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The Mischief of Maxims

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I. INTRODUCTION

There is a book to be written on 'Equitable Legal Method', if that is not an oxymoron, concerned with how judges wearing their equity hats decide cases. The essential question would be whether, and if so, how, judicial reasoning in equity differs from that at common law. Such a book would have to concern itself with a number of matters. One would be the relationship between law and equity. Another would be the so-called 'good man' theory of equity.[1] Others still would be the differences, if any, concerning the criteria for the award of remedies, the use of precedent, the various uses of analogy, the effect of the Judicature Acts 1873–75, and the use of fictions. There would also be a chapter on maxims.

At common law, the use of maxims in judicial reasoning is generally eschewed. Thus, towards the end of the nineteenth century, Lord Esher MR said he detested attempts to 'fetter the law by maxims',[2] a sentiment endorsed many times since.[3] Yet in equity, the maxims are alive and well – thriving, in fact. Indeed, in recent years, two new maxims have been coined, that '[e]quity does not strive officiously to defeat a gift',[4] and '[e]quity tempers the wind to the shorn lamb'.[5] In contrast to the common law, judges in equity reason from maxims without compunction, and practitioner works such as *Snell* devote considerable space discussing them.[6] Though we have

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[1] Relied on, eg, by Sir Peter Millett, as the basis of an argument for trusts of bribes in P Millett, 'Bribes and Secret Commissions' (1993) 1 *Restitution Law Review* 7, 19. For a full discussion, see A Mackley, 'A Challenge to the Utility and Distinctiveness of the Good Man Theory of Equity' (2021) 27 *Trusts and Trustees* 376. One assumes Equity takes a similar view of the behaviour of women.

[2] *Yarmouth v France* (1887) 19 QBD 647 (QBD) 653.

[3] See the text to nn 18–29.

[4] *T Choithram International SA v Pagarani* [2001] 1 WLR 1 (PC) 11 (Lord Browne-Wilkinson).

[5] *Pennington v Waine* [2002] EWCA Civ 227, [2002] 1 WLR 2075 [54] (Arden LJ).

[6] J McGhee (ed), *Snell's Equity*, 34th edn (London, Sweet & Maxwell, 2021) devotes a whole chapter to maxims (ch 5). J Heydon, M Leeming and P Turner, *Meagher, Gummow and Lehane: Equity Doctrines and Remedies*, 5th edn (Chatswood NSW, LexisNexis Butterworths, 2015) paras [3-005]–[3-260] has a long and difficult discussion. There is a shorter treatment in the standard student work, J Glister and J Lee, *Hanbury and Martin: Modern Equity*, 22nd edn (London, Sweet & Maxwell, 2021) paras [1-024]–[1-036]. Interestingly, D Browne, *Ashburner's Principles of Equity*, 2nd edn (London, Butterworth & Co,

no equivalent texts for common law[7] or statute,[8] books on legal method contain no discussion of maxims, with the last edition of the leading common law work on maxims, *Broom's Legal Maxims*, published over 80 years ago, before the outbreak of the Second World War.[9]

The purpose of this chapter is to question the continued use of maxims in equity. In that respect, it is interesting to compare the approach of two recent editions of *Snell*. In the 32nd, published in 2010 (where the discussion is that of James Edelman),[10] their use is deprecated and the recommendation made that they be abolished altogether.[11] In the latest and 34th edition, published in 2021, Ben McFarlane is in charge,[12] and, though still critical, the argument is made that the maxims continue in some circumstances to be useful. This chapter urges that the approach of the 32nd edition be followed, and that courts stop reasoning from maxims altogether. However, it goes further. Edelman largely rejected the use of maxims because he thought judges could get to the same results without them. They were innocuous: mere rhetorical devices. This chapter argues that the position is worse than that, that maxims can lead judges into errors of reasoning or provide an excuse to give no reasons at all.

II. MAXIMS GENERALLY

The word 'maxim' is often used in common parlance to describe simple and memorable rules or guides for living. They are usually pedagogical and involve specific actions. The following definition of a proverb can also be applied to maxims: a 'short, generally known sentence of the folk which contains wisdom, truth, morals and traditional views in a metaphorical, fixed and memorisable form and which is handed down from generation to generation',[13] 'an aphoristic expression of an ostensible general rule of science'.[14] Proverbs in everyday speech include 'look before you leap', 'a stitch in time saves nine', 'marry in haste, repent at leisure' and 'ignorance is bliss'. There are hundreds, if not thousands of maxims, and they appear in most language systems.

More rarely, the word is used to describe general rules (for example about language or morality). Perhaps the best-known maxim is Kant's 'formula of the universal law'.[15] However, a philosopher would not (or, at least, should not) invoke a maxim to

1933) has no separate treatment. In fact, the word does not even appear in the index. This, as we shall see, is how it should be.

[7] Such books did once exist, eg, J Indemaur, *Principles of the Common Law: An Elementary Work Intended for the Use of Students and the Profession*, 5th edn (London, Stevens & Haynes, 1888). They died out in the 19th century with the rise of textbooks on substantive topics.

[8] At least not ones where the whole of the content of statutory law is discussed, rather than simply statutory interpretation.

[9] RH Kersley, *Broom's Legal Maxims*, 10th edn (London, Sweet & Maxwell, 1939).

[10] Then a professor of law at the University of Oxford, now a justice of the High Court of Australia.

[11] McGhee (n 6) para [5-001].

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[13] W Mieder, 'Proverbs' in JH Brunvand (ed), *American Folklore: An Encyclopaedia* (New York, Garland Publishing, 1996) 597–621.

[14] *The Compact Edition of the Oxford English Dictionary* (Oxford, Clarendon Press, 1971) 1748.

[15] Viz, 'act only according to that maxim through which you can at the same time will that it become a universal law': I Kant, *Groundwork of the Metaphysics of Morals* (M Gregor and J Timmermann tr, Cambridge, CUP, 2012) para [4:421].

put a stop to analysis. A maxim cannot be raised in answer to the question 'why do this?' without it being left open to question whether that maxim is a good approach to the question at hand (be it morality or language or whatever).[16] Reasoning from maxims alone, it has been said, is 'appropriate only for the obsessive, the lazy – or the simple-minded'.[17]

III. MAXIMS AT COMMON LAW

As we have seen, the use of maxims at common law, generally rendered in Latin, is deprecated. The reason Lord Esher MR gave in *Yarmouth v France*, speaking of the maxim *volenti non fit injuria*,[18] was that they are 'almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them'.[19] Lord Wright later added: 'these general formulae are found in experience often to distract the court's mind from the actual exigencies of the case, and to induce the court to quote them as offering a ready made solution.'[20]

The problem, of course, is that maxims are conclusory, providing no reasons. Take as an example the maxim *in pari delicto potior est conditio defendentis*: 'where the fault of the parties is equal, the position of the defendant is the stronger'. What we are not told, however, is *why* the defendant's position is the stronger; if that is unknown, we have no guidance on the rule's application.[21] Thus, in *Patel v Mirza*,[22] where both the dicta of Lord Esher and Lord Wright were rehearsed,[23] it was rightly held by all nine members of the Supreme Court that the use of maxims was an unsatisfactory way to adjudicate on the consequences of illegality in private law.[24] We see similar problems with the maxim *sic utere tuo ut alieno non laedas*[25] in the law of nuisance, where its application is notoriously difficult, many harmful uses being perfectly lawful. As Lord Goff said of yet another common law maxim, that 'no-one should profit from his own wrong', it is 'in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case'.[26] Maxims at common law thus do no useful work and are often only incorporated for rhetorical effect.[27]

[16] I thank Frederick Wilmot-Smith for this insight.

[17] P Kitcher, 'What is a Maxim?' (2003) 31 *Philosophical Topics* 215.

[18] 'To a willing person, no injury is done.'

[19] *Yarmouth* (n 2) 653.

[20] *Lissenden v Bosch* [1940] AC 412 (HL) 440–41, in connection with the 'principle, rule, or maxim' that one 'cannot both approbate and reprobate'.

[21] The position is made more complex still by the interaction of this maxim with another, *ex turpi causa non oritur actio* (no action arises from a disgraceful cause).

[22] [2016] UKSC 42, [2017] AC 467.

[23] ibid [95] (Lord Toulson, with whom Lady Hale and Lords Kerr, Wilson and Hodge agreed).

[24] Though the court was then split on whether the solution was the formulation of a rule or the application of a balancing exercise of various factors. Somewhat unhelpfully, the latter approach was endorsed by the majority.

[25] So to use your own that you do not harm another.

[26] *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL) 286.

[27] A point forcefully made by P Jackson, 'The Maxims of Equity Revisited' in S Goldstein (ed), *Equity and Contemporary Legal Developments* (Jerusalem, International Conference on Equity – Sacher Institute for Legislative Research and Comparative Law, 1992) 72.

Moreover, as Lord Esher's statement makes clear, in that they are so generally stated, maxims have a tendency to snare things never intended to be caught, much as fishermen sometimes catch dolphins when fishing for cod. A well-known example is the maxim *ignorantia juris non excusat*, that ignorance of the law is no excuse, which for over two centuries was used to deny recovery to claimants paying money under mistakes of law.[28] Only recently have courts woken up to the fact that such claimants are not asking to be excused for their actions, as with criminal defendants, but are instead explaining why the transfer was made and giving a reason for recovery.[29]

IV. EQUITABLE MAXIMS

Equity knows its fair share of maxims which, unlike the common law's, are always rendered in English, though this helps little in their understanding. *Snell*, said to be canonical in this matter,[30] lists 12:

(i) Equity will not suffer a wrong to be without a remedy;
(ii) Equity follows the law;
(iii) Where there is equal equity, the law shall prevail;
(iv) Where the equities are equal, the first in time shall prevail;
(v) He who seeks equity must do equity;
(vi) He who comes into equity must come with clean hands;
(vii) Delay defeats equity;
(viii) Equity is equality;
(ix) Equity looks to intent rather than to form;
(x) Equity looks on that as done which ought to be done;
(xi) Equity imputes an intention to fulfil an obligation; and
(xii) Equity acts *in personam*.[31]

The equitable maxims are no better than their common law counterparts. As Gardner notes, 'they possess a particularly Delphic quality, wrapped as they are in metaphor, grandly unqualified, and acknowledging no authority but transcendent wisdom'.[32] Their use, he says, makes the law the 'subject of oracular pronouncements, as though it were a mystery of which the judges were priests'.[33] As to their source, Pound[34] demonstrated that many are traceable back to the *Digest*, attaining the status of

[28] A position once endorsed in *Snell* itself: 'money paid under a mistake of law cannot be recovered, this being perhaps the only type of relief where it can be regarded as absolutely clearly established by way of general rule that ignorantia legis non excusat': H Gibson Rivington, *Snell's Equity*, 21st edn (London, Sweet & Maxwell, 1934) 439–40.

[29] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL).

[30] R Pound, 'On Certain Maxims in Equity' in P Winfield and A McNair (eds), *Cambridge Legal Essays* (Cambridge, W Heffer & Sons, 1926) 259.

[31] McGhee (n 6) para [5-000].

[32] S Gardner, 'Two Maxims of Equity' (1995) 54 *CLJ* 60, 60.

[33] ibid 67.

[34] (n 30).

maxims, not by judicial decision, but in a book written in 1728.[35] He also noted that they often have common law equivalents, so are not peculiarly equitable, start out as specific rules,[36] only later being elevated to the status of maxims, and, as with those at common law, can be taken as authority for many different propositions. A good example is the 'first in time' maxim, the common law equivalent of *qui prior est in tempore potior est in jure*, which was used at one point by Coke to justify primogeniture.[37]

Moreover, the list is unstable. We noted two recent judicial additions at the outset.[38] As will be seen, *Snell* originally listed only 11 maxims, the missing candidate being 'equity acts *in personam*'.[39] One modern student text lists 14, two of which, 'equity is cynical' and 'equity is imaginative',[40] are the invention of the author. And as anyone who studies the law of resulting trusts will know, yet another academic invention is the supposed maxim that 'equity is suspicious of gifts'.[41] At the same time, there are many equitable maxims which do not appear in the standard lists, including that 'equity leans against joint tenancies',[42] 'equity will not allow a trust to fail for want of a trustee', 'equity does not act in vain',[43] 'equity will not perfect an imperfect gift',[44] 'equity will not allow a statute to be used as an instrument of fraud',[45] and 'equity does not assist a volunteer'. Our focus, however, will be on those which make *Snell's* list.

V. MAXIMS MISUSED

Sometimes, the use of equitable maxims by judges is harmless; like their common law counterparts, their incorporation adds only a rhetorical flourish to a result which

[35] R Francis, *Maxims of Equity, Collected and Proved by Cases, Out of the Books of the Best Authority, in the High Court of Chancery* (London, E and R Nutt and R Gosling, 1728).

[36] An example is the usage of Lord Eldon in *Morice v Bishop of Durham* (1805) 10 Ves Jnr 522, 539: 'As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature, that it can be under that control; so that the administration of it can be reviewed by the court …'.

[37] Pound (n 30) 272.

[38] See the text to nn 4–5.

[39] This seems to make its first appearance in the seventh edition of *Snell* (see EHT Snell and A Brown, *The Principles of Equity*, 7th edn (London, WH Stevenson, 1884) 17, where it is rightly described as 'relating to the procedure in a court of equity, and not to the principles themselves of equity'. After that, however, it is listed alongside the other maxims.

[40] G Virgo, *The Principles of Equity and Trusts*, 4th edn (Oxford, OUP, 2020) ch 2.

[41] P Birks, 'Restitution and Resulting Trusts' in S Goldstein (ed), *Equity and Contemporary Legal Developments* (Jerusalem, International Conference on Equity – Sacher Institute for Legislative Research and Comparative Law, 1992) 343–45; R Chambers, *Resulting Trusts* (Oxford, Clarendon Press, 1997) 11. The existence of such 'suspicion' is refuted in W Swadling, 'Explaining Resulting Trusts' (2008) 124 *LQR* 72. The confusion is probably caused by a failure properly to distinguish between matters of substance and procedure. In the same area, the supposed maxim that 'equity abhors a vacuum' was rightly rejected in *Vandervell v IRC* [1967] 2 AC 291 (HL).

[42] *Burgess v Rawnsley* [1975] Ch 429 (CA).

[43] *Attorney General v Guardian Newspapers Ltd (No 1)* [1987] 1 WLR 1248 (HL) 1270 (Sir Nicolas Browne-Wilkinson V-C); *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [136]–[141] (Lord Walker).

[44] *Milroy v Lord* (1862) 4 De G F & J 264.

[45] *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA).

could have been reached through orthodox doctrinal reasoning. Moreover, judges in equity are sometimes likewise alive to their dangers. Thus, in speaking of the maxim 'equity does not assist a volunteer', Mason CJ and McHugh J in the High Court of Australia said:

> it would be a mistake to set too much store by the maxim. Like other maxims of equity, it is not a specific rule or principle of law. It is a summary statement of a broad theme which underlies equitable concepts and principles. Its precise scope is necessarily ill-defined and somewhat uncertain.[46]

Sometimes, however, their use is more pernicious. They obscure weak or non-existent reasoning; worse, they lead to wrong results. To demonstrate this, three maxims will be considered: 'equity looks upon as done that which ought to be done'; 'equity follows the law'; and 'equity acts *in personam*'.[47]

A. 'Equity Looks Upon as Done that which Ought to be Done'

There are three stages in the life of the maxim 'equity looks upon as done that which ought to be done'. It began as a perfectly sensible rule concerned with the performance of substantive duties affecting the devolution of estates. It then became a maxim and applied so that the availability of a specific remedy for failure to perform a substantive duty, a procedural issue, had the illogical effect of altering substantive rights. Finally, it became divorced from those primary duties altogether.[48]

(i) A Rule as to the Devolution of Estates

The rule that equity looks upon as done that which ought to be done originally applied to those cases where a trustee was obliged to convert a title to land into money or vice versa but failed in their duty. For the purposes of devolution, the trustee would be fictitiously treated as having performed such duty. The rights of those entitled were correctly held not to depend on the exact moment at which the duty was performed. Otherwise, said Chitty J:

> the property would shift from time to time as the trustees in the execution of their duty thought fit to sell; and there is this extraordinary result, that if the trustees, being bound by the imperative directions to make a sale, should omit, for good or bad reasons, to sell, and

[46] *Corin v Patton* (1990) 169 CLR 540 (HCA) 557, cited with approval by Lord Walker in *Pitt v Holt* (n 43) [136].

[47] There are no doubt others we might consider, as witness Gardner's critique (n 32) 63–68 of Lord Templeman's invocation in *Rhone v Stephens* [1994] 2 AC 310 (HL) of the maxim 'equity supplements but does not contradict the common law' to reject any doctrine of positive covenants between freeholders. The obvious difficulty is then to explain how the enforceability of negative covenants does not also fall foul of the maxim.

[48] Somewhat confusingly, this maxim appears twice in *Snell*, both in the list of maxims and later, as a 'doctrine': McGhee (n 6) ch 6 ('The Equitable Doctrines'). No explanation for this double treatment is, however, supplied.

> commit that which would be a breach of trust on their part, the result would be that the rights of the persons claiming under the heir would be altered.[49]

The conversion, of course, was purely notional. It did not 'turn sovereigns into acres, or *vice versa*', working a conversion only 'for the purpose of devolution.'[50]

(ii) From Rule to Maxim: Availability of a Specific Remedy to Enforce the Duty

While a 'rule' concerning the devolution of estates, 'equity looks upon as done' was both sensible and manageable. However, it later achieved the status of a maxim, at which point it became partially uncoupled from the duty. Attention now turned to the remedies available to enforce the duty, with everything turning on the availability of specific performance as opposed to damages. For that reason, as a maxim, it does not operate in favour of volunteers.[51] Nor will it be engaged where a damages award is adequate.

When applied to contracts for the sale of certain rights, most notably titles to land, the maxim is said to produce a trust. According to Sir George Jessel MR, 'the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold',[52] though as Lord Parker later added, this was 'only true if and so far as a Court of Equity would … grant specific performance of the contract'.[53] However, despite everything turning on the availability of a specific remedy, what is being considered as done is the performance of the substantive duty, not compliance with the court order, for the trust is said to arise on the making of the contract.[54]

There are a number of problems with this use of the maxim. First, why should substantive rights turn on the availability of a specific rather than a monetary remedy? The decision to award a specific remedy turns on issues having nothing to do with the substantive position of the parties. In deciding on remedies, courts look to practical issues concerning the administration of justice.[55] We would never say that a claimant's substantive rights were affected by the fact that a court declines specific performance on supervision grounds. Why then do the very opposite here? Moreover, as already

[49] *Re Richerson* [1892] 1 Ch 379 (Ch) 383. See also *Lechmere v Earl of Carlisle* (1733) 3 P Wms 211, 215.

[50] *Chandler v Pocock* (1880) 15 Ch D 491 (Ch) 496 (Sir George Jessel MR in argument). The importance of the rule today has diminished: McGhee (n 6) paras [6-003]–[6-005].

[51] *Re Ellenborough* [1903] 1 Ch 697 (Ch). This may be the difference between the rule as 'doctrine' (operating in favour of volunteers) and 'maxim' (which does not operate in favour of volunteers).

[52] *Lysaght v Edwards* (1876) 2 Ch D 499 (Ch). There is sometimes said to be a different doctrine operating to generate a trust where the purchase money has been paid in full, which does not depend on the availability of specific performance: D Waters, L Smith and M Gillen, *Waters' Law of Trusts in Canada*, 5th edn (Toronto, Thomson Reuters, 2021) 636.

[53] *Howard v Miller* [1915] AC 318 (PC) 326. See also *Ezair v Conn* [2020] EWCA Civ 687, [2020] BCC 865 [47] (Patten LJ); *Momin v February Point Resort Estates Ltd (Bahamas)* [2022] UKPC 3 [24] (Lord Burrows).

[54] This is an extremely contentious area. It is sometimes said that the trust only arises on payment of the purchase price, though it is then backdated to the date of the contract. There is no space to explore that issue here.

[55] See the excellent discussion by S Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford, OUP, 2020) 167–68, 301–03. I am grateful to him for the point made in the text.

seen, the fiction attaches not to the remedy, but to the duty, yet all contracts of sale ought to be performed. It accordingly leads to arbitrary results. Take the example of two purchasers from the same vendor, the first of a specific parcel of shares in a private company, the second of the same in a public one. In the case of breach, the vendor in the first case will be ordered to perform, while in the second, the purchaser will only have a judgment for damages.[56] There will only be a trust in the first case, so that should the vendor become insolvent before performance, the second purchaser will be left to prove in the vendor's bankruptcy, along with the other creditors, while the first will obtain performance in full. Yet the merits of both are indistinguishable.

A second objection is that there is no explanation why the availability of specific performance (rather than the duty to convey) generates a trust. The thinking seems to be that by the application of the maxim, the duty to convey is treated as performed; however, since the fiction only applies in equity, there is a conflict: while the right contracted to be sold may be in the purchaser's hands so far as equity is concerned, the reality is that it remains with the vendor; to 'resolve' that conflict, courts interpose a trust. The explanation is, however, flawed, for trusts do not involve contradictions as to the location of rights. As Maitland famously explained:

> Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*. There was no conflict here. Had there been a conflict here [section 25] of the Judicature Act [1873] would have abolished the whole law of trusts. Common law says that A is the owner, equity says that B is the owner, but equity is to prevail, therefore B is the owner and A has no right or duty of any sort or kind in or about the land. Of course the Judicature Act has not acted in this way; it has left the law of trusts just where it stood, because it found no conflict, no variance even, between the rules of the common law and the rules of equity.[57]

Third, the doctrine assumes that an order of specific performance will be made should the matter reach court. However, circumstances may change between the date of contract and court proceedings,[58] so that though specific performance might have been ordered on Day 1, it may not be on Day 2.[59] Moreover, the vendor might not be able to make out title. The courts have therefore qualified this 'trust' by saying that the vendor is not a full-blown trustee, merely 'in progress towards it',[60] a trustee *sub modo*.[61] On other occasions, they go further and say that the vendor is not a trustee at all, merely someone liable to be ordered to perform their contract. Lord Westbury

[56] *Duncuft v Albrecht* (1841) 12 Sim 189.

[57] FW Maitland, *Equity* (Cambridge, CUP, 1909) 17.

[58] As noted by the Court of Appeal in *Rayner v Preston* (1881) 18 Ch D 1 (CA).

[59] A well-known example is *Patel v Ali* [1984] Ch 283 (Ch), where Goulding J refused an order for specific performance of a contract of sale of a title to land because of illness after the contract was signed and the hardship it would thereby cause the vendor.

[60] *Wall v Bright* (1820) 1 Jac & W 494, 503 (Sir Thomas Plumer MR). See also *Jerome v Kelly* [2004] UKHL 25, [2004] 1 WLR 1409 [30].

[61] 'Subject to a condition'. The language is that of Stamp LJ in *Berkley v Poulett* [1977] 1 ECLR 86 (CA) 93.

said that 'the vendor is called a trustee only by a metaphor, and by an improper use of the term,'[62] while Deane J said that it was:

> inaccurate and misleading to speak of the unpaid vendor under an uncompleted contract as a trustee for the purchaser … [T]he ordinary unpaid vendor of land is not a trustee of the land for the purchaser. Nor is it accurate to refer to such a vendor as a 'trustee sub modo' unless the disarming mystique of the added Latin is treated as a warrant for essential misdescription.[63]

(iii) From Rule to Maxim: Extension Beyond Enforcement of the Duty

Though it may be too late to remove the vendor purchaser constructive trust,[64] we should certainly not expand it. Some recent cases, however, do that very thing, forgetting that the doctrine, however illogically, requires a substantive executory duty to convey, albeit one which equity will specifically enforce.

The first misuse of the doctrine is illustrated by *Bristol Airports plc v Powdrill*,[65] where an airline company was the lessee of a number of aircraft. It was indebted in respect of unpaid airport charges to Bristol Airport, which by statute was entitled to seize and sell aircraft of which the airline was the operator to recover such charges. The airline was insolvent. To enable it to continue trading, it had been placed under an administration order pursuant to section 8 of the Insolvency Act 1986. Section 11(3) of the same Act provided that no steps could be taken to 'enforce any security over the company's property … except with the consent of the administrator or the leave of the court'. The question was whether the airport authority required leave to exercise its statutory power of detention. They argued that the aircraft, being held under leases, were not the 'property' of the insolvent company, it being accepted on both sides that a lease of goods had no proprietary effect at law. The Court of Appeal held that even if a lease of goods did not amount to a legal property right, the aircraft were still the company's 'property' because of the specific enforceability of the contract of lease. Sir Nicolas Browne-Wilkinson V-C said:

> Although a chattel lease is a contract, it does not follow that no property interest is created in the chattel. The basic equitable principle is that if, under a contract, A has certain rights over property as against the legal owner, which rights are specifically enforceable in equity, A has an equitable interest in such property. I have no doubt that a court would order specific performance of a contract to lease an aircraft, since each aircraft has unique features peculiar to itself. Accordingly in my judgment the 'lessee' has at least an equitable

[62] *Knox v Gye* (1871–72) LR 5 HL 656, 675–76 (Lord Westbury). See also *Rayner* (n 58) 11 (Brett LJ): 'I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other'; *Berkley* (n 61) 93 (Stamp LJ): 'the duties do not arise because he is a trustee but because he has agreed to sell the land to the purchaser and the purchaser on tendering the price is entitled to have the contract specifically performed according to its terms'.

[63] *Kern Corpn Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164 (HCA) 192.

[64] Which has its defenders: P Turner, 'Understanding the Constructive Trust Between Vendor and Purchaser' (2012) 128 *LQR* 582; C McClure, 'Specific Performance and the Constructive Trust' in E Bant and M Bryan (eds), *Principles of Proprietary Remedies* (Pyrmont NSW, Thomson Reuters, 2013) ch 8.

[65] [1990] Ch 744 (CA).

> right of some kind in that aircraft which falls within the statutory definition as being some 'description of interest … arising out of, or incidental to' that aircraft.[66]

Though the conclusion that a chattel lease is a property right may well be correct in the specific context of the Insolvency Act 1986, particularly in view of the extremely wide definition of 'property' contained therein,[67] it cannot be because of the maxim 'equity looks upon as done that which ought to be done'.

First, this was a case of an executed, not an executory, contract, to which the doctrine has no application. As Lord Selbourne LC explained in *Wolverhampton & Walsall Rly Co v London & North Western Rly Co*, the equitable remedy of specific performance 'presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed'.[68] Here, possession of the aircraft had been delivered by the lessor to the lessee; nothing remained to be done on the lessor's part.[69]

Second, a lease of land is a property right at common law, and an application of the maxim 'equity looks upon as done that which ought to be done' anticipates, albeit only in equity, the final result. But a lease of a chattel was assumed by Sir Nicolas Browne-Wilkinson V-C to create no property right at law; indeed, if it did, there would have been no need to resort to the equitable doctrine.[70] Since in his view actual performance could not create property rights, anticipated performance could not do so either. Indeed, if it did, equity would not simply be jumping the gun, but destroying altogether the division between personal and proprietary rights, for now the question whether a right was personal or proprietary would turn, not on the *numerus clausus* rule we see in *Hill v Tupper*[71] and *King v David Allen (Billposting)*,[72] but on the availability of specific performance; yet given that contractual licences to occupy land are both specifically enforceable[73] and not property rights,[74] we know this cannot be true.

A second illegitimate application of the maxim occurred in *Attorney General for Hong Kong v Reid*.[75] As is well known, the Court of Appeal in *Lister v Stubbs*[76] had

[66] ibid 759.

[67] Section 436 of the Insolvency Act 1986 defines 'property' as including 'money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out, or incidental to, property'. As Sir Nicolas Browne-Wilkinson V-C remarked in *Powdrill* (n 65) 759, '[i]t is hard to think of a wider definition of property'.

[68] (1873) LR 16 Eq 433 (Court of Equity) 439.

[69] Even if it were a property right at law, there are no formalities prescribed for its 'grant', so nothing left to be done.

[70] For a full discussion, see W Swadling, 'The Proprietary Effect of a Hire of Goods' in N Palmer and E McKendrick (eds), *Interests in Goods*, 2nd edn (London, LLP, 1998) 491–526.

[71] (1863) 2 H & C 121.

[72] [1916] 2 AC 54 (HL).

[73] *Verrall v Great Yarmouth BC* [1981] QB 202 (CA).

[74] *National Provincial Bank v Ainsworth* [1965] AC 1175 (HL) 1253 (Lord Wilberforce); *Ashburn Anstalt v Arnold* [1989] Ch 1 (CA).

[75] [1994] 1 AC 324 (PC).

[76] (1890) 45 Ch D 1 (CA).

previously held that fiduciaries receiving bribes did not hold them on trust for their principal, that only a debtor–creditor relationship was generated. However, Lord Templeman in *Reid* used the 'equity looks upon as done' maxim, along with another, that equity acts *in personam*,[77] to produce a trust. He said of a public prosecutor who took a bribe, that when

> offered and accepted in money or in kind, the money or property constituting the bribe belongs in law to the recipient. … Equity, however, which acts in personam, insists that it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty. … The false fiduciary who received the bribe in breach of duty must pay and account for the bribe to the person to whom that duty was owed. In the present case, as soon as Mr Reid received a bribe in breach of the duties he owed to the Government of Hong Kong, he became a debtor in equity to the Crown for the amount of that bribe. … As soon as the bribe was received it should have been paid or transferred instanter to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured.[78]

This is an incorrect application of the maxim for two reasons.

First, the prosecutor's duty was not to take any bribes at all.[79] However, were we to deem him never to have taken the bribes, there would not even be a personal claim to his gain. As we have seen, the vendor–purchaser constructive trust arises because of the fictional performance of the substantive duty of the vendor to perform their promise. In that sense, it is not a doctrine which can ever apply to wrongdoing, and *Reid*, at least in the view of Lord Templeman, who uses the phrase 'breach of duty' four times in the passage set out above, was a case concerning a wrong, breach of fiduciary duty.[80] Second, the argument mistakes the nature of the fiduciary's duty to account when ordered to do so by a court. The duty entails the making of an account and the payment of the debt found due at the end of the accounting process. But the debt, should there be one, can be satisfied by the payment of money from any source belonging to the person liable to account. Differently to an agreement to convey a title to a particular plot of land, it is not an obligation to transfer rights *in specie*.

B. Equity Follows the Law

The second maxim to be discussed is 'equity follows the law'. As was pointed out by Pound, what was operating here initially was once again a rule, not a maxim, one which provided that the rights of beneficiaries of bare trusts devolved in the same way as those forming the subject matter of the trust.[81] Thus in *Hopkins v Hopkins*, Lord Hardwicke said: 'It is the maxim of this court that trust estates, which are the

[77] Presumably on the basis that two maxims, as with two heads, are better than one. This second maxim is discussed below, text to nn 95–118.

[78] *Reid* (n 75) 331.

[79] A point also made by Gardner (n 32) 62.

[80] Though it is difficult to see how Reid was a fiduciary at all.

[81] Detail in Browne (n 6) 74.

creatures of equity, shall be governed by the same rules as legal estates in order to preserve the uniform rule of property'.[82]

The same thinking was applied to the equity of redemption.[83] It also applied so that the common law rule against limitations to successive unborn generations (now abolished) also governed equitable estates.[84]

As a rule, it made perfect sense and was easy to apply. However, as with the previously discussed maxim, once elevated to the status of a maxim, it lost its context and became nonsensical, for if literally true, there could be no equity at all: in the vast majority of cases where equity does have something to say, it most certainly does not follow the law. If it did, we would have no trusts, no fiduciary duties, nothing to fill books such as *Snell*. For that reason, Cardozo CJ famously said that the maxim should be reformulated to read: 'Equity follows the law but not slavishly nor always'.[85] On that basis, one would have thought that no judge would ever use it again. Yet use it they do, at the very least obscuring what they are trying to say.

A notorious example is *Stack v Dowden*,[86] where the issue was whether a title to land held by a man and woman as joint tenants was vested in them beneficially or whether, as the woman alleged, on trust for them both in unequal shares. In answering that question, Lord Walker said:

> In the ordinary domestic case where there are joint legal owners there will be a heavy burden in establishing to the court's satisfaction that an intention to keep a sort of balance-sheet of contributions actually existed, or should be inferred, or imputed to the parties. The presumption will be that equity follows the law. In such cases the court should not readily embark on the sort of detailed examination of the parties' relationship and finances that was attempted (with limited success) in this case.[87]

Likewise, Lady Hale said:

> At first blush, the answer appears obvious. It should only be expected that joint transferees would have spelt out their beneficial interests when they intended them to be different from their legal interests. Otherwise, it should be assumed that equity follows the law and that the beneficial interests reflect the legal interests in the property ….[88]

These statements are difficult to follow. It may be that both judges were doing nothing more than describing the location of the burden of proof in this type of civil proceeding.[89] But even so, given that equity does not slavishly follow the law elsewhere, why should it do so here? Maxims, as we have seen, allow judges to reach decisions without giving reasons, and this is a prime example of that vice. The only

[82] (1738) West t Hard 606, 619.
[83] *Casburne v Inglis* (1737) West t Hard 221.
[84] *Re Nash* [1910] 1 Ch 1 (CA).
[85] *Graf v Hope Building Corp* (1930) 254 NY 1 (New York Court of Appeals) 9.
[86] [2007] UKHL 17, [2007] 2 AC 432. McGhee (n 6) para [5-006] also notes that the 'potential for confusion in applying the maxim can be seen in *Stack v Dowden*'.
[87] *Stack* (n 86) [33].
[88] ibid [54].
[89] Or is it the standard of proof which is being referred to? If so, how do such statements square with that of Lord Hoffmann in *Re B (Children)* [2008] UKHL 35, [2009] 1 AC 11 [13] that there is only one standard of civil proof?

function it seems to play is to dispense with legal analysis. But it is worse than that. Both common law and equity, through the operation of presumptions, know situations in which the burden of proof shifts mid-trial.[90] If equity really did follow the law, then what Lord Walker and Lady Hale would be saying is that only in those situations in which presumptions operate at law will they likewise operate in equity. If so, by a sidewind, they will have abolished entirely the presumptions which operate to create resulting trusts, those operating in cases of undue influence,[91] and the so-called *Lake v Craddock*[92] presumption of tenancy in common arising where there are conveyances to joint tenants who are either business partners, unequal contributors to the purchase price, or mortgagees.[93] What has happened to these presumptions? The problem, as was we saw in relation to the common law, is that maxims tend to be expressed in such wide terms that they catch unintended material. Although there is a nod to some of the aforementioned presumptions in Lady Hale's speech, we are left with uncertainty as to their continued existence. It might be said that *Stack v Dowden* was not concerned with the question in *Lake v Craddock*, viz, whether there was a tenancy in common in equity or joint tenancy, but merely the quantification of the shares of tenants in common.[94] But the expression of the rule in terms of a maxim only muddies these already murky waters.

C. Equity Acts *in Personam*

The third maxim, that 'equity acts *in personam*', usually juxtaposed with the statement that 'the common law acts *in rem*',[95] is something of a latecomer. It was not listed by Hohfeld in his 1913 article on the relationship between law and equity,[96] and, as seen, only appeared in *Snell* in its seventh edition. Its inclusion, however, was a mistake, for it does not qualify as a maxim, laying down no rule, offering no words of wisdom. Properly understood, it does no more than describe an historical difference between common law and equity in matters of procedure.

We saw the use of the phrase as a rhetorical device in Lord Templeman's opinion in *Reid* discussed above.[97] A similar usage occurs in Lord Browne-Wilkinson's speech in *Target Holdings Ltd v Redferns*:

> a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting *in personam*, ordered the defaulting trustee to restore the trust estate. If specific restitution of the trust property is not possible, then the

[90] This perhaps explains Lord Walker's mysterious description of the maxim as a 'presumption'.

[91] Assuming there really is a presumption in such cases: W Swadling, 'Undue Influence: Lessons from America?' in C Mitchell and W Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment: Critical and Comparative Essays* (Oxford, Hart, 2013) 111.

[92] (1732) 3 P Wms 158 (assuming, of course, that a presumption really was involved in that case).

[93] As *Malayan Credit v Jack* [1986] AC 549 (PC) illustrates, the list is not closed.

[94] Though how the erstwhile joint tenants became tenants in common is an abiding mystery: A Briggs, 'Co-Ownership and an Equitable Non Sequitur' (2012) 128 *LQR* 183.

[95] See, eg, *Ewing v Orr Ewing (No 1)* (1883) LR 9 App Cas 34 (HL) 40 (Lord Selbourne LC).

[96] WN Hohfeld, 'The Relations Between Equity and Law' (1913) 11 *Michigam Law Review* 537, 550.

[97] See the text to n 77.

> liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed.[98]

The maxim is clearly doing no work in these cases and could easily have been dispensed with. Indeed, in *Target* itself, Lord Browne-Wilkinson controversially adopted the common law rules of causation in a claim for equitable compensation for breach of trust, a case of equity following the law, it might be thought.

So what exactly does the phrase mean? The clue is in the word 'acts' – it is concerned with the *form* which equitable court orders take. By a judgment at common law, the defendant was not ordered to do anything. Instead, the Court ordered that 'the plaintiff shall have and recover of the defendant the sum of £xxx'. Not being an order against the defendant personally, he could not be jailed for contempt for non-compliance. Instead, his goods were seized and sold to meet the judgment. It was in this sense, therefore, that the common law traditionally acted *in rem*.[99] By contrast, orders of courts of equity were directed to the defendant personally, ordering him to do or refrain from doing something. A failure to comply was a contempt of court, which could lead to imprisonment. A court of equity thus went after the defendant's body, while the common law went after his goods, and it was in this sense that equity acted *in personam* and the common law *in rem*. As Scott explained:

> By a judgment at law the plaintiff is usually declared to have a certain right; by a decree in equity the defendant is usually ordered to act, or to refrain from acting in a certain way. A judgment at law is usually enforced without the co-operation of the defendant; if by the terms of the judgment the plaintiff is declared entitled to specific property the sheriff puts him in possession of that property; if by the terms of the judgment the plaintiff is entitled to recover a certain sum of money the sheriff seizes the defendant's property and sells it and out of the proceeds pays the plaintiff the amount to which he is entitled. On the other hand, a decree in equity is usually enforced by imprisoning the defendant and thereby making things so disagreeable for him that he will generally choose ultimately to obey rather than continue to suffer the disagreeable consequences of his disobedience.[100]

What the phrase describes, therefore, is not a maxim, not even a rule, just the process by which equity works.

This particular aspect of the 'maxim', however, is no longer literally true; indeed, it has not been so for centuries. Merely locking the defendant up, even when the windows of his cell were boarded up, or he was put in irons,[101] did not necessarily result in compliance with the order, and so was not particularly attractive to

[98] [1996] AC 421 (HL) 434. Another example from the same judge, then as a justice of the High Court, occurs in *Swiss Bank Corpn v Lloyds Bank Ltd* [1979] Ch 548 (Ch) 565–66. The phrase was more recently invoked by Lord Sumption to describe the 'proprietary' nature of the rights of a beneficiary of a trust: *Akers v Samba* [2017] UKSC 6, [2017] AC 424 [83].

[99] See the excellent account in N Oman, 'Why There is no Duty to Pay Damages: Powers, Duties, and Private Law' (2011) 39 *Florida State University Law Review* 137, 152–53.

[100] AW Scott, 'The Nature of the Rights of the *Cestui Que Trust*' (1917) 17 *Columbia Law Review* 269, 277. To be fair, McGhee (n 6) does not propose any wider use than this. So, eg, at para [5-017] he says that the maxim has a precise, technical meaning (explained at para [5-018] as a procedural distinction about the means of execution) and has been misused when divorced from that historical context.

[101] *Clerke v Waller* (1598) Monro 718: 'His lordship mindeth … to lay as many irons on him as he may bear'.

plaintiffs. As a consequence, equity very early on began to act in the same way as the common law, and by the end of the sixteenth century, principally through orders of sequestration, acted '*in rem*'. Under the process of sequestration, 'sequestrators were entitled to possession of the property over which the sequestration was granted, and, if possession was denied them, the court awarded a writ of assistance to put them in possession'.[102] It is important to understand that the fact that equity acts *in personam*, and the common law *in rem*, even when literally true, said nothing about the nature of the substantive rights there recognised. It was not saying that equity recognised only personal rights,[103] and the common law only property rights. As Hackney explained:

> 'The *in personam* phrase is not descriptive of X's rights, but simply describes the mode of execution of the court in protecting them – property rights protected by imprisoning contumacious violators. One can protect rights *in rem* by judgments *in personam*'.[104]

Unfortunately, judges using the 'maxim' do not always appreciate this point, the most egregious modern example being that of Lord Neuberger in *FHR European Ventures LLP v Cedar Capital*.[105]

We already encountered the misapplication of the maxim that 'equity looks upon as done that which ought to be done' by Lord Templeman in *Attorney General for Hong Kong v Reid*[106] in holding that a bribe was held on trust for the victim of the breach of fiduciary duty, invoking the *in personam* maxim for good measure. In *Sinclair Investments v Versailles*,[107] Lord Neuberger MR, then sitting in the Court of Appeal, refused to apply *Reid*, going so far as to predict that the Supreme Court would not follow it either.[108] However, in a complete *volte face* just two years later, and with only the occasional reference to *Sinclair*, his Lordship, now as President of the Supreme Court, wholeheartedly embraced *Reid*, using little by way of argument other than the *in personam* maxim. He said it was

> … not possible to identify any plainly right or plainly wrong answer to the issue of the extent of the rule [that bribes are held on trust], as a matter of pure legal authority. There can clearly be different views as to what requirements have to be satisfied before a proprietary interest is created. More broadly, it is fair to say that the concept of equitable proprietary rights is in some respects somewhat paradoxical. Equity, unlike the common law, classically acts in personam …; yet equity is far more ready to accord proprietary claims than common law. Further, two general rules which law students learn early on are that common law legal rights prevail over equitable rights, and that where there are

[102] Details in Browne (n 6) para [30-34]. It was also possible for plaintiffs to be put into possession of land and chattels.

[103] Many people make this mistake. An example is F de Londras, *Principles of Irish Property Law*, 2nd edn (Dublin, Clarus Press, 2011) paras [3-75]–[3-76].

[104] J Hackney, *Understanding Equity and Trusts* (London, Fontana Press, 1987) 26. McGhee (n 6) para [5-018] makes the same point about the maxim referring to execution and does not use the maxim to draw conclusions about the nature of equitable rights However, the point does not seem to be appreciated by Heydon, Leeming and Turner (n 6) paras [3-220]–[3-260], where the bulk of the discussion of the maxim comprises an exposition on the nature of equitable rights, whether *in rem* or *in personam*.

[105] [2014] UKSC 45, [2015] AC 250.

[106] (n 75).

[107] [2011] EWCA Civ 347, [2012] Ch 453.

[108] ibid [76].

> competing equitable rights the first in time prevails; yet, given that equity is far more ready to recognise proprietary rights than common law, the effect of having an equitable right is often to give priority over common law claims – sometimes even those which may have preceded the equitable right. Given that equity developed at least in part to mitigate the rigours of the common law, this is perhaps scarcely surprising. However, it underlines the point that it would be unrealistic to expect complete consistency from the cases over the past 300 years. It is therefore appropriate to turn to the arguments based on principle and practicality, and then to address the issue, in the light of those arguments as well as the judicial decisions discussed above.[109]

Seizing on the supposed confusion, his Lordship felt able to rise above the case law and lay down a bright line rule, viz, that bribes are held on trust.[110] The confusion, however, was purely of Lord Neuberger's own making. Had he understood the 'maxim' correctly, he would have been forced to engage with the prior law.

A final point concerns the relationship of this 'maxim' with the notion that 'equity is a court of conscience', fortunately not yet a maxim. The two are often run together, as seen in the famous statement of Lord Selbourne LC that the 'courts of Equity in England are, and always have been, courts of conscience, operating *in personam* and not *in rem* …'.[111] However, in the same way that 'equity acts *in personam*' is not a rule, so too is the notion of equity being a 'court of conscience'. Although often lost sight of, and being thought to give courts of equity the power to dispense justice on vague notions of fairness,[112] it describes nothing more than the relationship between law and equity, between competing legal systems.[113] More specifically, it describes the fact that courts of equity do not sit on appeal from common law courts,[114] do not overturn common law judgments, but instead direct defendants not to enforce them. As Lord Hardwicke explained two centuries ago:

> Though this court cannot set aside a judgment of a common law court obtained against conscience, yet will it decree the party to acknowledge satisfaction on that judgment, though he has received nothing; because obtained where nothing was due. So it cannot set aside a fine for being obtained by fraud and imposition … yet, on a conveyance so obtained, this court never sent the plaintiff to the Common Bench to set it aside, but considers the person obtaining the estate, even by fine, as a trustee, and decrees him to reconvey on the general ground of laying hold of the ill-conscience of the party, to make him do what is necessary to restore matters as before.[115]

[109] *FHR* (n 105) [32].

[110] Unfortunately, the equally bright line rule, that there should never be a trust – the approach taken in *Lister v Stubbs* itself – was nowhere considered.

[111] *Ewing* (n 95) 40.

[112] Famously criticised by Selden, F Pollock (ed), *Table Talk of John Selden* (London, Selden Society, 1927) 43 in the following terms: 'Equity is according to the conscience of him who is Chancellor, and as that is larger or narrower, so is equity. It is all one as if they should make the standard for the measure we call a *foot* "a chancellor's foot"'. Though subsequently refuted on many occasions, some judges still purport to decide cases on this basis, see, eg, Arden LJ's judgment in *Pennington* (n 5).

[113] According to Birks, it was the *in personam* rule which did this: P Birks, 'In Rem or In Personam?' (1994) 8 *Trusts Law International* 99, 100.

[114] See too, McFarlane's and Hudson's chapters in this volume.

[115] *Barnesly v Powel* (1749) 1 Ves Snr 284, 289. Today, it would be only in comparatively rare cases where a party would go to equity only after a common law judgment. Equitable intervention would normally be sought before that point.

Maitland said much the same thing at the turn of the last century:

> In fraud or in breach of trust you obtain a judgment against me in a court of law; I complain to the Chancellor, and he after hearing what you have to say enjoins you not to put in force your judgment, says in effect that if you do put your judgment in force you will be sent to prison. Understand well that the Court of Chancery never asserted that it was superior to the courts of law; it never presumed to send to them such mandates as the Court of King's Bench habitually sent to the inferior courts, telling them that they must do this or must not do that or quashing their proceedings – the Chancellor's injunction was in theory a very different thing from a mandamus, a prohibition, a certiorari, or the like. It was addressed not to the judges, but to the party. You in breach of trust have obtained a judgment – the Chancellor does not say that this judgment was wrongly granted, he does not annul it, he tells you that for reasons personal to yourself it will be inequitable for you to enforce that judgment, and that you are not to enforce it.[116]

Unfortunately, this fact is also often lost sight of.

A prime example is in some discussions of the nature of the rights of beneficiaries of trusts. Since equity both acts on the defendant's conscience and operates *in personam*, it is sometimes said that because trusts are the product of equity, the rights of trust beneficiaries can only be personal.[117] However, that is immediately contradicted by the empirical evidence for, as is well known, trusts have certain third-party effects, as witness the fact that a transferee from a trustee in breach of trust can be ordered to retransfer the rights unless a bona fide purchaser of a legal right without notice of the dissipation in breach of trust.[118] Indeed, as noted above, it was this very confusion which Lord Neuberger seized upon in *FHR* to draw a line under the existing law. The problem is that the protagonists in this debate have lost sight of the fact that, as we have seen, neither 'maxim' says anything about the substantive nature of the beneficiary's rights, is concerned only with matters of procedure. But that is the problem with maxims, and why their use, at least at common law, is rightly deprecated.

VI. CONCLUSION

We have examined three equitable maxims: 'equity looks upon as done that which ought to be done'; 'equity follows the law'; and, 'equity acts *in personam*'. As to the first two, though both were accurate statements of the law when merely rules, wrong turns were made on their elevation to the status of maxims. With the 'equity looks upon as done that which ought to be done' maxim, the mistake was to divorce the rule from the substantive duty and link it instead to the remedy; it led to arbitrary trusts and an illegitimate extension to contracts of hire and gains made in breach of fiduciary duty. In the case of the maxim 'equity follows the law', the immediate problem

[116] Maitland (n 57) 9.

[117] See, eg, the debate concerning Case C-294/92 *Webb v Webb* [1994] ECR I-1717: for discussion see, eg, Birks, 'In Rem or In Personam?' (n 113); A Briggs, *The Conflict of Laws*, 4th edn (Oxford, OUP, 2019) 59.

[118] *Pilcher v Rawlins* (1871–72) LR 7 Ch App 259 (CA).

is that it is patently false, for there are countless instances of equity *not* doing so. All the maxim does is cause confusion, as witness the speeches of Lord Walker and Lady Hale in *Stack v Dowden*. Finally, we saw that the maxim 'equity acts *in personam*' was no maxim at all, not even a rule. The phrase instead described how equity works, in the form of its orders and the method of their enforcement. Although frequently lost sight of, the 'maxim' says nothing of the nature of substantive rights in equity. Nor is this contradicted by the fact that equity acts on the defendant's 'conscience'.

Hohfeld told his students that the equitable maxims were 'mere "guide-posts"' and not to be taken literally.[119] Unfortunately, many judges in equity fail to heed this warning, and are led into error. On the sesquicentenary of the Judicature Acts, is it not time that equity followed the law and eschewed the use of maxims altogether?

[119] Hohfeld (n 96) 550.