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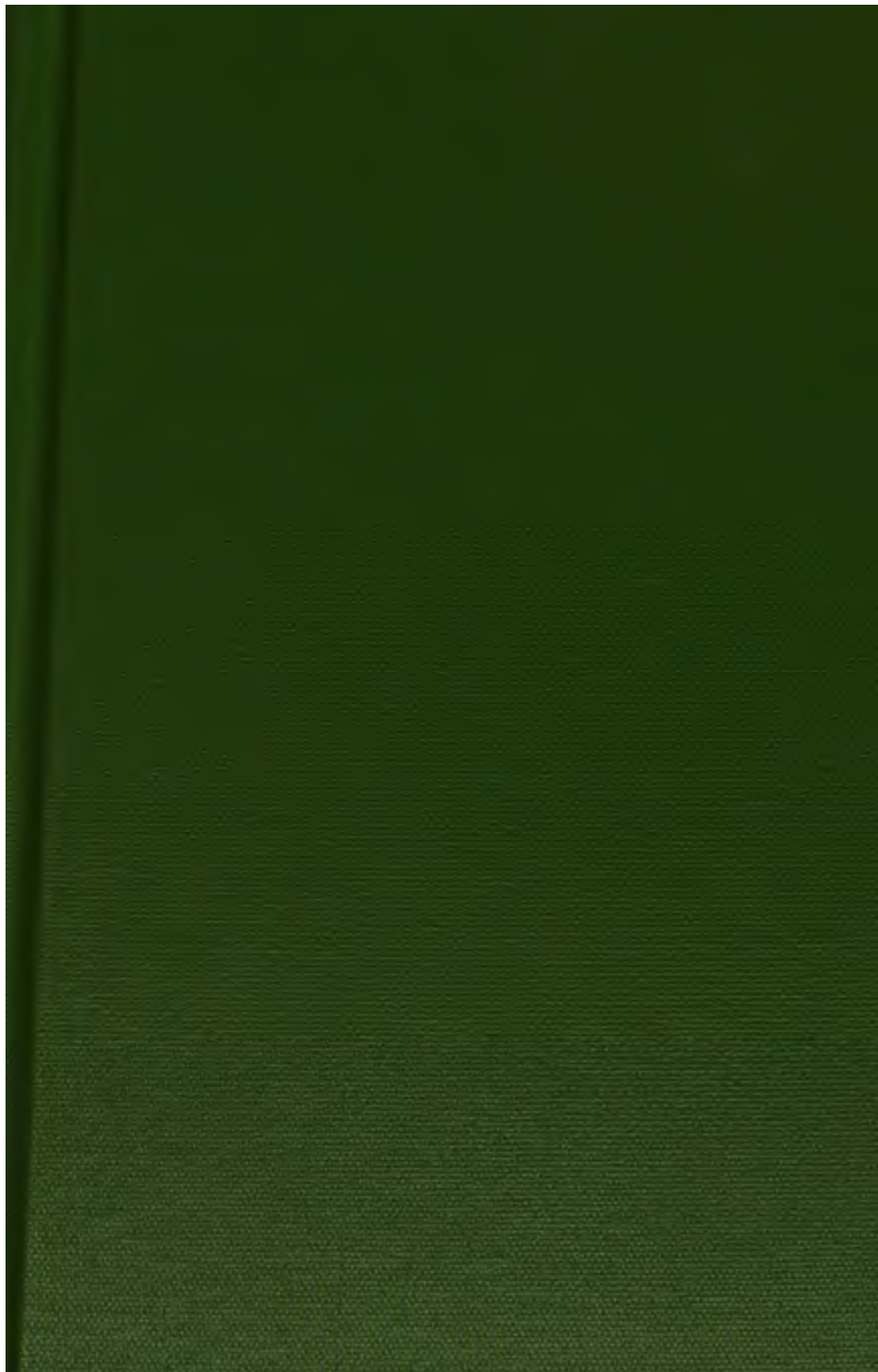
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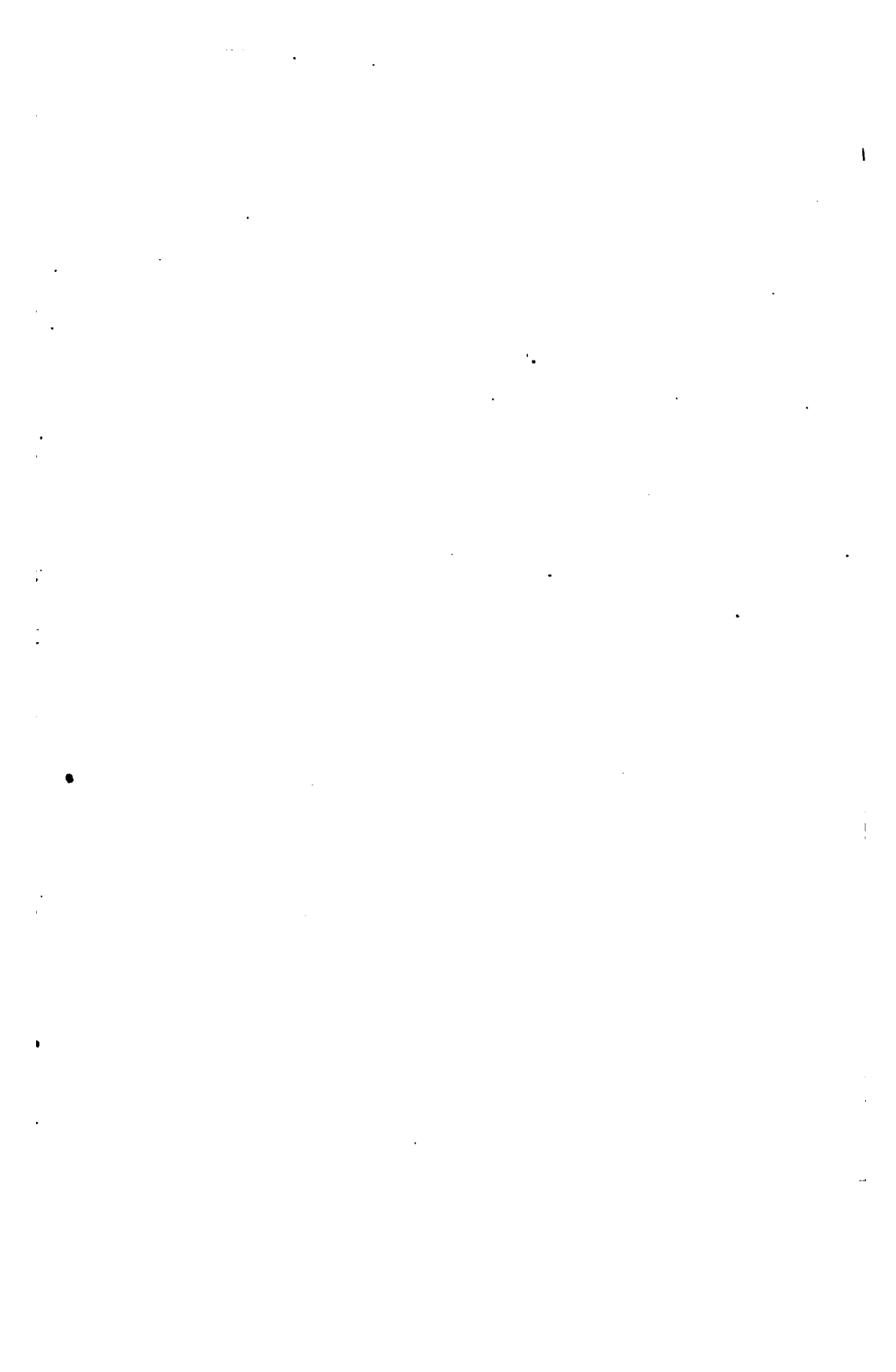
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HANDBOOK

OF

EQUITY JURISPRUDENCE

BY  
NORMAN FETTER

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WEST PUBLISHING CO.  
1895

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## PREFACE.

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The system of equity jurisprudence, created by the English chancellors, and developed by English and American courts of equity, will always be a fascinating subject of study for the lawyer. It has its roots in social conditions which have long since passed away,—when the clergy were supreme in the administration of secular as well as of spiritual affairs. Down to the time of the Reformation, one hundred and sixty prelates, in an almost unbroken succession, were elevated to the office of lord high chancellor of England. In influence and authority, political as well as judicial, they stood without a rival, save the king. Enjoying an almost complete immunity from secular control, and intrusted even with the nomination of the common-law judges, it is not strange that these dignified ecclesiastics should have succeeded in establishing a court, constituted in effect of one man, the lord chancellor, having for its object the correction of the common law, though at the very time there existed a legislature, consisting of the king, lords, and commons, charged with the duty of amending the law, and securing its due administration.<sup>1</sup>

The personal conscience of the chancellor, and the principles of morality as declared in the Bible, supplemented by the rules of the Roman law, constituted the primitive equity jurisprudence as administered by the ecclesiastical chancellors. No reports of their decisions ever existed; and but few of them—and these with perhaps not altogether friendly motives—are preserved in the Year Books. One of them is here quoted to show the wide gulf which separates the modes of thought and reasoning of the ecclesiastical chancellors from those of their modern successors. Lord Chancellor, Archbishop Morton, is reported to have delivered himself as follows concerning an executor who had wasted the assets of an estate: "I know that the law is or ought to be according to the law of God; and the

<sup>1</sup> 1 Spence, Eq. 355, 356.



law of God is that an executor who is evilly disposed shall not expend all the goods; and this I know that if he do so, and do not make amends if he can, he will be damned in hell.”<sup>1</sup>

With the advent of the lay chancellors, learned in the common law, and fully alive to the fact that uncertainty of the law is the greatest obstacle to the due administration of justice, there was developed a practically new system of equity jurisprudence, with principles as fixed and as definite as those of the common law itself.

To state clearly these principles as they now obtain, with their proper qualifications and limitations, to sketch their development whenever necessary to their comprehension, to illustrate their application by brief statements of decided cases, and to clothe the whole in a garb which will attract, rather than repel, the student, have been the objects in view during the composition of this book. That the performance falls far short of these ideals is apparent from even a cursory examination of the following pages.

In the preparation of the book, the researches and labors of others have been freely drawn upon. Among the books that have been specially helpful are Smith's Principles of Equity, Snell's Principles of Equity, Haynes' Outlines of Equity, and Underhill's Concise Guide to Equity,—all English works designed principally for students' use, Kerley's History of Equity, an historical sketch published in England in 1890, and Spence's Equity, have been my chief guides as to historical matters touching the introduction and development of the leading principles. The American works of Story, Pomeroy, and Beach have been freely consulted; and so have the standard text-books on special topics, such as Lewin and Perry on Trusts, Kerr and High on Injunctions, Jones on Mortgages, and Kerr on Fraud and Mis-  
take.

N. F.

St. Paul, Jan. 18, 1895.

<sup>1</sup>1 Spence, Eq. 578; Year Books, 4 Hen. VII. fol. 5.

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# HANDBOOK OF EQUITY JURISPRUDENCE.

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## CHAPTER I.

### NATURE AND DEFINITION OF EQUITY.

#### EQUITY DEFINED.

1. As understood in English and American jurisprudence, equity may be defined to be that portion of natural justice, susceptible of judicial enforcement, which was either not recognized at all by the common law, or only inadequately enforced by reason of its cramped procedure.<sup>1</sup>

In its largest sense, equity is synonymous with natural justice. But it was early found that there are many cases against natural justice which cannot be conveniently corrected by any human court,

<sup>1</sup> See Maitland, *Justice & Police*, 38, 39; Snell, *Eq.* p. 2; Haynes, *Eq.* p. 7. Pomeroy (*Eq. Jur.* § 67) defines equity as "those doctrines and rules, primary and remedial rights and remedies, which the common law, by reason of its fixed methods and remedial system, was either unable or inadequate, in the regular course of its development, to establish, enforce, and confer, and which it therefore either tacitly omitted or openly rejected." Bigelow (*Eq.* p. 9) says: "The jurisdiction of courts of chancery now extends to all civil cases, proper in good conscience and honesty for relief or aid, as to which the procedure of the common-law courts is unsuited to give an adequate remedy, or as to which the common-law courts, when able to extend their aid, have refused to do so." Judge Phelps, of Baltimore, Md., defines equity as follows: "By juridical equity is meant a systematic appeal for relief from a cramped administration of defective laws to the disciplined conscience of a competent magistrate, applying to the special circumstances of defined and limited classes of civil cases the principles of natural justice, controlled in a measure as well by considerations of public policy as by established precedent, and by positive provisions of law." Phelps, *Jurid. Eq.* p. 102. Other writers, following the lead of Justice Story, have defined equity by reference to the court in which it was anciently administered. Thus, Bispham (*Eq.* p. 1) states that equity

and which must be left to the conscience of the party offending. The courts of no civilized country can or do undertake to enforce the various obligations of gratitude, kindness, or charity;<sup>2</sup> nor will they exercise their powers for the enforcement of right or prevention of wrong in the abstract.<sup>3</sup> Even positive contract obligations barred by the statute of limitations, and promises not founded on a valid consideration, are not enforceable either at law or in equity.<sup>4</sup>

Again, a large portion of natural equity or justice is enforced in the courts of law, and is excluded from the domain of equity jurisprudence, technically so called. It is no exaggeration to say that the principles of the common law are or were originally grounded on reason and justice.<sup>5</sup> Certainly, in applying those principles to new conditions of society in this country, courts of law have been avowedly controlled by considerations based on the welfare of the community, and by reasons founded on the actual facts of life. They have therefore enforced only such portions of the common law of England as are suited to our changed conditions;<sup>6</sup> and perhaps it

"is that system of justice which was administered by the high court of chancery in England, in the exercise of its extraordinary jurisdiction." See, also, Story, Eq. Jur. (13th Ed.) § 25.

<sup>2</sup> Rees v. City of Watertown, 19 Wall. 121; Green v. Lyon, 21 Wkly. Rep. 830.

<sup>3</sup> Goodrich v. Moore, 2 Minn. 61 (Gil. 49).

<sup>4</sup> Forster v. Ulman, 64 Md. 526, 3 Atl. 113; Dunphy v. Ryan, 116 U. S. 498, 6 Sup. Ct. 486 (statute of frauds is as binding on courts of equity as on courts of law, except when it is being used as an instrument of fraud). See, post, 43, as to statute of limitations.

<sup>5</sup> Thus, Blackstone says: "The [common] law is the perfection of reason; it always intends to conform thereto; and what is not reason is not law." He then goes on to say: "Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded." 1 Bl. Comm. p. 70. In *Hurtado v. California*, 110 U. S. 530, 4 Sup. Ct. 111, 292, Justice Mathews says: "The flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."

<sup>6</sup> Mr. Austin Abbott, in a paper read before the American Bar Association at its meeting in 1893, says that American jurisprudence "is not the jurisprudence of a system of commands; it is the jurisprudence of common welfare, wrought out by free reasoning upon the actual facts of life. American jurisprudence, as actually administered to-day, is the jurisprudence of the common-

would not be going too far to say that they have also in some respects created a new American common law, which is suited to our conditions.<sup>7</sup>

The question, then, naturally arises, why did not courts of law afford relief in all cases judicially cognizable? This is a matter of history, rather than of principle. Most of the modern writers on equity jurisprudence find in the inflexible, inelastic, and cramped procedure of the common-law courts the chief cause for their inability to bring within their jurisdiction all cases requiring judicial interference.<sup>8</sup> It is true that an action at common law could be commenced only by virtue of the king's writ, issued out of chancery, an office over which the chancellor presided; that, in the course of time, every species of civil wrong cognizable at common law had its particular writ; and that, unless the wrong could be referred to an appropriate writ, the party was without a remedy at law. To remedy this evil, parliament, in the reign of Edward I., passed a statute (13 Edw. I. St. 1, c. 24) having for its object the adaptation of

wealth. \* \* \* The great mass of the business of our courts to-day turns upon questions not wholly foreclosed by the history of the past. The question, what is the traditional law that has come down to us? is still asked; but another question is always open, viz. does our situation to-day suggest the wisdom of a deviation from that traditional law? The keynote of this good change was struck when our courts determined that, notwithstanding the unqualified adoption of the English common law by our constitutions, they would apply and enforce only so much as is suited to our condition. From that time forward it has always been for a court of last resort a legitimate inquiry, what rule on the subject under consideration is suitable to the condition of our people? and a legitimate course to disregard common-law rules whenever unsuitable, and to consult the common welfare of the people, as sound premises for the decision of any question not foreclosed by statutory authority." *Am. Law Rev.* 1893. pp. 803, 804.

<sup>7</sup> Thus, by the common law of England only such streams as are subject to the ebb and flow of the tide are deemed navigable waters; by the American common law, as announced by the courts, all waters capable of being used in their natural state for the purposes of commerce or trade, or even pleasure, are deemed navigable.

<sup>8</sup> Haynes, *Eq.* pp. 8-15. Professor Pomeroy ascribes the necessity for a separate equity jurisprudence to the "rigid character, external and internal, which the common law assumed after it began to be embodied in judicial precedents, and to the unreasoning respect shown by the judges for their decisions merely as precedents." 1 *Pom. Eq. Jur.* § 10.

the old forms of writs "to like cases requiring like remedy," but not covered by the existing writs. Under this statute, during the course of centuries, the judges, by taking certain of the old writs as starting points, and accumulating successive variations on them, added great areas to the common law, and many of its most famous actions, such as *assumpsit* and *trover* and *conversion*, were developed in this way.

It is often alleged that the common-law judges obstinately refused to avail themselves of the opportunity afforded them by this statute to extend their jurisdiction to all civil cases requiring judicial redress. This allegation, however, ignores one of the main springs of human action,—the acquisition of power and its concomitant emoluments; and it also assumes that the common-law courts were intended to supply a remedy for the violation of every right recognized by the municipal law.

In the earlier history of England, the compensation of the common-law judges depended on the fees paid into their courts by suitors, and all human experience is contradicted by the assumption that they obstinately and perversely thrust from themselves new business legitimately falling within their jurisdiction. That they had no such scruples is attested by the facts that, by means of fictitious allegations in pleadings, the court of exchequer and the court of king's bench raided the jurisdiction of the court of common pleas;<sup>9</sup> and that, by similar means, all three of the common-law courts joined in a raid on the jurisdiction of the court of admiralty.<sup>10</sup> The truth seems to be that the common-law courts were never intended to offer a remedy for every civil wrong. It is certain that,

<sup>9</sup> The exchequer had jurisdiction of civil cases only where plaintiff was a debtor of the king, and the defendant had done a wrong or injury by which plaintiff was less able to pay the king his debt. Whenever the declaration contained such an allegation, defendant was not permitted to deny its truth, and so the court was open to all the nation equally. 3 Bl. Comm. 45, 46. The court of king's bench assumed jurisdiction of all civil cases on the fictitious allegation that defendant was an officer of this court, or in custody of its marshal or prison keeper. *Id.* 42.

<sup>10</sup> Courts of admiralty originally had jurisdiction of all matters occurring on the high seas; but the courts of common law would assume jurisdiction of actions involving contracts made on the high seas whenever plaintiff fictitiously alleged that they were made on land. 3 Bl. Comm. 107.

even in the days of their infancy, their work was supplemented by the ecclesiastical courts, which exercised jurisdiction, not only in cases of marriage and testament, but also, down to the time of Edward I., in cases where the faith of the party was pledged and broken. Then, too, the jurisdiction of the common-law courts was supplemented by the judicial power of the king and his council. The power to personally decide disputes between their subjects would probably have been the last of the prerogatives of the early Norman kings that would ever have been called in question. Not only did they decide causes without reference to the courts at all, but they also entertained appeals from the decisions of these tribunals, and sometimes they directly interfered with causes pending therein.<sup>11</sup> In the course of time, when foreign wars and domestic politics came to occupy the attention of the later Plantagenets, these judicial functions were delegated to their councils,—a body of permanent salaried officials, the most important of whom was the chancellor, who presided in it and directed its business. Here was the origin of the chancellor's equitable jurisdiction, for petitions craving the aid of the king and his council were continually referred to the chancellor for consideration, until the reference became so much a matter of course that ultimately petitions were addressed directly to him in the first instance.

Down to the fall of Cardinal Wolsey, in 1529, the office of chancellor, with a few unimportant exceptions, had been filled by the great clerics of the kingdom, who were also in most cases at the head of the chief ecclesiastical court of the realm. It was only natural, therefore, when the chancellor's judicial powers in lay matters became established, that he should adopt a procedure modeled after that of the ecclesiastical courts. Since the ecclesiastical courts had no jurisdiction over property, their decrees were enforced by sentences of excommunication; and, if the party proved contumacious, a writ de excommunicato capiendo was issued, which

<sup>11</sup> In a History of Equity, written in 1890, by D. M. Kerley, on chapters 1 and 2 of which work the present sketch is largely based, are given many instances of the exercise of judicial functions by the king. Parliament also assumed the power of deciding causes, and an instance is of record where a dispute occurred between parliament and the judges upon a point of law. Introduction to Year Book, 13 & 14 Edw. III., Pike, p. xxxvii.

required his arrest and imprisonment by the secular authorities. Hence the chancellor likewise enforced his decrees and orders by process in personam, and, as a rule, he disclaimed jurisdiction in rem. Here was the root of the peculiar equitable remedies, such as injunction and specific performance; for, by enforcing his decrees against the person, the chancellor had the power of compelling the party to do or refrain from doing what was therein commanded. The common-law courts, on the other hand, whose judgments were enforced primarily out of the property of the unsuccessful litigant, were powerless in this class of cases. Hence, in the development of its jurisprudence, equity assumed jurisdiction in many cases where the common law recognized a right, but for the violation of which it furnished no adequate remedy.

But, as has been shown in the foregoing sketch, the origin of the equity system of jurisprudence lies not so much in the inadequacy of the remedies and the procedure of the common-law courts as in the fact that matters of "grace and conscience," as they were called in the early days, were never considered as falling within the scope of the common-law jurisdiction. The equitable jurisdiction over trusts, for instance, does certainly not rest on defects in the remedies or procedure of the common law.

The early chancellors, as has already been observed, were ecclesiastical dignitaries, and they possessed immense political power. Next to the king, my lord chancellor was undoubtedly the greatest man in the kingdom. For many centuries their equitable jurisdiction remained untrammelled by any definite rule. In the language of Blackstone,<sup>12</sup> the decrees of the court of chancery down to the reign of Elizabeth were "rather in the nature of awards formed on the sudden pro re nata, with more probity of intention than knowledge of the subject, founded on no settled principles, as being never designed and therefore never used for precedents."<sup>13</sup> But,

<sup>12</sup> 3 Bl. Comm. 3.

<sup>13</sup> This conception as to the power of the chancellor is shown by the definitions or descriptions of equity given by the older text writers. Thus in Fonblanque on Equity it is said (book 1, c. 1, § 3): "So there will be a necessity of having recourse to natural principles, that what is wanting to the finite may be supplied out of that which is infinite. And this is properly what is called equity, in opposition to strict law. \* \* \* And thus in chancery every particular case stands upon its own particular circumstances; and, although

in the course of time, judicial equity became crystallized and defined; principles and doctrines were formulated which form the basis of all decisions; and courts of equity have, as regards these principles and doctrines, no more discretionary powers than courts of common law.<sup>14</sup> In fact, it may be said that, for a long time past, judicial equity has been as positive and well settled a body of rules as the common law itself.<sup>15</sup> This distinction is, however, to be kept in mind: "The rules of courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. \* \* \* [In many cases] we can name the chancellors who first invented them, and state the date when they were first introduced into equity jurisprudence, and therefore in cases of this kind the older precedents in equity are of very little value. The doctrines are progressive, refined, altered, and improved; and, if we want to know what the rules of equity are, we must look, of course, rather to the more modern than the more ancient cases."<sup>16</sup>

the common law will not decree against the general rule of law, yet chancery doth, so as the example introduce not a general mischief. Every matter, therefore, that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief here." To this stage of its development the famous criticism of equity by Selden well applies: "Equity is a roguish thing. For law we have a measure, and know what we trust to. Equity is according to the conscience of him that is chancellor; and, as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard for the measure we call a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the chancellor's conscience." Table talk, tit. "Equity."

<sup>14</sup> In *Gee v. Pritchard* (1818) 2 Swanst. 402, Lord Eldon said: "The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot."

<sup>15</sup> *Wright v. Ellison*, 1 Wall. 16, 22.

<sup>16</sup> *Jessel, M. R., in Re Hallett's Estate*, 13 Ch. Div. 696, 710.



## CHAPTER II.

### PRINCIPLES DEFINING AND LIMITING JURISDICTION.

2. No Jurisdiction over Crimes.
3. No Jurisdiction Where the Legal Remedy is Adequate.
4. Jurisdiction not Divested by Enlargement of Legal Remedy.
5. Jurisdiction Retained to Award Complete Relief.
6. Assumption of Jurisdiction to Prevent Multiplicity of Suits.

### NO JURISDICTION OVER CRIMES.

**2. A court of equity has no jurisdiction to prevent the commission or interfere with the prosecution of crimes, unless the power is conferred by express statute.**

**QUALIFICATION—Jurisdiction over an action for wrongful invasion of private property rights is not divested by the fact that the wrongful act is also a crime.**

The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of civil rights.<sup>1</sup> It has jurisdiction neither to prevent the commission of crimes,<sup>2</sup> nor to interfere with their prosecution,<sup>3</sup> pardon, or punishment. To

<sup>1</sup> As to the limitation of equitable jurisdiction to protection of property rights, see post, 310.

<sup>2</sup> Equity will not restrain the issuance of licenses to gamblers by officers of fair association, since gambling "is a violation of the Criminal Code, which affords ample means for its suppression." *Cope v. Fair Ass'n*, 99 Ill. 489. Injunction against violation of Sunday laws refused. *State v. Schweickardt*, 109 Mo. 496, 19 S. W. 47; *Sparhawk v. Railway Co.*, 54 Pa. St. 401. Unlicensed dramshop not abated. *State v. Uhrig*, 14 Mo. App. 413. See, also, *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217. It has also been held that in this country suit cannot be maintained in equity by the attorney general to enjoin a corporation from exercising powers in violation of its charter, but the remedy is at law by quo warranto. *Attorney General v. Tudor Ice Co.*, 104 Mass. 239; *Attorney General v. Utica Ice Co.*, 2 Johns. Ch. 371.

<sup>3</sup> One of the earliest reported cases on this subject is *Mayor, etc., of York v. Pilkington* (1742) 2 Atk. 302, where Lord Hardwicke laid down the general proposition that chancery has no restraining power over criminal prosecutions;

assume such a jurisdiction is to invade the domain of courts of common law, or of the executive or administrative department of the government.

In some of the states, however, jurisdiction has been conferred by statute on courts of equity to enforce criminal laws prohibiting the liquor traffic, by abating as nuisances, at the suit of the state or of private persons not specially damaged, the places where the liquor is sold; and it has been held that such statutes are not unconstitutional as depriving the citizen of his right to trial by jury.<sup>4</sup>

It is also well settled that an individual menaced in his property rights by the unlawful act of another is not precluded from suing in equity merely because the unlawful act is also a crime. It is only when the injury is general and public in its effects, and no private

but plaintiffs, having first brought suit in chancery to determine a right of fishery in the River Ouse, were ordered to discontinue, until the termination of the chancery suit, a criminal prosecution subsequently instituted by them against defendants for the same acts. In the following English cases the jurisdiction of a court of equity to restrain criminal prosecution is denied: *Montague v. Dudman*, 2 Ves. Sr. 396, 398; *Attorney General v. Cleaver*, 18 Ves. 218; *Turner v. Turner*, 15 Jur. 218; *Saull v. Browne*, 10 Ch. App. 64; *Kerr v. Corporation of Preston*, 6 Ch. Div. 463 (characterizing Lord Hardwicke's decision in the first case cited as doubtful). In the American courts the principle has been very generally upheld, and has been applied whether the prosecutions or arrests sought to be restrained arose under statutes of the state or under municipal ordinance. *West v. Mayor*, 10 Paige, 539; *Davis v. Society*, 75 N. Y. 362; *Tyler v. Hamiersley*, 44 Conn. 419, 422; *Stuart v. Board*, 83 Ill. 341; *Devron v. First Municipality*, 4 La. Ann. 11; *Moses v. Mayor*, 52 Ala. 198; *Gault v. Wallis*, 53 Ga. 675; *Phillips v. Mayor, etc.*, 61 Ga. 386; *Cohen v. Goldsboro Com'rs*, 77 N. C. 2; *Peirce Oil Co. v. City of Little Rock*, 39 Ark. 412; *Spink v. Francis*, 19 Fed. 670, 20 Fed. 567; *Suess v. Noble*, 31 Fed. 855; *In re Sawyer*, 124 U. S. 210, 8 Sup. Ct. 482; *Hemsley v. Myers*, 45 Fed. 283; *Crichton v. Dahmer*, 70 Miss. 602, 13 South. 237; *Chisholm v. Adams*, 71 Tex. 678, 10 S. W. 336; *Poyer v. Village of Desplaines*, 123 Ill. 111, 13 N. E. 819 (repeated prosecutions). In two cases decided by inferior courts of the state of New York, however, criminal prosecutions were restrained: *Wood v. City of Brooklyn*, 14 Barb. 425; *Manhattan Iron Works Co. v. French*, 12 Abb. N. C. 446.

<sup>4</sup> *Littleton v. Fritz*, 65 Iowa, 488, 22 N. W. 641; *Mugler v. Kansas*, 123 U. S. 623, 672, 8 Sup. Ct. 273; *Ellenbecker v. District Ct. of Plymouth Co.*, 134 U. S. 31, 10 Sup. Ct. 424; *State v. Saunders*, 66 N. H. 39, 25 Atl. 588; *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 53.

right is violated, in contradistinction to the rights of the rest of the public, that individuals are precluded from bringing suits.<sup>5</sup>

### ADEQUATE REMEDY AT LAW.

**3. Equity has no jurisdiction where there has always been a plain, adequate, and complete remedy at law.**

Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.<sup>6</sup> This principle has been observed, not perhaps from the earliest period of the recorded history of the English chancery court,<sup>7</sup> but certainly ever since equity jurisprudence has been reduced to a definite system.<sup>8</sup> Thus, courts of equity have steadily refused to entertain jurisdiction of actions for the recovery of land, since the legal remedy by ejectment is adequate;<sup>9</sup> and it has been held that the

<sup>5</sup> The fact that the accumulation of nitroglycerine within the corporate limits of a city is made a crime does not prevent a private citizen from having it enjoined, where, in case of an explosion, he would suffer an injury in person or property not sustained by the public in general. *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N. E. 50; *Greenfield Gas Co. v. People's Gas Co.*, 131 Ind. 590, 31 N. E. 61. So a threatened violation of an ordinance prohibiting the erection of wooden buildings within the fire limits of a city will be enjoined at suit of private persons, who would sustain irreparable injury, though the building would not be a nuisance per se. *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434. The fact that a nuisance is a crime, and punishable as such, does not deprive equity of its jurisdiction to restrain and abate by injunction. *Minke v. Hopeman*, 87 Ill. 450; *Blanc v. Murray*, 36 La. Ann. 162.

<sup>6</sup> *Hipp v. Babin*, 19 How. 271, 277; *Lewis v. Cocks*, 23 Wall. 466, 467; *Smyth v. New Orleans Canal & Banking Co.*, 141 U. S. 656, 12 Sup. Ct. 113; *Killian v. Ebbinghaus*, 110 U. S. 568, 573, 4 Sup. Ct. 232; *Porter v. Frenchman's Bay & Mt. D. Land & Water Co.*, 84 Me. 195, 24 Atl. 814; *Watson v. Ferrell*, 34 W. Va. 406, 12 S. E. 724; *McMillan v. Mason*, 71 Wis. 405, 37 N. W. 253; *Williams v. Haynes*, 78 Ga. 133; *Avery v. Empire Woolen Co.*, 82 N. Y. 582.

<sup>7</sup> *Lewis v. Cocks*, 23 Wall. 466, 467.

<sup>8</sup> See *Lord Tenham v. Herbert*, 2 Atk. 483.

<sup>9</sup> *Hipp v. Babin*, 19 How. 271; *Lewis v. Cocks*, 23 Wall. 466.

mere fact that damages for breach of contract cannot be ascertained with precision does not warrant a court of equity in issuing injunction and decreeing specific performance.<sup>10</sup>

But, to exclude the jurisdiction of equity, the remedy at law must be as practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity.<sup>11</sup> Thus, a vendee of land will be compelled in equity to pay the agreed price, though the vendor has also a remedy at law by action for breach of contract;<sup>12</sup> and equity will assume jurisdiction of an action involving long and complicated accounts, though there is also a remedy at law.<sup>13</sup>

An erroneous adjudication that the legal remedy is inadequate, and that the case is therefore of equitable cognizance, is not, however, necessarily void, within the meaning of the general rule that the judgment of a court not having jurisdiction of the subject-matter is an absolute nullity, and may be attacked collaterally.<sup>14</sup> Whenever a court has power to enter on an inquiry, its adjudication is binding on the parties, though it may be wrong.<sup>15</sup>

#### JURISDICTION NOT DIVESTED BY ENLARGEMENT OF LEGAL REMEDY.

#### 4. The jurisdiction of equity is not ousted by the enlargement of legal remedies by judicial construction; nor

<sup>10</sup> *Texas & P. Ry. Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846.

<sup>11</sup> *Tyler v. Savage*, 143 U. S. 79, 95, 12 Sup. Ct. 340; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 504; *Hipp v. Babin*, 19 How. 278; *Lewis v. Cocks*, 23 Wall. 470; *Board of Chosen Freeholders v. Newark City Nat. Bank*, 48 N. J. Eq. 51, 21 Atl. 185; *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979; *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461; *Godfrey v. White*, 60 Mich. 443, 27 N. W. 593; *Warner v. McMullin*, 131 Pa. St. 370, 18 Atl. 1056; *Nease v. Aetna Ins. Co.*, 32 W. Va. 283, 9 S. E. 233; *Darrah v. Boyce*, 62 Mich. 480, 29 N. W. 102; *Overmire v. Haworth*, 48 Minn. 372, 51 N. W. 121.

<sup>12</sup> *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979. But see *Holley v. Anness* (S. C.) 19 S. E. 646.

<sup>13</sup> *Warner v. McMullin*, 131 Pa. St. 370, 18 Atl. 1056. See, as to jurisdiction of equity over accounts, post, 247.

<sup>14</sup> *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 367, 9 Sup. Ct. 781; *Goodman v. Winter*, 64 Ala. 410, 432.

<sup>15</sup> *Van Fleet*, Coll. Attack, p. 82, § 61.

by legislative enactment, unless abrogated expressly or by fair interpretation.

Equity has constantly reacted on the common law, and the rigor of many of its ancient rules has been relaxed. Thus, equity originally assumed jurisdiction of actions on lost bonds or other instruments, because courts of law refused to assist plaintiff who could not make proof of the instrument. Afterwards the courts of law changed the rule, and permitted a man to declare on a lost bond. Lord Thurlow held that the equity jurisdiction over this class of actions was not thereby divested;<sup>16</sup> and Lord Eldon,<sup>17</sup> some years later, said: "This court will not suffer itself to be ousted of any part of its original jurisdiction because a court of law happens to fall in love with the same or a similar jurisdiction."

So it has been generally held that the statutory creation of a remedy at law in cases theretofore exclusively cognizable in equity does not destroy or abridge the equity jurisdiction, unless it is either expressly or by fair interpretation so provided. Thus, the ancient jurisdiction of equity over suits to charge the separate property of a married woman with her debts has been held not to be divested by a statute giving creditors the right to sue at law;<sup>18</sup> and a special statutory proceeding enabling a court to vacate its own judgments rendered at a previous term, for fraud practiced by the successful party, has been held not to exclude or limit the right of a party, by original action in equity, to impeach the judgment or enjoin its collection.<sup>19</sup>

<sup>16</sup> *Atkinson v. Leonard*, 3 Brown, Ch. 218, 224. See, to the same effect, *Toulmin v. Price*, 5 Ves. 235, 238; *Bromley v. Holland*, 7 Ves. 3; *East India Co. v. Boddam*, 9 Ves. 464, 466; *Reeves v. Morgan*, 48 N. J. Eq. 429, 21 Atl. 1040.

<sup>17</sup> *Eyre v. Everett*, 2 Russ. 381, 382. Equity jurisdiction not ousted in case of trust, though common-law courts now afford remedy by equitable action of assumpsit. *Varet v. New York Ins. Co.*, 7 Paige, 560, 24 Wend. 505. Cases of fraud, mistake, or accident, see *People v. Houghtaling*, 7 Cal. 348, 351; *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, 215. Suits by sureties, *Sally v. Elmore*, 2 Paige, 497, 499. See, also, *Schroeder v. Loeber*, 75 Md. 195, 23 Atl. 579, 24 Atl. 226; *Mayne v. Griswold*, 3 Sandf. 463; *White v. Meday*, 2 Edw. Ch. 486.

<sup>18</sup> *Thrasher v. Dolg*, 18 Fla. 809; *Rooney v. Michael*, 84 Ala. 585, 4 South. 421; *Phlipps v. Kelly*, 12 Or. 213, 6 Pac. 707.

<sup>19</sup> *Darst v. Phillips*, 41 Ohio St. 514. See, also, *Case v. Fishback*, 10 B. Mon.

While the foregoing is an accurate statement of the judicial theory, nevertheless it must be admitted that the practical result of the enlargement of the common-law remedies has been to reduce some of the ancient heads of equity jurisdiction to a state of "innocuous desuetude." Thus, discovery in aid of legal proceedings is no longer necessary, since parties have been rendered competent witnesses by statute; equitable actions to charge the separate property of a married woman are practically obsolete in states whose statutes place her on the footing of a feme sole so far as property rights are concerned; and an assignee of a legal chose in action, who may now sue at law in the name of his assignor in those states wherein he is not required to sue in his own name, would have no standing in equity, though anciently the court of chancery was the only tribunal which would protect his rights.<sup>20</sup>

#### RETENTION OF JURISDICTION TO AWARD COMPLETE RELIEF.

**5. Equity jurisdiction, having rightfully attached to a controversy, will be made effectual for the purpose of complete relief, though it may involve the adjudication of purely legal questions.**

"Where this court can determine the matter, it shall not be a handmaid to other courts, nor beget a suit to be ended elsewhere," is the graphic manner in which this principle was first expressed by Lord Nottingham.<sup>21</sup> It rests on the principle that equity prevents multiplicity of suits.<sup>22</sup>

40, 41; *King v. Payn*, 18 Ark. 583, 587, 588; *Payne v. Bullard*, 23 Miss. 83, 90; *Lane v. Marshall*, 1 Heisk. (Tenn.) 30, 34. Jurisdiction as to discovery not affected by statute authorizing examination of parties as witnesses in courts of law. *Cannon v. McNab*, 48 Ala. 99; *Shackelford v. Bankhead*, 72 Ala. 476; *Handley v. Heflin*, 84 Ala. 600, 4 South. 725. See, as to discovery, post, 318.

<sup>20</sup> 1 Pom. Eq. Jur. § 281.

<sup>21</sup> *Parker v. Dee*, 2 Ch. Cas. 200. For recent decisions announcing this principle, see *Valentine v. Richardt*, 126 N. Y. 272, 27 N. E. 255; *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274, 29 N. E. 315; *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 213, 21 N. E. 75.

<sup>22</sup> *Jesus College v. Bloom*, 3 Atk. 262, 263; *Turner v. Pierce*, 34 Wis. 658; *Eastman v. Savings Bank*, 58 N. H. 421; *McGean v. Railroad Co.*, 133 N. Y. 16, 30 N. E. 647.

To authorize the application of this principle, the party invoking it must prove facts bringing the case within the general jurisdiction of equity, or he must at least show that he brought the suit in good faith, supposing and having reasons to suppose himself entitled to equitable relief.<sup>23</sup> The court may then grant him both equitable and legal relief,<sup>24</sup> or it may grant him legal relief alone, if equitable relief is impracticable.<sup>25</sup>

Thus, on a bill for discovery in a matter involving purely legal questions, equity will retain jurisdiction for all purposes, provided plaintiff has no other means of proving his case;<sup>26</sup> where plaintiff makes out a case entitling him to an injunction against a nuisance, a court of equity will, as an incident to such relief, consider and settle the question of damages;<sup>27</sup> after reforming a contract, equity will award damages for its breach;<sup>28</sup> and relief by award of compensation has been decreed where specific performance of a contract has become impracticable.<sup>29</sup> The constitutional right to trial by jury is not infringed, in such cases, by award of legal relief.<sup>30</sup>

<sup>23</sup> *Milkman v. Ordway*, 106 Mass. 232; *Case v. Minot*, 158 Mass. 577, 33 N. E. 700.

<sup>24</sup> *Gormley v. Clark*, 134 U. S. 338, 349, 10 Sup. Ct. 554; *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053; *Virginia & A. M. & M. Co. v. Hale*, 93 Ala. 542, 9 South. 256; *Turner v. Pierce*, 34 Wis. 658.

<sup>25</sup> *Gleaton v. Gibson*, 29 S. C. 514, 7 S. E. 833; *Case v. Minot*, 158 Mass. 577, 33 N. E. 700; *Holland v. Anderson*, 38 Mo. 55; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532.

<sup>26</sup> *Virginia & A. M. & M. Co. v. Hale*, 93 Ala. 542, 9 South. 256; *Lyons v. Miller*, 6 Grat. 427, 438; *Russell v. Clark*, 7 Cranch, 69.

<sup>27</sup> *Fleischner v. Citizens' Real-Estate & Imp. Co. (Or.)* 35 Pac. 174; *Brickner Woolen Mills Co. v. Henry*, 73 Wis. 229, 40 N. W. 809; *Bassett v. Manufacturing Co.*, 43 N. H. 249; *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. 533; *Case v. Minot*, 158 Mass. 577, 33 N. E. 700.

<sup>28</sup> *State v. Hall (Miss.)* 13 South. 39; *Phoenix Ins. Co. v. Ryland*, 98 Md. 437, 16 Atl. 109.

<sup>29</sup> *Milkman v. Ordway*, 106 Mass. 232; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532; *Woodcock v. Bennett*, 1 Cow. 711; *Rankin v. Maxwell*, 2 A. K. Marsh. 488. Further illustrations: Action to rescind deed for breach of condition retained to award damages. *Pinkum v. City of Eau Claire*, 81 Wis. 301, 51

<sup>30</sup> *Montgomery & F. Ry. Co. v. McKenzie*, 85 Ala. 549, 5 South. 322; *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053; *Cogswell v. Railroad Co.*, 105 N. Y. 319, 11 N. E. 518.

Where, however, plaintiff makes out no case entitling him to equitable relief, and the facts show that he had no reason to suppose himself entitled to such relief when the action was brought, equity will not retain the cause to award him legal relief, but will leave him to pursue his remedy in a court of law.<sup>31</sup> Thus, in an action to foreclose a mortgage, where plaintiff fails to establish the mortgage, a money judgment for the amount of the debt cannot be rendered;<sup>32</sup> nor will damages be awarded in an action for specific performance, where plaintiff knew that he was not entitled to equitable relief when the action was brought.<sup>33</sup>

#### PREVENTION OF MULTIPLICITY OF SUITS.

##### 6. Equity will assume jurisdiction to prevent multiplicity of suits:

- (a) Where numerous persons have a community of interest or a common right or title in the subject-matter of controversy, as against a common adversary,—or where each has an equitable cause of action or an equitable defense against such adversary, involving the same questions of law and fact.

N. W. 550; *Martin v. Martin*, 44 Kan. 295, 24 Pac. 418. In proceedings to establish title under burnt records act of Illinois, equity will determine all issues, legal as well as equitable. *Gormley v. Clark*, 134 U. S. 338, 349, 10 Sup. Ct. 554; *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053. Action to construe will, or to enjoin executor or administrator, will be retained for complete settlement of estate. *Withers v. Sims*, 80 Va. 651; *Younmans v. Youmans*, 26 N. J. Eq. 149, 154; *Cowles v. Pollard*, 51 Ala. 445. Contra, *Gilliam v. Chancellor*, 43 Miss. 437, 448. See, also, *Leighton v. Young*, 10 U. S. App. 301, 3 C. C. A. 176, and 52 Fed. 439; *McGean v. Railway Co.*, 133 N. Y. 16, 30 N. E. 647; *Haynes v. Whitsett*, 18 Or. 454, 22 Pac. 1072; *Penn v. Ingles*, 82 Va. 69; *Barnes v. Dow*, 59 Vt. 530, 10 Atl. 258; *Currie v. Clark*, 101 N. C. 329, 7 S. E. 805; *Griffin v. Fries*, 23 Fla. 173, 2 South. 266; *Crump v. Ingersoll*, 47 Minn. 179, 182, 49 N. W. 739.

<sup>31</sup> *Dodd v. Home Ins. Co.*, 22 Or. 3, 28 Pac. 881, 884, and 29 Pac. 3; *W. J. Johnston Co. v. Hunt*, 21 N. Y. Supp. 314, 66 Hun, 504.

<sup>32</sup> *Dudley v. Congregation of St. Francis*, 138 N. Y. 451, 458, 34 N. E. 281.

<sup>33</sup> *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925; *Saur v. Ferris*, 145 Ill. 115, 34 N. E. 52; *McQueen v. Chouteau*, 20 Mo. 222. See, also, post, 286.



- (b) **Where reiterated litigation at law between the same individuals concerning the same subject-matter is threatened, or has actually taken place, without conclusively adjudicating their rights.**

This principle grows out of the preceding one concerning equity jurisdiction where there is no plain, adequate, and complete remedy at law.<sup>34</sup> To warrant a court of equity in assuming jurisdiction to prevent multiplicity of suits, it must, however, appear that the party has some defense to the numerous suits instituted or threatened against him.<sup>35</sup>

1. Turning now to the first class of cases mentioned in the black-letter text, the equity jurisdiction has been long established whenever numerous persons have a community of interest or a common right or title in the subject-matter of controversy; it matters not whether the right be asserted by one against many, or by many against one. This form of action is technically called a "bill of peace"; and the illustrations usually given are disputes as to rights of common by a numerous body of tenants on one side and their landlord on the other,<sup>36</sup> and between a corporation claiming an exclusive right of fishery in a river and numerous riparian owners setting up adverse rights.<sup>37</sup> In these cases the numerous persons have at least a community of interest in the subject-matter of the suit,—the right of common in the one case, and the right of fishery in the other. Modern cases, however, have extended the equitable jurisdiction; and it has been stated that equity will assume jurisdiction whenever the rights of the numerous persons depend for solution on the same questions of law and fact, though purely legal rights are involved

<sup>34</sup> Ante, p. 10.

<sup>35</sup> *Storrs v. Pensacola & A. R. Co.*, 29 Fla. 617, 11 South. 226.

<sup>36</sup> *How v. Tenants of Bromsgrove* (1681) 1 Vern. 22; *Powell v. Earl of Powis* (1826) 1 Younge & J. 158; *Warrick v. Queen's College* (1871) 6 Ch. App. 716. Other illustrations: Numerous persons having easement of passage over an alley may unite in a bill to enjoin its obstruction. *Cadigan v. Brown*, 120 Mass. 493. Right of numerous mill owner to draw water from a common reservoir determined in one proceeding. *Adams v. Manning*, 48 Conn. 477.

<sup>37</sup> *Mayor of York v. Pilkington* (1737) 1 Atk. 282.

and purely legal relief can be conferred.<sup>38</sup> It is believed, however, that this statement of the rule is too broad; and that, when no community of interest in the subject-matter of the suit subsists between the numerous persons, there must exist some recognized ground for equitable interference aside from mere multiplicity of suits. The precise question arose in a recent Mississippi case.<sup>39</sup> Numerous persons sued a railroad company at law for the destruction of their property by fire alleged to have been caused by defendant's negligence. The company then filed its bill in equity to enjoin the prosecution of the actions at law, and to compel a determination of the entire matter in a single suit in equity, on the ground that the same questions of law and fact were involved in each case. The court, after an exhaustive review of all the authorities, denied the equity jurisdiction in such cases, saying: "There must be some recognized ground of equitable interference or some community of interest in the subject-matter of controversy, or a common right or title involved, to warrant the joinder of all in one suit; or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit; and it is not enough that there is a community of interest merely in the questions of law or fact involved."<sup>40</sup>

<sup>38</sup> 1 Pom. Eq. Jur. §§ 250, 269; Phelps, Eq. § 230; *Preteca v. Maxwell Land Grant Co.*, 4 U. S. App. 326, 1 C. C. A. 607, and 50 Fed. 674; *Osborne v. Wisconsin Cent. R. Co.*, 43 Fed. 826.

<sup>39</sup> *Tribette v. Illinois Cent. R. Co.* (1892) 70 Miss. 182, 12 South. 32.

<sup>40</sup> This is believed to be the true rule. The right to have such a case tried and the damages assessed by a jury cannot be taken away merely because litigation by numerous other persons involving the same questions of law and fact is threatened. The following cases support the above view: *Lehigh Val. R. Co. v. McFarlan*, 31 N. J. Eq. 730; *National Park Bank of New York v. Goddard*, 131 N. Y. 494, 30 N. E. 506; *Hanstein v. Johnson*, 112 N. C. 253, 17 S. E. 155; *Northern Pac. R. Co. v. Amacker*, 46 Fed. 233. Equity will not entertain jurisdiction of a suit to cancel municipal bonds in the hands of numerous persons where the municipality has a complete defense in an action at law should suit be brought thereon. *Farmington Village Corp. v. Sandy River Nat. Bank*, 85 Me. 47, 26 Atl. 965. For actions where each one of the numerous persons might have maintained a separate suit in equity, see *Ballou v. Hopkinton*, 4 Gray, 324; *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592; *Sheffield Waterworks v. Yeomans*, 2 Ch. App. 8; *Foxwell v. Webster*,

2. The jurisdiction to prevent reiterated litigation between the same individuals concerning the same subject-matter originated from the inconclusive nature of the judgment in ejectment; and whenever plaintiff had satisfactorily established his title at law, but yet was threatened with further litigation from new attempts to controvert it, equity would grant a perpetual injunction to quiet plaintiff's possession and to suppress future litigation.<sup>41</sup> Though equitable interference is no longer necessary to prevent reiterated litigation in ejectment, since the enactment of statutes rendering the judgment therein final and conclusive as to title, the principle still survives; and it is on this ground that equity now assumes jurisdiction to restrain repeated trespasses by one person on the land of another,<sup>42</sup> and to abate a continuing nuisance.<sup>43</sup> If, however, the title to the land is disputed, equity will not interfere until it has been satisfactorily established at law.<sup>44</sup> Applying this principle, it has also been held that, where numerous suits involving the same subject-matter between the same parties are pending in a court of law which has no power to consolidate them, equity will stay the prosecution of all but one until that can be finally heard and determined.<sup>45</sup>

2 Drew & S. 250; *Lockwood Co. v. Lawrence*, 77 Me. 297; *Louisville, N. A. & C. Ry. Co. v. Ohio Val. Improvement & Contract Co.*, 57 Fed. 42.

<sup>41</sup> *Earl of Bath v. Sherwin*, 4 Brown, Parl. Cas. 373; *Eldridge v. Hill*, 2 Johns. Ch. 281; *Marsh v. Reed*, 10 Ohio, 347.

<sup>42</sup> *Mussleman v. Marquis*, 1 Bush, 465; *Lembeck v. Nye*, 47 Ohio St. 336, 24 N. E. 686; *Warren Mills v. New Orleans Seed Co.*, 65 Miss. 391, 4 South. 298; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67; *Ladd v. Osborne*, 79 Iowa, 93, 44 N. W. 235.

<sup>43</sup> *Kavanagh v. Railroad Co.*, 78 Ga. 271, 273, 2 S. E. 636; *Sheldon v. Rockwell*, 9 Wis. 166, 179; *Eastman v. Amoskeag Manuf'g Co.*, 47 N. H. 71.

<sup>44</sup> *Carney v. Hadley*, 32 Fla. 344, 14 South. 4; *Eldridge v. Hill*, 2 Johns. Ch. 281; *Lord Tenham v. Herbert*, 2 Atk. 483.

<sup>45</sup> *Third Ave. R. Co. v. Mayor, etc.*, 54 N. Y. 159.

### CHAPTER III.

#### THE MAXIMS OF EQUITY.

7. Definition and Classification of Maxims.
8. Enabling Maxims—No Right without a Remedy.
9. Equity Regards Substance Rather than Form.
10. Equity Looks on That as Done which Ought to be Done.
11. Equity Imputes an Intention to Fulfill an Obligation.
12. Equity Acts in Personam, and not in Rem.
13. Equity Acts Specifically, and not by Way of Compensation.
14. Equality is Equity.
15. Restrictive Maxims—Equity Follows the Law.
16. Where Equities are Equal, the Law will Prevail.
17. Where There are Equal Equities, the First in Order of Time shall Prevail.
18. He Who Seeks Equity must do Equity.
19. He Who Comes into Equity must Come with Clean Hands.
20. Equity Aids the Vigilant, not Those Who Slumber on Their Rights.

#### DEFINITION AND CLASSIFICATION OF MAXIMS.

7. The maxims of equity are pithy statements of its acknowledged and fundamental principles, and are the germs from which the system of equity jurisprudence has been largely developed.<sup>1</sup> They may be classified<sup>2</sup> as:

- (a) Enabling.
- (b) Restrictive.

The enabling maxims impel the court to action, while the restrictive operate to keep it passive.

The enabling maxims are:

- (a) Equity will not suffer a right to be without a remedy.
- (b) Equity regards substance rather than form.

<sup>1</sup> See 1 Pom. Eq. Jur. § 360.

<sup>2</sup> This classification was first suggested in Haynes' Outlines of Equity (page 19), and was perfected by Judge Phelps (Juridical Equity Abridged, page 269), whose arrangement of the maxims I have followed.

- (c) Equity looks on that as done which ought to be done.
- (d) Equity imputes an intention to fulfill an obligation.
- (e) Equity acts in personam, and not in rem.
- (f) Equity acts specifically, and not by way of compensation.
- (g) Equality is equity.

The restrictive maxims are:

- (h) Equity follows the law.
- (i) Where the equities are equal, the law must prevail.
- (j) Where there are equal equities, the first in order of time shall prevail.
- (k) He who seeks equity must do equity.
- (l) He who comes into equity must come with clean hands.
- (m) Equity aids the vigilant, not those who slumber on their rights.

The student should bear in mind that, like proverbs, the practical value of these maxims lies in the skill and judgment with which they are applied to the facts of each particular case; that they do not express in each and every case an exhaustive statement of some independent truth, but that they are interdependent; and that, consequently, some one of the restrictive maxims may induce the court to withhold the relief which one or more of the enabling maxims impel it to grant.

#### ENABLING MAXIMS.

8. Equity will not suffer a right to be without a remedy.

**LIMITATIONS**—(a) The right asserted must not be a mere moral right, and it must not contravene express statutes, or the declared public policy of the state.

- (b) Equity cannot create a new remedy for the enforcement of a purely legal right merely because the remedy provided by law proves inadequate in a particular instance.

This maxim lies at the foundation of equity jurisprudence, which aims to supplement the defects of the common law; but, since the crystallization of equity into a body of definite rules and principles, its jurisdiction depends, not so much on the nonexistence of a remedy at law, as on the question whether its established principles will warrant the granting of the relief sought. Applications of this maxim in modern times are, however, not wanting. "Take such things as these: The separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the chancellors who first invented them, and state the date when they were first introduced into equity jurisprudence."<sup>3</sup> The doctrines that the unpaid capital stock of a corporation is a trust fund for the benefit of creditors, and the invention of receivers' certificates as security for money loaned to carry on the business during the receivership, which are entitled to a preference over all prior liens on the property, have been cited as other modern instances of the application of this maxim.<sup>4</sup> And it may be stated generally that whenever a statute or a constitution creates a new right,—especially if it be equitable in its nature,—and provides no method for its enforcement, equity will afford relief.<sup>5</sup> Thus, equity will enforce a statutory lien where the statute itself provides no method of enforcement;<sup>6</sup> and a provision of the interstate commerce act prohibiting discrimination against connecting carriers was enforced by mandatory injunction against the employes of a discriminating road,

<sup>3</sup> Jessel, M. R., in *Knatchbull v. Hallett*, 13 Ch. Div. 696, 710.

<sup>4</sup> Phelps, Eq. § 193.

<sup>5</sup> One exception to this principle is in cases of contested election, based on the theory that these are political matters, with which courts have no power to deal. See *Parmeter v. Bourne* (Wash.) 35 Pac. 586; *Dickey v. Reed*, 78 Ill. 282; *State v. Police Jury*, 41 La. Ann. 850, 6 South. 777; *Skrine v. Jackson*, 73 Ga. 377; *Sanders v. Metcalf*, 1 Tenn. Ch. 419; *McWhirter v. Brainard*, 5 Or. 426. However, the jurisdiction of equity has been upheld in the following contested county-seat elections: *Boren v. Smith*, 47 Ill. 482; *Down v. Board* (Idaho) 26 Pac. 167; *Sweatt v. Faville*, 23 Iowa, 321. If the jurisdiction of equity is limited to the protection of property rights, these cases are clearly erroneous. See post, 310.

<sup>6</sup> *Gilchrist v. Helena, H. S. & S. R. Co.*, 58 Fed. 708; *Lockett v. Robinson* (Fla.) 12 South. 649.

who had declared a boycott against the connecting carrier, and who had refused to handle its freight.<sup>7</sup> In this last case it was said: "It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was borne of some emergency, to meet some new condition, and was therefore in its time without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to one party, without imposing illegal burdens on the others, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief."

#### *Limitations.*

We have already seen that abstract moral rights are enforced neither at law nor in equity,<sup>8</sup> and it is obvious that no court will enforce any right opposed to express statute or declared public policy.<sup>9</sup> In this respect equity follows the law. Thus, where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce it, or, in the absence of fraud, accident, or mistake, to so modify it as to make it legal, and then enforce it.<sup>10</sup>

The second limitation likewise results from the operation of the restrictive maxim that equity follows the law. Thus, equity will not levy a tax, or subject the taxable property within the corporate limits of a city to the payment of a judgment against it, merely because the legal remedy by mandamus has proved inefficient through various devices of the city authorities.<sup>11</sup> "The total failure

<sup>7</sup> *Toledo, A., A. & N. M. R. Co. v. Pennsylvania Co.*, 54 Fed. 746; *Southern California R. Co. v. Rutherford*, 62 Fed. 796. It should be noted, however, that the interstate commerce act expressly authorizes the federal courts to prevent and restrain its violation. *U. S. v. Elliot*, 62 Fed. 801. The mere fact that a case is novel, and is not brought plainly within the limits of some adjudged case, does not defeat the jurisdiction of equity. *Piper v. Hoard*, 107 N. Y. 73, 13 N. E. 626. See, also, *Joy v. St. Louis*, 138 U. S. 1, 50, 11 Sup. Ct. 243; *Britton v. Royal Arcanum*, 46 N. J. Eq. 102, 18 Atl. 675; *Wickersham v. Crittenden*, 93 Cal. 32, 28 Pac. 788.

<sup>8</sup> *Ante*, p. 1.

<sup>9</sup> *Gorman v. Low*, 2 Edw. Ch. (N. Y.) 324.

<sup>10</sup> *Hedges v. Dixon Co.*, 150 U. S. 182, 14 Sup. Ct. 71. Where bonds issued by a county in aid of a railroad exceed the limit authorized by law, equity will not cancel the excess, and enforce payment of the residue.

<sup>11</sup> *Rees v. City of Watertown*, 19 Wall. 109; *Heine v. Levee Commissioners*,

of ordinary remedies does not confer on the court of chancery an unlimited power to give relief. Such relief as is consistent with the general law of the land, and authorized by the principles and practice of the courts of equity, will, under such circumstances, be administered. But the hardship of the case, and the failure of the mode of procedure established by law, is not sufficient to justify a court of equity to depart from all precedent, and assume unregulated power of administering abstract justice at the expense of well-settled principle."<sup>12</sup>

### 9. Equity regards substance rather than form.

This maxim operates without any limitations. Equity will in no case permit the veil of form to hide the true effect or intent of the transaction.<sup>13</sup> The only difficulty is in determining what is matter of substance and what of form.<sup>14</sup> This maxim was long ago applied to relieve against penalties and forfeitures. The usual security in olden times for money borrowed seems to have been a bond for an amount considerably larger than the sum borrowed, and conditioned to be void if such sum, with interest, was paid on a specified day. The courts of common law said a bargain is a bargain, and, if the debtor made default, the bond became absolute and indefeasible, and the creditor was entitled to recover its full amount. Equity, however, looking at the substance of the transaction, said that the bond was intended merely as security for the money borrowed; and if the debtor, after the day named, offered

19 Wall. 658; *Finnegan v. City of Fernandina*, 15 Fla. 379; *Thompson v. Allen Co.*, 115 U. S. 550, 6 Sup. Ct. 140.

<sup>12</sup> Mr. Justice Miller in *Heine v. Levee Commissioners*, 19 Wall. 655. In accordance with this principle, it has also been held that the nonexistence of any method at common law for subjecting a debtor's choses in action to the payment of a judgment does not authorize a resort to equity, in the absence of fraud, trust, or other ground for equitable relief, or of a statute conferring jurisdiction. *Donovan v. Finn*, Hopk. Ch. (N. Y.) 59, 74, followed in *Greene v. Keene*, 14 R. I. 388, 393, where authorities are collected. Contra, *Hadden v. Spader*, 20 Johns. 554, 562.

<sup>13</sup> Snell, Eq. p. 43.

<sup>14</sup> *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, 76, 24 Atl. 964.



to repay it, with interest and expenses, equity would restrain the creditor from suing at law for the amount of the bond, on the ground that such a course was unconscientious and oppressive. This doctrine was gradually extended to contracts other than for the repayment of money; and the general rule now is that, whenever a penalty or forfeiture is inserted to secure the performance of some act or the enjoyment of some right, the latter will be regarded as the real and principal intent of the instrument, and the penalty or forfeiture as merely an accessory, and the debtor will be relieved therefrom on compensating the creditor for the damages he has actually sustained.<sup>15</sup>

This maxim is also at the foundation of the law of mortgages. Even at this day, a mortgage is in form a conveyance conditioned to be void on the repayment, by the mortgagor, on a specified day, of the sum borrowed, with interest. The common-law courts, looking merely at the form of the instrument, held the mortgagee's estate indefeasible, unless the money was paid on the very day stipulated. Equity, however, looking at the substance, regarded the transaction merely as a pledge to secure the money borrowed, and permitted the mortgagor to redeem after the time fixed, on payment of principal and interest then due.<sup>16</sup> Carrying this principle still further, it is held that an absolute deed, taken as security for a debt, is in equity a mortgage.<sup>17</sup> "If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage."<sup>18</sup>

The maxim has also been held to be specially applicable in cases of suretyship, with respect to which, whatever may be the form of the instrument, or the obligation of the parties on its face, a court

<sup>15</sup> Pom. Eq. Jur. § 381; 2 Story, Eq. Jur. § 1314; *Peachy v. Duke of Somerset*, 1 Strange, 447, 2 White & T. Lead. Cas. Eq. 1082; *Sloman v. Walter*, 1 Brown, Ch. 418, 2 White & T. Lead. Cas. Eq. 1094; *Hagar v. Buck*, 41 Vt. 285. See post, 107, for a further discussion of the equitable doctrine concerning penalties and forfeitures.

<sup>16</sup> 1 Spence, Eq. Jur. 601; *Langford v. Barnard*, Toth. 134 (decided 37 Eliz.); *Emanuel College v. Evans*, 1 Ch. R. 18. See post, 212, for a further statement of the equitable principles relating to mortgages.

<sup>17</sup> *Stinchfield v. Milliken*, 71 Me. 567; *Morris v. Nixon*, 1 How. 118; *Russell v. Southard*, 12 How. 139; *Ex parte Odell*, 10 Ch. Div. 76.

<sup>18</sup> *Flagg v. Mann*, 2 Sumn. 533, Fed. Cas. No. 4,847.

of equity always inquires into the real nature and objects of the transaction, and affords relief accordingly.<sup>19</sup>

But the maxim does not apply alone to carry out the true intent of the parties to a contract. It also applies to frustrate that intent whenever it contravenes the laws of the state, and the parties have adopted some specious form to disguise it. In such cases, equity will strip off the disguises, and, if necessary to the ends of justice, cancel the contract.<sup>20</sup>

The foregoing illustrations do not, by any means, exhaust the applications of this maxim; nor can it be said at the present day to be confined exclusively to courts of equity. Notable instances of a disregard of form by courts of law, or at least in legal actions, will be found in a number of recent quo warranto proceedings against corporations for attempted evasion of anti-trust laws.<sup>21</sup>

**10. Equity looks on that as done which ought to be done.**

**LIMITATION**—The maxim does not apply as against the intervening rights of third persons, nor in favor of one who has no right to have a thing regarded as done.

This principle is an expansion of the preceding one. Looking at the substance of things, equity will place one having an equitable right to demand the performance of any act on the part of another in the same situation, and clothe him with the same interests in

<sup>19</sup> *Dodd v. Wilson*, 4 Del. Ch. 114, 409.

<sup>20</sup> *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, 24 Atl. 964. A statute of New Jersey prohibited the leasing of the property of a domestic railroad to a foreign corporation. A lease was executed to a financially irresponsible domestic company, and the lease was guaranteed by a wealthy foreign company. The court, disregarding the mere form, held the transaction to be a lease to the foreign company, and the guaranty to be a mere device to evade the statute. See, also, *Pennsylvania R. Co. v. Com.* (Pa. Sup.) 7 Atl. 368, where another device to evade a statute prohibiting the lease of competing railroads was disregarded.

<sup>21</sup> *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798; *People v. North River Sugar-Refining Co.*, 121 N. Y. 582, 24 N. E. 834; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279.

the subject-matter, as if the act had been performed at the proper time.<sup>22</sup> A right to demand the performance must exist; for equity regards as done only what "ought" to have been done, not what "might" have been done.<sup>23</sup>

The doctrine of equitable conversion has its origin in this maxim. Whenever, by deed or will, money is directed to be converted into land, or land into money, a court of equity, acting on this principle, will consider the conversion to have taken place at the time the deed or will takes effect,—i. e. the delivery of the deed, or the death of testator; and the personalty is transmissible or descendible as real estate, and the realty as personal property.<sup>24</sup>

So, also, acting on this maxim, it is the settled doctrine in equity that the vendee in an executory contract for the sale of land is the equitable owner of the land, while the vendor has merely a lien for the purchase money; and, being thus in equity the owner, the vendee must bear any loss which may happen, and is entitled to any benefit which may accrue, to the estate in the interim between the agreement and the conveyance.<sup>25</sup> On this principle, also, "an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property intended to be mortgaged."<sup>26</sup>

Like the preceding maxim, the one now under consideration also

<sup>22</sup> See Pom. Eq. Jur. § 365; Adams, Eq. p. 135.

<sup>23</sup> Burgess v. Wheate, 1 W. Bl. 123, 129.

<sup>24</sup> Fletcher v. Ashburner, 1 Brown, Ch. 497, 1 White & T. Lead. Cas. Eq. 826; Craig v. Leslie, 3 Wheat. 563, 567; Dunscomb v. Dunscomb, 1 Johns. Ch. 508; Peter v. Beverly, 10 Pet. 532; Tazewell v. Smith's Adm'r, 1 Rand. (Va.) 313, 320. See post, 67, for further discussion of conversion.

<sup>25</sup> Payne v. Meller, 6 Ves. 340; Revell v. Hussey, 2 Ball & B. 287; Lewis v. Smith, 9 N. Y. 502, 510; Brewer v. Herbert, 30 Md. 301; Haughwout v. Murphy, 22 N. J. Eq. 531.

<sup>26</sup> Currey, C. J., in Daggett v. Rankin, 31 Cal. 321, 326. Where a mortgagor covenants to insure the premises for the benefit of the mortgagee, and the mortgagor or some other person procures insurance payable to the mortgagor, without the mortgagee's knowledge, and with no intent to perform the covenant, yet equity, looking on that as done which ought to have been, will treat the insurance as effected under the agreement, and will give the mort-

applies to cases of fraud. Not only does equity look on things agreed or directed to be done as done, but also, if acts have, by fraud of the parties, been prevented from being done, it will interfere and treat the case exactly as if the acts had been done.<sup>27</sup> "The principle is that a person is not allowed to derive any advantage from his own wrongdoing, and that, in order to prevent this, a court of equity will treat him as having done that which ought to have been done."<sup>28</sup>

*Limitations.*

Equity will not consider that as done which ought to have been done if to do so would injuriously affect third persons who have contracted with reference to what actually has been done.<sup>29</sup> Thus, equity will not consider a transaction as a pledge when there is no delivery of the thing pledged, though the parties intended the transaction as such, if credit has been given to the pledgor by third persons, which might not have been given if he had not remained in possession of the thing pledged.<sup>30</sup> Nor does the maxim apply in favor of strangers and volunteers, but only in favor of the parties to the transaction, and their privies.<sup>31</sup>

**11. Equity imputes an intention to fulfill an obligation.**

Where a man is bound to do an act, and he does one which is capable of being considered as done in fulfillment of his obligation, it will be presumed that he acted rightfully in the performance of his duty, and not in violation thereof.<sup>32</sup> Thus, where a man, on

gagee his equitable lien accordingly. *Ames v. Richardson*, 29 Minn. 330, 13 N. W. 137; *Thomas v. Vonkpf*, 6 Gill & J. 372; *Wheeler v. Insurance Co.*, 101 U. S. 439; *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42.

<sup>27</sup> Story, Eq. Jur. § 187; *Moore v. Crawford*, 130 U. S. 122, 128, 9 Sup. Ct. 447.

<sup>28</sup> *London, C. & D. R. Co. v. Southeastern R. Co.* (1892) 1 Ch. 143.

<sup>29</sup> *Vose v. Cowdrey*, 49 N. Y. 336; *Clabaugh v. Byerly*, 7 Gill, 354.

<sup>30</sup> *Casey v. Cavaroc*, 96 U. S. 467.

<sup>31</sup> Snell, Eq. p. 10; *Jefferys v. Jefferys*, Craig & P. 138; *Chetwynd v. Morgan*, 31 Ch. Div. 596; *Redfield v. Parks*, 132 U. S. 239, 247, 248, 10 Sup. Ct. 83. It has also been held that this maxim does not apply to errors or omissions in the record of judicial proceedings. *King v. French*, 2 Sawy. 441, Fed. Cas. No. 7,793.

<sup>32</sup> 2 Spence, Eq. \*204; Snell, Eq. p. 45; 1 Pom. Eq. Jur. § 420.

his marriage, covenants to settle a specified quantity of land on his wife as jointure, and then on his first and other sons, and, after marriage, acquires property of the specified kind, without settling the same, equity will regard it as acquired with a view to fulfill the obligation, and the first son cannot claim the land as heir, and insist on the investment of personalty in other lands in fulfillment of the covenant.<sup>33</sup> So, also, where a trustee empowered to invest trust funds takes the title acquired therewith in his own name, equity will presume that he acted in the performance of his duty, and that the property belongs to the beneficiaries of the trust.<sup>34</sup>

In a rather recent leading case in England, the principle was carried still a step further. It was held that where one holding money in a fiduciary capacity mingles it with his own, and draws out of the mixed fund, equity will presume that he is rightfully drawing out his own money, rather than that he is violating his trust by drawing out the trust funds; and it was accordingly held, contrary to the general rule applying the first drawings to the first deposits, that the unexpended balance was subject to a charge for the entire amount of the trust funds.<sup>35</sup>

These illustrations show that the maxim now under consideration is closely analogous to the preceding one,—equity regards that as done which ought to be done.

## 12. Equity acts in personam, and not in rem.

**QUALIFICATION**—By statute, in most of the states, a decree of a court of equity operates, when necessary, as a transfer of title to real estate; and, whenever such decree merely directs the payment of money, it is enforceable by execution against the property of the unsuccessful party.

<sup>33</sup> *Wilcocks v. Wilcocks*, 2 Vern. 558, 2 White & T. Lead. Cas. Eq. \*415; *Lechmere v. Lechmere*, Cas. t. Talb. 80.

<sup>34</sup> 2 *Spence*, Eq. \*204; 1 Pom. Eq. Jur. § 422; *Johnson v. Dougherty*, 18 N. J. Eq. 406.

<sup>35</sup> *In re Hallett's Estate*, 13 Ch. Div. 696, 727, 745. Followed in *Central Nat. Bank of Baltimore v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54; *Englar v. Offutt*, 70 Md. 78, 86, 16 Atl. 497.

In the absence of statutes providing otherwise, the decrees of a court of equity are to be regarded not so much as decisions affecting the property or rights in dispute as in the light of directions or commands, positive or negative, addressed to the individual party or parties.<sup>36</sup> The only method for their enforcement is by process of contempt, under which the party failing to obey them is arrested and imprisoned until he yields obedience, or purges the contempt, by showing that the disobedience is not willful, but the result of inability not produced by his own fault or contumacy.<sup>37</sup>

Several important results follow from the application of this maxim:

1. Acting directly on the conscience and person of the individual, equity will not permit him to make an unconscientious or oppressive use of the rules of common or statute law. Thus, equity will enjoin an individual from maintaining unconscientious proceedings in common-law courts, and will punish disobedience of its orders by imprisonment.<sup>38</sup> So, one who enters into a parol contract for the sale of land, on the faith of which the vendee takes possession, and makes expenditures and improvements, will be compelled in equity to execute a deed, notwithstanding the statute of frauds.<sup>39</sup> In such a case equity does not set aside the statute, but imposes on the individual seeking to use it as an instrument of fraud a personal obligation to hold the land for the vendee's benefit.<sup>40</sup>

2. By virtue of its control over the persons before the court, equity may compel them to do, or restrain them from doing, acts with reference to a subject-matter beyond its territorial jurisdiction.<sup>41</sup>

<sup>36</sup> Smith, Pr. Eq. p. 15. For the origin of this maxim, see ante, 5.

<sup>37</sup> Clements v. Tillman, 79 Ga. 451, 5 S. E. 194.

<sup>38</sup> Earl of Oxford's Case, 1 Ch. R. 1, 2 White & T. Lead. Cas. Eq. 1291; Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Maps v. Cooper, 39 N. J. Eq. 316; Texas & P. Ry. Co. v. Kuteman, 54 Fed. 547. The injunction operates on the parties, and not on the court of law; and hence, if it proceeds with the action, its judgment is not void. Platt v. Woodruff, 61 N. Y. 378. See, also, post, 291.

<sup>39</sup> Pom. Eq. Jur. § 430. See post, p. 280, for doctrine of part performance.

<sup>40</sup> McCormick v. Grogan, L. R. 4 H. L. 82, 97; Greaves v. Topfield, 14 Ch. Div. 563, 577.

<sup>41</sup> Adams v. Messinger, 147 Mass. 185, 17 N. E. 491. In this case an agreement between an inventor and an assignee of a patent binding the inventor

Thus, it is firmly settled, both in England and in this country, that a court of equity has power to restrain a person within its jurisdiction from prosecuting an action in a foreign court.<sup>42</sup> So, also, where it has jurisdiction of the person of a defendant, equity may compel or restrain a conveyance of his interest in real or personal property abroad.<sup>43</sup> But "the claim to affect foreign lands through the person of the party must be strictly limited to those cases in which the relief decreed can be entirely obtained through the party's personal obedience."<sup>44</sup> Thus, equity will not decree partition of land situated in a foreign state or country, simply because no power could be given to commissioners to go there, and take the steps necessary for carrying out the decree.<sup>45</sup> For the same reason, it has been held that a court of equity has no power to decree a foreclosure sale of land situated wholly in another state;<sup>46</sup> but a foreclosure sale of an entire railroad has been decreed, though partly without the jurisdiction of the court.<sup>47</sup>

#### *Limitations.*

The enforcement of a decree by fine and imprisonment was found to be an expensive and troublesome method of compelling a trans-

to patent improvements in Canada on obtaining such a patent in the United States was held capable of specific performance in Massachusetts.

<sup>42</sup> Lord Portarlington v. Soulby (1834) 3 Mylne & K. 104; Mackintosh v. Ogilvie, 3 Swanst. 365, note; Carron Iron Co. v. Maclaren 5 H. L. Cas. 416, 445; Hutton v. Hutton, 40 N. J. Eq. 461, 2 Atl. 280; Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269; Dehon v. Foster, 4 Allen, 545, 550. Injunction against proceedings in another state to attach exempt property. Snook v. Snetzer, 25 Ohio St. 516; Wilson v. Joseph, 107 Ind. 490, 8 N. E. 616; Allen v. Buchanan (Ala.) 11 South. 777.

<sup>43</sup> Penn. v. Lord Baltimore, 1 Ves. Sr. 444; McQuerry v. Gilliland, 89 Ky. 434, 12 S. W. 1037; Newton v. Bronson, 13 N. Y. 587; Bailey v. Ryder, 10 N. Y. 363; Myres v. De Mier, 4 Daly, 343; on appeal, 52 N. Y. 647; Potter v. Hollister, 45 N. J. Eq. 508, 18 Atl. 204; Cloud v. Greasley, 125 Ill. 313, 17 N. E. 826; Hicks v. Turck, 72 Mich. 311, 40 N. W. 339. Equity has jurisdiction to administer personal estate located in England, though testator was domiciled in Scotland, and the bulk of his property was there, and the will had been confirmed in Scotland. Ewing v. Ewing, L. R. 9 App. Cas. 34.

<sup>44</sup> Westl. Priv. Int. Law, 64, 65.

<sup>45</sup> Cartwright v. Pettus, 2 Ch. Cas. 214; Poindexter v. Burwell, 82 Va. 507.

<sup>46</sup> Farmers' Loan & Trust Co. v. Postal Tel. Co., 55 Conn. 334, 11 Atl. 184.

<sup>47</sup> Muller v. Dows, 94 U. S. 444. Decree cannot affect title to lands in another

fer of the title to real estate, and it also frequently happened that the party was not within reach of the process of the court, so that he could be attached. Statutes have therefore been enacted in many of the states, either declaring that the judgment or decree of the court shall operate as a conveyance on the failure of the party to obey, or authorizing the appointment of a special commissioner to make a conveyance on such failure.<sup>48</sup> So, also, a decree for the payment of money is enforced by execution against the property in many states,—in all where the code system of procedure prevails. To enforce such a decree by contempt proceedings would violate the constitutional provision prohibiting imprisonment for debt.<sup>49</sup> In all other cases, however, decrees are still enforced by attachment for contempt, especially injunctions.

### **13. Equity acts specifically, and not by way of compensation.**

Excepting in actions of ejectment and replevin, the only remedy afforded by the common law against a wrongdoer is by money compensation. The manner of redress in equity, however, is by decree against the wrongdoer, compelling him to specifically make good his default. Thus, equity will compel a contract to be specifically performed, instead of awarding damages for its breach.<sup>50</sup> Where a mistake has been made in a written instrument, or the instrument itself has been lost or destroyed, equity, acting specifically, will place the parties in the same situation as though the mistake or loss had not occurred, by decreeing a reformation in the one case and a re-execution in the other.<sup>51</sup>

state. *Lindley v. O'Reilly*, 50 N. J. Law, 636, 640, 15 Atl. 379; *Carpenter v. Strange*, 141 U. S. 87, 106, 11 Sup. Ct. 960. Equity will not entertain jurisdiction of action to recover proceeds of sale of real estate situate in a foreign country, though parties reside in England, where title to property is in dispute. *In re Hawthorne*, 23 Ch. Div. 745.

<sup>48</sup> *Langdon v. Sherwood*, 124 U. S. 31, 8 Sup. Ct. 429.

<sup>49</sup> *Clements v. Tillman*, 79 Ga. 453, 5 S. E. 194.

<sup>50</sup> See post, 261.

<sup>51</sup> See post, 314.



#### 14. Equality is equity.

**LIMITATION**—In the distribution of equitable assets, a creditor, having a lien on the fund either by the rules of the common law or by virtue of a statute, is entitled to preference over creditors having none.

Acting on this principle, equity leans strongly against joint tenancy and its inseparable incident of survivorship.<sup>52</sup> This application of the maxim is now unimportant, for the statutes in most of the states declare that a conveyance to two or more shall create a tenancy in common, and not a joint tenancy, unless the contrary clearly appears. So, also, a joint liability on the death of one of the obligees would be enforced at law only against the survivor; but equity, acting on the principle that all the obligors intended to bind themselves equally for the payment of the debt, permitted its enforcement against the estate of the deceased debtor if the survivors were insolvent.<sup>53</sup> In modern times the maxim is chiefly applied to cases of contribution between co-contractors, sureties, and others;<sup>54</sup> to cases of abatement of legacies where there is a deficiency of assets; to cases of apportionment of moneys due on incumbrances among different purchasers and claimants of different parcels of land;<sup>55</sup> and to cases of marshaling<sup>56</sup> and distribution of equitable assets.<sup>57</sup> And assets will be treated as equitable assets whenever the creditor must resort to the aid of a court of equity to subject them to his claim.<sup>58</sup>

#### *Limitation.*

A lien created by the common law or by statute will not be destroyed in equity on distributing the fund on which it is impressed,

<sup>52</sup> *Lake v. Gilson*, 1 White & T. Lead. Cas. Eq. 178.

<sup>53</sup> *Pope v. Cole*, 53 N. Y. 124; *Hunt v. Rousmanler*, 8 Wheat. 211, 212; *Ex parte Kendall*, 17 Ves. 514, 526, 527.

<sup>54</sup> *Russell v. Fallor*, 1 Ohio St. 327; 1 Story, Eq. Jur. § 67f; post, 252.

<sup>55</sup> Post, 225.

<sup>56</sup> Post, 256.

<sup>57</sup> *Day v. Washburn*, 24 How. 352-357; *Wabash & E. Canal Co. v. Beers*, 2 Black, 448; *Bank of Rochester v. Emerson*, 10 Paige, 359.

<sup>58</sup> *City of St. Louis v. O'Neil Lumber Co.*, 114 Mo. 74, 21 S. W. 484.

and the legal priority will be protected and preserved; for in this respect equity follows the law.<sup>59</sup>

### RESTRICTIVE MAXIMS.

#### 15. Equity follows the law:

- (a) As regards legal estates, rights, and interests, equity is bound by the rules of law.
- (b) As regards equitable estates, rights, and interests, equity acts in analogy to the rules of law, whenever an analogy clearly subsists.

We have already seen that equity jurisprudence has its origin in the failure of the common law to recognize and to adequately protect certain rights.<sup>60</sup> Manifestly, therefore, the maxim now under consideration is not of universal application, and its chief use has been stated to be the anticipation of a hasty generalization on the part of the student that equity wantonly disregards the provisions of the common and statute law.<sup>61</sup>

However, legal rights, clearly defined and established, cannot be changed or unsettled by a court of equity when dealing with them; and in such instances the maxim is strictly applicable.<sup>62</sup> Thus, in England the court of chancery never interfered with the rule of primogeniture;<sup>63</sup> and in this country it has been held that a contract imposing no legal obligation cannot be enforced in equity.<sup>64</sup>

Equitable estates, rights, and interests, though called into exist-

<sup>59</sup> *Codwise v. Gelston*, 10 Johns. 507; *Lidderdale v. Robinson*, 12 Wheat. 594; *Johnson v. Straus* (C. C. Va.) 4 Hughes, 621-639, 28 Fed. 57.

<sup>60</sup> *Ante*, 3.

<sup>61</sup> *Smith*, Pr. Eq. p. 11.

<sup>62</sup> *Magniac v. Thompson*, 15 How. 281; *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85, 90.

<sup>63</sup> *Snell*, Eq. p. 17.

<sup>64</sup> *Hedges v. Dixon Co.*, 150 U. S. 182, 14 Sup. Ct. 71; *Henderson v. Overton*, 2 Yerg. 394. Lord Chancellor Talbot long ago refused to decree against a settled rule of law, saying: "There are instances, indeed, in which a court of equity gives a remedy where the law gives none; but where a particular remedy is given by the law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where

ence in disregard of the common law, nevertheless partake of the same rules which govern corresponding legal estates, rights, and interests.<sup>65</sup> Thus, words of limitation used in the creation of executed trusts will be given the same construction and effect as if used in creating legal estates;<sup>66</sup> equitable estates are subject to the same canons of descent as legal estates, excepting dower rights;<sup>67</sup> and proceedings in equity must generally be brought within the statutory period of limitations prescribed for legal proceedings of a similar kind.<sup>68</sup> Further than this, the rules governing the admissibility and weight of evidence and the construction of contracts are the same at law and in equity.<sup>69</sup>

the law leaves it, and to extend it further than the law allows." *Heard v. Stanford*, Cas. t. Talb. 173. And see, also, ante, 19, maxim "No right without a remedy."

<sup>65</sup> The rule with respect to equitable estates was stated as follows by Sir Joseph Jekyll, in *Cowper v. Cowper*, 2 P. Wms. 720, 753: "The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estate; otherwise great uncertainty and confusion would come. And, though proceedings in equity are said to be *secundem discretionem boni viri*, yet when it is asked, '*Vir bonus est quis?*' the answer is '*Qui consulta patrum, qui leges juraque servat.*' (Who is the good man? He who maintains the opinions of his predecessors, and the laws and decisions.) And as it is said in *Rooke's Case*, 5 Coke, 99b, that discretion is a science not to act arbitrarily according to men's wills and private affections, so the discretion which is executed here is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to, the other. This discretion in some cases follows the law implicitly; in others, assists it, and advances the remedy; in others, again, it relieves against the abuse, or allays the rigor of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with."

<sup>66</sup> *Dibrill v. Carlisle*, 48 Miss. 391. See, also, post, 182, "Interpretation of Trusts."

<sup>67</sup> *Cowper v. Cowper*, 2 P. Wms. 720; *Cross v. De Valle*, 1 Cliff. (U. S.) 282, Fed. Cas. No. 3,430.

<sup>68</sup> *Hollingshead v. Webster*, 37 Ch. Div. 659; *Upham v. Wyman*, 7 Allen, 499, 502. Sometimes, however, laches of complainant will cause a court of equity to refuse relief, though the statute of limitations has not run. See post, 44.

<sup>69</sup> In *re Terry and White's Contract*, 32 Ch. Div. 21. In this case Lord Esher said: "I doubt myself \* \* \* whether there are any principles of law

**16. Where the equities are equal, the law will prevail.**

This maxim applies whenever both parties are equally entitled to the protection of a court of equity, and one of them, in addition to his equitable rights, obtains the legal title to the subject-matter in controversy. In such a case, equity does not aid either party, but leaves the matter to depend on the legal title.<sup>70</sup> Thus, a purchaser who pays a valuable consideration, without notice of a prior outstanding equitable title, stands on as high ground in equity as the holder of a prior equitable title; and, if he obtains the legal title before he has notice of the prior equity, the legal title prevails.<sup>71</sup> The English doctrine of tacking is another illustration of this maxim, viz.: A third mortgagee, who advances his money

which were differently affirmed in the old court of equity and the old courts of common law. These courts dealt with the same matters for the purpose of different remedies, and therefore were necessarily looking at the same matters from different points of view. But it has been often said that the rules of evidence in the court of equity were different from those in the courts of common law, and that a different construction was put upon the same instrument; that the same instruments in the same words would be construed in one way in a court of equity and in another way in a court of common law; and it has been said that that which in the one court would have been deemed to be neither immoral or dishonest was in the other court deemed to be both immoral and dishonest. Ever since I have been in this court of appeal I have been trying to point out, not the differences, but the resemblances and the identities, between law and equity; and I now protest against each and every one of those alleged doctrines. I protest most strongly that evidence was always the same in the court of equity as in the courts of common law as to its effect in finding out the truth. What an absurdity it would be if the same evidence to prove a given fact before one of two tribunals should be taken to prove it, and before the other tribunal should be taken not to prove it! The idea seems to me to be monstrous; and, as to a matter being called immoral and dishonest in one court and moral and honest in another, if the law were so, I should consider it perfectly hateful that a man should be branded with fraud or with dishonesty according to the court in which his adversary brought the suit. It seems to me to be equally absurd and ridiculous to suppose that the same words, in the same contract, should be held to have one meaning in a court of law, and another in a court of equity."

<sup>70</sup> *Thorndike v. Hunt*, 3 De Gex & J. 563; *Sturge v. Starr*, 2 Mylne & K. 195; *Boone v. Chiles*, 10 Pet. 210; *Peiffer v. Bates*, 45 N. J. Eq. 311, 19 Atl. 612.

<sup>71</sup> *Crump v. Black*, 6 Ired. Eq. 321, *Jones v. Zollcoffer*, N. C. Term. R. 212; *Hoult v. Donahue*, 21 W. Va. 294, 300; *Carlisle v. Jumper*, 81 Ky. 282; *Bas-*

without notice of the second mortgage, has an equal equity with the second mortgagee, and, by afterwards purchasing the first mortgage, the third mortgagee obtains the legal title, and is thus entitled to priority over the second.<sup>72</sup>

**17. Where there are equal equities, the first in order of time shall prevail.**

The meaning of this maxim is that, as between persons having only equitable interests, priority in time gives the better equity, if their interests are in all other respects equal. In other words, in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; i. e. a court of equity will not prefer the one to the other on the mere ground of priority of time, until it finds, upon an examination of their relative merits, that there is no other sufficient ground of preference between them; and if one has, on other grounds, a better equity than the other, priority of time is immaterial.<sup>73</sup> Thus, as between unrecorded mortgages, the one first executed is entitled to priority, since the equities of the mortgagees are in other respects equal;<sup>74</sup> but, as against a voluntary conveyance, a subsequent purchaser for value without notice has the superior equity, and is entitled to priority.<sup>75</sup>

**18. He who seeks equity must do equity.**

**LIMITATION**—The maxim does not apply to equities other than those growing out of the transaction which forms the subject of plaintiff's suit, nor to equities existing in favor of third persons not parties to the suit.

sett v. Nosworthy, 2 White & T. Lead. Cas. Eq. 102; Attorney General v. Wilkins, 17 Beav. 285. See post, 80, as to doctrine of notice.

<sup>72</sup> Marsh v. Lee, 1 White & T. Lead. Cas. Eq. 616, 2 Vent. 337; Brace v. Duchess of Marlborough, 2 P. Wms. 491.

<sup>73</sup> Rice v. Rice, 2 Drew. 73; Phillips v. Phillips, 4 De Gex, F. & J. 208, 215.

<sup>74</sup> Berry v. Mutual Ins. Co., 2 Johns. Ch. 603. See, also, Grimstone v. Carter, 3 Paige, 421; Ingram v. Morgan, 4 Humph. (Tenn.) 66; Heyder v. Excelsior Building Loan Ass'n, 42 N. J. Eq. 403, 407, 408, 8 Atl. 310.

<sup>75</sup> Robinson v. Cathcart, 2 Cranch, C. C. 590, Fed. Cas. No. 11,946. See, also, post, 95, "Bona Fide Purchasers."

The maxim now under consideration, together with the two following, "He who comes into equity must come with clean hands," and "Equity aids the vigilant," illustrate a great distinctive and governing principle of equity,—that nothing can call a court of equity into activity but conscience, good faith, and reasonable diligence.<sup>76</sup> The meaning of the maxim is that one invoking the aid of a court of conscience will not be granted the relief to which he is otherwise entitled, except on equitable terms.<sup>77</sup> These terms will be imposed as the price of the decree given him; and, if he declines to comply with them, his suit will be dismissed.<sup>78</sup>

In the earlier history of equity jurisprudence the wife's equity to a settlement afforded the principal illustration of this maxim. Whenever a husband resorted to equity to reduce his wife's personal property to possession, relief was granted him only on condition that he make a fair settlement out of the property for the benefit of the wife and children.<sup>79</sup> So, also, if a borrower of money on usurious interest seeks the cancellation of the instrument which evidences the debt, equity will grant relief only on condition that payment be made the lender of what is bona fide due him,<sup>80</sup> unless there is a statutory prohibition against imposing such condition.<sup>81</sup> And, generally, a contract void for illegality, or incapable of enforcement even in equity, will not be canceled unless the party seeking the relief will do equity by paying whatever is actually due thereon.<sup>82</sup>

<sup>76</sup> Snell. Eq. p. 39; Lord Camden in *Smith v. Clay*, 3 Brown, Ch. 640, note.

<sup>77</sup> *Kline v. Vogel*, 90 Mo. 239, 245, 1 S. W. 733, and 2 S. W. 408.

<sup>78</sup> *Alexander v. Merrick*, 121 Ill. 606, 614, 13 N. E. 190.

<sup>79</sup> *Sturgis v. Champneys*, 5 Mylne & C. 105.

<sup>80</sup> *Fanning v. Dunham*, 5 Johns. Ch. 122, 142-144; *Noble v. Walker*, 32 Ala. 456; *Rogers v. Torbut*, 58 Ala. 523; *Whatley v. Barker*, 79 Ga. 790, 4 S. E. 387.

<sup>81</sup> *Bissell v. Kellogg*, 60 Barb. 617; *Scott v. Austin*, 36 Minn. 460, 32 N. W. 89, 864.

<sup>82</sup> *Deans v. Robertson*, 64 Miss. 195, 1 South 189; *Tuthill v. Morris*, 81 N. Y. 94, 100. Some of the cases seem to hold that the equities which the maxim supposes must be capable of enforcement in an independent action either at law or in equity. *Finch v. Finch*, 10 Ohio St. 501, 508; *Otis v. Gregory*, 111 Ind. 504, 509, 13 N. E. 39; *Hanson v. Keating*, 4 Hare, 1. But certainly a contract tainted with usury or any other illegality is not capable of judicial enforcement in an independent action; and yet the courts have always required payment of what is equitably due before decreeing cancellation. See *Pom. Eq. Jur.* § 386.

One who comes into equity to have a void judicial sale of his land set aside as a cloud on his title must do equity by tendering what is justly due on the debt for which the sale was made.<sup>83</sup> The doctrine of equitable estoppel has its origin in this maxim; and whenever the owner of land stands by and knowingly suffers a third person, who is ignorant of his title, to expend money on the estate in improvements, equity will grant him relief only on condition that he compensate the third person for such expenditures.<sup>84</sup>

*Limitations.*

The maxim is applied only where the adverse equity to be secured or awarded grows out of the very controversy before the court, or out of such transactions as the record shows to be a part of its history, or where it is so connected with the cause in litigation as to be presented in the pleadings and proofs, with full opportunity afforded to the party thus recriminated to explain or refute the charges.<sup>85</sup> Furthermore, the maxim is confined exclusively to cases in which there is an equity between the parties; an equity in favor of a third person against plaintiff can never be available, under this maxim, to the defendant.<sup>86</sup>

**19. He who comes into equity must come with clean hands.**

**LIMITATIONS—(a) The maxim does not apply to misconduct of complainant in no wise affecting the equitable relations between the parties, and not arising out of the transaction as to which the relief is sought.**

<sup>83</sup> Loney v. Courtney, 24 Neb. 580, 39 N. W. 616; Blackburn v. Clarke, 85 Tenn. 506, 3 S. W. 505; McQuddy v. Ware, 20 Wall. 14-20.

<sup>84</sup> Snell, Eq. p. 40; Pratt v. Thornton, 28 Me. 355; Dilworth v. Sinderling, 1 Bin. (Pa.) 488. For other illustrations of this maxim, see Yard v. Pacific Mut. Ins. Co., 10 N. J. Eq. 480; Jones v. Roberts, 6 Call (Va.) 187. Where specific performance is sought, the court will require the party who seeks it to show a performance or readiness to perform on his part, or a default on the other side, which utterly excuses him. McNeil v. Magee, 5 Mason, 244, Fed. Cas. No. 8,915.

<sup>85</sup> Comstock v. Johnson, 46 N. Y. 615; Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020; Colvin v. Hartwell, 5 Clark & F. 484.

<sup>86</sup> Garland v. Rives, 4 Rand. (Va.) 282.

- (b) Though both parties have been engaged in a fraudulent or illegal transaction, equitable relief will be granted complainant if public policy is advanced thereby, or if he was not in equal wrong with defendant.

This maxim, or, as it is otherwise expressed, "He that hath committed iniquity shall not have equity," is the equitable application of a fundamental principle pervading the entire body of the law,—that no one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim in his own iniquity, or to acquire property by his own crime.<sup>87</sup>

The meaning of the maxim is that a court of equity will not lend its active aid to one who has been guilty of unconscientious or oppressive conduct, or who has been in equal wrong with defendant, touching the transaction as to which the relief is sought; but in such cases the court will leave the parties where it finds them, without interfering in behalf of either.<sup>88</sup>

The maxim applies not only to fraudulent and illegal transactions, but to any unrighteous, unconscientious, or oppressive conduct by one seeking equitable interference in his own behalf. Thus, a label of a trades-union which on its face shows a purpose to stigmatize all craftsmen not members of the union, irrespective of their character, will not be protected from infringement by a court of

<sup>87</sup> *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188. In this case it was held that a beneficiary under a will who murders the testator to prevent a revocation, and to obtain a speedy enjoyment of the property, will not be permitted to take either under the will or as heir or next of kin, though there is no law declaring a forfeiture; approving *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, holding that the beneficiary under a policy of life insurance who murders the insured cannot recover on the policy, and disapproving *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794, holding that a woman who murders her husband may claim dower in his land. In *Shellenberger v. Ransom* (Neb.) 59 N. W. 935, the doctrine of *Riggs v. Palmer*, is rejected; and it is held that a murder perpetrated for the purpose of inheriting the estate of the murdered person will not justify a court in adding an exception to the statute of descent so as to divest the murderer of the fruits of his crime.

<sup>88</sup> *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203; *Atwood v. Fisk*, 101 Mass. 363; *Harrington v. Bigelow*, 11 Paige, 349; *Weakley v. Watkins*, 7 Humph. (Tenn.) 356.



equity.<sup>89</sup> A contract which is unequal, oppressive, or improvident will not be specifically enforced,<sup>90</sup> nor a nuisance abated at suit of one maintaining the same nuisance.<sup>91</sup>

Frequent application of this maxim is made to the case of a complainant guilty of fraud in respect to the matter in litigation.<sup>92</sup> Thus, a grantor in a conveyance executed to defraud creditors cannot maintain a suit in equity for its cancellation;<sup>93</sup> and a trademark containing false representations calculated to deceive the public will not be protected in equity.<sup>94</sup>

So, also, where both parties have been engaged in an illegal transaction, neither is, in general, entitled to the aid of a court of equity as against the other, who has obtained the fruits of the crime, it matters not whether the transaction be merely prohibited by statute, or whether it is intrinsically immoral or vicious.<sup>95</sup> Thus, all instruments executed to give effect to an illegal agreement are tainted with the illegality, and will neither be canceled nor en-

<sup>89</sup> *McVey v. Brendel*, 144 Pa. St. 235, 22 Atl. 912. This case is justly criticised in *Cohn v. People*, 149 Ill. 486, 37 N. E. 60, on the ground that the label in question does not stigmatize non-union labor.

<sup>90</sup> *Friend v. Lamb*, 152 Pa. St. 529, 25 Atl. 577; *Bagwell v. Bagwell*, 72 Ga. 92; *Mansfield v. Sherman*, 81 Me. 365, 367, 17 Atl. 300; *Willard v. Tayloe*, 8 Wall. 557, 567. See, also, post, 273.

<sup>91</sup> *Cassady v. Cavenor*, 37 Iowa, 300; *Medford v. Levy*, 31 W. Va. 649, 8 S. E. 302. Equity does not aid oppressive conduct, *Hunter v. Carroll*, 64 N. H. 572, 15 Atl. 17; nor give complainant relief against his own vice and folly, *Rozell v. Redding*, 59 Mich. 331, 26 N. W. 498; or from the consequence of a risk voluntarily assumed, *Patterson v. Brown*, 32 N. Y. 81.

<sup>92</sup> *Fraud of Infant, Overton v. Banlster*, 3 Hare, 503; *Nelson v. Stocker*, 4 De Gex & J. 458, 464. See, generally, *Whceler v. Sage*, 1 Wall. 529; *Pearce v. Ware*, 94 Mich. 321, 53 N. W. 1106; *Scranton Electric Light & Heat Co. v. Scranton Illuminating Heat & Power Co.*, 122 Pa. St. 154, 15 Atl. 446; *Bleakley's Appeal*, 66 Pa. St. 187; *Walker v. Hill*, 22 N. J. Eq. 513; *Musselman v. Kent*, 33 Ind. 452.

<sup>93</sup> *Dent v. Ferguson*, 132 U. S. 50, 10 Sup. Ct. 13; *Freeman v. Sedwick*, 6 Gill (Md.) 28. But a debtor may abandon his fraudulent purpose, and may maintain suit to compel a reconveyance for the benefit of his creditors. *Curl v. Emery*, 148 Mass. 32, 18 N. E. 574.

<sup>94</sup> *Joseph v. Macowsky*, 96 Cal. 518, 31 Pac. 914; *Prince Manuf'g Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 31 N. E. 990.

<sup>95</sup> *Harrington v. Bigelow*, 11 Paige, 349; *Gordon Tp. v. Shoemaker*, 12 Ohio, St. 624; *Sample v. Barnes*, 14 How. 70. Gambling transactions, *Smith v.*

forced in equity;<sup>98</sup> nor can a participant in an illegal transaction compel his confederate to account for property which has come into the latter's possession as a result of the crime.<sup>97</sup>

*Limitations.*

1. The maxim applies only to the conduct of the complainant in respect to the particular transaction under consideration, for the court will not go outside of the case to examine his conduct in other matters, or to question his character for fair dealing.<sup>98</sup> Thus, a violation of a statute with respect to platting land within city limits does not prevent the owner from resorting to equity to enjoin the flooding of the property by a private person;<sup>99</sup> fraud in obtaining a patent of public lands from the federal government does not prevent the reformation of a deed whereby one of the participants in the fraud, for an independent valuable consideration, conveys his interest in the land to his confederate;<sup>100</sup> and the fact that plaintiff coerced his wife into signing a mortgage given to cover a balance found due defendant on the settlement of an account is no ground for refusing to open the settlement for defendant's fraudulent imposition.<sup>101</sup> So, also, the fact that the parties have been engaged in illegal transactions, which have been fully completed, will not prevent one of them from resorting to equity for relief as to subsequent independent or collateral contracts or transactions, in which the original illegal transaction forms no part of the consideration.<sup>102</sup> Thus, a partner's sale of his interest in the firm to

Kammerer, 152 Pa. St. 98, 25 Atl. 165; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; Atwood v. Fisk, 101 Mass. 363; Weakley v. Watkins, 7 Humph. (Tenn.) 356.

<sup>98</sup> *Blasdel v. Fowle*, 120 Mass. 447.

<sup>97</sup> *Snell v. Dwight*, 120 Mass. 9, and cases there cited.

<sup>99</sup> *Dering v. Earl of Winchelsea*, 1 Cox, 318; *Lewis' Appeal*, 67 Pa. St. 153, 166; *Langdon v. Templeton*, 66 Vt. 173, 28 Atl. 866; *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 3 C. C. A. 605, 53 Fed. 592.

<sup>98</sup> *Sylvester v. Jerome* (Colo. Sup.) 34 Pac. 760.

<sup>100</sup> *Foster v. Winchester*, 92 Ala. 497, 9 South. 83.

<sup>101</sup> *Bateman v. Fargason*, 2 Flip. 660, 4 Fed. 32.

<sup>102</sup> *Armstrong v. Toler*, 11 Wheat. 258, 271; *Tenant v. Elliott*, 1 Bos. & P. 3; *Thomson v. Thomson*, 7 Ves. 470; *Sharp v. Taylor*, 2 Phil. Ch. 801. In *Sykes v. Beadon*, 11 Ch. Div. 170, 193, 194, Jessel, M. R., says: "You cannot ask the aid of a court of equity to carry out an illegal contract; but in cases

his copartner will be set aside in equity for the latter's fraudulent misrepresentation as to the value of the firm assets, though they were acquired in illegal transactions.<sup>103</sup>

2. Again, when the parties to a fraudulent or illegal transaction are not equally in the wrong, equity will not refuse relief to the more excusable of the two, especially if public policy is considered as advanced thereby.<sup>104</sup> Thus, a borrower who has joined in violating the usury law will, nevertheless, be relieved from his contract in equity, on the theory that the law was enacted to prevent oppression, and that public policy will be advanced by assisting the oppressed party who is not in *pari delicto*.<sup>105</sup> So, also, a conveyance to defraud creditors will be set aside if the grantee occupied confidential relations towards the grantor, and exerted undue influence in procuring it.<sup>106</sup>

**20. Equity aids the vigilant, not those who slumber on their rights.**

**LIMITATION**—Legal disabilities, such as infancy, coverture, and insanity, excuse delay; nor is the sovereign power chargeable with laches in respect to public rights and interests.

No rule of law is better settled than that a court of equity will discourage stale demands, for the peace of society, by refusing to

where the contract is actually at an end, or is put an end to, the court will interfere to prevent those who have, under the illegal contract, obtained money belonging to other persons, on representation that the contract was legal, from keeping that money. \* \* \* It does not follow that you cannot, in some cases, recover money paid over to third persons in pursuance of the contract; and it does not follow that you cannot, in other cases, obtain, even from the parties to the contract, moneys which they have become possessed of by representations that the contract was legal, and which belong to the persons who wish to recover them."

<sup>103</sup> *Brooks v. Martin*, 2 Wall. 70.

<sup>104</sup> *Reynell v. Sprye*, 1 De Gex, M. & G. 660, 679; *Tracy v. Talmage*, 14 N. Y. 162; *Duvall v. Wellman*, 124 N. Y. 158, 26 N. E. 343.

<sup>105</sup> *Adams, Eq.* p. 175; *Peters v. Mortimer*, 4 Edw. Ch. 279; *Fanning v. Dunham*, 5 Johns. Ch. 122, 142-144.

<sup>106</sup> *Ford v. Harrington*, 16 N. Y. 285; *Freelove v. Cole*, 41 Barb. 318, affirmed 41 N. Y. 619.

interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred.<sup>107</sup> The rule is peculiarly applicable when the difficulty of doing entire justice arises through the death of the principal participants in the transaction complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible.<sup>108</sup> Each case must necessarily be governed by its own circumstances;<sup>109</sup> since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge, or means of information,<sup>110</sup> great changes in values,<sup>111</sup> the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of alleged rights,<sup>112</sup> the intervening rights of third persons,<sup>113</sup> and the nature of the relief sought.<sup>114</sup>

Whenever the statute of limitations applies exclusively to legal actions, courts of equity are, of course, not strictly bound by it; but they generally require that analogous equitable actions be brought within the statutory period, on the principle that equity

<sup>107</sup> *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418; *Akins v. Hill*, 7 Ga. 573, 577; *March v. Whitmore*, 21 Wall. 178; *Castner v. Walrod*, 83 Ill. 171; *McDonnell v. White*, 11 H. L. Cas. 570; *Catlin v. Green*, 120 N. Y. 441, 24 N. E. 941.

<sup>108</sup> *Harrison v. Gibson*, 23 Grat. 212; *Lawrence v. Rokes*, 61 Me. 38; *Hatcher v. Hall*, 77 Va. 578; *Barnes v. Taylor*, 27 N. J. Eq. 259.

<sup>109</sup> *Reynolds v. Sumner*, 126 Ill. 58, 18 N. E. 334; *Bell v. Hudson*, 73 Cal. 285, 14 Pac. 791.

<sup>110</sup> *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Boswell v. Coaks*, 27 Ch. Div. 424, 457; *Bausman v. Kelley*, 38 Minn. 197, 36 N. W. 333.

<sup>111</sup> *Bliss v. Pritchard*, 67 Mo. 187; *Allen v. Allen*, 47 Mich. 79, 10 N. W. 113; *Pratt v. California Min. Co.*, 24 Fed. 809; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587.

<sup>112</sup> *Hammond v. Hopkins*, 143 U. S. 224, 250, 12 Sup. Ct. 418.

<sup>113</sup> *Ridgway v. Newstead*, 2 Giff. 492; *Lehmann v. McArthur*, 3 Ch. App. 496.

<sup>114</sup> Length of time sufficient to preclude rescission may not bar reformation of contract. *Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334.

follows the law.<sup>115</sup> In many of the states the time within which equitable actions must be brought is prescribed by statute; but it has been held that this fact does not take away the right of the court to refuse purely equitable relief on the ground of laches, though short of the statute period of limitations.<sup>116</sup>

*Limitations.*

Since a person non sui juris cannot act in his own behalf, neither an infant<sup>117</sup> nor a married woman under the disability of coverture<sup>118</sup> is chargeable with laches. So, also, with one under the disability of insanity.<sup>119</sup> A suit by the sovereign power to enforce a public right or assert a public interest is not barred by the laches of its officers, however gross.<sup>120</sup>

<sup>115</sup> Ante, 34.

<sup>116</sup> Calhoun v. Millard, 121 N. Y. 69, 24 N. E. 27.

<sup>117</sup> McMillan v. Rushing, 80 Ala. 402; Whaley v. Elliot, 1 A. K. Marsh. 345; Blandford v. Marlborough, 2 Atk. 545.

<sup>118</sup> Baker v. Morris, 10 Leigh (Va.) 284; Willson v. McCarty, 55 Md. 277.

<sup>119</sup> Craig v. Leiper, 2 Yerg. (Tenn.) 193; Dungan v. Insurance Co., 46 Md. 469, 499.

<sup>120</sup> U. S. v. Insley, 130 U. S. 263, 9 Sup. Ct. 485; U. S. v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083; Steele v. U. S., 113 U. S. 128, 5 Sup. Ct. 396.

**CHAPTER IV.****THE DOCTRINES OF EQUITY—ESTOPPEL, ELECTION, SATISFACTION, PERFORMANCE, AND CONVERSION.**

21. Equitable Estoppel.
22. Essential Elements.
23. Effect of Estoppel.
24. Election.
25. Conditions Requiring Election.
26. Election between Dower and Testamentary Gift.
27. Mode of Election.
28. Ascertainment of Values.
- 29-31. Election by Persons under Disability.
32. Effect of Election.
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- 34-35. Admissibility of Evidence as to Intention.
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37. Satisfaction of Debt by Legacy, etc.
38. Double Provisions for Child by Parent or Person in Loco Parentis.
39. Ademption.
40. Person in Loco Parentis.
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42. Covenant to Make Settlement Followed by Testamentary Provision.
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44. Conversion.
45. Words Sufficient to Work a Conversion.
46. Time of Conversion.
47. Effect of Conversion.
- 48-49. Total or Partial Failure of Purposes for which Conversion is Directed.
50. Double Conversion.
51. Reconversion.

**EQUITABLE ESTOPPEL.**

21. Where one voluntarily, by his words or conduct, causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position for the worse, the former

is concluded from averring against the latter a different state of things as existing at the same time.<sup>1</sup>

This branch of the law of estoppel originated in the English court of chancery.<sup>2</sup> It was definitely adopted in England as a common-law doctrine in the leading case of *Pickard v. Sears*;<sup>3</sup> and it is now administered almost as freely by courts of law as by courts of equity.<sup>4</sup> The doctrine rests on the broad ground of public policy and good faith, and is interposed to guard against fraud and prevent injustice.<sup>5</sup> Its vital principle is that he who, by his language or conduct, leads another to do what he would otherwise not have done, shall not subject such person to loss or injury by disappointing the expectations on which he acted.<sup>6</sup> It is always applied so as to promote the ends

<sup>1</sup> *Pickard v. Sears*, 6 Adol. & E. 469; *Freeman v. Cooke*, 2 Exch. 654. "Where one voluntarily, by acts or declarations, represents a certain state of facts to exist, and thereby procures a change of conduct in another, he cannot afterwards be heard to assert a contrary state of facts, if injury results to, or fraud is perpetrated thereby upon, the party who has acted relying upon the truth of his representations." *Gillett v. Willey*, 126 Ill. 310, 323, 19 N. E. 287. "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might, perhaps, have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." 2 Pom. Eq. Jur. § 804.

<sup>2</sup> In *Keate v. Phillips*, 18 Ch. Div. 560, 577, Vice Chancellor Bacon said: "The common-law doctrine of estoppel was, as I have said, a device which the common-law courts resorted to at a very early period to strengthen and lengthen their arm, and, not venturing to exercise an equitable jurisdiction over the subject before them, they did convert their own special pleading tactics into an instrument by which they could obtain an end which the court of chancery, without any foreign assistance, did at all times, and I hope will at all times, put in force in order to do justice." See, also, as to origin of equitable estoppel, *Horn v. Cole*, 51 N. H. 287.

<sup>3</sup> Adol. & E. 460, decided in 1837.

<sup>4</sup> It has been held by some courts that the doctrine of equitable estoppel cannot be invoked in legal actions involving the title to real estate. *Hayes v. Livingston*, 34 Mich. 384; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 514.

<sup>5</sup> *Shipley v. Fox*, 60 Md. 572, 579; 16 Atl. 275.

<sup>6</sup> *Dickerson v. Colgrove*, 100 U. S. 578, 580.

of justice, is available only for protection, and cannot be used as a weapon of assault.<sup>7</sup>

#### **SAME—ESSENTIAL ELEMENTS.**

**22. The elements essential to create an equitable estoppel are:**

- (a) Words or conduct by the party against whom the estoppel is alleged, amounting to misrepresentation or concealment of material facts.<sup>8</sup>**

The words relied on to work an estoppel may be either written or spoken; and misleading silence, where there is a duty to speak, is as effectual to create an estoppel as a direct representation. He who is silent when it is his duty to speak will not be permitted to speak when it is his duty to be silent.<sup>9</sup> The representation must, however, be certain, and of a material character, and such as would naturally lead an ordinarily prudent man to act on it.<sup>10</sup> As a rule, it must relate to a matter of fact, and not of law or opinion,<sup>11</sup> and must relate to a past or present, as distinguished from a future, state of things.<sup>12</sup>

- (b) The party against whom the estoppel is alleged must have knowledge, actual or imputed, of the untruthfulness of the representations made by him.<sup>13</sup>**

<sup>7</sup> *Dickerson v. Colgrove*, 100 U. S. 578, 580; *Seton v. Lafone*, 19 Q. B. Div. 68, 70.

<sup>8</sup> *Stevens v. Dennett*, 51 N. H. 333, 334; *Pittsburg v. Danforth*, 56 N. H. 278.

<sup>9</sup> *Swayze v. Carter*, 41 N. J. Eq. 231, 233, 3 Atl. 706; *Morgan v. Railroad Co.*, 96 U. S. 716, 720; *Vreeland v. Ellsworth*, 71 Iowa, 347, 32 N. W. 374; *Leather Manuf'rs' Nat. Bank v. Morgan*, 117 U. S. 96, 108, 6 Sup. Ct. 657; *Gill v. Hardin*, 48 Ark. 409, 3 S. W. 519; *State v. Wertzell*, 62 Wis. 188, 22 N. W. 150; *Gregg v. Wells*, 10 Adol. & E. 90.

<sup>10</sup> *Blodgett v. Perry*, 97 Mo. 263, 273, 10 S. W. 891; *Howe Mach. Co. v. Farrington*, 82 N. Y. 121; *The Belle of the Sea*, 20 Wall. 429.

<sup>11</sup> *Whitwell v. Winslow*, 134 Mass. 346, 347; *Chatfield v. Simonson*, 92 N. Y. 209, 218; *Soward v. Johnston*, 65 Mo. 102.

<sup>12</sup> *Jackson v. Allen*, 120 Mass. 79; *White v. Ashton*, 51 N. Y. 280; *Starry v. Korab*, 65 Iowa, 267, 21 N. W. 600; *Insurance Co. v. Mowry*, 96 U. S. 544, 547.

<sup>13</sup> *Bigelow, Estop.* p. 609; 2 Pom. Eq. Jur. § 809.



If one knowingly makes a false representation in reference to a material matter, the case is clear. If he recklessly makes a representation without knowing whether it be true or false, he is equally bound by it; for the affirmation of what one does not know or believe to be true is, equally, in morals and in law, as unjustifiable as the affirmation of what is known to be positively false.<sup>14</sup> So, also, a misrepresentation, innocently made, and with a belief in its truth will work an estoppel where the party making it was in a position in which he ought to have known the actual facts.<sup>15</sup>

- (c) The party relying on the estoppel must show that he was ignorant of the facts, and that such ignorance was not chargeable to his neglect.<sup>16</sup>**

One who has knowledge of the facts, or being put on inquiry, and having the means of knowledge within his reach, fails to use reasonable diligence to ascertain the truth, cannot claim an estoppel;<sup>17</sup> nor can he claim an estoppel if he knew the facts when he acted on the representation, though he was ignorant of them when the representation was made.<sup>18</sup>

- (d) The party estopped must intend, or be in a position to reasonably anticipate, that his conduct or representation will be acted on by the party asserting the estoppel, or the public generally.**

The party against whom the estoppel is alleged need not intend to deceive or mislead; it is sufficient if the act or declaration was calculated to and did in fact mislead another acting in good faith and with reasonable diligence.<sup>19</sup> The use of the term "fraud" is

<sup>14</sup> 1 Story, Eq. Jur. § 193; *Preston v. Mann*, 25 Conn. 118, 129.

<sup>15</sup> *Irving Nat. Bank v. Alley*, 79 N. Y. 536, 540; *Horn v. Cole*, 51 N. H. 237.

<sup>16</sup> *Bigelow*, Estop. p. 629, 2 Pom. Eq. Jur. § 810.

<sup>17</sup> *Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389; *Robbins v. Potter*, 98 Mass. 532; *Odlin v. Gove*, 41 N. H. 465; *Lux v. Haggin*, 69 Cal. 255, 266, 10 Pac. 674.

<sup>18</sup> *Freeman v. Cooke*, 2 Exch. 654.

<sup>19</sup> *Blair v. Walt*, 69 N. Y. 113; *Standard Paper Co. v. Guenther*, 67 Wis. 106, 30 N. W. 298; *Stevens v. Ludlum*, 46 Minn. 160, 48 N. W. 771; *Trustees, etc.*,

unnecessary, and even improper, in connection with equitable estoppel, unless applied to the effort of the party estopped to repudiate his conduct, and to assert a right or claim in contravention thereof.<sup>20</sup>

While, as a general rule, the party making the representation must intend that it be acted on by the party to whom it is made,<sup>21</sup> an estoppel may arise where the conduct of one is such that another may reasonably infer the existence of a certain state of facts, whether the party intends that he should or not.<sup>22</sup> A familiar example is the estoppel of the owner of chattels from asserting title thereto as against a bona fide purchaser from one whom he has clothed with the apparent title, though without any intention that the purchaser should act on such appearance.<sup>23</sup> If the representation, whether by words or conduct, instead of being confined to a particular person, or to a particular class of persons, was actually intended to be, or must reasonably be presumed to have been intended, for the public generally, any one of the public who acted in reliance on it may assert the estoppel.<sup>24</sup>

**(e) The representation or conduct must have been acted on promptly and to his prejudice by him who asserts the estoppel.**

The one asserting the estoppel must have acted on his adversary's representation or conduct with reasonable promptness. "His first acts after listening to the words or witnessing the conduct of his adversary in regard to the matter involved is the test of his belief in the existence of the thing represented, and indicates that belief; for, unless he is induced by those words or that conduct to alter his position, his adversary cannot be concluded from averring a different

of *Town of Brookhaven v. Smith*, 118 N. Y. 634, 23 N. E. 1002; *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657; *Continental Nat. Bank v. National Bank of the Commonwealth*, 50 N. Y. 575.

<sup>20</sup> *Galbraith v. Lunsford*, 87 Tenn. 89, 105, 9 S. W. 365.

<sup>21</sup> *Zuchtmann v. Roberts*, 109 Mass. 53; *Plumer v. Lord*, 9 Allen, 455; *Hodge v. Ludlum*, 45 Minn. 290, 47 N. W. 805.

<sup>22</sup> *Horn v. Cole*, 51 N. H. 287; *Cornish v. Abington*, 4 Hurl. & N. 549; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Combes v. Chandler*, 33 Ohio St. 178.

<sup>23</sup> *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325.

<sup>24</sup> *McLean v. Dow*, 42 Wis. 610.

state of things.”<sup>25</sup> Not only must he act promptly, but he must so change his position that he will be injured if the representation be withdrawn, or the conduct repudiated.<sup>26</sup> The injury need not, however, result from affirmative action on his part, but it is enough that he was induced by the other party to refrain from obtaining a particular benefit, which he would otherwise have been reasonably sure of acquiring.<sup>27</sup>

#### **SAME—EFFECT OF ESTOPPEL.**

**23.** The party entitled to the benefit of an estoppel has the same rights against the one estopped as if the representation had been true, and his right of recovery is not limited to the consideration actually paid, or the actual damages sustained.

For example, the assignee of mortgages, who purchased in reliance on the mortgagor's representation that they are valid, is entitled to recover the full amount of the mortgages, and not merely the sum paid by him therefor.<sup>28</sup> So, also, where one has estopped himself from denying the genuineness of his indorsement on a note, the holder is entitled to recover from him the whole amount due thereon; and it is immaterial whether his actual damage in relying on the representation is more or less.<sup>29</sup>

#### **ELECTION.**

**24.** Where property is given by deed or will, and by the same instrument the donor assumes to transfer the donee's property to a third person, the donee must elect to take either:

<sup>25</sup> *Andrews v. Aetna Life Ins. Co.*, 85 N. Y. 334.

<sup>26</sup> *Nell v. Dayton*, 43 Minn. 242, 45 N. W. 229; *Railroad Co. v. Dubois*, 12 Wall. 47; *Warder v. Baldwin*, 51 Wis. 450, 8 N. W. 257; *East v. Dollhite*, 72 N. C. 502; *Adler v. Pin*, 80 Ala. 351, 354, 355.

<sup>27</sup> *Continental Nat. Bank v. National Bank of the Commonwealth*, 50 N. Y. 575, 585; *Weinstein v. National Bank*, 69 Tex. 38, 6 S. W. 171.

<sup>28</sup> *Grissler v. Powers*, 81 N. Y. 57.

<sup>29</sup> *Fall River Bank v. Buffinton*, 97 Mass. 498. See, however, contra, *Campbell v. Nichols*, 33 N. J. Law, 81.

- (a) Under the instrument, in which case he must carry out all its provisions, and he must transfer his property to the person named therein.
- (b) Against the instrument, in which case he forfeits so much of the gift intended for him as is necessary to compensate the person disappointed by his election, and he will be entitled to any surplus remaining after such compensation.

This doctrine rests on the maxim that he who asks equity must do it, and means that, where two inconsistent rights are presented to the choice of a party by a person who manifests a clear intention that he shall not enjoy both, he must accept or reject one or the other; in other words, that one cannot take a benefit under an instrument, and then repudiate that instrument.<sup>30</sup> Thus, it has been held in a recent case that where testator devises land to his wife, and bequeathes to others the proceeds of a policy of insurance which was payable to her, and she accepts the devise, she thereby relinquishes her right under the policy.<sup>31</sup> In such a case as this—where the donee elects to take under the instrument, and to part with his own property—no further question can arise; but where he elects to take against the instrument, and to retain his own property, the question arises, what becomes of the gift intended for him? It was held in some of the earlier cases that the donee forfeited the entire gift by such election;<sup>32</sup> but it is now established that compensation, not forfeiture, is the object of the doctrine, and that all that is required from the donee is to make or allow compensation to the person who is disappointed by the election.<sup>33</sup> Illustration

<sup>30</sup> *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354; *Penn v. Guggenheimer*, 76 Va. 839; *Hyde v. Baldwin*, 17 Pick. 303; *Havens v. Sackett*, 15 N. Y. 365.

<sup>31</sup> *Huhlien v. Huhlien* (Ky.) 8 S. W. 260. See, also, *Noys v. Mordaunt*, 1 White & T. Lead. Cas. Eq. 337; *Wilbanks v. Wilbanks*, 18 Ill. 17; *Gorham v. Dodge*, 122 Ill. 528, 14 N. E. 44; *McQuerry v. Gilliland*, 89 Ky. 434, 12 S. W. 1037; *Brown v. Ward*, 103 N. C. 173, 9 S. E. 300.

<sup>32</sup> *Cowper v. Scott*, 3 P. Wms. 124; *Cookes v. Hellier*, 1 Ves. Sr. 235.

<sup>33</sup> *Streatfield v. Streatfield*, Cas. t. Talb. 176; *Gretton v. Haward*, 1 Swanst. 433; *Rogers v. Jones*, 3 Ch. Div. 688; *Cauffman v. Cauffman*, 17 Serg. & R. 16, 24, 25; *Roe v. Roe*, 21 N. J. Eq. 253; *Brown v. Brown*, 42 Minn. 270, 44 N. W. 250; *Colver v. Wood* (Tenn.) 25 S. W. 963.

will perhaps make this clearer. Suppose a legacy of \$20,000 is given to A., and by the same will testator undertakes to devise to B. land worth \$10,000, owned by A. A. elects against the will, and retains his land. By so doing, he does not forfeit the entire legacy of \$20,000, but may receive \$10,000 thereof; the remaining \$10,000 being paid to B., as a compensation for his disappointment in not receiving the estate intended for him.

#### **SAME—CONDITIONS REQUIRING ELECTION.**

**25. To make a case requiring an election, the following things are necessary:**

- (a) The instrument itself must show a clear intention on the part of the donor to dispose of property belonging to the person required to elect.**
- (b) A gift of property actually and absolutely owned by the donor to the person required to elect.**

#### *Intention to Dispose of Donee's Property.*

No case for an election arises unless the donor attempts to dispose of property belonging to the person required to elect. Thus, where a parent, after making and publishing his will, conveys to his daughter, to whom he had devised land in his will, a portion of the land he had devised to his son, a case requiring an election by the daughter is not made out, since the parent was dealing entirely with his own property, and made no pretense of dealing with the property of another.<sup>34</sup>

Further than this, the donor's intention to dispose of property not his own must clearly appear.<sup>35</sup> It need not, however, be expressly de-

<sup>34</sup> *Hattersley v. Bissett* (N. J. Ch.) 25 Atl. Rep. 332. Same principle, *Long v. Wier*, 2 Rich. Eq. 283; *Thompson v. Thompson*, 2 Strobh. 48. So, also, when by will two distinct gifts are made to the same person, one of which is onerous and the other beneficial, the donee is not required to elect whether he will accept both or neither. He may, if he pleases, accept the benefit and reject the burden. *Andrew v. Trinity Hall*, 9 Ves. 525. But, if the onerous and

<sup>35</sup> *Forrester v. Cotton*, 1 Eden, 531; *Dillon v. Parker*, 1 Swanst. 359; *Pickersgill v. Rodger*, 5 Ch. Div. 163, 166; *Havens v. Sackett*, 15 N. Y. 365; *Penn v. Guggenheimer*, 76 Va. 839.

clared, but may be gathered from the whole instrument.<sup>36</sup> Ordinarily, such intention is clear whenever the donor has no interest whatever in the property he attempts to dispose; but, where he has a partial interest in the property dealt with, it will often be doubtful whether his language is designed to refer to the whole property, and so to affect the interest of another person, or whether it is to be confined to his own partial interest only. In such a case of partial ownership, the presumption is that he intended to give only that which he might properly dispose of, and nothing more; and this presumption will always prevail, unless by demonstration plain, or necessary implication, the contrary appears.<sup>37</sup> Thus, if in making a devise, testator uses general expressions, such as "all my lands," "all my estate," no case of election arises, for it does not plainly appear that he meant to dispose of anything but what was strictly his own;<sup>38</sup> but where, owning merely a partial or undivided interest in an estate, testator devises the entire corpus therein specifically, a case for an election is made.<sup>39</sup>

Again, the donor's intention must appear from the instrument itself, and cannot be proved by evidence dehors the instrument.<sup>40</sup> When, however, the donor's intention to dispose of property not his own does clearly appear, it is immaterial whether he knew the property to be not his own or erroneously conceived it to be so;<sup>41</sup>

the beneficial property are included in the same gift, the acceptance of the burden is *prima facie* deemed to be a condition of the gift, and the donee must elect to take the whole gift or none of it. *Guthrie v. Walrond*, 22 Ch. Div. 573; *In re Hotchkys*, 32 Ch. Div. 408; *Warren v. Rudall*, 1 Johns. & H. 13.

<sup>36</sup> *Penn v. Guggenheimer*, 76 Va. 839.

<sup>37</sup> *Pickersgill v. Rodger*, 5 Ch. Div. 163, 170; *Maddison v. Chapman*, 1 Johns. & H. 470; *Penn v. Guggenheimer*, 76 Va. 839.

<sup>38</sup> *Wintour v. Clifton*, 8 De Gex, M. & G. 641, 650; *Maxwell v. Maxwell*, 2 De Gex, M. & G. 705, 713; *Dummer v. Pitcher*, 2 Mylne & K. 262; *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318; *Haack v. Welcken*, 118 N. Y. 67, 23 N. E. 133.

<sup>39</sup> *Penn v. Guggenheimer*, 76 Va. 839 (devise of "home place" in which testator owned only an undivided interest); *Shuttleworth v. Greaves*, 4 Mylne & C. 35.

<sup>40</sup> *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318; *Blake v. Bunbury*, 1 Ves. Jr. 523; *Clementson v. Gandy*, 1 Keen, 309.

<sup>41</sup> *Thellusson v. Woodford*, 13 Ves. 221; *Coutts v. Acworth*, L. R. 9 Eq. 519; *Griffith v. Scott*, 26 Ch. Div. 358.

and, when the gift is made by will, it is also immaterial whether the donee's interest in the property attempted to be disposed is vested or only contingent at the time of testator's death, provided it becomes vested before the distribution of the estate.<sup>42</sup>

There is another class of cases varying in their facts from the foregoing, but likewise depending on the donor's intention. A testator dies leaving property in several states. His will is valid in the state where executed, but void in so far as it undertakes to devise to a stranger land situated in a foreign state, because not executed in conformity with its laws. In these cases the question arises, must the heirs, who are entitled to take such land as intestate property, elect between it and valid legacies bequeathed to them by the will, or may they take both? Applying the foregoing rules, it has been held that if the will disposes of testator's property in general terms, without any specific reference to the land in the foreign state, the presumption is that testator intended to dispose of only such property as would pass by the particular will in question, and that, consequently, no election is required;<sup>43</sup> but if there is a specific devise of the foreign land, either expressly or by necessary implication, an election is required.<sup>44</sup>

*Gift to Person Required to Elect.*

As the doctrine of election depends upon compensation, it will not be applicable unless there be an available fund from which compensation can be made; that is, there will be no ground for election unless the donor bestows some property absolutely and actually his own on the person required to elect.<sup>45</sup> Thus, where testator devises to one of his daughters land owned by the husband of another daughter, and then devises another tract to this last-named daughter, the husband cannot be required to elect, because nothing has been devised to him.<sup>46</sup>

<sup>42</sup> *McQueen v. McQueen*, 2 Jones, Eq. 16.

<sup>43</sup> *Maxwell v. Maxwell*, 2 De Gex, M. & G. 705; *Johnson v. Telford*, 1 Russ. & M. 244; *Allen v. Anderson*, 5 Hare, 163; *Maxwell v. Hyslop*, L. R. 4 Eq. 407; *Jones v. Jones*, 8 Gill (Md.) 197.

<sup>44</sup> *Van Dyke's Appeal*, 60 Pa. St. 481, 489; *Brodie v. Barry*, 2 Ves. & B. 127; *Orrell v. Orrell*, 6 Ch. App. 302; *Dewar v. Maitland*, L. R. 2 Eq. 834.

<sup>45</sup> *Snell*, Eq. p. 240.

<sup>46</sup> *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143. So, also, where a person, having a power to appoint among children, makes an appointment con-

**SAME—ELECTION BETWEEN DOWER AND TESTAMENTARY GIFT.**

26. In the absence of statute, a widow is not put to her election between her dower and a testamentary disposition in her favor in her husband's will, unless the testator has declared the same to be in lieu of dower, either by express words or necessary implication; and it is not sufficient that the will renders it doubtful whether he intended that she should have her dower in addition to the provision.<sup>47</sup>

At common law, express words were necessary to require an election by the widow between her dower and a testamentary gift from her husband;<sup>48</sup> the presumption being that the gift was intended in addition to her dower. In equity, however, the rule was as stated in the black-letter text; that is, the intention to require an election might appear by implication. At the present time, both in England and in this country, statutes very generally enact that any provision in the husband's will is to be deemed in lieu of dower, requiring the widow to elect.<sup>49</sup>

**SAME—MODE OF ELECTION.**

27. An election may be either:

- (a) **Express**; such an election being some positive declaration by the person required to elect showing the intention and the fact of election.<sup>50</sup>

trary to the terms of the power, a child entitled in default of appointment was allowed to set it aside, notwithstanding that a share had, by the same instrument, been appointed to him. He was not required to elect, because there was no free disposable property of the appointor given to him which could be laid hold of to compensate the person disappointed. *Bristow v. Warde*, 2 Ves. Jr. 336. For a somewhat similar case, see *In re Fowler's Trust*, 27 Beav. 362.

<sup>47</sup> *Church v. Bull*, 2 Denio, 430; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Birmingham v. Kirwan*, 2 Schoales & L. 452; *Hall v. Hill*, 1 Dru. & War. 94, 103.

<sup>48</sup> *Gosling v. Warburton*, Cro. Eliz. 128; *Nottley v. Palmer*, 2 Drew. 93.

<sup>49</sup> *Smith*, Pr. Eq. p. 444; 1 Pom. Eq. Jur. § 494.

<sup>50</sup> 1 Pom. Eq. Jur. § 514.



(b) **Implied; an election being implied when the person required to elect, with full knowledge of his rights and of the facts, so deals with the properties as to evince an intention to take one and reject the other.**

1. An instance of an express election is where the party required to elect executes a written instrument declaring which one of the two properties he will take, and in such a case no further question can arise.

2. The question as to what is an implied election is one often difficult of solution. It may be inferred from the conduct of the party, his acts, his omissions, and his mode of dealing with the property. Unequivocal acts of ownership, with knowledge of the right to elect, and not through a mistake with respect to the value of the estate, will generally be deemed binding;<sup>51</sup> but it is otherwise where there is ignorance of material facts or of the right to elect.<sup>52</sup> Lapse of time, though not of itself conclusive, yet, when connected with circumstances of enjoyment, may be decisive on the question of election;<sup>53</sup> and, where a specific time has been limited for election, a person who does not elect within such time will be deemed to have elected against the instrument.<sup>54</sup> Ability to restore others to the same position as if there had been no election is one of the indices of election.<sup>55</sup>

#### **SAME—ASCERTAINMENT OF VALUES.**

**28. Persons required to elect are entitled to ascertain the respective values of their own property and of that conferred on them, and may commence an action to have all requisite accounts taken.<sup>56</sup>**

It follows from this rule that an election made under a mistake of facts as to the value of the property or its condition is not binding, and is subject to revocation.<sup>57</sup>

<sup>51</sup> *Penn v. Guggenheimer*, 76 Va. 839.

<sup>52</sup> *Watson v. Watson*, 128 Mass. 152; *Briscoe v. Briscoe*, 7 Ir. Eq. 123.

<sup>53</sup> *Tibbits v. Tibbits*, 19 Ves. 663; *Dewar v. Maitland*, L. R. 2 Eq. 834.

<sup>54</sup> *Streatfield v. Streatfield*, Cas. t. Talb. 176.

<sup>55</sup> *Penn v. Guggenheimer*, 76 Va. 839.

<sup>56</sup> *Buttricke v. Brodhurst*, 3 Brown, Ch. 88.

<sup>57</sup> *Pusey v. Desbouvrie*, 3 P. Wms. 315; *Wake v. Wake*, 3 Brown, Ch. 255;

**SAME—ELECTION BY PERSONS UNDER DISABILITY.**

29. Married women may make a binding election without the intervention of a court, though an inquiry may be directed as to what course is the more beneficial, and an election required within a limited time thereafter.<sup>58</sup>

30. With respect to infants, the election may be deferred until the infant becomes of age;<sup>59</sup> but the usual practice is for the court to make the election for him, after judicially ascertaining what course is the more beneficial.<sup>60</sup>

31. With respect to lunatics, the court will elect for them, after judicial inquiry as to what course is best for them.<sup>61</sup>

In making an election the court will generally select the more valuable property; but in the case of lunatics the court may exercise a sound discretion. Accordingly, where testator's widow had been hopelessly insane for many years, the court elected to take a testamentary provision ample for her support, though her statutory interest in her husband's estate was much more valuable; being controlled by the consideration that a contrary election would greatly interfere with the entire scheme of the will which contained many bequests for public and charitable purposes.<sup>62</sup>

*Dillon v. Parker*, 1 Swanst. 359, note; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Dabney v. Bailey*, 42 Ga. 521; *Richart v. Richart*, 30 Iowa, 465; *Woodburn's Estate*, 138 Pa. St. 606, 21 Atl. 16.

<sup>58</sup> *Gretton v. Haward*, 1 Swanst. 409, 413, note; *Davis v. Page*, 9 Ves. 350; *Tiernan v. Roland*, 15 Pa. St. 451; *Howell v. Tomkins*, 42 N. J. Eq. 305, 11 Atl. 333.

<sup>59</sup> *Streatfield v. Streatfield*, Cas. t. Talb. 176, 1 White & T. Lead. Cas. Eq. 333.

<sup>60</sup> *Bigland v. Huddleston*, 3 Brown, Ch. 285, note; *Ashburnham v. Ashburnham*, 13 Jur. 1111; *Cavendish v. Dacre*, 31 Ch. Div. 470; *McQueen v. McQueen*, 2 Jones, Eq. 16.

<sup>61</sup> *Wilder v. Pigott*, 22 Ch. Div. 263; *Kennedy v. Johnston*, 65 Pa. St. 451; *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *Penhallow v. Kimball*, 61 N. H. 596; *State v. Ueland*, 30 Minn. 277, 15 N. W. 245.

<sup>62</sup> *Van Steenwyck v. Washburn*, 59 Wis. 483, 509, 17 N. W. 289. It has, however, been held that the court will not regard the interest of the heirs in making such an election. *Penhallow v. Kimball*, 61 N. H. 596.

### SAME—EFFECT OF ELECTION.

32. An election once made, whether express or implied, is irrevocable, and binds not only the person making it, and all claiming under him,<sup>63</sup> but also the other beneficiaries under the instrument of donation whose rights are directly affected by the election.<sup>64</sup>

Thus, where, by virtue of an election by a widow to take under a will, an estate has become vested in another devisee, the latter cannot defeat the right of his creditors to subject that estate to their debts by disclaiming title in favor of the widow, so as to enable her to hold the estate as her dower.<sup>65</sup>

### SATISFACTION.

33. Satisfaction is the donation of a thing with the intention that it is to be taken either wholly or in part in extinguishment of some prior claim of the donee.<sup>66</sup>

The principle underlying the doctrine of satisfaction is similar to the one which underlies the doctrine of election; namely, that, when the donor makes a gift with the express or implied intention that it shall be taken in extinguishment of some prior claim of the donee, the latter cannot accept the gift and at the same time enforce his claim against the donor.<sup>67</sup> To warrant the application of the doctrine, there must be something to show that it was the donor's intention that the gift should be in satisfaction of the prior obligation. Where this intention is expressed, no comment is required; for, where the subsequent gift is expressly bestowed in extinguishment of the prior demand, the donee clearly cannot claim both.<sup>68</sup>

<sup>63</sup> *Earl of Northumberland v. Earl of Aylesford*, Amb. 540; *Dewar v. Maitland*, L. R. 2 Eq. 834; *Cory v. Cory*, 37 N. J. Eq. 198.

<sup>64</sup> 1 Pom. Eq. Jur. § 516.

<sup>65</sup> *Penn v. Guggenheimer*, 76 Va. 839.

<sup>66</sup> *Lord Chichester v. Coventry*, L. R. 2 H. L. 71, 95.

<sup>67</sup> 1 Pom. Eq. Jur. § 520.

<sup>68</sup> *Hardingham v. Thomas*, 2 Drew, 353.

But in many cases this intention has to be implied from the circumstances, and then considerable difficulty is often experienced.

#### **SAME—ADMISSIBILITY OF EVIDENCE AS TO INTENTION.**

34. Where the gift relied on to extinguish the prior claim is not accompanied by any writing, and rests wholly in parol, verbal evidence, including the donor's contemporaneous declarations, is admissible to show the true nature and effect of the whole transaction.<sup>69</sup>

35. Where the subsequent gift is evidenced by a written instrument which raises a presumption that the gift is in satisfaction of the prior claim, parol evidence is admissible to rebut the presumption; but, where the instrument raises no such presumption, parol evidence is not admissible to raise the presumption and to show the intention of the parties.<sup>70</sup>

Where, under the rules of law, a written donation indicates no intention to satisfy the prior claim of the donee, parol evidence is not admissible to show such intent, since that would be to alter and vary the terms of the instrument; but, where a presumption of satisfaction arises from the instrument itself, the admission of parol evidence to show whether this presumption is well or ill founded does not violate the rule against the alteration of written instruments by parol evidence.<sup>71</sup> It should also be noted that questions as to the admissibility of extrinsic evidence as to the donor's intention are of necessity confined to the subsequent gift, and not to the prior obligation, for that stands admitted, and the only inquiry is whether the subsequent gift was intended by the donor as a satisfaction.<sup>72</sup>

<sup>69</sup> 1 Pom. Eq. Jur. § 576; Kirk v. Eddowes, 3 Hare, 509; Sims v. Sims, 10 N. J. Eq. 158, 162, 163; Jones v. Mason, 5 Rand. (Va.) 577.

<sup>70</sup> Tussaud v. Tussaud, 9 Ch. Div. 363; Hall v. Hill, 1 Dru. & War. 94; Kirk v. Eddowes, 3 Hare, 509; Gilliam v. Chancellor, 43 Miss. 437; Cloud v. Clinkinbeard, 8 B. Mon. 397; Reynolds v. Robinson, 82 N. Y. 103.

<sup>71</sup> Hall v. Hill, 1 Dru. & War. 94; Kirk v. Eddowes, 3 Hare, 509.

<sup>72</sup> Hall v. Hill, 1 Dru. & War. 94, 133.

**SAME—CLASSIFICATION.**

**§6.** The doctrine of satisfaction has been applied to two classes of cases:

- (a) Where a debtor, by will or otherwise, confers a pecuniary benefit on his creditor.
- (b) Where a father or person filling the place of a parent makes a double provision for a child or person standing towards him in a filial relation.<sup>73</sup>

**SAME—SATISFACTION OF DEBT BY LEGACY, ETC.**

**§7.** Where testator gives a legacy to a creditor equal to or exceeding the amount of the debt, the presumption is that it was intended to be a discharge of the debt;<sup>74</sup> but slight circumstances will be laid hold of to overcome the presumption.<sup>75</sup>

This branch of the doctrine rests on the maxim that equity imputes an intention to fulfill an obligation, viz. a legacy to a creditor must have been intended in satisfaction of the debt which testator was under a legal obligation to pay. But, since a legacy also imports a bounty, the presumption is not favored by the courts, and they lean against it. Where, however, the debtor bequeaths exactly the same sum as the debt, or a greater sum, without any statement as to intent, it will be taken as a satisfaction;<sup>76</sup> but, if the legacy be less than the debt, it has never been held a satisfaction, even *pro tanto*.<sup>77</sup> So, also, satisfaction will not be presumed where

<sup>73</sup> A third class of cases is added by Mr. Pomeroy and by Mr. Snell, viz. satisfaction of legacies by subsequent legacies, but manifestly this is purely a question as to the construction of the will, and not of satisfaction.

<sup>74</sup> *Talbot v. Duke of Shrewsbury*, 2 White & T. Lead. Cas. Eq. 379.

<sup>75</sup> *Lady Thynne v. Earl of Glengall*, 2 H. L. Cas. 153; *Richardson v. Greese*, 3 Atk. 65; *Strong v. Williams*, 12 Mass. 390; *Deichman v. Arndt*, 49 N. J. Eq. 106, 22 Atl. 790; *Eaton v. Benton*, 2 Hill (N. Y.) 576.

<sup>76</sup> *Talbot v. Duke of Shrewsbury*, 2 White & T. Lead. Cas. Eq. 379; *Haynes v. Mico*, 1 Brown, Ch. 130.

<sup>77</sup> *Eastwood v. Vinke*, 2 P. Wms. 617; *Strong v. Williams*, 12 Mass. 391.

there is an express direction in the will for payment of debts and legacies,<sup>78</sup> or even of debts alone,<sup>79</sup> for in such cases the court infers an intention by testator that both the debt and the legacy shall be paid the creditors; nor will satisfaction be presumed where the time fixed for the payment of the legacy is different from that at which the debt is due, so as not to be equally advantageous to the creditor;<sup>80</sup> nor where the legacy is contingent or uncertain, as, for example, the residue of testator's estate;<sup>81</sup> nor where testator has assigned a particular motive for the gift;<sup>82</sup> nor where the debt was incurred after the will was executed;<sup>83</sup> nor where the legacy is of specific goods and chattels of uncertain value.<sup>84</sup> In conclusion, it should be stated that the foregoing rules apply only where there is no express declaration in the will as to the intention with which the legacy is given, for in all cases an express declaration in the will that the legacy is in satisfaction of the debt will be respected by the courts.

**SAME—DOUBLE PROVISIONS FOR CHILD BY PARENT OR PERSON IN LOCO PARENTIS.**

**38. This class of cases is again subdivided as follows:**

- (a) First a will, and then a gift or advancement.
- (b) First a covenant or agreement to make a settlement, followed by a testamentary provision.

**SAME—ADEMPTION.**

**39. Where a father or a person standing in loco parentis makes a testamentary provision for a child, and then,**

<sup>78</sup> *Chancey's Case*, 1 P. Wms. 408, 2 White & T. Lead. Cas. Eq. 380.

<sup>79</sup> *In re Huish*, 43 Ch. Div. 260; *Heisler v. Sharp's Ex'rs* (N. J. Prerog.) 14 Atl. 624.

<sup>80</sup> *Clark v. Sewell*, 3 Atk. 96; *Byrne v. Byrne*, 3 Serg. & R. 54; *Van Riper v. Van Riper*, 2 N. J. Eq. 1; *Cloud v. Clinkinbeard*, 8 B. Mon. 397. But, where the legacy is payable before the debt becomes due, satisfaction is presumed. *Walthen v. Smith*, 4 Madd. 325.

<sup>81</sup> *Barret v. Beckford*, 1 Ves. Sr. 519; *Byrne v. Byrne*, 3 Serg. & R. 54.

<sup>82</sup> *Mathews v. Mathews*, 2 Ves. Sr. 635; *Charlton v. West*, 30 Beav. 124.

<sup>83</sup> *Cranmer's Case*, 2 Salk. 508; *Heisler v. Sharp's Ex'rs*, 44 N. J. Eq. 167, 14 Atl. 624; *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. 701.

<sup>84</sup> *Deichman v. Arndt*, 49 N. J. Eq. 106, 22 Atl. 799.

during his lifetime, makes a gift or advancement to such child, the presumption arises that the subsequent gift was intended as a satisfaction of the testamentary provision. This form of satisfaction is technically called an "ademption" of the testamentary provision.<sup>85</sup>

This branch of the doctrine rests on the two maxims that equality is equity, and that equity imputes an intention to fulfill an obligation, viz.: Looking at the ordinary dealings of mankind, equity will presume that a parent intends to do what he is in duty bound to do,—make a provision for his children according to his means,—and that he will distribute his estate equally among them. Hence the presumption is, in the absence of any declaration to the contrary, that a father who makes a gift to a child, after having already provided for him by will, did not intend the will to remain in full force, but that he intended to satisfy in his lifetime the obligation which he would otherwise have discharged at his death.<sup>86</sup> It follows from this principle that where the relation of parent and child, either natural or artificial, does not exist between the parties, a subsequent gift by the testator will not be presumed to adeem or satisfy a prior testamentary provision, for both proceed from testator's bounty, and there is no reason why the court should assign any limit to that bounty which is wholly arbitrary. The consequence is that an illegitimate child, which is in law deemed to be a stranger to its father, may find itself better provided for than it would have been if it had been legitimate.<sup>87</sup> It should, however, be carefully borne in mind that these presumptions apply only where there is no express declaration of the donor's intention; and that in all cases—it matters not whether the parental relation exists, or whether the parties are strangers—it is perfectly competent for the donor, by an instrument in writing executed contemporaneously with the gift, to declare that the prior testamentary provision is thereby adeemed; and the courts will give effect to such declaration.<sup>88</sup> In a recent

<sup>85</sup> *Ex parte Pye*, 18 Ves. 150, 2 White & T. Lead. Cas. Eq. 368; *Jones v. Mason*, 5 Rand. (Va.) 577.

<sup>86</sup> *Suisse v. Lord Lowther*, 2 Hare, 424, 435.

<sup>87</sup> *Ex parte Pye*, 18 Ves. 150.

<sup>88</sup> *Tussaud v. Tussaud*, 9 Ch. Div. 363; *Cooper v. Cooper*, 8 Ch. App. 813, 819, note; *Howze v. Mallett*, 4 Jones, Eq. 194; *Richards v. Humphreys*, 15 Pick. 133.

case, however, the New York court of appeals held that a devise of land by a father to a daughter was not adeemed by a subsequent gift of money to her, though she gave a receipt expressly declaring the gift to be received as part of her father's estate; one of the grounds of decision being that such an ademption would be a revocation of the will in a manner other than that specified by the statute of wills.<sup>89</sup> Now, manifestly an ademption of a testamentary provision is not a revocation of the will. A testator bequeaths a specific chattel which is destroyed during his lifetime. The legacy fails, not because it is revoked, but because there is no subject-matter to satisfy it. It is "adeemed" or "taken away" for want of subject-matter. So, where the will gives a legacy, and afterwards the testator makes an advancement similar in kind and amount to the legatee, the will remains intact, but the legacy will not be paid to the legatee because he has already had it. The testator has in fact anticipated his own death, and acted as his own executor, by making the gift during his own lifetime.<sup>90</sup> This reasoning, it seems to me, shows the error of the New York decision; and in an Indiana case, decided about the same time, it was held that a gift of money, accompanied by a receipt stating that it was received in consideration of the donee's interest in land devised to him by the donor, was an ademption of the devise.<sup>91</sup>

#### **SAME—PERSON IN LOCO PARENTIS.**

**40. One who intends to assume a parent's duty to make provision for a child, and who has so acted towards the child as to raise a moral obligation to provide for it, stands in loco parentis to such child.**<sup>92</sup>

<sup>89</sup> *Burnham v. Comfort*, 108 N. Y. 535, 15 N. E. 710, the court saying, as an excuse for awarding the daughter both the money and the land, that "a rule of law is to be followed rather than departed from, for reasons moving from the circumstances of the particular case."

<sup>90</sup> *Rosewell v. Bennett*, 3 Atk. 78; *Kirk v. Eddowes*, 3 Hare, 519; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9, 39-41; *Haynes, Eq.* (5th Ed.) p. 311; 1 Pom. Eq. Jur. p. 738, § 554.

<sup>91</sup> *Roquet v. Eldridge*, 118 Ind. 147, 20 N. E. 733. For further discussion as to ademption of devise of land by subsequent advancement. see post, 65.

<sup>92</sup> *Powys v. Mansfield*, 3 Mylne & C. 359.



The importance of some definite rule on this head is manifest when we bear in mind that the doctrine does not apply where the parties are strangers, but does apply where the donor has placed himself in loco parentis to the child. Under the above rule, it is not necessary that there should be a legal adoption of the child, or that there should be any actual relationship;<sup>93</sup> and, notwithstanding the father of the child is living, another person may be deemed to stand in loco parentis to it.<sup>94</sup>

#### SAME—PRESUMPTION IN FAVOR OF ADEMPMENT.

41. The presumption in favor of ademption is so strong that it will not be repelled by slight circumstances showing a contrary intention.<sup>95</sup>

Herein lies the distinguishing feature between this branch of the doctrine and that of satisfaction of debts by legacies. Thus, where, after a legacy of a larger amount, a smaller sum is given by way of advancement, the presumption is that the legacy is pro tanto adeemed.<sup>96</sup> So, also, a residuary bequest, though uncertain in amount, may be adeemed either totally or pro tanto by a subsequent gift or advancement.<sup>97</sup> The doctrine has its limitations, however, and it has been held that the payment of money to a child before the execution of the will does not adeem a legacy therein contained;<sup>98</sup>

<sup>93</sup> *Rogers v. Soutten*, 2 Keen, 598.

<sup>94</sup> *Fowkes v. Pascoe*, 10 Ch. App. 350.

<sup>95</sup> *Lady Thynne v. Earl of Glengall*, 2 H. L. Cas. 131; *Ex parte Pye*, 18 Ves. 140.

<sup>96</sup> *Pym v. Lockyer*, 5 Milne & C. 29, overruling earlier cases holding any advancement to be a complete ademption of a prior legacy, even though the latter were larger in amount; *Kirk v. Eddowes*, 3 Hare, 509; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9; *Richards v. Humphreys*, 15 Pick. 133, 136; *Jones v. Mason*, 5 Rand. (Va.) 577.

<sup>97</sup> *Schofield v. Heap*, 27 Beav. 93; *Montefiore v. Guedalla*, 1 De Gex, F. & J. 93; *Vickers v. Vickers*, 37 Ch. Div. 526; *Van Houten v. Post*, 32 N. J. Eq. 709; *Allen v. Allen*, 13 S. C. 512; *In re Turfier's Estate*, 1 Misc. Rep. 58, 23 N. Y. Supp. 135. A contrary rule once prevailed in England. *Freeworth v. Banks*, 8 Ves. 85. See, also, *Davis v. Whittaker*, 38 Ark. 435.

<sup>98</sup> *Taylor v. Cartwright*, L. R. 14 Eq. 167, 176; *Jaques v. Swasey*, 153 Mass. 596, 27 N. E. 771; *In re Crawford*, 113 N. Y. 560, 21 N. E. 682; *Yundt's Appeal*, 13 Pa. St. 575.

nor is there any ademption where the subsequent gift is of a different character from the prior testamentary devise, or is expressed to be given for a different purpose.<sup>99</sup> It is on this ground that a devise of land is not adeemed by a subsequent gift of money,<sup>100</sup> but it is adeemed by a subsequent gift of land.<sup>101</sup>

**SAME—COVENANT TO MAKE SETTLEMENT FOLLOWED BY  
TESTAMENTARY PROVISION.**

**42. Where a father or person in loco parentis first agrees or covenants to make a provision for a child, and afterwards makes a testamentary provision for such child, the presumption is that the testamentary provision is in satisfaction of the prior contract obligation.<sup>102</sup>**

This class of cases is extremely rare with us. In England they generally arise in this manner: A father, on the marriage of a child, covenants to settle certain property on him, and afterwards, by will, makes provision for him. Is the testamentary provision a satisfaction of the prior covenant obligation, or is the child entitled to both? The rules on which the solution of this question depends are in the main the same as those governing ademption. One important distinction must, however, be noticed. In case of ademption, the will—a revocable instrument—is first, and testator has an absolute power of revoking or altering any gift thereby made. But, where the covenant obligation is earlier in date than the will, the testator, when he makes his will, is under a liability which he cannot revoke or avoid. He can only put an end to it by payment, or by making a gift with the condition, expressed or implied, that the legatees shall take the gift made by the will in satisfaction of their claim under the previous obligation. It is therefore easier to assume an intention to adeem than an intention to give a legacy in lieu

<sup>99</sup> *Suisse v. Lord Lowther*, 2 Hare, 424, 434; *Watson v. Watson*, 33 Beav. 574; *Clark v. Jetton*, 5 Sneed (Tenn.) 229.

<sup>100</sup> *Allen v. Allen*, 13 S. C. 512; *Weston v. Johnson*, 48 Ind. 1.

<sup>101</sup> *Hansbrough's Ex'rs v. Hooe*, 12 Leigh (Va.) 316; *Pickett v. Leonard*, 104 N. C. 326, 10 S. E. 466.

<sup>102</sup> *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516; *Lady Thynne v. Earl of Glengall*, 2 H. L. Cas. 131.

or in satisfaction of an existing obligation.<sup>103</sup> Indeed, this class is very nearly analogous to the satisfaction of debts by legacies.

### PERFORMANCE.

43. A covenant to do a certain act by which a particular benefit or specified property is to be conferred on another will be deemed to be performed—

- (a) Where the covenantor does some act which wholly or approximately effects the purpose of the covenant, though it does not expressly refer or precisely conform to the covenant.
- (b) Where, by operation of law, the covenantor permits property to descend to the covenantee which may be taken wholly or partially to fulfill the obligation.

This doctrine rests on the maxim that equity imputes an intention to fulfill an obligation.<sup>104</sup> The first class of cases is illustrated by *Wilcocks v. Wilcocks*.<sup>105</sup> There a man on his marriage covenanted to purchase lands of £200 a year, and settle them as jointure on his wife, and to the first and other sons of the marriage. He purchased lands of that value, and took a conveyance to himself in fee, making no settlement. At his death, his heir, who was also entitled under the settlement as first son, claimed the purchased land as heir, and also asserted a right to have the covenant performed by laying out an adequate portion of the personalty in the purchase of other land. It was held that the lands which had descended to him as heir must have been purchased by the deceased with an intention to fulfill his covenant obligation, and that, though no settlement had actually been made, the covenant must be deemed to have been performed.

The second class of cases is illustrated by *Blandy v. Widmore*,<sup>106</sup>

<sup>103</sup> *Tussaud v. Tussaud*, 9 Ch. Div. 363; *Lord Chichester v. Coventry*, L. R. 2 H. L. 71, 90.

<sup>104</sup> Ante, 27.

<sup>105</sup> 2 Vern. 558, 2 White & T. Lead. Cas. Eq. 417. See, also, as illustrating same principle, *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211, Cas. t. Talb. 88.

<sup>106</sup> 1 P. Wms. 324, 2 White & T. Lead. Cas. Eq. 417.

where a man had covenanted to leave his wife £620, and he died intestate, and her share under the statute of distribution came to more than £620. It was held that she must take her distributive share as performance of the covenant, and that she could not take her share and also claim under the covenant.

This doctrine is of very little importance with us, and it is only necessary to point out the distinction between it and satisfaction, which has been stated as follows: In satisfaction the thing done is something different from the thing covenanted to be done, and is in fact a substitute for the thing covenanted to be done; whereas in performance the identical act which the party contracted to do is considered to have been done.<sup>107</sup>

#### CONVERSION.

**44. Conversion is that notional change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal as real, and transmissible and descendible as such.**<sup>108</sup>

The great practical importance of this doctrine arises from the distinction which our law unfortunately allows between the successions on intestacy to real and to personal property. It rests, as we have seen, on the maxim that equity regards that as done which ought to be done,<sup>109</sup> and it applies whenever money or other personal property is directed to be employed in the purchase of land, or whenever land is directed to be sold and turned into money, it matters not how the direction be given, whether by will, by way of contract, marriage settlement, or otherwise.<sup>110</sup> The continually recurring elementary question in applying this doctrine is: Does the instrument relied on as working a conversion contain an absolute expression of intention that the money shall be laid out in land, or that the land be sold and turned into money? When once this intention is sufficiently expressed, the accidental circumstance that the money has

<sup>107</sup> Smith's Eq. p. 267; *Goldsmid v. Goldsmid*, 1 Swanst. 211.

<sup>108</sup> Haynes, Eq. p. 325; 3 Pom. Eq. Jur. § 1159.

<sup>109</sup> Ante, 26.

<sup>110</sup> *Fletcher v. Ashburner*, 1 Brown, Ch. 497, 499, 1 White & T. Lead. Cas. Eq. 826.

in fact not been laid out in land, or the land in fact not been sold and turned into money, can have no effect, for equity will treat as done that which ought to be done.<sup>111</sup> To work a conversion, there need be, on the one hand, no express direction that the property be treated as converted, nor, on the other, a conversion in fact; but the test in all cases is whether there is an absolute direction that the real estate be turned into personal, or that personal estate be turned into real.

#### **SAME—WORDS SUFFICIENT TO WORK A CONVERSION.**

45. While the direction to convert must be clear and imperative, it need not be express; but it is sufficient if the general scope and tenor of the instrument (be it will, contract, or otherwise) manifest, by necessary implication, a clear intention by the owner or contracting parties to convert in any event.

The direction to convert must be clear and imperative; for, if the question of laying out money in land or land in money is optional or discretionary with any one, there is no room for the application of the maxim that equity considers that as done which ought to be done, simply because there is no obligation on any one to make the change.<sup>112</sup> It has therefore been held that a mere naked power of sale, or a discretionary or contingent power, conferred by the owner on a third person, does not work a conversion of realty into personalty;<sup>113</sup> nor will a mere discretionary power to invest personalty in land work a conversion of the money into real estate.<sup>114</sup> Where, however, in such a case, the whole scope and tenor of an instrument show that the owner intended the realty to be sold, or the money to

<sup>111</sup> *Lechmere v. Earl of Carlisle*, 3 P. Wms. 215; *Scudamore v. Scudamore*, Finch, Prec. 543; *Haynes, Eq. p. 326*; 3 Pom. Eq. Jur. § 1159.

<sup>112</sup> *Haynes, Eq. p. 329*; *Wheless v. Wheless (Tenn.)* 21 S. W. 595.

<sup>113</sup> *Curling v. May*, cited 3 Atk. 255; *Bourne v. Bourne*, 2 Hare, 35; *Moncrief v. Ross*, 50 N. Y. 431; *Haward v. Peavey*, 128 Ill. 430, 21 N. E. 503; *Clift v. Moses*, 116 N. Y. 144, 157, 22 N. E. 393; *In re McComb*, 117 N. Y. 378, 22 N. E. 1070; *Greenough v. Small*, 137 Pa. St. 128, 20 Atl. 396; *In re Machemer's Estate*, 140 Pa. St. 544, 21 Atl. 441; *Mills v. Harris*, 104 N. C. 629, 10 S. E. 704.

<sup>114</sup> *Polley v. Seymour*, 2 Young & C. 708.

be invested in land, in any event, then the duty and obligation to convert are imperative, and the doctrine of equitable conversion applies.<sup>115</sup> So, also, an imperative direction to sell land in any event works an equitable conversion, though the time of sale is left by the owner in the discretion of some one else;<sup>116</sup> and in the case of wills a conversion of real estate will be implied where there has been a blending of the real and personal estate, so as to show that testator intended to create a common fund out of both the real and personal estate, and to bequeath the fund as money.<sup>117</sup>

*Contract for Sale of Land.*

After the execution of a contract for the sale of land, equity, looking on that agreed to be done as actually done, considers the vendee as the equitable owner of the land, and the interest of the vendor as personalty.<sup>118</sup> But, to have this effect, the contract must be enforceable, and hence a parol contract of sale does not work a conversion of the real estate into personalty so far as the vendor's rights are concerned.<sup>119</sup> If, however, the contract is enforceable, all the consequences of conversion follow; and on the vendor's death the purchase price belongs to his residuary legatees, and not to the persons to whom he has specifically devised the land, though they will be compelled to execute the deed to the vendee.<sup>120</sup>

**SAME—TIME OF CONVERSION.**

**46. Subject to the general principle that the terms of each particular instrument must guide in the construction and effect of that instrument, the rule is that conversion**

<sup>115</sup> *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188; *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, and 50 N. W. 1103; *Fahnestock v. Fahnestock*, 152 Pa. St. 56, 25 Atl. 313.

<sup>116</sup> *Crane v. Bolles*, 49 N. J. Eq. 373, 24 Atl. 237; *Stagg v. Jackson*, 1 N. Y. 206; *Ford v. Ford*, 70 Wis. 19, 49, 33 N. W. 188; *Mellon v. Reed*, 123 Pa. St. 1, 14, 15 Atl. 906.

<sup>117</sup> *In re Marshall's Estate*, 147 Pa. St. 77, 23 Atl. 391; *Hunt's Appeals*, 105 Pa. St. 128, 141.

<sup>118</sup> See ante, 26, maxim "Equity regards that as done which ought to be done"; *Gilbert v. Port*, 28 Ohio St. 276, 296.

<sup>119</sup> *Mills v. Harris*, 104 N. C. 626, 10 S. E. 704.

<sup>120</sup> *Newport Waterworks v. Slisson (R. I.)* 28 Atl. 336.

takes place at the time the instrument becomes operative; i. e. in case of wills, at the death of testator, and in case of deeds and other instruments *inter vivos*, on execution and delivery.<sup>121</sup>

Here, as everywhere throughout this doctrine, the intention of the testator or of the contracting parties, as expressed in the instrument, is our guide. We have already seen that, when the question of sale is left in the discretion of any one, there is no constructive conversion; and in such a case the conversion takes place, not on the taking effect of the instrument, but from the time of sale.<sup>122</sup> So, also, if there be a trust to sell on the happening of a particular event, which may or may not happen, the conversion takes place only as from the happening of that event, though, of course, the moment the event occurs the conversion takes place, just as if there had been an absolute direction to sell at that time.<sup>123</sup> When, however, the direction to convert is imperative and absolute, the conversion takes place when the instrument becomes operative. Therefore a direction in a will to sell real estate, and distribute the proceeds, works an equitable conversion, so far as the legatee's rights are concerned, as of the date of testator's death, though the time of sale is postponed until the termination of a life estate created by the will.<sup>124</sup>

<sup>121</sup> Snell, Eq. p. 211.

<sup>122</sup> *Ness v. Davidson*, 49 Minn. 469, 52 N. W. 46; *Stoner v. Zimmerman*, 21 Pa. St. 394; *Konvalinka v. Geibel*, 40 N. J. Eq. 443, 446, 3 Atl. 260; *Darlington v. Darlington*, 160 Pa. St. 65, 28 Atl. 503.

<sup>123</sup> *Haynes*, Eq. p. 334; *Ward v. Arch*, 15 Sim. 389; *Polley v. Seymour*, 2 Younge & C. Exch. 708; *Keller v. Harper*, 64 Md. 74, 1 Atl. 65.

<sup>124</sup> *Allen v. Watts*, 98 Ala. 384, 11 South. 646; *Ramsey v. Hanlon*, 33 Fed. 425; *In re Thomman's Estate* (Pa. Sup.) 29 Atl. 84. In *Cropley v. Cooper*, 16 Wall. 167, it is said: "The real estate having been directed by the will to be converted into money, it is to be regarded for all the purposes of this case as if it were money at the time of the death of testator. That it was not to be sold until after the termination of two successive life estates does not affect the application of the principle: Equity regards substance, and not form, and considers that as done which is required to be done. The sale being directed absolutely, the time is immaterial." See, also, *Wurts v. Page*, 19 N. J. Eq. 365; *Hocker v. Gentry*, 3 Metc. (Ky.) 463; *Tazewell v. Smith*, 1 Rand. (Va.) 313; *Bright's Appeal*, 100 Pa. St. 602. In New York the rule is that if tes-

With respect to the time of conversion, a difficult question has arisen where land has been leased for a long term of years, with an option in the lessee to purchase at any time. On exercising the option after the lessor's death, does the conversion of the lessor's interest in the land relate back to the date of the lease, and the purchase money thus go to his personal representatives, or does the conversion take place when the option is exercised, and the purchase money, therefore, belong to the lessor's heirs? The English rule is that the conversion operates retrospectively, and that the purchase money must be paid to the lessor's personal representatives;<sup>125</sup> but in a recent well-considered Ohio case it was held that the conversion takes place when the option is exercised, and that the purchase money will go to the lessor's heirs, as between them, on the one side, and the personal representatives of the lessor on the other.<sup>126</sup> Plainly, the Ohio decision is right in principle, for the option to purchase is a matter entirely within the discretion of the lessee, bringing the case within the general rule heretofore stated,—that conversion takes place only from the date of sale whenever that question is discretionary or depends on the happening of a contingent event.

#### SAME--EFFECT OF CONVERSION.

**47. The general effect of this doctrine is to make personal estate real, and real estate personal, with all the**

tator devises a life estate in land, and directs a sale on its expiration, the conversion takes place on the termination of the life estate, and not on testator's death. *Moncrief v. Ross*, 50 N. Y. 431; *Savage v. Burnham*, 17 N. Y. 561, 569. But, if the direction to sell is absolute, the fact that the executors are vested with a discretionary power as to the time of sale does not prevent the conversion from taking place as of the date of testator's death. "When the time of sale is not necessarily postponed to a specified future time, or the happening of a designated event, the conversion takes place at the testator's death; the distributees taking their interests as money, not land." *Underwood v. Curtis*, 127 N. Y. 523, 28 N. E. 585; *Robert v. Corning*, 89 N. Y. 225, 239; *Fraser v. Trustees*, 124 N. Y. 479, 26 N. E. 1034.

<sup>125</sup> *Lawes v. Bennett*, 1 Cox, 167; *Townley v. Bedwell*, 14 Ves. 592; *Collingwood v. Row*, 3 Jur. (N. S.) 785; But even in England, where an option of purchase is conferred and subsequently exercised, the court will not, as between the vendor and purchaser, imply a conversion as from the date of the contract conferring the option. *Edwards v. West*, 7 Ch. Div. 858.

<sup>126</sup> *Smith v. Loewenstein*, 50 Ohio St. 346, 34 N. E. 159, 161.



legitimate consequences flowing from such a change, though there has been no actual conversion of the property.

**LIMITATION**—The conversion exists only for the purposes of the instrument directing it, and, except in so far as required for such purposes, the property constructively converted will be treated as that species of property which it actually is.

The importance of the doctrine of conversion becomes evident when its effects are fully understood. Thus, money directed to be laid out in land descends, like land, to the heirs of the person for whose benefit the direction is made, though he dies before the investment actually takes place.<sup>127</sup> It will pass by a general devise,<sup>128</sup> and not by a general bequest.<sup>129</sup> So, also, if money is directed to be laid out for the benefit of a married woman, her husband is entitled to an estate by the curtesy in it.<sup>130</sup>

On the other hand, land directed to be sold is regarded as personal property. It will pass to the personal representatives of the person entitled to the proceeds,<sup>131</sup> and will be included in a general residuary bequest,<sup>132</sup> but not in a general devise of land.<sup>133</sup> It may be sold and transferred by parol, like any other personal property, notwithstanding the statute of frauds relating to land;<sup>134</sup> and an alien may take the proceeds of land directed to be sold for his benefit, though he could not have taken the land as land.<sup>135</sup>

*Effects of Actual Conversion Rightly Made.*

The foregoing discussion has been as to the effect of constructive conversion before any actual conversion has taken place. Some in-

<sup>127</sup> Scudamore v. Scudamore, Finch, Prec. 543.

<sup>128</sup> Greenhill v. Greenhill, 2 Vern. 679.

<sup>129</sup> Edwards v. Warwick, 2 P. Wms. 171.

<sup>130</sup> Sweetapple v. Bindon, 2 Vern. 536.

<sup>131</sup> Ashby v. Palmer, 1 Mer. 296; Hood v. Hood, 85 N. Y. 561; Wurts' Ex'rs v. Page, 19 N. J. Eq. 365; Eby's Appeal, 84 Pa. St. 241; Fisher v. Banta, 68 N. Y. 468; Welsh v. Crater, 32 N. J. Eq. 177.

<sup>132</sup> Stead v. Newdigate, 2 Mer. 521.

<sup>133</sup> Elliott v. Fisher, 12 Sim. 505.

<sup>134</sup> Mellon v. Reed, 123 Pa. St. 1, 15 Atl. 906.

<sup>135</sup> Du Hourmelin v. Sheldon, 1 Beav. 79; Craig v. Leslie, 3 Wheat. 563.

interesting questions have arisen with respect to the effects of an actual conversion. The earlier English rule was that where land was sold under order of court or by a trustee under a power of sale, and the purchase money exceeded the amount required for the particular purpose for which the sale was made, as, for example, the payment of debts, then the excess, though in form money, remained, as before, impressed with the character of land, and would descend as such.<sup>136</sup> But these cases were overruled in *Steed v. Preece*,<sup>137</sup> where Jessel, M. R., ruled that if a conversion is rightfully made, whether by the court or a trustee, all the consequences of conversion must follow, and that the property must be treated as that species of property which it actually is at the death of the person in whom it vested. The later American cases are to the same effect. Thus, it was recently held by the supreme court of Arkansas<sup>138</sup> that, where land

<sup>136</sup> *Cooke v. Dealey*, 22 Beav. 196; *Jermy v. Preston*, 13 Sim. 356. See, also, *Collins v. Champ*, 15 B. Mon. 118.

<sup>137</sup> L. R. 18 Eq. 192. In this case, real estate had been conveyed in trust for two infants as tenants in common, with cross remainders between them. A suit was instituted for the administration of the trust, a decree of sale made, the estate sold, and the purchase money paid into court. Half the fund was paid to one of the tenants in common, who had attained majority, and the other half was carried over to the separate account of the other cotenant, who would have been absolutely entitled to that moiety if he had attained majority. He died before that time, however, and the surviving tenant in common claimed that the money took the place of the land which had been sold, and that he was therefore entitled to it by virtue of the cross remainder. The court, however, held that the fund must be treated as money, and that he was not entitled to take it. This case was followed in *Arnold v. Dixon*, L. R. 19 Eq. 113; *Foster v. Foster*, 1 Ch. Div. 588; *Wallace v. Greenwood*, 16 Ch. Div. 362; and *Hyett v. Mekin*, 25 Ch. Div. 735.

<sup>138</sup> *In re Simmons*, 55 Ark. 485, 18 S. W. 933. Another instructive recent decision on this subject is *Wentz's Appeal*, 126 Pa. St. 541, 17 Atl. 875. There land belonging to a person who died intestate was sold in partition proceedings, and the proceeds were set apart for the widow's benefit in lieu of dower. One of the children died during minority, and in the lifetime of the widow; and, on the widow's death, the question arose as to whether the deceased child's share in the fund would descend to her heirs as land, or whether it should be paid to her personal representatives as personal property. The court said: "It is error to assume that the proceeds of the sale in partition are real estate, and require a positive act of reconversion to get them back into their character as money. \* \* \* The money never is real estate in law any more than in fact, but for certain purposes, and within certain limits,

is sold pursuant to a decree of partition, the proceeds, on the death of the owner, though he is an infant, must be distributed as personalty, and do not descend to his heirs; the court saying: "There was a conversion of land into personalty, and it must go in the condition it is found at the death of the person in whom it was vested,—to his personal representative, unless the heir can show an equity in his favor for re-conversion. But the heir, equally with the distributees, is a volunteer; and when he stands on his naked right as heir, uncoupled with any other fact, there is no equity in his favor as against the distributee. The equities between them being equal, or, rather, there being no equities, the money must go in the form in which it is at the death of the owner; that is, as personalty."

*Limitation.*

These cases suggest the limitation of the doctrine of equitable conversion, viz. that the conversion exists only for certain purposes, and, except in so far as required for such purposes, the property will be treated as it actually is. Thus, it has been held that a direction in

it is treated as if it were real estate. The purpose is to preserve the inheritable quality of the estate, so that the title may not be diverted from the previous owner, and the limit is the first devolution. The whole doctrine is the creature of equity for a specific purpose, and, when that purpose is accomplished, the rule ceases to operate. So far, therefore, from the money being actually real estate, and requiring a positive act of reconversion to restore it to its natural character of money, it never is real estate, and is only treated as such within a limit which all the cases agree is the first transmission." It was therefore held that the purpose of constructive conversion is fully accomplished when the child's share vested in her in remainder after her mother's life interest, and that the fund, on the child's death, would pass as personalty to her personal representatives. The Massachusetts doctrine has been stated to be that, where real estate is rightly converted into money, the money is impressed with the character of land, until it reaches one who, if it had remained real estate, would take it beneficially; that is, to his own use absolutely, or with a power to dispose of it absolutely, or make it his own to all purposes, and it will then be his own absolutely. *Holland v. Cruft*, 3 Gray, 162; *Holland v. Adams*, Id. 188, 191; *Hovey v. Dary*, 154 Mass. 7, 27 N. E. 659; *Emerson v. Cutler*, 14 Pick. 108. In *Wetherill v. Hough* (N. J. Ch.) 29 Atl. 592, it was held, contrary to the cases first above cited, that when the land of an infant is converted into money by the order of the court, and the infant dies before attaining its majority, the fund will be treated as real estate, and descend to the heirs at law of the infant.

a will to convert real estate into money does not actually change the character of the land so as to authorize its sale as personalty by one of the executors without the concurrence of his coexecutor; the court saying: "There may have been a conversion of this realty into personalty for many purposes, but not for all purposes. It physically remained real estate, taxable as such, controllable as such, and it could only be conveyed as such; and the rules of law generally applicable to real estate remained applicable to this."<sup>139</sup> So, also, it has been held that an equitable conversion of realty into personalty, for distribution among testator's children, does not prevent the title to the land, on testator's death and until its actual conversion, from vesting in the children as his heirs, and consequently it will be subject to the lien of a judgment against one of them.<sup>140</sup> Conversely, money directed to be laid out in land, though regarded as a devise of land as between the legatee's heirs and personal representatives, is, nevertheless, a personal asset so far as testator's creditors are concerned, and must be applied, like other personal assets, to the payment of his debts.<sup>141</sup> Again, a direction to sell land and to turn over the proceeds to a married woman does not so change its character as to enable her husband to dispose of it as the personal property of the wife.<sup>142</sup>

<sup>139</sup> *Wilder v. Ranney*, 95 N. Y. 7, 12. See, also, *Crowley v. Hicks*, 72 Wis. 539, 543, 40 N. W. 151, where the same conclusion was reached. But see *Mellon v. Reed*, 123 Pa. St. 1, 15 Atl. 906, where it was held that real estate directed to be converted may be conveyed as personal property.

<sup>140</sup> *Enebery v. Carter*, 98 Mo. 647, 12 S. W. 522. The contrary has, however, been held where the title to the land vested in a trustee. *Hunter v. Anderson*, 152 Pa. St. 386, 25 Atl. 538.

<sup>141</sup> *McFadden v. Hefley*, 28 S. C. 317, 5 S. E. 812.

<sup>142</sup> *Franks v. Bollans*, 3 Ch. App. 717, 718. In this case it was said: "Until the land is sold, this court, for many purposes, treats it as money; but no authority has been cited, and I should have been surprised if any authority could have been cited, to show that the husband could, by any act of his, before sale, bar his wife's right to her share of it." But in *Benbow v. Moor*, (N. C.) 19 S. E. 156, it was held that where a will directs a sale of testator's estate, and bequeaths the proceeds to a married woman, the conversion takes place at the time of testator's death, and then vests in the husband as a chose in action of the wife, and he cannot be deprived thereof by subsequent legislation creating married women's separate estates.

**SAME—TOTAL OR PARTIAL FAILURE OF PURPOSES FOR WHICH CONVERSION IS DIRECTED.**

48. Where conversion is directed, whether by will or by deed, and whether of money into land or land into money, if the objects and purposes for which the conversion is intended totally fail before or at the time when the will or deed comes into operation, no conversion will take place; but the property will remain in its original state, or, rather, will result to the testator or grantor with its original form unchanged.

49. When the failure is but partial, and the direction to convert is contained in a will, conversion takes place only to such extent as is necessary to effect the purpose of the will; and, in as far as the property is not required for that purpose, the property will result unchanged. If the direction to convert is contained in a deed or other instrument inter vivos, conversion takes place when the instrument becomes operative; and, if a part of the property is not required for the purposes of the conversion, it will result to the grantor or settlor in its changed form.

*Total Failure.*

The simplest case of a total failure is where a testator devises all his real estate to trustees in trust to sell and divide the proceeds equally between A. and B. Both die during testator's lifetime. The whole purpose and object of testator in directing a conversion having failed, the matter is in the same position as if no trust to sell had ever been inserted in the will, and the land descends to the heir.<sup>143</sup>

<sup>143</sup> Haynes, Eq. 347; Hill v. Cook, 1 Ves. & B. 175; Fitch v. Weber, 6 Hare, 145. In Read v. Williams, 125 N. Y. 560, 571, 26 N. E. 730, it is said: "A power of sale in a will, however peremptory in form, if it can be seen that it was inserted in aid of a particular purpose of testator, or to accomplish his general scheme of distribution, does not operate as a conversion where the scheme or purpose fails by reason of illegality, lapse, or other cause. In that case the property retains its original character, and it goes to the heirs or next of kin as the case may be." See, also, Luffberry's Appeal, 125 Pa. St. 513, 17 Atl. 447.

The same rule holds good if the direction to convert is contained in a deed.<sup>144</sup> So, also, where the direction is to lay out money in land, whether by deed or will, and the purpose for which the direction is made wholly fails, no conversion takes place, and the heir has no right in the money so directed to be laid out.<sup>145</sup>

*Partial Failure.*

Suppose, however, that the direction to convert realty into money for the benefit of A. and B. is contained in a will, and A. alone dies during testator's lifetime. The trust for conversion still subsists, for, without its exercise, B., the survivor, cannot receive his half of the proceeds. Shall A.'s lapsed half, which, by the doctrine of conversion, is personal property, go to testator's heir, or to those entitled under the will to the personal estate? The answer is found in the case of *Ackroyd v. Smithson*,<sup>146</sup> where it was held that the heir, and not the residuary legatee or next of kin, was entitled to this lapsed half, on the ground that the heir takes every interest in land not actually disposed of by his ancestor, and that testator never intended to deprive him of the real estate directed to be converted, except so far as necessary for the purposes of the will. This principle also applies to the converse case of money directed to be laid out in the purchase of real estate devised to uses which partially fail; for the undisposed of interest in the money will result for the benefit of testator's next of kin or residuary legatees, and will not go to the heir at law.<sup>147</sup>

A material distinction, however, exists as to the persons who reap the benefit where a conversion partially fails, when it is directed by will and when it is directed by deed. Suppose, for instance, a conveyance of real estate in trust to pay the rents and profits to the grantor during life, and after his death to sell and pay one-half

<sup>144</sup> *Clarke v. Franklin*, 4 Kay & J. 257; *Ripley v. Waterworth*, 7 Ves. 435; *Smith v. Claxton*, 4 Madd. 492.

<sup>145</sup> *Cogan v. Stephens*, 5 Law J. Ch. 17.

<sup>146</sup> 1 Brown, Ch. 503. This case is celebrated, not only because of the point of law decided, but also because Lord Eldon, then John Scott, earned his earliest laurels, and laid the foundation of his fortunes, by his argument in behalf of the heir.

<sup>147</sup> *Cogan v. Stephens*, 5 Law J. Ch. 17; *Hawley v. James*, 5 Paige, 318; *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241.

of the proceeds to A., if then living, and the other half to B., if then living. We have seen that, if both die during the grantor's lifetime, the trust for conversion fails altogether, and the land descends to the grantor's heirs. If, however, A. alone dies, the case is different. The conversion must take place to satisfy the trust for B., and A.'s undisposed of share is also personalty. When did it become so? According to the rule heretofore stated, when the deed became operative; i. e. on its execution and delivery, and not on the death of the grantor. On A.'s death, therefore, during the grantor's lifetime, this undisposed of share resulted immediately to the grantor as personal property, and on the grantor's death it will devolve as such, and will not descend to his heir as real estate.<sup>148</sup> On the same reasoning, money directed by deed to be laid out in land will, on a partial failure of the objects of the conversion, result to the grantor's heir, and not to his next of kin.<sup>149</sup>

#### SAME—DOUBLE CONVERSION.

50. Double conversion takes place where land is directed to be sold, and the proceeds reinvested in other lands, or where money is directed to be invested in land which is to be resold before making distribution; and in such a case the court will treat the property as already converted into that species of property into which it is directed to be changed, no matter whether the steps are more or less numerous.<sup>150</sup>

Thus, land in Michigan directed to be sold for the purpose of investing the proceeds in Missouri land was treated by the court as though it were Missouri land;<sup>151</sup> and a direction in a will to invest money in land for testator's widow for life, and to sell the land after her death, and divide the proceeds among the children, was held to work a double conversion from her death.<sup>152</sup>

<sup>148</sup> *Clarke v. Franklin*, 4 Kay & J. 257.

<sup>149</sup> *Wheldale v. Partridge*, 8 Ves. 236; *Lechmere v. Lechmere*, Cas. t. Talb. 80.

<sup>150</sup> *Pearson v. Lane*, 17 Ves. 101; *Ford v. Ford*, 80 Mich. 42, 44 N. W. 1057.

<sup>151</sup> *Ford v. Ford*, 80 Mich. 42, 44 N. W. 1057.

<sup>152</sup> *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211.

**SAME—RECONVERSION.**

**51. Reconversion is that notional or imaginary process by which a prior constructive conversion is annulled and taken away, and the constructively converted property restored, in contemplation of a court of equity, to its original actual quality.<sup>153</sup>**

Thus, where money is directed to be invested in land in fee simple for A.'s benefit, equity will regard the money as land; but A., being absolutely entitled, may elect to take the property in its original form; and in that event "equity, which, like nature, does nothing in vain,"<sup>154</sup> will treat the property as reconverted into money; for it would evidently be vain and useless to insist that a person should take a fund in the quality of land when he prefers it in the form of money, and can at any moment reduce it to that form by sale.<sup>155</sup> Since, however, a person under disability, such as an infant or a lunatic, cannot exercise the right of election, it follows that there can be no reconversion of property belonging either to an infant<sup>156</sup> or a lunatic.<sup>157</sup>

<sup>153</sup> Haynes, Eq. p. 365; Snell, Eq. p. 229.

<sup>154</sup> Seeley v. Jago, 1 P. Wms. 389.

<sup>155</sup> Bayley v. Bishop, 9 Ves. 6; De Vaughn v. McLeroy, 82 Ga. 687, 10 S. E. 211; Hetzel v. Barber, 69 N. Y. 1, 11.

<sup>156</sup> Seeley v. Jago, 1 P. Wms. 389; Carr v. Branch, 85 Va. 597, 604, 8 S. E. 476.

<sup>157</sup> In re Wharton, 5 De Gex, M. & G. 33; Ashby v. Palmer, 1 Mer. 296.



## CHAPTER V.

### DOCTRINES OF EQUITY (Continued)—CONFLICTING RIGHTS OF PURCHASERS, ASSIGNEES, ETC.

- 52. Notice
- 53.     Classification.
- 54.     Actual Notice.
- 55.     Constructive Notice.
- 56.     Notice of Fact is Notice of Cause.
- 57.     Possession as Notice.
- 58.     Recitals in Title Papers.
- 59.     Notice to Agent.
- 60.     Notice by record.
- 61.     Lis Pendens.
- 62.     Bona Fide Purchasers.
- 63-67.   Priorities—Unequal Equities.
- 68-70.   Equal Equities.

### NOTICE.

**52. Notice is the transmission, to the party under consideration, of certain information respecting facts directly or indirectly affecting his rights or liabilities, as viewed by a court of equity, in relation to certain property.<sup>1</sup>**

The principles or maxims which govern the conflicting rights of assignees, including under that term purchasers, mortgagees, and persons having liens, are, broadly speaking: "Where the equities of the rival claimants are equal, the law prevails;" and "Where the equities are equal, and there is no legal estate in any claimant, the first in order of time prevails." To these might be added a third: "When the equities are not equal, he who has the better equity takes precedence." These principles are plain and comprehensible in them-

<sup>1</sup> Smith, Pr. Eq. p. 309. In 2 Pom. Eq. Jur. § 504, "notice" is defined as "the information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent in its legal effects to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge."

selves; but the great difficulty, as in all matters of law, is in their proper application to complicated facts; and obviously the first inquiry must always be whether the equities are in fact equal, or whether one is not on the whole better than the other. This inquiry in many cases resolves itself into the question whether one of the claimants took with notice of a prior equitable right in another; for, if he did, he takes subject to that right. What, therefore, is notice? It should be observed that "notice" and "knowledge" are not synonymous. The record in the proper office of a properly executed deed is notice of its existence and of all facts therein recited to all persons thereafter dealing with the property which it covers, though they may in fact have no knowledge of its existence. On the other hand, a deed defectively executed or not recorded in the proper place is not notice to any one; but, nevertheless, one may have knowledge of its existence by having actually seen it, or the improperly recorded copy.<sup>2</sup> While, therefore, notice, or "the transmission of information respecting certain facts," may in some cases produce knowledge, yet there are other cases where notice without knowledge exists. Of course, where there is knowledge, notice, as legally and technically understood, becomes immaterial.<sup>3</sup>

#### **SAME—CLASSIFICATION.**

**53. Notice may be classified as either:**

- (a) Actual, or
- (b) Constructive.

#### **SAME—ACTUAL NOTICE.**

**54. Actual notice is either knowledge of a fact, or the conscious possession of means of knowledge, though they may not be used.<sup>4</sup>**

Actual notice may be express or implied. Express notice may be proved by direct evidence, and includes actual knowledge; while

<sup>2</sup> 2 Pom. Eq. Jur. § 592.

<sup>3</sup> Cleveland Woolen Mills v. Sibert, 81 Ala. 140, 141, 1 South. 773.

<sup>4</sup> Drey v. Doyle, 90 Mo. 459, 12 S. W. 287; Speck v. Riggins, 40 Mo. 405; Maupin v. Emmons, 47 Mo. 304; Mayor v. Whittington (Md.) 27 Atl. 984.

implied notice is established by proof of circumstances from which knowledge is inferable as a fact.<sup>5</sup> Implied notice, which is equally actual notice, arises where a party is conscious of having the means of knowing a fact, though he may not employ these means for the purpose of gaining further information.<sup>6</sup> The distinction between implied notice and constructive notice is extremely important in states whose statutes declare that a purchaser with "actual notice" of a prior unrecorded deed takes subject to such deed. Some of the courts have limited the term "actual notice" to "actual knowledge";<sup>7</sup> while others have widened it so as to embrace matters falling within the term "constructive notice."<sup>8</sup> The true distinction between implied notice, which is actual, and constructive notice, seems to be

<sup>5</sup> *Knapp v. Bailey*, 79 Me. 195, 9 Atl. 122; *Mayor v. Whittington* (Md.) 27 Atl. 984; *Williamson v. Brown*, 15 N. Y. 354; *Brinkman v. Jones*, 44 Wis. 498; *Brown v. Volkening*, 64 N. Y. 76.

<sup>6</sup> *Rhodes v. Outcalt*, 48 Mo. 370; *Mayor v. Whittington* (Md.) 27 Atl. 984.

<sup>7</sup> *Lamb v. Pierce*, 113 Mass. 72; *Crassen v. Swoveland*, 22 Ind. 428; *Story*, Eq. Jur. § 399. In England the terms "actual" and "constructive" notice are defined by the conveyancing act of 1882. Actual notice is defined as "an instrument, fact, or thing within the party's own knowledge"; and constructive or implied notice is defined as "an instrument, fact or thing which would have come to the party's knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him, or which (in the same transaction with respect to which the question of notice arises) have come to the knowledge of his counsel, agent, or solicitors as such, or would have come to the knowledge of such solicitor or agent if such inquiries or inspections had been made as ought to have been made by them." The above definition of "actual notice" is substantially the same as that adopted by the Massachusetts and Indiana courts; and it has the merit of being easily comprehended. But the American courts which have extended the meaning of the term "actual notice" as stated in the text were impelled to do so by considerations of substantial justice. "Notice must be held to be actual [within the meaning of a statute declaring that a purchaser with 'actual notice' of a prior unrecorded deed takes subject to that deed] where the subsequent purchaser has actual knowledge of such facts as would put a prudent man on inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase. When the subsequent purchaser has knowledge of such facts, it becomes his duty to make inquiry; and he is guilty of bad faith if he neglects to do so, and consequently he will be charged with the actual notice he would have received if he had made the inquiry." *Brinkman v. Jones*, 44 Wis. 498.

<sup>8</sup> *Mayor v. Whittington* (Md.) 27 Atl. 984, which holds that a principal has

that implied notice is an inference of fact as to the existence of information drawn by the jury from the circumstances proved, without the aid of a legal presumption; while constructive notice is a presumption of law which is for the court where the facts have been ascertained.<sup>9</sup>

*What Constitutes Actual Notice.*

Vague reports from persons not interested in the property do not amount to actual notice; nor do mere general assertions that some other person claims a title.<sup>10</sup> It has even been stated that the notice must be given by some person interested in the property, or his agent, to the party charged, or his agent, and communicated in the same transaction, or in the negotiation leading up to it.<sup>11</sup> But it is believed that the true rule is that knowledge of facts, from whatever source obtained, which are sufficient to put an ordinarily prudent man on inquiry, will charge a purchaser with actual notice of all the facts which such an inquiry would have developed.<sup>12</sup>

**SAME—CONSTRUCTIVE NOTICE.**

**55. Constructive notice is a legal presumption of notice, either arising from evidence so strong that the court will act on it in the absence of contradiction, or existing by**

actual notice of information obtainable by his agent by the exercise of ordinary diligence.

<sup>9</sup> Wade, Notice, § 40.

<sup>10</sup> Jolland v. Stainbridge, 3 Ves. 478; Maul v. Rider, 59 Pa. St. 172; Chicago v. Witt, 75 Ill. 211; Lambert v. Newman, 56 Ala. 623, 625, 626; Parker v. Foy, 43 Miss. 260, 266; Bugbee's Appeal, 110 Pa. St. 331, 1 Atl. 273; Satterfield v. Malone, 35 Fed. 445.

<sup>11</sup> Barnhart v. Greenshields, 9 Moore, P. C. 18; Sugd. Vend. 755; Woods v. Farmere, 7 Watts, 382, 387.

<sup>12</sup> Parkhurst v. Hosford, 21 Fed. 827, 835; Lawton v. Gordon, 37 Cal. 202; Deetjen v. Richter, 33 Kan. 410, 6 Pac. 595; Curtis v. Mundy, 3 Metc. (Mass.) 405; Wilcox v. Hill, 11 Mich. 256; Lloyd v. Banks, 3 Ch. App. 488. In this last case it was said, speaking of a trustee who had merely seen an insolvency mentioned in a newspaper: "If it can be shown that in any way the trustee had got knowledge of that kind, knowledge which would operate on the mind of any rational man or man of business, and make him act with reference to the knowledge he has or acquired,—then I think the end is attained."

virtue of positive statutes, such as the recording acts of the various states.<sup>13</sup>

As a general rule, if a person has notice, it is entirely immaterial whether that notice is actual or constructive; the distinction being important, as before stated, only in those cases where a statute requires actual notice.<sup>14</sup> Constructive notice, like constructive fraud, indicates that the presumption of certain facts is so strong that it cannot be safely ignored, though the actual fact (the transmission of information) may be unsupported by positive evidence.<sup>15</sup>

The following are some of the rules formulated by courts and text writers respecting the doctrine of notice:

**SAME—NOTICE OF FACT IS NOTICE OF CAUSE.**

**56. Notice of a fact is notice of its causes; or, in other words, where there has been actual notice of a fact which would have the effect of putting a reasonable person on further inquiry, the result will be constructive notice of other facts which would be elicited by such inquiry.<sup>16</sup>**

The visible appearance of property may be such as to put a purchaser on inquiry. Thus, the existence and operation of a railroad charge the purchaser of the land on which the roadbed is located with notice of the extent of the company's right of way;<sup>17</sup> and the existence and use of passways for cattle under a railroad embankment charge a purchaser of the railroad with constructive notice of the adjoining owner's rights in the passways.<sup>18</sup> So, also, construc-

<sup>13</sup> Story, Eq. § 399; Bisp. Eq. § 268; 1 Wade, Notice, §§ 37-39; *Clafin v. Lenhelm*, 66 N. Y. 301, 306; *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. 357; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239.

<sup>14</sup> *Prosser v. Rice*, 28 Beav. 68, 74.

<sup>15</sup> *Smith*, Pr. Eq. p. 310.

<sup>16</sup> *Smith*, Pr. Eq. p. 313.

<sup>17</sup> *Campbell v. Indianapolis & V. R. Co.*, 110 Ind. 490, 11 N. E. 482; *Paul v. Connersville & N. J. R. Co.*, 51 Ind. 527.

<sup>18</sup> *Rock Island & P. Ry. Co. v. Dimick*, 144 Ill. 628, 32 N. E. 291; *Swan v. Burlington, C. R. & N. Ry. Co.*, 72 Iowa, 650, 34 N. W. 457.

tive notice of water rights incumbering property was held to result from a mill race and dam on the land.<sup>19</sup>

This rule is also illustrated by a series of English cases, which hold that actual notice that title deeds to land are in the hands of another is constructive notice of any charge which he may have thereon.<sup>20</sup>

#### **SAME—POSSESSION AS NOTICE.**

**57. Visible and notorious possession of land is notice of the possessor's title to subsequent purchasers and incumbrancers.<sup>21</sup>**

The foregoing proposition has been embodied in our law ever since Lord Thurlow's time.<sup>22</sup> The possession and occupation must be actual, open, and visible; it must not be equivocal, occasional, or for a special temporary purpose; neither must it be consistent with the title of the apparent owner by the record.<sup>23</sup> If the possession is of this character, then the purchaser's ignorance of the occupancy is immaterial, for it is the purchaser's duty to ascertain in advance who is in possession.<sup>24</sup> If, on the other hand, the purchaser does know of such occupancy, he is put on inquiry as to the possessor's title, and will therefore be presumed to be aware of all equities of the occupier in the land which would have been disclosed on such inquiry.<sup>25</sup> It therefore follows that possession of land by a vendee under an unrecorded contract of sale is notice of his equities to a sub-

<sup>19</sup> *Raritan Water-Power Co. v. Veghte*, 21 N. J. Eq. 463. The existence of an archway is notice of a right of way under it. *Davies v. Sear*, L. R. 7 Eq. 427. And the existence of a sea-wall is notice of an obligation for its maintenance and repair. *Morland v. Cook*, L. R. 6 Eq. 252.

<sup>20</sup> *Birch v. Ellames*, 2 Anstr. 427; *Maxfield v. Burton*, L. R. 17 Eq. 15.

<sup>21</sup> *Holmes v. Powell*, 8 De Gex, M. & G. 572, 580, 581; *Phelan v. Brady*, 119 N. Y. 587, 23 N. E. 1109; *Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082; *Petrain v. Kiernan*, 23 Or. 455, 32 Pac. 158.

<sup>22</sup> *Taylor v. Stibbert*, 2 Ves. Jr. 437.

<sup>23</sup> *Brown v. Volkening*, 64 N. Y. 76, 83; *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. 357; *Atwood v. Bearss*, 47 Mich. 72, 10 N. W. 112.

<sup>24</sup> *Sheerer v. Cuddy*, 85 Cal. 270, 24 Pac. 713; *Hodge v. Amerman*, 40 N. J. Eq. 99, 104, 2 Atl. 257; *Wickes v. Lake*, 25 Wis. 71; *Dutton v. Warschauer*, 21 Cal. 609; *Honzik v. Delagllise*, 65 Wis. 499, 27 N. W. 171.

<sup>25</sup> *Rogers v. Jones*, 8 N. H. 204; *Rogers v. Hussey*, 36 Iowa, 664.

sequent purchaser from the common vendor,<sup>26</sup> and possession of a cestui que trust is notice of his rights, though the legal title is in another.<sup>27</sup> So, also, possession of a tenant is constructive notice of the terms of his tenancy;<sup>28</sup> but on the question whether it is also notice of the landlord's title the authorities are divided.<sup>29</sup> So, also, there is a division of authority on the question whether possession by a vendor after the delivery of his deed is notice of any right or interest which he may have in the land. Some cases hold that the deed is conclusive that the vendor reserves no interest in the land, and that a purchaser from the grantee has a right to assume, without inquiry, that the vendor is in possession merely for a temporary purpose, as tenant at sufferance of the grantee.<sup>30</sup> Other cases, with probably the better reason, hold that the vendor's possession, after the delivery of his deed, is a fact inconsistent with its legal effect, and is suggestive that he still retains some interest in the premises, and that, therefore, his possession is as effectual, as notice, as that of a stranger to the record title.<sup>31</sup>

<sup>26</sup> *White v. Patterson*, 139 Pa. St. 429, 21 Atl. 360; *Strickland v. Kirk*, 51 Miss. 795, 797; *Tunison v. Chamblin*, 88 Ill. 378, 390; *Jaeger v. Hardy*, 48 Ohio St. 335, 27 N. E. 863; *Phelan v. Brady*, 119 N. Y. 587, 23 N. E. 1109.

<sup>27</sup> *Petrain v. Kiernan*, 23 Or. 455, 32 Pac. 158; *Hawley v. Geer* (Tex. Sup.) 17 S. W. 914.

<sup>28</sup> *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Cunningham v. Pattee*, 99 Mass. 248; *Thomas v. Burnett*, 128 Ill. 37, 21 N. E. 352.

<sup>29</sup> The following cases hold that it is: *Dickey v. Lyon*, 19 Iowa, 545; *Bowman v. Anderson*, 82 Iowa, 210, 47 N. W. 1087; *Levy v. Holberg*, 67 Miss. 526, 7 South. 431; *Edwards v. Thompson*, 71 N. C. 177, 181; *O'Rourke v. O'Connor*, 39 Cal. 442, 446. That it is not: *Flagg v. Mann*, 2 Sumn. 436, 557, Fed. Cas. No. 4,847; *Beatie v. Butler*, 21 Mo. 313; *Jones v. Smith*, 1 Hare, 43, 63.

<sup>30</sup> *Van Keuren v. Cent. R. Co.*, 38 N. J. Law, 165, 167; *Dodge v. Davis*, 85 Iowa, 77, 52 N. W. 2; *Exon v. Dancke* (Or.) 32 Pac. 1045; *Rankin v. Coar*, 46 N. J. Eq. 566, 22 Atl. 177; *Hafter v. Strange*, 65 Miss. 323, 3 South. 190; *Eylar v. Eylar*, 60 Tex. 315; *Scott v. Gallagher*, 14 Serg. & R. 333, 334; *Newhall v. Pierce*, 5 Pick. 450.

<sup>31</sup> *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166; *Groff v. State Bank*, 50 Minn. 234, 52 N. W. 651; *Turman v. Bell*, 54 Ark. 273, 15 S. W. 886; *Stevens v. Hulin*, 53 Mich. 93, 18 N. W. 569; *McKecknie v. Hoskins*, 23 Me. 230; *Pell v. McElroy*, 36 Cal. 268; *Hopkins v. Garrard*, 7 B. Mon. 312.

## SAME—RECITALS IN TITLE PAPERS.

58. One claiming title to land is chargeable with notice of every matter affecting the estate which appears on the face of any instrument in his chain of title, and of every matter he would have learned by any inquiry suggested by the recitals in any such deed.

It is the duty of a purchaser of real estate to inspect all the title papers in his vendor's chain of title, and he is therefore conclusively presumed to know every matter affecting the title which appears therein, and also in all other deeds and instruments recited or referred to therein as limiting or affecting the title to the property conveyed.<sup>32</sup> It has even been held that a person is not excused from inspecting a deed, which he knows affects the land, by the vendor's statement that it contains nothing which renders an inspection necessary,<sup>33</sup> though it is otherwise where the purchaser does not know that the land is affected by a prior deed or settlement, and is told by the vendor that it is not.<sup>34</sup> So, also, the fact that a deed or instru-

<sup>32</sup> *Moore v. Bennett*, 2 Ch. Cas. 246; *Bacon v. Bacon*, Toth. 133; *Bisco v. Earl of Banbury*, 1 Ch. Cas. 287; *Wilson v. Hart*, 1 Ch. App. 463; *Deason v. Taylor*, 53 Miss. 607; *Wiseman v. Hutchinson*, 20 Ind. 40; *Burch v. Carter*, 44 Ala. 115; *Major v. Buckley*, 51 Mo. 227, 231; *Willis v. Gay*, 48 Tex. 463; *Pringle v. Dunn*, 37 Wis. 449, 464; *Baker v. Mather*, 25 Mich. 51, 53; *Acer v. Westcott*, 46 N. Y. 384; *White v. Foster*, 102 Mass. 375, 380; *Smith v. Burgess*, 133 Mass. 513; *Roll v. Rea*, 50 N. J. Law 264, 12 Atl. 905; *Selberling v. Tipton* (Mo. Sup.) 21 S. W. 4. The practical applications and illustrations of this rule are very numerous. Where, under a description in a deed, resort must be had to a prior deed to locate the same, and the prior deed so describes the land that a person reading it would discover something had been omitted from the description therein, the purchaser is put on inquiry, and will be charged with notice of what an inquiry would have revealed. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239. Notice of a lease is notice of the covenants therein. *Taylor v. Stibbert*, 2 Ves. Jr. 437. A recital in a deed that the purchase money is unpaid is notice of a vendor's lien to a subsequent purchaser from the grantor. *Deason v. Taylor*, 53 Miss. 607; *Tydings v. Pitcher*, 82 Mo. 379; *Wiseman v. Hutchinson*, 20 Ind. 40; *Willis v. Gay*, 48 Tex. 463.

<sup>33</sup> *Patman v. Harland*, 17 Ch. Div. 355.

<sup>34</sup> *Jones v. Smith*, 1 Hare, 43.



ment affecting the title has not been recorded is entirely immaterial if it is referred to in the chain of title.<sup>35</sup>

The rule, however, does not operate so as to charge a purchaser with constructive notice of a recital wholly foreign to the purposes of the instrument;<sup>36</sup> nor does it apply to collateral and immaterial instruments incidentally referred to, not relating in any way to the title or property conveyed, but only to the consideration.<sup>37</sup>

#### SAME—NOTICE TO AGENT.

**59. Notice to an agent, as to matters within the scope of his agency, is constructive notice to the principal.**

Various reasons have been assigned for this rule. Some of the cases hold that it rests on the legal identity of the principal and agent;<sup>38</sup> others, that it rests on the duty of the agent to communicate his knowledge to the principal, and that he is therefore conclusively presumed to have so communicated it.<sup>39</sup> The true reason probably is that, where the principal has consummated a transaction in whole or in part through an agent, it is contrary to equity and good conscience that he should be permitted to avail himself of the benefits of his agent's participation without becoming responsible, as well for his agent's knowledge as for his agent's acts.<sup>40</sup>

<sup>35</sup> *Hancock v. McAvoy*, 151 Pa. St. 439, 25 Atl. 48; *Martin v. Neblett*, 86 Tenn. 383, 7 S. W. 123; *Aetna Life Ins. Co. v. Bishop*, 69 Iowa, 645, 29 N. W. 761; *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 29 Fed. 546; *Baker v. Mather*, 25 Mich. 51; *White v. Foster*, 102 Mass. 375, 380.

<sup>36</sup> 2 Pom. Eq. Jur. § 629; *Burch v. Carter*, 44 Ala. 115, 117. A purchaser of land is not chargeable with constructive notice of a clause in a deed in his chain of title reserving a lien for the purchase price of personalty also conveyed by the deed. *Mueller v. Engeln*, 12 Bush. 441.

<sup>37</sup> *Kansas City Land Co. v. Hill*, 87 Tenn. 589, 11 S. W. 797, citing *Bigelow, Estop.* 341; 2 Devl. Deeds, §§ 1000, 1006.

<sup>38</sup> *Boursot v. Savage*, L. R. 2 Eq. 134.

<sup>39</sup> *Thompson v. Cartwright*, 33 Beav. 178; *Barnes v. Trenton Gaslight Co.*, 27 N. J. Eq. 35.

<sup>40</sup> 2 *White & T. Lead. Cas. Eq.* (4th Am. Ed.) 179, note; *Irvine v. Grady*, 85 Tex. 120, 19 S. W. 1028; *Hickman v. Green* (Mo. Sup.) 22 S. W. 455. In this last case a married woman under the disability of coverture was held chargeable with her agent's knowledge, the court saying: "She cannot be

As to the time when the knowledge must come to the agent to bind the principal, there has been no little diversity of opinion. As long ago as 1684, Lord North said:<sup>41</sup> "Though notice to a man's counsel be notice to the party, yet, where the counsel comes to have notice of the title in another affair which it may be he has forgot when his client comes to advise with him a case of other circumstances, that shall not be such a notice as to bind the party." Lord Keeper Bridgman, in an earlier case, had asked, with the feeling of one who had been a fashionable conveyancer, whether counsel could be expected to remember forever. In England a statute now requires that the notice must come to the agent in the same transaction with respect to which the controversy arises;<sup>42</sup> and this is also the doctrine judicially announced by some of the American courts.<sup>43</sup> But in this country the weight of authority seems to incline in favor of the proposition that, if a fact is actually recollected and present in the mind of an agent while acting for his principal in a particular transaction or matter, the principal is chargeable with constructive notice of the fact as respects such transaction or matter, regardless of whether the knowledge was obtained by the agent during the transaction, or even during the agency.<sup>44</sup> However, to charge the principal with knowledge possessed by an agent, the fact of which the agent has notice must be within the scope of his agency. As the question whether the principal is bound by contract entered into

permitted to flaunt her disability in the face of a court of equity; assert she had no notice because she could have no agent; and still, at the same time, claim and hold under the questionable services of the very person whom she employed in that fiduciary capacity." See, also, *Whitehead v. Wells*, 29 Ark. 99; *Winchester v. Baltimore & S. R. Co.*, 4 Md. 231.

<sup>41</sup> *Preston v. Tubbin*, 1 Vern. 286.

<sup>42</sup> *Conveyancing Act*, 1882.

<sup>43</sup> *Houseman v. Girard Mut. Bldg. & L. Ass'n*, 81 Pa. St. 256, 262; *Barbour v. Wiehle*, 116 Pa. St. 308, 9 Atl. 526; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Pringle v. Dunn*, 37 Wis. 449. Knowledge of an agent is not constructive notice to his principal, unless acquired after the agency was created. *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190.

<sup>44</sup> *The Distilled Spirits*, 11 Wall. 356; *Holden v. New York & E. Bank*, 72 N. Y. 286, 292; *Abell v. Howe*, 43 Vt. 403; *Patten v. Merchants' & F. M. F. Ins. Co.*, 40 N. H. 375; *Snyder v. Partridge*, 138 Ill. 173, 29 N. E. 851; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 73; *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. 145.

by the agent depends on the nature and extent of the agency, so does the effect upon the principal of notice to the agent depend on the same conditions.<sup>45</sup>

#### SAME—NOTICE BY RECORD.

60. By virtue of statutes in all the American states, the recordation in the proper place of a properly executed instrument affecting title to land operates as constructive notice of its contents, and of the rights and estates created by it, to subsequent purchasers or incumbrancers under the same grantor.

The object of the recording acts in the various states is to establish a permanent method by which the exact state of the title to real estate may be easily discovered, and thus to protect subsequent bona fide purchasers;<sup>46</sup> and this object is generally accomplished by declaring that conveyances of land not recorded shall be void as against subsequent bona fide purchasers or incumbrancers whose conveyances are first recorded. The ground on which these statutes are based is that a grantee who fails to record his muniment of title places it in the power of his grantor to commit a fraud on others, and the law considers him as assisting the grantor to do this and holds him responsible accordingly.<sup>47</sup>

Since constructive notice by record is purely a statutory creation, there must be a compliance with all the statutory requirements.<sup>48</sup> Therefore the record of a deed not executed<sup>49</sup> or acknowledged<sup>50</sup> as

<sup>45</sup> *Trentor v. Pothen*, 46 Minn. 298, 49 N. W. 129. In this case it was held that one who employs an attorney for the special purpose of examining an abstract of title to land is not charged with constructive notice of the attorney's knowledge, acquired in another transaction, of the pendency of a suit which may affect the title to the land.

<sup>46</sup> *Wade*, Notice, § 96; 2 Pom. Eq. Jur. § 649; *Bird v. Dennison*, 7 Cal. 297; *Spielmann v. Kliest*, 36 N. J. Eq. 202.

<sup>47</sup> *Bird v. Dennison*, 7 Cal. 297.

<sup>48</sup> 2 Pom. Eq. Jur. § 650.

<sup>49</sup> Proper signature necessary. *Shepherd v. Burkhalter*, 13 Ga. 443. Proper attestation by witness necessary. *Pringle v. Dunn*, 37 Wis. 449; *Carter v. Champion*, 8 Conn. 549; *White v. Denman*, 1 Ohio St. 110.

<sup>50</sup> *Jacoway v. Gault*, 20 Ark. 190; *Blood v. Blood*, 23 Pick. 80; *Reynolds*

required by statute, or not delivered,<sup>51</sup> does not operate as constructive notice. So, also, it must be recorded in the proper book of records,<sup>52</sup> and within the county where the land lies,<sup>53</sup> and must definitely describe the land.<sup>54</sup>

Nor does the record of a conveyance after a compliance with all statutory requirements operate as constructive notice to all the world. The object of the recording acts is, as we have seen, the protection of subsequent bona fide purchasers. The registration of a deed from one having no title does not therefore charge the lawful owner with notice of its existence.<sup>55</sup> In other words, the record is notice to only those claiming under the same grantor,<sup>56</sup> and does not operate as notice retrospectively.<sup>57</sup>

*v. Kingsbury*, 15 Iowa, 238; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Hayden v. Moffatt*, 74 Tex. 647, 12 S. W. 820.

<sup>51</sup> *Parker v. Hill*, 8 Metc. (Mass.) 447. But delivery to the recording officer for the benefit of the grantee is a valid delivery. *Withers v. Jenkins*, 6 Rich (N. S.) 122.

<sup>52</sup> Where a statute requires a mortgage to be recorded in "book of mortgages," the record of an absolute deed intended as a mortgage is not constructive notice if recorded in the book of deeds. *McLanahan v. Roeside*, 9 Watts, 508; *Dey v. Dunham*, 2 Johns, Ch. 182; *Fisher v. Tunnard*, 25 La. Ann. 179. To same effect, *Gulley v. Macy*, 84 N. C. 434; *Ives v. Stone*, 51 Conn. 446 (where there is no such express statutory requirement). But, in the absence of express statute, the record of a conveyance, absolute in form, being notice of a greater interest than the mortgagee really has, must be held adequate to protect his rights, and be treated as sufficient notice of his actual interest, whatever that may prove to be. *Marston v. Williams*, 45 Minn. 116, 47 N. W. 644; *Kemper v. Campbell*, 44 Ohio St. 210, 6 N. E. 566; *Bank of Mobile v. Tishomingo Sav. Inst.*, 62 Miss. 250; *Knowlton v. Walker*, 13 Wis. 264.

<sup>53</sup> *King v. Portis*, 77 N. C. 25; *Cohen v. Barton* (Md.) 21 Atl. 63; *Adams v. Hayden*, 60 Tex. 223; *Astor v. Wells*, 4 Wheat. 466.

<sup>54</sup> *Bailey v. Galpin*, 40 Minn. 319, 41 N. W. 1054.

<sup>55</sup> *Bates v. Norcross*, 14 Pick. 224; *Roberts v. Richards*, 84 Me. 1, 24 Atl. 425. See, also, *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Stuyvesant v. Hone*, 1 Sandf. Ch. 419.

<sup>56</sup> *Loscy v. Simpson*, 11 N. J. Eq. 246; *Holmes v. Buckner*, 67 Tex. 107, 2 S. W. 452; *Baker v. Griffin*, 50 Miss. 158; *Roberts v. Bourne*, 23 Me. 165.

<sup>57</sup> *Wade*, Notice, § 203; 2 Pom. Eq. Jur. § 657; *Birne v. Main*, 29 Ark. 591; *Ward's Ex'rs v. Hague*, 25 N. J. Eq. 397.

*Notice of Unrecorded Deed.*

One other question should be noticed in this connection, and that is, does a subsequent purchaser, who buys with notice of a prior unrecorded conveyance, take subject to that conveyance, though his is first placed on record? It was held by the English chancery court in an early case, which has been followed by nearly all the courts, both in England and America, that the taking of a deed with knowledge of a prior unrecorded deed is a fraud on the part of the subsequent purchaser, and that he therefore takes subject to the prior deed.<sup>58</sup> There has been a wide diversity of opinion, however, as to whether the subsequent purchaser must have actual notice of the prior unrecorded conveyance, or whether constructive notice alone is sufficient. The earlier English cases required actual notice.<sup>59</sup> The statutes of some of our states also require "actual notice,"<sup>60</sup> and the decisions in other states are to the same effect;<sup>61</sup> the term "actual notice" being construed to mean, not only actual knowledge, but the conscious possession of means of knowledge, as heretofore defined. Other courts have held constructive notice sufficient.<sup>62</sup> On principle, and in the absence of express statutes requiring actual notice, this would seem to be the correct doctrine. Since the record itself is merely constructive notice to subsequent purchasers, any other notice, actual or constructive, ought to be a substitute for the record.<sup>63</sup>

<sup>58</sup> *Le Neve v. Le Neve* (1747) Amb. 436, 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 109. Followed in *Rolland v. Hart*, 6 Ch. App. 678; *Wyatt v. Barwell*, 19 Ves. 435; *Tuttle v. Jackson*, 6 Wend. 213; *Britton's Appeal*, 45 Pa. St. 172; *Wyatt v. Stewart*, 34 Ala. 716. Some of the earlier decisions in this country, however, hold that an unrecorded deed is void as to subsequent purchasers or creditors of the grantor, whether they had notice or not. *Washington v. Trousdale*, Mart. & Y. 385; *Lillard v. Ruckers*, 9 Yerg. 64; *Mayham v. Coombs*, 14 Ohio, 428.

<sup>59</sup> *Hine v. Dodd*, 2 Atk. 275; *Jolland v. Stainbridge*, 3 Ves. 478.

<sup>60</sup> Maine, Massachusetts, Missouri, Wisconsin, and perhaps others.

<sup>61</sup> *Jackson v. Van Valkenburgh*, 8 Cow. 260; *Brown v. Volkening*, 64 N. Y. 76, 82.

<sup>62</sup> *Porter v. Cole*, 4 Me. 20; *Price v. McDonald*, 1 Md. 414; 2 Pom. Eq. Jur. § 664; *Wade*, Notice, § 251.

<sup>63</sup> 2 Pom. Eq. Jur. § 665.

**SAME—LIS PENDENS.**

61. In the absence of statutes, one who, pending a suit to reach specific property, within the jurisdiction of the court (other than negotiable paper), acquires from a party thereto any interest in or lien on that property, is bound by the judgment or decree, though he purchases for a valuable consideration, and without actual notice of the suit.

The subject of lis pendens is usually treated as forming part of the equitable doctrine of constructive notice;<sup>64</sup> but in truth lis pendens is a doctrine common to courts of both law and equity,<sup>65</sup> and rests on public policy and expediency, as it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings anew, subject again to be defeated by the same course of proceedings.<sup>66</sup>

*Prerequisites for Application of Doctrine.*

1. To warrant the application of the doctrine, the litigation must, in the first place, be about some specific thing which must necessarily be affected by the termination of the suit.<sup>67</sup> While the doctrine has found its chief application in suits involving specific realty,<sup>68</sup> it has

<sup>64</sup> 1 Story, Eq. Jur. § 405; Chancellor Kent, in *Murray v. Ballou*, 1 Johns. Ch. 566.

<sup>65</sup> *Sorrell v. Carpenter*, 2 P. Wms. 482; 2 Co. Inst. p. 375.

<sup>66</sup> *Bellamy v. Sabine*, 1 De Gex & J. 566, 578, 584; *Dovey's Appeal*, 97 Pa. St. 153; *Houston v. Timmerman*, 17 Or. 499, 21 Pac. 1037.

<sup>67</sup> There has been some diversity of opinion as to whether the doctrine applies to an action for divorce, where the wife seeks to charge the husband's realty with alimony. The general and better rule is that the doctrine does not apply. *Scott v. Rogers*, 77 Iowa, 483, 42 N. W. 377; *Houston v. Timmerman*, 17 Or. 499, 21 Pac. 1037. But the contrary has been held where the particular property to be charged was described in the complaint. *Wilkinson v. Elliott*, 43 Kan. 500, 23 Pac. 614; *Powell v. Campbell*, 20 Nev. 232, 20 Pac. 156.

<sup>68</sup> *Center v. Bank*, 22 Ala. 743; *Blanchard v. Ware*, 43 Iowa, 530, 531; *Chapman v. West*, 17 N. Y. 125.

in some cases been also extended to suits involving specific personal property,<sup>69</sup> other than negotiable paper, corporate bonds, etc.<sup>70</sup>

2. The particular property involved in the suit must be so definitely described in the pleading that any one reading it can learn thereby what property is intended to be made the subject of litigation.<sup>71</sup>

3. To make the pendency of a suit notice, so as to affect the conscience of the purchaser, it is essential that the court have jurisdiction over the specific thing which is the subject of litigation.<sup>72</sup>

4. The jeopardy of being a purchaser pendente lite, and thus taking subject to the result of the suit, begins, of course, with its commencement, and continues until its final termination. For the purposes of the doctrine now under consideration, and in the absence of statute, the suit is not commenced until both the bill is filed and the process is served;<sup>73</sup> and it continues not only until the rendition of final judgment,<sup>74</sup> but until a reasonable time for appeal has elapsed.<sup>75</sup>

<sup>69</sup> Mortgages and other securities held in trust. *Murray v. Lylburn*, 2 Johns. Ch. 441. See, also, *Fletcher v. Ferrill*, 9 Dana, 373; *M'Cutchen v. Miller*, 31 Miss. 66; *Diamond v. Lawrence Co.*, 37 Pa. St. 353; *Armstrong v. Broom*, 5 Utah, 176, 13 Pac. 364. Doctrine applies to transfer of tax certificates. *Hixon v. Oneida Co.*, 82 Wis. 515, 52 N. W. 445.

<sup>70</sup> Public policy does not require that the doctrine be applied to transfers of negotiable paper, stocks, or bonds. On the contrary, its application to such property would work great mischief, and lead to great embarrassments. *Letch v. Wells*, 48 N. Y. 585, 613; *Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co.*, 4 C. C. A. 561, 54 Fed. 759; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Warren Co. v. Marcy*, 97 U. S. 96.

<sup>71</sup> *Allen v. Poole*, 54 Miss. 323, 333; *Houston v. Timmerman*, 17 Or. 499, 21 Pac. 1037; *Miller v. Sherry*, 2 Wall. 237; *Russell v. Kirkbride*, 62 Tex. 459.

<sup>72</sup> *Carrington v. Brents*, 1 McLean (U. S.) 167, Fed. Cas. No. 2,446; *Jones v. Lusk*, 2 Metc. (Ky.) 356. Doctrine does not apply where subject of litigation is real estate located outside of county. *Benton v. Shafer*, 47 Ohio St. 117, 24 N. E. 197.

<sup>73</sup> *Franklin Sav. Bank v. Taylor*, 131 Ill. 376, 23 N. E. 397; *Staples v. White, Handley & Co.*, 88 Tenn. 30, 12 S. W. 339; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *Duff v. McDonough*, 155 Pa. St. 10, 25 Atl. 608; *Murray v. Ballou*, 1 Johns. Ch. 566; *Allen v. Poole*, 54 Miss. 323, 324. Different rule by virtue of statutes. *Burleson v. McDermott*, 57 Ark. 229, 21 S. W. 222; *Rothschild v. Kohn* (Ky.) 19 S. W. 780.

<sup>74</sup> *Turner v. Crebill*, 1 Ohio, 372; *Page v. Waring*, 76 N. Y. 463; *Woraley v. Earl of Scarborough*, 3 Atk. 392.

<sup>75</sup> *Moore v. Moore*, 67 Tex. 293, 3 S. W. 284. A purchaser after final decree,

5. Since there is no *lis pendens* as against a person not a party to the suit, it follows that a purchaser of property in litigation from a person not a party thereto is not chargeable with constructive notice.<sup>76</sup>

*Statutory Enactments.*

In England, and in most of the American states, it is now provided by statute that the pendency of a suit does not affect a purchaser with constructive notice, unless notice is filed in some designated public office. It may be stated as a general proposition, however, that these statutes do not abrogate the foregoing special rules, but merely require the filing of the proper notice before they come into play.<sup>77</sup>

**BONA FIDE PURCHASERS.**

**62. A bona fide purchaser is one who for a valuable consideration and in good faith acquires property, without notice, when the consideration is paid, of the adverse rights of others therein.**

*Valuable Consideration.*

The payment of a valuable consideration is necessary to constitute a bona fide purchaser; a merely good consideration, as love and affection, is not sufficient.<sup>78</sup> The purchaser must pay value or make advances or incur liabilities on the credit of his vendor's apparent title.<sup>79</sup> Of course, money or money's worth is always a

and before bill of review is filed, is not a purchaser *pendente lite*. *Ludlow v. Kidd*, 3 Ohio, 544. Abandonment or voluntary dismissal of suit prevents application of doctrine. *Allison v. Drake*, 145 Ill. 500, 32 N. E. 541; *Valentine v. Austin*, 124 N. Y. 400, 26 N. E. 973.

<sup>76</sup> *Green v. Rick*, 121 Pa. St. 130, 15 Atl. 497; *Brundage v. Biggs*, 25 Ohio St. 652, 656; *Carr v. Callaghan*, 3 Litt. 365.

<sup>77</sup> 2 Pom. Eq. Jur. § 640, and cases cited.

<sup>78</sup> *Roseman v. Miller*, 84 Ill. 297; *Everts v. Agnes*, 4 Wis. 356; *Patten v. Moore*, 32 N. H. 382; *Boon v. Barnes*, 23 Miss. 136; *Aubuchon v. Bender*, 44 Mo. 560. Moral consideration not sufficient. *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227. Devisee is not a purchaser for value. *Jackson v. Lynch*, 129 Ill. 72, 21 N. E. 580, and 22 N. E. 246.

<sup>79</sup> *Barnard v. Campbell*, 58 N. Y. 73; *Hoffman v. Noble*, 6 Metc. (Mass.) 68; *Weaver v. Barden*, 49 N. Y. 286; *Dickerson v. Tillinghast*, 4 Paige, 215. *Roxborough v. Messick*, 6 Ohio St. 448.



valuable consideration; and so is marriage.<sup>80</sup> As a general rule, a person taking property in consideration of a pre-existing debt is not considered a purchaser for a valuable consideration, because he parts with nothing of value, and has lost nothing by the transaction.<sup>81</sup> But in some states it is held that an absolute discharge and extinguishment of an antecedent debt constitutes a valuable consideration, because the creditor divests himself of the right of action, or of securing the original liability, and places himself in a worse position than he would have done by a definite forbearance of the debt.<sup>82</sup>

If the consideration is in fact a valuable one, the court will not inquire whether it is adequate,<sup>83</sup> unless the discrepancy is so gross as to amount to evidence of bad faith.<sup>84</sup> Again, the consideration must be actually paid before there is any notice of the adverse claim to the property.<sup>85</sup> If part of the consideration is paid before notice, and part after, the purchaser will be protected as to the amount paid before notice, but not as to the amount paid thereafter.<sup>86</sup>

#### *Good Faith.*

The maxim that he who comes into equity must come with clean hands is peculiarly applicable to one claiming to be a bona fide purchaser.<sup>87</sup> Good faith consists in an honest intention to abstain

<sup>80</sup> Jackson v. Rowe, 2 Sim. & S. 472; Penny v. Watts, 2 De Gex & S. 501.

<sup>81</sup> Padgett v. Lawrence, 10 Paige, 180; Eaton v. Davidson, 46 Ohio St. 355, 364, 21 N. E. 442; Gest v. Packwood, 34 Fed. 368; Clark v. Flint, 22 Pick. 243; Ashton's Appeal, 73 Pa. St. 153; People's Sav. Bank v. Bates, 120 U. S. 556, 565, 7 Sup. Ct. 679.

<sup>82</sup> State Bank v. Frame, 112 Mo. 502, 20 S. W. 620; Hanold v. Kays, 64 Mich. 439, 31 N. W. 420; Soule v. Shotwell, 52 Miss. 236; Gassen v. Hendrick, 74 Cal. 444, 16 Pac. 242.

<sup>83</sup> Basset v. Nosworthy, 2 White & T. Lead. Cas. 1; Wood v. Chapin, 13 N. Y. 509; Skerrett v. Presbyterian Society, 41 Ohio St. 606.

<sup>84</sup> Worthy v. Caddell, 76 N. C. 82; Dunn v. Barnum, 2 C. C. A. 265, 51 Fed. 355; Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. 623.

<sup>85</sup> Green v. Green, 41 Kan. 472, 21 Pac. 586; Young v. Kellar, 94 Mo. 581, 7 S. W. 293; Tourville v. Naish, 3 P. Wms. 307.

<sup>86</sup> Youst v. Martin, 3 Serg. & R. 423; Mitchell v. Dawson, 23 W. Va. 86; Kitteridge v. Chapman, 36 Iowa, 348; Baldwin v. Sager, 70 Ill. 503; Birdsall v. Cropsey, 29 Neb. 679, 45 N. W. 921.

<sup>87</sup> Cram v. Mitchell, 1 Sandf. Ch. 251.

from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence or belief of facts which would render the transaction unconscientious.<sup>88</sup> Not only must there be an absence of positive fraud, but any inequitable conduct by the purchaser towards his grantor, or the latter's creditors, defeats the protection which equity would otherwise accord a bona fide purchaser.<sup>89</sup> We have already seen that gross inadequacy of consideration is a badge of fraud,<sup>90</sup> and it has also been held that a mortgagee cannot be considered a bona fide purchaser where there is usury in the debt secured.<sup>91</sup>

*Notice.*

The question as to what constitutes notice has already been discussed.<sup>92</sup> It is settled that one who pays the purchase money with notice, in any of its various forms, either actual or constructive, of adverse rights in the property purchased, takes subject to those rights, and will not be protected as a bona fide purchaser.<sup>93</sup> It remains, however, to state a few additional rules respecting notice as affecting bona fide purchasers:

1. The weight of authority is that a grantee in a quitclaim deed which conveys only the "right, title, and interest of the grantor" is not a bona fide purchaser, because the deed itself is notice that he is getting only a doubtful title.<sup>94</sup> But there are other cases

<sup>88</sup> *Gress v. Evans*, 1 Dak. 387, 46 N. W. 1132.

<sup>89</sup> 2 Pom. Eq. Jur. § 762.

<sup>90</sup> *Ante*, p. 96.

<sup>91</sup> *Smith v. Lehman, Durr & Co.*, 85 Ala. 394, 5 South. 204. Where a land grant by the federal government is made on condition that a certain road be completed by the grantees, purchasers from the grantees are not chargeable with bad faith because they fail to make a personal examination of the road to ascertain whether it is completed, when the governor of the state, to whose determination the matter had been committed by statute, certifies that the road is completed. *U. S. v. California & O. Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458. Other recent cases involving the question of good faith are *Billings v. Aspen Mining & Smelting Co.*, 2 C. C. A. 252, 51 Fed. 338; *Tarkington v. Purvis*, 128 Ind. 182, 25 N. E. 879; *Barrett v. Sear*, 128 Ind. 261, 27 N. E. 607.

<sup>92</sup> *Ante*, p. 80 et seq.

<sup>93</sup> 1 Story, Eq. Jur. § 395; *Murray v. Ballou*, 1 Johns. Ch. 566.

<sup>94</sup> *Martin v. Morris*, 62 Wis. 418, 22 N. W. 525; *Thorn v. Newsom*, 64 Tex. 161; *Dodge v. Briggs*, 27 Fea. 160; *Peters v. Cartler*, 80 Mich. 124, 45 N. W.

holding that a grantee in a quitclaim deed, who in good faith parts with a valuable consideration, is entitled to protection, as a bona fide purchaser, equally with a grantee in a deed containing covenants warranting the title.<sup>95</sup>

2. Though a purchaser of property has notice of adverse rights, yet a bona fide purchaser from him will be protected in equity; for otherwise no man would be safe in any purchase, but would be liable to have his own title defeated by secret equities of which he could have no possible means of making a discovery.<sup>96</sup>

So, also, if a purchaser has notice of adverse rights in the property, yet he will be protected if he purchases from a bona fide purchaser without notice; for otherwise such bona fide purchaser could not enjoy the benefit of his own unexceptionable title.<sup>97</sup>

#### PRIORITIES.

Having ascertained what constitutes a bona fide purchaser for value without notice, we are now in a position to inquire when he is entitled to invoke the protection of a court of equity as against one asserting adverse rights to the property, either legal or equitable. The broad proposition has been laid down that equity will in no case

73; *Richardson v. Levi*, 67 Tex. 359, 3 S. W. 444; *Johnson v. Williams*, 37 Kan. 179, 14 Pac. 537; *Dickerson v. Colgrove*, 100 U. S. 578, 584; *Baker v. Humphrey*, 101 U. S. 494, 499.

<sup>95</sup> *Nidever v. Ayers*, 83 Cal. 39, 23 Pac. 192; *Fox v. Hall*, 74 Mo. 315; *Chapman v. Sims*, 53 Miss. 154. In recent cases questioning prior decisions, the United States supreme court lays down the proposition that the grantee in a quitclaim deed may be a bona fide purchaser. *Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. 426; *U. S. v. California & O. Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458.

<sup>96</sup> 1 Story, Eq. Jur. § 409; *Harrison v. Forth*, Finch, Prec. 51; *Paris v. Lewis*, 85 Ill. 597; *Odom v. Riddick*, 104 N. C. 515, 10 S. E. 609; *Zoeller v. Riley*, 100 N. Y. 108, 2 N. E. 388; *Somes v. Brewer*, 2 Pick. 183; *Latham v. Inman*, 88 Ga. 505, 15 S. E. 8.

<sup>97</sup> *Trull v. Bigelow*, 16 Mass. 406; *Mott v. Clark*, 9 Pa. St. 390; *Craig v. Zimmerman*, 87 Mo. 478; *Hayes v. Nourse*, 114 N. Y. 606, 22 N. E. 40; *Scotland Co. v. Hill*, 132 U. S. 107, 10 Sup. Ct. 26. The second bona fide purchaser cannot, however, convey back to his grantor with notice, so as to enable the latter to take free from the adverse equities. *Kennedy v. Daly*, 1 Schoales & L. 355, 379; *Church v. Rutland*, 64 Pa. St. 432; *Clark v. McNeal*, 114 N. Y. 295, 21 N. E. 405.

give assistance against a bona fide purchaser for value without notice, but this proposition is subject to so many exceptions and limitations as to be practically valueless.<sup>98</sup> The following statement of the general principles governing courts of equity in determining the priority of adverse claimants to the same property will, it is believed, materially aid the student in understanding the somewhat intricate and perplexing cases on this subject:

#### **SAME—UNEQUAL EQUITIES.**

**63. Where the equities of rival claimants are not equal, he who has the best equity takes precedence.**

This principle, though rarely announced in express terms, is one of controlling importance; for the maxims, "Where there are equal equities, the law prevails," and, "Where there are equal equities, the first in order of time prevails," can have no application where the equities are not equal. The following rules have been formulated to determine whether one equity is superior to another:

**64. An equity founded on a valuable consideration is superior to one founded on a mere voluntary transfer or gift.<sup>99</sup>**

We have already seen that, to constitute a bona fide purchaser, there must be the payment of a valuable consideration; in other words, one who acquires an equitable interest in property for a valuable consideration has a superior equity to one who thereafter acquires the legal title by way of gift without knowledge of the prior interest. This proposition is illustrated in a somewhat recent case. A woman had been induced to marry a man on the faith of his promise to convey certain land to her. Instead of so doing, he conveyed it, by way of gift, to a son by a former wife. It was held that the second wife's equity to the land was superior to the legal title of the son, though he knew nothing of his father's fraud, because a mere volunteer, however innocent, cannot retain the fruits of the

<sup>98</sup> Haynes, Eq. (5th Ed.) pp. 388-390; 2 Pom. Eq. Jur. §§ 737-746.

<sup>99</sup> Adams, Eq. p. 147; 2 Pom. Eq. Jur. § 635.

fraud.<sup>100</sup> This rule is very frequently applied to cases of insolvency and bankruptcy. It is uniformly held that an assignee in insolvency or bankruptcy is merely a volunteer, and takes the property subject to all equities existing against the insolvent.<sup>101</sup> For instance, when property is held by a bankrupt as trustee, the cestui que trust has a superior equity to the assignee, though no declaration of trust appears on record.<sup>102</sup> This principle, as we shall hereafter see, is of controlling importance in determining the rights of a grantee in a conveyance assailed by the grantor's creditors as in fraud of their rights.<sup>103</sup>

**65. An equity to a specific thing or a specific lien is superior to an equity general in its scope or nature.<sup>104</sup>**

A frequent application of this rule is to cases of conflicting rights between a grantee or mortgagee in an unrecorded instrument, and a subsequent judgment creditor of the grantor or mortgagor. In the absence of express statute, the lien of a mortgage on specific land, though not recorded, is superior to the general lien of a subsequent judgment against the mortgagor.<sup>105</sup> So a vendee under an unrecorded deed is entitled to priority over a subsequent judgment against the grantor.<sup>106</sup> When, however, the land is sold on execution under such a judgment, the purchaser, on placing the sheriff's deed on record, will be protected against a prior unrecorded mortgage, since

<sup>100</sup> *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227.

<sup>101</sup> *Dudley v. Easton*, 104 U. S. 99, 103; *Webber v. Clark*, 136 Ill. 256, 26 N. E. 360, and 32 N. E. 748; *Kirk v. Roberts* (Cal.) 31 Pac. 620.

<sup>102</sup> *Webber v. Clark*, 136 Ill. 256, 26 N. E. 360, and 32 N. E. 748.

<sup>103</sup> See post, 158.

<sup>104</sup> *Adams*, Eq. p. 147; 2 Pom. Eq. Jur. §§ 720, 721.

<sup>105</sup> *Sappington v. Oeschli*, 49 Mo. 244; *Carraway v. Carraway*, 27 S. C. 576, 5 S. E. 157; *Churchill v. Morse*, 23 Iowa, 229; *Jackson v. Dubois*, 4 Johns. 216; *Hunter v. Watson*, 12 Cal. 263. A contrary rule, however, prevails in other states, chiefly by virtue of statutory provisions. *Vreeland v. Clafflin*, 24 N. J. Eq. 313; *McFadden v. Worthington*, 45 Ill. 362; *Young v. Devries*, 31 Gratt. 304; *Humphreys v. Merrill*, 52 Miss. 92; *Andrews v. Mathews*, 59 Ga. 466; *Anderson v. Nagle*, 12 W. Va. 98; *Cavanaugh v. Peterson*, 47 Tex. 198.

<sup>106</sup> *Schroeder v. Gurney*, 73 N. Y. 430; *Harral v. Gray*, 10 Neb. 180, 4 N. W. 1040.

the sheriff's deed is treated as if given by the judgment debtor himself, and conveys precisely what he could have conveyed when the judgment was docketed.<sup>107</sup> Decisions that the specific lien of a purchase money mortgage executed contemporaneously with the deed is superior to the general lien of an existing judgment against the mortgagor may also be sustained under the above rule, though the reason assigned in some of the earlier cases is that the mortgagor has but an instantaneous seizin, and that the judgment lien cannot therefore attach.<sup>108</sup> Another important application of the principle is to be found in cases involving the rights of a grantee in a conveyance assailed as in fraud of the grantor's creditors.<sup>109</sup>

**66. The equity of the party misled is superior to his who has willfully misled him.**<sup>110</sup>

Though somewhat analogous to the doctrine of equitable estoppel, this rule existed prior to that doctrine, and is entirely independent of it. The meaning of the rule is that one interested in an estate, who knowingly misleads another into dealing with the estate as if he were not interested, will be postponed to the party misled, and compelled to make his representation specifically good. There is a distinction, however, to be observed between the case where the dispute arises between two merely equitable assignees and where the first assignee in order of date has the legal title. It is clear that if a mere equitable owner, by his carelessness, enables a fraud to be perpetrated, the result of which is that either he or some innocent third party must suffer, equity will aid the third party, and not the careless one. Thus, where one having merely an equitable interest in land stands by and sees another purchase the land without giving notice of his equities, the purchaser will take the land discharged of such equities.<sup>111</sup> So, also, it has been held that the failure of an assignee of notes secured by mortgage to procure and record an

<sup>107</sup> *Hetzel v. Barber*, 69 N. Y. 1, 9; *McKnight v. Gordon*, 13 Rich. Eq. 222.

<sup>108</sup> *Stewart v. Smith*, 36 Minn. 82, 30 N. W. 430; *Roane v. Baker*, 120 Ill. 308, 11 N. E. 246; *Curtis v. Root*, 20 Ill. 54; *Bradley v. Bryan*, 43 N. J. Eq. 396, 13 Atl. 806.

<sup>109</sup> See post, 158.

<sup>110</sup> *Adams*, Eq. p. 148; 2 Pom. Eq. Jur. § 686.

<sup>111</sup> *Wells v. Neff*, 14 Or. 66, 14 Pac. 84, 88.

assignment of the mortgage is such negligence as will postpone his lien to that of a junior mortgagee, who loaned his money on the faith of the release of the prior mortgage by the mortgagee, though the release was not authorized by the assignee, and though the mortgagee embezzled the money paid to procure it.<sup>112</sup>

Mere carelessness, however, will not defeat the rights of the holder of the prior legal estate as against one having subsequent equities. The legal owner has a right to say: "I am the legal owner, and I have yet to learn that a legal estate can be defeated by mere carelessness."<sup>113</sup> Thus, it has been held that the legal owner, whose title is on record, will not be postponed merely because he remained silent while another dealt with the property as his own.<sup>114</sup> But positive fraud or even gross carelessness will postpone the legal owner.<sup>115</sup> For example, he cannot assert his title, though duly recorded, against one who expended money on the faith of his denial of title, either by acts or declarations.<sup>116</sup>

**67. One taking with notice of an equity takes subject to that equity.<sup>117</sup>**

The meaning of this rule is that if one acquiring property has, when he pays the purchase money, notice of a prior equity binding the owner in respect of that property, he shall be assumed to have contracted for that only which the owner could honestly transfer, viz. his interest, subject to the equity as it existed at the date of notice.<sup>118</sup> The following are some of the more important applications of the rule: The purchaser of property from a trustee, with notice of the trust, is himself a trustee for the same purposes;<sup>119</sup> the

<sup>112</sup> *Livermore v. Maxwell* (Iowa) 55 N. W. 37.

<sup>113</sup> *Underh. Eq.* p. 165.

<sup>114</sup> *Clabaugh v. Byerly*, 7 Gill, 354; *Groundie v. Northampton Water Co.*, 7 Pa. St. 239; *Knouff v. Thompson*, 16 Pa. St. 361, 363; *Hill v. Epley*, 31 Pa. St. 331; *Neal v. Gregory*, 19 Fla. 356.

<sup>115</sup> *Northern Counties of Eng. F. Ins. Co. v. Whipp*, 26 Ch. Div. 482.

<sup>116</sup> *Evans v. Forstall*, 58 Miss. 30.

<sup>117</sup> *Adams*, Eq. p. 148; 2 Pom. Eq. Jur. § 688.

<sup>118</sup> *Adams*, Eq. p. 151; *Gamble v. Hamilton* (Fla.) 12 South. 229; *McCone v. Courser*, 64 N. H. 306, 15 Atl. 129; *Otis v. Payne*, 86 Tenn. 663, 8 S. W. 848; *Oliver v. Sanborn*, 60 Mich. 346, 27 N. W. 527.

<sup>119</sup> *Burgess v. Wheate*, 1 Eden, 177, 195; *Pindall v. Trevor*, 30 Ark. 249;

purchaser of property which the vendor has already contracted to sell, with notice of such prior contract, is bound to convey to the claimant under it;<sup>120</sup> and the purchaser of land which the vendor has covenanted to use in a specified manner, having notice of that covenant, is bound by its terms, though it does not at law run with the land.<sup>121</sup> The questions as to what constitutes notice, when it must be given, etc., have already been discussed.<sup>122</sup>

Our next inquiry will be as to the priority of rights of assignees and purchasers having equal equities.

#### SAME—EQUAL EQUITIES.

68. A court of equity will not assist the holder of an equitable estate as against one who has an equal equitable claim on or interest in the subject-matter, and who, in addition, has acquired the legal title.

This proposition rests on the maxim, "When the equities are equal, the law shall prevail." No relief will be given against a defendant who, in these circumstances, has acquired the legal title without notice of plaintiff's equity. This proposition may be thus illustrated: The owner of land contracts to sell it to A., who pays part or all of the purchase money before the estate is legally conveyed to him. The owner then sells the estate to B., who has no notice of the transaction with A. B. pays his purchase money, and *Storrs v. Wallace*, 61 Mich. 437, 28 N. W. 602; *Rabb v. Flenniken*, 29 S. O. 278, 7 S. E. 597.

<sup>120</sup> *Merry v. Abney*, 1 Cas. Ch. 38; *Potter v. Sanders*, 6 Hare, 1; *Greaves v. Toffield*, 14 Ch. Div. 563, 577; *Veith v. McMurtry*, 26 Neb. 341, 42 N. W. 6.

<sup>121</sup> *Tulk v. Moxhay*, 11 Beav. 571; 2 Phil. Ch. 774, 777; *Parker v. Nightingale*, 6 Allen, 341, 344; *Whitney v. Union Railway Co.*, 11 Gray, 359, 368; *Barrow v. Richard*, 8 Paige, 351; *Trustees of Village of Watertown v. Cowen*, 4 Paige, 510; *Trustees of Columbia College v. Lynch*, 70 N. Y. 440, 449-452; *Willoughby v. Lawrence*, 116 Ill. 11, 4 N. E. 356; *Gilmer v. Mobile & M. Ry. Co.*, 79 Ala. 569; *De Gray v. Monmouth Beach Clubhouse Co.* (N. J. Ch.) 24 Atl. 388; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335. But a covenant which affects use of land merely in a collateral way will not be enforced in equity against an assignee with notice. *Kettle River R. Co. v. Eastern Ry. of Minn.*, 41 Minn. 461, 43 N. W. 469; *Norcross v. James*, 140 Mass. 188, 2 N. E. 946.

<sup>122</sup> Ante, 80 et seq.



a deed to him is executed and recorded. If, then, A. comes into equity to enforce against the estate the lien to which, as a purchaser, equity would under other circumstances have held him entitled, the relief will be refused to him. It will be held that B. has as good a right in conscience to the full enjoyment of his estate as A. has to security for his prematurely paid purchase money. Equity will therefore refuse to interfere with the advantage he derives from his legal position.<sup>123</sup> Another illustration is to be found where one purchases trust property for value without notice of the trust. The purchaser who has parted with value on the faith of an apparently absolute title in the trustee has an equal equity with the *cestuis que trustent*; and, since the deed from the trustee vests him with the legal title, equity will give no assistance to the beneficiaries as against him.<sup>124</sup>

The rule above stated in the black-letter text not only applies to cases where the purchaser has secured the legal title contemporaneously with his equitable estate, but also to cases where he afterwards acquired the legal title; and this, notwithstanding that, in the interval between his purchase and his acquiring the legal title, he may have had notice of the prior transaction with plaintiff.<sup>125</sup>

A rather frequent application of the rule is to cases where plaintiff has a mere equity as distinguished from an equitable estate; for example, a right to rescission of a deed or mortgage for the fraud of the grantee or mortgagee, or a right to reformation for a mistake in the instrument. It is uniformly held that this relief will be denied as against one who has purchased the legal title from the grantee or mortgagee for value, and without notice of plaintiff's equities.<sup>126</sup> So,

<sup>123</sup> Smith, Pr. Eq. p. 319.

<sup>124</sup> Warnock v. Harlow, 96 Cal. 298, 31 Pac. 106. Purchaser from trustee without notice of constructive or resulting trust will be protected against beneficiaries. Gray v. Coan, 40 Iowa, 327; Wilson v. Western N. C. Land Co., 77 N. C. 445. So, also, where a defective mortgage is executed by a trustee, and is not placed on record, a subsequent conveyance of the legal title to the *cestui que trust* for value and without notice will be protected. Fox v. Palmer, 25 N. J. Eq. 416.

<sup>125</sup> Smith, Pr. Eq. p. 320. The principal illustration of this branch of the rule is the English doctrine of tacking, heretofore explained. See ante, 35. Applications of this branch of the doctrine are very rare with us.

<sup>126</sup> Reformation of deed or mortgage for mistake denied as against subse-

also, a conveyance void as against the grantor's creditors for fraud will not be set aside at their suit as against a bona fide purchaser for value from the grantee.<sup>127</sup>

**69. Where the equities are otherwise in every respect equal, and there is no legal estate or interest in either claimant, he whose equity first accrued will take precedence.**

This proposition is merely an amplification of the maxim, "Where the equities are equal, the first in order of time shall prevail." In England its chief application has been to cases of equitable mortgage created by the deposit of title deeds. Though this form of mortgage is unknown to us, our own courts apply the doctrine whenever the facts warrant them in so doing. For example, as between two assignees of the same mortgage, the first in order of time is entitled to the money due thereon, though the second assignee took without notice of the first, and each gave notice of his assignment to the mortgagor.<sup>128</sup> So, also, as between a mortgagee whose mortgage has been discharged of record, solely through the unauthorized act of another, and a purchaser who buys the land in the belief, induced by the cancellation, that the mortgage is satisfied and discharged, the equities are balanced, and the rights, in the order of

quent bona fide purchasers. *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181, 470; *Mayor of City of Macon v. Dasher*, 90 Ga. 195, 16 S. E. 75; *Toll v. Davenport*, 74 Mich. 386, 42 N. W. 63; *Knobloch v. Mueller*, 123 Ill. 554, 17 N. E. 406; *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69; *Whitman v. Weston*, 30 Me. 285. Rescission denied as against bona fide purchaser. *Town of Cherry Creek v. Becker*, 123 N. Y. 161, 25 N. E. 369 (municipal bonds); *Dettra v. Kestner*, 147 Pa. St. 566, 23 Atl. 889; *Zoeller v. Riley*, 100 N. Y. 108, 2 N. E. 388; *Rowley v. Bigelow*, 12 Pick. 307; *Halverson v. Brown*, 75 Iowa, 702, 38 N. W. 123; *Hewlett v. Pilcher*, 85 Cal. 542, 24 Pac. 781; *Dickerson v. Evans*, 84 Ill. 451.

<sup>127</sup> *Holmes v. Gardner*, 50 Ohio St. 167, 33 N. E. 644; *Sawyer v. Almand*, 89 Ga. 314, 15 S. E. 315; *Blackshire v. Pettit*, 35 W. Va. 547, 14 S. E. 133; *Fletcher v. Peck*, 6 Cranch, 87, 133, 134; *Rowley v. Bigelow*, 12 Pick. 307; *Ledyard v. Butler*, 9 Paige, 132; *Anderson v. Roberts*, 18 Johns. 515; *Hood v. Fahnestock*, 8 Watts, 489; *Price v. Junkin*, 4 Watts, 85; *Sydnor v. Roberts*, 13 Tex. 598.

<sup>128</sup> *Muir v. Schenck*, 3 Hill, 228.

time, must prevail. The lien of the mortgage must remain, despite the apparent discharge.<sup>129</sup>

**70. Where the equities are equal, and plaintiff, who has also the legal title, invokes the assistance of a court of equity, the defense of bona fide purchaser for value without notice will not prevail.<sup>130</sup>**

On this ground, it has been held that it is no defense to a bill by a widow for dower, which is the legal estate, that defendant purchased from her husband for value, without any notice that he was married.<sup>131</sup> It was formerly held, however, that when plaintiff, having the legal estate, resorted to the auxiliary jurisdiction of the chancery court for discovery to perfect his interest, no assistance would be given him as against a purchaser for value without notice;<sup>132</sup> but since the enactment of the judicature act in England, fusing law and equity, it has been held that the plea of purchase for value without notice is no longer any defense to making discovery of defendant's title deeds.<sup>133</sup> Owing to our recording acts, it is difficult to conceive how the question could arise with us.

<sup>129</sup> *Heyder v. Excelsior Building Loan Ass'n*, 42 N. J. Eq. 403, 408, 8 Atl. 310.

<sup>130</sup> *Pom. Eq. Jur.* 765; *Smith, Pr. Eq.* p. 322.

<sup>131</sup> *Williams v. Lambe*, 3 Brown, Ch. Cas. 264.

<sup>132</sup> *Basset v. Nosworthy*, 2 White & T. Lead Cas. Eq. 1.

<sup>133</sup> *Ind v. Emmerson*, 12 App. Cas. 300.

## CHAPTER VI.

### DOCTRINES OF EQUITY (Continued)—PENALTIES AND FORFEITURES.

71. Penalties and Forfeitures.
72. Penalty or Liquidated Damages.
73. Statutory Penalties.
74. Enforcing Forfeiture.

### PENALTIES AND FORFEITURES.

71. Whenever a penalty or forfeiture is inserted in a contract merely to secure the performance of some act or the enjoyment of some right or benefit, the performance of such act or the enjoyment of such right or benefit is the substantial and principal intent of the instrument, and the penalty or forfeiture is only accessory, and therefore intended only to secure the damage actually incurred; and hence equity will relieve against the penalty or forfeiture, and decree compensation, whenever such compensation can effectually be made.

This doctrine rests, as we have seen, on the maxim that equity looks at the substance of a transaction, rather than its form.<sup>1</sup> In its earlier history, equity would relieve against a penalty only when intended to secure the payment of a sum of money;<sup>2</sup> but Lord Thurlow extended the doctrine to penalties intended to secure the performance of some collateral act or the enjoyment of some right or benefit;<sup>3</sup> and the common-law courts ultimately adopted the same view.<sup>4</sup> The chief question in modern cases has always been whether a sum fixed in an agreement as payable in default of compliance with its primary terms is to be taken as a penalty against which the courts will grant relief, or as liquidated damages which the courts will enforce. This difficulty has arisen from a conflict between the equi-

<sup>1</sup> Ante, 23.

<sup>2</sup> *Peachy v. Duke of Somerset*, 2 White & T. Lead. Cas. Eq. 2014.

<sup>3</sup> *Sloman v. Walter*, 2 White & T. Lead. Cas. Eq. 2022.

<sup>4</sup> *Kemble v. Farren*, 6 Bing. 141; *Astley v. Weldon*, 2 Bos. & P. 346.

table principle that relief will be given against hard, unconscientious, and oppressive agreements, and the acknowledged rights of persons not under disability and dealing with each other at arms' length to make their own contracts, which the courts are bound to enforce as written.<sup>5</sup> While the courts generally profess that the primary object is to ascertain the intent of the parties,<sup>6</sup> they have also held that the use of the words "penalty" or of "liquidated damages" is not conclusive of that intent;<sup>7</sup> and the principle which seems in fact to have largely controlled their decision on this question is that the parties will not, by express agreements, be permitted to set aside the rule of law which limits recovery for injuries sustained to just compensation.<sup>8</sup>

#### PENALTY OR LIQUIDATED DAMAGES.

72. To determine whether a sum of money stipulated to be paid on breach of condition in a contract is to be treated as "liquidated damages" which plaintiff is entitled to recover irrespective of the loss sustained, or as a "penalty," limiting his recovery to the amount of his actual loss, not, however, exceeding the penalty, the following rules have been established:

- (a) Where a sum of money is stated to be payable, either by way of liquidated damages or by way of penalty, for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, the sum stipulated to be paid is treated as a penalty, and only the actual damages can be recovered.<sup>9</sup>

<sup>5</sup> *Wallis v. Smith*, 21 Ch. Div. 243; *Little v. Banks*, 85 N. Y. 258, 266; *Dwinel v. Brown*, 54 Me. 468.

<sup>6</sup> *Little v. Banks*, 85 N. Y. 258, 266; *Bagley v. Peddie*, 16 N. Y. 469.

<sup>7</sup> *Hardee v. Howard*, 33 Ga. 533; *Duffy v. Shockey*, 11 Ind. 70; *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149; *Brennan v. Clark*, 29 Neb. 335, 45 N. W. 472.

<sup>8</sup> *Myer v. Hart*, 40 Mich. 517, 523; *Jaquith v. Hudson*, 5 Mich. 123, 136, 137.

<sup>9</sup> *Wallis v. Smith*, 21 Ch. Div. 243; *Barton v. Capewell* Cont. Pat. Co. (Q. B. Div. 1893) 68 Law T. (N. S.) 857; *Clement v. Cash*, 21 N. Y. 253, 260.

It is a principle of universal application that, where a payment of a smaller sum is secured by a larger, the larger sum will be regarded as a penalty, the enforcement of which will be relieved against.<sup>10</sup> The above rule is but an extension of the principle, since the court will not sever the stipulations.<sup>11</sup>

**(b) Where a lump sum is made payable by way of compensation on the occurrence of one or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification.<sup>12</sup>**

As a corollary of this rule, it may be stated that, where a contract makes no distinction between the amount to be forfeited on a total failure to perform and only a partial failure, the amount will be regarded as a penalty, and not as liquidated damages.<sup>13</sup>

**(c) Where there is only one event on which the money is to become payable, and there is no adequate means of ascertaining the precise damages which may result from breach of the contract, it is per-**

<sup>10</sup> *Astley v Weldon*, 2 Bos. & P. 350, 354; *Turnan v. Hemman*, 16 Ill. 400. As an application of this principle, it has been held that if a certain rate of interest is reserved by contract, with an agreement that, if it be not paid punctually, the rate shall be increased, the larger interest is in the nature of a penalty, and may be relieved against in equity. *Mason v. Callender*, 2 Minn. 350 (Gil. 302). But, if the larger rate be originally reserved with an agreement for reduction on punctual payment, the condition for such punctual payment is part of the contract, and relief cannot be given if it is not fulfilled. *Nicholls v. Maynard*, 3 Atk. 519; *Carler v. Corley*, 23 Ala. 612; *Adams*, Eq. 108, 109.

<sup>11</sup> *Whitfield v. Levy*, 35 N. J. Law, 149; *Shiell v. McNitt*, 9 Paige, 101, 106; *In re Newman*, 4 Ch. Div. 724.

<sup>12</sup> *Lord Elphinstone v. Monkland Iron & Coal Co.*, 11 App. Cas. 332; *Kemble v. Farren*, 6 Bing. 141; *Condon v. Kemper*, 47 Kan. 126, 27 Pac. 829; *Wilhelm v. Eaves*, 21 Or. 184, 27 Pac. 1053; *Basye v. Ambrose*, 28 Mo. 39.

<sup>13</sup> *Jemmisson v. Gray*, 29 Iowa, 537; *Lee v. Overstreet*, 44 Ga. 507; *Hamaker v. Schroers*, 49 Mo. 406; *Curry v. Larer*, 7 Pa. St. 470; *Lyman v. Babcock*, 40 Wis. 503.

**fectly competent for the parties to fix a given amount as liquidated damages in order to avoid the difficulty.<sup>14</sup>**

The applications of this rule are numerous. Thus, a stipulation to pay a specified sum on breach of covenant not to engage in a certain business will in general be treated as providing for liquidated damages;<sup>15</sup> so, also, with a stipulation to forfeit a certain sum per day for failure to complete a structure at a specified time;<sup>16</sup> and with a covenant against breach of contract for services;<sup>17</sup> and with a covenant not to reveal trade secrets.<sup>18</sup>

**(d) Where a contract contains several stipulations of varying importance, none of which are of a trifling nature, and the damages for breach of each stipulation are unascertainable or not readily ascertainable, the sum stipulated to be paid will be treated as liquidated damages.<sup>19</sup>**

The foregoing rules do not, of course, exhaust the various forms which the parties to a contract may adopt. Thus, it has been held

<sup>14</sup> *Sainter v. Ferguson*, 7 C. B. 730; *Sparrow v. Paris*, 8 Jur. (N. S.) 391; *Rolfe v. Peterson*, 2 Brown, Parl. Cas. (Tomlins' Ed.) 436.

<sup>15</sup> *Kelso v. Reid*, 145 Pa. St. 606, 23 Atl. 323; *Cushing v. Drew*, 97 Mass. 445; *Green v. Price*, 13 Mees. & W. 695; *Dakin v. Williams*, 17 Wend. 452.

<sup>16</sup> *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. Law, 132, 26 Atl. 140; *Malone v. Philadelphia*, 147 Pa. St. 416, 23 Atl. 628; *O'Brien v. Anniston Pipe Works*, 93 Atl. 582, 9 South. 415; *De Graff, Vrieling & Co. v. Wickham* (Iowa) 52 N. W. 503; *Lincoln v. Little Rock Granite Co.*, (Ark.) 19 S. W. 1056.

<sup>17</sup> *Tennessee Manuf'g Co. v. James*, 91 Tenn. 154, 18 S. W. 262; *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149. See, however, *Richardson v. Woehler*, 26 Mich. 90.

<sup>18</sup> *Bagley v. Peddle*, 16 N. Y. 469; *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469. Agreement by a tenant to forfeit \$50 per day liquidated damages for holding over after his term will not be treated as a penalty, when the rental value of the premises is \$7,000 per annum. *Poppers v. Meager* (Ill. Sup.) 35 N. E. 805.

<sup>19</sup> *Wallis v. Smith*, 21 Ch. Div. 260; *Cotheal v. Talmage*, 9 N. Y. 551; *Clement v. Cash*, 21 N. Y. 253, 259.

that where separate payments are stipulated for breach of each of the several conditions in a contract, and are made proportionate to the extent to which the contractors may fail to fulfill their obligations, and they are to bear interest from the date of their failure, payments so adjusted with reference to the actual damages are liquidated damages.<sup>20</sup> It has also been held that, where the expressions are doubtful, the court will lean in favor of the construction which treats the sum as a penalty.<sup>21</sup>

### STATUTORY PENALTIES.

**73. The jurisdiction to relieve against penalties and forfeitures does not extend to those imposed by statute.<sup>22</sup>**

The reason is that statutory enactments are as binding on courts of equity as on those of law. The distinction between penalties and forfeitures imposed by contract and those imposed by law has always been observed. "You can never say that the law determined hardly, but you may say that the party has made a hard bargain," said Lord Macclesfield in the leading case on this subject.<sup>23</sup> It has even been held that a statutory penalty will be enforced by a court of equity, if the case is properly before it.<sup>24</sup>

<sup>20</sup> Lord Elphinstone v. Monkland Iron & Coal Co., 11 App. Cas. 332. In this case it was said (page 346): "The parties to any contract may fix the damages to result from a breach at a sum estimated, as liquidated damages, or they may enforce the performance of the stipulation of the agreement by a penalty. In the first instance, plaintiff is entitled to recover the estimated sum as stipulated damages, irrespective of the loss sustained. In the other the penalty is to recover all the damages actually sustained; but it does not estimate them, and the amount of loss, not, however, exceeding the penalty, is to be ascertained in the ordinary way."

<sup>21</sup> Davies v. Penton, 6 Barn. & C. 216; Keeble v. Keeble, 85 Ala. 552, 5 South. 149.

<sup>22</sup> Clark v. Barnard, 108 U. S. 436, 457, 2 Sup. Ct. 878, and cases cited; State v. McBride, 76 Ala. 51; Keating v. Sparrow, 1 Ball & B. 373.

<sup>23</sup> Peachy v. Duke of Somerset, 2 White & T. Lead. Cas. Eq. 2014.

<sup>24</sup> State v. Hall, 70 Miss. 678, 13 South. 39. Contra, Broadnax v. Baker, 94 N. C. 675.



**ENFORCING FORFEITURE.**

**74. Equity will not lend its active aid to enforce a forfeiture.<sup>25</sup>**

This rule rests on the maxims that he who comes into equity must do equity, and must come with clean hands. Equity will therefore withhold its aid from one insisting on the harsh remedy of forfeiture for condition broken, since equitably he is entitled only to just compensation for his injury, and he will be remitted to his legal remedies.<sup>26</sup>

<sup>25</sup> *Douglas v. Union Mut. Life Ins. Co.*, 127 Ill. 101, 20 N. E. 51; *Craig v. Hukill*, 37 W. Va. 520, 16 S. E. 363; *Birmingham v. Lisan*, 77 Me. 494, 1 Atl. 151; *Mills v. Evansville Seminary*, 52 Wis. 669, 9 N. W. 925; *McCormick v. Rossi*, 70 Cal. 474, 15 Pac. 35; *Livingston v. Tompkins*, 4 Johns. Ch. 415, 431; *Meigs' Appeal*, 62 Pa. St. 28, 35.

<sup>26</sup> *Oil Creek R. Co. v. Atlantic & G. W. R. R.* 57 Pa. St. 65; 1 *com. Eq. Jur.* § 459.

## CHAPTER VII.

### GROUNDS FOR EQUITABLE RELIEF.

- 75. Accident.
- 76.     When Relief will be Granted.
- 77. Mistake.
- 78.     Classification.
- 79.     Mistake of Law.
- 80.     Mistake of Fact.
- 81.         Fundamental Mistake.
- 82.         Unilateral Mistake as to Subject-Matter.
- 83.         Mistake of Expression.
- 84. Fraud.
- 85.     Classification.
- 86.     Actual Fraud.
- 87.         Wrongful Acts or Misrepresentations.
- 88.         Wrongful Omissions.
- 89.         Rights and Duties of Defrauded Party.
- 90.     Inequitable or Unconscientious Transactions—Presumption of Fraud from Nature of Transaction.
- 91.         Fraud Presumed from Position or Condition of Parties.
- 92.         Contracts with Persons under Mental Disability or Duress.
- 93.         Contracts between Persons in Fiduciary Relations.
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- 95.     Frauds on Third Persons.
- 96.         Composition with Creditors.
- 97.         Fraudulent Conveyances.
- 98.         Essential Elements of Fraudulent Conveyance.
- 99.         The Creditor.
- 100.        Intent to Defraud.
- 101.        Transfer of Property.
- 102.        Frauds on Marital Rights.
- 103.        Frauds on Powers.

### ACCIDENT.

**75. Accident, in the sense in which it is used in courts of equity, may be defined as an unforeseen and injurious event, occurring external to the parties affected by it, and not attributable to their mistake, neglect, or misconduct.<sup>1</sup>**

<sup>1</sup> Smith, Man. Eq. Jur. p. 36. "Accident is an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own

Accident relates to facts wholly external to the parties, and refers to some event which occurs after the transaction in question has taken place, introducing some modification in the remedy, which would otherwise be available, or giving rise to some particular claim for relief. The jurisdiction of equity to grant relief in certain cases of accident is of very ancient date, having been exercised by the ecclesiastical chancellors of England and by their successors afterwards.<sup>2</sup> In the earlier history of equity, when its jurisprudence was not very clearly defined, relief was given in many cases when it would now be refused.<sup>3</sup>

#### SAME—WHEN RELIEF WILL BE GRANTED.

**76.** In modern times the right to relief, on the ground of accident, is determined by two considerations:

- (a) The party seeking relief must show a conscientious title thereto.
- (b) Courts of law must have been unable to originally grant suitable relief.

#### *Conscientious Title to Relief.*

One who has been guilty of gross negligence or other misconduct in the transaction cannot successfully appeal to equity for relief on the ground of accident.<sup>4</sup> So, also, if both parties stand on an

agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, in the circumstances, to retain." 2 Pom. Eq. Jur. § 823.

<sup>2</sup> Originally equity would grant relief against penalties and forfeitures only when accident in allowing the day of payment to pass by, or some other circumstances of hardship, induced the equity judge to mitigate the literal rigor of the contract. The same was true in cases of mortgage, redemption after default being originally permitted only when the default was accidental or caused by the fraud of the mortgagee. 1 Spence, Eq. p. 602.

<sup>3</sup> Thus, an action for relief from a penalty incurred for failure to repair a river bank within the time agreed was sustained, on the ground that plaintiff had been prevented from executing his contract by reason of unexpected floods. Introduction to Calendars of Chancery, vol. 1, p. 142.

<sup>4</sup> Ex parte Greenway, 6 Ves. 812.

equal footing in equity, there will be no interference with their legal rights, under the maxim that, when the equities are equal, the law prevails. Thus, accident preventing the execution of a will, or causing it to be improperly executed, is no ground for relief against the heir.<sup>5</sup> And, generally, against a bona fide purchaser for value without notice, equity will not interfere on the ground of accident.<sup>6</sup> On similar grounds, equity will not relieve against accident in matter of positive contract, where the possibility of accident may fairly be considered to have been within the contemplation of the contracting parties. Thus, independent of statute, a lessee will not be relieved from his covenant to pay rent or to repair because of the accidental destruction of the premises.<sup>7</sup>

*Inadequate Remedy at Law.*

We have already seen that the enlargement of legal remedies does not divest courts of equity of any part of their ancient jurisdiction; and the question on this branch of the subject is therefore whether there has always been an adequate remedy at law.<sup>8</sup> Now, courts of law have always recognized the plea of "vis major" or the "act of God." These terms are not, indeed, understood in a wide sense; but only as including "events which, as between the parties, and for the purposes of the matter in hand, cannot be definitely foreseen or controlled."<sup>9</sup> Thus, when the performance of a contract depends on the existence of a specific thing, and, by the accidental destruction of that thing, performance becomes impossible, the contract is no longer enforceable at law.<sup>10</sup> The law implies a condition that the contract shall cease if a thing necessary to its performance perishes without default of the contractor. For similar reasons, a con-

<sup>5</sup> *Whitton v. Russell*, 1 Atk. 448.

<sup>6</sup> *Malden v. Menill*, 2 Atk. 8. See, also, ante, 104.

<sup>7</sup> *Bullock v. Dommitt*, 6 Term R. 650; *Wym v. Blackburn*, 3 Ves. 34, 38; *Fowler v. Bott*, 6 Mass. 63; *Hallett v. Wylie*, 3 Johns. 44. So, also, one who has contracted to raise and deliver a specific quantity of seeds will not be relieved from his contract because of the accidental destruction of his crop. *Anderson v. May*, 50 Minn. 280, 52 N. W. 530.

<sup>8</sup> Ante, 11.

<sup>9</sup> Pol. Cont. (4th Ed.) 567.

<sup>10</sup> *Taylor v. Caldwell*, 3 Best & S. 826; *Howell v. Coupland*, L. R. 9 Q. B. 462.

tract for personal services is deemed to be conditioned upon the continuance of the life and health of the contracting party.<sup>11</sup>

Turning now to the consideration of cases when accident is a ground for equitable relief, the first and perhaps most important class is that of lost instruments. In the case of lost bonds and sealed instruments, not only did the courts of law originally refuse to dispense with proferet and oyer of the bond, but equity alone had the power of imposing just conditions on plaintiff by requiring from him a suitable bond of indemnity.<sup>12</sup> So, also, equity has jurisdiction to grant relief in the case of lost negotiable instruments and other simple contracts, on the ground that it alone could originally protect defendant by requiring a bond of indemnity.<sup>13</sup>

Another class of cases affording ground for equitable relief is where a person in a fiduciary capacity has paid money in reliance on the sufficiency of the trust estate, and it has subsequently, without his fault, been stolen and destroyed. Instances of this kind are supplied by cases in which the goods of the testator have been stolen without any negligence on the part of his executor,<sup>14</sup> or have been destroyed or damaged by fire or otherwise,<sup>15</sup> and also by cases in which an executor has reckoned as an asset a debt which he supposed to be still due, but which proves in fact to have been paid to testator.<sup>16</sup>

A third class of cases in which equity will afford relief is against judgments at law, where a defendant has been prevented from availing himself of a good defense on the merits by accident, unmixed with negligence or fraud on his part.<sup>17</sup>

<sup>11</sup> *Farrow v. Wilson*, L. R. 4 C. P. 744.

<sup>12</sup> *Ex parte Greenway*, 6 Ves. 812; *Patton v. Campbell*, 70 Ill. 72; *Bohart v. Chamberlain*, 99 Mo. 622, 13 S. W. 85; *Griffin v. Fries*, 23 Fla. 173, 2 South. 266; *Livingston v. Livingston*, 4 Johns. Ch. 294. Lost mortgage, *Lawrence v. Lawrence*, 42 N. H. 109.

<sup>13</sup> Lost negotiable instruments, *Hansard v. Robinson*, 7 Barn. & C. 90; *Savannah Nat. Bank v. Haskins*, 101 Mass. 370; *City of Bloomington v. Smith*, 123 Ind. 41, 23 N. E. 972; *Force v. City of Elizabeth*, 27 N. J. Eq. 408. Other simple contracts, *Macartney v. Graham*, 2 Sim. 285; *Hardeman v. Battersby*, 53 Ga. 36, 38.

<sup>14</sup> *Jones v. Lewis*, 2 Ves. Sr. 240.

<sup>15</sup> *Clough v. Bond*, 3 Mylne & C. 490, 496.

<sup>16</sup> *Pooley v. Ray*, 1 P. Wms. 355.

<sup>17</sup> *Herbert v. Herbert*, 49 N. J. Eq. 70, 22 Atl. 789; *Buchanan v. Griggs*.

Again, whenever a penalty or a forfeiture has been incurred through accident, unmixed with negligence or fraud, equity will afford relief,<sup>18</sup> even though it would not be warranted in so doing under the principles heretofore discussed relating to penalties and forfeitures.<sup>19</sup>

#### MISTAKE.

**77. Mistake, in its legal sense, exists when a person acting on some erroneous mental conception or conviction, either of law or of fact, executes some instrument or does some act which but for that erroneous conception or conviction he would not have executed or done.<sup>20</sup>**

Mistake indicates a mental condition of one or both of the parties concerned, and has reference to a state of things existing when the contract or other transaction in question takes place. In these respects it differs from accident, which, as we have seen, refers to some event which occurs subsequent to the transaction, and relates to facts wholly external to the parties.<sup>21</sup>

The indefiniteness characteristic of the earlier equity jurisprudence was long retained in that branch which dealt with relief on the ground of mistake. Except in cases for specific performance, the effect of mistake on a contract, unaccompanied by fraud or misrep-

18 Neb. 121, 24 N. W. 452; *New York & H. R. Co. v. Haws*, 56 N. Y. 175; *Holland v. Trotter*, 22 Grat. 136; *Darling v. Mayor, etc., of Baltimore*, 51 Md. 1; *Barber v. Rukeyser*, 39 Wis. 590. Statutes in many states give a right to a new trial in this class of cases, and the equitable remedy is to some extent disused. See, also, post, 204.

<sup>19</sup> *Bostwick v. Stiles*, 35 Conn. 195; *Wheeler v. Connecticut Mut. Life Ins. Co.*, 82 N. Y. 543, 550; *Kopper v. Dyer*, 59 Vt. 477, 9 Atl. 4; *Palmer v. Ford*, 70 Ill. 369; *Hill v. Barclay*, 18 Ves. 56, 58, 62; *Jones v. Lewis*, 2 Ves. Sr. 240.

<sup>20</sup> Ante, 107 et seq.

<sup>21</sup> *Haynes*, Eq. p. 80. Prof. Pomeroy's definition is as follows: Mistake "is an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time."

<sup>22</sup> *Smith*, Prin. Eq. p. 217.

resentation, came chiefly before courts of law.<sup>22</sup> The earlier theory of equity seems to have been that mistake, whether of fact or of law, was ground for relief in all cases.<sup>23</sup> Such, however, is no longer the law. It is an almost universal rule that a man is bound by an agreement to which he has expressed his assent in unequivocal terms, uninfluenced by falsehood, violence, or oppression. If he has exhibited all the outward signs of agreement, the law will hold that he has agreed. As a rule, a person cannot avoid his contract by simply showing that he has made a mistake.<sup>24</sup> There are exceptions to this rule, even at law, and still more in equity; and the question when mistake is ground for relief in equity will now be discussed.

#### **SAME—CLASSIFICATION OF MISTAKE.**

**78. Mistake may be classified as either:**

- (a) Of law, or
- (b) Of fact.

#### **SAME—MISTAKE OF LAW.**

**79. Equity will not grant relief merely on the ground that there has been a mistake of law, but there must be some other additional fact which is sufficient to call forth the remedial power of equity.**

The maxim "Ignorance of law is no excuse" is applied as well in courts of equity as in courts of law. The ground was long ago stated by Lord Ellenborough: "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent

<sup>22</sup> Pol. Cont. (5th Ed.) p. 444.

<sup>23</sup> Francis, in his treatise on Equity, written in 1737, says (page 10): "Another impediment of assent is ignorance and error, whether in fact or in law; and, if the mistake is discovered before any step is taken towards performance, it is just that he should have liberty to retract, at least upon satisfying the other of the damage that he has sustained in losing his bargain. But if the contract is either wholly or in part performed, and no compensation can be given him, then it is absolutely binding, notwithstanding the error. Yet this is not to be understood when there proves to be an error in the thing or subject for which he bargained."

<sup>24</sup> Anson, Cont. p. 122; Pol. Cont. (4th Ed.) p. 302.

the ignorance might not be carried. It would be urged in almost every case."<sup>25</sup> However, the presumption that every one knows the law does not extend to the laws of foreign countries or states,<sup>26</sup> or to private statutes,<sup>27</sup> and hence mistakes as to them are treated as mistakes of fact. The cases in which the rule itself has been applied are very numerous.<sup>28</sup> Thus, it is settled that, when money has been voluntarily paid under a mistake of law, a court of equity will not order its repayment;<sup>29</sup> and it has even been held that the reversal or modification, by subsequent decisions, of the law on which the parties acted, is no ground for equitable relief.<sup>30</sup>

*When Relief will be Granted in Equity.*

It is doubtful whether any exceptions really exist to the general principle that equity will not relieve against a mistake of law; and it is believed that relief, whenever given, may be grounded, not on the mere fact that there was a mistake of law, but on some other fact, which is, independent of that, efficacious to call forth the remedial power of equity.<sup>31</sup> Thus, where the mistake of law is occasioned

<sup>25</sup> *Bilble v. Lumley*, 2 East, 469, where it was held that money paid with knowledge of all the facts, but in ignorance of the parties' legal rights, could not be recovered back.

<sup>26</sup> *Leslie v. Baillie*, 2 Young & C. Ch. 91; *McCormick v. Garnett*, 5 De Gex, M. & G. 278; *Haven v. Foster*, 9 Pick. 111; *Morgan v. Bell*, 3 Wash. 576, 28 Pac. 925.

<sup>27</sup> *Earl of Pomfret v. Lord Windsor*, 2 Ves. Sr. 472, 480.

<sup>28</sup> *Hunt v. Rousmanler*, 8 Wheat 174; *Kenyon v. Welty*, 20 Cal. 637; *State v. Paup*, 13 Ark. 129; *Stoddard v. Hart*, 23 N. Y. 556; *Peters v. Florence*, 38 Pa. St. 194; *Allen v. Galloway*, 30 Fed. 466; *De Give v. Healey*, 60 Ga. 391; *Ottenheimer v. Cook*, 10 Helsk. (Tenn.) 309; *Bledsoe v. Nixon*, 68 N. C. 521; *Williamson v. Hiltner*, 79 Ind. 233; *Stewart v. Stewart*, 6 Clarke & F. 911, 966; *Powell v. Smith*, L. R. 14 Eq. 85.

<sup>29</sup> *Rogers v. Ingham*, 3 Ch. Div. 351, 356, 357; *Railroad Co. v. Soutter*, 13 Wall. 517, 524; *Haven v. Foster*, 9 Pick. 112; *Storrs v. Barker*, 6 Johns. Ch. 166; *Beard v. Beard*, 25 W. Va. 486; *Erkens v. Nicollin*, 39 Minn. 461, 40 N. W. 567. An exception exists, however, where money has been paid under a mistake of law, to an officer of the court,—as a receiver or trustee in bankruptcy,—based on the consideration that the court should set an example of honesty higher than it would be justified in enforcing on litigants before it. *Ex parte James*, 9 Ch. App. 609; *Ex parte Simmonds*, 16 Q. B. Div. 308; *Dixon v. Brown*, 32 Ch. Div. 597.

<sup>30</sup> *Jacobs v. Morange*, 47 N. Y. 57; *Baker v. Pool*, 56 Ala. 14; *Kenyon v. Welty*, 20 Cal. 637; *Lyon v. Richmond*, 2 Johns. Ch. 60.

<sup>31</sup> *Smith*, Prin. Eq. p. 200; *Snell's Eq.* p. 525.



by fraud, imposition, or misrepresentation, a party suffering thereby may have relief in equity.<sup>32</sup> There need not even be actual fraud, but it is sufficient if one of the parties, availing himself of the opportunities afforded by the mistake, will take an unconscionable advantage of the other;<sup>33</sup> but here, as before, the true ground of relief is not the mistake of law, but the fraud which is implied.

So, also, a contract entered into under a mistake of law by both parties will not be enforced in equity when the effect of the mistake is such as to make the contract something entirely different from what they intended. In such a case there is indeed no contract at all, the mutual agreement being different in substance from that which legally springs from their acts. The question here is not whether a mistake of law will avoid a contract, but whether there ever was a contract.<sup>34</sup> The case is quite analogous where an agreement which has been made is erroneously expressed through a mistake of law. Here, again, to refuse relief against the erroneous expression would be to hold the parties to an agreement which they never made.<sup>35</sup> Another class of cases, closely approaching these, is where an act, performed in ignorance of a legal right, has been reversed on the ground of mere surprise.<sup>36</sup> But, where a contract is written as the parties intended it to be, the mere fact that they misconceived the legal effect of the words employed is no ground for equitable relief.<sup>37</sup>

<sup>32</sup> *Willan v. Willan*, 16 Ves. 72; *Bales v. Hunt*, 77 Ind. 355; *Kyle v. Fehley* 81 Wis. 67, 51 N. W. 257; *Moreland v. Atchison*, 19 Tex. 303.

<sup>33</sup> *Benson v. Markoe*, 37 Minn. 30, 33 N. W. 38; *Jordan v. Stevens*, 51 Me. 78; *Champlin v. Laytin*, 18 Wend. 407, 422; *Green v. Morris & E. R. Co.*, 12 N. J. Eq. 165; *Tyson v. Passmore*, 2 Pa. St. 122; *Insurance Co. v. Raden*, 87 Ala. 311, 5 South. 876; *Snell v. Insurance Co.*, 98 U. S. 83, 90, 92; *Allen v. Elder*, 76 Ga. 674; *Kornegay v. Everett*, 99 N. C. 30, 5 S. E. 418.

<sup>34</sup> *Pol. Cont.* (4th Ed.) 412.

<sup>35</sup> *Hunt v. Rousmanler*, 8 Wheat. 174; *Pitcher v. Hennessey*, 48 N. Y. 415; *Canedy v. Marcy*, 13 Gray, 375, 377; *Stone v. Hale*, 17 Ala. 557; *Lant's Appeal*, 95 Pa. St. 279; *Whitmore v. Hay* (Wis.) 55 N. W. 708; *Evants v. Strode*, 11 Ohio, 480. See, also, post, 127.

<sup>36</sup> *Pusey v. Desbouvrie*, 3 P. Wms. 315, 321; *Cochrane v. Willis*, 1 Ch. App. 58; *Tyson v. Tyson*, 31 Md. 134; *Jones v. Munroe*, 32 Ga. 181; *Harney v. Charles*, 45 Mo. 157.

<sup>37</sup> *Powell v. Smith*, L. R. 14 Eq. 85, 90; *Hunt v. Rousmanler*, 8 Wheat. 174, 1 Pet. 1; *Fowler v. Black*, 136 Ill. 363, 26 N. E. 596; *Caldwell v. Depew*, 40 Minn. 528, 42 N. W. 479; *Kelly v. Turner*, 74 Ala. 513.

Again, a transaction entered into by a party under a mistake as to his own antecedent or existing private legal rights or liabilities will be treated in equity as really a mistake of fact, rather than of law.<sup>38</sup> However, the foregoing rule has no application, where the parties, without fraud or imposition, have entered into a compromise for the express purpose of settling some doubtful private legal rights;<sup>39</sup> and especially is this the case where the compromise is of the nature of a family arrangement.<sup>40</sup>

<sup>38</sup> 2 Pom. Eq. Jur. § 849. The meaning of this proposition is well illustrated by the language of Jessel, M. R., in *Eaglesfield v. Marquis of Londonderry*, 4 Ch. Div. 693, 702, 703: "A misrepresentation of law is this: When you state the facts, and state a conclusion of law, so as to distinguish between the facts and the law, the man who knows the facts is taken to know the law. But when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact, and not a statement of law. Suppose a man is asked by his tradesman whether he can give credit to a lady, and the answer is: 'You may. She is a single woman, of large fortune.' It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that the marriage ceremony was null and void, though it had not been declared so by any court, and it afterwards turned out that they were all mistaken,—that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story and all the facts, and said, 'Now, you see the lady is single,' that would have been a misrepresentation of law. But the single fact he states—that the lady is unmarried—is a statement of fact, neither more nor less; and it is not the less a statement of fact that, in order to arrive at it, you must know more or less of the law." See, also, *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Broughton v. Hutt*, 3 De Gex & J. 501, 504; *Blake-man v. Blakeman*, 39 Conn. 320; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91; *Lovell v. Wall*, 31 Fla. 73, 12 South. 659; *Morgan v. Bell*, 3 Wash. 576, 28 Pac. 925.

<sup>39</sup> *Pickering v. Pickering*, 2 Beav. 56; *Naylor v. Winch*, 1 Sim. & S. 564; *Miles v. New Zealand Alford Estate Co.*, 32 Ch. Div. 266; *Gormly v. Gormly*, 130 Pa. St. 467, 18 Atl. 727; *Hall v. Wheeler*, 37 Minn. 522, 35 N. W. 377; *Bell v. Lawrence*, 51 Ala. 160; *Dalley v. King*, 79 Mich. 568, 44 N. W. 959; *Allen v. Galloway*, 30 Fed. 466.

<sup>40</sup> In *Westby v. Westby*, 2 Dru. & War. 505, Lord St. Leonards said: "Wherever doubts and disputes have arisen with regard to the rights of different members of the same family, and fair compromises have been entered into, to preserve the harmony and affection, or to save the honor of the family, then

**SAME—MISTAKE OF FACT.****80. Mistake of fact may be:**

- (a) Fundamental, in which case it prevents any real contract from being formed between the parties.
- (b) Unilateral as to subject-matter.
- (c) Of expression.

In the discussion of this subject it should be borne in mind that the general rule is that mere mistake does not render a transaction void or voidable; and that the cases in which relief is granted, though very numerous, are really exceptions to the general rule.<sup>41</sup> In addition to the classes above mentioned, there is another in which application is made to a special and discretionary jurisdiction of equity, in the exercise of which courts of equity are particularly careful that their decrees shall not be productive of hardship. This class consists almost wholly of suits for specific performance, and will be discussed under that head.<sup>42</sup>

**SAME—FUNDAMENTAL MISTAKE OF FACT.**

**81. A fundamental mistake, which prevents any real contract from being formed between the parties, is ground for relief both at law and in equity.**

Contract requires consensual agreement; and if, owing to some error on one or both sides, the parties never had a common intention, it follows that no contract is formed. Errors of this kind prevent a contract from being binding both at law and in equity. In the discussion of the subject, however, illustrations will chiefly be taken from cases which have usually fallen under the special notice of equity.

arrangements have been sustained by this court; albeit, perhaps, resting on grounds which would not have been considered satisfactory if the transaction had occurred between mere strangers."

<sup>41</sup> See ante, 113.

<sup>42</sup> See post, 276.

*Mistake as to Nature of Transaction.*

There may be a fundamental mistake as to the nature of the transaction itself; but this must needs be of rare occurrence, for men are not apt to enter into engagements of the nature of which they are ignorant. A case like this must arise almost of necessity from the misrepresentation of a third person; for, if it proceeds from the other party to the contract, the ground for avoidance would be misrepresentation or fraud, and not mistake. On the other hand, if there is no misrepresentation, the contract cannot be avoided on the ground that one of the parties failed to apply his mind to its contents, or that he did not suppose it would have any legal effect.<sup>43</sup>

*Mistake as to Person with Whom Contract is Made.*

Where it is of the very essence of the intention of one of the contracting parties to deal with another particular person, a mistake as to the person will invalidate the agreement.<sup>44</sup> Thus, a note executed under the belief that the maker owes the payee, when in fact the debt is owing to another person of the same name, will be canceled in equity.<sup>45</sup> This rule does not, however, apply where the personality of the parties is quite immaterial, such as a sale of goods for ready money. It should be observed that mistakes under this head are almost necessarily unilateral.

*Mutual Mistake as to Subject-Matter.*

Where the subject-matter in contemplation of the parties does not in fact exist at the time of the agreement, and the mistake is common to both parties, the agreement is void.<sup>46</sup> On this principle, a contract for the sale of shares in a corporation is void if, at the time of the agreement, a winding-up petition has been presented, of which neither the vendor nor the purchaser knew.<sup>47</sup> So, also, where both the beneficiary of a life insurance policy and the company are ig-

<sup>43</sup> *Hunter v. Walters*, 7 Ch. App. 81; *Foster v. Mackinnon*, L. R. 4 C. P. 704, 711; *Kennedy v. Green*, 3 Mylne & K. 699, 718. A bill or sale cannot be avoided because the party supposed she was signing a note, where there was no fraud or misrepresentation of the other party. *Gage v. Phillips*, 21 Nev. 150, 26 Pac. 60. See, also, *Cannon v. Lindsey*, 85 Ala. 198, 3 South. 676.

<sup>44</sup> *Boulton v. Jones*, 2 Hurl. & N. 564; *Boston Ice Co. v. Potter*, 123 Mass. 28.

<sup>45</sup> *Fitzmaurice v. Mosier*, 116 Ind. 363, 16 N. E. 175, and 19 N. E. 180.

<sup>46</sup> *Couturier v. Hastie*, 5 H. L. Cas. 675; *Allen v. Hammond*, 11 Pet. 65.

<sup>47</sup> *Emmerson's Case*, 1 Ch. App. 433.

norant of the death of the insured when the policy is surrendered, and a paid-up policy for a smaller amount is issued in its place, equity will reinstate the beneficiary to his rights in the surrendered policy.<sup>48</sup> Similarly, a sale of land entered into by both parties under the belief that the vendor's ancestor, through whom he derives title, is dead, will be set aside where it afterwards appears that the ancestor is in fact alive.<sup>49</sup> If, in such cases, the mistake is confined to one of the parties, the agreement is *prima facie* valid; but it will usually be found that there is some ingredient of fraud involved which will make it voidable at the option of the mistaken party.

Again, a mistake as to the nature or fundamental qualities of the subject-matter, so that it goes to the whole substance of the agreement, and renders the subject-matter contracted for essentially different in kind from the thing as it actually exists, may avoid the contract. Thus, equity will set aside a sale of land entered into by both parties under the belief that it is underlaid with coal,<sup>50</sup> or covered with standing pine,<sup>51</sup> where it appears that the land has no value whatever for mining or lumbering. So, also, a belief by both parties to a deed that the land conveyed includes land on which a building is located, which was the main inducement to the purchase, is ground for rescission.<sup>52</sup> In the foregoing class of cases the agree-

<sup>48</sup> *Riegel v. American Life Ins. Co.*, 153 Pa. St. 134, 25 Atl. 1070.

<sup>49</sup> *Fleetwood v. Brown* (Ind. Sup.) 9 N. E. 352. So, also, a contract for the sale of a life interest after it has in fact, though without the knowledge of the parties, expired, is void. *Cochrane v. Willis*, 1 Ch. App. 58; *Strickland v. Turner*, 7 Exch. 208.

<sup>50</sup> *Fritzler v. Robinson*, 70 Iowa, 500, 31 N. W. 61.

<sup>51</sup> *Thwing v. Lumber Co.*, 40 Minn. 184, 41 N. W. 815.

<sup>52</sup> *Barth v. Deuel*, 11 Colo. 404, 19 Pac. 471. Further illustrations: A mutual mistake as to the quantity of land conveyed is ground for rescission, where the deficiency materially affects the value. *Newton v. Tolles* (N. H.) 19 Atl. 1092. Equity will set aside a contract for the sale of the vendor's entire interest in land when both parties believed such interest to be an undivided one-fifth, and in fact it was an undivided three-fifths. *Cleghorn v. Zumwalt*, 83 Cal. 155, 23 Pac. 294. A belief that a county seat has been legally removed is such a mistake of fact as will authorize a rescission of a deed of land to the county, to be used for a courthouse site, when it is afterwards judicially declared that the proceedings for the removal were illegal, and that no removal has in fact taken place. *Griffith v. Sebastian Co.*, 49 Ark. 24, 3 S. W. 886. The sale of a blooded cow for a small sum, under the mutual belief

ment is void only if the error is mutual.<sup>53</sup> If only one of the parties is mistaken, it depends on circumstances now to be considered whether or not the agreement is voidable at his option.

#### **SAME—UNILATERAL MISTAKE AS TO SUBJECT-MATTER.**

**82.** The circumstance that one of the parties has entered into an agreement under the influence of a mistake of fact as to the subject-matter has no legal effect,<sup>54</sup> unless

- (a) The fact is material to the transaction; or, in other words, is essential to its character.
- (b) The mistake is not due to the negligence of the mistaken party.
- (c) The fact is one which the party who has knowledge of it is under an obligation to disclose.

#### *Fact Material to Transaction.*

A fact may be said to be material when the formation of the contract is conditional on its existence. The mistake must go to the essence of the object in view, and not be merely incidental.<sup>55</sup> It has accordingly been held that the mere fact that a purchaser of mineral land supposes an abandoned shaft to be located on the land is no ground for rescission in equity, when it does not appear that this mistake induced him to purchase.<sup>56</sup> Nor does the circumstance that one of the parties is mistaken as to a material fact entitle him to equitable relief in every instance. The mistake, as we shall hereafter see, must not be due to his own negligence.<sup>57</sup> So, also, if parties

that she is barren, is void, when it afterwards turns out that she was not barren at the time of the sale, and therefore worth a large sum for breeding purposes. *Sherwood v. Walker*, 66 Mich. 568, 33 N. W. 919. See, also, *Chapman v. Cole*, 12 Gray, 141.

<sup>53</sup> *Smith v. Hughes*, L. R. 6 Q. B. 597.

<sup>54</sup> *White v. Richmond & D. R. Co.*, 110 N. C. 456, 461, 15 S. E. 197; *Kleinsorge v. Rohse (Or.)* 34 Pac. 874; *Page v. Higgins*, 150 Mass. 27, 22 N. E. 63; *Hartford Fire Ins. Co. v. Haas (Ky.)* 9 S. W. 720; *Thomas v. Bartow*, 48 N. Y. 193, 198.

<sup>55</sup> *Grymes v. Sanders*, 93 U. S. 55, 60.

<sup>56</sup> *Grymes v. Sanders*, 93 U. S. 55.

<sup>57</sup> *Post*, 126.

stand on an equal footing, and the means of knowledge are open to them both, either of them is entitled to the benefit of his own judgment, skill, and capacity.<sup>58</sup> The current of the modern cases, especially the English, seems to be that a mistake of only one of the parties to a contract, respecting the subject-matter, though material, is no ground for equitable relief, unless there is some fiduciary relation between the parties, to raise an independent equity.<sup>59</sup> A party who enters into a contract in good faith, without any knowledge of mistake on the part of the other, ought to be treated as a bona fide purchaser without notice, and so be unaffected by the possible "equity" arising in favor of the mistaken party.

*Negligence of Mistaken Party.*

Equity will never encourage negligence; and it accordingly will not grant any relief against a mistake of fact, however material, if it be such that complainant might have avoided it by reasonable diligence.<sup>60</sup> The mere fact, however, that he might possibly have acquired accurate knowledge is not sufficient to debar him from relief.<sup>61</sup>

*Obligation to Disclose Knowledge.*

This excludes facts the means of information as to which are open to both parties; and cases in which each party is presumed to ex-

<sup>58</sup> Kerr, *Fraud & M.* 408.

<sup>59</sup> See cases cited in note 54, *supra*. "Perhaps some of the cases on this subject go too far; but for the most part the cases where a defendant has escaped on the ground of mistake, not contributed to by the plaintiff, have been cases when a hardship amounting to injustice would have been inflicted on him by holding him to his bargain, and it was unreasonable to hold him to it." *Tamplin v. James*, 15 Ch. Div. 215. "The court of equity will grant relief where only the party complaining makes mistakes, when the facts and circumstances give rise to the presumption that there has been some undue influence, misapprehension, imposition, mental imbecility, surprise, or confidence abused. Mere ignorance, mere inadequacy of consideration, mere weakness of mind, mere mistake, on the part of one party, will not entitle that party to relief. But it is otherwise when there is a combination of such things to prejudice the party." *Bean v. Railroad Co.*, 107 N. C. 731, 747, 12 S. E. 600.

<sup>60</sup> *Grymes v. Sanders*, 93 U. S. 55; *Wier v. Johns* (Colo. Sup.) 24 Pac. 262; *Conner v. Welch*, 51 Wis. 431, 8 N. W. 200; *Duke of Beaufort v. Neeld*, 12 Clark & F. 248, 286.

<sup>61</sup> *Willmott v. Barber*, 15 Ch. Div. 96, 106; *Werner v. Rawson*, 89 Ga. 620, 15 S. E. 813.

ercise his own skill and judgment, and there is no confidence reposed;<sup>63</sup> and also facts which are in their nature doubtful, and as to the probabilities of which each may be supposed to calculate in his own discretion.<sup>64</sup> It is evident that this qualification almost, if not quite, amounts to the statement that a unilateral mistake is relieved against only when nondisclosure of the better informed party amounts to fraud. Relief will, however, be given if there be a duty to disclose. A party who is under a duty to disclose, and who, there is reason to believe, knows more about the subject-matter than the other party, will not be permitted by a court of equity to hold the latter to the agreement.<sup>65</sup>

#### SAME—MISTAKE OF EXPRESSION.

**83. Mistake of expression occurs whenever an agreement or disposition is sought to be embodied in a formal instrument, and the instrument is so framed as not to express clearly or truly the intention of the parties or party. Such mistake, if mutual, will be rectified in equity.**

This head of equity really rests on the maxim that equity regards substance rather than form. Whenever it clearly appears that a written instrument, drawn professedly to carry out the agreement of the parties previously entered into, is executed under the misapprehension that it really embodies the agreement, whereas, by mistake of the draftsman, either as to fact or law, it fails to fulfill that purpose, equity will correct the mistake by reforming the instrument in accordance with the contract.<sup>66</sup> And in these cases it is entirely

<sup>63</sup> Kerr, *Fraud & M.* pp. 408, 414. Where there is no such relation of trust or confidence between the parties as imposes on one an obligation to give full information to the other, the latter cannot proceed blindly, omitting all inquiry and examination, and then complain that the other did not volunteer to give all the information he had. *Dambmann v. Schulting*, 75 N. Y. 55.

<sup>64</sup> *Bell v. Lawrence*, 51 Ala. 160; *Anthony v. Boyd*, 15 R. I. 495, 8 Atl. 701, and 10 Atl. 657; *Stover v. Mitchell*, 45 Ill. 213; *Mortimer v. Capper*, 1 Browne, Ch. 158.

<sup>65</sup> *McHarry v. Irvin*, 85 Ky. 322, 3 S. W. 374, and 4 S. W. 800; *Epes v. Williams' Adm'r (Va.)* 17 S. E. 235; *Cocking v. Pratt*, 1 Ves. Sr. 400; *Millar v. Craig*, 6 Beav. 433.

<sup>66</sup> *Trusdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391; *Kelster v. Myers*, 115 Ind. 312, 17 N. E. 161; *Adams v. Wheeler*, 122 Ind. 251, 23 N. E. 760; *Knight*



immaterial whether the mistake is one of law or of fact; equity will grant relief in either case.<sup>66</sup> But the mistake must be mutual. An agreement cannot be affected by the mistake of either party in expressing his intention, of which the other party has no knowledge.<sup>67</sup> Thus, when one of the parties signs a contract which contains the whole agreement as he understands it, the other party cannot assert that the true agreement was different in an important particular, and demand a reformation accordingly.<sup>68</sup> The only qualification to the foregoing rule is this: Where a written contract does not truly express the agreement of the parties, and one of the parties is ignorant of this fact, the other party who, with knowledge of the ignorance of the other, has kept silent when he should have spoken, is estopped to defeat a reformation by alleging that he knew that the instrument was different from the agreement.<sup>69</sup>

*Mistake Apparent on Face of Instrument.*

Both at law and in equity, rules for the interpretation of written instruments have been established from ancient times in order to eliminate mistakes of expression. Thus, clerical errors and omissions which could be certainly supplied from the context, and all mere grammatical mistakes, were remedied;<sup>70</sup> the context of a doubtful expression might be referred to, to ascertain its meaning;<sup>71</sup> and the general intent was always regarded as prevailing over the particular expression.<sup>72</sup>

*v. Glasscock*, 51 Ark. 390, 11 S. W. 580; *Andrews v. Andrews*, 81 Me. 337, 17 Atl. 166.

<sup>66</sup> *Park Bros. & Co. v. Blodgett & Clapp Co.*, 64 Conn. 28, 29 Atl. 133; *Lee v. Percival*, 85 Iowa. 639, 52 N. W. 543. See, also, ante, 120.

<sup>67</sup> *Kerr, Fraud & M.* 409.

<sup>68</sup> *Roemer v. Conlon*, 45 N. J. Eq. 234, 19 Atl. 664; *Ellison v. Fox*, 38 Minn. 454, 38 N. W. 358.

<sup>69</sup> *Roszell v. Roszell*, 109 Ind. 354, 10 N. E. 114; *Gray v. Supreme Lodge, etc.*, 118 Ind. 295, 297, 20 N. E. 833.

<sup>70</sup> *Doe d. Leach v. Micklem*, 6 East, 486; *Redfern v. Bryning*, 6 Ch. Div. 133; *Salt v. Pym*, 28 Ch. Div. 155; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. Law, 132, 26 Atl. 140; *Ketchum v. Spurlock*, 34 W. Va. 597, 12 S. E. 832.

<sup>71</sup> *Browning v. Wright*, 2 Bos. & P. 15, 26; 2 Kent, Comm. \*p. 553.

<sup>72</sup> *Ford v. Beech*, 11 Q. B. 866.

*Parol Evidence to Show Mistake.*

While it is a general rule, both at law and in equity, that oral evidence is not admissible to vary a written instrument, yet it is also well settled that such evidence is admissible in equity to show that, either because of accident, mistake, or fraud, the instrument does not truly express the meaning of the parties;<sup>73</sup> and if accident or mistake is clearly proved by such evidence, or is admitted by the other side, or is evident from the nature of the case, equity will rectify it.<sup>74</sup>

*Mistakes in Wills.*

In the earlier history of equity, the English court of chancery did not scruple to alter a will to make its wording conform to testator's presumed intention. If "there falleth out an unseen accident, which, if testator had foreseen, he would have altered his will, I shall consider it," Lord Nottingham declared.<sup>75</sup> Such, however, is no longer the law. In no case can oral evidence, or any evidence dehors the will, be admitted to vary or control the terms thereof, though oral evidence may be resorted to, to explain a latent ambiguity. It is only when a mistake is apparent on the face of the will itself that equity will interfere.<sup>76</sup>

*Other Instances Where Relief has been Given.*

In earlier times, the commonest cases in which equitable interference for mistakes of expression was invoked related to the reformation of marriage settlements. In these cases there was generally a discrepancy between the preliminary articles and the settlement as finally executed.<sup>77</sup>

<sup>73</sup> *Murray v. Parker*, 19 Beav. 305, 308; *Greer v. Caldwell*, 14 Ga. 215; *Rogers v. Saunders*, 16 Me. 92; *Glass v. Hulbert*, 102 Mass. 34; *Patterson v. Bloomer*, 35 Conn. 57; *Walden v. Skinner*, 101 U. S. 577, 583; *Harding v. Long*, 103 N. C. 1, 9 S. E. 445.

<sup>74</sup> *Davis v. Symonds*, 1 Cox, 402, 404; *Fowler v. Fowler*, 4 De Gex & J. 250; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Nevius v. Dunlap*, 33 N. Y. 676; *Marsh v. Marsh*, 74 Ala. 418; *Maxwell Land Grant Case*, 121 U. S. 325, 7 Sup. Ct. 1015; *Hutchinson v. Ainsworth*, 73 Cal. 458, 15 Pac. 82. See, also, post, 314, "Reformation."

<sup>75</sup> *Winkfield v. Combe* (1679) 2 Ch. Cas. 16.

<sup>76</sup> *Milner v. Milner*, 1 Ves. Sr. 106; *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085; *Bingel v. Volz*, 142 Ill. 214, 31 N. E. 13.

<sup>77</sup> *Legg v. Goldwire*, 1 White & T. Lead. Cas. Eq. 17.

One of the most useful heads of the jurisdiction of equity in relieving against mistake and accident is in interfering in aid of the execution of powers. The principles on which it proceeds in these cases have been thus expressed: "Whenever a man, having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the court will operate upon the conscience of the heir or other person benefited by the default to make him perfect this intention."<sup>78</sup>

Another instance is found in relieving against mistakes in the settlement of accounts and the execution of releases.<sup>79</sup> One rule respecting releases is that general words are always limited to the matter or matters especially within the contemplation of the parties at the time when the release was given;<sup>80</sup> but where a release is general in its terms, and there is no limitation, by recital or otherwise, the releasor may not prove an exception by parol.<sup>81</sup>

### FRAUD.

**84. Fraud is deception or circumvention which interferes with the legal rights of another.<sup>82</sup>**

To give relief against all kinds of fraud had from the first been one of the objects of the high court of chancery,<sup>83</sup> and its power of

<sup>78</sup> *Chapman v. Gibson*, 3 Brown, Ch. 229.

<sup>79</sup> *Millar v. Craig*, 6 Beav. 433; *Gandy v. Macaulay*, 31 Ch. Div. 1; *Stuart v. Sears*, 119 Mass. 143; *Russell v. Presbyterian Church*, 65 Pa. St. 9.

<sup>80</sup> *London & S. W. R. Co. v. Blackmore*, L. R. 4 H. L. 610, 625; *Turner v. Turner*, 14 Ch. Div. 829.

<sup>81</sup> *Kirchner v. New Home S. M. Co.*, 135 N. Y. 182, 31 N. E. 1104.

<sup>82</sup> *Smith*, Prin. Eq. p. 153; M. M. Bigelow, in *Law Quarterly Review*, October, 1887. "Fraud, in the contemplation of equity, may be said to include properly all acts, omissions, or concealment which involve a breach of equitable duty, trust, or confidence justly reposed, and are injurious to another; or by which an undue and unconscientious advantage is taken of another." 1 Fonbl. Eq. bk. 1, c. 11, § 5; 1 Story, Eq. Jur. § 187; Kerr, *Fraud & M.* p. 42; 2 Pom. Eq. Jur. § 875.

<sup>83</sup> In Lord Coke's time there was a doggerel rhyme in vogue, expressing the legal view on the subject:

"Three things are judged in court of conscience:  
Covin, accident, and breach of confidence."

*Haynes' Eq.* p. 74.

searching the conscience of defendant and of decreeing a specific restitution of property, in place of mere damages ascertained by the rough assessment of a jury, gave to the relief it offered a peculiarly beneficial character. In addition to this, the term "fraud" is used in a more comprehensive sense in courts of equity than in courts of law. Equity will not only relieve against actual deception, but it will extend its interference to all cases of unfair dealing, and prevent the dishonest circumvention of one person by another.

Courts of equity have always declined to hamper themselves with any definition which will indicate the various forms in which fraud may present itself. "Fraud is infinite; and were a court of equity once to lay down rules how far they would go, and no further, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive."<sup>84</sup>

Nevertheless, the meaning attached in equity to the term "fraud" is sufficiently indicated in the above black-letter definition. While fraud primarily imports falsehood or deception, the term, as used in equity, covers transactions in which there is no falsehood, either express or implied. For instance, equity will relieve against a conveyance made with intent to defeat the grantor's creditors, or against an unconscionable bargain secured by taking undue advantage of the necessities of another. In neither of these cases does falsehood or deception operate on the mind of the injured party. He is merely tricked or circumvented out of his rights. It should also be borne in mind that courts of equity do not deal with merely abstract rights, and that, no matter how shocking to the moral sense a transaction may be, equity will not interfere unless there is an infringement of a right recognized by the municipal law.<sup>85</sup>

The various classes of cases in which relief has been afforded against fraud will next be considered.

<sup>84</sup> Lord Hardwicke, quoted in Parkes' Hist. Ch. p. 508; *Mortlock v. Buller*, 10 Ves. 292, 308.

<sup>85</sup> See ante, 1, 2.

**SAME—CLASSIFICATION OF FRAUD.**

85. The different species of fraud may be classified as follows:

(I) **Actual fraud.**

- (a) **Arising from wrongful acts.**
- (b) **Arising from wrongful omissions.**

(II) **Inequitable and unconscientious transactions.**

- (a) **Fraud presumed from nature of the transactions.**
- (b) **Fraud presumed from position or condition of the parties.**
  - (1) **Contracts with persons under duress, lunatics, imbeciles, etc.**
  - (2) **Contracts between persons in fiduciary relations.**
  - (3) **Gifts between parties in fiduciary relations.**

(III) **Frauds on rights of third persons.**

- (a) **Composition with creditors.**
- (b) **Fraudulent conveyances.**
- (c) **Frauds on marital rights.**
- (d) **Frauds on powers.**

In the leading case of *Earl of Chesterfield v. Janssen*,<sup>86</sup> Lord Hardwicke classified the different species of fraud which will be relieved against in equity. His classification has been adopted by nearly all subsequent judges and text writers, and forms the basis for that given above.<sup>87</sup> It will be observed that the term "constructive fraud"

<sup>86</sup> 2 Ves. Sr. 125; 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 773.

<sup>87</sup> Lord Hardwicke said: "This court has an undoubted jurisdiction to relieve against every species of fraud. First, then, fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case. Secondly, it may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept, on the other, which are inequitable and unconscientious bargains. A third kind of fraud is that which may be presumed from the circumstances and condi-

is not used in the foregoing classification, though the subjects classified under the second and third subdivisions are generally so termed by text writers. By constructive fraud is meant conduct by one or both parties, not actually dishonest or fraudulent, but so like it that, for reasons of public policy, it would be unsafe to attempt to draw a judicial distinction between them. In other words, a court of equity practically says to the parties: "If your conduct was not in reality dishonest and fraudulent, it might just as well have been so."<sup>88</sup>

#### ACTUAL FRAUD.

**86. Actual fraud is fraud evidenced by some positively dishonest act or omission. As already stated, it may consist in either:**

- (a) Wrongful acts or misrepresentations.
- (b) Wrongful omissions.

#### SAME—WRONGFUL ACTS OR MISREPRESENTATIONS.

**87. To constitute a misrepresentation justifying the rescission of a contract in equity—**

tions of the parties contracting; and this goes further than the rule of law, which is that it must be proved, not presumed; but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance. A fourth kind of fraud may be collected or inferred, in the consideration of this court, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement. \* \* \* The last head of fraud on which there has been relief is that which infects catching bargains with heirs, reversioners, or expectants, in the life of their fathers. These have generally been mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive."

Writers on equity jurisprudence have treated under fraud contracts having for their object the violation of some public policy or express statutes. Such cases have no connection with fraud. 1 Bigelow, *Frauds*, 9. As that subject is fully covered in one of the books of this series (Clark, *Cont.* 374 et seq.), and as there is no distinction between the rules of law and those of equity on this subject, the matter has not been touched on here.

<sup>88</sup> Smith, *Prin. Eq.* 155.

- (a) The representation must have been contrary to the fact.
- (b) The party making it must have known it to be contrary to the fact.
- (c) It must be as to some material fact constituting an inducement or motive to the act or omission of the other party.<sup>80</sup>

These cases of misrepresentation or *suggestio falsi* are the largest class in which courts of justice are called on to give relief against fraud.

*Representation must be Contrary to Fact.*

The most essential element of a misrepresentation is, of course, its falsity. This element is not susceptible of any exception or limitation, and no citation of special authorities is necessary to sustain the proposition.

In the next place, the representation must be of a fact, as distinguished from a mere expression of opinion.<sup>80</sup> No certain rule can, however, be laid down by which to determine whether a false representation constitutes matter of opinion or matter of fact. Each case must, in large measure, be adjudged on its own circumstances. In reaching its conclusion, the court will take into consideration the situation and intelligence of the parties, the general information and experience of the people as to the nature and use of the property, the habits and methods of those dealing with it, and then determine upon all the circumstances of the case whether the representations ought to have been understood as affirmations of fact or as matter of opinion or judgment.<sup>81</sup> Promises to perform certain acts in the future, and statements as to intention, are generally classed as expressions of opinion.<sup>82</sup> So with puffing or commendation com-

<sup>80</sup> See *Attwood v. Small*, 6 Clark & F. 232, 244; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881.

<sup>81</sup> *Page v. Bent*, 2 Metc. (Mass.) 371, 374; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881; *Akin v. Kellogg*, 119 N. Y. 441, 449, 23 N. E. 1046; *Conant v. National State Bank*, 121 Ind. 323, 22 N. E. 250; *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58.

<sup>82</sup> *Reeves v. Corning*, 51 Fed. 774, 780.

<sup>83</sup> *Birmingham Warehouse & Elevator Co. v. Elyton Land Co.*, 93 Ala. 549, 9 South. 235; *Adams v. Schiffer*, 11 Colo. 15, 17 Pac. 21; *Knowlton v. Keenan*,

menly resorted to by vendors,<sup>93</sup> including statements as to the value of property sold,<sup>94</sup> when not made as a positive affirmation of fact;<sup>95</sup> but a statement as to the actual cost of the property to the vendor is regarded as a representation of fact.<sup>96</sup>

*Knowledge of Falsity.*

The second rule is subject to some important qualifications. Since actual fraud involves positive dishonesty, it follows that the party making the misrepresentation must have (1) knowledge of its falsity;<sup>97</sup> (2) or must make it recklessly without any knowledge or belief on the subject;<sup>98</sup> (3) or, believing his representation to be true, must be guilty of negligence, and thus ignorant of that which he would have known if he had rightly discharged his duty.<sup>99</sup> A man who makes a representation which he honestly and on reasonable grounds

146 Mass. 86, 15 N. E. 127; *Gray v. Suspension Car Truck Manuf'g Co.*, 127 Ill. 187, 19 N. E. 874. Promise to make new invention is expression of opinion. *Norfolk & N. B. Hosiery Co. v. Arnold*, 49 N. J. Eq. 390, 23 Atl. 514.

<sup>93</sup> *Fenton v. Browne*, 14 Ves. 144; *Reynolds v. Palmer*, 21 Fed. 433.

<sup>94</sup> *Ellis v. Andrews*, 56 N. Y. 85; *Byrne v. Stewart*, 124 Pa. St. 450, 17 Atl. 19; *Suessenguth v. Bingenheimer*, 40 Wis. 370; *Gordon v. Butler*, 105 U. S. 553; *Dillman v. Nadlehoffer*, 119 Ill. 567, 7 N. E. 88; *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779.

<sup>95</sup> Deliberate statement of value by a person having full knowledge, made in response to an inquiry for the guidance of the other party, and acted on in reliance on its good faith and honesty, is a representation of fact. *Haygarth v. Wearing*, L. R. 12 Eq. 320, 327, 328; *Jordan v. Volkenning*, 72 N. Y. 300, 306; *Morgan v. Dinges*, 23 Neb. 271, 36 N. W. 544; *Perkins v. Partridge*, 30 N. J. Eq. 82.

<sup>96</sup> *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779; *Sandford v. Handy*, 23 Wend. 260; *Van Epps v. Harrison*, 5 Hill, 65. Contra, *Cooper v. Lovering*, 106 Mass. 77, 79; *Tuck v. Downing*, 76 Ill. 71; *Holbrook v. Connor*, 60 Me. 578.

<sup>97</sup> *Patch v. Ward*, 3 Ch. App. 203, 207; *Smith v. Richards*, 13 Pet. 26, 36; *Frenzel v. Miller*, 37 Ind. 1.

<sup>98</sup> *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360; *Hexter v. Bast*, 125 Pa. St. 52, 72, 17 Atl. 252; *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. 566; *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800; *Stimson v. Helps*, 9 Colo. 35, 10 Pac. 290; *Stone v. Denny*, 4 Metc. (Mass.) 151; *Marsh v. Falker*, 40 N. Y. 562.

<sup>99</sup> *Hart v. Swaine*, 7 Ch. Div. 42, 46; *Rawlins v. Wickham*, 3 De Gex & J. 304; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Converse v. Blumrich*, 14 Mich. 109; *Frenzel v. Miller*, 37 Ind. 1; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 168.



believes to be true, or believes himself entitled to assert, is not, independently of a duty cast on him to know the truth, bound in equity to make good what he has so represented, if it turns out to be untrue.<sup>100</sup> However, such a misrepresentation, honestly made, may entitle the parties to relief on the ground of mistake, under the principles heretofore discussed.<sup>101</sup>

*Materiality of Misrepresentation and Reliance Thereon.*

A misrepresentation, to be material, must be one necessarily influencing and inducing the transaction, and affecting and going to its very essence and substance.<sup>102</sup> Misrepresentations extending only to some unimportant detail, or to something collateral to the contract, are not material.<sup>103</sup> And it follows from this rule that a misrepresentation is of no effect unless it has in fact misled the complaining party. If he knows it to be false, and has not relied on it, it cannot have influenced his conduct.<sup>104</sup> But no obligation rests on him to investigate or verify the representations, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.<sup>105</sup> In a court of equity no man can complain that another has too implicitly relied on the truth of what he himself has stated.<sup>106</sup> However, one who has the means of knowledge, uses them, makes inquiries, and eventually relies on his own judgment, cannot afterwards complain of the misrepresentation,

<sup>100</sup> Kerr, *Fraud & M.* p. 60; *Merewether v. Shaw*, 2 Cox, 124.

<sup>101</sup> Ante, 122 et seq. See, also, *Smith v. Bricker*, 86 Iowa, 285, 53 N. W. 250.

<sup>102</sup> Kerr, *Fraud & M.* p. 74; *Colton v. Stanford*, 82 Cal. 351, 23 Pac. 16; *Powell v. Adams*, 98 Mo. 598, 12 S. W. 295; *Smith v. Kay*, 7 H. L. Cas. 750, 755.

<sup>103</sup> *Percival v. Harger*, 40 Iowa, 236; *Winston v. Gwathney*, 8 B. Mon. 19.

<sup>104</sup> *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Pearce v. Buell*, 22 Or. 29, 29 Pac. 78; *Nelson v. Stocker*, 4 De Gex & J. 458.

<sup>105</sup> *Kramer v. Williamson*, 135 Ind. 655, 35 N. E. 398; *Mead v. Bunn*, 32 N. Y. 275; *Erickson v. Fisher*, 51 Minn. 300, 53 N. W. 638; *Morehead v. Eades*, 8 Bush, 121.

<sup>106</sup> *Redgrave v. Hurd*, 20 Ch. Div. 1. In *Sutton v. Morgan*, 158 Pa. St. 204, 27 Atl. 894, it was said, speaking of the failure of purchasers of land to investigate respecting misrepresentations made by the vendors: "They fell easily into the trap which was set with some skill and some effrontery for them; but their neglect or want of prudence cannot justify the falsehood or fraud of those who practice upon their credulity. The doctrine of contributory negligence cannot be invoked by defendants to save them from liability for misleading their victims"

nor claim that he did not learn the truth, and was in fact misled.<sup>107</sup> And, if a misrepresentation is capable of several interpretations, it is for the plaintiff to show on which he relied. The court will not assume that he has been deceived merely because the circumstances are such that he might well have been.<sup>108</sup>

In addition to the foregoing elements, injury must result as the immediate, and not the remote, consequence of the misrepresentation.<sup>109</sup>

#### SAME—WRONGFUL OMISSIONS.

**88. Mere silence will not amount to fraud, unless the fact suppressed is material, and is one which the party concealing it is under some legal or equitable duty to disclose.**

At the outset, it should be borne in mind that the question now to be discussed relates only to passive, though wrongful, concealment, as distinguished from cases of "active concealment," where a person uses some contrivance to hide a defect in something offered for sale. These latter cases are really cases of wrongful acts, and fall within our first division of actual fraud. Indeed, a misrepresentation need not be made by language, spoken or written, but conduct calculated to convey a false impression is sufficient.<sup>110</sup> In cases of mere omission or silence, as in cases of wrongful acts, the fact concealed must be material, and must be instrumental in bringing about the contract. The only point of difference between wrongful acts and omissions is, therefore, as to the obligation to make disclosure; and this question will be now considered.

Where parties deal at arms' length, and there is no confidential or fiduciary relation between them, either of them may remain silent, and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both, or equally within the

<sup>107</sup> *Colton v. Stanford*, 82 Cal. 352, 23 Pac. 16; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881; *Billings v. Aspen Mining & Smelting Co.*, 2 C. C. A. 252, 51 Fed. 338; *Jennings v. Broughton*, 5 De Gex, M. & G. 126; *Dyer v. Hargrave*, 10 Ves. 505.

<sup>108</sup> *Smith v. Chadwick*, 9 App. Cas. 187.

<sup>109</sup> *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *Wells v. Waterhouse*, 22 Me. 131; *Branham v. Record*, 42 Ind. 181; *Barry v. Croskey*, 2 Johns. & H. 1.

<sup>110</sup> *Lovell v. Hicks*, 2 Young & C. Exch. 46; *Denny v. Hancock*, 6 Ch. App. 1.

reach of their ordinary diligence, and is under no obligation, either at law or in equity, to draw the attention of the other to circumstances affecting the value of the property in question, though he may know him to be ignorant of them.<sup>111</sup> Thus, a purchaser of land is not required to communicate his knowledge of something which gives it an exceptional value, such as a mineral deposit under it;<sup>112</sup> nor need the vendor communicate his information respecting defects rendering it less valuable than the purchaser supposes it to be.<sup>113</sup> But if a vendor conceals a material fact, as to which, from the nature of the case, confidence is reposed in him, the transaction may be set aside on the mere ground of his silence.<sup>114</sup> A distinction has also been made between patent and latent defects. A vendor is under no obligation to disclose a defect which is patent, or such as the buyer, having an opportunity to inspect, can discover by the exercise of ordinary vigilance;<sup>115</sup> but he should disclose latent defects, or such as the buyer has no means, or not equal means, of ascertaining.<sup>116</sup>

*Contracts of a Fiduciary Nature.*

The foregoing rules are generally applicable, but certain contracts, from their very nature, are considered to be essentially fiduciary in

<sup>111</sup> *Dambmann v. Schulting*, 75 N. Y. 55; *Graham v. Meyer*, 99 N. Y. 611, 1 N. E. 143; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Cleaveland v. Richardson*, 132 U. S. 318, 329, 10 Sup. Ct. 100; *Goninan v. Stephenson*, 24 Wis. 75; *Wilde v. Gibson*, 1 H. L. Cas. 605.

<sup>112</sup> *Fox v. Mackreth*, 2 Cox, 320, 2 Brown, Ch. 400, 420; *Harris v. Tyson*, 24 Pa. St. 347; *Williams v. Spurr*, 24 Mich. 335. Failure of a purchaser of oil lands to disclose the output of a well on adjoining land operated by himself is not such a fraud as entitles the vendor to rescission. *Neill v. Shamburg*, 158 Pa. St. 263, 27 Atl. 992.

<sup>113</sup> *Haywood v. Cope*, 25 Beav. 140; *People's Bank v. Bogart*, 81 N. Y. 101; *Laidlaw v. Organ*, 2 Wheat. 178. A sale of land for an extravagant price will not be rescinded at the suit of the purchaser who invested his money on the faith of his belief in the power of a third person to locate mineral deposits, when the vendor did nothing to create or strengthen the false opinions on which the purchaser acted. *Law v. Grant*, 37 Wis. 548.

<sup>114</sup> *Edwards v. McLeay*, 2 Swanst. 287; *Ellard v. Llandaff*, 1 Ball & B. 241; *Howard v. Gould*, 28 Vt. 525; *Brown v. Montgomery*, 20 N. Y. 287.

<sup>115</sup> *Leake*, Cont. 361; *Brown v. Gray*, 6 Jones (N. C.) 103.

<sup>116</sup> *Turner v. Huggins*, 14 Ark. 21; *Lunn v. Shermer*, 93 N. C. 164; *George v. Taylor*, 55 Tex. 97; *Prout v. Roberts*, 32 Ala. 427.

their character, and full disclosure is required. Among these is the contract of insurance; and it is held that the intentional concealment by the insured of a material fact vitiates the policy.<sup>117</sup> In the contract of suretyship, also, the duty of making disclosure is insisted on;<sup>118</sup> and likewise in family settlements.<sup>119</sup>

#### **SAME—RIGHTS AND DUTIES OF DEFRAUDED PARTY.**

**89. Fraud does not render a transaction void, but only voidable. If the defrauded party elects to rescind, he must act promptly after discovering the fraud; and he cannot repudiate the transaction in part, and adopt it as far as it is beneficial.<sup>120</sup>**

Since fraud renders a transaction, not void, but only voidable, several courses are open to the defrauded party: (1) He may affirm the transaction, and sue at law to recover the damages sustained by reason of the fraud.<sup>121</sup> (2) He may absolutely rescind the transaction, and sue at law to recover the property he parted with. This action proceeds on the theory that the transaction has already been rescinded, and therefore, before plaintiff can maintain it, he must have returned or tendered all that he received by virtue of the transaction.<sup>122</sup> (3) He may sue in equity for a rescission. This action does not proceed on the theory that plaintiff has already rescinded, but it is for a rescission; and therefore it is sufficient for plaintiff to offer in his complaint to restore to defendant what he has

<sup>117</sup> *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402; *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 185; *Ionides v. Pender*, L. R. 9 Q. B. 531, 537; *Thomson v. Weems*, 9 App. Cas. 671.

<sup>118</sup> *Wythes v. Labouchere*, 5 De Gex & J. 595; *Howe Mach. Co. v. Farrington*, 82 N. Y. 121.

<sup>119</sup> *Gordon v. Gordon*, 3 Swanst. 400, 475, 477; *Fane v. Fane*, L. R. 20 Eq. 698.

<sup>120</sup> *Oakes v. Turquand*, L. R. 2 H. L. 345, 346; *Lindsley v. Ferguson*, 40 N. Y. 623; *Negley v. Lindsay*, 67 Pa. St. 217.

<sup>121</sup> *Krumm v. Beach*, 96 N. Y. 398, 406; *Urquhart v. Macpherson*, App. Cas. 831.

<sup>122</sup> *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75; *Vall v. Reynolds*, 118 N. Y. 207, 302, 23 N. E. 301; *Thayer v. Turner*, 8 Metc. (Mass.) 550.

received, and the rights of the parties can be fully regulated and protected by the judgment to be entered.<sup>123</sup>

In all cases plaintiff must act with reasonable diligence after becoming aware of the fraud;<sup>124</sup> but the question as to what is reasonable diligence depends on the facts of each particular case.<sup>125</sup> However, the duty to bring action arises only on discovery of the fraud; and hence the statute of limitations does not begin to run until the fraud is discovered, or might have been with the exercise of reasonable diligence.<sup>126</sup>

Another result of the merely voidable nature of transactions tainted with fraud is that complainant will be given no relief unless he comes with clean hands. If complainant has himself participated in the scheme to defraud, and is in *pari delicto* with defendant, equity will not interfere in his favor, but will leave the parties where it finds them.<sup>127</sup>

Since a fraudulent transaction is merely voidable, it also follows that rescission cannot be decreed as against a bona fide purchaser; he acquires a good title as against the defrauded party.<sup>128</sup> With this exception, however, "a court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but, to use Lord Cottenham's language, from his children and his children's children, or, as elsewhere said, from any persons amongst whom he may have parceled out the fruits of his fraud."<sup>129</sup>

#### INEQUITABLE OR UNCONSCIENTIOUS TRANSACTIONS.

This is necessarily a very wide and somewhat indeterminate class, which is scarcely susceptible of systematic analysis. A distinction

<sup>123</sup> Gould v. Cayuga Co. Nat. Bank, 86 N. Y. 75; Thomas v. Beals (Mass.) 27 N. E. 1004; Nelson v. Carlson (Minn.) 55 N. W. 821.

<sup>124</sup> Campau v. Van Dyke, 15 Mich. 371; Brown v. Brown (Ill. Sup.) 32 N. E. 500; Richardson v. Walton, 49 Fed. 883; Weaver v. Carpenter, 42 Iowa, 345; Akerly v. Vilas, 21 Wis. 88.

<sup>125</sup> Kilbourn v. Sunderland, 130 U. S. 505, 518, 9 Sup. Ct. 594.

<sup>126</sup> Gibbs v. Guild, 9 Q. B. Div. 59; Dodge v. Essex Ins. Co., 12 Gray, 65; Brown v. Brown, 61 Tex. 45; Kirby v. Railroad Co., 120 U. S. 136, 137, 7 Sup. Ct. 430.

<sup>127</sup> See ante, 40.

<sup>128</sup> Oakes v. Turquand, L. R. 2 H. L. 325. See, also, ante, —.

<sup>129</sup> Vane v. Vane, 8 Ch. App. 385, 397, per James, L. J.

may, however, be drawn between those cases in which the very nature of the transaction gives rise to a suspicion of fraud and those cases where a presumption of fraud arises from the peculiar circumstances and relations of the parties.

#### **PRESUMPTION OF FRAUD FROM NATURE OF TRANSACTION.**

**90. Mere inadequacy of consideration, in the absence of other inequitable circumstances, is no ground for avoiding a transaction in equity, unless it is so gross as to shock the conscience, and amount to clear evidence of actual fraud.**

No principle is better settled than that mere inadequacy of price does not form a distinct ground of equitable relief.<sup>130</sup> Courts of equity, as well as of law, act on the ground that every person who is not, from his peculiar circumstances or condition, under disability, is entitled to dispose of his property in such manner and upon such terms as he may choose. There are cases, however, where there is no positive evidence of fraud, and yet the inequality of the bargain is so gross that the mind cannot resist the inference that it was improperly obtained. To have this effect, however, "there must be an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it."<sup>131</sup> And, though the inadequacy is not of this shocking character, yet, if it is accompanied by circumstances of an inequitable nature, such as concealment, oppression, or undue influence, on the one hand, or old age, mental infirmity, or pecuniary embarrassment, on the other, a presumption of fraud is raised, warranting equitable relief, unless the party claiming the benefit succeeds in showing perfect good faith in the transaction.<sup>132</sup>

<sup>130</sup> *Parmelee v. Cameron*, 41 N. Y. 392; *Butler v. Haskell*, 4 Dessaus. Eq. 651; *Martinez v. Moll*, 46 Fed. 724; *Harris v. Tyson*, 24 Pa. St. 347, 360; *Collier v. Brown*, 1 Cox, 428.

<sup>131</sup> Lord Thurlow in *Gwynne v. Heaton*, 1 Brown, Ch. 8; *Matthews v. Crockett's Adm'r*, 82 Va. 394; *Hamblin v. Bishop*, 41 Fed. 74; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Phillips v. Pullen*, 45 N. J. Eq. 5, 830, 16 Atl. 9, and 18 Atl. 849.

<sup>132</sup> *Burke v. Taylor*, 94 Ala. 530, 10 South. 129; *Tracey v. Sacket*, 1 Ohio St. 54; *Deane v. Rastron*, 1 Anst. 64.

*Catching Bargains.*

It remains to notice a peculiar class of cases, frequently arising in England, but rarely with us, known as catching bargains with heirs, reversioners, or expectants. Fraud was, in these cases, commonly presumed from inadequacy of consideration;<sup>133</sup> and such transactions were frequently set aside on this ground alone, without proof of any other ingredients of fraud, such as misrepresentation, undue influence, etc.<sup>134</sup> And the fact that the expectant was of a mature age, or well understood the nature and extent of the transaction, was immaterial.<sup>135</sup> From the fact of a person's selling such an interest the court presumed that he was under pecuniary pressure, and it was not incumbent on him to prove that it was so. The onus was on the purchaser to show that the transaction was just and reasonable.<sup>136</sup> Post obit bonds, or bonds conditioned for payment of a sum of money on the death of a person from whom the obligor has expectations, are, on similar principles, regarded with suspicion in equity, and, if of an unconscionable character, will be suffered to stand only as security for the actual sum lent thereon, with proper interest.<sup>137</sup>

#### FRAUD PRESUMED FROM POSITION OR CONDITION OF PARTIES.

91. To simplify matters, the cases where fraud is presumed from the position or condition of the parties may be further subdivided as follows:

- (a) Contracts with persons under mental disability, or under duress.
- (b) Contracts between persons occupying a fiduciary relation.

<sup>133</sup> *Peacock v. Evans*, 16 Ves. 512.

<sup>134</sup> *Curwyn v. Miller*, 3 P. Wms. 293, note; *Earl of Aylesford v. Morris*, 8 Ch. App. 484.

<sup>135</sup> *Earl of Pertmore v. Taylor*, 4 Sim. 182; *Bromley v. Smith*, 26 Beav. 644.

<sup>136</sup> *Gowland v. De Faria*, 17 Ves. 20; *Lord v. Jeffkins*, 35 Beav. 7, 9. This matter is now regulated by statute in England. St. 31 Vict. c. 4, provides that "no purchase made bona fide, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on ground of undervalue."

<sup>137</sup> *Curling v. Townshend*, 19 Ves. 628; *Benyon v. Fitch*, 35 Beav. 570.

(c) Gifts between persons occupying a fiduciary relation.

**SAME—CONTRACTS WITH PERSONS UNDER MENTAL DISABILITY OR DURESS.**

92. The very foundation of contract is consent or agreement. There can be no true consent or agreement without a capacity to understand the terms of the agreement, and also freedom to accept or to refuse the terms proposed. Therefore, if a person induces another, who lacks either this capacity or this freedom, to enter into an apparent contract, equity will not recognize the transaction, however it may be fenced by formal observances, but, deeming it fraudulent, will generally grant relief against it at the suit of the party imposed upon.<sup>138</sup>

*Insanity.*

On this ground the contracts of idiots, lunatics, and other persons non compos mentis are generally deemed invalid by courts of equity. The general rule in this country is that the contracts of a lunatic, made after the fact of insanity has been judicially ascertained, are absolutely void, until, by permission of the court, he is allowed to resume control of his property.<sup>139</sup> But contracts entered into by a person apparently sane, before the fact of insanity has been thus established, are at most only voidable, and will not be set aside, when the other party has no notice of the insanity, derives no inequitable advantage, and the parties cannot be placed in statu quo.<sup>140</sup> The reason for this distinction is plain. Insanity is one of the most mysterious diseases to which humanity is subject. The ripest professional skill and the keenest observation sometimes fail to detect it in its incipient stages. Sound law and good morals, therefore,

<sup>138</sup> Smith, Prin. Eq. p. 167

<sup>139</sup> Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446; Rannells v. Gerner, 80 Mo. 474; Copenrath v. Klenby, 83 Ind. 18.

<sup>140</sup> Manby v. Bewicke, 3 Kay & J. 342; Yauger v. Skinner, 14 N. J. Eq. 389; Gribben v. Maxwell, 34 Kan. 8, 7 Pac. 584; Schaps v. Lehner, 54 Minn. 208, 55 N. W. 911; Abbott v. Creal, 56 Iowa, 175, 9 N. W. 115; Scanlan v. Cobb, 85 Ill. 296. The same rule applies to idiots. Burnham v. Kidwell, 113 Ill. 425.



alike forbid the rescission of a contract on the ground of insanity by one who is unable or unwilling to restore the property acquired thereunder to the other party, who entered into it in good faith, in entire ignorance of the insanity, and without taking any advantage by reason thereof.<sup>141</sup>

*Mental Weakness.*

The mere fact that a man is of weak understanding, or is in intellectual capacity below the average of mankind, is not of itself an adequate ground to set aside the transaction.<sup>142</sup> But equity will interfere where weakness of intellect is coupled with other circumstances, such as inadequacy of consideration, undue influence, or want of advice, showing that the other party has taken advantage of the weakness.<sup>143</sup> The burden of proving fairness of dealing with such people is on him who ventures on it; and, if he fails, any advantage made thereout must be disgorged.<sup>144</sup>

*Drunkenness.*

To render a transaction voidable for drunkenness, it must have been such as to have drowned reason, memory, and judgment, and impaired the mental faculties to such an extent as to render the victim non compos mentis.<sup>145</sup> Drunkenness of this nature is open to the observation of every one; and one who deals with a person so intoxicated is necessarily guilty of inequitable conduct. In case of slighter intoxication, equity will refuse to interfere, either to enforce or rescind a contract, being equally unwilling to assist the one person who has immorally incapacitated himself and the other who has immorally taken advantage of the incapacity.<sup>146</sup> But, if

<sup>141</sup> Lancaster Co. Nat. Bank v. Moore, 78 Pa. St. 407, 414.

<sup>142</sup> Ball v. Mannin, 3 Bligh (N. S.) 1; Harrison v. Guest, 6 De Gex, M. & G. 428, 8 H. L. Cas. 481; Thomas v. Sheppard, 2 McCord, Eq. 36; Burt v. Quisenberry, 132 Ill. 385, 24 N. E. 622.

<sup>143</sup> Boyse v. Rossborough, 6 H. L. Cas. 2; Tracey v. Sacket, 1 Ohio St. 54; Williams v. Williams, 63 Md. 371; Kelly v. Smith, 73 Wis. 191, 41 N. W. 69; Allore v. Jewell, 94 U. S. 508.

<sup>144</sup> Longmate v. Ledger, 2 Giff. 157, 164; Cowee v. Cornell, 75 N. Y. 91, 99, 100; Highberger v. Stiffier, 21 Md. 338; Wilkinson v. Sherman, 45 N. J. Eq. 421, 18 Atl. 228; Gates v. Cornett, 72 Mich. 420, 40 N. W. 740.

<sup>145</sup> Bates v. Ball, 72 Ill. 108; Loftus v. Maloney, 89 Va. 576, 16 S. E. 749; Crane v. Conklin, 1 N. J. Eq. 346.

<sup>146</sup> Cook v. Clayworth, 18 Ves. 12; Johnson v. Medlicott, 3 P. Wms. 130.

one person has designedly contrived to draw another into intoxication for the purpose of imposing on him while in that state, equity will interfere to prevent the enjoyment of the advantage thus fraudulently conceived.<sup>147</sup>

*Duress and Undue Influence.*

In the foregoing cases the absence of capacity to understand the proposal was the chief ground of interference. The absence of freedom to accept or reject the proposal is of like effect. Obligations entered into under duress have always been unenforceable at law; but equity goes much further, and interferes, wherever confidence is reposed and betrayed, to set aside the obligation or conveyance obtained by unfair advantage. To warrant equitable interference, however, the undue influence must have been of such a nature as to deprive the complainant of his free agency, and thus to render his act more the offspring of the will of another than of his own will.<sup>148</sup>

**SAME—CONTRACTS BETWEEN PERSONS IN FIDUCIARY RELATION.**

**93.** Whenever two persons stand in such relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advan-

note; *Shackelton v. Sebree*, 86 Ill. 616. Equity will not permit the rescission of a contract for intoxication by one unable to restore the property acquired thereunder, since to do so would permit "intoxicated people to acquire property, and build up fortunes for themselves, on drunken incapacity alone." *Youn v. Lamont* (Minn.) 57 N. W. 478, 480.

<sup>147</sup> *Cory v. Cory*, 1 Ves. Sr. 19; *Rottenburgh v. Fowl* (N. J. Ch.) 26 Atl. 338; *Dunn v. Amos*, 14 Wis. 106.

<sup>148</sup> *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150. Cases where transaction was avoided for undue influence: *Evans v. Llewellyn*, 1 Cox, 333, 340; *Sym v. Howe*, L. R. 6 Eq. 55; *Leighton v. Orr*, 44 Iowa, 679; *Aldridge v. Aldridge*, 120 N. Y. 614, 24 N. E. 1022; *Rau v. VonZedlitz*, 132 Mass. 164; *Haydock v. Haydock*, 33 N. J. Eq. 494; *Gay v. Witherspoon* (Ky.) 16 S. W. 96; *Todd v. Grove*, 33 Md. 194. Cases where it was held that no undue influence existed: *Hollocher v. Hollocher*, 62 Mo. 267; *Furlong v. Sanford*, 87 Va. 506, 12 S. E. 1048; *Earle v. Norfolk & N. B. H. Co.*, 36 N. J. Eq. 188; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622; *Howe v. Howe*, 99 Mass. 88.

tage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relations had existed.<sup>149</sup>

In the cases considered under the preceding subdivision, fraud was sought to be inferred by reason of the incapacity, total or partial, of one of the parties to the contract. In the cases now to be considered, a suspicion of fraud arises from the special relation between the parties, such as trustee and cestui que trust, principal and agent, etc.

It is a rule of equity that no man can be permitted to take a benefit when he has a duty to perform which is inconsistent with his acceptance of the benefit.<sup>150</sup> This rule is founded on considerations of public policy, since the condition of the parties would generally render it extremely difficult to obtain positive evidence of the fairness of transactions which are peculiarly open to fraud and undue influence. The policy of the rule is to shut the door against temptation.<sup>151</sup>

*Trustee and Cestui Que Trust.*

A common application of the rule is to the case of actual trustees. Dealings by trustees with trust estates may be divided into two classes: (1) When the trustee contracts with himself, without the intervention of the cestui que trust; and (2) when he deals directly with the cestui que trust.

1. With respect to the first class of cases, there is no rule of equity more sacred than that a trustee cannot so execute a trust as to derive any benefit for himself.<sup>152</sup> It is accordingly firmly settled that a purchase of the trust estate by the trustee is void at the option of the cestui que trust, though the trustee may have given an adequate price and gained no advantage.<sup>153</sup> It is entirely immaterial

<sup>149</sup> *Tate v. Williamson*, 2 Ch. App. 55, 60, 61, per Lord Chelmsford.

<sup>150</sup> *Robinson v. Pett*, 3 P. Wms. 249; *Van Epps v. Van Epps*, 9 Paige, 241.

<sup>151</sup> *Herne v. Meeres*, 1 Vern. 405.

<sup>152</sup> *Forbes v. Ross*, 2 Cox, 116.

<sup>153</sup> *Fox v. Mackreth*, 2 Brown, Ch. 400, 1 White & T. Lead. Cas. Eq. 125; *Dyer v. Shurtleff*, 112 Mass. 165; *Romaine v. Hendrickson*, 27 N. J. Eq. 102;

whether the sale be private or at public auction,<sup>154</sup> or under a judicial decree,<sup>155</sup> or whether the trustee purchases personally or through an agent,<sup>156</sup> or whether he purchases for himself or as agent for some third person.<sup>157</sup> In all these cases the rule is inflexible that the transaction is voidable at the option of the cestui que trust. The trustee cannot be both vendor and vendee. He cannot represent in himself two opposite and conflicting interests.<sup>158</sup>

2. As to the second class of cases, dealings between trustee and cestui que trust respecting the trust estate are presumed to be invalid.<sup>159</sup> But there is no imperative rule of law prohibiting such dealings. The transaction will be permitted to stand if the trustee can show that the beneficiary clearly understood with whom he was dealing, and made no objection to the transaction, and that the trustee fairly and honestly disclosed all he knew respecting the property, gave a just and fair price, and did not surreptitiously secure any advantage for himself.<sup>160</sup>

#### *Principal and Agent.*

Considerations of like nature apply to the case of persons standing in the relation of principal and agent. A person who is an agent

*Munson v. Syracuse, G. & C. R. Co.*, 103 N. Y. 58, 8 N. E. 355; *Price v. Thompson*, 84 Ky. 219, 1 S. W. 408; *Carrier v. Heather*, 62 Mich. 441, 29 N. W. 38; *Scott v. Sierra Lumber Co.*, 67 Cal. 71, 7 Pac. 131; *Cushman v. Bonfield* 139 Ill. 219, 28 N. E. 937. Purchase of trust property by trustee at public sale is only voidable, and will be ratified unless the beneficiary repudiates it within reasonable time. *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418; *Scott v. Freeland*, 7 Smedes & M. 409.

<sup>154</sup> *Ex parte Lacey*, 6 Ves. 629; *Ex parte James*, 8 Ves. 348; *Michoud v. Girod*, 4 How. 503.

<sup>155</sup> *Cary v. Cary*, 2 Schoales & L. 175; *Feamster v. Feamster*, 35 W. Va. 1, 13 S. E. 53; *Carter v. Burr*, 46 N. J. Eq. 134, 18 Atl. 463; *Tracy v. Colby*, 55 Cal. 67; *Tracy v. Craig*, Id. 91; *Powell v. Powell*, 80 Ala. 11.

<sup>156</sup> *Campbell v. Walker*, 5 Ves. 678; *Ingle v. Richards*, 28 Beav. 361; *Houston v. Bryan*, 78 Ga. 181, 1 S. E. 252; *Bassett v. Shoemaker*, 46 N. J. Eq. 538, 20 Atl. 52.

<sup>157</sup> *Ex parte Bennett*, 10 Ves. 381, 400; *North Baltimore Bldg. Ass'n v. Caldwell*, 25 Md. 420.

<sup>158</sup> *Wormley v. Wormley*, 8 Wheat. 421.

<sup>159</sup> *Coles v. Trecothick*, 9 Ves. 234; *Spencer & Newbold's Appeal*, 80 Pa. St. 317; *Nichols v. McCarthy*, 53 Conn. 299, 23 Atl. 93.

<sup>160</sup> *Barnard v. Stone*, 159 Mass. 224, 34 N. E. 272; *Williams v. Powell*, 63

for another undertakes a duty in which there is a confidence reposed, and which he is bound to execute to the utmost advantage of the person who employs him. He cannot be allowed to place himself in a situation which, under ordinary circumstances, might tempt him not to do that which is the best for his principal.<sup>161</sup>

*Principal and Agent.—Dealings without the Intervention of the Principal.*

It is therefore settled that an agent who is employed to sell cannot become the purchaser surreptitiously, and without the knowledge or consent of his employer;<sup>162</sup> nor can an agent employed to purchase buy secretly from himself or for his own benefit.<sup>163</sup> All such transactions are voidable at the principal's option.

— *Dealings between Agent and Principal.*

There is no rule to prevent an agent from dealing with his principal as to the matter in which he is employed as agent. The presumption, however, is against the validity of the transaction; and the agent, seeking to uphold it, must show to the satisfaction of the court that he gave his principal the same advice in the matter as an independent and disinterested adviser would have done, and made a full disclosure of all he knew respecting the property, and that the principal knew with whom he was dealing, and made no objection to the transaction, and that the price was just and fair.<sup>164</sup>

Ala. 20; Colton v. Stanford, 82 Cal. 351, 28 Pac. 16; Marshall v. Stephens, 8 Humph. 159; Coles v. Trecothick, 9 Ves. 234, 246.

<sup>161</sup> East India Co. v. Henchman, 1 Ves. Jr. 289; Keighler v. Savage Manuf'g Co., 12 Md. 383; Neuendorff v. World Mut. Life Ins. Co., 69 N. Y. 389; Wilber v. Lynde, 49 Cal. 290; Grumley v. Webb, 44 Mo. 444; Dutton v. Willner, 52 N. Y. 312.

<sup>162</sup> Ex parte Hughes, 6 Ves. 617; Lewis v. Hillman, 3 H. L. Cas. 607; Cope-land v. Mercantile Ins. Co., 6 Pick. (Mass.) 198; Adams v. Sayre, 70 Ala. 318; Fry v. Platt, 32 Kan. 62, 3 Pac. 781; Colbert v. Shepherd (Va.) 16 S. E. 246; Euneau v. Rieger, 105 Mo. 659, 16 S. W. 854; McClendon v. Bradford 42 La. 160, 7 South. 78, and 8 South. 256.

<sup>163</sup> East India Co. v. Henchman, 1 Ves. Jr. 289; Tyrrell v. Bank of London, 10 H. L. Cas. 26; Conkey v. Bond, 36 N. Y. 427; Tewksbury v. Spruance, 75 Ill. 187; Bischoffsheim v. Baltzer, 20 Fed. 890; Distrow v. Secor, 58 Conn. 35, 18 Atl. 981.

<sup>164</sup> Walsham v. Stainton, 1 De Gex, J. & S. 678; Keith v. Kellam, 35 Fed. 243; Le Gendre v. Byrnes, 44 N. J. Eq. 372, 14 Atl. 621; Kerby v. Kerby, 57 Md. 345; Rochester v. Levering, 104 Ind. 562, 4 N. E. 203; Cook v. Berlin

*Attorney and Client.*

The rules governing transactions between principal and agent apply with even greater strictness to those between attorney and client. The client is entitled to the full benefit of the best exertions of the attorney, and the highest degree of good faith is required of him in all dealings with his client. Even contracts for compensation are closely scrutinized by the courts, and formerly in England an agreement to pay a gross sum for future services was voidable at the client's option.<sup>165</sup> Recent statutes have, however, modified this rule somewhat,<sup>166</sup> and it has been greatly relaxed with us.<sup>167</sup>

Respecting contracts other than for compensation, the rule is that an attorney is under no incapacity to buy from or sell to his client. The burden, however, is on the attorney to establish affirmatively that his transactions with his client were fair and just; that his client acted on full information of all the material circumstances; and that he did not take undue advantage of his client's complaisance, confidence, ignorance, or misconception.<sup>168</sup> Lord Eldon said, regarding the purchase of a client's property by his attorney: "The attorney must prove that his diligence to do the best for his

Woolen Mills Co., 43 Wis. 433. "It is not enough for an agent to tell the principal that he is going to have an interest in the purchase, or to have a part in the purchase. He must tell him all the material facts. He must make a full disclosure." Jessel, M. R., in *Dunne v. English*, L. R. 18 Eq. 524.

<sup>165</sup> In re Newman, 30 Beav. 196.

<sup>166</sup> 33 & 34 Vict. c. 28, § 4; 44 & 45 Vict. c. 44, § 8; In re Attorneys' & Solicitors' Act 1870, 1 Ch. Div. 573.

<sup>167</sup> Special contract for compensation for future services is valid if the attorney shows that it is free from fraud, undue influence, or exorbitance. *Planters' Bank v. Hornberger*, 4 Cold. 531; *Blaisdell v. Ahern*, 144 Mass. 393, 11 N. E. 681; *Ryan v. Ashton*, 42 Iowa, 365; *Ballard v. Carr*, 48 Cal. 74. In *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, it was, however, held that, where value of property depends on the result of litigation as to title, a contract made during its pendency to compensate the attorney with part of the property is voidable at the client's election, irrespective of the fairness or unfairness of the transaction, provided such election is exercised within a reasonable time.

<sup>168</sup> *Place v. Hayward*, 117 N. Y. 487, 497, 23 N. E. 25; *Dunn v. Dunn*, 42 N. J. Eq. 431, 7 Atl. 842; *Baker v. Humphrey*, 101 U. S. 494; *Dunn v. Record*, 63 Me. 17; *Merryman v. Euler*, 59 Md. 588; *Gresley v. Mousley*, 4 De Gex & J. 78; *Luddy's Trustee v. Peard*, 33 Ch. Div. 500.

vendor has been as great as if he was only an attorney dealing for that vendor with a stranger."<sup>169</sup>

*Guardian and Ward.*

The rule of equity with respect to dealings between guardian and ward is extremely strict;<sup>170</sup> and transactions between them during the existence of the relationship are voidable at the option of the ward.<sup>171</sup> Even transactions which have taken place after the guardianship has come to a close will not be permitted to stand, unless the influence which is presumed to arise from the existence of the relation has ceased to exist.<sup>172</sup>

*Parent and Child.*

The presumption of undue influence in transactions between parent and child is not as strong as in those between guardian and ward; but still courts of equity will scrutinize them closely, and will require the parent to disprove the exercise of paternal influence.<sup>173</sup> The question usually arises with respect to gifts, and accordingly falls under our next subdivision.

*Other Cases.*

The foregoing illustrations do not by any means exhaust the list of cases in which fraud and undue influence is presumed by reason of the fiduciary relations between the parties. Promoters and officers of corporations occupy confidential relations towards the corporation and the stockholders, and they are governed by the rules applicable to trustees generally.<sup>174</sup> So with executors and adminis-

<sup>169</sup> *Gibson v. Jeyes*, 6 Ves. 266, 271.

<sup>170</sup> *Hylton v. Hylton*, 2 Ves. Sr. 548, 549; *Hatch v. Hatch*, 9 Ves. 292.

<sup>171</sup> *Powell v. Glover*, 3 P. Wms. 251, note; *Hendee v. Cleaveland*, 54 Vt. 142; *Walker v. Walker*, 101 Mass. 169; *Meek v. Perry*, 36 Miss. 190.

<sup>172</sup> *Hylton v. Hylton*, 2 Ves. Sr. 549; *Waller v. Armistead*, 2 Leigh (Va.) 11; *Wright v. Arnold*, 14 B. Mon. 638; *Rist v. Hartner*, 44 La. 430, 10 South. 759.

<sup>173</sup> *Williams v. Williams*, 63 Md. 371; *Noble v. Moses*, 74 Ala. 604; *Id.*, 81 Ala. 530, 1 South. 217; *Davis v. Dunne*, 46 Iowa, 684; *Wright v. Vanderplank*, 8 De Gex, M. & G. 133; *Turner v. Collins*, 7 Ch. App. 329.

<sup>174</sup> *Aberdeen Ry. Co. v. Blakie*, 1 Macq. 461; *Thomas v. Brownville*, Ft. K. & P. R. Co., 109 U. S. 522, 3 Sup. Ct. 315; *Munson v. Syracuse, G. & C. Ry. Co.*, 103 N. Y. 58, 8 N. E. 355; *Parker v. Nickerson*, 112 Mass. 195; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1236.

trators,<sup>175</sup> partners,<sup>176</sup> and husbands and wives.<sup>177</sup> Indeed, courts of equity have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise.<sup>178</sup>

#### **SAME — GIFTS BETWEEN PERSONS IN FIDUCIARY RELATIONS.**

94. A gift to one in a fiduciary relation with the donor is regarded with even greater suspicion than a contract between such persons. The donee must rebut the presumption of fraud by showing that the gift was not the result of undue influence; that it was the free, voluntary, and well-understood act of the donor; and, under the English rule, that he had independent advice in the matter.<sup>179</sup>

In discussing the subject of contracts between persons in fiduciary relations, it was shown that the payment of a fair and adequate price was one of the facts which must appear in order to sustain the transaction.<sup>180</sup> A gift to a person in a fiduciary relation, in which there is no valuable consideration whatever, is therefore subject to a still more jealous scrutiny, and a court of equity will weigh every such transaction with golden scales.<sup>181</sup> And this is particularly the case when the effect of the gift is to divert an estate from those who by the ties of nature would be its recipients.<sup>182</sup> It has even been held that, though no confidential relation subsists, the burden is on the donee to show the righteousness of the transaction, and that the

<sup>175</sup> *Ives v. Ashley*, 97 Mass. 198; *Green v. Sargeant*, 23 Vt. 466.

<sup>176</sup> *Simons v. Vulcan Oil & Min. Co.*, 61 Pa. St. 202; *Wheeler v. Sage*, 1 Wall. 518; *Bowman v. Patrick*, 36 Fed. 158.

<sup>177</sup> *Shea v. Shea*, 121 Pa. St. 302, 15 Atl. 629; *Bartlett v. Bartlett*, 15 Neb. 593, 19 N. W. 691; *Brisson v. Brisson*, 75 Cal. 525, 17 Pac. 689; *Farmer v. Farmer*, 39 N. J. Eq. 211.

<sup>178</sup> *Tate v. Williamson*, 2 Ch. App. 55.

<sup>179</sup> It should be borne in mind that testamentary gifts are not within the operation of this rule, and that it applies solely to gifts *inter vivos*.

<sup>180</sup> *Ante*, 147, 148.

<sup>181</sup> *Wright v. Vanderplank*, 8 De Gex, M. & G. 137; *Huguenin v. Baseley*, 14 Ves. 275, 2 White & T. Lead. Cas. Eq. 1156.

<sup>182</sup> *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785.



donor knew and understood what he was doing.<sup>182</sup> The existence of a confidential relation adds another consideration; and the question then is not whether the donor knew what he was doing, but how the intention to give was produced, and, though the donor was well aware as to what he did, yet, if his disposition to do it was produced by undue influence, the transaction will be set aside.<sup>184</sup> The modern rule in England is that such a gift will not be sustained unless the donor had competent and independent advice in the matter.<sup>185</sup> With us, however, all that seems to be necessary is to show the absence of undue influence, and full knowledge by the donor of all the facts, and of the nature and effect of the transfer.<sup>186</sup> If these things appear, the gift will be sustained, for there is no rule of law which prohibits a man from making a voluntary disposition of his property during his lifetime.<sup>187</sup>

As to the persons within the operation of the principle, it may be stated that any relationship which raises a presumption against the fairness of a contract necessarily does the same with respect to a gift. Donations from cestui que trust to trustee,<sup>188</sup> from principal to agent,<sup>189</sup> from client to attorney,<sup>190</sup> from ward to guardian,<sup>191</sup> from child to parent,<sup>192</sup> are all presumptively invalid. Some of the cases

<sup>182</sup> *Hoghton v. Hoghton*, 15 Beav. 299.

<sup>184</sup> *Huguenin v. Baseley*, 14 Ves. 273, 2 White & T. Lead. Cas. Eq. 1156.

<sup>185</sup> *Rhodes v. Bate*, 1 Ch. App. 252; *Smith v. Kay*, 7 H. L. Cas. 772.

<sup>186</sup> *Ralston v. Turpin*, 129 U. S. 675, 9 Sup. Ct. 420; *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910; *Sanfley v. Jackson*, 16 Tex. 579; *Boyd v. De La Montagnole*, 73 N. Y. 498, 502. Same rule applied to will, *Garvin v. Williams*, 44 Mo. 465.

<sup>187</sup> Cases cited in preceding note.

<sup>188</sup> *Hatch v. Hatch*, 9 Ves. 292.

<sup>189</sup> *Ralston v. Turpin*, 129 U. S. 675, 9 Sup. Ct. 420; *Hall v. Knappenberger* (Mo. Sup.) 6 S. W. 381; *Hobday v. Peters*, 28 Beav. 349.

<sup>190</sup> *Nesbit v. Lockman*, 34 N. Y. 167; *Greenfield's Estate*, 14 Pa. St. 489. In England a gift to an attorney made by a client pending suit will not be sustained, unless the client had independent professional advice. *Morgan v. Minett*, 6 Ch. Div. 638.

<sup>191</sup> *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918; *Fish v. Miller*, 1 Hoff. Ch. 267; *Everitt v. Everitt*, L. R. 10 Eq. 405; *Hylton v. Hylton*, 2 Ves. Sr. 547, 549.

<sup>192</sup> *Whitridge v. Whitridge*, 76 Md. 54, 24 Atl. 645; *Baldock v. Johnson*, 14 Or. 542, 13 Pac. 434; *Taylor v. Taylor*, 8 How. 183; *Baker v. Bradley*, 7 De Gex, M. & G. 597; *Wright v. Vanderplank*, 8 De Gex, M. & G. 135, 146.

hold that undue influence is not to be inferred from the relation of parent and child, where the gift is from the parent to the child;<sup>193</sup> but where the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent on his bounty, the burden is unquestionably on the donee to show that the gift was made freely and voluntarily, and with full knowledge of all the facts, and with perfect understanding of the effects of the transfer.<sup>194</sup> In addition to the foregoing classes, it has been held that the relation between a physician and his patient is sufficient to support a claim for relief against a voluntary gift, on the ground of undue influence.<sup>195</sup> A clergyman or other religious adviser is likewise within the principle;<sup>196</sup> and so is a professor of spiritualism, with respect to a believer in his art.<sup>197</sup> Gifts by wife to husband are not outside the scope of the rule,<sup>198</sup> and even a gift from an engaged lady to her suitor is liable to be carefully scrutinized, and, to sustain it, the gentleman must be prepared to show that it was made without undue solicitation or pressure.<sup>199</sup>

#### FRAUDS ON THIRD PERSONS.

**95. Not only shall parties to a transaction act in good faith as between themselves, but they shall not act in bad faith in respect to other persons who stand in such rela-**

<sup>193</sup> *Millican v. Millican*, 24 Tex. 446.

<sup>194</sup> *Whelan v. Whelan*, 3 Cow. 537; *Todd v. Grove*, 33 Md. 194; *Highberger v. Stiffler*, 21 Md. 352; *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910.

<sup>195</sup> *Dent v. Bennett*, 4 Mylne & C. 269; *Woodbury v. Woodbury*, 141 Mass. 329, 5 N. E. 275. The relation of physician and patient does not per se prevent the physician from accepting a gift from the patient. *Doggett v. Lane*, 12 Mo. 215; *Andenreid's Appeal*, 89 Pa. St. 114.

<sup>196</sup> *Ford v. Hennessy*, 70 Mo. 580; *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785; *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. 66, Fed. Cas. No. 10,003; *Huguenin v. Baseley*, 14 Ves. 275, 2 White & T. Lead. Cas. Eq. 1156.

<sup>197</sup> *Lyon v. Home*, L. R. 6 Eq. 655.

<sup>198</sup> *Boyd v. De La Montagnie*, 73 N. Y. 498, 502; *Stiles v. Stiles*, 14 Mich. 72; *Hollis v. Francois*, 5 Tex. 195; *Campbell's Appeal*, 80 Pa. St. 208; *Smyley v. Reese*, 53 Ala. 80; *Scarborough v. Watkins*, 9 B. Mon. 540.

<sup>199</sup> *Page v. Horne*, 11 Beav. 227; *Cobbett v. Brock*, 20 Beav. 524.

tions to either as to be affected by the transaction or its consequences.<sup>200</sup>

In the cases considered under the foregoing subdivision, one of the parties to a transaction or his privies sought to impeach it for fraud practiced on him by the other. The questions now to be considered arise where a third person, not a party to the transaction, assails it for collusion between the parties, resulting in prejudice or loss to him. Several classes of cases fall under this subdivision.

#### **SAME—COMPOSITION WITH CREDITORS.**

**96. A composition by a debtor with his creditors, under which they agree to accept a part of their debts in satisfaction of the whole, is based on the principle that all the creditors shall stand on an equal footing, and observe good faith towards each other, and therefore any secret arrangement between the debtor and a particular creditor whereby he is placed in a more favored position than the others is a fraud on them, and renders the composition agreement voidable.<sup>201</sup>**

Where a secret preference is thus given one of the creditors, the others have the right to rescind the composition agreement, and recover the full amount of their debts.<sup>202</sup> On the other hand, the creditor who is the beneficiary of the secret agreement cannot enforce it against the debtor;<sup>203</sup> and it has even been held that the

<sup>200</sup> Lord Hardwicke, in 2 Ves. Sr. 156, 157; *Wallis v. Duke of Portland*, 3 Ves. 502.

<sup>201</sup> *Cullingworth v. Loyd*, 2 Beav. 385; *Leicester v. Rose*, 4 East, 372; *Ramsdell v. Edgerton*, 8 Metc. (Mass.) 227; *Lawrence v. Clark*, 36 N. Y. 128; *Willis v. Morris*, 63 Tex. 458.

<sup>202</sup> *Kullman v. Greenebaum*, 92 Cal. 403, 28 Pac. 674. Subsequent creditors not parties to the composition agreement cannot attack it. *Guggenheimer v. Groeschel*, 23 S. C. 274.

<sup>203</sup> *Jackman v. Mitchell*, 13 Ves. 581; *Fay v. Fay*, 121 Mass. 561; *Sternburg v. Bowman*, 103 Mass. 325; *Lawrence v. Clark*, 36 N. Y. 128.

latter may recover any money paid by him to such creditor under the agreement.<sup>204</sup>

**SAME—FRAUDULENT CONVEYANCES.**

**97. A fraudulent conveyance is one, the object, tendency, or effect of which is to defraud another, or the intent of which is to avoid some duty or debt due by or incumbent on the party making it.<sup>205</sup>**

Transfers of property made with the intention of defrauding creditors were voidable at common law,<sup>206</sup> on the principle that a man must be just before he is generous;<sup>207</sup> but statutes were enacted at an early day in England with a view of affirming the rule and carrying the principle of the common law more fully into effect. The principal of these was the statute of 15 Eliz. c. 5, which declared all gifts, grants, and conveyances of goods, chattels, or lands made with an intent to hinder, delay, or defraud creditors, void as against the person to whom such frauds would be prejudicial; but conveyances made bona fide, on good consideration, and without notice of any fraud or collusion, were excepted from the operation of the statute.<sup>208</sup> This statute has been universally adopted in this country as the basis of our jurisprudence on the subject.<sup>209</sup>

**SAME—ESSENTIAL ELEMENTS OF FRAUDULENT CONVEYANCE.**

**98. To render a conveyance fraudulent, there must be:**

- (a) A creditor to be defrauded.**
- (b) An intention to defraud.**
- (c) A transfer of property.<sup>210</sup>**

<sup>204</sup> *Mare v. Sandford*, 1 Giff. 238. This proposition is doubted in *Solinger v. Earle*, 82 N. Y. 395, on the ground that the parties are in pari delicto.

<sup>205</sup> Bouv. Law Dict. tit. "Fraudulent Conveyances"; 2 Kent, Comm. \*440; *Walt, Fraud. Conv.* § 15.

<sup>206</sup> *Twyne's Case*, 3 Coke, 80, 1 Smith, Lead. Cas. 33; *Cadogan v. Kennett*, 2 Cowp. 432; *Clements v. Moore*, 6 Wall. 312.

<sup>207</sup> *Planters' & Merchants' Bank v. Walker*, 7 Ala. 946.

<sup>208</sup> *Kerr, Fraud & M.* 148.

<sup>209</sup> *Story, Eq.* § 353; 2 Pom. Eq. Jur. § 968.

<sup>210</sup> *Walt, Fraud. Conv.* § 15; *Hoyt v. Godfrey*, 88 N. Y. 609.

## SAME—THE CREDITOR.

99. Before a creditor can assail a conveyance in equity, he must have reduced his debt to judgment, or have acquired a lien on specific property, or placed himself in a position to obtain one on the avoidance of the transfer.<sup>211</sup> It is not necessary, however, that his demand be certain and liquidated at the time of the transfer, or that it be then in existence, for a subsequent creditor may avoid a fraudulent conveyance, as well as an antecedent or existing creditor.

Courts of equity are not tribunals for the collection of debts;<sup>212</sup> and therefore, before they will entertain jurisdiction of an action to set aside a debtor's conveyance, the debt must be established by some judicial proceeding, and it must generally be shown that the legal means for its collection have been exhausted.<sup>213</sup> If the object of the suit be to reach personal property or equitable assets, it must appear that an execution has been returned unsatisfied,<sup>214</sup> unless the property is not susceptible to levy.<sup>215</sup> The demand need not, however, be certain and liquidated at the time of the conveyance. It is sufficient that the creditor has a cause of action against the debtor, and it is immaterial whether it arises out of contract or out of tort.<sup>216</sup> Thus, it has been held that one who has a cause of action for libel or slander,<sup>217</sup> seduction,<sup>218</sup> breach of marriage promise,<sup>219</sup> or assault and battery<sup>220</sup> is a "creditor," within the meaning

<sup>211</sup> Southard v. Benner, 72 N. Y. 426.

<sup>212</sup> Webster v. Clark, 25 Me. 314.

<sup>213</sup> Board of Public Works v. Columbia College, 17 Wall. 530; Powell v. Howell, 63 N. C. 284; Fox v. Moyer, 54 N. Y. 128.

<sup>214</sup> Baxter v. Moses, 77 Me. 465, 1 Atl. 350; McElwain v. Willis, 9 Wend. (N. Y.) 548; Vasser v. Henderson, 40 Miss. 519; Newman v. Willetts, 52 Ill. 98.

<sup>215</sup> Snodgrass v. Andrews, 30 Miss. 472.

<sup>216</sup> Bishop v. Redmond, 83 Ind. 157; Weir v. Day, 57 Iowa, 84, 10 N. W. 304; Damon v. Bryant, 2 Pick. 411; Bongard v. Block, 81 Ill. 186.

<sup>217</sup> Cooke v. Cooke, 43 Md. 522; Hall v. Sands, 52 Me. 355.

<sup>218</sup> Hunsinger v. Hofer, 110 Ind. 390, 11 N. E. 463.

<sup>219</sup> Hoffman v. Junk, 51 Wis. 613, 8 N. W. 493; McVey v. Ritemous, 40 Ohio St. 107.

<sup>220</sup> Martin v. Walker, 12 Hun, 46.

of the statute. Nor need the debt be in existence at the time of the conveyance. It may be avoided by subsequent creditors if made in contemplation of future indebtedness,<sup>221</sup> as well as by antecedent and existing creditors. An important distinction, however, exists between these two classes of creditors. A voluntary conveyance is presumptively fraudulent as against antecedent and existing creditors;<sup>222</sup> but subsequent creditors have the burden of showing that it was executed as a cover for future schemes of fraud.<sup>223</sup>

#### SAME—INTENT TO DEFRAUD.

100. To render a conveyance voidable, there must be an intent, participated in by both the grantor and the grantee, to defraud the grantor's creditors, except where the conveyance is voluntary, when the grantor's fraudulent intent alone will be sufficient to avoid it.

The intent to hinder, delay, or defraud creditors is the essential and poisonous element in the transaction.<sup>224</sup> "Intent or intention is an emotion or operation of the mind, and can usually be shown only by acts or declarations; and, as acts speak louder than words, if a party does an act which must defraud another his declaring that he did not by the act intend to defraud is weighed down by the evidence of his own act."<sup>225</sup> Since every man is presumed to intend the natural and necessary consequence of his acts, the absence of actual or meditated fraud is not in all cases decisive in favor of the conveyance;<sup>226</sup> and therefore a voluntary conveyance, the natural

<sup>221</sup> *Case v. Phelps*, 39 N. Y. 164; *Day v. Cooley*, 118 Mass. 527; *Mullen v. Wilson*, 44 Pa. St. 413; *Smith v. Vedges*, 92 U. S. 183.

<sup>222</sup> *Lerow v. Wilmarth*, 9 Allen (Mass.) 386; *Parish v. Murphree*, 13 How. 92; *Babcock v. Eckler*, 24 N. Y. 623; *Jenkins v. Clement*, 1 Harp. Eq. (S. C.) 72, 14 Am. Dec. 705, note. Some cases hold that a voluntary conveyance is not only presumptively, but absolutely, void, as against existing creditors. *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481; *Freeman v. Pope*, L. R. 9 Eq. 211.

<sup>223</sup> *Horbach v. Hill*, 112 U. S. 149, 5 Sup. Ct. 81; *Teed v. Valentine*, 65 N. Y. 474; *Matthal v. Heather*, 57 Md. 483.

<sup>224</sup> *Moore v. Hinnant*, 89 N. C. 455; *Worthy v. Brady*, 91 N. C. 209.

<sup>225</sup> *Per Sutherland, J.*, in *Babcock v. Eckler*, 24 N. Y. 632.

<sup>226</sup> *Lukins v. Aird*, 6 Wall. 79; *Klisterbock's Appeal*, 51 Pa. St. 483.

and necessary effect of which is to hinder, delay, and defraud creditors, is voidable by them, though the debtor may have believed he had a right to make it.<sup>227</sup>

We now come to the question, in what cases must the grantee participate in the grantor's scheme to defraud, in order to render the conveyance voidable by the grantor's creditors? In considering this question, we must bear in mind two principles heretofore announced, viz.: (1) An equity founded on a valuable consideration is superior to one founded on a mere voluntary transfer or gift; and (2) an equity to a specific thing is superior to an equity general in its scope or nature.<sup>228</sup> A creditor has an equity which entitles him to subject his debtor's property to the satisfaction of his claim. One who purchases that property for a valuable consideration after that debt was incurred has also an equity in that property; and, though it is subsequent in time to that of the creditor, it is yet superior, for the obvious reason that the purchaser has not trusted, as the creditor has, to the personal responsibility of the debtor, but has paid the consideration on the faith of the debtor's actual title to the specific property transferred.<sup>229</sup> The creditor must therefore prove a participation of the grantee in the debtor's fraud whenever the grantee is a purchaser for value.<sup>230</sup> When, however, the transfer is not founded on a valuable consideration, but is voluntary, then the other principle comes into play, viz. an equity founded on a valuable consideration is superior to one founded on a mere voluntary transfer or gift. In other words, a creditor whose claim is founded on a valuable consideration may impeach a voluntary transfer or gift without showing that the grantee participated in the debtor's fraudulent intent.<sup>231</sup>

<sup>227</sup> *Potter v. McDowell*, 31 Mo. 62.

<sup>228</sup> *Ante*, 99, 100.

<sup>229</sup> *Seymour v. Wilson*, 19 N. Y. 417, 420.

<sup>230</sup> *Prewit v. Wilson*, 103 U. S. 22; *Mehlhop v. Pettibone*, 54 Wis. 652, 11 N. W. 553, and 12 N. W. 443; *Schroeder v. Walsh*, 120 Ill. 403, 11 N. E. 70; *Jaeger v. Kelley*, 52 N. Y. 274; *Foster v. Hall*, 12 Pick. (Mass.) 80.

<sup>231</sup> *Laughton v. Harden*, 68 Me. 213; *Marden v. Babcock*, 2 Metc. (Mass.) 104. See, also, cases cited in notes 222, 223.

**SAME—TRANSFER OF PROPERTY.**

101. Property of all kinds, real and personal, legal and equitable, vested, reversionary, or contingent, is susceptible of fraudulent alienation, and may be reclaimed by the grantor's creditors.<sup>232</sup>

**QUALIFICATION**—The thing disposed of must be of some value, out of which the creditors might have realized the whole or a portion of their claims.<sup>233</sup>

"The entire property of which a debtor is the real or beneficial owner constitutes a fund which is primarily applicable, to the fullest extent of its entire value, to the payment of its owner's debts; and the courts will not allow any of that value to be withdrawn from such primary application if they can find any legal or equitable ground on which to prevent such withdrawal."<sup>234</sup> The right of creditors to pursue property fraudulently conveyed away by their debtor is therefore not limited to that which is of a tangible nature, and which may be levied on and sold under execution, but extends to every species of property, including intangible rights and choses in action,<sup>235</sup> such as annuities,<sup>236</sup> royalties,<sup>237</sup> and corporate stock.<sup>238</sup>

*Qualification.*

An important limitation on the right of the creditors to pursue their debtor's property is this: The thing disposed of must be of some value, out of which the creditors might have realized the whole or a part of their claims.<sup>239</sup> Therefore property exempt by statute from liability for the grantor's debts cannot be reclaimed by his creditors.<sup>240</sup>

<sup>232</sup> May, *Fraud. Conv.* p. 17; Wait, *Fraud. Conv.* §§ 24, 25.

<sup>233</sup> Hoyt v. Godfrey, 88 N. Y. 669.

<sup>234</sup> Essay by Joshua Reynolds, Esq., on "Fraudulent Conveyances," quoted in Wait, *Fraud. Conv.* § 24.

<sup>235</sup> Wait, *Fraud. Conv.* § 24.

<sup>236</sup> Norcutt v. Dodd, 1 Craig & P. 100.

<sup>237</sup> Lord v. Harte, 118 Mass. 271.

<sup>238</sup> Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450. Equitable interest in real estate, *Edmeston v. Lyde*, 1 Paige (N. Y.) 641.

<sup>239</sup> Hoyt v. Godfrey, 88 N. Y. 669.

<sup>240</sup> O'Conner v. Ward, 60 Miss. 1037; *Nichols v. Easton*, 91 U. S. 726; *Car-*



Another exception exists as to the personal talents and industry of the debtor. The creditors cannot compel him to work; and hence he does not defraud them if he chooses to give away his services by working gratuitously for another.<sup>241</sup>

#### SAME—FRAUD ON MARITAL RIGHTS.

102. A conveyance, by either party to a marriage contract, of his or her property, without the knowledge of the other, and with the intent of depriving such other of the rights which he or she would otherwise acquire in the property by the marriage, is a fraud on, and may be avoided by, such other.

The earlier cases on this subject arose where a woman, in contemplation of marriage, settled her real estate in trust to her separate use, for the purpose of depriving her intended husband of the rents and profits which devolved on him during coverture by the common law. But courts of equity, though they were wont to protect married women in the enjoyment of their separate estates, held that such a conveyance made by a woman pending a marriage engagement, without notice to her intended husband, was a fraud on the husband's marital rights, and was voidable by him because affected with that fraud.<sup>242</sup> This application of the rule has, of course, become obsolete since the enactment of the married women's statutes in the several states, giving married women complete control of their real estate; and, through one of the curious changes wrought by Father Time, the rule is now chiefly applied to protect their inchoate dower interests in real estate conveyed away by their intended husbands in contemplation of marriage,<sup>243</sup> though a case occa-

hart v. Harshaw, 45 Wis. 340; Taylor v. Duesterberg, 109 Ind. 165, 170, 9 N. E. 907; Washburn v. Goodheart, 88 Ill. 229; Rhead v. Hounson, 46 Mich. 243, 9 N. W. 267.

<sup>241</sup> Abbey v. Deyo, 44 N. Y. 347.

<sup>242</sup> Strathmore v. Bowes, 1 Ves. jr. 22, 1 White & T. Lead. Cas. Eq. 605; England v. Downs, 2 Beav. 522; Lance v. Norman, 2 Ch. R. 79.

<sup>243</sup> De Armond v. De Armond, 10 Ind. 191; Smith v. Smith, 6 N. J. Eq. 515; Brown v. Bronson, 35 Mich. 415; Leach v. Duvall, 8 Bush (Ky.) 201; Kelly

sionally arises where a husband complains of an alienation by the wife as in fraud of his inchoate estate by the curtesy.<sup>244</sup>

By the weight of modern authority, mere noncommunication to the intended spouse of the execution of a deed in contemplation of marriage is not conclusive on the question of fraud, but the circumstances surrounding the case may be shown;<sup>245</sup> and a voluntary conveyance of property to the children by a former marriage will be upheld where no representation has been made to the intended spouse as to the extent of the grantor's property, and the provision for the children is reasonable when compared with the balance of the estate.<sup>246</sup>

#### **SAME—FRAUD ON POWERS.**

**103. The donee of a limited power must execute it bona fide, for the end designed; otherwise the appointment will be held fraudulent and void in equity.**

Where an owner of land confers on another a power to dispose of an estate therein, the donee of the power must act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power. He cannot carry into execution any indirect object, or acquire any benefit for himself, either directly or indirectly.<sup>247</sup> Thus, where a father has a power of appointment among his children, an appointment in favor of one of them, in consideration of a promise by the appointee to pay the father's debts, is void.<sup>248</sup> So, also, an appointment will be deemed fraudulent when a father, having a power of raising portions for his children, directs a portion to be raised long before it is required, or in favor of

v. McGrath, 70 Ala. 75; Swaine v. Perine, 5 Johns Ch. 482; Kline v. Kline, 57 Pa. St. 120; Beere v. Beere, 79 Iowa, 555, 44 N. W. 809.

<sup>244</sup> Ferebee v. Pritchard, 112 N. C. 83, 16 S. E. 903.

<sup>245</sup> Dudley v. Dudley, 76 Wis. 567, 45 N. W. 602; Champlin v. Champlin, 16 R. I. 314, 15 Atl. 85; Butler v. Butler, 21 Kan. 521.

<sup>246</sup> Alkire v. Alkire, 134 Ind. 350, 32 N. E. 573; Kinne v. Webb, 54 Fed. Rep. 34; Murray v. Murray, 90 Ky. 1, 13 S. W. 244.

<sup>247</sup> Aley v. Belchier, 1 Eden, 132, 1 White & T. Lead. Cas. Eq. 573; Portland v. Tophan, 11 H. L. Cas. 32.

<sup>248</sup> Farmer v. Martin, 2 Sim. 502; In re Kirwan's Trusts, 25 Ch. Div. 373.

a sickly child, with a view of acquiring the money on its decease as next of kin.<sup>249</sup>

<sup>249</sup> *Hinchinbroke v. Seymour*, 1 Brown. Ch. 395; *Wellesley v. Mornington*, 2 Kay & J. 143. American cases on this subject are very few. The question of fraudulent execution of powers has, however, been considered in the following, among other, cases: *William's Appeal*, 73 Pa. St. 249; *Jackson v. Veeder*, 11 Johns. 169, 171; *Haynesworth v. Cox*, Harp. Eq. (S. C.) 117, 119; *Budington v. Munson*, 33 Conn. 481; *Lippincott v. Ridgway*, 10 N. J. Eq. 164.

**CHAPTER VIII.****PROPERTY IN EQUITY—TRUSTS.**

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**DEFINITION AND HISTORY OF TRUSTS.**

104. A trust may be defined to be an obligation under which a person in whom the legal title to property is

vested is bound in equity to deal with the beneficial interest therein in a particular manner, either wholly in favor of others, or partly in favor of others conjointly with himself.<sup>1</sup>

The introduction of uses and trusts in the English law is generally ascribed to the clergy. In the reign of Edward I., statutes of mortmain were enacted, which prohibited lands from being granted to religious houses. It is generally supposed that the clergy, who were familiar with the dual ownerships of the Roman law, conceived the idea of evading these statutes by grants to feoffees for the benefit of these houses. Mr. Justice Holmes<sup>2</sup> has, however, traced the origin of uses and trusts to a different source, and he finds in the Teutonic "salman" the ancestor of the medieval feoffee to uses. Each was a person to whom property was transferred in order that he might make a conveyance according to the grantor's directions, and the essence of the relation in each case was the fiducia of the grantee. Thus, the executor was originally a salman, whose duty it was to distribute the estate in the manner directed by the will of the owner, including real estate, until devises were prohibited under the early Plantagenets.

But whatever may have been its origin, the reason for the perpetuation of the system of uses is to be found in the hardships and restrictions incident to the feudal tenure of land. Absolute ownership in land was never recognized by the common law. The person in possession or enjoyment was vested only with a legal estate or interest, of greater or less extent or duration, subject to the right of a superior lord, or, at any rate, of the crown, as chief and paramount lord of all the soil of the country.

During a period of 500 years, from the days of the Norman Conquest to the time of Henry VIII., this legal estate or interest could not be devised by will, and no means existed by which the legal estate could be prevented from passing to the natural heir, who was generally the oldest son, with the possible result that the other

<sup>1</sup> Underh. Eq. p. 32. In the preparation of the following sketch of the history of uses and trusts, Haynes' *Outlines of Equity* and Kerley's *History of Equity* have been my chief guides.

<sup>2</sup> 1 Law Rev. Quar. 163.

children might be left unprovided for. The court of chancery, however, held that, if land was conveyed to feoffees to use, the use was devisable; and thus, by putting the land in use, an absolute power of testamentary disposition was acquired. Again, the legal interest in land could be conveyed only in a formal notorious manner by livery of seisin; that is, the conveying party executed a deed of feoffment, and then openly, on the land itself, delivered seisin to the feoffee by handing to him a clod, a piece of turf, or a twig, with words showing that the delivery so made was symbolical of the delivery of the whole property. But, when the land had been conveyed to uses, the cestui que use might deal with the beneficial interest by an entirely secret deed or instrument, without livery. The acquisition of these larger powers of alienation must have been a great inducement for putting lands in use.

Again, the use was not forfeitable for the offense of the cestui que use, nor did it escheat in the event of attainder, though the land itself was liable to be forfeited, or to escheat, in the event of the attainder of the feoffee to uses. In the turbulent times of the middle ages, men who took an active interest in political movements would therefore naturally vest their estates in feoffees to uses whose known characters were guaranties against the exposure of the estates to forfeiture or escheat.

Another inducement to put lands in use is to be found in a desire to escape from many of the oppressive feudal rights of the lord, such as marriage and wardship. The rights of wardship enabled the lord, when a tenant by knight service died leaving an infant heir, to enter on the heir's lands, and to take the whole rents and profits during minority, subject to the heir's maintenance. The right of marriage authorized the lord to marry his ward to the highest bidder, subject to the only restriction that the marriage was not a disparaging one; and, if the ward refused to accept the marriage offered, he was heavily mulcted.

Still another inducement to put land in use is to be found in the fact that a creditor could, by means of the writ of elegit, take possession of one-half the lands of which his debtor was seised of a legal estate, and subject the rents and profits in satisfaction of his debts; but he had no such power over the use.

For all the foregoing reasons, the custom of putting lands in use became extremely popular among tenants. But, for the same reasons, it must have been extremely distasteful to the great lords and the crown, who were defrauded of their "wardships, reliefis, heriots, and escheats," and to the creditors who were deprived of their "extent for debt."<sup>3</sup> The statute books of England bear witness to a continual struggle against the system.<sup>4</sup> Finally, in the reign of Henry VIII. a supreme effort was made to sweep away uses, root and branch. The celebrated statute of uses (St. 27 Hen. VIII. c. 10) was passed to reinstate the "common laws of this realm" by turning the equitable uses into legal estates, with all the incidents and burdens of legal estates.<sup>5</sup>

<sup>3</sup> Bacon's Works, Use of the Law, vol. 13, p. 240. The whole of this oft-quoted passage, arraigning the system of uses, is as follows: "A man that had cause to sue for his land knew not against whom to bring his action, nor who was the owner of it. The wife was defrauded of her thirds; the husband of being tenant by the curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; the poor tenant of his lease."

<sup>4</sup> The more important of those statutes are 50 Edw. III. c. 6, giving creditors execution against lands and chattels in spite of gifts made in fraud of them; 7 Rich. II. c. 12, forbidding aliens, and 15 Rich. II. c. 5, forbidding spiritual corporations or persons, to hold lands by way of use; 1 Rich. II. c. 1, making all grants by and executions against a seller of lands binding upon his heirs and upon feoffees to his or their use; 3 Hen. VII. c. 4, forbidding deeds of gift on trust made to defraud creditors; 4 Hen. VII. c. 17, declaring uses liable to wardships and reliefs; 19 Hen. VII. c. 15, declaring them liable to execution; and 26 Hen. VIII. c. 13, declaring them liable to forfeiture. In the twenty-third year of the reign of Henry VIII. a bill passed the house of lords greatly circumscribing the right to put land in use, but it was rejected by the commons.

<sup>5</sup> The following is a summary of the statute: The preamble complains that by secret conveyances, and by wills made "by nude parolx and words, sometimes by signs and tokens, and sometimes by writing" made for the most part by persons in extremis, with "scantly any good memory or remembrance," and "provoked by greedy and covetous persons lying in wait about them," many persons indiscreetly disposed of their inheritance, whereby heirs lost their lands, and lords their rights, and purchasers were made insecure; men lost their tenancies by curtesy, and women their dowers; perjuries were encouraged, and the king was deprived of his profits in attainder, and on purchases by aliens; and many other inconveniences happened,—to the "utter subversion of the ancient common laws of this realm." The statute then provides, "for the extirping and extinguishment" of these errors, that "where any person or persons stand or be seized of and in any lands, tenements, or

The history of the English-speaking race does not furnish a more conspicuous example of the futility of legislation when opposed to current public opinion.<sup>6</sup> The statute declared that when any person stood "seized" of any "hereditament," to the use of another, such other should be deemed in lawful "seizin" of the "hereditament." Since the words "seized," "seizin," and "hereditament" were applicable only to freehold estates, the statute was adjudged not to affect any trusts of personal property or chattels or terms for years in land. It was also held, soon after the statute was passed, that special trusts, which cast some duty on the trustee, remained unexecuted by the statute, since in such case the trustee was not seised wholly to the use of another, but partly, at least, to his own use.

The complete nullification of the statute, however, resulted from a decision of the common-law judges rendered about 20 years after its enactment. To enable the student to clearly understand this decision, it is desirable to specifically call his attention to the operation of the statute. Before the statute, if there was a feoffment to A. and his heirs, to the use of B. and his heirs, A. took a legal estate in fee simple, and B. was a cestui que use, whose rights were disregarded by the common-law courts, and who could seek his remedies only in chancery. After the statute the same limitation would secure, not only the use, but also the legal estate to B.; in other words, the use would at once draw to itself the legal estate, or, as it is technically expressed, the statute executed the use in B. In the decision above referred to, known as "Tyrrell's Case,"<sup>7</sup> the common-law judges held that a use could not be limited upon a use. It therefore fol-

other hereditaments to the use, confidence, or trust of any other person or persons or any body publick. by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, all and every such person and persons and bodies politick that have any such use, confidence or trust in fee simple or otherwise, or in remainder or in reverter, shall stand and be seized and adjudged in lawful seizin, estate and possession of and in the same lands, \* \* \* of and in such like estates as they had on use, trust or confidence of or in the same." Kerley, Hist. Eq. pp. 132, 133.

<sup>6</sup> Mr. Sugden, in his introduction to Gilbert on Uses (page 63), says of the judicial nullification of the statute: "This should operate as a lesson to the legislature not vainly to oppose the current of general opinion; for, although diverted for a time, it will regain its old channel."

<sup>7</sup> 2 Dyer, 155a, 1 White & T. Lead. Cas. Eq. 335.



lowed from this decision that when there was a limitation to A. and his heirs, to the use of B. and his heirs, to the use of C. (or in trust for C.) and his heirs, the statute had no effect beyond the use limited to B. It converted the use first declared into a legal estate, but in so doing its power was exhausted, and a second use or trust, declared upon or after the first, remained unaffected thereby. The court of chancery, however, following its former course of preserving to a grantee rights which were meant to be preserved by the grant, stepped in and supported, as trusts identical in character with the old uses, the trusts or uses which the law refused to recognize, and these are the trusts so familiar in later equity. The student is now able to appreciate Lord Hardwicke's remark: "A statute made upon great consideration, introduced in a solemn and pompous manner, by a strict construction, has had no other effect than to add at most three words to a conveyance."<sup>\*</sup>

It is not necessary to add to this brief sketch a history of the various steps by which trusts have obtained their present position in our jurisprudence. Enough has been said to render the definition of a trust intelligible, and it remains to point out the leading principles governing this class of property.

#### CLASSIFICATION OF TRUSTS.

**105. Trusts may be classified as follows:**

- (a) Trusts created by the intentional acts of the parties.**
  - (1) Express private trusts.**
  - (2) Public or charitable trusts.**
- (b) Trusts created by operation of law.**
  - (1) Resulting trusts.**
  - (2) Constructive trusts.**

The foregoing classification by Mr. Lewin<sup>\*</sup> not only calls attention to the very prominent distinction between the different kinds of

<sup>\*</sup> *Hopkins v. Hopkins*, 1 Atk. 591.

<sup>\*</sup> Lewin, *Trusts*, p. 18. Some writers use the term "implied trusts" to designate the trusts created by operation of law. Others apply the same term to a class of express private trusts where, owing to the ambiguous language

trusts as regards their creation, but it also coincides with an equally prominent distinction in the nature of trusts themselves. These four species of trusts will naturally yield to further analysis as each is separately considered. Our attention will first be directed to express private trusts.

#### EXPRESS PRIVATE TRUSTS.

**106. An express private trust is one created for the benefit of individuals or families, and designed for private convenience and support.<sup>10</sup>**

The distinction between a private and a public or charitable trust is that the former is created and intended for the convenience and support of private individuals or families, while the latter is created and intended for the general public good. The rules governing the two classes differ widely, and the distinctions will be pointed out when we consider public or charitable trusts.

#### SAME—PARTIES.

**107. The parties necessary to the creation of an express trust are:**

- (a) The settlor, or person creating the trust.
- (b) The trustee, or the person in whom the legal title is vested.
- (c) The cestui que trust, or person entitled to the beneficial interest.

#### SAME—THE SETTLOR.

**108. Whoever is competent to deal with the legal estate may, if he be so disposed, vest it in a trustee for the purpose of executing the settlor's intention.<sup>11</sup>**

employed by the parties, their intention<sup>1</sup> to create a trust is inferred or implied from the terms employed. The term "implied trusts" has therefore been designedly rejected as tending to confuse the student.

<sup>10</sup> Perry, Trusts, § 22.

<sup>11</sup> Lewin, Trusts, p. 21.

The creation of a trust is a modification of property in a particular form. All persons *sui juris* may impress a trust on property owned by them. A corporation may create a trust in land whenever it has the power to alienate it.<sup>12</sup> As to persons under disability, such as infants, married women, and lunatics, trusts created by them are on the same footing as absolute conveyances, and are voidable by them in the same manner and to the same extent as such conveyances would be.<sup>13</sup>

#### SAME—THE TRUSTEE.

**109. The trustee should be a person capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust, and domiciled within the jurisdiction of the court.<sup>14</sup>**

1. The sovereign may sustain the character of a trustee, so far as regards the capacity to take the estate and execute the trust; but the difficulty lies in the remedy by which the *cestui que trust* can enforce the performance of the trust.<sup>15</sup> Since neither the United States nor any of the states can be sued without their consent, the only way in which they could administer a trust is through the legislative power.<sup>16</sup>

2. Since the ancient doctrine that a trust rests on the foundation of personal confidence has evaporated, a corporation may now be a trustee, provided the trust is within the general scope of its corporate powers.<sup>17</sup> An unincorporated association cannot, however, act as trustee of a private trust, since it is incapable of taking title to the land.<sup>18</sup>

<sup>12</sup> *Mayor, etc., of Colchester v. Lowten*, 1 Ves. & B. 226; *State v. Bank of Maryland*, 6 Gill & J. 205; *Dana v. Bank of U. S.*, 5 Watts & S. 226.

<sup>13</sup> *Perry, Trusts*, §§ 32-35.

<sup>14</sup> *Lewin, Trusts*, p. 30.

<sup>15</sup> *Lewin, Trusts*, p. 30.

<sup>16</sup> This was done in the case of the Smithsonian Institute, a public trust. *Stat. U. S.* 1836, c. 252.

<sup>17</sup> *Attorney General v. St. John's Hospital*, 2 De Gex, J. & S. 621. In *re Howe*, 1 Paige, 214; *Story, J., Vidal v. Girard*, 2 How. 188-190. In recent years the organization of trust companies having for their object the administration of trust estates has become very common in this country.

<sup>18</sup> The rule is different with respect to public trusts. *Tucker v. Seaman's*

3. A married woman is legally capable of being a trustee; but, except in special cases, courts regard her appointment as undesirable, because of the influence her husband is supposed to wield over her.<sup>19</sup> For this reason it is also inadvisable to make an unmarried woman a trustee, since, if she should marry, the above disadvantages would at once arise.<sup>20</sup>

4. An infant is under still greater disabilities, having no legal capacity or discretion. All of his acts, beyond such as are merely ministerial, are voidable. He cannot be held guilty of a breach of trust. A case, therefore, is scarcely conceivable in which circumstances could warrant such an appointment.<sup>21</sup>

5. An alien cannot act as trustee of real property, except in those states where he is permitted to hold land to his own use.<sup>22</sup> There is no objection anywhere, however, to his appointment as trustee of personal property.

6. While an insolvent is not absolutely disqualified from being a trustee, and his insolvency has no effect on the trust estate,<sup>23</sup> his insolvency is unquestionably a good ground for his removal.<sup>24</sup>

7. Lastly, equity never wants a trustee; and, whenever a trust is valid in its inception, equity will not permit it to fail either because of the trustee's death or his refusal to act, but will itself provide a trustee.<sup>25</sup>

#### SAME—CESTUI QUE TRUST.

110. Under the maxim that equity follows the law, any one capable of taking the legal estate may, through the channel of trusts, be made the recipient of the equitable;<sup>26</sup>

*Ald Soc.*, 7 Metc. (Mass.) 188; *Winslow v. Cummings*, 3 Cush. 358. See post, 188.

<sup>19</sup> *Drummond v. Tracy*, 1 Johns. Eng. Ch. 608; *Still v. Ruby*, 35 Pa. St. 373.

<sup>20</sup> *In re Campbell's Trusts*, 31 Beav. 176.

<sup>21</sup> *Smith*, Prin. Eq. p. 26; *Perry, Trusts*, §§ 52-54.

<sup>22</sup> *Perry, Trusts*, § 53.

<sup>23</sup> *Harris v. Harris*, 29 Beav. 107; *Shryock v. Waggoner*, 28 Pa. St. 431.

<sup>24</sup> *In re Barker's Trusts*, 1 Ch. Div. 43; *In re Adams' Trust*, 12 Ch. Div. 634. See, also, post, 211.

<sup>25</sup> *Story, Eq.* § 976; *McCartee v. Orphan Asylum Soc.*, 9 Cow. (N. Y.) 437; *Bowditch v. Banuelos*, 1 Gray, 220; *Dodkin v. Brunt*, L. R. 6 Eq. 580.

<sup>26</sup> *Lewin, Trusts*, p. 44.

and, as a legal estate can be conveyed or devised only to a definite grantee or devisee, so the cestui que trust must likewise be certain and definite.

It is unnecessary to add anything to the black-letter text as to the classes of persons capable of becoming cestuis que trustent. It should be borne in mind, however, that no valid private trust can be created unless there is a certain and definite beneficiary. "If there is a single postulate of common law established by an unbroken line of decision, it is that a trust without a certain beneficiary who can claim its enforcement is void."<sup>27</sup> Thus, a trust for the benefit of "near relations" has been considered too indefinite to create a trust.<sup>28</sup> The cestui que trust need not, however, be described by name; any other designation or description by which he may be identified is sufficient.<sup>29</sup>

#### SAME—WHAT PROPERTY SUBJECT TO TRUST.

111. As a general rule, all property, whether real or personal, and whether legal or equitable, may be made the subject of a trust.<sup>30</sup>

All property which is assignable either at law or in equity, real or personal, may be transferred in trust, including choses in action,<sup>31</sup> growing crops,<sup>32</sup> patent rights,<sup>33</sup> etc. As to foreign lands, the rule is that they are governed by the law of the state or country where located, and therefore an express trust in foreign lands will not be enforced.<sup>34</sup>

#### SAME—CREATION OF TRUST.

112. At common law a trust could be declared by parol, but the statute of frauds,<sup>35</sup> requires trusts in real prop-

<sup>27</sup> Per Wright, J., in *Levy v. Levy*, 33 N. Y. 97, 107.

<sup>28</sup> *Sale v. Moore*, 1 Sim. 534.

<sup>29</sup> *Holmes v. Mead*, 52 N. Y. 332, 343.

<sup>30</sup> Lewin, *Trusts*, p. 47.

<sup>31</sup> *Row v. Dawson*, 1 Ves. Sr. 332.

<sup>32</sup> *Robinson v. Mauldin*, 11 Ala. 977; *McCarty v. Blevins*, 5 Yerg. 195.

<sup>33</sup> *Russell's Patent*, 2 De Gex & J. 130.

<sup>34</sup> Lewin, *Trusts*, p. 49.

<sup>35</sup> 29 Car. II. c. 3, § 7.

erty to be manifested by some writing, signed by the party declaring the trust, or by his will in writing.

Since the statute relates only to trusts in real estate, trusts in personal property may still be created by parol.<sup>36</sup> Chattels real are, however, within the statute, and a trust of them must be evidenced by writing, as in the case of freeholds.<sup>37</sup> With respect to trusts in real estate, the first point to be noticed is that the statute does not require more than that the trust shall be manifested and proved by writing. No formal writing, such as a deed, is required.<sup>38</sup> Again, the statute is satisfied by written evidence of a trust which may not necessarily have been originally declared in writing.<sup>39</sup> It is necessary, however, that in such cases the evidence should clearly be shown to relate to the subject of the alleged trust;<sup>40</sup> and not only the fact of the trust, but also the terms of it, must be supported by written evidence under the signature of the settlor.<sup>41</sup> In several of the states, the statute of frauds requires the trust to be "created or declared by an instrument in writing, signed by the party." The same construction has been placed on these words as on the original statute of frauds, and the same evidence is admissible to establish the trust.<sup>42</sup>

With respect to wills, statutes in all the states require them to be in writing, signed by the testator, and attested by witnesses. Hence, where a trust appears in a paper of a testamentary character, not designed to take effect during testator's lifetime, and to be am-

<sup>36</sup> *Gilman v. McArdle*, 99 N. Y. 451, 2 N. E. 464; *Chace v. Chapin*, 130 Mass. 128; *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659; *Crissman v. Crissman*, 23 Mich. 218; *Danser v. Warwick*, 33 N. J. Eq. 133; *Patterson v. Mills*, 69 Iowa, 755, 28 N. W. 53.

<sup>37</sup> *Forster v. Hale*, 3 Ves. 696.

<sup>38</sup> *Perry*, Trusts, § 82.

<sup>39</sup> *Forster v. Hale*, 3 Ves. 696; *Safford v. Rantoul*, 12 Pick. 233; *Whelan v. Whelan*, 3 Cow. 537.

<sup>40</sup> *Forster v. Hale*, 3 Ves. 696; *Arms v. Ashley*, 4 Pick. 71.

<sup>41</sup> *Smith v. Matthews*, 3 De Gex, F. & J. 139; *Steere v. Steere*, 5 Johns. Ch. 1; *Dyer's Appeal*, 107 Pa. St. 446.

<sup>42</sup> *Perry*, Trusts, § 81; *Urann v. Coates*, 109 Mass. 585; *Cook v. Barr*, 44 N. Y. 159; *McClellan v. McClellan*, 65 Me. 504.

bulatory until his death, the writing must be executed with all the formalities of a will, or the trust will be inoperative.<sup>43</sup>

Lastly, it should be noted that resulting and constructive trusts are not within the statute, and may be proved by parol.<sup>44</sup>

#### **SAME—WORDS ESSENTIAL TO CREATE TRUST.**

**113. Any language will suffice if it can be gathered therefrom that a trust was intended, provided that the person to be benefited, the property, and the way it is to be disposed of are clearly indicated.<sup>45</sup>**

The word "trust" is, of course, the proper word to use in creating a trust; but words which import confidence, direction, proviso, or condition, and even words of recommendation or request (at all events in a will), may be construed to evince an intention to create a trust, unless accompanied by other words which indicate an intention that the first taker should have a discretionary power over the subject, or that the donor did not intend the wish to be imperative.<sup>46</sup> The plainest case of a trust occurs where property is conveyed or devised to A. in trust for B. But the word "trust" need not be used. Thus, a devise of land to A., with a proviso that B. shall have a home and support thereon, is construed to impose a trust on A. to maintain B. on the land.<sup>47</sup> So, if A. devises land to B., "he paying testator's debts," the proviso or condition is construed to impose a trust on B. to pay those debts.<sup>48</sup> Again, if testator bequeaths or devises property to A., and states that he "requests" <sup>49</sup> or "has confidence" <sup>50</sup> or "wishes and desires" <sup>51</sup> that it be applied for the benefit of B., A.

<sup>43</sup> Lewin, Trusts, p. 59; Perry, Trusts, § 93.

<sup>44</sup> See post, 195.

<sup>45</sup> Knight v. Knight, 3 Beav. 148, 172.

<sup>46</sup> Howorth v. Dewell, 29 Beav. 18; Benson v. Whittam, 5 Sim. 22.

<sup>47</sup> Lyon v. Lyon, 65 N. Y. 339; Estate of Goodrich, 38 Wis. 492.

<sup>48</sup> Wright v. Wilkin, 2 Best & S. 232. See, also, Stanley v. Colt, 5 Wall. 119; Sohler v. Trinity Church, 109 Mass. 1.

<sup>49</sup> Knox v. Knox, 59 Wis. 172, 18 N. W. 155.

<sup>50</sup> Dresser v. Dresser, 46 Me. 48; Warner v. Bates, 98 Mass. 274.

<sup>51</sup> Cockrell v. Armstrong, 31 Ark. 580; Reid's Adm'r v. Blackstone, 14 Grat. 363.

will be regarded in equity as a mere trustee for B., since testator's words evince an intention that A. should not keep the property beneficially.

*Precatory Trusts.*

Trusts thus created by words of request, prayer, or recommendation are called "precatory trusts"; and it is always difficult to say whether such words do or do not create a trust enforceable in equity. In modern decisions the leaning of the courts is against the establishment of precatory trusts. Thus, where a gift was to testator's widow, to be "at her disposal in any way she might think best for the benefit of herself and family," it was held that the widow took absolutely. In this case Lord Justice James said: "In hearing case after case cited, I could not help feeling that the officious kindness of the court of chancery in interposing trusts where in many cases the father of the family never meant to create trusts must have been a very cruel kindness, indeed. I am satisfied that testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this court, and, under the pretense of benefiting the children, have taken the administration of the estate from the wife."<sup>52</sup> The modern rule is not to rely on the mere use of any particular words, but to look at them in the light of the whole will, and thus ascertain the true intention of the testator.<sup>53</sup>

**SAME—CONSIDERATION TO SUPPORT TRUST—VOLUNTARY SETTLEMENTS.**

114. Unlike a contract, a trust requires no consideration to sustain it; but, where the trust is purely voluntary, the question whether it will be enforced depends on whether it is perfectly created. If it is not perfectly created,—that is, if there is a mere intention of creating a trust, or a mere voluntary agreement to do so, and the

<sup>52</sup> *Lambe v. Eames*, 6 Ch. App. 597.

<sup>53</sup> *In re Adams and Kensington Vestry*, 27 Ch. Div. 394; *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164; *Foose v. Whitmore*, 82 N. Y. 405; *Phillips v. Phillips*, 112 N. Y. 197, 19 N. E. 411; *Elliott v. Elliott*, 117 Ind. 380, 20 N. E. 264; *Mills v. Newberry*, 112 Ill. 123; *Hess v. Singler*, 114 Mass. 56, 59.



settlor himself contemplates some further act for the purpose of giving it completion,—a voluntary trust will not be enforced or aided in equity.

Where there is a valuable consideration, and a trust is intended to be created, formalities are of minor importance; for equity regards the substance, and not the form, and, considering that as done which ought to be done, will carry into effect a trust, if value has been given, however rudely created.<sup>54</sup> Thus, a deed of trust, based on value, which omits the trustee's name, will be reformed, and a proper trustee appointed, and his name inserted.<sup>55</sup> The same principle applies to wills, where a consideration is implied.<sup>56</sup> For instance, where a testator directs a sale of his real estate, and a distribution of the proceeds among certain persons, but fails to appoint a trustee to make the sale and the distribution, the land will descend to the heir; but he will be regarded in equity as the trustee, and the trust will be enforced as against him.<sup>57</sup>

*Voluntary Settlements.*

But where the trust is voluntary, and not created by will, the form of the transaction becomes of the utmost importance. The question then comes to this: Has the donor created a perfect trust, or has he merely agreed or evinced an intention to create one? If the declaration of trust is perfect and complete, equity will enforce it, though there is no consideration, since a man may divest himself of his property rights by gift.<sup>58</sup> If, however, the trust is not thus

<sup>54</sup> Lewin, Trusts, p. 67; Underh. Eq. p. 40.

<sup>55</sup> Burnside v. Wayman, 49 Mo. 356.

<sup>56</sup> Lewin, Trusts, 130.

<sup>57</sup> Lewin, Trusts, 141.

<sup>58</sup> In *Richards v. Delbridge*, L. R. 18 Eq. 11, 13, Sir George Jessel, M. R., said: "The principle is a very simple one. A man may transfer his property without valuable consideration in one of two ways: He may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its legal ownership, and declare that he will hold it from that time forward on trust

perfected and complete, if there is a mere voluntary agreement, or an unfulfilled intention to create a trust, then equity will not enforce it, for an intention to make a gift is nudum pactum, and of no binding force either at law or in equity.<sup>59</sup> The question whether or not a voluntary trust has been perfectly created will, perhaps, be more easily comprehended if we consider, first, those cases where the donor proposes to convert himself into a trustee, and, secondly, those cases where he proposes to make a stranger trustee.

1. If the settlor proposes to convert himself into a trustee, then the trust is perfectly created, and will be enforced, so soon as the settlor has executed an express direction of trust, intended to be final and binding on him; and in this case it is immaterial whether the nature of the property is legal or equitable, or whether it be capable or incapable of transfer.<sup>60</sup> Thus, where one deposits money in bank

for the other person." In *Estate of Webb*, 49 Cal. 541, 545, Crockett, J., said: "In such cases the point to be determined is whether the trust has been perfectly created,—that is to say, whether the title has passed and the trust been declared; and, the trust being executed, nothing remains for the court but to enforce it." See, also, *Milroy v. Lord*, 4 De Gex, F. & J. 264, 274.

<sup>59</sup> See cases cited in note 58. In *Martin v. Funk*, 75 N. Y. 134, 137, Church, C. J., says: "It is clear that a person sui juris, acting freely and with full knowledge, has the power to make a voluntary gift of the whole or any part of his property, while it is well settled that a mere intention, whether expressed or not, is not sufficient, and a voluntary promise to make a gift is nudum pactum, and of no binding force. The act constituting the transfer must be consummated, and not remain incomplete, or not in mere intention; and this is the rule, whether the gift is by delivery only, or by the creation of a trust in a third person, or in creating the donor himself a trustee." In *Stone v. Hackett*, 12 Gray, 227, it was said: "It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such a contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and cestui que trust is deemed to be established, and the equitable rights and interests, arising out of the conveyance, though made without consideration, will be enforced in chancery." See, also, on the general subject, *Allen v. Withrow*, 110 U. S. 130, 3 Sup. Ct. 517; *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940; *Keyes v. Carleton*, 141 Mass. 49, 6 N. E. 524; *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659.

<sup>60</sup> *Ex parte Pyc*, 18 Ves. 140; *Crawford's Appeal*, 61 Pa. St. 52; *Dickerson's Appeal*, 115 Pa. St. 198, 8 Atl. 64.

in trust for another, and the account is so entered in the books of the bank, and in the pass book delivered to the depositor, a perfect trust is created, which will be enforced, though the cestui que trust was ignorant of the deposit until after the depositor's death, who retained possession of the pass book during his lifetime.<sup>61</sup>

Care must, however, be taken to distinguish this class of cases from those where the donor attempts to make an outright gift of property by transferring the legal title directly to the donee, and the gift proves to be ineffective, because all acts requisite to the passing of title have not been performed by the donor, such as the execution and delivery of a valid deed in case of real property, and the execution of a valid assignment and delivery of possession in the case of personal property. "It is established as unquestionable law that a court of equity cannot, by its authority, render that gift perfect which the donor has left imperfect, and cannot convert an imperfect gift into a declaration of trust, merely on account of that imperfection."<sup>62</sup> Thus, where an intended gift of bonds proves ineffectual because the donor retains possession for the purpose of collecting the interest during his lifetime, the transaction cannot be sustained as a declaration of trust, though the intention to make the gift is clearly manifested.<sup>63</sup> So, where the payee of promissory notes states to his nephew, "I will give you these notes," and indorses them, "I bequeath,—pay the within contents to [the nephew] or his order, at my death," but does not deliver the possession, and retains them in his custody until his death, the nephew obtains no right in the notes.<sup>64</sup> In *Richards v. Delbridge*,<sup>65</sup> Jessel, M. R., said: "The true distinction appears to me to be plain and beyond dispute. For a man to make himself a trustee, there must be an expression of inten-

<sup>61</sup> *Martin v. Funk*, 75 N. Y. 134. For similar cases of trusts in savings bank deposits, see *Minor v. Rogers*, 40 Conn. 512; *Ray v. Simmons*, 11 R. 1. 266; *Willis v. Smyth*, 91 N. Y. 297. A contrary rule seems to prevail in Massachusetts as to such deposits. *Brabrook v. Bank*, 104 Mass. 228; *Clark v. Clark*, 108 Mass. 522.

<sup>62</sup> *Young v. Young*, 80 N. Y. 422, 437, per Rapallo, J. See, to same effect, *Jones v. Lock*, 1 Ch. App. 25; *Milroy v. Lord*, 4 De Gex, F. & J. 264; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940.

<sup>63</sup> *Young v. Young*, 80 N. Y. 422.

<sup>64</sup> *Mitchell v. Smith*, 4 De Gex, J. & S. 422.

<sup>65</sup> L. R. 18 Eq. 11, 13.

tion to become a trustee; whereas words of present gift show an intention to give over property to another, and not to retain it in the donor's hands for any purpose, fiduciary or otherwise."

2. Turning now to the cases where the donor proposes to make a stranger the trustee, our inquiry will again be facilitated if we consider, first, those cases where the donor has the legal title to the property, and, second, those where he has only an equitable interest therein.

First. If the subject of the trust is the legal interest, and assignable at law, such as land or chattels, money or choses in action, the trust is not perfectly created unless the legal interest be actually vested in the trustee. It is not enough that the settlor executed a deed affecting to pass it, and that he believed nothing to be wanting to give effect to the transaction. The intention of divesting himself of the legal property must in fact be executed, or the court will not recognize the trust.<sup>66</sup> In the comparatively unimportant class of cases where the legal title is not assignable, the rule is that if the settlor makes all the assignment of the property in his power, and perfects the transaction as far as the law permits, equity will recognize the act, and support the validity of the trust.<sup>67</sup>

Second. If the subject of the trust be an equitable interest, then it is not necessary that the legal title be assigned to the trustee, but it is sufficient if the equitable interest merely is so assigned.<sup>68</sup>

#### **SAME—THE OBJECT PROPOSED BY THE TRUST.**

**115. Equity will not permit the system of trusts to be directed to any object that contravenes the policy of the**

<sup>66</sup> Lewin, *Trusts*, p. 70; *Ellison v. Ellison*, 6 Ves. 662; *Garrard v. Lauderdale*, 2 Russ. & M. 452.

<sup>67</sup> *Kekewich v. Manning*, 1 De Gex, M. & G. 187, 188. In this case, Lord Justice Knight Bruce observed: "It is upon legal and equitable principles, we apprehend, clear, that a person *sui juris*, acting truly and fairly and with sufficient knowledge, ought to have and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or in reversion, or howsoever circumstanced."

<sup>68</sup> Lewin, *Trusts*, p. 72; *Sloane v. Cadogan*, Sugd. Vend. Append.; *Kekewich v. Manning*, 1 De Gex, M. & G. 188.

law;<sup>69</sup> and, where a trust is created for an unlawful or fraudulent purpose, equity will neither enforce the trust in favor of the parties to be benefited nor will it assist the settlor to recover the estate.<sup>70</sup>

In the foregoing pages we have considered what parties, what language, and what consideration is necessary to the creation of an express private trust, and also what property may be impressed with such a trust. One further question remains to be considered before we can be sure that the trust is valid, and that is, is the object of the trust legal or illegal? For equity will not sustain a trust that contravenes the policy of the law. Thus, a settlement of property in trust for illegitimate children to be thereafter born is void, since this tends to immorality.<sup>71</sup> So, where the entire beneficial ownership of property is vested in a cestui que trust, a proviso that it shall not be alienated or subjected to the claims of his creditors is void; but a trust of the income of property, to cease on the insolvency or bankruptcy of the cestui que trust, is valid.<sup>72</sup> At

<sup>69</sup> Lewin, *Trusts*, p. 94; *Attorney General v. Pearson*, 3 Mer. 399; *Lemmond v. Peoples*, 6 Ired. Eq. (N. C.) 137.

<sup>70</sup> *Cottington v. Fletcher*, 2 Atk. 155; *Muckleston v. Brown*, 6 Ves. 68; *Ford v. Lewis*, 10 B. Mon. 127. The authorities are not uniform as to whether or not equity will interfere where the object of the trust is illegal and fraudulent. Thus, in *Lemmond v. Peoples*, 6 Ired. Eq. (N. C.) 137, a conveyance of slaves in trust to emancipate them was held a violation of the laws of the state, and a trust was therefore declared to result in favor of the settlor. In *Owens v. Owens*, 23 N. J. Eq. 60, land had been conveyed in trust to reconvey to the settlor or any person whom she should appoint. The object of the conveyance was to defraud the settlor's creditors. On a bill by the settlor to compel a reconveyance of the legal estate by the trustee, it was held that the maxim "*in pari delicto*," etc., did not apply, because the equitable estate was actually vested in the settlor, and the case was therefore on the same footing as if the legal estate had already been reconveyed. It would seem that in all such cases the maxim "*He who comes into equity must come with clean hands*" ought to apply. See post, 192.

<sup>71</sup> *Medworth v. Pope*, 27 Beav. 71; *Occleston v. Fullalove*, 9 Ch. App. 147.

<sup>72</sup> *Snowdon v. Dales*, 6 Sim. 524; *Green v. Spicer*, 1 Russ. & M. 395; *Blackstone Bank v. Davis*, 21 Pick. 43; *Sparhawk v. Cloon*, 125 Mass. 263; *Bramhall v. Ferris*, 14 N. Y. 41; *Nichols v. Eaton*, 91 U. S. 716; *Shankland's Appeal*, 47 Pa. St. 113; *Keyser's Appeal*, 57 Pa. St. 236; *In re Barker's Estate*.

common law it was not permissible for the holder of the fee-simple title to fetter the alienation of the estate for a longer period than a life or lives in being at the date of the conveyance, and for 21 years and 9 months thereafter. This rule, which is known as the rule against perpetuities, applies with equal force to the limitation of trust estates.<sup>73</sup> Independent of statute, the same rule applies to accumulations of the rents and profits of an estate; that is, the settlor may direct them to be accumulated during a period limited by a life or lives in being and 21 years and a fraction thereafter. It was found, however, that, under this rule, accumulations might continue for 75 or 100 years, and thus create enormous fortunes.<sup>74</sup> A statute was therefore enacted in the reign of George III. (St. 39 & 40 Geo. III. c. 98) commonly known as the "Thellusson Act," which still further restricted the period of accumulation by limiting it (1) to the life of the settlor; or (2) to twenty-one years from his death; or (3) during the minority of any person or persons living at his death; or (4) during the minority of any person or persons who would be entitled, if of full age, to take the rents and profits directed to be accumulated.

*Legislation in New York and Other States.*

In conclusion it should be observed that statutes in many of the states have greatly restricted the objects for which trusts may be created. Thus, statutes in New York,<sup>75</sup> substantially re-enacted in

159 Pa. St. 518, 28 Atl. 305, 368. See, however, *Roberts v. Stevens*, 84 Me. 325, 24 Atl. 873.

<sup>73</sup> *Duke of Norfolk's Case*, 3 Ch. Cas. 20, 28, 35; *Schettler v. Smith*, 41 N. Y. 329; *Lovering v. Worthington*, 106 Mass. 86; *Barnum v. Barnum*, 26 Md. 119.

<sup>74</sup> *Thellusson v. Woodford*, 4 Ves. 227, 11 Ves. 112. In this case testator directed his entire estate, real and personal, to be converted into one common fund, to be vested in trustees in fee. The rents and profits were to accumulate during the lives of all testator's sons and grandsons born in testator's lifetime, or living at his death, or in ventre sa mere, and thus be added to the principal. The property, which amounted to about £500,000, was thus tied up from alienation and from enjoyment during three generations, with the expectation that at the end of that period it would amount to an enormous fortune.

<sup>75</sup> 1 Rev. St. pt. 2, tit. 2, c. 1, art. 2, § 55.

Michigan,<sup>76</sup> Wisconsin,<sup>77</sup> Minnesota,<sup>78</sup> California,<sup>79</sup> and the Dakotas,<sup>80</sup> prohibit the creation of express trusts, except for the following purposes: (1) To sell land for the benefit of creditors; (2) to sell, mortgage, or lease land for the benefit of legatees, or for the purpose of satisfying any charge thereon; (3) to receive the rents and profits of lands, and apply them to the use of any person during the life of such person, or for any shorter term, subject to the rules prescribed for the creation of legal estates; (4) to receive the rents and profits of lands, and to accumulate the same for the benefit of minors then in being, and during their minority. Where a trust is created for any other purpose, no estate vests in the trustee; but a trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust.<sup>81</sup> The statutes, however, apply only to real estate, and trusts in personal property are not affected thereby.<sup>82</sup>

#### SAME—INTERPRETATION OF TRUSTS.

116. For the purposes of interpretation, express private trusts are divided into:

- (a) Executed trusts.
- (b) Executory trusts.

117. A trust is said to be executed when its terms are completely and perfectly declared by the instrument creating it, and no further act is required to give it effect.

118. A trust is said to be executory when the scheme is imperfectly created at the outset, and the settlor has merely denoted his ultimate object, imposing on the trustee or on the court the duty of effectuating it in the most convenient way.

<sup>76</sup> 2 How. Ann. St. 1883, c. 214, § 11.

<sup>77</sup> 1 Sanb. & B. Ann. St. 1889, § 2081.

<sup>78</sup> Gen. St. 1878, p. 553, § 11.

<sup>79</sup> Civ. Code, § 857.

<sup>80</sup> Civ. Code 1880, p. 243, § 282.

<sup>81</sup> 1 Rev. St. N. Y. pt. 2, c. 1, § 58.

<sup>82</sup> *Gilman v. McArdle*, 99 N. Y. 451, 2 N. E. 464.

119. In executed trusts, a court of equity will construe technical terms in the same manner as a court of law would construe them when applied to legal estates. In executory trusts, a court of equity does not consider itself bound to construe technical expressions with the same legal strictness; and if, from the nature of the instrument or from the circumstances of the case, a contrary intention of the settlor of the trust can be ascertained, the court will, in supplying or directing the further acts necessary for the execution of the trusts, mold them according to such intention.

"All trusts," observed Lord St. Leonards, "are in a sense executory, because there is always something to be done. But that is not the sense which a court of equity puts upon the term 'executory trust.' A court of equity, in considering an executory trust, as distinguished from an executed trust, distinguishes the two in this manner: Has the testator been what is called, and very properly called, his own conveyancer? Or has he, on the other hand, left it to the court to make out from general expressions what his intention is? If he has so defined that intention that you have nothing to do but to take the limitations he has given you, and to convert them into legal estates, then the trust is executed, but otherwise it is executory."<sup>83</sup> The student will observe that the distinction between an executed and an executory trust approximates very closely to the distinction between a perfectly created voluntary trust, which a court of equity will enforce, and an imperfectly created voluntary trust, which it will refuse to enforce.<sup>84</sup>

The distinction between the interpretation of executed and executory trusts is said to be traceable to a desire to obviate the consequences of the extremely technical doctrine known as the "Rule in Shelley's Case."<sup>85</sup> Cases arising under marriage settlements offer very good illustrations of the distinction in the interpretation of executed and executory trusts. An actual conveyance to trustees in trust for the intended husband for life, with remainder in trust

<sup>83</sup> *Egerton v. Brownlow*, 4 H. L. Cas. 3, 10.

<sup>84</sup> *Ante*, 176.

<sup>85</sup> *West v. Holmesdale*, L. R. 4 H. L. 545, 553, per Lord Hatherly.



for the heirs of his body, is an executed trust; and the technical terms therein will be given their technical meaning, with the result that, under the rule in *Shelley's Case*, the intended husband takes, not an equitable life estate, but an equitable fee tail.<sup>86</sup> When, however, there is a mere covenant in marriage articles to settle an estate in trust for the intended husband for life, with remainder in trust for the heirs of his body, a court of equity, regarding that as an executory trust, will not construe it strictly, but will order the settlement to be prepared, giving the husband a life estate only, with remainder to his first and other sons in tail male, on the ground that that was the obvious intention of the parties.<sup>87</sup> The same principles of construction apply to wills, except that in executory trusts created by marriage articles equity will presume an intention to provide for the offspring of the marriage, while in executory trusts created by wills there must be some affirmative showing that the rule in *Shelley's Case* was not intended to apply.<sup>88</sup> The abrogation of the rule in *Shelley's Case* in many of the states renders the application of these principles rather infrequent with us.

#### SAME—NATURE OF CESTUI QUE TRUST'S ESTATE.

120. To determine the nature of the cestui que trust's estate, express private trusts are classified as:

- (a) Passive or simple trusts.
- (b) Active or special trusts.

#### SAME—PASSIVE TRUSTS.

121. A passive or simple trust is one in which the property is vested in a trustee to whose office no duties were

<sup>86</sup> *Wright v. Pearson*, 1 Eden, 119; *Austen v. Taylor*, Id. 361; *Cushing v. Blake*, 30 N. J. Eq. 689; *Tillinghast v. Coggeshall*, 7 R. I. 385; *Carroll v. Renich*, 7 Smedes & M. 798.

<sup>87</sup> *Trevor v. Trevor*, 1 P. Wms. 622; *Streatfield v. Streatfield*, Cas. t. Talb. 176.

<sup>88</sup> *Glenorchy v. Bosville*, Cas. t. Talb. 5, 1 White & T. Lead. Cas. Eq. 1; *Sweetapple v. Bindon*, 2 Vern. 536; *Papillon v. Voice*, 2 P. Wms. 471; *Wood v. Burnham*, 6 Palge, 514; *Tallman v. Wood*, 26 Wend. 9; *In re Angell*, 13 R. I. 630.

originally attached, or, by the course of events, no duties are any longer attached. In such trusts the cestui que trust is considered in equity as the absolute owner, and therefore he is always entitled to put an end to the trust by calling on the trustee to convey to him the legal estate.

An example of a passive or a simple trust is a conveyance of property to A. and his heirs in trust for B. and his heirs, for A. has no duties to perform. So, where property is conveyed to A. and his heirs in trust to collect the rents and profits, and pay them over to B. during his lifetime, and on his death in trust for his eldest son absolutely, the trust is active or special during B.'s lifetime, but on his death it becomes a passive or simple trust, for B.'s son is then in equity regarded as the absolute owner.

In the case of passive trusts, equity regards the cestui que trust as the owner of the property, and will compel the trustee to execute such conveyances of the legal estate as the cestui que trust may direct.<sup>89</sup> He is also entitled to the possession of the real estate, and to the rents and profits thereof.<sup>90</sup>

In many of the states, passive or simple trusts in real estate have been abolished by statutes, and the entire estate, legal and equitable, vests in the cestui que trust by force of the statute.<sup>91</sup> Passive trusts in personal property are not, however, uncommon; as where money is deposited in bank by A. in trust for B.<sup>92</sup>

#### SAME—ACTIVE OR SPECIAL TRUSTS.

**122. An active or special trust is one in which the trustee is charged with the execution of some purpose pointed out by the settlor, calling for active exertion by the trust-**

<sup>89</sup> Lewin, Trusts, p. 684.

<sup>90</sup> *Brown v. How*, Barnard. Ch. 354; *Attorney General v. Gore*, Id. 150.

<sup>91</sup> Such statutes exist in New York, Michigan, Wisconsin, Minnesota, California, and the Dakotas. See, as to construction of these statutes generally, *Farmers' Nat. Bank v. Moran*, 30 Minn. 165, 14 N. W. 805; *Sullivan v. Bruhl*, 66 Wis. 472, 29 N. W. 211; *Syracuse Sav. Bank v. Holden*, 105 N. Y. 415, 11 N. E. 950; *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805.

<sup>92</sup> See ante, 177.

tee in the business and administration of the trust. In such a trust the cestui que trust possesses only the right to enforce in equity the specific execution of the settlor's intention to the extent of that cestui que trust's particular interest.<sup>93</sup>

Active or special trusts may be created for any purpose not prohibited by law.<sup>94</sup> Generally, the trustee is entitled to the possession, control, and management of the trust property, and sometimes to the right to sell it.<sup>95</sup> As a general rule, the cestui que trust has no estate in the property, but merely the right to compel the execution of the settlor's intention. One of the most common forms of active trusts is a voluntary assignment by a failing debtor to a trustee or assignee in trust for the payment of the assignor's creditors. Another form quite frequent in some of the states is the "deed of trust," which takes the place of a real-estate mortgage. The land, which is designed to stand as security for the debt, is conveyed by the debtor to a trustee, who is directed to sell the property on default of payment by the grantor, and out of the proceeds to pay the debt, and account to the grantor for the surplus. Such deeds do not differ materially from mortgages containing a power of sale, and they are usually considered and treated as mortgages.<sup>96</sup>

#### PUBLIC OR CHARITABLE TRUSTS.

123. A charitable trust has been defined to be a "gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons,—either by bring-

<sup>93</sup> Lewin, *Trusts*, p. 689.

<sup>94</sup> In many of the states the purposes for which active trusts may be created are greatly limited by statute. But trusts not within the statute, if lawful in other respects, may be sustained as powers in trust. See ante, 181.

<sup>95</sup> 2 Pom. Eq. Jur. § 991.

<sup>96</sup> *Webb v. Hoselton*, 4 Neb. 308; *Austin v. Sprague Manuf'g Co.*, 14 R. I. 464; *Hoffman v. Macall*, 5 Ohio St. 124; *Wisconsin Cent. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94, 36 N. W. 837. In some of the states, however, it is held that a trust deed differs from a mortgage in that it conveys the legal title, while the mortgage does not. *Partridge v. Shepard*, 71 Cal. 470, 12 Pac. 480; *Soutter v. Miller*, 15 Fla. 625.

ing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government."<sup>77</sup>

The objects which are included within the term "charitable" were enumerated by St. 43 Eliz. c. 4, as follows: "The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners; schools of learning and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; the education and preferment of orphans; the relief, stock, or maintenance of houses of correction; the marriage of poor maids; the supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; the aid or care of any poor inhabitants concerning payment of fifteens, setting out soldiers, or other taxes." While it is now settled that this statute did not originate the system of charitable trusts, and that it is merely declaratory of the common law,<sup>78</sup> the term "charity," in the sense in which it is used in courts of equity, includes only such bequests as are within the letter and spirit of this enumeration.<sup>79</sup> The tendency has been to give these words a very liberal interpretation, and thus they cover a very wide range of objects. The relief of aged, impotent, and poor people is one of the objects mentioned in the statute of Elizabeth, and hence gifts in aid or support of the poor, widows, orphans,

<sup>77</sup> Per Justice Gray in *Jackson v. Phillips*, 14 Allen, 556.

<sup>78</sup> The researches of the English record commissioners have proved that a large number of cases were brought in the court of chancery before the enactment of the statute, and that indefinite charities were generally sustained. At one time an opinion prevailed in the United States that the statute originated the equitable jurisdiction. *Baptist Ass'n v. Hart's Ex'rs*, 4 Wheat. 1; *Gallego's Ex'rs v. Attorney General*, 3 Leigh, 450. But this opinion has been abandoned even by the courts that announced it. *Vidal v. Girard's Ex'rs*, 2 How. 127, 155, 194, 196; *Protestant Episcopal E. Soc. v. Churchman*, 80 Va. 718; *Trustees v. Guthrie* (1889) 86 Va. 125, 10 S. E. 318.

<sup>79</sup> *Morice v. Bishop of Durham*, 9 Ves. 399, 405; *Kendall v. Granger*, 5 Beav. 300, 302.

etc., are generally upheld as charitable.<sup>100</sup> Gifts for schools of learning are within the express language of the statute, and all gifts for educational purposes are therefore sustained as charitable.<sup>101</sup> Gifts for advancement of religion are by analogy held to be within the statute,<sup>102</sup> and so are gifts for public and general purposes.<sup>103</sup>

*Distinction between Private and Charitable Trusts.*

The distinction between private and charitable trusts arises out of the principle that, whenever a valid charitable trust appears, a court of equity will always treat it with favor. Thus, we have seen that in a private trust the beneficiary must always be an ascertained person or persons, but it is almost of the essence of a charitable trust that the beneficiaries be an indefinite class of persons; as the poor of a certain city. So, the trustee in a private trust must be an ascertained and described person, but equity will sustain a charitable trust, though no trustee has been appointed.<sup>104</sup> Again, charitable trusts are not within the rule against perpetuities, but may continue forever.<sup>105</sup> Again, the objects and purposes of a charitable trust need not be clearly defined by the settlor. If an abso-

<sup>100</sup> *Powell v. Attorney General*, 3 Mer. 48; *Sohler v. Burr*, 127 Mass. 221; *Goodell v. Union Ass'n of Children's Home*, 29 N. J. Eq. 32; *Dascomb v. Marston*, 80 Me. 223, 13 Atl. 888; *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, and 17 N. E. 491.

<sup>101</sup> *In re Latymer's Charity*, L. R. 7 Eq. 353; *Second Religious Soc. v. Harriman*, 125 Mass. 321; *Piper v. Moulton*, 72 Me. 155; *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, and 50 N. W. 1103; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336.

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<sup>102</sup> *Gass v. Wilhite*, 2 Dana (Ky.) 170; *Morville v. Fowle*, 144 Mass. 109, 10 N. E. 766; *Kinney v. Kinney*, 86 Ky. 610, 6 S. W. 593; *Andrews v. Andrews*, 110 Ill. 223. A devise to an infidel society for the purpose of building a hall for the free discussion of religion, politics, etc., is not a valid charitable gift. *Zelzweiss v. James*, 63 Pa. St. 465.

<sup>103</sup> *Jones v. Williams*, Amb. 651; *Nightingale v. Goulbourn*, 2 Phill. Ch. 594; *Newland v. Attorney General*, 3 Mer. 684.

<sup>104</sup> *Mills v. Farmer*, 1 Mer. 55, 96; *Pocock v. Attorney General*, 3 Ch. Div. 342; *Russell v. Allen*, 107 U. S. 167, 2 Sup. Ct. 327; *In re Schouler*, 134 Mass. 426; *Brown v. Pancoast*, 34 N. J. Eq. 324.

<sup>105</sup> *Attorney General v. Duke of Northumberland*, 7 Ch. Div. 745; *Gillam v. Taylor*, L. R. 16 Eq. 581; *Isaac v. Defriez*, Amb. 595; *Andrews v. Andrews*, 110 Ill. 230; *City of Richmond v. Davis*, 103 Ind. 449, 3 N. E. 130; *Webster v. Morris*, 66 Wis. 366, 28 N. W. 353.

lute intention to make a gift for a charitable purpose clearly appears, but the mode by which it is to be carried into effect has been left uncertain, a court of equity will supply the defect, and enforce the charity. For instance, if a man bequeaths a sum of money to such charitable uses as he shall direct by a codicil annexed to his will, and dies without making such a codicil, the court will devote the gift to such charitable purposes as it thinks fit.<sup>106</sup> But such assistance will only be given where the charitable intention is definite and general.<sup>107</sup>

The most striking distinction between the two classes of trusts appears in the doctrine of cy-pres, which was thus expressed by Lord Eldon: "If a testator has manifested a general intention to give to a charity, the failure of the particular mode in which the charity is to be executed shall not destroy the charity; but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished."<sup>108</sup> One of the most striking illustrations of this doctrine appears in the case of *Attorney General v. Ironmongers' Co.*<sup>109</sup> There property had been bequeathed in trust to apply one-half the income for "the redemption of British slaves in Barbary or in Turkey," and the other one-half to other specified charitable purposes. In the course of time, it happened that one-half the income remained unused, because there were no longer any British slaves in Barbary or in Turkey to redeem, and the court of chancery directed this undisposed of one-half to be applied to the other charitable purposes named in the will, thus carrying out the original purposes of testator as nearly as possible. The same principle was applied in a celebrated case in our own country.<sup>110</sup> Property had been bequeathed to trustees to apply the income to the maintenance of publications having for their object the creation of a public sentiment that would put an end to negro slavery in the United States. Afterwards negro slavery was abolished, and it was held that the income should be applied to the education of the

<sup>106</sup> *Attorney General v. Syderfin*, 1 Vern. 224.

<sup>107</sup> *Leavers v. Clayton*, 8 Ch. Div. 584; *Aston v. Wood*, L. R. 6 Eq. 419.

<sup>108</sup> *Moggridge v. Thackwell*, 7 Ves. 56, 60.

<sup>109</sup> 2 Beav. 313.

<sup>110</sup> *Jackson v. Phillips*, 14 Allen, 530.

freed slaves, as being more nearly in consonance with testator's general intention than to treat the trust as at an end, and turn over the property to the residuary legatees named in the will.

*Charitable Trusts in the United States.*

This brings us to the question, how far do the peculiar doctrines of the English court of chancery with respect to charitable trusts prevail in the United States? The general system has been adopted in Massachusetts,<sup>111</sup> Kentucky,<sup>112</sup> and Rhode Island.<sup>113</sup> The federal courts, also, accept the English system, unless the question arises in a state where it has been wholly or partially rejected.<sup>114</sup> In other states the English system prevails in a limited and restricted form,—to the extent, at least, that the beneficiaries, and sometimes the trustees and the objects, are permitted to be uncertain.<sup>115</sup> In others, again, the entire system has been rejected, root and branch, and no distinction is made in favor of charitable trusts as compared with private trusts.<sup>116</sup>

<sup>111</sup> See cases heretofore cited; *Kent v. Dunham*, 142 Mass. 216, 7 N. E. 730; *Minot v. Baker*, 147 Mass. 348, 17 N. E. 839; *Stratton v. Physio-Medical College*, 149 Mass. 508, 21 N. E. 874; *Weeks v. Hobson*, 150 Mass. 377, 23 N. E. 215.

<sup>112</sup> *Peynado v. Peynado*, 82 Ky. 5; *Kinney v. Kinney's Ex'r*, 86 Ky. 610, 6 S. W. 593; *Moore v. Moore*, 4 Dana, 354.

<sup>113</sup> *Pell v. Mercer*, 14 R. I. 412; *Peckham v. Newton*, 15 R. I. 321, 4 Atl. 758.

<sup>114</sup> *Ould v. Washington Hospital*, 95 U. S. 303; *Mormon Church v. U. S.*, 136 U. S. 1, 10 Sup. Ct. 792.

<sup>115</sup> *Hunt v. Fowler*, 121 Ill. 269, 276, 12 N. E. 331, and 17 N. E. 491; *Colt v. Comstock*, 51 Conn. 352; *Burke v. Roper*, 79 Ala. 138; *George v. Braddock*, 45 N. J. Eq. 757, 18 Atl. 881; *Howe v. Wilson*, 91 Mo. 45, 3 S. W. 390; *Jones v. Renshaw*, 130 Pa. St. 327, 18 Atl. 651; *Seda v. Huole*, 75 Iowa, 429, 39 N. W. 685; *Estate of Hinckley*, 58 Cal. 457.

<sup>116</sup> *Dashiell v. Attorney General*, 5 Har. & J. (Md.) 392; *Eutaw Place Baptist Church v. Shively*, 67 Md. 493, 10 Atl. 244; *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. 305; *Ruth v. Oberbrunner*, 40 Wis. 238; *Webster v. Morris*, 66 Wis. 366, 28 N. W. 353; *Methodist Episcopal Church v. Clark*, 41 Mich. 730, 3 N. W. 207; *Little v. Willford*, 31 Minn. 173, 17 N. W. 282; *Atwater v. Russell*, 49 Minn. 22, 51 N. W. 624. In all these states, except Maryland, it is held that charitable trusts are abolished because the statutes heretofore cited prohibit all trusts except those enumerated. The supreme court of California, however, under statutes substantially similar, nevertheless sustains indefinite charitable trusts. *Estate of Hinckley*, 58 Cal. 457. Until quite recently, charitable trusts were not recognized in Virginia. *Gallego's Ex'rs v. Attor-*

**RESULTING TRUSTS.**

124. When the legal title to property is conveyed or disposed of, but the terms of the conveyance or disposition, or the accompanying facts and circumstances, show that the beneficial interest is not intended to go with the legal title, a trust will result by operation of law in favor of the person for whom the beneficial interest is intended, though no trust is expressly declared in his favor.<sup>117</sup>

The main distinction between express and resulting trusts is this: In an express trust an intention to create a trust is always expressed or declared. In a resulting trust the intention is not expressed, but is inferred by operation of law from the terms of the conveyance or will, or from the accompanying facts and circumstances.

**SAME—CLASSIFICATION.**

125. There are two leading classes of resulting trusts:

- (a) Where an owner parts with the legal title, but an intention to retain the equitable interest is presumed.
- (b) Where property is purchased in the name of a third person, but equity presumes that the person paying the consideration intended to acquire the equitable interest.

**SAME—PARTING WITH LEGAL AND RETAINING EQUITABLE INTEREST.**

126. Wherever, upon a conveyance, devise, or bequest, it appears that the grantee, devisee, or legatee was intended to take the legal estate merely, the equitable inter-

ney General, 3 Leigh, 450; *Kain v. Gibboney*, 101 U. S. 362. But now, by force of recent decisions, indefinite charitable trusts will be upheld. *Protestant Episcopal E. Soc. v. Churchman*, 80 Va. 718; *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. 318.

<sup>117</sup> 2 Pom. Eq. Jur. § 1031; 1 Beach, Eq. Jur. § 213.



est, or so much as remains undisposed of, will result, if arising out of the settlor's realty, to himself or his heirs, and, if out of the personal estate, to himself or his executors.

The important question in this class of resulting trusts is, on what grounds will a court of equity hold that a settlor or testator did not part with the equitable interest? It should be observed, in the first place, that this class of resulting trusts arises only in cases of gifts or voluntary conveyances; for, wherever a consideration is paid by the immediate transferee, the presumption that a trust was intended to result in favor of the settlor is at once rebutted.<sup>118</sup>

*Where Intention is Express.*

Sometimes an intention not to benefit the grantee, devisee, or legatee is actually expressed in the instrument which transfers the legal estate. Thus, where a bequest is made to a person "upon trust," and no trust is declared,<sup>119</sup> or the trusts declared are too vague to be executed,<sup>120</sup> or fail by lapse,<sup>121</sup> the trustee can have no pretense for claiming the beneficial ownership, the whole property being clearly impressed with a trust. In such cases, therefore, the trust will result to the settlor or his representatives, the heir as to realty, and the next of kin as to personalty. Cases where a settlor has attempted to create an illegal express trust present some difficulty. As a general rule, however, the maxim applies, "He who comes into equity must come with clean hands." If a person knowingly attempts to contravene the law, and for that purpose conveys his property to a trustee, that law which he has attempted to outrage will give him no assistance to recover his property by way of resulting

<sup>118</sup> *Salisbury v. Clarke*, 61 Vt. 453, 17 Atl. 135; *Hogan v. Jaques*, 19 N. J. Eq. 123; *Moore v. Jordan*, 65 Miss. 229, 3 South. 737; *Brown v. Jones*, 1 Atk. 188.

<sup>119</sup> *Dawson v. Clarke*, 18 Ves. 247, 254; *Barrs v. Fewkes*, 2 Hen. & M. 60; *Shaw v. Spencer*, 100 Mass. 382, 388. See, also, *Bennett v. Hutson*, 33 Ark. 762; *Russ v. Meblus*, 16 Cal. 350.

<sup>120</sup> *Fowler v. Garlike*, 1 Russ. & M. 232; *Leavers v. Clayton*, 8 Ch. Div. 584; *Nichols v. Allen*, 130 Mass. 211; *Olliffe v. Wells*, 130 Mass. 221; *Heiskell v. Trout*, 31 W. Va. 810, 8 S. E. 557.

<sup>121</sup> *Ackroyd v. Smithson*, 1 Brown, Ch. 505. And see ante, 76, "Conversion."

trust.<sup>122</sup> But, although equity will, in general, give no assistance to wrongdoers, yet it will, on grounds of public policy, decree a resulting trust in favor of the settlor, where the effect of allowing the trustee to retain the property might be to effectuate an unlawful object or protect a fraud. And it will also make a like decree when the illegal purpose has never been carried into effect; for one who merely intends to commit an illegality is allowed a *locus penitentiae*.<sup>123</sup> Since the trust in this class of cases results by force of the written instrument, the trustee cannot defeat the resulting trust by parol evidence in his favor.<sup>124</sup>

*Where Intention is Presumed.*

1. The most important class of cases under this head are those in which a settlor conveys property on trusts which do not exhaust the whole estate. In respect to this class, the rule is that if a trust be declared of part of the estate, and nothing is said as to the residue, then, clearly, the creation of the partial trust is regarded as the sole object in view, and the equitable interest undisposed of will result to the settlor or his representatives.<sup>125</sup> A distinction must, however, be observed between a devise to a person for a particular purpose, with no intention of conferring the beneficial interest, and a devise with a view of conferring the beneficial interest subject to a particular direction. Thus, a devise to A. and his heirs on trust to pay testator's debts is a devise solely for a particular purpose, and the residue will result to testator's heirs; but a devise to A. and his heirs charged with testator's debts shows an intention to devise beneficially subject to the charge, and whatever remains after the charge has been satisfied will belong to the devisee.<sup>126</sup>

2. It was an ancient and well-known principle of equity, before the statute of uses, that, when a feoffment of real estate was made

<sup>122</sup> *Ayerst v. Jenkins*, L. R. 16 Eq. 285; *Symes v. Hughes*, L. R. 9 Eq. 475; *Haigh v. Kaye*, 7 Ch. App. 469; *Pawson v. Brown*, 13 Ch. Div. 202. See, also, ante, 180, "Illegal Express Trusts."

<sup>123</sup> *Underh. Eq.* p. 65.

<sup>124</sup> *Langham v. Sanford*, 17 Ves. 442; *Irvine v. Sullivan*, L. R. 8 Eq. 675.

<sup>125</sup> *Parnell v. Hingston*, 3 Smale & G. 337, 344; *Easterbrookes v. Tillinghast*, 5 Gray, 17; *McCollister v. Willey*, 52 Ind. 382; *Skellenger's Ex'rs v. Skellenger's Ex'r*, 32 N. J. Eq. 659; *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728; *Weaver v. Lelman*, 52 Md. 708; *Blount v. Walker*, 31 S. C. 13, 9 S. E. 804.

<sup>126</sup> *King v. Denison*, 1 Ves. & B. 272, per Lord Eldon.

to a person without consideration, the use at once resulted to the feoffor, and in equity he continued to enjoy the beneficial interest. It was therefore at one time held in England that, on a voluntary conveyance to a stranger, a trust would result to the grantor when no intention appeared to confer a beneficial interest on the grantee.<sup>127</sup> This doctrine, however, never applied to conveyances to a wife or child, but an intention to make an advancement was presumed, and the wife or child took beneficially.<sup>128</sup> Under the system of conveyances in force in the United States, where land is conveyed to the "use" of the grantee, no use can, of course, result to the grantor, though the conveyance is voluntary;<sup>129</sup> and especially is this true of deeds containing covenants of warranty, which estop the grantor from claiming any legal or beneficial interest in the estate.<sup>130</sup>

3. Since this species of resulting trust depends merely on presumption, parol evidence of the settlor's intention is admissible to rebut it as to instruments *inter vivos*.<sup>131</sup>

#### **SAME—PURCHASE IN NAME OF THIRD PERSON.**

**127. Purchases of this kind are divisible into two classes:**

(a) Purchase in name of stranger.

(b) Purchase in name of wife, child, or near relative.

#### **SAME—PURCHASE IN NAME OF STRANGER.**

**128. The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether taken in the names of the purchaser and others jointly, or in the names of others without the purchaser, whether in one or several, whether jointly or successive, results to the man who advances the purchase money.**<sup>132</sup>

<sup>127</sup> Lewin, *Trusts*, 144.

<sup>128</sup> *Id.*

<sup>129</sup> *Graves v. Graves*, 29 N. H. 129; *Sprague v. Woods*, 4 Watts & S. 192; *Gove v. Learoyd*, 140 Mass. 524, 5 N. E. 499; *Gould v. Lynde*, 114 Mass. 366; *Philbrook v. Delano*, 29 Me. 410.

<sup>130</sup> *Beavers v. McKinley*, 50 Kan. 602, 32 Pac. 363, and 33 Pac. 359.

<sup>131</sup> *Cook v. Hutchinson*, 1 Keen, 42, 50; *Fowkes v. Pascoe*, 10 Ch. App. 343.

<sup>132</sup> Per Lord Chief Baron Eyre, *Dyer v. Dyer*, 2 Cox. 93.

This rule rests on the maxim that equity regards substance rather than form. The person paying the consideration for property is the equitable owner, though in form the legal title may be taken in the name of another. To warrant the application of this rule, however, the person advancing the purchase money must do so as purchaser, and not by way of loan to the person in whose name the legal title is taken.<sup>133</sup> The rule itself is not confined to realty, but also applies to personalty; and, if one purchases stock or a chattel interest in the name of a stranger, a trust results to the purchaser.<sup>134</sup>

A very important application of the rule is to the case of joint purchasers. Where several persons join in a purchase of land, and their contributions are unequal, then, though the legal title is taken in the name of all jointly, or in the name of one only, or in the name of a stranger, a trust results to each of them, in proportion to the amount originally contributed.<sup>135</sup> If, however, the contributions are equal, and the legal title is taken in the name of all jointly, a court of equity, acting on the maxim that equity follows the law, will presume that the creation of a joint tenancy was intended, and consequently no trust will result in favor of the heirs of one joint tenant as against the survivor, who by the rules of law takes the entire estate.<sup>136</sup>

#### *Parol Evidence.*

Since the statute of frauds extends to creations or declarations of trusts by parties only, and does not affect—indeed, expressly ex-

<sup>133</sup> *Whaley v. Whaley*, 71 Ala. 159; *Torrey v. Cameron*, 73 Tex. 583, 11 S. W. 840.

<sup>134</sup> *Ridder v. Kidder*, 10 Ves. 360; *Ex parte Houghton*, 17 Ves. 253; *Creed v. Bank*, 1 Ohio St. 1; *Kelley v. Jenness*, 50 Me. 455.

<sup>135</sup> *Lake v. Craddock*, 3 P. Wms. 158, 1 White & T. Lead. Cas. Eq. 265; *Lewis v. Building Ass'n*, 70 Ala. 276; *Somers v. Overhulser*, 67 Cal. 237, 7 Pac. 645; *Donlin v. Bradley*, 119 Ill. 412, 10 N. E. 11; *Dow v. Jewell*, 18 N. H. 340; *McCully v. McCully*, 78 Va. 159; *Parker v. Coop*, 60 Tex. 111. Some of the cases, however, hold that a trust will not result in such a case, unless the person in whose favor it is sought to be enforced advanced the money for some specific part or distinct interest in the land. *McGowan v. McGowan*, 14 Gray, 119; *Bailey v. Hemenway*, 147 Mass. 326, 17 N. E. 645; *White v. Carpenter*, 2 Paige, 217, 239.

<sup>136</sup> *Rigden v. Vallier*, 3 Atk. 735. This branch of the rule is comparatively

cepts—trusts arising by operation or construction of law, it is competent for the real purchaser to prove his payment of the purchase money by parol, even though it be expressed otherwise in the deed.<sup>137</sup> The evidence must prove the fact very clearly,<sup>138</sup> though no objection lies against the reception of circumstantial evidence; as that the means of the pretended purchaser were so slender as to make it impossible that he should have paid the purchase money himself.<sup>139</sup>

*Modern Legislation.*

On studying this subject, "the thought arises that in this class of cases equity has busied itself overmuch with the affairs of others, and that some observance of the doctrine of *laissez faire* would not have been an unmixed evil."<sup>140</sup> For example, when a person paying the purchase money for land directs a conveyance to be made to a stranger, why should it not be presumed that a gift was intended, and why should the purchaser afterwards be permitted to assert title by way of resulting trust? Considerations such as these have led to the enactment of statutes in several states abolishing this class of resulting trusts. These statutes declare that no trust shall result in favor of the person paying the consideration as against the grantee named in the conveyance, unless the grantee takes the title without the knowledge of the person paying the consideration, or unless the grantee, in violation of a trust, purchases the land with money belonging to another person. Such conveyances are also declared fraudulent as against the creditors of the person paying the consideration, and a trust results in their favor.<sup>141</sup> These statutes,

unimportant in the United States, since joint tenancies are practically abolished.

<sup>137</sup> Lewin, *Trusts*, p. 667; citing *Ryall v. Ryall*, 1 Atk. 59; *Lench v. Lench*, 10 Ves. 517. See, also, *Peabody v. Tarbell*, 2 Cush. (Mass.) 232; *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 582; *McGuire v. Ramsey*, 9 Ark. 518, 527; *Osborne v. Endicott*, 6 Cal. 149; *Depeyster v. Gould*, 3 N. J. Eq. 474, 480.

<sup>138</sup> *Gascolgne v. Thwing*, 1 Vern. 366; *Boyd v. McLean*, 1 Johns. Ch. 582; *Sandford v. Weeden*, 2 Helsk. 71; *Shaw v. Shaw*, 86 Mo. 594; *Green v. Dietrich*, 114 Ill. 636, 3 N. E. 800; *Laughlin v. Mitchell*, 14 Fed. 382; *Hayes' Appeal*, 123 Pa. St. 100, 16 Atl. 600.

<sup>139</sup> *Willis v. Willis*, 2 Atk. 71.

<sup>140</sup> Underh. Eq. p. 67.

<sup>141</sup> Rev. St. N. Y. pt. 2, c. 1, art. 2, §§ 51-53; How. Ann. St. Mich. 1833, §§ 5560-5571; Gen. St. Minn. p. 553, §§ 7-9; Sanb. & B. Ann. St. Wis. §§

however, relate only to real property, and do not touch cases of personal property.<sup>142</sup>

**SAME—PURCHASE IN NAME OF WIFE, CHILD, OR NEAR RELATIVE.**

129. Where land is purchased in the name of a wife, child, or other near relative, there will be *prima facie* no resulting trust for the purchaser; but, on the contrary, a presumption arises that an advancement was intended.

Where one person stands in such relation to another that there is an obligation on that person to make a provision for the other, a purchase or investment in the name of the other will be presumed to be in discharge of that obligation, and therefore, in the absence of evidence to the contrary, the purchase or investment is in itself evidence of a gift; in other words, the presumption of gift arises from the moral obligation to give.<sup>143</sup> This principle extends not only to the case of children,<sup>144</sup> but to that of a wife,<sup>145</sup> son-in-law,<sup>146</sup> or mother;<sup>147</sup> in short, to all persons whom the purchaser is under a moral obligation to support.<sup>148</sup> But such a purchase gives rise only to a presumption of gift, and hence parol evidence is admissible to rebut the presumption.<sup>149</sup> The evidence must, however, be re-

2077-2079; Dassler's Comp. Laws Kan. p. 996, §§ 6-8; 2 Rev. St. Ind. 1838, §§ 2974-2976.

<sup>142</sup> 2 Pom. Eq. Jur. § 1042.

<sup>143</sup> Jessel, M. R., in *Bennet v. Bennet*, 10 Ch. Div. 474.

<sup>144</sup> *Dyer v. Dyer*, 2 Cox, 92, 1 White & T. Lead. Cas. Eq. 314; *Murphy v. Nathans*, 46 Pa. St. 508.

<sup>145</sup> *Schuster v. Schuster*, 93 Mo. 438, 6 S. W. 259; *Earnest's Appeal*, 106 Pa. St. 310.

<sup>146</sup> *Baker v. Leathers*, 3 Ind. 538.

<sup>147</sup> *Todd v. Moorhouse*, L. R. 19 Eq. 69.

<sup>148</sup> It has been held in England that a purchase by a mother in her child's name, during her husband's lifetime, does not give rise to the presumption of an advancement, because the mother is under no legal obligation to support the child during coverture. In *re De Visme*, 2 De Gex, J. & S. 17; *Bennet v. Bennet*, 10 Ch. Div. 474. The soundness of this proposition is questionable; for, as said in *Sayre v. Hughes*, L. R. 5 Eq. 376, maternal affection as a motive for bounty is the strongest of all.

<sup>149</sup> *Beck v. Beck*, 43 N. J. Eq. 39, 10 Atl. 155; *Harden v. Darwin*, 66 Ala. 55.

stricted to facts and declarations that occurred antecedently to, or contemporaneously and in immediate connection with, the transaction.<sup>150</sup>

### CONSTRUCTIVE TRUSTS.

130. When, on the grounds of justice and good conscience, without reference to the intention of the parties, equity considers the holder of the legal estate to be not entitled to enjoy the equitable or beneficial interest, it treats him as trustee. Trusts thus created are called "constructive trusts."<sup>151</sup>

In express and resulting trusts, an intention to create a trust is either expressed or presumed. The element of intention, whether express or presumed, does not enter into the creation of a constructive trust. Whenever one person acquires the property of another by fraud in any of its various forms, equity will raise a constructive trust in favor of such other, and thus enable him to follow the specific property, and preserve his ownership therein.<sup>152</sup> The defrauded person is in equity considered the cestui que trust and the real equitable owner, while the person committing the fraud is considered the trustee holding the bare legal title. The beneficiary may therefore compel the trustee to convey the property, and account for the rents and profits which he has received, or which he ought to have obtained, while the property has been in his hands and under his control.<sup>153</sup>

In considering the subject of fraud, we saw that the acquisition of trust property by a trustee or person having a fiduciary character was presumptively fraudulent.<sup>154</sup> In devising a remedy for such fraud, equity has utilized the principle of constructive trusts; and it decrees that any person who makes personal profit out of his

<sup>150</sup> *Grey v. Grey*, 2 Swanst. 594, 600; *Sidmouth v. Sidmouth*, 2 Beav. 447, 456; *Read v. Huff*, 40 N. J. Eq. 229.

<sup>151</sup> *Smith*, Prin. Eq. p. 84.

<sup>152</sup> *Pom. Eq. Jur.* § 1044.

<sup>153</sup> *Perry*, Trusts, § 166; *Hollinshead v. Simms*, 51 Cal. 158; *Hendrix v. Nunn*, 46 Tex. 142; *Johnson v. Giles*, 69 Ga. 652; *McLane v. Johnson*, 43 Vt. 48.

<sup>154</sup> *Ante*, 145.

fiduciary position holds such profit as a constructive trustee for the beneficiary.<sup>155</sup> Thus, a trustee who in his own name renews a lease belonging to his cestui que trust holds the new lease for his cestui que trust;<sup>156</sup> and a partner who renews a partnership lease in his own name holds it as a trust for the partnership.<sup>157</sup>

The principle of constructive trusts is not, however, confined to cases of fraud presumed from the relation of the parties. It applies, also, to cases of actual fraud. A striking illustration is furnished in the case of wills. While it is fully settled that a court of equity has no jurisdiction to set aside a will procured by fraud,<sup>158</sup> yet it is just as fully settled that equity will fasten a constructive trust on a particular devise or bequest procured by the fraud of the devisee or the legatee. Thus, if a bequest is made on the faith of the legatee's promise to apply it for a particular purpose, equity will raise a constructive trust in favor of the person for whom it was promised to be applied; and, if the purpose proves to be illegal, then a constructive trust will arise in favor of the heirs and next of kin.<sup>159</sup> In all these cases it was steadily claimed that a plain and unambiguous devise in a will could not be modified or cut down by extrinsic matter lying in parol or unattested papers, and that the statute of frauds and that of wills excluded the evidence; and it was as steadily answered that the devise was untouched, that it was not at all modified, that the property passed under it, but that the law dealt with the holder for his fraud, and out of the facts raised a trust *ex maleficio*,

<sup>155</sup> In *Rolfe v. Gregory*, 4 De Gex, J. & S. 576, 579, Lord Westbury said: "When it is said that the person who fraudulently receives or possesses himself of trust property is converted by this court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust."

<sup>156</sup> *Phyfe v. Wardell*, 5 Paige, 268; *Keech v. Sandford*, 1 White & T. Lead. Cas. Eq. 53; *In re Morgan*, 18 Ch. Div. 93.

<sup>157</sup> *Mitchell v. Reed*, 61 N. Y. 123.

<sup>158</sup> *Allen v. McPherson*, 1 H. L. Cas. 191; *In re Broderick's Will*, 21 Wall. 503; *Colton v. Ross*, 2 Paige, 396.

<sup>159</sup> *In re O'Hara*, 95 N. Y. 403; *Curdy v. Berton*, 79 Cal. 420, 21 Pac. 858; *Williams v. Vreeland*, 32 N. J. Eq. 135; *Hooker v. Oxford*, 33 Mich. 454; *Dowd v. Tucker*, 41 Conn. 197; *Gilpatrick v. Glidden*, 81 Me. 137, 16 Atl. 464; *Thynn v. Thynn*, 1 Vern. 296.



instead of resting upon one as created by testator.<sup>160</sup> So, also, when the next of kin prevents the making of a bequest by promising to hold the property for the benefit of the intended legatee, the property will be impressed with a constructive trust in favor of the legatee.<sup>161</sup>

#### DUTIES AND LIABILITIES OF TRUSTEES.

131. The paramount duty of a trustee is to carry out the directions contained in the instrument creating the trust, except so far as they are contrary to good morals, or are in conflict with some positive law, or except so far as some statute has given him a discretion.<sup>162</sup>

The rules fixed by law governing a trustee's duties and liabilities apply only when the instrument creating the trust is silent, and in all cases the trustee must conform to the directions contained in the trust instrument. Thus, where a trust instrument directs a sale of the property for a certain price, the trustee cannot sell for less;<sup>163</sup> and, where the direction is to sell for cash, a sale on credit is bad.<sup>164</sup>

#### SAME—GETTING IN OUTSTANDING TRUST PROPERTY.

132. Subject to the foregoing principle, it is the first duty of a trustee to reduce the trust property to his possession, because he is responsible for its security.

Debts due the trust estate must therefore be collected with all reasonable diligence. Money should not, as a rule, be left outstanding on personal security, though the creator of the trust himself consid-

<sup>160</sup> *In re O'Hara*, 95 N. Y. 403, 413, 414.

<sup>161</sup> *Williams v. Fitch*, 13 N. Y. 546. The same principle applies where an absolute conveyance is made to one on the faith of his oral promise to hold it for another. *Fischbeck v. Gross*, 112 Ill. 208.

<sup>162</sup> 2 Pom. Eq. Jur. § 1062; Underh. Eq. p. 73.

<sup>163</sup> *Cadwell v. Brown*, 36 Ill. 103.

<sup>164</sup> *Perry, Trusts*, § 785; *Waterman v. Spaulding*, 51 Ill. 425; *Palmer v. Williams*, 24 Mich. 328. For other illustrations of the rule, see *In re Lewis*, 81 N. Y. 421; *James v. Cowing*, 82 N. Y. 449.

ered it sufficient.<sup>165</sup> Trustees will, however, be allowed the exercise of a fair discretion, and are not expected to commence legal proceedings unnecessarily, nor where such proceedings would be useless;<sup>166</sup> but they will not be justified in granting any great indulgence.<sup>167</sup> Trustees may, in the exercise of a sound discretion, release or compound a debt.<sup>168</sup> Money invested in good real-estate securities need not be called in, unless it is necessary for the payment of debts.<sup>169</sup> If bonds, insurance policies, and other choses in action are assigned in trust, it is generally safer for the trustee to notify the debtor of the assignment, since otherwise payment to the assignor would be valid.<sup>170</sup>

#### SAME—CUSTODY AND CARE OF TRUST PROPERTY.

133. In managing trust affairs, the trustee must exercise all those precautions which an ordinarily prudent man of business would take in managing similar affairs of his own.

134. The trustee must act personally, and cannot delegate to strangers, at his own will and pleasure, the execution of the trust, and the care and management of the trust moneys.

##### *Duty to Exercise Ordinary Care.*

There has been some diversity of opinion as to the degree of care required of trustees. It is, of course, impossible to give the measure of culpable negligence for all cases, as the degree of care required de-

<sup>165</sup> *Powell v. Evans*, 5 Ves. 839; *Cross v. Petrie*, 10 B. Mon. 413; *Neff's Appeal*, 57 Pa. St. 91; *Will's Appeal*, 22 Pa. St. 325.

<sup>166</sup> *Clack v. Holland*, 19 Beav. 271.

<sup>167</sup> *Lowson v. Copeland*, 2 Brown, Ch. 156; *Caffrey v. Darby*, 6 Ves. 488; See, also, *Harrington v. Keteltas*, 92 N. Y. 40; *O'Connor v. Gifford*, 117 N. Y. 245, 22 N. E. 1036.

<sup>168</sup> *Blue v. Marshall*, 3 P. Wms. 381; *Bacot v. Heyward*, 5 S. C. 441. In the United States the power to compromise debts is very generally conferred by statute. 2 *Perry, Trusts*, § 482.

<sup>169</sup> *Orr v. Newton*, 2 Cox, 274.

<sup>170</sup> *Jacob v. Lucas*, 1 Beav. 436; *Brashear v. West*, 7 Pet. 608; *Reed v. Marble*, 10 Paige, 409.

pend upon the subject to which it is to be applied. The modern decisions, however, both English and American, unite in holding that the trustee is bound to employ such diligence and prudence in the care and management of the trust property as an ordinarily prudent man of business would exercise in managing similar affairs of his own.<sup>171</sup> If, however, trustees act in good faith, within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment.<sup>172</sup> Applying this rule, it has been held that a trustee is not liable for a loss caused by some unavoidable accident.<sup>173</sup> So, also, a trustee is not liable where money deposited in bank in the proper course of business is lost by the failure of the bank.<sup>174</sup> Trust moneys must remain somewhere, and, in the usual course of business, one would utilize a bank for that purpose.

In conclusion, it should be borne in mind that the creator of the trust may exempt the trustee from the measure of liability imposed by law, and that in such case the court has no right to impose obligations from which he has been thus relieved.<sup>175</sup>

#### *Delegation of Powers.*

The office of trustee, being one of personal confidence, cannot be delegated; and a trustee, who attempts to shift his duty on other persons, remains responsible to the cestuis que trustent.<sup>176</sup> Thus, a trustee vested with a discretionary power to sell land cannot au-

<sup>171</sup> *King v. Talbot*, 40 N. Y. 76, 85; *Hun v. Cary*, 82 N. Y. 65; *In re Cornell*, 110 N. Y. 351, 357, 18 N. E. 142; *Carpenter v. Carpenter*, 12 R. I. 544; *Shurtleff v. Rile*, 140 Mass. 213, 4 N. E. 407; *Loud v. Winchester*, 64 Mich. 23, 30 N. W. 896; *Godfrey v. Faulkner*, 23 Ch. Div. 483; *Smethurst v. Hastings*, 30 Ch. Div. 490, 498.

<sup>172</sup> *Pleasanton's Appeal*, 99 Pa. St. 362; *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243; *Miller v. Proctor*, 20 Ohio St. 442; *Bowker v. Pierce*, 130 Mass. 262.

<sup>173</sup> *Job v. Job*, 6 Ch. Div. 562. Nor by theft, *Carpenter v. Carpenter*, 12 R. I. 544.

<sup>174</sup> *Ex parte Belchier*, Amb. 219; *Johnston v. Newton*, 11 Hare, 160; *People v. Faulkner*, 107 N. Y. 477, 488, 14 N. E. 415. Trustee is not responsible for receiving depreciated Confederate currency in payment of a debt due the trust estate, where he acted in good faith and with ordinary prudence. *Douglass v. Stephenson's Ex'rs*, 75 Va. 747.

<sup>175</sup> *Cranb v. Young*, 92 N. Y. 56; *Tuttle v. Gilmore*, 36 N. J. Eq. 617.

<sup>176</sup> *Turner v. Corney*, 5 Beav. 517; *City of St. Louis v. Priest*, 88 Mo. 612; *Fuller v. O'Neil*, 69 Tex. 349, 6 S. W. 181; *Newton v. Bronson*, 13 N. Y. 587.

thorize an agent to contract for its sale.<sup>177</sup> Though this rule has a very wide application, there are several exceptions to it: First. A trustee may delegate his duties, if authorized so to do by the trust instrument.<sup>178</sup> Second. A trustee may employ an agent to administer such affairs as an ordinarily prudent man, acting in his own behalf, would in the usual course of business commit to an agent.<sup>179</sup> This exception is, of course, subject to the limitation that the agent must not be employed outside of the ordinary scope of his business.<sup>180</sup>

#### SAME—INVESTMENTS.

135. When the trust money cannot be applied, within a reasonably short time, to the purposes of the trust, it is the duty of the trustee to make the fund productive to the cestui que trust, by the investment of it in some proper security.<sup>181</sup>

Since the trustee must act with a view solely to the benefit of the cestui que trust, it is his duty to keep invested the trust funds so as to yield an income to the cestui que trust. A reasonable time after coming into possession of trust funds, generally six months, is allowed to the trustee to make the investment; and after that time he is prima facie chargeable with interest thereon.<sup>182</sup> In making the investment, the trustee must, of course, conform to the directions contained in the instrument creating the trust.<sup>183</sup> If that is silent, the general rule again applies that he must act with the care that an ordinarily prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide,—not such care as a prudent man would take if he had only himself to consider.<sup>184</sup> This necessarily excludes all

<sup>177</sup> *Sebastian v. Johnson*, 72 Ill. 282; *City of St. Louis v. Priest*, 88 Mo. 612.

<sup>178</sup> *Kilbee v. Sneyd*, 2 Moll. 199, 200.

<sup>179</sup> *Speight v. Gaunt*, 9 App. Cas. 1.

<sup>180</sup> *Fry v. Tapson*, 28 Ch. Div. 268.

<sup>181</sup> *Lewin, Trusts*, p. 306.

<sup>182</sup> *Lent v. Howard*, 89 N. Y. 169; *Crosby v. Merriam*, 31 Minn. 342, 17 N. W. 950.

<sup>183</sup> 2 Pom. Eq. Jur. § 1075.

<sup>184</sup> *Whiteley v. Learoyd*, 33 Ch. Div. 347, 355; *King v. Talbot*, 40 N. Y. 76;

speculation, all investments for an uncertain and doubtful use in the market, and, of course, everything that does not take into view the nature and object of the trust, and the consequence of a mistake in the selection of the investment to be made.<sup>185</sup>

In England, no rule is better settled than that a trustee cannot lend trust funds on mere personal security;<sup>186</sup> and Lord Kenyon said that it "ought to be rung in the ears" of every one who acts in the character of trustee.<sup>187</sup> The same rule prevails in the United States, though it is not so stringent and invariable as in England.<sup>188</sup> Thus, in Massachusetts and several other states, a trustee may invest in the stock of private corporations.<sup>189</sup> Generally, trustees are required to invest trust funds in real-estate or government securities,<sup>190</sup> though investments in bonds of municipal corporations are also permitted.<sup>191</sup> In England, trustees are advised not to advance more than two-thirds of the actual value of an estate on mortgage security;<sup>192</sup> and with us, as well as in England, loans on second mortgages are regarded with disfavor.<sup>193</sup>

#### SAME—LIABILITY FOR ACTS OF COTRUSTEE.

**136. A trustee is liable for the acts or defaults of a co-trustee, in which he has himself participated, or which he has permitted or aided by his own negligence.**

*Peckham v. Newton*, 15 R. I. 321, 4 Atl. 758; *Waller v. Catlett*, 83 Va. 200; *Harvard College v. Amory*, 9 Pick. 447, 461.

<sup>185</sup> *King v. Talbot*, 40 N. Y. 76, 86.

<sup>186</sup> *Terry v. Terry*, Finch, Prec. 273; *Darke v. Martyn*, 1 Beav. 525.

<sup>187</sup> *Holmes v. Dring*, 2 Cox, 1.

<sup>188</sup> *Judge of Probate v. Mathes*, 60 N. H. 433; *Clark v. Garfield*, 8 Allen, 427.

<sup>189</sup> *Harvard College v. Amory*, 9 Pick. 446; *New England Trust Co. v. Eaton*, 140 Mass. 532, 4 N. E. 69; *McCoy v. Horwitz*, 62 Md. 183; *Smyth v. Burns*, 25 Miss. 422; *Peckham v. Newton*, 15 R. I. 321, 4 Atl. 758. Contra, *King v. Talbot*, 40 N. Y. 76; *Tucker v. State*, 72 Ind. 242; *Hemphill's Appeal*, 18 Pa. St. 305.

<sup>190</sup> *Ormiston v. Olcott*, 84 N. Y. 339, 343; *Perry, Trusts*, §§ 452, 458.

<sup>191</sup> *Perry, Trusts*, § 456.

<sup>192</sup> *Lewin, Trusts*, p. 325.

<sup>193</sup> *Drosier v. Brereton*, 15 Beav. 221; *Tuttle v. Gilmore*, 36 N. J. Eq. 617; *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

This rule was established, after great consideration, in the case of *Townley v. Sherborne*,<sup>194</sup> in the reign of King Charles I. It has been adopted in the United States,<sup>195</sup> and it applies to all persons acting in the capacity of trustees, such as executors.<sup>196</sup> The material question, therefore, nowadays, is what conduct will render a trustee liable for breach of trust committed by a cotrustee? The general rule is that a trustee is responsible for a breach of trust committed by his cotrustee which his own negligence has rendered possible, or with which he failed to interfere after obtaining knowledge that it was being committed.<sup>197</sup> Still more certainly a trustee or executor who is guilty of any fraud in the matter of the trust will not be able to escape liability by throwing the blame on his colleague in the office.<sup>198</sup>

From the rule that a trustee cannot delegate his powers, it follows that a trustee who places trust funds into the power of a cotrustee is liable for their loss caused by the bankruptcy or embezzlement of the cotrustee.<sup>199</sup> But this rule does not apply when the money is remitted to the cotrustee in the usual course of business, as, for example, to pay a debt to a creditor residing in the cotrustee's neighborhood.<sup>200</sup>

There has been some conflict of authority as to the liability of a trustee who has joined his cotrustee in a receipt for trust money paid the latter. The modern rule is that, if the signature of all the trustees is formally necessary to the receipt, the signature of a trustee to whose hand the money does not come will not alone render him

<sup>194</sup> *Bridg.* 35, 2 *White & T. Lead. Cas. Eq.* 1738.

<sup>195</sup> *Peter v. Beverly*, 10 *Pet.* 532; *English v. Newell*, 42 *N. J. Eq.* 82, 6 *Atl.* 505; *Vandever's Appeal*, 8 *Watts & S.* 405; *Estate of Fesmire*, 134 *Pa. St.* 67, 19 *Atl.* 502.

<sup>196</sup> *Littlehales v. Gascoine*, 3 *Brown, Ch.* 74; *Sutherland v. Brush*, 7 *Johns. Ch.* 17; *McKim v. Aulbach*, 130 *Mass.* 481; *Ormiston v. Olcott*, 84 *N. Y.* 339, 346; *Irwin's Appeal*, 35 *Pa. St.* 294.

<sup>197</sup> *Mucklow v. Fuller*, *Jac.* 198; *Booth v. Booth*, 1 *Beav.* 125; *Richards v. Seal*, 2 *Del. Ch.* 266; *In re Niles*, 113 *N. Y.* 547, 21 *N. E.* 687; *Pim v. Downing*, 11 *Serg. & R.* 71; *Crane v. Hearn*, 26 *N. J. Eq.* 378.

<sup>198</sup> *Butler v. Butler*, 5 *Ch. Div.* 554; *Hinson v. Williamson*, 74 *Ala.* 180.

<sup>199</sup> *Bruen v. Gillet*, 115 *N. Y.* 10, 21 *N. E.* 676 (trustee held liable for moneys deposited with cotrustee, a private banker); *Langford v. Gascoyne*, 11 *Ves.* 333.

<sup>200</sup> *Bacon v. Bacon*, 5 *Ves.* 331.

liable to account for it.<sup>201</sup> It is but reasonable that, in a case in which he has no power to refuse to sign, his signature, without more, should not fix him with liability. But, on the other hand, a person who joins voluntarily in a receipt in which his concurrence is not formally required, and whose interference is therefore unnecessary, is to be considered as assuming a power over the fund, and is therefore answerable for the application thereof, as far as it is connected with the particular transaction in which he joins.<sup>202</sup>

#### SAME—COMPENSATION.

137. In England, a trustee is not allowed any compensation for his time and trouble in executing the trust, but in the United States he is allowed a reasonable compensation; and in both countries trustees will be reimbursed for all proper expenses out of pocket.

The English rule is a deduction from the principle that equity will not permit a trustee to make a profit out of his trust. It matters not to what extent the trustee may have devoted himself to the duties of the trust, or to what extent the trust estate has thereby been benefited; the trustee can claim no compensation for his personal trouble or loss of time.<sup>203</sup> The only exception that exists is where the settlor of the trust authorizes the trustee to charge for his services.<sup>204</sup> The English rule prevails in Delaware,<sup>205</sup> and perhaps in Ohio<sup>206</sup> and Illinois;<sup>207</sup> but in all the other states trustees are entitled to compensation for their time and trouble, either by way of a gross sum, or in the form of commissions on the property under their care.<sup>208</sup>

<sup>201</sup> *Brice v. Stokes*, 11 Ves. 319, 2 White & T. Lead. Cas. Eq. 1742; *Stowe v. Bowen*, 99 Mass. 194; *McKim v. Aulbach*, 130 Mass. 481; *Griffin v. Macaulay*, 7 Grat. 476.

<sup>202</sup> *Brice v. Stokes*, 11 Ves. 319, 2 White & T. Lead. Cas. Eq. 1742.

<sup>203</sup> *Robinson v. Pett*, 3 P. Wms. 249, 2 White & T. Lead. Cas. Eq. 512; *Brock-sopp v. Barnes*, 5 Madd. 90; *Barrett v. Hartley*, L. R. 2 Eq. 789.

<sup>204</sup> *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Baker v. Martin*, 8 Sim. 25.

<sup>205</sup> *Egbert v. Brooks*, 3 Har. (Del.) 112; *State v. Platt*, 4 Har. (Del.) 154.

<sup>206</sup> *Gilbert v. Sutliff*, 3 Ohio St. 149.

<sup>207</sup> *Constant v. Matteson*, 22 Ill. 546.

<sup>208</sup> 2 Perry, Trusts, §§ 916, 917.

In both countries, trustees are allowed all proper expenses out of pocket, whether provided for in the instrument creating the trust or not.<sup>209</sup> Traveling expenses,<sup>210</sup> legal expenses,<sup>211</sup> and proper outlays for improvement of the property<sup>212</sup> are allowed the trustee. So, he will be allowed for salaries and commissions paid to an agent employed in good faith in administering the trust.<sup>213</sup> But, while a trustee is allowed expenses incurred in the employment of attorneys, yet, if he is himself an attorney, no compensation will be allowed him for professional services performed by himself, on the principle that he cannot use his position so as to make profit for himself; and this rule applies as well in the United States as in England.<sup>214</sup>

Not only is the trustee entitled to reimbursement for his proper expenses, but he has a lien on the trust estate to secure them, which must be satisfied before the cestui que trust can compel a reconveyance from the trustee.<sup>215</sup>

#### REMEDIES OF CESTUI QUE TRUST—FOLLOWING TRUST ESTATE.

138. Where trust property has been wrongfully disposed of by the trustee, the cestui que trust may assert his right to the specific property in two ways:

- (a) He may follow it into the hands of the person to whom it has been wrongfully conveyed by the trustee, unless such person is a bona fide purchaser for value without notice of the trust.

<sup>209</sup> *Hilde v. Haywood*, 2 Atk. 126; *Worrall v. Harford*, 8 Ves. 4, 8; *Wilkinson v. Wilkinson*, 2 Sim. & S. 237; *Downing v. Marshall*, 37 N. Y. 380, 389; *Rensselaer & S. R. Co. v. Miller*, 47 Vt. 146; *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870; *Reynolds v. Cridge*, 131 Pa. St. 189, 18 Atl. 1010; *Towle v. Mack*, 2 Vt. 19.

<sup>210</sup> *Ex parte Lovegrove*, 3 Deac. & C. 763.

<sup>211</sup> *Downing v. Marshall*, 37 N. Y. 380; *McElhenny's Appeal*, 46 Pa. St. 347; *Brady v. Dilley*, 27 Md. 570.

<sup>212</sup> *Quarrell v. Beckford*, 1 Madd. 269, 282.

<sup>213</sup> *Hopkinson v. Roe*, 1 Beav. 180; *Parker v. Johnson*, 37 N. J. Eq. 366.

<sup>214</sup> *Collier v. Munn*, 41 N. Y. 145; *In re Corsellis*, 34 Ch. Div. 675.

<sup>215</sup> *In re Exhall Coal Co.*, 35 Beav. 449; *Stott v. Milne*, 25 Ch. Div. 710; *New v. Nicoll*, 73 N. Y. 127; *Ellig v. Naglee*, 9 Cal. 685; *Beatty v. Clark*, 20 Cal. 11, 30; *Johnson v. Leman*, 131 Ill. 609, 23 N. E. 435; *Foxworth v. White*,



- (b) **He may attach and follow the property that has been substituted for the trust estate so long as the substituted property can be traced.**

*Following Trust Funds in Stranger's Hands.*

One who purchases trust property with notice of the trust is considered in equity as a constructive trustee, and subject to all the liabilities of a trustee.<sup>216</sup> If the trust property is a nonnegotiable chose in action, such as a bond, the purchaser takes subject to all equities, whether he had notice or not. As to all other classes of property, however, a purchaser who in good faith acquires the legal title for value without notice of the trust will be protected,<sup>217</sup> but not if he is a mere volunteer.<sup>218</sup> In short, the various rules relating to bona fide purchasers govern in determining the liability of purchasers of trust property.<sup>219</sup>

*Following Trust Funds in Changed State.*

A trustee is charged with the duty of keeping trust funds separate and distinct from his own personal funds. If he mixes trust funds with his own, he is clearly liable to the cestui que trust for so much of the mixed funds as he cannot prove to be his own.<sup>220</sup> If the mingled fund is lost by accident or otherwise, the trustee must make good the loss; as where he deposits trust moneys to his individual account in a bank which afterwards fails.<sup>221</sup> If he purchases land

72 Ala. 224; Haydel v. Hurck, 72 Mo. 253; Stewart v. Fellows, 128 Ill. 480, 20 N. E. 657.

<sup>216</sup> Rolfe v. Gregory, 4 De Gex, J. & S. 576; Caldwell v. Carrington, 9 Pet. 86. Jones v. Shaddock, 41 Ala. 262; Ryan v. Doyle, 31 Iowa, 53; Smith v. Walser, 49 Mo. 250.

<sup>217</sup> Bassett v. Nosworthy, Cas. t. Finch, 102, 2 White & T. Lead. Cas. Eq. 1; Dillaye v. Commercial Bank, 51 N. Y. 345.

<sup>218</sup> Mansell v. Mansell, 2 P. Wms. 681; Lyford v. Thurston, 16 N. H. 399; Barr v. Cabbage, 52 Mo. 404.

<sup>219</sup> See ante, 95 et seq.

<sup>220</sup> Fellows v. Mitchell, 1 P. Wms. 83; Mason v. Morley, 34 Beav. 475; Morrison v. Kinstra, 55 Miss. 71; Atkinson v. Ward, 47 Ark. 533, 2 S. W. 77; Page v. Holman, 82 Ky. 573.

<sup>221</sup> The rule is the same whether or not the trustee has funds of his own in the bank. Williams v. Williams, 55 Wis. 300, 12 N. W. 465, and 13 N. W. 274; Norris v. Hero, 22 La. Ann. 605; Naltner v. Dolan, 108 Ind. 503, 8 N. E. 289.

partly with his own money and partly with trust money, the cestui que trust has clearly a lien on the whole estate for the amount of his fund.<sup>222</sup> Difficulties, however, arise where the trust property has been disposed of, and third persons, such as creditors of the trustee, assert a claim to the proceeds. Here the rule stated in the black-letter text applies: The cestui que trust may attach and follow the substituted property so long as it can be traced or identified as arising out of the trust estate; it makes no difference whether the disposition was rightfully or wrongfully made by the trustee.<sup>223</sup> In some of the earlier cases it seems to have been held that if the trust property was converted into money, and that money mingled with other money of the trustee, then the right of the cestui que trust to follow the specific proceeds was lost, because money has no earmark by which it can be identified.<sup>224</sup> This is no longer the law, and the modern rule is that a cestui que trust who can trace the proceeds of the trust estate into a fund deposited by the trustee in his own name is entitled to a charge on that fund, which takes precedence over the claims of the general creditors of the trustee.<sup>225</sup>

#### SAME—PERSONAL REMEDIES.

**139. A breach of trust by a trustee creates a personal obligation of the nature of a simple contract debt, which may be enforced against the trustee or his estate in a proper proceeding.**

<sup>222</sup> *Lane v. Dighton*, Amb. 400; *Hopper v. Conyers*, L. R. 2 Eq. 549; *Brazel v. Fair*, 26 S. C. 370, 2 S. E. 293; *Houghton v. Davenport*, 74 Me. 590.

<sup>223</sup> *Knatchbull v. Hallett*, 13 Ch. Div. 696; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Bundy v. Town of Monticello*, 84 Ind. 119.

<sup>224</sup> *Whitecomb v. Jacob*, 1 Salk. 161; *Ex parte Dale*, 11 Ch. Div. 772.

<sup>225</sup> *Knatchbull v. Hallett*, 13 Ch. Div. 696; *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Third Nat. Bank v. Stillwater Gas Co.*, 36 Minn. 75, 30 N. W. 440; *Englar v. Offutt*, 70 Md. 78, 16 Atl. 497. Not necessary to trace trust fund into specific property, but only into estate of trustee. *McLeod v. Evans*, 66 Wis. 400, 23 N. W. 173, 214; *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499; *Harrison v. Smith*, 83 Mo. 210. See, however, *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504; *Continental Nat. Bank v. Weems*, 69 Tex. 480, 6 S. W. 802; *Appeal of Hopkins (Pa.)* 9 Atl. 867.

If the trustee is solvent, an equitable action to compel compensation for the loss which the trust estate has sustained is the proper and effective remedy.<sup>226</sup> Such action may be brought, not only against the trustee, but against his representatives.<sup>227</sup> The claim, however, ranks only as a simple contract debt,<sup>228</sup> unless the trust instrument contains a covenant, express or implied, for the payment of the trust fund, and has been executed by the trustee.<sup>229</sup> If the trustee becomes insolvent, his indebtedness to the trust is provable against his estate.<sup>230</sup> In all cases the cestui que trust is entitled to recover an amount which will fully reimburse him for the loss sustained by the breach.<sup>231</sup>

The remedy of a cestui que trust who is sui juris may be barred by his acquiescence or concurrence;<sup>232</sup> but persons under disability do not lose their remedy unless they have by their own fraud induced the breach of trust.<sup>233</sup> Misrepresentation or concealment by the trustee bars the defense of acquiescence, and vitiates a release given by the cestui que trust.<sup>234</sup>

#### SAME—REMOVAL OF TRUSTEE.

**140. Where a trustee has been guilty of such acts or omissions as endanger the trust property, or show a want**

<sup>226</sup> *Long v. Fox*, 100 Ill. 44; *Oliver v. Platt*, 3 How. 333; *Lathrop v. Bampton*, 31 Cal. 17; *Callhoun v. Burnett*, 40 Miss. 599.

<sup>227</sup> *Dehaynes v. Robinson*, 24 Beav. 86.

<sup>228</sup> *Vernon v. Vawdry*, 2 Atk. 119; *Little v. Chadwick*, 151 Mass. 100, 23 N. E. 1005.

<sup>229</sup> *Isaacson v. Harwood*, 3 Ch. App. 225; *Richardson v. Jenkins*, 1 Drew. 477.

<sup>230</sup> *Ex parte Shakeshaft*, 3 Brown, Ch. 197.

<sup>231</sup> 2 Pom. Eq. Jur. § 1080; *Robinson v. Robinson*, 1 De Gex, M. & G. 247; *In re Grabowski's Settlement*, L. R. 6 Eq. 12; *Dilworth's Appeal*, 108 Pa. St. 92; *Zimmerman v. Fraley*, 70 Md. 561, 17 Atl. 560; *Rowley v. Towsley*, 53 Mich. 329, 19 N. W. 20.

<sup>232</sup> *Brice v. Stokes*, 11 Ves. 319; *Walker v. Symonds*, 3 Swanst. 1, 64; *Zimmerman v. Fraley*, 70 Md. 564, 17 Atl. 560; *McCoy v. O'Donnell*, 56 Md. 197; *Pope v. Farnsworth*, 146 Mass. 339, 16 N. E. 262; *Butterfield v. Cowing*, 112 N. Y. 486, 20 N. E. 369.

<sup>233</sup> *Lord Montford v. Lord Cadogan*, 19 Ves. 636, 639, 640.

<sup>234</sup> *Adams v. Clifton*, 1 Russ. 297; *Jones v. Lloyd*, 117 Ill. 597, 7 N. E. 119; *Shartel's Appeal*, 64 Pa. St. 25.

of honesty or of proper capacity to execute the duties of the trust, a court of equity will remove him, and appoint a successor.

While, on the one hand, a trustee who accepts the office cannot relinquish it at will, unless permitted by the trust instrument,<sup>235</sup> and, on the other, the cestui que trust cannot at will dismiss him, a court of equity has inherent jurisdiction to remove a trustee, and appoint another, whenever such step is desirable for the welfare of the beneficiaries and the trust estate.<sup>236</sup> A reasonable cause for equitable interference must, however, be shown. Thus, a removal will not be made at the mere caprice of the cestui que trust,<sup>237</sup> nor on the ground of an honest exercise of discretion which may prove to be prejudicial to the cestui que trust,<sup>238</sup> nor even for mistake in the execution of his duty.<sup>239</sup> But a trustee who has permanently departed out of the jurisdiction of the court,<sup>240</sup> or has become insolvent,<sup>241</sup> or deals with the trust property for his own advancement,<sup>242</sup> or suffers a co-trustee to commit a breach of trust,<sup>243</sup> will be removed.

In appointing a new trustee, the court will be guided (1) by the wishes of the creator of the trust, if ascertainable; (2) by a due regard for the interests of all parties concerned, not favoring any particular class; and (3) by the nature of the trust and the question by whose instrumentality it can best be carried into execution.<sup>244</sup>

<sup>235</sup> *Chalmer v. Bradley*, 1 Jac. & W. 68.

<sup>236</sup> *Story*, Eq. Jur. § 287; *Letterstedt v. Broers*, 9 App. Cas. 371.

<sup>237</sup> *O'Keeffe v. Calthorpe*, 1 Atk. 17. Disagreements not sufficient. *Gibbes v. Smith*, 2 Rich. Eq. 131. Cessation of social intercourse between trustee and beneficiary not sufficient. *Nickels v. Phillips*, 18 Fla. 732.

<sup>238</sup> *Lee v. Young*, 2 Younge & C. Ch. 532.

<sup>239</sup> *In re Durfee*, 4 R. I. 401; *Attorney General v. Coopers' Co.*, 19 Ves. 192.

<sup>240</sup> *O'Reilly v. Alderson*, 8 Hare. 101; *Dorsey v. Thompson*, 37 Md. 25; *Ketchum v. Mobile & C. R. Co.*, 2 Woods, 532, Fed. Cas. No. 7,737. See, however, *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243.

<sup>241</sup> *Bainbrigge v. Blair*, 1 Beav. 495; *In re Barker's Trusts*, 1 Ch. Div. 43.

<sup>242</sup> *Ex parte Phelps*, 9 Mod. 357; *Kraft v. Lohman*, 79 Ala. 323; *Clemens v. Caldwell*, 7 B. Mon. 171; *Lathrop v. Smalley*, 23 N. J. Eq. 192.

<sup>243</sup> *Ex parte Reynolds*, 5 Ves. 707.

<sup>244</sup> *In re Tempest*, 1 Ch. App. 487.

**CHAPTER IX.****PROPERTY IN EQUITY (Continued)—MORTGAGES, LIENS, AND ASSIGNMENTS.**

- 141. Real-Estate Mortgages.
- 142. Absolute Deed as Mortgage.
- 143. Conditional Sale or Mortgage.
- 144. Assignment of Mortgage.
- 145. Transfer of Mortgaged Land.
- 146-147. Foreclosure of Mortgage.
- 148-149. Redemption.
- 150-151. Mortgages and Pledges of Personality.
- 152. Equitable Liens.
- 153. Equitable Mortgages.
- 154. Liens Based on Considerations of Justice.
- 155. Vendor's Lien.
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- 157. Charges of Debts and Legacies.
- 158-159. Assignments.
- 160. What Assignments Now Recognized at Law.
- 161-162. Equitable Assignments.
- 163. Assignment Subject to Equities.

**REAL-ESTATE MORTGAGES.**

**141. As viewed by a court of equity, a real-estate mortgage is a lien or charge on land to secure the payment of a debt.<sup>1</sup>**

On its face, a real-estate mortgage is a conveyance of an estate in land by a borrower of money to the lender, with a condition that, if the loan and interest be repaid on a day certain, the lender will reconvey it. The common-law judges held that a bargain is a bargain, and that, therefore, if the condition was broken by nonpayment of the debt and interest on the day specified, the estate of the mortgagee became absolute and indefeasible, however much the land might exceed in value the sum secured.<sup>2</sup> It does not appear that the early

<sup>1</sup> Seton v. Slade, 7 Ves. 205, 273.

<sup>2</sup> Littleton thus describes the common-law mortgage: "If a feoffment be made upon such condition that if the feoffor pay to the feoffee at a certain

chancellors ventured to interfere with the common-law system, except when the mortgagor's default happened through accident, or because of the fraud of the mortgagee.<sup>3</sup> However, during the reign of King James I., the court of chancery took the view that security of the debt was the main object of the transaction, and that, if this were obtained,—if repayment of principal, interest, and costs were offered,—the mortgagee should abandon his hold on the land. This became the established doctrine during the reign of Charles I.,<sup>4</sup> and since that time the mortgagor has in equity been vested with a right to redeem at any time after default, on payment of principal and interest, unless in the meantime the mortgagee obtained from the court of chancery a decree that the mortgagor should be absolutely foreclosed. The mortgagor's right to redeem was known as the "equity of redemption," and was regarded as an equitable estate, which might be conveyed or devised, and which descended, as real estate.<sup>5</sup>

No sooner, however, was the equity of redemption established, than another bold decision was required to confirm the principle in its utility. Creditors, eager to regain the advantage afforded them by the common law, attempted an evasion of the equitable doctrine by requiring their debtors to renounce the right of redemption by an express stipulation in the mortgage. Equity, however, acting on the maxim that it always looks at the substance rather than the form, frustrated this attempt, by establishing, as a principle never to be departed from, that "once a mortgage is always a mortgage"; that an estate could not at one time be a mortgage, and at another time cease to be so by one and the same deed; and that, whatever clause or covenant there might be in a conveyance, yet if, upon the whole, it appeared to have been the intention of the parties that such conveyance should only be a mortgage, or should only pass an estate redeemable, equity would always construe it so.<sup>6</sup>

day, etc., forty pounds of money, then the feoffor may re-enter: in this case the feoffee is called tenant in mortgage. \* \* \* If the feoffor doth not pay, then the land which is put in pledge, upon condition for the payment of money, is taken from him forever; \* \* \* and, if he doth pay the money, then the pledge is dead as to the tenant." Section 332.

<sup>3</sup> 1 Spence, p. 602.

<sup>4</sup> *How v. Vigures*, 1 Ch. R. 32. See, also, *Toth*, 132.

<sup>5</sup> *Casborne v. Scarfe*, 1 Atk. 603, 2 White & T. Lead. Cas. Eq. 1945.

<sup>6</sup> *Howard v. Harris*, 1 Vern. 190, 2 White & T. Lead. Cas. Eq. 1949.

In working out this system, the court of chancery, true to its methods and traditions, did not attempt to directly interfere with the common-law system. It acted in personam on the conscience of the mortgagee, and compelled him to reconvey the legal title to the mortgagor whenever the latter exercised his right of redemption.<sup>7</sup> The two systems, therefore, continued to exist side by side; and even in equity the legal title of the mortgagee was recognized so far as necessary to protect his security.<sup>8</sup> Thus, after default, equity would not enjoin the mortgagee from maintaining ejectment against the mortgagor for the possession of the mortgaged premises,<sup>9</sup> and the mortgagor could not make a valid lease binding on the mortgagee.<sup>10</sup> For all other purposes, however, the mortgagor was regarded as the actual owner of the estate.<sup>11</sup>

*Mortgages in United States.*

Having thus briefly considered the historical development of the equitable theory regarding mortgages, we come to the question, how are mortgages regarded in the United States? In some of the states the equitable theory has been carried to its logical conclusion. A mortgage is regarded as a mere lien or charge on land to secure repayment of the debt. The mortgage does not vest the mortgagee with any title to the land, nor has he a right to take possession, even after default. His only right, on default, is to bring proceedings for the sale of the land, and thus obtain a satisfaction of the mortgage out of the proceeds, accounting to the mortgagor for the surplus. This is substantially the system in California,<sup>12</sup> Colorado,<sup>13</sup> Florida,<sup>14</sup> Georgia,<sup>15</sup> Indiana,<sup>16</sup> Iowa,<sup>17</sup> Kansas,<sup>18</sup> Kentucky,<sup>19</sup> Louisiana,<sup>20</sup> Mich-

<sup>7</sup> Barrett v. Hinckley, 124 Ill. 32, 14 N. E. 863.

<sup>8</sup> 1 Jones, Mortg. § 11.

<sup>9</sup> Cholmondeley v. Clinton, 2 Mer. 350.

<sup>10</sup> Keech v. Hall, Doug. 22.

<sup>11</sup> 1 Jones, Mortg. § 11.

<sup>12</sup> McMillan v. Richards, 9 Cal. 365; Dutton v. Warschauer, 21 Cal. 609.

<sup>13</sup> Drake v. Root, 2 Colo. 685.

<sup>14</sup> McMahon v. Russell, 17 Fla. 698; Jordan v. Sayre, 29 Fla. 100, 10 South. 823.

<sup>15</sup> Vason v. Ball, 56 Ga. 268; Carter v. Gunn, 64 Ga. 651.

<sup>16</sup> Fletcher v. Holmes, 32 Ind. 497, 515.

<sup>17</sup> White v. Rittenmyer, 30 Iowa, 268.

<sup>18</sup> Chick v. Willetts, 2 Kan. 384.

<sup>19</sup> Woolley v. Holt, 14 Bush, 788; Taliaferro v. Gay, 78 Ky. 406.

<sup>20</sup> Duclaud v. Rousseau, 2 La. Ann. 168.

igan,<sup>21</sup> Minnesota,<sup>22</sup> Montana,<sup>23</sup> Nebraska,<sup>24</sup> Nevada,<sup>25</sup> New Mexico,<sup>26</sup> New York,<sup>27</sup> North and South Dakota,<sup>28</sup> Oregon,<sup>29</sup> South Carolina,<sup>30</sup> Texas,<sup>31</sup> Utah,<sup>32</sup> Washington,<sup>33</sup> and Wisconsin.<sup>34</sup> In the other states the dual English system prevails, with varying modifications. It may, however, be stated as a general proposition, that in these states a mortgage is regarded as a conveyance of the legal title, entitling the mortgagee to possession always after default, and sometimes even before; while the mortgagor has only the equity of redemption. This system prevails in Alabama,<sup>35</sup> Arkansas,<sup>36</sup> Connecticut,<sup>37</sup> Delaware,<sup>38</sup> Illinois,<sup>39</sup> Maine,<sup>40</sup> Maryland,<sup>41</sup> Massachusetts,<sup>42</sup> Mississippi,<sup>43</sup>

<sup>21</sup> *Caruthers v. Humphrey*, 12 Mich. 270; *Lee v. Clary*, 38 Mich. 223.

<sup>22</sup> *Adams v. Corrison*, 7 Minn. 456 (Gil. 365).

<sup>23</sup> *Fee v. Swingly*, 6 Mont. 596, 13 Pac. 375.

<sup>24</sup> *Kyger v. Ryley*, 2 Neb. 20, 28; *McHugh v. Smiley*, 17 Neb. 620, 20 N. W. 296.

<sup>25</sup> Gen. St. 1885, § 3284; *Firat Nat. Bank v. Kreig* (Nev.) 32 Pac. 641.

<sup>26</sup> Comp. Laws 1884, § 1595.

<sup>27</sup> *Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Shattuck v. Bascom*, 105 N. Y. 40, 12 N. E. 283; *Packer v. Rochester & S. R. Co.*, 17 N. Y. 283.

<sup>28</sup> Rev. Codes 1883, § 1733.

<sup>29</sup> *Thompson v. Marshall*, 21 Or. 171, 27 Pac. 957; *Adair v. Adair*, 22 Or. 115, 29 Pac. 193.

<sup>30</sup> *Navassa Guano Co. v. Richardson*, 26 S. C. 401, 2 S. E. 307; *Hardin v. Hardin*, 34 S. C. 77, 12 S. E. 936.

<sup>31</sup> *Wright v. Henderson*, 12 Tex. 43.

<sup>32</sup> Comp. Laws 1876, p. 478.

<sup>33</sup> Code Wash. 1881, § 546.

<sup>34</sup> *Wood v. Trask*, 7 Wis. 566; *Wisconsin Cent. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94, 36 N. W. 837.

<sup>35</sup> *Knox v. Easton*, 38 Ala. 345; *Downing v. Blair*, 75 Ala. 216.

<sup>36</sup> *Kannady v. McCarron*, 18 Ark. 166; *Fitzgerald v. Beebe*, 7 Ark. 310.

<sup>37</sup> *Chamberlain v. Thompson*, 10 Conn. 243, 251.

<sup>38</sup> *Hall v. Tunnell*, 1 Houst. 320; *Cornog v. Cornog*, 3 Del. Ch. 407, 416. In Delaware the English system is greatly modified, and approximates very nearly to that in force in the first class of states.

<sup>39</sup> *Carroll v. Ballance*, 26 Ill. 9; *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863.

<sup>40</sup> *Blaney v. Bearce*, 2 Greenl. 132.

<sup>41</sup> *Brown v. Stewart*, 1 Md. Ch. 87; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115.

<sup>42</sup> *Ewer v. Hobbs*, 5 Metc. (Mass.) 1-3; *Howard v. Robinson*, 5 Cush. 119, 123.

<sup>43</sup> *Carpenter v. Bowen*, 42 Miss. 28; *Buckley v. Daley*, 45 Miss. 338, 565. Here, too, the English system is greatly modified.



Missouri,<sup>44</sup> New Hampshire,<sup>45</sup> New Jersey,<sup>46</sup> North Carolina,<sup>47</sup> Ohio,<sup>48</sup> Pennsylvania,<sup>49</sup> Rhode Island,<sup>50</sup> Tennessee,<sup>51</sup> Vermont,<sup>52</sup> Virginia, and West Virginia.<sup>53</sup>

#### SAME—ABSOLUTE DEED AS MORTGAGE.

**142. A deed absolute in form will in equity be treated as a mortgage if it was executed to secure the repayment of a loan or debt.**

The presumption, of course, is that a deed is what it purports to be on its face; but equity regards substance, and not form; and, if it appears that the parties intended the deed to stand as security for a loan, effect will be given to such intention by treating the deed as in all respects a mortgage.<sup>54</sup> Parol evidence is admissible to show such intention. The rule forbidding the admission of parol evidence to vary or contradict the terms of a written instrument does not forbid an inquiry into the object of the parties in executing and re-

<sup>44</sup> *Johnson v. Houston*, 47 Mo. 227; *Bailey v. Winn*, 101 Mo. 649, 12 S. W. 1045.

<sup>45</sup> *Brown v. Cram*, 1 N. H. 169; *Hobart v. Sanborn*, 13 N. H. 226; *Great Falls Co. v. Worster*, 15 N. H. 412, 444.

<sup>46</sup> *Sanderson v. Price*, 21 N. J. Law, 637, 646; *Shields v. Lozeau*, 34 N. J. Law, 496; *Verner v. Betz*, 46 N. J. Eq. 256, 19 Atl. 206.

<sup>47</sup> *Hemphill v. Ross*, 66 N. C. 477.

<sup>48</sup> *Allen v. Everly*, 24 Ohio St. 97, 114.

<sup>49</sup> *Tryon v. Munson*, 77 Pa. St. 250.

<sup>50</sup> *Carpenter v. Carpenter*, 6 R. I. 542; *Waterman v. Matteson*, 4 R. I. 539.

<sup>51</sup> *Henshaw v. Wells*, 9 Humph. 568; *Vance v. Johnson*, 10 Humph. 214.

<sup>52</sup> *Hagar v. Brainerd*, 44 Vt. 294; *Brunswick-Balke-Collender Co. v. Herrick*, 63 Vt. 286, 21 Atl. 918.

<sup>53</sup> 2 Minor, Inst. 500-530. Trust deeds which vest the legal title in the trustee are extensively used in Virginia and West Virginia.

<sup>54</sup> *Beach*, Eq. Jur. § 406; *Peugh v. Davis*, 96 U. S. 332, 336; *Ensign v. Ensign*, 120 N. Y. 655, 24 N. E. 942; *Helm v. Boyd*, 124 Ill. 370, 16 N. E. 85; *Cullen v. Carey*, 146 Mass. 50, 15 N. E. 131; *Harper's Appeal*, 64 Pa. St. 315; *Turple v. Lowe*, 114 Ind. 37, 15 N. E. 834; *McMillan v. Bissell*, 63 Mich. 60, 29 N. W. 737; *Madigan v. Mead*, 31 Minn. 94, 16 N. W. 539; *McMillan v. Jewett*, 85 Ala. 476, 5 South. 145; *Cake v. Shull*, 45 N. J. Eq. 208, 16 Atl. 434; *Becker v. Howard*, 75 Wis. 415, 44 N. W. 755; *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420; *Pearce v. Wilson*, 111 Pa. St. 14, 2 Atl. 99; *Ross v. Brustle*, 70 Cal. 465, 11 Pac. 760.

ceiving the instrument.<sup>55</sup> Nor does the admission of parol evidence for such purpose violate the statute of frauds, which can never be made a cover for fraud.<sup>56</sup>

#### **SAME—CONDITIONAL SALE OR MORTGAGE.**

**143.** A sale of land, with an option reserved to the vendor to repurchase within a specified time, will in equity be treated as a mortgage, if the conveyance was intended by the parties to stand as security for a debt.

A loan of money secured by a mortgage on land, and a sale of land with an option reserved to the vendor to repurchase by a payment of a specified sum to the vendee within a designated time, often *prima facie* greatly resemble each other; and yet the distinction between the two is extremely important in its consequences. In the case of a mortgage, a default in payment at the time stipulated does not bar the right of redemption; but in case of a conditional sale the vendor must exercise his option to repurchase within the time limited, or it is gone forever.<sup>57</sup> The intention of the parties, as ascertained by considering their situation and the surrounding facts, as well as the written memorials of the transaction, furnishes the criterion for the distinction.<sup>58</sup> If it appears that the parties intended the sale to stand merely as security for a debt, equity will treat the transaction in all respects as a mortgage.<sup>59</sup> Chancellor Kent states the test of distinction as follows: "If the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage; but if the debt be extinguished by the agreement of the

<sup>55</sup> *Peugh v. Davis*, 96 U. S. 332, 336; *Campbell v. Dearborn*, 109 Mass. 120; *Stinchfield v. Milliken*, 71 Me. 567.

<sup>56</sup> *Carr v. Carr*, 52 N. Y. 251, 260; *Klein v. McNamara*, 54 Miss. 90; *Sewell v. Price*, 32 Ala. 97.

<sup>57</sup> *Alderson v. White*, 2 De Gex & J. 97; *Turner v. Wilkinson*, 72 Ala. 361.

<sup>58</sup> *Cornell v. Hall*, 22 Mich. 377, 383; *Smith v. Crosby*, 47 Wis. 160, 2 N. W. 104; *Henley v. Hotelling*, 41 Cal. 22.

<sup>59</sup> *Schriber v. Le Clair*, 66 Wis. 579, 29 N. W. 570, 889; *Jackson v. Lynch*, 129 Ill. 72, 21 N. E. 580, and 22 N. E. 246; *Lipp v. Land Syndicate*, 24 Neb. 692, 40 N. W. 129; *White v. Megill* (N. J. Ch.) 18 Atl. 355; *Buse v. Page*, 32 Minn. 111, 19 N. W. 736, and 20 N. W. 95.

parties, or the money advanced is not by way of loan, and the grantor has the privilege of refunding, if he pleases, by a given time, and thereby entitles himself to a reconveyance, it is a conditional sale.”<sup>60</sup> In cases of doubt, courts will construe the transaction as a mortgage, because the vendor recovers his debt with legal interest, and the danger of oppression resulting from the inability of the vendor to repurchase within the time limited is obviated.<sup>61</sup>

#### SAME—ASSIGNMENT OF MORTGAGE.

**144. As viewed by a court of equity, the debt is the principal thing, and the mortgage an accessory, and therefore an assignment of the debt carries with it the mortgage.**<sup>62</sup>

In those states where the legal title to land vests in the mortgagee, a deed executed with due formality is, of course, essential to vest the legal title in his assignee.<sup>63</sup> In equity, however, where the mortgage is regarded as merely a lien on the land, an assignment of the debt operates as an assignment of the mortgage, giving the assignee a right to enforce the same.<sup>64</sup> It is, of course, desirable that a formal written assignment of the debt and mortgage be executed, but this is not necessary to the validity of the assignment. Some difficult questions have arisen where the mortgage debt is evidenced by several notes, and these notes have been assigned to different persons. If the notes mature at different times, some of the courts hold that

<sup>60</sup> 4 Kent, Comm. p. 145. See, also, *Kraemer v. Adelsberger*, 122 N. Y. 467, 25 N. E. 859; *Adams v. Pilcher*, 92 Ala. 474, 8 South. 757; *Henley v. Hotelling*, 41 Cal. 22, 28.

<sup>61</sup> *Rapier v. Gulf City Paper Co.*, 77 Ala. 126, 134; *Roddy v. Brick*, 42 N. J. Eq. 218, 6 Atl. 806; *Niggeler v. Maurin*, 34 Minn. 119, 24 N. W. 369.

<sup>62</sup> *Carpenter v. Longan*, 16 Wall. 271, 275.

<sup>63</sup> *Sanders v. Cassady*, 86 Ala. 246, 248, 5 South. 503; *Smith v. Kelley*, 27 Me. 237; *Adams v. Parker*, 12 Gray, 53.

<sup>64</sup> In states where a mortgage is merely a chattel interest, such assignment is treated as a legal assignment. *Sangster v. Love*, 11 Iowa, 580; *Runyan v. Mersereau*, 11 Johns. 534; *Reeves v. Hayes*, 95 Ind. 521. In the other states such assignment is treated as an equitable assignment. *Keyes v. Wood*, 21 Vt. 331; *Mayo v. Merrick*, 127 Mass. 511; *Jordan v. Cheney*, 74 Me. 359.

the respective assignees will be entitled to priority according to the order of time in which these notes mature,<sup>65</sup> though in some of the states it is held that all the assignees stand on an equality, and must share the proceeds of the mortgaged premises *pro rata*.<sup>66</sup>

#### **SAME—TRANSFER OF MORTGAGED LAND.**

**145. Where mortgaged premises are conveyed subject to the mortgage, the land continues the primary fund for the payment of the debt; but the grantee is not personally liable unless he assumes payment of the mortgage.**

As between a mortgagor and his grantee of the premises, "subject to" the mortgage, the land is the primary fund for the payment of the debt. Consequently, a mortgagor who is compelled by the mortgagee to discharge the debt out of his individual property is entitled to indemnity out of the mortgaged premises.<sup>67</sup> In such a case, however, the grantee is not personally liable for the mortgage debt.<sup>68</sup>

But a grantee who covenants in the deed, not merely to take subject to the mortgage, but to assume payment of the mortgage debt as part of the purchase price, becomes the principal debtor, and the mortgagor merely a surety;<sup>69</sup> and should the mortgagee, after notice of such assumption, release the grantee, or extend the time of pay-

<sup>65</sup> *Leavitt v. Reynolds*, 79 Iowa, 348, 44 N. W. 567; *Lyman v. Smith*, 21 Wis. 674; *Winters v. Bank*, 33 Ohio St. 250; *Doss v. Ditmars*, 70 Ind. 451; *Herrington v. McCullum*, 73 Ill. 476; *Mitchell v. Ladew*, 36 Mo. 526. In *Granger v. Crouch*, 86 N. Y. 494, 499, it was held that the intention of the parties is controlling on the question of priority.

<sup>66</sup> *Lovell v. Cragin*, 136 U. S. 147, 10 Sup. Ct. 1024; *Fourth Nat. Bank's Appeal*, 123 Pa. St. 484, 16 Atl. 779; *Penzel v. Brookmire*, 51 Ark. 105, 10 S. W. 15; *Wilson v. Eigenbrodt*, 30 Minn. 4, 13 N. W. 907; *Jennings v. Moore*, 83 Mich. 231, 47 N. W. 127.

<sup>67</sup> *Johnson v. Zink*, 51 N. Y. 333; *Cleveland v. Southard*, 25 Wis. 479; *Sweetzer v. Jones*, 35 Vt. 317; *Stevens v. Church*, 41 Conn. 369; *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547.

<sup>68</sup> *Belmont v. Coman*, 22 N. Y. 438; *Elliott v. Sackett*, 108 U. S. 140, 2 Sup. Ct. 375; *Tichenor v. Dodd*, 4 N. J. Eq. 454.

<sup>69</sup> *Rice v. Sanders*, 152 Mass. 108, 24 N. E. 1079; *Snyder v. Robinson*, 35 Ind. 311; *Palmeter v. Carey*, 63 Wis. 426, 21 N. W. 793, and 23 N. W. 586.

ment without the mortgagor's consent, the latter will be discharged from liability, just as any other surety.<sup>70</sup> A grantee who thus assumes payment of the mortgage debt, as part of the consideration, cannot evade liability thereon by contesting the validity of the mortgage.<sup>71</sup>

In many of the states it is held that the grantee's personal liability may be enforced in an action at law by the mortgagee, though he was not a party or a privy to the contract in which the grantee assumed payment. The courts holding this rule base it on the theory that the person for whose benefit a promise is made may enforce it, though he be a stranger to the contract and to the consideration; as where A. transfers property to B., and B. assumes payment of A.'s debts as the consideration for the transfer, the creditors of A., who are the persons beneficially interested, may maintain an action at law directly against B.<sup>72</sup> Other courts, however, hold that the personal liability of the grantee can be enforced only in equity, on the theory that, since the mortgagor is merely a surety, the mortgagee is entitled to the benefit of any collateral security held by the surety against the principal, the grantee; and that, therefore, the mortgagee may proceed directly against the latter to avoid circuitry of action.<sup>73</sup>

#### SAME—FORECLOSURE OF MORTGAGE.

**146. In the English system of mortgages, foreclosure signifies a proceeding in chancery, brought by the mortgagee, wherein the mortgagor's right of redemption of**

<sup>70</sup> *Calvo v. Davies*, 73 N. Y. 211, 215; *George v. Andrews*, 60 Md. 26. See, however, *Boardman v. Larrabee*, 51 Conn. 39.

<sup>71</sup> *Crawford v. Edwards*, 33 Mich. 354; *Ritter v. Phillips*, 53 N. Y. 536. Purchaser cannot set up usury in mortgage. *Cramer v. Lepper*, 26 Ohio St. 59; *Hartley v. Harrison*, 24 N. Y. 170; *Bearce v. Barstow*, 9 Mass. 45.

<sup>72</sup> *Lawrence v. Fox*, 20 N. Y. 268; *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. 756; *Follansbee v. Johnson*, 28 Minn. 311, 9 N. W. 882; *Ayres v. Randall*, 108 Ind. 595, 9 N. E. 464; *Bassett v. Hughes*, 43 Wis. 319; *Dean v. Walker*, 107 Ill. 540, 545; *Bay v. Williams*, 112 Ill. 91; *Rockwell v. Bank*, 31 Neb. 128, 47 N. W. 641.

<sup>73</sup> *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Keller v. Ashford*, 133 U. S. 610, 620, 10 Sup. Ct. 494; *Osborne v. Cabell*, 77 Va. 462.

the mortgaged premises is barred or closed forever. This method of foreclosure prevails also in some of the American states, and is known as "strict foreclosure."

147. In most of the American states, foreclosure means a proceeding having for its object a sale of the mortgaged lands, so that the proceeds may be applied in satisfaction of the mortgage debt. This sale may take place either by virtue of a judicial decree, or by virtue of a power of sale contained in the mortgage.

*Strict Foreclosure.*

In the English system of mortgages, followed, as we have seen, in some of the American states, the legal title to the land is regarded as vested in the mortgagee. On default in the payment of the mortgage debt, the mortgagee may therefore obtain possession of the premises by the legal action of ejectment or the writ of entry. This method prevails in England, and in Maine, New Hampshire, Massachusetts, and Rhode Island.<sup>74</sup> The mortgagor, however, possesses a right to redeem which continues for an indefinite period. To cut off this right of redemption, it is necessary for the mortgagee to bring foreclosure proceedings in equity. The English practice is to order an accounting, and then enter a decree requiring the mortgagor to redeem within six months, or be forever barred of his right. If a default is so made, then a final order for foreclosure absolute is made on motion as of course. This mode of foreclosure is still the usual one in Connecticut and Vermont, and may be resorted to in Alabama, California, Illinois, Massachusetts, New Jersey, New York, and Wisconsin.<sup>75</sup> In all the other states it is practically obsolete.<sup>76</sup>

*Foreclosure by Judicial Sale.*

In nearly all the states of the Union, the mortgagee, on default in payment of the mortgage debt, may bring a suit in equity which has a twofold object: (1) A sale of the premises, and the application of the proceeds in satisfaction of the mortgage; (2) a personal judgment for any deficiency against all persons liable for the mortgage debt.<sup>77</sup> Statutes generally require the action to be brought in the

<sup>74</sup> 2 Jones, Mortg. § 1238.

<sup>76</sup> Id.

<sup>75</sup> 2 Jones, Mortg. §§ 1542-1556.

<sup>77</sup> Wiltzie, Mortg. Forec. § 11.

county where the land lies. The owner of the mortgaged premises, whether he be the mortgagor or his grantee, is a necessary party defendant, since its object is to divest his title.<sup>78</sup> All persons who have acquired liens or incumbrances on the mortgaged premises subsequent to the mortgage are proper parties defendant.<sup>79</sup> Prior mortgages and incumbrancers should not be joined, because their rights cannot be affected by a sale under a junior mortgage.<sup>80</sup> The decree of foreclosure directs a sale of the land to be made by the proper judicial officer. On such sale, the purchaser is vested with the title which the mortgagor had when the mortgage was executed and recorded, as well as any title thereafter acquired by him.<sup>81</sup> If the price bid at the sale exceeds the mortgage debt and costs of foreclosure, the surplus takes the place of the land, and belongs to the persons whose estates or interests in the land were cut off by the sale.<sup>82</sup> If the proceeds of the sale do not equal the amount of the mortgage debt and costs, the mortgagee is entitled to a personal judgment for deficiency against all persons liable for the mortgage debt.<sup>83</sup>

*Foreclosure by Sale under Power.*

A more expeditious method of foreclosure exists in many of the states of this country as well as in England.<sup>84</sup> Mortgages at the present time are drawn with a power of sale, authorizing a sale of the premises at public auction on default in payment of the mortgage debt; and statutes exist prescribing how the power must be exercised. These statutes generally require the mortgagee to give public notice of the sale, by publication for a specified time, in the newspapers of the county where the land is located.<sup>85</sup> The mortgagee must exercise his power of sale fairly and properly, and there-

<sup>78</sup> *Landon v. Townshend*, 112 N. Y. 93, 98, 19 N. E. 424; *Griffin v. Hodshire*, 119 Ind. 235, 21 N. E. 741; *Hambrick v. Russell*, 86 Ala. 199, 201, 5 South. 298.

<sup>79</sup> *Beach*, Mod. Eq. § 500; *Kay v. Whittaker*, 44 N. Y. 565, 572; *Cheney v. Patton*, 134 Ill. 422, 25 N. E. 792; *Verden v. Slocum*, 71 N. Y. 345.

<sup>80</sup> *McComb v. Spangler*, 71 Cal. 423, 12 Pac. 347; *Goebel v. Iffla*, 111 N. Y. 170, 177, 18 N. E. 649; *Macloon v. Smith*, 49 Wis. 200, 5 N. W. 336.

<sup>81</sup> *Gaylord v. City of Lafayette*, 115 Ind. 423, 17 N. E. 899; *Barnard v. Wilson*, 74 Cal. 513, 16 Pac. 307.

<sup>82</sup> *Clarkson v. Skidmore*, 46 N. Y. 301; *Lithauer v. Royle*, 17 N. J. Eq. 40.

<sup>83</sup> 2 Jones, Mortg. § 1700.

<sup>84</sup> 2 Jones, Mortg. § 1764.

<sup>85</sup> *Id.* § 1827; *Shillaber v. Robinson*, 97 U. S. 68.

fore he cannot buy the property either in person or by an agent, unless authorized so to do by statute or by the power.<sup>86</sup> As in the case of a sale under a judicial decree, the purchaser acquires the mortgagor's title as it existed when the mortgage was executed and recorded, as well as any title subsequently acquired,<sup>87</sup> and any surplus arising from the sale must be accounted for to the persons having estates or interests in the land.<sup>88</sup>

*Concurrent Remedies.*

In addition to his right of foreclosure, the mortgagee may maintain an action at law against all persons liable for the mortgage debt, and he is entitled to recover the amount of principal, interest, and costs.<sup>89</sup> While all these remedies are concurrent, the mortgagee cannot retain more than the amount of his claim; and, if the personal judgment is satisfied, he must surrender the land.<sup>90</sup>

**SAME—REDEMPTION.**

**148. Any person who has an interest in the property subject to the mortgage may redeem.**

**149. Redemption can be made only from the mortgage debt in its entirety; and consequently, if the person redeeming is not primarily liable for the debt, or liable for only a portion thereof, he is entitled to exoneration or contribution from the other persons liable.**

In the English system of mortgages, the equity of redemption signifies the right of the mortgagee to pay the mortgage debt after default, and thus regain possession of the premises. The usual method

<sup>86</sup> *Martinson v. Clower*, 21 Ch. Div. 857; *Ezzell v. Watson*, 83 Ala. 120, 3 South. 309; *Very v. Russell*, 65 N. H. 646, 23 Atl. 522.

<sup>87</sup> *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Slin v. Field*, 66 Mo. 111.

<sup>88</sup> 2 Jones, *Mortg.* § 1929; *Cook v. Basley*, 123 Mass. 396; *Buttrick v. Wentworth*, 6 Allen, 79; *Ballinger v. Bourland*, 87 Ill. 513; *Brown v. Crookston Agricultural Ass'n*, 34 Minn. 545, 26 N. W. 907.

<sup>89</sup> 2 Jones, *Mortg.* § 1220; *Lichty v. McMartin*, 11 Kan. 565; *Vansant v. Allmon*, 23 Ill. 30.

<sup>90</sup> *Burnell v. Martin*, 2 Doug. 417; 2 Jones, *Mortg.* § 1215.



of redemption under this system is by a suit in equity, and in his bill the mortgagor tenders the amount due on the mortgage debt. A decree is then made compelling the mortgagee to reconvey. This method of redemption prevails in those states where the dual English system exists.<sup>91</sup>

In most of the states, where the mortgage vests no title in the mortgagee, and does not entitle him to the possession, and where the mortgage is foreclosed by sale, statutes exist conferring on the mortgagor, and those claiming under him, the right to redeem by paying to the purchaser, within a specified time,—generally a year after the sale,—the amount of his bid, with interest.<sup>92</sup> This, of course, is a substantially different form of redemption from that existing under the English system.

All persons having an interest in the property subject to the mortgage may redeem.<sup>93</sup> For example, judgment creditors of the mortgagor,<sup>94</sup> and junior mortgagees,<sup>95</sup> may redeem, since they have liens on the property. The mortgagor's heirs may exercise the right,<sup>96</sup> and so may his grantee if the premises have been conveyed.

The land must, however, be redeemed as a whole. Since the entire premises stand as security for the whole debt, the mortgagee need not accept payment in installments, and cannot be compelled to release a specific portion of the land from the lien of the mortgage.<sup>97</sup>

<sup>91</sup> 2 Jones, Mortg. § 1093 et seq.

<sup>92</sup> This right exists in Alabama, Arkansas, California, Colorado, Illinois, Indiana, Iowa, Minnesota, Missouri, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Tennessee, and Washington. In Michigan the sale cannot take place until a year after the bill to foreclose is filed, and in Wisconsin not until a year after the decree. See 2 Jones, Mortg. § 1051, and notes.

<sup>93</sup> *Pearce v. Morris*, 5 Ch. App. 229.

<sup>94</sup> *Willard v. Finnegan*, 42 Minn. 476, 44 N. W. 985; *Bozarth v. Largent*, 128 Ill. 95, 21 N. E. 218; *Cramer v. Watson*, 73 Ala. 127; *Mallalieu v. Wickham*, 42 N. J. Eq. 297, 10 Atl. 880.

<sup>95</sup> *Twombly v. Cassidy*, 82 N. Y. 155; *Gaskell v. Viquesney*, 122 Ind. 244, 23 N. E. 791; *Lewis v. Hinman*, 56 Conn. 55, 13 Atl. 143.

<sup>96</sup> *Alexander v. Hill*, 88 Ala. 487, 7 South. 238; *Hunter v. Dennis*, 112 Ill. 568; *Pym v. Bowreman*, 3 Swanst. 241, note; *Zaegel v. Kuster*, 51 Wis. 31, 7 N. W. 781; *Chew v. Hyman*, 10 Biss. 240, 7 Fed. 7.

<sup>97</sup> *Meacham v. Steele*, 93 Ill. 135; *Lamb v. Montague*, 112 Mass. 353; *Spurgin v. Adamson*, 62 Iowa, 661, 18 N. W. 293; *Coffin v. Parker*, 127 N. Y. 117, 27 N. E. 814.

*Contribution and Exoneration.*

Of course, it frequently happens that one who has acquired only a portion of the mortgaged premises, or who is primarily liable for only a portion of the mortgage debt, wishes to redeem. He must pay the whole amount of the mortgage debt, or the whole amount bid at foreclosure sale, and then look to the others liable with him for exoneration or contribution, as the case may be. If the equities of the parties are in all respects equal, then the others must contribute ratably to the one who has effected the redemption. Thus, where tenants in common join in a mortgage on the entire estate, the tenant who redeems may compel contribution by his cotenant.<sup>98</sup> And so, where the mortgagor conveys the mortgaged premises by simultaneous deeds to different persons, neither of whom assumes payment of the mortgage, the one redeeming may enforce contribution from the others.<sup>99</sup>

Where the equities of the parties are unequal, the one having the superior equity is entitled, not merely to contribution from, but to exoneration by, the one having the inferior equity. Thus, where a mortgagor conveys a portion of the mortgaged premises by a deed in which the grantee does not assume payment of the mortgage, the portion in the mortgagor's hands is primarily liable for the mortgage debt; and, if the grantee redeems, he may enforce the entire mortgage against the portion of the premises still in the mortgagor's possession.<sup>100</sup> So, if the entire premises are conveyed at different times to different grantees, the maxim which applies is: Where the equities are equal, the first in order of time prevails; and hence the rule is that, as between the grantees, the parcels are liable in the inverse order of their alienation.<sup>101</sup>

<sup>98</sup> Chase v. Woodbury, 6 Cush. 143; Damm v. Damm, 91 Mich. 424, 51 N. W. 1069; Alken v. Gale, 37 N. H. 501.

<sup>99</sup> Adams v. Smille, 50 Vt. 1.

<sup>100</sup> Cheever v. Fair, 5 Cal. 337; Hall v. Morgan, 79 Mo. 47; Sargeant v. Rowsey, 89 Mo. 617, 1 S. W. 823. The converse of this proposition is also true: If the mortgagor redeems, he cannot enforce contribution from the grantee. 2 Jones, Mortg. § 1091; Wallace v. Stevens, 64 Me. 225; Henderson v. Trullitt, 95 Ind. 309.

<sup>101</sup> National Sav. Bank v. Creswell, 100 U. S. 630; Moore v. Shurtleff, 128 Ill. 370, 21 N. E. 775; Clowes v. Dickinson, 5 Johns. Ch. 235, 240; Milligan's Appeal, 104 Pa. St. 503; Worth v. Hill, 14 Wis. 559.

**MORTGAGES AND PLEDGES OF PERSONALTY.**

150. A chattel mortgage is a sale of personal property on condition that it shall be avoided by the performance of the condition,—usually the payment of a debt within a specified time. If the condition is broken, the title vests absolutely at law in the mortgagee. Equity, however, as in the case of mortgages on land, created a right of redemption after default.

151. A pledge or pawn is a security created by the actual or constructive delivery of a personal chattel to a bailee or pledgee; the general property remaining in the pledgor, the pledgee having only a special property or right of retainer until the debt is paid.

We have seen that, in the case of real-estate mortgages, the legal title to the land was originally regarded as vested in the mortgagee. We have also seen that many of the states have discarded this theory; and that a real-estate mortgage is regarded as merely a lien on the land. No similar departure has, however, been made in any of the states in regard to chattel mortgages, except in California and a few of the western states.<sup>102</sup> In all the other states of the Union, the mortgage vests the mortgagee with the legal title.<sup>103</sup> If there is a breach of condition by nonpayment of the debt at the time specified, the mortgagee's title becomes absolute by the old common law.<sup>104</sup> In analogy to mortgages on land, equity vested the mortgagor with a right to redeem within a reasonable time after default.<sup>105</sup> To cut off this right of redemption, it is not necessary,

<sup>102</sup> The Civil Code of California declares that a chattel mortgage creates merely a lien on the property mortgaged. Civil Code, § 2920 et seq.

<sup>103</sup> The decisive test as to whether a chattel mortgage exists is whether the instrument is a conditional sale transferring the title. *Jones, Chat. Mortg.* § 8; *Campbell v. Woodstock Iron Co.*, 83 Ala. 351, 3 South. 369.

<sup>104</sup> *Taber v. Hamlin*, 97 Mass. 489, per Foster, J.; *Burtis v. Bradford*, 122 Mass. 129; *Jones, Chat. Mortg.* § 681.

<sup>105</sup> *Kemp v. Westbrook*, 1 Ves. Sr. 278; *Flanders v. Chamberlain*, 24 Mich. 305, 315; *Davis v. Hubbard*, 38 Ala. 185, 189; *Boyd v. Beaudin*, 54 Wis. 193, 198, 11 N. W. 521.

however, for the mortgagee to bring a foreclosure suit in equity, as in the case of real-estate mortgages. He can bar the equity of redemption by a public sale of the property, made on due notice, without any suit.<sup>106</sup> This distinction between the two classes of mortgages is similar to the distinction which equity makes in relation to specific performance between real and personal property, viz. other chattels of the same kind and the same worth may be purchased for the price bid at the public sale.<sup>107</sup> The right of foreclosure and redemption is now regulated in all states by statute.<sup>108</sup>

The law of pledges falls under the head of bailment at common law rather than under any doctrine in equity, and is referred to here merely for the purpose of distinction from that applicable to chattel mortgages. To create a pledge, no transfer of the legal title is necessary, but there must be a transfer of the possession. The general title to the property remains in the pledgor, and the pledgee has only a special property or right of retainer until the debt is paid.<sup>109</sup> The pledgor has a right to redeem even at law at any time after default, and before a public sale of the pledged property by the pledgee.<sup>110</sup>

#### EQUITABLE LIENS.

**152. An equitable lien is a right to subject a particular fund or specific property to the satisfaction of a demand. It is a charge on the property, and not an estate or interest in the property.**

A lien at common law is defined as the right to retain possession of property belonging to another until a demand against him is sat-

<sup>106</sup> *Patchin v. Pierce*, 12 Wend. 61, 63; *Long Dock Co. v. Mallery*, 12 N. J. Eq. 93; *Denny v. Faulkner*, 22 Kan. 89, 100; *First Nat. Bank v. Damm*, 63 Wis. 249, 23 N. W. 497; *Broadhead v. McKay*, 46 Ind. 595; *In re Morritt*, 18 Q. B. Div. 222.

<sup>107</sup> *Smith*, Man. Eq. Jur. p. 339.

<sup>108</sup> See *Jones*, Chat. Mortg. c. 18, where the statutes of the various states are collected.

<sup>109</sup> *Jones v. Smith*, 2 Ves. Jr. 378; *Walker v. Staples*, 5 Allen, 34; *Wright v. Ross*, 36 Cal. 414.

<sup>110</sup> *Jones v. Smith*, 2 Ves. Jr. 372, 378.

ified.<sup>111</sup> Hence possession is necessary to the existence of a common-law lien. An equitable lien, on the contrary, is not dependent on the possession or retention of the property on which it is charged. "In courts of equity, the term 'lien' is used as synonymous with a charge or incumbrance upon a thing, where there is neither *jus in re* nor *ad rem* nor possession of the thing."<sup>112</sup> Prof. Pomeroy<sup>113</sup> ascribes the origin of equitable liens to the fact that, in the great majority of cases, courts of law could confer only a pecuniary remedy for breach of contract, while courts of equity viewed contracts as creating a right in specific property; and equitable liens were introduced "for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating on particular identified property, instead of the general pecuniary recoveries granted by courts of law."

#### SAME—EQUITABLE MORTGAGES.

**153. An equitable mortgage is a charge or lien on property created:**

- (a) **By an agreement to give a mortgage.**
- (b) **By the imperfect execution of a mortgage.**
- (c) **By a deposit of title deeds.**
- (d) **By a formal mortgage of an estate recognized only in equity.**

1. On the principle that what is agreed to be done is regarded in equity as done, an express agreement in writing to effect a mort-

<sup>111</sup> *Hammonds v. Barclay*, 2 East, 227, 235, per Grose, J.

<sup>112</sup> 1 Beach, Eq. § 287; *Peck v. Jenness*, 7 How. 612, per Grier, J. "An equitable lien is not an estate or property in the thing itself, nor a right to recover the thing; that is, a right which may be the basis of a possessory action. It is neither a *jus ad rem* nor a *jus in re*. It is simply a right of a special nature over the thing, which constitutes a charge or incumbrance upon the thing, so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree, and its proceeds, in the one case, or its rents and profits, in the other, applied upon the demand of the creditor in whose favor the lien exists." 3 Pom. Eq. Jur. § 1233.

<sup>113</sup> 3 Pom. Eq. Jur. § 1234.

gage is treated as an equitable mortgage.<sup>114</sup> This principle applies with especial force to agreements to mortgage property to be acquired in the future. When the property is acquired, it stands charged with a lien, just as if a mortgage had been formally executed.<sup>115</sup>

2. Equity regards substance, and not form; and, though a mortgage is not executed with all the formalities required by law, equity will uphold it, if it appears that the parties intended to execute a mortgage on specified property to secure a certain debt.<sup>116</sup>

3. In England, a deposit of title deeds by a debtor with his creditor constitutes an equitable mortgage, even though there is no written contract or memorandum stating why they were so deposited. The statute of frauds does not apply to a mortgage created by such deposit, since equity will not permit the statute to be made an instrument of fraud; and, holding that the deposit is conclusive evidence of an agreement under which one has advanced money on the faith of the deposit, it will not allow the depositor to set up the statute for the obvious purpose of swindling his creditor.<sup>117</sup> This form of mortgage, though very common in England, is practically obsolete with us.<sup>118</sup>

4. In England, the doctrine that a mortgage vests the legal title in the mortgagee is pushed to its logical conclusion; and it is therefore held that all mortgages executed by the mortgagor after the

<sup>114</sup> *Hall v. Hall*, 50 Conn. 104; *Read v. Simons' Adm'r*, 2 Desaus. Eq. 552; *In re Howe*, 1 Paige, 125; *Payne v. Wilson*, 74 N. Y. 348.

<sup>115</sup> *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Chester v. Jumel*, 125 N. Y. 237, 251, 26 N. E. 297; *Taylor v. Huck*, 65 Tex. 238; *Powell v. Jones*, 72 Ala. 392.

<sup>116</sup> *Payne v. Wilson*, 74 N. Y. 348; *Walton v. Cody*, 1 Wis. 420; *Dunman v. Coleman*, 59 Tex. 199; *New Vienna Bank v. Johnson*, 47 Ohio St. 306, 24 N. E. 503; *New Orleans Nat. Banking Ass'n v. Adams*, 109 U. S. 211, 3 Sup. Ct. 161; *Bank of Muskingum v. Carpenter*, 7 Ohio, 21.

<sup>117</sup> *Russel v. Russel*, 1 Brown, Ch. 269, 1 White & T. Lead. Cas. Eq. 931; *Keys v. Williams*, 3 Younge & C. 55.

<sup>118</sup> Mortgages by deposit of title deeds have been recognized in some of the American states. *Mounce v. Byars*, 16 Ga. 469; *Hackett v. Reynolds*, 4 R. I. 512; *Rockwell v. Hobby*, 2 Sandf. Ch. 9; *Griffin v. Griffin*, 18 N. J. Eq. 104; *Mowry v. Wood*, 12 Wis. 413; *Edwards' Ex'rs v. Trumbull*, 50 Pa. St. 509; *Bloom v. Noggle*, 4 Ohio St. 45, 46. In others, the doctrine has been repudiated. *Lehman v. Collins*, 69 Ala. 127; *Bicknell v. Bicknell*, 31 Vt. 498; *Gothard v. Flynn*, 25 Miss. 58.

first are merely equitable mortgages, since he has nothing but an equity to mortgage.<sup>119</sup> This doctrine does not prevail in any of the states of the Union, and no distinction is made in this respect between first and subsequent mortgages.

#### **SAME—LIENS BASED ON CONSIDERATIONS OF JUSTICE.**

**154. Not only will equity enforce liens created by express agreement of the parties, but it will create a lien whenever required by considerations of justice.<sup>120</sup>**

1. At common law, improvements made by an occupant of land in good faith, under the belief that he was the owner, passed, as part of the freehold, to the lawful owner when he recovered the premises in ejectment.<sup>121</sup> In all cases, however, where he brought an action in equity for an account of the rents and profits, the maxim, "He who seeks equity must do equity," was applied, and the value of the improvements was allowed to the occupant.<sup>122</sup> Courts of law subsequently adopted the same theory, and permitted the value of the improvements to be set off in an action for the mesne profits.<sup>123</sup> The general rule, however, was that the claim for improvements could only be made use of by way of defense, and that the occupant could not himself come into equity and obtain affirmative relief,<sup>124</sup> except where the legal owner knowingly stood by, and permitted the improvements to be made without objection.<sup>125</sup> This question is now regulated by statutes in the various states.

2. A tenant in common has an equitable lien on his cotenant's interest for useful and necessary repairs made by him to preserve

<sup>119</sup> Smith, *Prin. Eq.* p. 285.

<sup>120</sup> 3 *Pom. Eq. Jur.* §§ 1258, 1259.

<sup>121</sup> *McCoy v. Grandy*, 3 *Ohio St.* 465, 466; *Lunquest v. Ten Eyck*, 40 *Iowa*, 213.

<sup>122</sup> *Bright v. Boyd*, 1 *Story*, 478, *Fed. Cas. No.* 1,875; *Green v. Biddle*, 8 *Wheat.* 77; *Putnam v. Ritchie*, 6 *Paige (N. Y.)* 390, 404.

<sup>123</sup> *Murray v. Gouverneur*, 2 *Johns. Cas.* 438, 441.

<sup>124</sup> *Neesom v. Clarkson*, 4 *Hare*, 97; *Thomas v. Evans*, 105 *N. Y.* 601, 12 *N. E.* 571; *Skiles' Appeal*, 110 *Pa. St.* 248, 20 *Atl.* 722.

<sup>125</sup> *Pilling v. Armitage*, 12 *Ves.* 78, 84; *Miner v. Beekman*, 50 *N. Y.* 337.

the common property from decay and ruin;<sup>126</sup> but for permanent improvements no lien exists, independent of contract, since the other cotenants might be deprived of their share in the property by the erection of improvements for which they are unable to pay.<sup>127</sup>

3. A tenant for life, who is entitled to the possession for an indefinite period, is presumed to make improvements for his own personal enjoyment; and hence the remainder-man's interest should not be charged with a lien for such improvements,<sup>128</sup> except when the tenant for life completes such as have been begun by the person creating the life estate.<sup>129</sup>

#### SAME—VENDOR'S LIEN.

**155. Where a vendor delivers possession of an estate to a purchaser without receiving the purchase money, equity gives the vendor a lien on the land for the unpaid purchase money, though there was no special agreement for that purpose.<sup>130</sup>**

There has been considerable diversity of opinion as to the origin of vendor's liens. By some writers, their origin is ascribed to the law of trusts, the purchaser being regarded as holding the title subject to a trust for the payment of the purchase money.<sup>131</sup> Others regard the vendor's lien as an equitable mortgage,<sup>132</sup> and others as arising from the implied intention of the parties.<sup>133</sup> But in the

<sup>126</sup> *Lake v. Craddock*, 3 P. Wins. 158; *Haven v. Mehlgarten*, 19 Ill. 95; *Alexander v. Ellison*, 79 Ky. 148.

<sup>127</sup> *Corbett v. Laurens*, 5 Rich. Eq. (S. C.) 301; *Carver v. Coffman*, 109 Ind. 547, 10 N. E. 567.

<sup>128</sup> *Corbett v. Laurens*, 5 Rich. Eq. (S. C.) 301, 315; *Taylor v. Foster*, 22 Ohio St. 255.

<sup>129</sup> *Dent v. Dent*, 30 Beav. 363; *Sohier v. Eldredge*, 103 Mass. 345, 351.

<sup>130</sup> 2 Sugd. Vend. 671.

<sup>131</sup> 2 Story, Eq. Jur. § 1218 et seq.; Snell, Eq. p. 142; Perry, Trusts, §§ 231, 232; *Blackburn v. Gregson*, 1 Brown, Ch. 420.

<sup>132</sup> *Adams*, Eq. 127; *Wilson v. Davisson*, 2 Rob. (Va.) 384, 404.

<sup>133</sup> In *Kauffelt v. Bower*, 7 Serg. & R. 64, 76, Chief Justice Gibson repudiates this view as follows: "The implication that there is an intention to reserve a lien for the purchase money in all cases where the parties do not by



earliest case on the subject, where the lien was allowed,<sup>134</sup> it was grounded "on a natural equity that the land should stand charged with so much of the purchase money as was not paid, and that without any special agreement for the purpose." And more than a century later, in what is now regarded as the leading case on the subject,<sup>135</sup> Lord Eldon said: "Upon principle, without authority, I cannot doubt that it goes upon this: that a person having got the estate of another shall not, as between them, keep it, and not pay the consideration."

Controlled by considerations such as these, vendor's liens have been recognized by the courts of Alabama,<sup>136</sup> Arkansas,<sup>137</sup> California,<sup>138</sup> Colorado,<sup>139</sup> District of Columbia,<sup>140</sup> Florida,<sup>141</sup> Illinois,<sup>142</sup> Indiana,<sup>143</sup> Iowa,<sup>144</sup> Kentucky,<sup>145</sup> Louisiana,<sup>146</sup> Maryland,<sup>147</sup> Michi-

express acts evince a contrary intention is in almost every case inconsistent with the truth of the facts, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass." In *Ahrend v. Odiorne*, 118 Mass. 261, Chief Justice Gray bases the doctrine on the fact that, by the law of England, real estate could not be taken in execution for debt, except to a limited extent, and that, therefore, the court of chancery interfered in favor of the vendor.

<sup>134</sup> *Chapman v. Tanner* (1684) 1 Vern. 267.

<sup>135</sup> *Mackreth v. Symmons* (1808) 15 Ves. 329, 1 White & T. Lead. Cas. Eq. 447.

<sup>136</sup> *Woodall v. Kelly*, 85 Ala. 368, 5 South. 164; *Jones v. Lockard*, 89 Ala. 575, 8 South. 103.

<sup>137</sup> *Springfield & M. R. Co. v. Stewart*, 51 Ark. 285, 10 S. W. 767.

<sup>138</sup> Civil Code, § 3046; *Avery v. Clark*, 87 Cal. 619, 25 Pac. 919.

<sup>139</sup> *Francis v. Wells*, 2 Colo. 660.

<sup>140</sup> *Ford v. Smith*, 1 McArthur, 592.

<sup>141</sup> *Bradford v. Marvin*, 2 Fla. 463.

<sup>142</sup> *Dyer v. Martin*, 4 Scam. 146; *Andrus v. Coleman*, 82 Ill. 26; *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18.

<sup>143</sup> *Lagow v. Badollet*, 1 Blackf. 416; *Fouch v. Wilson*, 60 Ind. 64; *Brower v. Witmeyer*, 121 Ind. 83, 22 N. E. 975.

<sup>144</sup> *Grapengether v. Fejervary*, 9 Iowa, 163; *Kendrick v. Eggleston*, 56 Iowa, 128, 8 N. W. 786; *Erickson v. Smith*, 79 Iowa, 374, 44 N. W. 681.

<sup>145</sup> *Fowler v. Heirs of Rust*, 2 A. K. Marsh. 294; *Brown v. Ferrell*, 83 Ky. 417.

<sup>146</sup> *Pedesclaux v. Legare*, 32 La. Ann. 380.

<sup>147</sup> Pub. Gen. Laws 1888, art. 16, § 93; *Moreton v. Harrison*, 1 Bland, 491; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Baltimore & L. T. Co. v. Moale*, 71 Md. 355, 18 Atl. 658.

gan,<sup>148</sup> Minnesota,<sup>149</sup> Mississippi,<sup>150</sup> Missouri,<sup>151</sup> New Jersey,<sup>152</sup> New York,<sup>153</sup> North and South Dakota,<sup>154</sup> Ohio,<sup>155</sup> Oregon,<sup>156</sup> Rhode Island,<sup>157</sup> Tennessee,<sup>158</sup> Texas,<sup>159</sup> and Wisconsin.<sup>160</sup> In Georgia,<sup>161</sup> Vermont,<sup>162</sup> Virginia,<sup>163</sup> and West Virginia<sup>164</sup> they have been abrogated by legislation; while in Kansas,<sup>165</sup> Maine,<sup>166</sup> Massachusetts,<sup>167</sup> Nebraska,<sup>168</sup> North Carolina,<sup>169</sup> Pennsylvania,<sup>170</sup> and South Carolina<sup>171</sup> they have been rejected as opposed to public policy, which requires all matters affecting land titles to be made a matter of record.

<sup>148</sup> *Converse v. Blumrich*, 14 Mich. 109; *Richards v. Lumber Co.*, 74 Mich. 57, 41 N. W. 860.

<sup>149</sup> *Selby v. Stanley*, 4 Minn. 65 (Gil. 34); *Peters v. Tunell*, 43 Minn. 473, 45 N. W. 867.

<sup>150</sup> *Dunlap v. Burnett*, 5 Smedes & M. 702; *Lissa v. Posey*, 64 Miss. 352, 1 South. 500.

<sup>151</sup> *McKnight v. Brady*, 2 Mo. 110; *Christy v. McKee*, 94 Mo. 241, 6 S. W. 658.

<sup>152</sup> *Vandoren v. Todd*, 3 N. J. Eq. 397; *Acton v. Waddington*, 46 N. J. Eq. 16, 18 Atl. 356.

<sup>153</sup> *Champion v. Brown*, 6 Johns. Ch. 398, 402; *Chase v. Peck*, 21 N. Y. 581.

<sup>154</sup> Civ. Code, § 1801.

<sup>155</sup> *Tiernan v. Beam*, 2 Ohio, 383; *Anketel v. Converse*, 17 Ohio St. 11.

<sup>156</sup> *Gee v. McMillan*, 14 Or. 268, 12 Pac. 417.

<sup>157</sup> *Kent v. Gerhard*, 12 R. I. 92.

<sup>158</sup> *Eskridge v. McClure*, 2 Yerg. (Tenn.) 86; *Cate v. Cate*, 87 Tenn. 41, 9 S. W. 231.

<sup>159</sup> *Briscoe v. Bronaugh*, 1 Tex. 326; *White v. Downs*, 40 Tex. 225; *Howe v. Harding*, 76 Tex. 17, 13 S. W. 41.

<sup>160</sup> *Tobey v. McAllister*, 9 Wis. 465; *Evans v. Enloe*, 70 Wis. 345, 34 N. W. 918, and 36 N. W. 22.

<sup>161</sup> Code 1882, § 1997.

<sup>162</sup> Gen. St. 1862, c. 65, § 33.

<sup>163</sup> Code 1873, c. 115, § 1.

<sup>164</sup> Code 1870, c. 75, § 1.

<sup>165</sup> *Simpson v. Munde*, 3 Kan. 172; *Greeno v. Barnard*, 18 Kan. 578.

<sup>166</sup> *Philbrook v. Delano*, 29 Me. 410, 415.

<sup>167</sup> *Ahrend v. Odiorne*, 118 Mass. 261.

<sup>168</sup> *Edminster v. Higgins*, 6 Neb. 265.

<sup>169</sup> *White v. Jones*, 92 N. C. 388; *Moore v. Ingram*, 91 N. C. 376; *Peck v. Culberson*, 104 N. C. 426, 10 S. E. 511.

<sup>170</sup> *Kauffelt v. Bower*, 7 Serg. & R. 64; *Hlester v. Green*, 48 Pa. St. 96; *Strauss's Appeal*, 49 Pa. St. 353.

<sup>171</sup> *Wragg v. Comptroller General*, 2 Desaus. Eq. 509, 520.

A fixed and certain debt for the purchase price of land is essential to the existence of a vendor's lien. Hence, where there is a sale of both real and personal property for a gross sum, the vendor's lien does not exist, because the court cannot accurately ascertain and define the amount of the charge to be imposed on the land, and enforced out of it.<sup>172</sup> Hence, too, it has been held that if the consideration is something other than money, as an agreement to support the grantor during life,<sup>173</sup> or a specified quantity of cotton,<sup>174</sup> no lien exists.

In the next place, the lien will be enforced as against the vendee and all persons claiming under him, except bona fide purchasers for value without notice.<sup>175</sup> A volunteer, therefore, takes subject to the lien, though he had no notice; and so does a purchaser for value with notice.<sup>176</sup>

By the weight of authority in the United States, a vendor's lien is not assignable, but is personal to the grantor himself,<sup>177</sup> though in England<sup>178</sup> and some of the states the rule is otherwise.<sup>179</sup>

<sup>172</sup> *Erickson v. Smith*, 79 Iowa, 374, 44 N. W. 681; *Peters v. Tunell*, 43 Minn. 473, 45 N. W. 867; *Alexander v. Hooks*, 84 Ala. 605, 4 South. 417; *Stringfellow v. Ivie*, 73 Ala. 209, 214.

<sup>173</sup> *Peters v. Tunell*, 43 Minn. 473, 45 N. W. 867.

<sup>174</sup> *Harris v. Hanle*, 37 Ark. 348.

<sup>175</sup> *Walker v. Preswick*, 2 Ves. Sr. 622; *Cator v. Earl of Pembroke*, 1 Brown, Ch. 302; *Christopher v. Christopher*, 64 Md. 583, 3 Atl. 296; *Crowe v. Colbeth*, 63 Wis. 643, 24 N. W. 478; *Graves v. Coutant*, 31 N. J. Eq. 763; *Edmonson v. Phillips*, 73 Mo. 57.

<sup>176</sup> *Christopher v. Christopher*, 64 Md. 583, 3 Atl. 296; *Beal v. Harrington*, 116 Ill. 113, 4 N. E. 664.

<sup>177</sup> *First Nat. Bank of Salem v. Salem Capital Flour-Mills Co.*, 39 Fed. 89, 95; *Carlton v. Buckner*, 28 Ark. 66; *Crossland v. Powers* (Ark.) 13 S. W. 722; *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18; *Payne v. Nowell*, 41 La. Ann. 852, 6 South. 636; *Dixon v. Dixon*, 1 Md. Ch. 220; *Hammond v. Peyton*, 34 Minn. 529, 27 N. W. 72; *White v. Williams*, 1 Paige, 502; *Ogle v. Ogle*, 41 Ohio St. 359; *Burkhardt v. Howard*, 14 Or. 39, 12 Pac. 79.

<sup>178</sup> *Dryden v. Frost*, 3 Mylne & C. 670.

<sup>179</sup> *Wilkinson v. May*, 69 Ala. 33; *Jones v. Lockard*, 89 Ala. 575, 8 South. 103; *Lowry v. Smith*, 97 Ind. 466; *Honore's Ex'r v. Bakewell*, 6 B. Mon. 67; *Louisiana Nat. Bank v. Knapp*, 61 Miss. 485; *Sloan v. Campbell*, 71 Mo. 387; *De Bruhl v. Maas*, 54 Tex. 464.

*Waiver of Lien.*

The fact that the conveyance recites payment of the consideration, or that a receipt for it is indorsed thereon, does not defeat the lien, if in reality the purchase price is unpaid.<sup>180</sup> Nor is the mere circumstance that the vendor has taken personal security from the vendee, such as a bond, bill, or note, conclusive on the vendor's intention to abandon the lien. To have this effect, the bond, note, or bill must in fact be the very consideration for which the land was sold, and not a mere evidence of indebtedness. If the bond, bill, or note was in fact substituted for the consideration money, and was the very thing bargained for, the lien does not exist.<sup>181</sup> So, also, the lien will be deemed waived if the vendor takes independent and collateral security for the purchase price, such as the note of a third person,<sup>182</sup> or a mortgage on land.<sup>183</sup>

*Express Reservation of Lien.*

In the foregoing classes of cases, the lien has been raised by courts of equity without any agreement by the parties as to its existence. It has, however, become the custom in some of the states to expressly reserve, in the deed conveying the land, a lien as security for the unpaid purchase money. Such a lien much more nearly resembles a purchase-money mortgage than the implied equitable vendor's lien,<sup>184</sup> and is recognized and enforced in some of the states where that lien is abrogated, since it is a matter of record.<sup>185</sup>

<sup>180</sup> *Mackreth v. Symmons*, 15 Ves. 329, 1 White & T. Lead. Cas. Eq. 447; *Ogden v. Thornton*, 30 N. J. Eq. 569; *Bankhead v. Owen*, 60 Ala. 457; *Holman v. Patterson*, 29 Ark. 357; *Walton v. Hargroves*, 42 Miss. 18; *Thompson v. Corrie*, 57 Md. 197.

<sup>181</sup> *Mackreth v. Symmons*, 15 Ves. 329, 1 White & T. Lead. Cas. Eq. 447; *Frail v. Ellis*, 16 Beav. 350; *Kent v. Gerhard*, 12 R. I. 92; *Madden v. Barnes*, 45 Wis. 135; *Dance v. Dance*, 56 Md. 435; *Lavender v. Abbott*, 30 Ark. 172.

<sup>182</sup> *Vail v. Foster*, 4 N. Y. 312; *Durette v. Briggs*, 47 Mo. 356; *Walker v. Struve*, 70 Ala. 167; *Christy v. McKee*, 94 Mo. 241, 6 S. W. 656; *Springfield & M. R. Co. v. Stewart*, 51 Ark. 285, 10 S. W. 767.

<sup>183</sup> *Nairn v. Prowse*, 6 Ves. 752; *Bond v. Kent*, 2 Vern. 281; *Land Co. v. Peck*, 112 Ill. 408, 451; *Walker v. Struve*, 70 Ala. 167; *Orrick v. Durham*, 79 Mo. 174; *Tinsley v. Tinsley*, 52 Iowa, 14, 2 N. W. 528.

<sup>184</sup> *King v. Young Men's Ass'n*, 1 Woods, 386, Fed. Cas. No. 7,811; *Kirk v. Williams*, 24 Fed. 437; *Bank v. Bradley*, 15 Lea, 279; *Collins v. Richart*, 14 Bush, 621; *Elcheiberger v. Gitt*, 104 Pa. St. 64; *Talleferro v. Burnett*, 37 Ark. 511.

<sup>185</sup> *Hlester v. Green*, 48 Pa. St. 96; *Yancey v. Mauck*, 15 Grat. 300.

*Vendor's Lien under Contract of Sale.*

It is sometimes said that a vendor under a contract of sale, who places his vendee in possession without executing or delivering a deed, has a lien on the land for the unpaid purchase price. This, however, is a misnomer. The legal title remains in the vendor; and, while the vendee is regarded as the owner in the eye of a court of equity, yet the vendor will be permitted to retain the legal title as security for the unpaid purchase money.<sup>186</sup> The vendor has also the right to foreclose the contract, and thus cut off all rights thereunder, unless the purchase price is paid within a specified time.

**SAME—VENDEE'S LIEN.**

**156. A vendee under a land contract who prematurely pays the purchase money, or any part of it, has a lien therefor on the land contracted to be sold, if, by reason of the vendor's default, the contract is not performed.**

This lien is in all respects analogous to the vendor's lien for the unpaid purchase money. The legal title remains in the vendor, but the vendee has a lien on the land as security for the purchase money he has paid.<sup>187</sup> Such a lien generally arises where a deposit has been made by the purchaser, and the title turns out to be defective, or for some other reason the sale is not completed.

**SAME—CHARGES OF DEBTS AND LEGACIES.**

**157. An equitable lien on land is created where it is devised subject to or charged with the payment of testator's debts and legacies.**

<sup>186</sup> *Lysaght v. Edwards*, 2 Ch. Div. 499, 506, 507; *Shaw v. Foster*, L. R. 5 H. L. 321; *Robinson v. Appleton*, 124 Ill. 276, 15 N. E. 761; *Sykes v. Betts*, 87 Ala. 537, 6 South. 428; *Church v. Smith*, 39 Wis. 492; *Ransom v. Brown*, 63 Tex. 188; *Wells v. Smith*, 44 Miss. 296; *White v. Blakemore*, 8 Lea, 49.

<sup>187</sup> *Wythes v. Lee*, 3 Drew, 390; *Torrance v. Bolton*, L. R. 14 Eq. 124, 8 Ch. App. 118; *Stewart v. Wood*, 63 Mo. 252; *Cooper v. Merritt*, 30 Ark. 686; *Wickman v. Robinson*, 14 Wis. 493.

The personal property of a deceased person is the primary fund for the payment of debts, and the exclusive fund, as between legatees and devisees, for the payment of legacies.<sup>188</sup> To overcome this rule of law, an intention by testator to subject the land to liability must appear. Such intention may be manifested by express direction to pay the debts and legacies out of the lands devised,<sup>189</sup> or it may be implied from the provisions of the will as a whole and the circumstances surrounding its execution.<sup>190</sup> The rule in England and in some of the courts of this country is that if testator gives a legacy, and then makes a general residuary disposition of the whole estate, blending the realty and the personalty together in one fund, the vendor's real estate will be charged with the legacies, as well as the personal.<sup>191</sup> But a legacy charged by general words on testator's real estate is not a lien on land specifically devised.<sup>192</sup>

While a charge of debts and legacies on the land creates a lien, the primary liability of the personalty is not thereby exonerated, but testator's intention to exonerate must expressly or by clear implication appear.<sup>193</sup> Hence, as a rule, the creditor or legatee has three remedies for enforcing a debt or legacy charged on the land:

<sup>188</sup> *Duke of Ancaster v. Mayer*, 1 Brown, Ch. 454, 1 White & T. Lead. Cas. Eq. 881; *Kitchell v. Young*, 46 N. J. Eq. 506, 19 Atl. 729; *Newsom v. Thornton*, 82 Ala. 402, 8 South. 261; *Appeal of Mann* (Pa. Sup.) 14 Atl. 270; *Davidson v. Coon*, 125 Ind. 497, 25 N. E. 601; *Allen v. Patton*, 83 Va. 255, 2 S. E. 143.

<sup>189</sup> Pom. Eq. Jur. § 1246. A mere general direction does not create a charge on the realty. *Harmon v. Smith*, 38 Fed. 482; *In re City of Rochester*, 110 N. Y. 165, 17 N. E. 740.

<sup>190</sup> *Stevens v. Flower*, 46 N. J. Eq. 340, 19 Atl. 777; *Duncan v. Wallace*, 114 Ind. 169, 170, 16 N. E. 137.

<sup>191</sup> *Greville v. Browne*, 7 H. L. Cas. 680; *Stevens v. Flower*, 46 N. J. Eq. 340, 19 Atl. 777; *Smith v. Fellows*, 131 Mass. 20; *Davis' Appeal*, 83 Pa. St. 348; *Hutchinson v. Gilbert*, 86 Tenn. 464, 469, 7 S. W. 126; *Lewis v. Darling*, 16 How. 1; *Lafferty v. People's Sav. Bank*, 76 Mich. 35, 43 N. W. 34; *Atmore v. Walker*, 46 Fed. 429; *Lapham v. Clapp*, 10 R. I. 543; *Jaudon v. Ducker*, 27 S. C. 295, 3 S. E. 465. This rule does not prevail in New York. *Brill v. Wright*, 112 N. Y. 129, 19 N. E. 628; *Briggs v. Carroll*, 117 N. Y. 288, 22 N. E. 1054; *Hoyt v. Hoyt*, 85 N. Y. 142.

<sup>192</sup> *Robinson v. McIver*, 63 N. C. 645; *Davenport v. Sargent*, 63 N. H. 538, 4 Atl. 569; *Spong v. Spong*, 3 Bligh (N. S.) 84.

<sup>193</sup> *Tower v. Lord Rous*, 18 Ves. 132, 138; *Chapin v. Waters*, 116 Mass. 140, 146; *Cooch's Ex'r v. Cooch's Adm'r*, 5 Houst. (Del.) 540, 569; *Hanson v. Hanson*, 70 Me. 508, 511; *Kirkpatrick v. Rogers*, 7 Ired. Eq. 44.

He may either enforce payment from the executor in the usual course of administration, or he may foreclose the lien against the land, or, if the devise has been made conditional on paying the debt or legacy, he may maintain a common-law action against the devisee on the promise to pay, implied from the acceptance of the devise.<sup>194</sup>

### ASSIGNMENTS.

**158. An assignment is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.<sup>195</sup> The term includes the act of transfer, as well as the instrument by which it is effected.<sup>196</sup>**

**159. Though anciently assignments of possibilities and choses in action were not permitted at common law, the validity of such assignments was recognized from a very early period in equity, and they were enforced by courts of equity whenever made for a valuable consideration.**

The reason for the common-law rule was thus expressed by Lord Coke: "The great wisdom and policy of the sages and founders of our law have provided that no possibility, right, title, or thing in action shall be granted or assigned to strangers; for that would be the occasion of multiplying contentions and suits, of great oppression of the people, and the subversion of the due and equal execution of justice."<sup>197</sup> Sir Frederick Pollock, however, asserts that the common-law rule was "a logical consequence of the primitive view of contract as creating a strictly personal obligation between the creditor and the debtor."<sup>198</sup>

<sup>194</sup> *Brown v. Knapps*, 79 N. Y. 136; *Lord v. Lord*, 22 Conn. 595, 602.

<sup>195</sup> *Bouv. Law Dict.* tit. "Assignment."

<sup>196</sup> *Burrill*, *Assignm.* § 1.

<sup>197</sup> *Lampet's Case*, 10 Coke, 48.

<sup>198</sup> *Poll. Cont.* p. 196. Many of the later writers on equity jurisprudence have denounced the common law as barbarous in this respect; and so it undoubtedly is when viewed in the light of modern social conditions. But substantial reasons of public policy were probably at the foundation of the

The necessities of commerce long ago effected a modification of the common-law principle. Thus, bills of exchange became assignable by custom, and promissory notes were made so by statute.<sup>199</sup> Further than this, in the course of time, courts of law came to recognize the assignee's rights in choses in action, so far as to permit him to sue in the assignee's name,<sup>200</sup> and equitable interference thus became unnecessary in this class of cases.<sup>201</sup> Finally, the judicature act in England renders an absolute assignment of a legal chose in action effectual at law, and the assignee may sue thereon in his own name.<sup>202</sup> So, in all the American states where the reformed procedure prevails, the real party in interest, which, of course, includes an assignee, is required to sue in his own name.

#### **SAME—WHAT ASSIGNMENTS NOW RECOGNIZED AT LAW.**

**160. To determine whether any cause of action is assignable at law, the following rule has been formulated: If the cause of action survives, and passes to the personal**

rule. In the middle ages, in addition to the temporal courts, there existed ecclesiastical or spiritual tribunals. "The cleric, whether plaintiff or defendant, was entitled in civil cases to be heard before the spiritual courts, which were naturally partial in his favor, even where not venal, so that justice was scarce to be obtained. That such in fact was the experience is shown by the practice which grew up of clerks purchasing doubtful claims from laymen, and then enforcing them before the Courts Christian,—a speculative proceeding, forbidden, indeed, by the councils, but too profitable to be suppressed." *Lea, History of the Inquisition*, p. 34. Such a practice would justify Lord Coke's language in relation to assignments, as tending to "the great oppression of the people, and the subversion of the due and equal execution of justice."

<sup>199</sup> 3 & 4 Anne, c. 9, p. 106; 7 Anne, c. 25.

<sup>200</sup> *De Pothonies v. De Mattos*, El., Bl. & El. 467; *Master v. Miller*, 4 Term. R. 320, 340, 341; *Johnson v. Bloodgood*, 1 Johns. Cas. 51.

<sup>201</sup> *Hammond v. Messenger*, 9 Sim. 327; *Keys v. Williams*, 3 Younge & C. Ex. 462, 466, 467. The mere fact that an assignee of a legal cause of action cannot sue in his own name at law does not warrant a court of equity in taking jurisdiction. *Walker v. Brooks*, 125 Mass. 241; *Hayward v. Andrews*, 106 U. S. 672, 675, 1 Sup. Ct. 544; *Hagar v. Buck*, 44 Vt. 285, 290.

<sup>202</sup> 36 & 37 Vict. c. 66, § 25, subsec. 6.



representatives of a decedent as assets, or continues as liabilities against his representatives, it is assignable; otherwise not.<sup>203</sup>

Applying this rule, contracts and rights of action for their breach are assignable, excepting contracts of a personal nature, involving personal trust or confidence.<sup>204</sup> Thus, a contract calling for personal services, requiring special skill or knowledge of the contracting party, dies with the party, and is not assignable;<sup>205</sup> and so with a right of action for breach of marriage promise.<sup>206</sup> With respect to torts, the general rule is that a right of action for a wrong done to the property of another, real or personal, will survive; but a right of action for a wrong to the person or feelings of another does not survive, and is not assignable.<sup>207</sup> Thus, a right of action for injury to land or personal property is assignable;<sup>208</sup> and so with a claim for damages to property caused by fraud or deceit,<sup>209</sup> though it is otherwise if only personal relations are affected.<sup>210</sup> The statutory right of action for wrongfully killing a person is regarded as assets of his estate, and is therefore assignable,<sup>211</sup> but a cause of action for a personal injury not causing death,<sup>212</sup> or for false imprisonment,<sup>213</sup> is not assignable.

<sup>203</sup> Pom. Rem. § 147 et seq.; *Brackett v. Griswold*, 103 N. Y. 425, 428, 9 N. E. 438; *Stewart v. Houston & T. C. Ry. Co.*, 62 Tex. 246; *Dayton v. Fargo*, 45 Mich. 153, 7 N. W. 158.

<sup>204</sup> Pom. Rem. § 147; Bliss, Code Pl. § 47.

<sup>205</sup> *Devlin v. Mayor, etc.*, 63 N. Y. 9; *Shultz v. Johnson*, 5 B. Mon. 497.

<sup>206</sup> *Chamberlain v. Williamson*, 2 Maule & S. 408; *Lattimore v. Simmons*, 13 Serg. & R. 183; *Stebbins v. Palmer*, 1 Pick. 71; *Smith v. Sherman*, 4 Cush. 408.

<sup>207</sup> *People v. Tioga Common Pleas*, 19 Wend. 73; *Comegys v. Vasse*, 1 P. 213; *Tyson v. McGuineas*, 25 Wis. 656; *Byxble v. Wood*, 24 N. Y. 607; *Zabriskie v. Smith*, 13 N. Y. 322. Bliss, Code Pl. § 38.

<sup>208</sup> *McKee v. Judd*, 12 N. Y. 622; *Chonteau v. Boughton*, 100 Mo. 406, 13 S. W. 877; *Lazard v. Wheeler*, 22 Cal. 139; *Tyson v. McGuineas*, 25 Wis. 656.

<sup>209</sup> *Haight v. Hayt*, 10 N. Y. 464; *Byxble v. Wood*, 24 N. Y. 607.

<sup>210</sup> *Higgins v. Breen*, 9 Mo. 497.

<sup>211</sup> *Quin v. Moore*, 15 N. Y. 432.

<sup>212</sup> *Purple v. Hudson River R. Co.*, 4 Duer, 74; *Rice v. Stone*, 1 Allen (Mass.) 566.

<sup>213</sup> *Noonan v. Orton*, 34 Wis. 259.

In this connection it should be stated that certain assignments are void, both at law and in equity, on grounds of public policy. In this class are included assignments which partake of the nature of champerty and maintenance.<sup>214</sup> So, in England, the salaries of public officers cannot be assigned, on the theory that they are given to maintain the dignity of their offices, and to secure the proper discharge of the duties thereof.<sup>215</sup> In several recent American cases it has also been held that an assignment of the salary of a public officer not yet due is void.<sup>216</sup> By act of congress, pensions are also not assignable.<sup>217</sup>

In many of the states special statutes have been passed, defining what choses in action may be assigned. Thus, in New York any claim or demand may be transferred, except for personal injury or breach of promise to marry, or founded on a grant void by statute, or where the transfer is forbidden by statute or is contrary to public policy.<sup>218</sup>

#### SAME—EQUITABLE ASSIGNMENTS.

**161. An assignment of a mere possibility or expectancy will be enforced in equity whenever the possibility or expectancy becomes a vested interest or possession.**<sup>219</sup>

**162. An order made payable out of a particular fund then due or to become due from the drawee to the drawer operates as an equitable assignment of the fund to the payee.**

<sup>214</sup> *Bradlaugh v. Newdegate*, 11 Q. B. Div. 1; *Dorwin v. Smith*, 35 Vt. 69; *Thurston v. Percival*, 1 Pick. 415; *Coquillard's Adm'r v. Bears*, 21 Ind. 479; *Martin v. Veeder*, 20 Wis. 466.

<sup>215</sup> *Davis v. Duke of Marlborough*, 1 Swanst. 74; *Arbuthnot v. Norton*, 5 Moore, P. C. 219; *Wells v. Foster*, 8 Mees. & W. 149.

<sup>216</sup> *Bliss v. Lawrence*, 58 N. Y. 442; *Township of Wayne v. Cahill*, 49 N. J. Law, 144, 148, 6 Atl. 621; *Field v. Chipley*, 79 Ky. 260; *Bangs v. Dunn*, 66 Cal. 72, 4 Pac. 963; *Schloss v. Hewlett*, 81 Ala. 266, 1 South. 263; *Shannon v. Bruner*, 36 Fed. 147; *Clark*, Cont. 419.

<sup>217</sup> Act Feb. 28, 1883.

<sup>218</sup> Code Civ. Proc. N. Y. § 1910.

<sup>219</sup> 3 Pom. Eq. Jur. § 1287.

*Assignments of Possibilities.*

Even after courts of law recognized the validity of assignments of choses in action, the assignment of possibilities or expectancies was enforced only in equity. Thus, the assignment of a vested remainder made by the remainder-man during the lifetime of the life tenant, being of a mere possibility, though not good at law, was held valid in equity.<sup>220</sup> Recent statutes in England authorize the assignment at law of contingent, executory, and future possibilities when coupled with an interest in real estate;<sup>221</sup> and even broader statutes have been enacted in some of the states authorizing the assignment at law of possibilities coupled with an interest in either real or personal property.<sup>222</sup> These statutes leave untouched the assignment of possibilities or expectancies not coupled with an interest, and hence such an assignment is still enforced only in equity. Thus, nonexistent property, or property to be acquired at a future time, is assignable in equity;<sup>223</sup> such as the future cargo of a ship,<sup>224</sup> or future patent rights.<sup>225</sup> To render such assignment effective, however, there must be no uncertainty as to the property intended to pass;<sup>226</sup> and words imputing a present transfer of property must be employed, as distinguished from a mere power to deal with the prop-

<sup>220</sup> *Warmstrey v. Tanfield*, 1 Ch. 29, 2 White & T. Lead. Cas. Eq. 729. Other assignment of expectancies held valid in equity: Of heirs at law, *Hobson v. Trevor*, 2 P. Wms. 191; of next of kin of living person, *Hinde v. Blake*, 3 Beav. 235; of interest which a person expects under the will of a living person, *Beckley v. Newland*, 2 P. Wms. 182; of share to which a person may become entitled under an appointment, *Musprat v. Gordon*, 1 Anst. 34.

<sup>221</sup> 8 & 9 Vict. c. 106, § 6.

<sup>222</sup> 1 Rev. St. N. Y. p. 725, § 35; Civ. Code Cal. §§ 693, 699, 700, 1045, 1046.

<sup>223</sup> *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673; *Patterson v. Caldwell*, 124 Pa. St. 455, 17 Atl. 18; *Jones v. Mayor, etc.*, 90 N. Y. 387; *Kimball v. Gafford*, 78 Iowa, 65, 42 N. W. 583. The same principle applies to mortgages of property to be acquired in the future. *Rutherford v. Stewart*, 79 Mo. 216; *Ludlum v. Rothschild*, 41 Minn. 219, 43 N. W. 137.

<sup>224</sup> *Lindsay v. Gibbs*, 22 Beav. 522; *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673.

<sup>225</sup> *Printing & Numerical R. Co. v. Sampson*, L. R. 19 Eq. 462. Contra, *Regan Vapor-Engine Co. v. Pacific Gas-Engine Co.*, 1 C. C. A. 169, 49 Fed. 68.

<sup>226</sup> *Tadman v. D'Epineull*, 20 Ch. Div. 758.

erty when it is acquired.<sup>227</sup> On the same principle, it has been held that future wages, to be earned under a subsisting contract of employment, are assignable;<sup>228</sup> but as to whether such an assignment is valid when there is no subsisting contract the authorities vary.<sup>229</sup>

*Order on Specific Fund.*

The principle that an order drawn against a particular fund operates as an assignment was announced in the leading case of *Row v. Dawson*.<sup>230</sup> To become effective as an assignment, the order must make an appropriation of the fund.<sup>231</sup> An order drawn generally on the drawee, payable in the first instance on the credit of the drawer, and without regard to the source from which the money used for its payment is obtained, does not operate as an assignment, though the drawer designates a particular fund out of which the drawee is subsequently to reimburse himself for the payment, or a particular account to which it is to be charged.<sup>232</sup> An ordinary draft, not drawn on any particular fund, does not operate as an assignment;<sup>233</sup> and by the weight of authority a check is on the same footing.<sup>234</sup>

<sup>227</sup> *Reeve v. Whitmore*, 4 De Gex, J. & S. 1, 16-18.

<sup>228</sup> *Emery v. Lawrence*, 8 Cush. 151; *Hartley v. Tapley*, 2 Gray, 565; *Field v. Mayor, etc.*, 6 N. Y. 179; *Appeal of Riddlesburg Coal & Iron Co.*, 114 Pa. St. 58, 6 Atl. 381; *Haynes v. Thompson*, 80 Me. 125, 13 Atl. 276.

<sup>229</sup> Held assignable in *Edwards v. Peterson*, 80 Me. 367, 14 Atl. 936; *Contra*, *Lehigh Val. R. Co. v. Woodring*, 116 Pa. St. 513, 9 Atl. 58; *Mullhall v. Quinn*, 1 Gray, 105.

<sup>230</sup> 1 Ves. Sr. 331, 2 White & T. Lead. Cas. Eq. 731.

<sup>231</sup> *Laclede Bank v. Schuler*, 120 U. S. 511, 516, 7 Sup. Ct. 644.

<sup>232</sup> *Brill v. Tuttle*, 81 N. Y. 454, 457. See, also, *Ex parte Carruthers*, 3 De Gex & S. 570; *Kelley v. Mayor, etc.*, of Brooklyn, 4 Hill, 265.

<sup>233</sup> *Shand v. Du Buisson*, L. R. 18 Eq. 283; *Kimball v. Donald*, 20 Mo. 577; *First Nat. Bank v. Dubuque S. W. Ry. Co.*, 52 Iowa, 378, 3 N. W. 395; *Holbrook v. Payne*, 151 Mass. 383, 24 N. E. 210; *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283; *Manderville v. Welch*, 5 Wheat. 277; *Grammel v. Carmer*, 55 Mich. 201, 21 N. W. 418.

<sup>234</sup> *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Attorney General v. Continental Life Ins. Co.*, 71 N. Y. 325; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 26 N. E. 816; *Florence Min. Co. v. Brown*, 124 U. S. 385, 8 Sup. Ct. 531; *Harrison v. Wright*, 100 Ind. 515; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401; *Hemphill v. Yerkcs*, 132 Pa. St. 545, 19 Atl. 342; *Pease v. Landauer*, 63 Wis. 20, 22 N. W. 847.

Any words, however, which show an intention to appropriate the fund to the payee are, if supported by a valuable consideration, sufficient to effect a valid assignment. Writing is not necessary if there is clear proof of an oral charge.<sup>235</sup>

The assignment, however, is not complete until it has been communicated to the intended assignee. Thus, a mere mandate from a principal to his agent to pay a debt out of a certain fund gives the creditor no specific charge on that fund.<sup>236</sup> Until such mandate is communicated to the creditor, and assented to by him, it may be revoked;<sup>237</sup> but after such communication the agent becomes the debtor of the assignee, and the order cannot then be countermanded.<sup>238</sup>

*Notice, When Necessary.*

An equitable assignment is complete, as between assignor and assignee, though no notice thereof is given to the depositary or holder of the fund;<sup>239</sup> nor is notice necessary as against a person standing in the same position as the assignor; for instance, a volunteer,<sup>240</sup> or attaching creditor.<sup>241</sup>

To bind the holder of the fund, however, notice is necessary. If none is given, the holder may discharge himself by paying the assignor.<sup>242</sup> Indeed, the practical distinction between an equitable assignment of a fund and an order or draft not amounting to such assignment seems to be that notice will fix the liability of the drawee in case of assignment, but acceptance is necessary to charge him on a draft.

<sup>235</sup> *Official Receiver v. Tailby*, 18 Q. B. Div. 25.

<sup>236</sup> *Morrell v. Wootten*, 16 Beav. 197; *White v. Coleman*, 127 Mass. 34.

<sup>237</sup> *Scott v. Porcher*, 3 Mer. 652.

<sup>238</sup> *Fitzgerald v. Stewart*, 2 Russ. & M. 457.

<sup>239</sup> *Jones v. Gibbons*, 9 Ves. 410; *Cook v. Black*, 1 Hare, 390; *Williams v. Ingersoll*, 89 N. Y. 508.

<sup>240</sup> *Justice v. Wynne*, 12 Ir. Ch. 289.

<sup>241</sup> *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235; *Williams v. Ingersoll*, 89 N. Y. 508; *Dix v. Cobb*, 4 Mass. 508.

<sup>242</sup> *Norrish v. Marshall*, 5 Madd. 475; *Switzer v. Noffsinger*, 82 Va. 518, 521; *Van Keuren v. Corkins*, 66 N. Y. 77; *Laclede Bank v. Schuler*, 120 U. S. 511, 7 Sup. Ct. 644; *Renton v. Monnier*, 77 Cal. 449, 19 Pac. 820. See, also, *Dale v. Kimpton*, 46 Vt. 76; *McWilliams v. Webb*, 32 Iowa, 577.

Again, if the assignor makes a subsequent assignment, the general rule is that the second assignee gains priority by giving notice before the first does.<sup>243</sup> The principle is the same as that which requires the assignor of a personal chattel to take every step in his power to reduce it into possession; and, in case of his neglect, postpones him to a subsequent assignee for value who takes without notice. Of the two parties one must suffer; and equity will not assist the one prior in time if, by his negligence, the possessor has been enabled to deceive the second assignee. This rule has, however, been rejected in some states, and the first assignee is protected, though he gave no notice.<sup>244</sup>

#### SAME—ASSIGNMENT SUBJECT TO EQUITIES.

**163. An assignee of a chose in action takes it subject to all equities existing against the assignor, except in the case of negotiable paper.**<sup>245</sup>

"A purchaser of a chose in action must always abide by the case of the person from whom he buys."<sup>246</sup> Thus, if the assigned debt is subject to a set-off, the assignee is liable to the set-off;<sup>247</sup> if the debt is payable only on condition, the condition is binding on the assignee;<sup>248</sup> and the assignee of a mortgage takes it subject to all

<sup>243</sup> *Dearle v. Hall*, 3 Russ. 1, 30, 48; *Brice v. Bannister*, 3 Q. B. Div. 569; *Spain v. Hamilton*, 1 Wall. 604, 624; *Murdoch v. Finney*, 21 Mo. 138.

<sup>244</sup> *Thayer v. Daniels*, 113 Mass. 129; *Fairbanks v. Sargent*, 104 N. Y. 108, 9 N. E. 870; *Kennedy v. Parke*, 17 N. J. Eq. 415. These decisions are supported by the principle that an assignee of a chose in action takes subject to all equities.

<sup>245</sup> *Callahan v. Edwards*, 32 N. Y. 483, 486; *Fairbanks v. Sargent*, 104 N. Y. 116, 9 N. E. 108; *Friedlander v. Texas & P. Ry. Co.*, 130 U. S. 416, 9 Sup. Ct. 570; *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 5 South. 317; *Jeffries v. Evans*, 6 B. Mon. 119; *Kamena v. Huelbig*, 23 N. J. Eq. 73.

<sup>246</sup> Per Lord Thurlow, in *Davies v. Austen*, 1 Ves. Jr. 247.

<sup>247</sup> Ex parte *Mackenzie*, L. R. 7 Eq. 240; *Cavendish v. Geaves*, 24 Beav. 163, 173; *Loomis v. Loomis*, 26 Vt. 198; *Rider v. Johnson*, 20 Pa. St. 190; *McKenna v. Kirkwood*, 50 Mich. 544, 15 N. W. 898; *Fairbanks v. Sargent*, 104 N. Y. 116, 9 N. E. 108; *Goldthwaite v. National Bank*, 67 Ala. 549; *Baker v. Kinsley*, 41 Ohio St. 403.

<sup>248</sup> *Tooth v. Hallett*, 4 Ch. App. 242; *Western Bank v. Sherwood*, 29 Barb. 383.

defenses which the mortgagor had against the mortgagee.<sup>249</sup> These cases illustrate the application of the rule as between the debtor and the assignee. Does it also apply as between an assignor who makes an assignment for a special purpose, and a subsequent assignee to whom the first assignee has assumed to transfer the complete title? In the leading case of *Bush v. Lathrop*<sup>250</sup> it was held that the second assignee stands in the shoes of the first; and that hence, where a mortgagee assigns a mortgage as security for a much smaller sum than the mortgage debt, and the assignee transfers the mortgage for its full face value to a purchaser without notice, the mortgagee may compel a return of the mortgage by payment of the amount secured, and not the face of the mortgage or the sum paid by the purchaser.<sup>251</sup> In the case of corporate stock, however, which is of a quasi negotiable character, the rule is that a stockholder who clothes another with the apparent title is estopped to assert his rights as against a bona fide purchaser from the assignee for value and without notice.<sup>252</sup>

In the case of negotiable paper, custom and statutes have combined to render the title of a bona fide purchaser for value before maturity perfect, as against the maker, whatever defenses the latter may have had against the payee.<sup>253</sup>

<sup>249</sup> *Hill v. Hoole*, 116 N. Y. 299, 302, 22 N. E. 547; *Bennett v. Bates*, 94 N. Y. 354, 363; *Theyken v. Howe Mach. Co.*, 100 Pa. St. 95; *Tabor v. Foy*, 56 Iowa, 539, 9 N. W. 897. Though the mortgage is given to secure a negotiable note, the fact that the note, as well as the mortgage, is assigned to a bona fide purchaser before maturity, does not enable the assignee to take a mortgage discharged of equities in favor of the mortgagor. *Scott v. Magloughlin*, 133 Ill. 33, 24 N. E. 1030; *Redin v. Branhan*, 43 Minn. 283, 45 N. W. 445; *Woodruff v. Morristown Inst.*, 34 N. J. Eq. 174. Contra, *Taylor v. Page*, 6 Allen, 86; *Spence v. Mobile & M. R. Co.*, 79 Ala. 576; *Cooper v. Smith*, 75 Mich. 247, 42 N. W. 815; *Cornell v. Hichins*, 11 Wis. 353.

<sup>250</sup> 22 N. Y. 535.

<sup>251</sup> The same principle was applied in *Davis v. Bechstein*, 60 N. Y. 440, 442; *Schafer v. Reilly*, 50 N. Y. 61; *Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Fairbanks v. Sargent*, 104 N. Y. 117, 9 N. E. 870.

<sup>252</sup> *McNeill v. Tentn Nat. Bank*, 43 N. Y. 325; *Bangor Electric Light & Power Co. v. Robinson*, 52 Fed. 520.

<sup>253</sup> *Ex parte City Bank*, 3 Ch. App. 758.

**CHAPTER X.****EQUITABLE REMEDIES—ACCOUNTING—CONTRIBUTION—EXONERATION—SUBROGATION AND MARSHALING.**

- 164. Accounting.
- 165-167. Application of Payments.
- 168. Contribution.
- 169. Exoneration.
- 170. Subrogation.
- 171. Marshaling.

We come now to the consideration of that department of equity jurisprudence where its jurisdiction rests chiefly on its distinctive procedure. For breach of contract, for perpetration of a fraud, for the infringement of a right, an action for money damages was, as a rule, the only remedy afforded by the common law. Equity, however, took a different view, and held that in many cases damages did not afford adequate relief. Hence it assumed jurisdiction to grant its own peculiar remedies; such as specific performance, injunction, cancellation, reformation, etc. It must, however, be admitted that it is impossible to draw any clearly-defined line between those matters in which the jurisdiction of equity has arisen from the distinctive character of its principles and those in which it is to be ascribed to the superiority or peculiarity of its procedure.

**ACCOUNTING.**

**164. Equity will assume jurisdiction in matters of account:**

- (a) **Where a fiduciary relation exists between the parties.**
- (b) **Where there are mutual accounts between the parties.**
- (c) **Where there are circumstances of great complication, though the accounts are not mutual.<sup>1</sup>**

<sup>1</sup> Snell, Eq. pp. 610-612; 3 Pom. Eq. Jur. § 1421.



One of the most ancient common-law actions was the action of account. It could, however, be brought only in a limited class of cases.<sup>2</sup> The proceeding under it was cumbersome in the extreme, and courts of common law could not compel a discovery from the parties, who were incompetent to testify.<sup>3</sup> It is not surprising, therefore, that the common-law action of account should have fallen into disuse. It was to some extent supplanted at law by the action of assumpsit. The equitable procedure, however, was greatly superior to that of the common-law tribunals, whatever form of action might be adopted. A master in chancery had abundant power to examine the parties on oath, to make inquiries from all proper persons by testimony on oath, and to require the production of all necessary documents.

It is obvious that the jurisdiction of equity in matters of account brought a great variety of business within its purview. As incident to accounts, equity took "cognizance of the administration of personal assets; consequently, of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts, they also took concurrent jurisdiction of tithes and all questions relating thereto; of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, factors, and receivers."<sup>4</sup> In more recent times the equity jurisdiction has been further extended to the dissolution and winding up of corporations, chiefly because of its superior procedure as to accounting.

The jurisdiction of equity does not, however, seem to extend to all cases of account, but is limited to the following classes: (1) Equity assumes jurisdiction of an action for an accounting where

<sup>2</sup> Privity between the parties, either of contract or in law, was originally necessary to sustain the action. It would lie against a bailiff or receiver appointed by the party or a guardian. Afterwards, by the law merchant, it was extended so that a merchant might have an account against another. Snell, Eq. p. 609.

<sup>3</sup> The auditors appointed to take the account could not until 4 Anne, c. 16, examine the parties before them on oath. Whenever a disputed item was in question, the parties might join issue thereon or demur, and bring their dispute before the court, and thus the inquiry might be almost interminably protracted. Smith, Prin. Eq. p. 497.

<sup>4</sup> 3 Bl. Comm. 437. In the United States, special courts have been created for the purpose of administering the estates of deceased persons. The law of partnership and of corporations is too broad to be adequately treated here.

the parties stand in a fiduciary relation; as, principal and agent,<sup>5</sup> trustee and cestui que trust.<sup>6</sup> (2) Equity assumes jurisdiction where the accounts are mutual. Accounts are mutual, within the meaning of this rule, where each of two parties has received and also paid on the other's account. Where one party only has received and paid moneys, the question is only one of receipts on the one side and payments on the other, and it is a question of mutual set-off; but it is otherwise where each party has received and paid.<sup>7</sup> (3) Where the account is not mutual, as above defined, equity will not assume jurisdiction unless there are circumstances of great complication.<sup>8</sup> In addition to the foregoing classes of cases, the remedy of accounting is incidental to and accompanies that of injunction; for instance, in suits for infringement of patents or copyright, and in respect of waste.

It should also be noted that now, in most of the American states, as well as in England, courts are empowered in legal, as well as in equitable, actions to direct a trial before a referee where the examination of a very long account on either side is necessary.

The principles by which courts of equity are guided in taking accounts will now be noticed.

#### **SAME—APPLICATION OF PAYMENTS.**

**165. A debtor making a payment has a right to appropriate it to the discharge of any debt due his creditor.**

<sup>5</sup> *Mackenzie v. Johnston*, 4 Madd. 373; *Rippe v. Stogdill*, 61 Wis. 38, 20 N. W. 645; *Webb v. Fuller*, 77 Me. 568, 1 Atl. 737; *Marvin v. Brooks*, 94 N. Y. 71. It has been held that an agent cannot maintain an action in equity against his principal for an accounting because the agent reposes no confidence in the principal. *Padwick v. Stanley*, 9 Hare, 627; *Smith v. Leveaux*, 2 De Gex, J. & S. 1.

<sup>6</sup> *Docker v. Somes*, 2 Mylne & K. 664. The equitable jurisdiction to compel an accounting between partners rests on this rule. *Partn. Partn.* 508.

<sup>7</sup> *Phillips v. Phillips*, 9 Hare, 471; *Padwick v. Hurst*, 18 Beav. 575; *Fluker v. Taylor*, 3 Drew. 183; *Garner v. Reis*, 25 Minn. 475; *Rogers v. Yarnell*, 51 Ark. 198, 10 S. W. 622; *Adams' Appeal*, 113 Pa. St. 449, 6 Atl. 100.

<sup>8</sup> *O'Connor v. Spraight*, 1 Schoales & L. 303; *Uhlman v. New York Life Ins. Co.*, 109 N. Y. 421, 17 N. E. 363; *McCulla v. Beadleston*, 17 R. I. 20, 20 Atl. 11; *Pierce v. Equitable Assur. Soc.*, 145 Mass. 60, 12 N. E. 858; *Attalla Min. & Manuf'g Co. v. Winchester (Ala.)* 14 South. 565.

Where there have been running accounts between debtor and creditor, and various payments have been made, and various credits given at different times, it often becomes material to ascertain to what debt a particular payment made by a debtor is to be applied. The first rule on the subject is that the debtor may apply the payment to the discharge of whatever debt he pleases,<sup>9</sup> and the creditor has no right to insist on a different application.<sup>10</sup> The debtor may make the application by a stipulation in express terms,<sup>11</sup> or his intention so to do may be inferred from the circumstances of the transaction. Thus, where one of the debts owing was secured, and another unsecured, an intention to first discharge the secured debt was presumed.<sup>12</sup> The debtor's right to make the application is lost, however, unless exercised at the time of payment. If he does not then declare on what account the money is paid, he cannot afterwards do so.<sup>13</sup>

**166. If, at the time of payment, there is no express or implied appropriation by the debtor, then the creditor has the right to make the appropriation.<sup>14</sup>**

Unlike the debtor, the creditor has a right to make the application at any time after payment, and before action brought or ac-

<sup>9</sup> Clayton's Case, 1 Mer. 572, 575; Tayloe v. Sandiford, 7 Wheat. 13; Pickering v. Day, 2 Del. Ch. 333, 3 Houst. (Del.) 474; Coleman v. Slade, 75 Ga. 61; Trentman v. Fletcher, 100 Ind. 105; Ross v. Crane, 74 Iowa, 375, 37 N. W. 959; Reed v. Boardman, 20 Pick. 441; Jones v. Williams, 39 Wis. 300.

<sup>10</sup> Anon, Cro. Eliz. 68; Eylar v. Read, 60 Tex. 387; Libby v. Hopkins, 104 U. S. 303; Wetherell v. Joy, 40 Me. 325.

<sup>11</sup> Ex parte Imbert, 1 De Gex & J. 152; Stewart v. Keith, 12 Pa. St. 238; Hansen v. Rounsavell, 74 Ill. 238; Gay v. Gay, 5 Allen (Mass.) 157.

<sup>12</sup> Young v. English, 7 Beav. 10; Holley v. Hardeman, 76 Ga. 328; Marx v. Schwartz, 14 Or. 177, 12 Pac. 253.

<sup>13</sup> Wilkinson v. Sterne, 9 Mod. 427; Aderholt v. Embry, 78 Ala. 185; Long v. Miller, 93 N. C. 233.

<sup>14</sup> Lysaght v. Walker, 5 Bligh (N. S.) 1, 28; Brady v. Hill, 1 Mo. 315; Johnson v. Thomas, 77 Ala. 367; Perry v. Bozeman, 67 Ga. 643; National Bank v. Bigler, 83 N. Y. 51; Blau v. Davis, 14 N. J. Eq. 467; Blackstone Bank v. Hill, 10 Pick. 129.

count settled between him and his debtor.<sup>15</sup> The creditor's right to make such application is not, however, unlimited. He may not indirectly secure payment of an illegal debt by appropriating a general payment to its discharge.<sup>16</sup> But a debt barred by the statute of limitations is not illegal; and if, therefore, a general payment is made, without appropriation by the debtor, it may be appropriated by the creditor to the discharge of a statute-barred debt.<sup>17</sup> The creditor cannot, however, by making such an appropriation in part payment of the debt, take it out of the operation of the statute.<sup>18</sup>

**167. In the absence of an appropriation by the parties, the law will make the appropriation according to the order of items of the account; the first item on the debit side being the item discharged or reduced by the first item on the credit side.**

This proposition was decided and is known as the rule in Clayton's Case,<sup>19</sup> and it has been repeatedly followed both in England and in this country.<sup>20</sup> Some of the courts have, however, manifested a tendency to follow the Roman law, which appropriates the payment to the most burdensome debt.<sup>21</sup> And when there are several debts

<sup>15</sup> *Philpott v. Jones*, 2 Adol. & E. 41, 44; *Callahan v. Boazman*, 21 Ala. 246; *Moss v. Adams*, 4 Ired. Eq. (N. C.) 42, 51; *Johnson v. Thomas*, 77 Ala. 367; *Haynes v. Walte*, 14 Cal. 446.

<sup>16</sup> *Wright v. Laing*, 3 Barn. & C. 165; *Turner v. Turner*, 80 Va. 379; *Gill v. Rice*, 13 Wis. 549; *Phillips v. Moses*, 65 Me. 70; *Rohan v. Hanson*, 11 Cush. (Mass.) 44; *Greene v. Tyler*, 39 Pa. St. 361; *Richards v. Columbia*, 55 N. H. 96.

<sup>17</sup> *Mills v. Fowkes*, 5 Bing. (N. C.) 455, 461; *Armistead v. Brooke*, 18 Ark. 521.

<sup>18</sup> *Nash v. Hodgson*, 6 De Gex, M. & G. 474; *Armistead v. Brooke*, 18 Ark. 521. See, however, *Ayer v. Hawkins*, 19 Vt. 26. Application may be made to debt unenforceable under statute of frauds. *Haynes v. Nice*, 100 Mass. 327; *Murphy v. Webber*, 61 Me. 478.

<sup>19</sup> 1 Mer. 585.

<sup>20</sup> *Pemberton v. Oakes*, 4 Russ. 154, 168; *Bank of Scotland v. Christie*, 8 Clark & F. 214; *Pickering v. Day*, 2 Del. Ch. 333, 3 Houst. 474; *Smith v. Loyd*, 11 Leigh, 512; *Crompton v. Pratt*, 105 Mass. 255; *Willis v. McIntyre*, 70 Tex. 34, 7 S. W. 594; *Allen v. Culver*, 3 Denio, 284; *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325, 21 N. E. 57.

<sup>21</sup> *Story*, Eq. Jur. § 459d; *Magarity v. Shipman*, 82 Va. 784, 1 S. E. 109.

owing to a creditor, some of which are barred by the statute of limitations and some not, and he does not expressly appropriate a payment to those that are barred, the law will appropriate the payment to those not barred.<sup>22</sup> In this respect, therefore, the law appropriates the payment to the best interest of the debtor. It should also be stated that, where a debt bearing interest stands against a debtor, general payments made by him are first to be applied in payment of interest, any balance beyond what is necessary for that being then credited in reduction of the principal.<sup>23</sup>

### CONTRIBUTION.

**168. A joint, or a joint and several, obligor on a contract, or obligation in the nature of contract, who has paid or satisfied more than his proportionate share of the obligation, is entitled to contribution from his co-obligors, so as to equalize the common burden.<sup>24</sup>**

The right to contribution is founded on the maxim, "Equality is equity," and depends on the general principles of equity, and not on contract.<sup>25</sup> The relief has been granted, as we have seen, to one

<sup>22</sup> *Nash v. Hodgson*, 6 De Gex, M. & G. 474.

<sup>23</sup> *Chase v. Box*, Freem. Ch. 261; *People v. New York Co.*, 5 Cow. (N. Y.) 331; *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514; *Morgan v. Michigan Air-Line R. Co.*, 57 Mich. 430, 25 N. W. 161, and 26 N. W. 865.

<sup>24</sup> 3 Pom. Eq. Jur. § 1418.

<sup>25</sup> *Dering v. Earl of Winchelsea*, 1 Cox. 318, 1 White & T. Lead. Cas. Eq. 106; *Stirling v. Forrester*, 3 Bligh, 590; *Norton v. Coons*, 6 N. Y. 33, 40; *Wells v. Miller*, 66 N. Y. 255; *Hendrick v. Whittemore*, 105 Mass. 23; *Chipman v. Morrill*, 20 Cal. 131, 135; *Robertson v. Deatherage*, 82 Ill. 511; *Camp v. Bostwick*, 20 Ohio St. 337. After the action of assumpsit became established, courts of law gave relief by way of contribution, on the theory of implied contract. *Jeffries v. Ferguson*, 87 Mo. 244. The legal remedy was, however, never as efficient as the equitable. Thus, where there were several obligors, and one became insolvent, the one who paid the entire debt could at law have recovered only an aliquot part of the whole, calculated according to the original number of co-obligors. *Cowell v. Edwards*, 2 Bos. & P. 268. In equity, however, he can compel the remaining co-obligors to contribute ratably with himself. *Hitchman v. Stewart*, 3 Drew. 271; *Breckinridge v. Taylor*, 5 Dana, 110; *Whitman v. Porter*, 107 Mass. 522; *Hodgson v. Baldwin*, 65 Ill. 532; *McKenna v. George*, 2 Rich. Eq. (S. C.) 15.

jointly liable for the payment of a mortgage debt, who has paid more than his proportionate share on redemption.<sup>26</sup> A partner who has paid more than his proportionate share of the firm debts is also entitled to contribution from his copartners, or out of the partnership property;<sup>27</sup> and a stockholder individually liable for the corporate debts, who has paid more than his proportionate share of them, may enforce contribution from the other stockholders.<sup>28</sup> The most frequent application of the rule, however, is to cases of cosureties. A surety who has paid the debt is not only entitled to contribution from the other sureties,<sup>29</sup> but also to the benefit of any security which any of them may have taken from the principal debtor by way of indemnity.<sup>30</sup>

Though the principle of contribution is a constructive doctrine of equity, and not founded on contract, still a person may, by contract, qualify or take himself out of the reach of the principle.<sup>31</sup> Again, the doctrine applies only to liabilities springing out of contract; no right to contribution exists as between wrongdoers.<sup>32</sup>

#### EXONERATION.

**169. One secondarily liable for the payment of a debt, not arising *ex delicto*, is entitled to exoneration from the one primarily liable.**

<sup>26</sup> Ante, 225.

<sup>27</sup> Kelly v. Kauffman, 18 Pa. St. 351; Logan v. Dixon, 73 Wis. 533, 41 N. W. 713; Sears v. Starbird, 78 Cal. 225, 20 Pac. 547.

<sup>28</sup> Beach, Eq. Jur. § 832; Aspinwall v. Sacchi, 57 N. Y. 331; Ray v. Powers, 134 Mass. 22. But see O'Reilly v. Bard, 105 Pa. St. 569.

<sup>29</sup> Adams, Eq. p. 269; Newcomb v. Gibson, 127 Mass. 396; Mason v. Pieron, 69 Wis. 585, 34 N. W. 921; Stubbins v. Mitchell, 82 Ky. 535; Neilson v. Williams, 42 N. J. Eq. 291, 11 Atl. 257; Moore v. Baker, 34 Fed. 1; Rynearson v. Turner, 52 Mich. 7, 17 N. W. 219.

<sup>30</sup> Steel v. Dixon, 17 Ch. Div. 825; Agnew v. Bell, 4 Watts (Pa.) 33; Guild v. Butler, 127 Mass. 386.

<sup>31</sup> Swain v. Wall, 1 Ch. R. 80; Craythorne v. Swinburne, 14 Ves. 160, 163.

<sup>32</sup> Merryweather v. Nixan, 8 Term R. 186; Peck v. Ellis, 2 Johns. Ch. 131; Churchill v. Holt, 131 Mass. 67; Spaulding v. Oakes, 42 Vt. 343; Seltz v. Unna, 6 Wall. 327.

Where a surety pays a debt on behalf of the principal debtor, the rule both at law and in equity is that he has a right to call upon such debtor for reimbursement.<sup>33</sup> If the surety discharges the debt for less than the full amount, he cannot, however, as against his principal, make himself a creditor for the whole amount, but can only claim what he has actually paid in discharge of the debt, with interest.<sup>34</sup> The surety need not, however, wait until he has paid the debt. He may maintain a suit in equity against the debtor to compel payment of the debt when due, whether the surety has actually been sued on it or not; for it is unreasonable that a man should always have a cloud hanging over him.<sup>35</sup>

#### SUBROGATION.

**170. Whenever, to protect his own rights, one not a volunteer pays or satisfies a debt for which another is primarily responsible, he is substituted in equity in place of the creditor, and may enforce against the person primarily liable all the securities, benefits, and advantages held by the creditor.**

Like contribution, subrogation rests on principles of equity and justice, and may be decreed, though no contract or privity of any kind exists between the parties.<sup>36</sup> The doctrine has many illustrations in reported cases. Thus, a surety, on payment of the debt,

<sup>33</sup> *Toussaint v. Martinnant*, 2 Term R. 105; *Craythorne v. Swinburne*, 14 Ves. 162; *White v. Miller*, 47 Ind. 385; *Tillotson v. Rose*, 11 Metc. (Mass.) 299; *Kimmel v. Lowe*, 28 Minn. 265, 9 N. W. 764; *Rice v. Southgate*, 16 Gray. 142; *Konitzky v. Meyer*, 49 N. Y. 571; *Merwin v. Austin*, 58 Conn. 22, 18 Atl. 1029.

<sup>34</sup> *Reed v. Norris*, 2 Mylne & C. 361, 375; *Blow v. Maynard*, 2 Leigh (Va.) 30; *Delaware L. & W. R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151.

<sup>35</sup> *Ranelaugh v. Hayes*, 1 Vern. 189; *Wooldridge v. Norris*, L. R. 6 Eq. 410; *Whitridge v. Durkee*, 2 Md. Ch. 442; *Hayes v. Ward*, 4 Johns. Ch. 123; *Irick v. Black*, 17 N. J. Eq. 189; *Hellams v. Abercrombie*, 15 S. C. 110; *Moore v. Topliff*, 107 Ill. 241.

<sup>36</sup> *Gans v. Thleme*, 93 N. Y. 225, 232; *Pease v. Eagan*, 131 N. Y. 262, 30 N. E. 102; *Cottrell's Appeal*, 23 Pa. St. 294; *Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625; *Philbrick v. Shaw*, 61 N. H. 356.

is entitled to all the securities which the creditor has against the principal debtor, whether given at the time of the contract or subsequently, and whether given with or without the knowledge of the surety or of the principal.<sup>37</sup> If the creditor obtains a judgment against the principal, the surety, on payment of the debt, is subrogated to the rights of the creditor in the judgment.<sup>38</sup> Negotiable paper, paid by an indorser, is kept alive for his benefit; and he may enforce it against prior indorsers and the maker.<sup>39</sup> A junior mortgagee who pays off a senior incumbrance on the land for his own protection is subrogated to all rights and remedies of the senior incumbrancer.<sup>40</sup> An insurance company which pays a loss caused by the negligence of a third person is subrogated to all rights of the insured against such third person.<sup>41</sup>

Numerous as are the applications of this principle, it nevertheless has its limits. A mere volunteer cannot invoke the aid of subrogation. He must have paid as surety, or under some compulsion made necessary by the adequate protection of his own rights; other-

<sup>37</sup> *Mayhew v. Crickett*, 2 Swanst. 185; *Pearl v. Deacon*, 24 Beav. 186; *Lake v. Brutton*, 18 Beav. 34; *Lewis v. Palmer*, 28 N. Y. 271; *Johnson v. Bartlett*, 17 Pick. 477; *Hess' Estate*, 69 Pa. St. 272; *Budd v. Olver*, 147 Pa. St. 194, 23 Atl. 1105; *Frank v. Traylor*, 130 Ind. 145, 29 N. E. 486.

<sup>38</sup> *Parsons v. Briddock*, 2 Vern. 608; *Townsend v. Whitney*, 75 N. Y. 431; *Fleming v. Beaver*, 2 Rawle (Pa.) 128; *German American Sav. Bank v. Fritz*, 68 Wis. 390, 32 N. W. 123; *Crisfield v. State*, 55 Md. 192; *Smith v. Rumsey*, 33 Mich. 183; *Lumpkin v. Mills*, 4 Ga. 343; *Crawford v. Logan*, 97 Ill. 396; *Schleissmann v. Kallenberg*, 72 Iowa, 338; *Lyon v. Bolling*, 9 Ala. 463. In some of the states, however, it is held that payment by the surety extinguishes the judgment. *Adams v. Drake*, 11 Cush. (Mass.) 504; *Findlay v. Bank of U. S.*, 2 McLean, 44 Fed. Cas. No. 4,791.

<sup>39</sup> *Beckwith v. Webber*, 78 Mich. 390, 44 N. W. 330; *Seixas v. Gonsoulin*, 40 La. Ann. 351, 4 South. 453; *Rushworth v. Moore*, 36 N. H. 188; *Parker v. Sanborn*, 7 Gray (Mass.) 191; *North Nat. Bank v. Hamlin*, 125 Mass. 506.

<sup>40</sup> *Mattison v. Marks*, 31 Mich. 421; *Levy v. Martin*, 48 Wis. 198, 4 N. W. 35; *Yaple v. Stephens*, 36 Kan. 680, 14 Pac. 222; *Lamb v. Montague*, 112 Mass. 352.

<sup>41</sup> *Burnand v. Rodocanachi*, 7 App. Cas. 339; *Déming v. Merchants' Cotton-Press & Storage Co.*, 90 Tenn. 306, 17 S. W. 89; *Connecticut Fire Ins. Co. v. Erie R. Co.*, 73 N. Y. 399; *Pratt v. Radford*, 52 Wis. 114, 8 N. W. 606; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car. Co.*, 139 U. S. 79, 11 Sup. Ct. 490; *Perrott v. Shearer*, 17 Mich. 48.



wise payment extinguishes the debt.<sup>42</sup> Again, the principle will not be applied in favor of one who has been guilty of inequitable or illegal conduct in the transaction.<sup>43</sup> "It is only to prevent fraud and subserve justice that equity ingrafts the wholesome provisions of subrogation or of equitable lien upon a transaction, and it should never be done where it would work injustice."<sup>44</sup>

### MARSHALING.

171. Where one person has a clear right to resort to two funds, and another person has a right to resort to only one of these two funds, the single creditor may say that, as between himself and the double creditor, the double creditor shall be put to exhaust the security on which the single creditor has no claim.<sup>45</sup>

The doctrine of marshaling owes its introduction into equity jurisprudence to the fact that at common law a debt by specialty could be enforced on the debtor's death, against his land as well as against his personal estate; while simple contract debts could be enforced against the personalty only. Courts of equity, therefore, laid down the principle that a person having resort to two funds shall not by his choice disappoint another having one only.<sup>46</sup> The practice

<sup>42</sup> 2 Beach, Mod. Eq. 801; *Acer v. Hotchkiss*, 97 N. Y. 395, 403; *Sandford v. McLean*, 3 Paige, 117; *Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625; *Desot v. Ross*, 95 Mich. 81, 54 N. W. 694; *Wormer v. Waterloo Agricultural Works*, 62 Iowa, 699, 14 N. W. 331; *Watson v. Wilcox*, 39 Wis. 643; *McNell v. Miller*, 29 W. Va. 480, 2 S. E. 335; *Wadsworth v. Blake*, 43 Minn. 509, 45 N. W. 1131; *Webster's Appeal*, 86 Pa. St. 409; *Brice v. Watkins*, 30 La. Ann. 21; *Kitchell v. Mudgett*, 37 Mich. 82.

<sup>43</sup> *Rowley v. Towsley*, 53 Mich. 329, 19 N. W. 20; *Milwaukee & M. R. Co. v. Soutler*, 13 Wall. 517; *Perkins v. Hall*, 105 N. Y. 539, 12 N. E. 48; *Devine v. Harkness*, 117 Ill. 147, 7 N. E. 52; *Wilkinson v. Babbitt*, 4 Dill. 207, Fed. Cas. No. 17,668; *Johnson v. Moore*, 33 Kan. 90, 5 Pac. 406; *Guckenheimer v. Angervine*, 81 N. Y. 394.

<sup>44</sup> *Kelly v. Kelly*, 54 Mich. 47, 19 N. W. 580; *Dwight v. Scranton & W. L. Co.*, 82 Mich. 624, 47 N. W. 102.

<sup>45</sup> Per Lord Westbury, in *Dolphin v. Aylward*, L. R. 4 H. L. 486.

<sup>46</sup> *Trimmer v. Bayne*, 9 Ves. 209, 211; *Aldrich v. Cooper*, 8 Ves. 382, 2 White & T. Lead. Cas. Eq. 80.

adopted in the early days was to summarily forbid the creditor with two funds to touch that which was the sole resource of the other.<sup>47</sup> The remedy by injunction is, however, rarely applied in modern times.<sup>48</sup> The usual course is to permit the double creditor to enforce his claim as he pleases; but, if he chooses to resort to the only fund on which the other has a claim, that other is subrogated to all his rights against the fund to which otherwise he could not have resorted.<sup>49</sup>

Though the distinction between specialty and simple contract debts has long ago been abolished, the doctrine of marshaling has survived. Thus, where a senior mortgage covers two estates, and a junior mortgage covers one only of these two, the senior mortgagee must resort first to the estate which is alone subject to his mortgage, so as to release as much as possible the estate which is subject to both mortgages, and so give the junior mortgagee, whose debt is solely charged on that estate, a chance of getting paid.<sup>50</sup> Where a partner gives a mortgage covering both firm and individual property to secure a firm debt, an individual creditor of the partner may compel the firm creditor to exhaust the firm assets before having recourse to the individual property.<sup>51</sup> A legatee whose legacy is charged on land cannot enforce it out of testator's personal estate, to the detriment of the other legatees whose legacies are not thus charged; and, if the privileged legatee does resort to the personalty, the others will be subrogated to his rights in the realty.<sup>52</sup>

It is necessary before dismissing this subject to guard against a too comprehensive interpretation of the principle. It does not ap-

<sup>47</sup> Kerley, *Hist. Eq.* p. 215.

<sup>48</sup> *Evertson v. Booth*, 19 Johns. (N. Y.) 495; *Woolcocks v. Hart*, 1 Paige (N. Y.) 185.

<sup>49</sup> *Milmine v. Bass*, 29 Fed. 632; *Ramsey's Appeal*, 2 Watts (Pa.) 228; *Hudkins v. Ward*, 30 W. Va. 204, 3 S. E. 600; *Sims v. Albea*, 72 Ga. 751; *Turner v. Flinn*, 67 Ala. 529.

<sup>50</sup> *Tidd v. Lister*, 3 De Gex, M. & G. 857; *Equitable Mortgage Co. v. Lowe* (Kan.) 35 Pac. 829; *Andreas v. Hubbard*, 50 Conn. 351; *Sibley v. Baker*, 23 Mich. 312; *Millsaps v. Bond*, 64 Miss. 453, 1 South. 506; *Turner v. Flinn*, 67 Ala. 529; *Gusdorf v. Ikelheimer*, 75 Ala. 148; *Hudson v. Dismukes*, 77 Va. 242.

<sup>51</sup> *Bass v. Estill*, 50 Miss. 300.

<sup>52</sup> *Hanby v. Roberts*, Amb. 128; *Bonner v. Bonner*, 13 Ves. 370; *Perry v. Hale*, 44 N. H. 363, 367; *Cryder's Appeal*, 11 Pa. St. 72.

ply as between creditors of different persons. Thus, if a person has a demand against A. and B. jointly and severally, a creditor of B. alone cannot compel the former creditor to apply to A. alone, so as to leave the property of B. free for his separate debts, unless there is some equity between A. and B. themselves which would entitle B. to a remedy against A.<sup>53</sup> Again, assets will not be marshaled in favor of a creditor, to the prejudice of another man's rights.<sup>54</sup>

<sup>53</sup> *Ex parte Kendall*, 17 Ves. 520; *Meech v. Allen*, 17 N. Y. 301; *Lloyd v. Galbraith*, 32 Pa. St. 103; *Lee v. Gregory*, 12 Neb. 282, 11 N. W. 297; *Huston's Appeal*, 69 Pa. St. 485.

<sup>54</sup> *Webb v. Smith*, 30 Ch. Div. 192; *Gilliam v. McCormack*, 85 Tenn. 597, 611, 4 S. W. 521; *People v. E. Remington & Sons*, 121 N. Y. 333, 24 N. E. 793.

## CHAPTER XI.

### EQUITABLE REMEDIES (Continued)—PARTITION AND BOUNDARIES.

- 172. Partition.
- 173. Who Entitled to Partition.
- 174. What Is Subject to Partition.
- 175. Settlement of Boundaries.

### PARTITION.

172. Partition is the segregation of property owned in undivided shares, so as to vest in each co-owner exclusive title to a specific portion in lieu of his undivided interest in the whole.

Property, whether real or personal, owned in undivided shares, may, of course, be partitioned by the voluntary acts of the owners. In the case of real estate, this is usually accomplished by a conveyance or release, to each cotenant by the others, of the portion which he is entitled to hold in severalty.<sup>1</sup>

At common law, however, coparceners alone could compel partition; but later the right was extended by statute to joint tenants and tenants in common.<sup>2</sup> This compulsory common-law remedy, which was by writ of partition, proved to be inadequate and incomplete at an early day, because of the various and complicated interests which arose in the ownership of real estate, and because courts of law could neither compel discovery as to titles, nor effectuate the partition in fact by compelling mutual conveyances.<sup>3</sup> That this state of the law must have led to serious inconvenience is apparent when it is remembered that each coparcener, joint tenant, or tenant in common has a right

<sup>1</sup> Freem. Coten. § 406; Yancey v. Radford, 86 Va. 638, 10 S. E. 972.

<sup>2</sup> An estate in coparcenary existed where land, on the death of the owner intestate, devolved on several persons as coheirs. Under the English law of primogeniture, the oldest son, if there was one, became entitled to the land on his father's death, and hence the estate of coparcenary existed only where the deceased left surviving him daughters, and no sons.

<sup>3</sup> Snell, Eq. p. 705.

to enter on every part of the land; and, except in the case of an actual expulsion, there is no remedy of any value short of partition. In the case of an undivided ownership of chattels personal, the legal results were even more inconvenient. Thus, Littleton says: "If two be possessed of chattels personalls in common by divers titles, as of an horse, an ox, or a cove, &c., if the one takes the whole to himselfe out of the possession of the other, the other hath no remedie but to take this from him who hath done to him the wrong, to occupie in common, &c., when he can see his time."<sup>4</sup>

Equity, therefore, began to exercise jurisdiction in cases of partition during the reign of Queen Elizabeth, and its procedure proved so effective that the common-law writ became rather a matter of antiquarian interest than of practical importance. It was finally abolished in England by legislation in 1833, and the equity jurisdiction thus became exclusive.<sup>5</sup>

The subject of partition, both in England and in this country, is now regulated by statutes, which are generally declaratory of the legal and equitable rights that previously obtained.<sup>6</sup> These statutes, of course, do not oust the jurisdiction of equity, unless they contain words of prohibition.<sup>7</sup>

#### SAME—WHO ENTITLED TO PARTITION.

**173. Partition is a matter of right, and may be compelled by any co-owner entitled to the possession.**

A suit for partition may be maintained by any cotenant, whether seised in fee<sup>8</sup> or for life,<sup>9</sup> and apparently even when the co-owners

<sup>4</sup> Co. Litt. § 323. The position of tenants in common of chattels when at odds with each other is forcibly illustrated in the following story: Two men are tenants in common of an elephant, and one declines either to pay anything to the other in the shape of profits of exhibition, or to buy his co-owner's share, and is at last brought to reason only by the threat of the injured party to shoot his undivided moiety. Haynes, Eq. p. 99.

<sup>5</sup> Haynes, Eq. pp. 100-102.

<sup>6</sup> See statutes of different states; Freem. Coten. § 423.

<sup>7</sup> Whitten v. Whitten, 36 N. H. 332; Wright v. Marsh, 2 G. Greene (Iowa) 104; Wilkinson v. Stuart, 74 Ala. 203; Labadie v. Hewitt, 85 Ill. 341.

<sup>8</sup> Lord Brook v. Lord Hertford, 2 P. Wms. 518.

<sup>9</sup> Gaskell v. Gaskell, 6 Slim. 643; Shaw v. Beers, 84 Ind. 528; Hawkins v. McDougal, 125 Ind. 597, 25 N. E. 807.

are entitled only for a term of years,<sup>10</sup> provided only they are in possession, actual or constructive.<sup>11</sup> When the action is brought by tenants for life, the decree of partition will not bind the reversioners or remainder-men actually in existence, unless they have been joined as parties;<sup>12</sup> but, where there are remainder-men who may come in esse and be entitled, they will be bound by a decree made against the tenant for life.<sup>13</sup>

A bill for partition is not maintainable by a cotenant entitled only in remainder or reversion, for it is unreasonable that a remainder-man or reversioner should disturb the existing state of things during the possession of the tenant for life or other prior tenant.<sup>14</sup> In some of the states, however, this rule is abrogated by statute.<sup>15</sup>

In the common-law action of partition, plaintiff was compelled to prove, not only his own title, but also that of defendant. In equity, however, plaintiff was entitled to discovery as to defendant's title.<sup>16</sup> Of course, the title of plaintiff to an interest in the property of which he seeks partition must be shown.<sup>17</sup> If it is disputed plaintiff is required to establish it at law before equity will decree partition.<sup>18</sup>

*Assignment of Dower.*

On the same principle as in cases of partition, equity assumed jurisdiction to assign dower to a widow in lands of which her husband

<sup>10</sup> *Baring v. Nash*, 1 Ves. & B 551; *Mussey v. Sanborn*, 15 Mass. 155.

<sup>11</sup> *Packard v. Packard*, 16 Pick. 191, 194; *Savage v. Savage*, 19 Or. 112, 23 Pac. 890; *Sullivan v. Sullivan*, 66 N. Y. 37.

<sup>12</sup> *Freem. Coten.* § 463. See, also, *Black v. Washington*, 65 Miss. 60, 3 South. 140; *Savage v. Savage*, 19 Or. 112, 23 Pac. 890.

<sup>13</sup> *Thomas v. Gyles*, 2 Vern. 233; *Brevoort v. Brevoort*, 70 N. Y. 136; *Baylor v. Dejarnette*, 13 Grat. 152.

<sup>14</sup> *Evans v. Bagshaw*, L. R. 6 Eq. 400, 5 Ch. App. 340; *Wilkinson v. Stuart*, 74 Ala. 198; *Nichols v. Nichols*, 28 Vt. 228.

<sup>15</sup> *Code Civ. Proc. N. Y.* § 1533.

<sup>16</sup> 3 *Pom. Eq. Jur.* § 1388.

<sup>17</sup> *Cartwright v. Pultney*, 2 Atk. 380; *Jope v. Morshead*, 6 Beav. 213; *Agar v. Fairfax*, 2 White & T. Lead. Cas. Eq. 865, 905; *Wilkinson v. Stuart*, 74 Ala. 203; *Brendel v. Klopp*, 69 Md. 1, 13 Atl. 539; *Criscoe v. Hambrick*, 47 Ark. 235, 1 S. W. 150.

<sup>18</sup> *Waite v. Bingley*, 21 Ch. Div. 674, 681; *Fenton v. Mackinac Circuit Judge*, 76 Mich. 405, 43 N. W. 437; *Nash v. Simpson*, 78 Me. 142, 3 Atl. 53; *Seymour v. Ricketts*, 21 Neb. 240, 31 N. W. 781; *Carrigan v. Evans*, 31 S. C. 262, 9 S. E. 852; *Rich v. Bray*, 37 Fed. 273.

had been seised in fee during coverture, though dower was originally a mere legal demand.<sup>19</sup> In most of the states, the procedure as to the assignment of dower is now regulated by statutes, and in many of them the equitable jurisdiction is abrogated.<sup>20</sup>

#### SAME—WHAT IS SUBJECT TO PARTITION.

**174.** The power of equity to decree partition extends to all property within the jurisdiction, whether real or personal.

Equity has power to decree partition of any property that can be divided.<sup>21</sup> The inconvenience or difficulty in making a partition is no objection to a decree.<sup>22</sup> This principle sometimes led to absurd results; for the court of chancery, in olden times, could not order a sale of the premises and a division of the proceeds without the consent of the cotenants.<sup>23</sup> Thus, in *Turner v. Morgan*,<sup>24</sup> there was a decree for the partition of a single house. The whole stack of chimneys, all the fire places, the only staircase, and all the conveniences in the yard were awarded to one of the parties, and the balance of the house to the other. Now, by statutes, both in this country and in England, courts may, in the exercise of a sound discretion, order a sale of the premises and a division of the proceeds.<sup>25</sup> In cases where no sale is ordered, the property is, of course, divided among the

<sup>19</sup> *Curtis v. Curtis*, 2 Brown, Ch. 620, 631, 632; *Mundy v. Mundy*, 2 Ves. Jr. 122; *McMahan v. Kimball*, 3 Blackf. (Ind.) 1; *Swaine v. Perine*, 5 Johns. Ch. 482.

<sup>20</sup> *Scrib. Dower* (2d Ed.) p. 414. Equity jurisdiction is abrogated in Arkansas, Connecticut, Delaware, Florida, Georgia, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, Oregon, South Carolina, and Wisconsin.

<sup>21</sup> *Moore v. Darby* (Del. Ch.) 18 Atl. 768.

<sup>22</sup> *Warner v. Baynes*, Amb. 589; *Hanson v. Willard*, 12 Me. 147; *Steedman v. Weeks*, 2 Strob. Eq. 145; *Cooper v. Cedar Rapids Water-Power Co.*, 42 Iowa, 398.

<sup>23</sup> *Griffles v. Griffles*, 11 Wkly. Rep. 943; *Codman v. Tinkham*, 15 Pick. 364; *Lyon v. Powell*, 78 Ala. 351.

<sup>24</sup> 8 Ves. 143.

<sup>25</sup> *Agar v. Fairfax*, 2 White & T. Lead. Cas. Eq. 915, and notes; *Brooks v. Davey*, 109 N. Y. 495, 17 N. E. 412; *Corrothers v. Jolliffe*, 32 W. Va. 562, 9 S. E. 889; *Brendel v. Klopp*, 69 Md. 1, 13 Atl. 589.

tenants in common as nearly equally as may be. If, however, it is impracticable to make a fair and equitable division, the tenant to whom the more valuable share is allotted must make compensation to equalize the others. This compensation is called the "owelty of partition,"<sup>26</sup> and may consist either in the payment of a sum of money,<sup>27</sup> or a servitude or easement imposed for the benefit of the less valuable share.<sup>28</sup>

Freehold estates were always subject to partition in equity, and leaseholds were made so by statute.<sup>29</sup> Even incorporeal hereditaments may be partitioned between the co-owners; for example, a ferry franchise,<sup>30</sup> or the right to a mineral spring.<sup>31</sup> The only limitation on the power of the court in this respect is that the property must be within its territorial jurisdiction.<sup>32</sup>

We have already seen that owners of personal property are entirely without a legal remedy as between themselves.<sup>33</sup> Courts of equity, therefore, have exclusive jurisdiction of suits for partition of this species of property;<sup>34</sup> and it is immaterial that plaintiff's title is disputed,<sup>35</sup> or that he is not in possession.<sup>36</sup>

#### SETTLEMENT OF BOUNDARIES.

**175. The jurisdiction of equity as to the settlement of boundaries is limited to those cases:<sup>37</sup>**

**(a) Where there is some peculiar equity superinduced by the acts of the parties;**

<sup>26</sup> *Clarendon v. Hornby*, 1 P. Wms. 446.

<sup>27</sup> *Field v. Leiter*, 117 Ill. 341, 7 N. E. 279; *Cox v. McMullin*, 14 Grat. (Va.) 82; *Smith v. Smith*, 10 Palge, 477; *Cheatham v. Crews*, 88 N. C. 38.

<sup>28</sup> *Cheswell v. Chapman*, 38 N. H. 17.

<sup>29</sup> 32 Hen. VIII. c. 32, § 1.

<sup>30</sup> *Rohn v. Harris*, 130 Ill. 525, 22 N. E. 587.

<sup>31</sup> *Foreman v. Hough*, 98 N. C. 386, 3 S. E. 912.

<sup>32</sup> See ante, 29.

<sup>33</sup> See ante, 260.

<sup>34</sup> *Freem. Coten*. § 426; *Godfrey v. White*, 60 Mich. 443, 27 N. W. 593; *Smith v. Smith*, 4 Rand. (Va.) 102; *Swain v. Knapp*, 32 Minn. 431, 21 N. W. 414; *Spaulding v. Warner*, 59 Vt. 646, 11 Atl. 186.

<sup>35</sup> *Godfrey v. White*, 60 Mich. 443, 27 N. W. 593; *Weeks v. Weeks*, 5 Ired. Eq. 111; *Smith v. Dunn*, 27 Ala. 316.

<sup>36</sup> *Spaulding v. Warner*, 59 Vt. 646, 11 Atl. 186.

<sup>37</sup> *Wake v. Conyers*, 1 Eden, 331, 2 White & T. Lead. Cas. Eq. 850.



- (b) Where there is a bona fide dispute as to the ownership of the soil; and
- (c) Where some portion of the premises is in the defendant's possession.

The jurisdiction of equity to settle disputed boundaries is limited by the rule that equity has no jurisdiction where there is an adequate remedy at law.<sup>38</sup> The plaintiff must show clearly that, without the assistance of the court, the boundaries could not be found;<sup>39</sup> or, failing the assistance of equity, that a multiplicity of actions would be occasioned.<sup>40</sup> Defendant's fraud in obliterating and confusing the boundaries will confer jurisdiction on the court.<sup>41</sup> As a rule, the location of disputed boundaries may be settled in the legal action of ejectment, and statutes in many of the states have prescribed a special procedure. The equity jurisdiction on this branch seems to be nearly obsolete in the United States.

<sup>38</sup> *Perry v. Pratt*, 31 Conn. 433.

<sup>39</sup> *Miller v. Warmington*, 1 Jac. & W. 491.

<sup>40</sup> *Bouverie v. Prentice*, 1 Brown, Ch. 200; *Perry v. Pratt*, 31 Conn. 433.

<sup>41</sup> *Bute v. Glamorganshire Canal Co.*, 1 Phil. Ch. 681; *Merriman v. Russell*, 2 Jones, Eq. (N. C.) 470.

## CHAPTER XII.

### EQUITABLE REMEDIES (Continued)—SPECIFIC PERFORMANCE.

- 176. Definition and Contracts Enforceable.
- 177. Inadequacy of Damages.
- 178. Contracts Relating to Personal Acts.
- 179. Grounds for Refusing Relief.
- 180. Defenses Having Same Effect at Law and in Equity.
- 181. Defenses Confined to Specific Performance.
- 182. Defenses Producing Different Result than at Common Law.
- 183. Statute of Frauds as a Defense.
- 184. Specific Performance with a Variation.

### DEFINITION AND CONTRACTS ENFORCEABLE.

176. Specific performance may be defined to be a judicial order that a legal contract be actually carried into effect, made in cases where damages would not give adequate compensation.<sup>1</sup>

It has heretofore been pointed out that the sole redress which the common law affords for breach of contract to the disappointed party is damages. Consequently, as far as the common-law remedy is concerned, it is open to a contracting party either to perform the contract or to pay damages, and to choose between these two courses at his pleasure. Equity, on the other hand, has regarded such a remedy as in many cases inadequate; and, deeming a party bound in conscience to do exactly what he has agreed to do, has exercised its authority to compel the specific performance of his agreement. The first question to be determined, therefore, is when damages do, and when they do not, afford an adequate remedy.

### SAME—INADEQUACY OF DAMAGES.

177. A breach of contract cannot be adequately recompensed by damages where the thing contracted for is spe-

<sup>1</sup> Underh. Eq. p. 196.

cific, and its exact counterpart cannot be purchased in the open market.<sup>2</sup>

One who has contracted to purchase a particular tract of land cannot get its exact counterpart anywhere, with all its surroundings and conveniences. It is a unique thing, not capable of being duplicated. The rule, therefore, is that where a contract in writing respecting real property is entered into between competent parties, and is in its nature and circumstances unobjectionable, it is as much of course for a court of equity to decree specific performance as it is for a court of common law to give damages for the breach of such a contract.<sup>3</sup>

A contract for the sale and delivery of chattels, possessing an easily ascertainable market value, such as articles of merchandise, corn, or wheat, is very different from a contract for the sale of lands, since damages awarded for breach of such a contract will enable plaintiff to procure other articles as good in all respects as those which were contracted for. The legal remedy, therefore, being adequate, there is generally no ground for the exceptional and discretionary interference of equity in contracts respecting personal chattels.<sup>4</sup>

Special circumstances may, however, induce the court to decree specific performance of such contracts. When chattels consist of works of art, or rare articles of virtu, or heirlooms, or the like,—things unique in themselves, and practically incapable of being replaced.—a contract in relation to them will be specifically enforced.<sup>5</sup> On the

<sup>2</sup> *Id.*

<sup>3</sup> *Hall v. Warren*, 9 Ves. 605, 608; *Page v. Martin*, 46 N. J. Eq. 585, 589, 20 Atl. 46; *Jackens v. Nicholson*, 70 Ga. 200; *Popplein v. Foley*, 61 Md. 281; *Conaway v. Sweeney*, 24 W. Va. 643, 649; *Ensign v. Kellog*, 4 Pick. (Mass.) 5; *Throckmorton v. Davidson*, 68 Iowa, 643, 27 N. W. 794; *McClure v. Otrich*, 118 Ill. 320, 8 N. E. 784; *Bogan v. Daughdrill*, 51 Ala. 312.

<sup>4</sup> *Cuddee v. Rutter*, 5 Vin. Abr. 538, pl. 21, 1 White & T. Lead. Cas. Eq. 1063; *Johnson v. Brooks*, 93 N. Y. 337, 343; *Dilburn v. Youngblood*, 85 Ala. 449, 5 South. 175; *Jones v. Newhall*, 115 Mass. 244; *Kimball v. Morton*, 5 N. J. Eq. 26; *Foll's Appeal*, 91 Pa. St. 434.

<sup>5</sup> Thus, a unique horn, known as the "Pusey Horn," was specifically ordered to be delivered up. *Pusey v. Pusey*, 1 Vern. 273, 1 White & T. Lead. Cas. Eq. 1109. And so with a curious Greek altar piece. *Duke of Somerset v. Cookson*, 3 P. Wms. 389, 1 White & T. Lead. Cas. Eq. 1110. See, also,

same principle, the court will order the delivery up of specific deeds and writings to the persons legally entitled thereto.<sup>6</sup>

In England, a contract for the sale of shares of corporate stock will be specifically enforced, because such shares are limited in number, and not always obtainable.<sup>7</sup> With us, such contracts will not be specifically enforced, because corporate stock is ordinarily purchasable in the market, and compensation in damages affords an adequate remedy.<sup>8</sup> And, for similar reasons, contracts for the sale of governmental securities or bonds will not be specifically enforced.<sup>9</sup>

Agreements relating to patents for inventions afford, perhaps, the best illustration of equitable interference in cases relating to personality. Such agreements will be specifically enforced, almost as much as a matter of course as contracts concerning real property.<sup>10</sup>

#### **SAME—CONTRACTS RELATING TO PERSONAL ACTS.**

**178. A contract relating to personal acts will not, as a rule, be specifically enforced.**

Contracts of hiring and service are of a personal and confidential character, and they will not be specifically enforced, for an enforced

*Fells v. Read*, 3 Ves. 70; *Lloyd v. Loaring*, 6 Ves. 773; *Williams v. Howard*, 3 Murph. (N. C.) 74; *McGowin v. Remington*, 12 Pa. St. 56.

<sup>6</sup> *Brown v. Brown*, 1 Dickens, 62; *Gibson v. Ingo*, 6 Hare, 112; *Baum's Appeal*, 113 Pa. St. 58, 4 Atl. 461; *Cowles v. Whitman*, 10 Conn. 121; *Pattison v. Skillman*, 34 N. J. Eq. 344.

<sup>7</sup> *Duncuft v. Albrecht*, 12 Sim. 189; *Poole v. Middleton*, 29 Beav. 646; *Shaw v. Fisher*, 2 De Gex & S. 11.

<sup>8</sup> *Eckstein v. Downing*, 64 N. H. 248; *Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317; *Noyes v. Marsh*, 123 Mass. 286. Rule is otherwise where stock cannot be obtained in the market. *Johnson v. Brooks*, 93 N. Y. 337; *Frue v. Houghton*, 6 Colo. 318.

<sup>9</sup> *Cuddee v. Rutter*, 5 Vin. Abr. 538, pl. 21, 1 White & T. Lead. Cas. Eq. 1063; *Ross v. Union Pac. Ry. Co.*, Woolw. 26, Fed. Cas. No. 12,080.

<sup>10</sup> *Whitney v. Burr*, 115 Ill. 289, 3 N. E. 434; *Hapgood v. Rosenstock*, 23 Fed. 86; *Adams v. Messinger*, 147 Mass. 185, 17 N. E. 491; *Hull v. Pitrat*, 45 Fed. 94; *Reese's Appeal*, 122 Pa. St. 392, 15 Atl. 807.

performance would probably be worse than a nonperformance.<sup>11</sup> The same remarks apply to the contract of agency.<sup>12</sup> For a somewhat similar reason, an agreement to sell the good will of a business, depending on personal considerations, will not be enforced;<sup>13</sup> but, where the good will is entirely or mainly attached to the premises, a contract for the sale of the good will and premises is enforceable.<sup>14</sup>

Contracts to perform certain acts relating to land, such as contracts to build and repair, are of a somewhat special nature; but, as a general rule, they will not be specifically enforced,<sup>15</sup> because the legal remedy is usually sufficient, and it would be almost impossible for the court to carry out its decree if made.<sup>16</sup> Nevertheless, the court has jurisdiction to decree the performance of certain works where damages would not be an adequate remedy. Thus, a contract to build a railway crossing will be specifically enforced.<sup>17</sup> Again, where there have been acts amounting to part performance of the contract, the court will decree specific performance which it might otherwise have refused.<sup>18</sup> The general tendency of modern decisions is towards granting the relief thus sought, if possible.<sup>19</sup>

Some of the English cases hold that specific performance will not be granted of a contract which imposes on the contractor the performance of continuous duties extending over a considerable period

<sup>11</sup> *Johnson v. Shrewsbury & B. R. Co.*, 3 De Gex, M. & G. 914; *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 498, 3 South. 449; *William Rogers Manuf'g Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467; *Lindsay v. Glass*, 119 Ind. 301, 21 N. E. 897; *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1131; *Campbell v. Rust*, 85 Va. 653, 8 S. E. 664.

<sup>12</sup> *Chinnock v. Sainsbury*, 30 Law J. Ch. 400.

<sup>13</sup> *May v. Thomson*, 20 Ch. Div. 705.

<sup>14</sup> *Cruttwell v. Lye*, 17 Ves. 335.

<sup>15</sup> *Errington v. Aynesly*, 2 Brown, Ch. 341; *Beck v. Allison*, 56 N. Y. 366; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 37 Fed. 733; *Ross v. Union Pac. Ry. Co.*, Woolw. 26, Fed. Cas. No. 12,080.

<sup>16</sup> *Middleton v. Greenwood*, 2 De Gex, J. & S. 142.

<sup>17</sup> *Post v. West Shore R. Co.*, 123 N. Y. 581, 26 N. E. 7. See, also, *Stuyvesant v. Mayor*, 11 Paige (N. Y.) 414; *Gregory v. Ingwersen*, 32 N. J. Eq. 199; *Storer v. G. W. R. Co.*, 2 Younge & C. Ch. 48.

<sup>18</sup> *Price v. Corp. of Penzance*, 4 Hare, 506, 509; *Ross v. Union Pac. Ry. Co.*, Woolw. 40, Fed. Cas. No. 12,080; *Birchett v. Bolling*, 5 Munf. (Va.) 442.

<sup>19</sup> *Wilson v. Furness R. Co.*, L. R. 9 Eq. 28, 33.

of time, on the ground that the court cannot undertake to see to such performance;<sup>20</sup> but this proposition has not been regarded as of controlling importance in several recent American decisions.<sup>21</sup>

*Other Instances.*

A contract to enter into a partnership to continue for an indefinite period will not be specifically enforced, since such a partnership is terminable at will.<sup>22</sup> If, however, the partnership is to continue for a fixed term of years, and there have been acts of part performance, the court will exercise its powers;<sup>23</sup> but, to warrant it, the circumstances must be strong.<sup>24</sup>

Contracts to refer to arbitration will not be specifically enforced.<sup>25</sup> The award of the arbitrators, however, is treated as a contract between the parties, and will be enforced where a contract would be enforced, but not otherwise.<sup>26</sup> An award to do anything in specie,

<sup>20</sup> *Blackett v. Bates*, 1 Ch. App. 117; *Powell D. S. C. Co. v. Taff Vale Ry. Co.*, 9 Ch. App. 331.

<sup>21</sup> *Joy v. St. Louis*, 138 U. S. 11, 47, 11 Sup. Ct. 243 (contract prescribing terms by which one railroad company may run its trains over track of another company specifically enforced); *Cornwall & L. R. Co.'s Appeal*, 125 Pa. St. 232, 17 Atl. 427 (contract requiring all trains to stop within 200 feet of a crossing specifically enforced); *South & N. A. R. Co. v. Highland Ave. & B. R. Co.*, 98 Ala. 400, 13 South. 682 (contract for construction, repair, and use of railroad track enforced); *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 2 C. C. A. 174, 51 Fed. 309; *Louisville & N. R. Co. v. Mississippi & T. R. Co.*, 92 Tenn. 681, 22 S. W. 920. It should be noted, however, that in all these cases the courts were controlled in some measure, at least, by the interest of the public in questions of transportation.

<sup>22</sup> *Scott v. Rayment*, L. R. 7 Eq. 112; *Buck v. Smith*, 29 Mich. 166; *Meason v. Kalne*, 63 Pa. St. 335.

<sup>23</sup> *Anon.*, 2 Ves. Sr. 629; *England v. Curling*, 8 Beav. 129.

<sup>24</sup> *Downs v. Collins*, 6 Hare, 418, 437.

<sup>25</sup> *Street v. Rigby*, 6 Ves. 815; *Cooke v. Cooke*, L. R. 4 Eq. 77; *Halfhide v. Fenning*, 2 Brown, Ch. 337; *Noyes v. Marsh*, 123 Mass. 280; *Smith v. Boston, C. & M. R. Co.*, 36 N. H. 487; *Hopkins v. Gilman*, 22 Wis. 476. In England such contracts are now enforceable by statute. 17 & 18 Vict. c. 125, § 11; *Sellgmann v. Le Boutillier*, L. R. 1 C. P. 681; *Willesford v. Watson*, L. R. 14 Eq. 572.

<sup>26</sup> *Blackett v. Bates*, 1 Ch. App. 117; *Caldwell v. Dickinson*, 13 Gray, 365; *Story v. Norwich & W. R. Co.*, 24 Conn. 94; *McNeil v. Magee*, 5 Mason, 244, Fed. Cas. No. 8,915; *Kirksey v. Fike*, 27 Ala. 383.

as to convey an estate or assign securities, will therefore be enforced,<sup>27</sup> but not an award to pay money.<sup>28</sup>

A court of equity will not specifically enforce a contract to lend or to borrow or to pay money,<sup>29</sup> but it will decree specific performance of an agreement to give security in consideration of money due.<sup>30</sup>

Contracts to insure have been enforced even after loss.<sup>31</sup>

### GROUND'S FOR REFUSING RELIEF.

**179.** For the purpose of conveniently dealing with the defenses open to a defendant in an action for specific performance, it may be noticed that there are:

- (a) Some which, if substituted in a common-law action for damages, would produce a similar result.
- (b) Others which are confined to specific performance actions.
- (c) Others which, although recurring in common-law actions for damages, produce in specific performance actions either a dissimilar, or, at least, not a precisely similar, result.

<sup>27</sup> Norton v. Mascall, 2 Vern. 24, and cases cited in preceding note.

<sup>28</sup> Hall v. Hardy, 3 P. Wms. 190; Howe v. Nickerson, 14 Allen (Mass.) 400; Turpin v. Banton, Hardin (Ky.) 320.

<sup>29</sup> Sichel v. Mosenthal, 30 Beav. 371; Rogers v. Challis, 27 Beav. 175; Crampton v. Varna R. Co., 7 Ch. App. 562; Bradford, E. & C. R. Co. v. New York, L. E. & W. R. Co., 123 N. Y. 327, 25 N. E. 499; Pierce v. Plumb, 74 Ill. 326, 330, 331.

<sup>30</sup> Ashton v. Corrigan, L. R. 13 Eq. 76; Triebert v. Burgess, 11 Md. 452; Rothholz v. Schwartz, 46 N. J. Eq. 477, 19 Atl. 312; Taylor v. Eckersley, 2 Ch. Div. 302, 5 Ch. Div. 740. Contra, City Fire Ins. Co. v. Olmsted, 33 Conn. 476; Johnson v. Hoover, 72 Ind. 395.

<sup>31</sup> Haden v. Farmers' & M. Fire Ass'n, 80 Va. 683; Baile v. St. Joseph Fire & M. Ins. Co., 73 Mo. 371; Tayloe v. Merchants' Fire Ins. Co., 9 How. 300; Covenant Mut. Ben. Ass'n v. Sears, 114 Ill. 108, 29 N. E. 480.

**SAME—DEFENSES HAVING SAME EFFECT AT LAW AND  
IN EQUITY.**

180. Specific performance will not be decreed of a contract void at law because of:

- (a) Incapacity of the parties.
- (b) Nonconclusion.
- (c) Illegality.

This class of defenses will be noticed but briefly, since it forms part of the general law of contracts.

*Incapacity of Parties.*

The incapacity of a party to yield assent to a contract, such as lunacy, renders the contract unenforceable in equity, as well as at law. As regards coverture, the contracts of married women respecting their separate property are enforceable against them and in their favor. Infancy, as we shall hereafter see, has a somewhat different effect in equity than at law.

*Contract must be Concluded.*

So long as the parties are only in negotiation, there is no contract which can be specifically enforced.<sup>32</sup> It is often very difficult, however, to distinguish mere negotiations from contract. The law on this subject is thus summarized by Mr. Fry:<sup>33</sup> The burden of proving that there is a concluded contract rests on plaintiff. A binding contract may be constituted by the proposal of one party and the acceptance of the other; but the proposal has no validity without the acceptance. A memorandum of agreement which may be retracted until accepted differs essentially from a memorandum of agreement which, whenever signed, is binding on the party who signs it. The acceptance of a proposal must be plain, unequivocal, unconditional, without variance between it and the proposal, and it must be completed without unreasonable delay. With respect to

<sup>32</sup> *Duff v. Hopkins*, 33 Fed. 599; *Mayer v. McCreery*, 119 N. Y. 434, 23 N. E. 1045; *Brown v. Finney*, 53 Pa. St. 373; *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. 1136; *Domestic Tel. Co. v. Metropolitan Tel. Co.*, 39 N. J. Eq. 160, 165; *Wardell v. Williams*, 62 Mich. 50, 28 N. W. 796.

<sup>33</sup> Fry, *Spec. Perf.* (3d Am. Ed.) p. 132.



the important question as to whether a contract has been concluded by correspondence the following rule has been announced: Where a complete contract can be collected from a correspondence between the parties, the court will grant specific performance, although it was agreed that the terms should be embodied in a formal contract, unless there was a condition suspending the final assent until the execution of the formal contract.<sup>34</sup>

*Illegality.*

The illegality of a contract, or any part of a contract, is, of course, a bar to specific performance; but the illegality must apparently be clearly made out.<sup>35</sup>

**SAME—DEFENSES CONFINED TO SPECIFIC PERFORMANCE.**

**181. The defenses peculiar to actions for specific performance, as opposed to actions for damages, are:**

- (a) Want of mutuality of obligation.
- (b) Hardship.
- (c) Want of fairness.
- (d) Inadequacy of consideration.

The defenses peculiar to the action of specific performance, as well as those producing a different result than at common law, are founded on the two maxims: "He who seeks equity must do equity," and "He who comes into equity must come with clean hands." In one case it was said: "Courts not merely observe the words of the contract, but also have respect to the obligations of the golden rule; and, unless plaintiff has done as he would be done by, it is useless for him to come into that forum where equity and good conscience reign supreme over the letter of the law."<sup>36</sup>

<sup>34</sup> *Rossiter v. Miller*, 3 App. Cas. 1124.

<sup>35</sup> *Sprague v. Rooney*, 104 Mo. 349, 16 S. W. 505; *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *Baggott v. Sawyer*, 25 S. C. 405; *Platt v. Maples*, 19 La. Ann. 459. Contract void in part will not be enforced. *Hall v. Loomis*, 63 Mich. 709, 30 N. W. 374.

<sup>36</sup> *Rushton v. Thompson*, 35 Fed. 635, per Brewer, J.

*Want of Mutuality.*

Mutuality of consensus is essential to the validity of every contract, but to recover damages there is no necessity for mutuality of obligation. Thus, an infant can recover damages against a person *sui juris* with whom he has contracted, although he might himself have pleaded infancy. But, for specific performance, mutuality of obligation is essential;<sup>37</sup> and in such a case one party to a bargain is not bound when he cannot enforce it against the other.<sup>38</sup>

Exceptions, however, exist to the necessity of mutuality. Thus, where an owner of land, for a valuable consideration, gives another, in writing, an option to purchase within a specified time, the contract will be enforced at the suit of the party holding the option, though no obligation rested on him to make the purchase.<sup>39</sup> So, a person who has not signed a contract required by the statute of frauds to be in writing may enforce it against the other who has signed.<sup>40</sup>

*Want of Fairness.*

Only those contracts which are fair, just, and reasonable will be specifically enforced.<sup>41</sup> Thus, a contract by a married woman to pur-

<sup>37</sup> *Flight v. Bolland*, 4 Russ. 301; *Marble Co. v. Ripley*, 10 Wall. 339, 359; *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 498, 3 South. 449; *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514; *Brown v. Munger*, 42 Minn. 482, 44 N. W. 519; *Glass v. Rowe*, 103 Mo. 513, 15 S. W. 334; *Butman v. Porter*, 100 Mass. 337.

<sup>38</sup> *Wylson v. Dunn*, 34 Ch. Div. 569, 577; *Alworth v. Seymour*, 42 Minn. 526, 44 N. W. 1030. The rule is subject to the modification that, if the quality originally lacking be subsequently supplied, the enforcement of the contract may be made possible. *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4.

<sup>39</sup> *Johnston v. Trippe*, 33 Fed. 530, 536; *Frue v. Houghton*, 6 Colo. 318; *Ross v. Parks*, 93 Ala. 153, 8 South. 368; *Johnston v. Wadsworth (Or.)* 34 Pac. 13; *Watts v. Kellar*, 5 C. C. A. 394, 56 Fed. 1; *Boston & M. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224. But, where there is no consideration for the option, specific performance will not be decreed. *Graybill v. Braugh*, 89 Va. 895, 17 S. E. 558.

<sup>40</sup> *Miller v. Cameron*, 45 N. J. Eq. 95, 15 Atl. 842; *Clason v. Bailey*, 14 Johns. 489; *Ives v. Hazard*, 4 R. I. 14; *Rogers v. Saunders*, 16 Me. 92; *Docter v. Hellberg*, 65 Wis. 415, 27 N. W. 176.

<sup>41</sup> *Cathcart v. Robinson*, 5 Pet. 269; *Rust v. Conrad*, 47 Mich. 449, 11 N. W. 265; *McElroy v. Maxwell*, 101 Mo. 294, 14 S. W. 1; *Ikerd v. Beavers*, 106 Ind. 483, 7 N. E. 326; *Godwin v. Collins*, 4 Houst. (Del.) 28.

chase land, by the terms of which she is to secure payment of the purchase price by a mortgage, not only on the land purchased, but on her other separate real estate, is so rash and improvident that a court of equity will not decree specific performance in the vendor's favor.<sup>42</sup> The period for testing fairness is the time the contract was entered into.<sup>43</sup>

The court will not exercise its extraordinary power in compelling specific performance where to do so would necessitate a breach of trust,<sup>44</sup> or would work an injury to a third person or to the public interests,<sup>45</sup> or would compel a person to do what he is not lawfully competent to do,—partly on the ground of the unfairness and illegal taint of such contract in itself, and partly of the hardship to which it would expose the person forced to execute it.<sup>46</sup>

#### *Hardship.*

If the result of a contract is to impose great hardship on either of the contracting parties, it will not be specifically enforced.<sup>47</sup> Thus specific performance will not be decreed in favor of a vendor, where, after the execution of the contract, a portion of the premises has been swept away by the sea,<sup>48</sup> or where improvements on the land were destroyed by fire before he was ready to convey.<sup>49</sup>

#### *Inadequacy of Consideration.*

At common law, as long as there is a consideration, the court does not, as a general rule, inquire into its adequacy. But, as regards specific performance, some of the earlier cases treated mere in-

<sup>42</sup> *Friend v. Lamb*, 152 Pa. St. 529, 25 Atl. 577.

<sup>43</sup> *Willard v. Tayloe*, 8 Wall. 557; *Hale v. Wilkinson*, 21 Grat. (Va.) 75.

<sup>44</sup> *Dunn v. Flood*, 28 Ch. Div. 586; *Saltmarsh v. Beene*, 4 Port. (Ala.) 283.

<sup>45</sup> *Thomas v. Duering*, 1 Keen, 729; *Curran v. Holyoke U. Water-Power Co.*, 116 Mass. 90; *Chicago, B. & Q. R. Co. v. Reno*, 113 Ill. 39; *Conger v. New York, W. S. & B. R. Co.*, 120 N. Y. 29, 23 N. E. 983; *Kelly v. Central Pac. R. Co.*, 74 Cal. 557, 16 Pac. 386.

<sup>46</sup> *Fry*, Spec. Perf. (3d Am. Ed.) p. 190.

<sup>47</sup> *Wedgwood v. Adams*, 6 Beav. 600, 8 Beav. 103; *Watson v. Marston*, 4 De Gex, M. & G. 230; *Ramsay v. Gheen*, 99 N. C. 215, 6 S. E. 75; *Miles v. Dover Furnace Iron Co.*, 125 N. Y. 294, 26 N. E. 261. See, however, *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 12 Sup. Ct. 900.

<sup>48</sup> *Huguenin v. Courtenay*, 21 S. C. 403.

<sup>49</sup> *Smith v. Cansler*, 83 Ky. 367.

adequacy of price as a sufficient defense to the action.<sup>50</sup> The modern rule, however, is that inadequacy of consideration is not a sufficient ground for refusing specific performance, unless it is so gross as to shock the conscience, amounting to conclusive evidence of fraud.<sup>51</sup>

**SAME—DEFENSES PRODUCING DIFFERENT RESULT THAN  
IN COMMON-LAW ACTION.**

182. The following defenses, though constantly recurring in common-law actions for damages, produce in specific performance actions a dissimilar, or, at any rate, not a precisely similar, result:

- (a) Lapse of time.
- (b) Fraud and mistake.
- (c) Uncertainty and indefiniteness of contract.
- (d) Want of good title.
- (e) Default on plaintiff's part.
- (f) The statute of frauds.

*Lapse of Time.*

Equity aids the vigilant, not those who slumber on their rights. Independent of the statute of limitations, the rules of equity require the plaintiff to exert himself energetically. He must come within a reasonable time with his demand. Laches will disentitle him to assistance.<sup>52</sup> Especially is this the case when the subject-matter of the contract is an article of fluctuating value, so that delay may greatly change the aspect of the bargain.<sup>53</sup>

<sup>50</sup> Falcke v. Gray, 4 Drew. 651.

<sup>51</sup> Watson v. Doyle, 130 Ill. 415, 22 N. E. 613; Lee v. Kirby, 104 Mass. 420; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. 655. See, also, ante, 141.

<sup>52</sup> Moore v. Blake, 1 Ball & B. 62; Smith v. Clay, 3 Brown, Ch. 640, note; Eads v. Williams, 4 De Gex, M. & G. 674, 691; Cocanaugher v. Green (Ky.) 20 S. W. 542; Young v. Young, 45 N. J. Eq. 27, 39, 16 Atl. 921; McCabe v. Mathews, 40 Fed. 338; Alexander v. Wunderlich, 118 Pa. St. 610, 12 Atl. 580; Blackwell v. Ryan, 21 S. C. 112; Ridgway v. Ridgway, 63 Md. 242, 14 Atl. 659; Boston & M. R. Co. v. Bartlett, 10 Gray (Mass.) 384.

<sup>53</sup> Pollard v. Clayton, 1 Kay & J. 462; Deen v. Milne, 113 N. Y. 303, 300, 20 N. E. 861; Combs v. Scott, 76 Wis. 662, 45 N. W. 532; Penrose v. Leads,

*Fraud and Mistake.*

The subjects of fraud and mistake have already been fully considered.<sup>54</sup> If a contract is such that equity would rescind it for fraud or mistake, a fortiori it will refuse specific performance, because plaintiff must come into equity with clean hands.<sup>55</sup> Statements contrary to fact, made by a party with a view to a contract, are grounds for resisting specific performance, though the party making them believed them to be true.<sup>56</sup> Silence as to material facts by one party is a defense to the other in a specific performance action.<sup>57</sup> A mistake of one party, contributed to by the other either intentionally or unintentionally, is ground for refusing specific performance.<sup>58</sup> The principle goes even further; and a mistake of one of the parties, not contributed to by the other, has been held a valid defense;<sup>59</sup> but generally the cases where a defendant has escaped on the ground of a mistake not contributed to by plaintiff have been cases where it would have amounted to an injustice to hold him to his bargain.<sup>60</sup>

*Contract must be Definite and Certain.*

A greater amount of certainty is required in an action for specific performance of a contract than in an action for damages. To sustain the common-law action, plaintiff need prove only the negative

46 N. J. Eq. 294, 296, 19 Atl. 134; Ruff's Appeal, 117 Pa. St. 319; 11 Atl. 553; Chicago, M. & St. P. R. Co. v. Stewart, 19 Fed. 5.

<sup>54</sup> Ante, 117.

<sup>55</sup> Vigers v. Pike, 8 Clark & F. 562, 565; Cathcart v. Robinson, 5 Pet. 264.

<sup>56</sup> In re Banister, 12 Ch. Div. 131, 142; Holmes' Appeal, 77 Pa. St. 50; Isaacs v. Strainka, 95 Mo. 517, 8 S. W. 427; Kelly v. Central Pac. R. Co., 74 Cal. 557, 16 Pac. 386.

<sup>57</sup> Byars v. Stubbs, 85 Ala. 256, 4 South. 755; Margraf v. Muir, 57 N. Y. 155; Baskcomb v. Beckwith, L. R. 8 Eq. 100.

<sup>58</sup> Denny v. Hancock, 6 Ch. App. 1; Campbell v. Durham, 86 Ala. 299, 5 South. 507.

<sup>59</sup> Webster v. Cecil, 30 Beav. 62; Malins v. Freeman, 2 Keen, 25; Buckley v. Patterson, 39 Minn. 250, 39 N. W. 490; Burkhalter v. Jones, 32 Kan. 5, 3 Pac. 559.

<sup>60</sup> Where there has been no fraud or misrepresentation, and the terms of the contract are unambiguous, so that there is no reasonable ground or excuse for a mistake, it is not sufficient, in order to resist specific performance, for a party to say that he did not understand its meaning. Caldwell v. Depew, 40 Minn. 528, 42 N. W. 479.

proposition that defendant has not performed the contract,—a conclusion which may be often arrived at without any exact consideration of the terms of the contract; while, in proceedings for specific performance, it must appear not only that the contract has not been performed, but what is the contract which is to be performed.<sup>61</sup> It is, perhaps, impossible to lay down any general rule as to what is sufficient certainty in a contract; but it must contain a description of the subject-matter, parties, price, and other terms.<sup>62</sup> When reduced to writing, the description may be identified by extrinsic evidence, and the maxim, "That is certain which may be made certain," applies.<sup>63</sup> When the contract specifies a mode of ascertaining the price, which is essential, specific performance will not be decreed, unless that mode has been followed.<sup>64</sup>

*Want of Good Title.*

The vendor must make out a title free from reasonable doubt,—a marketable title, as it is called.<sup>65</sup> But a title will not be considered doubtful merely because there is a slight risk of some future litiga-

<sup>61</sup> Fry, Spec. Perf. (3d Am. Ed.) 173.

<sup>62</sup> Ross v. Purse, 17 Colo. 24, 28 Pac. 473; Iron Age Pub. Co. v. W. U. Tel. Co., 83 Ala. 498, 3 South. 449; Woods v. Evans, 113 Ill. 186; Ham v. Johnson (Minn.), 56 N. W. 584; Walcott v. Watson (Cir. Ct.) 53 Fed. 429; Hennessey v. Woolworth, 128 U. S. 440, 9 Sup. Ct. 109; Crouse v. Frothingham, 97 N. Y. 105; Anderson v. Brinser, 129 Pa. St. 376, 11 Atl. 809, and 18 Atl. 520. Indefiniteness as to consideration, Weaver v. Shenk, 154 Pa. St. 206, 26 Atl. 811; Fogg v. Price, 145 Mass. 513, 14 N. E. 741; Huff v. Shepard, 58 Mo. 242; Pray v. Clark, 113 Mass. 283; Maud v. Maud, 33 Ohio St. 147. Indefinite description of subject-matter, Preston v. Preston, 95 U. S. 200; Eggleston v. Wagner, 46 Mich. 610, 10 N. W. 37; Minneapolis & St. L. Ry. Co. v. Cox, 76 Iowa, 306, 41 N. W. 24; Combs v. Scott, 76 Wis. 662, 45 N. W. 532; Mann v. Higgins, 83 Cal. 66, 23 Pac. 206; Olmstead v. Abbott, 61 Vt. 281, 18 Atl. 315.

<sup>63</sup> Shardlow v. Cotterell, 20 Ch. Div. 90; Ragsdale v. Mays, 65 Tex. 255; Docter v. Hellberg, 65 Wis. 415, 27 N. W. 176.

<sup>64</sup> Firth v. Midland Ry. Co., L. R. 20 Eq. 100; Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4; Hopkins v. Gilman, 22 Wis. 476; Graham v. Call, 5 Munf. (Va.) 396.

<sup>65</sup> Vought v. Williams, 120 N. Y. 253, 24 N. E. 195; Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. 1056; Emmert v. Stouffer, 64 Md. 543, 3 Atl. 273, and 6 Atl. 177; Cornell v. Andrews, 35 N. J. Eq. 7; Adams v. Valentine, 33 Fed. 1; People v. Open Board, 92 N. Y. 98.

tion against the purchaser,<sup>66</sup> nor where it would be the duty of the judge to give a clear direction to the jury in favor of the title, and not leave the evidence generally to its consideration.<sup>67</sup>

*Default on Plaintiff's Part.*

The plaintiff must perform the material and essential terms of the contract, or equity will refuse specific performance in his favor.<sup>68</sup> Generally, the dispute arises as to whether he has performed within the proper time. At law, failure of the plaintiff to perform all the conditions of his contract within the time specified therein was always a bar to an action.<sup>69</sup> In equity, the question of time was differently regarded; for a court of equity discriminated between those terms of a contract which were formal and those which were of the substance and essence of the agreement;<sup>70</sup> and, applying to contracts those principles which had governed its interference in relation to mortgages, it held that the principal object of the parties was the sale of an estate for a specified sum, and that the particular day named in the contract for its completion was nonessential.<sup>71</sup> Specific performance will therefore be granted, notwithstanding plaintiff's failure to keep the dates assigned by the contract, at least in cases where the element of time is clearly of no consequence.<sup>72</sup>

<sup>66</sup> *First African M. E. Soc. v. Brown*, 147 Mass. 296, 298, 17 N. E. 549; *Hellreigel v. Manning*, 97 N. Y. 56; *Cambrelleng v. Purton*, 125 N. Y. 610, 26 N. E. 907; *Stevenson v. Polk*, 71 Iowa, 278, 32 N. W. 340; *Hedderly v. Johnson*, 42 Minn. 443, 44 N. W. 527.

<sup>67</sup> *Chesman v. Cummings*, 142 Mass. 65, 67, 7 N. E. 130. The parties interested should, however, all be before the court. *Fleming v. Burnham*, 100 N. Y. 1, 9, 2 N. E. 905.

<sup>68</sup> *Haggerty v. Elyton Land Co.*, 89 Ala. 428, 7 South. 651; *Eastman v. Plumer*, 46 N. H. 404; *Chicago Municipal G. L. & F. Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616; *Alexander v. Wunderlich*, 118 Pa. St. 610, 12 Atl. 580.

<sup>69</sup> *Stowell v. Robinson*, 3 Bing. N. C. 928.

<sup>70</sup> *Parkin v. Thorold*, 16 Beav. 59.

<sup>71</sup> Per Lord Eldon in *Seton v. Slade*, 7 Ves. 273.

<sup>72</sup> *Sylvester v. Born*, 132 Pa. St. 467, 19 Atl. 337; *Dynan v. McCulloch*, 46 N. J. Eq. 11, 14, 18 Atl. 822; *Day v. Hunt*, 112 N. Y. 191, 193, 19 N. E. 414; *Maltby v. Austin*, 65 Wis. 527, 27 N. W. 162; *Dresel v. Jordan*, 104 Mass. 407; *Vaught v. Cain*, 31 W. Va. 424, 427, 7 S. E. 9; *Hunkins v. Hunkins*, 65 N. H. 95, 18 Atl. 655; *Tilley v. Thomas*, 3 Ch. App. 67. Delay on plaintiff's part must not, however, be so long as to amount to laches. See ante, 275.

There are some cases, however, where time is deemed the essence of the contract, even in equity. An express stipulation that time is of the essence of the contract, or that the agreement shall be void if it is not completed on a specified day, will be respected in equity.<sup>73</sup> And, though time be not originally of the essence, yet where there has been great and unreasonable delay on the one side, the other party has a right to fix a reasonable time within which the contract is to be completed, and that time will be regarded and insisted on by equity.<sup>74</sup> The notice must, however, be reasonable in its terms.<sup>75</sup>

Again, the nature of the property itself may be such as to make time of the essence of the contract, without any express stipulation. Contracts for the purchase of property of a fluctuating value are of this description;<sup>76</sup> as in the case of mining property<sup>77</sup> or stocks.<sup>78</sup> So, on the sale of a public house as a going concern, time is deemed of the essence of the contract.<sup>79</sup>

If time has been made of the essence of the contract by agreement, or is considered so by reason of the nature of the property, or becomes so by notice during the progress of the transaction, it may be enlarged or waived by subsequent agreement, or by the conduct of the parties.<sup>80</sup>

<sup>73</sup> *Hudson v. Bartram*, 3 Madd. 440; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498; *Woodruff v. Semi-Tropic Land & Water Co.*, 87 Cal. 275, 25 Pac. 354; *Sowles v. Hall*, 62 Vt. 247, 20 Atl. 810; *Barnard v. Lee*, 97 Mass. 92; *Jones v. Robbins*, 29 Me. 351. A stipulation that time is of the essence of the contract was disregarded in *Merriam v. Goodlett*, 36 Neb. 384, 54 N. W. 686.

<sup>74</sup> *King v. Wilson*, 6 Beav. 126; *Reed v. Breeden*, 61 Pa. St. 460; *Thompson v. Dulles*, 5 Rich. Eq. 370; *Smith v. Lawrence*, 15 Mich. 499; *Carter v. Phillips*, 144 Mass. 100, 10 N. E. 500.

<sup>75</sup> *Green v. Sevin*, 13 Ch. Div. 589; *Austin v. Wacks*, 30 Minn. 335, 15 N. W. 409.

<sup>76</sup> *Edwards v. Atkinson*, 14 Tex. 373; *Wilson v. Roots*, 119 Ill. 379, 10 N. E. 204; *Goldsmith v. Guild*, 10 Allen, 239; *Jennisons v. Leonard*, 21 Wall. 302.

<sup>77</sup> *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646; *Macbryde v. Weekes*, 22 Beav. 533.

<sup>78</sup> *Doloret v. Rothschild*, 1 Sim. & S. 590.

<sup>79</sup> *Day v. Luhke*, L. R. 5 Eq. 336.

<sup>80</sup> *Dana v. St. Paul Investment Co.*, 42 Minn. 194, 44 N. W. 55; *Merriam v. Goodlett*, 36 Neb. 384, 54 N. W. 686; *Cartwright v. Gardner*, 5 Cush. 273, 280, 281; *Boyes v. Liddell*, 6 Jur. 725.



**SAME—STATUTE OF FRAUDS AS A DEFENSE.**

183. Though a contract has not been reduced to writing as required by the statute of frauds, equity will specifically enforce it in three classes of cases:

- (a) Where there has been some part performance of the contract by plaintiff.
- (b) Where fraud has been used to prevent the contract from being properly reduced to writing.
- (c) Where defendant fails to plead the statute as a defense.

The statute of frauds enacts that no action shall be brought on a contract for sale of real estate unless in writing, and signed by the party to be charged. Notwithstanding this enactment, there are many cases in which equity has interfered out of its regard for considerations which the courts of common law refused to recognize. The reasoning on which courts of equity have acted, in what has been termed their boldest encroachment on the functions of the legislature,<sup>81</sup> is this: The statute of frauds was passed to prevent fraud, and never could have been intended by the legislature as an instrument of fraud; and therefore a man who has procured some benefit from another on the faith of an oral promise will not be permitted to turn around and fail to perform that promise, on the ground that the formalities required by the statute have not been observed. In such cases the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not upon the contract itself.<sup>82</sup>

*Part Performance.*

The majority of the cases in which relief is given, notwithstanding the statute of frauds, are those where the agreement has been in part performed by the plaintiff. The doctrine is completely established that contracts relating to land may be taken out of the oper-

<sup>81</sup> *Britain v. Rossiter*, 11 Q. B. Div. 123, 129; *Maddison v. Alderson*, 8 App. Cas. 467.

<sup>82</sup> *Maddison v. Alderson*, 8 App. Cas. 467, 474, per Lord Selborne.

ation of the statute of frauds by part performance.<sup>83</sup> In the leading case on the subject, specific performance of an oral agreement was decreed, because plaintiff had incurred considerable expense and trouble in pulling down an old house, and building new ones, according to the terms of the agreement; it being considered against conscience, under such circumstances, for defendant to plead the statute.<sup>84</sup> In order, however, to prevent the recurrence of the mischief which the statute was passed to suppress, the application of the equity of part performance has been limited by certain principles.

1. The acts must be such as are indisputably referable to the contract in question, and not referable to any other title.<sup>85</sup> Whether or not admission into possession of an estate will be considered part performance depends on circumstances. If it has unequivocal reference to the contract, it is sufficient.<sup>86</sup> That a stranger should be found in acknowledged possession of the land of another is strong evidence of an antecedent agreement, and is usually sufficient to warrant an application for relief in equity;<sup>87</sup> a fortiori where plain-

<sup>83</sup> *Maddison v. Alderson*, 8 App. Cas. 467; *Lester v. Foxcroft*, Colles. 108, 1 White & T. Lead. Cas. Eq. 1027, 1038, 1042; *Freeman v. Freeman*, 43 N. Y. 34; *Hiatt v. Williams*, 72 Mo. 214; *Schuey v. Schaeffer*, 130 Pa. St. 18, 18 Atl. 544; *McWhinne v. Martin*, 77 Wis. 182, 46 N. W. 118; *Union Pac. Ry. Co. v. McAlpine*, 129 U. S. 305, 9 Sup. Ct. 286; *Young v. Young*, 45 N. J. Eq. 34, 16 Atl. 921; *Starkey v. Starkey* (Ind. Sup.) 36 N. E. 287; *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883; *Popp v. Swanke*, 68 Wis. 364, 31 N. W. 916. In some of the American states, however, the doctrine of part performance seems to be rejected. *White v. O'Bannon*, 86 Ky. 93, 5 S. W. 346; *Buchannon v. Little* (Ky. App.) 22 S. W. 559; *Holmes v. Holmes*, 86 N. C. 205; *Niles v. Davis*, 60 Miss. 750.

<sup>84</sup> *Lester v. Foxcroft* (1701) 1 White & T. Lead. Cas. Eq. 1027.

<sup>85</sup> *Maddison v. Alderson*, 8 App. Cas. 467, 485; *Allen v. Young*, 88 Ala. 338, 6 South. 747; *Nelbert v. Baghurst* (N. J. Ch.) 25 Atl. 474; *Rogers v. Wolfe*, 104 Mo. 1, 14 S. W. 805; *Morrison v. Herrick*, 130 Ill. 631, 642, 22 N. E. 537; *Truman v. Truman*, 79 Iowa, 506, 44 N. W. 721.

<sup>86</sup> *Clinan v. Cooke*, 1 Schoales & L. 22; *Danforth v. Laney*, 28 Ala. 274; *Sitton v. Shipp*, 65 Mo. 297; *Knoll v. Harvey*, 19 Wis. 99; *Cole v. Potts*, 10 N. J. Eq. 67. See, also, *Ferbrache v. Ferbrache*, 110 Ill. 210; *Heflin v. Milton*, 69 Ala. 354; *Holmes v. Caden*, 57 Vt. 111.

<sup>87</sup> *Morphett v. Jones*, 1 Swanst. 181; *Mundy v. Jolliffe*, 5 Mylne & C. 167; *Pain v. Coombs*, 1 De Gex & J. 34, 46; *Eaton v. Whitaker*, 18 Conn. 222, 229;

tiff has made improvements and laid out money on the land.<sup>88</sup> On the other hand, if the possession can reasonably be accounted for apart from the alleged contract, it will not suffice. Thus, the mere continuance in possession of a tenant is not a part performance of an agreement for a new lease, since the possession may be referred to the old lease.<sup>89</sup> Such continued possession, however, accompanied by expenditures in improving the premises, or the payment of an increased rent, referable only to the new agreement, has been held an act of part performance.<sup>90</sup>

2. Acts that are merely auxiliary and introductory, such as delivery of abstract, measurement of the land, etc., are clearly insufficient to take the contract out of the statute of frauds.<sup>91</sup>

3. Acts capable of being undone, and admitting of the parties' being remitted to their original position, are of no avail. Thus, part payment, or even entire payment, of the purchase money, is not sufficient to entitle to relief. Here the legal remedy would be quite adequate; return of the money, with interest, being a complete redress.<sup>92</sup> Marriage, however, is not of itself a sufficient part performance; the statute of frauds expressly enacting that every agreement

Reed v. Reed, 12 Pa. St. 117; Wallace v. Scoggins, 17 Or. 476, 21 Pac. 578; Morrison v. Herrick, 130 Ill. 631, 642, 22 N. E. 537; Recknagle v. Schmaltz, 72 Iowa, 63, 33 N. W. 365.

<sup>88</sup> Crook v. Corp. of Seaford, 6 Ch. App. 551; Freeman v. Freeman, 43 N. Y. 34; Moss v. Culver, 64 Pa. St. 414; Union Pac. Ry. Co. v. McAlpine, 129 U. S. 305. 9 Sup. Ct. 286; Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526; Everett v. Dille, 39 Kan. 73, 17 Pac. 661; Hunkins v. Hunkins, 65 N. H. 95, 18 Atl. 665; Frame v. Frame, 32 W. Va. 463, 9 S. E. 901.

<sup>89</sup> Wills v. Stradling, 3 Ves. 378; Ewins v. Gordon, 49 N. H. 444; Morrison v. Herrick, 130 Ill. 631, 642, 22 N. E. 537; Recknagle v. Schmaltz, 72 Iowa, 63, 33 N. W. 365.

<sup>90</sup> Nunn v. Fabian, 1 Ch. App. 35; Pfiffner v. S. & St. P. R. Co., 23 Minn. 343.

<sup>91</sup> Hawkins v. Holmes, 1 P. Wms. 770; Pembroke v. Thorpe, 3 Swanst. 437, note; Phillips v. Edwards, 33 Beav. 440; Lydick v. Holland, 83 Mo. 703; Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Colgrove v. Solomon, 34 Mich. 494.

<sup>92</sup> Clinan v. Cooke, 1 Schoales & L. 22, 40; Hughes v. Morris, 2 De Gex, M. & G. 349, 356; Gallagher v. Gallagher, 31 W. Va. 9, 14, 5 S. E. 297; Townsend v. Fenton, 30 Minn. 528, 16 N. W. 421; Id., 32 Minn. 482, 21 N. W. 726; Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Winchell v. Winchell, 100 N. Y. 159, 163, 2 N. E. 897; Forrester v. Flores, 64 Cal. 24, 28 Pac. 107.

made in consideration of marriage must be in writing.<sup>93</sup> But if an antenuptial verbal agreement for the conveyance of land is followed, not only by marriage, but by the expenditure of money, that is sufficient.<sup>94</sup>

4. The equity of part performance applies only to contracts respecting lands. It does not affect other contracts within the statute; for instance, a contract not to be performed within a year.<sup>95</sup>

*Fraud Preventing Execution of Proper Written Contract.*

Where the agreement was intended to have been in writing according to the statute, but this has been prevented from being done by the fraud of the defendant, equity has granted specific performance; otherwise, the statute, designed to prevent fraud, would be used as a protection for it.<sup>96</sup> Thus, where a vendor who has agreed to sell certain land receives the full consideration, and then fraudulently gives a deed conveying only part of the land, specific performance will be decreed, even though the contract was oral.<sup>97</sup>

*Failure to Plead Statute.*

The statute of frauds is an affirmative defense, and is waived unless pleaded.<sup>98</sup> Hence the court will specifically enforce an oral contract where defendant has neglected to claim the benefit of the statute.<sup>99</sup>

### SPECIFIC PERFORMANCE WITH A VARIATION.

184. Though a contract cannot be strictly carried out according to its terms, specific performance will be

<sup>93</sup> *Warden v. Jones*, 23 Beav. 487; *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227; *Henry v. Henry*, 27 Ohio St. 121; *Adams v. Adams*, 17 Or. 247, 20 Pac. 633.

<sup>94</sup> *Surcome v. Pinniger*, 3 De Gex, M. & G. 571; *Welch v. Whelpley*, 62 Mich. 15, 28 N. W. 744.

<sup>95</sup> *Britaln v. Rossiter*, 11 Q. B. Div. 123; *Osborne v. Kimball*, 41 Kan. 187, 21 Pac. 163; *Wahl v. Barnum*, 116 N. Y. 87, 98, 22 N. E. 280.

<sup>96</sup> 1 Story, Eq. Jur. § 161.

<sup>97</sup> *McDonald v. Yungbluth*, 46 Fed. 836; *Hitchins v. Pettingill*, 53 N. H. 386; *Murray v. Drake*, 46 Cal. 648. Contra, *Glass v. Hulbert*, 102 Mass. 24.

<sup>98</sup> *Maybee v. Moore*, 90 Mo. 340, 2 S. W. 471; *McClure v. Otrich*, 118 Ill. 320, 8 N. E. 784; *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911.

<sup>99</sup> *Cooth v. Jackson*, 6 Ves. 39; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Cloud v. Greasley*, 125 Ill. 313, 17 N. E. 826; *Shakespeare v. Alba*, 76 Ala. 351; *Fall v. Hazelrigg*, 45 Ind. 581; *Battell v. Matot*, 58 Vt. 271, 5 Atl. 479.

granted, if proper compensation can be made, and the parties in fact put in the same situation as if the contract had been strictly fulfilled.

The specific enforcement of contracts which cannot be literally fulfilled, with a compensation for defects, affords one of the most striking illustrations of the contrast between the principles and methods of equity and those which prevailed in the courts of common law. At law, a vendor cannot recover part of the purchase money if he is unable to literally perform the contract; nor can the purchaser insist on paying a part only, in respect of a partial failure in the sale.<sup>100</sup> A different rule, however, prevails in equity. There are two classes of cases where a contract not capable of literal performance will be specifically enforced, with a compensation for defects: (1) Where there is a variance as to the time in which the contract is to be performed; (2) where there is a variance in the subject-matter of the sale.

*Variance as to Time.*

We have already seen that, as a rule, time is not deemed the essence of a contract in equity. But in all cases where specific performance has been decreed, notwithstanding a discrepancy in time, compensation has been made to the party injured by the delay. Ordinarily, a purchaser is entitled to the rents and profits of the estate from the time at which the contract ought to have been completed, and the vendor is entitled to interest on the unpaid purchase money from the same time.<sup>101</sup> If there has been delay in making out the title, and the property has deteriorated by dilapidation or mismanagement, compensation will be allowed to the purchaser,<sup>102</sup> but not for deterioration after the time when he ought to have taken possession,<sup>103</sup> and, of course, not for deterioration caused by himself.<sup>104</sup>

When time is of the essence of the contract, and the purchaser ob-

<sup>100</sup> Adams, Eq. p. 89.

<sup>101</sup> *De Visme v. De Visme*, 1 Macn. & G. 346; *Calcraft v. Reebuck*, 1 Ves. Jr. 221; *Bostwick v. Beach*, 105 N. Y. 661, 663, 12 N. E. 32.

<sup>102</sup> *Foster v. Deacon*, 3 Madd. 394; *Worrall v. Munn*, 38 N. Y. 137; *Bostwick v. Beach*, 105 N. Y. 661, 12 N. E. 32.

<sup>103</sup> *Binks v. Rokeby*, 2 Swanst. 226.

<sup>104</sup> *Harford v. Purrier*, 1 Madd. 532.

tains a decree for specific performance, he will be entitled to compensation for the loss which he sustained in consequence of possession not having been given to him according to the contract.<sup>105</sup>

*Variation as to Subject-Matter.*

Frequently, a contract for the sale of land cannot be literally performed, either because of a discrepancy as to quantity or the extent of the estate which the vendor agreed to convey. The cases on this question naturally fall into two divisions, according as to whether specific performance is demanded by the vendor or by the purchaser:

1. When the vendor demands specific performance, the relief will be granted on allowing the purchaser compensation, provided the contract can be performed in substance. No material part must be wanting.<sup>106</sup> Thus, a deficiency of 20 acres in a contract for the sale of 300 was held not to defeat the vendor's right to specific performance, the purchase price being proportionately abated.<sup>107</sup> But, if there is a substantial variance, specific performance will not be decreed in the vendor's favor.<sup>108</sup> On sale of an estate with a mansion, a small part of the estate, if near the house, may be material.<sup>109</sup> So where the contract was for a wharf and jetty, and it appeared that the jetty was liable to be removed by the corporation of London, specific performance was refused.<sup>110</sup>

A material variation with respect to the title contracted to be sold is likewise fatal to a vendor's suit for specific performance. Thus, a contract for the sale of a freehold estate will not be enforced in favor of a vendor who has merely a leasehold, however long the term.<sup>111</sup>

2. When the purchaser insists on the specific performance of a contract by a vendor who has agreed to sell a larger interest in an estate than he has, the purchaser is entitled to take what the vendor

<sup>105</sup> *Carrodus v. Sharp*, 20 Beav. 56.

<sup>106</sup> *M'Queen v. Farquhar*, 11 Ves. 467; *Vaught v. Cain*, 31 W. Va. 424, 7 S. E. 9; *Towner v. Tickner*, 112 Ill. 217, 244.

<sup>107</sup> *Morgan's Adm'r v. Brast*, 34 W. Va. 332, 12 S. E. 710. See, also, *Farrin v. Hughes* (Va.) 17 S. E. 518.

<sup>108</sup> *Kenner v. Bitely*, 45 Fed. 133.

<sup>109</sup> *Perkins v. Ede*, 16 Beav. 193; *Knatchbull v. Grueber*, 3 Mer. 124.

<sup>110</sup> *Peers v. Lambert*, 7 Beav. 546.

<sup>111</sup> *Drewe v. Corp.*, 9 Ves. 368.

can give, and demand compensation for what he cannot give;<sup>112</sup> and this whether the difference is one of tenure or of quantity.<sup>113</sup> This has been done, even when the difference in quantity amounted to as much as one-half.<sup>114</sup> And so, though the vendor's wife refuse to join in the deed, and release her inchoate dower right, the purchaser may compel specific performance, with an abatement of the price to compensate him for the defect.<sup>115</sup> So, also, if the vendor agrees to convey a title free of incumbrances, the purchaser may compel specific performance with an abatement of the purchase price to the extent of incumbrances.<sup>116</sup>

It sometimes happens that, in a suit for specific performance by a purchaser, it appears that the vendor has no title whatever to any portion of the premises. In such cases the rule is that equity will retain jurisdiction to award damages, if the suit was brought in good faith, without knowledge of the defect;<sup>117</sup> but not if plaintiff had such knowledge.<sup>118</sup>

*Parol Evidence to Show Variation.*

We have already seen that the rule which prohibits the admission of parol evidence to vary a written contract has no application to

<sup>112</sup> *Hill v. Buckley*, 17 Ves. 401; *Mortlock v. Buller*, 10 Ves. 315; *Walling v. Kinnard*, 10 Tex. 508; *Harbers v. Gadsden*, 6 Rich. Eq. (S. C.) 284; *Bostwick v. Beach*, 103 N. Y. 414, 422, 9 N. E. 41; *Docter v. Hellberg*, 65 Wis. 415, 27 N. W. 176; *Lancaster v. Roberts* (Ill. Sup.) 33 N. E. 27; *Roberts' Heirs v. Lovejoy*, 60 Tex. 253, 257.

<sup>113</sup> *Hughes v. Jones*, 3 De Gex, F. & J. 307; *Hooper v. Smart*, L. R. 18 Eq. 683.

<sup>114</sup> *Burrow v. Scammell*, 19 Ch. Div. 175.

<sup>115</sup> *Davis v. Parker*, 14 Allen, 94, 98, 104; *Bostwick v. Beach*, 103 N. Y. 414, 9 N. E. 41; *Martin v. Merritt*, 57 Ind. 34. Some of the courts, however, hold that the wife will not be indirectly coerced into releasing her dower right, and that, therefore, the purchaser must pay the full purchase price if he insists on specific performance, without any abatement for the outstanding dower interest. *Graybill v. Braugh* (Va.) 17 S. E. 558; *Burk's Appeal*, 75 Pa. St. 141.

<sup>116</sup> *Grant v. Beronlo* (Cal.) 32 Pac. 556; *Hunt v. Smith*, 139 Ill. 296, 28 N. E. 809.

<sup>117</sup> *Cunningham v. Duncan*, 4 Wash. 506, 30 Pac. 647; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532; *Milkman v. Ordway*, 106 Mass. 232, 253.

<sup>118</sup> *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925. See, however, *Sternberger v. McGovern*, 56 N. Y. 12, 20. And see, also, ante, 15, "Jurisdiction Once Attached."

cases of fraud or mistake.<sup>119</sup> It is therefore settled, both in England and America, that it is open to a defendant to resist a claim for specific performance by means of parol evidence designed to show that, either because of fraud or mistake, the contract as written does not truly express the agreement, and that its enforcement would therefore be inequitable.<sup>120</sup> But in England such parol evidence is not admissible in favor of plaintiff who seeks specific performance of a written contract, with a variation for alleged mistake or fraud, on the ground that the court would thus be virtually enforcing an oral agreement, in violation of the statute of frauds.<sup>121</sup> The distinction is very generally repudiated in the United States, and parol evidence is admissible to show fraud or mistake in favor of plaintiff who seeks specific performance, with a variation from the written contract.<sup>122</sup> The American rule is supported by the principle, heretofore stated, that fraud in preventing the reduction of an agreement to writing takes the case out of the operation of the statute of frauds.<sup>123</sup>

<sup>119</sup> Ante, 129.

<sup>120</sup> *Clinan v. Cooke*, 1 Schoales & L. 32, 39; *Manser v. Back*, 6 Hare, 443.

<sup>121</sup> *Woollam v. Hearn*, 2 White & T. Lead. Cas. Eq. 920; *Townshend v. Stangroom*, 6 Ves. 328.

<sup>122</sup> *Gillespie v. Moon*, 2 Johns. Ch. 585; *Flisback v. Ball*, 34 W. Va. 644, 12 S. E. 856; *Redfield v. Gleason*, 61 Vt. 220, 17 Atl. 1075; *Strickland v. Barber*, 76 Mich. 310, 43 N. W. 449.

<sup>123</sup> Ante, 283.



**CHAPTER XIII.****EQUITABLE REMEDIES (Continued)—INJUNCTION.**

- 185. Definition.
- 186. Jurisdictional Principles.
- 187. Classes of Cases Where Remedy may be Used.
- 188. Injunctions against Proceedings at Law.
- 189. Injunctions Relating to Contracts.
- 190. Injunctions Relating to Torts.
- 191. General Principles Governing Exercise of Jurisdiction.
- 192. Classes of Torts Enjoined.
- 193. Injunctions Relating to Trusts and Equitable Rights.

**DEFINITION.**

**185. An injunction is a judicial order, operating in personam, requiring a party to do or to abstain from doing some particular act.<sup>1</sup>**

Injunctions which require the doing of particular acts are called **mandatory injunctions.**<sup>2</sup> Their occurrence is infrequent, since, in the absence of contract, a court of equity cannot directly compel the performance of a positive act. But it sometimes will accomplish this object in an indirect form. Thus, railroad companies have been prevented by mandatory injunctions from entering into agreements not to transport goods at rates fixed by law; that is, to compel them to observe the law, and regulate their rates according to statute.<sup>3</sup> The most frequent use of mandatory injunctions is in cases of nuisances, where the court may compel an abatement or removal. This jurisdiction, however, is exercised only in cases which admit of no other

<sup>1</sup> High, Inj. § 1; Kerr, Inj. p. 9.

<sup>2</sup> High, Inj. § 2; Kerr, Inj. p. 20.

<sup>3</sup> *Rogers Locomotive & M. Works v. Erie R. Co.*, 20 N. J. Eq. 370. So an injunction against trustees of a church, who had wrongfully excluded the minister, did not command them to open the church to him, but to desist and refrain from keeping it closed. *Whitecar v. Michenor*, 37 N. J. Eq. 6, 14; *Beach*, Mod. Eq. § 630.

remedy, and will always be refused if the injury can be reasonably compensated in damages, or even if the balance of convenience is strongly on the side of the defendant.<sup>4</sup>

By far the most frequent use of injunctions is the prevention of a meditated wrong, rather than the redress of an injury already done, and it is with such injunctions that we have chiefly to deal.<sup>5</sup> The remarkable difference between these injunctions and the legal remedy of damages is that they will be granted in advance of any injury, provided only an intention to do an act which will result in irreparable injury is shown to exist.

With respect to their duration, injunctions are either interlocutory or final. Interlocutory injunctions, which are also termed temporary or preliminary injunctions, are made pending the hearing of the cause on its merits, and are generally expressed to continue until such hearing or until further order. They are merely provisional, and do not conclude a right. Their object is to preserve the property subject to litigation in statu quo until the hearing or further order, and may be obtained by a plaintiff who shows that he has a fair question to raise as to the existence of the right which he alleges.<sup>6</sup> Final injunctions, or perpetual injunctions, as they are sometimes termed, are granted on the final hearing on the merits, and perpetually restrain the defendant from the assertion of a right or the commission of some act contrary to equity.<sup>7</sup>

#### JURISDICTIONAL PRINCIPLES.

**186. To warrant the issuance of an injunction, complainant must show:**

- (a) That he has no plain, adequate, and complete remedy at law.
- (b) That an irreparable injury will result unless the relief is granted.

<sup>4</sup> *Deere v. Guest*, 1 Mylne & C. 516; *Jacomb v. Knight*, 3 De Gex, J. & S. 538.

<sup>5</sup> *High, Inj.* § 1.

<sup>6</sup> *Blakemore v. Glamorganshire Canal Navigation*, 1 Mylne & K. 154; *High, Inj.* § 5.

<sup>7</sup> *High, Inj.* § 3.

The mere fact that a legal remedy exists is not sufficient to prevent the issuance of an injunction. The question in all cases is whether the legal remedy is full and complete. If the legal remedy does not fully come up to the requisition of the case, the exercise of the jurisdiction may be proper and beneficial.<sup>8</sup> Thus, the necessity of bringing numerous actions at law to obtain complete redress is, as we have seen, one of the grounds of equitable interference.<sup>9</sup>

The term "irreparable injury" does not mean that there must be no physical possibility of repairing the injury, but merely that the threatened injury is a grievous one, or, at least, a material one, and not adequately reparable by damages.<sup>10</sup> If the act complained of threatens to destroy the subject-matter in controversy, the case may come within the principle, even though the damages may be capable of being accurately measured.<sup>11</sup> It should also be added that the maxims, "He who comes into equity must come with clean hands," and "He who seeks equity must do equity," apply with full force to the remedy by injunction.

#### CLASSES OF CASES WHERE REMEDY MAY BE USED.

**187. The remedy by injunction may be used in the following classes of cases:**

- (a) To restrain proceedings at law.
- (b) To restrain breach of contract.
- (c) To restrain commission of tort.
- (d) To restrain breach of trust and violation of equitable rights.

It is, of course, impossible, within the limits of this work, to specify every case to which the remedy of injunction might be applied.

<sup>8</sup> *Lumley v. Wagner*, 1 De Gex, M. & G. 616; *Watson v. Sutherland*, 5 Wall. 74; *Payne v. Kansas & A. V. R. Co.*, 46 Fed. 546; *Irwin v. Lewis*, 50 Miss. 363.

<sup>9</sup> *Ante*, 15.

<sup>10</sup> *Pinchin v. London & B. Ry. Co.*, 5 De Gex, M. & G. 860; *Puckette v. Judge*, 39 La. Ann. 901, 2 South. 801; *Dudley v. Hurst*, 67 Md. 44, 8 Atl. 901; *Hodge v. Giese*, 43 N. J. Eq. 342, 11 Atl. 484.

<sup>11</sup> *Hilton v. Earl of Granville*, Craig & P. 283, 292.

All that can be done is to illustrate the circumstances in which the remedy is most usually sought; and it is believed that whatever other cases may suggest themselves will be found to fall within some one of the classes indicated.

#### INJUNCTIONS AGAINST PROCEEDINGS AT LAW.

**188. When, by accident, mistake, or fraud, or otherwise, a party has an unfair advantage in a court of law, and it is against conscience that he should use that advantage, a court of equity will restrain him.**

In the earlier history of equity jurisprudence, the remedy of injunction was used almost exclusively to restrain actions at law.<sup>12</sup> The ground for imposing this restraint was the refusal of common-law courts to entertain equitable defenses, and hence a cause was liable to be decided by them on consideration of a part only, and not the whole, of the dispute.<sup>13</sup> To render such equitable defenses effective, and prevent a miscarriage of justice, equity would restrain the plaintiff personally from further steps in the action at law. These injunctions were not directed against the courts of common law, and did not assume to prohibit them from exercising their jurisdiction; but they were directed against the parties, who rendered themselves liable for contempt towards the equity court if they persisted in moving a step in disobedience to the injunction.<sup>14</sup> Since these injunc-

<sup>12</sup> "The weapon of injunction was wielded by the court until the present century with little of its later effect. Whenever a *prima facie* case for the exercise of equitable interference to stay action at law was established, the 'common injunction' might be obtained on motion or at the hearing. 'Prevention of mischief by injunction is a head of equity upon which instances few and far between are to be found before Lord Eldon's time. Lord Thurlow would hardly grant an injunction where the parties had a remedy at law. Before his time there are not more than half a dozen instances of each species of injunction, and in these relief was as often denied as granted. Now, injunction is, it is well known, the right arm of the court, pervading the workshop of the artisan, entering alike into the miner's shaft and the merchant's counting house.'" Kerley, *Hist. Eq.* p. 258.

<sup>13</sup> Story, *Eq. Jur.* § 875; Adams, *Eq.* p. 195.

<sup>14</sup> Story, *Eq. Jur.* § 875; *Sanders v. Metcalf*, 1 Tenn. Ch. 419; *Platt v. Woodruff*, 61 N. Y. 378.

tions rest on the refusal or inability of common-law courts to consider equitable defenses, it follows that the relief will not be granted upon grounds of which the person aggrieved might have availed himself in an action at law, and in all such cases the parties will be left to defend at law.<sup>15</sup>

Courts of equity did not, however, confine themselves to restrain the prosecution of actions at law, but at a very early day the chancellor claimed the right to arrest the fruits of an unconscionable judgment rendered by courts of law. The common-law judges refused from the first to bow to these injunctions, and they asserted the right to release on habeas corpus suitors in their courts who had been imprisoned for contempt in violating such injunctions.<sup>16</sup> In the celebrated case of the Earl of Oxford,<sup>17</sup> decided during the reign of King James I., Lord Chancellor Ellesmere stated the rule to be: "Where a judgment is obtained by oppression, wrong, and a hard conscience, the chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party." Soon after this decision, the common-law judges, led by Lord Coke, made an ineffectual attempt to put an end to the chancellor's interference with their judgments; but, on appeal to the king, the question was finally settled in favor of the chancery jurisdiction.<sup>18</sup>

<sup>15</sup> *New York Dry-Dock Co. v. American L. I. & T. Co.*, 11 Paige, 384; *Palmer v. Hayes*, 93 Ind. 189; *Womack v. Powers*, 50 Ala. 5; *Palmer v. Gardiner*, 77 Ill. 143; *Dubuque & S. C. Ry. Co. v. Cedar Falls & M. Ry. Co.*, 76 Iowa, 702, 39 N. W. 691.

<sup>16</sup> *Kerley*, Hist. Eq. 89. So, also, in *Throgmorton v. Finch*, 3 Inst. 124, 4 Inst. 86, cited Cro. Jac. 344, the common-law judges resolved that after judgment at law there could be no relief in equity.

<sup>17</sup> 2 White & T. Lead. Cas. Eq. 111.

<sup>18</sup> Shortly after the decision in the Earl of Oxford's Case, an injunction was issued to stay proceedings on a judgment obtained, it was said, by the plaintiff inveigling the defendant's witnesses into an alehouse while the hearing was going on. Lord Ellesmere was ill at the time, and it was thought unlikely that he would recover. The common-law judges seized this opportunity, and Lord Coke advised the plaintiff's attorney to indict the defendant, his counsel, and all concerned in obtaining the injunction, of a praemunire, under 27 Edw. III., for impeaching a judgment; and in the following term he persuaded Choke, J., in charging the grand jury, to tell them to inquire, among other things, of such persons as questioned judgments by bill, and he himself strongly pressed the jury to find true bills against one such person; but

The right to an injunction against a judgment is determined by the following rules: (1) If, after judgment, additional circumstances are discovered, not cognizable at law, but converting the controversy into matter of equitable jurisdiction, the court of chancery will interfere. (2) Even though the circumstances so discovered would have been cognizable at law if known in time, yet, if their nondiscovery has been caused by fraudulent concealment, the fraud will warrant an injunction. (3) But if the newly-discovered facts would have been cognizable at law, and there have been no fraudulent concealments, the mere fact of their late discovery does not give a right to injunctive relief; and still less so if the facts were known at the time of the trial, and the grievance complained of has been caused either by a mistake in pleading or other mismanagement, or by a supposed error in the judgment of the court.<sup>19</sup>

they, having a wholesome fear that to be employed as a weapon in the contest between the chancellor and the chief justice would bring but little profit and much danger, altogether declined to follow his advice. The chief justice, moreover, announced that any counsel who signed a bill praying an inquiry into the circumstances of a judgment would find his mouth closed forever in the common-law courts, an even more severe measure than the imprisonment by which a barrister in Elizabeth's reign had been driven to humble apologies for the same offense, for, until centuries afterwards, there was no separate chancery bar. The lord chancellor appealed to the king, and the matter was referred to Bacon (then attorney general) and other lawyers. They reported in favor of the chancery jurisdiction, on the ground that it had been exercised for a long time; and the question was accordingly settled in the chancellor's favor. Kerley, *Hist. Eq.* 113, 114.

<sup>19</sup> Adams, *Eq.* p. 197; Bateman v. Willoe, 1 Schoales & L. 201; Harrison v. Nettleship, 2 Mylne & K. 423; Taylor v. Sheppard, 1 Younge & C. Ex. 271; In Hendrickson v. Hinckley, 17 How. (U. S.) 443, 445, Mr. Justice Curtis stated the principle as follows: "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law of which he was prevented from availing himself by fraud or accident, unmixed with negligence of himself or agents." See, to same effect, Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9; Nevins v. McKee, 61 Tex. 412; Headley v. Bell, 84 Ala. 346, 4 South. 391; Darling v. Mayor, 51 Md. 1; Knox Co. v. Harsham, 133 U. S. 152, 10 Sup. Ct. 257; Warner v. Conant, 24 Vt. 351; Danaher v. Prentiss, 22 Wis. 311. Ignorance or mistake of party's own counsel does not authorize injunction against judgment, Hambrick v. Crawford, 55 Ga. 335; Brownson v. Reynolds, 77 Tex. 254, 13 S. W.

In modern times, the enlarged powers of courts of common law to grant new trials for errors and mistakes occurring during the trial has rendered equitable interference with judgments of rare occurrence, except where tainted with fraud; and in this respect the court proceeds on the principles which govern it in setting aside deeds and other contracts for fraud and mistake.<sup>20</sup>

In England, and in all the states of this country which have adopted the code procedure, injunctions against the prosecutions of actions at law have also become infrequent, since defendant may in the legal action avail himself of any equitable defense he may have; and, as a rule, the jurisdiction is exercised only to prevent multiplicity of suits, and to prevent interference with the jurisdiction of a court of equity after it has once attached.<sup>21</sup>

#### INJUNCTIONS RELATING TO CONTRACTS.

**189. An injunction will issue against the breach of a negative contract where such breach will result in irreparable injury, not capable of being adequately compensated in damages.**

An injunction against the breach of a negative contract is equivalent to its specific performance, and it has sometimes been stated that the jurisdiction to enjoin the breach of such contract is coextensive with the power to compel specific performance. It is true that, in all cases where specific performance can be decreed, the jurisdiction by injunction will attach as matter of course; but it is not con-

986; *Vaughan v. Hewitt*, 17 S. C. 442; nor error of court during trial, since there is a remedy by appeal, *Cassel v. Scott*, 17 Ind. 514; *Reynolds v. Horine*, 13 B. Mon. 234; *Vaughn v. Johnson*, 9 N. J. Eq. 173.

<sup>20</sup> 3 Pom. Eq. Jur. § 1365. Fraud practiced by successful party is ground for injunction against judgment. *Greenwaldt v. May*, 127 Ind. 511, 27 N. E. 158; *Gates v. Steele*, 58 Conn. 316, 20 Atl. 474; *Taylor v. Nashville & C. R. Co.*, 86 Tenn. 228, 6 S. W. 393; *Wagner v. Shank*, 59 Md. 313; *Murphy v. Smith*, 86 Mo. 333.

<sup>21</sup> 3 Pom. Eq. Jur. §§ 1370-1374; *Wood v. Swift*, 81 N. Y. 31; *Platto v. Deuster*, 22 Wis. 482; *Revalk v. Kraemer*, 8 Cal. 66.

fined to such cases,<sup>22</sup> and will be exercised in all cases where it can operate to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreement.<sup>23</sup> The test, however, which determines the right to an injunction for breach of contract is the absence of an adequate remedy at law, and the fact that the damages are not susceptible of proper assessment by the jury.<sup>24</sup>

Among the classes of contracts which equity will protect by way of injunction are the following:

1. Whenever a covenant in a deed or lease restricts the use to which the premises may be put,—as not to erect certain classes of improvements, or not to use them for the sale of liquor,—an injunction will issue, as a matter of course, against its violation, not only by the original parties, but by any subsequent purchaser or assignee with notice.<sup>25</sup> In such a case, it is not for the court, but for the plaintiff, to estimate the amount of damages that arises from the injury inflicted upon him. The moment the court finds that there has been a breach of covenant, that is an injury; and the court has no right to measure it, and no right to refuse to plaintiff specific performance of his contract by way of injunction against its breach.<sup>26</sup>

2. Another class of negative contracts which the court will enforce by injunction are contracts in partial restraint of trade, where the limitation is reasonable.<sup>27</sup> A covenant not to engage in business will not, however, be implied from a sale of the business, or even of the

<sup>22</sup> *Singer Sewing Mach. Co. v. Union Buttonhole Co.*, 1 Holmes, 253, Fed. Cas. No. 12,904; *Steinau v. Gas Co.*, 48 Ohio St. 324, 27 N. E. 547; *Wolverhampton & W. R. Co. v. London & N. W. R. Co.*, L. R. 16 Eq. 433, 438.

<sup>23</sup> *Kerr*, Inj. p. 426; *Lumley v. Wagner*, 1 De Gex, M. & G. 619.

<sup>24</sup> *Beach*, Mod. Eq. Jur. § 768; *Steinau v. Gas Co.*, 48 Ohio St. 324, 27 N. E. 545; *Burdon Cent. Sugar Ref. Co. v. Leverich*, 37 Fed. 67; *Bailey v. Collins*, 59 N. H. 450.

<sup>25</sup> See ante, 103; *Tulk v. Moxhay*, 2 Phil. Ch. 777; *Renals v. Cowlishaw*, 9 Ch. Div. 130, 11 Ch. Div. 866; *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; *Godfrey v. Black*, 39 Kan. 193, 17 Pac. 849; *Morris v. Tuskaloosa Manuf'g Co.*, 83 Ala. 565, 3 South. 689; *Gawtry v. Leland*, 40 N. J. Eq. 323.

<sup>26</sup> *Per Jessel, M. R.*, in *Leech v. Schweder*, 9 Ch. App. 463, 465.

<sup>27</sup> *McClurg's Appeal*, 58 Pa. St. 51; *Beal v. Chase*, 31 Mich. 490; *Butler v. Burleson*, 16 Vt. 176; *Ropes v. Upton*, 125 Mass. 258; *Guerand v. Dandeleit*, 32 Md. 561; *Barret v. Blagrove*, 5 Ves. 555, 6 Ves. 104. Some of the later cases have upheld contracts in restraint of trade, though unlimited territorially.



good will; and, unless there is a restrictive covenant in the contract of sale, an injunction will not, as a rule, issue to restrain the vendor from carrying on the same business in the neighborhood.<sup>28</sup>

3. We have already seen that equity will not decree the specific performance of a contract for personal services;<sup>29</sup> nor will it indirectly or negatively, by means of an injunction restraining the violation of a contract, compel the affirmative performance from day to day, or the affirmative acceptance, of merely personal services.<sup>30</sup> But where a contract for personal services, of a special, unique, and extraordinary character, contains a covenant not to perform similar services for any other person during the lifetime of the contract, an injunction will issue to restrain the breach of the negative covenant. The leading case on this subject is that of *Lumley v. Wagner*,<sup>31</sup> where defendant had entered into a contract with plaintiff to sing at his theater for three months, and not to sing at any other theater during this period. Though the agreement to sing at plaintiff's theater was of such a nature that it could not be specifically enforced by decree, an injunction was issued to restrain defendant from singing at a rival theater.<sup>32</sup>

Breach of contract for ordinary personal services, not intellectual or peculiar or individual in their character, will not be thus restrained, since the remedy at law in damages is adequate.<sup>33</sup>

*Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419; *Leather Cloth Co. v. Lorisont*, 39 Law J. Ch. 86; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *High. Inj.* § 1174.

<sup>28</sup> *Cruttwell v. Lye*, 17 Ves. 335; *Churton v. Douglas*, Johns. Eng. Ch. 174; *Close v. Flesher* (Com. Pl. N. Y.) 28 N. Y. Supp. 737. In Massachusetts a restrictive covenant is implied from a sale of the good will. *Dwight v. Hamilton*, 113 Mass. 175.

<sup>29</sup> *Ante*, 267.

<sup>30</sup> *Arthur v. Oakes*, 63 Fed. 318.

<sup>31</sup> 1 De Gex, M. & G. 616.

<sup>32</sup> See, also, *Cort v. Lassard*, 18 Or. 221, 22 Pac. 1054; *Daly v. Smith*, 49 How. Pr. 150; *McCaull v. Braham*, 16 Fed. 37. A negative covenant is sometimes implied from affirmative stipulations to devote entire time to a business. *Duff v. Russell*, 14 N. Y. Supp. 134; affirmed on appeal, 16 N. Y. Supp. 958, and again in 133 N. Y. 678, 31 N. E. 622; *Webster v. Dillon*, 3 Jur. (N. S.) 432.

<sup>33</sup> *Wm. Rogers Manuf'g Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467; *Cort v. Lassard*, 18 Or. 221, 22 Pac. 1054; *Burney v. Ryle*, 91 Ga. 701, 17 S. E. 986.

**INJUNCTIONS RELATING TO TORTS.**

190. Where a legal right in property exists, a violation of that right will be prohibited by injunction in all cases where the injury is such as is not susceptible of being adequately compensated in damages, or, at least, not without the necessity of a multiplicity of actions for that purpose; but an injunction will not be granted where the injury is trivial in amount, or where the court, in its discretion, considers that damages should alone be given.<sup>34</sup>

By far the most important class of injunctions at the present time is that dealing with wrongs independent of contract. The jurisdiction to restrain actions and judgments at law, once so important, is gradually becoming less so, owing to reasons heretofore stated. With respect to contracts, the usual equitable remedy is by way of specific performance, and the right to injunctive relief is limited to a comparatively small class, chiefly of a negative character. With respect to wrongs independent of contract, however, the restraining process of equity extends throughout the whole range of property rights and duties recognized by municipal law.<sup>35</sup> In recent times, even the time-honored rule that the jurisdiction is exercised only to protect rights in property has been somewhat shaken; and the principle in the black-letter text is subject to the qualification that there is a tendency in both English and American courts to restrain by injunction every species of tort for which damages are not an adequate remedy, whether the wrong be to property, person, or reputation.<sup>36</sup>

**SAME—GENERAL PRINCIPLES GOVERNING EXERCISE OF JURISDICTION.**

191. To entitle a complainant to an injunction against the violation of a legal right, he must, in addition to the

<sup>34</sup> Underh. Eq. p. 209.

<sup>35</sup> Snell, Eq. p. 685; 3 Pom. Eq. Jur. § 1338; *Gaslight & Coke Co. v. Vestry of St. Mary Abbott's*, 15 Q. B. Div. 1; *Tuchman v. Welch*, 42 Fed. 548, 559.

<sup>36</sup> See post, 310.

**inadequacy of the legal remedy and the irreparable nature of the injury, establish:**

- (a) The existence of the right which he asserts.**
- (b) An actual violation of that right by defendant, or a real probability or danger of such violation.**

To warrant the issuance of an interlocutory injunction before the hearing on the merits, the complainant must be able to show a fair *prima facie* case in support of the title which he asserts.<sup>37</sup> There should be no real doubt as to the existence of plaintiff's legal right;<sup>38</sup> and there must be some substantial grounds for doubting the existence of the alleged legal right, the exercise of which he seeks to prevent.<sup>39</sup> If the legal right of complainant is not disputed, but the fact of its violation is denied, he must be able to show that the act complained of is an actual violation of the right,<sup>40</sup> or is at least an act which must, if carried into effect, result necessarily or inevitably in a ground of action.<sup>41</sup> The mere prospect or apprehension of injury, or the mere belief that the act may or will be done, is not sufficient;<sup>42</sup> but if an intention to do the act complained of can be shown to exist, or if a man insists on his right to do, or begins to do, or gives notice of his intention to do, an act which must, in the opinion of the court, if completed, give a ground of action, there is a foundation for the exercise of the jurisdiction.<sup>43</sup> After the establishment of the con-

<sup>37</sup> *Saunders v. Smith*, 3 Mylne & C. 714, 728; *Hilton v. Earl of Granville*, Craig & P. 283, 292.

<sup>38</sup> *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Mammoth Vein Consol. Coal Co.'s Appeal*, 54 Pa. St. 183.

<sup>39</sup> *Sparrow v. Oxford, W. & W. R. Co.*, 9 Hare, 436, 441.

<sup>40</sup> *Imperial Gaslight & Coke Co. v. Broadbent*, 7 H. L. Cas. 600; *Ripon v. Hobart*, 3 Mylne & K. 169, 176.

<sup>41</sup> *Haines v. Taylor*, 10 Beav. 75; *Goodhart v. Hyett*, 25 Ch. Div. 190.

<sup>42</sup> *Ripon v. Hobart*, 3 Mylne & K. 174; *Haines v. Taylor*, 10 Beav. 75; *Lutheran Church v. Maschop*, 10 N. J. Eq. 57; *Jenny v. Crase*, 1 Cranch, C. C. (U. S.) 443, Fed. Cas. No. 7,285.

<sup>43</sup> *Attorney General v. Forbes*, 2 Mylne & C. 123, 132; *Cooper v. Whittingham*, 15 Ch. Div. 501; *Attorney General v. Acton Local Board*, 22 Ch. Div. 221; *McArter v. Kelly*, 5 Ohio, 139; *Owen v. Ford*, 49 Mo. 436; *Diedrichs v. Northwestern Union R. Co.*, 33 Wis. 219; *East & West R. Co. v. East Tennessee, V. & G. R. Co.*, 75 Ala. 275.

troverted right on a trial on the merits, and the fact of its violation, complainant is entitled, as of course, to a perpetual injunction to prevent the recurrence of the wrong.

#### SAME—CLASSES OF TORTS ENJOINED.

192. Courts of equity regard the legal remedy inadequate, and will therefore interfere by injunction—

- (a) To protect real property against certain torts, such as waste, trespass, and nuisance.
- (b) To protect property rights in patents, copyrights, works of literature, science, and art, and trademarks.
- (c) But, as a rule, an injunction will not issue to protect other than property rights from violation, unless a breach of trust, confidence, or contract is also involved.

#### *Injuries to Real Property—Waste.*

Waste is a substantial injury to the inheritance done by one having a limited estate, either of freehold or for years, during the continuance of his estate.<sup>44</sup> The essential character of waste is that the party committing it is in rightful possession, and that there is privity of title between the parties.<sup>45</sup> The ground on which equity proceeds in restraining waste is the protection of the property from irreparable injury; and an injunction will issue in favor of the remainder-man or reversioner against the commission of any acts by the tenant for life or for years amounting to legal waste.<sup>46</sup> A mortgagor, being regarded in equity as the owner of the land, may commit waste; and an injunction will not issue against him, unless it appears that the security is insufficient, or will be rendered insufficient by the act complained of.<sup>47</sup>

<sup>44</sup> Co. Litt. 53a.

<sup>45</sup> Davenport v. Davenport, 7 Hare, 222.

<sup>46</sup> Pulteney v. Shelton, 5 Ves. 260, note; Brock v. Dole, 66 Wis. 142, 28 N. W. 334; Mutual Life Ins. Co. v. Bigler, 79 N. Y. 568; Watson v. Hunter, 5 Johns. Ch. 169; Lavenson v. Standard Soap Co., 80 Cal. 245, 22 Pac. 184.

<sup>47</sup> Moriarty v. Ashworth, 43 Minn. 1, 44 N. W. 531; Harris v. Bannon, 78 Ky. 568; Fairbank v. Cudworth, 33 Wis. 358; King v. Smith, 2 Hare, 244.

Not only will equity restrain the commission of legal waste by the tenant of the particular estate, but it will also restrain what is known as equitable waste. Thus, where the estate of a tenant for life or for years is declared by the instrument creating it to be "without impeachment of waste," courts of law will never interfere;<sup>48</sup> but equity will control him in the exercise of the power, on the ground that it will not permit an unconscientious use to be made of a legal power.<sup>49</sup> In the leading case, a tenant for life without impeachment of waste, who was proceeding to pull down the mansion house, was enjoined at the suit of the remainder-man.<sup>50</sup>

— *Trespass.*

The jurisdiction of a court of equity to grant injunctions against trespass is comparatively of modern origin. The court for a long time confined relief in equity to waste, founding its interference on the privity of title between the parties.<sup>51</sup> The rigor of the old rule in confining relief in equity to waste was relaxed for the first time by Lord Thurlow, in a case where, the plaintiff being in possession of a close, a wrongdoer was working into his minerals, and taking away the very substance of his estate.<sup>52</sup> The foundation for the jurisdiction is the inadequacy of the legal remedy,<sup>53</sup> either (1) because of the irreparable nature of the injury caused by a single act of trespass,<sup>54</sup> or (2) because of the necessity for a multiplicity of suits caused by continued and repeated trespasses.<sup>55</sup>

<sup>48</sup> Bowles' Case, 11 Coke, 81b.

<sup>49</sup> Micklethwait v. Micklethwait, 1 De Gex & J. 504, 524; Hawley v. Clowes, 2 Johns. Ch. 122.

<sup>50</sup> Lord Bernard's Case, Finch, Prec. Ch. 454, 2 Vern. 738.

<sup>51</sup> Davenport v. Davenport, 7 Hare, 217.

<sup>52</sup> Flamang's Case, cited 6 Ves. 147, 7 Ves. 305, 308, 18 Ves. 184.

<sup>53</sup> Silva v. Garcia, 65 Cal. 591, 4 Pac. 628; Frink v. Stewart, 94 N. C. 494; Smith v. City of Oconomowoc, 49 Wis. 694, 6 N. W. 329; Mulry v. Norton, 100 N. Y. 424, 3 N. E. 581. Fugitive or temporary trespass, such as removal of fence, will not be enjoined. Minnig's Appeal, 82 Pa. St. 373; Jordan v. Lanier, 73 N. C. 90.

<sup>54</sup> Removal of ore from mines by a trespasser, going to the destruction of inheritance, will be enjoined. Anderson v. Harvey, 10 Grat. 386; Cheesman v.

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<sup>55</sup> Mussleman v. Marquis, 1 Bush. (Ky.) 463; Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686; Warren Mills v. New Orleans Seed Co., 65 Miss. 391, 4 South.

*Injuries to Real Property—Nuisance.*

A nuisance, as distinguished from a trespass, is an act, not in itself an invasion of property, which causes a substantial injury to the corporeal and incorporeal hereditaments of other persons. In the case of trespass it is the immediate act which causes the injury, while in the case of nuisance the injury is the consequence of an act done beyond the bounds of the property affected by it.<sup>56</sup> A nuisance may be either of a private or a public nature. The distinction between the two is that a private nuisance is an injury to the property of an individual, while a public nuisance is an injury to the property of all persons who come within the sphere of its operation.<sup>57</sup> The usual remedy for a public nuisance is a criminal prosecution brought by the sovereign power; and, if a prosecution in the

Shreve, 37 Fed. 36; *Silva v. Rankin*, 80 Ga. 79, 4 S. E. 756; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Richards v. Dower*, 64 Cal. 62, 28 Pac. 113; *Hammond v. Winchester*, 82 Ala. 470, 2 South. 892. Cutting timber for which land is chiefly valuable, *Fulton v. Harman*, 44 Md. 251; *Thatcher v. Humble*, 67 Ind. 444; *Powell v. Cheshire*, 70 Ga. 357; interference with burial ground, *Mooney v. Cooledge*, 30 Ark. 640. An attempt to enter upon and take possession of land for public use without the assent of the owner, and without the damages having been ascertained or paid or tendered, is, or would be if consummated, in the nature of an irreparable injury for the prevention of which injunction is the proper remedy. *Uren v. Walsh*, 57 Wis. 98, 14 N. W. 902; *Church v. Joint School Dist.* No. 12, 55 Wis. 399, 13 N. W. 272.

298; *Whetlock v. Noonan*, 108 N. Y. 179, 15 N. E. 67; *Ladd v. Osborne*, 79 Iowa, 93, 44 N. W. 235; *Wilson v. Hill*, 46 N. J. Eq. 369, 19 Atl. 1097; *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132, 28 N. E. 479; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 4 South. 106. Some of the cases hold that there must be several persons controverting the same right, and each standing on his own claim or pretension. *John A. Roebling Sons' Co. v. First Nat. Bank*, 30 Fed. 744; *Carney v. Hadley (Fla.)* 14 South. 4, 7; *Thorn v. Sweeney*, 12 Nev. 251; *Nicodemus v. Nicodemus*, 41 Md. 529. Repeated trespasses no ground for injunction if multiplicity of suits not necessary to put an end to them. For example, an intruder into plaintiff's factory, under a claim of right so to do, may be ejected by force, and hence injunction denied. *Mechanics' Foundry v. Ryall*, 75 Cal. 601, 17 Pac. 703. See, also, ante, 15, "Multiplicity of Suits."

<sup>56</sup> Kerr, *Inj.* p. 106; High, *Inj.* § 739.

<sup>57</sup> *Attorney General v. Sheffield Gas Co.*, 3 De Gex, M. & G. 320; *Soltau v. De Held*, 2 Sim. (N. S.) 142; *Lansing v. Smith*, 8 Cow. (N. Y.) 146.

ordinary tribunals does not afford an adequate relief, the attorney general may resort to equity to enjoin its maintenance.<sup>58</sup> A private individual cannot enjoin a public nuisance, unless he sustains some special, direct, and substantial damage thereby, over and above the general damage sustained by the rest of the public.<sup>59</sup>

In the case of a private nuisance the injured person has a personal right to a civil action for its redress, though it is not in every case that he will be entitled to the special remedy by injunction. If the case made out is such that the recovery of damages will give a full and adequate compensation for the injury, no foundation is laid for the interference of the court by way of injunction. If, on the other hand, the injury is of so material a nature that it cannot be well or fully compensated by the recovery of damages, or be such as from its continuance and permanent mischief might occasion a constantly recurring grievance, a foundation is laid for the interference of the court by way of injunction.<sup>60</sup> The principles which control courts of equity in enjoining nuisances will perhaps be better understood by considering some of the cases most frequently occurring in practice.

1. One large class consists of nuisances to dwelling houses and houses of business. To authorize the issuance of an injunction, there must be such a degree of injury to the property as interferes ma-

<sup>58</sup> Attorney General v. Cleaver, 18 Ves. 211; Attorney General v. Steward, 21 N. J. Eq. 340. The remedy by injunction at suit of the attorney general is chiefly applied to that form of public nuisances known as "purprestures"; i. e. encroachments on highways, streets, and navigable waters. People v. Vanderbilt, 28 N. Y. 396; People v. New York & S. I. F. Co., 68 N. Y. 71; Attorney General v. Woods, 108 Mass. 436; Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518. Inclosure of public domain by private persons enjoined as purpresture. U. S. v. Brighton Rancho Co., 26 Fed. 218; State v. Goodnight, 70 Tex. 686, 11 S. W. 119.

<sup>59</sup> Soltau v. De Held, 2 Sim. (N. S.) 141; Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514; Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264; Pearson v. Allen, 151 Mass. 79, 23 N. E. 731; Van Wegenen v. Cooney, 45 N. J. Eq. 24, 16 Atl. 689; Cummings v. City of St. Louis, 90 Mo. 259, 2 S. W. 130; Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106.

<sup>60</sup> Kerr, Inj. p. 166; Gardner v. Newburgh, 2 Johns. Ch. 162; McCord v. Iker, 12 Ohio, 388; Sellers v. Parvis & Williams Co., 30 Fed. 164; Rouse v. Flowers, 75 Ala. 513; Mowday v. Moore, 133 Pa. St. 611, 19 Atl. 626; Carlisle v. Cooper, 21 N. J. Eq. 576.

terially with its comfort and enjoyment, either for domestic purposes or purposes of business. The standard by which to determine the amount of damages that calls for the exercise of the equitable jurisdiction is the comfort and enjoyment in their abode to which the inmates are reasonably entitled;<sup>61</sup> and this must be estimated according to the plain and simple notions entertained by persons in ordinary life, and not according to those held by persons accustomed to dainty habits of living.<sup>62</sup>

The enjoyment of pure and wholesome air is a right to which the owners of land and the inmates of dwelling houses are of common right entitled. Any act which pollutes or corrupts the air is, strictly speaking a nuisance;<sup>63</sup> but, inasmuch as the business of life in cities and populous neighborhoods renders it impossible that the air should retain its natural state of purity, the law does not regard trifling inconveniences, but only regards inconveniences which sensibly and materially diminish the comfort and enjoyment or value of the property.<sup>64</sup> It is not necessary, however, that impurities in the air should be injurious to health, but it is sufficient if they cause discomfort and annoyance to persons of ordinary sensibilities.<sup>65</sup>

If, again, real damage or great inconvenience is occasioned by the carrying on of a noisy trade, or otherwise causing excessive noise

<sup>61</sup> *Jackson v. Duke of Newcastle*, 3 De Gex, J. & S. 284; *Fleming v. Hislop*, 11 App. Cas. 691.

<sup>62</sup> *Kerr*, Inj. p. 192; *Walter v. Selfe*, 4 De Gex & S. 322; *Cooper v. Crabtree*, 20 Ch. Div. 589; *Powell v. Bentley & G. Furniture Co.*, 34 W. Va. 804, 12 S. E. 1085; *Dittman v. Repp*, 50 Md. 516; *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490.

<sup>63</sup> *Aldred's Case*, 9 Coke, 58b.

<sup>64</sup> *Kerr*, Inj. p. 211; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Sellers v. Local Board of Health*, 14 Q. B. Div. 928; *Duncan v. Hayes*, 22 N. J. Eq. 26; *Rhodes v. Dunbar*, 57 Pa. St. 274.

<sup>65</sup> *Meigs v. Lister*, 23 N. J. Eq. 199; *Babcock v. New Jersey Stock-Yard Co.*, 20 N. J. Eq. 296. The following are examples of nuisances causing impurities in the air which have been enjoined. *Erection of slaughterhouse*, *Bushnell v. Robeson*, 62 Iowa, 540, 17 N. W. 888; *Reichert v. Geers*, 98 Ind. 73; *rendering and fertilizing establishments*, *Evans v. Reading Chemical Fertilizing Co.*, 100 Pa. St. 209, 28 Atl. 702; *City of Grand Rapids v. Weiden*, 97 Mich. 82, 56 N. W. 233; *Peck v. Elder*, 3 Sandf. 126; *soot, smoke, and noxious gases*, *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655; *Campbell v. Seaman*, 63 N. Y. 568; *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 8 N. E. 537.



or vibration, an action may be brought, and an injunction obtained, to prevent its continuance.<sup>66</sup>

2. Another important class of cases rests on the right of the landowner to the subjacent and lateral support of his land in its natural state. The right is not in the nature of an easement; but, like the right to the flow of a natural stream or of air, is an incident to the right of the ordinary enjoyment of property.<sup>67</sup> The landowner may therefore enjoin his neighbor from so digging out the adjacent soil as to cause a subsidence of the surface of his land.<sup>68</sup> The right to the support of a building or other artificial weight is of a different nature. This is not a natural right of property, but is an easement which can be acquired only by grant or by prescription which presupposes a grant.<sup>69</sup>

3. Another large class which is often enjoined, consists of nuisances affecting water rights. All acts done by a man on his own land, whereby the rights of his neighbor in water are injuriously affected, or whereby water becomes the cause of damage to the land of his neighbor, are considered as nuisances relating to water.<sup>70</sup> It will, of course, be impossible to give a particular account of the various rights to water. They may be conveniently classified as rights respecting quantity and rights respecting quality.

The water of permanent running streams and of inland lakes is sacred to the common use alike of all riparian proprietors, and this right is incident to the ownership of the adjacent soil. Each proprietor may use the water for all reasonable purposes as it flows

<sup>66</sup> Vibrations caused by machinery, *Dittman v. Repp*, 50 Md. 516; *Hennessey v. Carmony* (N. J. Ch.) 25 Atl. 374; *Demarest v. Hardham*, 34 N. J. Eq. 460; but not if located in manufacturing district, *Straus v. Barnett*, 140 Pa. St. 111, 21 Atl. 253; skating rink near dwelling house, *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241; ringing bells, *Soltau v. De Held*, 2 Sim. (N. S.) 133; *Davis v. Sawyer*, 133 Mass. 280; keeping horses in stable near dwelling house, *Ball v. Ray*, 8 Ch. App. 467; house of ill fame near dwelling, *Hamilton v. Whitridge*, 11 Md. 128; *Marsan v. French*, 61 Tex. 173; *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514.

<sup>67</sup> *Backhouse v. Bonomi*, 9 H. L. Cas. 512; *Dalton v. Angus*, 6 App. Cas. 809.

<sup>68</sup> *Trowbridge v. True*, 52 Conn. 190.

<sup>69</sup> *Hunt v. Peake*, Johns. Eng. Ch. 710; *Tunstall v. Christian*, 80 Va. 1; *City of Quincy v. Jones*, 76 Ill. 231; *Charles v. Rankin*, 22 Mo. 568.

<sup>70</sup> *Kerr*, Inj. p. 236; *Ballard v. Tomlinson*, 29 Ch. Div. 115.

through or by his land; but he must, after its use, return it without substantial diminution or change in quantity to its natural bed or channel before it leaves his own land, so that it will reach his adjacent proprietor in its full, original, and natural condition.<sup>71</sup> He may therefore be restrained from diverting the stream, or materially diminishing the quantity which would naturally flow to his neighbors below;<sup>72</sup> or, on the other hand, from damming back the stream, so as to cause an overflow on the land of his neighbor above him.<sup>73</sup>

A riparian owner has also the right to the flow of the stream in a natural state of purity, and, where the violation of the right is continuous, he may restrain the fouling of the water without proof of actual injury.<sup>74</sup>

<sup>71</sup> Pom. Water Rights, § 4. *Heath v. Williams*, 25 Me. 209; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14 312; *Pugh v. Wheeler*, 2 Dev. & B. 55. Owing to necessities of mining, a departure was made in California and other Pacific states; and the doctrine is there settled, in opposition to the common law, that a permanent right of property in the water of streams and inland lakes may be acquired by a mere prior appropriation; that a prior appropriator may thus acquire the right to divert, use, and consume a quantity of water, from the natural flow or condition of such streams or lakes, which may be necessary for his mining operations; and that he becomes, so far as he has thus made an actual prior appropriation, the owner of the water as against all the world. This doctrine, applied at first to the operation of mining, has been extended to all other beneficial purposes for which water may be essential,—to milling, manufacturing, and municipal purposes. Pom. Water Rights, § 15.

<sup>72</sup> *Ferrand v. Corporation of Bradford*, 21 Beav. 412; *Wright v. Moore*, 38 Ala. 593; *Morrill v. St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 2 N. W. 842; *Lawson v. Wooden-Ware Co.*, 59 Wis. 393, 18 N. W. 440; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Burden v. Stein*, 27 Ala. 104. So, also, an upper riparian owner will be enjoined from changing the course of a stream so as to materially increase its current, to the detriment of a lower proprietor. *Kay v. Kirk*, 76 Md. 41, 24 Atl. 326.

<sup>73</sup> *Bemis v. Upham*, 13 Pick. 169; *Stone v. Roscommon Lumber Co.*, 59 Mich. 24, 26 N. W. 216; *Learned v. Hunt*, 63 Miss. 373; *Minor v. De Vaughn*, 72 Ga. 208; *McCormick v. Horan*, 81 N. Y. 86. Statutes in many of the states provide for the condemnation of land to be overflowed by the erection of mill-dams.

<sup>74</sup> *Merrifield v. Lombard*, 13 Allen, 16; *Holsman v. Bolling Spring Co.*, 14 N. J. Eq. 335; *Mayor, etc., of Baltimore v. Warren Manuf'g Co.*, 59 Md. 96, 110; *Richmond Manuf'g Co. v. Atlantic De Laine Co.*, 10 R. I. 106; *Indianapolis Water Co. v. American Strawboard Co.*, 57 Fed. 1000; *Satterfield v. Rowan*,

4. It must suffice to mention other extensive classes of nuisances which will be enjoined, if they result in irreparable injury to private individuals; for instance, obstruction of public highways and private rights of way, of navigable water by bridges, and of easements of light and air. Before dismissing this subject, however, it should be noted that a series of recent decisions has established the principle that the owner of a lot abutting on a public street in a city has, as appurtenant to the lot, and independent of the ownership of the fee in the street, an easement in the street to its full width, in front of his lot, for the purposes of access, light, and air, which constitutes property, and which cannot be taken from him for public use without compensation; and therefore he may enjoin the construction and operation of an elevated railroad in the street, though authorized by the proper authorities, unless compensation is made for the taking.<sup>75</sup>

*Protection of Patents, Copyrights, Literary Property, and Trade-Marks.*

Patents and copyrights are in themselves fully recognized at law, and an action at law for damages could always be maintained for their infringement.<sup>76</sup> But it is evident that such a remedy supplies an exceedingly inadequate protection. Not only might the patentee or author be compelled to bring innumerable actions, and thus be ruined by interminable litigation, but in many cases damages, even if recovered, would afford an insufficient redress for the injury sustained. The business or the reputation might be impaired by the interference, pending the litigation, in a manner and to an extent

83 Ga. 187, 9 S. E. 677. *Against deposit of sewage, Village of Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218; *Attorney General v. Leeds Corp.*, 5 Ch. App. 583; *Oldaker v. Hunt*, 6 De Gex. M. & G. 376.

<sup>75</sup> *Story v. New York El. R. Co.*, 90 N. Y. 122; *Lahr v. Metropolitan El. Ry. Co.*, 104 N. Y. 268, 10 N. E. 528. The New York court of appeals has refused to apply this principle to the case of an ordinary "surface" railroad, *Fobes v. Rome, W. & O. R. Co.*, 121 N. Y. 505, 24 N. E. 919; but it has been so applied by the supreme court of Minnesota, *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 39 N. W. 629; *Lamm v. Chicago, St. P., M. & O. Ry. Co.*, 45 Minn. 71, 47 N. W. 455.

<sup>76</sup> Action on the case is the proper legal action. *Walk. Pat. § 418 et seq.*; *Stein v. Goddard*, 1 McAll. (U. S.) 82, Fed. Cas. No. 13,353; *Byam v. Bullard*, 1 Curt. (U. S.) 100, Fed. Cas. No. 2,262.

which no inquiry could ascertain.<sup>77</sup> And, further, the facility for taking accounts afforded by equity, and yet more conspicuously its power of peremptorily stopping the infringement of the right by injunction, plainly indicates the appropriateness of the jurisdiction of the court for dealing with such matters.<sup>78</sup>

1. The federal courts are the only tribunals that have jurisdiction of questions directly affecting the validity or infringement of patents.<sup>79</sup> To warrant the issue of a preliminary injunction, plaintiff must show both a *prima facie* title to the patent and a *prima facie* case of infringement.<sup>80</sup> If the validity of plaintiff's patent was denied, a trial at law was required by the earlier English decisions, unless plaintiff had been in the exclusive enjoyment for so long a period as to give rise to presumption of exclusive right.<sup>81</sup> The federal courts, however, sitting in equity, hear the cause on the merits, and decide the question of validity and infringement, without any trial at law,<sup>82</sup> though they may, in their discretion, submit issues to a jury.<sup>83</sup>

2. A copyright is defined as the exclusive right of multiplying a work of literature after its publication.<sup>84</sup> It is now established that a copyright exists only by statute.<sup>85</sup> Before publication, an author has at common law a property right in his manuscript which will

<sup>77</sup> Smith, Pr. Eq. p. 730; *Hogg v. Kirby*, 8 Ves. 223; 2 Story, Eq. § 930.

<sup>78</sup> Smith, Pr. Eq. p. 730; *Root v. Railway Co.*, 105 U. S. 189.

<sup>79</sup> *Parkhurst v. Kinsman*, 6 N. J. Eq. 600; *Dudley v. Mayhew*, 3 N. Y. 9; *Slemmer's Appeal*, 58 Pa. St. 155; *Gaines v. Fuentes*, 92 U. S. 17.

<sup>80</sup> *High, Inj.* § 938; *Standard Paint Co. v. Reynolds*, 43 Fed. 304; *Potter v. Whitney*, 1 Lowell (U. S.) 87, Fed. Cas. No. 11,341; *Parker v. Sears*, 1 Fish. Pat. Cas. 93, Fed. Cas. No. 10,748; *American Fire Hose Manuf'g Co. v. Cornelius Callahan Co.*, 41 Fed. 50.

<sup>81</sup> *Hill v. Thompson*, 3 Mer. 622; *Caldwell v. Vanvlissengen*, 9 Hare, 424.

<sup>82</sup> *McCoy v. Nelson*, 121 U. S. 487, 7 Sup. Ct. 1000; *Wise v. Grand Ave. R. Co.*, 33 Fed. 277; *Buchanan v. Howland*, 2 Fish. Pat. Cas. 341, Fed. Cas. No. 2,074.

<sup>83</sup> *Wise v. Grand Ave. R. Co.*, 33 Fed. 277; *Sickles v. Gloucester Manuf'g Co.*, 1 Fish. Pat. Cas. 222, Fed. Cas. No. 12,811; *Sanders v. Logan*, 2 Fish. Pat. Cas. 167, Fed. Cas. No. 12,295.

<sup>84</sup> *Jefferys v. Boosey*, 4 H. L. Cas. 833; *Stephens v. Cady*, 14 How. 530; *Baker v. Selden*, 101 U. S. 99.

<sup>85</sup> *Jefferys v. Boosey*, 4 H. L. Cas. 833; *Wheaton v. Peters*, 8 Pet. U. S. 591; *Clemens v. Belford*, 14 Fed. 728.

be protected by courts of equity; but, by a publication, he dedicates it to the public, and loses his property rights, unless he complies with the copyright laws.<sup>86</sup> The federal courts have exclusive jurisdiction as to all matters pertaining to statutory copyrights.<sup>87</sup>

3. The author of an unpublished work of literature, science, or art is, of course, entitled to an injunction against its unauthorized publication by others, whether he does or does not intend to seek profit by future publication.<sup>88</sup> The same principle applies to private letters, whether on literary subjects, or on matters of private business, personal friendship, or family concerns. The writer of private letters has such a qualified right of property in them as will entitle him to an injunction to restrain their publication by the person written to, or his assignees;<sup>89</sup> and the person written to has such a qualified right of property in the letters as will entitle him or his personal representatives to restrain their publication by a stranger.<sup>90</sup>

As regards lectures, persons admitted as pupils or otherwise to hear them cannot publish them for profit, and will be restrained from so doing;<sup>91</sup> and, though they have been partly published by the lec-

<sup>86</sup> *Bartlett v. Crittenden*, 5 McLean, 32, Fed. Cas. No. 1,076; *Carte v. Duff*, 25 Fed. 183; *Clemens v. Beiford*, 14 Fed. 728.

<sup>87</sup> *Drone*, Copyr. 545.

<sup>88</sup> *Prince Albert v. Strange*, 1 Macn. & G. 42; *Grigsby v. Breckinridge*, 2 Bush (Ky.) 480; *Paige v. Banks*, 13 Wall. 608. The leading case on the subject is *Prince Albert v. Strange*. Her majesty, Queen Victoria, and the Prince Consort, had made certain etchings, and had certain lithographs struck off from them for their own use, and not for the purpose of publication. One of the impressions had been surreptitiously retained by one of the workmen employed in the operation, and had passed from his hands into the hands of a publisher, who declared his intention of publicly exhibiting the impression so improperly obtained, and also of selling a descriptive catalogue of the lithographs. Lord Cottenham restrained the publication of the catalogue, as well as the exhibition of the impression, upon the ground that, as the etchings were the exclusive property of the plaintiff, no one had, without his consent, the right to make any use whatever of them, either by publishing a catalogue of them or otherwise.

<sup>89</sup> *Gee v. Pritchard*, 2 Swanst. 418; *Woolsey v. Judd*, 4 Duer, 379; *Denis v. Leclerc*, 1 Mart. (La.) 297; *Grigsby v. Breckinridge*, 2 Bush (Ky.) 480.

<sup>90</sup> *Earl of Granard v. Dunkin*, 1 Ball & B. 207; *Thompson v. Stanhope*, Amb. 737.

<sup>91</sup> *Abernethy v. Hutchinson*, 1 Hall & T. 28, 40, 3 Law J. Ch. 209; *Caird v. Sime*, 12 App. Cas. 326; *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1,082.

turer, he is entitled to an injunction against their publication by others in an incorrect and garbled form.<sup>92</sup>

4. A trade-mark is a peculiar name or device by which a person dealing in an article designates it as of a peculiar kind, character, or quality, or as manufactured by or for him, and of which he is entitled to the exclusive use.<sup>93</sup> The exclusive right to make such use or application is rightly treated as property, and no other dealer has the right to use the same mark on goods of the same description. By so doing, he would be substantially representing the goods to be the manufacture of the dealer who had previously adopted the mark or brand in question, and so would or might deprive him of the profit he might have made by the sale of the goods which the purchaser intended to buy. The jurisdiction of a court of equity, therefore, to restrain the infringement of a trade-mark, is founded, not upon the imposition upon the public practiced by the palming off, by one man, of his goods as the goods of another, but on the wrongful invasion of the right of property acquired in the trade-mark.<sup>94</sup> It therefore follows that the fraudulent use of marks and labels for the purpose of deceiving the public will not be enjoined at the suit of persons who do not carry on any business to which the use of such marks and labels is incident; such as the officers and members of a labor organization, which has adopted a label to designate goods manufactured by its members, as employes of others.<sup>95</sup>

A recent act of congress provides for the registration of trade-marks in the patent office, and gives a remedy, either by way of dam-

<sup>92</sup> *Drummond v. Altemus*, 60 Fed. 338.

<sup>93</sup> *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46; *Rogers v. Taintor*, 97 Mass. 291; *Kerr*, *Inf.* p. 394.

<sup>94</sup> *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De Gex, J. & S. 137; *Mitchell v. Henry*, 15 Ch. Div. 191; *Schneider v. Williams*, 44 N. J. Eq. 391, 14 Atl. 812; *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46; *U. S. v. Steffens*, 100 U. S. 82.

<sup>95</sup> *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46; *Cigar Makers' Protective Union v. Conhalm*, 40 Minn. 243, 41 N. W. 943; *Schneider v. Williams*, 44 N. J. Eq. 391, 14 Atl. 812. A fraudulent use of the union label may be enjoined by a manufacturer who has adopted it, and whose business is injured by the fraudulent use. *Carson v. Ury* (U. S. Cir. Ct. Mo.) 39 Fed. 777. Since these decisions have been made, statutes have been passed in many of the states protecting labels and trade-marks adopted by labor organizations.

ages or by injunction, in equity for their infringement;<sup>96</sup> but the right to trade-marks and the remedies for their infringement exist independent of this statute.<sup>97</sup> It has also been held that the state courts have jurisdiction in trade-mark cases, since the federal constitution does not place this matter within the control of congress, except, perhaps, by virtue of the power to regulate commerce.<sup>98</sup>

*Protection of Other than Property Rights.*

The English court of chancery had no power to grant injunctions except in cases where there was injury, either actual or prospective, to civil property.<sup>99</sup> It therefore possessed no jurisdiction to restrain, by injunction, the publication of a libel, or the making of slanderous statements calculated to injure a man in his business.<sup>100</sup>

The judicature act of 1873, which abolished the ancient English courts, and substituted in their place the high court of justice, conferred on that court the power to grant injunctions whenever it shall appear to the court to be just and convenient.<sup>101</sup> Sir George Jessel, commenting on this provision, said: "Probably it is still true that, as a general rule, the court only interferes where there is some question as to property. I do not think that the interference of the court is absolutely confined to that now."<sup>102</sup> It has accordingly been held in England that, where a libel is calculated to injure plaintiff in his trade or business, an injunction may be granted;<sup>103</sup> and even an oral slander which is detrimental to the business of the plaintiff may be enjoined.<sup>104</sup> The American courts, however, have refused to follow these recent English decisions; and the publication of a libel, no

<sup>96</sup> Act Cong. March 3, 1881.

<sup>97</sup> *L. H. Harris Drug Co. v. Stucky*, 46 Fed. 624.

<sup>98</sup> *Small v. Sanders*, 118 Ind. 105, 20 N. E. 296; *U. S. v. Steffens*, 100 U. S. 82.

<sup>99</sup> *Huggensin's Case*, 2 Atk. 469, 488; *Gee v. Pritchard*, 2 Swanst. 402, 413; *Seeley v. Fisher*, 11 Sim. 581, 583; *Fleming v. Newton*, 1 H. L. Cas. 363, 371, 376; *Emperor of Austria v. Day*, 3 De Gex. F. & J. 217, 238-241; *Kerr*, Inj. p. 1.

<sup>100</sup> *Prudential Assur. Co. v. Knott*, 10 Ch. App. 142.

<sup>101</sup> Act 36 & 37 Vict. c. 66, § 25, subsec. 8.

<sup>102</sup> *Aslatt v. Corporation of Southampton*, 16 Ch. Div. 148.

<sup>103</sup> *Thorley's Cattle Food Co. v. Massam*, 14 Ch. Div. 763; *Quartz Hill Con. G. Min. Co. v. Beall*, 20 Ch. Div. 501; *Hill v. Hart-Davies*, 21 Ch. Div. 798; *Hayward v. Hayward*, 34 Ch. Div. 198.

<sup>104</sup> *Loog v. Bean*, 26 Ch. Div. 366.

matter how injurious to plaintiff's business, will not be enjoined,—partly because the jurisdiction of equity does not extend to false representations as to the character or quality of plaintiffs' property or as his title thereto, which involve no breach of trust or of contract, and partly because to grant such an injunction would result in establishing a censorship over the press, in violation of the constitutional provision guarantying freedom of speech and of the press.<sup>105</sup> But if the publication is not only libelous, but is intended to frighten away plaintiff's customers, and intimidate them from dealing with him, an injunction against its circulation will be granted.<sup>106</sup>

A recent decision by a New York court, though not one of last resort, warrants a doubt as to whether the jurisdiction of courts of equity, even in this country, is "absolutely confined" to the protection of civil property. The exhibition of a statue of a deceased person, as a typical philanthropist, was enjoined at the suit of her relatives, on the sole ground that such exhibition would cause them mental pain, distress, and disgrace, for which no damages would afford any remedy.<sup>107</sup> In a still more recent case, however, the federal circuit court for the district of Massachusetts refused to enjoin the publication of the biography of a deceased inventor, not libelous or scandalous in its nature, though the publication injured the feelings and was undertaken against the express prohibition of his widow and children.<sup>108</sup> It is worthy of note, in this connection, that as far back as Lord Eldon's time it was the settled doctrine of equity that injury to feelings was no ground for injunctive relief.<sup>109</sup>

<sup>105</sup> *Kidd v. Horry*, 28 Fed. 773; *Boston Dlatite Co. v. Florence Manuf'g Co.*, 114 Mass. 69; *Whitehead v. Kitson*, 119 Mass. 484; *Mayer v. Association*, 47 N. J. Eq. 519, 20 Atl. 492; *New York, J. G. Soc. v. Roosevelt*, 7 Daly, 188; *Brandreth v. Lance*, 8 Paige (N. Y.) 24; *Singer Manuf'g Co. v. Domestic S. M. Co.*, 49 Ga. 70.

<sup>106</sup> Threats to prosecute plaintiff's customers for infringement of patent, *Emack v. Kane*, 34 Fed. 47; *Grand Rapids School Furniture Co. v. Haney School Furniture Co.*, 92 Mich. 558, 52 N. W. 1009; *Shoemaker v. South Bend Spark Arrester Co.*, 135 Ind. 471, 35 N. E. 380; boycotting circulars, *Casey v. Cincinnati Typographical Union*, 45 Fed. 135.

<sup>107</sup> *Schuyler v. Curtis*, 64 Hun, 594, 19 N. Y. Supp. 264.

<sup>108</sup> *Corliss v. E. W. Walker Co.*, 57 Fed. 434.

<sup>109</sup> In *Gee v. Pritchard* (1818) 2 Swanst. 402, where the author of private letters sought to enjoin their publication by the receiver, plaintiff's counsel in



### INJUNCTIONS RELATING TO TRUSTS AND EQUITABLE RIGHTS.

**193. Equity will restrain the breach of a trust or confidence, or the violation of an equitable right, whenever the circumstances are such that the aid of an injunction is required.**

Heretofore we have been considering rights recognized by courts of law, and in which the ground of jurisdiction is the superiority of the equitable over the legal remedy. We now come to consider a class of cases where the wrong restrained is one which is regarded as such in equity only, and in which, accordingly, the ground of the jurisdiction is the absence of a legal remedy. A very wide range of subjects falls under this subdivision, and it will be impossible to do more than mention the most conspicuous examples.

A trustee may not use the power which the trust confers on him at law, except for the legitimate purposes of the trust. If he attempts to do so, equity will restrain him by injunction from making a wanton exercise of his legal powers.<sup>110</sup> So, also, the court has jurisdiction to restrain by injunction one or more members of a partnership from doing acts inconsistent with the terms of the partnership agreement, or with the duties of a partner, though a dissolution is not sought.<sup>111</sup> Equity will restrain a corporation, at the suit of a stockholder, from doing acts beyond the authority conferred on it

argument stated that an attempt would be made to sustain the injunction, on the ground that the publication of the letters will be painful to the feelings of plaintiff. "The Lord Chancellor: I will relieve you also from that argument. The question will be whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort: that, if a letter has been written in the way of friendship, either the continuance or discontinuance of that friendship affords a reason for the interference of the court." The injunction was finally sustained, on the ground that the publication of the letters by the receiver was an invasion of the property rights of the author.

<sup>110</sup> *Balls v. Strutt*, 1 Hare, 146; *Cohen v. Morris*, 70 Ga. 318; *Davis v. Browne*, 2 Del. Ch. 188.

<sup>111</sup> *Fairthorne v. Weston*, 3 Hare, 387; *Rutland Marble Co. v. Ripley*, 10 Wall. 339; *New v. Wright*, 44 Miss. 202.

by its charter, or from violating the duties which in equity attach to the relation of directors and stockholders *inter se*.<sup>112</sup> To the extent that public officers and public bodies are trustees either of franchises or property for the benefit of the public, they are amenable to the jurisdiction of courts of equity in the administration of such trusts,—at the suit of the people if the people of the state at large are *cestuis que trustent*, or of the particular municipality interested, or of individuals having a special interest in the execution of the trust, or in preventing the acts sought to be enjoined.<sup>113</sup> Again, where a negotiable instrument is invalid as between the parties, the maker is entitled to an injunction against its negotiation by the payee to an innocent holder, whereby the defense would be lost;<sup>114</sup> and so with corporate stock and other securities not strictly negotiable.<sup>115</sup>

<sup>112</sup> *Hawes v. Oakland*, 104 U. S. 450; *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 98, 99, 25 N. E. 201; *Wiswell v. First Cong. Church*, 14 Ohio St. 31; *Small v. Minneapolis Electric Matrix Co.*, 45 Minn. 264, 267, 47 N. W. 797.

<sup>113</sup> *People v. Canal Board of New York*, 55 N. Y. 390, 394; *Greene v. Mumford*, 5 R. I. 472.

<sup>114</sup> *Metler v. Metler*, 18 N. J. Eq. 270; *Moeckly v. Gorton*, 78 Iowa, 202, 42 N. W. 648; *Wilhelmson v. Bentley*, 25 Neb. 473, 41 N. W. 387; *Hinkle v. Margerum*, 50 Ind. 240; *Hille v. Davison*, 20 N. J. Eq. 229.

<sup>115</sup> *King v. King*, 6 Ves. 172.

## CHAPTER XIV.

### REFORMATION, CANCELLATION, AND QUIETING TITLE.

- 194. Reformation
- 195. Cancellation.
- 196. Removing Cloud on Title.

#### REFORMATION.

**194. Equity will reform a written contract or other instrument inter vivos where, through mutual mistake, or mistake of one of the parties accompanied by the fraud of the other, it does not as written truly express the agreement of the parties.**

Courts of common law could declare a written instrument either valid or invalid. If invalid, they could set it aside altogether; and, if valid, they could construe and enforce it as written; but they possessed no power of rectifying it to conform to the intention of the parties. Hence arose the equitable jurisdiction of reformation. Equity, which always regards the intention of the parties rather than the form in which they have expressed it, did not scruple from the earliest times to rectify written contracts and other instruments inter vivos to make them correspond with the real meaning and intention of the parties.<sup>1</sup> To warrant this relief, however, the mistake in reducing the agreement to writing must be mutual,<sup>2</sup> or there must be mistake of one party and fraud in the other in taking advantage

<sup>1</sup> One of the earliest cases on record is thus stated in Toth. 131 (37 Eliz.): A lease was to be made excepting the woods, but the clerk drew the deed so that it made no mention of woods, though it did refer to some exception; and, on the lessee commencing to cut, he was enjoined not to do so.

<sup>2</sup> Holabird v. Burr, 17 Conn. 559; Murphy v. Rooney, 45 Cal. 78; Hancock v. Cossett, 45 Fed. 754; Canedy v. Marcy, 13 Gray (Mass.) 373. Mistake of one party only is no ground for relief when the contract is written just as it was understood and intended by the other. Paine v. Jones, 75 N. Y. 593. See, also, ante, 127, "Mistake," etc.

of that mistake, and obtaining a contract with knowledge that the one dealing with him is in error in regard to what are its terms.<sup>3</sup>

The reformation of a written contract, which is the highest and most solemn evidence of the agreement of the parties, will not be granted, unless the proof of mistake or fraud is clear and definite;<sup>4</sup> and a complainant who asks that a part of the stipulation be permitted to stand, and a part altered or stricken out, must produce stronger proof than is required from one who disowns the contract in its entirety, on the ground of fraud or undue influence.<sup>5</sup>

#### CANCELLATION.

##### 195. Equity will cancel a written instrument:

- (a) If, though utterly void, it is apparently valid on its face.
- (b) If it is voidable on the ground of fraud or mistake, as heretofore explained.

Courts of common law would, of course, not enforce a void or voidable instrument; but they "pursued a policy of masterly inactivity," and would grant a party executing it no affirmative relief until a suit was brought thereon. Equity, however, acting on the ground that such an instrument might be vexatiously used, when, by lapse of time, the evidence of its void or voidable character might be lost, took upon itself to order its cancellation.<sup>6</sup>

1. With respect to an instrument absolutely void, the rule is that where the illegality is apparent on its face, so that its nullity can admit of no doubt, equity will not interfere.<sup>7</sup> Such a document is plainly innocuous; no lapse of time can add to its power so as to

<sup>3</sup> Bryce v. Lorillard Fire Ins. Co., 55 N. Y. 240, 243; Welles v. Yates, 44 N. Y. 525, 529; Winans v. Huyck, 71 Iowa, 459, 32 N. W. 422; Higgins v. Parsons, 65 Cal. 280, 3 Pac. 881; James v. Cutler, 54 Wis. 172, 10 N. W. 147.

<sup>4</sup> Henkle v. Royal Exch. Assur. Co., 1 Ves. Sr. 318; Turner v. Shaw, 96 Mo. 22, 8 S. W. 897; Sable v. Maloney, 48 Wis. 331, 4 N. W. 479; Ford v. Joyce, 78 N. Y. 618; Muller v. Rhuman, 62 Ga. 332.

<sup>5</sup> Harding v. Long, 103 N. C. 1, 9 S. E. 445.

<sup>6</sup> Underh. Eq. p. 215.

<sup>7</sup> Pellsoll v. Elliott, 6 Pet. 95; Town of Venice v. Woodruff, 62 N. Y. 462, 468; Town of Springport v. Teutonia Sav. Bank, 75 N. Y. 397, 402.

render it dangerous. Illustrations are supplied by instruments which on their face disclose an illegal consideration, or the fact that they have been fully satisfied.<sup>8</sup> But where the instrument, though in fact void, has the appearance of validity, the case is otherwise. Then there exists a material danger, against which protection may reasonably be sought. Thus, forged instruments have been ordered canceled.<sup>9</sup>

2. As to voidable instruments, it is not now necessary to repeat what has already been said, under the headings of "Fraud" and "Mistake," respecting the circumstances which will give a person the option of avoiding his own acts; and the student is referred to these subjects, and to what has been said under the maxim, "He who comes into equity must come with clean hands," for information respecting the right of cancellation or rescission in such cases.<sup>10</sup>

#### REMOVING CLOUD ON TITLE.

196. Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice and the right of the party may require.<sup>11</sup>

A suit to remove a cloud from title, like a suit for the cancellation of documents, depends on the principle of *quia timet*; that is, the deed or instrument constituting the cloud may be used vexatiously, when, by lapse of time, the evidence of its void or voidable character

<sup>8</sup> *Simpson v. Howden*, 3 Mylne & C. 97; *Smyth v. Griffin*, 13 Sim. 245; *Threlfall v. Lunt*, 7 Sim. 627.

<sup>9</sup> *Peake v. Highfield*, 1 Russ. 559; *Cooper v. Vesey*, 20 Ch. Div. 612; *Dunn v. Miller*, 96 Mo. 324, 9 S. W. 640; *Sharon v. Terry*, 36 Fed. 337.

<sup>10</sup> See ante, 38.

<sup>11</sup> *Story*, Eq. Jur. § 694; *Martin v. Graves*, 5 Allen (Mass.) 661; *Dull's Appeal*, 113 Pa. St. 510, 6 Atl. 540.

may be lost.<sup>12</sup> Independent of statute, an action to remove a cloud from title can only be brought by plaintiff in possession,<sup>13</sup> since an owner of land out of possession may establish his title at law in ejectment.<sup>14</sup> In some of the states, however, statutes exist which permit the action to be brought by a plaintiff out of possession.<sup>15</sup> In analogy to the rule which obtains in action for cancellation and rescission, equity will not interfere to remove, as a cloud on title, an instrument void on its face;<sup>16</sup> and relief will only be granted when the hostile title is apparently good, but is really defective by something not appearing on its face.<sup>17</sup>

<sup>12</sup> 1 Fonbl. Eq. bk. 1, c. 1, § 8, note y.

<sup>13</sup> *U. S. v. Wilson*, 118 U. S. 86, 6 Sup. Ct. 991; *Moore v. Townshend*, 102 N. Y. 387, 393, 7 N. E. 401.

<sup>14</sup> *Wetherell v. Eberle*, 123 Ill. 666, 14 N. E. 675.

<sup>15</sup> *Hatch v. Village of St. Joseph*, 68 Mich. 220, 36 N. W. 36; *Hyde v. Redding*, 74 Cal. 493, 16 Pac. 380; *Wilson v. Hooser*, 72 Wis. 420, 39 N. W. 772.

<sup>16</sup> *Maloney v. Finnegan*, 38 Minn. 70, 35 N. W. 723; *Moore v. Townshend*, 102 N. Y. 387, 393, 7 N. E. 401.

<sup>17</sup> *Beach*, Eq. Jur. § 558; *Benner v. Kendall*, 21 Fla. 584, 588; *Rea v. Longstreet*, 54 Ala. 291; *Davis v. Boston*, 129 Mass. 377; *Browning v. Lavender*, 104 N. C. 69, 10 S. E. 77.

**CHAPTER XV.****ANCILLARY REMEDIES.**

- 197. Discovery.
- 198. Bills to Perpetuate Testimony.
- 199. Examination of Witnesses de Bene Esse.
- 200. Ne Exeat.
- 201. Interpleader.
- 202. Essential Elements.
- 203. Receivers.
- 204. In What Cases Receivers will be Appointed.

The equitable remedies we have just considered have had for their object the adjudication of the rights of the parties and the award of final relief. We now come to consider a class of remedies which has for its object either the preservation of the property in controversy until the final termination of the litigation, or the acquisition of means by which the final rights of the parties can be more conveniently and perfectly adjusted.

**DISCOVERY.**

197. A bill of discovery was a bill which asked no relief, but simply for a discovery of facts resting in the knowledge of the defendant, or of deeds or writings in the possession or the power of the defendant; and the object of the discovery was to maintain some action or other proceeding in a court of law. To maintain a bill of discovery, the action must already have been commenced at law, unless, indeed, the object of the discovery is to ascertain in fact who is a proper defendant at law.<sup>1</sup>

At common law, the parties litigant, as well as all other interested persons, were incompetent to testify in the action. Jeremy Bentham, who described these rules of evidence as devised to exclude

<sup>1</sup> Snell, Eq. p. 718; *Angell v. Angell*, 1 Sim. & S. 83; *City of London v. Levy*, 8 Ves. 404.

the testimony of every one who was likely to know anything about the matter, was the first to point out that, as a rule, no witness ought to be disqualified on account of interest alone, and that the objection to the evidence of an interested person ought to be treated, not as an objection to the reception of his evidence, but merely as detracting from its weight when received. It was not until 1851 that Mr. Bentham's views finally triumphed in England;<sup>2</sup> and the evils of the common-law rules of evidence would have been intolerable had it not been for the jurisdiction which equity assumed to grant discovery, and thus render the evidence of the parties litigant available. Whenever a defendant in an action at law desired to avail himself of facts known only to himself and the plaintiff, he would file his bill in equity, calling on plaintiff to answer on oath the interrogatories contained in it; and then the plaintiff, unless prepared to perjure himself, was obliged by his answer to admit, though it might be with his own coloring, the substantial facts of the case. This answer, though not evidence in the ordinary sense, might then have been introduced in the action at law by defendant as an admission made by plaintiff, just as any letter written by him admitting relevant facts might have been given in evidence. In addition to the cases in which the object of the bill was to obtain an admission of facts exclusively within the knowledge of the parties litigant, there were many others in which the aim was to obtain a discovery and production of documents,—an object effected in equity by means of the ordinary interrogatory as to documents and subsequent motion for production.

By these means the shortcomings of the law were in some measure remedied. Since, however, the admission of a third person could never be received in evidence against a party litigant, the assistance of equity could in no way be made available to supply the exclusion of persons disqualified because of interest, but not actually parties to the litigation; and the rule was perfectly settled that no bill of discovery lay against a mere witness.<sup>3</sup>

Not only would equity grant discovery in aid of actions of law; but whenever a suit was brought in equity, touching matters otherwise within its jurisdiction, defendant was compellable to answer inter-

<sup>2</sup> St. 14 & 15 Vict. c. 99, rendered interested persons competent as witnesses. Similar statutes exist in all the states.

<sup>3</sup> *Fenton v. Hughes*, 7 Ves. 287; 2 Story, Eq. Jur. § 1499.



rogatories which were contained in the body of the bill; and complainant was likewise compellable to make discovery by means of cross interrogatories in the answer.<sup>4</sup>

The question, of course, arises, what has been the effect of the statutes in England and the various states in this country removing the disqualification of parties and interested persons? The practical effect has everywhere been to render the technical bill of discovery in aid of an action at law obsolete. In England and in some of the states it has been held that a bill of discovery will not lie when full disclosure can be compelled in the action at law,<sup>5</sup> while other courts have held that the ancient equity jurisdiction still remains, under the rule that the jurisdiction once existing is not lost because courts of law have subsequently acquired a like authority.<sup>6</sup> The principles, however, on which courts of equity acted in granting discovery are still important, partly because they form the basis of a system of statutory discovery in force in many of the states, and partly because they are the origin of some very important rules of evidence.

#### *Rules Respecting Discovery.*

There were three important rules respecting the right of discovery founded on public policy, which still survive in modern principles of evidence: (1) No man need discover matter tending to criminate

<sup>4</sup> 2 Story, Eq. Jur. § 1483; Haynes, Eq. p. 118.

<sup>5</sup> Anderson v. Bank of British Columbia, 2 Ch. Div. 644; Attorney General v. Gaskill, 20 Ch. Div. 519; Ex parte Boyd, 105 U. S. 657; Riopelle v. Doellmer, 26 Mich. 105; Hall v. Joiner, 1 S. C. 190; Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736.

<sup>6</sup> Post v. Toledo, etc., R. Co., 144 Mass. 341, 11 N. E. 540; Union Pass. Ry. Co. v. Mayor, etc., 71 Md. 238, 17 Atl. 933; Handley v. Heflin, 84 Ala. 600, 4 South. 725; Kearny v. Jeffries, 48 Miss. 357; Hoppock's Ex'rs v. United New Jersey R. & C. Co., 27 N. J. Eq. 286; Lancy v. Randlett, 80 Me. 109, 13 Atl. 686; Russell v. Dickeschied, 24 W. Va. 61. It should be observed, however, that in these cases discovery was sought of facts exclusively within defendant's knowledge, and not of facts known to plaintiff, and to which he was incompetent to testify. The statutory systems of discovery in force in many of the states have also for their object the ascertaining of facts peculiarly within defendant's knowledge, and necessary to enable plaintiff to prove his case.

himself, or to expose him to a penalty or forfeiture.<sup>7</sup> (2) No man need discover legal advice which has been given him by his professional advisers, or statements of facts which have passed between himself and them in reference to the dispute in litigation;<sup>8</sup> nor will a married woman be compelled to disclose facts which might damage her husband.<sup>9</sup> (3) Official persons cannot be compelled to disclose any matters of state, the publication of which may be prejudicial to the community.<sup>10</sup>

Other rules, still important to be borne in mind, are the following: Defendant must answer as to all facts material to plaintiff's case; he must answer to all, and not to a portion only; and he must answer distinctly, completely, and without needless prolixity, and to the best of his information and belief.<sup>11</sup> It will be observed that defendant is not required to answer questions merely because they are material to the issue, but only because they are material to plaintiff's case; for, although plaintiff is entitled to know what the defense is, and to have it verified on oath, he is not entitled to cross-examine the defendant as to the precise mode in which to establish it.<sup>12</sup>

All the foregoing rules also apply, when discovery is sought with respect to documents in defendant's possession. When required by plaintiff, defendant must set forth a list of all documents in his possession from which discovery of the matter in question can be obtained; and if it appears from the answer that the documents are in defendant's possession or power, and that they are of such character as to constitute proper matters of discovery within the ordinary rules, plaintiff will be given leave to inspect and copy them,

<sup>7</sup> *East India Co. v. Campbell*, 1 Ves. Sr. 246; *Claridge v. Hoare*, 14 Ves. 59, 65; *Saunders v. Wiel* [1892] 2 Q. B. 321; *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524; *State v. Simmons Hardware Co.*, 109 Mo. 118, 18 S. W. 1125; *Horstman v. Kaufman*, 97 Pa. St. 147; *Adams*, Eq. p. 2.

<sup>8</sup> *Greenough v. Gaskell*, 1 Mylne & K. 98; *Jones v. Pugh*, 1 Phil. Ch. 96; *Parkhurst v. Lowten*, 2 Swanst. 194, 216.

<sup>9</sup> *Le Texier v. Margrave of Anspach*, 5 Ves. 322.

<sup>10</sup> *Smith v. East India Co.*, 1 Phil. Ch. 50.

<sup>11</sup> *Story*, Eq. Pl. § 853; *Mitt. Eq. Pl.* 357, 365.

<sup>12</sup> *Llewellyn v. Badeley*, 1 Hare, 527; *Haskell v. Haskell*, 3 Cush. 542; *Willson v. Webber*, 2 Gray, 558; *Norfolk & W. R. Co. v. Postal Tel. Cable Co.*, 88 Va. 932, 14 S. E. 689; *Downie v. Nettleton*, 61 Conn. 593, 24 Atl. 977.

and their production at the hearing of the cause will also be compelled.<sup>13</sup> The documents must be in defendant's possession or power,<sup>14</sup> but for this purpose it is sufficient that they are admitted to belong to him, though they may be out of his actual custody.<sup>15</sup> The possession, therefore, of his solicitor or agent, or of any other person whose possession he can control, is equivalent to his own.<sup>16</sup> If, however, a document is in the joint possession of the defendant and of some other person who is not before the court, its production will not be compelled.<sup>17</sup>

#### BILLS TO PERPETUATE TESTIMONY.

198. The object of a bill to perpetuate testimony was to preserve evidence when it was in danger of being lost before the matter to which it related could be made the subject of a judicial investigation.<sup>18</sup>

It sometimes happens that a person entitled presumptively to some future interest in property finds his title impeached or threatened by some other person interested in disputing it; and yet, in consequence of the future or reversionary interest of that title, the law affords him no means of asserting or establishing it. Meanwhile, the very testimony on which his title depends may be in danger of perishing by the death of those who, if alive, would be able to give evidence in its support. Such cases strongly appealed to that maxim of equity which declares that it will not suffer a wrong without a remedy. And yet the exercise of a jurisdiction thus to perpetuate testimony was evidently subject to the strong objection that the depositions so taken were not published until after the death of the witnesses. The evidence, therefore, was not given under the legal penalties attached to perjury. For this reason, chiefly, courts of equity

<sup>13</sup> Adams, Eq. pp. 12, 13; *Wisner v. Dodds*, 14 Fed. 656.

<sup>14</sup> *Hardman v. Ellames*, 2 Mylne & K. 732.

<sup>15</sup> *Clinch v. Financial Corp.*, L. R. 2 Eq 271; *Earl of Glengall v. Frazer*, 2 Hare, 99.

<sup>16</sup> *Eages v. Wiswall*, 2 Paige, 369; *Robbins v. Davis*, 1 Blatchf. 238, Fed. Cas. No. 11,890.

<sup>17</sup> *Edmonds v. Foley*, 30 Beav. 282.

<sup>18</sup> *Snell, Eq.* p. 721.

generally did not entertain such bills, except where it was absolutely necessary to prevent a failure of justice,<sup>19</sup> or where the preservation of the evidence would clearly tend to defeat future litigation, or to defeat such litigation if commenced.<sup>20</sup> If, therefore, it were possible that the matter in controversy could be made the subject of immediate judicial investigation by the party who sought to perpetuate the testimony, there was no reason for giving him the advantage of deferring his proceedings to a future time, and of substituting written depositions for viva voce evidence.<sup>21</sup> Hence suits to perpetuate testimony were rigidly confined to cases where the party who filed the bill could not bring the matter into immediate judicial investigation, either because his title was in remainder, or because he himself was in possession of the property.<sup>22</sup>

A mere expectancy, as that of an heir at law, was not considered sufficient to sustain the bill; but any interest which the law would recognize, however small or remote, even though contingent, entitled a party to the relief.<sup>23</sup> So, also, a bill to perpetuate testimony was allowed only where some right to property was involved, as distinguished from an office or dignity.<sup>24</sup> The perpetuation of testimony is now regulated by statutes in most of the states, and independent suits in equity are no longer resorted to for this purpose; but the principles on which courts of equity acted form the basis of most of the statutes on this subject, and hence they are still important.<sup>25</sup>

<sup>19</sup> *Angell v. Angell*, 1 Sim. & S. 83; *Booker v. Booker*, 20 Ga. 781.

<sup>20</sup> *Brooking v. Maudslay*, 38 Ch. Div. 636.

<sup>21</sup> *Ellice v. Roupell*, 32 Beav. 299.

<sup>22</sup> *Booker v. Booker*, 20 Ga. 781; *Baxter v. Farmer*, 7 Ired. Eq. 239; *Earl Spencer v. Peek*, L. R. 3 Eq. 415; *Llanover v. Homfray*, 19 Ch. Div. 224; *Hall v. Stout*, 4 Del. Ch. 269.

<sup>23</sup> *Dursley v. Fitzhardinge*, 6 Ves. 251.

<sup>24</sup> *Townshend Peerage Case*, 10 Clark & F. 289. St. 5 & 6 Vict. c. 69, extends the right to perpetuate testimony in favor of persons having a mere expectancy to property, or to any dignity, honor, or title.

<sup>25</sup> In the federal courts, depositions in perpetuum rei memoriam are directed to be taken according to the usages of chancery. Rev. St. U. S. § 800.

**EXAMINATION OF WITNESSES DE BENE ESSE.**

199. Either party to a litigation actually pending, who was under an apprehension either that, at the time of trial, important witnesses abroad might still be there, or that important witnesses of advanced years might then be dead, or that old or infirm witnesses might then be unable to travel, could file a bill in equity praying a commission to examine the witnesses, and thus preserve their evidence for use at the trial, in case it was not then obtainable in the regular way.<sup>26</sup>

Originally, common-law courts possessed no machinery for preserving the testimony of witnesses described in the black-letter text, and the power was not conferred on them in England until 1830.<sup>27</sup> Statutes in all the states confer power on all courts of general original jurisdiction, whether of law or equity, to issue commissions for the examination of witnesses at home or abroad, and hence independent suits in equity have become obsolete. While bills de bene esse and bills to perpetuate testimony obviously resembled each other, there was this distinction: Bills de bene esse could be brought only during the pendency of an action, and not before;<sup>28</sup> and they might be maintained by a person not in possession of the property in dispute, as well as by a person in possession.<sup>29</sup>

<sup>26</sup> The phrase "de bene esse" is a term applied to such acts or proceedings as are done or permitted to take place in an action, but the validity or effect of which depends upon some subsequent act or fact, matter or proceeding. An examination of witnesses de bene esse is an examination of them out of court, before the trial, subject to the contingency of their death, removal, or inability to attend the trial, in which event such examination is good, and the deposition may be read in evidence on the trial; otherwise not. *Grah. Pr.* 584; 1 Burrill, *Law Dict.* (2d Ed.) 212, 447.

<sup>27</sup> *St. 1 Wm. IV. c. 22, § 1.*

<sup>28</sup> *Angell v. Angell*, 1 Sim. & S. 83; *Howard v. Folger*, 15 Me. 447.

<sup>29</sup> *Angell v. Angell*, 1 Sim. & S. 83.

## NE EXEAT.

**200.** The writ of *ne exeat* is a writ issued by courts of equity to prevent a person from leaving the state until bail is given to obey the decree of the court.<sup>30</sup>

The writ was originally applied only for political objects and purposes of state, and is now exercised for the protection of private rights with much caution and jealousy.<sup>31</sup> As a general rule, the writ is granted only in cases of equitable debts and claims, and operates in the nature of equitable bail.<sup>32</sup> The equitable demand must be certain in its nature, and actually and presently payable, not contingent or prospective,<sup>33</sup> or unliquidated and uncertain.<sup>34</sup> In New Jersey, the writ may be granted before suit is actually pending.<sup>35</sup>

To the rule that the writ will issue only in cases of equitable demands, there are two exceptions: (1) When alimony has been decreed to a wife, the writ is procurable to restrain the husband from evading his obligation by leaving the state.<sup>36</sup> The alimony must, however, be actually decreed, and not appealed from. The writ could not be obtained while the case was still pending.<sup>37</sup> (2) When there is an admitted balance due from defendant to plaintiff, but the plaintiff claims a larger sum, he may be assisted by the writ.<sup>38</sup> This case is brought within the purview of equity by its jurisdiction in matters of account.<sup>39</sup>

<sup>30</sup> *Cable v. Alvord*, 27 Ohio St. 666; *Gresham v. Peterson*, 25 Ark. 377; *Mitchell v. Bunch*, 2 Paige, 617.

<sup>31</sup> Story, Eq. Jur. §§ 1465, 1467.

<sup>32</sup> *Bonesteel v. Bonesteel*, 28 Wis. 245; *Allen v. Hyde*, 2 Abb. N. C. 197; *Rice v. Hale*, 5 Cush. 241; *Malcolm v. Andrews*, 68 Ill. 100.

<sup>33</sup> *Anon.*, 1 Atk. 521; *Rico v. Gualtier*, 3 Atk. 500.

<sup>34</sup> *Etches v. Lance*, 7 Ves. 417; *Cock v. Ravie*, 6 Ves. 283.

<sup>35</sup> *Clark v. Clark* (N. J. Ch.) 26 Atl. 1012.

<sup>36</sup> *Read v. Read*, 1 Ch. Cas. 115; *Shaftoe v. Shaftoe*, 7 Ves. 171; *Denton v. Denton*, 1 Johns. Ch. 364.

<sup>37</sup> *Dawson v. Dawson*, 7 Ves. 173; *Colverson v. Bloomfield*, 29 Ch. Div. 341.

<sup>38</sup> *Jones v. Sampson*, 8 Ves. 593; *Jones v. Alephsin*, 16 Ves. 471; *McGehee v. Polk*, 24 Ga. 406; *Porter v. Spencer*, 2 Johns. Ch. 169, 171.

<sup>39</sup> *Allen v. Smith*, 16 N. Y. 418, 419; *MacDonough v. Gaynor*, 18 N. J. Eq. 249.

### INTERPLEADER.

201. Where two or more persons, between whom there is privity of title, claim the same thing, debt, or duty from a third person, such third person, if he does not himself claim any interest in the matter, and has incurred no independent liability to any of them, may exhibit a bill of interpleader against them, stating their several claims and his own position in regard to the matter, and praying that the claimants may interplead, so that the court may adjudge to whom the thing, debt, or duty belongs; and, if any suits at law had been brought against him, he might also have prayed that the claimants might be restrained from those suits or actions till the right was determined.<sup>40</sup>

The remedy of interpleader existed also at common law, but it had a very narrow range of application, lying only in cases where possession had arisen from accident or bailment. Equity, therefore, has jurisdiction because of the double claim made on the complainant giving rise to a multiplicity of actions.<sup>41</sup> It is not necessary that suit should have been actually commenced against complainant, and it is sufficient that conflicting claims have been made against him, and that he is in danger of being molested.<sup>42</sup> But after judgment at law, and after the right is thus determined, a court of equity cannot interfere upon the footing of interpleader.<sup>43</sup>

The right to file a bill of interpleader in equity exists, though both claims are legal, or one is legal and the other is equitable.<sup>44</sup> In many of the states, statutes now exist permitting a defendant sued on contract, or for specific real or personal property, who claims no

<sup>40</sup> Mitf. Eq. Pl. 58, 59; Adams, Eq. p. 202.

<sup>41</sup> Crawford v. Fisher, 1 Hare, 430, 441; School District No. 1 v. Weston, 31 Mich. 85; Angell v. Hadden, 15 Ves. 244.

<sup>42</sup> Angell v. Hadden, 15 Ves. 244; Gibson v. Goldthwaite, 7 Ala. 281; Yarbrough v. Thompson, 3 Smedes & M. (Miss.) 291; Providence Bank v. Wilkinson, 4 R. I. 507.

<sup>43</sup> Yarbrough v. Thompson, 3 Smedes & M. (Miss.) 291; McKinney v. Kuhn, 59 Miss. 180; Larabrie v. Brown, 26 Law J. Eq. 605.

<sup>44</sup> Morgan v. Marsack, 2 Mer. 107; Lowndes v. Cornford, 18 Ves. 209.

interest in the subject-matter, to apply to the court to substitute in his place a third person who makes against him a demand for the same debt or property.<sup>45</sup> The principles governing this statutory right of interpleader are in the main the same as those which controlled courts of equity, independent of statutes, and they will now be considered.

#### **SAME—ESSENTIAL ELEMENTS.**

**202.** Independent of statute, the following conditions must exist to give a right to an interpleader in equity:

- (a) The same thing, debt, or duty must be claimed by both the persons against whom the relief is asked.
- (b) Privity of title must exist between the claimants.
- (c) The party seeking relief must claim no interest in the matter.
- (d) He must have incurred no independent personal liability to either claimant.<sup>46</sup>

1. The same thing, debt, or duty must be claimed by both claimants. If the subject of dispute has a bodily existence, no difficulty can arise as to identity. Where, however, the subject-matter is a chose in action, it becomes necessary to determine what is identity, and this is a question attended occasionally with much difficulty, and which in each case must be determined by the original nature and constitution of the debt.<sup>47</sup> Thus, a purchaser of goods who has accepted a draft drawn on him by a bank for the purpose of placing it in funds to meet the purchase price, but which funds were never so applied, because the bank became insolvent, cannot compel the seller of the goods and a bona fide holder of the draft to interplead, since one claims for goods sold and the other on the draft.<sup>48</sup> The amount in dispute need not, however, be iden-

<sup>45</sup> Civ. Code N. Y. § 820. The same statute, in substance, is enacted in all the code states.

<sup>46</sup> Adams, Eq. p. 203; 3 Pom. Eq. Jur. § 1322.

<sup>47</sup> Adams, Eq. p. 203.

<sup>48</sup> *Bassett v. Leslie*, 123 N. Y. 396, 25 N. E. 396. So, also, where a purchaser of goods was sued by the seller for the price, and was also sued in trover by



tical.<sup>49</sup> Thus, a landowner whose property has been taxed in different amounts by two towns may maintain an interpleader to compel them to litigate which one has jurisdiction to levy the tax, notwithstanding the difference in amount.<sup>50</sup>

2. There must be privity of title between the claimants. They must derive title from a common source, or one must derive title from the other. Where there was no privity of title between the claimants of the thing, debt, or duty, equity would afford no relief to the person holding the property, but he was compelled to defend himself as well as he could at law. Equity refused to interfere in such a case, because it would not assume the right to try merely legal titles upon a controversy between different parties, where there was no privity of contract between them and the third person who called for the interpleader.<sup>51</sup> This rule has been criticised, and the proposition has been advanced that complainant need only show that he cannot determine, without hazard to himself, to which of the claimants the property belongs.<sup>52</sup> Under the statutes heretofore cited, it would seem that privity of title is unnecessary.

3. Complainant must claim no interest in the subject-matter. He must be a mere stakeholder, entirely indifferent between the conflicting claimants.<sup>53</sup> Hence one who claims a commission out of the property or fund in his possession, or a lien thereon, cannot

a person who alleged himself to be the real owner, it was held not to be a case of interpleader, for the parties were not seeking the same thing. One was endeavoring to obtain the price of the goods, and the other damages for their conversion. *Glyn v. Duesbury*, 11 Sim. 139. Other cases involving identity of subject-matter: *Wilkinson v. Searcy*, 74 Ala. 243; *Blue v. Watson*, 59 Miss. 619; *Dodd v. Bellows*, 29 N. J. Eq. 127; *City Bank v. Bangs*, 2 Paige, 570.

<sup>49</sup> *School Dist. No. 1 v. Weston*, 31 Mich. 85; *Newhall v. Kastens*, 70 Ill. 156. Contra, *Glyn v. Duesbury*, 11 Sim. 139, 148.

<sup>50</sup> *Dorn v. Fox*, 61 N. Y. 264.

<sup>51</sup> *Story*, Eq. Jur. § 820; *Third Nat. Bank v. Skillings Lumber Co.*, 132 Mass. 410; *Pearson v. Cardon*, 2 Russ. & M. 606, 609-612; *Crawshay v. Thornton*, 2 Mylne & C. 1, 19-24.

<sup>52</sup> See *Crane v. McDonald*, 118 N. Y. 648, 23 N. E. 991.

<sup>53</sup> *Wing v. Spaulding*, 64 Vt. 83, 23 Atl. 615; *Baltimore & O. R. Co. v. Arthur*, 90 N. Y. 234; *Appeal of Bridesburg Manuf'g Co.*, 106 Pa. St. 275; *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. 232; *Williams v. Matthews*, 47 N. J. Eq. 196, 20 Atl. 261; *Sprague v. West*, 127 Mass. 471.

maintain a bill of interpleader.<sup>54</sup> So, also, one who is not in possession of the property which is the subject of claim, or who has put one of the claimants in possession, cannot maintain a bill of interpleader.<sup>55</sup>

4. Complainant must not have incurred any independent personal liability to either claimant.<sup>56</sup> Thus, a sheriff who seizes property by virtue of an execution cannot compel a claimant of the property to interplead with the execution creditor, since the sheriff has incurred a liability to the claimant if it should turn out that the property is his.<sup>57</sup> So, also, where a tenant is sued by his landlord, or an agent by his principal, a claim by a third person adverse to the landlord or principal will not warrant a bill of interpleader,<sup>58</sup> unless it originates in the landlord's or principal's own act, done after the commencement of the tenancy or agency, creating a doubt as to who is the true landlord or principal to whom the tenancy or agency refers.<sup>59</sup> In like manner, a bill of interpleader will not lie if the party seeking relief has acknowledged title in one of the claimants, and has thus incurred an independent liability to him.<sup>60</sup>

<sup>54</sup> *Crass v. Memphis & C. R. Co.*, 96 Ala. 447, 11 South. 480; *Mitchell v. Hayne*, 2 Sim. & S. 63.

<sup>55</sup> *Burnett v. Anderson*, 1 Mer. 405; *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. 232; *Stone v. Reed*, 152 Mass. 179, 25 N. E. 49; *Mt. Holly, L. & M. Turnpike Co. v. Ferree*, 17 N. J. Eq. 117.

<sup>56</sup> *Crawshay v. Thornton*, 2 Mylne & C. 1, 19; *Cullen v. Dawson*, 24 Minn. 46; *National Ins. Co. v. Pingrey*, 141 Mass. 411, 6 N. E. 93; *Wakeman v. Kingsland*, 46 N. J. Eq. 113, 18 Atl. 680; *Tyus v. Rust*, 37 Ga. 574.

<sup>57</sup> *Slingsby v. Boulton*, 1 Ves. & B. 334; *Shaw v. Coster*, 8 Paige (N. Y.) 339. Statutes in most of the states give a claimant of property seized on execution the right to intervene and litigate his title with the execution creditor.

<sup>58</sup> *Dungey v. Angove*, 2 Ves. Jr. 304; *Snodgrass v. Butler*, 54 Miss. 45; *De Zouche v. Garrison*, 140 Pa. St. 430, 21 Atl. 450. These cases rest on the ground that the tenant or the agent is estopped to deny the title of his landlord or of his principal.

<sup>59</sup> *Cowtan v. Williams*, 9 Ves. 107; *Gibson v. Goldthwaite*, 7 Ala. 281; *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515.

<sup>60</sup> *Crawshay v. Thornton*, 2 Mylne & C. 1, 19-24; *Jew v. Wood, Craig & P.* 185; *Pfister v. Wade*, 56 Cal. 43.

## RECEIVERS.

203. A receiver is an indifferent person between the parties, appointed by a court of equity to take charge of the fund or property in controversy, when it does not seem proper that either party should retain it.<sup>61</sup>

Unlike discovery and kindred ancillary remedies, the law of receivers is a subject of growing importance, and it furnishes one of the most remarkable examples of the expansive powers of equitable remedies. Though of English origin, the remedy has been largely developed in this country, chiefly during the past quarter of a century. The object of a receivership is to preserve the fund or property from removal beyond the jurisdiction, or from spoliation, waste, or deterioration, pending litigation or during the minority of infants;<sup>62</sup> and in this respect it resembles the interlocutory injunction. The receiver is an officer of the court appointing him, and not an agent of the parties.<sup>63</sup> His possession is the possession of the court,<sup>64</sup> and any attempt to disturb it is a contempt punishable as such.<sup>65</sup>

The appointment of a receiver, like the granting of an interlocutory injunction, determines nothing as to the ultimate rights of the parties;<sup>66</sup> and, in dealing with an application for the appointment

<sup>61</sup> *Booth v. Clark*, 17 How. 322; *Baker v. Bachus' Adm'r*, 32 Ill. 79; *Chautauque Co. Bank v. White*, 6 Barb. 589; High, Rec. § 1; Beach, Rec. § 1; Kerr, Rec. p. 2.

<sup>62</sup> *Myers v. Estell*, 48 Miss. 401; *Taylor v. Philadelphia & R. R. Co.*, 7 Fed. 385; *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 28; *Beverley v. Brooke*, 4 Grat. 187.

<sup>63</sup> *Davis v. Duke of Marlborough*, 2 Swanst. 125; *Davis v. Gray*, 16 Wall. 218; *Hooper v. Winston*, 24 Ill. 353; *Morrill v. Noyes*, 56 Me. 463.

<sup>64</sup> *Ellicott v. Warford*, 4 Md. 85; *Runyon v. Farmers' & M. Bank*, 4 N. J. Eq. 480.

<sup>65</sup> *Beverley v. Brooke*, 4 Grat. 187, 211; *Hazelrigg v. Bronaugh*, 78 Ky. 62; *Chafee v. Quidnick Co.*, 13 R. I. 442; *Secor v. Toledo, P. & W. R. Co.*, 7 Biss. 513, Fed. Cas. No. 12,605.

<sup>66</sup> *Hugonin v. Basely*, 13 Ves. 107; *Beverley v. Brooke*, 4 Grat. 208; *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1; *Ex parte Dunn*, 8 Rich. (N. S.) 207; *Chase's Case*, 1 Bland, 206-213; *Leavitt v. Yates*, 4 Edw. Ch. 162.

of a receiver, it is the duty of the court to confine itself strictly to the point upon which it is called upon to decide, and not to go into the merits of the cause.<sup>67</sup>

The appointment of a receiver is said to be discretionary with the court;<sup>68</sup> but, in exercising that discretion, the court is controlled by these two principles: (1) Plaintiff must show that he has either a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim. (2) Plaintiff must further show that defendant obtained possession of the property by fraud, or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant.<sup>69</sup>

#### **SAME—IN WHAT CASES RECEIVERS WILL BE APPOINTED.**

204. Subject to the foregoing rules, a receiver will be appointed:<sup>70</sup>

- (a) Where the person entitled to the possession of property pending a litigation or a judicial proceeding is incompetent to manage or care for it; as in the case of infants, lunatics, etc.
- (b) Where each of the parties litigant is equally entitled to possession, but the circumstances are such that it is not proper for either of them to retain control; as in the case of litigation between partners, cotenants, etc.
- (c) Where the party entitled to the possession of property pending litigation is misapplying or spoliat-

<sup>67</sup> *Skinnners' Co. v. Irish Soc.*, 1 Mylne & C. 164.

<sup>68</sup> *Skip v. Harwood*, 3 Atk. 564; *Sage v. Memphis & I. R. R. Co.*, 125 U. S. 361, 8 Sup. Ct. 887; *Chicago & A. O. & M. Co. v. United States Petroleum Co.*, 57 Pa. St. 83; *Ashurst v. Lehman*, 86 Ala. 371, 5 South. 731.

<sup>69</sup> *Mays v. Rose*, Freem. Ch. (Miss.) 703; *Ellett v. Newman*, 92 N. C. 519; *Blondhelm v. Moore*, 11 Md. 365; *Ashurst v. Lehman*, 86 Ala. 371, 5 South. 731; *Elwood v. Bank*, 41 Kan. 475, 21 Pac. 673; *Bainbrigge v. Baddeley*, 3 Macn. & G. 413; *Owen v. Homan*, 3 Macn. & G. 378, 412.

<sup>70</sup> 3 Pom. Eq. Jur. §§ 1332-1334.

ing it, to the detriment of the other party claiming an equitable interest therein.

(d) By virtue of statute, in proceedings to dissolve and wind up corporations.

(e) To reach property of a judgment debtor which cannot be seized on execution.

1. The court will, upon a proper case being made out, protect the estate of an infant by appointing a receiver; as, where no guardian exists,<sup>71</sup> or where the parent of the infant, in possession of his property, is squandering it.<sup>72</sup> So, also, in the case of a lunatic, where the person appointed as guardian or committee declines to act.<sup>73</sup> It was also the practice of courts of chancery to appoint a receiver of a decedent's estate pending litigation to probate his will;<sup>74</sup> but now the practice has fallen into disuse, because courts of probate have been empowered by statute to appoint a special administrator during such a contest.

2. A receiver of a partnership will be appointed, pending a suit for dissolution, where it appears that complainant is probably entitled to the dissolution, and the partners cannot agree among themselves as to the disposition\*and control of the firm property.<sup>75</sup> So, also, after a dissolution of the firm, whether by mutual agreement or by the death of one of its members, a receiver will be appointed where it appears that the partners in possession are misconducting themselves, or that the assets are in peril.<sup>76</sup> As between tenants in common, the general rule is that a receiver will not be appointed

<sup>71</sup> *Hicks v. Hicks*, 3 Atk. 273.

<sup>72</sup> *Butler v. Freeman*, 1 Amb. 303; *In re Cormicks*, 2 Ir. Eq. 264.

<sup>73</sup> *Ex parte Warren*, 10 Ves. 621. Also, after lunatic's death, receiver will be appointed until determination of question as to who is entitled to estate. *In re Colvin*, 3 Md. Ch. 288.

<sup>74</sup> *King v. King*, 6 Ves. 172; *Atkinson v. Henshaw*, 2 Ves. & B. 85.

<sup>75</sup> *McElvey v. Lewis*, 76 N. Y. 373; *Jordan v. Miller*, 75 Va. 442; *New v. Wright*, 44 Miss. 202; *Allen v. Hawley*, 6 Fla. 164; *Barnes v. Jones*, 91 Ind. 161. Wrongful exclusion of one partner from management of firm is ground for a receiver. *Const. v. Harris*, 1 Turn. & R. 517; *Katz v. Brewington* (Md.) 20 Atl. 139.

<sup>76</sup> *Word v. Word*, 90 Ala. 81, 7 South. 412; *Bufkin v. Boyce*, 104 Ind. 53, 3 N. E. 615.

unless one excludes the other from the possession and enjoyment of the property;<sup>77</sup> but, as between tenants in common of mining property, a more liberal rule prevails.<sup>78</sup>

3. The court may, on a proper showing, dispossess an executor or trustee, and appoint a receiver, but it will not do so on slight grounds.<sup>79</sup> Misconduct, waste of trust property, and insolvency have been held sufficient grounds.<sup>80</sup>

In England, and those states where the legal title to real estate vests in the mortgagee, a receiver will not be appointed at his instance to take possession of the mortgaged premises and of the rents and profits, since he can recover them in ejectment;<sup>81</sup> but, in those states where a mortgage is regarded as a mere lien on the land, the mortgagee is entitled to a receiver, pending foreclosure proceedings, where the mortgaged premises are an inadequate security, the mortgagor is insolvent, and there is good reason to believe that the premises will be wasted or deteriorated in his hands.<sup>82</sup>

On similar principles,—insolvency of the mortgagor and the inadequacy of the security,—a court of equity will, at the suit of bondholders secured by mortgage on the property of a railroad company, appoint a receiver in aid of the foreclosure proceedings.<sup>83</sup> And in these cases the functions and duties of the receiver are not merely to keep the property in his custody, but to operate and manage it until

<sup>77</sup> *Norway v. Rowe*, 19 Ves. 159; *Williams v. Jenkins*, 11 Ga. 595; *Pierce v. Pierce*, 55 Mich. 629, 22 N. W. 81; *Baughman v. Reed*, 75 Cal. 319, 17 Pac. 222; *Low v. Holmes*, 17 N. J. Eq. 150; *Vaughan v. Vincent*, 88 N. C. 116; *Varnum v. Leek*, 65 Iowa, 751, 23 N. W. 151.

<sup>78</sup> *Jefferys v. Smith*, 1 Jac. & W. 208; *Parker v. Parker*, 82 N. C. 165.

<sup>79</sup> *Smith v. Smith*, 2 Younge & C. Exch. 361; *Haines v. Carpenter*, 1 Woods, 265, 266, Fed. Cas. No. 5,905; *Hill v. Arnold*, 79 Ga. 367.

<sup>80</sup> *Anon.*, 12 Ves. 4; *Stairley v. Rabe*, McMul. Eq. (S. C.) 22; *Price's Ex'r v. Price's Ex'rs*, 23 N. J. Eq. 428; *Calhoun v. King*, 5 Ala. 525; *Hagenbeck v. Hagenbeck Zoological Arena Co.*, 59 Fed. 14.

<sup>81</sup> *Berney v. Sewell*, 1 Jac. & W. 648; *Sturch v. Young*, 5 Beav. 537; *Williams v. Robinson*, 16 Conn. 517.

<sup>82</sup> *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297; *Hollenbeck v. Donnell*, 94 N. Y. 342; *United States Trust Co. v. New York, W. S. & B. R. Co.*, 101 N. Y. 483, 5 N. E. 316; *Schreiber v. Carey*, 48 Wis. 208, 4 N. W. 124.

<sup>83</sup> *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 Fed. 221; *Pennsylvania Co. for Insurance on Lives v. American Trust Co.*, 2 U. S. App. 600, 5 C. C. A. 53, and 55 Fed. 131; *High*, Rec. § 376 et seq.

the litigation is finally terminated, being subject to all the responsibilities of a common carrier.<sup>84</sup> In exceptional cases, courts of equity have even authorized the receiver to extend and complete lines of road, when necessary to save a land grant or to the successful operation of the road.<sup>85</sup> One remarkable result of this extension of the powers of receivers should be noticed in this connection: The indebtedness incurred by the receiver, in thus operating and managing the road, is entitled to priority over the debt of the bondholders, secured, as it is, by mortgage. Having requested the court to take control of the property, and maintain it as a going concern for their benefit, they are estopped from denying that the expenses of such management are entitled to priority, forming, as they do, a part of the costs of the litigation.<sup>86</sup> To enable the receiver to raise funds for the operation and maintenance of the road, the court generally authorizes the issuance of receivers' certificates; and, on the distribution of the proceeds of sale of the mortgaged premises, the holders of these certificates are entitled to priority over the bondholders.<sup>87</sup>

4. The common law furnished a remedy by writ of *quo warranto* for the dissolution of a corporation. Independent of statute, therefore, courts of equity have no power to dissolve a corporation, wind

<sup>84</sup> Beach, Rec. § 359.

<sup>85</sup> *Kennedy v. St. Paul & P. R. Co.*, 5 Dill. 519, Fed. Cas. No. 7,707; *Jerome v. McCarter*, 94 U. S. 734, 738 (canal); *Bank of Montreal v. Chicago, C. & W. R. Co.*, 48 Iowa, 518.

<sup>86</sup> *Hale v. Nashua & L. R. Co.*, 60 N. H. 333; *Miltnerberger v. Logansport Ry. Co.*, 106 U. S. 286, 1 Sup. Ct. 140; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 46 Fed. 26; *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950. Some of the cases hold that the expenses of a receivership are entitled to priority over the mortgage bondholders, though they have not consented to the receivership or the expenses, on the theory that railroads are quasi public corporations, and that public necessities require their continued operation. *Meyer v. Johnston*, 53 Ala. 237, 348; *Kneeland v. Bass Foundry & Mach. Works*, 140 U. S. 502, 11 Sup. Ct. 857; *Kneeland v. Luce*, 141 U. S. 491, 12 Sup. Ct. 32. This last proposition has been severely criticised, on the ground that to give priority to the receivership expenses over a mortgage of earlier date is, in effect, impairing the obligation of a contract in violation of the federal constitution.

<sup>87</sup> *Credit Co. of London v. Arkansas Cent. R. Co.*, 15 Fed. 46; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 437, 6 Sup. Ct. 809.

up its affairs, sequester its property, and in that connection appoint a receiver.<sup>88</sup> In most of the states of the Union, however, this power has been conferred by statute; but the courts are very cautious in its exercise,<sup>89</sup> and the receiver is regarded in the light of a trustee for the creditors and stockholders.<sup>90</sup>

5. A judgment creditor, who has issued an execution on his judgment which has been returned unsatisfied, has a right to come into equity for the appointment of a receiver of his judgment debtor's property which cannot be sold under execution at law.<sup>91</sup> The receiver in these cases is vested, not only with the title and rights possessed by the judgment debtor, but also with the right of the judgment creditor to set aside fraudulent conveyances made by the debtor.<sup>92</sup>

<sup>88</sup> *Decker v. Gardner*, 124 N. Y. 334, 26 N. E. 814; *Neall v. Hill*, 16 Cal. 145; *Folger v. Columbian Ins. Co.*, 99 Mass. 267.

<sup>89</sup> High, Rec. § 280; *Oakley v. Paterson Bank*, 2 N. J. Eq. 173.

<sup>90</sup> High, Rec. §§ 314, 315; *Curtis v. Leavitt*, 15 N. Y. 44; *Attorney General v. Guardian Mut. Life Ins. Co.*, 77 N. Y. 272.

<sup>91</sup> *Curling v. Marquis Townshend*, 19 Ves. 632; *Bloodgood v. Clark*, 4 Paige, 574; *Osborn v. Heyer*, 2 Paige, 342; *Johnson v. Tucker*, 2 Tenn. Ch. 398. In states where the code procedure prevails, statutes exist providing for the examination of the judgment debtor concerning his property after the execution has been returned unsatisfied, and authorizing the appointment of a receiver of property discovered on such examination. These proceedings are known as proceedings supplementary to execution, and have to a certain extent superseded judgment creditors' bills.

<sup>92</sup> *Green v. Bostwick*, 1 Sandf. Ch. 185; *Porter v. Williams*, 9 N. Y. 142; *Hamlin v. Wright*, 23 Wis. 491.





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