B.D. 210; *Poyser v. Minors*, 7 Q.B.D. 329; *Dalrymple v. Leslie*, 8 Q.B.D. 5; *Harrison v. Rutland*, [1893] 1 Q.B., p. 149). But the equitable practice is also followed when it results from the adoption of equitable doctrines.

"The Court is now not a Court of Law nor a Court of Equity, but a Court of complete jurisdiction, and if there were a variance between what, before the Judicature Act, a Court of Law and a Court of Equity would have done, the rule of the Court of Equity must now prevail" (per Earl Cairns in *Pugh v. Heath*, 7 App. Cas., p. 237; *Antrim Land Co. v. Stewart*, [1904] 2 Ir. R. p. 364). But these Acts do not abolish the distinction between law and equity (see the judgment of Cotton, L.J., in *Joseph v. Lyons*, 15 Q.B.D., p. 285, C.A.); nor between legal and equitable estates (see *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch., p. 617, commenting on *Walsh v. Lonsdale*, 21 Ch. D. 9, and *Re Irwin*, [1904] 2 Ch. 752) and as to words of limitations, cf. *Re Irwin*.

3375 "*Conflict or Variance.*"- If this exists between equitable principles and those of common law, the former are to prevail. So in cases in which the officers of the Court are quasilitigants (and possibly in others, *Else v. EE., L.R.*, 13 Eq. 196), the Court, in spite of a rule of law, will insist on good faith and honesty being shown in the matter: see (n) to s. 37, *supra*. Compare, with *Re Hall*, [1907] 1 K.B. 875, C.A.

If there is "no conflict or variance" the section does not apply (*The Bernina*, 12 P.D., p. 95; *Mannerv v. Mew*, 29 Ch. D., p. 735; *Re Terry*, 32 Ch. D., p.23).

Copyright - Infringement.- See *Performing Right Society v. London Theatre of Varieties, Ltd*, [1924] A.C. 1. The legal owner must join.

Costs, Interest on.- Now, in all Divisions, unless by special order, the interest runs from the judgment. See (nn.) under O. 62, r. 35 (7).

Costs Default in giving Security for.- When security for costs is not given when ordered, the action may be dismissed on summons following the rule in equity (*La Grange v. McAndrew*, 4 O.B.D. 210), or the order for security may itself provide for the appeal to stand dismissed in case of default. See O. 59, r. 10. (S.C.R. 1970 Pt. 61 r.11).

Covenants running with Land. Notice.- As to the effect of this subsection on the question of notice with regard to covenants running with the land, see *Spencer's Cave*, *Smith's L.C.* Vol. 1. Cf. *Manchester Brewery Co. v. Coombs*, [1901]2Ch.,p.619;L.C.C.v.Allen,[1914]3K.B.642. See now LandCharges Act, 1925, s. 10 (1), D, and L.P. (Am.) Act, 1926, L.P. Act, 1925, ss. 197, 198.

3376 *Covenant under Seal.*- Although a covenant under seal cannot be varied at law, the covenantee will not be allowed to sue on the original covenant after agreeing to a variation for valuable consideration under hand (*Berry v. Berry*, [1929] 2 K.B. 316).

Debt, whether Joint or Several.- See *Steeds v. S.*, explained *Powell v. Broadhurst*, [1901] 2 Ch., p. 164; *Re E.W.A.*, [1901] 2 K.B. 642, C.A.

Ejectment Action.- The plaintiffs may now be entitled to possession without bringing the legal estate before the court, *Antrim, etc., Co v. Stewart*, [1904] 2 fr. R. p. 364). See (n.) "Mortgagees", *infra*.

Executor and Administrator.- "The rule at law as well as in equity now is that an executor or administrator is in the position of a gratuitous bailee who cannot be charged with the loss of his testator's assets without wilful default" (M.R., *Job v. Job*, 6 Ch.D. 562; and *cf. Jobson v. Palmer*, [1893] 1 Ch. 71). And as to validity of pledge by executor, see *Attenborough v. Solomon*, [1913] A.C. 76; and *cf. Parker v. Judkin*, [1931] 1 Ch. 475, C.A.

Executor, Payment of Debts by, after action, etc.- "The equity rule established by the House of Lords in *Darston v. Lord Orford* (Prec. Ch. 188) must now prevail both at law and in equity, and therefore if an executor or administrator, after commencement of a creditor's action but before judgment, voluntarily pays any creditor in full, he will be considered as having made a good payment, and will be allowed it in passing his accounts" (*Re Radcliffe*, 7 Ch.D., p. 734, M.R.; *Vibart v. Coles*, 24 O.B.D. 364, C.A.; *Harris v. H.*, 35 W.R. 710).

3377 Frustration.- As to right of a party to recover money paid under a contract avoided on the ground of frustration, see *Vibrova Spolka, etc. V. Fairbairn, etc., Ltd*, [1943] A.C. 32, overruling *Chandler v. Webster*, [1904] 1 K.B. 403; and now the Law Reform (Frustrated Contracts) Act, 1943.

Interest.- See s.3, L.R. (Misc. Prov.) Act, 1934. In an action against agents at common law for an account of proceeds of sale, interest on such proceeds could not be recovered, but now the principle of equity is to prevail (*Harsant v. Blaine*, 56 L.J.O.B. 511).

Laches is still a good defence to actions founded on stale equitable claims, apart from any Statute of Limitations. On this ground an action for foreclosure of a mortgage of an advowson, forty-eight years old, was dismissed (*Brooks v. A4uckleston*, [1909] 2 Ch. 519, *cf. Williams v. Thomas*, [1909] 1 Ch. 713, *dower*).

Merger.- See L. of P. Act, 1925, s. 185 (Conveyancing Act, 1919, s.10)

Mistake.- See (n) "Rectification", *infra*. As to defence of a surety on a guarantee of a debt recited to be charged on certain securities in fact invalid, see *Greer v. Kettle*, [1938] A.C. 156.

Money paid under a Mistake.- It has been sometimes thought that equity would go further than law in ordering the repayment of money paid under the unilateral mistake of the payer as to matter of law. See, however, *Sinclair v. Brougham*, [1914] A.C. 398; the judgment of Hamilton, L.J., in *Stanley Bros, Ltd v. Nuneaton Corporation* (1913), 108 L.T., p. 992; *Baylis v. Bishop of London*, [1913] 1 Ch. 127; *Banque Belge v. Hambrough*, [1921] 1 K.B. 321. The mistake must be as to a fact which, if true, would create liability to pay (*Morgan v. Ashcroft*, [1938] 1 K.B. 49, C.A.).

If paid under a mistake of law, even on threat of legal proceedings, it is not recoverable (*Sawyer V. Window Brace, Ltd*, [1943] 1 K.B. 32). See also (n.) "Frustration", *supra*.

3378 Mortgages.- The rights of a legal mortgagee are assimilated to those of an equitable mortgagee. *Per North, J., Fowke v. Draycott*, 29 Ch.D., p. 1003. As to suits for possession by a legal mortgagee, see *Pugh v. Heath*, 7 App. Cas., p. 237. A receiver will be appointed at the instance of a legal mortgagee (*Tillett v. Nixon*, 25 Ch.D. 238). As to delivery of possession to the receiver, see *Pratchett v. Drew*, [1924] 1 Ch, 280.

The former Limitation Acts did not apply to mortgage of personalty (*Weld v. Petre*, [1929] 1 Ch. 33); *cf. Re Edward v Trusts*, [1937] 1 Ch. 553. See now Limitation Act, 1939, s. 18 (Limitation Act, 1969, ss. 4146).

Notice - Constructive.- This is an equitable doctrine unknown to the common law, but must now be dealt with by all the Courts (*English, etc., Investment Co. v. Brunton*, [1892] 2 O.B., p. 708), subject to L. of P. Act, 1925, ss. 2, 27, 197, 198, L.R. Act, 1925, L.C. Act, 1925. The equitable doctrines of constructive notice are not to be applied to purely commercial transactions (*Greer v. Downs Supply Co.*, [1927] 2 K.B. 28, C.A.).

Part Performance.- See this (n.), s. 43.

Parties.- See notes to 0. 15, and Vol. 2, Part 7B, "Parties Generally".

3379 Partnership.- It used to be stated that in equity partnership debts were several as well as joint, but the H.L. has held that there was no such settled rule in equity as between a creditor of the partnership and the partners (*Kendall v. Hamilton*, 4 App. Cas. 504).

Penalties and Forfeitures.- See s. 46 (Supreme Court Act, 1970, s. 73), and (n.); *Peachey v. Somerset; Sloman v. Walter*, and (nn.) White & Tudor, L.C. (9th ed.), Vol. II, p. 212f.

Power Coupled with Interest.- In equity a power coupled with an interest was not revocable by the death of the principal (*Lepard v. Vernon*, 2 V. & B. 51); at law it was otherwise (*Watson v. King*, 4 Camp. 272); *semble*, the equitable rule will now prevail.

Principal and Surety.- See *Bechervaise v. Lewis*, L.R. 7 C.P. 372. In equity a surety might sue the principal debtor before he had paid or been sued on his suretyship, if the liability were ascertained: and the rule still holds (*Ascherson v. Tredegar, etc. Co., Ltd*, [1909] 2 Ch. 401). This is a form of the old *quia timet* action.

Purchaser for Value.- See *James v. Giles*, [1880] W.N. 170; *Manners v. Mew*, 29 Ch. D. 725; and *cf. Cooper v. Vesey*, 29 Ch. D. 611, and *Re Ingham*, [1893] 1 Ch., p. 361; *Basset v. Nosworthy*, White & Tudor, L.C., Vol. II. The L. of P. Act, 1925, s. 2, in certain cases enables a purchaser for value to acquire a good title irrespective of notice. In many cases notice will be implied by virtue of Land Charges Act, 1925; L.P. Act, 197, 198. Notice of a charge void as unregistered under Companies Act, 1948, s. 95 (Companies Act, 1961, s. 100) is immaterial (see *Re Monolithic, etc., Co. Ltd*, [1915] 1 Ch. 643); so under L.R. Act, 1925.

3380 Quia timet.- See (n.) "Principal of Surety", supra; *Burberry's v. J. C. Cording, etc., Ltd*, 101 L.T. 985 at P. 992; *Watt v. Mortlock*, [1964] Ch. 84; [1963] 2 W.L.R. 626.

Rectification.- The Court can rectify a conveyance on the ground of mutual mistake although the deed exactly conforms to the written contract (*Craddock Bros v. Hunt*, [1923] 2 Ch. 136; *U.S.A. V. Motor Trucks, Ltd*, [1924] A.C. 196); but cannot rectify Articles of Association (*Scott v. Scott*, [1940] Ch. 794, C.A.).

Rentcharge and Rent.- Equitable apportionment of remedies for non-payment, see L. of P. Act, 1925, s. 189.

Specialty Debt - Plea of Accord and Satisfaction.- Following the rule in equity, accord and satisfaction may now be a good plea to an action for a specialty debt (*Steeds v. S.*, 22 Q.B.D. 537); *cf. Powell v. Brodhurst*, [1901] 2 Ch. 160; *Re E.W.A.*, [1901] 2 K.B. 642, CA. *Hookham v. Mayle*, (1906), 22 T.L.R. 241).

Title Deeds.- *cf. Manners v. Mew*, 29 Ch.D. 725; *Re Ingham*, [1893] 1 Ch. 352. Where mortgagee's title barred by statute the mortgagor can recover the deeds (*Lewis v. Plunket*, [1937] 1 Ch. 306).

3381 Time.- As to stipulations in contracts as to time and otherwise, see L. of P. Act, 1925, s. 41 (Conveyancing Act, 1919, s. 13).

Trade Mark - Innocent Infringement.- Where a registered trade mark has been innocently infringed, the old equity rule applies; the owner is entitled to an injunction, but not to damages or an account of profits (*Slazenger v. Spalding*, [1910] 1 Ch. 257).

Vendor's Lien for Unpaid Purchase Money.- This right depended at law upon possession, and after conveyance executed by the vendor, the right to a lien was gone. In equity the right continued as long as the purchase money was in fact unpaid, and that rule now prevails. See *Mackreth v. Symmon*, and (nn.) *White & Tudor*, L.C., Vol. II. It extends to personal estate (*Re Stucley*, [1906] 1 Ch. 67, C.A.).

Waste.- Cf. L. of P. Act, 1925, s. 135 (Conveyancing Act, 1919, s. 9).