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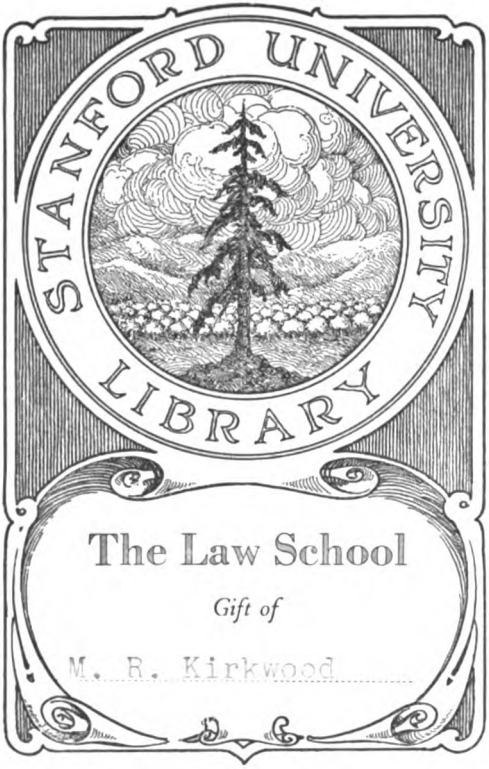
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Handbook of equity jurisprudence

James Webster Eaton

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HANDBOOK

OF

EQUITY JURISPRUDENCE

By JAMES W. EATON

of the Albany Bar

Professor of Law in the Albany Law School, and Lecturer in the Boston University School of Law

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ST. PAUL, MINN.

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PUBLISHERS' PREFACE.

By the untimely death of James W. Eaton, the author of this book, soon after the completion of the manuscript, and while it was yet in the hands of the printers, the making of such statement as may be helpful to the reader in regard to its purposes, scope, and preparation, which would have come more fitly and satisfactorily from him who had devoted to the work much of the last year of his life, devolves on the publishers.

The general purpose of the author and the publishers has been to make a systematic, complete, and reliable presentation of Equity Jurisprudence, as full as is practicable within the limits of an ordinary volume, in the form and having the special features of the Hornbook Series, and, like others of the series, adapted to the needs both of the student and the practitioner. The Hornbook method, combining text, commentary, and annotation, seems peculiarly suitable for the treatment of this subject, in which general principles and maxims are so prominent and controlling, and their meaning and application are so fully illustrated by decided cases. The chief difficulty, indeed, arises from the great extent and variety of the subjects involved in the application of equitable doctrines. But while exhaustive treatment of specific subjects of equity jurisdiction is beyond the scope of this work, it is quite practicable to exhibit the application to each such subject of the various principles applicable, as fully as is useful in a general treatise.

To the execution of this project, the author brought qualifications not often found in combination: Thorough knowledge of the subject, derived from study, stimulated by genuine interest in this department of the law; experience as a practicing lawyer, who had put to actual test the relative weight of conflicting principles, arguments, and precedents, and who knew what the practitioner would expect in such a work; experience as an instructor and lecturer on the law,

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who understood the requirements of both teacher and student; and command of a clear style and faculty of precise expression, well calculated to render the work attractive in form as well as reliable in substance. It is believed that the result fully realizes what was intended and expected.

In particular, the author has endeavored to state and explain accurately, clearly, and concisely the principles of the subject, as now established; to describe the origin and development of equity as a system and of its particular doctrines, so far as may aid in understanding their scope and application; to indicate the qualifications and limitations of each principle or rule, whether inherent, or imposed by the relation of equity to the common or the statutory law, or arising only in its application to a specific subject; to show the scope and operation of the various equitable remedies; and to illustrate the whole by ample statements and citations of judicial decisions, especially the more recent cases.

That the rules of equity are to be sought in the modern rather than the ancient cases, by reason of the progressive nature of equity jurisprudence, has long been recognized. Besides this, new applications of equitable doctrines and new uses of equitable remedies continually arise. On the other hand, the adoption and application by law courts of equitable doctrines, legislative enactments recognizing and enforcing equitable rights and principles, and changes in forms of procedure, have removed the occasion for resort to the equity courts in large classes of cases, and thus made practically useless the discussion of many equitable doctrines. In this work, the treatment of the various subjects is intended to correspond to the existing conditions of equity jurisprudence, as developed or diminished, for practical purposes; and in this respect, especially, it is believed the book will prove more useful than its predecessors, as treating the subjects of present interest more fully as well as in their latest developments.

The author had expressed, in the strongest terms, his sense of obligation to Frank B. Gilbert, of the New York Bar, for the greatest possible assistance in preparing the manuscript, without which he believed he would have been unable to complete the work, by reason of the exactions of other professional engagements; and he had intended to make, in the preface or otherwise, full acknowledgment

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thereof. Upon Mr. Gilbert has devolved, also, the responsibility and labor of reading and correcting the proof, compiling the index, and other matters incident to the production of the book. The publishers gladly add, to the author's tribute of thanks and appreciation, their own acknowledgment of the important services rendered by Mr. Gilbert, before and since the decease of the author.

In the preparation of the work, free use of the material contained in Fetter on Equity, an excellent, though much briefer, work of the same nature, was authorized by the publishers, owners of the copyright. Whenever other standard authors have been quoted or otherwise used as authorities, as the great work of Pomeroy on Equity Jurisprudence, or other writers on special topics, due credit is given in the notes. In the main, the work is derived from the decisions, with special attention to those included in well-known collections of illustrative cases, principally White and Tudor's Leading Cases in Equity and Keener's Cases on Equity Jurisprudence.

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HANDBOOK

OF

EQUITY JURISPRUDENCE

CHAPTER I.

ORIGIN AND HISTORY.

1. Distinction Between Equity and Law—History.
2. Causes of the Existence of the Equity Jurisdiction.
3. Separate Equitable Tribunals Abolished.
4. Equity Jurisdiction in the United States.

DISTINCTION BETWEEN EQUITY AND LAW—HISTORY.

1. The distinction between equity, in a technical sense, and law, is a matter not so much of substance or principle as of form and history.[1]

Equity, in its technical sense, as used in connection with that system of law known as "equitable jurisprudence," means neither natural justice nor even that kind of natural justice which is capable of being judicially enforced. There are many matters of natural justice which cannot be, or at least are not, enforced in any court, either because of the difficulty of framing general rules to meet them, or from the doubtful policy of attempting to give a legal sanction to du-

§ 1. [1] Snell, Eq. p. 3.

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ties of imperfect obligation, such as charity, gratitude, and kindness.[2] 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.[3] So, too, the administration of natural justice lies largely within the competency of courts of law, which often proceed, as far as the nature of the remedies they administer will permit, on the same doctrines as courts of chancery. Natural justice, or equity, in its larger meaning, is often covered by legislative enactments, and to that extent is, therefore, excluded from equity in a technical sense.

It is in view of these facts that equity, as used in the language of English law, has been so often defined, or rather described, by modern equity writers, as being that kind of natural justice which, though of such a nature as properly to admit of being judicially enforced, is not enforced by common-law courts,—an omission which is supplied by the courts of equity.[4]

[2] Snell, Eq. p. 1; 1 Beach, Mod. Eq. Jur. p. 2, citing Rees v. City of Watertown, 19 Wall. 121, 19 L. Ed. 541; Haynes, Eq. (5th Ed.) p. 7; Smith, Eq. (15th Ed.) p. 3; Story, Eq. Jur. § 2; Green v. Lyon, 21 Wkly. Rep. 830.

[3] Forster v. Ulman, 64 Md. 526, 3 Atl. 113; Dunphy v. Ryan, 116 U. S. 498, 6 Sup. Ct. 486, 2 L. Ed. 703,—where the court held the statute of frauds to be as binding on courts of equity as on courts of law, except when it is being used as an instrument of fraud.

[4] See Mait. Justice, 38, 39; Snell, Eq. p. 2; Haynes, Eq. p. 7. Pom. 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

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It may be easily seen that this definition or description is meaningless without some knowledge or understanding of the origin and development of the extraordinary jurisdiction of the English court of chancery, and the relation it bore to the English judiciary. The importance of the history of the court of chancery is not diminished by the supreme court judicature act of 1873 and its amendments, which abolished the distinction between courts of equity and courts of law. By that act equitable principles were preserved, and applied to the administration of justice in all courts. Nor is this history of less importance to the student of equity as it exists in the courts of our own country. In a comparatively recent case in the United States supreme court it was held that the equity jurisdiction conferred on the federal courts is the same as that possessed by the high court of chancery.[5] One of the rules of the supreme court, made under the authority of an act of congress, is that, when not otherwise directed, the practice in the high court of chancery in England shall be followed.[6]

In many of the states the common law and chancery jurisdiction is exercised by the same courts, but without changing the essential distinction between legal and equitable principles;[7] in other states separate common-law and equity tribunals have been retained; while in others equitable principles are administered by means of common-law or statutory forms. In the courts of all these states equitable prin-

public policy as by established precedent and by positive provisions of law." Phelps, Jud. Eq. p. 192. Story, Eq. Jur. § 25, says that "equity jurisprudence may properly be said to be that portion of remedial justice which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law." Bisp. Eq. p. 1, states that equity "is that system of justice which was administered by the high court of chancery in England in the exercise of its extraordinary jurisdiction."

[5] Mississippi Mills v. Cohn, 150 U. S. 202, 205, 14 Sup. Ct. 75, 76, 37 L. Ed. 1052. See, also, Payne v. Hook, 7 Wall. 425, 430, 19 L. Ed. 260; Kirby v. Railroad Co., 120 U. S. 130, 138, 7 Sup. Ct. 430, 30 L. Ed. 569.

[6] Bein v. Heath, 12 How. 168, 13 L. Ed. 939; Pennsylvania v. Bridge Co., 13 How. 518, 14 L. Ed. 249; Wells v. Pierce, 27 N. H. 503.

[7] Basey v. Gallagher, 20 Wall. 670, 22 L. Ed. 452.

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ciples, as administered by the chancery courts in England, are still recognized and applied, unless inconsistent with the statutes and constitutions of the states.[3]

The Judiciary of Early Norman England.

The general scheme of judicial organization existing during the reign of William the Conqueror did not differ materially from what it had been under Edward the Confessor, prior to the Norman conquest. The shire or county courts, the hundred motes and borough courts, together with the hall motes, manor courts, or courts baron of the king and of the Norman lords, continued to be the ordinary courts of civil jurisdiction. But the supreme judicial authority was vested in the king, assisted by his councils. William appointed a chief justiciary to preside over all pleas and suits heard in the curia regis, which then, and for a considerable time afterwards, was a body composed of barons and high ecclesiastics with legislative, judicial, and administrative functions. Prof. Pomeroy, in his treatise on Equity Jurisprudence,* says that this creation of a permanent judicial officer was the germ of the professional common-law tribunals having a supreme jurisdiction throughout England, which subsequently became established as a part of the government, distinct from the legislative and the executive.

The judicial business of the curia regis was not separated from the legislative until the reign of Henry II. This was done by assigning the legal work to certain members of the king's court or council, who formed what was called the "aula regis." From the time of this separation until the enactment of the supreme court judicature act of 1873, the aula regis, or, as it was afterwards called, the "court of the king's bench," continued to be the highest common-law tribunal of original jurisdiction.

William the Conqueror appointed, as occasion required it, certain of his justices to preside over the county or hundred courts of the several provinces, and suits which would otherwise have been tried in the king's court were trans-

[3] Jones v. Mill Corp., 4 Pick. (Mass.) 507, 16 Am. Dec. 358; Tirrell v. Merrill, 17 Mass. 117; Wells v. Pierce, 27 N. H. 503; Boyd v. Dowie, 65 Barb. (N. Y.) 237.

* 1 Pom. Eq. Jur. § 11.

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ferred to the courts so constituted.[9] These justices were nominally the king's representatives, and were appointed to administer or superintend the administration of justice; but they were really in many cases the instruments of extortion and injustice. Following this practice, itinerant justices or justices in eyre were occasionally appointed by Henry I. to go from county to county to hold pleas, civil and criminal. This practice became permanent in the reign of Henry II.[10]

Justices of assize and nisi prius and of gaol delivery were appointed in the reign of Edward I. to hold sessions of justice in the provinces. Additional powers were given to these justices, and improvements made in their proceedings, which superseded the necessity of the appointment of justices in eyre, and none were appointed after the tenth year of the reign of Edward III. As a consequence of these changes in the administration of justice in the provinces, almost all the judicial business of the county was driven into the king's court, and the county and hundred courts ceased to exist for the purpose of determining controversies between litigants.[11]

The king's court followed the king in his journeys to different parts of his kingdom. This resulted in great inconvenience to suitors, which was sought to be remedied by one of the articles of Magna Charta, which declared that common pleas should no longer follow the king. Thenceforth justices were appointed expressly to hear and determine pleas of land, and injuries merely civil, which were known as "common pleas." This branch of the king's court was fixed at Westminster, and dates the origin of the court of common pleas.[12]

Perhaps the oldest of all courts emanating from the curia or aula regis was the exchequer. This was a board or court

[9] 1 Spence, Eq. Jur. p. 101.

[10] Spence, Eq. Jur. p. 115. Henry II. divided the kingdom into six parts, and chose as justices prudent and discreet men. These justices went from county to county, and held pleas, civil as well as criminal. The justices in eyre heard, among others, common pleas in their courts. There was an appeal from their decisions to the king's court. In all cases they had to give an account of their proceedings, which, for this purpose, was regularly entered on the rolls. Id.

[11] Spence, Eq. Jur. p. 116.

[12] Spence, Eq. Jur. pp. 113, 114.

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established by William the Conqueror to superintend and manage the royal revenues. To this board or court were added the chief justiciary, and the chancellor, and such barons and dignitaries of the church as the king selected for the purpose, who attended to judge the law and determine all matters of doubt. At first the jurisdiction of this court was confined to the decision of causes connected with the revenues, but its authority was subsequently enlarged by the use of a legal fiction, the plaintiff being permitted to allege that he was a debtor to the crown, and the aid of the court was invoked to enable him to recover from the defendant what would enable him to pay his debt to the crown.[13] In this way, to a certain extent, the jurisdiction of the court of exchequer became concurrent with that of the other superior law courts.

The Court of Chancery.

The court of chancery, in the exercise of its ordinary or common-law jurisdiction, is of very high antiquity. When the aula regis, or king's court, was broken into pieces, and its jurisdiction distributed among the several courts as above designated, the court of chancery received its portion. But at that time it is apparent that the court of chancery did not exist as a court of equity as distinguished from a court of law.[14] Under the early Norman kings there existed a select council, always in attendance on the king's person, corresponding to what is now termed the "privy council." This select council consisted of certain great officers, who were members ex officio,—as the chancellor, treasurer, grand justiciary, and justices of the other courts, and such others, usually barons, earls, and bishops, as the king might name. In early times—probably down to the time of Edward III.—this council, presided over by the king himself, discussed and decided upon applications for the exercise of the royal prerogative in regard to matters of judicial cognizance, crim-

[13] Spence, Eq. Jur. pp. 102, 114.

[14] Story, Eq. § 39, where it is said that among the earliest writers of the common law, such as Bracton, Glanvil, Britton, and Fleta, there is not a syllable to be found relating to the equitable jurisdiction of the court of chancery.

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inal and civil.[15] The great council of the king, which afterwards became parliament, also possessed and exercised on petition certain judicial functions. If it were impossible for the applicants and petitioners to obtain a remedy in the common-law courts, their applications and petitions were transmitted to the councils.[16] It is apparent that the chancellor was the principal officer with reference to the judicial business which the select council, as well as the great council, had to advise upon or transact. It early became the custom of the king to send certain petitions addressed to him, praying for extraordinary remedies, to the chancellor and master of the rolls, or to the chancellor alone. When the chancellor administered relief independently of the council, it was by express delegation from the king, and given, as it would

[15] "This council had an absolute jurisdiction over all the proceedings in the courts below. * * * If any litigant felt himself aggrieved, he applied for redress to the council in the same manner as he would have applied to the king before the latter committed his prerogative of distributing justice and equity to his council." Hardy, Introduction to Close Rolls, p. 26. Hallam, speaking of the ordinary functions of the select or privy council of the king, says: "The business of this council out of parliament may be reduced to two heads,—its deliberative office, as a council of advice, and its decisive power of jurisdiction. With respect to the first, it obviously comprehended all subjects of political deliberation, which were usually referred to it by the king; this being in fact the administration or governing council of state, the distinction of a cabinet being introduced in comparatively modern times. But there were likewise a vast number of petitions continually presented to the council upon which they proceeded no further than to sort, as it were, and forward them by indorsement to the proper courts, or advise the suitor what remedy he had to seek. Thus, some petitions are answered, 'This cannot be done without a new law;' some were turned over to the regular courts, as the chancery or king's bench; some of greater moment were indorsed to be heard 'before the great council'; some concerning the king's interest were referred to the chancery or select persons of the council." Hallam, Middle Ages, c. 8, pt. 3; Hale, Lords' House in Parliament, p. 26.

[16] If the matter were remediable at law, and there were no obstacles to the remedy being obtained, the petitioner was sent to the common-law courts; if it were a matter of revenue, he was sent to the exchequer; if the matter related to the king's grants, or was cognizable under the chancellor's ordinary jurisdiction, he was sent to the chancery. Spence, Eq. Jur. p. 332.

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seem, by the advice of the council.[17] Gradually judicial business of the council of a civil nature was assumed by the chancellor as the keeper of the king's conscience, and its chief judicial officer. The inadaptability of the council for the transaction of judicial business made easier this assumption.[18] The exercise of judicial functions by the king, the select or privy council, and the great council or parliament makes clear the fact that the common-law courts were insufficient, even in their infancy, for the needs of the country, and that there were civil rights which such courts could not protect.

The earliest general reference to petitions to the chancellor is found in an ordinance of 8 Edw. I., in the year 1280, complaining of the multitude of petitions presented to the king which could properly be dealt with by the chancellor and judges, and providing that all petitions that touch the seal shall go first to the chancellor, and those relating to other subjects shall go to the exchequer, the justices, and other tribunals, according to their nature.[19] It thus appears that during the reign of Edward I. it was not yet a fixed practice to send to the chancellor all petitions coming before the king or his councils which could not, in the first instance, go to the common-law courts. But the practice of delegating cases coming within the prerogative judicial jurisdiction of the crown and its councils to the chancellor for his sole decision, having once commenced, rapidly grew until it became the common method of dealing with such controversies.

In the reign of Edward III. the court of chancery, as a court of ordinary jurisdiction, became of great importance. But the chancellor, in the exercise of his common-law or or-

[17] Spence, Eq. Jur. p. 335.

[18] It is probable that the judicial power of the chancellor as a law judge, and his consequent familiarity with the laws of the realm, and experience in adjudicating, were the reasons why any case which appealed to the king's judicial prerogative, and which for any cause could not be properly examined by the council, was naturally referred either by the crown or the council to the chancellor for his sole decision. Whatever may have been the motives, it is certain that the chancellor's equitable jurisdiction commenced in this manner. Pom. Eq. Jur. § 33.

[19] Hardy, Introduction to Close Rolls, p. 28; 2 Stubbs, Const. Hist. Eng. p. 263.

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dinary jurisdiction, could not advert to matters of conscience. It would, nevertheless, seem that it was during this reign that the court of chancery first existed as a distinct court for giving relief in cases which required extraordinary remedies. Edward III. was a busy king, engaged in numerous foreign enterprises, and therefore unable to attend to the many petitions which were presented to him; consequently, in the twenty-second year of his reign, he, by a writ or ordinance, referred all matters as were of grace to be dispatched by the chancellor, or the keeper of the privy seal. It is generally considered that the court of chancery owes its existence as a regular court for administering extraordinary relief and equitable remedies to this or a similar ordinance.[20] It does not

[20] Spence, Eq. Jur. p. 337. Story quotes Wooddeson as deducing the jurisdiction from the same source, laying great stress on the ordinance above referred to, and also on the statute of 36 Edw. III. (Stat. I. c. 9), which he considers as referring many things to the sole and exclusive cognizance of the chancellor. And he adds that it seems incontrovertible that the chancery exercised an equitable jurisdiction, though its practice was, perhaps, not very flourishing or frequent, throughout the reign of Edward III. Story, Eq. (13th Ed.) § 45. S. Newham Davis says (Origin and Nature of Equity, 2 Jurist, 26): "In 1348, by the writ of 22 Edw. III., it was enacted that all matters of grace and favor were to be referred to the chancellor, and to be dispatched either by him or the keeper of the privy seal. This was the great step which recognized the equitable, as opposed to the legal, jurisdiction of the court of chancery, although the distinction was not finally established until the following reign. From this date the chancellor possessed an independent as well as separate jurisdiction." The ordinance or proclamation above referred to ran as follows: "The king to the sheriffs of London, greeting: For as much as we are greatly and daily busied in various affairs concerning us and the state of our realm of England, we will that whatsoever business, relating as well to the common law of our kingdom as our special grace, cognizable before us, from henceforth be prosecuted as followeth, viz.: The common law business, before the Archbishop of Canterbury elect, our chancellor, by him to be dispatched; and the other matters, grantable by our special grace, be prosecuted before our said chancellor or our well beloved clerk, the keeper of the privy seal, so that they, or one of them, transmit to us such petitions of business which without consulting us they cannot determine, together with their advice thereupon, without any further prosecution to be had before us for the same; that upon inspection thereof we may further signify to the aforesaid chancellor or keeper our will and pleasure therein; and, that none other do for the future

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appear, however, that matters of grace, involving equitable relief and remedies, were, at this time, exclusively sent to the chancellor. The great council, or parliament, and the privy council still exercised an equitable jurisdiction by delegation from the sovereign. From this time suits were brought before the chancellor by petition or bill, without any preliminary writ. If, on the presentation of such petition or bill, the case called for extraordinary interference, a writ was issued on the command of the chancellor, but in the name of the king, by which the party complained against was summoned to appear before the court of chancery to answer the complaint and abide by the order of the court.[21] In the reign of Edward III. the court of chancery ceased to follow the king.[22]

It was during the reign of Richard II. that the court of chancery was established as a distinct and permanent court, having a separate jurisdiction, with its own peculiar mode of procedure.[23] From the time of the reign of Henry VI. the equity jurisdiction of the court constantly grew in importance, and in the reign of Henry VIII. it expanded into a broad, and almost boundless, jurisdiction under the fostering care, the ambitious wisdom, and love of power of Cardinal Wolsey.[24]

pursue such kind of business before us, we command you immediately upon sight hereof to make proclamation of the premises." 1 Story, Eq. Jur. (13th Ed.) 44, note

[21] Spence, Eq. Jur. p. 338.

[22] Spence, Eq. Jur. p. 340; Parke, Hist. Court of Chancery, p. 34.

[23] Story, Eq. Jur. 46. By the statute 17 Rich. II. c. 6, it was enacted that, where persons were compelled to appear before the council or the chancery on suggestions found to be untrue, the chancellor should have power to award damages according to his discretion. From the time of the passing of this statute the court of chancery was established as a distinct and permanent court, having a separate jurisdiction. Spence, Eq. Jur. p. 345. This statute was a solemn recognition by parliament of the court as a distinct and permanent tribunal, having a separate jurisdiction, and its own modes of procedure and of granting relief; and the enactment was an important event in the legal history of the chancery. Pom. Eq. Jur. § 37.

[24] Story, Eq. Jur. (13th Ed.) § 51. See, also, 3 Reeve, Hist. Eng. Law, 379–382.

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CAUSES OF THE EXISTENCE OF THE EQUITY JURISDICTION.

2. The equitable jurisdiction of the court of chancery owes its origin to

(a) The inflexibility and rigidity of the common law,

(b) The inelasticity of the common-law system of procedure, and

(c) The ineffectiveness or inadequacy of the remedies provided by the common law.

Inflexibility of the Common Law.

It is frequently asserted that the principles of common law are founded on reason and equity. Doubtless this is, in a sense, true. So long as the common law was in the course of formation, it was not only susceptible of application to cases within the spirit of existing law, but not expressly provided for, but also of being applied in accordance with the principles of equity as subsequently known. But precedents established by the decisions of the judges soon came to be considered as of binding authority on succeeding judges. Hence, early in its history the English common law became essentially a lex scripta, positive and inflexible; and, although new principles have ever continued to be made, the rules of practice have not accommodated themselves to the exigencies of new circumstances and new cases.[1]

Had it not been for the blind conservatism of the courts of king's bench, common pleas, and exchequer in their regard for the rules and doctrines once formulated by precedents, and their inability and unwillingness to furnish remedies for such wrongs as, by their nature, would permit of redress, the reserve jurisdiction of the king's council would probably not

§ 2. [1] Spence, Eq. Jur. p. 321. The creation of equity arose out of the inability of courts of law, through the inflexibility of their rules and want of power, to adapt judgments to the special circumstances of cases to reach and to complete justice in all cases. Thomas v. Musical Mut. Protective Union, 121 N. Y. 45, 24 N. E. 24.

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have been called into play, and the distinct equitable jurisdiction of a court of chancery would never have been created. Mr. Green, in his History of England,* says: "The equitable jurisdiction of the chancellor sprang from the defective nature and technical and unbending rules of the common law. As the council had given redress in cases where law became injustice, so the court of chancery interfered, without regard to the rules of procedure adopted by the common-law courts, on the petition of a party for whose grievance the common law provided no adequate remedy. An analogous extension of his powers enabled the chancellor to afford relief in cases of fraud, accident, or abuse of trust; and this side of the jurisdiction was largely extended at a later time by the results of legislation on the tenure of land by ecclesiastical bodies."

It may be correctly assumed that the ultimate source of equitable jurisdiction was in the king's prerogative to administer justice independently of the courts. We have seen how the common law and equitable jurisdiction of the chancellor arose from the custom of the king and his council to refer matters pertaining to the administration of justice to that officer. But it is also true that the exercise of the king's prerogative would not have been often required had the common-law courts been able or willing to provide a remedy for every wrong. Many injuries existed which the common-law courts could not relieve. The suitor was, therefore, in such cases, compelled to throw himself upon the grace and compassion of the king and council; and later, when the equitable jurisdiction of the court of chancery became firmly established, he was required to seek relief in that court.

The equitable jurisdiction of the chancellor grew up in the same manner, and under the same circumstances, as the equitable jurisdiction of the prætor at Rome. Each of them arose from necessity in the actual administration of justice and from the deficiencies of the positive law (the lex scripta), or from the inadequacy of the remedies, in the prescribed forms, to meet the full exigency of each particular case. It was not a usurpation for the purpose of acquiring and exercising power, but a beneficial interposition to correct gross

* Green, Hist. Eng. book 3, c. 4.

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injustice, and to redress aggravated and intolerable grievances.[2]

The inability or failure of the common-law judges to adopt and apply the equitable principles contained in the Roman law added materially to the inflexibility of the common law, and aided in the growth of the equitable jurisdiction of the court of chancery. The Roman law was a growth in keeping with the needs of society, and contained a notion of equity sufficient, if applied to the administration of justice by common-law courts, to have made the development of the equitable jurisdiction of the court of chancery exceedingly difficult. This would have been especially so had the common-law judges availed themselves of the example set by the Roman prætors, and invented new actions and defenses to meet the exigencies of an advancing civilization. But in the early stages of the development of English equity, Roman law was not easily applied to the tenure of real property, and the status of persons, which were feudal in their origin and nature. There was nothing in common between the institutions of feudalism as they existed under the Norman kings and the doctrines of the Roman law. As long as these institutions continued, none of the doctrines of the Roman law could be effectively or advantageously applied to them. Moreover, the possible growth of the Roman law early received a lasting check. In the reign of Edward III. the exactions of the court of Rome had become odious to the king and the people. The king, having the support of his parliament, refused payment of the tribute which had been demanded by the pope, and measures were taken to prevent further encroachments of the papal power.[3] A general dislike on the part of the laity to anything connected with the Holy See began to spring up. The very name of Roman law became the object of aversion. In the reign of Richard II. the barons formally protested that they would not allow the kingdom to be governed by the Roman law, and the common-law judges prohibited it from being any longer cited in their courts. The immediate effect of this was not to banish the Roman law, but to transfer it to another tribunal, which

[2] Story, Eq. Jur. (13th Ed.) § 50.
[3] Spence, Eq. Jur. p. 346.

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was not governed by common-law doctrines. The jurisdiction of the court of chancery was greatly extended, and at once embraced the subject-matters of litigation which required the application of the principles and doctrines of the Roman law.

Inelasticity of System of Procedure.

The causes stated above as resulting in the extension of equity and the prevention of the expansion of the common law would not have been so effectual had it not been for the cramped and inflexible system of procedure early established in the courts of law. According to the common law, every species of civil wrong was supposed to fall within some particular class, and for each class an appropriate remedy existed by the use of a fixed number of "forms of action." If the facts and circumstances of a particular case could not be embraced in any of these forms, no remedy could be had, and the only mode of redress was by an application made directly to the king. The first step in every action was by a writ or breve issued in the name of the king. Each writ was founded on some principle of law authorizing the right of action, and stated sufficient facts to bring the case within such principle.[4] Thus, if a suitor had suffered an injury, it was not competent for him to bring to the notice of the court the facts of the case, and leave it to the court to say whether, upon such facts, the case was one deserving of redress; but he had first to determine within what class of wrong his case fell, and then apply for the proper writ. If the facts were such as to bring the alleged wrong within some of the classes recognized at common law, there was the risk of selecting an improper writ, which resulted in the suitor failing in his action.[5]

[4] Spence, Eq. Jur. p. 226.

[5] This, indeed, was a fertile source of injustice in common-law proceedings, even within the last few years; in fact until the common-law procedure act of 1852 (15 & 16 Vict. c. 76, § 3), which enacted "that it shall not be necessary to mention any form or cause of action in any writ of summons." Thus, before the late procedure act, it often happened that a man sued in "debt" when he ought to have sued in "assumpsit," or "trespass" when he ought to have selected "case." He incurred, perhaps, great expense; and, although proving at the trial facts showing him to be entitled to a

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All these writs were issued in early times by the clerks in chancery. Their nature was fixed, and could not be substantially changed. If a precedent could not be found among those formerly granted on facts similar to those of the case brought by the suitor, he had no action. It often happened, therefore, that there was an absolute denial of justice to the complainant. This evil was apparently felt at an early time, for in 13 Edw. I. a statute was passed attempting a remedy by extending the discretion of the clerks in chancery in framing the writ. This statute * provided that "whensoever from henceforth it shall fortune in the chancery, that in one case a remedy is found, and in like case falling under like law, and requiring like remedy, none is found, the clerks of the chancery shall agree in making the writ, or the plaintiff may adjourn it until the next parliament; and the cases in which the clerks cannot agree are to be written and referred by them unto the next parliament, and by agreement of men learned in the law a writ is to be made, lest it should happen that the court should long time fail to minister justice unto complainant." This statute did not furnish adequate relief. The clear intent was to permit the common-law courts to administer justice in cases not within the precedents already established. But the common-law judges refused to consider themselves bound by the decisions of the clerks in chancery in issuing writs under such statute, and exercised the right, which they had always assumed, of determining the validity of all writs. Knowing the antipathy to Roman law, it can be readily seen that new writs issued to meet newly-occurring emergencies involving, as they undoubtedly did, the principles of Roman law, must have aroused the jealousy of the common-law judges, and made them reluctant to avail themselves of the privileges conferred by the statute. When not disregarding entirely the new writs issued by the chancery clerks, the judges construed the statute so strictly that its ultimate object of enlarging the scope of the common law and retarding the growth of the equitable jurisdiction of the court of chancery was completely frus-

common-law remedy, yet failed because he had selected the wrong form of action. Haynes, Eq. p. 9.

* 13 Edw. I. st. 1, c. 24.

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trated. The courts imposed a highly restrictive meaning upon the words, "falling under like law, and requiring like remedies," and insisted that all new writs should be like one of those in use in the common-law forms of action; so that, unless the relief sought fell within prescribed forms, there was no remedy, and litigants requiring special equitable relief were still compelled to seek another tribunal. The statute only provided for new writs on behalf of plaintiffs. But with advancing civilization new defenses also arose, for which no provision had been made, and which, therefore, fell beyond the province of the common law. In such cases the jurisdiction of the chancellor was appealed to, which was generally exercised by enjoining the prosecution of the legal action in which the equitable defense interposed had been rejected.

While this statute was ineffectual to prevent the growth of the equity jurisdiction, it resulted in the creation of at least three new forms of legal actions,—"trespass on the case," and its offshoots, "trover" and "assumpsit,"—which in later times were potent aids in the reformation and reconstruction of the common law. These actions have been free from formal restraints, flexible in their adaptability, and capable of being administered in conformity with equitable doctrines. Through their means, many of the rules which were originally established by the chancellor have been incorporated into the law, and are now mere legal commonplaces.[6]

Inadequacy of Common-Law Remedies.

Another, and perhaps the most direct and proximate, cause of the growth and development of the system of equity is the insufficiency or inadequacy of common-law remedies. It has been said that the growth of equity has its root in the system of remedies adopted. While it is the office of chancery to mitigate the rigor of the common law, to supply its deficiencies, to relieve against its technical rules, and to decide controversies according to equity and good conscience, it is because of its system of remedies that it is enabled to do this.[7] To understand this, it is only necessary to consider

[6] 1 Pom. Eq. Jur. § 29.
[7] 1 Keener, Cas. Eq. Jur. p. 10 (Langd. Eq. Pl.).

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the distinction between the judgments of courts of law and the decrees of courts of chancery. In an action at law a general and unqualified judgment only can be given for the plaintiff or for the defendant, without any adaptation of it to particular circumstances. But courts of equity can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest. They may administer remedies for rights which are not recognized by courts of common law. Thus, what are technically called "trusts" are wholly without any cognizance at the common law, and the abuses of such trusts are beyond the reach of legal process. But they are cognizable in courts of equity, and an ample remedy is there given in favor of the cestuis que trustent for all wrongs and injuries, whether arising from negligence or positive misconduct. There are also many cases of losses and injuries by mistake, accident, and fraud, of penalties and forfeitures, of impending irreparable injuries or meditated mischiefs, and of oppressive proceedings, undue advantages and impositions, betrayals of confidences, and unconscionable bargains, in all of which courts of equity will interfere, and grant redress, but of which the common law takes no notice, or silently disregards. Courts of equity may compel a party to specifically perform a broken contract; courts of common law can only award damages for the breach. Courts of equity can prevent wrongs by injunction, but courts of common law can only grant redress when the wrong is done.[8] This power of

[8] Story, Eq. Jur. §§ 28–30. It was probably in the reign of Richard II. that the chancellor began to establish systematically his peculiar restraining jurisdiction. This originated in the practice of feoffments to uses, by which the feoffor, who had legal seisin of the land, stood bound by private engagement to suffer another, called the cestui que use, to enjoy its use and possession. Such fiduciary estates were well known to the Roman jurists, but inconsistent with the feudal genius of the English law. The courts of justice gave no redress, if the feoffor to uses violated his trust by detaining the land. To remedy this, an ecclesiastical chancellor devised the writ of subpœna, compelling him to answer on oath as to his trust. It was evidently necessary also to restrain him from proceeding, as he might do, to obtain possession; and this gave rise to injunctions,—that is, prohibitions to sue at law,—the violation of which was punishable by imprisonment as a contempt of

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diversifying the remedies so that they may be applied to all wrongs capable of redress, and protect the legal rights of suitors, has always given courts of equity an advantage over courts of common law, and tended to enlarge the exercise of the jurisdiction of the former.

SEPARATE EQUITABLE TRIBUNALS ABOLISHED.

3. The separate tribunals of law and equity were abolished in England by the supreme court judicature act of 1873.

By the supreme court judicature act of 1873,[1] the constitution of the courts of England was radically changed. By this act it was enacted that in every civil cause or matter law and equity shall be concurrently administered in one supreme court of judicature created by uniting all the higher tribunals both of equity and common law, and that in all matters not particularly mentioned in the act, where there is any conflict or variance between the rules of equity and the rules of common law, the rules of equity shall prevail. As a result of this legislation, the legal and equitable jurisdictions are administered by the same court, and legal and equitable rights are enforced, and legal and equitable remedies are granted in the same action.[2] The line of demarkation be-

court. Other instances of breach of trust occurred in personal contracts, and others wherein, without any trust, there was a wrong committed beyond the competence of the courts of law to redress; to all which the process of subpœna was made applicable. This extension of a novel jurisdiction was partly owing to a fundamental principle of our common law that a defendant cannot be examined, so that, if no witness or written instrument could be produced to prove a demand, the plaintiff was wholly debarred of justice; but in a still greater degree to a strange narrowness and scrupulosity of the judges, who, fearful of quitting the letter of their precedents, even with the clearest analogies to guide them, repelled so many just suits, and set up rules of so much hardship, that men were thankful to embrace the relief held out by a tribunal acting in a more rational spirit. 1 Hallam, Const. Hist. p. 469.

§ 3. [1] 36 & 37 Vict. c. 66.

[2] By the supreme court of judicature act the court of chancery,

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tween legal actions and suits in equity was thus obliterated after the development and growth of both systems, side by side, through many centuries. But the principles of equity jurisprudence are still in force. Equitable doctrines, estates, and remedies still exist as part and parcel of a system as distinct from the legal system as when separate tribunals were in active operation for the administration of justice. Nor have the importance and value of equitable principles been lessened by the consolidation of such tribunals. No modifications can be introduced by statute into the judicial system of any civilized state whose institutions are directly or indirectly of English origin which will in any way abrogate the necessity for the use and application of principles which have always been administered by courts of equity.

EQUITY JURISDICTION IN THE UNITED STATES.

4. The equity jurisdiction exercised in the United States courts and in the courts of the several states is founded upon, co-extensive with, and in most respects conformable to, that of England.

When the American colonies became states, statutes were passed in many of them declaring that the English law in force on a certain day should be adopted by the courts of such states as the common law thereof, and should remain such until modified by legislation. In many states there was also contained in the same or similar statutes a declaration recognizing and adopting the equity jurisdiction of the English courts of chancery. In other states—as New York, New Jersey, Maryland, Delaware, and South Carolina—the constitutions provided for the establishment of courts of

the court of queen's bench, the court of common pleas, the court of exchequer, the high court of admiralty, the court of probate, the court for divorce and matrimonial causes, and the London court of bankruptcy were united and consolidated in one supreme court of judicature, to consist of two divisions under the name of "Her Majesty's High Court of Justice" and "Her Majesty's Court of Appeal."

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chancery. In still others the courts, without the intervention of constitutional or statutory provision, at once adopted the judicial system of the mother country.

The federal constitution provides that the judicial power of the United States "shall extend to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority." [1] The uniform interpretation of this clause has been that by cases in equity are meant cases which, in the jurisprudence of England, are so called in contradistinction to cases at common law.[2] The rules of the supreme court of the United States provide, and it has more than once been held, that, when not otherwise directed, the practice in the high court of chancery in England shall be followed.[3] And in states where courts of equity do not exist, or where equity is administered by the same courts and in the same form as the common law, the procedure of the federal courts is regulated by the provisions of the United States constitution and statutes, and is not affected by the practice in the state courts. Federal courts are bound to administer equitable remedies uniformly throughout the United States in all cases to which they are applicable, where such remedies cannot be obtained in a common-law action, regardless of the statutes in force in the states where such courts are sitting.[4]

§ 4. [1] Const. U. S. art. 3, § 2.

[2] Robinson v. Campbell, 3 Wheat. 223, 4 L. Ed. 372; Parsons v. Bedford, 3 Pet. 433, 447, 7 L. Ed. 732; Neves v. Scott, 13 How. 270, 14 L. Ed. 140; Boyle v. Zacharie, 6 Pet. 658, 8 L. Ed. 532.

[3] Mississippi Mills v. Cohn, 150 U. S. 202, 205, 14 Sup. Ct. 75, 76, 37 L. Ed. 1052; Payne v. Hook, 7 Wall. 425, 430, 19 L. Ed. 260; Kirby v. Railroad Co., 120 U. S. 130, 138, 7 Sup. Ct. 430, 30 L. Ed. 569; Bein v. Heath, 12 How. 168, 13 L. Ed. 939; Pennsylvania v. Bridge Co., 13 How. 518, 14 L. Ed. 249; Wells v. Pierce, 27 N. H. 503.

[4] Equitable titles, though allowed to be set up in state courts in common-law suits, cannot be recognized in such suits in the federal courts. They must be made the subject of suits in equity. Ridings v. Johnson, 128 U. S. 217, 9 Sup. Ct. 72, 32 L. Ed. 401. See, also, Bodley v. Taylor, 5 Cranch, 191, 221, 222, 3 L. Ed. 75; Livingston v. Story, 9 Pet. 632, 9 L. Ed. 255; Watkins v. Holman's Lessee, 16 Pet. 25, 26, 58, 59, 10 L. Ed. 873; Stinson v. Dousman, 20

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Administration of Equity in the Several States.

Mr. Pomeroy says: "The American state courts do not derive their equitable powers, as they do their common-law functions, as a part of the entire common-law system of jurisprudence which we have inherited from England, and which is assumed to exist even independently of legislation. Their equitable jurisdiction is wholly a creature of statute, and is measured in each state by the extent and limitations of the statutory authority." [5] It may thus be seen that the details of the equity jurisdiction as it exists in any particular state can only be ascertained by a close study of the decisions and statutes of that state. In many of the states equity is still administered by separate tribunals. Such states are New Jersey, Alabama, Delaware, Mississippi, and Tennessee. In Kentucky, the circuit courts have original jurisdiction of all matters, both in law and equity; but a special court is established in certain districts for the hearing and decision of all equitable actions which would otherwise be heard by the circuit courts of those districts. In many other states—such as Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Maryland, Virginia, West Virginia, Georgia, Florida, Texas, Arkansas, Michigan, Iowa, North Dakota, South Dakota, Colorado, Washington, and Oregon—separate courts of equity have either never existed or have been abolished, and chancery powers are exercised by common-law courts, but the forms of action and procedure are retained. The state of New York, by its constitution of 1846, abolished courts of chancery, and conferred upon the supreme court general jurisdiction in law and equity, with all the powers possessed by the former court of chancery.[6] By the Code of Procedure enacted soon after the adoption of this constitution, the distinction between actions at law and suits in equity, and the forms of all such actions and suits, were abolished, and one form of

How. 461, 464, 15 L. Ed. 966; Greer v. Mezes, 24 How. 268, 277, 16 L. Ed. 661; Noonan v. Lee, 2 Blackf. 499, 509, 17 L. Ed. 278; Walker v. Dreville, 12 Wall. 440, 20 L. Ed. 429; Basey v. Gallagher, 20 Wall. 670, 679, 22 L. Ed. 452.

[5] 1 Pom. Eq. Jur. § 282.

[6] Const. 1846, art. 6, § 6, and Id. art. 14, §§ 5, 6. See present Const. 1894, art. 6, § 1.

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action for the enforcement and protection of private rights and the redress of private wrongs was adopted, which is denominated a "civil action." [7] The example thus set by New York has been followed by North and South Carolina, Ohio, Indiana, Wisconsin, Minnesota, Missouri, Kansas, Nebraska, Wyoming, Idaho, Montana, Utah, California, and Nevada.

The classification of states above made is in accordance with the manner and method of administering equity. In many of the states above classified the chancery powers delegated to the courts are substantially the same as those possessed by the English court of chancery; but in others the delegation of power is special in its nature, and limited in its extent. In the states of Maine, New Hampshire, Massachusetts, and Pennsylvania the chancery powers possessed by the courts were originally specified by statute; and no powers were thus possessed which were not so specified. New Hampshire and Massachusetts by subsequent statutes so extended the equity jurisdiction of their courts that it is now practically unlimited.[8] But in Maine and Pennsylvania the statute still limits the equitable jurisdiction of the courts. The statutes of the other states differ in their methods of conferring the equitable jurisdiction, but it may be stated

[7] Code Proc. (passed April 12, 1848) § 69. See present Code Civ. Proc. § 3339, which is as follows: "There is only one form of civil action. The distinction between actions at law and suits in equity, and forms of those actions and suits, have been abolished."

[8] By Gen. St. N. H. 1867, p. 388, c. 190, § 1, the supreme court has the powers of a court of equity in all cases cognizable in such courts, and may hear and determine according to the course of equity in cases of charitable uses, trusts, fraud, accident, or mistake; of the affairs of co-partners, joint tenants or owners, or tenants in common; of the redemption and foreclosure of mortgages, etc., "and in all other cases where there is not a plain, adequate, and complete remedy at law, and such remedy may be had by proceedings according to the course of equity." In Massachusetts it was provided by St. 1877, c. 178, p. 558, § 1, that: "The supreme judicial court shall have jurisdiction in equity of all cases and matters of equity cognizable under the general principles of equity jurisprudence, and in respect of all such cases and matters shall be a court of general equity jurisdiction." This jurisdiction was conferred in 1883 upon the superior court, which now has concurrent equity jurisdiction with the supreme judicial court.

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generally that the extraordinary jurisdiction of the English courts of chancery has been transferred to and adopted by the courts of such states practically without limitation as to scope and nature.[9]

It is evident that the greatest change in the equity jurisdiction has been made in those states in which the distinction between legal and equitable forms of action has been abolished, and one form of action adopted to take the place of both. But even in those states the equitable principles according to which the rights of parties are to be determined remain unchanged. The change in procedure and in judicial systems was not intended to secure an interference with or modification of the existing rules and principles of equity unless questions of equity pleading and procedure are involved, or unless such rules and principles affect the separate and distinct character of the equity jurisdiction.[10] The

[9] Mr. Pomeroy, in his Equity Jurisprudence (volume 1 [2d Ed.] 283–288), attempts a classification of the states in respect to the amount of equity jurisdiction possessed by the state courts. He divides the states into four classes: (1) Where statutes or constitutions confer an equity jurisdiction identical or co-extensive with that possessed by the English court of chancery; (2) where the constitutions, not in express terms, but by implication, create and confer an equity jurisdiction substantially the same as that possessed by the English court of chancery, except so far as modified or limited by statute; (3) where the constitutions and statutes do not confer a general equity jurisdiction by any single comprehensive provision, or single grant of power, but enumerate and specify the heads or divisions of equity jurisprudence over which the jurisdiction of the courts shall extend, with various restrictions and limitations; (4) where the constitutions and statutes, in their grants of jurisdiction to the courts, make no distinction between, nor even any mention of, either "law" or "equity." These are the states which have abandoned the forms of procedure inherited from England, and adopted the reformed American procedure. Their constitutions and statutes confer upon the courts complete power and jurisdiction to hear and determine all civil cases, or to grant all civil remedies; and they thus implicitly include a full jurisdiction in cases and over remedies of an equitable character, as well as those of a legal nature.

[10] The following note in 1 Abb. N. Y. Dig. tit. "Actions," p. 31, is instructive as showing the effect of the abolition of the distinctions between legal and equitable forms of actions, as declared by the court of appeals in New York: "The following principles may now

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only result sought or attained by abolishing the distinction between law and equity procedure was to unify the instrumentalities, modes, and external forms by which justice is

be deemed settled by the decisions of the court of appeals, and recognized by good authority in practice: First. It is only the distinction between different forms of actions or suits that is abolished. The difference between legal relief (by which is understood, in general, compensation in damages), and equitable relief (by which is understood, in general, specific relief, such as courts of law could not grant), is inherent, and the essential facts which constitute the right to relief of either kind are unchanged; suitors will ask for one or the other or both, according to the nature of the facts. Cole v. Reynolds, 18 N. Y. 74; Goulet v. Asseler, 22 N. Y. 225. Second. Where the same facts entitle plaintiff to both kinds of relief, both may be administered in one action. All the relief to which a party is entitled, arising from the same transaction, may be obtained in one suit. Corning v. Nail Factory, 40 N. Y. 191; Lattin v. McCarty, 41 N. Y. 107. Upon the same principle, when, as is often the case, the facts would sustain plaintiff's claim to legal relief, and yet would entitle defendant to equitable relief interfering with and nullifying the former, the whole matter can be adjusted in one action. In other words, purely equitable defenses are available against strictly legal causes of action. Crary v. Goodman, 12 N. Y. 266, 64 Am. Dec. 506; Phillips v. Gorham, 17 N. Y. 270. And, on the other hand, in an action for legal relief, a matter which would have been a bar in an action at law is not such if it would not have been in equity. Cole v. Reynolds, 18 N. Y. 74. Third. It is no objection to joining distinct causes of action or defenses in one action that they require different kinds of relief. Phillips v. Gorham, 17 N. Y. 275; Lattin v. McCarty, 41 N. Y. 107." As to the effect of abolishing such distinction in other states, see De Witt v. Hays, 2 Cal. 463, 56 Am. Dec. 352; Woodford v. Leavenworth, 14 Ind. 311; Matlock v. Todd, 25 Ind. 128; Claussen v. La Frenz, 4 G. Greene (Iowa) 224; Russell v. Minnesota Outfit, 1 Minn. 162 (Gil. 136); Maguire v. Vice, 20 Mo. 429; Richardson v. Means, 22 Mo. 495; Hunter v. Hunter, 50 Mo. 445; Matthews v. McPherson, 65 N. C. 189; Burrage v. Mining Co., 12 Or. 169, 6 Pac. 766; Sykes v. Bank, 2 S. D. 242, 49 N. W. 1058. The functions of judges in dealing with equitable principles in equitable cases are as well settled a part of the judicial power, and as necessary to its administration, as the functions of juries in common-law cases, and it is not in the power of the legislature to take them away. It was, therefore, held that the constitution of Michigan (Art. 6, § 5), which authorizes the legislature to abolish, as far as practicable, distinctions between law and equity proceedings, only authorizes the removal of nominal distinctions. Brown v. Circuit Judge, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226.

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administered, rights are protected, and remedies are conferred, without affecting the settled principles, doctrines, and rules of equity jurisprudence and equity jurisdiction.[11]

[11] Mr. Pomeroy in his Equity Jurisprudence (volume 1, 2d Ed. § 854) says: "To sum up this result in one brief statement, all equitable estates, interests, and primary rights, and all the principles, doctrines, and rules of the equity jurisprudence by which they are defined, determined, and regulated, remain absolutely untouched, in their full force and extent, as much as though a separate court of chancery were still preserved. In like manner all equitable remedies and equitable rights—that is, the equitable causes of action, and the rights to obtain the reliefs appropriate therefor, and the doctrines and rules of equity jurisdiction which govern and regulate; not the mere mode of obtaining them, but the fact of obtaining such remedies—also remain wholly unchanged, and still control the action of courts in the administration of justice."

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CHAPTER II.

GENERAL PRINCIPLES GOVERNING THE EXERCISE OF EQUITY JURISDICTION.

5. Equity and the Common Law.
6. Equity Jurisdiction Defined.
7. Exercise of Equity Jurisdiction.
8. Adequate Remedy at Law.
9. Multiplicity of Suits.
10. Retention of Jurisdiction to Award Complete Relief.
11. Effect of Acquisition by Courts of Law of a Jurisdiction Similar to that of Equity.
12. Auxiliary Jurisdiction of Equity.

EQUITY AND THE COMMON LAW.

5. The original relationship of equity and the common law has been materially modified by

(a) The gradual adoption and application by law courts of equitable doctrines,

(b) Legislative enactments.

Many important doctrines formerly recognized by courts of equity alone have, in modern times, been adopted and applied by courts of law. The rigid adherence of the common law to precedent, and a strict application of the forms and notions of the ancient law, have been gradually lessened, so that now many of the rules in force in courts of law are as equitable and righteous in their nature as those applied in courts of equity.[1] Statutes have been enacted which have directed the application of equitable principles in all courts, producing in many instances an amelioration of the hardships of the common law, and imposing upon courts of law, in such instances, a jurisdiction which had hitherto been exclusively cognizable in courts of equity. The statutes here referred to are not those modifying the forms of procedure, and providing for the administration of legal and equitable rules by

§ 5. [1] Pom. Eq. Jur. § 69.

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the same courts, but those having for their object the general use of equitable principles and doctrines in all courts. It is not necessary at this time to specify in detail all these changes. Among the most important, perhaps, are those affecting the rights and property of married women. Statutes have been passed in nearly all the states abrogating the common-law rules giving the husband an ownership or interest in his wife's property; and by such statutes she is generally given the same power to manage her property and make contracts in respect thereto as if she were unmarried. These statutes vary in their extent in the several states; but in all of them the effect upon the equitable jurisdiction has been very great. Equity has always intervened for the protection of married women as against the frequent hardships resulting from the application of legal rules. But the necessity for this intervention is taken away when statutes confer upon married women the right of full legal ownership.

Statutes in the American states govern the administration of estates of decedents, and the care and custody of the persons and property of infants. For this purpose surrogates' or probate courts have been created, and the equitable rules relating to the settlement of such estates and the management of the property of infants have been enacted in statutory form to be enforced in such courts, to the practical exclusion of the equitable jurisdiction.

Among other instances of the modification of the relation existing between the two jurisdictions by statutory enactment is the abrogation of the distinction between sealed and unsealed instruments. At law a sealed instrument could only be discharged by another instrument of as high a character, or by a delivery and cancellation of the sealed instrument. Equity, regarding the real relations of the parties, looked beyond the seal, and gave force to the real fact of the payment or satisfaction of the sealed instrument. Statutes in many states have declared that the equitable rule shall be universally applied, and have abolished the distinction between sealed and unsealed instruments.

Many other instances of the legislative enunciation of equitable principles might be mentioned. The present purpose is merely to emphasize the fact that the relations existing

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between the two systems of equity and the law are not now the same as when equity was in its infancy, and the common-law undeveloped. These changes have made useless the discussion of many equitable doctrines which have become obsolete, since all occasion for their application has been removed.

EQUITY JURISDICTION DEFINED.

6. Equity jurisdiction, as distinguished from the common-law jurisdiction, is the power to hear certain kinds and classes of civil causes according to the principles of the method and procedure adopted by the court of chancery, and to decide them in accordance with the doctrines and rules of equity jurisprudence.[1]

Ordinarily, the term "jurisdiction" means the power possessed by a court to determine judicially a case presented to it for decision. If such power is not possessed in reference to a particular case, the determination of the court in respect thereto is of no force or effect. This strict meaning of the term is not generally applied when used in connection with courts of equity. An action may not properly be brought in a court of equity, and yet its judgment therein is not necessarily null and void, unless objection be made by the defendant at the commencement of the action.[2]

A court of equity cannot try issues arising in the prosecution of a criminal indictment, and its judgment therein would be unenforceable. Equity can neither prevent the commission of crimes,[3] interfere with their prosecution,[4] nor par-

§ 6. [1] Pom. Eq. Jur. § 129.

[2] Cummings v. Mayor, etc., 11 Paige (N. Y.) 596; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528; Creely v. Brick Co., 103 Mass. 514.

[3] Equity will not restrain the issuance of licenses to gamblers by the officers of a fair association, since gambling is a violation of

[4] See note 4 on following page.

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don a punishment. But a person who is 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 right is violated, in contradistinction to the rights of the rest of the public, that individuals are precluded from bringing suits.[5]

the Criminal Code, which affords ample means for its suppression. Cope v. Association, 99 Ill. 489. And injunction has been refused against a violation of the Sunday laws. State v. Schweickardt, 109 Mo. 496, 19 S. W. 47; Sparhawk v. Railway Co., 54 Pa. 401.

[4] It was laid down in an early case (1742) by Lord Hardwicke that chancery has no restraining power over criminal prosecutions. Mayor, etc., of York v. Pilkington, 2 Atk. 302. And see, also, 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. In our courts the same principle has been generally unheld. West v. Mayor, etc., 10 Paige (N. Y.) 539; Davis v. Society, 75 N. Y. 362; Tyler v. Hamersley, 44 Conn. 419, 422, 26 Am. Rep. 479; Stuart v. Board, 83 Ill. 341, 25 Am. Rep. 397; Devron v. First Municipality, 4 La. Ann. 11; Moses v. Mayor, etc., 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; Waters Pierce Oil Co. v. City of Little Rock, 39 Ark. 412; Spink v. Francis (C. C.) 19 Fed. 670; Spink v. Francis (C. C.) 20 Fed. 567; Suess v. Noble (C. C.) 31 Fed. 855; In re Sawyer, 124 U. S. 210, 8 Sup. Ct. 482, 31 L. Ed. 402; Hemsley v. Myers (C. C.) 45 Fed. 283; Crighton v. Dahmer, 70 Miss. 602, 13 South. 237, 21 L. R. A. 84, 35 Am. St. Rep. 666; Chisholm v. Adams, 71 Tex. 678, 10 S. W. 336; Poyer v. Village of Des Plaines, 123 Ill. 111, 13 N. E. 819.

[5] The fact that the accumulation of nitroglycerin within the corporate limits of a city is made a crime does not prevent a private citizen from securing an injunction, 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. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433; Greenfield Gas Co. v. Gas Co., 131 Ind. 599, 31 N. E. 61. And a threatened violation of an ordinance prohibiting the erection of wooden buildings within the fire limits of a city will be enjoined at the suit of private persons, who would sustain irreparable injury, though the building would not be a nuisance per se. First Nat. Bank of Mt. Vernon v. Sarlis, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185. 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, 29 Am. Rep. 63; Blanc v. Murray, 36 La. Ann. 162, 51 Am. Rep. 7.

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EXERCISE OF EQUITY JURISDICTION.

7. To warrant the exercise of equity jurisdiction, either

(a) The cause of action must involve the maintenance or protection of an equitable right, estate, or interest; or

(b) The remedy sought must be in its nature purely and exclusively equitable; or

(c) The remedy afforded by common law must be inadequate, and the remedy sought in equity one which, under the facts and circumstances of the case, can only be made complete and adequate through equitable modes of procedure.

There are many titles and interests not cognizable at law. The common law recognizes none but the legal title. He who seeks the aid of a law court must base his demand upon his legal title. Without such title his suit will not succeed. But frequently the legal title to an estate is vested in one person, while the right to its use and enjoyment is in another. This right constitutes an equitable interest, which, being ignored by the common-law, can only be preserved and protected in equity. This right is generally termed a trust estate, and the person holding the estate is the trustee, and the person for whose benefit the trust is held is the beneficiary, or cestui que trust.[1] Many other rights, titles, and interests in property have been created by equity which were unknown at common law, and which have never been recognized in law courts. Among these are the mortgagor's equity of redemption,[2] and the rights of assignees of choses in action,[3] and of equitable lienors.[4] Cases involving the enforcement,

§ 7. [1] See post, c. 14, p. 354.
[2] See post, c. 17, p. 468.
[3] See post, c. 19, p. 493.
[4] See post, c. 18, p. 474.

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maintenance, and protection of these equitable rights fall within the exclusive jurisdiction of courts of equity. Unless otherwise provided by legislative enactment, such cases are never cognizable by courts of law.

There are also purely equitable remedies, which are administered by courts of equity, and not by courts of law. These remedies do not necessarily depend upon the estate involved for their equitable character. They are equitable because they can only be obtained in courts of equity. A suit for quieting title, or for removing a cloud upon title by the cancellation of an adverse instrument, may result in the establishment of a legal estate; but, nevertheless, the remedy itself is within the exclusive jurisdiction of a court of equity. A suit for the specific performance of a contract is within this exclusive jurisdiction, although an action might be maintained at law for the recovery of damages for the breach of the contract sought to be enforced.

ADEQUATE REMEDY AT LAW.

8. Equity has no jurisdiction where there is an adequate, complete, and certain remedy at law. If the law falls short of what the suitor is entitled to, if it does not furnish him full and complete justice, or if it affords him a remedy which is doubtful or obscure, a jurisdiction in equity is established.[1]

§ 8. [1] Story, Eq. Jur. 33. And see National Bank of Commerce of Tacoma, Wash., v. Wade (C. C.) 84 Fed. 10; Grand Trunk Ry. Co. v. Railroad Co. (C. C.) 85 Fed. 87. A singular and interesting case involving the question of the power of equity to intervene where no remedy exists at law is that of Dr. David Kennedy Corp. v. Kennedy, 165 N. Y. 353, 59 N. E. 133, 55 N. Y. Supp. 917. In this case the defendant was engaged in the manufacture and sale of proprietary remedies, and sold to the plaintiff, a corporation, his business and the sole and absolute right to use his name and address, viz. the names, "Dr. David Kennedy, of Rondout, N. Y., or Dr. D. Kennedy, Rondout, N. Y., in connection with the manufacture of proprietary medicines," which business was largely carried on by advertising and correspondence under such names. It

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The inadequacy of the legal remedy may be said to be the foundation of the concurrent jurisdiction of courts of equity. The concurrent jurisdiction covers all cases in which no adequate remedy can be obtained at law except by circuity of action or by multiplicity of suits, and adequate and complete relief can be given in equity in one and the same action; as in the cases of accident, mistake, and fraud.

Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords adequate, complete, and certain relief, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.[2] This principle has been observed, not, perhaps, from the very earliest period of the recorded history of the English chancery court, but certainly ever since equity jurisprudence has been reduced to a definite system.[3] Courts of equity have steadily refused to entertain jurisdiction of actions for the recovery of land when the legal remedy by ejectment is adequate,[4] and so, where

was held that the purchaser had an absolute right to use such names and addresses. Where it afterwards appears that the seller is receiving and opening letters belonging to the corporation, addressed in the forms aforesaid, such acts are properly restrained by injunction. But since the parties, by their contract, made it difficult to so separate their letters as to give each its or his own, and their relations are so unfriendly that neither should be allowed to receive and open letters of a confidential character intended for the other, the court directed the appointment of a referee, with power to receive, open, and read all letters sent to such names and addresses, and to make prompt distribution of the same according to their true destination.

[2] Hipp v. Babin, 19 How. 271, 277, 15 L. Ed. 633; Lewis v. Cocks, 23 Wall. 466, 467, 23 L. Ed. 70; Smyth v. Banking Co., 141 U. S. 656, 12 Sup. Ct. 113, 35 L. Ed. 891; Killian v. Ebbinghaus, 110 U. S. 568, 573, 4 Sup. Ct. 232, 28 L. Ed. 246; Porter v. Water Co., 84 Me. 195, 24 Atl. 814; Watson v. Ferrell, 34 W. Va. 406, 12 S. E. 724; McMillen v. Mason, 71 Wis. 405, 37 N. W. 253; Williams v. Haynes, 78 Ga. 133; Avery v. Woolen Co., 82 N. Y. 582; Alger v. Anderson (C. C.) 92 Fed. 696; Tuttle v. Batchelder & Lincoln Co., 170 Mass. 315, 49 N. E. 640; Pulezer v. Kucharzyk, 116 Mich. 92, 74 N. W. 304.

[3] Lewis v. Cocks, 23 Wall. 466, 467, 23 L. Ed. 70; Tenham v. Herbert, 2 Atk. 483.

[4] Cox v. Boyleston, 57 Ala. 270; Lewis v. Cocks, 23 Wall. 466, 23 L. Ed. 70; Danforth v. Roberts, 20 Me. 307; Weiss v. Levy, 166 Mass. 290, 44 N. E. 225; McClanahan v. West, 100 Mo. 309, 13 S.

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the controversy involves merely the legal title to lands, there is an adequate remedy at law, and equity has no jurisdiction.[5] And equity will not assume jurisdiction of a case involving a question of unliquidated damages for a tort.[6] Where, by the commission of a tort in the conversion of personal property, a right to damages has accrued to a person, the remedy is at law, and there is no reason for a resort to equity.[7] And in cases arising from violations of contract obligations, where the plaintiff may be amply compensated by an award of damages, the legal remedy is adequate, and a suit in equity will not lie.[8] A suit in equity cannot be maintained to re-

W. 674; Haythorn v. Margerem, 7 N. J. Eq. 324; Mead v. Camfield, 11 N. J. Eq. 38; Moores v. Townshend, 102 N. Y. 387, 393, 7 N. E. 401; Jenkins v. Hannan (C. C.) 26 Fed. 657 (in this case it was sought to set aside deeds made on orders of sale of lands in judicial proceedings, which were alleged to be null and void, and for an account of rents and profits; it was held that there was a plain and adequate remedy at law by an action of ejectment for the recovery of the possession of the lands and the mesne profits, and that equity has no jurisdiction); Dalton v. Hamilton, 50 Cal. 422; Daniel v. Green, 42 Ill. 471; Wells v. Lamney, 88 Ill. 174; Janney v. Spedden, 38 Mo. 395; Bobb v. Woodward, 42 Mo. 482; Odle v. Odle, 73 Mo. 289; Harper v. Crawford, 13 Ohio, 129; Long's Appeal, 92 Pa. 171.

[5] Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 659, 36 L. Ed. 368; Watts v. Frazer, 80 Ala. 186; Freeman v. Timanus, 12 Fla. 393; Hinton v. Fox, 13 Ky. 380; Campbell v. Whittingham, 28 Ky. 96, 20 Am. Dec. 241; Brown's Heirs v. Brown's Devisees, 31 Ky. 39; Cowman v. Colquhoun, 60 Md. 127; Ragland v. Green, 22 Miss. 194; Waddell v. Beach, 9 N. J. Eq. 798; Barry v. Shelby, 5 Tenn. 229; Seeley v. Baldwin, 185 Ill. 211, 56 N. E. 1075; Campbell v. Adsit, 111 Mich. 575, 70 N. W. 141; Leininger v. Railroad Co., 180 Pa. 288, 36 Atl. 738.

[6] Brown v. Railway Co., 96 Ill. 297; Crislip v. Cain, 19 W. Va. 438.

[7] Lacombe v. Forstall, 123 U. S. 562, 8 Sup. Ct. 247, 31 L. Ed. 255; Bay City Bridge Co. v. Van Etten, 36 Mich. 210.

[8] Walker v. Brown, 63 Fed. 204, 11 C. C. A. 135; Turner v. Flinn, 67 Ala. 529; Powell v. Maguire, 43 Cal. 11 (in this case two persons agreed to form a partnership to do certain work, but the partnership was never launched, and one of the persons carried on the work alone. It was held that the only remedy for the person excluded was in an action at law for breach of contract); West v. Howard, 20 Conn. 581; Kellogg v. Moore, 97 Ill. 282; Coquillard v. Suydam, 8 Blackf. (Ind.) 24; Slaughter v. Nash, 1 Litt. (Ky.) 324.

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scind an agreement for the sale of real estate by reason of a defect in the title, or a want of power to sell in the vendors. Such a suit is unnecessary, since there is a perfect defense to any action which might be brought by the vendors to enforce the agreement.[9] The mere fact that damages for breach of contract cannot be ascertained with precision does not warrant a court of equity in issuing an injunction and decreeing specific performance.[10] But there are many cases where courts of equity have concurrent jurisdiction with courts of law, and courts of equity may then assume jurisdiction, although courts of law may afford a remedy. But such concurrent jurisdiction will not be exercised unless there is some equitable circumstance to give jurisdiction; such as fraud, irreparable injury, trust, accident, or the like.[11] And where a court of equity has once assumed jurisdiction it cannot be ousted by a subsequent proceeding in a court of law.[12] Nor will courts of equity be ousted of their original jurisdiction because courts of law have adopted equitable principles.[13] But, unless the legal remedy is plain, adequate, and complete, and as practical in its results, and as efficient in the administration of justice, as the equitable rem-

Equity will not take jurisdiction of an action to recover a simple debt on the ground that a pretended payment thereon was fraudulent. Andrews v. Moen, 162 Mass. 294, 38 N. E. 505. And see Aldrich v. Lewis, 60 Miss. 229; Strong v. Krebs, 63 Miss. 338; Linn v. Gunn, 56 Mich. 447, 23 N. W. 84; Dougherty v. Hughes, 165 Ill. 384, 46 N. E. 229.

[9] Bruner v. Meigs, 64 N. Y. 506, 515; Reilley v. Roberts, 34 N. J. Eq. 299; Blair v. Brabson, 3 Hayw. (Tenn.) 18; Bier v. Smith, 25 W. Va. 830.

[10] Texas & P. Ry. Co. v. City of Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385.

[11] Robinson v. Chesseldine, 4 Scam. (Ill.) 332; Nelson v. Betts, 21 Mo. App. 219; Phalen v. Clark, 19 Conn. 421, 1 Am. Rep. 253.

[12] Gainty v. Russell, 40 Conn. 450; Meyer v. Saul, 82 Md. 459, 33 Atl. 539.

[13] Walker v. Cheever, 35 N. H. 339; Heath v. Bank, 44 N. H. 174; Wesley Church v. Moore, 10 Pa. 273, 279, 280; Sweeny v. Williams, 36 N. J. Eq. 627; Schroeder v. Loeber, 75 Md. 195, 23 Atl. 579, 24 Atl. 226; Gridley v. Garrison, 4 Paige (N. Y.) 647; Minturn v. Trust Co., 3 N. Y. 498; Bell v. Dewoody, 1 Overt. (Tenn.) 478; Meek v. Spacher, 87 Va. 162, 12 S. E. 397.

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edy, the jurisdiction in equity will attach.[14] 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;[15] and, where a case involves such a mass of accounts and complications as to make the remedy at law inconvenient, if not actually inadequate, equity will take jurisdiction.[16] The remedy at law must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.[17] 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.[18]

MULTIPLICITY OF SUITS.

9. Equity will exercise its jurisdiction to prevent multiplicity of suits.

(a) Where the nature of the wrong is such that at law it would be necessary for the injured party, in order to obtain complete relief, to bring a number of actions, arising from the

[14] Tyler v. Savage, 143 U. S. 79, 95, 12 Sup. Ct. 340, 36 L. Ed. 82; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005; Thompson v. Allen Co., 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472; City of Hartford v. Chipman, 21 Conn. 488; Bierbower's Appeal, 107 Pa. 14; Warner v. McMullin, 131 Pa. 370, 18 Atl. 1056; Board of Chosen Freeholders of Essex Co. v. Bank, 48 N. J. Eq. 51, 21 Atl. 185; Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; Nease v. Insurance Co., 32 W. Va. 283, 9 S. E. 233; Cadigan v. Brown, 120 Mass. 403; Darrah v. Boyce, 62 Mich. 480, 29 N. W. 102; Overmire v. Haworth, 48 Minn. 372, 51 N. W. 121; Walker v. Daly, 80 Wis. 222, 49 N. W. 812.

[15] Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87.

[16] Warner v. McMullin, 131 Pa. 370, 18 Atl. 1056.

[17] Barthet v. City of New Orleans (C. C.) 24 Fed. 563; Rees v. Smith, 1 Ohio, 124, 13 Am. Dec. 599; Smith v. Machine Co., 79 Ill. App. 519; Boyd v. Carbon Black Co., 182 Pa. 206, 37 Atl. 937.

[18] Mellen v. Iron Works, 131 U. S. 352, 367, 9 Sup. Ct. 781, 33 L. Ed. 178; Goodman v. Winter, 64 Ala. 410, 432, 38 Am. Rep. 13.

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same wrongful act, against the same wrongdoer.

(b) Where a party institutes, or is about to institute, a number of successive or simultaneous actions against another party, all depending upon the same legal questions and similar issues of fact.

(c) Where a number of persons have separate and distinct rights of action against the same party, arising from the same cause, governed by the same legal rule, and involving similar facts, and the circumstances are such that the rights of all may be settled in a single suit, brought by one of such persons in behalf of all.

(d) Where a party claims a common right against a number of persons, the establishment of which would require a separate legal action brought by him against each of such persons, and which are of such a nature that they might be determined in a single suit in equity brought against all of such persons.[1]

It is a familiar rule governing common-law procedure that no action will lie upon a contract unless all the parties named as plaintiffs have a joint and common interest in the contract. If there are many distinct and adverse interests at stake, it is not possible to adjust them by a single suit at law. It is the inadequacy of the law to combine and adjust manifold and adverse claims and interests which gives rise to the ju-

§ 9. [1] The above division of the cases in which equity will intervene to prevent multiplicity of suits is substantially the same as that adopted by Prof. Pomeroy in his celebrated work on Equity Jurisprudence (section 245), and is probably as satisfactory as any that can be made.

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risdiction of equity to settle and dispose of the whole controversy in a single proceeding, and thus prevent a multiplicity of suits.

The exercise of this jurisdiction has sometimes assumed the form of an injunction, called a "bill of peace," to restrain the prosecutions of the several actions seeking to litigate the same right. The earliest instances of the intervention of equity in such cases seem to have been for the purpose of establishing a general right in behalf of one party as against a number of persons claiming distinct and individual interests; or for the purpose of restraining further actions of ejectment to recover the premises by a single adverse claimant, after several successive actions had already been prosecuted without success. Equity will not assume jurisdiction to prevent multiplicity of action unless it appears that the suits which have been or are about to be instituted are based upon a valid cause of action, and it has been held that a court of equity would not intervene unless it appeared that the party had some defense to the numerous suits brought, or about to be brought, against him.[2]

Suits between Two Parties.

The first and second classes mentioned in the black letter text refer to suits brought by one party against another. Among the cases belonging to the first class, where a person would be obliged to bring a number of actions at law in succession in order to secure complete, or even partial, relief, and in which equity will interfere to prevent multiplicity of suits, are actions to abate nuisances,[3] to restrain continuous waste,[4] continuous trespass,[5] and to settle disputed boundaries, involving acts of trespass by the defendant. The second class of cases includes those where successive actions of ejectment have been brought by one person against another,

[2] Storrs v. Railroad Co., 29 Fla. 617, 11 South. 226.

[3] Corning v. Nail Factory, 39 Barb. (N. Y.) 311, 327; Cadigan v. Brown, 120 Mass. 493; Carlisle v. Cooper, 21 N. J. Eq. 576; Scheetz's Appeal, 35 Pa. 88; Sheldon v. Rockwell, 9 Wis. 166, 76 Am. Dec. 265.

[4] Hughlett v. Harris, 1 Del. Ch. 349, 352.

[5] Hacker v. Barton, 84 Ill. 313; Livingston v. Livingston, 6 Johns. Ch. (N. Y.) 497; Wheelock v. Noonan, 108 N. Y. 179, 186, 15 N. E. 67; Murdock v. Railroad Co., 73 N. Y. 579.

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and the defendant finally resorts to a suit in equity to quiet his title, and to restrain all further actions of ejectment by the plaintiff;[6] and also those where numerous simultaneous actions are brought against one party by another, all involving the same questions, and the party proceeded against applies to a court of equity for the purpose of having all the actions decided by one trial and decree.[7]

Suits between One Party and a Number of Parties.

The jurisdiction of equity to prevent multiplicity of suits whenever numerous persons have a community of interest or a common right or title in the subject-matter of controversy, has been long established; and it is immaterial whether the right be asserted by one against many, or by many against one. It has been frequently 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, and purely legal relief can be conferred.[8] This statement of the rule has been criticized, and it is asserted 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. In a comparatively recent Mississippi case[9] it appeared that a number of persons sued a railroad company at law for the destruction of their property by fire, alleged to have been caused by the negligence of the defendant. The company then filed its bill in equity to enjoin the prosecution of the actions at law, and to compel a determination of the whole 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,

[6] Eldridge v. Hill, 2 Johns. Ch. (N. Y.) 281; Woods v. Monroe, 17 Mich. 238; Patterson v. McCamant, 28 Mo. 210.

[7] Third Ave. R. Co. v. Mayor, etc., 54 N. Y. 159; West v. Same, 10 Paige (N. Y.) 539; Kensington v. White, 8 Price, 164.

[8] Pom. Eq. Jur. §§ 250, 269; Phelps, Jud. Eq. § 230; Preteca v. Land Grant Co., 4 U. S. App. 326, 1 C. C. A. 607, 50 Fed. 674; Osborne v. Railroad Co. (C. C.) 43 Fed. 826.

[9] Tribette v. Railroad Co. (1892) 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642.

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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 the 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." [10]

RETENTION OF JURISDICTION TO AWARD COMPLETE RELIEF.

10. When once equity has interfered to prevent a wrong or to preserve a right, it will retain its jurisdiction until a complete remedy is afforded, although it may be necessary to determine purely legal questions.[1]

Lord Nottingham has said: "Where this court can determine the matter, it shall not be a handmaid to other courts, nor beget a suit to be ended elsewhere." [2] When once the

[10] The following cases may be cited in support of the opinion of the court in the above-cited Mississippi case: 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. 566; Hanstein v. Johnson, 112 N. C. 253, 17 S. E. 155; Northern Pac. R. Co. v. Amacker (C. C.) 46 Fed. 238.

§ 10. [1] Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829; Houston v. Faul, 86 Ala. 232, 5 South. 433; Ord v. McKee, 5 Cal. 515; Savage v. Berry, 3 Ill. 545; Wade v. Bunn, 84 Ill. 117; Mitchell v. Shortt, 113 Ill. 251, 1 N. E. 909; Albrecht v. Lumber Co., 126 Ind. 318, 26 N. E. 157 (in which case it was held that a court of equity has jurisdiction to decree a foreclosure of a mechanic's lien, and, where it has acquired a rightful jurisdiction for one purpose, it retains it for all legitimate purposes, and will render a money judgment where it is an incident of a decree against specific property); Rickle v. Dow, 89 Mich. 91; Chase v. Boughton, 93 Mich. 285, 54 N. W. 44; Ostrander v. Weber, 114 N. Y. 95, 21 N. E. 112; Oliver v. Pray, 4 Ohio, 175, 19 Am. Dec. 595; Rison v. Moon, 91 Va. 384, 22 S. E. 165.

[2] Parker v. Dee, 2 Ch. Cas. 200.

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jurisdiction has been acquired, it will be retained until the whole cause is determined, and all questions, both legal and equitable, relating to the subject-matter of the controversy, have been decided.[3] To such an extent has this rule been carried that it has been declared that, if the controversy contains any equitable feature, or requires any purely equitable relief belonging to the exclusive jurisdiction of equity, or pertaining to the concurrent jurisdiction of equity and law, and a court of equity thus acquires a partial cognizance of the action, it may go on to a complete adjudication, and establish purely legal rights, and grant legal remedies, which would otherwise be beyond the scope of its authority.[4] When, therefore, a court of equity assumes jurisdiction to restrain a continuous trespass in order to prevent a multiplicity of suits, it may proceed to give full relief, both for the tortious act and the resulting damages.[5] Having acquired jurisdiction, the court cannot be devested thereof because it appears that adequate relief may be reached by a merely personal judgment.[6] Where, in an equitable action, relief is sought of a purely equitable nature, and, as incident thereto, an award of damages is asked, a court of equity will proceed to dispose of the whole matter, and render a judgment for damages.[7]

[3] Catheart v. Robinson, 5 Pet. 264, 8 L. Ed. 120; Tyler v. Savage, 143 U. S. 79, 97, 12 Sup. Ct. 340, 36 L. Ed. 82; Gormly v. Clark, 134 U. S. 338, 349, 10 Sup. Ct. 554, 33 L. Ed. 909; Milkman v. Ordway, 106 Mass. 232; Combs v. Scott, 76 Wis. 662, 671, 45 N. W. 532; Pool v. Docker, 92 Ill. 501; McMurray v. Van Gilder, 56 Iowa, 605, 9 N. W. 903. While it is not within the province of a court of equity to remove a cloud from title when complainant is not in possession, yet, when other distinct grounds of jurisdiction are averred, the court, having assumed jurisdiction for one purpose, will retain it, that the whole litigation may be settled, and complete justice done between the parties. Shipman v. Furniss, 69 Ala. 555, 44 Am. Dec. 528.

[4] McGean v. Railway Co., 133 N. Y. 9, 30 N. E. 647.

[5] Lynch v. Railway Co., 129 N. Y. 274, 29 N. E. 315.

[6] Van Rensselaer v. Van Rensselaer, 113 N. Y. 207, 214, 21 N. E. 75.

[7] Wiswall v. McGown, 2 Barb. (N. Y.) 270; White v. Fratt, 13 Cal. 521; Burdell v. Comstock (C. C.) 15 Fed. 395. Damages may be recovered in a suit to enjoin a nuisance, Farris v. Dudley, 78 Ala. 124, 56 Am. Rep. 24; Fleischner v. Investment Co., 25 Or. 119.

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EFFECT OF ACQUISITION BY COURTS OF LAW OF A JURISDICTION SIMILAR TO THAT OF EQUITY.

11. When courts of equity inherently possess power to grant relief in certain cases under certain circumstances, their jurisdiction is not lost, abridged, or affected because courts of law, by judicial interpretation or legislative enactment, have acquired a jurisdiction to grant relief in the same kind of cases and under the same facts and circumstances.

There are many cases where courts of law have abandoned the arbitrary rules which formerly restrained them in the exercise of their judicial powers. Common-law actions have been widened in their scope and effect, so that now courts of law may grant adequate and complete relief which could formerly be afforded by courts of equity alone. As an example, equity assumed jurisdiction of actions on lost bonds and sealed instruments, because courts of law refused to aid the plaintiff, who could not produce the instrument. The rule was changed by courts of law permitting the plaintiff to declare on a lost bond. But Lord Thurlon held the jurisdiction of equity over this class of cases was not thereby diverted;[1] and Lord Eldon some years later said: "This court will not suffer itself to be ousted of any part of its origi-

35 Pac. 174; so also in a suit to restrain waste, Lefforge v. West, 2 Ind. 514; and to prevent a trespass for prior injuries, Winslow v. Nayson, 113 Mass. 411. In an action to reform a contract, damages may be awarded for a breach thereof. Bidwell v. Insurance Co., 16 N. Y. 263. Equity may award a money judgment where such relief is connected with a transaction over which the court has jurisdiction, although, for the purpose of collecting damages only, equity would not have jurisdiction. Carpenter v. Osborne, 102 N. Y. 552, 7 N. E. 823.

§ 11. [1] Atkinson v. Leonard, 3 Brown, C. C. 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.

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nal jurisdiction because a court of law happens to fall in love with the same or a similar jurisdiction." [2] There are a number of like instances where courts of law have assumed a jurisdiction similar to that exercised by courts of equity, but which has not resulted in ousting equity of its jurisdiction. Among these are the powers now generally possessed by courts of law to enforce the recovery of a fund impressed with a trust; [3] the granting of relief in cases involving fraud, mistake, or accident; [4] actions brought by sureties against co-sureties upon an implied contract, which relief would be afforded in equity by suits for exoneration or contribution.[5]

Where the powers of law courts have been enlarged by legislative enactment, the jurisdiction of equity is not affected, unless by an express provision, or by a fair and reasonable construction of the statute, it is apparent that it was the legislative intent to abrogate or abridge such jurisdiction.[6] While, in principle, the jurisdiction of equity will remain regardless of the enlargement of the remedies afforded by the common law, the jurisdiction may nevertheless become obsolete, and be practically abolished, because unused. Numerous instances of such effect are mentioned elsewhere in this chapter.[7]

AUXILIARY JURISDICTION OF EQUITY.

12. The auxiliary jurisdiction of equity had its origin in the failure of the common law to

(a) Permit the examination of either party as a witness, and provide for the discovery and

[2] Eyre v. Everett, 2 Russ. 381, 382.

[3] Varet v. Insurance Co., 7 Paige (N. Y.) 560; New York Ins. Co. v. Roulet, 24 Wend. (N. Y.) 505; Kirkpatrick v. McDonald, 11 Pa. 387, 392.

[4] People v. Houghtaling, 7 Cal. 348, 351; Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215, 7 L. Ed. 655; Babcock v. McCamant, 53 Ill. 214, 217.

[5] Sailly v. Elmore, 2 Paige (N. Y.) 497, 499.

[6] Atkinson v. Leonard, 3 Brown, C. C. 218, 224. Force v. City of Elizabeth, 27 N. J. Eq. 408; Darst v. Phillips, 41 Ohio St. 514; Howell v. Moores, 127 Ill. 67, 19 N. E. 863.

[7] Ante, p. 26.

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inspection of books and documents in possession of either party.

(b) Provide for the taking of testimony by commission before trial, or before the commencement of an action.

The auxiliary jurisdiction has reference entirely to the procedure employed for the enforcement of rights and remedies. It is not proposed in this place to discuss at length the exercise of this jurisdiction. Bills of discovery,[1] bills to perpetuate testimony,[2] and the examination of witnesses de bene esse,[3] will be considered in another part of this work. It is only desirable here to mention the so-called "auxiliary jurisdiction" of equity as one of the divisions of the subject formerly considered by text-book writers and judges. Being entirely a matter of procedure, it has been more affected by modern legislation than either the exclusive or concurrent equity jurisdictions. The English supreme court judicature act of 1873 seems to have effectually abrogated bills of discovery, bills to perpetuate testimony, and the equitable procedure for the examination of witnesses de bene esse; and the same may be said as to the effect of statutes enacted in most of the American states adopting the reformed procedure.

§ 12. [1] Post, p. 630. [2] Post, p. 636. [3] Post, p. 637.

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CHAPTER III.

MAXIMS.

13. No Wrong without a Remedy.
14. Equity Follows the Law.
15. Equity Aids the Vigilant.
16. Equality is Equity.
17. Equal Equities, the Law Must Prevail.
18. Equal Equities, First in Order of Time Must Prevail.
19. He Who Seeks Equity Must Do Equity.
20. He Who Comes into Equity Must Come with Clean Hands.
21. Equity Looks on That as Done Which Ought to be Done.
22. Equity Looks to the Intent Rather than to the Form.
23. Equity Imputes an Intent to Fulfill an Obligation.
24. Equity Acts in Personam.
25. Equity Acts Specifically and not by Way of Compensation.

NO WRONG WITHOUT A REMEDY.

13. Equity will not suffer a wrong to be without a remedy. ("Ubi jus, ibi remedium.")

QUALIFICATION—Equity will not interfere where the wrong is not within the scope of judicial action.

In so far as equity jurisdiction had its rise in the defects of the common law, the above maxim may be said to lie at the foundation of that jurisdiction. The maxim is, therefore, of great importance, and has had great influence upon the growth and development of equity jurisprudence. From it arose the exclusive, the concurrent, and the auxiliary jurisdiction of courts of equity, since by its application courts of equity assumed control of matters not cognizable by courts of law, applied remedies where legal remedies were lacking, inadequate, or incomplete, and aided courts of law in the administration of justice through channels not available to such courts. 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

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relief.[1] Thus equity will enforce a statutory lien where the statute itself provides no method of enforcement;[2] and a provision of the interstate commerce act prohibiting discrimination against connecting carriers was enforced by mandatory injunction against employés of a discriminating road, who had declared a boycott against the connecting carrier, and who had refused to handle its freight.[3] In the last case the rule was stated as follows: "It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency, to meet some new condition, and was, therefore, in its time, without a precedent. If based on sound principles, and

§ 13. [1] Whenever the legislature creates new rights in parties, for the enforcement and protection of which rights the common law affords no effectual remedy, and the statute itself does not prescribe the mode in which such rights are to be protected, a court of equity, in the exercise of its acknowledged jurisdiction, is bound to give to a party the relief to which he is equitably entitled under the statute. Innes v. Lansing, 7 Paige (N. Y.) 583. See, also, Gibson v. Supervisors, 80 Cal. 359, 363, 22 Pac. 225. One exception to this principle is in cases of contested elections, based on the theory that these are political matters, with which courts of equity have no power to deal. Parmeter v. Bourne, 8 Wash. 45, 35 Pac. 586, 757; Dickey v. Reed, 78 Ill. 262; 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. But, under circumstances involving a question as to the location of county seats and the legality of elections held for a change thereof, the jurisdiction of courts of equity has been upheld, although it necessitated a determination of the question of such legality. Boren v. Smith, 47 Ill. 482; Sweatt v. Faville, 23 Iowa, 321.

[2] Gilchrist v. Railroad Co. (C. C.) 58 Fed. 708; Lockett v. Robinson (Fla.) 12 South. 649.

[3] Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. (C. C.) 54 Fed. 746, 19 L. R. A. 895; Southern California R. Co. v. Rutherford (C. C.) 62 Fed. 796. It should be noted, however, that the interstate commerce law expressly authorizes the federal courts to prevent and restrain its violation. U. S. v. Elliott (C. C.) 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, 1 Am. St. Rep. 789. See, also, Joy v. City of St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; Britton v. Supreme Council, 46 N. J. Eq. 102, 18 Atl. 675, 19 Am. St. Rep. 376; Wickersham v. Crittenden, 93 Cal. 32, 28 Pac. 788.

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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." While this maxim is frequently applied in dealing with newly-created rights and duties, before its principle should be invoked careful examination should be made to see if an efficient and adequate remedy does not already exist.[4]

Wrong Must Be within Scope of Judicial Action.

Equity does not take upon itself to enforce every moral right, such as gratitude, hospitality, the sanctity of domestic relations, etc. The maxim must be understood as referring to rights which come within a class enforceable at law, or capable of being judicially enforced, and the enforcement of which would not occasion a greater detriment or inconvenience to the public than would result from leaving them to be disposed of in foro conscientiæ.[5] Equity cannot assume control over that large class of obligations called "imperfect obligations," resting upon conscience and moral duty only, unconnected with legal obligations.[6] The total failure

[4] In Hadden v. Spader, 20 Johns. (N. Y.) 554, Justice Woodworth said: "It would be a matter of surprise, as well as regret, if, in a system of jurisprudence that has been matured by the wisdom of ages, adequate remedies were not provided for the violation of every important civil right. Although this consideration will have no influence in deciding on a case where the power of the court to redress an alleged wrong is drawn in question, it may, nevertheless, be useful in calling for the most careful and strict examination before the point is conceded that there is no efficient remedy."

[5] Snell, Eq. p. 17; Smith, Eq. p. 12, citing Day v. Brownrigg, 10 Ch. Div. 294; Ajello v. Worsley [1898] 1 Ch. Div. 274. Equity has left many matters of natural justice wholly unprovided for from the difficulty of framing any general rules to meet them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligations, such as charity, gratitude, and kindness, or even to positive engagements of parties, where they are not founded in what constitutes a meritorious consideration. Story, Eq. Jur. § 2.

[6] Rees v. City of Watertown, 19 Wall. 107, 22 L. Ed. 72. See, also, In re Hoffner's Estate, 161 Pa. 331, 344, 29 Atl. 33; Heine v. Commissioners, 19 Wall. 658, 22 L. Ed. 223; Finnegan v. Fernandina, 15 Fla. 379, 21 Am. Rep. 292.

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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, are not sufficient to justify a court of equity in departing from all precedent, and assuming an unregulated power of administering abstract justice at the expense of well-settled principle.[7] The maxim, therefore, does not apply to real wrongs which are not remediable, either at law or in equity, nor to apparent wrongs which are not wrongs at all, except in the imagination of the suitor.

EQUITY FOLLOWS THE LAW.

14. Equity follows the law. ("Æquitas sequitur legem.") This maxim is to be applied in two classes of cases:

(a) Where legal rights are considered in a court of equity, the general rules and policy of the law must be obeyed.

(b) Where equitable estates and interests are considered, the court generally applies the same rules as are applied to similar legal estates and interests at common law.

This maxim is narrow in its scope, and really does not amount to a general principle, though commonly considered

[7] Mr. Justice Miller, in Heine v. Commissioners, 19 Wall. 655, 22 L. Ed. 223. 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 a fraud, trust, or other ground of equitable relief, or of a statute conferring jurisdiction. Donovan v. Finn, 1 Hopk. Ch. (N. Y.) 59, 74, 14 Am. Dec. 351, followed in Greene v. Keene, 14 R. I. 388, 395, 51 Am. Rep. 400, where authorities are collected. Contra, Hadden v. Spader, 20 Johns. (N. Y.) 554, 562.

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as such. The great mass of equity jurisprudence has been created by an open disregard of the law. Many equitable estates arose in contravention of law, and equitable rules have been applied thereto, which, for the most part, are contradictory to corresponding legal rules of the most positive and mandatory character. Indeed, the whole theory of the development of the equity jurisdiction has been in opposition to the principle that equity follows the law.[1] It may be said that the maxim in its strict literal sense is not of sufficient scope to permit of its universal use and application. Where a rule, either of the common or the statute law, is direct and applicable, a court of equity is as much bound by it as a court of common law. But equity will only follow the law so far as it can without sacrificing claims grounded on peculiar circumstances, which render it incumbent on a court of equity to interpose in accordance with the maxim previously mentioned that equity will not suffer a wrong to be without a remedy. The meaning of the principle that, where legal interests are involved, a court of equity must follow the general rules and policy of the law, is clearly expressed by Lord Chancellor Talbot, who says: "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 is bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and to extend it further than the law allows."[2] And, where legal rights

§ 14. [1] The maxim is, in truth, operative only within a very narrow range. To raise it to the position of a general principle would be a palpable error. Throughout the great mass of its jurisprudence, equity, instead of following the law, either ignores or openly disregards and opposes the law. One large division of equity jurisprudence lies completely outside of the law. It is additional to the law. And while it leaves the law concerning the same subject-matter in full force and efficacy, its doctrines and rules are constructed without any reference to the corresponding doctrines and rules of the law. 1 Pom. Eq. Jur. § 427.

[2] Heard v. Stanford, Cas. Talb. 173. In this case the court refused to compel the husband to pay the wife's debts after her death, in consequence of his having acquired a fortune from her, since the failure of the creditors to bring action against the hus-

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and remedies are clearly defined and established by law, equity has no power to change or unsettle those rights and remedies. In dealing with legal rights, courts of equity adopt and apply legal rules whenever they are applicable.[3] For instance, if a contract executed by a municipality 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.[4] And judgment liens, and the rights of parties thereunder, are legal in their nature, but courts of equity will recognize and enforce the lien, and protect the rights of the parties in the same manner as courts of law.[5] And with respect to legal estates it is well settled that equity follows the law relating to the canons of descent. The rule of primogeniture, productive as it is of the greatest hardship towards the younger members of a family by leaving them without any sort of provision, while the eldest son may be in affluence, has been followed by courts of equity in countries where that rule exists. And where the circumstances are such as to be sufficient to create an equity, a court of equity will not violate or disregard a rule of law, since it has no power and no discretion in the matter; but, while recognizing the rule of law, and even maintaining it, a court of equity will, in a proper case, find a way to avoid or obviate it.[6] This has been instanced in a case where a testator in

band during the lifetime of the wife debarred, at law, the recovery of a judgment against him.

[3] Magniac v. Thomson, 15 How. 281, 14 L. Ed. 696; Mathews v. Insurance Co., 75 Ala. 85.

[4] Hedges v. Dixon Co., 150 U. S. 182, 192, 14 Sup. Ct. 71, 37 L. Ed. 1044.

[5] Lawson v. Jordan, 19 Ark. 305, 70 Am. Dec. 596; Hamilton Trust Co. v. Clemes, 17 App. Div. 152, 155, 45 N. Y. Supp. 141.

[6] Snell, Eq. (10th Ed.) p. 18, where, as an illustration, it is also stated: "For example, if an eldest son should prevent his father from executing a proposed will devising one estate to a younger brother by promising to convey such estate to such younger brother, and that estate should accordingly descend at law to the eldest son as a consequence flowing from his promise, which was the cause, a court of equity would interpose, and say: 'True it is, you (the eldest son) have the estate at law; in other words, the legal estate. That we don't deny or interfere with. But, precisely because you have it, you will make a convenient trustee of it for

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advanced years induced his niece to reside with him as a housekeeper and nurse on the verbal representation that he had provided for her in his will, which he had in fact prepared and executed. After his death it appeared that the provision had been revoked by a codicil. The court directed that the trusts of the will in the niece's favor should be performed, and held that in such cases a representation that property is given, even though by a revocable instrument, is binding, where the person to whom the representation is made has acted on the faith of it to his or her detriment; and that it is the law of the court, grounded on such detriment, that makes it binding. Such a ruling, it will be observed, does not set aside, but avoids, the law. The complete legal grant made by the will was left to subsist unaffected, but to subsist subject to the contract in favor of the niece, on the ground that the testator had already during his lifetime, and to the extent of that contract, fettered his own otherwise free power of devise.[7] But the representation must result in a contractual obligation; a mere representation of an intention not amounting to a promise is insufficient.[8]

The second method of applying the maxim has been stated as follows: Equity is regulated by the analogy of legal interests and rights, and the rules of the law affecting the same, in regard to equitable estates, interests, and rights, where any such analogy clearly subsists.[9] Equity, having created equitable estates and interests, has determined that there should be applied thereto, to a certain extent, the rules pertaining to corresponding legal estates and interests.[10]

your younger brother, who, in our opinion, is equitably entitled to it, because, but for your promise, he would have had it.'"

[7] See the following English cases: Loffus v. Maw, 3 Giff. 592; Coverdale v. Eastwood, L. R. 15 Eq. 121; Coles v. Pilkington, L. R. 19 Eq. 174; In re Applebee [1891] 3 Ch. Div. 422.

[8] Maddison v. Alderson, 8 App. Cas. 467; Hammersley v. De Biel (Eng.) 12 Clark & F. 45.

[9] Snell, Eq. 14.

[10] The following extract from a decision by Sir Joseph Jekyll in Cowper v. Cowper, 2 P. Wms. 720, clearly elucidates this principle: "The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise, great uncertainty and confusion would ensue. And though

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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.[11] And the rules governing the admissibility and weight of evidence and the construction of contracts are the same at law and in equity.[12] It may be also stated generally that proceedings in equity must be brought within the period prescribed by statutes of limita-

proceedings in equity are said to be 'secundum discretionem boni viri,' yet when is asked, 'Vir bonus est quis?' the answer is, 'Qui consulta patrum, qui leges juraque servat.' And as is said in Rook'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 rigour, 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 this nor any other court, not even the highest, acting in a judicial capacity, is, by the constitution, intrusted with."

[11] Dibrell v. Carlisle, 48 Miss. 691.

[12] In re Terry & White's Contract, 32 Ch. Div. 21. In this case Lord Esher said: "I doubt myself * * * whether there are any principles of law 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

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tions for the bringing of similar legal proceedings.[13] This rule is not without qualification. A court of equity, in the exercise of its concurrent jurisdiction, will never either exceed or abridge the limit of time prescribed at law; but in the exericse of its exclusive jurisdiction it will, through reasons of its own, such as laches, etc., abridge, although perhaps never exceed, the limit thus prescribed.[14]

EQUITY AIDS THE VIGILANT.

15. Equity aids the vigilant, not the indolent. ("Vigilantibus non dormientibus æquitas subvenit.")

But legal disabilities, such as infancy, incompetency, and absence from the state, excuse delay; and the sovereign power is not chargeable with laches in respect to public rights and interests.

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."

[13] Boone Co. v. Railroad Co., 139 U. S. 693, 11 Sup. Ct. 687, 35 L. Ed. 319; Bickel's Appeal, 86 Pa. 204; Hollingshead v. Webster, 87 Ch. Div. 659.

[14] Snell, Eq. p. 20; Fullwood v. Fullwood, 9 Ch. Div. 176; Godden v. Kimmell, 99 U. S. 201, 25 L. Ed. 431; Manning v. Warren, 17 Ill. 267; Richardson v. Gregory, 126 Ill. 166, 18 N. E. 777; McCrea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103. The existence of special circumstances may relieve the suitor of the operation of the statute. Preston v. Preston, 95 U. S. 200, 24 L. Ed. 494; Meath v. Phillips Co., 108 U. S. 553, 2 Sup. Ct. 869, 27 L. Ed. 819; Williamson v. Monroe (C. C.) 101 Fed. 322; Kirkpatrick v. Atkinson, 11 Rich. Eq. (S. C.) 27. A shorter time than that prescribed by the statute may suffice to prevent the court giving relief. Kirksey v. Keith, 11 Rich. Eq. (S. C.) 33. In the absence of fraud, equity adopts the period of the statute. Church v. Winton, 196 Pa. 107, 46 Atl. 363.

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A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept on his rights, and acquiesced for a great length of time.[1] A court of equity will not aid the slothful. A claim worthy of support in that court must be asserted in a reasonable time, or equitable relief will be refused. This maxim is applied to promote diligence on the part of suitors, to discourage laches by making it a bar to relief, and to prevent the enforcement of stale demands of all kinds, wholly independent of any statutory periods of limitation.[2] The rule is peculiarly applicable where 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 facts impossible of ascertainment.[3]

Effect of Statutes of Limitations.

Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy, because, where the legal remedy is barred, the spirit of the statute bars the equi-

§ 15. [1] Lord Camden, in Smith v. Clay, 2 Ambl. 645, cited and approved in Calhoun v. Millard, 121 N. Y. 69, 81, 24 N. E. 27, 8 L. R. A. 248, where it was said: "It is, and always has been, the practice of courts of equity to remain inactive where a party seeking their interference has been guilty of unreasonable laches in making his application." Speidel v. Henrici, 120 U. S. 387, 7 Sup. Ct. 610, 612, 30 L. Ed. 718.

[2] Pom. Eq. Jur. § 418. Equity can only help the diligent. The principle laid down by Lord Camden more than a century ago is still the guide of the court in cases where the party seeking its aid has been guilty of great delay. Norfolk & N. B. Hosiery Co. v. Arnold, 49 N. J. Eq. 397, 23 Atl. 514.

[3] Harrison v. Gibson, 23 Grat. (Va.) 212; Lawrence v. Rokes, 61 Me. 38; Hatcher v. Hall, 77 Va. 578; Barnes v. Taylor, 27 N. J. Eq. 259. Laches may apply where, from the lapse of time, the death of the parties, the destruction of records, and the loss of papers, there can be no longer a safe determination of the matters in controversy. Nelson's Adm'r v. Kownslar's Ex'r, 79 Va. 468; Perkins v. Lane, 82 Va. 59; Mathias v. O'Neil, 94 Mo. 520, 6 S. W. 253.

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table remedy also.[4] In many other cases they act upon the analogy of the like limitation at law. But there is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case.[5] In such cases courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence by parties out of possession of real property is productive of much hardship and injustice to others, and cannot be excused save by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor.[6]

What Constitutes Laches.

What delay in bringing suit will constitute such laches as will bar relief, in the absence of the defense of the statute of limitations, depends upon the facts and circumstances of each particular case, and is within the sound discretion of the court to determine.[7] Lapse of time is only one of the many

[4] Richardson v. Gregory, 126 Ill. 166, 18 N. E. 777, 780, citing Hancock v. Harper, 86 Ill. 445; Quayle v. Guild, 91 Ill. 378; Bonney v. Stoughton, 122 Ill. 541, 13 N. E. 833; Calhoun v. Millard, 121 N. Y. 69, 81, 24 N. E. 27, 8 L. R. A. 248; Holmes v. Railroad Co. (D. C.) 98 Fed. 100.

[5] In re Neilley, 95 N. Y. 382, 390; Groenendyke v. Coffeen, 109 Ill. 329; Stout v. Seabrook's Ex'rs, 30 N. J. Eq. 189, 190; Bell v. Hudson, 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791. In McKnight v. Taylor, 1 How. 168, 11 L. Ed. 88, the court said: "We do not found our judgment on the presumption of payment, for it is not merely on presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence to call into action the powers of the court."

[6] Badger v. Badger, 2 Wall. 94, 17 L. Ed. 836; Richards v. Mackall, 124 U. S. 183, 8 Sup. Ct. 438, 31 L. Ed. 396; Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; Hayward v. Bank, 96 U. S. 617, 24 L. Ed. 855; Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134; Castner v. Walrod, 83 Ill. 171, 25 Am. Rep. 369; Catlin v. Green, 120 N. Y. 441, 24 N. E. 941; Melms v. Brewing Co., 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899.

[7] Gibson v. Herriott, 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17,

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circumstances from which the conclusion of laches must be drawn, and each case must be determined in the light of the particular facts shown.[8] And while the principal foundations of the doctrine of laches are lapse of time and acquiescence, other circumstances will be taken into consideration. Thus it is a material circumstance that the claim was not made until after the death of those who could have explained the transaction.[9] It has been held that a change in the value and character of the property may be material.[10] And, where a suit was brought by the heirs of a deceased partner for an accounting, it was held that a delay of 16 years constituted laches, and rendered the claim stale.[11] Where the parties are in confidential or fiduciary relationship with each other, the delay may not be so material as in

where the court held that the delay of a party holding the equitable title to land in standing by and permitting the owner of the legal title to expend large sums in improving and developing the property until it has largely increased in value, without notice of his claim, constitutes such laches as will bar relief. See, also, Brown v. Wilson, 21 Colo. 309, 40 Pac. 688, 52 Am. St. Rep. 288; Bryan v. Kales, 134 U. S. 126, 135, 10 Sup. Ct. 435, 33 L. Ed. 829; McQuiddy v. Ware, 20 Wall. 19, 22 L. Ed. 311; Carpenter v. Canal Co., 35 Ohio St. 307. In enforcing purely equitable remedies, depending on general equitable principles, unreasonable and inexcusable delay is an element in the plaintiff's case which a court of equity always takes into consideration in exercising its discretion to grant or refuse relief, and is not a mere collateral incident. Calhoun v. Millard, 121 N. Y. 69, 83, 24 N. E. 27, 8 L. R. A. 248.

[8] Reynolds v. Sumner, 126 Ill. 58, 18 N. E. 334, 9 Am. St. Rep. 523, citing Boone v. Chiles, 10 Pet. 177, 9 L. Ed. 388; Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076; Baker v. Read, 18 Beav. 398; Prevost v. Gratz, 6 Wheat. 481, 5 L. Ed. 311; Paschall v. Hinderer, 28 Ohio St. 568, 580; Brown v. County of Buena Vista, 95 U. S. 159, 24 L. Ed. 422.

[9] Bell v. Hudson, 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791; Mooers v. White, 6 Johns. Ch. (N. Y.) 360; Barnes v. Taylor, 27 N. J. Eq. 259; German-American Seminary v. Keifer, 43 Mich. 111, 4 N. W. 636.

[10] Bliss v. Prichard, 67 Mo. 187; Allen v. Allen, 47 Mich. 79, 10 N. W. 113; Pratt v. Mining Co. (C. C.) 24 Fed. 869; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328.

[11] Groenendyke v. Coffeen, 109 Ill. 339. And see Codman v. Rogers, 10 Pick. 119; Harris v. Hillegass, 66 Cal. 79, 4 Pac. 987; Curtis v. Lakin, 94 Fed. 251, 36 C. C. A. 222.

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other cases; and, where the parties are members of the same family, the delay is not so prejudicial.[12] In cases where it is sought to impeach a transaction because of fraud, lapse of time is a question of much importance, owing to the fact that much evidence originally available and necessary to a full knowledge of the equities of the transaction may be lost.[13] But the lapse of time in such cases begins to run only from the time of the discovery of the fraud.[14] This is so since where there has been no knowledge there can be no acquiescence or laches. The rule may be stated thus: In equity cases time does not commence to run unless there is full information and knowledge by a party of his rights and the injury done, or he has such notice thereof that he ought to have made inquiry, or where there is undue influence, and the disability is removed, or where he himself possesses the means of knowledge.[15] To constitute laches, there must have been actual or imputable knowledge of the facts which should have prompted a choice either to diligently seek relief, or thereafter to be content with such remedies as a court of law might afford; or, if there was actual ignorance, that must have been without just excuse.[16]

[12] Note 4 to Crowe v. Ballard, 1 Ves. Jr. (Sumner's Ed.) 215, citing Beaumont v. Boultbee, 5 Ves. 492, 494; Hardwicke v. Vernon, 14 Ves. 511; Macdonald v. Macdonald, 1 Bligh, 336; Lewes v. Morgan, 5 Price, 42; Berkmeyer v. Killerman, 32 Ohio St. 257, 30 Am. Rep. 577.

[13] Prevost v. Gratz, 6 Wheat. 481, 498, 5 L. Ed. 311; Thomas v. Van Meter, 164 Ill. 304, 45 N. E. 405.

[14] Longworth v. Hunt, 11 Ohio St. 194; Meader v. Norton, 11 Wall. 442, 20 L. Ed. 184; Charter v. Trevelyan, 11 Clark & F. 714, 740,—where relief was granted when the fraud was discovered after a lapse of 37 years.

[15] 1 Sugd. Vend. (8th Am. Ed., Perkin's Notes) 387. And see Morony v. O'Dea, 1 Ball & B. 118; Ferris v. Henderson, 12 Pa. 49, 51 Am. Dec. 580; Hellman v. Davis, 24 Neb. 793, 40 N. W. 309; Parker v. Kuhn, 21 Neb. 413, 32 N. W. 74. A person is not guilty of laches, so as to deprive him of relief, by waiting three years after discovery of a mistake in an agreement before he begins an action to correct the same. Thompson v. Marshall, 36 Ala. 504, 76 Am. Dec. 328.

[16] Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661, 666, citing Stocking v. Hanson, 35 Minn. 207, 28 N. W. 507.

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When Laches Not Imputed.

Where there has been a reasonable excuse for the delay, equity will not refuse its aid. As where, because of the obscurity of the transaction, a plaintiff was unable to obtain full information in regard to his rights, lapse of time may be excused. As long as a person remains under the duress or undue influences which induced him to execute the contract or perform the act from which he seeks relief, he will not be deemed to have acquiesced. It is only when the distressed party is relieved from the oppression which controlled in the first instance that he can be expected to act.[17] Since a person non sui juris cannot act in his own behalf, neither an infant, a married woman under the disability of coverture, nor an insane person is chargeable with laches.[18] And a suit by the government to enforce a public right or assert a public interest is not barred by the laches of its officers, however gross.[19]

[17] Note 4 to Crowe v. Ballard, 1 Ves. Jr. (Sumner's Ed.) 221, citing Purcell v. McNamara, 14 Ves. 106, 121; Gowland v. De Faria, 17 Ves. 25; Aylward v. Kearney, 2 Ball & B. 477; Wood v. Downes, 18 Ves. 128. It was held in Roberts v. Tunstall, 4 Hare, 257, that the poverty of the cestuis que trustent was not sufficient to excuse delay in prosecuting his claim to relief.

[18] McMillan v. Rushing, 80 Ala. 402; Whaley v. Eliot's Heirs, 1 A. K. Marsh. (Ky.) 345, 10 Am. Dec. 737; Blandford v. Marlborough, 2 Atk. 545. As to married women under coverture, see Baker v. Morris' Adm'r, 10 Leigh (Va.) 284; Wilson v. McCarty, 55 Md. 277; Harrison v. Gibson, 23 Grat. (Va.) 212; Etting v. Marx's Ex'r (C. C.) 4 Hughes, 312, 4 Fed. 673; Bedilian v. Seaton, 3 Wall. Jr. 279, 287, Fed. Cas. No. 1,218. As to insane persons, see Craig v. Leiper, 2 Yerg. (Tenn.) 193, 24 Am. Dec. 479; Dungan v. Insurance Co., 46 Md. 469, 499.

[19] U. S. v. Insley, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968; U. S. v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; Steele v. U. S., 113 U. S. 128, 5 Sup. Ct. 396, 28 L. Ed. 952. And see U. S. v. City of Alexandria (C. C.) 4 Hughes, 545, 19 Fed. 609; 22 Meyer, Fed. Dec. § 327, where the court said: "The general principle is that laches are not imputable to the government. The utmost vigilance would not save the public from the most serious losses if the doctrine of laches could be applied to its transactions." And see, also, Haehnlen v. Com., 13 Pa. 617, 53 Am. Dec. 502, and note; U. S. v. Williams, 4 McLean, 567, Fed. Cas. No. 16,720; U. S. v. Kirkpatrick, 9 Wheat. 720, 6 L. Ed. 199; U. S. v. Van Zandt, 11 Wheat. 184, 6 L. Ed. 448; U. S. v. Barrowcliff, 3 Ben. 519, Fed. Cas. No. 14,528.

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EQUALITY IS EQUITY.

16. Equality is equity.

This maxim is sometimes expressed thus: "Equity delighteth in equality." It is of wide and general application, and is the source of many important doctrines of equity jurisprudence. By its application courts of equity will decree a pro rata distribution of the assets of a debtor among his creditors, without regard to legal priorities or preferences obtained by such creditors, if such assets are not sufficient to discharge all claims against the debtor, or the debtor is insolvent. This is in contravention of the ordinary legal rule that the creditor who first obtains judgment and execution against an insolvent debtor is entitled to full satisfaction of his judgment, although there is not sufficient property belonging to the debtor to satisfy the claims of all his creditors.[1] Upon this maxim are built all our modern bankruptcy laws, for the main object gained by such laws is the fair and equitable distribution of the assets of an insolvent debtor. Receiverships are subjected to this principle, and the receiver, as an officer of a court of equity, will generally be required to distribute the funds in his hands pro rata among the just claimants thereto.[2] And, where the aid of equity has been once invoked to settle the affairs of an insolvent debtor, a creditor will not usually be permitted to obtain a preference, even in a court of law.[3]

§ 16. [1] The right to prefer creditors is an infirmity still remaining in the body of the common law. It is contrary to the letter and spirit of the maxim that equality is equity. It is condemned in all our state insolvent laws. The federal bankrupt laws have never omitted to annex penalties to its exercise. Butler Paper Co. v. Robbins, 151 Ill. 632, 38 N. E. 153.

[2] International Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866; Burnham v. Barth, 89 Wis. 362, 62 N. W. 96; Blum v. Van Vechten, 92 Wis. 378, 66 N. W. 507; Shepherd v. Guernsey, 9 Paige (N. Y.) 357,—where it was held that the principle that equality among persons having a common right to payment out of a fund provided for the benefit of all is equity will not be departed from unless there is a clear intent to that effect expressed in a statute, or an assignment based on it.

[3] In re Thompson, 10 App. Div. 40, 41 N. Y. Supp. 740; Rose-

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The maxim applies with equal force to a case where a single claim exists against several persons. The law permits the claimant to enforce his claim against any one of such persons, and did not, in former times, give the debtor who paid the claim the right of enforcing contribution from the others jointly liable, so that in the end the burden might be distributed among all in just proportions. The modern law provides such right of reimbursement, but it was derived solely from equity jurisprudence. It was from the hardship imposed by this legal rule that the equitable doctrine of contribution arose, and courts of equity applied the principle that, whenever a common liability rests upon several persons in favor of a single claimant, equity will enforce such liability upon all such persons of the same class.[4] As an example of the application of this maxim, a person, being one of a number of sureties, who pays the debt of the principal debtor, may secure from his co-sureties a pro rata contribution.[5] Another application of this maxim is in the case of joint purchases and mortgages. The common-law rule is in favor of constituting the ownership a joint tenancy, which will pass to the survivor on the death of the co-owner. Equity does not favor joint tenancy, and, whenever circumstances arise which are available, a court of equity will prevent the incident of survivorship.[6] If the purchase price was paid by the

boom v. Whittaker, 132 Ill. 81, 23 N. E. 339; Russell v. Bank, 139 Ill. 549, 29 N. E. 37, 17 L. R. A. 345; Breed v. Investment Co. (C. C.) 71 Fed. 903.

[4] Anniston Loan & Trust Co. v. Ward, 108 Ala. 85, 18 South. 937; Trustees of Internal Improvement Fund v. Greenough, 105 U. S. 527, 26 L. Ed. 1157; Central Railroad & Banking Co. of Georgia v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915.

[5] Hawker v. Moore, 40 W. Va. 49, 20 S. E. 848; Norton v. Coons, 6 N. Y. 33,—where the court said: "The doctrine of contribution was first established and enforced in equity. It rested upon and resulted from the maxim that 'equality is equity.' This principle has been so long established that persons becoming bound as sureties for a principal debtor are regarded as acting under a contract implied from the settled rules which regulate their liability to each other,"—citing Craythorne v. Swinburne, 14 Ves. 169. And see Wells v. Miller, 66 N. Y. 255.

[6] In Lake v. Gibson, 1 Eq. Cas. Abr. 290, 1 White & T. Lead. Cas. Eq. 215, it was held that, where two or more purchase lands, and advance the purchase money in unequal shares, and this ap-

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co-owners in equal proportions, even in equity, the ownership was a joint tenancy, and the common-law rule of survivorship was applied. Where a mortgage was taken by two or more persons for money loaned in either equal or unequal proportions, their estate, at law, is joint, and on the death of one the security would belong to the survivor. But in equity the interest of the mortgagees is in common, and on the death of one the survivor holds for the benefit of the personal representatives of the deceased mortgagee.[7] The statutes of the several states have abrogated the necessity of applying this maxim to estates owned by two or more. It is now provided, generally, by statute, throughout all the states, that a conveyance of land to two or more grantees shall, unless a contrary intention is clearly expressed, create an ownership in common, and not a joint tenancy.

At common law, where two or more persons bind themselves to pay a sum of money, or to perform any other act, the obligation and liability are joint; and in case of the death of one of the obligors his obligation ceases, and his estate cannot be subjected to the obligation, but the survivor must bear the entire burden.[8] But in equity the rule is different. Upon the death of one of the obligors the liability does not remain upon the survivor alone. If the survivor is insolvent, or if the creditor has exhausted his legal remedy against the survivor, a suit in equity may be maintained against the personal representatives of the deceased debtor to secure payment out of his estate.[9] In England, and in

pears on the deed itself, the mere circumstance of the inequality of the sums advanced makes them in the nature of partners; and, however the legal estate may survive, yet the survivor will, in equity, be considered as a trustee for the other, in proportion to the sum advanced by him, and, of course, a trustee also for himself in proportion to his own original share.

[7] Appleton v. Boyd, 7 Mass. 131, 134; Goodwin v. Richardson, 11 Mass. 469; Kinsley v. Abbott, 19 Me. 430, 434.

[8] Cairns v. O'Bleness, 40 Wis. 469; Jones v. Keep's Estate, 23 Wis. 45; Morehouse v. Ballou, 16 Barb. (N. Y.) 289.

[9] Voorhis v. Childs' Ex'rs, 17 N. Y. 354; Pope v. Cole, 55 N. Y. 124, 14 Am. Rep. 198; Richter v. Poppenhausen, 42 N. Y. 373; Harbeck v. Pupin, 123 N. Y. 115, 25 N. E. 311; Hotopp v. Huber, 160 N. Y. 524, 532, 55 N. E. 206; Barlow v. Scott's Adm'rs, 12 Iowa,

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some of the states, the creditor is permitted to sue the personal representatives of the deceased debtor, without even attempting to exhaust legal remedies against the survivor.[10] But the rule in equity as above stated is subject to this exception: If the joint obligor who died be a surety, not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged, both at law and in equity; the survivor only being liable. In such case, where the surety owed no debt outside and irrespective of the joint obligation, the contract is the measure and the limit of his obligation. He signs a joint contract, and incurs a joint liability, and no other. Dying prior to his co-maker, the entire liability attaches to the survivor.[11]

There are many other examples of the application of this maxim. It will not be necessary to specify more than those already mentioned. In the following chapters of this work many doctrines will be treated and principles discussed which are the result of the operation of this maxim in the administration of equitable remedies.

EQUAL EQUITIES, THE LAW MUST PREVAIL.

17. Where there is equal equity the law must prevail. In other words, if the defendant has a claim to the protection of equity equal to the claim of the plaintiff for its assistance, equity will not interpose, but will leave the matter as it stands.

It is by an application of this maxim that a court of equity will refuse to interfere against a bona fide purchaser of the

63; May v. Hanson, 6 Cal. 642. But see Bostwick v. McEvoy, 62 Cal. 496.

[10] Wilkinson v. Henderson, 1 Mylne & K. 582; Braithwaite v. Britain, 1 Keen, 219; De Vaynes v. Noble, 2 Russ. & M. 495; Freeman v. Stewart, 41 Miss. 138; Braxton v. State, 25 Ind. 82; Eaton v. Burns, 31 Ind. 390; Myers v. State, 47 Ind. 293, 297; Voris v. State, Id. 345, 349, 350; Bostwick v. McEvoy, 62 Cal. 496.

[11] Getty v. Binsse, 49 N. Y. 385, 10 Am. Rep. 379; Wood v. Fisk, 63 N. Y. 245, 20 Am. Rep. 528.

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legal estate for a valuable consideration without notice of the adverse title, if the purchaser is himself in possession, or has purchased from an apparent owner in possession, provided he avail himself of the defense at the proper time, and in the proper mode. If the bona fide purchaser secures a legal title in addition to his equitable title, even after notice of the adverse equitable title, a court of equity will not deprive him of his advantage, and his legal title will prevail.[1] This is apparent, since, the equities of the parties being equal, and the bona fide purchaser having also a legal title, the refusal of a court of equity to interfere will enable him to assert his legal title in a court of law, where his adversary will not be able to set up his equitable title. And, according to the above maxim, a purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity, as well as at law.[2]

EQUAL EQUITIES, FIRST IN ORDER OF TIME MUST PREVAIL.

18. Where there are equal equities, the first in order of time shall prevail. ("Qui prior est tempore potior est jure.") Another, and more correct, form of stating the rule is: As between persons having only equitable interests, if their interests are in all other respects equal, priority in time gives the better equity.[1]

§ 17. [1] Taylor v. Russell [1892] App. Cas. 244; Blackwood v. Bank, L. R. 5 P. C. 92, 111; Crump v. Black, 6 Ired. Eq. (N. C.) 321, 51 Am. Dec. 422; Hoult v. Donahue, 21 W. Va. 294, 300; Carlisle v. Jumper, 81 Ky. 282; McNary v. Southworth, 58 Ill. 473; Carroll v. Johnston, 55 N. C. 120.

[2] Basset v. Nosworthy, 2 White & T. Lead. Cas. Eq. p. 14, note, citing Pitcher v. Rawlins, 7 Ch. App. 259.

§ 18. [1] In the case of Rice v. Rice, 2 Drew. 78, an able equity judge, in discussing this maxim, said; "What is the rule of a court of equity for determining the preferences as between persons having adverse equitable interests? The rule is sometimes expressed in

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The true meaning of the rule is that in a contest between persons having only equitable interests priority of time is the ground of preference last resorted to; that is, 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,—or, in other words, that their equities are in all respects equal; and that, if the one has on other grounds a better equity than the other, priority of time is immaterial.[2] When conflicting claims and

this form, as between persons having only equitable interests: 'Qui prior est tempore, potior est jure.' This is an incorrect statement of the rule, for that proposition is far from being invariably true. In fact, not only is it not universally true as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal,—as in the common case of two successive assignments for a valuable consideration of a reversionary interest in the names of trustees, where the second assignee has given notice to the trustees, and the first has omitted it. Another form of stating the rule is this: As between persons having only equitable interests, if their equities are equal, 'qui prior est tempore, potior est jure.' This form of stating the rule is not so obviously incorrect as the former. And yet even this enunciation of the rule, when accurately considered, seems to me to involve a contradiction; for when we talk of two persons having equal or unequal equities, in what sense do we use the term 'equity.' For example, where we say that A. has a better equity than B., what is meant by that? It means only that, according to those principles of right and justice which a court of equity recognizes and acts upon, it prefers A. to B., and will interfere to enforce the rights of A. as against B.; and therefore it is impossible, strictly speaking, that two persons should have equal equities, except in a case in which a court of equity would altogether refuse to lend its assistance to either party as against the other. If the court will interfere to enforce the right of one against the other on any ground whatever,—say on the ground of priority of time,—how can it be said that the equities of the two are equal? i. e., in other words, how can it be said that the one has no better right to call for the interference of a court of equity than the other? To lay down the rule with perfect accuracy, I think it should be stated in some such form as this: As between persons having only equitable interests, if their interests are in all other respects equal, priority in time gives the better equity."

[2] Rice v. Rice, 2 Drew. 73. In this case a grantor claimed a vendor's lien for purchase money on lands, in the conveyance of which

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interests respecting the same subject-matter are equitable, and neither is accompanied by the legal estate, and neither possesses any special features which in equity would give it a preference over the others independent of the order of time, the maxim applies, and priority of claim is determined by priority of time.[3] As between unrecorded deeds and mortgages, the grantees and mortgagees take according to the dates of their securities;[4] but, as against a voluntary conveyance, a subsequent purchaser for value, without notice, has the superior equity, and is entitled to priority.[5] Upon this maxim are based the equitable doctrines of priorities and notice, and the rights of bona fide purchasers for a valuable consideration.

there was an acknowledgment of the receipt by him of the consideration, against the lien of a subsequent equitable mortgagee who loaned money to the grantee on the deposit of title deeds as security. The grantor claimed that his lien was prior in point of time, but the court held that the equitable mortgagee's equity was, in other respects, superior, on account of his being misled by the acknowledgment in the deed of the receipt of the consideration, and hence the rule as to priority of time did not apply. See, also, Spencer v. Clarke, 9 Ch. Div. 137; Newton v. Newton, 6 L. R. Eq. 135, 140, 141; Berry v. Insurance Co., 2 Johns. Ch. (N. Y.) 603; Muir v. Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633 (in this case two assignments of the same claim were made by a person to different assignees, and it was held that the assignment first in point of time would be protected as between the assignees, though notice had not been given to the subsequent assignee or to the debtor; but, if the debtor pays the subsequent assignee without notice of the first assignment, he will be protected, and the first assignee cannot recover from him); Maguire v. Heraty, 163 Pa. 381, 30 Atl. 151; Neslin v. Wells, 104 U. S. 428, 26 L. Ed. 802; Hume v. Dixon, 37 Ohio St. 66.

[3] 1 Pom. Eq. Jur. § 415, citing Brace v. Duchess of Marlborough, 2 P. Wm. 491; Loveridge v. Cooper, 3 Russ. 30; Rowan v. Bank, 45 Vt. 303; Edmondson v. Hays, 1 Tenn. 509.

[4] Berry v. Insurance Co., 2 Johns. Ch. (N. Y.) 603; Grimstone v. Carter, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; Ingram v. Morgan, 4 Humph. (Tenn.) 66, 40 Am. Dec. 626; Heyder v. Association, 42 N. J. Eq. 403, 407, 408, 8 Atl. 310, 59 Am. Rep. 49.

[5] Robinson v. Cathcart, 2 Cranch, C. C. 590, Fed. Cas. No. 11,946. To illustrate an application of this maxim, the following language of an able equity judge may be quoted (Phillips v. Phillips, 4 De Gex, F. & J. 208, 215,—Lord Westbury): "I take it to be a clear proposition that every conveyance of an equitable interest is an in-

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HE WHO SEEKS EQUITY MUST DO EQUITY.

19. He who seeks equity must do equity. A court of equity giving the plaintiff the relief to which he is entitled will do so only upon the terms of his submitting to give the defendant such corresponding rights, if any, as he may also be entitled to in respect to the same subject-matter.[1]

This maxim and the maxims, "He who comes into equity must come with clean hands," and "Equity aids the vigilant," illustrate the distinctive and governing principle of equity that nothing can call forth a court of equity into activity but conscience, good faith, and personal diligence.[2] Within the restrictions above prescribed, the maxim is of universal application, and governs courts of equity in administering all kinds of equitable relief, whenever necessary to do complete justice to all parties to a controversy. The true meaning of the maxim is that, to entitle a plaintiff to the aid of a court of equity, he must secure to the defendant the

nocent conveyance; that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding) makes an assurance by way of mortgage, or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz. the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities, and the maxim applies, 'Qui prior est tempore, potior est jure.' The first grantee is potior; that is, potentior. He has a better and superior, because a prior, equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers, at the time when they took their securities and paid their money, had notice of the first incumbrance or not." See, also, Cory v. Eyre, 1 De Gex, J. & S. 149, 167; Newton v. Newton, 6 L. R. Eq. 135, 140, 141.

§ 19. [1] Hanson v. Keating, 4 Hare, 1, 4.

[2] Snell, Eq. 40; Lord Camden, in Smith v. Clay, 3 Brown, Ch. 640, note.

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rights which are his according to the settled doctrines and principles of equity jurisprudence. But the plaintiff cannot be arbitrarily compelled to perform acts or secure rights to which the defendant is not equitably entitled. The rights which the plaintiff may be compelled to secure to the defendant must be connected with the subject-matter of the suit or controversy. Or, to state the doctrine more in detail, the rule is applied where the adverse equity to be secured or awarded to the defendant 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.[3]

Application of Maxim.

The rights or equities which the defendant, by invoking this maxim, may force the plaintiff to secure, are not necessarily those which the defendant might enforce by a separate equitable proceeding.[4] This has not been universally declared to be the rule, for it has been asserted, in applying this maxim, that a plaintiff will never, in that character, be compelled to give a defendant anything but what the defendant might, as a plaintiff, enforce in a suit brought by him.[5] But this proposition has not been generally followed, and

[3] Comstock v. Johnson, 46 N. Y. 615, citing Tripp v. Cook, 26 Wend. (N. Y.) 143; McDonald v. Neilson, 2 Cow. (N. Y.) 190, 14 Am. Dec. 431; Casler v. Shipman, 35 N. Y. 533; Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175. And see Finch v. Finch, 10 Ohio St. 501, 507, where it is said that the principle does not apply "unless the mutual equities supposed by the maxim arise out of the subject-matter of the suit, and are such as have a foundation in established rules of law or of equity; the maxim invests courts of equity with no arbitrary discretion." And see Bethea v. Bethea (Ala.) 22 South. 561.

[4] Sturgis v. Champneys, 5 Mylne & C. 102; Comstock v. Johnson, 46 N. Y. 615, where Chief Justice Church said: "It is not indispensable to the application of this rule that the fault of the plaintiff should be of such a character as to authorize an independent action for an injunction against him." And see Charleston & W. C. Ry. Co. v. Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17.

[5] Hanson v. Keating, 4 Hare, 1, 4, citing Elibank v. Montolieu, 5 Ves. 737, and Sturgis v. Champneys, 5 Mylne & C. 102.

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the weight of authority seems to be in favor of the rule as first stated. For example, a court of equity recognized the common-law rule that the wife's property became that of her husband, and denied her any direct remedy against the claims of her husband or his creditors. But, if the husband or his creditors sought the aid of a court of equity to secure control or possession of the wife's property, the court would compel the plaintiff, under certain circumstances, as a condition of his obtaining relief, to set apart a sufficient portion of the property to provide for the comfortable support of the wife.[6] This application of the maxim is not now of practical importance, since in England, and in nearly, if not all, of the states, statutes have abolished the husband's common-law rights in his wife's property. And, again, statutes have declared usurious debts and obligations to be void, but have provided that debtors may maintain a suit in equity to set aside or cancel the usurious contract. But this relief will only be granted on condition that the plaintiff repay his creditor the amount due on the contract. Thus the defendant secures a remedy which he could not have secured had he sued the debtor at law or in equity, for in such a suit the defense of usury would be a complete bar.[7] This maxim is also applied to all suits in a court of equity brought by an obligor to be relieved from an illegal obligation, where the

[6] Smith v. Kane, 2 Paige (N. Y.) 303; Short v. Moore, 10 Vt. 446, 451; Tucker v. Andrews, 13 Me. 124, 128; Gardner v. Hooper, 3 Gray (Mass.) 398; Page v. Estes, 19 Pick. (Mass.) 269, 271; Howard v. Moffatt, 2 Johns. Ch. (N. Y.) 206, 208; Haviland v. Bloom, 6 Johns. Ch. (N. Y.) 178, 180; Glen v. Fisher, 6 Johns. Ch. (N. Y.) 33, 36.

[7] Williams v. Fitzhugh, 37 N. Y. 444, 453, where it is said that a person might stand on his legal rights, and defend any and every endeavor to compel him to pay a usurious loan, but, if he invoked the aid of a court of equity to give him affirmative relief, that court recognized his equitable obligation to refund what he had received, citing Rogers v. Rathbun, 1 Johns. Ch. (N. Y.) 367; Tupper v. Powell, Id. 439; Fanning v. Dunham, 5 Johns. Ch. (N. Y.) 122, 137, 9 Am. Dec. 283; Morgan v. Schemerhorn, 1 Paige (N. Y.) 544, 19 Am. Dec. 449. And see Noble v. Walker, 32 Ala. 456; Corby v. Bean, 44 Mo. 379; Whateley v. Barker, 79 Ga. 790, 4 S. E. 387. In New York the statute does not require the payment of the usurious loan before setting aside the security. Tuthill v. Morris, 81 N. Y. 94, 100.

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obligor has received a valuable consideration. In such a case equity will not aid the obligor unless he returns to the obligee the amount or makes restitution for the benefits which he has received under the illegal contract.[8] In a suit in equity to restrain the collection of an illegal assessment, the court will not grant the injunction unless the plaintiff first tenders the lawful tax or assessment.[9]

Another instance of the application of this maxim, which is frequently cited, is where a contract for the sale of land was made when the currency of the country was gold. Later, when the value of the land had greatly increased, and after the passage of the legal-tender act in 1864, the purchaser offered payment in United States legal-tender notes, which the vendor refused. In an action to enforce specific performance of the contract, the supreme court held that the plaintiff was not entitled to relief unless the payment was made in gold.[10] And 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.[11] If the owner of an estate stands by, and permits a person who is ignorant of his title to improve the estate, and spend money thereon, a court of equity, upon being asked to establish the owner's title, will require him to indemnify the person making such expenditure.[12] And if a purchaser of land at an illegal partition sale

[8] Mumford v. Trust Co., 4 N. Y. 463, 483; Deans v. Robertson, 64 Miss. 195, 1 South. 159; Tuthill v. Morris, 81 N. Y. 94, 100; Goodenow v. Curtis, 33 Mich. 505. See, also, Dranga v. Rowe, 127 Cal. 506, 59 Pac. 944; Interocean Pub. Co. v. Associated Press (Ill. Sup.) 56 N. E. 822; German Nat. Bank of Hastings v. Bank, 59 Neb. 7, 80 N. W. 49.

[9] Board of Com'rs of Montgomery Co. v. Elston, 82 Ind. 27, 2 Am. Rep. 327; Merrill v. Humphrey, 24 Mich. 170; Dean v. Charlton, 23 Wis. 590, 99 Am. Dec. 205; Hart v. Smith, 44 Wis. 213.

[10] Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501. And see, also, McGoon v. Shirk, 54 Ill. 408, 5 Am. Rep. 122; Wales v. Coffin, 105 Mass. 328.

[11] McQuiddy v. Ware, 20 Wall. 14, 20, 22 L. Ed. 311; Loney v. Courtnay, 24 Neb. 580, 39 N. W. 616; Blackburn v. Clarke, 85 Tenn. 506, 3 S. W. 505.

[12] Miner v. Beekman, 50 N. Y. 337; Powell v. Thomas, 6 Hare, 300; Cravens v. Moore, 61 Mo. 178.

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has paid taxes on the land in the belief that he is the bona fide owner, the claimants seeking to set aside the sale will be required to refund such taxes as a condition of the relief sought by them.[18] It is the application of this maxim that gave rise to the equitable doctrine of estoppel, and has had its influence upon the origin and development of many other equitable principles and doctrines, such as election, marshaling assets, etc.

HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS.

20. He who comes into equity must come with clean hands.

(a) The maxim must be understood to refer to willful misconduct in regard to the matter in litigation, and not to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party in the cause has no concern.[1]

(b) Though both parties have been engaged in a fraudulent or illegal transaction, equitable

[18] Chambers v. Jones, 72 Ill. 275. Among other cases where the maxim has been applied are the following: A beneficiary cannot set aside a sale by his trustee, and recover back the property, and yet retain the consideration. Fears v. Lynch, 28 Ga. 249. One cannot obtain the abatement of a nuisance on his neighbor's land if he maintains one equally offensive on his own premises. Cassady v. Cavenor, 37 Iowa, 300. A party cannot ask for a partial release of premises from a past-due incumbrance in accordance with the terms of the trust deed, while he refuses to pay what is due from him under the provisions of the same deed. Lane v. Allen, 60 Ill. App. 457. A deed of trust cannot be canceled unless the complainant has performed his own equitable obligations. Jones v. Langhorne, 3 Bibb (Ky.) 453. A stockholder must pay legal assessments on his stock before he can complain of the company and its incorporators. Yard v. Insurance Co., 10 N. J. Eq. 480, 64 Am. Dec. 467.

§ 20. [1] Snell, Eq. p. 42; Smith, Eq. 20.

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relief will be granted the plaintiff if public policy is advanced thereby, and he was not in pari delicto with the defendant.[1]

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 on his own iniquity, or to acquire property by his own crime.[2] This maxim, while of the same nature as the one preceding, "He who seeks equity must do equity," has many distinctive characteristics. The preceding maxim does not assume that the plaintiff has done a wrong to the defendant, nor does it refuse him relief; but it grants him the remedy sought on condition that he secures to the defendant the rights to which he is equitably entitled. But this maxim refuses the plaintiff the relief he seeks when it appears that he has been guilty of conduct towards the defendant in respect to the subject-matter of the controversy, which, measured by the principles of equity, is unconscionable and unrighteous. "It says that whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the

[1] Pom. Eq. Jur. § 403; Adams, Eq. 175; Tied. Eq. Jur. § 16.

[2] Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 840. In this case it was held that a beneficiary under a will, who murdered 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, 29 L. Ed. 997, 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, 10 L. R. A. 810, 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 devest the murderer of the fruits of his crime.

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doors of the court will be shut against him in limine. The court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." [4] The maxim means 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 the 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.[5]

Limitations.

The maxim is wide in its scope, and of general application, but it is limited in its use to such acts on the part of the plaintiff as relate to the subject-matter of the controversy, and affect the rights of the parties. The court will not go outside of the case to examine the conduct of the plaintiff in other matters, or to question his character for fair dealing.[6] For instance, a contract obligation will be enforced, although it is indirectly connected with an illegal transaction, if it is supported by an independent consideration, and the alleged rights of the plaintiff are not dependent on the illegal transaction.[7] And a violation of a statute

[4] Pom. Eq. Jur. § 397.

[5] Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; Atwood v. Fisk, 101 Mass. 363, 100 Am. Dec. 124; Harrington v. Bigelow, 11 Paige (N. Y.) 349; Weakley v. Watkins, 7 Humph. (Tenn.) 356; Bleakley's Appeal, 66 Pa. 187; Creath v. Sims, 5 How. 192, 12 L. Ed. 111; Longinette v. Shelton (Tenn. Ch. App.) 52 S. W. 1078; Liverpool, London & Globe Ins. Co. v. Clunie (C. C.) 88 Fed. 160.

[6] Dering v. Earl of Winchelsea, 1 Cox, 318; Lewis' Appeal, 67 Pa. 166,—where the court said: "It is not every unfounded claim which a man may make, or unfounded defense which he may set up, which will bar him from proceeding in a court of equity. The rule that he who comes into equity must come with clean hands must be understood to refer to willful misconduct in regard to the matter in litigation." And see, also, Langdon v. Templeton, 66 Vt. 173, 28 Atl. 866; Edison Electric Light Co. v. Electric Co., 3 C. C. A. 605, 53 Fed. 592. The maxim does not apply to misconduct, however gross, which is unconnected with the matter in suit. Mossler v. Jacob, 66 Ill. App. 571; Equitable Gaslight Co. v. Manufacturing Co., 65 Md. 73, 3 Atl. 108. And see Upchurch v. Anderson (Tenn. Ch. App.) 52 S. W. 917; City of Chicago v. Transit Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281.

[7] Armstrong v. Bank, 133 U. S. 469, 10 Sup. Ct. 450, 33 L. Ed. 747.

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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;[8] nor will fraud in obtaining a patent of public lands from the federal government 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.[9] 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 collateral contracts or transactions, in which the original illegal transaction forms no part of the consideration.[10]

Another limitation in the application of this maxim has been stated thus: Where the parties to a contract which is against public policy or illegal are not in pari delicto, and where public policy is considered as advanced by allowing either, or at least the more excusable, to sue for relief against the transaction, relief is given to him.[11] Or, as it

[8] Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760.

[9] Foster v. Winchester, 92 Ala. 497, 9 South. 83.

[10] Armstrong v. Toler, 11 Wheat. 258, 271, 6 L. Ed. 468; 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 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."

[11] Reynell v. Sprye, 1 De Gex, M. & G. 660, 679. In the case of Tracy v. Talmage, 14 N. Y. 162, 181, Judge Selden has discussed this rule, and cited a number of cases relative thereto. He says (at page 181): "The maxim, 'Ex dolo malo non oritur actio,' is qualified by another, viz., 'In pari delicto melior est conditio defendentis.' Unless, therefore, the parties are in pari delicto, as well as particeps criminis, the courts, although the contract be illegal, will afford relief, where equity requires it, to the more innocent

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has also been expressed, when the parties are not equally guilty, or when the public interest is advanced by allowing the more excusable of the two to sue for relief, the courts will aid the injured party by setting aside the contract, and restoring him, so far as possible, to his original position.[12] Upon the application of this doctrine it has been held that usurious interest paid by a borrower might be recovered independently of the statute, and that the maxim, "Inter partes in pari delicto potior est conditio defendentis," did not apply, as the law considered the borrower the victim of the usurer; and where statutes protecting one set of men from another set of men prohibit certain transactions, the parties thereto are not in pari delicto.[13] Many cases have been decided to the effect that a plaintiff might be relieved from a usurious contract, all of which appear to be 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.[14] Finally, it may be stated that two parties may often concur in an illegal act without being in all respects in pari delicto. In many such cases relief from the contract will be afforded to the less guilty party when he appears to have acted under circumstances of imposition, hardship, or undue influence, and especially where there is necessity of supporting public interest, or a well-settled policy of the law, whether that policy be declared in the statutes of the state, or be the outgrowth of the decisions of the courts.[15]

party." See, also, White v. Bank, 22 Pick. (Mass.) 186; Lowell v. Railroad Corp., 23 Pick. (Mass.) 32, 34 Am. Dec. 33; Prescott v. Norris, 32 N. H. 101.

[12] Duval v. Wellman, 124 N. Y. 156, 160, 26 N. E. 343.

[13] Wheaton v. Hibbard, 20 Johns. (N. Y.) 290, 11 Am. Dec. 284; Browning v. Morris, 2 Cowp. 790.

[14] Fanning v. Dunham, 5 Johns. Ch. (N. Y.) 122, 142–144; Peters v. Mortimer, 4 Edw. Ch. (N. Y.) 279.

[15] Duval v. Wellman, 124 N. Y. 156, 161, 26 N. E. 343; Smith v. Bruning, 2 Vern. 392; Goldsmith v. Bruning, 1 Eq. Cas. Abr. 89. In Ford v. Harrington, 16 N. Y. 285, it is held that, where confidential relations exist between the parties,—as between an attorney and his client,—and a conveyance is made to the attorney by his client to defraud the creditors of the client on the attorney's promise that he will reconvey, although the transaction is illegal, the at-

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Application of Maxim.

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. A court of equity will not decree the specific performance of a contract unless it is strictly equitable, and free from trickery and deception on the part of the party seeking such performance.[16] Even if the inequity of the plaintiff is insufficient to warrant the court in canceling the contract, yet the plaintiff may be refused its enforcement. And equity will refuse its aid in the enforcement of a contract where the plaintiff has practiced fraud on the defendant, and also where the plaintiff has been guilty of unconscionable conduct which does not amount to legal fraud.[17] If the plaintiff is guilty of fraud upon his adversary, he will not be given relief. This has been instanced where a minor, fraudulently concealing his age, obtained from his trustees a part of a sum of stock to which he was entitled on coming of age, and, when of age, a few months after, he applied for and received the residue of such stock. Afterwards a suit was instituted to compel the trustees to pay over again the portion of stock improperly paid during minority; but

torney must reconvey to the client on the consideration price being refunded to him; citing Story, Eq. Jur. 300; Osborne v. Williams, 18 Ves. 379. The case of Ford v. Harrington has been followed in Herrick v. Lynch, 49 Ill. App. 657, affirmed in 150 Ill. 283, 37 N. E. 221.

[16] Sherman v. Wright, 49 N. Y. 227; Weise's Appeal, 72 Pa. 351; Snell v. Mitchell, 65 Me. 48, 50; Crane v. Decamp, 21 N. J. Eq. 414; Plummer v. Keppler, 26 N. J. Eq. 481; Phillips v. Stauch, 20 Mich. 369; Mississippi & M. R. Co. v. Cromwell, 91 U. S. 643, 23 L. Ed. 367.

[17] Marcy v. Dunlap, 5 Lans. (N. Y.) 365; Evroy v. Nicholas, 2 Eq. Cas. Abr. 488. For other instances where specific performance will be refused, see Fish v. Leser, 69 Ill. 394; Rutland Marble Co. v. Ripley, 10 Wall. 339, 356, 357, 19 L. Ed. 955; Seymour v. Delancey, 6 Johns. Ch. (N. Y.) 222 (where the court refused its aid because of the inadequacy of price mentioned in the contract, since it gave the contract a character of unreasonableness, inequality, and hardship); Quinn v. Roath, 37 Conn. 16, 24; Bruck v. Tucker, 42 Cal. 346; Smoot v. Rea, 19 Md. 398; Auter v. Miller, 18 Iowa, 405; Burke v. Seely, 46 Mo. 334. And see Raasch v. Raasch, 100 Wis. 400, 76 N. W. 591; Lawton v. Estes, 167 Mass. 181, 45 N. E. 90.

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the court held that the concealment of the age of the minor was a fraud on the trustees, and neither the minor nor his assignee could compel the trustees to pay against the stock paid during minority.[18] Any material misrepresentation in a trade-mark tending to deceive the public as to the place where the article marked is manufactured, or as to the materials composing it, is a fraud on the public, and deprives the owner of the trade-mark of the right to relief for infringement in equity.[19] And a grantor in a conveyance executed to defraud creditors cannot maintain a suit in equity for its cancellation.[20] And, if the contract in fraud of creditors is executory, a court of equity will not interfere in favor of either party to enforce its performance.[21] Equity

[18] Overton v. Vanister, 3 Hare, 503. And see, also, Savage v. Foster, 9 Mod. 35; Nelson v. Stocker, 4 De Gex & J. 458, 464.

[19] Prince Mfg. Co. v. Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; Joseph v. Macowsky, 96 Cal. 518, 31 Pac. 914, 19 L. R. A. 53; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706; Palmer v. Harris, 60 Pa. 156; Kenney v. Gillet, 70 Md. 574, 17 Atl. 499.

[20] Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13, 33 L. Ed. 242; Freeman v. Sedgwick, 6 Gill (Md.) 28, 46 Am. Dec. 650. But a debtor may abandon his fraudulent purpose, and maintain suit to compel a reconveyance for the benefit of his creditors. Carll v. Emery, 148 Mass. 32, 18 N. E. 574, 1 L. R. A. 618. It is a conclusive rule of law, with a few exceptions, that deeds, conveyances, contracts, and other transactions entered into in fraud of creditors are valid between the parties. Jackson v. Cadwell, 1 Cow. (N. Y.) 622; Owen v. Dixon, 17 Conn. 496; Waterbury v. Westervelt, 9 N. Y. 598; Schenck v. Hart, 32 N. J. Eq. 774, 781; Osborne v. Moss, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252, and note; Jackson v. Garnsey, 16 Johns. (N. Y.) 189, 192; Finley v. McConnell, 60 Ill. 259; Smith v. Grim, 26 Pa. 95, 65 Am. Dec. 400; Choteau v. Jones, 11 Ill. 300, 50 Am. Dec. 460, and note. And see cases cited in note to Whitworth v. Thomas, 3 Am. St. Rep. 727.

[21] Nellis v. Clark, 20 Wend. (N. Y.) 24, where the court held that, while an executed contract in fraud of creditors might be valid as between the parties, an executory contract for the same purpose could not be enforced between the parties. Followed in Moseley v. Moseley, 15 N. Y. 334, 335. This rule was dissented from in Harvey v. Varney, 98 Mass. 118, where it was held that it made no difference whether the contract was executed or executory. The rule, as first stated, is followed in Walton v. Tusten, 49 Miss. 569, 576; Shank v. Simpson, 114 Pa. 208, 212, 6 Atl. 847; Winton v. Freeman, 102 Pa. 366, 369 (where the court said: "It is not the province

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will refuse relief to one who, in seeking its aid, discloses his own turpitude in the very contract on which his action depends.[22] And, where both parties have been engaged in a fraudulent 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.[23] When one party, pursuant to a prior arrangement, has fraudulently secured property for the benefit of another, equity will not aid the fraudulent beneficiary by compelling a conveyance of such property to him.[24] And, pursuant to the principle of this maxim, equity will refuse its aid to any of the parties to a transaction which is in violation of a statute.[25] And the

of the law to help a rogue out of his toils. The rule is to leave the parties where it finds them, giving no relief and no countenance to illegal contracts"). And see Hukill v. Yoder, 189 Pa. 233, 42 Atl. 122.

[22] Kunkle's Appeal, 107 Pa. 368; Pringle v. Pringle, 59 Pa. 281, 286.

[23] Harrington v. Bigelow, 11 Paige (N. Y.) 349; Trustees of Goshen Tp. v. Railroad Co., 12 Ohio St. 624; Sample v. Barnes, 14 How. 70, 14 L. Ed. 330. Application of principle to gambling transactions, see Smith v. Kammerer, 152 Pa. 98, 25 Atl. 165; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; Atwood v. Fisk, 101 Mass. 363, 100 Am. Dec. 124. And see Union Nat. Bank v. Hines, 177 Ill. 417, 53 N. E. 83.

[24] Johns v. Norris, 22 N. J. Eq. 102; Allen v. Berry, 50 Mo. 90; Musselman v. Kent, 33 Ind. 452; Hunt v. Rowland, 28 Iowa, 349; Walker v. Hill's Ex'rs, 22 N. J. Eq. 513. In the last case an execution debtor, by a secret arrangement, procured a person to buy in property at an auction sale for the debtor's benefit in such a manner as to be fraudulent against the other creditors. The court refused to grant relief by compelling a conveyance by the purchaser to the execution debtor. See, also, Bleakley's Appeal, 66 Pa. 187.

[25] As where a number of persons conspiring contrary to statute to unlawfully advance the price of an article of food, the courts will not intervene in favor of any one of the parties to give him redress for frauds perpetrated by another to his detriment in carrying out the unlawful enterprise. Leonard v. Poole, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728. Similarly held where a company was formed for the consummation of an unlawful lottery scheme. Sykes v. Beadon, 11 Ch. Div. 170. The illegality of an agreement for the formation of an illegal industrial "trust" taints the whole contract, and therefore equity will leave the parties to the agree-

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same may be said when the transaction is malum in se, as opposed to public policy and good morals.[26] An action cannot be maintained to recover the profits of an illegal transaction where it is necessary, in order to sustain the action, to appeal to and depend upon the terms of an illegal agreement.[27]

21. Equity looks on that as done which ought to be done.

This maxim is of great practical importance. It is the foundation of many great equitable doctrines. Its application has given rise to many equitable estates, and its effect will be seen in one form or another throughout the whole system of equity jurisprudence. It has been attempted by some writers to limit the scope of this maxim to express executory contracts, and to those dispositions of property, by grant or otherwise, which give rise to an equitable conversion. But the better opinion is that the maxim will find an effective application in every instance where an equitable duty in respect to the subject-matter rests on one person in favor of another; "to every kind of case where an affirmative equitable duty to do some positive act devolves upon one party, and a corresponding equitable right is held by another." [1] The right to demand the performance of

ment as it finds them, whether the agreement is executed or partially performed. Unckles v. Colgate, 148 N. Y. 529, 43 N. E. 59.

[26] 1 Pom. Eq. Jur. § 402.

[27] Gray v. Oxnard Bros. Co., 59 Hun (N. Y.) 387, 13 N. Y. Supp. 86, citing Keene v. Kent, 4 N. Y. St. Rep. 431; Woodworth v. Bennett, 43 N. Y. 273, 3 Am. Rep. 706.

§ 21. [1] 1 Pom. Eq. Jur. § 364. Adams, Eq. (6th Am. Ed.) p. 295, says: "What ought to be done is considered in equity as done; and its meaning is that, whenever the holder of property is subject to an equity in respect of it, the court will, as between the parties to the equity, treat the subject-matter as if the equity had been worked out, and as impressed with the character which it would then have borne. The simplest operation of this maxim is found in the rule that trusts and equities of redemption are treated as estates; but its effect is most obvious in the constructive change of property from real to personal estate, so as to introduce new laws of devolution and transfer."

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an equitable duty must exist; for equity regards as done only what "ought" to have been done, not what "might" have been done.[2]

Application of Maxim.

The most direct application of the maxim is where, by deed or will, it is directed that money be laid out in land, in which case the money is already treated as land in equity; and, conversely, where land is, by agreement, contracted, or, by will, directed, to be sold, it is considered and treated as money.[3] Thus arose the equitable doctrine of conversion, which will be discussed later.[4] The whole doctrine of equitable mortgages is founded on this maxim. Where a party advances money to another on the faith of a verbal agreement by the latter to secure its payment by a mortgage on certain lands, which is never executed, or is executed in such an informal and defective manner as to fail in effectuating the purpose of its execution, equity will impress on the land intended to be mortgaged a lien in favor of the creditor who advanced the money, for the security and satisfaction of his debt.[5] And based on this maxim is the settled doctrine in

[2] Burgess v. Wheate, 1 W. Bl. 123, 129.

[3] Snell, Eq. p. 45. Nothing is better established than this principle that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given. Fletcher v. Ashburner, 1 Brown, Ch. 497, cited in Craig v. Leslie, 3 Wheat. 577, 4 L. Ed. 460.

[4] Post, c. 10.

[5] Sprague v. Cochran, 144 N. Y. 104, 112, 38 N. E. 1000. The court said: "In order to apply this maxim according to its true meaning, the court will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as the parties might have executed them, always regarding the substance, and not the form, of the transaction." See, also, Payne v. Wilson, 74 N. Y. 348; Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657; Smith v. Smith, 125 N. Y. 224, 26 N. E. 259; Daggett v. Rankin, 31 Cal. 321, 326 (where Cuney, C. J., said: "Where a mortgage 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 knowledge of the mortgagee, and with no intent to perform the cove-

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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 suffer 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.[6] In such cases, by the doctrine of equitable conversion having its root in the maxim under discussion, the vendee's interest under the contract is to be treated as real estate, while the vendor's interest is personal.[7] The vendor is regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for the rents and profits; and the purchaser will be treated as trustee of the purchase money, if not paid, and will be charged with interest thereon.[8] The entire doctrine of trusts, both express and constructive, may be said to rest on the principle that equity looks upon that as done which ought to have been done; for in equity the right of the beneficiary to enjoy the profits of property, the legal title of which is vested in another, is fully protected and well preserved, while at law only the legal title of the trustee is recognized.[9] The equitable

nant, yet equity, looking on that as done which ought to have been done, will treat the insurance as effected under the agreement, and will give the mortgagee his equitable lien accordingly"); Ames v. Richardson, 29 Minn. 330, 13 N. W. 137; Wheeler v. Insurance Co., 101 U. S. 439, 25 L. Ed. 1055; Cromwell v. Insurance Co., 44 N. Y. 42, 4 Am. Rep. 641.

[6] Paine v. Meller, 6 Ves. 349; Revell v. Hussey, 2 Ball & B. 287; Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582; Haughwout v. Murphy, 22 N. J. Eq. 531; Moyer v. Hinman, 13 N. Y. 180. In such cases the vendor holds the legal estate as trustee for the purchasers. Thomson v. Smith, 63 N. Y. 301, 303; Crawford v. Bertholf, 1 N. J. Eq. 460; King v. Ruckman, 21 N. J. Eq. 599.

[7] Thomson v. Smith, 63 N. Y. 301, 303; Moore v. Burrows, 34 Barb. (N. Y.) 176; Schroeppel v. Hopper, 40 Barb. (N. Y.) 425.

[8] Worrall v. Munn, 38 N. Y. 142. Where the vendor is himself in the actual occupation of the premises, he is himself charged with the value of the use and occupation. Robertson v. Skelton, 12 Beav. 260; Dyer v. Hargrave, 10 Ves. 506.

[9] 1 Pom. Eq. Jur. § 375, where it is said: "The beneficiary may not have anything which the law requires as a 'title'; he may even be without any written evidence of his right; his proprietorship may rest wholly upon acts and words; but still he is the equitable owner, because equity treats that as done which in good conscience

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estate is vested in the beneficiary, and he is clothed with all the attributes of a true owner.

Among other equitable estates which are affected by this important maxim is the mortgagor's equity of redemption. A mortgage vests in the mortgagee a legal estate, which, upon breach of the condition, becomes absolute. But equity will nevertheless secure to the mortgagor a right to redeem, and the mortgagee may be compelled to reconvey the property to the mortgagor. This equitable right of the mortgagor is deemed, in pursuance of the spirit of this maxim, an estate, and not a mere chose in action. The real, beneficial ownership of the land remains in the mortgagor, subject to the lien of the mortgagee for the payment of the amount secured by the mortgage.

This maxim also applies to cases of fraud. Not only does equity look on things agreed or directed to be done as done, but, if parties have been prevented by fraud from doing certain acts, equity will interfere, and treat the case as if the acts had been actually performed.[10] The principle, as thus applied, is that a person is not allowed to derive any advantage from his 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.[11] But equity will not consider that as done which ought to have been done if to do so would injuriously affect third parties who have contracted with reference to what actually has been done.[12] Thus, equity will not consider a transaction as a pledge when there

ought to have been done." In this connection, see, also, McDonough v. O'Niel, 113 Mass. 92; Fisher v. Fobs, 22 Mich. 454; Mitchell v. Read, 61 N. Y. 123, 19 Am. Rep. 252; Jones v. Van Doren, 130 U. S. 684, 9 Sup. Ct. 685, 32 L. Ed. 1077; Gisborn v. Insurance Co., 142 U. S. 326, 335, 12 Sup. Ct. 277, 35 L. Ed. 1029, and the following English cases: Dyer v. Dyer, 2 Cox, Ch. 92; Id., 1 White & T. Lead. Cas. Eq. 203; Keech v. Sandford, 1 White & T. Lead. Cas. Eq. 48; Hurguenin v. Baseley, 14 Ves. 273; In re Adams & Kensington Vestry, 27 Ch. Div. 394; Id., Brett, Lead. Cas. Mod. Eq. 18.

[10] Story, Eq. Jur. § 187; Moore v. Crawford, 130 U. S. 122, 128, 9 Sup. Ct. 447, 32 L. Ed. 878. And see Shipman v. Lord (N. J. Err. & App.) 46 Atl. 1101.

[11] London, C. & D. R. Co. v. Railway Co., 40 Ch. Div. 100.

[12] Vose v. Cowdrey, 49 N. Y. 336; Clabaugh v. Byerly, 7 Gill (Md.) 354, 48 Am. Dec. 575.

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is no delivery of the thing pledged, though the parties so intended, 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.[13] Nor does the maxim apply in favor of strangers and volunteers, but only in favor of the parties to the transaction and their privies.[14]

22. Equity looks to the intent rather than to the form.

The principle of this maxim is of great practical importance, and affects to a greater or less extent the whole system of equity jurisprudence. Equity, at the outset, combated the harsh formalism of the common law. It attempted to relieve suitors from the evil consequences of blindly following the rigid forms required by courts of law, and at a very early time disregarded such forms, and examined into the substance of contracts and the intent of parties. It early became its purpose to enforce the rights and duties of parties to a transaction in accordance with the real intent of such parties and the true purposes, objects, and consequences of such transaction. "Equity always seeks for the real intent under cover of whatever forms and appearances, and will give effect to such intent unless prevented by some positive and mandatory rule of law." [1] It would in no case permit the veil of form to hide the true effect or intention of the transaction. The rigid formality of the common law is not

[13] Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779.

[14] Snell, Eq. p. 10; Smith, Eq. (15th Ed.) p. 21; Chetwynd v. Morgan, 31 Ch. Div. 596; Redfield v. Parks, 132 U. S. 239, 247, 248, 10 Sup. Ct. 83, 33 L. Ed. 327. 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.

§ 22. [1] 1 Pom. Eq. Jur. § 378. Equity looks beyond the form of a transaction, and shapes its judgment in such a way as to carry out the purposes of the parties to the agreement; and to protect either of them against any unconscionable advantage to be derived from the apparent form in which their transaction has taken place. Campbell v. Freeman, 99 Cal. 546, 34 Pac. 113. Equity looks through form to substance. Texas v. Hardenberg, 10 Wall. 89, 19 L. Ed. 839.

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so apparent at the present time, and the consequent injustice has been greatly lessened. But this result has been brought about by the influence of this once exclusively equitable principle. With increasing liberality at common law, this maxim has become of universal application in all courts, of law as well as equity.

This maxim should be collated with the one preceding. Justice Washington, in speaking of the doctrine of conversion, says: "The principle upon which the whole of this doctrine is founded is that a court of equity, regarding the substance, and not the mere forms and circumstances, of agreements and other instruments, considers things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head [conversion] of equity." [2] These two principles, acting jointly, have given rise to many of the distinctive features of equity jurisprudence. They are often applied in common, and the same reason that exists for the application of one may also exist for the application of the other. By the application of this maxim, courts of equity are enabled to disregard strict legal technicalities, and to so mold their relief as to reach the real merits of the controversy.[3] In order to ascertain and carry out the intention of the parties to a transaction, such courts will look at their situation, and the attendant circumstances.[4] Equity will disregard

[2] Craig v. Leslie, 3 Wheat. 563, 578, 4 L. Ed. 460. Mr. Pomeroy has said (Eq. Jur. § 378): "In fact, it is only by looking at the intent, rather than the form, that equity is able to treat that as done which in good conscience ought to be done. * * * The two principles act together, and aid each other, and it is by their universality and truth that much of equity jurisprudence which is peculiar and distinctive, in contrast with the law, has been developed."

[3] Crain v. Barnes, 1 Md. Ch. 151.

[4] Frink v. Cole, 10 Ill. 339; Nixon's Heirs v. Carco's Heirs, 28 Miss. 414; Livermore v. McNair, 34 N. J. Eq. 478; Lee v. Peckham, 17 Wis. 383. Where a claim is vested on the rights of a purchaser at a judicial sale, and it appears that he was only a nominal purchaser, and that the certificate of sale made to him was a mere sham, and used as a mere matter of form, equity will look through

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names, and penetrate disguises, to get at the substance underneath.[5]

Application of Maxim as Source of Doctrines.

There are many important equitable doctrines which have their origin in the application of this maxim. A few of these may be profitably mentioned in this connection for the purpose of illustrating the use of the maxim. The equitable doctrine of forfeitures and penalties is based on this maxim. Where a contract provides for the payment of a stipulated sum of money, or, in default thereof, the payment of a greater sum as a penalty, courts of equity will grant relief by decreeing a payment of the amount due on the contract, with costs and interest, unless, of course, the defaulting party has, by inequitable conduct, debarred himself from any relief in equity.[6] In such a case equity disregards the form of the contract, and gets at what must have been the intent of the parties, in the view of that other maxim that equity regards that as done which ought to have been done. And, where a forfeiture is imposed in a contract for the performance of some act or service, in case of default a court of equity will disregard the arbitrary forfeiture, and, considering the true intent of the parties to be the performance of such act or service, will relieve the defaulting party from such forfeiture if the damages to the injured party can be otherwise compensated.[7]

the form of the transaction to its substance, and will deny him relief. Beach v. Shaw, 57 Ill. 17.

[5] Stockton v. Railroad Co., 50 N. J. Eq. 73, 24 Atl. 964, 17 L. R. A. 97. Courts of equity look behind the forms of judgments, and inquire into the nature of the demands on which they are founded, and the relation to the parties, when necessary to the preservation of equitable rights. Meir v. Bank, 55 Ohio St. 460, 45 N. E. 907.

[6] Relief from forfeitures for breach of covenants in leases. Bowser v. Colby, 1 Hare, 109; White v. Warner, 2 Mer. 459; Palmer v. Ford, 70 Ill. 369. And for other cases see Peachy v. Duke of Somerset, 1 Strange, 477; Id., 2 White & T Lead. Cas. Eq. 1082; Hagar v. Buck, 44 Vt. 285, 5 Am. Rep. 368; Warner v. Bennett, 31 Conn. 468; Orr v. Zimmerman, 63 Mo. 72; Robinson v. Loomis, 51 Pa. 78.

[7] In the case of Sloman v. Walter, 1 Brown, Ch. 418, 1 White & T. Lead. Cas. Eq. 1094, an injunction was issued to restrain a suit for the recovery of a penalty prescribed in the bond, and the chancellor

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This maxim has also been of great importance in developing the equity jurisprudence relating to the characteristics of mortgages, and the rights of parties thereunder. Even at the present time a mortgage is in form a conveyance, conditioned to be void on the repayment by the mortgagor, on a specified day, of the sum secured, 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, regarding the intent of the parties to be the payment of the debt, and deeming it equitable that that should be treated as done which in good conscience ought to be done, permitted the mortgagor to redeem after the time fixed, on payment of principal and interest then due.[8]

Many other equitable estates have arisen through the application of this important maxim. The common law, in its rigid observance of form, compelled contracting parties to obey absolutely the terms and stipulations of their valid agreements. "Performance to the very letter of every covenant or promise was the inflexible rule." [9] Equity tempered the hardness of this rule, and, ever looking for the meaning and intent of the agreement, and ever striving to enforce the performance of the equitable "ought," devised certain equitable estates and liens which could find no place in the common law. Thus it has been held that an absolute deed, taken as security for a debt, is, in equity, a mortgage.[10] And where a mortgage is so imperfectly executed as to be entirely nugatory at law as a valid mortgage, equity will nev-

said: "The rule that, where a penalty is invested merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred, is too strongly established in equity to be shaken."

[8] 1 Spence, Eq. Jur. 601; Langford v. Barnard, Toth. 134, (decided 37 Eliz.); Emmanuel College v. Evans, 1 Ch. R. 18.

[9] 1 Pom. Eq. Jur. § 379.

[10] Stinchfield v. Milliken, 71 Me. 567; Morris v. Nixon, 1 How. 118, 11 L. Ed. 69; Russell v. Southard, 12 How. 139, 13 L. Ed. 927; Ex parte Odell, 10 Ch. Div. 76. 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. Flagg v. Mann, 2 Sumn. 533, Fed. Cas. No. 4,847.

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ertheless declare the instrument a valid agreement to give a mortgage, and an equitable lien upon the land will exist, valid for all purposes, and as against all persons, except a purchaser for a valuable consideration, and without notice.[11]

Another striking example of the application of this maxim by courts of equity is in its treatment of instruments under seal. At common law a seal was declared to be conclusive evidence of a valuable consideration, and to estop any inquiry into its existence.[12] Equity, looking at the intent, rather than the form, disregarded the presence of a seal, and always permitted evidence to be adduced as to whether there was an actual consideration. In the same manner a court of equity refused to be bound by the common-law rule that a sealed instrument could only be discharged by a writing under seal, and would afford the obligor such relief as the circumstances might demand, frequently in the nature of an injunction to compel the obligee to deliver up or cancel the sealed instrument.[13] 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 of equity always inquires into the real nature and objects of the transaction, and affords relief accordingly.[14] But the maxim does not apply alone to carry out the true intent of the parties to a contract. It applies as well 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 disguise, and, if necessary to the ends of justice, cancel the contract.[15] It would be useless to at-

[11] Love v. Mining Co., 82 Cal. 639, 654, 91 Am. Dec. 602. See, also, Munds v. Cassidey, 98 N. C. 558, 4 S. E. 353, 355; Sparks v. Steel Co., 87 Ala. 294, 6 South. 195; Dreutzer v. Lawrence, 58 Wis. 594, 17 N. W. 423.

[12] This doctrine is no longer in force in courts of common law, and actual consideration or want thereof, as the case may be, must be shown. Burling v. King, 66 Barb. (N. Y.) 633; In re Webb's Estate, 49 Cal. 541, 545; Minturn v. Seymour, 4 Johns. Ch. (N. Y.) 497; Wason v. Colburn, 99 Mass. 342.

[13] Cross v. Sprigg, 6 Hare, 552; Hurlbut v. Phelps, 30 Conn. 42; Kidder v. Kidder, 33 Pa. 268.

[14] Dodd v. Wilson, 4 Del. Ch. 114, 409.

[15] Stockton v. Railroad Co., 50 N. J. Eq. 52, 24 Atl. 964. A statute

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tempt, in this connection, an exhaustive enumeration of the applications of this maxim. As has been intimated, it lies at the foundation of almost every equitable estate and doctrine. This may be shown in the proper place under discussions hereinafter in respect to these estates and doctrines.

23. Equity imputes an intent to fulfill an obligation.

Where a man is bound to do an act, and he does that which may be considered as done in whole or partial fulfillment of his obligation, such shall be construed to be his intention. This is so because it is right to put the most favorable construction on the acts of others, and to presume that a person intended to do right, rather than wrong; to act conscientiously, rather than in bad faith; and even to be just before he is generous.[1] This maxim is especially applicable to cases arising from the performance or satisfaction of express covenants; as, where a husband covenants to settle on his wife a certain sum, to be expended by trustees in the purchase of lands in a certain county, and he never pays the money to the trustees, but himself purchases lands in such county, takes a conveyance to himself in fee simple, and afterwards dies intestate, such lands will be deemed as purchased by the husband in pursuance of the settlement, and will be liable to the terms thereof.[2] And where a person in a fiduci-

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 guarantied 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.

§ 23. [1] Snell, Eq. p. 45; 1 Pom. Eq. Jur. § 420; Lechmere v. Lechmere, 3 P. Wms. 211; Streatfield v. Streatfield, 1 White & T. Lead. Cas. Eq. 399; Blandy v. Widmore, 2 White & T. Lead. Cas. Eq. 428.

[2] Sowden v. Sowden, 1 Brown, Ch. 582. And see post, c. 9. See, also, Wilcocks v. Wilcocks, 2 Vern. 558, 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 833. Where a person having no real estate covenants to convey and settle lands, and afterwards he purchases,

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ary capacity—as a trustee, executor or administrator, guardian or committee, director or manager of a corporation, agent, or partner in control of partnership funds—purchases property, either real or personal, with trust funds in his hands, and takes the title thereto in his own name, without any declaration of the trust, he will be deemed to have purchased for the benefit of the cestuis que trustent, and as to such property he will still be deemed a trustee. Equity will impute to the trustee an intent to conscientiously fulfill his obligations as such trustee, and will not assume that he intended to violate his fiduciary duties.[3] But the money paid by the trustee for the property purchased must be identified as trust moneys.[4] In a rather recent leading case in England, the principle was carried still 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 drawing out the trust funds in violation of his trust; 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.[5]

but does not convey and settle, he will be deemed to have purchased for the purpose of fulfilling his obligation, and the lands thus purchased will be treated as subject to the covenants. Deacon v. Smith, 3 Atk. 323; Wellesley v. Wellesley, 4 Mylne & C. 581.

[3] As to trustees, see Schlaefer v. Corson, 52 Barb. (N. Y.) 510; Day v. Roth, 18 N. Y. 448; Ferris v. Van Vechten, 73 N. Y. 113; McLarren v. Brewer, 51 Me. 402. As to partners, see Homer v. Homer, 107 Mass. 85; Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Oliver v. Platt, 3 How. 401, 11 L. Ed. 622. As to guardians and committees, see Bancroft v. Consen, 13 Allen (Mass.) 50; Johnson v. Dougherty, 18 N. J. Eq. 406; Reid v. Fitch, 11 Barb. (N. Y.) 399. As to executors or administrators, see Stow v. Kimball, 28 Ill. 93; White v. Drew, 42 Mo. 561. As to directors of corporations, see Robb's Appeal, 41 Pa. 45; Bridenbecker v. Lowell, 32 Barb. (N. Y.) 10.

[4] Ferris v. Van Vechten, 73 N. Y. 113.

[5] In re Hallett's Estate, 13 Ch. Div. 696, 727, 745, followed in Central Nat. Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Englar v. Offutt, 70 Md. 78, 86, 16 Atl. 497.

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EQUITY ACTS IN PERSONAM.

24. Equity acts in personam. The force and effect of this maxim has been modified by statute in most of the states, so that 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 may be enforced by execution against the property of the unsuccessful party in the same manner as a judgment at law.

This is a maxim descriptive of the procedure in a court of equity, and is not, perhaps, in any other respect a maxim or principle of equity itself. A decree of a court of equity did not, by its own force, vest in a party in whose favor it was granted a legal estate, interest, or right to which he was declared to be entitled, nor could it transfer a legal right or title from one party to another. Such decree was a personal demand that the defendant perform as therein directed, but the personal act of the defendant was necessary to complete the relief which had been granted the plaintiff by such decree. Such decrees were enforceable by attachment against the person, or by process of contempt, under which the party failing to obey the decree was arrested and imprisoned until he yielded obedience, or purged the contempt by showing that the disobedience was not willful, but the result of inability, not produced by his own fault or contumacy.[1] Under existing state statutes decrees of courts of equity are themselves, in many instances, directly enforceable against the property of the defendant, and of themselves or by officers of the court convey the estate or afford the relief sought, without the necessity of personal action on the part of the defendant; but these statutes are only in force with-

§ 24. [1] Clements v. Tillman, 79 Ga. 451, 5 S. E. 194; Dickinson v. Hoomes' Adm'r, 8 Grat. (Va.) 410; Pain v. Pain, 80 N. C. 322, 325.

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in the boundaries of the states where enacted.[2] The United States courts are unaffected by such statutes, and, in the absence of legislation by congress, the ordinary doctrine as to the effect of remedies and decrees in equity is still in operation.[3] Notwithstanding the various state statutes providing that decrees in equity apply to and are enforceable in rem, many equitable remedies exist which are unaffected by the change, and still retain their personal character. Acting directly on the conscience and person, equity will not permit an unconscientious or oppressive use of the common or statute law. This principle may be illustrated by the case of a devise of certain lands secured by a person by wrongful and fraudulent misrepresentations made by him to the testator. In equity the fraud of the devisee should not be permitted to succeed. But the statute relating to the execution of wills is peremptory, and equity will not disregard it. But, directing its decree to the conscience of the devisee, equity prevents his holding the title of the devised lands for his own benefit, and compels him to hold them for the benefit of the person to whom they equitably belong.[4] So, one who enters into a parol agreement 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

[2] Langdon v. Sherwood, 124 U. S. 74, 81, 8 Sup. Ct. 429, 31 L. Ed. 344; Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918.

[3] Hart v. Sansom, 110 U. S. 155, 3 Sup. Ct. 586, 28 L. Ed. 101, in which the rule that equity acts in personam is examined, and discussed at length. See, also, Watkins v. Holman, 16 Pet. 25, 26, 10 L. Ed. 873; Tardy v. Morgan, 3 McLean, 358, Fed. Cas. No. 13,752; Briggs v. French, 1 Sumn. 504, Fed. Cas. No. 1,870; Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181.

[4] Lord Westbury, in McCormick v. Grogan, L. R. 4 H. L. 82, 97, says: "The court of equity has, from a very early period, decided that even an act of parliament shall not be used as an instrument of fraud; and if, in the machinery of perpetrating a fraud, an act of parliament intervenes, the court of equity, it is true, does not set aside the act of parliament, but it fastens on the individual who gets a title under that act, and imposes on him, a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the statute of wills and the statute of frauds."

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execute a deed, notwithstanding the statute of frauds.[5] In such case, also, equity does not act in contravention of 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. And any wrongful act threatened by a defendant may be restrained by a personal decree against him. Relief by injunction, in its very nature, depends for its efficacy upon the principle that equity acts in personam, and not in rem. Thus, equity will enjoin an individual from maintaining unconscientious proceedings in common-law courts, and will punish disobedience of its orders by imprisonment.[6]

Jurisdiction of Person.

The statutes of the several states have not deprived courts of equity of their power to act in personam. If the subject-matter of the controversy is in another state or country, and without the territorial jurisdiction of such courts, equitable remedies may be granted which affect the person of either party, provided such party is within the jurisdiction of such courts. An equitable decree may be rendered, directed to either party, compelling or restraining the performance of an act respecting a subject-matter which is beyond the territorial jurisdiction of a court of equity.[7] Hence equitable remedies may be employed by a court of equity in personam against all persons within its jurisdiction for relief against fraud, for the settlement of a partnership, the performance of a contract, or any other similar purpose, even if the subject-

[5] 1 Pom. Eq. Jur. § 430.

[6] Earl of Oxford's Case, 1 Ch. R. 1, 2 White & T. Lead. Cas. Eq. 642; Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. Ed. 362; Maps v. Cooper, 39 N. J. Eq. 316; Texas & P. Ry. Co. v. Kuteman, 54 Fed. 547, 4 C. C. A. 503. 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.

[7] 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 to patent certain improvements in Canada whenever such a patent was secured in the United States, was held capable of specific performance in Massachusetts. Where a court of equity has jurisdiction of the parties, it may compel them to do equity in relation to lands located without its jurisdiction. Gardner v. Ogden, 22 N. Y. 327, 333.

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matter is without its jurisdiction.[8] It has been frequently held, both in this country and England, that a court of equity has power to restrain a person within its jurisdiction from prosecuting an action in a foreign court.[9] In this connection Judge Story says: "When both parties to a suit in a foreign country are residents within the territorial limits of another country, the courts of equity in the latter may act in personam upon these parties, and direct them by injunction to proceed no further in such suit. In such case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the suit, they consider the equities between the parties, and decree in personam according to those equities; and enforce obedience to their decrees by process in personam." [10] And in a proper case the court will restrain a party from leaving its jurisdiction, although this is a reme-

[8] Jurisdiction of equity in case of fraud is sustainable wherever the person sought to be affected is reached, even if land affected by the decree is without the jurisdiction of the court. De Klyn v. Watkins, 3 Sandf. Ch. (N. Y.) 185; Davis v. Morriss' Ex'rs, 76 Va. 21. Payment of legacy from lands without the jurisdiction. Lewis v. Darling, 16 How. 1, 14 L. Ed. 819. In the case of Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181, Chief Justice Marshall, after reviewing all the leading English cases, concludes by holding that in case of fraud, of trust, or of contract the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.

[9] Portarlington v. Soulby, 3 Myine & 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, 33 L. Ed. 538; Dehon v. Foster, 4 Allen (Mass.) 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. See, also, Dale v. Roosevelt, 5 Johns. Ch. (N. Y.) 174 (where Chancellor Kent granted an injunction to restrain suit upon an agreement relating to lands in Ohio); Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Great Falls Co. v. Worster, 15 N. H. 412; Proctor v. Bank, 152 Mass. 223, 25 N. E. 81, 9 L. R. A. 122; Wilson v. Joseph, 107 Ind. 490, 8 N. E. 616.

[10] Story, Eq. Jur. § 899; High, Inj. §§ 103–107.

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dy which at the present time is little used.[11] It seems now well established that a court of chancery, having jurisdiction of the party in whom the legal title to the land in controversy is vested, may, by its process of attachment and injunction, compel him to do justice by the execution of such conveyances and assurances as will affect the title of the property in the jurisdiction where it is situated.[12] In general, the fact that the property is not within the jurisdiction constitutes no bar to a proceeding in a court of equity, if the person is within the jurisdiction, for a court of equity acts upon the person; or, to use the appropriate phrase, "Æquitas agit in personam."[13] But the claim, to affect foreign

[11] Enos v. Hunter, 9 Ill. 211; Denton v. Denton, 1 Johns. Ch. (N. Y.) 364; Porter v. Spencer, 2 Johns. Ch. (N. Y.) 169; Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 35 L. Ed. 678; Bankr. Act 1898, § 7, subd. 5.

[12] Gardner v. Ogden, 22 N. Y. 327, 339, citing Mead v. Merritt, 2 Paige (N. Y.) 402; Mitchell v. Bunch, Id. 606, 22 Am. Dec. 669; Sutphen v. Fowler, 9 Paige (N. Y.) 280; Shattuck v. Cassidy, 3 Edw. Ch. (N. Y.) 152; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89. And see Bailey v. Ryder, 10 N. Y. 363. The circumstances that the real property constituting the subject-matter of the contract was situated in another state presents no obstacle to the jurisdiction. Sloan v. Baird, 162 N. Y. 327, 331, 56 N. E. 752. See, also, Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181.

[13] Story, Eq. Pl. § 489. And see Penn v. Baltimore, 2 White & T. Lead. Cas. Eq. 1047. Conveyance of land may be decreed, Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207. If the parties in an action for a specific performance are within the jurisdiction of the court, the fact that the subject-matter is without such jurisdiction is immaterial. Burrell v. Root, 40 N. Y. 496; Brown v. Desmond, 100 Mass. 267. Courts of equity in England are, and always have been, courts of conscience, operating in personam, and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which are not either locally or ratione domicilii within their jurisdiction. Lord Selborne, in Ewing v. Ewing, 9 App. Cas. 34; Id., Brett's Lead. Cas. Mod. Eq. 234. And see the following American cases: Guild v. Guild, 16 Ala. 121; McGee v. Sweeney, 84 Cal. 100, 23 Pac. 1117; Montgomery v. U. S. (C. C.) 36 Fed. 4; Carver v. Peck, 131 Mass. 292; Bethell v. Bethell, 92 Ind. 318; Johnson v. Gibson, 116 Ill. 294, 6 N. E. 205; Poindexter v. Burwell, 82 Va. 507; Allen v. Buchanan, 97 Ala. 309, 11 South. 777; Cooley v. Scarlett, 38 Ill. 316, 87 Am. Dec. 298; Harris v. Pullman, 84 Ill. 20, 25 Am. Rep. 416. A party within the jurisdiction of a court of equity may be compelled,

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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.[14] If the relief sought is such that it must act directly upon specific property located without the court's jurisdiction, and not upon the person of the defendant, the suit must be brought where the property is situated. As, for instance, a suit cannot be entertained to determine or affect the title to lands situated in another state.[15] Nor will equity decree partition of land situated in a foreign state or country, because no power could be given to commissioners to go there, and take the steps necessary for carrying out the decree.[16] A suit to foreclose a mortgage on lands situated beyond the territorial jurisdiction of a court of equity cannot be maintained.[17] But it is a settled law that a decree of foreclosure, and a sale of the entire mortgaged property, is valid, although part of the mortgaged property lies without the territorial jurisdiction of the court within which the suit was brought.[18] Eq-

under certain circumstances, to transfer title to real property in another state. Baker v. Rockabrand, 118 Ill. 365, 8 N. E. 456.

[14] Westl. Priv. Int. Law, 64, 65.

[15] Northern Indiana R. Co. v. Railroad Co., 15 How. 233, 14 L. Ed. 674; Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Lindley v. O'Reilly, 50 N. J. Law, 636, 640, 15 Atl. 379, 1 L. R. A. 79; Carpenter v. Strange, 141 U. S. 106, 11 Sup. Ct. 960, 35 L. Ed. 640.

[16] Cartwright v. Pettus, 2 Ch. Cas. 214; Poindexter v. Burwell, 82 Va. 507; Wimer v. Wimer, Id. 899, 3 Am. St. Rep. 126.

[17] Farmers' Loan & Trust Co. v. Telegraph Co., 55 Conn. 334, 11 Atl. 184, 3 Am. St. Rep. 53.

[18] Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207, where Mr. Justice Strong said: "Without reference to the English chancery decisions, where this objection to the decree would be quite untenable, we think the power of a court of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity, sitting in a state, and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendant. True, it cannot send its process into another state, nor can it deliver possession of land in another jurisdiction; but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of trustees when they are complainants." See, also, McElrath v. Railroad Co., 55 Pa. 189; White v. Hall, 12 Ves. 321; MacGregor v. MacGregor, 9 Iowa, 65. And see

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uity will not, however, entertain jurisdiction of an action to recover proceeds of the sale of real estate situated in a foreign country, where title to the property is in dispute.[19]

25. Equity acts specifically, and not by way of compensation.

Equity attempts to place the parties in the position which they ought to occupy by decreeing specifically that each party be given the rights which he ought to enjoy, and putting an end to the wrongs of which either party may be guilty. With few exceptions, courts of law can only direct the payment of a sum of money as compensation for injuries suffered by either party, and cannot prevent the repetition of the injuries. As will thus be seen, this maxim illustrates the great difference in the jurisdiction of equity and law.[1] It is the embodiment of a general principle running through the whole system of equity jurisprudence. To illustrate this maxim it will only be necessary to refer to a few equitable doctrines and remedies. Thus equity will compel a contract to be specifically performed, instead of awarding damages for its breach. 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.

Bankr. Act 1898, § 7, subd. 5, compelling bankrupt to make conveyance to his trustee.

[19] In re Hawthorne, 23 Ch. Div. 745.

§ 25. [1] Snell, Eq. Jur. p. 47.

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CHAPTER IV.

PENALTIES AND FORFEITURES.

26–27. Doctrine Relative to Penalties and Forfeitures.
28–29. Definitions.
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32. Rules Governing the Determination as to Liquidated Damages or Penalty.
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35. Statutory Penalties and Forfeitures.

DOCTRINE RELATIVE TO PENALTIES AND FORFEITURES.

26. 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, such performance or enjoyment is the substantial and principal intent of the parties to the contract, and the penalty or forfeiture is only accessory thereto.

27. Equity will not enforce, but will relieve against, such penalty or forfeiture upon payment by the party subjected thereto of the amount due, with interest, or of damages proportionate to the injury occasioned by a failure to perform the act or secure the enjoyment of the right or benefit.

The doctrine was originally applied to those cases where the penalty or forfeiture was for the purpose of enforcing the payment of a sum of money; but later the doctrine was extended to cases where the penalty or forfeiture was used

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to secure the performance of a specific act, or the enjoyment of some right or benefit. It is now a general principle, to be applied in all courts of equity, that equity will relieve where a penalty is forfeited, if the case admits of a certain compensation; and the true foundation of such relief is that, when penalties are designed only to secure money or damages really incurred, if the party obtains his money or damages, he gets all that he expected or required.[1] The doctrine, as we have seen, rests on the maxim that equity looks at the intent, rather than the form, of a transaction.[2] The common law has followed equity, and now in most states, in a great variety of cases, relief may be had in common-law courts against penalties and forfeitures.[3]

§§ 26-27. [1] Skinner v. Dayton, 2 Johns. Ch. (N. Y.) 526, 535, citing Sanders v. Pope, 12 Ves. 282; Davis v. West, Id. 475. And see Livingston v. Tompkins, 4 Johns. Ch. (N. Y.) 432, 8 Am. Dec. 598, where the court says: "It may be laid down as a fundamental doctrine of the court that equity does not assist the recovery of a penalty or forfeiture, or anything in the nature of a forfeiture." Followed in Marshall v. Mayor, etc., of City of Vicksburg, 16 Wall. 146, 149, 21 L. Ed. 121.

[2] Peachy v. Duke of Somerset, 1 Strange, 447; Sloman v. Walter, 1 Brown, Ch. 418. "Accident is undoubtedly the origin of the jurisdiction of chancery upon the subject of penalties, but subsequently the jurisdiction was extended to embrace all questions as to penalties irrespective of accident." Bisp. Eq. § 178, citing 1 Spence, Eq. 629, 630. Story says that it is highly probable that relief was first granted in such cases upon the ground of accident, or mistake, or fraud. Story, Eq. Jur. § 1313. But Pomeroy does not concur in this view of the origin of this relief. The doctrine has a deeper foundation in universal principles of right, and is grounded in the maxim that equity looks to the intent, rather than to the form. Pom. Eq. Jur. §§ 378, 381, 433, note.

[3] Statutes in England have rendered it unnecessary for equity to relieve from a penalty, by providing that a debtor should be discharged, in every case, from his obligation, on payment of principal, interest, and costs. 8 & 9 Wm. III. c. 11, and 4 & 5 Anne, c. 16, §§ 12, 13. Similar statutes are in force in the several states in this country. But the jurisdiction of a court of chancery to interfere still exists. Ewing v. Litchfield, 91 Va. 575, 22 S. E. 362; Lynch v. Gas Co., 165 Pa. 518, 30 Atl. 984.

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DEFINITIONS.

28. A penalty is a sum of money which the obligor contracts to pay by way of penalty if he fails to perform or carry out the terms imposed on him by the contract.

29. Forfeiture is a destruction or deprivation of some estate or right because of the failure to perform some obligation or condition contained in a contract.

There is a distinction between a penalty and a forfeiture, although, in a general sense, the two words have the same meaning. Relief is always given against a penalty if compensation can be made, for it is deemed a mere security; but in the case of a forfeiture relief is not always given, although compensation can be made. A court of equity will not always set aside a forfeiture incurred on the breach of a covenant, although the resulting damages may be easily ascertained, and payment made therefor in money, unless upon the ground of accident, mistake, surprise, or fraud. If a person is liable, under his obligation, to pay a certain sum of money, but stipulates that, if such sum is not paid at the time stated in the contract, he will pay a larger sum of money, such stipulation is a penalty; if such stipulation involves the loss of lands, chattels, or securities for a failure to pay a certain sum or perform a certain act, it is a forfeiture. Where a sale of an estate was made on terms that half the purchase money should be paid at once, and the other half on a fixed day, and that, if the whole was not paid on that day, the vendor should retain the estate and all the money then paid, it was held to be a penalty, as forfeiting the purchase money paid for a default in part, and relief was given on payment of the unpaid balance with interest.[1] When a party contracts in the alternative, agreeing to pay a certain sum if he performs one of the alternative stipulations, and a larger sum if he performs the other stipulation, equity does

§§ 28-29. [1] In re Dagenham Dock Co., 8 Ch. App. 1022.

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not regard the latter stipulation as a penalty. In a leading English case, Lord St. Leonards, in speaking of such alternative contracts, says: "If a man covenants to abstain from doing a certain act, and agrees that, if he does it, he will pay a sum of money, he would be compelled to abstain from doing that act; for he cannot, in such a case, elect to break his engagement, and pay the penalty instead. But if a man lets meadow land for two guineas an acre, and the contract is that, if the tenant chooses to employ it in tillage, he may do so, paying an additional rent of two guineas an acre, the breaking up of the land is an act permitted by the contract, which in that case provides that the landlord is to receive the increased rent." [2] In other words, the lessee may do with the land as he pleases. If he uses it in one way, he is to pay one rent, and, if in another, a larger rent. Such an arrangement is altogether different from an agreement not to do a thing, with a penalty for doing it.[3] And if an agreement is made for the payment of a smaller sum at a certain time, and in a certain manner, in discharge of an existing debt, with the condition that in default of payment the whole debt shall be payable, the reserved right to compel the payment of the original debt is not a penalty, and equity will afford no relief against it.[4] Where a mortgage is made at a certain rate of interest, conditioned that, if payments thereunder are not punctually made, a higher rate of interest shall be charged, such increased interest is a penalty, and relief may be had if the debtor pay interest at the lower rate, including in-

[2] French v. Macale, 2 Dru. & War. 274. See, also, Parfitt v. Chambre, L. R. 15 Eq. 36.

[3] Hardy v. Martin, 1 Cox, 27; Herbert v. Railway, L. R. 2 Eq. 221, 224, 225.

[4] Thompson v. Hudson, L. R. 4 H. L. 1; Ford v. Earl of Chesterfield, 19 Beav. 429; United States Mortg. Co. v. Sperry, 138 U. S. 313, 348, 11 Sup. Ct. 321, 332, 34 L. Ed. 969, 982; Reeves v. Stipp, 91 Ill. 609. In Peachy v. Duke of Somerset, 2 White & T. Lead. Cas. Eq. 2025, it is said that: "Where a certain sum of money is due, and the creditor enters into arrangements with his debtor to take a lesser sum, provided that sum is secured in a certain way, and paid at a certain day, but, if any of the stipulations of the arrangements are not performed as agreed on, the creditor is to be entitled to recover the whole of the original debt, such remitter to his original rights does not constitute a penalty, and equity will not interfere to prevent its observance."

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terest for the delay; but, if a certain rate of interest is fixed, and the mortgagee agrees to take less if it be paid punctually, the agreement is valid, and no relief can be given.[5] And where a debt is contracted to be paid in installments, subject to the condition that on default of any installment the whole sum will become payable at once, the condition is not a penalty, and there is no relief against it.[6] But, if the debtor is prevented by the fraud or inequitable conduct of the creditor from paying the installment, relief may be had in equity from the effect of the default.[7]

GROUNDS FOR RELIEF.

30. The general test by which to ascertain whether relief in equity can or cannot be had against a penalty is to consider whether or not adequate compensation can be made for a breach of the obligation secured by such penalty.

(a) If the penalty is to secure the payment of money, the debtor party will be relieved

[5] Powis v. Maynard, 3 Atk. 519; Attwood v. Taylor, 1 Man. & G. 279; Wallis v. Smith, 21 Ch. Div. 249.

[6] People v. Superior Court, 19 Wend. (N. Y.) 104; Noyes v. Clark, 7 Paige (N. Y.) 179, 180; Malcolm v. Allen, 49 N. Y. 448; Bennett v. Stevenson, 53 N. Y. 508. A court of equity cannot relieve a mortgagor from a failure to pay taxes. Ferris v. Ferris, 28 Barb. (N. Y.) 29; Spring v. Fisk, 21 N. J. Eq. 175, 178. See, also, Baldwin v. Van Vorst, 10 N. J. Eq. 577; Martin v. Melville, 11 N. J. Eq. 222; Robinson v. Loomis, 51 Pa. 78; Schooley v. Romain, 31 Md. 574, 579; Ottawa Northern Plank-Road Co. v. Murray, 15 Ill. 337; Harper v. Ely, 56 Ill. 179; Magnusson v. Williams, 111 Ill. 450; Hoodless v. Reid, 112 Ill. 105, 1 N. E. 118; Gibbons v. Hoag, 95 Ill. 45; Chapin v. Billings, 91 Ill. 539; Howell v. Railroad Co., 94 U. S. 463, 24 L. Ed. 254; Wilcox v. Allen, 36 Mich. 160.

[7] Bennett v. Stevenson, 53 N. Y. 508, where it is clearly held that fraud or improper conduct on the part of the creditor would operate as an excuse. Noyes v. Anderson, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657,—in which case relief was given for a default in the payment of taxes on the mortgaged premises, occasioned by mistake. See, also, Martin v. Melville, 11 N. J. Eq. 222; Wilcox v. Allen, 36 Mich. 160.

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on the payment of the amount, with interest and costs.

(b) If the penalty is to secure the performance of a collateral act or undertaking, equity will interfere if adequate compensation can be made the creditor party.

The earliest case for relief against penalties was where the penalty was contained in a common bond to secure the payment of the principal and interest thereof.[1] In such a case there is no difficulty in ascertaining the amount which is sufficient to compensate the creditor for the failure of the debtor to make the agreed payment. At a later time, however, equity assumed to grant relief against a penalty or forfeiture imposed for a breach of any obligation, provided such breach could be amply compensated by a payment of money.[2] The true ground of relief in both these cases is that, as the penalty is designed as a mere security, if the party obtains his money or his damages, he gets all that he expected, and all that in justice he is entitled to.[3] Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose as it would be to allow him to substitute another for the principal obligation.[4] As has been noticed, if the penalty is for the payment of money only, and the penalty requires a payment of a larger sum, the rule is easily applied.[5] But,

§ 80. [1] Peachy v. Duke of Somerset, 2 White & T. Lead. Cas. Eq. p. 1245.

[2] Sloman v. Walter, 2 White & T. Lead. Cas. Eq. p. 1260, note.

[3] Skinner v. Dayton, 2 Johns. Ch. (N. Y.) 535. "In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be said that it is his own folly to have made such a stipulation, it may equally well be said that the folly of one man cannot authorize gross oppression on the other side." Story, Eq. Jur. § 1316.

[4] Story, Eq. Jur. § 1316.

[5] Thompson v. Hudson, L. R. 4 H. L. 15, in which case Lord

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when the penalty is to secure the performance of some collateral act, it is more difficult. The penalty in such case may be in the nature of liquidated damages, and as such enforceable both in law and equity. The cases relative to the question as to whether a provision in a contract for the payment of money for a breach thereof is to be treated as a penalty or as stipulated damages are many and varied. The determination of such question is by no means free from difficulties. It is probable that no one rule of universal application can be stated which will be decisive in reaching such determination. The most that can be done is to state a few special rules which are of importance in considering the question, and which are applicable to most, if not all, agreements.

LIQUIDATED DAMAGES.

31. If a contract is for the performance or non-performance of some act other than the payment of money, and the nature of the contract is such that the damages resulting from the violation thereof cannot be readily and definitely ascertained, an express clause may be inserted therein providing for the payment of a certain sum of money as liquidated damages for such violation, and as

Hatherley says: "Where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage or be it by way of stipulation that, in case of its not being paid at the time appointed, a larger sum shall become payable and be paid, in either of these cases equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged, or any augmentation of the debt as a penal provision, on the ground that equity regards the contemplated forfeiture which might take place at law with reference to the estate as in the nature of a penal provision against which equity will relieve when the object in view, viz. the securing of the debt, is attained, and regarding also the stipulation for the payment of a larger sum of money, if the sum be not paid at the time it is due, as a penalty and a forfeiture against which equity will relieve." See, also, Holles v. Wyse, 2 Vern. 289; Strode v. Barker, Id. 316; Nicholls v. Maynard, 3 Atk. 519; Wallis v. Smith, 21 Ch. Div. 243.

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full compensation therefor. Such a provision is enforceable in law and equity.

Liquidated damages may be said to occur when the parties to a contract have agreed that, in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum as the just, appropriate, and conventional amount of the damages sustained by such act or omission. In such cases equity will not interfere, but will deem the parties competent to determine what the measure of damages should be. But relief may be had, even in cases where the damages are agreed upon, if they are grossly and unreasonably disproportionate to the nature or extent of the injury.[1] If there is doubt as to whether the parties intended to express stipulated damages or a penalty, the tendency of the courts will be in favor of the latter, because the law favors mere indemnity.[2]

RULES GOVERNING THE DETERMINATION AS TO LIQUIDATED DAMAGES OR PENALTY.

82. The following rules may be stated as affecting the question whether an amount stated in a contract to be paid for a breach thereof is intended as liquidated damages or a penalty:

(a) When, from the nature of a contract, it is impossible to definitely compute the dam-

§ 81. [1] Story, Eq. Jur. § 1318. See, also, Clement v. Cash, 21 N. Y. 253; Colwell v. Lawrence, 38 N. Y. 71; Perkins v. Lyman, 11 Mass. 76; Lynde v. Thompson, 2 Allen (Mass.) 456, 459; Streeper v. Williams, 48 Pa. 450.

[2] State v. Dodd, 45 N. J. Law, 525; Wallis v. Carpenter, 13 Allen (Mass.) 19. And see Fitzpatrick v. Cottingham, 14 Wis. 219. Equity is best satisfied by the payment of damages, and no more, and will accept the conclusion that a sum stated in a contract was intended as liquidated damages only when plainly shown. Baird v. Tolliver, 6 Humph. (Tenn.) 186, 44 Am. Dec. 298; Cheddick's Ex'r v. Marsh, 21 N. J. Law, 463; Hahn v. Horstman, 12 Bush (Ky.) 249. See, also, Hennessy v. Metzger, 152 Ill. 505, 38 N. E. 1058; Monmouth Park Ass'n v. Iron Works, 55 N. J. Law, 132, 26 Atl. 140, 39 Am. St. Rep. 626.

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ages resulting from a breach thereof, the sum stated therein as compensation for such breach, if not grossly disproportionate to the injuries suffered, will be deemed liquidated damages. This rule involves a consideration of the subject in three aspects:

(1) The intent of the parties.

(2) The reasonableness of the liquidation.

(3) The language employed.

(b) If the contract provides for a payment of a larger sum on the failure of the party to pay a less sum, or to deliver a thing of less value, the larger sum is a penalty, whatever may be the language used in describing it.

(c) When the agreement contains provisions for the performance of several acts, or for omitting to perform several acts, and the damages occasioned by their breach cannot be measured, and it is agreed that a stipulated sum shall be paid as damages for a violation of any or all of such provisions, such sum is to be deemed liquidated damages, and not a penalty.

(d) When the agreement contains provisions for the performance or nonperformance of various acts which are not measurable by any exact pecuniary standard, together with one or more other acts, in respect of which the damages occasioned by a breach thereof are easily ascertainable by a jury, and a certain sum is stipulated to be paid

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on a violation of any or all of these provisions, such sum is deemed a penalty.

(e) But where the stipulated sum to be paid in case of a violation of any or all the provisions of a contract is the same whether the party's failure to perform is partial or complete, it must be considered a penalty, and not as liquidated damages.

These rules are not of sufficient scope to include all cases which may arise in which the determination of the question of what constitutes liquidated damages as distinguished from a penalty is of importance. There are many agreements which cannot be subjected to any fixed rule, and to which the courts will apply general rules of interpretation. The question is always one of construction, and any rule on the subject is a mere guide to the intention of the parties.[1]

When Damages Cannot be Ascertained.

Uncertainty as to the extent of the injuries which may ensue is always a criterion by which to determine whether the case is one of liquidated damages or a penalty.[2] A frequent application of this test is where a party sells his business and the good will thereof, and contracts not to engage in the same business within a given territory, and for a breach thereof to forfeit a certain sum as stipulated damages. In such a case it is clearly apparent that the damages resulting from the breach are not measurable, and the agreed sum may be recovered, unless, of course, it is unreasonable.[3]

§ 32. [1] Kunkel v. Wherry, 189 Pa. 198, 42 Atl. 112.

[2] Powell v. Borroughs, 54 Pa. 329; Wolf Creek Diamond Coal Co. v. Schultz, 71 Pa. 180.

[3] Kelso v. Reid, 145 Pa. 606, 23 Atl. 323; Pierce v. Fuller, 8 Mass. 223, 5 Am. Dec. 102; Cushing v. Drew, 97 Mass. 445; Streeter v. Rush, 25 Cal. 67; Newman v. Wolfson, 69 Ga. 764; Duffy v. Shockey, 11 Ind. 70, 71 Am. Dec. 348; Spicer v. Hoop, 51 Ind. 365; Johnson v. Gwinn, 100 Ind. 466; Jaquith v. Hudson, 5 Mich. 123; Cheddick's Ex'r v. Marsh, 21 N. J. Law, 463; Hoagland v. Segur, 38 N. J. Law, 230; Nobles v. Bates, 7 Cow. (N. Y.) 307; Smith v. Smith, 4 Wend. (N. Y.) 468; Dakin v. Williams, 17 Wend. (N. Y.)

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And where a purchase was made of a business and a trade secret, which secret the vendor agreed not to divulge under a penalty described in the contract as stipulated damages, the purchaser was held liable to pay the entire penalty as liquidated damages, on the ground that the damages occasioned by a violation of the agreement were wholly uncertain, and incapable of being ascertained except by conjecture.[4] Another frequent application of the rule that damages may be liquidated by the parties is in the case of failure to complete the performance of a contract at the time mentioned therein,—as, when a building contract provides that the work shall be completed on a certain day, and in default thereof the builder shall pay a stipulated sum for every day or week for which the completion of the work is delayed beyond that time, the stipulated sum, if reasonable, may be recovered as stipulated damages.[5] The cases mentioned are only a few of those in which the rule that, when the amount of damages occasioned by a breach of a contract cannot be easily ascertained, the sum stipulated will be allowed as liquidated damages. A number of cases are cited in the note which are illustrative of this principle.[6]

447; Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Lange v. Werk, 2 Ohio St. 519.

[4] Tode v. Gross, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475.

[5] O'Donnell v. Rosenberg (N. Y.) 14 Abb. Prac. (N. S.) 59; Bridges v. Hyatt, 2 Abb. Prac. 449; Folsom v. McDonough, 6 Cush. (Mass.) 208; Mueller v. Kleine, 27 Ill. App. 473. But in Wilcus v. Kling, 87 Ill. 107, where no actual damage could be shown, the stipulated sum was deemed a penalty; and, where the stipulated sum is greatly out of proportion to any possible damage,—as where it was stipulated in a contract for the construction of a house, the rental value of which was $25 a month, that $150 a week should be paid as damages for delay in the completion of the work,—the sum was not allowed as liquidated damages. Clements v. Railroad Co., 132 Pa. 445, 19 Atl. 274, 276.

[6] Cotheal v. Talmage, 9 N. Y. 551, 61 Am. Dec. 716; Pearson v. Williams' Adm'r, 24 Wend. (N. Y.) 246; Clement v. Cash, 21 N. Y. 253; Bagley v. Peddie, 16 N. Y. 470, 69 Am. Dec. 713; Leary v. Laflin, 101 Mass. 334; Wolf Creek Diamond Coal Co. v. Schultz, 71 Pa. 180; Powell v. Borroughs, 54 Pa. 329, 336; Brewster v. Edgerly, 13 N. H. 275; Berrikott v. Traphagen, 39 Wis. 220; Peine v. Weber, 47 Ill. 41. The sum stipulated to be paid for a breach of contract for the sale of personal property, if the articles sold are

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Intent of the Parties.

If the damages stipulated against are certain and fixed, and may be easily and accurately ascertained, the intent of the parties is immaterial, and the sum stipulated will be considered as a penalty. This is in contravention of the general rule relative to the construction of contracts, which gives controlling weight to the intent of the parties as expressed in the contract. The underlying principle of the whole subject relative to the payment of any stipulated sum for a breach of a contract is that of compensation. If the contracting parties lose sight of this principle, and stipulate, not for compensation, but for a sum out of proportion to the actual damages incurred by a breach of the contract, the law will not enforce a payment of the stipulated amount, even if the contract, by express terms, declares such amount to be "liquidated damages." But, if there is uncertainty as to the amount of damages incurred by the breach, the question as to whether the parties intended the stipulated sum to be considered as a penalty or liquidated damages is to be determined, among other things, by considering the language of the contract.[7]

The Liquidation must be Reasonable.

If the intent, as expressed in the contract, is that the sum stipulated therein should be paid upon a breach, the sum, if

such as to be subject to the legal measure of damages,—that is, the difference between the market price and the price agreed to be paid,—is generally considered a penalty. Jemmison v. Gray, 29 Iowa, 537; Shreve v. Brereton, 51 Pa. 175, 186; Burr v. Todd, 41 Pa. 209. If the contract is for the sale of a particular kind of personal property, or some specified article of peculiar value, to which it is impossible to affix a market value, the stipulated sum may be deemed liquidated damages. See Lynde v. Thompson, 2 Allen (Mass.) 460; Gammon v. Howe, 14 Me. 250; Chamberlain v. Bagley, 11 N. H. 234; Mead v. Wheeler, 13 N. H. 351; Shiell v. McNitt, 9 Paige (N. Y.) 101, 103. But, if the stipulated sum is excessive, a court of equity might deem it a penalty. Spencer v. Tilden, 5 Cow. (N. Y.) 144; Burr v. Todd, 41 Pa. 206.

[7] Little v. Banks, 85 N. Y. 258, 266, where the court lays down the rule that in construing such provisions, in contracts, the actual intention of the parties, so far as it can be reasonably and fairly ascertained from the language of the contract, and from the circumstances of the case, is to be considered, citing Colwell v. Lawrence, 38 N. Y. 71; Cotheal v. Talmage, 9 N. Y. 551, 61 Am. Dec. 716.

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reasonable, and proportionate to the injuries sustained, must be paid by the party in default. If the stipulated sum is unreasonably large, it will be deemed a penalty, and the courts will require damages to be assessed as if no stipulated sum was named in the contract.[8] Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted by express stipulation to set this principle aside.[9] In many cases, however, it has been stated that the mere amount stipulated is not sufficient of itself to justify the court in holding that it is a penalty.[10] But it is certain that the amount of the sum can always be taken into consideration as an aid in determining the intention of the parties to the contract, and, if it be disproportionate to the damages that would be sustained by the breach, the court may properly declare it to be a penalty.[11]

The Language Employed.

The language of a contract is not conclusive to determine the question whether a stipulated sum is to be allowed as liquidated damages. Because parties have called a sum damages, or because they have designedly used language and inserted provisions which are in their nature penal, and yet

[8] People v. Railroad Co., 76 Cal. 29, 18 Pac. 90; Monmouth Park Ass'n v. Iron Works, 55 N. J. Law, 132, 26 Atl. 140; Sedg. Dam. § 407; Story, Eq. Jur. § 1318.

[9] Myer v. Hart, 40 Mich. 517, 523, 29 Am. Rep. 553.

[10] Clement v. Cash, 21 N. Y. 253; Shiell v. McNitt, 9 Paige (N. Y.) 101; Dwinel v. Brown, 54 Me. 468; Morse v. Rathburn, 42 Mo. 594, 97 Am. Dec. 359; Peine v. Weber, 47 Ill. 41; Gobble v. Linder, 76 Ill. 157; Keeble v. Keeble, 85 Ala. 552, 5 South. 149.

[11] March v. Allabough, 103 Pa. 335, where the court said, in determining the question: "We must consider the relation which the sum stipulated bears to the injury which may be caused by the breach provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or necessarily inherent in the transaction." See, also, Keck v. Bieber, 148 Pa. 645, 24 Atl. 170: Kunkel v. Wherry, 189 Pa. 198, 42 Atl. 112; Berry v. Wisdom, 3 Ohio St. 241; Perkins v. Lyman, 11 Mass. 76, 6 Am. Dec. 158; Lynde v. Thompson, 2 Allen (Mass.) 456, 459; Hodges v. King, 7 Metc. (Mass.) 583; Curry v. Larer, 7 Pa. 470; Colwell v. Lawrence, 38 N. Y. 71; Parr v. Village of Greenbush, 42 Hun (N. Y.) 232; Scofield v. Tompkins, 95 Ill. 190, 35 Am. Rep 160.

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have endeavored to cover up their objects under other disguises, courts of equity will not be deprived of their jurisdiction to relieve against what is in truth a penalty.[12] If it is apparent from the intent of the parties as expressed in the contract that the word "penalty" was used where "liquidated damages" was intended, or, on the other hand, that the words "liquidated damages" were used where "penalty" was meant, the use of either of such terms will not control in determining the question.[13] And it has been decided in a well-considered case that, even if it were admitted as a fact that the parties intended the sum to be deemed liquidated damages, and not a penalty, the intention could have no influence on the decision of a court of law.[14]

Stipulation for Nonpayment of Smaller Sum.

Although the contract may not, in form, provide for the payment of money, if it, in effect, provides for such a payment, and a sum is stipulated for a breach thereof, such sum is a penalty.[15] Such stipulation is a penalty not only when it provides for the payment of a larger sum on the failure to pay a smaller amount, but also where it may possibly lead to such a result.[16]

Contract Providing for More Than One Thing.

Where a contract provides for the performance or nonperformance of more than one act, and the damages resulting

[12] Story, Eq. Jur. § 1318; Ropes v. Upton, 125 Mass. 258; Bird v. Lake, 1 Hem. & M. 111; Howard v. Woodward, 34 Law J. Ch. 47.

[13] Parfitt v. Chambre, L. R. 15 Eq. 36; Fletcher v. Dysche, 2 Term R. 32; Green v. Price, 13 Mees. & W. 701; Cushing v. Drew, 97 Mass. 445; Shute v. Taylor, 5 Metc. (Mass.) 61; Streeper v. Williams, 48 Pa. 450; Hamaker v. Schroers, 49 Mo. 406; Little v. Banks, 85 N. Y. 266; Ward v. Building Co., 125 N. Y. 230, 26 N. E. 256; Yenner v. Hammond, 36 Wis. 277; Schofield v. Tompkins, 95 Ill. 190, 35 Am. Rep. 160; Beard v. Delaney, 35 Iowa, 16; Spear v. Smith, 1 Denio (N. Y.) 464; Hoag v. McGinnis, 22 Wend. (N. Y.) 165.

[14] Jaquith v. Hudson, 5 Mich. 123, 136.

[15] Clement v. Cash, 21 N. Y. 253; Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713; Whitfield v. Levy, 35 N. J. Law, 149; Dakin v. Williams, 17 Wend. (N. Y.) 447; Tiernan v. Hinman, 16 Ill. 400; Peine v. Weber, 47 Ill. 41; Kuhn v. Myers, 37 Iowa, 351.

[16] Spear v. Smith, 1 Denio (N. Y.) 465; Gray v. Crosby, 18 Johns. (N. Y.) 219, 226; Curry v. Larer, 7 Pa. 470.

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from a violation of all or each of them are uncertain as to amount, a stipulated sum will be treated as liquidated damages, for the same reasons and on the same principles as though only one provision was contained in the contract.[17] But where the sum is fixed as security for the performance or nonperformance of several acts of widely different importance, damages for breaches of some of which are easily ascertained, and for any of which the sum stipulated is an excessive compensation, such sum must be regarded as a penalty.[18] In New York the principle has been deduced from the leading English cases that, where a party agrees to do several things, one of which is to pay a sum of money, and in case of a failure to perform any or either of the stipulations agrees to pay a larger sum as liquidated damages, the larger sum is to be regarded in the nature of a penalty, and, being a penalty in regard to one of the stipulations to be performed, is a penalty as to all.[19] It follows from the reasoning of the New York cases that, if one of the things to be performed is of such a nature that failure to perform can be easily measured by a pecuniary standard, the same principle applies. If the contract is one in which the damages occasioned by a partial performance are ascertainable, and a sum is stipulated for a breach of the entire contract, such

[17] Green v. Price, 13 Mees. & W. 695; Rawlinson v. Clarke, 14 Mees. & W. 187; Shute v. Hamilton, 3 Daly (N. Y.) 462; Mott v. Mott, 11 Barb. (N. Y.) 134; Lange v. Werk, 2 Ohio St. 519.

[18] Ex parte Capper, 4 Ch. Div. 724; Davies v. Penton, 6 Barn. & C. 216; Edwards v. Williams, 5 Taunt. 247; Beckham v. Drake, 8 Mees. & W. 846; Watts v. Camors, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406; Trower v. Elder, 77 Ill. 452; Carpenter v. Lockhart, 1 Ind. 434; Heatwole v. Gorrell, 35 Kan. 692, 12 Pac. 135; Heard v. Bowers, 23 Pick. (Mass.) 455; Higginson v. Weld, 14 Gray (Mass.) 165; Daily v. Litchfield, 10 Mich. 29; Trustees of First Orthodox Congregational Church of Middleville v. Walrath, 27 Mich. 232; Carter v. Strom, 41 Minn. 522, 43 N. W. 394; Moore v. Platte Co., 8 Mo. 467; Long v. Towl, 42 Mo. 545, 97 Am. Dec. 355; Whitfield v. Levy, 35 N. J. Law, 149; State v. Dodd, 45 N. J. Law, 525; Jackson v. Baker, 2 Edw. Ch. (N. Y.) 471; Niver v. Rossman, 18 Barb. (N. Y.) 50; Staples v. Parker, 41 Barb. (N. Y.) 648; Beale v. Hayes, 5 Sandf. (N. Y.) 640; Barry v. Wisdom, 3 Ohio St. 241; Shreve v. Brereton, 51 Pa. 175; March v. Allabough, 103 Pa. 335.

[19] Cotheal v. Talmage, 9 N. Y. 551, 556, 61 Am. Dec. 716; Lampman v. Cochran, 16 N. Y. 275; Clement v. Cash, 21 N. Y. 253.

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sum will not be allowed as liquidated damages in case of such partial performance;[20] as, where a contract is made for the sale and delivery of a specified commodity in certain quantities at different times, for a breach of which a lump sum is stipulated to be paid, the sum must be considered as a penalty, for otherwise the vendor might be required to pay as much for a partial failure to perform his contract as though he had made no effort to fulfill.[21] In such cases, as in all cases involving a consideration of this question, if it is apparent that the parties have abandoned the fundamental guide of compensation, and have applied an unjust, oppressive, and disproportionate measure of damages, the courts will not allow the intention of the parties to prevail.

ENFORCING FORFEITURES.

33. Equity will not lend its active aid to enforce a forfeiture.

This rule rests on the maxim 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 a condition broken, since equitably he is entitled only to just compensation for his injury, and he will be remitted to his legal remedies.[1]

[20] Heatwole v. Gorrell, 35 Kan. 692, 12 Pac. 135; Watt's Ex'rs v. Sheppard, 2 Ala. 425; Shute v. Taylor, 5 Metc. (Mass.) 61; Hamaker v. Schroers, 49 Mo. 406.

[21] Shreve v. Brereton, 51 Pa. 175; Lee v. Overstreet's Adm'r, 44 Ga. 507; Hamaker v. Schroers, 49 Mo. 406.

§ 33. [1] Douglas v. Insurance Co., 127 Ill. 101, 20 N. E. 51; Craig v. Hukill, 37 W. Va. 520, 16 S. E. 363; Birmingham v. Lesan, 77 Me. 494, 1 Atl. 151; Mills v. Seminary, 52 Wis. 669, 9 N. W. 925; McCormick v. Rossi, 70 Cal. 474, 15 Pac. 35; Livingston v. Tompkins, 4 Johns. Ch. (N. Y.) 415, 431; Meigs' Appeal, 62 Pa. 28, 35; Oil Creek R. Co. v. Railroad Co., 57 Pa. 65.

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WHEN EQUITY WILL RELIEVE AGAINST FORFEITURES.

34. Equity will relieve against a forfeiture in all cases where it is incurred by a breach of an express agreement to pay a sum of money, or any other agreement which involves indirectly the payment of a sum of money.

It is generally stated that relief against forfeitures is afforded on the same grounds and in the same cases as relief against penalties. This statement is subject to qualification, for equity will not relieve against forfeitures in all cases where compensation can be made. There are many forfeitures incurred by the breach of covenants in leases and other strict contracts, where compensation can easily be made, against which equity will not relieve;[1] as, where a contract for the sale of land is so drawn that the time of payment is the essence of the contract, equity will not relieve against the default of the vendee; and when such contract is made to depend upon a condition precedent—as the payment of the consideration by the vendee before performance by the vendor—equity will not relieve against a forfeiture occasioned by a nonperformance of the condition precedent.[2] Nor will equity relieve against a forfeiture for the breach of a covenant contained in a lease, other than one to pay rent, unless on the ground of accident, mistake, or fraud; for it has been considered that, even where the damages are capable of being ascertained, the jurisdiction of equity in giving relief in such cases is a dangerous jurisdiction, and rarely

§ 34. [1] Eaton v. Lyon, 3 Ves. 692, 693; Germantown Passenger Ry. Co. v. Fitler, 60 Pa. 131; Dunklee v. Adams, 20 Vt. 415.

[2] Wells v. Smith, 2 Edw. Ch. (N. Y.) 78; Wells v. Smith, 7 Paige (N. Y.) 22, 31 Am. Dec. 274; Edgerton v. Peckham, 11 Paige (N. Y.) 362; Sanborn v. Woodman, 5 Cush. (Mass.) 36; Remington v. Irwin, 14 Pa. 143, 145; Clark v. Lyons, 25 Ill. 105; Snyder v. Spaulding, 57 Ill. 480, 482.

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works a real compensation.[3] But where a person has been prevented from executing an agreement by fraud, accident, surprise, or excusable ignorance, equity will relieve against a forfeiture, even if the damages resulting from the breach cannot be measured by a pecuniary standard.[4]

STATUTORY PENALTIES AND FORFEITURES.

35. The jurisdiction of equity to relieve against penalties and forfeitures does not extend to those imposed by statute.[1]

Statutory enactments are binding on all courts, and courts of equity are powerless to set them aside. The distinction between penalties and forfeitures imposed by contract and those imposed by statute has always been observed. As Lord Macclesfield, in the leading case on this subject, said: "You can never say that the law determined hardly, but you may say that the party has made a hard bargain." [2] It has even been held that a statutory penalty will be enforced by a court of equity if the case is properly before it.[3]

[3] Smith, Eq. (15th Ed.) p. 335; Gregory v. Wilson, 9 Hare, 689; Nokes v. Gibbon, 3 Drew. 681; Bracebridge v. Buckley, 2 Price, 215.

[4] Eaton v. Lyon, 3 Ves. 693; Hill v. Barclay, 18 Ves. 58, 62; Noyes v. Anderson, 124 N. Y. 175, 26 N. E. 316; Kopper v. Dyer, 59 Vt. 477, 9 Atl. 4; Mactier v. Osborn, 146 Mass. 399, 15 N. E. 641; Hulett v. Fairbanks, 40 Ohio St. 233.

§ 35. [1] Clark v. Barnard, 108 U. S. 436, 457, 2 Sup. Ct. 878, 27 L. Ed. 780, and cases cited; State v. McBride, 76 Ala. 51; Keating v. Sparrow, 1 Ball & B. 373.

[2] Peachy v. Duke of Somerset, 2 White & T. Lead. Cas. Eq. 1253.

[3] State v. Hall, 70 Miss. 678, 13 South. 39. Contra, Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633.

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CHAPTER V.

PRIORITIES AND NOTICE.

36. Origin and Application of Doctrine of Priority.
37. Doctrine Does Not Apply to Legal Estates.
38. Equal Equities.
39. Where One of the Parties Has the Legal Estate.
40. Superior Equities.
41. Superiority of Estate Created by Trust or Contract.
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ORIGIN AND APPLICATION OF DOCTRINE OF PRIORITY.

36. The doctrine of priority rests on the equitable maxims: "Where the equities are equal, the first in time will prevail," and, "Where the equities are equal, the law must prevail."

The meaning and effect of these maxims have been explained in a preceding chapter.[1] Both are based upon the assumption that the equities, the priorities of which are to be determined, are equal. If they are unequal, the superior equity must, of course, prevail, and they are not affected by the order of time. As a result of the application of the second maxim, if there be annexed to one of two equal equities in an estate, the legal title thereto, the person acquiring such

§ 36. [1] Ante, §§ 17, 18.

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legal title will have a priority of claim over a person having a bare equity in the estate.

DOCTRINE DOES NOT APPLY TO LEGAL ESTATES.

37. The equitable doctrine of priority, as affected by lack of consideration, absence or presence of notice, or other incident, excepting order of time, does not apply to legal estates and interests.

At law, priorities were determined almost exclusively by order of time. The equitable doctrine of priority, as affected by want of consideration, presence or absence of notice, or any other incident cognizable in equity, but not at law, had no place in the administration of the common law, unless expressly provided by statute. At law, the equities vested in either of the parties to a controversy do not influence the determination of the rights of such parties, which depend for their priority exclusively upon the order of time; as, when a legal conveyance of property is made, the grantor has no right remaining in such property which he can transfer to another, and the first conveyance has precedence over any subsequent conveyance, even if the subsequent grantee had no notice of the prior conveyance.[1] Even the absence of a valid consideration does not affect priority at law, except where it is otherwise provided by statute.[2] The equitable doctrine of priority is applicable to equitable estates, rights,

§ 37. [1] Gaines v. City of New Orleans, 6 Wall. 642, 716, 18 L. Ed. 950; Ruckman v. Decker, 23 N. J. Eq. 283; Van Amringe v. Morton, 4 Whart. (Pa.) 382; Wade v. Withington, 1 Allen (Mass.) 561.

[2] Statutes have been passed in England (27 Eliz. c. 4; 13 Eliz. c. 5) and in the states of this country declaring invalid transfers of land and other property made for the purpose of defrauding creditors, and providing that grants of lands made for the purpose of defrauding subsequent purchasers for a valuable consideration are void as against such subsequent purchasers. See Tey's Case, 3 Coke, 80; Twyne's Case, 1 Smith, Lead. Cas. Eq. (8th Am. Ed.) 33; Sexton v. Wheaton, 8 Wheat. 229, 5 L. Ed. 603.

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and remedies, and to conflicting legal and equitable estates and interests in the same subject-matter.[8]

EQUAL EQUITIES.

38. Order of time controls in all cases where the parties have equal equitable interests in the same subject-matter, and are all entitled, with respect to such interests, to the protection and aid of a court of equity.

This rule is merely an amplification of the maxim, "Where the equities are equal, the first in order of time shall prevail." It is difficult to lay down a rule that can be universally applied in determining what are equal equities. They may not be of precisely the same nature, and yet be equally entitled to the protection of a court of equity.[1] But it may be stated as generally true that, if the equities of the parties are such that each is equally entitled to the aid and protection of a court of equity, their equities are equal, and the first in order of time must prevail. The fact that the party possessing the subsequent equity had no notice of the prior one

[8] Bassett v. Nosworthy, Finch, 102; Id., 2 White & T. Lead. Cas. Eq. 1; Le Neve v. Le Neve, 3 Atk. 646; Id., 1 Ves. Sr. 64; Id., 2 White & T. Lead. Cas. Eq. 26; Newton v. Newton, L. R. 6 Eq. 135. Mr. Pomeroy (Eq. Jur. § 681) says: The equitable doctrine concerning priorities resulting from the presence or absence of notice, or of a valuable consideration, or other incident, by which a precedence may be given contrary to the mere order of time, applies to conflicting legal and equitable estates or interests in the same subject-matter, and to successive equitable estates, equitable interests (such as liens and charges), and mere "equities" (meaning thereby purely remedial rights, such as that of cancellation, reformation, and the like); and it applies to no other kind of estates, interests, or rights.

§ 38. [1] "When we say that A. has a better equity than B., what is meant by that? It means only that, according to those principles of right and justice which a court of equity recognizes and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B.; and therefore it is impossible, strictly speaking, that two persons should have equal equities, except in a case in which a court of equity would altogether refuse to lend its assistance to either party as against the other." Rice v. Rice, 2 Drew. 73.

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cannot entitle him to preference.[2] As an example of the application of the above rule, 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.[3] And 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 time, must prevail, and the lien of the mortgage must remain, notwithstanding the apparent discharge.[4]

SAME—WHERE ONE OF THE PARTIES HAS THE LEGAL ESTATE.

39. Where the parties have equal equitable estates and interests in the same subject-matter, and are, therefore, both equally entitled to the aid and protection of a court of equity, and one of the parties has acquired the legal estate in such subject-matter, a court of equity will not interfere, and the party who has the legal estate will prevail.

This rule is based on the maxim that, "Where the equities are equal, the law will prevail," and is, indeed, a descriptive explanation of that maxim. An illustration of this principle 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

[2] See Phillips v. Phillips, 4 De Gex, F. & J. 208, 215; Cory v. Eyre, 1 De Gex, J. & S. 149, 167; Rice v. Rice, 2 Drew. 73. The opinion of the chancellor in this case is quoted at length in the note under the preceding discussion of the maxim, "Where there are equal equities, the first in order of time shall prevail."

[3] Muir v. Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633.

[4] Heyder v. Association, 42 N. J. Eq. 403, 408, 8 Atl. 310.

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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 beneficiaries as against him.[1] The rule is also frequently applied to cases where the plaintiff has a mere equity, as distinguished from an equitable estate, as a right to rescission of a deed or mortgage for 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 the plaintiff's equities.[2] So, 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.[3]

§ 39. [1] Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, 31 Am. St. Rep. 209. Purchaser from trustee without notice of construction or resulting trust will be protected against beneficiaries. Gray v. Coan, 40 Iowa, 327; Wilson v. 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, without notice, and for value, will be protected. Fox v. Palmer, 25 N. J. Eq. 416.

[2] Reformation of deed or mortgage for mistake denied as against subsequent bona fide purchasers. Lough v. Michael, 37 W. Va. 679, 17 S. E. 180, 470; Mayor, etc., 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. 696; Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69; Whitman v. Weston, 80 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. 566, 23 Atl. 889; Zoeller v. Riley, 100 N. Y. 108, 2 N. E. 388; Rowley v. Bigelow, 12 Pick. (Mass.) 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.

[3] 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, 3 L. Ed. 162; Rowley v. Bigelow, 12 Pick. (Mass.) 307; Ledyard v. Butler, 9 Paige (N. Y.) 132, 37 Am. Dec. 379; Anderson v. Roberts, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235; Hood v. Fahnestock, 8 Watts (Pa.) 489; Price v. Junkin, 4 Watts (Pa.) 85; Sydnor v. Roberts, 13 Tex. 598, 65 Am. Dec. 84.

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SUPERIOR EQUITIES.

40. When the legal title is not involved in the controversy, and there are several unequal equities in the same subject-matter,—as where one has a perfect equitable estate, and another a mere equity; or where the equitable interests of the parties are of the same nature, but one is affected by some incident which renders it inferior to the other,—then the superior equitable estate or interest must prevail, regardless of the order of time.[1]

This proposition is necessarily implied in the maxim, "Where there are equal equities, the first in order of time must prevail." As will be observed by an examination of this rule, the main question to be determined is in what respect an equitable interest or estate may be deemed superior. Some general rules may be stated, which will be of use in determining this question.

SAME—SUPERIORITY OF ESTATE CREATED BY TRUST OR CONTRACT.

41. An equitable interest or estate, created by a trust or a contract in rem founded on a valuable consideration, is superior to an equity arising from a voluntary transfer or gift, or under a lien by judgment.

This rule is based upon the fact that a claimant under a trust or contract in rem has an equitable interest, in the nature of property, in the specific thing itself, which is binding on the conscience of the original holder; but the voluntary

§ 40. [1] Pom. Eq. Jur. § 682.

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transferee or donee has only such an interest as the donor could honestly give.[1] The donee or transferee can possess no paramount right in the property as against third persons dealing with the donor in respect to the same property. In the former case the equitable interest or estate is based upon a valuable consideration, but in the case of a voluntary gift or transfer there is no such consideration. As an illustration of this rule, a recent case may be mentioned. 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 fraud.[2]

SAME—EQUITY IN SPECIFIC THING.

42. An equity in a specific thing or a specific lien is superior to an equity general in its scope and nature.

The lien of a judgment is general, not specific. The beneficiary under a trust, the holder of a lien created by a contract in rem, or a vendee under a contract of sale has an equitable interest in a specific thing concerning which he has dealt; but a judgment creditor has not advanced his money or allowed the existence of his debt on a specific security. He has not parted with value in contemplation of a specific thing, and is entitled only to such interests as were possessed by the debtor at the date of the judgment. Therefore, in the absence of an 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.[1] A vendee

§ 41. [1] Green v. Givan, 33 N. Y. 343.

[2] Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185.

§ 42. [1] Sappington v. Oeschli, 49 Mo. 244; Carraway v. Carraway, 27 S. C. 576, 5 S. E. 157; Churchill v. Morse, 23 Iowa, 229, 92 Am. Dec. 422; Jackson v. Dubois, 4 Johns. (N. Y.) 216; Hunter v. Watson, 12 Cal. 263, 73 Am. Dec. 543. A contrary rule, however, prevails in other states, chiefly by virtue of statutory provisions.

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under an unrecorded deed is entitled to priority over a subsequent judgment against the grantor.[2] But, if the land is sold under such a judgment, the purchaser, upon placing the sheriff's deed on record, will be protected against a prior unrecorded mortgage, since the sheriff's deed is treated as if given by the judgment debtor himself, and conveys precisely the same interests as he could have conveyed at the time the judgment was docketed.[3] The specific lien of a purchase-money mortgage executed contemporaneously with the deed is superior to the general lien of a judgment existing against the mortgagor at the time of the execution of such mortgage.[4] This is so in view of the foregoing rule, although some of the cases assign the reason to be that the mortgagor only possesses an instantaneous seisin, and therefore the judgment cannot attach.

SAME—EQUITY OF PARTY MISLED.

43. The equity of the party misled is superior to the equity of the party who has willfully misled him.

The rule has been thus stated: "If a man, by the suppression of the truth, which he was bound to communicate, or by the suggestion of a falsehood, be the cause of prejudice to another, who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of good conscience that his claim should be postponed to that of the person who was misled by his representation." [1] This

Vreeland v. Clafflin, 24 N. J. Eq. 313; McFadden v. Worthington, 45 Ill. 362; Young v. Devries, 31 Grat. (Va.) 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.

[2] Schroeder v. Gurney, 73 N. Y. 430; Harral v. Gray, 10 Neb. 186, 4 N. W. 1040.

[3] Hetzel v. Barber, 69 N. Y. 1, 9; McKnight v. Gordon, 18 Rich. Eq. (S. C.) 222, 94 Am. Dec. 164.

[4] Stewart v. Smith, 36 Minn. 82, 30 N. W. 430, 1 Am. St. Rep. 651; 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.

§ 43. [1] Fonbl. Eq. 64.

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rule is but an application of the general principle with respect to fraud, where the fraud consists of representations known by the party making them to be expressly or impliedly false. Its meaning is that, where a person, having an equitable or other interest in an estate, knowingly misleads another into dealing with the same estate, as if he had no such interest, his equity will be postponed to that of the party misled, and he will be compelled to make good his representations. If a person intending to purchase an estate or to advance money thereon inquires of another person whether he has any claim thereon, stating at the same time that he proposes to purchase such estate, or to make a loan thereon, and he is falsely informed by such other person that he has no such claim, equity will protect the person misinformed.[2] And where a person having a deed of land keeps it secret for many years, and knowingly suffers third persons to purchase parts of the same premises from the reputed owner, who was in possession, and to expend money on the land without any notice of his claim, he will not be permitted to assert his legal title against such innocent and bona fide purchasers.[3] It is, in equity, an act of fraud for a party cognizant of his own right to suffer another party to purchase the property in ignorance of that right, or expend money in making improvements on it.[4] But, where there is no duty imposed on the owner to speak, the owner cannot be estopped from asserting his title.[5] To authorize the intervention of equity in

[2] Otis v. Sill, 8 Barb. (N. Y.) 102; Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166, 168, 10 Am. Dec. 316; Lesley v. Johnson, 41 Barb. (N. Y.) 359; Baker v. Humphrey, 101 U. S. 494, 25 L. Ed. 1065; Hendricks v. Kelly, 64 Ala. 388; Alexander v. Ellison, 79 Ky. 148; Hill v. Blackwelder, 113 Ill. 283; Guffey v. O'Reiley, 88 Mo. 418, 57 Am. Rep. 424; Race v. Groves, 43 N. J. Eq. 284, 7 Atl. 667; Putnam v. Tyler, 117 Pa. 570, 12 Atl. 43.

[3] Wendell's Ex'rs v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 344, 354; Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166; Nicholson v. Hooper, 4 Mylne & C. 179; Carr v. Wallace, 7 Watts (Pa.) 400; Chapman v. Pingree, 67 Me. 198; Kirk v. Hamilton, 102 U. S. 68, 26 L. Ed. 79; Slocumb v. Railroad Co., 57 Iowa, 675, 11 N. W. 641.

[4] Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166, 168. See, also, Town v. Needham, 3 Paige (N. Y.) 545; Thompson v. Blanchard, 4 N. Y. 303; Trenton Banking Co. v. Duncan, 86 N. Y. 221; New York Rubber Co. v. Rothery, 107 N. Y. 310, 315, 14 N. E. 269, 1 Am. St. Rep. 822.

[5] New York Rubber Co. v. Rothery, 107 N. Y. 310, 14 N. E. 269, 1 Am. St. Rep. 822.

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such cases there must be either an actual intention to mislead, or that degree of gross negligence which is the same in its effects as an intentional deception. Mere carelessness or want of prudence on the part of the owner of the prior legal estate will not justify a postponement of such estate to the subsequent equitable estate.[6] As, for instance, a 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.[7] This rule bears an analogy to the equitable doctrine of estoppel, which is the subject of a subsequent chapter of this work, to which reference may be made for a more comprehensive discussion of this question.[8]

SAME—NOTICE OF AN EQUITY.

44. One taking with notice of an equity takes subject to that equity.

The meaning of this rule is that, if a person acquiring either a legal or equitable estate or interest has, at the time of acquisition, notice of an existing claim, interest, or estate in the same subject-matter possessed by a third person, he will be held to have acquired only such an interest or estate

[6] Briggs v. Jones, L. R. 10 Eq. 92. In this case a first equitable mortgagee left the deeds with the mortgagor to enable him to raise money on a mortgage of the equity of redemption, and the mortgagor, taking advantage of this, and suppressing the fact of the first mortgage, effected another mortgage. On these facts it was held that the second mortgagee was entitled to priority over the first, for it was owing to the carelessness of the first that the mortgagor was enabled to perpetrate the fraud, and therefore equity would not assist him against the second mortgagee. Northern Counties of Eng. Fire Ins. Co. v. Whipp, 26 Ch. Div. 482, where the court of appeals laid down the rule that a legal mortgagee will not be deprived of the benefit of the legal estate on the ground of mere carelessness or want of prudence, unless he has assisted or connived at the fraud. See, also, Manners v. Mew, 29 Ch. Div. 725; Union Bank of London v. Kent, 39 Ch. Div. 238; Heyder v. Association, 42 N. J. Eq. 403, 8 Atl. 310.

[7] Clabaugh v. Byerly, 7 Gill (Md.) 354, 48 Am. Dec. 575; Groundie v. Water Co., 7 Pa. 239; Knouff v. Thompson, 16 Pa. 361, 363; Hill v. Epley, 31 Pa. 331; Neal v. Gregory, 19 Fla. 356.

[8] Post, c. 7.

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as the owner could honestly transfer. This rule is of almost universal application. It affects all kinds of equitable interests and estates. Its discussion necessarily involves a consideration of the whole subject of notice, and therefore it cannot be deemed an impropriety to follow what has already been said concerning the superiority of equities with a consideration of this equitable doctrine.[1]

NOTICE—DEFINITION.

45. Notice is information concerning a certain fact, either directly communicated to a party by an authorized person, or actually received by him from a proper source, or presumed by law to have been communicated to or acquired by him.

46. Such notice may not be actual knowledge, but the legal effects and consequence are the same as though the party had full knowledge of the fact.[1]

The doctrine of notice is of equitable origin, and almost exclusively of equitable application. The rights of claimants to purely legal estates are not affected by the presence or absence of notice of the existing adverse claims. A valid legal title will be maintained in a court of law regardless of the existence of equitable interests and estates in the same subject-matter. This doctrine, as in the case of the doctrine concerning priorities, is a growth of the application of the

§ 44. [1] "Notice, although a collateral incident, is thus, perhaps, the most powerful element in creating a superiority, and in disturbing an order of priority which would otherwise have existed. It may destroy the precedence which a legal estate ordinarily has over an equitable one; it may operate as well between legal and equitable estates, in the same thing, as between successive estates or interests which are purely equitable." Pom. Eq. Jur. § 689.

§§ 45–46. [1] Pom. Eq. Jur. § 594.

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two maxims: "Where the equities are equal, the one which is prior in time must prevail," and, "Where the equities are equal, the law must prevail." In the application of such principles the main question to be determined is whether or not the equities are equal. It is, as we have seen, a general, and most important, rule in equity that, where one acquires an estate with notice of existing equities therein, he takes the estate subject to such equities; in other words, the equities of which he had legal knowledge render his rights so acquired subservient to such equities. The doctrine has been thus enunciated: A person who purchases an estate, although for a valuable consideration, after notice of a prior equitable right, makes himself a mala fide purchaser, and he will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose rights he sought to defeat.[2] It may thus be seen that notice is a most important element in determining the equalities of equitable rights, estates, and interests. Before proceeding to a further consideration of the subject, it will be well to note the fact that, technically speaking, legal notice is not always knowledge, although in many cases the consequent effects produced by each are the same. Notice, as applicable to conveyances, does not necessarily mean actual knowledge. The notice may be implied from indirect and circumstantial evidence, and may be held to exist even where there is an entire absence of knowledge.[3] The record of a deed or mortgage is constructive notice to subsequent purchasers and incumbrancers, but it does not necessarily convey knowledge to such persons of the existence of such deed or mortgage. On the other hand, if actual knowledge of a certain fact is possessed by a party, even if such knowledge cannot correctly be deemed a technical "notice," he will be held to have acted with reference to

[2] Le Neve v. Le Neve, 3 Atk. 646; Id., 1 Ves. Sr. 64; Id., 2 White & T. Lead. Cas. Eq. (Text-Book Series) 26.

[3] Knapp v. Bailey, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295. To constitute actual knowledge, there must be direct and positive information of the fact itself; but a knowledge of such facts as will lead upon inquiry to actual knowledge is sufficient to constitute actual notice. Cleveland Woolen Mills v. Sibert, 81 Ala. 140, 1 South. 773; Brinkman v. Jones, 44 Wis. 498.

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such knowledge, and the effect will be the same as though he had had actual notice[4]

SAME—KINDS OF NOTICE.

47. Notice is of two kinds:
(a) Actual, or
(b) Constructive.

48. Actual notice consists in information of a fact directly communicated to a person, or of such information as would lead to knowledge of such fact.

49. Constructive notice is such information of a fact as a person will be legally presumed to possess from the existence of established facts.[1]

[4] Pom. Eq. Jur. § 592. Lloyd v. Banks, L. R. 3 Ch. 488, 490, where Lord Cairns said, in considering an incumbrance on a trust fund of which it was alleged the trustee had no notice, but was proved to have had knowledge: "If it can be shown that in any way the trustee has got knowledge of that kind,—knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired,—there, I think, the end is attained, and there has been fixed on the conscience of the trustee, and, through that, on the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created."

§§ 47–49. [1] Notice is of two kinds,—actual and constructive. Actual notice embraces all degrees and grades of evidence from the most direct and positive proof to the slightest circumstances from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. Constructive notice, on the other hand, is a legal inference from established facts; and, like other legal presumptions, does not admit of dispute. Williamson v. Brown, 15 N. Y. 354, 359. Constructive notice has been defined as being in its nature no more than evidence of notice, the presumptions of which are so violent that the court will not allow of its being controverted. Plumb v. Fluitt, 2 Aust. 432, by Chief Baron Eyre. See, also, Mayor, etc., of City of

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Some difficulties and confusion have arisen from attempted classifications of notice. Text-book writers and judges have differed as to what is the line of distinction between actual and constructive notice. In many instances constructive notice has been declared to be the same as implied notice.[2] Knowledge or information of facts sufficient to put a party on an inquiry has often been considered as a peculiar characteristic of constructive notice. But it has been stated that the difference between implied and constructive notice is that the former is an inference of fact, which is capable of being explained or contradicted, while the latter is a conclusion of law, which cannot be controverted.[3] This difference of classification is not of much practical importance, since the ultimate result in both classes of notice is the same. If notice can be charged to determine the superiority of equitable interests or estates, it does not change the result by denominating such notice either "actual" or "constructive." But in statutes declaring the effect of notice upon the title of a purchaser for a valuable consideration the term generally used is "actual notice," and then it becomes necessary to determine what will constitute such a notice.

Baltimore v. Williams, 6 Md. 235; Harper v. Ely, 56 Ill. 194; Knapp v. Bailey, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295. In this latter case Chief Justice Peters, in discussing actual notice, says: "It amounts substantially to this: that actual notice may be proved by direct evidence, or it may be inferred or implied (that is, proved) as a fact from indirect evidence,—by circumstantial evidence. A man may have notice, or its legal equivalent. * * * The decided preponderance of authority supports the position that the statutory 'actual notice' is a conclusion of fact capable of being established by all grades of legitimate evidence." See, also, Claflin v. Lenheim, 66 N. Y. 301, 306; Birdsall v. Russell, 29 N. Y. 220, 249; Bailey v. Galpin, 40 Minn. 319, 324, 41 N. W. 1054.

[2] Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261, where Chancellor Kent said: "I hold him chargeable with constructive notice, or notice in law, because he had information sufficient to put him upon inquiry."

[3] Drey v. Doyle, 99 Mo. 459, 12 S. W. 287.

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ACTUAL NOTICE.

50. Actual notice may be either express or implied.

(a) Express actual notice is information of a fact directly communicated to a person, either in writing or orally, by a person having knowledge of the fact communicated.

(b) Implied actual notice is such information of a fact as a person will be presumed to have received from a knowledge of circumstances proved to have been possessed by such person.

In the English conveyancing act of 1882 the terms "actual notice" and "constructive notice" are defined. In this statute the term "actual notice" is limited to actual knowledge. Many American courts have adopted these definitions,[1] but for the most part, even in considering the effects of statutes declaring that a purchaser with actual notice of a prior unrecorded deed takes subject to that deed, our courts have extended the meaning of the term "actual notice," so that notice is held to be actual 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.[2] Actual notice is

§ 50. [1] Lamb v. Pierce, 113 Mass. 72; Crassen v. Swoveland, 22 Ind. 428. In the English 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 had been made as ought to have been made by them." 45 & 46 Vict. c. 39.

[2] Brinkman v. Jones, 44 Wis. 498; Brown v. Volkening, 64 N. Y.

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not necessarily confined to such notice as comes from actual knowledge. Actual notice may be such information of the fact as a person may fairly be inferred to possess from the proof. Whether such proof be positive, direct, and convincing, or indirect and circumstantial, is immaterial. Proof of circumstances short of what will constitute actual knowledge, which should put a prudent man upon inquiry, authorizes the court or jury to infer and find actual notice.[3] Mr. Justice Taylor, in a much-quoted Wisconsin case,[4] says: "We think the true rule is that notice must be held to be actual when the subsequent purchaser has knowledge of such facts as would put a prudent man upon 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." While a purchaser is not required to use the utmost circumspection, he is bound to act as an ordinarily prudent and careful man would do under the circumstances. He cannot act in contravention to the dictates of reasonable prudence, or refuse to inquire

76; Rhodes v. Outcalt, 48 Mo. 370; Mayor, etc., of City of Baltimore v. Whittington, 78 Md. 231, 27 Atl. 984; Ross v. Caywood, 16 App. Div. 591, 44 N. Y. Supp. 985.

[3] Brown v. Volkening, 64 N. Y. 76, 82; Gollober v. Martin, 33 Kan. 252, 6 Pac. 287; Trustees of Schools of Sheik, 119 Ill. 579, 8 N. E. 189; Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. 623; Chicago, R. I. & P. R. Co. v. Kennedy, 70 Ill. 350, 361; Shepardson v. Stevens, 71 Ill. 646; Erickson v. Rafferty, 79 Ill. 209, 212; Reynolds v. Ruckman, 35 Mich. 80; Shotwell v. Harrison, 30 Mich. 179; Munroe v. Eastman, 31 Mich. 283; Hunt v. Dunn, 74 Ga. 124; Clark v. Holland, 72 Iowa, 34, 33 N. W. 350; Knapp v. Bailey, 79 Me. 195, 9 Atl. 122; Oliver v. Sanborn, 60 Mich. 346, 27 N. W. 527; Gaines v. Summers, 50 Ark. 322, 7 S. W. 301.

[4] Brinkman v. Jones, 44 Wis. 498. To the same effect is Manpin v. Emmons, 47 Mo. 304, 306, 307. And see, also, Anthony v. Wheeler, 130 Ill. 128, 22 N. E. 494. Notice of a prior unrecorded deed will be charged to a subsequent purchaser if the exercise of ordinary prudence and care would have led him to knowledge. Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169; Kirsch v. Tozier, 143 N. Y. 390, 38 N. E. 375.

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when the propriety of inquiry is naturally suggested by circumstances known to him.[5]

What Information Sufficient to Constitute Actual Notice.

The foregoing discussion shows the importance of determining what amount of information is sufficient to charge a purchaser—a person obtaining any right in specific property—with notice of a prior conflicting claim upon the same property. The notice must be based on definite and certain information. Vague reports from outside parties, who are not interested in the property, will not constitute notice.[6] To charge a purchaser with a notice of a prior conflicting claim, the information acquired by him must be such that, if he had inquired with due diligence into the existence of such claim, it would have become apparent. There must appear to be, in the nature of the case, such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a reasonable and natural clue to the latter.[7] It has been stated as a general rule that the notice must come from some person who is interested in the property, or his agent, and be communicated directly to the party to be charged with the notice, on the theory that a purchaser is not bound to attend to statements of mere strangers.[8] But this does not seem to be generally accepted as a true principle. It is in contra-

[5] Kirsch v. Tozier, 143 N. Y. 390, 397, 38 N. E. 375, 42 Am. St. Rep. 729. Having readily accessible means of acquiring knowledge of a fact which he might have ascertained by inquiry is equivalent to notice and knowledge of it. Montgomery v. Keppel, 75 Cal. 128, 19 Pac. 178, 7 Am. St. Rep. 125. See, also, Fresno Canal & Irrigation Co. v. Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112; Hoy v. Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687; Booth v. Barnum, 9 Conn. 286, 23 Am. Dec. 339.

[6] Jolland v. Stainbridge, 3 Ves. 478; Maul v. Rider, 59 Pa. 172; City of Chicago v. Witt, 75 Ill. 211; Lambert v. Newman, 56 Ala. 623, 625, 626; Packer v. Foy, 43 Miss. 260, 266, 55 Am. Rep. 484; Bugbee's Appeal, 110 Pa. 331, 1 Atl. 273; Satterfield v. Malone (C. C.) 35 Fed. 445, 1 L. R. A. 35.

[7] Page v. Waring, 76 N. Y. 463, 471; Birdsall v. Russell, 29 N. Y. 220; Tompkins v. Henderson, 83 Ala. 391, 3 South. 774.

[8] Butler v. Stevens, 26 Me. 484; City Council of Charleston v. Page, 1 Speer, Eq. (S. C.) 159; Lamont v. Stimson, 5 Wis. 443; Churcher v. Guernsey, 39 Pa. 86; Woods v. Farmere, 7 Watts (Pa.) 382, 387, 32 Am. Dec. 772; Barnhart v. Greenshields, 9 Moore, P. C. 18.

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vention of the principle involved in the rule that a person is charged with actual notice who has knowledge of such facts as are sufficient to put a prudent man on inquiry, and are of such a nature that, if the inquiry was prosecuted with reasonable diligence, the conflicting claim would be disclosed. Knowledge is the essential part of this rule. If the knowledge is acquired, it matters little from what source it came.[9] The correct rule is that notice need not come from a party or his agent, but it is sufficient if it be derived aliunde, provided it be of a character likely to gain credit.[10] Except where, by a positive rule of law, an actual, technical notice from one party to another is required in order to put a person in default, or to perfect some legal right, actual knowledge, however acquired, is the same in its effects on the rights and interests of parties as actual notice.[11]

It is not practicable to lay down definite rules to determine the nature or amount of information required to charge a person with notice of an existing, outstanding claim or interest in conflict with the interest which he has acquired, beyond the general proposition, above stated, that, if a person have information which would induce a man of ordinary intelligence and prudence to make inquiry as to the existence of a claim or interest in conflict with the estate which he contemplates acquiring, and he fails or neglects to make that inquiry, he will be presumed to possess actual notice of the facts which such an inquiry would have disclosed.[12] The

[9] Lloyd v. Banks, 3 Ch. App. 488, where it was said, in considering a case where it was shown that the knowledge possessed by a trustee came from a newspaper item: "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."

[10] Parkhurst v. Hosford (C. C.) 21 Fed. 827, 835; Curtis v. Mundy, 8 Metc. (Mass.) 405; Wilcox v. Hill, 11 Mich. 256.

[11] Pom. Eq. Jur. § 603, where it is said: "Actual knowledge will generally have the same effect as notice in controversies concerning priorities; but it is especially important in determining the existence of good faith. It is often a most essential element in making out a fraudulent intent, where a mere technical notice would be insufficient."

[12] Ellis v. Horrman, 90 N. Y. 466, 473; Kennedy v. Green, 3 Mylne & K. 699; Flagg v. Mann, 2 Sumn. 554, Fed. Cas. No. 4,847; Grim-

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fact of the existence of the conflicting claim or interest may be disclosed by a definite statement of the vendor, mortgagor, or grantor imparting actual knowledge, or it may be by a statement which could not communicate complete knowledge. It is sufficient if it is so definite as to convey the impression that the conflicting claim or interest does really exist.[13] Such knowledge may be imparted by statements made by near friends and relatives of either the grantor, vendor, or mortgagor, or the holder of the conflicting claim or interest. It is presumed that the knowledge so imparted is of sufficient authenticity, owing to the position of the informant, to impose upon the person contemplating the acquisition of the estate a duty of pursuing a further inquiry as to the truth of such statements.[14] If the price paid by the purchaser is grossly inadequate, it may tend to show that he had notice of outstanding conflicting claims or interests, since such fact should have put him on inquiry as to the reasons for selling the property at less than its apparent value.[15] So, also, the knowledge of visible material objects on the premises, which might reasonably suggest the existence of some easement or right therein, may be sufficient to put a purchaser on inquiry.[16]

stone v. Carter, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; Jackson v. Post, 15 Wend. (N. Y.) 588; Reed v. Gannon, 50 N. Y. 345; Parker v. Conner, 93 N. Y. 118, 45 Am. Rep. 178; Hume v. Franzen, 73 Iowa, 25, 34 N. W. 490; Brown v. Connell, 85 Ky. 403, 3 S. W. 794; Leas v. Garverich, 77 Iowa, 275, 42 N. W. 194; Tillman v. Thomas, 87 Ala. 321, 6 South. 151, 13 Am. St. Rep. 42; Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661; Drey v. Doyle, 99 Mo. 459, 12 S. W. 287.

[13] Epley v. Witherow, 7 Watts (Pa.) 163; Blatchley v. Osborn, 33 Conn. 226, 233; Price v. McDonald, 1 Md. 403, 54 Am. Dec. 657.

[14] Butcher v. Yocum, 61 Pa. 168, 171, 100 Am. Dec. 625; Mulliken v. Graham, 72 Pa. 484; Spurlock v. Sullivan, 36 Tex. 511; Ripple v. Ripple, 1 Rawle (Pa.) 386; John v. Battle, 58 Tex. 591.

[15] Peabody v. Fenton, 3 Barb. Ch. (N. Y.) 451; Beadles v. Miller, 9 Bush (Ky.) 405; Durant v. Crowell, 97 N. C. 367, 2 S. E. 541; Hoppin v. Doty, 25 Wis. 573; Eck v. Hatcher, 58 Mo. 235.

[16] Phillipson v. Gibbon, 6 Ch. App. 428; Raritan Water-Power Co. v. Veghte, 21 N. J. Eq. 463, 478; Hoy v. Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687; Randall v. Silverthorn, 4 Pa. 173; Fresno Canal & Irrigation Co. v. Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112; Paul v. Railroad Co., 51 Ind. 527, 530.

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Notice to Agent.

The knowledge of an agent will affect his principal with notice, if acquired by him during his agency, and in the course of transaction of the same business from which the principal's rights and liabilities arise.[17] It is the duty of an attorney at law, or other agent, to communicate to his client whatever information he acquires in relation to the subject-matter involved in the transaction; and he will be conclusively presumed to have performed such duty, and notice to him is, therefore, actual notice to his client or principal.[18] Another reason stated for the existence of this rule is that for many purposes the agent and principal are regarded as one person.[19] The reason has also been declared to be 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 for his agent's knowledge as well as for his agent's acts.[20] But in the case of an attorney, if the knowledge acquired is of such a nature that he cannot communicate it to his client without a breach of professional confidence, the client cannot be charged with notice.[21] But notice to the agent will not bind the principal unless it is ac-

[17] Snyder v. Partridge, 138 Ill. 173, 29 N. E. 851; Littauer v. Houck, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572; Follette v. Association, 110 N. C. 877, 14 S. E. 923, 15 L. R. A. 668, 28 Am. St. Rep. 693; Burditt v. Porter, 63 Vt. 296, 21 Atl. 955, 25 Am. St. Rep. 763; Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 26 N. E. 640.

[18] Wittenbrock v. Parker, 102 Cal. 93, 36 Pac. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172.

[19] Boursot v. Savage, L. R. 2 Eq. 134.

[20] 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 179, note; Irvine v. Grady, 85 Tex. 120, 19 S. W. 1028; Hickman v. Green, 123 Mo. 165, 22 S. W. 455, 29 L. R. A. 39. 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 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. Railroad Co., 4 Md. 231.

[21] Littauer v. Houck, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572.

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quired by the agent while acting in the course of his employment.[22] In many cases it has been held that the knowledge possessed by the agent must have been acquired while engaged in the transaction, to be affected by such knowledge.[23] The rule has been stated in the supreme court of the United States as follows: "That notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence."[24] It will thus be noticed that there is diversity of opinion as to when, and under what circumstances, the knowledge of the agent must have been acquired to bind the principal.

The conclusion to be drawn from these opinions is that, if the notice to the agent was imparted to the agent in the same transaction, the principal will be bound thereby. If the knowledge was acquired by the agent in a prior transaction for another principal, it must be clearly shown that such knowledge was present in his mind at the time of the transaction sought to be affected.[25] And where an agency is, in its nature, continuous, and made up of a long series of transactions of the same general character, the knowledge

[22] Weisser's Adm'rs v. Denison, 10 N. Y. 68, 61 Am. Dec. 731; Reynolds v. Ingersoll, 11 Smedes & M. (Miss.) 249, 49 Am. Dec. 57; Russell v. Sweezey, 22 Mich. 235; Smith v. Dunton, 42 Iowa, 48; Goodwin v. Dean, 50 Conn. 517; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Verona Central Cheese Co. v. Murtaugh, 50 N. Y. 314, 316; Cole v. Getzinger, 96 Wis. 559, 71 N. W. 75.

[23] Warrick v. Warrick, 3 Atk. 294; In re Smith's Appeal, 47 Pa. 128; Roberts v. Fleming, 53 Ill. 198; Keenan v. Insurance Co., 12 Iowa, 126; Bierce v. Hotel Co., 31 Cal. 160.

[24] In re Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167.

[25] Constant v. University, 111 N. Y. 604, 611, 19 N. E. 631, 2 L. R. A. 734; Slattery v. Schwannecke, 118 N. Y. 543, 547, 23 N. E. 922. Story, in his work on Agency (page 152, § 140), says: "But, unless notice of the fact come to the agent while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice thereof to the principal; for otherwise the agent might have forgotten it, and then the principal would be affected by his want of memory at the time of undertaking his agency. Notice, therefore, to the agent, before the agency is begun or after it has terminated, will not ordinarily affect the principal."

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acquired by the agent in one or more of the transactions is notice to the agent and the principal, which will affect the latter in any other transaction in which the agent, as such, is engaged, and in which the knowledge is material.[26] In all cases, 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 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.[27]

The general rule embraces in its operations all persons acting for others in any representative capacity. It applies to officers of corporations, when such officers are acting in their official capacities.[28] But, when an officer of a corporation is dealing with it in his individual capacity and interest, the corporation is not chargeable with his uncommunicated knowledge of facts derogatory to his title to the property which is the subject of the transaction.[29] It also applies to trustees acting on behalf of their beneficiaries.[30] And where an attorney is in fact acting in behalf of both parties to a transaction, his clients will all be presumed to possess the knowledge possessed by him.[31]

[26] Holden v. Bank, 72 N. Y. 286. See, also, Tagg v. Bank, 9 Heisk. (Tenn.) 479.

[27] Trentor v. Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225. 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.

[28] Smith v. Commissioners, 38 Conn. 208; Tagg v. Bank, 9 Heisk. (Tenn.) 479; Holden v. Bank, 72 N. Y. 286; Fulton Bank v. Canal Co., 4 Paige (N. Y.) 127; New Hope & D. Bridge Co. v. Bank, 3 N. Y. 156; Bank of U. S. v. Davis, 2 Hill (N. Y.) 451; National Security Bank v. Cushman, 121 Mass. 490; Merchants' Nat. Bank of Kansas City v. Lovitt, 114 Mo. 519, 21 S. W. 825, 35 Am. St. Rep. 770.

[29] Merchants' Nat. Bank of Kansas City v. Lovitt, 114 Mo. 519, 21 S. W. 825, 35 Am. St. Rep. 770; Frenkel v. Hudson, 82 Ala. 158, 2 South. 758; Wickersham v. Zinc Co., 18 Kan. 481; Barnes v. Gaslight Co., 27 N. J. Eq. 33; Innerarity v. Bank, 139 Mass. 332, 1 N. E. 282; Atlantic Cotton Mills v. Orchard Mills, 147 Mass. 268, 17 N. E. 496.

[30] Willes v. Greenhill, 4 De Gex, F. & J. 147; Myers v. Ross, 3 Head (Tenn.) 59.

[31] See note to Le Neve v. Le Neve, 2 White & T. Lead. Cas. Eq.

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The knowledge acquired by an agent, to bind his principal, must be of a fact material to the transaction in which the rights of the principal therein are to be affected, and it must be such knowledge as the agent is in duty bound to disclose to his principal.[32] If it can be shown that the knowledge of the agent was concealed by him from his principal for the purpose of consummating a fraud on the principal, the principal will not be bound by such knowledge. Such fraud must be contrived and carried out by the agent for his own benefit, in the course of the transaction in which he is employed; and it must be essential to the successful consummation of such fraud that the agent conceal the real facts from his principal.[33]

(4th Am. Ed.) 77; Holden v. Bank, 72 N. Y. 286; First Nat. Bank of New Milford v. Town of New Milford, 36 Conn. 93; Losey v. Simpson, 11 N. J. Eq. 246. The mere fact that but one attorney is employed does not necessarily make him an attorney for both parties to the transaction. It does not follow that, if there is not an attorney on each side, the attorney who does act is the attorney of both. Perry v. Holl, 2 De Gex, F. & J. 38, 53.

[32] Rolland v. Hart, 6 Ch. App. 678, 681, 682; In re Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167; Roach v. Karr, 18 Kan. 529, 26 Am. Rep. 778; Pringle v. Dunn, 37 Wis. 449; May v. Borel, 12 Cal. 91; Fry v. Shehee, 55 Ga. 208.

[33] Cave v. Cave, 15 Ch. Div. 639, 643, in which the court sums up the doctrine on this subject as follows: "There is undoubtedly an exception to the construction or imputation of notice from the agent to the principal; that exception arising in the case of such conduct by the agent as raises a conclusive presumption that he would not communicate the fact in controversy. This exception has been put in two ways. In the very well known case of Rolland v. Hart, 6 Ch. App. 678, Lord Hatherly put it substantially in this way: That you must look at the circumstances of the case, and inquire whether the court can see that the solicitor intended a fraud, which would require the suppression of the knowledge of the incumbrance from the person upon whom he was committing the fraud. In Thompson v. Cartwright, 33 Beav. 178, the late master of rolls put it rather differently, and it would appear that, in his view, you must inquire whether there are such circumstances in the case, independently of the fact under inquiry, as to raise an inevitable conclusion that the notice had not been communicated. In the one view, notice is not imputed, because the circumstances are such as not to raise the conclusion of law, which does ordinarily arise from the mere existence of notice to the agent; in the other view,—that of Lord Hatherly,—'the act done by the agent is such as cannot be said to be done by him in the character of agent, but is done by him in the character of a party to an independent fraud on his principal, and that is not to be imputed to the principal as an act done by his agent.'" See, also,

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CONSTRUCTIVE NOTICE.

51. The following examples of constructive notice affecting subsequent purchasers and incumbrancers of real property will be considered:

(a) Possession by the adverse claimant under claim of ownership.

(b) Notice by registration of instruments affecting the title.

(c) Recitals in title papers through which the title of the grantor is traced.

(d) Lis pendens.

Constructive notice has been defined in another place in this chapter as such information of a fact as a person will be legally presumed to possess from the existence of established facts. The legal presumption may be rebuttable, or it may be conclusive. If a person has information of certain extraneous facts, "which do not of themselves constitute actual notice of an existing interest, claim, or right in or to the subject-matter, but which are sufficient to put him upon an inquiry concerning the existence of a conflicting interest, claim, or right, then he is charged with constructive notice, because a presumption of law arises." [1] It will be noticed that the facts need not directly show the existence of such conflicting interests or claims. If they did, the person receiving notice thereof would be charged with actual notice. To illustrate this proposition: If a party contemplating the purchase of real property knows that the property is in the possession of a party other than the grantor, such knowledge is sufficient to put the expected purchaser upon an inquiry concerning the occupant's interest. The legal presumption in such a case would be that the purchaser had full notice of such occupant's interest, and

Allen v. Railroad Co., 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Holden v. Bank, 72 N. Y. 286.

§ 51. [1] Pom. Eq. Jur. § 606.

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bought subject thereto. As soon as it has been shown that the purchaser had knowledge of the occupant's possession, he is legally presumed to have had notice of such occupant's adverse claim. But this legal presumption may be rebutted by evidence to the effect that he pursued diligently the inquiry pointed out to him by the information which he had received of such extraneous facts, and that he was unable to ascertain the existence of any conflicting claim or interest.[2] But other species of constructive notice are conclusive, and cannot be rebutted. Notice from recitals contained in a deed which is a necessary link in a party's chain of title, and that derived from registration and a lis pendens, are absolute in their effects, and conclusive on a party, without any regard to the probability, or even the possibility, of his having gained a knowledge of the prior right.

SAME—POSSESSION AS CONSTRUCTIVE NOTICE.

52. Visible and notorious possession of real property under an apparent claim of ownership is notice to those who subsequently deal with the title, and to all the world, of the existence of any right, claim, or interest which the person in possession is able to establish.[1]

[2] Williamson v. Brown, 15 N. Y. 362; Reynolds v. Carlisle, 99 Ga. 730, 27 S. E. 169.

§ 52. [1] Phelan v. Brady, 119 N. Y. 587, 23 N. E. 1109, 8 L. R. A. 211; Gouverneur v. Lynch, 2 Paige (N. Y.) 300; Bank of Orleans v. Flagg, 3 Barb. Ch. (N. Y.) 318; Moyer v. Hinman, 13 N. Y. 184; Trustees of Union College v. Wheeler, 61 N. Y. 88, 89; Cavalli v. Allen, 57 N. Y. 517; Landers v. Brant, 10 How. 348, 13 L. Ed. 449; McKinzie v. Perrill, 15 Ohio St. 168; Jones v. Marks, 47 Cal. 242; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Ill. 210; Dunlap v. Wilson, 32 Ill. 517; Reeves v. Ayers, 38 Ill. 418; Bogue v. Williams, 48 Ill. 371; Warren v. Richmond, 53 Ill. 52; Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352, 4 L. R. A. 222; Lafferty v. Railroad Co., 124 Pa. 297, 16 Atl. 869, 3 L. R. A. 124, 10 Am. St. Rep. 587; Miller v. Railroad Co., 132 U. S. 662, 10 Sup. Ct. 206, 33 L. Ed. 487; Noyes v. Hall, 97 U. S. 34, 24 L. Ed. 909; Baldwin v. Johnson, 1 N. J. Eq. 441; Diehl v. Page, 3 N. J. Eq. 143; Petrain v. Kiernan, 28 Or. 455, 32 Pac. 158; Woods v. Farmere, 7 Watts (Pa.) 385, 32 Am. Dec. 772; Glidewell v. Spaugh, 26 Ind. 319; Robbins v. Moore, 129 Ill. 30, 21 N. E. 934; Wertheimer v. Thomas, 168 Pa. 168, 31 Atl.

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This proposition has been embodied in our law since the time of Lord Thurlow.[2] To constitute notice, the possession and occupation must be actual, open, and visible. It must not be equivocal, occasional, or for a special or temporary purpose; neither must it be consistent with the title of the apparent owner by record.[3] In case of such an actual, open, and visible occupation and possession, it would seem that it is not necessary for the subsequent purchaser to have had knowledge thereof to charge him with notice, for it has frequently been held that such a purchaser would be charged although he was a resident of another state, and unfamiliar with the premises in question.[4] An English judge has stated the rule as follows: "I apprehend that by the law of England, when a man is of right and de facto in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property conflicting or inconsistent with the title or alleged title under which he is in possession, or which he has a right to connect with his possession of the property. It is equally a part of the law of the country, as I understand it, that a man who knows, or who cannot be heard to deny that he knows, another to be in possession of certain property, cannot, for any civil purpose, as against him at least, be heard to deny having thereby notice of the title or alleged title under which, or in respect of which, the former is, and claims to be, in that possession." [5] If the purchaser have knowledge of the occupancy

1096, 47 Am. St. Rep. 882; Anderson v. Brinser, 129 Pa. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205; Henderson v. Wanamaker, 79 Fed. 736, 25 C. C. A. 181; Prouty v. Tilden, 164 Ill. 163, 45 N. E. 445; Lynch v. Sanders, 8 App. Div. 613, 40 N. Y. Supp. 594; Can v. Brennan, 166 Ill. 108, 47 N. E. 721; Marden v. Dorthy, 160 N. Y. 39, 52, 54 N. E. 726, 46 L. R. A. 694.

[2] Taylor v. Stibbert, 2 Ves. Jr. 437.

[3] Brown v. Volkening, 64 N. Y. 76, 82, 83; Townsend v. Little, 109 U. S. 504, 3 Sup. Ct. 357, 27 L. Ed. 1012; Atwood v. Bearss, 47 Mich. 72, 10 N. W. 112; Holland v. Brown, 140 N. Y. 344, 348, 35 N. E. 577.

[4] Emmons v. Murray, 16 N. H. 385; Farmers' Loan & Trust Co. v. Maltby, 8 Paige (N. Y.) 361; Doyle v. Stevens, 4 Mich. 87; Tillotson v. Mitchell, 111 Ill. 518; Higgins v. White, 118 Ill. 619, 8 N. E. 808; Ranney v. Hardy, 43 Ohio St. 157, 1 N. E. 523; Hodge's Ex'r v. Amerman, 40 N. J. Eq. 99, 104, 2 Atl. 257.

[5] Holmes v. Powell, 8 De Gex, M. & G. 572, per Knight Bruce, L. J. That the purchaser's ignorance of visible, notorious, and actual

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or possession, he is, in any court, put upon an inquiry as to the claim or interest of the occupant, and will be presumed to possess such information as he could have acquired had he prosecuted such inquiry.[6] Possession out of the vendor, and actually in another person, only suggests an inquiry into the claim of the latter. Ordinarily, that inquiry should be made, because it evinces bad faith or gross neglect not to make it. But notice will only be imputed to a purchaser where it is a reasonable and just inference from the visible facts. The purchaser cannot willfully close his eyes, and then allege good faith; nor can he pause in the examination where the facts made known to him suggest the pursuit of a further inquiry.[7]

Sufficiency of Possession.

It is sometimes difficult to determine whether the possession is sufficiently unequivocal and distinct to give notice to subsequent purchasers or incumbrancers. If the premises are vacant of possession at the time when a party acquires his interest therein, no notice will be imputed to him, because there are no visible facts sufficient to put him on inquiry.[8] And if the possession was prior to the acquisition of title by the subsequent purchaser, it will not impose upon him the

possession is immaterial, see Scheerer v. Cuddy, 85 Cal. 270, 24 Pac. 713; Wickes v. Lake, 25 Wis. 71; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Honzik v. Delaglise, 65 Wis. 499, 27 N. W. 171.

[6] Rogers v. Jones, 8 N. H. 264; Rogers v. Hussey, 36 Iowa, 664; Hull v. Noble, 40 Me. 459, 480; Van Keuren v. Railroad, 38 N. J. Law, 165, 167; Illinois Cent. R. Co. v. McCullough, 59 Ill. 166; Tunnison v. Chamblin, 88 Ill. 378, 390; Jamison v. Dimock, 95 Pa. 52; Hottenstein v. Lerch, 104 Pa. 454; Coe v. Manseau, 62 Wis. 81, 22 N. W. 155; Honzik v. Delaglise, 65 Wis. 499, 27 N. W. 171.

[7] Cook v. Travis, 20 N. Y. 400, 403, citing Jones v. Smith, 1 Hare, 43; Hewes v. Wiswall, 8 Greenl. (Me.) 94; Flagg v. Mann, 2 Sumn. 555, Fed. Cas. No. 4,847; McMechan v. Griffing, 3 Pick. (Mass.) 156, 15 Am. Dec. 198; Scott v. Gallagher, 14 Serg. & R. (Pa.) 333. The only effect which the occupancy of the premises can have is to excite inquiry with reference to the title, and any failure on the part of such purchaser to make such inquiry is regarded as an intentional avoidance of the truth which would have been disclosed. Wade, Notice, § 279.

[8] Miles v. Langley, 1 Russ. & M. 39; Jones v. Smith, 1 Hare, 46, 62; Meehan v. Williams, 48 Pa. 238; Hewes v. Wiswall, 8 Greenl. (Me.) 94.

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duty of making inquiry as to such prior occupancy.[9] Nor will the presence of an alleged occupant on the land at stated intervals, when such presence is transitory, and not connected with any use of the land, be such possession as will charge the subsequent purchasers or incumbrancers with notice of his interests therein.[10] Nor will the principles of constructive notice apply to unimproved lands,[11] nor should they apply to uninhabited and unfinished dwelling houses.[12] And the using of lands for pasturage or for cutting timber is not such an occupancy as will charge a purchaser or incumbrancer with notice.[13] While actual residence on the land may not be necessary to show possession, yet, if there be no actual pedis possessio, dominion must be manifested by such notorious acts of ownership as will naturally be observed by others, and the acts must be of a character so certain and definite as not to be liable to be misunderstood or misconstrued.[14]

Possession by Tenant.

Possession by a tenant is constructive notice to a purchaser or incumbrancer of the terms of the lease, and also of all rights and interests which the tenant may have acquired by other agreements.[15] The English rule is that the possession of a tenant under a lease is only notice of his tenancy, and not of the nature or extent of the landlord's title.[16]

[9] Ehle v. Brown, 31 Wis. 405; Campbell v. Brackenridge, 8 Blackf. (Ind.) 471.

[10] Kendall v. Lawrence, 22 Pick. (Mass.) 540; Noyes v. Hall, 97 U. S. 34, 24 L. Ed. 909; Cabeen v. Breckenridge, 48 Ill. 91; Tankard v. Tankard, 79 N. C. 54.

[11] Patten v. Moore, 32 N. H. 382.

[12] Brown v. Volkening, 64 N. Y. 76, 83.

[13] Coleman v. Backlew, 27 N. J. Law, 357; McMechan v. Griffing, 3 Pick. (Mass.) 149, 15 Am. Dec. 198; Holmes v. Stout, 10 N. J. Eq. 419. See, also, Fassett v. Smith, 23 N. Y. 252.

[14] Hodge's Ex'r v. Amerman, 40 N. J. Eq. 99, 2 Atl. 257.

[15] Notice of terms of lease. James v. Litchfield, L. R. 9 Eq. 51; Hiern v. Mill, 13 Ves. 114; Knight v. Bowyer, 23 Beav. 609; Taylor v. Stibbert, 2 Ves. Jr. 437; Kerr v. Day, 14 Pa. 112; Cunningham v. Pattee, 99 Mass. 248; Phelan v. Brady, 119 N. Y. 587, 23 N. E. 1109, 8 L. R. A. 211; Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537. Notice as to collateral interests of tenant. Daniels v. Davison, 16 Ves. 249; Douglas v. Whitrong, cited in Id. 254; Wilbraham v. Livesey, 18 Beav. 206; Pom. Eq. Jur. § 625.

[16] Jones v. Smith, 1 Hare, 43, 63; Barnhart v. Greenshields, 28 Eng. Law & Eq. 77; Id., 9 Moore, P. C. 18, 36.

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There is some conflict among the decisions in the American courts. The preponderance of authority, however, seems to be that possession of a lessee is notice of the lessor's title, since by such possession the purchaser is put upon an inquiry respecting all the rights and interests which the lessee may have in the premises; and, if such inquiry be pursued, the purchaser might ascertain who the lessor is and what his rights are.[17]

Grantor Remaining in Possession.

There is also division of authority upon the question as to whether the possession of a grantor remaining in possession after the execution and delivery of a deed absolute on its face, and which has been duly recorded, under some agreement or arrangement not included in the deed, is constructive notice to the purchaser, from the grantee, of any right or interest which the grantor may have, antagonistic to the deed. Many cases hold that the purchaser may rely on the statements contained in the recorded deed, and that, having expressly declared by his deed that he makes no reservation, he cannot afterwards set up any secret arrangement by which his grant would be impaired.[18] Other cases hold that the

[17] Metropolitan Bank v. Godfrey, 28 Ill. 579, 607; Smith v. Jackson's Heirs, 76 Ill. 254; Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352; Crawford v. Railroad Co., 112 Ill. 314; Haworth v. Taylor, 108 Ill. 275; Cunningham v. Pattee, 99 Mass. 248; Dickey v. Lyon, 19 Iowa, 545; Bowman v. Anderson, 82 Iowa, 210, 47 N. W. 1087, 31 Am. St. Rep. 478; Nelson v. Wade, 21 Iowa, 49; Bank of Orleans v. Flagg, 3 Barb. Ch. (N. Y.) 316; Kerr v. Day, 14 Pa. 112; Wright v. Wood, 23 Pa. 120, 130; Hottenstein v. Lerch, 104 Pa. 454; Levy v. Holberg, 67 Miss. 526, 7 South. 431; Edwards v. Thompson, 71 N. C. 177, 181; O'Rourke v. O'Connor, 89 Cal. 442, 446. The following cases are opposed to this doctrine: Flagg v. Mann, 2 Sumn. 486, 557, Fed. Cas. No. 4,847; Beatie v. Butler, 21 Mo. 313, 64 Am. Dec. 234; Jaques v. Weeks, 7 Watts (Pa.) 261, 272; Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870.

[18] Van Keuren v. Railroad Co., 38 N. J. Law, 165, 167, where it is expressly held that the doctrine of constructive notice by possession does not apply to a grantor remaining in possession after his conveyance, and that the deed absolute in form is conclusive, and the purchaser may safely rely on it. See, also, Dodge v. Davis, 85 Iowa, 77, 52 N. W. 2; Exon v. Dancke, 24 Or. 110, 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; Lamoreux v. Huntley, 68 Wis. 34, 31 N. W. 331; Mateskey v. Feldman, 75 Wis. 103, 43 N. W. 733; Rowe v. Ream, 105 Pa. 543; Staton v. Davenport, 95 N. C. 11.

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grantor'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 to charge a subsequent purchaser from the grantee with constructive notice as if the possession had been that of a stranger to the record title.[19]

Effect of Record Title on Possession as Notice.

Under some circumstances a person being in possession of land under his title may, nevertheless, be prevented from relying on such possession as notice to subsequent purchasers,—as where, in addition to the unrecorded or parol title under which the person in possession assumes to hold the land, he has a title which is on record, under which he would also be entitled to possession. In such case he will be deemed in possession under his recorded title, and the purchaser will not be charged with notice of the undisclosed title or interest which the possessor may have. Thus, where a mortgagee is in possession under a recorded mortgage, a purchaser from the mortgagor will not be presumed to know of an unrecorded conveyance of the equity of redemption from the mortgagor to the mortgagee, unless by the terms of the recorded instrument the mortgagor was entitled to possession at the time of the purchase.[20] When a party records an instrument, the terms of which are consistent with his possession of the land, subsequent purchasers have a right to rely on such record. The fact that he has placed the evidence of his right to occupy on record, where it is accessible to the whole world, arrests inquiry at that point, and plainly informs the purchaser that he may rest securely on the information already obtained.[21]

[19] Illinois Cent. R. Co. v. McCullough, 59 Ill. 166; Ford v. Marcall, 107 Ill. 136; Metropolitan Bank v. Godfrey, 23 Ill. 579, 607; Pell v. McElroy, 36 Cal. 268; Groff v. Bank, 50 Minn. 234, 52 N. W. 651; Turman v. Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; Stevens v. Hulin, 53 Mich. 93, 18 N. W. 569; McKecknie v. Hoskins, 23 Me. 230; Hopkins v. Garrard, 7 B. Mon. (Ky.) 312.

[20] Plumer v. Robertson, 6 Serg. & R. (Pa.) 179; Palmer v. Bates, 22 Minn. 532; Great Falls Co. v. Worster, 15 N. H. 412; Bell v. Twilight, 22 N. H. 500; Crassen v. Swoveland, 22 Ind. 427; Newhall v. Pierce, 5 Pick. (Mass.) 450.

[21] Woods v. Farmere, 7 Watts (Pa.) 385.

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Presumption of Notice by Possession is Rebuttable.

The question has frequently arisen whether the presumption of notice arising from possession of land by a stranger to the title is conclusive upon a subsequent purchaser or incumbrancer. The difficulties involved in a correct determination of this question arise from the fact that the courts, in discussing the effect of possession as constructive notice, employ language which makes it more or less doubtful as to whether it is intended that the presumption of notice is conclusive or may be rebutted. In a great majority of the cases involving a consideration of this question it is evident that the courts were not required to pass directly upon the nature of the presumption. It may be stated generally that, if a purchaser or incumbrancer, knowing the fact of possession by a stranger, and being, therefore, put on inquiry, has either neglected to make such inquiry, or to prosecute it with due diligence, he is conclusively presumed to have had notice of the conflicting rights and interests of the person in possession.[22] And again, if a person is in rightful possession under an unrecorded deed, and such possession is visible, notorious, and exclusive, a subsequent purchaser or incumbrancer, even though his deed or mortgage is put on record, becomes charged with absolute notice.[23] The presumption of notice in such cases cannot be rebutted or overcome by any evidence. But it seems authoritatively determined, where the courts have directly passed upon the question, that a presumption of notice under ordinary circumstances may be rebutted and overcome by evidence that the subsequent purchaser or incumbrancer has made diligent inquiry concerning the existence of an adverse claim or interest in the party in possession, and has failed to discover the truth in respect thereto.[24]

[22] Grimstone v. Carter, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; Brice v. Brice, 5 Barb. (N. Y.) 533; Tuttle v. Jackson, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306; Kent v. Plummer, 7 Greenl. (Me.) 464; Jaques v. Weeks, 7 Watts (Pa.) 272; Hanly v. Morse, 32 Me. 287; Burt v. Cassety, 12 Ala. 739; Hardy v. Summers, 10 Gill & J. (Md.) 316, 32 Am. Dec. 167.

[23] Pom. Eq. Jur. § 623; Noyes v. Hall, 97 U. S. 34, 38, 24 L. Ed. 909; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Ill. 210; Emmons v. Murray, 16 N. H. 385; Strickland v. Kirk, 51 Miss. 795, 797; Moss v. Atkinson, 44 Cal. 3, 17.

[24] Williamson v. Brown, 15 N. Y. 354, 361, 362, where it is said

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SAME—CONSTRUCTIVE NOTICE BY REGISTRATION.

53. By virtue of statutes in all the American states, the record or registration in the proper place of a properly executed instrument affecting the title to real estate 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 statutes of the several states have all provided for the registration of instruments affecting the title to real property. These statutes vary in detail, but are the same in their essential characteristics. The provision generally made is that every deed, conveyance, or other instrument affecting the title to real property, unless recorded, is void as against subsequent purchasers or incumbrancers in good faith, for a valuable consideration, whose muniments of title are first recorded. These statutes are all intended to establish a permanent method by which the exact state of the title to real estate may easily be discovered, and thus to protect subsequent bona fide purchasers.[1] One of the grounds 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.[2]

that possession puts the purchaser on inquiry, and makes it his duty to pursue his inquiry with diligence, but is not absolutely conclusive upon him. Rogers v. Jones, 8 N. H. 264, where Judge Parker says: "To say that he [the purchaser] was put on inquiry, and that, having made all due investigation, without obtaining any knowledge of title, he was still chargeable with notice of a deed, if one did really exist, would be absurd." See, also, Thompson v. Ploche, 44 Cal. 508, 516; Flagg v. Mann, 2 Sumn. 486, 554, Fed. Cas. No. 4,847; Kerr v. Day, 14 Pa. 112; Scheerer v. Cuddy, 85 Cal. 271, 24 Pac. 713.

§ 53. [1] Wade, Notice, § 96; Pom. Eq. Jur. § 649; Bird v. Dennison, 7 Cal. 297; Spielmann v. Kliest, 36 N. J. Eq. 202.

[2] Bird v. Dennison, 7 Cal. 297.

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Recording acts are designed to furnish a complete public record of all rights, interests, claims, incumbrances, and charges, both legal and equitable, on each parcel of land within the territorial limits which the record is intended to cover. It has been generally held, therefore, that, independent of the express provisions of such acts, an instrument creating or passing an equitable interest or estate may be recorded; and, if executed with all the formalities prescribed by law, the record will be constructive notice to subsequent purchasers and incumbrancers to the same extent as the record of a conveyance of the legal title.[3] In a New York case it has been held that the registry of a conveyance of an equitable title is notice to a subsequent purchaser of the same interest or title from the same grantor, but is not notice to a purchaser of the legal title from the person who appears by the record to be the real owner.[4] And where a right of way was, by agreement, reserved out of land conveyed by a deed in which no mention of the reservation was made, it was held that an innocent purchaser, for a valuable consideration, from the grantee, was not charged with notice of such reservation, because it had not been reduced to writing, and filed for record, as was required of instruments affecting the title to the land itself.[5] But the voluntary recording of an instrument not authorized by statute would not charge subsequent purchasers or incumbrancers with notice of its contents, or with any rights arising thereunder,—as in the case of a transfer of personal property in a deed also conveying real property; although the recording of the deed is authorized, it is not constructive notice of the transfer of the personal property.[6]

Requisites of Record.

Since constructive notice by record is purely a statutory creation, there must be a compliance with all the statutory

[3] Digman v. McCollum, 47 Mo. 372; Wilder v. Brooks, 10 Minn. 50 (Gil. 32), 88 Am. Dec. 49; Dickinson v. Glenney, 27 Conn. 104; Russell's Appeal, 15 Pa. 319; Doyle v. Teas, 5 Ill. 202; Tarbell v. West, 86 N. Y. 280; Stoddard v. Whiting, 46 N. Y. 627; Hunt v. Johnson, 19 N. Y. 281; Parkist v. Alexander, 1 Johns. Ch. (N. Y.) 394.

[4] Tarbell v. West, 86 N. Y. 280, 287.

[5] Bush v. Golden, 17 Conn. 594.

[6] Pitcher v. Barrows, 17 Pick. (Mass.) 361, 38 Am. Dec. 306; Scott v. Lumber Co., 67 Cal. 71, 7 Pac. 131.

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requirements.[7] If an instrument is defectively executed, or is not properly acknowledged, or any other formality necessary to entitle it to be recorded is omitted, the record thereof is but a voluntary act, and will not charge subsequent purchasers or incumbrancers with notice.[8] If a deed has been recorded before delivery, the record will only be notice to those who purchase subsequent to the delivery; and, if a recorded deed is never delivered, it is no notice to subsequent purchasers.[9] The record must be made in the proper book, and in the manner and form prescribed by statute.[10]

[7] Pom. Eq. Jur. § 650.

[8] Pringle v. Dunn, 37 Wis. 449, 460, 461; Shepherd v. Burkhalter, 13 Ga. 443, 58 Am. Dec. 523. Proper attestation by witnesses necessary, Carter v. Champion, 8 Conn. 549, 21 Am. Dec. 695; White v. Denman, 1 Ohio St. 110; improper acknowledgment, Jacoway v. Gault, 20 Ark. 190, 73 Am. Dec. 494; Blood v. Blood, 23 Pick. (Mass.) 80; Reynolds v. Kingsbury, 15 Iowa, 238; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Hayden v. Moffatt, 74 Tex. 647, 12 S. W. 820, 15 Am. St. Rep. 866; Wells v. Polk, 36 Tex. 120; De Witt v. Moulton, 17 Me. 418; Brown v. Lunt, 37 Me. 423; Cockey v. Milne's Lessee, 16 Md. 200; Stevens v. Morse, 47 N. H. 532. But defectively acknowledged instruments may be cured by legislation. Watson v. Mercer, 8 Pet. 88, 8 L. Ed. 876; Tate v. Stooltzfoos, 16 Serg. & R. (Pa.) 35, 16 Am. Dec. 546; Wallace v. Moody, 26 Cal. 387; Logan v. Williams, 76 Ill. 175; Gatewood v. Hart, 58 Mo. 261. In the case of Stevens v. Hampton, 46 Mo. 404, it was held that, where the instrument was fair on its face, the record will impart notice notwithstanding hidden defects in the execution or acknowledgment.

[9] Parker v. Hill, 8 Metc. (Mass.) 447; Mutual Ben. Life Ins. Co. v. Rowand, 26 N. J. Eq. 389; Jones v. Roberts, 65 Me. 273.

[10] Where a statute requires a mortgage to be recorded in the "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. Reeside, 9 Watts, 508; Dey v. Dunham, 2 Johns. Ch. (N. Y.) 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, 22 Am. St. Rep. 719; Kemper v. Campbell, 44 Ohio St. 210, 6 N. E. 566; Bank of Mobile v. Institution, 62 Miss. 250; Knowlton v. Walker, 13 Wis. 264. The record of a mortgage in a "book of deeds" or of a deed in a "book of mortgages" is not constructive notice. In re Leech's Estate, 44 Pa. 140; Calder v. Chapman, 52 Pa. 359, 91 Am. Dec. 163. In Mutual Life Ins. Co. v. Dake, 87 N. Y. 257, 263, it was said:

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It must also be made in the county in which the land is situated.[11] And the record of a deed only imparts notice of such facts as appear on the face of the instrument. It is not notice of fraud, for instance, perpetrated in its execution.[12] If omissions or alterations are made in the registration of an instrument, notice can only be afforded thereby of what is contained in the record itself. A bona fide purchaser is entitled to rely on the record as he finds it, and is not bound to take notice of errors in recording, of which he has never been actually informed.[13] The record and the instrument itself must accurately and definitely describe the premises affected, and, if the property in controversy is not so described as to identify it with reasonable certainty, the record cannot be constructive notice to subsequent bona fide purchasers.[14]

It has been held that the indexing of conveyances is no part of the record thereof, and that the omission of the recording officer to properly index does not deprive grantees or mortgagees of the benefits of recording acts.[15] This doctrine has been frequently controverted by cases holding that, in the absence of a proper index, subsequent purchasers will not be charged with notice.[16]

"Whatever forms part of a perfect record, as prescribed in the act is essential; that is, the conveyance must be recorded in the proper book, in the proper order, and with substantial accuracy. If the record be defective in anything essential, it will not serve the purpose of giving constructive notice to subsequent bona fide grantees or incumbrancers."

[11] King v. Portis, 77 N. C. 25; Cohen v. Barton, 73 Md. 408, 21 Atl. 68; Adams v. Hayden, 60 Tex. 223; Astor v. Wells, 4 Wheat. 466, 4 L. Ed. 616.

[12] Hoffman v. Strokecker, 7 Watts (Pa.) 86.

[13] Terrell v. Andrew Co., 44 Mo. 309; Brydon v. Campbell, 40 Md. 331; Calder v. Chapman, 52 Pa. 359; Jennings v. Wood, 20 Ohio, 261; Peek v. Mallams, 10 N. Y. 509; Beekman v. Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246; Young v. Wilson, 27 N. Y. 351.

[14] Bailey v. Galpin, 40 Minn. 319, 41 N. W. 1054; Miller v. Bradford, 12 Iowa, 14; Jennings v. Wood, 20 Ohio, 261.

[15] Mutual Life Ins. Co. of New York v. Dake, 87 N. Y. 257; Curtis v. Lyman, 24 Vt. 338, 58 Am. Dec. 174; Bishop v. Schelder, 46 Mo. 472, 2 Am. Rep. 533.

[16] Speer v. Evans, 47 Pa. 141; Barney v. McCarty, 15 Iowa, 510; Whalley v. Snall, 25 Iowa, 184; Ætna Life Ins. Co. v. Hesser, 77 Iowa, 381, 42 N. W. 325, 4 L. R. A. 122, 14 Am. St. Rep. 297.

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Record is Notice to Whom.

The record of a conveyance after a compliance with all statutory requirements does not operate as constructive notice to all the world. The statutes prescribing the effect of the registration of instruments vary in their terms. They, in substance, all declare that an unrecorded conveyance is invalid as against subsequent purchasers or incumbrancers for a valuable consideration. It would necessarily follow that the registration of a conveyance is constructive notice only to subsequent bona fide purchasers and incumbrancers.[17] These statutes have no reference to prior incumbrances already recorded. The effect of recording a conveyance is not retrospective, nor was it designed to change rights already vested and secured by a recorded deed or mortgage. It simply protects a purchaser who takes the precaution to search the records and record his own conveyance against unrecorded conveyances of which he had no notice.[18] The registration of a deed from one having no title does not charge the lawful owner with notice of its existence.[19] It is settled doctrine that a record is only a constructive notice to subsequent purchasers deriving title from the same grantor.[20]

SAME—RECITALS IN TITLE PAPERS.

54. A purchaser of real property 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 that

[17] Hunter v. Watson, 12 Cal. 363, 3 Am. Dec. 543; Dennis v. Burritt, 6 Cal. 670; Coleman v. Reynolds, 181 Pa. 317, 37 Atl. 543.

[18] Stuyvesant v. Hone, 1 Sandf. Ch. (N. Y.) 419; Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151; Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 Am. Dec. 478; Hill's Adm'r v. McCarter, 27 N. J. Eq. 41; Hoy v. Bramhall, 19 N. J. Eq. 563, 27 Am. Dec. 687; Leiby v. Wolfe, 10 Ohio St. 83; James v. Brown, 11 Mich. 25; Doolittle v. Cook, 75 Ill. 354; Iglehart v. Crane, 42 Ill. 261; Ackerman v. Hunsicker, 85 N. Y. 43, 49, 39 Am. Rep. 621.

[19] Bates v. Norcross, 14 Pick. (Mass.) 224; Roberts v. Richards, 84 Me. 1, 24 Atl. 425.

[20] Pom. Eq. Jur. § 658.

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would have been discovered by an inquiry suggested by the recitals contained in any such instrument.

This doctrine is of universal recognition, both in this country and Great Britain, subject, however, to such refinements and modifications as the peculiarities of adjudicated cases have from time to time demanded.[1] It is the duty of a purchaser of real property to inspect all the title papers in his vendor's chain of title, and he is, therefore, 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.[2] It has even been held that a purchaser 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,[3] 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.[4] It is not necessary that the antecedent

§ 54. [1] Wade, Notice, § 310.

[2] 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. 697; Wiseman v. Hutchinson, 20 Ind. 40; Burch v. Carter, 44 Ala. 115; Major v. Bukley, 51 Mo. 227, 231; Willis v. Gay, 48 Tex. 463, 26 Am. Rep. 328; Pringle v. Dunn, 37 Wis. 449, 464, 19 Am. Rep. 772; Baker v. Mather, 25 Mich. 51, 53; Acer v. Westcott, 46 N. Y. 384, 7 Am. Rep. 355; White v. Foster, 102 Mass. 375, 380; Smith v. Burgess, 133 Mass. 513; Roll v. Rea, 50 N. J. Law, 264, 12 Atl. 905; Seiberling v. Tipton, 113 Mo. 373, 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, 35 L. Ed. 1063. 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. 697; Tydings v. Pitcher, 82 Mo. 379; Wiseman v. Hutchinson, 20 Ind. 40; Willis v. Gay, 48 Tex. 463, 26 Am. Rep. 328.

[3] Patman v. Harland, 17 Ch. Div. 355.

[4] Jones v. Smith, 1 Hare, 43.

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deed or other instrument, through which the title is traced, should contain such explicit information of collateral rights or interests in the property purchased as would dispense with further proof. If such deed or other instrument contain a reference to another deed not in the chain of title, the purchaser has notice of such collateral deed and of its contents, and will be bound thereby.[5] And this is so whether such collateral deed be recorded or unrecorded.[6] But the reference to collateral rights and interests must be sufficiently explicit to arouse the suspicion or arrest the attention of a person of ordinary care.[7] The rule is only applicable to cases where the purchaser or incumbrancer is chargeable with gross negligence in not pursuing an inquiry as to the collateral rights or interests so referred to.[8] But a purchaser or incumbrancer is not charged with notice of any fact collateral and foreign to the interest or claim which he has acquired in the property.[9] Nor is he compelled to inquire into recitals contained in collateral deeds which do not deal with the subject-matter of the transaction to which he is a party.[10] The doctrine only applies to recitals in deeds executed prior to the time when the purchaser or incumbrancer acquires his title. It cannot refer to deeds which are in contemplation, although they should afterwards become operative.[11]

[5] George v. Kent, 7 Allen (Mass.) 16; Judson v. Dada, 79 N. Y. 373, 379; Deason v. Taylor, 53 Miss. 697; Wiseman v. Hutchinson, 20 Ind. 40; Thompson v. Sheppard, 85 Ala. 611, 5 South. 334; Tydings v. Pitcher, 82 Mo. 379; Leiter v. Pike, 127 Ill. 287, 20 N. E. 23.

[6] Howard v. Chase, 104 Mass. 249; White v. Foster, 102 Mass. 375, 380; Baker v. Mather, 25 Mich. 51; Garrett v. Puckett, 15 Ind. 485; Ross v. Worthington, 11 Minn. 438 (Gil. 323), 83 Am. Dec. 95; Price v. McDonald, 1 Md. 403, 54 Am. Dec. 657; Hancock v. McAvoy, 151 Pa. 439, 25 Atl. 48; Martin v. Neblett, 86 Tenn. 383, 7 S. W. 123; Ætna Life Ins. Co. v. Bishop, 69 Iowa, 645, 29 N. W. 761.

[7] Acer v. Westcott, 46 N. Y. 384, 7 Am. Rep. 355.

[8] Id.

[9] Burch v. Carter, 44 Ala. 115, 117; Mueller v. Engeln, 12 Bush (Ky.) 441 (in which case it was held that a purchaser of land is not chargeable with constructive notice of a clause in a deed in his claim of title reserving a lien for the purchase price of personalty also conveyed by the deed).

[10] Kansas City Land Co. v. Hill, 87 Tenn. 589, 11 S. W. 797, citing Bigelow, Estop. 341; 2 Devl. Deeds, §§ 1000, 1006.

[11] Cothay v. Sydenham, 2 Brown, Ch. 391. See, also, Cook v.

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LIS PENDENS.

55. A purchase of real property in litigation (pendente lite), although for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit.

The subject of lis pendens is usually treated as forming part of the equitable doctrine of constructive notice,[1] but in reality the doctrine is common to both courts of law and equity.[2] Mr. Pomeroy states that the entire doctrine is contained in the proposition that during the pendency of an equitable suit neither party to the litigation can alienate the property in dispute, so as to affect the rights of his opponent. The rule is said to rest upon the presumption that every man is attentive to what passes in the courts of justice of the state or sovereignty where he resides, and to be founded on public policy; for otherwise alienations and transfers of title made during the pendency of a suit might defeat its whole purpose, and there would be no end to litigation.[3] In a leading English case[4] it was said: "It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice. It affects him, not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation,

Travis, 22 Barb. (N. Y.) 338; Clabaugh v. Byerly, 7 Gill (Md.) 354, 48 Am. Dec. 575.

§ 55. [1] Story, Eq. Jur. § 405; Chancellor Kent, in Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566.

[2] Sorrell v. Carpenter, 2 P. Wms. 482.

[3] Story, Eq. Jur. §§ 405, 406; Leitch v. Wells, 48 N. Y. 585, 608, citing Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441; Green v. Slayter, 4 Johns. Ch. (N. Y.) 38; Hopkins v. McLaren, 4 Cow. (N. Y.) 667; Murray v. Blatchford, 1 Wend (N. Y.) 583, 19 Am. Dec. 587; Jackson v. Andrews, 7 Wend. (N. Y.) 152. See, also, Green v. Rick, 121 Pa. 180, 15 Atl. 497; Dovey's Appeal, 97 Pa. 153; Boulden v. Lanahan, 29 Md. 200.

[4] Bellamy v. Sabine, 1 De Gex & J. 566, 578.

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rights to the property in dispute, so as to prejudice the opposite party." The object of the rule is to bring litigation to an end, to prevent new suits, the introduction of new parties, and to lead the existing controversy to a close.[5] The rule is a hard one, and not a favorite with the courts, and a party claiming the benefit of it must clearly bring his case within it. It is said that, if he makes a slip in his proceedings, the court will not assist him to rectify his mistake.[6]

Requisites of the Lis Pendens.

The particular property involved in the suit must be so definitely described and identified in the pleading that any one reading it can learn thereby what property is intended to be made the subject of litigation.[7] It is, perhaps, not necessary that the land be described by metes and bounds. Reasonable certainty as to the intent would be sufficient.[8] A lis pendens, and its consequent notice, begins to operate when the suit is properly commenced by the service of process,[9] and continues to operate until the rendition of final judgment.[10] A purchaser, pendente lite, of the subject of the litigation, if he buys in good faith, and without notice of the rights and interests of the litigants, is not affected by the suit pending, or by notice of its pendency, unless the suit has been prosecuted with due diligence.[11] Where the suit

[5] Holbrook v. Zinc Co., 57 N. Y. 616, 627; Newman v. Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766.

[6] Leitch v. Wells, 48 N. Y. 585, 605; Holbrook v. Zinc Co., 57 N. Y. 616, 627; Sorrell v. Carpenter, 2 P. Wms. 482; 3 Sugd. Vend. 460.

[7] Allen v. Poole, 54 Miss. 323, 333; Houston v. Timmerman, 17 Or. 499, 21 Pac. 1037, 4 L. R. A. 716, 11 Am. St. Rep. 848; Miller v. Sherry, 2 Wall. 237, 17 L. Ed. 827; Russell v. Kirkbride, 62 Tex. 459; Griffith v. Griffith, 9 Paige (N. Y.) 315, 317; Low v. Pratt, 53 Ill. 438.

[8] Pom. Eq. Jur. § 634.

[9] 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. 10, 25 Atl. 608; Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566; Allen v. Poole, 54 Miss. 323, 324. A different rule may be in force under certain statutes. Burleson v. McDermott, 57 Ark. 229, 21 S. W. 222; Rothschild's Adm'r v. Kohn, 93 Ky. 107, 19 S. W. 180, 40 Am. St. Rep. 184.

[10] Turner v. Crebill, 1 Ohio, 372; Page v. Waring, 76 N. Y. 463; Worsley v. Earl of Scarborough, 3 Atk. 392.

[11] Hayes v. Nourse, 114 N. Y. 595, 22 N. E. 40, 11 Am. St. Rep.

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abates by the death of a party, the lis pendens will not lose its force as a notice, if it be revived without unreasonable delay.[12] The lis pendens may be operative after the rendition of the judgment if an appeal is taken, and diligently prosecuted.[13] The abandonment or voluntary dismissal of the suit prevents the application of this doctrine.[14]

Applicable to what Suits.

The doctrine of notice by lis pendens applies generally to all suits involving the title to a specific parcel of real estate, or affecting equitable interests, rights, and estates therein, or enforcing charges, liens, and incumbrances thereon. Among the kinds of actions in which the doctrine is frequently employed are suits for the foreclosure of mortgages,[15] and vendors' liens,[16] to enforce the specific performance of contracts for the sale of real estate,[17] and in all suits for the enforcement of a charge on land.[18] And, where an action of ejectment is instituted against an occupant of real property, one coming into possession thereof, by assignment or otherwise, pendente lite, will be bound by the judgment, although he is not made a party to the litigation.[19] There

700, citing Preston v. Tubbin, 1 Vern. 286; Kinsman v. Kinsman, Tam. 399; Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566; Hayden v. Bucklin, 9 Paige (N. Y.) 512; Myrick v. Selden, 36 Barb. (N. Y.) 15; Herrington v. McCollum, 73 Ill. 476, 483; Watson v. Wilson, 2 Dana (Ky.) 406, 26 Am. Dec. 459; Clarkson v. Morgan's Devisees, 6 B. Mon. (Ky.) 441; Erhman v. Kendrick, 1 Metc. (Ky.) 146; Petree v. Bell, 2 Bush (Ky.) 58. And see, also, Durand v. Lord, 115 Ill. 610, 4 N. E. 483; Hammond v. Paxton, 58 Mich. 393, 25 N. W. 321.

[12] Debell v. Foxworthy's Heirs, 9 B. Mon. (Ky.) 228; Watson v. Wilson, 2 Dana (Ky.) 406, 26 Am. Dec. 459; Herrington v. McCollum, 73 Ill. 476.

[13] Gilman v. Hamilton, 16 Ill. 225; Moore v. Moore, 67 Tex. 293, 8 S. W. 284. A purchaser after a final decree and before a bill of revision is filed is not a purchaser pendente lite. Ludlow's Heirs v. Kidd's Ex'rs, 3 Ohio, 544.

[14] Valentine v. Austin, 124 N. Y. 400, 26 N. E. 978; Allison v. Drake, 145 Ill. 500, 32 N. E. 537.

[15] Chapman v. West, 17 N. Y. 125; Center v. Bank, 22 Ala. 743; McCutchen v. Miller, 31 Miss. 65.

[16] Center v. Bank, 22 Ala. 743.

[17] Blanchard v. Ware, 43 Iowa, 530.

[18] Seabrook v. Brady, 47 Ga. 650; Salisbury v. Morss, 7 Lans. (N. Y.) 359, 365.

[19] Bolin v. Connelly, 73 Pa. 336; Hersey v. Turbett, 27 Pa. 418; Hill v. Oliphant, 41 Pa. 364; Howard v. Kennedy's Ex'rs, 4 Ala.

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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 the better rule is that the doctrine does not apply to such suits,[20] although, where the pleading definitely describes the property sought to be charged, there would seem to be some justification for its application.[21] As a general rule, the doctrine does not extend to ordinary suits concerning personal property.[22] But, under special circumstances, it may be extended to mortgages and other securities held in trust,[23] and has been held to apply to a suit brought for the purpose of settling partnership affairs, and to enforce a partner's lien upon partnership property.[24]

592, 39 Am. Dec. 307; Jackson v. Tuttle, 9 Cow. (N. Y.) 233; Jones v. Chiles, 2 Dana (Ky.) 25.

[20] Scott v. Rogers, 77 Iowa, 483, 42 N. W. 377; Houston v. Timmerman, 17 Or. 499, 21 Pac. 1037, 4 L. R. A. 716, 11 Am. St. Rep. 848.

[21] Wilkinson v. Elliott, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158; Powell v. Campbell, 20 Nev. 232, 20 Pac. 156, 2 L. R. A. 615, 19 Am. St. Rep. 350.

[22] Miles v. Lefi, 60 Iowa, 168, 14 N. W. 233; Gardner v. Peckham, 13 R. I. 102; Hill v. Scotland Co. (C. C.) 34 Fed. 208.

[23] Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441,—which is a leading case on this subject. The chancellor said: "If he [the trustee] possessed cash, as proceeds of the trust estate, or negotiable paper not due, or perhaps movable personal property, such as horses, cattle, grain, etc., I am not prepared to say the rule is to be carried so far as to affect such sales. The safety of commercial dealings would require a limitation of the rule; but bonds and mortgages are not the subject of ordinary commerce, and the rule may very well be applied to them." See, also, Leitch v. Wells, 48 N. Y. 585, 613, where the court held that "the doctrine of constructive notice by lis pendens has never yet been applied to ordinary commercial paper, nor to bills of lading, nor to government or corporate bonds payable to bearer. Indeed, I do not find that it has ever been applied to any of the articles of ordinary commerce. Public policy does not require that it should be thus applied. On the contrary, its application to such property would work great mischief, and lead to great embarrassments." Farmers' Loan & Trust Co. v. Railroad Co., 4 C. C. A. 561, 54 Fed. 759; Holbrook v. Zinc Co., 57 N. Y. 616; Warren Co. v. Marcy, 97 U. S. 96, 24 L. Ed. 977.

[24] Hoxie v. Carr, 1 Sumn. 173, Fed. Cas. No. 6,802; Dresser v. Wood, 15 Kan. 344.

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Persons Affected by Notice.

The lis pendens will not operate as constructive notice against a purchaser unless, at the time the property which is the subject of the suit is purchased, the grantor was a party to the suit.[25] And this is so although the grantor is subsequently brought in by summons, or may voluntarily appear.[26] In some of the states it has been held that the notice of the pendency of the suit does not extend to persons living without the territorial jurisdiction of the court in which the action is pending.[27] But in other states it has been held, by virtue of the constitutional provision that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," [28] that purchases made in one state pending an action brought in another state must be subjected to the rule of lis pendens.[29]

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 charge 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 effect.[30]

[25] Green v. Rock, 121 Pa. 130, 15 Atl. 497; Brundagee v. Biggs, 25 Ohio St. 652, 656; Carr v. Callaghan, 3 Litt. (Ky.) 365; Miller v. Sherry, 2 Wall. 237, 17 L. Ed. 827 (where the court said): "We apprehend that, to affect a person as a purchaser pendente lite, it is necessary to show that the holder of the legal title was impleaded before the purchase which is to be set aside."

[26] French v. Loyal Co., 5 Leigh (Va.) 627; Stuyvesant v. Hone, 1 Sandf. Ch. (N. Y.) 419; Parks v. Jackson, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656; Parsons v. Hoyt, 24 Iowa, 154.

[27] Holbrook v. Zinc Co., 57 N. Y. 616, 625; Shelton v. Johnson, 4 Sneed (Tenn.) 672, 70 Am. Dec. 265.

[28] Const. U. S. art. 4, § 1.

[29] Fletcher v. Ferrel, 9 Dana (Ky.) 372, 35 Am. Dec. 143; Carr v. Coal Co., 15 Mo. App. 551.

[30] Pom. Eq. Jur. § 640, note.

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CHAPTER VI.

BONA FIDE PURCHASERS WITHOUT NOTICE.

56. Doctrine of Bona Fide Purchase.
57. Application of Doctrine.
58. What Constitutes a Bona Fide Purchase.

DOCTRINE OF BONA FIDE PURCHASE.

56. A court of equity will not exercise its jurisdiction against a bona fide purchaser without notice and for a valuable consideration.

This doctrine is of universal application in cases where the parties possess conflicting interests or estates in the same subject-matter.[1] In its original form it was purely equitable, and had no place in the common law. Questions involving the priority of legal estates were determined according to their intrinsic merits and validity. This doctrine can only be employed in equity where the controversy arises between parties, one of whom holds a legal title and the other an equitable title, or where they both hold equitable titles.

By the recording acts of the several states the equitable doctrine of bona fide purchase has been extended to all conveyances and mortgages, and many other estates and interests to which the doctrine was not originally applicable. The doctrine has, therefore, become of universal use in all courts for determining the validity of legal as well as equitable titles. It is not our purpose to discuss the doctrine as affected by the recording acts. It will suffice to call attention to a number of general rules and principles which have arisen by the application of the doctrine in courts of equity.

§ 56. [1] Jerrard v. Saunders, 2 Ves. Jr. 454, 457; Boone v. Chiles, 10 Pet. 177, 210, 9 L. Ed. 388.

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APPLICATION OF DOCTRINE.

57. In the application of the doctrine, equity does not determine which of the conflicting interests or estates is the better. The merits of the litigant parties are not considered.

The whole doctrine rests on this refusal of a court of equity to interfere as against the subsequent bona fide purchaser. The most frequent application of the doctrine is where the holder of an equitable estate or interest brings suit against a subsequent bona fide purchaser of the legal estate. In such a case the defendant is entitled to the protection of the court, and his interests so acquired will not be molested.[1]

The authorities are conflicting as to whether a defendant, who is a subsequent bona fide purchaser of a mere equitable interest, can avail himself of the defense permitted by an application of this doctrine as against a plaintiff who is the holder of the legal title. The weight of authority, however, seems to be in favor of permitting the defendant in such a case to avail himself of such defense.[2]

Another class of cases in which the doctrine is often applied is where several purchasers or incumbrancers each claim an equity, and one who is later or last in time acquires an outstanding legal estate, or any other legal advantage. Such purchaser or incumbrancer will not be deprived of this advantage by a court of equity. To a bill filed against him for this purpose by a prior purchaser or incumbrancer, the defendant may maintain the plea of purchase for valuable consideration without notice, for the principle is that a court of equity will not disarm a purchaser; that is, will not take from him the shield of any legal advantage.[3] And, where

§ 57. [1] Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129, 147, 8 Am. Dec. 467; Varick v. Briggs, 6 Paige (N. Y.) 323; Sumner v. Waugh, 56 Ill. 531; Robbins v. Moore, 129 Ill. 30, 21 N. E. 934; Wells v. Morrow, 38 Ala. 125.

[2] Bassett v. Nosworthy, Cas. t. Finch, 102; Id., 2 White & T. Lead. Cas. Eq. (Text-Book Series) pt. 1, p. 6; Lane v. Jackson, 20 Beav. 535; Hope v. Liddell, 21 Beav. 183; Flagg v. Mann, 2 Sumn.

[3] Phillips v. Phillips, 4 De Gex, F. & J. 208. See, also, Carlisle v. Jumper, 81 Ky. 282; Zollman v. Moore, 21 Grat. (Va.) 313; Campbell v. Brackenridge, 8 Blackf. (Ind.) 471.

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an equitable remedy arises to set aside a deed for fraud or accident, or to correct it for a mistake, a subsequent purchaser of the title from one against whom the remedy could have been maintained may maintain the plea of purchase for valuable consideration without notice, and the court will not interfere.[4]

WHAT CONSTITUTES A BONA FIDE PURCHASE.

58. There are three elements essential to constitute a bona fide purchase:

(1) A valuable consideration.

(2) Absence of notice of prior adverse claims.

(3) Presence of good faith.

Valuable Consideration.

"Considerations," as used by most text-writers on the subject of contracts, are classified as "good" and "valuable." The definition of Blackstone is: "A 'good' consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relative; being founded on motives of generosity, prudence, and natural duty. A 'valuable' consideration is such as money, marriage, or the like, which the law esteems an equivalent given for a grant; and is, therefore, founded in motives of justice." [1] A valuable consideration, within the meaning of the doctrine of bona fide purchases, is usually in some way pecuniary; that is, something of actual value, capable of being measured by a pecuniary standard.[2] A person who has acquired title as a

486, Fed. Cas. No. 4,847; Union Canal Co. v. Young, 1 Whart. (Pa.) 410, 431, 30 Am. Dec. 212; Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661.

[4] This is the third class where the defense is available mentioned by Lord Westbury in Phillips v. Phillips, 4 De Gex, F. & G. 208. And see Sturge v. Starr, 2 Mylne & K. 195; Malden v. Menill, 2 Atk. 8; Marshall v. Collett, 1 Young & C. Exch. 238; Harvey v. Woodhouse, Cas. t. King, 80; Ligon's Adm'rs v. Rogers, 12 Ga. 281, 292; Whitman v. Weston, 80 Me. 285.

§ 58. [1] Bl. Comm. 297; Pars. Cont. p. 480.

[2] Story v. Lord Windsor, 2 Atk. 630; Hardingham v. Nicholls, 3 Atk. 304; Weaver v. Barden, 49 N. Y. 286; De Lancey v. Stearns, 66 N. Y. 157; Westbrook v. Gleason, 79 N. Y. 23, 28; Roxborough v. Messick, 6 Ohio St. 448, 67 Am. Dec. 346; Palmer v. Williams, 24

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donee, or in any other manner, as a volunteer, cannot be considered a bona fide purchaser.[3] If the consideration is in fact a valuable one, the court will not inquire whether it is adequate,[4] unless the inadequacy is so great as to amount to evidence of bad faith.[5] Loaning money, an exchange or transfer of property, or the performance of a valuable service may be a sufficient valuable consideration.[6] So, also, will the surrender or release of an existing legal right, and the assumption of a new obligation which is, in its nature, irrevocable, or from which he will not be relieved by a court of equity, constitute a sufficient valuable consideration.[7]

Where property is conveyed as security for an antecedent debt, it has been generally held that the transfer is not made for a valuable consideration, and the transferee is not, therefore, a bona fide purchaser. This is based upon the fact that the creditor has not parted with anything of value, and that by the acceptance of such security he has not surrendered a legal right, or assumed any responsibility.[8] In many of

Mich. 328; Keys v. Test, 33 Ill. 316; Roseman v. Miller, 84 Ill. 297; Haughwout v. Murphy, 21 N. J. Eq. 118. No merely moral consideration is sufficient. Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185. A devisee is not a purchaser for value. Jackson v. Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246.

[3] Roseman v. Miller, 84 Ill. 297; Bowen v. Prout, 52 Ill. 354; Boon v. Barnes, 23 Miss. 136; Frost v. Beekman, 1 Johns. Ch. (N. Y.) 288; Petry v. Ambrosher, 100 Ind. 510; Hughes v. Berrien, 70 Ga. 273; Ford v. Ticknor, 169 Mass. 276, 47 N. E. 877.

[4] Basset v. Nosworthy, 2 White & T. Lead. Cas. Eq. 1; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Skerrett v. Society, 41 Ohio St. 606; Cary v. White, 52 N. Y. 138, 142.

[5] 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. 628.

[6] Gerson v. Pool, 31 Ark. 85 (loan of money); Bowen v. Prout, 52 Ill. 354 (exchange of lands); Glidden v. Hunt, 24 Pick. (Mass.) 22; Palmer v. Williams, 24 Mich. 328; Kiersted v. Curry, 4 Paige (N. Y.) 9; Conrad v. Insurance Co., 1 Pet. 386, 7 L. Ed. 189.

[7] Assumption of new liability, Williams v. Shelly, 37 N. Y. 375; surrender of title, Westbrook v. Gleason, 79 N. Y. 23, 36. And see, also, Youngs v. Lee, 12 N. Y. 551; Meads v. Bank, 25 N. Y. 143, 82 Am. Dec. 331; Struthers v. Kendall, 41 Pa. 214, 218, 80 Am. Dec. 610; Goodman v. Simonds, 20 How. 343, 371, 15 L. Ed. 934.

[8] Alexander v. Caldwell, 55 Ala. 517; Short v. Battle, 52 Ala. 456; Banks v. Long, 79 Ala. 319; Wells v. Morrow, 38 Ala. 125; Seymour v. McKinstry, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94; Young v. Guy, 87 N. Y. 457, 462; Van Heusen v. Radcliff, 17 N. Y. 580, 72 Am. Dec. 480; Morse v. Godfrey, 3 Story, 364, 389, Fed.

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the states even this rule has been disapproved, and securing a pre-existing debt is held to be a valuable consideration.[9] But where the property is conveyed in complete satisfaction of an antecedent debt, or for the purpose of extending the time of payment thereof, the weight of authority seems to favor the rule that the transfer, in such cases, is made for a valuable consideration.[10] Where the antecedent creditor

Cas. No. 9,856; Mingus v. Condit, 23 N. J. Eq. 313; Wheeler v. Kirtland, 24 N. J. Eq. 552; Ashton's Appeal, 73 Pa. 153, 162; Garrard v. Railroad Co., 29 Pa. 154, 159; Liggett Spring & Axle Co.'s Appeal, 111 Pa. 291, 2 Atl. 684; Buffington v. Gerrish, 15 Mass. 156; Goodwin v. Trust Co., 152 Mass. 189, 25 N. E. 100; Merchants' Ins. Co. of Providence v. Abbott, 131 Mass. 397; Sleeper v. Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377; Poor v. Woodburn, 25 Vt. 235. But it has been generally held, except in New York and a few other states, that, where negotiable paper is taken as security for an antecedent indebtedness, this rule does not apply, and a bona fide holder taking such paper as security is unaffected by equities or defenses between the prior parties of which he had no notice. See Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Brooklyn & N. R. Co. v. Bank, 102 U. S. 14, 26 L. Ed. 61; Currie v. Misa, L. R. 10 Exch. 153; Armour v. McMicheal, 36 N. J. Law, 92; Hanold v. Kays, 64 Mich. 439, 31 N. W. 420, 8 Am. St. Rep. 835; Fisher v. Fisher, 98 Mass. 303. The subject is exhaustively examined in Brooklyn & N. R. Co. v. Bank, supra. The rule to the contrary in New York, based upon the decision of Coddington v. Bay, 20 Johns. 637, 11 Am. Dec. 342, has since been changed by the adoption of the New York negotiable instruments law (Laws 1897, c. 612, § 51), which is in conformity with the rule in the federal courts.

[9] A pre-existing debt is a valuable consideration. See Lawrence v. Tucker, 23 How. 14, 16 L. Ed. 474; Conrad v. Insurance Co., 1 Pet. 386, 7 L. Ed. 189; Shirras v. Craig, 7 Cranch, 34, 3 L. Ed. 260; Frey v. Clifford, 44 Cal. 335; Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318; Robinson v. Smith, 14 Cal. 94; Partridge v. Smith, 2 Biss. 183, Fed. Cas. No. 10,787; Doolittle v. Cook, 75 Ill. 354; Manning v. McClure, 36 Ill. 490; Work v. Brayton, 5 Ind. 396; Wright v. Bundy, 11 Ind. 398; Aiken v. Bruen, 21 Ind. 137; Wert v. Naylor, 93 Ind. 431; Adams v. Vanderbeck, 148 Ind. 92, 45 N. E. 645, 47 N. E. 24, 62 Am. St. Rep. 497. But, if the mortgage is to secure a pre-existing debt, the supreme court of Indiana has held otherwise in First Nat. Bank of Martinsville v. Insurance Co., 129 Ind. 241, 28 N. E. 695.

[10] Satisfaction of antecedent debt a valuable consideration, Safford v. Wade's Ex'rs, 51 Ala. 214; Ohio Life Ins. & Trust Co. v. Ledyard, 8 Ala. 866; Schluter v. Harvey, 65 Cal. 158, 3 Pac. 659; Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680; Metropolitan Bank v. Godfrey, 23 Ill. 579, 606; Ruth v. Ford, 9 Kan. 17; Christopher v. Christopher, 64 Md. 583, 3 Atl. 296; Soule v. Shotwell, 52 Miss. 236; Love v. Tay-

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surrenders or cancels some security which he already has upon the execution of a new conveyance or incumbrance, such creditor is a bona fide purchaser for a valuable consideration.[11] Not only must there be a valuable consideration, but it must be paid before the purchaser receives notice of the prior adverse claim to the property purchased.[12] If, after the contract has been executed, and the title to the property delivered, notice is received of the adverse interest before payment of the consideration, the subsequent purchaser cannot avail himself of the doctrine of bona fide purchase. English and American courts have generally held, however, that, where a part of the purchase price has been paid before notice, the purchaser will be protected as to the amount so paid, and that as to such amount he will be deemed a bona fide purchaser.[13] And where the consideration consists of an executory contract, bond, covenant, bond and mortgage, or other nonnegotiable security for the price, and such contract has not been performed, or the amount secured has not been paid before notice of an

lor, 26 Miss. 567; extension of time of payment, Atkinson v. Brooks, 26 Vt. 569, 62 Am. Dec. 592; Griswold v. Davis, 31 Vt. 390, 394; Pittsburgh & C. R. Co. v. Barker, 29 Pa. 160, 162; State Bank of St. Louis v. Frame, 112 Mo. 502, 20 S. W. 620; Hanold v. Kays, 64 Mich. 439, 31 N. W. 420, 8 Am. St. Rep. 835; Gassen v. Hendrick, 74 Cal. 444, 16 Pac. 242.

[11] Youngs v. Lee, 12 N. Y. 551; Meads v. Bank, 25 N. Y. 143, 82 Am. Dec. 331; Padgett v. Lawrence, 10 Paige (N. Y.) 170, 40 Am. Dec. 232; Struthers v. Kendall, 41 Pa. 214, 218; Goodman v. Simonds, 20 How. 343, 371, 15 L. Ed. 934; Mobile Life Ins. Co. v. Randall, 71 Ala. 220; Lane v. Logue, 12 Lea (Tenn.) 681.

[12] Wood v. Mann, 1 Sumn. 506, Fed. Cas. No. 17,951; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847; Penfield v. Dunbar, 64 Barb. (N. Y.) 239; Sargent v. Apparatus Co., 46 Hun (N. Y.) 19; Keyser v. Angle, 40 N. J. Eq. 481, 4 Atl. 641; Dean v. Anderson, 34 N. J. Eq. 496; Pearce v. Jackson, 61 Tex. 642; Withers v. Little, 56 Cal. 370; Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641; Baldwin v. Sager, 70 Ill. 503; Palmer v. Williams, 24 Mich. 328; Kitteridge v. Chapman, 36 Iowa, 348.

[13] Youst v. Martin, 3 Serg. & R. (Pa.) 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; Haughwout v. Murphy, 21 N. J. Eq. 118; Juvenal v. Jackson, 14 Pa. 519, 524; Everts v. Agnes, 5 Wis. 343; Farmers' Loan & Trust Co. v. Maltby, 8 Paige (N. Y.) 361.

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adverse claim, it will not be deemed a valuable consideration for the sake of rendering the party a bona fide purchaser.[14]

Absence of Notice.

The question as to what constitutes notice has already been discussed. 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.[15]

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.[16] But there are a number of other cases 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.[17]

A bona fide purchaser is not only entitled to protection for his title while it remains in him, but he may also transfer such title to any other person, and with it goes his superior equity as a bona fide purchaser. And, although the grantee of a bona fide purchaser may have notice of outstanding conflicting interests which are a defect upon the title, he may

[14] Roseman v. Miller, 84 Ill. 297; Dickerson v. Tillinghast, 4 Paige (N. Y.) 215, 25 Am. Dec. 528; Ellis v. Tousley, 1 Paige (N. Y.) 280; Whittick v. Kane, Id. 200, 208; Jewett v. Palmer, 7 Johns. Ch. (N. Y.) 65, 68, 11 Am. Dec. 401; Weaver v. Barden, 49 N. Y. 286; De Lancey v. Stearns, 66 N. Y. 157; Beck v. Uhrich, 13 Pa. 636; Storrs v. Wallace, 61 Mich. 437, 28 N. W. 662.

[15] 1 Story, Eq. Jur. § 395; Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566.

[16] Martin v. Morris, 62 Wis. 418, 22 N. W. 525; Thorn v. Newson, 64 Tex. 161, 53 Am. Rep. 747; Dodge v. Briggs (C. C.) 27 Fed. 160; Peters v. Cartier, 80 Mich. 124, 45 N. W. 73, 20 Am. St. Rep. 508; Richardson v. Levi, 67 Tex. 359, 3 S. W. 444; Johnson v. Williams, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243; Dickerson v. Colgrove, 100 U. S. 578, 584, 25 L. Ed. 618; Baker v. Humphrey, 101 U. S. 494, 499, 25 L. Ed. 1065.

[17] Nidever v. Ayers, 83 Cal. 39, 23 Pac. 192; Fox v. Hall, 74 Mo. 315, 41 Am. Rep. 316; 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, 37 L. Ed. 350; U. S. v. Land Co., 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354.

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still claim the benefit of the superior equity acquired by his grantor as a bona fide purchaser.[18] But this rule is subject to the exception that a bona fide purchaser cannot reconvey the title, free from prior equities, to a former owner, who was charged with notice of such equities.[19] If the title to real estate passes through the hands of successive grantees, all with notice of prior equities, and finally comes to a bona fide purchaser without notice of such equities, it is immediately freed from such equities, and such purchaser obtains a valid title,[20] subject to the exception above stated.

Presence of 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.[21] Not only must there be a valuable consideration, and lack of notice of prior equities, but the purchaser must have entered into the transaction in good faith. He must be guiltless of fraud, and free from the taint of unconscionable conduct. If he be a party to an intended fraud against the vendor's or grantor's creditors; if he obtains his title through misrepresentations or concealments which are inequitable, although not amounting to actual fraud,—he cannot maintain his character as a bona fide purchaser.[22]

Good faith has been declared to consist in an honest intention to abstain from taking any unconscientious advantage

[18] Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Trull v. Bigelow, 16 Mass. 406; Mott v. Clark, 9 Pa. 399; Craig v. Zimmerman, 87 Mo. 478, 56 Am. Rep. 466; Hayes v. Nourse, 114 N. Y. 606, 22 N. E. 40, 11 Am. St. Rep. 700; Scotland Co. v. Hill, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261.

[19] Bumpus v. Platner, 1 Johns. Ch. (N. Y.) 213, 219; Schutt v. Large, 6 Barb. (N. Y.) 373; Church v. Rutland, 64 Pa. 432; Ashton's Appeal, 73 Pa. 153; Clark v. McNeal, 114 N. Y. 295, 21 N. E. 405; Johnson v. Gibson, 116 Ill. 294, 6 N. E. 205; Trentman v. Eldridge, 98 Ind. 525; Brown v. Cody, 115 Ind. 488, 18 N. E. 9.

[20] 1 Story, Eq. Jur. § 409; Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686; Zoeller v. Riley, 100 N. Y. 108, 2 N. E. 388; Valentine v. Lunt, 115 N. Y. 496, 503, 22 N. E. 209; Somes v. Brewer, 2 Pick. (Mass.) 183, 13 Am. Dec. 406; Latham v. Inman, 88 Ga. 505, 15 S. E. 8; Paris v. Lewis, 85 Ill. 597; Fish v. Benson, 71 Cal. 429, 12 Pac. 454; Hewlett v. Pilcher, 85 Cal. 542, 24 Pac. 781.

[21] Cram v. Mitchell, 1 Sandf. Ch. (N. Y.) 251.

[22] Pom. Eq. Jur. § 762.

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of another, even through the forms or technicalities of law, together with an absence of knowledge of facts which would render the transaction unconscientious.[23] We have already seen that gross inadequacy of consideration may be evidence of fraud, and it has also been held that a mortgagee cannot be considered a bona fide purchaser where there is usury in the debt secured.[24]

[23] Gress v. Evans, 1 Dak. 387, 46 N. W. 1132.

[24] 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. United States v. Land Co., 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354. Other recent cases involving the question of good faith are Billings v. Smelting Co., 2 C. C. A. 252, 51 Fed. 388; Tarkington v. Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607; Barrett v. Sear, 128 Ind. 261, 27 N. E. 607.

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CHAPTER VII.

EQUITABLE ESTOPPEL.

59. Definition.
60. Fraud as a Basis of Equitable Estoppel.
61. Essential Elements.
62. Operation of Estoppel.
63. In Whose Favor Estoppel Does Not Operate.

DEFINITION.

59. Equitable estoppel consists in this: When one, by his words or conduct, voluntarily causes another to believe the existence of a certain state of things, and induces him to act in that belief, so as to alter his own previous position, the former is precluded from asserting, as against the latter, a different state of things as existing at the same time.[1]

§ 59. [1] Pickard v. Sears, 6 Adol. & E. 469; Freeman v. Cooke, 2 Exch. 654; Dyer v. Cady, 20 Conn. 263; Shapley v. Abbott, 42 N. Y. 448, 1 Am. Rep. 548. "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. Wiley, 126 Ill. 310, 323, 19 N. E. 287, 9 Am. St. Rep. 587. "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." Pom. Eq. Jur. § 804. "Equitable estoppel consists in this: Whenever, by his conduct or declarations, one had induced another to act upon the belief in certain facts, he shall not thereafter deny the truth of such facts to the prejudice of the other." Merwin, Eq. Pl. § 910. The definition in the text was derived from that in the case of Pickard v. Sears, supra, except that the word "voluntarily" is inserted for "willfully." In the case of Cornish v. Abington, 4

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The doctrine of estoppel was recognized by the common law at an early day.[2] Lord Coke, in stating the doctrine of the common law, said: "An estoppel is where a man is concluded by his own act or acceptance to say the truth," and, in classifying the subject, he added: "Touching estoppels, which are a curious and excellent sort of learning, it is to be observed that there are three kinds of estoppels, viz. by matter of record, by matter in writing, and by matter in pais." The instances which he gave of estoppel in pais were: "By matter in pais,—as by livery, by entry, and by acceptance of an estate."[3] All of these are instances of legal estoppel, and are not to be considered in a discussion of equitable estoppel. While equitable estoppels arise from facts which are all matters in pais, there is an essential and marked distinction between them and legal estoppels in pais. The equitable estoppel and legal estoppel in pais agree, however, in that they both preclude a person from showing the truth in an individual case. But the legal estoppel shuts out the truth, and also the equity and justice of the individual case, on account

Hurl. & N. 549, it was said that the word "willfully," as so used, meant "voluntarily." Sir James Fitzjames Stephen, in his Digest of the Laws of Evidence (page 124), says: "When one person, by anything which he does or says, or abstains from doing or saying, intentionally causes or permits another person to believe a thing to be true, and to act upon such belief otherwise than, but for that belief, he would have acted, neither the person first mentioned nor his representative in interest is allowed in any suit or proceeding between himself and such person or his representative in interest to deny the truth of that thing. When any person under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business neglects that duty, and when the person to whom the duty is owing alters his position for the worse, because he is misled as to the conduct of the negligent person by a fraud, of which such neglect is, in the natural course of things, the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act."

[2] 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."

[3] Co. Litt. 352 (a).

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of the supposed paramount importance of rigorously enforcing a certain and unvarying maxim of the law. It excludes evidence of the truth, and the equity of the particular case to support a strict rule of law on grounds of public policy. Equitable estoppels are admitted on the exactly opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth.[4] Equitable estoppels are only called into being to redress an injury or to prevent a wrong, and will not be extended further than necessary to accomplish the purposes for which they were created. But legal estoppels take effect in all cases, when once called into being, without regard to consequences, and produce an inflexible barrier which will not yield to circumstances.[5]

The equitable doctrine of estoppel had its origin in courts of equity; but it is now generally available in courts of law,[6] although it has been frequently held that an equitable estoppel in pais will not be available as a defense in the common-law action of ejectment.[7] The doctrine rests on the broad ground of public policy and good faith, and is interposed to guard against fraud and prevent injustice.[8] The vital principle of the doctrine is that he, who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disap-

[4] Horn v. Cole, 51 N. H. 287, 289, 12 Am. Rep. 111, per Perley, C. J. And see, also, Stevens v. Dennett, 51 N. H. 324.

[5] McAfferty v. Conover's Lessee, 7 Ohio St. 99, 70 Am. Dec. 57.

[6] Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618.

[7] Delaplaine v. Hitchock, 6 Hill (N. Y.) 14; Hamlin v. Hamlin, 19 Me. 141; Hayes v. Livingston, 34 Mich. 284, 22 Am. Rep. 533; De Mill v. Moffatt, 49 Mich. 125, 13 N. W. 387; St. Louis Nat. Stock Yards v. Ferry Co., 102 Ill. 514; Townsend Sav. Bank v. Todd, 47 Conn. 190.

[8] Shipley v. Fox, 69 Md. 572, 579, 16 Atl. 275. In the case of Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111, it was said, among other things: "It thus appears that what has sometimes been called an equitable estoppel, and sometimes with less propriety an estoppel in pais, is properly and peculiarly a doctrine of equity, originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights, though now with us, like many other doctrines of equity habitually administered at law."

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pointing the expectations upon which he acted. Such a change of position is strictly forbidden. It involves fraud and falsehood, and the law abhors both. The remedy is to be applied to promote the ends of justice, is available only for protection, and cannot be used as a weapon of assault.[9]

FRAUD AS A BASIS OF EQUITABLE ESTOPPEL.

60. Fraud, when used in the general sense of what is "inequitable" or "unconscientious" is essential, either in the intention of the party estopped or in the effect of the evidence which he sets up.[1]

This proposition is not intended to convey the impression that, to admit of the possibility of an equitable estoppel, the party estopped must have been guilty of actual and intentional fraud. It is not necessary to an equitable estoppel that the party should design to mislead.[2] It would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases mere negligence on the part of the person estopped has been deemed sufficient for an application of the doctrine.[3]

Fraud, as an essential element in equitable estoppel, may exist not only in the conduct of the party which has caused the estoppel, but also in the effort of the party to assert claims inconsistent with such former conduct. Although fraud is often an ingredient in the conduct of the party

[9] Dickerson v. Colgrove, 100 U. S. 578, 580, 25 L. Ed. 618. "Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel." Pom. Eq. Jur. § 802.

§ 60. [1] Brant v. Iron Co., 93 U. S. 326, 335, 23 L. Ed. 927.

[2] Trustees, etc., of Town of Brookhaven v. Smith, 118 N. Y. 634, 23 N. E. 1002; Blair v. Wait, 69 N. Y. 113, 116; Galbraith v. Lunsford, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522; Gillett v. Wiley, 126 Ill. 310, 323, 19 N. E. 287; Anderson v. Hubble, 93 Ind. 570, 47 Am. Rep. 394.

[3] Continental Nat. Bank v. Bank, 50 N. Y. 578.

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estopped, it is not an essential element, if the word is used in its commonly accepted sense; and the use of the term is unnecessary, and often improper, unless applied to the effort of the party estopped to repudiate his conduct, and to assert a right or claim inconsistent therewith.[4]

ESSENTIAL ELEMENTS.

61. The elements essential to create an equitable estoppel are:

(a) Words or conduct by the party against whom the estoppel is alleged, amounting to a misrepresentation or concealment of material facts.

(b) The party against whom the estoppel is alleged must have knowledge, either actual or implied, at the time the representations were made, that they were untrue.

(c) The truth respecting the representations so made must be unknown to the party claiming the benefit of the estoppel at the time they were made and at the time they were acted on by him.

(d) The party estopped must intend or expect that his conduct or representations will be acted on by the party asserting the estoppel, or by the public generally.

(e) The representations or conduct must have been relied and acted on by the party claiming the benefit of the estoppel.

(f) The party claiming the benefit of the estoppel must have so acted, because of such representations or conduct, that he would be prejudiced if the first party be permitted to deny the truth thereof.

[4] Galbraith v. Lunsford, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522.

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Conduct and Representations.

The words relied on to effect 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. Silence of a party having full knowledge of his own rights, so as to intentionally permit others to be deceived and misled in relation to them, will preclude him from afterwards interposing his claim to the prejudice of the party thus deceived or misled.[1] But silence can never create an estoppel unless there is a duty to speak.[2] It is a general principle that, when one knowingly suffers another in his presence to purchase property to which he has a claim of title, which he willfully conceals, he will be deemed to have waived his claim, and he will not, thereafter, be permitted to assert it against the purchaser.[3] But, where the public records would disclose the rights of a party in a piece of land, a purchaser thereof cannot assert against such party an estoppel founded on his silence and acquiescence.[4] But in a recent New York case it has been held that, where the party to be estopped has made representations in hostility to his record title, he will not be permitted to deny the truth of such representations if the consequences would be to work an injury to a third person, or a person claiming under him.[5] A similar principle is applied where a person denies his own title or incumbrance when inquired of by a person who is about to purchase the land, or loan money upon its security; or where a person knowingly suffers another to expend money in improvements on land without disclosing

§ 61. [1] Titus v. Morse, 40 Me. 348, 63 Am. Dec. 665; Phillips v. Clark, 4 Metc. (Ky.) 348, 83 Am. Dec. 471; Cowley v. City of Spokane (C. C.) 99 Fed. 840.

[2] New York Rubber Co. v. Rothery, 107 N. Y. 310, 14 N. E. 269, 1 Am. St. Rep. 822.

[3] Lindsay v. Cooper, 94 Ala. 170, 11 South. 325, 16 L. R. A. 813, 33 Am. St. Rep. 105; Dewey v. Field, 4 Metc. (Mass.) 381, 38 Am. Dec. 376; Stephens v. Baird, 9 Cow. (N. Y.) 274; Favill v. Roberts, 50 N. Y. 222; Greene v. Smith, 57 Vt. 268; Fielding v. Du Bose, 63 Tex. 631; Wells v. Pierce, 27 N. H. 503; Raley v. Williams, 73 Mo. 310; Bullis v. Noble, 36 Iowa, 618; Workman v. Guthrie, 29 Pa. 495, 72 Am. Dec. 654; Peters v. Canfield, 74 Mich. 498, 42 N. W. 125.

[4] Thor v. Oleson, 125 Ill. 365, 17 N. E. 780.

[5] Mattes v. Frankel, 157 N. Y. 603, 609, 52 N. E. 585, 68 Am. St. Rep. 804.

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his claim or interest therein.[6] This rule is not to be applied unless the legal owner of the land is guilty of actual fraud, "or fault or negligence equivalent to fraud, on his part, in concealing his title," or unless he was silent when the circumstances would impel an honest man to speak.[7] The representations must be certain, and of a material character, and such as would naturally lead an ordinarily prudent man to act thereon.[8] They must relate to the existence of some past or present fact. Anything stated with respect to the future must constitute a mere expression of opinion, or a promise to do or not to do something in the future. In either event, the party making the representations is not estopped by them, or bound with respect to his future conduct, unless they are such, in form and substance, that they must be deemed to have become part of a valid contract.[9] Nor does the assertion of a legal conclusion, where the facts were all stated, operate as an estoppel on the party making such assertion.[10] And if the misrepresentation is made through mistake, or induced by the fraud of the person to whom it is made, it does not create an estoppel.[11]

[6] Pom. Eq. Jur. § 807.

[7] Chapman v. Chapman, 59 Pa. 214, where the court said: "Silence will postpone a title when one should speak out, when, knowing his own right, one suffers his silence to lull to rest, instead of warning to danger; when, to use the language of the books, 'silence becomes a fraud.' Such a silence, though negative in form, is operative in effect, and becomes suggestive in the seeming security it leads to. He who is led by such silence ignorantly or innocently to rest upon his title believing it to be secure, and to expend money and make improvements on his property, without the timely warning he should have had to dispel his illusion, will be protected by estoppel against recovery."

[8] 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, 22 L. Ed. 362.

[9] Turnipseed v. Hudson, 50 Miss. 429, 19 Am. Rep. 15; Langdon v. Doud, 10 Allen (Mass.) 433; Bigelow, Estop. p. 486; Jackson v. Allen, 120 Mass. 79; White v. Ashton, 51 N. Y. 280; Starry v. Korab, 65 Iowa, 267, 21 N. W. 600.

[10] Chatfield v. Simonson, 92 N. Y. 208, 218; Whitwell v. Winslow, 134 Mass. 346, 347; Soward v. Johnston, 65 Mo. 102.

[11] Lyndonville Nat. Bank v. Fletcher, 68 Vt. 81, 34 Atl. 38, 54 Am St. Rep. 874.

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Knowledge by Party Estopped.

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.[12] But, if he has reasonable grounds for believing that the statements made by him were true, there can be no estoppel against him.[13] But a misrepresentation, innocently made, and with a belief in its truth, may work an estoppel where the party making it was in a position in which he ought to have known the actual facts.[14]

Ignorance of Facts by Party Claiming Benefit of Estoppel.

Where the party to whom the representations are made has full knowledge of the facts, either at the time they were made or when he acted upon them, he cannot claim an estoppel.[15] There can be no fraud when both parties to the transaction are equally informed of all the facts, and mutually assent to them.[16] If the representations are known by the party to whom they were made to be untrue, it cannot be said that he was induced to act because of such representations. Knowing them to be false, he could not have been influenced thereby to his detriment. Nor can he claim to have been misled by the false representations or concealment of facts by the party sought to be estopped, if he could have ascertained the truth by prosecuting an inquiry with due diligence.[17] It is negligence for a person to blindly follow

[12] Story, Eq. Jur. § 193; Preston v. Mann, 25 Conn. 118, 129.

[13] Proctor v. Machine Co., 137 Mass. 159; Wright's Appeal, 99 Pa. 425; Fay v. Tower, 58 Wis. 285, 16 N. W. 558; Gray v. Agnew, 95 Ill. 315; Watters v. Connelly, 59 Iowa, 217, 13 N. W. 82; Van Ness v. Hadsell, 54 Mich. 560, 20 N. W. 585.

[14] Irving Nat. Bank v. Alley, 79 N. Y. 536, 540; Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111.

[15] Robbins v. Potter, 98 Mass. 532; Buck v. Milford, 90 Ind. 291, 293; Steel v. Refining Co., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; Baker v. Insurance Co., 43 N. Y. 283, 289; Western Land Ass'n v. Banks, 80 Minn. 317, 83 N. W. 192.

[16] Rapalee v. Stewart, 27 N. Y. 310; Richards v. Railroad Co., 137 Pa. 531, 19 Atl. 931; Whitney v. Holmes, 15 Mass. 152; Stanton v. Manufacturing Co., 90 Mich. 12, 51 N. W. 101.

[17] Steel v. Refining Co., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed.

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the representations of another with whom he may be dealing, or to rest supinely under a concealment of material facts, when the truth can be readily ascertained. This rule has been frequently applied where an investigation of the records would disprove false statements, or disclose concealed facts, —as in the case of alleged estoppel by conduct affecting the title to land, where it has been held that, since, by an investigation of the record the true facts might be ascertained, a party cannot claim to have been misled and he cannot avail himself of the doctrine of estoppel.[18] This application of the rule is of doubtful force, and, if applied at all, it must be only in the case of concealment of material facts. A recent New York case is to the effect that a person making representations in hostility to his recorded title will not be permitted to deny the truth of those representations, and the weight of authority in other states is in support of this view.[19]

Intention of Party Estopped.

An act or admission, to operate as an estoppel, must have been intended to influence the conduct of the party claiming the benefit of the estoppel.[20] This statement of the principle is somewhat broad, and may be properly subjected to qualification. It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead, and actually has misled another acting upon it in good faith, and exercising reasonable care and due diligence under all the circumstances, that is enough.[21] It is not necessary, in equity, that the intention should be to

226; Robbins v. Potter, 98 Mass. 532; Odlin v. Gove, 41 N. H. 465, 77 Am. Dec. 773; Lux v. Haggin, 69 Cal. 255, 266, 10 Pac. 674.

[18] Schaidt v. Blaul, 66 Md. 141, 6 Atl. 669; Thor v. Oleson, 125 Ill. 365, 17 N. E. 780; Hill v. Epley, 31 Pa. 331; Goundie v. Northampton Co., 7 Pa. 233; Fisher's Ex'r v. Mossman, 11 Ohio St. 42.

[19] Mattes v. Frankel, 157 N. Y. 603, 609, 52 N. E. 585; Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166, 10 Am. Dec. 316; Davis v. Handy, 37 N. H. 65; Colbert v. Daniel, 32 Ala. 314, 316; David v. Park, 103 Mass. 501; Kiefer v. Rogers, 19 Minn. 32 (Gil. 14); Peery v. Hall, 75 Mo. 503; Evans v. Forstall, 58 Miss. 30.

[20] Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406.

[21] Manufacturers' & Traders' Bank v. Hazard, 30 N. Y. 226, 230; Blair v. Wait, 69 N. Y. 113, 116; Standard Paper Co. v. Guenther, 67 Wis. 106, 30 N. W. 298; Stevens v. Ludlum, 46 Minn. 160, 48 N. W. 771, 13 L. R. A. 270, 24 Am. St. Rep. 210; Leather Manufacturers' Nat. Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811.

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deceive any particular individual or individuals. If the representations are such, and made in such circumstances, that all persons interested in the subject have the right to rely on them as true, their truth cannot be denied by the party making them against any one who has trusted and acted thereon.[22] The intention to induce a person to act upon the representation or conduct of another is to be inferred from such representation and conduct. If such representation or conduct is in fact acted upon by such person, and is of such a kind that a reasonable man would rely upon it, and would believe that it was meant to be relied upon, there is an estoppel.[23]

An illustration of the operation of this principle is the estoppel of the owner of a chattel from asserting title thereto as against a bona fide purchaser from one whom he has clothed with the apparent title, although he had no intention that such purchaser should act on such appearance.[24] 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 person who acted in reliance on such representation may assert the estoppel.[25] In the case of a dedication of land for use as a highway, it has been held that an estoppel in pais is created, precluding the owner from asserting any right inconsistent with such use; but the owner's acts and declarations in making such dedication should be deliberate, unequivocal, and decisive, manifesting a positive and unmistak-

[22] Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111. And see, also, Cornish v. Abington, 4 Hurl. & N. 549, where it is said: "If any person, by a course of conduct, or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct." And also, to the same effect, Freeman v. Cooke, 2 Exch. 654; Howard v. Hudson, 2 El. & Bl. 1; Moore v. Bank, 55 N. Y. 41, 14 Am. Rep. 173; Combes v. Chandler, 33 Ohio St. 178.

[23] Tracy v. Lincoln, 145 Mass. 353, 14 N. E. 122; Carr v. Railway Co., L. R. 10 C. P. 307.

[24] McNeil v. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Anderson v. Armstead, 69 Ill. 452, 454; Combes v. Chandler, 33 Ohio St. 178.

[25] McLean v. Dow, 42 Wis. 610.

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able intention to permanently abandon his property for the specific public use.[26]

Conduct or Representations must be Acted on.

The conduct or representations upon which an estoppel is based must have induced the party claiming the benefit of such estoppel to act in reliance thereon. The declaration on which an estoppel is asserted must have, in truth, influenced the conduct of him who sets it up, so that he will be prejudiced if the party making it is allowed to retract.[27] The act must have been an immediate and proximate result of the conduct of the party to be estopped. "One who would profit by the doctrine of equitable estoppel must show speedy faith in his adversary, and not a halting and changing belief. The door which excludes the truth cannot be open and shut at his pleasure. 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 state of things. The effect must be instantaneous and manifest before a step is taken in opposition to such a representation." [28]

It is not indispensable that the action induced by such conduct or representations be affirmative. It is possible that the estoppel may be occasioned by conduct or representations which induced a person to refrain from doing what he otherwise would have done, and thereby suffer a loss.[29]

[26] Holdane v. Trustees, 21 N. Y. 474, 477.

[27] Andrews v. Insurance Co., 85 N. Y. 334, 344; Waring v. Somborn, 82 N. Y. 604; Van Horn v. Overman, 75 Iowa, 421, 39 N. W. 679; Conkey v. Hawthorne, 69 Wis. 199, 33 N. W. 435; Warder v. Baldwin, 51 Wis. 450, 8 N. W. 257; Townsend Sav. Bank v. Todd, 47 Conn. 190; Tyler v. Association, 145 Mass. 134, 13 N. E. 360; Butchers' Slaughtering & Melting Ass'n v. City of Boston, 139 Mass. 290, 30 N. E. 94; Union Mut. Life Ins. Co. v. Slee, 123 Ill. 57, 12 N. E. 543; McClure v. Livermore, 78 Me. 391, 6 Atl. 11.

[28] Andrews v. Insurance Co., 85 N. Y. 334.

[29] Continental Nat. Bank v. Bank, 50 N. Y. 575, 586, where the court says: "And such quiescence and content, induced by false or erroneous statement, may be quite as damaging as any result from action. It is as bad to fail to recover property gone, when, with the knowledge of an existing fact, it might have been retrieved, as it is to lose it. And so it is as damaging to rely in quiet

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Injury must be Sustained by Conduct.

There can be no estoppel unless the person to whom the representations were made has acted thereon, and been injured thereby. If such person has so changed his position that he will be injured if the representations be withdrawn, or the conduct repudiated, he may assert an estoppel.[80] And the injury must be the proximate result of the conduct depended upon to create the estoppel.[81] To raise an admission from the rank of evidence to that of an estoppel, it must not only be inconsistent with the evidence proposed to be given in a subsequent controversy, but must have so influenced the conduct of the other party that loss or injury would result from allowing the evidence to be introduced.[82] No one can be estopped from alleging the truth, unless his false assertion or equally culpable silence has been the inducement to a course of action which would result in a loss if he were permitted to change his position and enforce the right which he has thus expressly or virtually waived.[83]

OPERATION OF ESTOPPEL.

62. Estoppel is limited to the representations made, and operates to place the person entitled to its benefit in the same position he would have been in had the representations been true.[1]

upon an untrue statement, to the neglect of using the means of recovery, as it is to rely upon an untrue statement, and by action thereon meet with loss irreparable. To hold otherwise would be to assert that the law makes a difference between damage received by action and omission to act, in circumstances precisely similar save in these elements. When an act produces conduct from which flows injury, it cannot matter whether that conduct be affirmative or negative, active or quiescent." Weinstein v. Bank, 69 Tex. 38, 6 S. W. 171; Voorhis v. Olmstead, 3 Hun (N. Y.) 744.

[80] Nell v. Dayton, 43 Minn. 242, 45 N. W. 229; Philadelphia, W. & B. R. Co. v. Dubois, 12 Wall. 47, 20 L. Ed. 265; Warder v. Baldwin, 51 Wis. 450, 8 N. W. 267; East v. Dolihite, 72 N. C. 562; Adler v. Pin, 80 Ala. 351, 354, 355.

[81] Adler v. Pin, 80 Ala. 351.

[82] Adler v. Pin, 80 Ala. 351; Patterson v. Lytle, 11 Pa. 53; Gjerstadengen v. Hartzell, 9 N. D. 268, 83 N. W. 230.

[83] Herman, Estop. § 327.

§ 62. [1] Grissler v. Powers, 81 N. Y. 57, 37 Am. Rep. 475; Tilton v.

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When the representation is made on the sale of a chattel or security, the remedy of the purchaser is not limited to a recovery simply of the money advanced, if the purchaser would have received a further benefit if the fact had been as represented.[2] An estoppel does not work any further than is reasonably and fairly within the intendment of the parties. A person is estopped only so far as his words or conduct have influenced another party.[3] It has been held that, where a person is estopped 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 damages in relying on the representation be more or less.[4]

IN WHOSE FAVOR ESTOPPEL DOES NOT OPERATE.

63. An equitable estoppel does not operate

(a) In favor of a stranger to the transaction in which the representation was made;

(b) To enforce contracts of an infant or married woman under coverture;

(c) In favor of a person chargeable with fraud, misconduct, or negligence.

An estoppel can only operate against and be claimed in favor of the parties or the privies of the parties to the transaction in the course of which the acts complained of were done.[1] It operates in favor of the person for whom it was intended, but not in favor of a stranger.[2] Only the party who has been misled by the misrepresentations or conceal-

Nelson, 27 Barb. (N. Y.) 595; Pickett v. Bank, 32 Ark. 346; Murray v. Jones, 50 Ga. 109; Campbell v. Nichols, 33 N. J. Law, 81.

[2] Grissler v. Powers, 81 N. Y. 57, 37 Am. Rep. 475.

[3] Geller v. Littlefield, 148 N. Y. 603, 610, 43 N. E. 66.

[4] Fall River Nat. Bank v. Buffington, 97 Mass. 498. But contra, Campbell v. Nichols, 33 N. J. Law, 81.

§ 63. [1] Wright v. Hazen, 24 Vt. 143; Parker v. Crittenden, 37 Conn. 148; Southard v. Sutton, 68 Me. 575; Kinnear v. Mackey, 85 Ill. 96; Simpson v. Pearson, 31 Ind. 1, 99 Am. Dec. 577; Murray v. Sells, 53 Ga. 257.

[2] Irish-American Bank v. Ludlum, 49 Minn. 344, 51 N. W. 1046.

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ment to his injury can avail himself of an estoppel.[3] Not only are the parties themselves bound by an estoppel, but so are their privies, whether by blood, by estate, or by contract. Estoppels by deed and by record have always been declared to run in favor of and against the privies in estate of the immediate parties to the estoppel, as well as for and against the parties personally; and there is no reason why estoppels in pais should not be within the rule.[4] But it may be that a privy in estate may be relieved from the result of an estoppel if he can assume the position of a bona fide purchaser, without notice, of the rights or interests of the party in whose favor the estoppel is asserted.[5]

The contract of an infant, or any other person under a disability, cannot be enforced by estoppel. As, where an infant enters into a contract for the sale of real estate, and the purchaser takes possession and assumes the position of an owner, without objection by or with the encouragement of the infant, it cannot be said that the infant is estopped from asserting his title. But, on the other hand, if the infant should encourage a person to purchase real estate of another, knowing that the title was in himself, he cannot assert his title against such purchaser after such purchase. An estoppel may always arise to prevent an infant from profiting by his own wrong or fraud.[6] In those states where the common-law disabilities of married women still exist, the question frequently arises whether a married woman can be bound by an estoppel. The authorities do not agree in all such states on this question. Many of them have held that, since a married woman cannot be bound by her contracts or conveyances, even though affected with fraud, she cannot be indirectly bound by means of an estoppel; and that an estoppel can only operate where she attempts to enforce a right in contravention of statements which she has previously made.[7] Many other authorities sustain the estoppel against

[3] Ketchum v. Duncan, 96 U. S. 696, 24 L. Ed. 868.

[4] Wood v. Seeley, 32 N. Y. 105, 116; Hills v. Miller, 3 Paige (N. Y.) 256, 24 Am. Dec. 218; Trustees of Watertown v. Cowen, 4 Paige (N. Y.) 514, 27 Am. Dec. 80; Graves v. Rogers, 59 N. H. 452.

[5] Rutz v. Kehn, 143 Ill. 558, 29 N. E. 553.

[6] Evans v. Bucknell, 6 Ves. 174; Fulton v. Moore, 25 Pa. 468; Dorlarque v. Cress, 71 Ill. 380; Padfield v. Pierce, 72 Ill. 500; McBeth v. Trabue, 69 Mo. 642; Tantum v. Coleman, 26 N. J. Eq. 128.

[7] Merriam v. Railroad Co., 117 Mass. 241; Lowell v. Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448; President, etc., of Concord Bank

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her, either in her attempt to enforce an alleged right or to maintain a defense.[8] Where the statutes have removed the common-law disabilities of married women, and have given them either partial or complete control of their property, they are subjected to the operation of estoppels in the same manner as though they were single.[9]

The doctrine of equitable estoppel is founded on principles of equity and justice, and is only applied to conclude a party by his acts and admissions intended to influence the conduct of another, when, in good conscience and honest dealing, he ought not to be permitted to gainsay them.[10] But the party claiming the benefit of the doctrine must himself be free from fraud and bad faith, for the doctrine is never applied to aid a fraudulent purpose.[11]

v. Bellis, 10 Cush. (Mass.) 276; Bemis v. Call, 10 Allen (Mass.) 512; Oglesby Coal Co. v. Pasco, 79 Ill. 164; Board of Sup'rs of Kane Co. v. Herrington, 50 Ill. 232; Schnell v. City of Chicago, 38 Ill. 382, 87 Am. Dec. 304; Stivers v. Tucker, 126 Pa. 74, 17 Atl. 541; Grim's Appeal, 105 Pa. 383; Glidden v. Strupler, 52 Pa. 400; Keen v. Coleman, 39 Pa. 299.

[8] This is clearly the rule in England. See Stafford v. Stafford, 1 De Gex & J. 193; Skottowe v. Williams, 7 Jur. (N. S.) 118; Jones v. Frost, 7 Ch. App. 773, 776. See, also, Bigelow v. Foss, 59 Me. 162; Drake v. Glover, 30 Ala. 382; Frazier v. Gelston, 35 Md. 298; Brinkerhoff v. Brinkerhoff, 23 N. J. Eq. 477, 483; Connelly v. Branstler, 3 Bush (Ky.) 702, 96 Am. Dec. 278.

[9] Dingens v. Clancey, 67 Barb. (N. Y.) 566; Bodine v. Killeen, 53 N. Y. 93; Noel v. Kinney, 106 N. Y. 74, 12 N. E. 351; Fryer v. Rishell, 84 Pa. 521; Hockett v. Bailey, 86 Ill. 74; Wilder v. Wilder, 89 Ala. 414, 7 South. 767, 9 L. R. A. 97, 18 Am. St. Rep. 130; Godfrey v. Thornton, 46 Wis. 677, 1 N. W. 362.

[10] Wilcox v. Howell, 44 N. Y. 398, 402; Welland Canal Co. v. Hathaway, 8 Wend. (N. Y.) 483, 24 Am. Dec. 51.

[11] Royce v. Watrous, 73 N. Y. 597; Thorne v. Mosher, 20 N. J. Eq. 257; Moore v. Bowman, 47 N. H. 494.

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CHAPTER VIII.

ELECTION.

64-65. Definition—Doctrine of Election.
66. Election under or against the Instrument.
67. Application of Doctrine.
68. Conditions Necessitating Election.
69. Doctrine when Not Applicable to Two Distinct Gifts.
70. Election between Dower and Testamentary Gift.
71. Manner of Making an Election.
72. Ascertainment of Values.
73. Election by Persons under Disabilities.
74. Time when Election must be Made.
75. Effect of Election.

DEFINITION—DOCTRINE OF ELECTION.

64. Election, in the sense used in equity jurisprudence, is the obligation imposed on a party to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both.[1]

65. The doctrine of election may also be stated thus: When a person purports to give away to a third the property of another person, and by the same instrument makes a gift to such other person, the latter cannot take the gift, and also claim his own property, but must elect to claim either under or against the instrument.

A familiar illustration of the doctrine of election is stated thus: If A., by will or deed, gives to B. property belonging to C., and by the same instrument gives other property belonging to himself to C., a court of equity will hold C. to be

§§ 64, 65. [1] Story, Eq. Jur. § 1075.

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entitled to the gift made to him by A. only upon the implied condition of his conforming with all the conditions of the instrument by renouncing the right to his own property in favor of B. He is, therefore, put to his election to take either under or against the instrument. If C. elects to take under, and consequently to conform with, all the provisions of the instrument, no difficulty arises, as B. will take C.'s property, and C. will take the property given to him by A. If C. elects to retain his own property, against the terms of the instrument, he forfeits so much of the property given him by the instrument as is necessary to compensate the disappointed beneficiary for the gift which he has lost.[2]

It has been stated that the foundation of the equitable doctrine of election is the intention, explicit or presumed, of the author of the instrument to which it is applied.[3] There can be no doubt of the truth of this statement as to instruments providing for the disposition of property which the donor knows belongs to another. But, if the donor is under the erroneous impression that he was the actual owner of the property disposed of, no actual intention on his part could have existed. As has been said by Mr. Pomeroy: "The doctrine of election has become a positive rule of the law governing the devolution and transmission of property by instruments of donation, and is invoked wholly irrespective of the intention of the donor, although in the vast majority of cases it undoubtedly does carry into effect the donor's real purpose and design." [4] The true foundation of the doctrine is in the maxim that he who seeks equity must do equity. The doctrine is applied not only for the purpose of carrying out the intentions of the donor as expressed in or implied by the instrument, but also for the purpose of preserving to all the parties the equitable rights derived therefrom.

The doctrine doubtless had its origin in the civil law, or, at least, a close analogy thereto existed in that law. In Justinian's Institutes the doctrine is stated thus: "A testator may not only give as a legacy his own property, or that of his heir, but also the property of others. The heir is

[2] Streatfield v. Streatfield, 1 White & T. Lead. Cas. Eq. (Text-Book Series) pt. 1, p. 406.

[3] Dillon v. Parker, 1 Swanst. 359, 394, 401.

[4] Pom. Eq. Jur. § 464. See, also, Haynes, Eq. (5th Ed.) p. 265.

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then either obliged to purchase and deliver it, or, if it cannot be bought, to give its value. * * * But when we say that a testator may give the goods of another as a legacy, we must be understood to mean that this can only be done if the deceased knew that what he bequeathed belonged to another, and not if he were ignorant of it; since, if he had known it, he would not, perhaps, have left such a legacy." [5] The Roman law, it will be noticed, excludes the application of the doctrine to cases proceeding from an erroneous supposition by the testator that he was the owner of the property. But in our own equity jurisprudence the doctrine applies whether the donor was or was not aware that he was dealing with his own property.

ELECTION UNDER OR AGAINST THE INSTRUMENT.

66. The donee either must elect to take

(a) Under the instrument, in which case he must carry out all its provisions, and transfer his own property disposed of thereunder to the person named as the recipient thereof; or

(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.

If the donee accepts of the first alternative, the property belonging to him and disposed of by the donor to another person, named in the instrument, must be transferred to such person before such donee can claim his gift under such instrument. In no other way can he comply with and fulfill the terms of the instrument. But where the donee elects against the instrument, and refuses to give up his property, and accept the gift so made to him, a question of more difficulty arises. The tacit condition of the instrument is that the donee shall either confirm the instrument, or make com-

[5] Just. Inst. II. tit. 20, § 4. The French Code (Code Civ. § 1021) rejects altogether the doctrine of election.

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pensation to the disappointed donee for what he loses by the failure of the refractory donee to comply with the terms thereof. In other words, if A., by will, gives C.'s property to B. and to C. property of his own, and C. elects to retain his own property, he cannot also take the gift, and thus deprive B. of any benefit under the will. C. will be required, because of his failure to accept the provisions of the will relating to the disposition of property belonging to him, to permit compensation to be made to B., which will be regulated according to the value of the property given to B. by the will. If the value of the property given to B., but retained by C., is greater than that of the gift to C., a court of equity will decree the transfer to B. of the property intended for C. If such value is less than that of the gift, an amount equal in value to the property retained by C. must be paid to B., and the surplus will be restored to C. Mr. Swanston states the proposition thus: (1) That, in the event of an election to take against the instrument, courts of equity assume jurisdiction to sequester the benefits intended for the refractory donee, in order to secure compensation to those whom his election disappoints. (2) That the surplus after compensation does not devolve as undisposed of, but is restored to the donee; the purpose being satisfied for which alone the court controlled his legal right.[1]

The rule as to compensation has not been often applied, since a donee almost invariably elects against an instrument, and to retain his own property, because the value thereof is

§ 66. [1] Gretton v. Haward, 1 Swanst. 409, in which case Sir Thomas Plummer, M. R., makes use of the following language: "I conceive it to be the universal doctrine that the court possesses power to separate the estate till satisfaction has been made, not permitting it to devolve in the customary course. Out of that sequestered estate so much is taken as is required to indemnify the disappointed devisee. If insufficient, it is left in his hands. In the case to which I have referred, Lord Loughberry uses the expression that the court 'lays hold of what is devised, and makes compensation out of that to the disappointed party.' * * * It would be too much now to dispute this principle, established more than a century, merely on the ground of difficulty in reducing it to practice, and disposing of the estate taken from the heir at law without any will to guide it; for to this purpose there is no will. The will destined to the devisee not this estate, but another. He takes by the act of the court (an act truly described as a strong operation); not by descent, not by devise, but by decree,—a creature of equity."

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greater than the gift made to him by the donor, in which case the gift is absolutely forfeited by his election. From this fact arise the dicta in many cases to the effect that, if the donee elects against the instrument, he forfeits the estate thereby conferred on him.[2] But it may happen that the donee elects to retain his own property, though less in value than the donor's gift to him, owing, perhaps, to some sentimental attachment to such property. In such case the donee does not forfeit the entire gift under the instrument, but only so much thereof as is sufficient to compensate the disappointed donee for what he has lost because of such election. This rule is now generally accepted by the authorities.[3]

APPLICATION OF DOCTRINE.

67. The doctrine of election applies to property of every kind and to interests of every description.[1]

The doctrine is applicable to deeds as well as to wills, although most frequently the cases have arisen under wills.[2] And it also applies to interests remote, contingent, or of

[2] Cowper v. Scott, 3 P. Wms. 124; Cookes v. Hellier, 1 Ves. Sr. 235; Pugh v. Smith, 2 Atk. 404; Wilson v. Townshend, 2 Ves. Jr. 697; Thellusson v. Woodford, 13 Ves. 220; Hibbs v. Insurance Co., 40 Ohio St. 543.

[3] Streatfield v. Streatfield, Cas. t. Talb. 176; Id., 1 White & T. Lead. Cas. Eq. (Text-Book Series) pt. 1, p. 398; Gretton v. Haward, 1 Swanst. 433; Rogers v. Jones, 3 Ch. Div. 688; Cauffman v. Cauffman, 17 Serg. & R. (Pa.) 16, 24, 25; In re Delaney's Estate, 49 Cal. 77; Wilbanks v. Wilbanks, 18 Ill. 17; Brown v. Brown, 42 Minn. 270, 44 N. W. 250; Roe's Ex'x v. Roe, 21 N. J. Eq. 253; In re Van Dyke's Appeal, 60 Pa. 481, 490; Key v. Griffin, 1 Rich. Eq. (S. C.) 67; In re Sandoe's Appeal, 65 Pa. 314; Stump v. Findlay, 2 Rawle (Pa.) 174.

§ 67. [1] 1 Watson, Comp. Eq. p. 177; Wilson v. Townshend, 2 Ves. Jr. 697; Webb v. Earl of Shaftesbury, 7 Ves. 480.

[2] Bigland v. Huddleston, 3 Brown, Ch. 286, note; Moore v. Butler, 2 Schoales & L. 266; Anderson v. Abbott, 23 Beav. 457; Mosley v. Ward, 29 Beav. 407; Codrington v. Lindsay, 8 Ch. App. 578, same case, sub nom., Codrington v. Codrington, L. R. 7 H. L. 854; Sigmon v. Hawn, 87 N. C. 450; Brown v. Ward, 103 N. C. 178, 9 S. E. 300.

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small value, as well as to those which are immediate, and of great value.[3]

CONDITIONS NECESSITATING ELECTION.

68. To necessitate an election there must appear in the instrument:

(a) A clear intention on the part of the donor to dispose of property which is not his own.

(b) A valid gift of property absolutely and actually owned by the donor.

There must be clearly apparent in the instrument an intention of the donor to dispose of property not his own.[1] There can be no election unless the donor confers some benefit upon the donee, and by the terms of the instrument assumes to dispose of some right of the latter.[2] But it is immaterial whether the donor knew that the property was not his own, or by mistake conceived it to be his own; for, in either case, if the intention to dispose of it clearly appears, his disposition will be sufficient to raise a case of election.[3]

The fact of the disposition by one person of the property of another must be very clearly shown. Prima facie it is not to be supposed that a testator disposes of that which is not his own. It must be by demonstration, or by necessary implication, plain that he could not have meant otherwise, be-

[3] Webb v. Earl of Shaftesbury, 7 Ves. 480; Highway v. Banner, 1 Brown, Ch. 584; Wilson v. Townshend, 2 Ves. Jr. 697.

§ 68. [1] 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; Weeks v. Weeks, 77 N. C. 421; Pennsylvania Co. for Insurance on Lives v. Stokes, 61 Pa. 136.

[2] Moore v. Baker, 4 Ind. App. 118, 30 N. E. 629, 51 Am. St. Rep. 203.

[3] Whistler v. Webster, 2 Ves. Jr. 370; Thellusson v. Woodford, 13 Ves. 221; Whitley v. Whitley, 31 Beav. 173; Coutts v. Acworth, L. R. 9 Eq. 519; Stump v. Findlay, 2 Rawle (Pa.) 168, 174; Moore v. Harper, 27 W. Va. 362; Van Schaack v. Leonard, 164 Ill. 602, 45 N. E. 982.

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fore the necessity of an election exists.[4] If the instrument declares by express terms that the gift is to be in lieu of the rights of the donee in other property disposed of by the donor to another person, there can be no difficulty in determining the intention of the donor. But the use of express terms is not indispensable. If a reasonable and fair interpretation of the instrument discloses an intent of the donor to put the donee to an election, it is sufficient. But it is not sufficient that the words used express a mere wish, desire, or expectation that a beneficiary will dispose of property in a certain way.[5]

Disposition of Partial Interest.

Where the instrument disposes of property in which both the donor and donee are interested, it is sometimes difficult to determine whether it was the intention of the donor to dispose of the entire property, and thus put the donee to his election. In such a case 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 it be clearly shown that the donor intended to dispose of the entire property.[6] Thus if, in making a devise, the 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;[7] but where, owning merely a par-

[4] Rancliffe v. Parkyns, 6 Dow, 149, 179, per Eldon, L. C.; Havens v. Sackett, 15 N. Y. 365.

[5] Langslow v. Langslow, 21 Beav. 552. And see, also, Blacket v. Lamb, 14 Beav. 482; Tibbits v. Tibbits, 1 Jac. 318, in which case a testator devised to his son and heir his real and personal property, with a recommendation that such son continue his cousins in possession of certain farms as long as they continue to "manage the same in a good and husbandlike manner, and to duly pay their rents." It was held that a trust was created for the cousins, and that the son was required to elect to continue them as tenants, or to make to them compensation for the value of the tenancy out of the property given him by the testator.

[6] Pickersgill v. Rodger, 5 Ch. Div. 163, 171; Maddison v. Chapman, 1 Johns. & H. 470; Wilkinson v. Dent, 6 Ch. App. 339; Penn v. Guggenheimer, 76 Va. 839; Havens v. Sackett, 15 N. Y. 365; Toney v. Spragins, 80 Ala. 541.

[7] 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. Weicken, 118 N. Y. 67, 23 N. E. 133.

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tial or individual interest, the testator devises the entire property, describing it specifically, a case for an election arises.[8]

Evidence Outside the Instrument.

If the language of the donation contained in the instrument is ambiguous and doubtful, and it does not clearly appear therefrom that it was the donor's intention to dispose of property not his own, parol evidence dehors the instrument cannot be introduced to show such an intention, and thus give rise to the necessity of an election.[9] This seems to be a fixed and well-established rule, based upon the decided weight of authority; but in a comparatively recent English case it is stated: "The presumption, in the absence of evidence to the contrary, is that the testator, by his will, intends merely to bequeath that which belongs to him. On the other hand, it is only a presumption, which may be rebutted even by parol evidence showing that, under a misapprehension of the law, the testator believed that the property which did not belong to him did really belong to him." [10]

Disposition by Will of After-Acquired Lands.

Unaffected by statute, it has always been held that a will of real estate speaks from the time of its execution, and that a disposition of real property acquired after such execution is void. And therefore, where a testator devised after-acquired land away from his heir, which he nevertheless took by descent, he did so subject to the application of the doctrine of election; for the rule in such cases was that, if the testator showed a clear intention of disposing of after-acquired estates, the heir was obliged to elect between the after-acquired estates which would descend to him, and any benefits given him by the will.[11] But this rule has been

[8] Penn v. Guggenheimer, 76 Va. 839 (devise of "home place," in which the testator owned only an undivided interest); Shuttleworth v. Greaves, 4 Myine & C. 35.

[9] Sherman v. Lewis, 44 Minn. 107, 46 N. W. 318; Stratton v. Best, 1 Ves. Jr. 285; Rutter v. MacLean, 4 Ves. 537; Seamen v. Woods, 24 Beav. 372; Druce v. Denison, 6 Ves. 385; City of Philadelphia v. Davis, 1 Whart. (Pa.) 490; Timberlake v. Parish's Ex'r, 5 Dana (Ky.) 345; Miller v. Springer, 70 Pa. 273.

[10] Pickersgill v. Rodger, 5 Ch. Div. 163, 170, per Jessell, M. R.

[11] Thellusson v. Woodford, 13 Ves. 209; Rendlesham v. Woodford,

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abrogated by statute, both in England and in the states of this country, and it is now provided that wills speak from the time of the testator's death, and consequently carry after-acquired lands.

Election under Power of Appointment.

Cases of election under powers of appointment do not often arise in the United States. But under certain circumstances such cases may arise, and in view of this fact it may be well to briefly consider some of the principles relating thereto. Where, under a special power, an express appointment is made to a stranger to the power, which is therefore void, and a benefit is also conferred by the same instrument upon a person entitled in default of appointment, the latter will be put to his election.[12] In order to create the necessity of an election, the appointor must give some property of his own to the object of the power,[13] for, if no property is given but what is subject to the power, there is nothing out of which compensation can be made.[14] There must also be an intention to make an unlawful and wrongful exercise of the power of appointment. If the wrongful appointment is conditional upon the power of the donor to lawfully make it, there can be no case for an election, because there has not been a positive disposition of property belonging to another.[15]

Disposition by Will which is Ineffectual.

Questions frequently arose, before the modern statutes permitting infants and married women to make a will of both personal and real property, relative to the application of the doctrine of election to cases where infants and married women ineffectually attempted to devise real property. These questions are of no importance at the present time, and it would be futile to discuss them. But it sometimes occurs that a testator attempts to dispose of property sit-

1 Dow, 249; Churchman v. Ireland, 4 Sim. 520; Greenwood v. Penny, 12 Beav. 403.

[12] Snell, Eq. p. 207.

[13] Whistler v. Webster, 2 Ves. Jr. 367; Tomkyns v. Blane, 28 Beav. 423; Reid v. Reid, 25 Beav. 469; Beauclerk v. James, 34 Ch. Div. 160.

[14] Pom. Eq. Jur. § 478; Bristow v. Warde, 2 Ves. Jr. 337.

[15] Church v. Kemble, 5 Sim. 525.

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uated in more than one state, and the 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. The question then arises as to whether the heirs, who are entitled to take such land as intestate property, are required to elect between it and the valid legacies bequeathed to them by the will, or are entitled to receive both. The settlement of this question depends, as in most other cases of election, upon the intention of the testator as expressed in the will. The English rule has arisen in cases of devises of lands situated in Scotland by testators residing in England, and may be stated as follows: If the disposition of real property is general in terms, and not by specific reference to the foreign property, the testator will be assumed to have intended to confine such disposition to property which he could legally dispose of by that will, and the heir to whom the heritable property in the foreign country would descend is not put to an election.[16] But, on the other hand, if there is a specific devise of the land in the foreign country, either expressly or by necessary implication, an election is required.[17] This rule is of universal application in the courts of the states of this country.[18]

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.[19] Thus, where a testator devises to one of his daughters land owned by the husband of another daughter, and then devises another tract to this last-named daugh-

[16] Maxwell v. Maxwell, 2 De Gex, M. & G. 705; Allen v. Anderson, 5 Hare, 163; Johnson v. Telford, 1 Russ. & M. 244; Maxwell v. Hyslop, L. R. 4 Eq. 407; Jones v. Jones, 8 Gill (Md.) 197.

[17] Brodie v. Barry, 2 Ves. & B. 127; Orrell v. Orrell, 6 Ch. App. 302; Dewar v. Maitland, L. R. 2 Eq. 834.

[18] Van Dyke's Appeal, 60 Pa. 481, 489; Kearney v. Macomb, 16 N. J. Eq. 189; Jones v. Jones, 8 Gill (Md.) 197.

[19] Snell, Eq. p. 240.

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ter, the husband cannot be required to elect, because nothing has been devised to him.[20]

DOCTRINE WHEN NOT APPLICABLE TO TWO DISTINCT GIFTS.

69. The doctrine of election is not applicable to two distinct gifts of the testator's own property, one beneficial and one onerous.

A case which is sometimes confounded with the doctrine of election is where a testator makes two distinct gifts of his own property, one beneficial and the other onerous; and the question is whether the donee is entitled to elect to accept the first and disclaim the second. The general rule in such cases is that the two gifts are distinct and separate, and the beneficiary may accept what is beneficial, and reject what is onerous,[1] although it has been held otherwise where an intention of the testator clearly exists to make an acceptance of the benefit conditional upon the assumption of the burden.[2] If the gift is single and undivided, it is prima facie evidence that it was the testator's intention that the legatee should take all the gift or none of it.[3]

ELECTION BETWEEN DOWER AND TESTAMENTARY GIFT.

70. Unless otherwise regulated by statute, if the will declares, in express terms or by clear and necessary implication, a testamentary gift to be in lieu of dower, the widow is required to elect; but, if such will contains no such express or implied declaration, every

[20] Bennett v. Harper, 36 W. Va. 546, 15 S. E. 143.

§ 69. [1] Andrew v. Trinity Hall, 9 Ves. 525; Moffett v. Bates, 3 Smale & G. 468; Syer v. Gladstone, 30 Ch. Div. 614.

[2] Talbot v. Earl of Radnor, 3 Myine & K. 252; Green v. Britten, 42 Law J. Ch. 187.

[3] Guthrie v. Walrond, 22 Ch. Div. 573, 577; Green v. Britten, 42 Law J. Ch. 187.

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devise or bequest to the wife will be presumed to be in addition to her dower right, and the widow is not required to elect.[1]

The most frequent application of the doctrine of election occurs in cases of testamentary gifts to widows, either expressly in lieu of dower or inconsistent therewith. At common law, express words were necessary to require an election by the widow between her dower and a testamentary gift from her husband; the presumption being that the gift was intended in addition to her dower.[2] But in equity it is now held that the necessity of election arises even if no express declaration be contained in the will that the gift is in lieu of dower. If the will contains a provision which is inconsistent with the assertion of the widow's right of dower, the widow may be required to elect.[3] If the legacy is not declared, by express words in the will, to be in lieu of dower, the inquiry is whether such an intention in the testator is to be collected by clear and manifest implication from the provisions in the will. To permit the deduction of such an implied intention, the claim of dower must be inconsistent with the will, and repugnant to its dispositions, or some of them.[4] As was said in a comparatively recent New York case: "There can be no controversy as to the general principles governing the question of election between dower and a provision for the widow in the will. Dower is favored. It is never excluded by a provision for a wife, except by express words or by necessary implication. Where there are no express words, there must be on the face of the will a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes this demonstration only when it clearly appears without ambiguity or doubt that to permit

§ 70. [1] Church v. Bull, 2 Denio (N. Y.) 430, 43 Am. Dec. 754; Adsit v. Adsit, 2 Johns. Ch. (N. Y.) 448; Birmingham v. Kirwan, 2 Schoales & L. 452; Hall v. Hill, 1 Dru. & War. 94, 103.

[2] Gosling v. Warburton, Cro. Eliz. 128; Nottley v. Palmer, 2 Drew. 93.

[3] In re Zahrt, 94 N. Y. 605, 609; Ellis v. Lewis, 3 Hare, 310.

[4] Adsit v. Adsit, 2 Johns. Ch. (N. Y.) 448, 7 Am. Dec. 539. See, also, Birmingham v. Kirwan, 2 Schoales & L. 444; Butcher v. Kemp, 5 Madd. 61; Bacon v. Cosby, 4 De Gex & S. 261.

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the widow to claim both dower and the provision would interfere with the other dispositions, and disturb the scheme of the testator, as manifested by his will." [5] And the fact that the testamentary provision is adequate or reasonably proportionate to the value of the dower is not controlling upon the question of intention,[6] although the fact of the inadequacy of the provision, which was known to the testator, is considered a strong indication that it was not the testator's intention to require his widow to elect between such provision and her dower.[7] This rule has been modified by the statutes of many of the states, so that, unless there is an express declaration in the husband's will that the wife should enjoy both the testamentary disposition and her dower, she will be required to elect.[8]

[5] Konvalinka v. Schlegel, 104 N. Y. 125, 129, 9 N. E. 868; citing Sanford v. Jackson, 10 Paige (N. Y.) 266; Church v. Bull, 2 Denio (N. Y.) 430, 43 Am. Dec. 754; Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706; Fuller v. Yates, 8 Paige (N. Y.) 325; Wood v. Wood, 5 Paige (N. Y.) 596, 28 Am. Dec. 451; Havens v. Havens, 1 Sandf. Ch. (N. Y.) 324, 331. See, also, Nelson v. Brown, 144 N. Y. 384, 39 N. E. 355; Preston v. Jones, 9 Pa. 456, 460; Fulton v. Moore, 25 Pa. 468; Cox v. Rogers, 77 Pa. 160; Stark v. Hunton, 1 N. J. Eq. 217; Colgate's Ex'r v. Colgate, 23 N. J. Eq. 372; Pratt v. Douglas, 38 N. J. Eq. 536; O'Brien v. Elliot, 15 Me. 125; Weeks v. Patten, 18 Me. 42; Reed v. Dickerman, 12 Pick. (Mass.) 145, 149; Hyde v. Baldwin, 17 Pick. (Mass.) 303, 308; In re Kempton, 23 Pick. (Mass.) 163; Smith v. Smith, 14 Gray (Mass.) 532; Lord v. Lord, 23 Conn. 327, 331; Alling v. Chatfield, 42 Conn. 276; Blair v. Wilson, 57 Iowa, 178, 10 N. W. 327; Daugherty v. Daugherty, 69 Iowa, 679, 29 N. W. 778; Howard v. Watson, 76 Iowa, 229, 41 N. W. 45.

[6] Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706.

[7] Tracey v. Shumate, 22 W. Va. 474; Atkinson v. Sutton, 23 W. Va. 197.

[8] Pom. Eq. Jur. § 494, and statutes cited in note. The English statute is to the effect that: "While a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will." 3 & 4 Wm. IV. c. 105. In some of the states the right of dower seems to be absolutely barred if the widow takes anything under the will,—as in Florida and North Carolina. In others she is required to elect unless a contrary intention is expressly or impliedly declared in the will. The following cases declare this to be the rule in the respective states: Alabama, Dean v. Hart, 62 Ala. 308; Arkansas, Apperson v. Bolton, 29 Ark. 418; Illinois, Blatchford v. Newberry

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Special Circumstances Necessitating Election.

If the disposition is expressly declared to be in lieu of dower, the widow must, of course, be put to an election If a trust be created of all the estate of the testator, and out of the income thereof the wife is given a certain annuity, she is put to an election between such annuity and her dower.[9] But where a testator, after providing for the payment of certain specific legacies, gave his residuary estate, bot real and personal, to his executors to sell and dispose of the same, and divide the proceeds equally between his "wife and children, share and share alike," it was held that the widow was not put to her election, but was entitled to dower in addition to the provision made for her in the will.[10] The mere creation of a trust for the sale of real property and its distribution is not inconsistent with the existence of a dower interest in the same property.[11] As a general rule, a devise of property to others in a will, and a testamentary provision in favor of the widow, will not put her to an election.[12] The testamentary provision must be clearly incon-

99 Ill. 11; Indiana, Ragsdale v. Parrish, 74 Ind. 191; Kansas, Sill v. Sill, 31 Kan. 248, 1 Pac. 556; Kentucky, Smith v. Bone, 7 Bush, 367; Exchange & Deposit Bank of Ourngsville v. Stone, 80 Ky. 109; Maine, Hastings v. Clifford, 32 Me. 132; Allan v. Pray, 12 Me. 138; Maryland, Durham v. Rhodes, 23 Md. 233; Gough v. Manning, 26 Md. 347; Massachusetts, Upham v. Emerson, 119 Mass. 509; Michigan, Tracy v. Murray, 40 Mich. 109; Minnesota, Washburn v. Van Steenwyk, 32 Minn. 336, 20 N. W. 324; Mississippi, Wilson v. Cox, 49 Miss. 538; Missouri, Dougherty v. Barnes, 64 Mo. 159; Martien v. Norris, 91 Mo. 465, 3 S. W. 849; New Hampshire, Copp v. Hersey, 31 N. H. 317; Ohio, Corry v. Lamb, 45 Ohio St. 208, 12 N. E. 660; Oregon, Hill's Ann. Laws, § 2971; Pennsylvania, Waterson's Appeal, 95 Pa. 312; Rhode Island, Chapin v. Hill, 1 R. I. 446; Tennessee, Jarman v. Jarman's Heirs, 4 Lea, 671; Vermont, Hathaway v. Hathaway, 44 Vt. 658; Wisconsin, Wilber v. Wilber, 52 Wis. 298, 9 N. W. 163.

[9] Vernon v. Vernon, 53 N. Y. 351.

[10] Konvalinka v. Schlegel, 104 N. Y. 125, 9 N. E. 868, 58 Am. Rep. 494; Ellis v. Lewis, 3 Hare, 310, where the vice chancellor said: "I take the law to be clearly settled at this day that a devise of lands eo nomine upon trusts for sale, or a devise of lands eo nomine to a devisee beneficially does not per se express an intention to devise the lands otherwise than subject to its legal incidents, dower included."

[11] Gibson v. Gibson, 17 Eng. Law & Eq. 349; Bending v. Bending, 3 Kay & J. 257; In re Frazer, 92 N. Y. 239.

[12] Loucks v. Churchill, 7 Cow. (N. Y.) 287, 17 Am. Dec. 514; Le-

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sistent with her right of dower to produce such result. This rule is operative even if the devise to others is specific, and not general,[13] unless, as has been held in some cases, the specific devise is to one whom the testator is morally bound to support, and such devise is not more than enough to support such person, in which case the widow may be put to her election.[14] And in certain English cases it was held that a devise of a house or farm, in terms showing that its personal use and occupation thereof by the devisee was intended, is inconsistent with the widow's right of dower therein, and that she must elect between her dower and other benefits conferred on her by the will.[15] There is also a line of English cases to the effect that, where a testator has devised lands and other property to his widow and others in equal shares, the widow must elect, upon the theory that, if the widow took her dower and what was given her by the will, it would be inconsistent with that equality which the testator, by his disposition of his property, clearly intended.[16] This principle has been frequently criticised and doubted.[17] A devise or bequest to a widow for life, with a devise of the rest of the lands of the testator to others, does not create the necessity of an election on the part of the widow.[18]

fevre v. Lefevre, 59 N. Y. 435; Bull v. Church, 5 Hill (N. Y.) 207; Brown v. Brown, 55 N. H. 106. In the case of Loucks v. Churchill, the testator devised to his widow his dwelling house and garden, and bequeathed her certain personal effects. He devised his farm to his sons. It was held that the widow was entitled to dower in the farm, as well as to the devise and legacy given by the will.

[13] Loucks v. Churchill, 7 Cow. (N. Y.) 287, 17 Am. Dec. 514; Kennedy v. Nedrow, 1 Dall. 415, 418, 1 L. Ed. 202.

[14] Alling v. Chatfield, 42 Conn. 276; Herbert v. Wren, 7 Cranch, 370, 378, 3 L. Ed. 374.

[15] Miall v. Brain, 4 Madd. 119; Butcher v. Kemp, 5 Madd. 61; Roadley v. Dixon, 3 Russ. 192.

[16] Chalmers v. Stovill, 2 Ves. & B. 222; Dickson v. Robinson, 1 Jac. 503; Roberts v. Smith, 1 Sim. & S. 513; Reynolds v. Torin, 1 Russ. 129; Goodfellow v. Goodfellow, 18 Beav. 356.

[17] Ellis v. Lewis, 3 Hare, 315, where it was stated that, in any event, the testator cannot be presumed to have intended to dispose of more than he possessed, and that the equal division should only be made after the widow's dower had been assigned. Bending v. Bending, 3 Kay & J. 261; In re Hatch's Estate, 62 Vt. 300, 18 Atl. 814.

[18] In Bull v. Church, 5 Hill (N. Y.) 207; Church v. Bull, 2 Denio

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MANNER OF MAKING AN ELECTION.

71. An election may be either

(a) Express,—by some positive and unequivocal declaration by the person required to elect, showing the intention and fact of election.

(b) Implied,—by such acts of acceptance and acquiescence as evince an intention of the person required to elect to take one gift and reject the other.

In the case of an express election no question can arise. The election becomes absolute upon the positive and unequivocal declaration of the party required to elect. An instance of an express election is where the party required to elect executes a written instrument declaring which one of two properties he will take.

The question as to what constitutes an implied election is often one difficult of solution. But few principles can be enunciated which will be of value in its determination. It is, for the most part, a question of fact, which must be determined, like any other question of fact, upon the circumstances of each particular case. Election may be inferred from the conduct of the party, his acts, omissions, and his mode of dealing with the property. It may be necessary to inquire into the circumstances of the property against which the party is required to elect; for, if the party continues to receive the rents of both properties, or refuses to receive the rents of either, there are no facts on which an implied election can be based.[1] But if the party assume any

(N. Y.) 430, 43 Am. Dec. 754,—a testator devised all his real and personal property to his wife during her life, or so long as she should remain his widow, and after her decease or remarriage to his children; and the widow, having survived him, entered and occupied under the will for several years, and then remarried. It was held that she was entitled to dower. See, also, Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706; Metteer v. Wiley, 34 Iowa, 214; Howard v. Watson, 76 Iowa, 229, 41 N. W. 45.

§ 71. [1] Padbury v. Clark, 2 Macn. & G. 298; Spread v. Morgan, 11 H. L. Cas. 588; Dillon v. Parker, 1 Swanst. 359, 381, 382; Whitridge v. Parkhurst, 20 Md. 62, 72.

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of the rights of ownership over one of the properties, and utterly disregards the other, he will be presumed to have made an election, and will be bound thereby, unless it appear that he had no knowledge of his right to elect, or had no conception of the value of the other property.[2] Before any presumption of an election can arise, it must be shown that the party was cognizant of this right before acting or acquiescing.[3] Any act, to be binding upon a person, must be done with the intention of constituting an election.[4] It seems to be generally held that, when a widow is put to an election between a testamentary provision in her favor and her dower, any unequivocal act of dealing with the property given her by the will, or the assumption of any right of ownership, with full knowledge of her right to elect, unaffected by any mistaken notion as to the value and condition of the property, will be deemed an election to take under the will.[5]

ASCERTAINMENT OF VALUES.

72. 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.[1]

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.[2] As, for

[2] Penn v. Guggenheimer, 76 Va. 839; Watson v. Watson, 128 Mass. 152.

[3] Story, Eq. Jur. § 1097; Dillon v. Parker, 1 Swanst. 359, 381; Edwards v. Morgan, 13 Price, 782.

[4] Stratford v. Powell, 1 Ball & B. 1; Dillon v. Parker, 1 Swanst. 359, 380, 387.

[5] Pom. Eq. Jur. § 515; Snell, Eq. Jur. p. 219; O'Driscoll v. Koger, 2 Desaus. (S. C.) 295.

§ 72. [1] Dillon v. Parker, 1 Swanst. 359, 381; Buttricke v. Brodhurst, 3 Brown, Ch. 88.

[2] Pusey v. Desbrouvrie, 3 P. Wms. 315; Wake v. Wake, 3 Brown, Ch. 255; Adsit v. Adsit, 2 Johns. Ch. (N. Y.) 448, 451, 7 Am. Dec. 539; Pratt v. Douglas, 38 N. J. Eq. 539; Elbert v. O'Neil, 102 Pa. 302; In re Woodburn's Estate, 138 Pa. 606, 21 Atl. 16.

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an example, where a widow who had elected to take a legacy instead of asserting her claim of dower, under the erroneous belief that her husband's estate was solvent, was permitted, on discovering that the estate was insolvent, to revoke her election and claim her dower.[3] And where a widow made her election under a mistake as to her rights under the will, and as to the amount which she would receive from the testamentary provision in her favor, it was held that a court of equity might permit a revocation of her election, where the rights of other parties would not be prejudiced.[4] In many of the states, statutes have been enacted requiring widows to elect within a prescribed period, or be deemed to have elected, which must necessarily affect the operation of this rule.[5]

ELECTION BY PERSONS UNDER DISABILITIES.

73. A married woman may elect without the intervention of the court. In the case of an infant the election may be deferred until he becomes of age; but the ordinary practice is for the court to judicially determine whether it is for the infant's advantage to make an election, and what course is more beneficial. In the case of a lunatic, the court will elect for him, after judicially ascertaining what action is most advantageous to him.

The question of the right of a married woman to elect can be of no importance except in those states where the common-law disabilities of married women still exist. Where the husband's interests in his wife's property are abrogated by statute, and the wife is clothed with all the capacities of a single woman, she must also possess the ability to elect in her own behalf. Independent of statute, it seems to be

[3] Dabney v. Bailey, 42 Ga. 521.

[4] Macknet v. Macknet, 29 N. J. Eq. 54. And see, also, In re Evans' Appeal, 51 Conn. 435.

[5] Akin v. Kellogg, 119 N. Y. 441, 23 N. E. 1046; Cox v. Rogers, 77 Pa. 160.

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the rule that a married woman may elect so as to affect her interest in both real and personal property.[1] An infant cannot elect for himself. If the infant may be compelled to elect, the period of election is, under some circumstances, deferred until after he becomes of age.[2] But in most cases the court will institute an inquiry to determine what would be most beneficial to the infant.[3]

The committee of a lunatic cannot elect for the lunatic. It is the duty of the committee to apply to the court for leave to elect, and permission will not be granted except upon a due consideration of the advantages and disadvantages resulting to the lunatic from the choice.[4] In directing an election the court will generally select the more valuable property, but may exercise a sound discretion. Accordingly, where the testator's widow had been hopelessly insane for many years, the court elected to take a testamentary provision ample for her support, although 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.[5]

§ 73. [1] Robinson v. Buck, 71 Pa. 386; Tiernan v. Roland, 15 Pa. 430, 452; Robertson v. Stephens, 36 N. C. 247, 251; McQueen v. McQueen, 55 N. C. 16, 62 Am. Dec. 205.

[2] Streatfield v. Streatfield, Cas. t. Talb. 176; Id., 1 White & T. Lead. Cas. Eq. (Text-Book Series) p. 398; Boughton v. Boughton, 2 Ves. Sr. 12; Bor v. Bor, 3 Brown, Parl. Cas. (Toml. Ed.) 173.

[3] Chetwynd v. Fleetwood, 1 Brown, Parl. Cas. (Toml. Ed.) 300; Goodwyn v. Goodwyn, 1 Ves. Sr. 228; Ebrington v. Ebrington, 5 Madd. 117; Brown v. Brown, L. R. 2 Eq. 481; Bigland v. Huddleston, 3 Brown, Ch. 285; McQueen v. McQueen, 55 N. C. 16, 62 Am. Dec. 205.

[4] Kennedy v. Johnson, 65 Pa. 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.

[5] Van Steenwyck v. Washburn, 59 Wis. 483, 509, 17 N. W. 289. It has, however, been held that the court will not regard the interests of the heirs in making such an election. Penhallow v. Kimball, 61 N. H. 596.

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TIME WHEN ELECTION MUST BE MADE.

74. Independent of statutes, there can be no limit to the time within which an election can be made, unless by the delay third persons have acquired rights in the property subjected to an election, or injury would otherwise result to third persons.[1]

It is almost impossible to lay down a general rule as to the length of time which must elapse after the acts done from which an election is usually implied, to bind the party required to elect, and prevent him from setting up the plea of ignorance of his right.[2] The rule as above stated is generally applied unless statutes are in force which modify or abrogate it. In many of the states such statutes exist, especially in regard to an election by a widow between her dower and a testamentary provision.

EFFECT OF ELECTION.

75. An election once made, by a party bound to elect, and under no misapprehension as to his rights, and with knowledge of the value of the properties to be affected by such election, is irrevocable, and binds the party making it, and all persons claiming under him,[1] and also all donees under the instrument whose rights are directly affected by the election.[2]

§ 74. [1] Pom. Eq. Jur. § 513; Dillon v. Parker, 1 Swanst. 359, 381, 386; Wake v. Wake, 1 Ves. Jr. 335; Tibbits v. Tibbits, 19 Ves. 656.
[2] Snell, Eq. p. 219.

§ 75. [1] Earl of Northumberland v. Earl of Aylesford, Amb. 540; Dewar v. Maitland, L. R. 2 Eq. 834; Tomkyns v. Ladbroke, 2 Ves. Sr. 593; Sopwith v. Maughan, 30 Beav. 235, 239; Whitley v. Whitley, 31 Beav. 173; Cory's Ex'r v. Cory, 37 N. J. Eq. 198.
[2] Pom. Eq. Jur. § 517.

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Where a person bound to elect dies before doing so, and his next of kin are entitled to elect, each of them has a separate right of election, and an election by any of them does not bind the others.[3] And, if a life estate is given to the party bound to elect, an election by him does not bind or affect the rights of the remainder-man.[4] And 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 in favor of the widow, so as to enable her to hold the estate as her dower.[5]

[3] Fytche v. Fytche, L. R. 7 Eq. 494.
[4] Ward v. Baugh, 4 Ves. 623; Long v. Long, 5 Ves. 445.
[5] Penn v. Guggenheimer, 76 Va. 839.

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CHAPTER IX.

SATISFACTION AND PERFORMANCE.

76. Satisfaction—Definition.
77–78. Admissibility of Parol or Extrinsic Evidence.
79. Application of Doctrine.
80. Satisfaction of Debts by Legacies.
81. When Presumption of Satisfaction Will Not Operate.
82. Declared Intention of Satisfaction of Debt.
83. Debt Owing to Wife or Child.
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85–88. Satisfaction of Legacies by Subsequent Legacies.
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94. Performance—Doctrine Stated.
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SATISFACTION—DEFINITION.

76. 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.[1]

The cases in which the doctrine of satisfaction has been applied have, for the most part, arisen under wills. The principle underlying the doctrine 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.[2] To warrant the application of the doctrine, there must be something to show that it was the donor's intention that the gift

§ 76. [1] Chichester v. Coventry, L. R. 2 H. L. 71, 95; Id., 2 White & T. Lead. Cas. Eq. (6th Ed.) p. 382 (notes to Chancey's Case); Tussaud v. Tussaud, 9 Ch. Div. 363, 1 Bretts, Lead. Cas. Eq. 255.
[2] Pom. Eq. Jur. § 520.

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should be in satisfaction of the prior obligation. When this intention is expressly declared, no difficulty can arise; for, where the subsequent gift is expressly bestowed in extinguishment of the prior demand, the donee clearly cannot claim both.[s] But in many cases this intention has to be implied from the circumstances, and then considerable difficulty is often experienced.

SAME—ADMISSIBILITY OF PAROL OR EXTRINSIC EVIDENCE.

77. Where the gift relied on to extinguish the prior claim is bestowed otherwise than by writing, verbal evidence, including the donor's contemporaneous declarations, is admissible to show the true nature and effect of the whole transaction.[1]

78. 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 or sustain 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.[2]

A subsequent gift can only be bestowed by the acts and words of the donor in the single case of a prior legacy

[s] Hardingham v. Thomas, 2 Drew. 353.

§§ 77, 78. [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, 16 Am. Dec. 461; Paine v. Parsons, 14 Pick. (Mass.) 318; Richardson v. Eveland, 126 Ill. 37, 18 N. E. 308, 1 L. R. A. 203; Langdon v. Astor's Ex'rs, 16 N. Y. 9, 34.

[2] Tussaud v. Tussaud, 9 Ch. Div. 363, 1 Bretts, Lead. Cas. Eq. 255; Hall v. Hill, 1 Dru. & War. 94; Kirk v. Eddowes, 3 Hare, 509; Gilliam v. Chancellor, 43 Miss. 437, 5 Am. Rep. 498; Cloud v. Clinkinbeard's Ex'rs, 8 B. Mon. (Ky.) 397, 48 Am. Dec. 397; Reynolds v. Robinson, 82 N. Y. 103, 37 Am. Rep. 555.

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sought to be extinguished by a subsequent advancement, payment, or gift. In such case, the subsequent transaction being entirely parol, the fact of the gift itself must be proved by verbal evidence, and to show the nature and effect of such transaction verbal evidence must be solely relied upon. It follows, therefore, that the intention of the donor can only be ascertained by the admission of verbal evidence. Nor, in such case, does the admission of verbal evidence affect the prior will. Such evidence cannot add to or contradict the terms of the will, because the nature and effect of the subsequent gift, however it may be determined, do not affect the validity of the prior legacy.[3]

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 such evidence would 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.[4] It should be noted, however, 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.[5]

SAME—APPLICATION OF DOCTRINE.

79. There are four classes of cases to which the doctrine of satisfaction may be applied.

(a) Satisfaction of debts by legacies.

(b) Satisfaction of legacies by subsequent legacies.

[3] Kirk v. Eddowes, 3 Hare, 509; Monck v. Monck, 1 Ball & B. 298; Rosewell v. Bennett, 3 Atk. 77; Powel v. Cleaver, 2 Brown, Ch. 499; Richards v. Humphreys, 15 Pick. (Mass.) 133; Hine v. Hine, 39 Barb. (N. Y.) 507; Van Houten v. Post, 33 N. J. Eq. 344; McDearman v. Hodnett, 83 Va. 281, 2 S. E. 643; Frey v. Heydt, 116 Pa. 601, 11 Atl. 535.

[4] Hall v. Hill, 1 Dru. & War. 94; Kirk v. Eddowes, 3 Hare, 509.

[5] Hall v. Hill, 1 Dru. & War. 94, 133.

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(c) Satisfaction of legacies by portions or advancements.

(d) Satisfactions of portions of legacies.[1]

Mr. Haynes divides the subject under two heads: "First, when 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; secondly, when a debtor confers, by will or otherwise, a pecuniary benefit on his creditor." [2] The first subdivision, as above stated in the black-letter text, is included under the second head of the classification used by Mr. Haynes. The other subdivisions are all embraced in the first head of such classification.

SATISFACTION OF DEBTS BY LEGACIES.

80. Where a testator, indebted to another in a sum of money, gives to him a sum equal to or greater than the debt, without taking notice of the debt, the legacy is presumed to be in satisfaction of the debt.[1]

This rule is founded on the maxim, "Debitor non præsumitur donare," and it may also be observed that it is in accordance with the maxim that equity imputes an intent to fulfill an obligation upon the theory that a legacy to a cred-

§ 79. [1] The classification adopted in the text is that used by Mr. Snell and Mr. Pomeroy, and seems to be the most useful and best conceived for a proper discussion of the subject. Snell, Eq. p. 230; Pom. Eq. Jur. § 526.

[2] Haynes, Eq. (5th Ed.) p. 291. Smith, Eq. (15th Ed.) p. 345, where the classification is as follows: "Equitable questions of satisfaction usually arise in three classes of cases: (1) In cases of portions secured by a marriage settlement; (2) in cases of portions given by a will, and an advancement of the donee afterwards in the testator's lifetime; (3) in cases of legacies to creditors."

§ 80. [1] The rule as laid down, Talbott v. Duke of Shrewsbury, Prec. Ch. 394; Id., 2 White & T. Lead. Cas. Eq. (Text-Book Series) pt. 1, p. 378,—is as follows: "If one, being indebted to another in a sum of money, does, by his will, give him a sum of money as great as or greater than the debt, without taking any notice at all of the debt, this shall, nevertheless, be in satisfaction of the debt, so that they shall not have both the debt and the legacy."

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itor must have been intended in satisfaction of the debt which the testator was under a legal obligation to pay. A testator is presumed to be just before he is generous.[2] It seems probable that this rule is derived from the civil law, where a similar proposition is laid down, but with limitations and qualifications which materially differ from those recognized in equity jurisprudence,—as, where the debt was absolutely due, and the sum of each was the same, it was deemed a satisfaction; but, if there was a difference in the amount, or even in the time of payment, there could be no satisfaction.[3] It will be noticed that in equity these limitations are not closely followed, although they have not been without their influence. While this rule is now universally recognized in equity, and is very generally applied, it is not without its limitations and qualifications. The following general principles may be stated as affecting the operation of the above rule:

SAME—WHEN PRESUMPTION OF SATISFACTION WILL NOT OPERATE.

81. Equity will lay hold of slight circumstances as indicating an intention that the legacy shall not go as a satisfaction,[1] and therefore it has been laid down that the presumption of satisfaction will not prevail:

(a) Where the legacy is of less amount than the debt, even pro tanto.[2]

(b) Where the legacy and debt are of a different nature either with respect to the subjects

[2] Story, Eq. Jur. § 1118.

[3] Poth. Pandects, lib. 34, tit. 8, notes 30–34.

§ 81. [1] Richardson v. Greese, 3 Atk. 65; Gillings v. Fletcher, 38 Ch. Div. 373; Thynne v. Earl of Glengall, 2 H. L. Cas. 153; Smith v. Smith, 1 Allen (Mass.) 129; Gilliam v. Brown, 43 Miss. 641; Strong v. Williams, 12 Mass. 391; Deickman v. Arndt, 49 N. J. Eq. 106, 22 Atl. 799; Eaton v. Benton, 2 Hill (N. Y.) 576.

[2] Eastwood v. Vinke, 2 P. Wms. 617; Graham v. Graham, 1 Ves. Sr. 263; Atkinson v. Webb, 2 Vern. 478; Strong v. Williams, 12 Mass. 391, 7 Am. Dec. 81; Eaton v. Benton, 2 Hill (N. Y.) 576.

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themselves or with respect to the interest given.[3]

(c) Where the legacy is payable at a different time, so as not to be equally advantageous to the legatee as the payment of his debt.[4]

(d) Where the debt was contracted subsequent to the making of the will.[5]

(e) Where the legacy is contingent or uncertain.[6]

(f) Where the testator expressly directs that debts and legacies shall be paid.[7]

(g) Where testator states that the legacy is bequeathed for some particular motive or reason.[8]

It was held by the Roman law that a legacy may be less in any one of four ways,—in amount, in convenience of place, in time, and in quality.[9] The application of such a principle to determine the presumption of satisfaction of a debt by a legacy would dispose of nearly all the cases arising under the above propositions. The existence of so many conditions and circumstances under which the pre-

[3] Alleyn v. Alleyn, 2 Ves. Sr. 37; Eastwood v. Vinke, 2 P. Wms. 614; Fourdrin v. Gowdey, 3 Myine & K. 409; Fairer v. Park, 3 Ch. Div. 309; Cloud v. Clinkinbeard's Ex'rs, 8 B. Mon. (Ky.) 397, 48 Am. Dec. 397.

[4] Nicholls v. Judson, 2 Atk. 300; Hales v. Darell, 3 Beav. 324, 332; Charlton v. West, 30 Beav. 124, 127; Van Riper v. Van Riper, 2 N. J. Eq. 1. But, where the legacy is payable before the debt becomes due, satisfaction is presumed. Wathen v. Smith, 4 Madd. 325.

[5] 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.

[6] Barret v. Beckford, 1 Ves. Sr. 519; Byrne v. Byrne, 3 Serg. & R. (Pa.) 54, 8 Am. Dec. 641; Dey v. Williams, 22 N. C. 66.

[7] Chancey's Case, 1 P. Wms. 408; Id., 2 White & T. Lead. Cas. Eq. (Text-Book Series) pt. 1, p. 380; Richardson v. Greese, 3 Atk. 65; Hales v. Darell, 3 Beav. 324, 332; Jefferies v. Michell, 20 Beav. 15; Bradshaw v. Huish, 43 Ch. Div. 262; Strong v. Williams, 12 Mass. 389, 7 Am. Dec. 81.

[8] Charlton v. West, 30 Beav. 124; Mathews v. Mathews, 2 Ves. Sr. 635.

[9] Snell, Eq. p. 234.

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sumption of satisfaction of a debt by a legacy will not prevail is evidence of the reluctance of the courts to apply the doctrine to such cases, and shows a decided leaning towards construing the words of a testator in granting a legacy as an intention to bestow a favor, rather than as to fulfill an obligation. Wherever it is possible for the courts to find a ground, in the facts of the case, for a presumption against the satisfaction of a debt by a legacy, they will avail themselves of such circumstances, it matters not how slight the circumstances, or how insufficient they would be considered in other cases falling under the doctrine of satisfaction.[10]

SAME—DECLARED INTENTION OF SATISFACTION OF DEBT.

82. The intention of the testator to satisfy a debt by a legacy may be declared or manifested.

(a) By an express declaration in the will.

(b) By an agreement made at the time the debt was contracted.

If the intention of the testator to satisfy the debt by a legacy can be clearly shown, no presumption can arise from the circumstances of the case which will circumvent or pervert that intention. If the testator declares in his will that the legacy is in lieu of a debt, no doubt can arise as to his intention, and the creditor will not be permitted to enforce his debt, and take the legacy, but will be required to elect between the two.[1] And, if the legatee has rendered some service to the testator under an understanding or agreement that he was to receive no pay therefor during the testator's lifetime, but is to be provided for in the testator's will, the testamentary provision will be deemed a satisfaction of the debt, and the creditor legatee cannot enforce his claim against the estate.[2]

[10] Tied. Eq. Jur. § 157; Eaton v. Benton, 2 Hill (N. Y.) 576.

§ 82. [1] Eaton v. Benton, 2 Hill (N. Y.) 576; Williams v. Crary, 4 Wend. (N. Y.) 443; Van Riper v. Van Riper, 2 N. J. Eq. 1.

[2] Eaton v. Benton, 2 Hill (N. Y.) 576; Patterson v. Patterson, 13 Johns. (N. Y.) 379.

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SAME—DEBT OWING TO WIFE OR CHILD.

83. Where the legacy is given to the testator's wife or child, to whom he is indebted, the same rule applies as if the legacy were given to a stranger.

If the legacy be given to a wife or child, to whom the testator is actually indebted in an ordinary way, no different rule or principle applies from that in the case of a legacy to a stranger. The presumption of satisfaction will exist under the same circumstances, and may be rebutted in the same manner, as if the parties were strangers to each other.[1] But where a parent is indebted to a child, and makes an advancement to the child of an amount equal to or exceeding the debt, it will be deemed prima facie as a satisfaction; and it is immaterial what the circumstances may be under which the advancement was made.[2]

SAME—LEGACY BY A CREDITOR TO HIS DEBTOR.

84. A legacy from a creditor to his debtor has no effect upon the indebtedness, unless accompanied by express declarations, either in the will or without it, showing a special intent to discharge or release the debt.

The doctrine of a legacy operating as payment of a debt applies only where the testator is the debtor and the legatee is the creditor.[1] No presumption of satisfaction can arise which would enable the legatee to receive the amount bequeathed to him, and at the same time be relieved from the payment of the debt which he owed to the testator. The

§ 83. [1] Tolson v. Collins, 4 Ves. 483; Stocken v. Stocken, 4 Sim. 152; Fowler v. Fowler, 3 P. Wms. 353; Cole v. Willard, 25 Beav. 568; Gilliam v. Chancellor, 43 Miss. 437, 5 Am. Rep. 498; Guignard v. Mayrant, 4 Desaus. (S. C.) 614; Kelly v. Kelly's Ex'rs, 6 Rand. (Va.) 176, 18 Am. Dec. 710.

[2] Wood v. Briant, 2 Atk. 521; Seed v. Bradford, 1 Ves. Sr. 501; Chave v. Farrant, 18 Ves. 8; Plunkett v. Lewis, 3 Hare, 316.

§ 84. [1] Clarke v. Bogardus, 12 Wend. (N. Y.) 67.

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legatee would be entitled to have his legacy applied in payment of his debt if the estate of the testator is solvent, and, on the other hand, the executors would be permitted to offset the debt against a demand made on them for the payment of the legacy.[2] But, where a testamentary gift is accompanied by written declarations, either in the will or made after its execution, to the effect that it is the testator's intention to discharge the debt by such legacy, an equitable satisfaction may arise which will prevent the executors from suing to enforce payment of the debt.[3]

SATISFACTION OF LEGACIES BY SUBSEQUENT LEGACIES.

85. Where the legacies, by the same or different instruments, are of the same identical thing, the second legacy is in satisfaction of the first.[1]

86. Where the legacies, by the same instrument, are of the same amount to the same individual, and are given simpliciter, the second legacy is in satisfaction of the first.[2]

87. Where the legacies, by the same instrument, are unequal in amount, and are given simpliciter, the second legacy is cumulative.[3]

[2] Wilmot v. Woodhouse, 4 Brown, Ch. 227; Clarke v. Bogardus, 12 Wend. (N. Y.) 67; Brokaw v. Hudson, 27 N. J. Eq. 135; Blackler v. Booth, 114 Mass. 24; Zeigler v. Eckert, 6 Pa. 13, 18, 47 Am. Dec. 428.

[3] Eden v. Smith, 5 Ves. 341; Pole v. Somers, 6 Ves. 309, 323; Zeigler v. Eckert, 6 Pa. 18, 47 Am. Dec. 428.

§§ 85–88. [1] St. Albans v. Beauclerk, 2 Atk. 633; Suisse v. Lord Lowther, 2 Hare, 424, 432.

[2] Greenwood v. Greenwood, 1 Brown, Ch. 31, note; Dewitt v. Yates, 10 Johns. (N. Y.) 156, 6 Am. Dec. 326; Jones v. Creveling's Ex'rs, 19 N. J. Law, 127; Edwards v. Rainier's Ex'rs, 17 Ohio St. 597.

[3] Hooley v. Hatton, 1 Brown, Ch. 390, note; Curry v. Pile, 2 Brown, Ch. 225; Yockney v. Hansard, 3 Hare, 620; Edwards v. Rainier's Ex'rs, 17 Ohio St. 597.

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88. Where the legacies, by different instruments, are of quantity equal or unequal in value, and are given simpliciter, the second legacy is cumulative.[4]

The determination of the question whether one legacy is in satisfaction of a prior one by the same or different instruments is generally one of construction. The presumption of satisfaction cannot arise where the testator has employed language which clearly shows his intention. Where the second gift is of the same specific thing, it is necessarily in satisfaction of the prior gift. The questions can only arise where the legacies are of quantity or an amount, and such legacies are necessarily general or pecuniary, and not specific.[5] If the legacies are in the same instrument, and are equal in amount, one only will be good, and slight differences in the way in which the legacies are made will not be evidence that the testator intended they should be cumulative.[6] Although the legacies are in different instruments, if they are not given simpliciter, but the motive of the legacy in each instrument is the same, and the same sum is given in each, the court will consider these coincidences as raising a presumption that the subsequent legacy was a repetition of the prior legacy, and not an additional gift.[7] This presumption can only arise where the motive and the sum are the same in each instrument. But, if a different motive, or no motive at all, is declared in the instruments, and the sum in each is the same, there can be no such presumption, and the legacies are cumulative;[8] and such is the fact

[4] Wallop v. Hewett, 2 Ch. R. 70; Roch v. Callen, 6 Hare, 531; Russell v. Dickson, 4 H. L. Cas. 293; Dewitt v. Yates, 10 Johns. (N. Y.) 156, 6 Am. Dec. 326.

[5] Pom. Eq. Jur. § 545.

[6] Greenwood v. Greenwood, 1 Brown, Ch. 31, note. This case was where a legacy was given by the testatrix "to her niece, Mary Cook, the wife of John Cook, £500," and afterwards, among other legacies in the same will, was one "to her cousin Mary Cook, £500, for her own use and disposal, notwithstanding her coverture." It was held that the legatee was entitled to but one legacy.

[7] Benyon v. Benyon, 17 Ves. 34.

[8] Roch v. Callen, 6 Hare, 531.

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if the same motive is expressed in each instrument, but the sums are different.[9]

However the rule may be stated, it is not to be applied to contravene the intention of the testator as gleaned from the language of the will. The legacies by different instruments may be different in amount, or given with different motives; and yet, if the language employed in making the second legacy is such that the testator's intention to substitute such legacy for the first is clearly shown, or if such intention appears from language contained in other parts of the will, the presumption which would otherwise arise from such double provision is overcome.[10] In such cases all that is required is a fair interpretation of the language of the will to ascertain the real intent of the testator. Recourse should then be had, not to the rules laid down as above, but to the general rules controlling the construction of wills.

Admission of Extrinsic Evidence.

Parol evidence may be admitted to show that the testator intended the legatee to take both legacies, where the presumption, in pursuance of either of the rules above stated, arises against the double legacies; for such evidence is in support of the apparent intention of the will, and does not contradict it.[11] But, if no such presumption arises,—as where legacies are given simpliciter by different instruments,—parol evidence will not be admitted to show that the testator intended that the legatee should take but one legacy; for such evidence would be contradictory to the literal terms of the will.[12]

SATISFACTION OF LEGACIES BY PORTIONS OR ADVANCEMENTS.

89. Where a parent or a person in loco parentis makes a testamentary provision for a child, and then, in his lifetime, makes a gift or ad-

[9] Hurst v. Beach, 5 Madd. 352.

[10] Rice v. Society, 56 N. H. 191; Mason's Ex'rs v. Trustees, etc., 27 N. J. Eq. 47. And see Pom. Eq. Jur. § 548.

[11] 2 Smith, Lead. Cas. 335; Snell, Eq. 236.

[12] Hurst v. Beach, 5 Madd. 351; Hall v. Hill, 1 Dru. & War. 94; Lee v. Pain, 4 Hare, 216.

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vancement to such child, the presumption arises that the subsequent gift or advancement was intended as a satisfaction of the testamentary provision. This form of satisfaction is technically called an "ademption" of the testamentary provision.[1]

This rule has been stated in a leading English case as follows: "Where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the court understands him as giving a portion; and by a sort of artificial rule,—upon an artificial notion, and a sort of feeling upon what is called a 'leaning against double portions,'—if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part."[2] This branch of the doctrine of satisfaction rests on the two maxims that equality is equity, and that equity imputes an intention to fulfill an obligation. 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 parent who makes a gift to his child, after having already provided for him by will, did not intend the will to remain in full force, but intended to satisfy in his lifetime the obligation which he would otherwise have discharged at his death.[3] But if,

§ 89. [1] Where the will is made first, and the settlement afterwards, it is always treated as a case of what is called ademption; that is to say, the benefits given by the settlement are considered to be an ademption of the same benefits given to the same child by the will. With reference to cases of a previous settlement and a subsequent will, it is now quite settled that there is no difference between the two cases beyond the verbal difference that the term "satisfaction" is used where the settlement has preceded the will, and the term "ademption" where the will has preceded the settlement. In substance there is no distinction between the principles applied to the two classes of cases. Coventry v. Chichester, 2 Hen. & M. 159.

[2] Ex parte Pye, 18 Ves. 140; Id., 2 White & T. Lead. Cas. Eq. (Text-Book Series) pt. 1, p. 365; Pym v. Lockyer, 5 Mylne & C. 29.

[3] Suisse v. Lord Lowther, 2 Hare, 424, 425.

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on the other hand, there is no relationship of parent and child, either natural or artificial, the gift proceeds from the mere bounty of the testator, and no reason exists for cutting off anything which has, in terms, been given and thus assigning an arbitrary limit to that bounty. It may happen, therefore, that a natural child, who is in law a stranger to his father, may stand in a better situation than a legitimate child; for an advancement in favor of the natural child is not prima facie an ademption.[4] The presumption against double portions is only applicable where there is no express declaration of the donor's intention; and in all cases, whether the parental relation exists, or the parties are strangers, the donor may, by an instrument in writing, executed contemporaneously with the gift, declare the ademption of a prior testamentary provision, and the courts will give effect to such declaration.[5] The satisfaction or ademption of a prior legacy by a subsequent gift in the lifetime of the testator takes place without regard to the assent of the legatee.[6] Nor is such satisfaction to be confused with a revocation of the will, for in no case can it be either a partial or complete revocation thereof. "But, the testamentary gift being under the control of the testator, he in reality acts as his own executor. He anticipates his own death, and by his own hand pays the legacy, in whole or in part, as the case may be, during his lifetime." [7]

This rule of ademption is not applicable to devises of real property. To so extend the rule would be to nullify statutory provisions regulating the manner in which wills devising real property may be revoked. As has been said in a leading New York case, "Its application to devises of real property might work great mischief, and tend to endanger the safety of titles which depend for their security upon the conduit of a testamentary devise." [8] It will be evident, upon an

[4] Ex parte Pye, 18 Ves. 150.

[5] Tussaud v. Tussaud, 9 Ch. Div. 363, 1 Bretts, Lead. Cas. Eq. 255; Cooper v. Cooper, 8 Ch. App. 813, 819, note; Howze v. Mallett, 57 N. C. 194; Richards v. Humphreys, 15 Pick. (Mass.) 133.

[6] Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716; Richards v. Humphreys, 15 Pick. (Mass.) 133; Cowles v. Cowles, 56 Conn. 240, 13 Atl. 414.

[7] Pom. Eq. Jur. § 554.

[8] Burnham v. Comfort, 108 N. Y. 535, 15 N. E. 710, 2 Am. St. Rep. 462; Snell v. Tuttle, 44 Hun (N. Y.) 331; Thomas v. Capps, 5 Bush

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examination of the cases, that there is an apparent conflict in regard to the application of the rule of ademption to devises of real property. The rule as laid down in New York is not followed in all the states. In a recent Indiana case 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.[9]

SAME—PERSON IN LOCO PARENTIS.

90. One who intends to assume a parent's duty to provide for a child, and who has so acted towards the child as to raise a moral obligation to provide for him, stands in loco parentis to such child.[1]

The doctrine of satisfaction or ademption does not, in general, apply to legacies and portions to strangers, but only where the parental relation, or its equivalent, exists. The presumption of satisfaction does not arise where the donor has not put himself in loco parentis, if the subsequent advance is not proved to be for the very purpose of satisfying the legacy; and in such a case the legatee can claim his legacy notwithstanding the advancement.[2] Such being

(Ky.) 273, 276; Weston v. Johnson, 48 Ind. 1; Swails v. Swails, 98 Ind. 511, 515; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716; Clark v. Jetton, 5 Sneed (Tenn.) 229; Davys v. Boucher, 3 Younge & Coll. Exch. 397. In the case of Burnham v. Comfort, supra, it is further said: "A specific devise of real property may be revoked by alteration or alienation of the estate during the testator's life (Livingston v. Livingston, 3 Johns. Ch. [N. Y.] 154; McNaughton v. McNaughton, 34 N. Y. 201), but we fail to see any other mode of effecting such revocation without running counter to those provisions of the statutes which declare what acts shall revoke or alter a will in writing. These provisions do not contemplate a revocation or alteration of any part of a will, or of any previous devise, except by some other will in writing, or some writing of the testator declaring such revocation or alteration, and executed with the same formalities as a will."

[9] Roquet v. Eldridge, 118 Ind. 147, 20 N. E. 733.

§ 90. [1] Powys v. Mansfield, 3 Myine & C. 359.

[2] Ex parte Pye, 18 Ves. 140; Id., 2 White & T. Lead. Cas. Eq. (Text-Book Series) pt. 1, p. 365.

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the law, it is important that it should be understood what constitutes the parental relationship. The relationship need not exist for all purposes and in all respects. It depends upon the donor's intention. A father is supposed to intend to do what he is in duty bound to do, namely, to provide for his child according to his means. So, one who has assumed that part of the office of a father is supposed to intend to do what he has assumed to himself the office of doing. If the assumption of the character be established,—and this fact may be proved by parol evidence,—the same inference and presumption must follow. The having so acted towards a child as to raise a moral obligation to provide for it affords a strong inference in favor of the fact of the assumption of the character, and the child having a father, with whom he resides, and by whom he is maintained, affords some inference against it; but neither inference is conclusive.[3] The legal relationship of father and child does not necessarily exist between a father and his illegitimate child, unless the putative father has actually placed himself in loco parentis.[4] An illegitimate child is, in the eyes of the law, a stranger, and the presumption against a double provision will not operate against him, unless other circumstances than the relation of parentage "by nature" are found. It is not necessary that there should be an actual relationship, nor that there should be a legal adoption of the child;[5] and, notwithstanding the father of the child is living, another person may be deemed to stand in loco parentis to it.[6]

SAME—PRESUMPTION IN FAVOR OF ADEMPTION.

91. The presumption in favor of ademption, or satisfaction of a legacy by a subsequent advancement, will not be repelled by slight circumstances showing a contrary intention.[1]

[3] Powys v. Mansfield, 3 Mylne & C. 359; Ex parte Pye, 18 Ves. 140; Pym v. Lockyer, 5 Mylne & C. 29; Cooper v. Cooper, 21 Wkly. Rep. 501; Langdon v. Astor's Ex'rs, 16 N. Y. 9.

[4] Ex parte Pye, 18 Ves. 140, 152; Wetherby v. Dixon, 19 Ves. 407.

[5] Rogers v. Soutten, 2 Keen, 598.

[6] Fowkes v. Pascoe, 10 Ch. App. 350.

§ 91. [1] Thynne v. Earl of Glengall, 2 H. L. Cas. 131; Ex parte Pye, 18 Ves. 140; Earl of Durham v. Wharton, 3 Clark & F. 146.

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In this respect the doctrine of satisfaction of legacies by subsequent advancements differs from that of satisfaction of debts by legacies. It does not affect the application of the doctrine if the legacy and subsequent advancement are unequal in amount, for the satisfaction will be pro tanto;[2] nor is it necessary that they should be payable at the same time. So, also, a residuary bequest, though uncertain in amount, may be adeemed either totally or pro tanto by a subsequent gift or advancement.[3] But a legacy cannot, in any event, be adeemed by a gift or advancement made before the execution of the will.[4] And it would seem to be true that the presumption of an ademption does not arise where the subsequent gift is of a different character from the prior testamentary devise or bequest, or is expressed to be given for a different purpose,[5] although Mr. Pomeroy has said that the latest English decisions have gone so far as to render it doubtful whether it is even necessary that the subject-matter of the two gifts should be ejusdem generis.[6] And where a testator, during his lifetime, made several small gifts to a child, they will not be added together for the purpose of creating a presumption that they were intended in ademption of a prior legacy.[7]

[2] Pym v. Lockyer, 5 Mylne & C. 29, overruling earlier cases holding an advancement to be a complete ademption of a prior legacy, even though the latter was larger in amount. Kirk v. Eddowes, 3 Hare, 509; Langdon v. Astor's Ex'rs, 16 N. Y. 9; Richards v. Humphreys, 15 Pick. (Mass.) 133, 136; Jones v. Mason, 5 Rand. (Va.) 577, 16 Am. Dec. 761.

[3] 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, 36 Am. Rep. 716; In re Turfler's Estate, 1 Misc. Rep. 58, 23 N. Y. Supp. 135. A contrary rule once prevailed in England. Freemantle v. Bankes, 5 Ves. 85. See, also, Davis v. Whittaker, 38 Ark. 435.

[4] In re Crawford, 113 N. Y. 560, 567, 21 N. E. 692, 5 L. R. A. 71; Jaques v. Swasey, 153 Mass. 596, 27 N. E. 771, 13 L. R. A. 566; Yundt's Appeal, 13 Pa. 575; Taylor v. Cartwright, L. R. 14 Eq. 167, 176.

[5] Suisse v. Lord Lowther, 2 Hare, 424, 434; Watson v. Watson, 33 Beav. 574; Clark v. Jetton, 5 Sneed (Tenn.) 229; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716; Weston v. Johnson, 48 Ind. 1.

[6] Pom. Eq. Jur. § 557.

[7] Suisse v. Lord Lowther, 2 Hare, 424; Nevin v. Drysdale, L. R. 4 Eq. 517; Watson v. Watson, 33 Beav. 574; Schofield v. Heap, 27 Beav. 93.

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Effect of Subsequent Codicil.

Where a legacy is presumed to be satisfied by a subsequent advancement or portion, a subsequent codicil to the will, which, on its face, purports to be in confirmation of the will, will not operate to revive the legacy. A codicil which republishes a will only acts upon the will as it existed at the time of the execution of the codicil; and since, at that time, the legacy was adeemed by the advancement, the codicil cannot effect a revivor of the legacy. The application of a different principle would make a codicil republishing a will operate as a new bequest.[s]

SAME—WHEN SATISFACTION MUST BE EXPRESSED.

92. When the relationship of parent and child does not exist between the testator and legatee, a legacy will not be satisfied or adeemed by a subsequent gift unless the intention of the donor be expressed to that effect.

LIMITATION—If, in such a case, the legacy be given for a particular purpose, and the testator subsequently makes a gift or advancement for the same purpose, the subsequent gift or advancement is in satisfaction of the legacy.[1]

As has been noted, the presumption of satisfaction does not arise as between persons who do not stand within the natural or assumed relationship of parent and child. As between such persons, the legacy will be deemed a bounty, and cannot be impliedly adeemed by a subsequent advance-

[s] Langdon v. Astor's Ex'rs, 16 N. Y. 37; Powys v. Mansfield, 3 Mylne & C. 376; Drinkwater v. Falconer, 2 Ves. Sr. 623; Paine v. Parsons, 14 Pick. (Mass.) 318; Milner v. Atherton's Ex'r, 35 Pa. 528, 537.

§ 92. [1] Monck v. Monck, 1 Ball & B. 303; Rosewell v. Bennett, 3 Atk. 77; Pankhurst v. Howell, 6 Ch. App. 136; Sims v. Sims, 10 N. J. Eq. 158; Williams' Appeal, 73 Pa. 249.

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ment.[2] In the case of such persons a legacy can only be satisfied by a payment or advancement made with the expressed intent of the testator to work such satisfaction. In the case of a stranger the presumption against double portions does not exist. The question of satisfaction never arises except upon the express words of the donor, and whether the gifts said to be given in satisfaction are given by a father or a stranger is wholly immaterial, and it is solely a question whether the original benefactor intended his benefit should be diminished or adeemed by benefits derived from any other source, and, if so, what other source.[3] Generally speaking, where a testator makes a bequest of a sum of money, and afterwards pays to the legatee a sum of money, which he expressly declares to be in lieu of the bequest so made, and the money is accepted by the legatee, the legacy is satisfied; and this declared intention of the testator will overcome any presumption which may arise against the ademption of such a legacy.[4]

Limitation.

As limiting the rule that, as between strangers, it is necessary that the intent of the testator to satisfy a prior legacy by a payment or advancement be expressed, it may be stated that, if the legacy be for a particular purpose, and the payment or advancement is for the same purpose, such payment or advancement is presumed to be a satisfaction of the legacy. In such cases the testator accomplishes during his lifetime the purpose or object which, by his will, he had

[2] Pankhurst v. Howell, 6 Ch. App. 136, 137.

[3] Cooper v. Cooper, 8 Ch. App. 813, 819, note by Lord Romilly, M. R., where the principle is thus illustrated: "This may be shown pointedly in a case where the gifts supposed to be a satisfaction of the original gifts are gifts of land. In the case of a parent, or person in loco parentis, land would be no presumed satisfaction of a gift of money. But, if the original gift was to a stranger, the doctrine of satisfaction becomes applicable according to the words of the original donor. Then the question is whether the words he has used, fairly interpreted, meant the gift of land as satisfaction of the benefits he has bequeathed or previously conveyed. It is therefore of paramount importance to consider in all cases whether the doctrine of presumption against double portions, or the doctrine of the construction of instruments, is that which applies."

[4] Howze v. Mallett, 57 N. C. 194; Richards v. Humphreys, 15 Pick. (Mass.) 133.

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designed to accomplish after his death.[5] And parol evidence of the donor's intention to satisfy the legacy may be admitted.[6]

SATISFACTION OF PORTIONS BY LEGACIES.

93. From the same inclination of courts against double portions arises the presumption that, where a legacy given by a parent or a person standing in loco parentis is as great as, or greater than, a portion or provision previously secured to the legatee upon marriage or otherwise, such legacy was intended by the testator as a complete satisfaction of such portion or other provision.[1] If the legacy is not as great as the portion or provision, the presumption arises that it was intended as a satisfaction pro tanto.[2]

The rules applicable to the satisfaction of legacies by subsequent portions and advancements are generally applicable to the questions involved in the satisfaction of portions by subsequent legacies. The cases arising under this branch of the doctrine of satisfaction are not frequent 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; and the question is whether the testamentary provision is a satisfaction of the prior covenant obligation, or is the child entitled to both? The presumption against double

[5] Monck v. Monck, 1 Ball & B. 303.

[6] Debeze v. Mann, 2 Brown, Ch. 166, 519, 521; Trimmer v. Bayne, 7 Ves. 516.

§ 93. [1] Bruen v. Bruen, 2 Vern. 439; Moulson v. Moulson, 1 Brown, Ch. 82; Ackworth v. Ackworth, Id. 307, note; Copley v. Copley, 1 P. Wms. 147; Duke of Somerset v. Duchess of Somerset, 1 Brown, Ch. 309; Bengough v. Walker, 15 Ves. 507; Thynne v. Earl of Glengall, 2 H. L. Cas. 131; Paget v. Grenfell, L. R. 6 Eq. 7; Rogers v. French, 19 Ga. 316; Clark v. Jetton, 5 Sneed (Tenn.) 229.

[2] Warren v. Warren, 1 Brown, Ch. 305; Thynne v. Earl of Glengall, 2 H. L. Cas. 131.

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portions is not as strong where the settlement or portion precedes the will as where the settlement or portion is subsequent to the will, and therefore what would destroy the presumption of satisfaction if the legacy is subsequent to the portion would not produce that effect if the legacy was prior to the portion. The reason for this distinction is obvious. The will of the testator is at all times subject to change by him, and any legacy contained therein may be revoked at his pleasure. But, if a covenant to bestow a settlement or portion be made, an obligation is imposed on the donor which cannot be discharged by him without the donee's consent. He can only put an end to it by payment, or by making a gift with the condition, expressed or implied, that the legatee will take the gift made by the will in satisfaction of his claim under the covenant. It is, therefore, easier to assume an intention to adeem than an intention to give a legacy in lieu or in satisfaction of an existing obligation.[s]

PERFORMANCE—DOCTRINE STATED.

94. When a person has covenanted to do a certain act, and he does some other act that is capable of being applied towards a performance of his covenant, he will be presumed to have had the intention of performing his covenant when he did the other act.[1]

This doctrine is based on the maxim that equity imputes an intention to fulfill an obligation. While the doctrine of satisfaction and performance have their origin in the equitable antipathy to double benefits to the same recipients, creating the presumption that only one benefit was intentionally conferred, there is a pronounced difference between them. This distinction may be stated thus: 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

[s] Tussaud v. Tussaud, 9 Ch. Div. 363; Lord Chichester v. Coventry, L. R. 2 H. L. 71, 90.

§ 94. [1] Snell, Eq. 221.

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been done.[2] Questions arising under this doctrine generally involve matters pertaining to marriage articles. These questions have been frequently considered in the English courts, but have seldom been judicially discussed in the courts of this country. It only seems necessary in this work to briefly state some of the general principles governing the application of the doctrine.

SAME—APPLICATION OF DOCTRINE.

95. The doctrine of performance is applied in two classes of cases:

(a) Where there is a covenant to purchase and settle lands, and a purchase is made, but is not expressed to be in pursuance of such covenant, and no settlement of the lands is made.

(b) Where there is a covenant to leave certain property, and, under the intestacy of the covenantor, the covenantee receives property.[1]

The first branch of this subject was fully discussed in the leading case of Lechmere v. Earl of Carlisle.[2] In that case there was a covenant by a husband on his marriage to lay out a certain sum of money in the purchase of lands, to be settled on himself for life, and remainder to his wife for her jointure. The husband purchased, after his marriage, certain lands in fee, some estates for lives, and some reversionary estates in fee, expectant on lives, and also contracted for the purchase of certain estates in fee in possession. The husband died intestate, without issue, and without having made a settlement of any estate as agreed in his covenant. It was held that the lands purchased and contracted to be purchased in fee simple in possession after the covenant, although with only a part of the sum agreed to be ex-

[2] Goldsmid v. Goldsmid, 1 Swanst. 211.

§ 95. [1] Snell, Eq. 221.

[2] 3 P. Wms. 211, 227; 2 White & T. Lead. Cas. Eq. (Text-Book Series) pt. 1, p. 413.

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pended, and left to descend, should go in part performance of the covenant.

The following principles are deemed well established from the exhaustive discussion in the case above referred to, as well as from other cases involving the same questions: [3]

(1) Where the lands purchased are of less value than the lands covenanted to be purchased and settled, they will be deemed purchased in part performance of the covenant.

(2) Where the covenant provides for the future purchase of lands, it cannot be presumed that lands of which the covenantor was seised at the time of executing the covenant, descending to his heir, were intended to be taken in performance of the covenant.

(3) It cannot be presumed that property of a different nature from that covenanted to be purchased and settled by the covenantor was intended as a performance.

(4) Although, by the settlement, the consent of trustees is required, the absence of that consent will not necessarily prevent the presumption of performance from arising, if the other circumstances of the purchase are favorable to such presumption.[4]

The second class of cases is illustrated by Blandy v. Widmore,[5] where a man had covenanted to leave his wife £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.

[3] See, also, Wilcocks v. Wilcocks, 2 Vern. 558; Sowden v. Sowden, 3 P. Wms. 228, note; 1 Brown, Ch. 582; Pinnell v. Hallet, Amb. 106.

[4] Snell, Eq. 224.

[5] 1 P. Wms. 324; 2 White & T. Lead. Cas. Eq. (Text-Book Series) pt. 1, p. 428.

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CHAPTER X.

CONVERSION AND RECONVERSION.

96. Equitable Conversion Defined.
97. Application of Doctrine.
98. Words Sufficient to Effect Conversion.
99. Time when Conversion Takes Place.
100. Effect of Conversion.
101. Conversion by Paramount Authority.
102–103. Total or Partial Failure of Purposes for which Conversion is Directed.
104. Double Conversion.
105–106. Reconversion.

EQUITABLE CONVERSION DEFINED.

96. Equitable conversion is that equitable or implied change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such.[1]

This doctrine rests on the maxim that equity regards that as done which ought to be done, and is, indeed, the most marked illustration of that maxim. As was said by Sir Thomas Sewell, M. R., in the leading case of Fletcher v. Ashburner:[2] "Nothing is better established than this principle that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever

§ 96. [1] Haynes, Eq. p. 325; Pom. Eq. Jur. § 1159. And see Fletcher v. Ashburner, 1 Brown, Ch. 497, which is a leading case on the subject. Bispham (Eq. p. 307) says: "By equitable conversion is meant a change of property from real into personal, or from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity." See Story, Eq. Jur. § 1212.

[2] 1 Brown, Ch. 497; 1 White & T. Lead. Cas. Eq. (Text-Book Series) pt. 2, p. 968.

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manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed." While no express declaration need be contained in the instrument in order that land shall be treated as money and money as land, it is requisite that an intention be absolutely expressed that the land shall be sold, and turned into money, and that money shall be expended in the purchase of land.[3] When once this intention is sufficiently expressed, the accidental circumstance that the money has not in fact 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 have been done.[4] The true test in all cases is whether there is in the instrument an absolute direction that the real estate be turned into personal, or the personal estate be turned into real.[5]

SAME—APPLICATION OF DOCTRINE.

97. The doctrine is applicable to cases arising under

(a) Trusts contained in wills;

(b) Settlements, and other contracts inter vivos.

[3] Pom. Eq. Jur. § 1159; White v. Howard, 46 N. Y. 144; Haward v. Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120; Eneberg v. Carter, 98 Mo. 647, 12 S. W. 522, 14 Am. St. Rep. 664.

[4] Lechmere v. Earl of Carlisle, 3 P. Wms. 215; Scudamore v. Scudamore, Finch, Prec. 543. In the former case Sir Jos. Jekyll said: "The forbearance of the trustees in not doing what it was their office to have done shall in no sort prejudice the cestuis que trustent, since at that rate it would be in the power of trustees, either by doing or delaying to do their duty, to affect the right of other persons, which can never be maintained. Wherefore the rule in such cases is that what ought to have been done shall be taken as done; and a rule so powerful it is as to alter the very nature of things,—to make money land, and, on the contrary, to turn land into money. Thus money articled to be laid out in land shall be taken as land, and descend to the heir, and, on the other hand, land agreed to be sold shall be considered as personal estate."

[5] Pom. Eq. Jur. § 1159.

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It was said in the leading case of Fletcher v. Ashburner, supra, that, wherever a conversion is directed, it will take place in whatever manner the direction is given, "whether by will, by way of contract, marriage articles, settlement, or otherwise." The cases in which this doctrine applies arise, for the most part, under trusts created by will. In the case of contracts it is essential that the contract be a binding one, and that the object of the conversion be within its scope, and equity will not assume a conversion in favor of or against a person who is not a party to the contract.[1]

Land Contracts.

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.[2] 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.[3] A verbal agreement, however, by an owner who dies intestate before it is carried out, will, if adopted by his heir voluntarily, and not under a mistake, effect a conversion retrospectively, and the money will belong to the next of kin.[4] If the contract is enforceable, all the consequences of conversion follow. The vendee will be entitled to all the rents and profits from the day of the completion of the contract, and he must bear any loss and will be entitled to all the benefits arising between the execution of the contract and the conveyance of the land; 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.[5]

§ 97. [1] Adams, Eq. p. 141. The maxim, "Equity regards that as done which ought to be done," applies only to persons who are entitled to enforce the contract, not to volunteers. Chetwynd v. Morgan, 31 Ch. Div. 596.

[2] See ante, p. 77, maxim "Equity regards that as done which ought to be done;" Gilbert v. Port, 28 Ohio St. 276, 296.

[3] Mills v. Harris, 104 N. C. 626, 10 S. E. 704.

[4] Frayne v. Taylor, 10 Jur. (N. S.) 119.

[5] Newport Waterworks v. Sisson, 18 R. I. 411, 28 Atl. 336.

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Partnerships.

The doctrine of conversion is applicable to partnerships. As has been stated in a leading English case on this subject: "Irrespective of authority, and looking at the matter with reference to principles well established in this court, if partners purchase land merely for the purpose of their trade, and pay for it out of the partnership property, that transaction makes the property personalty, and effects a conversion out and out. What is the clear principle of this court as to the law of partnership? It is that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule, and it requires no special stipulation. It is inherent in the very contract of partnership." [6]

SAME—WORDS SUFFICIENT TO EFFECT CONVERSION.

98. The direction to convert either money into land or land into money must be clear and imperative, although it need not be express, but may be implied from the general scope and tenor of the instrument, showing a clear intention of the owner 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

[6] Attorney General v. Hubbuck, 10 Q. B. Div. 488, affirmed in 13 Q. B. Div. 275, citing with approval Darby v. Darby, 3 Drew. 495. The general rule throughout the United States is that, in the absence of any agreement to the contrary, partnership real estate retains the character of realty until the occasion arises for a conversion, and then becomes personalty only to the extent required. The portion not required for partnership equities retains its character as realty, and the rule leaves the laws of descent to their ordinary operation. Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61; Shearer v. Shearer, 98 Mass. 107; Hale v. Plummer, 6 Ind. 121; Dilworth v. Mayfield, 36 Miss. 40; Lang's Heirs v. Waring, 25 Ala. 625.

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money is optional or discretionary, there is no duty imposed on the trustees or other parties to make the change, and no equitable conversion can take place.[1] If the will or other instrument directs that the land be sold in express terms, it is obviously the duty of the trustees or other parties to make the sale, and turn the land into personalty, and apply the proceeds as directed in such will or instrument. And, where the will or other instrument has provided for such a disposition of the property as to render it necessary to sell the lands or invest the money in order that the terms of the instrument be carried into effect, the conversion will be deemed to have been made. In order to work a conversion, there must be either a positive direction to sell, or an absolute necessity to sell in order to execute the instrument, or such a blending of real and personal estate in the instrument as to clearly show that it was intended to create a fund out of both real and personal estate, and to provide for the disposition of such fund as money.[2] The determination of the question is always based on intention. Such intention is to be discovered from the whole scope and tenor of the instrument. In general, courts of equity will not interfere to change the quality of property as the testator or intestate has left it, unless there is some clear act or intention by which he has unequivocally fixed upon it throughout a definite character either as money or as land.[3] And where a will directs the conversion of real property, but for a void purpose, the doctrine of conversion does not apply; and, unless otherwise plainly indicated by the will, such realty will pass to the heirs as realty.[4]

Where the general scheme of the will requires a conversion, a power of sale operates as a conversion of real prop-

§ 98. [1] Haynes, Eq. p 329; Wheless v. Wheless, 92 Tenn. 293, 21 S. W. 595; Hood v. Hood, 85 N. Y. 561; Prentice v. Janssen, 79 N. Y. 478; Peterson's Appeal, 88 Pa. 397; Jones v. Caldwell, 97 Pa. 42; McClure's Appeal, 72 Pa. 414; Pratt v. Talliaferro, 3 Leigh (Va.) 419; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; Janes v. Throckmorton, 57 Cal. 368.

[2] Hunt's Appeal, 105 Pa. 128, 141; In re Marchall's Estate, 147 Pa. 77, 23 Atl. 391; Merritt v. Merritt, 32 App. Div. 442, 53 N. Y. Supp. 127; Harrington v. Pier, 105 Wis. 485, 82 N. W. 345.

[3] Story, Eq. Jur. § 1214; King v. King, 13 R. I. 501.

[4] Harrington v. Pier, 105 Wis. 485, 82 N. W. 345.

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erty into personalty, although not in terms imperative.[5] In such a case it becomes the duty and obligation of the trustees to sell, and the doctrine of equitable conversion must necessarily apply.[6] And an imperative direction to sell land works an equitable conversion, though the time of sale is left by the owner in the discretion of some one else.[7] But it has always 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 effect a conversion of realty into personalty;[8] nor, on the other hand, will a mere discretionary power to invest personalty in land work a conversion of the money into real estate.[9]

SAME—TIME WHEN CONVERSION TAKES PLACE.

99. Subject to the general principle that the terms of each instrument must control as to the construction and effect thereof, conversion takes place:

(a) In the case of wills, from the death of the testator.

(b) In the case of deeds and other instruments inter vivos, from the date of their execution and delivery.

[5] Salisbury v. Slade, 160 N. Y. 278, 54 N. E. 741; Lent v. Howard, 89 N. Y. 169; Power v. Cassidy, 79 N. Y. 602, 35 Am. Rep. 550; Fisher v. Banta, 66 N. Y. 468; In re Page's Estate, 75 Pa. 87; Gould v. Asylum, 46 Wis. 106, 50 N. W. 422; Wurts' Ex'rs v. Page, 19 N. J. Eq. 365.

[6] Ford v. Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; Fahnestock v. Fahnestock, 152 Pa. 56, 25 Atl. 313.

[7] 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, 5 Am. St. Rep. 117; Mellon v. Reed, 123 Pa. 1, 14, 15 Atl. 906.

[8] Curling v. May, cited 3 Atk. 255; Bourne v. Bourne, 2 Hare, 35; Moncrief v. Ross, 50 N. Y. 431; Clift v. Moses, 116 N. Y. 144, 157, 22 N. E. 393; In re McComb, 117 N. Y. 378, 22 N. E. 1070; Matthews v. Studley, 17 App. Div. 303, 45 N. Y. Supp. 201; Haward v. Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 126; Greenough v. Small, 137 Pa. 128, 20 Atl. 396; In re Machemer's Estate, 140 Pa. 544, 21 Atl. 441; Mills v. Harris, 104 N. C. 629, 10 S. E. 704.

[9] Polley v. Seymour, 2 Younge & C. 708.

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The will or other instrument may contain an express direction as to when the conversion will take place, in which case such direction must necessarily control.[1] And if the will creates a trust upon the happening of a specified event, which might or might not happen, then the conversion takes place only when that event happens, and at that time takes place as though there had then been an absolute direction to sell.[2] And if it appear by the will that the conversion is only to take place for certain purposes, the property will be treated as converted for those purposes, and beyond that it will be regarded as unchanged.[3] Whether the conversion takes place at the death of the testator or at some later period depends upon his intention. Unless the will in terms provides for a sale at a specified future time, or creates a trust with the discretion to sell only on the happening of a designated event, which may or may not happen, the conversion will be deemed to take place as of the date of the testator's death.[4] 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, although the time of sale is postponed until the termination of a life estate created by the will.[5]

§ 99. [1] Moncrief v. Ross, 50 N. Y. 431, 3 Keener, Cas. Eq. 960; McClure's Appeal, 72 Pa. 414; Keller v. Harper, 64 Md. 74, 1 Atl. 65; Massey v. Modawell, 73 Ala. 421.

[2] McClure's Appeal, 72 Pa. 414; Pom. Eq. Jur. § 1162.

[3] Ackroyd v. Smithson, 1 Brown, Ch. 503; Cruse v. Barley, 3 P. Wms. 20; Chitty v. Parker, 2 Ves. Jr. 270; Taylor v. Taylor, 3 De Gex, M. & G. 190; King v. King, 13 R. I. 501.

[4] Mutual Life Ins. Co. v. Bailey, 19 App. Div. 204, 45 N. Y. Supp. 1069; Fisher v. Banta, 66 N. Y. 468. For other cases as to the time when conversion will take place, see Cook's Ex'rs v. Cook's Adm'r, 20 N. J. Eq. 375; Jones v. Caldwell, 97 Pa. 42; McClure's Appeal, 72 Pa. 414; Ramsey v. Hanlon (C. C.) 33 Fed. 425; Lent v. Howard, 89 N. Y. 169; Underwood v. Curtis, 127 N. Y. 523, 28 N. E. 585; Dutton v. Pugh, 45 N. J. Eq. 426, 18 Atl. 207; Reiff v. Strite, 54 Md. 298; Carr v. Branch, 85 Va. 597, 8 S. E. 476.

[5] Allen v. Watts, 98 Ala. 384, 11 South. 646; Ramsey v. Hanlon (C. C.) 33 Fed. 425; In re Thomman's Estate, 161 Pa. 444, 29 Atl. 84. In Cropley v. Cooper, 16 Wall. 167, 22 L. Ed. 109, 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 sub-

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Contracts and Other Instruments Inter Vivos.

As a general rule, in a deed the conversion takes place from the date of its execution and delivery, notwithstanding the fact that the deed contains a trust for sale which is not effective until after the settlor's death.[6] This rule is not to apply to mortgages or other instruments, where there can be no intention, expressed or implied, to effect a conversion,—as, where a mortgage provided that the surplus moneys arising from the sale of the mortgaged premises should be paid to A., his executors or administrators. A. died intestate, and afterwards B. sold the property under the power of sale for a sum which exceeded the mortgage money and interest. The court held that the surplus money was real estate. If the estate had been sold by the mortgagee in the lifetime of the mortgagor, the surplus would certainly have been the personal estate of the mortgagor, and his next of kin would have been entitled thereto after his death. But, since the estate was not sold at the time of the death of the mortgagor, the equity of redemption descended to his heir, and he is entitled to the surplus.[7]

A contract which contains an option for the sale of land may work a conversion of the land, although the option may

stance, 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' Ex'rs v. Page, 19 N. J. Eq. 365; Hocker v. Gentry, 3 Metc. (Ky.) 463; Tazewell v. Smith's Adm'r, 1 Rand. (Va.) 313, 10 Am. Dec. 533; In re Bright's Appeal, 100 Pa. 602. In New York the rule is that, if testator 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, 3 Keener, Cas. Eq. 960; 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.

[6] Griffith v. Ricketts, 7 Hare, 299, 311.

[7] Wright v. Rose, 2 Sim. & S. 323; Snell, Eq. 173.

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not be exercised until after the death of the vendor.[8] Whenever the vendee exercises his option, the conversion, as to the parties claiming under the vendor's title, dates back to the time of the execution of the contract.[9] This same principle is applicable in the case of a lease of land 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, the conversion of the lessor's interest in the land relates back to the date of the lease, and the purchase money goes to the lessor's personal representatives. This rule is firmly established by the weight of English authority, and has been followed and favorably considered in the courts of this country.[10] A recent Ohio case holds, however, that the conversion takes place when the option is exercised, and that the purchase money will go to lessor's heirs as real property, instead of to the lessor's personal representatives.[11] But this case does not seem to be based on the weight of judicial authority, and is evidently decided without reference to a long line of cases arising under contracts for the optional purchase of real property. It is evident, however, that the courts are reluctant to extend the rule. Its operation may be productive of hardship, since the option might not be exercised for many years after the lessor's death. In a comparatively recent English case it was held that its operation should be confined to the question of conversion as between the heir or devisee of the vendor or lessor and his personal representatives, and that it does not apply as between the vendor and purchaser, or lessor and lessee. As between these parties, the conversion cannot take place until the option has been declared.[12]

[8] Lawes v. Bennett, 1 Cox, 167; Townley v. Bedwell, 14 Ves. 591; D'Arras v. Keyser, 26 Pa. 249.

[9] Pom. Eq. Jur. § 1163.

[10] Lawes v. Bennett, 1 Cox, 167; Emuss v. Smith, 2 De Gex & S. 722.

[11] Smith v. Loewenstein, 50 Ohio St. 346, 34 N. E. 159.

[12] Edwards v. West, 7 Ch. Div. 858, 862, 863.

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EFFECT OF CONVERSION.

100. By the doctrine of conversion, land directed or agreed to be sold, although yet unsold, is to be treated in equity as money; money directed or agreed to be laid out in land is to be treated in equity as land. Although there has not been an actual change in the nature of the property, all the legitimate consequences which would follow such a change will result.

QUALIFICATION—(a) It affects only those persons who claim under the instrument, or directly from or under its author.

(b) Conversion takes place only for the purpose of the instrument.

In determining the rights of claimants to land directed or agreed to be sold, such land, while still unsold, will be treated as personal property. It will pass under a general gift or bequest of personal estate,[1] and, in the absence of a will, it will go to the personal representatives as money, to be distributed to the next of kin after the payment of the debts of the decedent.[2] Such land will be included in a general residuary bequest,[3] but not in a general devise of land.[4] It may be sold and transferred by parol, as any other personal property, notwithstanding the statute of frauds relat-

§ 100. [1] Fisher v. Banta, 66 N. Y. 468; Welsh v. Crater, 32 N. J. Eq. 177; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; Gould v. Orphan Asylum, 46 Wis. 106, 50 N. W. 422; Chandler v. Pocock, 16 Ch. Div. 648.

[2] Moncrief v. Ross, 50 N. Y. 431, 3 Keener, Cas. Eq. 960; Van Vechten v. Keator, 63 N. Y. 52; Hood v. Hood, 85 N. Y. 561; Wurts' Ex'rs v. Page, 19 N. J. Eq. 365; Welsh v. Crater, 32 N. J. Eq. 177; McClure's Appeal, 72 Pa. 414; In re Eby's Appeal, 84 Pa. 241; Jones v. Caldwell, 97 Pa. 42; Ferguson v. Stuart's Ex'rs, 14 Ohio, 140, 146; Collier v. Collier's Ex'rs, 3 Ohio St. 369; Ex parte McBee, 63 N. C. 332.

[3] Stead v. Newdigate, 2 Mer. 521.

[4] Elliott v. Fisher, 12 Sim. 505.

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ing to land;[5] and an alien may take the proceeds of land directed to be sold for his benefit, though he could not have taken the land under a devise.[6] On the other hand, money directed or agreed to be laid out in land will pass under a general devise of land,[7] and, in the absence of a will, will descend to the heir as real estate.[8] And such money will pass to the heirs of the person for whose benefit the direction is made, even if he dies before the investment actually takes place.[9] And, if money is directed to be laid out for the benefit of a married woman, her husband is entitled to an estate by curtesy in it.[10] It has also been held in some states that a widow has a dower in lands which the husband has contracted to purchase, where he died before the deed was delivered.[11]

Qualifications.

The doctrine of conversion is subject to certain qualifications in its application. It is not effectual as determining the rights of persons who have no interest in the property under or through the instrument, or who do not claim

[5] Mellon v. Reed, 123 Pa. 1, 15 Atl. 906.

[6] Du Hourmelin v. Sheldon, 1 Beav. 79; Craig v. Leslie, 3 Wheat. 563, 4 L. Ed. 460; De Garante v. Gott, 6 Barb. (N. Y.) 492, 497.

[7] Greenhill v. Greenhill, 2 Vern. 679.

[8] Hawley v. James, 5 Paige (N. Y.) 318; Gott v. Cook, 7 Paige (N. Y.) 521, 534; Tayloe v. Johnson, 63 N. C. 381; Collins v. Champ's Heirs, 15 B. Mon. (Ky.) 118, 61 Am. Dec. 179.

[9] Scudamore v. Scudamore, Finch, Prec. 543, 3 Keener, Cas. Eq. 947; Edwards v. Countess of Warwick, 2 P. Wms. 171.

[10] Sweetapple v. Bindon, 2 Vern. 536.

[11] Church v. Church, 3 Sandf. Ch. (N. Y.) 434; Smiley v. Wright, 2 Ohio, 512; Davenport v. Farrar, 2 Ill. 314; Reed v. Whitney, 7 Gray (Mass.) 553; Lobdell v. Hayes, 4 Allen (Mass.) 187; Bowen v. Lingle, 119 Ind. 560, 20 N. E. 534; Joseph v. Fisher, 122 Ind. 399, 23 N. E. 856; Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921; Glenn v. Clark, 53 Md. 580; Warford v. Noble, 9 Biss. 320, 2 Fed. 202. So in England by statute, Macq. Husb. & W. (3d Ed.) 123. But widow must pay her share of unpaid purchase money. Warford v. Noble, supra. And a simple entry under a parol contract without payment of purchase price will not give dower. Latham v. McLain, 64 Ga. 320. But it is held in other jurisdictions that where there is a mere equitable right to compel a conveyance which husband never enforces, there is no seisin to give dower. Bowman v. Bailey, 20 S. C. 550; Cornog v. Cornog, 3 Del. Ch. 407.

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directly under or through its author.[12] Nor is it true that the property is to be treated for all purposes as converted. Except as required for the purposes specified in the instrument, the property will be treated as it actually is. As an example, it has been held that a direction in 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 co-executor; 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."[13] And an equitable conversion of realty into personalty for distribution among the testator's children does not prevent the title to the land, on the death of the testator, vesting in his children as heirs, until its actual conversion; and, consequently, it will be subject to the lien of a judgment against any one of them.[14] Where a will directs the conversion of realty, the husband of one of the persons entitled to share in the proceeds cannot dispose of her interests in the same manner as he can her personal property.[15] On the other hand, where money is directed to be laid out in land, though to be treated as a devise as between the legatees, heirs, and personal representatives, is, nevertheless, a personal asset so far as the testator's creditors are concerned, and must be

[12] Pom. Eq. Jur. § 1166.

[13] Wilder v. Ranney, 95 N. Y. 712, 3 Keener, Cas. Eq. 992. 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. 1, 15 Atl. 906, where it was held that real estate directed to be converted may be conveyed as personal property.

[14] Eneberg v. Carter, 98 Mo. 647, 12 S. W. 522. But it has been held otherwise where the title to the land vested in a trustee. Hunter v. Anderson, 152 Pa. 386, 25 Atl. 538.

[15] Franks v. Bollans, 3 Ch. App. 717, 718, in which case Sir W. Page Wood, L. J., says: "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 the sale, bar his wife's right to her share of it."

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applied like other personal assets to the payment of his debts.[16]

CONVERSION BY PARAMOUNT AUTHORITY.

101. Conversion by paramount authority includes the compulsory sale of lands to corporations and others for public purposes, and the sale of land by order of the court for the purpose of settling estates of infants and incompetents, for partition and the payment of debts of decedents. The general rule in such cases is that the doctrine of equitable conversion is applicable, and that the proceeds of the sale should be treated as real estate.

The questions arising under this branch of the doctrine differ from those already discussed. The question which arises under the ordinary form of conversion is whether the property, though not actually changed in its nature, is to be treated as converted. We are now to determine whether the property can be treated as not converted, although its nature has been actually changed. Where, under a statute, a railroad corporation has given notice of its intention to take land, to the owner in fee, the notice itself does not effect a conversion; but, where the purchase price is agreed on, a conversion is effected, although the purchase price has not been paid. The owner's interest becomes money, and is to be treated as such.[1] And where the land is not voluntarily sold, but is taken by virtue of compulsory proceedings, and the award is paid into court, the money so paid is deemed real estate until taken out by some person entitled thereto.[2] In many of the earlier English cases the rule was laid down that, where land was sold under an order of the

[16] McFadden v. Hefley, 28 S. C. 317, 5 S. E. 812.

§ 101. [1] Haynes v. Haynes, 1 Drew & S. 426; In re Battersea Park Acts, 9 Jur. (N. S.) 883.

[2] Ex parte Hawkins, 13 Sim. 569; In re Manchester & S. Ry. Co., 19 Beav. 365; Regent's Canal Co. v. Ware, 23 Beav. 575.

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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, the excess, though in form money, remained, as before the sale, impressed with the character of land, and would descend as such.[3] But this rule has been questioned, and materially modified, by subsequent English cases. In the case of Steed v. Preece,[4] Jessel, M. R., ruled that, if a conversion is rightly made, whether by a court or a trustee, all the consequences of conversion must follow. There is no equity in favor of the heir, or any one else, to take the property in any other form than that in which it is found. The American cases are, for the most part, to the same effect. In a recent Arkansas case [5] the supreme court declared that, where land is

[3] Cooke v. Dealey, 22 Beav. 196; Jermy v. Preston, 13 Sim. 356; Dyer v. Dyer, 34 Beav. 504; Johnson v. Webster, 4 De Gex, M. & G. 484. And see Collins v. Champ's Heirs, 15 B. Mon. (Ky.) 118, 61 Am. Dec. 179.

[4] 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 co-tenant, 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. But the court 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.

[5] In re Simmons, 55 Ark. 485, 18 S. W. 933. Another instructive recent decision on this subject is Wentz's Appeal, 126 Pa. 541, 17 Atl. 875, 3 Keener, Cas. Eq. 995. 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

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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 said: "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 reconversion. 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 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."

It seems to be well settled that the courts will not direct a conversion of property belonging to an infant or lunatic, unless there is good cause therefor, and then only so far as is necessary to accomplish the particular purpose. Notwithstanding the cases above referred to, there seems to be plenty of authority for the rule that, where lands of an infant or lunatic are sold by virtue and order of the court, the sur-

more than in fact, but for certain purposes, and within certain limits 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 (Mass.) 162; Holland v. Adams, 3 Gray (Mass.) 188, 191; Hovey v. Dary, 154 Mass. 7, 27 N. E. 659; Emerson v. Cutler, 14 Pick. (Mass.) 108.

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plus of the proceeds always remains real estate.[6] In a recent New Jersey case it was held that, when the land of an infant is converted into money by order of the court, and the infant dies before attaining his majority, the fund will be treated as real estate, and descend to the heirs at law of the infant.[7] In many of the states—as in Massachusetts—it is provided by statute that in every sale of the real estate of a decedent by an executor or administrator the proceeds remaining on the final settlement of the accounts shall be considered as real estate.[8] Under such a statute the unexpended balance of the proceeds of the sale remaining after the payment of debts should be paid over by the administrator or executor to the persons entitled thereto.[9]

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

102. TOTAL FAILURE—Where a conversion is directed or agreed upon, by will, or by deed, or other instrument inter vivos, whether of land into money or money into land, if the objects and purposes of such conversion have totally failed before the instrument directing the conversion came into operation, no conversion will take place, but the property will remain in its original state, and will result, unchanged, to the heirs or personal representatives of the testator, or to the settlor or grantor, or his heirs or personal representatives, as the case may be.

[6] In re Skeggs' Settlement, 2 De Gex, J. & S. 533; In re Bagot's Settlement, 31 Law J. Ch. 722; Dixie v. Wright, 32 Beav. 662; Oxenden v. Lord Compton, 2 Ves. Jr. 69, 72; Smith v. Bayright, 34 N. J. Eq. 424.

[7] Wetherill v. Hough, 52 N. J. Eq. 683, 29 Atl. 592.

[8] Massachusetts, Pub. St. c. 142, § 9; New York, Code Civ. Proc. § 2793, subd. 10.

[9] Adams v. Jones, 176 Mass. 185, 57 N. E. 362.

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103. PARTIAL FAILURE—Where the failure is partial, and the direction to convert is contained in

(a) A will, the conversion takes place only to such extent as is necessary to effect the purpose of the will; and the undisposed-of surplus, in the case of land, to be converted into personalty, will result to the testator's heir as money; and in the case of money to be laid out in land, the undisposed-of surplus will go to his personal representatives.

(b) A deed or other instrument inter vivos, the undisposed-of surplus results to the grantor in its converted state, whether land is to be converted into money or money into land.

Total Failure.

In the case of a total failure of the objects or purposes for which the conversion is directed or agreed upon, the rule is simple, and easily applied. A simple illustration is where land is devised on trust to be sold and distributed between A. and B., and both die during the testator's lifetime. In such case the whole object and purpose of the testator in directing the conversion has failed. The purpose being to divide the proceeds of the sale, and there being no one to receive any share, the matter is in the same position as if no trust to sell had been inserted in the will, and the land descends to the heir.[1] There is no distinction to be made in

§§ 102, 103. [1] 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, 732, 21 Am. St. Rep. 748, 752, 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. 513, 17 Atl. 447; Moore v. Robbins, 53 N. J. Eq. 137, 32 Atl. 379; Slocum v. Slocum, 4 Edw. Ch. (N. Y.) 613;

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the case of a will and a deed. As was said by Vice Chancellor Wood: "So here, if, at the moment when the grantor put his hand to this deed, the purpose for which the conversion was directed had failed,—for instance, if he had given all the proceeds, instead of a part, to charitable purposes, so that the property would have been at home in his lifetime,—the court would have regarded it as if no conversion had been directed, and the property would have resulted to the grantor as real estate." [2] And where the will or deed directs money to be laid out in land, and there is a total failure of purpose, the same rule applies, and the money directed to be laid out descends to the personal representatives.[3]

Partial Failure in the Case of a Will.

Where there is only a partial failure of purpose of the will, and it is necessary to sell the land to fulfill the effectual portion of such purpose, the surplus remaining thereafter will not be treated as personalty, but will descend to the heir of the testator. It was the intention of the testator to deprive his heir of the land for a particular purpose, and, that purpose having partially failed, there is no reason why such surplus should be taken away from him. In the leading case of Ackroyd v. Smithson [4] this rule was ably discussed and firmly established. It was there held that the heir was entitled to the undisposed-of surplus, and not the residuary legatee or next of kin, on the ground that the heir takes every interest in land not actually disposed of by his ancestor, and that the testator could not have intended to deprive him of the real estate directed to be converted, except so far as necessary for the purposes of the will. Since it is necessary to sell the land for the purposes of the trust, such surplus will belong to the heir as money, and not as land,

Wood v. Keyes, 8 Paige (N. Y.) 365; Bogert v. Hertell, 4 Hill (N. Y.) 492; Hetzel v. Barber, 69 N. Y. 1; Sweeney v. Warren, 127 N. Y. 426, 28 N. E. 413, 24 Am. St. Rep. 468; Davis' Appeal, 83 Pa. 348.

[2] Clarke v. Franklin, 4 Kay & J. 257, 3 Keener, Cas. Eq. 982; Smith v. Claxton, 4 Madd. 492. Evans' Appeal, 63 Pa. 183, seems at variance with this principle, but it was approved in Davis' Appeal, 83 Pa. 348.

[3] Cogan v. Stephens, 5 Law J. Ch. 17.

[4] Brown, Ch. 503, 3 Keener, Cas. Eq. 977. And see Wood v. Cone, 7 Paige (N. Y.) 471; Lindsay v. Pleasants, 39 N. C. 320; Craig v. Leslie, 3 Wheat. 563, 4 L. Ed. 460.

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and will, therefore, go to his personal representatives, even though the land was not sold during his lifetime, provided it be actually sold, and the surplus ascertained.[5] Where the will directs money to be laid out in land, by a close analogy to the reasoning of the case of Ackroyd v. Smithson the surplus resulting from a partial failure of the trust will devolve upon the personal representatives of the testator in its original form of personalty.[6]

Intention of Testator to Convert Out and Out.

The rights of heirs to take the undisposed-of surplus where there is a partial failure of the purposes for which the conversion is directed are affected by the declared intention of the testator as expressed in the will. If there is an intention expressed to convert realty into personalty for the particular purposes of the will, the heir will take; but, if there is an intention to convert "out and out," as it is called, —that is, to change the character of the property for all purposes and to all intents,—the heir will not take. Unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personalty for the purposes of the will, but, further, that the proceeds of the sale of the real estate shall be taken as personalty, whether such purposes take effect or not, so much of the real estate or the proceeds thereof as is not effectually disposed of by the will at the time of the testator's death will result to the heir. But every conversion, however absolute in its terms, will be deemed a conversion for the purposes of the will only, unless the testator distinctly indicates that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin.[7] And where a sale of real estate is directed, and the proceeds thereof are to be blended with personal estate for an express purpose,

[5] Snell, Eq. p. 183; Wright v. Wright, 16 Ves. 188; Jessopp v. Watson, 1 Mylne & K. 665; Wall v. Colshead, 2 De Gex & J. 683. And see Pom. Eq. Jur. § 1171.

[6] Cogan v. Stephens, 5 Law J. Ch. 17; Id., 1 Beav. 482, note; Hawley v. James, 5 Paige (N. Y.) 318; Phillips v. Ferguson, 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78.

[7] Cruse v. Bailey, 3 P. Wms. 22; Note of Mr. Cox, Fitch v. Weber, 6 Hare, 146; Amphlett v. Parke, 2 Russ. & M. 221; Taylor v. Taylor, 8 De Gex, M. & G. 190; Nagles' Appeal, 13 Pa. 260, 261.

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which fails, there will not be a conversion of the realty into personalty for a purpose not expressed, so as to give it to the next of kin.[8] But where land has been directed to be sold, and out of the proceeds thereof and the personal estate combined, debts and legacies are to be paid, and the whole of the surplus is given in the residuary bequest as personalty, the conversion of the realty will be absolute, and the proceeds of the land will go to the residuary legatee, and not to the heir.[9] The American cases are not as strong in favor of the heir. In the case of Craig v. Leslie [10] it was held "that, if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold the quality of personalty, not only to subserve the particular purposes of the will, but to all intents, the claims of the heir at law to a resulting trust is defeated, and the estate is considered to be personal."

It follows, then, that blending the proceeds of the realty and personalty in a common fund, for all the purposes of the will, though some of them fail, will render the conversion absolute, and change the devolution of the undisposed-of surplus.[11]

Partial Failure in the Case of a Deed.

There is a material distinction between conversion under wills and those under deeds or other instruments inter vivos in case of partial failure of the purposes for which they are directed. Where the partial failure is of a purpose declared in an instrument inter vivos, the surplus always results to the grantor in its converted, and not in its original, form. The rule has been stated thus: Where real estate is settled by deed upon trust to sell for certain specified purposes, and one of those purposes fails, the property to that extent results to the settlor as personalty from the moment the deed is executed, whether the trust for sale is to arise in the lifetime of the settlor or not until after his decease.[12]

[8] Jessopp v. Watson, 1 Mylne & K. 667.

[9] Mallabar v. Mallabar, Cas. t. Talb. 78; Hutcheson v. Hammond, 3 Brown, Ch. 128, 148; Kennell v. Abbott, 4 Ves. 802; Green v. Jackson, 2 Russ. & M. 238; Salt v. Chattaway, 3 Beav. 576.

[10] 3 Wheat. 563, 4 L. Ed. 460.

[11] Craig v. Leslie, 3 Wheat. 563, 4 L. Ed. 460; Morrow v. Brenizer, 2 Rawle (Pa.) 185; Burr v. Sim, 1 Whart. (Pa.) 252, 29 Am. Dec. 48.

[12] Clarke v. Franklin, 4 Kay & J. 263, 3 Keener, Cas. Eq. 982.

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The reason for the distinction between wills and instruments inter vivos, in this respect, is found in the fact that, while a conversion directed by a will does not take place until the death of the testator, in the case of a deed or other instrument inter vivos the conversion is effected from the time of the execution of such instrument; and the rights of the parties, and the character in which the property is taken by them, are to be determined according to that conversion.[13] If the deed directs a conversion of money into land, and there is a partial failure of purposes, the conversion must be carried out to the extent of such purposes as are effectual, and the undisposed-of surplus will result to the grantor or his heirs as land. The reason of this rule is the same as in the case of a direction for the conversion of land into money.[14]

DOUBLE CONVERSION.

104. A 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. In such cases the property is to be treated as that species of property into which, pursuant to such direction, it is to be ultimately converted.

Where real estate is directed to be sold, and the proceeds expended in the purchase of other real estate, the persons interested in the estate to be so purchased will take the same interest in the real estate to be sold and in its proceeds.[1] And where land in Michigan was directed to be sold, and the proceeds invested in lands in Missouri, the court treated the interests of the parties in the lands as though they were sit-

[13] Wheldale v. Partridge, 8 Ves. 227, 236.

[14] Lechmere v. Lechmere, Cas. t. Talb. 80; Pulteney v. Earl of Darlington, 1 Brown, Ch. 223.

§ 104. [1] Pearson v. Lane, 17 Ves. 101; White v. Howard, 46 N. Y. 144.

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uated in Missouri.[2] A will directing an investment of money in land for the benefit of the widow of the testator during her lifetime, and at her death to be sold, and the proceeds distributed among the children, was held to work a double conversion from the time of the widow's death.[3]

RECONVERSION.

105. Reconversion is that imaginary process by which a prior constructive conversion is annulled and taken away, and the constructively converted property is restored, in contemplation of a court of equity, to its original actual quality.[1]

106. Reconversion may take place by

(a) Election of the party interested in the converted estate.

(b) By operation of law.

By Election.

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 to the land, may elect to take the property in its original form; and in that event equity will treat the property as reconverted into money, since it would be 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.[2] The law is clear as to the right of the party to reconvert where he is entitled to the whole interest in possession, either to the land to be sold or the money to be invested; but where his interest is a partial one, or he has only an undivided share in the land or money, he cannot elect

[2] Ford v. Ford, 80 Mich. 42, 44 N. W. 1057.

[3] De Vaughn v. McLeroy, 82 Ga. 687, 10 S. E. 211.

§§ 105, 106. [1] Snell, Eq. 190; Haynes, Eq. 365.

[2] Seeley v. Jago, 1 P. Wms. 389; Bayley v. Bishop, 9 Ves. 6; De Vaughn v. McLeroy, 82 Ga. 687, 10 S. E. 211.

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unless it can be shown that the interests of the other parties would not be affected thereby.[3] This doctrine is founded on the presumption that a power of sale is given by the testator for the benefit and convenience of the devisees and legatees, and, unless made so in terms, was not intended to be imperative so as to prevent the beneficiaries from taking his bounty, except in the precise form in which the property would exist after the conversion.[4] A remainder-man cannot elect so as to affect the interests; but there is nothing to prevent the remainder-man declaring, as between his real and personal representatives, that a particular reversionary interest to which he is entitled shall be money or shall be land.[5] And while the persons who are exclusively entitled to the fund arising from the sale of land may, if they so elect, take the land in its unconverted form, there must be a concurrence of all the beneficiaries in the election in order to take the real estate out of the operation of the power of sale.[6] A person who is non sui juris—that is, subject to such an incapacity as prevents him from effectively dealing with his own property—cannot elect to reconvert. Therefore an infant or a lunatic cannot reconvert, although the court may,

[3] Holloway v. Radcliffe, 23 Beav. 163; Deeth v. Hale, 2 Moll. 317; Prentice v. Janssen, 79 N. Y. 478; Mellen v. Mellen, 139 N. Y. 220, 34 N. E. 925. In this case the court says: "It is a principle now well settled that where, by will, money is directed to be laid out in the purchase of land for designated beneficiaries, or land is directed to be sold, and the proceeds distributed, it is competent for the parties beneficially interested, provided they are competent and of full age, and the gift is immediate, and not in trust to elect, before the conversion has actually taken place, to take the money in the one case and the land in the other, and when they have so elected, and the election has been made known, the power of the trustee for conversion ceases, and becomes extinguished, and he cannot thereafter lawfully proceed to execute the power." And see, also, Armstrong v. McKelvey, 104 N. Y. 179, 10 N. E. 266; McDonald v. O'Hara, 144 N. Y. 566, 39 N. E. 642; High v. Worley, 83 Ala. 196; Baker v. Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Shallenberger v. Ashworth, 25 Pa. 152; Evans' Appeal, 63 Pa. 183, 186; Pyle's Appeal, 102 Pa. 321.

[4] Mellen v. Mellen, 139 N. Y. 210, 220, 34 N. E. 925.

[5] 2 Spence, Eq. 271; Triquet v. Thornton, 13 Ves. 345; Gillies v. Longlands, 4 De Gex & S. 372, 379; Prentice v. Janssen, 79 N. Y. 478.

[6] McDonald v. O'Hara, 144 N. Y. 566, 39 N. E. 642.

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if it appears to be to the advantage of an infant, direct a reconversion in his behalf.[7]

An express declaration of intention by the beneficiary will, of course, result in an election; but it is not indispensable. No distinct and positive act is required for such a purpose, and the rule applicable is that in the reconversion of real estate a slight expression of intention will be considered sufficient to demonstrate an election on the part of those absolutely entitled.[8] But the act relied upon to show an election must be clear and unequivocal, and of such a character as to leave no reasonable doubt of the intention.[9]

By Operation of Law.

Reconversion by operation of law results when a fund which is directed or agreed to be laid out in land comes to the hands of the person for whom the purchase is to be made, and in whom the entire right is vested, and such person dies before he has declared his intention to elect. Such fund then, being in the hands of one who is entitled to the sole use thereof, will be treated as money, and will not go to the heir.[10]

[7] Seeley v. Jago, 1 P. Wms. 389; Carr v. Ellison, 2 Brown, Ch. 56; Dyer v. Dyer, 13 Wkly. Rep. 739; Robinson v. Robinson, 19 Beav. 494; Ashby v. Palmer, 1 Mer. 296.

[8] Leigh & D. Convers. (volume 5, Law Library) Marg. p. 168; 1 Jarm. Wills, § 523; Mutlow v. Bigg, 1 Ch. Div. 385; Prentice v. Janssen, 79 N. Y. 478, 485; Bailey v. Nat. Bank, 104 Pa. 425.

[9] Beatty v. Byers, 18 Pa. 105.

[10] Chicherter v. Bickerstaff, 2 Vern. 295; Pulteney v. Earl of Darlington, 1 Brown, Ch. 223; Wheldale v. Partridge, 8 Ves. 235.

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CHAPTER XI.

GROUNDS OF EQUITABLE RELIEF—ACCIDENT.

107. Accident Defined.
108. Right to Relief because of Accident.
109. Cases in Which Relief will be Afforded.

ACCIDENT DEFINED.

107. Accident, as considered in equity, is an unforeseen, unexpected, and injurious event, occurring to a party affected by it, and which cannot be attributed to his mistake, neglect, or misconduct.[1]

It has been said that all attempts to define accident in its equitable significance must prove unsuccessful. The definition above used is that given by Mr. Smith in his Manual of Equity, and has been favorably considered by many able writers. Mr. Pomeroy, whose definition is contained in the footnote, has excluded all "fortuitous occurrences which do not occasion any exercise of jurisdiction, since they are not 'accidents' within the equitable conception." His definition, while valuable and accurate, is explanatory of its use in equity jurisprudence, and therefore goes further than is essential for a simple and concise definition.

The jurisdiction of a court of equity in cases of accident is of very ancient origin, and is probably coeval with its existence.[2] In the earlier history of equity, when its juris-

§ 107. [1] 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 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." Pom. Eq. Jur. § 823.

[2] Story, Eq. Jur. § 79.

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diction was not very clearly defined, relief was given in many cases of accident where it would now be refused.[s]

RIGHT TO RELIEF BECAUSE OF ACCIDENT.

108. The right to equitable relief on the ground of accident is based on two essentials:

(a) The party's conscientious title to relief.

(b) The inability of a court of law to originally afford an adequate remedy.

Title to Relief.

There are many cases of accident in which no remedy can be had, either legal or equitable; as, where one has been guilty of gross negligence, or other misconduct in the transaction, he cannot successfully appeal to equity for relief.[1] Nor will relief be granted in favor of a party, however great the injury caused by the accident, if the other party to the transaction is equally entitled to the protection of the court. The relief will not be granted if the adverse party is a bona fide purchaser without notice.[2] Nor will relief be afforded to legatees or devisees under a will defectively executed through accident; for a legatee or devisee is a mere volunteer, taking by the bounty of the testator, and has no independent right until there is a title consummated by law.[3] And equity will not afford relief in matters of positive contract, and against obligations created by the deliberate acts of the parties, where the nonperformance is wholly the result of accident, or where one of the parties has been prevented from deriving the full benefit of the contract on his own side.[4] There is an exception to this rule

[s] 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 the plaintiff had been prevented from executing his contract by reason of unexpected floods. Introduction to Calendars in Chancery, vol. 1, p. 142.

§ 108. [1] Ex parte Greenway, 6 Ves. 812.

[2] Malden v. Menill, 2 Atk. 8; Powell v. Powell, Finch, Prec. 278; Jenkins v. Kemis, 1 Ch. Cas. 103; Pom. Eq. Jur. § 829.

[3] Whitton v. Russell, 1 Atk. 448.

[4] To illustrate the application of this doctrine in a case where a lessee covenants to keep the buildings in repair, when he will be

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in the case of agreements providing for penalty and forfeiture, in which, as we have seen, equity may intervene to relieve, within certain limits.[5]

Inability of Courts of Law to Afford Relief.

Courts of law have always had jurisdiction to grant relief in certain cases of accident, such as loss of deeds, mistakes in receipts and payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies.[6] In such cases the equitable jurisdiction has ever been exercised. But courts of law could not and did not exercise jurisdiction in a great number of cases of accident, and, on the other hand, courts of equity assumed jurisdiction over many such cases which were not cognizable in law. By statutory enactment and subsequent development and extension of the jurisdiction of common-law courts redress can now be afforded in those courts in many cases of accident which were not originally within the scope of that jurisdiction. But, where courts of equity have once assumed to afford relief against an accident which was not originally cognizable in a court of law, no future assumption of jurisdiction by such a court can deprive a court of equity of its jurisdiction. Nor will authority conferred by statute on such courts to afford relief in similar cases of accident affect such equitable jurisdiction.[7] This principle is in conformity with that other fundamental principle that,

bound to do so both in law and equity, notwithstanding the injury of the premises by inevitable accident, see Bullock v. Dommitt, 6 Term R. 650; Navigation Co. v. Pritchard, Id. 750; Pym v. Blackburn, 3 Ves. 34, 38. Covenants to pay rent unless proper exceptions are made are enforceable regardless of accident to the leasehold. Story, Eq. Jur. § 102; Wood v. Hubbell, 10 N. Y. 479; Fowler v. Nott, 6 Mass. 63; Phillips v. Stevens, 16 Mass. 238; Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582,—where a contract for the sale of a house and land was enforced, although the house had burned down. And see McKechnie v. Sterling, 48 Barb. (N. Y.) 330, 335; Smith v. McCluskey, 45 Barb. (N. Y.) 610, 613. 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, 17 L. R. A. 555, 36 Am. St. Rep. 642.

[5] Penalties and Forfeitures, ante, p. 95.

[6] 3 Bl. Comm. 431.

[7] Case v. Fishback, 10 B. Mon. (Ky.) 40; Hall v. Hall, 43 Ala. 488, 94 Am. Dec. 703.

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where the equitable jurisdiction has once been established with respect to any subject-matter, it is not destroyed or abridged by a jurisdiction subsequently acquired by courts of law to give the same or other adequate relief under the same circumstances. The statement that relief against accident will not be afforded where there is an adequate remedy at law must be understood to mean an adequate remedy, which could not be originally afforded by a court of law; that is, at the time when the equitable jurisdiction was first established.

CASES IN WHICH RELIEF WILL BE AFFORDED.

109. Courts of equity will afford relief

(a) Where deeds or other instruments are lost or destroyed.

(b) Where powers are imperfectly executed.

(c) Where payments are erroneously made.

(d) Against judgments at law, and in other miscellaneous cases which cannot be conveniently grouped.

Lost or Destroyed Deeds or Other Instruments.

Courts of equity have, from an early time, exercised jurisdiction of suits brought to recover the amount due on lost or destroyed bonds or other instruments under seal, where no remedy exists at law, or no remedy which is adequate, and adapted to the circumstances of the case. The reasons for the exercise of the equitable jurisdiction in such cases is found in the fact that in a court of law profert of the sealed instrument was required, which was impossible when the instrument was lost. Courts of equity never required this formality. The abolishment of the common-law requisite of a profert has not theoretically affected the equitable jurisdiction,[1] although courts of law now entertain jurisdiction if an allegation of the loss by accident be stated in the pleading.[2] Another reason may be found

§ 109. [1] Pom. Eq. Jur. § 831.

[2] Read v. Brookman, 3 Term R. 151; Duffield v. Elwes, 1 Bligh (N. S.) 543; Almy v. Reed, 10 Cush. (Mass.) 421.

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in the fact that only a court of equity could exact an indemnity bond from the plaintiff to protect the defendant from future liability.[3] An indemnity of the defendant is a necessary feature of actions brought to recover on lost negotiable instruments. An offer of indemnity is generally required, but without it a recovery may be had, and the judgment recovered will be conditioned upon the defendant being fully protected by an indemnity bond.[4] It is this ability of courts of equity to protect the defendant which made possible the exercise of its jurisdiction in actions to recover on lost negotiable instruments. No such protection was ever afforded by the common-law courts, and while, in such cases, actions might be maintained therein, the remedy was not adequate or suitable.[5] This jurisdiction of courts of equity is concurrent, and is not now subject to question or doubt. Courts of law in most of our states have express statutory authority to render judgments in such cases which would be in every way sufficient to meet the requirements.

Defective Execution of Powers.

Equity will relieve where it is shown that a power is imperfectly executed because of accident or mistake; but such defect must be a formal one, and not of the very essence of the power.[6] Equity will not interfere where the power is not executed at all, unless the power is coupled with a

[3] 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, 11 Am. St. Rep. 351; Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 294; Lawrence v. Lawrence, 42 N. H. 109.

[4] Walmsley v. Child, 1 Ves. Sr. 341, 344, 345; Savannah Nat. Bank v. Haskins, 101 Mass. 370, 3 Am. Rep. 373; City of Bloomington v. Smith, 123 Ind. 41, 23 N. E. 972, 18 Am. St. Rep. 310.

[5] Other American cases involving the question of jurisdiction in actions to recover on lost negotiable instruments are Patton v. Campbell, 70 Ill. 72; Force v. City of Elizabeth, 27 N. J. Eq. 408; Donaldson v. Williams, 50 Mo. 407; Bohart v. Chamberlain, 99 Mo. 622, 13 S. W. 85; Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 294; Thornton v. Stewart, 7 Leigh (Va.) 128; Griffin v. Fries, 23 Fla. 173, 2 South. 266, 11 Am. St. Rep. 351; Hickman v. Painter, 11 W. Va. 386; Lyttle v. Cozad, 21 W. Va. 183; Hardeman v. Battersby, 53 Ga. 36; Lawrence v. Lawrence, 42 N. H. 109.

[6] Smith, Man. Eq. Jur. (15th Ed.) p. 32.

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trust.[7] Where there is a clear manifestation in writing of an intention to execute a power, it will be deemed a defective execution, and equity will relieve.[8] But equity will only interpose in favor of purchasers (including mortgagees and lessees), creditors, wives, children, and charities; but not in favor of the donee of the power, husbands, illegitimate children, distant relatives, or mere volunteers.[9]

Erroneous Payments.

A court of equity will relieve an executor or administrator from many liabilities resulting from accident, where he has acted in good faith and with due caution; as, where executors or administrators have paid debts and legacies in full, believing that the estate is sufficient for all purposes, and it afterwards turns out that there is a deficiency of assets, equity will intervene to grant such remedies as will relieve them from legal liability.[10] And, where certain legatees have been paid in full, equity will interpose in favor of the unpaid legatees against the legatees who are paid, to compel them to refund in proportion, if there was an original

[7] Warneford v. Thompson, 3 Ves. 513; Brown v. Higgs, 8 Ves. 574; Withers v. Yeadon, 1 Rich. Eq. (S. C.) 324; Norcum v. D'Oench, 17 Mo. 98.

[8] Sugd. Powers, 549; Snell, Eq. 362; Smith, Eq. (15th Ed.) 32; Mitchell v. Denson, 29 Ala. 327, 65 Am. Dec. 403; Barr v. Hatch, 3 Ohio, 527.

[9] Fothergill v. Fothergill, 1 Freem. 257; Barker v. Hill, 2 Ch. R. 218; Reid v. Shergold, 10 Ves. 370; Pollard v. Greenvil, 1 Ch. Cas. 10; Wilkes v. Holmes, 9 Mod. 485; Clifford v. Earl of Burlington, 2 Vern. 379; Sarth v. Blanfrey, Gilb. Eq. 166; Bruce v. Bruce, L. R. 11 Eq. 371; Innes v. Sayer, 7 Hare, 377; Attorney General v. Sibthorp, 2 Russ. & M. 107; Ellison v. Ellison, 6 Ves. 656; Watt v. Watt, 3 Ves. 244; Tudor v. Anson, 2 Ves. Sr. 582; Watts v. Bullas, 1 P. Wms. 60; Smith v. Ashton, 1 Freem. 309; Beatty v. Clark, 20 Cal. 11; Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175; Hout v. Hout, 20 Ohio St. 119; Dennison v. Goehring, 7 Pa. 175; Huss v. Morris, 63 Pa. 367; Freeman v. Eacho, 79 Va. 43. As to the general doctrine, see Long v. Hewitt, 44 Iowa, 363; Bakewell v. Ogden, 2 Bush (Ky.) 265; Stewart v. Stokes, 33 Ala. 494, 73 Am. Dec. 429; Kearney v. Vaughan, 50 Mo. 284; Bradish v. Gibbs, 3 Johns. Ch. (N. Y.) 523; Freeman v. Eacho, 79 Va. 43; American Freehold Land Mortg. Co. of London v. Walker (C. C.) 31 Fed. 103.

[10] Edwards v. Freeman, 2 P. Wms. 447; Hawkins v. Day, Amb. 160; Chamberlaine v. Chamberlaine, 1 Freem. 141; Story, Eq. Jur. § 90 et seq.

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deficiency of assets, and the executor is insolvent.[11] Other cases of the intervention of courts of equity to relieve an executor are found where the goods of the testator have been stolen without negligence on the part of his executor,[12] or have been destroyed or damaged by fire or otherwise,[13] and where 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.[14]

Relief against Judgments.

Many of the cases in which relief has been granted against a judgment because of accident have related to proceedings subsequent to the entry thereof, and the accident complained of has been one which destroyed the remedy by way of appeal or motion for a new trial. It has been almost universally held in such cases that such an accident, whereby a party has been deprived of his remedy without any lack of diligence on his part, warrants the interference of a court of equity.[15] But in such cases the party losing his right to present his appeal or his motion for a new trial by some accident must show, in addition to establishing the loss and the accident, that, but for the accident, he would have escaped from the judgment.[16] And, generally, where a party has been prevented from setting up a good defense on the merits, without negligence on his part, and a judgment is rendered against him, equity will enjoin further proceedings to enforce the judgment, or will set it aside, and order a new trial on the merits.[17]

[11] Story, Eq. Jur. § 92, citing Edwards v. Freeman, 2 P. Wms. 447; Moore v. Moore, 2 Ves. Sr. 600; Walcott v. Hall, 2 Brown, Ch. 305.

[12] Jones v. Lewis, 2 Ves. Sr. 240.

[13] Clough v. Bond, 3 Mylne & C. 490, 496.

[14] Pooley v. Ray, 1 P. Wms. 355.

[15] Leigh v. Armor, 35 Ark. 123; Kansas & A. V. Ry. Co. v. Fitzhugh, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211; Picket v. Morris, 2 Wash. (Va.) 255; Knifong v. Hendricks, 2 Grat. (Va.) 212, 44 Am. Dec. 385.

[16] Little Rock & Ft. S. Ry. Co. v. Wells, 61 Ark. 354, 33 S. W. 208, 30 L. R. A. 560, 54 Am. St. Rep. 216; Galbraith v. Barnard, 21 Or. 67, 26 Pac. 1110; Overton v. Blum, 50 Tex. 417; Ratto v. Levy, 63 Tex. 278.

[17] Thomason v. Fannin, 54 Ga. 361; Grubb v. Kolb, 55 Ga. 630; Darling v. Mayor, etc., 51 Md. 1; Robinson v. Wheeler, 51 N. H.

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Miscellaneous Cases.

There are many other cases in which equity will interfere to relieve a person from the result of an accident which cannot be classified under either of the foregoing heads. But the instances cited in which such relief will be afforded seem sufficient to illustrate the application of the several rules applicable to cases of accident.

884; Cairo & F. R. Co. v. Titus, 27 N. J. Eq. 102; Herbert v. Herbert, 49 N. J. Eq. 70, 22 Atl. 789; New York & H. R. Co. v. Haws, 56 N. Y. 175; Barber v. Rukeyser, 89 Wis. 590.

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CHAPTER XII.

GROUNDS OF EQUITABLE RELIEF—MISTAKE.

110. Definition.
111. Classification.
112. Mistake of Law.
113. Mistake of Fact.
114. Classification.
115. When Mutual or Fundamental.
116. Of One of the Parties as to Subject-Matter.
117. Mistake of Expression.
118. Restoration of Parties.

DEFINITION.

110. Mistake may be said to exist, in a legal sense, where a person, acting upon some erroneous conviction, either of law or of fact, executes an instrument, or does an act, which, but for that erroneous conviction, he would not have executed or done.[1]

In distinguishing between accident and mistake, Prof. Pomeroy calls attention to the fact that an accident is an unexpected occurrence external to the party affected by it, which prevents the performance of an act which the party is bound to do, and he is thereby subjected to a liability; while a mistake is internal. "It is a mental condition, a

§ 110. [1] Haynes, Eq. p. 80. The definitions which have been given by leading text writers and judges are not always appropriate or satisfactory. Judge Story says: "Mistake is some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence." Eq. Jur. § 110. This definition has been followed by Snell (Eq. p. 367). Pomeroy justly criticises this definition as defining the consequences of mistake, rather than the fact itself. He defines mistake 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."

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conception, a conviction of the understanding,—erroneous, indeed, but none the less a conviction,—which influences the will, and leads to some outward physical manifestation." [2]

Equitable Jurisdiction.

Mistake has, from the beginning of the exercise of equitable jurisdiction, been a favorite ground for the award of equitable remedies. There are many remedies based on mistake, originally administered by courts of equity, which are now afforded by courts of law. But the relief afforded at law was and is partial, and not always sufficient to meet the exigencies of every case. For instance, in the case of an instrument executed through mistake, the only relief that could be afforded in a court of law was to declare the instrument a nullity, and thereby the rights of the parties might be affected; but in equity the instrument itself could be reformed, and relief granted on the reformed instrument as if it was originally correct.[3]

Except in cases of specific performance, the effect of mistake on a contract, unaccompanied by fraud or misrepresentation, came chiefly before courts of law.[4] The earlier theory of equity seems to have been that mistake, whether of fact or of law, was a ground for relief in all cases.[5] Such, however, is not now the law. It is an almost universal rule that a person 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 an agreement, the law will hold that he has agreed. As a rule, a person cannot avoid his contract by showing that he has made a mistake.[6] There

[2] Pom. Eq. Jur. § 839.

[3] Bisp. Eq. § 184.

[4] Pol. Cont. (5th Ed.) p. 444.

[5] 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."

[6] Anson, Cont. p. 122; Pol. Cont. (5th Ed.) p. 392.

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are exceptions to this rule, both at law and in equity. When mistake is a ground for relief in equity is the subject of the following discussion.

CLASSIFICATION.

111. Mistake may be classified as

(a) Of law, or

(b) Of fact.

David Dudley Field, in his proposed Civil Code of New York, defined mistake of law and mistake of fact as follows:

"Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consists in (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed." [1]

"Mistake of law constitutes a mistake only when it arises from (1) a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or (2) a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify." [2]

§ 111. [1] Field's Proposed Civ. Code N. Y. § 762. And see Civ. Code Cal. § 1577. The Field Code cites, among other cases substantiating the definition quoted in the text, the following: U. S. Bank v. Bank, 10 Wheat. 333, 6 L. Ed. 334; Kelly v. Solari, 9 Mees. & W. 54; McDaniels v. Bank, 29 Vt. 230, 238, 70 Am. Dec. 406; Elwell v. Chamberlain, 4 Bosw. (N. Y.) 320; Briggs v. Vanderbilt, 19 Barb. (N. Y.) 222; Rheel v. Hicks, 25 N. Y. 289; Ketchum v. Stevens, 19 N. Y. 499, 502; Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120; Martin v. McCormick, 8 N. Y. 331, 335; Wheadon v. Olds, 20 Wend. (N. Y.) 174.

[2] Field's Proposed Civ. Code N. Y. § 763; Civ. Code Cal. § 1578. The New York Code cites Many v. Iron Co., 9 Palge (N. Y.) 188; Hall v. Reed, 2 Barb. Ch. (N. Y.) 500; Pitcher v. Plank-Road Co., 10 Barb. (N. Y.) 436.

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MISTAKE OF LAW.

112. As a general rule, equity will not relieve on the ground of a mistake of law; but, where there are special circumstances giving rise to an independent equity on behalf of the mistaken party, equity will intervene.

It is a well-known and firmly-established maxim, both in law and equity, that ignorance of the law is no excuse to any person, either for breach or omission of a duty,—"Ignorantia legis neminem excusat." The rule 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 the ignorance might not be carried. It would be urged in almost every case." [1] This rule does not extend, however, to the laws of foreign countries or states,[2] or to private statutes; [3] hence mistakes as to them are treated as mistakes of fact.

When Relief will be Granted.

There are qualifications of this general rule, which have given rise to the equitable jurisdiction to relieve on the ground of mistake of law. Many cases can be cited directly opposed to the existence of this jurisdiction.[4] But there is a long line of specific authorities, most of them undoubtedly correct, in which relief for mistake of law has either been granted or admitted to be a proper head of equity jurisdiction. All of these cases will, upon examination, be found to rest, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an ad-

§ 112. [1] Bilbie 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.

[2] Leslie v. Baillie, 2 Younge & C. Ch. 91; McCormick v. Garnett, 5 De Gex, M. & G. 278; Haven v. Foster, 9 Pick. (Mass.) 112; Morgan v. Bell, 3 Wash. St. 576, 28 Pac. 925, 16 L. R. A. 614.

[3] Earl of Pomfret v. Lord Windsor, 2 Ves. Sr. 472, 480; Cooper v. Phibbs, L. R. 2 H. L. 149, 170.

[4] Peters v. Florence, 38 Pa. 194; Goltra v. Sanasack, 53 Ill. 456; Zollman v. Moore, 21 Grat. (Va.) 313; Brown v. Armistead, 6 Rand. (Va.) 594.

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mixture of other ingredients going to establish misrepresentation, imposition, abuse of confidence, undue influence, mental imbecility, or that sort of surprise which equity uniformly regards as a just foundation for relief.[5]

In determining the question whether relief may be had in equity because of a mistake of law it is important to ascertain the nature of the mistake. The mistake may be one of the general rules of law governing a person's relations and duties to the state and to his fellows, which affect the particular obligation or contract from which he seeks to be relieved, but which are not especially applicable thereto. Among such laws are those making certain acts criminal regulating the acquisition and disposition of property and controlling the execution of agreements. There is scarcely an exception, in such cases, to the general rule that "ignorantia juris non excusat." On the other hand, the mistake may be one occasioned by the ignorance or error of a particular person with respect to his own legal rights and interests which are affected by, or which result from, a certain transaction in which he is engaged.[6] Applications for relief based upon mistake generally fall within this latter class. It has, in fact, been stated by an able English judge that in the legal maxim expressed as "Ignorantia juris haud excusat" "the word 'jus' is used in the sense of denoting general law,—the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right, that maxim has no application."[7] This limited application of the maxim is not warranted by the great weight of judicial authority. It would seem that, unless there are attendant circumstances, such as misrepresentation, concealment, undue influence, or other inequitable conduct on the part of one of the parties to the contract, the mistaken party cannot be relieved from his contractual obligation because he was ignorant of the legal effects of the contract or of his rights thereunder.

There can be no relief from the obligation of a contract because of a mistake of one of the parties as to the legal

[5] Snell, Eq. p. 368.

[6] Pom. Eq. Jur. § 841.

[7] Cooper v. Phibbs, L. R. 2 H. L. 149, 170, per Lord Westbury. See, also, Keener, Eq. Cas. p. 43.

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effects of certain words used therein.[8] And where parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension and the insufficiency of such security in consequence of a subsequent event, not foreseen, perhaps, or thought of, direct a new security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument which was finally agreed upon.[9] The general rule may be stated to be that, where a contract is made by parties having knowledge of the facts, and with no inequitable incidents connected therewith, equity will not intervene to protect either party who may have been mistaken as to the legal effect, meaning, or scope of the contract.[10]

But the rule that equity will not grant relief where the mistake is one of law is, at best, a hard one, and applies only where the mistake is simply one of law, and the party had full knowledge of all the material facts and circumstances. All the cases which deny a remedy for a mere mistake of law on one side are careful to add the qualification that there must be no improper conduct on the other.[11] Where

[8] Powell v. Smith, L. R. 14 Eq. 85, 90.

[9] Hunt v. Rousmanier's Adm'rs, 8 Wheat. 174, 5 L. Ed. 589; Id., 1 Pet. 1, 7 L. Ed. 27; 3 Keener, Eq. Cas. 6, 20, note.

[10] Rogers v. Ingham, 3 Ch. Div. 351, 3 Keener, Eq. Cas. 75; Larkins v. Biddle, 21 Ala. 252; Kelly v. Turner, 74 Ala. 513, 519, 3 Keener, Eq. Cas. 92; Wood v. Price, 46 Ill. 439; Nelson v. Davis, 40 Ind. 366; Heavenridge v. Mondy, 49 Ind. 434; Glenn v. Statler, 42 Iowa, 107; Moorman v. Collier, 32 Iowa, 138; Molony v. Rourke, 100 Mass. 190; Stockbridge Iron Co. v. Iron Co., 107 Mass. 290, 319, 3 Keener, Eq. Cas. 54; Smith v. Hitchcock, 130 Mass. 570; Norris v. Larabee, 58 Me. 260; Martin v. Hamlin, 18 Mich. 354; Kennard v. George, 44 N. H. 440; Wintermute v. Snyder, 3 N. J. Eq. 489; Bentley v. Whittemore, 18 N. J. Eq. 366; Hawralty v. Warren, Id. 124, 90 Am. Dec. 613; Leavitt v. Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Lanning v. Carpenter, 48 N. Y. 408; Pitcher v. Hennessey, Id. 415, 423, 3 Keener, Eq. Cas. 65; Weed v. Weed, 94 N. Y. 243; Born v. Schrenkeisen, 110 N. Y. 55, 17 N. E. 339; Clayton v. Freet, 10 Ohio St. 544; Evants v. Strode's Adm'r, 11 Ohio, 480, 38 Am. Dec. 744; Huss v. Morris, 63 Pa. 367; Light v. Light, 21 Pa. 407; Mellish v. Robertson, 25 Vt. 603.

[11] Haviland v. Willets, 141 N. Y. 35, 50, 35 N. E. 958, 3 Keener, Eq. Cas. 144, citing Silliman v. Eing, 7 Hill (N. Y.) 159; Flynn v.

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relief has been granted on the ground of mistake of law, it has generally appeared either that there has been a marked disparity in the position or intelligence of the parties, so that they have not been on equal terms, or that the party obtaining the property persuaded the other to part with it; so that there has been "undue influence" on the one side and "undue confidence" on the other.[12] It may be stated as a well-established rule that, where there is a mistake of law on one side, and either positive fraud on the other, or inequitable, unfair, and deceptive conduct, which contends to confirm the mistake and conceal the truth, it is the right and duty of equity to award relief.[13]

Reformation of Instruments Because of Mistake of Law.

There is now no doubt as to the right of a party to obtain in equity a reformation of an instrument for a mistake of law.[14] As has been held in New York, where parties, to carry out their contract, agree to use an instrument which, by their mistake of the law, will not effectuate their intention, equity will not reform the instrument or substitute another; but where parties intending to reduce a parol agreement to writing, and because they are ignorant of the force of language, and misunderstand the meaning of the terms used, make a contract different from that intended, equity will grant relief by reforming the instrument, and compelling the parties to execute and perform their agreement as they made it.[15] In other words, if in the latter

Hurd, 118 N. Y. 26, 22 N. E. 1109; Vanderbeck v. City of Rochester, 122 N. Y. 285, 25 N. E. 408.

[12] Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556.

[13] Haviland v. Willets, 141 N. Y. 35, 50, 35 N. E. 958, 3 Keener, Eq. Cas. 144; Greene v. Smith, 160 N. Y. 533, 55 N. E. 210; Boggs v. Hargrave, 16 Cal. 559, 76 Am. Dec. 507; Sands v. Sands, 112 Ill. 225; Hollingsworth v. Stone, 90 Ind. 244; Appeal of Whelen, 70 Pa. 410.

[14] Snell v. Insurance Co., 98 U. S. 85, 25 L. Ed. 52, 3 Keener, Eq. Cas. 80; Walden v. Skinner, 101 U. S. 577, 583, 25 L. Ed. 963; Larkins v. Biddle, 21 Ala. 252; Stedwell v. Anderson, 21 Conn. 139; Remington v. Higgins, 54 Cal. 620; Cooke v. Husbands, 11 Md. 492; Stover v. Poole, 67 Me. 217, 223; McMillan v. Paper Co., 29 N. J. Eq. 610; Kennard v. George, 44 N. H. 440, 446; Pitcher v. Hennessey, 48 N. Y. 415, 3 Keener, Eq. Cas. 65; Benson v. Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816.

[15] Pitcher v. Hennessey, 48 N. Y. 415, 3 Keener, Eq. Cas. 65.

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case the written instrument fails to express the meaning of the parties thereto, and does not carry out their intentions, relief may be had in equity, regardless of the mistake of one or both of the parties as to the legal effects, scope, and meaning of the terms contained in the instrument.[16]

There are cases which seem to indicate that there can be no relief in equity against a mistake of one or both the parties to an instrument as to the legal meaning of words contained therein, where the parties were aware of the language used, and were not in any way deceived, misled, or otherwise imposed upon, or subjected to any undue or improper influence. In an Illinois case the court refused to permit the reformation of a deed by inserting the word "children" for the word "heirs," although it was apparent that the grantor intended to use the word "children." [17] This case, and the others cited in the footnote, are not in direct contravention of the rule first alluded to. In the cases upon which the rule as first stated is based there was a failure to express in legal language the intent of the parties as verbally agreed upon. In the latter class of cases the instruments in question were not based upon prior oral agreements. Judge Story states the rule thus: "Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or as to law, does not fulfill that intention, or violates it, equity will correct the mistake, so as to produce

And see Lanning v. Carpenter, 48 N. Y. 408; Born v. Schrenkeisen, 110 N. Y. 55, 17 N. E. 339.

[16] Hunt v. Rousmanier's Adm'rs, 8 Wheat. 174, 5 L. Ed. 589, 3 Keener, Eq. Cas. 6; Id., 1 Pet. 1, 7 L. Ed. 27; Stockbridge Iron Co. v. Iron Co., 107 Mass. 290, 3 Keener, Eq. Cas. 54; Blakeman v. Blakeman, 39 Conn. 320, 3 Keener, Eq. Cas. 72. When parties enter into a written agreement, and the instrument fails, through mistake of law or fact, to express their true agreement, or omits stipulations agreed upon, or contains terms contrary to the intention of the parties, equity will reform the writing, making it conform to the agreement entered into by the parties. Stafford v. Fetters, 55 Iowa, 484, 8 N. W. 322, 3 Keener, Eq. Cas. 86.

[17] Fowler v. Black, 136 Ill. 363, 26 N. E. 596, 3 Keener, Eq. Cas. 100. And see Sibert v. McAvoy, 15 Ill. 106; Goltra v. Sanasack, 53 Ill. 456; Sands v. Sands, 112 Ill. 225; Bonney v. Stoughton, 122 Ill. 536, 13 N. E. 833.

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a conformity to the intention." [18] Another general rule applicable to the reformation of a written instrument on the ground of a mistake of law is as follows: A mistake which will warrant a court of equity in reforming a written contract must be a mistake made by both parties to the agreement, or it must be a mistake of one party, by which his intentions have failed of correct expression, and there must be fraud in the other party in taking advantage of the mistake, and obtaining a contract with the knowledge that the one dealing with him is in error as to what are its terms.[19]

Mistake as to Existing Legal Rights.

A mistake as to the legal effects of a transaction is not a ground for equitable relief, unless there are accompanying incidents which entitle the mistaken party to equitable protection. But where a party is possessed of certain antecedent or existing legal rights or interests which are either unknown to him at the time of entering into a transaction, or he is mistaken as to the effect such transaction will have upon such rights or interests, he may be granted equitable relief from the obligations assumed by such transaction in ignorance of such rights or interests, or in mistake of the effect thereon. A mistake as to such legal rights and interests has frequently been treated as a mistake of fact, and upon this theory courts of equity have most frequently intervened.[20] Mr. Pomeroy states the rule as follows:

[18] Story, Eq. Jur. § 115. And see Lee v. Percival, 85 Iowa, 639, 52 N. W. 543, 3 Keener, Eq. Cas. 135; Dinwiddie v. Self, 145 Ill. 290, 33 N. E. 892, 3 Keener, Eq. Cas. 137; Park Bros. & Co. v. Blodgett & Clapp Co., 64 Conn. 28, 29 Atl. 133, 3 Keener, Eq. Cas. 150.

[19] Bryce v. Insurance Co., 55 N. Y. 243, 14 Am. Rep. 249; Winans v. Huyck, 71 Iowa, 459, 32 N. W. 422; Marshall v. Westrope, 98 Iowa, 324, 67 N. W. 257, 3 Keener, Eq. Cas. 166.

[20] 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

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"Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property, or contract, or personal status, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." [21]

Compromises not Affected by Mistake of Law.

If a compromise be made in case of a dispute between parties as to their legal rights to the property in question, a court of equity will not interfere, although one of the parties enters into the compromise with an erroneous conception as to his legal rights and interests. Such compromises are favored by courts of equity, and they will not be disturbed, in the absence of conduct otherwise inequitable.[22]

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; Blakeman 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. St. 576, 28 Pac. 925, 16 L. R. A. 614.

[21] Pom. Eq. Jur. § 849. And see Hearst v. Pujol, 44 Cal. 230; Chestnut Hill Reservoir Co. v. Chase, 14 Conn. 123; Carley v. Lewis, 24 Ind. 23; Fly v. Brooks, 64 Ind. 50; Bonney v. Stoughton, 122 Ill. 536, 13 N. E. 833; Kornegay v. Everett, 99 N. C. 30, 5 S. E. 418; Skillman v. Teeple, 1 N. J. Eq. 232; Layton v. Chaplin, 1 Edw. Ch. (N. Y.) 467; Whelen's Appeal, 70 Pa. 410.

[22] Pickering v. Pickering, 2 Beav. 56; Naylor v. Winch, 1 Sim. & S. 564; Miles v. Estate Co., 32 Ch. Div. 266; Gormly v. Gormly, 130 Pa. 467, 18 Atl. 727; Hall v. Wheeler, 37 Minn. 522, 35 N. W. 377;

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And when family compromises or agreements have been entered into without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false, each of the parties investigating the subject for himself, and each communicating to the other all he knows and all the information which he has received on the question, a court of equity will not disturb the quiet which is the consequence of that agreement, although the parties may have greatly misunderstood their position and mistaken their rights.[23] In all such compromises there must be not only good faith and honest intention, but full disclosure; and, without full disclosure, honest intention is not sufficient.[24] If these requisites exist, it is not indispensable that the question settled be a doubtful one, if the parties believed it to be actually doubtful.[25] All these principles will apply whether the doubtful points with reference to which the compromise has been made are matters of fact or of law.[26]

Recovery of Money Paid under Mistake of Law.

It is a rule of law that money paid with full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back.

Bell v. Lawrence's Adm'r, 51 Ala. 160; Dailey v. King, 79 Mich. 568, 44 N. W. 959; Allen v. Galloway (C. C.) 30 Fed. 466.

[23] Snell, Eq. p. 370; Gordon v. Gordon, 3 Swanst. 463; Shartel's Appeal, 64 Pa. 25. 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 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."

[24] Gordon v. Gordon, 3 Swanst. 400; De Cordova v. De Cordova, 4 App. Cas. 692.

[25] Lucy's Case, 4 De Gex, M. & G. 356, 3 Keener, Eq. Cas. 14.

[26] Neale v. Neale, 1 Keen, 672; Westby v. Westby, 2 Dru. & War. 502. The following American cases are cited in connection with the general rule as to the effect of compromises of disputed questions: Bell v. Lawrence's Adm'r, 51 Ala. 160; Wells v. Neff, 14 Or. 66, 12 Pac. 84, 88; Hall v. Wheeler, 37 Minn. 522, 35 N. W. 377; Shartel's Appeal, 64 Pa. 25; Wistar's Appeal, 80 Pa. 484; Gormly v. Gormly, 130 Pa. 467, 18 Atl. 727; Smith v. Tanner, 32 S. C. 259, 10 S. E. 1008; Gilliam v. Alford, 69 Tex. 267, 6 S. W. 757.

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And courts of equity have always recognized and followed the rule of law, unless there are present equitable grounds which make it inequitable that the party who received the money should retain it.[27]

MISTAKE OF FACT.

113. An act done or a contract made under a mistake, or in ignorance of a material fact, is voidable, and relievable in equity.[1]

The power of a court of equity to relieve against a mistake of fact has been long and frequently exercised.[2] But equity does not attempt to interfere in all cases where the parties have acted through ignorance, mistake, or misapprehension. It does not require that the parties to a contract should stand upon the same footing as to knowledge or information. Where one has full and equal opportunity with the other to ascertain the facts, and no fraud is practiced on him, he must abide by his contract; and each of the parties to the contract is entitled to the benefit of his own sagacity.[3]

A different presumption exists in the case of a mistake of fact than in the case of a mistake of law. Every man

[27] Rogers v. Ingham, 3 Ch. Div. 351, 3 Keener, Eq. Cas. 75; Bilbie v. Lumley, 2 East, 469; Milwaukee & M. R. Co. v. Soutter, 13 Wall. 517, 524, 20 L. Ed. 543; Haven v. Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166, 10 Am. Dec. 316; Beard v. Beard, 25 W. Va. 486, 52 Am. Rep. 219; Erkens v. Nicolin, 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. And a different rule seems to exist in Connecticut. Northrop's Ex'rs v. Graves, 19 Conn. 548, 50 Am. Dec. 264; Mansfield v. Lynch, 59 Conn. 320, 22 Atl. 313, 12 L. R. A. 285.

§ 113. [1] Story, Eq. Jur. § 140; Snell, Eq. p. 372.

[2] Williams v. U. S., 138 U. S. 517, 11 Sup. Ct. 457, 34 L. Ed. 1026; Riegel v. Insurance Co., 140 Pa. 203, 21 Atl. 392, 11 L. R. A. 857.

[3] Stettheimer v. Killip, 75 N. Y. 282, 287; Etting v. Bank, 11 Wheat. 59, 6 L. Ed. 419.

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of reasonable intelligence is presumed to know the law, and to act upon the rights which it confers or supports. When he knows all the facts, it is culpable negligence in him to do an act or to make a contract, and then set up his ignorance of the law as a defense. But no person can be presumed to be acquainted with all matters of fact. Neither is it possible, by any degree of diligence, in all cases to acquire that knowledge; and therefore an ignorance of facts does not impart culpable negligence.[4]

SAME—CLASSIFICATION.

114. Mistake of fact may be

(1) Mutual or fundamental, in which case it prevents any real contract between the parties.

(2) Of one of the parties as to the subject-matter.

(3) Of expression of the intention of the parties in an instrument.

It is not intended by this classification to cover all possible cases in which relief may be had on the ground of a mistake of fact. Such mistakes are of great variety, and it is not possible to present a classification which will compose all cases which may arise. The above classification will only be useful in considering the most important of the principles which are applied in cases involving mistakes of fact, and in determining many of the instances in which equitable relief can be properly afforded.

SAME—WHEN MUTUAL OR FUNDAMENTAL.

115. If the mistake of fact is mutual or fundamental, preventing the existence of a valid contract between the parties, relief may be had both at law and in equity.

A valid contract is based upon a meeting of the minds of the parties thereto; and if, owing to some error on one

[4] Story, Eq. Jur. § 140.

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or both sides, the parties never had a common intention, no valid contract could have been formed. Errors of this kind prevent a contract from being binding both at law and in equity.

Mistake as to Nature of Transaction.

There may be a fundamental mistake as to the nature of the transaction itself; but this is of rare occurrence, for men are not apt to enter into contracts, the nature of which they do not understand. A case like this must necessarily arise from the misrepresentation of a third person; for, if it proceeds from the other party to the contract, the ground of equitable relief would be fraud or misrepresentation, 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.[1] If certain facts are assumed by both parties to a contract as its basis, and it subsequently appears that such facts did not exist, the contract is inoperative.[2]

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.[3] 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, as between the parties, be canceled in equity.[4] This rule does not, however, apply where the personality of the parties is quite immate-

§ 115. [1] 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 of 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, 37 Am. St. Rep. 494. See, also, Cannon v. Lindsey, 85 Ala. 198, 3 South. 676, 7 Am. St. Rep. 38.

[2] Fink v. Smith, 170 Pa. 124, 32 Atl. 566, 50 Am. St. Rep. 750; Ketchum v. Catlin, 21 Vt. 191; Daniel v. Mitchell, 1 Story, 172, Fed. Cas. No. 3,562; Miles v. Stevens, 3 Pa. 21, 45 Am. Dec. 621.

[3] Boulton v. Jones, 2 Hurl. & N. 564; Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9.

[4] Fitzmaurice v. Mosier, 116 Ind. 363, 16 N. E. 175, 19 N. E. 180, 9 Am. St. Rep. 854.

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rial, 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.[5] 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 both the vendor and purchaser were ignorant.[6] And where both the beneficiary of a life insurance policy and the company are ignorant 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 legal rights in the surrendered policy.[7] And where A. buys from B. an estate to which the latter is supposed to have an unquestionable title, and it turns out, upon due investigation of the facts (unknown at the time to both parties), that B. has no title (as if there be a nearer heir than B., who was supposed to be dead, but is in fact living), in such a case equity would relieve the purchaser and rescind the contract.[8] It makes no difference in the application of the principle that the subject-matter of the contract be known by both the parties to be liable to a contingency which may destroy it immediately; for, if the contingency has, unknown to the parties, already happened, the contract will be avoided as founded on a mutual mistake of a matter constituting the basis of the contract.[9] And 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

[5] Couturier v. Hastie, 5 H. L. Cas. 675; Allen v. Hammond, 11 Pet. 65, 9 L. Ed. 633.

[6] Emmerson's Case, 1 Ch. App. 433.

[7] Riegel v. Insurance Co., 153 Pa. 134, 25 Atl. 1070, 19 L. R. A. 166, 3 Keener, Eq. Cas. 191.

[8] Story, Eq. Jur. § 140.

[9] Story, Eq. Jur. § 143a; Bingham v. Bingham, 1 Ves. Sr. 126; Riegel v. Insurance Co., 153 Pa. 134, 25 Atl. 1070, 19 L. R. A. 166, 3 Keener, Eq. Cas. 191.

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the ancestor is in fact alive.[10] 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.

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,[11] or covered with standing pine,[12] 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.[13] In the foregoing class of cases the agreement is void only if the error is mutual.[14] Where testamentary trustees have taken

[10] Fleetwood v. Brown, 109 Ind. 567, 9 N. E. 852, 11 N. E. 779. 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.

[11] Fritzler v. Robinson, 70 Iowa, 500, 31 N. W. 61.

[12] Thwing v. Lumber Co., 40 Minn. 184, 41 N. W. 815.

[13] Barth v. Deuel, 11 Colo. 494, 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, 66 N. H. 136, 19 Atl. 1092, 9 L. R. A. 50, 49 Am. St. Rep. 593. 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 court-house 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, 3 Keener, Eq. Cas. 217. The sale of a blooded cow for a small sum, under the mutual belief 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, 11 Am. St. Rep. 531. See, also, Chapman v. Cole, 12 Gray (Mass.) 141; Allen v. Hammond, 11 Pet. 71, 9 L. Ed. 633.

[14] Smith v. Hughes, L. R. 6 Q. B. 597.

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from the executors a conveyance of certain real property at a fixed sum in satisfaction of a trust, and a latent defect in the building is subsequently discovered, which seriously impairs its value, the trustees can rescind the contract under which the conveyance was taken, and compel the executors to take the premises back.[15] 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—OF ONE OF THE PARTIES AS TO SUBJECT-MATTER.

116. A mistake of fact of one of the parties to a contract, as to the subject-matter thereof, cannot be relieved against in equity unless

(a) The fact is material to the transaction.

(b) The mistake is not due to the culpable negligence of the mistaken party.

(c) The fact is one which the party who has knowledge of it is bound to disclose.

Fact must be Material.

The fact concerning which either party is mistaken must be material to the transaction, and of sufficient importance to have influenced the mistaken party in entering into the agreement. If the mistake is made in reference to a fact which is a mere incident, and not a material part of the transaction, and if it is not shown that the conduct of the mistaken party was determined by such mistake, there is no ground for equitable relief.[1] It has accordingly been held that the mere fact that a purchaser of mineral land supposes an abandoned shaft to be located thereon is no

[15] Stevens v. Melcher, 152 N. Y. 551, 46 N. E. 965.

§ 116. [1] Penny v. Martin, 4 Johns. Ch. (N. Y.) 566; Dambmann v. Schulting, 75 N. Y. 55, 63, 3 Keener, Eq. Cas. 202; Stettheimer v. Killip, 75 N. Y. 282; Segur v. Tingley, 11 Conn. 134; Weaver v. Carter, 10 Leigh (Va.) 87; Trigg v. Read, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447; Paulison v. Van Iderstine, 28 N. J. Eq. 306; Henderson v. Dickey, 85 Mo. 120; Daggett v. Ayer, 65 N. H. 82, 18 Atl. 169.

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ground for rescission in equity, when it does not appear that this mistake induced him to purchase.[2] But where a contract was made for the sale of timber land under a mistaken belief by both parties that it contained a large amount of standing timber, and it afterwards appeared that the land had been denuded of its timber, and it was valueless for timber purposes, for which it had been bought, it was held that it was a proper case for equitable relief.[3]

Nor does the circumstance that one of the parties is mistaken as to a material fact entitle him to equitable relief in every instance. As we shall hereafter see, the mistake must not be due to his own negligence. So, also, if parties 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.[4] The current of the modern cases, especially in England, 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.[5]

[2] Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798, 3 Keener, Eq. Cas. p. 175. In this case the court said: "A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that, but for the mistake, the complainant would not have assumed the obligation from which he seeks to be relieved."

[3] Thwing v. Lumber Co., 40 Minn. 184, 41 N. W. 815.

[4] Kerr, Fraud & M. 408.

[5] "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.

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Negligence of Mistaken Party.

Equity will not extend its aid to relieve a mistaken party who has been guilty of culpable negligence. Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may be fairly expected from a reasonable person.[6] Equity gives relief only to the vigilant, and not to the negligent; to those who have not been put upon their diligence to make an inquiry, and not to those who, being put on an inquiry, have chosen to omit all inquiry, which would have enabled them at once to correct the mistake, or to obviate all ill effects therefrom.[7] A party coming into a court of equity, and asking relief upon the ground of a mistake, must show that he has used due diligence and good faith to avoid the consequences of the mistake. He cannot obtain relief where his delay and omission of duty have caused irreparable mischief to the other party.[8] The degree of vigilance which is to be exercised must depend on the facts of each case. Where the act done by mistake is one calculated to induce others to take a line of conduct which will put them to loss if the mistake is corrected, it ought to be clear that the party asking for relief has been led into the mistake in spite of the employment of the highest degree of vigilance. Where, however, no one is injured by the mistake but the party himself, and no one has changed his position by reason of the act executed through the influence of the alleged mistake, there is

[6] Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798, 3 Keener, Eq. Cas. 174; Duke of Beaufort v. Neeld, 12 Clark & F. 248, 286; Conner v. Welch, 51 Wis. 431, 8 N. W. 260, 3 Keener, Eq. Cas. 372, where it was said: "It is infinitely better that men should be held to the consequences of their own culpable carelessness than that courts of equity should undertake to relieve therefrom. The rule requires reasonable caution and prudence in the transaction of business, and is deeply imbedded in our jurisprudence. It is within the principle and reason of caveat emptor. The abrogation of the rule would tend to encourage negligence, and to introduce uncertainty and confusion in all business transactions." And see Seeley v. Bacon (N. J. Ch.) 34 Atl. 139, 3 Keener, Eq. Cas. 387.

[7] Story, Eq. Jur. § 1381, note.

[8] Thomas v. Bartow, 48 N. Y. 193; Susquehanna Mut. Fire Ins. Co. v. Swank, 102 Pa. 17.

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no reason why the mistake should not be corrected, although the highest degree of diligence has not been exercised.[9]

This rule as to diligence only applies where it is the duty of the mistaken party to make the inquiry and to obtain the information; as, where an attorney drew a correct decree, and left it with the proper officer to be recorded, it was held that he was not guilty of negligence because he did not see that it was correctly entered, for he had a right to suppose that this would be done.[10]

Obligation to Disclose Knowledge.

There is no obligation to disclose knowledge in respect to the subject-matter of a contract if it appears that means of information are open to both parties. Nor is there an obligation resting on either party to disclose, if each is presumed to exercise his own skill and judgment, and there is no confidence reposed in one by the other. As has been said: "If parties are at arm's length, 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 reach of their ordinary diligence, and is under no obligation to draw the attention of the other to circumstances affecting the property, the subject-matter of the contract, although he may know him to be under a mistake with respect to them." [11] It is evident from this observation that a mistake of one of the parties to a contract is not relieved against unless the failure of the better informed party to disclose amounts to fraud. A party may, because of his position, fiduciary or otherwise, be under a duty to disclose; in which event, if there

[9] Seeley v. Bacon (N. J. Ch.) 34 Atl. 139, 3 Keener, Eq. Cas. 387. And see Simmons v. Palmer, 93 Va. 389, 25 S. E. 6, 3 Keener, Eq. Cas. 393.

[10] Snyder v. Ives, 42 Iowa, 157.

[11] 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, 3 Keener, Eq. Cas. 202; Bell v. Lawrence's Adm'r, 51 Ala. 160; Anthony v. Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657; Stover v. Mitchell, 45 Ill. 213; Mortimer v. Capper, 1 Browne, Ch. 158.

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is reason to believe that he knows more about the subject-matter than the other party, he will not be permitted by a court of equity to hold the latter to his agreement.[12]

MISTAKE OF EXPRESSION.

117. 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 correctly express the intention of the parties thereto. Such mistake, if mutual, will be rectified in equity.

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 previous agreement.[1]

Mistake must be Mutual to Admit of Reformation.

In all cases where a court of equity is asked to reform a written instrument because of mistake of fact, it must appear that the mistake is mutual.[2] A court of equity has no power to alter or reform an agreement made between parties, since this would be in truth a power to contract

[12] McHarry v. Irvin, 85 Ky. 322, 3 S. W. 374, 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.

§ 117. [1] Trusdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391; Keister v. Myers, 115 Ind. 312, 17 N. E. 161, 3 Keener, Eq. Cas. 314; Adams v. Wheeler, 122 Ind. 251, 23 N. E. 760; Knight v. Glasscock, 51 Ark. 390, 11 S. W. 580; Andrews v. Andrews, 81 Me. 337, 17 Atl. 166.

[2] Jackson v. Andrews, 59 N. Y. 244; Nevius v. Dunlap, 33 N. Y. 676; Mead v. Insurance Co., 64 N. Y. 453; Cooper v. Insurance Co., 50 Pa. 299, 88 Am. Dec. 544; Ludington v. Ford, 33 Mich. 123; Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Kornegay v. Everett, 99 N. C. 30, 5 S. E. 418.

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for them; but merely to correct the writing executed as evidence of the agreement, so as to make it express what the parties actually agreed to. It follows that the mistake which it may correct in such a writing must be mutual; that is, such a mistake in the drafting of the writing as makes it cover the intent or meaning of neither party to the contract.[3] To entitle the plaintiff to a reformation of the contract, he must prove that it was the intention of both parties to make a contract such as he seeks to have established, and that this intention was frustrated, either from some fraud, accident, or mutual mistake of the parties.[4] 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.[5] But where an instrument 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, cannot defeat a reformation by alleging that he knew that the instrument was different from the agreement.[6] It is not intended to state the principles relative to the reformation of a written instrument. Such principles, and a discussion thereof, will be contained in a separate chapter.[7]

When Contract has been Executed.

There is no doubt but that a court of equity has the same power to correct a mistake occurring in an executed contract as in an executory contract. The annulling or reforming of an executed transaction is an exercise of supreme judicial power, and should be exercised with great caution; and, when invoked on the ground of mistake, a plain case

[3] Diman v. Railroad Co., 5 R. I. 130, 3 Keener, Eq. Cas. 256.

[4] Jackson v. Andrews, 59 N. Y. 244. And see Kilmer v. Smith, 77 N. Y. 226, 33 Am. Rep. 613, 3 Keener, Eq. Cas. 303; Gould v. Emerson, 160 Mass. 438, 35 N. E. 1065, 3 Keener, Eq. Cas. 324.

[5] Roemer v. Conlon, 45 N. J. Eq. 234, 19 Atl. 664, Ellison v. Fox, 38 Minn. 454, 38 N. W. 358.

[6] Roszell v. Roszell, 109 Ind. 354, 10 N. E. 114; Gray v. Supreme Lodge, 118 Ind. 295, 297, 20 N. E. 833.

[7] Post, c. 24.

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should be made before it is exerted. These considerations address themselves to the sound discretion of the chancellor, and should not prevent the interference of equity when the proper occasion for interference arises. The granting or refusing of equitable relief on the ground of mistake may depend, to some extent, on the fact whether the contract is executed or executory. The court might very well refuse the specific performance of a contract for the sale of land, in respect to which a mistake is alleged, and leave the party to his remedy at law, when it would not interfere if the contract had been executed. But where, in the case of a deed conveying real estate, a mistake is admitted or proved, the fact that the title has passed, and the purchase money has been paid or secured, will not preclude the court from granting relief, on the mistake being discovered.[8]

Mistakes 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 and correct mistakes of expression. Clerical errors and omissions, which could be accurately corrected or supplied from the context of the instrument, and mere grammatical mistakes therein, can be remedied.[9] A mistake in the description of land in a deed may be corrected,[10] as may also a gross error in the amount conveyed, when not conveyed by name of lot, or by clear and understood bounds.[11]

The use of the term "more or less," following the enu-

[8] Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371, 3 Keener, Eq. Cas. 286; Wilson v. Randall, 67 N. Y. 338; Darling v. Osborne, 51 Vt. 148.

[9] Leach v. Micklen, 6 East, 486; Redfern v. Bryning, 6 Ch. Div. 133; Salt v. Pym, 28 Ch. Div. 155; Monmouth Park Ass'n v. Iron Works, 55 N. J. Law, 132, 26 Atl. 140; Ketchum v. Spurlock, 34 W. Va. 597, 12 S. E. 832.

[10] Dozier v. Mitchell, 65 Ala. 511; Turner v. Kelly, 70 Ala. 85, 3 Keener, Eq. Cas. 92; Mills v. Lockwood, 42 Ill. 111; Wilcox v. Lucas, 121 Mass. 21; Dwight v. Tyler, 49 Mich. 614, 14 N. W. 567; Fuchs v. Treat, 41 Wis. 404.

[11] Winston v. Browning, 61 Ala. 80; Noble v. Googins, 99 Mass. 231; Ladd v. Pleasants, 39 Tex. 415.

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meration of the number of acres to be conveyed, is not a fatal objection to interference, except where the discrepancy is slight. These words do not import a special engagement that the purchaser takes the risk of the quantity; and, while their presence may render it more difficult to prove such a mistake as will justify the interference of equity, they are not equivalent to a stipulation that the mistake, when ascertained, shall not be a ground of relief. Such words are intended to cover small discrepancies between the actual quantity and that stated in the contract or deed, and no inference of mistake would arise from a small discrepancy merely. But where the difference is material, and the mistake is confessed, or satisfactorily proved, there is no violation of principle in granting relief.[12]

And where there is a mistake in the location of the land, either in whole or in part, it may be rectified.[13] And a mortgage of land which, by mistake, does not cover all that was intended, may be rectified, even against the wife who released her dower.[14] And generally the mistakes of a scrivener in preparing an instrument may be corrected in equity.[15]

Parol Evidence to Correct Mistakes in Written Instruments.

It is a rule, both of law and equity, that parol evidence is not admissible to vary a written instrument. But there is a well-established exception to this rule in the case of mistake, fraud, accident, or surprise. Courts of equity have never hesitated to entertain jurisdiction to reform a contract where a fraudulent suppression, omission, or insertion

[12] Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371, Keener, Eq. Cas. 286; Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120; Hosleton v. Dickinson, 51 Iowa, 244, 1 N. W. 550; Noble v. Googins, 99 Mass. 231. But see Ketchum v. Stout, 20 Ohio, 453; Stull v. Hurtt, 9 Gill (Md.) 446.

[13] Spurr v. Benedict, 99 Mass. 463; Sulvey v. Baker, 37 Cal. 465; Watts v. Cummins, 59 Pa. 84; Best v. Stow, 2 Sandf. Ch. (N. Y.) 298; Allen v. Yeater, 17 W. Va. 128; Fuchs v. Treat, 41 Wis. 404.

[14] Chapman v. Field, 70 Ala. 403.

[15] Stone v. Hale, 17 Ala. 557, 52 Am. Dec. 185; Hartford & S. Ore Co. v. Miller, 41 Conn. 112; Sowler v. Day, 58 Iowa, 252, 12 N. W. 297; Wilcox v. Lucas, 121 Mass. 21; Van Donge v. Van Donge, 23 Mich. 321; Huss v. Morris, 63 Pa. 367; Allen v. Brown, 6 R. I. 386; Elliott v. Sackett, 108 U. S. 133, 2 Sup. Ct. 375, 27 L. Ed. 678; Drury v. Hayden, 111 U. S. 223, 4 Sup. Ct. 405, 28 L. Ed. 408.

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of a material stipulation exists, notwithstanding that it breaks in, to some extent, on the uniformity of the rule as to the exclusion of parol evidence to control written contracts. And the same may be said in regard to a contract entered into under a mistake of a material fact.[16] This exception is based upon the same policy as the rule itself; that is, the desire to suppress fraud, and to promote general good faith and confidence in the formation of contracts. If the mistake is admitted by both parties, equity will permit the introduction of parol evidence to vary the terms of the instrument; and, if it can be proved by evidence equivalent to, or as satisfactory as, an admission, the same reasons exist for granting relief.[17]

Effect of Statute of Frauds.

The statute of frauds, which requires certain contracts to be in writing, cannot prevent a variance of the terms of a contract for the purpose of rectifying a mistake therein. The question of the admissibility of parol evidence to vary the terms of such contracts generally arises in suits for the specific performance thereof. It has been generally held by the courts that such parol evidence may be admitted to show that the contract sought to be enforced does not, because of mistake, conform with the real intentions of the parties.[18] All courts, both English and Ameri-

[16] Story, Eq. Jur. §§ 153–155; Murray v. Parker, 19 Beav. 305, 308; Greer v. Caldwell, 14 Ga. 215, 58 Am. Dec. 553; Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635; Glass v. Hulbert, 102 Mass. 34, 3 Am. Rep. 418; Patterson v. Bloomer, 35 Conn. 57; Harding v. Long, 108 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775; Walden v. Skinner, 101 U. S. 577, 583, 25 L. Ed. 963.

[17] Davis v. Symonds, 1 Cox, 402, 404p; Fowler v. Fowler, 4 De Gex & J. 250; Stockbridge Iron Co. v. Iron Co., 107 Mass. 290, 3 Keener, Eq. Cas. 54; Nevius v. Dunlap, 33 N. Y. 676; Marsh v. Marsh, 74 Ala. 418; Hutchinson v. Ainsworth, 73 Cal. 458, 15 Pac. 82, 2 Am. St. Rep. 823; Maxwell Land-Grant Case, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949.

[18] Quinn v. Roath, 37 Conn. 16; Osborn v. Phelps, 19 Conn. 63, 48 Am. Dec. 133; Campbell v. Durham, 86 Ala. 299, 5 South. 507; Ring v. Ashworth, 8 Iowa, 452; Mansfield v. Sherman, 81 Me. 365, 17 Atl. 300; Chambers v. Livermore, 15 Mich. 389; Berry v. Whitney, 40 Mich. 65; Caldwell v. Depew, 40 Minn. 528, 42 N. W. 479; Ryno v. Darby, 20 N. J. Eq. 231; Stoutenburgh v. Tompkins, 9 N. J. Eq. 332; Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559; Coles v.

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can, have agreed that such evidence is admissible in a suit for specific performance, where there has been a partial performance of the omitted parol provision by the plaintiff.[19] Where there has been no such partial performance, the courts have not been unanimous as to such question, although the preponderance of authority is in favor of admitting parol evidence to vary the terms of a contract sought to be enforced without regard to a partial performance of the omitted parol provisions.[20]

Where the plaintiff, in an action for the specific performance of a contract, asks that the contract be reformed to rectify a mistake, and enforced as so reformed, the question also arises as to whether, in the admission of parol evidence as to such mistake, there is not a violation of the statute of frauds. It may be correctly assumed that such contract as so reformed does not comply with the provisions of the statute; but it has been generally held that such noncompliance does not prevent the intervention of equity to reform the instrument, and decree its enforcement as reformed.[21] To permit the statute to so interfere in the administering of equitable remedies would deprive it of its efficacy as an instrument for the prevention of injustice to innocent parties. Equity does not deny or overrule the statute, but it declares that fraud or mistake creates obligations, and confers remedial rights which are not within the statu-

Bowne, 10 Paige (N. Y.) 526; Dennis v. Dennis, 4 Rich. Eq. (S. C.) 307.

[19] Gilroy v. Alls, 22 Iowa, 174; Legal v. Miller, 2 Ves. Sr. 299; Price v. Dyer, 17 Ves. 356; Glass v. Hurlburt, 102 Mass. 24, 28, 3 Keener, Eq. Cas. 327; Beardsley v. Duntley, 69 N. Y. 577; Tilton v. Tilton, 9 N. H. 385; Hitchins v. Pettingill, 58 N. H. 386, 3 Keener, Eq. Cas. 344, 371.

[20] Clopton v. Martin, 11 Ala. 187; Murphy v. Rooney, 45 Cal. 78; Thompsonville Scale Mfg. Co. v. Osgood, 26 Conn. 16; Rogers v. Atkinson, 1 Ga. 12; Broadwell v. Broadwell, 6 Ill. 599; Hunter v. Bilyeu, 30 Ill. 228; Hallam v. Corlett, 71 Iowa, 446, 32 N. W. 449; Hall v. Clagett, 2 Md. Ch. 151; Craig v. Kittredge, 23 N. H. 231; De Peyster v. Hasbrouck, 11 N. Y. 582; Beardsley v. Duntley, 69 N. Y. 577; Webster v. Harris, 16 Ohio, 490.

[21] Murphy v. Rooney, 45 Cal. 78; Provost v. Rebman, 21 Iowa, 419; Wright v. McCromick, 22 Iowa, 545; Hunter v. Bilyeu, 30 Ill. 228; Kelsselbrack v. Livingston, 4 Johns. Ch. (N. Y.) 144; Coles v. Bowne, 10 Paige (N. Y.) 526, 535; Beardsley v. Duntley, 69 N. Y. 577; Blodgett v. Hobart, 18 Vt. 414.

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tory prohibition. In respect to them the statute is uplifted.[22]

Defective Execution of Powers.

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 principle on which this equitable jurisdiction is based has been stated thus: "Whenever a man, having power over an estate, whether of ownership or not, in discharge of his 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." [23] But, if there is no execution of the power, or no contract requiring such execution, the court cannot interpose; for, unless the power is in the nature of a trust, the donee has his choice to execute it or not; and, if he does not execute, or attempt to execute, there is no equity to execute for him, or to do that for him which he did not think fit to do for himself.[24] Nor can an execution be aided in equity if the defect be not formal, but in the substance of the power, for such aid would defeat the intention of the donor.[25] The only persons in whose favor equity will interpose to supply the defect in the execution of a power are a bona fide purchaser for a valuable consideration, a creditor, a charity, a wife, or a legitimate child; and such character of purchaser, creditor, wife, or child must be borne by the party claiming relief in relation to the donee of the power, and not to the person creating the power.[26]

[22] Pom. Eq. Jur. § 867.

[23] Chapman v. Gibson, 3 Brown, Ch. 229.

[24] Tollet v. Tollet, 2 P. Wms. 489; Johnson v. Cushing, 15 N. H. 298, 41 Am. Dec. 694; Howard v. Carpenter, 11 Md. 259.

[25] Kerr, Fraud & M. p. 440.

[26] Kerr, Fraud & M. p. 440; Hughes v. Wells, 9 Hare, 769; Affleck v. Affleck, 3 Smale & G. 394; Innes v. Sayer, 7 Hare, 377; Hervey v. Hervey, 1 Atk. 567; Medwin v. Sandham, 3 Swanst. 686; Proby v. Landor, 28 Beav. 504.

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RESTORATION OF PARTIES.

118. As a general rule, he who seeks to be relieved from the consequences of a mistake must see that the party against whom relief is sought is remitted to the position he occupied before the transaction in which the mistake occurred.[1]

This rule is of general application in all cases where relief is sought against accident, mistake, and fraud, and is based upon the equitable maxim that he who seeks equity must do equity. A court of equity is always reluctant to rescind a contract because of a mistake of fact, unless the parties can be put back in statu quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it.[2] But in the leading case of Beauchamp v. Winn [3] it was stated that, where two parties to a contract are mutually mistaken as to their rights, occasioning an injury to one of them, the court will not decline to grant the relief, if a clear case is established, merely because, on account of the circumstances which have intervened since the contract was made, it has become difficult to restore the parties to their original condition. But in a recent case in Pennsylvania it was held that equity will not afford relief in cases of mutual mistake of legal rights, where it is impossible to restore both parties to their former position.[4] And, if the rights of innocent third parties have intervened, and relief cannot be had except by affecting those rights, a court of equity will not interfere.[5]

§ 118. [1] Neblett v. MacFarland, 92 U. S. 101, 23 L. Ed. 471, 3 Keener, Eq. Cas. 693; Hammond v. Pennock, 61 N. Y. 145, 3 Keener, Eq. Cas. 688; Masson v. Bovet, 1 Denio (N. Y.) 69, 43 Am. Dec. 651.

[2] Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798, 3 Keener, Eq. Cas. 175, 180.

[3] L. R. 6 H. L. 223, 233. But see In re Saxon Life Assur. Soc., 2 Johns. & H. 408, 413.

[4] Fink v. Bank, 178 Pa. 154, 35 Atl. 636.

[5] Malden v. Menill, 2 Atk. 8; Warrick v. Warrick, 3 Atk. 293; Macknet v. Macknet, 29 N. J. Eq. 54.

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CHAPTER XIII.

GROUNDS OF EQUITABLE RELIEF—FRAUD.

119. Equitable Jurisdiction in Cases of Fraud.
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EQUITABLE JURISDICTION IN CASES OF FRAUD.

119. As a general rule, courts of equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with, and sometimes exclusive of, other courts. The single exception to this rule is in the case of wills.[1]

Courts of equity, from their inception, exercised jurisdiction in matters of fraud. There is no field of equitable

§ 119. [1] Story, Eq. Jur. § 184; Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125; Id., 1 Atk. 301; 1 White & T. Lead. Cas. Eq. pt. 2, p. 624.

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jurisdiction which has been as fruitful of substantial justice, and in no other class of cases have courts of equity so often administered equitable remedies. The English rule seems to be that the jurisdiction of equity may be applied in every case of fraud, without regard to the rights of the parties affected thereby, and the remedies which are sought; and such jurisdiction may be exercised even though courts of law have a concurrent jurisdiction of the case, and can administer the same kind of relief. As has often been said by the ablest English judges, one of the occasions for the existence of a separate court of chancery was its power to deal with all cases of fraud. Its original grant of jurisdiction covered fraud in all its forms and phases.[2] The jurisdiction of the common-law courts over such cases was of a later growth. In fact, at an early time there was no defense based on the fraud of the plaintiff in an action brought at common law to enforce covenants, debts, and other obligations ex contractu. It was not until the invention of the common-law actions of assumpsit, case, and trover that courts of law were enabled to afford relief on the ground of fraud. It is a familiar doctrine that courts of equity cannot be deprived of jurisdiction originally possessed by them by the assumption of a similar jurisdiction by courts of law.

The American rule is not so favorable to the exercise of equitable jurisdiction in cases of fraud of every kind and species. Mr. Pomeroy states the doctrine to be "that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, certain, and complete;[3] * * * that, when the estate or interest is equitable, the jurisdiction exists, and

[2] Hill v. Lane, L. R. 11 Eq. 215; Ogilvie v. Currie, 37 Law J. Ch. 541; Ramshire v. Bolton, L. R. 8 Eq. 294; Blair v. Bromley, 5 Hare, 556; Slim v. Croucher, 1 De Gex, F. & J. 518.

[3] Pom. Eq. Jur. § 914; Town of Grand Chute v. Winegar, 15 Wall. 373, 21 L. Ed. 174; Phœnix Mut. Life Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Jones v. Bolles, 9 Wall. 364, 19 L. Ed. 734; Bassett v. Brown, 100 Mass. 355; Suter v. Matthews, 115 Mass. 253; Piscataqua Fire & Marine Ins. Co. v. Hill, 60 Me. 178, 183; Miller v. Scammon, 52 N. H. 609. And see Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451, 3 Keener, Eq. Cas. 487; Tillison

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will always be exercised. Where the estate, interest, or right is legal, and the remedies are equitable, the jurisdiction always exists, but will not always be exercised. Where the right is legal, and the remedy is pecuniary and legal, the jurisdiction is concurrent, and only exists where the remedy at law is inadequate." [4]

Frauds in Wills.

For more than a century the English courts have refused to exercise jurisdiction to set aside the probate of a will. It is now recognized as a general rule in such courts, and in the courts of this country, that equity cannot afford relief in such cases.[5] The reasons given for a refusal to intervene in such cases are not satisfactory. In England it was generally ascribed to the fact that ecclesiastical courts had exclusive jurisdiction to entertain questions as to the validity of wills of personal property, and as to wills of real

v. Ewing, 87 Ala. 350, 6 South. 276; Taylor v. Taylor, 74 Me. 582; Fitzmaurice v. Mosier, 116 Ind. 365, 16 N. E. 175, 19 N. E. 180.

[4] Pom. Eq. Jur. § 914.

Cancellation of instruments: Hammond v. Pennock, 61 N. Y. 145, 3 Keener, Eq. Cas. 688; Fisher v. Hersey, 78 N. Y. 387; Hackley v. Draper, 60 N. Y. 88; Willemin v. Dunn, 93 Ill. 511; Fuller v. Percival, 126 Mass. 381; Pfeifer v. Snyder, 72 Ind. 78; Globe Mut. Life Ins. Co. v. Reals, 79 N. Y. 202; Dunaway v. Robertson, 95 Ill. 419; Compton v. Bank, 96 Ill. 301, 36 Am. Rep. 147; Briggs v. Johnson, 71 Me. 235; Lavassar v. Washburne, 50 Wis. 200, 6 N. W. 516.

Cancellation of judgments: Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Harbaugh v. Hohn, 52 Ind. 243; Harris v. Cornell, 80 Ill. 54; Babcock v. McCamant, 53 Ill. 214; Huxley v. Rice, 40 Mich. 73; U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Kelly v. Christal, 81 N. Y. 619; Cairo & F. R. Co. v. Titus, 27 N. J. Eq. 102; Barber v. Rukeyser, 39 Wis. 590.

Pecuniary recoveries: Getty v. Devlin, 70 N. Y. 504; Stephens v. Board, 79 N. Y. 183, 35 Am. Rep. 511; Marlow v. Marlow, 77 Ill. 633; Frue v. Loring, 120 Mass. 507; Bassett v. Brown, 100 Mass. 355; Suter v. Matthews, 115 Mass. 253; Jewett v. Bowman, 29 N. J. Eq. 174.

Matters of administration: Fulton v. Whitney, 5 Hun (N. Y.) 16; Kellogg v. Aldrich, 39 Mich. 576.

Miscellaneous: Struve v. Childs, 63 Ala. 473; Leupold v. Krause, 95 Ill. 440; Dickinson v. Seaver, 44 Mich. 624, 7 N. W. 182; Grubb's Appeal, 90 Pa. 228; Williamson v. Carskadden, 36 Ohio St. 664.

[5] Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054; Case of Broderick's Will, 21 Wall. 503, 22 L. Ed. 599; Gains v. Chew, 2 How. 645, 11 L. Ed. 402; Bailey v. Briggs, 56 N. Y. 407; Kerrich v. Bransby, 7 Brown, Parl. Cas. 437; Jones v. Jones, 3 Mer. 171.

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property such questions were within the jurisdiction of the common-law courts.[6] The statutes of the several states providing for the probate of wills have declared as to the jurisdiction of the probate courts in determining questions involving the validity of such wills, and as to the effect of the decrees of such courts in respect thereto.

WHAT CONSTITUTES FRAUD.

120. Fraud, in the contemplation of equity, properly includes all acts, omissions, or concealment which involves a breach of equitable duty, trust, or confidence justly reposed, and which are injurious to another, or by which an undue and unconscientious advantage is taken of another.[1]

The term "fraud" is used in a more comprehensive sense in courts of equity than in courts of law. What constitutes fraud at law will always be treated as fraud in equity, but there are many acts deemed fraudulent in equity which are not so considered at law. Equity will not only relieve against actual deception, but it will extend its interference in all cases of unfair dealing, and prevent the dishonest circumvention of one person by another. To define the equitable conception of fraud is not possible. The fertility of man's invention in devising new schemes of fraud is so great that courts of equity have declined the hopeless attempt of embracing in one formula all its varieties of form and color, reserving to themselves the liberty to deal with it under whatever form it may present itself.[2] As has been said: "Fraud is infinite, and, were courts of equity once to lay down rules as to 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

[6] Allen v. McPherson, 1 H. L. Cas. 191; Archer v. Mosse, 2 Vern. 8; Gingell v. Horne, 9 Sim. 539.

§ 120. [1] Story, Eq. Jur. § 187. And see 1 Fonbl. Eq. book 1, c. 2, § 3; Earl of Chesterfield v. Janssen, 2 Ves. Sr. 155, 156; Smith, Eq. 153; Kerr, Fraud & M. p. 42; Pom. Eq. Jur. § 875.

[2] Kerr, Fraud & M. p. 42; Pom. Eq. Jur. § 873.

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cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive." [8] The description of fraud as stated in the black-letter text has been frequently used by text writers, and is sufficiently comprehensive to include almost all of the species of fraud which are likely to arise.

CLASSIFICATION OF FRAUD.

121. Fraud has been generally classified as

(a) Actual fraud.

(b) Constructive fraud.

122. Actual fraud arises from facts and circumstances of imposition, and may be described as something said, done, or omitted by a person with the design of perpetrating what he must have known to be a positive fraud.

123. Constructive fraud may be described as an act done or omitted, not with an actual design to perpetrate positive fraud or injury upon other persons, but which, nevertheless, amounts to positive fraud, or is construed as a fraud by the court because of its detrimental effect upon public interests and public or private confidence.[1]

124. Frauds may again be divided as follows:

(1) Frauds arising from facts and circumstances of imposition.

(2) Frauds apparent from the intrinsic nature and subject of the bargain itself.

(3) Frauds presumed from the circumstances and condition of the contracting parties.

[8] Lord Hartwick, quoted in Parkes, Hist. Ch. p. 508; Mortlock v. Buller, 10 Ves. 292, 306.

§§ 121–124. [1] Smith, Eq. 65; Indermaur, Lead. Cas. Eq. 158.

[2] Story, Eq. Jur. § 258.

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(4) Fraud upon third persons not parties to the fraudulent contract.[3]

The first of these classes constitutes actual fraud; the other three, constructive fraud.

From the infinite variety of cases arising in equity which involve questions of fraud, it is well-nigh impossible to formulate a classification which will comprise every species of fraud which is properly the subject of the equitable jurisdiction. The division of the subject into two classes—actual fraud and constructive fraud—has, in many modern cases, been severely criticised;[4] and a celebrated text writer has emphatically declared "that legal or constructive fraud may be discarded as a worse than useless figment."[5] Notwithstanding this adverse authority, it does not seem best to disregard a classification which has existed for so long, and has been so often used by text writers and judges. As Mr. Pomeroy has observed: "The settled terminology of the law is one of its most important features."[6] To refuse to those acts which have always been termed "constructive fraud" classification as such would produce confusion, and would not be productive of substantial benefit.

ACTUAL FRAUD.

125. Actual fraud consists of

(a) Misrepresentations,—suggestio falsi,—or

(b) Fraudulent concealment,—suppressio veri.

SAME—MISREPRESENTATION.

126. A misrepresentation constitutes fraud relievable in equity when

(a) It is untrue.

[3] Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125; Id., 1 Atk. 301, 1 White & T. Lead. Cas. Eq. (Text-Book Series) pt. 2, p. 624.

[4] Weir v. Bell, 3 Exch. Div. 243; Derry v. Peek, 14 App. Cas. 346; Angus v. Clifford [1891] 2 Ch. Div. 449; Jolliffe v. Baker, 11 Q. B. Div. 271; Smallcombe's Case, L. R. 3 Eq. 769, 771.

[5] Pol. Cont. p. 480.

[6] Pom. Eq. Jur. § 874, note.

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(b) The party making it knew, or should have known, it to be untrue, and it was made by him to induce the other party to act or omit to act.

(c) It induced the other party to act or omit to act.

(d) It is of a material fact.

Courts of equity are most frequently asked to relieve against fraud where there has been a misrepresentation, or suggestio falsi. It was said in the case of Smith v. Chadwick [1] by the lord chancellor: "In an action of deceit it is the duty of the plaintiff to establish two things: First, actual fraud, which is to be judged by the nature and character of the representations made, considered with reference to the object with which they were made, the knowledge or means of knowledge of the persons making them, and the intention which the law justly imputes to any man to produce those consequences which are the natural result of his acts; and, secondly, he must establish that this fraud was an inducing cause to the contract, for which purpose it must be material, and it must have produced in his mind an erroneous belief influencing his conduct."

Representation must be Untrue.

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. The representation must be of such a nature as to carry conviction to the mind of a man of ordinary intelligence. If the misrepresentation is uncertain, indefinite, or vague, it cannot be made the basis of a demand or a defense.[2] It must be a positive statement or affirmation of a fact, and not a mere expression of opin-

§ 126. [1] 20 Ch. Div. 27; Brett, Lead. Cas. Mod. Eq. p. 204. And see Edgington v. Fitzmaurice, 29 Ch. Div. 459; Pasley v. Freeman, 3 Term R. 51; Derry v. Peek, 14 App. Cas. 372; Graham v. Hollinger, 46 Pa. 57; Hubbell v. Meigs, 50 N. Y. 489.

[2] Smith v. Chadwick, 20 Ch. Div. 27; Dimmock v. Hallett, 2 Ch. App. 21, 30; Arnold v. Bright, 41 Mich. 207, 2 N. W. 16; Wakeman v. Dalley, 51 N. Y. 27, 30, 10 Am. Rep. 551.

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ion.[3] It generally consists of words, either written or spoken; but this is not indispensable, for it may be effected by acts alone.[4] A misrepresentation of the law does not amount to fraud, since all persons are presumed to know the law.[5]

Expression of Opinion.

When the misrepresentation consists of a mere expression of opinion of the party making it, there is no basis for an action for relief at law or in equity.[6] As Chancellor Kent says: "Every person reposes at his peril in the opinion of others, when he has an opportunity to form and exercise his own judgment." On this account the praise by a vendor of his own goods for the purpose of enhancing their value in the mind of the purchaser cannot be deemed fraudulent, if it is kept within reasonable limits. But, if such praise assumes the form of an expression of a specific fact, the statement may become a fraudulent misrepresentation, and afford opportunity for the intervention of equity.[7] It is not possible to assert a fixed rule to determine whether a false representation constitutes a matter of opinion or a matter of fact. Each case must, to a certain extent, be adjudged by

[3] Gifford v. Carvill, 29 Cal. 589; Printup v. Fort, 40 Ga. 276; Bowman v. Carithers, 40 Ind. 90; Derrick v. Insurance Co., 74 Ill. 404; Pike v. Fay, 101 Mass. 134, 137; Cooper v. Lovering, 106 Mass. 77, 79; Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598; Perkins v. Partridge, 30 N. J. Eq. 82; Beardsley v. Duntley, 69 N. Y. 577; Dambmann v. Schulting, 75 N. Y. 55; Verplanck v. Van Buren, 76 N. Y. 247; Babcock v. Case, 61 Pa. 427, 100 Am. Dec. 654.

[4] Denny v. Hancock, 6 Ch. App. 1; Kilmer v. Smith, 77 N. Y. 226, 33 Am. Rep. 413; Bethell v. Bethell, 92 Ind. 318; Harrington v. Brewer, 56 Mich. 301, 22 N. W. 813.

[5] Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; The Belfast v. Boon, 41 Ala. 50, 68; People v. Board, 27 Cal. 655; Drake v. Latham, 50 Ill. 270; Reed v. Sidener, 32 Ind. 373; Abbott v. Treat, 78 Me. 121, 125, 3 Atl. 44; Jaggar v. Winslow, 30 Minn. 263, 15 N. W. 242.

[6] Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; Holton v. Noble, 83 Cal. 7, 23 Pac. 58; Nounnan v. Land Co., 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219, 15 Am. St. Rep. 34; Conant v. Bank, 121 Ind. 323, 22 N. E. 250; Akin v. Kellogg, 119 N. Y. 441, 449, 23 N. E. 1046; Conlan v. Roemer, 52 N. J. Law, 53, 18 Atl. 858.

[7] Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 673, 14 Sup. Ct. 219, 37 L. Ed. 1215; Adams v. Soule, 33 Vt. 549; Hunter v. McLaughlin, 43 Ind. 38; French v. Griffin, 18 N. J. Eq. 279.

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its own circumstances. The court, in reaching its conclusion, will take into consideration the situation and intelligence of the parties, the general information and experience of the public as to the nature and use of the property, and 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.[8] Generally, if the representation is expressed by the party making it as his own belief and opinion, and is not stated as an existing fact, he cannot be held to account therefor, although such representation is false. But, if the opinion is given by the party as an expert, and is concerning a matter of which the party to whom it is made is ignorant, such opinion may become material, and may be held to be the representation of a material fact.[9] The most common instances of expression of opinion are in cases where statements are made in respect to value of property sold. As a general rule, statements as to the value of property, though false, are not grounds for affirmative relief, or good as matters of defense.[10] An assertion as to the value of an article does not imply knowledge, but must be understood by the purchaser as a matter of judgment or opinion, and upon a subject to which the purchaser is generally supposed to be as competent to form a correct judgment as the vendor.[11] The reason for this rule seems to rest upon the fact that, the

[8] Reeves v. Corning (C. C.) 51 Fed. 774, 780.

[9] Pom. Eq. Jur. § 878. See Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241.

[10] Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; Gordon v. Butler, 105 U. S. 553, 26 L. Ed. 1166; Rendell v. Scott, 70 Cal. 514, 11 Pac. 779; Williams v. McFadden, 23 Fla. 143, 1 South. 618, 11 Am. St. Rep. 345; Dillman v. Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Schramm v. O'Connor, 98 Ill. 539; Lucas v. Crippen, 76 Iowa, 507, 41 N. W 205; Dawson v. Graham, 48 Iowa, 378; Curry v. Keyser, 30 Ind. 214; Shade v. Creviston, 93 Ind. 591; Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212; Pike v. Fay, 101 Mass. 134; Homer v. Perkins, 124 Mass. 431, 27 Am. Rep. 677; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168; Allison v. Ward, 63 Mich. 128, 29 N. W. 528; Hubbell v. Meigs, 50 N. Y. 480; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Watts v. Cummins, 59 Pa. 84; Byrne v. Stewart, 124 Pa. 450, 17 Atl. 19.

[11] Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678.

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owner being interested in enhancing the value of the article which he seeks to sell, his statement as to its value should not be absolutely relied on. Although the value of an article is to be determined by the purchaser in reliance upon his own judgment and opinion, yet, as to any extrinsic fact affecting the value or quality of the subject of the contract, he may rely upon the assurances of the vendor; and, if he does not so rely, and those assurances are fraudulently made to induce him to make the contract, he may maintain an action for the injury sustained.[12]

To admit of relief in favor of the purchaser, there must be a want of knowledge and a want of means to acquire knowledge on his part, or he must have been prevented from inquiry or obtaining knowledge by some artifice of the vendor.[13] A 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 full reliance on its good faith and honesty, has been held to be a representation of fact.[14] And any misrepresentation as to the actual cost of the property sold is a material fact, and naturally calculated to mislead the purchaser. It not only tends to enhance the value of such property, but produces an effect beyond the force of a mere opinion.[15] This rule has been limited in its application in many of the states, and only held to apply where a fiduciary relation existed between the parties.[16] In conclusion, it may be well to quote the following statement as to the distinction between a misrepresentation

[12] Ellis v. Andrews, 56 N. Y. 83; Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755; Byrne v. Stewart, 124 Pa. 450, 17 Atl. 19; Suessenguth v. Brigenheimer, 40 Wis. 370; Dillman v. Nadlehoffer, 119 Ill. 567, 7 N. E. 88.

[13] Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779.

[14] 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.

[15] Sandford v. Handy, 23 Wend. (N. Y.) 260; Van Epps v. Harrison, 5 Hill (N. Y.) 63, 40 Am. Rep. 314; Hammond v. Pennock, 61 N. Y. 151; Goldenbergh v. Hoffman, 69 N. Y. 326; Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779.

[16] Cooper v. Lovering, 106 Mass. 77, 79; Mooney v. Miller, 102 Mass. 217, 220; Tuck v. Downing, 76 Ill. 71; Noetling v. Wright, 72 Ill. 390; Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212.

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of fact and an expression of opinion: "If the representation is as to a matter not equally open to both parties, it may be said to be a statement of a fact; but, if it is as to a matter that rests entirely on the judgment of the person making it, and the means of information upon which a fair judgment can be predicated are equally open to both parties, and there is no artifice or fraud used to prevent the person to be affected thereby from making an examination and forming a judgment for himself, the representation is a mere expression of opinion, and does not support an action for fraud." [17]

Knowledge that Representation is Untrue.

No misrepresentation can be deemed fraudulent unless the party making it believed or knew it to be untrue. This general proposition is subject to the following qualifications: A person may be charged with fraud (1) if he makes an untrue statement, not knowing or believing it to be true; or (2) if he recklessly makes an untrue statement, the falsity of which he might have ascertained.[18] At law, if a person makes an untrue statement without knowledge of its truth, he cannot be adjudged guilty of fraud if he had reason to believe it to be true; but in equity it has been generally held that if, at the time he made the statement, he had no knowledge of its truth, he will be chargeable with fraud, and the fact that he believes it to be true is not material.[19] As was said in a recent New York case: "Where a party repre-

[17] 2 Add. Torts, 422, § 1186 (Woods' note).

[18] Marsh v. Falker, 40 N. Y. 562; Stone v. Denny, 4 Metc. (Mass.) 151; Stimson v. Helps, 9 Colo. 35, 10 Pac. 290; Hexter v. Bast, 125 Pa. 52, 72, 17 Atl. 252, 11 Am. St. Rep. 874; Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566, 6 L. R. A. 149, 18 Am. St. Rep. 485; McKinnon v. Vollmar, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 161, 17 Am. St. Rep. 178; Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382; Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1, 40 Atl. 1046.

[19] Rawlins v. Wickham, 3 De Gex & J. 304; Hart v. Swaine, 7 Ch. Div. 42, 46; McFerran v. Taylor, 3 Cranch, 281, 2 L. Ed. 436; Smith v. Richards, 13 Pet. 38, 10 L. Ed. 42; Thorne v. Prentiss, 83 Ill. 99; Ruff v. Jarrett, 94 Ill. 475; Hubbard v. Weare, 79 Iowa, 678, 44 N. W. 915; Munroe v. Pritchett, 16 Ala. 785, 50 Am. Dec. 203; Beebe v. Knapp, 28 Mich. 53; Rowell v. Chase, 61 N. H. 135; Potter's Appeal, 56 Conn. 1, 12 Atl. 513, 7 Am. St. Rep. 272; McMullin's Adm'r v. Sanders, 79 Va. 356, 362.

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sents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of falsehood, even if he believes it to be true; and, if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud." [20]

If a person recklessly make a statement, the truth of which may be ascertained, with no knowledge of its truth or falsity, there will be imputed to him a knowledge of its falsity, and he will be held accountable therefor.[21] The reason for this rule may be found in the fact that he who makes such a statement "takes upon himself to warrant his own belief of the truth of that which he asserts, and a man who makes a representation as to which he neither knows nor cares whether it is true or not can have no real belief in the truth of which he asserts, and is justly guilty of deception." [22] And if a statement be made which is believed by the person making it to be true, but which is, in fact, untrue, and it was the duty of such person to know the truth, which, if fulfilled, would have prevented him from making the statement, such person is chargeable with fraud.[23] When at the time a statement was made it was honestly believed to be true, and there was no intention to deceive the party to whom it was made, or to secure any undue advantage of him, and it afterwards appeared that such statement was incorrect, if the party making it did not endeavor to correct the error, and permitted the other party to continue in the belief that such statement was true, his fraud dates from the discovery of the error.[24] But if a party make a statement which is untrue,

[20] Hadcock v. Osmer, 153 N. Y. 604, 608, 47 N. E. 923.

[21] Atwood's Adm'r v. Wright, 29 Ala. 346; Alvarez v. Brannan, 7 Cal. 503, 68 Am. Dec. 274; Borders v. Kattleman, 142 Ill. 96, 31 N. E. 19; Gatling v. Newell, 9 Ind. 572; Bethell v. Bethell, 92 Ind. 318; Parmlee v. Adolph, 28 Ohio St. 10; Braunschweiger v. Waits, 179 Pa. 47, 36 Atl. 155; McKinnon v. Vollmar, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 161, 17 Am. St. Rep. 178.

[22] Evans v. Edmonds, 13 C. B. 777; Kountze v. Kennedy, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651.

[23] Pom. Eq. Jur. § 888; Burrowes v. Lock, 10 Ves. 470, 475; Rawlins v. Wickham, 3 De Gex & J. 304, 313, 316; Babcock v. Case, 61 Pa. 427, 430.

[24] Reynell v. Sprye, 1 De Gex, M. & G. 660, 709; Traill v. Baring, 4 De Gex, J. & S. 318, 329, 330.

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but which he honestly believes to be true, and had reasonable grounds therefor, he cannot be charged with fraud.[25]

Inducement to Act or Omit to Act.

A fraudulent misrepresentation, to be the ground of equitable relief, must be relied on by the person to whom it is made, and must be an immediate inducement to him to act or omit to act. The misrepresentation must be the assertion of such a fact that, if it had not been made, the person to whom it was made would not have entered into the contract.[26] It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate, and material.[27] Where a purchaser made a false statement as to his financial condition, but the vendor to whom it was made, before completing the transaction, made further inquiries of mercantile agencies, and relied on this, and not upon the purchaser's representations, the contract of sale cannot be rescinded because of such representations.[28] But

[25] Cabot v. Christie, 42 Vt. 121, 126, 1 Am. Rep. 313; Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Hartford Live-Stock Ins. Co. v. Matthews, 102 Mass. 221; Fisher v. Mellen, 103 Mass. 503; Wheeler v. Randall, 48 Ill. 182.

[26] Pulsford v. Richards, 17 Beav. 87, 96. And see Attwood v. Small, 6 Clark & F. 523, note, where Lord Brougham thus states the rule: "Now, my lords, what inference do I draw from these cases? It is this: That general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction; and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract." See, also, Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931; Baker v. Maxwell, 99 Ala. 558, 14 South. 468; Bennett v. Gibbons, 55 Conn. 450, 12 Atl. 99; Lewis v. Mortgage Co., 94 Ga. 572, 21 S. E. 224; Dady v. Condit, 163 Ill. 511, 45 N. E. 224; Windram v. French, 151 Mass. 547; 24 N. E. 914, 8 L. R. A. 750; Burns v. Dockray, 156 Mass. 138, 30 N. E. 551; McIntyre v. Buell, 132 N. Y. 192, 30 N. E. 396; Arnold v. Hosiery Co., 148 N. Y. 392, 42 N. E. 980; Ackman v. Jaster, 179 Pa. 463, 36 Atl. 324.

[27] Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246.

[28] Boyd v. Shiffer, 156 Pa. 100, 27 Atl. 60; Lee v. Burnham, 82 Wis. 209, 52 N. W. 255; Singer v. Schilling, 74 Wis. 369, 43 N. W.

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where false statements have been willfully made by a person to a commercial agency for the purpose of obtaining a financial standing or credit to which he is not entitled, he is liable to the same extent as if he had made a direct false representation.[29]

In no case can a contract be set aside or rescinded unless it can be proved that the party to whom the false representations were made relied and acted thereon.[30] Not only must the party to whom a false representation has been made have relied and acted thereon, but he must have been justified in such reliance. For instance, if a person has knowledge that a representation made to him is false, and he nevertheless acts thereon, he cannot be said to have relied on such representation, and cannot treat it as a fraud.[31] But

101. And, on the other hand, false statements made to a mercantile agency by a vendor must have been communicated to and relied upon by the vendee in order to give the latter a right to relief. Tindle v. Birkett, 57 App. Div. 450, 67 N. Y. Supp. 1017.

[29] The law on the subject of communications to mercantile agencies is very well reviewed in the case of Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. 31, 38 Am. Rep. 389, in which it is held that it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof, and that this principle is peculiarly applicable to the case of statements made to mercantile agencies, of whose business the courts may take judicial notice. A person furnishing information to such an agency in relation to his own circumstances, means, and pecuniary responsibility can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it for their guidance in giving credit to the party; and, if a merchant furnishes to such an agency a willfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows he is not justly entitled, and thus to defraud whoever may resort to such agency, and in reliance upon the false information there lodged extend credit to him, his liability is the same as if he had made a direct false representation. It seems to be clear that, in order to hold the defendant liable under such circumstances, the communication must have been willfully false. See Macullar v. McKinley, 99 N. Y. 353, 2 N. E. 9. And see opinion on this subject by Referee Hawley in the case of In re Russell, 5 Am. Bankr. R. 608.

[30] Dady v. Condit, 163 Ill. 511, 45 N. E. 224, citing Douglass v. Sittler, 58 Ill. 342; Tuck v. Downing, 76 Ill. 71; Stearn v. Clifford, 62 Vt. 92, 18 Atl. 1045.

[31] Dyer v. Hargrave, 10 Ves. 505; Bennett v. Gibbons, 55 Conn. 450, 12 Atl. 99; Newman v. Sylvester, 42 Ind. 106; Proctor v. Mc-

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where, from the circumstances of the case, the representation is such that the person to whom it is made had a right to rely thereon, he is not bound to satisfy himself as to its truth by making a further inquiry, if he have no knowledge of his own, or there are no facts which would naturally arouse his suspicion as to the truth of such representation. The person making such representation cannot complain if the other took him at his word, and relied thereon; and if he asserts that the other party had knowledge of the falsity of the representation, and was not misled thereby, it is for him to remove the presumption that his false statement induced the action of the other party by showing clearly that he possessed such knowledge.[32] But if a false representation is so palpably false that a reasonable man would not have relied thereon, the person to whom it is made cannot justify his reliance, and he must take the consequences of his own negligence.[33] And if, after a representation of fact, the person to whom it is made investigates to ascertain the truth of such representation, and acts upon his own judgment, based on such investigation, he cannot treat such representation as fraudulent;[34] as, when a purchaser investigates

Cord, 60 Iowa, 153, 14 N. W. 208; Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98; Cloutman v. Bailey, 62 N. H. 44; Davis v. Hawkins, 163 Pa. 228, 29 Atl. 746.

[32] Reynell v. Sprye, 1 De Gex, M. & G. 660, 691, 708; Dyer v. Hargrave, 10 Ves. 505; Boynton v. Hazelboom, 14 Allen (Mass.) 107, 92 Am. Dec. 738; Swimm v. Bush, 23 Mich. 99; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241; Drake v. Latham, 50 Ill. 270; Dillman v. Nadlehoffer, 119 Ill. 567, 7 N. E. 88; In re Holmes' Appeal, 77 Pa. 50; Watts v. Cummins, 59 Pa. 84; Wilkin v. Barnard, 61 N. Y. 628.

[33] Trower v. Newcome, 3 Mer. 704; Irving v. Thomas, 18 Me. 418, 424; Savage v. Jackson, 19 Ga. 305; Slaughter v. Gerson, 13 Wall. 379, 20 L. Ed. 627.

[34] In Clapham v. Shillito, 7 Beav. 149, Lord Langdale says: "If the party to whom the representations were made himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or, if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded." And see Farrar v. Churchill, 135 U.

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for himself, and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representations.[35] And if a person have means at his disposal for acquiring information, which, if employed, would lead to an ascertainment of the falsity or statement made to him, he will be presumed to have known that such statement was false. As the rule has been stated: "If the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentation." [36]

But the presumption is always against the party making a positive representation of fact, for the general rule is that the party to whom it is made had a right to rely on its truthfulness. It follows, therefore, that, if a person seeks to avoid the effects of his misrepresentations by alleging that the person to whom they were made did not rely or should not have relied thereon, it is incumbent on him to show that the person to whom they were made either had knowledge of the facts, or had made inquiry in respect thereto, and had ascertained the truth, or had availed himself to some extent of a means or opportunity of obtaining knowledge of such facts.[37]

No obligation rests on a person to investigate or verify representations of fact made to him, to the truth of which the other party to the contract, with full means of knowledge,

S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931; Slaughter v. Gerson, 13 Wall. 379, 383, 20 L. Ed. 627; Moses v. Katzenberger, 84 Ala. 95, 4 South. 237; Crocker v. Manley, 164 Ill. 282, 45 N. E. 577; Bowker v. Delong, 141 Mass. 315, 4 N. E. 834; Arnold v. Hosiery Co., 148 N. Y. 392, 42 N. E. 980.

[35] Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; Slaughter v. Gerson, 13 Wall. 379, 20 L. Ed. 627.

[36] Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755. And see, also, Colton v. Stanford, 82 Cal. 352, 23 Pac. 16; Herron v. Herron, 71 Iowa, 428, 32 N. W. 407; Fish v. Cleland, 33 Ill. 238; Rockafellow v. Baker, 41 Pa. 319.

[37] Price v. Macaulay, 2 De Gex, M. & G. 339, 346; Redgrave v. Hurd, 20 Ch. Div. 1; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241; Wenzel v. Shulz, 78 Cal. 221, 20 Pac. 404.

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has deliberately pledged his faith.[38] In a court of equity no man can complain that another has too implicitly relied on the truth of what he himself has stated.[39]

Misrepresentation must be Material.

The misrepresentation must be of such a nature as to have injuriously affected the rights and interests of the person to whom it was made. Such person must have suffered some financial loss or injury as a natural result of such misrepresentation.[40] Such misrepresentation, to be material, must be one necessarily influencing and inducing the transaction, and affecting and going to its very essence and substance.[41] Misrepresentations extending only to some unimportant detail, or to something collateral to the contract, are not material.[42]

[38] Kramer v. Williamson, 135 Ind. 655, 35 N. E. 388; Mead v. Bunn, 32 N. Y. 275; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638; Morehead v. Eades, 3 Bush (Ky.) 121.

[39] Redgrave v. Hurd, 20 Ch. Div. 1. In Sutton v. Morgan, 158 Pa. 204, 27 Atl. 894, it was said in reference to a failure of purchasers of land to investigate respecting misrepresentations made by 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."

[40] Clark v. White, 12 Pet. 178, 9 L. Ed. 1046; Reay v. Butler, 69 Cal. 580, 11 Pac. 463; Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386; Rogers v. Higgins, 57 Ill. 244; Bartlett v. Blaine, 83 Ill. 25, 25 Am. Rep. 346; McShane v. Hazlehurst, 50 Md. 107; Wells v. Waterhouse, 22 Me. 131; Wuesthoff v. Seymour, 22 N. J. Eq. 66; Bennett v. Judson, 21 N. Y. 238; Taylor v. Guest, 58 N. Y. 262; Marr's Appeal, 78 Pa. 66; Wells v. Millett, 23 Wis. 64.

[41] 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.

[42] Percival v. Harger, 40 Iowa, 286; Winston v. Gwathmey, 8 B. Mon. (Ky.) 19.

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SAME—FRAUDULENT CONCEALMENT.

127. Concealment of, or failure to disclose, a fact does not constitute a fraud, unless such fact is material, and is one which the person concealing it is bound in conscience and duty to disclose.[1]

Fraudulent concealment, as here referred to, does not relate to that "active concealment" where a person uses some contrivance or artifice to hide a defect in something offered for sale. Such concealment constitutes actual fraud in the nature of a misrepresentation. As we have seen, a misrepresentation need not be made by language, spoken or written, but conduct calculated to convey a false impression is sufficient.[2] As a general rule, both at law and in equity, the mere failure of a party to a contract to disclose a material fact is not fraud.[3] It has never been asserted in any legal tribunal that a vendor is bound to disclose all facts, which, if known by the purchaser, would prevent a purchase. When parties deal at arm's 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 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.[4] As an instance it has been held that a person about to purchase an oil lease was not bound to disclose to his vendor the fact that oil had

§ 127. [1] Snell, Eq. p. 552.

[2] Lovell v. Hicks, 2 Younge & C. Exch. 46; Denny v. Hancock, 6 Ch. App. 1.

[3] Keates v. Earl of Cadogan, 10 C. B. 591; Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Dambmann v. Schulting, 75 N. Y. 55, 62; People's Bank of City of New York v. Bogart, 81 N. Y. 101, 37 Am. Rep. 481; Wood v. Amory, 105 N. Y. 278, 11 N. E. 636.

[4] Cleaveland v. Richardson, 132 U. S. 318, 329, 10 Sup. Ct. 100, 33 L. Ed. 384; 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; Goninan v. Stephenson, 24 Wis. 75.

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been produced on a neighboring leasehold, which he owned, and that the failure to disclose such fact was not a fraud.[5] And a purchaser of lands is not required to communicate his knowledge of something which gives it an exceptional value, such as a mineral deposit under it;[6] nor need the vendor communicate his information respecting defects rendering it less valuable than the purchaser supposes it to be.[7] But if, in addition to the party's silence, something be done to conceal the truth, or if the party discloses a part of the truth and keeps silent as to a material fact, there may be a fraudulent concealment, or even a fraudulent misrepresentation.[8]

Duty to Disclose.

Concealment is fraudulent when, owing to the relationship existing between the parties, the subject-matter of the transaction, or other circumstances, it is the duty of the party having knowledge of material facts to disclose them. Silence when there is a legal or equitable duty to speak is a fraud.[9] If, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is, in effect, a representation that what is disclosed is the whole truth.[10]

The chief difficulty in these cases seems to be to determine when a party may be charged with a duty to speak.

[5] Neill v. Shamburg, 158 Pa. 263, 27 Atl. 992.

[6] Fox v. Mackreth, 2 Cox, 320, 2 Brown, Ch. 400, 420; Harris v. Tyson, 24 Pa. 347, 64 Am. Dec. 661; Williams v. Spurr, 24 Mich. 335; Neill v. Shamburg, 158 Pa. 263, 27 Atl. 992.

[7] Haywood v. Cope, 25 Beav. 140; Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed. 214; People's Bank of City of New York v. Bogart, 81 N. Y. 101. A sale of land at 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 opinion on which the purchaser acted. Law v. Grant, 37 Wis. 548.

[8] Neckley v. Thomas, 22 Barb. (N. Y.) 252; Newell v. Randall, 32 Minn. 171, 19 N. W. 972, 50 Am. Rep. 562. And see Turner v. Harvey, Jac. 169, 178; Davies v. Cooper, 5 Mylne & C. 270.

[9] Paddock v. Strobridge, 29 Vt. 470, 477; Kerr, Fraud & M. 93; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 346, 36 L. Ed. 82; Horton v. Handvil, 41 N. J. Eq. 57, 3 Atl. 72.

[10] Stewart v. Cattle-Ranch Co., 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439.

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Generally, where a relationship of trust and confidence exists between the parties, and one of the parties, by the nature of such relationship, either actually or legally reposes confidence in the other, the party in whom the confidence is reposed is legally and equitably bound to disclose to the other the knowledge which he may possess as to material facts, and his intentional silence as to such facts is fraud. As examples of the application of this rule, a trustee dealing with his cestui que trust must disclose all material facts,[11] and the same may be said where the relationship is that of principal and agent,[12] attorney and client,[13] and of partners.[14]

A special fiduciary relationship may exist between strangers, although the transaction may not be fiduciary in its nature; as where one of the parties expressly reposes trust or confidence in the other. In such cases, if the party in whom the trust is reposed does not disclose material facts, he is guilty of fraud. To hold otherwise would be to permit a party to take advantage of confidences reposed in him.[15] This rule has been applied where a promoter of a corporation induces a person to subscribe to the capital stock of a corporation, in which case the subscriber may be relieved if the promoter failed to disclose facts which would probably have prevented him from subscribing.[16] It is often difficult to determine when a special fiduciary relationship exists. Each case depends on its own particular circumstances. It may exist because of the nature of the dealings of the parties and their positions towards each other; as where there was a pre-existing fiduciary relationship, or where one party is in

[11] Dalbiac v. Dalbiac, 16 Ves. 124; Maddeford v. Austwick, 1 Sim. 89.

[12] Mason v. Bauman, 62 Ill. 76; Porter v. Woodruff, 36 N. J. Eq. 174; Green v. Peeso, 92 Iowa, 261, 60 N. W. 531; Bell v. Bell, 3 W. Va. 183.

[13] Miller v. Whelan, 158 Ill. 544, 42 N. E. 59; Todd v. Wilson, 9 Beav. 486; Howell v. Baker, 5 Johns. Ch. (N. Y.) 118; Thomas v. Turner's Adm'r, 87 Va. 1, 12 S. E. 149, 668.

[14] Warren v. Schainwald, 62 Cal. 56; Hopkins v. Watt, 13 Ill. 298; Pomeroy v. Benton, 57 Mo. 531; Bennett v. McMillin, 179 Pa. 146, 36 Atl. 188; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769.

[15] Bennett v. McMillin, 179 Pa. 146, 36 Atl. 188; Enmons v. Moore, 85 Ill. 304; Virginia Land Co. v. Haupt, 90 Va. 533, 19 S. E. 168, 44 Am. St. Rep. 939.

[16] Virginia Land Co. v. Haupt, 90 Va. 533, 19 S. E. 168, 44 Am. St. Rep. 939.

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possession of knowledge of a material fact, of which, from the circumstances of the case, the other party must be ignorant, and could not acquire knowledge. It has been stated as a general rule that "each party is bound in every case to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation." [17] And where a party knows that his silence in respect to a material fact will cause a misapprehension thereof by the other party, it is his duty to correct such misapprehension. And if facts arise, after a statement which was true when made, which render such statement false, and the party to whom such statement was made has not acted thereon, it is the duty of the person making such statement to disclose such facts to the other party, if such facts are within his knowledge, and are such as would not naturally come to the knowledge of such other party.[18]

As a general rule, a buyer on credit is not bound to declare as to his financial condition, and, in the absence of evasive and partial answers, or of conduct amounting to misrepresentation, his silence as to his financial difficulties, or even insolvency, will not constitute a fraudulent concealment.[19] But where he has once declared his financial condition to a commercial agency, or to a person with whom he transacts business, and circumstances thereafter arise which would tend to impair his ability to pay, it is his duty to disclose such circumstances to the persons with whom he is dealing, or to such commercial agency. His silence as to such circumstances, even though no questions are asked, is

[17] 2 Kent, Comm. 482. And see Bryant's Ex'r v. Boothe, 30 Ala. 311, 68 Am. Dec. 117; Mitchell v. McDougall, 62 Ill. 498; Downing v. Dearborn, 77 Me. 457, 1 Atl. 407; Minor v. Sharon, 112 Mass. 477, 17 Am. Rep. 122,—where a landlord leased a dwelling house which was infected with smallpox without disclosing such fact to the lessor. And see, to same effect, Cesar v. Karutz, 60 N. Y. 229, 19 Am. Rep. 164. See, also, Grigsby v. Stapleton, 94 Mo. 423, 7 S. W. 421; Hanson v. Edgerly, 29 N. H. 343; Daly v. Wise, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236; Dinsmore v. Tidball, 34 Ohio St. 418; Forster's Ex'rs v. Gillam, 13 Pa. 340; Dowling v. Lawrence, 58 Wis. 282, 16 N. W. 552.

[18] Traill v. Baring, 4 De Gex, J. & S. 318; Reynell v. Sprye, 1 De Gex, M. & G. 660; Janes v. Trustees, 17 Ga. 515; Loewer v. Harris, 6 C. C. A. 394, 57 Fed. 368.

[19] Pom. Eq. Jur. § 906.

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a fraudulent concealment.[20] Independent of the relationship of the parties or the attendant circumstances, the vendor of real property is legally and equitably bound to disclose defects in the title, which are known to him and unknown to the vendee.[21] This is also true as to facts indicating a deficiency in the quantity of land sold, and affecting the quality and value thereof, which are peculiarly within the vendor's knowledge, but are not ascertainable by the vendee.[22] This rule has no application where the facts are readily ascertainable, and the vendor does or says nothing to prevent an investigation.[23]

REMEDIES OF DEFRAUDED PARTY.

128. 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.[1]

[20] Mooney v. Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; Nichols v. Pinner, 18 N. Y. 295; Boaz v. Manufacturing Co. (Tex. Civ. App.) 40 S. W. 866. It seems reasonably clear that, where a man has once made a declaration to a mercantile agency, it is to be regarded as a continuous statement within reasonable limits, which is, perhaps, the better way of stating the principle. But in Maculiar v. McKinley, 99 N. Y. 353, 2 N. E. 9, the vendee made a statement in February, 1881, in response to an application from a mercantile agency. He was applied to in June for a statement, which he refused. In the following August, September, and October he purchased goods on credit, and in November made a general assignment, and it was held that the plaintiffs, vendors, were properly nonsuited, and that the evidence failed to show any intention on the part of defendant to mislead or deceive plaintiffs; and that, in view of the circumstances of the case, it could not be said that the misrepresentations of February had any legitimate connection with the credits extended in August, September, and October.

[21] Barnard v. Duncan, 38 Mo. 170, 90 Am. Dec. 416; Forster's Ex'rs v. Gillam, 18 Pa. 340; Bryant's Ex'r v. Boothe, 30 Ala. 311, 68 Am. Dec. 117.

[22] Bedford v. Hickman, 5 Call (Va.) 236, 2 Am. Dec. 590; Mitchell v. McDougall, 62 Ill. 498.

[23] Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386; McCall v. Davis, 56 Pa. 431.

§ 128. [1] Oakes v. Turquand, L. R. 2 H. L. 345, 346; Lindsley v. Ferguson, 49 N. Y. 623; Negley v. Lindsay, 67 Pa. 217.

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Since fraud renders a transaction voidable, and not void, there are several remedies available to the defrauded party: (1) He may affirm the transaction, and sue at law to recover the damages sustained by reason of the fraud.[2] (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 the plaintiff can maintain it, he must have returned or tendered all that he received by virtue thereof.[3] (3) He may sue in equity for a rescission. This remedy does not proceed on the theory that the plaintiff has already rescinded, but it is for a rescission, and therefore it is sufficient for the plaintiff to restore to the defendant what he has received, and the rights of the parties can be fully regulated and protected by the judgment to be rendered.[4] In all cases the plaintiff must act with reasonable diligence after becoming aware of the fraud.[5] But the question as to what is reasonable diligence depends on the facts in each particular case.[6] A failure to institute judicial proceedings for relief within a reasonable time after the discovery of the fraud may be deemed an acquiescence, and defeat the remedy, although the delay is for a less time than that prescribed by the statute of limitations.[7] But it is necessary to bear in mind that the right of the party defrauded is not affected by the lapse of time, or, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.[8]

[2] Krumm v. Beach, 96 N. Y. 398, 406; Urquhart v. MacPherson, 3 App. Cas. 831.

[3] Gould v. Bank, 86 N. Y. 75; Vail v. Reynolds, 118 N. Y. 297, 302, 23 N. E. 301; Thayer v. Turner, 8 Metc. (Mass.) 550.

[4] Gould v. Bank, 86 N. Y. 75; Thomas v. Beals, 154 Mass. 51, 27 N. E. 1004; Nelson v. Carlson, 54 Minn. 94, 55 N. W. 821.

[5] Campau v. Van Dyke, 15 Mich. 371; Brown v. Brown, 142 Ill. 409, 32 N. E. 500; Richardson v. Walton (C. C.) 49 Fed. 888; Weaver v. Carpenter, 42 Iowa, 345; Akerly v. Vilas, 21 Wis. 88.

[6] Kilbourn v. Sunderland, 130 U. S. 505, 518, 9 Sup. Ct. 594, 32 L. Ed. 1005.

[7] Hanner v. Moulton, 138 U. S. 486, 11 Sup. Ct. 408, 34 L. Ed. 1032; Norris v. Haggin, 136 U. S. 386, 10 Sup. Ct. 942, 34 L. Ed. 424; Strong

[8] Rolfe v. Gregory, 4 De Gex, J. & S. 576; Vane v. Vane, 8 Ch. App. 383; Phalen v. Clark, 19 Conn. 421, 50 Am. Dec. 253; Stocks v. Van Leonard, 8 Ga. 511; Martin v. Martin, 35 Ala. 560; Cock v. Van Etten, 12 Minn. 522 (Gil. 431).

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Another result of the merely voidable nature of transactions tainted with fraud is that the complainant will be given no relief unless he comes with clean hands. If he has participated in the scheme to defraud, and is in pari delicto with the defendant, equity will not relieve in his favor, but will leave the parties where it finds them.

This equitable relief against fraud is, however, very extensive in its scope. It reaches not only all those who were engaged in the fraud, but all who directly and knowingly enjoyed the benefits thereof, and all who derive title from them knowingly, or with notice. "A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but 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." [9] But there is one limitation to the application of this rule. If the relief cannot be granted without injuriously affecting the rights of third parties who are innocent of any wrong, a remedy against the fraud may not be afforded. This is so where the property acquired by the fraud has been transferred to a bona fide purchaser for a valuable consideration, without notice. The only relief to be had in such a case is against the perpetrator of the fraud.[10]

129. CONSTRUCTIVE FRAUD.

In treating this branch of the subject of fraud, we will consider the last three forms of fraud recognized in the classification of Lord Hardwicke in the case of Earl of Chesterfield v. Janssen; [1] i. e.: (2) Fraud apparent from the intrinsic nature and subject of the bargain itself; (3) frauds presumed from the circumstances and conditions of the contracting parties; (4) fraud upon third persons not parties to the fraudulent contract. The effect of constructive fraud is

v. Strong, 102 N. Y. 73, 5 N. E. 799; Calhoun v. Millard, 121 N. Y. 77, 24 N. E. 27, 8 L. R. A. 248; Allen v. Allen, 47 Mich. 74, 10 N. W. 113; Haldane v. Sweet, 55 Mich. 196, 20 N. W. 902; Burdett v. May, 100 Mo. 18, 12 S. W. 1056.

[9] Vane v. Vane, 8 Ch. App. 383, 397, per James, L. J.

[10] Stephens v. Board, 79 N. Y. 183, 35 Am. Rep. 511; Dunklin v. Wilson, 64 Ala. 162; Oakes v. Turquand, L. R. 2 H. L. 325.

§ 129. [1] 2 Ves. Sr. 125; Id., 1 Atk. 301. And see ante, p. 287.

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the same as of actual fraud. It has, indeed, often been doubted whether the use of the term "constructive fraud" is in accordance with accurate and correct nomenclature. There may be constructive fraud, so called, when there is no untruth or falsity in the words or acts of the party charged therewith; and it has been said by a leading English equity judge "that to treat such a transaction as a fraud is, in my opinion, to confound moral principles, and to introduce an element of great confusion into the doctrine of courts of equity, the fundamental principle of which, as regards fraud, is, as it appears to me, that nothing can be called fraud, and nothing can be treated as fraud, except an act which involves grave moral guilt." Granting that the term "constructive fraud" is inappropriate, it does not seem expedient to drop the use of it at this time; especially since its known meaning, and the distinction between it and actual fraud, have become so firmly fixed in legal literature.

SAME—APPARENT FROM NATURE OF BARGAIN.

129½. Contracts and transactions may be deemed constructively fraudulent

(a) Because of an inadequacy of consideration which is so gross that it shocks the conscience, or is coupled with other inequitable circumstances.

(b) Because contrary to statute, public policy, or good morals.

Inadequacy of Consideration.

Inadequacy of consideration generally occurs in contracts of sale, or in transactions analogous thereto, and may be either in the price paid or to be paid or in the value of the subject-matter; or, in other words, it exists both when the price is too small and when it is too great. It is a well-settled principle in law and equity that mere inadequacy of consideration does not form a distinct ground of equitable relief.[1] It is not enough to induce a court of equity to in-

§ 129½. [1] Parmelee v. Cameron, 41 N. Y. 392; Butler v. Haskell, 4 Desaus. (S. C.) 651; Martinez v. Moll (C. C.) 46 Fed. 724; Harris v. Tyson, 24 Pa. 347, 360; Collier v. Brown, 1 Cox, 428.

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terfere that a bargain is hard and unreasonable. Every man is presumed to be capable of managing his own affairs, and whether his bargains are wise or unwise is not, ordinarily, a legitimate subject of inquiry in a court of either legal or equitable jurisdiction.[3] And this equally applies in cases of executed or executory contracts, whether the relief sought is cancellation or performance.

But there are cases 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. In such cases a court of equity avoids the bargain, not merely on account of its gross inequality, but because such inequality furnishes the most vehement presumption of fraud.[4] But 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." [5]

It is not often that equity will interpose where there is nothing but mere inadequacy of consideration. But, even in such cases, if the inadequacy is coupled with circumstances of an inequitable nature,—such as concealment, oppression, or undue influence on the one hand, or old age, mental infirmity, ignorance, or pecuniary embarrassment on the other,—a presumption of fraud is raised, which warrants equitable relief, unless the party whom the contract benefits succeeds in showing perfect good faith in the transaction.[6]

[3] Dunn v. Chambers, 4 Barb. (N. Y.) 376; Holmes v. Fresh, 9 Mo. 201; Maddox v. Simmons, 31 Ga. 512; Lee v. Kirby, 104 Mass. 420, 428; Ready v. Noakes, 29 N. J. Eq. 497; Cumming's Appeal, 67 Pa. 404.

[4] Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513; Seymour v. Delancy, 3 Cow. (N. Y.) 452, 15 Am. Dec. 270; Dunn v. Chambers, 4 Barb. (N. Y.) 376; Parmelee v. Cameron, 41 N. Y. 392; Lee v. Kirby, 104 Mass. 420; Berry v. Lovi, 107 Ill. 612; Adair v. Cummin, 48 Mich. 375, 12 N. W. 495.

[5] Lord Thurlow in Gwynne v. Heaton, 1 Brown, Ch. 8; Matthews v. Crockett's Adm'rs, 82 Va. 394; Hamblin v. Bishop (C. C.) 41 Fed. 74; Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39; Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9; Id., 45 N. J. Eq. 830, 18 Atl. 849.

[6] Burke v. Taylor, 94 Ala. 530, 10 South. 129; Tracey v. Sacket, 1 Ohio St. 54, 59 Am. Dec. 610; Blackwilder v. Loveless, 21 Ala. 371; Fish v. Leser, 69 Ill. 394; Davis v. Dock Co., 129 Ill. 180, 21 N. E. 830; Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971; Dickson v. Kempinsky, 96 Mo. 252, 9 S. W. 618.

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Catching Bargains.

There is a peculiar class of transactions, known as "catching bargains," with heirs, reversioners, or expectants which frequently arise in England, but rarely with us, and in which fraud is commonly presumed from inadequacy of consideration.[6] Such transactions may be set aside on the ground of inadequacy alone, without proof of any other ingredients of fraud, such as misrepresentation, undue influence, etc.[7] The fact that the expectant was of mature age, and well understood the nature and extent of the transaction, is immaterial.[8] From the fact of a person's selling such an interest, the court presumes that he was under pecuniary pressure, and he is not called upon to prove that such was the fact. The onus is on the purchaser to show that the transaction was just and reasonable.[9] Post obit bonds, or bonds conditioned for the 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 permitted to stand only as security for the actual sum lent thereon, with proper interest.[10] These cases are no longer of practical use, because of the statute of 31 & 32 Vict. c. 4, which 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 the ground of undervalue." But it is of interest to note the rule existing before the statute, especially since the influence of such rule can be observed in many of our American cases.[11]

[6] Peacock v. Evans, 16 Ves. 512.

[7] Curwyn v. Milner, 3 P. Wms. 293; Earl of Aylesford v. Morris, 8 Ch. App. 484.

[8] Earl of Portmore v. Taylor, 4 Sim. 182; Bromley v. Smith, 26 Beav. 644.

[9] Gowland v. De Faria, 17 Ves. 20; Lord v. Jeffkins, 35 Beav. 7, 9.

[10] Curling v. Marquis Townshend, 19 Ves. 628; Benyon v. Fitch, 35 Beav. 570.

[11] Jenkins v. Pye, 12 Pet. 241, 9 L. Ed. 1070; Larrabee v. Larrabee, 34 Me. 477; Lowry v. Spear, 7 Bush (Ky.) 451; Boynton v. Hubbard, 7 Mass. 112; Trull v. Eastman, 3 Metc. (Mass.) 121, 37 Am. Dec. 126; Butler v. Duncan, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711; Poor v. Hazleton, 15 N. H. 564; Mastin v. Marlow, 65 N. C. 695; Varick v. Edwards, 1 Hoff. Ch. (N. Y.) 382; Needles v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85; Power's Appeal, 63 Pa. 443.

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Contracts Illegal Because Contrary to Statute.

Many contracts which were formerly illegal at the common law because opposed to public policy or good morals have since become the subject of legislative enactment, and are now expressly declared by statute to be illegal. Among the more common contracts which are in violation of statute, and therefore void, are usurious and gaming contracts. In England the laws prohibiting usury have been repealed, and the present tendency of legislative authority in the American states seems to be in the same direction. But it has been held that the doctrines of equity as to the relief of expectant heirs from unconscionable bargains have not been affected by the repeal of the usury laws, or by the alteration of the laws as to sales of reversionary interests.[12] Some of the American states have followed England, and repealed the usury laws; but in many of the states usurious contracts are still void under the statute. In other states the usurious excess only is void, and the contract remains enforceable. It has been generally held that courts of equity will follow the statutory rule, and, where a party claiming under a usurious security resorts to such courts to render his claim available, and the defendant sets up and establishes the charge of usury, the courts will decide according to the letter of the statute, and deny all assistance, and set aside every security and instrument infected with usury.[13]

Modern English and American statutes have declared gaming and waging contracts, and all instruments and agreements connected therewith, to be void. All courts, both of law and equity, will refuse to lend their aid to enforce or to relieve against a gambling contract.[14] Contracts for the delivery of stock, generally known as "time contracts," which are in their nature gambling contracts, cannot be enforced.[15]

[12] Earl of Aylesford v. Morris, 8 Ch. App. 484.

[13] Fanning v. Dunham, 5 Johns. Ch. (N. Y.) 122, 142, 9 Am. Dec. 283.

[14] Dade's Adm'r v. Madison, 5 Leigh (Va.) 401; Wilkinson v. Tousley, 16 Minn. 299 (Gil. 263), 10 Am. Rep. 139; Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172; Cole v. Milmine, 88 Ill. 349; Alvord v. Smith, 63 Ind. 58; Harris v. White, 81 N. Y. 532; People v. Fallon, 152 N. Y. 12, 46 N. E. 296; Irwin v. Williar, 110 U. S. 499, 508, 510, 4 Sup. Ct. 160, 28 L. Ed. 225.

[15] Story v. Salomon, 71 N. Y. 420; Bigelow v. Benedict, 70 N. Y. 202, 206, 26 Am. Rep. 573; Fareira v. Gabell, 89 Pa. 89; Griffiths v.

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Mr. Benjamin, in his work on Sales, has observed: "It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade."

Contracts and Transactions against Public Policy.

Among the contracts and transactions which are deemed constructively fraudulent because opposed to public policy are those interfering with the rights of marriage, waiving an equity of redemption, in restraint of trade, and for the procurement of office. Justly and wisely considering the sacredness of the marriage relation, equity has, from a very early period, interposed to relieve against, and has declared null and void, contracts or agreements which interfere in any way with the absolute freedom of marriage. As an illustration, marriage brokerage contracts, whereby an agreement is made to negotiate a marriage, are entirely void. They cannot be confirmed, and money paid thereunder may be recovered.[16] The same may be said in respect to agreements between persons not to marry at all, or not to marry any person except the promisee.[17]

Gifts and testamentary dispositions in restraint of marriage are subject to the application of similar rules and principles. It is somewhat difficult to lay down fixed rules relative to such cases, because of the great mass of law upon the subject, and the confusion and uncertainty which exists in respect thereto. Two rules or principles may be stated which seem to be reasonably well settled: (1) If a gift is made under a condition that the donee shall refrain from marriage, such condition is void, and the donee will take free therefrom. This is subject to the limitation that a condition

Sears, 112 Pa. 523, 4 Atl. 492; Lowry v. Dillman, 59 Wis. 197, 18 N. W. 4. But there is no presumption of illegal intent in a contract for future delivery of stock. Bigelow v. Benedict, supra.

[16] Cole v. Gibson, 1 Ves. Sr. 503; Boynton v. Hubbard, 7 Mass. 112; Morrison v. Rogers, 115 Cal. 252, 46 Pac. 1072; Johnson's Adm'r v. Hunt, 81 Ky. 321; Antcliff v. June, 81 Mich. 477, 45 N. W. 1019, 10 L. R. A. 621, 21 Am. St. Rep. 533; Duval v. Wellman, 124 N. Y. 156, 26 N. E. 343; Place v. Conklin, 34 App. Div. 191, 54 N. Y. Supp. 532.

[17] Lowe v. Peers, 4 Burrows, 2225; Baker v. White, 2 Vern. 215; Conrad v. Williams, 6 Hill (N. Y.) 444; White v. Union, 76 Ala. 251, 52 Am. Rep. 325.

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precedent annexed to a devise of land, although in absolute restraint of marriage, will, if broken, operate to prevent the taking effect of the devise.[18] (2) Where the condition annexed to the gift is only in partial restraint of marriage, as where the donee should not marry before a certain age, or a certain person, or a person of a certain religious denomination, or without the consent of trustees, it is valid and enforceable.[19] In this latter case, in case of a breach of the condition, if the gift is of real property, the condition is valid whether there is a gift over or not;[20] but, if the gift is of personalty, and there is no gift over, the restraint may be inoperative to defeat the estate.[21]

Contracts in general restraint of trade, have, from an early time, been deemed void as against public policy. If such restraint is partial, reasonable, and founded on a valuable consideration, it may be sustained.[22] Contracts for the sale

[18] Scott v. Tyler, 2 Brown, Ch. 431, 2 White & T. Lead. Cas. (4th Am. Ed.) 429; Morley v. Rennoldson, 2 Hare, 570; Waters v. Tazewell, 9 Md. 291.

[19] Hoopes v. Dundas, 10 Pa. 75; In re Hotz's Estate, 38 Pa. 422, 80 Am. Dec. 490; Collier v. Slaughter's Adm'r, 20 Ala. 263; Graydon's Ex'rs v. Graydon, 23 N. J. Eq. 229.

[20] Clarke v. Parker, 19 Ves. 1, 13; Lloyd v. Branton, 3 Mer. 108, 117, 119.

[21] Harvey v. Aston, 1 Atk. 361, 375, 377; Parsons v. Winslow, 6 Mass. 169, 4 Am. Dec. 107.

[22] See Year Book, 2 Hen. V. Term Pasch. pl. 26; Davies v. Davies, 38 Ch. Div. 499; Mitchell v. Reynolds, 1 Smith, Lead. Cas. (9th Ed.) 705. And see the following recent cases: Harding v. Glucose Co., 182 Ill. 551, 55 N. E. 577; Buck v. Coward, 122 Mich. 530, 81 N. W. 328; Rakestraw v. Lanier, 104 Ga. 188, 30 S. E. 735; Ru Ton v. Everitt, 35 App. Div. 412, 54 N. Y. Supp. 896; Leonard v. Poole, 114 N. Y. 371, 21 N. E. 707. Formerly this rule was applied with great strictness, and anything which tended to a general restraint of trade, and was unlimited either in respect to time or place, was considered invalid. The modern tendency is to hold that, where "the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public, it will be upheld." Tindal, C. J., in Horner v. Graves, 7 Bing. 735. See, also, Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Webster v. Buss, 61 N. H. 40, 60 Am. Rep. 317; Nordenfelt v. Ammunition Co. [1894] App. Cas. 535, 63 Law J. Ch. 908, 71 Law T. 489, 6 Eng. Rul. Cas. 413; Gamewell Fire-Alarm Tel. Co. v. Crane, 160 Mass. 50, 35 N. E. 98, 22 L. R. A. 673, and note, 39 Am. St. Rep. 458.

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of a business and good will are often made with a clause restricting the vendor from carrying on a similar business within a certain distance of the old place for a specified length of time. Courts of equity will enforce such contracts if they are reasonable as to limit of territory and length of time.[23] But equity will not enforce a contract in restraint of trade, although it is good at law, if its terms are hard and complex.[24] There are many other contracts, either in restraint of trade, or regulating in some manner business methods and relations, which are generally held invalid as against public policy. It is not possible to enter into an elaborate discussion of such contracts in a work of this extent on the subject of equity. Mr. Clark has treated the subject at length in his work on Contracts, to which the reader is referred.[25]

There are also many contracts and agreements which injuriously affect the public, and are constructively fraudulent, and therefore invalid. Among these may be mentioned agreements for the sale of or traffic in the emoluments of a public office, and agreements to influence legislation by personal solicitation of the members of legislative bodies. "Any contract," says Greenhood,[26] "contemplating the use of secret influence with public officers, or calculated to induce the use of such influence, is void, especially when one of the parties is a public officer, though he be but a repre-

But under the federal statute against monopolies it does not make any difference whether the restraint of trade is reasonable or unreasonable. U. S. v. Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; U. S. v. Association, 171 U. S. 505, 19 Sup Ct. 25, 43 L. Ed. 259.

[23] Robbins v. Webb, 68 Ala. 393; Goodman v. Henderson, 58 Ga. 567; Lanzit v. Manufacturing Co., 184 Ill. 326, 56 N. E. 393; Hedge v. Lowe, 47 Iowa, 137; Smalley v. Greene, 52 Iowa, 241, 3 N. W. 78, 35 Am. St. Rep. 267; Dean v. Emerson, 102 Mass. 480; Timmerman v. Dever, 52 Mich. 34, 17 N. W. 230, 50 Am. Rep. 240; Watrous v. Allen, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363; Thompson v. Andrus, 73 Mich. 551, 41 N. W. 683; Bingham v. Brands, 119 Mich. 255, 77 N. W. 940; Trenton Potteries Co. v. Oliphant, 56 N. J. Eq. 680, 39 Atl. 923.

[24] Kimberley v. Jennings, 6 Sim. 340; Mineral Water Bottle Exchange & Trade Soc. v. Booth, 36 Ch. Div. 465.

[25] Clark, Cont. (Hornbook Series) p. 374, c. 8.

[26] Greenh. Pub. Pol. p. 357, rule 300.

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sentative of a foreign government, and his position is merely honorary." [27]

Any agreement which is opposed to good morals,—"contra bonos mores,"—cannot be enforced, although the act agreed to be done is not in itself a violation of a statute, or such as will render the doer liable to a penalty. Frequent among such class of agreements are those made in consideration of present or future illicit sexual intercourse or cohabitation.[28] And any agreement which is contrary to established rules of decency and morality is contrary to public policy.[29]

SAME—INFERRED FROM CONDITION OF PARTIES.

130. For convenience of discussion, the cases in which constructive fraud may be inferred from the circumstances and conditions of the contracting parties may be divided into the following classes:

(a) Transactions with persons totally or partially incapacitated.

(b) Transactions with persons under duress or undue influence.

(c) Transactions between persons in fiduciary relationship.

This subdivision of the subject of constructive fraud includes a consideration of that species of fraud embraced under the third head of Lord Hardwicke's classification. As was stated by this great judge: "A third kind of fraud is

[27] Gray v. Hook, 4 N. Y. 449; Ormerod v. Dearman, 100 Pa. 561; Wight v. Rindskopf, 43 Wis. 344; Rhodes v. Neal, 64 Ga. 704, 37 Am. Rep. 93; Haines v. Lewis, 54 Iowa, 301, 6 N. W. 495, 37 Am. Rep. 202; Trist v. Child, 21 Wall. 441, 22 L. Ed. 623; O'Hara v. Carpenter, 23 Mich. 410, 9 Am. Rep. 89; Hovey v. Storer, 63 Me. 486; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539.

[28] Ayerst v. Jenkins, L. R. 16 Eq. 275; Wallace v. Rappleye, 103 Ill. 229; Drennan v. Douglas, 102 Ill. 341, 40 Am. Rep. 595; Hanks v. Naglee, 54 Cal. 51, 35 Am. Rep. 67; Forsythe v. State, 6 Ohio, 20; Saxon v. Wood, 4 Ind. App. 242, 30 N. E. 797.

[29] Clark, Cont. (Hornbook Series) p. 439.

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that which may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is that it must be proved, and 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."[1] Fraud vitiates all contracts, but, as a general rule, it is not presumed, but must be proved. But, whenever the relations between the contracting parties are of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, then the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary, and well understood.[2]

SAME—TRANSACTIONS WITH PERSONS TOTALLY OR PARTIALLY INCAPACITATED.

131. The contract of a lunatic, idiot, or other person completely non compos mentis may be set aside, because such persons are incapable, at law and in equity, of giving a true consent.

132. There can be no true consent or agreement without a capacity to understand the terms of the agreement. If a person induces another who lacks this capacity to enter into an apparent contract, equity will not recognize the transaction, however it may be fenced by formal observances, but, deeming

§ 130. [1] Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125; Id., 1 Atk. 301, 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 773.
[2] Cowee v. Cornell, 75 N. Y. 91, 99, 31 Am. Rep. 428.

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it fraudulent, will generally grant relief against it, at the suit of the party imposed upon or his legal representatives.[1]

One of the fundamental essentials of a valid contract is the assent of two minds. A lunatic, idiot, or other person non compos mentis has no mind, and is, therefore, incapable of assenting.

Insanity.

Legal insanity is difficult to define. It is a state or condition which must be noted with reference to each class of actions to which it is applied. As a cause of civil incapacity it is such a defect or weakness as prevents rational assent to a contract, or due consideration of the facts properly and naturally entering into the testamentary disposition of one's estate. It includes idiocy, lunacy, and any mental derangement. It is generally held in this country 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.[2] But in some jurisdictions this rule is not adhered to very closely, for it has been sometimes held that the fact that a person has been adjudged insane, and placed under a guardianship, only raises a presumption of incapacity to contract, which may be rebutted; but the presumption is very strong, and the proof of capacity must be clear.[3] But contracts entered into by a person apparently sane, before the fact of insanity has been established, are at most only voidable, and will not be set aside, when the other party has no notice of

§§ 131, 132. [1] Smith, Eq. 167.

[2] Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 637; Fitzhugh v. Wilcox, 12 Barb. (N. Y.) 235; Wait v. Maxwell, 5 Pick. (Mass.) 217, 16 Am. Dec. 391. There must be an actual guardianship. If the guardian is discharged as being an unsuitable person, and no other guardian is appointed, the decree adjudging the ward insane is not conclusive as to his incapacity after the guardian's discharge. Willwerth v. Leonard, 156 Mass. 277, 31 N. E. 299. The rule does not apply to statutory proceedings to determine whether a person is insane, and in need of care and treatment, for the purpose of committing him to a hospital for the insane. Knox v. Haug, 48 Minn. 58, 50 N. W. 934.

[3] Mott v. Mott, 49 N. J. Eq. 192, 22 Atl. 997; In re Gangwere's Estate, 14 Pa. 417; Parker v. Davis, 53 N. C. 460.

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the insanity and derives no inequitable advantage, and the parties cannot be placed in statu quo.[4] The reason for this rule is apparent. 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, 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.[5]

Mental Weakness.

The mere fact that a man is of a weak understanding, or is below the average of mankind in intellectual capacity, is not of itself an adequate ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance.[6] But where mental weakness is accompanied by other inequitable incidents,—such as undue influence, great ignorance, and want of advice, or inadequacy of consideration,—equity will interfere, and grant either affirmative or defensive relief.[7] There is a presumption against the validity of a transaction with such persons, and the burden of proving their capacity to contract, and the good faith and fairness of the transaction, rests with those who deal with them. If such proof is not produced, the advantages gained

[4] 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. But in New York the deed of a lunatic is absolutely void, whether given before or after inquisition. Van Deusen v. Sweet, 51 N. Y. 378.

[5] Lancaster Co. Nat. Bank v. Moore, 78 Pa. 407, 414. And see Haines v. Scott, 35 App. Div. 515, 54 N. Y. Supp. 844; Flach v. Gottschalk Co. (Md.) 41 Atl. 906; Ætna Life Ins. Co. v. Sellers, (Ind. Sup.) 56 N. E. 97; Farnum v. Brooks, 9 Pick. (Mass.) 212.

[6] Ball v. Mannin, 3 Bligh (N. S.) 1; Harrison v. Guest, 6 De Gex, M. & G. 428; Burt v. Quisenberry, 182 Ill. 385, 24 N. E. 622; Guild v. Hull, 127 Ill. 523, 20 N. E. 665; Davis v. Phillips, 85 Mich. 196, 48 N. W. 513; West v. Russell, 48 Mich. 74, 11 N. W. 812.

[7] Boyse v. Rossborough, 6 H. L. Cas. 2; Tracey v. Sacket, 1 Ohio St. 54, 59 Am. Dec. 610; Williams v. Williams, 63 Md. 371; Kelly v. Smith, 73 Wis. 191, 41 N. W. 69; Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 260.

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and benefits derived must be given up.[8] There are, however, certain conditions of mental weakness, not being lunacy or idiocy, resulting from sickness, old age, or other cause, which will be ground in itself for setting aside the person's contracts, although there are no attendant inequitable incidents.[9]

Drunkenness.

Drunkenness which does not affect the understanding and the will does not constitute a defense, in equity, to an action for the enforcement of an executory contract, nor will affirmative relief be granted because thereof. To render a transaction voidable because of drunkenness, it must have been such as to drown reason, memory, and judgment, and have impaired the mental faculties to such an extent as to render the victim non compos mentis.[10] Drunkenness of this nature is open to the observation of every one, and one who deals with a person intoxicated to such an extent is necessarily guilty of inequitable conduct. A slighter degree of intoxication will not be a ground of equitable interference, since equity is equally unwilling to assist the person who has immorally incapacitated himself, or the person who has immorally taken advantage of the incapacity.[11] But, if one person has designedly contrived to entice 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 secured.[12]

[8] Longmate v. Ledger, 2 Giff. 157, 164; Cowee v. Cornell, 75 N. Y. 91, 99, 100; Highberger v. Stiffler, 21 Md. 338, 83 Am. Dec. 593; Wilkinson v. Sherman, 45 N. J. Eq. 421, 18 Atl. 228; Gates v. Cornett, 72 Mich. 420, 40 N. W. 740.

[9] See Shakespeare v. Markham, 72 N. Y. 400; King v. Cummings, 60 Vt. 502, 11 Atl. 727; Campbell v. Campbell, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167.

[10] Bates v. Ball, 72 Ill. 108; Loftus v. Maloney, 89 Va. 576, 16 S. E. 749; Crane v. Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519.

[11] Cooke v. Clayworth, 18 Ves. 12; Johnson v. Medlicott, 3 P. Wms. 130, 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, 56 Minn. 216, 57 N. W. 478, 480.

[12] Cory v. Cory, 1 Ves. Sr. 19; Rottenburgh v. Fowl (N. J. Ch.) 26 Atl. 338; Freeman v. Staats, 9 N. J. Eq. 816; Warnock v. Camp-

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SAME—TRANSACTIONS WITH PERSONS UNDER DURESS OR UNDUE INFLUENCE.

133. Equitable relief will be afforded, either defensively or affirmatively, against a contract or conveyance obtained by actual duress, or under circumstances constituting undue influence.

Duress.

Duress is a species of fraud. It means some actual or threatened personal violence against, or imprisonment of, a person, or of his very near relative, by reason of which he is forced or induced to enter into a contract.[1] The ground upon which a contract entered into under duress can be avoided is that there is no real consent. The apparent consent is unreal, because of the imprisonment or force, or of the fear caused by the threats.[2] In determining what constitutes duress, equity follows the law, although equity will interfere in many instances where there is no legal duress, and where the party injured could have no relief at the common law.[3]

Undue Influence.

The exercise of undue influence raises a presumption of fraud. "Fraud does not here mean deceit or circumvention;

bell, 25 N. J. Eq. 485; O'Connor v. Rempt, 29 N. J. Eq. 156; Dunn v. Amos, 14 Wis. 106.

§ 133. [1] Clark, Cont. (Hornbook Series) p. 356.

[2] Brown v. Pierce, 7 Wall. 205, 19 L. Ed. 134, where it is said: "Actual violence is not necessary to constitute duress, * * * because consent is the very essence of a contract, and, if there be compulsion, there is no actual consent; and moral compulsion, such as that produced by threats to take life, or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because, in that state of the case, there is no consent. Duress, in its more extended sense, means that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or apprehension, to overcome the mind and will of a person of ordinary firmness."

[3] Pom. Eq. Jur. § 950; Francis v. Wilkinson, 147 Ill. 370, 35 N. E. 150; Radich v. Hutchins, 95 U. S. 210, 24 L. Ed. 409; Tilley v. Damon, 11 Cush. (Mass.) 247; Fairbanks v. Snow, 145 Mass. 153,

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it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties; and, when the relative condition of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable." [4] It is not appropriate at this time and place to designate in detail the circumstances and conditions which will give rise to what the law regards as undue influence.[5] The equitable doctrine relative to undue influence is applied in a very great variety of cases. It may consist: (1) In the use by one in whom confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; or (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities and distress.[6] In all such cases equity will interfere 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.[7]

13 N. E. 596; Morgan v. Joy, 121 Mo. 677, 26 S. W. 670; Schoellhamer v. Rometsch, 26 Or. 394, 38 Pac. 344.

[4] Lord Selborne in Earl of Aylesford v. Morris, 8 Ch. App. 490; Green v. Roworth, 113 N. Y. 462, 21 N. E. 165, 3 Keeners, Eq. Cas. 815; In re Nelson's Will, 39 Minn. 204, 39 N. W. 143.

[5] Clark, Cont. (Hornbook Series) p. 364.

[6] Proposed Civ. Code N. Y. § 231 (Field's Code); Clark, Cont. p. 364.

[7] Francis v. Wilkinson, 147 Ill. 370, 35 N. E. 150. Cases where transaction was avoided for undue influence: Evans v. Llewellin, 1 Cox, Ch. 333, 340; Lyon v. Home, L. R. 6 Eq. 655; Leighton v. Orr, 44 Iowa, 679; Aldridge v. Aldridge, 120 N. Y. 614, 24 N. E. 1022; Rau v. Von Zedlitz, 132 Mass. 164, 3 Keener, Eq. Cas. 784; Haydock's Ex'rs v. Haydock, 33 N. J. Eq. 494, 3 Keener, Eq. Cas. 807; 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. Hosiery Co., 36 N. J. Eq. 188; Burt v. Quisenberry, 132 Ill. 385, 24 S. E. 622; Howe v. Howe, 99 Mass. 88.

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SAME—TRANSACTIONS BETWEEN PERSONS IN FIDUCIARY RELATIONSHIP.

134. 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 advantage 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 relationship had existed.[1]

A fiduciary relationship between two parties implies a dependence of one upon the other, and a court of equity will carefully scrutinize every transaction in which the superior party secures an advantage. The obtaining of a possible benefit by such superior party raises a presumption against the validity of the transaction, and it is incumbent upon him to show that all the requirements which equity insists upon have been complied with. As has been said by an able English judge: "The broad principle upon which the court acts in cases of this description is that wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the court will not allow any transaction between the parties to stand unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him." [2]

It is a rule of equity that no man can be permitted to take

§ 134. [1] Tate v. Williamson, 2 Ch. App. 55, 60, 61, per Lord Chelmsford.

[2] Tate v. Williamson, L. R. 1 Eq. 528, 536, per Page Wood, V. C.

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a benefit when he has a duty to perform which is inconsistent with his acceptance of the benefit.[3] 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 so peculiarly open to fraud and undue influence. The rule exists as a bar against temptation.[4] The relationship may not be of a definite and well-defined character, such as trustee and beneficiary, guardian and ward, and the like. The rule applies to all cases where confidence on the one hand and influence on the other exist, from whatever cause they may spring.[5] As has been said, the familiar cases of the influence of a parent over his child, of a guardian over his ward, of an attorney over his client, are but instances of a broad and widely applicable principle.[6]

Trustees and Beneficiaries.

Trustees and beneficiaries have relations that, from their nature, must be confidential. The value of the trust estate, and all matters in respect thereto, are peculiarly within the knowledge of the trustee, of which the beneficiary, not being in control of his property, may be ignorant. The trustee, from his commanding position, generally possesses an influence which would naturally place him at an advantage in all his dealings with the beneficiary.[7] There are two classes of cases involving the considerations of dealings by a trustee

[3] Bennett v. Austin, 81 N. Y. 308, 332; Robinson v. Pett, 3 P. Wms. 249; Van Epps v. Van Epps, 9 Paige (N. Y.) 241.

[4] Herne v. Meeres, 1 Vern. 465.

[5] McCormick v. Malin, 5 Blackf. (Ind.) 509. And see Shipman v. Furniss, 69 Ala. 555, 44 Am. Rep. 528; Brown v. Burbank, 64 Cal. 99, 27 Pac. 940; Rockafellow v. Newcomb, 57 Ill. 186; Kline v. Kline, 57 Pa. 120.

[6] Smith v. Kay, 7 H. L. Cas. 771.

[7] Romaine v. Hendrickson's Ex'rs, 27 N. J. Eq. 162, where the court says: "One of the most obvious purposes [of the rule] is to prevent the trustee from using his knowledge of the character and value of the property, and of the wants, necessities, and situation of the cestui que trust, and his power over the estate, to the prejudice of the cestui que trust. * * * The object of the rule is to prevent the trustee from using his information and power to the prejudice of the cestui que trust. Whether they are used for the benefit of the trustee or some other person against the cestui que trust, the consequences are the same to him, and in either case justice requires the cestui que trust shall have the right to avoid the sale."

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with the trust estate and the beneficiary: (1) When the trustee contracts with himself, without the intervention of the beneficiary; (2) when he deals directly with the beneficiary.

(1) There is no equitable principle more firmly grounded in good reason, morality, and sound public policy than that a trustee cannot so execute a trust as to derive any benefit for himself.[8] And it is also firmly fixed that a trustee cannot, in the performance of his trust, directly or indirectly become the purchaser of any portion of the trust property, whether it be realty, personalty, or mercantile assets, without the knowledge and consent of the beneficiary. Such a purchase is voidable at the option of the beneficiary, although the trustee may have given an adequate price, and gained no advantage.[9] It is entirely immaterial whether the sale be private or at public auction,[10] or under a judicial decree,[11] or whether the trustee purchases personally or through an agent,[12] or whether he purchases for himself or as agent for some third person.[13] 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

[8] Forbes v. Ross, 2 Cox, Ch. 116.

[9] Fox v. Mackreth, 2 Brown, Ch. 400; Id., 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 125; Dyer v. Shurtleff, 112 Mass. 165, 17 Am. Rep. 77; Romaine v. Hendrickson's Ex'rs, 27 N. J. Eq. 162; Munson v. Railroad Co., 103 N. Y. 58, 8 N. E. 355; Price's Adm'r v. Thompson, 84 Ky. 219, 1 S. W. 408; Carrier v. Heather, 62 Mich. 441, 29 N. W. 38; Scott v. Lumber Co., 67 Cal. 71, 7 Pac. 131; Cushman v. Bonfield, 139 Ill. 219, 28 N. E. 937. Purchase of trust property by a trustee at a public sale is only voidable, and will be ratified unless the beneficiary repudiates it within a reasonable time. Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134; Scott v. Freeland, 7 Smedes & M. (Miss.) 409, 45 Am. Dec. 310.

[10] Ex parte Lacey, 6 Ves. 629; Ex parte James, 8 Ves. 348; Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076.

[11] 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.

[12] Campbell v. Walker, 5 Ves. 678; Ingle v. Richards, 28 Beav. 361; Houston v. Bryan, 78 Ga. 181, 1 S. E. 252; Bassett v. Schoemaker, 46 N. J. Eq. 538, 20 Atl. 52.

[13] Ex parte Bennett, 10 Ves. 381, 400; North Baltimore Bldg. Ass'n v. Caldwell, 25 Md. 420, 90 Am. Dec. 67.

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and vendee. He cannot represent in himself two opposite and conflicting interests.[14]

(2) Dealings between a trustee and his cestui que trust are presumptively invalid. Any purchase, or other transaction between them, whereby the trustee obtains an advantage, even if the consideration thereof is adequate, and no undue advantage is obtained, is prima facie voidable at the option of the cestui que trust.[15] But there is no rule of law or equity which makes dealings between trustees and their cestui que trust absolutely invalid. Dealings between parties thus situated, resulting in a benefit conferred upon, or an advantage gained by, the trustee, naturally excite suspicion, and, when this situation is shown, the burden of relieving himself from the suspicion thus engendered is cast upon the trustee, and he must show, either by direct proof or circumstances, that the transaction was free from fraud or undue influence, and that the cestui que trust acted without restraint, and under no coercion or pressure, direct or indirect, of the trustee.[16] The transaction will ordinarily be permitted to stand if the trustee proves 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 that he knew respecting the property, gave a just and fair price, and did not surreptitiously secure any advantage for himself.[17]

Principal and Agent.

The rules respecting contracts and transactions between a trustee and the beneficiary are the same, and are nearly as strictly applied, where the parties are in the relation of prin-

[14] Wormley v. Wormley, 8 Wheat. 421, 5 L. Ed. 651.

[15] Pom. Eq. Jur. § 958; Cowee v. Cornell, 75 N. Y. 100, 31 Am. Rep. 428; Coles v. Trecothick, 9 Ves. 234; Spencer's Appeal, 80 Pa. 317; Nichols v. McCarthy, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 155.

[16] Barnard v. Gantz, 140 N. Y. 249, 35 N. E. 430; In re Smith, 95 N. Y. 522.

[17] Coles v. Trecothick, 9 Ves. 234, 246, where Lord Eldon said: "A trustee may buy from the cestui que trust, provided there is a clear and distinct contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances; that the cestui que trust intended that the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee." And see Barnard v. Stone, 159 Mass. 224, 34 N. E. 272; Williams v. Powell,

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cipal and agent. A person who is an agent for another undertakes a duty which he is bound to perform 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 best for his principal.[18] If the agent deals with the subject-matter of the agency, or, by departing from the instructions of his principal, obtains a better result than could have been obtained by following them, the principal can claim the advantage thus obtained, even though the agent may have contributed his own funds or responsibility in producing the result. The rule which places it beyond the power of the agent to profit by such transactions is founded upon considerations of policy, and is intended not merely to afford a remedy for discovered frauds, but to reach those which may be concealed; and also to prevent them, by removing from agents all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency relates.[19] It is, therefore, settled that an agent who is employed to sell cannot become the purchaser surreptitiously, and without the knowledge and consent of his employer;[20] nor can an agent employed to purchase buy secretly from himself, or for his own benefit.[21] All such transactions are voidable at the option of the principal.

66 Ala. 20, 41 Am. Rep. 742; Colton v. Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137; Marshall v. Stephens, 8 Humph. 159, 47 Am. Dec. 601.

[18] East India Co. v. Henchman, 1 Ves. Jr. 289; Keighler v. Manufacturing Co., 12 Md. 383, 71 Am. Dec. 600; Neuendorff v. Insurance Co., 69 N. Y. 389; Dutton v. Willner, 52 N. Y. 312; Wilber v. Lynde, 49 Cal. 290, 19 Am. Rep. 645; Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304.

[19] Keech v. Sandford, 2 Eq. Cas. Abr. 741; York Bldg. Co. v. MacKenzie, 8 Brown, Parl. Cas. (Toml. Ed.) Append. 42, 3 Paton, 378; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; Moore v. Moore, 5 N. Y. 256; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Dutton v. Willner, 52 N. Y. 312; Ringo v. Binns, 10 Pet. 269, 9 L. Ed. 420.

[20] Ex parte Hughes, 6 Ves. 617; Lewis v. Hillman, 3 H. L. Cas. 607; Copeland v. Insurance Co., 6 Pick. (Mass.) 198; Adams v. Sayre, 70 Ala. 318; Fry v. Platt, 32 Kan. 62, 3 Pac. 781; Euneau v. Rieger, 105 Mo. 659, 16 S. W. 854; Hodgson v. Raphael, 105 Ga. 480, 30 S. E. 416; Dana v. Trust Co., 99 Wis. 663, 75 N. W. 429.

[21] Tyrrell v. Bank, 10 H. L. Cas. 26; Conkey v. Bond, 36 N. Y. 427; Tewksbury v. Spruance, 75 Ill. 187; Disbrow v. Secor, 58 Conn. 85, 18 Atl. 981.

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Dealings between the principal and his agent in respect to the subject-matter of the agency are not necessarily invalid. There is, however, a presumption against their validity, and it is incumbent upon the agent seeking to uphold them to satisfactorily show that there was no unfairness on his part, that he concealed no material fact connected with the subject of the transaction, that he disclosed all knowledge in his possession in regard thereto, and that the price paid was adequate.[23] Mere sufficiency of consideration and absence of undue influence will not be sufficient; there must be proof of good faith and absolute fairness.

Attorney and Client.

The rules governing transactions between principal and agent are even more rigidly applied to those between attorney and client. The client is entitled to the full benefit of the best exertions of his attorney, and the highest degree of good faith is required of him in all his dealings with his client. In England, contracts for compensation have always been closely scrutinized, and prior to 33 & 34 Vict. c. 28, § 4, and 44 & 45 Vict. c. 44, § 8, an agreement to pay a gross sum for future services was voidable at the option of the client.[24] And, while an agreement between a client and his solicitor to pay a gross sum for part services has been held valid in the English courts,[24] the solicitor must use great caution, and preserve sufficient evidence that the agreement was fair, and that his client was not under the influence of the pressure arising from the relationship,[25]—a pressure characterized as "the crushing influence of an attorney who has the affairs of a man in his hand." [26] The American courts have not been so strict in their surveillance of agreements between attorneys and their clients for compensation for the perform-

[23] Walsham v. Stainton, 1 De Gex, J. & S. 678; Keith v. Kellam (C. C.) 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. Woolen-Mill 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. Jessup, M. R., in Dunne v. English, L. R. 18 Eq. 524.

[24] In re Newman, 30 Beav. 196.

[24] In re Russell, 30 Ch. Div. 114.

[25] Morgan v. Higgins, 1 Giff. 277.

[26] Lord Thurlow, in Re Newman, 30 Beav. 196.

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ance of legal services,[27] and in most instances such agreements have been sustained if they are free from fraud, undue influence, or exorbitance.[28]

Contracts of purchase, sale, and the like, entered into between an attorney and his client while the relationship exists, may be valid. But there is a presumption against their validity, which casts upon the attorney the burden of proving that they were fair, just, and in the utmost good faith on his part; 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.[29] As Lord Eldon said: "The attorney must prove that his diligence to do the best for his vendor has been as great as if he was only an attorney dealing for that vendor with a stranger." [30]

[27] Judge Pomeroy deplores this condition of affairs in the following language: "I venture the suggestion that no single circumstance has done more to debase the practice of the law in the popular estimation, and even to lower the lofty standard of professional ethics and self-respect among the members of the legal profession itself, in large portions of our country, than the nature of the transactions, often in the highest degree champertous, between attorney and client, which are permitted, and which have received judicial sanction. It sometimes would seem that the fiduciary relation and the opportunity for undue influence, instead of being the grounds for invalidating such agreements, are practically regarded rather as their excuse and justification." Pom. Eq. Jur. § 960, note.

[28] Planters' Bank of Tennessee v. Homberger, 4 Cold. (Tenn.) 531; Blaisdell v. Ahern, 144 Mass. 393, 11 N. E. 681; Manning v. Sprague, 148 Mass. 18, 18 N. E. 673, 1 L. R. A. 516; Ryan v. Ashton, 42 Iowa, 365; Ballard v. Carr, 48 Cal. 74. In Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366, it was 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.

[29] 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, 25 L. Ed. 1065; Dunn v. Record, 63 Me. 17; Merryman v. Euler, 59 Md. 588, 43 Am. Dec. 564; Gresley v. Mousley, 4 De Gex & J. 78; Luddy's Trustee v. Pearce, 33 Ch. Div. 500.

[30] Gibson v. Jeyes, 6 Ves. 266, 271.

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Guardian and Ward.

During the existence of a guardianship the relative situation of the parties imposes a general restriction upon dealings with each other, and transactions between them during such period are generally held voidable at the option of the ward.[31] And this equitable restriction exists to a large extent, even after the termination of the guardianship, if the influence of the guardian and the dependence of the ward in fact or presumptively continues.[32] But when the property of the ward has actually and wholly come into his possession, and the guardian's duties are completed, and his control of the person of the ward has ceased, transactions between them may be sustained if full knowledge and free consent on the part of the ward and good faith and fair dealing on the part of the guardian are shown.[33]

Parent and Child.

Contracts between parent and child are not subject to the same degree of suspicion as between guardian and ward; but they are carefully scrutinized in equity, and, if there is any evidence of unfairness or undue influence, they will not be permitted to stand.[34] The doctrine in relation to such cases has been expressed as follows: "Transactions between parent and child may proceed upon arrangements between them for the settlement of property, or of their rights in property in which they are interested. In such cases courts of equity regard the transactions with favor. They do not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction. On the other hand, the transaction may be one of bounty from the child to the

[31] Hylton v. Hylton, 2 Ves. Sr. 548, 549; Hatch v. Hatch, 9 Ves. 292.

[32] 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; Noble's Adm'r v. Moses, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175; Carter v. Tice, 120 Ill. 277, 11 N. E. 529.

[33] Kirby v. Taylor, 6 Johns. Ch. (N. Y.) 242; Cowan's Appeal, 74 Pa. 329; Sherry v. Sansberry, 3 Ind. 320; Ralston v. Turpin, 129 U. S. 663, 9 Sup. Ct. 420, 32 L. Ed. 747.

[34] Williams v. Williams, 63 Md. 371; Noble's Adm'r v. Moses, 74 Ala. 604; Id., 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175; Davis v. Dunne, 46 Iowa, 684; Wright v. Vanderplank, 8 De Gex, M. & G. 133; Turner v. Collins, 7 Ch. App. 329.

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parent soon after the child has attained twenty-one. In such cases the court views the transaction with jealousy, and anxiously interposes its protection to guard the child from the exercise of parental influence." [36] In an Alabama case, where the whole subject of transactions between persons occupying fiduciary relations was ably discussed, it was held that business transactions between a father and his unmarried daughter, who continues to reside with him as a member of his family, though her legal disabilities have been removed, and she has attained her majority, by which she assumes a pecuniary obligation for his benefit, are to be regarded in equity as transactions between persons occupying a fiduciary relation towards each other; and will not be sustained or enforced unless the presumption of undue influence is rebutted, and it is shown that the daughter acted with full knowledge of the facts, and had independent legal advice.[38]

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.[37] And the same is true as to executors and administrators,[38] partners,[39] and husbands and wives.[40] Courts of equity have always been careful not to fetter this useful jurisdiction by defining the exact limits of its existence.[41]

[36] Baker v. Bradley, 7 De Gex, M. & G. 597.

[36] Noble's Adm'r v. Moses, 74 Ala. 604.

[37] Aberdeen Ry. Co. v. Blakie, 1 Macq. H. L. Cas. 461; Thomas v. Railroad Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018; Munson v. Railroad Co., 103 N. Y. 58, 8 N. E. 355; Parker v. Nickerson, 112 Mass. 195; Erlanger v. Phosphate Co., 3 App. Cas. 1218, 1236.

[38] Ives v. Ashley, 97 Mass. 198; Green v. Sargeant, 23 Vt. 466, 56 Am. Dec. 88.

[39] Simons v. Mining Co., 61 Pa. 202, 100 Am. Dec. 628; Wheeler v. Sage, 1 Wall. 518, 17 L. Ed. 646; Bowman v. Patrick (C. C.) 86 Fed. 138.

[40] Shea v. Shea, 121 Pa. 302, 15 Atl. 629; Bartlett v. Bartlett, 15 Neb. 593, 19 N. W. 691; Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Farmer's Ex'rs v. Farmer, 39 N. J. Eq. 211.

[41] Tate v. Williamson, 2 Ch. App. 55.

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SAME—GIFTS BETWEEN PERSONS IN FIDUCIARY RELATIONSHIP.

135. A gift inter vivos to one in a fiduciary relation with the donor is regarded with even greater suspicion than a contract ebtween 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.

In discussing the subject of contracts between persons in fiduciary relations, it was stated that the payment of a fair and adequate price was one of the facts which must appear in order to sustain the transaction. It is apparent that a gift to a person in a fiduciary relation is a transaction which should be scrutinized much more closely, and, as has been said, "A court of equity will weigh every such transaction with golden scales." [1] Independent of the existence of the fiduciary relation, it is a principle to be universally observed in a court of equity that, where one devests himself of his estate without receiving an equivalent, it is incumbent upon the person who receives or profits by the gift to give such an account of the transaction as will satisfy a chancellor that the donor was of sound mind, and had a full and accurate understanding of the nature of the act, and the consequences that it would produce.[2] Much more may be required of the donee when a fiduciary relation exists. He may be compelled to show that he did not induce or prompt the act, and that it was the spontaneous and unforced growth of the donor's mind. If such evidence be not ad-

§ 135. [1] Wright v. Vanderplank, 8 De Gex, M. & G. 137; Huguenin v. Baseley, 14 Ves. 275, 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 1156.

[2] Phillipson v. Kerry, 32 Beav. 628; Coutts v. Acworth, L. R. 8 Eq. 558; Russell's Appeal, 75 Pa. 269; Tyler v. Gardiner, 35 N. Y. 559; Conant v. Jackson, 16 Vt. 335, 352.

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duced, and the gift is out of proportion with the donor's means, or will be prejudicial to those who have a paramount claim to his bounty, it will be inferred, in equity, that it is the result of undue influence, although there may be no direct proof.[3]

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.[4] But in our courts all that seems 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.[5] 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.

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,[6] from principal to agent,[7] from client to attorney,[8] from ward to guardian,[9] from child to parent,[10] are all presumptively invalid. It has been held that undue

[3] Brooke v. Berry, 2 Gill (Md.) 83, 100; Rhodes v. Bate, 1 Ch. App. 252, 261; Bergen v. Udall, 31 Barb. (N. Y.) 9, 34; Lee v. Pearce, 68 N. C. 76; Long v. Mulford, 17 Ohio St. 484, 505, 93 Am. Dec. 638; Ross v. Conway, 92 Cal. 632, 28 Pac. 785.

[4] Rhodes v. Bate, 1 Ch. App. 252; Smith v. Kay, 7 H. L. Cas. 772.

[5] Ralston v. Turpin, 129 U. S. 675, 9 Sup. Ct. 420, 32 L. Ed. 747; Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910; Sanfley v. Jackson, 16 Tex. 579; Boyd v. De La Montagnie, 73 N. Y. 498, 502, 29 Am. Rep. 197. Same rule applied to wills, Garvin's Adm'r v. Williams, 44 Mo. 465, 100 Am. Dec. 314.

[6] Hatch v. Hatch, 9 Ves. 292.

[7] Ralston v. Turpin, 129 U. S. 675, 9 Sup. Ct. 420, 32 L. Ed. 747; Hall v. Knappenberger (Mo. Sup.) 6 S. W. 381; Hobday v. Peters, 28 Beav. 349.

[8] Nesbit v. Lockman, 34 N. Y. 167; In re Greenfield's Estate, 14 Pa. 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.

[9] Ashton v. Thompson, 32 Minn. 25, 18 N. W. 918; Fish v. Miller, 1 Hoff. Ch. (N. Y.) 267; Everitt v. Everitt, L. R. 10 Eq. 405; Hylton v. Hylton, 2 Ves. Sr. 547, 549.

[10] Whitridge v. Whitridge, 76 Md. 54, 24 Atl. 645; Baldock v. Johnson, 14 Or. 542, 13 Pac. 434; Taylor v. Taylor, 8 How. 183, 12 L. Ed. 1040; Baker v. Bradley, 7 De Gex, M. & G. 597; Wright v. Vanderplank, 8 De Gex, M. & G. 135, 146.

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influence is not to be inferred from the relation of parent and child, where the gift is from the parent to the child;[11] 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 a perfect understanding of the effects of the transfer.[12]

In addition to the foregoing cases, 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.[13] A clergyman or other spiritual adviser is also within the principle;[14] and so is a professor of spiritualism, with respect to a believer in his art.[15] Gifts by a wife to her husband are within the scope and application of the rule;[16] and a gift from a woman to her successful suitor will be subjected to careful scrutiny, and it will not be sustained unless the suitor can show that it was made without undue solicitation or pressure.[17]

[11] Millican v. Millican, 24 Tex. 446.

[12] Whelan v. Whelan, 3 Cow. (N. Y.) 537; Todd v. Grove, 33 Md. 194; Highberger v. Stiffler, 21 Md. 352, 83 Am. Dec. 593; Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910.

[13] Dent v. Bennett, 4 Myine & C. 269; Woodbury v. Woodbury, 141 Mass. 329, 5 N. E. 275. The relationship of physician and patient does not per se prevent a physician from accepting a gift from his patient. Doggett v. Lane, 12 Mo. 215; Audenreid's Appeal, 89 Pa. 114.

[14] Ford v. Hennessy, 70 Mo. 580; Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Nachtreib v. Harmony Settlement, 3 Wall. Jr. 66, Fed. Cas. No. 10,003; Huguenin v. Baseley, 14 Ves. 275, 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 1156.

[15] Lyon v. Home, L. R. 6 Eq. 655.

[16] Boyd v. De La Montagnie, 73 N. Y. 498, 502, 29 Am. Rep. 197; Stiles v. Stiles, 14 Mich. 72; Hollis v. Francois, 5 Tex. 195, 51 Am. Dec. 760; Campbell's Appeal, 80 Pa. 298; Smyley v. Reese, 53 Ala. 89, 25 Am. Rep. 598; Scarborough v. Watkins, 9 B. Mon. (Ky.) 540.

[17] Page v. Horne, 11 Beav. 227; Cobbett v. Brock, 20 Beav. 524.

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SAME—RATIFICATION, CONFIRMATION, OR ACQUIESCENCE.

136. A contract or other transaction constructively fraudulent because of the confidential relation of the parties, or for any other reason, may be made valid and effectual by

(a) Ratification and confirmation thereof by the party injuriously affected thereby.

(b) Acquiescence; that is, recognition of the existence of the gift or contract, and the performance of some act to carry it into effect.

(c) Lapse of time, without taking some action to disavow the gift or contract.

Ratification and Confirmation.

As a general rule, contracts which are void because unlawful cannot be made valid by any act of either party. But, where only the rights of the parties themselves are concerned, a contract which is voidable because constructively fraudulent may be ratified and confirmed, and thus made valid. But the party who is entitled to equitable relief against a fraudulent transaction must have full knowledge of all material facts connected with the transaction, and must either be aware of his rights to impeach such transaction, or have had an opportunity by the exercise of reasonable diligence to become aware of such rights, to make his actions or words in ratification of a voidable transaction binding upon him. It must also appear that such ratification was accomplished free from the undue influence of the other party.[1] If the parties still continue in the same relationship, or there exists the same undue influence, or if the act of confirmation is a continuation of the original transaction, no ratification or confirmation, however formal, or by whatever acts or words, will be effectual to remove the taint of fraud.[2]

§ 136. [1] Kerby v. Kerby, 57 Md. 345; Crooks v. Nippolt, 44 Minn. 239, 46 N. W. 349; Dobson v. Racey, 8 N. Y. 216; Pearsoll v. Chapin, 44 Pa. 9.

[2] Pom. Eq. Jur. § 964.

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Acquiescence.

A party entitled to relief against a contract tainted with fraud may lose the right thereto by acquiescence; as, where the party treats the contract as binding, after he has discovered that he was drawn into it by fraud, he will be deemed to have waived the right to treat it as invalid.[3] Mr. Pomeroy says that "acquiescence is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing, and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it."[4]

The doctrine seems to be based upon the theory that, where a person has done something to carry a contract into effect, and sought or taken the benefits thereof, although only partially, he cannot afterwards repudiate the transaction, and set up its voidability. Acquiescence is not, however, a bar to relief, unless it appear that the defrauded party had knowledge of the fraud, and that he did not continue under the undue influence of the other party, and was perfectly free to act.[5]

Lapse of Time.

Delay in repudiating or rescinding a fraudulent contract after discovery of the fraud, while not necessarily acquiescence, will ordinarily defeat the remedy of the defrauded party.[6] What constitutes an unreasonable delay, such as would prevent the granting of equitable relief, is to be determined by the facts in each case.

[3] Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798, 3 Keener, Eq. Cas. 175; Hunt v. Hardwick, 68 Ga. 100; Seavey v. Potter, 121 Mass. 297; Montgomery v. Pickering, 116 Mass. 227; Himes v. Langley, 85 Ind. 77; Dunks v. Fuller, 32 Mich. 242. The fact that the defrauded party has treated the property as his own before discovering the fraud is nothing, if he has not thus prevented himself from returning it. Brophy v. Lawler, 107 Ill. 284.

[4] Pom. Eq. Jur. § 965.

[5] Kilpatrick v. Henson, 81 Ala. 464, 1 South. 188; Maulfair's Appeal, 110 Pa. 402, 2 Atl. 530; Borland v. Thornton, 12 Cal. 440; McNaughton v. Partridge, 11 Ohio, 223, 38 Am. Dec. 731.

[6] Pryor v. Foster, 130 N. Y. 171, 29 N. E. 123; Schiffer v. Dietz, 83 N. Y. 300.

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SAME—FRAUD UPON THIRD PERSONS NOT PARTIES TO THE CONTRACT.

137. Not only shall parties to a contract act in good faith as between themselves, but they shall not act in bad faith in respect to other persons who stand in such relations to either as to be affected by the transaction or its consequences.[1]

138. This class of frauds embraces those which do not deceive the parties to the contract, but affect injuriously the interests of third persons.

139. Such frauds may be either (1) upon creditors, (2) upon subsequent purchasers, (3) upon marital rights, or (4) upon powers.

Under the foregoing divisions of this subject, the cases considered were those in which one of the parties to a contract has been injuriously affected by the fraud of the other, and has sought to be relieved against such fraud. 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.

SAME—FRAUDS UPON CREDITORS.

140. Frauds upon creditors may be treated under the following heads:

(a) Frauds in compositions with creditors.

(b) Fraudulent conveyances.

§§ 137–139. [1] Lord Hardwicke in Earl of Chesterfield v. Janssen, 2 Ves. Sr. 156, 157; Wallis v. Duke of Portland, 3 Ves. 502.

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SAME—COMPOSITIONS WITH CREDITORS.

141. 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 upon 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.[1]

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.[2] On the other hand, the creditor who is the beneficiary of the secret agreement cannot enforce it against the debtor;[3] and it has been held that the latter may recover money paid by him to such creditor under the agreement.[4]

§ 141. [1] Cullingworth v. Loyd, 2 Beav. 385; Leicester v. Rose, 4 East, 372; Ramsdell v. Edgarton, 8 Metc. (Mass.) 227, 41 Am. Dec. 503; Lawrence v. Clark, 36 N. Y. 128; Willis v. Morris, 63 Tex. 458, 51 Am. Rep. 655.

[2] Kullman v. Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150. Subsequent creditors, not parties to the composition agreement, cannot attack it. Guggenheimer v. Groeschel, 23 S. C. 274, 55 Am. Rep. 15.

[3] Jackman v. Mitchell, 13 Ves. 581; Sternburg v. Bowman, 103 Mass. 325; Fay v. Fay, 121 Mass. 561; Lawrence v. Clark, 36 N. Y. 128.

[4] Mare v. Sandford, 1 Giff. 288. This proposition is doubted in Golinger v. Earle, 82 N. Y. 395, on the ground that the parties are in pari delicto.

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SAME—FRAUDULENT CONVEYANCES.

142. 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.[1]

143. To render a conveyance fraudulent there must be:

(a) A creditor to be defrauded.

(b) An intention to defraud.

(c) A transfer of the property.[2]

Transfers of property made with intent to defraud creditors were void at common law,[3] on the principle that a man must be just before he is generous;[4] 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 principle of these was the statute of 13 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. This statute has been universally adopted in this country as the basis of our jurisprudence on the subject.[5]

SAME—CREDITOR TO BE DEFRAUDED.

144. Before a creditor can assail a conveyance in equity, he must have reduced his debt to judgment, or have acquired a lien on specific

§§ 142, 143. [1] Bouv. Law Dict.; 2 Kent, Comm. 440.

[2] Wait, Fraud. Conv. § 15; Hoyt v. Godfrey, 88 N. Y. 669.

[3] Twyne's Case, 3 Coke, 80a, 1 Smith, Lead. Cas. 33; Cadogan v. Kennett, 1 Cowp. 432; Clements v. Moore, 6 Wall. 312, 18 L. Ed. 786.

[4] Planters' & Merchants' Bank v. Walker, 7 Ala. 946.

[5] Story, Eq. Jur. § 353; Pom. Eq. Jur. § 968.

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property, or placed himself in a position to obtain one on the avoidance of the transfer.[1]

145. 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,[2] 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.[3] If the object of the suit be to reach personal property or equitable assets, it must appear that an execution has been returned unsatisfied,[4] unless the property is not susceptible to levy.[5] 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.[6] For instance, it has been held that one who has a cause of action for libel or slander,[7] seduction,[8] breach of promise to marry,[9] or assault and battery,[10] is a creditor, within the meaning of the statute.

§§ 144, 145. [1] Southard v. Benner, 72 N. Y. 426. See Bankr. Act U. S. 1898, § 67, subd. f.

[2] Webster v. Clark, 25 Me. 314.

[3] Board of Public Works v. Columbia College, 17 Wall. 530, 21 L. Ed. 687; Powell v. Howell, 63 N. C. 284; Fox v. Moyer, 54 N. Y. 128.

[4] Baxter v. Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; McElwain v. Willis, 9 Wend. (N. Y.) 548; Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351; Newman v. Willetts, 52 Ill. 98.

[5] Snodgrass v. Andrews, 30 Miss. 472, 64 Am. Dec. 169.

[6] Bishop v. Redmond, 83 Ind. 157; Weir v. Day, 57 Iowa, 84, 10 N. W. 304; Damon v. Bryant, 2 Pick. (Mass.) 411; Bongard v. Block, 81 Ill. 186, 25 Am. Rep. 276.

[7] Cooke v. Cooke, 43 Md. 522; Hall v. Sands, 52 Me. 355.

[8] Hunsinger v. Hofer, 110 Ind. 390, 11 N. E. 463.

[9] Hoffman v. Junk, 51 Wis. 613, 8 N. W. 493; McVeigh v. Ritenour, 40 Ohio St. 107; Burton v. Mill, 78 Va. 468.

[10] Martin v. Walker, 12 Hun (N. Y.) 46.

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Nor need the debt be in existence at the time of the conveyance. Such conveyance may be avoided by subsequent creditors if made in contemplation of future indebtedness.[11] There is this distinction, however, between the rights of antecedent and existing creditors, and those of subsequent creditors: A voluntary conveyance is presumptively fraudulent as against the former,[12] while the burden rests upon the latter to show that the conveyance was executed as a cover for future schemes of fraud.[13]

SAME—INTENT TO DEFRAUD.

146. 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.[1] "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 one act which must defraud another, his declaring that he did not by the act intend to defraud is weighed down by the

[11] Case v. Phelps, 39 N. Y. 164; Day v. Cooley, 118 Mass. 527; Mullen v. Wilson, 44 Pa. 418, 84 Am. Dec. 461; Smith v. Vodges, 92 U. S. 183, 23 L. Ed. 481.

[12] Lerow v. Wilmarth, 9 Allen (Mass.) 386; Parish v. Murphree, 13 How. 92, 14 L. Ed. 65; Babcock v. Eckler, 24 N. Y. 625; 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, 8 Am. Dec. 520; Freeman v. Pope, L. R. 9 Eq. 211.

[13] Horbach v. Hill, 112 U. S. 149, 5 Sup. Ct. 81, 28 L. Ed. 670; Teed v. Valentine, 65 N. Y. 474; Matthai v. Heather, 57 Md. 483.

§ 146. [1] Moore v. Hinnant, 89 N. C. 455; Worthy v. Brady, 91 N. C. 269.

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evidence of his own act." [2] Since every man is presumed to intend the natural and necessary consequences of his acts, the absence of actual or meditated fraud is not, in all cases, decisive in favor of the conveyance; [3] and therefore a voluntary conveyance, the natural 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.[4] If no intent existed in the minds of the parties at the time a conveyance was executed, the subsequent conduct of such parties will not render the conveyance fraudulent.[5] But the subsequent use of the property conveyed in furtherance of fraud against the creditors of the original grantor will be evidence that the conveyance was made with an intent to defraud.[6]

As a general rule, a conveyance will not be set aside as fraudulent, and the title in the property of the grantee vitiated, unless the grantee participated in the intent to defraud, or had knowledge of the existence of such intent or notice of some fact calculated to put him on inquiry, which, if followed up, would have led to a discovery of the fraudulent intent.[7] The reason for the existence of this rule may be found in the fact that, while the creditor has an equity which entitles him to satisfaction of his debt out of the debtor's property, one who purchases that property for a valuable consideration after that debt was incurred has also an equity therein; and, although it is subsequent in time to that of the creditor, it is nevertheless superior, for the obvious reason that the purchaser has not trusted, as the creditor has, to the personal responsibility of the debtor,

[2] Per Sutherland, J., in Babcock v. Eckler, 24 N. Y. 632.

[3] Lukins v. Aird, 6 Wall. 79, 18 L. Ed. 750; Kisterbock's Appeal, 51 Pa. 485.

[4] Potter v. McDowell, 31 Mo. 62.

[5] Ray v. Simons, 76 Ind. 150; Hatch v. Smith, 5 Mass. 50; Page v. Kendrick, 10 Mich. 300; Weller v. Wayland, 17 Johns. (N. Y.) 102; McGuire v. Faber, 25 Pa. 436.

[6] Lynde v. McGregor, 13 Allen (Mass.) 172; Constantine v. Twelves, 29 Ala. 607.

[7] Schaungut's Adm'r v. Udell, 98 Ala. 302, 9 South. 550; Grunsky v. Parlin, 110 Cal. 179, 42 Pac. 575; Hughes v. Noyes, 171 Ill. 575, 49 N. E. 703; Straight v. Roberts, 126 Ind. 383, 26 N. E. 78; Snow v. Paine, 114 Mass. 520; Fraser v. Passage, 63 Mich. 551, 30 N. W. 334; Galle v. Tode, 148 N. Y. 270, 42 N. E. 673. See Bankr. Act U. S. 1898, § 67, subd. f.

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but has paid the consideration on the faith of the debtor's actual title to the specific property transferred.[8] The creditor must, therefore, prove a participation of the grantee in the debtor's fraud whenever the grantee is a purchaser for value.[9] When, however, the transfer is not founded on a valuable consideration, but is voluntary, the grantee cannot claim the advantages which are accorded purchasers; and, although he may be entirely free from connivance with the grantor, and ignorant of his fraudulent intent, a creditor may impeach the transfer without proof that the grantee participated in the fraudulent intent of the grantor.[10]

SAME—TRANSFER OF PROPERTY.

147. 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.[1]

LIMITATION—But the subject-matter of the conveyance must be something of value, out of which the creditors might have realized a part or all of their claims.[2]

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

[8] Seymour v. Wilson, 19 N. Y. 417, 420.

[9] Prewit v. Wilson, 103 U. S. 22, 26 L. Ed. 360; Mehlhop v. Pettibone, 54 Wis. 652, 11 N. W. 553, 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.) 89.

[10] Laughton v. Harden, 68 Me. 213; Marden v. Babcock, 2 Metc. (Mass.) 104; Schaible v. Ardner, 98 Mich. 70, 56 N. W. 1105; Werner v. Zierfuss, 162 Pa. 360, 29 Atl. 737.

§ 147. [1] May, Fraud. Conv. p. 17; Wait, Fraud. Conv. §§ 24, 25.

[2] Hoyt v. Godfrey, 88 N. Y. 669.

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prevent such withdrawal.[3] 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 actions;[4] such as annuities,[5] royalties,[6] and corporate stock.[7]

Conveyance of Legal Title to Equitable Owner.

Where a debtor who holds the legal title to property, of which another is the equitable owner, conveys such legal title to such equitable owner, such conveyance will not be deemed fraudulent as to the creditors of such debtor.[8] As where a husband purchases land with money derived from his wife's separate estate, and takes the title in his own name, and afterwards conveys the property to his wife, the conveyance is not fraudulent, and cannot be assailed by his creditors.[9] But, if the wife permits the husband to obtain credit on the faith of his apparent ownership, she may be estopped from asserting her title against those creditors of her husband who had no knowledge of her rights in the property.

Limitation.

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.[10] Therefore property which is exempt by statute from liability for

[3] Essay by Joshua Reynolds, Esq., on "Fraudulent Conveyances," quoted in Wait, Fraud. Conv. § 24.

[4] Wait, Fraud. Conv. § 24. See Bankr. Act U. S. 1898, § 67, subd. e.

[5] Norcutt v. Dodd, 1 Craig & P. 100.

[6] Lord v. Harte, 118 Mass. 271.

[7] Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450. Equitable interest in real estate, see Edmeston v. Lyde, 1 Paige (N. Y.) 641, 19 Am. Dec. 454.

[8] Desmond v. Myers, 113 Mich. 437, 71 N. W. 877; C. Aultman & Co. v. Booth, 95 Mo. 383, 8 S. W. 742; Iauch v. De Socarras, 56 N. J. Eq. 538, 39 Atl. 870.

[9] Eads v. Thompson, 109 Ill. 87; Lord v. Bishop, 101 Ind. 334; Dresser v. Zabriskie (N. J. Ch.) 39 Atl. 1066; Syracuse Chilled Plow Co. v. Wing, 85 N. Y. 421.

[10] Hoyt v. Godfrey, 88 N. Y. 669.

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the grantor's debts cannot be reclaimed by his creditors.[11] Neither law nor equity will take cognizance of fraudulent practices that injure no one. Therefore, regardless of the fraudulent intent, if the subject-matter involved in the transaction is of such a nature that it cannot be appropriated to the payment of the amount due the creditor, the conveyance cannot be fraudulent as against such creditor.[12]

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.[13]

FRAUD ON MARITAL RIGHTS.

148. 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 arise 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

[11] O'Connor v. Ward, 60 Miss. 1037; Nichols v. Eaton, 91 U. S. 726, 23 L. Ed. 254; Carhart v. Harshaw, 45 Wis. 340, 30 Am. Rep. 752; 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.

[12] Legro v. Lord, 10 Me. 161; Smillie v. Swinn, 90 N. Y. 492; O'Connor v. Ward, 60 Miss. 1025, 1037; Howell Bros. Shoe Co. v. Mars, 82 Tex. 493, 17 S. W. 370.

[13] Abbey v. Deyo, 44 N. Y. 347.

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because affected with that fraud.[1] 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 the rule is now chiefly applied to protect the inchoate dower interests of married women in real estate conveyed away by their intended husbands in contemplation of marriage,[2] although a case occasionally arises where a husband complains of an alienation by his wife as in fraud of his inchoate estate by curtesy.[3] 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;[4] 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.[5]

FRAUD ON POWERS.

149. 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

§ 148. [1] Strathmore v. Bowes, 1 Ves. Jr. 22, 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 605; England v. Downs, 2 Beav. 522; Lance v. Norman, 2 Ch. R. 79.

[2] Dearmond v. Dearmond, 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 v. McGrath, 70 Ala. 75, 45 Am. Rep. 75; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Kline v. Kline, 57 Pa. 120; Beere v. Beere, 79 Iowa, 555, 44 N. W. 809.

[3] Ferrebee v. Pritchard, 112 N. C. 83, 16 S. E. 903.

[4] Dudley v. Dudley, 76 Wis. 567, 45 N. W. 602, 8 L. R. A. 814; Champlin v. Champlin, 16 R. I. 814, 15 Atl. 85; Butler v. Butler, 21 Kan. 521.

[5] Alkire v. Alkire, 134 Ind. 350, 32 N. E. 573; Kinne v. Webb, 4 C. C. A. 170, 54 Fed. 34; Murray v. Murray, 90 Ky. 1, 13 S. W. 244, 8 L. R. A. 95.

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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.[1] 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.[2] 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 a sickly child, with a view of acquiring money on its decease as next of kin.[3]

§ 149. [1] Aleyn v. Belchier, 1 Eden, 132, 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 573; Portland v. Topham, 11 H. L. Cas. 32.

[2] Farmer v. Martin, 2 Sim. 502; In re Kirwan's Trusts, 25 Ch. Div. 373.

[3] Hinchingbroke v. Seymour, 1 Brown, Ch. 395; Wellesley v. Earl of Mornington, 2 Kay & J. 143. There are but few American cases on this subject. The question of fraudulent executions of powers has, however, been considered in the following, among other, cases: Williams' Appeal, 73 Pa. 249; Jackson v. Veeder, 11 Johns. (N. Y.) 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.

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CHAPTER XIV.

EQUITABLE PROPERTY—TRUSTS GENERALLY—EXPRESS TRUSTS.

150. Definition of a Trust.
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155. Express Private Trusts.
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DEFINITION OF A TRUST.

150. A trust may be defined as 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.

It is somewhat difficult to accurately and definitely define a trust. The definition above given is based upon that of Mr. Underhill in his work on Trusts and Trustees.[1] The

§ 150. [1] Underh. Trusts, p. 1.

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late Judge Josiah Smith, in his Manual of Equity, has defined a trust as "a beneficial interest in, or a beneficial ownership of, real or personal property, distinct from the legal ownership thereof." [2] This definition is that used by Justice Story,[3] and is similar to that contained in Spence's Jurisdiction of the Court of Chancery, and followed in Snell's Principles of Equity. But it is suggested by Mr. Underhill that the definition employed by all these eminent writers is not the definition of a trust, but rather of the beneficial interest or property of persons in whose favor a trust is created. This same objection may be made to the definition of Mr. Bispham, who defines a trust as "the right, enforceable only in equity, to the beneficial enjoyment of property of which the legal title is in another." [4] But both of these definitions are valuable in emphasizing the cardinal idea of the co-existence of the legal title in one person and the beneficial ownership or equitable title in another.

HISTORICAL STATEMENT.

151. There is a suggestion of the trust, as known to us, in the Roman fidei-commissum, although it cannot be correctly said that the entire equity jurisprudence of uses and trusts was derived from the Roman law.

152. Uses and trusts were probably first introduced into the English law to evade the statutes of mortmain, which prohibited lands from being granted to religious houses.

153. The system of uses and trusts was perpetuated as a means of relief against the hardships and restrictions incident to the feudal tenure of land.

It was a rule of the Roman law that a testator could not name a devisee to succeed the first devisee of his property. The devise was absolute in the devisee first named,

[2] Smith, Man. Eq. § 224. [3] Story, Eq. Jur. § 964.
[4] Bisp. Eq. p. 71.

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and the legal title and beneficial ownership of the property were vested in him. In other words, the testator could not control, by direction in his will, the use and enjoyment of his property after his death. The Roman law restricted the Roman citizen in his choice of a testamentary heir. He could not devise to an alien, a posthumous child not belonging to his family, nor, in certain cases, to a woman. The only manner in which these restrictions could be evaded was by a devise of his property to one entitled to take, and trust him to dispose of such property according to his directions. This trust was called "fidei-commissum," the heir or trustee the "fiduciarius," and the beneficiary the "fidei-commissarius." [1] At first there was no legal method of enforcing the testator's direction, but its fulfillment was left to the honor of the heir. But later, by the intervention of the Emperor Augustus, the consuls interposed their authority, and enforced the trust.[2] The authority of the consuls was favored as just by public opinion, and it gradually assumed the character of a regular jurisdiction, and fidei-commissa grew into such favor that soon a special prætor was appointed to adjudicate in these cases.[3]

It is not intended to carry the idea that the trust of the English law is identical with that of the Roman fidei-commissum. There is evidently a clear distinction between the two.[4] In the first place, it must be noted that a fidei-commissum was but a method of carrying out the direction of the testator as to the ultimate disposition of his property. There was no separation of the legal title from the beneficial enjoyment. The devisee first named was the absolute owner as long as he held the title. He was but the means whereby the estate was to descend to the person upon whom the testator desired to bestow his property. At the time mentioned in the testator's will he was to deliver over the inheritance. But the trust of the English law is based upon

§§ 151–153. [1] Pom. Eq. Jur. § 976.

[2] Just. Inst. lib. II. tit. 23, § 1.

[3] Just. Inst. lib. II. tit. 23, § 2.

[4] McDonogh's Ex'rs v. Murdoch, 15 How. 367, 14 L. Ed. 732, which was a case arising under the Louisiana Code, where the question arose whether a "trust" was within the language of that Code prohibiting substitutions and fidei commissa, and it was held that it was not.

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the separation of a perfect ownership into a legal title vested in one person and a beneficial interest or equitable title vested in another.

It is probable, however, that the English clergy, in their effort to evade the effect of the statutes of mortmain, which were enacted to prohibit the accumulation of lands in the hands of religious houses and corporations, adopted the method suggested by the fidei-commissum of the Roman law, and developed the practice of a conveyance of lands to one person for the use or benefit of another person or a corporation.

One of the important reasons 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.[8]

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 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 instru-

[8] In the following paragraphs of this sketch Haynes' Outlines of Equity and Kerley's History of Equity have been followed.

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ment, 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, until the reign of Henry VIII., 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, relieifis, heriots, and escheats," and to the creditors who were deprived of their "extent for debt." *

* Bacon's Works, Use of the Law, vol. 12, 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."

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The statute books of England bear witness to a continual struggle against the system.[7] Finally, in the reign of Henry VIII. a supreme effort was made to sweep away uses, root and branch. The celebrated statute of uses[8] 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.[9]

The history of the English-speaking race does not furnish a more conspicuous example of the futility of legis-

[7] 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.

[8] St. 27 Hen. VIII. c. 10.

[9] 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 exterping and extinguishment" of these errors, that "where any person or persons stand or be seized of and in any lands, tenements, or 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.

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lation when opposed to current public opinion.[9] The statute declared that when any person stood "seised" of any "hereditament" to the use of another, such other should be deemed in lawful "seisin" of the "hereditament." Since the words "seised," "seisin," 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," [10] the common-law judges held that a use could not be limited upon a use. It therefore followed 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

[9] Mr. Sugden, in his introduction to Gilbert on Uses (page 68), 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."

[10] 2 Dyer, 155a, 1 White & T. Lead. Cas. Eq. 335.

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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." [11]

CLASSIFICATION OF TRUSTS.

154. Trusts are generally classified in respect to the manner of their creation, as:

(1) Express trusts, created by the intentional act of the authors of the trusts, which are either

(a) Express private trusts, or

(b) Public or charitable trusts.

(2) Implied trusts, created by the operation of law, which are either

(a) Resulting trusts, or

(b) Constructive trusts.

This classification of the subject is that generally adopted by text writers, and will be followed in the following discussion. It refers particularly to the manner of the creation of trusts. The subject has also been classified in respect to the duties of trustees into: (1) Simple or passive trusts, in which the trustees have no active duties to perform, but are mere depositaries of the trust estate, and may be compelled in equity to convey the estate to the beneficiaries, or according to their direction; (2) special or active trusts, in which the trustees are directed to carry out the intentions of the settlor, and are called upon to actively exert themselves in the performance of their duties. This classification has more direct application to express trusts, and will be treated more fully in connection with such trusts.

[11] Hopkins v. Hopkins, 1 Atk. 591.

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Trusts have also been classified in respect to the interpretation of the terms creating the trust as (1) executed trusts, (2) executory trusts. These trusts will also be more fully considered in their proper place.

EXPRESS PRIVATE TRUSTS.

155. An express private trust is one created for the benefit of individuals or families, and designed for private convenience and support.

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.

EXPRESS TRUSTS—PARTIES.

156. 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—WHO MAY BE A SETTLOR.

157. Every person who can hold and dispose of any legal or equitable estate or interest in property may create a trust in respect thereto.[1]

§ 155. [1] Perry, Trusts, § 22.

§ 156. [1] In the Proposed (Field's) Civ. Code N. Y., which has been adopted in California, and some of the other states, the parties to a trust are designated as a trustor, trustee, and beneficiary.

§ 157. [1] Underh. Trusts, art. 12.

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All persons sui juris may impress a trust on property owned by them. An infant can create a trust which will be valid until avoided.[2] Modern decisions, both in this country and in England, hold that the acts and contracts of infants are voidable only, and subject to their election, when of age, either to avoid or confirm them.[3] Persons who have been judicially declared insane cannot create either a testamentary trust, or a trust inter vivos in favor of volunteers.[4] It has, however, been generally held that contracts of lunatics, who have not been judicially declared insane, are voidable only, and, if restitution can be made, they will be set aside.[5] It follows, then, that a conveyance in trust by a lunatic is good until it is avoided. If such conveyance is fair and reasonable, and the parties cannot be restored to their former condition, it will not be set aside.[6] Corporations, in the absence of restricting statutes, may convey their property in trust.[7]

[2] Whitney v. Dutch, 14 Mass. 457; Shipley v. Bunn, 125 Mo. 445, 28 S. W. 754; Illinois Land & Loan Co. v. Bonner, 75 Ill. 315.

[3] Tucker v. Moreland, 10 Pet. 58, 71, 9 L. Ed. 345; Irvine v. Irvine, 9 Wall. 617, 19 L. Ed. 800.

[4] Niell v. Morley, 9 Ves. 478; L'Amoureux v. Crosby, 2 Paige (N. Y.) 422, 22 Am. Dec. 655; Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Crawford v. Scovell, 94 Pa. 48.

[5] Behrens v. McKenzie, 23 Iowa, 333, 92 Am. Dec. 428; Somers v. Pumphrey, 24 Ind. 231; Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Burnham v. Kidwell, 113 Ill. 425; Baldwin v. Golde, 88 Hun, 115, 34 N. Y. Supp. 587. But in New York a conveyance of land by a lunatic is void even before inquisition found. Van Deusen v. Sweet, 51 N. Y. 378.

[6] Story, Eq. Jur. § 228; Perry, Trusts, § 34.

[7] Mayor, etc., of Colchester v. Lowten, 1 Ves. & B. 226; State v. Bank, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; Dana v. Bank, 5 Watts & S. (Pa.) 226; Pope v. Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49, where Collier, J., says: "The power of a corporation to vest its property in trustees results from the control which every one possesses by law over his own estate. It cannot be that a corporation is under a greater restraint in regard to the use and enjoyment of its estate than a natural person, unless a restriction is imposed by positive law, or may be inferred from its character and the object of its existence."

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SAME—WHO MAY BE A TRUSTEE.

158. 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.[1]

It may be laid down as a general rule that whoever is capable of taking the legal title or beneficial interest in the trust estate is also capable of taking such an estate in trust for others.[2] It does not necessarily follow that whoever is qualified to take in trust is capable of performing or executing it. The question then becomes, who may execute and perform a trust?[3]

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 enforcing the performance of the trust in favor of the beneficiaries and against the sovereign power.[4] A state cannot be sued in any court without its consent, or unless there is some general or special statute authorizing the suit.[5] The administration of a trust which is accepted by a state is either by its legislature or some officer or board appointed by it.[6]

In ancient times it was laid down that corporations could not accept or execute trusts, for the reason that no confidence could be placed in them, and they could not be compelled by courts of equity to execute a trust, since equity acts upon the conscience, and it was thought impossi-

§ 158. [1] Lewin, Trusts, 27.

[2] Fonbl. Eq. § 80, note; Hill, Trustees, 48; Perry, Trusts, § 39.

[3] Perry, Trusts, § 39.

[4] Lewin, Trusts, p. 80. But see Levy v. Levy, 33 N. Y. 97, 122, where it was held that neither the United States nor the state of Virginia, whose powers are fixed and prescribed by a written constitution, could take upon themselves the exercise of the functions of trustees. This case has not been followed, and a contrary principle seems to have been laid down. McDonogh's Ex'rs v. Murdoch, 15 How. 367, 14 L. Ed. 732.

[5] Briggs v. Light Boat Lower Cedar Point, 11 Allen (Mass.) 157.

[6] This was done in the case of the Smithsonian Institute, a public trust. 5 Stat. 64, c. 252.

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ble to enforce an equitable demand against a body so artificially formed that from its nature it could possess no conscience.[7] This theory was long since exploded, and it is now universally held that a corporation may be a trustee, if the execution of the trust is within the scope of its corporate powers.[8] Municipal corporations may take and hold property for public charities and other benevolent purposes.[9] An unincorporated association cannot, however, act as a trustee of a private trust, since it is incapable of taking title to land; but the rule is different in the case of public trusts.[10]

There never existed any legal incapacity in a married woman to act as a trustee or to execute a trust. The statutes in many of the states have removed the common-law restrictions imposed upon the power of a married woman to contract, and by such statutes she is made liable for her wrongful and tortious acts, and her husband is released from such liability. Where such statutes exist, there seems to be no good reason why a married woman should not be appointed a trustee. Her husband would not be liable for her breaches of trust, and the only objection that could arise against such an appointment would be the possible influence exerted by her husband over her actions.[11]

An infant is presumed to lack legal capacity, judgment, and discretion. All of his acts, beyond such as are merely ministerial, are voidable. He cannot be held responsible for a breach of trust. Hence, though he may be legally appointed a trustee, a case is scarcely conceivable in which circumstances could warrant such an appointment.[12]

[7] Bac. St. Uses, p. 57; Sugden, Vend. p. 417.

[8] Attorney General v. St. Johns Hospital, 2 De Gex, J. & S. 621; In re Howe, 1 Paige (N. Y.) 214; Vidal v. Girard's Ex'rs, 2 How. 188–190, 11 L. Ed. 205; Town of Dublin's Case, 38 N. H. 577.

[9] Sargeant v. Cornish, 54 N. H. 18; Dailey v. City of New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69; Higginson v. Turner, 171 Mass. 586, 51 N. E. 172; Handley v. Palmer (C. C.) 91 Fed. 948; Stone v. Perkins (C. C.) 85 Fed. 616.

[10] Tucker v. Society, 7 Metc. (Mass.) 188; Winslow v. Cummings, 3 Cush. (Mass.) 358; Burbank v. Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312.

[11] Still v. Ruby, 35 Pa. 378; Drummond v. Tracy, 1 Johns. Eng. Ch. 608.

[12] Smith, Eq. p. 26; Perry, Trusts, §§ 52, 54.

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An alien cannot act as trustee of real property, except in those states where he is permitted to hold property to his own use.[13] There is no objection anywhere, however, to his appointment as trustee of personal property. While an insolvent is not absolutely disqualified from being a trustee, and his insolvency has no effect on the trust estate,[14] his insolvency is unquestionably a good ground for his removal.[15]

It is a rule of equity which admits of no exception that a court of equity never wants a trustee. This rule is applied wherever there is no appointment of a trustee; where the individuals named as trustees fail by death, disability, or by refusal to act; or where the trust cannot, for any reason, be executed through the medium specified by the settlor. In all these cases a court of equity will supply the deficiency, and the trust will be executed through some agency designated by it.[16] Property once charged with a valid trust will be followed in equity into whosesoever hands it comes, and he will be charged with the execution of the trust, unless he is a purchaser for value, and without notice.[17]

SAME—WHO MAY BE A CESTUI QUE TRUST.

159. As a general rule, equity follows the law, and whoever is capable of taking and holding the legal title to property may, as cestui que trust, be the recipient of the equitable title;[1] and, as the 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.

[13] Perry, Trusts, § 55.

[14] Harris v. Harris, 29 Beav. 107; Shryock v. Waggoner, 28 Pa. 431.

[15] In re Barker's Trusts, 1 Ch. Div. 43; In re Adams' Trust, 12 Ch. Div. 634.

[16] Snell, Eq. (Am. Ed.) p. 139; Story, Eq. Jur. § 946; McCartee v. Society, 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; Bowditch v. Banuelos, 1 Gray (Mass.) 220.

[17] Perry, Trusts, § 38; Shepherd v. McEvers, 4 Johns. Ch. (N. Y.) 136, 8 Am. Dec. 501.

§ 150. [1] Lewin, Trusts, p. 44.

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It may not be necessary to specify in detail the classes of persons who are capable of becoming cestuis que trustent. As stated in the black-letter text, any person capable of taking and holding the legal title may become the beneficiary of a trust. An alien, at common law, could not take or hold land by descent. He could take, but not hold, land acquired by purchase, and as to such lands his title was good as against every one save the sovereign; so that, until the claim of the sovereign was asserted, his title was good as against the world.[2] The same doctrine prevails in equity, and an alien beneficiary under a trust deed can assert his interest as against every one except the state.[3] The statutes of the several states have modified to a greater or less extent the common-law rule as to the rights of aliens to take and hold by descent, grant, or purchase, and have, of course, affected the rights of aliens as beneficiaries under trust deeds. There is no rule of law or equity which restricts the right of an alien to become the recipient of the benefits of a trust of personal property.

It is a well-established principle that no valid private trust can be created unless there be a certain and definite beneficiary. "If there is a single postulate of common law established by an unbroken line of decisions, it is that a trust without a certain beneficiary who can claim its enforcement is void."[4] Thus a devise for the benefit of "near relations" has been considered too indefinite to create a trust.[5] The cestui que trust need not, however, be described by name. Any other designation or description by which he may be identified is sufficient.[6]

[2] Levy's Lessee v. McCartee, 6 Pet. 108, 8 L. Ed. 334; Governeur's Heirs v. Robertson, 11 Wheat. 332, 6 L. Ed. 48; Montgomery v. Dorion, 7 N. H. 475; Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; Mooers v. White, 6 Johns. Ch. (N. Y.) 360; Munro v. Merchant, 28 N. Y. 9.

[3] Cross v. De Valle, 1 Cliff. 282, Fed. Cas. No. 3,430; Id., 1 Wall. 8, 17 L. Ed. 515.

[4] Wright, J., in Levy v. Levy, 33 N. Y. 97, 107.

[5] Sale v. Moore, 1 Sim. 534.

[6] Holmes v. Mead, 52 N. Y. 332, 343.

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SAME—PROPERTY SUBJECT TO TRUST.

160. As a general rule, all property, whether real or personal, legal or equitable, may be made the subject of a trust.[1]

All property which is assignable at law or in equity, either real or personal may be transferred in trust. At common law, choses in action were not assignable; but this rule was never followed in equity,[2] and choses in action may be made the subject of a trust. The same is true as to expectancies,[3] contingent interests,[4] reversionary estates,[5] and estates in remainder.[6] There are, however, certain species of property which are made inalienable by statute or rules of public policy. In some jurisdictions it has been held that an assignment of future wages is invalid,[7] although the general rule would seem to favor the validity of such an assignment where the wages are to be earned under an existing contract of employment.[8] The unearned fees and salary of a public officer have almost invariably been held to be unassignable.[9]

Foreign lands are governed by the laws of the state or country where located; and a trust created in such lands, if invalid in such foreign state or country, will be invalid

§ 160. [1] Lewin, Trusts, p. 47.

[2] Thalimer v. Brinkerhoff, 20 Johns. (N. Y.) 386; Mandeville v. Welch, 5 Wheat. 283, 5 L. Ed. 87; Dix v. Cobb, 4 Mass. 508.

[3] Fitzgerald v. Vestal, 4 Sneed (Tenn.) 258; Varick v. Edwards, 1 Hoff. Ch. (N. Y.) 382; Steele v. Frierson, 85 Tenn. 432, 3 S. W. 649; In re Fritz's Estate, 160 Pa. 156, 26 Atl. 642.

[4] Varick v. Edwards, 1 Hoff. Ch. (N. Y.) 382.

[5] Woodgate v. Fleet, 44 N. Y. 1.

[6] Moore v. Littel, 41 N. Y. 66; Whelen v. Phillips, 151 Pa. 312, 25 Atl. 44; Watson v. Smith, 110 N. C. 6, 14 S. E. 640, 28 Am. St. Rep. 665.

[7] Herbert v. Bronson, 125 Mass. 475; Eagan v. Luby, 133 Mass. 543; Lehigh Val. R. Co. v. Woodring, 116 Pa. 513, 9 Atl. 58.

[8] O'Connor v. Meehan, 47 Minn. 247, 49 N. W. 982; Sullivan v. Sweeney, 111 Mass. 366; Garland v. Harrington, 51 N. H. 409.

[9] Bowery Nat. Bank v. Wilson, 122 N. Y. 478, 25 N. E. 855, 9 L. R. A. 706; State v. Williamson, 118 Mo. 146, 23 S. W. 1054, 21 L. R. A. 827; Schwenck v. Wyckoff, 46 N. J. Eq. 560, 20 Atl. 259, 19 Am. St. Rep. 438; Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963.

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elsewhere.[10] If the parties affected by the trust are within the jurisdiction of the court, the trust will be enforced.[11] Courts of equity cannot make a decree affecting and binding upon land in a foreign state or country, but they can make and enforce a decree against the trustee, if he is brought within their jurisdiction.[12] Such courts must, therefore, refuse to act where the relief sought demands a decree against the land which is the subject of the trust, and which is beyond their jurisdiction.[13]

SAME—CREATION.

161. An express trust in relation to real property must either be created by will, or evidenced by some writing, signed by the settlor.

162 An express trust in relation to personal property may be made verbally, unless intended to be testamentary, in which case it must be created by a duly executed will or codicil.

Before the enactment of the statute of frauds, trusts of both real and personal property could be declared by parol. As Mr. Lewin has said, trusts, like uses, are in their nature averrable; i. e. may be declared by word of mouth, without writing, in the absence of a statute requiring it.[1]

[10] Underh. Trusts, art. 9.

[11] Perry, Trusts, § 71. And see Massie v. Watts, 6 Cranch, 160, 8 L. Ed. 181, where Chief Justice Marshall laid down the rule "that, in case of fraud of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

[12] White v. White, 7 Gill & J. (Md.) 208; Mead v. Merritt, 2 Paige (N. Y.) 404.

[13] Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; Cloud v. Greasley, 125 Ill. 313, 17 N. E. 826; Potter v. Hollister, 45 N. J. Eq. 508, 18 Atl. 204.

§§ 161, 162. [1] Lewin, Trusts, 41. Lord Chief Justice Gilbert stated the principle as follows: "At common law a use might have been raised by words upon a conveyance that passed the possession by some solemn act, as feoffment; but, where there was no such

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But the original statute of frauds provided that "all declarations or creations of trusts, or confidences in any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare the trust, or by his last will in writing, or else they shall be utterly void," and also that "all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void."[2] Similar statutes have been enacted in the states of this country.[3]

Wherever such statutes have been enacted, trusts in real property cannot be proved by parol. It does not follow that trusts in real property must be created by written instruments. It is a sufficient compliance with the statute if they be manifested and proved by writing;[4] for if there be written evidence of the existence of the trust, the danger of parol evidence, against which the statute was directed, is effectually removed.[5] A subsequent written acknowledgment of the creation of a trust will establish the trust estate as of the date of its creation.[6] The statute prescribes no particular form by which the trust is to be created or declared.[7] And, as was stated in a quite recent New York case: "It is not necessary now to produce a deed or a formal writing intended for the purpose, in order to prove the trust, but letters or informal memoranda, signed by the party, and even admissions in a pleading in another action between other parties, if signed by the party with

act, then it seems a deed declaratory of the use was necessary, for, as a feoffment might be made at common law by parol, so might the uses be declared by parol. But where a deed was necessary for passing the estate itself, it was also requisite for the declaration of the uses." Gilb. Uses, 270.

[2] 29 Car. II. c. 3, §§ 7–9.

[3] The statutes of the several states differ from the English and among themselves in language, but for the most part they are substantially the same. See Perry, Trusts, § 78, note.

[4] Forster v. Hale, 3 Ves. 696; Gardner v. Rowe, 2 Sim. & S. 346; Movan v. Hays, 1 Johns. Ch. (N. Y.) 339, 342; Wiser v. Allen, 92 Pa. 317; McVay v. McVay, 43 N. J. Eq. 47, 10 Atl. 178.

[5] Perry, Trusts, § 79.

[6] Ambrose v. Ambrose, 1 P. Wms. 322; Barrell v. Joy, 16 Mass. 223.

[7] Wright v. Douglass, 7 N. Y. 564, 569; Cook v. Barr, 44 N. Y. 158.

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knowledge of its contents, will satisfy the requirements of the statute, if they contain enough to show the nature, character, and extent of the trust interest." [8] The statutes in several of the states have prescribed that a trust in lands must be created and declared in writing. But it has been thought that this modification in the language of the original statute has not changed the general rule as originally established, and that, notwithstanding such modification, the same evidence will be received to establish a trust.[9]

Statutes have also been enacted in the several states regulating the execution of wills, and prescribing the formalities to be observed by testators in relation thereto. These statutes require all wills to be in writing, and to be signed and executed by the testator in the presence of witnesses, except in the case of soldiers in actual service, and sailors at sea, whose parol declarations, known as "nuncupative wills," will be effectual in disposing of their property. It follows from these statutes that trusts of real or personal property cannot be created in a will, unless the will is executed in such form that it can be admitted to probate, and pass the estate or interest upon which it is intended to operate.[10] This does not preclude the effect of a defective will as evidence of a trust created by the testator prior to the execution of such will. Although the will is so defective as to be incapable of passing the estate, yet, if signed by the testator, under the above rule, it would be as good proof of the creation of the trust as any other memorandum or writing signed by the testator;[11] although if the validity

[8] Hutchins v. Van Vechten, 140 N. Y. 115, 118, 35 N. E. 446. And see Loring v. Palmer, 118 U. S. 321, 6 Sup. Ct. 1073, 30 L. Ed. 211; Urann v. Coates, 109 Mass. 581; In re Roberts' Appeal, 92 Pa. 407. An answer to a complaint in a judicial proceeding may establish a trust, Broadup v. Woodman, 27 Ohio St. 553; McVay v. McVay, 48 N. J. Eq. 47, 10 Atl. 178; or a letter recognizing another's control of the property, Packard v. Putnam, 57 N. H. 43; memoranda, one signed and another cited, Gordon v. McCulloh, 66 Md. 245, 7 Atl. 457; writing signed by initials, Smith v. Howells, 11 N. J. Eq. 349.

[9] Perry, Trusts, § 81. And see In re Sheets' Estate, 52 Pa. 527; Blodgett v. Hildreth, 103 Mass. 484; Bragg v. Paulk, 42 Me. 502; McClellan v. McClellan, 65 Me. 504; Kingsbury v. Burnside, 58 Ill. 310, 11 Am. Rep. 67.

[10] Davis v. Stambaugh, 168 Ill. 557, 45 N. E. 170; Chase v. Stockett, 72 Md. 235, 19 Atl. 761.

[11] Perry, Trusts, § 91; Leslie v. Leslie, 53 N. J. Eq. 275, 281, 31 Atl. 170.

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of the trust depends upon the will to transfer title of the property, the will cannot be used as evidence unless it was legally executed.* Mr. Lewin states the law as follows: "We must bear in mind that the absolute owner of property combines in himself both the legal and equitable interest; and, when the legislature enacts that no devise or bequest of property shall be valid without certain ceremonies, a testator cannot, by an informal instrument, affect the equitable any more than the legal estate, for the one is a constituent part of the ownership as much as the other. * * * As, if a legacy be bequeathed by a will in writing to A. upon trust, and the testator by parol express an intention that it shall be held by A. upon trust for B., such a direction is in fact a testamentary disposition of the equitable interest in the chattel, and therefore void by the statute, which imposes the necessity of a written will. If it be said that such expression of intention, though void as a devise or bequest, may yet be good as a declaration of trust, and therefore, that, where the legal estate of a freehold is well devised, a trust may be ingrafted upon it by a single note in writing; and, where a personal chattel is well bequeathed, a trust of it, as excepted from the seventh section of the statute of frauds, may be raised by a mere parol declaration,—the answer is that a wide distinction exists between testamentary dispositions and declarations of trust. The former are ambulatory until the death of the testator, but the latter take effect, if at all, at the time of the execution. * * * We may, therefore, safely assume, as an established rule, that, if the intended disposition be of a testamentary character, and not to take effect in the testator's lifetime, but ambulatory until his death, such disposition is inoperative, unless it be declared in writing, in strict conformity with the statutory enactments regulating devises and bequests." [12] Personal property is not within the provisions of the statute of frauds, and there seems no valid reason why trusts in such property cannot be created by parol.[13]

* Anding v. Davis, 38 Miss. 574, 77 Am. Dec. 658, and see Davis v. Stambaugh, 163 Ill. 557, 45 N. E. 170; Chase v. Stockett, 72 Md. 235, 19 Atl. 761.

[12] Lewin, Trusts, 66.

[13] Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464; Day v. Roth, 18 N. Y. 448; In re Carpenter, 131 N. Y. 86, 29 N. E. 1005; Hess' Appeal,

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SAME—LANGUAGE CREATING TRUST.

163. No particular or technical words are required to create a trust. It is sufficient if it clearly appears that there was an intention to create a trust, or to confer a benefit best carried out by means thereof, and the property embraced within the trust, the beneficiaries in whose behalf it is created, and the manner in which it is to be performed are clearly indicated.[1]

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 and 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.[2] The plainest case of a trust occurs where property is devised or conveyed 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.[3] So, if A. devises land to B., "he paying testator's debts," the condition is construed to impose a trust on B. to pay those debts.[4] And if a testator bequeaths or devises property to A., and states that he "requests,"[5] or "has confidence,"[6] or "wishes or desires"[7]

112 Pa. 168, 4 Atl. 840; Calder v. Moran, 49 Mich. 14, 12 N. W. 892; Chace v. Chapin, 130 Mass. 128; Danser v. Warwick, 33 N. J. Eq. 133.

§ 163. [1] Underh. Trusts, art. 7; Pom. Eq. Jur. § 1009.

[2] Howorth v. Dewell, 29 Beav. 18; Benson v. Whittam, 5 Sim. 22.

[3] Lyon v. Lyon, 65 N. Y. 339; In re Goodrich's Estate, 38 Wis. 492.

[4] Wright v. Wilkin, 2 Best & S. 232. See, also, Stanley v. Colt, 5 Wall. 119, 18 L. Ed. 502; Sohier v. Trinity Church, 109 Mass. 1.

[5] Knox v. Knox, 59 Wis. 172, 18 N. W. 155, 48 Am. Rep. 487.

[6] Dresser v. Dresser, 46 Me. 48; Warner v. Bates, 98 Mass. 274.

[7] Cockrill v. Armstrong, 31 Ark. 580; Reid's Adm'r v. Blackstone, 14 Grat. (Va.) 363.

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that it be applied for the benefit of B., such testator's words evince an intention that A. should not keep the property beneficially.

Intention must Appear.

Although no particular form of expression is required to create a trust, there must be a definite intention, expressed with sufficient clearness.[8] It is not enough to state that a purchase was made for another, for the mere fact that the purchaser intended to give the property to the alleged beneficiary cannot create a trust.[9] Courts seek for the intention of the parties, however informal or obscure the language may be; and, if a trust can fairly be implied from the language used, the intention will be executed through the medium of a trust.[10] The equitable maxim that "equity regards the intention, rather than the form," is thus applied; and, wherever that intention is apparent, however rudely expressed, it will be carried into effect. But there must be a plain manifestation of such intention. Loose and equivocal expressions of parties, made at different times and on different occasions, will not be regarded.[11]

Intention to Create Trust Evinced by Powers Conferred and Duties Imposed on Trustees.

The intention of the donor to create a trust may often be inferred from the powers granted to the trustee; as where, by the express terms of a will, an estate is apparently devised to the beneficiaries, but by its terms it also appears that the executors are required to perform certain duties which are necessarily inconsistent with the vesting of the legal title in such beneficiaries. If the executors of a will are authorized to lease, rent, repair, insure, pay taxes, assessments, and interest, and otherwise manage the trust property, and pay over the net income to the devisees and legatees, the legal estate in the property is necessarily con-

[8] Heermans v. Burt, 78 N. Y. 259; Savage v. Burnham, 17 N. Y. 561.

[9] Hays v. Quay, 68 Pa. 263. If the intention was never executed, either by conveyance, change of possession, or in any other manner, no trust is created. Girard Trust Co. v. Mellor, 156 Pa. 589, 590, 27 Atl. 662.

[10] Perry, Trusts, § 112.

[11] Steere v. Steere, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 256; Barkley v. Lane's Ex'r, 6 Bush (Ky.) 587.

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ferred upon the executors, and an express active trust is created in them.[12]

A trust may also be inferred, when no trust is declared in terms, by directions given to the trustee to provide for the maintenance of the donor's family or children; as, where a devise is given to a son, with the direction that he provide for his mother during her lifetime, a trust is created in favor of the mother.[13]

Extent of Estate as Affected by Language.

The intent of the settlor as to the quantity or quality of the estate which the cestui que trust is to take should be clearly expressed, but it is not necessary that the technical words required to limit legal estates should be used. An equitable fee may be created without the use of the word "heirs" if the intention to give a fee sufficiently appears from the language used.[14] The extent of the estate which the cestui que trust is to take is sometimes dependent upon the estate given the trustee; as, where an estate is devised to the use of a man and his heirs, in trust for another, the cestui que trust takes the equitable fee. The entire estate passes to the trustee, and his interest under the trust is, in equity, considered the interest of the beneficiary.[15] But when an estate is conveyed by a deed to a person and his heirs in trust for the grantor for life, and after his death upon trust for his children, without using the words "and their heirs," the children take for life only.[16]

[12] Tobias v. Ketchum, 32 N. Y. 319, 327–331. In Brewster v. Striker, 2 N. Y. 19, the testator devised his real estate to his grandchildren, and then provided that the lands should not be sold, but the executors should lease or rent them, and pay the rents and profits to the grandchildren, and it was held that the executors were trustees, and took the legal estate. See, also, Ferry v. Laible, 31 N. J. Eq. 566; Johnson v. Lawrence, 95 N. Y. 154; In re Denton, 102 N. Y. 200, 6 N. E. 299.

[13] In re Goodrich's Estate, 38 Wis. 492. And see Young v. Young, 68 N. C. 309; Blouin v. Phaneuf, 81 Me. 176, 16 Atl. 540; Bryan v. Howland, 98 Ill. 625; Smith v. Wildman, 37 Conn. 387; Paisley's Appeal, 70 Pa. 153.

[14] Lewin, Trusts, 108, 109; Packard v. Railroad Co., 168 Mass. 96, 46 N. E. 433.

[15] Lewin, Trusts, 96; Moore v. Cleghorn, 10 Beav. 423; Knight v. Selby, 3 Man. & G. 92.

[16] Holliday v. Overton, 14 Beav. 467; In re Whiston's Settlement [1894] 1 Ch. Div. 661; Tatham v. Vernon, 29 Beav. 604.

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SAME—PRECATORY WORDS.

164. Precatory words are words of expectation, hope, desire, or recommendation, used by a donor in qualifying an absolute gift.

165. In the earlier cases the doctrine as to precatory trusts has been stated as follows: When property is given absolutely to any person, and the same person is, by the giver, who has power to command, recommended, or entreated, or wished to dispose of that property in favor of another, the recommendation, or entreaty, or wish shall be held to create a trust

(1) If the words are so used that, upon the whole, they ought to be construed as imperative;

(2) If the subject of the recommendation or wish be certain; and

(3) If the objects or persons intended to have the benefit of the recommendation or wish be also certain.[1]

166. The modern rule has been stated thus: In order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled, and sure as though he had given the

§§ 164–166. [1] Knight v. Knight, 3 Beav. 148, per Lord Langdale, Mr. Pomeroy says: "With respect to the essential elements which must exist in every precatory trust, it is impossible to add anything to the clear and accurate statement of Lord Langdale in the case of Knight v. Knight." Pom. Eq. Jur. § 1016.

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property to hold upon a trust declared in express terms in the ordinary manner.[2]

The doctrine of precatory trusts is not, in the light of modern cases, a favored one. Many able judges have dissented from it on principle. There is a present general tendency in all courts to restrict its operation within reasonable bounds. The evident danger in the application of the doctrine lies in the natural tendency to clothe the vague recommendations and desires of the testator with the imperative character of an expressed trust, and thus extend their meaning and purpose beyond their real intent. On the other hand, an entire disregard of the doctrine would, in effect, compel the creation of a trust by the use of definite and technical expressions. The most that can be desired in any case where precatory words are in question is a determination of the real intent of the testator. This can be best attained by an examination of the context of the instrument. Whether precatory words in a will are to be accorded such force as to deprive the donee of the absolute right of disposal, and thereby qualify the beneficial interest in the gift, must be determined in connection with what may be gathered from the rest of the will as an intention which would be reconcilable with the idea of a trust imposed upon the legal estate. Where to impose such a trust would be to nullify previous expressions in a will, and to create a repugnancy between its different parts, then the rules of construction forbid the attempt.[3] It does not seem advisable to attempt a classification of all the cases involving a consideration of this difficult question. There is an apparent conflict in the decisions of the several courts in this country, which does not admit of a satisfactory explanation. Quite often the same precatory words have received opposite constructions from different courts in the same state. Each case must be decided in view of its own particular circumstances. The courts will endeavor to ascertain the donor's intention, not only from the precatory words themselves, but from the context of the instrument.[4]

[2] Pom. Eq. Jur. § 1016.

[3] Clay v. Wood, 153 N. Y. 134, 142, 47 N. E. 274.

[4] In re Adams & Kensington Vestry, 27 Ch. Div. 394; Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138; Foose v.

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SAME—ENFORCEMENT OF VOLUNTARY TRUSTS.

167. A valid trust may be created without valuable consideration. If the trust has been completely declared, the absence of consideration is immaterial.

168. A voluntary trust will be enforced if

(1) It is created by will; or

(2) The settlor has transferred the trust property to a trustee; or

(3) The settlor has retained the title to the trust estate, and declared himself a trustee for the purposes of the trust.[1]

169. If there is a mere intention of creating a trust or a mere voluntary agreement to do so, and the settlor himself contemplates some further act to complete the trust, equity will not enforce it, or aid in its enforcement.

Where there is a valuable consideration, and a trust is intended to be created, formalities are of minor importance;

Whitmore, 82 N. Y. 405, 37 Am. Rep. 572; Phillips v. Phillips, 112 N. Y. 197, 19 N. E. 411, 8 Am. St. Rep. 737; Elliott v. Elliott, 117 Ind. 380, 20 N. E. 264, 10 Am. St. Rep. 54; Hess v. Singler, 114 Mass. 56. The following cases are adverse to the creation of a trust by the use of precatory words: ("Recommend") In re Whitcomb's Estate, 86 Cal. 265, 24 Pac. 1028; Van Gorder v. Smith, 99 Ind. 404; ("I request * * *, but neither of them is under responsibility to any court to do so") Bacon v. Ransom, 139 Mass. 117, 29 N. E. 473; ("I make this only as a request, for I feel that her own kind heart will prompt her to do so without") Sale v. Thornberry, 86 Ky. 266, 5 S. W. 468; ("I expect and I desire that my wife will not dispose of said estate in such a manner") In re Gardner, 140 N. Y. 122, 35 N. E. 439. In Pennsylvania the doctrine of precatory words has been very reluctantly applied. In re Pennock's Estate, 20 Pa. 268, 59 Am. Dec. 718; Beck's Appeal, 46 Pa. 527; Paisley's Appeal, 70 Pa. 153; Boyle v. Boyle, 152 Pa. 108, 25 Atl. 494, 34 Am. St. Rep. 629; Good v. Fichthorn, 144 Pa. 287, 22 Atl. 1032, 27 Am. St. Rep. 630.

§§ 167–169. [1] Milroy v. Lord, 4 De Gex, F. & J. 264.

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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.[2] 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.[3] The same principle applies to wills where a consideration is implied. 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 will be compelled to execute the trust.[4]

Enforcement of Voluntary Trusts.

In the case of voluntary trusts, not created by will, the form of the transaction becomes important. To constitute a valid and effectual trust enforceable in equity, the settlor must, either by direct transfer or express declaration, have done everything that was necessary to transfer the property, and render the transaction binding. If the transaction does nothing more than evince an intention to create a trust, and there is no valuable consideration, courts of equity will not enforce the trust, or aid in its enforcement; for an intention to make a gift is nudum pactum, and of no binding force, either at law or in equity.[5] If, however, the

[2] Lewin, Trusts, p. 67.

[3] Burnside v. Wayman, 49 Mo. 356.

[4] Lewin, Trusts, p. 141.

[5] 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 (Mass.) 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, 28 L.

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declaration of trust is perfect and complete, equity will enforce it, though there is no consideration; for 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.[6]

As stated in the black-letter text, a voluntary trust will be enforced where the settlor has transferred the trust property to a third person as trustee. If the trust property is a legal estate, capable of transfer and delivery, there is no perfect trust unless the legal interest is transferred to and vested in the trustee for the purposes of the trust. It is not enough that the settlor executed a deed purporting to pass the legal interest, and that he believed nothing to be wanting to give effect to the transaction. The intention of devesting himself of the legal estate must in fact be executed, or the court will not recognize the trust.[7] As an instance of the application of this rule, if the settlor execute a deed in trust of stock in a corporation, which can only be legally transferred by assignment on the backs of

Ed. 90; Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531; Keyes v. Carleton, 141 Mass. 49, 6 N. E. 524; Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659.

[6] Martin v. Funk, 75 N. Y. 134, 137, 31 Am. Rep. 446; Young v. Young, 80 N. Y. 422, 436, 36 Am. Rep. 634. 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 devest 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 for the other person." In re Webb's Estate, 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; Kekewich v. Manning, 1 De Gex, M. & G. 176.

[7] Lewin, Trusts, p. 70; Ellison v. Ellison, 6 Ves. 662; Garrard v. Lauderdale, 2 Russ. & M. 452.

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the certificates and on the books of the corporation, the deed, if voluntary, will not create a trust which the court will enforce, unless the stocks are actually transferred in fact.[8] Where the legal title is not assignable, the rule seems to be that, if the settlor make all the assignment of property in his power, and perfect the transaction as far as the law permits, equity will recognize the act, and support the validity of the trust.[9] But, if part of the property be capable of delivery and transfer, and part of it incapable of delivery, and that which might have been legally assigned and delivered is not so assigned and delivered, no trust is created.[10] If the subject of the trust is an equitable interest, the owner thereof may create a valid trust by executing an assignment of the interest to a trustee, notwithstanding the fact that the legal title is vested in another.[11]

If the settlor proposes to convert himself into a trustee, the trust is perfectly created, and will be enforced, upon the execution by the settlor of a clear and explicit declaration of trust, intended to be final, and binding upon him; and this is so whether the nature of the property be legal or equitable, and whether it be capable or incapable of trans-

[8] Garrard v. Lauderdale, 2 Russ. & M. 451; Ellison v. Ellison, 6 Ves. 662,—where Lord Eldon said: "I take the distinction to be that, if you want the assistance of the court to constitute you cestui que trust, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you cestui que trust; as upon a covenant to transfer stock, etc., if it rests in covenant, and is purely voluntary, this court will not execute the voluntary covenant; but, if the party has completely transferred stock, etc., though it is voluntary, yet, the legal conveyance being effectually made, the equitable interest will be enforced by this court."

[9] 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." And see Fortescue v. Barnett, 3 Mylne & K. 36; Roberts v. Lloyd, 2 Beav. 376; Elliot's Ex'rs' Appeal, 50 Pa. 75.

[10] Perry, Trusts, § 101; Richardson v. Richardson, L. R. 3 Eq. 686.

[11] Lewin, Trusts, p. 72; Sloane v. Cadogan, cited in Sugd. Vend. 719; Voyle v. Hughes, 2 Smale & G. 18; Gannon v. White, 2 Ir. Ch. 207.

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fer.[12] Thus, where one deposits money in a bank 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, although the pass book remained in the possession of the depositor, and the cestui que trust was ignorant of the deposit until after the depositor's death.[13]

These cases are to be carefully distinguished from those where the donor attempts to make an absolute 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.[14] As, 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 a trust, though the intention to make the gift is clearly manifested.[15] And also 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

[12] Ex parte Pye, 18 Ves. 140; Crawford's Appeal, 61 Pa. 52; Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64, 2 Am. St. Rep. 547.

[13] Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Minor v. Rogers, 40 Conn. 512, 16 Am. Rep. 69; Sayre v. Weil, 94 Ala. 466, 10 South. 546, 15 L. R. A. 544. And the trust exists although the depositor retains the right to draw interest. Gerrish v. Institution, 128 Mass. 159, 35 Am. Rep. 370; Willis v. Smyth, 91 N. Y. 297. There must be some act to show intent to create trust, unless pass book is delivered or notice is given to beneficiary. Connecticut River Sav. Bank v. Albee's Estate, 64 Vt. 571, 25 Atl. 487; Scott v. Bank, 140 Mass. 157, 2 N. E. 925.

[14] Young v. Young, 80 N. Y. 422, 437, 36 Am. Rep. 634, per Rapallo, J. See, also, 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, 6 L. R. A. 403.

[15] Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634.

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does not deliver the possession, and retains them in his custody until his death, the nephew obtains no right in the notes.[16] In Richards v. Delbridge,[17] 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 intention to become a trustee; whereas words of present gift show an intention to give other property to another, and not to retain it in the donor's hands for any purpose, fiduciary or otherwise."

SAME—OBJECTS OF TRUSTS.

170. A trust which has for its object the contravention of the policy of the law,[1] or which is created for an unlawful or fraudulent purpose, will not be enforced in equity in favor of the parties to be benefited thereby, nor will equity aid the settlor to recover the estate.[2]

171. The following are instances of illegal trusts:

(a) For unreasonable accumulations restricting the power of alienation.

[16] Mitchell v. Smith, 4 De Gex, J. & S. 422.

[17] L. R. 18 Eq. 11, 13.

§§ 170, 171. [1] Lewin, Trusts, p. 94; Attorney General v. Pearson, 3 Mer. 393; Lemmond v. Peoples, 41 N. C. 137.

[2] Cottington v. Fletcher, 2 Atk. 155; Muckleston v. Brown, 6 Ves. 68; Ford's Ex'rs v. Lewis, 10 B. Mon. (Ky.) 127. The authorities are not uniform as to whether or not equity will interfere in favor of the settlor where the object of the trust is illegal and fraudulent. Thus, in Lemmond v. Peoples, 41 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 Ownes v. Ownes, 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.

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(b) In derogation of the rights of creditors.

(c) Against statutes of mortmain, or those in regard to aliens.

(d) Promoting or encouraging immorality, fraud, or dishonesty.

(e) In restraint of marriage.

In addition to the preceding principles involving the questions as to what parties, language, and consideration are essential for the creation of a valid trust, we have yet to consider what constitutes legal and illegal objects of trusts. Equity will not sustain a trust that contravenes the policy of the law, or is in violation of statute. Trusts which provide for the accumulation of income, unless for the benefit of minors during their minority, are quite generally opposed to specific statutory enactments, and, in any event, in contravention of the settled policy of the law. The same may be said in respect to trusts which unlawfully or unreasonably suspend the power of alienation, or which are opposed to the law against perpetuities. It does not seem necessary in a work of this character to treat extensively of the subject of trusts for accumulation of incomes or in suspension of the power of alienation.[3]

A trust which would tend, by its execution, to promote immorality, will not be enforced; as, where a settlement of property is made in trust for illegitimate children to be thereafter born.[4] And trusts which are for the purpose of promulgating atheism, infidelity, or hostility to the existing forms of government cannot be enforced in equity.[5]

[3] See Perry, Trusts, c. 13.

[4] Medworth v. Pope, 27 Beav. 71; Occleston v. Fullalove, 9 Ch. App. 147.

[5] Zeisweiss v. James, 63 Pa. 465, 3 Am. Rep. 558, was where a devise was made to "The Infidel Society of Philadelphia," and the court intimated that the devise was void because an insult to the popular religion of the country; an insult of such a nature as to be indictable as "directly tending to disturb the public peace." In Jackson v. Phillips, 14 Allen (Mass.) 539, the court adopts the rule that trusts directed at existing institutions of laws or the frame of government are void. See, also, George v. Braddock, 45 N. J. Eq. 757, 18 Atl. 881, 6 L. R. A. 511, 14 Am. St. Rep. 754, where a trust to "spread the light" of the doctrines of Henry George was declared void as calling in question fundamental rules of government.

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There is a pronounced conflict of authority as to whether a trust may be created containing provisions that the estate shall not be subjected to liability for the debts and other engagements of the beneficiary. These trusts are commonly termed "spendthrift trusts," and have been almost invariably upheld by the courts of Pennsylvania, and in the courts of some of the other states.[6] On the other hand, there are a number of cases which follow the English rule, to the effect that a proviso in a trust that the interest of the cestui que trust shall not be liable to the claims of creditors is void.[7] In New York it is provided by statute that, where a trust is created to receive rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits beyond the sum necessary for the education and support of the beneficiary shall be liable to the claims of his creditors in the same manner as other personal property.[8]

Trusts Illegal in Part.

But a void trust, which is separable from other valid trusts, may be cut off when the trust thus defeated is independent of the other dispositions of the will, and subordinate to them, and not an essential part of the general scheme.[9] In cases where a part of an estate is given upon a valid trust and part upon an invalid trust, two rules have been laid down: (1) If an ascertainable portion of a fund or estate be given on a void trust, and the residue on a

[6] Girard Life & Trust Co. v. Chambers, 46 Pa. 486; Keyser v. Mitchell, 67 Pa. 473; Philadelphia Trust Co. v. Guillon, 100 Pa. 254; Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504; Nichols v. Eaton, 91 U. S. 716, 23 L. Ed. 254; Hyde v. Woods, 94 U. S. 34, 24 L. Ed. 264; Lampert v. Haydel, 96 Mo. 450, 9 S. W. 780, 2 L. R. A. 113. But see Hahn v. Hutchinson, 159 Pa. 133, 28 Atl. 167.

[7] Tillinghast v. Bradford, 5 R. I. 205; Mandelbaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 61; Blackstone Bank v. Davis, 21 Pick. (Mass.) 42, 32 Am. Dec. 241. And see the following English cases: Younghusband v. Gisborne, 1 Colly. 400; Green v. Spicer, 1 Russ. & M. 395; Graves v. Dolphin, 1 Sim. 66; Snowdon v. Dales, 6 Sim. 524.

[8] Real Property Law (Laws 1896, c. 547) § 78; Williams v. Thorn, 70 N. Y. 270.

[9] Manice v. Manice, 43 N. Y. 303, 384; Knox v. Jones, 47 N. Y. 389; Culross v. Gibbons, 130 N. Y. 447, 29 N. E. 839; Sears v. Putnam, 102 Mass. 9; Bristol v. Bristol, 53 Conn. 242, 5 Atl. 687; Andrews v. Rice, 53 Conn. 566, 5 Atl. 823.

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good trust, the residue has the benefit of a failure of the trust; (2) if an unascertainable portion be given upon a void trust, and the residue upon a valid trust, the whole fails.[10]

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. Statutes in New York,[11] substantially re-enacted in Michigan,[12] Wisconsin,[13] Minnesota,[14] California,[15] and the Dakotas,[16] prohibit the creation of express trusts, except for the following purposes: (1) To sell real property for the benefit of creditors; (2) to sell, mortgage, or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon; (3) to receive the rents and profits of real property, and apply them to the use of any person during the life of that person, or for any shorter term, subject to the provision of law relating thereto; (4) to receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits prescribed by law,—that is, 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 which directs or authorizes the performance of any act which may be lawfully performed under a power is valid as a power in trust.[17] The statutes, however, apply only to real estate, and trusts in personal property are not affected thereby.[18]

EXECUTED AND EXECUTORY TRUSTS.

172. For the purposes of construction and interpretation, trusts are either executed or executory. An executed trust is one where no

[10] Kelly v. Nichols, 17 R. I. 306, 21 Atl. 906.

[11] Real Property Law (Laws 1896, c. 547) § 76 (former 1 Rev. St. pt. 2, c. 1, tit. 2, § 55).

[12] 2 How. Ann. St. 1883, c. 214, § 11.

[13] 1 Sanb. & B. Ann. St. 1898, § 2081.

[14] Gen. St. 1878, p. 553, § 11.

[15] Civ. Code, § 857.

[16] Civ. Code 1880, p. 243, § 282.

[17] New York Real Property Law (Laws 1896, c. 547) § 79.

[18] Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464, 52 Am. Rep. 41.

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act is necessary to be done to give it effect, since its terms and limitations are completely and perfectly declared by the instrument creating it, and no further act is required to give it effect.

173. An executory trust is one where the scheme of the trust has been imperfectly declared at the outset, and the creator of the trust has merely denoted his ultimate object, imposing on the trustee or on the court the duty of effectuating it in the most convenient way.[1]

174. In the construction of executed trusts, technical trusts are construed in their legal and technical sense. In the construction of executory trusts a court of equity is not bound to the technical, legal meaning of the language employed by the settlor; but where a technical construction of such language would defeat the obvious intent of the settlor, as gathered from the motives of the trust, its general objects and purposes, or from any other attendant circumstance, the court will direct an executed trust to be made in a proper and legal manner in conformity with the intent of the parties.

To avoid confusion and misconception, it is well to call attention to the fact that a trust is not executory because the trustee is therein directed to perform some duty with respect to the property which is the subject of the trust. The essence of an executory trust does not consist in acts directed to be done by the trustee with respect to the property, but in acts directed to be done perfecting and complet-

§§ 172–174. [1] Adams, Eq. 127 (40).

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ing the trust itself, which was not fully declared in the original instrument of creation.[2]

The following much-quoted observation of Lord St. Leonards is instructive as indicating the distinction between executed and executory trusts: "All trusts 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 consisomething ding 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."[3] The distinction between executed and executory trusts is one of interpretation and construction, and is directly traceable to a desire to obviate the consequences of the extremely technical doctrine of the rule in Shelley's Case.[4]

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 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.[5] 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 hus-

[2] Pom. Eq. Jur. § 1001.

[3] Egerton v. Brownlow, 4 H. L. Cas. 3, 10.

[4] Sackville-West v. Holmesdale, L. R. 4 H. L. 545, 553, per Lord Hatherley.

[5] 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. (Miss.) 798.

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band 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.[6]

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 affirmation showing that the rule in Shelley's Case was not intended to apply.[7] The abrogation of the rule in Shelley's Case in many of the states renders the application of these principles rather infrequent with us.

ACTIVE AND PASSIVE TRUSTS.

175. In respect to the nature of the duties of the trustee and of the interest of the cetui que trust, an express private trust may be either

(1) An active, or special, trust, or

(2) A passive, or simple, trust.

ACTIVE TRUST.

176. An active trust, or a special trust, as it is sometimes called, is one in which a trustee is appointed to carry out some scheme specified by the creator of the trust, and is charged with the performance of active and substantial duties in connection with the control, management, and disposition of the trust property.

177. In an active trust the cestui que trust only possesses the right to enforce in equity the

[6] Trevor v. Trevor, 1 P. Wms. 622; Streatfield v. Streatfield, Cas. t. Talb. 176.

[7] Glenorchy v. Bosville, Cas. t. Talb. 5, 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 1; Sweetapple v. Bindon, 2 Vern. 536; Papillon v. Voice, 2 P. Wms. 471; Wood v. Burnham, 6 Paige (N. Y.) 514; Tallman v. Wood, 26 Wend. (N. Y.) 9; In re Angell, 13 R. I. 630.

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specific execution of the duties declared in the trust, to the extent of the interest of such cestui que trust in the trust estate.[1]

Active or special trusts may be created for any purpose not prohibited by law,[2] and may extend to every species of property. The legal title of the trust property in all such trusts remains in the trustee, and the cestui que trust has only a beneficial interest therein; but he always has the right, however, to compel a performance of the trust according to its terms and intent. If a trust is to A. to collect rents and profits, and to pay therefrom all expenses in caring for the property, and the residue to C. during his lifetime, the trust is an active one.[3] There are a great number of special purposes for which active trusts may be created. Among the most common of these are where (1) the trust is for the conveyance of the property to designated persons; (2) where the trustee is directed to dispose of the entire property, and use the proceeds for the payment of debts, legacies, and the like; (3) where the profits and income of the trust property are to be accumulated or applied for some specific purpose. Another form of this trust 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 designated 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.[4]

§§ 176, 177. [1] Lewin, Trusts, p. 689.

[2] 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, p. 378.

[3] Goodrich v. City of Milwaukee, 24 Wis. 422; Watson's Appeal, 125 Pa. 340, 17 Atl. 426; Holl's Appeal, 133 Pa. 351, 19 Atl. 558; Henson v. Wright, 88 Tenn. 501, 12 S. W. 1035.

[4] Webb v. Hoselton, 4 Neb. 308, 19 Am. Rep. 638; Austin v. Manufacturing Co., 14 R. I. 464; Hoffman v. Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Wisconsin Cent. R. Co. v. Land Co., 71 Wis. 94, 36 N. W. 837. In some of the states, however, it is held that a trust deed

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It has been held that the discretion reposed in a trustee is decisive of the active character of the trust,[5] and the fact that the beneficiary has the power to remove or substitute trustees has no bearing on this question.[6]

PASSIVE TRUST.

178. An express passive, or simple, trust, as it is sometimes called, is one in which the property is vested in a person in trust for another, and the trustee has no active duties to perform in respect to the trust property, nor any right of possession, nor power of management, nor control of such property, except by the direction of the cestui que trust.

179. In such a trust the cestui que trust is considered in equity as the absolute owner, and is, therefore, entitled to put an end to the trust by calling on the trustee to convey to him the legal estate.[1]

A simple case of a passive trust is where A. devises or conveys property to B. in trust for C., without any further direction. In such a trust the only duty which B. has to perform is to convey the legal estate to C. The beneficial ownership is, to all intents and purposes, in C., and he is entitled to the possession, the rents and profits, and the man-

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.

[5] Kirkland v. Cox, 94 Ill. 400.

[6] Hart v. Seymour, 147 Ill. 598, 35 N. E. 246.

§§ 178, 179. [1] Perry, Trusts, § 18, where a simple trust is defined as a simple conveyance of property to one upon trust for another, without further specifications or directions. In such case the law regulates the trust, and the cestui que trust has the right of possession and of disposing of the property, and he may call upon the trustee to execute such conveyances of the legal estates as are necessary.

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agement and control of the trust property to the full extent of his estate.[2] And where property is conveyed to B. and his heirs in trust to collect the rents and profits, and pay them to C., during his lifetime, and on his death in trust for his eldest son absolutely, the trust is active or special during C.'s lifetime, but on his death it becomes a passive or simple trust, for C.'s son is then in equity regarded as the absolute owner.

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.[3] But passive trusts in personal property are not uncommon; as, where money is deposited in a bank by A. in trust for B.[4]

ASSIGNMENT FOR BENEFIT OF CREDITORS.

180. A voluntary general assignment by an embarrassed debtor for the benefit of his creditors is valid, unless prohibited by statute. Such an assignment creates a true trust relation, and the creditors are true beneficiaries. The assent of the creditors is presumed, since such trust is for their benefit; and the trust is therefore irrevocable by the assignor.

The English doctrine in respect to voluntary assignments for the benefit of creditors differs materially from that adopted by the courts in this country. In England the rule seems to be that, where a person who is indebted makes provision

[2] Pom. Eq. Jur. § 988; Brown v. How, Barnard, Ch. 354; Attorney General v. Gore, Id. 150.

[3] Such statutes exist in New York, Michigan, Wisconsin, Minnesota, California, and the Dakotas, see ante, p. 378. As to the construction of such statutes, see Farmers' Nat. Bank v. Moran, 30 Minn. 165, 14 N. W. 805; Sullivan v. Bruhling, 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.

[4] Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Boone v. Bank, 84 N. Y. 83, 38 Am. Rep. 498; Leighton v. Bowen, 75 Me. 504. And see cases cited ante, p. 374, note 13.

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for the payment of his debts by vesting his property in trustees upon trust to pay them, but does so behind the backs of the creditors, and without communicating with them, the trustees do not become trustees for the creditors. The arrangement is supposed to be made by the debtor for his own convenience only. It is deemed to be the same as where a debtor puts a sum of money into the hands of an agent with directions to apply it in paying certain specified debts. In such a case there is no privity between the agent and the creditor, and the trust is revocable by the settlor at any time before the money is paid to the creditors.[1]

In the American states, assignments for the benefit of creditors are generally regulated by statute. But, independent of statute, it is well established in the courts of this country that a trust created for the payment of debts, if for the benefit of creditors, is a valid trust, and vests the title of the trust property in the trustee. The assent of the creditors will be presumed, and the trust, being duly executed, is irrevocable.[2]

PUBLIC OR CHARITABLE TRUSTS—OBJECTS.

181. 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 bringing 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 build-

§ 180. [1] Underh. Trusts (Am. Ed.) p. 37; Walwyn v. Coutts, 3 Sim. 14; Garrard v. Lord Lauderdale, Id. 1; Acton v. Woodgate, 2 Mylne & K. 495; Johns v. James, 8 Ch. Div. 744; Henderson v. Rothschild, 33 Ch. Div. 459.

[2] Ingram v. Kirkpatrick, 41 N. C. 463, 51 Am. Dec. 428; Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 522; Valentine v. Decker, 43 Mo. 583; Mills v. Parkhurst, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472; Moore v. Hoinnant, 89 N. C. 455; Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. 611.

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ings or works, or otherwise lessening the burden of government." [1]

It has been supposed that the jurisdiction of courts of equity in respect to charitable trusts had its origin in the so-called "statute of charitable uses." [2] This was at one time a prevailing opinion in England,[3] and was adopted more or less generally in the courts of this country.[4] But upon research it was discovered that courts of chancery had entertained jurisdiction over charitable trusts prior to the enactment of that statute, and it is now well settled that such jurisdiction existed independently of and prior to that enactment.[5] Notwithstanding the fact that the system of charitable trusts does not owe its origin to such statute, it is certain that there is contained therein a declaratory statement defining and enumerating charitable uses, which, while not conclusive in those states where the statute is not in force, has always been a guide to the courts in considering the subject of charitable trusts. Such charitable uses are set forth in the preamble of the act 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 and captives; the aid or care of any poor inhabitants concerning payment of fifteens, setting out soldiers, or other taxes." This enumeration may not be deemed conclusive of all other charitable uses not specifically mentioned there-

§ 181. [1] Jackson v. Phillips, 14 Allen (Mass.) 556, per Gray, J.

[2] 43 Eliz. c. 4.

[3] 1 Spence, Eq. Jur. 589.

[4] Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. 1, 4 L. Ed. 499; Gallego's Ex'rs v. Attorney General, 3 Leigh (Va.) 450, 24 Am. Dec. 650.

[5] Vidal v. Girard's Ex'rs, 2 How. 127, 155, 194, 196, 11 L. Ed. 205; Protestant Episcopal Soc. v. Churchman, 80 Va. 718; Trustees, etc., of Presbyterian Church v. Guthrie, 86 Va. 125, 10 S. E. 318, 6 L. R. 321.

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in, but it has always been considered illustrative of the purposes for which charitable trusts may be created. Many objects have been declared to be charitable which are not mentioned in the statute, because they are analogous to those therein mentioned, and are in conformity with the spirit of the preamble.

Gifts and conveyances in trust for religious purposes, though not expressly included in the statutory enumeration, have always been upheld and enforced. These include trusts created for the propagation of religion, the erection and maintenance of church edifices, the support of clergymen, and the spread of religious influences by missionary, Bible, and other religious societies.[6] Trusts for religious purposes are valid, although not mentioned in the statute, since they are within its spirit and intent; as trusts in aid or support of the poor, widows, and orphans.[7] The benevolent purpose must, however, be a public one, and a beneficial society the benefits of which are confined to its own members is not a public charity.[8] Gifts for educational purposes are clearly within the spirit of the statute; as for the advancement of learning,[9] the maintenance and support of library and literary institutions,[10] and for the founding and support of

[6] Jones v. Habersham, 107 U. S. 174, 182, 2 Sup. Ct. 336, 27 L. Ed. 401; De Camp v. Dobbins, 29 N. J. Eq. 36; Old South Society v. Crocker, 119 Mass. 1, 20 Am. Rep. 299; Morville v. Fowle, 144 Mass. 109, 10 N. E. 766; Goodell v. Association, 29 N. J. Eq. 32. But see Starkweather v. Society, 72 Ill. 50, 22 Am. Rep. 133, which holds that the American Bible Society is not a charity. Domestic missions, see Morville v. Fowle, 144 Mass. 109, 10 N. E. 766; Andrews v. Andrews, 110 Ill. 223. And see, generally, the recent cases of Alden v. Parish, 158 Ill. 631, 42 N. E. 392, 30 L. R. A. 232; Mack's Appeal, 71 Conn. 122, 41 Atl. 242; Trustees, etc., of Christ Church v. Parish, 67 Conn. 554, 35 Atl. 552; Teele v. Bishop of Derry, 168 Mass. 341, 47 N. E. 422, 38 L. R. A. 629.

[7] Sohier v. Burr, 127 Mass. 221; Ould v. Hospital, 95 U. S. 303, 24 L. Ed. 450; Bullard v. Chandler, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104; Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491.

[8] Swift's Ex'rs v. Society, 73 Pa. 362.

[9] Whicker v. Hume, 7 H. L. Cas. 124, 1 De Gex, M. & G. 506; Attorney General v. Parker, 126 Mass. 216; Taylor's Ex'rs v. Trustees, 34 N. J. Eq. 401; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401.

[10] Drury v. Inhabitants of Natick, 10 Allen (Mass.) 169; Dascomb v. Marston, 80 Me. 223, 13 Atl. 888; Brown v. Pancoast, 34 N. J. Eq. 824.

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schools and colleges.[11] But these purposes must be public, or for the benefit of some portion of the public. A gift to trustees "for the establishment of a school at M. for the education of children" was held not a valid charity, since the school might be private.[12] The statute expressly mentions certain public purposes for which charitable trusts might be created, and there are many other public purposes which may be valid charities because within the plain intent of the statute. Among these are gifts for the erection and maintaining of public buildings,[13] the support of public parks,[14] and the erection of public monuments. There are other charitable purposes either within the letter or the spirit and intent of the statute which may be made the objects of charitable trusts. These purposes are much too numerous to specify in detail. Reference may be had to any leading textbook on the subject of trusts and trustees, where many more individual cases are doubtless enumerated and described.[15] In concluding this portion of the subject it is well to observe that courts of equity look with favor upon gifts for charities, and will endeavor to carry them into effect, if it can be done consistently with the rules of law.[16] If the words of a gift are ambiguous or contradictory, they are so construed as to support the charity, if possible. It is an established maxim of interpretation in courts of equity that the court is bound to carry the gift into effect if it can see a general charitable intention consistent with the rules of law, even if the particular manner indicated by the donor is illegal or impracticable.[17]

[11] Second Religious Soc. of Boxford v. Harriman, 125 Mass. 321; Quincy v. Attorney General, 160 Mass. 431, 35 N. E. 1066; Piper v. Moulton, 72 Me. 155; People v. Cogswell, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269; Crerar v. Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454.

[12] Attorney General v. Soule, 28 Mich. 153; Carne v. Long, 2 De Gex, F. & J. 75.

[13] Coggeshall v. Pelton, 7 Johns. Ch. (N. Y.) 292, 11 Am. Dec. 471.

[14] Cresson's Appeal, 30 Pa. 437; Townley v. Bedwell, 6 Ves. 194; Feversham v. Ryder, 27 Eng. & E. Eq. 369.

[15] Perry, Trusts, c. 23, §§ 698, 706.

[16] Duggan v. Slocum (C. C.) 83 Fed. 244; Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; In re Willey's Estate (Cal.) 56 Pac. 550.

[17] Perry, Trusts, § 709.

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SAME—CHARACTERISTICS.

182. The distinguishing characteristics of a charitable or public trust as compared with a private trust are:

(a) The uncertainty which is permitted in describing its objects and purposes.

(b) The uncertainty of its beneficiaries.

(c) The perpetuity of its existence.

In the case of an express private trust the objects and purposes thereof must be definitely and clearly declared. But a charitable trust will be sustained and enforced if the donor sufficiently shows his intention to create a charity, and indicates its general nature and purposes, although much has been left to the discretion of the trustees, and the declaration and description of the objects and purposes of the trust are indefinite and uncertain.[1] But there is a limit to the uncertainty and indefiniteness that will be observed even in those jurisdictions where the statute of charitable uses is in full force.[2] There must be a clear intention to create the charity, and a sufficient declaration of the purposes thereof to enable the court to enforce its provisions. As we have seen, the beneficiary of an express private trust must be an ascertained person or persons; but, from the very nature of a charitable trust, the beneficiaries are an uncertain body or class. The courts of this country, except in those few states where the system of charitable uses still prevails, have not adopted the doctrine of uncertainty of purposes, objects, and

§ 182. [1] The following cases are in support of trusts uncertain in their terms and objects: Magistrates of Dundee v. Morris, 3 Macq. 134, 157 (a bequest "for such charities and other public purposes as may lawfully be in the parish of T."); Dolan v. Macdermot, L. R. 5 Eq. 60, 3 Ch. App. 676 (for charitable purposes generally); Chamberlayne v. Brockett, L. R. 8 Ch. App. 206 (charitable purposes in discretion of trustees); Lewis v. Allenby, L. R. 10 Eq. 668; Wilkinson v. Barber, L. R. 14 Eq. 96; Pocock v. Attorney General, 3 Ch. Div. 342.

[2] Vezey v. Jamson, 1 Sim. & S. 69, Morice v. Bishop of Durham, 9 Ves. 399, and Williams v. Kershaw, 5 Clack & F. 111, are examples of bequests in trust declared invalid because there is too great an uncertainty as to the purposes of the trust.

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beneficiaries to its full extent. For the most part, a greater definiteness in declaring the objects of the trust and in describing its beneficiaries has been required in order to sustain its validity.[3]

Uncertainty of Trustees.

It is a part of the English doctrine of charitable trusts that no legal or valid trust shall be permitted to fail for want of a trustee; so that, if a donor makes a gift for a particular charitable purpose, and appoints no trustee, or the trustee appointed by him is incapable of acting, dies before the testator, declines to act, or is not in esse, but is to come into existence by an act of incorporation, courts of equity, in the exercise of their ordinary jurisdiction, can establish the charity.[4] There is great diversity of opinion on this subject in the courts of the several states of this country. It is impracticable to treat exhaustively of this important question in a work of this character. There is no doubt that many trusts with a total failure in the appointment of a trustee have been sustained and enforced. There is no prevailing American rule, and an almost hopeless confusion even in the decisions of the courts of the same state. The doctrine has been absolutely rejected, however, in many states, which admit the existence and validity of charitable trusts only in cases where the property is given to a certain and competent trustee.[5]

Perpetuities.

One of the characteristics of the charitable trust is the fact that it is not subject to the ordinary rules in respect to per-

[3] Bequests to executors for "such persons, societies, or institutions as they may consider most deserving" were held invalid because too indefinite, Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445; "to the Roman Catholic orphans," Heiss v. Murphey, 40 Wis. 276; to trustees "for benefit of colored persons," Needles v. Martin, 33 Md. 609. And see Kain v. Gibboney, 101 U. S. 362, 25 L. Ed. 813; Bristol v. Bristol, 53 Conn. 242, 5 Atl. 687; Mills v. Newberry, 112 Ill. 123, 54 Am. Rep. 213; Gafney v. Kenison, 64 N. H. 354, 10 Atl. 706.

[4] Perry, Trusts, § 722; Sears v. Chapman, 158 Mass. 400, 33 N. E. 604. And see Mills v. Farmer, 1 Mer. 55, 96; Moggridge v. Thackwell, 3 Brown, Ch. 517; Russell v. Allen, 107 U. S. 167, 2 Sup. Ct. 327, 27 L. Ed. 397; Brown v. Pancoast, 34 N. J. Eq. 324; McCord v. Ochiltree, 8 Blackf. (Ind.) 15, 22.

[5] Pom. Eq. Jur. § 1026.

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petuities. A perpetual trust cannot be created for an individual and his heirs in succession forever.[6] But a charitable trust generally contemplates the establishment of a charity which is to endure forever. "Indeed, it is always hoped, where funds are given in trust, the income to be applied to some church, almshouse, hospital, or school, that such institution will exist indefinitely, and that the donor's bounty will be a perennial spring for generations." [7] This rule as to perpetuities does not prohibit the alienation of the trust property, for the court can decree the sale of any part thereof, if the exigencies of the charity seem to demand it.[8] In the state of New York charitable trusts have, until very recently, been subjected to all the rules and the statute against perpetuities.[9] The courts of England have favored so

[6] Thellusson v. Woodford, 4 Ves. 226; Hooper v. Hooper, 9 Cush. (Mass.) 122; Thorndike v. Loring, 15 Gray (Mass.) 391; Hawley v. James, 5 Paige (N. Y.) 445.

[7] Perry, Trusts, § 737.

[8] Shotwell v. Mott, 2 Sandf. Ch. (N. Y.) 55; Stanley v. Colt, 5 Wall. 119, 18 L. Ed. 502; Sohier v. Trinity Church, 109 Mass. 1; Yard's Appeal, 64 Pa. 95; Gram v. Society, 36 N. Y. 161.

[9] The change in the state of New York on this subject is very well set forth in the following extract from the opinion of Gray, J., in the case of In re Griffin's Will, 167 N. Y. 71, 60 N. E. 284: "In Williams v. Williams, 8 N. Y. 525, it was declared that the law of England upon the subject of gifts to charitable uses as it was administered by the court of chancery became, at the time of the adoption of our constitution, and continued to be, the law of this state. Under that legal system charitable trusts were favored by the court, and effectuated by the exercise of prerogative powers. But with the decision in Holmes v. Mead, 52 N. Y. 332, the question whether the English law of charitable uses had become the law of this state, as held in the Williams Case, was settled. The Williams Case, as an authority to the effect that gifts to charity, etc., were not within the statute against perpetuities, nor were avoided by indefiniteness of the beneficiaries, after several attacks upon its soundness, was finally repudiated, and it was held that the provisions of the Revised Statutes, in their abolition of all uses and trusts, except those specifically named, included all charities. 1 Rev. St. p. 727, § 45. In 1893 the legislature passed an act (chapter 701, Sess. Laws), which, as recently construed in Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568, restored the law as it was declared to be in this state in Williams v. Williams. The act was entitled 'An act to regulate gifts for charitable purposes,' and contained two sections. The first section provided that 'no gift, grant, bequest or devise to religious, educational, charitable or benevolent uses, which shall, in other respects, be valid under the laws of this state, shall be deemed

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strongly the sustaining and execution of trusts for charitable purposes that they have gone beyond the rule that charitable trusts are enforceable where the trustee, objects, and beneficiaries are uncertain, and invented and fully established the so-called "cy-pres doctrine."

invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same.' It further provides that, if a trustee is named in the instrument, the legal title to the property given shall vest in such trustee; but, 'if no person be named as trustee, then title to such lands or property shall vest in the supreme court.' By the second section it is provided that 'the supreme court shall have control over the gifts, grants, bequests and devises in all cases provided for by section 1,' and directs the attorney general to 'enforce such trusts by proper proceedings in the court.' In Allen v. Stevens the question arose over the residuary clause of a will, wherein the testator gave the residue of his estate to trustees for the purpose of founding, erecting, and maintaining 'Graves Homes for the Aged,' in the city of Syracuse, in this state. It was contended that the bequest was bad for the indefiniteness of the beneficiaries, and because, although intending to found a permanent charity, the testator did not direct the formation of a corporation within two lives in being, to take over the trust property. The case decided that the act of 1893 had so far amended the law relating to the subject of charitable bequests as to make it possible to effectuate the testator's intention. The opinion reviews the decisions since the case of Williams v. Williams and prior to the act of 1893, which resulted in the overruling of that case, and in limiting all charitable gifts to the provisions of our statutes of uses and trusts. The frequent miscarriages of the intentions of donors to charity, etc., were commented upon, and the conclusion was reached that the legislature intended in the enactment of the law of 1898 to furnish a remedy for such cases in the future. It was held that thereby the legislature intended to restore to courts of equity that power to administer charitable trusts which they were declared to have by the decision in the Williams Case. This intention was found to be manifest in the broadness of the title of the act and in the grant of power over charitable gifts to the supreme court, and the construction given effectuated that legislative intention, notwithstanding the letter of the statute. The broad construction given to the provisions of the act of 1893 in Allen v. Stevens relieves a gift under section 1 from the defect of indefiniteness of the beneficiary, or of a failure to name a trustee, and exempts it from the operation of the statute of perpetuities. We must accept the decision of that case as declaring that, to give practical effect to the legislation of 1893, it must be interpreted as reviving the ancient law as to gifts for charitable purposes, and as preventing the failure of a trust by vesting its administration in the supreme court."

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SAME—CY-PRES DOCTRINE.

183. The word "cy-pres" means "near; next to; as near as may be."[1] Where the literal execution of the trusts of a charitable gift is inexpedient or impracticable, a court of equity will execute them, as nearly as it can, according to the original plan. The general principle upon which the court acts is that, if the 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.[2]

This doctrine has never been applied where the testator has not shown a general intention to aid a charity. As, where a testator shows an intention to give to some particular institution, and such intention cannot be carried out, and there is no intention in favor of charity generally, there cannot be a valid trust.[3] One of the most striking illustrations of this doctrine appears in the case of Attorney General v. Ironmongers' Co.[4] 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

§ 183. [1] Stand. Dict.

[2] Lord Eldon, in Moggridge v. Thackwell, 7 Ves. 56, 69.

[3] Attorney General v. Bishop of Llandaff, cited in 2 Mylne & K. 586; Attorney General v. Oglander, 3 Brown, Ch. 166; Attorney General v. Mayor, etc., Id. 171; Broadbent v. Barrow, 29 Ch. Div. 560; In re Slevin [1891] 1 Ch. Div. 373; Mormon Church v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 481.

[4] 2 Beav. 313.

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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 the testator as nearly as possible. The same principle was applied in a celebrated case in our own country.[5] 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 freed slaves, as being more nearly in consonance with the 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. Very many of the American states have absolutely rejected the cy-pres doctrine as inconsistent with their institutions and modes of public administration. A few, however, in which the English statutes relative to charitable trusts are in force, have accepted such doctrine in a more or less modified form.

SAME—CHARITABLE TRUSTS IN THE UNITED STATES.

184. The several states have differed as to the enforcement of trusts for charitable uses and the application of the doctrines in respect thereto. The states may be divided into three classes.

(a) Those in which charitable trusts have been abrogated or never adopted.

(b) Those in which the system prevails in a limited and restricted form.

(c) Those in which the system has been adopted in its full extent.

[5] Jackson v. Phillips, 14 Allen (Mass.) 539.

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Of those states in the first class, New York may be taken as a leading example. Until the recent very radical change in its policy referred to in a preceding note,* it seemed to have been settled that the English system of indefinite charitable uses had no existence in that state, and no place in its system of jurisprudence.[1] Wisconsin [2] and Michigan [3] have followed the rule prevailing in New York, and have rejected the doctrine of charitable trusts. And the same may be said as to Minnesota,[4] Maryland,[5] North Carolina,[6] Virginia,[7] and West Virginia.[8] In all these states a valid charitable trust must possess all the attributes of a valid private trust; that is, there must be a trustee competent to take and hold the property, definite beneficiaries, a certain object, and no perpetuity created. A much larger number of states have adopted and applied the doctrine of charitable trusts in a restricted and modified form.[9] The decisions of these states

§ 184. * See note on p. 391, ante.

[1] Bascom v. Albertson, 34 N. Y. 584; Levy v. Levy, 33 N. Y. 97; Cottman v. Grace, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145; People v. Powers, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502. At the present time the doctrine seems to have been unrestrictedly adopted. See In re Griffin's Will, 167 N. Y. 71, 60 N. E. 284, quoted from in note on 391.

[2] Webster v. Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278; In re Hoffen's Estate, 70 Wis. 522, 36 N. W. 407.

[3] Methodist Episcopal Church of Newark v. Clark, 41 Mich. 730, 3 N. W. 207.

[4] Little v. Williford, 31 Minn. 173, 17 N. W. 282; Atwater v. Russell, 49 Minn. 22, 51 N. W. 624.

[5] Rizer v. Perry, 58 Md. 112; Barnum v. Mayor, etc., 62 Md. 275, 50 Am. Rep. 219; Eutaw Place Baptist Church v. Shively, 67 Md. 493, 10 Atl. 244, 1 Am. St. Rep. 412.

[6] Miller v. Atkinson, 63 N. C. 537; Holland v. Peck, 37 N. C. 255.

[7] Commonwealth v. Levy, 23 Grat. (Va.) 21; Gallego's Ex'rs v. Attorney General, 3 Leigh (Va.) 450. The rule in Virginia has been modified by the recent decision in Protestant Episcopal Education Soc. v. Churchman's Representatives, 80 Va. 718.

[8] Wilson v. Perry, 29 W. Va. 169, 1 S. E. 302.

[9] Among these states are Alabama (see Johnson v. Holifield, 79 Ala. 423, 58 Am. Rep. 596), Arkansas, California (see In re Hinckley's Estate, 58 Cal. 457), Connecticut (a statute similar to the statute of charitable uses has been enacted; and see Camp v. Crocker, 54 Conn. 21, 5 Atl. 604), Delaware, Georgia (see Beckwith v. Rector, etc., 69 Ga. 564), Illinois (see Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331; Heuser v. Harris, 42 Ill. 425), Indiana (see Cruse v. Axtel, 50 Ind. 49), Iowa, Louisiana, Maine (see Dascomb v. Marston, 80 Me.

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have only a general resemblance. There is more or less divergence in the particular rules which prevail therein. In the most of them the statute of charitable uses is either in force, a similar statute has been enacted, or the doctrines developed by effect of that statute have been adopted in more or less modified forms. In a few of them the doctrine of cy-pres is accepted, but for the most part it is rejected.[10] There are a few states which have adopted the general system of charitable trusts, and the doctrine of cy-pres has been fully and freely accepted and enforced. These states are Massachusetts,[11] Kentucky,[12] and Rhode Island, to which, perhaps, must now be added New York.[13]

228, 13 Atl. 886), Missouri, New Hampshire, New Jersey, Ohio (see Mannix v. Purcell, 46 Ohio St. 102, 19 N. E. 572), Pennsylvania (see Humane Fire Co.'s Appeal, 88 Pa. 389; Jones v. Renshaw, 130 Pa. 327, 18 Atl. 651), Rhode Island, South Carolina, Tennessee, Texas, Vermont.

[10] In Missouri (Visitation Academy v. Clemens, 50 Mo. 167) and Illinois (Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331) the doctrine has been approved.

[11] 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. 505, 21 N. E. 874; Weeks v. Hibson, 150 Mass. 377, 23 N. E. 215, 6 L. R. A. 147.

[12] Peynado's Devisees v. Peynado's Ex'r, 82 Ky. 5; Kinney v. Kinney's Ex'r, 86 Ky. 610, 6 S. W. 598.

[13] Pell v. Mercer, 14 R. I. 412; Peckham v. Newton, 15 R. I. 321, 4 Atl. 758; In re Griffin's Will, 167 N. Y. 71, 60 N. E. 284.

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CHAPTER XV.

IMPLIED TRUSTS—RESULTING AND CONSTRUCTIVE.

185. Implied Trusts—Definition.
186. Resulting Trusts.
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194. Constructive Trusts.
195. Purchases with Trust Funds.
196. Conveyance of Trust Property to Volunteer or Purchaser with Notice.
197. Bequests and Devises Obtained through Fraud.

IMPLIED TRUSTS—DEFINITION.

185. Implied trusts are those which arise by operation of law from the deeds, wills, contracts, acts, or conduct of parties, either with or without their intention, but without any express words of creation.[1] Implied trusts are either resulting or constructive.

There is a marked distinction between express trusts, which have been discussed in the preceding chapter, and those which arise by operation of law, or implied trusts. In the former class there is always a more or less explicit declaration of the object of the trust, a clear intention as to the trustee and cestui que trust, and an element of permanency. In the case of an implied trust the intention of the parties is not always material. The trust relation may exist because of the presumed intention of the parties, though not expressed; or it may exist contrary to that intention, and without regard thereto. There is no permanency attached

§ 185. [1] Pom. Eq. Jur. § 1030.

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to such a trust, but in its place there is the right of the beneficiary that it be terminated at once, and the legal title to the property be vested in him.[2]

RESULTING TRUSTS.

186. When the legal title to property is conveyed or disposed of, but the terms of the conveyance or disposition, or the accompanying facts or 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.

A resulting trust is founded on the presumed intention of the parties, although such intention is not expressed by words or acts creating the trust. In all such trusts there must be a conveyance, and circumstances from which it may be inferred that the transferee was not to become the beneficial owner of the legal estate, but that a trust was to arise either in favor of the person executing the conveyance or of some other person for whose benefit the conveyance was made.[1]

SAME—CLASSIFICATION.

187. Resulting trusts may arise in either of the following cases:

(a) Where an owner parts with the legal estate, but there is no reason to infer that it was his intention to convey the beneficial interest.

(b) Where an estate is conveyed upon a trust or for some particular object which fails either in whole or in part, or the particular trusts

[2] Cone v. Dunham, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647.

§ 186. [1] Pom. Eq. Jur. § 1031.

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are so indefinite and uncertain that they cannot be carried into effect, or they lapse or are illegal.

(c) Where the conveyance is made without consideration and there is no apparent intention that the grantee is to take beneficially.

(d) Where the purchaser of an estate pays the purchase money, and takes the title in the name of a third person.

This classification is similar to that used by many of the text-book writers, although many of them have classed as a resulting trust that which arises where a person standing in a fiduciary relation uses fiduciary funds to purchase property, and takes the title in his own name.[1] Such a trust has one element in common with resulting trusts, and that is the presumed intention of the purchase; but in all other respects it differs from those trusts, and should be treated as a constructive trust.[2]

Lord Chancellor Hardwicke said that a resulting trust arising by operation of law existed: (1) When an estate was purchased in the name of one person, and the consideration came from another. (2) When a trust was declared only as to part, and nothing was said as to the residue, that residue, being undisposed of, remained to the heirs at law. And he observed that he did not know of any other instances, unless in the case of fraud.[3] Prof. Pomeroy, in his work on Equity Jurisprudence,[4] has classified resulting trusts into two subdivisions: (1) Where there is a gift to A., but the intention appears from the terms of the instrument that the legal and beneficial estates are to be separated, and that he is either to enjoy no beneficial interest or only a part of it. (2) Where a purchase has been made, and the legal estate is conveyed or transferred to A., but the purchase price is paid by B. In the first subdivision many varieties of resulting trusts are included, which Prof. Pomeroy has

§ 187. [1] Perry, Trusts, § 125; Bisp. Eq. p. 125.
[2] Pom. Eq. Jur. § 1049, note.
[3] Lloyd v. Spillet, 2 Atk. 150.
[4] Pom. Eq. Jur. § 1031.

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again subdivided in somewhat the same manner as stated in the black-letter text.

SAME—WHERE OWNER OF LEGAL AND EQUITABLE ESTATE CONVEYS LEGAL TITLE ONLY.

188. Wherever it appears, upon a conveyance, devise, or bequest, that it was intended that the grantee, devisee, or legatee should take the legal estate only, the equitable interest, or so much as remains undisposed of, will result, if arising out of the settlor's realty, to himself or his heirs; if out of his personal estate, to himself or his executors.[1]

This class of resulting trusts can only arise 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.[2] Ordinarily, a conveyance or gift to a wife or child will be presumed to carry a beneficial interest,[3] but such presumption may be overcome by the attendant circumstances.[4]

As an illustration of this class of resulting trusts, where real estate was devised to "my trustees," but no trusts were declared in relation to it, it was held that the trustees must hold it in trust for the testator's heir; for by the expression "trustees," unexplained by anything else in the instrument, all notion of a beneficial interest being intended in their favor was excluded.[5]

§ 188. [1] Lewin, Trusts, 115.

[2] Salisbury v. Clarke, 61 Vt. 453, 17 Atl. 135; Hogan v. Jacques, 19 N. J. Eq. 123, 97 Am. Dec. 644; Moore v. Jordan, 65 Miss. 229, 3 South. 737; Brown v. Jones, 1 Atk. 188; Kerlin v. Campbell, 15 Pa. 500.

[3] Hill v. Bishop of London, 1 Atk. 620; Walton v. Walton, 14 Ves. 322.

[4] Christ's Hospital v. Budgin, 2 Vern. 683; Grey v. Grey, 2 Swanst. 598; Robinson v. Taylor, 2 Brown, Ch. 594.

[5] Batteley v. Windle, 2 Brown, Ch. 31; Pratt v. Sladden, 14 Ves. 193; Dawson v. Clarke, 18 Ves. 247.

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Whenever expressions are used in the instrument which indicate an intention to benefit the donee, no trust will result in favor of the donor or his heirs.[6] In such a case, since the trust results from the terms of a written instrument, the trustee cannot defeat the resulting trust by parol evidence.[7]

Trusts as to Residue.

The most important class of cases under this form of resulting trusts are those where the settlor conveys property on trusts which do not exhaust the whole estate. The rule is that where, upon a conveyance, devise, or bequest, a trust is declared of a part of the estate only, or the purposes of the trust do not exhaust the whole beneficial interest, the trust in the residue will result to the settlor or his heirs;[8] the reason being that a declaration of a trust as to a part of the estate is evidence that the settlor did not intend the donee to take a beneficial interest in the whole, but that the creation of the trust was the sole object of the transaction.[9] 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. If a gift is in trust to a person to pay the donor's debts, it is a gift for a particular purpose; and, if that purpose does not exhaust the estate, and that estate is given for no other purpose, the remainder results to the donor or his heirs.[10] But, if the gift is to a person and his heirs, charged with the payment of debts, such gift is for a particular purpose, but not for that purpose only, and an intention is presumed to make the gift absolute, subject to the charge,

[6] Rogers v. Rogers, 3 P. Wms. 193; Cook v. Hutchinson, 1 Keen, 42; Meredith v. Heneage, 1 Sim. 555.

[7] Langham v. Sandford, 17 Ves. 442; Irvine v. Sullivan, L. R. 8 Eq. 675.

[8] Parnell v. Hingston, 3 Smale & G. 337, 344; Easterbrooks v. Tillinghast, 5 Gray (Mass.) 17; Loring v. Eliot, 16 Gray (Mass.) 568; McCollister v. Willey, 52 Ind. 382; Skellenger v. Skellenger, 32 N. J. Eq. 659; Schlessinger v. Mallard, 70 Cal. 326, 11 Pac. 728; Weaver v. Leiman, 52 Md. 708; Blount v. Walker, 31 S. C. 13, 9 S. E. 804.

[9] King v. Denison, 1 Ves. & B. 272, per Lord Eldon.

[10] King v. Denison, 1 Ves. & B. 272; McElroy v. McElroy, 113 Mass. 509.

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and whatever remains after the charge has been satisfied will belong to the donee, and will not result to the donor or his representatives.[11]

Any expression which indicates an intention that the donee should be benefited after the particular purposes are satisfied will prevent a trust from resulting. For instance, expressions of affection or relationship will be evidence upon the question as to whether a trust was intended to result after the particular trusts are satisfied.[12]

SAME—ARISING FROM FAILURE OF EXPRESS TRUSTS.

189. Where a voluntary disposition of property is made, by will or deed, to a person as trustee, and the trust is not declared, or is ineffectually declared, or fails in whole or in part by lapse or because of illegality, the interest undisposed of will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself, or for his heir at law or next of kin, according to the nature of the estate.[1]

As under the preceding class, a resulting trust will not arise in cases under this class unless the disposition is voluntary, and without consideration. A plain case of a resulting trust arising as described above is where a gift is made to a person upon trust, but no trusts are declared. A leading case is where a testator gave £200,000 to his executors "for the purpose I have before named," but no purpose was named, and it was held that a resulting trust arose in favor of the residuary legatees.[2] And also, where a gift is

[11] King v. Denison, 1 Ves. & B. 272; Walton v. Walton, 14 Ves. 318; Downer v. Church, 44 N. Y. 647.

[12] Rogers v. Rogers, 3 P. Wms. 193; King v. Denison, 1 Ves. & B. 274; Hobart v. Comitiss, Suffolk, 2 Vern. 644.

§ 189. [1] Hill, Trustees, 113, 114.

[2] Mayor, etc., of Gloucester v. Wood, 3 Hare, 131; Schmucker's Estate v. Reel, 61 Mo. 592.

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made upon trusts thereafter to be declared, and no declaration is ever made, the legal title only will pass to the grantee or devisee, and a trust will result in favor of the heirs or legal representatives of the settlor.[3] An insufficient declaration of purpose—as where it is too indefinite, vague, and uncertain to be carried into effect—will produce the same result as if there was a total failure of declaration.[4]

Failure by Lapse or for Illegality.

If a gift fails because of the death of the beneficiary during the lifetime of the testator,[5] or by the dissolution of a corporation or other organized body for whose benefit a trust is created,[6] a resulting trust will arise in favor of the donor's heirs or legal representatives, if the property is not otherwise disposed of.[7]

Where a person has intentionally vested property in another for an unlawful purpose, no relief will be afforded the settlor, and a court of equity will not aid him in recovering the property.[8] As a general rule, the maxim, "He who comes into equity must come with clean hands," applies in all such cases. A common application of this rule is where conveyances are made to hinder, delay, and defraud creditors. Such conveyances will not be set aside at the request of the grantor, nor will a resulting trust arise in his favor, or in favor of his heirs and legal representatives.[9] But where

[3] City of London v. Garway, 2 Vern. 571; Fitch v. Weber, 6 Hare, 145; Sturtevant v. Jaques, 14 Allen (Mass.) 526; Shaw v. Spencer, 100 Mass. 388, 97 Am. Dec. 107, 1 Am. Rep. 115.

[4] Morice v. Bishop of Durham, 9 Ves. 399; Ellis v. Selby, 7 Sim. 352; Leslie v. Duke of Devonshire, 2 Brown, Ch. 187; Shaw v. Spencer, 100 Mass. 388, 97 Am. Dec. 107, 1 Am. Rep. 115; Jenkins v. University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785; Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445; Heiskell v. Trout, 31 W. Va. 810, 8 S. E. 557.

[5] Ackroyd v. Smithson, 1 Brown, Ch. 503; Bond v. Moore, 90 N. C. 239.

[6] Easterbrooks v. Tillinghast, 5 Gray (Mass.) 17.

[7] In re Rudy's Estate, 185 Pa. 359, 39 Atl. 968; Edson v. Bartow, 154 N. Y. 199, 48 N. E. 541.

[8] 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.

[9] Francis v. Wilkinson, 147 Ill. 370, 35 N. E. 150; Barrow v. Barrow, 108 Ind. 345, 9 N. E. 371; Risley v. Parker, 50 N. J. Eq. 284, 23 Atl. 424; Block v. Darling, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476.

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the illegal purpose is not carried into execution,[10] or the retention of the property by the trustee would effectuate an unlawful purpose, defeat a legal prohibition, or protect a fraud, a trust will result in favor of the grantor, or his heirs or legal representatives.[11]

SAME—CONVEYANCE WITHOUT CONSIDERATION.

190. Where a person is in possession of an estate under a conveyance duly executed, but without valuable consideration, the want of such consideration will not of itself create any presumption that he is a trustee for the grantor; but he will be considered entitled to the enjoyment of the beneficial interest, unless that title is displaced by sufficient evidence of an intention on the part of the donor to create a trust. The burden of proof is upon the person seeking to deprive him of such beneficial interest.[1]

This is the modern rule. It was formerly held that, if a man conveyed his estate to a stranger without a consideration, or for a mere nominal one, a trust resulted to the owner on the ground that the law would not presume a man to part with his property without some inducement thereto.[2] But under the system of conveyancing in vogue at the present time the former doctrine can have no application, unless it should occur that the deed simply contains words of transfer without reciting or implying a consideration, or a clause declaring the use in the grantee.[3] But, if fraud or misrepre-

[10] Symes v. Hughes, L. R. 9 Eq. 475; Mitchell v. Henley, 110 Mo. 598, 19 S. W. 993; Williams v. Clink, 90 Mich. 297, 51 N. W. 453.

[11] Underh. Trusts (Am. Ed.) p. 156. When the parties are not in pari delicto, and where public policy is considered as advanced by allowing either party, or at least the more excusable of the two, to sue for relief, relief is given to him. Reynell v. Sprye, 1 De Gex, M. & G. 660. And see Wheeler v. Kirtland, 23 N. J. Eq. 18.

§ 190. [1] Hill, Trustees (4th Am. Ed.) 170.

[2] Story, Eq. Jur. §§ 1197, 1199.

[3] Gould v. Lynde, 114 Mass. 366; Osborn v. Osborn, 29 N. J. Eq.

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sentation is practiced upon a grantor, equity will impress a trust upon the conscience of the fraudulent grantee.[4] And where a grantee, through the influence of a confidential relation, acquires title to property without consideration, the court, to prevent an abuse of confidence, may impress upon the property a trust in favor of the grantor's heirs.[5]

SAME—WHERE PURCHASE IS IN NAME OF ANOTHER.

191. Such purchase may be either
(a) In the name of a stranger, or
(b) In the name of a wife, child, or near relative.

SAME—PURCHASE IN NAME OF STRANGER.

192. The clear result of all the cases, without a single exception, unless otherwise provided by statute, 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 jointly or successively, results to the man who advances the purchase money.[1]

This rule is founded on the natural presumption, in the absence of rebutting circumstances, that the person who furnishes the purchase money intends the purchase to be for his own benefit, rather than for that of another; and that the conveyance in the name of the latter is a matter of convenience and arrangement between the parties for other col-

385; Gerry v. Stimson, 60 Me. 186; Miller v. Wilson, 15 Ohio, 108; Bank of U. S. v. Housman, 6 Paige (N. Y.) 526; Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691.

[4] Perry, Trusts, § 163.

[5] Goldsmith v. Goldsmith, 145 N. Y. 313, 39 N. E. 1067; Myers v. Jackson, 135 Ind. 136, 34 N. E. 810; Giffen v. Taylor, 139 Ind. 573, 37 N. E. 392; Larmon v. Knight, 140 Ill. 232, 29 N. E. 1116, 33 Am. St. Rep. 229.

§ 192. [1] Lord Chief Baron Eyre in Dyer v. Dyer, 2 Cox, Ch. 98.

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lateral purposes.[2] If only part of the purchase money is paid by a third person, a trust results pro tanto. But such trusts only arise when the proportionate share is ascertainable, and the payment was distinctly made for a specific part. In such trusts the interest of the cestui que trust is determined by the proportion his contribution bears to the total sum.[3]

To warrant the application of this rule, the advancement of the purchase money must be made by the person as purchaser, and not by way of a loan to a person in whose name the legal title is taken.[4] And the purchase money must be paid at the time the purchase is made to create a true resulting trust; and no subsequent and entirely independent conduct, intervention, or payment on the part of the purchaser will be effectual.[5] As Chancellor Kent has stated: "If A. purchases an estate with his own money, and takes the deed in the name of B., a trust results to A., because he paid the money. If, therefore, the party who sets up a resulting trust made no payment, he cannot be permitted to show by parol proof that the purchase was made for his benefit. This would be to overturn the statute of frauds. Nor would a subsequent advance to the purchaser, after the purchase is complete and ended, alter the case. It might be evidence of a new loan, or a new agreement, but it would not attach, by relation, a trust to the original purchase; for the trust arises out of the circumstance that the money of the real, and not of the nominal, purchaser formed at the time the consideration of that purchase, and became converted into the land." [6] If the purchase money is trust money in the hands of the purchaser, this rule does not apply, but the right to charge the property with a trust may be enforced notwith-

[2] Story, Eq. Jur. § 1201.

[3] Fay v. Fay, 50 N. J. Eq. 260, 24 Atl. 1036; Rogers v. Tyler, 144 Ill. 652, 32 N. E. 393; Torrence v. Shedd, 156 Ill. 194, 41 N. E. 95, 42 N. E. 171; Speer v. Burns, 173 Pa. 77, 34 Atl. 212.

[4] Whaley v. Whaley, 71 Ala. 159; Torrey v. Cameron, 78 Tex. 583, 11 S. W. 840. And see, also, Fowler v. Webster, 180 Pa. 610, 37 Atl. 102.

[5] Levi v. Evans, 6 C. C. A. 500, 57 Fed. 677; Osgood v. Eaton, 62 N. H. 512; Ryder v. Loomis, 161 Mass. 161, 36 N. E. 836.

[6] Botsford v. Burr, 2 Johns. Ch. (N. Y.) 408. And see Olcott v. Bynum, 17 Wall. 44, 21 L. Ed. 570; Midmer v. Midmer's Ex'rs, 27 N. J. Eq. 548.

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standing the fact that the payment was made subsequent to the purchase, if the trust funds can be traced, and bona fide purchasers have not acquired rights in the land.[7]

A very important application of the rule is where the purchase is made jointly. If several persons join in the purchase of land, and their contributions are unequal, then, although 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.[8] 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 the joint tenant as against the survivor, who, by the rules of law, takes the entire estate.[9]

Parol Evidence.

Since the statute of frauds extends to creations or declarations of trusts by parties only, and expressly excepts 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 otherwise expressed in the deed.[10] The evidence must prove the fact very clear-

[7] Lehman v. Lewis, 62 Ala. 129; Bourke v. Callanan, 160 Mass. 195, 35 N. E. 460; Gray v. Jordan, 87 Me. 140, 32 Atl. 793; Gilchrist v. Brown, 165 Pa. 275, 30 Atl. 839; Keith v. Miller, 174 Ill. 64, 51 N. E. 151.

[8] Lake v. Craddock, 3 P. Wms. 158, 1 White & T. Lead. Cas. Eq. 265; Lewis v. Association, 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, 45 Am. Dec. 371; 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 (Mass.) 119, 74 Am. Dec. 668; Bailey v. Hemenway, 147 Mass. 326, 17 N. E. 645; White v. Carpenter, 2 Paige (N. Y.) 217, 239.

[9] Rigden v. Vallier, 3 Atk. 735. But under modern statutes an estate in land granted or devised to two or more in their own right is presumed, unless otherwise expressly declared, to render them tenants in common. New York Real Property Law (Laws 1896, c. 547), § 56.

[10] Lewin, Trusts, p. 667; Ryall v. Ryall, 1 Atk. 59; Lench v.

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ly,[11] though circumstantial evidence is admissible; as, where the means of the pretended purchaser were so limited as to make it impossible for him to have paid the purchase money.[12] And when parol evidence is admitted it must be convincing, as the burden of proof is on him who seeks to establish the resulting trust.[13] Parol evidence is also admissible to rebut the presumption of a resulting trust.[14]

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." [15] 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 a 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

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, 65 Am. Dec. 498; De Peyster v. Gould, 3 N. J. Eq. 474, 480, 29 Am. Dec. 723; Blodgett v. Hildreth, 103 Mass. 486; McGinity v. McGinity, 63 Pa. 38.

[11] Gascoigne v. Thwing, 1 Vern. 366; Boyd v. McLean, 1 Johns. Ch. (N. Y.) 582; Sandford v. Weeder, 2 Helsk. (Tenn.) 71; Shaw v. Shaw, 86 Mo. 594; Green v. Dietrich, 114 Ill. 636, 3 N. E. 800; Laughlin v. Mitchell (C. C.) 14 Fed. 382; Hayes' Appeal, 123 Pa. 110, 16 Atl. 600.

[12] Willis v. Willis, 2 Atk. 71.

[13] Burleigh v. White, 64 Me. 53; Whitmore v. Learned, 70 Me. 276; Hoover v. Hoover, 129 Pa. 201, 19 Atl. 854; Philpot v. Penn, 91 Mo. 44, 3 S. W. 386.

[14] Tryon v. Huntoon, 67 Cal. 325, 7 Pac. 741; Baker v. Vining, 30 Me. 121, 1 Am. Rep. 617; Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405.

[15] Underh. Eq. p. 67.

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also declared fraudulent as against the creditors of the person paying the consideration, and a trust results in their favor.[16] These statutes, however, relate only to real property, and do not apply to cases of personal property.[17]

SAME—PURCHASE IN NAME OF WIFE, CHILD, OR RELATIVE.

193 If the purchaser take the conveyance in the name of his wife or child, or of some other person, for whom he is under some natural, moral, or legal obligation to provide, the presumption of a resulting trust is rebutted, and the presumption arises that the purchase and conveyance were intended as an advancement for the nominal purchaser.[1]

Where a person stands in such relation to another that there is an obligation resting on him 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.[2]

A leading case on the rule as above stated is that of Dyer v. Dyer,[3] where copyhold premises were granted to Simon Dyer, his wife, Mary, and his son William (the defendant), to take in succession for their lives and to the longest-lived of them. The father paid the purchase money. Simon Dyer survived his wife, and died, leaving all his interest in the premises to a younger son (the plaintiff). The defend-

[16] New York Real Property Law (Laws 1896, c. 547) § 74. And see How. Ann. St. Mich. 1883, §§ 5568–5571; Gen. St. Minn. 1878, p. 553, §§ 7–9; Sanb. & B. Ann. St. Wis. §§ 2077, 2079; Dassler's Comp. Laws Kan. p. 996, §§ 6–8; 2 Rev. St. Ind. 1888, §§ 2974, 2976.

[17] Pom. Eq. Jur. § 1042.

§ 193. [1] Perry, Trusts, § 143.

[2] Jessel, M. R., in Bennet v. Bennet, 10 Ch. Div. 474.

[3] 2 Cox, Ch. 92, 2 White & T. Lead. Cas. Eq. 236.

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ant, William Dyer, claimed that the insertion of his name in the grant operated as an advancement to him from his father to the extent of the legal interest thereby given to him. This contention was sustained, and the petition of the younger son was dismissed.

When a purchase is made by a parent in the name of a child, it is presumed to be an advancement, and not a trust.[4] This presumption is rebuttable by evidence or circumstances; as, if a child in whose name the purchase is made is already provided for, it will be a circumstance to be considered with other evidence, but it will not of itself rebut the presumption. Lord Loughborough said "that a purchase under such circumstances by a father in the name of a son was not, but might be, a trust for the father." [5] And so an advancement is presumed when the person who pays for the property purchased is under any natural or moral obligation to provide for the person receiving the conveyance.[6] If the purchaser stands in loco parentis towards the person in whose name the purchase is made, the same presumption will arise; [7] as in the case of a grandfather and grandchild where the father is dead,[8] of an illegitimate child,[9] and the nephew of a wife who had been practically adopted by the husband as his child.[10] But the mere fact that a grandfather took care of his daughter's illegitimate child, and sent it to school, has been held to be insufficient to raise the presumption; Vice Chancellor Wood saying: "I cannot put the doctrine so high as to hold that, if a person educate a child to whom he is under no obligation, ei-

[4] Danforth v. Briggs, 89 Me. 316, 36 Atl. 452; Roberts v. Remy, 56 Ohio St. 249, 46 N. E. 1066; Oliphant v. Leversidge, 142 Ill. 160, 30 N. E. 334.

[5] Dyer v. Dyer, 2 Cox, Ch. 92, 2 White & T. Lead. Cas. Eq. p. 236.

[6] Whitley v. Ogle, 47 N. J. Eq. 67, 20 Atl. 284; Danforth v. Briggs, 89 Me. 316, 36 Atl. 452; Smithsonian Inst. v. Meech, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793. No such presumption arises where the purchase is made by the grantee's brother. Teegarden v. Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9.

[7] Waterman v. Seeley, 28 Mich. 77; Osborn v. Osborn, 29 N. J. Eq. 385; Read v. Huff, 40 N. J. Eq. 229; Wheeler v. Kidder, 105 Pa. 270; Tremper v. Barton, 18 Ohio, 418.

[8] Ebrand v. Dancer, 2 Ch. Cas. 26; Loyd v. Read, 1 P. Wms. 607.

[9] Beckford v. Beckford, Lofft. 490; Kilpin v. Kilpin, 1 Mylne & K. 542.

[10] Currant v. Jago, 1 Colly. 261.

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ther morally or legally, the child is, therefore, to be provided for at his expense." [11] 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.[12] This rule is not without question, as it would seem that maternal affection is a sufficiently strong motive for the bounty of the mother.[13] But where a husband purchases real property with his wife's money, and takes the title in his own name, a resulting trust will arise in favor of the wife, enforceable by her to the extent of the money invested.[14] In such a case, however, the wife may be estopped in equity from claiming title to the land, where her husband's creditors have been permitted to contract with him in reliance upon his ownership of the property.[15]

CONSTRUCTIVE TRUSTS.

194. 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 not to be entitled to enjoy the equitable or beneficial interest, it treats him as trustee. Trusts thus created are called "constructive trusts."[1]

An exhaustive analysis would disclose the fact that all instances of constructive trusts, properly so called, may be referred to what equity denominates "fraud," either actual or

[11] Tucker v. Burrow, 2 Hem. & M. 515.

[12] In re De Visme, 2 De Gex, J. & S. 17; Bennet v. Bennet, 10 Ch. Div. 474.

[13] Sayre v. Hughes, L. R. 5 Eq. 376.

[14] Light v. Zeller, 144 Pa. 570, 22 Atl. 1029; Id., 144 Pa. 582, 22 Atl. 1025; In re Lau's Estate, 176 Pa. 100, 34 Atl. 969; Fawcett v. Fawcett, 85 Wis. 332, 55 N. W. 405, 39 Am. St. Rep. 844; Shupe v. Bartlett (Iowa) 77 N. W. 455.

[15] Smith v. Willard, 174 Ill. 538, 51 N. E. 835; Moore v. Moore, 165 Pa. 464, 30 Atl. 932.

§ 194. [1] Smith, Eq. p. 84.

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constructive.[2] Mr. Perry, in discussing the subject, bases his classification upon the degree and nature of the fraud which has given rise to the trust. He says: "If a person obtains the legal title to property by such arts or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations; and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it, or to execute the trust in such a manner as to protect the rights of the defrauded party and promote the safety and interests of society." [3] So intimately and closely connected are the doctrines and principles of fraud and constructive trusts, it would be profitless to duplicate the discussion already had under the head of fraud.[4]

A constructive trust is created without consideration of the intent of the parties. Its extent and operation are limited to the purpose for which it is created; that is, to furnish an adequate remedy against fraud. Lord Westbury observed: "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." [5]

[2] Pom. Eq. Jur. § 1044.

[3] Perry, Trusts, § 166; Thompson v. Thompson, 16 Wis. 91; Hollinshead v. Simms, 51 Cal. 158.

[4] Ante, p. 283.

[5] Rolfe v. Gregory, 4 De Gex, J. & S. 576, 579.

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SAME—PURCHASES WITH TRUST FUNDS.

195. When a trustee or other person in a fiduciary capacity purchases property with the fiduciary funds in his hands, and takes the title in his own name, a trust arises with respect to such property in favor of the cestui que trust or other beneficiary.

This form of trust is treated by many of the writers as belonging to the class of "resulting trusts," but, as Mr. Pomeroy suggests, it is always established in invitum, and, although an assumption of fraud is not necessary, some element of fraud, actual or constructive, is generally present.[1] It would, therefore, seem more proper to classify such trusts under the head of constructive trusts. This doctrine applies to trustees, executors, and administrators, directors of corporations, guardians of infants, committees of incompetent persons, agents, partners, and in fact to all persons who are in fiduciary relations with others. It is based upon the assumption that the purchaser intended to act in pursuance of his fiduciary relationship, and not in violation of it.

As an illustration of the extent and application of this doctrine, the case of Ferris v. Van Vechten [2] is interesting and instructive. In this case an attempt was made to reach land purchased by a trustee on the ground that it was paid for with trust funds. There was no evidence tending to show how much of the trust funds was used in the purchase, and in fact there was no positive and direct evidence that the trustee used any portion of the trust funds in making the purchase. The court refused to apply the doctrine, asserting that, while the general rule must be admitted, it is not applicable unless the trust funds can be clearly and distinctly traced, and positively shown to have been used in the purchase. The relief cannot be granted upon any mere inference.

§ 195. [1] Pom. Eq. Jur. § 1049, note.

[2] 73 N. Y. 113. And see Little v. Chadwick, 151 Mass. 110, 23 N. E. 1005, 7 L. R. A. 570; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383.

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The identity of the fund does not, however, consist in the specific pieces of money or bills, but in the general character of the fund out of which the payment is made; and the fund may be followed so long as its general character can be followed.[3] And where a trustee purchases an estate with trust funds, and adds funds of his own to the purchase money, a trust will arise in favor of the cestui que trust; and the burden will be on the trustee to show the amount of his own funds in the purchase, otherwise the cestui que trust will take the whole estate.[4]

Bearing an analogy to this class of cases are those where trustees or agents charged with the duty of selling property buy for themselves. In such cases such trustees or agents will be held to be constructive trustees for their cestuis que trustent or principals.[5] Nor can a trustee take a lease of the trust property from himself;[6] and so jealously does a court of equity look upon a trustee becoming a lessee of such property that in a case where a testator had given a trustee power to become a lessee he was removed, principally upon the ground that he was placed in a position in which his interest necessarily came in conflict with his duty.[7] This rule applies to a renewal of a lease by a trustee, executor, partner, etc., for his own benefit.[8]

[3] Thompson's Appeal, 22 Pa. 16; McLarren v. Beaver, 51 Me. 402.

[4] Russell v. Jackson, 10 Hare, 209; McLarren v. Brewer, 51 Me. 402; Seaman v. Cook, 14 Ill. 505; Persch v. Quiggle, 57 Pa. 247.

[5] Fox v. Mackreth, 2 Brown, Ch. 400, 1 White & T. Lead. Cas. Eq. 141; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Lythe v. Beveridge, 58 N. Y. 592.

[6] Attorney General v. Earl of Clarendon, 17 Ves. 491; Ex parte Hughes, 6 Ves. 617; King v. Cushman, 41 Ill. 31, 89 Am. Dec. 366.

[7] Passingham v. Sherborn, 9 Beav. 424.

[8] Keech v. Sandford, Sel. Cas. Ch. 61, 1 White & T. Lead. Cas. Eq. 53; Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252,—where, in discussing renewals of leases by partners, it was said: "This doctrine extends to commercial partnerships; and one of several partners cannot, while a partnership continues, take a renewal lease clandestinely, or 'behind the backs' of his associates, for his own benefit * * * It is of no consequence whether the partnership is for a definite or an indefinite period. The disability to take the lease for individual profit grows out of the partnership relation. While that lasts, the renewal cannot be taken for individual persons, even though the lease does not commence until after the expiration of the partnership. It cannot necessarily be assumed that the lease can be taken by an individual member of the firm, even after disso-

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In no case will a trustee or other person charged with the performance of fiduciary duties be permitted to make a profit by dealing with the fiduciary funds in his hands;[9] and, if he makes a purchase using such funds, the cestui que trust or other beneficiary can elect to treat the property as a part of the trust property, and he is entitled to all the advantages of the speculation or investment thus made with the property in the name of the trustee.[10] The restraint put upon trustees in dealing with the trust property does not depend upon any question of fraud, but is made absolute to avoid the possibility of fraud.[11] The law permits no one to act in the inconsistent relation of selling as owner and purchasing as trustee. "It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction, or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents fraud by making it as far as may be impossible, knowing that real motives often elude the most searching inquiry; and it leaves neither to judge nor jury the right to determine, upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances, shall stand or fall." [12]

SAME—CONVEYANCE OF TRUST PROPERTY TO VOLUNTEER OR PURCHASER WITH NOTICE.

196. Where trust property is conveyed or transferred by the trustee, or devolves from a trustee to a third person, who is a volun-

lution. The former partners may still be tenants in common, or there may be other reasons of a fiduciary nature why the transaction cannot be entered into."

[9] Landis v. Saxton, 89 Mo. 375, 1 S. W. 359; Ward v. Davidson, 89 Mo. 445, 1 S. W. 846.

[10] Perry, Trusts, § 128; Hill, Trustees, 534; Lench v. Lench, 10 Ves. 511; Weaver v. Fisher, 110 Ill. 146; Bent v. Priest, 86 Mo. 475.

[11] Perry, Trusts, § 129.

[12] Munson v. Railroad Co., 103 N. Y. 58, 74, 8 N. E. 355. And see, also, Rich v. Black, 173 Pa. 99, 33 Atl. 880; Miles v. Wheeler, 43 Ill. 123.

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teer or purchaser with notice of the trust, it is a universal rule that such volunteer, be he heir, devisee, successor, or other transferee without consideration, or such purchaser with notice, acquires the property subject to the same trust which existed before such transfer, and becomes himself a trustee for the original cestui que trust; provided such transfer is not made by the trustee in executing the terms of an express trust.[1]

This rule exists for the protection and safeguard of the rights of beneficiaries. It enables them to follow trust property into the hands of all persons who may become possessed therewith, except bona fide purchasers without notice.[2] In all cases of voluntary transfer, although the transferee cannot be charged with fraud or unconscionable conduct, the property in his hands is impressed with a trust by construction. The trust follows the property so transferred, and the holder thereof becomes charged with the duties of the original trustee, and subject to his liabilities. But where money is paid by a trustee to his creditor in settlement of an antecedent debt, and such creditor is ignorant of the trust, this rule does not apply, and such money is not subject to the trust.[3]

§ 196. [1] Pom. Eq. Jur. § 1048.

[2] Wetmore v. Porter, 92 N. Y. 76; Zimmerman v. Kinkle, 108 N. Y. 282, 15 N. E. 407; Musham v. Musham, 87 Ill. 80; McVey v. McQuality, 97 Ill. 93; Smith v. Ayer, 101 U. S. 320, 25 L. Ed. 955; Union Pac. Ry. Co. v. McAlpine, 129 U. S. 305, 314, 9 Sup. Ct. 286, 32 L. Ed. 678.

[3] Stephens v. Board, 79 N. Y. 183, 35 Am. Rep. 511; Burnett v. Gustafson, 54 Iowa, 86, 6 N. W. 132, 37 Am. Rep. 190; Mills v. Swearingen, 67 Tex. 269, 3 S. W. 268.

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SAME—BEQUESTS AND DEVISES OBTAINED THROUGH FRAUD.

197. If one procures a devise or bequest to be made in his favor through false representations, assurances, or promises that he will apply the property devised or bequeathed as desired by the testator, equity will impress a trust upon the property in favor of the person who has been defrauded of the testator's intended beneficence.

It is fully settled that a court of equity has no jurisdiction to set aside a will procured by fraud;[1] but it is as well settled that equity will fasten a constructive trust on a particular devise or bequest procured by the fraud of the devisee or 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.[2] In all these cases cited in the note 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, and 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, instead of resting upon one as created by the testator.[3] So, also, when the next of kin prevents the making of a bequest by promis-

§ 197. [1] Allen v. McPherson, 1 H. L. Cas. 191; In re Broderick's Will, 21 Wall. 503, 22 L. Ed. 599; Colton v. Ross, 2 Paige (N. Y.) 396, 22 Am. Dec. 648.

[2] In re O'Hara's Will, 95 N. Y. 403, 47 Am. Rep. 53; Curdy v. Berton, 79 Cal. 420, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157; Williams v. Vreeland, 32 N. J. Eq. 135; Hooker v. Axford, 33 Mich. 454; Dowd v. Tucker, 41 Conn. 197; Gilpatrick v. Glidden, 81 Me. 137, 16 Atl. 464; Thynn v. Thynn, 1 Vern. 296.

[3] In re O'Hara's Will, 95 N. Y. 403, 413, 414, 47 Am. Rep. 53.

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ing 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.[4]

There need be no written promise to carry out the wishes of the testator.[5] A verbal promise or representation, if fraudulently intended, is sufficient to raise the trust.[6] And it has been held that where a person, by silent acquiescence, encourages a testator to make a devise or bequest to him, with a declared expectation that he will apply it for the benefit of others, it has all the force and effect of an express promise to so apply it, for, if he does not intend so to do, his silent acquiescence is a fraud.[7]

[4] Williams v. Fitch, 18 N. Y. 546. The same principle applies where an absolute conveyance is made to a person on the faith of his oral promise to hold it for another. Fischbeck v. Gross, 112 Ill. 208.

[5] Dowd v. Tucker, 41 Conn. 197; Williams v. Vreeland, 29 N. J. Eq. 417.

[6] Pom. Eq. Jur. § 1054. The preponderance of authority seems now to be in favor of sustaining the trust when arising from a mere verbal promise. In re O'Hara's Will, 95 N. Y. 403, 47 Am. Rep. 53; Olliffe v. Wells, 130 Mass. 221; Cagney v. O'Brien, 83 Ill. 72; In re Fleetwood, 15 Ch. Div. 594.

[7] In re O'Hara's Will, 95 N. Y. 403, 412, 47 Am. Rep. 53; Curdy v. Berton, 79 Cal. 420, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157.

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CHAPTER XVI.

POWERS, DUTIES, AND LIABILITIES OF TRUSTEES.

198–199. Acceptance of Trust.
200. Paramount Duty of Trustee.
201. Duty to Acquire Outstanding Trust Property.
202. Duty to Exercise Reasonable Care.
203. Delegation of Powers.
204. Duty to Invest.
205. Other Duties Respecting Management of Trust Property.
206. Liability for Acts of Co-Trustee.
207. Compensation and Expenses of Trustee.
208–209. Accounts of Trustees.
210. Following Trust Property.
211–212. Breach of Trust.
213. Removal of Trustee.

ACCEPTANCE OF TRUST.

198. The powers, duties, and liabilities of a trustee can only originate upon his acceptance of the trust.

199. Acceptance may be

(a) Express.

(b) Constructive, by acts done by the trustee in executing the trust.

(c) By acquiescence.

It is only the powers, duties, and liabilities of trustees of express trusts that are to be considered in this chapter. Every person named as trustee may refuse the office of trustee; and no deed of renunciation is required,[1] but a continual refusal to act under the instrument creating the trust will be sufficient.[2] A person intending to refuse a trust should make his disclaimer within a reasonable time, having regard for the circumstances of the particular case.[3]

§§ 198–199. [1] Burritt v. Silliman, 13 N. Y. 93, 64 Am. Dec. 530; Dunning v. Bank, 61 N. Y. 497, 19 Am. Rep. 293.

[2] Adams v. Adams, 64 N. H. 224, 9 Atl. 100; In re Robinson, 37 N. Y. 261.

[3] Chidgey v. Harris, 16 Mees. & W. 522; Paddon v. Richardson, 7 De Gex, M. & G. 566.

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Express assent to the terms of the trust is not necessary to constitute an acceptance.[4] The exercise of any act of control over the property—such as giving notice to the tenants to pay the rents to himself or his agent, or advertising the property for sale—will show an acceptance.[5] An act of acquiescence—as a failure to object when a trust deed is read to the trustee,[6] or allowing an action concerning the trust property to be brought in his name—will raise the presumption of acceptance.[7]

When once the trustee has accepted the trust, he cannot renounce it without the consent of the beneficiaries, or the authority of a court of equity, or by complying with a special power for such purpose contained in the instrument creating the trust.[8]

PARAMOUNT DUTY OF TRUSTEE.

200. 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.[1]

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. As, where a trust instrument directs a sale of the property for a certain

[4] Thatcher v. St. Andrew's Church, 37 Mich. 264; Martin v. Paxson, 66 Mo. 260; Flint v. Clinton Co., 12 N. H. 432.

[5] Bence v. Gilpin, L. R. 3 Exch. 76; McBride v. McIntyre, 91 Mich. 406, 51 N. W. 1113; Crocker v. Lowenthal, 83 Ill. 579.

[6] Roberts v. Moseley, 64 Mo. 507; Hanson v. Worthington, 12 Md. 418.

[7] Lord Montfort v. Lord Cadogan, 17 Ves. 485.

[8] Doyle v. Blake, 2 Schoales & L. 245; Read v. Truelove, 1 Amb. 417; Switzer v. Skiles, 3 Gilman (Ill.) 529, 44 Am. Dec. 723; Diefendorf v. Spraker, 10 N. Y. 246; Cruger v. Halliday, 11 Paige (N. Y.) 314.

§ 200. [1] Pom. Eq. Jur. § 1062; Underh. Eq. p. 73.

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price, the trustee cannot sell for less;[2] and, where the direction is to sell for cash, a sale on credit is invalid.[3] This rule overshadows and modifies all other rules relative to the duties of trustees, and all such rules must be read as if they contained an express declaration that they are subject to any provisions to the contrary contained in the instrument creating the trust.[4]

DUTY TO ACQUIRE OUTSTANDING TRUST PROPERTY.

201. Unless otherwise directed by the instrument creating the trust, it is the first duty of the trustee to reduce the trust property to his possession, because he is responsible for its security; and he should get in all trust money invested on insufficient or hazardous security.

Debts due the trust estate must be collected with all reasonable diligence. Money should not, as a rule, be left outstanding on personal security, although the creator of the trust himself considered it sufficient.[1] 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;[2] but they will not be justified in granting any great indulgence.[3] They may, in the exercise of a sound discretion, release or compound a debt.[4] Money invested in good real-estate securi-

[2] Cadwell v. Brown, 36 Ill. 103.

[3] Perry, Trusts, § 785; Waterman v. Spaulding, 51 Ill. 425; Palmer v. Williams, 24 Mich. 328. And see In re Lewis, 81 N. Y. 421; James v. Cowing, 82 N. Y. 449.

[4] Underh. Trusts, art. 35.

§ 201. [1] Powell v. Evans, 5 Ves. 839; Cross v. Petree, 10 B. Mon. (Ky.) 413; Neff's Appeal, 57 Pa. 91; Wills' Appeal, 22 Pa. 325.

[2] Clark v. Holland, 19 Beav. 271.

[3] Lowson v. Copeland, 2 Brown, Ch. 156; Caffrey v. Darby, 6 Ves. 488; Harrington v. Keteltas, 92 N. Y. 40; O'Connor v. Gifford, 117 N. Y. 275, 22 N. E. 1036.

[4] 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. Perry, Trusts, § 482.

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ties need not be called in, unless it is necessary for the payment of debts.[5] 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.[6]

DUTY TO EXERCISE REASONABLE CARE.

202. Trustees are bound to exercise such due diligence and care in the management of the trust estate as men of ordinary prudence and vigilance would exercise in the management of their own affairs.

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 depends upon the subject to which it is applied.[1] But there seems to be no conflict in the modern cases, which invariably hold that a trustee is bound to employ such diligence and prudence in the care and management of the trust property as an ordinarily prudent man would exercise in managing similar affairs of his own.[2]

The reason for the rule is obvious. Trusts of property are generally created for the benefit and support of the young, helpless, and inexperienced, and depend for their proper administration upon the honesty and capacity of those to whom they are confided. From the fact that those who are most immediately interested are usually incapable of properly guarding their own interests, and must necessarily

[5] Orr v. Newton, 2 Cox, Ch. 274.

[6] Jacob v. Lucas, 1 Beav. 436; Brashear v. West, 7 Pet. 608, 8 L. Ed. 801; Reed v. Marble, 10 Paige (N. Y.) 409.

§ 202. [1] First Nat. Bank of Lyons v. Bank, 60 N. Y. 278, 19 Am. Rep. 181.

[2] King v. Talbot, 40 N. Y. 76, 85; Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; In re Cornell, 110 N. Y. 351, 357, 18 N. E. 142; Carpenter v. Carpenter, 12 R. I. 544, 34 Am. Rep. 716; Shurtleff v. Rile, 140 Mass. 213, 4 N. E. 407; Loud v. Winchester, 64 Mich. 23, 30 N. W. 896; Waterman v. Alden, 144 Ill. 90, 32 N. E. 972; Godfrey v. Faulkner, 23 Ch. Div. 483; Smethurst v. Hastings, 30 Ch. Div. 490, 498.

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depend so much on the good faith of others, the court will guard their rights with jealous care, and scrutinize closely the conduct of trustees, with the view of holding them to a high degree of responsibility in the management and control of trust estates.[3]

If, however, trustees act in good faith, within the limits of the powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment;[4] nor can they be made insurers of the property. Applying this rule, it has been held that a trustee is not liable for a loss caused by some avoidable accident;[5] nor is a trustee liable where money deposited in a bank, in the proper course of business, is lost by failure of the bank.[6] 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.[7]

DELEGATION OF POWERS.

203. A trustee cannot delegate his powers or duties either to a stranger or co-trustee, unless authorized by the instrument creating the trust, or unless he is morally obliged to do so from necessity, and the powers or duties delegated are administered, and not discretionary, and are such as may prop-

[3] Crabb v. Young, 92 N. Y. 56, 66.

[4] Pleasonton's Appeal, 99 Pa. 362; Williams v. Nichol, 47 Ark. 254, 1 S. W. 243; Miller v. Proctor, 20 Ohio St. 442; Bowker v. Pierce, 130 Mass. 262.

[5] Job v. Job, 6 Ch. Div. 562; nor by theft, Carpenter v. Carpenter, 12 R. I. 544, 34 Am. Rep. 716.

[6] Ex parte Belchier, 1 Amb. 219; Johnson v. Newton, 11 Hare, 160; People v. Faulkner, 107 N. Y. 477, 14 N. E. 415. As an illustration, it was held that a 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'r, 75 Va. 747.

[7] Crabb v. Young, 92 N. Y. 56; Tuttle v. Gilmore, 36 N. J. Eq. 617.

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erly be so delegated in conformity with common business usages.

The position of trustee is one of personal confidence. The rule is founded on the maxim, "Delegatus non potest delegare;" for a trustee is merely an agent for others, and, being personally trusted by the settlor, he cannot delegate to others the duties which were confided to his own discretion.[1] This rule is to be especially enforced where the powers and duties imposed on the trustee are purely discretionary.[2] And in no case will a trustee be permitted to convey the trust property to another upon a trust to perform the original trust.[3] A trustee vested with discretionary power to sell land cannot authorize an agent to contract for its sale.[4] But there have been cases where trustees have been permitted to employ agents to assist in consummating a sale;[5] but in all such cases it would seem necessary that the trustee be present at the sale, and retain personal control over all matters pertaining to the transaction.[6] If a trustee delegates any of his powers and duties, he is liable to the beneficiaries of the trust for all losses occasioned by the fraud, neglect, or want of good faith of his delegate.[7]

But this rule does not prohibit a trustee from employing agents 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.[8] In discussing the question of the employment of agents and their remuneration, Mr. Justice Kekewich has said: "A trustee certainly has the right to appoint [agents] if, and so far as, the work of the trust reasonably requires. For instance, he may appoint a

§ 203. [1] Underh. Trusts, art. 43.

[2] Hawley v. James, 5 Paige (N. Y.) 318.

[3] Morville v. Fowle, 144 Mass. 109, 10 N. E. 766.

[4] Sebastian v. Johnson, 72 Ill. 282, 22 Am. Rep. 144; City of St. Louis v. Priest, 88 Mo. 612.

[5] Connolly v. Belt, 5 Cranch, C. C. 405, Fed. Cas. No. 3,117; Gillespie v. Smith, 29 Ill. 473, 81 Am. Dec. 328.

[6] Graham v. King, 50 Mo. 22, 11 Am. Rep. 401; Spurlock v. Sproule, 72 Mo. 503; Cushman v. Stone, 69 Ill. 516.

[7] 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, 5 Am. St. Rep. 59; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89.

[8] Speight v. Gaunt, 9 App. Cas. 1.

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broker to make or realize investments, or a solicitor to do legal business; and the power of employment involves that of remuneration at the cost of the trust estate. The limit of the power of employment is, as pointed out in the well-known case of Speight v. Gaunt, reasonableness; and reasonableness must also, I think, be the limit of the power of remuneration. A trustee is bound to exercise discretion in the choice of his agents, but, so long as he selects persons properly qualified, he cannot be made responsible for their intelligence or their honesty. He does not in any sense guaranty the performance of their duties. It does not, however, follow that he can intrust his agents with any duties which they are willing to undertake, or pay them or agree to pay them any remuneration which they see fit to demand. The trustee must consider these things for himself, and the court would be disposed to support any conclusion at which he arrives, however erroneous, provided it really is his conclusion,—that is, the outcome of such consideration as might reasonably be expected to be given to a like matter by a man of ordinary prudence, guided by such rules and arguments as generally guide such a man in his own affairs." [9]

Delegation to Co-Trustee.

Upon a similar principle as in the case of a delegation of powers and duties to a stranger, a trustee is not justified in leaving the whole control and management of the trust estate to a co-trustee. The settlor has intrusted the trust estate and its management to all the trustees, and the beneficiaries are entitled to the benefit of their collective wisdom and experience.[10] And, if a trustee allows his co-trustee to have exclusive control of trust funds and property, he is liable for any loss which may occur, although such control only extends to a part thereof.[11] He should exercise due caution and vigilance in respect to the approval of and acquiescence in the acts of his co-trustees, for, if he delivers over the whole management to others, and betrays supine indifference or gross negligence in regard to the interests of the cestui que trust, he will be held responsible.[12]

[9] In re Weall, 42 Ch. Div. 674.

[10] Luke v. Hotel Co., 11 Ch. Div. 121.

[11] Spencer v. Spencer, 11 Paige (N. Y.) 299; State v. Guilford, 18 Ohio, 500.

[12] Earle v. Earle, 93 N. Y. 104, 113; Clark v. Clark, 8 Paige (N. Y.) 153, 160, 35 Am. Dec. 676.

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DUTY TO INVEST.

204. 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.[1]

It is the duty of the trustee to make the trust property as productive as is consistent with its security. A reasonable time will be allowed the trustee, after coming in possession of the trust funds, within which to make the investment, and after that time he will be charged with the lawful interest which would have been obtained had he exercised reasonable care and diligence in making the investment;[2] and, should the principal fund be depleted or entirely lost because of such delay, he will be charged with the deficiency.[3]

Kinds of Investments.

The creator of a trust may, of course, specify the kind of investment to be made, and what security must be taken. Under such circumstances the trustee is bound by such directions, and, if loss is occasioned by compliance therewith, he is not liable. A departure from such directions will entail a liability upon the trustee for all losses which may be occasioned thereby.[4] In the absence of such directions, the trustees must be governed by the general rules of the court, or by the statutes and laws of the state in which the trust is to be executed. If there are no directions in the instrument, nor any rules of the court nor statutory provisions regulating instruments, the general rule again applies that the trustee must act with the care that an ordinarily prudent man would take if he intended to make an investment for the benefit of other people for whom he felt morally

§ 204. [1] Lewin, Trusts, p. 306.

[2] Lent v. Howard, 89 N. Y. 169; Crosby v. Merriam, 31 Minn. 342, 17 N. W. 950; In re Merkel's Estate, 131 Pa. 584, 18 Atl. 931; Hetfield v. Debaud, 54 N. J. Eq. 371, 34 Atl. 882.

[3] Pom. Eq. Jur. § 1072.

[4] Pom. Eq. Jur. § 1073; Denike v. Harris, 84 N. Y. 89.

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bound to provide,—greater care than he would take if he had only himself to consider.[5] This necessarily excludes all speculation, all investments for an uncertain and doubtful rise 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. And it does not follow that, because prudent men may, and often do, conduct their own affairs with the hope of growing rich, and therein take the hazard of adventures which they deem hopeful, trustees may do the same. The preservation of the fund, and the procurement of a just income therefrom, are primary objects of the creation of the trust itself, and are to be primarily regarded.[6]

In England no rule is better established than that a trustee cannot lend trust funds on mere personal security,[7] and Lord Kenyon said that it "ought to be sung in the ears" of every one who acts in the character of trustee.[8] This rule is of practically universal application in the courts of this country.[9] In the absence of express authority, the employment of trust funds in trade or speculation, or in a manufacturing establishment, will be a gross breach of trust.[10] This rule applies even where the trustee simply continues the business or trade of a testator. It is the duty of a trustee to close up the trade or business, to withdraw the funds, and invest them in proper securities at the earliest convenient moment.[11] The English rule is against the investment of trust funds in the stock or shares of banks or other trading corporations; and, where no directions are contained in the

[5] Whiteley v. Learoyd, 33 Ch. Div. 347, 355; King v. Talbot, 40 N. Y. 76; Peckham v. Newton, 15 R. I. 321, 4 Atl. 758; Waller's Adm'r v. Catlett's Ex'rs, 83 Va. 200, 2 S. E. 280; Harvard College v. Amory, 9 Pick. (Mass.) 447, 461.

[6] King v. Talbot, 40 N. Y. 76, 86.

[7] Terry v. Terry, Finch, Prec. 273; Darke v. Martyn, 1 Beav. 525.

[8] Holmes v. Dring, 2 Cox, Ch. 1.

[9] Dufford's Ex'r v. Smith, 46 N. J. Eq. 216, 18 Atl. 1052; Nobles v. Hogg, 36 S. C. 322, 15 S. E. 359; Simmons v. Oliver, 74 Wis. 633, 43 N. W. 561; Harding v. Larned, 4 Allen (Mass.) 426.

[10] Munch v. Cockerell, 5 Mylne & C. 178; Kyle v. Barnett, 17 Ala. 306. And see Butler v. Butler, 164 Ill. 171, 45 N. E. 426; Wolfort v. Reilly, 133 Mo. 463, 34 S. W. 847; Warren v. Bank, 157 N. Y. 259, 51 N. E. 1036.

[11] Warren v. Bank, 157 N. Y. 259, 268, 51 N. E. 1036.

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trust instrument, the trustee can only escape personal liability by investing such funds in real-estate securities, or in the public, governmental securities of the British government.[12] In Massachusetts the English rule has been declared to be wholly inapplicable to the conditions existing in this country,[13] and in most of the other states there has been a general inclination to lessen the rigor of the English rule, and it would seem that the question of the trustee's liability will be governed by the general requirements of the care and diligence of an ordinarily prudent man.[14] The English rule prevails in New York and Pennsylvania, where it is agreed that trustees cannot invest trust funds in trade, nor directly in manufacturing, nor in business generally, nor in personal securities, unless there is an authority contained in the instrument of trust.[15] In England trustees are advised not to advance more than two-thirds of the actual value of an estate on mortgage security;[16] and with us, as well as in England, loans on second mortgages are regarded with disfavor.[17]

OTHER DUTIES RESPECTING MANAGEMENT OF TRUST PROPERTY.

205. Among the other duties of trustees in respect to the care, management, and control of the trust estate are:

(a) They shall act in all matters pertaining to the trust for the benefit of the cestui que

[12] Howe v. Earl of Dartmouth, 7 Ves. 137, 151; Hume v. Richardson, 4 De Gex, F. & J. 29; Webb v. Jones, 39 Ch. Div. 660.

[13] Lovell v. Minot, 20 Pick. 116, 32 Am. Dec. 206; Brown v. French, 125 Mass. 410, 28 Am. Rep. 254; In re Hunt, 141 Mass. 515, 6 N. E. 554.

[14] McCoy v. Horwitz, 62 Md. 183; Smyth v. Burns, 25 Miss. 422; Peckham v. Newton, 15 R. I. 321, 4 Atl. 758.

[15] King v. Talbot, 40 N. Y. 76, where an investment in canal, bank, and railroad stock was disallowed; Adair v. Brimmer, 74 N. Y. 539, in which an investment in a coal mining company stock was disfavored. And see Hemphill's Appeal, 18 Pa. 303; Pray's Appeals, 34 Pa. 100; Baer's Appeal, 127 Pa. 360, 18 Atl. 1.

[16] Lewin, Trusts, p. 325.

[17] 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.

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trust, and shall not use the trust property, nor their relation to it, for their own personal advantage.

(b) They shall not accept any position, nor enter into any relation, nor do any act inconsistent with the interests of the cestui que trust.

(c) They shall not sell trust property to themselves, nor buy property from themselves for the trust estate.[1]

It is practically an impossibility to specify in detail all the duties which are imposed upon the trustee by virtue of his position. Many of his important duties may be classified in the above subdivisions. It is not necessary to consider at length the duties above referred to. In the preceding pages of this chapter attention has been called to them in connection with other duties of trustees.

The first and most important duty which devolves upon a trustee upon his acceptance of the trust is that he shall manage the affairs of the trust entirely and exclusively for the benefit of the cestui que trust. All the power and influence which the possession of the trust fund gives must be used for the advantage and profit of the beneficial owners, and not for the personal gain and emolument of the trustee.[2] No other rule would be safe; nor would it be possible to apply any other rule as between trustee and cestui que trust.[3] In the preceding chapter on frauds we have seen that transactions between persons in fiduciary relations are presumptively invalid.[4] For the same reason, a trustee is not allowed to profit from the use of the trust money in his possession. He cannot invest such money in his own business, nor in the business of another under an arrangement whereby he is to derive benefit or advantage. In all such cases the cestui que trust is entitled to the profits

§ 205. [1] Pom. Eq. Jur. § 1077.

[2] Perry, Trusts, § 427.

[3] Docker v. Somes, 2 Mylne & K. 664; Bentley v. Craven, 18 Beav. 75; Parshall's Appeal, 65 Pa. 233.

[4] Ante, p. 321.

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made by the transaction, and the trustee is chargeable with all losses resulting therefrom. As has been said, the rule is made thus stringent that trustees may not be tempted from selfish motives to embark the trust funds upon the chances of trade and speculation.[5]

In no event, and under no circumstances, can a trustee set up a claim to the trust property adverse to the cestui que trust.[6] He cannot assume any relation or perform any act which is in conflict with the interests of the cestui que trust. Since his position compels him to act for the sole benefit and advantage of his beneficiary, he cannot place himself in a position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to the best interests of such beneficiary.[7]

As we have seen, where a trustee purchases for himself trust property, such sale is constructively fraudulent, and may be set aside at the option of the cestui que trust.[8] The rule may be stated thus: When a trustee sells trust property, and becomes himself directly or indirectly interested in the purchase, the sale may be set aside at the election of the cestui que trust.[9] This rule applies whether the sale is made by the trustee himself or under a decree of the court.[10] And equally subject to criticism is a transaction in which the trustee, having authority to purchase, buys, on account of the trust estate, property in which he has an interest.[11]

[5] Perry, Trusts, § 429. And see Sloo v. Law, 8 Blatchf. 459, Fed. Cas. No. 12,957; Emerson v. Atwater, 7 Mich. 12; Flagg v. Ely, 1 Edm. Sel. Cas. (N. Y.) 206; Davis v. Wright, 2 Hill, Law (S. C.) 560; Robbins v. Butler, 24 Ill. 387. A trustee cannot receive gifts from tenants. Jacobus v. Munn, 38 N. J. Eq. 622. A trustee is chargeable with actual profits. Appeal of Baker, 120 Pa. 33, 13 Atl. 487.

[6] Attorney General v. Monro, 2 De Gex & S. 163; Shields v. Atkins, 3 Atk. 560; Langley v. Fisher, 9 Beav. 90; Benjamin v. Gill, 45 Ga. 110.

[7] Pom. Eq. Jur. § 1077.

[8] Ante, p. 323.

[9] Price's Adm'r v. Thompson, 84 Ky. 219, 1 S. W. 408; Golson v. Dunlap, 73 Cal. 157, 14 Pac. 576; Patterson v. Lennig, 118 Pa. 571, 12 Atl. 679; Bennett v. Austin, 81 N. Y. 322.

[10] Borders v. Murphy, 125 Ill. 577, 18 N. E. 739.

[11] Munn v. Burges, 70 Ill. 604; Spencer's Appeal, 80 Pa. 317; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149.

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LIABILITY FOR ACTS OF CO-TRUSTEE.

206. 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.

Unless trustees have mutually agreed to be bound for each other, or by voluntary co-operation or connivance have enabled each other to violate the trust, they cannot be held liable each for the acts of the other.[1] But, where a breach of trust has affected two or more or all of the trustees with a common liability, they are each liable for the acts of the other. In such a case each is liable for the whole loss sustained, or the whole amount due, and a decree obtained against them jointly may be enforced against any one of them.[2]

The general rule is that a trustee is responsible for a breach of trust committed by his co-trustee which his own negligence has rendered possible, or with which he failed to interfere after obtaining knowledge that it was being committed.[3] And a trustee or executor who is guilty of any fraud pertaining to the trust will not be able to escape liability by throwing the blame on his colleague.[4] There are three modes by which a trustee may become liable for the acts of a co-trustee, according to the ordinary rules of equity: (1) Where one trustee receives trust money, and hands it over to a co-trustee, without securing its due application; (2) where he permits a co-trustee to receive trust

§ 206. [1] Taylor v. Roberts, 8 Ala. 88; Hinson v. Williamson, 74 Ala. 195; Sutherland v. Brush, 7 Johns. Ch. (N. Y.) 17, 11 Am. Dec. 383; De Haven v. Williams, 80 Pa. 480; Ormiston v. Olcott, 84 N. Y. 339.

[2] Wilson v. Wilson, 1 Mylne & K. 126; Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; Heath v. Waters, 40 Mich. 457. And see Brice v. Stokes, 11 Ves. 319, 2 White & T. Lead. Cas. Eq. 967.

[3] Mucklow v. Fuller, Jac. 198; Booth v. Booth, 1 Beav. 125; Richards v. Seal, 2 Del. Ch. 266; In re Niles, 118 N. Y. 547, 21 N. E. 687; Pim v. Downing, 11 Serg. & R. (Pa.) 71; Crane v. Hearn, 26 N. J. Eq. 378.

[4] Butler v. Butler, 5 Ch. Div. 554; Hinson v. Williamson, 74 Ala. 180.

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money without making due inquiry as to his dealing with it; (3) where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the necessary steps to obtain restitution.[5]

We have seen that a trustee cannot delegate the entire control and management of the trust estate to his co-trustee,[6] and it follows that a trustee who places trust funds into the power of a co-trustee is liable for their loss, caused by the bankruptcy or embezzlement of the co-trustee. In a New York case [7] the rule has been stated thus: "Where one executor or trustee receives the funds of the estate, and either delivers them over to his associate, or does any act by which the funds come under the sole possession and control of the latter, and but for which he would not have received them, the executor or trustee is liable for the loss which is sustained in consequence of such action." [8] But this rule does not apply when the money is remitted to the co-trustee in the usual course of business; as, for example, to pay a debt to a creditor residing in the co-trustee's neighborhood.[9]

There has been some conflict of authority as to the liability of a trustee who has joined his co-trustee in a receipt of trust moneys 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 liable to account for it.[10] It is reasonable that, in a case in which he has no power to refuse to sign, his signature alone should not impose a liability upon him. 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

[5] Wats. Comp. Eq. 1005.

[6] Ante, p. 423.

[7] Bruen v. Gillet, 115 N. Y. 10, 14, 21 N. E. 676, 4 L. R. A. 529.

[8] See, also, Langford v. Gascoyne, 11 Ves. 333; Williams v. Nixon, 2 Beav. 472; Croft v. Williams, 88 N. Y. 384.

[9] Bacon v. Bacon, 5 Ves. 331.

[10] 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, 39 Am. Rep. 470; Griffin's Ex'r v. Macaulay's Adm'r, 7 Grat. (Va.) 476.

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application thereof, as far as it is connected with the particular transaction in which he joins.[11]

It has been said that there would be neither wisdom nor justice in a rule which would practically end in making a trustee a guarantor of the diligence and good faith of his associates, and hold him responsible for acts which he did not commit, and could not prevent.[12] But a trustee should exercise due caution and vigilance in respect to the approval of and acquiescence in the acts of his co-trustee; and where he knows of and assents to a misapplication of the trust funds, or negligently suffers his co-trustee to receive and waste the estate, when he has the means of preventing it by proper care, he will be liable for a resulting loss.[13]

COMPENSATION AND EXPENSES OF TRUSTEE.

207. In England the services of a trustee in executing a trust are gratuitous. In most of the states of this country it is customary to allow a trustee a reasonable compensation. In both countries a trustee is entitled to be reimbursed out of the trust property for all expenses which he has properly paid or incurred in the execution of the trust.

The English rule proceeds upon the well-known principle invariably acted upon by courts of equity that a trustee shall not profit by his trust; and, as it is further stated by Chancellor Talbot: "The reason seems to be for that on these pretenses, if allowed, the trust estate might be loaded, and rendered of little value. Besides the great difficulty there might be in settling and adjusting the quantum of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee who will choose whether

[11] Brice v. Stokes, 11 Ves. 319, 2 White & T. Lead. Cas. Eq. 1742.
[12] Ormiston v. Olcott, 84 N. Y. 339.
[13] Earle v. Earle, 93 N. Y. 104; In re Niles, 113 N. Y. 547, 21 N. E. 687; Croft v. Williams, 88 N. Y. 384.

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he will accept the trust or not."[1] It matters not to what extent the trustee may have devoted himself to the duties of the trust, or to what extent the estate has been thereby benefited. The trustee can claim no compensation for his personal trouble or loss of time.[2] The only exception that exists is where the settlor of the trust authorizes the trustee to charge for his services.[3]

In most of the American states statutes have been enacted fixing the amount of compensation to be allowed trustees, and in those states where no such statutes have been enacted the courts will fix such amount.[4] The English rule is applied in all cases in the state of Delaware,[5] and seems to prevail in Ohio and Illinois.[6] It has been said "that the state of our country and the habits of our people are so different as to have induced the legislatures of nearly all the states to introduce provisions by statute for competent remuneration to those to whom the law commits the care and charge of the estate of infants and deceased persons, and the courts make a reasonable allowance to receivers appointed by them, besides reimbursing their expenses; * * * and the equity of the statute is, by construction, generally extended to conventional trustees where the instrument is silent."[7] If the instrument creating the trust states a sum that is to be paid as compensation to the trustee, no greater amount can be allowed.

A trustee, both in England and in this country, is entitled to reimbursement out of the trust property for all

§ 207. [1] Robinson v. Pett, 3 P. Wms. 249, 2 White & T. Lead. Cas. Eq. 512.

[2] Moore v. Frowd, 3 Mylne & C. 50; Brocksopp v. Barnes, 5 Madd. 90; Barrett v. Hartley, L. R. 2 Eq. 789.

[3] Webb v. Earl of Shaftesbury, 7 Ves. 480; Baker v. Martin, 8 Sim. 25.

[4] Perry, Trusts, § 918, and note.

[5] Egbert v. Brooks, 3 Har. (Del.) 112; State v. Platt, 4 Har. (Del.) 154.

[6] Cook v. Gilmore, 133 Ill. 139, 24 N. E. 524; Buckingham v. Morrison, 136 Ill. 437, 27 N. E. 65.

[7] Boyd v. Hawkins, 17 N. C. 334. Mr. Story says: "The policy of the law ought to be such as to induce honorable men, without a sacrifice of their private interests, to accept the office, and to take away the temptation to abuse the trust for mere selfish purposes, as the only indemnity for services of an important and anxious character." Story, Eq. Jur. § 1268, note.

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expenses which he has properly incurred in the execution of the trust, whether it is so provided in the instrument creating the trust or not.[8] Traveling expenses,[9] legal expenses,[10] and proper outlays for improvement of the property,[11] are proper expenditures, and will be allowed the trustee. And he will be allowed for salaries and commissions paid to an agent employed in good faith in administering the trust.[12] 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.[13] 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.[14]

ACCOUNTS OF TRUSTEES.

208. A trustee should keep clear and accurate accounts of the trust property.

209. He should at all reasonable times, at the request of a beneficiary, give him full and accurate

[8] Hide 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, 29 L. Ed. 940; Reynolds v. Cridge, 131 Pa. 189, 18 Atl. 1010; Towle v. Mack, 2 Vt. 19.

[9] Ex parte Lovegrove, 3 Deac. & C. 763.

[10] Downing v. Marshall, 37 N. Y. 380; McElhenny's Appeal, 46 Pa. 347; Brady v. Dilley, 27 Md. 570.

[11] Quarrell v. Beckford, 1 Madd. 269, 282.

[12] Hopkinson v. Roe, 1 Beav. 180; Parker v. Johnson, 37 N. J. Eq. 366.

[13] Collier v. Munn, 41 N. Y. 145; In re Corsellis, 34 Ch. Div. 675.

[14] In re Exhall Coal Co., 35 Beav. 449; Stott v. Milne, 25 Ch. Div. 710; New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111; Ellig v. Naglee, 9 Cal. 685; Beatty v. Clark, 20 Cal. 11, 30; Johnson v. Leman, 131 Ill. 609, 23 N. E. 435, 7 L. R. A. 656, 19 Am. St. Rep. 63; Foxworth v. White, 72 Ala. 224; Haydel v. Hurck, 72 Mo. 253; Stewart v. Fellows, 128 Ill. 480, 20 N. E. 657.

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information as to the amount and state of the trust property, and permit him or his attorney to inspect the accounts and vouchers, and other documents relating to the trust.[1]

Every presumption is against a trustee who has kept no accounts, or who has kept them in an inaccurate and confused manner.[2] The accounts of a trustee are always subject to investigation by the court, and he must render proper accounts whenever summoned so to do.[3] A trustee is bound to give his cestui que trust proper information as to the investment of the trust estate, and, where the trust estate is invested on mortgage, it is not sufficient for the trustee merely to say, "I have invested the trust money on mortgage," but he must produce the mortgage deeds, so that the cestui que trust may thereby ascertain that the trustee's statement is correct, and that the trust estate is so invested.[4]

FOLLOWING TRUST PROPERTY.

210. 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

(b) He may attach and follow the property that has been substituted for the trust estate so

§§ 208-209. [1] Underh. Trusts, art. 48.

[2] Landis v. Scott, 32 Pa. 495; In re Gaston Trust, 35 N. J. Eq. 60.

[3] Pearse v. Green, 1 Jac. & W. 135. And see Ahl's Appeal, 129 Pa. 43, 18 Atl. 471.

[4] Per Chitty, J., in Re Tillott [1892] 1 Ch. 86. See Lee v. Wilson [1892] 1 Ch. Div., at page 88.

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long as the substituted property can be traced.

As we have seen, if a person purchases trust property with notice of the trust, he is considered in equity as a constructive trustee, and subject to all the liabilities of a trustee.[1] 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 actual or constructive notice of the trust will be protected,[2] but not if he is a mere volunteer.[3] In short, the various rules relating to bona fide purchasers govern in determining the liability of purchasers of trust property.[4]

As a general rule, so long as trust property can be really identified in its original or in a substituted form, it belongs to the original owner, if he elects to claim it; and, if it passes into the hands of an innocent purchaser for value, the title of the defrauded owner, at his option, at once attaches to the avails, so long as their identity is preserved, without regard to the number of transmutations through which the property has passed.[5] But when the cestui que trust is unable to show that the specific property claimed is his, or that the trust fund has gone into and forms a part of the estate he seeks to charge, he has no preference or lien over the trustee's other creditors.[6] A leading case

§ 210. [1] Ante, p. 413. And see Rolfe v. Gregory, 4 De Gex, J. & S. 576; Caldwell v. Carrington, 9 Pet. 86, 9 L. Ed. 60; Jones' Adm'r v. Shaddock, 41 Ala. 262; Ryan v. Doyle, 81 Iowa, 53; Smith v. Walser, 49 Mo. 250.

[2] Bassett v. Nosworthy, Cas. t. Finch, 102, 2 White & T. Lead. Cas. Eq. 1; Dillaye v. Bank, 51 N. Y. 345.

[3] Mansell v. Mansell, 2 P. Wms. 681; Lyford v. Thurston, 16 N. H. 399; Barr v. Cubbage, 52 Mo. 404.

[4] Ante, p. 425.

[5] In re Hallett [1894] 2 Q. B. Div. 237; Patten v. Bond, 60 Law T. (N. S.) 583; Roca v. Byrne, 145 N. Y. 182, 39 N. E. 812; Orcutt v. Gould, 117 Cal. 315, 49 Pac. 188; Mutual Acc. Ass'n of the Northwest v. Jacobs, 141 Ill. 261, 31 N. E. 414, 16 L. R. A. 516, 33 Am. St. Rep. 302; Gianella v. Momsen, 90 Wis. 476, 63 N. W. 1018; Pundmann v. Schoenich, 144 Mo. 149, 45 S. W. 1112.

[6] Portland & H. Steamboat Co. v. Locke, 78 Me. 370; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383.

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illustrating this principle is that of In re Hallett's Estate,[7] where a solicitor held for his client certain bonds, upon which he collected the interest. He improperly sold some of the bonds, and deposited the proceeds in a bank in his own name, and subsequently added to his account other money of his own. It was held that the proceeds of the sale of the bonds could be followed by the client, and the balance in the bank in the name of the solicitor could be charged therewith; Sir George Jessel, M. R., saying: "Supposing the trust money were 1,000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise dropped a sovereign of his own in the bag, could anybody suppose that a judge in equity would find any difficulty in saying that the cestui que trust has a right to take 1,000 sovereigns out of the bag?" The modern rule seems to be 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.[8] In a recent case in the federal courts it was said by Mr. Justice Bradley: "Formerly the equitable right of following misapplied money or other property into the hands of the person receiving it depended upon the ability of identifying it. The equity attached only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguished, without any fault of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a

[7] 13 Ch. Div. 696.

[8] Central Nat. Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Van Alen v. Bank, 52 N. Y. 1; Third Nat. Bank v. Gas Co., 36 Minn. 75, 30 N. W. 440; Englar v. Offutt, 70 Md. 78, 16 Atl. 497, 14 Am. St. Rep. 332. Not necessary to trace trust fund into specific property, but only into estate of trustee. McLeod v. Evans, 66 Wis. 409, 23 N. W. 173, 214, 57 Am. Rep. 287; Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; Harrison v. Smith, 83 Mo. 210, 53 Am. Rep. 571. See, however, Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; Continental Nat. Bank v. Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; Hopkins' Appeal (Pa.) 9 Atl. 867.

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charge upon the entire mass, giving to the party injured by the unlawful division a priority of right over the other creditors of the possessor." [9]

As to the trustee himself, and independent of the rights of others, if he mixes trust funds with his own, he is clearly liable to the cestui que trust for so much of the trust funds as he cannot prove to be his own.[10] 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.[11] If he purchases land 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.[12]

BREACH OF TRUST.

211. Every violation by a trustee of a duty which equity imposes upon him, whether willful or fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.[1]

212. A breach of trust by a trustee creates a personal obligation in the nature of a simple contract debt, which may be enforced against the trustee or his estate in a proper proceeding.

[9] Frelinghuysen v. Nugent (C. C.) 36 Fed. 229, 239. And see, also, Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; Union Nat. Bank of Chicago v. Goetz, 138 Ill. 127, 27 N. E. 907; Davenport Plow Co. v. Lamp, 80 Iowa, 722, 45 N. W. 1049, 20 Am. St. Rep. 442.

[10] 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's Ex'rs v. Holeman, 82 Ky. 573.

[11] 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, 13 N. W. 274, 42 Am. Rep. 708; Norris v. Hero, 22 La. Ann. 605; Naltner v. Dolan, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61.

[12] Lane v. Dighton, 1 Amb. 409; 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.

§§ 211–212. [1] Pom. Eq. Jur. § 1079.

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What Constitutes Breach of Trust.

Mr. Pomeroy has said that the term "breach of trust" includes "every omission or commission which violates in any manner either of the three great obligations of carrying out the trust according to its terms, of care and diligence in protecting and investing the trust property, and of using perfect good faith." [2] The office of trustee is one of great personal responsibility, and he must bring to bear in the performance of his duties the best of his energies and abilities. He cannot carelessly neglect his lawful obligations as such trustee, and much less willfully or fraudulently connive to profit by his position. All parties to a breach of trust are equally liable, and there is between them no primary liability; nor is this liability confined to the express trustees, but extends to all who are actually privy to the breach.[3]

Liability for Breach of Trust and Enforcement Thereof.

It is not feasible to specify the great number of violations for which a trustee may be made liable to his cestui que trust, and the rules pertaining thereto are altogether too numerous to be discussed in a work of this kind. Reference may be had to the various treatises on trusts for a full discussion of these rules.[4] 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; [5] and such an action may not only be brought against the trustee, but against his representatives.[6] The claim, however, ranks only as a simple contract debt,[7] unless the trust instrument contains a covenant, express or implied, for the payment of the trust fund, and has been executed by the trustee.[8] If the trustee becomes insolvent,

[2] Id.

[3] Wilson v. Moore, 1 Mylne & K. 126; Cowper v. Stoneham, 68 Law T. (N. S.) 18; Blyth v. Fladgate [1891] 1 Ch. Div. 337.

[4] Perry, Trusts (5th Ed.) c. 27.

[5] Long v. Fox, 100 Ill. 44; Oliver v. Piatt, 3 How. 333, 11 L. Ed. 622; Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141; Calhoun v. Burnett, 40 Miss. 599.

[6] Devaynes v. Robinson, 24 Beav. 86.

[7] Vernon v. Vawdry, 2 Atk. 119; Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570.

[8] Isaacson v. Harwood, 3 Ch. App. 225; Richardson v. Jenkins, 1 Drew. 477.

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his indebtedness to the trust is provable against his estate.[9] 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.[10]

The remedy of a cestui que trust who is sui juris may be barred by his acquiescence or concurrence;[11] but persons under disability do not lose their remedy unless they have, by their own fraud, induced the breach of trust.[12] Misrepresentation or concealment by the trustee bars the defense of acquiescence, and vitiates a release given by the cestui que trust.[13] And a cestui que trust may be debarred from relief by long acquiescence in a breach of trust, though he did not originally concur in it;[14] as, where beneficiaries have for many years seen purchasers of trust property erect thereon valuable improvements without objection, they are estopped from setting up title thereto.[15]

Bar of Statute of Limitations.

As a general rule, lapse of time is not a defense to a beneficiary's right of action for a breach of trust. But nevertheless a great delay after a discovery of the breach may be a bar.[16] It has been held in a number of cases that equity will not lend its aid to establish or enforce a stale trust; and, when there has been great delay in bringing suit, even though the trustee has fraudulently concealed the facts from the beneficiary, the latter must definitely set forth in his bill the cause of his ignorance, the impediments to an earlier prosecution of the claim, the means used by the trustee to mislead him, and how and when he acquired a

[9] Ex parte Shakeshaft, 3 Brown, Ch. 197.

[10] 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. 92; Zimmerman v. Fraley, 70 Md. 561, 17 Atl. 560; Rowley v. Towsley, 58 Mich. 329, 19 N. W. 20.

[11] 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.

[12] Lord Montford v. Lord Cadogan, 19 Ves. 636, 639, 640.

[13] Adams v. Clifton, 1 Russ. 297; Jones v. Lloyd, 117 Ill. 597, 7 N. E. 119; Shartel's Appeal, 64 Pa. 25.

[14] Perry, Trusts, § 850. And see Villines v. Norfleet, 17 N. C. 167.

[15] Iverson v. Saulsbury, 65 Ga. 724.

[16] Pom. Eq. Jur. § 1083.

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knowledge of his rights.[17] But the statute of limitations is itself no bar, in the absence of express words in the statute applying to such actions. It can in no event be more than a guide to the court in determining what constitutes laches. Against an express and continuing trust time does not run until repudiation or adverse possession by the trustee and knowledge thereof on the part of the cestui que trust.[18]

REMOVAL OF TRUSTEE.

213. Where a trustee has been guilty of such acts or omissions as endanger the trust property, or show a want of honesty, or of proper capacity to execute the duties of the trust, a court of equity will remove him, and appoint his successor.

While a trustee who accepts the office cannot relinquish it at will, unless permitted by the trust instrument,[1] and 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.[2] The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever such a state of mutual ill feeling growing out of the behavior of a trustee exists between him and his co-trustee, or between him and the beneficiaries,

[17] Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005; Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134; Whitney v. Fox, 166 U. S. 637, 17 Sup. Ct. 713, 41 L. Ed. 1145; McIntire v. Pryor, 173 U. S. 38, 19 Sup. Ct. 352, 43 L. Ed. 606; Wood v. Williams, 142 Ill. 269, 31 N. E. 681; Jackson v. Jackson, 149 Ind. 238, 47 N. E. 963.

[18] Perry, Trusts, § 863. And see Gisborn v. Insurance Co., 142 U. S. 326, 12 Sup. Ct. 277, 35 L. Ed. 1029; Gilmore v. Ham, 142 N. Y. 1, 36 N. E. 826; McGuire v. Devlin, 158 Mass. 63, 32 N. E. 1028; Jones v. Henderson, 149 Ind. 458, 49 N. E. 443; Smith v. Combs, 49 N. J. Eq. 420, 24 Atl. 9.

§ 213. [1] Chalmer v. Bradley, 1 Jac. & W. 68.

[2] Story, Eq. Jur. § 287; Letterstedt v. Broers, 9 App. Cas. 371.

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that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the co-trustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are not made out, or are grossly exaggerated.[3] It does not follow that mere disagreements between the trustee and the beneficiaries will justify a removal.[4] If a trustee fails in the discharge of his duties from an honest mistake, or a misunderstanding of them, or because of a misjudgment, he should not be removed.[5] Nor will a trustee be removed for every violation of duty or breach of trust, if the trust property is not endangered.[6] But, where a trustee refuses or neglects to invest the trust funds in the manner directed by the instrument creating the trust, it will be sufficient ground for his removal;[7] and the same is true where he loans money on personal security.[8] And a trustee who has permanently departed from the jurisdiction of the court,[9] or has become insolvent,[10] or deals with the trust property for his own advancement,[11] or suffers a co-trustee to commit a breach of trust,[12] or wastes the estate by unnecessary litigation,[13] or refuses to convey property as directed by a valid decree of the court,[14] will be removed.

[3] May v. May, 167 U. S. 310, 320, 17 Sup. Ct. 824, 42 L. Ed. 179; Wilson v. Wilson, 145 Mass. 490, 493, 14 N. E. 521; In re Marsden's Estate, 166 Pa. 213, 31 Atl. 46.

[4] Clemens v. Caldwell, 7 B. Mon. (Ky.) 171; Gibbes v. Smith, 2 Rich. Eq. (S. C.) 131.

[5] In re Durfee, 4 R. I. 401; Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. 192.

[6] Waterman v. Alden, 144 Ill. 90, 32 N. E. 972; In re O'Hara, 62 Hun, 531, 17 N. Y. Supp. 91; Lathrop v. Bauble, 106 Mo. 470, 17 S. W. 584.

[7] Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. 192; Cavender v. Cavender, 114 U. S. 464, 5 Sup. Ct. 955, 29 L. Ed. 212.

[8] Johnson's Appeal, 9 Pa. 416.

[9] O'Reilly v. Alderson, 8 Hare, 101; Dorsey v. Thompson, 37 Md. 25; Ketchum v. Railroad Co., 2 Woods, 532, Fed. Cas. No. 7,737.

[10] Bainbrigge v. Blair, 1 Beav. 495; In re Barker's Trusts, 1 Ch. Div. 43.

[11] Ex parte Phelps, 9 Mod. 357; Kraft v. Lohman, 79 Ala. 323; Clemens v. Caldwell, 7 B. Mon. (Ky.) 171; Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. 192.

[12] Ex parte Reynolds, 5 Ves. 707.

[13] In re McGillivray, 138 N. Y. 308, 33 N. E. 1077.

[14] Harrison v. Trust Co., 144 N. Y. 326, 39 N. E. 353.

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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.[18]

[18] In re Tempest, 1 Ch. App. 487.

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CHAPTER XVII.

MORTGAGES.

214. The Common-Law Doctrine as to Real-Estate Mortgages.
215. Equitable Theory of a Mortgage.
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226. Foreclosure of Mortgage.
227-228. Rights and Liabilities of Mortgagor and Mortgagee.
229. Redemption.
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THE COMMON-LAW DOCTRINE AS TO REAL-ESTATE MORTGAGES.

214. At common law a mortgage conveyed the entire legal estate to the mortgagee, and, unless otherwise provided in the mortgage, the mortgagee could eject the mortgagor either before or after default in payment of the debt.

By the common-law mortgage the legal title of the estate vested immediately in the mortgagee, subject to be defeated by a performance by the mortgagor of the conditions of the mortgage and the paying of the debt upon the day specified. If the condition was performed, and the payment made, as prescribed in the mortgage, the legal title became reinvested in the mortgagor, with all the rights of ownership. But, if there was any default in performance or payment, the estate of the mortgagee became absolute, and all the rights and interests of the mortgagor in the mortgaged premises were lost beyond redemption. Littleton thus described the common-law mortgage: "If a feoffment be made upon such condition that, if the feoffor pay

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to the feoffee at a certain day, etc., a certain sum of money, then the feoffor may re-enter, in this case the feoffee is called the 'tenant in mortgage.' * * * If the feoffor does 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."[1]

At the present time, by the enactment of remedial statutes, and the development of the jurisdiction of the common-law courts, the rights and interests of mortgagors are fully recognized and protected at law, so that "their former precarious condition has become a matter of history, rather than one of practical importance."[2] "The case of mortgages," said Chancellor Kent, "is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and of the homage which these principles have received by their adoption in courts of law."[3]

EQUITABLE THEORY OF A MORTGAGE.

215. In equity the mortgage is regarded primarily as a security for a debt. The debt is the principal fact, and the mortgage is collateral thereto. The interest which it confers on the mortgagee is a lien on the land, and not an estate in the land.[1]

As we have seen, at common law the mortgagee was clothed with the entire legal estate, and after the default of the mortgagor the estate of the mortgagee became absolute and indefeasible. This harshness of the common law was softened by the interposition of equity without actual interference with common-law principles. A system was eventually established, at once consistent with the security of the creditor and a due regard for the interests of

§ 214. [1] Co. Litt. § 332.
[2] Bisp. Eq. § 149.
[3] 4 Kent, Comm. 158.
§ 215. [1] 3 Washb. Real Prop. c. 16, § 4; Pom. Eq. Jur. § 1181.

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the debtor.[2] It does not appear that the early chancellors ventured to interfere with the common-law system, except when the mortgagor's default was occasioned by mistake or the fraud of the mortgagee.[3] But during the reign of 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. The origin of this doctrine is, doubtless, in the civil law. In the court of the prætor at Rome, which was in some respects the equivalent of a modern court of equity, it was well established that, where property was pledged, the pledgor might redeem it on payment of the debt for which it was pledged at any time before the delivery of a judgment, giving the creditor the absolute and indefeasible estate in the pledged property.[4]

Equity did not attempt to alter the legal effect of the forfeiture at common law. It could not, in conformity with the principles of the civil law, declare that the force of the conveyance should, notwithstanding forfeiture committed, cease at any time before a decree of foreclosure on payment of the debt to secure which it was made. But, leaving the forfeiture to its legal consequences, equity operated on the conscience of the mortgagee, and, acting in personam and not in rem, declared it unreasonable that he should retain as owner for his own benefit what was intended as a mere pledge, and adjudged that a breach of the condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an "equity to redeem" on payment within a reasonable time of principal, interest, and costs, notwithstanding the forfeiture at law.[5] This became the established doctrine during the reign of Charles I.,[6] and since that time the mortgagor has been vested with the 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. This right

[2] Coote, Mortg. 6.
[3] 1 Spence, Eq. Jur. p. 602.
[4] Underh. Guide Mod. Eq. p. 118.
[5] Coote, Mortg. 19, 20.
[6] How v. Vigures, 1 Ch. R. 32. See, also, Toth. 132.

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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.[7]

No sooner, however, was the equity of redemption established than another bold decision was required to confirm the utility of the principle. 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.[8]

In England the common-law and equitable methods of treating the rights and interests of mortgagors and mortgagees have grown up side by side, without conflict or friction. The equity courts did not attempt to control the law courts, or even question the legal doctrines which they announced. On the contrary, their force and validity were often recognized in the relief granted. Thus equity courts, in allowing a redemption after a forfeiture of the legal estate, uniformly required the mortgagee to reconvey to the mortgagor, which was, of course, necessary to make his title available in a court of law. In maintaining these two systems and theories in England, there was none of that confusion and conflict which we encounter in the decisions of the courts of this country, resulting chiefly from a failure to keep in mind the distinctions between courts of law and of equity, and the rules and principles applicable to them respectively.[9] As an illustration of the consideration given

[7] Casborne v. Scarfe, 1 Atk. 603, 2 White & T. Lead. Cas. Eq. 1945.

[8] Howard v. Harris, 1 Vern. 190, 2 White & T. Lead. Cas. Eq. 1949.

[9] Barrett v. Hinckley, 124 Ill. 32, 14 N. E. 863.

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by courts of equity to the legal rights and title of the mortgagee in the mortgaged premises, it may be observed that, after default, equity would not enjoin the mortgagee from maintaining ejectment against the mortgagor for the possession of the mortgaged premises,[10] and the mortgagor could not make a valid lease binding on the mortgagee.[11] For all other purposes, however, the mortgagor was regarded as the actual owner of the estate.[12]

Mortgages in the United States.

From the earlier cases in the American states it would seem that the legal and equitable theories of mortgages were both in full force, and that the two systems, each independent of the other, were transplanted from England into this country, and became a part of our own system of laws. But statutory changes in the laws of the several states, and the failure of the courts and authors to note such changes, and the substitution of a single statutory form of action for the former common-law and equitable procedure, have produced confusion, and destroyed the certainty and uniformity which formerly prevailed with us, in respect to the rights of the parties to a mortgage. Under the influence of these statutory enactments and radical changes in legal procedure, by which legal and equitable rights are enforced and given effect in the same suit, the equitable theory of a mortgage has, in many of our states, entirely superseded the legal one.[13]

Perhaps the leading state among those which have adopted the equitable theory is New York. In that state a mortgage has none of the characteristics of a conveyance. The mortgagor has every attribute and right of an absolute owner of the real estate, subject to the lien of the mortgage, and his title can only be defeated by foreclosure.[14] The mortgagee, before possession taken, has only a chose in action. He holds the mortgage only for the security of

[10] Cholmondeley v. Clinton, 2 Mer. 359.

[11] Keech v. Hall, Doug. 22.

[12] 1 Jones, Mortg. § 11.

[13] Barrett v. Hinckley, 124 Ill. 32, 14 N. E. 863.

[14] Trustees of Union College v. Wheeler, 61 N. Y. 88; Shattuck v. Bascom, 105 N. Y. 40, 12 N. E. 283; Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623.

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his debt. He can sell his interest in the land by mere delivery of the mortgage, as personal property. At his death his interest and the mortgage pass to his personal representatives as a portion of his personal estate. He has no such estate in the land as can be sold on execution, or as can give his widow dower, and he has no attribute of ownership in the land.[15] The mortgage does not vest the mortgagee with any title to the land, nor has he a right to take possession, or maintain an action in ejectment against the owner of the equity of redemption,[16] 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. The equitable rule has also been adopted in California,[17] Colorado,[18] Florida,[19] Georgia,[20] Indiana,[21] Iowa,[22] Kansas,[23] Kentucky,[24] Louisiana,[25] Michigan,[26] Minnesota,[27] Montana,[28] Nebraska,[29] Nevada,[30] New Mexico,[31] North and South Dakota,[32] Oregon,[33] South Caro-

[15] Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623.

[16] Murray v. Walker, 31 N. Y. 399.

[17] McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765.

[18] Drake v. Root, 2 Colo. 685.

[19] McMahon v. Russell, 17 Fla. 698; Jordan v. Sayre, 29 Fla. 100, 10 South. 823.

[20] Vason v. Ball, 56 Ga. 268; Carter v. Gunn, 64 Ga. 651.

[21] Fletcher v. Holmes, 32 Ind. 497, 515.

[22] White v. Rittenmyer, 30 Iowa, 268.

[23] Chick v. Willetts, 2 Kan. 384.

[24] Woolley v. Holt, 14 Bush (Ky.) 788; Tallaferro v. Gay, 78 Ky. 496.

[25] Duclaud v. Rousseau, 2 La. Ann. 168.

[26] Caruthers v. Humphrey, 12 Mich. 270; Lee v. Clary, 38 Mich. 223.

[27] Adams v. Corriston, 7 Minn. 456 (Gil. 365).

[28] Fee v. Swingly, 6 Mont. 596, 13 Pac. 375.

[29] Kyger v. Ryley, 2 Neb. 20, 28; McHugh v. Smiley, 17 Neb. 620, 20 N. W. 296.

[30] Gen. St. 1885, § 3284; First Nat. Bank v. Kreig (Nev.) 32 Pac. 641.

[31] Comp. Laws 1884, § 1595.

[32] Rev. Codes 1883, § 1733.

[33] Thompson v. Marshall, 21 Or. 171, 27 Pac. 957; Adair v. Adair, 22 Or. 115, 29 Pac. 193.

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lina,[34] Texas,[35] Utah,[36] Washington,[37] and Wisconsin.[38] 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,[39] Arkansas,[40] Connecticut,[41] Delaware,[42] Illinois,[43] Maine,[44] Maryland,[45] Massachusetts,[46] Mississippi,[47] Missouri,[48] New Hampshire,[49] New Jersey,[50] North Carolina,[51] Ohio,[52] Pennsylvania,[53]

[34] Navassa Guano Co. v. Richardson, 26 S. C. 401, 2 S. E. 307; Hardin v. Hardin, 34 S. C. 77, 12 S. E. 936.

[35] Wright v. Henderson, 12 Tex. 43.

[36] Comp. Laws 1876, p. 478.

[37] Code Wash. 1881, § 546.

[38] Wood v. Trask, 7 Wis. 566, 76 Am. Dec. 230; Wisconsin Cent. R. Co. v. Land Co., 71 Wis. 94, 36 N. W. 837.

[39] Knox v. Easton, 38 Ala. 345; Downing v. Blair, 75 Ala. 216.

[40] Kannady v. McCarron, 18 Ark. 166; Fitzgerald v. Beebe, 7 Ark. 310, 46 Am. Dec. 285.

[41] Chamberlain v. Thompson, 10 Conn. 243, 251, 26 Am. Dec. 390.

[42] Hall v. Tunnell, 1 Houst. (Del.) 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.

[43] Carroll v. Ballance, 26 Ill. 9, 79 Am. Dec. 354; Barrett v. Hinckley, 124 Ill. 32, 14 N. E. 863.

[44] Blaney v. Bearce, 2 Greenl. (Me.) 132.

[45] Brown v. Stewart, 1 Md. Ch. 87; Annapolis & E. R. Co. v. Gantt, 39 Md. 115.

[46] Ewer v. Hobbs, 5 Metc. (Mass.) 1–3; Howard v. Robinson, 5 Cush. (Mass.) 119, 123.

[47] Carpenter v. Bowen, 42 Miss. 28; Buckley v. Daley, 45 Miss. 338, 565. Here, too, the English system is greatly modified.

[48] Johnson v. Houston, 47 Mo. 227; Bailey v. Winn, 101 Mo. 649, 12 S. W. 1045.

[49] Brown v. Cram, 1 N. H. 169; Hobart v. Sanborn, 13 N. H. 226, 38 Am. Dec. 483; Great Falls Co. v. Worster, 15 N. H. 412, 444.

[50] Sanderson v. Price, 21 N. J. Law, 637, 646; Shields v. Lozear, 34 N. J. Law, 496, 3 Am. St. Rep. 256; Verner v. Betz, 46 N. J. Eq. 256, 19 Atl. 206, 7 L. R. A. 630, 19 Am. St. Rep. 387.

[51] Hemphill v. Ross, 66 N. C. 477.

[52] Allen v. Everly, 24 Ohio St. 97, 114.

[53] Tryon v. Munson, 77 Pa. 250.

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Rhode Island,[54] Tennessee,[55] Vermont,[56] Virginia and West Virginia.[57]

DEFINITION OF MORTGAGE.

216. A mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession.[1]

217. 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.[2]

An accurate and concise definition of a mortgage, which will embrace both its equitable and legal character, is difficult to formulate. The one given in the first paragraph of the black-letter text is that contained in the Civil Code of California, and has been approved and cited by a number of writers.[3] Mr. Coote has defined a mortgage as a "debt by specialty, secured by pledge of lands, of which the legal ownership is vested in the creditor, but of which, in equity, the debtor and those claiming under him remain the actual owners, until debarred by judicial sentence, by legislative enactment, or their own laches."[4] And Mr. Pomeroy has said, in criticising many of the definitions set forth by judges and writers, that: "Any true definition based upon the original common-law and equitable system must embody and express all the double nature of the mortgage; that is, both as a lien in equity and a conveyance at law."[5]

[54] Carpenter v. Carpenter, 6 R. I. 542; Waterman v. Matteson, 4 R. I. 539.

[55] Henshaw v. Wells, 9 Humph. (Tenn.) 568; Vance's Heirs v. Johnson, 10 Humph. (Tenn.) 214.

[56] Hagar v. Brainerd, 44 Vt. 294; Brunswick-Balke-Collender Co. v. Herrick, 63 Vt. 286, 21 Atl. 918.

[57] 2 Minor, Inst. 500–530. Trust deeds which vest the legal title in the trustee are extensively used in Virginia and West Virginia.

§§ 216, 217. [1] Civ. Code Cal. § 2920; Proposed Field's Civ. Code N. Y. § 1608.

[2] Seton v. Slade, 7 Ves. 265, 273.

[3] Pom. Eq. Jur. § 1191, note; Hill, Real Prop. § 294.

[4] Coote, Mortg. 139.

[5] Pom. Eq. Jur. § 1191.

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OBJECTS OF MORTGAGE.

218. The object of a mortgage may be the payment of a debt, the protection of a surety, or the performance of any other act.[1]

The first great object of a mortgage of real estate is, in the form of a conveyance in fee, to give the mortgagee an effectual security, by the pledge or hypothecation of real estate, for the payment of a debt, or the performance of some other obligation. The next is to leave to the mortgagor, and to purchasers, creditors, and all others claiming derivatively through him, the full and entire control, disposition, and ownership of the estate, subject only to the first purpose,—that of securing the mortgagee.[2] Mortgages may be made conditioned upon the support of the mortgagee or other persons, as well as for the payment of money. In such mortgages the obligation to support is a personal one, and prevents the alienation of the mortgaged premises, or their sale under execution, unless, by the terms of the instrument, the obligation is imposed upon all claiming under the mortgagor.[3]

REAL-ESTATE MORTGAGE—ABSOLUTE DEED AS MORTGAGE.

219. A deed absolute in form will, in equity, be treated as a mortgage, if it was executed to secure the payment of a loan or debt. Any evidence, written or parol, tending to show that a deed absolute in form was intended as a mortgage, is admissible.[1]

§ 218. [1] 2 Washb. Real Prop. (4th Ed.) 475; Tied. Real Prop. § 310; Rice, Mod. Law Real Prop. § 295; Lanfair v. Lanfair, 18 Pick. (Mass.) 304; Mitchell v. Burnham, 44 Me. 299.

[2] Chief Justice Shaw in Ewer v. Hobbs, 5 Metc. (Mass.) 1.

[3] Bryant v. Erskine, 55 Me. 156; Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700; Daniels v. Eisenlord, 10 Mich. 455; Soper v. Guernsey, 71 Pa. 224. These mortgages are not often found in actual practice, and are more prevalent in the New England states than elsewhere.

§ 219. [1] Peugh v. Davis, 96 U. S. 332, 336, 24 L. Ed. 775.

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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. This principle is well established in most of the states, and is supported by a multitude of cases.[2] In some of the earlier decisions the ground of this doctrine was said to be that of fraud, accident, or mistake, and where neither of these elements existed the deed was not treated as a mortgage.[3] This still seems to be the prevailing theory in the states of Alabama, Connecticut, Florida, Kentucky, Maryland, North Carolina, Rhode Island, and South Carolina.[4] But in the United States supreme court, and in most of the other states, the existence of the rule is based on the intention of the parties; and it has been held that, where it is shown that a deed is intended to operate as a mortgage, it would be a fraud upon the grantor if the grantee should insist that the deed conveyed an absolute title.[5]

Admissibility of Parol Evidence.

Parol or any other evidence is admissible to show that a deed absolute on its face was intended as a mortgage. Such

[2] Among the many cases upholding this doctrine are the following: Peugh v. Davis, 96 U. S. 332, 336, 24 L. Ed. 775; 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. 315; Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834; McMillan v. Bissell, 63 Mich. 66, 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, 28 L. Ed. 415; Pearce v. Wilson, 111 Pa. 14, 2 Atl. 99; Ross v. Brusie, 70 Cal. 465, 11 Pac. 760.

[3] Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499.

[4] Bragg v. Massie's Adm'r, 38 Ala. 89, 106, 79 Am. Dec. 82; French v. Burns, 35 Conn. 359; Lindsay v. Matthews, 17 Fla. 575; Stapp v. Phelps, 7 Dana (Ky.) 296; Price v. Gover, 40 Md. 102; Green v. Sherrod, 105 N. C. 197, 10 S. E. 986; Nichols v. Reynolds, 1 R. I. 80, 36 Am. Dec. 238; Nesbitt v. Cavender, 27 S. C. 1, 2 S. E. 702.

[5] Babcock v. Wyman, 19 How. 289, 15 L. Ed. 644; Russell v. Southard, 12 How. 139, 13 L. Ed. 927; Brick v. Brick, 98 U. S. 514, 25 L. Ed. 256; Ruckman v. Alwood, 71 Ill. 155; Campbell v. Dearborn, 109 Mass. 130, 12 Am. Rep. 671; Vliet v. Young, 34 N. J. Eq. 15; Carr v. Carr, 52 N. Y. 251; Horn v. Keteltas, 46 N. Y. 605.

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evidence is not admitted to affect the validity of the instrument, but to determine its character. It will be equally valid and binding whether it be deemed a mortgage or an absolute deed. It cannot be said, therefore, that the admission of such evidence is in conflict with the rule prohibiting the variance of the express terms of a deed or other instrument by parol evidence.[6] Nor does the admission of parol evidence for such purpose violate the statute of frauds, which can never be made a cover for fraud.[7] But, in order to rebut the presumption in favor of the deed being what it purports to be on its face, the proof adduced must be clear, unequivocal, and convincing.[8] The burden of proof rests upon him who alleges that the deed was intended as a mortgage. As was said in a New York case, the burden of establishing a penal defeasance to a deed absolute in form "is an onerous one, resting on whoever alleges it, and its existence, and also its precise terms, must be established by clear and convincing evidence; otherwise, the strong presumption that the deed expresses the entire contract is not overcome. A conveyance of land in fee so executed, acknowledged, and recorded is of too great solemnity, and of too much importance, to be set aside or converted into a mere security upon loose or uncertain testimony, and it will not be unless the existence of the alleged oral defeasance is established beyond a reasonable doubt." [9]

[6] In Peugh v. Davis, 96 U. S. 332, 336, 24 L. Ed. 775, 776, Justice Field says: "The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or carried from its natural import, but must speak for itself. The rule does not forbid an inquiry into the objects of the parties in executing and receiving the instrument. Thus it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of the parties in such cases will be considered by a court of equity. It constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice." See, also, Carr v. Carr, 52 N. Y. 251, 260; Campbell v. Dearborn, 109 Mass. 130; Stinchfield v. Milliken, 71 Me. 567.

[7] Carr v. Carr, 52 N. Y. 251, 260; Klein v. McNamara, 54 Miss. 90; Sewell v. Price's Adm'r, 32 Ala. 97.

[8] Cadman v. Peter, 118 U. S. 73, 80, 6 Sup. Ct. 957, 30 L. Ed. 78; Wallace v. Johnstone, 129 U. S. 58, 64, 9 Sup. Ct. 243, 32 L. Ed. 619; Helm v. Boyd, 124 Ill. 370, 16 N. E. 85; McMillan v. Bissell, 63 Mich. 66, 29 N. W. 737.

[9] Ensign v. Ensign, 120 N. Y. 656, 24 N. E. 942.

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SAME—CONDITIONAL SALE AS MORTGAGE.

220. 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.

Where land is sold with an option reserved to the vendor to repurchase by the payment of a certain sum within a specified time, the sale is known as a conditional sale, and will become absolute upon a failure to pay the stipulated sum at the time specified. The vendor in such a transaction is not entitled to an equity of redemption, but can only enforce the agreement to resell if the payment is made as required.[1] A conditional sale may, in equity, be shown to be a mortgage upon the same principles as in the case of a deed absolute on its face. If it appears that the parties intended the conditional sale to operate as a security for a debt, equity will treat the transaction in all respects as a mortgage.[2] 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.[3] 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 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 recognizance, it is a conditional sale." [4] In cases of doubt,

§ 220. [1] Alderson v. White, 2 De Gex & J. 97; Turner v. Wilkinson, 72 Ala. 361.

[2] Schriber v. Leclair, 66 Wis. 579, 29 N. W. 570, 889; Jackson v. Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Lipp v. Land Syndicate, 24 Neb. 692, 40 N. W. 129; White v. Megill (N. J. Ch.) 18 Atl. 855; Buse v. Page, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95.

[3] Cornell v. Hall, 22 Mich. 377, 383; Smith v. Crosby, 47 Wis. 160, 2 N. W. 104; Henley v. Hotaling, 41 Cal. 22.

[4] 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. Hotaling, 41 Cal. 22, 28.

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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.[5]

SAME—MORTGAGE TO SECURE FUTURE ADVANCES.

221. A mortgage to secure future advances is a valid contract, whether given in addition to or without a present indebtedness.

222. Independent of the recording acts, such a mortgage is a prior lien against subsequent purchasers and incumbrancers for all advances made without notice of such subsequent conveyances or incumbrances.

223. If the prior mortgage is recorded, it has a preference over subsequent recorded mortgages and conveyances and subsequent docketed judgments for all advances which, by the terms of the mortgage, are to be secured thereby, made not only before, but after, their recording or docketing, without actual notice thereof.

It has been settled in this country by a long line of decisions that a mortgage may be given to secure future advances; to secure debts to be contracted as well as those already due.[1] As has been said: "There is no question as to the validity of mortgages to secure future advances or liabilities. They have become a recognized form of security. Their frequent use has grown out of the necessities

[5] Rapier v. 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.

§§ 221–223. [1] Shirras v. Caig, 7 Cranch, 34, 3 L. Ed. 260; Jones v. Indemnity Co., 101 U. S. 622, 626, 25 L. Ed. 1030; Ferris v. Spooner, 102 N. Y. 10, 5 N. E. 773; Robinson v. Williams, 22 N. Y. 380; Huckaba v. Abbott, 87 Ala. 409, 6 South. 48; Newkirk v. Newkirk, 56 Mich. 525, 23 N. W. 206; Philadelphia, W. & B. R. Co. v. Woelper, 64 Pa. 366, 3 Am. Rep. 596.

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of trade and their convenience in the transaction of business. They enable parties to provide for continuous dealings, the nature or extent of which may not be known or anticipated at the time, and they avoid the expense and inconvenience of executing a new security for each transaction. It is well known that such mortgages are constantly taken by banks and bankers as security for final balances, and banking facilities are extended, and daily credits given, in reliance upon them. Mortgages for future advances have sometimes been regarded with jealousy, but their validity is now fully recognized and established." [2]

There can be no question that such a mortgage is a prior lien against subsequent incumbrancers and purchasers for all advances made before the execution of the subsequent conveyances or mortgages, or the docketing of the subsequent judgments against him.[3] But, if such advances were made after such execution or docketing, the question frequently arises as to the priority of a mortgage to secure such advances over the subsequent conveyance, mortgage, or judgment. This question is not without its difficulties, and there seems to be more or less conflict of authority as to its proper disposition. But it seems well established that, if such advances were made with notice of the subsequent incumbrance or conveyance, the mortgagee under the prior mortgage secures no preference, but his claim for such advances will be postponed to that of the subsequent purchaser or incumbrancer.[4] Such notice, to deprive the mortgagee of the priority of his lien, must be actual notice, and the constructive notice afforded by recording or docketing the subsequent mortgage, conveyance, or judgment is not sufficient.[5]

A mortgage for future advances, which has been duly recorded, has preference, therefore, over all subsequent mort-

[2] Ackerman v. Hunsicker, 85 N. Y. 43, 47, 39 Am. Rep. 621, 622, per Andrews, J.

[3] Pom. Eq. Jur. § 1198.

[4] Shirras v. Caig, 7 Cranch, 34, 3 L. Ed. 260.

[5] Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621; Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288; Lovelace v. Webb, 62 Ala. 271. The opposite rule is adopted in some states. See Ladue v. Railroad Co., 13 Mich. 380, 87 Am. Dec. 759; Spader v. Lawler, 17 Ohio, 371, 49 Am. Dec. 461; Bank of Montgomery Co.'s Appeal, 36 Pa. 170.

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gages, conveyances, or judgments, unless actual notice has been given the mortgagee of the existence thereof. The law requires mortgages to be recorded for the protection of creditors and purchasers. When recorded, a mortgage is notice of its contents. If it gives information that it is to stand as security for all future indebtedness to accrue from the mortgagor to the mortgagee, a person examining the record is put upon inquiry as to pending transactions between the parties, and the amount of the indebtedness covered by the mortgage, and is duly advised of the right of the mortgagee to hold the mortgaged property as security to him for such indebtedness as may accrue to him.[6] The party taking the subsequent security may protect himself by notice; and, as it is said by Mr. Jarman in his notes to Bythewood's Conveyancing, "no person ought to accept a security subject to a mortgage authorizing future advances without treating it as an actual advancement to that extent." [7]

SAME—ASSIGNMENT OF MORTGAGE.

224. 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.[1]

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.[2] In equity, however, an assignment of the debt is regarded as an assignment of the mortgage, giving the assignee a right to enforce the same.[3] It is, of course, desirable that a formal

[6] Witczinski v. Everman, 51 Miss. 841.

[7] Ackerman v. Hunsicker, 85 N. Y. 43, 52.

§ 224. [1] Carpenter v. Longan, 16 Wall. 271, 275, 21 L. Ed. 313.

[2] Sanders v. Cassady, 86 Ala. 246, 248, 5 South. 503; Smith v. Kelley, 27 Me. 237, 36 Am. Dec. 595; Adams v. Parker, 12 Gray (Mass.) 53.

[3] 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. (N. Y.) 534, 6 Am. Dec. 393; Reeves v. Hayes, 95 Ind. 521. In the other states such assignment is treated as an equitable assignment. Keyes v. Wood, 21

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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 the respective assignees will be entitled to priority according to the order of time in which these notes mature,[4] 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.[5]

SAME—CONVEYANCE OF MORTGAGED PREMISES.

225. Where mortgaged premises are conveyed subject to the mortgage, the land continues the primary fund for the payment of the debt; but the grantee does not become personally liable for the payment of the debt secured by the mortgage, unless he assumes such payment.

A mortgagor may convey the whole or any part of the mortgaged premises. If the grantee has actual notice, or constructive notice by record or otherwise, of the incumbrance, he takes subject to that incumbrance. When the deed is silent with respect to the mortgage, and the mortgage debt is not a part of the purchase price, the grantor remains the principal debtor, and the land is simply security.

Vt. 331; Mayo v. Merrick, 127 Mass. 511; Jordan v. Cheney, 74 Me. 359.

[4] Leavitt v. Reynolds, 79 Iowa, 348, 44 N. W. 567, 7 L. R. A. 365; Lyman v. Smith, 21 Wis. 674; Winters v. Bank, 33 Ohio St. 250; Doss v. Ditmars, 70 Ind. 451; Herrington v. McCollum, 73 Ill. 476; Mitchell v. Ladew, 86 Mo. 526, 88 Am. Dec. 156. 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.

[5] Lovell v. Cragin, 136 U. S. 147, 10 Sup. Ct. 1024, 34 L. Ed. 372; Fourth Nat. Bank's Appeal, 123 Pa. 484, 16 Atl. 779, 10 Am. St. Rep. 538; Penzel v. Brookmire, 51 Ark. 105, 10 S. W. 15, 14 Am. St. Rep. 23; Wilson v. Eigenbrodt, 30 Minn. 4, 13 N. W. 907; Jennings v. Moore, 88 Mich. 231, 47 N. W. 127, 21 Am. St. Rep. 601.

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The primary liability of the mortgagor to pay the debt cannot be shifted to the land, save by a conveyance thereof subject to its payment, or by deducting the amount from the consideration for the conveyance, or by some agreement between the parties changing such liability.[1] But, where the premises are conveyed subject to the mortgage, as between the mortgagor and his grantee the land is the primary fund for the payment of the debt; but, if the mortgagor is required to pay the debt secured by the mortgage out of his individual funds, he should be subrogated to the rights of the mortgagee, and may have recourse to the mortgaged premises for reimbursement.[2] The grantee does not, however, become personally liable for the mortgage debt, but the grantor mortgagor continues personally liable on his bond for any deficiency which may arise from a foreclosure sale of the mortgaged premises.[3] As a general rule, one who holds lands under a deed which, by its terms, is subject to a prior mortgage, is estopped from questioning the consideration or validity of that mortgage;[4] but the disability may be removed by the grantor conferring upon the grantee the right to question the validity of the mortgage.[5]

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;[6] and should the mortgagee, after notice of such assumption, release the grantee, or extend the time of payment without

§ 225. [1] Wadsworth v. Lyon, 93 N. Y. 201, 45 Am. Rep. 190.

[2] Johnson v. Zink, 51 N. Y. 333; Cleveland v. Southard, 25 Wis. 479; Sweetzer v. Jones, 35 Vt. 317, 82 Am. Dec. 639; Stevens v. Church, 41 Conn. 369; Drury v. Holden, 121 Ill. 130, 13 N. E. 547.

[3] Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213; Bennett v. Bates, 94 N. Y. 354; Shepherd v. May, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. Ed. 456; Tichenor v. Dodd, 4 N. J. Eq. 454; Cleveland v. Southard, 25 Wis. 479.

[4] Freeman v. Auld, 44 N. Y. 50; Johnson v. Thompson, 129 Mass. 398; Maher v. Lanfrom, 86 Ill. 513.

[5] Bennett v. Bates, 94 N. Y. 354, 371; Wolbert v. Lucas, 10 Pa. 78, 49 Am. Dec. 578.

[6] Rice v. Sanders, 152 Mass. 108, 24 N. E. 1079, 8 L. R. A. 815, 23 Am. St. Rep. 804; Snyder v. Robinson, 35 Ind. 311, 9 Am. Rep. 738; Palmeter v. Carey, 68 Wis. 426, 21 N. W. 793, 23 N. W. 586.

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the mortgagor's consent, the latter will be discharged from liability in the same manner as any other surety.[7] It is not necessary that the assumption of the debt secured by the mortgage should be expressed in any particular form. If the language clearly and unequivocally shows an intent on the part of the grantee to assume such debt, it will be sufficient.[8] 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.[9]

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.[10] Other courts,

[7] Calvo v. Davies, 73 N. Y. 211, 215, 29 Am. Rep. 130; George v. Andrews, 60 Md. 26, 45 Am. Rep. 706. But see Boardman v. Larrabee, 51 Conn. 39.

[8] Strong v. Converse, 8 Allen (Mass.) 557, 85 Am. Dec. 732; Miller v. Thompson, 34 Mich. 10; Fowler v. Fay, 62 Ill. 375. In Thayer v. Torrey, 37 N. J. Law, 339, it was held that a provision in a deed that the amount of a certain mortgage shall be paid as a part of the purchase price was an assumption of the debt; but in Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659, a similar provision was held not to be an assumption.

[9] Crawford v. Edwards, 33 Mich. 354; Ritter v. Phillips, 53 N. Y. 586.

[10] Lawrence v. Fox, 20 N. Y. 268; Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508; 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, 47 Am. Rep. 467; Bay v. Williams, 112 Ill. 91, 54 Am. Rep. 209; Rockwell v. Bank, 31 Neb. 128, 47 N. W. 641. In late New York decisions this general rule has been limited to cases where there has been a debt or duty owing from the promisee to the party suing on the promise, and there has been an intent to benefit such party. Therefore, where a grantee of mortgaged premises assumes and agrees to pay the mortgage as part of the consideration, he is not liable for a deficiency arising upon a foreclosure and sale in case his grantor was not personally liable, legally or

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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 circuity of action.[11]

SAME—FORECLOSURE OF MORTGAGE.

226. The remedies afforded in equity for enforcing the lien of the mortgagee are:

(a) By a strict foreclosure proceeding, whereby the legal estate and title of the mortgagee is made absolute and indefeasible, and the equity of redemption held by the mortgagor and those claiming under him is cut off; and

(b) By a proceeding for the foreclosure of the mortgage by a judicial sale of the mortgaged premises, and an application of the proceeds of the sale in satisfaction of the mortgage debt.

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. A strict foreclosure carries out this theory of a mortgage by rendering the legal title of the mortgagee absolute and indefeasible, and cutting off forever the equity of redemption possessed by the mortgagor and those claiming under him. In some of those states which have adopted the legal theory of a mortgage the remedy of strict foreclosure is frequently employed; but by statute in many of such states the use of

equitably, for the payment of the mortgage. Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195.

[11] Crowell v. Hospital, 27 N. J. Eq. 650; Keller v. Ashford, 133 U. S. 610, 620, 10 Sup. Ct. 494, 33 L. Ed. 667; Osborne v. Cabell, 77 Va. 462.

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strict foreclosure has been abandoned, and the foreclosure by judicial sale substituted therefor.

In England, and in Maine, New Hampshire, Massachusetts, and Rhode Island, the mortgagee may obtain possession of the premises, on default in the payment of the mortgage debt, by the legal action of ejectment or the writ of entry.[1] The mortgagor still retains the right to redeem, which continues for an indefinite period, and can only be cut off by strict foreclosure proceedings in equity, instituted by the mortgagee. The English practice is to order an accounting, and then enter a decree requiring the mortgagor to redeem within a certain period,—generally six months,—or be forever barred of his equity. If the mortgagor fails to redeem within the specified time, the legal estate and title of the mortgagee become absolute and indefeasible, and a decree is entered declaring the equity of redemption of the mortgagor, and of all other persons claiming under him, subsequent to the mortgagor, who were made parties to the suit, to be forever barred, cut off, and foreclosed.[2] This mode of foreclosure is still the usual one in Connecticut and Vermont, and may be resorted to in some of the other states.[3]

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.[4] Statutes generally require the action to be brought in the 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 devest him of his title,[5] and all subsequent lienors or incumbrancers should

§ 226. [1] 2 Jones, Mortg. § 1238.
[2] Pom. Eq. Jur. § 1227.
[3] 2 Jones, Mortg. §§ 1542, 1556.
[4] Wilts. Mortg. Forec. § 11.
[5] Landon v. Townshend, 112 N. Y. 93, 96, 19 N. E. 424, 8 Am. St. Rep. 712; Griffin v. Hodshire, 119 Ind. 235, 21 N. E. 741; Hambrick v. Russell, 86 Ala. 199, 201, 5 South. 298.

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be made parties defendant.[6] Prior mortgagees and incumbrancers need not be joined, since their rights are not affected by a sale under a subsequent mortgage.[7] 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.[8] 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.[9] 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.[10]

Foreclosure by Sale under a Power.

A more expeditious method of foreclosure exists in many of the states of this country, as well as in England.[11] Mortgages at the present time are generally 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.[12] The mortgagee must exercise his power of sale fairly and properly, and therefore he cannot buy the property either in person or by an agent, unless authorized so to do by stat-

[6] Beach, Mod. Eq. Jur. § 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.

[7] 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.

[8] Gaylord v. City of Lafayette, 115 Ind. 423, 17 N. E. 899; Barnard v. Wilson, 74 Cal. 513, 16 Pac. 307.

[9] Clarkson v. Skidmore, 46 N. Y. 301; Lithauer v. Royle, 17 N. J. Eq. 40.

[10] 2 Jones, Mortg. § 1709.

[11] 2 Jones, Mortg. § 1764.

[12] 2 Jones, Mortg. § 1827; Shillaber v. Robinson, 97 U. S. 68.

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ute or by the power;[13] 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,[14] and any surplus arising from the sale must be accounted for to the persons having estates or interests in the land.[15]

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.[16] 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.[17]

SAME—RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE.

227. A mortgagor is, in most states, entitled to the possession of the mortgaged premises, and is not accountable for the rents and profits, until possession is duly taken by the mortgagee. He may use the premises in such a manner as they are ordinarily used, but he will be liable for waste which will unreasonably impair the security of the mortgage.

228. A mortgagee in possession must exercise such care and diligence over the mortgaged prem-

[13] 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.

[14] Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; Sim v. Field, 66 Mo. 111.

[15] 2 Jones, Mortg. § 1929; Cook v. Basley, 123 Mass. 396; Buttrick v. Wentworth, 6 Allen (Mass.) 79; Ballinger v. Bourland, 87 Ill. 513, 29 Am. Rep. 69; Brown v. Association, 34 Minn. 545, 26 N. W. 907.

[16] 2 Jones, Mortg. § 1220. Lichty v. McMartin, 11 Kan. 565; Vansant v. Allmon, 23 Ill. 30.

[17] Burnell v. Martin, 2 Doug. Elect. Cas. 417; 2 Jones, Mortg. § 1215.

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ises as a prudent person would exercise in respect to his own property; and he must account for the rents and profits of the premises while he holds the same under his mortgage.[1]

It is the common custom in this country for the mortgagor to remain in possession of the mortgaged premises until by foreclosure he has been devested of his rights. While the mortgagor is in possession, he may exercise the ordinary rights of ownership; he may recover for trespass on the property;[2] he may convey or lease the premises, and may maintain an action to recover possession thereof. It has been almost universally held that the mortgagor is not accountable to the mortgagee for the rents and profits until the possession is transferred to the mortgagee.[3]

The mortgagor may use the property in his possession in the same manner as such property is ordinarily used, but he cannot so use it as to impair the security of the mortgage. If the value of the property is sufficient to afford adequate security for the mortgage, the mortgagor may be permitted to cut the timber on the mortgaged land.[4] But, if a continuance of the waste would so lessen the value of the property as to render the security inadequate, an injunction may be had by the mortgagee, and in such a case it is not necessary to allege or prove the insolvency of the mortgagor.[5]

A mortgagee in possession must use the premises as an ordinarily prudent owner. He is charged with the rents and profits of the mortgaged premises while he holds the

§§ 227, 228. [1] Beach, Mod. Eq. Jur. § 430.

[2] Talcott v. Peterson, 63 Ill. App. 421; Bird v. Decker, 64 Me. 550.

[3] Freedman's Savings & Trust Co. v. Shepperd, 127 U. S. 494, 502, 8 Sup. Ct. 1250, 32 L. Ed. 163; Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415; Murray v. Riley, 140 Mass. 490, 6 N. E. 512; Noyes v. Rich, 52 Me. 115; Argall v. Pitts, 78 N. Y. 239.

[4] Bagnall v. Villar, 12 Ch. Div. 812; King v. Smith, 2 Hare, 242; Searle v. Sawyer, 127 Mass. 491, 34 Am. Rep. 425.

[5] Stark v. Redfield, 52 Wis. 349, 9 N. W. 168; Harris v. Bannon, 78 Ky. 568; Coker v. Whitlock, 54 Ala. 180; Angier v. Agnew, 98 Pa. 587; Verner v. Betz, 46 N. J. Eq. 256, 19 Atl. 206, 7 L. R. A. 630, 19 Am. St. Rep. 387; Taylor v. Collins, 88 Ill. 107.

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same under his mortgage.[6] The doctrine upon which this rule is based has been stated thus: "While the mortgagee is the holder of the legal title to the premises, he holds it, nevertheless, subject to the equitable right of the mortgagor to pay the debt, and thus put an end to his legal title. The mortgagee is entitled to no more than the mortgage is intended to secure. So, when the mortgagor desires to redeem from the mortgagee in possession, he can, in equity, call upon the mortgagee to account for the rents and profits received by him, for the purpose of determining how much, if anything, is required in order to discharge the mortgage debt."[7] If the premises are occupied by tenants, he is chargeable with the actual rents and profits received, and no more, unless he has been guilty of willful default.[8]

SAME—REDEMPTION.

229. All persons may redeem who have an interest in the property subject to the mortgage. The redemption can only be made by payment of the entire mortgage debt; and, consequently, if the person redeeming is not primarily liable for the debt, and he redeems because of his liability as surety, or because he holds an interest in the mortgaged premises which the foreclosure of the mortgage would destroy, he is entitled to be subrogated to the rights, and to occupy the position, of the creditor from whom he redeems.

[6] Toomer v. Randolph, 60 Ala. 356; Wood v. Whelen, 93 Ill. 153; Clark v. Clark, 62 N. H. 267.

[7] Gaskell v. Viquesney, 122 Ind. 244, 23 N. E. 791, 17 Am. St. Rep. 364.

[8] Harper v. Ely, 70 Ill. 581; Moore v. Titman, 44 Ill. 367; Pinneo v. Goodspeed, 120 Ill. 524, 533, 12 N. E. 196; Merriam v. Goss, 139 Mass. 83, 28 N. E. 449; Brown v. Bank, 148 Mass. 300, 19 N. E. 382; Van Buren v. Olmstead, 5 Paige (N. Y.) 9; Quinn v. Brittain, 3 Edw. Ch. (N. Y.) 314.

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In the English system of mortgages the equity of redemption signifies the right of the mortgagor to pay the mortgage debt after default, and thus regain possession of the premises. The usual method 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 deliver possession. This method of redemption prevails in those states where the dual English system exists.[1]

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 simply by the exercise of the power of sale therein, 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.[2] This statutory right is in addition to the equitable right of redemption. It comes into existence only after the equity of redemption proper has been cut off by sale or foreclosure.[3]

The right to redeem accompanies every mortgage.[4] It is guarded most jealously by the courts, in order to prevent injustice and oppression; and it can only be extinguished by the free act of the mortgagor for a valuable consideration, by the judgment of a court, or proceedings out of court which are the statutory equivalent of such a judgment, or by the neglect of the mortgagor to assert it for such a length of time that he is presumed by law to have relinquished it.[5] As a general rule, twenty years' possession by the mortgagee without any account or acknowledgment of the mortgage is a bar to the redemption, un-

§ 229. [1] 2 Jones, Mortg. § 1093 et seq.

[2] 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.

[3] Mewburn's Heirs v. Bass, 82 Ala. 622, 2 South. 520.

[4] Henry v. Davis, 7 Johns. Ch. (N. Y.) 40, affirmed in 2 Cow. (N. Y.) 324.

[5] Holdridge v. Gillespie, 2 Johns. Ch. (N. Y.) 30; Odell v. Montross, 6 Hun (N. Y.) 155.

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less the mortgagor can bring himself within some of the exceptions made for disabilities.[6] Statutes have been passed in many of the states limiting the time within which such actions must be brought;[7] but, independent of any such statutes, the time stated in such rule is adopted by courts of equity in analogy to the statute of limitations.[8]

The right to redeem belongs to the mortgagor, and to all persons entitled to any interest in any part of the mortgaged premises under or through the mortgagor.[9] Judgment creditors[10] and junior mortgagees[11] may redeem, since they have liens on the property. The mortgagor's heirs may exercise the right, and so may his grantee, if the premises have been conveyed.[12] 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.[13]

Right of Subrogation, Contribution, and Exoneration.

Where a person interested in the premises, who is not primarily liable for the mortgage debt, pays the mortgage, and clears the premises from its lien, he may regard the transaction as an equitable assignment of the mortgage to himself, and may keep it alive to protect his own rights

[6] Jackson v. Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Locke v. Caldwell, 91 Ill. 417; Stevens v. Dedham Institute, 129 Mass. 547; Chapin v. Wright, 41 N. J. Eq. 438, 5 Atl. 574; Hoffman v. Harrington, 33 Mich. 392.

[7] Code Civ. Proc. N. Y. § 379; Civ. Code Cal. § 346.

[8] Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467.

[9] Boqut v. Coburn, 27 Barb. (N. Y.) 230.

[10] Willard v. Finnegan, 42 Minn. 476, 44 N. W. 985, 8 L. R. A. 50; 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.

[11] Twombly v. Cassidy, 82 N. Y. 155; Gaskell v. Viquesney, 122 Ind. 244, 23 N. E. 791, 17 Am. St. Rep. 364; Lewis v. Hinman, 56 Conn. 55, 13 Atl. 143.

[12] 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.

[13] 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.

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against others who are owners of or interested in the land.[14] If any such person exercises his right of redemption, he must redeem the entire mortgage by paying all of the mortgage debt, in which case he is entitled to contribution from the other persons interested in the premises, according to the value of the interests of such persons. To enforce the right of contribution, the doctrine of equitable assignment is applied, and the person redeeming the mortgage may be subrogated to all the rights, and occupy the position, of the mortgagee from whom he has redeemed the mortgage. If the equities of the parties are equal, then the others must contribute ratably to the one who has effected the redemption,—as, where a mortgage is placed upon land owned by two or more persons, whose interests therein are equal, if one of such persons redeems from the mortgage, he may compel a pro rata contribution from his co-owners;[15] and 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.[16]

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.[17] And, 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

[14] Pom. Eq. Jur. §§ 1211, 1212, 1221.

[15] Chase v. Woodbury, 6 Cush. (Mass.) 143; Damm v. Damm, 91 Mich. 424, 51 N. W. 1069; Aiken v. Gale, 37 N. H. 501.

[16] Adams v. Smilie, 50 Vt. 1.

[17] 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. Truitt, 95 Ind. 309.

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rule is that, as between the grantees, the parcels are liable in the inverse order of their alienation.[18]

MORTGAGES AND PLEDGES OF PERSONAL PROPERTY.

230. A chattel mortgage is a transfer of personal property as security for a debt or obligation in such form that, upon failure by the mortgagor to comply with the terms of the contract, the title of the property will be in the mortgagee.[1] At law, upon breach of the condition, the title vests absolutely in the mortgagee; but in equity, as in the case of real-estate mortgages, the mortgagor retains an equity of redemption notwithstanding his breach.

231. A pledge 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.

In most of the states a chattel mortgage vests the mortgagee with a legal title of the property, which title becomes absolute at law upon the mortgagor's failure to perform the condition.[2] While, by the mortgagor's default, the legal title of the mortgagee becomes absolute, equity has vested the mortgagor with a right to redeem within a reasonable

[18] National Sav. Bank v. Creswell, 100 U. S. 630, 25 L. Ed. 713; Moore v. Shurtleff, 128 Ill. 370, 21 N. E. 775; Clowes v. Dickinson, 5 Johns. Ch. (N. Y.) 235, 240; Milligan's Appeal, 104 Pa. 508; Worth v. Hill, 14 Wis. 559.

§§ 230, 231. [1] Thomas, Mortg. 427.

[2] The Civil Code of California provides that a chattel mortgage creates merely a lien on the property mortgaged. Civ. Code, § 2920. But see Taber v. Hamlin, 97 Mass. 489, 93 Am. Dec. 113; Burtis v. Bradford, 122 Mass. 129.

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time after such default.[3] To cut off this right of redemption, it is not necessary 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.[4]

The right to redeem personal property carries with it the right to have an account of the rents and profits of the mortgaged property while the mortgagee has been in possession, and, pending litigation, up to the time of making the final decree. If this were not so, the right to redeem would be, in many cases, entirely defeated by a protracted litigation.[5] The right of foreclosure and redemption is now regulated by statute in all the states.[6]

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 distinguishing it 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.[7] 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.[8]

[3] 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. 198, 11 N. W. 521.

[4] Patchin v. Pierce, 12 Wend. (N. Y.) 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.

[5] Pratt v. Stiles, 17 How. Prac. (N. Y.) 211, 222.

[6] See Jones, Chat. Mortg. c. 18, where the statutes of all the states are collected.

[7] Jones v. Smith, 2 Ves. Jr. 378; Walker v. Staples, 5 Allen (Mass.) 34; Wright v. Ross, 36 Cal. 414.

[8] Jones v. Smith, 2 Ves. Jr. 372, 378.

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CHAPTER XVIII.

EQUITABLE LIENS.

232. Definition and Nature.
233. Equitable Mortgages, how Created.
234–235. Equitable Liens Arising from Considerations of Justice.
236. Equitable Liens Arising from Charges by Will or Deed.
237. Vendor's Lien.
238. Under Contracts of Sale.
239. Arising after Conveyance of Land.

DEFINITION AND NATURE.

232. 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. It can only be enforced in equity, and is not dependent, like a common-law lien, upon the possession or retention of the property charged therewith.

A lien at common law is defined as "a right in one man to detain that which is in his possession, belonging to another, till certain demands of him, the person in possession, are satisfied." [1] 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.[2] In no case is an equitable lien dependent upon the possession or retention of the property on

§ 232. [1] Hammonds v. Barclay, 2 East, 227. This definition has been accepted as a correct one by many writers. Beach, Eq. Jur. § 287. Story defines a lien at common law as "right to possess and retain property until some charge attaching to it is paid or discharged." Story, Eq. Jur. § 377.

[2] Beach, Mod. Eq. Jur. § 287, citing Peck v. Jenness, 7 How. 612, 12 L. Ed. 841, per Grier, J.

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which it is charged.[3] Prof. Pomeroy 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."[4]

EQUITABLE MORTGAGES, HOW CREATED.

233. 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.

Many text writers do not employ the term "equitable mortgage," but use the term "equitable lien" as including within its meaning an equitable mortgage. In speaking of the doctrine of equitable liens arising from express contracts, Prof. Pomeroy uses the following language, which is also applicable to equitable mortgages created as above specified: "The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal,

[3] "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." Pom. Eq. Jur. § 1238.

[4] Pom. Eq. Jur. § 1234.

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or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey, or assign, or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien on personal property." [1] There must be a specific designation of the property to which the lien is to attach, or at least a description sufficiently accurate to indicate the property which is to be subjected thereto, in order to create an equitable mortgage, and there must be language showing clearly an intent to create such mortgage.[2]

Agreement to Give Mortgage.

On the principle that what is agreed to be done is regarded in equity as done, an express agreement in writing to give a mortgage is treated as an equitable mortgage.[3] 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 the lien, just as if a mortgage had been formally executed.[4] But in all such cases the agreement must be sufficiently clear and explicit to enable the court to give effect to the understanding of the parties.[5]

Imperfect Execution.

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

§ 233. [1] Pom. Eq. Jur. § 1235.

[2] Williams v. Lucas, 2 Cox, 160; Countess of Mornington v. Keane, 2 De Gex & J. 292; Adams v. Johnson, 41 Miss. 258; Goembel v. Arnett, 100 Ill. 34.

[3] Hall v. Hall, 50 Conn. 104; Read v. Gaillard, 2 Desaus. Eq. (S. C.) 552, 2 Am. Dec. 696; In re Howe, 1 Paige (N. Y.) 125, 19 Am. Dec. 395; Payne v. Wilson, 74 N. Y. 348; Starks v. Redfield, 52 Wis. 349, 9 N. W. 168.

[4] 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.

[5] McClintock v. Laing, 22 Mich. 212.

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intended to execute a mortgage on specified property to secure a certain debt.[6] And, although neither the word "lien" nor "mortgage" appears in the contract, yet if, from its character, it is manifest that it was contemplated by the parties that the property specified therein should constitute a security for the performance of the obligation, equity will give effect to the intention.[7] As was said by Lord Justice James: "I apprehend that, where this court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to that intention, notwithstanding any mistake which may have occurred in the attempt to effect it." [8] As where, upon receiving a grant of land, the grantee executed an agreement, not under seal, to support and maintain the grantor, pledging for that purpose the produce of the land, and, should that prove insufficient, appropriating the entire fee, it was held that such agreement, being the consideration of the grant, was an equitable mortgage of the land.[9] And a deed of trust, which is inoperative at law because of a failure to insert the name of the trustee, if the deed is perfect in other respects, will be considered in equity as an equitable mortgage.[10] A lack of formality in the execution or acknowledgment of instruments intended as mortgages will not destroy their character as mortgages, but they will be treated as equitable liens on the property intended to be charged therewith.[11]

Deposit of Title Deeds.

In England a deposit of title deeds by a debtor with his creditor constitutes an equitable mortgage, even though

[6] 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, 27 L. Ed. 910; Bank of Muskingum v. Carpenter's Adm'rs, 7 Ohio, pt. 1, p. 21, 28 Am. Dec. 616.

[7] Dunman v. Coleman, 59 Tex. 199; Weed v. Mirick, 62 Mich. 414, 29 N. W. 78; Whittemore v. Fisher, 132 Ill. 243, 24 N. E. 636.

[8] In re Strand Music Hall Co., 3 De Gex, J. & S. 147.

[9] Chase v. Peck, 21 N. Y. 581.

[10] McQuie v. Peay, 58 Mo. 56.

[11] McClurg v. Phillips, 49 Mo. 315; Dunn v. Raley, 58 Mo. 134; Burnet v. Boyd, 60 Miss. 627; Abbott v. Godfrey's Heirs, 1 Mich. 178.

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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.[18] This method of creating a lien on land was peculiarly adapted to England at a time when, in the absence of laws requiring the registration of instruments conveying real property, the possession of the title deeds was the only evidence of the ownership of the land. No one was presumed to have the right to their possession unless he had an equitable or legal title to the land described therein, and their exhibition when a conveyance was executed was the only safeguard of the vendee that the valid title was in the vendor. In this country registry laws have done away with the necessity of the exhibition of title deeds. A vendee may examine the records, and be assured as to the validity of the title which he is to acquire. The creation of an equitable mortgage by the mere deposit of title deeds has not, therefore, been looked upon with favor by our courts; and for the most part the English doctrine has been repudiated as wholly inconsistent with our statutory system of registry and methods of conveyancing.[19] The English doctrine of an equitable mortgage resulting from a deposit of title deeds assumes a simple deposit as security, without any express written agreement. But, if the deposit of the deeds should be accompanied by a written agreement to the effect that the lands described therein were to be considered as a security for the payment of a debt, such agree-

[18] Russell v. Russell, 1 Brown, Ch. 269; 1 White & T. Lead. Cas. Eq. 931; Keys v. Williams, 3 Younge & C. 55.

[19] 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. (N. Y.) 9; Griffin v. Griffin, 18 N. J. Eq. 104; Mowry v. Wood, 12 Wis. 413; Edwards' Ex'rs v. Trumbull, 50 Pa. 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.

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ment would, under the principles laid down as above, constitute an equitable mortgage of such lands.[14]

Mortgage of an Equitable Estate.

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 first are merely equitable mortgages, since he has nothing but an equity to mortgage.[15] 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.

EQUITABLE LIENS ARISING FROM CONSIDERATIONS OF JUSTICE.

234. Equitable liens will arise without express agreement of the parties, based upon considerations of right and justice.

235. Such equitable liens will arise

(a) Where an occupant of land, innocently and in good faith, under a belief that he is the owner thereof, makes improvements, repairs, or other expenditures, which permanently increase the value of the property.

(b) Where one of two or more joint owners of property makes repairs and improvements, which permanently increase the value of the entire property.

(c) Where a tenant for life completes permanent and beneficial improvements to the estate, which had been commenced by the testator.

[14] In re Luch's Appeal, 44 Pa. 519; Edwards' Ex'rs v. Trumbull, 50 Pa. 509.

[15] Smith, Eq. p. 285.

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Improvements by Occupant.

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.[1] While a person expending money through mistake has no claim in equity for reimbursement in an action brought therefor against the true owner, who was ignorant of the expenditure, and did nothing to encourage it, yet whenever it is necessary for the owner himself to proceed in equity the principle that he who seeks equity must do equity is applied, and he will only be entitled to seek the aid of the court upon making compensation for the expenditures.[2] 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.[3] This question is now generally regulated by statutes in the various states.

Improvements by Joint Owner.

Where one of two or more joint owners of property has expended money in making necessary and useful repairs to preserve the common property from ruin and decay, he may not only compel his co-owners to contribute their share of the cost of such repairs, but he also has an equitable lien upon their interests in the property.[4] But it has been held that no lien will arise for permanent improvements made independent of contract, since the other co-owners might thus be deprived of their share in the property by the erection of improvements for which they are unable to pay.[5]

§§ 234–235. [1] McCoy v. Grandy, 8 Ohio St. 465, 466; Lunquest v. Ten Eyck, 40 Iowa, 213.

[2] Neeson v. Clarkson, 4 Hare, 97; Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1,875; Green v. Biddle, 8 Wheat. 77, 5 L. Ed. 547; Putnam v. Ritchie, 6 Paige (N. Y.) 390, 404; Thomas v. Evans, 106 N. Y. 614, 12 N. E. 571.

[3] Murray v. Gouverneur, 2 Johns. Cas. (N. Y.) 438, 441, 1 Am. Dec. 177.

[4] Lake v. Craddock, 3 P. Wms. 158; Haven v. Mehlgarten, 19 Ill. 95; Alexander v. Ellison, 79 Ky. 148.

[5] Corbett v. Laurens, 5 Rich. Eq. (S. C.) 301; Carver v. Coffman, 109 Ind. 547, 10 N. E. 567.

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Improvements by Tenant for Life.

A tenant for life, who is entitled to the possession of the property for an indefinite period, is presumed to make improvements thereon for his own personal enjoyment; and hence the remainder-man's interest should not be charged with a lien for such improvements.[6] But if a tenant for life, holding under a will, expends money in completing permanent beneficial improvements which were begun by the testator, he may have a lien upon the property benefited for the amount so expended.[7]

EQUITABLE LIENS ARISING FROM CHARGES BY WILL OR DEED.

236. An equitable lien is created where land or other property is conveyed, devised, or bequeathed subject to or charged with the payment of debts, legacies, portions, or annuities to third persons.

Charges upon land and other property are sometimes made by instruments inter vivos; as, where land is settled by deed upon sons charged with the payment of portions in favor of daughters. But in this country such charges are much more frequently created by will. Where property is devised or bequeathed subject to the payment of the testator's debts, or of legacies to certain persons named in the will, a lien arises in favor of the creditors or legatees which may be enforced against the property so disposed of. Such lien may be enforced not only against the devisee, but also against the grantee, mortgagee, or other subsequent purchasers of the property, who takes such property with notice of the lien.[1]

The personal property of a deceased person is the primary fund for the payment of debts, and the exclusive fund, as

[6] Corbett v. Laurens, 5 Rich. Eq. (S. C.) 301, 315; Taylor v. Foster's Adm'r, 22 Ohio St. 255.

[7] Dent v. Dent, 30 Beav. 363; Sohier v. Eldredge, 103 Mass. 345, 351.

§ 236. [1] Blauvelt v. Van Winkle, 29 N. J. Eq. 111; Donnelly v. Edelen, 40 Md. 117.

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between legatees and devisees, for the payment of legacies.[2] An intention to overcome this rule must be clearly shown, either by the express language of the will or by implication from the provisions thereof, and the circumstances of the parties interested therein.[3] As has been said in a leading New York case on this subject: "Legacies may be charged upon real estate without express direction in the will, if the intention of the testator so to do can be fairly gathered from all the provisions of the will; and extraneous circumstances may be considered in aid of the terms of the will." [4]

The testator may expressly charge the payment of his debts or of a legacy upon a particular piece of real property, or upon the real property devised by a residuary clause. Similar charges may be made upon any particular fund, or upon personal property bequeathed by a residuary clause. The language employed in creating an express charge is not important if the intention to charge the property with the payment of the debt or legacy is manifest in the will.[5] The rule in England, and in some of the courts of this country, is that, if the testator gives a legacy, and then makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund, the testator's real, as well as his personal, estate will be charged with the payment of the legacies.[6]

[2] 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, 60 Am. Rep. 743; Appeal of Mann (Pa.) 14 Atl. 270; Davidson v. Coon, 125 Ind. 497, 25 N. E. 601; Allen v. Patton, 83 Va. 255, 2 S. E. 143; Hogan v. Kavanaugh, 138 N. Y. 417, 34 N. E. 292.

[3] Taylor v. Dodd, 58 N. Y. 335; Heslop v. Gatton, 71 Ill. 528; Owens v. Claytor, 56 Md. 129; Stevens v. Flower, 46 N. J. Eq. 340, 19 Atl. 777; Duncan v. Wallace, 114 Ind. 169, 170, 16 N. E. 137.

[4] Hoyt v. Hoyt, 85 N. Y. 142, 146.

[5] An express charge may be in positive terms; as, where A. devises certain land to B., subject to the payment of a debt or legacy to C., or where the testator directs that the payment of all his debts and legacies be charged upon the real estate devised by his will. See Brown v. Knapp, 79 N. Y. 136; Olmstead v. Brush, 27 Conn. 530. In some of the states it is held that a direction to a devisee that he shall pay a certain debt or legacy does not, without further language showing the testator's intention, create a charge on the land devised. In re Cable's Appeal, 91 Pa. 327; Allen v. Patton, 83 Va. 255, 2 S. E. 143.

[6] Greville v. Browne, 7 H. L. Cas. 689; Stevens v. Flower, 46 N.

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The rule in New York has been stated to be as follows: "When legacies are given generally, and the residue of the real and personal estate is afterwards devised in one mass, and it appears from other provisions on the face of the will that the testator must have contemplated, from the known condition of his property, that the personal estate would not be sufficient to pay his legacies, and that they could not be paid without resorting to the real estate embraced within the terms of the residuary clause, then an intention on his part will be implied that the legacies shall be payable out of such real estate, as well as out of the personalty; or, in other words, the residue of the real estate will be charged with their payment." [7] A somewhat similar rule seems to have been adopted in Connecticut,[8] Maryland,[9] and New Jersey.[10]

While a charge of debts and legacies on the land creates a lien, the primary liability of the personalty is not thereby exonerated, unless the intention of the testator to exonerate appears either by an express declaration or by clear implication.[11] Hence, as a rule, the creditor or legatee has

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, 14 L. Ed. 819; Lafferty v. Bank, 76 Mich. 35, 43 N. W. 34; Atmore v. Walker (C. C.) 46 Fed. 429; Lapham v. Clapp, 10 R. I. 543; Jaudon v. Ducker, 27 S. C. 295, 3 S. E. 465. This rule has been modified 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.

[7] Pom. Eq. Jur. § 1247, note. And see Bevan v. Cooper, 72 N. Y. 317; Le Fevre v. Toole, 84 N. Y. 95; Hoyt v. Hoyt, 85 N. Y. 142, 147, where Judge Folger said: "It is assumed that no man, in making a final disposition of his property, will make a legacy save with the honest, sober-minded intention that it shall be paid. Hence when, from the provisions of the will prior to the gift of legacies, it is seen that the testator must have known that he had already so far disposed of his personal estate as that there would not be enough left to pay the legacies, it is reasoned that the bare fact of giving a legacy indicates an intention that it shall be met from the real estate." See, also, Goddard v. Pomeroy, 36 Barb. (N. Y.) 546; McCorn v. McCorn, 100 N. Y. 511, 3 N. E. 480.

[8] Canfield v. Bostwick, 21 Conn. 550; Gridley v. Andrews, 8 Conn. 1.

[9] White v. Kauffman, 66 Md. 89, 5 Atl. 865.

[10] Corwine v. Corwine's Ex'rs, 23 N. J. Eq. 368; Leigh v. Savidge's Ex'rs, 14 N. J. Eq. 124; Massaker v. Massaker, 13 N. J. Eq. 264.

[11] Tower v. Lord Rous, 18 Ves. 132, 138; Miller v. Cooch, 5 Houst.

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three remedies for enforcing a debt or legacy charged on the land: (1) He may either enforce payment from the executor in the usual course of administration; or (2) he may foreclose the lien against the land; or (3) if the devise has been made conditioned 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.[12]

VENDOR'S LIEN.

237. 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.[1]

This doctrine has been established for many years in the courts of England; the leading case, perhaps, being that of Mackreth v. Symmons,[2] decided by Lord Eldon in 1808. In considering the grounds upon which the doctrine is based, Lord Eldon said in this case: "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; and there is no doubt that a third person, having full knowledge that the other got the estate without payment, cannot maintain that, though a court of equity will not permit him to keep it, he may give it to another person without payment." By some writers vendors' liens are said to have their origin from the trust relation which exists between the vendor and vendee, the vendor being regarded as holding the title subject to a trust for the payment of the purchase money.[3] Others regard the

(Del.) 540, 569; Hanson v. Hanson, 70 Me. 508, 511; Kirkpatrick v. Rogers, 42 N. C. 44.

[12] Brown v. Knapp, 79 N. Y. 136; Lord v. Lord, 22 Conn. 595, 602.

§ 237. [1] 2 Sugd. Vend. 671.

[2] 15 Ves. 329, 1 White & T. Lead. Cas. Eq. 355.

[3] 2 Story, Eq. Jur. § 1218 et seq.; Snell, Eq. § 142; Perry, Trusts, §§ 231, 232; Blackburn v. Gregson, 1 Brown, Ch. 420.

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vendor's lien as an equitable mortgage,[4] and others as arising from the implied intention of the parties.[5]

SAME—UNDER CONTRACTS OF SALE.

238. Where land is sold under a contract of sale, the vendor retains the legal title, of which he cannot be devested except by the payment of the purchase money, which the retention of the legal title was intended to secure.[1] This title is sometimes incorrectly termed a vendor's lien.

Many cases, both English and American, have held that a vendor's lien may arise both before and after a conveyance of the title to land to the purchaser.[2] Before conveyance, under an agreement to sell, the legal title remains in the vendor. The vendee cannot prejudice this title, or by any act destroy its validity, except by paying the purchase money according to the terms of agreement. The vendor retains the legal title to secure the payment of the purchase price. This title is much more efficacious as a security than a mere lien would be. It has been frequently said that, when a contract is consummated for the sale and purchase of real property, and the relation of vendor and vendee is constituted,

[4] Adams, Eq. 127; Wilson v. Davisson, 2 Rob. (Va.) 384, 404.

[5] In Kauffelt v. Bower, 7 Serg. & R. (Pa.) 64, 76, 10 Am. Dec. 428, 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 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, 19 Am. Dec. 449, 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.

§ 238. [1] Beach, Mod. Eq. Jur. § 298.

[2] Dixon v. Gayfere, 1 De Gex & J. 655; Weare v. Linnell, 29 Mich. 224; Hill v. Grigsby, 32 Cal. 55; Haughwout v. Murphy, 22 N. J. Eq. 531; Neel v. Clay, 48 Ala. 252; Sykes v. Betts, 87 Ala. 537, 6 South. 428; Williams v. Simmons, 79 Ga. 649, 7 S. E. 183.

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the vendor becomes a constructive trustee for the vendee.[3] In equity the vendor becomes by equitable conversion the owner of the purchase money, of which the vendee is his trustee.[4] This interest is personal property, and passes upon his death to his personal representatives. The vendee is, in equity, the real and beneficial owner of the land; and his interest therein under the contract will descend as real property to his heirs.

This co-called vendor's lien can be nothing more than the right of the vendor to enforce his claim for the purchase money, out of the vendee's equitable interest in the property sold, by means of a suit in equity to compel the payment of such purchase money within the time prescribed in the contract, or else be barred of all his rights thereunder.[5]

SAME—ARISING AFTER CONVEYANCE OF LAND.

239. In England and in many of the states in this country the grantor of land, who has sold, conveyed, and delivered possession to the grantee, retains an equitable lien upon the land for the unpaid purchase money, although there is no distinct agreement to that effect, and he has taken no separate security for it, and even though the deed recites that the consideration has been fully paid.[1]

This lien has been recognized in the courts of equity in England from an early period. In the case of Chapman v. Tanner [2] such a lien was allowed, based upon the ground that it is "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."

In this country vendors' liens have been recognized by the

[3] Shaw v. Foster, L. R. 5 H. L. 321, 338, 349, 356; Lysaght v. Edwards, 2 Ch. Div. 499, 506, 507. And see ante, p. 484.

[4] See Conversion and Reconversion, ante, p. 223.

[5] Pom. Eq. Jur. §§ 1261, 1262.

§ 239. [1] Pom. Eq. Jur. § 1249.

[2] (1684) 1 Vern. 267.

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courts of Alabama,[3] Arkansas,[4] California,[5] Colorado,[6] District of Columbia,[7] Florida,[8] Illinois,[9] Indiana,[10] Iowa,[11] Kentucky,[12] Louisiana,[13] Maryland,[14] Michigan,[15] Minnesota,[16] Mississippi,[17] Missouri,[18] New Jersey,[19] New York,[20] North and South Dakota,[21] Ohio,[22] Oregon,[23] Rhode Island,[24] Tennessee,[25] Texas,[26] and Wisconsin.[27] In Geor-

[3] Woodall v. Kelly, 85 Ala. 368, 5 South. 164, 7 Am. St. Rep. 57; Jones v. Lockard, 89 Ala. 575, 8 South. 108.

[4] Springfield & M. R. Co. v. Stewart, 51 Ark. 285, 10 S. W. 767.

[5] Civ. Code, § 3046; Avery v. Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272.

[6] Francis v. Wells, 2 Colo. 660.

[7] Ford v. Smith, 1 McArthur, 592.

[8] Bradford v. Marvin, 2 Fla. 463.

[9] Dyer v. Martin, 4 Scam. 146; Andrus v. Coleman, 82 Ill. 26, 25 Am. Rep. 289; Gruhn v. Richardson, 128 Ill. 178, 21 N. E. 18.

[10] Lagow v. Badollet, 1 Blackf. 416, 12 Am. Dec. 258; Fouch v. Wilson, 60 Ind. 64, 28 Am. Rep. 651; Brower v. Witmeyer, 121 Ind. 83, 22 N. E. 975.

[11] Grapengether v. Fejervary, 9 Iowa, 163, 74 Am. Dec. 336; Kendrick v. Eggleston, 56 Iowa, 128, 8 N. W. 786, 41 Am. Rep. 90; Erickson v. Smith, 79 Iowa, 374, 44 N. W. 681.

[12] Fowler v. Rust's Heirs, 2 A. K. Marsh. 294; Brown v. Ferrell, 83 Ky. 417.

[13] Pedesclaux v. Legare, 32 La. Ann. 380.

[14] 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.

[15] Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Richards v. Lumber Co., 74 Mich. 57, 41 N. W. 860.

[16] Selby v. Stanley, 4 Minn. 65 (Gil. 34); Peters v. Tunell, 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252.

[17] Dunlap v. Burnett, 5 Smedes & M. 702, 45 Am. Dec. 269; Lissa v. Posey, 64 Miss. 352, 1 South. 500.

[18] McKnight v. Brady, 2 Mo. 110; Christy v. McKee, 94 Mo. 241, 6 S. W. 656.

[19] Vandoren v. Todd, 3 N. J. Eq. 397; Acton v. Waddington, 46 N. J. Eq. 16, 18 Atl. 356.

[20] Champion v. Brown, 6 Johns. Ch. 398, 402, 10 Am. Dec. 343; Chase v. Peck, 21 N. Y. 581.

[21] Civ. Code, § 1801.

[22] Tiernan v. Beam, 2 Ohio, 383, 15 Am. Dec. 557; Anketel v. Converse, 17 Ohio St. 11, 91 Am. Dec. 115.

[23] Gee v. McMillan, 14 Or. 268, 12 Pac. 417, 58 Am. Rep. 315.

[24] Kent v. Gerhard, 12 R. I. 92, 34 Am. Rep. 612.

[25] Eskridge v. McClure, 2 Yerg. (Tenn.) 86; Cate v. Cate, 87 Tenn. 41, 9 S. W. 231.

[26] Briscoe v. Bronaugh, 1 Tex. 326, 46 Am. Dec. 108; White v.

[27] See foot note 27 on following page.

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gia,[28] Vermont,[29] Virginia,[30] and West Virginia [31] they have been abrogated by legislation; while in Kansas,[32] Maine,[33] Massachusetts,[34] Nebraska,[35] North Carolina,[36] Pennsylvania,[37] and South Carolina [38] they have been rejected as opposed to public policy, which requires all matters affecting land titles to be made a matter of record.

The vendor's lien is not permitted as a security for any other indebtedness than the unpaid purchase money. A fixed and certain debt for the purchase price of land is essential to the existence of a vendor's lien. So, when a sale of both real and personal property is made 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.[39] And it has also been held that, if the consideration is something other than money,—as an agreement to support the grantor during life,[40] or the delivery of a specified quantity of cotton,[41] —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

Downs, 40 Tex. 225; Howe v. Harding, 76 Tex. 17, 13 S. W. 41, 18 Am. St. Rep. 17.

[27] Tobey v. McAllister, 9 Wis. 465; Evans v. Enloe, 70 Wis. 345, 34 N. W. 918, and 36 N. W. 22.

[28] Code 1882, § 1997.

[29] Gen. St. 1862, c. 65, § 33.

[30] Code 1873, c. 115, § 1.

[31] Code 1870, c. 75, § 1.

[32] Simpson v. Mundee, 3 Kan. 172; Greeno v. Barnard, 18 Kan. 518.

[33] Philbrook v. Delano, 29 Me. 410, 415.

[34] Ahrend v. Odiorne, 118 Mass. 261.

[35] Edminster v. Higgins, 6 Neb. 265.

[36] 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.

[37] Kauffelt v. Bower, 7 Serg. & R. 64, 10 Am. Dec. 428; Hiester v. Green, 48 Pa. 96, 86 Am. Dec. 569; Strauss' Appeal, 49 Pa. 353.

[38] Wragg v. Comptroller General, 2 Desaus. Eq. 509, 520.

[39] Erickson v. Smith, 79 Iowa, 374, 44 N. W. 681; Peters v. Tunell, 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252; Alexander v. Hooks, 84 Ala. 605, 4 South. 417; Stringfellow v. Ivie, 73 Ala. 209, 214.

[40] Peters v. Tunell, 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252.

[41] Harris v. Hanie, 37 Ark. 348.

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purchasers for value, without notice.[42] A volunteer, therefore, takes subject to the lien, though he had no notice; and so does a purchaser for value with notice.[43]

There is a direct conflict of opinion in American courts as to whether a vendor's lien after conveyance is a prior lien to that of a subsequent judgment creditor without notice. The weight of authority, founded on better principle, favors the precedence of the subsequent judgment lien.[44]

By the weight of authority in the United States, a vendor's lien is not assignable, but is personal to the grantor himself,[45] though in England [46] and some of the states the rule is otherwise.[47]

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.[48]

[42] 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, 78 Mo. 57.

[43] Christopher v. Christopher, 64 Md. 583, 3 Atl. 296; Beal v. Harrington, 116 Ill. 113, 4 N. E. 664.

[44] Allen v. Loring, 34 Iowa, 499; Cook v. Banker, 50 N. Y. 655; Robinson v. Williams, 22 N. Y. 380; Bayley v. Greenleaf, 7 Wheat. 46, 5 L. Ed. 393; Webb v. Robinson, 14 Ga. 216; Adams v. Buchanan, 49 Mo. 64. Contra, see Dickerson v. Carroll, 76 Ala. 377; Tucker v. Hadley, 52 Miss. 414; Aldridge v. Dunn, 7 Blackf. (Ind.) 249, 41 Am. Dec. 224; Bowman v. Faw, 5 Lea (Tenn.) 472.

[45] First Nat. Bank v. Mills Co. (C. C.) 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 (N. Y.) 502; Ogle v. Ogle, 41 Ohio St. 359; Burkhardt v. Howard, 14 Or. 39, 12 Pac. 79.

[46] Dryden v. Frost, 3 Mylne & C. 670.

[47] 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. (Ky.) 67, 43 Am. Dec. 147; Louisiana Nat. Bank v. Knapp, 61 Miss. 485; Sloan v. Campbell, 71 Mo. 387, 36 Am. Rep. 493; De Bruhl v. Maas, 54 Tex. 464.

[48] 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, 97 Am. Dec. 429; Thompson v. Corrie, 57 Md. 197.

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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 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 thing bargained for, the lien does not exist.[49] 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,[50] or a mortgage on land.[51]

Express Reservation of Lien.

In the foregoing classes of cases the lien has been deemed waived 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,[52] and is recognized and enforced in some of the states where that lien is abrogated, since it is a matter of record.[53]

[49] 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, 34 Am. Rep. 612; Madden v. Barnes, 45 Wis. 135, 30 Am. Rep. 703; Dance v. Dance, 56 Md. 435; Lavender v. Abbott, 30 Ark. 172.

[50] 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.

[51] Nairn v. Prowse, 6 Ves. 752; Bond v. Kent, 2 Vern. 281; Chicago & G. W. R. 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.

[52] King v. Association, 1 Woods, 386, Fed. Cas. No. 7,811; Kirk v. Williams (C. C.) 24 Fed. 437; Exchange & Deposit Bank and Commercial Bank of Knoxville v. Bradley, 15 Lea (Tenn.) 279; Collins v. Richart, 14 Bush (Ky.) 621; Eichelberger v. Gitt, 104 Pa. 64; Talleferro v. Burnett, 37 Ark. 511.

[53] Hiester v. Green, 48 Pa. 96; Yancey v. Mauck, 15 Grat. (Va.) 300.

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CHAPTER XIX.

ASSIGNMENTS.

240. Assignments at Common Law.
241–242. Assignability of Choses in Action.
243–244. Equitable Assignments—Possibilities and Expectancies—After-Acquired Property.
245. Order upon a Fund.
246–247. Notice to Debtor.
248. Assignment Subject to Equities.

ASSIGNMENTS AT COMMON LAW.

240. By the ancient common law, the assignment of choses in action, expectancies, possibilities, and the like, was prohibited, and the rights of the assignee in and to the property assigned were not recognized.

It was said 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." [1] 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." [2] From a

§ 240. [1] Lampet's Case, 10 Coke, 48.

[2] Pol. 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 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

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very early time there was an exception to this common-law rule in favor of the king, and an exception also arose respecting private persons in the case of bills of exchange and promissory notes.[3] It also appears that annuities could be assigned under the common-law rule, where express words to that effect were used in the instrument creating the annuity.[4] There seems to be no logical reason for excepting annuities from the general rule, as, from their nature, they are personal contracts, and therefore choses in action.[5] It was probably thought that it would be oppressive if this species of property was not alienable in the same manner as personal property in possession.

In the course of time courts of law have come to recognize the rights of an assignee of a chose in action to bring an action in the name of the assignor, and equitable interference became unnecessary in this class of cases.[6] It has been said that the true meaning of the common-law rule was that an assignee could not bring an action upon a nonnegotiable chose in action in his own name. "Courts of law had long recognized the essential validity of such an assignment in a large class of cases by permitting the assignee who sued in the name of the assignor to have entire control of the action, and by treating him as the only person immediately interested in the recovery. Indeed, the assignment gave to the assignee every element and right of property in the de-

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."

[3] Spence, Eq. Jur. p. 850.

[4] Maund's Case, 7 Coke, 28b.

[5] 2 Spence, Eq. Jur. p. 850.

[6] 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, 1 Am. Dec. 93; Hammond v. Messenger, 9 Sim. 327; Keys v. Williams, 3 Younge & C. Exch. 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, 27 L. Ed. 271; Hagar v. Buck, 44 Vt. 285, 290, 8 Am. Rep. 368.

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mand transferred, except the single one of suing upon it in his own name. It was regarded as assets in his hands and in those of his personal representatives. His rights were completely protected against the interference of the assignor with an action brought in the latter's name." [7]

The judicature acts in England have changed the common-law rule, and an absolute assignment of a chose in action is made effectual at law, and the assignee may sue thereon in his own name.[8] In New York, and in all the other states where the new system of procedure has been adopted, the real party in interest—which, of course, includes an assignee—is required to sue in his own name.[9]

ASSIGNABILITY OF CHOSES IN ACTION.

241. All choses in action embracing demands which are considered as matters of property or estate are now assignable at law and in equity.[1]

242. To determine whether a cause of action is assignable at law, the following rule has been formulated: If the cause of action survives, and passes as an asset to the personal representatives of a decedent creditor, or continues as a liability against the representatives of a decedent debtor, it is assignable; otherwise not.[2]

It has always been held at law and in equity that nothing is assignable which does not, directly or indirectly, involve a property right.[3] Applying the rule as above formulated, all contracts and rights of action for their enforcements,

[7] Pom. Code Rem. § 124.

[8] 36 & 37 Vict. c. 66, § 25, subsec. 6.

[9] Code Civ. Proc. N. Y. § 449.

§§ 241, 242. [1] Hoyt v. Thompson, 5 N. Y. 320, 347.

[2] Pom. Code Rem. § 147; Brackett v. Griswold, 103 N. Y. 425, 428, 9 N. E. 438; Stewart v. Railway Co., 62 Tex. 246; Dayton v. Fargo, 45 Mich. 153, 7 N. W. 758.

[3] Dayton v. Fargo, 45 Mich. 153, 7 N. W. 758.

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except contracts of a personal nature, involving personal trust or confidence, are assignable.[4] Causes of action arising from torts, affecting the value of real or personal property, or from any fraud or other wrong whereby an interest or estate, either real or personal, is injured, or in any way lessened in value, will survive the death of the injured party, and are therefore assignable.[5] The statutory right of action for wrongfully killing a person is regarded as an asset of his estate, and is therefore assignable;[6] as is also a cause of action against a railroad company for damages caused by negligently running over and killing cattle, since the injury is one to the estate, and not to the person.[7] Any claim for property fraudulently taken, received, or withheld may be assigned,[8] and so may a cause of action for fraudulent representations concerning the value of certain property.[9] Where the damages are confined to the body and feelings of the person injured, a cause of action therefor cannot be assigned. It is well settled that an administrator or executor cannot recover upon a right of action accruing to the deceased, where the damage consists entirely of the personal sufferings of the deceased, whether mental or corporeal. Actions for breach of a promise of marriage, for unskillfulness of medical practitioners contrary to their implied undertaking, or the imprisonment of a person on account of the neglect of his attorney to perform his professional engagements, fall under this head, being considered virtually actions for injuries to the person.[10]

[4] Pom. Code Rem. § 147; Bliss, Code Pl. 47.

[5] Hoyt v. Thompson, 5 N. Y. 320; Tyson v. McGuineas, 25 Wis. 656.

[6] Quinn v. Moore, 15 N. Y. 432.

[7] G. H. & S. A. R. Co. v. Freeman, 57 Tex. 156.

[8] Hoyt v. Thompson, 5 N. Y. 320; McKee v. Judd, 12 N. Y. 622, 64 Am. Dec. 515; Sherman v. Elder, 24 N. Y. 381; Richtmeyer v. Remsen, 38 N. Y. 206; Chouteau v. Boughton, 100 Mo. 406, 13 S. W. 877; Lazard v. Wheeler, 22 Cal. 139.

[9] Garland v. Harrington, 51 N. H. 409; Edwards v. Parkhurst, 21 Vt. 472; Rice v. Stone, 1 Allen (Mass.) 566; Grant v. Ludlow's Adm'r, 8 Ohio St. 1, 37.

[10] Zabriskie v. Smith, 13 N. Y. 322, 333, 64 Am. Dec. 556, per Denio, J. And see People v. Tioga Common Pleas, 19 Wend. (N. Y.) 73; Comegys v. Vasse, 1 Pet. 213, 7 L. Ed. 108; Tyson v. McGuineas, 25 Wis. 656; Byxbie v. Wood, 24 N. Y. 607. If only personal relations are affected by fraud or deceit, a cause of action therefor is not assignable. Higgins v. Breen, 9 Mo. 497. A right of action for

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There are certain assignments which 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.[11] And 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.[12] 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;[13] and an act of congress prohibits the assignment of pensions issued to veterans of the Civil War.[14]

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.[15]

Equitable Jurisdiction in Favor of Assignee.

In those states in which the right of an assignee to sue in his own name upon the claim assigned to him is not recognized, the question sometimes arises as to when equity will intervene to aid the assignee in the enforcement of his claim. As a general rule, equity will not entertain a suit by an assignee of a legal chose in action, for the only reason that he cannot sue at law in his own name. But, if it appears that

personal injuries does not survive to an executor; and here is found the proper test of the assignability of a chose in action. Purple v. Railroad Co., 4 Duer (N. Y.) 74; Rice v. Stone, 1 Allen (Mass.) 566; nor for false imprisonment, Moonan v. Orton, 84 Wis. 259, 17 Am. Rep. 441.

[11] Bradlaugh v. Newdegate, 11 Q. B. Div. 1; Dorwin v. Smith, 35 Vt. 69; Thurston v. Percival, 1 Pick. (Mass.) 415; Coquillard's Adm'r v. Bears, 21 Ind. 479, 83 Am. Dec. 362; Martin v. Veeder, 20 Wis. 466.

[12] Davis v. Duke of Marlborough, 1 Swanst. 74; Arbuthnot v. Norton, 5 Moore, P. C. 219; Wells v. Foster, 8 Mees. & W. 149.

[13] Bliss v. Lawrence, 58 N. Y. 442, 17 Am. Rep. 273; Wayne Tp. v. Cahill, 49 N. J. Law, 144, 148, 6 Atl. 621; Field v. Chipley, 79 Ky. 260, 42 Am. Rep. 215; Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963; Schloss v. Hewlett, 81 Ala. 266, 1 South. 263; Shannon v. Bruner (C. C.) 36 Fed. 147; Clark, Cont. 419.

[14] Act Feb. 28, 1883.

[15] Code Civ. Proc. § 1910.

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an assignor prevents the bringing of such an action in his name, or that an action so brought would not afford the assignee an adequate remedy, he will be permitted to sue in equity.[16]

EQUITABLE ASSIGNMENTS—POSSIBILITIES AND EXPECTANCIES—AFTER-ACQUIRED PROPERTY.

243. An assignment of a mere possibility or expectancy, based upon a valuable consideration, will be enforced in equity whenever the possibility or expectancy becomes a vested interest or possession.

244. Equity will uphold assignments of property to be acquired in the future, and will enforce them when the property acquired comes into existence.

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.[1] Whatever doubts may have formerly existed on this subject, the better opinion now is that courts of equity will support assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but vest in possibility only, provided

[16] Chicago & N. W. Ry. Co. v. Nichols, 57 Ill. 464; Thompson v. Railroad Co., 6 Wall. 134, 18 L. Ed. 765; Walker v. Brooks, 125 Mass. 241. And see Hammond v. Messenger, 9 Sim. 327.

§§ 243, 244. [1] Warmstrey v. Tanfield, 1 Ch. R. 29, 2 White & T. Lead. Cas. Eq. 794. Other assignment of expectancies held valid in equity: Of heirs at law, Hobson v. Trevor, 2 P. Wms. 191; Stover v. Eycleshimer, 4 Abb. Dec. (N. Y.) 302; 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 Anstr. 34.

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the agreements are fairly entered into, and it would not be against public policy to uphold them.[2]

Recent statutes in England authorize the assignment at law of executory and future possibilities when coupled with an interest in real estate,[3] 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.[4] These statutes leave untouched the assignment of possibilities or expectancies not coupled with an interest in property, and hence such an assignment is still enforced only in equity.

Assignment of After-Acquired Property.

At common law the assignment of property to be acquired in the future was void; as, for an example, the future freights, earnings, and profits of a ship.[5] No legal property can be passed by such an assignment without some new act of the assignor after the property is acquired. The rule is different in equity. An assignment, sale, or mortgage of personal property to be acquired in futuro, if made for a valuable consideration, and not against public policy, will be upheld in equity. Such a transaction vests in the assignee, purchaser, or mortgagee an equitable ownership in the personal property transferred, to take effect and attach as soon as such property comes into existence.[6] Such ownership will be protected in equity at the suit of the equitable owner. An interesting and important case on this subject is that of Holroyd v. Marshall,[7] in which it appears that machinery in a mill was assigned in trust to secure a debt due to the plaintiff, and the contract provided that all other machinery placed in the mill during the time of the trust should vest in the trustee for the same purpose. New machinery was purchased, and placed in the mill, notice of which was

[2] Field v. Mayor, etc., 6 N. Y. 179, 57 Am. Dec. 435. And see Kenyon v. See, 94 N. Y. 563; Patterson v. Caldwell, 124 Pa. 455, 17 Atl. 18.

[3] 8 & 9 Vict. c. 106, § 6.

[4] Civ. Code Cal. §§ 693, 699, 700, 1045, 1046.

[5] Robinson v. Macdonnell, 5 Maule & S. 228.

[6] Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673; Patterson v. Caldwell, 124 Pa. 455, 17 Atl. 18; Kimball v. Safford, 78 Iowa, 65, 42 N. W. 583, 4 L. R. A. 393.

[7] 10 H. L. Cas. 191.

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given to the plaintiff. Before the plaintiff took possession under the contract, creditors of the owner levied on the machinery under an execution against him. It was held that the plaintiff's equitable title was superior to the subsequent legal claim of the judgment creditors. Lord Westbury, in his opinion in this case, says: "It is quite true that a deed which professes to convey property which is not in existence at the time is, as a conveyance, void at law, simply because there is nothing to convey. So, in equity, a contract which engages to transfer property which is not in existence cannot operate as an immediate alienation, merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired." [8] It would seem that the assignee has an equitable title in the property to be acquired, dating from the time of the assignment, and instantly upon the acquisition of such property the assignor holds it in trust for the assignee, whose title requires no act on his part to perfect it. The enforcement of such contracts seems to have been based, in the case above referred to, and in other cases on the same subject, on the ground that the assignee is entitled to have specific performance of the contract to assign as soon as the property comes into existence in the hands of the assignor. Mr. Pomeroy does not accept this view of the grounds for the interference of equity in such cases, and says: "In my opinion, it fails to wholly explain the equitable doctrine and jurisdiction,

[8] We have inserted a somewhat lengthy reference to this case because of the fact that it so clearly illustrates the principle of the text. There are many other cases in which the ruling of Lord Westbury has been followed and cited with approval. Coombe v. Carter, 36 Ch. Div. 109,—where a mortgage was given upon all moneys to which the mortgagor might become entitled during the security by will, settlement, etc., and it was held that the share of the mortgagor under a residuary clause in a will was subject to the mortgage. And see Tailby v. Official Receiver, 13 App. Cas. 523.

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since transfers of personal property to be acquired in the future are constantly enforced under the operation of this doctrine, where a court of equity would hardly have decreed the specific performance of the contract if it had been confined to property then in the ownership and possession of the vendor or assignor." [9] It must be admitted that the right of the assignee is something more than the right to the specific performance of an executory contract. There is also an equitable title vested in the assignee which will become effectual when the property assigned comes into the possession of the assignor.

The doctrine as declared in the case of Holroyd v. Marshall is fairly well established in the courts of this country. A lease containing a clause giving the lessor a lien as security for the rent "on all goods, implements, stock, fixtures, tools, and other personal property which may be put on said premises" was sustained upon the doctrine laid down in the case above referred to.[10] Assignments of future cargoes of ships [11] and future patent rights [12] have also been sustained. In a recent New York case it was held that a chattel mortgage on property to be acquired in the future, while regarded in equity as an executory agreement to give a lien when the property comes into existence, cannot be made an actual and effectual lien as against creditors without some further intervening act.[13] This case was decided under a statute requiring a filing of the mortgage as a substitute for "an immediate delivery," or "an actual and continued change of possession of the thing mortgaged," and the court considered that this statute excluded the idea of a chattel mortgage upon nonexistent things.

Future wages, to be earned under a subsisting contract of employment, are assignable; [14] but the authorities vary as

[9] Pom. Eq. Jur. § 1288.

[10] McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 614.

[11] Lindsay v. Gibbs, 22 Beav. 522; Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673.

[12] Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462. Contra, Regan Vapor-Engine Co. v. Gas-Engine Co., 1 C. C. A. 169, 49 Fed. 68.

[13] Rochester Distilling Co. v. Rasey, 142 N. Y. 570, 37 N. E. 632.

[14] Emery v. Lawrence, 8 Cush. (Mass.) 151; Hartley v. Tapley, 2 Gray (Mass.) 565; Field v. Mayor, etc., 6 N. Y. 179; Appeal of Riddlesburg Coal & Iron Co., 114 Pa. 58, 6 Atl. 381; Haynes v. Thompson, 80 Me. 125, 13 Atl. 276.

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to whether such an assignment is valid when there is no subsisting contract.[15]

To render an assignment of future-acquired property valid and effectual, there must be no uncertainty as to the property intended to pass;[16] and words imputing a present transfer of property must be employed, as distinguished from a mere power to deal with the property when it is acquired.[17]

SAME—ORDER UPON A FUND.

245. An order given by a debtor to his creditor upon a third person having funds of the debtor in his possession, to pay the creditor out of such funds, will create a binding equitable assignment of such portion of such funds as is specified in such order.[1]

At common law no action can be maintained on a contract unless there is privity of contract between the parties to the action. So that, where a person is indebted, or has funds belonging to another, who, by an order, assigns such debt or a portion of such funds to a third person, no action at law will lie to enforce such order, unless there has been a consent or an acceptance thereof by the person upon whom it is made; because, without the implied promise of such consent or acceptance, there is no contractual relation upon which a legal action can be based. But in equity the rule is different. Equity recognizes the interests of the payee of such an order in the fund upon which it is drawn, and will compel an appropriation of such fund according to the directions of such order. As was said by Judge Rapallo: "There can be no doubt as to the rule that when, for a valuable consideration from the payee, an order is drawn upon a third person, and

[15] Held assignable in Edwards v. Peterson, 80 Me. 367, 14 Atl. 936. Contra, Lehigh Val. R. Co. v. Woodring, 116 Pa. 513, 9 Atl. 58; Mullhall v. Quinn, 1 Gray (Mass.) 105, 61 Am. Dec. 414.

[16] Tadman v. D'Epineuil, 20 Ch. Div. 758.

[17] Reeve v. Whitmore, 4 De Gex, J. & S. 1, 16–18.

§ 245. [1] Burn v. Carvalho, 4 Mylne & C. 702; Row v. Dawson, 1 Ves. Sr. 331, 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 731.

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made payable out of a particular fund, then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment pro tanto of the fund; and the drawee is bound, after notice of such assignment, to apply the fund as it accrues to the payment of the order, and to no other purpose; and the payor may, by action, compel such application." [2] To become effective as an assignment, the order must make an actual appropriation of the fund.[3] An equitable assignment cannot be based upon a mere promise or agreement, either by parol or in writing, to pay a debt out of a designated fund.[4] 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 equitable assignment, although 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.[5] An ordinary draft, not drawn on any particular fund, does not operate as an assignment.[6] And it seems well settled that an unaccepted check will not result in an equitable assignment of the fund pro tanto.[7]

[2] Brill v. Tuttle, 81 N. Y. 454, 457, 37 Am. Rep. 515; Lauer v. Dunn, 115 N. Y. 405, 22 N. E. 270; Bates v. Bank, 157 N. Y. 322, 51 N. E. 1033.

[3] Laclede Bank v. Schuler, 120 U. S. 511, 516, 7 Sup. Ct. 644, 30 L. Ed. 704.

[4] Rogers v. Hosack's Ex'rs, 18 Wend. (N. Y.) 319; Christmas v. Russell, 14 Wall. 69, 20 L. Ed. 762; Trist v. Child, 21 Wall. 441, 22 L. Ed. 623; Williams v. Ingersoll, 89 N. Y. 508, 518.

[5] Brill v. Tuttle, 81 N. Y. 454, 457, 37 Am. Rep. 515. See, also, Ex parte Carruthers, 3 De Gex & S. 570; Kelley v. Mayor, etc., 4 Hill (N. Y.) 265. An order of this kind is a negotiable bill of exchange. Kelley v. Mayor, etc., supra; Schmittler v. Simon, 101 N. Y. 554, 560, 5 N. E. 452, 54 Am. Rep. 737.

[6] Shand v. Du Buisson, L. R. 18 Eq. 283; Kimball v. Donald, 20 Mo. 577, 64 Am. Dec. 209; First Nat. Bank v. Railway Co., 52 Iowa, 378, 3 N. W. 395, 35 Am. Rep. 280; Holbrook v. Payne, 151 Mass. 383, 24 N. E. 210; Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283; Mandeville v. Welch, 5 Wheat. 277, 5 L. Ed. 87; Grammel v. Carmer, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363.

[7] Hopkinson v. Forster, L. R. 19 Eq. 74; Attorney General v. Insurance Co., 71 N. Y. 325, 27 Am. Rep. 55; O'Connor v. Bank, 124 N. Y. 324, 26 N. E. 816; Florence Min. Co. v. Brown, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424; Harrison v. Wright, 100 Ind. 515, 58 Am. Rep. 805; National Bank of America v. Banking Co., 114 Ill.

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This doctrine accords with the relations between the parties to the transaction. A check is a request of the depositor to pay the whole or a portion of the deposit to the bearer, or to the order of the payee. Until presented and accepted, it is inchoate. It vests in the payee no legal or equitable title or interest in the fund. Before acceptance the drawer may withdraw his deposit. The bank owes no duty to the holder of a check until it is presented for payment.[8] But there may be circumstances connected with the giving of a check which will make the check operate as an equitable assignment of the fund upon which it is drawn; as where, in addition to the check, there was an oral agreement between the drawer and payee, by which the former, for a valuable consideration, agreed to assign so much of the indebtedness of the bank to him as was represented by the check, and the check was given to enable the payee to collect and recover the portion of the debt assigned, the agreement operates as an assignment, and is sufficient to vest in the payee a title to that portion of the debt.[9]

Any words 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.[10] 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.[11] Until such mandate is communicated to the creditor, and assented to by him, it may be revoked;[12] but after such communication the agent becomes the debtor of the assignee, and the order cannot then be countermanded.[13]

483, 2 N. E. 401; Hemphill v. Yerkes, 132 Pa. 545, 19 Atl. 342; Pease v. Landauer, 63 Wis. 20, 22 N. W. 847, 53 Am. Rep. 247.

[8] Tyler v. Gould, 48 N. Y. 682, per Church, C. J.

[9] Risley v. Bank, 83 N. Y. 318, 38 Am. Rep. 421; Coates v. Bank, 91 N. Y. 26; Fourth St. Nat. Bank v. Yardley, 165 U. S. 644, 17 Sup. Ct. 439, 41 L. Ed. 855; First Nat. Bank v. Clark, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580.

[10] Tailby v. Official Receiver, 13 Q. B. Div. 523.

[11] Morrell v. Wootten, 16 Beav. 197; White v. Coleman, 127 Mass. 34.

[12] Scott v. Porcher, 3 Mer. 652.

[13] Fitzgerald v. Stewart, 2 Russ. & M. 457.

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SAME—NOTICE TO DEBTOR.

246. Notice of an assignment is not necessary to render it perfect as between the assignor and the assignee, whether it be for a valuable consideration or only voluntary.[1]

247. But the neglect to give notice of an assignment, or to obtain what is equivalent thereto, may have the effect:

(a) Of rendering subsequent payments to the assignor valid.

(b) Of enabling a subsequent assignee, purchaser, or incumbrancer to gain priority by giving notice.

The only object to be gained by a notice to the debtor is to put him on his guard against dealing with the assignor on the belief that he still continues the owner of the debt.[2] The assignment is complete, as between the assignor and assignee, although no notice is given the depositary or holder of the fund;[3] nor is notice necessary as against a person standing in the same position as the assignor; for instance, a volunteer,[4] or attaching creditor.[5] But, if the assignee does not give notice of the assignment to the debtor, trustee, or other person, from whom the assignor would have been entitled to receive the claims assigned, he will be compelled to allow the payments made by such debtor, trustee, or other person to the assignor after such assignment.[6]

§§ 246, 247. [1] Burn v. Carvalho, 4 Mylne & C. 702; In re Lowe's Settlement, 30 Beav. 95; Roberts v. Lloyd, 2 Beav. 376; Donaldson v. Donaldson, Kay, 711; Board of Education of School Dist. No. 85 v. Du Parquet, 50 N. J. Eq. 234, 24 Atl. 922; Williams v. Ingersoll, 89 N. Y. 508, 522, 523.

[2] Coates v. Bank, 91 N. Y. 20, 27.

[3] Jones v. Gibbons, 9 Ves. 410; Cook v. Black, 1 Hare, 390; Williams v. Ingersoll, 89 N. Y. 508.

[4] Justice v. Wynne, 12 Ir. Ch. 289.

[5] Pickering v. Railway Co., L. R. 3 C. P. 235; Williams v. Ingersoll, 89 N. Y. 508; Dix v. Cobb, 4 Mass. 508.

[6] Stocks v. Dobson, 4 De Gex, M. & G. 11; Cothay v. Sydenham,

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If the assignee does not perfect his title by giving notice to the debtor, a subsequent assignee, purchaser, or incumbrancer without notice of the prior assignment will acquire priority by giving notice of his assignment.[7] The principle upon which this rule is based is the same as that which requires the assignee of a personal chattel to take every step in his power to reduce it to 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 protect the one who has been most diligent in the preservation of his rights. Notice to the debtor must exist to give the assignee a perfect title, and he who first accomplishes this result is entitled to the protection of a court of equity. But a subsequent assignee, giving notice of his assignment, will not gain priority over a prior assignee who has not given notice, if, at the time of giving such notice, he has express or implied notice of the former assignment.[8]

This rule as to the necessity of notice to protect the title of an assignee has not been adopted in all the courts of this country, although the English rule seems to be based upon the more correct view of the law on the question.[9] The rule in New York is that, as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, although he has given no notice of such assignment to either the subsequent assignee or the debtor.[10]

2 Brown, Ch. 391; 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, 30 L. Ed. 704; Renton v. Monnier, 77 Cal. 449, 19 Pac. 820. See, also, Dale v. Kimpton, 46 Vt. 76; McWilliams v. Webb, 32 Iowa, 577.

[7] Dearle v. Hall, 3 Russ. 1, 30, which is the leading case on this subject. And see Spencer v. Clarke, 9 Ch. Div. 137; McWilliams v. Webb, 32 Iowa, 577; Spain v. Hamilton's Adm'r, 1 Wall. 604, 624, 17 L. Ed. 619; Murdoch v. Finney, 21 Mo. 138; Loomis v. Loomis, 26 Vt. 198.

[8] Spencer v. Clarke, 9 Ch. Div. 137.

[9] Vanbuskirk v. Insurance Co., 14 Conn. 145, 36 Am. Dec. 473, Campbell v. Day, 16 Vt. 558; Loomis v. Loomis, 26 Vt. 198; Clodfelter v. Cox, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157; Woodbridge v. Perkins, 3 Day (Conn.) 364.

[10] Fortunato v. Patten, 147 N. Y. 277, 283, 41 N. E. 572, citing Fairbanks v. Sargent, 104 N. Y. 108, 9 N. E. 870; Williams v. Inger-

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SAME—ASSIGNMENT SUBJECT TO EQUITIES.

248. The general rule is that the assignee of a chose in action takes it subject to all the equities existing against it in the hands of his assignor, and can acquire no greater right or interest therein than belonged to such assignor.[1]

EXCEPTION—This rule does not apply to the assignment of negotiable instruments.

A purchaser of a chose in action must always abide by the case of the person from whom he buys.[2] Any defense or set-off to which the debtor is entitled as against the assignor at the time of the assignment may be had by him against the assignee.[3] If the debt is payable only on condition, the condition is binding on the assignee,[4] and the assignee of a mortgage takes it subject to all the defenses which the mortgagor had against the mortgagee.[5] But, if a debtor actively

soll, 89 N. Y. 508; Muir v. Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633. And see Thayer v. Daniels, 113 Mass. 129; Kennedy v. Parke, 17 N. J. Eq. 415.

§ 248. [1] Callanan v. Edwards, 32 N. Y. 483, 486; Fairbanks v. Sargent, 104 N. Y. 116, 9 N. E. 870, 58 Am. Rep. 490; Friedlander v. Railway Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 5 South. 317, 2 L. R. A. 836, 7 Am. St. Rep. 73; Jeffries v. Evans, 6 B. Mon. (Ky.) 119, 43 Am. Dec. 158; Kamena v. Huelbig, 23 N. J. Eq. 78.

[2] Per Lord Thurlow, in Davies v. Austen, 1 Ves. Jr. 247.

[3] Bebee v. Bank, 1 Johns. (N. Y.) 529, 552, 3 Am. Dec. 353; Ex parte Mackenzie, L. R. 7 Eq. 240; Loomis v. Loomis, 26 Vt. 198; Rider v. Johnson, 20 Pa. 190; McKenna v. Kirkwood, 50 Mich. 544, 15 N. W. 898; Fairbanks v. Sargent, 104 N. Y. 116, 9 N. E. 870, 58 Am. Rep. 490; Goldthwaite v. Bank, 67 Ala. 549; Baker v. Kinsey, 41 Ohio St. 403.

[4] Tooth v. Hallett, 4 Ch. Div. 242; Western Bank v. Sherwood, 29 Barb. (N. Y.) 383.

[5] Hill v. Hoole, 116 N. Y. 299, 302, 22 N. E. 547, 5 L. R. A. 620; Bennett v. Bates, 94 N. Y. 354, 363; Theyken v. Machine Co., 109 Pa. 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. Maglough-

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misleads an assignee as to the existence of a defense or set-off possessed by him, or remains silent when it his duty to speak, he may be estopped from taking advantage of such defense or set-off.[6]

Where an assignment is made by an assignee of a chose in action formerly assigned to him, the question arises as to whether the subsequent assignee takes subject to the equities existing between the first assignor and his assignee. In the leading case of Bush v. Lathrop [7] it was held that the second assignee stands in the shoes of the first; and therefore, 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.[8] 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.[9]

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.[10]

lin, 133 Ill. 33, 24 N. E. 1030; Redin v. Branhan, 43 Minn. 283, 45 N. W. 445; Woodruff v. Institution, 34 N. J. Eq. 174. Contra, Taylor v. Page, 6 Allen (Mass.) 86; Spence v. Railroad Co., 79 Ala. 576; Cooper v. Smith, 75 Mich. 247, 42 N. W. 815; Cornell v. Hichins, 11 Wis. 353.

[6] In re Agra & Masterman's Bank, 2 Ch. App. 391; Sargeant v. Sargeant, 18 Vt. 371; Middletown Bank v. Jerome, 18 Conn. 443; Watson's Ex'rs v. McLaren, 19 Wend. (N. Y.) 557.

[7] 22 N. Y. 535.

[8] The same principle was applied in Davis v. Bechstein, 69 N. Y. 440, 442, 25 Am. Rep. 218; 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.

[9] McNeil v. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Bangor Electric Light & Power Co. v. Robinson (C. C.) 52 Fed. 520.

[10] Ex parte City Bank, 3 Ch. App. 758.

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CHAPTER XX.

REMEDIES SEEKING PECUNIARY RELIEF.

249. Contribution.
250. Exoneration.
251. Subrogation.
252. Marshaling.
253. Accounting.
254. When Equity will Assume Jurisdiction.
255. Defense of Stated Account.
256. Application of Payments.

CONTRIBUTION.

249. Where several parties are jointly, or jointly and severally, liable on a contract, or obligation in the nature of a contract, or are sureties for the same principal debtor, for the same debt or obligation, and one of them has paid more than his proportionate share of such debt or obligation, he is entitled to contribution from his co-obligors or co-sureties for the excess paid by him.

The doctrine of contribution is not so much founded on contract as on the principle of equity and justice that, where the interest is common, the burden also shall be common.[1] The equitable maxim, "Equality is equity," is the basis of this principle.[2] The relief will be granted, as we have seen,

§ 249. [1] Campbell v. Mesier, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570. And see Steel's Appeal, 72 Pa. 101; Eads v. Retherford, 114 Ind. 273, 16 N. E. 587, 5 Am. St. Rep. 611; Vogle v. Brown, 120 Ill. 338, 11 N. E. 327, 12 N. E. 252; Tomlinson v. Bury, 145 Mass. 346, 14 N. E. 137, 1 Am. Rep. 464.

[2] Dering v. Earl of Winchelsea, 1 Cox, Ch. 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, 5 Am. Rep. 669. After the action of assumpsit became es-

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to one jointly liable for the payment of a mortgage debt, who has paid more than his proportionate share on redemption.[3] A partner, who has paid more than his proportionate share of the firm debts, is entitled to contribution from his co-partners, or out of the partnership property.[4] A stockholder individually liable for the corporate debts, who has paid more than his proportionate share thereof, may enforce contribution from the other stockholders, who are also liable.[5]

The most frequent use of the remedy exists in the case of co-sureties. A surety who has paid the debt is not only entitled to contribution from the other sureties,[6] but also to the benefit of any security which any of them may have taken from the principal debtor by way of indemnity.[7] But, where sureties are bound by different instruments for distinct portions of a debt due from the same principal, if the suretyship of each is a separate and distinct transaction, there will be no right of contribution among the sureties.[8] The surety who pays the debt must first exhaust his remedies against the principal debtor, before he is entitled to contribution from his co-sureties.[9]

tablished, 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 (Ky.) 110; Whitman v. Porter, 107 Mass. 522; Hodgson v. Baldwin, 65 Ill. 532; McKenna v. George, 2 Rich. Eq. (S. C.) 15.

[3] Ante, p. 470.

[4] Kelly v. Kauffman, 18 Pa. 351; Logan v. Dixon, 78 Wis. 533, 41 N. W. 713; Sears v. Starbird, 78 Cal. 225, 20 Pac. 547.

[5] 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. 569.

[6] Adams, Eq. p. 269; Newcomb v. Gibson, 127 Mass. 396; Mason v. Pierron, 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 (C. C.) 34 Fed. 1; Rynearson v. Turner, 52 Mich. 7, 17 N. W. 219.

[7] Steel v. Dixon, 17 Ch. Div. 825; Agnew v. Bell, 4 Watts (Pa.) 33; Guild v. Butler, 127 Mass. 386.

[8] Moore v. Isley, 22 N. C. 372; Johnson v. Wild, 44 Ch. Div. 146.

[9] Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669.

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If the sureties are not obligated for the same purpose, or do not occupy the position of co-sureties, then, either (1) the surety paying the debt cannot enforce contribution,—as, where a surety is substituted for another, he cannot enforce contribution against the person whom he has succeeded;[10] or (2) a surety first in point of time may have no remedy against one who is subsequent,—as, where a note is signed by a person as surety for those who have signed before him;[11] or (3) a subsequent surety may have no right of contribution against the first,—as, where an action is brought on the original obligation, and in such action an appeal bond is given, the surety on such bond cannot enforce contribution against a surety on the original obligation.[12] Where one surety has succeeded in extinguishing the debt by payment of less than its full value, he cannot enforce contribution from his co-sureties for more than the amount paid by him.[13] It would not be equitable to permit a surety to speculate upon the debt.

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.[14] And if the liability of the sureties arise ex delicto, there is no right to contribution, for courts of equity will not lend their aid to equalize burdens of wrongdoers, but will leave them where found.[15] This rule does not apply, however, unless the parties were knowingly and willfully associated in wrongdoing.[16]

[10] Longley v. Griggs, 10 Pick. (Mass.) 121.

[11] Harris v. Warner, 13 Wend. (N. Y.) 400.

[12] Schnitzel's Appeal, 40 Pa. 23; Douglass v. Fagg, 8 Leigh (Va.) 588.

[13] Reed v. Norris, 2 Mylne & C. 361, 375; Bonney v. Seely, 2 Wend. (N. Y.) 481; Lawrence v. Blow, 2 Leigh (Va.) 30.

[14] Swain v. Wall, 1 Ch. R. 80; Craythorne v. Swinburne, 14 Ves. 160, 163.

[15] Merryweather v. Nixan, 8 Term R. 186; Peck v. Ellis, 2 Johns. Ch. (N. Y.) 131; Churchill v. Holt, 131 Mass. 67, 41 Am. Rep. 191; Spalding v. Oakes' Adm'r, 42 Vt. 343; Selz v. Unna, 6 Wall. 327, 18 L. Ed. 799.

[16] Moore v. Appleton, 26 Ala. 633; Ankeny v. Moffett, 37 Minn. 109, 33 N. W. 320; Acheson v. Miller, 2 Ohio St. 203, 59 Am. Dec. 663.

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EXONERATION.

250. Where one secondarily liable for the payment of a debt not arising ex delicto has paid or satisfied the debt, he is entitled to be reimbursed by the person primarily liable therefor, and may enforce exoneration from him.

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 the principal debtor for reimbursement;[1] and where, by the terms of the contract, a surety is only liable after the default of the principal debtor and a prior surety, he may enforce his claim for exoneration against either of them.[2] A jurisdiction at law exists to grant relief in all such cases, since the right of recovery is based upon an implied contract of the person primarily liable, and in this country resort is generally had to such jurisdiction. But the equitable jurisdiction also exists, and it is customary to treat the remedy as one pertaining to equity jurisprudence.

If the surety discharges the debt for less than the full amount, he cannot, 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 and costs.[3] The surety may maintain a suit in equity against his principal to compel him to pay the debt at any time after the obligation becomes due, before payment by him, and although he has not been sued by the creditor.[4] A person

§ 250. [1] 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 (Mass.) 142; Konitzky v. Meyer, 49 N. Y. 571; Merwin v. Austin, 58 Conn. 22, 18 Atl. 1029.

[2] Harris v. Warner, 13 Wend. (N. Y.) 400.

[3] Reed v. Norris, 2 Mylne & C. 361, 375; Blow v. Maynard, 2 Leigh (Va.) 30; Delaware, L. & W. R. Co. v. Iron Co., 38 N. J. Eq. 151; Hayden v. Cabot, 17 Mass. 169.

[4] 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. (N. Y.) 123, 8 Am. Dec. 554; Irick v. Black, 17 N. J. Eq. 189; Hellams v. Abercrombie, 15 S. C. 110, 40 Am. Rep. 684;

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who is entitled to be indemnified against loss is not obliged to wait until he has suffered, and perhaps been ruined before having recourse to judicial aid.[s]

SUBROGATION.

251. Whenever, to protect his own rights, one not a volunteer pays or satisfies a debt for which another is primarily liable, he is subrogated to the rights of the creditor, and may enforce against the person primarily liable all the securities, benefits, and advantages held by the creditor.

The doctrine of subrogation is of purely equitable origin and nature, and its operation is always controlled by equitable principles. Like contribution, it rests on principles of equity and justice, and may be decreed though no contract or priority of any kind exists between the parties.[1] There are many different classes of cases in which the doctrine will be applied, but the most important and useful for the purpose of illustrating the several principles connected with the doctrine are cases of subrogation in favor of sureties. A surety, on the payment of the debt of his principal, is entitled to all the securities which the creditor has against the principal debtor, whether given at the time of the contract or subsequent thereto, and whether given with or without the knowledge of the surety.[2] 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 judg-

Moore v. Topliff, 107 Ill. 241; Beaver v. Beaver, 23 Pa. 167; Fame Ins. Co.'s Appeal, 83 Pa. 396, 405.

[s] 1 Lindl. Partn. p. 375.

§ 251. [1] Gans v. Thieme, 93 N. Y. 225, 232; Pease v. Eagan, 131 N. Y. 262, 30 N. E. 102; Cottrell's Appeal, 23 Pa. 294; Ætna Life Ins. Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; Philbrick v. Shaw, 61 N. H. 356.

[2] 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. (Mass.) 477; In re Hess' Estate, 69 Pa. 272; Budd v. Olver, 147 Pa. 194, 23 Atl. 1105; Frank v. Traylor, 130 Ind. 145, 29 N. E. 486, 16 L. R. A. 115.

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ment.[3] In England, prior to recent legislation, if a surety paid a contract which he executed jointly with his principal debtor, or paid a judgment against him and his principal jointly, the contract or judgment was thereby ended and discharged, and could not be enforced by the surety.[4] Negotiable paper, paid by an indorser, is kept alive for his benefit, and he may enforce it against prior indorsers and the maker.[5] A junior mortgagee, who pays off a senior incumbrance on the land for his own protection, is subrogated to all the rights and remedies of the senior incumbrancer.[6] 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.[7]

Numerous as are the applications of this principle, it nevertheless has its limits. A mere volunteer cannot invoke the aid of subrogation. One of the principles lying at the foundation of subrogation in equity is that the person seeking the subrogation must have paid the debt under some necessity, to save himself from loss which might arise or accrue

[3] Parsons v. Briddock, 2 Vern. 608; Townsend v. Whitney, 75 N. Y. 431; Fleming v. Beaver, 2 Rawle (Pa.) 128, 19 Am. Dec. 629; 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, 33 N. W. 459; Lyon v. Bolling, 9 Ala. 463, 44 Am. Dec. 444. 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, 2 McLean, 44, Fed. Cas. No. 4,791.

[4] Dering v. Earl of Winchelsea, 1 Cox, Ch. 318, 1 White & T. Lead. Cas. Eq. p. 114; Hodgson v. Shaw, 3 Mylne & K. 183; Pearl v. Deacon, 24 Beav. 186.

[5] 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.

[6] Mattison v. Marks, 31 Mich. 421, 18 Am. Rep. 197; 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.

[7] Burnand v. Rodocanachi, 7 App. Cas. 339; Deming v. Storage Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Connecticut Fire Ins. Co. v. Railroad Co., 73 N. Y. 399, 29 Am. Rep. 171; Pratt v. Radford, 52 Wis. 114, 8 N. W. 606; Chicago, St. L. & N. O. R. Co. v. Car Co., 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97; Perrott v. Shearer, 17 Mich. 48.

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to him by the enforcement of the debt in the hands of the original creditor.[8] One who discharges an incumbrance upon property in which he has no interest is not subrogated to the rights of the holder of the mortgage, nor does the loan of money to discharge a lien subrogate the lender to the rights of the lien holder.[9]

The principle will not be applied in favor of one who has been guilty of inequitable or illegal conduct in the transaction.[10] 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 will never be done where it will result in injustice.[11]

MARSHALING.

252. Where one person has a clear right to resort to two funds, and another person has a right to resort to but one of them, the latter may compel the former, as double creditor, to exhaust the fund on which the latter, as a single creditor, has no claim.[1]

[8] Ætna Life Ins. Co. v. Middleport, 124 U. S. 534, 547, 8 Sup. Ct. 625, 31 L. Ed. 537. And see, also, Acer v. Hotchkiss, 97 N. Y. 395, 403; Sandford v. McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; Desot v. Ross, 95 Mich. 81, 54 N. W. 694; Wormer v. Agricultural Works, 62 Iowa, 699, 14 N. W. 331; Watson v. Wilcox, 39 Wis. 643, 20 Am. Rep. 63; McNeil 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. 409; Brice v. Watkins, 30 La. Ann. 21; Kitchell v. Mudgett, 37 Mich. 82; Repass v. Moore (Va.) 36 S. E. 474.

[9] Moody v. Moody, 68 Me. 155; Unger v. Leiter, 32 Ohio St. 210; Wilson v. Soper, 44 Me. 118; Farmers' & Mechanics' Nat. Bank v. Railway Co., 72 N. Y. 188; Jacques v. Fackney, 64 Ill. 87; Mosier's Appeal, 56 Pa. 76, 93 Am. Dec. 783; Van Winkle v. Williams, 38 N. J. Eq. 105.

[10] Rowley v. Towsley, 53 Mich. 329, 19 N. W. 20; Milwaukee & M. R. Co. v. Soutter, 13 Wall. 517, 20 L. Ed. 543; Perkins v. Hall, 105 N. Y. 580, 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, 38 Kan. 90, 5 Pac. 406; Guckenheimer v. Angevine, 81 N. Y. 394.

[11] Kelly v. Kelly, 54 Mich. 47, 19 N. W. 580; Dwight v. Lumber Co., 82 Mich. 624, 47 N. W. 102.

§ 252. [1] Per Lord Westbury, in Dolphin v. Aylward, L. R. 4 H. L. 486.

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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 resort to but one.[2] The doctrine has been illustrated in the leading case of Webb v. Smith,[3] as follows: "If A. has a charge upon Whiteacre and Blackacre, and if B. also has a charge upon Blackacre only, A. must take payment of his charge out of Whiteacre, and must leave Blackacre so that B., the other creditor, may follow it, and obtain payment of his debt out of it. In other words, if two estates (Whiteacre and Blackacre) are mortgaged to one person, and subsequently one of them (Blackacre) is mortgaged to another person, unless Blackacre is sufficient to pay both charges, the first mortgagee will be compelled to take satisfaction out of Whiteacre, in order to leave Blackacre to the second mortgagee upon which alone he can go."

The practice adopted in the early days was to summarily forbid the creditor having two funds at his disposal to resort to that which was the sole resource of the other.[4] The remedy by injunction is, however, rarely applied in modern times.[5] 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 another person has a claim, such person is subrogated to all his rights against the fund to which otherwise he could not have resorted.[6]

Marshaling will not be enforced to the detriment or injury of the rights of another person.[7] It will not be available

[2] Trimmer v. Bayne, 9 Ves. 209, 211; Aldrich v. Cooper, 8 Ves. 382, 2 White & T. Lead. Cas. Eq. 82.

[3] 30 Ch. Div. 192, Brett, Cas. Eq. (Dickson Ed.) 222.

[4] Kerley, Hist. Eq. p. 215.

[5] Evertson v. Booth, 19 Johns. (N. Y.) 495; Woolcocks v. Hart, 1 Paige (N. Y.) 185.

[6] Milmine v. Bass (C. C.) 29 Fed. 632; Ramsey's Appeal, 2 Watts (Pa.) 228, 27 Am. Dec. 301; Hudkins v. Ward, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22.

[7] Gilliam v. McCormack, 85 Tenn. 597, 611, 4 S. W. 521; People v. E. Remington & Sons, 121 N. Y. 333, 24 N. E. 793.

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where to compel a resort to the singly charged fund would produce an additional risk, injury, or delay to the double creditor;[8] nor will it be enforced against intervening liens having a superior equity.[9] The equity ought not to be applied unless there is reasonable certainty that one fund is sufficient to satisfy the debt of the first creditor. When, in a foreclosure suit brought by the holder of the first lien, there is reason to think that both the real estate mortgaged and certain personal securities which are subject to the plaintiff's lien would, if brought to a sale, be insufficient to pay the debt and interest due from the mortgagor, the equitable rule does not apply in favor of subsequent mortgagees or judgment creditors. Under such circumstances, all that the subsequent incumbrancers have a right to claim is a judgment awarding to them, after the payment of the plaintiff's debt, the right, in the order of priority of their respective liens, to be subrogated to the plaintiff in respect to the securities then held by him.[10] And it has been held that a creditor holding security upon different kinds of property cannot be compelled to select that which is least convenient and available to himself, in order to aid other creditors whose claims are not adequately secured.[11]

The most frequent use of the remedy is for the protection of prior mortgagees. When two mortgagees have mortgage liens on the same land, and one of them has also other security for his debt, the latter must satisfy his claim out of his other security so far as it will go before he will be permitted to have recourse to the mortgage.[12] 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.[13] And a legatee whose legacy is charged on land cannot en-

[8] Brinkerhoff v. Marvin, 5 Johns. Ch. (N. Y.) 320; Evertson v. Booth, 19 Johns. (N. Y.) 486.

[9] Leib v. Stribling, 51 Md. 285.

[10] Hudkins v. Ward, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22.

[11] Emmons v. Bradley, 56 Me. 333.

[12] Beach, Mod. Eq. Jur. § 789; 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.

[13] Bass v. Estill, 50 Miss. 300.

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force it out of the 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.[14] The equity of marshaling was most frequently employed in England to confine the payment of the debts of a decedent which are a charge upon real property, so that the rights of others in the personalty of the decedent should not be interfered with. In the American states the equity is not so frequently employed in such cases, since both the real and personal property of a decedent are considered assets for the payment of his debts, and specialty and simple contract creditors are upon the same footing as to both classes of property.

The rules relative to this equity are never applied between creditors of different persons. Thus, if a person has a claim 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.[15]

ACCOUNTING.

253. Courts of equity acquired jurisdiction of actions of accounts because of the inconvenience and difficulty of adjusting conflicting accounts by a jury, and the inadequacy of the remedies afforded at law.

One of the most ancient of common-law actions is that of account render. This action was the only means which the common law afforded for obtaining a settlement of an account, except that assumpsit might be brought for a determinate balance.[1] In assumpsit it was necessary, if the bal-

[14] Hanby v. Roberts, Amb. 128; Bonner v. Bonner, 13 Ves. 379; Perry v. Hale, 44 N. H. 363, 367; Cryder's Appeal, 11 Pa. 72.

[15] Ex parte Kendall, 17 Ves. 520; Meech v. Allen, 17 N. Y. 301, 72 Am. Dec. 465; Lloyd v. Galbraith, 82 Pa. 103; Lee v. Gregory, 12 Neb. 282, 11 N. W. 297; Huston's Appeal, 69 Pa. 485.

§ 253. [1] 3 Bl. Comm. 162.

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ance was disputed, for the jury to investigate the items one by one, a task which, in long and complicated accounts, was practically impossible. The action of account render was more suitable. After a judgment quod computet, there was a reference to auditors, who could examine the account item by item, but could not conduct an investigation as to each disputed item, but were obliged to refer each of them to the court or a jury as a distinct issue of law or fact. The action of account could be employed in but few cases. It would lie against guardians in socage, bailiffs, and receivers; and, in favor of trade, by one merchant against another. In the case of McMurray v. Rawson [2] it was stated that the action did not seem to have been brought in England, according to the reported cases, more than a dozen times in the last two centuries; and attention is called to but one case in New York prior to the one then considered. The action was there declared to be "one of the most difficult, dilatory, and expensive ever known to the law." It is easy to understand that the difficulties and disadvantages of the common-law remedies early led to a resort to courts of equity for relief, and suits for an accounting soon became a well-established head of equitable jurisdiction.

SAME—WHEN EQUITY WILL ASSUME JURISDICTION.

254. Equity will assume jurisdiction in matters of account where

(a) A fiduciary relation exists between the parties.

(b) There are mutual accounts between the parties.

(c) There are circumstances of great complication, though the accounts are not mutual.[1]

The existence of the jurisdiction in equity depends, not on the absence of a common-law remedy, but upon its inadequacy. In most cases the jurisdiction of courts of equity in

[2] 3 Hill (N. Y.) 62.

§ 254. [1] Snell, Eq. pp. 610–612; Pom. Eq. Jur. § 1421.

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actions of account is concurrent with that of courts of law;[2] but whether or not a court of equity will exercise its jurisdiction is a question to be determined by the court in its discretion.[3]

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 titles, and all questions relating thereto; of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, factors, and receivers." [4] 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.

Fiduciary Relationship.

Equity will assume jurisdiction where there exists a fiduciary relationship between the parties,—as in favor of beneficiaries against trustees,[5] including actions against directors of corporations. An action for an accounting between partners is peculiarly one for the cognizance of a court of equity, and it has entertained jurisdiction in such cases from time immemorial.[6] And where an agent has been intrusted with his principal's money, to be expended for a specific purpose, the former may be required to account in equity.[7] But the existence of a bare agency is not sufficient; there must be a trust or fiduciary relation between the parties.[8] Wherever the relation is such that confidence is reposed by

[2] Tillar v. Cook, 77 Va. 477; Mitchell v. Manufacturing Co., 2 Story, 648, Fed. Cas. No. 9,662; Post v. Kimberly, 9 Johns. (N. Y.) 470; Baugher's Appeal (Pa.) 8 Atl. 841; Holt v. Daniels, 61 Vt. 89, 17 Atl. 786.

[3] Jewett v. Bowman, 29 N. J. Eq. 176.

[4] 3 Bl. Comm. 437.

[5] See ante, p. 34.

[6] King v. Barnes, 109 N. Y. 267, 286, 16 N. E. 332; Bishop v. Bishop, 54 Conn. 232, 6 Atl. 426; Couillard v. Eaton, 139 Mass. 105, 28 N. E. 579; Christy's Appeal, 92 Pa. 157.

[7] Marvin v. Brooks, 94 N. Y. 71.

[8] Foley v. Hill, 2 H. L. Cas. 28; Moxon v. Bright, 4 Ch. App. 292.

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the principal in his agent, and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction,[9] because in such actions "the plaintiff can only learn from the discovery of the defendant how he has acted in the execution of his agency." [10] But ordinarily the agent is not entitled to an accounting from his principal, since it is his duty to keep an account of all his transactions in behalf of his principal, and he therefore does not require a discovery from him. His remedy is complete at law.[11]

Mutual Accounts.

In cases of mutual accounts founded in privity of contract, equity exercises its jurisdiction without any limitation.[12] It has been stated that a mutual account "means not merely where one of the two parties has received money, and paid it on the account of the other, but where each of two parties has received and paid on the other's account." [13]

Two separate accounts between A. and B.—A.'s account consisting of goods sold to B., and B.'s account of goods sold to A., or of payments made to A.—do not constitute mutual accounts. They are separate, independent accounts, and each can sue on his own. Nor is an account on one side consisting of payments made by A. for B. a mutual account, nor one of goods sold by A. to B. Here, also, all that A. has to do is to sue on his own account. But, if A. has made payments to or on account of B., and B. has also made payments to or on account of A., there is a case of mutual account.[14]

Complicated Accounts.

A court of equity may assume jurisdiction when the accounts are complicated, although they are only on one side. The reason in most cases for the exercise of such jurisdic-

[9] Makepiece v. Rogers, 11 Jur. (N. S.) 215; Moxon v. Bright, 4 Ch. App. 292; Webb v. Fuller, 77 Me. 568, 1 Atl. 737; Rippe v. Stogdill, 61 Wis. 38, 20 N. W. 645.

[10] Mackenzie v. Johnston, 4 Madd. 373.

[11] Padwick v. Stanley, 9 Hare, 627; Lynch v. Willard, 6 Johns. Ch. (N. Y.) 342; Nash v. Burchard, 87 Mich. 85, 49 N. W. 492.

[12] Story, Eq. Jur. § 457.

[13] Phillips v. Phillips, 9 Hare, 471, per Sir George Turner, V. C.

[14] Merwin, Prin. Eq. 587, 588.

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tion is the fact that a court of law cannot, with the means at its disposal, examine and adjust an account which is complicated because of the multiplicity of the transactions involved, or of other circumstances.[15] Even if an action at law could be maintained in such cases, the remedy afforded would not be as available, and would not permit of as convenient and accurate an investigation as by a suit in equity. Even if a trial by jury be claimed and allowed, the court might, in a suit in equity, so mold the issues, and direct the course of the trial, as to avoid many of the difficulties attending a trial at common law.[16] In the practice acts of many of the states provisions have been made for the adjustment of long and complicated accounts in courts of law, and the reason for a resort to equity is very slight, if it can be said to exist at all.[17] What constitutes complexity is a matter addressed to the discretion of the court, to be determined according to the circumstances of each case.[18]

SAME—DEFENSE OF STATED ACCOUNT.

255. It is ordinarily a good bar to a suit for an account that the parties have already, in writing, stated and adjusted the items of the account, and struck a balance.[1]

Where an account has been settled, and a balance struck, there is no occasion for a resort to equity, as the remedy at law is adequate. It necessarily follows, therefore, that a

[15] O'Connor v. Spaight, 1 Schoales & L. 305, where Lord Redesdale said: "This is a principle on which courts of equity constantly act by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law."

[16] Hallett v. Cumston, 110 Mass. 32; Pierce v. Society, 145 Mass. 60, 12 N. E. 858, 1 Am. St. Rep. 433.

[17] Marvin v. Brooks, 94 N. Y. 71, 80; Uhlman v. Insurance Co., 109 N. Y. 421, 433, 17 N. E. 363, 4 Am. St. Rep. 482.

[18] White v. Hampton, 10 Iowa, 238, 245; Woolley v. Osborne, 39 N. J. Eq. 54; Uhlman v. Insurance Co., 109 N. Y. 421, 433, 17 N. E. 363, 4 Am. St. Rep. 482; Warner v. McMullin, 131 Pa. 370, 18 Atl. 1056.

§ 255. [1] Snell, Eq. 440; Dawson v. Dawson, 1 Atk. 1; Weed v. Smull, 7 Paige (N. Y.) 573.

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stated account is a bar to relief in equity, unless some matter is shown which calls for the interposition of a court of equity. If any error, mistake, accident, or fraud has occurred which would vitiate the stated account, and lessen the balance struck, equity will not suffer it to be conclusive upon the parties, but will, in some cases, cause the account to be reopened and resettled.[3] If the mistake, accident, or fraud has not affected all the items of the transaction, the court may allow the account to stand, and permit the complainant to surcharge and falsify.[3] To surcharge an account means to show that a proper credit has been omitted; to falsify means to show that an item has been wrongfully inserted.[4] The burden of proof always rests upon the party who is permitted to surcharge and falsify.[5]

A stated account is not required to be signed by the parties. Its acceptance may be implied from the circumstances. The court will generally refuse to open a settled account after a long time has elapsed, except in cases of apparent fraud.[6]

SAME—APPLICATION OF PAYMENTS.

256. The following rules may be cited by which courts of equity are guided in taking accounts:

(a) A debtor making a payment may appropriate it to the discharge of any debt due his creditor.

(b) If, at the time of payment, there is no express or implied appropriation by the debtor, then the creditor may make the appropriation.[1]

[3] Bankhead v. Alloway, 6 Cold. (Tenn.) 56; Conville v. Shook, 144 N. Y. 686, 39 N. E. 405.

[3] Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366; Johnson's Ex'rs v. Ketchum, 4 N. J. Eq. 364.

[4] Snell, Eq. 441.

[5] Pit v. Cholmondeley, 2 Ves. Sr. 565.

[6] Thompson v. Fisher, 13 Pa. 313; Porter v. Patterson, 15 Pa. 229; Beers v. Reynolds, 12 Barb. (N. Y.) 288; Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

§ 256. [1] Lysaght v. Walker, 5 Bligh (N. S.) 1, 28; Brady v. Hill,

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(c) In the absence of an appropriation by the parties, the law will make the appropriation according to the order of the 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.

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.

Appropriation by Debtor.

The first rule on the subject is that the debtor may apply the payment to the discharge of whatever debt he pleases,[2] and the creditor has no right to insist on a different application.[3] The debtor may make the direct application in express terms,[4] 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.[5] 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.[6]

1 Mo. 315, 13 Am. Dec. 503; Johnson v. Thomas, 77 Ala. 367; Perry v. Bozeman, 67 Ga. 643; National Bank of Newburgh v. Bigler, 83 N. Y. 51; Bird v. Davis, 14 N. J. Eq. 467; Blackstone Bank v. Hill, 10 Pick. (Mass.) 129.

[2] Clayton's Case, 1 Mer. 572, 575; Tayloe v. Sandiford, 7 Wheat. 13, 5 L. Ed. 384; Pickering v. Day, 2 Del. Ch. 333, 3 Houst. 474, 95 Am. Dec. 291; 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. (Mass.) 441; Jones v. Williams, 39 Wis. 300.

[3] Anon. Cro. Eliz. 68; Eylar v. Read, 60 Tex. 387; Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769; Wetherell v. Joy, 40 Me. 325.

[4] Ex parte Imbert, 1 De Gex & J. 152; Stewart v. Keith 12 Pa. 238; Hansen v. Rounsavell, 74 Ill. 238; Gay v. Gay, 5 Allen (Mass.) 157.

[5] Young v. English, 7 Beav. 10; Holley v. Hardeman, 76 Ga. 328; Marx v. Schwartz, 14 Or. 177, 12 Pac. 253.

[6] Wilkinson v. Sterne, 9 Mod. 427; Aderholt v. Embry, 78 Ala. 185; Long v. Miller, 93 N. C. 233.

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When Creditor may Appropriate.

Unlike the debtor, the creditor has a right to make the application at any time after payment and before action brought or account settled between him and his debtor.[7] 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.[8] 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 debt barred by statute.[9] The creditor cannot, however, by making such an appropriation in part payment of the debt, take it out of the operation of the statute.[10]

Absence of Appropriation by Either Party.

In the absence of appropriation by the parties, the appropriation will be made according to the order of the items of the account. This proposition was decided, and is known as the rule in Clayton's Case,[11] and it has been repeatedly followed both in England and in this country.[12] Some of the courts have, however, manifested a tendency to follow the Roman rule, which appropriates the payment to the most

[7] Philpott v. Jones, 2 Adol. & E. 41, 44; Callahan v. Boazman, 21 Ala. 246; Moss v. Adams, 39 N. C. 42, 51; Johnson v. Thomas, 77 Ala. 367; Haynes v. Waite, 14 Cal. 446.

[8] Wright v. Laing, 3 Barn. & C. 165; Turner v. Turner, 80 Va. 379; Gill v. Rice, 18 Wis. 549; Phillips v. Moses, 65 Me. 70; Rohan v. Hanson, 11 Cush. (Mass.) 44; Greene v. Tyler, 39 Pa. 361; Richards v. Columbia, 55 N. H. 96.

[9] Mills v. Fowkes, 5 Bing. N. C. 455, 461; Armistead v. Brooke, 18 Ark. 521.

[10] 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, 1 Am. Rep. 109; Murphy v. Webber, 61 Me. 478.

[11] 1 Mér. 585.

[12] 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, 95 Am. Dec. 291; Smith v. Loyd, 11 Leigh (Va.) 512; Crompton v. Pratt, 105 Mass. 255; Willis v. McIntyre, 70 Tex. 34, 7 S. W. 594, 8 Am. St. Rep. 574; Allen v. Culver, 3 Denio (N. Y.) 284; Thompson v. Bank, 113 N. Y. 325, 21 N. E. 57.

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burdensome debt.[13] And where there are several debts owing to a creditor, some of which are barred by the statutes 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.[14] 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.[15]

[13] Story, Eq. Jur. § 459d; Magarity v. Shipman, 82 Va. 784, 1 S. E. 109.

[14] Nash v. Hodgson, 6 De Gex, M. & G. 474.

[15] 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. Railroad Co., 57 Mich. 430, 25 N. W. 161, 26 N. W. 365.

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CHAPTER XXI.

SPECIFIC PERFORMANCE.

257–258. Definition—Equity Jurisdiction.
259. Inadequacy or Impracticability of Damages.
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263. Defenses in Actions for Specific Performance—Incapacity of Parties.
264. Nonconclusion of the Contract.
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275. Statute of Frauds as a Defense.
276–277. Specific Performance with a Variance.

DEFINITION—EQUITY JURISDICTION.

257. Specific performance may be defined as a judicial order that a legal contract be carried into effect.[1]

258. The equity to compel specific performance arises where a legal contract has been infringed, and the remedy at law by an award of damages is inadequate.

The sole redress which the common law affords for breach of contract to the disappointed party is an award of damages. This, in effect, requires the party violating the contract to either perform the contract at his sole pleasure, or to pay damages for a failure so to do. But courts of equity have deemed such a course wholly inadequate for the purposes of justice; and, considering a breach of contract a

§§ 257–258. [1] Underh. Eq. p. 196.

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violation of moral and equitable duty, they have not hesitated to interpose and require from the conscience of the offending party a strict performance of what he cannot refuse without manifest wrong or fraud.[2]

The jurisdiction of courts of equity to decree a specific performance of a contract is of very ancient origin, if it is not coeval with the existence of such courts.[3] It may be distinctly traced back to the reign of Edward IV.; for in the Year Book of 8 Edw. IV. 4 (b), it was expressly recognized by the chancellor as a clear jurisdiction.[4] The ground for the exercise of this jurisdiction is the inadequacy of the remedies afforded by courts of law, which, as said before, can only relieve the injured party by compensation in damages.

INADEQUACY OR IMPRACTICABILITY OF DAMAGES.

259. A court of equity will decree the specific performance of a contract, where

(a) A breach of contract cannot be adequately recompensed by an award of damages, since the subject-matter of the contract is specific, and its exact counterpart cannot be purchased in the open market.

(b) It is impracticable to compensate the injured party by an award of damages, since the special features connected with the subject-matter of the contract, or with the terms thereof, or with the relation of the parties thereto, render it impossible to arrive at a legal measure of damages.[1]

[2] Story, Eq. Jur. § 714.

[3] 1 Spence, Eq. Jur. 645; Union Pac. R. Co. v. Railroad Co., 163 U. S. 600, 16 Sup. Ct. 1173, 41 L. Ed. 265,—where Chief Justice Fuller says: "The jurisdiction of courts of equity to decree the specific performance of agreements is of very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for their breach."

[4] Halsey v. Grant, 13 Ves. 76; 1 Fonbl. Eq. book 1, c. 1, § 5, note.

§ 259. [1] Pom. Eq. Jur. § 1401.

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Land Contracts.

The most frequent use of the equity of specific performance is in the case of contracts for the sale of real property. 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 a matter 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.[2]

Contracts Respecting Chattels.

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 the plaintiff to procure other articles as good in all respects as those for which he contracted. The legal remedy, therefore, being adequate, there is generally no ground for the exceptional and discretionary interference of equity in such contracts.[3]

Special circumstances may, however, induce the court to decree specific performance of such contracts. When chattels consist of works of art, or valuable 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.[4] On the same principle

[2] 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 381; Conaway v. Sweeney, 24 W. Va. 643, 649; Ensign v. Kellogg, 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.

[3] Cuddee v. Rutter, 5 Vin. Abr. 538, pl. 21, 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 1063; Johnson v. Brooks, 93 N. Y. 337, 343; Dilburn v. Youngblood, 85 Ala. 449, 5 South. 175; Jones v. Newhall, 115 Mass. 244, 15 Am. Rep. 97; Kimball v. Morton, 5 N. J. Eq. 26, 53 Am. Dec. 621; Foll's Appeal, 91 Pa. 434, 36 Am. Rep. 671.

[4] 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. (4th Am. Ed.) 1109. And so with a

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the court will order the delivery of specific deeds and writings to the persons legally entitled thereto.[5]

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.[6] With us such contracts will not be specifically enforced, because corporate stock is ordinarily purchased in the market, and compensation in damages affords an adequate remedy.[7] And, for similar reasons, contracts for the sale of governmental securities or bonds will not be specifically enforced.[8]

Agreements relating to patents for inventions afford, perhaps, the best illustration of equitable interference in cases relating to personalty. Such agreements will be specifically enforced, almost as much as a matter of course as contracts concerning real property.[9]

Impracticability of Legal Remedy.

There are other reasons than the inadequacy of an award of damages to do complete justice to the injured party for the exercise of the equitable jurisdiction of specific performance. There are contracts, the damages for the breach of which are impossible to determine. Equity will in such cases decree a specific performance. Instances of such cases are where the plaintiff has not performed all the conditions of a

curious Greek altar piece. Duke of Somerset v. Cookson, 3 P. Wms. 389, 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 1110. See, also, Fells v. Read, 3 Ves. 70; Lloyd v. Loaring, 6 Ves. 773; Williams v. Howard, 7 N. C. 74; McGowin v. Remington, 12 Pa. 56, 51 Am. Dec. 584.

[5] Brown v. Brown, 1 Dickens, 62; Gibson v. Ingo, 6 Hare, 112; Baum's Appeal, 113 Pa. 58, 4 Atl. 461; Cowles v. Whitman, 10 Conn. 121, 25 Am. Dec. 60; Pattison v. Skillman, 34 N. J. Eq. 344.

[6] Duncuft v. Albrecht, 12 Sim. 189; Poole v. Middleton, 29 Beav. 646; Shaw v. Fisher, 2 De Gex & S. 11.

[7] Eckstein v. Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404; Avery v. Ryan, 74 Wis. 591, 43 N. W. 317, 4 L. R. A. 282; Noyes v. Marsh, 123 Mass. 286. The rule is otherwise where stock cannot be obtained in the market. Johnson v. Brooks, 93 N. Y. 337; Frue v. Houghton, 6 Colo. 318.

[8] Cuddee v. Rutter, 5 Vin. Abr. 538, pl. 21, 1 White & T. Lead. Cas. Eq. 1063; Ross v. Railway Co., Woolw. 20, Fed. Cas. No. 12,080.

[9] Whitney v. Burr, 115 Ill. 289, 3 N. E. 434; Hapgood v. Rosenstock (C. C.) 23 Fed. 86; Adams v. Messinger, 147 Mass. 185, 17 N. E. 491; Hull v. Pitrat (C. C.) 45 Fed. 94; Reese's Appeal, 122 Pa. 392, 15 Atl. 807.

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contract on his part, and cannot, therefore, maintain an action at law, but which equity may still treat as binding, and enforce.[10] And verbal contracts concerning land, which are invalid at law, but which have been in part performed, may be enforced in equity.[11]

Another illustration of the application of this rule is where the contract was for the sale of debts proved under two commissions of bankruptcy, and a court of equity granted a decree of specific performance, because to compel the plaintiff to accept damages would be, in effect, to make him sell the dividends, which were of unascertainble value, at a conjectural price.[12]

THE EXERCISE OF JURISDICTION IS DISCRETIONARY.

260. The enforcement of specific performance of a contract is discretionary with the court, and performance will not be decreed where it will result in great hardship and injustice to one party without any considerable benefit to the other, or in a case where the public interest would be prejudiced thereby.[1]

While the enforcement of specific performance is a matter of discretion, it is one of sound judicial discretion, controlled by well-defined principles of equity, and exercised upon a consideration of all the circumstances of each particular case.[2] Where the contract is in writing, is certain in

[10] Mortlock v. Buller, 10 Ves. 292, 305, 306; Day v. Hunt, 112 N. Y. 191, 195, 19 N. E. 414,—where the court says: "The very fact that the plaintiff has not strictly performed his part [of a contract], and so is without remedy at law, is frequently a sufficient reason for the interposition of courts of equity, where relief is given, notwithstanding the lapse of time, according to the actual merits of the case."

[11] Gough v. Crane, 3 Md. Ch. 119.

[12] Adderley v. Dixon, 1 Sim. & S. 607.

§ 260. [1] Conger v. Railroad Co., 120 N. Y. 29, 23 N. E. 983.

[2] Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500; Day v. Hunt, 112 N. Y. 191, 19 N. E. 414; Woods v. Evans,

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its terms, is for a valuable consideration, and is capable of being enforced without hardship to either party, it is as incumbent upon a court of equity to decree its specific performance as upon a court of law to award a judgment of damages for its breach.[3] In the exercise of its discretion, the court must determine whether the contract is equitable, and whether its enforcement would be conducive to a proper administration of justice. When this is determined the discretion of the court ceases, and its decree must issue.[4]

Before granting its decree, the court must be satisfied not only of the existence of a valid contract, but that its enforcement would be equitable and just.[5] As was said by Justice Field: "In general, it may be said that the specific relief will be granted when it is apparent from a view of all the circumstances of the particular case that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for, if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result." [6]

113 Ill. 186, 190, 55 Am. Rep. 409; Combs v. Scott, 76 Wis. 662, 667, 45 N. W. 532; Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501.

[3] Pom. Eq. Jur. § 1404.

[4] Godwin v. Collins, 3 Del. Ch. 189, 201.

[5] Ikerd v. Beavers, 106 Ind. 483, 485, 7 N. E. 326; Simon v. Wildt, 84 Ky. 157, 165; Trustees of Columbia College v. Thacher, 87 N. Y. 311, 317, 41 Am. Rep. 365; Conger v. Railroad Co., 120 N. Y. 29, 23 N. E. 983. As was said in the case of Mansfield v. Sherman, 81 Me. 365, 367, 17 Atl. 300: "However strong, clear, and emphatic the language of the contract, however plain the right at law, if a specific performance would, for any reason, cause a result harsh, inequitable, or contrary to good conscience, the court should refuse such a decree, and leave the parties to their remedies at law."

[6] Willard v. Tayloe, 8 Wall. 557, 567, 19 L. Ed. 501.

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CONTRACTS FOR PERFORMANCE OF PERSONAL ACTS.

261. A contract requiring the performance of personal acts will not, as a rule, be specifically enforced.

The relation established by a contract of hiring and service is of so personal and confidential a character that it would be impossible for a court of equity to specifically enforce such a contract against an unwilling party with any hope of ultimate and real success.[1] The same may be said as to a contract of agency.[2] And for a somewhat similar reason an agreement to sell the good will of a business depending on personal considerations will not be enforced;[3] but, where the good will is entirely or mainly connected with the premises, a contract for the sale of the good will and premises is enforceable.[4]

Contracts to perform certain acts relating to land—such as contracts to build and repair buildings thereon—are of a somewhat special nature; but, as a general rule, they will not be specifically enforced, because the legal remedy is usually sufficient, and it would be almost impossible for the court to carry out its decree if made.[5] Nevertheless the court has jurisdiction to decree the performance of certain works where damages would not be an adequate remedy. For instance, it has been held that a contract made by a railroad company to build a crossing over its railway will be specifically enforced.[6]

§ 261. [1] Rigby v. Connol, 14 Ch. Div. 487; De Francesco v. Barnum, 45 Ch. Div. 430; Iron Age Pub. Co. v. Telegraph Co., 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758; Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779; 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.

[2] Chinnock v. Sainsbury, 30 Law J. Ch. 409.

[3] May v. Thomson, 20 Ch. Div. 705.

[4] Cruttwell v. Lye, 17 Ves. 335.

[5] Errington v. Aynesly, 2 Brown, Ch. 341; Middleton v. Greenwood, 2 De Gex, J. & S. 142; Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430; Oregonian R. Co. v. Navigation Co. (C. C.) 37 Fed. 733; Ross v. Railway Co., Woolw. 26, Fed. Cas. No. 12,080.

[6] Post v. Railroad Co., 123 N. Y. 581, 26 N. E. 7. See, also, Stuyve-

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Some of the English cases hold that specific performances will not be decreed of a contract which imposes on the contractor the performance of continuous duties extending over a long period of time, since the court cannot undertake to see that its decree is carried into effect;[7] but this proposition has been disregarded in several recent American decisions.[8]

Other Instances of Contracts not Enforceable.

A court of equity will not enforce a contract which is in its language revocable by the defendant, for its interference in such a case would be idle, since what it had done might be instantly undone by one of the parties.[9] It is on this principle that equity refuses to interfere in case of contracts to enter into partnership which do not specify the duration of the partnership, since that relation, unless otherwise provided, is dissoluble at the will of either party,[10] but, if the partnership is to continue for a fixed term of years, and there have been acts of particular performance, the court will exercise its powers, but there must be facts shown which would render indispensable the interposition of equity.[11]

sant v. Mayor, etc., 11 Paige (N. Y.) 414; Gregory v. Ingwersen, 32 N. J. Eq. 199; Storer v. Railway Co., 2 Younge & C. Ch. 48.

[7] Blackett v. Bates, 1 Ch. App. 117; Powell D. S. C. Co. v. Railway Co., 9 Ch. App. 331.

[8] Joy v. City of St. Louis, 138 U. S. 11, 47, 11 Sup. Ct. 243, 34 L. Ed. 843 (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. 232, 17 Atl. 427 (contract requiring all trains to stop within 200 feet of a crossing specifically enforced); South & N. A. R. Co. v. Railroad Co., 98 Ala. 400, 13 South. 682, 39 Am. St. Rep. 74 (contract for construction, repair, and use of railroad track enforced); Union Pac. Ry. Co. v. Railway Co., 2 C. C. A. 174, 51 Fed. 309; Louisville & N. R. Co. v. Railroad 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.

[9] Fry, Spec. Perf. § 94.

[10] Hercy v. Birch, 9 Ves. 357; Scott v. Rayment, L. R. 7 Eq. 112; Buck v. Smith, 29 Mich. 166, 18 Am. Rep. 84; Meason v. Kaine, 63 Pa. 335.

[11] Anonymous, 2 Ves. Sr. 629; England v. Curling, 8 Beav. 129; Downs v. Collins, 6 Hare, 418, 437.

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Contracts to refer disputed matters to arbitrators will not be specifically enforced.[12] 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.[13] Where the award is for the performance of a thing in specie,—as to convey an estate or to assign securities,—it will be enforced;[14] but equity will not enforce an award to pay money.[15] A court of equity will not specifically enforce a contract to lend, or to borrow, or to pay money,[16] but it will decree specific performance of an agreement to give security in consideration of money due.[17] Contracts for insurance have been enforced even after loss.[18]

SPECIFIC PERFORMANCE IS AGAINST THE PERSON.

262. The jurisdiction to decree the specific performance of a contract is exercised against the person of the defendant on the equities arising from the contract.[1]

[12] 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. 286; Smith v. Railroad 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; Seligmann v. Le Boutillier, L. R. 1 C. P. 681; Willesford v. Watson, L. R. 14 Eq. 572.

[13] Blackett v. Bates, 1 Ch. App. 117; Caldwell v. Dickinson, 13 Gray (Mass.) 365; Story v. Railroad Co., 24 Conn. 94; McNeil v. Magee, 5 Mason, 244, Fed. Cas. No. 8,915; Kirksey v. Fike, 27 Ala. 383, 62 Am. Dec. 768.

[14] Norton v. Mascall, 2 Vern. 24, and cases cited in preceding note.

[15] Hall v. Hardy, 3 P. Wms. 190; Howe v. Nickerson, 14 Allen (Mass.) 400; Turpin v. Banton, Hardin (Ky.) 320.

[16] 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. Railroad Co., 123 N. Y. 327, 25 N. E. 499, 11 L. R. A. 116; Pierce v. Plumb, 74 Ill. 326, 330, 331.

[17] 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, 19 Am. St. Rep. 409; 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.

[18] Haden v. Association, 80 Va. 683; Baile v. Insurance Co., 73 Mo. 371; Tayloe v. Insurance Co., 9 How. 390, 13 L. Ed. 187; Covenant Mut. Ben. Ass'n v. Sears, 114 Ill. 108, 29 N. E. 480.

§ 262. [1] Fry, Spec. Perf. § 123.

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As a result of this principle, where the defendant is a person over whom a court of equity has no jurisdiction, there can be no relief. The maxim, "Equity acts against the person" ("Æquitas agit in personam"), applies in such cases; so that, if the person is within the jurisdiction of the court, it is no objection to specific performance that the subject-matter which the contract controls is without that jurisdiction.[2] In the case of Massie v. Watts the supreme court of the United States sustained a bill filed in the circuit court of Kentucky to compel a conveyance of land situated in Ohio, and in the case of Penn v. Lord Baltimore, Lord Chancellor Hardwicke held that a contract respecting boundaries between the colonies of Pennsylvania and Maryland could be specifically enforced in the English court of chancery.

DEFENSES IN ACTIONS FOR SPECIFIC PERFORMANCE—INCAPACITY OF PARTIES.

263. The incapacity to contract of either of the contracting parties furnishes ground on which the defendant may resist specific performance.

The question of the incapacity to contract, as raised in actions for specific performance, is identical with the question as discussed at common law, and therefore it has no peculiar relation to the jurisdiction of equity in relation to specific performance; no particular reference, therefore, will be made to such question in this work. An infant has no general power to contract, and generally can neither sue nor be sued on a contract into which he has purported to enter. As regards coverture, the contracts of married women respecting their separate property are enforceable against them and in their favor. Lunatics cannot bind themselves by contract, except during lucid intervals, during which times contracts entered into by them are as bind-

[2] Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Davis v. Parker, 14 Allen (Mass.) 94; Brown v. Desmond, 100 Mass. 267; Burrell v. Root, 40 N. Y. 496; Bailey v. Ryder, 10 N. Y. 363; Stephenson v. Davis, 56 Me. 73; Penn v. Lord Baltimore, 1 Ves. Sr. 444.

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ing as if made by a person of sound mind.[1] In judging of insanity, courts of equity are governed by the same principles as courts of common law.

SAME—NONCONCLUSION OF THE CONTRACT.

264. Specific performance cannot be had unless the contract has been actually concluded.

So long as the parties are only in negotiation, there is no contract which can be specifically enforced.[1] It is sometimes difficult, however, to distinguish mere negotiations from the contract itself. The law on this subject is thus summarized by Mr. Fry:[2] "The burden of proving that there is a concluded contract rests on the 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. Such acceptance must be plain, unequivocal, and unconditional, without variance between it and the proposal, and it must be completed without unreasonable delay." With respect to the immediate question as to whether a contract has been concluded by correspondence, the following rule has been stated: Where a completed contract can be concluded 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.[3]

§ 263. [1] Hall v. Warren, 9 Ves. 605.

§ 264. [1] Duff v. Hopkins (D. C.) 33 Fed. 599; Mayer v. McCreery, 119 N. Y. 434, 23 N. E. 1045; Brown v. Finney, 53 Pa. 373; Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136; Domestic Telegraph & Telephone Co. v. Telegraph Co., 39 N. J. Eq. 150, 165; Wardell v. Williams, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814.

[2] Fry, Spec. Perf. § 278.

[3] Rossiter v. Miller, 3 App. Cas. 1124; Sanders v. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 43 Am. St. Rep. 757, 25 N. Y. Supp. 257, 29 L. R. A. 431, Keener, Cas. Cont. 233.

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SAME—WANT OF MUTUALITY.

265. Whenever from personal incapacity to contract, the nature of the contract, or from any other cause, the contract is incapable of being enforced against one party, such party is equally incapable of enforcing it against the other.[1]

Mutuality of consent 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;[2] and in such a case one party to a contract is not bound when he cannot enforce it against the other.[3]

It has been said that the doctrine of mutuality "is a technical doctrine; but, like many other technical doctrines, it is founded on common sense. It comes simply to this: That one party to a bargain shall not be held bound to that bargain when he cannot enforce it against the other. If the contract is not mutually enforceable, it is a voidable contract; that is, it may be avoided as soon as the person who has a right to avoid it discovers that the cause or occasion for doing so occurs." [4]

Exceptions exist to the necessity of mutuality. Certain unilateral or conditional contracts come within such excep-

§ 265. [1] Fry, Spec. Perf. § 460; Rutland Marble Co. v. Ripley, 10 Wall. 339, 359, 19 L. Ed. 955.

[2] Flight v. Bolland, 4 Russ. 301, 2 Keener, Eq. Cas. 800; Rutland Marble Co. v. Ripley, 10 Wall. 339, 359, 19 L. Ed. 955; Iron Age Pub. Co. v. Telegraph Co., 83 Ala. 498, 3 South. 449, 2 Keener, Eq. Cas. 834; 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.

[3] 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, 1 L. R. A. 380.

[4] Wylson v. Dunn, 34 Ch. Div. 569, 577, per Kekewich, J.

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tions,—as, where an owner of land gives another, for a valuable consideration, an option to purchase the land within a specified time, the contract will be enforced at the suit of the party holding the option, although no obligation rested on him to make the purchase;[5] and also a contract for the purchase of land at the option to sell of the owner can be enforced by the owner.[6] And a memorandum for the sale and conveyance of land, although signed only by the party to be charged, when sufficiently clear and certain in its terms, affords sufficient basis for a suit for specific performance.[7]

SAME—WANT OF FAIRNESS.

266. There are many cases where a want of equality and fairness in the contract will preclude a court of equity from exercising its jurisdiction to decree a specific performance, although actual fraud is not involved.

In cases of fraud, the effect of which is to be hereafter considered, a court of equity will not only not specifically enforce a contract, but will rescind it. But there are many cases where actual fraud is not involved, in which the court will refuse to interpose its jurisdiction.[1] The unfairness in question may be either in the terms of the contract itself, or it may be in matters extrinsic, and in the circumstances under which it was made. With regard to the latter, parol evidence is,

[5] Johnston v. Trippe (C. C.) 33 Fed. 530, 536; Frue v. Houghton, 6 Colo. 318; Ross v. Parks, 93 Ala. 153, 8 South. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47; Johnston v. Wadsworth, 24 Or. 494, 34 Pac. 13; Watts v. Kellar, 5 C. C. A. 394, 56 Fed. 1; Boston & M. R. Co. v. Bartlett, 3 Cush. (Mass.) 224; Miller v. Cameron, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554. But, where there is no consideration for the option, specific performance will not be decreed. Graybill v. Brugh, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894.

[6] Miller v. Cameron, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554.

[7] Mastin v. Grimes, 88 Mo. 478; Dynan v. McCulloch, 46 N. J. Eq. 11, 18 Atl. 822; Clason v. Bailey, 14 Johns. (N. Y.) 489; Ives v. Hazard, 4 R. I. 14, 67 Am. Dec. 500; Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635; Docter v. Hellberg, 65 Wis. 415, 27 N. W. 176.

§ 266. [1] Willan v. Willan, 16 Ves. 83; Twining v. Morrice, 2 Brown, Ch. 326; Savage v. Brocksopp, 18 Ves. 335.

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of course, admissible.[2] As an instance of the application of this rule, the court of equity refused to exercise its jurisdiction to enforce a contract by a married woman to purchase land, by the terms of which she was to secure payment of the purchase price by a mortgage, not only on the land purchased, but on her other separate real estate, because such a contract was deemed rash and improvident.[3] And on the ground of want of fairness the court will not specifically enforce a contract against a party thereto who, at the time of entering into it, was in a state of intoxication; and this is true even in the absence of any unfair advantage taken of his situation which would induce the court to rescind the contract.[4] The fairness of the contract, like all its other qualities, must be judged as of the time it was entered into, or at least when the contract became absolute, and not by subsequent events.[5] The fact that events uncertain at the time of the contract may afterwards happen in a manner contrary to the expectation of one or both of the parties is no reason for holding the contract to have been unfair.[6]

The court will not exercise its extraordinary power in compelling specific performance, where to do so would necessitate a breach of trust[7] or of a prior contract with a third person;[8] nor will equity compel a person to do any act which he is not lawfully competent to do, even though at the time of the contract the act might have been lawful,—partly as it seems, on the ground of the unfairness and illegal taint of such a contract in itself, and partly because of the hardship to which it would expose the person forced to execute it;[9] and, if the contract would work an injury to a third person, or to the public interests, equity will not decree its specific performance.[10]

[2] Davis v. Symonds, 1 Cox, Ch. 402; Fry, Spec. Perf. § 388.

[3] Friend v. Lamb, 152 Pa. 529, 25 Atl. 577, 34 Am. St. Rep. 672.

[4] Cooke v. Clayworth, 18 Ves. 12; Nagle v. Baylor, 3 Dru. & War. 60.

[5] Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501; Hale v. Wilkinson, 21 Grat. (Va.) 75.

[6] Fry, Spec. Perf. § 389.

[7] Dunn v. Flood, 28 Ch. Div. 586; Saltmarsh v. Beene, 4 Port. (Ala.) 283, 30 Am. Dec. 525.

[8] Willmott v. Barber, 15 Ch. Div. 96, 107.

[9] Fry, Spec. Perf. § 407.

[10] Thomas v. Dering, 1 Keen, 729; Curran v. Power Co., 116 Mass.

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SAME—HARDSHIP OF THE CONTRACT.

267. A court of equity will not decree the specific performance of a contract, the result of which would be to impose great hardship on either of the parties, although the party seeking specific performance may be free from improper conduct.[1]

If a contract is unreasonably oppressive on either of the contracting parties, a court of equity will not lend its aid by decreeing a specific performance thereof.[2] 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 washed away by the sea,[3] or where improvements on the land were destroyed by fire before he was ready to convey.[4]

SAME—INADEQUACY OF CONSIDERATION.

268. Unless the inadequacy of consideration is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance.[1]

The doctrine of the older English cases was that inadequacy of consideration was a sufficient ground of defense

90; Chicago, B. & Q. R. Co. v. Reno, 113 Ill. 39; Conger v. Railroad Co., 120 N. Y. 29, 23 N. E. 983; Kelly v. Railroad Co., 74 Cal. 557, 16 Pac. 386, 5 Am. St. Rep. 470.

§ 267. [1] Gould v. Kemp, 2 Mylne & K. 308; Falcke v. Gray, 4 Drew. 660.

[2] Wedgwood v. Adams, 6 Beav. 600; Id., 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. Iron Co., 125 N. Y. 294, 26 N. E. 261. But see, however, Franklin Tel. Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776.

[3] Huguenin v. Courtenay, 21 S. C. 403, 53 Am. Rep. 688.

[4] Smith v. Cansler, 83 Ky. 367.

§ 268. [1] Per Lord Eldon in Stillwell v. Wilkins, Jac. 282.

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to a specific performance, it being regarded, even where not amounting to evidence of fraud, as a circumstance of hardship which should prevent equitable interference. But the later cases have refused to regard inadequacy of consideration in itself as a defense of specific performance, unless it amounts to an evidence of fraud, and would, therefore, constitute a sufficient ground for the cancellation of the contract.[2] There is no doubt, however, that inadequacy of consideration, when combined with fraud, misrepresentation, studied suppression of the true value of the property, or with other circumstances of oppression or even of ignorance, is a most material ingredient in the case as affecting the discretion of the court in granting specific performance.[3]

The question as to whether inadequacy of consideration is a good defense in a suit for specific performance has been a somewhat troublesome one for the courts in this country. Chief Justice Savage, in the case of Seymour v. De Lancy,[4] in the old court of errors of New York, said: "Upon authority, therefore, as well as upon principle, I am clearly of the opinion that a court of equity ought not to lend its aid in enforcing an executory contract, unless it is fair, just, reasonable, and equal in all its particulars, and founded upon adequate consideration." Chief Justice Savage goes on to say in this case: "If the contract be free from objection, it is the duty of the court to decree performance, but, if there are circumstances of unfairness, though not amounting to fraud or oppression, or if the inadequacy of consideration be so great as to render the bargain hard and unconscionable, on either ground the court may refuse its aid to enforce the contract, and leave the parties to contest their rights in a court of law. If it is asked, what degree of inadequacy is necessary to constitute the bargain a hard one? it might be asked in answer, what degree of inadequacy is necessary to constitute fraud,—to shock the conscience and produce an exclamation?" It would seem,

[2] 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, 34 L. Ed. 200.

[3] Fry, Spec. Perf. § 440; Conaway v. Sweeney, 24 W. Va. 643, 651.

[4] 3 Cow. 445, 15 Am. Dec. 270, 2 Keener, Eq. Cas. 772, 784.

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as Prof. Pomeroy suggests,[5] since fraud is now regarded as a fact, and its existence is ascertained, like that of any other fact, by comparing and weighing the evidence, that the phrase "conclusive evidence of fraud," as used in the black-letter text, is, from the very nature of the case, an absurdity, and that the difficulties in the question have not been removed by treating the inadequacy as an evidence of fraud, rather than as a hardship. Notwithstanding the many learned judges and writers who have seemed to disagree with the rule as stated above, it seems to be settled in this country by the weight of authority.

SAME—LAPSE OF TIME.

269. The lapse of time before application to the court for a decree to enforce the specific performance of a contract may furnish grounds of defense in an action therefor.

Equity aids the vigilant, not those who slumber on their rights. Independent of the statutes of limitation, the rules of equity require the plaintiff to exert himself energetically. He must come into court within a reasonable time with his demand. Laches will destroy his right to equitable aid.[1] Especially is this the case when the subject-matter of the contract is an article of fluctuating value, so that the delay may greatly change the aspect of the bargain.[2] This doctrine rests upon the principle that for the peace of society the court will discourage demands by refusing to interfere where there has been gross laches in prosecuting rights, or

[5] Pom. Spec. Perf. 27.

§ 269. [1] 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; Cocanougher v. Green, 93 Ky. 519, 20 S. W. 542; Young v. Young, 45 N. J. Eq. 27, 39, 16 Atl. 921; McCabe v. Mathews (C. C.) 40 Fed. 338; Alexander v. Wunderlich, 118 Pa. 610, 12 Atl. 580; Blackwell v. Ryan, 21 S. C. 112; Ridgway v. Ridgway, 69 Md. 242, 14 Atl. 659; Boston & M. R. Co. v. Bartlett, 10 Gray (Mass.) 384.

[2] Pollard v. Clayton, 1 Kay & J. 462; Deen v. Milne, 113 N. Y. 303, 309, 20 N. E. 861; Combs v. Scott, 76 Wis. 662, 45 N. W. 532; Penrose v. Leeds, 46 N. J. Eq. 294, 296, 19 Atl. 134; Ruff's Appeal, 117 Pa. 319, 11 Atl. 553; Chicago, M. & St. P. R. Co. v. Stewart (C. C.) 19 Fed. 5.

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long and unreasonable acquiescence in the assertion of adverse rights.[8]

SAME—FRAUD AND MISTAKE.

270. If a contract is such that equity would rescind it for fraud or mistake, a fortiori it will refuse specific performance thereof.

In former chapters we have already considered what will vitiate contracts because of fraud and mistake.[1] A court of equity will not specifically enforce a contract which has been procured by false misrepresentations, or the practice of deceit.[2] Statements contrary to fact, made by a party with a view to the contract, are means of resisting performance, though the party making them believe them to be true.[3] A silence as to material facts by one party is a defense to the other in an action for specific performance.[4] As was said by Lord Romilly: "It is of the greatest importance that it should be understood that the most perfect truth and the fullest disclosure should take place in all cases where the specific performance of a contract is required, and that, if this fails, even without any intentional suppression, the court will grant relief to the man who has been thereby deceived, provided he has acted reasonably and openly." [5] Where the aid of a court of equity is sought by way of specific performance of a contract, the principles of ethics have a more extensive sway than where a contract is sought to be rescinded. Where a party calls for specific performance, he must, at every stage of the transaction, be free from imputation of fraud or deceit, and show that his conduct has been clear, honorable, and fair.[6]

[8] Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921.

§ 270. [1] Ante, pp. 255–345.

[2] Kelly v. Kendall, 118 Ill. 650, 9 N. E. 261; Orne v. Coal Co., 114 Pa. 172, 6 Atl. 358; Sheets v. Bray, 125 Ind. 33, 24 N. E. 357.

[3] In re Banister, 12 Ch. Div. 131, 142; Holmes' Appeal, 77 Pa. 50; Isaacs v. Strainka, 95 Mo. 517, 8 S. W. 427; Kelly v. Railroad Co., 74 Cal. 557, 16 Pac. 386, 5 Am. St. Rep. 470.

[4] Byars v. Stubbs, 85 Ala. 256, 4 South. 755; Margraf v. Muir, 57 N. Y. 155; Baskcomb v. Beckwith, L. R. 8 Eq. 100, 2 Keener, Eq. Cas. 963.

[5] Baskcomb v. Beckwith, L. R. 8 Eq. 100, 2 Keener, Eq. Cas. 963.

[6] Kerr, Fraud & M. 357, 358.

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An intentional or unintentional mistake of one party, contributed to by the other, is a ground for refusing specific performance.[7] 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;[8] but generally the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff have been cases where it would have amounted to an injustice to hold him to his bargain. It would be impracticable as well as unsafe, to attempt to enumerate the circumstances under which mistakes would operate as a defense in an action of specific performance; but one principle would seem to run through all the cases,—that, to constitute a defense, the mistake must not be due solely to the negligence and want of reasonable care on the part of him who seeks to set it up. 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 the mistake, it is not sufficient, in order to resist specific performance, for the party to say that he did not understand its meaning.[9]

SAME—UNCERTAINTY OF CONTRACT.

271. A contract will not be specifically enforced, unless it is certain in its terms, or can be made certain by reference to such extrinsic facts as may, within the rules of law, be referred to for the purpose of ascertaining its meaning.[1]

A greater amount of certainty is required in an action for the specific performance of a contract than in an action for damages. To sustain an action at law, the plaintiff need prove only the negative proposition that the defendant has

[7] Denny v. Hancock, 6 Ch. App. 1; Campbell v. Durham, 86 Ala. 299, 5 South. 507.

[8] Webster v. Cecil, 30 Beav. 62; Mullins v. Freeman, 2 Keen, 25; Buckley v. Patterson, 39 Minn. 250, 39 N. W. 490; Burkhalter v. Jones, 32 Kan. 5, 3 Pac. 559.

[9] Caldwell v. Depew, 40 Minn. 528, 42 N. W. 479, 2 Keener, Eq. Cas. 1000.

§ 271. [1] Shakespeare v. Markham, 72 N. Y. 400, 406.

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not performed the contract,—a conclusion which may be often arrived at without any exact consideration of the terms of the contract; but in proceedings for specific performance it must appear not only that the contract has not been performed, but what the contract is which is to be performed.[2] It is perhaps impossible to lay down any general rule as to what is sufficient certainty in a contract; but it may be safely stated that the certainty required must be a reasonable one, having regard to the subject-matter of the contract, and the circumstances under which, and with regard to which, it was entered into.[3] The reason for this rule has been stated thus: "Unless the court be fully advised as to what particular obligations the parties have undertaken to assume, and what specific rights they have mutually stipulated to confer, it would be impossible to adjudge whether the contract is sufficiently fair, just, and equitable in its parts to justify its enforcement by the strong arm of the court, or to render a decree intelligibly settling the rights and duties of the parties which the court is asked to enforce." [4]

Where the terms of the contract are originally uncertain, but it has been acted upon and the subsequent dealings of the parties have given certainty to what was originally uncertain, the court has in some cases regarded such facts as removing the original difficulty.[5] When a contract is reduced

[2] Fry, Spec. Perf. § 380.

[3] Ross v. Purse, 17 Colo. 24, 28 Pac. 473; Iron Age Pub. Co. v. Telegraph Co., 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758, 2 Keener, Eq. Cas. 834; Woods v. Evans, 113 Ill. 186; Ham v. Johnson (Minn.) 56 N. W. 584; Walcott v. Watson (C. C.) 53 Fed. 429; Hennessey v. Woolworth, 128 U. S. 440, 9 Sup. Ct. 109, 32 L. Ed. 500; Crouse v. Frothingham, 97 N. Y. 105; Anderson v. Brinser, 129 Pa. 376, 11 Atl. 809, 18 Atl. 520. Indefiniteness as to consideration, Weaver v. Shenk, 154 Pa. 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, 24 L. Ed. 494; 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.

[4] Iron Age Pub. Co. v. Telegraph Co., 83 Ala. 498, 503, 3 South. 449, 3 Am. St. Rep. 758, 2 Keener, Eq. Cas. 834.

[5] Oxford v. Provand, 5 Moore, P. C. (N. S.) 150; Hart v. Hart, 18 Ch. Div. 670, 685.

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to writing, the description contained therein may be identified by extrinsic evidence under an application of the maxim, "That is certain which may be made certain." [6] 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.[7]

SAME—WANT OF TITLE.

272. A vendor is not entitled to a specific performance against a vendee, unless he can tender what is called a marketable title; that is, a title which can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as a security for the loan of money.[1]

This rule, of course, is most frequently applied in cases of executory contracts for the sale of land. Unless a person has expressly stipulated in his contract to take a title, notwithstanding its defects, it is implied that the title sold is clear of defects and incumbrances. The right of the vendee to an indisputable title does not depend upon the agreement of the party, but is given by law.[2] It has often been held that a title is not marketable when it exposes the party holding it to litigation.[3] But a title will not be considered doubtful merely because there is a slight risk of some future litigation against the purchaser,[4] nor where it would be the duty of the judge to give a clear direction to

[6] Shardlow v. Cotterell, 20 Ch. Div. 90; Ragsdale v. Mays, 65 Tex. 255; Doctor v. Hellberg, 65 Wis. 415, 27 N. W. 176.

[7] 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.

§ 272. [1] Moore v. Williams, 115 N. Y. 586, 592, 22 N. E. 233, 5 L. R. A. 654.

[2] Sugd. Vend. 14; Burwell v. Jackson, 9 N. Y. 535.

[3] Dobbs v. Norcross, 24 N. J. Eq. 327.

[4] 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.

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the jury in favor of the title, and not leave the evidence generally to its consideration.[5]

It is by no means easy to express what amount of doubt upon a title there must be to induce a court of equity to refuse specific performance. In many cases the question rests in the sound discretion of the court.[6] Lord Eldon once said: "The court has almost gone the length of saying that, unless it is so confident that, if it had £5,000 to lay out on such an occasion, it would not hesitate to trust its own money on the title, it would not compel a purchaser to take it." [7]

The doubt which may prevent the court from compelling the purchaser to accept a title may be either of law or of fact.[8] If the doubt rests upon record evidence, and the muniments of title are preserved and accessible, it will be a question for the court to determine upon their inspection,—a question of legal construction. If it is to be established by proof of matters of fact not of record, the case must be made very clear by the vendor to warrant the court in decreeing a specific performance.[9] Thus a title depending upon the bar of the statute of limitations may be a marketable title, if it clearly appears that the entry of the real owner is barred.[10] But, where the title depends upon matter of fact, such as is not capable of satisfactory proof, or where the fact is capable of such proof, yet is not so

[5] 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.

[6] Shriver v. Shriver, 86 N. Y. 575, 584; White v. Damon, 7 Ves. 35.

[7] Jervoise v. Duke of Northumberland, 1 Jac. & W. 569; Pyrke v. Waddingham, 10 Hare, 9, where Turner, V. C., says: "A doubtful title, which a purchaser will not be compelled to accept, is not only a title upon which the court entertains doubt, but includes also a title which, although the court has a favorable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons; for the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favor of the title should turn out not to be well founded."

[8] Sloper v. Fish, 2 Ves. & B. 145; In re Thackwray and Young's Contract, 40 Ch. Div. 34.

[9] Townshend v. Goodfellow, 40 Minn. 312, 316, 41 N. W. 1056, 3 L. R. A. 739, 12 Am. St. Rep. 736.

[10] Pratt v. Eby, 67 Pa. 396.

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proved, the purchaser cannot be compelled to take it.[11] Mr. Fry states grounds for the existence of a doubt as to a title which may be summarized as: (1) Where there is probability of litigation ensuing against the purchaser; (2) where there has been a decision of a court of co-ordinate jurisdiction adverse to the title; (3) where there has been a decision favorable to the title which the court thinks is wrong; (4) where the title depends upon the construction of some ill-expressed and inartificial instrument; (5) where the title rests on a presumption of fact of such a kind that, if the question of fact were before a jury, it would be the duty of the court, not to give a clear direction in favor of the fact, but to leave the jury to draw their own conclusion from the evidence; (6) where the circumstances amount to presumptive (though not necessarily conclusive) evidence of a fact fatal to the title.[12]

It is not sufficient, to render a title doubtful, that there be a mere possibility of an adverse claim. If the existence of the alleged fact creating the doubt is a possibility merely, or the alleged outstanding right a very improbable and remote contingency, the court may, in its discretion, compel the purchaser to complete his purchase.[13] And a court of equity will compel a purchaser to complete his contract for the purchase of lands if the vendor is able to make good the title at any time before the final decree of the court is pronounced;[14] and the vendor will be permitted to remedy the defects in his title if he can do so

[11] Shriver v. Shriver, 86 N. Y. 575, 585.

[12] Fry, Spec. Perf. § 890.

[13] Ferry v. Sampson, 112 N. Y. 415, 20 N. E. 387; Vreeland v. Blawvelt, 23 N. J. Eq. 483; Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282; Hedderly v. Johnson, 42 Minn. 443, 44 N. W. 527, 18 Am. St. Rep. 521; Webb v. Chisolm, 24 S. C. 487, 491. In the case of Schermerhorn v. Niblo, 2 Bosw. (N. Y.) 161 (approved and followed in Moses v. Cochrane, 107 N. Y. 35, 41, 13 N. E. 442), it was said: "As the law does not regard trifles, a bare possibility that the title may be affected by the existing causes which may subsequently be developed, when the highest evidence which the nature of the case admits, amounting to a moral certainty, is given, that no such cause exists, will not be regarded as a sufficient ground for declining to compel a purchaser to perform his contract."

[14] Hepburn v. Dunlop, 1 Wheat. 179, 4 L. Ed. 65; Moss v. Hanson, 17 Pa. 379; Richmond v. Gray, 3 Allen (Mass.) 25; Linn v. McLean, 80 Ala. 360; Fraker v. Brazelton, 12 Lea (Tenn.) 278.

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within a reasonable time.[15] But, if the vendor had no title at the time the contract was executed, equity will not interfere to compel specific performance of the contract, even if the vendor subsequently acquires a title. Such a transaction is speculative, and the vendor is not a bona fide contractor.[16]

SAME—DEFAULT OF PLAINTIFF.

273. It is incumbent upon a party who seeks the specific performance of a contract to show that he has substantially performed, or has been ready and willing to perform, all that the contract has required on his part; and also that he is ready and willing to perform, according to the terms of the contract, all the things that are thereafter to be done by him.[1]

The plaintiff must show the performance of all conditions precedent, and not only must it appear that the plaintiff has performed all the express terms of the contract, but also such of the implied terms as are essential.[2] A court of equity has no power to relieve against the consequences of the nonperformance of conditions precedent unless under special and extraordinary circumstances.[3] But there is a distinction to be made between a nonperformance of the essential and nonessential terms of a contract. The defendant cannot defend a suit for specific performance where the default of the plaintiff is in an unimportant matter.[4] As an illustration of the principle of nonperformance as a defense, a contract for the sale of land by which the vendee, before conveyance, is to erect a building, and complete cer-

[15] Logan v. Bull, 78 Ky. 607.

[16] Wylson v. Dunn, 34 Ch. Div. 569; Forrer v. Nash, 35 Beav. 171; Tiernan v. Roland, 15 Pa. 429.

§ 273. [1] Haggerty v. Land Co., 89 Ala. 428, 7 South. 651.

[2] Tildesley v. Clarkson, 30 Beav. 419. But see Chappell v. Gregory, 34 Beav. 250.

[3] Haggerty v. Land Co., 89 Ala. 428, 7 South. 651.

[4] Fry, Spec. Perf. § 935.

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tain improvements on the land, will not be enforced in his favor until such building has been erected and improvements made.[5] If the nonperformance has been waived by the defendant,[6] or was caused by his neglect or default,[7] it will not constitute a valid defense to specific performance.

SAME—FAILURE TO PERFORM WITHIN THE TIME.

274. Time is originally of the essence of the contract whenever the justice of the case requires it, or when it appears to have been a part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract.[1]

In a comparatively recent case in the supreme court of the United States it was said: "Time may be made of the essence of the contract by the express stipulation of the parties, or it may arise by implication from the very nature of the property, or from the surrounding circumstances." [2] 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.[3] But the court of chancery seems at one time to have gone so far in its disregard of time as to consider that it was of no consequence in equity;[4] and Lord Thurlow, in the case of Gregson v. Riddle,[5] maintained that the parties to a contract could use no expression which would make time one of its essentials. This doc-

[5] Haggerty v. Land Co., supra. And see Eastman v. Plumer, 46 N. H. 464; Chicago Municipal Gaslight & Fuel Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616; Alexander v. Wunderlich, 118 Pa. 610, 12 Atl. 580.

[6] Lamare v. Dixon, L. R. 6 H. L. 414.

[7] Murrell v. Goodyear, 1 De Gex, F. & J. 432.

§ 274. [1] Fry, Spec. Perf. § 1075.

[2] Cheney v. Libby, 134 U. S. 68, 77, 10 Sup. Ct. 498, 33 L. Ed. 818. And see Brown v. Deposit Co., 128 U. S. 403, 414, 9 Sup. Ct. 127, 32 L. Ed. 468; Mayor, etc., of City of Griffin v. City Bank, 58 Ga. 584.

[3] Stowell v. Robinson, 3 Bing. N. C. 928.

[4] Gibson v. Patterson, 1 Atk. 12.

[5] Cited by Sir Samuel Romilly in Seton v. Slade, 7 Ves. 265.

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trine was based upon the principles that in a contract of sale the principal object of the parties was the sale of an estate for a specified sum, and that the particular time named therein for its completion was nonessential.[6] Where the element of time is of no consequence, and no express stipulations in regard to a default have been made, the present rule in equity is to decree a specific performance, notwithstanding the plaintiff's failure to keep the dates assigned by the contract.[7]

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.[8] In order to render time thus essential, it must be clearly and expressly stipulated, and must also have been actually contemplated and intended by the parties that it shall be so. It is not enough that a time is merely mentioned during which or before which something shall be done.[9] But, when such a stipulation is clearly made, the court cannot refuse to give it effect, however harsh and exacting the terms of the contract may be, unless in contravention of public policy; otherwise, it would be to make a contract for the parties which they have not made for themselves.[10] And, although time may not be originally of the essence of the contract, yet, where there has been great and unreasonable delay by one of the parties, the other party may fix a reasonable time within which the contract is to be completed, and the time so fixed will be regarded and insisted upon in

[6] Lord Eldon, in Seton v. Slade, 7 Ves. 273.

[7] Sylvester v. Born, 132 Pa. 467, 19 Atl. 337; Dynan v. McCulloch, 46 N. J. Eq. 11, 14, 18 Atl. 822; Day v. Hunt, 112 N. Y. 191, 195, 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.

[8] Hudson v. Bartram, 3 Madd. 440; Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; Woodruff v. 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, 1 Am. Rep. 593. A stipulation that time is of the essence of the contract was disregarded in Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686.

[9] Fry, Spec. Perf. § 1077; Brown v. Safe-Deposit Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468.

[10] Cheney v. Libby, 134 U. S. 68, 78, 10 Sup. Ct. 498, 33 L. Ed. 818.

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equity.[11] But the time specified in the notice must be reasonable; that is, long enough for the proper doing of the things required to be done.[12]

The nature of the property itself may be such as to make time the essence of the contract, without express stipulation. Contracts for the purchase of property of a fluctuating value are of this description;[13] as in the case of mining property,[14] or stocks.[15] And, where a public house is sold as a going concern, time is deemed of the essence of the contract.[16]

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.[17]

SAME—STATUTE OF FRAUDS AS A DEFENSE.

275. Though a contract has not been reduced to writing as required by the statute of frauds, equity will nevertheless decree a specific performance thereof where

(a) There has been a part performance of the contract.

[11] Taylor v. Brown, 2 Beav. 180; Benson v. Lamb, 9 Beav. 502; King v. Wilson, 6 Beav. 126; Reed v. Breeden, 61 Pa. 460; Thompson v. Dulles, 5 Rich. Eq. (S. C.) 370; Smith v. Lawrence, 15 Mich. 499; Carter v. Phillips, 144 Mass. 100, 10 N. E. 500.

[12] King v. Wilson, 6 Beav. 124; Crawford v. Toogood, 13 Ch. Div. 153; Green v. Sevin, Id. 589; Austin v. Wacks, 30 Minn. 335, 15 N. W. 409.

[13] Edwards v. Atkinson, 14 Tex. 373; Wilson v. Roots, 119 Ill. 379, 10 N. E. 204; Goldsmith v. Guild, 10 Allen (Mass.) 239; Jennison v. Leonard, 21 Wall. 302, 22 L. Ed. 539.

[14] Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; Macbryde v. Weekes, 22 Beav. 533.

[15] Doloret v. Rothschild, 1 Sim. & S. 590.

[16] Day v. Lubke, L. R. 5 Eq. 336.

[17] Dana v. Investment Co., 42 Minn. 194, 44 N. W. 55; Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686; Cartwright v. Gardner, 5 Cush. (Mass.) 273, 280, 281; Boyes v. Liddell, 6 Jur. 725.

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(b) Fraud has been used to prevent the contract from being properly reduced to writing.

(c) The defendant fails to plead the statute as a defense.

The statute of frauds requires a contract concerning real estate to be in writing. Notwithstanding this statute, 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,[1] 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 statutes 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.[2]

Part Performance.

The most frequeut cases where specific performance of contracts for the sale of land is decreed, notwithstanding the statute of frauds, are those where the contract has been in part performed. The doctrine is well established that, where an oral agreement for the sale of land has been in part performed by one of the parties, the statute of frauds will not prevent a court of equity from decreeing a specific performance in favor of the other party.[3] This doc-

§ 275. [1] Britain v. Rossiter, 11 Q. B. Div. 123, 129; Maddison v. Alderson, 8 App. Cas. 467, 2 Keener, Eq. Cas. 675.

[2] Maddison v. Alderson, 8 App. Cas. 467, 474, 2 Keener, Eq. Cas. 675.

[3] Maddison v. Alderson, 8 App. Cas. 467, 2 Keener, Eq. Cas. 675; Lester v. Foxcroft, Colles, 108, 1 White & T. Lead. Cas. Eq. 1027, 1038, 1042; Neale v. Neale, 9 Wall. 1, 19 L. Ed. 590, 2 Keener, Eq. Cas. 647, 651; Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657, 2 Keener, Eq. Cas. 654; Hiatt v. Williams, 72 Mo. 214, 37 Am. Rep. 438; Schuey v. Schaeffer, 130 Pa. 18, 18 Atl. 544; McWhinne v. Martin, 77 Wis. 182, 46 N. W. 118; Union Pac. Ry. Co. v. McAlpine,

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trine seems to be based on the view that, where a man has made a contract with another, and has allowed that other to act upon it, he may have created an equity against himself which he cannot resist by setting up the want of formality in the evidence of the contract out of which the equity in part arose.[4] In a leading case on the subject, specific performance of an oral agreement was decreed, because the 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 the defendant to plead the statute.[5]

The application of the doctrine of part performance is limited by certain well-established principles.

Same—Not Applicable to Certain Contracts.

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.[6] But this doctrine is not necessarily confined to agreements for the sale or acquisition of an interest in land. It applies to a parol agreement for an easement, though no interest in land is intended to be acquired.[7]

Same—Must be Certain and Unequivocal.

The act of part performance must be unequivocal, refer exclusively to the contract, and be such as would not have been performed but for such contract.[8] As was said by

129 U. S. 305, 9 Sup. Ct. 286, 32 L. Ed. 673; 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.) 22 S. W. 559; Holmes v. Holmes, 86 N. C. 205; Niles v. Davis, 60 Miss. 750.

[4] Per Lord Selborne in Maddison v. Alderson, 8 App. Cas. 467, 476, 2 Keener, Eq. Cas. 675.

[5] Lester v. Foxcroft (1701) Colles, 108, 1 White & T. Lead. Cas. Eq. 1027.

[6] Britain 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, 5 L. R. A. 623.

[7] McManus v. Cooke, 35 Ch. Div. 681, 691.

[8] Allen v. Young, 88 Ala. 338, 6 South. 747; Neibert v. Baghurst

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Lord O'Hagan: "It must have relation to the one agreement relied on, and no other. It must be such, in Lord Hardwicke's words, as could be done with no other view or design than to perform that agreement. It must be sufficient of itself, and without any other information or evidence, to satisfy a court, from the circumstances it has created, and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced." [9]

Same—Acts must Render Nonperformance a Fraud.

The principle upon which the court exercises jurisdiction in adjudging specific performance of parol contracts followed by part performances is the fraud and injustice which would result from allowing the party charged to refuse to perform his part after performance by the other upon the faith of the contract, and with the knowledge of the party charged.[10] The acts must be such that a refusal of full execution would operate as a fraud on the party performing them, and place him in a situation which does not lie in compensation.[11] So, where the acts of the party charged with part performance have caused no change of circumstances in the other party,[12] and are not such as to render a refusal by the party charged to perform the contract a fraud against the other party, the jurisdiction to enforce the

(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; Ogsbury v. Ogsbury, 115 N. Y. 290, 296, 22 N. E. 219.

[9] Maddison v. Alderson, 8 App. Cas. 467, 485, 2 Keener, Eq. Cas. 675. Mr. Fry has said: "The true principle, however, of the operation of acts of part performance, seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged." Fry, Spec. Perf. § 582.

[10] Per Grant, M. R., in Buckmaster v. Harrop, 7 Ves. 346; Miller v. Ball, 64 N. Y. 286, 2 Keener, Eq. Cas. 657.

[11] Pond v. Sheean, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414, 2 Keener, Eq. Cas. 715; Gallagher v. Gallagher, 31 W. Va. 9, 13, 5 S. E. 297, 2 Keener, Eq. Cas. 696; Barnes v. Railroad Co., 130 Mass. 388.

[12] Caton v. Caton, 1 Ch. App. 137; Miller v. Ball, 64 N. Y. 286, 2 Keener, Eq. Cas. 657; Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418; Purcell v. Miner, 4 Wall. 513, 18 L. Ed. 435.

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contract, notwithstanding the statute of frauds, will not be exercised.[13]

Same—Possession and Improvements.

Whether or not admission into possession of an estate will be considered part performance depends upon circumstances. If the party setting up the oral agreement was already in possession, as tenant of the vendor, for instance, then, of course, his continued possession has of itself no significance, and therefore is not evidence of the alleged contract.[14] 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.[15] But the possession must be shown to be under and in pursuance of the contract sought to be enforced.[16] It must be open and visible [17] and exclusive; that is, "the possession of vendee must be peaceful and undisputed."[18] As was said by Mr. Justice Grier, the proof must be "that delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party. This will not be satisfied by proof of a scrambling and litigious possession."[19]

Possession under a contract, accompanied by expenditures made with the actual or presumed knowledge of the vendor, for the permanent improvement of the estate, is universally held to be part performance.[20] Equity proceeds

[13] Fry, Spec. Perf. § 587.

[14] Knoll v. Harvey, 19 Wis. 99; Barnes v. Railroad Co., 130 Mass. 388; Johns v. Johns, 67 Ind. 440; Recknagle v. Schmaltz, 72 Iowa, 63, 33 N. W. 365; Ewins v. Gordon, 49 N. H. 444.

[15] Morphett v. Jones, 1 Swanst. 181; Mundy v. Jolliffe, 5 Mylne & C. 167; Paine v. Coombs, 1 De Gex & J. 34, 46; Eaton v. Whitaker, 18 Conn. 222, 229, 44 Am. Dec. 586; Reed v. Reed, 12 Pa. 117; Wallace v. Scoggins, 17 Or. 476, 21 Pac. 558; Morrison v. Herrick, 130 Ill. 631, 642, 22 N. E. 537, 2 Keener, Eq. Cas. 706; Recknagle v. Schmaltz, 72 Iowa, 63, 33 N. W. 365.

[16] Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537, 2 Keener, Eq. Cas. 706; Andrews v. Babcock, 63 Conn. 109, 26 Atl. 715; Shahan v. Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517, 2 Keener, Eq. Cas. 726; Brown v. Brown, 33 N. J. Eq. 650.

[17] Frostburg Coal Co. v. Thistle, 20 Md. 186; Charplot v. Sigerson, 25 Mo. 63; Brawdy v. Brawdy, 7 Pa. 157.

[18] Haslet v. Haslet, 6 Watts (Pa.) 464.

[19] Purcell v. Miner, 4 Wall. 513, 18 L. Ed. 435.

[20] Crook v. Corporation of Seaford, 6 Ch. App. 551; Freeman v.

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on the ground that it would be fraud for the vendor to allow the vendee to continue in possession, and expend his money in improvements, so as to render it impossible for the parties to be restored to their original situations, confessedly on the faith of an agreement of sale, and then try to avail himself of the statute of frauds to avoid the contract.[21]

Same—Ancillary Acts.

Acts ancillary to an agreement, although attended with expense, are not considered acts of part performance. Thus, the delivery of abstracts of title, giving orders for conveyances, going to view an estate, putting a deed in the solicitor's hands to prepare a conveyance, surveying, and similar acts, do not have the effect of taking the agreement out of the interdiction of the statute.[22]

Same—Acts Capable of being Undone.

Acts capable of being undone, and admitting of the parties being remitted to their original position, are of no avail as a means of removing the prohibition of the statute. Thus a part, or even an entire, payment of the purchase money is not sufficient of itself to warrant a decree of the specific performance of an oral contract, because that may be recovered in an action at law.[23]

Freeman, 43 N. Y. 34, 3 Am. Rep. 657, 2 Keener, Eq. Cas. 654; Moss v. Culver, 64 Pa. 414; Union Pac. Ry. Co. v. McAlpine, 129 U. S. 305, 9 Sup. Ct. 286, 32 L. Ed. 673; Neale v. Neale, 9 Wall. 1, 19 L. Ed. 590, 2 Keener, Eq. Cas. 647; Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829; Everett v. Dilley, 39 Kan. 73, 17 Pac. 661; Hunkins v. Hunkins, 65 N. H. 95, 18 Atl. 665; Potter v. Jacobs, 111 Mass. 32; Frame v. Frame, 32 W. Va. 463, 9 S. E. 901, 5 L. R. A. 323; Pond v. Sheean, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414, 2 Keener, Eq. Cas. 715.

[21] Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252, 2 Keener, Eq. Cas. 722.

[22] 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. 201, 20 Atl. 252, 2 Keener, Eq. Cas. 722; Colgrove v. Solomon, 34 Mich. 494.

[23] 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, 2 Keener, Eq. Cas. 722; Winchell v. Winchell, 100 N. Y.

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Marriage is not of itself a sufficient part performance, since the statute of frauds has expressly provided that every agreement made in consideration of marriage must be in writing.[24] But it is sufficient if an antenuptial verbal agreement for the conveyance of land is followed, not only by marriage, but by the expenditure of money.[25]

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.[26] 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.[27]

Failure to Plead Statute.

The statute of frauds is an affirmative defense, and is waived unless pleaded.[28] Hence the court will specifically enforce an oral contract where defendant has neglected to claim the benefit of the statute.[29]

159, 163, 2 N. E. 897; Forrester v. Flores, 64 Cal. 24, 28 Pac. 107. Where a recovery of the purchase money will not restore vendee to his former position, he will be entitled to specific performance. Malins v. Brown, 4 N. Y. 403. Some authorities hold payment a sufficient part performance. Stein v. Nysonger, 69 Iowa, 512, 29 N. W. 433; Townsend v. Houston, 1 Har. (Del.) 532.

[24] Warden v. Jones, 23 Beav. 487; Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185; Henry v. Henry, 27 Ohio St. 121; Adams v. Adams, 17 Or. 247, 20 Pac. 633.

[25] Surcome v. Pinniger, 3 De Gex, M. & G. 571; Welch v. Whelpley, 62 Mich. 15, 28 N. W. 744.

[26] 1 Story, Eq. Jur. § 161.

[27] McDonald v. Yungbluth (C. C.) 46 Fed. 836; Hitchins v. Pettingill, 58 N. H. 386; Murray v. Drake, 46 Cal. 648. Contra, Glass v. Hulbert, 102 Mass. 24.

[28] 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.

[29] 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.

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SPECIFIC PERFORMANCE WITH A VARIANCE.

276. Though a contract cannot be strictly carried out according to its terms, specific performance will be granted, if proper compensation can be made, and the parties put in fact in the same situation as if the contract had been strictly fulfilled.

277. Specific performance of a contract not capable of literal performance will be decreed with compensation for deficiencies where there is a variance

(a) As to the time in which the contract is to be performed.

(b) In the subject-matter of the sale.

The specific enforcement of contracts which cannot be literally fulfilled, with a compensation for deficiencies, affords one of the most striking illustrations of the contrast between the principles and methods of equity and those which prevailed in 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 case of a partial failure in the sale;[1] but in equity, on the other hand, an investigation will be made as to whether the property can be either literally or substantially transferred. If a substantial transfer can be made, it is considered in equity as against conscience to take advantage of similar circumstances of variation.[2]

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 en-

§§ 276–277. [1] Adams, Eq. 89.

[2] Hepburn v. Auld, 5 Cranch, 262, 3 L. Ed. 96; Evans v. Kingsberry, 2 Rand. (Va.) 120, 14 Am. Dec. 779.

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titled 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.[3] If there has been a delay in making out the title, and the property has deteriorated by dilapidation or mismanagement, compensation will be allowed to the purchaser,[4] but not for deterioration after the time when he ought to have taken possession,[5] and, of course, not for deterioration caused by himself.[6] When time is of the essence of the contract, and the purchaser has obtained a decree for specific performance, he will be entitled to compensation for the loss which he has sustained in consequence of possession not having been given to him according to the contract.[7]

Variance 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; but it must be clear that the deficiency is not substantial, for a purchaser cannot be required against his will to pay for that which he has not bought.[8] Where the vendor seeks the specific performance of a contract, equity will be slow in granting the relief, and will in all cases refuse its aid, unless the purchaser can be put in substantially as favorable a condition as he would have been if the terms of the contract had been fully complied with.[9] It has been held that the deficiency of twenty acres in a contract for the

[3] De Visme v. De Visme, 1 Macn. & G. 346; Calcraft v. Roebuck, 1 Ves. Jr. 221; Bostwick v. Beach, 105 N. Y. 661, 663, 12 N. E. 32.

[4] Foster v. Deacon, 3 Madd. 394; Worrall v. Munn, 38 N. Y. 137; Bostwick v. Beach, 105 N. Y. 661, 12 N. E. 32.

[5] Binks v. Rokeby, 2 Swanst. 226.

[6] Harford v. Purrier, 1 Madd. 532.

[7] Carrodus v. Sharp, 20 Beav. 56.

[8] Kenner v. Bitely (C. C.) 45 Fed. 133.

[9] Roberts' Heirs v. Lovejoy, 60 Tex. 253, 257.

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sale of three hundred acres did not defeat the vendor's right to specific performance, the purchase price being proportionately abated;[10] and in another case, where there was a deficiency of four acres in three hundred, performance with compensation was decreed.[11] On the sale of an estate with a mansion thereon, a similar deficiency in that part of the estate which is near the house may be material.[12] And where the contract was for the sale of a wharf and jetty, and it appeared that the jetty was liable to be removed by the corporation of London, specific performance was refused.[13] A material variation with respect to the title contracted to be sold is 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 of the lease may be.[14] And the rule as to compensation can never be employed to compel a purchaser to accept a doubtful title, or one different from that which he agreed to purchase, or one which may expose him to litigation.[15]

(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 can give, and demand compensation for what he cannot give;[16] and this is so whether the difference is one of tenure or of quantity.[17] This has been done even when the difference in quantity amounted to as much as one-half.[18] And where the vendor's wife re-

[10] Morgan's Adm'r v. Brast, 34 W. Va. 332, 12 S. E. 710. See, also, Farris v. Hughes (Va.) 17 S. E. 518.

[11] Stevenson v. Polk, 71 Iowa, 278, 32 N. W. 340.

[12] Perkins v. Ede, 16 Beav. 193; Knatchbull v. Grueber, 3 Mer. 124.

[13] Peers v. Lambert, 7 Beav. 546.

[14] Drewe v. Corp, 9 Ves. 368.

[15] Richmond v. Gray, 3 Allen (Mass.) 25; Irving v. Campbell, 121 N. Y. 354, 24 N. E. 821, 8 L. R. A. 620; Close v. Stuyvesant, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161; Jeffries v. Jeffries, 117 Mass. 184.

[16] Hill v. Buckley, 17 Ves. 401; Mortlock v. Buller, 10 Ves. 315; Walling v. Kinnard, 10 Tex. 508, 60 Am. Dec. 216; Harbers v. Gadsden, 6 Rich. Eq. (S. C.) 284, 62 Am. Dec. 390; 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, 144 Ill. 213, 33 N. E. 27; Roberts' Heirs v. Lovejoy, 60 Tex. 253, 257.

[17] Hughes v. Jones, 3 De Gex, F. & J. 307; Hooper v. Smart, L. R. 18 Eq. 683.

[18] Burrow v. Scammell, 19 Ch. Div. 175.

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fused to join in the deed, and to release her inchoate right of dower, the purchaser may compel specific performance, with the abatement of the price equal to the value of the wife's interest ascertained by the use of the standard life tables;[19] but the courts in some of the states 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 value of the outstanding interests.[20] If the vendor agrees to convey a title free of all incumbrances, the purchaser may compel specific performance of the contract, with an abatement of the purchase price to the extent of incumbrances.[21]

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 case the rule is that equity will retain jurisdiction to award damages, if the suit was brought in good faith, without knowledge of the defect.[22]

Parol Evidence to Show Variation.

As was stated in a former chapter, the rule which prohibits the admission of parol evidence to vary a written contract has no application to cases of fraud or mistake.[23] It is, therefore, a well-established principle that the defendant may resist a claim for the specific performance of a contract by the use of parol evidence designed to show that either because of fraud or mistake the written contract does not express the agreement, and that its enforcement would, therefore, be inequitable.[24] But in England

[19] Jackson v. Edward, 7 Paige (N. Y.) 408; Davis v. Parker, 14 Allen (Mass.) 94, 98, 104; Bostwick v. Beach, 103 N. Y. 414, 9 N. E. 41; Martin v. Merritt, 57 Ind. 34, 26 Am. Rep. 45.

[20] Graybill v. Braugh (Va.) 17 S. E. 558; Burk's Appeal, 75 Pa. 141; Borden v. Curtis, 46 N. J. Eq. 468, 19 Atl. 127; Lucas v. Scott, 41 Ohio St. 636.

[21] Grant v. Beronio, 97 Cal. 496, 32 Pac. 556; Hunt v. Smith, 139 Ill. 296, 28 N. E. 809.

[22] Cunningham v. Duncan, 4 Wash. 506, 30 Pac. 647; Morgan v. Bell, 3 Wash. St. 554, 28 Pac. 925, 16 L. R. A. 614; Combs v. Scott, 76 Wis. 662, 45 N. W. 532; Milkman v. Ordway, 106 Mass. 232, 253.

[23] Ante, p. 351.

[24] Clinan v. Cooke, 1 Schoales & L. 32, 39; Manser v. Back, 6 Hare, 443.

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such parol evidence is not admissible in favor of a plaintiff who seeks the specific performance of a written contract, with a variation for alleged mistake or fraud, on the ground that the court would thus be enforcing an oral agreement in violation of the statute of frauds.[25] This distinction is very generally repudiated in this country, and it has been generally held that either party may have a decree for the specific performance of a written contract with such corrections in it as parol proof may show to be necessary to correct a mistake therein.[26]

[25] Woollam v. Hearn, 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 920; Townshend v. Stangroom, 6 Ves. 228.

[26] Gillespie v. Moone, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559; Fishack v. Ball, 34 W. Va. 644, 12 S. E. 856; Redfield v. Gleason, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. Rep. 889; Strickland v. Barber, 76 Mich. 310, 43 N. W. 449.

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CHAPTER XXII.

INJUNCTION.

278. Definition.
279–281. Classification.
282. Principles Governing Jurisdiction.
283. When Injunction will be Granted—Classification.
284. Injunction against a Legal Proceeding.
285. Injunction to Prevent Breach of Contract.
286–287. Injunctions to Prevent Torts.
288. Protection of Other than Property Rights.
289. Protection of Real Property—Waste, Trespass, and Nuisance.
290. Protection of Patents, Copyrights, and Trade-Marks.
291. Injunctions against Breach of Trust and Violation of Equitable Rights.
292. Injunctions in Matters of Taxation.
293–294. Injunctions against Public Officers and Municipalities.

DEFINITION.

278. An injunction is a judicial order operating in personam, requiring a party to do or to abstain from doing some particular act.

A writ of injunction was, and still is, peculiarly an instrument of courts of equity, though there were some cases where courts of law were accustomed to exercise analogous powers,—as by the writ of prohibition and estrepement in cases of waste. The cases, however, to which these common-law processes were applicable were so few, and the processes themselves were so utterly inadequate for the purposes of justice, that the jurisdiction at law fell practically into disuse, and almost all the remedial justice of this sort came to be administered by courts of equity.[1]

The interdict of the Roman law, and the action founded thereon, furnished to the early chancellors a precedent for the remedy of injunction. These interdicts were pronounced by the prætors in the exercise of their extraordinary or equitable jurisdiction for the purpose of mitigating the se-

§ 278. [1] Snell, Eq. p 481.

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verity which resulted from an undeviating adherence to the technical forms of the civil law.[2]

In the former practice in equity the injunction was in the form of a writ, and this is still the case in the federal courts, and in the courts of those states which retain a separate system of equitable procedure. In most of the states, and also in England, statutes provide for the granting of temporary injunctions by order, and of permanent injunctions by a final decree. While, as thus stated, modern statutes have modified the practice in respect to the granting of injunctions, and have divided them into temporary and permanent injunctions, according to their duration, the principles, doctrines, and rules which determine and regulate the exercise of the jurisdiction of equity in respect to injunctions remain unchanged. And the provisions of the Codes of the several states which specify the cases in which injunctions will be granted do not materially alter the settled equitable jurisdiction, except in reference to injunctions against actions or judgments at law.[3]

CLASSIFICATION.

279. Injunctions are either mandatory or preventive.

280. A mandatory injunction is one which requires the doing of a particular thing, and compels the defendant to restore things to their former condition.[1]

281. A preventive injunction is one which is granted for the purpose of restraining the continuance or commission of some act by the defendant which is injurious to the plaintiff.

The granting of mandatory injunctions is not frequent, since, in the absence of a contract, it was formerly held that a court of equity could not directly compel the performance

[2] Joyce, Inj. 2.
[3] Pom. Eq. Jur. 1337.
§§ 279–281. [1] Joyce, Inj. 1309, 1310.

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of a positive act. Because of this doubt of the right of a court of equity to interfere, it sometimes accomplished the same object in an indirect form. Thus railroad companies have been prevented by mandatory injunctions from entering into agreements not to transfer goods at rates fixed by law; that is, to compel them to observe the law and regulate their rates according to statute.[2]

It seems well established at the present time that a court of equity may compel by injunction the performance of a positive act. As was said by Lord Justice Cotton: "This court, when it sees that a wrong is committed, has a right at once to put an end to it, and has no hesitation in doing so by a mandatory injunction, if it is necessary for the purpose."[3] In a recent New Jersey case the injunction was in the following language: "That the defendants do desist and refrain from further performing and carrying into effect the laws," etc., "and that the P. Company," etc., "do desist and refrain from continuing to control the right of the C. Company, and that the C. Company do desist and refrain from permitting the P. Company," etc., "to operate its road, and that the C. Company do again resume control of all its property and franchises and performance of all its corporate duties."[4] The last of these directions is clearly mandatory, not only in effect, but in terms. As suggested by Mr. Bispham,[5] there would seem to be no good reason why a direct form of decree similar to the one quoted should not be used.

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 remedy, and will always be refused if the injury can be reasonably compensated in damages, or even if the balance of evidence is strongly

[2] Rogers Locomotive & Machine Works v. Railway Co., 20 N. J. Eq. 379. 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.

[3] Loog v. Bean, 26 Ch. Div. 314.

[4] Stockton v. Railroad Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; Stockton v. Railroad Co., 50 N. J. Eq. 489, 25 Atl. 942. See, also, Hall's Appeal, 112 Pa. 42, 3 Atl. 783.

[5] Bisp. Eq. (6th Ed.) § 400.

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on the side of the defendant.[6] 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 the principles hereafter cited and commented upon generally apply to such injunctions. The remarkable difference between these injunctions and the legal remedy of damages is that they will be granted in advance of an injury, provided only an intention to do an act which will result in irreparable injury is shown to exist.

Classification as to Duration.

Injunctions, with respect to their duration, are either temporary or permanent. Temporary injunctions, which are also termed interlocutory or preliminary injunctions, are made pending the hearing of the case on its merits, and are generally expressed so as to continue until a final determination can be had. Such injunctions are merely provisional, and do not conclude a right. Their object is to preserve the property which is the subject of the litigation in statu quo until the rights of the parties in respect thereto have been determined. Such injunctions may be obtained by the plaintiff when he shows that he has a fair question to raise as to the existence of the right alleged by him.[7] Permanent injunctions, or final or perpetual injunctions, as they are sometimes called, 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.[8]

PRINCIPLES GOVERNING JURISDICTION.

282. To warrant the issuance of an injunction, the 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.

[6] Deere v. Guest, 1 Mylne & C. 516; Jacomb v. Knight, 3 De Gex, J. & S. 538.

[7] Blakemore v. Canal Nav., 1 Mylne & K. 154; High, Inj. § 5.

[8] High, Inj. § 8.

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Adequacy of Legal Remedy.

A court of equity will not lend its aid for the prevention of wrongs or the protection of rights by the granting of an injunction, if the party aggrieved has a full, complete, and adequate remedy at law. As is said by Prof. Pomeroy: "The restraining power of equity extends through the whole range of rights and duties which are recognized by the law, and would be applied to every case were it not for certain reasons of expediency and policy which control and limit its exercise." [1] These considerations of expediency and policy confine the exercise of the jurisdiction of equity to those cases in which the legal remedy is not full and adequate. It is not sufficient, to authorize the remedy by injunction, that a violation of a naked legal right of property is threatened.[2] In no case can equity restrain the breach of a contract, or the commission of a tort, if, by an action at law, adequate compensatory damages can be recovered. 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 requisites of the case, the exercise of the jurisdiction may be proper and beneficial.[3] And whenever the rights of the party aggrieved cannot be protected or enforced in the ordinary course of proceedings at law, except by numerous and expensive suits, a court of equity may properly interpose and afford relief by injunction.[4]

Irreparable Injury.

Equity interferes in the transactions of men by preventive measures only when irreparable injury is threatened and the law does not afford an adequate remedy for the contemplated wrong.[5] 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

§ 282. [1] Pom. Eq. Jur. § 1338; Tuchman v. Welch (C. C.) 42 Fed. 548, 559.

[2] McHenry v. Jewett, 90 N. Y. 58.

[3] Lumley v. Wagner, 1 De Gex, M. & G. 616; Watson v. Sutherland, 5 Wall. 74, 18 L. Ed. 580; Payne v. Railroad Co. (C. C.) 46 Fed. 546; Irwin v. Lewis, 50 Miss. 363.

[4] Pennsylvania Coal Co. v. Canal Co., 31 N. Y. 91; Wheelock v. Noonan, 108 N. Y. 179, 15 N. E. 67; Warren Mills v. Seed Co., 65 Miss. 391, 4 South. 298.

[5] Thomas v. Protective Union, 121 N. Y. 48, 52, 24 N. E. 24.

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grievous one, or, at least, a material one, and not adequately reparable by damages.[6] 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.[7] The facts alleged upon which the complainant bases his demand must show more than a remote possibility that injury will result from the threatened action. "Injury, material and actual, not fanciful or theoretical, or merely possible, must be shown as the necessary or probable result of the action sought to be restrained."[8]

WHEN INJUNCTION WILL BE GRANTED—CLASSIFICATION.

283. The remedy by injunction may be used to restrain

(a) Proceedings at law.

(b) Breach of contract.

(c) Commission of torts.

(d) Breach of trust, and violation of equitable rights.

(e) The collection of illegal taxes.

(f) Violation of law by public officers and municipal corporations.

It is not possible, within the limits of a work of this character, to specify every case to which the remedy of injunction might be applied. All that can be attempted is an illustration of 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.

[6] Pinchin v. Railway 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, 1 Am. St. Rep. 368; Hodge v. Giese, 43 N. J. Eq. 342, 11 Atl. 484.

[7] Hilton v. Earl of Granville, Craig & P. 283, 292.

[8] Genet v. President, etc., 122 N. Y. 505, 529, 25 N. E. 922; People v. Canal Board, 55 N. Y. 390, 397.

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INJUNCTION AGAINST A LEGAL PROCEEDING.

284. Equity will interfere to restrain a proceeding at law whenever, through mistake, accident, or fraud, or otherwise, one of the parties to an action at law obtains, or is likely to obtain, an unfair advantage over the other, so as to make the legal proceeding an instrument of injustice.[1]

Against Prosecution of Actions at Law.

In the exercise of its jurisdiction by injunction against a legal proceeding, a court of equity claims no supremacy over a court of law, since the injunction is in no sense a prohibition upon the action of the court of law. The injunction is directed, not to the court, but to the litigant parties, and in no manner denies the jurisdiction of the legal tribunal.[2] It is granted on the sole ground that, from certain equitable circumstances, of which the court of equity granting the process has cognizance, it is against conscience that the party inhibited should proceed in the cause. The object really is to prevent an unfair use being made of the process of a court of law, in order to deprive another party of his just rights, or to subject him to some unjust vexation or injury which is wholly irremediable by a court of law.[3]

Since these injunctions 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 party aggrieved might have availed himself in an action at law, and in all such cases the parties will be left to defend at law.[4]

§ 284. [1] Earl Oxford's Case, 1 Ch. R. 1, 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 601.

[2] High, Inj. § 45. Compare In re Schuyler's Steam Towboat Co., 136 N. Y. 169, 32 N. E. 623, 20 L. R. A. 391, reversed on another point 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981, sub nom. Moran v. Sturges.

[3] Story, Eq. Jur. § 875. Compare provisions of federal bankruptcy act as to staying actions in state courts during bankruptcy proceedings.

[4] New York Dry-Dock Co. v. Trust Co., 11 Paige (N. Y.) 384; Palm-

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In England, and in those states in this country where, by the adoption of the reformed procedure, equity and law are administered by the same courts, injunctions against the prosecutions of actions at law have become infrequent, since the defendant may, in a legal action, avail himself of any equitable defense he may have. But the jurisdiction of courts of equity in those states to restrain proceedings at law in cases where the exercise of this jurisdiction is essential to the complete administration of justice and the proper security of the rights of litigants has not been abrogated or abridged in any of its essential features by the union of law and equity in a single tribunal.[5] Such jurisdiction will be exercised when necessary to prevent interference where the jurisdiction of equity has once attached, and such interference would render the jurisdiction ineffectual.[6]

Against Judgments.

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.[7] In the celebrated Case of the Earl of Oxford,[8] decided during the reign of King James I., Lord Chancellor Ellsmere 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

er v. Hayes, 93 Ind. 189; Womack v. Powers, 50 Ala. 5; Palmer v. Gardiner, 77 Ill. 143; Dubuque & S. C. Ry. Co. v. Railway Co., 76 Iowa, 702, 39 N. W. 691.

[5] Fielding v. Lucas, 87 N. Y. 197, 200; Erie R. Co. v. Ramsey, 45 N. Y. 637.

[6] Pom. Eq. Jur. §§ 1370–1374; Wood v. Swift, 81 N. Y. 31; Platto v. Deuster, 22 Wis. 482; Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304.

[7] 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.

[8] 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 601.



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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.[9]

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 a 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,

[9] 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 præmunire, 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 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.

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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.[10]

In modern times the enlarged powers of courts of common law to grant new trials for errors and mistakes occurring during the trial have 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.[11]

[10] 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. 443, 445, 15 L. Ed. 123, 124, 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, etc., 51 Md. 1; Knox Co. v. Harsham, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. Ed. 586; Warner v. Conant, 24 Vt. 351, 58 Am. Dec. 178; 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. 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. (Ky.) 234; Vaughn v. Johnson, 9 N. J. Eq. 173.

[11] 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, 22 Am. St. Rep. 660; Gates v. Steele, 58 Conn. 316, 20 Atl. 474, 18 Am. St. Rep. 268; Taylor v. Railroad Co., 86 Tenn. 228, 6 S. W. 393; Wagner v. Shank, 59 Md. 313; Murphy v. Smith, 86 Mo. 333. By the English judicature act of 1873, § 24 (5), it was enacted that no injunction should issue from the court of chancery to restrain proceedings at law, but that any matter of equity which, before the act, would have been a sufficient ground for obtaining an injunction, could, after the act, be relied on as a defense in the proceedings. This section does not interfere with the granting of an injunction restraining the institution of proceedings. Besant v. Wood, 12 Ch. Div. 630.

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INJUNCTION TO PREVENT BREACH OF CONTRACT.

285. Injunctions will be granted to prevent the breach of a contract where such breach will result in irreparable injury not capable of being adequately compensated in damages.

If it appears that the complainant has an adequate remedy at law for the threatened breach of a contract, a court of equity will refuse to lend its aid.[1] The jurisdiction will be exercised in case of oral as well as written contracts.[2] Any valid contract, the breach of which will cause mischief which cannot be repaired or well estimated, will provide a basis for such jurisdiction.[3] And it need not be shown that the threatened act would be a violation of the express terms of the contract, if it appear that it would be a violation of its spirit and meaning,[4]—as where the defendant, an actress, by her contract with the plaintiff, agreed to appear in seven performances in each week given by the plaintiff, it was held that, as it was not possible for her to perform elsewhere without violating her contract, the fact that it did not contain a negative clause, binding her not to appear elsewhere, was not a ground for refusing the plaintiff an injunction.[5]

An injunction against the breach of a negative contract is similar to a decree for its specific performance. Where the contract contains express negative as well as positive terms,

§ 285. [1] West v. Cobb, 63 Ga. 341; Hill v. Staples, 85 Ga. 863, 11 S. E. 967; Harkinson's Appeal, 78 Pa. 196, 21 Am. Rep. 9; Steinau v. Gas Co., 48 Ohio St. 324, 27 N. E. 545; Burdon Cent. Sugar Refining Co. v. Leverich (C. C.) 37 Fed. 67; Bailey v. Collins, 59 N. H. 459.

[2] Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153; Spier v. Lambdin, 45 Ga. 319.

[3] McClurg's Appeal, 58 Pa. 51; Manhattan Mfg. & Fertilizing Co. v. Market Co., 23 N. J. Eq. 161.

[4] Richardson v. Peacock, 26 N. J. Eq. 40; Wright v. Evans, 2 Abb. Prac. N. S. (N. Y.) 308.

[5] Duff v. Russell (N. Y. Super. Ct.) 14 N. Y. Supp. 134, affirmed in 16 N. Y. Supp. 958, affirmed on opinion below in 133 N. Y. 678, 31 N. E. 622.

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and the positive terms are capable of specific performance by the court, the court may enforce by injunction the observance of the negative terms.[6] It does not follow, however, that an injunction will only issue against a breach of a contract which can be specifically enforced.[7] An injunction will be granted where it can operate to bind men's conscience, as far as they can be bound, to a true and literal performance of their agreement.[8]

Contracts Concerning Real Estate.

It is generally presumed that the violation of a contract relating to real estate, the result of which will be injurious to the inheritance, is irreparable at law. 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 such premises 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.[9] In this country it has generally been held that the violation of contracts and covenants concerning the manner of holding, using, and disposing of realty places the burden of proving that no serious or irreparable injury would result upon the defendant; and where it is not made clear at a trial whether the plaintiff can obtain full damages at law for the violation of a covenant,—for instance, not to build a pond, or incumber a certain right of way,—an injunction against such violation is discretionary with the trial court, and, having been granted, will not be disturbed.[10] A tenant will be restrained from using the leased premises for any purpose or in any manner which would be violative of the covenants of his lease, whether or not irreparable or serious injury would

[6] Fry, Spec. Perf. § 1148.

[7] Singer Sewing-Mach. Co. v. Embroidery Co., 1 Holmes, 253, Fed. Cas. No. 12,904; Steinau v. Gas Co., 48 Ohio St. 324, 27 N. E. 545; Wolverhampton & W. Ry. Co. v. Railway Co., L. R. 16 Eq. 433, 438.

[8] Kerr, Inj. 426; Lumley v. Wagner, 1 De Gex, M. & G. 619.

[9] 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, 41 Am. Rep. 365; Godfrey v. Black, 39 Kan. 193, 17 Pac. 849, 7 Am. St. Rep. 544; Morris v. Manufacturing Co., 83 Ala. 565, 3 South. 689; Gawtry v. Leland, 40 N. J. Eq. 323.

[10] Dexter v. Beard, 53 Hun, 638, 7 N. Y. Supp. 11.

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result from such violation.[11] The act in violation of the covenants of the lease need not amount to waste, but it is sufficient if it is in contravention of such covenants, or of an agreement which may be implied from the dealings between the parties.[12] In all cases involving the restraint of a breach of a covenant in a contract respecting real property, it is not for the court, but for the plaintiff, to estimate the amount of damages that arises from the injury inflicted upon him by such breach. The breach itself constitutes an injury, and the court has no right to measure it, and cannot refuse to the plaintiff specific performance of his contract by way of injunction against such breach.[13]

Contracts not to Engage in Business.

Preventive relief is frequently granted to parties who seek to restrain the violation of provisions in contracts for not engaging in a particular business or profession in a certain locality. The validity of such a contract generally depends upon the reasonableness of the limitation. If it attempts to prevent a person from resuming his business or calling in the whole state, it is invalid, because in restraint of trade, and its violation will not be enjoined.[14] And it has been held that the prohibitory terms of such a contract do not extend to a member of a partnership bound by it after a dissolution of such a partnership, unless it is expressly provided in the contract or appears by clear implication.[15] Subject to the rule as to the reasonableness of the limitation, the court will prevent by injunction the violation of provisions in such contracts, whereby one of the parties agrees not to engage in a certain business or profession in a specified locality.[16] A covenant not to engage in business

[11] Steward v. Winters, 4 Sandf. Ch. (N. Y.) 587; Barrow v. Richard, 8 Paige (N. Y.) 357, 35 Am. Dec. 713. And see Kerr, Inj. 86; Spell. Extr. Relief, § 498.

[12] Frank v. Brunnemann, 8 W. Va. 462; Parker v. Garrison, 61 Ill. 250; Lewis v. Christian, 40 Ga. 187.

[13] Per Jessel, M. R., in Leech v. Schweder, 9 Ch. App. 463, 465.

[14] Lange v. Werk, 2 Ohio St. 520; Baumgarten v. Broadaway, 77 N. C. 8.

[15] Baker v. Pottmeyer, 75 Ind. 451.

[16] McClurg's Appeal, 58 Pa. 51; (in case of publishers) Beal v. Chase, 31 Mich. 490; Spicer v. Hoop, 51 Ind. 365; (innkeepers) Stines v. Dorman, 25 Ohio St. 580; McAlister v. Howell, 42 Ind. 15; Elliot's

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will not, however, be implied from a sale of the business, or even of the 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.[17]

Contracts for Personal Services.

We have already seen that a court of equity will not decree the specific performance of the contract for personal services;[18] nor will it enjoin the violation of restrictive covenants in such contracts, nor compel the affirmative performance from day to day, or the affirmative acceptance of merely personal services.[19] A breach of contract for ordinary personal services, not peculiar in their character, will not be restrained since the remedy at law in damages is adequate;[20] but, where the services are of a special, unique, and extraordinary character, and the contract contains a covenant not to perform similar services for any other reason during the existence of the contract, a breach of such a covenant may be restrained by an injunction. The leading case on this subject is that of Lumley v. Wagner,[21] where the defendant had entered into a contract with the plaintiff to sing at his

Appeal, 60 Pa. 161; (attorneys) Smalley v. Greene, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; (druggists) Baker v. Cordon, 86 N. C. 116, 41 Am. Rep. 448; Ward v. Hogan, 11 Abb. N. C. (N. Y.) 478; (dressmakers) Morgan v. Perhamus, 36 Ohio St. 517, 38 Am. Rep. 607; (dentists) Cook v. Johnson, 47 Conn. 175, 36 Am. Rep. 64; (undertakers) Hall's Appeal, 60 Pa. 458, 100 Am. Dec. 584; (physicians) Thayer v. Younge, 86 Ind. 259; Pickett v. Green, 120 Ind. 584, 22 N. E. 737. Some of the later cases have upheld contracts in restraint of trade, though unlimited territorially. Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Leather Cloth Co. v. Lorsont, 39 Law J. Ch. 86; Rousillon v. Rousillon, 14 Ch. Div. 351.

[17] Cruttwell v. Lye, 17 Ves. 335; Churton v. Douglas, Johns. Eng. Ch. 174; Close v. Flesher (Com. Pl.) 28 N. Y. Supp. 737. In Massachusetts a restrictive covenant was implied from a sale of the good will. Dwight v. Hamilton, 113 Mass. 175.

[18] Ante, p. 531.

[19] Arthur v. Oakes, 11 C. C. A. 209, 63 Fed. 318, 25 L. R. A. 414.

[20] Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278; Cort v. Lassard, 18 Or. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726; Burney v. Ryle, 91 Ga. 701, 17 S. E. 986.

[21] 1 De Gex, M. & G. 616.

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theater for three months, and not to sing at any other theater during such period. Although the agreement to sing at the plaintiff's theater was of such a nature that its specific performance could not be decreed, an injunction was issued to restrain the defendant from singing at a rival theater.[22]

INJUNCTIONS TO PREVENT TORTS.

286. Wherever a right exists or is created which is cognizable by law, a violation of that right will be prevented by injunction, provided

(a) The injury is such that it cannot be adequately compensated in damages, or at least not without the necessity of a multiplicity of actions for that purpose.

(b) There is an actual violation of a legal right by the defendant, or a probability or danger of such violation.

287. 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.

By far the most important class of injunctions is that dealing with wrongs independent of contract. The jurisdiction to restrain actions and judgments at law, once important, is gradually becoming less so, owing to reasons heretofore stated. With respect to contracts, the usual equita-

[22] See, also, Cort v. Lassard, 18 Or. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726; Daly v. Smith, 49 How. Prac. 150; McCaull v. Braham (C. C.) 16 Fed. 37; Metropolitan Exhibition Co. v. Ward (Sup.) 9 N. Y. Supp. 779; Duff v. Russell (Super. N. Y.) 14 N. Y. Supp. 134, affirmed on appeal 133 N. Y. 678, 31 N. E. 622, where it was held that a negative covenant is sometimes implied to devote the entire time to a business. And see Pratt v. Montegriffo, 57 Hun, 587, 10 N. Y. Supp. 903; Allegany Baseball Club v. Bennett (C. C.) 14 Fed. 257.

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ble remedy is by way of specific performance, and the right to injunctive relief is limited to a comparatively small class of cases, generally 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. Although the jurisdiction of equity is in general so extensive, it is restrained and modified by considerations of convenience, and equity will not interfere where the breach of a duty or the violation of a right may be completely and adequately paid for by damages at law, or where other reasons of justice and convenience are against and in contravention of equity.[1] As, for instance, injunction will not lie where the act to be enjoined is political or governmental, nor where the issuance thereof would prevent the exercise of executive discretion, or where its effect would be to determine the title to a public office.[2] Under the old cases the rule was that the jurisdiction should be exercised only to protect property rights, but there seems at the present time to be a tendency in both the English and American courts to restrain by injunction every species of torts for which damages are not an adequate remedy, whether the wrong be to property, person, or reputation.

To warrant the issuance of a temporary injunction before the hearing on the merits, the plaintiff must be able to show a fair prima facie case in support of the title which he asserts.[3] There should be no real doubt as to the existence of the plaintiff's legal right,[4] and there must be ground for the allegation that the act which he seeks to prevent is a wrongful act.[5] If the legal right of the plaintiff 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

§§ 286, 287. [1] Snell, Eq. 492; Pom. Eq. Jur. § 1338; Gaslight & Coke Co. v. Vestry of St. Mary Abbotts, 15 Q. B. Div. 1; Tuchman v. Welch (C. C.) 42 Fed. 548, 559.

[2] Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; Heffran v. Hutchins, 160 Ill. 550, 43 N. E. 709; Goldsworthy v. Boyle, 175 Pa. 254, 34 Atl. 630.

[3] Saunders v. Smith, 3 Mylne & C. 714, 728; Hilton v. Earl of Granville, Craig & P. 283, 292.

[4] National Docks R. Co. v. Railroad Co., 32 N. J. Eq. 755; Mammoth Vein Consol. Coal Co.'s Appeal, 54 Pa. 183.

[5] Sparrow v. Railroad Co., 9 Hare, 436, 441.

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the right,[6] or is at least an act which must, if carried into effect, necessarily result in a ground of action.[7] The mere prospect of injury, or the mere belief that the act may or will be done, is not sufficient;[8] but, if an intention to do the act complained of can be shown to exist, or if a man insists in 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 basis for the exercise of the jurisdiction.[9] After the establishment of a property right on a trial on the merits, and of the fact of its violation, the complainant is entitled as of course to a permanent injunction to prevent the recurrence of the wrong.

SAME—PROTECTION OF OTHER THAN PROPERTY RIGHTS.

288. As a general 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.

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.[1] It therefore possessed no jurisdiction to restrain by injunction the publication of a libel, or the making of slanderous statements cal-

[6] Imperial Gaslight & Coke Co. v. Broadbent, 7 H. L. Cas. 600; Ripon v. Hobart, 3 Mylne & K. 169, 176.

[7] Haines v. Taylor, 10 Beav. 75; Goodhart v. Hyett, 25 Ch. Div. 190.

[8] 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. 443, Fed. Cas. No. 7,285.

[9] Attorney General v. Forbes, 2 Mylne & C. 123, 132; Cooper v. Whittingham, 15 Ch. Div. 501; Attorney General v. Board, 22 Ch. Div. 221; McArter v. Kelly, 5 Ohio, 139; Owen v. Ford, 49 Mo. 436; Diedrichs v. Railroad Co., 33 Wis. 219; East & West R. Co. v. Railroad Co., 75 Ala. 275.

§ 288. [1] Huggonson's Case, 2 Atk. 469; 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.

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culated to injure a man in his business.[2] The judicature act of 1873, which abolished the ancient English courts, and substituted in their place, the supreme court of judicature, conferred on that court the power to grant injunctions whenever it appeared to the court to be just and convenient.[3] 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."[4] It is accordingly held in England that, where a libel is calculated to injure the plaintiff in his trade or business, an injunction may be granted;[5] and even an oral slander, which is detrimental to the business of the plaintiff, may be enjoined.[6] The American courts, however, have refused to follow these recent English decisions; and the publication of a libel, no matter how injurious to the 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 the plaintiff's property or 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 granting freedom of speech and of the press;[7] but, if the publication is not only libelous, but is intended to frighten away the plaintiff's customers, and intimidate them from dealing with him, an injunction against its circulation will be granted.[8]

[2] Prudential Assur. Co. v. Knott, 10 Ch. App. 142.

[3] Acts 36 & 37 Vict. c. 66, § 25, subsec. 8.

[4] Aslatt v. Corporation of Southampton, 16 Ch. Div. 148.

[5] Thorley's Cattle Food Co. v. Massam, 14 Ch. Div. 763; Quartz Hill Consol. Gold Min. Co. v. Beall, 20 Ch. Div. 501; Hill v. Hart-Davies, 21 Ch. Div. 798; Hayward v. Hayward, 34 Ch. Div. 198.

[6] Loog v. Bean, 26 Ch. Div. 306.

[7] Kidd v. Horry (C. C.) 28 Fed. 773; Boston Diatite Co. v. Manufacturing Co., 114 Mass. 69, 19 Am. Rep. 310; Whitehead v. Kitson, 119 Mass. 484; Mayer v. Association, 47 N. J. Eq. 519, 20 Atl. 492; New York Juvenile Guardian Soc. v. Roosevelt, 7 Daly (N. Y.) 188; Brandreth v. Lance, 8 Paige (N. Y.) 24, 34 Am. Dec. 368; Singer Mfg. Co. v. Machine Co., 49 Ga. 70, 15 Am. Rep. 674.

[8] Threats to prosecute plaintiff's customers for infringement of patent, Emack v. Kane (C. C.) 34 Fed. 47; Grand Rapids School Furniture Co. v. Furniture Co., 92 Mich. 558, 52 N. W. 1009, 11 L. R. A. 721, 31 Am. St. Rep. 611; Shoemaker v. Arrester Co., 135 Ind.

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A decision of the general term (now appellate division) of the supreme court of the state of New York held that the exhibition of a statute of a deceased person as a typical philanthropist should be 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 an adequate remedy. But this decision was reversed by the court of appeals on the ground that there was no reasonable cause in the act complained of for this mental distress and injury. But the court distinctly held that the surviving relatives have a right to protect the memory of the deceased and their own feelings from a substantial injury existing in something more than a mere supersensitive and morbid mental caprice. This would tend to show that in New York there is a tendency to extend the remedy beyond the mere protection of property.[9] In a recent case the federal circuit court for the district of Massachusetts refused to enjoin the publication of a biography of a deceased person, 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.[10] But it is worthy of note in this connection that as far back as Lord Eldon's time it was a settled doctrine of equity that injury to feelings was no ground for injunctive relief.[11]

471, 35 N. E. 380, 22 L. R. A. 332; boycotting circulars, Casey v. Union (C. C.) 45 Fed. 135, 12 L. R. A. 193.

[9] Schuyler v. Curtis, 64 Hun, 594, 19 N. Y. Supp. 264, 1 Keener, Eq. Cas. 95, reversed in 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671. "On the right to privacy," see note in 1 Keener, Eq. Cas. 95.

[10] Corliss v. E. W. Walker Co. (C. C.) 57 Fed. 434.

[11] 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 argument stated that an attempt would be made to sustain the injunction, on the ground that the publication of the letters would 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 sus-

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SAME—PROTECTION OF REAL PROPERTY—WASTE, TRESPASS, AND NUISANCE.

289. Equity will interfere to protect real property from irreparable injury by certain torts, such as waste, trespass, and nuisance.

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.[1] 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.[2] As was stated by Judge Story: "The jurisdiction of courts of equity to interpose by way of injunction in cases of waste may be referred to the broadest principles of social justice. It is exerted where the remedy at law is imperfect or is wholly denied; where the nature of the injury is such that preventive remedy is indispensable, and it should be permanent; where matters of discovery and account are incidental to the proper relief; and where equitable rights and equitable injuries call for redress, to prevent a malicious, wanton, and capricious abuse of their legal rights and authorities by persons having but temporary and limited interests in the subject-matter."[3] The interference of equity in cases of waste depends on much latitude of discretion in the court, and has come to be allowed very much as a matter of course.[4] But it has been held that, if the injury is not irreparable, but is susceptible of perfect compensation, and for which the party may obtain adequate satisfaction, the injunction should not be granted.[5] It may be stated as a well-established principle that an injunc-

tained, on the ground that the publication of the letters by the receiver was an invasion of the property rights of the author.

§ 289. [1] Co. Litt. 53a.

[2] Davenport v. Davenport, 7 Hare, 222.

[3] Story, Eq. Jur. § 919. And see Watson v. Hunter, 5 Johns. Ch. (N. Y.) 170, 9 Am. Dec. 295; Winship v. Pitts, 3 Paige (N. Y.) 259.

[4] Kane v. Vanderburgh, 1 Johns. Ch. (N. Y.) 11; Markham v. Howell, 33 Ga. 508; Griffin v. Sketol, 30 Ga. 300.

[5] Keller v. Ogsbury, 121 N. Y. 362, 24 N. E. 803; Chapel v. Hull, 60 Mich. 167, 26 N. W. 874; Clark's Appeal, 62 Pa. 447.

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tion will be granted in all such cases where it is shown that the defendant in an action at law would be unable to respond in damages.[6]

To constitute waste it is necessary that the wrongdoer be in actual possession of the premises; such possession constituting the distinction between waste and trespass, a principal element of the latter being a wrong done to one in possession.[7] It was formerly held that equity would not restrain waste unless there was unquestioned evidence of the plaintiff's title.[8] But in more recent cases it has been the common practice to issue an injunction where the threatened waste will cause material and irreparable injury, although the title to the premises be in litigation.[9] The existence of a doubt as to the title does not of itself constitute a sufficient ground for refusing an injunction;[10] but, if the plaintiff's title is bad, or he has no reasonable ground for asserting such title, an injunction will not be granted.[11]

Although the acts may ultimately lead to the improvement of the land, waste may be restrained, if the immediate result is injurious to the premises;[12] and any material alterations may be restrained, notwithstanding the fact that the value of the property will be increased thereby.[13] The relief by injunction will be granted to prevent threatened waste without waiting for its actual commission.[14]

[6] Kinsler v. Clarke, 2 Hill, Eq. (S. C.) 617; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; Cornelius v. Post, 9 N. J. Eq. 196; Tainter v. Mayor of Morristown, 19 N. J. Eq. 46.

[7] Cooley, Torts, 232; Denny v. Brunson, 29 Pa. 382. But see More v. Massini, 32 Cal. 590, where it was held that an injunction will lie to restrain a threatened injury to real property in the nature of waste, although the plaintiff is in possession of the land.

[8] Pillsworth v. Hopton, 6 Ves. 51; Davis v. Leo, Id. 784; Nethery v. Payne, 71 Ga. 379; Preston v. Smith (C. C.) 26 Fed. 884.

[9] Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; Hunt v. Steese, 75 Cal. 621, 17 Pac. 920; West Point Iron Co. v. Reymert, 45 N. Y. 703; Wilson v. City of Mineral Point, 39 Wis. 160.

[10] Hunt v. Steese, 75 Cal. 620, 17 Pac. 920; Snyder v. Hopkins, 31 Kan. 559, 3 Pac. 367.

[11] Hunt v. Steese, 75 Cal. 620, 17 Pac. 920.

[12] Coppinger v. Gubbins, 9 Ir. Eq. 304.

[13] Douglass v. Wiggins, 1 Johns. Ch. (N. Y.) 435; Brock v. Dole, 66 Wis. 145, 28 N. W. 334.

[14] Rodgers v. Rodgers, 11 Barb. (N. Y.) 595; Livingston v. Reynolds, 26 Wend. (N. Y.) 123; More v. Massini, 32 Cal. 590; Sheridan v. McMullen, 12 Or. 150, 6 Pac. 497.

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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.[15] 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 made so by the act complained of.[16] A vendor who sells land under a contract, retaining the title as security for the purchase money, sustains the same relative position in respect to the property sold as does a mortgagee to the mortgagor, and he may restrain the commission of waste by the vendee, if the security is insufficient.[17]

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;[18] 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.[19] In the leading case (Lord Bernard's Case)[20] 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.

Trespass.

The ground of the equitable jurisdiction to prevent trespass by injunction is the probability of irreparable injury, the inadequacy of the legal remedy, and the prevention of a mul-

[15] Pulteney v. Shelton, 5 Ves. 147, 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. (N. Y.) 169, 9 Am. Dec. 295; Lavenson v. Soap Co., 80 Cal. 245, 22 Pac. 184, 13 Am. St. Rep. 147.

[16] Moriarty v. Ashworth, 43 Minn. 1, 44 N. W. 531, 19 Am. St. Rep. 203; Harris v. Bannon, 78 Ky. 568; Fairbank v. Cudworth, 33 Wis. 358; King v. Smith, 2 Hare, 244.

[17] Moses v. Johnson, 88 Ala. 517, 7 South. 146, 16 Am. St. Rep. 58; Core v. Bell, 20 W. Va. 169; Van Wyck v. Alliger, 6 Barb. (N. Y.) 507.

[18] Bowles' Case, 11 Coke, 81b.

[19] Micklethwait v. Micklethwait, 1 De Gex & J. 504, 524; Hawley v. Clowes, 2 Johns. Ch. (N. Y.) 122.

[20] Finch, Prec. 454, 2 Vern. 738.

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tiplicity of suits.[21] Formerly courts of equity hesitated, even in cases of repeated trespass, to interfere by injunction. But at the present time the jurisdiction is freely exercised in all cases where the threatened trespass, if committed, would be ruinous or irreparable in damages, or would impair the just enjoyment of the property in the future.[22] It was said by Chancellor Kent that the common-law remedy by action and the assessment of damages by a jury had been found in ordinary cases "amply sufficient for the protection of property; and I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass, which go to the destruction of the inheritance, or where the mischief is remediless." [23] This statement of the rule is opposed to the decisions of many able judges of the present day, and injunctions are now frequently granted, not merely because the injury is essentially destructive, but because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages.[24] The foundation for the jurisdiction at the present time may be said to be the inadequacy of the legal remedy,[25] either (1) because of the irreparable nature of the injury caused by a single act of trespass,[26] or (2) because of the necessity for a

[21] Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686, 8 L. R. A. 578, 21 Am. St. Rep. 828; Western Union Tel. Co. v. Judkins, 75 Ala. 428; Poughkeepsie Gas Co. v. Gas Co., 89 N. Y. 493; Wheelock v. Noonan, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405; 1 Keener, Eq. Cas. 194; Owens v. Crossett, 105 Ill. 356; Poyer v. Village of Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494; Smithers v. Fitch, 82 Cal. 155, 22 Pac. 935.

[22] Spell. Extr. Relief, § 337.

[23] Jerome v. Ross, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484.

[24] Pom. Eq. Jur. § 1357.

[25] Silva v. Garcia, 65 Cal. 591, 4 Pac. 628; Frink v. Stewart, 94 N. C. 484; 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. 373; Jordan v. Lanier, 73 N. C. 90.

[26] Removal of ore from mines by a trespasser, going to the destruction of inheritance, will be enjoined. Anderson v. Harvey's Heirs, 10 Grat. (Va.) 386; Cheesman v. Shreve (C. C.) 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 will be restrained, Fulton v. Harman,

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If the assignee does not perfect his title by giving notice to the debtor, a subsequent assignee, purchaser, or incumbrancer without notice of the prior assignment will acquire priority by giving notice of his assignment.[7] The principle upon which this rule is based is the same as that which requires the assignee of a personal chattel to take every step in his power to reduce it to 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 protect the one who has been most diligent in the preservation of his rights. Notice to the debtor must exist to give the assignee a perfect title, and he who first accomplishes this result is entitled to the protection of a court of equity. But a subsequent assignee, giving notice of his assignment, will not gain priority over a prior assignee who has not given notice, if, at the time of giving such notice, he has express or implied notice of the former assignment.[8]

This rule as to the necessity of notice to protect the title of an assignee has not been adopted in all the courts of this country, although the English rule seems to be based upon the more correct view of the law on the question.[9] The rule in New York is that, as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, although he has given no notice of such assignment to either the subsequent assignee or the debtor.[10]

2 Brown, Ch. 391; 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, 30 L. Ed. 704; Renton v. Monnier, 77 Cal. 449, 19 Pac. 820. See, also, Dale v. Kimpton, 46 Vt. 76; McWilliams v. Webb, 32 Iowa, 577.

[7] Dearle v. Hall, 3 Russ. 1, 30, which is the leading case on this subject. And see Spencer v. Clarke, 9 Ch. Div. 137; McWilliams v. Webb, 32 Iowa, 577; Spain v. Hamilton's Adm'r, 1 Wall. 604, 624, 17 L. Ed. 619; Murdoch v. Finney, 21 Mo. 138; Loomis v. Loomis, 26 Vt. 198.

[8] Spencer v. Clarke, 9 Ch. Div. 137.

[9] Vanbuskirk v. Insurance Co., 14 Conn. 145, 36 Am. Dec. 473, Campbell v. Day, 16 Vt. 558; Loomis v. Loomis, 26 Vt. 198; Clodfelter v. Cox, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157; Woodbridge v. Perkins, 3 Day (Conn.) 364.

[10] Fortunato v. Patten, 147 N. Y. 277, 283, 41 N. E. 572, citing Fairbanks v. Sargent, 104 N. Y. 108, 9 N. E. 870; Williams v. Inger-

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SAME—ASSIGNMENT SUBJECT TO EQUITIES.

248. The general rule is that the assignee of a chose in action takes it subject to all the equities existing against it in the hands of his assignor, and can acquire no greater right or interest therein than belonged to such assignor.[1]

EXCEPTION—This rule does not apply to the assignment of negotiable instruments.

A purchaser of a chose in action must always abide by the case of the person from whom he buys.[2] Any defense or set-off to which the debtor is entitled as against the assignor at the time of the assignment may be had by him against the assignee.[3] If the debt is payable only on condition, the condition is binding on the assignee,[4] and the assignee of a mortgage takes it subject to all the defenses which the mortgagor had against the mortgagee.[5] But, if a debtor actively

soll, 89 N. Y. 508; Muir v. Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633. And see Thayer v. Daniels, 113 Mass. 129; Kennedy v. Parke, 17 N. J. Eq. 415.

§ 248. [1] Callanan v. Edwards, 32 N. Y. 483, 486; Fairbanks v. Sargent, 104 N. Y. 116, 9 N. E. 870, 58 Am. Rep. 490; Friedlander v. Railway Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 5 South. 317, 2 L. R. A. 836, 7 Am. St. Rep. 73; Jeffries v. Evans, 6 B. Mon. (Ky.) 119, 43 Am. Dec. 158; Kamena v. Huelbig, 23 N. J. Eq. 78.

[2] Per Lord Thurlow, in Davies v. Austen, 1 Ves. Jr. 247.

[3] Bebee v. Bank, 1 Johns. (N. Y.) 529, 552, 3 Am. Dec. 353; Ex parte Mackenzie, L. R. 7 Eq. 240; Loomis v. Loomis, 26 Vt. 198; Rider v. Johnson, 20 Pa. 190; McKenna v. Kirkwood, 50 Mich. 544, 15 N. W. 898; Fairbanks v. Sargent, 104 N. Y. 116, 9 N. E. 870, 58 Am. Rep. 490; Goldthwaite v. Bank, 67 Ala. 549; Baker v. Kinsey, 41 Ohio St. 403.

[4] Tooth v. Hallett, 4 Ch. Div. 242; Western Bank v. Sherwood, 29 Barb. (N. Y.) 383.

[5] Hill v. Hoole, 116 N. Y. 299, 302, 22 N. E. 547, 5 L. R. A. 620; Bennett v. Bates, 94 N. Y. 354, 363; Theyken v. Machine Co., 109 Pa. 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. Maglough-

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misleads an assignee as to the existence of a defense or set-off possessed by him, or remains silent when it his duty to speak, he may be estopped from taking advantage of such defense or set-off.[6]

Where an assignment is made by an assignee of a chose in action formerly assigned to him, the question arises as to whether the subsequent assignee takes subject to the equities existing between the first assignor and his assignee. In the leading case of Bush v. Lathrop [7] it was held that the second assignee stands in the shoes of the first; and therefore, 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.[8] 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.[9]

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.[10]

lin, 133 Ill. 33, 24 N. E. 1030; Redin v. Branhan, 43 Minn. 283, 45 N. W. 445; Woodruff v. Institution, 34 N. J. Eq. 174. Contra, Taylor v. Page, 6 Allen (Mass.) 86; Spence v. Railroad Co., 79 Ala. 576; Cooper v. Smith, 75 Mich. 247, 42 N. W. 815; Cornell v. Hichins, 11 Wis. 353.

[6] In re Agra & Masterman's Bank, 2 Ch. App. 391; Sargeant v. Sargeant, 18 Vt. 371; Middletown Bank v. Jerome, 18 Conn. 443; Watson's Ex'rs v. McLaren, 19 Wend. (N. Y.) 557.

[7] 22 N. Y. 535.

[8] The same principle was applied in Davis v. Bechstein, 69 N. Y. 440, 442, 25 Am. Rep. 218; 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.

[9] McNeil v. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Bangor Electric Light & Power Co. v. Robinson (C. C.) 52 Fed. 520.

[10] Ex parte City Bank, 3 Ch. App. 758.

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CHAPTER XX.

REMEDIES SEEKING PECUNIARY RELIEF.

249. Contribution.
250. Exoneration.
251. Subrogation.
252. Marshaling.
253. Accounting.
254. When Equity will Assume Jurisdiction.
255. Defense of Stated Account.
256. Application of Payments.

CONTRIBUTION.

249. Where several parties are jointly, or jointly and severally, liable on a contract, or obligation in the nature of a contract, or are sureties for the same principal debtor, for the same debt or obligation, and one of them has paid more than his proportionate share of such debt or obligation, he is entitled to contribution from his co-obligors or co-sureties for the excess paid by him.

The doctrine of contribution is not so much founded on contract as on the principle of equity and justice that, where the interest is common, the burden also shall be common.[1] The equitable maxim, "Equality is equity," is the basis of this principle.[2] The relief will be granted, as we have seen,

§ 249. [1] Campbell v. Mesier, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570. And see Steel's Appeal, 72 Pa. 101; Eads v. Retherford, 114 Ind. 273, 16 N. E. 587, 5 Am. St. Rep. 611; Vogle v. Brown, 120 Ill. 338, 11 N. E. 327, 12 N. E. 252; Tomlinson v. Bury, 145 Mass. 346, 14 N. E. 137, 1 Am. Rep. 464.

[2] Dering v. Earl of Winchelsea, 1 Cox, Ch. 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, 5 Am. Rep. 669. After the action of assumpsit became es-

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to one jointly liable for the payment of a mortgage debt, who has paid more than his proportionate share on redemption.[3] A partner, who has paid more than his proportionate share of the firm debts, is entitled to contribution from his co-partners, or out of the partnership property.[4] A stockholder individually liable for the corporate debts, who has paid more than his proportionate share thereof, may enforce contribution from the other stockholders, who are also liable.[5]

The most frequent use of the remedy exists in the case of co-sureties. A surety who has paid the debt is not only entitled to contribution from the other sureties,[6] but also to the benefit of any security which any of them may have taken from the principal debtor by way of indemnity.[7] But, where sureties are bound by different instruments for distinct portions of a debt due from the same principal, if the suretyship of each is a separate and distinct transaction, there will be no right of contribution among the sureties.[8] The surety who pays the debt must first exhaust his remedies against the principal debtor, before he is entitled to contribution from his co-sureties.[9]

tablished, 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 (Ky.) 110; Whitman v. Porter, 107 Mass. 522; Hodgson v. Baldwin, 65 Ill. 532; McKenna v. George, 2 Rich. Eq. (S. C.) 15.

[3] Ante, p. 470.

[4] Kelly v. Kauffman, 18 Pa. 351; Logan v. Dixon, 78 Wis. 533, 41 N. W. 713; Sears v. Starbird, 78 Cal. 225, 20 Pac. 547.

[5] 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. 569.

[6] Adams, Eq. p. 269; Newcomb v. Gibson, 127 Mass. 396; Mason v. Pierron, 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 (C. C.) 34 Fed. 1; Rynearson v. Turner, 52 Mich. 7, 17 N. W. 219.

[7] Steel v. Dixon, 17 Ch. Div. 825; Agnew v. Bell, 4 Watts (Pa.) 83; Guild v. Butler, 127 Mass. 386.

[8] Moore v. Isley, 22 N. C. 372; Johnson v. Wild, 44 Ch. Div. 146.

[9] Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669.

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If the sureties are not obligated for the same purpose, or do not occupy the position of co-sureties, then, either (1) the surety paying the debt cannot enforce contribution,—as, where a surety is substituted for another, he cannot enforce contribution against the person whom he has succeeded;[10] or (2) a surety first in point of time may have no remedy against one who is subsequent,—as, where a note is signed by a person as surety for those who have signed before him;[11] or (3) a subsequent surety may have no right of contribution against the first,—as, where an action is brought on the original obligation, and in such action an appeal bond is given, the surety on such bond cannot enforce contribution against a surety on the original obligation.[12] Where one surety has succeeded in extinguishing the debt by payment of less than its full value, he cannot enforce contribution from his co-sureties for more than the amount paid by him.[13] It would not be equitable to permit a surety to speculate upon the debt.

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.[14] And if the liability of the sureties arise ex delicto, there is no right to contribution, for courts of equity will not lend their aid to equalize burdens of wrongdoers, but will leave them where found.[15] This rule does not apply, however, unless the parties were knowingly and willfully associated in wrongdoing.[16]

[10] Longley v. Griggs, 10 Pick. (Mass.) 121.

[11] Harris v. Warner, 13 Wend. (N. Y.) 400.

[12] Schnitzel's Appeal, 40 Pa. 23; Douglass v. Fagg, 8 Leigh (Va.) 588.

[13] Reed v. Norris, 2 Mylne & C. 361, 375; Bonney v. Seely, 2 Wend. (N. Y.) 481; Lawrence v. Blow, 2 Leigh (Va.) 30.

[14] Swain v. Wall, 1 Ch. R. 80; Craythorne v. Swinburne, 14 Ves. 160, 163.

[15] Merryweather v. Nixan, 8 Term R. 186; Peck v. Ellis, 2 Johns. Ch. (N. Y.) 131; Churchill v. Holt, 131 Mass. 67, 41 Am. Rep. 191; Spalding v. Oakes' Adm'r, 42 Vt. 343; Selz v. Unna, 6 Wall. 327, 18 L. Ed. 799.

[16] Moore v. Appleton, 26 Ala. 633; Ankeny v. Moffett, 37 Minn. 109, 33 N. W. 320; Acheson v. Miller, 2 Ohio St. 203, 59 Am. Dec. 663.

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EXONERATION.

250. Where one secondarily liable for the payment of a debt not arising ex delicto has paid or satisfied the debt, he is entitled to be reimbursed by the person primarily liable therefor, and may enforce exoneration from him.

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 the principal debtor for reimbursement;[1] and where, by the terms of the contract, a surety is only liable after the default of the principal debtor and a prior surety, he may enforce his claim for exoneration against either of them.[2] A jurisdiction at law exists to grant relief in all such cases, since the right of recovery is based upon an implied contract of the person primarily liable, and in this country resort is generally had to such jurisdiction. But the equitable jurisdiction also exists, and it is customary to treat the remedy as one pertaining to equity jurisprudence.

If the surety discharges the debt for less than the full amount, he cannot, 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 and costs.[3] The surety may maintain a suit in equity against his principal to compel him to pay the debt at any time after the obligation becomes due, before payment by him, and although he has not been sued by the creditor.[4] A person

§ 250. [1] 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 (Mass.) 142; Konitzky v. Meyer, 49 N. Y. 571; Merwin v. Austin, 58 Conn. 22, 18 Atl. 1029.

[2] Harris v. Warner, 13 Wend. (N. Y.) 400.

[3] Reed v. Norris, 2 Mylne & C. 361, 375; Blow v. Maynard, 2 Leigh (Va.) 30; Delaware, L. & W. R. Co. v. Iron Co., 38 N. J. Eq. 151; Hayden v. Cabot, 17 Mass. 169.

[4] 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. (N. Y.) 123, 8 Am. Dec. 554; Irick v. Black, 17 N. J. Eq. 189; Hellams v. Abercrombie, 15 S. C. 110, 40 Am. Rep. 684;

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who is entitled to be indemnified against loss is not obliged to wait until he has suffered, and perhaps been ruined before having recourse to judicial aid.[5]

SUBROGATION.

251. Whenever, to protect his own rights, one not a volunteer pays or satisfies a debt for which another is primarily liable, he is subrogated to the rights of the creditor, and may enforce against the person primarily liable all the securities, benefits, and advantages held by the creditor.

The doctrine of subrogation is of purely equitable origin and nature, and its operation is always controlled by equitable principles. Like contribution, it rests on principles of equity and justice, and may be decreed though no contract or priority of any kind exists between the parties.[1] There are many different classes of cases in which the doctrine will be applied, but the most important and useful for the purpose of illustrating the several principles connected with the doctrine are cases of subrogation in favor of sureties. A surety, on the payment of the debt of his principal, is entitled to all the securities which the creditor has against the principal debtor, whether given at the time of the contract or subsequent thereto, and whether given with or without the knowledge of the surety.[2] 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 judg-

Moore v. Topliff, 107 Ill. 241; Beaver v. Beaver, 23 Pa. 167; Fame Ins. Co.'s Appeal, 83 Pa. 396, 405.

[5] 1 Lindl. Partn. p. 375.

§ 251. [1] Gans v. Thieme, 93 N. Y. 225, 232; Pease v. Eagan, 131 N. Y. 262, 30 N. E. 102; Cottrell's Appeal, 23 Pa. 294; Ætna Life Ins. Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; Philbrick v. Shaw, 61 N. H. 356.

[2] 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. (Mass.) 477; In re Hess' Estate, 69 Pa. 272; Budd v. Olver, 147 Pa. 194, 23 Atl. 1105; Frank v. Traylor, 130 Ind. 145, 29 N. E. 486, 16 L. R. A. 115.

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ment.[3] In England, prior to recent legislation, if a surety paid a contract which he executed jointly with his principal debtor, or paid a judgment against him and his principal jointly, the contract or judgment was thereby ended and discharged, and could not be enforced by the surety.[4] Negotiable paper, paid by an indorser, is kept alive for his benefit, and he may enforce it against prior indorsers and the maker.[5] A junior mortgagee, who pays off a senior incumbrance on the land for his own protection, is subrogated to all the rights and remedies of the senior incumbrancer.[6] 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.[7]

Numerous as are the applications of this principle, it nevertheless has its limits. A mere volunteer cannot invoke the aid of subrogation. One of the principles lying at the foundation of subrogation in equity is that the person seeking the subrogation must have paid the debt under some necessity, to save himself from loss which might arise or accrue

[3] Parsons v. Briddock, 2 Vern. 608; Townsend v. Whitney, 75 N. Y. 431; Fleming v. Beaver, 2 Rawle (Pa.) 128, 19 Am. Dec. 629; 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, 33 N. W. 459; Lyon v. Bolling, 9 Ala. 463, 44 Am. Dec. 444. 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, 2 McLean, 44, Fed. Cas. No. 4,791.

[4] Dering v. Earl of Winchelsea, 1 Cox, Ch. 318, 1 White & T. Lead. Cas. Eq. p. 114; Hodgson v. Shaw, 3 Mylne & K. 183; Pearl v. Deacon, 24 Beav. 186.

[5] 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.

[6] Mattison v. Marks, 31 Mich. 421, 18 Am. Rep. 197; 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.

[7] Burnand v. Rodocanachi, 7 App. Cas. 339; Deming v. Storage Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Connecticut Fire Ins. Co. v. Railroad Co., 73 N. Y. 399, 29 Am. Rep. 171; Pratt v. Radford, 52 Wis. 114, 8 N. W. 606; Chicago, St. L. & N. O. R. Co. v. Car Co., 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97; Perrott v. Shearer, 17 Mich. 48.

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to him by the enforcement of the debt in the hands of the original creditor.[8] One who discharges an incumbrance upon property in which he has no interest is not subrogated to the rights of the holder of the mortgage, nor does the loan of money to discharge a lien subrogate the lender to the rights of the lien holder.[9]

The principle will not be applied in favor of one who has been guilty of inequitable or illegal conduct in the transaction.[10] 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 will never be done where it will result in injustice.[11]

MARSHALING.

252. Where one person has a clear right to resort to two funds, and another person has a right to resort to but one of them, the latter may compel the former, as double creditor, to exhaust the fund on which the latter, as a single creditor, has no claim.[1]

[8] Ætna Life Ins. Co. v. Middleport, 124 U. S. 534, 547, 8 Sup. Ct. 625, 31 L. Ed. 537. And see, also, Acer v. Hotchkiss, 97 N. Y. 395, 403; Sandford v. McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; Desot v. Ross, 95 Mich. 81, 54 N. W. 694; Wormer v. Agricultural Works, 62 Iowa, 699, 14 N. W. 331; Watson v. Wilcox, 39 Wis. 643, 20 Am. Rep. 63; McNeil 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. 409; Brice v. Watkins, 30 La. Ann. 21; Kitchell v. Mudgett, 37 Mich. 82; Repass v. Moore (Va.) 36 S. E. 474.

[9] Moody v. Moody, 68 Me. 155; Unger v. Leiter, 32 Ohio St. 210; Wilson v. Soper, 44 Me. 118; Farmers' & Mechanics' Nat. Bank v. Railway Co., 72 N. Y. 188; Jacques v. Fackney, 64 Ill. 87; Mosier's Appeal, 56 Pa. 76, 93 Am. Dec. 783; Van Winkle v. Williams, 38 N. J. Eq. 105.

[10] Rowley v. Towsley, 53 Mich. 329, 19 N. W. 20; Milwaukee & M. R. Co. v. Soutter, 13 Wall. 517, 20 L. Ed. 543; Perkins v. Hall, 105 N. Y. 589, 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, 38 Kan. 90, 5 Pac. 406; Guckenheimer v. Angevine, 81 N. Y. 394.

[11] Kelly v. Kelly, 54 Mich. 47, 19 N. W. 580; Dwight v. Lumber Co., 82 Mich. 624, 47 N. W. 102.

§ 252. [1] Per Lord Westbury, in Dolphin v. Aylward, L. R. 4 H. L. 486.

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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 resort to but one.[2] The doctrine has been illustrated in the leading case of Webb v. Smith,[3] as follows: "If A. has a charge upon Whiteacre and Blackacre, and if B. also has a charge upon Blackacre only, A. must take payment of his charge out of Whiteacre, and must leave Blackacre so that B., the other creditor, may follow it, and obtain payment of his debt out of it. In other words, if two estates (Whiteacre and Blackacre) are mortgaged to one person, and subsequently one of them (Blackacre) is mortgaged to another person, unless Blackacre is sufficient to pay both charges, the first mortgagee will be compelled to take satisfaction out of Whiteacre, in order to leave Blackacre to the second mortgagee upon which alone he can go."

The practice adopted in the early days was to summarily forbid the creditor having two funds at his disposal to resort to that which was the sole resource of the other.[4] The remedy by injunction is, however, rarely applied in modern times.[5] 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 another person has a claim, such person is subrogated to all his rights against the fund to which otherwise he could not have resorted.[6]

Marshaling will not be enforced to the detriment or injury of the rights of another person.[7] It will not be available

[2] Trimmer v. Bayne, 9 Ves. 209, 211; Aldrich v. Cooper, 8 Ves. 382, 2 White & T. Lead. Cas. Eq. 82.

[3] 30 Ch. Div. 192, Brett, Cas. Eq. (Dickson Ed.) 222.

[4] Kerley, Hist. Eq. p. 215.

[5] Evertson v. Booth, 19 Johns. (N. Y.) 495; Woolcocks v. Hart, 1 Paige (N. Y.) 185.

[6] Milmine v. Bass (C. C.) 29 Fed. 632; Ramsey's Appeal, 2 Watts (Pa.) 228, 27 Am. Dec. 301; Hudkins v. Ward, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22.

[7] Gilliam v. McCormack, 85 Tenn. 597, 611, 4 S. W. 521; People v. E. Remington & Sons, 121 N. Y. 333, 24 N. E. 793.

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where to compel a resort to the singly charged fund would produce an additional risk, injury, or delay to the double creditor;[8] nor will it be enforced against intervening liens having a superior equity.[9] The equity ought not to be applied unless there is reasonable certainty that one fund is sufficient to satisfy the debt of the first creditor. When, in a foreclosure suit brought by the holder of the first lien, there is reason to think that both the real estate mortgaged and certain personal securities which are subject to the plaintiff's lien would, if brought to a sale, be insufficient to pay the debt and interest due from the mortgagor, the equitable rule does not apply in favor of subsequent mortgagees or judgment creditors. Under such circumstances, all that the subsequent incumbrancers have a right to claim is a judgment awarding to them, after the payment of the plaintiff's debt, the right, in the order of priority of their respective liens, to be subrogated to the plaintiff in respect to the securities then held by him.[10] And it has been held that a creditor holding security upon different kinds of property cannot be compelled to select that which is least convenient and available to himself, in order to aid other creditors whose claims are not adequately secured.[11]

The most frequent use of the remedy is for the protection of prior mortgagees. When two mortgagees have mortgage liens on the same land, and one of them has also other security for his debt, the latter must satisfy his claim out of his other security so far as it will go before he will be permitted to have recourse to the mortgage.[12] 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.[13] And a legatee whose legacy is charged on land cannot en-

[8] Brinkerhoff v. Marvin, 5 Johns. Ch. (N. Y.) 320; Evertson v. Booth, 19 Johns. (N. Y.) 486.

[9] Leib v. Stribling, 51 Md. 285.

[10] Hudkins v. Ward, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22.

[11] Emmons v. Bradley, 56 Me. 333.

[12] Beach, Mod. Eq. Jur. § 789; 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.

[13] Bass v. Estill, 50 Miss. 300.

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force it out of the 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.[14] The equity of marshaling was most frequently employed in England to confine the payment of the debts of a decedent which are a charge upon real property, so that the rights of others in the personalty of the decedent should not be interfered with. In the American states the equity is not so frequently employed in such cases, since both the real and personal property of a decedent are considered assets for the payment of his debts, and specialty and simple contract creditors are upon the same footing as to both classes of property.

The rules relative to this equity are never applied between creditors of different persons. Thus, if a person has a claim 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.[15]

ACCOUNTING.

253. Courts of equity acquired jurisdiction of actions of accounts because of the inconvenience and difficulty of adjusting conflicting accounts by a jury, and the inadequacy of the remedies afforded at law.

One of the most ancient of common-law actions is that of account render. This action was the only means which the common law afforded for obtaining a settlement of an account, except that assumpsit might be brought for a determinate balance.[1] In assumpsit it was necessary, if the bal-

[14] Hanby v. Roberts, Amb. 128; Bonner v. Bonner, 13 Ves. 379; Perry v. Hale, 44 N. H. 363, 367; Cryder's Appeal, 11 Pa. 72.

[15] Ex parte Kendall, 17 Ves. 520; Meech v. Allen, 17 N. Y. 301, 72 Am. Dec. 465; Lloyd v. Galbraith, 82 Pa. 103; Lee v. Gregory, 12 Neb. 282, 11 N. W. 297; Huston's Appeal, 69 Pa. 485.

§ 253. [1] 3 Bl. Comm. 162.

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ance was disputed, for the jury to investigate the items one by one, a task which, in long and complicated accounts, was practically impossible. The action of account render was more suitable. After a judgment quod computet, there was a reference to auditors, who could examine the account item by item, but could not conduct an investigation as to each disputed item, but were obliged to refer each of them to the court or a jury as a distinct issue of law or fact. The action of account could be employed in but few cases. It would lie against guardians in socage, bailiffs, and receivers; and, in favor of trade, by one merchant against another. In the case of McMurray v. Rawson [2] it was stated that the action did not seem to have been brought in England, according to the reported cases, more than a dozen times in the last two centuries; and attention is called to but one case in New York prior to the one then considered. The action was there declared to be "one of the most difficult, dilatory, and expensive ever known to the law." It is easy to understand that the difficulties and disadvantages of the common-law remedies early led to a resort to courts of equity for relief, and suits for an accounting soon became a well-established head of equitable jurisdiction.

SAME—WHEN EQUITY WILL ASSUME JURISDICTION.

254. Equity will assume jurisdiction in matters of account where

(a) A fiduciary relation exists between the parties.

(b) There are mutual accounts between the parties.

(c) There are circumstances of great complication, though the accounts are not mutual.[1]

The existence of the jurisdiction in equity depends, not on the absence of a common-law remedy, but upon its inadequacy. In most cases the jurisdiction of courts of equity in

[2] 3 Hill (N. Y.) 62.

§ 254. [1] Snell, Eq. pp. 610-612; Pom. Eq. Jur. § 1421.

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actions of account is concurrent with that of courts of law;[2] but whether or not a court of equity will exercise its jurisdiction is a question to be determined by the court in its discretion.[3]

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 titles, and all questions relating thereto; of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, factors, and receivers."[4] 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.

Fiduciary Relationship.

Equity will assume jurisdiction where there exists a fiduciary relationship between the parties,—as in favor of beneficiaries against trustees,[5] including actions against directors of corporations. An action for an accounting between partners is peculiarly one for the cognizance of a court of equity, and it has entertained jurisdiction in such cases from time immemorial.[6] And where an agent has been intrusted with his principal's money, to be expended for a specific purpose, the former may be required to account in equity.[7] But the existence of a bare agency is not sufficient; there must be a trust or fiduciary relation between the parties.[8] Wherever the relation is such that confidence is reposed by

[2] Tillar v. Cook, 77 Va. 477; Mitchell v. Manufacturing Co., 2 Story, 648, Fed. Cas. No. 9,662; Post v. Kimberly, 9 Johns. (N. Y.) 470; Baugher's Appeal (Pa.) 8 Atl. 841; Holt v. Daniels, 61 Vt. 89, 17 Atl. 786.

[3] Jewett v. Bowman, 29 N. J. Eq. 176.

[4] 3 Bl. Comm. 437.

[5] See ante, p. 34.

[6] King v. Barnes, 109 N. Y. 267, 286, 16 N. E. 332; Bishop v. Bishop, 54 Conn. 232, 6 Atl. 426; Couillard v. Eaton, 139 Mass. 105, 28 N. E. 579; Christy's Appeal, 92 Pa. 157.

[7] Marvin v. Brooks, 94 N. Y. 71.

[8] Foley v. Hill, 2 H. L. Cas. 28; Moxon v. Bright, 4 Ch. App. 292.

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the principal in his agent, and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction,[9] because in such actions "the plaintiff can only learn from the discovery of the defendant how he has acted in the execution of his agency." [10] But ordinarily the agent is not entitled to an accounting from his principal, since it is his duty to keep an account of all his transactions in behalf of his principal, and he therefore does not require a discovery from him. His remedy is complete at law.[11]

Mutual Accounts.

In cases of mutual accounts founded in privity of contract, equity exercises its jurisdiction without any limitation.[12] It has been stated that a mutual account "means not merely where one of the two parties has received money, and paid it on the account of the other, but where each of two parties has received and paid on the other's account." [13]

Two separate accounts between A. and B.—A.'s account consisting of goods sold to B., and B.'s account of goods sold to A., or of payments made to A.—do not constitute mutual accounts. They are separate, independent accounts, and each can sue on his own. Nor is an account on one side consisting of payments made by A. for B. a mutual account, nor one of goods sold by A. to B. Here, also, all that A. has to do is to sue on his own account. But, if A. has made payments to or on account of B., and B. has also made payments to or on account of A., there is a case of mutual account.[14]

Complicated Accounts.

A court of equity may assume jurisdiction when the accounts are complicated, although they are only on one side. The reason in most cases for the exercise of such jurisdic-

[9] Makepiece v. Rogers, 11 Jur. (N. S.) 215; Moxon v. Bright, 4 Ch. App. 292; Webb v. Fuller, 77 Me. 568, 1 Atl. 737; Rippe v. Stogdill, 61 Wis. 38, 20 N. W. 645.

[10] Mackenzie v. Johnston, 4 Madd. 373.

[11] Padwick v. Stanley, 9 Hare, 627; Lynch v. Willard, 6 Johns. Ch. (N. Y.) 342; Nash v. Burchard, 87 Mich. 85, 49 N. W. 492.

[12] Story, Eq. Jur. § 457.

[13] Phillips v. Phillips, 9 Hare, 471, per Sir George Turner, V. C.

[14] Merwin, Prin. Eq. 587, 588.

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tion is the fact that a court of law cannot, with the means at its disposal, examine and adjust an account which is complicated because of the multiplicity of the transactions involved, or of other circumstances.[15] Even if an action at law could be maintained in such cases, the remedy afforded would not be as available, and would not permit of as convenient and accurate an investigation as by a suit in equity. Even if a trial by jury be claimed and allowed, the court might, in a suit in equity, so mold the issues, and direct the course of the trial, as to avoid many of the difficulties attending a trial at common law.[16] In the practice acts of many of the states provisions have been made for the adjustment of long and complicated accounts in courts of law, and the reason for a resort to equity is very slight, if it can be said to exist at all.[17] What constitutes complexity is a matter addressed to the discretion of the court, to be determined according to the circumstances of each case.[18]

SAME—DEFENSE OF STATED ACCOUNT.

255. It is ordinarily a good bar to a suit for an account that the parties have already, in writing, stated and adjusted the items of the account, and struck a balance.[1]

Where an account has been settled, and a balance struck, there is no occasion for a resort to equity, as the remedy at law is adequate. It necessarily follows, therefore, that a

[15] O'Connor v. Spaight, 1 Schoales & L. 305, where Lord Redesdale said: "This is a principle on which courts of equity constantly act by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law."

[16] Hallett v. Cumston, 110 Mass. 32; Pierce v. Society, 145 Mass. 60, 12 N. E. 858, 1 Am. St. Rep. 433.

[17] Marvin v. Brooks, 94 N. Y. 71, 80; Uhlman v. Insurance Co., 109 N. Y. 421, 433, 17 N. E. 363, 4 Am. St. Rep. 482.

[18] White v. Hampton, 10 Iowa, 238, 245; Woolley v. Osborne, 39 N. J. Eq. 54; Uhlman v. Insurance Co., 109 N. Y. 421, 433, 17 N. E. 363, 4 Am. St. Rep. 482; Warner v. McMullin, 131 Pa. 370, 18 Atl. 1056.

§ 255. [1] Snell, Eq. 440; Dawson v. Dawson, 1 Atk. 1; Weed v. Smull, 7 Paige (N. Y.) 573.

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stated account is a bar to relief in equity, unless some matter is shown which calls for the interposition of a court of equity. If any error, mistake, accident, or fraud has occurred which would vitiate the stated account, and lessen the balance struck, equity will not suffer it to be conclusive upon the parties, but will, in some cases, cause the account to be reopened and resettled.[2] If the mistake, accident, or fraud has not affected all the items of the transaction, the court may allow the account to stand, and permit the complainant to surcharge and falsify.[3] To surcharge an account means to show that a proper credit has been omitted; to falsify means to show that an item has been wrongfully inserted.[4] The burden of proof always rests upon the party who is permitted to surcharge and falsify.[5]

A stated account is not required to be signed by the parties. Its acceptance may be implied from the circumstances. The court will generally refuse to open a settled account after a long time has elapsed, except in cases of apparent fraud.[6]

SAME—APPLICATION OF PAYMENTS.

256. The following rules may be cited by which courts of equity are guided in taking accounts:

(a) A debtor making a payment may appropriate it to the discharge of any debt due his creditor.

(b) If, at the time of payment, there is no express or implied appropriation by the debtor, then the creditor may make the appropriation.[1]

[2] Bankhead v. Alloway, 6 Cold. (Tenn.) 56; Conville v. Shook, 144 N. Y. 686, 39 N. E. 405.

[3] Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366; Johnson's Ex'rs v. Ketchum, 4 N. J. Eq. 364.

[4] Snell, Eq. 441.

[5] Pit v. Cholmondeley, 2 Ves. Sr. 565.

[6] Thompson v. Fisher, 13 Pa. 313; Porter v. Patterson, 15 Pa. 229; Beers v. Reynolds, 12 Barb. (N. Y.) 288; Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

§ 256. [1] Lysaght v. Walker, 5 Bligh (N. S.) 1, 28; Brady v. Hill,

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(c) In the absence of an appropriation by the parties, the law will make the appropriation according to the order of the 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.

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.

Appropriation by Debtor.

The first rule on the subject is that the debtor may apply the payment to the discharge of whatever debt he pleases,[2] and the creditor has no right to insist on a different application.[3] The debtor may make the direct application in express terms,[4] 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.[5] 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.[6]

1 Mo. 315, 13 Am. Dec. 503; Johnson v. Thomas, 77 Ala. 367; Perry v. Bozeman, 67 Ga. 643; National Bank of Newburgh v. Bigler, 83 N. Y. 51; Bird v. Davis, 14 N. J. Eq. 467; Blackstone Bank v. Hill, 10 Pick. (Mass.) 129.

[2] Clayton's Case, 1 Mer. 572, 575; Tayloe v. Sandiford, 7 Wheat. 13, 5 L. Ed. 384; Pickering v. Day, 2 Del. Ch. 333, 3 Houst. 474, 95 Am. Dec. 291; 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. (Mass.) 441; Jones v. Williams, 39 Wis. 300.

[3] Anon. Cro. Eliz. 68; Eylar v. Read, 60 Tex. 387; Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769; Wetherell v. Joy, 40 Me. 325.

[4] Ex parte Imbert, 1 De Gex & J. 152; Stewart v. Keith 12 Pa. 238; Hansen v. Rounsavell, 74 Ill. 238; Gay v. Gay, 5 Allen (Mass.) 157.

[5] Young v. English, 7 Beav. 10; Holley v. Hardeman, 76 Ga. 328; Marx v. Schwartz, 14 Or. 177, 12 Pac. 253.

[6] Wilkinson v. Sterne, 9 Mod. 427; Aderholt v. Embry, 78 Ala. 185; Long v. Miller, 93 N. C. 233.

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When Creditor may Appropriate.

Unlike the debtor, the creditor has a right to make the application at any time after payment and before action brought or account settled between him and his debtor.[7] 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.[8] 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 debt barred by statute.[9] The creditor cannot, however, by making such an appropriation in part payment of the debt, take it out of the operation of the statute.[10]

Absence of Appropriation by Either Party.

In the absence of appropriation by the parties, the appropriation will be made according to the order of the items of the account. This proposition was decided, and is known as the rule in Clayton's Case,[11] and it has been repeatedly followed both in England and in this country.[12] Some of the courts have, however, manifested a tendency to follow the Roman rule, which appropriates the payment to the most

[7] Philpott v. Jones, 2 Adol. & E. 41, 44; Callahan v. Boazman, 21 Ala. 246; Moss v. Adams, 39 N. C. 42, 51; Johnson v. Thomas, 77 Ala. 367; Haynes v. Waite, 14 Cal. 446.

[8] Wright v. Laing, 3 Barn. & C. 165; Turner v. Turner, 80 Va. 379; Gill v. Rice, 18 Wis. 549; Phillips v. Moses, 65 Me. 70; Rohan v. Hanson, 11 Cush. (Mass.) 44; Greene v. Tyler, 39 Pa. 361; Richards v. Columbia, 55 N. H. 96.

[9] Mills v. Fowkes, 5 Bing. N. C. 455, 461; Armistead v. Brooke, 18 Ark. 521.

[10] 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, 1 Am. Rep. 109; Murphy v. Webber, 61 Me. 478.

[11] 1 Mér. 585.

[12] 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, 95 Am. Dec. 291; Smith v. Loyd, 11 Leigh (Va.) 512; Crompton v. Pratt, 105 Mass. 255; Willis v. McIntyre, 70 Tex. 34, 7 S. W. 594, 8 Am. St. Rep. 574; Allen v. Culver, 3 Denio (N. Y.) 284; Thompson v. Bank, 113 N. Y. 325, 21 N. E. 57.

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burdensome debt.[13] And where there are several debts owing to a creditor, some of which are barred by the statutes 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.[14] 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.[15]

[13] Story, Eq. Jur. § 459d; Magarity v. Shipman, 82 Va. 784, 1 S. E. 109.

[14] Nash v. Hodgson, 6 De Gex, M. & G. 474.

[15] 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. Railroad Co., 57 Mich. 430, 25 N. W. 161, 26 N. W. 865.

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CHAPTER XXI.

SPECIFIC PERFORMANCE.

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DEFINITION—EQUITY JURISDICTION.

257. Specific performance may be defined as a judicial order that a legal contract be carried into effect.[1]

258. The equity to compel specific performance arises where a legal contract has been infringed, and the remedy at law by an award of damages is inadequate.

The sole redress which the common law affords for breach of contract to the disappointed party is an award of damages. This, in effect, requires the party violating the contract to either perform the contract at his sole pleasure, or to pay damages for a failure so to do. But courts of equity have deemed such a course wholly inadequate for the purposes of justice; and, considering a breach of contract a

§§ 257–258. [1] Underh. Eq. p. 196.

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violation of moral and equitable duty, they have not hesitated to interpose and require from the conscience of the offending party a strict performance of what he cannot refuse without manifest wrong or fraud.[2]

The jurisdiction of courts of equity to decree a specific performance of a contract is of very ancient origin, if it is not coeval with the existence of such courts.[3] It may be distinctly traced back to the reign of Edward IV.; for in the Year Book of 8 Edw. IV. 4 (b), it was expressly recognized by the chancellor as a clear jurisdiction.[4] The ground for the exercise of this jurisdiction is the inadequacy of the remedies afforded by courts of law, which, as said before, can only relieve the injured party by compensation in damages.

INADEQUACY OR IMPRACTICABILITY OF DAMAGES.

259. A court of equity will decree the specific performance of a contract, where

(a) A breach of contract cannot be adequately recompensed by an award of damages, since the subject-matter of the contract is specific, and its exact counterpart cannot be purchased in the open market.

(b) It is impracticable to compensate the injured party by an award of damages, since the special features connected with the subject-matter of the contract, or with the terms thereof, or with the relation of the parties thereto, render it impossible to arrive at a legal measure of damages.[1]

[2] Story, Eq. Jur. § 714.

[3] 1 Spence, Eq. Jur. 645; Union Pac. R. Co. v. Railroad Co., 163 U. S. 600, 16 Sup. Ct. 1173, 41 L. Ed. 265,—where Chief Justice Fuller says: "The jurisdiction of courts of equity to decree the specific performance of agreements is of very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for their breach."

[4] Halsey v. Grant, 13 Ves. 76; 1 Fonbl. Eq. book 1, c. 1, § 5, note.

§ 259. [1] Pom. Eq. Jur. § 1401.

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Land Contracts.

The most frequent use of the equity of specific performance is in the case of contracts for the sale of real property. 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 a matter 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.[2]

Contracts Respecting Chattels.

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 the plaintiff to procure other articles as good in all respects as those for which he contracted. The legal remedy, therefore, being adequate, there is generally no ground for the exceptional and discretionary interference of equity in such contracts.[3]

Special circumstances may, however, induce the court to decree specific performance of such contracts. When chattels consist of works of art, or valuable 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.[4] On the same principle

[2] 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 381; Conaway v. Sweeney, 24 W. Va. 643, 649; Ensign v. Kellogg, 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.

[3] Cuddee v. Rutter, 5 Vin. Abr. 538, pl. 21, 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 1063; Johnson v. Brooks, 93 N. Y. 337, 343; Dilburn v. Youngblood, 85 Ala. 449, 5 South. 175; Jones v. Newhall, 115 Mass. 244, 15 Am. Rep. 97; Kimball v. Morton, 5 N. J. Eq. 26, 53 Am. Dec. 621; Foll's Appeal, 91 Pa. 434, 36 Am. Rep. 671.

[4] 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. (4th Am. Ed.) 1109. And so with a

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the court will order the delivery of specific deeds and writings to the persons legally entitled thereto.[5]

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.[6] With us such contracts will not be specifically enforced, because corporate stock is ordinarily purchased in the market, and compensation in damages affords an adequate remedy.[7] And, for similar reasons, contracts for the sale of governmental securities or bonds will not be specifically enforced.[8]

Agreements relating to patents for inventions afford, perhaps, the best illustration of equitable interference in cases relating to personalty. Such agreements will be specifically enforced, almost as much as a matter of course as contracts concerning real property.[9]

Impracticability of Legal Remedy.

There are other reasons than the inadequacy of an award of damages to do complete justice to the injured party for the exercise of the equitable jurisdiction of specific performance. There are contracts, the damages for the breach of which are impossible to determine. Equity will in such cases decree a specific performance. Instances of such cases are where the plaintiff has not performed all the conditions of a

curious Greek altar piece. Duke of Somerset v. Cookson, 3 P. Wms. 389, 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 1110. See, also, Fells v. Read, 3 Ves. 70; Lloyd v. Loaring, 6 Ves. 773; Williams v. Howard, 7 N. C. 74; McGowin v. Remington, 12 Pa. 56, 51 Am. Dec. 584.

[5] Brown v. Brown, 1 Dickens, 62; Gibson v. Ingo, 6 Hare, 112; Baum's Appeal, 113 Pa. 58, 4 Atl. 461; Cowles v. Whitman, 10 Conn. 121, 25 Am. Dec. 60; Pattison v. Skillman, 34 N. J. Eq. 344.

[6] Duncuft v. Albrecht, 12 Sim. 189; Poole v. Middleton, 29 Beav. 646; Shaw v. Fisher, 2 De Gex & S. 11.

[7] Eckstein v. Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404; Avery v. Ryan, 74 Wis. 591, 43 N. W. 317, 4 L. R. A. 282; Noyes v. Marsh, 123 Mass. 286. The rule is otherwise where stock cannot be obtained in the market. Johnson v. Brooks, 93 N. Y. 337; Frue v. Houghton, 6 Colo. 318.

[8] Cuddee v. Rutter, 5 Vin. Abr. 538, pl. 21, 1 White & T. Lead. Cas. Eq. 1063; Ross v. Railway Co., Woolw. 20, Fed. Cas. No. 12,080.

[9] Whitney v. Burr, 115 Ill. 289, 3 N. E. 434; Hapgood v. Rosenstock (C. C.) 23 Fed. 86; Adams v. Messinger, 147 Mass. 185, 17 N. E. 491; Hull v. Pitrat (C. C.) 45 Fed. 94; Reese's Appeal, 122 Pa. 392, 15 Atl. 807.

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contract on his part, and cannot, therefore, maintain an action at law, but which equity may still treat as binding, and enforce.[10] And verbal contracts concerning land, which are invalid at law, but which have been in part performed, may be enforced in equity.[11]

Another illustration of the application of this rule is where the contract was for the sale of debts proved under two commissions of bankruptcy, and a court of equity granted a decree of specific performance, because to compel the plaintiff to accept damages would be, in effect, to make him sell the dividends, which were of unascertainble value, at a conjectural price.[12]

THE EXERCISE OF JURISDICTION IS DISCRETIONARY.

260. The enforcement of specific performance of a contract is discretionary with the court, and performance will not be decreed where it will result in great hardship and injustice to one party without any considerable benefit to the other, or in a case where the public interest would be prejudiced thereby.[1]

While the enforcement of specific performance is a matter of discretion, it is one of sound judicial discretion, controlled by well-defined principles of equity, and exercised upon a consideration of all the circumstances of each particular case.[2] Where the contract is in writing, is certain in

[10] Mortlock v. Buller, 10 Ves. 292, 305, 306; Day v. Hunt, 112 N. Y. 191, 195, 19 N. E. 414,—where the court says: "The very fact that the plaintiff has not strictly performed his part [of a contract], and so is without remedy at law, is frequently a sufficient reason for the interposition of courts of equity, where relief is given, notwithstanding the lapse of time, according to the actual merits of the case."

[11] Gough v. Crane, 3 Md. Ch. 119.

[12] Adderley v. Dixon, 1 Sim. & S. 607.

§ 260. [1] Conger v. Railroad Co., 120 N. Y. 29, 23 N. E. 983.

[2] Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500; Day v. Hunt, 112 N. Y. 191, 19 N. E. 414; Woods v. Evans,

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its terms, is for a valuable consideration, and is capable of being enforced without hardship to either party, it is as incumbent upon a court of equity to decree its specific performance as upon a court of law to award a judgment of damages for its breach.[3] In the exercise of its discretion, the court must determine whether the contract is equitable, and whether its enforcement would be conducive to a proper administration of justice. When this is determined the discretion of the court ceases, and its decree must issue.[4]

Before granting its decree, the court must be satisfied not only of the existence of a valid contract, but that its enforcement would be equitable and just.[5] As was said by Justice Field: "In general, it may be said that the specific relief will be granted when it is apparent from a view of all the circumstances of the particular case that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for, if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result." [6]

113 Ill. 186, 190, 55 Am. Rep. 409; Combs v. Scott, 76 Wis. 662, 667, 45 N. W. 532; Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501.

[3] Pom. Eq. Jur. § 1404.

[4] Godwin v. Collins, 3 Del. Ch. 189, 201.

[5] Ikerd v. Beavers, 106 Ind. 483, 485, 7 N. E. 326; Simon v. Wildt, 84 Ky. 157, 165; Trustees of Columbia College v. Thacher, 87 N. Y. 311, 317, 41 Am. Rep. 365; Conger v. Railroad Co., 120 N. Y. 29, 23 N. E. 983. As was said in the case of Mansfield v. Sherman, 81 Me. 365, 367, 17 Atl. 300: "However strong, clear, and emphatic the language of the contract, however plain the right at law, if a specific performance would, for any reason, cause a result harsh, inequitable, or contrary to good conscience, the court should refuse such a decree, and leave the parties to their remedies at law."

[6] Willard v. Tayloe, 8 Wall. 557, 567, 19 L. Ed. 501.

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CONTRACTS FOR PERFORMANCE OF PERSONAL ACTS.

261. A contract requiring the performance of personal acts will not, as a rule, be specifically enforced.

The relation established by a contract of hiring and service is of so personal and confidential a character that it would be impossible for a court of equity to specifically enforce such a contract against an unwilling party with any hope of ultimate and real success.[1] The same may be said as to a contract of agency.[2] And for a somewhat similar reason an agreement to sell the good will of a business depending on personal considerations will not be enforced;[3] but, where the good will is entirely or mainly connected with the premises, a contract for the sale of the good will and premises is enforceable.[4]

Contracts to perform certain acts relating to land—such as contracts to build and repair buildings thereon—are of a somewhat special nature; but, as a general rule, they will not be specifically enforced, because the legal remedy is usually sufficient, and it would be almost impossible for the court to carry out its decree if made.[5] Nevertheless the court has jurisdiction to decree the performance of certain works where damages would not be an adequate remedy. For instance, it has been held that a contract made by a railroad company to build a crossing over its railway will be specifically enforced.[6]

§ 261. [1] Rigby v. Connol, 14 Ch. Div. 487; De Francesco v. Barnum, 45 Ch. Div. 430; Iron Age Pub. Co. v. Telegraph Co., 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758; Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779; 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.

[2] Chinnock v. Salnsbury, 30 Law J. Ch. 409.

[3] May v. Thomson, 20 Ch. Div. 705.

[4] Cruttwell v. Lye, 17 Ves. 335.

[5] Errington v. Aynesly, 2 Brown, Ch. 341; Middleton v. Greenwood, 2 De Gex, J. & S. 142; Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430; Oregonian R. Co. v. Navigation Co. (C. C.) 37 Fed. 733; Ross v. Railway Co., Woolw. 26, Fed. Cas. No. 12,080.

[6] Post v. Railroad Co., 123 N. Y. 581, 26 N. E. 7. See, also, Stuyve-

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Some of the English cases hold that specific performances will not be decreed of a contract which imposes on the contractor the performance of continuous duties extending over a long period of time, since the court cannot undertake to see that its decree is carried into effect;[7] but this proposition has been disregarded in several recent American decisions.[8]

Other Instances of Contracts not Enforceable.

A court of equity will not enforce a contract which is in its language revocable by the defendant, for its interference in such a case would be idle, since what it had done might be instantly undone by one of the parties.[9] It is on this principle that equity refuses to interfere in case of contracts to enter into partnership which do not specify the duration of the partnership, since that relation, unless otherwise provided, is dissoluble at the will of either party,[10] but, if the partnership is to continue for a fixed term of years, and there have been acts of particular performance, the court will exercise its powers, but there must be facts shown which would render indispensable the interposition of equity.[11]

sant v. Mayor, etc., 11 Paige (N. Y.) 414; Gregory v. Ingwersen, 32 N. J. Eq. 199; Storer v. Railway Co., 2 Younge & C. Ch. 48.

[7] Blackett v. Bates, 1 Ch. App. 117; Powell D. S. C. Co. v. Railway Co., 9 Ch. App. 331.

[8] Joy v. City of St. Louis, 138 U. S. 11, 47, 11 Sup. Ct. 243, 34 L. Ed. 843 (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. 232, 17 Atl. 427 (contract requiring all trains to stop within 200 feet of a crossing specifically enforced); South & N. A. R. Co. v. Railroad Co., 98 Ala. 400, 13 South. 682, 39 Am. St. Rep. 74 (contract for construction, repair, and use of railroad track enforced); Union Pac. Ry. Co. v. Railway Co., 2 C. C. A. 174, 51 Fed. 309; Louisville & N. R. Co. v. Railroad 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.

[9] Fry, Spec. Perf. § 94.

[10] Hercy v. Birch, 9 Ves. 357; Scott v. Rayment, L. R. 7 Eq. 112; Buck v. Smith, 29 Mich. 166, 18 Am. Rep. 84; Meason v. Kaine, 63 Pa. 335.

[11] Anonymous, 2 Ves. Sr. 629; England v. Curling, 8 Beav. 129; Downs v. Collins, 6 Hare, 418, 437.

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Contracts to refer disputed matters to arbitrators will not be specifically enforced.[13] 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.[14] Where the award is for the performance of a thing in specie,—as to convey an estate or to assign securities,—it will be enforced;[14] but equity will not enforce an award to pay money.[15] A court of equity will not specifically enforce a contract to lend, or to borrow, or to pay money,[16] but it will decree specific performance of an agreement to give security in consideration of money due.[17] Contracts for insurance have been enforced even after loss.[18]

SPECIFIC PERFORMANCE IS AGAINST THE PERSON.

262. The jurisdiction to decree the specific performance of a contract is exercised against the person of the defendant on the equities arising from the contract.[1]

[13] 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. 286; Smith v. Railroad 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; Seligmann v. Le Boutillier, L. R. 1 C. P. 681; Willesford v. Watson, L. R. 14 Eq. 572.

[14] Blackett v. Bates, 1 Ch. App. 117; Caldwell v. Dickinson, 13 Gray (Mass.) 365; Story v. Railroad Co., 24 Conn. 94; McNeil v. Magee, 5 Mason, 244, Fed. Cas. No. 8,915; Kirksey v. Fike, 27 Ala. 383, 62 Am. Dec. 768.

[15] Norton v. Mascall, 2 Vern. 24, and cases cited in preceding note.

[16] Hall v. Hardy, 3 P. Wms. 190; Howe v. Nickerson, 14 Allen (Mass.) 400; Turpin v. Banton, Hardin (Ky.) 320.

[16] 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. Railroad Co., 123 N. Y. 327, 25 N. E. 499, 11 L. R. A. 116; Pierce v. Plumb, 74 Ill. 326, 330, 331.

[17] 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, 19 Am. St. Rep. 409; 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.

[18] Haden v. Association, 80 Va. 683; Baile v. Insurance Co., 73 Mo. 371; Tayloe v. Insurance Co., 9 How. 390, 13 L. Ed. 187; Covenant Mut. Ben. Ass'n v. Sears, 114 Ill. 108, 29 N. E. 480.

§ 262. [1] Fry, Spec. Perf. § 123.

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As a result of this principle, where the defendant is a person over whom a court of equity has no jurisdiction, there can be no relief. The maxim, "Equity acts against the person" ("Æquitas agit in personam"), applies in such cases; so that, if the person is within the jurisdiction of the court, it is no objection to specific performance that the subject-matter which the contract controls is without that jurisdiction.[2] In the case of Massie v. Watts the supreme court of the United States sustained a bill filed in the circuit court of Kentucky to compel a conveyance of land situated in Ohio, and in the case of Penn v. Lord Baltimore, Lord Chancellor Hardwicke held that a contract respecting boundaries between the colonies of Pennsylvania and Maryland could be specifically enforced in the English court of chancery.

DEFENSES IN ACTIONS FOR SPECIFIC PERFORMANCE—INCAPACITY OF PARTIES.

263. The incapacity to contract of either of the contracting parties furnishes ground on which the defendant may resist specific performance.

The question of the incapacity to contract, as raised in actions for specific performance, is identical with the question as discussed at common law, and therefore it has no peculiar relation to the jurisdiction of equity in relation to specific performance; no particular reference, therefore, will be made to such question in this work. An infant has no general power to contract, and generally can neither sue nor be sued on a contract into which he has purported to enter. As regards coverture, the contracts of married women respecting their separate property are enforceable against them and in their favor. Lunatics cannot bind themselves by contract, except during lucid intervals, during which times contracts entered into by them are as bind-

[2] Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Davis v. Parker, 14 Allen (Mass.) 94; Brown v. Desmond, 100 Mass. 267; Burrell v. Root, 40 N. Y. 496; Bailey v. Ryder, 10 N. Y. 363; Stephenson v. Davis, 56 Me. 73; Penn v. Lord Baltimore, 1 Ves. Sr. 444.

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ing as if made by a person of sound mind.[1] In judging of insanity, courts of equity are governed by the same principles as courts of common law.

SAME—NONCONCLUSION OF THE CONTRACT.

264. Specific performance cannot be had unless the contract has been actually concluded.

So long as the parties are only in negotiation, there is no contract which can be specifically enforced.[1] It is sometimes difficult, however, to distinguish mere negotiations from the contract itself. The law on this subject is thus summarized by Mr. Fry:[2] "The burden of proving that there is a concluded contract rests on the 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. Such acceptance must be plain, unequivocal, and unconditional, without variance between it and the proposal, and it must be completed without unreasonable delay." With respect to the immediate question as to whether a contract has been concluded by correspondence, the following rule has been stated: Where a completed contract can be concluded 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.[3]

§ 263. [1] Hall v. Warren, 9 Ves. 605.

§ 264. [1] Duff v. Hopkins (D. C.) 33 Fed. 599; Mayer v. McCreery, 119 N. Y. 434, 23 N. E. 1045; Brown v. Finney, 53 Pa. 373; Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136; Domestic Telegraph & Telephone Co. v. Telegraph Co., 39 N. J. Eq. 150, 165; Wardell v. Williams, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814.

[2] Fry, Spec. Perf. § 278.

[3] Rossiter v. Miller, 3 App. Cas. 1124; Sanders v. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 43 Am. St. Rep. 757, 25 N. Y. Supp. 257, 29 L. R. A. 431, Keener, Cas. Cont. 233.

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SAME—WANT OF MUTUALITY.

265. Whenever from personal incapacity to contract, the nature of the contract, or from any other cause, the contract is incapable of being enforced against one party, such party is equally incapable of enforcing it against the other.[1]

Mutuality of consent 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;[2] and in such a case one party to a contract is not bound when he cannot enforce it against the other.[3]

It has been said that the doctrine of mutuality "is a technical doctrine; but, like many other technical doctrines, it is founded on common sense. It comes simply to this: That one party to a bargain shall not be held bound to that bargain when he cannot enforce it against the other. If the contract is not mutually enforceable, it is a voidable contract; that is, it may be avoided as soon as the person who has a right to avoid it discovers that the cause or occasion for doing so occurs." [4]

Exceptions exist to the necessity of mutuality. Certain unilateral or conditional contracts come within such excep-

§ 265. [1] Fry, Spec. Perf. § 460; Rutland Marble Co. v. Ripley, 10 Wall. 339. 339, 19 L. Ed. 955.

[2] Flight v. Bolland, 4 Russ. 301, 2 Keener, Eq. Cas. 800; Rutland Marble Co. v. Ripley, 10 Wall. 339, 359, 19 L. Ed. 955; Iron Age Pub. Co. v. Telegraph Co., 83 Ala. 498, 3 South. 449, 2 Keener, Eq. Cas. 834; 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.

[3] 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, 1 L. R. A. 380.

[4] Wylson v. Dunn, 34 Ch. Div. 569, 577, per Kekewich, J.

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tions,—as, where an owner of land gives another, for a valuable consideration, an option to purchase the land within a specified time, the contract will be enforced at the suit of the party holding the option, although no obligation rested on him to make the purchase;[5] and also a contract for the purchase of land at the option to sell of the owner can be enforced by the owner.[6] And a memorandum for the sale and conveyance of land, although signed only by the party to be charged, when sufficiently clear and certain in its terms, affords sufficient basis for a suit for specific performance.[7]

SAME—WANT OF FAIRNESS.

266. There are many cases where a want of equality and fairness in the contract will preclude a court of equity from exercising its jurisdiction to decree a specific performance, although actual fraud is not involved.

In cases of fraud, the effect of which is to be hereafter considered, a court of equity will not only not specifically enforce a contract, but will rescind it. But there are many cases where actual fraud is not involved, in which the court will refuse to interpose its jurisdiction.[1] The unfairness in question may be either in the terms of the contract itself, or it may be in matters extrinsic, and in the circumstances under which it was made. With regard to the latter, parol evidence is,

[5] Johnston v. Trippe (C. C.) 33 Fed. 530, 536; Frue v. Houghton, 6 Colo. 318; Ross v. Parks, 93 Ala. 153, 8 South. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47; Johnston v. Wadsworth, 24 Or. 494, 34 Pac. 13; Watts v. Kellar, 5 C. C. A. 394, 56 Fed. 1; Boston & M. R. Co. v. Bartlett, 3 Cush. (Mass.) 224; Miller v. Cameron, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554. But, where there is no consideration for the option, specific performance will not be decreed. Graybill v. Brugh, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894.

[6] Miller v. Cameron, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554.

[7] Mastin v. Grimes, 88 Mo. 478; Dynan v. McCulloch, 46 N. J. Eq. 11, 18 Atl. 822; Clason v. Bailey, 14 Johns. (N. Y.) 489; Ives v. Hazard, 4 R. I. 14, 67 Am. Dec. 500; Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635; Docter v. Hellberg, 65 Wis. 415, 27 N. W. 176.

§ 266. [1] Willan v. Willan, 16 Ves. 83; Twining v. Morrice, 2 Brown, Ch. 326; Savage v. Brocksopp, 18 Ves. 335.

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of course, admissible.[2] As an instance of the application of this rule, the court of equity refused to exercise its jurisdiction to enforce a contract by a married woman to purchase land, by the terms of which she was to secure payment of the purchase price by a mortgage, not only on the land purchased, but on her other separate real estate, because such a contract was deemed rash and improvident.[3] And on the ground of want of fairness the court will not specifically enforce a contract against a party thereto who, at the time of entering into it, was in a state of intoxication; and this is true even in the absence of any unfair advantage taken of his situation which would induce the court to rescind the contract.[4] The fairness of the contract, like all its other qualities, must be judged as of the time it was entered into, or at least when the contract became absolute, and not by subsequent events.[5] The fact that events uncertain at the time of the contract may afterwards happen in a manner contrary to the expectation of one or both of the parties is no reason for holding the contract to have been unfair.[6]

The court will not exercise its extraordinary power in compelling specific performance, where to do so would necessitate a breach of trust[7] or of a prior contract with a third person;[8] nor will equity compel a person to do any act which he is not lawfully competent to do, even though at the time of the contract the act might have been lawful,—partly as it seems, on the ground of the unfairness and illegal taint of such a contract in itself, and partly because of the hardship to which it would expose the person forced to execute it;[9] and, if the contract would work an injury to a third person, or to the public interests, equity will not decree its specific performance.[10]

[2] Davis v. Symonds, 1 Cox, Ch. 402; Fry, Spec. Perf. § 388.

[3] Friend v. Lamb, 152 Pa. 529, 25 Atl. 577, 34 Am. St. Rep. 672.

[4] Cooke v. Clayworth, 18 Ves. 12; Nagle v. Baylor, 3 Dru. & War. 60.

[5] Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501; Hale v. Wilkinson, 21 Grat. (Va.) 75.

[6] Fry, Spec. Perf. § 389.

[7] Dunn v. Flood, 28 Ch. Div. 586; Saltmarsh v. Beene, 4 Port. (Ala.) 283, 30 Am. Dec. 525.

[8] Willmott v. Barber, 15 Ch. Div. 96, 107.

[9] Fry, Spec. Perf. § 407.

[10] Thomas v. Dering, 1 Keen, 729; Curran v. Power Co., 116 Mass.

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SAME—HARDSHIP OF THE CONTRACT.

267. A court of equity will not decree the specific performance of a contract, the result of which would be to impose great hardship on either of the parties, although the party seeking specific performance may be free from improper conduct.[1]

If a contract is unreasonably oppressive on either of the contracting parties, a court of equity will not lend its aid by decreeing a specific performance thereof.[2] 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 washed away by the sea,[3] or where improvements on the land were destroyed by fire before he was ready to convey.[4]

SAME—INADEQUACY OF CONSIDERATION.

268. Unless the inadequacy of consideration is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance.[1]

The doctrine of the older English cases was that inadequacy of consideration was a sufficient ground of defense

90; Chicago, B. & Q. R. Co. v. Reno, 113 Ill. 39; Conger v. Railroad Co., 120 N. Y. 29, 23 N. E. 983; Kelly v. Railroad Co., 74 Cal. 557, 16 Pac. 386, 5 Am. St. Rep. 470.

§ 267. [1] Gould v. Kemp, 2 Mylne & K. 308; Falcke v. Gray, 4 Drew. 660.

[2] Wedgwood v. Adams, 6 Beav. 600; Id., 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. Iron Co., 125 N. Y. 294, 26 N. E. 261. But see, however, Franklin Tel. Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776.

[3] Huguenin v. Courtenay, 21 S. C. 403, 53 Am. Rep. 688.

[4] Smith v. Cansler, 83 Ky. 367.

§ 268. [1] Per Lord Eldon in Stillwell v. Wilkins, Jac. 282.

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to a specific performance, it being regarded, even where not amounting to evidence of fraud, as a circumstance of hardship which should prevent equitable interference. But the later cases have refused to regard inadequacy of consideration in itself as a defense of specific performance, unless it amounts to an evidence of fraud, and would, therefore, constitute a sufficient ground for the cancellation of the contract.[2] There is no doubt, however, that inadequacy of consideration, when combined with fraud, misrepresentation, studied suppression of the true value of the property, or with other circumstances of oppression or even of ignorance, is a most material ingredient in the case as affecting the discretion of the court in granting specific performance.[3]

The question as to whether inadequacy of consideration is a good defense in a suit for specific performance has been a somewhat troublesome one for the courts in this country. Chief Justice Savage, in the case of Seymour v. De Lancy,[4] in the old court of errors of New York, said: "Upon authority, therefore, as well as upon principle, I am clearly of the opinion that a court of equity ought not to lend its aid in enforcing an executory contract, unless it is fair, just, reasonable, and equal in all its particulars, and founded upon adequate consideration." Chief Justice Savage goes on to say in this case: "If the contract be free from objection, it is the duty of the court to decree performance, but, if there are circumstances of unfairness, though not amounting to fraud or oppression, or if the inadequacy of consideration be so great as to render the bargain hard and unconscionable, on either ground the court may refuse its aid to enforce the contract, and leave the parties to contest their rights in a court of law. If it is asked, what degree of inadequacy is necessary to constitute the bargain a hard one? it might be asked in answer, what degree of inadequacy is necessary to constitute fraud,—to shock the conscience and produce an exclamation?" It would seem,

[2] 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, 34 L. Ed. 200.

[3] Fry, Spec. Perf. § 440; Conaway v. Sweeney, 24 W. Va. 643, 651.

[4] 3 Cow. 445, 15 Am. Dec. 270, 2 Keener, Eq. Cas. 772, 784.

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as Prof. Pomeroy suggests,[5] since fraud is now regarded as a fact, and its existence is ascertained, like that of any other fact, by comparing and weighing the evidence, that the phrase "conclusive evidence of fraud," as used in the black-letter text, is, from the very nature of the case, an absurdity, and that the difficulties in the question have not been removed by treating the inadequacy as an evidence of fraud, rather than as a hardship. Notwithstanding the many learned judges and writers who have seemed to disagree with the rule as stated above, it seems to be settled in this country by the weight of authority.

SAME—LAPSE OF TIME.

269. The lapse of time before application to the court for a decree to enforce the specific performance of a contract may furnish grounds of defense in an action therefor.

Equity aids the vigilant, not those who slumber on their rights. Independent of the statutes of limitation, the rules of equity require the plaintiff to exert himself energetically. He must come into court within a reasonable time with his demand. Laches will destroy his right to equitable aid.[1] Especially is this the case when the subject-matter of the contract is an article of fluctuating value, so that the delay may greatly change the aspect of the bargain.[2] This doctrine rests upon the principle that for the peace of society the court will discourage demands by refusing to interfere where there has been gross laches in prosecuting rights, or

[5] Pom. Spec. Perf. 27.

§ 269. [1] 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; Cocanougher v. Green, 93 Ky. 519, 20 S. W. 542; Young v. Young, 45 N. J. Eq. 27, 39, 16 Atl. 921; McCabe v. Mathews (C. C.) 40 Fed. 338; Alexander v. Wunderlich, 118 Pa. 610, 12 Atl. 580; Blackwell v. Ryan, 21 S. C. 112; Ridgway v. Ridgway, 69 Md. 242, 14 Atl. 659; Boston & M. R. Co. v. Bartlett, 10 Gray (Mass.) 384.

[2] Pollard v. Clayton, 1 Kay & J. 462; Deen v. Milne, 113 N. Y. 303, 309, 20 N. E. 861; Combs v. Scott, 76 Wis. 662, 45 N. W. 532; Penrose v. Leeds, 46 N. J. Eq. 294, 296, 19 Atl. 134; Ruff's Appeal, 117 Pa. 319, 11 Atl. 553; Chicago, M. & St. P. R. Co. v. Stewart (C. C.) 19 Fed. 5.

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long and unreasonable acquiescence in the assertion of adverse rights.[8]

SAME—FRAUD AND MISTAKE.

270. If a contract is such that equity would rescind it for fraud or mistake, a fortiori it will refuse specific performance thereof.

In former chapters we have already considered what will vitiate contracts because of fraud and mistake.[1] A court of equity will not specifically enforce a contract which has been procured by false misrepresentations, or the practice of deceit.[2] Statements contrary to fact, made by a party with a view to the contract, are means of resisting performance, though the party making them believe them to be true.[3] A silence as to material facts by one party is a defense to the other in an action for specific performance.[4] As was said by Lord Romilly: "It is of the greatest importance that it should be understood that the most perfect truth and the fullest disclosure should take place in all cases where the specific performance of a contract is required, and that, if this fails, even without any intentional suppression, the court will grant relief to the man who has been thereby deceived, provided he has acted reasonably and openly." [5] Where the aid of a court of equity is sought by way of specific performance of a contract, the principles of ethics have a more extensive sway than where a contract is sought to be rescinded. Where a party calls for specific performance, he must, at every stage of the transaction, be free from imputation of fraud or deceit, and show that his conduct has been clear, honorable, and fair.[6]

[8] Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921.

§ 270. [1] Ante, pp. 255–345.

[2] Kelly v. Kendall, 118 Ill. 650, 9 N. E. 261; Orne v. Coal Co., 114 Pa. 172, 6 Atl. 358; Sheets v. Bray, 125 Ind. 33, 24 N. E. 357.

[3] In re Banister, 12 Ch. Div. 131, 142; Holmes' Appeal, 77 Pa. 50; Isaacs v. Strainka, 95 Mo. 517, 8 S. W. 427; Kelly v. Railroad Co., 74 Cal. 557, 16 Pac. 386, 5 Am. St. Rep. 470.

[4] Byars v. Stubbs, 85 Ala. 256, 4 South. 755; Margraf v. Muir, 57 N. Y. 155; Baskcomb v. Beckwith, L. R. 8 Eq. 100, 2 Keener, Eq. Cas. 963.

[5] Baskcomb v. Beckwith, L. R. 8 Eq. 100, 2 Keener, Eq. Cas. 963.

[6] Kerr, Fraud & M. 357, 358.

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An intentional or unintentional mistake of one party, contributed to by the other, is a ground for refusing specific performance.[7] 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;[8] but generally the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff have been cases where it would have amounted to an injustice to hold him to his bargain. It would be impracticable as well as unsafe, to attempt to enumerate the circumstances under which mistakes would operate as a defense in an action of specific performance; but one principle would seem to run through all the cases,—that, to constitute a defense, the mistake must not be due solely to the negligence and want of reasonable care on the part of him who seeks to set it up. 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 the mistake, it is not sufficient, in order to resist specific performance, for the party to say that he did not understand its meaning.[9]

SAME—UNCERTAINTY OF CONTRACT.

271. A contract will not be specifically enforced, unless it is certain in its terms, or can be made certain by reference to such extrinsic facts as may, within the rules of law, be referred to for the purpose of ascertaining its meaning.[1]

A greater amount of certainty is required in an action for the specific performance of a contract than in an action for damages. To sustain an action at law, the plaintiff need prove only the negative proposition that the defendant has

[7] Denny v. Hancock, 6 Ch. App. 1; Campbell v. Durham, 86 Ala. 299, 5 South. 507.

[8] 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.

[9] Caldwell v. Depew, 40 Minn. 528, 42 N. W. 479, 2 Keener, Eq. Cas. 1000.

§ 271. [1] Shakespeare v. Markham, 72 N. Y. 400, 406.

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not performed the contract,—a conclusion which may be often arrived at without any exact consideration of the terms of the contract; but in proceedings for specific performance it must appear not only that the contract has not been performed, but what the contract is which is to be performed.[2] It is perhaps impossible to lay down any general rule as to what is sufficient certainty in a contract; but it may be safely stated that the certainty required must be a reasonable one, having regard to the subject-matter of the contract, and the circumstances under which, and with regard to which, it was entered into.[3] The reason for this rule has been stated thus: "Unless the court be fully advised as to what particular obligations the parties have undertaken to assume, and what specific rights they have mutually stipulated to confer, it would be impossible to adjudge whether the contract is sufficiently fair, just, and equitable in its parts to justify its enforcement by the strong arm of the court, or to render a decree intelligibly settling the rights and duties of the parties which the court is asked to enforce." [4]

Where the terms of the contract are originally uncertain, but it has been acted upon and the subsequent dealings of the parties have given certainty to what was originally uncertain, the court has in some cases regarded such facts as removing the original difficulty.[5] When a contract is reduced

[2] Fry, Spec. Perf. § 380.

[3] Ross v. Purse, 17 Colo. 24, 28 Pac. 473; Iron Age Pub. Co. v. Telegraph Co., 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758, 2 Keener, Eq. Cas. 834; Woods v. Evans, 113 Ill. 186; Ham v. Johnson (Minn.) 56 N. W. 584; Walcott v. Watson (C. C.) 53 Fed. 429; Hennessey v. Woolworth, 128 U. S. 440, 9 Sup. Ct. 109, 32 L. Ed. 500; Crouse v. Frothingham, 97 N. Y. 105; Anderson v. Brinser, 129 Pa. 376, 11 Atl. 809, 18 Atl. 520. Indefiniteness as to consideration, Weaver v. Shenk, 154 Pa. 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, 24 L. Ed. 494; 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.

[4] Iron Age Pub. Co. v. Telegraph Co., 83 Ala. 498, 503, 3 South. 449, 3 Am. St. Rep. 758, 2 Keener, Eq. Cas. 834.

[5] Oxford v. Provand, 5 Moore, P. C. (N. S.) 150; Hart v. Hart, 18 Ch. Div. 670, 685.

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to writing, the description contained therein may be identified by extrinsic evidence under an application of the maxim, "That is certain which may be made certain." [6] 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.[7]

SAME—WANT OF TITLE.

272. A vendor is not entitled to a specific performance against a vendee, unless he can tender what is called a marketable title; that is, a title which can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as a security for the loan of money.[1]

This rule, of course, is most frequently applied in cases of executory contracts for the sale of land. Unless a person has expressly stipulated in his contract to take a title, notwithstanding its defects, it is implied that the title sold is clear of defects and incumbrances. The right of the vendee to an indisputable title does not depend upon the agreement of the party, but is given by law.[2] It has often been held that a title is not marketable when it exposes the party holding it to litigation.[3] But a title will not be considered doubtful merely because there is a slight risk of some future litigation against the purchaser,[4] nor where it would be the duty of the judge to give a clear direction to

[6] Shardlow v. Cotterell, 20 Ch. Div. 90; Ragsdale v. Mays, 65 Tex. 255; Doctor v. Hellberg, 65 Wis. 415, 27 N. W. 176.

[7] 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.

§ 272. [1] Moore v. Williams, 115 N. Y. 586, 592, 22 N. E. 233, 5 L. R. A. 654.

[2] Sugd. Vend. 14; Burwell v. Jackson, 9 N. Y. 535.

[3] Dobbs v. Norcross, 24 N. J. Eq. 327.

[4] 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.

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the jury in favor of the title, and not leave the evidence generally to its consideration.[5]

It is by no means easy to express what amount of doubt upon a title there must be to induce a court of equity to refuse specific performance. In many cases the question rests in the sound discretion of the court.[6] Lord Eldon once said: "The court has almost gone the length of saying that, unless it is so confident that, if it had £5,000 to lay out on such an occasion, it would not hesitate to trust its own money on the title, it would not compel a purchaser to take it."[7]

The doubt which may prevent the court from compelling the purchaser to accept a title may be either of law or of fact.[8] If the doubt rests upon record evidence, and the muniments of title are preserved and accessible, it will be a question for the court to determine upon their inspection,—a question of legal construction. If it is to be established by proof of matters of fact not of record, the case must be made very clear by the vendor to warrant the court in decreeing a specific performance.[9] Thus a title depending upon the bar of the statute of limitations may be a marketable title, if it clearly appears that the entry of the real owner is barred.[10] But, where the title depends upon matter of fact, such as is not capable of satisfactory proof, or where the fact is capable of such proof, yet is not so

[5] 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.

[6] Shriver v. Shriver, 86 N. Y. 575, 584; White v. Damon, 7 Ves. 35.

[7] Jervoise v. Duke of Northumberland, 1 Jac. & W. 569; Pyrke v. Waddingham, 10 Hare, 9, where Turner, V. C., says: "A doubtful title, which a purchaser will not be compelled to accept, is not only a title upon which the court entertains doubt, but includes also a title which, although the court has a favorable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons; for the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favor of the title should turn out not to be well founded."

[8] Sloper v. Fish, 2 Ves. & B. 145; In re Thackwray and Young's Contract, 40 Ch. Div. 34.

[9] Townshend v. Goodfellow, 40 Minn. 312, 316, 41 N. W. 1056, 3 L. R. A. 739, 12 Am. St. Rep. 736.

[10] Pratt v. Eby, 67 Pa. 396.

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proved, the purchaser cannot be compelled to take it.[11] Mr. Fry states grounds for the existence of a doubt as to a title which may be summarized as: (1) Where there is probability of litigation ensuing against the purchaser; (2) where there has been a decision of a court of co-ordinate jurisdiction adverse to the title; (3) where there has been a decision favorable to the title which the court thinks is wrong; (4) where the title depends upon the construction of some ill-expressed and inartificial instrument; (5) where the title rests on a presumption of fact of such a kind that, if the question of fact were before a jury, it would be the duty of the court, not to give a clear direction in favor of the fact, but to leave the jury to draw their own conclusion from the evidence; (6) where the circumstances amount to presumptive (though not necessarily conclusive) evidence of a fact fatal to the title.[12]

It is not sufficient, to render a title doubtful, that there be a mere possibility of an adverse claim. If the existence of the alleged fact creating the doubt is a possibility merely, or the alleged outstanding right a very improbable and remote contingency, the court may, in its discretion, compel the purchaser to complete his purchase.[13] And a court of equity will compel a purchaser to complete his contract for the purchase of lands if the vendor is able to make good the title at any time before the final decree of the court is pronounced;[14] and the vendor will be permitted to remedy the defects in his title if he can do so

[11] Shriver v. Shriver, 86 N. Y. 575, 585.

[12] Fry, Spec. Perf. § 890.

[13] Ferry v. Sampson, 112 N. Y. 415, 20 N. E. 387; Vreeland v. Blawvelt, 23 N. J. Eq. 483; Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282; Hedderly v. Johnson, 42 Minn. 443, 44 N. W. 527, 18 Am. St. Rep. 521; Webb v. Chisolm, 24 S. C. 487, 491. In the case of Schermerhorn v. Niblo, 2 Bosw. (N. Y.) 161 (approved and followed in Moses v. Cochrane, 107 N. Y. 35, 41, 13 N. E. 442), it was said: "As the law does not regard trifles, a bare possibility that the title may be affected by the existing causes which may subsequently be developed, when the highest evidence which the nature of the case admits, amounting to a moral certainty, is given, that no such cause exists, will not be regarded as a sufficient ground for declining to compel a purchaser to perform his contract."

[14] Hepburn v. Dunlop, 1 Wheat. 179, 4 L. Ed. 65; Moss v. Hanson, 17 Pa. 379; Richmond v. Gray, 3 Allen (Mass.) 25; Linn v. McLean, 80 Ala. 360; Fraker v. Brazelton, 12 Lea (Tenn.) 278.

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within a reasonable time.[15] But, if the vendor had no title at the time the contract was executed, equity will not interfere to compel specific performance of the contract, even if the vendor subsequently acquires a title. Such a transaction is speculative, and the vendor is not a bona fide contractor.[16]

SAME—DEFAULT OF PLAINTIFF.

273. It is incumbent upon a party who seeks the specific performance of a contract to show that he has substantially performed, or has been ready and willing to perform, all that the contract has required on his part; and also that he is ready and willing to perform, according to the terms of the contract, all the things that are thereafter to be done by him.[1]

The plaintiff must show the performance of all conditions precedent, and not only must it appear that the plaintiff has performed all the express terms of the contract, but also such of the implied terms as are essential.[2] A court of equity has no power to relieve against the consequences of the nonperformance of conditions precedent unless under special and extraordinary circumstances.[3] But there is a distinction to be made between a nonperformance of the essential and nonessential terms of a contract. The defendant cannot defend a suit for specific performance where the default of the plaintiff is in an unimportant matter.[4] As an illustration of the principle of nonperformance as a defense, a contract for the sale of land by which the vendee, before conveyance, is to erect a building, and complete cer-

[15] Logan v. Bull, 78 Ky. 607.

[16] Wylson v. Dunn, 34 Ch. Div. 569; Forrer v. Nash, 35 Beav. 171; Tiernan v. Roland, 15 Pa. 429.

§ 273. [1] Haggerty v. Land Co., 89 Ala. 428, 7 South. 651.

[2] Tildesley v. Clarkson, 30 Beav. 419. But see Chappell v. Gregory, 34 Beav. 250.

[3] Haggerty v. Land Co., 89 Ala. 428, 7 South. 651.

[4] Fry, Spec. Perf. § 935.

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tain improvements on the land, will not be enforced in his favor until such building has been erected and improvements made.[5] If the nonperformance has been waived by the defendant,[6] or was caused by his neglect or default,[7] it will not constitute a valid defense to specific performance.

SAME—FAILURE TO PERFORM WITHIN THE TIME.

274. Time is originally of the essence of the contract whenever the justice of the case requires it, or when it appears to have been a part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract.[1]

In a comparatively recent case in the supreme court of the United States it was said: "Time may be made of the essence of the contract by the express stipulation of the parties, or it may arise by implication from the very nature of the property, or from the surrounding circumstances." [2] 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.[3] But the court of chancery seems at one time to have gone so far in its disregard of time as to consider that it was of no consequence in equity;[4] and Lord Thurlow, in the case of Gregson v. Riddle,[5] maintained that the parties to a contract could use no expression which would make time one of its essentials. This doc-

[5] Haggerty v. Land Co., supra. And see Eastman v. Plumer, 46 N. H. 464; Chicago Municipal Gaslight & Fuel Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616; Alexander v. Wunderlich, 118 Pa. 610, 12 Atl. 580.

[6] Lamare v. Dixon, L. R. 6 H. L. 414.

[7] Murrell v. Goodyear, 1 De Gex, F. & J. 432.

§ 274. [1] Fry, Spec. Perf. § 1075.

[2] Cheney v. Libby, 134 U. S. 68, 77, 10 Sup. Ct. 498, 33 L. Ed. 818. And see Brown v. Deposit Co., 128 U. S. 403, 414, 9 Sup. Ct. 127, 32 L. Ed. 468; Mayor, etc., of City of Griffin v. City Bank, 58 Ga. 584.

[3] Stowell v. Robinson, 3 Bing. N. C. 928.

[4] Gibson v. Patterson, 1 Atk. 12.

[5] Cited by Sir Samuel Romilly in Seton v. Slade, 7 Ves. 265.

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trine was based upon the principles that in a contract of sale the principal object of the parties was the sale of an estate for a specified sum, and that the particular time named therein for its completion was nonessential.[6] Where the element of time is of no consequence, and no express stipulations in regard to a default have been made, the present rule in equity is to decree a specific performance, notwithstanding the plaintiff's failure to keep the dates assigned by the contract.[7]

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.[8] In order to render time thus essential, it must be clearly and expressly stipulated, and must also have been actually contemplated and intended by the parties that it shall be so. It is not enough that a time is merely mentioned during which or before which something shall be done.[9] But, when such a stipulation is clearly made, the court cannot refuse to give it effect, however harsh and exacting the terms of the contract may be, unless in contravention of public policy; otherwise, it would be to make a contract for the parties which they have not made for themselves.[10] And, although time may not be originally of the essence of the contract, yet, where there has been great and unreasonable delay by one of the parties, the other party may fix a reasonable time within which the contract is to be completed, and the time so fixed will be regarded and insisted upon in

[6] Lord Eldon, in Seton v. Slade, 7 Ves. 273.

[7] Sylvester v. Born, 132 Pa. 467, 19 Atl. 337; Dynan v. McCulloch, 46 N. J. Eq. 11, 14, 18 Atl. 822; Day v. Hunt, 112 N. Y. 191, 195, 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.

[8] Hudson v. Bartram, 3 Madd. 440; Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; Woodruff v. 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, 1 Am. Rep. 593. A stipulation that time is of the essence of the contract was disregarded in Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686.

[9] Fry, Spec. Perf. § 1077; Brown v. Safe-Deposit Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468.

[10] Cheney v. Libby, 134 U. S. 68, 78, 10 Sup. Ct. 498, 33 L. Ed. 818.

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equity.[11] But the time specified in the notice must be reasonable; that is, long enough for the proper doing of the things required to be done.[12]

The nature of the property itself may be such as to make time the essence of the contract, without express stipulation. Contracts for the purchase of property of a fluctuating value are of this description;[13] as in the case of mining property,[14] or stocks.[15] And, where a public house is sold as a going concern, time is deemed of the essence of the contract.[16]

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.[17]

SAME—STATUTE OF FRAUDS AS A DEFENSE.

275. Though a contract has not been reduced to writing as required by the statute of frauds, equity will nevertheless decree a specific performance thereof where

(a) There has been a part performance of the contract.

[11] Taylor v. Brown, 2 Beav. 180; Benson v. Lamb, 9 Beav. 502; King v. Wilson, 6 Beav. 126; Reed v. Breeden, 61 Pa. 460; Thompson v. Dulles, 5 Rich. Eq. (S. C.) 370; Smith v. Lawrence, 15 Mich. 499; Carter v. Phillips, 144 Mass. 100, 10 N. E. 500.

[12] King v. Wilson, 6 Beav. 124; Crawford v. Toogood, 13 Ch. Div. 153; Green v. Sevin, Id. 589; Austin v. Wacks, 30 Minn. 335, 15 N. W. 409.

[13] Edwards v. Atkinson, 14 Tex. 373; Wilson v. Roots, 119 Ill. 379, 10 N. E. 204; Goldsmith v. Guild, 10 Allen (Mass.) 239; Jennison v. Leonard, 21 Wall. 302, 22 L. Ed. 539.

[14] Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; Macbryde v. Weekes, 22 Beav. 533.

[15] Doloret v. Rothschild, 1 Sim. & S. 590.

[16] Day v. Lubke, L. R. 5 Eq. 336.

[17] Dana v. Investment Co., 42 Minn. 194, 44 N. W. 55; Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686; Cartwright v. Gardner, 5 Cush. (Mass.) 273, 280, 281; Boyes v. Liddell, 6 Jur. 725.

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(b) Fraud has been used to prevent the contract from being properly reduced to writing.

(c) The defendant fails to plead the statute as a defense.

The statute of frauds requires a contract concerning real estate to be in writing. Notwithstanding this statute, 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,[1] 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 statutes 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.[2]

Part Performance.

The most frequeut cases where specific performance of contracts for the sale of land is decreed, notwithstanding the statute of frauds, are those where the contract has been in part performed. The doctrine is well established that, where an oral agreement for the sale of land has been in part performed by one of the parties, the statute of frauds will not prevent a court of equity from decreeing a specific performance in favor of the other party.[3] This doc-

§ 275. [1] Britain v. Rossiter, 11 Q. B. Div. 123, 129; Maddison v. Alderson, 8 App. Cas. 467, 2 Keener, Eq. Cas. 675.

[2] Maddison v. Alderson, 8 App. Cas. 467, 474, 2 Keener, Eq. Cas. 675.

[3] Maddison v. Alderson, 8 App. Cas. 467, 2 Keener, Eq. Cas. 675; Lester v. Foxcroft, Colles, 108, 1 White & T. Lead. Cas. Eq. 1027, 1038, 1042; Neale v. Neale, 9 Wall. 1, 19 L. Ed. 590, 2 Keener, Eq. Cas. 647, 651; Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657, 2 Keener, Eq. Cas. 654; Hiatt v. Williams, 72 Mo. 214, 37 Am. Rep. 438; Schuey v. Schaeffer, 130 Pa. 18, 18 Atl. 544; McWhinne v. Martin, 77 Wis. 182, 46 N. W. 118; Union Pac. Ry. Co. v. McAlpine,

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trine seems to be based on the view that, where a man has made a contract with another, and has allowed that other to act upon it, he may have created an equity against himself which he cannot resist by setting up the want of formality in the evidence of the contract out of which the equity in part arose.[4] In a leading case on the subject, specific performance of an oral agreement was decreed, because the 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 the defendant to plead the statute.[5]

The application of the doctrine of part performance is limited by certain well-established principles.

Same—Not Applicable to Certain Contracts.

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.[6] But this doctrine is not necessarily confined to agreements for the sale or acquisition of an interest in land. It applies to a parol agreement for an easement, though no interest in land is intended to be acquired.[7]

Same—Must be Certain and Unequivocal.

The act of part performance must be unequivocal, refer exclusively to the contract, and be such as would not have been performed but for such contract.[8] As was said by

129 U. S. 305, 9 Sup. Ct. 286, 32 L. Ed. 673; 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.) 22 S. W. 559; Holmes v. Holmes, 86 N. C. 205; Niles v. Davis, 60 Miss. 750.

[4] Per Lord Selborne in Maddison v. Alderson, 8 App. Cas. 467, 476, 2 Keener, Eq. Cas. 675.

[5] Lester v. Foxcroft (1701) Colles, 108, 1 White & T. Lead. Cas. Eq. 1027.

[6] Britain 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, 5 L. R. A. 623.

[7] McManus v. Cooke, 35 Ch. Div. 681, 691.

[8] Allen v. Young, 88 Ala. 338, 6 South. 747; Neibert v. Baghurst

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Lord O'Hagan: "It must have relation to the one agreement relied on, and no other. It must be such, in Lord Hardwicke's words, as could be done with no other view or design than to perform that agreement. It must be sufficient of itself, and without any other information or evidence, to satisfy a court, from the circumstances it has created, and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced." [9]

Same—Acts must Render Nonperformance a Fraud.

The principle upon which the court exercises jurisdiction in adjudging specific performance of parol contracts followed by part performances is the fraud and injustice which would result from allowing the party charged to refuse to perform his part after performance by the other upon the faith of the contract, and with the knowledge of the party charged.[10] The acts must be such that a refusal of full execution would operate as a fraud on the party performing them, and place him in a situation which does not lie in compensation.[11] So, where the acts of the party charged with part performance have caused no change of circumstances in the other party,[12] and are not such as to render a refusal by the party charged to perform the contract a fraud against the other party, the jurisdiction to enforce the

(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; Ogsbury v. Ogsbury, 115 N. Y. 290, 296, 22 N. E. 219.

[9] Maddison v. Alderson, 8 App. Cas. 467, 485, 2 Keener, Eq. Cas. 675. Mr. Fry has said: "The true principle, however, of the operation of acts of part performance, seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged." Fry, Spec. Perf. § 582.

[10] Per Grant, M. R., in Buckmaster v. Harrop, 7 Ves. 346; Miller v. Ball, 64 N. Y. 286, 2 Keener, Eq. Cas. 657.

[11] Pond v. Sheean, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414, 2 Keener, Eq. Cas. 715; Gallagher v. Gallagher, 31 W. Va. 9, 13, 5 S. E. 297, 2 Keener, Eq. Cas. 696; Barnes v. Railroad Co., 130 Mass. 388.

[12] Caton v. Caton, 1 Ch. App. 137; Miller v. Ball, 64 N. Y. 286, 2 Keener, Eq. Cas. 657; Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418; Purcell v. Miner, 4 Wall. 513, 18 L. Ed. 435.

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contract, notwithstanding the statute of frauds, will not be exercised.[13]

Same—Possession and Improvements.

Whether or not admission into possession of an estate will be considered part performance depends upon circumstances. If the party setting up the oral agreement was already in possession, as tenant of the vendor, for instance, then, of course, his continued possession has of itself no significance, and therefore is not evidence of the alleged contract.[14] 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.[15] But the possession must be shown to be under and in pursuance of the contract sought to be enforced.[16] It must be open and visible [17] and exclusive; that is, "the possession of vendee must be peaceful and undisputed."[18] As was said by Mr. Justice Grier, the proof must be "that delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party. This will not be satisfied by proof of a scrambling and litigious possession."[19]

Possession under a contract, accompanied by expenditures made with the actual or presumed knowledge of the vendor, for the permanent improvement of the estate, is universally held to be part performance.[20] Equity proceeds

[13] Fry, Spec. Perf. § 587.

[14] Knoll v. Harvey, 19 Wis. 99; Barnes v. Railroad Co., 130 Mass. 388; Johns v. Johns, 67 Ind. 440; Recknagle v. Schmaltz, 72 Iowa, 63, 33 N. W. 365; Ewins v. Gordon, 49 N. H. 444.

[15] Morphett v. Jones, 1 Swanst. 181; Mundy v. Jolliffe, 5 Mylne & C. 167; Paine v. Coombs, 1 De Gex & J. 34, 46; Eaton v. Whitaker, 18 Conn. 222, 229, 44 Am. Dec. 586; Reed v. Reed, 12 Pa. 117; Wallace v. Scoggins, 17 Or. 476, 21 Pac. 558; Morrison v. Herrick, 130 Ill. 631, 642, 22 N. E. 537, 2 Keener, Eq. Cas. 706; Recknagle v. Schmaltz, 72 Iowa, 63, 33 N. W. 365.

[16] Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537, 2 Keener, Eq. Cas. 706; Andrews v. Babcock, 63 Conn. 109, 26 Atl. 715; Shahan v. Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517, 2 Keener, Eq. Cas. 726; Brown v. Brown, 33 N. J. Eq. 650.

[17] Frostburg Coal Co. v. Thistle, 20 Md. 186; Charplot v. Sigerson, 25 Mo. 63; Brawdy v. Brawdy, 7 Pa. 157.

[18] Haslet v. Haslet, 6 Watts (Pa.) 464.

[19] Purcell v. Miner, 4 Wall. 513, 18 L. Ed. 435.

[20] Crook v. Corporation of Seaford, 6 Ch. App. 551; Freeman v.

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on the ground that it would be fraud for the vendor to allow the vendee to continue in possession, and expend his money in improvements, so as to render it impossible for the parties to be restored to their original situations, confessedly on the faith of an agreement of sale, and then try to avail himself of the statute of frauds to avoid the contract.[21]

Same—Ancillary Acts.

Acts ancillary to an agreement, although attended with expense, are not considered acts of part performance. Thus, the delivery of abstracts of title, giving orders for conveyances, going to view an estate, putting a deed in the solicitor's hands to prepare a conveyance, surveying, and similar acts, do not have the effect of taking the agreement out of the interdiction of the statute.[22]

Same—Acts Capable of being Undone.

Acts capable of being undone, and admitting of the parties being remitted to their original position, are of no avail as a means of removing the prohibition of the statute. Thus a part, or even an entire, payment of the purchase money is not sufficient of itself to warrant a decree of the specific performance of an oral contract, because that may be recovered in an action at law.[23]

Freeman, 43 N. Y. 34, 3 Am. Rep. 657, 2 Keener, Eq. Cas. 654; Moss v. Culver, 64 Pa. 414; Union Pac. Ry. Co. v. McAlpine, 129 U. S. 305, 9 Sup. Ct. 286, 32 L. Ed. 673; Neale v. Neale, 9 Wall. 1, 19 L. Ed. 590, 2 Keener, Eq. Cas. 647; Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829; Everett v. Dilley, 39 Kan. 73, 17 Pac. 661; Hunkins v. Hunkins, 65 N. H. 95, 18 Atl. 665; Potter v. Jacobs, 111 Mass. 32; Frame v. Frame, 32 W. Va. 463, 9 S. E. 901, 5 L. R. A. 323; Pond v. Sheean, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414, 2 Keener, Eq. Cas. 715.

[21] Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252, 2 Keener, Eq. Cas. 722.

[22] 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. 201, 20 Atl. 252, 2 Keener, Eq. Cas. 722; Colgrove v. Solomon, 34 Mich. 494.

[23] 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, 2 Keener, Eq. Cas. 722; Winchell v. Winchell, 100 N. Y.

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Marriage is not of itself a sufficient part performance, since the statute of frauds has expressly provided that every agreement made in consideration of marriage must be in writing.[24] But it is sufficient if an antenuptial verbal agreement for the conveyance of land is followed, not only by marriage, but by the expenditure of money.[25]

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.[26] 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.[27]

Failure to Plead Statute.

The statute of frauds is an affirmative defense, and is waived unless pleaded.[28] Hence the court will specifically enforce an oral contract where defendant has neglected to claim the benefit of the statute.[29]

159, 163, 2 N. E. 897; Forrester v. Flores, 64 Cal. 24, 28 Pac. 107. Where a recovery of the purchase money will not restore vendee to his former position, he will be entitled to specific performance. Malins v. Brown, 4 N. Y. 403. Some authorities hold payment a sufficient part performance. Stein v. Nysonger, 69 Iowa, 512, 29 N. W. 433; Townsend v. Houston, 1 Har. (Del.) 532.

[24] Warden v. Jones, 23 Beav. 487; Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185; Henry v. Henry, 27 Ohio St. 121; Adams v. Adams, 17 Or. 247, 20 Pac. 633.

[25] Surcome v. Pinniger, 3 De Gex, M. & G. 571; Welch v. Whelpley, 62 Mich. 15, 28 N. W. 744.

[26] 1 Story, Eq. Jur. § 161.

[27] McDonald v. Yungbluth (C. C.) 46 Fed. 836; Hitchins v. Pettingill, 58 N. H. 386; Murray v. Drake, 46 Cal. 648. Contra, Glass v. Hulbert, 102 Mass. 24.

[28] 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.

[29] 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.

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SPECIFIC PERFORMANCE WITH A VARIANCE.

276. Though a contract cannot be strictly carried out according to its terms, specific performance will be granted, if proper compensation can be made, and the parties put in fact in the same situation as if the contract had been strictly fulfilled.

277. Specific performance of a contract not capable of literal performance will be decreed with compensation for deficiencies where there is a variance

(a) As to the time in which the contract is to be performed.

(b) In the subject-matter of the sale.

The specific enforcement of contracts which cannot be literally fulfilled, with a compensation for deficiencies, affords one of the most striking illustrations of the contrast between the principles and methods of equity and those which prevailed in 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 case of a partial failure in the sale;[1] but in equity, on the other hand, an investigation will be made as to whether the property can be either literally or substantially transferred. If a substantial transfer can be made, it is considered in equity as against conscience to take advantage of similar circumstances of variation.[2]

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 en-

§§ 276–277. [1] Adams, Eq. 89.

[2] Hepburn v. Auld, 5 Cranch, 262, 3 L. Ed. 96; Evans v. Kingsberry, 2 Rand. (Va.) 120, 14 Am. Dec. 779.

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titled 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.[3] If there has been a delay in making out the title, and the property has deteriorated by dilapidation or mismanagement, compensation will be allowed to the purchaser,[4] but not for deterioration after the time when he ought to have taken possession,[5] and, of course, not for deterioration caused by himself.[6] When time is of the essence of the contract, and the purchaser has obtained a decree for specific performance, he will be entitled to compensation for the loss which he has sustained in consequence of possession not having been given to him according to the contract.[7]

Variance 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; but it must be clear that the deficiency is not substantial, for a purchaser cannot be required against his will to pay for that which he has not bought.[8] Where the vendor seeks the specific performance of a contract, equity will be slow in granting the relief, and will in all cases refuse its aid, unless the purchaser can be put in substantially as favorable a condition as he would have been if the terms of the contract had been fully complied with.[9] It has been held that the deficiency of twenty acres in a contract for the

[3] De Visme v. De Visme, 1 Macn. & G. 346; Calcraft v. Roebuck, 1 Ves. Jr. 221; Bostwick v. Beach, 105 N. Y. 661, 663, 12 N. E. 32.

[4] Foster v. Deacon, 3 Madd. 394; Worrall v. Munn, 38 N. Y. 137; Bostwick v. Beach, 105 N. Y. 661, 12 N. E. 32.

[5] Binks v. Rokeby, 2 Swanst. 226.

[6] Harford v. Purrier, 1 Madd. 532.

[7] Carrodus v. Sharp, 20 Beav. 56.

[8] Kenner v. Bitely (C. C.) 45 Fed. 133.

[9] Roberts' Heirs v. Lovejoy, 60 Tex. 253, 257.

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sale of three hundred acres did not defeat the vendor's right to specific performance, the purchase price being proportionately abated;[10] and in another case, where there was a deficiency of four acres in three hundred, performance with compensation was decreed.[11] On the sale of an estate with a mansion thereon, a similar deficiency in that part of the estate which is near the house may be material.[12] And where the contract was for the sale of a wharf and jetty, and it appeared that the jetty was liable to be removed by the corporation of London, specific performance was refused.[13] A material variation with respect to the title contracted to be sold is 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 of the lease may be.[14] And the rule as to compensation can never be employed to compel a purchaser to accept a doubtful title, or one different from that which he agreed to purchase, or one which may expose him to litigation.[15]

(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 can give, and demand compensation for what he cannot give;[16] and this is so whether the difference is one of tenure or of quantity.[17] This has been done even when the difference in quantity amounted to as much as one-half.[18] And where the vendor's wife re-

[10] Morgan's Adm'r v. Brast, 34 W. Va. 332, 12 S. E. 710. See, also, Farris v. Hughes (Va.) 17 S. E. 518.

[11] Stevenson v. Polk, 71 Iowa, 278, 32 N. W. 340.

[12] Perkins v. Ede, 16 Beav. 193; Knatchbull v. Grueber, 3 Mer. 124.

[13] Peers v. Lambert, 7 Beav. 546.

[14] Drewe v. Corp, 9 Ves. 368.

[15] Richmond v. Gray, 3 Allen (Mass.) 25; Irving v. Campbell, 121 N. Y. 354, 24 N. E. 821, 8 L. R. A. 620; Close v. Stuyvesant, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161; Jeffries v. Jeffries, 117 Mass. 184.

[16] Hill v. Buckley, 17 Ves. 401; Mortlock v. Buller, 10 Ves. 315; Walling v. Kinnard, 10 Tex. 508, 60 Am. Dec. 216; Harbers v. Gadsden, 6 Rich. Eq. (S. C.) 284, 62 Am. Dec. 390; 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, 144 Ill. 213, 33 N. E. 27; Roberts' Heirs v. Lovejoy, 60 Tex. 253, 257.

[17] Hughes v. Jones, 3 De Gex, F. & J. 307; Hooper v. Smart, L. R. 18 Eq. 683.

[18] Burrow v. Scammell, 19 Ch. Div. 175.

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fused to join in the deed, and to release her inchoate right of dower, the purchaser may compel specific performance, with the abatement of the price equal to the value of the wife's interest ascertained by the use of the standard life tables;[19] but the courts in some of the states 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 value of the outstanding interests.[20] If the vendor agrees to convey a title free of all incumbrances, the purchaser may compel specific performance of the contract, with an abatement of the purchase price to the extent of incumbrances.[21]

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 case the rule is that equity will retain jurisdiction to award damages, if the suit was brought in good faith, without knowledge of the defect.[22]

Parol Evidence to Show Variation.

As was stated in a former chapter, the rule which prohibits the admission of parol evidence to vary a written contract has no application to cases of fraud or mistake.[23] It is, therefore, a well-established principle that the defendant may resist a claim for the specific performance of a contract by the use of parol evidence designed to show that either because of fraud or mistake the written contract does not express the agreement, and that its enforcement would, therefore, be inequitable.[24] But in England

[19] Jackson v. Edward, 7 Paige (N. Y.) 408; Davis v. Parker, 14 Allen (Mass.) 94, 98, 104; Bostwick v. Beach, 103 N. Y. 414, 9 N. E. 41; Martin v. Merritt, 57 Ind. 34, 26 Am. Rep. 45.

[20] Graybill v. Braugh (Va.) 17 S. E. 558; Burk's Appeal, 75 Pa. 141; Borden v. Curtis, 46 N. J. Eq. 468, 19 Atl. 127; Lucas v. Scott, 41 Ohio St. 636.

[21] Grant v. Beronio, 97 Cal. 496, 32 Pac. 556; Hunt v. Smith, 139 Ill. 296, 28 N. E. 809.

[22] Cunningham v. Duncan, 4 Wash. 506, 30 Pac. 647; Morgan v. Bell, 3 Wash. St. 554, 28 Pac. 925, 16 L. R. A. 614; Combs v. Scott, 76 Wis. 662, 45 N. W. 532; Milkman v. Ordway, 106 Mass. 232, 253.

[23] Ante, p. 351.

[24] Clinan v. Cooke, 1 Schoales & L. 32, 39; Manser v. Back, 6 Hare, 443.

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such parol evidence is not admissible in favor of a plaintiff who seeks the specific performance of a written contract, with a variation for alleged mistake or fraud, on the ground that the court would thus be enforcing an oral agreement in violation of the statute of frauds.[25] This distinction is very generally repudiated in this country, and it has been generally held that either party may have a decree for the specific performance of a written contract with such corrections in it as parol proof may show to be necessary to correct a mistake therein.[26]

[25] Woollam v. Hearn, 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 920; Townshend v. Stangroom, 6 Ves. 228.

[26] Gillespie v. Moone, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559; Fishack v. Ball, 34 W. Va. 644, 12 S. E. 856; Redfield v. Gleason, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. Rep. 889; Strickland v. Barber, 76 Mich. 310, 43 N. W. 449.

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CHAPTER XXII.

INJUNCTION.

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DEFINITION.

278. An injunction is a judicial order operating in personam, requiring a party to do or to abstain from doing some particular act.

A writ of injunction was, and still is, peculiarly an instrument of courts of equity, though there were some cases where courts of law were accustomed to exercise analogous powers,—as by the writ of prohibition and estrepement in cases of waste. The cases, however, to which these common-law processes were applicable were so few, and the processes themselves were so utterly inadequate for the purposes of justice, that the jurisdiction at law fell practically into disuse, and almost all the remedial justice of this sort came to be administered by courts of equity.[1]

The interdict of the Roman law, and the action founded thereon, furnished to the early chancellors a precedent for the remedy of injunction. These interdicts were pronounced by the prætors in the exercise of their extraordinary or equitable jurisdiction for the purpose of mitigating the se-

§ 278. [1] Snell, Eq. p 481.

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verity which resulted from an undeviating adherence to the technical forms of the civil law.[2]

In the former practice in equity the injunction was in the form of a writ, and this is still the case in the federal courts, and in the courts of those states which retain a separate system of equitable procedure. In most of the states, and also in England, statutes provide for the granting of temporary injunctions by order, and of permanent injunctions by a final decree. While, as thus stated, modern statutes have modified the practice in respect to the granting of injunctions, and have divided them into temporary and permanent injunctions, according to their duration, the principles, doctrines, and rules which determine and regulate the exercise of the jurisdiction of equity in respect to injunctions remain unchanged. And the provisions of the Codes of the several states which specify the cases in which injunctions will be granted do not materially alter the settled equitable jurisdiction, except in reference to injunctions against actions or judgments at law.[3]

CLASSIFICATION.

279. Injunctions are either mandatory or preventive.

280. A mandatory injunction is one which requires the doing of a particular thing, and compels the defendant to restore things to their former condition.[1]

281. A preventive injunction is one which is granted for the purpose of restraining the continuance or commission of some act by the defendant which is injurious to the plaintiff.

The granting of mandatory injunctions is not frequent, since, in the absence of a contract, it was formerly held that a court of equity could not directly compel the performance

[2] Joyce, Inj. 2.
[3] Pom. Eq. Jur. 1337.
§§ 279–281. [1] Joyce, Inj. 1309, 1310.

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of a positive act. Because of this doubt of the right of a court of equity to interfere, it sometimes accomplished the same object in an indirect form. Thus railroad companies have been prevented by mandatory injunctions from entering into agreements not to transfer goods at rates fixed by law; that is, to compel them to observe the law and regulate their rates according to statute.[2]

It seems well established at the present time that a court of equity may compel by injunction the performance of a positive act. As was said by Lord Justice Cotton: "This court, when it sees that a wrong is committed, has a right at once to put an end to it, and has no hesitation in doing so by a mandatory injunction, if it is necessary for the purpose."[3] In a recent New Jersey case the injunction was in the following language: "That the defendants do desist and refrain from further performing and carrying into effect the laws," etc., "and that the P. Company," etc., "do desist and refrain from continuing to control the right of the C. Company, and that the C. Company do desist and refrain from permitting the P. Company," etc., "to operate its road, and that the C. Company do again resume control of all its property and franchises and performance of all its corporate duties." [4] The last of these directions is clearly mandatory, not only in effect, but in terms. As suggested by Mr. Bispham,[5] there would seem to be no good reason why a direct form of decree similar to the one quoted should not be used.

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 remedy, and will always be refused if the injury can be reasonably compensated in damages, or even if the balance of evidence is strongly

[2] Rogers Locomotive & Machine Works v. Railway Co., 20 N. J. Eq. 379. 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.

[3] Loog v. Bean, 26 Ch. Div. 314.

[4] Stockton v. Railroad Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; Stockton v. Railroad Co., 50 N. J. Eq. 489, 25 Atl. 942. See, also, Hall's Appeal, 112 Pa. 42, 3 Atl. 783.

[5] Bisp. Eq. (6th Ed.) § 400.

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on the side of the defendant.[6] 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 the principles hereafter cited and commented upon generally apply to such injunctions. The remarkable difference between these injunctions and the legal remedy of damages is that they will be granted in advance of an injury, provided only an intention to do an act which will result in irreparable injury is shown to exist.

Classification as to Duration.

Injunctions, with respect to their duration, are either temporary or permanent. Temporary injunctions, which are also termed interlocutory or preliminary injunctions, are made pending the hearing of the case on its merits, and are generally expressed so as to continue until a final determination can be had. Such injunctions are merely provisional, and do not conclude a right. Their object is to preserve the property which is the subject of the litigation in statu quo until the rights of the parties in respect thereto have been determined. Such injunctions may be obtained by the plaintiff when he shows that he has a fair question to raise as to the existence of the right alleged by him.[7] Permanent injunctions, or final or perpetual injunctions, as they are sometimes called, 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.[8]

PRINCIPLES GOVERNING JURISDICTION.

282. To warrant the issuance of an injunction, the 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.

[6] Deere v. Guest, 1 Mylne & C. 516; Jacomb v. Knight, 3 De Gex, J. & S. 538.

[7] Blakemore v. Canal Nav., 1 Mylne & K. 154; High, Inj. § 5.

[8] High, Inj. § 3.

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Adequacy of Legal Remedy.

A court of equity will not lend its aid for the prevention of wrongs or the protection of rights by the granting of an injunction, if the party aggrieved has a full, complete, and adequate remedy at law. As is said by Prof. Pomeroy: "The restraining power of equity extends through the whole range of rights and duties which are recognized by the law, and would be applied to every case were it not for certain reasons of expediency and policy which control and limit its exercise." [1] These considerations of expediency and policy confine the exercise of the jurisdiction of equity to those cases in which the legal remedy is not full and adequate. It is not sufficient, to authorize the remedy by injunction, that a violation of a naked legal right of property is threatened.[2] In no case can equity restrain the breach of a contract, or the commission of a tort, if, by an action at law, adequate compensatory damages can be recovered. 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 requisites of the case, the exercise of the jurisdiction may be proper and beneficial.[3] And whenever the rights of the party aggrieved cannot be protected or enforced in the ordinary course of proceedings at law, except by numerous and expensive suits, a court of equity may properly interpose and afford relief by injunction.[4]

Irreparable Injury.

Equity interferes in the transactions of men by preventive measures only when irreparable injury is threatened and the law does not afford an adequate remedy for the contemplated wrong.[5] 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

§ 282. [1] Pom. Eq. Jur. § 1338; Tuchman v. Welch (C. C.) 42 Fed. 548, 559.

[2] McHenry v. Jewett, 90 N. Y. 58.

[3] Lumley v. Wagner, 1 De Gex, M. & G. 616; Watson v. Sutherland, 5 Wall. 74, 18 L. Ed. 580; Payne v. Railroad Co. (C. C.) 46 Fed. 546; Irwin v. Lewis, 50 Miss. 363.

[4] Pennsylvania Coal Co. v. Canal Co., 31 N. Y. 91; Wheelock v. Noonan, 108 N. Y. 179, 15 N. E. 67; Warren Mills v. Seed Co., 65 Miss. 391, 4 South. 298.

[5] Thomas v. Protective Union, 121 N. Y. 48, 52, 24 N. E. 24.

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grievous one, or, at least, a material one, and not adequately reparable by damages.[6] 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.[7] The facts alleged upon which the complainant bases his demand must show more than a remote possibility that injury will result from the threatened action. "Injury, material and actual, not fanciful or theoretical, or merely possible, must be shown as the necessary or probable result of the action sought to be restrained."[8]

WHEN INJUNCTION WILL BE GRANTED—CLASSIFICATION.

283. The remedy by injunction may be used to restrain

(a) Proceedings at law.

(b) Breach of contract.

(c) Commission of torts.

(d) Breach of trust, and violation of equitable rights.

(e) The collection of illegal taxes.

(f) Violation of law by public officers and municipal corporations.

It is not possible, within the limits of a work of this character, to specify every case to which the remedy of injunction might be applied. All that can be attempted is an illustration of 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.

[6] Pinchin v. Railway 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, 1 Am. St. Rep. 368; Hodge v. Giese, 43 N. J. Eq. 342, 11 Atl. 484.

[7] Hilton v. Earl of Granville, Craig & P. 283, 292.

[8] Genet v. President, etc., 122 N. Y. 505, 529, 25 N. E. 922; People v. Canal Board, 55 N. Y. 390, 397.

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INJUNCTION AGAINST A LEGAL PROCEEDING.

284. Equity will interfere to restrain a proceeding at law whenever, through mistake, accident, or fraud, or otherwise, one of the parties to an action at law obtains, or is likely to obtain, an unfair advantage over the other, so as to make the legal proceeding an instrument of injustice.[1]

Against Prosecution of Actions at Law.

In the exercise of its jurisdiction by injunction against a legal proceeding, a court of equity claims no supremacy over a court of law, since the injunction is in no sense a prohibition upon the action of the court of law. The injunction is directed, not to the court, but to the litigant parties, and in no manner denies the jurisdiction of the legal tribunal.[2] It is granted on the sole ground that, from certain equitable circumstances, of which the court of equity granting the process has cognizance, it is against conscience that the party inhibited should proceed in the cause. The object really is to prevent an unfair use being made of the process of a court of law, in order to deprive another party of his just rights, or to subject him to some unjust vexation or injury which is wholly irremediable by a court of law.[3]

Since these injunctions 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 party aggrieved might have availed himself in an action at law, and in all such cases the parties will be left to defend at law.[4]

§ 284. [1] Earl Oxford's Case, 1 Ch. R. 1, 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 601.

[2] High, Inj. § 45. Compare In re Schuyler's Steam Towboat Co., 136 N. Y. 169, 32 N. E. 623, 20 L. R. A. 391, reversed on another point 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981, sub nom. Moran v. Sturges.

[3] Story, Eq. Jur. § 875. Compare provisions of federal bankruptcy act as to staying actions in state courts during bankruptcy proceedings.

[4] New York Dry-Dock Co. v. Trust Co., 11 Paige (N. Y.) 384; Palm-

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In England, and in those states in this country where, by the adoption of the reformed procedure, equity and law are administered by the same courts, injunctions against the prosecutions of actions at law have become infrequent, since the defendant may, in a legal action, avail himself of any equitable defense he may have. But the jurisdiction of courts of equity in those states to restrain proceedings at law in cases where the exercise of this jurisdiction is essential to the complete administration of justice and the proper security of the rights of litigants has not been abrogated or abridged in any of its essential features by the union of law and equity in a single tribunal.[5] Such jurisdiction will be exercised when necessary to prevent interference where the jurisdiction of equity has once attached, and such interference would render the jurisdiction ineffectual.[6]

Against Judgments.

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.[7] In the celebrated Case of the Earl of Oxford,[8] decided during the reign of King James I., Lord Chancellor Ellsmere 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

er v. Hayes, 93 Ind. 189; Womack v. Powers, 50 Ala. 5; Palmer v. Gardiner, 77 Ill. 143; Dubuque & S. C. Ry. Co. v. Railway Co., 76 Iowa, 702, 39 N. W. 691.

[5] Fielding v. Lucas, 87 N. Y. 197, 200; Erie R. Co. v. Ramsey, 45 N. Y. 637.

[6] Pom. Eq. Jur. §§ 1370–1374; Wood v. Swift, 81 N. Y. 31; Platto v. Deuster, 22 Wis. 482; Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304.

[7] 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.

[8] 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 601.

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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.[9]

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 a 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,

[9] 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 præmunire, 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 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.

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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.[10]

In modern times the enlarged powers of courts of common law to grant new trials for errors and mistakes occurring during the trial have 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.[11]

[10] 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. 443, 445, 15 L. Ed. 123, 124, 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, etc., 51 Md. 1; Knox Co. v. Harsham, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. Ed. 586; Warner v. Conant, 24 Vt. 351, 58 Am. Dec. 178; 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. 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. (Ky.) 234; Vaughn v. Johnson, 9 N. J. Eq. 173.

[11] 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, 22 Am. St. Rep. 660; Gates v. Steele, 58 Conn. 316, 20 Atl. 474, 18 Am. St. Rep. 268; Taylor v. Railroad Co., 86 Tenn. 228, 6 S. W. 393; Wagner v. Shank, 59 Md. 313; Murphy v. Smith, 86 Mo. 333. By the English judicature act of 1873, § 24 (5), it was enacted that no injunction should issue from the court of chancery to restrain proceedings at law, but that any matter of equity which, before the act, would have been a sufficient ground for obtaining an injunction, could, after the act, be relied on as a defense in the proceedings. This section does not interfere with the granting of an injunction restraining the institution of proceedings. Besant v. Wood, 12 Ch. Div. 630.

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INJUNCTION TO PREVENT BREACH OF CONTRACT.

285. Injunctions will be granted to prevent the breach of a contract where such breach will result in irreparable injury not capable of being adequately compensated in damages.

If it appears that the complainant has an adequate remedy at law for the threatened breach of a contract, a court of equity will refuse to lend its aid.[1] The jurisdiction will be exercised in case of oral as well as written contracts.[2] Any valid contract, the breach of which will cause mischief which cannot be repaired or well estimated, will provide a basis for such jurisdiction.[3] And it need not be shown that the threatened act would be a violation of the express terms of the contract, if it appear that it would be a violation of its spirit and meaning,[4]—as where the defendant, an actress, by her contract with the plaintiff, agreed to appear in seven performances in each week given by the plaintiff, it was held that, as it was not possible for her to perform elsewhere without violating her contract, the fact that it did not contain a negative clause, binding her not to appear elsewhere, was not a ground for refusing the plaintiff an injunction.[5]

An injunction against the breach of a negative contract is similar to a decree for its specific performance. Where the contract contains express negative as well as positive terms,

§ 285. [1] West v. Cobb, 63 Ga. 341; Hill v. Staples, 85 Ga. 863, 11 S. E. 967; Harkinson's Appeal, 78 Pa. 196, 21 Am. Rep. 9; Steinau v. Gas Co., 48 Ohio St. 324, 27 N. E. 545; Burdon Cent. Sugar Refining Co. v. Leverich (C. C.) 37 Fed. 67; Bailey v. Collins, 59 N. H. 459.

[2] Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153; Spier v. Lambdin, 45 Ga. 319.

[3] McClurg's Appeal, 58 Pa. 51; Manhattan Mfg. & Fertilizing Co. v. Market Co., 23 N. J. Eq. 161.

[4] Richardson v. Peacock, 26 N. J. Eq. 40; Wright v. Evans, 2 Abb. Prac. N. S. (N. Y.) 308.

[5] Duff v. Russell (N. Y. Super. Ct.) 14 N. Y. Supp. 134, affirmed in 16 N. Y. Supp. 958, affirmed on opinion below in 133 N. Y. 678, 31 N. E. 622.

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and the positive terms are capable of specific performance by the court, the court may enforce by injunction the observance of the negative terms.[6] It does not follow, however, that an injunction will only issue against a breach of a contract which can be specifically enforced.[7] An injunction will be granted where it can operate to bind men's conscience, as far as they can be bound, to a true and literal performance of their agreement.[8]

Contracts Concerning Real Estate.

It is generally presumed that the violation of a contract relating to real estate, the result of which will be injurious to the inheritance, is irreparable at law. 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 such premises 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.[9] In this country it has generally been held that the violation of contracts and covenants concerning the manner of holding, using, and disposing of realty places the burden of proving that no serious or irreparable injury would result upon the defendant; and where it is not made clear at a trial whether the plaintiff can obtain full damages at law for the violation of a covenant,—for instance, not to build a pond, or incumber a certain right of way,—an injunction against such violation is discretionary with the trial court, and, having been granted, will not be disturbed.[10] A tenant will be restrained from using the leased premises for any purpose or in any manner which would be violative of the covenants of his lease, whether or not irreparable or serious injury would

[6] Fry, Spec. Perf. § 1148.

[7] Singer Sewing-Mach. Co. v. Embroidery Co., 1 Holmes, 253, Fed. Cas. No. 12,904; Steinau v. Gas Co., 48 Ohio St. 324, 27 N. E. 545; Wolverhampton & W. Ry. Co. v. Railway Co., L. R. 16 Eq. 433, 438.

[8] Kerr, Inj. 426; Lumley v. Wagner, 1 De Gex, M. & G. 619.

[9] 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, 41 Am. Rep. 365; Godfrey v. Black, 39 Kan. 193, 17 Pac. 849, 7 Am. St. Rep. 544; Morris v. Manufacturing Co., 83 Ala. 565, 3 South. 689; Gawtry v. Leland, 40 N. J. Eq. 323.

[10] Dexter v. Beard, 53 Hun, 638, 7 N. Y. Supp. 11.

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result from such violation.[11] The act in violation of the covenants of the lease need not amount to waste, but it is sufficient if it is in contravention of such covenants, or of an agreement which may be implied from the dealings between the parties.[12] In all cases involving the restraint of a breach of a covenant in a contract respecting real property, it is not for the court, but for the plaintiff, to estimate the amount of damages that arises from the injury inflicted upon him by such breach. The breach itself constitutes an injury, and the court has no right to measure it, and cannot refuse to the plaintiff specific performance of his contract by way of injunction against such breach.[13]

Contracts not to Engage in Business.

Preventive relief is frequently granted to parties who seek to restrain the violation of provisions in contracts for not engaging in a particular business or profession in a certain locality. The validity of such a contract generally depends upon the reasonableness of the limitation. If it attempts to prevent a person from resuming his business or calling in the whole state, it is invalid, because in restraint of trade, and its violation will not be enjoined.[14] And it has been held that the prohibitory terms of such a contract do not extend to a member of a partnership bound by it after a dissolution of such a partnership, unless it is expressly provided in the contract or appears by clear implication.[15] Subject to the rule as to the reasonableness of the limitation, the court will prevent by injunction the violation of provisions in such contracts, whereby one of the parties agrees not to engage in a certain business or profession in a specified locality.[16] A covenant not to engage in business

[11] Steward v. Winters, 4 Sandf. Ch. (N. Y.) 587; Barrow v. Richard, 8 Paige (N. Y.) 357, 35 Am. Dec. 713. And see Kerr, Inj. 86; Spell. Extr. Relief, § 498.

[12] Frank v. Brunnemann, 8 W. Va. 462; Parker v. Garrison, 61 Ill. 250; Lewis v. Christian, 40 Ga. 187.

[13] Per Jessel, M. R., in Leech v. Schweder, 9 Ch. App. 463, 465.

[14] Lange v. Werk, 2 Ohio St. 520; Baumgarten v. Broadaway, 77 N. C. 8.

[15] Baker v. Pottmeyer, 75 Ind. 451.

[16] McClurg's Appeal, 58 Pa. 51; (in case of publishers) Beal v. Chase, 31 Mich. 490; Spicer v. Hoop, 51 Ind. 365; (innkeepers) Stines v. Dorman, 25 Ohio St. 580; McAlister v. Howell, 42 Ind. 15; Elliot's

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will not, however, be implied from a sale of the business, or even of the 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.[17]

Contracts for Personal Services.

We have already seen that a court of equity will not decree the specific performance of the contract for personal services;[18] nor will it enjoin the violation of restrictive covenants in such contracts, nor compel the affirmative performance from day to day, or the affirmative acceptance of merely personal services.[19] A breach of contract for ordinary personal services, not peculiar in their character, will not be restrained since the remedy at law in damages is adequate;[20] but, where the services are of a special, unique, and extraordinary character, and the contract contains a covenant not to perform similar services for any other reason during the existence of the contract, a breach of such a covenant may be restrained by an injunction. The leading case on this subject is that of Lumley v. Wagner,[21] where the defendant had entered into a contract with the plaintiff to sing at his

Appeal, 60 Pa. 161; (attorneys) Smalley v. Greene, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; (druggists) Baker v. Cordon, 86 N. C. 116, 41 Am. Rep. 448; Ward v. Hogan, 11 Abb. N. C. (N. Y.) 478; (dressmakers) Morgan v. Perhamus, 36 Ohio St. 517, 38 Am. Rep. 607; (dentists) Cook v. Johnson, 47 Conn. 175, 36 Am. Rep. 64; (undertakers) Hall's Appeal, 60 Pa. 458, 100 Am. Dec. 584; (physicians) Thayer v. Younge, 86 Ind. 259; Pickett v. Green, 120 Ind. 584, 22 N. E. 737. Some of the later cases have upheld contracts in restraint of trade, though unlimited territorially. Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Leather Cloth Co. v. Lorsont, 39 Law J. Ch. 86; Rousillon v. Rousillon, 14 Ch. Div. 351.

[17] Cruttwell v. Lye, 17 Ves. 335; Churton v. Douglas, Johns. Eng. Ch. 174; Close v. Flesher (Com. Pl.) 28 N. Y. Supp. 737. In Massachusetts a restrictive covenant was implied from a sale of the good will. Dwight v. Hamilton, 113 Mass. 175.

[18] Ante, p. 531.

[19] Arthur v. Oakes, 11 C. C. A. 209, 63 Fed. 318, 25 L. R. A. 414.

[20] Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278; Cort v. Lassard, 18 Or. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726; Burney v. Ryle, 91 Ga. 701, 17 S. E. 986.

[21] 1 De Gex, M. & G. 616.

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theater for three months, and not to sing at any other theater during such period. Although the agreement to sing at the plaintiff's theater was of such a nature that its specific performance could not be decreed, an injunction was issued to restrain the defendant from singing at a rival theater.[22]

INJUNCTIONS TO PREVENT TORTS.

286. Wherever a right exists or is created which is cognizable by law, a violation of that right will be prevented by injunction, provided

(a) The injury is such that it cannot be adequately compensated in damages, or at least not without the necessity of a multiplicity of actions for that purpose.

(b) There is an actual violation of a legal right by the defendant, or a probability or danger of such violation.

287. 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.

By far the most important class of injunctions is that dealing with wrongs independent of contract. The jurisdiction to restrain actions and judgments at law, once important, is gradually becoming less so, owing to reasons heretofore stated. With respect to contracts, the usual equita-

[22] See, also, Cort v. Lassard, 18 Or. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726; Daly v. Smith, 49 How. Prac. 150; McCaull v. Braham (C. C.) 16 Fed. 37; Metropolitan Exhibition Co. v. Ward (Sup.) 9 N. Y. Supp. 779; Duff v. Russell (Super. N. Y.) 14 N. Y. Supp. 134, affirmed on appeal 133 N. Y. 678, 31 N. E. 622, where it was held that a negative covenant is sometimes implied to devote the entire time to a business. And see Pratt v. Montegriffo, 57 Hun, 587, 10 N. Y. Supp. 903; Allegany Baseball Club v. Bennett (C. C.) 14 Fed. 257.

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ble remedy is by way of specific performance, and the right to injunctive relief is limited to a comparatively small class of cases, generally 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. Although the jurisdiction of equity is in general so extensive, it is restrained and modified by considerations of convenience, and equity will not interfere where the breach of a duty or the violation of a right may be completely and adequately paid for by damages at law, or where other reasons of justice and convenience are against and in contravention of equity.[1] As, for instance, injunction will not lie where the act to be enjoined is political or governmental, nor where the issuance thereof would prevent the exercise of executive discretion, or where its effect would be to determine the title to a public office.[2] Under the old cases the rule was that the jurisdiction should be exercised only to protect property rights, but there seems at the present time to be a tendency in both the English and American courts to restrain by injunction every species of torts for which damages are not an adequate remedy, whether the wrong be to property, person, or reputation.

To warrant the issuance of a temporary injunction before the hearing on the merits, the plaintiff must be able to show a fair prima facie case in support of the title which he asserts.[3] There should be no real doubt as to the existence of the plaintiff's legal right,[4] and there must be ground for the allegation that the act which he seeks to prevent is a wrongful act.[5] If the legal right of the plaintiff 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

§§ 286, 287. [1] Snell, Eq. 492; Pom. Eq. Jur. § 1338; Gaslight & Coke Co. v. Vestry of St. Mary Abbotts, 15 Q. B. Div. 1; Tuchman v. Welch (C. C.) 42 Fed. 548, 559.

[2] Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; Heffran v. Hutchins, 160 Ill. 550, 43 N. E. 709; Goldsworthy v. Boyle, 175 Pa. 254, 34 Atl. 630.

[3] Saunders v. Smith, 3 Mylne & C. 714, 728; Hilton v. Earl of Granville, Craig & P. 283, 292.

[4] National Docks R. Co. v. Railroad Co., 32 N. J. Eq. 755; Mammoth Vein Consol. Coal Co.'s Appeal, 54 Pa. 183.

[5] Sparrow v. Railroad Co., 9 Hare, 436, 441.

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the right,[6] or is at least an act which must, if carried into effect, necessarily result in a ground of action.[7] The mere prospect of injury, or the mere belief that the act may or will be done, is not sufficient;[8] but, if an intention to do the act complained of can be shown to exist, or if a man insists in 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 basis for the exercise of the jurisdiction.[9] After the establishment of a property right on a trial on the merits, and of the fact of its violation, the complainant is entitled as of course to a permanent injunction to prevent the recurrence of the wrong.

SAME—PROTECTION OF OTHER THAN PROPERTY RIGHTS.

288. As a general 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.

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.[1] It therefore possessed no jurisdiction to restrain by injunction the publication of a libel, or the making of slanderous statements cal-

[6] Imperial Gaslight & Coke Co. v. Broadbent, 7 H. L. Cas. 600; Ripon v. Hobart, 3 Mylne & K. 169, 176.

[7] Haines v. Taylor, 10 Beav. 75; Goodhart v. Hyett, 25 Ch. Div. 190.

[8] 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. 443, Fed. Cas. No. 7,285.

[9] Attorney General v. Forbes, 2 Mylne & C. 123, 132; Cooper v. Whittingham, 15 Ch. Div. 501; Attorney General v. Board, 22 Ch. Div. 221; McArter v. Kelly, 5 Ohio, 139; Owen v. Ford, 49 Mo. 436; Diedrichs v. Railroad Co., 33 Wis. 219; East & West R. Co. v. Railroad Co., 75 Ala. 275.

§ 288. [1] Huggonson's Case, 2 Atk. 469; 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.

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culated to injure a man in his business.[3] The judicature act of 1873, which abolished the ancient English courts, and substituted in their place, the supreme court of judicature, conferred on that court the power to grant injunctions whenever it appeared to the court to be just and convenient.[4] 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."[4] It is accordingly held in England that, where a libel is calculated to injure the plaintiff in his trade or business, an injunction may be granted;[5] and even an oral slander, which is detrimental to the business of the plaintiff, may be enjoined.[6] The American courts, however, have refused to follow these recent English decisions; and the publication of a libel, no matter how injurious to the 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 the plaintiff's property or 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 granting freedom of speech and of the press;[7] but, if the publication is not only libelous, but is intended to frighten away the plaintiff's customers, and intimidate them from dealing with him, an injunction against its circulation will be granted.[8]

[3] Prudential Assur. Co. v. Knott, 10 Ch. App. 142.

[4] Acts 36 & 37 Vict. c. 66, § 25, subsec. 8.

[4] Aslatt v. Corporation of Southampton, 16 Ch. Div. 148.

[5] Thorley's Cattle Food Co. v. Massam, 14 Ch. Div. 763; Quartz Hill Consol. Gold Min. Co. v. Beall, 20 Ch. Div. 501; Hill v. Hart-Davies, 21 Ch. Div. 798; Hayward v. Hayward, 34 Ch. Div. 198.

[6] Loog v. Bean, 26 Ch. Div. 366.

[7] Kidd v. Horry (C. C.) 28 Fed. 773; Boston Diatite Co. v. Manufacturing Co., 114 Mass. 69, 19 Am. Rep. 310; Whitehead v. Kitson, 119 Mass. 484; Mayer v. Association, 47 N. J. Eq. 519, 20 Atl. 492; New York Juvenile Guardian Soc. v. Roosevelt, 7 Daly (N. Y.) 188; Brandreth v. Lance, 8 Paige (N. Y.) 24, 34 Am. Dec. 368; Singer Mfg. Co. v. Machine Co., 49 Ga. 70, 15 Am. Rep. 674.

[8] Threats to prosecute plaintiff's customers for infringement of patent, Emack v. Kane (C. C.) 34 Fed. 47; Grand Rapids School Furniture Co. v. Furniture Co., 92 Mich. 558, 52 N. W. 1009, 11 L. R. A. 721, 31 Am. St. Rep. 611; Shoemaker v. Arrester Co., 135 Ind.

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A decision of the general term (now appellate division) of the supreme court of the state of New York held that the exhibition of a statute of a deceased person as a typical philanthropist should be 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 an adequate remedy. But this decision was reversed by the court of appeals on the ground that there was no reasonable cause in the act complained of for this mental distress and injury. But the court distinctly held that the surviving relatives have a right to protect the memory of the deceased and their own feelings from a substantial injury existing in something more than a mere supersensitive and morbid mental caprice. This would tend to show that in New York there is a tendency to extend the remedy beyond the mere protection of property.[9] In a recent case the federal circuit court for the district of Massachusetts refused to enjoin the publication of a biography of a deceased person, 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.[10] But it is worthy of note in this connection that as far back as Lord Eldon's time it was a settled doctrine of equity that injury to feelings was no ground for injunctive relief.[11]

471, 35 N. E. 380, 22 L. R. A. 332; boycotting circulars, Casey v. Union (C. C.) 45 Fed. 135, 12 L. R. A. 193.

[9] Schuyler v. Curtis, 64 Hun, 594, 19 N. Y. Supp. 264, 1 Keener, Eq. Cas. 95, reversed in 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671. "On the right to privacy," see note in 1 Keener, Eq. Cas. 95.

[10] Corliss v. E. W. Walker Co. (C. C.) 57 Fed. 434.

[11] 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 argument stated that an attempt would be made to sustain the injunction, on the ground that the publication of the letters would 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 sus-

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SAME—PROTECTION OF REAL PROPERTY—WASTE, TRESPASS, AND NUISANCE.

289. Equity will interfere to protect real property from irreparable injury by certain torts, such as waste, trespass, and nuisance.

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.[1] 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.[2] As was stated by Judge Story: "The jurisdiction of courts of equity to interpose by way of injunction in cases of waste may be referred to the broadest principles of social justice. It is exerted where the remedy at law is imperfect or is wholly denied; where the nature of the injury is such that preventive remedy is indispensable, and it should be permanent; where matters of discovery and account are incidental to the proper relief; and where equitable rights and equitable injuries call for redress, to prevent a malicious, wanton, and capricious abuse of their legal rights and authorities by persons having but temporary and limited interests in the subject-matter."[3] The interference of equity in cases of waste depends on much latitude of discretion in the court, and has come to be allowed very much as a matter of course.[4] But it has been held that, if the injury is not irreparable, but is susceptible of perfect compensation, and for which the party may obtain adequate satisfaction, the injunction should not be granted.[5] It may be stated as a well-established principle that an injunc-

tained, on the ground that the publication of the letters by the receiver was an invasion of the property rights of the author.

§ 289. [1] Co. Litt. 53a.

[2] Davenport v. Davenport, 7 Hare, 222.

[3] Story, Eq. Jur. § 919. And see Watson v. Hunter, 5 Johns. Ch. (N. Y.) 170, 9 Am. Dec. 295; Winship v. Pitts, 3 Paige (N. Y.) 259.

[4] Kane v. Vanderburgh, 1 Johns. Ch. (N. Y.) 11; Markham v. Howell, 33 Ga. 508; Griffin v. Sketol, 30 Ga. 300.

[5] Keller v. Ogsbury, 121 N. Y. 362, 24 N. E. 803; Chapel v. Hull, 60 Mich. 167, 26 N. W. 874; Clark's Appeal, 62 Pa. 447.

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tion will be granted in all such cases where it is shown that the defendant in an action at law would be unable to respond in damages.[6]

To constitute waste it is necessary that the wrongdoer be in actual possession of the premises; such possession constituting the distinction between waste and trespass, a principal element of the latter being a wrong done to one in possession.[7] It was formerly held that equity would not restrain waste unless there was unquestioned evidence of the plaintiff's title.[8] But in more recent cases it has been the common practice to issue an injunction where the threatened waste will cause material and irreparable injury, although the title to the premises be in litigation.[9] The existence of a doubt as to the title does not of itself constitute a sufficient ground for refusing an injunction;[10] but, if the plaintiff's title is bad, or he has no reasonable ground for asserting such title, an injunction will not be granted.[11]

Although the acts may ultimately lead to the improvement of the land, waste may be restrained, if the immediate result is injurious to the premises;[12] and any material alterations may be restrained, notwithstanding the fact that the value of the property will be increased thereby.[13] The relief by injunction will be granted to prevent threatened waste without waiting for its actual commission.[14]

[6] Kinsler v. Clarke, 2 Hill, Eq. (S. C.) 617; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; Cornelius v. Post, 9 N. J. Eq. 196; Tainter v. Mayor of Morristown, 19 N. J. Eq. 46.

[7] Cooley, Torts, 232; Denny v. Brunson, 29 Pa. 382. But see More v. Massini, 32 Cal. 590, where it was held that an injunction will lie to restrain a threatened injury to real property in the nature of waste, although the plaintiff is in possession of the land.

[8] Pillsworth v. Hopton, 6 Ves. 51; Davis v. Leo, Id. 784; Nethery v. Payne, 71 Ga. 379; Preston v. Smith (C. C.) 26 Fed. 884.

[9] Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; Hunt v. Steese, 75 Cal. 621, 17 Pac. 920; West Point Iron Co. v. Reymert, 45 N. Y. 703; Wilson v. City of Mineral Point, 39 Wis. 160.

[10] Hunt v. Steese, 75 Cal. 620, 17 Pac. 920; Snyder v. Hopkins, 31 Kan. 559, 3 Pac. 367.

[11] Hunt v. Steese, 75 Cal. 620, 17 Pac. 920.

[12] Coppinger v. Gubbins, 9 Ir. Eq. 304.

[13] Douglass v. Wiggins, 1 Johns. Ch. (N. Y.) 435; Brock v. Dole, 66 Wis. 145, 28 N. W. 334.

[14] Rodgers v. Rodgers, 11 Barb. (N. Y.) 595; Livingston v. Reynolds, 26 Wend. (N. Y.) 123; More v. Massini, 32 Cal. 590; Sheridan v. McMullen, 12 Or. 150, 6 Pac. 497.

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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.[15] 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 made so by the act complained of.[16] A vendor who sells land under a contract, retaining the title as security for the purchase money, sustains the same relative position in respect to the property sold as does a mortgagee to the mortgagor, and he may restrain the commission of waste by the vendee, if the security is insufficient.[17]

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;[18] 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.[19] In the leading case (Lord Bernard's Case)[20] 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.

Trespass.

The ground of the equitable jurisdiction to prevent trespass by injunction is the probability of irreparable injury, the inadequacy of the legal remedy, and the prevention of a mul-

[15] Pulteney v. Shelton, 5 Ves. 147, 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. (N. Y.) 169, 9 Am. Dec. 295; Lavenson v. Soap Co., 80 Cal. 245, 22 Pac. 184, 13 Am. St. Rep. 147.

[16] Moriarty v. Ashworth, 43 Minn. 1, 44 N. W. 531, 19 Am. St. Rep. 203; Harris v. Bannon, 78 Ky. 568; Fairbank v. Cudworth, 33 Wis. 358; King v. Smith, 2 Hare, 244.

[17] Moses v. Johnson, 88 Ala. 517, 7 South. 146, 16 Am. St. Rep. 58; Core v. Bell, 20 W. Va. 169; Van Wyck v. Alliger, 6 Barb. (N. Y.) 507.

[18] Bowles' Case, 11 Coke, 81b.

[19] Micklethwait v. Micklethwait, 1 De Gex & J. 504, 524; Hawley v. Clowes, 2 Johns. Ch. (N. Y.) 122.

[20] Finch, Prec. 454, 2 Vern. 738.

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tiplicity of suits.[21] Formerly courts of equity hesitated, even in cases of repeated trespass, to interfere by injunction. But at the present time the jurisdiction is freely exercised in all cases where the threatened trespass, if committed, would be ruinous or irreparable in damages, or would impair the just enjoyment of the property in the future.[22] It was said by Chancellor Kent that the common-law remedy by action and the assessment of damages by a jury had been found in ordinary cases "amply sufficient for the protection of property; and I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass, which go to the destruction of the inheritance, or where the mischief is remediless." [23] This statement of the rule is opposed to the decisions of many able judges of the present day, and injunctions are now frequently granted, not merely because the injury is essentially destructive, but because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages.[24] The foundation for the jurisdiction at the present time may be said to be the inadequacy of the legal remedy,[25] either (1) because of the irreparable nature of the injury caused by a single act of trespass,[26] or (2) because of the necessity for a

[21] Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686, 8 L. R. A. 578, 21 Am. St. Rep. 828; Western Union Tel. Co. v. Judkins, 75 Ala. 428; Poughkeepsie Gas Co. v. Gas Co., 89 N. Y. 493; Wheelock v. Noonan, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405; 1 Keener, Eq. Cas. 194; Owens v. Crossett, 105 Ill. 356; Poyer v. Village of Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494; Smithers v. Fitch, 82 Cal. 155, 22 Pac. 935.

[22] Spell. Extr. Relief, § 337.

[23] Jerome v. Ross, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484.

[24] Pom. Eq. Jur. § 1357.

[25] Silva v. Garcia, 65 Cal. 591, 4 Pac. 628; Frink v. Stewart, 94 N. C. 484; 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. 378; Jordan v. Lanier, 73 N. C. 90.

[26] Removal of ore from mines by a trespasser, going to the destruction of inheritance, will be enjoined. Anderson v. Harvey's Heirs, 10 Grat. (Va.) 386; Cheesman v. Shreve (C. C.) 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 will be restrained, Fulton v. Harman,

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multiplicity of suits, caused by continuous and repeated trespasses.[27]

The pecuniary irresponsibility of the alleged wrongdoer may sometimes be the ground for an injunction to restrain a trespass, although the injury might not otherwise be irreparable.[28] And the court will not stop to enter into nice calculations, or to diligently seek a standard by which to measure the extent of probable damages to result from the wrongful act, if it appears that an action at law to recover such damages will be barred of beneficial results, because of the pecuniary irresponsibility of the defendants.[29]

As a general rule, an injunction will not issue unless the

44 Md. 251; Thatcher v. Humble, 67 Ind. 444; Powell v. Cheshire, 70 Ga. 357; and so will interference with a 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. School Dist., 55 Wis. 399, 13 N. W. 272.

[27] Musselman v. Marquis, 1 Bush (Ky.) 463, 89 Am. Dec. 637; Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686; Warren Mills v. Seed Co., 65 Miss. 391, 4 South. 298, 7 Am. St. Rep. 663; Wheelock v. Noonan, 108 N. Y. 179, 15 N. E. 67, 1 Keener, Eq. Cas. 194; Ladd v. Osborne, 79 Iowa, 93, 44 N. W. 235; Wilson v. Hill, 46 N. J. Eq. 369, 19 Atl. 1097; Galway v. Railroad Co., 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788; Port of Mobile v. Railroad Co., 84 Ala. 115, 4 South. 106, 5 Am. St. Rep. 342. 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. Bank (D. C.) 30 Fed. 744; Carney v. Hadley, 32 Fla. 344, 14 South. 4, 7, 22 L. R. A. 233, 37 Am. St. Rep. 101; Thorn v. Sweeney, 12 Nev. 251; Nicodemus v. Nicodemus, 41 Md. 529. Repeated trespasses do not warrant an injunction if a number of suits are 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 will be denied. Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703.

[28] Thornton v. Roll, 118 Ill. 350, 8 N. E. 145; Hicks v. Compton, 18 Cal. 206; Piper v. Piper, 38 N. J. Eq. 81; West v. Smith, 52 Cal. 322; Dunkart v. Rinehart, 87 N. C. 224; Mulry v. Norton, 100 N. Y. 424, 428, 3 N. E. 581; Watson v. Sutherland, 5 Wall. 74, 18 L. Ed. 580.

[29] Real Del Monte Co. v. Mining Co., 23 Cal. 82; Sullivan v. Rabb, 86 Ala. 433, 5 South. 746; Hicks v. Compton, 18 Cal. 206.

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plaintiff's title to the premises in dispute is clear.[80] It is always an absolute bar to the allowance of an injunction for the protection of property during the litigation that the defendant shows that the party seeking the injunction has no title or interest in the property, and no claim to the ultimate relief sought by the litigation.[81] And it has been held that the plaintiff must not only show himself entitled to the possession, but also that he is actually in possession.[82] But this rule has its exceptions, and is of little importance under the modern system of trying equity cases.[83]

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.[84] 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.[85]

A public nuisance may be enjoined by an injunction at the suit, in England, of the attorney general, and in this country at the suit of the state, the people, a municipality, or some officer representing either of them.[86] A private individual

[80] Harper v. McElroy, 42 N. J. Eq. 280, 10 Atl. 879; Bates v. Slade, 76 Ga. 50; Eskridge v. Eskridge, 51 Miss. 522.

[81] State v. McGlynn, 20 Cal. 233; 81 Am. Dec. 118; Wearin v. Munson, 62 Iowa, 466, 17 N. W. 746.

[82] Hillman v. Hurley, 82 Ky. 626; Spofford v. Railroad Co., 66 Me. 51.

[83] Wheelock v. Noonan, 108 N. Y. 179, 186, 15 N. E. 67, 1 Keener, Eq. Cas. 194.

[84] Kerr, Inj. 106; High, Inj. § 739.

[85] Attorney General v. Gas Consumers' Co., 3 De Gex, M. & G. 320, 1 Keener, Eq. Cas. 682: Soltau v. De Held, 2 Sim. (N. S.) 142, 1 Keener, Eq. Cas. 665; Lansing v. Smith, 8 Cow. (N. Y.) 146.

[86] Attorney General v. Cleaver, 18 Ves. 211; Attorney General v. Steward, 21 N. J. Eq. 340. The remedy by injunction at the suit of the people is chiefly applied to that form of public nuisances known as "purprestures"; i. e. encroachments on highways, streets, and

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cannot enjoin a public nuisance, unless he sustains some special, direct, and substantial damage thereby, distinct from that suffered by him in common with the public at large.[37]

It is sometimes difficult to draw a clear distinction between a public and private nuisance. Lord Justice Turner said: "The only distinction which seems to exist between cases of public nuisance and private nuisance is this: that in cases of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind." [38] Whether the nuisance be public or private, the principles upon which the relief is administered are the same. There are offenses and occupations which are usually considered to be essentially injurious to health and comfort, or dangerous to life, and will be enjoined upon slight evidence of special injury, and in some cases upon no other evidence than that they exist, and that persons reside in their vicinity.[39] Slaughter houses, for instance, which have long been regarded as prima facie nuisances, may be enjoined by persons living in their vicinity.[40]

Private Nuisances.

In restraining a private nuisance by injunction, a court of equity may act from one or more of three motives,—the restraint of irreparable mischief, the suppression of oppressive

navigable waters. People v. Vanderbilt, 28 N. Y. 396; People v. Ferry Co., 68 N. Y. 71; Attorney General v. Woods, 108 Mass. 436; Pennsylvania v. Bridge Co., 13 How. 518, 14 L. Ed. 249. Inclosure of public domain by private persons enjoined as purpresture. U. S. v. Ranche Co. (C. C.) 26 Fed. 218; State v. Goodnight, 70 Tex. 686, 11 S. W. 119.

[37] Soltau v. De Held, 2 Sim. (N. S.) 141, 1 Keener, Eq. Cas. 665; Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514, 1 Keener, Eq. Cas. 788; Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Keener, Eq. Cas. 765; 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.

[38] Attorney General v. Gas Consumers' Co., 3 De Gex, M. & G. 304, 319, 1 Keener, Eq. Cas. 682.

[39] Quinn v. Light Corp., 140 Mass. 106, 3 N. E. 200; Rogers v. Elliott, 146 Mass. 349, 15 N. E. 768; Cook v. Anderson, 85 Ala. 99, 4 South. 713.

[40] Brady v. Weeks, 3 Barb. (N. Y.) 157; Dubois v. Budlong, 15 Abb. Prac. (N. Y.) 445; Pruner v. Pendleton, 75 Va. 516, 40 Am. Rep. 738.

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and interminable litigation, or the prevention of a multiplicity of suits.[41] 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. But if the threatened or present injury is material and real, and cannot be compensated by the recovery of damages, or is such that its continuance will occasion a constantly recurring grievance, an injunction should be granted.[42] If it be necessary to prevent a permanent injury to property, or its entire ruin, from the erection and continuance of a nuisance, and the law cannot prevent the evil, equity will interfere, although the property itself may be of small value.[43]

Same—Injury to Dwellings and Places of Business.

To authorize the issuance of an injunction, there must be such a degree of injury to the property as interferes materially with its comfortable enjoyment, either for domestic or business purposes. 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,[44] 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 extravagant habits of living.[45]

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,[46] but, inas-

[41] Spell. Extr. Relief, § 377.

[42] Kerr, Inj. p. 166; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526, 1 Keener, Eq. Cas. 654; McCord v. Iker, 12 Ohio, 388, 1 Keener, Eq. Cas. 659; Sellers v. Parvis & Williams Co. (C. C.) 30 Fed. 164; Rouse v. Flowers, 75 Ala. 513, 51 Am. Rep. 463; Mowday v. Moore, 133 Pa. 611, 19 Atl. 626; Carlisle v. Cooper, 21 N. J. Eq. 576.

[43] McCord v. Iker, 12 Ohio, 388, 1 Keener, Eq. Cas. 659.

[44] Jackson v. Duke of Newcastle, 3 De Gex, J. & S. 284; Fleming v. Hislop, 11 App. Cas. 691.

[45] Kerr, Inj. p. 192; Walter v. Selfe, 4 De Gex & S. 322; Cooper v. Crabtree, 20 Ch. Div. 589; Powell v. Furniture Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; Dittman v. Repp, 50 Md. 516; Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490.

[46] Aldred's Case, 9 Coke, 58b.

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much 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 comfortable enjoyment or the value of the property.[47] 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.[48] And if real damage or great inconvenience is occasioned by the carrying on of a noisy trade, or by otherwise causing excessive noise or vibration, an injunction may be obtained to prevent its continuance.[49] The mere fact of a business being carried on, which may be shown to be immoral, and therefore prejudicial to the character of the neighborhood, furnishes of itself no ground for equitable interference at the suit of a private person; and, though the use of property may be unlawful or unreasonable, unless special damage can be shown, a neighboring property owner cannot base thereupon any private right of action.[50] If the use of a

[47] Kerr, Inj. p. 211; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642; Sellors v. Board, 14 Q. B. Div. 928; Duncan v. Hayes, 22 N. J. Eq. 26; Rhodes v. Dunbar, 57 Pa. 274.

[48] Meigs v. Lister, 23 N. J. Eq. 199; Babcock v. 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. Fertilizing Co., 160 Pa. 209, 28 Atl. 702; City of Grand Rapids v. Weiden, 97 Mich. 82, 56 N. W. 233; Peck v. Elder, 3 Sandf. (N. Y.) 126; soot, smoke, and noxious gases, Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Cogswell v. Railroad Co., 103 N. Y. 10, 8 N. E. 537; English v. Motor Co., 95 Ala. 239, 10 South. 134, 1 Keener, Eq. Cas. 790.

[49] Vibrations caused by machinery, Dittman v. Repp, 50 Md. 516, 33 Am. Rep. 325; Hennessey v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374, 1 Keener, Eq. Cas. 806; Demarest v. Hardham, 34 N. J. Eq. 469; but not if located in manufacturing district, Straus v. Barnett, 140 Pa. 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, 1 Keener, Eq. Cas. 665; Davis v. Sawyer, 133 Mass. 289; keeping horses in stable near dwelling house, Ball v. Ray, 8 Ch. App. 467.

[50] Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514, 1 Keener, Eq. Cas. 788.

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property is one which renders a neighbor's occupation and enjoyment physically uncomfortable, or which may be hurtful to the health,—as where trades are conducted which are offensive by reason of odors, noises, or other injurious or annoying features,—a private nuisance is deemed to be established, against which the power of a court of equity may be invoked. Accordingly, it was held that an action would lie to restrain a defendant from keeping a house of ill fame, and from using his premises as an assignation house, since the indecent conduct of the occupants of the defendant's house, and the noise therefrom, rendered the plaintiff's house unfit for comfortable or respectable occupation, and for the purposes for which it was intended.[51]

In regard to the inconveniences caused by noises resulting from the conduct of a lawful business, it may be said, as in the case of inconveniences arising from impurities in the air, caused by smoke and noxious gases, that "a person who resides in a large city must not expect to be surrounded by the stillness that prevails in rural districts. He must necessarily hear some of the noise, and occasionally feel slight vibrations, produced by the movements and labor of its people, and by the hum of its mechanical industries. The aid of a court may be invoked to keep annoying sounds within reasonable limits. Every noise, however, is not a nuisance, nor, when produced in the exercise of a lawful occupation, should the strong arm of a chancellor be extended to suppress it." [52] Whether or not the power of the court should be exercised under such circumstances must be determined in view of the relative rights of the parties and the public welfare.[53] No distinction will be made between a locality occupied by tradesmen and mechanics for residences and one which contains elegant and costly dwellings, and is inhabited by the wealthy and luxurious. Some parts of a town may, by lapse of time, or prescription, as by the continuance therein of a large number of factories for a long time, be so dedicated to smells, smoke, noise,

[51] Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514, 1 Keener, Eq. Cas. 788.

[52] McCaffrey's Appeal, 105 Pa. 253; Louisville Coffin Co. v. Warren, 78 Ky. 400; English v. Motor Co., 95 Ala. 239, 10 South. 134, 1 Keener, Eq. Cas. 790, 795.

[53] Gilbert v. Showerman, 23 Mich. 448.

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and dust that an additional factory, which adds a little to the common evil, would not be considered, at law, a nuisance, or be restrained in equity. But no equitable principle can be cited which would give protection to the many comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer and their families the fewer and more restricted comforts which they enjoy.[54]

Same—Lateral Support.

Courts of equity will prevent by injunction adjoining landowners from digging in the soil of their own land so as to endanger their neighbor's buildings. The jurisdiction rests upon the right of a landowner to the subjacent and lateral support of his land in its natural state.[55] 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.[56] 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.[57]

Riparian and Water Rights.

Water wholly on one's land is an inseparable part of the realty, and is owned and held by the owner of the soil as such, and the same is true of surface waters; but the owner of the soil has only an easement in the waters of a stream which has a well-defined channel, and flows perennially or for considerable seasons, and is entitled to the

[54] Ross v. Butler, 19 N. J. Eq. 294, 1 Keener, Eq. Cas. 800.

[55] Trowbridge v. True, 52 Conn. 190, 52 Am. Rep. 579. But it has been held that a man may dig so near his neighbor's land as to unsettle his foundations and precipitate his soil, provided he uses ordinary care; and that no person has a right to lateral support. Radcliffe's Ex'rs v. Mayor, etc., 4 N. Y. 195, 53 Am. Dec. 357; Panton v. Holland, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369, and cases cited.

[56] Backhouse v. Bonomi, 9 H. L. Cas. 512; Dalton v. Angus, 6 App. Cas. 809.

[57] Hunt v. Peake, Johns. Eng. Ch. 710; Tunstall v. Christian, 80 Va. 1, 56 Am. Rep. 581; City of Quincy v. Jones, 76 Ill. 231, 20 Am. Rep. 243; Charless v. Rankin, 22 Mo. 566, 66 Am. Dec. 642; Northern Transportation Co. v. City of Chicago, 99 U. S. 635, 25 L. Ed. 336; Ryckman v. Gillis, 57 N. Y. 68, 15 Am. Rep. 464.

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reasonable use of such waters, not to be exercised, however, to the prejudice or total deprivation of other riparian owners. What constitutes a reasonable use is a question of fact depending upon the circumstances appearing in each particular case.[58]

All acts done by a man on his own land, whereby the rights of his neighbor to the use of waters are injuriously affected, or whereby water becomes the cause of damage to the land of his neighbor, are considered as nuisances relating to water.[59] Each owner may use the water of a stream running through or by his land for all reasonable purposes; but after its use he must return it, without substantial diminution or change in quality, to its natural bed or channel, before it leaves his own land, so that it will reach his adjacent owner in its full, original, and natural condition.[60] He may, therefore, be restrained from diverting the stream, or materially diminishing the quantity which would naturally flow to his neighbors below;[61] or, on the

[58] Heilbron v. Water Co., 80 Cal. 189, 22 Pac. 62; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217.

[59] Kerr, Inj. p. 236; Ballard v. Tomlinson, 29 Ch. Div. 115.

[60] Pom. Water Rights, § 4; Heath v. Williams, 25 Me. 209, 63 Am. Dec. 265; Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312; Pugh v. Wheeler, 19 N. C. 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.

[61] Ferrand v. Corporation of Bradford, 21 Beav. 412; Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731; Morrill v. Water-Power Co., 26 Minn. 222, 2 N. W. 842, 37 Am. Rep. 399; Lawson v. Wooden-Ware Co., 59 Wis. 393, 18 N. W. 440; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162; Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758. 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

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other hand, from damming back the stream, so as to cause an overflow on the land of his neighbor above him.[62] A riparian owner has also the right to the flow of the stream in its 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.[63]

Same—Other Cases.

It is not possible within the scope of this chapter to mention in detail all the cases or classes of cases of nuisance in which the remedy by injunction may be had. The principles relating to nuisances arising from the obstruction of public highways and private rights of way, of navigable water by bridges, and of easements of light and air, are too numerous to be specified in a work of this nature. 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 constitute 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.[64]

detriment of a lower proprietor. Kay v. Kirk, 76 Md. 41, 24 Atl. 326, 35 Am. St. Rep. 408.

[62] Bemis v. Upham, 13 Pick. (Mass.) 169; Stone v. 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, 37 Am. Rep. 479. Statutes in many of the states provide for the condemnation of land to be overflowed by the erection of milldams.

[63] Merrifield v. Lombard, 13 Allen (Mass.) 16, 90 Am. Dec. 172; Holsman v. Bleaching Co., 14 N. J. Eq. 335; Mayor, etc., of Baltimore v. Manufacturing Co., 59 Md. 96, 110; Richmond Mfg. Co. v. De Laine Co., 10 R. I. 106, 14 Am. Rep. 658; Indianapolis Water Co v. Strawboard Co. (C. C.) 57 Fed. 1000; Satterfield v. Rowan, 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.

[64] Story v. Railroad Co., 90 N. Y. 122, 43 Am. Rep. 146; Lahr v. Railway Co., 104 N. Y. 268, 10 N. E. 528. The New York court of

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SAME—PROTECTION OF PATENTS, COPYRIGHTS, AND TRADE-MARKS.

290. A court of equity will restrain by an injunction an infringement of a patent or a copyright, or the wrongful use of a trade-mark. The jurisdiction is based upon the necessary inadequacy of the legal remedy.

Patents and copyrights are in themselves fully recognized at law, and an action at law for damages could always be maintained for their infringement.[1] But it is evident that such a remedy supplied 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 which no inquiry could ascertain.[2] And, further, the facility for taking accounts afforded by equity, and yet more conspicuously its power of peremptorily stopping the infringement by injunction, plainly indicate the appropriateness of the jurisdiction of equity for dealing with such matters.[3]

Jurisdiction of Federal Courts.

The federal constitution vests in congress the exclusive power of granting patents and copyrights. By federal statute the jurisdiction of equity to protect these rights is vested

appeals has refused to apply this principle to the case of an ordinary "surface" railroad, Fobes v. Railroad Co., 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453; but it has been so applied by the supreme court of Minnesota, Adams v. Railroad Co., 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644; Lamm v. Railway Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268.

§ 290. [1] Walk. Pat. § 418; Stein v. Goddard, 1 McAll. 82, Fed. Cas. No. 13,353; Byam v. Bullard, 1 Curt. 100, Fed. Cas. No. 2,262.

[2] Smith, Eq. p. 730; Hogg v. Kirby, 8 Ves. 223; Story, Eq. Jur. § 930.

[3] Smith, Eq. p. 730; Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975.

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exclusively in the federal courts.[4] Under the act of congress of 1819 some doubt was expressed as to whether the jurisdiction in patent cases which it conferred was exclusive of the state courts,[5] but all doubt was removed by the act of 1836.[6] While state courts may pass upon contracts relating to patents and their validity, there is no jurisdiction vested in them to adjudicate and determine questions arising as to infringements.[7]

When Injunction will be Granted.

There is no practical difference between the rules governing the courts in patent cases and those involving copyrights, as far as concern the time when and the conditions under which the injunction will be granted.[8] 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.[9] If the validity of the plaintiff's patent was denied, a trial at law was required by the earlier English decisions, unless the plaintiff had been in the exclusive enjoyment for so long a period as to give rise to a presumption of exclusive right.[10] 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,[11] though they may, in their discretion, submit issues to a jury.[12]

[4] As to patents, Rev. St. U. S. 1874, § 4921; as to copyrights, Id. §§ 629, 4970. And see Dudley v. Mayhew, 3 N. Y. 9; Slemmer's Appeal, 58 Pa. 155; Parkhurst v. Kinsman, 6 N. J. Eq. 600; Gaines v. Fuentes, 92 U. S. 17, 23 L. Ed. 524.

[5] Burrall v. Jewett, 2 Paige (N. Y.) 134.

[6] Gibson v. Woodworth, 8 Paige (N. Y.) 132; Parkhurst v. Kinsman, 6 N. J. Eq. 600.

[7] Continental Store-Service Co. v. Clark, 100 N. Y. 365, 3 N. E. 335.

[8] Oxford Universities v. Richardson, 6 Ves. 705, 706; Wilkins v. Aikin, 17 Ves. 422.

[9] High, Inj. § 938; Standard Paint Co. v. Reynolds (C. C.) 43 Fed. 804; Potter v. Whitney, 1 Low. 87, Fed. Cas. No. 11,341; Parker v. Sears, 1 Fish. Pat. Cas. 93, Fed. Cas. No. 10,748; American Fire Hose Mfg. Co. v. Cornelius Callahan Co. (C. C.) 41 Fed. 50.

[10] Hill v. Thompson, 3 Mer. 622; Caldwell v. Vanvlissengen, 9 Hare, 424.

[11] McCoy v. Nelson, 121 U. S. 487, 7 Sup. Ct. 1000, 30 L. Ed. 1017; Wise v. Railroad Co. (C. C.) 33 Fed. 277; Buchanan v. Howland, 2 Fish. Pat. Cas. 341, Fed. Cas. No. 2,074.

[12] Wise v. Railroad Co. (C. C.) 33 Fed. 277; Sickles v. Mfg. Co., 1

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As a general rule, a court of equity will not lend its aid by way of preliminary injunction in those cases where the complainant has acquiesced in the infringement, and unreasonably delayed suit against the infringers. In such cases the complainant must be satisfied with the relief afforded by a decree after a final hearing.[13] And, independent of laches, a complainant may be estopped from bringing suit by reason either of his general conduct with reference to the property interest in the invention, or on account of specific acts of acquiescence imputable to him.[14]

Copyrights.

A copyright is defined as the exclusive right of multiplying a work of literature after its publication.[15] It is now established that a copyright exists only by statute.[16] Before publication an author has at common law a property right in his manuscript, which will be protected by courts of equity; but by publication he dedicates it to the public, and loses his property rights, unless he complies with the copyright laws.[17] It is difficult to lay down definite rules for the determination of the question as to what constitutes infringement of copyrighted matter. It seems well established that a bona fide extract or quotation may be made from a book which is protected by a copyright, and a bona fide abridgment, or a bona fide use of the same common materials, would not constitute an infringement.[18] To determine what are bona fide extracts or abridgments, the

Fish. Pat. Cas. 222, Fed. Cas. No. 12,841; Sanders v. Logan, 2 Fish. Pat. Cas. 167, Fed. Cas. No. 12,295.

[13] Green v. French, 4 Barn. & H. 169, Fed. Cas. No. 5,757; Wyeth v. Stone, 1 Story, 273, Fed. Cas. No. 18,107; Keyes v. Refining Co. (C. C.) 31 Fed. 560; McLaughlin v. Railroad Co. (C. C.) 21 Fed. 574.

[14] Kittle v. Hall (C. C.) 29 Fed. 508; Union Mfg. Co. v. Lounsberry, 2 Fish. Pat. Cas. 389, Fed. Cas. No. 14,368; Magic Ruffle Co. v. Elm City Co., 14 Blatchf. 109, Fed. Cas. No. 8,950.

[15] Jefferys v. Boosey, 4 H. L. Cas. 833; Stephens v. Cady, 14 How. 530, 14 L. Ed. 528; Baker v. Selden, 101 U. S. 99, 25 L. Ed. 841.

[16] Jefferys v. Boosey, 4 H. L. Cas. 833; Wheaton v. Peters, 8 Pet. 591, 8 L. Ed. 1055; Clemens v. Belford, Clark & Co. (C. C.) 14 Fed. 728.

[17] Bartlett v. Crittenden, 5 McLean, 32, Fed. Cas. No. 1,076; Carte v. Duff (C. C.) 25 Fed. 183; Clemens v. Belford, Clark & Co. (C. C.) 14 Fed. 728.

[18] Story, Eq. Jur. § 939; Eden, Inj. c. 13, pp. 280, 281.

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court will consider the quantity, value, nature, and objects of the selection made, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[19] And the honest intention of the subsequent writer to make only such use of the extracted material as will produce no substantial injury to the proprietor of the original work will be given due weight in determining the question as to whether an injunction should be granted.[20]

Literary Property.

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.[21] 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,[22] and the person written to has

[19] Folsom v. Marsh, 2 Story, 100, Fed. Cas. No. 4,901. And see Wilkins v. Aikin, 17 Ves. 422; Bramwell v. Halcomb, 3 Myine & C. 738; Scott v. Stanford, L. R. 3 Eq. 718.

[20] Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136. And see, on the general question, Story v. Holcombe, 4 McLean, 306, Fed. Cas. No. 13,497; Reed v. Holliday (C. C.) 19 Fed. 325.

[21] Prince Albert v. Strange, 1 Macn. & G. 42; Grigsby v. Breckinridge, 2 Bush (Ky.) 480; Paige v. Banks, 13 Wall. 608, 20 L. Ed. 709. 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.

[22] Gee v. Pritchard, 2 Swanst. 418; Woolsey v. Judd, 4 Duer (N. Y.) 379; Denis v. Leclerc, 1 Mart. (La.) 297; Grigsby v. Breckinridge, 2 Bush (Ky.) 480, 92 Am. Dec. 509.

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such a qualified right of property in the letters as will entitle him or his personal representatives to restrain their publication by a stranger.[23]

As regards lectures, persons admitted as pupils or otherwise to hear them cannot publish them for profit, and will be restrained from so doing;[24] and, though they have been partly published by the lecturer, he is entitled to an injunction against their publication by others in an incorrect and garbled form.[25]

Trade-Marks.

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.[26] 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.[27] 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

[23] Earl of Granard v. Dunkin, 1 Ball & B. 207; Thompson v. Stanhope, Amb. 737.

[24] 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.

[25] Drummond v. Altemus (C. C.) 60 Fed. 338.

[26] Weener v. Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640; Rogers v. Taintor, 97 Mass. 291; Kerr, Inj. p. 394.

[27] Leather Cloth Co. v. Cloth Co., 4 De Gex, J. & S. 137; Mitchell v. Henry, 15 Ch. Div. 191; Schneider v. Williams, 44 N. J. Eq. 301, 14 Atl. 812; Weener v. Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640; U. S. v. Steffens, 100 U. S. 82, 25 L. Ed. 550.

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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 employés of others.[28]

An act of congress provides for the registration of trade-marks in the patent office, and gives a remedy, either by way of damages, or by injunction in equity, for their infringement;[29] but the right to trade-marks and the remedies for their infringement exist independent of this statute.[30] 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.[31]

INJUNCTIONS AGAINST BREACH OF TRUST AND VIOLATION OF EQUITABLE RIGHTS.

291. Equity will restrain the breach of a trust or confidence, or any act in violation of an equitable right, estate, or interest, whenever the circumstances are such that the aid of an injunction is required.

The jurisdiction of a court of equity in such cases is not based upon the inadequacy of the remedy at law, since the rights and interests involved are purely equitable, and are not cognizable at law. If an interest or estate is shown to be equitable, a court of equity may afford any remedy within its power for the protection thereof; and when the neces-

[28] Weener v. Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640; Cigar Makers' Protective Union v. Conhaim, 40 Minn. 243, 41 N. W. 943, 3 L. R. A. 125, 12 Am. St. Rep. 726; 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 (C. C.) 39 Fed. 777, 5 L. R. A. 614. Since these decisions have been made, statutes have been passed in many of the states protecting labels and trade-marks adopted by labor organizations.

[29] Act Cong. March 3, 1881 (21 Stat. 502).

[30] Harris Drug Co. v. Stucky (C. C.) 46 Fed. 624.

[31] Small v. Sanders, 118 Ind. 105, 20 N. E. 296; U. S. v. Steffens, 100 U. S. 82, 25 L. Ed. 550.

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sity arises an injunction may be granted to restrain a transfer, incumbrance, or any other act which would prejudice the rights of the owner of such interest or estate. A trustee may not use the power which the trust confers on him, 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.[1] So, also, equity may 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, although a dissolution is not sought.[2] And equity will interfere to restrain a corporation, at the suit of a stockholder, from doing acts beyond the authority conferred on it by its charter, or from violating the duties which in equity attach to the relation of directors and stockholders inter se.[3] 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;[4] and so with corporate stock and other securities not strictly negotiable.[5]

INJUNCTIONS IN MATTERS OF TAXATION.

292. Courts of equity will not interfere to restrain the collection of a tax, unless the case is brought within some acknowledged head of equity jurisprudence; that is, unless the enforcement of the tax would lead to a multiplicity of suits, produce irreparable

§ 291. [1] Balls v. Strutt, 1 Hare, 146; Cohen v. Morris, 70 Ga. 313; Davis v. Browne, 2 Del. Ch. 188.

[2] Fairthorne v. Weston, 3 Hare, 387; Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955; New v. Wright, 44 Miss. 202.

[3] Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; Gamble v. Water Co., 123 N. Y. 91, 98, 99, 25 N. E. 201, 9 L. R. A. 527; Wiswell v. First Congregational Church, 14 Ohio St. 31; Small v. Electro-Matrix Co., 45 Minn. 264, 267, 47 N. W. 797.

[4] Metler's Adm'rs 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; Hile v. Davison, 20 N. J. Eq. 229.

[5] King v. King, 6 Ves. 172.

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injury, throw a cloud upon the title of real estate, or unless the tax is illegal, or the assessment void, because of fraud or mistake.

There is an apparent want of harmony in the decisions as to the exercise of the jurisdiction of a court of equity in restraining the collection of taxes. In the ordinary process of the collection of revenue, there is a decided weight of authority against equitable interference with the exercise of the taxing power. Equity will not interfere where the tax is illegal or void, merely because of its illegality, hardship, or irregularity, but there must be some special circumstances attending the injury threatened which will bring the case within some recognized head of equity jurisprudence; otherwise, the person aggrieved will be left to his remedy at law.[1]

Statutes have been passed in some of the states authorizing the granting of injunctions in matters of taxation. In other states the granting of such injunctions is restricted. The laws of many of the states provide for the review of erroneous assessments by writs of certiorari. An adequate legal remedy being thus available, courts of equity will refuse to interfere by injunction, unless to prevent irreparable injury, multiplicity of suits, or the consummation of gross fraud on the part of the assessors.[2]

If a tax is wholly void, a court of equity may, subject to the rules already stated, interfere by injunction to restrain

§ 292. [1] Dows v. City of Chicago, 11 Wall. 108, 20 L. Ed. 65; Heywood v. City of Buffalo, 14 N. Y. 534; McConkey v. Smith, 73 Ill. 313; Warden v. Supervisors, 14 Wis. 672; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 669; Cummings v. Bank, 101 U. S. 153, 25 L. Ed. 903; Hunnewell v. City of Charlestown, 106 Mass. 350.

[2] Western R. Co. v. Nolan, 48 N. Y. 513, 519. It was said in this case: "The rule that equity will not interfere by injunction where there is a sufficient remedy at law is equally well settled. The remedy by certiorari has been repeatedly adopted and sustained by the court of appeals in such cases. If promptly urged, upon proper proofs presented to the assessors in due season, this remedy is adequate for the correction of all errors and injustice liable to be committed in the performance of their official duties." The statutes of New York have, since 1880, provided the remedy by certiorari. See New York Tax Law (Laws 1896, c. 908) art. 11.

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its collection.[3] In all such cases the illegality of the tax must clearly appear.[4] The presumption is always in favor of the validity of the tax.[5] Mere irregularities and informalities of the tax officers, which are not productive of substantial injury, and do not render the tax void, will not justify interference by a court of equity.[6] If the assessment or levy of a tax is tainted with fraud, sufficient grounds exist for granting an injunction;[7] as when, by collusion between assessors and owners, property is assessed far below its real value, the owners of other property are entitled to relief, to the extent, at least, of the amount added to their taxes by the fraudulent undervaluation.[8]

INJUNCTIONS AGAINST PUBLIC OFFICERS AND MUNICIPALITIES.

293. Public bodies and public officers may be restrained by injunction from proceeding in violation of law to the prejudice of the public or the injury of public rights.

294. A court of equity will not exercise its jurisdiction in such cases except:

(a) To prevent a breach of trust affecting the public interests.

(b) To prevent an illegal act under color or claim of right, affecting injuriously the property rights of individuals.

(c) That it be shown that the complainant has a clear and legal right to the relief demanded,

[3] Davis v. Burnett, 77 Tex. 3, 13 S. W. 613; St. Louis & S. F. Ry. Co. v. Apperson, 97 Mo. 300, 10 S. W. 478.

[4] Van Nort's Appeal, 121 Pa. 129, 15 Atl. 473; Union Trust Co. v. Weber, 96 Ill. 346.

[5] Tingue v. Village of Port Chester, 101 N. Y. 294, 4 N. E. 625.

[6] Davis v. Railway Co., 114 Ind. 364, 16 N. E. 639; Keigwin v. Commissioners, 115 Ill. 347, 5 N. E. 575.

[7] Walsh v. King, 74 Mich. 350, 41 N. W. 1080; Leitch v. Wentworth, 71 Ill. 146; Chicago, B. & Q. R. Co. v. Cole, 75 Ill. 591.

[8] Walsh v. King, 74 Mich. 350, 41 N. W. 1080. And see Merrill v. Humphrey, 24 Mich. 170; Kemble v. City of Titusville, 135 Pa. 141, 19 Atl. 946.

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or some part of it, which cannot be afforded without an injunction, and also that some act is being done by the defendant, or is threatened and imminent, which will be destructive of, or injurious to, such right.[1]

A court of equity has, as such, no supervisory power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made coming within one of the acknowledged heads of equity.[2] But the jurisdiction of the court over a public officer is well established, within the limits, at least, prescribed in the black-letter text.[3]

It is not, however, the mere fact that a public officer is attempting to exercise a void authority which induces a court of equity to restrain him, but that, notwithstanding he is a public officer, he is about, by such exercise, to do an act which brings the case within its peculiar jurisdiction; for example, an act in breach of trust, in derogation of a contract which ought to be specifically enforced, or an act of irreparable mischief to the real estate of another.[4] While equity will not ordinarily interfere in matters resting in the discretion of municipal authorities, if the threatened act will produce irreparable injury, or is corrupt and fraudulent, the court may interfere by injunction.[5] Mr. Spelling, in his Treatise on Extraordinary Relief, concludes, from an examination of the authorities, that two things must exist to warrant relief by injunction against a public officer or a municipality: "First, that the act is an excess of the legal authority conferred upon the municipal body; second, that its consequences, if not prevented, will result in an increase of taxation, thus imposing an additional burden upon individual

§§ 293, 294. [1] People v. Board, 55 N. Y. 390, 394.

[2] Id.

[3] People v. Dwyer, 90 N. Y. 410; Littler v. Jayne, 124 Ill. 123, 16 N. E. 374; Delaware Co.'s Appeal, 119 Pa. 159, 13 Atl. 62; Briggs v. Borden, 71 Mich. 87, 38 N. W. 712.

[4] Greene v. Mumford, 5 R. I. 472, 73 Am. Dec. 79; Darby v. Wright, 3 Blatchf. 170, Fed. Cas. No. 3,574; Bigelow v. Bridge Co., 14 Conn. 565, 36 Am. Dec. 502.

[5] People v. Dwyer, 90 N. Y. 402; Kitchel v. Board, 123 Ind. 540, 24 N. E. 366.

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taxpayers, or otherwise inflict irreparable injury, or lead to numerous actions or proceedings to correct the wrong." [6]

The jurisdiction of equity extends to the restraint of the illegal and wrongful acts of municipal corporations as such, when it is shown that such acts will result in irreparable injury.[7] This jurisdiction is based upon the theory that a municipal corporation is the depositary of a trust, which it is bound to administer faithfully, honestly, and justly; and, if it is guilty of a breach of the trust, it will stand upon the same footing as if it were the representative of a private individual.[8] The most frequent use of this equitable jurisdiction is for the prevention of illegal acts which will increase the burden of taxation.[9] In many states statutes have been enacted authorizing actions by taxpayers to restrain any illegal official act on the part of the officers of municipal corporations.[10]

[6] § 677.

[7] Place v. City of Providence, 12 R. I. 1; Port of Mobile v. Railroad Co., 84 Ala. 115, 4 South. 106, 5 Am. St. Rep. 342; McCord v. Pike, 121 Ill. 288, 12 N. E. 259, 2 Am. St. Rep. 85; City of Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416.

[8] Milhau v. Sharp, 15 Barb. (N. Y.) 193; Village of Hyde Park v. City of Chicago, 124 Ill. 161, 16 N. E. 222.

[9] McCord v. Pike, 121 Ill. 288, 12 N. E. 259, 2 Am. St. Rep. 85; Peck v. Belknap, 55 Hun, 96, 8 N. Y. Supp. 265; Ayers v. Lawrence, 59 N. Y. 192.

[10] Warrin v. Baldwin, 105 N. Y. 534, 12 N. E. 49; Ayers v. Lawrence, 59 N. Y. 192.

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CHAPTER XXIII.

PARTITION, DOWER, AND ESTABLISHMENT OF BOUNDARIES.

295. Partition—Definition.
296-297. Jurisdiction in Equity—Modern Statutes.
298-299. Procedure in Equity.
300. Who Entitled to Partition.
301. What is Subject to Partition.
302. Allowance for Improvements.
303-304. Assignment of Dower.
305. Establishment of Boundaries.

PARTITION—DEFINITION.

295. 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.

The term "partition" is generally, but not exclusively, applied to real estate.[1] All kinds of property may 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 co-tenant by the others, of the portion which he is entitled to hold in severalty.[2] But, even when no actual conveyance is made, a voluntary written agreement for a partition will be treated as such in equity, and specific performance will be enforced by conveyance.[3] And a parol partition may be made of lands owned by tenants in common, provided each party takes and retains exclusive possession of the portion allotted to him.[4]

§ 295. [1] Bouv. Law Dict. tit. "Partition."

[2] Freem. Co-Ten. § 406; Yancey v. Radford, 86 Va. 638, 10 S. E. 972.

[3] Masterson v. Finnigan, 2 R. I. 318; Gage v. Bissell, 119 Ill. 298, 10 N. E. 238; Tomlin v. Hilyard, 43 Ill. 302, 92 Am. Dec. 118; Davidson v. Coon, 125 Ind. 502, 25 N. E. 601, 9 L. R. A. 584.

[4] Wood v. Fleet, 36 N. Y. 499, 93 Am. Dec. 528; Taylor v. Millard,

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SAME—JURISDICTION IN EQUITY—MODERN STATUTES.

296. The jurisdiction of equity in cases of partition of real estate originated because of the inadequacy and inconvenience of the common-law remedy by writ of partition.

297. In England, and in nearly all of the United States, the partition of real property is regulated by statutes; either increasing the efficiency and adaptability of the common-law remedy, or declaring the legal and equitable rights and remedies previously existing.

Partition by parties entitled thereto was a matter of right at common law, and could be enforced regardless of the inconvenience and hardship occasioned thereby.[1] The common-law writ of partition was limited to those cases where the joint ownership arose by operation of the law. The right to the writ was thus restricted to coparceners,[2] although it was afterwards extended in favor of joint tenants or tenants in common whose estate arose by gift or contract.[3] The common-law remedy was, at an early period, found inadequate and incomplete, because of the various and complicated interests which, in process of time arose out of or attached to the ownership of real estate, and be-

118 N. Y. 244, 23 N. E. 376, 6 L. R. A. 667; Mitchell v. Mitchell, 68 Mich. 106, 35 N. W. 844; Bruce v. Osgood, 113 Ind. 360, 14 N. E. 563; Hamilton v. Phillips, 83 Ga. 296, 9 S. E. 606.

§§ 296, 297. [1] Lord Coke observed that the only sort of tenure that could not be the subject of partition was a castle; that being necessary for the defense of the realm.

[2] An estate in coparcenary existed where land, on the death of the owner intestate, devolved on several persons as co-heirs. 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.

[3] Adams, Eq. p. 229.

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cause courts of law could neither compel discovery as to titles, nor effectuate the partition in fact by compelling mutual conveyances.[4] Another inconvenience attending a partition at law was the fact that the writ could only be issued by or against those in possession, so that an estate in remainder or contingency could not be reached. And, besides all this, the judgment in each case was for partition according to title proved, and it was necessary, therefore, for the plaintiff to prove the defendant's title as well as his own; and the partition, when made, was not by mutual conveyances, but by an actual division of the property by the sheriff; and the subsequent judgment of the court could not be conveniently adapted to the requirements of each case. These disadvantages, and the superiority of equitable methods, naturally led to a resort to courts of equity for relief in cases of partition. As was said by Lord Redesdale: "In the case of partition of an estate, if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partitions, which are affected by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required; and upon return of the commission, and confirmation of that return by the court, the petition is finally completed by mutual conveyances of the allotments made to the several parties." [5] Equity 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 statute passed in 1833, and the equity jurisdiction thus became exclusive.[6]

In the case of an undivided ownership of chattels personal, the legal results were even more unsatisfactory and inconvenient than in the case of realty. Thus, Littleton says: "If two be possessed of chattels personalls in common by divers titles, as of an horse, an oxe, or a cowe, &c., if the one takes the whole to himself out of the possession

[4] Snell, Eq. p. 504.

[5] Wills v. Slade, 6 Ves. 498. And see Hall v. Piddock, 21 N. J. Eq. 314.

[6] Haynes, Eq. pp. 100–102.

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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." [7]

Modern Statutes.

The subject of partition, both in England and in this country, is now regulated by statutes, which are generally either for the purpose of adding to the efficiency and adaptability of the common-law remedy or are declaratory of the legal and equitable rights and remedies which previously existed. These statutes, for the most part, do not exclude the exercise of jurisdiction by courts of equity. They are generally construed as merely cumulative in effect, and not as removing nor disturbing such jurisdiction.[8] Where law and equity are administered by the same tribunals, the cases formerly cognizable in courts of equity are within the jurisdiction of such tribunals, which possess the same jurisdiction and power in cases of partition as were formerly had by the court of chancery.[9]

SAME—PROCEDURE IN EQUITY.

298. Originally, in equity, the partition was effected by mutual conveyance after ascertaining the rights of the several parties in interest. If the estate could not be exactly or fairly divided, the court decreed pecuniary compensation to one or more of the parties as "owelty", which included a pay-

[7] 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.

[8] 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; Robinson v. Fair, 128 U. S. 53, 81, 91, 9 Sup. Ct. 30, 32 L. Ed. 415.

[9] Spitts v. Wells, 18 Mo. 468; Holloway v. Holloway, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 345.

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ment of money, or a charge upon the land by way of rent, servitude, or easement.

299. If all the parties who were sui juris consented, the court could decree a sale of the property and a division of the proceeds.

Division and Mutual Conveyances.

It was customary in equity to first ascertain the interests of the parties in the property sought to be partitioned, for which purpose, if they did not appear upon the pleadings, a reference was made to a master. Afterwards a commission was issued to make the required partition. Upon the return of the commission, and its confirmation by the court, the partition was finally completed by mutual conveyances of the allotments made to the several parties.[1] Sometimes, instead of ordering a commission, the court made a declaration that the estate ought to be divided, in which case the parties were permitted to bring before the judge at chambers, proposals for a partition.[2] As has been stated in an often-quoted New Jersey case, which fully illustrates and explains the equitable method of procedure in partition: "The peculiarities of an equitable partition are that such part of the land as may be more advantageous to any party on account of its proximity to his other land, or for any other reason, will be directed to be set off to him if it can be done without injury to the others; that, when the lands are in several parcels, each joint owner is not entitled to a share of such parcel, but only to his equal share in the whole; that, where a partition exactly equal cannot be made without injury, a gross sum or yearly rent may be directed to be paid for owelty or equality of partition by one whose share is too large to others whose shares are too small; and that when one joint owner has put improvements on the property he shall receive compensation for his improvements, either by having the part on which the improvements are assigned to him at the value of the land without the improvements, or by compensation directed to be made for them." [3]

§§ 298, 299. [1] Daniell, Ch. Prac. 1121–1123.
[2] Daniell, Ch. Prac. 1121; Clarke v. Clayton, 2 Giff. 333.
[3] Chancellor Zabriskie in Hall v. Piddock, 21 N. J. Eq. 314.

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Sale of Property.

Independent of statute, courts of equity had no jurisdiction to decree the sale of the property and a division of the proceeds, unless all the parties in interest who were sui juris consented. If infants were interested, the court could decree a sale if it was deemed to their advantage.[4] But without such consent the court had no option but to proceed with the ordinary mode of partition.[5] By statute, in England, and many, if not all, of the United States, sales may be had in partition cases without the consent of the co-tenants. Under such statutes it is within the discretion of the court to direct a sale of the premises.[6]

SAME—WHO ENTITLED TO PARTITION.

300. Partition is a matter of right, and may be compelled by any person having legal or equitable title and actual or constructive possession of the premises.

A suit for partition may be maintained by any co-tenant, whether seised in fee [1] or for life,[2] and apparently even when the co-owners are entitled only for a term of years,[3] provided they are in actual or constructive possession.[4] 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;[5] but, where there are remainder-men who are not in esse, they

[4] Davis v. Turvey, 82 Beav. 554; Wilkinson v. Stuart, 74 Ala. 203.

[5] Wood v. Little, 35 Me. 107; Codman v. Tinkham, 15 Pick. (Mass.) 364; Lyon v. Powell, 78 Ala. 351.

[6] Brooks v. Ackerly, 109 N. Y. 495, 17 N. E. 412; Scott v. Guernsey, 48 N. Y. 106.

§ 300. [1] Lord Brook v. Lord Hartford, 2 P. Wms. 518.

[2] Gaskell v. Gaskell, 6 Sim. 643; Shaw v. Beers, 84 Ind. 528; Hawkins v. McDougal, 125 Ind. 597, 25 N. E. 807.

[3] Baring v. Nash, 1 Ves. & B. 551; Mussey v. Sandborn, 15 Mass. 155.

[4] Packard v. Packard, 16 Pick. (Mass.) 191, 194; Savage v. Savage, 19 Or. 112, 23 Pac. 890; Sullivan v. Sullivan, 66 N. Y. 37.

[5] Freem. Co-Ten. § 463. See, also, Black v. Washington, 65 Miss. 60, 3 South. 140; Savage v. Savage, 19 Or. 112, 23 Pac. 890.

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will be bound by a decree made against the tenant for life.[6]

It is well settled that, in the absence of statutory provisions to the contrary, partition of an estate held in remainder or reversion will not be awarded, either at law or in equity.[7] The reason for this rule is that tenants in reversion or remainder are not entitled to the possession, are in no respect inconvenienced or damaged by the undivided possession held by others, and will not, therefore, be permitted to interfere with tenants in possession, or control or affect the manner in which the estate of the tenant in possession is enjoyed.[8]

In the common-law action of partition, the plaintiff was compelled to prove, not only his own title, but also that of the defendant. But in equity the plaintiff was entitled to a discovery of the defendant's title.[9] Partition will not, however, be allowed, either at law or in equity, unless the plaintiff co-tenant can show a good title,[10] and the defendant's title must also be shown.[11] Unless the title is undisputed, the bill will be dismissed, or retained until the title has been settled at law.[12] A bill for partition cannot be made the means of trying a disputed title.[13] But, if only equitable questions are involved in the dispute as to the title, a court of equity may retain jurisdiction over the whole matter.[14]

[6] Thomas v. Gyles, 2 Vern. 233; Brevoort v. Brevoort, 70 N. Y. 136; Baylor's Lessee v. Dejarnette, 13 Grat. (Va.) 152. In the case of Mead v. Mitchell, 17 N. Y. 210, 72 Am. Dec. 455, it was held that, independent of statute, contingent remainder-men, or persons to take under an executory devise, who may hereafter come into being, are bound by the judgment, as being virtually represented by the parties to the action in whom the existing estate is vested. And see Cheesman v. Thorne, 1 Edw. Ch. (N. Y.) 629.

[7] Evans v. Bagshaw, L. R. 8 Eq. 469; Wilkinson v. Stuart, 74 Ala. 198.

[8] Freem. Co-Ten. § 440.

[9] Pom. Eq. Jur. § 1388.

[10] Wilkinson v. Stuart, 74 Ala. 203; Brendel v. Klopp, 69 Md. 1, 13 Atl. 589; Fenton v. Steere, 76 Mich. 405, 43 N. W. 437.

[11] Johnson v. Moser, 72 Iowa, 523, 34 N. W. 314; Id., 72 Iowa, 654, 34 N. W. 459.

[12] Waite v. Bingley, 21 Ch. Div. 674, 681; Fenton v. 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 (C. C.) 37 Fed. 273.

[13] Williams v. Wiggand, 53 Ill. 233; Smith v. Smith, 10 Paige (N. Y.) 470; Morenhout v. Higuera, 32 Cal. 289.

[14] Warner v. Baynes, Amb. 589; Hanson v. Willard, 12 Me. 147.

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SAME—WHAT IS SUBJECT TO PARTITION.

301. The power of equity to decree partition extends to all property capable of division within its jurisdiction, whether real or personal.

Equity has power to decree partition of any property that can be divided.[1] The inconvenience or difficulty in making the partition is no objection to the exercise of its jurisdiction.[2] This principle sometimes led to absurd results; for, until changed by modern statutes, a court of equity would not order a sale of the premises and a division of the proceeds without the consent of the co-tenants.[3] Thus, in Turner v. Morgan,[4] there was a decree for the partition of a single house. The whole stack of chimneys, all the fireplaces, 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.

Incorporeal hereditaments are subject to partition in equity only, and the same is true as to franchises; for instance, a ferry franchise,[5] or the right to a mineral spring.[6] All lands held in common, whether by legal or equitable title, wherever there is right of possession, or at least of rents and profits, in the person applying therefor, may be partitioned.[7] The only limitation of the power of the court to award partition in all such cases is that the property must be within its territorial jurisdiction.

Except as prescribed by statute, courts of equity have exclusive jurisdiction of suits for the partition of personal

28 Am. Dec. 162; Steedman v. Weeks, 2 Strob. Eq. (S. C.) 145, 49 Am. Dec. 660; Cooper v. Power Co., 42 Iowa, 398.

§ 301. [1] Moore v. Darby (Del. Ch.) 18 Atl. 768.

[2] Warner v. Baynes, Amb. 589; Hanson v. Willard, 12 Me. 147, 28 Am. Dec. 162; Cooper v. Water Power Co., 42 Iowa, 398.

[3] Griffles v. Griffles, 11 Wkly. Rep. 943; Codman v. Tinkham, 15 Pick. (Mass.) 364; Lyon v. Powell, 78 Ala. 351.

[4] 8 Ves. 143.

[5] Rohn v. Harris, 130 Ill. 525, 22 N. E. 587.

[6] Foreman v. Hough, 98 N. C. 386, 3 S. E. 912.

[7] Holloway v. Holloway, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 348; Hayes' Appeal, 123 Pa. 110, 16 Atl. 600.

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property;[8] and it is immaterial that plaintiff's title is disputed,[9] or that he is not in possession.[10]

SAME—ALLOWANCE FOR IMPROVEMENTS.

302. A co-tenant, out of possession, asking the aid of a court of equity for partition against a co-tenant, who has made improvements upon the property, is entitled to relief only upon condition that any equities arising because of such improvements shall be taken into account.[1]

The liability of one co-tenant to another for improvements made by him is not recognized at law. But, as was said in the case of Ford v. Knapp:[2] "The rule which takes from one co-tenant the fruit of his thrift and enterprise, and adds it to the unthrift and neglect of the other; which loads upon industry and ability the losses and burdens of idleness or ill fortune; which ties up property from improvement, and looks contented upon rot and decay,—is a rule which sometimes the rigid and inelastic jurisdiction of a court of law may adopt from necessity, but is without excuse in a court of equity." Compensation for improvements is allowed, not upon the ground that the improving tenant, who acts without the agreement or consent of the other owners, gains a lien upon the property for his advances, but upon the proposition that one who seeks equity must do equity, and that the tenant out of the actual occupation, who asks a court of equity to award him partition,

[8] Freem. Co-Ten. § 426; Godfrey v. White, 60 Mich. 443, 27 N. W. 593, 1 Am. St. Rep. 537; 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.

[9] Godfrey v. White, 60 Mich. 443, 27 N. W. 593, 1 Am. St. Rep. 537; Weeks v. Weeks, 40 N. C. 111, 47 Am. Dec. 358; Smith v. Dunn, 27 Ala. 316.

[10] Spaulding v. Warner, 59 Vt. 646, 11 Atl. 186.

§ 302. [1] Ford v. Knapp, 102 N. Y. 135, 6 N. E. 283, 55 Am. Rep. 782.

[2] 102 N. Y. 135, 6 N. E. 283, 55 Am. Rep. 782, per Finch, J. And see Hewlett v. Wood, 62 N. Y. 75.

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is entitled to relief only upon condition that the equitable rights of his co-tenants shall be respected.[3] Such compensation will not be allowed unless the improvements were made in good faith for the purpose of permanently improving the property.[4] The bare fact of improvements made does not, by itself, irrespective of their character, and of the circumstances under which they were made, and their effect upon the property, necessarily give a right to an equitable allowance. Every case of the kind must be determined upon its own facts and surroundings, and those may occur in which such an allowance would be unjust and inequitable.[5] If the property is sold in partition proceedings, the co-tenant who has made improvements may be allowed out of the proceeds of the sale, not the cost of such improvements, but such sum as, in the opinion of the court, they have added to the saleable value of the property.[6]

ASSIGNMENT OF DOWER.

303. Dower is the right of a married woman to have assigned to her for her enjoyment during her life, on the death of her husband, one-third of the lands and tenements of which he was seised during the marriage in fee simple or fee tail, and which his issue by her might have inherited.

304. It has been established from an early time in England and the United States, independent of statutes, that the equitable jurisdiction over the assignment of dower is concurrent in its general nature with that of law.

[3] Taylor v. Baldwin, 10 Barb. (N. Y.) 582; Ford v. Knapp, 102 N. Y. 135, 6 N. E. 283, 55 Am. Rep. 782.

[4] Hall v. Piddock, 21 N. J. Eq. 311.

[5] Scott v. Guernsey, 48 N. Y. 106; Elrod v. Keller, 89 Ind. 387; Thurston v. Dickinson, 2 Rich. Eq. (S. C.) 317, 46 Am. Dec. 56.

[6] Dean v. O'Meara, 47 Ill. 120; Moore v. Throop, 16 R. I. 655, 19 Atl. 321, 7 L. R. A. 731; Killmer v. Wuchner, 79 Iowa, 722, 45 N. W. 299, 8 L. R. A. 289; Ward v. Ward's Heirs, 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449.

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If the heir neglected or refused to assign to the widow her dower, she had her remedy at law by writ of dower, or of dower unde nihil habet, and the sheriff was appointed to assign it.[1] Courts of equity began to assume jurisdiction over proceedings for dower as early as the reign of Queen Elizabeth; at the outset for the purpose of removing impediments in the way of recovery at law, and as ancillary to proceedings at law. The jurisdiction gradually developed until it could afford complete relief between the parties. Among the advantages which aided in the development of the equitable jurisdiction were: because a partition in the case of undivided interests could be decreed and an account could be taken,[2] fraudulent conveyances could be set aside,[3] and antagonistic claims to the subject-matter could be determined without multiplicity of suit.[4]

If the estates in which the widow seeks her dower are equitable, the jurisdiction of equity is exclusive,—as, where the husband's estate was an equity in redemption, the widow may proceed in equity to compel the mortgagee to redeem;[5] and where the lands of the husband were occupied by him under a contract of purchase, whether wholly paid for or not, the widow may proceed in equity for an assignment of her dower.[6] But, in the exercise of its jurisdiction, concurrently with law, a court of chancery will apply the same principles as would be applied by a court of law.[7] 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.[8]

§§ 303, 304. [1] Adams, Eq. p. 234.

[2] Nye v. Patterson, 35 Mich. 413; Hill v. Gregory, 56 Miss. 341; Herbert v. Wren, 7 Cranch, 370, 3 L. Ed. 374.

[3] Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Jones v. Jones, 71 Wis. 514, 38 N. W. 88; Jones v. Van Doren, 130 U. S. 684, 9 Sup. Ct. 685, 32 L. Ed. 1077.

[4] Pom. Eq. Jur. § 1282.

[5] Dawson v. Bank of Whitehaven, 4 Ch. Div. 639; Farwell v. Cotting, 8 Allen (Mass.) 211; Chiswell v. Morris, 14 N. J. Eq. 101.

[6] Thompson v. Cochran, 7 Humph. (Tenn.) 72, 46 Am. Dec. 68; Daniel v. Leitch, 13 Grat. (Va.) 195; Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921.

[7] Drost v. Hall, 52 N. J. Eq. 68, 28 Atl. 81.

[8] Scrib. Dower (2d Ed.) p. 414. Equity jurisdiction is abrogated in Connecticut, Delaware, Florida, Georgia, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, Oregon, South Carolina, and Wisconsin. In Arkansas the circuit court in chancery has concurrent jurisdiction with the probate court. Ex parte Hilliard, 50 Ark. 84, 6 S. W. 326.

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ESTABLISHMENT OF BOUNDARIES.

305. The jurisdiction of equity as to the establishment of disputed boundaries is limited to those cases

(a) Where there is some peculiar equity superinduced by the acts of the parties;

(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.[1]

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.[2] The plaintiff must show clearly that, without the assistance of the court, the boundaries could not be found;[3] or, failing the assistance of equity, that a multiplicity of actions would be occasioned.[4] The defendant's fraud in obliterating and confusing the boundaries will confer jurisdiction on the court.[5] 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.

§ 305. [1] Wake v. Conyers, 1 Eden, 331, 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 850.

[2] Perry v. Pratt, 31 Conn. 433.

[3] Miller v. Warmington, 1 Jac. & W. 491.

[4] Bouverie v. Prentice, 1 Brown, Ch. 200; Perry v. Pratt, 31 Conn. 433.

[5] Bute v. Glamorganshire Canal Co., 1 Phil. Ch. 681; Merriman v. Russell, 55 N. C. 470.

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CHAPTER XXIV.

REFORMATION, CANCELLATION, AND CLOUD ON TITLE.

306. Reformation.
307. Mistake or Fraud.
308-309. By and against Whom Reformation may be Had.
310-311. Evidence—Statute of Frauds.
312. Cancellation.
313. Cloud on Title.
314. When Suit may be Maintained.

REFORMATION.

306. Equity will reform a written contract or other instrument inter vivos, where, through mutual mistake, or the mistake of one of the parties, induced or 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.[1] The reason for the exercise of this jurisdiction is plain. To compel the parties to abide by the terms of an instrument which, through mistake or fraud, does not express their real intention would result in

§ 306. [1] One of the earliest cases on record is thus stated in Bleverhasset v. Fuller, 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 from so doing.

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carrying into operation such mistake or fraud; and to set aside such an instrument might deprive one of such parties of the benefits to which he is justly entitled. This jurisdiction is exercised in a great variety of cases; most frequently, perhaps, in cases of deeds,[2] mortgages,[3] and other conveyances of real property, and contracts to convey such property.[4] Insurance policies, which, through fraud or mistake, do not contain the terms of the contracts entered into between the parties, are frequently reformed to accord with the intention of the parties;[5] and this may be done in the case of a fire policy after a loss has occurred.[6]

SAME—MISTAKE OR FRAUD.

307. Equity will not reform a written instrument, unless

(a) The mistake is one made by both parties to the agreement, so that the intentions of neither are expressed in it; or

(b) There is a mistake of one party, by which his intentions have failed of correct ex-

[2] Parker v. Parker, 88 Ala. 362, 6 South. 740, 16 Am. St. Rep. 52; Adams v. Wheeler, 122 Ind. 251, 23 N. E. 760; Conlin v. Masecar, 80 Mich. 139, 45 N. W. 67; Rice v. Kelset, 42 Minn. 511, 44 N. W. 535; Haack v. Welcken, 118 N. Y. 67, 23 N. E. 133; Hollenback's Appeal, 121 Pa. 322, 15 Atl. 616; Grossbach v. Brown, 72 Wis. 458, 40 N. W. 494; Brown v. Coal Co., 28 C. C. A. 567, 84 Fed. 930; Green v. Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577.

[3] Allen v. Elder, 76 Ga. 674, 2 Am. St. Rep. 63; Whipperman v. Dunn, 124 Ind. 349, 24 N. E. 166, 1045; Wait v. Axford, 63 Mich. 227, 29 N. W. 693; Thomas v. Harmon, 122 N. Y. 84, 25 N. E. 257.

[4] Olson v. Erickson, 42 Minn. 440, 44 N. W. 317; Fishack v. Ball, 34 W. Va. 644, 12 S. E. 856.

[5] Western Assur. Co. v. Ward, 21 C. C. A. 378, 75 Fed. 338; Fink v. Insurance Co. (C. C.) 24 Fed. 318; German Fire Ins. Co. v. Gueck, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835; Balen v. Insurance Co., 67 Mich. 179, 34 N. W. 654; Bryce v. Insurance Co., 55 N. Y. 240, 14 Am. Rep. 249; Mackenzie v. Coulson, L. R. 8 Eq. 368, 3 Keener, Eq. Cas. 267.

[6] Continental Ins. Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; Snell v. Insurance Co., 98 U. S. 85, 25 L. Ed. 52; Esch v. Insurance Co., 78 Iowa, 334, 43 N. W. 229, 16 Am. St. Rep. 443; Hill v. Insurance Co., 39 N. J. Eq. 66.

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pression, and there is fraud in the other party in taking advantage 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.[1]

The authorities are unanimous that, to justify a reformation of a written instrument on the ground of mistake, unmixed with fraud, the mistake must be mutual or common to both the parties; and the mistake must be in regard to a matter which is material to the contract.[2] The phrase "mutual mistake," as used in equity, means a mistake common to all the parties to a written contract or instrument, and it usually relates to a mistake concerning the contents or the legal effect of the contract or instrument.[3] There are some cases which hold that a reformation cannot be had unless the mistake is one of fact, rather than of law;[4] but in many other cases the relief has been granted where the mistake is one as to the legal effect of the instrument, when it does not fulfill or violates the manifest intention of the parties.[5] The conflict of authority on this question is more apparent than real. If the contract contains the real agreement between the parties, it will require more than a mistake as to the legal effects of the provisions of the contract to warrant the interposition of equity.[6] The question in any case

§ 307. [1] Bryce v. Insurance Co., 55 N. Y. 240, 243, 14 Am. Rep. 249, per Folger, J.

[2] Purvines v. Harrison, 151 Ill. 219, 37 N. E. 705; Green v. Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; Clark v. Higgins, 132 Mass. 586, 589; Chute v. Quincy, 156 Mass. 189, 30 N. E. 550; Bigelow v. Wilson, 99 Iowa, 456, 68 N. W. 798; Carskaddon v. City of South Bend, 141 Ind. 596, 39 N. E. 667, 41 N. E. 1; Burns v. Caskey, 100 Mich. 94, 58 N. W. 642; Garrard v. Frankel, 30 Beav. 445; 8 Keener, Eq. Cas. 261; Welles v. Yates, 44 N. Y. 525, 3 Keener, Eq. Cas. 272.

[3] Page v. Higgins, 150 Mass. 27, 31, 22 N. E. 63, 5 L. R. A. 152.

[4] Fowler v. Black, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670, 3 Keener, Eq. Cas. 100; Purvines v. Harrison, 151 Ill. 219, 224, 37 N. E. 705; Burns v. Caskey, 100 Mich. 94, 58 N. W. 642.

[5] Neininger v. State, 50 Ohio St. 394, 34 N. E. 633, 3 Keener, Eq. Cas. 358; Larkins v. Biddle, 21 Ala. 252; Reed v. Root, 59 Iowa, 359, 13 N. W. 323; Benson v. Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816; Walden v. Skinner, 101 U. S. 577, 583, 25 L. Ed. 963.

[6] Park Bros. & Co. v. Blodgett & Clapp Co., 64 Conn. 28, 29 Atl.

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will be as to whether the contract actually expresses the intent of the parties. If it does not, because of a mutual mistake, either of fact or law, the contract may be rectified.

Equity will relieve against the mistake of one party, either of law or of fact, where it is produced by misleading statements or representations of the other party to the contract.[7] The subject of fraud has been more fully treated in another part of this work, to which reference is made for the purpose of determining what acts are fraudulent.[8]

SAME—BY AND AGAINST WHOM REFORMATION MAY BE HAD.

308. The relief by reformation of a written instrument will be granted to the original parties thereto, and to all those claiming under or through them in privity.[1]

309. Such instruments will be reformed against creditors, and purchasers having actual or constructive notice of the mistake, but not as against subsequent purchasers for value, and without notice.[2]

In cases of mistake, equity may interfere, not only as between the parties themselves, but also in favor of those claiming under or through them in privity; such as personal representatives, heirs, etc.[3] Thus, a mistake in a mortgage

133, 3 Keener, Eq. Cas. 150; Moore v. Tate, 114 Ala. 582, 21 South. 820; Walden v. Skinner, 101 U. S. 577, 25 L. Ed. 963; Elliott v. Sackett, 108 U. S. 132, 141, 2 Sup. Ct. 375, 27 L. Ed. 678.

[7] Bales v. Hunt, 77 Ind. 355; Bush v. Merriman, 87 Mich. 260, 49 N. W. 567; Kyle v. Fehley, 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866, 3 Keener, Eq. Cas. 131; Snell v. Insurance Co., 98 U. S. 85, 91, 25 L. Ed. 52, 3 Keener, Eq. Cas. 80.

[8] Ante, p. 283.

§§ 308, 309. [1] Keister v. Myers, 115 Ind. 312, 314, 17 N. E. 161, 3 Keener, Eq. Cas. 314; East v. Peden, 108 Ind. 92, 8 N. E. 722.

[2] Hyland v. Hyland, 19 Or. 51, 28 Pac. 811; Pence v. Armstrong, 95 Ind. 191; Carver v. Lassallette, 57 Wis. 232, 15 N. W. 162.

[3] Morris v. Stern, 80 Ind. 227; Whitmore v. Hay, 85 Wis. 240, 55 N. W. 708, 39 Am. St. Rep. 826; Hutsell v. Crewse, 138 Mo. 1, 39 S. W. 449.

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given by a decedent may be reformed against his widow and heirs or devisees and administrator or executor.[4] The relief cannot be had to the injury of innocent third persons, such as mortgagees, bona fide purchasers without notice, and others who have acquired intervening or vested rights, and who cannot be placed in statu quo.[5] A voluntary conveyance of land by a father to his adult son, founded on natural love and affection, and made without any prior consultation or agreement with the grantee, as a testamentary disposition of the property, cannot, after the death of the grantor, and as against his other heirs, be reformed in equity, and made to describe the land which the grantor intended, but, by mistake, failed to convey.[6]

SAME—EVIDENCE—STATUTE OF FRAUDS.

310. A written instrument will not be reformed for mistake or fraud unless clear, positive, and convincing evidence be produced showing the existence of such mistake or fraud.

311. Parol evidence is admissible for such purpose, although the instrument is one which is required by the statute of frauds to be in writing.

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;[1] and a complainant who asks that a part of the stipulation be permitted to stand, and a part to be altered, or stricken out, must produce stronger proof than is required from one who disowns the contract in its entire-

[4] Wilson v. Stewart, 63 Ind. 294.

[5] Pence v. Armstrong, 95 Ind. 191; Ingles v. Merriman, 96 Wis. 400, 71 N. W. 368; Toll v. Davenport, 74 Mich. 386, 42 N. W. 63; Way v. Roth, 159 Ill. 162, 42 N. E. 321.

[6] Willey v. Hodge, 104 Wis. 81, 80 N. W. 75.

§§ 310, 311. [1] Henkle v. Assurance 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.

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ty on the ground of fraud or undue influence.[2] An instrument will not be reformed on the ground of mistake unless the evidence shows clearly and satisfactorily, not only that the writing does not truly express the intention of the parties, but also what was intended to be expressed, or what the actual contract was.[3] The courts have stated the rule as to the degree of evidence required for the reformation of a contract in many different ways; but, however the rule may be expressed, the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court that fraud has been committed, or that a mistake has been made.[4] A court of equity, in correcting an agreement of parties upon the ground of mistake, proceeds upon the theory that it does not express their real sense, and it is most evident that the mutuality of the mistake must be made out, and the fact of a different agreement having been intended by both established, by evidence which is clear and convincing.[5]

Statute of Frauds.

There are cases which hold that an executory contract, required by the statute of frauds to be in writing, can only be reformed where the mistake of the parties consists in having included in the contract more of the subject-matter than they intended. In such case parol testimony may be admitted for the purpose of eliminating the surplus subject-

[2] Harding v. Long, 103 N. C. 1, 9 S. E. 445.

[3] Guilmartin v. Urquhart, 82 Ala. 570, 1 South. 897; Bishop v. Insurance Co., 49 Conn. 167.

[4] Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 435, 12 Sup. Ct. 239, 35 L. Ed. 1063. Evidence must be "clear, exact, and satisfactory," Sawyer v. Hovey, 3 Allen (Mass.) 331, 81 Am. Dec. 659; must be "clear, precise, and indubitable," Breneiser v. Davis, 141 Pa. 85, 21 Atl. 508; Boyertown Nat. Bank v. Hartman, 147 Pa. 558, 23 Atl. 842, 30 Am. St. Rep. 759; must establish the mistake beyond a reasonable doubt, Hupsch v. Resch, 45 N. J. Eq. 657, 662, 18 Atl. 372; Stockbridge Iron Co. v. Iron Co., 102 Mass. 45, 3 Keener, Eq. Cas. 54, 397; but it has also been held that it is sufficient to establish the fact by a clear preponderance of evidence, without establishing it beyond a reasonable doubt, Southard v. Curley, 134 N. Y. 148, 31 N. E. 330, 16 L. R. A. 561, 30 Am. St. Rep. 642, 3 Keener, Eq. Cas. 460. And see, also, Christopher & T. St. R. Co. v. Railway Co., 149 N. Y. 51, 43 N. E. 538.

[5] Allison Bros. Co. v. Allison, 144 N. Y. 21, 30, 38 N. E. 956, per Gray, J.

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matter from the operation of the contract.[6] The reason for limiting the reformation of a written instrument to cases where it is sought to strike from an instrument matter which the parties did not intend to insert is that the admission of parol testimony in such cases is not in conflict with the statute of frauds, since it is not attempted to make a parol contract required by the statute to be in writing, but simply restricts a written contract already made.[7] But the weight of authority seems to be against the drawing of a distinction between cases where the relief sought is for the purpose of restricting the operation of a contract and those where it is sought to enlarge such operation.[8] The general rule is that the statute of frauds does not prevent the reformation of a contract thereby required to be in writing by the admission of parol testimony for the purpose of enlarging or restricting its terms or subject-matter.[9] "Whether the parol evidence offered to correct the writing on account of fraud or mistake shows the verbal contract to be broader than the written instrument, covering more or a different subject-matter or enlarging the terms, or is narrower than the written instrument, either in the terms or subject-matter of the contract, courts of equity will grant relief by reforming the contract so as to prevent fraud or mistake. The statute of frauds, in granting such relief, is not violated but 'is uplifted,' that it may not perpetuate the fraud that the legislature designed it to prevent." [10]

[6] Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418, 3 Keener, Eq. Cas. 327; Climer v. Hovey, 15 Mich. 18; Elder v. Elder, 10 Me. 80, 25 Am. Dec. 205; Osborn v. Phelps, 19 Conn. 63, 48 Am. Dec. 133.

[7] Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418, 3 Keener, Eq. Cas. 327.

[8] Beardsley v. Duntley, 69 N. Y. 577, 582, 584, 3 Keener, Eq. Cas. 344.

[9] Noel's Ex'r v. Gill, 84 Ky. 241, 249, 1 S. W. 428, 3 Keener, Eq. Cas. 347; Judson v. Miller, 106 Mich. 140, 63 N. W. 965; McDonald v. Yungbluth (C. C.) 46 Fed. 836; Finucan v. Kendig, 109 Ill. 198; Morrison v. Collier, 79 Ind. 417.

[10] Noel's Ex'r v. Gill, 84 Ky. 241, 248, 1 S. W. 428, 3 Keener, Eq. Cas. 347, per Bennett, J.

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CANCELLATION.

312. 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.[1]

(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.[2] Such a document is plainly innocuous. No lapse of time can add to its power so as to 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.[3] 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.[4]

(2) As to voidable instruments, it is not now necessary to repeat what has already been said in the chapters on "Fraud" and "Mistake" respecting the circumstances which will give a person the option of avoiding his own acts; and

§ 312. [1] Underh. Eq. p. 215.

[2] Pelrsoll v. Elliott, 6 Pet. 95, 8 L. Ed. 332; Town of Venice v. Woodruff, 62 N. Y. 462, 468, 20 Am. Rep. 495; Town of Springport v. Bank, 75 N. Y. 397, 402.

[3] Simpson v. Lord Howden, 3 Mylne & C. 97; Smyth v. Griffin, 13 Sim. 245; Threlfall v. Lunt, 7 Sim. 627.

[4] 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 (C. C.) 36 Fed. 337, 1 L. R. A. 572.

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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.[6]

CLOUD ON TITLE.

313. 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 rights of the party may require.[1]

Courts of chancery have always had jurisdiction to remove clouds from title. Modern statutes in many states have provided a remedy at law for the trying of title to land, which have rendered a resort to equity in such cases much less frequent.[2] A suit to remove a cloud from a 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 may be lost.[3]

What Constitutes Cloud on Title.

A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make

[6] See ante, p. 69.

§ 313. [1] Story, Eq. Jur. § 694; Martin v. Graves, 5 Allen (Mass.) 601; Dull's Appeal, 113 Pa. 510, 6 Atl. 540, 1 Keener, Eq. Cas. 348.

[2] Sheppard v. Nixon, 43 N. J. Eq. 627, 13 Atl. 617.

[3] 1 Fonbl. Eq. book 1, c. 1, § 8, note.

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no difference in the right to have it removed. Anything of this kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is a cloud upon his title.[4] To constitute a cloud which the court will interfere to remove, it must appear that it is prejudicial, which involves the existence of some reason to apprehend injury, or that it is set on foot and relied upon to the prejudice of the title. Where the so-called cloud or adverse claim has not even the appearance of validity or substance,—as where it appears on the face of the documents or proceedings upon which the alleged claimant must rely, and which he must produce, that there is no legal validity in the claim,—there is no ground for invoking the aid of a court, for there is no injury, and no ground for apprehension of injury.[5] The general rule to be deduced from the authorities is that, if the title against which relief is prayed is of such a character that, if asserted by action, and put in evidence, it would drive the true owner of the property to the production of his own title in order to establish a defense, it constitutes a cloud which he has a right to have removed.[6]

SAME—WHEN SUIT MAY BE MAINTAINED.

314. Independent of statute or equitable circumstances, a suit to remove a cloud on a title cannot be maintained unless the plaintiff has a legal title to the property, and is in possession thereof.

As has been said in a leading New York case on this subject: "We have been unable to find any case where a party out of possession has been allowed to sustain an action quia

[4] Whitney v. City of Port Huron, 88 Mich. 269, 272, 50 N. W. 316, 26 Am. St. Rep. 291.

[5] Crooke v. Andrews, 40 N. Y. 547; Hatch v. City of Buffalo, 38 N. Y. 276; Ward v. Dewey, 16 N. Y. 519; Moores v. Townshend, 102 N. Y. 387, 392, 7 N. E. 401, 1 Keener, Eq. Cas. 355; Briggs v. Johnson, 71 Me. 235.

[6] Lick v. Ray, 43 Cal. 83, 88; Sloan v. Sloan, 25 Fla. 53, 5 South. 603; Maloney v. Finnegan, 38 Minn. 70, 35 N. W. 723.

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timet to remove a cloud upon title, except when it was specially authorized by statute, or when special circumstances existed affording grounds for equitable jurisdiction, aside from the mere allegation of legal title. Indeed, the right to resort to a court of equity in such cases was based upon the assumption that the legal title to the property had been established by an action at law, and jurisdiction was entertained solely for the purpose of protecting the party in the enjoyment of rights in possession thus legally established; and, while the jurisdiction has, in the course of time, been somewhat extended, it has never been stretched to cover cases brought merely to establish a legal title, or recover possession alone." [1] If the plaintiff is possessed of the legal title, and is not in possession, there is no occasion for the exercise of equitable jurisdiction, since the remedy at law by ejectment is full, adequate, and complete.[2] If the legal owner is in possession, as he can bring no action at law, he may ask a court of equity to remove a cloud upon his title, which makes it less valuable, and may prevent his disposing of it to others.[3] The object of a bill to remove a cloud upon title and to quiet the possession of real estate is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff.[4] If a plaintiff has the legal title to lands which are wild, unimproved, and unoccupied, he is deemed to have a constructive possession, and he may institute proceedings for the removal of a cloud upon his title.[5] In many of the states statutes have been passed authorizing a suit in equity to quiet title to be brought by a person who is out of possession. In other states the

§ 314. [1] Moores v. Townshend, 102 N. Y. 387, 392, 7 N. E. 401, 1 Keener, Eq. Cas. 355, per Judge Ruger.

[2] Davis v. Sloan, 95 Mo. 552, 5 S. W. 702; Sheppard v. Nixon, 43 N. J. Eq. 627, 13 Atl. 617; Gage v. Schmidt, 104 Ill. 106; Wetherell v. Eberle, 123 Ill. 666, 14 N. E. 675; Kilgannon v. Jenkinson, 51 Mich. 240, 16 N. W. 390; Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010, 1 Keener, Eq. Cas. 359.

[3] Allen v. Hanks, 136 U. S. 300, 311, 10 Sup. Ct. 961, 34 L. Ed. 414.

[4] Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010, 1 Keener, Eq. Cas. 359; Orton v. Smith, 18 How. 263, 15 L. Ed. 393; Alexander v. Pendleton, 8 Cranch, 462, 3 L. Ed. 624.

[5] Wetherell v. Eberle, 123 Ill. 666, 14 N. E. 675.

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courts have permitted such suits without regard to the possession of the plaintiff.[6] It has been held that the holder of an equitable title to real property may maintain a suit to remove a cloud on his title, although he is not in possession;[7] but the supreme court of the United States has rejected this doctrine, and held that a person out of possession cannot maintain the suit, whether his title be legal or equitable. If his title is equitable, he must acquire the legal title, and then bring ejectment.[8]

[6] Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333; De Camp v. Carnahan, 26 W. Va. 839.

[7] Mason v. Black, 87 Mo. 329; Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. 623; Freeman v. Brown, 96 Ala. 301, 11 South. 249; Bryan v. Winburn, 43 Ark. 29.

[8] U. S. v. Wilson, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. Ed. 110; Fussell v. Gregg, 113 U. S. 550, 5 Sup. Ct. 631, 28 L. Ed. 993; Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010, 1 Keener, Eq. Cas. 359; Herrington v. Williams, 31 Tex. 448.

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CHAPTER XXV.

ANCILLARY REMEDIES.

315. Bill of Discovery.
316–320. Rules Respecting Discovery.
321. Bills to Perpetuate Testimony.
322. Examination of Witnesses De Bene Esse.
323. Writ of Ne Exeat.
324. Interpleader.
325. Essential Features.
326. Receivers.
327. In what Cases Receivers will be Appointed.

BILL OF DISCOVERY.

315. A bill of discovery was a bill which asked no relief, but simply the discovery of facts resting in the knowledge of the defendant, or of deeds or writings in the possession or the power of the defendant, in order to maintain the right or title of the party asking it, in some suit or action or other proceeding in another court. In general, to maintain the bill, it was necessary that an action should have been already commenced in another court, unless the object of the bill was to ascertain who was the proper party against whom the suit or action should be brought.[1]

The power of courts of equity to compel discovery arose from the inability of courts of law to compel a complete discovery of the material matters involved in the controversy by the oaths of the parties thereto, and also because of their want of power to compel the production of deeds, books, and writings in the possession or under the control of one of the

§ 315. [1] Snell, Eq. p. 507; Angell v. Angell, 1 Sim. & S. 83; Mayor, etc., of London v. Levy, 8 Ves. 404.

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parties.[2] Jeremy Bentham described the common-law rules of evidence as devised to exclude the testimony of every one who was likely to know anything about the matter. He was the first to insist 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 is apparent that the evils of the common-law rules of evidence would have been intolerable had it not been for the jurisdiction assumed by courts of equity to grant discovery, and thus render the evidence of the litigant parties 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 the 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 the defendant as an admission made by the plaintiff, 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 a subsequent motion for their production.

By means of these equitable proceedings, the shortcomings of the law were, in a 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 well settled that no bill of discovery lay against a mere witness.[3] Not only

[2] Colgate v. Compagnie Francaise du Telegraphe de Paris a N. Y. (C. C.) 23 Fed. 82.

[3] Fenton v. Hughes, 7 Ves. 287, Story, Eq. Jur. § 1499.

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would equity grant discovery in aid of actions at law, but, whenever a suit was brought in equity, touching matters otherwise within its jurisdiction, the defendant might be compelled to answer interrogatories which were contained in the body of the bill; and the plaintiff could likewise be compelled to make discovery by means of cross interrogatories in the answer.[4]

Effect of Modern Statutes.

In England statutes were passed in the earlier years of the reign of Queen Victoria authorizing either party to an action or proceeding at law to examine his opponent under oath as a witness, and empowering courts of law to compel either party to an action to produce documents in his possession or under his control.[5] The English supreme court of judicature act of 1873, and the rules adopted in conformity therewith, permit a party to an action to obtain discovery from the other upon interrogatories, and provide that the court may order any party to discover, produce, and permit inspection of documents in his possession or under his control.[6] There is thus provided a simpler and more efficacious mode of discovery than that obtained by a resort to equity for a bill, which has practically superseded, if not entirely abrogated, the equitable remedy.

The states, like New York, which have adopted the so-called reformed procedure, have enacted statutes providing similar modes for procuring evidence from the opposite party with a like effect. In some of the states the suit for discovery is expressly abrogated by statute. Even in those states where the courts of law and equity are retained distinct from each other statutes exist which permit the examination of parties to all act ons and proceedings, both at law and in equity, in the same manner as other witnesses, and authorize courts to compel the production and inspection of books, papers, and documents.

It has sometimes been held, notwithstanding these statutes, that the equitable jurisdiction to entertain a suit for a discovery still exists, upon the theory that equity, having once acquired jurisdiction, cannot lose that jurisdiction by

[4] Story, Eq. Jur. § 1483.
[5] 14 & 15 Vict. c. 99, § 2; 17 & 18 Vict. c. 125, §§ 51, 52.
[6] 36 & 37 Vict. c. 66, Schedule Rules of Procedure, 25–27.

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the mere fact that the common-law courts have also become invested with the same powers.[7] This is not, by any means, a universal rule. In many of the states the courts have expressly declared that the statutory method of discovery has necessarily abrogated the equitable jurisdiction.[8] In any event, the resort to equity at the present time is seldom had. The principles, however, on which courts of equity acted in granting discovery are still important, partly because they form a basis of the 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.

316. The plaintiff's right to a discovery is confined to facts which are material to his own title or cause of action. It does not authorize him to ascertain facts in support of the defense of the defendant.[1]

317. A bill of discovery cannot be maintained in aid of criminal proceedings, nor can it be maintained if the court in which the orig-

[7] Shotwell's Adm'x v. Smith, 20 N. J. Eq. 79; Hoppock's Ex'rs v. Railroad Co., 27 N. J. Eq. 286; Post v. Railroad Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86; 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; Lancy v. Randlett, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169; Russell v. Dickeschied, 24 W. Va. 61. It should be observed, however, that in these cases discovery was sought of facts exclusively within the defendant's knowledge, and not of facts known to the plaintiff, and to which he was incompetent to testify.

[8] Anderson v. Bank, 2 Ch. Div. 644; Attorney General v. Gaskill, 20 Ch. Div. 519; Ex parte Boyd, 105 U. S. 657, 26 L. Ed. 1200; Riopelle v. Doellner, 26 Mich. 105; Hall v. Joiner, 1 S. C. 190; Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736.

§§ 316–320. [1] Allan v. Allan, 15 Ves. 131; Llewellyn v. Badeley, 1 Hare, 527; Phillips v. Prevost, 4 Johns. Ch. (N. Y.) 205; Cuyler v. Rogert, 3 Paige (N. Y.) 186; Hoppock's Ex'rs v. Railroad Co., 27 N. J. Eq. 286; Heath v. Railway Co., 9 Biatchf. 316, Fed. Cas. No. 6,307.

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inal action is pending is authorized to grant the same discovery.[2]

318. No man need discover matter tending to criminate himself, or to expose himself to a penalty or forfeiture.[3]

319. Discovery cannot be had of confidential communications between counsel and client;[4] nor can a married woman be compelled to disclose facts, ascertained by her through her marital relation, which would tend to impose a liability upon her husband.[5]

320. Public officials cannot be compelled to disclose matters of state, at the suit of an individual, the publication of which may be prejudicial to the public.[6]

These are, perhaps, the most important of the rules applicable to a suit for a discovery. The practical utility and actual use of these principles is not so apparent since the relief by a bill of discovery has become practically obsolete. An attempt will not, therefore, be made to explain and illustrate their application.

The defendant must answer as to all facts material to the plaintiff's case; and he must answer distinctly, completely,

[2] Heath v. Railway Co., 9 Blatchf. 316, Fed. Cas. No. 6,307; Drexel v. Berney (C. C.) 14 Fed. 268; Post v. Railroad Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86.

[3] East India Co. v. Campbell, 1 Ves. Sr. 246; Claridge v. Hoare, 14 Ves. 59, 65; Saunders v. Wiel [1892] 2 Q. B. Div. 321; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; State v. Hardware Co., 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676; Horstman v. Kaufman, 97 Pa. 147.

[4] Greenough v. Gaskell, 1 Mylne & K. 98; Jones v. Pugh, 1 Phil. Ch. 96; Parkhurst v. Lowten, 2 Swanst. 194, 216; Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; Edison Electric Light Co. v. Lighting Co. (C. C.) 44 Fed. 294.

[5] Le Texier v. Auspach, 5 Ves. 322; Cartwright v. Green, 8 Ves. 405, 408.

[6] Smith v. East India Co., 1 Phil. Ch. 50. And see, Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60.

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and without needless prolixity, and to the best of his information and belief.[7] As stated above, the plaintiff is only entitled to know the facts which are material to his title or his cause of action. He is not entitled to ascertain the facts in support of the defense of the defendant, although he may compel a discovery as to the defendant's title, and as to what constitutes his defense.[8]

The foregoing rules also apply when discovery is sought with respect to documents in the defendant's possession or under his control. When required by the plaintiff, the 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 the defendant's possession, or under his control, and that they are of such character as to constitute proper matters of discovery within the ordinary rules, the plaintiff will be permitted to inspect and copy them, and their production at the hearing of the cause will also be compelled.[9] The documents must be in defendant's possession or power,[10] but for this purpose it is sufficient that they are admitted to belong to him, though they may be out of his actual custody.[11] The possession, therefore, of his solicitor or agent, or of any other person whose possession he can control, is equivalent to his own.[12] 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.[13]

[7] Smith v. East India Co., 1 Phil. Ch. 50.

[8] Haskell v. Haskell, 3 Cush. (Mass.) 542; Wilson v. Webber, 2 Gray (Mass.) 558; Norfolk & W. R. Co. v. Cable Co., 88 Va. 962, 14 S. E. 689; Downie v. Nettleton, 61 Conn. 598, 24 Atl. 977.

[9] Adams, Eq. pp. 12, 13; Wisner v. Dodds (C. C.) 14 Fed. 656.

[10] Hardman v. Ellames, 2 Mylne & K. 732.

[11] Clinch v. Financial Corp., L. R. 2 Eq. 271; Earl of Glengall v. Frazer, 2 Hare, 99.

[12] Eager v. Wiswall, 2 Paige (N. Y.) 369; Robbins v. Davis, 1 Blatchf. 288, Fed. Cas. No. 11,880.

[13] Edmonds v. Foley, 30 Beav. 282.

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BILLS TO PERPETUATE TESTIMONY.

321. 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.[1]

The common law furnished no method for taking the testimony of a person in anticipation of an action not yet brought. Where a person had some right or interest which could not at the time be made the subject of an action at law, and which was endangered because of the likelihood of a failure of proof by the death of witnesses before such an action could be brought, equity, in response to that maxim which declares that it will not suffer a wrong without a remedy, intervened by a bill to perpetuate the testimony of such witnesses. The exercise of jurisdiction in such cases being subject to the objection that the depositions so taken were not to be published until after the death of witnesses, and the evidence was, therefore, not given under the legal penalties attached to perjury, courts of equity did not entertain such bills, unless absolutely necessary to prevent a failure of justice,[2] or where the preservation of the evidence would clearly tend to prevent future litigation, or to defeat such litigation if commenced.[3] 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.[4] 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.[5]

§ 321. [1] Snell, Eq. p. 721.
[2] Angell v. Angell, 1 Sim. & S. 83; Booker v. Booker, 20 Ga. 781.
[3] Brooking v. Maudslay, 38 Ch. Div. 636.
[4] Ellice v. Roupell, 32 Beav. 299.
[5] Booker v. Booker, 20 Ga. 781; Baxter v. Farmer, 42 N. C. 239;

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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.[6] So, also, a bill to perpetuate testimony was allowed only where some right to property was involved, as distinguished from an office or dignity.[7] 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.[8]

EXAMINATION OF WITNESSES DE BENE ESSE.

322. Either party to a litigation actually pending might maintain a suit to take testimony de bene esse for the purpose of examining a witness who was very aged, sick, or who was about to depart from the country, if there was a probability that at the time of trial such witness would be dead, unable to appear, or absent from the country.[1]

Spencer v. Peek, L. R. 3 Eq. 415; Llanover v. Homfray, 19 Ch. Div. 224; Hall v. Stout, 4 Del. Ch. 269.

[6] Dursley v. Berkeley, 6 Ves. 251.

[7] Townshend Peerage Case, 10 Clark & F. 289. Statute 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.

[8] In the federal courts, depositions in perpetuam rei memoriam are directed to be taken according to the usages of chancery. Rev. St. U. S. § 866.

§ 322. [1] 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.

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Originally, common-law courts possessed no machinery for taking and preserving the testimony of a witness who was aged, sick, infirm, or about to depart from the country, and this power was not conferred upon them in England until 1830.[2] Statutes in all the states confer power on all courts of general original jurisdiction, whether of law or of equity, to issue commissions for the examination of witnesses at home or abroad, and independent suits in equity have, therefore, 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;[3] and they might be maintained by a person not in possession of the property in dispute, as well as by a person in possession.[4]

WRIT OF NE EXEAT.

323. The writ of ne exeat is a writ issued by a court of equity to prevent a person from leaving the state until bail is given to abide the decree of the court.[1]

The writ of ne exeat regno was originally a high prerogative writ issued by a court of equity for great political objects and purposes of state. The writ is now granted for the protection of private rights with much caution and jealousy.[2] In several of the states the writ has been abolished by statute, or by judicial construction as opposed to the spirit of our institutions.[3]

As a general rule, the writ is granted only in cases of equitable debts and claims, and operates in the nature of equi-

[2] St. 1 Wm. IV. c. 22, § 1.

[3] Angell v. Angell, 1 Sim. & S. 83; Howard v. Folger, 15 Me. 447.

[4] Angell v. Angell, 1 Sim. & S. 83.

§ 323. [1] Cable v. Alvord, 27 Ohio St. 666; Gresham v. Peterson, 25 Ark. 377; Mitchell v. Bunch, 2 Paige (N. Y.) 617, 22 Am. Dec. 669. Compare the provisions of the federal bankruptcy act (section 9b) as to power to prevent bankrupt from leaving district of his residence, etc.

[2] Story, Eq. Jur. §§ 1465, 1467.

[3] Code Civ. Proc. N. Y. § 548; Collins v. Collins, 80 N. Y. 24; Ex parte Harker, 49 Cal. 465.

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table bail.[4] The equitable demand must be certain in its nature, and actually and presently payable, not contingent or prospective,[5] or unliquidated and uncertain.[6] In New Jersey the writ may be granted before the suit is actually pending.[7] The writ may be issued against a foreigner who is within the jurisdiction of the court, as well as a citizen of the state.[8]

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.[9] The alimony must, however, be actually decreed, and not appealed from. The writ could not be obtained while the case was still pending.[10] (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.[11] This case is brought within the purview of equity by its jurisdiction in matters of account.[12]

INTERPLEADER.

324. Where two or more persons, whose titles are connected by reason of one being derived from the other, or of both being derived from the same source, claim the same thing, debt, or duty by different interests from a

[4] Bonesteel v. Bonesteel, 28 Wis. 245; Allen v. Hyde, 2 Abb. N. C. 197; Rice v. Hale, 5 Cush. (Mass.) 241; Malcolm v. Andrews, 68 Ill. 100.

[5] Anon., 1 Atk. 521; Rico v. Gualtier, 3 Atk. 500.

[6] Etches v. Lance, 7 Ves. 417; Cock v. Ravie, 6 Ves. 283.

[7] Clark v. Clark, 51 N. J. Eq. 404, 26 Atl. 1012.

[8] Mitchell v. Bunch, 2 Paige (N. Y.) 617, 22 Am. Dec 669; McNamara v. Dwyer, 7 Paige (N. Y.) 237, 32 Am. Dec. 627.

[9] Read v. Read, 1 Ch. Cas. 115; Shaftoe v. Shaftoe, 7 Ves. 171; Denton v. Denton, 1 Johns. Ch. (N. Y.) 364.

[10] Dawson v. Dawson, 7 Ves. 173; Colverson v. Bloomfield, 29 Ch. Div. 341.

[11] 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.

[12] Allen v. Smith, 16 N. Y. 418, 419; MacDonough v. Gaynor, 18 N. J. Eq. 249.

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third person, such third person, if he does not himself claim any interest in the matter, and is under no independent liability to either of such persons, may maintain a bill of interpleader. In his bill he must state his own rights and the claims of the other persons, and pray that they may interplead, so that the court may adjudge to whom the thing, debt, or duty belongs; and, if suits have been brought against him by such persons, he may also pray that they be restrained from prosecuting such suits until the right is determined.[1]

The remedy by interpleader was not unknown to the common law, but it had a very narrow range of purpose and application, existing only where the possession of the third person had arisen from accident or a joint bailment by the other persons.

The equity is that the conflicting claimants should litigate the matter among themselves, without involving the stakeholder in their dispute.[2] The office of a suit of interpleader is not to protect a party against a double liability, but against double vexation in respect of one liability. The essence of the suit is that the plaintiff shall be liable to one only of the claimants, and the relief which equity affords him is against the vexation of two proceedings on a matter which may be settled in a single suit.[3] It is not necessary that suit should have been actually commenced against the plaintiff. It is sufficient if conflicting claims have been made against him, and he is in danger of being sued by the several claimants.[4] But, after an action at law has been

§ 324. [1] Mitf. Eq. Pl. 58, 59; Adams, Eq. p. 202; Snell, Eq. pp. 505, 506.

[2] Adams, Eq. p. 202.

[3] Crawford v. Fisher, 1 Hare, 436, 441; School Dist. No. 1 of Grand Haven v. Weston, 31 Mich. 85; Angell v. Hadden, 15 Ves. 244; Pfister v. Wade, 56 Cal. 43.

[4] Angell v. Hadden, 15 Ves. 244; Gibson v. Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; Farley v. Blood, 30 N. H. 354; Yarbrough v

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brought to a judgment against him in favor of one of the claimants, a court of equity cannot intervene by means of an interpleader.[5]

The right to file a bill of interpleader in equity exists where both of the claims are legal, or where one is legal and the other is equitable.[6] In many of the states, statutes have been enacted which permit a defendant sued upon a contract, or for specific real or personal property, who claims no 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.[7] 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 FEATURES.

325. Independent of statute, the following conditions must exist to give a right to an interpleader in equity:

(a) Two or more persons must claim the same thing, debt, or duty from the complainant.

(b) Privity of title must exist between the claimants.

(c) The complainant must have no beneficial interest in the thing claimed.

(d) The complainant must have incurred no independent personal liability to either of the claimants.

Thompson, 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626; Providence Bank v. Wilkinson, 4 R. I. 507, 70 Am. Dec. 160.

[5] McKinney v. Kuhn, 59 Miss. 186; Yarbrough v. Thompson, 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626; Larabrie v. Brown, 26 Law J. Ch. 605.

[6] Morgan v. Marsack, 2 Mer. 107; Lowndes v. Cornford, 18 Ves. 299.

[7] Code Civ. Proc. N. Y. § 820. A similar statute has been enacted in all of the code states.

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(e) The complainant must be unable to ascertain without hazard to himself to which of the claimants the thing, debt, or duty belongs.[1]

The same thing, debt, or duty must, in every case, be claimed by the persons against whom the relief is asked. If the subject of dispute has a bodily existence, its identity can create no difficulty; but, where the subject-matter is a chose in action, the question of identity is attended with some difficulty, and must in each case be determined by the nature of the debt or duty, and the incidents connected with it.[2] 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 vendor 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.[3] It is not necessary, however, that the amount claimed by the persons against whom the relief is asked should be the same. Bills of interpleader have been maintained where the several claimants, instead of claiming the whole fund or matter in dispute, have claimed different portions of the fund, when the aggregate of all the claims exceeded the full amount of the fund; as in the case of a contract for the construction of a public building for a specified sum, where portions of the contract price were claimed by subcontractors and material men, the total amount of whose claims exceeded such contract price.[4] And a land-

§ 325. [1] Pom. Eq. Jur. § 1322; Crane v. McDonald, 118 N. Y. 648, 654, 23 N. E. 991.

[2] Adams, Eq. p. 203; Dodd v. Bellows, 29 N. J. Eq. 127; Salisbury Mills v. Townsend, 109 Mass. 115; City Bank v. Bangs, 2 Paige (N. Y.) 570.

[3] Bassett v. Leslie, 123 N. Y. 396, 25 N. E. 386. So, also, where a purchaser of goods was sued by the seller for the price, and was also sued in trover by 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. See, also, Wilkinson v. Searcy, 74 Ala. 243; Blue v. Watson, 59 Miss. 619.

[4] School Dist. No. 1 of Grand Haven v. Weston, 31 Mich. 85; Newhall v. Kastens, 70 Ill. 156; Yates v. Tisdale, 3 Edw. Ch. (N. Y.) 71.

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owner whose property has been taxed in different amounts by two towns may maintain an interpleader to compel them to litigate the question as to who has jurisdiction to levy the tax, notwithstanding the difference in amount.[5]

Privity of Title.

The doctrine has been declared that, where there is no privity of title between the claimants, and their titles are separate and independent, and not derived from a common source, equity would afford no relief to the person holding the property, but he was compelled to defend himself as well as he could against each separate demand. The refusal of equity to intervene in such a case was 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.[6] This doctrine has been criticised by many of the later cases, and some have ignored it altogether. In England, and in many of the states of this country, it seems to have been abrogated partly by statute and partly by judicial decisions.[7] Mr. Pomeroy, referring to this rule, says that: "It is a manifest imperfection of the equity jurisdiction that it should be so limited. A person may be and is exposed to danger, vexation, and loss from conflicting independent claims to the same thing, as well as from claims that are dependent; and there is certainly nothing in the nature of the remedy which need prevent it from being extended to both classes of demands." [8]

Complainant to Have no Beneficial Interest.

The complainant must be a mere stakeholder, entirely indifferent between the conflicting claimants.[9] He must be

[5] Dorn v. Fox, 61 N. Y. 264; Thomson v. Ebbets, Hopk. Ch. (N. Y.) 272.

[6] Story, Eq. Jur. § 820; Crawshay v. Thornton, 2 Mylne & C. 1, 19–24; Pearson v. Cardon, 2 Russ. & M. 606, 609–612; Third Nat. Bank v. Lumber Co., 132 Mass. 410.

[7] Code Civ. Proc. N. Y. § 820; Code Civ. Proc. Cal. § 386; Attenborough v. Dock Co., 3 C. P. Div. 450; Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991.

[8] Pom. Eq. Jur. § 1324, note.

[9] Wing v. Spalding, 64 Vt. 83, 23 Atl. 615; Baltimore & O. R. Co. v. Arthur, 90 N. Y. 234; Appeal of Bridesburg Mfg. Co., 106 Pa. 275; Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. Ed. 246;

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ready and willing at all times to deliver the thing, to pay the debt, or perform the duty to or for the claimant entitled thereto, without any deduction or charge. Hence one who claims a commission out of the property or funds in his possession, or a lien thereon, cannot maintain a bill of interpleader;[10] nor can one who is not in possession of the property which is the subject of the claim, or who has put one of the claimants in possession thereof.[11] So, where the complainant claims to retain from the amount in his hands an alleged indebtedness for freight, he will not be permitted to maintain an action of interpleader. The amount due cannot be the subject of controversy in such a suit, and the difference between the debt claimed by one of the defendants and the sum which the plaintiff is willing to pay presents an insuperable objection to its prosecution.[12]

No Independent Personal Liability.

If the complainant has incurred an independent personal liability to either claimant, he will not be permitted to maintain a bill of interpleader.[13] A sheriff who has seized property by fraud on 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 belongs to such claimant.[14] And where a defendant 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,[15] un-

Williams v. Matthews, 47 N. J. Eq. 196, 20 Atl. 261; Sprague v. West, 127 Mass. 471.

[10] Mitchell v. Hayne, 2 Sim. & S. 63; Crass v. Railroad Co., 96 Ala. 447, 11 South. 480.

[11] Burnett v. Anderson, 1 Mer. 405; Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. Ed. 246; Stone v. Reed, 152 Mass. 179, 25 N. E. 49; Mt. Holly, L. & M. Turnpike Co. v. Ferree, 17 N. J. Eq. 117.

[12] Baltimore & O. R. Co. v. Arthur, 90 N. Y. 234.

[13] Crawshay v. Thornton, 2 Mylne & C. 1, 19; Cullen v. Dawson, 24 Minn. 66; 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, 95 Am. Dec. 365.

[14] Slingsby v. Boulton, 1 Ves. & B. 334; Shaw v. Coster, 8 Paige (N. Y.) 339, 35 Am. Dec. 690. 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.

[15] Dungey v. Angove, 2 Ves. Jr. 304; Snodgrass v. Butler, 54

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less 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.[16] 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.[17]

RECEIVERS.

326. A receiver is a person standing indifferent between the parties, appointed by a court of equity to take charge of the fund or property in controversy under direction of the court, and during the continuance of such controversy, when it does not seem proper that either party should retain it.[1]

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 courts of equity. The remedy is of English origin, but it has been largely developed in this country during the past quarter of a century. The object of a receivership is to preserve the fund or property from removal beyond the jurisdiction of the court, or from spoliation, waste, or deterioration pending litigation, or during the minority of infants.[2] The receiver is an officer of the court appointing

Miss. 45; De Zouche v. Garrison, 140 Pa. 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.

[16] Cowtan v. Williams, 9 Ves. 107; Gibson v. Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; Ketcham v. Coal Co., 88 Ind. 515.

[17] Crawshay v. Thornton, 2 Mylne & C. 1, 19–24; Jew v. Wood, Craig & P. 185; Pfister v. Wade, 56 Cal. 43.

§ 326. [1] Booth v. Clark, 17 How. 322, 15 L. Ed. 164; Baker v. Bachus' Adm'r, 82 Ill. 79; Chautauque Co. Bank v. White, 6 Barb. (N. Y.) 589; High, Rec. § 1; Beach, Rec. § 1; Kerr, Rec. p. 2.

[2] Myers v. Estell, 48 Miss. 401; Taylor v. Railroad Co. (C. C.) 7 Fed. 385; Ellis v. Railroad Co., 107 Mass. 28; Beverley v. Brooke, 4 Grat. (Va.) 187.

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him, and not an agent of the parties.[3] His possession is possession of the court,[4] and any attempt to disturb it is a contempt, punishable as such.[5]

The appointment of a receiver, like the granting of an interlocutory injunction, determines nothing as to the ultimate rights of the parties;[6] and in dealing with the application for the appointment of a receiver it is the duty of the court to confine itself directly to the point upon which it is asked to decide, and not to go into the merits of the case.[7] The appointment of a receiver rests in the sound discretion of the court.[8] In exercising such discretion, the court is controlled by certain well-established rules. The power is deemed one of the most responsible duties which a court of equity is called upon to perform, since its effect is to deprive the defendant of his possession before a final decree, which may work great, and even irreparable, injury, though the property taken into the custody of the court may finally be restored. The power is therefore exercised with great caution and circumspection.[9] The plaintiff must show: (1) 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; and (2) that the 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.[10]

[3] Davis v. Duke of Marlborough, 2 Swanst. 125; Davis v. Gray, 16 Wall. 218, 21 L. Ed. 447; Hooper v. Winston, 24 Ill. 353; Morrill v. Noyes, 56 Me. 463, 96 Am. Dec. 486.

[4] Ellicott v. Warford, 4 Md. 85; Runyon v. Bank, 4 N. J. Eq. 480.

[5] Beverley v. Brooke, 4 Grat. (Va.) 187, 211; Hazelrigg v. Bronaugh, 78 Ky. 62; Chafee v. Quidnick Co., 13 R. I. 442; Secor v. Railroad Co., 7 Biss. 513, Fed. Cas. No. 12,605.

[6] Hugonin v. Basely, 13 Ves. 107; Beverley v. Brooke, 4 Grat. (Va.) 208; Ellis v. Railroad Co., 107 Mass. 1; Ex parte Dunn, 8 S. C. 207; Chase's Case, 1 Bland (Md.) 206–213, 17 Am. Dec. 277; Leavitt v. Yates, 4 Edw. Ch. (N. Y.) 162.

[7] Skinner's Co. v. Society, 1 Mylne & C. 164.

[8] Skip v. Harwood, 3 Atk. 564; Sage v. Railroad Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694; Chicago & A. Oil & Mining Co. v. Petroleum Co., 57 Pa. 83; Ashurst v. Lehman, 86 Ala. 371, 5 South. 731.

[9] Ashurst v. Lehman, 86 Ala. 371, 5 South. 731.

[10] Mays v. Rose, Freem. Ch. (Miss.) 703; Ellett v. Newman, 92 N.

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SAME—IN WHAT CASES RECEIVERS WILL BE APPOINTED.

327. Subject to the rules already stated, a receiver will be appointed

(a) Where the person entitled to the possession of the property pending the litigation or a judicial proceeding is incompetent to manage or care for it; as in the case of infants, lunatics, etc.

(b) While the parties in litigation are 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, co-tenants, etc.

(c) Where one of the parties is entitled to possession of the property, but there is danger of its misapplication or spoliation by him to the detriment of the other party.

(d) By virtue of statute in proceedings to dissolve and wind up the affairs of corporations.

(e) To reach property of a judgment debtor which cannot be seized on execution.

C. 519; Blondheim 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, Id. 378, 412. The case of Blondheim v. Moore, 11 Md. 365, has been frequently quoted as a leading case upon the question of the exercise of the discretion of the court in the appointment of receivers. In that case the following rules were laid down: (1) That the power of appointment is a delicate one, and is to be exercised with great circumspection; (2) that it must appear that the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property; (3) that there is no case in which the court appoints a receiver merely because the measure can do no harm; (4) that fraud or imminent danger, if the intermediate possession should not be taken by the court, must be

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Receivers of Property of Infants and Lunatics.

A court of equity will, upon a proper case being made out, protect the estate of an infant by appointing a receiver; as where no guardian exists,[1] or where the parent of the infant, in possession of his property, is squandering it.[2] So, also, in the case of a lunatic, where the person appointed as guardian or committee declines to act.[3] It was formerly the practice of courts of chancery to appoint a receiver of a decedent's estate pending litigation over the probate of his will,[4] but now the practice is falling into disuse, because courts of probate have been empowered by statute to appoint a special administrator during such a contest.

Receiver of Partnership and for Tenants in Common.

Independent of statutory authority, a court of equity may appoint a receiver of a partnership; but the jurisdiction is exercised with great caution, and only in cases where it is necessary for the preservation of the rights and interests of all the parties to the partnership agreement. When it appears that a dissolution must be declared, "it follows very much as a matter of course that a receiver must be appointed." [5] This is especially so if, after dissolution, the parties cannot agree among themselves as to the disposition and control of the partnership property.[6] And after a dissolution of the firm, whether by mutual agreement or by death of one of its members, a receiver will be appointed where it appears that the parties in possession are misconducting

clearly proved; (5) that, unless the necessity be of the most stringent character, the court will not appoint a receiver until the defendant is first heard in response to the application.

§ 327. [1] Hicks v. Hicks, 3 Atk. 273.

[2] Butler v. Freeman, 1 Amb. 303; In re Cormicks, 2 Ir. R. Eq. 264.

[3] Ex parte Warren, 10 Ves. 621. Also, after the lunatic's death, a receiver will be appointed until a determination of the question as to who is entitled to the estate. In re Colvin, 3 Md. Ch. 388.

[4] King v. King, 6 Ves. 172; Atkinson v. Henshaw, 2 Ves. & B. 85.

[5] Lord Eldon in Goodman v. Whitcomb, 1 Jac & W. 589; McElvey v. Lewis, 76 N. Y. 373, 375.

[6] Jordan v. Miller, 75 Va. 442; New v. Wright, 44 Miss. 202; Allen v. Hawley, 6 Fla. 164, 63 Am. Dec. 198; Barnes v. Jones, 91 Ind. 161. Wrongful exclusion of one partner from management of a firm is ground for the appointment of a receiver. Katz v. Brewington, 71 Md. 79, 20 Atl. 139.

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themselves, or that the assets are in peril.[7] But a receiver will not be appointed upon the termination of a partnership contract, upon the application of one of the partners, because of a disagreement as to the meaning of the terms of the contract, in the absence of misconduct or mismanagement on the part of the other.[8]

As between tenants in common, the general rule is that a receiver will not be appointed unless one excludes the other from the possession and enjoyment of the property;[9] but, as between tenants in common of mining property, a more liberal rule prevails.[10]

Receivers of Decedent's Estate and Estates in Trust.

A court of equity may, if a proper case be shown, dispossess an executor, administrator, or trustee, and appoint a receiver of the decedent's estate or the trust property. If waste or improper use of funds or misconduct can be shown against an executor or administrator, the court may take the property out of his hands; but the court will not act on slight grounds.[11] Where there is a contest over the probate of a will, and the legal title or the rights of the parties interested are endangered, a receiver may be appointed.[12] But receivers will not be appointed in suits for the administration of estates unless the executor or administrator has been guilty of misconduct, waste, misuse of assets, and there is real danger of loss;[13] nor will a court of equity interfere by the appointment of a receiver with the possession of a

[7] Word v. Word, 90 Ala. 81, 7 South. 412; Bufkin v. Boyce, 104 Ind. 53, 3 N. E. 615.

[8] Bufkin v. Boyce, 104 Ind. 53, 3 N. E. 615.

[9] 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.

[10] Jefferys v. Smith, 1 Jac. & W. 298; Parker v. Parker, 82 N. C. 165.

[11] Beverley v. Brooke, 4 Grat. (Va.) 208; Smith v. Smith, 2 Younge & C. 361; Haines v. Carpenter, 1 Woods, 265, 266, Fed. Cas. No. 5,905; Hill v. Arnold, 79 Ga. 367, 4 S. E. 751.

[12] Schlecht's Appeal, 60 Pa. 172; In re Colvin, 3 Md. Ch. 278.

[13] Anon., 12 Ves. 4; Stairley v. Rabe, McMul. Eq. (S. C.) 22; Price's Ex'x v. Price's Ex'rs, 23 N. J. Eq. 428; Calhoun v. King, 5 Ala. 525; Hagenbeck v. Arena Co. (C. C.) 59 Fed. 14.

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trustee, unless it is clearly shown that the trust estate is endangered by his misconduct.[14]

Receivers for Mortgagees and Corporate Bondholders.

In England, and in 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;[15] 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.[16] For similar reasons,—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;[17] 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 the litigation is finally terminated, being subject to all the responsibilities of a common carrier.[18] 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.[19] 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 man-

[14] Evans v. Coventry, 5 De Gex, M. & G. 911, 916; Richards v. Barrett, 5 Ill. App. 510; Cohen v. Morris, 70 Ga. 313.

[15] Berney v. Sewell, 1 Jac. & W. 648; Sturch v. Young, 5 Beav. 557; Williams v. Robinson, 16 Conn. 517.

[16] Lowell v. Doe, 44 Minn. 144, 46 N. W. 297; Hollenbeck v. Donnell, 94 N. Y. 342; United States Trust Co. v. Railroad Co., 101 N. Y. 483, 5 N. E. 316; Schreiber v. Carey, 48 Wis. 208, 4 N. W. 124.

[17] Mercantile Trust Co. v. Railroad Co. (C. C.) 36 Fed. 221; Pennsylvania Co. for Insurance on Lives v. Trust Co., 2 U. S. App. 606, 5 C. C. A. 53, 55 Fed. 131; High, Rec. § 376 et seq.

[18] Beach, Rec. § 359.

[19] Kennedy v. Railroad Co., 5 Dill. 519, Fed. Cas. No. 7,707; Jerome v. McCarter, 94 U. S. 734, 738, 24 L. Ed. 136 (canal); Bank of Montreal v. Railroad Co., 48 Iowa, 518.

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aging 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.[20] 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.[21]

Receivers of Corporations.

The court of chancery never assumed jurisdiction in cases involving a forfeiture of corporate franchises until authorized by statute. It declined, unless authorized by statute, to sequestrate corporate property through the medium of a receiver, or to dissolve corporate bodies, or to restrain the usurpation of corporate powers.[22] The jurisdiction exercised by courts of equity to appoint receivers of corporations is, therefore, wholly statutory. In most of the states of the Union, however, this jurisdiction has been conferred by statute upon such courts; but they are very cautious in its ex-

[20] Hale v. Railroad Co., 60 N. H. 333; Miltenberger v. Railway Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117; Central Trust Co. v. Railway Co. (C. C.) 46 Fed. 26; Kneeland v. Trust Co. 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379. 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. Machine Works, 140 U. S. 592, 11 Sup. Ct. 857, 35 L. Ed. 543; Kneeland v. Luce, 141 U. S. 491, 12 Sup. Ct. 32, 35 L. Ed. 830. 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.

[21] Credit Co. of London v. Railroad Co. (C. C.) 15 Fed. 46; Union Trust Co. v. Railway Co., 117 U. S. 437, 6 Sup. Ct. 809, 29 L. Ed. 963.

[22] Decker v. Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; Folger v. Insurance Co., 99 Mass. 267, 96 Am. Dec. 747.

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ercise,[23] and the receiver is regarded in the light of a trustee for the creditors and stockholders.[24]

Receivers in Aid of Judgment Creditors.

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 an execution at law.[25] The receiver in such 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.[26] In many of the states statutes exist which provide for the examination of the judgment debtor concerning his property after an execution has been returned unsatisfied, and authorize the appointment of a receiver of property disclosed upon such examination. Such proceedings are known as proceedings supplementary to execution, and have, to a greater or less extent, superseded judgment creditors' bills in equity.

[23] High, Rec. § 289; Oakley v. President, etc., 2 N. J. Eq. 173.

[24] High, Rec. §§ 314, 315; Curtis v. Leavitt, 15 N. Y. 44; Attorney General v. Insurance Co., 77 N. Y. 272.

[25] Curling v. Marquis Townshend, 19 Ves. 632; Bloodgood v. Clark, 4 Paige (N. Y.) 574; Osborn v. Heyer, 2 Paige (N. Y.) 342; Johnson v. Tucker, 2 Tenn. Ch. 398.

[26] Green v. Bostwick, 1 Sandf. Ch. (N. Y.) 185; Porter v. Williams, 9 N. Y. 142, 59 Am. Dec. 519; Hamlin v. Wright, 23 Wis. 491.

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