

## A Critical Analysis on The Assertion “Equitable Rights Are Rights “In Personam” And Not “In Rem”

Ibeosu, Raymond O\*

LL. B Candidate, Osun State University, Nigeria

\*Corresponding Author

Ibeosu, Raymond O, LL. B Candidate, Osun State University, Nigeria.

Submitted: 2025, Dec 15; Accepted: 2026, Jan 16; Published: 2026, Jan 23

**Citation:** Raymond O, I. (2026). A Critical Analysis on The Assertion “Equitable Rights Are Rights “In Personam” And Not “In Rem”. *World J Tourism Mgm*, 2(1), 01-06.

### Abstract

One of the reasons for the popularity of equity was the development of equitable rules and remedies which served as mitigating factors for the hardship created by the stringent rules of the common law. These Equitable rules are encompassed in what has come to be referred to as the “Maxims of Equity”. One of which is construed as “Equity acts in personam”. This maxim is the foundation of all equitable jurisdiction, it meant that equity dealt primarily with the person and only against his property through him/her However, this maxim which used to be a rule without an exception now seems to be used in modern equity as simply a series of ideas used for remembrance as situations in which Equity can be said to act “in rem” (against property”). This essay seeks to offer a conceptual definition of equity, equitable rights and legal rights. Thereafter drawing a distinction between legal and equitable rights with reference to certain examples under both and further discussing the intersection of the former and the latter with major focus being on the relevance of the maxim “Equity acts in personam” and not “in rem” in the context on modern equity with the introduction of situations where Equity acts in rem.

**Keywords:** Equity, “Rights in Personam”, “Rights in Rem”, Maxim

### 1. Introduction

The development of Equity in England goes as far back as the Anglo-Saxon period, during this period, the king was seen as the “fountain of justice” and petitions on matters of injustice were a matter of the possible “grace” to be given by the king.<sup>1</sup> This would be made possible by the king offering remedies which the common law had denied, in this way common law and equity originated together. It should be noted that at that time, common law was rigid and unadaptable to meet the social standards. Thus, petitions were sent to the council which was thereafter dealt with by the chancellor who was the leading member of the council.<sup>2</sup> There were two main groups of cases which were referred to the Chancellor, these were; cases where the law was defective and cases where there was a remedy but owing to the influence of the other party, redress could not be obtained. Equity was thus drawn out of the attempts to eliminate or mitigate the harshness which might have resulted from the strict application of common law.

Overtime, certain principles or rules were developed in the administration of Equity; these were popularly referred to as “Maxims of Equity”. The maxims in themselves are not a set of rigid rules but rather principles which can be deviated from in specific cases.<sup>3</sup> These maxims are varied however they have been acceptable classified into twelve (12) parts, the major focus of this discussion will be the 12th Maxim of Equity stated as “EQUITY ACTS IN PERSONAM”.

Having its basis as one of the foundations of Equitable jurisdiction, the maxim underscores the belief that the decrees or directives of Equity unlike certain instances under common law acts against the individual personally majorly on the instance of property matters in which Equity acts against the individual by i.e. committing him to prison for contempt when he failed to obey a decree rather than in rem (against the property) which was the subject matter of the action.

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While it is true that equity originally acted only in personam, yet numerous situations developed where such action was impracticable and law courts due to the rigidity of form and peculiarity of remedies were unable to grant relief. Suppose for example, that the legal title of a trustee became vested in one incompetent to act as a trustee or to convey the legal title to the beneficiary, Equity only acting in personam could appoint a successor to act as trustee but could not by doing that vest the legal title to convey such property to him [1]. In this situation, Equity would be of no help if it only acted in personam. The frequent re-occurrence of situations where Equity could not grant such prayers for relief led courts to act upon jurisdiction in rem.<sup>4</sup>

## 2. Conceptual Clarification

### 2.1. Concept of Equity

Equity, in a layman's definition generally means right doing, good faith, honest and ethical dealings in interaction between man and man, whether in business or social relationships. In legal parlance, it is the body of rules and principles that existed along the common law rules of England before the Judicature Act of 1873. It had the characteristic of mitigating the rigidity inherent in the common law, in quest for integral justice. In the general sense, it forms the body of rules that mitigate the harshness in the municipal law of any legal system. It is the concept which by applying what is fair and just, attempts to eliminate the harshness and hardship which might result from the strict application of legal rules. Maxims of equity can be described as a set of principles underlying the operation of equity in its quest to reduce the harshness of the Common law.

These rules developed into certain guidelines to aid administering of Equity, These guidelines of the jurisdiction of Equity are referred to as the "Maxims of Equity". These Maxims are not rigid formulae for the application of equitable rules, but rather, a collection of general principles, which can be adopted to suit the circumstances of the individual case.<sup>5</sup> The maxims tend to illustrate the qualities of equity, in contrast to the common law, as more flexible, responsive to the needs of the individual, and more inclined to take account of the parties conduct and worthiness. The role of Maxims was given effect in *Tinsley v Milligan*<sup>6</sup>. Here it was stated that maxims are very broadly worded and cannot be treated without more, as binding rules; rather they are principles underlying various specific rules, and the case of *Barrett v Barrett*<sup>8</sup> presents a picture of a more flexible approach. It would be necessary to state the relevance of the maxims of Equity, to mention but a few;

- To show the historical development of equitable rules and procedures;
- To guide the application of those rules at the present and in the future
- They afford an overview of the basis for the various principles and doctrines of equity.
- They confer some authority and distinction on equity itself as a system of law.
- They act as a direction or indicator to the Courts as it is easier to arrive at a conclusion of a matter relying on the maxims.

The exact number of maxims has been a subjective issue. One may Count up to 16, 20 or even more. The variance arises because, some maxims that may be counted by some, may indeed be a part of another basic maxim. For instance, the maxim "Equity will not allow a statute to be used as an engine of fraud", may be categorized as a maxim by some, while indeed it is in the actual sense, a part of the maxim "Equity follows the law". Indeed, it would not be difficult to reduce all Maxims into two namely, "Equity will not suffer a wrong to be without a remedy, and: "Equity acts in Personam"<sup>7</sup>. It should be noted that there are twelve (12) traditional maxims of Equity. The maxim under consideration in this discussion is however, "Equity acts in Personam".

### 2.2. Legal Rights/Interests

Legal interests are those rights over properties which are recognized and enforceable by Common Law. When an individual possesses a legal interest over an asset is able to pursue legal action in the event that his legal rights are breached by another party. It should be noted that a person who has legal interest over an asset is said to have a "perfect right" over the ownership of the asset. The major advantage of possession of this legal interest is the access to unlimited legal remedies once these rights are infringed upon. To further aid practical understanding, certain forms of legal interests will be discussed;

#### 2.2.1. Leases

A lease is a contract outlining the terms under which one party agrees to rent an asset—in this case, property owned by another party. It guarantees the lessee, also known as the tenant, use of the property and guarantees the lessor (the property owner or landlord) regular payments for a specified period in exchange.<sup>8</sup>

#### 2.2.2. Easements

An easement is a real estate concept that defines a scenario in which one party uses the property of another party, where a fee is paid to the owner of the property in return for the right of easement. Easements are often purchased by public utility companies for the right to erect telephone poles or run pipes either above or beneath private property. However, while fees are paid to the property owner, easements can negatively affect property values in that unsightly power lines, for example, can lower the visual appeal of a piece of land.<sup>9</sup>

#### 2.2.3. Right of Entry Under A Lease

is also known as "right of re-entry" or "forfeiture clause", is a provision in a lease agreement that allows the landlord to enter the leased premises and take possession of them in certain circumstances such as; Non-payment of rent by tenant, Breach of the lease covenants, Insolvency or bankruptcy of the tenant. It is also worthy to note the condition that the landlord must give the tenant notice of intention to exercise the right of entry. See the case of *Central London Commercial Estates Ltd v Kato Kagaku Co Ltd*.<sup>12</sup>

#### 2.2.4. Rent Charges

A rent charge is a legal arrangement where a landowner is required

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to make regular payments, normally annual, to a third party. That third party is the rentcharge owner, who typically has no other interest in the property. Rentcharges are a historical concept where landowners would sell their land to developers at a reduced price in exchange for a regular income from the new homeowners, known as the rentcharge payer.

### 2.2.5. Equitable Rights/Interests

Equitable Interests are those rights over the property, which were recognized and enforced by the Court of Chancery, but which were not valid at Common Law. They may be grouped into two classes; (i) those modeled on Common Law rights (ii) those invented by Equity independently.

In the first category come beneficial interests in trusts. Any property, real or personal property, may be held on trust, the trustee having the legal estate and the beneficiaries having equitable interests [2]. The equitable interests may be said to be modeled on Common Law rights in that Equity adopted the Common Law doctrine of estates, so that the beneficial interests may be estates in fee simple, in tail or for life. Thus, if D property to T in trust for Z for life, remainder to B in tail, remainder to C in fee simple. Z, B and C all have equitable interests, whilst T has the legal estate. In such a case before 1873, the Common Law did not recognize the interests of Z, B, and C, whereas Equity regarded Z, B and C as the real owners, the trustee merely a custodian of the property for them. Now, since the Judicature Acts (1873-1875), the equity interests are enforceable in any court.

In the second category come a variety of interests which had no equivalent at Common Law, either (a) because they were invalid at Common Law for lack of formality. To aid practical understanding, certain terms will be briefly discussed;

### 2.2.6. Restrictive Covenant

A restrictive covenant in equity is a private agreement, usually found in a deed or lease that limits the use or occupancy of real property. It can specify things like lot sizes, building lines, architectural styles, and the uses to which the property may be put. Some restrictive covenants, such as race-based restrictions on transfers, are unenforceable but do not necessarily void the deed. This type of covenant is also known as an equitable easement or equitable servitude. For example, a developer may include a restrictive covenant in the deed for a new housing development that prohibits homeowners from painting their houses bright colors or parking commercial vehicles in their driveways. These restrictions are meant to maintain a certain aesthetic and preserve property values.

**2.2.7. Constructive Trust:** is an equitable remedy imposed by a court to benefit a party that has been wrongfully deprived of its rights due to either a person obtaining or holding a legal property right which they should not possess due to unjust enrichment or interference, or due to a breach of fiduciary duty. For example, Ade stole \$5,000 from Ahmed and used that money to buy a used car. Ahmed understandably is upset and sues Ade for the money

and the judge agrees with Ahmed. The used car can be placed in a constructive trust so that Ade is no longer its true owner.

**2.2.8. Licenses by Estoppel:** Is a type of license that arises from the principles of estoppel, which is a legal doctrine that prevents a person from denying or asserting something that is contrary to what they have previously stated or done. For example, where a company A uses a trademark in reliance of the B's representation (Trademark Owner) that the company has permission to do so. See the case of Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd<sup>10</sup>

**2.2.9. Life Interest Trust:** is a form of trust which is usually established under a will whereby the settlor names a beneficiary who will receive a benefit from the trust for their lifetime. This person is known as the life tenant. The life tenant can enjoy the use of trust property or receive an income from the trust, but does not have a right to the underlying capital. Following the life tenant's death, or earlier if they give up their rights to the trust during their lifetime, one or more beneficiaries who will become absolutely entitled to the trust assets after the life tenant's death, or on the occurrence of the specified event. These beneficiaries are referred to as 'remainder-men'. An example of where a life interest trust is useful is where a couple live in a house which only one owns. Both have children from a previous relationship and the person who owns the house wishes to give the house to their children, not the children of their partner. However, in this circumstance the person who owns the house does not want to leave their partner without somewhere to live on their death. If a life interest trust is created, the owner of the house would name their partner as the life tenant and their own children as remainder-men. Therefore, the partner could live in the house for the rest of their life but the house would ultimately pass to the owner's children once the partner passes away.

## 3. Intersection of Legal Interests and Equitable Interests

As has been stated above, certain equitable principles are modeled against Common Law rights, This is in tandem with the maxim "Equity follows the law" which emphasizes that Equity only came to supplement the common law and though it is underscored that most equitable principles would be meaningless if divorced from the rules of Common Law. In relation to Legal and Equitable Interest in property though both represent a sense of ownership in the property; they are quite distinct from one another. Legal Interest is when a person has the interest or ownership in the asset and can legally enforce these rights whilst Equitable interest is when a person enjoys use of the land without legally owning the asset.

The general principle is that legal estate or interest is valid against all the world any person who subsequently acquires a legal or equitable interest in that same property takes his interest as subject to the prior owner's legal interest, whether he has notice of the interest or not. For clear understanding, If B is the owner of Mikky, X has a right of way (a legal easement) over Mikky. B later sells Mikky to C. Here, C will take Mikky subject to the legal interest

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of X, whether or not he was aware of the existence of X's legal interest when he purchased the property.

However, under Equitable Interest, If X has an equitable Interest over Mikky and B, the owner subsequently sells or conveys the property to C, who has no notice of X's equitable interest. X's equitable interest will be invalid against C. This is the same result when a trustee breaches a trust by selling the trust property to a bonafide purchaser for value without notice of the trust (the latter will acquire the legal estate free from the equitable interest of the beneficiaries [3]. This position is properly encompasses as follows "A legal estate in property is enforceable against the whole world. An equitable interest in property is enforceable against the whole world except a purchaser for value of the legal estate in the property in question, provided that, when the purchaser acquired the legal estate, he had no notice, either actual, constructive or imputed of the equitable interest."

#### **4. Equitable Maxim: Equity Acts "In Personam"**

A characteristic feature of the Court of Chancery was that, its decrees were directed against the defendant personally to refrain from doing an act<sup>11</sup>, hence the maxim "Equity acts in Personam". In equity, if the defendant failed or refused to comply with an equitable decree, all that the Chancellor could do was to order the imprisonment of the defendant for contempt. The Chancery had no power to deprive the defendant of his property, because courts of equity have always operated on 'conscience' and not on subject-matter in dispute. In this manner, equitable decree of specific performance would operate only upon the person of the defendant and not upon the property that was the subject-matter in dispute. For example, where in an equitable action for specific performance of contract for the sale of land, the defendant was ordered to convey the piece of land to the plaintiff, and he refused to comply with the order, the Chancery would proceed to imprison the defendant for contempt. The Chancery would not by itself execute the conveyance. A court of Equity will in certain cases, exercise its jurisdiction in respect of matters affecting foreign land or land situated outside its jurisdiction.

The basis for the exercise of this jurisdiction is to be found in the maxim 'Equity acts in personam'. See *Penn v. Baltimore*<sup>12</sup> Specific performance was decreed in respect of articles executed in England concerning boundaries of two provinces in America, because 'the conscience of the party was bound by this agreement; and being within the jurisdiction of the court, which acts in personam the court may properly decree it as an agreement' [4]. The relevant equitable decree is enforceable against the person of the defendant who must be within the jurisdiction of the court. In the case of *British Bata Shoe Co. v. Melikan*<sup>13</sup> that an order of specific performance of an agreement to assign a lease could be granted by a Lagos High Court with respect to a land in Aba in the former Eastern Nigeria, outside the jurisdiction of the Court, because the defendant was resident within the jurisdiction of the Court.

The quintessence of this maxim is also manifest in *Ayinule v Abimbola*<sup>17</sup> where a business transaction in Ghana was restrained by a Court in Nigeria, because the conduct of the business was considered a threat to the business interest of the plaintiff, and the defendant lived in Nigeria. The issue canvassed at the trial was whether the Lagos High Court had jurisdiction to restrain the defendant within its jurisdiction from performing an act outside its jurisdiction. The question was answered in the affirmative by Onyeama J (as he then was) thus; "An order of injunction is directed to the person to be restrained and it is an order in personam. It follows from this that if the person to be restrained is within jurisdiction and amenable to the processes of the court, an injunction may be ordered regardless of the locality of the act to be done."

#### **5. Equity Acts in Rem**

The traditional conception is that an equitable decree is directed against the person and that it only binds the person to obedience, it does not operate upon the subject matter in dispute. See *J.R v. M.P.*<sup>14</sup> From this standpoint, equitable rights are said to be rights in personam. This proposition may not be challenged in as much as the methods of enforcement of equitable decrees are not to be related to the principal or essential objects of the decrees. However, subsequent developments, judicial and statutory, affecting equity jurisdiction has enlarged the functional significance of the maxim "Equity acts in personam."The merging of the Courts by the Judicature Act, and the development of Trust paved way for equity to acquire the characteristic of 'acting "in rem"'. In order that equitable decrees should not be rendered illusory, the Chancery introduced various equitable writs, the principal object of which was to get at the specific property, that is, the subject matter in dispute. These include equitable instruments such as;

##### **5.1. Writ of Assistance**

Writ of Assistance empowered the sheriff to put the plaintiff into possession of the subject matter in dispute. See *Vanlore v. Lidall* (1624). In a situation where the decree were for land, and the party remained obstinate in prison, the court granted an injunction for yielding up possession to the party for whom the decree was made. If this were disobeyed, the court granted a commission to justices of the peace to put the party in possession; and in case of need, a writ of assistance was awarded, directing the plaintiff to put the party in possession, and to apprehend the contemners of the court; so that though the court could not bind the right it secured the possession.<sup>15</sup> At that stage, equitable rights could not be said to be merely rights in personam for the real object of the writs of assistance was to deprive the defendant of the possession of a specific res, for the benefit of the plaintiff.<sup>16</sup>

##### **5.2. Writ of Sequestration**

Where a defendant, who had been committed to prison for his refusal to comply with an equitable decree continued to be recalcitrant, the Court of Chancery would issue a writ of sequestration whereby a sequestrator would be appointed to take possession of the defendant's property pending the time the defendant would comply with the terms of the decree. It is not certain whether the

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purchaser under the sale by the sequestrators got title. Originally the Chancellor could not act in rem in the sense of passing the legal title to property of any kind; but, in the development of our judicial system, he asserted successfully the power to do this in the case of chattels, by means of a sale under a writ of sequestration.

Even if this is denied, it by no means follows that equity acts only in personam. If we recall that in personam means in reference to procedure, nothing but bringing pressure to bear upon the defendant's physical person, it is clear that equity has done something which goes far beyond that. It has given the purchaser from the sequestrator: (1) full 'equitable title' to the chattels; (2) possession of the chattels; (3) the right to use all the powers of the court of equity to protect the possession and 'equitable title'. As a consequence of the possession, the purchaser thus becomes, according to the common law, owner as against the entire world except the defendant. On the other hand, the plaintiff having received money, has, and may of course transfer, an indefeasible title to it, and is a swell off as the judgment creditor in the legal action.'

It should further be noted that the inadequate or limited power of a court of equity to transfer property through its writs of assistance and sequestration can be seen to have been remedied by statutory provisions. Making relevant examples such as section 14 Judicature Act 1884; section 31 Trustee Act 1893. The extended powers are both vesting and appointive. Section 31 of the Trustee Act, 1893 empowered the court to make a vesting order in respect of the property in dispute. The effect of a vesting order is the transfer of the property from one party to the other [5]. Where a vesting order could be made, the court may, if it is more convenient, appoint a person to execute conveyance, contract or other instruments on behalf of the party who had refused to comply with the order.

### 5.3. Foreclosure Order

Whenever it is proper and equitable, a court of equity will decree a strict foreclosure of a mortgagor's equity of redemption in favour of the mortgagee.<sup>17</sup> Making reference to the case of *Toller v. Carteret*<sup>22</sup>, the Court of Chancery decreed foreclosure of an equity of redemption to land situated outside jurisdiction on the ground that equity acts in personam, and since the defendant was properly served within the jurisdiction, the court had jurisdiction to entertain the action [6]. In view of the full effect of this decision, can it truly be said that equity acts in personam in decreeing a strict foreclosure of an equity of redemption? In a bid to answer this question the words of the defence counsel in *Paget v. Ede*<sup>18</sup>, "We dissent from the proposition that a foreclosure decree is merely a personal decree. In as much as it deprives the mortgagor of his estate, and operates to vest the estate, in the mortgagee, it is a direct proceeding in rem. It is a decree in personam in form only, the gist and essence being in the consequences, which are, that if the mortgagor do not pay, the estate will be taken out of him and transferred to the mortgagee, and his equity of redemption are wholly inconsistent with its being a mere personal right."

### 6. Analysis of The Assertion "Equity Is A Right in Personam Not A Right in Rem

The assertion that equity is a right in personam and not a right in rem is borne from the equitable maxim "equity acts in personam" meaning Equity acts against the person. As has been connoted, the traditional view was that in property matters, equity could only act against the person or make judgment against the conscience of the person and not the res (which referred to the property in question). This view was re-emphasized through a discussion on the traditional means through which equity enforced judgments which was through reprimanding the person until he obeyed the decree in question. However, subsequently it was brought to limelight that over the years, equity created other means through which judgments could be enforced which indicated that the means of enforcement acted against the property of the person rather than the person.

These forms of judgment were namely; writ of assistance, writ of sequestration, foreclosure order etc. under these forms of judgment, equity enforced the judgment against the property rather than the individual or person. It would therefore seem that equity started acting in rem, and that the maxim "Equity acts in Personam" has lost a greater part of its earlier use and significance. Where in then lies the necessity for the continual study and existence of this maxim? Which forms the basis of the assertion that Equity is a right in personam and not in rem? These questions are properly answered through equity's sustenance of its characteristic to make orders concerning property outside its jurisdiction; Under common law where the property in issue is outside the Jurisdiction of the Court, the orders of the common law Court concerning the property cannot be enforced even when the defendant lives within the jurisdiction of the Court.

Equity did not suffer this judicial restraint because its orders and decrees were directed to the person. Provided that the defendant was within the jurisdiction of the Court, equity will not be constrained by the fact that the property in question is outside the jurisdiction of the Court. In *Ewing v Orr*<sup>19</sup> a man died while domiciled in Scotland [7]. The executors of his estate and the estate itself were all in England. It was held that the administration of his estate could begin in England, as equity acts in personam. In otherwords, where executors live within jurisdiction, the Court could, and can still decree the administration of assets abroad.

At this juncture, it would be discuss the controversial point whether the beneficiary's right under a trust is a right in personam or a right in rem.

Certainly, it seems more than a right in persona, since the beneficiary may only sue the trustee personally to recover the trust property or its value, but may also trace the property and recover it or its proceeds from any other person into whose hands it has come [8]. This is referred to as the "right to trace" thus resembling a right in rem, attaching itself to the property, However, because the beneficiary has no right to trace against a bonafide purchaser of the property without notice of the trust, his interest cannot be

said to a full right in rem (unlike a legal interest). It has thus been suggested by many legal scholars and writers that these equitable rights are hybrids, being technically rights in personam but bearing more resemblance to rights in rem.

## 7. Conclusion

Equity through its equitable jurisdictions put a gloss to the rigidity of the common law. With the Maxims of equity as a backbone, equity provided remedies where the common law did not and adequate remedies where the legal remedies were inadequate. In all this, equity still realized that it was not a self-sufficient system, and in developing new rules and remedies to meet new situations. The maxims of equity have played a vital role in the development of equity. The maxim 'Equity acts in Personam' presented its sterling properties even after it seemed it had lost its usefulness. This discussion examined the use of this maxim in its traditional use and its advanced use after its acquisition of the characteristic of acting in rem. Though it is properly noted that the assertion that equity is applied against the person alone and not the property has been altered greatly, it cannot be overlooked that the view that equity acts against the person still serves a viable tool especially in checkmating a situation in which decrees are made as regards property outside the jurisdiction of the court so far as the person/individual is within the jurisdiction of the court. The maxim

continues to be the basis for equity to attain judicial feats where the law has failed. Equity is still very much subject to growth and change in many instances, the courts have widened the frontiers of equity in order that justice may be done.

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