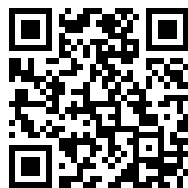


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ON

# EQUITY JURISPRUDENCE,

AS ADMINISTERED IN

THE UNITED STATES OF AMERICA;

ADAPTED FOR ALL THE STATES,

AND

TO THE UNION OF LEGAL AND EQUITABLE REMEDIES

UNDER THE REFORMED PROCEDURE.

By JOHN NORTON POMEROY, LL.D.

STUDENTS' EDITION,

BY

JOHN NORTON POMEROY, JR., A.M., LL.B.

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TO

STEPHEN J. FIELD, LL.D.,

ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT  
OF THE UNITED STATES:

NOT ONLY AS A TRIBUTE TO HIS EMINENT PUBLIC SERVICES IN THE MOST AUGUST  
TRIBUNAL OF ANY MODERN NATION, BUT ALSO AS AN ACKNOWLEDG-  
MENT OF HIS PRIVATE FRIENDSHIP, AND OF THE AUTHOR'S  
ESTEEM AND RESPECT,

THIS WORK IS DEDICATED.



## PREFACE TO STUDENTS' EDITION.

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THE purpose of the editor in preparing the present abridgment of his father's work, for the use of students in law schools, appears to call for little defense or explanation. Between one-third and two-fifths of the text has been omitted, and the greater part of the notes; all except such as seemed essential to a clear understanding of the text. No part of the text has been re-written. By the sacrifice of some details of comparatively little importance to the American student (as in the chapters on Election, Satisfaction, and Performance, §§ 461-590), of matters peculiar to the jurisdiction in individual states (as in §§ 299-352), and by the free use of cross references (e. g., see §§ 70-88, 151-169), it has been found possible to preserve intact those full discussions of the foundation and rationale of the various equitable doctrines which are the chief excellence of the work. The index (with some regret) has been greatly shortened; on the other hand, the chapter analyses have been retained without omissions, for the purpose of showing the author's full scheme of treatment of the various subjects.

The editor's notes consist, in the main, of the citation of cases—seldom more than three to each point of the text,—selected with reference to the needs of the elementary student and the facilities of the average law school library. They comprise (1) the cases chiefly relied upon and quoted by the author; (2) those in the case books on equity of Ames, Keener, Scott, Hutchins and Bunker, Shepherd, Lewis, in Ames's Trusts and Kirchwey's Mortgages; (3) other cases chosen by reason of their historical importance, clearness and fullness of discussion, and (a rare virtue) simplicity of facts. No attempt has been made, by use of brackets or other cumbersome devices, to distinguish between the author's and the editor's notes.

A number of topics of importance have been annotated with more fullness; e. g., Multiplicity of Suits (§§ 261, 264, 267); Jurisdiction of Federal Courts (§§ 292 et seq.); Executory Contract for Sale of Land (§ 368); Laches (§ 419); Equity acts in personam (§§ 428,

429); various matters in Trusts; Covenant creating an Equitable Servitude (§ 1295); the various Equitable Remedies, especially Receivers (§§ 1334, 1336); Injunctions; Reformation and Cancellation (§§ 1376, 1377); Cloud on Title (§ 1399); and Specific Performance. The chapters on Injunction and Specific Performance have been materially enlarged, and in these instances it seemed expedient to insert a few new paragraphs in the text.

In few American law schools, it is believed, does the study of Equity receive an allotment of time proportioned either to its practical importance or its educational value. No apology, perhaps, is needed for the fact that the length of this edition is somewhat greater than that of the average student's manual. It is sufficient to point to the experience of instructors who have used the work, that the well known clearness, ease, and fluency of Prof. Pomeroy's literary style render the student's progress comparatively rapid. A number of the topics, moreover, are customarily treated in other parts of the curriculum.

J. N. P. Jr.

September, 1907.

## PREFACE.

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THE author herewith submits to the legal profession a text-book which treats, in a somewhat comprehensive manner, of the equitable jurisdiction as it is now held by the national and state tribunals, and of the equitable jurisprudence as it is now administered by the courts of the United States, and of all those states in which the principles of equity, originally formulated by the English Court of Chancery, have been adopted and incorporated into the municipal law. It is proper that he should, in a few words, explain the motives which led to the preparation of such a work, and describe the plan which he has pursued in its composition. . . . .

It is of vital importance, therefore, that a treatise on equity for the use of the American bar should be adapted to the existing condition of jurisprudence throughout so large a part of the United States. It should be based upon, and should present in the clearest light, those principles which lie at the foundation of equity, and which are the sources of its doctrines and rules. In this respect, the plan of the present work was deliberately chosen, and has been steadily pursued, even when it has led to amplifications which might, perhaps, be regarded by some readers as unnecessary. It has been my constant endeavor to present the great underlying principles which sustain the whole superstructure of equity, and to discuss, explain, and illustrate them in the most complete manner. Some of these principles are so comprehensive and fruitful, that one who has grasped them in their fullness of conception has already mastered the system of equity; all else is the mere application of these grand truths to particular circumstances. .

Such a treatise, designed for the American profession, if it would at all meet and satisfy the needs of the bench and bar, must also be based upon and adapted to the equitable jurisdiction which is actually possessed by the state and national courts, and

the equitable jurisprudence which is actually administered by them. It must recognize the existing condition, both of law and equity, the limitations upon the chancery jurisdiction resulting from varying statutes, and the alterations made by American legislation, institutions, and social habits. Many departments of equity, many doctrines and modes of applying the jurisdiction which were important at an earlier day, and are perhaps still prominent in England, have become practically obsolete in this country; while others have risen in consequence, and are constantly occupying the attention of the courts. It has been my purpose and endeavor to discuss and describe the equity jurisprudence as viewed in this light, and to present the actual system which is now administered by the courts of the United States and of all the states. As an illustration, I have attempted to ascertain and determine the amount of jurisdiction held by the different state tribunals, as limited and defined by statutes, and established by judicial interpretation; and have not confined the treatment of this subject to a mere account of the general jurisdiction possessed by the English Court of Chancery. It is true that the fundamental principles are the same as those which were developed through the past centuries by the English chancery; but the application of these principles, and the particular rules which have been deduced from them, have been shaped and determined by the modern American national life, and have received the impress of the American national character. It has been my design, therefore, to furnish to the legal profession a treatise which should deal with the equity jurisdiction and jurisprudence as they now are throughout the United States; with their statutory modifications and limitations, and under their different types and forms in various groups of states; and thus to prepare a work which would be useful to the bench and bar in all parts of our country. During its composition I have constantly had before me a high ideal. The difficulty in carrying out this conception has been very great; the labor which it has required has been enormous. That I may have fallen short of this ideal in all its completeness and perfection I am only too conscious; its full realization was perhaps impossible. If the book shall be of any help to the courts and the profession in administering equitable doctrines and rules; if it shall be of any assistance to students in disclosing the grand prin-

ciples of equity; if it shall to any extent maintain the equitable jurisprudence in its true position as a constituent part of the municipal law,—then the time and labor spent in its composition will be amply repaid.

The internal plan, the system of classification and arrangement, the modes of treatment, and especially the reasons for departing from the order and methods which have usually been followed by text-writers, are described at large in the third, fourth and fifth sections of the Introductory Chapter. To that chapter I would respectfully refer any reader who may at the outset desire a full explanation of these matters, which are so important to a full understanding of an author's purposes, and to a correct appreciation of his work. The book is submitted to the profession with the hope that it may be of some aid to them in their judicial and forensic duties, and may accomplish something for the promotion of justice, righteousness, and equity in the legal and business transactions and relations of society.

J. N. P.

HASTINGS COLLEGE OF THE LAW.  
SAN FRANCISCO, MAY, 1881.



# TABLE OF CONTENTS.

## INTRODUCTORY CHAPTER.

- Section I. The origin of equity jurisdiction and jurisprudence, §§ 1-42.
- Section II. The nature of equity, §§ 43-67.
- Section III. The present relation of equity with the law, §§ 68-88.
- Section IV. The constituent parts of equity, §§ 89-117.
- Section V. The principles of classification, §§ 118-128.

## PART FIRST.

### THE NATURE AND EXTENT OF EQUITY JURISDICTION.

#### CHAPTER FIRST.

##### THE GENERAL DOCTRINE CONCERNING THE JURISDICTION.

- Section I. Fundamental principles and divisions, §§ 129-145.
- Section II. The exclusive jurisdiction, §§ 146-172.
- Section III. The concurrent jurisdiction, §§ 173-189.
- Section IV. The auxiliary jurisdiction, §§ 190-215.

#### CHAPTER SECOND.

##### GENERAL RULES FOR THE GOVERNMENT OF THE JURISDICTION.

- Section I. Inadequacy of legal remedies, §§ 216-222.
- Section II. Discovery as a source or occasion of jurisdiction, §§ 223-230.
- Section III. The doctrine that jurisdiction existing over some portion or incident extends to and embraces the whole subject-matter or controversy, §§ 231-242.
- Section IV. The doctrine that the jurisdiction exists in order to prevent a multiplicity of suits, §§ 243-275.
- Section V. The doctrine that the jurisdiction once existing is not lost because the courts of law have subsequently acquired a like authority, §§ 276-281.

#### CHAPTER THIRD.

##### THE JURISDICTION AS HELD BY THE COURTS OF THE SEVERAL STATES, AND BY THE COURTS OF THE UNITED STATES.

- Section I. Abstract of legislative provisions, §§ 282-288.
- Section II. The jurisdiction as established by judicial interpretation, §§ 289-358.

## PART SECOND.

## THE MAXIMS AND GENERAL PRINCIPLES OF EQUITY JURISPRUDENCE, AND THE EVENTS WHICH ARE OCCASIONS OF EQUITABLE PRIMARY OR REMEDIAL RIGHTS.

Preliminary Section, §§ 359-362.

## CHAPTER FIRST.

## THE FUNDAMENTAL PRINCIPLES OR MAXIMS OF EQUITY.

- Section I. Equity regards that as done which ought to be done, §§ 363-377.  
 Section II. Equity looks to the intent rather than to the form, §§ 378-384.  
 Section III. He who seeks equity must do equity, §§ 385-396.  
 Section IV. He who comes into equity must come with clean hands, §§ 397-404.  
 Section V. Equality is equity, §§ 405-412.  
 Section VI. Where there are equal equities, the first in order of time shall prevail, §§ 413-415.  
 Section VII. Where there is equal equity the law must prevail, §§ 416, 417.  
 Section VIII. Equity aids the vigilant, not those who slumber on their rights, §§ 418, 419.  
 Section IX. Equity imputes an intention to fulfill an obligation, §§ 420-422.  
 Section X. Equity will not suffer a wrong without a remedy, §§ 423, 424.  
 Section XI. Equity follows the law, §§ 425-427.  
 Section XII. Equity acts in personam and not in rem, §§ 428-431.

## CHAPTER SECOND.

## CERTAIN DISTINCTIVE DOCTRINES OF EQUITY JURISPRUDENCE.

- Section I. Concerning penalties and forfeitures, §§ 432-460.  
 Section II. Concerning election, §§ 461-519.  
 Section III. Concerning satisfaction, §§ 520-577.  
 Section IV. Concerning performance, §§ 578-590.  
 Section V. Concerning notice, §§ 591-676.  
 Section VI. Concerning priorities, §§ 677-734.  
 Section VII. Concerning bona fide purchase for a valuable consideration and without notice, §§ 735-785.  
 Section VIII. Concerning merger, §§ 786-800.  
 Section IX. Concerning equitable estoppel, §§ 801-821.

## CHAPTER THIRD.

## CERTAIN FACTS AND EVENTS WHICH ARE THE OCCASIONS OF EQUITABLE PRIMARY OR REMEDIAL RIGHTS.

- Section I. Accident, §§ 823-837.  
 Section II. Mistake, §§ 838-871.  
 Section III. Actual fraud, §§ 872-921.  
 Section IV. Constructive fraud, §§ 922-974.

## PART THIRD.

## THE EQUITABLE ESTATES, INTERESTS, AND PRIMARY RIGHTS RECOGNIZED AND PROTECTED BY THE EQUITY JURISPRUDENCE.

Preliminary paragraph, § 975.

## CHAPTER FIRST.

## TRUSTS.

- Section I. Origin of uses and trusts, §§ 976-986.  
 Section II. Express private trusts, §§ 987-1005.  
 Section III. How express trusts are created, §§ 1006-1017.  
 Section IV. Public or charitable trusts, §§ 1018-1029.  
 Section V. Trusts arising by operation of law—resulting and constructive trusts, §§ 1030-1058.  
 Section VI. Powers, duties, and liabilities of express trustees, §§ 1059-1087.  
 Section VII. Corporation directors and others quasi trustees, §§ 1088-1097.

## CHAPTER SECOND.

## ESTATES AND INTERESTS OF MARRIED WOMEN.

- Section I. The separate estate of married women, §§ 1098-1113.  
 Section II. The wife's equity to a settlement, §§ 1114-1120.  
 Section III. The contracts of married women, §§ 1121-1126.

## CHAPTER THIRD.

## ESTATES AND INTERESTS ARISING FROM A SUCCESSION TO A DECEDENT.

- Section I. Legacies, §§ 1127-1134.  
 Section II. Donations causa mortis, §§ 1146-1151.  
 Section III. Administration of estates, §§ 1152-1154.  
 Section IV. Construction and enforcement of wills, §§ 1155-1158.

## CHAPTER FOURTH.

## EQUITABLE ESTATES ARISING FROM CONVERSION.

- Section I. The conversion of real estate into personal, and of personal estate into real, §§ 1159-1168.  
 Section II. Resulting trust upon a failure of the purposes of the conversion, §§ 1169-1174.  
 Section III. Reconversion, §§ 1175-1178.

## CHAPTER FIFTH.

## MORTGAGES OF LAND.

- Section I. The original or English doctrine, §§ 1179-1185.  
 Section II. The American doctrine, §§ 1186-1191.  
 Section III. Various forms and kinds of mortgage, §§ 1192-1203.  
 Section IV. Interests, rights, and liabilities of the mortgagor and of the mortgagee, §§ 1204-1228.

CHAPTER SIXTH.

Mortgages of personal property and pledges, §§ 1229-1232.

CHAPTER SEVENTH.

EQUITABLE LIENS.

- Section I. Their general nature, §§ 1233, 1234.
- Section II. Arising from express contract, §§ 1235-1237.
- Section III. Arising from implied contracts, §§ 1238-1243.
- Section IV. Arising from charges by will or by deed, §§ 1244-1248.
- Section V. The grantor's lien, on conveyance, §§ 1249-1259.
- Section VI. The vendor's lien and the vendee's lien, on contract for sale and purchase, §§ 1260-1263.
- Section VII. Arising from a deposit of title deeds, §§ 1264-1267.
- Section VIII. Various statutory liens, §§ 1268, 1269.

CHAPTER EIGHTH.

ESTATES AND INTERESTS ARISING FROM ASSIGNMENTS.

- Section I. Assignment of things in action, §§ 1270-1279.
- Section II. Equitable assignment of a fund by order or otherwise, §§ 1280-1284.
- Section III. Assignment of possibilities, expectancies, and property to be acquired in future, §§ 1285-1291.

CHAPTER NINTH.

CONTRACTS IN EQUITY.

- Section I. General doctrine concerning contracts, §§ 1292-1297.
- Section II. Equitable debts, §§ 1298-1302.

CHAPTER TENTH.

PERSONS NOT SUI JURIS.

- Section I. Infants, §§ 1303-1310.
- Section II. Persons of unsound mind, §§ 1311-1314

PART FOURTH.

THE REMEDIES AND REMEDIAL RIGHTS WHICH ARE CONFERRED BY THE EQUITY JURISPRUDENCE.

Preliminary section, §§ 1315-1318.

FIRST GROUP.

REMEDIES PURELY ANCILLARY AND PROVISIONAL.

CHAPTER FIRST.

Interpleader, §§ 1319-1329.

CHAPTER SECOND.

Receivers, §§ 1330-1336.

SECOND GROUP.

REMEDIES PURELY PREVENTIVE.

CHAPTER FIRST.

INJUNCTIONS.

- Section I. To protect or restrain the violation of obligations and rights of property or of contract, either legal or equitable, §§ 1337-1345.
- Section II. To prevent or restrain the commission of torts, §§ 1346-1358.
- Section III. Mandatory injunctions, § 1359.
- Section IV. To restrain actions or judgments at law, §§ 1360-1365.

THIRD GROUP.

REMEDIES WHICH INDIRECTLY ESTABLISH OR PROTECT INTERESTS AND PRIMARY RIGHTS, EITHER LEGAL OR EQUITABLE.

CHAPTER FIRST.

Reformation and cancellation, §§ 1375-1377.

FOURTH GROUP.

REMEDIES BY WHICH ESTATES, INTERESTS, AND PRIMARY RIGHTS, EITHER LEGAL OR EQUITABLE, ARE DIRECTLY DECLARED, ESTABLISHED, OR RECOVERED, OR THE ENJOYMENT THEREOF FULLY RESTORED.

CHAPTER FIRST.

Suits by which purely legal estates are established, and the enjoyment thereof recovered: namely, assignment of dower; establishment of disputed boundaries; partition of land, and of personal property, §§ 1378-1392.

CHAPTER SECOND.

Suits by which some general right, either legal or equitable, is established. Bills of peace, and bills quia timet; quieting title, §§ 1393, 1394.

CHAPTER THIRD.

Suits by which some particular estate, interest, or right, either legal or equitable, is established. Statutory suit to quiet title; suit to remove a cloud from title, §§ 1395-1399.

FIFTH GROUP.

REMEDIES BY WHICH EQUITABLE OBLIGATIONS ARE SPECIFICALLY AND DIRECTLY ENFORCED.

CHAPTER FIRST.

Specific performance of contracts, §§ 1400-1410.

CHAPTER SECOND.

Specific enforcement of obligations arising from trusts and fiduciary relations, §§ 1411, 1412.

SIXTH GROUP.

REMEDIES IN WHICH THE FINAL RELIEF IS PECUNIARY, BUT IS OBTAINED BY THE ENFORCEMENT OF A LIEN OR CHARGE UPON SOME SPECIFIC PROPERTY OR FUND.

CHAPTER FIRST.

Foreclosure suits; marshaling securities; creditors' suits, §§ 1413-1415.

SEVENTH GROUP.

REMEDIES IN WHICH THE FINAL RELIEF IS WHOLLY PECUNIARY, AND IS OBTAINED IN THE FORM OF A GENERAL PECUNIARY RECOVERY.

CHAPTER FIRST.

Suits for contribution, exoneration, and subrogation, §§ 1416-1419.

CHAPTER SECOND.

Suits for an accounting, §§ 1420, 1421.

A TREATISE  
ON  
EQUITY JURISPRUDENCE.



TREATISE  
ON  
EQUITY JURISPRUDENCE

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INTRODUCTORY CHAPTER

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SECTION I.

THE ORIGIN OF EQUITY JURISDICTION AND JURISPRUDENCE.

ANALYSIS.

- § 1. Object of this Introduction.
- §§ 2-9. *Aequitas* in the Roman Law.
- §§ 10-42. Origin of equity in the English Law.
- §§ 10-13. Primitive condition of the law and the courts.
- §§ 14, 15. Early influence of the Roman Law.
- §§ 16-20. Causes which made a court of equity necessary.
- §§ 21-23. The earliest common-law actions and procedure.
  - § 24. Statute of Edward I. concerning new writs.
- §§ 25-29. Limited results of this legislation.
- §§ 30-42. Commencement and progress of the chancery jurisdiction.
  - § 31. Original powers of the King's Council.
  - § 32. Original common-law jurisdiction of the Chancellor.
- §§ 33-35. Jurisdiction of grace transferred to the Chancellor; Statute 24 Edward III.
- §§ 36-39. Development of the equitable jurisdiction.
  - § 40. Abolition of the court in England and in many American states.
- §§ 41, 42. Equity jurisdiction in other American states.

**§ 1. Object of this Introduction.**—It is not my purpose to attempt a complete and detailed history of equity as it exists in England and in the United States. That work has already been done by Mr. Spence, in his *Equitable Jurisdiction of the Court of Chancery*.<sup>1</sup> Some general account, however, of the origin of the equitable jurisdiction, of the sources from which the principles and doctrines

<sup>1</sup> A shorter and more recent work which may be read with profit by the elementary student, is Kerly's *Historical Sketch of the Equity Jurisdiction of the Court of Chancery*. Some extracts from this and other authors, relating to the growth and development of the equity jurisdiction, are collected in 1 Scott, 1-30.

of the equity jurisprudence took their rise, and of the causes which led to the establishment of the Court of Chancery, with its modes of procedure separate and distinct from the common-law tribunals, with their prescribed and rigid forms of action, is absolutely essential to an accurate conception of the true nature and functions of equity as it exists at the present day. I shall therefore preface this introductory chapter with a short historical sketch, exhibiting the system in its beginnings, and describing the early movements of that progress through which its principles have been developed into a vast body of doctrines and rules which constitute a most important department of the municipal law.

### § 2. *Aequitas* in the Roman Law.

§ 8. In their work of improving the primitive *jus civile*, the magistrates who issued edicts (who possessed the *jus edicendi*), and the juriconsults who furnished authoritative opinions (*responsa*) to aid the praetors (those who possessed the *jus respondendi*), obtained their material from two sources, namely: At first, from what they termed the *jus gentium*, the law of nations, meaning thereby those rules of law which they found existing alike in the legal systems of all the peoples with which Rome came into contact, and which they conceived to have a certain universal sanction arising from principles common to human nature; and at a later day, from the Stoic theory of morality, which they called *lex naturae*, the law of nature. The doctrines of this *jus gentium* and of this *lex naturae* were often identical, and hence arose the conception, generally prevalent among the juridical writers of the empire, that the "natural law" (*lex naturae*) and the "law of nations" (*jus gentium*) were one and the same; or in other words, that the doctrines which were found common to all national systems were dictated by and a part of this natural law. The particular rules of the Roman jurisprudence derived from this morality, called the law of nature, were termed "*aequitas*," from *aequum*, because they were supposed to be impartial in their operation, applying to all persons alike. The *lex naturae* was assumed to be the governing force of the world, and was regarded by the magistrates and jurists as having an absolute authority. They felt themselves, therefore, under an imperative obligation to bring the jurisprudence into harmony with this all-pervading morality, and to allow such actions and make such decisions that no moral rule should be violated. Whenever an adherence to the old *jus civile* would do a moral wrong, and produce a result inequitable (*inaequum*), the praetor, conforming his edict or his decision to the law of nature, provided a remedy by means of an appropriate action or defense. Gradually the cases, as well as the modes in which he

would thus interfere, grew more and more common and certain, and thus a body of moral principles was introduced into the Roman law, which constituted equity (*aequitas*).<sup>1</sup> This resulting equity was not a separate department; it penetrated the entire jurisprudence, displacing what of the ancient system was arbitrary and unjust, and bringing the whole into an accordance with the prevailing notions of morality. In its original sense, *aequitas*, *aequum*, conveyed the conception of universality, and therefore of impartiality, a having regard for the interests of *all* whose interests ought to be regarded, as contrasted with the having an exclusive or partial regard for the interests of *some*, which was the essential character of the old *jus civile*. At a later period, and especially after the influence of Christianity had been felt, the signification of *aequitas* became enlarged, and was made to embrace our modern conceptions of right, duty, justice, and morality.

§ 9. There are certainly many striking analogies between the growth of equity in the Roman and in the English law; the same causes operated to make it necessary, the same methods were up to a certain point pursued, and in principle the same results were reached. The differences, however, are no less remarkable. No separate tribunal or department was made necessary in the Roman jurisprudence, because the ordinary magistrates were willing to do what the early English common-law judges utterly refused to perform; that is, to promote and control the entire legal development as the needs of an advancing civilization demanded. While these common-law judges resisted every innovation upon their established forms, and shut up every way for the legal growth, the Roman magistrates were the leaders in the work of reform, and constantly anticipated the wants of the community. The English judges made a new court and a separate department indispensable; the Roman praetors accomplished every reform by means of their own jurisdiction, and preserved in the jurisprudence a unity and homogeneity which the English and American law lacks, and which it can perhaps never acquire. Both these resemblances and these contrasts are exhibited in the following paragraphs, which describe the introduction of equity into the English system of jurisprudence.

**§ 10. Origin of Equity in the English Law—Primitive Condition of the Law and the Courts.**

§ 12. . . . The office of Chancellor was very ancient. It had existed before the conquest, and was continued by William. Under his successors, the Chancellor soon became the most important functionary of the King's government, the personal adviser and repre-

<sup>1</sup> See Sandar's *Institutes of Justinian*. pp. 13, 14; Phillimore's *Private Law among the Romans*, pp. 21, 22; 2 Austin on *Jurisprudence*, pp. 240-287.

sentative of the crown, but, in the very earliest times, without, as it seems, any purely judicial powers and duties annexed to the position. How these functions were acquired, it is the main purpose of this historical sketch to describe. The three superior law courts<sup>1</sup> whose origin has thus been stated have remained, with some statutory modification, through the succeeding centuries, until, by the Judicature Act of 1873, which went into operation November 2, 1875, they and the Court of Chancery, and certain other courts, were abolished as distinct tribunals, and were consolidated into one "Supreme Court of Judicature."

§ 13. The local folk courts left in existence at the conquest, and even the itinerant justices and the central King's Court, for a while continued to administer a law which was largely customary. The progress of society, the increase in importance of property rights, the artificial system which we call feudalism, with its mass of arbitrary rules and usages, all demanded and rapidly produced a more complete, certain, and authoritative jurisprudence for the whole realm than the existing popular customs, however ancient and widely observed. This work of building up a positive jurisprudence upon the foundation of the Saxon customs and feudal usages, this initial activity in creating the common law of England, was done, not by parliamentary legislation nor by royal decrees, but by the justices in their decisions of civil and criminal causes. The law which had been chiefly customary and therefore unwritten, preserved by tradition, *lex non scripta*, was changed in its form by being embodied in a series of judicial precedents preserved in the records of the courts, or published in the books of reports, and thus it became, so far as these precedents expressed its principles and rules, a written law, *lex scripta*.<sup>1</sup>

#### § 14. Early Influences of the Roman Law.

§ 15. Had it not been for several powerful causes, partly growing out of the English national character, or rather, the character of the Norman kings and barons who ruled over England, and partly arising from external events connected with the government itself, it is probable that this work of assimilation and of building up the common law with materials taken from the never-failing quarries of the Roman legislation, would have continued throughout its en-

<sup>1</sup> Viz., the King's Bench, the Common Pleas, and the Exchequer.

<sup>2</sup> The division of "written" and "unwritten" law made by Blackstone, and writers who have copied his notions, which makes the "written" identical with the statutory, and describes the entire portion embodied in judicial decisions as "unwritten," is simply absurd. This definition is another instance of Blackstone's mistaking the meaning of Roman law terms. The *lex non scripta* is customary, traditional, preserved in the popular memory; a law expressed in judicial records or in statutes is written.

ture formative period. As the *corpus juris civilis* contains the results of the labors of the great philosophic jurists who brought the jurisprudence of Rome to its highest point of excellence, and as its rules, so far as they are concerned with private rights and relations, are based upon principles of justice and equity, it is also certain that if this work of assimilation had thus gone on, the common law of England would from an early day have been molded into the likeness of its original. Through the decisions of its own courts the principles of justice and equity would everywhere have been adopted, and would have appeared throughout the entire structure. All this would have been accomplished in the ordinary course of development, by the ordinary common-law tribunals, without any necessity for the creation of a separate court which should be charged with the special function of administering these principles of right, justice, and equity. The growth of the English law would have been identical in its external form with that of Rome; it would have proceeded in an orderly, unbroken manner through the instrumentality of the single species of courts, and the present double nature of the national jurisprudence—the two great departments of “Law” and “Equity”—would have been obviated. This result, however, was prevented by several potent causes which checked the progress of the law towards equity, narrowed its development into an arbitrary and rigid form, with little regard for abstract right, and made it necessary that a new jurisdiction should be erected to administer a separate system more in accordance with natural justice and the rules of a Christian morality. These causes I proceed to state.

**§ 16. Causes Which Made a Court of Equity Necessary.**—The one which was perhaps the source and explanation of all the others consisted in the rigid character, external and internal, which the common law soon assumed after it began to be embodied in judicial precedents, and the unreasoning respect shown by the judges for these decisions *merely as precedents*. There was, of course, a time, before the character of the law as a *lex scripta* became well established, when this rigidity and inflexibility was not exhibited. The history of civilized jurisprudence can show nothing of the same kind comparable with the blind conservatism with which the common-law judges were accustomed to regard the rules and doctrines which had once been formulated by a precedent, and the stubborn resistance which they interposed to any departure from or change in either the spirit or the form of the law which had been thus established. The most that was ever allowed was the extension of a doctrine to facts and circumstances presenting some points of difference from those which had already formed the subject-

matter of adjudication, but in which this difference was not so great as to require a substantial modification of the principle. The frequent occurrence of cases in which the rules of the law produced manifest injustice, and of cases to which the legal principles as settled by the precedents could not apply, and the unwillingness of the common-law judges to allow any modification of the doctrines once established by their prior decisions, furnished both the occasion and the necessity for another tribunal, which should adopt different methods and exhibit different tendencies.<sup>1</sup>

§ 17. When the same difficulty of rigidity, arbitrariness, and non-adaptation to the needs of society began to be severely felt in the administration of the law at Rome, the magistrates, as I have before shown, supplied the remedy by means which they already possessed. The praetors constantly invented new actions and defenses, which preserved, however, a resemblance to the old; and at length they boldly freed the jurisprudence from the restraints of the ancient methods, and introduced the notion of *aequitas* by which the whole body of judicial legislation became in time reconstructed. All the process of development was completed without any violent or sudden change in the judicial institutions, and the Roman law thus preserved its unity and continuity. The English common-law judges, on the other hand, set themselves with an iron determination against any modification of the doctrines and rules once established by precedent, any relaxation of the settled methods which made the rights of suitors to depend upon the strictest observance of the most arbitrary and technical forms, any introduction of new principles which should bring the law as a whole into a complete harmony with justice and equity. I would not be understood as asserting that the conservatism of the courts was so absolute as to prevent any improvement or progress in the law from age to age. I only describe the general attitude and tendency during the period in which the court of chancery took its rise and for a long time thereafter. The improvement which an advancing civilization effected in the nation itself was to a partial extent reflected in the law. It is certain, however, beyond the possibility of dispute, that the English common law was always far behind the progress of the English people, and in very many particulars retained the impress of its primitive barbarism down to the present century. By the continental jurists contemporary with Coke, Lord

<sup>1</sup> 1 Spence's Eq. Jur., pp. 321, 322. The description of the text is not intended to apply to the entire history of the common law. Another spirit has animated its judges since the example set by Lord Mansfield, and its inherent power of development, when freed from the narrow and obstructive notions of the earlier judges, has been fully exhibited both in England and in the United States.

Hale, or Blackstone, it was regarded with mingled feelings of wonder and contempt as a barbarous code; and except in its provisions securing the personal and political rights of the individual, and in its antagonism to the slavish doctrine of the Roman jurisprudence, *Quod placuit principi legis vigorem habet*, it was a barbarous code. Parliamentary legislation occasionally interfered and effected a special reform; and the principles of equity as administered by the Court of Chancery reacted to a slight degree upon the law; but still the common-law judges as a body exhibited the blind conservatism which I have described down to a period wholly modern. With the partial exception of Lord Holt, whose masculine intellect sometimes broke away from the trammels,<sup>1</sup> Lord Mansfield was the first great English judge who consciously, and with systematic and persistent purpose, adopted the policy of the Roman praetors, endeavored to impart a new life and give a new direction to the growth of the common law, and by means of equitable principles in combination with its own methods to reform the law from within. As a reward for these innovations, Lord Mansfield was charged in his own day—and the accusation has been handed down as a part of judicial history—with ignorance of the English law. Although the work which Lord Mansfield began was interrupted by his narrow-minded successor, Lord Kenyon, it has been taken up and carried on in the same spirit by many of the able judges who have adorned the English bench within the present century, and by the state and national courts of this country, until the common law has now become a truly scientific and philosophical code.

§ 18. A second cause which prevented a development of the national jurisprudence in harmony with and by the aid of the equitable notions contained in the Roman codes, and which therefore tended to the creation of a separate court of chancery, was the fact that the rules concerning real property and, to a considerable extent, those concerning personal *status* and relations, were feudal in their origin and nature. . . .

§ 19. Although the feudal institutions in their integrity were undoubtedly an obstacle to the introduction of Roman law principles, and the development of one homogeneous jurisprudence for the English people, still the obstacle was not insuperable. The

<sup>1</sup> Among the recent English judges who have represented the ancient rather than the modern tendencies of the law, and who have exalted its rules of form, Baron Parke stands the foremost, and has actually obtained the reputation of a jurist, because he was able to discuss and state these arbitrary dogmas in a scientific manner, and to clothe them with some appearance of a philosophic system. But in no series of English reports are the rights of suitors made to depend upon a compliance with mere forms, and the decisions made to turn upon mere technicalities, more than in the volumes of Meeson and Welsby.

same institutions existed on the continent, and in Germany, especially, they have largely modified the law down to the time when the present system of codes was adopted. Notwithstanding this fact, the Roman law has entered as the principal element into the jurisprudence of every western continental nation, and through it the doctrines of equity have been everywhere accepted, not as constituting a separate department, but as pervading and influencing the whole.

§ 20. The third cause which I shall mention, and it was an exceedingly important one in its effects upon the jurisdiction of chancery, which had already become quite extensive, arose from the position and policy of the kings, the Parliament, and the nation towards the church of Rome. The English kings had maintained a long and bitter struggle with the Pope and his emissaries among the higher ecclesiastics to maintain the independence of the crown and of the Anglican branch of the church. In the reign of Edward III., the exactions of the Papal See became peculiarly hateful to the King and to the nation. Having the support of his Parliament, Edward refused payment of the tribute which had been demanded by the Pope, and measures were taken to prevent any further encroachments. A general hostility, or at least a sentiment of opposition, to the Papal court and to everything connected with it had sprung up and spread among all ranks of the laity. The Roman law fell under this common aversion. Partly from its name, partly because it was supported by the Papal See, both on account of its connection with the canon law, and on account of its doctrines favorable to absolutism, and partly because a knowledge of it prevailed most extensively among the ecclesiastics, so that it was popularly regarded as an instrument of the church, the Roman law, which had been treated with favor by Henry II., Henry III., and Edward I., and by the judges themselves in former reigns, became an object of general dislike, and even antipathy. In the reign of Henry III. the barons formally declared that they would not suffer the kingdom to be governed by the Roman law;<sup>1</sup> and the common-law judges prohibited it from being any longer cited in their courts. This action of the barons and judges was certainly a mistake, and it produced an opposite effect from the one intended. The Roman law, instead of being banished, was simply transferred

<sup>1</sup> *Quod noluerunt leges Angliae mutare, quae usque ad illud tempus usitatae fuerunt et approbatae.* The occasion upon which this memorable declaration was made, at the Parliament of Merton, A. D. 1236, was the attempt of the ecclesiastics to introduce the doctrine that illegitimate children are made legitimate by the subsequent marriage of their parents. This doctrine was peculiarly distasteful to the English barons, since it interfered with the feudal rules of inheritance.

to another court, which was not governed by common-law doctrines. As the law courts intentionally cut themselves off from all opportunity of borrowing equitable principles from this foreign source, the necessity arose for a separate tribunal, in which those principles could be recognized. It therefore followed, immediately upon this prohibition, that the hitherto narrow jurisdiction of the Court of Chancery was greatly increased, and extended over subject-matters which required an ample and constant use of Roman law doctrines. To the same cause was chiefly due the selection, which was really a necessity, of chancellors from among the ecclesiastics, during the period while the jurisdiction of the court was thus enlarged and established.<sup>2</sup>

**§ 21. The Earliest Common-law Actions and Procedure.**—The last cause which I shall mention, and practically the most immediate and efficient one in its operation to prevent any expansion of the common law, so as to obviate the necessity of a separate equitable jurisdiction, was the peculiar procedure which was established by the courts at a very early day, and to which they clung with a surprising tenacity. This procedure furnished a fixed number of “forms of action.” Every remedial right must be enforced through one of these forms; and if the facts of a particular case were such that neither of them was appropriate, the injured party was without any ordinary legal remedy, and his only mode of redress was by an application made directly to the King. The initial step in every action was a written document issued in the name of the King, called a writ, which was both the commencement and the foundation of all subsequent proceedings. This document gave a brief summary of the facts upon which the right of action was based, and contained certain technical formulas indicating what form of action was brought and what remedy was demanded. If it had been possible for suitors or the officers of the court to multiply these writs indefinitely, so as to meet all possible circumstances and social relations, there would have been no difficulty, and the procedure could have been expanded so as to embrace every variety of wrong and every species of remedial right which might subsequently arise in the course of the national development. But there was absolutely no such possibility, and herein was the essential vice of the system. The nature of these writs was fixed, and could not be substantially changed. A writ had been settled, not only for each of the different “forms of action,” but for the facts, circumstances, and events which could constitute the subject-matter of the particular actions embraced within each one of these several “forms of action.” The precedents of all the writs which had

<sup>2</sup> 1 Spence's Eq. Jur., p. 347.

been thus established were kept in an office connected with the chancery, called the *Registra Brevium*. Certain officers of the chancery were charged with the duty of issuing the writs to plaintiffs, and this they did by selecting and copying the one which agreed with the facts of the applicant's case. If no writ could be found in the collection which substantially corresponded with the facts constituting the ground of complaint, then the plaintiff could have no action. The chancery clerks could not draw up entirely new writs, nor alter the existing ones in any substantial manner; it is probable, however, that they assumed to make some slight changes, so as to accommodate the recitals to the facts of special cases, but this power could only be exercised within the narrowest limits. There were, however, certain kinds of facts connected with every cause of action, which might be varied. The statements in the writs were somewhat general in their terms, some applying to land, some to chattels, others to persons, debts, torts, and, of course, the particulars of quantity, size, value, time, place, amount of damage, and the like, were not material, and could be varied without limit. One other fact of the utmost importance remains to be mentioned. Although the chancery clerks decided in the first place upon the form and kind of writ in every case, and thus determined the species of action to be brought, this decision did not in the least protect or secure the plaintiff after he had commenced his action. When the action came before the common-law courts, the judges assumed and constantly exercised the power of determining the sufficiency of the writ; and if they held that it was not the proper one for the case, or that its recitals of facts or formulas were imperfect or mistaken, no attention was given to the prior decision of the chancery officials, the writ and action were dismissed, and the plaintiff thrown out of court.

§ 22. The ancient actions of the common law, prior to the statutory legislation hereafter mentioned, as described by Bracton, were of two general classes: 1. Those which concerned lands and all estates or interests therein; and 2. Those which concerned persons, chattels, contracts, and torts. The former class, the *Real Actions*, included a considerable number of particular actions, adapted to various estates and rights, some for determining the title, others for the recovery of possession merely; and were all technical and arbitrary in their modes of procedure. The action of ejectment by which they were superseded was a growth of later times. The second class, the *Personal Actions*, contained two actions *ex contractu*, "Debt" and "Covenant," and two *ex delicto*, "Trespas" and "Detinue." "Replevin," which was one of the most ancient judicial proceedings known to the English law, was so restricted

in its use to special circumstances and inferior courts that it was not classified among the ordinary common-law forms of action. The functions of these four personal actions are so well known that no description of them is necessary.

§ 23. From this enumeration it is plain that the common law furnished a very meager system of remedies, utterly insufficient for the needs of a civilization advancing beyond the domination of feudal ideas. The appliances for maintaining rights over land were perhaps sufficient in number and in variety, but they were excessively cumbrous, and the rights of suitors were liable to be defeated by some failure in technical matters of form. The lack of remedial instruments was chiefly felt in the class of personal actions. No contract could be enforced unless it created a certain debt, or unless it was embodied in a sealed writing. No means was given for the legal redress of a wrong to person or property, unless the tortious act was accompanied with violence, express or implied. The injuries and breaches of contract which now form the subject-matter of so much litigation were absolutely without any legal remedy. It is true, the ancient records show a few instances in which the action of trespass was extended to torts without violence, such as defamation, but these cases were exceptional and governed by no legal rule. The chief defect, however, of the legal procedure, which rendered it incomplete as a means of administering justice, and wholly insufficient for the needs of a people whose social relations were constantly growing more complex, consisted in its inability to adapt its actual reliefs to the varying rights and duties of litigants. Whatever might be the form of action used, the remedy conferred by its judgment was either a recovery of the possession of land, a recovery of the possession of chattels, or a recovery of money. Although these simple species of relief might be suited to a primitive society, the necessity of other and more specific forms, adapted to various circumstances and relations, was felt as soon as the progress of the nation towards a higher civilization had fairly begun. From the causes which I have thus briefly described, the common-law courts were closed against a large and steadily increasing class of rights and remedies, and a distinct tribunal, with a broader and more equitable jurisdiction and mode of procedure, became an absolute necessity, or else justice would be denied.

§ 24. **Statute of Edward I. Concerning New Writs.**—Parliament at length interposed with a reformatory measure which was intended to be radical, and which perhaps might have checked the growing jurisdiction of chancery if the common-law judges had treated the statute in the same liberal spirit with which it was

enacted. As all writs for the commencement of actions were drawn up by the clerks in chancery, the legislature attempted to remove all the existing difficulties by enlarging the powers of these officials, and conferring upon them a wide discretion in the invention of new forms of writs, suitable to new conditions of fact, and providing for remedial rights hitherto without any means of enforcement. In the reign of Edward I. the following statute was passed:<sup>1</sup> “Whensoever from henceforth it shall fortune in chancery that in one case a writ is found, and in a like case falling under *like law* and requiring *like remedy* is found none, the clerks of the chancery shall agree in making the writ, or the plaintiff may adjourn it into the next Parliament, and let the cases be written in which they cannot agree, and let them refer themselves to the next Parliament, and by consent of men learned in the law a writ shall be made, lest it should happen after *that the court should long time fail to minister justice unto complainants.*”

§ 25. **Limited Results of this Legislation.**—The general intent of this enactment is perfectly clear, and it should have been liberally and largely construed in accordance with that intent. The common-law judges, however, applied to it a strict and narrow construction, a literal and verbal interpretation, wholly foreign to its design and meaning. Although by its means the new common-law forms of action known as “Case,” “Trover,” and “Assumpsit” were invented, which in later times have been the most potent instruments for the development and improvement of the common law itself,<sup>1</sup> yet so far as the legislature proposed to enlarge the scope of the law by the introduction of equitable principles and remedies, and thereby to stop the growth of the equitable jurisdiction of chancery, that purpose was wholly frustrated by the action of the law judges in construing and enforcing the statute. The main points in which this restrictive interpretation was made effective, so as to defeat the ultimate object of the statute, were the following:—

§ 26. 1. The act permitted the framing of new writs in cases “falling under *like law* and requiring *like remedy*” with the existing ones. Upon this permissive language the courts put a highly restrictive meaning. As the common-law forms of action gave only three different kinds of remedies, every remedy obtained through the means of the new writs must be *like* one of these three species. Thus at one blow all power was denied of awarding to

<sup>1</sup> 13 Edw. I., chap. I., § 24.

<sup>1</sup> I have elsewhere described the manner in which these new actions were invented,—one of the most interesting events in the history of the English law. See Pomeroy’s Introduction to Municipal Law, §§ 200–204.

suitors any special equitable relief which did not fall within one or the other of these three classes, and parties who required such special forms of remedy were still compelled to seek them from another tribunal. The same was true, irrespective of the particular kinds of relief, of all cases which might arise, quite dissimilar in their facts and circumstances from those to which the existing forms of action applied; not falling under "like law," they were held to be without the scope of the statute, and the complainants could obtain no redress from the common-law courts.

§ 27. 2. The statute only provided for new writs on behalf of plaintiffs. As civilization progressed, and the relations of men grew more intricate from increase of commerce, trade, and other social activities, new defenses as well as new causes of action constantly arose. Although these were not within the letter of the act, they were fairly within its spirit. But the law courts adhered to the letter, and ignored the spirit. If, therefore, the new matter of defense did not fall within the prescribed formulas of the legal actions, and did not conform to the established rules defining legal defenses, the party must seek relief in some manner from the jurisdiction of the chancellor.<sup>1</sup>

§ 28. 3. Although the statute authorized the "clerks of chancery" to frame the new writs, and seemed by implication to confer upon them the absolute powers with respect to the matter which, it was conceded, were held by Parliament, still the common-law judges assumed for themselves the same exclusive jurisdiction to pass upon the propriety and validity of the new writs which they had always exercised over those issued by the clerks prior to the statute. They did not regard the action of the chancery officials in sanctioning a writ which would give a new remedial right to the plaintiff as at all binding, and in fact rejected all the new writs contrived in pursuance of the statute, which did not closely conform to some one of the existing precedents. The chancery clerks, being ecclesiastics and acquainted with the Roman law, seem to have fashioned most of their new writs in imitation of the Roman formulæ; but all these innovations upon the established methods the law courts refused to accept.

§ 29. This legislation, however, produced in the course of time the most beneficial effects upon the development of the common law itself, independently of the chancery jurisdiction. Upon the basis of certain new writs contrived by the chancery clerks and adopted by the law judges, three additional legal actions were in-

<sup>1</sup> This jurisdiction, to be effective, would generally be exercised by means of enjoining the legal action brought against the party applying to the chancellor, and in which his attempted defense had been rejected.

vented, "Trespass on the Case," and its branches or offshoots, "Trover," and "Assumpsit," which have been the most efficient and useful of all the forms of legal actions in promoting the growth of an enlightened national jurisprudence. Without the action of "Case" applicable to an unlimited variety of wrongs, and affording an opportunity for enforcing the maxim, *Ubi jus ibi remedium*, and the action of "Assumpsit," by which the multiform contracts growing out of trade and commerce could be judicially enforced, it is safe to say that the common law of England would have remained stationary in the condition which it had reached at a time not later than the reign of Edward III. These two actions resembled the *actiones bonae fidei* of the Roman law, in admitting motives of natural right and justice for the decision of causes, instead of purely technical and arbitrary rules of form. When at a still later day the principles of equity began to react upon the law, and the common-law judges freely applied these equitable doctrines in adjudicating upon legal rights, it was chiefly through these actions of Case and Assumpsit that the work of reforming and reconstructing the common law was accomplished. The actions of Trespass, Covenant, and Debt have remained, even to the present day, technical in their modes and arbitrary in their rules; but the actions of Case, Trover, and Assumpsit have been free from formal restraints, flexible in their adaptability, 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.<sup>1</sup>

**§ 30. Commencement and Progress of the Chancery Jurisdiction.**—I have thus far described the causes existing in the early condition of the common law, and in the attitude of the law courts, which rendered necessary a separate tribunal with an equitable jurisdiction, and a procedure capable of being adapted to a variety of circumstances, and of awarding a variety of special remedies. I now proceed to state the origin of this tribunal, and the principal events connected with the establishment of its jurisdiction.

**§ 31. Original Powers of the King's Council.**—Under the early Norman kings, the Crown was aided by a Council of Barons and high ecclesiastics, which consisted of two branches—the General Council, which was occasionally called together, and was the historical predecessor of the Parliament, and a Special Council, very much smaller in number, which was in constant attendance upon the King, and was the original of the present Privy Council. It was

<sup>1</sup> For an account of the origin and progress of these actions, see 1 Spence's Eq. Jur., pp. 237-254; Pomeroy's Introduction to Municipal Law, §§ 200-204.

composed of certain high officials, as the Chancellor, the Treasurer, the Chief Justiciary, and other members named by the King. This Special Council aided the Crown in the exercise of its prerogative, which, as has been stated, embraced a judicial function over matters that did not or could not come within the jurisdiction of the ordinary courts. The extent of this judicial prerogative of the King was, from its nature and from the unsettled condition of the country, very ill defined. It appears from an ancient writer that in the time of Henry I. the Select Council generally took cognizance of those causes which the ordinary judges were incapable of determining. From later records it appears that the council acted on all applications to obtain redress for injuries and acts of oppression, wherever, from the heinousness of the offense, or the rank and power of the offender, or any other cause, it was probable that a fair trial in the ordinary courts would be impeded, and also wherever, by force and violence, the regular administration of justice was hindered. The council also seems to have had a jurisdiction in cases of fraud, deceit, and dishonesty, which were beyond the reach of common-law methods. It is evident, however, that this extraordinary jurisdiction of the King and council was not always exercised without opposition, especially when the matters in controversy fell within the authority of the common-law courts.

§ 32. **Original Common-law Jurisdiction of the Chancellor.**—Side by side with this extraordinary or prerogative judicial function exercised by the King, or by the Select Council *in his name and stead*, there grew up a jurisdiction of the Chancellor. This is not the place to detail the numerous special powers of that officer, for we are only concerned with those which were judicial. It is certain that the Chancellor possessed and exercised an important *ordinary*—that is, common-law—jurisdiction, similar to that held by the common-law courts, and wholly independent of the extraordinary prerogative jurisdiction originally possessed by the King and council, and afterwards delegated to the Chancellor himself. The proceedings in causes arising before the Chancellor, under this, his ordinary jurisdiction, were commenced by common-law process, and not by bill or petition; he could not summon a jury, but issues of fact in these proceedings were sent for trial before the King's Bench. When this ordinary common-law jurisdiction of the Chancellor commenced is not known with certainty; it had risen in the reign of Edward III. to be extensive and important, and it had probably existed through several reigns.

§ 33. **Jurisdiction of Grace Transferred to the Chancellor.**—In addition to this ordinary function as a common-law judge, the Chancellor began at an early day to exercise the extraordinary

jurisdiction—that of *Grace*—by delegation either from the King or from the Select Council. The commencement of this practice cannot be fixed with any precision. 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, when any case came before the King which appealed to his judicial prerogative, and which for any cause could not be properly examined by the council, such case was naturally referred either by the Crown or by the council to the Chancellor for his sole decision. Whatever may have been the motives, it is certain that the Chancellor's extraordinary equitable jurisdiction commenced in this manner. At first it was a tentative proceeding, governed by no rule, the reference being sometimes to the Chancellor alone, sometimes to him in connection with another official, and even occasionally to another official without the Chancellor. In the reign of Edward I., such references of cases coming before the King and council to the Chancellor, either alone or in connection with others, were very common, although the practice of selecting him alone had not yet become fixed.

§ 34. The practice of delegating the cases which came before the prerogative judicial function of the Crown and its council to the Chancellor, for his sole decision, having once commenced, it rapidly grew, until it became the common mode of dealing with such controversies. The fact that the attention of the King and of his high officials was constantly engaged in matters of state administration rendered this method natural and even necessary. In the reign of Edward III., the Court of Chancery was in full operation as the ordinary tribunal for the decision of causes which required an exercise of the prerogative jurisdiction, and the granting of special remedies which the common-law courts could not or would not give. Edward III. established this jurisdiction, which hitherto had been merely permissive, upon a legal and permanent foundation. In the twenty-second year of his reign, by a general writ, he ordered that all such matters as were of *Grace* should be referred to and dispatched by the Chancellor, or by the Keeper of the Privy Seal. The Court of Chancery, as a regular tribunal for the administering of equitable relief and extraordinary remedies, is usually spoken of as dating from this decree of King Edward III.; but it is certain that the royal action was merely confirmatory of a process which had gone on through many preceding years.

§ 35. The delegation made by this order of the King conferred a general authority to give relief in all matters, of what nature soever, requiring the exercise of the prerogative of *Grace*. This authority differed wholly from that upon which the jurisdiction

of the law courts was based. These latter tribunals acquired jurisdiction in each case which came before them by virtue of a delegation from the Crown, contained in the particular writ on which the case was founded, and a writ for that purpose could only be issued in cases provided for by the positive rules of the common law. This was one of the fundamental distinctions between the jurisdiction of the English common-law courts, under their ancient organization, and that of the English Court of Chancery.<sup>1</sup> The principles upon which the Chancellor was to base his decision in controversies coming within the extraordinary jurisdiction thus conferred upon him were Honesty, Equity, and Conscience.<sup>2</sup> The usual mode of instituting suits in chancery became, from this time, that by bill or petition, without any writ issued on behalf of the plaintiff.

**§ 36. Development of the Equitable Jurisdiction.**—Having thus shown the historical origin of the chancery as a court distinct from the common-law tribunals, I shall now describe the growth of the equitable jurisdiction until it became settled upon the certain basis of principles which has continued without substantial change to the present time. In the earliest periods the jurisdiction was ill defined, and was in some respects even much more extensive than it afterwards became when the relations between the equity and the common-law tribunals were finally adjusted. This was chiefly due to the troublous times, the disturbed condition of the country, while violence and oppression everywhere prevailed, and the ordinary courts could give but little protection to the poor and the weak; when the powerful landowners were constantly invading the rights of their inferiors and overawing the local magistrates. In the reign of Richard II. the Chancellor actually exercised some criminal jurisdiction to repress violence, and restrain the lawlessness of the great against the poor and helpless. He also entertained suits concerning land, for the recovery of possession or the estab-

<sup>1</sup> This distinction has never existed in the United States. The highest courts of law and of equity, both state and national, derive their jurisdiction either from the constitutions or from the statutes. There is no such thing as a delegation of authority from the executive or the legislature to these courts; for the authority of the courts and of the other branches of the government is directly derived from the same source,—the organic body politic composing the state or the nation.

<sup>2</sup> The following case illustrates the kind of matters brought before the King and referred to the chancellor: Lady Audley, without joining her husband, sued her father-in-law to obtain a specific performance of certain covenants in her favor in the deed of settlement made on her marriage. Nothing could be more opposed to common-law doctrines. This was in 35 Edward III., and it shows that two most important heads of equity jurisprudence were then known,—the protection of the wife's separate interests, and specific performance of contracts. See Sir F. Palgrave's *History of the Council*, pp. 64, 67.

ishment of title, and even actions of trespass, when there had been dispossession with great violence.<sup>1</sup> A strong opposition naturally arose to these alleged usurpations by the Chancellors; but they persevered as long as was necessary, and were supported by the King and council.

§ 37. There were other reasons, inhering in the nature of its procedure and extent of its remedial functions, which operated to extend the authority and increase the business of the chancery court. It possessed and exercised the power, which belonged to no common-law court, of ascertaining the facts in contested cases by an examination of the parties under oath,—the “probing their consciences,”—a method which gave it an enormous advantage in the discovery of truth, and which has only within our own times been extended to all other tribunals. Again, the Chancellor was able to grant the remedy of prevention, which was wholly beyond the capacity of the law courts; and he seems to have used this kind of relief with great freedom, unrestrained by the rules which have since been settled with respect to the injunction. As the business of the court increased and became regular and constant, the practice was established in the reign of Richard II. of addressing the suitor’s bills or petitions directly to the Chancellor, and not to the King or his council. During the same reign a statute was passed by Parliament for the purpose of regulating the business of the court and restraining its action, which enacted that when 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 against the complainant, in his discretion.<sup>1</sup> 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.

§ 38. In the reign of Richard II., Uses first came distinctly into notice and were brought under judicial cognizance. This species of interest in land was utterly unknown to the common law, and foreign to the feudal notions; it was therefore ignored by the law courts, and fell under the exclusive control of chancery. As uses were derived, with much modification, from the Roman law, the

<sup>1</sup> The instances of the kind mentioned in the text are probably all referable to the notion, which seems to have been entertained by the early chancellors, that one important head of their jurisdiction, founded upon the principle of *conscience*, was the protection of the poor, weak, helpless, and oppressed against the rich and powerful. This early notion has left some traces in the subsequent equity jurisprudence.

<sup>1</sup> 17 Rich. II., chap. 6.

doctrines of that jurisprudence were naturally resorted to in deciding controversies respecting them, and in settling the rules for their government. The action of the law judges in banishing the Roman law from their courts, which has already been described,<sup>1</sup> also operated very powerfully to throw the consideration of these matters into the chancery, and greatly augmented and strengthened its authority. No one subject has contributed so much to enlarge and perfect the jurisdiction of the Court of Chancery as the uses thus surrendered to its exclusive cognizance. The principles which underlie them and the trusts which succeeded them have been extended to all departments of equity, and have been more efficient than any other cause in building up an harmonious system of equitable jurisprudence in conformity with right and justice. These flexible principles have been applied to almost every relation of life affecting property rights, and have been molded so as to meet the exigencies of the infinite variety of circumstances which arise from modern civilization. They have even reacted upon the common law, and have been recognized by the law judges in their settlement of the rules which govern the rights and obligations growing out of contract.

§ 39. In the reigns of Henry IV. and Henry V., the Commons, from time to time, complained that the Court of Chancery was usurping powers and invading the domain of the common-law judges. It is a very remarkable fact, however, that this opposition never went to the extent of denouncing the equity jurisdiction as wholly unnecessary; it was always conceded that the law courts could furnish no adequate remedy for certain classes of wrongs, and that a separate tribunal was therefore necessary. As the result of these complaints, statutes were passed which forbade the Chancellor from interfering in a few specified instances of legal cognizance, but did not abridge his general jurisdiction. In the reign of Edward IV. the Court of Chancery was in full operation; the mode of procedure by bill filed by the complainant, and a subpoena issued thereon to the defendant, was settled; and the principles of its equitable jurisdiction were ascertained and established upon the basis and with the limitations which have continued to the present time. No more opposition was made to the court by the Commons, although the law judges from time to time, until as late as the reign of James I., still denied the power of the Chancellor to interfere with matters pending before their own courts, and especially disputed his authority to restrain the proceedings in an action at law, by means of his injunction. This controversy between the law and the equity courts, with respect

<sup>1</sup> See ante, § 20.

to the line which separates their jurisdictions, has in fact never been completely settled; and perhaps it must necessarily continue until the two jurisdictions are blended into one, or at least are administered by the same judges in the same proceeding.<sup>1</sup>

**§ 40. Abolition of the Court in England and in Many American States.**—The court of equity, having existed as a separate tribunal for so many centuries, has at length disappeared in Great Britain and in most of the American states, and the reforming tendency of the present age is strongly towards an obliteration of the lines which have hitherto divided the two jurisdictions. By the recent legislation of England and of many of the states in this country, the separate tribunals of law and of equity have been abolished; the two jurisdictions have been so far combined that both are administered by the same court and judge; legal and equitable rights are enforced and legal and equitable remedies are granted in one and the same action; and the distinctions which hitherto existed between the two modes of procedure are as far as possible abrogated, one kind of action being established for all judicial controversies.<sup>1</sup>

<sup>1</sup> Wherever the distinctions between suits in equity and actions at law have been abolished, and equitable and legal rights may be enforced, and equitable and legal remedies may be obtained, in the same proceeding, we might suppose this contest would necessarily have disappeared, and it necessarily would have disappeared if the courts had carried out the plain intent of the legislation; unfortunately, however, in some of the states where this legislation has been adopted, the distinction between the legal and equitable jurisdictions is kept up as sharply as though there were the separate tribunals, and the different systems of procedure.

<sup>1</sup> The English Judicature Act of 1873, already quoted, after uniting all the higher tribunals into one Supreme Court of Judicature, enacts that "in every civil cause or matter, law and equity shall be concurrently administered" by this court according to certain general rules; and that generally in all matters not particularly mentioned in other provisions of the act, in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail: 36 & 37 Vict., chap. 66, §§ 24, 25. This great reform, which was inaugurated by New York in 1848, has been adopted by the states of Ohio, Kentucky, Indiana, Wisconsin, Iowa, Minnesota, Missouri, Kansas, Nebraska, Nevada, California, Oregon, North Carolina, South Carolina, Arkansas, Connecticut, Colorado, Washington, Montana, Idaho, Wyoming, Utah, North Dakota, South Dakota, Oklahoma, and by the territories of Arizona and New Mexico. The form of legislation which has generally been adopted is substantially the following: "The distinction between actions of law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." In two or three of the states a slight external distinction between legal and equitable actions is still preserved.

§ 41. **Equity Jurisdiction in Other American States.**—In the national courts of the United States, and in most of the states which have not adopted the reformed procedure, the two departments of law and equity are still maintained distinct in their rules, in their procedure, and in their remedies; but the jurisdiction to administer both systems is possessed and exercised by the same tribunal, which in one case acts as a court of law, and in the other as a court of equity. The organization of the judiciary differs widely in the states of this class, and no attempt need be made to describe it. The procedure at law is based, although in most instances with extensive modifications, upon the old common-law method, and retains in whole or in part the ancient forms of action. The equity procedure is the same in its essential principles with that which long prevailed in the English Court of Chancery, but is much simplified in its details and rules.<sup>1</sup>

§ 42. In a very few of the states the policy of separation is still maintained. Law and equity are not only distinct departments, but they are administered by different tribunals, substantially according to the system, both in respect to jurisdiction and procedure, which existed in England prior to the recent legislation. There is a court of general original jurisdiction at law, and another court of equity, consisting of one or more chancellors, and the two are entirely distinct in the persons of the judges, and in the judicial functions which they possess. Even in these states, however, there is generally but one appellate tribunal of last resort, which reviews on error the judgments of the law courts, and on appeal the decrees of the Chancellor.<sup>1</sup>

<sup>1</sup> This mode of judicial organization and of maintaining the two jurisdictions with one tribunal has been adopted by the United States for the national judiciary, including that of the District of Columbia, and by the following States: Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, West Virginia.

<sup>1</sup> This system exists in Alabama, Delaware, Mississippi, New Jersey, Tennessee.

## SECTION II.

## THE NATURE OF EQUITY.

## ANALYSIS.

- § 43. Importance of a correct notion of equity.  
 §§ 44, 45. Various meanings given to the word.  
 §§ 46, 47. True meaning as a department of our jurisprudence.  
 §§ 48-54. Theories of the early chancellors concerning equity as both supplying and correcting the common law.  
 §§ 55-58. Sources from which the early chancellors took their doctrines; their notions of "conscience" as a ground of their authority.  
 §§ 59-61. Equity finally established upon a basis of settled principles.  
 § 62. How the equitable jurisdiction is determined at the present day.  
 §§ 63-67. Recapitulation: Nature of equity stated in four propositions.

§ 43. **Importance of a Correct Notion of Equity.**— . . . This inquiry is not purely theoretical; it is, on the contrary, in the highest degree practical. . . . Since the combination of legal and equitable remedies in one judicial proceeding which has been effected in many of the states, the notion seems to have been revived, somewhat vague and undefined perhaps, but still widely diffused among the legal profession, that equity is nothing more or less than the power possessed by judges—and even the duty resting upon them—to decide every case according to a high standard of morality and abstract right; that is, the power and duty of the judge to do justice to the individual parties in each case. This conception of equity was known to the Roman jurists, and was described by the phrase, *Arbitrium boni viri*, which may be freely translated as the decision upon the facts and circumstances of a case which would be made by a man of intelligence and of high moral principle; and it was undoubtedly the theory in respect to their own functions, commonly adopted and acted upon by the ecclesiastical chancellors during the earliest periods of the English Court of Chancery. It needs no argument to show that if this notion should become universally accepted as the true definition of equity, every decision would be a virtual arbitration, and all certainty in legal rules and security of legal rights would be lost.

§ 44. **Various Meanings Given to the Word.**— . . . The original or root idea of the word, as first used by the Roman jurists, *universality*, and thence *impartiality*, has already been explained. From this fundamental notion, equity has come to be employed with various special significations. It has been applied in the interpretation of statutes, when a legislative enactment is said to be interpreted equitably; or, as the expression often is, according to

the equity of the statute. This takes place when the provisions of a statute, being perfectly clear, do not in terms embrace a case which, in the opinion of the judge, would have been embraced if the legislator had carried out his general design. . . .

§ 45. Another signification sometimes given to equity is that of judicial impartiality; the administration of the law according to its true spirit and import, uninfluenced by any extrinsic motives or circumstances; the application of the law to particular cases, in conformity with the special intention or the general design of the legislator. A third meaning makes equity synonymous with natural law as that term is used by modern writers, or morality; so that it practically becomes the moral standard to which all law should conform. It is in this sense that the epithet "equitable" is constantly used, even at the present day, by judges and text-writers, in order to describe certain doctrines and rules which, it is supposed, will tend to promote justice and right in the relations of mankind, or between the litigant parties in a particular case. The only other signification which I shall mention does not greatly differ from the one last given. In that use of the term, equity is the unchangeable system of moral principles to which the law does or should conform; but in this use it rather describes the power belonging to the judge—a power which must, of course, be exercised according to his own standard of right—to decide the cases before him in accordance with those principles of morality, and so as to promote justice between suitors, even though in thus deciding some rule of positive law should be violated or at least disregarded. This conception of equity regards it, not as a system of juridical principles and rules based upon morality, right, and justice, but rather as a special function or authority of the courts to dispense with fixed legal rules, to limit their generality, or to supplement their defects in particular cases, not in obedience to any higher and more comprehensive doctrines of the same positive national jurisprudence, but in obedience to the dictates of natural right, or morality, or conscience.<sup>1</sup>

**§ 46. True Meaning as a Department of our Jurisprudence.—**

. . . We are met at the very outset by numerous definitions and descriptions taken from old writers and judges of great ability and high authority, many of which are entirely incorrect and mis-

<sup>1</sup>This theory was known to the Roman judicial writers; it was the notion constantly maintained by Cicero, who says: "Æquitas est laximentum juris," and traces of it are found throughout the Digest. It was universally adopted by the clerical chancellors in the earliest stages of the chancery jurisdiction; and the English equity commenced, and for a considerable period continued its growth as a direct result of this conception: See 2 Austin on Jurisprudence, pp. 272-280.

leading, so far at least as they apply to the system which now exists, and has existed for several generations. These definitions attribute to equity an unbounded discretion, and a power over the law unrestrained by any rule but the conscience of the Chancellor, wholly incompatible with any certainty or security of private right.

§ 47. It is very certain that no court of chancery jurisdiction would at the present day consciously and intentionally attempt to correct the rigor of the law or to supply its defects, by deciding contrary to its settled rules, in any manner, to any extent, or under any circumstances beyond the already settled principles of equity jurisprudence.<sup>1</sup> Those principles and doctrines may unquestionably be extended to new facts and circumstances as they arise, which are analogous to facts and circumstances that have already been the subject-matter of judicial decision, but this process of growth is also carried on in exactly the same manner and to the same extent by the courts of law. Nor would a chancellor at the present day assume to decide the facts of a controversy according to his own standard of right and justice, independently of fixed rules,—he would not attempt to exercise the *arbitrium boni viri*; on the contrary, he is governed in his judicial functions by doctrines and rules embodied in precedents, and does not in this respect possess any greater liberty than the law judges.

§ 48. **Theories of the Early Chancellors Concerning Equity.**—It is nevertheless true that there was much in the proceedings of the early clerical and some of the lay chancellors which furnished a ground for the theories given in the foregoing note. In the commencement of the jurisdiction, and down to a time when the *principles* of equity as they now exist had become established, every decision made by chancery, every equitable doctrine which it declared, every equitable rule which it announced, was of *necessity* an innovation to a greater or less extent upon the then existing common law, sometimes supplying defects both with respect to primary rights and to remedies which the law did not recognize, and sometimes invading, disregarding, and overruling the law by enforcing rights or conferring remedies with respect to which the

<sup>1</sup> Quoting Doctor and Student Dial. 1, chap. 16; Grounds and Rudiments pp. 5, 6; Finch's Law, p. 20; Eunomus, Dial. 3, § 60; Kame's Eq., Introd., pp. 12, 15; Fonblanque on Equity, b. 1, chap. 1, § 3. The same large view of equity has sometimes been taken by the earlier judges, but not to any considerable extent since the Reformation. The following example will suffice: Dudley v. Dudley, Prec. Ch. 241, 244, Sir John Trevor, M. R.

<sup>1</sup> The text is quoted in Harper v. Clayton, 84 Md. 356, 35 Atl. 1083, 35 L. R. A. 211, 57 Am. St. Rep. 407; Henderson v. Hall, 134 Ala. 455, 32 South. 840; and cited in Sell v. West, 125 Mo. 621, 46 Am. St. Rep. 508, 28 S. W. 969.

law was not silent, but which it actually denied and refused. The very growth of equity, as long as it was in its formative period, was from its essential nature an antagonism to the common law, either by way of adding doctrines and rules which the law simply did not contain, or by way of creating doctrines and rules contradictory to those which the law had settled and would have applied to the same facts and circumstances. It would be a downright absurdity, a flat contradiction to the plainest teachings of history, to deny that the process of building up the system of equity involved and required on the part of the chancellors an evasion, disregard, and even violation of many established rules of the common law; in no other way could the system of equity jurisprudence have been commenced and continued so as to arrive at its present proportions.<sup>1</sup>

§ 49. Nor can it be denied that the early clerical and even lay chancellors, in their first processes of innovating upon the law, and laying the foundations of equity, were constantly appealing to and governed by the eternal principles of absolute right, of a lofty Christian morality; that in these principles they sought and found the materials for their decisions; that they were ever guided in their work by *Conscience*, not by what has since been aptly termed the *civil or judicial conscience of the court*, but by their own individual consciences, by their moral sense apprehending what is right and wrong, by their own conceptions of *bona fides*. The very ground of the delegated authority required them to do so, and the function which they possessed and exercised was literally the *arbitrium boni viri*. In this manner the first precedents were made, and undoubtedly for a considerable space of time the decisions in chancery varied and fluctuated according to the personal capacity and high sense of right and justice possessed by individual chancellors. In the lapse of time, however, the precedents had multiplied, and from the universal conservative tendency of courts to be controlled by what has been already decided, a system of doctrines had developed and assumed a comprehensive shape; and finally, when it had attained a reasonable completeness with respect to fundamental principles and general rules, this accumulation became the storehouse whence the chancellors obtained the material for their decisions, and both guided and restrained their judicial action. When this time arrived, all assumption that the Chancellor was to be governed by his own standard and conception of natural justice disappeared from the court of equity, and individual

<sup>1</sup> The text is quoted in *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 546, 64 N. E. 442, 89 Am. St. Rep. 828, 50 L. R. A. 478, 1 Scott 178, by Parker, C. J.

conscience was no longer the motive power in that tribunal. The accuracy of this general account will appear from a brief review of what the early chancellors actually did during the formative period of their jurisdiction, and of the principles which they adopted in the prosecution of their reformatory work.

§ 50. In the original delegation of general authority by the Crown to the Chancellor, over matters falling under the King's judicial prerogative of grace, such authority was to be exercised according to Conscience, Equity, Good Faith, and Honesty. It was undoubtedly a maxim, even in the earliest times, that the equitable jurisdiction of chancery only extended to such matters as *were not remediable by the common law*. At the same time great latitude was used in determining what matters were not thus remediable. The chancellors therefore exercised a jurisdiction which was *supplementary* to that of the law courts, and to this there was never any real opposition. At the same time they exercised a jurisdiction which was *corrective* of the law, and this was undoubtedly the most important part of their functions. It is absolutely certain from all the existing records, and from the result itself of their work, that they did not refrain from deciding any particular case, according to their views of equity and good conscience, merely because the doctrine which they followed or established in making the decision was inconsistent with the rule of law applicable to the same facts, nor because the law had deliberately and intentionally refused to acknowledge the existence of a primary right, or to give a remedy under those facts and circumstances.<sup>1</sup>

§ 53. While the early chancellors did much, they stopped very far short of consummating the work of reform by extending it to the entire body of the common law. They left untouched, in full force and operation, a great number of legal rules which were certainly as harsh, unjust, and unconscientious as any of those which they did attack; and their successors upon the chancery

<sup>1</sup>The author here gives, as instances of remedies granted by the early chancellors, where any remedy was refused by positive rules of the common law: the doctrine that one executor or joint tenant might sue his co-executor or co-tenant in the Court of Chancery in respect to their joint interests, although forbidden to do so by the law; relief on lost bonds, where *profert* was impossible (see post, §§ 831, 832); defense of payment, where the debtor upon a sealed instrument had neglected to take a release or surrender of the instrument (see post, § 383); relief from forfeitures (see post, §§ 449-458); injunction against enforcement of judgments recovered at law (see post, §§ 1360-1365).

As instances of relief more efficient than the legal remedies granted under the same circumstances: specific performance of contracts; the whole doctrine concerning uses and trusts, and the separate estate of married women. See post, chapters on these subjects.

bench have never assumed to complete what they left unfinished. That task has since been accomplished, if at all, either by the legislature, or by the common-law courts themselves. Among these legal rules with which equity did not interfere, the following may be mentioned as illustrations: The doctrine by which the lands of a debtor were generally exempted from all liability for his simple contract debts;<sup>1</sup> the entire doctrine of collateral warranty, which was confessedly most unjust and harsh in its operation, and resting wholly upon that kind of verbal reasoning which really had no meaning;<sup>2</sup> and in fact, most of the particular rules concerning real estate, which had been logically derived by the courts of law from the feudal institutions and customs. There might, perhaps, have been a sufficient reason for leaving this latter mass of rules, *as such*, untouched. The introduction of uses, and afterwards of trusts, and the invention of the married woman's separate estate, withdrew the greater part of the land, so far as its actual enjoyment and control were concerned, from the operation of the common-law dogmas, and placed it under the domain of equity; and as the Court of Chancery had an exclusive jurisdiction over these new species of estates, and treated them as the true ownerships, and in dealing with them disregarded the most objectionable of the feudal incidents, the chancellors probably thought that these rules of the common law had been practically abrogated, or at least evaded en masse, and that there was therefore no necessity for any further attack upon them in detail.

§ 54. Sir William Blackstone, citing these and some other instances in which the Court of Chancery refrained from interfering with legal doctrines, and using them as the basis of his argument, goes to the extent of denying that equity has or ever has had any power to correct the common law or to abate its rigor.<sup>1</sup> This is one example among many of Blackstone's utter inability to comprehend the real spirit and workings of the English law. That equity did to a large extent interfere with and prevent the practical operation of legal rules, and did thus furnish to suitors a corrective of the harshness and injustice of the common law, history and the very existing system incontestably show; and that the chancellors, from motives of policy or otherwise, refrained from

<sup>1</sup> 3 Black. Com., p. 430.

<sup>2</sup> Lord Cowper said of this doctrine, in *Earl of Bath v. Sherwin*, 10 Mod. 4: "A collateral warranty was certainly one of the harshest and most cruel parts of the common law, because there was no such pretended recompense (as in the case of a lineal warranty); yet I do not find that the court (of chancery) ever gave satisfaction."

<sup>1</sup> 3 Black. Com., p. 430.

exercising their reformatory function in certain instances, is not, in the face of the historical facts, any argument against the existence of the power. And even in the present condition of equity as an established department of the national jurisprudence, whenever a court determines the rights of parties by enforcing an equitable doctrine which differs from and perhaps conflicts with the legal rule applicable to the same facts, such court does still, in very truth, exercise a corrective function, and wield an authority by which it relieves the rigor and often the injustice of the common law. It is undoubtedly true that a court of equity no longer inaugurates new attacks upon legal doctrines, and confines itself to the application of principles already settled; but it is none the less true that a large part of the equity which is daily administered consists in doctrines which modify and contradict as well as supplement the rules of the law.<sup>2</sup>

**§ 55. Sources From Which the Early Chancellors Took Their Doctrines.**— . . . They were directed in their original delegation of authority, and they assumed, in compliance with the direction, to proceed according to Equity and Conscience. . . .

**§ 57.** The question is naturally suggested, whether this "conscience" was interpreted as the personal conscience of the individual chancellor, or whether it was a kind of *judicial* conscience, limited by and acting according to definite rules, and constituting a fixed and common standard of right recognized and followed by all the equity judges. Beyond a doubt, during the infancy of the jurisdiction, the former of these conceptions was the prevailing one, and each Chancellor was governed in his judicial work by his own notions of right, good faith, and obligation, by his own interpretation of the Divine code of morality. Even during the reigns of Henry VIII. and of Elizabeth, some of the chancellors seem to have taken a view of their authority which freed them from the restraints of precedent and even of principle, and enabled them to decide according to their private standard of right. It was this mistaken theory, so satisfying to an ambitious and self-reliant judge, but so dangerous to the equable and certain administration of justice, which provoked the sarcastic criticism of Selden so often quoted, and so often applied, in complete ignorance either of the subject or the occasion, to the equity jurisdiction in general.<sup>1</sup>

<sup>2</sup> See dictum of Sir George Jessel, M. R., in *Johnson v. Crook*, L. R. 12 Ch. Div. 639, 649.

<sup>1</sup> Table Talk, tit. Equity: "Equity is a roguish thing. For law we have a measure, and know what we trust to. Equity is according to the conscience of him that is Chancellor; and as that is larger or narrower, so is equity. 'T is all one as if they should make his foot the standard for the measure we call a

After the period of infancy was passed, and an orderly system of equitable principles, doctrines, and rules began to be developed out of the increasing mass of precedents, this theory of a personal conscience was abandoned; and the "conscience" which is an element of the equitable jurisdiction came to be regarded, and has so continued to the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, to which the court appeals, and by which it tests the conduct and rights of suitors,—a juridical and not a personal conscience.<sup>2</sup> This theory was at length announced by Lord Nottingham as the one which regulated the equity jurisdiction: "With such a conscience as is only naturalis and interna, this court has nothing to do; the conscience by which I am to proceed is merely civilis and politica, and tied to certain measures."<sup>3</sup>

§ 58. After "conscience" became thus defined as a common civil standard, it was practically the same as "equity;" the distinctions between them had disappeared, and both terms were and have since been used interchangeably. From the time of Henry VI., precedents of decisions made in the Court of Chancery were recorded in the Year-Books, and special collections of them were made in the reigns of Elizabeth, James I., and Charles I. By the time of Charles I. the number of precedents had so accumulated, either in published or in private collections, or handed down traditionally, that they substantially contained the entire principles of equity, and the chancellors yielded almost wholly to their guidance. In fact, they sometimes fell into the mistake of refusing relief in a case plainly within the scope of established principles, because there was no precedent which exactly squared with the facts in controversy.

§ 59. **Equity Finally Established Upon a Basis of Settled Principles.**—The result of this review is very clear, and enables us to define with accuracy the general character of the English and American equity. After its growth had proceeded so far that its important principles were all developed, equity became a system of positive jurisprudence, peculiar indeed, and differing from the common law, but founded upon and contained in the mass of cases

Chancellor's foot. What an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the Chancellor's conscience." Mr. Spence very truly remarks: "Selden, better than any man living, perhaps, knew what equity really was."

<sup>2</sup> The text is quoted in *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 546, 64 N. E. 442, 89 Am. St. Rep. 828, 832, 50 L. R. A. 478, 1 Scott 178, by Parker, C. J.

<sup>3</sup> *Cook v. Fountain*, 3 Swanst. 585, 600 (1676).

already decided. The Chancellor was no longer influenced by his own conscience, or governed by his own interpretation of the Divine morality. He sought for the doctrines of equity as they had already been promulgated, and applied them to each case which came before him. No doubt (and this is a point of the highest importance) the system was, and is, much more elastic and capable of expansion and extension to new cases than the common law. Its very central principles, its foundation upon the eternal verities of right and justice, its resting upon the truths of morality rather than upon arbitrary customs and rigid dogmas, necessarily gave it this character of flexibility, and permitted its doctrines to be enlarged so as to embrace new cases as they constantly arose. It has, therefore, as an essential part of its nature, a capacity of orderly and regular growth—a growth not arbitrary, according to the will of individual judges, but in the direction of its already settled principles. It is ever reaching out and expanding its doctrines so as to cover new facts and relations, but still without any break or change in the principles or doctrines themselves. It is certainly, therefore, a mistaken theory which is maintained by many writers like Blackstone, and even by those of a later day and higher authority, and which represents the English and American equity as entirely an artificial system, embodied wholly in unyielding precedents, and incapable of further development. It is true that there can be no more capricious enlargement according to the will of individual chancellors; but the principles of right, justice, and morality, which were originally adopted, and have ever since remained, as the central forces of equity, gave it a necessary and continuous power of orderly expansion, which cannot be lost until these truths themselves are forgotten, and banished from the courts of chancery.<sup>1</sup>

§ 60. The general language of some writers, and particularly

<sup>1</sup>The doctrine of the text was clearly stated by Lord Redesdale, in *Bond v. Hopkins*, 1 Schoales & L. 413, 429: "There are certain principles on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have in this respect no more *discretionary* power than courts of common law. They decide new cases as they arise, by the principles on which former cases have been decided, *and may thus illustrate or enlarge the operation of these principles*, but the principles are as fixed and certain as the principles on which the courts of common law proceed." In *Gee v. Pritchard*, 2 Swanst. 402, 414, 1 Keener 59, 1 Scott 149, Lord Eldon states the same theory: "The doctrines of this court ought to be as well settled and made as uniform *almost* as those of the common law, *laying down fixed principles, but taking care that they are to be applied according to the circumstances of each particular case.*" The old case of *Fry v. Porter*, 1 Mod. 300, 307 (22 Car. 11.), 1 Scott 145, exhibits the strange notions concerning equity then held by the common-law judges.

of Blackstone, presents an erroneous theory as to the office of precedents in equity, and if followed, would check and abridge the beneficent operation of its jurisdiction. The true function of precedents is that of illustrating principles; they are examples of the manner and extent to which principles have been applied; they are the landmarks by which the court determines the course and direction in which principles have been carried. But with all this guiding, limiting, and restraining efficacy of prior decisions, the Chancellor always has had, and always must have, a certain power and freedom of action, not possessed by the courts of law, of adapting the doctrines which he administers. He can extend those doctrines to new relations, and shape his remedies to new circumstances, if the relations and circumstances come within the principles of equity, where a court of law in analogous cases would be powerless to give any relief. In fact, there is no limit to the various forms and kinds of specific remedy which he may grant, adapted to novel conditions of right and obligation, which are constantly arising from the movements of society. While it must be admitted that the broad and fruitful principles of equity have been established, and can not be changed by any judicial action, still it should never be forgotten that these principles, based as they are upon a Divine morality, possess an inherent vitality and a capacity of expansion, so as ever to meet the wants of a progressive civilization. Lord Hardwicke, who was, I think, the greatest of the English chancery judges, and who, far more than Lord Eldon, was penetrated by the genius of equity, indicated the true theory in a letter to Lord Kames: "Some general rules there ought to be, for otherwise the great inconvenience of *ius vagum et incertum* will follow. And yet the Praetor [Chancellor] must not be so absolutely and invariably bound by them as the judges are by the rules of the common law. For if he were so bound, the consequence would follow that he must sometimes pronounce decrees which would be materially unjust, since no rule can be equally just in the application to a whole class of cases that are far from being the same in every circumstance."<sup>1</sup>

<sup>1</sup>Parke's History of Chancery, pp. 501, 506. Judge Story severely criticises this language, pronounces it very loosely said, and virtually repudiates it. But with all deference to Judge Story, these few sentences, although undoubtedly not written in a scientific form, contain the central truth of the system, the truth which must always be recognized and acted upon in the administration of equity. Lord Hardwicke does not deny the existence nor the necessity of general principles, — no other Chancellor was ever more governed in his judicial work by principles, — but he would guard against the theory which locks these principles up in the already existing precedents, and limits their free application to facts, circumstances, and relations similar to those which had been the subject-matter of former adjudications. In other words, Lord Hardwicke in this short

**§ 62. How the Equitable Jurisdiction is Determined at the Present Day.**—Although the jurisdiction of chancery was originally based in great measure upon the omissions of the common law, the injustice of many of its rules, and its inability, from its modes of

passage states the same view which I had given in the text. Although equity is and long has been in every sense of the word a system, and although it is impossible that any *new* general principles should be added to it, yet the truth stands, and always must stand, *that the final object of equity is to do right and justice.*

In the case of *Manning v. Manning*, 1 Johns. Ch. 530, 1 Scott 147, Chancellor Kent explained his own position as an American chancellor, and his conception of equity as a whole: "I take this occasion to observe that I consider myself bound by these principles, which were known and established as law in the courts of equity in England at the time of the institution of this court, and I shall certainly not presume to strike into any new path with visionary schemes of innovation and improvement; *Via antiqua via est tuta.* . . . This court ought to be as much bound as a court of law by a course of decisions applicable to the case, and establishing a rule. As early as the time of Lord Keeper Bridgman, it was held that precedents were of authority (1 Mod. 307. See the citation ante, in the note under § 59). The system of equity principles which has grown up and become matured in England, and chiefly since Lord Nottingham was appointed to the custody of the great seal, is a scientific system, being the result of the reason and the labors of learned men for a succession of ages. It contains the most enlarged and liberal views of justice, with a mixture of positive and technical rules founded in public policy, and indispensable in every municipal code. It is the duty of this court to apply the principles of this system to individual cases as they may arise, and by this means endeavor to transplant and incorporate all that is applicable in that system into the body of our own judicial annals, by a series of decisions at home." The propositions here quoted are undoubtedly true, and yet the feeling can not be avoided that they do not represent the *entire* truth. The character of Chancellor Kent's mind was eminently conservative; and this conservative tendency has led him to suppress, or at least to refrain from *expressing*, the element of vitality and expansion which inheres in the system, and the power of the court in its fulness to enlarge the equitable principles, to extend them over new facts and relations, and to render them fruitful in the constant production of new rules.

Contrast with Chancellor Kent's remarks the well known dictum of Jessel, M. R., in *In re Hallett's Estate*, 13 Ch. Div. 696, 710: "I intentionally say modern rules, because it must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these; the separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the Chancellors who first invented them, and state the date when they were first introduced into Equity jurisprudence; and, therefore, in cases of this kind, the older precedents in Equity are of very little value. The doctrines are progressive, refined, and improved; and if we want to know what the rules of Equity are we must look, of course, rather to the more modern than the more ancient cases."

procedure, to grant the variety of remedies adequate to the wants of society and the demands of justice, yet since the equitable system has become fully established, and its principles settled, this *origin* of the jurisdiction is no longer regarded as furnishing the *real* criterion. The whole question by which the extent of the equity jurisdiction is *practically* determined is no longer, whether the case is omitted by the law, or the legal rule is unjust, or even the legal remedy is inadequate,—although the latter inquiry is still sometimes made and treated as though it were controlling,—the question is, rather, whether the circumstances and relations presented by the particular case are fairly embraced within any of the settled principles and heads of jurisdiction which are generally acknowledged as constituting the department of equity.<sup>1</sup> Two results therefore follow: *First*, a court of equity will not, unless perhaps in some very exceptional case, assume jurisdiction over a controversy the facts of which do not bring it within some general principle or acknowledged head of the equitable jurisprudence; and *secondly*, if the circumstances do bring the case within any of these principles or heads, a jurisdiction over it will be maintained, although the *law* may have been so altered by judicial action or by positive legislation that it has supplied the original omission, or has brought the legal rule into a conformity with justice, or has furnished an adequate legal remedy. This latter proposition is true as the general doctrine concerning the extent of the equity jurisdiction, but its operation has sometimes been prevented, and the jurisdiction itself denied, in such cases by express statute.<sup>2</sup>

§ 63. **Recapitulation: Nature of Equity Stated in Four Propositions.**— . . .

§ 66. . . . The element, however, of the English and American law, which has operated by far the most powerfully to retard its development in the direction of morality, which has placed an insuperable barrier to its perfected growth, which has rendered it incomplete as an embodiment of jural rights, unable to administer justice to the citizen in all his relations, and unequal to the needs of society, has been and is its mode of procedure, its remedial system as a whole. This narrow, technical, arbitrary procedure, admitting growth in only one direction, granting but few remedies, and incapable of enlarging their number or changing their nature, was the fact which more than all else made it impossible for the “law” to borrow *all* the jural precepts of the moral code, incorporate them into its own rules, and administer the full remedial

<sup>1</sup> See dictum of Jessel, M. R.,—one of the most clear-headed and able judges of this generation.—in the case of *Johnson v. Crook*, L. R. 12 Ch. Div. 639, 649.

<sup>2</sup> See *post*, § 276 et seq.

justice which these equitable principles demanded. The legal growth was stunted, its development was checked, its tendencies to do justice in all the private relations of society were thwarted by its partial remedies and its imperfect means of administering them. From this cause the necessity of a distinct department of equity, with its own mode of procedure, and with absolute freedom and elasticity in the forms of its remedies, and their adaptation to the rights and duties of parties, has continued to the present day, and must continue until the principles and rules of the common-law remedial system are utterly abandoned.

§ 67. 4. As the expansive tendencies of the common law are thus confined within certain limits, and as its power to administer justice and to grant the variety of remedies needed in the manifold relations of society is incomplete, the English and American system of equity is preserved and maintained to supply the want, and to render the national jurisprudence as a whole adequate to the social needs. It is so constructed upon comprehensive and fruitful principles, that it possesses an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age. It consists of 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. On account of the somewhat arbitrary and harsh nature of the common law in its primitive stage, these doctrines and rules of equity were intentionally and consciously based upon the precepts of morality by the early chancellors, who borrowed the jural principles of the moral code, and openly incorporated them into their judicial legislation. This origin gave to the system which we call equity a distinctive character which it has ever since preserved. Its great underlying principles, which are the constant sources, the never-failing roots, of its particular rules, are unquestionably principles of right, justice, and morality, so far as the same can become the elements of a positive human jurisprudence; and these principles, being once incorporated into the system, and being essentially unlimited, have communicated their own vitality and power of adaptation to the entire branch of the national jurisprudence of which they are, so to speak, the substructure. It follows that the department which we call equity is, as a whole, more just and moral in its creation of right and duties than the correlative department which we call the law. It does not follow, however, that the equity so described is absolutely identical with natural justice or morality. On the contrary, a considerable portion of its rules

are confessedly based upon expediency or policy, rather than upon any notions of abstract right.

### SECTION III.

#### THE PRESENT RELATIONS OF EQUITY WITH THE LAW.

##### ANALYSIS.

- § 68. Importance of correctly understanding these present relations.
- § 69. Changes in the relations of equity to the law effected partly by statute and partly by decisions.
- §§ 70-88. Important instances of such changes in these relations.
  - § 70. In legal rules concerning the effect of the seal.
  - § 71. Ditto suits on lost instruments.
  - § 72. Ditto forfeitures and penalties.
- §§ 73, 74. Ditto mortgages of land.
  - § 75. In statutes concerning express trusts.
  - § 76. Ditto recording and doctrines of priorities.
  - § 77. Ditto administration of decedent's estates.
  - § 78. Ditto jurisdiction over infants.
- §§ 79, 80. Ditto married women's property.
  - § 81. In statutory restrictions upon the equitable jurisdiction.
- §§ 82, 83. In the practical abolition of the "auxiliary" jurisdiction.
- §§ 84-88. In the Reformed Procedure combining legal and equitable methods.

**§ 68. Importance of Correctly Understanding These Present Relations.**—In accounting for the historical origin of equity, and in describing its general nature, it is necessary to go back to the period of its infancy and early growth, when the common law was also in its primitive and undeveloped condition. We thus naturally form a picture of the two systems standing in marked contrast and even opposition, acknowledging different sources, controlled by different principles, exhibiting different tendencies, each complete in itself and independent of the other. The impression which is thus obtained of their relations is too apt to be retained in describing the equity as it has existed at subsequent times, and even as it exists at the present day. The effect of such a tendency to confuse different epochs and conditions is shown in some of the treatises upon equity jurisprudence, which tacitly assume that all of the original antagonism still prevails, and which, ignoring the great and often radical changes made in the law, discuss their subject-matter as though the relations between law and equity continued to be the same as they were in the reign of Charles II., or even later, in the reigns of George III. and George IV., and under the chancellorships of Lord Thurlow and Lord Eldon—as though all the harsh, arbitrary, unjust rules which then disgraced the law remained unmodi-

fied. Such neglect to appreciate the actual condition of the law will lead to the useless discussion of equitable doctrines which have become obsolete, since all occasion for their application has been removed, and will produce, almost as a matter of course, a distorted representation of equity as a whole. In order, therefore, to form an accurate notion of equity, its present relations with the law must be carefully observed, and to that end the changes which have been made in the law itself, and which have modified those relations, must be pointed out at every stage of the discussion. Without undertaking to give an exhaustive enumeration, or any detailed description, I shall simply mention some of the most important classes of alterations which have been made in the law since the principles and doctrines of equity were definitely settled.

**§ 69. Changes in the Relations of Equity to the Law.**—These changes have certainly been very great. They have been effected, *first*, by the legislative work of the common-law courts; and *secondly*, by statutory legislation. Since the doctrines of equity began to react upon the law, and especially since the impulse given by the brilliant career of Lord Mansfield, the common-law courts have consciously adopted and applied, as far as possible, purely equitable notions—not so much the technical equity of the Court of Chancery, but the principles of natural justice—in their decision of new cases, and in the development of the law, until a large part of its rules are as truly equitable and righteous in their nature as those administered by the Chancellor. From time to time, the legislature has interposed, and by occasional statutes has aided this work of reform. During the past generation, since about 1830 in England, and an earlier date in the United States, this legislative process of amendment has been more constant, more systematic, and more thorough, extending to all parts of the law, and has been the chief agency in the work of legal reform. The result is, that many doctrines and rules which were once exclusively recognized and enforced by chancery have become incorporated into the law, and are now, and perhaps long have been, administered by the law courts in the decision of cases. In this manner, the law has been brought at many points into a coincidence with equity. Nor has the legislative work been confined to the law; it has largely acted upon the system of equity, and has brought that system into a closer resemblance, external at least, with the law. These changes have naturally gone much further in the United States than in England; the law has been more essentially altered, and equity itself has been subjected to more limitations.<sup>1</sup>

<sup>1</sup>The author instances alterations in the relations of equity and law by reason of changes in the legal rules in reference to (§ 70) the effect of a seal; see post,

## SECTION IV.

## THE CONSTITUENT PARTS OF EQUITY.

## ANALYSIS.

- § 89. Object of this section.
- §§ 90, 91. Rights are either "primary" or "remedial"; each described.
- § 92. Division of "primary" rights, viz.: 1. Those concerned with personal status; 2. Those concerned with things.
- §§ 93-95. Two general classes of rights concerned with things, viz.: "real" and "personal"; each described.
- §§ 96, 97. What of these kind of rights are embraced within equity; both "primary" and "remedial."
- §§ 98-107. I. Equitable primary rights, kinds and classes of.
- §§ 108-116. II. Equitable remedial rights, kinds and classes of.
  - § 112. General classes of equitable remedies.
  - § 112. General classes of equitable remedies.
- §§ 113-116. Mode of administering them.
  - § 116. How far legal and equitable modes can be combined.
  - § 117. Recapitulation.
  - § 116. How far legal and equitable modes can be combined.
  - § 117. Recapitulation.

§ 90. **Classes of Rights.**—Laying out of view the rules which form the "public law" and the "criminal law," all the commands and rules which constitute the "private civil law" create two classes of rights and duties, the "primary" and the "remedial." The primary rights and duties form the body of the law; they include all the rights and obligations of property, of contract, and of personal *status*; they are the very end and object of all law. If mankind were so constituted that disobedience to legal rules was impossible, then the law would be entirely made up of the rules which create these primary rights and duties. But since all these primary rights and duties may be violated, another branch of the law becomes necessary, which may enforce obedience by means of the "Remedies" which it provides. All possible remedies are either substitutes or equivalents given to the injured party in place of his original primary rights which have been broken, or they are the means by which he can maintain and protect his primary rights in their

§§ 379, 389; to (§ 71) actions on lost instruments; see post, §§ 280, 831, 832; to (§ 72) penalties; see post, § 434; to (§§ 73, 74) mortgages; see post, §§ 1188-1190; to (§ 75) express trusts in land; see post, §§ 1003-1005; to (§ 76) recording and priorities; to (§ 77) administration; to (§ 78) infants; to (§ 79) married women's property and contracts; by reason of changes in the law of evidence resulting in the partial disappearance of the auxiliary jurisdiction (§§ 82, 83); and above all (§§ 84-88) by reason of the reformed procedure in the majority of the United States and in England: see post, §§ 353-358.

actual form and condition. Remedial rights are those which a person has to obtain some appropriate remedy when his primary rights have been violated by another. Remedial duties are those devolving upon the wrong-doer in such case to give the proper remedy prescribed by law.

§ 92. **Primary Rights.**—A very general analysis and classification of Primary Rights and Duties will, however, be essential to an accurate notion of the constituent parts of equity. The rules and their resulting primary rights and duties which make up the private municipal law—omitting, as before stated, the public and the criminal law—fall by a natural line of separation into two grand divisions, namely: 1. Those directly and exclusively concerned with or relating to *Persons*; 2. All the remaining portions, which, in a broad sense, relate to or are concerned with *Things*. The first of these divisions, under a natural and logical system of arrangement, comprises only those rules the exclusive object of which is to define the *status* of persons; or in other words, those which determine the capacities and incapacities of persons to acquire and enjoy legal rights, and to be subject to legal duties.<sup>1</sup> In the United States, where nearly all distinctions of class have been abolished, and all persons *sui juris* stand upon an equality with respect to their capacity of enjoying civil rights, and of being subject to civil duties, this division contains but a very small part of the law, as compared with the corresponding department in the Roman law, or even in the existing law of many European countries. It also follows, as a necessary consequence of this principle of classification, that most of the matter which Blackstone, and after him Kent and other institutional writers, have treated as belonging to the so-called “Rights of Persons,” has been misplaced. Such matter has no connection whatever with personal *status* or capacity, and if any scientific or consistent system of arrangement is pursued, it plainly belongs among those rules which relate to *Things*.<sup>2</sup>

<sup>1</sup> See 2 Austin on Jurisprudence, pp. 10, 382, 386, note, 412; vol. 3, pp. 170-172.

<sup>2</sup> Simply as illustrations of this improper classification, without attempting to enumerate all the cases, I mention the following: All the rules concerning the property and contracts of married women, and the contracts actually made by infants, have no proper place in the division which treats of the “Law as to Persons”; they form a part of the law concerning Things, in exactly the same manner, and for exactly the same reason, that the rules regulating the property and contracts of adult men or of single women belong to the law of things. The same is true of the rules defining rights which Blackstone calls “absolute rights of persons,” but which are no more absolute than their rights of property, or rights growing out of contract. The rules defining the rights and duties existing between husband and wife, parent and child, guardian and ward, master and servant, also come within the law concerning things, as truly as do those

§ 93. The primary rights embraced in the second grand division of the law—those concerned with or relating to Things—are naturally separated into two principal classes, namely, Rights in rem, or Real rights, and Rights in personam, or Personal rights. Rights in rem, or real rights, are those which, from their very nature, avail to their possessor against all mankind, and a correlative duty rests alike upon every person not to molest, interfere with, or violate the right. Rights in personam, or personal rights, are those which avail to their possessor against a specified, particular person, or body of persons only, and the correlative duty not to infringe upon or violate the right rests alone upon such specified person or body of persons.

§ 94. **Real Rights.**—The first of these classes, the rights in rem, embraces three distinct genera, which differ from each other in the subject-matter over which the rights extend, but not in the essential nature of the rights themselves. These three genera are: 1. Rights of property of every degree and kind over lands or chattels, things real or things personal; 2. The rights which every person has over and to his own life, body, limbs, and good name; 3. The rights which certain classes of persons, namely, husbands, parents, and masters, have over certain other persons standing in domestic relations with themselves, namely, wives, children, and servants and slaves. The rights of the husband, parent or master *over* the wife, child, or servant are in our law very meager and limited, but so far as they exist at all, they resemble the more complete rights of property, because they avail against all mankind, and impose an equal duty upon every human being. Thus the husband is, by virtue of this right, entitled to the society of his wife, and the father is entitled to the services of his infant children, while a duty rests upon every person not to violate these rights by enticing away, seducing, or injuring the wife or child. This latter group of rights must not be confounded with those which the husband and wife, parent and child, master and servant, *hold against each other*, and which resemble in their nature the rights arising from contract.

§ 95. **Personal Rights.**—The second class, rights in personam, personal rights (called by the Roman law “Obligations”) includes two distinct genera, namely: 1. Rights arising from contract; and 2. Rights arising, not from contract, but from some existing relation between two specific persons or groups of persons, which is

which define the rights and duties existing between the parties to any and every contract. The subject of corporations, with all of its ramifications involving every department of the private Municipal Law, has not even the semblance of belonging to the division which comprises the “Law concerning Persons.”

generally created by the law. . . . The legal effect of these special relations is so similar to that produced by contract, that the rights flowing from them were said by the Roman law to arise from quasi contract (*quasi ex contractu*). . . .

§ 98. **I. Equitable Primary Rights.**—Equity consists in part of rules creating primary rights and duties differing from those relating to the same subject-matter, which are purely legal. Recurring to the classification given in a former paragraph (§ 92), it will enable us to fix the limits of these primary rights, and to determine the classes in which they are all found, with great ease and precision. No equity primary rights belong to the first grand division of rights relating to or concerned with the *status* of persons. All the rules which define the capacities and incapacities of persons to acquire rights or to be subject to duties are strictly legal. The only apparent exceptions to this proposition are the statutory special proceedings for determining whether a person is a lunatic, or non compos mentis, or a confirmed drunkard, and the statutory suits for divorce, which in many of the states are confided to the Chancellor, or to a judge or court possessing equity powers. But in the first place, these proceedings are wholly statutory, and do not belong to the equity jurisdiction as such; and in the second place, they are wholly remedial.<sup>1</sup> All the primary rights, therefore, which form a part of equity are referable to the second division of Rights relating to Things.

§ 99. From this division, also, there must be a process of elimination. In the department of Real rights, Rights in rem, very important and broad limitations are to be made. No equitable primary rights are contained in the second of the three genera into which real rights are divided—or those which a person possesses over his own life, body, limbs, or good name. All the rights of this kind are purely legal; they are the very flower and fruit of the common law—its highest excellence; and equity does not intrude upon this peculiar field of the law. Nor are any equitable primary rights contained in the third of these genera—the rights held by certain classes of persons *over* certain other persons occupying special domestic relations towards themselves. The rules which define these rights, and determine the powers of husbands over their wives, parents over their children, guardians over their wards, masters over their servants, belong exclusively to the domain of the law;

<sup>1</sup>These proceedings are in truth remedies; they are intended to ascertain and establish the *status* of lunacy, unsoundness of mind, etc., or to dissolve the *status* of marriage; but they do not determine the capacities or incapacities of lunatics, etc.,—all the rules which determine who are lunatics, insane, married, etc., and their capacities, are wholly legal, and are not equitable.

equity does not interfere with these purely personal relations. It is only when some property rights or questions concerning property arise between husband and wife, parent and child, guardian and ward, that equity can possibly have jurisdiction, and even in such cases the jurisdiction does not extend to the merely personal relations.<sup>1</sup>

§ 100. We are now prepared by this process of elimination to define with exactness the classes of primary rights and duties which alone come within the domain of equity, and thus form a part of its jurisprudence. Among the rights in rem, real rights, it is only those of the first genus, the rights of property, which do or can come within the scope of equity. Among the rights in personam, personal rights, both of the genera, those arising from contract and those arising from particular relations subsisting between two or more specific persons, may come within the domain of equity. The rights and duties of the parties growing out of contracts, and especially those growing out of certain determinate relations not based upon contract, but directly concerned with property, such as trustee and cestui que trust in all its forms, guardian and ward, executor or administrator and legatees, distributees, or creditors, and the like, constitute a large and important part of the primary rights falling under the equitable jurisdiction. Having thus referred the primary rights which equity creates to their general classes, I shall now describe with more of detail their essential nature and qualities.

§ 101. It must be premised that in most instances the legal primary right, and the corresponding but different equitable primary right, arise from the same facts, circumstances, acts, or events which are the occasion of both. But in some instances, facts, circumstances, or events which are not the occasion of any legal right at all give rise to a primary right in equity.<sup>1</sup> With respect to the equitable primary rights taken as a whole, it is proper to say that most of them are simply *different* from or *additional* to those which exist at law; they do not contradict any rules upon the same subject-matter which the common law provides; but they are supplementary, touching upon particulars in relation to which the law is

<sup>1</sup>The text is cited to this effect in *Lombard v. Morse*, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273.

<sup>1</sup>A familiar example will illustrate both of these cases. From the same fact, namely, a valid written contract for the sale of land, there arise the legal right of the vendee, and also his very different equitable right. From a verbal contract for the sale of land when part performed, there arises no legal right whatever; but these facts, the verbal contract together with the part performance, are the occasion of an equitable right in the vendee which is even a right of property, an equitable estate in the land itself.

silent. Between this class of equitable rights and the corresponding legal rights there is, therefore, no conflict; each is absolutely true at all times and in all places; equity courts recognize and administer the one, and law courts the other, without clashing or discord. With respect to another portion of these primary equitable rules and rights, it must be said that they are not merely additional to, but they are in actual conflict with, the legal rules and rights concerning the same subject-matter, or arising from the same circumstances; between the kind of equitable rules and rights and the corresponding portions of the law, there is, therefore, an antagonism; the equity courts admit and uphold a particular right as resulting from a certain state of facts, which the law courts not only refuse to recognize, but which they would deny and oppose. This contrariety existed to a much larger extent in the infancy of the system than it does now; it has gradually become less as the law itself has grown more liberal and equitable. That there should be any such conflict between two departments of a municipal law is undoubtedly a blemish upon the national jurisprudence; but this condition had a strictly historical origin, and the very progress towards perfection largely consists in the elimination of these instances of antagonism. It should be remembered, also, that equity sometimes furnishes its remedies for the violation of primary rights which are strictly legal, as, for example, in many cases of accounting.<sup>2</sup>

§ 105. I pass to examples of other kinds. Wherever the books or the courts speak of "equitable estates," either in land or in chattels, as held by a person, there are in reality equitable *real* rights, rights in rem, rights of property, in the land or chattels, different from or additional to the rights arising from the same facts which the law confers upon the same party. The kinds and degrees of these equitable rights of property are numerous, ranging from the most complete, beneficial ownership, simply wanting the legal title, through various grades to mere liens; the special rules concerning them constitute an important part of equity jurisprudence.<sup>1</sup> . . .

<sup>2</sup>The foregoing description of equitable primary rights is illustrated by the following instances; (§ 102) primary and remedial rights in equity of a debtor on a sealed obligation who has paid the debt but has failed to take an acquittance under seal, or a surrender of the instrument; see post, § 383; (§ 103) primary and remedial rights in equity of a purchaser of land by verbal contract which has been part performed; see post, § 1400; (§ 104) married women's contracts in equity; see post, §§ 1121-1126; (§ 104 note) right of creditor against estate of deceased joint debtor; see post, § 409.

<sup>1</sup> Examples of equitable estates or rights of property, arising from circumstances which create only a personal right at law: (§ 105) estates arising from

§ 108. **II. Equitable Remedies.**—Equity consists, to a very great extent, of Remedies and Remedial Rights different from any which the law administers by means of its ordinary actions; although it does, under certain circumstances, grant remedies which are legal in their nature, and are capable of being conferred by a judgment at law, namely, a mere recovery of money, or of the possession of specific land or chattels. Many of the ordinary equitable remedies are derived directly from the nature of the primary right which they are intended to protect. For example, in the case of a contract for the purchase of land, or of an implied trust in land, or of any other transaction from which the equitable primary right consists in a right of property, this equitable estate, although the real, beneficial ownership is subject to some great inconveniences which lessen its value, the holder of the legal title in trust for the equitable owner cannot defeat the latter's right as long as he retains such title in his own hands, but he can convey it to another bona fide purchaser, and thus cut off the existing equitable estate. To prevent this, and to secure his full enjoyment of the property, a peculiar remedy is given to the equitable owner, by which he establishes his right, perfects his interest, compels a conveyance of the legal title, and a transfer of the possession, if necessary, and thus acquires a full and indefeasible estate, legal as well as equitable, in the land.<sup>1</sup> A large class of remedies are thus based upon and exactly fitted to the nature of the primary right; these remedies are distinctively equitable; and their intimate correspondence with the primary rights which they enforce has, more than anything else perhaps, led to the mistake, alluded to in a former paragraph, of confounding all equitable *primary* rights with *remedial* ones, and of supposing that equity is wholly a system of remedies.

§ 109. The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rules which govern their use. The legal remedies by action are, in fact, only two: recovery of possession of specific things, land or chattels, and the recovery of a sum of money. When a person is owner of land or of chattels in such a way that he is entitled to immediate possession, he may recover that possession; but since the action of "Ejectment" has taken the place of the old real actions, a recovery of the land executory contract for purchase and sale of land; see post, § 368; (§106) resulting trust in land in favor of one with whose money the land is purchased by another; see post, §§ 1037-1043 ; (§ 107) express passive trusts in lands; see post, §§88-90; estate in equity, of mortgagor; see post, §§1180, 1181.

<sup>1</sup>This paragraph of the text is cited in *Provisional Municipality of Pensacola v. Lehman*, 57 Fed. 324, 330, 13 U. S. App. 411 (suit for specific performance against a municipality).

by its means does not necessarily determine or adjudge the *title*, and in a recovery of chattels by the action of replevin, the title is only determined in an incidental manner.<sup>1</sup> For all other violations of all possible primary rights, the law gives, as the only remedy, the recovery of money, which may be either an ascertained sum owed as a debt, or a sum by way of compensation, termed damages. Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.<sup>2</sup>

§ 111. . . . Equity has followed the true principle of contriving its remedies so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated. It has, therefore, never placed any limits to the remedies which it can grant, either with respect to their substance, their form, or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed.<sup>1</sup>

113. The equitable remedies also differ from the legal ones in the manner of their administration. The common-law rules of pro-

<sup>1</sup> It should be remembered that I am speaking of the common-law forms of action, and not of the system introduced by the reformed procedure. Since in the action of ejectment the plaintiff was a fictitious person, and not the real party in interest, a judgment was no bar to any number of succeeding actions; it required a suit in equity and a perpetual injunction to restrain the continuous bringing of such actions in a given case, and to *declare* the title. In the American states, statutes have put a limit upon the number of separate actions which may be brought. Under the reformed procedure, the action to recover land really has nothing in common with "ejectment"; it rather resembles the old "real action" in determining the title as well as the possession, and it is so regarded in some of the states. But by strange inconsistency, the statutes of other states treat it as only a simplified ejectment, and the judgment recovered by it as not finally adjudicating upon the title. In a few of the states, the old common-law "real action" is still used instead of ejectment.

<sup>2</sup> The text is quoted in *Sourwine v. Supreme Lodge*, 12 Ind. App. 447, 54 Am. St. Rep. 532, 40 N. E. 646, 1 Scott 320.

<sup>1</sup> The text is quoted in *Union Pacific R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173; *Columbia Ave. Sav. Fund, etc., Co. v. City of Dawson*, 130 Fed. 152, 176; *Harrigan v. Gilchrist (Wis.)*, 99 N. W. 909; *Sourwine v. Supreme Lodge*, 12 Ind. App. 447, 54 Am. St. Rep. 532, 40 N. E. 646, 1 Scott 320; and cited in *Kessler & Co. v. Ensley Co.*, 129 Fed. 397.

cedure are fixed, rigid, arbitrary, technical, while those of the equity suit are natural and flexible. In no features is the contrast greater than in respect to parties and to judgments. The doctrines of the common law concerning the parties to actions, their joint or several rights and liabilities, and the form of judgment based upon these respective kinds of right and liability, are the crowning technicality of the system, resting upon verbal premises which mean nothing, and built up from these premises by the most accurate processes of mere verbal logic. It was a fundamental principle that no one could be a plaintiff unless he was alone or jointly with the co-plaintiffs entitled to the *whole* recovery, nor a defendant unless he was alone or jointly with the co-defendants liable to the *entire* demand. The common law knew no such thing as the making a person plaintiff who did not share the right of recovery, or defendant who was not liable for the whole claim, *merely for the purpose of binding him by the judgment and cutting off any possible right on his part.*<sup>1</sup> The judgment must be one single, entire recovery, both as affects the plaintiffs and the defendants; and no one could be a plaintiff who did not thus hold the legal title, even though all beneficial interest in the cause of action belonged to another. On this ground the assignor of a thing in action not negotiable must be the plaintiff, and the ability of an assignee to bring an action is wholly the result of statute. Where the action was by two or more plaintiffs, the judgment was necessarily a single one in favor of all considered as one undivided body. It was impossible that each one of several plaintiffs could recover a different sum of money by way of debt or damages. Even if the action was for the possession of chattels or land, different plaintiffs could not recover distinct chattels or tracts of land; the judgment was for all the chattels as one subject-matter, or for the whole land as a unit, and if the plaintiff's rights were different they must be undivided, so that each share, being as yet unpartitioned, should extend throughout the entire mass, and the judgment be for all as joint or co-owners. The same rule extended to the defendants. If there were two or more, one single judgment must be rendered

<sup>1</sup> This rule has been changed by the new procedure as adopted in several of the western states, which very properly requires that when an action is brought by the assignee of a thing in action, except of a negotiable paper, the assignor must be made a party either plaintiff or defendant, so that he may be heard, if necessary, on the question as to the validity of the alleged assignment, and any future claim against the debtor on his part may be barred by the judgment. This innovation, which strikes at the very root of the common-law theory as to parties and judgments, has been in operation for years without the slightest difficulty, and its advantages are patent. This single fact demonstrates the utter worthlessness, the mere *verbal* character, of the so-called legal reasoning by which the common-law dogmas have been upheld.

against all; different recoveries against separate defendants in the same action were impossible. The common law permitted no affirmative relief, no recovery of debt or damages, land or chattels, in favor of a defendant against a plaintiff, except perhaps in the little used and now virtually obsolete legal action of "account." Even in the case of "Recoupment of Damages," which was a recent invention of the common-law courts, the demand on behalf of the defendant was only used *defensively*. The exceptional case of "Set-off," in which alone an affirmative recovery always pecuniary was ever possible in favor of the defendant, was wholly of a statutory origin.

§ 114. The equitable doctrines with respect to parties and judgments are wholly unlike those which prevailed at the common law, different in their fundamental conceptions, in their practical operation, in their adaptability to circumstances, and in their results upon the rights and duties of litigants. The governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in the one suit the rights and duties of all the parties, which really grow out of or are connected with the subject-matter of that suit. Its fundamental principle concerning parties is, that all persons in whose favor or against whom there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject-matter and the relief granted, that their rights or duties might be affected by the decree, although no substantial recovery can be obtained either for or against them, shall be made parties to the suit; and it is not ordinarily a matter of substantial importance whether they are joined as plaintiffs or as defendants, although this question of procedure is regulated to a certain extent by rules based upon considerations of convenience rather than upon any essential requirements of the theory. The primary object is, that all persons sufficiently interested may be before the court, so that the relief may be properly adjusted among those entitled, the liabilities properly apportioned, and the incidental or consequential claims or interests of all may be fixed, and all may be bound in respect thereto by the single decree.

§ 115. The fundamental principle of equity in relation to judgments is, that the court shall determine and adjust the rights and liabilities concerning or connected with the subject-matter of all the parties to the suit, and shall grant the particular remedy appropriate in amount and nature *to* each of those entitled to any relief, and *against* each of those who are liable, and finally shall so frame its decree as to bar all future claims of any party before it which may arise from the subject-matter, and which are within the scope of the present adjudication. In rendering its decree, a court of equity is not hampered by any of the arbitrary regulations which restrict the

action of common-law tribunals; and especially, it is not bound to give a single judgment in favor of the co-plaintiffs regarded as one body, nor against the defendants as a group of persons jointly or equally liable. In this respect it possesses a full freedom to adapt its relief to the particular rights and liabilities of each party, and to determine the special interests of all, so far as they are legitimately connected with the subject-matter, and properly within the scope of the adjudication. It has power to grant relief to some of the co-plaintiffs, and not to others, and against some of the co-defendants, and not against others; it can confer different reliefs in kind and extent to different plaintiffs and against different defendants; it can bestow affirmative relief upon all or some of the defendants against all or some of the plaintiffs; and finally, it can determine and adjust the rights and duties of the co-plaintiffs, or of the co-defendants, as between themselves. I would not be understood as asserting that this extreme flexibility or apportionment of remedies and obligations is common in ordinary equitable suits, nor that it is without limit and control; on the contrary, it is regulated by rules of pleading and procedure so contrived that all parties may be informed of the claims made against them, and of the liabilities to which they are exposed. My object here is simply to state the general principles of the Equity Remedial System, and to describe the power which inheres in a court of equitable jurisdiction to mold its decree and to adjust its reliefs so as to establish and enforce the particular rights and liabilities, legitimately connected with the subject-matter, and within the scope of the judgment, of all the parties to the action. The modes in which this power should be exercised according to the rules of pleading and procedure must be considered in another place.

§ 116. The remedial system of equity as a whole, with its great variety of specific remedies which enforce the very primary rights and duties of persons rather than give pecuniary equivalents for their violation, with its power to enlarge the scope of these ordinary forms of relief, and even to contrive new ones adapted to new circumstances, with its comprehensive rules concerning parties, and with its unlimited control over the form and material of its judgments, possesses enormous advantages over the narrow, inflexible and artificial methods of the common law. The reformed American procedure has attempted to combine the two, or rather to enlarge the equity doctrines and rules, so that they may embrace all actions, legal as well as equitable; and in those states where the courts have accepted and carried out the reform in its true spirit, this attempt has been successful as far as is possible from the essential elements of the two jurisdictions. A complete amalgamation, however, is not possible, so long as the jury trial is retained in legal actions. . . .

§ 117. To sum up the discussions of the foregoing section: The entire municipal law, so far as it is concerned with private civil relations, comprises,—1. Legal rules defining legal primary rights and duties applicable to most of the facts and circumstances which have been brought within the range of jural relations; 2. Legal rules defining legal remedial rights and duties and remedies, which are few in number, and very limited in their nature and form; 3. Equitable rules defining equitable primary rights and duties applicable to certain classes of jural relations, which rights and duties are supplementary and additional rather than contradictory to the legal ones affecting the same relations; 4. Equitable rules defining equitable primary rights and duties applicable to a comparatively few facts and circumstances, which are actually conflicting with the corresponding legal rights and duties; 5. Equitable rules defining equitable remedial rights and duties and remedies, which are much more various in their nature and form, specific in their object, and flexible in their operation, than the remedies supplied by the law. There is, therefore, no clashing nor uncertainty with respect to the final absolute rights and duties of individuals, except so far as such conflict or doubt may arise from the comparatively few rules of the fourth class, where the antagonism between equity and the law does actually exist. It is certainly strange, inexplicable except upon historical grounds, that in an age and country advanced in civilization, the municipal law should present such an anomaly, that a married woman's agreement, for example, should be utterly void by the rules of the law, while, according to the doctrines of equity, it might be valid and enforceable out of her separate estate; or that a certain contract for the sale of land should be treated as an absolute nullity by a court of law, and should be regarded as binding and specifically executed by a court of equity. If any change, however, is to be made for the purpose of removing this discord, it must be in the legal and not in the equitable rules. The latter are, in all instances, the more just, and more in accordance with the sentiments and opinions of the age; while the former are necessarily subordinate, some of them have become practically obsolete, and all of them would be totally abandoned in any thorough revision or scientific codification of our entire jurisprudence.

## SECTION V.

## THE PRINCIPLES OF CLASSIFICATION.

## ANALYSIS.

§ 118. Importance and difficulty of a correct classification.

§§ 119, 120. Different grounds which might be taken for a classification.

§§ 121-125. Ordinary mode of classification according to the nature of the jurisdiction.

§ 121. In the three divisions of exclusive, concurrent, and auxiliary.

§§ 122, 123. Different modes of carrying out this system by various writers.

§§ 124, 125. Fundamental objections to this system of classification.

§§ 126, 127. The true principles of classification in the present condition of Equity.

§ 128. Plan and order of arrangement in this treatise.

**§ 121. Ordinary Mode of Classification.**—The plan of arrangement which has been followed by most authors of general treatises is based upon the relations which formerly existed between equity and the law when the two jurisdictions were as yet wholly distinct, and were administered by separate tribunals. Its divisions were made, not according to any inherent quality or nature either of rights or remedies, but according to a purely accidental quality of the *jurisdiction*. . . . This plan of classification separates the whole body of equity into the three following grand divisions: 1. That containing the matters in respect of which courts of equity had an exclusive jurisdiction; 2. That containing matters in respect of which courts of equity had jurisdiction concurrently with courts of law; 3. That containing matters in respect of which the equity jurisdiction, though exclusive, was wholly exercised in aid of certain actions or proceedings which belonged exclusively to courts of law. In brief, the classification which has ordinarily been adopted in the text-books is, the Exclusive Jurisdiction, the Concurrent Jurisdiction, and the Auxiliary Jurisdiction.

§ 128. I shall in the following treatise adopt the general plan, principles of classification, and method of treatment described in the foregoing paragraphs. The entire work will be separated into four parts. *Part First* will contain an inquiry into the nature and extent of the Equity Jurisdiction as it now exists in the United States, both in its original and general form, and as limited or regulated by the statutory legislation of the various states and of the Congress of the United States. The three remaining parts will treat of the Equity Jurisprudence, or the doctrines which are administered by the courts in the exercise of their equitable *jurisdiction*. *Part Second* will discuss the grand principles and maxims which are the foundation of

Equity Jurisprudence, and the sources of its particular doctrines, and will also describe some of the most important facts and events which are the *occasions* of equitable primary and remedial rights and duties. *Part Third* will contain that portion of Equity Jurisprudence which consists of Primary Rights and Duties, or in other words, of equitable estates, titles, and interests. *Part Fourth* will contain that portion of Equity Jurisprudence which consists of remedial rights and duties and of remedies. This description does not include any discussion of mere procedure. The term "Remedies," as it has been defined, and as it will be used throughout the book, does not embrace the rules of procedure, but only the reliefs which are granted for a violation, actual or threatened, of legal and equitable rights.

# PART FIRST.

## THE NATURE AND EXTENT OF EQUITY JURISDICTION.

### CHAPTER FIRST.

#### THE GENERAL DOCTRINE CONCERNING THE JURISDICTION.

##### SECTION I.

###### FUNDAMENTAL PRINCIPLES AND DIVISIONS.

###### ANALYSIS.

§ 129. Equity jurisdiction defined.

§ 130. Requisites in order that a case may come within it.

§ 131. Distinction between the existence of equity jurisdiction and the proper exercise of it.

§ 132. Inadequacy of legal remedies, how far the test.

§ 133. Equity jurisdiction depends on two facts: the existence of equitable interests, and the inadequacy of legal remedies.

§§ 134, 135. How far the jurisdiction is in personam, how far in rem.

§ 136. Equity jurisdiction threefold,—exclusive, concurrent, and auxiliary.

§§ 137, 138. What embraced in the exclusive jurisdiction.

§§ 139, 140. What embraced in the concurrent jurisdiction.

§ 141. Cases may fall under both.

§§ 142–144. What embraced in the auxiliary jurisdiction.

§ 145. Order of subjects.

§ 129. **Equitable Jurisdiction Defined.**—It is important to obtain at the outset a clear and accurate notion of what is meant by the term “Equity Jurisdiction.” It is used in contradistinction to “jurisdiction” in general, and to “common-law jurisdiction” in particular. In its most general sense the term “jurisdiction,” when applied to a court, is the power residing in such court to determine judicially a given action, controversy, or question presented to it for decision. If this power does not exist with reference to any particular case, its determination by the court is an absolute nullity; if it does exist, the determination, however erroneous in fact or in law, is binding upon the parties until reversed or set aside in some proceeding authorized by the practice, and brought for that express pur-

pose.<sup>1</sup> It is plain that the term used in this strict sense *may* be applied to courts of equity as well as to any other tribunals. With this signification of the word, it would be said that an equity court has no jurisdiction to try the issues arising upon an indictment, and to render judgment in a criminal prosecution; the entire proceeding would be null and void. On the other hand, it is equally plain that this strict meaning is not always given to the term "equity jurisdiction," as it is ordinarily used. The proceedings and judgment of a court of chancery or of a court clothed with equity powers are not *necessarily* null and void because the action is not one which comes within the scope of the "equity jurisdiction" in the common acceptance of that phrase, or in other words, because the claim is one for which there is a full, adequate, and complete remedy at law.<sup>2</sup> This well-settled rule furnishes a decisive test, and shows that when ordinarily speaking of the "equity jurisdiction" we do not thereby refer to the general power inherent in a court to decide a controversy at all,—a power so essential that its absence renders the decision a mere nullity, but we intend by the phrase to describe some more special and limited judicial authority.

§ 130. "Equity jurisdiction," therefore, in its ordinary acceptance, as distinguished on the one side from the general power to decide matters at all, and on the other from the jurisdiction "at law" or "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, which decision may involve either the determination of the equitable rights, estates, and interests of the parties to such causes, or the granting of equitable remedies. In order that a cause may come within the scope of the equity jurisdiction, one of two alternatives is essential; either the primary right, estate, or interest to be maintained, or the violation of which furnishes the cause of action, must be equitable rather than legal; or the remedy granted must be in its nature purely equitable, or if it be a remedy which *may* also be given by a court of law, it must be one which, under the facts and circumstances of the case, can only be made complete and adequate through the equitable modes of procedure. At the same time, if a court clothed with the equity jurisdiction as thus described should hear and decide, according to equitable methods, a case which did not fall within the scope of the equity jurisprudence, because both the primary right invaded constituting the cause of action and the

<sup>1</sup> See *Hunt v. Hunt*, 72 N. Y. 217, 228-230, 28 Am. Rep. 129, by Folger, J. in which the subject is explained in a very clear and convincing manner.

<sup>2</sup> *Creely v. Bay State B. Co.*, 103 Mass. 514.

remedy granted were wholly legal, and belonging properly to the domain of the law courts, such judgment, however erroneous it might be and liable to reversal, would not *necessarily* be null and void. On the contrary, as will be more fully stated hereafter, the objection that the case does not come within this so-called equity jurisdiction must ordinarily be definitely raised by the defendant at the commencement of the proceedings, or else it will be regarded as waived, and the judgment will not even be erroneous.<sup>1</sup> In some instances, however, where the equitable functions of the court are specifically defined by statute, or the facts show very clearly that the rights involved in the controversy and the remedies demanded are purely legal, and completely within the scope of ordinary legal proceedings, the court of equity will itself take the objection at any stage of the cause, and will dismiss the suit, although no objection has in any way been raised by the parties.<sup>2</sup>

§ 132. **Extent of the Jurisdiction.**— . . . The attempt has been made to furnish one comprehensive test for the solution of all questions which may arise as to the existence of the jurisdiction—to reduce all special rules to one general formula. To this end, it has often been said by courts as well as by text-writers that the equity jurisdiction extends to and embraces all civil cases, and none others, in which there is not a full, adequate, and complete remedy at law. . . .

§ 133. The general criterion which has thus been proposed is, however, insufficient and misleading. Although the inadequacy of legal remedies explains, and is even necessary to explain, the interposition of equity in certain classes of cases, it wholly fails to account in any consistent and correct manner for the entire equity jurisdiction. The history of the court of chancery shows that all its powers cannot be referred to this source. It is true that the common-law modes of procedure are utterly inadequate to meet all the ends of justice, and to administer all the remedies which are granted by equity; and that in some general sense equity is established to supply this defect in the law. But the absence of full, adequate, and complete remedies at law does not constitute a basis upon which to rest the whole equity jurisdiction, nor furnish a practical explanation of all the doctrines and rules which make up the equity jurisprudence. No theory is scientifically complete, nor practically efficient, which does not recognize two distinct sources and objects of the equity jurisdiction, namely, the primary rights, estates, and interests which equity jurisprudence creates and protects, and the remedies which it confers. These two facts in com

<sup>1</sup> Creely v. Bay State B. Co., 103 Mass. 514.

<sup>2</sup> Hipp v. Babin, 19 How. 271, 278.

bination can alone define the extent and fix the limits of the equity jurisdiction.

§ 136. **Divisions.**—Adopting, therefore, the primary rights, estates, and interests which equity creates, and the remedies which it confers, as the objects which define and limit the extent of the equity jurisdiction, I shall state the principles by which the extent and limits of that jurisdiction are ascertained. It has been customary among writers to distinguish the equitable jurisdiction as *exclusive* and *concurrent*, and some have added the third subdivision, *auxiliary*.

§ 137. **Exclusive Jurisdiction.**—The exclusive jurisdiction extends to and embraces, *first*, all civil cases in which the primary right violated or to be declared, maintained, or enforced—whether such right be an estate, title, or interest in property, or a lien on property, or a thing in action arising out of contract—is purely equitable, and not legal, a right, estate, title, or interest created by equity, and not by law. All cases of this kind fall under the equitable jurisdiction alone, because of the nature of the primary or substantive right to be redressed, maintained, or enforced, and not because of the nature of the remedies to be granted; although in most of such instances the remedy is also equitable . . .

§ 138. The exclusive jurisdiction includes, *secondly*, all civil cases in which the remedy to be granted—and, of course, the remedial right—is purely equitable, or one which is recognized and administered by courts of equity, and not by courts of law. In the cases of this class, the primary right which is maintained, redressed, or enforced is sometimes equitable and is sometimes legal; but the jurisdiction depends, not upon the nature of these rights, estates, or interests, but wholly upon the nature of the remedies.<sup>1</sup> Cases in which the remedy sought and obtained is one which equity courts alone are able to confer must, upon any consistent system of classification, belong to the *exclusive* jurisdiction of equity, even though the primary right, estate, or interest of the party is one which courts of law recognize, and for the violation of which they give *some* remedy. Thus a suit to compel the specific performance of a contract falls under the exclusive jurisdiction of equity, although a legal right also arises from the contract, and courts of law will give the remedy of damages for its violation. . . . Again, the particular fact or event which occasions the peculiar equitable remedy, and gives rise to the right to such remedy, may also be the occasion of a legal remedy and a legal remedial right

<sup>1</sup>The text is quoted in *Montana Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co.*, 27 Mont. 536, 70 Pac. 1114, 71 Pac. 1005, an action to quiet title.

simultaneous with the equitable one. This is especially true with reference to fraud, mistake, and accident. Fraud, for example, may at the same time be the occasion of the legal remedy of damages and of the equitable relief of cancellation. These two classes of cases cannot, however, be regarded or treated as belonging to the concurrent jurisdiction; such a mode of classification could only be productive of confusion. The criterion which I have given is always simple and certain in referring to the exclusive jurisdiction all cases in which the remedy is given by courts of equity alone, without regard to the nature of the substantive right which forms the basis of the action, or to the fact or event which is the occasion of the required relief. In this manner only is the notion of *jurisdiction* preserved distinct from all questions as to the propriety of exercising that jurisdiction and of granting relief by equity courts in particular cases. . . .

§ 139. **Concurrent Jurisdiction.**—The concurrent jurisdiction embraces all those civil cases in which the primary right, estate, or interest of the complaining party sought to be maintained, enforced, or redressed is one which is cognizable by the law, and in which the remedy conferred is of the same kind as that administered, under the like circumstances, by the courts of law—being ordinarily a recovery of money in some form. The primary right, the estate, title, or interest, which is the foundation of the suit, must be legal, or else the case would belong to the exclusive jurisdiction of equity; and the law must, through its judicial procedure, give *some* remedy of the same general nature as that given by equity, but this legal remedy is not, under the circumstances, full, adequate, and complete. The fact that the legal remedy is not full, adequate, and complete is, therefore, the real foundation of this *concurrent* branch of the equity jurisdiction.<sup>1</sup> This principle is well illustrated

<sup>1</sup> The text is quoted in *Myers v. Sierra Valley Stock & Agric. Assn.*, 122 Cal. 669, 55 Pac. 689 (remedy to enforce contribution among stockholders is at law); *Buck v. Ward*, 97 Va. 209, 33 S. E. 513 (suit to recover money expended by reason of defendant's fraud).

There is a distinction here of great importance, but which has often been overlooked. The want of a full, adequate, and complete remedy at law, under the circumstances of the particular case, is also the reason why the jurisdiction of equity is actually *exercised*, and a decision is made in favor of the plaintiff granting him equitable relief, in some instances of the *exclusive* jurisdiction; as, for example, in suits for the specific performance of contracts. But such fact is not in these instances the foundation of the *jurisdiction*; it is only the occasion on which a decision is rightfully made in pursuance of the doctrines of equity jurisprudence by courts already possessing the jurisdiction. The jurisdiction exists because courts of equity alone are competent to administer these remedies. In all instances of *concurrent* jurisdiction, both the courts of law and those of

by the case of contribution among sureties. The surety entitled to reimbursement may maintain an action at law, and recover a pecuniary judgment against each of the persons liable to contribution, but this legal relief is subject to so many limitations that it may often fail to restore the plaintiff to his rightful position. The equity suit for a contribution gives exactly the same final remedy—a recovery of money; but on account of the greater freedom and adaptability to circumstances incident to the equitable procedure, it enables the plaintiff in one proceeding to obtain such complete reimbursement as relieves him effectually from all the burden which does not properly rest upon him, and produces a just equality of recompense as well as of loss among all the parties.<sup>3</sup>

§ 142. **Auxiliary Jurisdiction.**—The auxiliary jurisdiction, in its original and true scope and meaning, is in fact a special case of the “exclusive,” since its methods and objects are confined to the equity procedure. In all suits which belong to this jurisdiction in its original and proper sense, no remedy is either asked or granted; their sole object is the obtaining or preserving of evidence to be used upon the trial of some action at law. The cases embraced within this proper auxiliary jurisdiction are suits for discovery, to obtain an answer under oath from a party to a pending or anticipated action at law, which answer may be used as evidence on the trial of such action; suits for the perpetuation of evidence; and suits for the obtaining of evidence in a foreign country. The latter two species of suits are practically obsolete in this country, having been superseded by more summary and efficient proceedings authorized by statutes.

*jurisdiction* in equity is the inadequacy of the relief as it is administered through means of the legal procedure. The *exclusive* jurisdiction of equity rests upon an entirely different foundation, and exists absolutely without reference to the adequacy of legal reliefs. This distinction is a plain one, but is often lost sight of; the two classes of cases are often confounded, and the equitable *jurisdiction*, in all instances exclusive and concurrent, is made to rest merely upon the inadequacy of legal remedies. This error grows out of the tendency to confound questions as to the equitable *jurisdiction*; i. e., the power of equity courts to hear and decide, with the altogether different questions as to the rightfulness of their decision; i. e. whether, according to the doctrines of equity, a case unquestionably within their jurisdiction was properly decided.

<sup>3</sup> *Dering v. Earl of Winchelsea*, 1 Cox 218, 1 Lead. Cas. Eq. 120, Sh. 94, 1 Scott 367.

## SECTION II.

## THE EXCLUSIVE JURISDICTION.

## ANALYSIS.

- § 146. Equitable primary rights and "equities" defined.
- §§ 147-149. Equitable estates described.
- § 150. Certain distinctive equitable doctrines forming part of equity jurisprudence.
- §§ 151-155. Trusts described.
- § 156. Executors and administrators.
- §§ 157, 158. Fiduciary relations.
- §§ 159, 160. Married women's separate property.
- § 161. Estates arising from equitable conversion.
- §§ 162, 163. Mortgages of land.
- § 164. Mortgages of personal property.
- §§ 165-167. Equitable liens.
- §§ 168, 169. Estates arising from assignment of things in action, possibilities, etc., and from an equitable assignment of a fund.
- §§ 170-172. Exclusive equitable remedies described.

**§ 146. Equitable Estates, Interests, and Rights in Property.**—It was stated in the preceding section<sup>1</sup> that the exclusive jurisdiction included, *first*, all civil cases based upon or relating to equitable estates, interests, and rights in property as the subject-matter of the action, whatever may be the nature of the remedy; and *secondly*, all civil cases in which the remedy granted is purely equitable, that is, administered by courts of equity alone, whatever may be the nature of the primary right, estate, or interest involved in the action. I purpose now to describe these two classes in a general manner. Equitable primary rights, interests, and estates may exist in things real and in things personal, in lands and in chattels. They are also of various amounts and degrees, from the substantial beneficial ownership of the subject-matter down to mere liens. In all cases, however, they are rights in, to, or over the subject-matter, recognized and protected by equity, and are to be distinguished from the so-called "equities," a term which, when properly used, denotes simply the right to some remedy administered by courts of equity.<sup>2</sup> A cestui que trust, a mortgagee, a vendee in a contract for the sale of land, is clothed with an equitable estate or interest;

<sup>1</sup> §§ 137, 138.

<sup>2</sup> The term "an equity" is thus synonymous with what I have denominated an equitable remedial right. It is, however, constantly used in a broader and improper sense, as describing every kind of right which equity jurisprudence recognizes,—estates and interests in land, or chattels, liens, and rights to obtain remedies. Such indiscriminate use of the term only tends to produce confusion of thought.

while the *mere* right to have an instrument reformed or canceled, or to have a security marshaled, and the like, is properly "an equity."

§ 147. **Equitable Estate Defined.**—An equitable *estate*, in its very conception, and as a fact, requires the simultaneous existence of two estates or ownerships in the same subject-matter, whether that be real or personal—the one legal, vested in one person, and recognized only by courts of law; the second equitable, vested in another person, and recognized only by courts of equity. These two interests must be separate, and as a rule, must be held by different persons; for if the legal estate and the equitable estate both become vested in the same person by the same right, then, as a general rule, a merger takes place, and the legal estate alone remains.<sup>1</sup> There are indeed exceptions to this general doctrine; for under certain circumstances, as will appear hereafter, equity prevents such a merger, and keeps alive and distinct the two interests, although they have met in the same owner.<sup>2</sup> In all cases of equitable *estates*, as distinguished from lesser interests, whether in fee, for life, or for years, they are in equity what legal estates are in law; the ownership of the equitable estate is regarded by equity as the real ownership, and the legal estate is, as has been said, no more than the shadow always following the equitable estate, which is the substance, except where there is a purchaser for value and without notice who has acquired the legal estate.<sup>3</sup> This principle of a double right, one legal and the other equitable, is not confined to equitable *estates*, properly so called; it is the essential characteristic of every kind of equitable interest inferior to estates. In the total ownership resulting from mortgages, or from the operation of the doctrine of conversion, or from the assignment of things in action, and other interests not assignable at law, and in liens, there is always a legal title or estate vested in one person, recognized by courts of law alone, and an equitable interest, ownership, or claim, distinct from a *mere* right of action or remedial right, vested in another person, which is recognized, and, according to its nature, protected or enforced by courts of equity.

§ 148. Equitable estates and interests of all kinds are separated by a broad line of distinction, with respect to their nature and the mode in which equity deals with them, into two classes. The first class contains those in which the equitable estate is regarded as a permanent, subsisting ownership; the separation between the legal

<sup>1</sup> Selby v. Alston, 3 Ves. 339.

<sup>2</sup> These apparent exceptions really confirm the general rule. See post, §§ 786-800.

<sup>3</sup> See Burgess v. Wheate, 1 Eden, 223, 1 Scott 58.

and equitable titles is not treated as an anomaly, much less a wrong, but as a fixed and necessary condition to be preserved as long as the equitable interest continues; and the various rules and doctrines of equity are concerned with the respective rights and liabilities of the two owners, while the remedies given to the equitable owner are intended to preserve his estate, and to protect it both against the legal owner and against third persons. The class embraces most species of express trusts, the interests created by mortgages as originally established by the court of chancery, the interests resulting from an assignment of things in action. These various species of equitable estates and interests might well be described by applying to them the term "permanent." In the second class the separation of the two interests is regarded as always temporary, and in many instances as actually wrongful. There is a certain antagonism between the equitable and the legal ownership or right, and the very existence of the legal estate is often in complete violation of the rights of the equitable owner. The doctrines and rules of equity concerning this class do not contemplate a permanent separation between the two interests; the rights of the equitable owner are hostile to those of the legal proprietor; while the remedies given to the equitable owner always have for their object the perfecting of his rights against the legal estate, and very generally consist in compelling a complete transfer of the legal estate, so that the equitable owner shall obtain the legal title in addition to the equitable interest which he already possesses. The class embraces resulting, implied, and constructive trusts, the interests arising from the operation of the doctrine of conversion, and liens, including the equitable interest of mortgagees according to the doctrine which prevails in many of the states. Equitable estates of the first class are very numerous in England, by reason of the customs of landed proprietors and the frequency of marriage settlements, provisions for families in wills, the separate property of married women, charitable foundations, and other species of express trusts; and a very large part of equity as administered in England is concerned with these permanent equitable estates. Although not unknown, they are, from our widely different social customs and practices of landowners, comparatively very infrequent in this country.

§ 149. From the universality of this double ownership, or separation of the legal and equitable titles between two proprietors or holders, which is an essential feature of trusts, all species of equitable estates and interests might possibly be regarded as particular kinds of trusts, or as special applications of the general principles concerning trusts. Thus the holder of the legal title in assignments

of things in action, in cases of conversion, in mortgages and in liens, no less than in trusts proper, is frequently spoken of as the trustee, and the holder of the equitable interest as the cestui que trust. It would be possible, therefore, to treat the entire jurisdiction of equity over equitable estates and interests, and these estates and interests themselves, as based upon and included within the single subject of trusts. But this method, while resting upon some analogies and external resemblances, would overlook essential differences between the various estates and interests created by equity, and would therefore be misleading.

§ 150. . . . The purely equitable estates and interests which come within the exclusive jurisdiction and constitute the first branch thereof are the following, separated, for purposes of convenience as to treatment, into general groups: Trusts;<sup>1</sup> married women's separate property;<sup>2</sup> equitable interests arising from the operation of the doctrine of conversion;<sup>3</sup> equitable estates or interests arising from mortgages of real<sup>4</sup> or of personal<sup>5</sup> property, and from pledges<sup>6</sup> of chattels or securities; equitable liens on real and on personal property;<sup>7</sup> equitable interests of assignees arising from assignments of things in action, possibilities, and the like, not assignable at law, or arising from transactions which do not at law operate as assignments.<sup>8</sup>

§ 170. **Exclusively Equitable Remedies.**— . . . There are

<sup>1</sup> An outline of these topics, substantially similar to that in the omitted §§ 151-169, may be obtained by a study of the following paragraphs: Uses and trusts; §§ 976-978, 983, 984, 986, 987. Classes of trusts; § 987. Express private passive and active trusts; §§ 988, 989, 991. Express public trusts or charities; §§ 1018, 1020, 1028, 1029. Trusts arising by operation of law; §§ 1030, 1031, 1034. Executors and administrators, and estates of decedents; §§ 1152-1154. Fiduciary relations; §§ 1088, 1097.

<sup>2</sup> Married women's separate property and contracts; See §§ 1098, 1099, 1105, 1121, 1125.

<sup>3</sup> Conversion; See §§ 371, 1159.

<sup>4</sup> Mortgages, the English doctrine; §§ 1179-1182. The American doctrine; §§ 1186-1188, 1190.

<sup>5</sup> Mortgages of personal property; §§ 1229, 1230, 1232.

<sup>6</sup> Pledges; § 1231.

<sup>7</sup> Equitable liens, in general; §§ 1233, 1234. Various classes of liens; §§ 1235, 1236, 1239, 1244, 1249, 1255, 1260, 1263, 1264, 1268, 1269.

<sup>8</sup> Assignments of things in action, possibilities, contingencies, and expectancies; §§ 1270-1273, 1277, 1278, 1283, 1285, 1287. Equitable assignment of a fund; § 1280.

To these might be added, as an example of equitable primary rights not being estates or interests in nor liens on specific property, the right in equity of a creditor against the personal representatives of a deceased joint debtor, although his right is wholly gone at law; and the similar right of the personal representatives of a deceased joint creditor.

certain general qualities belonging to all these remedies, which should be clearly and correctly understood; otherwise our notions of the remedial functions of equity will be partial, confused, and even erroneous. 1. These exclusive remedies may be granted in order to protect, maintain, or enforce primary rights, estates, or interests which are legal as well as those which are equitable; they are not administered in behalf of equitable substantive rights alone. As illustrations, an injunction is often given to prevent the invasion of a legal ownership or interest, a decree quieting title is often rendered to establish an existing legal estate, and the like. And in many instances where the existing primary right, estate, or interest of the complainant is equitable, the very object and effect of the remedy is to clothe him with the corresponding legal right, estate, or interest; as, for example, when the beneficiary under a constructive trust, or the vendee under a contract for the sale of land, obtains a decree directing a conveyance of the legal title.<sup>1</sup>

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### SECTION III.

#### THE CONCURRENT JURISDICTION.

##### ANALYSIS.

- §§ 173, 174. What embraced in the concurrent jurisdiction; inadequacy of legal remedies defined.
- § 175. The remedies given must be legal in their nature.
- §§ 176-179. General principle; when no concurrent jurisdiction exists.
- §§ 177, 178. Examples of such cases.
- § 179. Where a law court has first taken cognizance of a case.
- § 180. General principle; where concurrent jurisdiction does exist.
- § 181. Rule first. Where equity has jurisdiction for any partial purpose, it may retain the cause for all purposes.
- § 182. Rule second. Where equity originally had jurisdiction, and the law subsequently acquires jurisdiction over the same matter, the equity jurisdiction still continues.
- § 183. Effect of the reformed procedure upon the equity jurisdiction.
- §§ 184-189. Enumeration of the principal matters over which the concurrent jurisdiction ordinarily extends.
- § 185. Suits for the recovery of lands and of chattels.
- §§ 186-188. Suits for pecuniary recoveries.
- § 188. Suits arising from accident, mistake, or fraud.
- § 189. Other special cases.

<sup>1</sup> As to the maxim Equity acts in personam and not in rem, and its somewhat limited application at the present day; and that equitable remedies deal with property rights rather than with mere personal rights and obligations, and are specific in their nature, see post, §§ 428, 429, etc. As to their unlimited variety, see ante, § 111. For a classification of equitable remedies see post, § 1316.

**§ 173. Description and Test.**—The Concurrent Jurisdiction, as stated in a former section in this chapter, embraces all those civil cases in which the primary right, estate, or interest of the complaining party sought to be maintained, enforced, or redressed is one which is created and is cognizable by the law, and in which the remedy conferred is also of the same kind as that administered, under the like circumstances, by the courts of law.<sup>1</sup> . . . The incompleteness or insufficiency of the legal remedy upon which the concurrent equitable jurisdiction rests must therefore necessarily exist in the modes of legal procedure, its arbitrary and unbending rules, its want of elasticity and adaptability to circumstances, and all the other incidents of legal methods which often prevent them from doing full justice to the litigant parties.

**§ 175. The Remedies Legal.**— . . . All the general kinds of remedy, or final relief, which are possible by means of legal actions are defined with absolute certainty and fixedness. Omitting the particular species of relief obtainable through certain writs or special judicial proceedings, such as “mandamus,” the writ of “prohibition,” “habeas corpus,” the law, through its actions, is confined to three general kinds of remedies—the obtaining possession of specific tracts of land, the obtaining possession of specific chattels, and the recovery of ascertained sums of money, either debts or damages, by way of compensation. In every case, therefore, properly belonging to the concurrent jurisdiction of equity, the final and substantial relief granted by the decree must be either an award of possession of some piece of land, or a delivery of possession of some specific chattel, including written instruments, such as deeds, which with this respect are regarded as chattels, or a pecuniary recovery.<sup>1</sup> While the equitable relief must be of

<sup>1</sup> See ante, § 139.

<sup>1</sup> In respect to no other topic connected with equity has there been such confusion of treatment, and such utter lack of any consistent principle, among text-writers, as in relation to the matter of the *concurrent* jurisdiction. As illustrations: Because some purely legal rights and legal causes of action may be occasioned by fraud, accident, or mistake, many text-writers have therefore placed fraud, accident, and mistake, and everything pertaining to them, wholly within the concurrent jurisdiction of equity. Although the primary right arising therefrom may be entirely equitable, and although the remedy conferred may be one which can be administered only by a court of equity, such as reformation, cancellation, injunction, etc., they are all, right and remedy, treated as though belonging to this branch of equity jurisdiction. In the same manner, the subject of partnership, as an entirety, is referred to this jurisdiction, although the interest to be maintained and the remedy to be obtained are wholly equitable in their nature. These instances are examples merely of a mode of treatment which fails to draw any true line of distinction between the two great departments of the equity jurisdiction.

the same general nature as that granted by the law courts, it need not be of the same external form, nor be accompanied by the same incidents. Thus . . . in most instances of pecuniary recoveries in equity, the money is regarded and treated as a fund, which is either awarded to the single claimant, or is distributed among the several claimants in the shares to which they are adjudged to be entitled. The cases are very few indeed in which a court of equity, in the same manner and form as a court of law, decrees the payment to the plaintiff of a sum of money *merely* as a debt or as compensatory damages.<sup>2</sup> . . .

**§ 176. General Principle—No Concurrent Jurisdiction.**—The principle may be stated in its broadest generality, that in cases where the primary right, interest, or estate to be maintained, protected, or redressed is a legal one, and a court of law can do as complete justice to the matter in controversy, both with respect to the relief granted and to the modes of procedure by which such relief is conferred, as could be done by a court of equity, equity will not interfere even with those peculiar remedies which are administered by it alone, such as injunction, cancellation, and the like, much less with those remedies which are administered both by it and by the law, and which therefore belong to its concurrent jurisdiction. This principle, however, must be understood as referring to the original condition of law and equity, at a period when equity was establishing its jurisdiction, and before the remedial powers of the law courts had been extended by statutes, or enlarged by the gradual adoption of equitable notions; for, as will be more fully shown hereafter, the *present* power of the law courts to grant complete relief does not, in general, deprive equity of a jurisdiction which it had formerly acquired, because the law courts then possessed no such power.<sup>1</sup> But in order that the general principle may apply, the sufficiency and completeness of the legal remedy must be certain; if it is doubtful, equity may take cognizance.<sup>2</sup> While the concurrent jurisdiction of equity thus depends upon the inadequacy of legal remedies for the particular controversy, or for the class of cases of which the particular controversy is an instance, it is impossible to define, by any single formula, what is the adequacy or sufficiency of the remedy at law which shall prevent an exercise of the equitable jurisdiction. . . .

<sup>1</sup> See post, §§ 276–281.

<sup>2</sup> For an instance where such relief was required, and a mere personal judgment was rendered, see *Baily v. Hornthal*, 154 N. Y. 648, 661, 61 Am. St. Rep. 645, 652, 49 N. E. 56. For the important difference between the equitable and legal procedures with respect to the form of judgments, see ante, §§ 113–115.

<sup>3</sup> *King v. Baldwin*, 2 Johns. Ch. 554, 17 Johns. 384, 8 Am. Dec. 415.

§ 177. **Illustrations.**—In all cases where the plaintiff holds or claims to have a purely legal estate in land, and simply seeks to have his title adjudicated upon,<sup>1</sup> or to recover possession, against an adverse claimant who also relies upon an alleged legal title, there being no equitable feature of fraud, mistake, or otherwise, calling for the application of equitable doctrines or the granting of peculiar equitable reliefs, the remedy at law is adequate, and the concurrent jurisdiction of equity does not exist. A suit in equity, under its concurrent jurisdiction, will not be maintained to take the place of the action of ejectment, and to try adverse claims and titles to land which are wholly legal, and to award the relief of a recovery of possession.<sup>2</sup> While this general doctrine is well established, still, in addition to the particular cases of disputed boundaries, partition, and assignment of dower, over which the concurrent jurisdiction may extend, and in which a remedy strictly legal may be granted, a court of equity will also confer the final relief of possession, and will decree a defendant to deliver up possession of land to the owner, when such relief is incidental to the main object of the suit, and the action is brought for some object otherwise within the equity jurisdiction.<sup>3</sup> In like manner, the concurrent jurisdiction does not embrace suits by the legal owner to recover possession of a chattel, except in the few cases where the chattel has a certain special, extraordinary, and unique value impossible to be compensated for by damages, nor suits merely to determine the legal title to chattels between adverse claimants, where the claim of neither party involves or depends upon any equitable interest or feature. In all ordinary controversies concerning the legal ownership or possession of chattels, the common-law actions of replevin or trover furnish a complete and adequate remedy.<sup>4</sup>

§ 178. Cases in which the remedy is a mere recovery of money do not ordinarily come under the concurrent jurisdiction. Where the primary right of the plaintiff is purely legal, arising either from the non-performance of a contract or from a tort, and the money is sought to be recovered as a debt or as damages, and the right of action is not dependent upon or connected with any equitable feature or incident, such as fraud, mistake, accident, trust, account-

<sup>1</sup> It must be borne in mind that cases where relief is sought to remove cloud on title belong to the exclusive jurisdiction.

<sup>2</sup> *Lewis v. Cocks*, 23 Wall. 446, Sh. 17; *Jordan v. Phillips & Crew Co.*, 126 Ala. 561, 29 South. 831; *Rogers v. Rogers*, 17 R. 1. 623, 24 Atl. 46.

<sup>3</sup> *Woodsworth v. Tanner*, 94 Mo. 124, 7 S. W. 104.

<sup>4</sup> *Jones v. MacKenzie*, 122 Fed. 390; *Chambers v. Chambers*, 98 Ala. 454, 13 South. 674.

ing, or contribution, and the like, full and certain remedies are afforded by actions at law, and equity has no jurisdiction; these are cases especially within the sole cognizance of the law.<sup>1</sup> This proposition does not state the entire doctrine. Even when the cause of action, based upon a legal right, does involve or present, or is connected with, some particular feature or incident of the same kind as those over which the concurrent jurisdiction ordinarily extends, such as fraud, accounting, and the like, still, if the legal remedy by action and pecuniary judgment for debt or damages would be complete, sufficient, and certain—that is, would do full justice to the litigant parties—in the particular case, the concurrent jurisdiction of equity does not extend to such case.<sup>2</sup> For example, whenever an action at law will furnish an adequate remedy, equity does not assume jurisdiction because an accounting is demanded or needed;<sup>3</sup> nor because the case involves or arises from fraud;<sup>4</sup> nor because a contribution is sought from persons jointly indebted.<sup>5</sup>

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§ 179. **Cognizance First Taken by a Law Court.**—In further limitation upon the power of equity to interfere where the primary rights, interests, or estates are legal, the doctrine is well settled that when the jurisdictions of law and of equity are concurrent, the one which first takes actual cognizance of any particular controversy ordinarily becomes thereby exclusive. If, therefore, the subject-matter or primary right or interest, although legal, is one of a class which may come within the concurrent jurisdiction of equity, and an action at law has already been commenced, a court of equity will not, unless some definite and sufficient ground of equitable interference exists, entertain a suit over the same subject-matter even for the purpose of granting reliefs peculiar to itself, such as cancellation, injunction, and much less to grant the same kind of relief which can be obtained by the judgment at law. The grounds which will ordinarily prevent the application of this doctrine, and will permit the exercise of the equitable jurisdiction in

<sup>1</sup> *Finnegan v. Fernandina*, 15 Fla. 379, 21 Am. Rep. 292; *Marsh v. Kaye*, 168 N. Y. 196, 61 N. E. 177, 2 Ames Eq. Jur. 89; *Bernz v. Marcus Sayre Co.*, 52 N. J. Eq. 275, 30 Atl. 21.

<sup>2</sup> *Campbell v. Rust*, 85 Va. 653, 8 S. E. 664; *Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. 426; *Boyce v. Allen*, 105 Iowa 249, 74 N. W. 948.

<sup>3</sup> *Jewett v. Bowman*, 29 N. J. Eq. 174; *Dargin v. Hewlitt*, 115 Ala. 510, 22 South 128; *Galusha v. Wendt*, 114 Iowa 597, 87 N. W. 512.

<sup>4</sup> *Bay City Bridge Co. v. Van Etten*, 36 Mich. 210; *Pohemus v. Holland Trust Co.*, 59 N. J. Eq. 93, 45 Atl. 534; *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249, H. & B. 268, 3 Keener 487.

<sup>5</sup> *Stone v. Stone*, 32 Conn. 142; *Myers v. Sierra Val. Stock & Agric. Assn.*, 122 Cal. 669, 55 Pac. 689.

such cases, are the existence of some distinctively equitable feature of the controversy which cannot be determined by a court of law, or some fraudulent or otherwise irregular incidents of the legal proceedings sufficient to warrant their being enjoined, or the necessity of a discovery, either of which grounds would render the legal remedy inadequate. This rule results in part, in the United States, from the provisions of the national and state constitutions securing the right to a jury trial which belongs especially to the machinery of legal actions.<sup>1</sup> In cases which are brought to procure some distinctively equitable remedy, and which therefore belong to the exclusive jurisdiction, the doctrine must be regarded as merely regulating the exercise of that jurisdiction, but in the cases which belong to the concurrent jurisdiction it must be regarded as one of the elements which determine the very existence of such jurisdiction.

**§ 180. General Principle—Concurrent Jurisdiction Exists.**— . . . The doctrine, in its most general and comprehensive form, admits the existence of the concurrent jurisdiction over all cases in which the remedy at law is not certain, complete, and sufficient. The fact that there is a legal remedy is not the criterion; that legal remedy, both in respect to its final relief and its modes of obtaining the relief, must be as efficient as the remedy which equity would confer under the same circumstances, or else the concurrent jurisdiction attaches. In applying this doctrine, the ordinary instances of the concurrent jurisdiction in which the final relief consists in the obtaining possession of a specific parcel of land, substantially the same as would be conferred by a court of law, are few and well defined; namely, the partition of land, the assignment of dower, and the settlement of disputed boundaries. But in addition to these three classes, the concurrent jurisdiction embraces other cases involving the ownership or enjoyment of lands, and a relief which is substantially the recovery of possession will be conferred, where the facts and circumstances are special, and the remedy at law would be doubtful, incomplete, or insufficient. The same is true with respect to pecuniary relief. While the various instances in which equity will decree a recovery of money as the final remedy, and which constitute a most important part of its concurrent jurisdiction, are well ascertained and form a settled and certain remedial system, they by no means exhaust that jurisdiction; it extends to and embraces all cases of legal primary rights and causes of action for which the law furnishes no certain, adequate, and complete remedy.

<sup>1</sup> *Grand Chute v. Winegar*, 15 Wall. 373, 2 Ames Eq. Jur. 116; *Insurance Co. v. Bailey*, 13 Wall. 616, 3 Keener 474; *Sweeney v. Williams*, 36 N. J. Eq. 627, 1 Scott 141; *Newman v. Commercial Nat. Bank*, 156 Ill. 530, 41 N. E. 156.

§ 181. **Effect of a Partial Jurisdiction.**<sup>1</sup>

§ 182. **Effect of Jurisdiction Subsequently Acquired by the Law Courts.**<sup>1</sup>

§ 183. **Effect of the Reformed Procedure.**<sup>1</sup>

§ 184. **The Principal Matters Within the Concurrent Jurisdiction.**— . . . The ordinary and well-settled instances . . . will be arranged into groups according to the nature of the final relief obtained, which is, of course, *essentially* the same as that conferred at law under like circumstances, namely: 1. Those in which the relief is substantially the recovery of possession, or the establishment of a right to the possession, of land; 2. Those in which the relief is the recovery of possession or delivery of specific chattels or written instruments; and 3. Those in which the relief is pecuniary, the recovery of or obtaining of money. . . .

§ 185. 1. Under the first of these classes, where the final relief is substantially a recovery or obtaining possession of specific portions of land, the concurrent jurisdiction is clearly established, and its exercise is a matter of ordinary occurrence, in suits for the partition of land among joint owners or owners in common;<sup>1</sup> in suits for the assignment or admeasurement of dower;<sup>2</sup> and in suits for the adjustment of disputed boundaries,<sup>3</sup> where some equitable incident or feature is involved, and the dispute is not wholly confined to an assertion of mere conflicting legal titles or possessory rights. 2. Under the second class, where the final relief is substantially a recovery of chattels, the jurisdiction embraces suits to compel the restoration or delivery of possession of specific chattels of such a peculiar, uncommon, or unique character that they cannot be replaced by means of money, and are not susceptible of being compensated for by any practicable or certain measure of damages, and in respect of which the legal actions of replevin, detinue, or trover do not furnish a complete remedy.<sup>4</sup> This particular exercise of the jurisdiction extends, for like reason, to suits to compel the delivery of deeds, muniments of title, and other writ-

<sup>1</sup> On this subject see post, §§ 231-242. On discovery as a source or occasion of jurisdiction, see §§ 223-230. On multiplicity of suits, see § 250, note.

<sup>2</sup> See post, §§ 276-281, where this subject is fully discussed.

<sup>3</sup> On this subject see post, §§ 353-358.

<sup>4</sup> *Agar v. Fairfax*, 17 Ves. 533, 2 Lead. Cas. Eq. 865-919. See post, §§ 1386-1390.

<sup>5</sup> See post, §§ 1380-1383.

<sup>6</sup> *New York & T. Land Co. v. Gulf, W. T. & P. R. Co.*, 100 Fed. 830, 41 C. C. A. 87. See post, §§ 1384, 1385.

<sup>7</sup> *Pusey v. Pusey*, 1 Vern. 273, 1 Lead. Cas. Eq. 1109-1117, H. & B. 573, 1 Scott 96, Sh. 278; *Cushman v. Thayer.etc., Co.*, 76 N. Y. 365, 32 Am. Rep. 315. See post, § 1402 etc.

ten instruments, the value of which cannot, with any reasonable certainty, be estimated in money.<sup>5</sup> The equitable jurisdiction in these cases really rests upon the fact that the only relief which the plaintiff can have is the possession of the *identical* thing, and this remedy cannot *with certainty* be obtained by any common-law action. In the same class must be placed suits, which are maintainable, under some special circumstances, for the partition of chattels, analogous to those for the partition of land.<sup>6</sup>

§ 186. 3. Under the third general class, where the final relief is pecuniary, or recovery or award of money in some form or for some purpose as the result of the preliminary determination or adjustment of primary or remedial rights which are legal, the well-settled instances of the concurrent jurisdiction are many in number and varied in kind. The following are the most important and the ones most frequently met in actual practice: In the contract of suretyship, and the relations growing out of it between sureties themselves, sureties and their principal and the creditor, the equitable jurisdiction includes suits for exoneration and for contribution, in the decision of which the principle of subrogation and marshaling of securities, and other equitable doctrines necessary to a complete adjustment of all claims and liabilities, may be invoked and enforced.<sup>1</sup> In the contract of partnership and the relations arising therefrom, the jurisdiction embraces suits for contribution, accounting, and pecuniary recovery necessary for the settlement of all claims which may exist between the partners themselves, or between the partnership and its members and the firm and individual creditors, all claims in fact for which the law by its actions gives no adequate remedy.<sup>2</sup> The principle of contribution,<sup>3</sup> and the pecuniary recoveries depending upon it, have, in the exercise of the concurrent jurisdiction, a very wide application, and are enforced under a great variety of circumstances. The most important, comprehensive, and multiform remedy of the concurrent jurisdiction which results in pecuniary recoveries is that of accounting.<sup>4</sup> The variety of its uses and possible applications

<sup>5</sup> *Bindseil v. Smith*, 61 N. J. Eq. 654, 47 Atl. 456; *Kelly v. Lehigh Min. & Mfg. Co.*, 98 Va. 405, 81 Am. St. Rep. 736, 36 S. E. 511. See post, § 1402, etc.

<sup>6</sup> *Robinson v. Dickey*, 143 Ind. 205, 52 Am. St. Rep. 417, 42 N. E. 679. See post, §§ 1391, 1392.

<sup>1</sup> *Dering v. Earl of Winchelsea*, 1 Cox 318, 1 Lead. Cas. Eq. 120-188, 1 Scott 367, Sh. 94; *Aldrich v. Cooper*, 8 Ves. 308, 2 Lead. Cas. Eq. 228. See post, §§ 1417-1419.

<sup>2</sup> *Baily v. Hornthal*, 154 N. Y. 648, 661, 61 Am. St. Rep. 645, 652, 49 N. E. 56.

<sup>3</sup> *Rindge v. Baker*, 57 N. Y. 209, 15 Am. Rep. 475, H. & B. 578.

<sup>4</sup> *Inhab. of Cranford Twp. v. Watters*, 61 N. J. Eq. 248, 48 Atl. 316; *Black v. Boyd*, 50 Ohio St. 46, 33 N. E. 207. See post, §§ 1420, 1421.

is practically unlimited; it can be adapted to all circumstances and relations in which an account is necessary for the settlement of claims and liabilities, and for the doing full justice to the litigant parties. Among the most common instances in which this remedy is employed by courts of equity are the ascertaining and settlement of claims and liabilities between principals and agents, and between all other persons standing in fiduciary relations to each other; the ascertaining and adjustment of the respective amounts of persons entitled to participate in the same fund, and of the respective shares of persons subjected to some common liability; the ascertaining and adjustment of the shares of persons liable to contribute to a general average; the ascertaining and adjustment of the shares of persons liable to contribute with respect to charges of any kind upon land or other property; the appropriation of payments; the apportionment of rents; and numerous other instances where a number of persons are differently interested in the same subject-matter, or are differently liable with respect to some common object.

§ 187. In the same general class of pecuniary reliefs belonging to the concurrent jurisdiction, and united together by a tie of close analogy, are suits for the recovery of legacies,<sup>1</sup> suits for the recovery or enforcement of donations causa mortis,<sup>2</sup> and the various suits, involving some equitable feature or incident, brought in connection with or in aid of the administration of the estates of deceased persons.<sup>3</sup> Although the administration of decedents' estates has, in this country, been committed to courts of probate, and the former jurisdiction of equity to entertain "administration bills" for the complete and final settlement of such estates does not practically even if nominally exist, still there are many special cases belonging to the concurrent jurisdiction in which suits may be brought to obtain pecuniary recoveries against executors and administrators, in the process of and connected with their work of administering and settlement.

§ 188. In another extensive class of suits brought to obtain pecuniary relief, and strictly belonging to the concurrent jurisdiction, the remedial right is occasioned by or in some manner connected with accident, mistake, or fraud. These three matters play an important part throughout the entire equity jurisprudence; and all cases involving or in any manner depending upon or growing out of accident, or mistake, or fraud, have sometimes been described as belonging to the concurrent jurisdiction, since courts of law may also take cognizance of some causes of action or defenses arising

<sup>1</sup> See post, §§ 1127-1145.

<sup>2</sup> See post, §§ 1146-1151.

<sup>3</sup> See post, §§ 1152-1154.

from the same sources. In the classification which I have adopted, and which is far more accurate and consistent, all those cases in which the strictly equitable remedies of reformation, re-execution, cancellation, and the like, are granted on account of mistake, accident, or fraud necessarily come within the exclusive jurisdiction. As these purely equitable kinds of relief are generally requisite, in order to do complete justice to the parties, where the remedial right arises from or is affected by mistake, accident, or fraud, it follows that the cases depending thereon, which properly belong to the concurrent jurisdiction, are comparatively few. In truth, mistake, and especially fraud, instead of being particular source of the concurrent jurisdiction, are facts which affect the causes of action and reliefs, the primary and remedial rights constituting the whole of equity jurisprudence.

§ 189. There are some other instances in which the concurrent jurisdiction is exercised, because the legal remedy is inadequate, or because, through the imperfection of the procedure at law, a legal remedy would be wholly insufficient, if not impracticable. Among these the most important are suits to recover rent under some special circumstances; suits to procure or compel a set-off which is not admissible or possible under the practice at law; suits by one firm against another, when both firms have a common partner, and other analogous suits which the technical legal rules, as to parties, prevented from being entertained by courts of law; and under peculiar circumstances, recoveries of damages by way of compensation in addition to, or even in place of, other equitable relief.

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## SECTION IV.

### THE AUXILIARY JURISDICTION.

#### ANALYSIS.

- § 190. The auxiliary jurisdiction defined.
- §§ 191-209. Of discovery.
  - § 191. Definition and kinds of discovery.
  - § 192. Origin of, in English and in Roman Law.
- §§ 193, 194. Effect of modern legislation; how far discovery proper has been abolished by statutes.
- § 195. General doctrine; when discovery will or will not be enforced.
- §§ 196, 197. I. What judicial proceedings, in what courts, will be aided by discovery in equity.
- §§ 198-200. II. The parties; their situation and relations to each other, in order that a discovery may be granted.
  - § 198. The plaintiff.
  - § 199. The defendant.

- § 200. A bona fide purchaser.
- §§ 201-207. III. The nature, subject-matter, and objects of the discovery itself; of what the plaintiff may compel discovery, and the defendant must make discovery.
- § 201. General doctrine; of what facts discovery may be compelled.
- § 202. Of what kinds of facts discovery will not be compelled.
- § 203. What is privileged from discovery.
- § 204. The manner in which the defendant must make discovery.
- §§ 205-207. Production and inspection of documents.
- § 208. IV. When, how far, and for whom may the answer in the discovery suit be used as evidence.
- § 209. How far the foregoing rules have been altered by statute.
- §§ 210-215. Of the examination of witnesses.
- § 210. This branch of the jurisdiction described.
- §§ 211, 212. I. Suit to perpetuate testimony.
- § 212. Statutory modes substituted.
- §§ 213-215. II. Suits to take testimony of witnesses *de bene esse*, and of witnesses in a foreign country.
- § 215. Statutory modes substituted.

**§ 190. Definition.**—The auxiliary jurisdiction of equity belongs entirely to the *procedure* by which rights are enforced and remedies are obtained, and is not in any manner concerned with the *reliefs* themselves which are granted, except so far as reliefs must always be indirectly affected by the procedure. Its object, scope, and functions are wholly confined to the procuring of evidence; and it consists of special judicial methods by which, under certain particular circumstances, the evidence needed in pending or anticipated litigations may be obtained. It is divided into two main branches: the first contains the modes by which the parties themselves are compelled to disclose facts and to produce documents, and thus to furnish the evidence needed by their adversaries; while the second contains the modes by which evidence of witnesses generally is procured and preserved, under particular circumstances, for which the common law made no provision. The rules of the ancient common law concerning the competency of witnesses were exceedingly arbitrary, and would often work great injustice, unless their defects had been supplied by the equitable jurisdiction. In the common-law courts, prior to the modern statutory legislation, a party could not be examined as a witness, nor forced to make admissions in his pleadings, in behalf of his adversary; nor was there any means in the common-law procedure of compelling a party to produce, or submit for inspection, or furnish copies of any documents or books which might be in his possession or under his control, however important they might be to the other party's cause of action or defense.<sup>1</sup> It was to supply this grievous defect in the

<sup>1</sup> 3 Black. Com. 381, 382; Com. Dig., tit. Chancery, 3, B; Jeremy's Eq. Jur. 255; 1 Spence's Eq. Jur. 677.

ancient common-law methods that equity established the first branch of its auxiliary jurisdiction, called *discovery*.<sup>2</sup> In like manner the ancient common law only permitted the examination of witnesses at the very trial of a cause, and its courts had no power to take testimony upon commission in anticipation of the trial, and much less in anticipation of the bringing of an action.<sup>3</sup> This defect was supplied by equity in the second branch of its auxiliary jurisdiction, which provides for and regulates the examination of witnesses *de bene esse*, and the perpetuation of evidence.<sup>4</sup> I shall discuss these two branches separately.

#### DISCOVERY.

§ 191. **Discovery Defined.**—In one most important sense “discovery” is not peculiar to and does not belong to the auxiliary jurisdiction. Every suit in equity brought to obtain relief is or may be most truly a suit for discovery; for the complainant may always, and generally does, by the allegations and interrogatories of his bill, call upon and force the defendant to disclose by his answer under oath facts and circumstances within his knowledge in support of the plaintiff’s contention; and the plaintiff may perhaps go to the hearing, relying largely, and sometimes wholly, upon the evidence thus furnished by the compulsory admissions of the defendant’s answer. . . . But this is not the discovery now under consideration.<sup>1</sup> Discovery proper is, in its essential conception, merely an instrument of procedure, unaccompanied by any

<sup>2</sup> *Ibid.*

<sup>3</sup> Black. Com. 383; Jeremy’s Eq. Jur. 270.

<sup>4</sup> Jeremy’s Eq. Jur. 255, 271, 273; 1 Spence’s Eq. Jur. 681.

<sup>1</sup> The distinction here pointed out should be most carefully observed, or else the whole subject will become confused and uncertain. Unfortunately the decisions, especially the American, while speaking of “discovery,” have not always been careful to distinguish between the “discovery” which is a constant incident to the obtaining of relief in every equity suit, and the “discovery” which is a branch of the auxiliary jurisdiction, obtained in a separate suit without any relief. Rules and modes applicable alone to the latter have sometimes been spoken of as belonging to the former, and vice versa. But rules hereinafter stated, concerning the *subject matter* of the discovery, the materiality of the facts disclosed to the plaintiff’s case, what disclosures cannot be compelled, privileged communications, the production of documents, etc., are generally applicable to the discovery sought by the plaintiff in a suit for *relief*, as well as the discovery sought in a separate “suit for discovery” alone; many of the decisions cited to illustrate these rules were rendered in suits for relief. The same is true under the new practice now prevailing in England and in many of our states, by which interrogatories filed by either party to a pending suit have been substituted in place of the discovery by means of the bill and answer in the same suit, or by means of a bill and answer in a separate “discovery suit.”

direct relief, but in aid of relief sought by the party in some other judicial controversy. The suit for discovery, properly so called, is a bill filed for the sole purpose of compelling the defendant to answer its allegations and interrogatories, and thereby to disclose facts within his own knowledge, information, or belief, or to disclose and produce documents, books, and other things within his possession, custody, or control, and asking no relief in the suit except it may be a temporary stay of the proceedings in another court to which the discovery relates. As soon, therefore, as the defendant in such suit has put in his answer containing a full discovery of all the matters and things which he is obliged, according to the principles and doctrines of equity on the subject, to disclose, the object of the suit has been accomplished, and the suit itself is ended; nothing remains to be done but to use this answer as evidence in the judicial proceeding to which this discovery was collateral.<sup>2</sup> . . . It is not, however, essential to a bill of discovery that it should be the *only* means which the complainant therein has of procuring evidence in support of his collateral cause of action or defense; that is, it is not necessary that the complainant should otherwise be destitute of proof or of the means of obtaining it. The bill for a discovery is proper, either when the complainant therein has no other proof than that which he expects to elicit by its means from the defendant, or when he needs the matters thus disclosed to supplement and aid other evidence which he furnishes;<sup>3</sup> or indeed whenever the court can fairly suppose that facts and circumstances discovered by means of the bill can be in any way material to the complainant therein in maintaining his cause of action or defense in a suit.<sup>4</sup>

**§ 192. Its Origin.**—The practice of the court of chancery to “probe the conscience” of the defendant, and to compel him to make full disclosure of matters within his knowledge in all suits brought for *relief*, was coeval with the establishment of the court itself, and was one of the principal means by which it rapidly extended its general jurisdiction. The auxiliary jurisdiction to compel discovery alone without relief, in aid of proceedings at law, was somewhat later in its origin, but still was exercised at an early day. . . .

**§ 193. Effect of Modern Statutes.**—Modern legislation has greatly interfered with the practical exercise of the auxiliary jurisdiction

<sup>2</sup> *Hurricane Tel. Co. v. Mohler*, 51 W. Va. 1, 41 S. E. 421.

<sup>3</sup> *Metler v. Metler*, 19 N. J. Eq. 457.

<sup>4</sup> *Peck v. Ashby*, 12 Met. 478; *Robson v. Doyle*, 191 Ill. 566, 61 N. E. 435; *Reynolds v. Burgess Sulphite Fibre Co.*, 71 N. H. 332, 51 Atl. 1075, 93 Am. St. Rep. 535, 57 L. R. A. 949, 1 Scott 45.

for a discovery, by introducing simpler and more efficacious methods in its stead, and by thus rendering a resort to it unnecessary and even inexpedient. The important question is, whether the suit for a discovery alone, without relief, has been directly or indirectly abolished or superseded by the recent statutes. English statutes, passed not many years since, gave full power and authority to any party to an action or proceeding at law to examine his opponent under oath as a witness;<sup>1</sup> and full power to the common-law courts to compel any party to an action to produce documents.<sup>2</sup> These permissive statutes, it was held, did not interfere with the equity jurisdiction for discovery in aid of a cause of action or defense at law.<sup>3</sup> More recent legislation of Parliament has gone much further. The supreme court judicature act of 1873, which consolidated all the superior courts into one tribunal having jurisdiction of all possible matters, except those purely ecclesiastical, which abolished the distinction between legal and equitable actions, and permitted all legal and equitable causes of action, defenses, and remedies to be united in one proceeding, and which provided for the examination of either party upon interrogatories at the instance of his adversary, and for the production and inspection of documents by either party at the requirement of the other, in any action, has superseded and practically put an end to, even if not directly abrogated, the suit for a discovery as a branch of the auxiliary jurisdiction of equity.<sup>4</sup> Under this new method of obtaining discovery from the opposite party in any kind of action, and of compelling the production of documents by means of interrogatories filed during the pendency of the action by either the plaintiff or the defendant, it is held that all the doctrines and rules concerning the subject-matter of discovery and concerning the documents

<sup>1</sup> 14 & 15 Vict., chap. 99, § 2.

<sup>2</sup> 17 & 18 Vict., chap. 125, §§ 51, 52.

<sup>3</sup> *Lovell v. Galloway*, 17 Beav. 1. This conclusion is reached by applying the general doctrine that equity, having once acquired jurisdiction over a given subject-matter, cannot lose that jurisdiction by the mere fact that the common-law courts have also become invested with the same powers.

<sup>4</sup> Supreme Court of Judicature Act of 1873, 36 & 37 Vict., chap. 66 Schedule, Rules of Procedure, rules 25-27. These rules provide that in any action either party may obtain discovery from the other on oath upon interrogatories; and that the court may order any party to discover, produce, and permit inspection of any documents, etc., in his possession or under his control, etc. In other words, everything which could be done by a bill for discovery can be accomplished in a more simple, direct, and speedy mode prescribed by the statute. The essential principles of this statute and of the system which it established for England are, as I have before stated, identical with the principles and methods of the reformed procedure prevailing in more than half of the American commonwealths. See *Attorney-General v. Gaskill*, L. R. 20 Ch. Div. 519.

whose production can be compelled, which had been established by courts of equity, are still in force, and control the same matters in the new procedure.<sup>5</sup> Similar modes of procuring evidence from the opposite party by means of interrogatories have been adopted by statute in several of our states, although in none of them does the matter seem to be so carefully regulated and so efficacious as in England. Passing to the legislation of this country, the reformed procedure, which was first enacted in the Code of Civil Procedure of New York in 1848, and has now extended to more than half the states and territories of this Union, and which is identical in its fundamental principles, doctrines, and methods with the English supreme court of judicature act, has in like manner superseded and *practically*, at least, destroyed the equitable suit for discovery without any other relief, wherever the system prevails. In some of these states the suit for "discovery," properly so called, is expressly abolished by the statute; and in all of them it is utterly inconsistent with both the fundamental theory and with the particular doctrines, rules, and methods of the reformed procedure. In the other commonwealths, where the common-law and the equity jurisdictions are still preserved distinct from each other, whether possessed by the same court, or as in a very few states, by separate tribunals, the statutes permit the parties to all civil actions and proceedings, both at law and in equity, to testify in their own behalf, and to be examined as witnesses, in the ordinary manner, on behalf of their adversaries; and have also provided summary and simple modes for compelling the disclosure and production and inspection, by the parties to any action, of documents, books, and the like material, to the opposite party, for maintaining his cause of action or defense. Notwithstanding these great changes, made by statutes, which seem to remove the very foundation for any interposition by equity, it has generally been held that the legislature has not abridged nor affected the auxiliary equitable jurisdiction to entertain suits for mere discovery of evidence and production of documents, and that such equitable jurisdiction still exists, where not expressly abolished by the statutes.<sup>6</sup> This conclusion, however, is not universal. In some cases it has been held that the legislation, by abolishing all the grounds upon which the suit for a discovery was based, has necessarily abrogated the jurisdiction itself.<sup>7</sup> This abridgment of the

<sup>5</sup> *Hoffman v. Postell*, L. R. 4 Ch. 673; *Attorney-General v. Gaskill*, L. R. 20 Ch. Div. 519.

<sup>6</sup> *Wood v. Hudson*, 96 Ala. 469, 11 South. 530; *Continental Nat. Bk. v. Heilman*, 66 Fed. 184; *Lancey v. Randlett*, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169, 1 Scott 409; *Reynolds v. Burgess Sulphite Fibre Co.*, 71 N. H. 332, 348, 51 Atl. 1075, 93 Am. St. Rep. 535, 550, 57 L. R. A. 949, 1 Scott 45.

<sup>7</sup> *Heath v. Erie R. R.* 9 Blatch. 316; *Turnbull v. Crick*, 63 Minn. 91, 65 N. W. 135; *Brown v. McDonald*, 130 Fed. 964.

technical "discovery," it should be carefully remembered, does not extend to the discovery or compelling defendants to make admissions or disclosures by means of the pleadings, in suits brought for relief.<sup>8</sup> In some of the states, however, which still retain the ancient common-law and equitable jurisdictions, the obtaining evidence by means of interrogatories filed in the action by either party, instead of by means of answers to allegations and questions contained in the bill or cross-bill,—substantially in accordance with the present English procedure,—has been provided for by recent statute; and this statutory change may have abrogated the mode of discovery as an incident and part of the pleadings in suits for relief, even though it may not have abolished the suit for a discovery alone without relief.

§ 194. It follows from the foregoing statements that the suit for a discovery, as a branch of the auxiliary jurisdiction, is now confined to a portion only of the states and territories; and even in those commonwealths a resort to it is quite infrequent. For this reason, an extensive and minute discussion of the rules which govern it seems to be unnecessary. On the other hand, the principles and doctrines relating to discovery, which have been settled by courts of equity, and which determine what facts parties can be compelled to disclose, and what documents to produce, and under what circumstances the disclosure or production can be obtained, will still continue to be recognized by the courts, and to regulate their action in enforcing the examination of parties and the production of writings by means of the more summary statutory proceedings.<sup>1</sup> The abolition or discontinuance of the technical "discovery" has not abrogated these principles and doctrines, nor dispensed with their statement, at least in a brief and condensed form.

§ 195. **General Doctrines when Discovery will be Enforced.**—As this auxiliary jurisdiction was contrived to supply a great defect in the ancient common-law methods, which was a constant source of wrong to suitors at law, and as it was intended to promote right and justice, discovery was, from the outset, favored by courts of equity; and as a general doctrine, it will always be enforced, unless some recognized and well-established objection exists in the particular case to prevent or to limit its operation. This affirmative proposition is so generally true that the discussion of the subject mainly consists in stating and explaining the objections which have been established, and which alone can avail to hinder the exercise of the jurisdiction. While thus made effective, the jurisdiction is

<sup>8</sup> *Le May v. Baxter*, 11 Wash. 649, 40 Pac. 122; *Smythe v. Henry*, 41 Fed. 705, 715.

<sup>1</sup> *Arnold v. Pawtuxet Water Co.*, 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602.

also carefully guarded, so as not to infringe upon the defendant's rights. Its object is to promote justice by eliciting facts material to the plaintiff's contention; not to compel the defendant to disclose matters injurious to himself or prejudicial to his own case. While the plaintiff is sufficiently aided in establishing his own side of the controversy, the defendant is also carefully guarded. . . .

§ 196. **I. What Judicial Proceedings, in what Courts, will be Aided by Discovery in Equity.**—A suit for discovery will be maintained in aid of another cause depending in a court of equity upon a cross-bill filed for that purpose by the defendant therein;<sup>1</sup> and especially in aid of proceedings in any common-law court of general jurisdiction or other public tribunal of the same country which is or was by its original modes of procedure unable to compel the needed disclosure.<sup>2</sup> . . . Discovery has sometimes been granted, both in England and in this country, in aid of a controversy pending in a tribunal of a foreign country.<sup>3</sup>

§ 197. The cause of action or the defense which can be aided by a suit for discovery must furthermore be wholly *civil* in its nature. The auxiliary jurisdiction of discovery will only be exercised on behalf of a contention, action, or defense entirely civil; and it will therefore withhold its aid from criminal prosecutions, actions penal in their nature, and controversies involving moral turpitude, or arising from acts clearly immoral, even though brought for the purpose of recovering pecuniary compensation.<sup>1</sup> . . . The action in aid of which the discovery is sought may be pending; but this is not necessary. It is sufficient if the plaintiff in the bill for a discovery shows that he has a right to maintain or defend an action in another court, and that he is about to sue or is liable to be sued therein, although no action is yet commenced; a discovery may be needed to determine the proper parties, or to properly frame the allegations of his pleading.<sup>2</sup> But after a judgment or verdict in the action at law, it is too late to bring a suit for discovery alone.<sup>3</sup>

<sup>1</sup> *Prioleau v. United States*, L. R. 2 Eq. 659.

<sup>2</sup> *Shotwell v. Smith*, 20 N. J. Eq. 79.

<sup>3</sup> *Mitchell v. Smith*, 1 Paige 287, Sh. 346; *Post v. Toledo C. & St. L. R. Co.*, 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86, Sh. 344; contra, now, in England: *Dreyfus v. Peruvian Guano Co.*, L. R. 41 Ch. Div. 151.

<sup>1</sup> *Black v. Black*, 26 N. J. Eq. 431; *Reynolds v. Burgess Sulphite Fibre Co.*, 71 N. H. 332, 341-345, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535, 544-549, 1 Scott 45 (discovery may be had in aid of action for personal tort—negligence—not involving moral turpitude).

<sup>2</sup> *Post v. Toledo, C. & St. L. R. Co.*, 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86 (discovery of names and addresses of stockholders of a corporation); *Reynolds v. Burgess Sulphite Fibre Co.*, 71 N. H. 332, 341, 51 Atl. 1075, 93 Am. St. Rep. 535, 544, 57 L. R. A. 949, 1 Scott 45.

<sup>3</sup> *Faulkner's Adm'r. v. Harwood*, 6 Rand. 125.

**§ 198. II. The Parties, Their Situation and Relations to Each Other, in Order that a Discovery may be Granted—The Plaintiff.**—Either the plaintiff or the defendant in the pending or anticipated action at law may file a bill for a discovery. Since by the rules of equity pleading, independent of modern statutes, only the complainant can compel a disclosure on oath from his adversary, if the defendant in an equity suit needs a discovery he must file a cross-bill, and thus become a plaintiff for that purpose.<sup>1</sup> As the first requisite, the plaintiff in the equity suit for a discovery must show that he has a title or interest in the subject-matter to which the proposed discovery relates, such an interest as he can maintain or defend in a proceeding pending or to be brought in another tribunal, and must thus show that he is entitled to the discovery. A mere stranger is never allowed to maintain a suit for discovery concerning a subject-matter in which he has no interest enforceable by a judicial proceeding, or concerning the title or estate of a third person.<sup>2</sup> In addition to exhibiting a title or interest in the subject-matter, the allegations of the plaintiff's bill must show that a discovery would not be useless. The plaintiff in the discovery suit must show by his averments, at least in a prima facie manner, that if he is the plaintiff in the action at law he has a good cause of action, and if he is the defendant, he has a good defense thereto. While it is not necessary that his right of action or of defense at law should be beyond dispute, still, if the bill should negative the existence of any such right, the court of equity would, of course, refuse a discovery which would then be useless.<sup>3</sup> If the result of the controversy at law is doubtful, even when the defendant in the suit for a discovery has denied the plaintiff's title, or has set up matter which if true would operate as a complete defense, the court of equity will, in general, grant the discovery, and leave the issue to be tried and finally determined by the court of law.<sup>4</sup>

**§ 199. The Defendant.**—I proceed to consider, in the next place, the requisites concerning the defendant in a suit for a discovery. No discovery can be compelled from an incompetent defendant; as, for example, an infant, or a lunatic without committee.<sup>1</sup> The gen-

<sup>1</sup> *Talmage v. Pell*, 9 Paige 410: As to "interrogatories" in aid of "counter-claim" in modern English practice, see *Hoffman v. Postill*, L. R. 4 Ch. 673.

<sup>2</sup> *Camp v. Ward*, 69 Vt. 286, 60 Am. St. Rep. 929, 37 Atl. 747; *Slack v. Black*, 109 Mass. 496.

<sup>3</sup> *Slack v. Black*, 109 Mass. 496; *Hurricane Tel. Co. v. Mohler*, 51 W. Va. 1, 41 S. E. 421 (bill allowed); *Everson v. Equitable Life Assur. Co.*, 68 Fed. 258.

<sup>4</sup> *Primmer v. Patton*, 32 Ill. 528.

<sup>1</sup> *Micklethwaite v. Atkinson*, 1 Coll. C. C. 173. Joinder as defendants in the same suit for discovery, of defendants in separate actions at law, is irregular; *Broadbent v. State*, 7 Md. 416.

eral rule is well settled, and admits of only one or two special exceptions, which are necessary to prevent a failure of justice, that no person can properly be made a defendant in the suit for a discovery, or compelled as such to disclose facts within his knowledge, unless he has an interest in the subject-matter of the controversy in aid of which the discovery is asked.<sup>2</sup> Thus, as an illustration of this rule, arbitrators cannot, in general, be joined as defendants to a bill of discovery and compelled to disclose the grounds of their award,<sup>3</sup> but if they are charged with actual misconduct, fraud, or corruption, they are obliged to answer with respect to such allegations.<sup>4</sup> As another illustration of the rule, mere witnesses cannot be joined as defendants and obliged to answer; nor can a mere agent be made a party for purpose of obtaining a discovery from him.<sup>5</sup> This application of the rule is not without exception. Where an agent, as, for example, an attorney, has assisted his principal in the accomplishment of actual fraud, he may be made a co-defendant and compelled to disclose the facts.<sup>6</sup> The most important exception is in case of suits against corporations. Where it is desired to obtain discovery from a corporation in a bill filed against it for that purpose, it is firmly settled by the authority of decided cases that a secretary or some other officer may and must be joined as a co-defendant, from whom the discovery may be obtained by his answer under oath. This exception is based wholly upon considerations of expediency, since a corporation cannot make an answer on oath, nor be liable for perjury.<sup>7</sup> For the same reason, the rule has been extended by modern cases to suits by and cross-bills against nations or states which are not monarchical, such as the United States of America and other republics.<sup>8</sup>

**§ 201. III. The Nature, Subject-Matter, and Objects of the Discovery Itself; that is, the Matters Concerning Which the Plaintiff may Inquire and Compel a Discovery, and the Defendant must Answer and Make Discovery.**—The fundamental rule on this subject is, that the plaintiff's right to a discovery does not extend to all facts which may be material to the issue, but is confined to facts which are material *to his own title or cause of action*; it does not enable him to pry into the defendant's case, or find out the evidence

<sup>2</sup> *Dineley v. Dineley*, 2 Atk. 394. See *In re Barned's Bank*, L. R. 2 Ch. 350.

<sup>3</sup> *Stewart v. East India Co.*, 2 Vern. 380.

<sup>4</sup> *Dummer v. Corp'n of Chippenham*, 14 Ves. 252.

<sup>5</sup> *Detroit Copper and Braes Rolling Mills Co. v. Ledwidge*, 162 Ill. 305, 44 N. E. 751.

<sup>6</sup> *Dummer v. Corp'n of Chippenham*, 14 Ves. 252, 254.

<sup>7</sup> *Wych v. Meal*, 3 P. Wins., 311, 312, per Talbot, L. C.; *Colgate v. Compagnie Francaise du Telegraphe*, 23 Fed. 82.

<sup>8</sup> *United States v. Wagner*, L. R. 2 Ch. 582; L. R. 3 Eq. 724.

by which that case will be supported. The plaintiff is entitled to a disclosure of the defendant's title, and to know what his defense is, but not to a statement of the evidence upon which the defendant relies to establish it.<sup>1</sup> This rule, however, must be understood with the limitation that the plaintiff may compel the discovery of all facts material to his own cause of action, even though the defendant's evidence may thereby be incidentally disclosed,<sup>2</sup> as, for example, where the establishment of the plaintiff's title or cause of action involves the proof of fraud; and the defendant, besides discovering what the case is on which he relies, can be compelled to disclose all facts which would, by way of evidence, tend to *impeach* or *destroy* it, unless otherwise privileged, since such facts are material evidence for his adversary, but is not bound to disclose any evidence by which he intends to or may *support* his case, for such evidence cannot be material to the plaintiff.<sup>3</sup> As a direct inference of this general rule, all the facts which the plaintiff seeks to discover must be *material*; the defendant is never compelled to disclose matters which are *immaterial* as evidence to support the plaintiff's contention; he is never obliged to answer vexatious or impertinent questions, asked from curiosity or malice.<sup>4</sup>

§ 202. As a general proposition, the discovery, in order to be granted, must be in aid of some object which a court of equity can regard with approval, or at least without disapproval,—some object which is not opposed to good morals or to the principles of public policy embodied in the law.<sup>1</sup> This doctrine is the foundation of several particular rules regulating the practice of discovery. The first of these particular applications of the doctrine is, that a defendant in the discovery suit, or in a suit for relief as well as discovery, is never compelled to disclose facts which would tend to criminate himself, or to expose him to criminal punishment or prosecution, or to pains, penalties, fines, or forfeitures. He may refuse an answer, not only to the main, directly crinating facts, but to every incidental fact which might form a link in the chain of evidence establishing his liability to punishment, penalty, or forfeiture.<sup>2</sup> This restriction upon the right to a discovery is subject to several limita-

<sup>1</sup> *Sunset Telephone & T. Co. v. City of Eureka*, 122 Fed. 961; *Saccharin Corporation v. Chemicals & Drugs Co.*, (1900) 2 Ch. 556; *Benbow v. Low*, L. R. 16 Ch. D. 93.

<sup>2</sup> *Dock v. Dock*, 180 Pa. St. 14, 36 Atl. 411, 57 Am. St. Rep. 617.

<sup>3</sup> *Attorney General v. Corporation of London*, 2 Mac. & G. 247, 256, 257, 13 Beav. 313; *Edison Electric Light Co. v. U. S. Electric Light Co.*, 45 Fed. 55, 58.

<sup>4</sup> *Richards v. Jackson*, 18 Ves. 472; *Alexander v. Mortgage Co.*, 47 Fed. 131.

<sup>1</sup> *Cousins v. Smith*, 13 Ves. 542.

<sup>2</sup> *United States v. Saline Bank*, 1 Pet. 100; *Robson v. Doyle*, 191 Ill. 566, 61 N. E. 435.

tions and exceptions necessary in order to promote the ends of justice. A defendant is always compelled to disclose his frauds and fraudulent practices, when such evidence is material to the plaintiff's case, even though the fraud might be so great as to expose the defendant to a prosecution for conspiracy, unless perhaps the indictment was actually pending.<sup>3</sup> And a party may have so contracted that he has thereby bound himself to make discovery, although it might subject him to pecuniary penalties.<sup>4</sup>

**§ 203. Privileged Communications.**—Another application of the general doctrine concerning public policy is, that no disclosure will be compelled of matters a knowledge of which has been communicated or obtained through or by means of certain close confidential relations, which are carefully guarded and protected from invasion or interference by the general policy of the law. For this reason a married woman cannot be compelled to disclose facts tending to establish any liability of her husband, the knowledge of which was acquired by her through her marital relation.<sup>1</sup> On the same foundation of principle rests the important rule that a party will not be compelled to disclose the legal advice given him by his attorney or counsel, nor the facts stated or matters communicated between himself and them in reference to the pending suit, or to the dispute which has resulted in the present litigation; nor, on the other hand, will these professional advisers be compelled or permitted to disclose the matters which they have learned or communicated in the same manner.<sup>2</sup> With respect to the nature of the matter passing between the client and his attorney or counsel, the protection is not absolute nor universal. The privilege from disclosure embraces those matters alone “in which it is lawful for the client to ask and the solicitor to give professional advice”; and therefore communications by which fraud is contrived or arranged between a lawyer and client are wholly excluded from the privilege, and must be divulged.<sup>3</sup> . . . Upon the same consideration of public policy controlling discovery, the rule is settled that governmental officers, whether civil or military, are not compelled to disclose matters of state, where the public interests might be harmed by such a disclosure, at the suit of a private individual.<sup>4</sup>

**§ 204. Manner of Making Discovery.**—Having thus ascertained

\* *Skinner v. Judson*, 8 Conn. 528, 21 Am. Dec. 691; *Postlethwaite v. Rickman*, L. R. 35 Ch. Div. 722.

<sup>1</sup> *Green v. Weaver*, 1 Sim. 404.

<sup>2</sup> *Cartwright v. Green*, 8 Ver. 405, 408.

<sup>3</sup> *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 49 Am. Dec. 189; *Lyell v. Kennedy*, L. R. 9 App. Cas. 81.

<sup>4</sup> See *Bullivant v. Attorney-General*, [1901] App. Cas. 196.

<sup>5</sup> *Smith v. East India Co.*, 1 Phill. Ch. 50.

what matters are exempt from a discovery, and of what a discovery will be compelled, it remains to consider certain settled rules concerning the *manner* in which the discovery must be made by the defendant. 1. Assuming that the matters called for are proper subjects of a discovery; that they belong to the plaintiff's case, and not to the defendant's; that they are not privileged, or are not exempt within the operation of any other doctrine,—then the defendant must disclose *all* material facts; in other words, if he answers at all, he must answer fully. The court will, however, in the exercise of its discretion, judge of the materiality, and guard him against oppressive, vexatious, or impertinent inquiries.<sup>1</sup> 2. The answers of the defendant must be complete, so that the information which they give will be of substantial use to the plaintiff;<sup>2</sup> and must be to the best of the defendant's knowledge, information, and belief. A defendant is bound to obtain information from all means reasonably within his power. If documents are ordered to be produced, it is no excuse for non-production that they are in the possession of a third person, or even that a third person has a lien upon or an interest in them.<sup>3</sup> But if documents *belong* wholly or in part to a third person, not a party to the suit, their production will not be compelled.<sup>4</sup> 3. The answers must be distinct, positive in their statements, not leaving facts to be inferred argumentatively, and giving specific replies to specific questions;<sup>5</sup> but must not be unnecessarily minute and prolix, especially in setting forth accounts.<sup>6</sup>

§ 208. IV. **When, How Far, and for Whom may the Answer in the Discovery Suit be Used as Evidence.**—If the suit is one for discovery alone, without relief, in aid of some action or proceeding in a court of law, and the answer is used as evidence on the trial of such action, its use is entirely governed by the legal rules applicable to such species of testimony. It is, in fact, the admissions of one party to the controversy, proved by his adversary, differing from ordinary admissions only by its more formal and elaborate character. It follows, therefore, that if the party obtaining the discovery reads any portion of the answer in evidence, the whole of it must be read on the demand of the one who made it, so that the jury may

<sup>1</sup> Shotwell v. Struble, 21 N. J. Eq. 31.

<sup>2</sup> For example, when accounts are called for, they must be reasonably made out, and not simply the books through which the items are scattered, produced for inspection; White v. Williams, 8 Ves. 193. See Christian v. Taylor, 11 Sim. 401.

<sup>3</sup> Glengall v. Frazer, 2 Hare 99; Vale v. Oppert, L. R. 10 Ch. 340, 342.

<sup>4</sup> Hadley v. Mc Dougall, L. R. 7 Ch. 312.

<sup>5</sup> Tipping v. Clarke, 2 Hare 383, 389.

<sup>6</sup> Norway v. Rowe, 1 Mer. 346.

be possessed of all his statements and explanation or qualification of his admissions.<sup>1</sup>

#### EXAMINATION OF WITNESSES.

**§ 210. This Jurisdiction Described.**—While the first branch of the auxiliary jurisdiction deals with the matter of obtaining evidence from the parties themselves, the second branch comprises the methods of examining witnesses who are not parties, and of preserving their evidence for future use at the trial of actions at law, or at the hearing of suits in equity. This branch of the auxiliary jurisdiction was doubtless established in aid of proceedings at law, although its methods may also be used in suits strictly equitable. Where a right now exists, which is likely to be disputed or contested at some future time, but no action can yet be brought for the purpose of establishing it, and there is danger that all the witnesses will have died, and the evidence by which alone it can be supported will have disappeared before that time arrives at which an action can be brought, the common law furnished no means for taking the testimony of the witnesses in anticipation. To prevent such a failure of justice, the auxiliary jurisdiction of equity contrived the suit for perpetuating the testimony of witnesses under such circumstances. Again, where a suit at law has actually been commenced, but has not reached the time for trial, and there is danger lest the evidence of certain material witnesses should be lost, from their extreme age, or from their being sick, or from their being about to leave the country, and also where in such a suit material witnesses are actually in a foreign country, so that their attendance cannot be compelled, nor their testimony taken upon deposition by any modes which the common law had furnished, the auxiliary jurisdiction supplied the defect by means of a suit to take the testimony of the witnesses *de bene esse* in the one case, and a suit to take the testimony of the witnesses in foreign countries upon a commission issued out of chancery in the other case. As these three equitable proceedings were very cumbrous, and as they have been practically superseded, even if not expressly abolished, both in England and in most of the states, by more simple, direct, and efficacious statutory methods, a very brief description of them will suffice.

**§ 211. I. Suit to Perpetuate Testimony.**—A suit to perpetuate testimony could only be maintained where the plaintiff had at the time some right vested or contingent, to which the testimony would relate; but such right could not *then* be investigated, established, or defended by an action at law. As the foundation of the suit, the

<sup>1</sup> *Fant v. Miller*, 17 Gratt. 187.

plaintiff in it, not yet being in possession of the property in question, might have a future interest, to take effect only upon the happening of some future and perhaps contingent event; or he might have an immediate present interest, being in possession of the property, and his possession not yet actually disturbed, but threatened with disturbance or contest, by the defendant, at some future time; in either of which cases he could immediately bring no action at law to maintain or defend his right.<sup>1</sup> As to the nature of the plaintiff's interest, it might be in real or in personal property, or in mere personal demands, and might be such that the testimony sought would be used in support of a cause of action or of a defense at law. But as the law stood independent of statute, the plaintiff must have an *interest* recognized and maintainable by the law, although it might be very small, remote, and contingent. Therefore if the plaintiff has only a possibility or an expectancy, no matter how probable and actually valuable, he could not maintain the suit; as in case of an heir at law during the life of his ancestor.<sup>2</sup> In England the right of the plaintiff to maintain the proceeding with respect to the nature of his interest has been enlarged by statute; which embraces those who have mere possibilities, as well as those who have actual interests.<sup>3</sup> If the right, interest, or claim could possibly be made the subject of an immediate judicial investigation in an action brought by the party who commences a suit to perpetuate testimony, such suit would for that reason be dismissed;<sup>4</sup> but if the party cannot possibly bring the matter before a court so that his right or claim may be adjudicated upon at once, the equity suit to perpetuate the testimony can be maintained. The reason given by the cases is, that the only evidence in support of the plaintiff's rights might be lost by the death of his witnesses; and the adverse party might delay to move in the matter for the very purpose of obtaining the advantage resulting from such an event.<sup>5</sup> The mode of examining the witnesses is by deposition similar to that pursued in other equity suits. The cause does not proceed any further than the examination of the witnesses; the suit is then really at an end. The only further step

<sup>1</sup> Angell v. Angell, 1 Sim. & St. 83, 2 Ames Eq. Jur. 168; Duke of Dorset v. Girdler, Prec. Ch. 531, 2 Ames Eq. Jur. 166.

<sup>2</sup> See Sackville v. Ayleworth, 1 Vern. 105, 2 Ames Eq. Jur. 165.

<sup>3</sup> Stat. 5 & 6 Vict. chap. 69.

<sup>4</sup> Parry v. Rogers, 1 Vern. 441, 2 Ames Eq. Jur. 165; Angell v. Angell, 1 Sim. & St. 83, 2 Ames Eq. Jur. 168.—*A fortiori*, a bill to perpetuate testimony will be dismissed if brought by one who is already a party defendant to a suit which involves his right, interest or claim: Earl Spencer v. Peek, L. R. 3 Eq. 415, 2 Ames Eq. Jur. 170.

<sup>5</sup> Angell v. Angell, 1 Sim. & St. 83, 2 Ames Eq. Jur. 168; Duke of Dorset v. Girdler, Prec. Ch. 531, 2 Ames Eq. Jur. 166.

is the "publication of the evidence," as it is called in the chancery practice, by which the parties have access to and become entitled to use the testimony. This "publication" is made by an order of the court; but such an order cannot be obtained except for the purpose of using the testimony in some action, nor can it be obtained, as a general rule, even for that purpose until after the death of the witnesses whose depositions are sought to be used. This latter rule can only be evaded on very special grounds, by showing that although the witnesses are still living their examination in the action is morally impossible.<sup>9</sup>

§ 213. **II. Suits to Take the Testimony of Witnesses de Bene Esse, and of Witnesses in a Foreign Country.**—A suit to take testimony de bene esse is maintained in aid of a pending action at law to examine a witness who is very aged, or who is sick, or who is about to depart from the country, or a person who is the *only* witness to a material fact in the cause, although neither aged nor sick; the ground of such proceeding being the evident danger lest the evidence should be entirely lost to the party by a delay.<sup>1</sup> There is a very clear line of distinction between this suit and that to perpetuate testimony. While the latter could only be brought by a party who had no present immediate cause of action, this suit to take testimony de bene esse can only be maintained by one who has an existing cause of action or defense, and while the action of law is pending.<sup>2</sup> After the depositions are completely taken, they cannot be read as evidence at the trial, unless it is shown that the witness is dead, or is beyond the jurisdiction, or is too physically infirm, or is otherwise incapable of attending to testify in person.<sup>3</sup>

§ 214. The suit to examine witnesses in a foreign country upon a commission issued for that purpose, in aid of a pending action at law, is founded upon the original lack of any power in the common-law courts to grant such commissions. The name indicates the nature and extent of the proceeding. It is in fact a branch or modification of the suit to take testimony de bene esse, and is governed by the rules applicable to that suit, except the witnesses in foreign countries to be examined need not be aged nor sick. The inability to reach them, or to compel their personal attendance by any legal process, is the ground upon which the jurisdiction rests.<sup>1</sup>

<sup>9</sup> Angell v. Angell, 1 Sim. & St. 83, 2 Ames Eq. Jur. 168; Duke of Dorset v. Girdler, *supra*; Earl Spencer v. Peek, *supra*.

<sup>1</sup> Angell v. Angell, 1 Sim. & St. 83, 2 Ames Eq. Jur. 168; Frere v. Green, 19 Ves. 320.

<sup>2</sup> *Id.*

<sup>3</sup> Gason v. Wordsworth, 2 Ves. Sr. 336.

<sup>1</sup> Angell v. Angell, 1 Sim. & St. 83, 2 Ames Eq. Jur. 168.

## CHAPTER II.

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### GENERAL RULES FOR THE GOVERNMENT OF THE JURISDICTION.

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#### SECTION I.

##### INADEQUACY OF LEGAL REMEDIES.

###### ANALYSIS.

- § 216. Questions to be examined stated.
- § 217. Inadequacy of legal remedies is the very foundation of the concurrent jurisdiction.
- § 218. Is only the occasion for the rightful exercise of the exclusive jurisdiction.
- § 219. Operation of the principle upon the exclusive jurisdiction; does not affect the first branch, which deals with equitable estates and interests.
- §§ 220, 221. Is confined to the second branch, which deals with equitable remedies.
- § 222. Summary of the equity jurisdiction as affected by the inadequacy of remedies.

**§ 217. Inadequacy of Legal Remedies the Foundation of the Concurrent Jurisdiction.<sup>1</sup>**

**§ 218. Is the Occasion only of the Exclusive Jurisdiction.<sup>1</sup>**

**§ 219. Operation of the Principle upon the Exclusive Jurisdiction.**— . . . The exclusive jurisdiction consists, as has been shown, of two distinct branches, namely: 1. Where the primary rights, interests, or estates of the complaining parties are wholly equitable; and 2. Where the primary rights, interests, or estates are legal, but the remedies sought and obtained are wholly equitable. The principle that the inadequacy of legal remedies furnishes the occasion for a resort to the equitable jurisdiction and the rule for its proper exercise does not extend to the first branch or division of the exclusive jurisdiction. . . . Wherever the complaining party has purely equitable primary rights, interests, or estates according to the doctrines and principles of the equity jurisprudence, courts having equitable powers do and must exercise their exclusive juris-

<sup>1</sup> See ante, § 139, note.

<sup>1</sup> See ante, § 139, note.

diction over the case, entirely irrespective of the adequacy or inadequacy of legal remedies, for the plain and sufficient reason that the litigant party cannot possibly obtain any legal remedies under the circumstances; the courts of law do not recognize his rights, and cannot adjudicate upon nor protect his interests and estates. One or two examples will illustrate the correctness and the generality of this statement. In the case of a trust created in lands, the estate of the cestui que trust is purely an equitable one, of which law courts refuse to take cognizance. He is therefore always entitled to the aid of a court of equity in establishing, maintaining, and enforcing his estate according to the nature of the trust and the doctrines of equity jurisprudence which regulate it, and to obtain such remedies as the circumstances may require; and the question never is asked, nor could be asked, whether the remedies given him by a court of law are or are not adequate, since all legal remedies are to him impossible.<sup>1</sup> . . .

§ 220. It is otherwise with the second branch of the exclusive jurisdiction, as above described, where the primary rights, interests, or estates of the complaining party are legal in their nature, but the remedies sought by him are entirely equitable. Where a person has a legal primary right, he is not always, and as a matter of course, entitled to go into a court of equity, set its jurisdiction in motion, and obtain the equitable remedies appropriate to maintain or protect his right. Since his estates, interests, or primary rights are legal, he can always, in case of their infringement or violation, demand and recover the legal remedies which are conferred by courts of law under the circumstances. Whether he may also demand and recover the proper equitable remedies depends upon other considerations. Although the jurisdiction of courts of equity to grant these equitable remedies in all such cases is *exclusive*, because courts of law (except as authorized by modern statutes) have no power to grant them, yet the courts of equity will not, in every instance, exercise their jurisdiction. The proper exercise of the jurisdiction in every case of this kind—but not the jurisdiction itself—depends upon the question whether the legal remedies which the party can obtain from courts of law upon the same facts and circumstances are inadequate to meet the ends of justice,—insufficient to confer upon him all the relief to which he is justly entitled. If the legal remedies administered by the judicial machinery and methods adopted in the law courts *are* fully adequate to establish, protect, and enforce the party's legal estates, interests, and rights, a court

<sup>1</sup>Further illustrations are found in the cases of the equitable assignment of a fund; of an injunction against the prosecution of an action at law, for the purpose of protecting an equitable interest or right in the subject matter.

of equity will not interfere in his behalf with the purely remedial branch of its exclusive jurisdiction; if the legal remedies, either from their own essential nature or from the imperfection of the legal procedure, are inadequate, then a court of equity will interpose, and do complete justice by granting the appropriate equitable remedies which it alone is competent to confer. . . . Additional examples<sup>1</sup> may be found in the established rules concerning the use of the injunction. The jurisdiction to restrain torts to property, real or personal, nuisances, trespasses, and the like, by injunction, is exclusive, although the estate of the complaining party which is interfered with, and which he seeks to protect, is legal, and he is entitled to the legal remedy of compensatory damages, yet the preventive remedy which he demands for the protection of his property is wholly equitable, and can only be administered by courts of equity. The general doctrine is well established that this exclusive jurisdiction will not be exercised in any case for the purpose of enjoining trespasses and other tortious acts to property, at the suit of one having the legal estate, unless the legal remedy—compensatory damages—is inadequate, under the circumstance of the case, to confer complete relief upon the injured party. Another illustration may be found in the doctrines concerning the remedy of specific performance of contracts. The jurisdiction to enforce performance of contracts specifically is exclusive, for the remedy itself is most distinctively equitable and completely beyond the judicial methods of the law courts; yet the complaining party has a *legal* primary right created by the contract, and upon its violation is *always* entitled to the relief afforded by an action at law,—compensatory damages—even though such damages are only nominal. The doctrine is fundamental that this jurisdiction will be called into operation, and the specific performance will be decreed only in those classes of cases in which, according to the views taken by the equity court, the legal remedy of compensatory damages is, from its essential nature, insufficient, and fails to do complete justice between the litigant parties. It is true that in applying this doctrine the courts of equity have established the further rule that in general the legal remedy of damages is inadequate in all agreements for the sale or letting of land, or of any estate therein; and therefore in such class of contracts the jurisdiction is always exercised, and a specific performance granted, unless prevented by other and independent equitable considerations which directly affect the reme-

<sup>1</sup> Other illustrations; injunction in behalf of defendant in action at law where his defense involves not an exclusively equitable right, but some question of fraud, mistake, etc.; see post, § 1363; cancellation of written instruments on the ground of fraud.

dial right of the complaining party; but this result does not interfere with nor modify the principle which is under discussion.<sup>2</sup>

§ 222. **Summary of the Jurisdiction as Affected by the Principle.** . . . Laying out of view for the present that special branch of equity which is called the "auxiliary jurisdiction," and which has become obsolete except in a few of our American states, the administration of the equitable jurisdiction, and the resulting doctrines which make up the equity jurisprudence, may be separated, according to a natural order, into four distinct classes, namely: 1. Where the primary right or interest of the complaining party which has been invaded is purely equitable—one which the doctrines of equity jurisprudence alone create and recognize,—and his remedial right and the remedies which he obtains are also wholly equitable; for example, where an equitable owner of land, under the doctrines of trust or of conversion, procures the declarative relief establishing his estate, and the relief of specific performance by means of a conveyance of the legal title. 2. Where the primary right or interest of the complaining party is in like manner equitable, and the remedies which he asks and receives are legal; that is, are of the same kind as those conferred by courts of law; for example, where the equitable owner of a fund, through an equitable assignment, establishes his ownership and recovers the

<sup>2</sup> Various and sometimes very insufficient reasons have been given by judges for the foregoing rule, that the legal remedy is always to be regarded as *inadequate* in contracts relating to real estate, while on the other hand it is generally to be regarded as adequate in contracts relating to personal property. The distinction stated in the text, and which I am illustrating, may perhaps furnish a complete explanation. In an agreement for the sale of land, the vendee, in addition to his legal primary right, also obtains, in pursuance of the equitable doctrine of conversion, an equitable *estate* in the land,—an estate which equity regards as the real beneficial ownership, burdened simply or encumbered with the lien of the unpaid purchase price. Being thus the holder of the equitable estate in the subject-matter, the equitable owner of the land, he is, according to the doctrine stated in the text, entitled as a matter of course to the aid of a court of equity in protecting such estate and in clothing him with the legal title by means of a conveyance from the vendor. The exercise of the jurisdiction does not then depend, as it does when the jurisdiction is *merely* to confer equitable relief, upon the inadequacy of the legal remedy, but is rather a matter of equitable right in the vendee. The same rule is applied in cases of similar contracts to the vendor, partly because he acquires an equitable ownership of the purchase price, and partly because of the doctrine of mutuality. In the contracts relating to personal property, the equitable principle of conversion is not applied with the same strictness and with all the consequences as in contracts relating to real estate. The further rule, that the granting a specific performance *in all cases* depends upon certain equitable grounds affecting the remedial right of the plaintiff, or, to use the common but misleading expression, that it depends upon the judicial discretion of the court, plainly does not interfere with this view.

fund by a final judgment which is simply pecuniary. 3. Where the primary right or interest of the complaining party is legal,—one which is created by the law, and cognizable by the law courts,—and his remedial right, and the remedies which he procures, are entirely equitable; for example, where the legal owner of property obtains protection to his possession or enjoyment by means of injunction against tortious acts, or against wrongful proceedings at law, or protects his title from disturbance, or himself from wrongful demands, by means of the remedy of cancellation, and the like. 4. Where the primary right or interest of the complaining party is legal, recognized and maintainable by the law courts, and the remedies which he obtains are also legal,—of the same kind as those administered and conferred by the courts of law,—recoveries of money, or of specific lands or chattels; for example, where a surety sues his principal, under his right of exoneration, to recover back the money paid out on behalf of such principal, or sues his co-surety to recover money, under his right of contribution; or where an owner in common of land by a legal estate therein recovers his own specific portion by a partition, and the like. All possible cases of equity may be referred to one or the other of these four divisions. The first three belong to the “exclusive” jurisdiction; the fourth constitutes the “concurrent” jurisdiction. Furthermore, in the first and second, the jurisdiction is not only exclusive, but is exercised as a matter of right in behalf of the complaining party whenever he has an equitable estate, interest, or primary right, according to the doctrines of equity jurisprudence. In the third division, although the jurisdiction always exists and is exclusive, it is not exercised on behalf of the complaining party as a matter of right in him; its proper exercise depends upon the inadequacy of the legal remedies which he might obtain to do him complete justice. Finally, in the fourth division, the very existence as well as the exercise of the jurisdiction, being concurrent, depends upon the inadequacy of the remedies which the party could obtain from a court of law, owing partly to the form of those remedies themselves, and partly to the imperfection of the legal mode of procedure.

## SECTION II.

## DISCOVERY AS A SOURCE OR OCCASION OF JURISDICTION.

## ANALYSIS.

- § 223. General doctrine as to discovery as a source of concurrent and an occasion for exclusive jurisdiction.
- §§ 224, 225. Early English rule.
- § 226. Present English rule.
- §§ 227-229. Broad rule established in some American states.
- § 229. The limitations of this rule.
- § 230. The true extent and meaning of this rule examined.

§ 223. **General Doctrine.**—It has already been shown that, under the general jurisdiction of equity, a suit of discovery alone without relief might be maintained in order to procure admissions from the defendant to be used on the trial of an action at law between the same parties; and that in every equitable suit brought for any purpose of relief over which a court of equity has jurisdiction, the plaintiff may make his pleading a means of discovery, and may compel the defendant to disclose facts within his knowledge material to the issue, which can be used as evidence on the hearing. In addition, however, to these original and strictly proper functions of discovery, the doctrine has been established in many of the American states, and to a very limited and partial extent in England, that discovery itself is, under certain circumstances, an independent source or foundation of the equitable jurisdiction to adjudicate upon matters and to award reliefs which are otherwise purely legal. In other words, that, under certain circumstances, where the plaintiff has asked and obtained a discovery, the court of equity may go on and decide the whole issue, and grant the requisite remedies, although the subject-matter of the controversy and the primary rights and interests of the party are wholly legal in their nature, and the remedies conferred are of such a kind as a court of law can administer. . . .

§ 224. **Early English Rule.**— . . . An early treatise of high authority, after admitting the impossibility of extracting a more definite rule from the conflicting decisions, says: "The court, having acquired cognizance of the suit for the purpose of discovery, will entertain it for the purpose of relief, in most cases of fraud, account, accident, and mistake."<sup>1</sup> . . .

§ 225. . . . What is the real significance of this proposition? . . . In many cases of fraud, mistake, or accident, the exclusive

<sup>1</sup> Fonblanque's Equity, b. 1, chap. 1, § 3, note f.

jurisdiction exists to award purely equitable remedies in support of legal interests and primary rights of the plaintiff; and such jurisdiction will be *exercised* in these cases, according to the principle heretofore explained, whenever the legal remedies obtainable therein are inadequate. Also, in many cases of fraud, mistake, accident, or account, the concurrent jurisdiction exists to award remedies of a kind which are purely legal, such as pecuniary recoveries, in support of the legal interests and primary rights of the plaintiff, whenever the remedies obtainable from a court of law are inadequate, through the imperfection of the legal modes of procedure. Now, the proposition quoted above simply asserts that in all cases falling within either of the two classes last mentioned, in all such cases belonging either to the exclusive or to the concurrent jurisdiction, the very fact that a discovery is necessary for the plaintiff, and is obtainable by him, shows of itself, and independent of any other considerations, that the case is one in which the ordinary remedies at law are inadequate, and therefore that the equitable jurisdiction is proper in such case. . . . This view, as it seems to me, removes all conflict appearing in the English decisions and dicta, and brings the effect of discovery into a complete harmony with the general principles concerning jurisdiction. It rejects the notion that the mere fact of discovery has any power to enlarge the equitable jurisdiction, or to extend that jurisdiction, whether exclusive or concurrent, to any cases in which it does not otherwise exist; on the other hand, it admits that, in cases otherwise belonging either to the exclusive or the concurrent jurisdiction, a discovery obtained may be the *determining fact* upon which the proper exercise of that jurisdiction depends,—the fact which, without any other accident, renders the legal remedies inadequate, and thus sets in motion the judicial machinery of equity.

§ 226. **Present English Rule.**—The conclusion thus reached is fully sustained by the more modern English decisions. The rule fully settled by the English courts, before the auxiliary jurisdiction over discovery was finally abolished by the supreme court of judicature act,<sup>1</sup> was, that if the controversy and the issues involved in it are not otherwise within the equitable jurisdiction, either exclusive or concurrent, and the legal remedies obtainable in the case are adequate, a bill properly for discovery without any relief, in aid of a pending or expected action at law, can alone be maintained; and if in such a bill the plaintiff demands relief, either general or special, the whole is demurrable.<sup>2</sup> This rule confines

<sup>1</sup> See ante, § 193.

<sup>2</sup> The same doctrine as to the effect of discovery upon the jurisdiction has

discovery to its legitimate function of furnishing evidence, and prevents it from operating to extend the equitable jurisdiction to causes which would otherwise be solely cognizable at law.

§ 227. **American Rule.**— . . . The rule has been asserted by many American courts in very general terms, that whenever a court of equity has obtained jurisdiction of a cause for any one purpose, it may retain such cause for the purpose of adjudicating upon all the matters involved, and of granting complete relief. As a consequence of this principle, whenever the court can entertain a suit for discovery, and a discovery is obtained, the court will go on and decide the whole issue, and will grant to the plaintiff, if he has prayed for it, whatever relief is proper, even though such relief is legal in its kind, and could have been obtained by an action at law.<sup>1</sup>

§ 228. It is plain that this doctrine, although expressed in such broad terms, cannot be intended to operate in all of its generality. Taken literally and without limitation, it would break down the barriers between the jurisdictions in equity and at law, and would virtually render the equitable jurisdiction universal by bringing every judicial controversy within its scope. Before the modern legislation concerning witnesses and evidence, the actions at law were very few in which one or the other of the parties might not be aided by a discovery, and might not, in conformity with settled rules, maintain a suit for a discovery. . . .

§ 229. Limitations were therefore established which very much restricted the operation of the doctrine. In the first place, the rule is settled in those American courts which admit the general doctrine, that when the action is one cognizable at law, in which the rights and remedies are legal, and which does not otherwise belong to the equitable jurisdiction, but which the plaintiff brings in a court of equity under the doctrine that a discovery of itself enables equity to extend its concurrent jurisdiction over the whole cause, he must allege that the facts concerning which he seeks a disclosure are material to his cause of action, and that he has no means of proving those facts by the testimony of witnesses or by any other kind of evidence used in courts of law, that the only mode of establishing them is by compelling the defendant to make disclosure, and therefore that a discovery by suit in equity is indispensable. Without these allegations the plaintiff cannot avail himself of the doctrine

been adopted in some American states; See *Mitchell v. Greene*, 10 Met. 101; *Miller v. Scammon*, 52 N. H. 609, H. & B. 265; *Safford v. Ensign Mfg. Co.*, (C. C. A.) 120 Fed. 480, 483.

<sup>1</sup> *Sanborn v. Kittredge*, 20 Vt. 632, 50 Am. Dec. 58; *Lancy v. Randlett*, 80 Me. 169, 6 Am. St. Rep. 169, 1 Scott 409.

and obtain relief as a consequence of the discovery. Nor are these allegations a mere empty form, a mere fiction of pleading; they may be controverted, must be supported by proof, and if disproved, the whole foundation for the equitable interference in the case would fail.<sup>1</sup> In the second place, if the defendant by his answer fully denies all the allegations of fact with respect to which a discovery is demanded, the suit must fail; the court of equity cannot grant the relief prayed for, since its jurisdiction to give relief in such causes, according to the very assumption, rests upon the fact of a discovery rightfully obtained.<sup>2</sup>

§ 230. **True meaning of the American Rule.**— . . . The question then arises, What effect has been produced upon this particular doctrine by the modern legislation, which authorizes the examination of parties on the trial of actions, abolishes the disabilities of witnesses, and removes the other legal restrictions upon the admissibility of evidence? In my opinion, the necessary effect of such legislation has been to abrogate the doctrine altogether, even in those states where "discovery" is still retained. In fact, the foundation upon which this peculiar American doctrine concerning the effect of discovery in the classes of cases above described was rested by the courts, has been wholly swept away by these reformatory statutes. It is simply impossible for a plaintiff now to allege with truth, and of course impossible for him to prove in any controversy legal in its nature, that a discovery by means of a suit in equity is *essential* to his maintaining his cause in action, and that he is unable to establish the issues on his part by the testimony of witnesses, and by other evidence admissible in courts of law. . . . It is true that the principle is well settled that when a court of equity had jurisdiction over a certain subject-matter, it does not lose such jurisdiction when courts of law have subsequently acquired the same jurisdiction. In my opinion the matter under consideration does not come within the operation of this principle. It is not the case of a jurisdiction held by courts of equity which courts of law did not originally possess, but have now obtained. By the very assumption, the controversy, the cause of action, and the reliefs demanded are all *legal* in their nature; courts of law always had jurisdiction over them. The only difficulty was, that by reason of certain arbitrary rules of law concerning evidence, the jurisdiction of the law courts over this particular class of legal controversies could not be *exercised* so as to do full justice, until the defective legal rules of

<sup>1</sup> *Lancey v. Randlett*, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169, 1 Scott 409; *Brown v. Swann*, 10 Pet. 497; *Pryor v. Adams*, 1 Call 382, 1 Am. Dec. 533.

<sup>2</sup> *Russell v. Clarke's Ex'r's*, 7 Cranch, 69; *Buzard v. Houston*, 119 U. S. 355, 7 Sup. Ct. 249, H. & B. 268, 3 Keener 487.

evidence had been aided or supplemented by means of a discovery in equity; when this discovery was once made, and the proper evidence was thereby obtained, the jurisdiction at law could then be exercised, and complete justice could be done by its trial and judgment, as much as in any other legal controversies. Since the particular equity doctrine under discussion arose, not from the *absence* of a jurisdiction at law, but merely from certain hindrances to its useful exercise, and since this doctrine depended for its existence and operation upon certain rules of evidence, it is not, in my opinion, embraced within the protection of the general principle as to jurisdiction quoted above; it seems to me to have been necessarily abrogated by the sweeping changes effected in the legal rules of evidence by modern statutes.<sup>3</sup>

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### SECTION III.

#### THE DOCTRINE THAT JURISDICTION EXISTING OVER SOME PORTION OR INCIDENT EXTENDS TO AND EMBRACES THE WHOLE SUBJECT-MATTER OR CONTROVERSY.

##### ANALYSIS.

- § 231. The doctrine as applied in the concurrent jurisdiction.
- § 232. As applied in the exclusive jurisdiction.
- § 233. Limitations on the doctrine.
- §§ 234-241. Illustrations of the doctrine.
  - § 234. In cases of discovery.
  - § 235. In cases of administration.
  - § 236. In cases of injunction.
  - § 237. In cases of waste, nuisance, damages.
- §§ 238-241. In various other cases.
  - § 242. Effect of the reformed procedure on the doctrine.

§ 231. **As Applied to the Concurrent Jurisdiction.**—The rule has already been stated, as one of the foundations of the concurrent jurisdiction, that where a court of equity has obtained jurisdiction over some portion or feature of a controversy, it may, and will in general, proceed to decide the whole issues, and to award complete relief, although the rights of the parties are strictly legal, and the final remedy granted is of the kind which might be conferred by a court of law. This principle is, however, of much wider application, extending in its operation to both the concurrent and the exclusive jurisdictions; and it requires, therefore, a more full discussion. In its application to the concurrent jurisdiction, this principle forms, as has been already shown, one of the very foundations upon which

<sup>3</sup> *Miller v. Scammon*, 52 N. H. 609, H. & B. 265.

that jurisdiction sometimes rests; and it is then something more than merely an occasion or condition of fact for the proper exercise of the jurisdiction. In other words, where the primary rights and cause of action of the complaining party are legal, and the remedy which he asks and obtains is of the kind given by courts of law, the concurrent jurisdiction of equity to interfere and adjudicate upon the controversy may exist by virtue of this principle; it may alone determine the inadequacy of legal remedies upon which the very existence of the concurrent jurisdiction always depends. It may be remarked that the instances in which the concurrent jurisdiction results from the operation of this principle, at least in the United States, are most frequently cases of accounting or of discovery followed by relief.

§ 232. **As Applied in the Exclusive Jurisdiction.**—The principle is also frequently applied in cases belonging to the exclusive jurisdiction, and it then furnishes an occasion for the proper exercise of that jurisdiction by the granting of complete final relief which is purely equitable in its nature. In such instances, where the primary rights and interests of the complaining party are legal, and the court has jurisdiction over some part of the controversy, or to grant some partial or incidental equitable relief, it may, under the operation of this principle, and generally will, go on and decide all the issues, and award the final equitable relief which is necessary to meet the ends of justice, and which belongs to the exclusive jurisdiction of the court. While, therefore, the same general doctrine, expressed in the same formula, is equally applicable to cases of the concurrent and of the exclusive jurisdiction, yet its operation, as furnishing a ground for the judicial action, is very different in the two jurisdictions.

§ 234. **Illustrations.**— . . .<sup>1</sup> The particular remedy of a discovery is also, to some extent at least, the foundation of the established jurisdiction of equity over the administration of the personal estates of deceased persons. It has frequently been held that where a creditor, or a legatee, or a distributee brought a suit in equity to obtain a discovery of assets in the hands of the personal representatives, the court having thus obtained a jurisdiction of the matter for this special purpose, would go on and make a full decree of administration, of accounting from the executors or administrators, and of final settlement or distribution.<sup>2</sup>

§ 235. Although the legislation of most of the states has either expressly or practically taken the general jurisdiction of adminis-

<sup>1</sup> For the application of the principle after a *discovery*, see ante, §§ 223–230.

<sup>2</sup> *Pratt v. Northam*, 5 *Mason* 95, 105; *Sanders v. Soutter*, 126 *N. Y.* 193, 27 *N. E.* 263.

tration from the courts of equity, and has conferred it upon courts of probate under minute statutory regulation, still, whenever a court of equity takes cognizance of a decedent's estate for any special purpose, or to grant any special relief not within the power of the probate court, such as the construction of a will, the setting aside of some fraudulent transaction of an executor or administrator, the restraining of an executor's or administrator's wrongful acts by injunction, and the like, it has been held in many states that the court of equity, having thus acquired a jurisdiction of the estate for this particular purpose, may and should, notwithstanding the statutory system, go on and decree a complete administration, settlement, and distribution of the entire estate, in the same manner in which it would have proceeded under the original jurisdiction of chancery prior to the legislation.<sup>1</sup> In some of the states this power of a court of equity to go on and control the entire administration of the estate and decree a final settlement and distribution, whenever it has thus obtained a jurisdiction for some special purpose, is doubtless limited or prohibited by the statutes. The language of the statute conferring general power over the whole subject of administration upon the probate court is so broad, minute, and peremptory that the general powers and jurisdiction originally belonging to chancery over the settlement of decedent's estates are completely taken away, and are wholly transferred into the exclusive cognizance of the probate court, and are exercised by it in accordance with the minute and compulsory provisions of a statutory system. In these states, and by virtue of these statutes, if a court of equity obtains jurisdiction over the subject-matter of a decedent's estate for any special purpose not within the competency of the probate court, such as the construction of a will, the control and enforcement of a trust, the cancellation of some fraudulent conveyance made by an executor or administrator, and the like, its function will be limited to matters which are necessary to render this special relief complete and effectual; it will not be allowed to go on to a full and final administration and settlement of the estate as a whole. Such administration and settlement, after receiving the aid of the special relief furnished by the decree in equity, can be accomplished by the probate court alone, to whose exclusive cognizance they have been intrusted by the statute.<sup>2</sup>

§ 236. Another extensive class of cases in which the principle has been applied embraces suits brought to enjoin the further prosecution of a pending action at law, or the enforcement of a judgment

<sup>1</sup> *Cowles v. Pollard*, 51 Ala. 445; *Gilliam v. Chancellor*, 43 Miss. 437, 448, 5 Am. Rep. 498; *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263.

<sup>2</sup> *Gilliam v. Chancellor*, 43 Miss. 437, 448, 5 Am. Rep. 498.

recovered at law, either on the ground of some equitable defense not cognizable by the law court, or on the ground of some fraud, mistake, ignorance, or other incident of the trial at law, which rendered the legal judgment inequitable. In such cases the court of equity, having obtained jurisdiction of the cause for the purpose of an injunction, may decide the whole controversy and render a final decree, even though all the issues are legal in their nature, capable of being tried by a court of law, and the legal remedies therefor are adequate<sup>1</sup> In fact, the rule is more general still in its operation, and extends to all suits brought to obtain the special relief of injunction, and is not confined to suits for the purpose of enjoining actions or judgments at law. It may be stated as a general proposition, that wherever the court of equity has jurisdiction to grant the remedy of injunction for some special purpose, even though the injunction covers only a portion of the controversy, it may go on and decide all the issues, and make a final decree granting full relief.<sup>2</sup>

§ 237. Particular instances of the operation of the above general rule concerning the remedy of injunction may be seen in the cases of waste and of private nuisance. Originally the jurisdiction over cases of waste was confined to courts of law; the legal remedy by action for damages was regarded as adequate, and as the only remedy. The same was true of private nuisance. In time it was felt that this merely compensatory relief was insufficient under some circumstances, and that a preventive remedy was necessary to the ends of justice. Equity therefore assumed a jurisdiction to grant an injunction restraining the commission of actual or threatened waste; and having obtained jurisdiction for the purpose of awarding this special relief, which, in many instances, is not complete, the court will retain the cause and decree full and final relief, including damages, and when necessary, an abatement of whatever creates the waste or causes the nuisance.<sup>1</sup> The same description will apply to all cases of private nuisance in which a court of equity may have jurisdiction to interfere by injunction.<sup>2</sup> There are some other instances, in addition to those of injunction,

<sup>1</sup> *Mays v. Taylor*, 7 Ga. 238, 243, 244; *Coons v. Coons*, 95 Va. 434, 64 Am. St. Rep. 804, 28 S. E. 885; *Crobert v. McDonald*, 2 S. D. 495, 51 N. W. 212, 39 Am. St. Rep. 796.

<sup>2</sup> *Jesus College v. Bloom*, 3 Atk. 262, 263, 1 Scott 115, 1 Ames Eq. Jur. 481, 1 Keener 404, per Lord Hardwicke; *People v. Chicago*, 53 Ill. 424, 428.

<sup>1</sup> *Jesus College v. Bloom*, 3 Atk. 262, 263, 1 Scott 115, 1 Ames Eq. Jur. 481, 1 Keener 404; *Lynch v. Metropolitan El. Ry. Co.*, 129 N. Y. 274, 15 L. R. A. 287, 26 Am. St. Rep. 523, 29 N. E. 315, 1 Scott, 124, Shep. 30.

<sup>1</sup> *Fleishner v. Citizens' R. E. & I. Co.*, 25 Oreg. 119, 35 Pac. 174; *Richi v. Chattanooga Brewing Co.*, 105 Tenn. 651, 58 S. W. 646.

waste, nuisance, and continuous or irreparable trespass, where equity, having obtained jurisdiction for some particular purpose, will complete the possible relief by decreeing damages; but this application of the principle is not general; on the contrary, it is rather exceptional. The award of mere compensatory damages, which are almost always unliquidated, is a remedy peculiarly belonging to the province of the law courts, requiring the aid of a jury in their assessment, and inappropriate to the judicial position and functions of a chancellor. It may be stated, therefore, as a general proposition, that a court of equity declines the jurisdiction to grant mere compensatory damages, when they are not given in addition to or as an incident of some other special equitable relief, unless under special circumstances the exercise of such jurisdiction may be requisite to promote the ends of justice.<sup>3</sup> There are, however, special circumstances in which the principle under discussion is invoked and is extended to the award of mere damages. If a court of equity obtains jurisdiction of a suit for the purpose of granting some distinctively equitable relief, such, for example, as the specific performance of a contract, or the rescission or cancellation of some instrument, and it appears from facts disclosed on the hearing, but not known to the plaintiff when he brought his suit, that the special relief prayed for has become impracticable, and the plaintiff is entitled to the only alternative relief possible of damages, the court then may, and generally will, instead of compelling the plaintiff to incur the double expense and trouble of an action at law, retain the cause, decide all the issues involved, and decree the payment of mere compensatory damages.<sup>4</sup>

<sup>3</sup> *Green v. Stewart*, 45 N. Y. Supp. 982, 19 App. Div. 201; *Crowell v. Young*, (Ind. T.) 64 S. W. 607; *Alger v. Anderson*, 92 Fed. 696.

<sup>4</sup> *Holland v. Anderson*, 38 Mo. 55, 58; *Lewis v. Town of Kingston*, 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 724; *Case v. Minot*, 158 Mass. 577, 22 L. R. A. 536, 33 N. E. 700. The application of the principle to the relief of damages has frequently occurred in suits for a specific performance. The following rules have been established by American decisions: If through a failure of the vendor's title, or any other cause, a specific performance is really impossible, and the vendee is aware of the true condition of affairs before and at the time he brings his suit, the court, being of necessity obliged to refuse the remedy of specific performance, will not, in general, retain the suit and award compensatory damages, because, as has been said, the court never acquired a jurisdiction over the cause for any purpose: *Hatch v. Cobb*, 4 Johns. Ch. 559, 2 Scott 343; *Milkman v. Ordway*, 106 Mass. 232, 253, 1 Scott 119. A second rule is, that if the remedy of specific performance is possible at the commencement of a suit by the vendee, and while the action is pending the vendor renders this remedy impracticable by conveying the subject-matter to a bona fide purchaser for value, the court will not compel the plaintiff to bring a second action at law, but having acquired jurisdiction, will do full justice by decreeing a recovery of damages; *Milkman v. Ordway*, 106 Mass. 232, 253, 1 Scott 119, per Wells, J. The rule

§ 238. . . . A suit being brought to reform a policy of insurance after a loss had occurred, the court retained the cause and gave the plaintiff final and complete relief by ordering a payment of the amount due on the policy as reformed, although the remedy would ordinarily and naturally have belonged to a court of law.<sup>1</sup>

§ 241. . . . The defendant, by one wrongful act and in one mass, detained a quantity of chattels belonging to the plaintiff. A part of these were articles of a special nature and personal value, for which damages could not adequately be ascertained, and in respect of which the equity jurisdiction to compel their restoration was clear. The remaining portion were ordinary chattels, of a kind readily purchasable in the market, and for which damages could be assessed without difficulty. The plaintiff brought a suit in equity to compel the restoration of the entire mass of chattels. The court held that since its jurisdiction attached over the one class of articles, it would decide the whole controversy in the one suit, and decree a return of the entire amount, the two kinds being connected by the single wrongful act of the defendant.<sup>1</sup>

applies where the contract is performed after commencement of suit. *Grubb v. Sharkey*, 90 Va. 831, 20 S. E. 784, H. & B. 736. The third rule is as follows: If a specific performance was originally possible, but before the commencement of the suit the vendor makes it impossible by a conveyance to a third person; or if the disability existed at the very time of entering into the contract on account of a defect in the vendor's title, or other similar reason,—in either of these cases, if the vendee brings his suit in good faith, without a knowledge of the existing disability, supposing, and having reason to suppose, himself entitled to the equitable remedy of a specific performance, and the impossibility is first disclosed by the defendant's answer or in the course of the hearing, then, although the court can not grant a specific performance, it will retain the cause, assess the plaintiff's damages, and decree a pecuniary judgment in place of the purely equitable relief originally demanded. This rule is settled by an overwhelming preponderance of American authorities: *Milkman v. Ordway*, 106 Mass. 232, 253, 1 Scott, 119; and see *Waite v. O'Neil*, 72 Fed. 348; affirmed, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550. In *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532, H. & B. 682, 2 Scott 357, 2 Keener 1194, the statute of limitations having run upon the contract pending suits for specific performance, the cause was retained for the purpose of granting compensation.

<sup>1</sup> *Bidwell v. Astor Ins. Co.*, 16 N. Y. 263. See, also, *Union Cent. Life Ins. Co. v. Phillips*, 102 Fed. 19, 41 C. C. A. 263 (bill to compel delivery of life insurance policy after death of insured retained for full relief on the policy). In general, where equity takes jurisdiction to reform an instrument, it may go on and decree full relief thereon; *Kelly v. Galbraith*, 186 Ill. 593, 58 N. E. 431.

<sup>1</sup> *McGowin v. Remington*, 12 Pa. St. 56, 63, 51 Am. Dec. 584. The whole opinion in this case is able and instructive.

Other instances: *United States v. Union Pac. R. Co.*, 160 U. S. 1, 16 Sup. Ct. 190, (cancellation); *Slegel v. Herbine*, 148 Pa. St. 236, 23 Atl. 996, 15 L. R.

**§ 242. Effect of the Reformed Procedure on the Doctrine. . .**

This same grand principle is one of the fundamental and essential thoughts embodied in the "reformed system of procedure," which first appeared in 1848, in the New York Code of Civil Procedure, has since extended through so many states and territories of this country and colonies of Great Britain, and was substantially adopted for England in the "Supreme Court of Judicature Acts." That system of procedure, by combining the actions at law and suits in equity into one "civil action," by permitting the union of legal and equitable primary rights, and interests, and causes of action in the one judicial proceeding, and the granting of legal and equitable remedies in the one judgment, and by the substitution of many equity rules concerning the prosecution of suits in place of the arbitrary rules of the law regulating the conduct of actions, has greatly enlarged the operation and increased the efficiency of the general doctrine under discussion. Wherever the true spirit of the reformed procedure has been accepted and followed, the courts not only permit legal and equitable causes of action to be joined, and legal and equitable remedies to be prayed for and obtained, but will grant purely legal reliefs of possession, compensatory damages, pecuniary recoveries, and the like, in addition to or in place of the specific equitable reliefs demanded in a great variety of cases which would not have come within the scope of the general principle as it was regarded and acted upon by the original equity jurisdiction, and in which, therefore, a court of equity would have refrained from exercising such a jurisdiction.<sup>1</sup>

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SECTION IV.

THE DOCTRINE THAT JURISDICTION EXISTS IN ORDER TO PREVENT A MULTIPLICITY OF SUITS.

ANALYSIS.

§ 243. The doctrine applies to both kinds of jurisdiction.

§ 244. The questions to be examined stated.

§ 245. Four possible cases to which the doctrine may apply.

§§ 246-248. "Bills of peace" rationale of, and examples.

§ 248. Bills "to quiet title" explained.

A. 547, (quieting title); Brock v. Berry, 132 Ala. 95, 90 Am. St. Rep. 896, 31 South. 517, (setting aside fraudulent conveyance); Fidelity Tr. & G. Co. v. Fowler Water Co., 113 Fed. 560, (foreclosure); Vick v. Beverly, 112 Ala. 458, 21 South. 325, (redemption).

<sup>1</sup> Armstrong v. Mayer (Nebr.), 95 N. W. 51; Lattin v. McCarty, 41 N. Y. 107, 109, 110; Henderson v. Dickey, 50 Mo. 161, 165.

- §§ 240-251. Rationale of the doctrine examined on principle.
- §§ 252-261. Examination of the doctrine upon judicial authority.
  - § 252. First class.
  - §§ 253, 254. Second class.
  - §§ 255-261. Third and fourth classes.
    - § 256. Community of interest: "Fisheries Case"; "Case of the Duties."
    - § 257. Where proprietors of distinct tracts of land have been injured by one wrong.
    - § 258. Where proprietors of distinct tracts of land have been relieved from illegal local assessments.
- §§ 259, 260. General rule as to relief from illegal taxes, assessments, and public burdens, on the ground of multiplicity of suits.
  - § 261. Other special cases of the third and fourth classes.
- §§ 262-266. Examination of opposing decisions; conclusions reached by such decisions.
  - § 263. In the first and second classes.
  - §§ 264-266. In the third and fourth classes.
- §§ 265, 266. In cases of illegal taxes and other public burdens.
- §§ 267-270. Conclusions derived from the entire discussion.
- §§ 268-270. Ditto as to the third and fourth classes.
- §§ 271-274. Enumeration of cases in which the jurisdiction to avoid a multiplicity of suits has been exercised.
  - § 271. Cases of the first class.
  - § 272. Cases of the second class.
  - § 273. Cases of the third class.
  - § 274. Cases of the fourth class.
  - § 275. The jurisdiction based upon statute.

**§ 243. Applies to Both Kinds of Jurisdiction.—**

**§ 245. Possible Conditions in Which the Doctrine may Apply.—**

It will aid us in reaching the true theory as well as in determining the extent and limitations of the doctrine, if we can fix at the outset all the *possible* conditions in which a multiplicity of suits can arise, and can thus furnish a source of or occasion for the equity jurisdiction in their prevention by settling *all* the controversy and *all* the rights in one single judicial proceeding. All these *possible* conditions may be reduced to the four following classes: 1. Where, from the nature of the wrong, and from the settled rules of the legal procedure, the same injured party, in order to obtain all the relief to which he is justly entitled, is obliged to bring a number of actions against the same wrong-doer, all growing out of the one wrongful act and involving similar questions of fact and of law. To this class would belong cases of nuisance, waste, continued trespass, and the like. 2. Where the dispute is between two individuals, A and B, and B institutes or is about to institute a number of actions either successively or simultaneously against A, all depending upon the same legal questions and similar issues of fact, and A by a single equitable suit seeks to bring them all within the scope and effect of one judicial

determination. A familiar example of one branch of this class is the case where B has brought repeated actions of ejectment to recover the same tract of land in A's possession, and A finally resorts to a suit in equity by which his own title is finally established and quieted, and all further actions of ejectment by B are enjoined.

3. Where a number of persons have separate and individual claims and rights of action against the same party, A, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone.<sup>1</sup> The case of several owners of distinct parcels of land upon which the same illegal assessment or tax has been laid is an example of this class.

4. Where the same party, A, has or claims to have some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him, and instead thereof he might procure the whole to be determined in one suit brought by himself against all the adverse claimants as co-defendants. It should be observed in this connection that the prevention of a multiplicity of suits as a ground for the equity jurisdiction does not mean the complete and absolute interdiction or prevention of any litigation concerning the matters in dispute, but the substitution of one equitable suit in place of the other kinds of judicial proceeding, by means of which the entire controversy may be finally decided. . . .

§ 246. **Bills of Peace.**—The earliest instances in which the court of chancery exercised its jurisdiction, avowedly upon the ground of preventing a multiplicity of suits, appear to have been called "bills of peace," of which there were two distinct kinds. One of these was brought to establish a general right between a single party on the one side, and numerous persons claiming distinct and individual interests on the other, plainly corresponding, in part at least, with the third and fourth classes mentioned in the preceding paragraph. The other kind was permitted to quiet the complainant's title to and possession of land, and to restrain any further actions of ejectment to recover the premises by a single adverse claimant, after several successive actions had already been prosecuted.

<sup>1</sup>The jurisdiction under discussion should not be confused with that which exists to apportion a fund ratably among several plaintiffs having claims upon the fund. In that case there is, of course, no necessity that the claims should be governed by the same legal rule, or involve similar facts; they may be not only distinct but entirely different. For examples, see *Pfohl v. Simpson*, 74 N. Y. 137; *Snowden v. General Dispensary*, 60 Md. 85.

ed without success, on the ground that the title could never be *finally* established by an indefinite repetition of such legal actions, and justice demanded that complainant should be protected against vexatious litigation. This form of the original bill of peace corresponds to the first branch of the second class described in the preceding paragraph.

§ 247. One of the most frequent purposes of such suits to establish a general right, in earlier periods, seems to have been the ascertaining and settling the customs of a manor, where they were in dispute between the lord of a manor and his tenants or copyholders, or between the tenants of two different manors. A bill might be filed on behalf of the whole body of tenants or copyholders of a particular manor against their lord, or perhaps against the lord or tenants of another manor; or it might be filed by the lord himself against his tenants; and by the decree in such suit, questions concerning various rights of common, or concerning fines or other services due to the lord, or other like matters affecting all the parties, could be finally established, which would otherwise require perhaps a multitude of individual actions. From this early purpose the jurisdiction was easily extended so as to embrace a great number of different but analogous objects.<sup>1</sup>

§ 248. **Bills of Quiet Title.**—The grounds and purposes of the second form of the “bill of peace,” as it was originally adopted, are very clearly stated by Lord Redesdale in his well-known and authoritative treatise upon equity pleadings: “In many cases, the courts of ordinary jurisdiction admit, at least for a certain time, of repeated attempts to litigate the same question. To put an end to the oppression occasioned by the abuse of this privilege, the courts of equity have assumed a jurisdiction. Thus actions of ejectment, which, as now used, are not part of the old law, have become the usual mode of trying titles at the common law, and judgments in those actions not being conclusive, the court of chancery has interfered, and after repeated trials and satisfactory determinations of the question, has granted perpetual injunctions to restrain further litigation, and thus has in some degree put that restraint upon litigation which was the policy of the ancient law in real actions.”<sup>1</sup>

<sup>1</sup> How v. Tenants of Bromsgrove, 1 Vern. 22, 2 Ames Eq. Jur. 55, 1 Keener 113; Powell v. Powis, 1 Lon. & Jer. 159, 1 Keener 170.

<sup>1</sup> Mitford's (Lord Redesdale) Eq. Pl. 143, 144; 1 Spence's Eq. Jur. 658. See Sharon v. Tucker, 144 U. S. 542, 12 Sup. Ct. 720, 1 Keener 392, Sh. 47, per Field, J. as to the two forms of the bill of peace. This particular exercise of its jurisdiction was not finally established by the court of chancery without a considerable struggle. In one case, after five ejectment trials, in all of which a verdict was rendered in favor of the complainant, Lord Chancellor Cowper refused to interfere

§ 249. **Rationale of the Doctrine on Principle.**

§ 250. In the first place, and as a fundamental proposition, it is plain that prevention of a multiplicity of suits is not, considered by itself alone, an independent source or occasion of jurisdiction in such a sense that it can create a cause of action where none at all otherwise existed. In other words, a court of equity cannot exercise its jurisdiction for the purpose of preventing a multiplicity of suits in cases where the plaintiff invoking such jurisdiction has not any prior existing cause of action, either equitable or legal; has not any prior existing right to *some* relief, either equitable or legal.<sup>1</sup> The very object of preventing a multiplicity of suits assumes that there are relations between the parties out of which other litigations of *some* form might arise. But this prior existing cause of action, this existing right to some relief, of the plaintiff need not be equitable in its nature. Indeed, in the great majority of cases in which the jurisdiction has been exercised, the plaintiff's existing cause of action and remedial right were purely legal; and it is because the only legal remedy which he could obtain was clearly inadequate to meet the demands of justice, partly from its own inherent imperfect nature, and partly from its requiring a number of simultaneous or successive actions at law, that a court of equity is competent to assume or exercise its jurisdiction. It follows as a necessary consequence—and this point is one of great importance to an accurate conception of the whole doctrine—that the existing legal relief to which the plaintiff who invokes the aid of equity is already entitled *need not be of the same kind as that which he demands and obtains from a court of equity*; on the contrary, it may be, and often is, an entirely different species of remedy.<sup>2</sup> One example will sufficiently illustrate this most important conclusion. The facts constituting the relations of the parties might be such that the only existing right to legal relief of the single

and restrain further actions at law; but his decree was reversed and set aside on appeal by the House of Lords: Earl of Bath v. Sherwin, Prec. Ch. 261, 10 Mod. 1, 1 Brown Parl. Cas. 266, 270, 2 Brown Parl. Cas., Tomlins's ed., 217, 4 Brown Parl. Cas. 373, 2 Ames Eq. Jur. 95, 1 Keener 153.

<sup>1</sup> "If a party—to give an illustration—be brought to the bar of a law court in forty separate actions of ejectment for as many distinct parcels of land, by the same plaintiff, upon identical facts in each case, he could not invoke the jurisdiction of equity to a prevention of a multiplicity of suits if he were a mere naked trespasser and wrongdoer in respect to the lands severally sued for; had no title, legal or equitable, no right to the possession, no defense to any of the actions. He can not invoke equity merely to have his wrongdoing adjudged in one suit instead of forty." Turner v. City of Mobile, 135 Ala. 73, 33 South. 133, 141.

<sup>2</sup> The remedy most frequently obtained is injunction; see post, § 261, note.

plaintiff against the wrong-doer is that of recovering amounts of damages by successive actions at law; or the only existing right to legal relief of each one of numerous plaintiffs having some common bond of union is that of recovering damages in a separate action at law against the same wrong-doer; while the equitable relief which might be obtained by the single plaintiff in the one case, or by all the plaintiffs united in the other, might include a perpetual injunction, and the rescission, setting aside, and abatement of the entire matter or transaction which caused the injury, or the declaration and establishment of some common right or duty affecting all the parties. The decisions are full of examples illustrating this most important feature of the doctrine.

§ 251. . . . Again, in speaking of cases which would fall either in the third or fourth class, where the total controversy is between a single determinate party on the one side, and a number of persons, more or less, on the other, the proposition has been stated in the most general terms, that in order to originate this jurisdiction—namely, a bill of peace by one plaintiff against numerous defendants—it is essential that there be a single claim of right *in all* (i. e., of the defendants) arising out of some *privity* or relationship with the plaintiff. If this be true, it must clearly be requisite also in the class of suits brought by or on behalf of numerous plaintiffs against one defendant.<sup>1</sup> The proposition thus quoted from a text-writer has been maintained by some judges; but it seems to be quite irreconcilable, at all events in its broad generality, with numerous well-considered and even leading decisions, both English and American, made by courts of the highest ability, if any ordinary and effective meaning is given to the word “privity.” Suits have often been sustained by a single plaintiff against a numerous class of defendants, and by or on behalf of a numerous class of plaintiffs against a single defendant, avowedly on the ground of “preventing a multiplicity of suits,” where there was no relation existing between the individual members of the class and their common adversary to which the term “privity” was at all applicable. Of course there must be *some* common relation, some common interest, or some common question, or else the decree of a court of equity, and the relief given by it in the one judicial proceeding, *could not by any possibility avail to prevent the multiplicity of suits* which is the very object of its interference.<sup>2</sup> Finally, it has been stated in a very positive manner in some American decisions, as an essential requisite to the existence or exercise

<sup>1</sup> Adams's Equity, 200, 6th Am. ed., 408; citing *Dilly v. Doig*, 2 Ves. 486, 2 Ames Eq. Jur. 58, 1 Keener 117.

<sup>2</sup> See post, § 264, note.

of the jurisdiction to prevent a multiplicity of suits, that the plaintiff who invokes the jurisdiction of equity must himself be the party who would be compelled to resort to numerous actions in order to obtain complete redress, or who would be subjected to numerous actions by his adversary party, unless the court of equity interferes and decides the whole matter, and gives final relief by one decree.<sup>3</sup> As I have already remarked, this proposition may be accepted as actually true in cases belonging to the first and to the second classes, where the controversy is always between two single and determinate parties, and the sole ground for a court of equity to interfere on behalf of either is, that numerous actions at law are or must be brought by one against the other. But if the same rule were extended as an essential requisite to cases belonging to the third and fourth classes,—and it is in such cases that it has sometimes been applied,—it would at one blow overturn a long line of decisions, both English and American, which have always been regarded as authoritative and leading. On principle, therefore, the rule last above stated cannot be regarded as a universal one, controlling the exercise of the equitable jurisdiction “to prevent a multiplicity of suits.”

**§ 252. Examination of the Doctrine upon Authority—First Class.**

—I shall now examine the nature, extent, and limitations of the general doctrine upon authority. The cases belonging to the first class of the arrangement made in a preceding paragraph,<sup>1</sup> where a court of equity interferes because the plaintiff would be obliged to bring a succession, perhaps an indefinite number, of actions at law in order to obtain relief appearing even to be sufficient have generally been cases of nuisance, waste, trespass to land, disputed boundaries involving acts of trespass by the defendant, and the like, the wrong complained of being in its very nature continuous. If the plaintiff's title to the subject-matter affected by the wrong is admitted, a court of equity will exercise its jurisdiction at once, and will grant full relief to the plaintiff, without compelling him to resort to a prior action at law. Whenever the plaintiff's title is disputed, the rule is settled that he must, in general, procure his title to be satisfactorily determined by at least one verdict in his own favor, by at least one successful trial at law, before a court of equity will interfere; but the rule no longer requires any particular number of actions or trials. The reason for this requisite is, that courts of equity will not, in general, try disputed legal titles to land. But the rule is one of expediency and policy, rather

<sup>3</sup> See post, § 267, note.

<sup>1</sup> See ante, § 245.

than an essential condition and basis of the equitable jurisdiction.<sup>2</sup> In addition to these ordinary cases of nuisance and similar *continuous* wrongs to property, there are some other special instances in which a court of equity has interfered and determined the entire controversy by one decree, in order to prevent a multiplicity of suits, where otherwise the plaintiff would be compelled to bring several actions at law against the same adversary, and with respect to the same subject-matter.<sup>3</sup>

§ 253. **Second Class.**—The second class, according to my previous arrangement, consists of two branches. In the first of these the defendant has brought, or threatens to bring, successive actions at law to recover the same subject-matter from the plaintiff, where from the rules of the legal procedure the title is not determined by a judgment in any such action or number of actions. This branch has therefore been ordinarily confined to cases of successive actions of ejectment to recover the same tract of land from the plaintiff. It follows as a matter of course that equity will not interfere on behalf of the plaintiff, and restrain the defendant's proceedings, until the plaintiff's title has been sufficiently established by the decision of at least one action at law in his favor. Indeed, the interference of equity assumes that the plaintiff's legal right and title have been clearly determined, and its sole object is to quiet that title by preventing the continuance of a litigation at law which has become vexatious and oppressive, because it is unnecessary and unavailing. A court of equity will not therefore interfere to restrain the defendant's litigation as long as the plaintiff's title is uncertain.<sup>1</sup> And in analogous cases, not of ejectment, the court will interfere and restrain the defendant's further prosecution of successive actions at law, and will thus establish and quiet the plaintiff's right, when all the questions of law and fact involved in these actions have already been fully determined in the plaintiff's favor by some former judicial proceeding between the same parties.<sup>2</sup>

§ 254. In the second branch of the same class the single defendant has brought a number of simultaneous actions at law

<sup>1</sup> See post, §§ 1350, ff., 1357 ff.

<sup>2</sup> *Black v. Shreve*, 7 N. J. Eq. 440, 456, 457; *Stovall v. McCutcheon*, 107 Ky. 577, 92 Am. St. Rep. 373, 54 S. W. 969, 47 L. R. A. 287; but see *Richmond v. Dubuque*, etc. R. R. Co., 33 Iowa 422, 487, 488.

<sup>3</sup> *Earl of Bath v. Sherwin*, Prec. Ch. 261, 4 Bro. Parl. C. 373, 2 Ames Eq. Jur. 95, 1 Keener 153; *Lord Tenham v. Herbert*, 2 Atk. 483, 2 Ames Eq. Jur. 97, 1 Keener 191; *Marsh v. Reed*, 10 Ohio 347, 1 Keener 159.

<sup>4</sup> Suits to enjoin collection of taxes, where the illegality of the tax, as respects the plaintiff, has already been established at law; *Paterson*, etc. R. R. v. *Jersey City*, 9 N. J. Eq. 434; *Bank of Kentucky v. Stone*, 88 Fed. 383.

against the plaintiff, all depending upon similar facts and circumstances, and involving the same legal questions, so that the decision of one would virtually be a decision of all the others. A court of equity *may* then interfere and restrain the prosecution of these actions, so that the determination of all the matters at issue between the two parties may be brought within the scope of one judicial proceeding and one decree, and a multiplicity of suits may thereby be prevented. It must be admitted that this exercise of the equitable jurisdiction is somewhat extraordinary, since the rights and interests involved are wholly legal, and the substantial relief given by the court is also purely legal. It may be assumed, therefore, that a court of equity will not exercise jurisdiction on this particular ground, unless its interference is clearly necessary to promote the ends of justice, and to shield the plaintiff from a litigation which is evidently vexatious. It should be carefully observed that a court of equity does not interfere in this class of cases to restrain absolutely and completely any and all trial and decision of the questions presented by the pending actions at law; it only intervenes to prevent the repeated or numerous trials, and to bring the whole within the scope and effect of one judicial investigation and decision. It should also be observed that if the pending actions at law are of such a nature or for such a purpose, that, according to the settled rules of the legal procedure, they may all be consolidated into one, and all tried together by an order of the court in which they or some of them are pending, then a court of equity will not interfere; since the legal remedy of the plaintiff is complete, certain, and adequate, there is no necessity for his invoking the aid of the equitable jurisdiction.<sup>1</sup>

<sup>1</sup> In Third Avenue R. R. v. Mayor of N. Y., 54 N. Y. 159, 162, 163, 2 Ames Eq. Jur. 102, 1 Keener 167, the city had brought seventy-seven actions in a justice's court to recover penalties for violating a city ordinance concerning the running of cars without a license, each action for a separate penalty. All the actions depended upon similar facts and upon the same question of law, viz., whether the railroad was liable under the ordinance; and a decision of one would virtually decide all. The company brought this suit in equity to restrain the prosecution of all these actions except one, offering to abide the final decision in that one. The suit was sustained, and the relief granted, *because a justice court had no power to consolidate these actions*. The decision was placed expressly upon the power of equity to prevent a multiplicity of suits, and the impossibility of the plaintiff's being relieved in any other manner from a vexatious litigation. The case was held to be distinguishable from *West v. Mayor*, etc., 10 Paige, 539, 1 Keener 161, in which an apparently contrary decision was made, because in the latter case the plaintiff, *West*, sought to restrain absolutely all the actions which were pending against him. I would add that some of the language in the Chancellor's opinion in *West v. Mayor*, etc., goes much further than the distinction thus made, and can hardly be reconciled with the decision of the court of appeals; but the decision in *West v. Mayor*, etc., is clearly distinguishable. See, also, *Galveston, H. & S. A. Ry. Co. v. Dowe*, 70 Tex. 5, 7 S. W. 368, Sh. 44.

§ 255. **Third and Fourth Classes.**—In pursuing this inquiry into the extent and limitations of the doctrine, the third and fourth of my classes may with advantage be considered together. In the third, a number of persons have separate and distinct interests, but still united by *some* common tie, against one determined party, and these interests may perhaps be enforced by one equitable suit brought by all the persons joining as co-plaintiffs, or by one suing on behalf of himself and all the others, or even by one suing for himself alone. The fourth is the exact converse of the third. One determined party has a general right against a number of persons, common to all in some of its features, but still affecting each individually, and only with respect to his separate, distinct interests, so that each of these persons has a separate and distinct claim in opposition to the asserted right. It is plain that the same fundamental questions must arise in both of these classes. The first and most important question which meets us is, What must be the character, the essential elements, and the external form of the common right, claim, or interest held by the number of persons against the single party in the third class, and by the single party against the number of persons in the fourth class, in order that a court of equity may acquire or exercise jurisdiction for the purpose of preventing a multiplicity of suits, and may determine the rights of all and give complete relief by one decree? Is it necessary that the common bond, element, or feature should inhere in the very rights, interests, or claims themselves which subsist between the body of persons on the one side and the single party on the other, and should affect the nature and form of those rights, interests, or claims to such an extent that they create some positive and recognized existing legal relation or privity between the individual members of the group of persons, as well as between each of them and the single determined party to whom they all stand in an adversary position? Or is it enough that the common bond or element consists solely in the fact that all the rights, interests, or claims subsisting between the body of persons and the single party have arisen from the same source, from the same event, or the same transaction, and in the fact that they all involve and depend upon similar questions of fact and the same questions of law, so that while the same positive legal relation exists between the single determined party on the one side *and each individual* of the body of persons on the other, no such legal relation exists between the individual members themselves of that body?—as among themselves their respective rights, interests, and claims against the common adversary party, otherwise than above stated, are wholly separate and distinct. . . .

§ 256. **Community of Interest.**—The two leading cases are generally known as “The Case of the Fisheries,”<sup>1</sup> and “The Case of the Duties.”<sup>2</sup> The former was a bill to restrain a large number of trespassers, and to establish the plaintiff’s right as against them. The corporation had exercised and claimed an exclusive right of fishery over an extent of nine miles in the river Ouse. The defendants were numerous lords of manors and owners of separate tracts of land adjacent to the river, and each claimed, in opposition to the city, an individual right of fishery within the specified limits by virtue of his separate and distinct riparian proprietorship. Lord Hardwicke sustained the bill, although the plaintiff had not established his exclusive title by any action at law, and although the claims of the various defendants were thus wholly distinct, and expressly placed his decision upon the equitable jurisdiction to prevent a multiplicity of suits, since otherwise the corporation would be obliged to bring endless actions at law against the individual trespassers. The second case was brought to establish the right of the city of London to a duty payable by all merchants importing a certain article of merchandise. It has ordinarily been quoted and treated as though it was a bill filed by the city against a number of individual importers separately engaged in the trade, for the purpose of establishing and enforcing the city’s common right to the duty or tax in question. An examination of the record shows that this is not an accurate account of the proceeding; but still the case has generally been regarded as an important authority in support of the equity jurisdiction under the circumstances described, and such seems to have been the view taken of it by Lord Hardwicke in deciding the Fisheries Case. There are other English decisions to the same effect, depending upon strictly analogous facts, and involving the same doctrine, which are referred to in the foot-note.<sup>3</sup> . . . The other English decisions

<sup>1</sup> *Mayor of York v. Pilkington*, 1 Atk. 282, 2 Ames Eq. Jur. 55, 1 Keener 114.

<sup>2</sup> *City of London v. Perkins*, 3 Brown Parl. C., Tomlins’s ed., 602.

<sup>3</sup> The doctrine was applied under analogous circumstances in the case of *Sheffield Water Works v. Yeomans*, L. R. 2 Ch. 8, 11, 2 Ames Eq. Jur. 67, 1 Keener 130, Sh. 39. A reservoir of the water company had burst, and damaged a large number of persons. Under a special statute, commissioners were appointed to examine the claims of all these persons, and to give a certificate to each one whose claim was satisfactorily proved. Each certificate would be prima facie a legal demand against the company for the amount of the damage certified in it; but to enforce such certificate, each holder must bring an action at law. The commissioners issued a large number of certificates, and among them a certain class, fifteen hundred in number, which the company claimed to be illegal. To avoid the multiplicity of actions against itself on these certificates, the company brought this suit in equity against certain of the holders sued on behalf of all the others, praying to have the certificates adjudged invalid, and canceled.

very clearly do not require any *privity* between the members of the numerous body, nor any common element or feature inhering in the very nature of their individual interests as between themselves.

§ 257. **Distinct Proprietors Injured by One Wrong.**—There is another important group of cases, presenting on their face a very different condition of facts, which illustrate the question as to the community of interests which must subsist among the individuals of a numerous body of persons in opposition to a single party, in order that a court of equity may take jurisdiction, and grant them relief upon the ground of preventing a multiplicity of suits. These are the cases in which a number of individual proprietors of separate and distinct parcels of land have all been interfered with and injured in the same general manner, with respect to their particular lands, by a private nuisance, so that they all have a similar claim for legal redress against the author of the nuisances. As, for example, where a number of different owners have separate mills and water-powers along the banks of a stream, and some party wrongfully erects a dam or diverts the water, and by this unlawful act the property rights of each owner are injuriously affected in the same general manner, although in unequal amounts. The instances are numerous in which courts of equity have interfered, under these and analogous circumstances, avowedly on the ground of preventing a multiplicity of suits, and have given complete relief to all the injured proprietors by a single decree.<sup>1</sup> The cases of this

Here was no community of right or of interest in the subject matter among these fifteen hundred certificate holders. In the form in which their demands existed, they did not all arise from the one wrongful act of the water company. Each holder's demand and separate right arose solely from the dealings of the commissioners with him individually. The only community of interest among them was in the question of law at issue upon which all their rights depended, and in the same remedy to which each might be entitled. The suit was sustained on demurrer first by Kindersly, V. C., and on appeal by Chelmsford, L. C. The latter said: "Strictly speaking, this is not a bill of peace, as the rights of the claimants under the alleged certificates are not identical; but it appears to me to be within the principle of bills of this description. The rights of the numerous claimants (certificate holders) *all depend upon the same question*. . . . It seems to me to be a very fit case, by analogy, at least, to a bill of peace, for a court of equity to interpose and prevent unnecessary litigation," etc. This case certainly cannot be reconciled with the theory, maintained by some of the American courts, that there must be a common interest in the subject-matter, or a common title among the numerous body of claimants, in order that a court of equity may interfere by such suit.

<sup>1</sup> In *Cadigan v. Brown*, 120 Mass. 493, 495, 1 Keener 189, the plaintiffs were individual owners of separate lots abutting on a passage-way, each holding under a distinct title from a different grantor. Defendant began an erection which would permanently block up the passage and interfere with each plaintiff's right of way, and was therefore a nuisance. The plaintiffs brought this suit to re-

group are exceedingly important in their bearing upon the question under examination as to the true meaning and extent of the doctrine concerning the prevention of a multiplicity of suits. At law, the only remedy was an action for damages by each owner against the author of the nuisance or trespass. It cannot be pretended that there existed among the various owners with respect to each other, or as between their entire body and the defendant, any common bond or interest to which the term "privity" can be applied, or which bore the slightest resemblance to any species of privity. In fact, there did not exist among them as individual owners, or between them as a body and the defendant, any distinct legal relation whatever which the law recognizes. The only common bond among them as individuals, or between them as a body and the defendant, consisted in the fact that they each and all suffered the same kind of wrong to their separate properties, arising at the same time and from the same tortious act of the defendant, and in the fact that the legal causes of action and remedial rights of each and all were the same, depending upon similar matters of fact and the same rules of law. They were in exactly the same position as that of any body of men who have all separately and individually suffered the same kind of injury to their persons or their properties by one trespass or other wrongful act; only in their cases the subject-matter which directly received the injury—the parcels of land—and the wrong itself—the nuisance or continued trespass—were of such a nature as brought them within the *possible* jurisdiction of equity, since a court of equity could never take jurisdiction in a case of mere wrong to the persons or the reputation of the injured parties. And yet in each decision it was expressly held that there

strain the further erection, and to remove the obstruction. Held, that the suit should be sustained, and that all the plaintiffs could join in one suit in equity on the ground of preventing a multiplicity of suits, since at law each owner must bring a separate action. "The plaintiffs, although they hold their right under separate titles, *have a common interest in the subject of the bill*. They are affected in the same way by the acts of the defendant, and seek the same remedy against him. The rights of all parties can be adjusted in one decree, and a multiplicity of suits is prevented." In *Ballou v. Inhabitants of Hopkinton*, 4 Gray, 324, 328, 1 Keener 174, the plaintiffs were individual owners of separate mills on the banks of a stream, and each drew a supply of water for his own mill from a dam higher up on the stream, which had been built by all of these proprietors. The defendants had begun to draw water from this dam, not removing or in any way interfering with the structure itself, but simply diverting the water, so that the supply for each mill was lessened, and might be rendered insufficient. It was held that the plaintiffs could join in one equity suit, and restrain the defendants by injunction, in order to prevent a multiplicity of suits. Erecting a wooden building within the fire limits of a town, *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434, 13 L. R. A. 401.

was a sufficient community of interest in the subject-matter of the suit to enable a court of equity to exercise its jurisdiction on behalf of the united plaintiffs. The conclusion, therefore, seems to me irresistible, that this group of decisions cannot be reconciled with that theory of the jurisdiction which requires, in cases of the third and fourth classes, a privity of interest or common legal relation existing among all the individuals of the body of persons who assert their separate claims against a single adversary party, in order that a court of equity may interfere on their united behalf against him, or on his behalf against them.<sup>2</sup>

§ 258. **Distinct Proprietors from Local Assessments.**—I pass now to consider another and even more interesting group of cases, which chiefly belong, with one or two exceptions, to the judicial history of this country, and in which more than in any other has arisen the direct conflict of judicial opinion already mentioned. I refer to cases brought by or on behalf of a body of individual taxpayers or owners of distinct tracts of lands to be relieved from illegal assessments upon their separate properties, made by municipal corporations to defray the expense of local improvements; or from general taxes, either personal or made liens on property, unlawfully assessed and levied by counties, towns, or cities. . . . .

<sup>2</sup> It may, perhaps, be said, in explanation of the judicial action in this group of cases, that on account of the continuous nature of the wrong—the nuisance or trespass—each separate owner, in addition to his actions at law for damages, would be entitled to maintain a separate suit in equity on his own behalf, and thereby restrain the further wrong. It would be enough to answer that in no instance was the decision put upon any such ground. In every instance the court rested its decree upon the broad ground that the legal remedies of the individual plaintiffs were imperfect, and that as there was a sufficient community of interest in the subject-matter among them, they could properly unite in the single equitable proceeding, in order to prevent a multiplicity of suits. But even admitting the facts above stated to their fullest extent, they do not in the slightest degree alter or affect the conclusions reached in the text, nor furnish any different explanation of the action of the courts in exercising their jurisdiction. Even if each individual plaintiff would have had a right to equitable relief as well as to legal relief of damages, the equitable jurisdiction to prevent a multiplicity of suits is never made to rest upon the *particular kind or extent* of relief which an individual party might otherwise have obtained in a separate suit. It always assumes that some relief, either legal or equitable, could have been thus obtained; and the only question, in cases of the third and fourth classes, is, whether there is a sufficient common bond among the body of similarly situated persons on the one side of the controversy to authorize the court to interfere and give *complete* relief to them or against them all in one proceeding, and thus avoid a multiplicity of suits.

This identity between the rules as to joinder in all other equity actions, and the rules as to joinder which, as the author shows, guide the exercise of the jurisdiction in bills of peace, is clearly recognized in *Lehigh Valley R. R. Co. v. McFarlan*, 31 N. J. Eq. 730, 759, 1 Keener's Cas. Eq. Jur. 133.

**§ 259. Relief from Illegal Taxes and Other Public Burdens in General.—**

§ 260. . . . Assessments for local improvements by municipal corporations are generally made a lien upon the lands declared to be benefited thereby; and where such is the case, the instances are numerous in which suits in equity brought by a number of individual owners of separate lots, or by one owner suing on behalf of himself and all the others similarly situated, to procure the enforcement and collection of the assessment to be enjoined, and the assessment itself to be set aside and annulled on account of its illegality, have been sustained upon the avowed ground that such relief granted in a single proceeding was both proper and necessary in order to prevent a multiplicity of suits. In all these cases each separate land-owner had, of course, some kind of legal remedy, either by action for damages against the officer enforcing the unlawful collection, or by writ of certiorari to review the assessment itself. But such remedy was inadequate when compared with the comprehensive and complete relief furnished by the single decree in equity.<sup>1</sup> The jurisdiction has been carried much further. In a large number of the states the rule has been settled in well-considered and often-repeated adjudications by courts of the highest character for ability and learning, that a suit in equity will be sustained when brought by any number of tax-payers joined as co-plaintiffs, or by one tax-payer suing on behalf of himself and all others similarly situated, or sometimes even by a single tax-payer suing on his own account, to enjoin the enforcement and collection, and to set aside and annul,

<sup>1</sup> Scofield v. City of Lansing, 17 Mich. 437, was a bill filed by a large number of owners of separate lots fronting on a street, to enjoin collection of an illegal assessment, which was declared by statute to be a lien on all the lands assessed. Pronouncing the assessment void, the court held that the suit could be sustained on the ground *that the questions to be decided were common to all the plaintiffs*, and it prevented a multiplicity of suits.

Dumars v. City of Denver (Colo. App.), 65 Pac. 580. "While void proceedings cast no cloud upon title to real estate, and a single individual, moving only in his own behalf, and for his own purposes, to restrain such proceedings, will be remitted to his remedy at law, yet where a number of persons are similarly affected, and the rights of all may be adjusted in one proceeding, a court of equity will assume jurisdiction, notwithstanding there is no cloud to remove, and the ground of its jurisdiction is the prevention of a multiplicity of suits. (Citing several cases, and Pom. Eq. Jur., §§ 260, 273.) The complaint in this case shows that a number of persons are affected by the same assessment, and that to determine their rights at law would require as many suits as there are individuals; and it also shows that, while they have no common ownership in the property affected by the assessment, they have a community of interest in the questions of law and fact involved in the controversy; and upon authority so overwhelming as to be practically unanimous, the case is one peculiarly of equitable cognizance. See, also, Pom. Eq. Jur., § 269."

any and every kind of tax or assessment laid by county, town, or city authorities, either for general or special purposes, whether it be entirely personal in its nature and liability, or whether it be made a lien on the property of each tax-payer, whenever such tax is illegal. . . . In the face of every sort of objection urged against a judicial interference with the governmental and executive function of taxation, these courts have uniformly held that the legal remedy of the individual tax-payer against an illegal tax, either by action for damages, or perhaps by certiorari, was wholly inadequate; and that to restrict him to such imperfect remedy would, in most instances, be a substantial denial of justice, which conclusion is, in my opinion, unquestionably true. The courts have therefore sustained these equitable suits, and have granted the relief, and have uniformly placed their decision upon the inherent jurisdiction of equity to interfere for the prevention of a multiplicity of suits. The result has demonstrated the fact that complete and final relief may be given to an entire community by means of one judicial decree, which would otherwise require an indefinite amount of separate litigation by individuals, even if it were attainable by any means.<sup>2</sup> . . . In all these suits by lot-owners to be relieved from a local assessment, and by tax-payers to be relieved from a tax or burden of public debt, there is no pretense of any privity, or existing legal relation, or common property or other right, among the plaintiffs individually, or between them as a body and the defendant. There is no common right of the single adversary party against them all, as is found in the case of a parson against his parishioners for tithes, or of the lord of a

<sup>2</sup> Greedup v. Franklin County, 30 Ark. 101; City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 87 Am. St. Rep. 224, 49 L. R. A. 408, 2 Ames Eq. Jur. 92; Carlton v. Newman, 77 Me. 408, 1 Atl. 194; McTwiggan v. Hunter, 18 R. I. 776, 30 Atl. 962, 2 Ames Cas. Eq. Jur. 71. The necessity of the jurisdiction was stated with great force in the case first cited: "These plaintiffs have sued in behalf of themselves and of the other taxpayers of the county; this they may do in a court of equity. But suppose we send them back to a court of law, to assert their rights; we know that at the common law there can be no combination of parties; each tax-payer must sue in his own right to recover the tax erroneously assessed against him. What a multiplicity of suits at law must be brought, in order to get redress for one injury which it is proposed to stop in a single suit in equity; we have no means of ascertaining the number of tax-payers in Franklin county, but may suppose that they exceed two thousand. Of these perhaps five hundred may be able to assert their rights at law, whilst fifteen hundred, who pay less tax, are in modern circumstances or too poor to employ counsel to stop the payment of an erroneous tax ten times less than it would cost to employ counsel to prosecute their suit. The mere suggestion of the situation, if left to redress at law, shows that it in effect would amount to a denial of redress to offer it to them. In such cases Chancery will interfere to prevent multiplicity of suits."

manor against his tenants for a general fine, or for certain rights of common; nor is there any common *right* or interest among them against their single adversary. The only community among them is in the questions at issue to be decided by the court; in the mere external fact that all their remedial rights arose at the same time, from the same wrongful act, are of the same kind, involve similar questions of fact, and depend upon the same questions of law. This sort of community is sufficient, in the opinion of so many and so able courts, to authorize and require the exercise, under such circumstances, of the equitable jurisdiction, in order to prevent a multiplicity of suits.

§ 261. **Other Special Cases of the Third and Fourth Classes.**—There are some other cases, belonging to the third or fourth of my general classes, which present a special condition of facts, and do not admit of being arranged in either of the foregoing groups. I have placed them in the foot-note.<sup>1</sup>

<sup>1</sup> The following cases will serve to illustrate the wide application of the principle, especially in recent American decisions.

*Third class:* Injunction against the enforcement of an invalid municipal ordinance affecting many persons. In City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 904, 2 Ames Cas. Eq. Jur. 92, numerous residents and taxpayers sued in behalf of themselves and all others similarly situated to enjoin the enforcement of an ordinance providing for the payment of a license fee on vehicles. The court, quoting § 245 of the text, and upholding the injunction, says in part: "In this case three hundred and seventy-three complainants present facts showing that between 200,000 and 300,000 citizens and taxpayers are affected by the provisions of the ordinance, and if compelled to pay the illegal tax, hardship and injustice will result to an enormous number of persons. If they pay the tax and are compelled to resort to a court of law to recover back the amount so paid, the business of the courts will be obstructed by the number of actions of the same character. Long delay will ensue, and the costs to the persons so paying such illegal tax or license fee will be greater than the amount to be recovered."

Injunction Against Trespass, or other Wrongful Act of the Defendant, Affecting Numerous Plaintiffs, where each suing singly might have an "adequate" remedy at law: Numerous owners of fishing interests in a lake united in a suit to enjoin an unauthorized and illegal act of certain commissioners, in opening a channel between the lake and the ocean. It did not appear that the threatened act would cause any of the plaintiffs such damage as to justify an injunction at his single suit. "The principal, if not the only, ground upon which the court can properly take jurisdiction in this case is that there are many parties plaintiff, all of whom, as land-owners on Great Pond, have the same rights, which can be settled in one action in equity, so as to avoid a multiplicity of suits at law. Upon that ground it seems to be our duty to determine the rights of the parties in this form of proceeding." Smith v. Smith, 148 Mass. 1, 18 N. E. 595, 2 Ames Cas. Eq. Jur. 64.

Pecuniary Relief to Numerous Plaintiffs.—In Smith v. Bank of New England, 69 N. H. 254, 45 Atl. 1082, 2 Ames Cas. Eq. Jur. 79, the holders of numerous certificates of deposit were permitted to join in an action charging the defendants with a negligent breach of trust affecting them all alike, although

§ 262. **Opposing Decisions Examined.**§ 263. **In the First and Second Classes.**—As the doctrine of

each plaintiff might maintain his action at law for damages; since the "question of the defendant's negligence would be exactly the same in all the actions and would necessarily be determined upon the same evidence." See extract from the opinion of the court, *post*, § 267, note.

Joinder, where Each of the Numerous Plaintiffs has an Equitable Cause of Action.—In addition to the class of cases described above, § 257, see the following analogous cases: Several persons who by the same fraudulent misrepresentations are induced to subscribe for stock in a corporation may join in an action to set aside their subscriptions and recover moneys paid thereon; *Bosher v. Richmond H. Land Co.*, 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 300. In *Brinkerhoff v. Brown*, 6 Johns. Ch. 139, which was a bill by a number of individual judgment creditors, having wholly distinct and separate judgments and demands, to reach the property of their common debtor, Chancellor Kent said (p. 151): "The plaintiffs are judgment creditors at law, seeking the aid of this court to render their judgments and executions effectual against certain fraudulent acts of their debtor equally affecting all of them. The question is, whether judgment creditors, whose rights are established and their liens fixed at law, may not unite in a bill to remove impediments to the remedy created by the fraud of the opposite party. It is an ordinary case in this court for creditors to unite, or for one or more on behalf of themselves and the rest, to sue the representative of the debtor in possession of the assets, and to seek an account of the estate. *This is done to prevent a multiplicity of suits*, a very favorite object with this court." And at page 156: "A bill may be filed *against* several persons relative to matters of the same nature, forming a connected series of acts, and all intended to defraud and injure the plaintiff, and in which all the defendants were more or less concerned, though not jointly, in each act." This opinion of Chancellor Kent shows that the uniting of numerous distinct judgment creditors, in one creditor's suit against the same defendant, or the suing by one such creditor for himself and all others, which has now become so familiar a mode of obtaining relief, was originally permitted and adopted on the ground of preventing a multiplicity of suits. This fact is of great importance in illustrating the meaning and extent of that doctrine; since the bond of union among the separate creditors is their community of interest in the relief demanded, in the questions at issue and decided by the court.

*Class Fourth: Injunction against Numerous Defendants Prosecuting Suits at Law.*—Complainant claimed the right to overflow, by means of its dam, the lands of the numerous defendants, under a dedication by the defendant's predecessors in title; held, that it might properly bring its bill to establish this right and enjoin actions at law for damages brought by the defendants, citing the text, § 268. The court also indicated that it was the proper practice in such cases to issue a temporary writ enjoining each of the defendants from further prosecution of his actions at law during the pendency of the equitable action. "No constitutional rights of defendants are taken away by the mere postponement of their actions at law; for if plaintiff is herein successful they are not entitled to an assessment of damages, and if unsuccessful the actions at law will duly proceed;" *City of Albert Lea v. Nielsen*, 83 Minn. 246, 86 N. W. 83. In *National Park Bank v. Goddard*, 62 Hun, 31, 16 N. Y. Supp. 343, 2 Ames Cas. Eq. Jur. 82; affirmed, 131 N. Y. 503, 30 N. E. 566, 1 Keener Cas. Eq. Jur. 142, the plaintiff, claiming a lien by attachment on a stock of goods, enjoined numerous replevin suits subsequently brought for the recovery of different portions

preventing a multiplicity of suits has been firmly established from an early day, with respect to the facts and circumstances which

of the stock by numerous defendants, jurisdiction being taken on the ground of preventing a multiplicity of suits.

Injunction against Tax Proceedings which involve the single plaintiff in litigation with numerous parties. The situation in these cases is the converse of that described in §§ 258-260, *supra*. Where a bank or other corporation is required by law to pay the taxes assessed on all of its shares, and reimburse itself by withholding proportionate parts of the dividends from its shareholders, it may enjoin an illegal tax, since its payment thereof would subject it to a suit by each shareholder; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153. By the practice in many of the states, taxes on railroad companies, telegraph companies, and the like are assessed by a state board on all the property of the company within the state, and proportionate parts of these taxes are certified for collection to the tax officials of the various counties in which the company operates. An illegality in the assessment by the state board may thus expose the company to separate suits in many counties, and has frequently been the subject of an injunction on the ground of preventing a multiplicity of suits. *Taylor v. Louisville & N. R. R. Co.*, 88 Fed. 350 (C. C. A.), by Taft, Cir. J.

Cancellation.—In *Louisville N. A. & C. R. Co. v. Ohio Val. I. & C. Co.*, 57 Fed. 42, 45, the plaintiff sued for the cancellation of its guaranty which had been indorsed upon several hundred bonds issued by another company illegally and fraudulently. The court was of the opinion that there was an adequate defense at law to a suit upon each bond, considered by itself, but that the multiplicity of suits threatened, and the common question involved of the validity of the guaranties and of the contract in pursuance of which they were made, rendered the case one for the exercise of its jurisdiction. Quoting § 269 of the text.

Recovery of Specific Chattels.—One of the earliest of the American cases, and one of the most striking illustrations to be found in the books, is that of *Vann v. Hargett*, 22 N. C. (2 Dev. & B. Eq.) 31, 32 Am. Dec. 689 (1833). The bill alleged that the plaintiffs were owners of a remainder interest in certain slaves; that the life tenant had sold them, and that the numerous defendants had possession of some of the issue of the slaves, asserting an absolute title therein. The prayer was that the defendants might surrender the slaves or account for their value, if they had been sold. The case, therefore, presents a clear illustration of the "concurrent jurisdiction" as defined by the author, the relief demanded being purely legal in its nature. The defendants demurred on the ground that the plaintiffs had a remedy at law by action of trover or detinue, and on the ground of multifariousness. The opinion of Daniel, J., states the doctrine with admirable clearness.

Pecuniary Relief against Numerous Defendants.—The opinion in *Bailey v. Tillinghast*, 99 Fed. 801, 806, 807 (C. C. A.), is very instructive. This was a suit in equity by the receiver of a national bank against forty-six stockholders, for the purpose of recovering an assessment of \$61 per share levied by the comptroller of the currency upon their personal liability on account of the stock held by them. By Severens, D. J., "We are clearly of the opinion that the bill should be maintained for the purpose of avoiding a multiplicity of suits. . . . There is a common question in the case between the receiver and the defendants, namely, the question whether the latter were released from their stock subscription by the fact that, whereas the resolution for increasing the stock in the sum of \$300,000 was that under which their subscription took place,

constitute the first and second classes, there are no decisions which positively deny the jurisdiction or the propriety of its exercise in cases belonging to either of them. . . . .

yet subsequently by proceedings to which they did not consent, the proposed increase was reduced to \$150,000. . . . And these circumstances, namely, the great number of the parties on one side or the other, the identity of the question of law, and the similarity of facts in the several controversies between the respective parties, are the basis on which the jurisdiction rests. The object is to minimize litigation, not only in the interest of the public, but also for the convenience and advantage of the parties. If the receiver was compelled to bring separate suits, it would entail a vast expense upon the fund in trying over and over again the identical questions of law and fact with each stockholder, and with no substantial advantage to him, but injury, rather, in the increased cost in the immediate suit, and the larger burden upon the fund, created by the many suits against the others. Nor is it necessary, as counsel seem to suppose, that there should be any privity of interest between the stockholders, other than that in the question involved and the kind of relief sought, the right of their claims being common to them all, in order to bring the case within the jurisdiction [citing several of the cases mentioned in this chapter]. It is true there are occasional cases where it seems to have been supposed that there must be some community of interest,—some tie between the individuals who make up the great number; but the great weight of authority is to the contrary, and there is a multitude of cases which either in terms deny the necessity of such a fact or ignore it by granting relief where the fact did not exist. And, indeed, it is difficult to find any reason why it should be thought necessary. *It has no relevancy to the principle or purpose of the doctrine itself*, which stands not merely as a makeweight when other equities are present, but as an independent and substantive ground of jurisdiction."

Joinder of Numerous Defendants against Each of Whom the Plaintiff has a Similar Cause of Action for Equitable Relief.—It has been frequently held that a riparian proprietor may restrain several tort feasons from diverting or polluting the waters of a stream, although they were not acting in unity of design or with concert of action: *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763, quoting § 269 of the text. On the same principle an injunction has been granted in a suit by the owner of a large body of land, valuable only for its pasturage rights and privileges, to protect that right from use by cattle and stock-owners, neighbors of the land of complainant, under authority of an unconstitutional statute: *Smith v. Bivens*, 56 Fed. 352, 2 Ames Cas. Eq. Jur. 62. *New York & N. H. R. R. v. Schuyler*, 17 N. Y. 592, 1 Keener 118, was certainly one of the most remarkable actions recorded in the annals of litigation. Schuyler, the treasurer of a railroad company, had during a period of two or three years fraudulently issued spurious certificates of stock of the company, until at last such certificates were scattered among about one hundred bona fide holders. Each fraudulent issue was accomplished by a similar contrivance and similar acts of deception; but each was, of course, an entirely distinct and separate transaction from all the others. The railroad, claiming that these certificates were null and void, brought this suit against all the holders for the purpose of having them surrendered up and canceled. The suit was sustained by analogy to a bill of peace, in an elaborate opinion of the court which is too long for quotation. See 17 N. Y. 592, 599, 600, 605-608, 34 N. Y. 30, 44-46. Here the only pretense of common interest among the certificate-holders was in the similar questions of fact and the same question of law at issue upon which all their

§ 264. In the Third and Fourth Classes.— . . . In these cases the jurisdiction was denied, on the ground that there was no privity or legal relation or community of interest and right among the individuals of the numerous body, which, it was held, must exist in order that a court of equity may interfere, under such circumstances, for the purpose of preventing a multiplicity of suits.<sup>1</sup> . . .

claims depended; there was no common title from which these questions sprung, nor any community of interest in the subject-matter.

<sup>1</sup> See *Tribette v. Illinois Cent. R. Co.*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, 2 Ames Cas. Eq. 74, 1 Keener 148, Sh. 36, and criticism thereof in *Pom. Eq. Jur.* 3d ed.; *Marselis v. Morris Canal Co.*, 1 N. J. Eq. 31, 35-39, and extracts from opinion therein. In the latter case, many separate owners of distinct tracts of land along the line of the defendant's canal united as plaintiffs, suing on behalf of themselves and all others, etc., charging that the defendant entered on their separate parcels of land and dug a canal, without permission or agreement, and without making any compensation; that defendant was insolvent. They prayed an account of damages for the injuries done, compensation for the lands taken, and an injunction to restrain the defendant from occupying or using their lands without compensation. Defendant demurred to the whole bill, and plaintiffs moved for a preliminary injunction, and the argument of both came on together. Prof. Pomeroy remarks: In whatever manner we may regard the general course and tendency of the chancellor's reasoning in this opinion, it is very evident that the *actual decision* made upon the facts does not in the slightest degree conflict with any of the cases heretofore quoted, in which the jurisdiction has been exercised. The facts of this case clearly distinguish it from each and all of them. Although on the first superficial view there may *appear* to be the same community, since the single defendant was all the time prosecuting one enterprise, viz., constructing its canal, yet in the case of each plaintiff there was a *separate, distinct trespass upon his land*; the claim of each land-owner resulted from a separate injury to his own property, unconnected with the injuries done to the others. This is the vital distinction in the facts which removes this case from the operation of the doctrine. In the group of decisions where many land-owners have united in a suit to restrain a trespass or a nuisance, such as a diversion of water from their mills, or an erection blocking up a passage to all their buildings, *the one wrongful act* of the defendant, uno flatu, did the injury complained of to the land of each plaintiff; in that group where many lot-owners united to obtain relief from an illegal assessment, the one official act of the municipality placed an unlawful burden on the lot of each plaintiff, and by this single wrong all of the lot-owners sustained their individual but common injuries. The same is true in the suits by tax-payers to be relieved from an illegal tax or public debt. In the present case, the transaction was otherwise, both in form and in its nature. There was no single wrongful act of the canal company, which by its comprehensive nature produced the same injury upon the land of each proprietor. On the contrary, the company committed a separate and wholly independent trespass upon the land of each by itself, and these trespasses were not simply distinct in contemplation of law, but they were different in their form, nature, and extent. It necessarily follows, therefore, that there was not among the plaintiffs even any *community of interest in the relief sought, nor in the questions at issue*, which, it is conceded, must exist in order that the court may interfere, and which did

§ 265. **In Cases of Illegal Taxes and Public Burdens.**—I pass to cases concerning local assessment, general taxes, and public debts or burdens. The line of decisions has already been mentioned, where, upon an equity suit brought in most instances by one pro-

exist in all the groups of cases heretofore cited. The decision of the chancellor was therefore unquestionably correct; but I cannot accept the whole course and tenor of his reasoning as equally correct. It is the case, not uncommon, of a judge who seeks to sustain a foregone conclusion by giving an imperfect construction or improper bias to the authorities which he cites.

The Marselis case is an example of an extensive class where the court of equity properly refuses to take jurisdiction, because the exercise of jurisdiction would not avail to avoid a multiplicity of suits, except in form. If, after the numerous parties are joined, there still remain separate issues to be tried between each of them and the single defendant or plaintiff, nothing has been gained by the court of equity's assuming jurisdiction. In such a case, "while the bill has only one number upon the docket and calls itself a single proceeding, it is really a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon the separate and distinct liability of one defendant" (class fourth), or upon the separate and distinct claim of one plaintiff (class third). Tompkins v. Craig, 93 Fed. 885, 2 Ames Eq. Jur. 87; Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 250-254; Pom. Eq. Jur. (3d ed.) § 251½. Tompkins v. Craig was a bill to collect the amounts previously assessed against the stockholders of a corporation under a statute making them severally and individually liable for its debts to an amount equal to the value of their respective shares. By McPherson, D. J.: "After the rate of assessment has been fixed, and the individual liability of each stockholder has thus been ascertained, the enforcement of such liability is the proper subject of a suit at law, in which the separate rights of the defendant stockholders are distinctively to be considered. . . . Each defendant may desire to set up a different defense. One stockholder may have paid his assessment in whole or in part; another may seek to raise the question whether the Iowa court had jurisdiction to make the levy; a third may wish to attack the amount of the assessment; another may aver that his subscription was void from the beginning; and still other defenses, which need not be specified, are readily conceivable. We say nothing about the validity of these defenses. Some of them may not be available and others may not be successful, but each defendant has the right to make whatever objection he may see fit to raise, in order that it may be passed upon by the court. If the defendants are numerous, as they are in the pending suit, it would be almost, perhaps wholly, impossible to apportion fairly the costs of hearing and of determining many unrelated issues." Hale v. Allinson was a similar case. See, further, Lehigh Valley R. R. Co. v. McFarlan, 30 N. J. Eq. 135, 2 Ames Cas. Eq. 85, 31 N. J. Eq. 730, 1 Keener 133 (two groups of defendants having divergent claims); Jones v. Hardy, 127 Ala. 221, 28 South. 504, 2 Ames Eq. Jur. 91; Van Auken v. Dammeier, 27 Oreg. 150, 40 Pac. 89 (plaintiffs having similar but unconnected claims cannot join). It has also been held in several cases that the jurisdiction will not be exercised where there is *no practical necessity* for its exercise; as, where adequate relief may be obtained by joining the numerous defendants or plaintiffs in an action of ejectment; Smythe v. New Orleans C. & B. Co., 34 Fed. 825; or where the alleged danger of numerous suits against the complainant amounts merely to a possibility, and not a threat, of vexatious litigation; Farmington Vill. v. Sandy R. Bk., 85 Me. 46, 26 Atl. 965.

prietor, to restrain or to set aside some illegal assessment or tax which imposed a lien or liability upon the plaintiff and others in the same position, the court has held that it would exercise its jurisdiction and grant the relief only where such judicial action was necessary to prevent a multiplicity of suits, or to remove a cloud from title, or to avoid irreparable mischief. These decisions therefore assert affirmatively that a court of equity *may* relieve from illegal assessments and taxes on the ground of preventing a multiplicity of suits; but they make no attempt to determine when or under what circumstances such ground for its interference would exist; and they all hold that the mere facts of the assessment or tax being illegal and of its creating an illegal personal liability or unlawful lien, and of its affecting numerous tax-payers and owners in the same manner, do not furnish the ground for equitable interference, nor bring the case within the jurisdiction based upon the prevention of a multiplicity of suits.

§ 266. The cases, however, to which I now refer go much further than these. There are well-considered adjudications of several courts, certainly among the ablest courts of this country, which hold that, as a general rule, or except under very special circumstances, a court of equity will not exercise its jurisdiction and grant relief upon the doctrine of preventing a multiplicity of suits in a suit brought by a single tax-payer and property owner, or by one or more suing on behalf of himself and others, or by many individuals united as co-plaintiffs to restrain the enforcement of, or to set aside and annul, or to be otherwise relieved from, any local municipal assessment, or any tax, purely personal or made a lien on property, laid by a county, town, city, or other district, or any official act, proceeding, or transaction of a county, town, city, or district, whereby a public indebtedness is or would be created, and the burden of taxation is or would be enhanced, upon the ground that such assessment, tax, official proceeding, or public debt was illegal, and either voidable or void. These cases therefore present a direct conflict of judicial opinion with those quoted in the preceding paragraphs. The most important reasons given by the courts in support of the general conclusion which they all reach are placed in the accompanying foot-note.<sup>1</sup>

<sup>1</sup> See especially *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Dodd v. City of Hartford*, 25 Conn. 232, 2 Ames Eq. Jur. 691; *Cutting v. Gilbert*, 5 Blatch. 259; and the exhaustive criticism of these cases in Prof. Pomeroy's note. The chief reasons adduced for declining equity jurisdiction in this class of cases are; (1) want of "privity" among the complainants; (2) that each of the numerous persons must himself be exposed to many actions, in order that a court of equity may interfere; as to this, see note

§ 267. **Summary of Conclusions.**— . . . In cases belonging to the third and fourth classes, when a body of persons assert some claim against a single distinct party, or conversely a single distinct party asserts some claim against a body of persons, the fundamental question, upon which the exercise of the jurisdiction confessedly rests, and over which there has been a direct antagonism of judicial opinion, relates to the nature, extent, and object of the common interest which must exist among the individual members of the numerous body, and between them and their single adversary, in order that a court of equity may interfere. Incidental to this main element, the further question has been raised, What party is entitled to relief for the purpose of preventing a multiplicity of suits?—whether the plaintiff who invokes the aid of a court upon that ground must himself be the person who would otherwise, and against his own choice, be exposed to a repeated and vexatious litigation? We have also seen, in a certain class of cases growing

to § 267; (3) “reasons of policy, founded on the necessity of speedy collection of taxes, which ought to prevent a court of chancery, from suspending these proceedings, except upon the clearest grounds.”

<sup>1</sup>Cases of the “Third Class” Denying the Jurisdiction.—Dodd v. City of Hartford, 25 Conn. 232, 2 Ames Eq. Jur. 69; Washington Co. v. Williams, 111 Fed. 801, 49 C. C. A. 621.

Cases which deny the jurisdiction in “class third” appear to be relatively more numerous than those that deny the jurisdiction in “class fourth.” In support of such denial of the jurisdiction in the former class the courts, so far as the editor has noticed, content themselves, in the main, with the dogmatic assertion that “the jurisdiction to prevent a multiplicity of suits cannot properly be invoked except by the person who may be subjected to them;” or that the numerous plaintiffs “cannot individually complain that others are compelled to sue, for they have no share in the expense or vexation of each other’s suits.” A convincing answer to this objection may be found in the two considerations clearly set forth in Smith v. Bank of New England, 69 N. H. 254, 45 Atl. 1082, 2 Ames Cas. Eq. 79, by Carpenter, C. J.: “For the determination of one issue the public must provide seventy-nine sessions of the court and seventy-nine juries. In short, a single issue, upon which the rights of all parties interested in the controversy depend, must be tried seventy-nine times, and the parties and the public be subjected to the worse than useless expense of seventy-eight trials. . . . A speedy and inexpensive adjudication of their common right is quite as important to the numerous plaintiffs as to the single defendant, and it may be much more so. Cases may often happen where a rejection of their application for equitable intervention to prevent a multiplicity of suits would operate practically as a denial of justice. Suppose, *e. g.*, that each of one hundred persons held an interest coupon for \$6, on bonds issued by a town or other corporation, and that the only controverted question was as to the validity of the bonds. Each coupon holder would have a clear and, in a legal sense, an adequate remedy at law. But if he recovered in an action at law, he would realize nothing, as the necessary expenses of the suit would exceed the amount recovered. If, on the other hand, the question were determined in one suit, each might realize substantially the amount of his demand. To hold that equity

out of some unauthorized public official act, the principle has been announced that, under the circumstances, the injured persons, citizens, or inhabitants of a local district had no cause of action of any kind, no claim to any relief from a court of justice. This principle, which may be correct, is avowedly based upon considerations of governmental policy and public expediency, and has therefore no legitimate connection with the doctrine concerning the prevention of a multiplicity of suits. The principle has, however, in some subsequent decisions, been regarded and acted upon, very improperly in my opinion, as though it directly applied to, interfered with, abridged, or regulated the equitable jurisdiction to prevent a multiplicity of suits. The error involved in the mingling of two entirely distinct matters has, I think, been shown with sufficient clearness in a previous note.

§ 268. **Conclusions as to the Third and Fourth Classes.**—From a careful comparison of the actual decisions embraced in the third and fourth classes, and which are quoted under the foregoing paragraphs, the following propositions are submitted as established by principle and by authority, and as constituting settled rules concerning this branch of the equitable jurisdiction. In that particular family of suits, whether brought on behalf of a numerous body against a single party, or by a single party against a numerous body, which are strictly and technically “bills of peace,” in order that a court of equity may grant the relief and thus exercise its jurisdiction on the ground of preventing a multiplicity of suits, there does and must exist among the individuals composing the numerous body, or between each of them and their single adversary, a common *right*, a community of interest in the *subject-matter of the controversy*, or a common *title* from which all their separate claims and all the questions at issue arise; it is not enough that the *claims* of each individual being separate and distinct, there is a community of interest merely in the *question* will intervene in behalf of the corporation, but not in behalf of the coupon-holders, to compel the issue to be tried in one suit, would bring deserved reproach upon the administration of justice.”

Indeed, the conjecture may be hazarded that the denial of the jurisdiction may frequently effect a greater practical injustice in cases of “class third” than in most cases of class fourth. In a typical case of class fourth, where the single party is assailed by numerous suits involving the same issues, a determination of one or a few of these in his favor will generally, perhaps, result in the abandonment of the others, even without the interposition of equity; while in very many cases of class third, the burden of a single great wrong is made to fall upon a large number of individuals, few of whom can, unaided, afford the expense of litigation, and thus practical immunity is secured for the wrong-doer. See the forcible observations of Walker, J., in *Greedup v. Franklin County*, 30 Ark. 101, quoted ante, note to § 260.

*of law or of fact* involved, or in the *kind and form of remedy* demanded and obtained by or against each individual. The instances of controversies between the lord of a manor and his tenants concerning some general right claimed by or against them all arising from the custom of the manor, or between a parson and his parishioners concerning tithes or a modus affecting all, and the like, are examples. It must be admitted, as a clear historical fact, that at an early period the court of chancery confined this branch of its jurisdiction to these technical "bills of peace." The above rule, as laid down in them, was for a considerable time the limit beyond which the court would not exercise its jurisdiction in cases belonging to the third and fourth classes. For this reason many passages and dicta found in the judicial opinions of that day must be regarded as merely expressing the restrictive theory which then prevailed in the court of chancery, and as necessarily modified by the great enlargement and extension of the jurisdiction which has since taken place; and at all events, these dicta and incidental utterances should, on any correct principle of interpretation, be treated as confined, and as intended to be confined, to the technical "bills of peace" in which they occurred, or concerning which they were spoken. Notwithstanding this general theory of the jurisdiction which prevailed at an early period, it is certain that even then the court sometimes transcended the arbitrary limit, and exercised the jurisdiction, where there was no pretense of any community of right, or title, or interest in the subject-matter.

§ 269. This early theory has, however, long been abandoned. The jurisdiction, based upon the prevention of a multiplicity of suits, has long been extended to other cases of the third and fourth classes, which are not technically "bills of peace," but "are analogous to" or "within the principle of" such bills. Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party or on behalf of a single party against such a numerous body, although there is no "common title," nor "community of right" or of "interest in the subject-matter" among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the

numerous body. In a majority of the decided cases, this community of interest in the questions at issue and in the kind of relief sought has originated from the fact that the separate claims of all the individuals composing the body arose by means of the same unauthorized, unlawful, or illegal act or proceeding. Even this external feature of unity, however, has not always existed, and is not deemed essential. Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy. The same overwhelming weight of authority effectually disposes of the rule laid down by some judges as a test, that equity will never exercise its jurisdiction to prevent a multiplicity of suits, unless the plaintiff, or each of the plaintiffs, is himself the person who would necessarily, and contrary to his own will, be exposed to numerous actions or vexatious litigation. This position is opposed to the whole course of decision in suits of the third and fourth classes from the earliest period down to the present time. While the foregoing conclusions are supported by the great weight of judicial authority, they are, in my opinion, no less clearly sustained by principle. The objection which has been urged against the propriety or even possibility of exercising the jurisdiction, either on behalf of or against a numerous body of separate claimants, where there is no "common title," or community "of right" or "of interest in the subject-matter," among them, is, that a single decree of the court cannot settle the rights of all; the legal position and claim of each being entirely distinct from that of all the others, a decision as to one or some could not in any manner bind and dispose of the rights and demands of the other persons, and thus the proceeding must necessarily fail to accomplish its only purpose,—the prevention of further litigation. This objection has been repeated as though it were conclusive; but like so much of the so-called "legal reasoning" traditional in the courts, it is a mere empty formula of words without any real meaning, because it has no foundation of fact,—it is simply untrue; one arbitrary rule is contrived and then insisted upon as the reason for another equally arbitrary rule. The sole and sufficient answer to the objection is found in the actual facts. The jurisdiction has been exercised in a great variety of cases where the individual claimants were completely separate and distinct, and the only community of interest among them was in the question at issue and perhaps in the kind of relief, and the single decree has without any difficulty settled the entire contro-

versy and determined the separate rights and obligations of each individual claimant.<sup>1</sup> The same *principle* therefore embraces both the technical "bills of peace," in which there is confessedly a common right or title or community of interest in the subject-matter, and also those analogous cases over which the jurisdiction has been extended, in which there is no such common right or title or community of interest in the subject-matter, but only a community of interest in the question involved and in the kind of relief obtained.

§ 270. A few additional words may be proper with respect to the exercise of the jurisdiction on behalf of taxpayers and other members of a local district or community affected by an unlawful common or public burden. Wherever the principle has been finally settled that individual citizens or members of a municipality sustaining an injury from some unauthorized or illegal official act, in common with all the other citizens or members of the same district,—that is, only suffering the same wrong or loss which is inflicted upon all other like persons,—have no cause of action whatever, no remedial right recognized by any court of justice, there can, of course, be no exercise on their behalf of the equitable jurisdiction to prevent a multiplicity of suits. And if the principle is held to embrace tax-payers, they are also without any equitable relief. But it is a grave error to suppose that this doctrine has any special connection with the equitable jurisdiction to prevent a multiplicity of suits, or in any special manner restricts that jurisdiction. Being based upon high considerations of governmental policy, it avowedly overrides and displaces all judicial authority, every form of judicial action. Wherever, on the other hand, the tax-payers of a district subject to an unlawful burden are regarded as having some cause of action, as entitled to some judicial remedy,—as, for example, where the individual tax-payer may maintain an action at law to recover back the illegal tax which he has paid, or to recover damages,—there, in my opinion, all the reasons for exercising the jurisdiction to prevent a multiplicity of suits in any case of the third or fourth classes apply with great

<sup>1</sup> While this result has been accomplished in the Schuyler fraud case, 17 N. Y. 592, in the water company case, L. R. 2 Ch. 8, in the case of the complicated contract, 7 N. J. Eq. 440, and in other like instances where the separate demands of the claimants had no common origin, but each arose from a distinct transaction, and in the various tax-payers' cases, it is plain that the objection under consideration is merely illusory; that it is truly what I have called it, an empty formula of words without any real meaning. Much of this a priori reasoning explaining why a particular thing could not be done, repeated by judge after judge, has in like manner been exploded simply by doing the thing which had, through verbal logic, been shown to be impossible. This one fact is the essence of a great deal of the modern legal form.

and convincing force in support of the same jurisdiction in behalf of such tax-payers. Notwithstanding the adverse decisions, the weight of judicial authority in favor of this conclusion, and of exercising the jurisdiction under every form of local assessment, general tax, municipal debt, or other public burden by which taxation would be increased, is very decided.<sup>1</sup> On principle, no distinction can be discovered between the case of such tax-payers, and the instances in which the jurisdiction has been repeatedly exercised and fully established on behalf of a common body of separate claimants. Each tax-payer has a remedy by action at law; but it is to the last degree inadequate and imperfect, and often nominal, since he must wait until the wrong has been accomplished against himself before he can obtain redress; and at best, the rights of all can only be secured even in this incomplete manner by an indefinite number of litigations. By means of the equitable jurisdiction, the whole controversy and the rights of every individual tax-payer can be finally determined in one judicial proceeding by one judicial decree. This is not a plausible theory; it is a fact demonstrated in the constant judicial experience of numerous states.<sup>2</sup>

<sup>1</sup>This weight of authority becomes even more imposing from the fact that in New York, and in several other states whose courts have followed the lead of New York tribunals, the denial of relief to the tax-payers has been based, in part at least, upon the principle of public policy mentioned above in the text, by virtue of which individual tax-payers were held to be without any remedial right. The adoption of this principle at once ended all possibility of judicial interference; and these decisions have therefore no legitimate authority upon the question as to the equitable jurisdiction to prevent a multiplicity of suits being exercised on behalf of tax-payers.

<sup>2</sup>Can it appear to the thoughtful observer otherwise than as a farce or travesty upon the administration of *justice*, to see a court deny all relief to a body of tax-payers suing in the form of an equitable *action* to restrain an illegal tax, or to set aside an illegal official act, such as a town bonding, for the alleged reasons that their interests were separate, and could not be determined by one decree, and then to see the self-same judges, on behalf of the same tax-payers in the same case, and upon exactly the same facts set forth in a petition, grant the very identical relief, and set aside the tax or official act, by their adjudication made upon a writ of *certiorari*? We may still hope that the time will come, in the progress of an enlightened legal reform, when the administration of justice will be *based* entirely upon considerations of substance, and not of mere form. The reformed system of procedure as it is administered by some courts has left much room for further improvement in the modes of obtaining *justice*.

## SECTION V.

THE DOCTRINE THAT THE JURISDICTION ONCE EXISTING IS NOT LOST BECAUSE THE COURTS OF LAW HAVE SUBSEQUENTLY ACQUIRED A LIKE AUTHORITY.

## ANALYSIS.

§ 276. The doctrine is applied to both kinds of jurisdiction.

§§ 277, 278. Where the jurisdiction at law has been enlarged entirely by the action of the law courts.

§ 278. Ditto, examples.

§§ 279-281. Where the jurisdiction at law has been enlarged by statute.

§ 280. Ditto, examples.

§ 281. Where such statute destroys the previous equity jurisdiction.

§ 276. **Is Applied to Both Kinds of Jurisdiction.**—There is still another principle affecting the equitable jurisdiction, which remains to be considered in all its relations, namely: Whenever a court of equity, as a part of its inherent powers, had jurisdiction to interfere and grant relief in any particular case, or under any condition of facts and circumstances, such jurisdiction is not, in general, lost, or abridged, or affected because the courts of law may have subsequently acquired a jurisdiction to grant either the same or different relief, in the same kind of cases, and under the same facts or circumstances. This principle has already been briefly mentioned as one source of the concurrent jurisdiction; but, like the doctrines discussed in the preceding sections of this chapter, it also extends to and operates in the exclusive jurisdiction. In other words, the exclusive jurisdiction to grant purely equitable reliefs, as well as the concurrent jurisdiction to confer legal reliefs, is still preserved, although the common-law courts may have obtained authority to award their remedies to the same parties upon the same facts.

§ 277. **Jurisdiction at Law Enlarged by the Law Courts.**—This subsequent jurisdiction of the courts of law may be acquired in either of two modes: by the virtual legislative action of the common-law judges themselves, or by express statutory legislation. In many instances it has happened that the law courts, by abandoning their old arbitrary rules, and by adopting notions which originated in the court of chancery, and by enlarging the scope and effect of the common-law actions, have in process of time obtained the power of giving even adequate relief in cases and under circumstances which formerly came within the exclusive domain of equity. In all such instances, the courts of equity have continued to assert and to exercise their own jurisdiction, for the reason that it

could not be destroyed, or abridged, or even limited by any action of the common-law courts alone. The enlargement of the jurisdiction at law, by the ordinary process of legal development, has not, in general, affected the pre-existing jurisdiction of equity.<sup>1</sup>

278. The following are some of the most important classes of cases in which this principle has been applied and the equitable jurisdiction has been exercised, although a court of law may maintain an action or allow a defense upon the same facts, and may give an adequate and perhaps the very same relief: In suits to recover a fund impressed with a trust, or where a trust relation in view of equity exists between the parties, where the plaintiff might recover the same sum by an action of assumpsit for money had and received, or like legal action;<sup>1</sup> . . . in suits growing out of the relation of suretyship, brought by a surety against his principal for an exoneration, or against co-sureties for a contribution, or against the creditor or the principal to be relieved from liability on account of the creditor's conduct, or for any other appropriate relief, although courts of law may give adequate relief to the surety by action upon implied contract, or by defense to an action brought against him by the creditor;<sup>2</sup> . . . and in suits to set aside or to be relieved from, or to restrain an action or judgment at law upon, a contract which is illegal, although the illegality may, either by authority of the law courts themselves or by express statute, be set up as a defense to an action at law brought to enforce the contract, and may thus defeat a recovery thereon; as, for example, where the contract is usurious, or given for a gambling debt, or other illegal consideration, or is contrary to good morals.<sup>3</sup>

§ 279. **Jurisdiction at Law Enlarged by Statute.**—Where, on the other hand, the new power is conferred upon the law courts by statutory legislation, the rule is well settled that unless the statute contains negative words or other language expressly taking away the pre-existing equitable jurisdiction, or unless the whole scope of the statute, by its reasonable construction and its operation, shows a clear legislative intent to abolish that jurisdiction, the former jurisdiction of equity to grant its relief under the circumstances continues unabridged. It follows, therefore, that where the statute merely by affirmative words empowers a court of law to interfere in the case, and to grant a remedy, even though such remedy may

<sup>1</sup> *Eyre v. Everitt*, 2 Russ. 381, 382, per Lord Eldon; *Atkinson v. Leonard*, 3 Brown Ch. 218, 1 Scott 138; *Sweeny v. Williams*, 36 N. J. Eq. 627, 1 Scott 141.

<sup>2</sup> *Kirkpatrick v. McDonald*, 11 Pa. St. 387, 392, 393.

<sup>3</sup> *Eyre v. Everitt*, 2 Russ. 381, 382; *Hempstead v. Watkins*, 6 Ark. 317, 355, 368, 42 Am. Dec. 696.

<sup>4</sup> *Bromley v. Holland*, 7 Ves. 3, 18-20; *Gough v. Pratt*, 9 Md. 526.

be adequate, and even though it may be special and equitable in its nature, the previous jurisdiction of equity generally remains.<sup>1</sup>

§ 280. The following are some of the instances in which this rule has been applied, and the equitable jurisdiction has been asserted, notwithstanding the statutory power given to the courts of law under the same condition of facts.<sup>1</sup> In suits upon lost instruments, bonds, notes, bills, and other contracts to recover the amounts due;<sup>2</sup> in suits for the establishment or admeasurement of dower, although a statutory authority over matters of dower has been given to other courts;<sup>3</sup> . . . suit by a creditor to reach the separate property of a married woman, where an action at law for the same purpose has been permitted by statute;<sup>4</sup> in suits to be relieved from an illegal contract, or to restrain an action brought or judgment obtained thereon, although a statute has permitted the illegality to be set up as a defense in bar of any recovery on the contract;<sup>5</sup> . . . statutes authorizing courts of law to grant some distinctively equitable relief to sureties, by means of proceedings in actions at law, do not alter nor abridge the equitable jurisdiction over suretyship, even in giving the very same relief;<sup>6</sup> and a statute giving common-law courts the power to correct a judgment fraudulently obtained does not affect the equity jurisdiction to relieve against fraudulent judgments; fraud is a matter of equitable cognizance, and the jurisdiction is not lost by legislation giving the same authority to courts of law;<sup>7</sup> . . . The radical change in the equitable and legal procedure effected in many states, which permits equitable defenses to be set up, and even affirmative equitable relief to be obtained, by the defendant in an action at law has not,

<sup>1</sup> *Atkinson v. Leonard*, 3 Brown Ch. 218, 1 Scott 138; *Darst v. Phillips*, 41 Ohio St. 514, Shep. 24; *Sweeney v. Williams*, 36 N. J. Eq. 627, 1 Scott 141; *Crass v. Memphis &c. R. Co.*, 96 Ala. 447, 11 South. 490, 1 Keener 311.

<sup>2</sup> In *Kelley v. Lehigh Min. & Mfg. Co.*, 98 Va. 405, 81 Am. St. Rep. 736, 36 S. E. 511, it was held that a code provision which makes more effective the common-law remedy of detinue does not affect the jurisdiction of equity to decree the specific delivery of title papers to heirs-at-law, devisees, and other persons properly entitled to the custody and possession of the title deeds of their respective estates, where they are wrongfully detained or withheld from them.

<sup>3</sup> *Atkinson v. Leonard*, 3 Brown Ch. 218, 1 Scott 138; *Patton v. Campbell*, 70 Ill. 72, H. & B. 171; *Bohart v. Chamberlain*, 99 Mo. 622, 13 S. W. 85. See, also, post, §§ 831, 832.

<sup>4</sup> *Elftand v. Elftand*, 96 N. C. 403, 1 S. E. 858; *Bishop v. Woodward*, 103 Ga. 281, 29 S. E. 968. See post, § 1382.

<sup>5</sup> *First Nat. Bank v. Albertson* (N. J. Ch.), 47 Atl. 818; *Rooney v. Michael*, 84 Ala. 585, 4 South. 421.

<sup>6</sup> *Clay v. Fry*, 3 Bibb. 248, 6 Am. Dec. 654; *Day v. Cummings*, 19 Vt. 495.

<sup>7</sup> *Hempstead v. Watkins*, 6 Ark. 317, 355, 368, 42 Am. Dec. 696; *Dysart v. Crow*, 170 Mo. 275, 70 S. W. 689.

<sup>8</sup> *Darst v. Phillips*, 41 Ohio St. 514, Shep. 24.

it has sometimes been held, abridged the former well established jurisdiction of equity to restrain actions and judgments at law on the ground that the controversy involved some equitable right or interest; but this question has been differently answered by different courts.

**§ 281. When Such Statute Destroys the Equity Jurisdiction.—**

On the other hand, the decisions all admit that if the statute contains words negating or expressly taking away the previous equitable jurisdiction, or even if, upon a fair and reasonable interpretation, the whole scope of the statute shows, by necessary intendment, a clear legislative intention to abrogate such jurisdiction, then the former jurisdiction of equity is thereby ended.<sup>1</sup> . . .

Whenever a legal right is wholly created by statute, and a legal remedy for its violation is also given by the same statute, a court of equity has no authority to interfere with its reliefs, even though the statutory remedy is difficult, uncertain, and incomplete.<sup>2</sup> Finally, where there is no statute, the equitable jurisdiction may become unused, obsolete, and practically abolished, since the courts of law have assumed the power to grant a simple, certain, and perfectly efficient remedy. The practical abandonment of the equity jurisdiction over suits by the assignees of ordinary things in action is a striking illustration of the change which may thus be effected. As a general rule, a court of equity will not now entertain a suit brought by the assignee of a debt or of a chose in action which is a mere legal demand.<sup>3</sup> The recent statutes of many states, as well as of England, requiring the assignee to sue at law in his own name confirm and establish this rule.

<sup>1</sup> *MacLaury v. Hart*, 121 N. Y. 636, 24 N. E. 1013; *Moore v. McIntyre*, 110 Mich. 237, 68 N. W. 130; *Barnes v. Sammons*, 128 Ind. 596, 27 N. E. 747.

<sup>2</sup> *Janney v. Buel*, 55 Ala. 408; *Dimmick v. Delaware L. & W. R. R. Co.*, 180 Pa. St. 468, 36 Atl. 866.

<sup>3</sup> *Ontario Bank v. Mumford*, 2 Barb. Ch. 596, 615, per Walworth, Ch.

## CHAPTER III.

### THE JURISDICTION AS HELD BY THE COURTS OF THE SEVERAL STATES, AND BY THE COURTS OF THE UNITED STATES.

#### SECTION I.

##### ABSTRACT OF LEGISLATIVE PROVISIONS.

###### ANALYSIS.

- § 282. Source of jurisdiction, both legal and equitable, of the courts in the American states.
- § 283. Division of the states into four classes with respect to the amount of equity jurisdiction given to their courts.
- § 284. The first class of states.
- § 285. The second class of states.
- § 286. The third class of states.
- § 287. The fourth class of states.
- § 288. Summary of conclusions.

§ 282. **Source of the Jurisdiction of the American Courts.**—  
. . . The highest courts of original jurisdiction in each of the states are understood to derive their common-law powers, substantially co-extensive with those possessed by the superior law courts of England, merely from the fact of their being created as such tribunals, and without any express grant of authority being essential. . . . It is not so with the equitable jurisdiction of the American courts. For that there must be an authority either expressly conferred, or given by necessary implication from the express terms, in some provision of the constitution or of a statute. . . .

§ 283. **Amount of Equity Jurisdiction—Four Classes of States.**  
— . . . A correct knowledge of these statutory provisions in the various states is of the highest importance from another point of view; without it the force and authority of decisions rendered in any particular state cannot be rightly appreciated by the bench and bar of other commonwealths.<sup>1</sup> . . .

<sup>1</sup> As an illustration, the modern decisions in Massachusetts upon questions of general equity jurisprudence, able and learned as they are, would often be very misleading in other states, if the statutes upon which the jurisdiction of its courts rests (prior to 1877) were not accurately known.

§ 284. 1. **Class First.**—The first class embraces those states in which the constitutions or statutes have in express terms created and conferred an equity jurisdiction identical or co-extensive with that possessed by the English court of chancery, so far as is compatible with our forms of government, political institutions, and public policy. . . . The following states compose this class: Michigan, New York, Vermont.

§ 285. 2. **Class Second.**—The second class embraces those states in which the constitutions, not in express terms, but by necessary implication, create and confer a general equity jurisdiction substantially the same as that possessed by the English court of chancery, except so far as modified or limited by other portions of the state legislation. In this type of legislative action, no attempt is made by any clause to particularly define the extent of the jurisdiction by comparing it with that held by the English chancery; the language employed is always general; it declares that certain courts “have power to decide all cases in equity;” or that they “have jurisdiction in equity,” or that they shall exercise their powers “according to the course of equity;” and it thereby plainly implies that the equity powers and jurisdiction thus recognized and conferred are substantially those possessed by the English court of chancery. In many of these states the general clause is added by way of limitation, that equity powers shall not exist where there is “a plain, adequate, and complete remedy at law.” . . . In this class, which is the most numerous of all, are included the following states: Alabama, California, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Kentucky, Maryland, Mississippi, Nebraska, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, Tennessee, Virginia, West Virginia, Wisconsin, and the United States.

§ 286. 3. **Class Third.**—The third class embraces those states in which 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 particular and partial heads or divisions of equity jurisprudence over which the jurisdiction of the courts shall extend, with various restrictions and limitations. The equitable jurisdiction thus created in any state is not co-extensive with that possessed by the English court of chancery, but is partial, and to a considerable extent fragmentary, since the more general clauses of the statutes have naturally been confined or restricted in their judicial interpretation by the enumeration of special powers contained in other clauses. In all these states the legislation on the subject has been progressive. At an early day the equity jurisdiction was either wholly with-

drawn from the courts, or else existed within extremely narrow bounds, and it has from time to time been enlarged by the legislature. For this reason the judicial decisions of all these states should be carefully examined and compared with the statutes in force at the time when they were rendered; otherwise their true scope and effect may be misapprehended. The following states are embraced in this class: Maine, Massachusetts, New Hampshire, Pennsylvania.

§ 287. 4. **Class Fourth.**—The fourth class embraces those states in which, from an abandonment of the ancient modes of procedure inherited from the law of England, the constitutions and statutes, in their grants of jurisdiction to the courts, make no distinction between, nor even any mention of, either the “law” or “equity.” All these states, excepting Louisiana and Texas, have adopted the reformed American system of procedure. Their constitutions and statutes confer upon the courts complete power and jurisdiction to hear and determine *all civil causes*, 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. From considerations of convenience, and because the same principle of administration is *now* common to the whole group, I have added to this class all those other states which have adopted the reformed procedure, but which have already been mentioned either in the first or the second of the foregoing classes. As a matter of fact, in all the commonwealths where the reformed procedure prevails, there is substantially the same amount of equitable jurisdiction, and there are also the same limitations upon the extent and exercise of that jurisdiction growing out of the radical change in the modes of administering it effected by the reformatory legislation. The fourth class is thus composed of the following states: Arkansas, Indiana, Kansas, Louisiana, Minnesota, Missouri, Ohio, South Carolina, Texas, and those which have already been mentioned: California, Connecticut, Iowa, Kentucky, Nebraska, Nevada, New York, North Carolina, Oregon, Wisconsin. To these may be added several of the territories.

## SECTION II.

## THE JURISDICTION AS ESTABLISHED BY JUDICIAL INTERPRETATION.

## ANALYSIS.

- § 289. The questions to be examined stated.
- § 290. Diversity of statutory interpretation in different states.
- §§ 291-298. United States courts, equity jurisdiction of.
  - § 292. First principle: Uniformity of jurisdiction.
  - § 293. Second principle: Identity of jurisdiction.
  - § 294. Third principle: Extent of the jurisdiction.
  - § 295. Fourth principle: Inadequacy of legal remedies.
- §§ 296, 297. Illustrations.
  - § 297. Ditto; effect of state laws on the subject-matter of the jurisdiction.
  - § 298. Territorial limitations on the jurisdiction.
- §§ 299-341. States in which only special and partial jurisdiction has been given by statute.
  - § 299. New Hampshire.
- §§ 311-321. Massachusetts.
- §§ 322-337. Maine.
- §§ 338-341. Pennsylvania.
- §§ 342-352. The other states in which a general jurisdiction has been given.
  - § 342. What states are included in this division.
  - § 343. Questions to be examined stated.
  - § 344. Interpretation of statute limiting the jurisdiction to cases for which the legal remedy is inadequate.
  - § 345. General extent of the statutory jurisdiction; the states arranged in the foot-note.
- §§ 346-352. How far this equity jurisdiction extends to the administration of decedents' estates.
  - § 347. Probate courts, jurisdiction and powers of.
  - § 348. Class first: The ordinary equity jurisdiction over administrations expressly abolished.
  - § 349. Class second: Such jurisdiction practically abrogated or obsolete.
  - § 350. Class third: Such jurisdiction still existing and actually concurrent.
- §§ 351, 352. Special subjects of equity jurisdiction connected with or growing out of administrations.
- §§ 353-358. States which have adopted the reformed system of procedure.
  - § 354. General effect of this procedure on the equity jurisdiction.
- §§ 355-358. Its particular effects upon equity.
  - § 356. On certain equitable interests and rights.
  - § 357. [§§ 85, 86, 87.] On certain equitable remedies.
  - § 358. On the doctrine as to inadequacy of legal remedies.

§ 290. **Different Theories of Interpretation.**—In the first place, a marked diversity will be found in the fundamental motives and theory of the judicial interpretation put upon these legislative pro-

visions by the courts of different states. In some of them a strong tendency has been shown to lay much stress upon the limiting clauses contained in the statutory grants of authority, and to give a broad meaning and controlling operation to such clauses as those which restrict the equitable jurisdiction to cases "where there is no plain, adequate, and complete remedy at law." In others, the tendency has been towards a more liberal construction; to hold that these and similar clauses are simply declaratory of a familiar principle embodied in the general theory of equity jurisdiction, and add no restriction whatever to the extent of jurisdiction which would have been conferred without their presence; in short, that they merely state a limitation which is necessarily involved in the very conception of the equitable jurisdiction. In the second place, the apparent uniformity in the jurisdiction created by these general provisions has been greatly interfered with, and even destroyed, by the different systems of legislation adopted by various states with reference to many important branches of the municipal law, which originally, and prior to any statutory interposition, formed a part of the equity jurisprudence. In many, and perhaps most, of the states, subjects which fell within the domain of equity, and which were governed by equitable doctrines as administered by the court of chancery, have been wholly subjected to a statutory regulation, and committed to special tribunals, such as the courts of probate, so that the interference of equity is no longer necessary, even if it is possible. Other departments of the municipal law—as, for example, trusts and married women's property—have been modified by legislation, so that the material upon which the equity jurisdiction acted has been altered, limited, or perhaps enlarged.

§ 291. **The United States.**—The constitution of the United States recognizes equity as a part of the national jurisprudence inherited from England at the time of the Revolution, and the equitable jurisdiction as a part of the judicial powers conferred upon the national tribunals. The statutes of Congress have, as is seen by the extracts given in the preceding section, acted upon this constitutional provision; and have, in broad terms, intrusted the exercise of this jurisdiction to the courts of original jurisdiction, which are established throughout the states, and to the supreme court created by the constitution as the appellate tribunal of last resort. In giving a judicial interpretation to these constitutional and statutory enactments, the national courts have, by numerous decisions, settled the following principles, which may justly be regarded as the foundations of the equitable powers possessed by the national judiciary.

**§ 292. First Principle: Uniformity.**—The equitable jurisdiction of the national courts, being derived wholly from the United States constitution and statutes, exists uniformly and to its full extent throughout the entire Union, independent of and unaffected by any state laws, or any peculiar system of jurisprudence and legislation adopted by individual states. It is the same in Louisiana with its civil law code, in California with its code combining legal and equitable doctrines, and in New Jersey, which has preserved the ancient English system of common law and equity almost unaffected by modern legal reform. Whatever may be the municipal law of any particular state, either in its substance or its form, the United States courts in that state preserve their equitable jurisdiction, and administer the equitable jurisprudence unchanged by such local legislation. It follows, as a necessary consequence from this principle, that the reformed system of procedure now prevailing in many states and territories, whereby all distinction between suits in equity and at law is abolished, and all rights are maintained and all reliefs procured by means of one judicial proceeding, called the “civil action,” has not in the least affected either the doctrines of equity jurisprudence administered, nor the extent and modes of equity jurisdiction exercised, by the national courts situated and acting within the same commonwealth.<sup>1</sup>

**§ 293. Second Principle: Identity.**—The second principle is a corollary of the first. The equitable jurisdiction is the same with respect to its nature and extent in all the states, and is wholly unmodified and unabridged by state legislation which deals with subjects belonging to the general system of equity jurisprudence. State laws subtracting from or limiting the scope of equity do not act upon the equitable powers and jurisdiction held by the national courts. But while state legislation cannot thus influence the jurisdiction *negatively* so as to narrow it, it may operate affirmatively so as, at least indirectly, to enlarge it. The actual jurisdiction of the United States courts in large measure depends upon the per-

<sup>1</sup>This result of the principle stated in the text is recognized and followed by the most recent legislation of Congress upon the subject. U. S. Rev. Stats., § 914 (Laws of 1872, chap. 255, § 5, 17 Stats at Large, p. 197), provides that practice, pleading, forms, and modes of proceeding in civil causes, *other than in equity or in admiralty*, shall conform as near as may be to the forms, pleading, etc., existing at the time in like causes in the courts of record of the state within which the United States court is held. This provision preserves the equity methods unchanged by the state laws. The following cases maintain the doctrine formulated in the text: *Bennett v. Butterworth*, 11 How. 669, 674, 675; *Thompson v. Railroad Co.*, 6 Wall. 134, 137; *Burnes v. Scott*, 117 U. S. 582, 587, 6 Sup. Ct. 868; *New Orleans v. Louisiana Construction Co.*, 129 U. S. 46, 9 Sup. Ct. 223 (equity jurisdiction of the United States courts in Louisiana).

sonality of the litigant parties,—their state citizenship,—and extends to all subject-matters belonging to such tribunals. The primary rights, interests, or estates of the litigant parties, which are dealt with by the exercise of this jurisdiction, must often, therefore, be created by state laws, and not by statutes of Congress. It has accordingly been repeatedly held that while the equitable jurisdiction cannot be narrowed or limited by any state legislative or judicial action, on the other hand, if equitable primary rights, interests, or estates have been enlarged, or if entirely new equitable primary rights or interests have been created, by state laws, such enlarged or new rights will necessarily come within the equity jurisdiction of the national courts, and may be protected, maintained, and enforced in appropriate suits by proper remedies.<sup>1</sup> A very striking illustration of this principle may be seen in the power of the United States circuit courts to entertain a suit for the general administration and settlement of a decedent's personal estate, when the citizenship of the parties is such as to confer the jurisdiction. In very many of the states the whole subject of administration has been taken from the equity tribunals, and conferred upon probate courts acting under special statutory authority. This legislation, it is held, has not affected the original equitable jurisdiction of the national courts sitting in such states, nor interfered with their power to entertain a suit for administration in a proper case.<sup>2</sup>

<sup>1</sup> *Equity Jurisdiction not Abridged by State Legislation.*—See next note; and for further illustration, *United States v. Howland*, 4 Wheat. 108; *Edwards v. Hill*, 59 Fed. 723, 19 U. S. App. 493.

<sup>2</sup> *Enlargement of Jurisdiction as Result of State Legislation.*—“Although a state law cannot give jurisdiction to any federal court, yet it may give a substantial right of such a character that, when there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, admiralty, or of common law;” *Reynolds v. Crawfordsville Bank*, 112 U. S. 410, 5 Sup. Ct. 216. This principle, however, is subject to important limitations produced by section 723 of the Revised Statutes, and by the seventh amendment of the Constitution of the United States. The state law “cannot control the proceedings in the federal courts, so as to do away with the force of the law of congress declaring that ‘suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate, and complete remedy may be had at law,’ or the constitutional right of parties in actions at law to a trial by a jury;” *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 277, by Field, J. “All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the federal courts only on their law side. Demands of this kind do not lose their character as claims cognizable in the courts of the United States only on their law side, because in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States;” *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 714, by Field, J.

§ 294. **Third Principle: Extent.**—The third principle relates to the extent of the jurisdiction. While the equitable jurisdiction

It is often a question of doubt whether the new right or remedy is legal or equitable in its nature. "Whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent on state statutes or acts of Congress, the jurisdiction of such cases, as between the law side and the equity side of the federal courts, must be determined by the essential character of the case; and unless it comes within some of the recognized heads of equitable jurisdiction, it must be held to belong to the other." *Van Norden v. Morton*, 99 U. S. 378, 380, 25 L. ed. 455.

Thus, proceedings to enforce a mechanics' or laborers' lien, where the state statute gives an action at law for the purpose, should be brought on the equity side of the United States court. Thus proceedings to enforce a mechanics' or laborers' lien where the state statute gives an action at law for the purpose should be brought on the equity side of the United States court: *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 579, 13 Sup. Ct. 936, 939.

*Enlargement of Jurisdiction; Statutory Suit to Quiet Title.*—A frequent application of these principles is found in the federal jurisdiction over statutory suits to quiet title. In the absence of statute, an owner of land can protect his title in equity only by a bill of peace or by a bill quia timet to remove a cloud upon the title. A bill of peace properly lies against an individual reiterating an unsuccessful claim to real property only where the plaintiff is in possession and his right has been successfully maintained at law. The equity arises from the protracted litigation for the possession which the common-law action of ejectment permits. A bill quia timet to remove cloud upon title differs from a bill of peace in that it does not seek so much to put an end to vexatious litigation as to prevent future litigation by removing existing causes of controversy as to the title. To maintain a suit of this character it is generally necessary that plaintiff be in possession, and, except where the defendants are numerous, that his title be established at law or founded on undisputed evidence or long-continued possession. The statutes in various states authorize a suit in either of these classes of cases without reference to any previous judicial determination of the validity of the plaintiff's right, and, in some instances, without reference to his possession.

Where the statute limits the right to parties in possession, the federal courts will take jurisdiction without question. The point arose in the early case of *Clark v. Smith*, 13 Pet. 195, 203, where the right was claimed under a statute of Kentucky. *Catron, J.*, said: "Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country." For a review of the supreme court decisions up to 1894, see *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 132.

Where the statute allows a suit by a party out of possession, a federal court will not as a general rule enforce it if the complainant is, as a matter of fact, out of possession, and defendant is in possession. It is provided by Rev. Stats., § 723, that federal equity courts shall not have jurisdiction where a plain, complete, and adequate remedy may be had at law, and the seventh amendment to the constitution of the United States secures the right of jury trial in all actions at law where the value in controversy exceeds twenty dollars. When the plaintiff is out of and the defendant in possession, the

of the national courts is derived wholly from the United States constitution and statutes, it is identical or equivalent in extent with that possessed by the English high court of chancery at the time of the Revolution. The *judicial* functions and powers of the English court of chancery are held to have been conferred en masse

remedy by ejectment is said to be adequate, and there must be a jury trial if desired. "The right which in this case the plaintiff wishes to assert is his title to certain property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury." *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 277.

Where neither party is in possession and the land is unoccupied, the case is different. In such a case there can be no controversy at law respecting the title or right of possession, for an action of ejectment will lie only against a party in possession. Accordingly the federal courts will take jurisdiction and enforce the equitable right. *Holland v. Challen*, 110 U. S. 16, 3 Sup. Ct. 495.

*Statutory Creditors' Suits by Simple Contract Creditors.*—In some of the states statutes have been passed allowing simple contract creditors to maintain creditors' bills without the establishment of their claims at law. The supreme court has declined to enforce these statutes. In the leading case of *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, Justice Field says: "All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the federal courts only on the law side. Demands of this kind do not lose their character as claims cognizable in the courts of the United States only on their law side, because in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States."

In *Cates v. Allen*, 149 U. S. 457, 13 Sup. Ct. 883, however, there is a vigorous dissenting opinion by Mr. Justice Brown, which seems to have much reason on its side (13 Sup. Ct. 977). He held that the statute creates a substantial right which the federal courts should enforce. See also, *Darragh v. H. Wetter Mfg. Co.*, 78 Fed. 7, 23 C. C. A. 609, where a bill by a simple contract creditor to wind up a corporation was allowed, under a statute of Arkansas.

*Jurisdiction in Matters of Administration.*—See *Payne v. Hook*, 7 Wall. 425, 430 (suit by distributee to set aside a fraudulent distribution of the estate); *Borer v. Chapman*, 119 U. S. 587, 600, 7 Sup. Ct. 342, 348 (suit by creditor of decedent to establish his claim); *Ball v. Tompkins*, 41 Fed. 486; *Hale v. Tyler*, 115 Fed. 833 (to set aside a fraudulent conveyance by decedent). The jurisdiction does not extend, however, to matters which, in England, were committed exclusively to the ecclesiastical courts, such as the probate of a will or the setting aside of probate; *In re Broderick's Will*, 21 Wall. 503; *Oakley v. Taylor*, 64 Fed. 25; but see *Williams v. Crabb*, 117 Fed. 193, 59 L. R. A. 425 (if the state statute has conferred jurisdiction on courts of equity to set aside wills or the probate thereof, it will be followed by the United States courts). The jurisdiction is also subject to the important qualification, that in the exercise thereof the United States courts can not seize or control property while in the custody of a court of the state; *Byers v. McAuley*, 149 U. S. 616, 13 Sup. Ct. 908; as to what constitutes such disturbance of the state court's possession, see also *Payne v. Hook*, *Borer v. Chapman*, *Ball v. Tompkins*, and *Hale v. Tyler*, *supra*.

upon the national judiciary; but not the peculiar administrative functions held by the chancellor as representative of the crown in its character of *parens patriae*. These latter functions of the English chancellor have not been granted to the United States courts, but are given to the several states, and are exercised either by the state legislatures or by the state tribunals. The United States supreme court has frequently laid down and acted upon this principle in deciding cases brought for the purpose of enforcing charitable trusts.<sup>1</sup>

**§ 295. Fourth Principle: Inadequacy of Legal Remedies.**—The fourth principle also relates to the extent of the equitable jurisdiction, as that is affected by the most important provision of the statute.<sup>1</sup> In the judicial interpretation of this clause, it has been well settled that the section of the statute is merely declaratory of a familiar doctrine belonging to the general system of equity jurisdiction and jurisprudence. It does not take away or abridge the jurisdiction which is affirmatively granted, nor deprive the United States courts of any part of the field of powers occupied by the English court of chancery so far as the functions of that tribunal are judicial. In short, this section does not substantially affect the equitable jurisdiction of the national courts; their powers would have been the same, and subject to the same limits, if the provision had not been enacted.<sup>2</sup>

**§ 296. Illustrations.**—The four foregoing principles may be justly regarded, I think, as the very foundations of the equitable jurisdiction of the United States courts. They give it whatever peculiar character it possesses growing out of the double organization of the national and state governments, and they clearly distinguish it from the jurisdiction possessed by any state tribunals. In the practical administration of their equitable powers, the national judiciary have constantly affirmed and steadily adhered to the doctrine in its negative form, that the equitable jurisdiction does not exist, or will not be exercised, in any case or under any circumstances where there is an adequate, complete, and certain remedy at law, sufficient to meet all the demands of justice.<sup>1</sup>

<sup>1</sup> I refer to the United States Revised Statutes, section 723, being the same as section 16 of the Judiciary Act of 1789.

<sup>2</sup> *Fountain v. Ravenel*, 17 How. 369; *Mormon Church v. United States*, 136 U. S. 1.

<sup>1</sup> *Boyce's Executors v. Grundy*, 3 Pet. 210, 215, Shep. 19; *McConihay v. Wright*, 121 U. S. 20.

<sup>1</sup> *Grand Chute v. Winegar*, 15 Wall. 373, 2 Ames Eq. Jur. 116; *Lewis v. Cocks*, 23 Wall. 466, Shep. 17; *Buzard v. Houston*, 119 U. S. 347, 4 Sup. Ct. 249, H. & B. 268, 3 Keener 487; *Killian v. Ebbinghaus*, 110 U. S. 568; *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. ed. 501.

§ 297. **Effect of State Laws.**—On the other hand, the affirmative form of the rule has also been uniformly asserted and maintained, that the equitable jurisdiction exists and will be exercised in all cases, and under all circumstances, where the remedy at law is not adequate, complete, and certain, so as to meet all the requirements of justice. That there is a legal remedy is not enough; such remedy, in order to oust or prevent the equitable jurisdiction, must be in all respects as satisfactory as the relief furnished by a court of equity.<sup>1</sup> . . . In order to prevent a misconception of the foregoing rules concerning the equitable jurisdiction of the national courts, there is one limitation which must be constantly borne in mind. Since the original jurisdiction of the United States courts—especially of the circuit courts—in large measure depends upon the state citizenship of the litigant parties as its sole basis, it follows that in some cases of ordinary controversies—in all those which do not directly arise under statutes of Congress or provisions of the United States constitution—the subject-matter of the suit, the primary rights, interests, or estates to be maintained and protected, are created and regulated by state laws alone. While, therefore, it is correctly held that the equitable *jurisdiction* of the national courts, their power to entertain and decide equitable suits and to grant the remedies properly belonging to a court of equity, is wholly derived from the constitution and laws of the United States, and is utterly unabridged by any state legislation, yet, on the other hand, the primary rights, interests, and estates which are dealt with in such suits and are protected by such remedies are within the scope of state authority, and may be altered, enlarged, or restricted by state laws.<sup>2</sup> The equitable jurisdiction of the national courts is not directly affected by the state statutes, but what may be finally accomplished by the exercise of that jurisdiction, what estates, property rights, and other interests of the litigants may be maintained, enforced, or enjoyed by its means, must depend to a great extent upon the policy of legislation adopted in each individual state.

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<sup>1</sup> *Baker v. Biddle*, 1 Bald. 394, 403-411; *Mann v. Appel*, 31 Fed. 378, 383; *Watson v. Sutherland*, 5 Wall. 74, 1 Ames Eq. Jur. 531, H. & B. 741, Shep. 22, 1 Scott 134; *Bodley v. Taylor*, 5 Cranch. 191, 221, 222; *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, 215, Shep. 19.

<sup>2</sup> As a familiar illustration of this proposition, I mention the statutes in many states modifying and reconstructing the whole subject of trusts in real and personal property, and creating the separate property of married women, and the like. While such state statutes do not abridge the jurisdiction of the national courts to entertain equitable suits concerning trusts or married women's property, they, of course, determine the rights growing out of these trusts or of the married women holding separate property.

**§ 344. Special Statutory Limitation—Inadequacy of Legal Remedies.**—In most of the states where the legislation contains the clause expressly declaring that the equitable jurisdiction shall not extend to cases for which the legal remedy is adequate, the courts have followed the example set by the national judiciary, and have firmly established the doctrine that this clause is simply declaratory of a principle inherent in the very conception of equity as a department of the municipal law; that it produces no practical effect whatever upon the extent and nature of the general jurisdiction otherwise conferred, but leaves that jurisdiction exactly what it would have been had the limiting language never been incorporated into the statute. The clause, therefore, is not regarded as forming any new and statutory test or criterion of the jurisdiction; and the equitable powers of the courts are determined by the other and more general provisions of the statutes and by the universal principles of equity jurisprudence. The equitable jurisdiction in these states is held to be a complete and comprehensive system, except so far as it may have been abridged, with respect to particular branches or subjects, by the restrictive operation of other statutes.<sup>1</sup> In a very few states, however, the narrower mode of interpretation, similar to that which long prevailed in Massachusetts, has been adopted. The clause is treated as creating a statutory, new, and effective measure of the equitable jurisdiction, restricting its operation and preventing its exercise in any cases for which there is an adequate remedy at law, even though such cases were undoubtedly embraced within the jurisdiction according to its original un-abridged extent and nature.<sup>2</sup>

**§ 345. Extent of the General Statutory Jurisdiction.**—The statutes of the remaining states composing the first, second, and fourth classes as heretofore arranged, are, with few exceptions, as we have seen, grants of general equitable jurisdiction described in somewhat vague terms, but all of them without any negative language or express limitation upon the nature and extent of this jurisdiction. . . . The doctrine is established throughout all the states now under consideration—whether the legislation confers a jurisdiction in express terms equivalent to that held by the English chancery, or confers such a jurisdiction by implication, or in abolishing the distinctions between legal and equitable forms of procedure confers a jurisdiction to decide all civil actions—that a complete equitable jurisdiction commensurate in its extent with that belonging to the English court of chancery, and coincident in its operation with the

<sup>1</sup> So in Oregon, Alabama, Arkansas, Missouri.

<sup>2</sup> So in South Carolina, Connecticut, Delaware.

entire domain of equity jurisprudence, exists in each one of these states, is possessed by some designated tribunals, and may be exercised by them in the modes of procedure established or sanctioned by law.

**§ 353. States Which have Adopted the Reformed System of Procedure.—**

**§ 354. Its General Effect on the Jurisdiction.—**The reformed procedure, in its abolition of all distinction between actions at law and suits in equity; in its abrogation of the common-law forms of action, and its institution of one "civil action" for all remedial purposes; in its allowing both legal and equitable rights to be maintained, and legal and equitable remedies to be conferred in combination by the single "civil action;" and in the uniform rules which it has established for the regulation of this civil action whenever and for whatever purposes it may be used,—purports to deal with, and does in fact deal with, the *procedure* alone, with the mere instrumentalities, modes, and external forms by which justice is administered, rights are protected, and remedies are conferred. The new system was not intended to affect, and does not affect, the differences which have heretofore existed, and still exist, between the separate departments of "law" and "equity;" it was not intended to affect, and does not affect, the settled principles, doctrines, and rules of equity jurisprudence and equity jurisdiction. 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 remedial rights,—that is, the equitable causes of action, and the rights to obtain the reliefs appropriate therefor,—and the doctrines and rules of equity jurisprudence which define and determine these remedies and remedial rights, 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. While the external distinctions of form between suits in equity and actions at law have been abrogated, the essential distinctions which inhere in the very nature of equitable and legal primary or remedial rights still exist as clearly defined as before the system was adopted, and must continue to exist until the peculiar features of the common law are destroyed, and the entire municipal jurisprudence of the state is transformed into equity. If, therefore, the facts stated in the

pleadings show that the primary rights, the cause of action, and the remedy to be obtained are legal, then the action is one at law, and falls within the jurisdiction at law. If, on the other hand, the facts stated show that the primary rights, or the cause of action, or the remedy to be obtained are equitable, then the action itself is equitable, governed by doctrines of the equity jurisprudence, and falling within the equitable jurisdiction of the court. It should be carefully observed, however, that, under the reformed system of procedure, the same action may be both legal and equitable in its nature, since it may combine both legal and equitable primary rights, causes of action, defenses, and remedies. It is this fact which, more than any other, has tended to produce whatever confusion may have arisen in the actual workings of the new system. . . .

**§ 355. Its Particular Effects.**—While this unanimous conclusion of the courts is, in general, correct; while, when we look at the effects of the reformed procedure as a whole,—*en masse*,—it is true that equity and the law remain unchanged,—still, this proposition is not true in every particular; there are some important and necessary limitations. . . .

**§ 356. On Certain Equitable Interests.**—The first and most palpable of these necessary changes is the complete abrogation of a certain class of equitable primary rights, and the transformation of them into strictly legal rights.<sup>1</sup>

**§ 357. On Certain Equitable Remedies.**—But there is another and still more important limitation of the general proposition. While it is undoubtedly true that with the exception just mentioned of the right conferred upon the direct assignee of a legal thing in action, all the equitable estates, interests, property, liens, and other primary rights recognized by the equity jurisprudence, and all the principles, doctrines, and rules of that jurisprudence which define them, determine their existence, and regulate their acquisition, transfer, and enjoyment, are untouched and unaffected, it is no less true that some of the equitable remedies and remedial rights belonging to the equity jurisprudence, and coming within the equity jurisdiction, are materially modified, if not indeed destroyed *as equitable remedies and remedial rights*, by the reformed procedure.

§ 85. In the first place, the permission to set up an equitable defense against a legal cause of action has in a great number of instances removed all occasion for bringing a suit in equity by which the equitable right of the defendant constituting his defense

<sup>1</sup>The author instances the right of the assignee of a thing in action, which, under the Codes, is transformed into a legal right; see post, §§ 1270–1279.

may be established and the prosecution of the legal action may be restrained. I take a simple example of a very large class of cases. A, the vendor in a contract for the sale of land, brings an action of ejectment against B, the vendee, who is in possession, and having the legal title, must of course recover at law. B was therefore obliged to file a bill in equity against A, and obtain thereby a decree of specific performance, and in the mean time an injunction restraining the further prosecution of the action at law. Having obtained a conveyance of the legal title under his decree, B would be in a position to defend the action of ejectment, or any subsequent one which might be brought against him. By the reformed procedure, when the vendor commences a legal action to recover possession of the land from the vendee, the latter need not resort to a second equitable suit, nor obtain an injunction. The whole controversy is determined in the one proceeding. B's equitable estate and right to a conveyance is not only a negative defense to A's legal cause of action, but entitles B in the same action to assume the position of an *actor*, and to obtain the full affirmative relief which he would formerly have obtained by his separate bill in equity,—a decree for a specific performance and a conveyance of the legal estate. Although no substantial doctrines of equity have been altered, still, the vendee is no longer compelled in such circumstances to sue in equity, nor to demand the ancillary remedy of an injunction.

§ 86. This familiar example may be generalized into the following universal proposition: Whenever, under the former procedure, one party, A, had a legal estate or right which entitled him to recover in an action at law brought against B; and where B, having no legal defense to this action, was still possessed of an equitable estate or right which entitled him to some particular affirmative equitable remedy,—as, for example, a specific performance, a reformation or correction, a cancellation, a rescission, etc.,—which remedy when obtained would clothe him with the legal estate or right, and enable him thereby to defeat the plaintiff A's action at law; and where, under these circumstances, B would be obliged to go into a court of equity jurisdiction, and file a bill therein against A, and obtain a decree granting the desired equitable relief, and, as an incident thereto, procure an injunction restraining A's action at law,—in all such cases, the necessity, and even the propriety, of bringing the separate equity suit and enjoining the legal action are completely obviated, since B can set up all his equity by way of defense or counterclaim, recover a judgment for the affirmative relief which he seeks, and defeat the action brought against him by A, in that very action itself. It would not

be correct to say that the equity jurisdiction has been abrogated in this class of cases, since the defendant B might possibly follow the former method, and bring a separate action instead of setting up his equitable rights as a defense and counterclaim; but this circuitous mode of proceeding is seldom adopted, and will ultimately, perhaps, be prohibited by the courts, so that this direct equity jurisdiction will doubtless, in time, become obsolete.

§ 87. One other equally important change produced by the reformed procedure should be mentioned. Under the system of separate jurisdiction, when a person possesses an equitable right or estate entitling him to some particular equitable remedy which, when obtained, would, in turn, confer upon him a *legal* right or estate in respect to the subject-matter, and enable him therewith to maintain an action at law, he is obliged (except in a few special cases) *first* to bring a suit in equity and procure a decree establishing his right and granting him the needed equitable remedy, which clothes him with the *legal* title or estate. Having thus acquired a *legal* basis for his demand, he must go into a court of law and enforce his newly perfected legal demand by means of a legal action. As familiar illustrations, if a person holds an equitable estate under a land contract, he must compel a specific performance in equity before he can recover possession of the land at law; if he holds the equitable estate under an implied trust, he must in general obtain a transfer of the legal title from the trustee before he can maintain ejectment for the possession; if the instrument under which he claims is infected with mistake, and his full rights under it depend upon a correction of the mistake, he must obtain the remedy of reformation or re-execution in equity, and may then enforce his perfected legal right by the proper action at law; if his estate in land is purely an equitable one because a deed voidable through fraud has conveyed the legal title to another person, the equitable remedy of cancellation or rescission must be granted before a legal action for the possession can be successful. Wherever the reformed procedure has been administered according to its plain intent, the necessity of this double judicial proceeding has been obviated; indeed, if the true spirit of the new procedure is accepted by the courts, such a separation of equitable and legal rights and remedies, and their prosecution in distinct actions, will not perhaps be allowed. The plaintiff brings one civil action in which he alleges all the facts showing himself entitled to both the equitable and the legal reliefs needed to complete his legal right, and asks and obtains a double judgment, granting, first, the proper equitable remedy, and secondly, the legal remedy, by which his juridical position with respect to the subject-matter is finally perfected; or he

may simply demand and recover a judgment conferring only the final legal remedy, the preliminary equitable relief being assumed as an essential prerequisite to the recovery, but not being in terms awarded by the court. It follows, as an incident of this union of rights and remedies in one action, that all occasion for the ancillary or provisional equitable remedy of injunction to restrain the defendant from proceeding at law is often, and indeed generally, avoided in this class of cases.

§ 358. **On the Inadequacy of Legal Remedies.**—Finally, if the true spirit and intent of the reformed procedure were fully carried out by the courts, I think that in all the states where it prevails the question whether or not an adequate remedy can be obtained at law would cease to have the slightest importance in the actual decision of causes. One of the plainest purposes of the new system is, that if a cause of action is stated in the pleading, the relief to which the plaintiff is entitled should be granted, whether that relief be legal or equitable. A suit should never be dismissed on the ground that a court of equity has no jurisdiction of the matter because the plaintiff has an adequate remedy at law; it should be retained and decided as an action at law, and the adequate legal relief should be awarded. The correctness of this theory is generally admitted, but the courts too often fail to carry the theory into practice.

## PART SECOND.

### THE MAXIMS AND GENERAL PRINCIPLES OF EQUITY JURISPRUDENCE, AND THE EVENTS WHICH ARE OCCASIONS OF EQUITABLE PRIMARY OR REMEDIAL RIGHTS.

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#### PRELIMINARY SECTION.

##### ANALYSIS.

- § 359. Objects, questions, and divisions stated.
- § 360. Equitable *principles* described.
- § 361. Equitable *doctrines* described.
- § 362. *Occasions* of equitable rights.

§ 359. **Questions and Divisions Stated.**—Thus far the discussion has been confined to the equity jurisdiction, or the power of courts to entertain and determine controversies involving equitable estates, interests, and rights, or to award remedies, in pursuance of the doctrines, methods, and procedure of equity. I now proceed to the examination of the doctrines and rules which make up the equity jurisprudence. In the introductory chapter it was shown that equity jurisprudence, considered as a department of the municipal law, as a collection of practical rules administered by the courts, is separated by a natural line of division into two parts, namely, equitable estates, interests, and primary rights, which are all either equitable rights of property or rights analogous to property, and equitable remedies and remedial rights. There are, however, certain elements underlying and running through the entire body of equity jurisprudence, which must be explained and described in all their fulness and force, before either of these two great divisions can be dealt with in a complete and accurate manner. As clearly appears in our preliminary historical sketch, the doctrines and rules of equity jurisprudence are not arbitrary; they are, to a very great extent, based upon and derived from those essential truths of morality, those unchangeable principles of right and obligation which have a juridical relation with and application to the events and transactions of society. These ethical truths do not, however, appear in equity jurisprudence in their purely abstract form. As they must be applied by the courts to juridical relations alone, they

have been made to assume a concrete and juridical character, without losing at the same time any of their inherent ethical nature. In fact, these juridical precepts of right and duty are the broad foundations upon which the superstructure of equity jurisprudence has been constructed; they are the sources from which most of those doctrines and rules have been drawn which define and regulate equitable estates, interests, and rights, and control the administration of equitable remedies. A careful examination and full comprehension of these sources—these fundamental principles—are plainly a prerequisite to any complete and accurate knowledge and understanding of the doctrines and rules which result from them.

**§ 360. Equitable Principles.**—The juridical principles<sup>1</sup> of morality which thus constitute the ultimate sources of equitable doctrines and rules are of two classes or grades. Underlying the entire body of equity jurisprudence, extending through every one of its departments, and shaping to a greater or less extent its doctrines concerning almost every important subject, are certain broad comprehensive precepts which are commonly denominated maxims of equity. These maxims are in the strictest sense the principia, the beginnings out of which has been developed the entire system of truth known as equity jurisprudence. They are not the practical and final doctrines or rules which determine the equitable rights and duties of individual persons, and which are constantly cited by the courts in their decisions of judicial controversies. They are rather the fruitful germs from which these doctrines and rules have grown by a process of natural evolution. They do not exclusively belong either to the department which treats of equitable estates, property, and other primary rights, nor to that which deals with equitable remedies; their creative and molding influence is found alike throughout both of these departments. Among the most important of these principia which have been crystallized into the pithy form of maxims are the following: Equity regards that as done which ought to have been done; equity looks at the intent, rather than the form; equality is equity; he who seeks equity must do equity; he who comes into equity must come with clean hands. While it cannot be said that these and other similar principles have all produced the same or equal effects upon the development of

<sup>1</sup>It is important to obtain an accurate notion of the distinction between "principles" and doctrines. "All principles are doctrines, but all doctrines are not principles. Those properly are principles which contain the principia, the beginnings or starting-points of evolution, out of which any system of truth is developed:" De Quincey. "Rules" are still more particular in their application and narrow in their scope than doctrines.

equity jurisprudence, yet it is undeniable that a vast proportion of the actual doctrines and rules which make up the system of equity are necessary inferences from or direct applications of some one or more of these fundamental maxims. It is evident, therefore, that any full and accurate discussion of the doctrines and rules which constitute the two main divisions of equity jurisprudence as heretofore described must be preceded by an examination into the nature, meaning, extent, and effects of these few germinal principles.

§ 361. **Equitable Doctrines.**—In addition to these true principia, these principles which run through and affect all parts of equity jurisprudence, there are also certain other comprehensive doctrines which are purely equitable, and largely serve to distinguish the system from the “law.” The doctrines to which I refer are neither equitable estates, nor property, nor remedies, nor are they exclusively concerned either with equitable estates and other similar rights, or with equitable remedies; on the contrary, they affect to a greater or less extent both the equitable rights of property and the administration of equitable remedies. It seems expedient, therefore, in order to avoid unnecessary repetition,—even if this arrangement is not essential in any scientific method,—that the investigation of these peculiar doctrines should precede the discussion of equitable estates, interests, and other primary rights, and of equitable remedies. The following are illustrations of the doctrines which constitute this special class: The equitable doctrines concerning penalties and forfeitures; the doctrine concerning priorities; the doctrine concerning notice; the doctrine of election. All of these are very comprehensive in their nature and effects, and are the immediate sources of numerous rules in all branches of equity jurisprudence.

§ 362. **Occasions of Equitable Rights.**—Finally, there are certain facts or events which are the *occasions* of numerous equitable rights, both primary and remedial, and which thus give rise to important doctrines and rules in every branch of equity jurisprudence. These facts and events have sometimes been described as forming a part of the concurrent jurisdiction; but this view, as has already been shown, is superficial and erroneous. The facts and events which are thus peculiarly the occasions of equitable rights are fraud, mistake, and accident. Under the system of classification which I have adopted, these subjects do not exclusively belong either to the department of equitable estates and other primary rights, nor to that of equitable remedies. Although not the sources of rules, like the principles and doctrines mentioned in the foregoing paragraphs, they are the occasions which give rise to a large number of rules,

and their examination should, in any proper order, precede the discussion of equitable property and equitable remedies. This second part will therefore be separated into three chapters, of which the first will be devoted to the fundamental maxims of equity, the second to the group of peculiarly equitable doctrines above described, and the third to the special facts and events which are the occasions of many equitable rights and remedies.

## CHAPTER I.

### THE FUNDAMENTAL PRINCIPLES OR MAXIMS OF EQUITY.

#### SECTION I.

##### EQUITY REGARDS THAT AS DONE WHICH OUGHT TO BE DONE.

###### ANALYSIS.

- § 363. List of equitable maxims.
- § 364. Equity regards as done what ought to be done; its importance.
- §§ 365-377. Its true meaning, and its effects upon equitable doctrines.
- §§ 366-369. Is the source of equitable property and estates.
  - § 366. Sources of legal property or titles described.
  - § 367. Effect of an executory contract at law.
  - § 368. Effect of an executory contract in equity.
  - § 369. Sources of all kinds of equitable property described.
- §§ 370-376. The equitable estates which are derived from this principle.
  - § 371. Conversion.
  - § 372. Contracts for the purchase and sale of lands.
  - § 373. Assignments of possibilities; sale of chattels to be acquired in the future; assignments of things in action; equitable assignments of moneys; and equitable liens.
  - § 374. Express trusts.
  - § 375. Trusts arising by operation of law.
  - § 376. Mortgage; equity of redemption.
  - § 377. Conclusions.

§ 363. **List of Maxims.**—Those principles which are so fundamental and essential that they may with propriety be termed the *maxims* of equity are the following: Equity regards that as done which ought to be done; equity looks to the intent, rather than to the form; he who seeks equity must do equity; he who comes into equity must come with clean hands; equality is equity; where there are equal equities, the first in time shall prevail; where there is equal equity, the law must prevail; equity aids the vigilant, not those who slumber on their rights, or *Vigilantibus non dormientibus, aequitas subvenit*; equity imputes an intention to fulfill an obligation; equity will not suffer a wrong without a remedy; and equity follows the law. It must not be supposed that all these maxims are equally important, or that all have been equally fruitful in the development of doctrines and rules; but it is not an exaggeration to say that he who has grasped them all with a clear comprehen-

sion of their full meaning and effects has already obtained an insight into whatever is essential and distinctive in the system of equity jurisprudence, and has found the explanation of its peculiar doctrines and rules. I purpose, in the successive sections of this chapter, to discuss them in the order given above.

§ 364. **First Maxim: Its Importance and General Operation.**—

The first maxim in the list has been stated in somewhat varying language by different text-writers, but without any substantial variation in the meaning. I think the following form is both strictly accurate and sufficiently comprehensive in expressing the equitable principle: Equity regards and treats that as done which in good conscience ought to be done. Some writers have failed to apprehend the full significance of this maxim, and have described its effects in altogether a too narrow and partial manner.<sup>1</sup> Others have correctly looked upon it as the very foundation of all distinctively equitable property rights, of all equitable estates and interests, both real and personal.<sup>2</sup> It is in fact the source of a large part of that division of equity jurisprudence which is concerned with equitable property; the doctrines and rules which create and define equitable estates or interests are in great measure derived from its operation. So far from the maxim being confined to express executory contracts, and to those dispositions of property which give rise to an equitable conversion, it has been applied by the most eminent courts to all classes of equities; to every instance where an equitable *ought* with respect to the subject-matter rests upon one person towards 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 party.<sup>3</sup> Whenever courts of high authority have dealt with the

<sup>1</sup> Thus Mr. Justice Story (1 Eq. Jur., § 64 g), and Mr. Snell (Snell's Equity, 37) following him, say: "The true meaning of this maxim is, that equity will treat the subject-matter of a contract, 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 they might have been, executed. . . . The most frequent cases of the application of the rule are under agreements." This description is merely the substituting one practical result of the principle in the place of the principle itself.

<sup>2</sup> Adams Equity, 135 (6th Am. ed., p. 295). See 2 Spence's Eq. Jur. 253 et seq.

<sup>3</sup> Frederick v. Frederick, 1 P. Wms. 710, 1 Scott 311. A person had contracted to become a citizen of London, but died before he had carried this agreement into effect by taking up his freedom. His widow thereupon brought a suit to procure his personal estate to be distributed in accordance with the customs of London, which applied to citizens only, and which prescribed a very different mode of distribution from that which prevailed under the statute in other parts of England. The court, invoking the maxim, held that the deceased

principle in a narrower manner, and have given to it a more restricted operation and effect, their language, although perhaps very general in its terms, should be taken as confined, and as intended by the court to be confined, to the particular application of the maxim then under judicial investigation.<sup>4</sup>

§ 365. **Its Meaning and Effects.**—What is the true meaning of the principle, taken in its most comprehensive and generic sense? and what are its true effects upon the system of distinctive doctrines and rules which constitute the equity jurisprudence? In the first place, it should be observed that the principle involves the notion of an equitable *obligation* existing from some cause; of a present relation of equitable right and duty subsisting between two parties,—a right held by one party, from whatever cause arising,

should be regarded as though he were actually a citizen at the time of his death, and that his estate should be distributed in pursuance of the custom. This decision clearly exhibits the universality of the maxim. *Coventry v. Barclay*, 3 De Gex, J. & S. 320, 328, per Lord Chancellor Westbury. In this case the question in dispute was, whether a partner—Bevan—was bound by certain accounts settled with his co-partners, or whether he could disregard them, and have a general accounting gone into. By the partnership articles it was stipulated that on a certain day of each year the accounts of the whole past year should be made up, presented to all the partners, settled, and signed by each. At the appointed day in one year the accounts were thus made up, and laid before all the firm, except Bevan, settled and signed by them. Bevan was not present, on account of illness, and never signed these accounts, but afterwards saw them, and verbally assented or agreed to their correctness. The same took place on another year. On these facts Lord Westbury said (p. 228): “It is the rule of a court of equity to consider that as done which ought to be done; and if, therefore, I find that the accounts and valuation of July, 1860, at the making of which Mr. Bevan was not present, were afterwards accepted and agreed to by him, I shall hold that the account was in equity signed by him at the time when it was so accepted.” Here, it will be seen, this most able judge applied the maxim, not to the title and property in land or chattels, but to a purely personal act, and held that equity would regard such a personal act as done, although in fact it never was done, because it ought to be done. The case is in exact harmony with *Frederick v. Frederick*, 1 P. Wms. 710. In *Sourwine v. Supreme Lodge*, 12 Ind. App. 447, 452, 453, 54 Am. St. Rep. 532, 536, 40 N. E. 646, 1 Scott 320, a member of a beneficial association in good standing and entitled under its constitution and bylaws to be transferred from one endowment class to another, requested to be so transferred, and did all that could be required of him to enter such class, but his request was wrongfully and arbitrarily refused. After his death, the court, recognizing the flexibility of equitable remedies, and quoting the above passage of the text, granted relief as though the transfer had been effected. See, also, *Ames v. Richardson*, 29 Minn. 330, 13 N. W. 137, Sh. 64.

‘This is the universal rule for the interpretation of judicial dicta, and it is the only mode of avoiding irreconcilable conflict of opinion. The narrow and restricted effect given to the maxim is most frequently found in decisions concerning equitable *conversion*; and it has no other legitimate meaning than that of defining the limits within which the principle can operate in such cases.

that the other *should* do some act, and the corresponding duty, the *ought* resting upon the latter to do such act. Equity does not regard and treat as done what *might* be done, or what *could* be done, but only what *ought* to be done. Nor does the principle operate in favor of every person, no matter what may be his situation and relations, but only in favor of him who holds the equitable right to have the act performed, as against the one upon whom the duty of such performance has devolved.<sup>1</sup> Wherever between two parties, A and B, an "equity" exists with respect to a subject-matter held by one of them, B, in favor of the other, A, then as between these two a court of equity regards and treats the subject-matter and the real beneficial rights and interests of A as though the "equity" had actually been worked out, and as impressed with the character and having the nature which they then would have borne. When in this proposition it is said that an "equity" exists between the two parties, the meaning is, that some equitable obligation to do some positive act with respect to the subject-matter, arising from a cause recognized by the rules of equity jurisprudence, rests upon B, and a corresponding equitable right to have the act done by B with respects to the same subject-matter springing from the same efficient cause, is held by A. This active relation subsisting between the two parties, a court of equity, partly acting upon its fundamental principle of going beneath the mere external form and appearance of things and dealing with the real fact, the real beneficial truth, and partly for the purpose of making its remedies more complete, treats the resulting rights of A as though the obligation of B had already been performed; regards A, in fact, as clothed with the same ultimate interests in the subject-matter which he would receive and hold if B had actually fulfilled his obligation by doing the act which he ought to do. Of course this interest thus possessed by A is and must be a purely equitable one, recognized by courts of equity alone, since no legal interest in the subject-matter could become vested in A except by the complete performance of his obligation on the part of B,—his really doing the act which his duty bound him to do.

§ 366. **Is the Source of Equitable Property—Sources of Legal Property or Titles.**—All kinds of equitable property, as distinguished from legal ownership, are, with perhaps one or two particular exceptions, derived from this fruitful and most just principle. Its full operation can best be understood and appreciated from a brief comparison of the modes in which absolute property—that

<sup>1</sup> *Burgess v. Wheate*, 1 W. Black. 123, 129, 1 Eden 177, 1 Scott 316; *Daggett v. Rankin*, 31 Cal. 321, 326, per Currey. 7.

is, the perfect right of ownership, dominium—arises or is acquired at law, with the modes in which the analogous right of property arises according to the doctrines of equity. In the earliest and rudest periods of the common law absolute property could only be acquired *inter vivos* by the accurate observance of certain arbitrary, external forms, or symbolic acts and gestures.<sup>1</sup> Although with an advancing civilization these external and symbolic acts have disappeared, still, down to the present time the only absolute property or right of ownership which the law recognizes, and which courts of law protect by their legal actions and remedies, whether in land or in things personal, must arise and be acquired in certain fixed, determinate methods, which alone constitute the “titles” known to the law,—using that word in its strict and true sense as *means of acquiring* property. Without following some one of these certain modes, no legal property can be obtained or transferred as between persons in their private capacities.<sup>2</sup> The most important of these common-law methods which must be pursued in order that a legal property may be acquired in land are: A conveyance under seal whereby the seisin was transferred; a will; inheritance; marriage whereby a freehold estate for life might be vested in one of the spouses; actual disseisin with an adverse possession during the period prescribed by the statute of limitations; and under very special circumstances, accession.<sup>3</sup> The important modes of acquiring a legal property in things personal are: A true present sale or bailment where the chattel is in existence and capable of immediate manual transfer; a will; a succession in case of intestacy as regulated by the statute of distributions; marriage; adverse possession aided by the statute of limitations; occupancy; and the various acts which are included under the generic term “accession.”<sup>4</sup>

<sup>1</sup>This is true of every system of national law in its earliest, semi-barbarous, and purely customary stage. The “livery of seisin” of the Saxon and ancient common-law was identical in principle with the “mancipation” by which complete dominion could alone be transferred in the primitive Roman law,—the early *jus civile*.

<sup>2</sup>As I am speaking only of private relations, I purposely omit all mention of the public modes in which property might be acquired by the state,—escheat, forfeiture, eminent domain, and the like,—and also those semi-public methods allowed by statutes in which property is vested in certain official persons, such as assignees in bankruptcy or insolvency, and the like.

<sup>3</sup>The case of “alluvion” where the proprietor’s land *grows*, as it were.

<sup>4</sup>In all the instances where property is divested and transferred through the agency of some administrative officer,—e. g., a sheriff acting in pursuance of a judicial authority,—the final means of transfer and of acquisition is a sale in case of chattels, and a conveyance in case of land. The only real distinction between these cases and those of ordinary sales and conveyances lies in the person who as vendor or grantor makes the transfer.

Unless a person has obtained the legal property in a specific tract of land through some one of the foregoing modes, he cannot as demandant maintain a real action to recover such land, or as lessor of the plaintiff under the ancient practice, or as plaintiff under the modern, maintain an action of ejectment for the same purpose. A legal estate acquired by some legal title is indispensable. Upon the same principle, unless a person has a legal property in a specific chattel, obtained through some mode recognized by the law, he cannot as plaintiff maintain any of the proprietary actions at law for the purpose of recovering the article itself, or its value in money, or damages for an invasion of his ownership, replevin or detinue, trespass or trover. While he may have legal *rights* with respect to the thing, which courts of law will protect, and for the violation of which he may be entitled to appropriate legal remedies, his legal right of property can only arise and exist upon the occasion of certain, determinate acts or events.

§ 367. **Effect of an Executory Contract at Law.**—What is the effect at law of a contract whereby the owner agrees to sell and convey a designated tract of land, but which is not a true conveyance operating as a present transfer of the legal estate and the legal seisin? It is wholly, in every particular, executory, and produces no effect upon the respective estates and titles of the parties, and creates no interest in nor lien or charge upon the land itself. The vendor remains, *to all intents*, the owner of the land; he can convey it to a third person free from any *legal* claim or encumbrance; he can devise it in the same manner; on his death intestate, it descends to his heirs. The contract in no manner interferes with his legal right to and estate in the land, and he is simply subject to the legal duty of performing the contract, or to the legal liability of paying such damages for its non-performance as a jury may award, which are collectible from his property generally. On the other hand, the vendee acquires no interest nor property right whatever; he can maintain no proprietary nor possessory action for its recovery; his right is a mere thing in action to recover compensation in damages for a breach from the vendor, and his duty is a debt,—an obligation to pay the stipulated price; on his death both this right and this duty pass to his personal representatives, and not to his heirs. In short, the vendee obtains at law no real property nor interest in real property. The relations between the two contracting parties are wholly *personal*. No change is made until, by the execution and delivery of a deed of conveyance, the estate in the land passes to the vendee. It is unnecessary to describe the similar legal effects produced by agreements to sell chattels,

sales of articles to be acquired by the vendor in the future, and all other contracts which are executory in their nature.

§ 368. **Effect of an Executory Contract in Equity.**—The full significance of the principle that equity regards and treats as done what ought to be done throughout the whole scope of its effects upon equity jurisprudence is disclosed in the clearest light by the manner in which equity deals with executory contracts for the sale of land or chattels, which presents such a striking and complete contrast with the legal method above described. While the legal relations between the two contracting parties are wholly *personal*,—things in action,—equity views all these relations from a very different stand-point. In some respects, and for some purposes, the contract is executory in equity as well as at law; but so far as the interest or estate in the land of the two parties is concerned, it is regarded as executed, and as operating to transfer the estate from the vendor and to vest it in the vendee. By the terms of the contract the land ought to be conveyed to the vendee, and the purchase price ought to be transferred to the vendor; equity therefore regards these as done: the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as *the owner of the land*; an equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years; although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee, to whom all the beneficial interest has passed, having a lien on the land, even if in possession of the vendee, as security for any unpaid portion of the purchase-money.<sup>1</sup> The consequences of this doctrine are all followed out. As the vendee has acquired the full equitable estate,—although still wanting the confirmation of the legal title for purposes of security

<sup>1</sup> *Farrar v. Winterton*, 5 Beav. 1, 8; *Haughwout v. Murphy*, 22 N. J. Eq. 531, Sh. 198. It is a great mistake, opposed to the fundamental notions of equity, to suppose that the equity maxim does not operate, and the vendee does not become equitable owner until and as far as he has actually paid the stipulated price. This erroneous view has sometimes been suggested, and sometimes even held, in a few American decisions; but it shows a misconception of the whole equitable theory. In truth, the vendee becomes equitable owner of the land, and the vendor equitable owner of the purchase-money, at once, upon the execution and delivery of the contract, even before any portion of the price is paid. It is true that the vendee's equitable estate is encumbered or charged with a lien as security for the unpaid price, and he, therefore, may, by the enforcement of this lien upon his final default in making payment, lose his whole estate, in the same manner as a mortgagor may lose his interest by a foreclosure. But this lien of the vendor is not inconsistent with the vendee's equitable estate, any more than the equitable lien of an ordinary mortgage is inconsistent with the mortgagor's legal estate.

against third persons,—he may convey or encumber it; may devise it by will;<sup>2</sup> on his death intestate, it descends to his heirs, and not to his administrators;<sup>3</sup> in this country, his wife is entitled to dower in it;<sup>4</sup> a specific performance is, after his death, enforced by his heirs; in short, all the incidents of a real ownership belong to it. As the vendor's legal estate is held by him on a naked trust for the vendee, this trust, impressed upon the land, follows it in the hands of other persons who may succeed to his legal title,—his heirs and his grantees, who take with notice of the vendee's equitable right. In other words, the vendee's equitable estate avails against the vendor's heirs, devisees, and other voluntary assignees, and his grantees with notice; it is only when the vendor has conveyed the land to a third person who is a bona fide purchaser for value without notice that other equitable principles come into play, and cut off the vendee's equitable estate.<sup>5</sup> It follows also, as a necessary consequence, that the vendee is entitled to any improvement or increment in the value of the land after the conclusion of the contract, and must himself bear any and all accidental injuries, losses, or wrongs done to the soil by the operations of nature, or by tortious third persons not acting under the vendor.<sup>6</sup> The equitable interest of the vendor is correlative

<sup>2</sup> Daire v. Beversham, Nelson 76, 1 Ch. Ca. 39, 1 Ames Cas. Eq. Jur. 192; Buck v. Buck, 11 Paige 170, 2 Keener 337.

<sup>3</sup> Milner v. Mills, Mos. 123, 1 Ames Cas. Eq. Jur. 191; Langford v. Pitt, 2 P. Wms. 629, 2 Scott 405, 2 Keener 333; Townsend v. Champernowne, 9 Price 130, 2 Scott 410, 2 Keener 335; House v. Dexter, 9 Mich. 246, 2 Scott 414 (heir of vendee's assignee). Therefore, the vendee's heir or devisee may compel his executor or administrator to pay the unpaid purchase money out of the vendee's personalty; Milner v. Mills, supra. If the contract was valid and enforceable at the vendee's death, but was afterwards rescinded, equity will not suffer the heir to be disappointed, but will compel the administrator to pay him an amount from the personalty equivalent to the price of the land: Matthews v. Gadd, 5 South Austr. L. R. 129, 1 Ames Cas. Eq. Jur. 193; Lysaght v. Edwards, 2 Ch. D. 499, 521, 2 Keener 360; but if the contract was not valid and enforceable at the vendee's death there being then no conversion, the heir has no claim to the purchase money; Green v. Smith, 1 Atk. 572, 1 Ames Cas. Eq. Jur. 193, 1 Scott 313.

<sup>4</sup> Thompson v. Thompson, 1 Jones (N. C.) 430, 1 Ames Cas. Eq. Jur. 201 (holding that the interest of the vendee is an equitable "estate," not a mere equitable "right"); Bailey v. Duncan, 4 Monr. (Ky.) 256, 2 Keener 343, 2 Scott 417.

<sup>5</sup> In that case the vendor is accountable as a trustee to the vendee for the price received by him for the land; Taylor v. Kelly, 3 Jones Eq. (N. C.) 240, 1 Ames Eq. Jur. 215; Haughwout v. Murphy, 22 N. J. Eq. 531, Sh. 198. See, also, White v. Patterson, 139 Pa. St. 429, 21 Atl. 360.

<sup>6</sup> Loss by earthquake: Cass v. Ruddle, 2 Vern. 280, 2 Scott 488. Loss by fire: Paine v. Meller, 6 Ves. 349, 1 Ames Eq. Jur. 227, 2 Scott 450, 2 Keener 403; Marks v. Tichenor, 85 Ky. 536, 4 S. W. 225, 2 Keener 430, H. & B. 662;

with that of the vendee; his beneficial interest *in the land* is gone, and only the naked legal title remains,<sup>7</sup> which he holds in trust for the vendee,<sup>8</sup> accompanied, however, by a lien upon the land as security when any of the purchase price remains unpaid. This lien, like every other equitable lien, is not an interest *in the land*, is neither a *jus ad rem* nor a *jus in re*, but merely an encumbrance.<sup>9</sup> The vendor is regarded as owner of the purchase price, and the vendee, before actual payment, is simply a trustee of the purchase-money for him. Equity carries out this doctrine to its consequences. Although the land should remain in the possession and in the legal ownership of the vendor, yet equity, in administering his whole property and assets, looks not upon the land as land,—for that has gone to the vendee,—but looks upon the money which has taken the place of the land; that is, so far as the land is a re-

*Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582, 1 Scott 425, 2 Keener 421; but see *Goldman v. Rosenberg*, 116 N. Y. 78, 15 Am. St. Rep. 410, 22 N. E. 397, 2 Keener 431; compare actions at law where the loss fell on the vendor: *Thompson v. Gould*, 20 Pick. 134, 1 Ames Eq. Jur. 234, 2 Keener 406; *Gould v. Murch*, 70 Me. 288, 35 Am. Rep. 325, 2 Keener 426, H. & B. 661. Of course, by special stipulation the risk of loss may fall on the vendor: *Counter v. Macpherson*, 5 Moore P. C. C. 83, 2 Keener 412; *Combs v. Fisher*, 3 Bibb (Ky.) 31, 2 Scott 453; and if at the time of the loss the contract was not binding upon and enforceable against the vendee, by reason of a defect in title, etc., the vendor must bear the loss: *Phinizy v. Guernsey*, 111 Ga. 346, 78 Am. St. Rep. 207, 36 S. E. 796, H. & B. 671; *Lombard v. Chicago Sinai Cong.* 75 Ill. 271, 2 Keener 398; *Blew v. McClelland*, 29 Mo. 304, 1 Ames Eq. Jur. 237 (contract not in writing). Similarly, loss by the happening of other contingencies falls upon the vendee; as where an estate for lives is purchased, and one or all of the lives drop before conveyance, the vendee is nevertheless compelled to pay the purchase price: *White v. Nutt*, 1 P. Wms. 61, 1 Ames Eq. Jur. 226, 2 Scott 450, 2 Keener 404; *Kenney v. Wexham*, 6 Madd. 355, 2 Keener 80. Since the vendor is in most respects a trustee for the vendee, it would seem clear that insurance money paid to the vendor in case of loss by fire should be held by him in trust for the vendee; see *Phinizy v. Guernsey*, supra; *Reed v. Lukens*, 44 Pa. St. 200, 84 Am. Dec. 425, and note, 2 Scott 455; but it has been held otherwise, in England, by a divided court; *Reynolds v. Preston*, L. R. 18 Ch. D. 1, 1 Ames Eq. Jur. 229, 2 Scott 458; and see *Castellain v. Preston*, L. R. 11 Q. B. D. 380, 2 Keener 427 (vendor must refund the insurance money paid him to the insurer).

<sup>7</sup> His widow has no dower in lands which he contracted to sell before his marriage; *Dean's Heirs v. Mitchell's Heirs*, 4 J. J. Marsh (Ky.) 451, 1 Ames Eq. Jur. 204.

<sup>8</sup> It is therefore the duty of the vendor in possession to take reasonable care to preserve the property in the condition in which it existed at the time of the contract; *Foster v. Deacon*, 3 Madd. 394, 2 Keener 341; *Phillips v. Silvester*, L. R. 8 Ch. App. 173, 2 Keener 356; *Clarke v. Ramuz* (1891), 2 Q. B. 456, 1 Ames Eq. Jur. 222, 2 Keener 380, 2 Scott 424; *Bostwick v. Beach*, 105 N. Y. 661, 12 N. E. 32, H. & B. 663; compare *Carrodus v. Sharp*, 20 Beav. 56, 2 Keener 350, 2 Scott 421.

<sup>9</sup> As to the vendor's lien, see post, §§ 1260, 1261.

presentative of the vendor's property, so far as it is an element in his total assets, equity treats it as money, as though the exchange had actually been made, and the vendor had received the money and transferred the land. Although the legal title to the land would still descend to the vendor's heirs upon his death, still when the vendee afterwards completes the contract, takes a conveyance of the legal title *from the heirs*, and pays the price, the money, being all the time an element of the vendor's assets, and being, therefore, all the time a part of his personal and not of his real property, goes to his administrators or executors, to be by them administered upon with the rest of his personal assets, and does not go to the heirs.<sup>10</sup>

§ 369. **Sources of All Equitable Property.**—In the foregoing description is shown how, in one particular manner, by the operation of the fundamental principle, the equitable estate in land, the beneficial property, the real ownership, arises, although no one of the acts or events has taken place which the common law so imperatively demands as a prerequisite to the existence of ownership or property. This instance is given simply as an example. An analysis of all the different equitable estates, property, and interests analogous to property, either real or personal, known to the equity jurisprudence will disclose the fact that nearly all, if not absolutely all, arise in the same general manner, by the operation upon the particular circumstances of the same fundamental principle, and with the same general results.<sup>1</sup> Thus an assignment or conveyance of that peculiar interest in land called a "possibility" is at the common law a mere nullity, so far at least as it attempted to create or transfer any ownership. At the time when the instrument is executed there is no present, certain, vested property right

<sup>10</sup> Bubb's Case, Freem. Ch. 38, 1 Ames Eq. Jur. 194; Hoddel v. Pugh, 33 Beav. 489, 2 Scott 412; Keep v. Miller, 42 N. J. Eq. 100, 6 Atl. 495, 1 Keener 328, H. & B. 157; Mayer v. Gowland, 2 Dick. 563, 2 Scott 408, 1 Ames Eq. Jur. 195 (does not go to the devisee of the vendor); Potter v. Ellice, 48 N. Y. 321, 2 Scott 415. So, if the contract was valid at the time of the vendor's death, but subsequently became unenforceable because of the vendee's laches, equity will not suffer the vendor's next of kin to be disappointed, but the land will go to the administrator as personal assets; Currie v. Bowyer, 5 Beav. 6, note (b), 1 Ames Eq. Jur. 196; and see Lysaght v. Edwards, L. R. 2 Ch. D. 499, 518, 519, 2 Keener 360; Keep v. Miller, 42 N. J. 100, 6 Atl. 495, 2 Keener 328, H. & B. 157. Otherwise, of course, if the contract was unenforceable at the time of the vendor's death, since in that case there is no conversion; Thomas v. Howell, L. R. 34 Ch. D. 166, 1 Ames Eq. Jur. 196; Lysaght v. Edwards, 2 Ch. D. 499, 515, 2 Keener 360. As to rights of heirs and personal representatives of a vendor who has given an option to purchase, which is exercised after his death, see post, § 1163.

<sup>1</sup> Sourwine v. Supreme Lodge, 12 Ind. App. 447, 54 Am. St. Rep. 532, 40 N. E. 646, 1 Scott, 320.

in the assignor upon which its granting language can attach; and if at some future time the contingency happens, the possibility changes into a certainty, and a property right becomes vested in the assignor, the arbitrary and technical rules of the common law concerning conveyances of real estate did not allow the words of assignment to act upon this newly arisen and vested interest so as to transfer it to the assignee. The effect of such a transaction in equity is wholly different. Although when the assignment is executed there is no present certain right of property in the assignor which can be transferred, yet in the view of equity the instrument operates at least as an executory agreement on the part of the assignor, and creates a *present* obligation resting upon him with reference to the land, which obligation, though *now* contingent, may in future become absolute. If, therefore, at a subsequent time the contingency happens, and a certain present property thereupon vests in the assignor, the obligation, now become absolute, at once attaches to it. By virtue of that obligation this property or estate of the assignor *ought* to be conveyed to the assignee by an efficient legal assurance; and equity, regarding what ought to be done as done, treats the property as transferred, and the assignee as vested with the complete beneficial ownership. In this manner equity, in pursuance of the fundamental principle under discussion, gives full effect to an assignment or conveyance of a "possibility," and makes it the source of an equitable property in land. Again, a sale of a chattel not yet in existence, or not yet in the possession of the vendor, but to be acquired in future, passes no property in the thing to the buyer at law, even when it subsequently comes into the seller's ownership and possession. Such contract gives to the buyer a right of action for damages, but no property; he can maintain an action of *assumpsit*, but not *replevin*, or *trover*, or *trespass*.<sup>1</sup> But as such a contract, although using language in *praesenti*, is, in effect, an executory agreement, and creates a definite obligation upon the vendor, equity, upon the same principle and in the same manner as last above explained, regards it as an assignment; and when the thing comes into existence, or into the ownership of the seller, the real, beneficial property in it is at once transferred to and vested in the buyer, and he is the equitable owner. It is in consequence of the same principle that an assignment of a thing in action, completely nugatory at the common law as a transfer, and indeed opposed to the ancient theories of the law, is regarded in equity as clothing the assignee with all the rights of his assignor.

<sup>1</sup> I am stating of course, the general rule, and need not describe the special excepted case of things having a "potential existence," such as an expected crop, etc.

These illustrations have all been taken from express contracts. The principle also extends to cases where the legal relations arise from conveyances *inter vivos*, or wills in which one of the parties is a volunteer, and even to transactions in which the legal relations arise from no such definite cause, but are merely implied from the prior conduct of the parties. In all express active trusts to convey the corpus of the trust property directly to the *cestui que trust*, and in all express passive trusts to hold the land for the use of the *cestui que trust*, created either by deed or by will, an equity exists between the beneficiary and the trustee, an obligation rests upon the latter, and this equity is treated as worked out, the obligation as performed, and the beneficiary as clothed with an equitable estate, depending in kind, quality, and degree upon the special provisions of the instrument. Finally, in trusts arising by operation of law, implied, constructive, and resulting trusts, the equity subsisting between the *cestui que trust* and the holder of the legal title, and the obligation resting upon the latter, are treated as though worked out, by regarding the beneficiary as vested with an equitable but no less real ownership.

**§ 370. The Equitable Estates Derived from This Principle.**

**§ 371. Conversion.**—One of the most direct and evident results of the principle is the equitable property which arises from the doctrine of conversion,—when real estate is treated by equity as personal property, or personal estate as real property; land as money, or money as land,—“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, whether by will, by way of contract, marriage articles, settlement, or otherwise, or whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed; the owner of the fund or the contracting parties may make land money or money land.”<sup>1</sup> A conversion may thus take place where, by a will, a deed, or family settlement, land is actually devised or conveyed, or money or securities are actually assigned to trustees, with directions in the one case to sell the land, and pay over the proceeds to the beneficiary, and in the other to invest the fund in the purchase of the land to be then conveyed to him; or it may in like manner take place where, by marriage articles or other executory agreement, land is

<sup>1</sup> *Fletcher v. Ashburner*, 1 Brown Ch. 497, 1 Lead. Cas. Eq., 4th Am. ed., 1118, 1120, 1 Scott 606, per Sir Thomas Sewell, M. R.

covenanted to be conveyed, or money is covenanted to be assigned, in like manner and for like purposes. The effect of the conversion is a direct consequence of the principle in question. Personal estate becomes, to all intents and purposes, in the view of equity, real, and real estate personal. Money directed to be invested in land descends to the heir of the original beneficiary, or passes under a general description of real property in his will, while land directed to be converted into money goes to his personal representatives, or is included in a residuary bequest of his "personal property." These are some of the incidents of a conversion, and are sufficient at present to illustrate its nature and results.<sup>2</sup>

§ 372. **Contracts for the Purchase and Sale of Lands.**<sup>1</sup>—

§ 373. **Assignments of Possibilities; Sales of Chattels to be Acquired in the Future; Assignments of Things in Action; Equitable Assignments of Moneys; and Equitable Liens.**<sup>1</sup> . . . and from a mortgage or other transfer inoperative as such at law, or from the mere executory stipulations of an agreement, complete equitable liens upon specific lands, chattels, or funds are created.<sup>2</sup>

§ 374. **Express Trusts.**<sup>1</sup> . . . In another class of express active trusts, where by the terms of the creation the possession of the subject-matter, and the control, management, and disposition of it during the time for which the trust is to last, are given to the trustee, to be exercised by him according to his own discretion, no such equitable property passes to the cestui que trust, and his right for the time being is only a thing in action, not an estate; no obligation rests upon the trustee as a part of his fiduciary duty to make a transfer of the title to the beneficiary; the "ought" re-

<sup>2</sup> Fletcher v. Ashburner, 1 Brown Ch. 497, 1 Lead. Cas. Eq., 4th Am. ed., 1118, 1123, 1157, 1 Scott 606; Guidot v. Guidot, 3 Atk. 254, 1 Keener 949, 1 Scott 600; Craig v. Leslie, 3 Wheat. 503, 577, H. & B. 39, Sh. 66, 1 Scott 611; Tazewell v. Smith's Adm'rs, 1 Rand. 313, 320, 10 Am. Dec. 533. See, further, post, §§ 1159-1178.

<sup>1</sup> See ante, § 368.

<sup>1</sup> See ante, § 369.

<sup>2</sup> In describing equitable liens, Currey, C. J., in Daggett v. Rankin, 31 Cal. 321, 326, used the following language: "The doctrine seems to be well established that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific [equitable] lien on the property intended to be mortgaged. The maxim of equity upon which this doctrine rests is, that equity looks upon things agreed to be done as actually performed; the true meaning of which is, that equity 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." See, also post, § 1237.

<sup>1</sup> See ante, § 369.

quired by the maxim is not present, and the principle itself does not apply as long, at least, as the trust remains alive.

§ 375. **Trusts Arising by Operation of Law.** . . . 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 ought to be done.<sup>1</sup>

§ 376. **Mortgage; Equity of Redemption.**—There remains but one important equitable estate to be considered, that of the mortgagor, called his equity of redemption; and a careful analysis will show that the existence of this as a part of equity jurisprudence can be accounted for upon no principle whatever other than the one under discussion. By a mortgage in fee the legal estate is vested in the mortgagee, and upon the condition being broken, this legal estate becomes absolute. Nevertheless an equity with respect to the land exists between the two parties, a right in the mortgagor and an obligation upon the mortgagee. "Equity of redemption" is only an abbreviation of "right in equity to have a redemption." The mortgagor is clothed with this equitable right to a redemption, or in other words, this right to compel a reconveyance and redelivery of possession at any time upon payment of the debt secured and interest, while the corresponding obligation rests on the mortgagee to make the conveyance and delivery. Upon the universal principle of treating everything as done which in good conscience ought to be done, equity regards this right of the mortgagor, not as a mere thing in action, but as property, as an estate, as the real,

<sup>1</sup> See ante, § 369. The opinion of the lord chancellor, Lord St. Leonards, will apply to all such cases. A man had conveyed his land in fee by a deed which was fraudulent as against himself, so that he could have procured the deed to be set aside in equity; still the legal estate was wholly conveyed to the grantee. Afterwards the grantor devised the same land, and the question was, What interest did he have in the land, and was it devisable? See *Stump v. Gaby*, 2 De Gex, M. & G. 623, 630. Lord St. Leonards said: "What, then, is the interest of a party in an estate which he has conveyed under circumstances which would give a right in this court to have the deed set aside? In the view of this court he remains the owner, and the consequence is, that he may devise the estate, not as a legal estate, but as an equitable estate. The testator therefore had a devisable interest." Now, where, as in this case, the legal title had vested in the grantee, upon what principle was the grantor still regarded as the equitable owner, with all the incidents of the beneficial ownership? Plainly because from the fraud an equity with respect to the land existed between the grantee and the grantor, and an obligation rested upon the former to reconvey, since the grantee in good conscience ought to reconvey, equity treated the parties as though this had been done, and the grantor as holding the equitable property. Upon the same principle is based the notion of equitable property in the beneficiary in all constructive and other implied trusts.

beneficial ownership of the land, subject, however, to the lien created by the mortgage as a security to the mortgagee for the payment of his demand. The mortgagor's equitable property is, in this respect, exactly analogous to the equitable estate of a vendee subject to a lien in favor of the vendor as security for payment of the purchase price.

§ 377. **Conclusions.**—In the foregoing discussion I have shown, in the most conclusive manner, that every species of purely equitable property, and of equitable interests analogous to property, except those which are intentionally created by the direct and affirmative operation of some instrument similar in its action to a conveyance at law,<sup>1</sup> is a certain and necessary result of the principle, that equity treats that as done which in good conscience ought to be done. It is no exaggeration, therefore, to say that the principle lies at the very foundation of the department of equity jurisprudence which deals with equitable estates, property, and interests analogous to property.

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## SECTION II.

### EQUITY LOOKS TO THE INTENT RATHER THAN TO THE FORM.

#### ANALYSIS.

- § 378. Its meaning and effect.
- § 379. Legal requirements of mere form.
- §§ 380–384. Is the source of equitable doctrines.
- § 380. Of equitable property.
- § 381. Of penalties and forfeitures.
- § 382. Of mortgages.
- § 383. Effect of the seal.
- § 384. Other special instances.

§ 378. **Its Meaning and Effect.**—The principle involved in this maxim, which is one of great practical importance, pervades and affects to a greater or less degree the entire system of equity jurisprudence, and is inseparably connected with that which forms the subject of the preceding section. In fact, *it is only by looking at the intent rather than at the form, that equity is able to treat that as done which in good conscience ought to be done.* In explaining the meaning and operation of the one maxim, and the effects produced by it, I have necessarily described the significance and workings of the other. The two principles act together and aid each other, and it

<sup>1</sup>The lien held by the mortgagee, created by the affirmative operation of the mortgage, and some other equitable liens, are examples of this class.

is by their universality and truth that much of equity jurisprudence which is peculiar and distinctive, in contrast with the law, has been developed. Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the *real* relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction. This principle of looking after the intent and giving it effect was fully recognized and distinctly formulated at an early day. In one leading case Lord Chancellor Macclesfield said: "The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court gives the party all that he expects or desired."<sup>1</sup> In another case Lord Thurlow said: "The rule is, that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of that object is considered as the principal intent of the deed, and the penalty only as occasional."<sup>2</sup> It is true that in both of these cases the court was dealing with penalties; but the principle stated in them is of universal application, that equity always seeks for the real intent under the cover of whatever forms and appearances, and will give effect to such intent unless prevented by some positive and mandatory rule of the law.

§ 379. **Legal Requirements of Form.**—The ancient common law paid great deference to matters of pure form, as, for example, in the symbolical process called "livery of seisin," by which alone a freehold estate in land could be transferred. Although such observances have long been abandoned, still the present rules of the law permit property in land or chattels to be created, transferred, or acquired only in certain defined modes, by means of the certain specified acts or events which constitute all the possible legal titles.<sup>1</sup> It was also one characteristic feature of the ancient law that it held contracting parties to a most rigid observance of all the stipulations of their valid agreements; performance to the very letter of every covenant or promise was the inflexible rule.<sup>2</sup> Still another

<sup>1</sup> *Peachy v. Duke of Somerset*, 1 Strange, 447, Prec. Ch. 568, 2 Eq. Cas. Abr. 227, 228.

<sup>2</sup> *Sloman v. Walter*, 1 Brown Ch. 418. And see 2 Lead. Cas. Eq. 4th Am. ed., 2014, 2022, and notes.

<sup>1</sup> See an enumeration of these modes, ante, § 366.

<sup>2</sup> For example, if A borrowed one hundred pounds to be repaid in six months, and as security gave his creditor a conditional conveyance in fee of an estate worth one hundred thousand pounds, to become void if the money was paid on the specified day, and in default of such payment to be absolute, and for any reason the debtor suffered the pay day to pass without performance, the ancient law would no more relieve the debtor from the onerous provisions of his con-

purely formal element of the law consisted in the extreme importance which it attached to the seal. The momentous and often most arbitrary results which flowed from the presence or absence of a seal, and its effect upon private rights of property and of contract, rendered many of the rules of the early law peculiarly rigid and almost barbarous. The equity jurisprudence, in all these respects, differed widely from the common law; from the very beginning it was distinguished by an entire absence of these arbitrary and purely formal incidents. That they have now, in a great degree, disappeared from the law itself, which has in consequence become more enlightened and more just, is wholly due to its gradual adoption of equitable principles, to its acceptance of doctrines originating in the court of chancery.<sup>3</sup>

§ 380. **Is the Source of Equitable Doctrines—Of Property.**—I shall now state, by way of illustration, some of the most important instances in which the principle has been applied, and the settled doctrines of equity jurisprudence which are its immediate results. The first, and by far the most important consequence of the principle, reaching through a large part of the equity jurisprudence, is found in every species of equitable property, estate, or interest, and of equitable lien, so far as these exist by the doctrines of equity, but not by those of the law. While, as is shown in the last section, all these purely equitable property interests and liens arise from the direct operation of the grand principle, equity treats that as done which in good conscience ought to be done, still this maxim could only produce such effects in consequence of the other principle, that equity looks at the intent rather than at the form.<sup>1</sup> In every kind of equitable property, or interest analogous to property, conveyance, or modify their rigor, than it would discharge him from his obligation to pay the debt of one hundred pounds; both would be regarded as standing upon exactly the same foundation of express contract.

<sup>3</sup> Pom. Eq. Jur. § 70. "In most of the states all distinction between sealed and unsealed instruments is abolished, except so far as the statute of limitations operates to bar a right of action; in others, the only effect of the seal upon executory contracts is to raise a prima facie presumption of a consideration, while it is still required on a conveyance of land; in a very few, the common-law rule is retained, which makes the seal conclusive evidence of a consideration. By this legislation, all the distinction between the legal and the equitable doctrines concerning contracts and other rights, except those growing out of a conveyance of land, founded upon the presence or absence of the seal, has been abrogated. The equitable doctrines, of course, remain, but they have become a part of the law, and no necessity remains of applying to courts of equity for their enforcement. Even the equitable rule permitting a sealed agreement to be modified or replaced by subsequent parol contract is generally adopted by the law courts, except in cases where the statute of frauds prevents its operation."

<sup>1</sup> Clarke v. Clarke, 46 S. C. 230, 57 Am. St. Rep. 675.

the external acts or events peremptorily required by the law in order to the existence of any property are wholly wanting; so that if the external form of the transaction had been regarded, no property, nor right resembling property, could possibly exist. It is by disregarding these forms and looking at the real relations involved in the acts of the parties, at the real substance and intent of the transaction, that the court of chancery has built up its magnificent structure of equitable property, estates, and proprietary interests. The same is true of a large part of equitable liens. The external form is either an assignment, which at the law is wholly nugatory, or an executory agreement, which at law only creates a mere personal right of action,—at most a claim for damages; but equity, going below this mere appearance, and seeing the real intent, gives effect thereto by treating the assignment or agreement as creating a definite lien upon specific lands, or chattels, or securities, or other kind of fund, as the case may be.<sup>1</sup> The discussions of the last preceding section fully illustrate and demonstrate the correctness of this conclusion.

§ 381. **Penalties and Forfeitures.**<sup>1</sup>— . . .

§ 382. **Mortgages.**—Another most remarkable application of the principle, from which arose an entire department of equity jurisprudence, was the equity of redemption,—the equitable right and estate of the mortgagor, after the legal title of the mortgagee had become absolute by a non-performance of the condition. Looking at the real intent of the parties, and considering the debt as the substantial feature, and the conveyance as a security, only, for its payment, the court of chancery declared that a breach of the condition was in the nature of a penalty which ought to be relieved against, and that the mortgagee had an equity to redeem on payment of the debt and interest, notwithstanding the forfeiture at law; and furthermore, that this right of redemption could not be

<sup>1</sup> An instrument purporting to be a mortgage of law, but imperfectly executed by the omission of the seal, or in some other manner, so as to be defective in form, is wholly nugatory at law as a valid mortgage, or as giving any interest in or claim upon the parcel of land described. Equity, however, not saying that the instrument is a true legal mortgage, declares that it is an efficient agreement to give a mortgage, and, as such, that it creates an equitable lien upon the land, valid for all purposes, and as against all parties, except a purchaser of the land for a valuable consideration and without notice: See *Love v. Sierra Nevada, etc., Co.*, 32 Cal. 639, 653, 654, 91 Am. Dec. 602, and cases cited, and post, § 1237.

A deed defective in form will generally be treated in equity as a contract to convey, specific performance of which will be decreed when that remedy is not inequitable. See *Sparks v. Woodstock Iron, etc., Co.*, 87 Ala. 294, 6 South. 195 (defective attestation).

<sup>1</sup> See post, §§ 433, 450, 456.

given up, waived, or parted with by any stipulation or covenant in the deed.<sup>1</sup> The whole system of equity jurisprudence presents no finer example of the triumph of equitable principles over the arbitrary and unjust dogmas of the common law than this.

§ 383. **Effect of the Seal.**—The important part played by the seal in the early common law, and the intensely technical and arbitrary effects produced by it according to the legal rules, are too well known to require any statement. Equity has applied its principle of looking at the intent rather than at the form, in some instances, by treating the presence of a seal as a matter of no consequence, as producing no effect upon rights and duties of parties; in other instances, by disregarding its absence where such absence would be fatal at the law. Although the common law, *in theory*, required a valuable consideration in order to render any agreement valid and binding, yet it declared that a seal was conclusive evidence of such a consideration, and under no circumstances would it permit this arbitrary effect to be removed by evidence showing, no matter how clearly, the absence of any consideration. Equity, disregarding such form and looking at the reality, always requires an actual consideration, and permits the want of it to be shown, notwithstanding the seal, and applies this doctrine to covenants, settlements, and executory agreements of every description.<sup>1</sup> Another application of the principle is still more striking and just. The early common law attributed such an efficacy to the seal that a written obligation under seal could only be discharged by an instrument of the same high character,—that is, by a writing under seal. A subsequent written but not sealed agreement, revoking or modifying the terms of the prior specialty, or a parol accord, or even payment in full unaccompanied by technical release, or any other matter in pais could not alter the rights and liabilities arising from the sealed instrument; it could still be enforced against the obligor by an action at law, and such acts furnished him no legal defense whatever. Such a doctrine was abhorrent to the spirit of equity. Paying no attention to the form of the transaction, if the act done was, in substance, a discharge, the court of equity treated it as equivalent in its effects to a technical release, and would relieve the obligor in any manner required by the circumstances of the case, even by a decree for a delivery up or cancellation of the sealed

<sup>1</sup> Howard v. Harris, 1 Vern. 190, 2 Lead. Cas. Eq., 4th Am. ed., 1945, 1949, 1983, Sh. 57; Casborne v. Scarfe, 1 Atk. 603, Sh. 213, 1 Scott 33.

<sup>1</sup> Jefferys v. Jefferys, Craig & P. 138, 141, 1 Ames Eq. Jur. 261, 2 Keener 760, 1 Scott, 303, 2 Scott 154; Minturn v. Seymour, 4 Johns. Ch. 497, 1 Scott 302; Selby v. Case, 87 Md. 459, 39 Atl. 1041.

undertaking.<sup>2</sup> One most important consequence of this principle is seen in the legal and equitable liabilities of sureties. Where the surety's contract is under seal, he is not, by the strict common-law rules, discharged by any conduct of the creditor towards the principal debtor, by an alteration of the principal debtor's undertaking, or by an agreement with the principal debtor extending his time of payment, since the surety's liability could only be discharged by an instrument under seal.<sup>3</sup> Equity was therefore compelled to interfere under these circumstances, and relieve the surety by restraining the creditor from suing at law, and compelling him to surrender and cancel the guaranty.<sup>4</sup> There are other instances of the disregard shown by equity to the presence or absence of a seal in determining the rights of parties. If, for an example, an instrument, from its imperfect execution in wanting a seal, is inoperative at law as a conveyance or as a mortgage of land, equity may treat it as an agreement to convey or to give a mortgage, and as therefore creating an equitable interest in or lien upon the land.<sup>5</sup>

**§ 384. Other Special Instances.**<sup>1</sup>— . . .

<sup>2</sup> Of course the discharge must be upon a valuable consideration in order that equity might enforce it: *McCreey v. Day*, 119 N. Y. 1, 23 N. E. 198, 16 Am. St. Rep. 793, 6 L. R. A. 506. The early common law was so monstrous in its adherence to this rule, that if the debtor on a bond or other specialty had paid the demand in full, and had even taken a written receipt therefor, but had failed to procure a surrender up of the instrument or a release of his liability, the creditor might still sue at law and recover the full amount again, and the law gave no redress or defense. One of the first steps by which equity broke in upon the rigor of the law was the remedy which it gave to the obligor under these circumstances, as stated in the text. It is a fact that the common-law lawyers vehemently inveighed against the court of chancery for this alleged invasion of legal rules. The equitable doctrine long ago became a part of the law, but it should not be forgotten that it originated in the court of chancery.

<sup>3</sup> In most of our states, if not indeed in all, this particular rule of the common law does not prevail.

<sup>4</sup> *Rees v. Berrington*, 2 Ves. 540, 2 Lead. Cas. Eq., 4th Am. ed., 1867, 1870, 1896.

<sup>5</sup> *Frost v. Wolf*, 77 Tex. 455, 19 Am. St. Rep. 761, 14 S. W. 440; *Allis v. Jones*, 45 Fed. 148.

<sup>1</sup> One of the most striking applications of this maxim is the doctrine relating to Merger; see post, § 786.

## SECTION III.

## HE WHO SEEKS EQUITY MUST DO EQUITY.

## ANALYSIS.

- § 385. General meaning of the principle.
- §§ 386, 387. In what cases applicable.
- § 388. Is a general rule regulating the administration of reliefs.
- §§ 389-393. Illustrations of the principle.
  - § 389. The wife's equity.
  - § 390. Equitable estoppel.
  - § 391. Relief against usury.
- §§ 392, 393. Other special instances.
- §§ 394-396. Is also the source of certain equitable doctrines.
  - § 395. Of election.
  - § 396. Of marshaling securities.

§ 385. **Its Meaning.**—This maxim expresses the governing principle that every action of a court of equity, in determining rights and awarding remedies, must be in accordance with conscience and good faith. In its broadest sense it may be regarded as the foundation of all equity, as the source of every doctrine and rule of equity jurisprudence; since it is undeniable that courts of equity do not recognize and protect the equitable rights of litigant parties, unless such rights are, in pursuance of the settled juridical notions of morality, based upon conscience and good faith. But as a practical principle, guiding the equity courts in their administration of justice, the maxim is only used in a much narrower and more special meaning. Even in this narrow signification it is a principle of most extensive application; it may be applied, in fact, in every kind of litigation and to every species of remedy. The meaning is, that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject-matter of the controversy.<sup>1</sup> It says, in effect, that the court will give the plaintiff the relief to which he is entitled, only upon condition that he has given, or consents to give, the defendant such corresponding rights as *he*

<sup>1</sup> *Charleston & W. C. R'y Co. v. Hughes*, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972; *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 282.

also may be entitled to in respect of the subject-matter of the suit.<sup>2</sup> This meaning of the principle was more definitely expressed by an eminent judge in the following terms: "The court of equity refuses its aid to give to the plaintiff what the law would give him if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the court considers he ought to comply with, although the subject of the condition should be one which the court would not otherwise enforce." In this narrow and particular sense the principle becomes a universal rule governing the courts of equity in administering all kinds of equitable relief, in any controversy where its application may be necessary to work out complete justice.<sup>3</sup>

§ 386. **When Applicable.**—If we analyze this general formula, we shall obtain a more accurate notion of the real scope and effect of the principle. In the first place, the rule only applies where a party is appealing as *actor* to a court of equity in order to obtain some equitable relief; that is, either some relief equitable in its essential nature, as an injunction or a cancellation, or equitable because it may come within the power of the court to administer by virtue of its concurrent jurisdiction, as an accounting, or a pecuniary recovery; and it is necessarily assumed that the party would, but for the operation of the rule, be entitled to all the relief which he demands.<sup>1</sup> Unless the party were otherwise so entitled, there would plainly be no occasion for invoking the rule. With respect to the terms which may be imposed upon the party as a condition to his obtaining the relief in accordance with the rule,—that is, the "equity" which he must do,—it is undoubtedly true, as said by Vice-Chancellor Wigram, that the court obtains no authority from this principle to impose any arbitrary conditions not warranted by the settled doctrines of equity jurisprudence; the court cannot deprive a plaintiff of his full equitable rights, under the pretense of awarding to the defendant something to which *he* has no equitable right, something which equity jurisprudence does not recognize. The principle only requires the plaintiff to do "equity." According to its true meaning, therefore, the terms imposed upon the plaintiff, as the condition of his obtaining the relief, must consist of the awarding or securing to the defendant something to which he is justly entitled by the principles

<sup>2</sup> *Charleston & W. C. R'y Co. v. Hughes*, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972; *Mack v. Hill*, 28 Mont. 99, 72 Pac. 307.

<sup>3</sup> *Hanson v. Keating*, 4 Hare, 1, 4, 1 Scott, 274, per Wigram, *V. C.*; *Sturgis v. Champneys*, 5 Mylne & C. 97, 101, per Lord Cottenham; *Otis v. Gregory*, 111 Ind. 504, 13 N. E. 39.

<sup>1</sup> *Otis v. Gregory*, 111 Ind. 504, 13 N. E. 39.

and doctrines of equity, although not perhaps by those of the common law,—something over which he has a distinctively equitable right. In many cases, this right or relief thus secured to or obtained by the defendant, under the operation of the rule, might be recovered by him, if he as plaintiff, the parties being reversed, had instituted a suit in equity for that purpose. But this is not indispensable, nor is it even always possible. The rule may apply, and under its operation an equitable right may be secured or an equitable relief awarded to the defendant which could not be obtained by him in any other manner,—that is, which a court of equity, in conformity with its settled methods, either would not, or even *could* not, have secured or conferred or awarded by its decree in a suit brought for that purpose by him as the plaintiff.<sup>2</sup>

§ 387. Finally, the principle will not apply so as to compel the plaintiff to do equity, where the relief sought by the plaintiff, and the equitable right or relief secured or awarded to the defendant, belong to or grow out of two entirely separate and distinct matters. The true meaning of the rule in this respect is, that the

<sup>2</sup> De Walsh v. Braman, 160 Ill. 415, 43 N. E. 597; Farmers' Loan & T. Co. v. Denver, L. & G. R. Co., 126 Fed. 46, 51. One or two simple examples will illustrate. One of the most familiar applications of the rule is the "wife's equity," so called, the securing to her a portion of her own property, to which her husband becomes legally entitled by the marriage; whenever her husband or his assignee comes into a court of equity and seeks its aid to reach her property, the court may, under certain circumstances, compel the plaintiff, as a condition of his obtaining relief, to secure a portion of the property to the separate use of the wife by a settlement, although at law she has no right over it. This is sometimes done in a case where the wife herself could, by means of her own suit, have obtained the same relief; but it may also be done where, under the settled doctrines of equity, no such suit could be maintained by the wife. Under statutes against usury, which make void all usurious debts and obligations, the debtor may maintain a suit in equity for the purpose of procuring the usurious bond or other security to be surrendered up and canceled; but this relief will only be granted upon the condition that the plaintiff does equity by repaying to his creditor the amount which was actually loaned upon the security. In this instance, by the operation of the principle, the defendant obtains a relief which he could not possibly have obtained in any other manner; for if he had sued the debtor either at law or in equity to enforce the security and recover the debt, the defense of usury would be a complete bar. Again, in many of the states a tax-payer may maintain a suit in equity and restrain the collecting officer from enforcing payment of illegal taxes; but the relief of injunction will not be granted unless the plaintiff pays in full all that part of the tax assessed against him which is legal. Here also the defendant obtains a relief, under the operation of the principle, which he could obtain from the court of equity in no other manner; for the court would not sustain a suit in equity brought by the collecting officer to enforce payment of the tax; his only affirmative remedy would be either at law or by special statutory proceedings.

equitable right or relief secured to or conferred upon the defendant must be something connected with the subject-matter of the very suit or controversy for the proper decision of which the principle is invoked. Or, to state the same doctrine in more detailed and particular terms, "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."<sup>1</sup> If the conduct of the plaintiff, growing out of matters entirely distinct and unconnected with those embraced within the suit, can affect his right to obtain relief which would be otherwise proper, it must be by virtue of another equitable maxim, He who comes into a court of equity must come with clean hands.

**§ 388. Is a General Rule Regulating Equitable Reliefs.**—With this explanation of its scope and meaning, it may be regarded as a universal rule governing the court of equity in the administration of its remedies, that whatever may be the nature of the relief sought by the plaintiff, the equitable rights of the defendant, growing out of or intimately connected with the subject of the controversy in question, will be protected; and for this purpose the plaintiff will be required, as a condition to his obtaining the relief which he asks, to acknowledge, admit, provide for, secure, or allow whatever equitable rights (if any) the defendant may have, and to that end the court will, by its affirmative decree, award to the defendant whatever reliefs may be necessary in order to protect and enforce those rights. This principle is not confined to any particular kind of equitable rights and remedies, but pervades the entire equity jurisprudence, so far as it is concerned with the administration of equitable remedies.<sup>1</sup>

**§ 389. Illustrations: The Wife's Equity.**<sup>1</sup>— . . .

**§ 390. Equitable Estoppel.**<sup>1</sup>—

**§ 391. Usury.**—Another remarkable application of the principle is seen in the action of the courts towards parties seeking its aid under the statutes against usury. Wherever the statutes have made

<sup>1</sup> Comstock v. Johnson, 46 N. Y. 615, H. & B. 26, Sh. 108; City of Chicago v. Union Stock Yards & Transit Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281; Bethea v. Bethea, 116 Ala. 265, 22 South. 561.

<sup>1</sup> Shuttleworth v. Laycock, 1 Vern. 244, 1 Scott, 264; Peacock v. Evans, 16 Ves. 512; Fanning v. Dunham, 5 Johns. Ch. 122, 9 Am. Dec. 283, 1 Scott, 271; Price v. Stratton (Fla.) 33 South. 644.

<sup>1</sup> See post, § 1114.

<sup>1</sup> See post, §§ 818, 1241.

usurious loans and obligations absolutely void, if a borrower brings a suit in equity for the purpose of having a usurious bond or other security surrendered up and canceled, the relief will be granted only upon condition that the plaintiff himself does equity by repaying to his creditor what is justly and in good faith due, that is, the amount actually advanced, with lawful interest; unless, indeed, the statute has gone so far as to expressly prohibit the court from imposing such terms as the price of its relief.<sup>1</sup> The same principle has been applied to a lender seeking the aid of the court to reform a security tainted with usury.<sup>2</sup> The case is entirely different, and another maxim governs its decision, when the lender sues in a court of equity to enforce a usurious obligation. The borrower may set up the defense and defeat the suit without repaying any amount.<sup>3</sup> The rule extends to all cases where a party seeks to have a contract set aside and canceled on the ground of its illegality in violating the provisions of some statute; the court will require him, as a condition to its granting the relief, to pay what is really due on the agreement, unless the illegality is a *malum in se*, or the statute itself prevents the imposition of such terms.<sup>4</sup>

§ 392. **Other Special Instances.**—It is also an application of the principle, that where there has been some misdescription of the property on the part of the vendor, a court of equity will not decree a specific performance of the contract at his suit, except upon the terms that he makes proper compensation for the injury which the defendant has sustained from the misdescription. Indeed, it is also by virtue of the rule, that the decree is made in all suits for specific performance of contracts, the plaintiff, whether purchaser or vendor, being compelled to perform his part of the agreement as a condition to his obtaining relief against the defendant.<sup>1</sup> The same is true with respect to the relief granted in suits for redemption brought either by a mortgagor or by a subsequent encumbrancer.<sup>2</sup> . . .

<sup>1</sup> *Fanning v. Dunham*, 5 Johns. Ch. 122, 142, 143, 144, 9 Am. Dec. 283, 1 Scott 648; *American Freehold L. & M. Co. v. Sewell*, 92 Ala. 163, 9 South. 143, 13 L. R. A. 299. See *Missouri K. & T. Co. v. Krumseig* 172 U. S. 359, 19 Sup. Ct. 182; S. C. 77 Fed. 32, 23 C. C. A. 1.

<sup>2</sup> *Corby v. Bean*, 44 Mo. 379.

<sup>3</sup> The maxim, *He who comes into a court of equity must come with clean hands*, applies to the plaintiff in this case: *Union Bank v. Bell*, 14 Ohio St. 200.

<sup>4</sup> *Dean v. Robertson*, 64 Miss. 195, 1 South. 159; *New England M. S. Co. v. Powell*, 97 Ala. 483, 12 South. 55. See, also, post, § 937.

<sup>1</sup> *Hanson v. Keating*, 4 Hare, 1, 4, 5, 1 Scott 274, per *Wigram, V. C.*

<sup>2</sup> *Levi v. Blackwell*, 35 S. C. 511, 15 S. E. 243; *Mack v. Hill*, 28 Mont. 99, 72 Pac. 307.

§ 393. . . . In states where a court of equity exercises a jurisdiction to set aside or to restrain the collection of illegal assessments or taxes, the relief will not be granted unless the plaintiff pays such portion of the tax or assessment as is lawful and justly due.<sup>1</sup> . . . Some further illustrations may be found in the footnote.<sup>2</sup>

§ 394. **Is the Source of Certain Equitable Doctrines.**—Thus far I have discussed the principle in the view taken of it by the great majority of judicial opinions, namely, as a universal rule guiding the court of equity in its administration of every kind of relief, and to be applied in practice according to the circumstances of the particular case before the court for decision. In this aspect of the principle it is not regarded as the source of any special doctrine of the equity jurisprudence, nor as the foundation of any special equitable interest or primary right. There is, however, another phase of the principle; it may be looked upon in another light. It is not wholly a rule for the guidance of the equity judge in measuring out and apportioning reliefs among litigants. It has exercised a molding influence in the development of important branches of the equity jurisprudence; certain doctrines are plainly derived from it as their chief, though not perhaps their only, source. The full scope and effect of such doctrines can only be understood by a clear perception of the relations which connect them with their common origin. I shall therefore conclude the discussion of the present section by a brief mention of the doctrines which are thus, as it seems to me, directly referable to the principle that he who seeks equity must do equity.

§ 395. **Of Election.**<sup>1</sup>— . . .

<sup>1</sup> See *Peoples' Nat. Bank v. Marye*, 191 U. S. 272, 24 Sup. Ct. 68; but see *Boals v. Bachman*, 201 Ill. 340, 66 N. E. 336.

<sup>2</sup> Setting aside invalid tax deed of plaintiff's land, only on condition that he refund all the taxes which had been advanced or paid by the party to whom the deed was given; *Alexander v. Merrick*, 121 Ill. 606, 13 N. E. 190. A mortgagor who seeks to cancel a mortgage on his homestead as a cloud on his title, on the general ground of defects in its execution and acknowledgment, must offer to do equity by refunding the mortgage money with lawful interest; *Grider v. American F. L. & M. Co.*, 99 Ala. 281, 12 South. 775, 42 Am. St. Rep. 58. A widow suing for dower must account for the use, rent and profits of the land which she has occupied in excess of her third: *McLaughlin v. McLaughlin*, 20 N. J. Eq. 190. That the maxim applies to an intervenor in the suit, see *Charleston & W. C. R. Co. v. Hughes*, 105 Ga. 1, 70 Am. St. Rep. 12, 30 S. E. 972.

For the important application of the maxim to parties seeking rescission or cancellation of transactions on the ground of fraud, mistake, etc., and the equitable theory of restoring all the parties to their original position, see § 910. For its application to the cancellation of deeds, etc., of insane persons, see § 946. For its application in behalf of persons holding under defective title who in good faith have made improvements, see § 1241, note.

§ 396. **Of Marshaling.**—The second doctrine which I shall notice is that known as the *marshaling of securities*.—“If a person who has two real estates mortgages both to one person, and afterwards only one estate to a second mortgagee, the court, in order to relieve the second mortgagee, has directed the first to take his satisfaction out of that estate only which is not in mortgage of the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgage.”<sup>1</sup> The same rule applies wherever one has any lien or security on two funds, and another has a subsequent lien on only one of them.<sup>2</sup> This doctrine is plainly referable to the principle. The holder of the security on two funds is compelled to shape his own remedy, so as to preserve, if possible, the equity of the one whose lien extends to but one fund.<sup>3</sup> In fact, the whole theory with respect to the marshaling of assets seems to be derived, in part at least, from the same source. A few other doctrines might, I think, be specified as thus related by a common descent; but enough has already been said to show the great importance of the principle. He who seeks equity must do equity, both as a practical rule governing the administration of remedies, and as the germ of equitable doctrines.

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## SECTION IV.

### HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS.

#### ANALYSIS.

- § 397. General meaning of this principle.
- § 398. Is based upon conscience and good faith.
- § 399. Limitations upon it.
- §§ 400–403. Illustrations of its application.
  - § 400. In specific performance.
  - § 401. In cases of fraud.
  - § 402. In cases of illegality.
  - § 403. Limitations in cases of fraud and illegality; parties not in *pari delicto*.
- § 404. Conclusion.

§ 397. **Its General Meaning.**—This maxim is sometimes expressed

<sup>1</sup> See post, § 465.

<sup>2</sup> *Lanoy v. Duke of Athol*, 2 Atk. 446, 1 Scott, 374, per Lord Hardwicke; *Dorr v. Shaw*, 4 Johns. Ch. 17; *Kendall v. New England Co.*, 13 Conn. 384.

<sup>3</sup> *Wyman v. Ft. Dearborn Nat. Bank*, 54 N. E. 946, 181 Ill. 279, H. & B.

<sup>4</sup> *Boone v. Clarke*, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; *Breed v. National Bank of Auburn*, 68 N. Y. Suppl. 68, 57 App. Div. 468, affirmed, 171 N. Y. 648, 63 N. E. 1115.

in the form, **He that hath committed iniquity shall not have equity.** Like the one described in the preceding section, it is not, in its ordinary operation and effect, the foundation and source of any equitable estate or interest, nor of any distinctive doctrine of the equity jurisprudence; it is rather a universal rule guiding and regulating the action of equity courts in their interposition on behalf of suitors for any and every purpose, and in their administration of any and every species of relief. Resembling the former maxim in this respect, it differs from that principle in some most important and essential features. In applying the maxim, **He who seeks equity must do equity**, as a general rule regulating the action of courts, it is necessarily assumed that different equitable rights have arisen from the same subject-matter or transaction, some in favor of the plaintiff and some of the defendant; and the maxim requires that the court should, as the price or condition of its enforcing the plaintiff's equity and conferring a remedy upon him, compel him to recognize, admit, and provide for the corresponding equity of the defendant, and award to *him* also the proper relief. The maxim does not assume that the plaintiff *has done* anything unconscientious or inequitable; much less does it refuse to him all relief; on the contrary, it grants to him the remedy to which he is entitled, but upon condition that the defendant's equitable rights are protected by means of the remedy to which *he* is entitled. On the other hand, the maxim now under consideration, **He who comes into equity must come with clean hands**, is much more efficient and restrictive in its operation. It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him *all* recognition and relief with reference to the subject-matter or transaction in question. 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 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.<sup>1</sup>

§ 398. **Is based upon Conscience and Good Faith.**—The principle involved in this maxim is merely the expression of one of the elementary and fundamental conceptions of equity jurisprudence. We have seen that in the origin of the jurisdiction the theory was adopted that a court of equity interposes only to en-

<sup>1</sup> *Lewis v. Holdrege*, 56 Neb. 379, 76 N. W. 890; *Michigan Pipe Co. v. Fremont Ditch, etc., Co.*, 111 Fed. 284, 49 C. C. A. 324.

force the requirements of conscience and good faith with respect to matters lying outside of, or sometimes perhaps opposed to, the law. The action of the court was, in pursuance of this theory, in a certain sense discretionary; and the terms "discretionary" and "discretion" are still occasionally used by modern equity judges while speaking of their jurisdiction and remedial functions. Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days, that while the court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of the law, or even in contradiction to those rules, while it could act *upon the conscience* of a defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies. This fundamental principle is expressed in the maxim, He who comes into a court of equity must come with clean hands; and although not the source of any distinctive doctrines, it furnishes a most important and even universal rule affecting the entire administration of equity jurisprudence as a system of remedies and remedial rights.<sup>1</sup>

§ 399. **Its Limitations.**—Broad as the principle is in its operation, it must still be taken with reasonable limitations; it does not apply to every unconscientious act or inequitable conduct on the part of plaintiff. The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern. When a court of equity is appealed to for relief it will not

<sup>1</sup> Bleakley's Appeal, 66 Pa. St. 187, H. & B. 31, Sh. 111; Michigan Pipe Co. v. Fremont Ditch, etc., Co., 111 Fed. 284, 49 C. C. A. 324.

go outside of the subject-matter of the controversy, and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands.<sup>1</sup>

§ 400. **Illustrations—Specific Performance.**—I shall now give some examples to illustrate the circumstances under which this principle operates in the administration of equitable relief, and the manner in which it is applied. The first instance which I shall mention is found in the familiar doctrine which controls the equitable remedy of the specific performance of contracts. A contract may be perfectly valid and binding at law; it may be of a class which brings it within the equitable jurisdiction, because the legal remedy is inadequate; but if the plaintiff's conduct in obtaining it, or in acting under it, has been unconscientious, inequitable, or characterized by bad faith, a court of equity will refuse him the remedy of a specific performance, and will leave him to his legal remedy by action for damages. It is sometimes said that the remedy of specific performance rests with the *discretion* of the court; but, rightly viewed, this discretion consists mainly in applying to the plaintiff the principle, He who comes into a court of equity must come with clean hands, although the remedy, under certain circumstances, is regulated by the principle, He who seeks equity must do equity. The doctrine, thus applied, means that the party asking the aid of the court must stand in conscientious relations towards his adversary; that the transaction from which his claim arises must be fair and just, and that the relief itself must not be harsh and oppressive upon the defendant. By virtue of this principle, a specific performance will always be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, by taking undue advantage of his position, or by any other means which are unconscientious; and when the contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature; and when the specific enforcement would be oppressive upon the defendant, or would prevent the enjoyment of his own rights, or would in any other manner work injustice.<sup>1</sup> This application

<sup>1</sup> Lewis's Appeal, 67 Pa. St. 166; City of Chicago v. Union Stock Yards & Transit Co., 164 Ill. 224, 45 N. E. 43, 35 L. R. A. 281; Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547.

<sup>1</sup> Willard v. Tayloe, 8 Wall. 557, 565, 1 Ames Eq. Jur. 404, 2 Keener, 1026, Sh. 112, 2 Scott 33, per Field, J.; Marble Co. v. Ripley, 10 Wall. 339, 356, 357, Sh. 251; Michigan Pipe Co. v. Fremont Ditch, etc., Co., 111 Fed. 284, 49 C. C. A. 324; Fish v. Leser, 69 Ill. 394, H. & B. 650; Stone v. Pratt, 25 Ill. 25, H. & B. 652, 2 Scott 293. See post, § 1405, notes.

of the principle, better perhaps than any other, illustrates its full meaning and effect; for it is assumed that the contract is not illegal; that no defense could be set up against it at law; and even that it possesses no features or incidents which could authorize a court of equity to set it aside and cancel it. Specific performance is refused simply because the plaintiff does not come into court with clean hands.

§ 401. **Fraud.**—Another familiar illustration of the principle may be found in all cases where the plaintiff's claim is affected by his own fraud. Whatever be the nature of the plaintiff's claim and of the relief which he seeks, if his claim grows out of or depends upon, or is inseparably connected with, his own prior fraud, a court of equity will, in general, deny him any relief, and will leave him to whatever remedies and defenses at law he may have.<sup>1</sup> The maxim is more frequently invoked in cases upon fraudulent contracts. If a contract has been entered into through fraud, or to accomplish any fraudulent purpose, a court of equity will not, at the suit of one of the fraudulent parties,—a *particeps doli*,—while the agreement is still executory, either compel its execution or decree its cancellation, nor after it has been executed, set it aside, and thus restore the plaintiff to the property or other interests which he had fraudulently transferred.<sup>2</sup> Equity will leave such parties in exactly the position in which they have placed themselves, refusing all *affirmative* aid to either of the fraudulent participants. The only equitable remedies which they can obtain are purely defensive. Upon the same principle, wherever one party, in pursuance of a prior arrangement, has fraudulently obtained property for the benefit of another, equity will not aid the fraudulent beneficiary by compelling a conveyance or transfer thereof to him; and generally, where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a

<sup>1</sup> *Overton v. Banister*, 3 Hare. 503, 506; *Trice v. Comstock*, 115 Fed. 765; *Bleakley's Appeal*, 66 Pa. St. 187, H. & B. 31, Sh. 111.

<sup>2</sup> *Reynell v. Sprye*, 1 De Gex, M. & G. 660, 668, 669; *Bartle v. Nutt*, 4 Pet. 184, Sh. 109; *Kirkpatrick v. Clarke*, 132 Ill. 342, 22 Am. St. Rep. 531, 24 N. E. 71, 8 L. R. A. 511.

One of the most common occasions for the enforcement of this rule arises in cases where a debtor has conveyed or assigned or in any manner transferred his property for the purpose of defrauding his creditors, and afterwards seeks to set aside the transfer as against the grantee or assignee and recover back the property. The door of a court of equity is always shut against such a claimant. *Pride v. Andrews*, 51 Ohio St. 405, 38 N. E. 84; *Massi v. Lavine*, (Mich.) 102 N. W. 665, 1 Scott 286.

court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves.<sup>3</sup>

§ 402. **Illegality.**<sup>1</sup>— . . .

§ 404. **Conclusion.**—The special rules contained in the foregoing paragraphs will serve to illustrate the meaning and operation of the principle, He who comes into a court of equity must come with clean hands; but they by no means exhaust its scope and effect. It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience.<sup>1</sup>

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## SECTION V.

### EQUALITY IS EQUITY.

#### ANALYSIS.

§ 405. Its general meaning.

§§ 406–411. Its effects upon certain equitable doctrines.

§§ 406, 407. Of pro rata distribution and contribution.

§ 408. Ownership in common.

§ 409. Joint indebtedness; liability of estate of deceased joint debtor.

§ 410. Settlement of insolvent estates; marshaling of assets.

§ 411. Abatement of legacies; apportionment of liens; appointment under trust powers; contribution among co-sureties and co-contractors.

§ 412. Conclusion.

§ 405. **Its General Meaning.**—We have seen in the opening paragraphs of the introductory chapter that the notion of equality or impartiality—*aequum*—lay at the very foundation of the *aequitas* as conceived of by the Roman jurists; the same idea was, from the outset, incorporated into the equity jurisprudence created by the English court of chancery, and has been perpetuated in all of its doctrines into which the notion could possibly enter, until the present day. While the common law looked at and protected the rights of a person as a separate and distinct individual, equity rather regards and maintains, as far as possible, the rights of *all* who are connected by *any* common bond of interest or of obligation.

<sup>3</sup> *Bleakley's Appeal*, 66 Pa. St. 187, H. & B. 31, Sh. 111; *Milhaus v. Sally*, 43 S. C. 318, 21 S. E. 268, 885, 49 Am. St. Rep. 834; *Lawton v. Estes*, 167 Mass. 181, 45 N. E. 90, 57 Am. St. Rep. 450.

<sup>1</sup> See post, §§ 940–942.

<sup>1</sup> *Brotzman's Appeal*, 119 Pa. St. 645, 13 Atl. 483.

The principle, Equality is equity, or Equity delighteth in equality, is of very wide and general application. It is the immediate and conceded source of several important and distinctive doctrines of the equity jurisprudence. But this is not all. It furnishes a practical rule for the guidance of equity courts in their administration of reliefs, whenever they obtain jurisdiction over a great variety of cases, unless some compulsory dogma of the law stands in the way. I shall briefly mention the important equitable doctrines which are derived from this principle, and indicate a few of the cases in which it operates as a rule controlling the administration of reliefs.

**§ 406. Is the Source of Certain Equitable Doctrines—Pro Rata Distribution and Contribution.**—Wherever a number of persons had separate claims against the same individual or the same fund, the law generally gave certain classes of such claimants a complete precedence, even to the exhaustion of the fund if necessary, over the others, arising solely from the *form* of their security; as, for example, bond and other specialty creditors over simple contract creditors. Also, among several persons having claims of the same grade against a single individual or fund, the one who by his superior activity, either by means of action and judgment or not, obtains payment of his demand the first in order of time, is entitled at law to the precedence thus acquired over the others, even though they should thereby be prevented, in whole or in part, from procuring satisfaction. Conversely, it is a familiar doctrine of the law, that when a creditor has a single claim against several persons, each of such debtors is regarded as so completely and individually liable that the creditor may enforce payment of the entire demand from any one of the number. The law will not interfere with the action of the creditor; it will not compel him in any manner to obtain satisfaction from all of the debtors, *pari passu*; and after one of the number had thus been obliged to pay the whole amount, the ancient common law, prior to its adoption of doctrines borrowed from equity, failed to give him any right of recourse upon his co-debtors by means of which the burden might finally be distributed among them all in just proportions. The rules of the modern law giving such right of reimbursement are a direct importation from the equity jurisprudence. Finally, the common law, prior to statutory changes, exhibited a decided preference, in fact leaned very strongly, in favor of *joint* ownership over ownership in common, and in favor of a joint right among creditors over a several right, and a joint liability among debtors over a several or joint and several liability, with all the legal consequences of “survivorship,” and of an extinction of the right or

liability on the part of any one of the creditors or debtors who dies. Under all these conditions of fact, equity proceeded upon a very different principle, upon the principle that equality is equity, that the right or burden should be equalized among all the persons entitled to participate. It must not be understood, however, that a court of equity would always directly interfere with parties under the circumstances above mentioned, for the purpose of carrying out the principle of equality; it could not, for example, restrain a creditor from prosecuting his legal demand by legal means, *merely* on the ground that the result would give him a precedence over others; in other words, the principle of equality is equity was not of itself the source of an equitable jurisdiction which would not otherwise have existed. The true doctrine is, that wherever a court of equity, upon any ground of equitable cognizance, acquires jurisdiction over a case falling under the general condition of fact mentioned above, it will apply the principle of equality in determining the collective rights and liabilities of all the parties.

§ 407. Under the limitation last stated, that the subject-matter properly belongs to the equitable jurisdiction, the following general principle may be regarded as firmly established and of wide application: Whenever several persons are all entitled to participate in a common fund, or are all creditors of a common debtor, equity will award a distribution of the fund, or a satisfaction of the claims, in accordance with the maxim, Equality is equity; in other words, if the fund is not sufficient to discharge all claims upon it in full, or if the debtor is insolvent, equity will incline to regard all the demands as standing upon an equal footing, and will decree a pro rata distribution or payment. On the other hand, whenever a common liability rests upon several persons in favor of a single claimant, equity will enforce such liability upon all the class in accordance with the same maxim, Equality is equity. It will apply the maxim either directly, by apportioning the burden *ratably* among all the individuals upon whom the common liability rests, or indirectly, by giving a right of *contribution* to the member of the class from whom a payment of the whole demand has been obtained, and enabling him to recover contributory shares of the amount from the other members of the class, by which means the entire burden is finally adjusted upon and among them all. It will be easily seen upon examination that this comprehensive principle of equity lies at the foundation of several well-settled doctrines of the jurisprudence, and that it furnishes the rule upon which a court of equity proceeds to award its relief in numerous cases which do not fall within either of these special doctrines.

§ 408. **Ownership in Common.**—One of the most remarkable

illustrations of the principle, being in direct antagonism with a specially favorite dogma of the old common law, is seen in the preference which equity gives to ownership in common over joint ownership of lands. It may be stated as a general proposition that equity *always* leans in favor of ownership in common, and wherever it is possible to do so, will hold an ownership to be in common, and thereby disregard the legal right of survivorship, although at law the ownership would be strictly joint. It was an invariable rule of the common law that when purchasers take a conveyance to themselves and their heirs, they will be joint tenants, and upon the death of one of them the estate will go to the survivor. The same rule prevails in equity, unless circumstances exist from which a contrary intention of the parties may be presumed, enabling a court of equity to disregard the legal rule.<sup>1</sup> The same is true of a joint contract to purchase land, made by two or more vendees, where they have paid or agreed to pay the purchase price in equal proportions. Equity would regard their right as a *joint* one, and upon the death of one vendee would not decree a conveyance to the survivor and the heirs of the deceased vendee as owners in common.<sup>2</sup> Although the legal rule was allowed to operate under these special circumstances, still, equity leans very strongly against joint ownership. Whenever circumstances occur from which it can reasonably be implied that a tenancy in common was intended, a court of equity will hold the ownership to be in common, and will disregard the legal right of survivorship by declaring the survivors to be trustees of the legal estate for the representatives of the deceased purchaser or owner. In pursuance of this view, the doctrine was well settled, long previous to all legislation on the subject, that where two or more purchase lands and advance or agree to pay the purchase-money in *unequal* proportions, this makes them in the nature of partners, and however the legal estate may survive on the death of one of them, the survivor will be considered in equity as only a trustee for the representatives of the other, in proportion to the sums advanced by each of them.<sup>3</sup> This equitable doctrine is always applied to mortgagees. Where money is advanced by two or more persons, no matter whether in equal or unequal proportions, and they take a mortgage to themselves jointly, in law their estate is joint, and on the death of one the debt and the security would belong wholly to the survivor.

<sup>1</sup> *Lake v. Gibson*, 1 Eq. Cas. Abr. 290, pl. 3, 1 Scott 367; *Rigden v. Vallier*, 3 Atk. 735, 2 Ves. Sr. 258; *Harris v. Ferguson*, 16 Sim. 308.

<sup>2</sup> *Lake v. Gibson*, 1 Eq. Cas. Abr. 294, p. 3, 1 Lead. Cas. Eq., 4th Am. ed., 264, 268, 1 Scott 367; *Aveling v. Knipe*, 19 Ves. 441, per Sir William Grant, M. R.

<sup>3</sup> *Rigden v. Vallier*, 3 Atk. 735, 2 Ves. Sr. 258.

In equity, however, the interest of the mortgagees is in common, and on the death of one the survivor is held a trustee for the personal representatives of the deceased mortgagee.<sup>4</sup> These equitable doctrines, drawing such a distinction between conveyances, contracts for purchase, and mortgages at law and in equity, were established before any statutes had changed the legal view, but they have become unnecessary and obsolete in the United States, in consequence of modern legislation. This legislation throughout all the states has declared 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 ownership. As the original doctrine of equity is thus incorporated into the law by statute, there is no longer any need of the equitable rule as above described. Furthermore, either as an inference from the statutes, or from the gradual adoption of equitable principles, the right and interest of two or more vendees in a contract for the purchase of land is no longer strictly joint, even at law, in a great majority of the states; that is, the right and interest of the heirs and representatives of a deceased vendee are fully recognized and protected. Finally, by the equitable theory of the mortgage, which, as has been shown, prevails in nearly all the states, the interest of the mortgagee being regarded as personal property, and not as an estate in the land, the right of two or more mortgagees is not strictly joint, when considered with reference to third persons, or even to the mortgagor himself.

§ 409. **Joint Liability—Death of a Joint Debtor.**—Another admirable illustration of the principle that equality is equity is shown in the case, analogous to the one last described, of the mode in which equity treats a liability arising out of contract joint at law. It is one of the oldest and most familiar doctrines of the law, that when two or more persons promise or bind themselves to pay a sum of money, or to do any other act, their obligation and liability are joint. It followed from the legal conception of a *joint* obligation that when one of the joint debtors dies, the liability on his part and on the part of his estate ipso facto ceases, and the only obligation for the entire debt rests, at law, upon the survivor or survivors; he or they alone could be sued at law by the creditor.<sup>1</sup> The injustice which might result from this purely technical rule of the law is very apparent. The doctrine of equity is quite different. Presuming upon the reasonable presumption that it is the intention of the parties in every such agreement that the creditor shall have the several as well as the joint obligation of each debtor as a

<sup>4</sup>Goodwin v. Richardson, 11 Mass. 469; Kinsley v. Abbott, 19 Me. 430, 434.

<sup>1</sup>Ex parte Kendall, 17 Ves. 525.

security for the payment or performance, equity declares, as a general rule, that every contract merely joint at law shall be regarded, as against the debtor parties, a joint and several undertaking, creating a joint and several obligation. As a consequence of this equitable view of the obligation, the doctrine is settled, that upon the death of one of the debtors the liability does not remain upon the survivors alone. If the survivors or survivor are insolvent, or if the creditor has exhausted his ordinary legal remedies against them in vain, by means of a judgment and an execution returned unsatisfied, then such creditor may maintain a suit in equity against the personal representatives of the deceased debtor, and enforce payment out of his estate.<sup>2</sup> In England, the doctrine, as settled by the modern decisions is still broader and more efficient. The creditor is entitled to sue the personal representatives of the deceased debtor in equity at once, without attempting, much less exhausting, any legal remedy against the survivor. In other words, the creditor has at all times the option to sue the survivor at law or the representatives of the deceased in equity, whether the survivors are solvent or not; and this rule has been adopted in some of the American states.<sup>3</sup> In certain of the states, the common-law dogma concerning joint debtors has been wholly abrogated. Special provisions of their codes of procedure, or of other statutes, expressly authorize a legal action to be brought in the first instance against the survivors and the personal representatives of the deceased joint debtor, or even against some, any, or one of them, at the option of the creditor who sues.<sup>4</sup> There is one important exception, as established by the courts in England and in many of the United States, to the doctrine that equity will regard and treat a joint obligation arising from contract as joint and several, so as to render the estate of a deceased debtor liable to a suit in equity brought by the creditor; and that is, where the deceased debtor is a surety. It is well settled, "that if the joint obligor so dying 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 limit of his obligation. He signs a joint contract and incurs a joint liability,

<sup>2</sup> *Pope v. Cole*, 55 N. Y. 124, 14 Am. Rep. 198; *Hunt v. Rousmaniere*, 8 Wheat. 212, 213, 1 Pet. 16; *Simpson v. Vaughan*, 2 Atk. 31, 2 Scott 542.

<sup>3</sup> *Wilkinson v. Henderson*, 1 Wylne & K. 582; *Braxton v. State*, 25 Ind. 82 (under code).

<sup>4</sup> *Sellon v. Braden*, 13 Iowa 365; *Burgoyne v. Ohio Life Ins. Co.*, 5 Ohio St. 586, 587.

and no other. Dying prior to his co-maker, the liability all attaches to the survivor.'"<sup>5</sup>

**§ 410. Settlement of Insolvent Estates—Marshaling of Assets.**—Another remarkable and most just application of the principle, often leading to results very different from those produced by the operation of legal rules, may be seen in all those instances where a court of equity acquires jurisdiction, from any cause, to wind up, distribute, or settle an estate, property, or fund against which there are a number of separate claimants. One example is that of settling the affairs of an insolvent partnership, corporation, or individual debtor in a creditor's suit brought by one on behalf of all other creditors, where the assets are not sufficient to satisfy all demands in full; the court always proceeds upon the principle that equality is equity, and of apportioning the property pro rata among all the creditors.<sup>1</sup> The principle is carried to such an extent in the settlement of insolvent partnerships, and partnerships where one of the members has died, that firm creditors are compelled in the first instance to resort to the firm assets, and creditors of the individual partners to individual assets, before either class can have recourse to any balance left remaining of the other kind of fund. A second example is that of marshaling the assets in the administration of the estates of deceased persons. At the common law certain classes of creditors enjoyed a precedence over others, and were entitled to be paid in full, even to the exclusion of the inferior orders, by the administrator or executor out of the legal assets of the decedent's estate, according to their established priority of right. But a court of equity, having obtained jurisdiction over an administration, regards all debts, in general, as standing upon an equal footing, and as entitled to payment pro rata out of the equitable assets, if the estate is not sufficient to pay them all in full, without any reference to their legal right of priority. In order to attain this result, and to carry out the principle of equality in equity in administrations, the doctrine of marshaling assets was established.

**§ 411. Abatement of Legacies;<sup>1</sup> Apportionment of Liens;<sup>2</sup> Appointment under Trust Powers;<sup>3</sup> and Contribution among Co-contractors and Co-sureties.<sup>4</sup>—**

<sup>5</sup> *Getty v. Binsse*, 49 N. Y. 385, 388, 389, 10 Am. Rep. 379; *Jones v. Beach*, 2 DeGex, M. & G. 886.

<sup>1</sup> *In re Lord & Polk Chemical Co.*, Del. Ch. 248, 44 Atl. 775.

<sup>2</sup> See post, §§ 1135-1143.

<sup>3</sup> See post, §§ 1221-1226.

<sup>4</sup> See post, § 1002.

<sup>5</sup> See post, § 1418.

## SECTION VI.

## WHERE THERE ARE EQUAL EQUITIES, THE FIRST IN ORDER OF TIME SHALL PREVAIL.

## ANALYSIS.

§ 413. Its application.

§ 414. Its true meaning; opinion in *Rice v. Rice*.

§ 415. Its effect upon equitable doctrines.

§ 413. **Its Application.**—The “equities” spoken of in this maxim embrace both equitable estates, interests, and primary rights of property, such as the cestui que trust’s estate in any species of trust, the mortgagee’s equitable interest, equitable liens, the interest of the assignee under an equitable assignment, and the like, and also the purely remedial rights, or rights to some purely equitable remedy, to which the distinctive name “equity” has been given by modern judges and text-writers; such, for example, as the equitable right to a reformation. With respect to “equities” considered in this comprehensive manner, and to many legal interests, the maxim, *Qui prior est tempore, potior est jure*, is of wide and important application both in equity and at law.

§ 414. **Its True Meaning—*Rice v. Rice*.**—The true meaning and effect of the principle, When there are equal equities, the first in order of time shall prevail, have often been misunderstood; and its correct signification cannot be better explained than by employing the exact language used by a very able English equity judge, in a recent case,<sup>1</sup> as follows: “What is the rule of a court of equity for the determining the preference as between persons having adverse equitable interests? The rule is sometimes expressed in 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 stock standing in the names of trustees, where the second assignee has given notice (to the trustee) and the first has

<sup>1</sup> *Rice v. Rice*, 2 Drew. 73, H. & B. 23, 1 Scott, 334. A grantor conveyed land without receiving his purchase-money, but the receipt of it was indorsed on the deed, and the title deeds were delivered to the grantee. Of course a vendor’s lien at once arose as security for the unpaid price, which was at

omitted it.<sup>2</sup> 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, 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. 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, therefore, 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; or, Qui prior est tempore, potior est jure. I have made these observations, not, of course, for the purpose of mere verbal criticism on the enunciation of a rule, but in order to ascertain and illustrate the real meaning of the rule itself. And I think the meaning is this: that in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; i. e., that 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

least valid between the grantor and the grantee, and was *prior* to any equity thereafter created by the grantee. The grantee afterwards borrowed money, and to secure its payment made an equitable mortgage of the land by a deposit of the title deeds with the creditor. Held, that as between the vendor's lien and the lien of the equitable mortgage, the possession of the title deeds by the grantee, and the receipt of the price indorsed on the deed of conveyance, operated to make the latter lien superior to the former, and thus overcame the effect of priority. The two equities were not equal. In his opinion the vice-chancellor used the language quoted in the text.

<sup>2</sup> Here the second assignee would obtain priority over the first: See *Lovridge v. Cooper*, 3 Russ. 30.

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. In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the court must direct its attention are obviously these: the nature and condition of their respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto. And in examining into these points, it must apply the test, not of any technical rule, or any rule of partial application, but the same broad principles of right and justice which a court of equity applies universally in deciding upon contested rights.”<sup>2</sup>

§ 415. **Its Effect.**—It follows from this explanation of the principle that when several successive and conflicting claims upon or interests in the same subject-matter are wholly equitable, and neither is accompanied by the legal estate, which is held by some third person, and neither possesses any special feature or incident which would, according to the settled doctrines of equity, give it a precedence over the others wholly irrespective of the order of time,—under these circumstances the principle applies, and priority of claim is determined by priority of time.<sup>1</sup> There are, however, many features and incidents of equitable interests which prevent the operation of this rule, and which give a subsequent equity the precedence over a prior one, as will be fully shown in the next chapter. The principle embodied in this maxim lies at the foundation of the important doctrines concerning priorities, notice, and the rights of purchasers in good faith and for a valuable consideration, which so largely affect the administration of equity jurisprudence in England, though to a less extent in the United States, and which are discussed in the following chapter.<sup>3</sup>

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## SECTION VII.

WHERE THERE IS EQUAL EQUITY, THE LAW MUST PREVAIL.

### ANALYSIS.

§ 416. Its application.

§ 417. Its meaning and effects.

<sup>2</sup>See, also, Phillips v. Phillips, 4 DeGex, F. & J. 208, 215, H. & B. 72, Ames Trusts 331, 1 Scott, 333, 511; Dueber Watch-Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455.

<sup>1</sup>Brace v. Duchess of Marlborough, 2 P. Wms. 491, 1 Scott, 330, 350; Berry v. Mutual Ins. Co., 2 Johns. Ch. 603, 1 Scott 331, Shep. 104; Muir v. Schenck, 3 Hill, 229, 38 Am. Dec. 633, Shep. 106.

<sup>3</sup>The text is quoted in Campbell v. Sidwell, 61 Ohio St. 179, 55 N. E. 609.

§ 416. **Its Application.**—This maxim and the one examined in the last preceding section must be taken in connection, in order to constitute the enunciation of a complete principle. The first applies to a certain condition of facts; the other supplements its operation by applying to additional facts by which equitable rights and duties may be affected. The two are in fact counterparts of each other, and taken together, they form the source of the doctrines, in their entire scope, concerning priorities, notice, and purchasers for a valuable consideration and without notice. Any full examination of these two maxims, and explanation of their effects, would, of necessity, be a complete discussion of those doctrines, and will, therefore, not be attempted at present, but will be postponed to a subsequent chapter.

§ 417. **Its Meaning and Effects.**—The meaning of the maxim is, if two persons have equal equitable claims upon or interests in the same subject-matter, or in other words, if each is equally entitled to the protection and aid of a court of equity with respect of his equitable interest, and one of them, in addition to his equity, also obtains the legal estate in the subject-matter, then he who thus has the legal estate will prevail. This precedence of the legal estate might be worked out by the court of equity refusing to interfere at all, and thereby leaving the parties to conduct their controversy in a court of law, where of course the legal estate alone would be recognized.<sup>1</sup> One of the most frequent and important consequences and applications of this principle is the doctrine, that when a purchaser of property for a valuable consideration, and without notice of a prior equitable right to or interest in the same subject-matter, obtains the legal estate in addition to his equitable claim, he becomes, in general, entitled to a priority both in equity and at law.<sup>2</sup>

In this interesting case it was urged that the maxim should be applied in a certain class of cases where, though the equities are admittedly unequal, the usual rules of priority cannot be applied without an apparent absurdity; viz., where lien A is superior to lien B, lien B is superior to lien C, but lien C is superior to lien A—a situation by no means uncommon. In the particular case, lien A was a grantor's lien, lien B that of a judgment against the grantee, lien C that of B's bona fide mortgagee. The court held that the maxim should be confined to cases where the liens are equitable and are equal in all respects save time; and, the property being insufficient to pay the mortgage in full, ordered sufficient of the proceeds paid to discharge the judgment, and the rest applied upon the mortgage. The second lien was thus given a priority which it would not have had save for the existence of the third lien.

<sup>1</sup> Thorndike v. Hunt, 3 DeGex & J. 563, 570, 571; Fitzsimmons v. Ogden, 7 Cranch. 2, 18.

<sup>2</sup> Basset v. Nosworthy, Cas. t. Finch, 102, 2 Lead. Cas. Eq. 1, and notes,

## SECTION VIII.

## EQUITY AIDS THE VIGILANT, NOT THOSE WHO SLUMBER ON THEIR RIGHTS.

## ANALYSIS.

§ 418. Its meaning; is a rule controlling the administration of remedies.

§ 419. Its application and effects.

§ 418. **Its Meaning; Is a Rule Controlling the Administration of Remedies.**—The principle embodied in this maxim, the original form of which is, *Vigilantibus non dormientibus aequitas subvenit*, operates throughout the entire remedial portion of equity jurisdiction, but rather as furnishing a most important rule controlling and restraining the courts in the administration of all kinds of reliefs, than as being the source of any particular and distinctive doctrines of the jurisprudence. Indeed, in some of its applications it may properly be regarded as a special form of the yet more general principle, *He who seeks equity must do equity.*<sup>1</sup> The principle thus used as a practical rule controlling and restricting the award of reliefs is designed 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. It is invoked for this purpose in suits for injunction, suits to obtain remedy against fraud, and in all classes of cases, except perhaps those brought to enforce a trust against an express trustee.<sup>2</sup>

§ 419. **Its Application and Effects.**—The scope and effect of the general principle as a rule for the administration of reliefs irrespective of any statutory limitations was stated by an eminent English chancellor in the following language: “A court of equity,

<sup>1</sup> Scott, 340, 498; *LeNeve v. LeNeve*, Amb. 436, 2 Lead Cas. Eq., 4th Am. ed. 109, and notes, 1 Scott, 536; *Phillips v. Phillips*, 4 De Gex, F. & J. 208, 1 Scott, 333, 511, H. & B. 72, *Ames Trusts* 331; *Economy Savings Bank v. Gordon*, 90 Md. 486, 45 Atl. 176, 48 L. R. A. 63, H. & B. 19.

<sup>2</sup> *Great Western R'y v. Oxford, etc.*, R'y, 3 De Gex, M. & G. 341, 359, per Turner, L. J.: “The jurisdiction to interfere is purely equitable, and it must be governed by equitable principles. One of the first of those principles is, that parties coming into equity must do equity; and this principle more than reaches to cases of this description. If parties cannot come into equity without submitting to do equity, a fortiori they cannot come for the summary interference of the court when their conduct before coming has been such as to prevent equity being done.”

<sup>3</sup> *Great Western R'y v. Oxford, etc.*, R'y, 3 DeGex, M. & G. 341: The text is cited in *Jackson v. Lynch*, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246.

which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and *reasonable diligence*.<sup>11</sup> The principle has

<sup>1</sup> Per Lord Camden in *Smith v. Clay*, 3 Brown Ch. 638, 1 Scott, 379; and see also *Lacon v. Briggs*, 3 Atk. 105, 2 Scott, 754 (suit by an executor to recover a debt due his testator, after seventeen years' delay, dismissed); *Ellison v. Moffatt*, 1 Johns. Ch. 46, 1 Scott, 387, 2 Scott, 758, Shep. 118 (suit for an account of transactions ended twenty-six years before the bill was filed dismissed).

There appears to be a fundamental difference of opinion as to the ultimate reasons in ethics or in public policy upon which the doctrine of laches should be based. Probably the majority of recent cases are in accord with the following statement: "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he can not be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief." *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804, by Stinness, C. J. See, also, *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, per Lord Selborne; *Wilson v. Wilson*, 41 Oreg. 459, 69 Pac. 923; *Citizens' Nat. Bank of Judy*, 146 Ind. 322, 43 N. E. 259, 3 Keener 433; Pom. Eq. Rem. § 21, and quotations. Thus, relief is often denied where, owing to the delay the defendant has spent large sums in the improvement of the property; *Gibson v. Herriott*, 55 Ark. 85, 29 Am. St. Rep. 17, 17 S. W. 589; or where, because of the delay important evidence on the defendant's behalf has been lost, as by the death or incapacity of his witnesses; see *Baker v. Cunningham*, 162 Mo. 134, 85 Am. St. Rep. 490, 62 S. W. 445; or where the "memories of those who had knowledge of the material facts have become faded and weakened by time"; *Lutjen v. Lutjen*, 64 N. J. Eq. 773, 53 Atl. 625. The principle stated above, in *Chase v. Chase*, supra, appears to be at variance with a long series of cases in the federal courts, which lay stress upon the circumstance that the property which is the subject-matter of the litigation has greatly risen in value since the complainant's cause of action accrued; and base the doctrine of laches not so much on the unfairness of the complainant's conduct as on general motives of public policy; see *Oil Co. v. Marbury*, 91 U. S. 592, 23 L. ed. 331, Shep. 119; *Naddo v. Bardon*, 51 Fed. 493, 2 C. C. A. 335, 4 U. S. App. 642; Pom. Eq. Rem. § 23, quotations and note.

That the doctrine of laches does not apply where an injunction is sought in support of a strict *legal* right, see post, § 817; *Galway v. Met. El. R. Co.*, 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788, 1 Ames Eq. Jur. 601, 1 Keener, 822; *Ide v. Trorlicht Co.*, 115 Fed. 137, 148, 1 Ames Eq. Jur. 642.

As to *excuses* for laches, see Pom. Eq. Rem. §§ 26-36; party's ignorance of his rights; *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907, 3 Keener 401, 2 Scott, 635; *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892, 3 Keener, 137 (delay of twenty years in suing to reform a deed due to advice of reputable attorney,

in fact two aspects, one of them wholly independent of any statutory limitation, and the other with reference to such statute. In the earlier forms of the statute of limitations, the provisions were, in express terms, confined to actions at law; and yet courts of equity, proceeding upon the analogy of these enactments in most suits to enforce equitable titles to real estate and equitable personal claims, applied the statutory periods.<sup>2</sup> In certain kinds of suits, however, especially those brought against trustees to enforce express trusts, the analogy of the statute was not followed.<sup>3</sup> The modern forms of these statutes, in the American states, generally declare, in express terms, that the periods of limitation shall apply to all equitable suits as well as to legal actions. This legislation has not, however, abrogated the principle under consideration; all cases not falling within the scope of the statutory limitations would still be controlled by it.<sup>4</sup>

that the deed correctly expressed the grantor's intention); post, § 917; but see *Badger v. Badger*, 2 Wall. 87, 95, 17 L. ed. 836, 2 Scott, 766 (complainant must show how he came to be so long ignorant of his rights). A party in possession of land who resorts to a court of equity to settle a question of title is not chargeable with laches, no matter how long his delay; he is at liberty to wait until his title is attacked before he is obliged to act; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. ed. 1063. It has been held that the plaintiff's poverty is not a sufficient excuse for his laches; *Naddo v. Bardon*, 51 Fed. 493, 2 C. C. A. 335, 4 U. S. App. 642.

<sup>2</sup>That a court of equity will usually act or refuse to act in analogy to the statute of limitations relating to actions at law of like character, but is not bound by the analogy of the statute where extraordinary circumstances exist, see *Kelley v. Boettcher*, 85 Fed. 55, 62, 29 C. C. A. 14, 21, 56 U. S. App. 363, 393; *Pom. Eq. Rem.* § 20; *Stevens v. Grand Central Min. Co.*, C. C. A. 133 Fed. 28.

<sup>3</sup>In cases of express trust, neither the statute of limitations nor laches is a defense to a suit by the cestui que trust, unless there has been a repudiation or breach of the trust brought home to the actual knowledge of the cestui que trust; *New Orleans v. Warner*, 175 U. S. 120, 130, 20 Sup. Ct. 44, 44 L. ed. 96; *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077.

<sup>4</sup>Where the period of limitation of equitable actions is fixed by express statute, the court may still deny relief for unreasonable delay (according to the weight of authority), although the statutory period has not elapsed; *Calhoun v. Millard*, 121 N. Y. 69, 8 L. R. A. 248, 24 N. E. 27, 1 Scott 388; *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. ed.

## SECTION IX.

## EQUITY IMPUTES AN INTENTION TO FULFILL AN OBLIGATION.

## ANALYSIS.

- § 420. Its meaning and application.  
 §§ 421, 422. Is the source of certain equitable doctrines.  
 § 421. Performance of covenants.  
 § 422. Trust resulting from acts of a trustee.

§ 420. **Its Meaning and Application.**—This principle is the statement of a general presumption upon which a court of equity acts. It means that wherever a duty rests upon an individual, in the absence of all evidence to the contrary, it shall be presumed that he intended to do right, rather than wrong; to act conscientiously, rather than with bad faith; to perform his duty, rather than to violate it. The principle is applied in those cases where a court of equity is called upon to determine whether an equitable estate or interest in certain subject-matter belongs to A, in pursuance of an obligation which rested upon B, although B, in acquiring the subject-matter, has not expressed or indicated in any manner an intention on his part of performing such obligation; that is, he did not acquire the subject-matter for the avowed purpose of fulfilling his duty. Notwithstanding the absence of such avowed intention, a court of equity may proceed upon the presumption that B did intend to perform his duty; may hold that the subject-matter was acquired with that design, and that in consequence of such purpose an equitable estate in it belongs to A.

§ 421. **Is the Source of Certain Equitable Doctrines: Performance of Covenants.**<sup>1</sup>—

§ 422. **Trust Resulting from Acts of a Trustee.**<sup>1</sup>—

## SECTION X.

## EQUITY WILL NOT SUFFER A WRONG WITHOUT A REMEDY.

## ANALYSIS.

- § 423. Its general meaning and effects.  
 § 424. Limitations upon it.

§ 423. **Its General Meaning.**—This principle, which is the somewhat restricted application to the equity jurisprudence of the more

<sup>1</sup> See post, § 579.

<sup>1</sup> See post, § 1049.

comprehensive legal maxim, *Ubi jus ibi remedium*,—wherever a legal right has been infringed, a remedy will be given,—is the source of the entire equitable jurisdiction, exclusive, concurrent, and auxiliary. A full treatment of it, including an explanation of its scope and meaning, with its various applications and illustrations, would simply be a restatement of all the doctrines and rules concerning jurisdiction which have already been discussed in the first part of this work. No such unnecessary repetition will be attempted. It is enough that the principle finds its development in the whole body of doctrines and rules which define and regulate the equitable jurisdiction as distinguished from the jurisdiction at law.

§ 424. *Its Limitations.*—There are, however, certain important limitations upon the generality of the maxim which may properly be stated here, although they have all been referred to in the Introductory Chapter, where the nature of equity is described, or in the chapters of Part First, where the doctrines concerning the exclusive and concurrent jurisdiction are explained. The first of these limitations is, that equity cannot interfere to give any remedy, unless the right in question, the invasion of which constitutes the wrong complained of, is one which comes within the scope of *judicial* action, of *judicial* events, rights, and duties. The right must belong to the purview of the municipal law,—must be one which the municipal law, through some of its departments, recognizes, maintains, and protects. Equity does not attempt, any more than the law, to deal with obligations and corresponding rights which are *purely* moral, which properly and exclusively belong to the tribunal of conscience.<sup>1</sup> The second limitation is, that equity

<sup>1</sup> It is upon this ground that where a right, undoubtedly belonging to the domain of the municipal law, is strictly legal, equity will not interfere *merely* because, under the particular circumstances of any case, *every legal means and instrument of obtaining relief* has been tried and exhausted without avail. It is plain that if equity should interfere in any such case, it could only be on the ground that the party had a *moral* right; that he was *morally* entitled to redress; because on the assumption, the right, being strictly legal, comes within no recognized head of the equitable jurisdiction, and the only possible reason for interference by a court of equity would be that, the legal remedies proving absolutely fruitless, and the party having no other means of redress, he has a claim upon a court of equity based upon the intrinsic righteousness of his demand. To such a purely moral claim equity does not and cannot respond. See *Finnegan v. Fernandina*, 15 Fla. 379, 21 Am. Rep. 292; *Rees v. City of Watertown*, 19 Wall. 121, H. & B. 5, Sh. 53, 1 Scott, 260. In *Rees v. Watertown*, a holder of bonds issued by the city alleged in his bill that he had obtained judgment thereon against the city, and had also obtained a writ of mandamus to compel the city officers to raise and apply funds to satisfy the judgment, but had wholly failed of obtaining any redress. He prayed that the taxable property of the citizens, which he claimed was a fund for the payment

does not interfere to remedy any wrong where the right and the remedy, assuming that the right falls within the purview of the municipal law, both completely belong to the domain of the law. In order that the principle may apply, one of three facts must exist, viz., either,—1. The right itself must be one not recognized as existing by the law; or 2. The right existing at the law, the remedy must be one which the law cannot or does not administer at all; or 3. The right existing at the law, and the remedy being one which the law gives, the remedy *as administered by the law* must be inadequate, incomplete, or uncertain. Of these three alternatives, the first and second denote the exclusive jurisdiction of equity; the third, the concurrent jurisdiction. The third limitation upon the principle is, that it does not apply where a party, whose case would otherwise come within one of the three alternatives above mentioned, has destroyed or lost or waived his right to an equitable remedy by his own act or laches. With these limitations upon its operation, the principle has been developed into the vast range of the equitable jurisdiction, which, considered in its entirety, gives,—1. Legal remedies for the violation of legal rights in a more certain, complete, and adequate manner than the law can give; 2. Equitable remedies for the violation of legal rights, which the law has no power to give with its means of procedure;<sup>2</sup> and 3. Remedies, either equitable or legal in their nature or form, for the violation of rights of which the law takes no cognizance, rights which the law does not recognize as existing, and which it either cannot or does not protect and maintain.

of municipal debts, might be subjected to the payment of his judgment, and that the marshal might be empowered to seize and sell so much of such property as should be necessary for that purpose. The court refused relief on the ground that the demand was wholly a legal one, and the proper remedy was by mandamus, and the *mere* fact that the mandamus had failed under the particular circumstances of this case did not give a court of equity any jurisdiction. The court said a court of equity "cannot assume control over that large class of obligations called *imperfect* obligations, resting upon conscience and moral duty only, unconnected with legal obligations." The decisions in the other cases above cited are to the same effect. This paragraph of the text is cited in *Harrigan v. Gilchrist* (Wis.), 99 N. W. 909, 933.

<sup>2</sup> It has been laid down, as a principle of jurisdiction, that equity will always give a remedy in this class of cases; see *Gavin v. Curtin*, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776.

## SECTION XI.

## EQUITY FOLLOWS THE LAW.

## ANALYSIS.

§§ 425, 426. Twofold meaning of the principle.

§ 425. *First*, in obeying the law: *Heard v. Stamford*, per Lord Chancellor Talbot.

§ 426. *Second*, in applying certain legal rules to equitable estates; *Cowper v. Cowper*, per Sir J. Jekyll, M. R.

§ 427. Operates within very narrow limits.

§ 425. **Twofold Meaning—First. In Obeying the Law.**—This maxim in its Latin form, *Aequitas sequitur legem*, was frequently quoted by the earlier chancellors before the extent of the equitable jurisdiction had been fully determined, and an importance, even a supreme and controlling efficacy, has been attributed to it by some writers which it does not and never did possess. So far as it can truly be called a general principle, guiding and regulating the action of equity courts, its meaning and effect are now settled within well-defined and narrow limits. As a practical rule, and not a mere verbal theory, it is wholly restrictive in its operation, and its only object is to keep the jurisdiction of equity from overstepping the boundaries which have been established by the prior course of adjudication. With this respect the maxim has a double import and operation: *First*. Equity follows the law, in the sense of obeying it, conforming to its general rules and policy, whether contained in the common or in the statute law. This meaning of the principle was very clearly stated by Lord Chancellor Talbot in the following passage: "There are instances, indeed, in which a court of equity gives a remedy, where the law gives none; but where a particular remedy is given by the law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and to extend it further than the law allows."<sup>1</sup> It should be observed,

<sup>1</sup> *Heard v. Stamford*, Cas. t. Talb. 173, 1 Scott 293. In this case the chancellor was asked to disregard a well-settled doctrine of the common-law. By the then existing law, if a man married he at once became personally liable for all his wife's antenuptial debts; but this liability ceased upon the wife's death. If the creditor had not recovered judgment at the time the wife died he was remediless, no matter how large a fortune the wife may have brought to and left with her husband. This rule was grossly unjust in both of its branches. Defendant's wife was indebted at the time of the marriage, and brought her husband a large fortune, but died soon after. One of her creditors brought this suit against the husband, urging that he should be held liable in equity, under the circumstances. The chancellor held that he was not liable, and refused to decree against a settled rule of the law. See in general,

however, that equity had not, in developing its jurisdiction, invaded the particular doctrine of the common law which was involved in this case; but it had certainly disregarded other rules as positive and well settled, in its previous course of decision.

§ 426. **Secondly. In Applying Legal Rules to Equitable Estates.**—Equity follows the law in the sense of applying to equitable estates and interests some of the same rules by which at common law legal estates and interests of a similar kind are governed. Equity, having by the exercise of its creative power called into existence the system of equitable estates, determined that these estates should partake, *to a certain extent*, of the quality of the corresponding legal estates. Thus a use in fee was held to descend according to the same rules as a legal estate in fee, and the husband was entitled to curtesy in such a use. It should be carefully observed, however, that courts of equity carried out the principle in this its second sense only to a partial and quite limited extent. A careful examination will show, I think, that the only important rules of law adopted by the early chancellors to regulate equitable estates *were those concerning descent and inheritance*.<sup>1</sup> The feudal incidents of legal estates were held not to apply to uses; equitable estates in fee could be conveyed without livery of seisin, and could be devised by will, and were not subject to dower. It is an evident error to say that equitable estates were regulated by all the rules of the law applicable to the corresponding legal estates. This second sense in which the principle is understood was admirably stated in a celebrated opinion of Sir Joseph Jekyll, of which the following is the important passage: “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 proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked, *Vir bonus est quis?* the answer is, *Qui consulta patrum, qui leges juraque servat*. And it is said in *Rooke’s Case*<sup>2</sup> 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

*Davis v. Williams*, 130 Ala. 530, 30 South. 488, 89 Am. St. Rep. 55, 54 L. R. A. 749. When a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or in the absence of fraud, accident, or mistake to so modify it as to make it legal, and then enforce it; *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 1 Scott 298.

<sup>1</sup>The early chancellors, in dealing with uses and other equitable estates, plainly shrank from interfering with the legal rules of descent and inheritance, which were so dear to the landed proprietors. Yet they held that equitable estates in fee, were not subject to dower, although they were to curtesy; perhaps this distinction was not displeasing to the body of landowners.

<sup>2</sup>*Rooke’s Case*, 5 Coke, 99 b.

by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to, the other. This discretion, in some cases, follows the law implicitly; in others, assists it and advances the remedy; in others again, it relieves against the abuse, or allays the rigor of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with."<sup>3</sup> Some of the sentences of this often quoted passage must, I think, be accepted only with considerable modification. Taken literally, they certainly contradict a large portion of the established equitable jurisdiction, and of the settled doctrines of the equity jurisprudence. The same twofold import of the principle has also been expressed in the following formulas: 1. Equity is governed by the rules of the law as to *legal* estates, interests, and rights. 2. Equity is regulated by the analogy of such 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*.<sup>4</sup>

§ 427. **Operates within Very Narrow Limits.**—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. As was shown in that portion of the Introductory Chapter which deals with the nature of equity, one large division of the 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. Another division of equity jurisprudence is directly opposed to the law which applies to the same subject-matter; its doctrines and rules are so contrary to those of the law, that when they are put into operation the analogous legal doctrines and rules are displaced and nullified. As these conclusions cannot be questioned, it is plain that the maxim, Equity follows the law, is very partial and limited in its application, and cannot, like all the other maxims discussed in this chapter, be regarded as a general principle.

<sup>3</sup> *Cowper v. Cowper*, 2 P. Wms. 720, 752, Sh. 84, 1 Scott, 206. In this case the court reluctantly adhered to the legal canon of descent which prefers the whole to the half blood, and held that an equitable estate in fee descended to a cousin of the whole blood, instead of to a brother of the half-blood of the deceased owner.

<sup>4</sup> *Snell's Equity*, -4.

## SECTION XII.

## EQUITY ACTS IN PERSONAM, AND NOT IN REM.

## ANALYSIS.

- § 428. Origin and original meaning of this principle.  
 §§ 170, 1317. Modified by statutes in the United States.  
 § 1318. Remedies in personam beyond the territorial jurisdiction.  
 § 429. [§ 170.] In what sense equitable remedies do operate in rem.  
 §§ 430, 431. The principle that courts of equity act upon the conscience of a party explained.  
 § 431. The same, per Lord Westbury.

§ 428. **Origin and Original Meaning.**— . . . In the infancy of the court of chancery, while the chancellors were developing their system in the face of a strong opposition, in order to avoid a direct collision with the law and with the judgments of law courts, they adopted the principle that their own remedies and decrees should operate in personam upon defendants, and not in rem. The meaning of this simply is, that a decree of a court of equity while declaring the equitable estate, interest, or right of the plaintiff to exist, did not operate by its own intrinsic force to vest the plaintiff with the legal estate, interest, or right to which he was pronounced entitled; it was not itself a legal title, nor could it either directly or indirectly transfer the title from the defendant to the plaintiff. A decree of chancery spoke in terms of personal command to the defendant, but its directions could only be carried into effect by his personal act. It declared, for example, that the plaintiff was equitable owner of certain land, the legal title of which was held by the defendant, and ordered the defendant to execute a conveyance of the estate; his own voluntary act was necessary to carry the decree into execution; if he refused to convey, the court could endeavor to compel his obedience by fine and imprisonment. The decree never stood as a title in the place of an actual conveyance by the defendant; nor was it ever carried into effect by any officer acting in the defendant's name.<sup>1</sup>

§ 170. . . . This ancient quality in the operation of equitable remedies has been greatly modified by various statutes in the United States, which, in some instances, provide that a decree establishing an estate, interest or right of property in the plaintiff

<sup>1</sup> See *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586, 1 Ames Eq. Jur. 11 (decree for removal of cloud on title); *McCann v. Randall*, 147 Mass. 81, 99, 9 Am. St. Rep. 666, 17 N. E. 75, 88 (decree directing sale of property); *Gay v. Parpart*, 106 U. S. 679, 690, 1 Sup. Ct. 456 (decree in partition).

shall execute itself, shall be of itself a muniment of title, by divesting the defendant of the interest and vesting the same in the plaintiff, without any conveyance or other instrument of transfer. The decree alone, being on record, operates as a sufficient security of the plaintiff's right as adjudged. In other instances, an officer of the court, commissioner, master, or referee is authorized to carry out the provisions of the decree by executing the necessary instruments, which are thereupon the plaintiff's muniments of title, with the same effect as though they had been executed by the defendant himself.<sup>3</sup>

§ 1317. . . . These statutes do not generally interfere with the original power of courts of equity to enforce obedience to their decrees by the parties themselves, and to punish such parties for their disobedience by attachment, fine, imprisonment, or sequestration.<sup>3</sup> The operation of these statutes is confined to the territorial limits and jurisdiction of the states in which they are respectively enacted.<sup>4</sup> . . . There are, of course, classes of remedies to which this legislation cannot apply,—as, for example, decrees prohibiting any act, general pecuniary recoveries, analogous to money judgments at law, and many purely ancillary or provisional reliefs.<sup>5</sup>

<sup>3</sup>Such statutes exist in nearly all the states; see 1 Pom. Eq. Rem. § 13, n. 30, where their provisions are given in detail. Both these types of statute are often found in the same state.

<sup>4</sup>It seems, however, that a general decree for the payment of money should not be enforced by imprisonment for contempt: *Clements v. Tillman*, 79 Ga. 451, 11 Am. St. Rep. 441, 5 S. E. 194, Sh. 104.

<sup>5</sup>*Guarantee Trust etc. Co. v. Delta etc. Co.*, 104 Fed. 5, C. C. A. That it is within the power of a United States court to give efficacy to its decree in transferring title, in conformity with the legislation of the state in which such court is sitting, see *Langdon v. Sherwood*, 124 U. S. 74, 8 Sup. Ct. 429, Sh. 79.

<sup>6</sup>See, also, *Merrill v. Beckwith*, 163 Mass. 503, 10 N. E. 855, 1 Ames Eq. Jur. 19 (specific performance; no personal service of summons on defendant).

*Validity of Decree Based upon Service of Process by Publication.*—Equity decrees which act only in personam can, in general, have effect only as against parties duly served with process within the territorial jurisdiction of the court: *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586, 1 Ames Eq. Jur. 11. It is competent, however, for a state to provide methods for the determination of title to land within its borders, and in the exercise of such power, it may give to equity decrees relating to or affecting the title to such land, the effect of judgments in rem, which, therefore may be based upon service of process by publication. "It can not bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits, and, for the purpose of such determination, may provide any reasonable methods of imparting notice"; *Arnold v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557. See, also, *Pennoyer v. Neff*, 95 U. S. 714 (the leading case); *Dillon v. Heller*, 39 Kan. 599, 18 Pac. 693. 1—Ames Eq. Jur. 14, 1 Scott 246.

§ 1318. **Remedies in Personam beyond the Territorial Jurisdiction.**—The power to act in personam, through their remedies, is still held by all courts of equity, even in presence of the foregoing legislation. Of this nature must always be the remedies when the subject-matter, either real or personal property, is situated beyond the territorial jurisdiction of the court, in another state or country. The jurisdiction to grant such remedies is well settled. Where the subject-matter is situated within another state or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which *directly* affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted. As examples of this rule, suits for specific performance of contracts, for the enforcement of express or implied trusts, for relief on the ground of fraud, actual or constructive, for the final accounting and settlement of a partnership, and the like, may be brought in any state where jurisdiction of defendant's person is obtained, although the land or other subject-matter is situated in another state, or even in a foreign country.<sup>1</sup> On the other hand, where the suit is strictly local, the subject-matter is specific property, and the relief when granted is such that it *must* act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject matter is situated.<sup>2</sup>

§ 429. **In What Sense Equitable Remedies do Operate in Rem.**—

§ 170. . . . When we turn from this mere external manner in which equitable remedies were enforced according to the original chancery procedure to the essential, and so to speak internal, nature and qualities of the remedies themselves, instead of their being merely personal, it is one of the distinctive and central principles of the equity remedial system that it deals with property rights,—estates, interests, liens,—rather than with the mere *personal*

<sup>1</sup>This rule applies to the United States courts as well as the state courts, and is also well settled in England: *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, 2 Lead. Cas. Eq., 4th Am. ed., 1806, 1 Keener 12, 1 Scott 236; *Toller v. Carteret*, 2 Vern. 494, 1 Ames Eq. Jur. 22, 1 Scott 235; *Massie v. Watts*, 6 Cranch 148, Sh. 82; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192, 1 Ames Eq. Jur. 6; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462, 1 Scott 241. As to foreclosure of mortgages on land outside the jurisdiction, see *Toller v. Carteret*, supra; *Union Trust Co. v. Olmsted*, 102 N. Y. 729, 7 N. E. 822, 1 Ames Eq. Jur. 23.

<sup>2</sup>*Carteret v. Petty*, 2 Swans. 323, 1 Ames Eq. Jur. 21; *In re Hawthorne*, 23 Ch. D. 743, Sh. 77.

rights and obligations of the litigant parties. This tendency of equity to base its remedies upon the rights of *property*, in their various grades, from complete estates to liens or charges, is exhibited in the clearest manner in all its suits brought to enforce the rights and duties growing out of contracts. Although the contract is executory, even though it stipulates only with respect to things not yet in existence,—things to be acquired in future,—the remedial right is worked out by conceiving of a present ownership, interest, lien, or charge, as arising from the executory provisions, or a present possibility which will ripen into such an interest, and by establishing this proprietary right, protecting and enforcing it. The decree, with a few exceptional cases, passes over the *personal* rights of the plaintiff, and the personal obligations of the defendant, deals with rights or interests in property, and shapes its relief by conferring rights, or imposing duties growing out of or connected with some grade of property. Even when the executory contract creates what at law would be a debt, and when the recovery at law would be a general pecuniary judgment, the equitable remedy views this debt as an existing fund and awards its relief in the form of an ownership or of lien upon that fund. A general pecuniary judgment to be recovered from the debtor's assets at large—as an award of damages—is only granted by a court of equity under very exceptional circumstances.<sup>1</sup>

Another quality of the distinctively equitable remedies, connected with and perhaps growing out of the one last mentioned, is their *specific* character, both with respect to substance and form. Except in actions to recover possession of land or of chattels (“action of right,” “ejectment,” or “replevin”), the legal remedies by action are all general recoveries of specified sums of money, which may be collected by execution out of any property of the debtor not exempted. The equitable remedies, with a few exceptions, are specific; deal with specific things, land, chattels, choses in actions, funds; establish specific rights, estates, interests, liens, and charges in or over these things; and direct specific acts to be done or omitted with respect to these things, for the purpose of enforcing the rights and duties thus declared. Even when the controversy is concerning pecuniary claims and obligations, and the final relief is wholly pecuniary, the equitable remedies are ad-

<sup>1</sup>The same conception is shown in the jurisdiction which equity exercises over the *persons* of those who are non sui juris, such as infants, lunatics, etc. Although the jurisdiction, when existing, extends over the persons, the *fact* upon which it rests, and which is the necessary occasion for its exercise, is the existence of *property* belonging to the person. An infant, for example, cannot be made a ward of the court merely because he is an infant, but because he is an infant possessing property which the court can administer.

ministered by regarding the subject-matter as a specific fund, and by adjudging such fund to its single owner, or by apportioning it among the several claimants. It is the distinctive feature of the system, which gives it a superior efficacy over the legal methods, that it ascertains a rightful claimant's interest in or over a specific thing, land, chattels, choses in action, debts, and even money in the form of a fund, and follows it through the hands of successive possessors as long as it can be identified. The two qualities which I have thus described, that equitable remedies deal with property rights rather than with personal rights and obligations, and that they are specific in their nature, are the peculiar and important features of the system, and give it the power of expansion and of application to an unlimited variety of circumstances, which enables equity to keep abreast with the progress and changing wants of society.

**§ 430. Operation of Equity upon the Conscience of a Party.—**There is still a third aspect of the remedial action of equity which should be accurately understood, since it lies at the foundation of much of the dealing of the court of chancery with the legal estates and rights, and especially those conferred by the positive provisions of statutes. I mean the most important principle, that equity acts upon the conscience of a party, imposing upon him a personal obligation of treating his property in a manner very different from that which accompanies and is permitted by his mere legal title. Whenever a legal estate is, by virtue of some positive rule of either the common or statute law, vested in A, but this legal estate in A is of itself a violation of some settled equitable doctrines and rules, so that B is equitably entitled to the property or to some interest in or claim upon it, equity grants its relief, and secures to B his right, not by denying, or disregarding, or annulling, or setting aside A's legal estate, but by admitting its existence, by recognizing it as wholly vested in A, and then by working upon A's conscience, and imposing upon him the duty of holding and using his legal title for B's benefit, so that, in the ordinary language of the courts, he is treated as a trustee for B. One or two familiar examples will illustrate the working of this fundamental principle. A testator has given certain lands to A by a will properly executed; but A procured the devise by wrongful representations made to the testator, and the lands should, by the doctrines of equity, belong to B. The statute of wills, however, is peremptory in its prescribed mode of executing a will; there can be no will without conforming to the statutory requirements. Equity does not attempt to overrule the statute; it admits the validity of the will, and the legal title vested in A, but on account of A's

wrongful conduct in procuring the devise to himself, it says that he cannot conscientiously hold and enjoy that legal title for his own benefit, and imposes upon his conscience the obligation to hold the land for B's benefit, as the equitable owner thereof; and then arises the further obligation upon his conscience to perfect and complete B's equitable ownership by a conveyance.<sup>1</sup> In exactly the same manner the equity of a party is worked out in all those cases where the peremptory provisions of the statute of frauds stand in the way of any legal right or claim, as in the specific enforcement of a verbal contract for the sale of land, which has been part performed by the plaintiff. Another illustration of the principle may be seen in the doctrine established by courts of equity concerning the effect of the registry or recording acts. These statutes declare, in general terms, and without any exception, that a subsequent grantee or mortgagee who first puts his deed or mortgage upon record shall thereby acquire the precedence over a prior unrecorded conveyance. Courts of equity have added the rule that if the subsequent party, who thus obtains the legal benefit of a record, has notice, his recorded instrument shall still be subordinate to the prior unrecorded conveyance of which he was charged with notice. In giving this effect to a notice, the courts of equity do not assume to nullify the provisions of the recording act; they admit that a subsequent grantee has, by means of his record, obtained the complete legal title, which cannot be directly set aside nor disturbed; but they say that the notice of the prior conveyance makes it unconscientious for him to hold and enjoy that legal title for his own benefit, and they impose upon his conscience the obligation of holding it for the benefit of the prior unrecorded grantee.<sup>2</sup>

§ 431. This principle which I have attempted to explain and illustrate in the preceding paragraph, and which underlies a very large part of the remedial action of equity, was stated with his usual clearness and accuracy by Lord Westbury in the following passage: "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 upon 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

<sup>1</sup> See post, §§ 919, 1054.

<sup>2</sup> See §§ 659-655.

with the statute of wills and the statute of frauds.”<sup>1</sup> Although Lord Westbury here speaks only of a case where the equitable rights of one person arise from the fraud of another who has thereby obtained the legal estate, yet the principle applies, whatever be the grounds and occasion of the equitable interests and claims which are asserted in opposition to the one having the legal title.<sup>2</sup>

<sup>1</sup> *McCormick v. Grogan*, L. R. 4 H. L. 82, 97, 1 Scott 241. This case was concerning a devise which had been obtained by fraud.

<sup>2</sup> In the very recent case of *Greaves v. Tofield*, L. R. 14 Ch. Div. 563, 577, 1 Scott, 285, which arose upon the effect of a recording act, and of actual notice to a subsequent encumbrancer who obtained the first registry, Bramwell, L. J., stated the principle as follows: “I understand the authorities to have established this beyond dispute, that if a man having an estate agrees to sell it, or undertakes to grant an interest in it, or a charge upon it, for a valuable consideration, and afterwards, disregarding the bargain he has made, conveys to a third person, or so deals with it by bargain with a third person that he is incompetent to convey the estate or grant the interest to the first which he had agreed to do, and the third person has all along had notice of the first contract, the conscience of the second purchaser is affected, and he cannot retain the estate without giving the person who entered into the first contract that right in it for which he had stipulated, and if necessary, he must join in a conveyance of the estate, if the first person was a purchaser, or he must join in executing a charge, if it was a charge that was to be executed, or a lease, if it was a lease to be granted. I understand the authorities further to establish this, that that principle is not affected by those acts of Parliament which require registration in order to give or to prevent a priority, but that the conscience of the second purchaser, as I have called him, is equally affected, and that the intention of the legislature in such acts as those I have referred to was to afford a protection to persons whose consciences were not affected and not to give the second purchaser whose conscience was affected an opportunity of joining in the commission of that which was a breach of contract and a wrong to the first person who made the bargain.” This is a clear statement of the principle, and one would have supposed that the very statement would have carried conviction of its essential justice. But the observations added by Mr. Justice Bramwell, in which he expresses a strong dissent from this principle, and condemns other familiar principles of equity which have been so long and so firmly established that they may be regarded as the foundations of its jurisprudence, show very clearly the danger to be apprehended from associating purely law judges in the administration of equity. His criticisms are trivial, and his reasoning is weak, but even such criticism and reasoning coming from the bench may, in time, undermine the whole system of equity. The danger was pointed out at the time when the judicature act was passed in England; it has been realized in some of the states of our own country, where equity and law have been combined, in which, beyond a doubt, equity, as a system, is being supplanted by the law as administered from the bench.

## CHAPTER II.

CERTAIN DISTINCTIVE DOCTRINES OF EQUITY  
JURISPRUDENCE.

## SECTION I.

## CONCERNING PENALTIES AND FORFEITURES.

## ANALYSIS.

- §§ 433-447. Penalties; equitable relief against.
  - § 433. General ground and mode of interference.
  - § 434. Form of relief; when given at law.
- §§ 435, 436. What are penalties.
  - § 436. To secure the payment of money alone.
- §§ 437-445. Stipulations not penalties.
  - § 437. Stipulations in the alternative.
  - § 438. Ditto, for the reduction of an *existing* debt upon prompt payment.
  - § 439. Ditto, for accelerating payment of an existing debt.
- §§ 440-445. Ditto, for "liquidated damages."
  - § 440. "Liquidated damages" described in general.
- §§ 441-445. Rules determining between liquidated damages and penalties.
  - § 441. 1. Payment of a smaller sum secured by a larger.
  - § 442. 2. Agreement for the performance or non-performance of a single act.
  - § 443. 3. Agreement for the performance or non-performance of several acts of different degrees of importance.
  - § 444. 4. The party liable in the same amount for a partial and for a complete default.
  - § 445. 5. Stipulation to pay a fixed sum on default in one of several acts.
  - § 446. Specific performance of a contract enforced, although a penalty is attached; party cannot elect to pay the penalty and not perform.
  - § 447. Otherwise as to stipulation for liquidated damages.
- §§ 448-460. Of forfeitures.
- §§ 449-458. When equity will relieve against forfeitures.
  - § 450. General ground and extent of such relief.
  - § 451. Relief when forfeiture is occasioned by accident, fraud, mistake, surprise, or ignorance.
  - § 452. No relief when forfeiture is occasioned by negligence, or is willful.
- §§ 453-454. Relief against forfeitures arising from covenants in leases.
  - § 455. Ditto, from contracts for the sale of lands.
  - § 456. Ditto, from other special contracts.
  - § 457. Ditto, of shares of stock for non-payment of calls.
  - § 458. Ditto, when created by statute.
- §§ 459-460. Equity will not enforce a forfeiture.

§ 433. **Penalties—Ground and Mode of Interference.**—The true ground of equitable interposition and relief in cases of penalties and forfeitures which might be enforced at law was stated by Lord Macclesfield, in the leading case of *Peachy v. Duke of Somerset*, to be "*from the original intent of the case, and the court can give a party, by way of recompense, all that he expected or desired.*" He confined the interference of equity, however, to those cases in which the penalty is intended only to secure the payment of money.<sup>1</sup> The doctrine was soon extended, so that it embraces cases where the penalty is used not merely to secure a money payment, but as a security for the performance of some collateral act.<sup>2</sup> In its most general scope and operation the doctrine may be stated as follows: Wherever a penalty or a forfeiture is used merely to secure the payment of a debt, or the performance of some act, or the enjoyment of some right or benefit, equity, considering the payment, or performance, or enjoyment to be the real thing intended by the agreement, and the penalty or forfeiture to be only an accessory, will relieve against such penalty or forfeiture by awarding compensation instead thereof, proportionate to the damages actually resulting from the non-payment, or non-performance, or non-enjoyment, according to the stipulations of the agreement. The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured. If the penalty is to secure the mere payment of money, compensation can always be made, and a court of equity will relieve the debtor party upon his paying the principal and interest. If it be to secure the performance of some collateral act, and compensation for a non-performance can be made, a court of equity will ascertain the amount of damages, and relieve upon their payment.<sup>3</sup> It is a familiar doctrine, therefore, that if the penalty is inserted to secure the payment of a pecuniary obligation, relief against it will be granted to the debtor upon his payment of the real amount due and secured, together with interest and costs, if any have accrued.<sup>4</sup> Where the penalty is to secure the performance of some collateral act or undertaking, equity will interpose, if adequate compensation can be made to the creditor party. The original practice in such cases was for the court of equity to retain the bill, direct an issue to ascertain the amount of damages, and to grant relief upon pay-

<sup>1</sup> *Peachy v. Duke of Somerset*, 1 Strange, 447.

<sup>2</sup> *Sloman v. Walter*, 1 Brown Ch. 418, per Lord Thurlow.

<sup>3</sup> *Reynolds v. Pitt*, 19 Ves. 140; *Walker v. Wheeler*, 2 Conn. 299; *Giles v. Austin*, 38 N. Y. Sup. Ct. 215, 62 N. Y. 486

<sup>4</sup> *Skinner v. Dayton*, 2 Johns. Ch. 535.

ment of the damages thus assessed by the jury.<sup>5</sup> By the more modern practice the court of equity would doubtless determine the amount of damages itself, without the intervention of a jury.

§ 434. **Form of Relief.**—While the two jurisdictions at law and in equity were kept distinct, although perhaps given to the same tribunal, the form of the remedy in which relief was obtained against a penalty was that of a suit brought by the debtor party to procure the agreement to be surrendered up and canceled, or the forfeiture perhaps to be set aside, upon payment of the debt or damages; and this decree would often be accompanied by an injunction restraining an action at law upon the agreement brought or threatened by the creditor party. Under the modern legislation, and especially under the reformed procedure, the rights of the debtor party would be protected, and the relief obtained, without any separate suit in equity, but by an equitable defense set up in the action at law by which the creditor sought to enforce the literal terms of the agreement. It has, however, become unnecessary, in many instances, to invoke the purely equitable jurisdiction in order to avoid penalties. The equitable doctrine, as above described, has to a considerable extent been incorporated into the law, partly as the result of statute, and partly from the gradual development of equitable principles in the common law. Whatever be the true explanation, the rule is now very general, even if not universal, that a recovery in actions at law upon contracts which contain an express stipulation for a penalty is limited to the actual debt due, or the actual damages sustained.<sup>1</sup> The law courts have not, however, gone to the same length in adopting the equitable principle in cases of forfeiture.

§ 435. **Penalties Defined.**—Such being the general doctrine, the important and practical inquiry in the vast majority of cases is, What are the distinctive features of a penalty? or, What kind of stipulation or provision in an agreement amounts to a penalty, so that it may come within the scope of the equitable doctrine? When the stipulation is intended to secure merely the payment of money, the test is easy and plain, and well established. When it is designed to secure the performance of some collateral act, the question is much more difficult to answer, and involves a statement of the differences between penalties and provisions for the pay-

<sup>5</sup> *Hardy v. Martin*, 1 Brown Ch. 419, note, 1 Cox 26, 2 Scott 123; *Hagar v. Buck*, 44 Vt. 285, 8 Am. Rep. 368.

<sup>1</sup> In most of the states the judgment at law is limited to the amount of debt or damages actually due or sustained; in a few, however, the judgment is formally entered for the whole sum mentioned in the penalty, but with a provision that it is to be satisfied by a payment of the actual debt or damages.

ment of "liquidated damages." The question what is and what is not a penalty I now proceed to examine.

**§ 436. To Secure the Payment of Money Alone.**—Where the act secured to be done is merely the payment of money, the test is simple and well established. It may be regarded as a rule of universal application, that if a party for any reason is liable to pay, or binds himself to pay, a certain sum of money, and adds a stipulation to the effect that in case such sum shall not be paid at the time agreed upon he shall then be liable to pay, or become bound to pay, *a larger sum of money*, the stipulation to pay the larger sum is invariably and necessarily a penalty. Of course, in this proposition it is understood that the "larger sum" is not simply the lawful interest accruing upon the principal actually due. The same doctrine may be stated in more comprehensive terms, in the language of one of the most able of modern English chancellors: "The law is perfectly clear that where there is a debt actually due,<sup>1</sup> and in respect of that debt a security is given, 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 estates 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."<sup>2</sup> The criterion here given, for all cases where the mere payment of a pecuniary obligation is intended to be secured, applies, it will be observed, alike to a penalty and to a forfeiture. If the additional stipulation involves a liability for a larger sum of money only, it is a penalty; if it involves the loss of lands, chattels, or securities pledged, it is a forfeiture. The same test, in substance, determines the nature of the provision by which the performance of some collateral act is secured. If the act thus secured be single, and the compensatory damages justly resulting from its non-performance can be ascertained with reasonable certainty, and the

<sup>1</sup> It should be observed by the student that the word "due" is used here in its legal meaning, of something agreed to be paid, and not in its popular sense, of something already payable.

<sup>2</sup> *Thompson v. Hudson*, L. R. 4 H. L. Cas. 1, 15, per Hatherley, L. C.

stipulation binds the debtor party to pay a fixed sum larger than such amount of damages, then the stipulation is a penalty.<sup>3</sup>

§ 437. **Stipulations not Penalties—Alternative Stipulations.**—Such being the general test by which to determine the nature of a penalty, there are certain kinds of stipulations not unfrequently inserted in agreements which have been judicially interpreted and held not to be penalties, and therefore not subject to be relieved against by courts of equity. The nature and effect of these stipulations I shall briefly explain. The first instance is that of a contract by the terms of which the contracting party so binds himself that he is entitled to perform either one of *two* alternative stipulations, at his option; and if he elects to perform one of these alternatives, he promises to pay a certain sum of money, but if he elects to perform the other alternative, then he binds himself to pay a larger sum of money. To state the substance of the agreement in briefer terms, the contracting party may do either of two things, but is to pay higher for one alternative than for the other. In such a case equity regards the stipulation for a larger payment, not as a penalty, but as liquidated damages agreed upon by the parties. It will not relieve the contracting party from the payment of the larger sum, upon his performance of the latter alternative to which such payment is annexed; nor, on the other hand, will it deprive him of his election by compelling him to abstain from performing whichever alternative he may choose to adopt.<sup>1</sup>

§ 438. **For the Reduction of an Existing Debt upon Prompt Payment.**—The second instance is that of an agreement in substance for the reduction of an existing debt, on condition of prompt payment by the debtor. A stipulation reserving to a creditor the right to have full payment of the money due on an existing contract, in case there should be a failure to pay a smaller sum on a specified day, is not a penalty. Wherever, therefore, a certain sum of money is actually due, either from a present advance or from any other cause, and the creditor enters into an agreement with his debtor to take a lesser sum in satisfaction, provided that lesser sum is secured in a specified manner and paid at a specified day, but if any of the stipulations of the agreement are not performed by the debtor according to the terms thereof, then the creditor shall be entitled to be paid and to recover the whole of the original debt, such provision for a return by the creditor to his original

<sup>3</sup> See post, §§ 440–445, where this subject is more fully examined, under the head of “liquidated damages.”

<sup>1</sup> French v. Macale, 2 Dru. & W. 274; Parfitt v. Chambre, L. R. 15 Eq. 36; Smith v. Bergengren, 153 Mass. 690, 10 L. R. A. 768.

rights does not constitute a penalty, and equity will not interfere to prevent its enforcement.<sup>1</sup>

§ 439. **For Acceleration of Payment of an Existing Debt.**—The third instance of what is not a penalty is that of a contract, not that the amount of a debt should be increased, but that in a specified event the time for the payment of a certain sum due shall be accelerated. It is therefore settled by the overwhelming weight of authority that if a certain sum is due and secured by a bond, or bond and mortgage, or other form of obligation, and is made payable at some future day specified, with interest thereon made payable during the interval at fixed times, annually, or semi-annually, or monthly, and a further stipulation provides that in case default should occur in the prompt payment of any such portion of interest at the time agreed upon, then the entire principal sum of the debt should at once become payable, and payment thereof could be enforced by the creditor, such a stipulation is not in the nature of a penalty, but will be sustained in equity as well as at law. In exactly the same manner, if a certain sum is due and is secured by any form of instrument, and is made payable in specified installments, with interest, at fixed successive days in the future, and a further stipulation provides that in case of a default in the prompt payment of any such installment in whole or in part at the time prescribed therefor, then the whole principal sum of the debt should at once become payable, and payment thereof could be enforced by the creditor, such stipulation has nothing in common with a penalty, and is as valid and operative in equity as at the law.<sup>1</sup> The stipulation is sometimes to the effect that if a default in payment continues for a specified number of days, and sometimes that the creditor may elect to treat the whole debt as payable; but the same rule applies to all such forms. The provision for accelerating the time of payment of the whole debt in this manner may, of course, be waived by the creditor, especially when it is made to depend upon his election.<sup>2</sup> It seems also that a court of equity may relieve against the effect of such provision, where the default of the debtor is the result of accident or mistake, and a fortiori when it is procured by the fraud or other inequitable conduct of the creditor himself.<sup>3</sup>

<sup>1</sup> *Thompson v. Hudson*, L. R. 4 H. L. 1 (reversing L. R. 2 Eq. 612; L. R. 2 Ch. 255); *Walsh v. Curtis* (Minn.), 76 N. W. 52.

<sup>2</sup> *Sterne v. Beck*, 1 De Gex, J. & S. 595; *Curran v. Houston*, 201 Ill. 442, 60 N. E. 228; *Connecticut Mut. Life Ins. Co. v. Westerhoff*, 58 Neb. 379, 78 N. W. 724, 76 Am. St. Rep. 101; *Malcolm v. Allen*, 49 N. Y. 448.

<sup>3</sup> *Langridge v. Payne*, 2 Johns. & H. 423; see *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466.

<sup>4</sup> *Wilcox v. Allen*, 36 Mich. 160; *Martin v. Mellville*, 11 N. J. Eq. 222; *Noyes*

§ 440. **Liquidated Damages Described in General.**—The fourth instance to be mentioned of a stipulation which is not a penalty within the scope and meaning of the equitable doctrine is that for “liquidated damages.” If the stipulation is one properly for liquidated damages, and not for a penalty, equity will not interfere with its enforcement, but if the case was one coming within the equitable jurisdiction, it would be treated as binding, and carried into effect by a court of equity. In general, where the contract is for the performance or non-performance of some act other than the mere payment of money, and there is no certain measure of the injury which will be sustained from a violation of the agreement, the parties may, by an express clause inserted for that purpose, fix upon a sum in the nature of liquidated damages which shall be payable as a compensation for such violation.<sup>1</sup> The question whether a sum thus stipulated to be paid is a “penalty” or is “liquidated damages” is often difficult to determine. It depends, however, upon a construction of the whole instrument, upon the real intention of the parties as ascertained from all the language which they have used, from the nature of the act to be performed, or not to be performed, from the consequences which naturally result from a violation of the contract, and from the circumstances generally surrounding the transaction. It has been repeatedly held that the words “penalty” or “liquidated” damages, if actually used in the instrument, are not at all conclusive as to the character of the stipulation. If upon the whole agreement the court can see that the sum stipulated to be paid was intended as a penalty, the designation of it by the parties as “liquidated damages” will not prevent this construction; if, on the other hand, the intent is plain that the sum shall be “liquidated damages,” it will not be treated as a penalty because the parties have called it by that name. It is well settled, however, that if the intent is at all doubtful, the tendency of the courts is in favor of the interpretation which makes the sum a penalty.<sup>2</sup> The mere largeness of the sum fixed upon for the doing or not doing a particular act—that is,

v. Clark, 7 Paige, 179, 32 Am. Dec. 620; Adams v. Rutherford, 13 Or. 78, 8 Pac. 896. See post, §§ 826, 833.

<sup>1</sup> Woodward v. Gyles, 2 Vern. 119, 2 Scott, 121; Keeble v. Keeble, 85 Ala. 552, 5 South. 149, H. & B. 68; Jaquith v. Hudson, 5 Mich. 123, H. & B. 62, per Christiancy, J. (a very able opinion); Willson v. Mayor, etc., of Baltimore, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774; Ward v. H. R. B. Co., 125 N. Y. 230, 26 N. E. 256; Wallis Iron Works v. Monmouth Park Ass'n., 55 N. J. L. 132, 39 Am. St. Rep. 626, 26 Atl. 140, 19 L. R. A. 456.

<sup>2</sup> Cushing v. Drew, 97 Mass. 445; Wilhelm v. Eaves, 21 Or. 194, 27 Pac. 1053, 14 L. R. A. 297; Gillis v. Hall, 7 Phila. 422, 2 Brewst. 342; Kunkle v. Wherry, 189 Pa. St. 198, 42 Atl. 112, 69 Am. St. Rep. 802, H. & B. 61.

the fact of its being disproportioned in amount to the damage which results therefrom—will not of itself be a sufficient reason for holding it to be a penalty.<sup>3</sup>

**§ 441. Rules Determining Liquidated Damages and Penalties.—**

While it is impossible to formulate one universal criterion by which the question of penalty or liquidated damages can be determined in every instance, certain particular rules have been well settled by the decisions, which apply to many important and customary forms and kinds of agreement, although there are, of course, numerous cases which cannot easily be brought within the operation of either of them. The following are the rules which have thus been established by judicial authority.

*First.* Wherever the payment of a smaller sum is secured by a larger, the larger sum thus contracted for can never be treated as liquidated damages, but must always be considered as a penalty.<sup>1</sup>

**§ 442. *Second.*** Where an agreement is for the performance or non-performance of only one act, and there is no adequate means of ascertaining the precise damage which may result from a violation, the parties may, if they please, by a separate clause of the contract, fix upon the amount of compensation payable by the defaulting party in case of a breach; and a stipulation inserted for such purpose will be treated as one for "liquidated damages," unless the intent be clear that it was designed to be only a penalty.<sup>1</sup>

**§ 443. *Third.*** Where an agreement contains provisions for the performance or non-performance of several acts of different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or of all such provisions, and the sum will be in some instances too large and in others too small a compensation for the injury thereby occasioned, that sum is to be treated as a

<sup>1</sup> Sun Printing & Pub. Ass'n v. Moore, 193 U. S. 642, 22 Sup. Ct. 240; Keeble v. Keeble, 85 Ala. 552, 5 South. 149, H. & B. 68; Taylor v. Times Newspaper Co., 83 Minn. 523, 85 Am. St. Rep. 473, 86 N. W. 760.

<sup>1</sup> Gay Mfg. Co. v. Camp, 65 Fed. 794, 13 C. C. A. 137, 25 U. S. App. 134; Morrill v. Weeks, 70 N. H. 178, 46 Atl. 32; Krutz v. Robbins, 12 Wash. 7, 40 Pac. 415, 50 Am. St. Rep. 871, 28 L. R. A. 676.

<sup>1</sup> Rolfe v. Peterson, 2 Brown Parl. C. 436; Keeble v. Keeble, 85 Ala. 552, 5 South. 149, H. & B. 68.

Where a party covenants that he will not carry on his trade or business within certain limits, and adds a clause making himself liable to pay a specified sum upon violation of the covenant, such sum is liquidated damages: Green v. Price, 13 Mees. & W. 695; McCurry v. Gibson, 108 Ala. 451, 18 South. 806, 54 Am. St. Rep. 177; Jacquith v. Hudson, 5 Mich. 123, H. & B. 62.

**Building Contracts:** If the amount of damage caused by delay is uncertain, the parties are allowed to stipulate for a fixed amount: DeGraff, etc., Co., v. Wickham, 89 Iowa, 720, 52 N. W. 503.

For the numerous other illustrations of this rule, see Pom. Eq. Jur., 3 ed., § 442, notes 1, a-g.

penalty, and not as liquidated damages. This rule has been laid down in a somewhat different form, as follows: Where the agreement contains provisions for the performance or non-performance of acts which are not measurable by any exact pecuniary standard, and also of one or more other acts in respect of which the damages are easily ascertainable by a jury, and a certain sum is stipulated to be paid upon a violation of any or of all these provisions, such sum must be taken to be a penalty.<sup>1</sup>

§ 444. *Fourth.* Whether an agreement provides for the performance or non-performance of one single act, or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed, is of such a nature and effect that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete, and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages. This rule plainly rests upon the same grounds as the third, and may be considered a particular application thereof.<sup>1</sup>

§ 445. *Fifth.* Finally, although an agreement may contain two or more provisions for the doing or not doing different acts, still, where the stipulation to pay a certain sum of money upon a default attaches to only one of these provisions, which is of such a nature that there is no certain means of ascertaining the amount of damages resulting from its violation,<sup>1</sup> or where all of the provisions are of such a nature that the damages occasioned by their breach cannot be measured, and a certain sum is made payable upon a default generally in any of them,<sup>2</sup>—in each of these cases, the sum so agreed to be paid may be considered as liquidated damage, provided, of course, that the language of the stipulation does not bring it within the limitations of the preceding fourth rule. It is evident that this proposition, in both its branches, is identical in substance with the second rule, heretofore given, and rests upon exactly the same grounds. The foregoing rules may be considered as settled by the strong preponderance of judicial authority, and they serve to explain large and important classes of cases. There

<sup>1</sup> *Kemble v. Farren*, 6 Bing. 141; *Willson v. Love*, [1896] 1 Q. B. 626, overruling *Wallis v. Smith*, 21 Ch. D. 243, Sh. 141, in so far as that case rejected the first form of the rule as stated in the text; *East Moline Plow Co. v. Weir Plow Co.*, 95 Fed. 250; *Wilhelm v. Eaves*, 12 Or. 194, 27 Pac. 1053, 14 L. R. A. 297.

<sup>2</sup> *Shreve v. Brereton*, 51 Pa. St. 175; *Hamaker v. Schroers*, 49 Mo. 406; *Johnson v. Cook*, 24 Wash. 274, 64 Pac. 729.

<sup>1</sup> *Green v. Price*, 13 Mees. & W. 695, 16 Mees. & W. 354.

<sup>2</sup> *Hall v. Crowley*, 5 Allen, 304, 81 Am. Dec. 704; *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716. See *Wallis v. Smith*, L. R. 21 Ch. D. 243, Sh. 141.

are undoubtedly numerous instances which cannot be easily referred to either of these rules; and this must be so almost as a matter of necessity. Since agreements are of infinite variety in their objects and in their provisions, and since the question of penalty or liquidated damages is always one of intention, depending upon the terms and circumstances of each particular contract, there must be many agreements which cannot be brought within the scope of any specific rule, and with which a court can only deal by applying the most general canon of interpretation.

**§ 446. No Election to Pay the Penalty and not to Perform.**—With respect to the effect of a penalty upon the equitable rights of the parties, while a court of equity will relieve the party who has thus bound himself against a penalty, or will restrain its enforcement against him at law, it will not, on the other hand, permit such party to resist a specific performance of the contract by electing to pay the penalty. Where a person has agreed to do a certain act, or to refrain from doing a certain act, and has added a penalty for the purpose of securing a performance, a court of equity will, if the contract is otherwise one which calls for its interposition, compel the party to specifically perform, or restrain him from committing the act, as the case may be, notwithstanding the penalty. If the sum stipulated to be paid is really a penalty, the party will never be allowed to pay it, and then treat such payment as a sufficient ground for refusing to perform his undertaking.<sup>1</sup> Where, however, the creditor party in such a contract has elected to proceed at law, and has recovered a judgment for damages, he cannot afterwards come into a court of equity, and obtain a specific performance; he cannot have the remedy given by both courts.<sup>2</sup>

**§ 447. Otherwise with Liquidated Damages.**—Where, however, the parties to an agreement have added a provision for the payment, in case of a breach, of a certain sum which is truly liquidated damages, and not a penalty,—in other words, where the contract stipulates for one of two things in the alternative, the doing of certain acts, or the payment of a certain amount of money in lieu thereof,—equity will not interfere to decree a specific performance of the first alternative, but will leave the injured party to his remedy of damages at law.<sup>1</sup> This is one reason among many why

<sup>1</sup> Hardy v. Martin, 1 Cox 26, 2 Scott, 123; French v. Macale, 2 Dru. & War. 274; Dooley v. Watson, 1 Gray, 414; Amanda Consol. G. M. Co. v. People's M. & M. Co., 28 Colo. 251, 64 Pac. 218.

<sup>2</sup> Fox v. Scard, 33 Beav. 327, per Sir J. Romilly, M. R.

<sup>1</sup> Woodward v. Gyles, 20 Vern. 119, 2 Scott, 121; Amanda Consol. G. M. Co. v. People's M. & M. Co., 28 Colo. 251, 64 Pac. 218; Hahn v. Concordia Soc., 42 Md. 460.

courts of equity incline strongly to construe such stipulations as providing for a penalty rather than for liquidated damages.

§ 448. **Forfeiture.**—This subject includes two entirely distinct questions, namely: When will equity interfere to aid the defaulting party, and to relieve against a forfeiture by setting it aside, or by allowing him to go on and perform as though it had not occurred, or by restraining the other party from enforcing it? and when will equity interfere at the suit of the creditor party, and by its decree actively enforce and carry into effect the forfeiture against the one in default? The former of these questions will be examined first in order.

§ 449. **When Equity will Relieve.**—It has been repeatedly assumed and asserted by numerous judicial dicta, and the statement seems to have been accepted by many text-writers as correct, that a court of equity is governed by the same doctrine with respect to relief against forfeitures and against penalties. This is true, perhaps, when considered simply as the announcement of a rule in its most general form; but in its practical application it is subject to such important exceptions and limitation that there is, in fact, a marked distinction between forfeitures and penalties, in the view with which they are respectively regarded and dealt with by equity. We have seen that wherever a certain sum is stipulated to be paid as security for the performance of some act which is capable of pecuniary measurement, so that the compensation in the nature of damages for a non-performance can be ascertained with reasonable exactness, the certain sum is taken to be a penalty, and that courts strongly lean in favor of a construction which shall make it a penalty, so that it may be disregarded. This is not universally true, is not the practical test in case of forfeitures, although, perhaps, the court may use the same general formula of words as applicable to both instances.

§ 450. **Ground and Extent of Such Relief.**—It is well settled that where the agreement secured is simply one for the payment of money, a forfeiture either of land, chattels, securities, or money, incurred by its non-performance, will be set aside on behalf of the defaulting party, or relieved against in any other manner made necessary by the circumstances of the case, on payment of the debt, interest, and costs, if any have accrued, unless by his inequitable conduct he has debarred himself from the remedial right, or unless the remedy is prohibited, under the special circumstances of the case, by some other controlling doctrine of equity.<sup>1</sup> Where the stipulation, however, is intended to secure the performance

<sup>1</sup> *Tibbetts v. Cate*, 66 N. H. 550, 22 Atl. 559; *Noyes v. Anderson*, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657.

or non-performance of some act in pais, it is impossible to lay down any such general rule with which all the classes of decisions shall harmonize. It is certain that if the act is of such a nature that its value cannot be pecuniarily measured, if the compensation for a default cannot be ascertained and fixed with reasonable precision, relief against the forfeiture incurred by its non-performance will not, under ordinary circumstances, be given.<sup>2</sup> The affirmative of this proposition cannot be stated as a rule with the same generality. It has, indeed, been said that equity would relieve against forfeitures in all cases where compensation can be made; but this is clearly incorrect. It is well settled that a court of equity will not, under ordinary circumstances, set aside forfeitures incurred on the breach of many covenants contained in leases, or of stipulations in other agreements, although the compensation for the resulting injury could be ascertained without difficulty;<sup>3</sup> and on the other hand, the relief is often given, as will appear from subsequent paragraphs, where the agreement secured by the clause of forfeiture is not one expressly and simply for the payment of money. The following proposition seems to be a conclusion fairly drawn from all the decisions upon the subject, and to be an accurate and comprehensive statement of the general doctrine as settled by them, namely: In the absence of special circumstances giving the defaulting party a higher remedial right, a court of equity will set aside or otherwise relieve against a forfeiture, both when it is incurred on the breach of an agreement expressly and simply for the payment of money, and also on the breach of an agreement of which the obligation, although indirectly, is yet substantially a pecuniary one.

§ 451. **Forfeiture Occasioned by Accident, Fraud, Surprise, or Ignorance.**—There are, as intimated above, special circumstances which will entitle a defaulting party to relief against a forfeiture in cases where otherwise it would not be granted. Although the agreement is not one measurable by a pecuniary compensation, still, if the party bound by it has been prevented from an exact fulfillment, so that a forfeiture is incurred, by unavoidable accident, by fraud, by surprise, or by ignorance, not willful, a court of equity will interpose and relieve him from the forfeiture so caused, upon his making compensation, if necessary, or doing everything else within his power.<sup>1</sup> Also, in the same class of cases, and upon the

<sup>1</sup> *Croft v. Goldsmid*, 24 Beav. 312; *Klein v. New York Life Ins. Co.*, 104 U. S. 88, (non-payment of life insurance premium); *Skinner v. Dayton*, 2 Johns. Ch. 526.

<sup>2</sup> *White v. Warner*, 2 Mer. 459.

<sup>3</sup> *Hill v. Barclay*, 18 Ves. 58; *Wing v. Harvey*, 5 De Gex, M. & G. 265; *Kopper*

same equitable grounds, if there has been a breach of the agreement sufficient to cause a forfeiture, and the party entitled thereto, either expressly or by his conduct, waives it or acquiesces in it, he will be precluded from enforcing the forfeiture, and equity will aid the defaulting party by relieving against it, if necessary.<sup>2</sup> For a like reason a court of equity may set aside or disregard a forfeiture occasioned by a failure to comply with the very letter of an agreement when it has nevertheless been substantially performed.<sup>3</sup>

**§ 452. Forfeiture Willful or through Negligence.**—While a defaulting party may thus acquire a right to the equitable relief from the conduct of the other party, he may also lose the right, which otherwise would have existed, as a consequence of his own conduct. In a case where an agreement creates a mere pecuniary obligation, so that a forfeiture incurred by its breach would ordinarily be set aside, a court of equity will refuse to aid a defaulting party, and relieve against a forfeiture, if his violation of the contract was the result of gross negligence, or was willful and persistent. He who asks help from a court of equity must himself be free from inequitable conduct with respect to the same subject-matter.<sup>1</sup> Having thus exhibited the doctrine in its general form, I shall briefly describe the most important instances of its application, namely: to conditions and covenants in leases; to conditions in contracts for the sale of land; to particular stipulations in other contracts; to the forfeiture of shares of stock; and to forfeitures created by statute.

**§ 453. Forfeitures Arising from Covenants in Leases.**—Where a lease contains a condition that the lessor may re-enter and put an end to the lessee's estate, or even that the lease shall be void, upon the lessee's failure to pay the rent at the time specified, it is well settled that a court of equity will relieve the lessee and set aside a forfeiture incurred by his breach of the conditions, whether the lessor has or has not entered and dispossessed the tenant. This rule is based upon the notion that such condition and forfeiture are intended merely as a security for the payment of money.<sup>1</sup>

v. Dyer, 59 Vt. 477, 59 Am. St. Rep. 742, 12 Atl. 4, H. & B. 166, 1 Scott 400 (an instructive opinion); Mactier v. Osborn, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323. See §§ 826, 833, post.

<sup>2</sup> *Pokegama Sugar Pine Lumber Co. v. Klamath River L. & I. Co.*, 96 Fed. 34; *Helme v. Philadelphia Ins. Co.*, 61 Pa. St. 107, 100 Am. Dec. 621.

<sup>3</sup> *Bliley v. Wheeler*, 5 Colo. App. 287, 38 Pac. 603; *Hagar v. Buck*, 44 Vt. 285, 8 Am. Rep. 368.

<sup>1</sup> *Hancock v. Carlton*, 6 Gray, 39; *N. Y. & N. E. R. R. Co. v. City of Providence*, 16 R. I. 746, 19 Atl. 759.

<sup>2</sup> *Lundin v. Schoeffel*, 167 Mass. 465, 45 N. E. 933; *Sunday Lake Min. Co. v. Wakefield*, 72 Wis. 204, 30 N. W. 136.

§ 454. Equity will not, under ordinary circumstances, relieve against a forfeiture arising from the breach of other covenants contained in a lease, on the ground that no exact compensation can be made. Among these covenants for a breach of which no relief can ordinarily be given is that to repair generally, or to make specific repairs, or to lay out a certain sum of money in repairs or erections within a specific time;<sup>1</sup> the covenant to insure;<sup>2</sup> the covenant not to assign without license;<sup>3</sup> and in other covenants of a special nature.<sup>4</sup> It should be observed, however, that in all cases of this class relief may be given when the breach was the result of fraud, mistake, accident, surprise, and the like, or was acquiesced in or waived by the lessor.<sup>5</sup>

§ 455. **From Contracts for the Sale of Land.**—<sup>1</sup>

§ 456. **From Other Contracts.**—In all other special contracts containing provisions for a forfeiture, the same general principle must, of course, be applied, although there may be some doubt or difficulty in the application. It is clear that if the contract be of such a nature that a clause for the payment of a certain sum upon its violation would be pronounced a provision for liquidated damages, then a court of equity would grant no relief against a forfeiture incurred by its non-performance. On the other hand, if the obligation created by the contract is substantially, though perhaps indirectly, a pecuniary one, then a court of equity undoubtedly will aid the defaulting party by setting aside a forfeiture. Between these two extremes there is a mass of agreements with respect of which the action of the courts in giving relief may perhaps be regarded as somewhat discretionary. The mere fact that a certain sum stipulated to be paid upon a violation would be treated as a penalty is not of itself decisive in favor of a relief from forfeiture in similar cases. The examples given in the note will serve to illustrate the action of courts in dealing with such agreements.<sup>1</sup>

§ 457. **Of Shares of Stock.**—A forfeiture of the shares of stock in a corporation, regularly and duly incurred by the stockholder's

<sup>1</sup> *Hill v. Barclay*, 16 Ves. 403, 406, 18 Ves. 58, 61; *Croft v. Goldsmid*, 24 Beav. 312.

<sup>2</sup> *Reynolds v. Pitt*, 19 Ves. 134; *White v. Warner*, 2 Mer. 459.

<sup>3</sup> *Barrow v. Trustees* (1891), 1 Q. B. 417.

<sup>4</sup> *Hills v. Rowland*, 4 De Gex, M. & G. 430; *Macher v. Foundling Hospital*, 1 Ves. & B. 187; *Monroe v. Armstrong*, 96 Pa. St. 307.

<sup>5</sup> See ante, § 451, and case in note.

<sup>1</sup> See post, § 1408, note.

<sup>1</sup> *Wilson v. Mayor, etc., of Baltimore*, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774 (relief); *Gregg v. Landis*, 19 N. J. Eq. 850, 21 N. J. Eq. 494, 514 (no relief); *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211 (no relief); *Henry v. Tupper*, 29 Vt. 358 (relief).

or subscriber's failure to pay the calls or installments thereon according to the charter or by-laws of the company, will not be set aside or relieved against by a court of equity; and the same is true of a forfeiture of public and governmental stock by reason of a failure to comply with the terms of the loan concerning payment.<sup>1</sup>

§ 458. **When Imposed by Statute.**—Finally, whenever any forfeiture is provided for by a statute, to be incurred on the doing or not doing some specified act, equity can afford no relief from it, and the same is true of a statutory penalty. A court of equity has no power to disregard or set aside the express terms of statutory legislation, however much it may interfere with the operation of common-law rules.<sup>1</sup>

§ 459. **Equity will not Enforce Forfeitures.**—The second question which it was proposed to consider is, When will a court of equity by its decree actively enforce or carry into effect a forfeiture? The general answer to this question is easy and clear. It is a well-settled and familiar doctrine that a court of equity will not interfere on behalf of the party entitled thereto, and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture. The few apparent exceptions to this doctrine are not real exceptions, since they all depend upon other rules and principles.<sup>1</sup> The reasons of the doctrine are to be found in the universal principle that a court of equity refuses to aid any party who, by the remedy which he seeks to obtain against his adversary, is not himself doing equity, or who does not come before the court "with clean hands,"—the same principle upon which the court acts when it refuses to specifically enforce a contract which is unequal, unjust, or has any inequitable features and incident.

<sup>1</sup> *Sparks v. Company, etc., of Liverpool Water Works*, 13 Ves. 428, 433, 434; *Southern B. & L. Ass'n. v. Anniston*, 101 Ala. 582, 46 Am. St. Rep. 138, 15 South. 123, 29 L. R. A. 120.

<sup>1</sup> *State v. McBride*, 76 Ala. 51; *State v. Hall*, 70 Miss. 678, 13 South. 39.

<sup>1</sup> *Oil Creek R. R. v. Atlantic, etc. R. R.*, 57 Pa. St. 65; *Worthington v. Moon*, 53 N. J. Eq. 46, 30 Atl. 251; *Craig v. Hukill*, 37 W. Va. 250, 16 S. E. 363 H. & B. 60.

SECTION II.  
CONCERNING ELECTION.

ANALYSIS.

- § 461. Questions stated.
- §§ 462-465. Rationale of the doctrine discussed.
  - § 463. In the Roman law.
  - § 464. Foundation, the presumed intention of the donor.
  - § 465. The true foundation is the principle, He who seeks equity must do equity.
- §§ 466-470. Meaning, extent, and effects of the doctrine.
  - § 466. Election in conformity with instrument of donation.
- §§ 467, 468. Election in opposition thereto; rules; compensation.
  - § 469. No election unless compensation can be made.
  - § 470. Applies to all instruments of donation.
- §§ 471-505. Applications; classes of cases in which the necessity for an election does or does not arise.
  - § 472. Fundamental rule; what creates the necessity for an election.
- §§ 473-475. Subordinate rules of interpretation.
- §§ 473, 474. Donor has only a partial interest; evidence of intention not admissible; a general gift raises no election.
  - § 475. Other special rules of interpretation.
- §§ 476-480. *First class*: Donor gives property wholly another's.
  - § 477. Ordinary case, gift of specific property.
- §§ 478-480. Under appointments in pursuance of powers.
- §§ 481-486. Where testator has attempted to give property by a will which is ineffectual.
  - § 482. Infancy or coverture of testator.
  - § 483. Will valid as to personal, invalid as to real estate.
  - § 484. Will invalid as to property in another state or country.
  - § 485. Will devising after-acquired lands.
  - § 486. Will of copyholds.
- §§ 487-505. *Second class*: Donor gives property in which he has a partial interest.
  - § 488. The general doctrine.
  - § 489. Donor owns only an undivided share.
  - § 490. Donor owns only a future interest.
  - § 491. Devise of lands encumbered.
- §§ 492-502. Dower; widow's election between dower and gifts by her husband's will.
  - § 493. The general rule.
  - § 494. Contrary legislation in the various states.
- §§ 495-502. Classes of testamentary dispositions.
  - § 496. Express declaration.
  - § 497. Devise of a part of testator's land to the widow, and the rest to others.
    - § 498. Devise to the widow for life.
    - § 499. Devise in trust to sell, or with a power of sale.
    - § 500. Gift of an annuity, etc., to widow, charged upon the lands devised to others.

- § 501. Devise with express power of occupying, leasing, etc.
- § 502. Devise to widow and others in equal shares.
- §§ 503-505. Election in devises of community property.
- § 506. The remaining questions stated.
- §§ 507-510. Who may elect; married women; infants; lunatics.
- §§ 511, 512. Rights and privileges of persons bound to elect.
- § 513. Time of election; state statutes.
- §§ 514, 515. Mode of election, express or implied; conduct amounting to an election.
- §§ 516, 517. Effects of an election.
- §§ 518, 519. Equitable jurisdiction in matters of election.

§ 462. **Rationale of the Doctrine.**—The essential facts presenting an occasion for the doctrine of election are: A gives to B property belonging to C, and by the same instrument gives to C other property belonging to himself. The equitable doctrine upon these facts, briefly, is: C has two alternatives: 1. He may elect to take under the instrument, and to carry out all its provisions; he will then take A's property, which was given to him, and B will take C's property. 2. He may elect against the instrument. In that case he will not wholly forfeit the benefits intended to be conferred upon him; he must surrender only so much of such benefits as may be necessary to compensate B for the disappointment he has suffered by C's election to take against the instrument. . . .

§ 465. **True Foundation.**— . . . I venture the assertion that the only true basis upon which the doctrine can be rested is that maintained in the preceding chapter, namely, the grand principle that he who seeks equity must do equity. This principle has ordinarily been regarded simply as furnishing a guide to the courts in their apportionment of equitable relief among the parties in a great variety of cases; but, as I have shown, it is also the undeniable source of certain distinctively equitable doctrines. There is no doctrine more unmistakably and completely derived from this grand principle than that of election. The whole theory and process of election is a practical application of the maxim, He who seeks equity must do equity. A party asserts his claim to certain property; in order that he may obtain any relief, he must acknowledge and make provision for the equitable rights of other parties derived from the same instrument, and to that end must make his election, so that in either choice those rights shall be preserved. The very election which he is obliged to make consists in the "doing equity" to others which the principle demands. . . .

§ 468. **Compensation the Result.**—In any case for an election, where the party upon whom the necessity devolves elects to take in opposition to the instrument of donation, and therefore retains

his own estate which had been bestowed upon the third person, does he thereby lose all claim upon or benefit of the donor's property given to himself? or does he only lose such part of it or so much of its value as may be needed to indemnify the disappointed third person? In adjusting the equities between himself and the third person, must he necessarily surrender to that person the entire gift made to himself? or must he simply make adequate compensation? Few, if any, of the cases have required a decision of this question;<sup>1</sup> and what has been said concerning it has chiefly been by way of argument and of judicial dictum. The rule may be regarded, however, as settled by the weight of judicial opinion very strongly in favor of *compensating* the donee who is disappointed by an election against the instrument. If the gift which he takes by way of substitution is not sufficient in value to indemnify him for that which he has lost, he of course retains the whole of it.<sup>2</sup>

§ 470. **Doctrine Applies Both to Wills and Deeds.**—It may be added that the doctrine of election, as generally described in the foregoing paragraphs, applies to all instruments of donation,—to deeds, settlements, and the like, as well as to wills,—although the cases involving it have most frequently arisen under wills.<sup>1</sup> . . .

§ 472. **Fundamental Rule.**—The first and fundamental rule, of which all the others are little more than corollaries, is: In order to create the necessity for an election, there must appear upon the face of the will itself, or of the other instrument of donation, a clear, unmistakable intention, on the part of the testator or other

<sup>1</sup>The reason is very plain. A person compelled to elect will generally be influenced, in making the election, solely by his own pecuniary interests. If the property bequeathed to himself by a will is more valuable than his own, he naturally elects to take under the will, and lets his own estate go to the third person. If the property bequeathed to himself be less valuable than his own, he elects to take against the will and retains his own. It is then of no consequence whether the principle adopted with reference to the bequest made to himself be forfeiture or compensation, since the whole subject-matter is insufficient to indemnify the disappointed legatee. In other words, the third person takes all the bequest in question, and must be satisfied with it, for he has no right to anything more. The question would arise in such a case as the following: A testator bequeaths fifty thousand dollars to A, and devises to B an old family estate of which A is the owner in fee, and which is worth only twenty thousand dollars. A, from attachment to the family estate, elects to keep it, and thus to take in opposition to the will. Is B then entitled to the whole fifty thousand dollars? or only to twenty thousand dollars of it,—the value of the estate which he loses by the election,—so that the balance of the thirty thousand dollars would still belong to A? The latter alternative is the view taken by the weight of authority. *Barrier v. Kelly* (Miss.), 33 South. 974.

<sup>2</sup>*Rogers v. Jones*, 3 Ch. Div. 688, H. & B. 131; *Barrier v. Kelly* (Miss.), 33 South. 974.

<sup>1</sup>*Mosley v. Ward*, 29 Beav. 407.

donor, to dispose of property which is in fact not his own. This intention to dispose of property which in fact belongs to another, and is not within the donor's power of disposition, must appear from language of the instrument which is unequivocal, which leaves no doubt as to the donor's design; the necessity of an election can never exist from an uncertain or dubious interpretation of the clause of donation. It is the settled rule that no case for an election arises unless the gift to one beneficiary is irreconcilable with an estate, interest, or right which another donee is called upon to relinquish; if both gifts can, upon any interpretation of which the language is reasonably susceptible, stand together, then an election is unnecessary. The instrument may declare in express terms that the gift to A must be accepted by him in lieu of his own interest, which is thereby transferred to B, and then no possible doubt could exist. But this direct mode of exhibiting the donor's purpose is not indispensable. It is sufficient if the dispositions of the instrument, fairly and reasonably interpreted, exhibit a clear intention of the donor to bestow upon B some estate, interest, or right of property, which is not the donor's, but which belongs to A, and at the same time to give to A some benefits derived from the donor's own property.<sup>1</sup> It is immaterial, however, whether the donor knew the property not to be his own, or erroneously conceived it to be his own; for in either case, if the intention to dispose of it clearly appears, the necessity for an election exists.<sup>2</sup>

**§ 473. Rule of Interpretation; Donor has a Partial Interest; Strong Leaning against Election; Extrinsic Evidence of Intention.**

— . . . If the language of the donation is ambiguous, so that its correct interpretation is at all doubtful, it is now a firmly established rule that parol evidence of matters outside the instrument cannot be admitted for the purpose of showing an intent of the donor to dispose of property which he knew did not belong to him, and thus to create the necessity for an election. The intent of the donor to dispose of that which is not his ought to appear upon the instrument. There were early decisions which acted upon another view, and received such evidence as controlling, but they have been completely overruled by subsequent authorities. Of course, extrinsic evidence is always admissible in such cases, as well as in all others arising upon wills and deeds, in order to show the surrounding circumstances, the nature and situation of the

<sup>1</sup> *Codrington v. Lindsay*, L. R. 8 Ch. 578, 587; *Fifield v. Van Wyck*, 94 Va. 557, 562, 64 Am. St. Rep. 745, 27 S. E. 446; *Hattersley v. Bissett*, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, 29 Atl. 187.

<sup>2</sup> *Cooper v. Cooper*, L. R. 6 Ch. 15, 16, 20; *Barrier v. Kelly (Miss.)*, 33 South. 974.

property, the relations of the donor to the beneficiaries, and the like facts, which place the court in the shoes of the donor; but such evidence can go no further.<sup>1</sup>

§ 476. **First Class of Cases.**—Cases in which the donor assumes to give specific property belonging entirely to another, where he himself has no interest in it, and no power of disposition over it.

§ 477. **Ordinary Case: Gift of Specific Property.**—The simplest case is that in which the donor, by language of description sufficient to designate the subject-matter, and by terms of donation sufficient to effect a transfer if they operated upon property of his own, bestows upon B some specific estate, interest, or fund, which in fact belongs entirely to A, and by the same instrument confers upon A some benefit out of the donor's own property. Under these circumstances a case for an election always arises. The whole effect depends upon the question whether there is such a gift; and if so, there is really no room for interpretation or construction. No discussion of this case is needed.<sup>1</sup>

§ 484. **Will Invalid in Another Country or State.**—There is a second case which may and does arise in this country and in England, having been affected by no statute. A testator has property situated in two states or countries; he makes a will, the language of which, either by general or particular description, applies to both classes of property, by which he devises his lands away from his heir to a stranger, and at the same time gives a legacy or other benefit to his heir; the will is valid and operative by the law of the state or country in which it is made, so that all the testator's property situated therein is effectively disposed of; but, either from the neglect of proper modes of execution, or of the requisite form of description or disposition, the will is not valid and operative by the law of the other state or country to carry the lands of the testator situated therein; the attempted devise of the lands situated in that other country or state is therefore void, and the lands themselves descend to the heir at law. The question presented upon these facts is, whether the heir is bound to elect between the gift contained in the will and the descended lands, or whether he may retain both. . . . The English courts have settled the two following conclusions: If the language by which the testator describes and disposes of his property is general in its terms, and makes no specific reference to his Scotch heritable property, and contains no words or phrases which, by a reasonable interpretation, necessarily refer to such property, then the general rule of

<sup>1</sup> *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318.

<sup>1</sup> *Moore v. Baker*, 4 Ind. App. 115, 51 Am. St. Rep. 203, 30 N. E. 629; *Fitzhugh v. Hubbard*, 41 Ark. 64, H. & B. 128.

construction governs the case, that the testator must be assumed to have intended to confine the dispositions to the property which he had the power to dispose of *by that will*,—namely, the English property. The Scotch heritable property is not disposed of, and was not intended to be disposed of, and the heir is not put to an election. In short, the case falls under the familiar rule stated in the last paragraph.<sup>1</sup> If, on the other hand, the testator makes an express reference to his Scotch property, or uses such specific language of description, that, upon a reasonable interpretation, he must have intended such a reference, and a clear intention is thereby shown to dispose of the Scotch as well as the English estate, then, although the disposition is void with respect to the Scotch heritable property, the heir at law is compelled to elect between this property thus descending to him, and the benefits conferred upon him by the will.<sup>2</sup> Similar cases have arisen in this country upon wills executed in one state, and valid for all purposes by the law thereof, but not valid as effective devises of land by the law of another state in which was situated real property owned by the testator. The same twofold rule has been adopted and enforced by the American courts; and it is plain that such cases may constantly arise from the varying legislation of different commonwealths.<sup>3</sup>

§ 487. **Second Class.**—Cases where property is given to B, in which the donor has only a partial interest, and a partial interest in it is held by A, and by the same instrument other property of the donor is conferred upon A. . . .

§ 488. **General Doctrine.**— . . . Where the testator has a partial interest in the property devised or bequeathed by his will, the necessity of an election is always much less apparent than where he purports to bestow property in which he has no interest whatever. In such cases it is a settled rule that courts will lean as far as possible in favor of an interpretation which shows an intention of the testator to give only the interest, estate, or share which he is enabled, by virtue of his own right, to deal with, or to give the property in its present condition, subject to all existing encumbrances and charges upon it. It requires a strong, unequivocal expression or indication of an intent on the part of the testator to bestow the entire property, and not simply his own interest in it, or to bestow the property freed from its encumbrances and charges, in order to raise the necessity for an election.<sup>1</sup>

<sup>1</sup> *Maxwell v. Maxwell*, 2 De Gex, M. & G. 705, 16 Beav. 106; *Maxwell v. Hyslop*, L. R. 4 Eq. 407.

<sup>2</sup> *Brodie v. Barry*, 2 Ves. & B. 127; *Dewar v. Maitland*, L. R. 2 Eq. 834.

<sup>3</sup> *Van Dyke's Appeal*, 60 Pa. St. 481, 489, H. & B. 136.

<sup>1</sup> *Reed v. Dickerman*, 12 Pick. 146, H. & B. 134; *Haven v. Sackett*, 15 N. Y. 365; *Toney v. Spragins*, 80 Ala. 541.

§ 489. **The Donor Owns only an Undivided Share of the Property.**—If a testator owning an undivided share uses language of description and donation which may apply to and include the whole property, and by the same will gives benefits to his co-owner, the question arises whether such co-owner is bound to elect between the benefits conferred by the will and his own share of the property. Prima facie a testator is presumed to have intended to bequeath that alone which he owned,—that only over which his power of disposal extended. Wherever, therefore, the testator does not give the whole property *specifically*, but employs *general words* of description and donation, such as “all my lands,” and the like, it is well settled that no case for an election arises, because there is an interest belonging to the testator to which the disposing language can apply, and the prima facie presumption as to his intent will control.<sup>1</sup> On the other hand, if the testator devises the property *specifically* by language indicating a specific gift of the property, an election becomes necessary. It seems now to be settled by the more recent English decisions that when the owner of an undivided share devises or bequeaths the property by words of description and donation importing an intent to give the *entirety*, then a case of election is raised against the other co-owner who receives a benefit under the same will.<sup>2</sup> The conclusion which is plainly deducible from these recent decisions in England is, that when a person owns an undivided interest or share in any species of property,—a house and lot, a farm, a fund of securities, or a fund of money,—and he does not use general words of gift, such as “all my estate,” “all my property,” and the like, but purports to give the *whole thing itself*, using language which, by a reasonable interpretation, must necessarily describe and define the whole corpus of the thing in which his partial interest exists, as a distinct and identified piece of property, then an intention to bestow the whole, and not merely the testator’s undivided share, must be inferred, and a case for an election arises. The language of description may be by metes and bounds, or may be any other form of words which will serve clearly to point out and identify the entire subject-matter.

§ 492. **Dower—Election by a Widow between her Dower and Benefits Given by her Husband’s Will.**—Where a husband devises or bequeaths property to his wife, the question arises, whether she must elect between this benefit and her dower, or whether she is

<sup>1</sup> *Miller v. Thurgood*, 33 Beav. 496; *Penn v. Guggenheimer*, 76 Va. 839, 847, H. & B. 123; *In re Gotzian*, 34 Minn. 159, 57 Am. Rep. 43, 24 N. W. 920.

<sup>2</sup> *Grissell v. Swinhoe*, L. R. 7 Eq. 201, 295; *Wilkinson v. Dent*, L. R. 6 Ch. 339; *Penn v. Guggenheimer*, 76 Va. 839, 847, H. & B. 123.

entitled to claim both her dower and the testamentary gift. This is by far the most important and frequent aspect in which the doctrine of election has come before the American courts,—so important that election itself has sometimes been treated by American writers as a mere incident of dower. . . .

§ 493. **The General Rule.**— . . . If the will declares in express words that the testamentary gift is intended to be in lieu of dower, the widow is obliged, even at law, to elect.<sup>1</sup> When, however, the will contains no such express words, every devise or bequest made to the wife is presumed to be intended as a provision in addition to her dower right, and in general, she will not be required to elect. The duty of electing may arise even in the absence of any express declaration that the testamentary gift is in lieu of dower, but can only arise from a clear, unequivocal intention exhibited in provisions of the will incompatible with the right of dower. . . . It results that whatever be the dispositions of the will to the widow and to others, the presumption is strong in favor of the intention that the widow shall have both the gift and her dower; the courts lean heavily in support of this presumption; nothing short of a perfect incongruity between the dispositions of the will and the widow's claim to set out her dower *by metes and bounds* from her husband's lands can put her to an election. However positive and absolute the testator's language of donation, the court will, if possible, read it as meaning, "I devise and bequeath all my interest in the land subject to my wife's dower right."<sup>2</sup> It must also be carefully observed, as a conclusion drawn from all the cases of authority, that it is not sufficient to raise a case for an election, that an intention can even be plainly inferred from the dispositions of the will for the widow to take the testament gift in lieu of her dower; in order to put her to an election, such an intention on the part of the testator must be expressed by means of testamentary dispositions and provisions which are wholly and unmistakably inconsistent with the assertion of her claim to the dower. *Mere* intention of the testator gathered from the will is clearly not enough; that intention must have been shown, or carried into operation, by totally inconsistent gifts of the land subject to the dower.

§ 494. **A Different Statutory Rule in Certain States.**—As will

<sup>1</sup> *Nottley v. Palmer*, 2 *Drew.* 93.

<sup>2</sup> *Birmingham v. Kirwan*, 2 *Schoales & L.* 444, 452; *Adsit v. Adsit*, 2 *Johns. Ch.* 448, 7 *Am. Dec.* 539; *Church v. Bull*, 2 *Denio* 430, 43 *Am. Dec.* 754; *Herbert v. Wren*, 7 *Cranch*, 370, 378; *Reed v. Dickerman*, 12 *Pick.* 145, 149, *H. & B.* 134; *Tobias v. Ketchum*, 32 *N. Y.* 319, 326, *H. & B.* 374; *Lewis v. Smith*, 9 *N. Y.* 502, 61 *Am. Dec.* 706.

more particularly appear in a subsequent paragraph, the time and mode of electing between her dower and a will, by a widow, is very precisely regulated in many of the states by statute. Either as a result of this legislation, or of statutes changing the nature of dower, a general rule concerning the necessity of election by widows, quite different from that set forth in the foregoing paragraph, has been adopted in some of the states. By this rule, whenever a testamentary disposition in behalf of his widow is contained in the husband's will, and his intention that she is to enjoy both this gift and her dower does not affirmatively and expressly appear on the face of the instrument, she is required to elect between the two.<sup>1</sup>

§ 499. **Devise in Trust to Sell, or with a Power of Sale.**—It is also a settled rule, both in England and in the American states, where statutes have not interfered, that, after a legacy, annuity, or other provision made for the wife, a devise of lands which are subject to dower, or of all the testator's lands, to trustees, on trust, to sell, or with power given to the executors to sell, for any purpose, is not inconsistent with the widow's claim of dower in the lands so devised, and therefore no necessity for an election by her is created. The will, in such case, is to be interpreted as though it had expressed the intention for the lands to be sold subject to the widow's dower. This conclusion is the same, even although the will directs that an interest in some part of the proceeds of the sale should be given or secured to the widow.<sup>1</sup> Some special provision of the will, however, in addition to the mere trust, or power to sell, and to the direction for distributing the proceeds, may create the inconsistency which prevents this rule from applying, and requires an election by the widow.<sup>2</sup>

§ 502. **Devise to Widow and Others in Equal Shares.**—The rule is also settled in England by a current of decisions that where a testator devises lands, which are by law subject to dower, in express terms, to his widow and others,—as, for example, his children,—in equal shares, this provision for an equality among the devisees is inconsistent with a claim of dower, and creates the necessity for an election by the widow.<sup>1</sup> Although this rule is sustained by

<sup>1</sup> *Reed v. Dickerman*, 12 Pick. 146, H. & B. 124; *Crenshaw v. Carpenter*, 69 Ala. 572, 44 Am. Rep. 539; *Warren v. Warren*, 148 Ill. 61, 22 L. R. A. 393, 36 N. E. 611; *Stearns v. Perrin*, 130 Mich. 456, 90 N. W. 297; *Clayton v. Akin*, 38 Ga. 320, 95 Am. Dec. 393; *Brant v. Brant*, 40 Mo. 266; *Cooper v. Cooper*, 56 N. J. Eq. 48, 38 Atl. 198.

<sup>2</sup> *Ellis v. Lewis*, 3 Hare 310; *Konvalinka v. Schlegel* 104 N. Y. 125, 58 Am. Rep. 494, 9 N. E. 868, H. & B. 132.

<sup>3</sup> *Vernon v. Vernon*, 53 N. Y. 351, 362.

<sup>4</sup> *Chalmers v. Storil*, 2 Ves. & B. 222; *Durfee's Petition*, 14 R. I. 47; *Helme v. Strater*, 52 N. J. Eq. 591, 30 Atl. 333.

the authority of several direct decisions, it cannot be reconciled with the general principle, which underlies all cases of election between a testamentary disposition for the widow and her dower,—the principle that a testator is to be presumed to have intended to devise only what belonged to him and what he was able to give. The correctness of the rule has been repeatedly questioned.<sup>2</sup>

§ 509. **Who may Elect—Infants.**<sup>1</sup>—It is very clear that an infant cannot elect. In cases where an infant, if he had been an adult, would be bound to elect, the court has sometimes deferred the question of election, where this could be done without prejudice to the rights of other parties, until the infant came of age. The ordinary rule is for the court to direct an inquiry to be made whether it is for the infant's advantage to elect or not, and what election ought to be made. In other words, the court, as the result of a judicial examination, itself makes the election on the infant's behalf.<sup>2</sup>

§ 510. **Lunatics.**—In like manner, where the person entitled or bound to elect is a lunatic, the court will make the election on his behalf, after having ascertained, through an inquiry, what action is most for his advantage; and this is the rule, even though the lunatic is under the care of a committee.<sup>1</sup>

§ 511. **Rights and Privileges of Persons Bound to Elect.**—It should be carefully observed that the rules to be mentioned under this head were established in the absence of any legislation upon the subject. . . .

§ 512. Subject to the above-stated limitations, it is a well-settled rule of equity that a person bound to elect has a right to become fully informed of and to know all the facts affecting his choice, and upon which a fair and proper exercise of the power of election can depend. To this end he has a right to inquire into and ascertain all the circumstances connected with the two properties,—that is, his own and the one conferred upon him, and especially their relative condition and value; and he will not be compelled to elect until he has made, or at least has had an opportunity to make, such an examination as enables him to learn the truth.<sup>1</sup> It follows that where an election has been made in ignorance or

<sup>2</sup> See *In re Hatch's Estate*, 62 Vt. 300, 18 Atl. 814, 22 Am. St. Rep. 109.

<sup>1</sup> As to election by *married women*, see *In re Vardon's Trusts*, L. R. 31 Ch. D. 275, Shep. 135.

<sup>2</sup> *McQueen v. McQueen*, 2 Jones Eq. 16, 62 Am. Dec. 205.

<sup>1</sup> *Kennedy v. Johnson*, 65 Pa. St. 451, 3 Am. Rep. 650; *Wilder v. Pigott*, L. R. 22 Ch. Div. 263; *Van Steenwyck v. Washburn*, 59 Wis. 483, 501, 48 Am. Rep. 532, 17 N. W. 289.

<sup>1</sup> *Wilson v. Thornbury*, L. R. 10 Ch. 239, 248, 249; *Macknet v. Macknet*, 29 N. J. Eq. 54.

under a mistake as to the real condition and value of the properties, or under a mistake as to the real nature and extent of the party's own rights, such a mistake is regarded as one of fact, rather than of law; the election itself is not binding, and a court of equitable powers will permit it to be revoked, unless the rights of third persons have intervened which would be interfered with by the revocation.<sup>2</sup> This particular rule must necessarily have been materially modified by the statutes in many states, which declare in positive terms that an election by widows can only be made within a certain prescribed period, and that if they suffer the time to elapse without taking any step, they shall be deemed to have elected, or to have abandoned the right of electing; and so the decisions seem to hold.

§ 513. **Time of Election.**— . . . Under the purely equitable doctrines, unmodified by statute, there is, as it seems, no limit in point of time to a right to elect, unless it can be shown that injury would result to third persons by delay.<sup>1</sup> Nevertheless it is clear that by the acquiescence and delay of the one entitled to elect, third persons may acquire rights in the property originally subject to an election, which equity will not suffer to be disturbed by means of a subsequent election.<sup>2</sup> It seems, on the other hand, that a person having the right to compel an election does not, in general, forfeit the right by a delay in its enforcement.<sup>3</sup> These purely equitable rules, at least so far as they affect widows electing between testamentary benefits and dower, have been greatly modified by legislation in this country. In very many of the states statutes have been passed which prescribe definite periods of time within which the right of election between dower and a provision made by will must be exercised.<sup>4</sup>

§ 514. **Mode of Election, Express or Implied—What Conduct Amounts to an Election.**—Independently of the statutes referred to in the foregoing paragraph, which have altered the equitable rules on the subject in very many states, an election may be either express or implied. An express election is made by some single unequivocal act of the party, accompanied by language showing his intention to elect, and the fact of his electing in a positive, unmistakable manner,—as, for example, by the execution of a written instrument declaring the election. As the election becomes

<sup>2</sup> *Macknet v. Macknet*, 29 N. J. Eq. 54; *Woodburn's Estate*, 138 Pa. St. 606, 21 Am. St. Rep. 932, 21 Atl. 16; *Evans's Appeal*, 51 Conn. 435.

<sup>1</sup> *Sopwith v. Maugham*, 30 Beav. 235.

<sup>2</sup> *Tibbitts v. Tibbitts*, 19 Ves. 663.

<sup>3</sup> *Spread v. Morgan*, 11 H. L. Cas. 588.

<sup>4</sup> *Lord v. Lord*, 23 Conn. 327; *Akin v. Kellogg*, 119 N. Y. 441, 23 N. E. 1046.

fixed by such a definite act, and at such precise time, no questions concerning it can arise.

§ 515. **Implied.**—An election may also be implied—that is, inferred—from the conduct of the party, his acts, omissions, modes of dealing with either property, acceptance of rents and profits, and the like. Courts of equity have never laid down any rule determining for all cases what conduct shall amount to an implied election, but each case must depend in great measure upon its own circumstances.<sup>1</sup> The following rules, however, have been fairly settled by the courts as guides in determining the general question. To raise an inference of election from the party's conduct merely, it must appear that he knew of *his right to elect*, and not merely of the instrument giving such right, and that he had full knowledge of all the facts concerning the properties.<sup>2</sup> As an election is necessarily a definite choice by the party to take one of the properties and to reject the other, his conduct, in order that an election may be inferred, must be done with an intention to elect, and *must show such an intention*. The intention, however, may be inferred from a series of unequivocal acts.<sup>3</sup> . . . The rule seems to be plainly deducible from the American cases which are placed in the note, that where a widow is required to elect between a testamentary provision in her favor and her dower, any unequivocal act of dealing with the property given by the will as her own, or the exercise of any unmistakable act of ownership over it, if done with knowledge of her right to elect, and not through a clear mistake as to the condition and value of the property, will be deemed an election by her to take under the will, and to reject her dower.<sup>4</sup>

§ 516. **Effects of an Election.**— . . . Where an election is once made by the party bound to elect, either expressly or inferred from his conduct, it binds not only himself, but also those parties who claim under him, his representatives and heirs.<sup>1</sup> . . .

§ 517. The other parties interested as donees under the instrument creating the necessity for an election are affected by it, when made, in the following manner: If the person on whom the duty of electing rests elects to take in conformity with the will or

<sup>1</sup> Padbury v. Clark, 2 Macn. & G., 298; Whitridge v. Parkhurst, 20 Md. 62, 72.

<sup>2</sup> Sopwith v. Maugham, 30 Beav. 231.

<sup>3</sup> Spread v. Morgan, 11 H. L. Cas. 588; Wilson v. Thornbury, L. R. 10 Ch. 239, 248, 249; Penn v. Guggenheimer, 76 Va. 839, H. & B. 123; Estate of Smith, 108 Cal. 115, 40 Pac. 1037.

<sup>4</sup> Penn v. Guggenheimer, 76 Va. 839, 850, H. & B. 123; Pratt v. Douglas, 38 N. J. Eq. 516, 538.

<sup>1</sup> Penn v. Guggenheimer, 76 Va. 839, 851, H. & B. 123.

other instrument of donation, he thereby relinquishes his own property, and must release or convey it to the donee upon whom the instrument had assumed to confer it.<sup>1</sup> If he elects against the will or other instrument of donation, he thereby retains his own property, and must compensate the disappointed donee out of the estate given to himself by the donor. A court of equity will then sequester the benefits intended for the electing beneficiary, in order to secure compensation to those persons whom his election disappoints.<sup>2</sup>

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### SECTION III.

#### CONCERNING SATISFACTION.

##### ANALYSIS.

- § 520. Questions stated.
- § 521. Definition.
- §§ 522-525. Various conditions of fact.
  - § 523. Rationale of the doctrine.
  - § 524. Ademption and satisfaction.
  - § 525. Extrinsic evidence.
  - § 526. Divisions of the subject.
- §§ 527-543. I. Satisfaction of debts by legacies.
  - §§ 527-540. Legacy by a debtor to his creditor.
  - §§ 528-536. Various circumstances which prevent the presumption of satisfaction.
    - § 537. Direction in will to pay debts.
    - § 538. Legacy in pursuance of agreement, or in express payment.
    - § 539. Debt owing to a child or wife.
    - § 540. Debt to child satisfied by an advancement.
  - §§ 541, 542. Legacy by a creditor to his debtor.
    - § 543. Satisfaction of debt, how enforced.
- §§ 544-552. II. Satisfaction of legacies by subsequent legacies.
  - § 545. Rule first: Specific legacies.
  - §§ 546-548. Rule second: Legacies of quantity by different instruments.
    - § 549. Rule third: Legacies of equal amounts by the same instrument.
  - §§ 550, 551. Rule fourth: Legacies of unequal amounts by the same instrument.
    - § 552. Extrinsic evidence.
- §§ 553-564. III. Satisfaction of legacies by portions and advancements.
  - § 554. Presumption of satisfaction.
  - § 555. Subsequent gift less than the legacy.
  - § 556. Person in loco parentis.

<sup>1</sup> See *Hibbs v. Insurance Co.*, 40 Ohio St. 543; *Caulfield v. Sullivan*, 85 N. Y. 153.

<sup>2</sup> *Rogers v. Jones*, 3 Ch. Div. 688, H. & B. 131; *Van Dyke's Appeal*, 60 Pa. St. 490, H. & B. 136; *Wilbanks v. Wilbanks*, 18 Ill. 17, H. & B. 129.

- §§ 557-560. Circumstances which do or do not prevent the presumption.
  - § 559. Payment to husband of a female legatee.
  - § 560. What prevents the presumption.
  - § 561. Effect of a codicil.
  - § 562. Satisfaction of legacies between strangers.
- §§ 563, 564. Satisfaction, when not presumed, but expressed.
- §§ 565-568. IV. Satisfaction of portions by subsequent legacies, or other similar provisions.
  - §§ 566, 567. Differences between the gifts which do not and which do defeat the presumption.
    - § 568. Election by the beneficiary.
- §§ 569-577. V. Admissibility and effect of extrinsic evidence.
  - § 570. General principles discussed and explained.
- §§ 571-575. When the subsequent benefit is given by writing.
  - § 572. The writing expressly states the donor's intention.
  - § 573. The writing silent as to donor's intention, and no presumption of satisfaction arises from it.
  - § 574. The writing silent as to donor's intention, but a presumption of satisfaction arises from it.
  - § 575. Cases to which the foregoing rules apply.
  - § 576. When the subsequent benefit is given verbally.
  - § 577. Amount of evidence.

§ 521. **Definition.**—Satisfaction may be defined, in a general manner, to be the donation of a thing, with the intention, either expressed or implied, that it is to be taken either wholly or in part in extinguishment, by way of substitution, of some prior claim in favor of the donee. The equitable doctrine of satisfaction, considered in all its aspects, arises in four general classes of cases, namely: Satisfaction of debts by legacies; satisfaction of legacies by subsequent legacies; satisfaction of portions by legacies; and satisfaction of legacies by portions or advancements.

§ 527. **I. Satisfaction of Debts by Legacies—Legacy by a Debtor to his Creditor.**—The general rule as stated by Sir J. Trevor, M. R., in the leading case of *Talbot v. Duke of Shrewsbury*,<sup>1</sup> 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 he shall not have both the debt and the legacy." Wherever this rule operates, and the presumption of satisfaction arises, the creditor-legatee is of course put to his election: if he claims the legacy, he cannot enforce the debt; if he enforces the debt, he cannot obtain the legacy. It is also proper to remark that a debtor-testator can always thus put his creditor to an election, by accompanying his testamentary gift, whatever be its nature or amount, with words sufficiently indicating his intention that it is made and must be received in lieu

<sup>1</sup> Prec. Ch. 394, 2 Lead. Cas. Eq. 4th Am. Ed. 751.

and satisfaction of the debt.<sup>2</sup> This general rule, being based upon artificial reasoning, has been distinctly condemned by able judges. It is not favored by courts of equity; on the contrary, they lean strongly against the presumption, will apply it only in cases which fall exactly within the rule, and will never enlarge its operation.<sup>3</sup>

§ 528. **What Prevents the Presumption.**—In consequence of this strong leaning against the presumption, it is well settled that courts of equity will take hold of very slight circumstances connected with any particular case, and will regard them as sufficient to remove the case from the operation of the general rule, and to prevent the presumption of a satisfaction from arising.<sup>1</sup> In fact, the discussion of the general doctrine chiefly consists in the statement and description of these facts and circumstances which prevent its application. The following are the important instances, as settled by the decisions, in which the presumption of a satisfaction is thus overcome.

§ 529. **Legacy Less than the Debt.**—

§ 530. **Legacy Payable at a Different Time from the Debt.**—A legacy payable at a different time from the debt will not be a satisfaction thereof, even though it may be equal in amount to or greater than the debt.<sup>1</sup>

§ 531. **Legacy Contingent or Uncertain.**—

§ 532. **Legacy of a Different Nature or for a Different Interest.**—The general presumption of a satisfaction does not arise where the legacy is given for a different interest, or is of a different nature from the debt,—as where the debt is a specific sum, and the bequest is of an annuity. For this reason a devise of lands or bequest of specific chattels or securities will not be a satisfaction of a pecuniary liability.<sup>1</sup>

§ 533. **Motive for the Gift Stated.**—

§ 534. **The Debt Contingent or Uncertain.**—

§ 535. **The Debt Subsequently Contracted.**—

§ 536. **Different Interests or Rights in the Debt and Legacy.**—

§ 537. **Direction in Will to Pay Debts.**—

§ 538. **Legacy in Pursuance of Agreement or in Express Payment.**— . . . It is therefore well settled that if one person renders any services to another *upon an understanding or arrangement* that he is to be remunerated therefor by a testamentary benefit,

<sup>1</sup> Strong v. Williams, 12 Mass. 389, 7 Am. Dec. 81, H. & B. 140, Shep. 127; In re Fletcher, L. R. 38 Ch. Div. 373.

<sup>2</sup> Richardson v. Greese, 3 Atk. 65.

<sup>3</sup> Strong v. Williams, 12 Mass. 389, 7 Am. Dec. 81, H. & B. 140, Shep. 127.

<sup>1</sup> VanRiper v. VanRiper, 2 N. J. Eq. 1; In re Horlock (1895), 1 Ch. 516.

<sup>1</sup> Cloud v. Clinkinbeard, 8 B. Mon. 397, 49 Am. Dec. 397.

and the party receiving the services afterwards makes a bequest or devise in his will in favor of the other, which is in its amount and value a reasonably sufficient compensation, such testamentary provision is a satisfaction, and the creditor party cannot enforce his demand as a debt by an action against the estate.<sup>1</sup> It would seem that, under these circumstances, the creditor party would not even have an election, since he had agreed to look to the testamentary benefit alone for compensation. This result, however, must evidently depend upon the terms of the original agreement, in pursuance of which the services were rendered. Wherever, also, there being an existing indebtedness, it is agreed between the parties, either expressly or impliedly, that it shall be paid by some benefit bestowed in the debtor's will, and a testamentary provision is subsequently made in favor of the creditor, which he accepts, his demand will thereby be satisfied; he cannot both take the bequest and enforce his debt as a subsisting claim against the estate. In this case, however, the creditor clearly has an election either to accept the bequest in satisfaction of his pre-existing demand, or to renounce the gift and enforce the demand.<sup>2</sup>

§ 539. **Debt Owing to a Child or Wife.**—Where a father, or person standing in loco parentis, owes an *ordinary* debt, arising in any manner, to his child, or to the one occupying the position of child, and while the debt is subsisting gives a legacy to such child, or to the one so treated as a child, the case is governed in every respect, both with regard to the general presumption of a satisfaction and the facts which rebut the presumption, by the same rules which apply to a debtor and creditor who are strangers to each other.<sup>1</sup> The same is true of a legacy given by a husband to his wife when he is indebted to her by any ordinary species of indebtedness.<sup>2</sup>

§ 541. **Legacy by a Creditor to his Debtor.**—A testamentary gift from a creditor to a debtor stands upon an entirely different footing from one by a debtor to his creditor, which was examined in the preceding paragraphs. A legacy from a creditor to his debtor, unaccompanied by language in the will or exterior to it expressly showing the special intent, whether equal to, greater or less than, the debt, raises no presumption whatever, either of law or of fact, that the testator intended thereby to excuse, release, or discharge the debt, so that the legatee would be entitled to claim and receive the whole amount bequeathed, but would be freed from all liability to pay the debt. In fact, such a legacy produces no effect upon

<sup>1</sup> Eaton v. Benton, 2 Hill 576, 578.

<sup>2</sup> Williams v. Crary, 5 Cow. 368, 8 Cow. 246, 4 Wend. 443.

<sup>1</sup> Gilliam v. Chancellor, 43 Miss. 437, 5 Am. Rep. 498.

<sup>2</sup> Gilliam v. Chancellor, 43 Miss. 437, 5 Am. Rep. 498.

the indebtedness.<sup>1</sup> The only effect which such a legacy given simpliciter can have is to create the right to an equitable set-off.

§ 543. **Satisfaction of Debt, how Enforced.**—It should be observed, in conclusion, that whenever a legacy is given by a debtor-testator in satisfaction of the debt which he owes, either by operation of the general presumption or by virtue of express language of the will, such satisfaction is purely a creation of equity, and cannot be set up as a defense at law, except so far as equitable defenses are allowed in legal actions by modern legislation. In the absence of such permissive legislation, any affirmative relief to compel an election or satisfaction by the creditor-legatee must be obtained in equity.<sup>1</sup>

§ 544. **II. Satisfaction of Legacies by Subsequent Legacies.**— . . . It should be carefully observed that whenever the second legacy is regarded as substitutionary, and not as cumulative, the satisfaction of the prior legacy is absolute; the former legacy creating no *right* in the legatee, there is no claim for an election between the two on his part; the former gift is completely ademed by the testator's own act. The following are the four rules:—

§ 545. **Rule First. Specific Legacies.**—A second gift of the *same specific* thing, whether by the same instrument or by different instruments, and whether given simpliciter or accompanied by a statement of the motive, is always substitutionary and in satisfaction of the prior gift. Such double legacies must, from the necessities of the case, constitute only one legacy, and can never be cumulative, since it is impossible that the same identical corpus or specific thing itself can be given twice.<sup>1</sup>

§ 546. **Rule Second. Legacies of Quantity by Different Instruments.**—It is well settled that where a testator by different instruments gives a legacy of quantity simpliciter, and also a second legacy of quantity to the same legatee, in the absence of language showing a different intent the second legacy is regarded and treated as cumulative, and not as substitutionary or in satisfaction of the prior one. The testator's intention is presumed to be that the beneficiary should receive both the gifts; and it makes no difference whether the second is exactly equal to or is greater or less than the first.<sup>1</sup>

<sup>1</sup> *Wilmot v. Woodhouse*, 4 Brown. Ch. 227; *Sharp v. Wightman*, 205 Pa. St. 285, 54 Atl. 888.

<sup>1</sup> *Malony v. Scanlan*, 53 Ill. 122.

<sup>1</sup> *Duke of St. Albans v. Beauclerk*, 2 Atk. 638; *Suisse v. Lowther*, 2 Hare 424, 432.

<sup>1</sup> *Wilson v. O'Leary*, L. R. 12 Eq. 525, 7 Ch. 448; *DeWitt v. Yates*, 10 Johns. 156, 6 Am. Dec. 326, H. & B. 144; *Edwards v. Rainier's Ex'rs.*, 17 Ohio St. 597, H. & B. 146.

**§ 548. Presumption Overcome by Language of Testator.**— . . . Although two bequests may be made to the same person by different instruments, and although these gifts may differ in their amounts, incidents, and forms, and although even different motives may be assigned for each separate bequest, still the special language used by the testator in making the second gift, or the language found in other parts of the will, may sufficiently show his intention to give the second legacy in substitution for or satisfaction of the prior one; and thus any presumption otherwise arising from such double provision will be wholly overcome. It is impossible to lay down any general rule governing such cases; each case must stand upon its own circumstances. The question is, then, simply one of interpretation, in order to ascertain the real intent of the testator; but in arriving at this intent, the court will, if necessary, look at all parts of the will.<sup>1</sup>

**§ 549. Rule Third. Legacies of Quantity by the Same Instrument, of Equal Amount.**—If by the same instrument, either by a will or a codicil, legacies of the same amount are given simpliciter to the same individual, the second is held to be substitutional, or in lieu or satisfaction of the first, and the legatee is entitled to but one legacy.<sup>1</sup> . . .

**§ 550. Rule Fourth. Legacies of Quantity by the Same Instrument, of Unequal Amounts.**—If by the same instrument, either will or codicil, legacies of unequal amounts are given simpliciter to the same person, the second legacy is held to be additional or cumulative, and it is immaterial whether it be greater or less than the first,—in either case the legatee is entitled to both the gifts.<sup>1</sup>

**§ 553. III. Satisfaction of Legacies by Portions and Advancements.**— . . . In this country formal settlements made by parents, upon or in favor of their children, are very infrequent. In the great majority of American cases, therefore, involving or depending upon this species of satisfaction, a legacy has first been given to a child, and subsequently, but before the will becomes operative, the testator either pays to the same child a sum by way of advancement, or agrees in some informal manner, either verbally or in writing, to pay such sum. The testator afterwards dying, the question arises, whether the child is entitled to the legacy.

**§ 554. Presumption of Satisfaction.**—Whenever a parent, or per-

<sup>1</sup> *Rice v. Boston etc. Aid Society*, 56 N. H. 191; *Estate of Zeile*, 74 Cal. 127, 137, 15 Pac. 455.

<sup>1</sup> *DeWitt v. Yates*, 10 Johns. 156, 6 Am. Dec. 326, H. & B. 144; *Edwards v. Rainier's Ex'rs.*, 17 Ohio St. 597, H. & B. 146; *Thompson v. Betts*, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep. 235.

<sup>1</sup> *Hartley v. Ostler*, 22 Beav. 449; *Edwards v. Rainier's Ex'rs.*, 17 Ohio St. 597, H. & B. 146.

son in loco parentis, gives a legacy to his child, or to the individual whom he treats as a child, without stating any particular object for which it is given, such legacy is regarded as a portion. And if the testator afterwards, during his own lifetime, makes a settlement upon the child by way of a portion, or pays to him a sum of money by way of a portion, or makes an advancement to him, or gives him a sum of money as an advancement, such payment, portion, or advancement amounts to a satisfaction—or, as is often said, an *ademption*—of the legacy, either *pro tanto* or in full, as the money thus paid or settled is less than, equal to, or greater than the amount of the legacy.<sup>1</sup> This rule is based upon a presumption against double portions; that is, a presumption adopted by courts of equity that a father, owing a common, natural duty to all his children, could not have intended to distribute his estate unequally among them, and to favor one at the expense of the others. This reasoning has sometimes been called artificial, and the rule itself harsh, but it is really founded upon equity and justice.<sup>2</sup> It should be carefully observed that whenever the equitable presumption arises, and the rule based upon it applies, the satisfaction, either in whole or in part, of the prior legacy is accomplished absolutely by the act of the testator alone, without any regard to the act or assent of the legatee. It is not the case of a revocation, partial or complete, of the will; there is no analogy whatever between such a satisfaction and a revocation. The will, in fact, is legally supposed to remain in force unaltered in its disposition. 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. The legatee, having thus received payment of the single gift designed for his benefit, cannot equitably demand to be paid a second time out of the estate in the hands of the executor. While the legacy is not *revoked*, it is removed or taken away by the act of the testator, and therefore this instance of satisfaction may with some propriety be called an “*ademption*.” This satisfaction or *ademption*, if it takes place at all, must necessarily take place without any regard to the assent or other conduct of the legatee.<sup>3</sup>

§ 555. **Subsequent Payment Less than the Legacy.**— . . . The doctrine thus announced by Lord Cottenham<sup>1</sup> is now estab-

<sup>1</sup> *Ex parte Pye*, 18 Ves. 140, 2 Lead. Cas. Eq. 4th Am. ed. 741; *VanHouten v. Post*, 33 N. J. Eq. 344.

<sup>2</sup> See explanation of the rule in *Suisse v. Lowther*, 2 Hare 424, 433, 435.

<sup>3</sup> *Allen v. Allen*, 13 S. C. 512, 36 Am. Rep. 716.

<sup>1</sup> *Pym v. Lockyer*, 3 Mylne & C. 29.

lished in England and in the United States, that if the subsequent advancement equals or exceeds the prior legacy, it is a satisfaction thereof in full; if less than the legacy, it is only a satisfaction pro tanto.<sup>2</sup>

§ 556. **Person in Loco Parentis.**— . . . The essential element of the legal conception in loco parentis depends rather upon the *intention* of the donor than upon his *conduct*, and consists of a design on his part to make future provision for the beneficiary, shown so clearly by his conduct that an obligation rests upon him, and a right arises on the part of the beneficiary, similar to the natural obligation and right existing between an actual father and child. The rule was first laid down in a clear and formal manner by Lord Cottenham, that a person *must mean and intend to provide* for the child, and thus to place himself in loco parentis towards it, and that such meaning and intent may be declared in an express manner, or may be shown by the donor's conduct; and where this is the case, it is immaterial that the child has a father living, with whom he resides, and by whom he is maintained according to his (the father's) means.<sup>1</sup> . . . As the assumption of the character depends upon the donor's meaning and intent, it plainly follows that this intent may be shown by parol evidence, since it is often, even if not generally, inferable from his conduct.<sup>2</sup> . . . It is also clearly settled by the English decisions that where the intention to assume the locus parentis does not exist, no relative, however near, except the actual parent, not even a grandparent, will be considered as in loco parentis, so as to create the equitable presumption of a satisfaction.<sup>3</sup>

§ 557. **Circumstances Which do or do not Prevent the Presumption.**—Notwithstanding the severe criticism upon the doctrine made by individual judges, the leaning of equity is so strong against double portions, and the presumption of a satisfaction is so favored by the courts, that its operation will not be prevented, "although there may be slight circumstances of difference between the advance and the portion" given by the prior will.<sup>1</sup> . . .

§ 558. If the legacy is of an uncertain amount,—as, for example, the bequest of a residue or part of a residue,—it is now settled by the more recent English decisions that a subsequent settlement or advancement of a definite sum will operate as a satisfaction in

<sup>2</sup> Clarke v. Jetton, 5 Sneed 229, H. & B. 155; Miner v. Atherton's Ex'rs, 35 Pa. St. 528; Van Houten v. Post, 33 N. J. Eq. 344.

<sup>1</sup> Powys v. Mansfield, 3 Mylne & C. 359, 6 Sim. 544.

<sup>2</sup> Pym v. Lockyer, 5 Mylne & C. 29; Langdon v. Astor's Ex'rs, 16 N. Y. 9.

<sup>3</sup> Lyddon v. Ellison, 19 Beav. 565, 572; Langdon v. Astor's Ex'rs, 16 N. Y. 9; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716.

<sup>1</sup> Per Lord Eldon, in Ex parte Pye, 18 Ves. 140.

full or in part, if the circumstances are such as otherwise bring the case within the presumption. The earlier decisions had held that the presumption of a satisfaction would not arise where the prior legacy was of a residue, because, as it was said, the legal conception of a "portion" necessarily required a gift of a definite sum.<sup>1</sup>

§ 559. **Payment to Husband of a Female Legatee.**— . . . It appears to be no less clearly settled by the decisions that where a father has given a legacy to his daughter, a subsequent payment by him to the daughter's husband alone, either at the time of or subsequent to their marriage, will operate as a satisfaction of the legacy in full or pro tanto, provided such payment was intended by the father to be in the nature of an advancement, and not to be a mere personal donation to his son-in-law; and this intention may appear in the very terms of the written instrument by which the payment is secured or which accompanies it, or by the circumstances surrounding it, or by the verbal declarations made by the donor as a part of the transaction; and of course extrinsic parol evidence is admissible to show such intention.<sup>1</sup> . . .

§ 560. **What Prevents the Presumption.**— . . . In the first place, where a father advances or pays money to his child before the execution of his will, there is no presumption that such advancement or payment is to be in satisfaction of a legacy given to the same child in the subsequent will.<sup>1</sup> . . . In the third place, it has been regarded, as a general rule, that the legacy and the subsequent portion, advancement, or payment must be ejusdem generis, or else that no presumption of a satisfaction can arise; and there are decisions which certainly support this rule in its general statement.<sup>2</sup>

<sup>1</sup> In re Vickers, L. R. 37 Ch. D. 525. As to the earlier decisions, see Clark v. Jetton, 5 Sneed 229, H. & B. 155; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716.

<sup>2</sup> Kirk v. Eddowes, 3 Hare 509; Linsay v. Platt, 9 Fla. 150; Dilley v. Love, 61 Md. 603. In all the American cases, the question arose concerning an advancement made to a daughter upon her distributive portion of her father's estate when he dies intestate. So far as a payment to the daughter's husband constitutes an advancement, the principle is clearly the same, whether the daughter's portion is derived through the operation of the statute of distributions or is given by her father's will. If the payment to the husband is an advancement and satisfaction in the one case, it certainly must be an advancement and satisfaction in the other.

<sup>1</sup> Upton v. Prince, Cas. t. Talb., 71; Estate of Lyon, 70 Iowa 375, 30 N. W. 642, 5 L. R. A. 71.

<sup>2</sup> In re Jacques (1903), 1 Ch. 267. While the rule that the subsequent advancement must be ejusdem generis with the legacy, in order to raise a presumption of satisfaction, has generally been enforced by the American courts, it is still well settled that the donor's intention will govern. If the intention that a subsequent gift shall be in satisfaction of a prior legacy is expressly declared by

§ 561. **Effect of a Codicil.**—Wherever a legacy has been satisfied by a portion, advancement, or payment, in pursuance of the presumption against double portions, it will not be revived by a subsequent codicil which simply purports to confirm the will and all the bequests in it. A codicil republishes a will, and reaffirms all the existing testamentary dispositions which purport to be operative, but does not reestablish particular bequests which have been already revoked or adeemed by the testator.<sup>1</sup> . . .

§ 562. **Satisfaction of Legacies between Strangers.**—If the testator is not the parent of the legatee, or does not stand to him in loco parentis, in general no presumption arises that a prior legacy is satisfied by a subsequent payment, or gift, or provision by way of portion or advancement; the legatee is, in general, entitled to the legacy, in addition to the other benefit.<sup>1</sup> To this general proposition there is, however, one important exception. If a legacy is given to a stranger *for any particular purpose*, and the testator subsequently makes a payment, advancement, or gift *for the same purpose*, such payment or advancement is presumed to be, and will operate as, a satisfaction of the legacy.<sup>2</sup> Parol evidence of the donor's intention in making the payment or gift is admissible for the purpose of repelling or strengthening the presumption.<sup>3</sup>

§ 563. **Satisfaction, when not Presumed, but Expressed.**—

§ 564. **Rationale of the Rule in Such Cases.**—It may be stated, therefore, as a general proposition, that wherever a testator has bequeathed a legacy to a child or to a stranger, and afterwards during his lifetime either advances an amount of money or gives any other species of property, lands, chattels, or things in action to the same legatee, and the beneficiary in accepting the money or other property expressly assents, acknowledges, or agrees that the same shall be in partial or complete payment or discharge of the prior bequest, then the legacy will be satisfied in whole or in part, as the case may be. Also, when a testator has in like manner bequeathed a pecuniary legacy, and afterwards pays to the legatee

the testator, then it makes no difference how unlike the two may be: a conveyance of land, if the intention were so expressed, would satisfy a legacy of money. In *Jones v. Mason*, 5 Rand. 577, 16 Am. Dec. 761, parol evidence of testator's declarations was held admissible, although no presumption of satisfaction arose because the two gifts were not ejusdem generis.

<sup>1</sup> *Powys v. Mansfield*, 3 Mylne & C. 359, 376, per Lord Cottenham; *Langdon v. Astor's Ex'rs.*, 16 N. Y. 9, 37.

**Ex parte Pye**, 18 Ves. 140, per Lord Eldon. This conclusion is either expressly or impliedly sustained by all the decisions heretofore cited which deal with the presumption as between parent-testator and child.

<sup>2</sup> *Pankhurst v. Howell*, L. R. 6 Ch. 136; *In re Pollock*, L. R. 28 Ch. Div. 552, 556.

<sup>3</sup> See *In re Pollock*, L. R. 28 Ch. Div. 552.

a sum of money which he expressly declares to be in discharge of the legacy, or gives to the legatee any other species of property which he expressly declares shall be in lieu of the legacy, and the legatee receives and enjoys the benefits of the payment or gift, the prior legacy is thereby satisfied.<sup>1</sup> . . .

§ 565. **IV. Satisfaction of Portions by Subsequent Legacies or other Similar Provisions.**—In pursuance of the same principle of opposition to double portions, the general rule is equally well settled, that where a portion is made payable under a settlement, or an instrument in the nature of a settlement, by a parent, or a person in loco parentis, and he afterwards makes a provision by a legacy in favor of the one entitled to the portion, a presumption arises that such provision is intended to be in complete or partial satisfaction of the portion, according as the amount of the legacy exceeds, is equal to, or is less than that of the prior portion. If the second provision is by a subsequent settlement instead of by will, it may also be a satisfaction; although the presumption does not seem to be as strong in that case as when the second gift is a legacy.<sup>1</sup> . . .

§ 568. **Election by the Beneficiary.**— . . . It follows, therefore, that whenever a portion is secured by a settlement or by any other agreement, and a subsequent provision is made for the same beneficiary by a legacy or otherwise, which would either operate as a satisfaction in pursuance of the equitable presumption, or which is expressly declared by the donor to be given in satisfaction, in each case the beneficiary has an election between the two provisions. He may, at his option, accept the subsequent legacy and surrender the prior portion, or he may reject the substituted legacy and claim the prior portion. By electing to take either, he necessarily renounces his claim to the other.

<sup>1</sup> Richards v. Humphreys, 15 Pick. 133; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716.

<sup>1</sup> Jesson v. Jesson, 2 Vern. 255; Montagu v. Earl of Sandwich, L. R. 32 Ch. Div. 525; Gilliam v. Chancellor, 43 Miss. 437, 5 Am. Rep. 498; Taylor v. Lanier, 3 Murph. 98, 9 Am. Dec. 599.

SECTION IV.  
CONCERNING PERFORMANCE.

ANALYSIS.

- § 578. Rationale.
- § 579. Definition.
- §§ 580-583. I. Covenant to purchase and settle or convey.
  - § 590. General rule: *Lechmere v. Earl of Carlisle*.
  - § 581. Forms of covenant to which the rule applies.
  - § 582. Special rules.
  - § 583. Such covenant creates no lien.
- §§ 584-586. II. Covenant to bequeath personal property.
  - § 584. General rule: *Blandy v. Widmore*; *Goldsmid v. Goldsmid*.
  - § 585. Limitations on the rule; covenant must not create a debt in life-time of deceased.
  - § 586. A legacy not a performance; distinction between "performance" and "satisfaction of legacy."
  - § 587. Presumption of performance by trustees.
- §§ 589-590. Meritorious or imperfect consideration; theory of.
- §§ 589, 590. Defective execution of powers; relief of.
  - § 590. Requisites for such relief; a partial execution necessary.

§ 579. **Definition.**—From the foregoing analysis it appears that the equity of Performance should be defined, or rather described, as follows: When a person has definitely bound himself to do a certain act, by which a particular kind of thing will be bestowed upon another in a specified manner, and instead thereof he either bestows the same kind of thing upon the obligee in a different manner, or else permits the same kind of thing to devolve upon the obligee in course and by operation of law, so that what is thus done or permitted may amount to a complete or partial fulfillment of the existing obligation, then the party will be presumed to have done or permitted this with *the intention* of performing the very obligation itself in whole or in part, and the obligation will be thus wholly or partially performed, as the case may be. Equity imputes to the party an intention of fulfilling the obligation resting upon him, rather than the intention of violating that duty, or of conferring a mere bounty. Equity thus says, not only that a man should be, but that he is, just before he is generous. The cases involving this doctrine may be arranged, for purposes of convenience, into two classes: 1. Where a person covenants to purchase and settle, or to purchase and convey, lands, and he afterwards purchases such lands without expressing any purpose for which the purchase is made, and does not convey or settle them

in pursuance of his covenant;<sup>1</sup> 2. Where a person covenants to leave property by will, and he does not make the bequest, but on his death the covenantee receives the same kind of property by succession. These two classes will be examined separately.<sup>2</sup>

§ 587. **Presumption of Performance by Trustees.**<sup>1</sup>—

§ 588. **Meritorious or Imperfect Consideration.**—Closely akin to the equity of performance, and properly a special instance of it, is that of meritorious or imperfect consideration. Indeed, all cases of satisfaction and of performance have been treated by some writers as applications of this equity. All agreements, so far as the binding efficacy of their promises is concerned, must be referred to one or the other of three *causes*,—a valuable consideration, a mere voluntary bounty, or the performance of a moral duty. The first alone is binding at law, and enables the promisee to enforce the obligation against the promisor. The second, while the promise is executory, is a mere nullity, both at law and in equity. The third constitutes the meritorious or imperfect consideration of equity, and is recognized as effective by it within very narrow limits, although not at all by the law. While this species of consideration does not render an agreement enforceable against the promisor himself, nor against any one in whose favor he has altered his original intention, yet if an intended gift based upon such meritorious consideration has been partially and *imperfectly* executed or carried into effect by the donor, and if his original intention remains unaltered at his death, then equity will, within certain narrow limits, enforce the promise thus imperfectly performed, as against a third person claiming merely by operation of law, who has no equally meritorious foundations for his claim.<sup>1</sup> The equity thus described as based upon a meritorious consideration only extends to cases involving the duties either of charity, of paying creditors, or of maintaining a wife and children. This last duty of maintaining children includes persons to whom the promisor stands in loco parentis.<sup>2</sup> The specific cases involving these three kinds of duties to which the doctrine has been applied by courts of equity are the supplying surrenders of copyholds against the heir,<sup>3</sup> and the supporting and completing defective executions of

<sup>1</sup> *Wilcocks v. Wilcocks*, 2 Vern. 558; 2 Lead. Cas. Eq. 833, Shep. 129, 1 Scott 324; *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211; *Deacon v. Smith*, 3 Atk. 323, 1 Scott, 327.

<sup>2</sup> *Blandy v. Wilmore*, 1 P. Wms. 324, 2 Vern. 209, 2 Lead. Cas. Eq. 4th Am. ed. 832, 842, Shep. 126, 1 Scott, 326.

<sup>3</sup> See post, § 1049.

<sup>1</sup> *Sipley v. Wass*, 49 N. J. Eq. 463, 24 Atl. 233.

<sup>2</sup> See ante, § 556; *Powell v. Morisey*, 98 N. C. 426, 2 Am. St. Rep. 343, 4 S. E. 185.

<sup>3</sup> *Rodgers v. Marshall*, 17 Ves. 294.

powers, where the defect is formal, against the one who would be entitled in remainder. Since the first of these cases does not exist under our law, it is only necessary to consider the second.

§ 589. **Defective Execution of Powers.**—Where the defect in the execution is merely formal, equity will support, correct, and complete the defective execution of powers, as against a remainderman who has no equally meritorious claim, on behalf of the classes of persons in whose favor the “meritorious consideration” exists,—that is, on behalf of charities, purchasers, creditors, children, or wives. The rationale of this doctrine is the following: Although in the absence of a valuable consideration there is no complete obligation resting upon the promisor, yet from the presence of the meritorious consideration there is, in contemplation of equity, as between the meritorious beneficiary and the remainderman possessing no equally meritorious claim, a quasi obligation,—a duty binding between the parties thus situated. An attempt having been made to execute the power, which is only *formally* defective, equity imputes to the donee in making the attempt an intent to fulfill this quasi obligation. An intent to perform having been thus shown and partly accomplished, a court of equity carries it into effect by decreeing a complete performance. The case is thus brought, in appearance at least, within the general principle concerning performance, and the equitable maxim which underlies that principle. The rationale thus described may be exceedingly artificial; it may be in reality unsound and inconsistent with other established principles; but notwithstanding these objections, the doctrine itself is firmly settled upon the basis of authority.<sup>1</sup>

§ 590. **Requisites—A Partial Execution Necessary.**—The powers which the doctrine may thus enforce are those given in wills, family settlements, and other similar instruments, and not bare authorities conferred by law. In the first place, there must be an execution of the power by the donee thereof formally defective, or a contract amounting to such a defective execution; otherwise the doctrine does not apply. If there has been no execution at all, the court cannot interfere; for the donee, having an option by the very terms of the power, has shown an intention not to execute. If the defect is substantial, and not formal, the court cannot relieve, for its interposition would then frustrate the intention of the donor, that the power, if executed at all, should be executed in a prescribed manner, or by specified means.<sup>1</sup> . . .

<sup>1</sup> Holmes v. Goghill, 7 Ves. 499; Tollet v. Tollet, 2 P. Wms. 489, 2 Ames Eq. Jur. 305, 1 Scott, 420; Freeman v. Eacho, 79 Va. 43.

<sup>1</sup> Tollet v. Tollet, 2 P. Wms. 489, 2 Ames Eq. Jur. 305, 1 Scott 420; Bingham's Appeal, 64 Pa. St. 345.

**SECTION V.**  
**CONCERNING NOTICE.**

**ANALYSIS.**

- § 591. Questions stated: *Le Neve v. Le Neve*.
- § 592. Knowledge and notice distinguished.
- § 593. Kinds; actual and constructive.
- § 594. Definition.
- §§ 595-603. Actual notice.
  - § 596. When shown by indirect evidence.
  - § 597. What constitutes; rumors; putting on inquiry, etc.
- §§ 598-602. Special rules concerning actual notice.
  - § 603. Effect of knowledge instead of notice.
- §§ 604-609. Constructive notice in general.
  - § 605. *Jones v. Smith*, opinion of Wigram, V. C.
- §§ 606, 607. When the presumption is rebuttable; due inquiry.
  - § 608. When it is conclusive.
  - § 609. Species of constructive notice.
- §§ 610-613. 1. By extraneous facts; acts of fraud, negligence, or mistake; general rule as to putting on inquiry; visible objects, etc.
- §§ 614-625. 2. By possession or tenancy.
  - §§ 614, 615. General rules, English and American.
  - §§ 616-618. Extent and effect of the notice.
  - §§ 619-622. Nature and time of the possession.
  - §§ 623, 624. Whether the presumption is rebuttable or not.
    - § 625. Possession by a tenant or lessee.
- §§ 626-631. 3. By recitals or references in instruments of title.
  - § 626. General rules.
- §§ 627-631. Nature and extent of the notice; limitations; instances, etc.
- §§ 632-640. 4. By *lis pendens*.
  - § 632. Rationale: *Bellamy v. Sabine*.
- §§ 633, 634. General rules; requisites.
- §§ 635, 636. To what kind of suits the rule applies.
- §§ 637, 638. What persons are affected.
- §§ 639, 640. Statutory notice of *lis pendens*.
- §§ 641-643. 5. By judgments.
- §§ 644-665. 6. By recording or registration of instruments.
  - §§ 645, 646. (1) The statutory system; abstract of statutes.
  - §§ 647-649. (2) General theory, scope, and object of the legislation.
  - §§ 650-654. (3) Requisites of the record, in order that it may be a notice.
    - § 655. (4) Of what the record is a notice.
  - §§ 656-658. (5) To whom the record is a notice.
    - § 657. Not to prior parties.
    - § 658. To subsequent parties holding under the same source of title; effect of a break in the record.
- §§ 659, 660. (6) Effect of other kinds of notice, in the absence of a record.

- §§ 661-665. (7) What kinds of notice will produce this effect.  
 § 662. English rule.  
 §§ 663, 664. Conflicting American rules; actual or constructive notice.  
 § 665. True rationale of notice in place of a record.  
 §§ 666-676. 7. Notice between principal and agent.  
 §§ 666-669. Scope and applications.  
 §§ 670-675. Requisites of the notice.  
 § 670. (1) Notice must be received by agent during his actual employment.  
 §§ 671, 672. (2) And in the same transaction; when in a prior transaction.  
 § 673. (3) Information must be material; presumption that it was communicated to the principal.  
 §§ 674, 675. Exceptions; agent's own fraud.  
 § 676. True rationale of this rule.

§ 591. **Questions Stated.**—It has been shown in the preceding chapter that there are two fundamental *principles* or maxims affecting to a greater or less degree nearly the entire body of equity jurisprudence,—nearly the entire administration of equitable rights and remedies,—namely, where there are equal equities, the one which is prior in time must prevail, and where there are equal equities, the law must prevail. These two principles necessarily find their most important application in cases, which are constantly arising, where several different, and perhaps successive, equitable, or legal and equitable, interests in or claims upon the same subject-matter exist at the same time, and there is a contest for the precedence among the respective holders of these interests or claims. It has also been shown that the application of these maxims turns upon the question, When are the different equities simultaneously subsisting with respect to the same subject-matter “equal”? or on the other hand, what renders them “unequal,” so that one shall have an essential inherent superiority over another? In answering this question, the doctrine of Notice plays a most important part. When a person is acquiring rights with respect to any subject-matter, the fact whether he is so acting with or without notice of the interests or claims of others in or upon the same subject-matter is regarded throughout the whole range of equity jurisprudence as a most material circumstance in determining the extent and even the existence of the rights which he actually acquires. In conformity with this view, the general rule has been most clearly established, that a purchaser with notice of the right of another is in equity liable to the same extent and in the same manner as the person from whom he made the purchase. The same rule may be thus expressed in somewhat different language: a person who acquires a legal title or an equitable title or interest in a given subject-matter, even for a valuable consideration, but with notice that the subject-matter is already affected by an equity or equitable claim in favor of another, takes it subject to that equity or

equitable claim. On the other hand, a person who has acquired a title, and paid a valuable consideration, without any notice of an equity actually existing in favor of another, *may* by that means obtain a perfect title, and hold the property freed from the prior outstanding equity. This general doctrine was formulated by Lord Hardwicke in a celebrated case in the following emphatic terms: "The ground of it is plainly this: that the taking of a legal estate, after notice of a prior right, makes a person a mala fide purchaser. This is a species of fraud and dolus malus itself; for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate. Now, if a person does not stop his hand, but gets the legal estate when he knew the right was in another, machinatur ad circumveniendum. It is a maxim, too, in our law that *fraus et dolus nemini patrocinari debent.*"<sup>1</sup> Lord Hardwicke was here speaking of the effect of an actual notice; and undoubtedly it is an act savoring of fraud for a person who has received actual, direct notice of another's right, to go on and knowingly acquire the property in violation of that other's right. But on the other hand, to base the entire doctrine of notice upon fraud, to regard all its rules as inferences from the equitable principle against fraud, is, in my opinion, to ignore the plain meaning of words, and to introduce an unnecessary and misleading fiction into the subject. Most of the confusion in the discussion by courts and writers has resulted, as it seems to me, from their acceptance of this dictum of Lord Hardwicke as universally true, and from their attempt to treat the effects of notice, under all circumstances, as mere instances and results of fraud. The great importance of the subject having thus been exhibited, its further examination will be conducted in the following order: 1. The nature of notice, what constitutes it, and its various kinds and classes; 2. The effects of notice, and especially the consequences of notice or the want of notice in determining priorities among equitable claims to or upon the same subject-matter.

§ 592. **Knowledge and Notice Distinguished.**—Before entering upon this examination, a few preliminary observations are necessary, to clear the ground and to explain the exact nature of the questions which are to be discussed, and of the conclusions to be reached by such discussion. In the first place, it is of the utmost importance to distinguish between the objects and purposes for which the fact of notice having been given may be invoked. One object of notice may be simply to affect the priority of a right which

<sup>1</sup> *Le Neve v. Le Neve*, Amb. 436; 2 Lead. Cas. Eq., 4th Am. Ed., 109, 1 Scott, 536.

the one receiving it has acquired, and to subordinate such right to an interest in the same subject-matter held by another. On the other hand, notice *may* be regarded as an ingredient or badge of fraud, as a feature which renders the transaction entered into by the person who receives it fraudulent. A distinction clearly exists between these two purposes; and the rules which govern the nature and effect of notice in each must be different. That might easily be sufficient to subordinate a person's right to another interest which would at the same time fall far short of stamping his conduct with actual fraud. In the second place, it should be most carefully borne in mind that the legal conception of "notice," as contained in the settled doctrines and rules of equity, is somewhat artificial and even technical. In this purely legal artificial sense, notice is by no means synonymous with knowledge, *although the effects produced by it are undoubtedly the same which would result from actual knowledge*. In other words, while the doctrines of equity on the subject do not assume that notice is knowledge, nor even that it is necessarily followed by knowledge, they still often impute to it the very same consequences which would flow from actual knowledge acquired by the party. As the notice spoken of by the rules is not knowledge, there may be notice without knowledge, and knowledge without notice. If a person, A, were negotiating with B for the purchase of a piece of land, and should be informed either by B or by C that B had already given a deed or mortgage of the same land to C, such information would be notice, and even the highest kind of notice; but A would not thereby, in any true meaning of the word, have *knowledge* of the deed or mortgage, of its various provisions and legal effect. On the other hand, if, before the negotiation, A had been casually shown the deed or mortgage itself by some third person in whose possession it happened to be, had been permitted by such person to take and read the instrument, had carefully examined it, and had thus become familiar with all of its provisions and its legal effect, he would not, within the settled meaning of the legal term, have received *notice*, but he would most certainly have obtained, and would be acting with, a complete *knowledge* of the instrument. Again, under certain circumstances, if A, while dealing with respect to a piece of property, deliberately and intentionally refrains from making inquiries concerning outstanding encumbrances or claims for the very purpose of avoiding any information, he is charged with notice of the encumbrances and claims which are actually outstanding; but he certainly does not acquire, and cannot possibly have, a *knowledge* of such prior charges or interests. The record of a deed or mortgage, when regularly and properly made, is constructive notice to sub-

sequent purchasers and encumbrances; but it does not necessarily convey any knowledge to such persons; while A, in purchasing land from B, is absolutely and conclusively bound by the proper record of a prior instrument affecting the same premises, he may be acting in perfect good faith and in most complete ignorance of the actual existence of any such instrument. If, however, before making the purchase, A had examined the official records, and had there discovered and read a deed or mortgage of the same land copied at length in the book of records, but under such circumstances that it was not legally entitled to be recorded, on account of a defective acknowledgment or other irregularity, he would not thereby have received any legal *notice* within the true meaning of the term, but he would as certainly have obtained a full *knowledge* of the instrument. These instances are sufficient to illustrate the distinction between notice, in its legal and somewhat artificial conception, and knowledge, and to show that one may exist without the other. Unless this distinction is clearly apprehended and constantly borne in mind, much of the judicial discussion concerning the nature and effect of notice will seem to be confused and uncertain, and an irreconcilable conflict will appear among many of the decisions; the distinction renders the discussion clear and certain, and the decisions harmonious. Whenever the mere notice, in its strict signification, is relied upon, even though not accompanied or followed by any actual knowledge, then, from considerations of policy and expediency, the same effects are attributed to it which would have resulted from actual knowledge; and it will be found that what constitutes this notice is determined by definite, precise, and even somewhat technical rules. Whenever, on the other hand, a party is shown to have obtained an actual knowledge, even though there has been nothing which constitutes a notice in its true sense, then there is no longer any necessity of resorting to the artificial conception of notice; the consequences must naturally and necessarily flow from an actual knowledge of facts by a party, which from motives of expediency are attributed to a *notice* of the same facts given to him, in the absence of actual knowledge. In a word, among the complicated affairs and transactions of life, it is often necessary that mere "notice" should take the place of actual knowledge; but this does not and cannot mean that actual knowledge shall not produce the same effects upon the rights of parties which, from motives of policy, are given to its representative and substitute notice. This conclusion is, as it seems to me, self-evident, and it is most important; it reconciles at once all the confusion and conflict of opinion which, it must be confessed, appear

in some of the decisions, and it has the support of the ablest judicial authority.<sup>1</sup>

§ 593. **Kinds—Actual and Constructive.**—Notice has been divided by judges and writers into the two main classes,—“actual” and “constructive;” but there is a great diversity of opinion among text-writers in determining what particular kinds shall come within each of these two classes. . . . I prefer and shall adopt the classification approved and followed by many of the most eminent judges, which has the merit of simplicity, naturalness, and certainty. According to this arrangement, “actual” notice embraces all those instances in which positive personal information of a matter is directly communicated to the party, and this communication of information, being a fact, is established by evidence *directly* tending with more or less cogency to its proof. “Constructive” notice includes all other instances in which the information thus directly communicated cannot be shown, but the information is either *conclusively* presumed to have been given and received from the existence of certain facts, or is implied by a prima facie presumption of the law in the absence of contrary proof.

§ 594. **Definition.**—Judges and text-writers have seldom attempted to define notice in the abstract, but have generally contented themselves with specifying instances, or describing its kinds and effects. Within the meaning of the rules, notice may, I think, be correctly defined as the *information concerning a fact* actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent *in its legal effects* to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge. It should be most carefully observed that the notice thus defined is not knowledge, nor does it assume that knowledge necessarily results. On the other hand, the information which constitutes the notice may be so full and minute as to produce complete knowledge. Although an actual knowledge is not necessarily assumed to result, yet in many instances, as will be seen, the party is not permitted to show this fact, but the same consequences follow with respect to his rights and interests as though he had obtained real knowledge. The correctness of the definition which I have formulated will appear from a comparison of all the cases hereafter cited in the discussion of this section. In dealing with the subject, great care should be taken to distinguish between notice and the evidence by which it is established. The personal communication of information which

<sup>1</sup> Lloyd v. Banks, L. R. 3 Ch. 488, 490, per Lord Cairns.

constitutes notice is a fact which may be proved by any kind of competent evidence submitted to, weighed, and passed upon by the tribunal which decides matters of fact. Whenever the notice is inferred by a conclusive or *prima facie* presumption from certain facts, the office of evidence is to prove the existence of those facts. Notice is either actual or constructive; but the legal effect of each kind, when established, is exactly the same.<sup>1</sup>

**§ 595. Actual Notice.**—Actual notice is information concerning the fact,—as, for example, concerning the prior interest, claim, or right,—directly and personally communicated to the party.<sup>1</sup> The distinction between actual and constructive notice does not primarily depend upon the *amount* of the information, but on the manner in which it is obtained, or assumed to have been obtained. In actual notice information is not *inferred* by any presumption of law; the personal communication of it is a fact, and, like any other fact, is to be proved by evidence. The information *may* be so full, minute, and circumstantial, that the party receiving it thereby acquires a complete knowledge of the prior fact affecting the transaction in which he is then engaged, or it may fall far short of conveying such knowledge.<sup>2</sup> Again, the evidence may be so direct, positive, and overwhelming as to establish the fact that the information was personally given and received in the most convincing and unequivocal manner, or it may be entirely indirect and circumstantial. Wherever, from competent evidence, either direct or circumstantial, the court or the jury is entitled to infer, *as a conclusion of fact, and not by means of any legal presumptions*, that the information was personally communicated to or received by the party, the notice is actual. In short, actual notice is a conclusion of fact, capable of being established by all grades of legitimate evidence.<sup>3</sup>

**§ 596. When Shown by Indirect Evidence.**—It is admitted by all text-writers and by many judges that much confusion and inaccuracy of language are exhibited in the decisions concerning actual and constructive notice; notices are not infrequently called “constructive,” which are really “actual,” and the rules governing the two are confounded.<sup>1</sup> That the party has knowledge or information

<sup>1</sup> *Prosser v. Rice*, 28 Beav. 68, 74.

<sup>2</sup> “Notice is actual when the purchaser is aware of the adverse claim or title, or has such information as would lead to knowledge”: Am. note in 2 Lead. Cas. Eq., 4th Am. ed. 144.

<sup>3</sup> *Williamson v. Brown*, 15 N. Y. 354, H. & B. 86.

<sup>4</sup> *Knapp v. Bailey*, 79 Me. 195, 1 Am. St. Rep. 295, 9 Atl. 122, H. & B. 75; *Williamson v. Brown*, 15 N. Y. 354, H. & B. 86.

<sup>5</sup> *Williamson v. Brown*, 15 N. Y. 354, H. & B. 86, per S. L. Selden, J. One illustration will suffice. A purchased land from B. A third person, C, from

of facts sufficient to put him upon an inquiry has often been treated as peculiarly the characteristic of constructive notice. In truth, however, this test is equally applicable to every instance of actual notice inferred by process of rational deduction from circumstantial evidence. The distinction is plain and natural. In all cases of constructive notice, there is no evidence which directly tends to show that any information of the prior conflicting claim was personally brought home to the consciousness of the party affected; the particular facts of which he is shown to have knowledge do not directly tend to show such information; but from these facts the legal presumption arises, either conclusive or rebuttable, that the information was received. In all cases of actual notice inferred from circumstantial evidence, the facts proved do directly tend to show that information of the prior conflicting claim was

whom B obtained the property, has a claim upon it; and the question is, whether A took with notice of C's claim. There is no direct evidence of any information given to A by either B or C. But it is proved that A is B's son, and has constantly lived in his house and been a member of his family; and for several years A has been acquainted with his father's business affairs, and has taken an active part in their management; that A was familiar with the transaction by which B obtained the premises from C, and aided his father in negotiating the contract with C, etc. If from these and similar facts a notice should be inferred, it would be an actual notice, and not constructive. No legal presumptions would aid the court or jury; they would simply arrive at the conclusion, by a process of rational argument, that at some time information or knowledge of C's claim was directly and personally communicated to or acquired by A, in exactly the same manner as a jury may infer that a certain man and woman were at some past time actually married, from the circumstantial evidence of their cohabitation and holding each other out to the world as husband and wife. The only question of law in such a case is, whether the evidence is sufficient to warrant the finding of fact that information or knowledge of C's claim was actually acquired by A. It is true that many cases say, under such circumstances, that "the facts proved are sufficient to put the party, A, upon an inquiry, and if he neglected to make a due inquiry he must be charged with notice." Such a mode of statement is entirely proper; but it is incorrect, misleading, and a confounding of the two kinds of notice, to say under such circumstances that if the party neglects to make a due inquiry *he is presumed to have received the information* which constitutes notice. In all cases of information constituting actual notice inferred from circumstantial evidence, this statement that "the facts proved are sufficient to put the party upon an inquiry," etc., is simply tantamount to saying that the facts and circumstances, when uncontradicted and unexplained, are sufficient evidence to warrant a finding that the information was directly and personally acquired by the party, but that the facts and circumstances may be sufficiently explained by the party's showing that he did make a reasonable inquiry, and did seek for information, but failed to obtain it. By such means the conclusion which would otherwise have been drawn from the unexplained circumstances is overcome and negatived. For illustrations of these positions, see cases cited in the next following note.

personally brought home to the consciousness of the party. The court or jury infers from the facts proved, by a process of rational deduction, *but without the aid of any legal presumption*, that such information was actually received. In weighing this evidence, the tribunal may properly ask whether the facts proved were sufficient to put the party upon an inquiry, so that, if he went on with the transaction without making any inquiry, his actual receipt of information and consequent notice is a legitimate or necessary conclusion; or whether, on the other hand, he prosecuted an inquiry to such an extent and in such a manner that his actual failure to acquire information is a just inference of fact.<sup>2</sup> A careful examination of the cases concerning notice inferred from circumstances will show that in a large proportion of them the notice was actual, and not constructive; and that one or the other of the following questions was in reality considered and determined by the court: 1. It being shown that the party had been informed of certain facts, and it further appearing that he had, notwithstanding such information, and without making any inquiry respecting its truth, gone on and completed the transaction, whether the court or jury were warranted in inferring as a legitimate conclusion from the evidence that he had *also* received that direct, personal information concerning the existence of a prior conflicting claim which the law calls "actual notice." 2. It being shown that the party had been informed of certain facts, and it further appearing that he had thereupon made inquiry respecting the truth of such information before he completed the transaction, whether the court or jury were warranted in inferring as a legitimate conclusion from the whole evidence, either that he had or had not received that direct personal information which constitutes actual notice.

**§ 597. What Constitutes It: Rumors; Putting on Inquiry, etc.—**

A purchaser, or person obtaining any right in specific property, is not affected by vague rumors, hearsay statements, and the like, concerning prior and conflicting claims upon the same property; and the reason is, that such kind of reports and statements do not furnish him with any positive information, any tangible clew, by the aid of which he may commence and successfully prosecute an inquiry, and thus discover the real truth; his conscience is therefore not bound.<sup>1</sup> On the other hand, the proposition is established by an absolute unanimity of authority, and is equally true both

<sup>2</sup> Knapp v. Bailey, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295, H. & B. 75; Brown v. Volkening, 64 N. Y. 76; Brinkman v. Jones, 44 Wis. 498; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772, H. & B. 92.

<sup>1</sup> Raymond v. Flavel, 27 Or. 219, 40 Pac. 158; Wilson v. McCullough, 23 Pa. St. 440, 62 Am. Lec. 347. See, also, § 602.

in its application to constructive notice, and to actual notice not proved by direct evidence but inferred from circumstances, that if the party obtains knowledge or information of facts tending to show the existence of a prior right in conflict with the interest which he is seeking to obtain, and which are sufficient to put a reasonably prudent man upon inquiry, then it may be a legitimate, and perhaps even necessary, inference that he acquired the further information which constitutes actual notice. This inference is not, in case of actual notice, a presumption, much less a conclusive presumption, of law; it may be defeated by proper evidence. If the party shows that he made the inquiry, and prosecuted it with reasonable diligence, but still failed to discover the conflicting claim, he thereby overcomes and destroys the inference.<sup>2</sup> If, however, it appears that the party obtains knowledge or information of such facts, which are sufficient to put a prudent man upon inquiry, and which are of such a nature that the inquiry, *if prosecuted with reasonable diligence, would certainly lead to a discovery of the conflicting claim*, then the inference that he acquired the information constituting actual notice is necessary and absolute; for this is only another mode of stating that the party was put upon inquiry; that he made the inquiry and arrived at the truth. Finally, if it appears that the party has knowledge or information of such facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make any inquiry, or having begun it fails to prosecute it in a reasonable manner, then, also, the inference of actual notice is necessary and absolute. These three propositions substantially embrace all instances of actual notice proved by circumstantial evidence, and they are illustrated by a vast number of decisions, each depending upon its own particular circumstances.<sup>3</sup>

**§ 598. Special Rules.**— . . . . The whole inquiry is reduced to the examination of two entirely distinct questions, which should not be confounded, namely: What kind of information personally communicated to a party constitutes the actual notice proved by direct evidence? What facts are sufficient to put a party upon an inquiry, so that, if not overcome by contrary proofs, they would constitute the actual notice inferred from circumstantial evidence?

**§ 599. Same—Kind and Amount of Information Necessary.**— In the first of these two inquiries, it is assumed that some information is shown by direct evidence to have been personally communi-

<sup>2</sup> See, also, § 601.

<sup>3</sup> Knapp v. Bailey, 79 Me. 195, 1 Am. St. Rep. 295, 9 Atl. 123, H. & B. 75; Sensenderfer v. Kempf, 83 Mo. 581; Williamson v. Brown, 15 N. Y. 354, 362, H. & B. 86; Carter v. City of Portland, 4 Oreg. 339, 350; Pringle v. Dunn, 37 Wis. 449, 465, 19 Am. Rep. 772, H. & B. 92.

cated to the party, and the sole question is, What kind or amount of such information will constitute actual notice, and so bind his conscience? Whenever A is dealing concerning certain property with B, who acts as owner, grantor, vendor, or mortgagor, as the case may be, a definite statement made to A by a third person, C, that he has or claims some conflicting interest or right, legal or equitable, in the subject-matter, is a sufficient actual notice to affect A's conscience. The statement need not be so full and detailed that it communicates to A complete knowledge of the opposing interest or right; it is enough that it is so definite as to assert the existence of an interest or right as a fact.<sup>1</sup> Under the same circumstances, if A is informed by the grantor or vendor, B, that the subject-matter is encumbered, or is subject to an outstanding lien or equitable claim, or that he himself has not for any reason a title free and perfect, such information is actual notice; it need not state all the particulars, nor impart complete knowledge of the conflicting interest, encumbrance, or right; it is enough that A is reasonably informed, and has reasonable grounds to believe, that the conflicting right exists as a fact.<sup>2</sup> Of course the statement by B may be so vague and uncertain, or it may be so accompanied by additional explanatory or contradictory matter, that it does not affect the conscience of the purchaser, A, and does not amount to an actual notice.<sup>3</sup> Wherever, under the circumstances above described, information given by the grantor or vendor with whom the purchaser is dealing, or by the holder of the conflicting claim or right, would constitute an actual notice, the same information may be communicated by a relative or friend of either of these persons, and would then operate in like manner as actual notice, provided the party so represented was prevented by absence, sickness, or other disability from making the communication in his own person and on his own behalf.<sup>4</sup>

**§ 600. Same—What Circumstances Sufficient.**—The second question is, What facts are sufficient to put the party upon an inquiry, so that he may thereby be charged with the actual notice inferred from circumstantial evidence? Among the facts to which, as evidence, such force has been attributed are: Close relationship, personal intimacy, or business connections existing between the purcha-

<sup>1</sup> *Barnes v. McClinton*, 3 Penn. & W. 67, 23 Am. Dec. 62 (opinion by Gibson, C. J. ).

<sup>2</sup> *Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657; *Grus v. Evans*, 1 Dak. 387, 1 Scott, 546.

<sup>3</sup> *Buttrick v. Holden*, 13 Met. 355. See post, § 601.

<sup>4</sup> *Butcher v. Yocum*, 61 Pa. St. 168, 171, 100 Am. Dec. 625; *Ripple v. Rawle*, 1 Rawle 386.

ser and the party with whom he is dealing, or between him and the holder of the adverse claim;<sup>1</sup> great inadequacy of the price, which may arouse the purchaser's suspicion, and put him upon an inquiry as to the reasons for selling the property at less than its apparent value;<sup>2</sup> the sight or knowledge of visible material objects upon or connected with the subject-matter, which may reasonably suggest the existence of some easement or other similar right.<sup>3</sup> The irregular, defective, or improper recording of an instrument, although clearly not a constructive notice under the statute, may be sufficient to put a purchaser upon inquiry, and so constitute an actual notice; and the inspection, perusal, or knowledge of a writing which purported to be a certified or official copy of the instrument thus defectively or improperly recorded should produce the same effect, although upon this particular point there seems to be some conflict of judicial opinion. It has even been held that, under special circumstances, a jury or court might assume as an inference of fact, in the absence of any positive evidence, that a purchaser examined the public records, and thus obtained information amounting to an actual notice from a conveyance imperfectly recorded, or improperly recorded, through some defect.<sup>4</sup>

**§ 601. Same—Effect of Explaining or Contradicting the Information Given.**—In concluding this branch of the discussion, the important question remains to be considered, How far may a party rely upon the whole of the information given or statement made to him in a case of actual notice? In other words, when information is given or a statement is made to a purchaser which, standing alone, would be actual notice, or at least would be sufficient to put him upon an inquiry, but this is accompanied by further explanatory or contradictory declarations which tend to nullify or destroy the effect of the former language, how far may the purchaser accept and act upon the entire communication? or how far is he affected by that portion which tends to show the existence of a prior, outstanding, and conflicting claim? If the only information given to the purchaser concerning the existence of an outstanding claim, contract, or equity affecting the property is communicated by a third person,—a stranger having no interest in the matter,—and

<sup>1</sup> It is hardly to be supposed, however, that notice could be inferred from mere relationship or intimacy, without any other circumstances; *Fluegel v. Henschel*, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996; *Tillinghast v. Champlin*, 4 R. I. 173, 204, 215, 67 Am. Dec. 510.

<sup>2</sup> *Dunn v. Barnum*, 51 Fed. 355, 10 U. S. App. 86, 2 C. C. A. 265; *Connecticut Mut. Life Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623; *Hoppin v. Doty*, 25 Wis. 573, 591.

<sup>3</sup> *Hervey v. Smith*, 22 Beav. 299; *Paul v. Connersville etc. R. R.*, 51 Ind. 527.

<sup>4</sup> *Hastings v. Cutler*, 24 N. H. 481.

this person also states that such contract has been rescinded, or such claim or equity has been abandoned or discharged, and no longer exists, the purchaser, it seems, may rely on the whole communication; it is not sufficient, in the absence of special reasons for believing the former part and rejecting the latter, to put him upon an inquiry, and does not therefore amount to an actual notice. This conclusion results from the obvious fact that such an informant has no personal interest to deceive the purchaser by misrepresenting or concealing the truth.<sup>1</sup> When, however, the grantor, vendor, or mortgagor admits that his title was defective or encumbered, or that there was some outstanding claim upon or equity in the property, or makes any other communication which, unexplained, would constitute an actual notice, but adds a further declaration to the effect that such defect has been cured, or encumbrance removed, or claim or equity rescinded and destroyed, the purchaser, according to the weight of authority, is not warranted in accepting and relying upon this explanation or contradiction; the information obtained under such circumstances and from such a source is sufficient to put a prudent man upon an inquiry. The reason of this is plain. The informant is under a strong personal interest to misrepresent or conceal the real facts. While the former branch of his communication is made against his interest, and is therefore more likely to be true, the latter part is in conformity with his personal interest, and is essentially untrustworthy.<sup>2</sup> Finally, a purchaser is fully warranted in accepting and acting upon the statements or conduct of the person who holds or asserts a conflicting interest, claim, or right, if he, when interrogated upon the subject, either keeps silence, or denies the existence of any claim, or affirmatively declares it to be of a certain kind or amount; such a person, even if not absolutely estopped from afterwards setting up any claim, or a claim different from his representations, would certainly be debarred from afterwards alleging that the purchaser was put upon an inquiry, and was charged with notice.<sup>3</sup> If a purchaser, having been put upon an inquiry, prosecutes it with reasonable and due diligence, without discovering any adverse right, the inference of an actual notice received by him is overcome and destroyed.<sup>4</sup> What is a due inquiry in these instances of actual notice inferred

<sup>1</sup> *Rogers v. Wiley*, 14 Ill. 65, 56 Am. Dec. 491.

<sup>2</sup> The rule, however, is not pushed so far by the courts as to work real injustice to innocent purchasers who have been manifestly deceived and misled. *Jones v. Smith*, 1 Hare, 43; *Simpson v. Hinton*, 88 Ala. 527, 7 South. 264.

<sup>3</sup> *Pearson v. Morgan*, 2 Brown Ch. 388; *Burrowes v. Locke*, 10 Ves. 470, 1 Scott 559; *Barrett v. Baker*, 136 Mo. 512, 37 S. W. 130.

<sup>4</sup> *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 40 Am. St. Rep. 299, 55 N. W. 825.

from circumstantial evidence must, to a great extent, depend upon the particular facts of each case. It is well settled, however, that mere examination of the record, and finding no adverse title or claim recorded, is not due inquiry by one who has been put upon inquiry by circumstances tending to show the existence of a conflicting title, claim, or right.<sup>5</sup>

**§ 602. Same—By Whom and when Information must be Given.**—Such being its general nature, it is impossible to define by a single formula what will amount to an actual notice sufficient to affect the conscience of the party receiving it, and courts have not attempted to lay down any such criterion; each case must, to a considerable extent, depend upon its own particular circumstances. The following ancillary rules, however, bearing upon the question, have been well settled. Where an actual notice is relied upon, in order to be binding it must come from some person interested in the property to be affected by it; and it is said that it must be given and received in the course of the very transaction itself concerning the property in which the parties are then engaged. As a necessary consequence, no mere vague reports from strangers, nor mere general statements by individuals not interested in the property, that some other person claims a prior right or title, will amount to an actual notice so as to bind the conscience of the party; nor will he be bound by a notice given in some previous and distinct transaction, which he might have forgotten.<sup>1</sup> It should be most carefully observed that the decisions here referred to, and the rules which they sustain, are dealing exclusively with the artificial conception of an actual *notice*, which is regarded as affecting the conscience of the party, and producing results upon his rights in the same manner and to the same extent as though it amounted to full knowledge, although it may perhaps fall far short of such a consummation. The question as to the consequences of such knowledge acquired in some other manner or from some other source is therefore left untouched.

**§ 603. Effect of Knowledge.**<sup>1</sup>—

**§ 604. Constructive Notice.**—Constructive notice assumes that no information concerning the prior fact, claim, or right has been directly and personally communicated to the party; at least, such information is not shown by evidence, but is only *inferred by operation*

<sup>5</sup> *Pringle v. Dunn*, 37 Wis. 449, 465, 467, 19 Am. Rep. 772, H. & B. 92.

<sup>1</sup> *Butcher v. Stapeley*, 1 Vern. 363, 1 Ames Eq. Jur. 279, 2 Keener 622, 2 Scott 188; *Wilson v. McCullough*, 23 Pa. St. 440, 62 Am. Dec. 347; *Raymond v. Flavel*, 27 Oreg. 219, 40 Pac. 158.

<sup>1</sup> On this subject see ante, § 602; also, *Montgomery v. Keppel*, 75 Cal. 128, 7 Am. St. Rep. 125, 19 Pac. 178; *Butcher v. Yocum*, 61 Pa. St. 168, 171, 100 Am. Dec. 625; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772, H. & B. 92.

*of legal presumptions.* It embraces all those instances, widely differing in their external features, in which, either from certain extraneous facts, or from certain acts or omissions of the party himself, disclosed by the evidence, the information is *conclusively presumed* to have been given to or received by him, or is inferred by a *prima facie* presumption of the law in the absence of contrary proof.

§ 606. **When the Presumption is Rebuttable.**—Since constructive notice, as heretofore defined, includes all the instances in which information concerning a prior fact, claim, or right is inferred either by a conclusive or by a rebuttable presumption of law, it would be a most important aid in the further discussion if we could discover a general criterion for distinguishing these two classes, and determining in what cases the presumption is conclusive, and in what it is only *prima facie* and rebuttable. It may not be possible to lay down a rule which is absolutely universal in its operation, and which furnishes a certain test for every case; but a rule may be formulated which is quite general in its application, and which gives a practical test sufficient for many instances differing widely in their external features.<sup>1</sup> Wherever a party has information or knowledge 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. . . . As an illustration, if a party is negotiating for the purchase of certain land, and sees or learns that the land is not in the intended grantor's possession, but is possessed and occupied by a third person, a stranger, this fact of possession is sufficient to put the expected grantee upon an inquiry concerning the nature of the occupant's interest. The information or knowledge of such extraneous facts which are sufficient to put the party upon an inquiry constitutes a constructive notice of the conflicting claim or interest which *does* exist, because a presumption thence arises. This presumption, in all cases of this class, is really a double one. The party is either presumed to have made the inquiry, and to have carried it out until he obtained full knowledge of the outstanding conflicting interest, claim, or right, or else to have intentionally and deliberately refrained from making the inquiry or following it up in a reasonable and proper manner for the very purpose of avoiding the knowledge which he might have acquired. The presumption is clearly one of law, and not a mere inference of fact; because upon the bare proof that the party

<sup>1</sup> *Williamson v. Brown*, 15 N. Y. 354, H. & B. 86.

had the information of facts sufficient to put him upon an inquiry, the inference is at once made without any further evidence in its support, and in the absence of all contrary evidence it is absolute and conclusive.<sup>2</sup>

**§ 607. Same—Rebutted by Due Inquiry.**—It may be stated as a general proposition that in all instances of constructive notice belonging to this class, where it arises from information of some extraneous facts, not of themselves tending to show an actual notice of the conflicting right, but sufficient to put a prudent man upon an inquiry, the constructive notice is not absolute; the legal presumption arising under the circumstances is only *prima facie*; it may be overcome by evidence, and the resulting notice may thereby be destroyed. Whenever, therefore, a party has merely received information, or has knowledge of such facts sufficient to put him on an inquiry, and this constitutes the sole foundation for inferring a constructive notice, he is allowed to rebut the *prima facie* presumption thence arising by evidence; and if he shows by convincing evidence that he did make the inquiry, and did prosecute it with all the care and diligence required of a reasonably prudent man,

<sup>2</sup> In several of the later English cases a very strong disposition has been shown to limit and restrict the effect of the constructive notice which arises from the existence of facts and circumstances sufficient to put the party on an inquiry. This limitation is applied both where the party made some inquiry and relied upon what he had learned thereby, and where he made no inquiry at all. *Ware v. Lord Egmont*, 4 De Gex, M. & G. 460, 473, by Lord Cranworth; *Bailey v. Barnes* (1894), 1 Ch. 25. It is plain that the criterion, as established by these most recent English cases, is no longer the mere want of that reasonable care and diligence in making an inquiry which would be used by a prudent man; the failure to prosecute or to make the inquiry must, under the circumstances, amount to gross or culpable negligence. It should be observed, however, that this rule is confined, and is intended to be confined, to that class of constructive notices in which the legal presumption is rebuttable.

The American courts do not appear to have adopted this most recent English rule. Wherever the facts and circumstances do not tend to show actual notice,—in other words, where the facts and circumstances are not simply the circumstantial evidence of an actual notice,—the test of constructive notice generally applied by the American courts has been, whether such facts are sufficient to put a prudent man upon an inquiry, and whether an inquiry has been prosecuted with reasonable care and diligence: See *Cordova v. Hood*, 17 Wall. 1; *Cambridge Valley Bk. v. Delano*, 48 N. Y. 326, 336, 339; *Baker v. Bliss*, 39 N. Y. 70, 74, 78; *Anthony v. Wheeler*, 130 Ill. 128, 17 Am. St. Rep. 281, 22 N. E. 494; *Tillman v. Thomas*, 87 Ala. 321, 13 Am. St. Rep. 42, 6 South. 151. It is sometimes difficult to distinguish a case of constructive notice arising from extraneous facts sufficient to put the party upon an inquiry from a case of mere actual notice depending upon circumstantial evidence; and the two have occasionally been confounded by the decisions themselves. The criterion as given in the text will, I think, render the distinction sufficiently plain and practical.

and that he failed to discover the existence of, or to obtain knowledge of, any conflicting claim, interest, or right, then the presumption of knowledge which had arisen against him will be completely overcome; the information of facts and circumstances which he had received will not amount to a constructive notice. What will amount to a due inquiry must largely depend upon the circumstances of each case.<sup>1</sup> If, on the other hand, he fails to make any inquiry, or to

<sup>1</sup>The different species of constructive notice in which the legal presumption may thus be overcome seem to be the following: 1. That derived wholly from mere extraneous facts and circumstances which are said to put a party on inquiry, which are matters in pais, and which generally consist of fraud, concealments, neglects, mistakes, and the like, by third persons; 2. That derived from the possession or tenancy of the property by some third person; and 3. To a partial extent, that derived from the pendency of an action affecting the property. In the following species the constructive notice seems to be absolute and the presumption conclusive: 1. That derived from a statutory recording or registration in the United States; 2. That derived from the statutory *lis pendens*; 3. That derived from a definite recital or reference in an instrument forming an essential part of a party's chain of title; and 4. That affecting a principal, where an actual or a constructive notice has been duly given to his proper agent. That the presumption *may* be overcome in the classes of cases first above mentioned is either directly or inferentially held by the following decisions, among others: *Williamson v. Brown*, 15 N. Y. 354, 360, H. & B. 86; *Anthony v. Wheeler*, 130 Ill. 128, 17 Am. St. Rep. 281, 22 N. E. 494.

Whenever a party has, by means of information concerning extraneous matters, been put upon inquiry, how this inquiry should be made, and how far it should be prosecuted, in order that the legal presumption may be overcome, and the constructive notice defeated, although the party may still have failed to have ascertained the real truth, must largely depend upon the particular circumstances of each case; no universal rule is possible. Much help, however, may be derived from a comparison of the decisions, which I have arranged according to their general subject-matter.

1. *Examination of the Records.*—Examination of the records is always necessary, and there could hardly be a “due inquiry” without it. If the information given points to the existence of some interest or claim which, if it exists at all, must necessarily appear upon the record, then a search of the proper record, and a discovery that no such claim appeared therein, would generally be sufficient; the “due inquiry” would have been prosecuted: *Barnard v. Campau*, 29 Mich. 162. In general, an examination of the records by such a party is not sufficient. If the information which puts him on inquiry points to the existence of some matter in pais, some interest *dehors* the records, or which would not necessarily be shown by the records, then a search of the records alone is not “due inquiry,”—if, for example, the supposed claim was an easement, or a grantor's lien for purchase price, and the like: *Baker v. Bliss*, 39 N. Y. 70.

2. *Inquiry from the Grantor or Vendor.*—A purchaser who has been put on an inquiry should seek information from his grantor or vendor, and a failure to do so would generally show a lack of the due care and diligence in making the inquiry.

3. *Inquiry from Third Persons.*—Under many circumstances, an examination of the records and a questioning of the vendor would not be sufficient, unless

prosecute one with due diligence to the end, the presumption remains operative, and the conclusion of a notice is absolute. The criterion thus laid down will serve to determine the *prima facie* nature of the presumption in a very large number of the instances which are properly referable to the class of "constructive notice."

§ 608. **When Conclusive.**—It should be added, for the purpose of concluding this general description, that the doctrine determining what constitutes a constructive notice under such circumstances may be formulated, in somewhat different terms, as follows: Whenever a party has information or knowledge of certain extraneous facts, which of themselves do not amount to, nor tend to show, an *actual* notice, but which are sufficient to put a reasonably prudent man upon an inquiry respecting a conflicting interest, claim, or right, *and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to a discovery of the truth*, to a knowledge of the interest, claim, or right which really exists, then the party is absolutely charged with a constructive notice of such interest, claim, or right. The presumption of knowledge is then conclusive. There is plainly nothing contradictory between this statement and the criterion laid down in the preceding paragraph; both are phases of the same doctrine. Since the facts are assumed to be such that an inquiry properly conducted would result in arriving at the truth, it would be impossible for the party to show by any evidence that he had duly prosecuted the inquiry, and had nevertheless failed to acquire the knowledge. If the facts of a particular case bring it within this description, the legal presumption becomes conclusive, and the constructive notice is absolute in its effects.<sup>1</sup>

§ 609. **Species of Constructive Notice.**—

§ 610. **1. By Extraneous Facts, Generally Acts of Fraud, Negligence, or Mistake.**—The criterion in all instances of this species is,

the inquiry were further prosecuted among third persons from whom information could probably be obtained; a neglect to make such an inquiry would not overcome the presumption. Thus an omission to seek information from a third person who was in possession, or from a third person who was said or claimed to hold some lien or encumbrance thereon, would generally be a failure to prosecute the inquiry with due diligence.

<sup>1</sup> It is in pursuance of this general proposition that the constructive notice from recitals contained in a deed forming a necessary link in a party's chain of title, and that chargeable upon a principle when given to an agent, and that derived from a *lis pendens* and from registration, are absolute in their effects, the legal presumptions being conclusive. In support of the general rule as given in the text, see the following cases, among others: *Lang Syne Gold Min. Co. v. Ross*, 20 Nev. 127, 19 Am. St. Rep. 337, 18 Pac 358; *Attorney-General v. Abbott*, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251.

that the party had knowledge or information of certain matters in pais, which, although not directly tending to show the existence of a prior conflicting right, are sufficient to put him, as a prudent man, upon an inquiry; and he is charged with constructive notice of all that he might have learned by an inquiry prosecuted with reasonable diligence; a legal presumption arises that he *has* obtained information of what he might thus have learned. In every such case the first question is, whether the facts of which the party has information *are* sufficient to put him upon an inquiry, so as to raise the prima facie presumption; the further question is then presented, whether he has made a due inquiry without discovering the truth, so as to overcome the presumption and defeat the notice, or whether he has so neglected this duty that the presumption remains unshaken and the notice effective. A third question might be suggested, whether he had made an inquiry and had ascertained the whole truth concerning the prior conflicting right, so that the constructive notice would in reality be turned into actual knowledge or actual notice. I would remark that in many of the decisions involving this species of notice it will be seen upon a careful examination that the point actually determined by the court was, not whether the party had made a due and reasonable inquiry, but whether the facts were sufficient to put him upon *any* inquiry, so that his failure to inquire would be a fatal neglect. It is plain from the discussions of the preceding paragraphs that in all instances belonging to this species the legal presumption upon which constructive notice always rests is only prima facie, and may be overcome by evidence clearly showing that the inquiry was duly prosecuted without success. Before describing the particular cases falling under this head, it is proper to mention the difficulty, which may sometimes exist, of distinguishing this kind of constructive notice from those instances of actual notice which are established merely by circumstantial evidence. In fact, there are decisions which make no attempt to distinguish them; the terms "constructive notice" and "actual notice" have been applied indiscriminately to the same condition of circumstances. The distinction, however, exists, and is fundamental. Whatever may be the language of judicial dicta, it is settled beyond a doubt that in one case the actual notice is argumentatively inferred as a conclusion of fact, by the jury or other tribunal, from circumstances which put the party upon an inquiry; and in the other case the constructive notice is inferred by the court as a presumption or conclusion of law from the same kind of circumstances, in the absence of contrary evidence.<sup>1</sup>

<sup>1</sup>Cases belonging to this first species of constructive notice are much more common in England than in the United States; indeed, a very large proportion

I shall now mention the most important instances which properly belong to this branch of constructive notice.

§ 611. **Visible Objects and Structures.**—If a purchaser sees or has knowledge of, or by the ordinary use of his senses might see or know of, visible material objects or structures upon or connected with the land or other subject-matter concerning which he is dealing, he may, and generally will, be charged with a constructive notice of any easement or other similar right the existence of which would be reasonably suggested to him by the appearance of such material object. He is put upon an inquiry, and is presumed to have ascertained whatever he might have learned by prosecuting the inquiry in a due and reasonable manner.<sup>1</sup>

§ 612. **Absence of Title Deeds.**—The case belonging to this head which most frequently occurs in England is that arising from the absence of the title deeds, or their non-production by the owner of land with whom an intended purchaser or encumbrancer is dealing. From the peculiar system of conveyancing and land titles prevailing in England, the owner of a *legal* estate in fee or for life is entitled and is presumed to have the title deeds and other muniments of title constituting the written evidence of his estate in his own possession or under his personal and immediate control. The inability to produce the title deeds, and especially their possession by a stranger, would indicate that some equitable or perhaps legal interest, mortgage, or lien had been created and was outstanding.<sup>1</sup>

§ 613. **Other Matters in Pais.**—As might be supposed from our wholly different system of conveyancing and titles, instances of constructive notice by the absence or non-production of title deeds

of the English decisions concerning constructive notice must be referred to this head. The reason is obvious. In England, the absence of any general system of recording renders it possible for titles to be affected in a vast number of modes by matters in pais, by matters resting in the knowledge of particular individuals, and which can only be ascertained by a special inquiry. The universal system of recording in this country largely diminishes the possibility of titles being thus affected by extraneous matters.

<sup>1</sup> *Davies v. Sear*, L. R. 7 Eq. 427; *Morland v. Cook*, L. R. 6 Eq. 252; *Raritan etc. Co. v. Veghte*, 21 N. J. Eq. 463. See, also, ante, § 600.

<sup>1</sup> In fact, the possession, by the apparent owner of the legal estate, of *all* the title deeds is quite analogous to, though not of course exactly identical with, a perfect record title in the United States. A purchaser dealing with the legal owner in England, and finding him in possession of *all* the title deeds, is in a position quite similar to that of a purchaser in this country who has made a search and finds the owner's title on the records clear and unencumbered. While in neither case is such purchaser *absolutely* secure against unknown outstanding claims, in both he stands in a like position of advantage and protection.

seldom, if ever, arise in this country. The same general rule, however, is applied by our courts in all analogous cases. If a purchaser or encumbrancer, dealing concerning property of which the record title appears to be complete and perfect, has information of extraneous facts or matters in pais, sufficient to put him on inquiry respecting some unrecorded conveyance, mortgage, or encumbrance, or respecting some outstanding interest, claim, or right which is not the subject of record, and he omits to make a proper inquiry, he will be charged with constructive notice of all the facts which he might have learned by means of a due and reasonable inquiry.<sup>1</sup>

§ 614. 2. **By Possession or Tenancy.**—The general rule is well settled in England that a purchaser or encumbrancer of an estate who knows or is properly informed that it is in the possession of a person other than the vendor or mortgagor with whom he is dealing is thereby charged with a constructive notice of all the interests, rights, and equities which such possessor may have in the land. He is put upon an inquiry concerning the grounds and reasons of the stranger's occupation, and is presumed to have knowledge of all that he might have learned by means of an inquiry duly and reasonably prosecuted. If he neglects to make any inquiry, or to make it with due diligence, the presumption and notice, of course, remain absolute.<sup>1</sup> The same general rule, based upon the same motives and reasons, has been established in the United States by a very great number of decisions and judicial dicta.<sup>2</sup> In by far the larger portion of English cases, the possession has been that of a tenant or lessee, while in this country the instances of notice by mere tenancy are comparatively few. I shall therefore treat the effect of tenancy as a particular application of the more general doctrine concerning notice by possession.

§ 615. **General Rules.**—Two leading and entirely distinct rules have been settled in the United States as well as in England, and the failure to recognize this fact has, as it seems to me, sometimes produced confusion and uncertainty in dealing with the general subject. In the first place, it is clearly established by many decisions of the highest authority that an actual, open, visible, and exclusive possession of a definite tract of land by one rightfully in possession or holding under a valid title is a constructive notice to subsequent purchasers and encumbrancers of whatever estate or interest in the

<sup>1</sup> *Kirsch v. Tozier*, 143 N. Y. 390, 42 Am. St. Rep. 729, 38 N. E. 375, H. & B. 77.

<sup>2</sup> *Taylor v. Stibbert*, 2 Ves. 437, 440, 2 Keener 450; *Holmes v. Powell*, 8 De Gex, M. & G. 572.

<sup>3</sup> *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 1 Scott 549; *Woods v. Farmere*, 7 Watts. (Pa.) 382, 32 Am. Dec. 772; *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846.

land is held by the occupant, equivalent in its extent and effects to the notice given by the recording or registration of his title. The constructive notice thus described, like that arising from a record or registration, does not seem to require nor to depend upon any actual knowledge or information of the possession communicated to or had by the subsequent purchaser, since he is held to be charged with notice, even though he is a resident of another state.<sup>1</sup> This rule is plainly the same as the first one laid down by Lord Justice Knight Bruce, in the opinion quoted under the last preceding paragraph.<sup>2</sup> The rationale seems to be, that as the occupant's title is a good one, and as his possession is notorious and exclusive, a purchaser would certainly arrive at the truth upon making any due inquiry. The purchaser cannot say, and cannot be allowed to say, that he made a proper inquiry, and failed to ascertain the truth. The notice, therefore, upon the same motives of expediency, is made as absolute as in the case of a registration. The second of the two rules is undoubtedly the one which is sustained by the greatest number of decisions. It must not be supposed, however, that there is any conflict between them, nor that the same court might not, under proper circumstances, adopt both. Whenever a party, dealing as purchaser or encumbrancer with respect to a parcel of land, is informed or knows, or is in a condition which prevents him from denying that he knows, that the premises are in the possession of a third person, other than the one with whom he is dealing as owner, he is thereby put upon an inquiry, and is charged with constructive notice of all the facts concerning the occupant's right, title, and interest which he might have ascertained by means of a due inquiry. A legal presumption arises that he possesses all the knowledge which he could have acquired by such an inquiry.<sup>3</sup> It follows, as a necessary consequence of these rules, that when a grantee or a vendee whose deed or contract is not recorded is in actual possession of the land conveyed or agreed to be conveyed to him, his possession is constructive notice to a subsequent grantee of the same premises whose deed is put upon record, and his title takes precedence of such subsequent but recorded deed.<sup>4</sup>

<sup>1</sup> Kirby v. Tallmadge, 160 U. S. 397, 16 Sup. Ct. 349; Tate v. Pensacola G. L. & D. Co., 37 Fla. 439, 20 South. 542, 53 Am. St. Rep. 251; Mullins v. Butte Hardware Co., 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430; Daniel v. Hester, 29 S. C. 147, 7 S. E. 65.

<sup>2</sup> Holmes v. Powell, 8 De Gex, M. & G. 572, 580.

<sup>3</sup> Bank of Mendocino v. Baker, 82 Cal. 114, 22 Pac. 1037, 6 L. R. A. 833; Rorer Iron Co. v. Trout, 83 Va. 397, 419, 2 S. E. 713, 5 Am. St. Rep. 285.

<sup>4</sup> Bank of Mendocino v. Baker, 82 Cal. 114, 22 Pac. 1037, 6 L. R. A. 833; Phelan v. Brady, 119 N. Y. 587, 23 N. E. 1109 (rule not changed by reason of

§ 616. **Extent and Effect of the Notice.**—There appears to be some disagreement among the American decisions concerning the question of what rights and interests held by the occupant his possession is a constructive notice. It is firmly settled in England that the possession of a tenant or lessee is not only notice of all rights and interests connected with or growing out of the tenancy itself or the lease, but is also notice of all interests acquired by collateral and even subsequent agreements. If, for example, a tenant should enter under his lease alone, and should afterwards make an agreement for the purchase of the land, his possession would be notice to a subsequent purchaser of his rights as vendee, as well as those belonging to him as lessee.<sup>1</sup> It would seem that the principle of these decisions extended to all persons in possession, whether as lessees, vendees, mortgagees, or otherwise. It has accordingly been adopted and followed by some of the American cases, which hold that a possession originally acquired by one right or in one manner is notice of all other rights subsequently and differently obtained and held by the occupant, unless there is something in the circumstances of the case which has actually misled the purchaser who is to be affected by the notice.<sup>2</sup> Exactly the opposite conclusion has, however, been reached by cases which hold that a possession begun under one kind of right is not notice of any other or different interest subsequently obtained by the occupant, unless there was something special in the circumstances which might draw

the great inconvenience to which a purchaser would be put in making inquiries of all persons in a large tenement house).

<sup>1</sup> *Daniels v. Davison*, 16 Ves. 249, 17 Ves. 433; *Taylor v. Stibbert*, 2 Ves. 437, 2 Keener 450.

<sup>2</sup> In my opinion, these decisions are much more in harmony with the general doctrine than those others which have speculated and drawn refined distinctions upon the amount of notice derived from the occupant's original right to the possession. The reasons upon which the whole doctrine rests seem to be conclusive. The possession of a third person is said to put a purchaser upon an inquiry; and he is charged with notice of all that he might have learned by a due and reasonable inquiry. Clearly a purchaser who is thus put upon inquiry is bound to inquire of the occupant with respect to *every* ground, source, and right of his possession; anything short of this would clearly fail to be the "due and reasonable inquiry": See *Bright v. Buckman*, 39 Fed. 243; *Phelan v. Brady*, 119 N. Y. 587, 23 N. E. 1109, 8 L. R. A. 211.

It has, accordingly, been held that the possession of the entire premises by one of the two or more co-tenants is sufficient to put a purchaser from a co-tenant out of possession upon inquiry as to the interests claimed by the possessor, by purchase of his co-tenant's shares, etc.: *Weisberger v. Wisner*, 55 Mich. 246, 21 N. W. 331. Other cases hold that such sole occupancy is not notice, since it could be referred to the occupant's former title as tenant in common: *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430.

the purchaser's attention to the change of title, and thus operate rather as an actual than a constructive notice.<sup>3</sup> The decisions may be regarded as agreeing upon the conclusion, which also seems to be in perfect harmony with sound principle, that where a title which the occupant holds has been put on record, and his possession is consistent with what thus appears of record, it shall not be a constructive notice of any additional or different title or interest to a purchaser who has relied upon the record, and has had no actual notice beyond what is thereby disclosed.<sup>4</sup>

**§ 617. Grantor Remaining in Possession.**—The last-mentioned rule has frequently been invoked where a grantor, having executed a deed absolute on its face, which is put upon record, remains in possession of the land by virtue of some arrangement or relation between himself and his grantee dehors the deed and the record, which entitles him to the possession, such as a collateral agreement which really turns the deed into a mortgage, a lien for the unpaid purchase price, an unrecorded mortgage, and the like. . . . There has been a direct conflict of opinion among the American courts in applying the rule to the condition of facts above described. In one group of decisions the possession of the grantor is held not to be a constructive notice of any right or interest he may have antagonistic to his deed which has been put upon record; a subsequent purchaser, it is said, has a right to rely upon the information derived, or which would be derived, from the record, and to assume that the grantor's continued possession is merely by sufferance.<sup>1</sup> Another group reaches a conclusion directly the contrary to this, and holds that a purchaser is put upon an inquiry and is affected by a constructive notice in the same manner as in any other case of possession by a third person.<sup>2</sup>

**§ 618. Tenant's Possession, how Far Notice of Lessor's Title.**—Whether possession by a tenant is constructive notice of his landlord's title, is also a question upon which the decisions are in direct conflict. In England it seems to be settled that the posses-

<sup>1</sup>Hodges v. Winston, 94 Ala. 576, 10 South. 535; McMechan v. Griffing, 3 Pick. 154, 15 Am. Dec. 198; Red River Val. L. & I. Co. v. Smith, 7 N. D. 236, 74 N. W. 194.

<sup>2</sup>Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349; Mullins v. Butte Hardware Co., 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430; Woods v. Farmere, 7 Watts 382, 383, 32 Am. Dec. 772.

<sup>3</sup>Truman v. Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; Bloomer v. Henderson, 8 Mich. 395, 404, 405, 77 Am. Dec. 453; Exon v. Dancke, 24 Or. 110, 32 Pac. 1045.

<sup>4</sup>Illinois Cent. R. R. v. McCullough, 59 Ill. 166; Groff v. State Bank, 50 Minn. 234, 52 N. W. 651, 36 Am. St. Rep. 640; Dennis v. Northern Pac. R. Co., 20 Wash. 320, 55 Pac. 210.

sion by a tenant, or notice of a tenancy, will not affect a purchaser with constructive notice of the landlord's title.<sup>1</sup> The same view has been adopted by several American decisions.<sup>2</sup> In the greater number of American cases, however, it is held that a purchaser is bound to make inquiry from the tenant in possession with respect to *all* the rights and interests which he claims to have, and under which he occupies, and is presumed to know all the facts which he might have learned by such an inquiry; he must pursue his inquiry to the final source of the tenant's right, and is thus affected with a constructive notice of the landlord's title and estate.<sup>3</sup>

§ 619. **Nature and Time of the Possession.**—Under this head, the kind, extent, and time of the possession necessary or sufficient to constitute a constructive notice will be examined. The determination of this question must largely depend upon the circumstances or conditions of fact under which it arises, and upon the immediate purpose or object for which the protection by a notice is invoked. Thus the question may arise between the rightful holder of a prior unrecorded title, and a subsequent purchaser whose conveyance is recorded; and it may therefore come within the first rule as stated in a former paragraph,<sup>1</sup> where the possession of a person rightfully entitled is equivalent, in its effects as notice, to a registration; or it may arise in other circumstances, which are not directly affected by the recording acts, and which are governed by the second general rule concerning the effect of possession as notice. A failure to recognize the difference existing between these two kinds of cases will undoubtedly account for whatever of confusion and conflict of opinion may be found in the decisions upon this subject.

§ 620. **Actual, Open, Exclusive Occupancy.**—It is therefore abundantly settled by the decisions, that where the first general rule as stated in a foregoing paragraph is invoked, and the party rightfully in possession under an unrecorded conveyance relies upon the fact of such possession as a constructive notice, equivalent in its effects to a registration, to a subsequent grantee or encumbrancer whose deed or mortgage has been recorded, his possession must be an actual, open, distinct, notorious, and exclusive *occupancy*

<sup>1</sup> Jones v. Smith, 1 Hare, 43, 63; Hunt v. Luck [1901] 1 Ch. 45, [1902] 1 Ch. 428.

<sup>2</sup> Flagg v. Mann, 2 Sum. 486, 557, Fed. Cas. No. 4,847.

<sup>3</sup> Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352, 4 L. R. A. 222, H. & B. 90; A. R. Beck Lumber Co. v. Rupp, 188 Ill. 562, 80 Am. St. Rep. 190, 59 N. E. 429; Edwards v. Thompson, 71 N. C. 177, 179; Randall v. Lingwall, 43 Or. 383, 73 Pac. 1.

<sup>1</sup> Ante, § 615.

of the land in question. No mere occupation of the premises in common or in connection with a third person, and no mere exercise of acts of ownership equivocal in their nature over the land, will then suffice.<sup>1</sup>

§ 622. **Time of the Possession.**—In order that any kind of possession, whether actual and visible, or simply constructive, or consisting in the rightful receipt of rents and profits, may put a purchaser upon an inquiry, and operate as a constructive notice, it must exist at the time of the transaction by which his rights and interests are created. A possession which had ended before, or which did not commence until after, the sale to him was made, or the conveyance or encumbrance was executed, could not affect him with any constructive notice.<sup>1</sup>

§ 623. **The Presumption is Rebuttable.**—

§ 624. **Same Continued.**—There is, on the other hand, an able and well-considered series of decisions in which the nature of the legal presumption arising from possession has been directly and intentionally examined. In all these cases, where the court has deliberately met the question, has intentionally investigated the presumption arising from possession, and has definitely passed upon its nature, it has been held that the presumption, under ordinary circumstances, or independently of special and controlling circumstances, is not a conclusive one, but is only *prima facie*, and may be rebutted and overcome by proper evidence showing that the party has made a diligent inquiry, and has nevertheless failed to discover the real truth concerning the existence of an adverse right or interest. This conclusion may be considered as settled by the decided weight of judicial authority, English and American.<sup>1</sup> It is also in complete conformity with principle. Undoubtedly, in ordinary cases, where a third person is possessed under a claim of right or title which is actually valid, an inquiry prosecuted with reasonable diligence from parties naturally conversant with the facts will generally result in a discovery of the truth, and the presumption thus becomes conclusive, not because it is essentially so, but because it is necessarily confirmed by the existing facts,—no evidence can overturn it. A different condition of circumstances,

<sup>1</sup> *Holmes v. Powell*, 8 De Gex, M. & G. 572, 580; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239; *Holland v. Brown*, 140 N. Y. 344, 35 N. E. 577; *Hodge v. Amerman*, 40 N. J. Eq. 99; *Rankin v. Coar*, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661 (occupancy not exclusive); *Kirby v. Tallmadge*, 160 U. S. 379, 16 Sup. Ct. 349.

<sup>1</sup> *Meehan v. Williams*, 48 Pa. St. 238; *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846.

<sup>1</sup> *Scheerer v. Cuddy*, 85 Cal. 271, 34 Pac. 713; *Williamson v. Brown*, 15 N. Y. 354, 360, 362, H. & B. 86.

however, might easily exist, and often does exist. The purchaser put upon an inquiry might exhaust all the reasonable modes of acquiring knowledge; he might receive incorrect information from the parties acquainted with the real facts, and on whom he had a right to rely; he might even be misled by the person in possession; he might act in the most perfect good faith,—and come to the reasonable conclusion that the possession was not based upon any adverse claim, and was wholly subordinate to his own right and that of his immediate grantor or mortgagor. To say that the presumption is, under such circumstances, conclusive, and the constructive notice is absolute, would be to violate all the equitable reasons upon which the whole doctrine of constructive notice is founded.

§ 626. 3. **By Recital or Reference in Instruments of Title—General Rule.**—Wherever a purchaser holds under a conveyance, and is obliged to make out his title through that deed, or through a series of prior deeds, the general rule is firmly established that he has constructive notice of every matter connected with or affecting the estate which appears, either by description of parties, by recital, by reference, or otherwise, on the face of any deed which forms an essential link in the chain of instruments through which he must derive his title. The reasons for this doctrine are obvious and most convincing; in fact, there could be no security in land ownership unless it were strictly enforced. The right of such a purchaser is, under our system of conveyancing, confined to the instruments which constitute his chain of title, which are his title deeds, and everything appearing in those instruments and forming a legitimate part thereof is a necessary element of his title. The rationale of the rule is equally clear and certain. Any description, recital of fact, reference to other documents, puts the purchaser upon an inquiry; he is bound to follow up this inquiry step by step, from one discovery to another, from one instrument to another, until the whole series of title deeds is exhausted, and a complete knowledge of all the matters referred to in their provisions and affecting the estate is obtained. Being thus put upon the inquiry, he is conclusively presumed to have prosecuted it until its final result, and with ultimate success. The purchaser's ignorance that a particular instrument forming a link in his chain of title was in existence, and his consequent failure to examine it, would not in the slightest affect the operation of the rule. An imperative duty is laid upon him to ascertain *all* the instruments which constitute essential parts of his title, and to inform himself of all that they contain.<sup>1</sup>

<sup>1</sup> *Bisco v. Earl of Banbury*, 1 Ch. Cas. 287; *Smith v. Burgess*, 133 Mass. 513;

§ 627. **Nature of the Notice.**—The notice which thus results from recitals and other matters contained in title deeds, within the operation of the general rule, is absolute in its nature. The party having been put upon an inquiry, the presumption that he obtained a knowledge of *all* the facts which could be ascertained by means of a diligent inquiry prosecuted through the entire chain of title deeds, and through all the instruments referred to, is conclusive; it cannot be rebutted by any evidence of a failure to discover the truth, nor even by proof of ignorance that instruments affecting the title were in existence. This presumption extends to unrecorded documents as well as to those which have been duly recorded.<sup>1</sup>

§ 628. **Extent of the Notice.**—Where, under the operation of the foregoing general rule, a purchaser has notice of a title deed, he is presumed to know all its contents, and is bound thereby. As an illustration, notice of a lease includes in its effects a constructive notice of all its covenants.<sup>1</sup> Furthermore, the necessity of prosecuting the inquiry, and the constructive notice arising therefrom, extend to every instrument forming an essential link in the direct chain of title through which the purchaser holds; that is, to the ultimate source of his title, and to every succeeding deed through which the title must be directly traced, and which is necessary to its establishment. The purchaser is thus charged with notice of every provision in each separate instrument constituting the entire series by which his own interest can be affected, or from which others have derived or may derive any rights.<sup>2</sup> Not only is a purchaser thus charged with a constructive notice of everything material in the deeds which form the direct chain through which his title is deduced, but if any of these conveyances should contain a recital of or reference to another deed otherwise collateral, and not a part of the direct series, he would by means of such recital or reference have notice of this collateral instrument, of all its contents, and of all the facts indicated by it which might be ascertained through an inquiry prosecuted with reasonable diligence.<sup>3</sup> Finally, the notice extends to all deeds and other instru-

*Deason v. Taylor*, 53 Miss. 697, 701, H. & B. 97; *National Bk. v. Morris*, 114 Mo. 255, 21 S. W. 511, 35 Am. St. Rep. 754, 19 L. R. A. 463; *Roll v. Rea*, 50 N. J. Law 264, 12 Ad. 905; *Pringle v. Dunn*, 37 Wis. 449, 464, 19 Am. Rep. 772, H. & B. 92.

<sup>1</sup> *Honore's Ex'rs v. Bakewell*, 6 B. Mon. 67, 43 Am. Dec. 147; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478. See *Roll v. Rea*, 50 N. J. Law 264, 12 Atl. 905.

<sup>2</sup> *Taylor v. Stibbert*, 2 Ves. 437, 2 Keener 450; *Sweet v. Henry*, 175 N. Y. 268, 67 N. E. 574.

<sup>3</sup> *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478; *Brown v. Simons*, 44 N. H. 175.

<sup>4</sup> *Hope v. Liddell*, 21 Beav. 183; *Deason v. Taylor*, 53 Miss. 697, H. & B. 97; *Fouse v. Gilfillan*, 45 W. Va. 213, 32 S. E. 178, 185.

ments properly falling within the two preceding rules, whether they are recorded or unrecorded. In other words, a purchaser is charged with notice of any deed forming a part of his direct chain of title, and of every collateral instrument recited or referred to, as well when it is unrecorded as when it is recorded.<sup>4</sup>

§ 630. **Particular Instances.**—The constructive notice arises not only from recitals, references, and other similar statements of fact, but also from the character and description of the parties to a deed or other instrument of title. A purchaser may thus be charged with notice of the rights held by third persons, from the fact that they are joined as parties to a conveyance, or from the character or description of them appearing in the instrument, as married women, trustees, administrators, executors, and the like.<sup>1</sup> The immediate parties—grantor and grantee, mortgagor and mortgagee—by whom and to whom the instrument is directly executed have, of course, a notice of everything which it contains. The notice is then really an *actual* one, rather than constructive; for the immediate parties are assumed to have read their own conveyance, and to have become acquainted with all of its contents.<sup>2</sup>

§ 631. **When the Notice Arises.**— . . . A recital, reference, or other statement in a title deed, in order to operate as notice, must be so definite and distinct that it conveys some information to the party, or else arouses his attention by directing him to the source of information. A statement may be so vague and uncertain in its terms that it will not put a purchaser upon an inquiry, and will not therefore affect his conscience with notice.<sup>1</sup> Finally, the notice arising from title deeds, like every other instance or kind of constructive notice, does not operate between the immediate parties to a conveyance,—the grantor and grantee, mortgagor and mortgagee,—but only between a purchaser, grantee, or mortgagee and some prior party holding or claiming to hold an adverse right, interest, or title.<sup>2</sup>

§ 632. **4. By Lis Pendens—Rationale of the Doctrine.**—It has been stated in numerous judicial opinions, and the same view has been

<sup>4</sup> Crawford v. Chicago, etc. R. Co., 112 Ill. 314; White v. Foster, 102 Mass. 375, 380; Baker v. Mather, 25 Mich. 51.

<sup>1</sup> A purchaser by a deed from a grantor who is a trustee, whose only title is that of a trustee, may have notice of the trust, and will certainly have such notice if the grantor executes the deed in his character as trustee: Marbury v. Ehlen, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467; Mercantile Nat. Bank v. Parsons, 54 Minn. 56, 55 N. W. 825, 40 Am. St. Rep. 299.

<sup>2</sup> McMurphy v. Adams, 67 N. H. 440, 39 Atl. 333.

<sup>1</sup> Bell v. Twilight, 22 N. H. 500; Durst v. Daugherty, 81 Tex. 650, 17 S. W. 388.

<sup>2</sup> Champlin v. Laytin, 6 Paige, 189, 203.

repeated by text-writers, that the rule concerning the effect of *lis pendens* is wholly referable to the general doctrine of constructive notice. It has been said that a pending suit in equity operates as a constructive notice to the world, and that a purchaser *pendente lite* is bound by the final result of the litigation, because he is charged with such a notice of the proceeding, entirely irrespective of any information which he may or may not have had. Courts of the highest ability and authority have, however, adopted a somewhat different theory. According to this view, "it is not correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. 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, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence."<sup>1</sup> It must not be supposed that this mode of explanation affects in the slightest degree the settled rules concerning *lis pendens*, or alters the rights and liabilities of alienees from a party to a suit during its pendency; it may, however, prevent the extension of the doctrine, and restrict its further application to particular persons and conditions of fact.

§ 633. **The General Rule.**—If we accept this rationale of the doctrine as correct, the general rule may be accurately formulated as follows: 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. This brief proposition in reality contains the entire doctrine.<sup>1</sup> Adopting, however, the ordinary mode of explanation, which regards the effect of *lis pendens* as merely a particular instance of constructive notice, "the general and established rule is," using the language carefully chosen by Chancel-

<sup>1</sup> *Bellamy v. Sabine*, 1 De Gex & J. 566, 578, 584. To the same effect, most of the recent cases: *Turner v. Houpt*, 53 N. J. Eq. 526, 33 Atl. 28, 3 Keener 646; *Norris v. Ile*, 152 Ill. 190, 199, 38 N. E. 762, 43 Am. St. Rep. 233.

<sup>1</sup> *Turner v. Houpt*, 53 N. J. Eq. 526, 33 Atl. 28, 3 Keener 646.

lor Kent in a leading case, "that a *lis pendens*—a pending suit in equity—duly prosecuted, and not collusive, is notice to a purchaser of the property in dispute from a party to the litigation, so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpoena after the bill is filed."<sup>2</sup> Whenever, therefore, an equitable suit affecting the title to a particular estate as its subject-matter has been begun by service of process, and is prosecuted in good faith, whether we say that the *lis pendens* is constructive notice to all the world, or regard the doctrine as necessarily resting upon a basis of expediency, the result is the same; an alienee of the subject-matter from either party during the pendency of the suit takes it subject to the rights of the other party involved in the controversy, and is bound by the decree or judgment finally rendered. In the great majority of ordinary litigations the rule has naturally been applied to an alienee of the defendant; but it is also extended, wherever the nature and object of the suit require, to one who derives title from the plaintiff.<sup>3</sup> The same *principle* embraces actions at law, as well as suits in equity; but from the essential nature of legal titles, it need not ordinarily be invoked at law. In all actions at law to which the doctrine could apply,—as, for example, in actions of ejectment,—if the plaintiff recovers a judgment against the defendant, he has also a perfect title against any alienee of the defendant, since he must necessarily recover upon the strength of his own legal title; in other words, the defendant can never give to an assignee or alienee a better title against the plaintiff than that which he himself holds.<sup>4</sup> It is otherwise in many equitable suits. Where the plaintiff in equity has only an equitable title or right to the property in dispute, it might be possible for the defendant to transfer the subject-matter to a bona fide purchaser, and thus to clothe such transferee with a title overriding the equity of the plaintiff. The doctrine of constructive notice by *lis pendens* is therefore an essential incident of many equitable suits, in order to prevent a failure of justice. It naturally came to be regarded as peculiar to proceedings in courts of equity, although the same *principle* would operate, if necessary, at law. This analysis and description, it should be observed, are entirely independent of any statutory modifications which have been made in some of the states and in England.

<sup>2</sup> *Allen v. Poole*, 54 Miss. 323, 333; *Stout v. Phillippi Mfg. Co.*, 41 W. Va. 339, 56 Am. St. Rep. 853, and note; *Murray v. Ballou*, 1 Johns. Ch. 566, 1 Scott 520 (Chan. Kent); *Murray v. Lylburn*, 2 Johns. Ch. 441, 1 Scott 526 (Chan. Kent); *Warren County v. Marcy*, 97 U. S. 96, 1 Scott 529.

<sup>3</sup> See post, § 638.

<sup>4</sup> *Sheridan v. Andrews*, 49 N. Y. 478.

§ 634. **Requisites of the Lis Pendens.**—Having thus explained the general rule and the reasons upon which it rests, I shall very briefly state those incidents of the pending suit which must exist in order that the rule may operate and its effects may be produced upon an alienee. The lis pendens and the consequent notice, to use the language ordinarily employed, only begin from the service of a subpoena or other process after the filing of the bill, so that the court may have acquired jurisdiction of the defendant.<sup>1</sup> The effect of the suit as notice continues through the entire time of its pendency, and ends when the suit is really ended by a final judgment.<sup>2</sup> In order, however, that a purchaser pendente lite may be thus affected, the suit must be prosecuted in good faith, with all reasonable diligence, and without unnecessary delay. A neglect to comply with this requisite would relieve a purchaser from the effect of the lis pendens as notice.<sup>3</sup> The question of reasonable diligence in prosecuting the suit must, however, depend upon the circumstances of each case. Thus the abatement of the suit by the death of a party will not destroy its effect as lis pendens, provided it is revived without unnecessary delay.<sup>4</sup> Even a judgment in favor of the defendant does not necessarily at once terminate the lis pendens. If the unsuccessful party is entitled to appeal, the constructive notice continues during a reasonable time for an appeal to be taken.<sup>5</sup> The effect of lis pendens upon the rights of an alienee depends not only upon this element of time, but also upon the averments of the pleadings. Proper and specific allegations are a necessary requisite. Lis pendens is notice of everything averred in the pleadings pertinent to the issue or to the relief sought, and of the contents of exhibits filed and proved.<sup>6</sup> In order that the notice may thus operate, the specific property to which the suit relates must be pointed out in the pleadings in such a manner as to call the attention of all persons to the very thing, and warn them not to intermeddle. It is not necessary that the land should be described by metes and bounds; certainty to a common intent—

<sup>1</sup> *Norris v. Ile*, 152 Ill. 190, 199, 43 Am. St. Rep. 233, 38 N. E. 762; *Allen v. Poole*, 54 Miss. 323, 333; *Murray v. Ballou*, 1 Johns. Ch. 566, 576, 1 Scott 520.

<sup>2</sup> *Whitfield v. Riddle*, 78 Ala. 99. As to effect of termination of suit by abandonment or dismissal, see *Northam v. Boyd*, 66 Tex. 401, 1 S. W. 109.

<sup>3</sup> *Murray v. Ballou*, 1 Johns. Ch. 566, 1 Scott 520; *Tinsley v. Rice*, 105 Ga. 285, 31 S. E. 174; *Taylor v. Carroll*, 89 Md. 32, 42 Atl. 920, 44 L. R. A. 479.

<sup>4</sup> *Watson v. Wilson*. 2 Dana 406, 26 Am. Dec. 459.

<sup>5</sup> *Olson v. Liebpke*, 110 Iowa, 594, 81 N. W. 801, 80 Am. St. Rep. 327; *Debell v. Foxworthy*, 9 B. Mon. 228.

<sup>6</sup> *Norris v. Ile*, 152 Ill. 190, 204, 38 N. E. 762, 43 Am. St. Rep. 233; *Allen v. Poole*, 54 Miss. 323, 333; *Stout v. Philippi Mfg. etc. Co.*, 41 W. Va. 339, 56 Am. St. Rep. 843, 23 S. E. 571.

reasonable certainty—is sufficient. The specific subject-matter should be so described and identified that no one, upon reading the allegations, could have a reasonable doubt as to what was intended. The averments of the bill “must be so definite that any one on reading it can learn what property was intended to be made the subject of litigation.” The notice arising from a pending suit does not affect property not embraced within the descriptions of the pleading; nor does its operation extend beyond the prayer for relief.<sup>8</sup>

**§ 635. To What Kinds of Suits the Rule Extends—Suits Concerning Land.**—It may be stated as a general proposition that the doctrine of notice by *lis pendens* extends to all equitable suits which involve the title to a specific tract of land, or which are brought to establish any equitable estate, interest, or right in an identified parcel of land, or to enforce any lien, charge, or encumbrance upon land. Among the most familiar instances in which the rule applies are suits to foreclose mortgages, to enforce vendor’s liens, to establish trusts, and the like.<sup>1</sup>

**§ 636. Suits concerning Personal Property.**—While the doctrine, in general, applies to all equitable suits in which the subject-matter is land, or any estate or interest therein, the proposition is equally true and general that it does not extend to ordinary suits concerning personal property, goods and chattels, securities or money. The reason for this restriction is obvious; there is no necessity for invoking the rule in such litigations, under all ordinary circumstances. The decisions have, however, admitted an exception to this general proposition in one class of suits. Actions brought to enforce a trust extending over personal property, goods, and securities not negotiable in their nature are held to be within the operation of the rule. A purchaser of such trust property from the trustee, during the pendency of the action, is charged with constructive notice, and his purchase is invalid as against the plaintiff whose rights are established by the final decree.<sup>1</sup> It is well settled

<sup>1</sup> *Norris v. Ile*, 152 Ill. 190, 202, 43 Am. St. Rep. 233, 38 N. E. 762; *Jones v. McNarrin*, 68 Me. 334, 28 Am. Rep. 66; *Allen v. Poole*, 54 Miss. 323, 333.

<sup>2</sup> *Ibid.* As to the effect of amending the bill, see *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762; *Turner v. Houpt*, 53 N. J. Eq. 526, 33 Atl. 28, 3 Keener 646.

<sup>3</sup> *Allen v. Poole*, 54 Miss. 323, 333; *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762 (foreclosure of mortgage). As to actions for divorce and alimony, see *Houston v. Timmerman*, 17 Oreg. 499, 11 Am. St. Rep. 848, H. & B. 98. See, also, *Green v. Rick*, 121 Pa. St. 130, 6 Am. St. Rep. 760, 15 Atl. 497, 2 L. R. A. (when doctrine not applicable).

<sup>4</sup> *Murray v. Lyburn*, 2 Johns. Ch. 441, 1 Scott 526; *Diamond v. Lawrence County Bank*, 37 Pa. St. 353, 78 Am. Dec. 429; *Bergman v. Bergman*, 43 Oreg. 456, 72 Pac. 1086, 73 Pac. 341, 99 Am. St. Rep. 771.

that the doctrine of constructive notice from *lis pendens* does not embrace suits concerning negotiable instruments or moneys, so as to affect the title of a transferee for value and in good faith during the pendency of the action, even when the transfer was made in direct violation of an injunction, so that the indorser or assignor would be punishable for the contempt.<sup>2</sup>

§ 637. **What Persons are Affected by the Notice.**—Assuming that all the foregoing requisites exist, the constructive notice by the pendency of the suit extends only to those who derive title from a party or *privy pendente lite*. A purchaser of the very land described in the pleadings from one who is not a party to the suit, or a privy to such party, is never chargeable with the constructive notice.<sup>1</sup> If, however, a person has acquired a prior right to the specific land, the commencement of a suit affecting the same land will not invalidate any act which he may subsequently do in pursuance of such antecedent right, or for the purpose of carrying it into effect.<sup>2</sup>

§ 638. **To a Purchaser from Either Litigant Party.**—The question yet remains whether the rule of constructive notice applies to a purchaser *pendente lite* from either party to the litigation. The principle upon which the doctrine is based, and all the reasons of policy by which it is supported, clearly extend alike to both the litigants. In the great majority of instances, it has undoubtedly been a purchaser from the defendant who has been charged with the constructive notice. The plaintiff, however, is equally prevented from alienating the subject-matter of the controversy, to the prejudice of the defendant, wherever, from the nature of the suit, he might have in the result, by the final decree, a right established as against the plaintiff.<sup>1</sup> Finally, is a purchaser from one defendant *pendente lite* affected by the right of another defendant in the same suit? This special question has, upon careful consideration, been answered in the negative. It has been held that where a person without actual notice of a suit purchases from one of the defendants

*Murray v. Lylburn*, 2 Johns. Ch. 441, 1 Scott 526; *Warren County v. Marcy*, 97 U. S. 96, 1 Scott 529.

<sup>1</sup> *Noyes v. Crawford*, 118 Iowa, 15, 96 Am. St. Rep. 363, 91 N. W. 799; *Merrill v. Wright* (Neb.), 91 N. W. 697; *Brundage v. Biggs*, 25 Ohio St. 652, 656.

<sup>2</sup> That the holder of an unrecorded deed or mortgage who does not record it until after the *lis pendens* in a suit against his grantor or mortgagor, is not a purchaser *pendente lite*, see *Lamont v. Cheshire*, 65 N. Y. 30, 37, 38; *Haughwort v. Murphy*, 22 N. J. Eq. 531, Sh. 198. Contra, that he is, in effect, a *pendente lite* purchaser, see *Smith v. Worster*, 59 Kan. 640, 54 Pac. 676, 68 Am. St. Rep. 385. The question depends largely upon the wording of the *lis pendens* and recording statutes.

<sup>1</sup> *Bellamy v. Sabine*, 1 De Gex & J. 566, 580; *Henderson v. Wanamaker*, 79 Fed. 736, 25 C. C. A. 181.

property which is the subject of it, he is not, in consequence of the pendency of the suit, affected by an equitable title of another defendant which appears on the face of the proceedings, but of which he has no notice, and to which it is not necessary for any purpose of the suit to give effect.<sup>2</sup>

§ 639. **The Statutory Notice of Lis Pendens.**—The general rule concerning constructive notice by *lis pendens*, although firmly settled, has always been regarded by the courts as a very harsh one in its application to bona fide purchasers for value; it has only been tolerated from the supposed necessity. It has not been a favorite with courts of equity, and has never been enlarged in its operation beyond its well-settled limits. These considerations have led the English Parliament and the legislatures of many states to interfere, and to create most important statutory modifications and restrictions. It should be observed that wherever the terms of these statutes, and the alterations made by them, apply only to suits concerning real estate,—which is true in much of the state legislation,—the rule as to suits concerning personal property remains unchanged, the same as at the common law.<sup>1</sup>

§ 640. **Modern Statutory Provisions.**—By the English statute, a pending suit will not affect a purchaser for value and without express notice, unless a notice of *lis pendens* has been properly registered in compliance with the statutory directions.<sup>1</sup> One quite general type of the American statutes enacts that in every suit relating to or affecting real estate the plaintiff may at the time of commencing the action, or afterwards, prior to final judgment, file or procure to be recorded in the clerk's or recorder's office of the county in which the land is situated a written notice describing the lands affected and the general nature of the action, and that no suit concerning real estate shall be notice to a purchaser *pendente lite* for value and without actual notice unless and until such a notice of *lis pendens* has been thus filed or recorded. The terms of these statutes apply alike to legal and to equitable actions. The second type of these statutes differs from the former one only in the provisions being more general, and extending to all suits which could possibly furnish an occasion for the operation of the original doctrine. The constructive notice in all actions to which the equitable rule would have applied is made to depend upon the filing or recording of a proper notice.<sup>2</sup> It is only necessary to add that all

<sup>1</sup> *Bellamy v. Sabine*, 1 De Gex & J. 566; *Geishaker v. Pancoast*, 57 N. J. Eq. 60, 40 Atl. 200.

<sup>1</sup> *Leitch v. Wells*, 48 N. Y. 585, 602.

<sup>1</sup> Stats. 2 & 3 Vict., c. 11, sec. 7.

<sup>2</sup> For reference to these statutes and the decisions thereunder, see *Pom. Eq. Jur.*, 3d ed., § 640, notes.

the special rules collected in the foregoing paragraphs concerning the commencement of the *lis pendens*, its continuance as long as the suit is diligently prosecuted, its termination by the final judgment which ends the action, the sufficient description or identification of the subject-matter by the allegations of the pleadings, and the persons who are affected by the constructive notice, are still in force, and apply to all cases which come within the operation of the statutory provisions.

§ 641. **5. By Judgments.**—By the original doctrine of equity, independent of all statutory changes, it was settled that a final judgment or decree by which the *lis pendens* is ended and the controversy is terminated was not a constructive notice to persons not parties to the suit,<sup>1</sup> except to a purchaser *pendente lite*.<sup>2</sup> It should be remembered in this connection that a decree in chancery originally acted only upon the person of a defendant, and did not create any interest or title in or lien upon the property affected by the suit. While this original rule was still unmodified by statute, a purchaser of the property affected by a judgment, even though it was not docketed, would be bound by it, provided he had, prior to the purchase, received actual notice of it.<sup>3</sup> If it was shown that a subsequent purchaser had made a search for judgments, actual notice of an existing judgment might also be inferred from that fact.<sup>4</sup> The British Parliament has, within the past generation, completely changed the original law concerning the effect of judgments, and has adopted another policy for England and Ireland, which is carried out by very stringent statutory enactments. . . .

§ 642. **American Legislation.**—A statutory policy with respect to judgments has also been adopted in this country, which is substantially the same throughout all the states. The state statutes have generally provided, with variations in the detail, a mode of docketing judgments at law; and the same method has been extended in many states to equitable decrees and judgments for the recovery of money. This docketed judgment or decree is generally made a lien, for a prescribed period of time, upon all lands of the judgment debtor situated within the same county, and a constructive notice to all subsequent purchasers and encumbrancers of such lands. Intended purchasers or encumbrancers are therefore obliged, for their own protection, to make a search of the official records over the period during which the statutory effect is given to the

<sup>1</sup> *Worsley v. Earl of Scarborough*, 3 Atk. 392.

<sup>2</sup> The notice then arose from the *lis pendens*, and not by virtue of any particular attribute of the judgment itself.

<sup>3</sup> *Davis v. Strathmore*, 16 Ves. 419.

<sup>4</sup> *Proctor v. Cooper*, 2 Drew. 1; 18 Jur. 444; 1 Jur. N. S. 149.

docketed judgment. In many of the states provision is also made by the statutes for the registration or recording of equitable decrees, and for the effect of such recording or registration upon those persons who subsequently acquired interests in the property covered by the decree.

§ 643. In giving an interpretation to these statutes concerning the docketing of judgments and registration of decrees, and in determining the questions which have arisen therefrom concerning the constructive notice created by the docket or record, and concerning any notice which may supply the want of a proper docket or record, rules have been adopted in the various states quite analogous to those established by the courts with reference to the recording or registration of deeds, mortgages, and other instruments. The statement and discussion of these rules and of the questions connected therewith, so far as they fall within the domain of equity, will therefore find their proper place under the next following section concerning priorities.<sup>1</sup>

§ 644. 6. **By Registration or Recording of Instruments.**—The subject to be considered under this subdivision is one of the highest practical importance, both at law and in equity, throughout all the American states. While the decisions of the English courts growing out of the local registration statutes of that country are few, and of little assistance to the American lawyer, those arising under our own statutory system are exceedingly numerous, and often involve questions of great magnitude and difficulty. . . .

§ 645. (1) **The Statutory System in England.**—No general system of registration has ever been adopted in England. For certain special reasons, however, local statutes were passed early in the last century providing for a registration in two or three counties or parts of counties. Other statutes have extended the method of registration into Ireland. The provisions of the different English statutes are the same. They enact, in substance, that a "memorial" of all deeds and conveyances affecting lands within the specified county may be registered in a prescribed manner, and that "every such conveyance shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration," unless a memorial thereof shall be registered before the registering of a memorial of the conveyance under which such subsequent purchaser or mortgagee shall claim. . . .

§ 646. **In the United States.**—While there is some variation in

<sup>1</sup> See *post*, §§ 721–724. See, also, on the subject of notice by docketing judgments, including the effect of irregularities in docketing, of errors or omissions in names, and of omission to index or imperfect indexing, monographic note, 87 Am. St. Rep. 665–673.

the detail among the statutes of the various states, the central conception and essential plan of the system are substantially the same in all. Many of the acts provide in general terms for the recording of deeds and conveyances; others specifically enumerate the kinds of writings which may be registered, including deeds, leases, mortgages, assignments of mortgages and of leases, agreements for the purchase and sale of land, and in fact all species of written instruments by which any estate, interest, or encumbrance, legal or equitable, in or upon land, is created or transferred.<sup>1</sup> In most of the states this language authorizing a registration is permissive only, but in a few of them it is virtually mandatory. Every such conveyance or other instrument, unless recorded, is declared to be void as against subsequent purchasers or encumbrancers in good faith for a valuable consideration whose muniments of title are first put on record. In several of the states the effect of a notice of a prior unregistered instrument is expressly recognized by the statute; in a few of them such a notice is required to be "actual;" while in the majority the legislation is silent upon the subject of notice in the place of recording, and its effect is thus

<sup>1</sup>I have arranged the statutes into classes, according to these types, which are determined by the material and controlling terms found in each. The statutes of each class are substantially alike, with respect to these main features, although their language may vary considerably. In almost every state it is enacted that filing or depositing the instrument for record in the proper office has the same effect with respect to notice, priority, etc., as the actual registration produces.

*First Class.*—No period is specified within which the record must be made. No express mention is made of notice, actual or constructive, in place of a record. The material provision is, in substance, that every conveyance not duly recorded shall be void as against subsequent purchasers or mortgagees in good faith and for valuable consideration whose conveyance is first duly recorded. In several of these states, *creditors* are joined with subsequent purchasers. In some, "conveyance" includes every instrument affecting land; and assignments of mortgages are often expressly mentioned in statutes belonging to all the classes.

*Second Class.*—No period is specified within which a record must be made. It is provided in substance that conveyances not recorded are void as to subsequent purchasers and encumbrancers in good faith *without notice* whose instruments are first recorded. In some states, *creditors* are added to subsequent purchasers.

*Third Class.*—The peculiar features of the statutes of this class, are that they require the record to be made within a specified period after execution of the instrument, or else it is void as against subsequent purchasers who are *without notice*, and in some states *creditors* are added. Filing for record is generally made equivalent to an actual recording.

*Fourth Class.*—The statutes of this class resemble those of the last one, in requiring the record to be made within a prescribed period of time after the execution; but they make no mention of the presence or absence of notice in connection with the subsequent purchasers, etc., who obtain a first record.

left to judicial construction. It would be impossible to give in the text any more exact account of this legislative system, but I have added in the preceding foot-note an abstract of the statutes, the states being arranged in classes, according to the varying types of their legislation.

**§ 649. (2) The American Theory.**—A broader and more effective interpretation has been established throughout the American states by an overwhelming weight of judicial authority. The recording statutes have been regarded with the utmost favor, and our whole system of conveyancing and of land titles has been based upon them. Indeed, the tendency of modern legislation has been to enlarge their scope and to define their operation, so that they should, in terms, include every kind of instrument by which the ownership and enjoyment of land can be affected. By this theory the object of the legislation is, that the proper record of every such instrument should be absolute notice of its contents, and of all rights, titles, or interests, legal and equitable, created by or embraced within it, to every person subsequently dealing with the subject-matter whose duty or interest is to make a search of the records. The intention is, to compel every person receiving such an instrument to place it upon the records, in order that he may thereby protect his own rights as well as those of all others who may afterwards acquire an interest in the same property. It was designed that the public records should, in this manner, furnish an accurate and complete transcript and exhibition of all estates, titles, interests, claims, encumbrances, and charges, both legal and equitable, in and upon every parcel of land which had come into private ownership within the territorial limits over which the particular record extends; and that a person about to deal with respect to any parcel of land should be able to discover, or find the means of discovering, every existing and outstanding estate, title, or interest in it which could affect the rights of a bona fide purchaser. This is the theory of the legislation as established by judicial interpretation; and this general design has, as far as possible, been carried into effect by the courts. It is therefore settled, even independently of the express terms of many state statutes, that equitable estates and interests, as well as legal, are embraced within the intent and operation of the recording acts, and that any instrument creating or conveying such an interest, which is duly recorded, must thereby obtain all the benefits which depend upon or flow from the fact of registration under these statutes.<sup>1</sup>

**§ 650. (3) Requisites of the Record, in Order that it may be**

<sup>1</sup> U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381; Parkist v. Alexander, 1 Johns. Ch. 394; Wilder v. Brooks, 10 Minn. 50, 88 Am. Dec. 49.

**a Constructive Notice.**—Since the constructive notice arising from a registration is unknown to the common law, and is entirely a creation of the statute, it is plain that the provisions of the statute must be exactly complied with, or else there will be no resulting notice. Certain requisites are prescribed by the legislation; they are essential; without them, the subject of the proceeding would wholly fail. I purpose to state and explain these requisites as they have been inferred from the statutory provisions, and settled by the decisions. They relate to the form, execution, and contents of the instrument, and to the form and manner of the registration.

§ 651. **The Form and Kind of Instrument.**—The record operates as a constructive notice only when the instrument itself is one of which the registration is required or authorized by the statute. The voluntary recording, therefore, of an instrument, when not authorized by the statute, would be a mere nullity, and would not charge subsequent purchasers with any notice of its contents or of any rights arising under it.<sup>1</sup>

§ 652. **Execution of the Instrument.**—The record does not operate as a constructive notice, unless the instrument is duly executed, and properly acknowledged or proved, so as to entitle it to be recorded. The statutes generally require, as a condition to registration, that the instrument should be legally executed, and that it should be formally acknowledged or proved, and a certificate thereof annexed. If a writing should be placed upon the records with any of these preliminaries entirely omitted or defectively performed, such a record would be a mere voluntary act, and would have no effect upon the rights of subsequent purchasers or encumbrancers.<sup>1</sup>

§ 653. **Form and Manner of the Record.**—Furthermore, the record of an instrument which is itself duly executed and entitled to be registered does not operate as a constructive notice, unless it is made in the proper form and manner, in the proper book, as required by the statute. The policy of the recording acts is, that those persons who are affected with constructive notice should be able to obtain an actual notice, and even full knowledge, by means of a search. A search could not *ordinarily* be successful and lead the party to the knowledge which he seeks, if the instrument were recorded in a wrong book. This rule, therefore, instead of being

<sup>1</sup> *Burck v. Taylor*, 152 U. S. 634, 14 Sup. Ct. 696; *Spielman v. Kliest*, 36 N. J. Eq. 202; *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 475 (assignment of mortgage).

<sup>1</sup> *Lynch v. Murphy*, 161 U. S. 247, 16 Sup. Ct. 523; *Carter v. Champion*, 8 Conn. 548, 21 Am. Dec. 695; *Pringle v. Dunn*, 37 Wis. 449, 460, 461, 19 Am. Rep. 772, H. & B. 92.

arbitrary and technical, is absolutely essential to any effective working of the statutory system.<sup>1</sup> For the same reason the operation of a record as constructive notice is limited territorially. A record is not a notice with respect to any land situated in a different county from that in which the registration is made. The statutes uniformly require the instrument to be registered in the same county in which the land is situated; a record in a different county is therefore inoperative as a constructive notice.<sup>2</sup>

§ 654. **Contents of the Record.**—A record is a constructive notice only when and so far as it is a true copy, substantially even if not absolutely correct, of the instrument which purports to be registered, and of all its provisions. Any material omission or alteration will certainly prevent the record from being a constructive notice of the original instrument, although it may appear on the registry books to be an instrument perfect and operative in all its parts. The test is a plain and simple one. It is, whether the record, if examined and read by the party dealing with the premises, would be an actual notice to him of the original instrument and of all its parts and provisions. By the policy of the recording acts, such a party is called upon to search the records, and he has a right to rely upon what he finds there entered as a true and complete transcript of any and every instrument affecting the title to the lands with respect to which he is dealing. A record can only be a constructive notice, at most, of whatever is contained within itself.<sup>1</sup> Finally, the record will not be a notice, unless it and the original

<sup>1</sup> Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772, H. & B. 92; Frost v. Beekman, 1 Johns. Ch. 288, 1 Scott 531; Ritchie v. Griffiths, 1 Wash. 429, 25 Pac. 341, 22 Am. St. Rep. 155, 12 L. R. A. 384. The statutes in many of the states contain provisions to the effect that the recording is deemed to be complete and to become operative from the moment the instrument is left with the proper officer for record. In these states it would seem to follow, and has repeatedly been decided in most of them, that no subsequent error or omission of the officers whose duty it is to make the record, will destroy the effectiveness of the recording as constructive notice. The person filing the instrument, it is held, discharges his full duty when he delivers it to the recording officer with directions how to record it: Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84; Farabee v. McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734. Contra, see Ritchie v. Griffiths, supra. After the recording has once been accomplished, its effectiveness is not defeated by the subsequent careless or accidental loss of the records, as by fire: Deming v. Miles, 35 Nebr. 739, 53 N. W. 665, 37 Am. St. Rep. 464. A failure to index the instrument, or a mistake in indexing, does not defeat the effect of the record as notice: Davis v. Whitaker, 114 N. C. 279, 19 S. E. 699, 41 Am. St. Rep. 793. Contra, in a few states, Ritchie v. Griffiths, supra.

<sup>2</sup> King v. Portis, 77 N. C. 25.

<sup>3</sup> Interstate B. & L. Ass'n v. McCartha, 43 S. C. 72, 20 S. E. 807; Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471; Frost v. Beekman, 1 Johns. Ch. 288, 1 Scott 531. Compare note to § 653.

instrument of which it is a copy correctly and sufficiently describe the premises which are to be affected, and correctly and sufficiently state all the other provisions which are material to the rights and interests of subsequent parties. The premises should at least be so described or identified that a subsequent purchaser or encumbrancer would have the means of ascertaining with accuracy what and where they were.<sup>2</sup> The same rule applies to the record of mortgages and all other encumbrances which can be recorded. The language, both of the original and of the record, must be such that if a subsequent purchaser or encumbrancer should examine the instrument itself, he would obtain thereby an actual notice of all the rights which were intended to be created or conferred by it.<sup>3</sup>

§ 655. (4) **Of What the Record is a Notice.**—The doctrine formulated under this head is merely the summing up and result of the various special rules which have been stated in the preceding paragraphs. When all the foregoing requisites to a valid registration have been complied with,—when an instrument is one entitled to be recorded, and has been duly executed and acknowledged or proved, and has been recorded in the proper manner and in the proper county,—then such record becomes a constructive notice not only of the fact that the instrument exists, but of its contents, and of all the estates, rights, titles, and interests, legal and equitable, created or conferred by it or arising from its provisions.<sup>1</sup> The inquiry therefore remains, To what classes of persons does this notice extend?

§ 656. (5) **To Whom the Record is a Notice.**—What classes of persons are thus charged with constructive notice by a regular and lawful registration? The answer to this question must depend upon the language of the recording acts. While the terms of the various state statutes may differ, in respect to this matter, in some of their subordinate and qualifying phrases, they all agree in the main and substantial provision; they all declare that an unrecorded conveyance is invalid only as against *subsequent* purchasers or encumbrancers, and, as a necessary inference, that the record only operates as a notice to the same persons.<sup>1</sup> In several of the statutes the qualification is added that the subsequent purchaser who is thus protected must be one “in good faith and for a valuable considera-

<sup>1</sup> *Davis v. Ward*, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29; *Bright v. Ruckman*, 39 Fed. 247. Compare *Vercruyssen v. Williams*, 112 Fed. 206, 50 C. C. A. 486.

<sup>2</sup> *Johnson v. Hess*, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471.

<sup>3</sup> *Bancroft v. Consen*, 13 Allen 50 (notice that grantee holds in trust); *Kirsch v. Tozier*, 143 N. Y. 390, 38 N. E. 375, 42 Am. St. Rep. 729, H. & B. 77 (record shows breach of trust has been committed).

<sup>1</sup> *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543.

tion;" in many of them this language is absent; but whether expressed or omitted by the legislature, it has uniformly entered into and formed a part of the judicial interpretation. In some instances "creditors" are expressly added.

§ 657. **Not to Prior Parties.**—It is a fundamental proposition, therefore, established with complete unanimity, that a registration properly made does not operate as constructive notice to all the world, but only to those persons who, under the policy of the legislation, are compelled to search the records in order to protect their own interests.<sup>1</sup> It is equally well settled that such record is not notice to the holders of antecedent rights,—that is, to those who have acquired their rights before the time when the record is made, —and this is so even when the antecedent right may, in pursuance of the statute, be defeated by the fact of the prior record. In other words, the registration of an instrument does not act *as a notice backwards in time.*<sup>2</sup>

<sup>1</sup>See *Maul v. Rider*, 59 Pa. St. 167, 171. This language, often used by the courts, is, however, a vicious reasoning in a circle, and does not really determine who are charged with notice. It simply says: "Those persons are affected with notice who are compelled to search the records in order to protect their own interests; and on the other hand, those persons who are charged with notice must make a search of the records."

<sup>2</sup>As illustrations of the proposition stated in the text, see *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Stuyvesant v. Hone*, 1 Sand. Ch. 419. The facts were, briefly, as follows: A tract of land was mortgaged to Stuyvesant, and his mortgage was duly recorded. Hone subsequently acquired a lien thereon by a second mortgage, which he foreclosed by a suit in chancery, and the land, which had been divided into fifty-six building lots, was sold under the decree to Thorne. T. afterwards gave a mortgage upon part of these lots back to H. All the conveyances and mortgages growing out of these proceedings were duly recorded, but S. had no notice of the foreclosure suit nor of any of the proceedings. Afterwards H. foreclosed T.'s mortgage by a suit in chancery, and filed the statutory notice of *lis pendens*. During the pendency of the suit, S., who had no notice of it, released to T. forty-two of the fifty-six lots from his own (S.'s) mortgage. The fourteen lots left subject to S.'s mortgage were part of those which T. had mortgaged to H., and all of T.'s lots not mortgaged to H. were released by S. S. now brings suit to foreclose his own mortgage, and it was claimed in defense that by his releasing the forty-two lots he had destroyed the lien of his mortgage on the remaining fourteen lots. The court held,— 1. That S. was not charged with constructive notice of the first suit, nor of the sale under the decree in it; 2. That neither the second suit, nor the notice of *lis pendens* filed in it, operated as notice to S.; 3. That the recording of the subsequent deeds of T. and of T.'s mortgages was not notice to S.; and that S. on releasing was not bound to search the records for subsequent conveyances or encumbrances. The vice-chancellor said on the question (1 Sand. Ch. 419, 425): "Notice by the recording of conveyances is created by the statutes, and its effect is to be learned from their provisions, and the adjudications thereon. The statute enacts that every conveyance not recorded shall be void as against any subsequent purchaser in good faith, etc., whose convey-

§ 658. **Only to Purchasers under Same Grantor. Effect of Perfect Record Title—Break in Record Title.**—It is not, however, every subsequent purchaser who comes within the purview of the statute. The mere fact that, subsequently to the registering of a deed of certain premises, a third person purchases the same premises, from any source of title, from any grantor whatsoever claiming to own them, does not render the purchaser necessarily chargeable with notice of the prior recorded conveyance.<sup>1</sup> The only subsequent purchaser who is charged with notice of the record of a conveyance is one who claims under the same grantor from the same source of title. If two titles to the same land are distinct and conflicting, the superiority between them depends, not upon their being recorded, but upon their intrinsic merits. It is settled doctrine, therefore, that a record is only a constructive notice to subsequent purchasers deriving title from the same grantor.<sup>2</sup> Intimately connected with, and indeed a branch of this same doctrine, is the question, How far back is a purchaser bound to search the record title of his own vendor? If the records show a good title vested in the

ance shall be first recorded. Neither the provision itself nor the objects of a registry law have any reference to prior encumbrances 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 prior unrecorded conveyances of which he had no notice.*" See, also, post, § 1226, and *Lynchburg P. B. & L. Co. v. Fellers*, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851. The record of a subsequent mortgage by the mortgagor, or judgment against the mortgagor, is not notice to the mortgagee senior in record: *Sarles v. McGee*, 1 N. Dak. 365, 48 N. W. 231, 26 Am. St. Rep. 633. As to mortgages to secure future advances, see post, § 1199. That the record of the assignment of a mortgage is not generally notice to the mortgagor, see post, § 733.

<sup>1</sup> This is clearly shown by the uniform mode in which the records of deeds, mortgages, etc., are *indexed* in the public offices of record. The indexes are never arranged according to the parcels of land, so that a person making search follows the ownership of a particular parcel irrespective of the sources of title; they are always arranged according to the grantors and grantees, mortgagors and mortgagees. The records can only disclose the title to a particular tract, so far as they enable one making search to trace the ownership from one grantor or mortgagor to another. Records are only constructive notice of a title of which they enable a party to obtain *actual* notice or knowledge by means of a search.

<sup>2</sup> Thus, if A conveys to B, and the deed is not recorded, and B then conveys the land to C, who puts his deed upon record, the registration of the second deed is not a constructive notice to one who subsequently purchases from A. Similarly, if B gives a mortgage on the land, even a purchase-money mortgage back to his grantor A, and this mortgage is recorded, a subsequent purchaser from A has no constructive notice: *Losey v. Simpson*, 11 N. J. Eq. 246; *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458; *Scotch Lumber Co. v. Sage*, 132 Ala. 598, 90 Am. St. Rep. 932, 32 South. 607; *Doran v. Dazey*, 5 N. Dak. 167, 64 N. W. 1023, 57 Am. St. Rep. 550.

vendor at a certain date, and nothing done by him after that time to impair or encumber the title, it would seem that the policy of the registry acts is thereby accomplished; the purchaser is protected; he is not bound to inquire farther back, and to ascertain whether the vendor has done acts which may impair his title prior to the time at which it was vested in him as indicated by the records. This view is supported by many decisions,—it seems by the weight of authority,—which hold that a purchaser need not prosecute a search for deeds or mortgages made by his own vendor, farther back than the time at which the title is shown by the records to have been vested in such a vendor; or in other words, a purchaser is not bound by the registry of deeds or mortgages from his vendor made prior to that time.<sup>3</sup> The record title is so far a protection under the statutes to purchasers relying upon it, that if an instrument appearing on its face to be an absolute conveyance is recorded, a subsequent purchaser in good faith and for a valuable consideration from the grantee named in it obtains a title free from all secret trusts, and from all outstanding equities not appearing on the record, which, if recorded or otherwise disclosed, might have shown the instrument to be in reality a mortgage.<sup>4</sup>

**§ 659. (6) Effect of Other Kind of Notice, in the Absence of a Registration.**—May any other kind of notice, actual or constructive, supply the want of a registration? In other words, if a subsequent purchaser for a valuable consideration has put his conveyance upon record, but at the time of his purchase was affected with notice that there was a prior outstanding but unregistered conveyance of the same premises from the same grantor, would he be protected by his record notwithstanding the notice? or would the notice oper-

<sup>3</sup>In *Farmers' Loan Co. v. Maltby*, 8 Paige, 361, a vendee in a contract for the purchase of land which was unrecorded—the mere equitable owner—gave a mortgage on the premises to one A, which was immediately put on record. This vendee afterwards obtained the legal title by a deed from his vendor, which deed was at once recorded; he then conveyed the land to the defendant, B, for a valuable consideration, and this second deed was also recorded. The court held that the recording of the mortgage to A, being prior to the time when the title, as appeared by the record, was vested in the mortgagor, did not operate as constructive notice to the grantee, B, who took his deed after the legal title was vested in his grantor. Chancellor Walworth said, in substance, that as the mortgagor had not the legal title when the mortgage to A was given, but only a contract to purchase the land from one S., it followed that the defendant, B, was not charged with constructive notice by the record of such mortgage. In taking a conveyance, B would not search for mortgages by his grantor prior to the date of his deed from S.: *Ford v. Unity Church Society*, 120 Mo. 498, 25 S. W. 394, 41 Am. St. Rep. 711, 23 L. R. A. 561; *Calder v. Chapman*, 52 Pa. St. 350, 91 Am. Dec. 163.

<sup>4</sup>*Orvis v. Newell*, 17 Conn. 97; *Jaques v. Weeks*, 7 Watts, 261, 271.

ate, like the constructive notice arising from a registry, to postpone his own interest to that conferred by the prior unregistered instrument? This question was presented to the English courts of chancery at an early day, and was settled by them in accordance with the general principles of equity; and their decisions have with great uniformity been adopted and followed by the American courts. It is the established doctrine that a notice of some kind, of an existing, prior, unrecorded conveyance, operates, like the constructive notice arising from a registry, to postpone a subsequent and recorded instrument. If a subsequent purchaser, even for a valuable consideration, had received notice of a prior unrecorded instrument, then he cannot acquire or retain the precedence from a registration of his own conveyance; his conveyance, though recorded, is subordinate and postponed to the prior unrecorded one of which he had received notice.<sup>1</sup> This conclusion, reached originally by the court of chancery, has, in England, furnished a rule for that tribunal alone, and has not been accepted by the courts of law; in this country it is recognized and enforced alike by the courts of equity and of law, for the reason that both have jurisdiction in matters of fraud.<sup>2</sup> The doctrine is, in fact, a mere application of the broader general principle that the person who purchases an estate, although for a valuable consideration, after notice of a prior equitable right, makes himself a *mala fide* purchaser, and will be held a trustee for the benefit of the person whose right he sought to defeat.

**§ 661. (7) What Kind of Notice is Sufficient to Produce this Effect.**—The doctrine, being thus established in England and throughout this country, that some notice of a prior unregistered conveyance may supply the want of a registration, the inquiry finally remains, What species or amount of notice will avail to produce this effect? Or, to put the question in its most practical form, whether an *actual* notice is requisite, or whether a *constructive* notice may also be sufficient. It is plain, if the theory is accepted in its full and literal sense, that the positive *fraud* of the subsequent purchaser in endeavoring to obtain a precedence by registering his own instrument while he has notice of the prior conveyance is the sole foundation of the doctrine, that it is difficult to escape from the conclusion that the notice which shall thus render his conduct fraudulent, and destroy the efficacy of his registration, must be an actual one. It is not in accordance with general

<sup>1</sup> This doctrine, which is nakedly stated in the text without its reasons, was settled by Lord Hardwicke (A. D. 1747), in the celebrated case of *Le Neve v. Le Neve*, Amb. 436; 2 Lead. Cas. Eq. 4th Am. ed., 109, 1 Scott 536; *Greaves v. Tofield*, L. R. 14 Ch. Div. 563, 1 Scott 235.

<sup>2</sup> It is rejected, however, in a few states, notably Ohio and North Carolina.

principles to pronounce a person guilty of fraud by reason of knowledge constructively imputed to him,—knowledge which he may in fact never have acquired, but which he is, from considerations of policy, *presumed* to have acquired, treated as having acquired.

§ 663. **American Rules.**—The same diversity and fluctuation of opinion appear among the decisions made by the courts of the various states, and in some instances between the earlier and later decisions of the same court. In one class of cases, an actual notice rendering the second purchaser's conduct positively fraudulent is held to be essential. In another class, no distinction, in respect to the operation of notice, is recognized between the subsequent purchaser under the recording acts and any other subsequent purchaser; the rights of both are treated as being equally affected by a constructive notice. Two causes have operated to produce this conflict. It has resulted in part from the different terms which the legislatures of various states have employed in the most important clauses of the recording acts. It has resulted in greater part, I think, from a lack of unanimity in the meanings given by the courts to "actual" and to "constructive" notice respectively; from a confusion and misconception with respect to the essential distinctions which exist between the two species. The conflict is therefore more apparent than real.<sup>1</sup>

§ 665. **Rationale of Notice in Place of a Record.**—I shall conclude this subject by an attempt to ascertain the true rationale of the rule concerning notice as a substitute for an actual registration. If the fraud of the second purchaser is adopted as the only explanation, it seems impossible to hold with consistency that anything less than actual notice, or even actual knowledge, of the prior conveyance acquired by him, should avail in place of the record. We have seen, however, that the vast majority of the decisions, even while nominally requiring an actual notice, do not demand actual knowledge, but are satisfied with a notice proved by indirect evi-

<sup>1</sup> In nearly all the states whose statutes in terms demand an "actual" notice, the courts admit the operation of those species which are uniformly regarded as belonging to the genus constructive, viz., notice arising from *lis pendens*, recitals in title papers, between principal and agent, and even possession. The courts of the same states hold that the "actual" notice of the statute does not mean knowledge, and may be shown by any kind of circumstances which would put a reasonable man upon inquiry. Practically, it seems very difficult to distinguish "actual" notice so defined from constructive notice. The courts of a few states have interpreted their statutes more literally, and have established a more stringent rule requiring an actual notice proved by direct evidence. Of this class, the most important is Massachusetts: See *Toupin v. Peabody*, 162 Mass. 473, 39 N. E. 280; *Robertson v. Wheeler*, 162 Ill. 566, 44 N. E. 870; *Essex Co. Bank v. Harrison*, 57 N. J. Eq. 91, 40 Atl. 209; *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 197.

dence and inferred from circumstances. Is fraud, then, a necessary or even proper foundation upon which to base the rule in all its applications? I submit that it is not, and think that there is one other rationale which fully explains the doctrine in all of its phases, and which produces a real harmony among all the decisions. It should be remembered—and the fact is very important in its bearing upon this discussion—that the English statutes do not speak of the registry as constituting any notice, nor has the rule which makes it a constructive notice ever been adopted in England. The statutory language was peremptory, that every unregistered conveyance should be deemed fraudulent and void as against a subsequent purchaser who had complied with the statute. The English judges, in the earliest decisions, were required to find some reason or excuse, in the settled principles of equity, for evading and disregarding this mandatory language. This reason and excuse they found in the theory of fraud imputed to the second purchaser who attempted to gain a preference by registering, although he had notice of the prior right. But in the very case of *Le Neve v. Le Neve*,<sup>1</sup> where Lord Hardwicke first formulated this theory of imputed fraud, the purchaser was charged with notice simply because his agent in the transaction had received information *which was not in fact communicated to the principal*. The purchaser's conduct was thus pronounced fraudulent, although he had personally no knowledge of the prior conveyance, and had acted in perfect good faith, and the notice to him was in every respect constructive. It seems, therefore, to be using an inconsistent or else unmeaning formula to speak of fraud as the essential foundation of the rule, and at the same time to hold purchasers chargeable with notice of a prior right when they had not received the slightest information of its existence,—as, for example, when they have been affected with notice by a *lis pendens*, by a recital in a title deed, which perhaps they never saw or heard of, or even by the possession of a stranger. Throughout the United States the doctrine is settled that the registration of an instrument in pursuance of the recording acts operates as a constructive notice to all subsequent purchasers. Whatever be the language of any state statute, this result of a registration—that it should be a constructive notice—is uniformly regarded as the most important object of the entire legislation—the final purpose for which the whole system of recording was established. By this American doctrine, the constructive notice given by a registration stands on exactly the same footing, produces the same effects, and is of the same nature as any other species of absolute constructive notice recognized by equity,—as, for example, that arising

<sup>1</sup> Amb. 436, 1 Scott 536.

from a *lis pendens* or from a recital, or that operating upon a principal through his agent. In all these instances the notice is a conclusive **presumption** of the law, and it is immaterial whether or not any information of the **prior right** was actually brought home to the consciousness of the party affected thereby. As, therefore, the one important and necessary effect of a registration, in pursuance of the American statutes, is to create and impose upon subsequent purchasers a constructive notice of a recorded instrument, it seems to be the natural and inevitable consequence of this view that any other species of notice, either constructive or actual, should, in the absence of a record, produce the same effect upon the rights of a subsequent purchaser. The registration of an instrument is a constructive notice; and this result was the main design of the legislation. It is therefore natural, just, and equitable that if a subsequent purchaser has received any other kind of notice, actual or constructive, the same effect upon his rights should be produced as would have followed from the single species of constructive notice occasioned by the statute. In this manner, all kinds of constructive notice are, with respect to their effects upon the rights of subsequent purchasers, harmonized and placed upon the same footing. In my opinion, this view furnishes a complete, adequate, and true rationale of the doctrine under discussion. It dispenses with the notion of fraud as a necessary element, which in very many admitted instances of notice must be a mere figment of judicial logic; it avoids all the inconsistencies which are incidents of that notion; and finally, it accords with the intent and purpose of the recording acts as recognized by the vast majority of American decisions.

**§ 666. 7. That Between Principal and Agent—General Rule.**—The general rule is fully established, that notice to an agent in the business or employment which he is carrying on for his principal is a constructive notice to the principal himself, so far as the latter's rights and liabilities are involved in or affected by the transaction. This rule alike includes and applies to the positive information or knowledge obtained or possessed by the agent in the transaction, and to actual or constructive notice communicated to him therein.<sup>1</sup> The rationale of the rule has been differently stated by different judges; by some it has been rested entirely upon the presumption of an actual communication between the agent and his

<sup>1</sup> *Le Neve v. Le Neve*, Amb. 436, 2 Lead. Cas. Eq., 4th Am. ed., 100, 133; 1 Scott 53; *Saffron, etc., Soc. v. Rayner*, L. R. 14 Ch. Div. 406, 409, per James, L. J.; *The Distilled Spirits*, 11 Wall. 356; *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319, per Peters, C. J. (an excellent resumé of the subject); *Littauer v. Houck*, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572. As to the application of the rule in the criminal law, see *State v. Kittelle*, 110 N. C. 660, 28 Am. St. Rep. 698, 15 L. R. A. 694, 15 S. E. 103.

principal; by others, upon the legal conception that for many purposes the agent and principal are regarded as one.<sup>2</sup> Whatever explanation be adopted as the true one, the rule itself is both unquestionable and necessary; the ordinary business affairs of life could not be safely conducted without it.

§ 667. **Scope and Applications.**—This general rule is of wide application. It embraces in its operation not only ordinary agents and attorneys, but all persons who act for or represent others in business relations and transactions. Thus it applies to directors, managers, presidents, cashiers, and other officers, while engaged in the business affairs of their corporations;<sup>1</sup> to trustees acting on behalf of their beneficiaries;<sup>2</sup> to an agent acting on behalf of a married woman;<sup>3</sup> to one of two or more joint agents;<sup>4</sup> and to all actual agents, whether the agency be express or implied.<sup>5</sup> The general rule also applies where the same agent or attorney in reality acts on behalf of both parties to the transaction; for both the grantor and the grantee, the vendor and the vendee, the mortgagor and the mortgagee.<sup>6</sup> This special application of the rule is carefully guarded by the courts, so that it shall not work injustice, and is not, therefore, enforced unless the same agent is in fact acting for both parties.<sup>7</sup>

<sup>1</sup> See *Boursot v. Savage*, L. R. 2 Eq. 134, 142.

<sup>2</sup> *Birmingham Trust & Sav. Bank v. Louisiana Nat. Bank*, 99 Ala. 379, 13 South. 112, 20 L. R. A. 600.

<sup>3</sup> *Willes v. Greenhill*, 4 De Gex, F. & J. 147, 150; *Batavia v. Wallace*, 102 Fed. 240, 42 C. C. A. 310.

<sup>4</sup> *Satterfield v. Malone*, 35 Fed. 445, 7 L. R. A. 35; *Goodbar v. Daniel*, 88 Ala. 583, 7 South. 254, 16 Am. St. Rep. 76.

<sup>5</sup> *Wittenbrock v. Parker*, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197; *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846.

<sup>6</sup> *Watson v. Wells*, 5 Conn. 468 (partner); *Waldman v. North British, etc., Ins. Co.*, 91 Ala. 170, 8 South. 666, 24 Am. St. Rep. 883 (sub-agent); *Bates v. American Mortgage Co.*, 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340 (sub-agent). Many questions have arisen as to the authority of soliciting agents and other special agents of insurance companies to bind their principals by information received in the discharge of their duties; especially as to whether the knowledge obtained by such an agent as to the falsity of representations made by the insured is imputed to the insurer so as to effect a waiver of conditions in the policy. See *Follette v. Mutual Accident Ass'n*, 110 N. C. 377, 14 S. E. 923, 28 Am. St. Rep. 693, 15 L. R. A. 668; *Reed v. Equitable F. & M. Ins. Co.*, 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496.

<sup>7</sup> *Le Neve v. Le Neve*, Amb. 436, 2 Lead. Cas. Eq., 4th Am. ed. 109, 1 Scott 536; *Pine Mt. Iron & Coal Co. v. Bailey*, 94 Fed. 258, 36 C. C. A. 229; *Holden v. New York, etc., Bank*, 72 N. Y. 286.

<sup>8</sup> Also the mere fact that two corporations have the same attorney, or the same directors, does not render each chargeable with notice of whatever is known or done by the other: See *In re Hampshire Land Co.* [1896] 2 Ch. 713.

**§ 668. Limitations—Within the Scope of the Agent's Authority.**—There are, on the other hand, certain important limitations upon the operation of the general rule. The employment of an agent or attorney to do a merely ministerial act for his principal does not constitute him such an agent that the rule as to constructive notice will apply.<sup>1</sup> Also, in pursuance of the fundamental doctrine of agency concerning the powers of agents, the notice given to or information acquired by the agent, in order to be operative upon the principal, must be within the scope of the agent's authority, to bind the principal. If an agent cannot bind his principal by acts beyond the limits of his authority, a notice beyond those limits is equally nugatory.<sup>2</sup>

**§ 669. Notice to Agent, Actual or Constructive.**—If the agency exists, and the foregoing requisites are complied with so as to admit the application of the general rule, then it will operate with equal force and effect, whether the notice to the agent be actual or constructive. Actual knowledge may be brought home to the agent by the most direct evidence, or he may be chargeable with constructive notice by a *lis pendens*, by a registration, by recitals in title deeds, by possession of a stranger, or by circumstances sufficient to put a prudent man upon an inquiry; in all such cases the effect upon the principal is the same.<sup>1</sup> The notice with which the principal is charged is, however, constructive, since it is a presumption, and generally a conclusive presumption, of the law, and takes effect even when the principal in fact received no communication of information from his agent.<sup>2</sup>

**§ 670. Essential Requisites—(1) When the Notice must be Received by the Agent—During His Actual Employment.**—Having thus stated the general rule, I shall now proceed to describe with more fullness its essential elements,—the requisites which must exist in order that it may operate. In the first place, as to the time when the information constituting notice must be acquired by or given to the agent. In order that the principal may be affected with a constructive notice under this rule, the information constituting

<sup>1</sup> As where he is employed simply to procure the execution of a deed: *Wylie v. Pollen*, 3 De Gex, J. & S. 596, 601; or to record a mortgage: *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115. As to *sub-agents*, see note 5 to § 667.

<sup>2</sup> *Pennoyer v. Willis*, 26 Oreg. 1, 36 Pac. 568, 46 Am. St. Rep. 594; *Trentor v. Pothen*, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225, and note.

<sup>3</sup> See *Kennedy v. Green*, 3 Mylne & K. 699, 719, per Lord Brougham; *Bank of United States v. Davis*, 2 Hill, 451, 461.

<sup>4</sup> There can be no greater misconception of its legal meaning, and no more complete confusion of the distinctions between the two kinds of notice, than to call the notice imputed to a principal through his agent an "actual" notice: See *Espin v. Pemberton*, 3 De Gex & J. 547, 554.

the notice must be obtained by or imparted to the agent while he is in fact acting *as agent*,—while he is actually engaged in doing his principal's business, in pursuance of his authority, and in his character as agent.<sup>1</sup> This special requisite finds a frequent application in the relations subsisting between directors and officers and the corporations to which they belong.<sup>2</sup>

§ 671. (2) **In the Same Transaction.**—In the second place, in order that a principal may thus be charged with constructive notice, not only must the person first receiving it be in fact an agent and be actually engaged in the business of his representative employment, but the notice must be given to, or the information acquired by, the agent or attorney in the course of the *same transaction* which is sought to be affected by the constructive notice; that is, in the same transaction from which the principal's rights and liabilities arise, which, it is claimed, depend upon or are modified by the constructive notice imputed to him. This is, in general, a well-settled requisite; and the grounds for it, depending upon motives of expediency, were thus stated by Lord Hardwicke in an early case. A different rule, he said, "would make purchasers' and mortgagees'

<sup>1</sup> *Saffron, etc., Soc. v. Rayner*, L. R. 14 Ch. Div. 406; *Goodbar v. Daniel*, 88 Ala. 583, 7 South. 254, 16 Am. St. Rep. 76; *Wittenbrock v. Parker*, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197.

<sup>2</sup> It has been held in numerous American decisions that notice given to, or information acquired by, a corporation director, manager, or officer will not affect the corporation itself with a constructive notice, unless he was at the time of the giving or acquiring acting on behalf of his corporation. It is not enough that he was, at that time, clothed with the official character; he must also, in pursuance of his official functions, have been actually engaged in transacting the business of his corporation. There are two exceptions or limitations. If the information received by him is of such a nature or is acquired under such circumstances that it is a part of his express official duty to communicate what he knows or has learned to the managing body or board, then the corporation will be affected with a constructive notice. Also, if the transaction in which the information was obtained was so recent, or the information itself was so positive, direct, and strong, that it must be regarded as certainly remaining present in the mind or memory of the official, then the case may fall under the operation of a rule stated in a subsequent paragraph (post, § 672), and the constructive notice to the corporation may follow: *Kearney Bank v. Froman*, 129 Mo. 427, 31 S. W. 769, 50 Am. St. Rep. 456; *Curtice v. Crawford Co. Bank*, 110 Fed. 830. Many cases make the distinction that private information is not notice to the corporation when the officer who has it takes no part in the transaction which is sought to be affected with the constructive notice, but that if the officer, having pertinent information, personally participates on behalf of his corporation in such subsequent transaction, the corporation may be charged with his knowledge, under the principle of § 672, post: *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705. For cases where the officer acts in the transaction in his own interest and adversely to that of the corporation, see post, § 675.

titles depend altogether on the memory of their counselors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions."<sup>1</sup>

§ 672. **Limitation—Prior Transaction.**—The foregoing requisite, general as it is in its application, is subject to an important and well-settled limitation, equally depending upon motives of expediency. Where the transaction in question closely follows and is intimately connected with a prior transaction in which the agent was also engaged, and in which he acquired material information, or where it is clear from the evidence that the information obtained by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction, then the foregoing requisite becomes inapplicable; the notice given to or information acquired by the agent in the former transaction operates as constructive notice to the principal in the second transaction, although that principal was a complete stranger to and wholly unconnected with the prior proceeding or business.<sup>1</sup> The explanation of this special rule is plainly to be found in the notion that the information obtained by the agent in his former employment was of such a nature, so definite and certain, that it amounted to actual *knowledge*; and as knowledge it is retained by him and carried with him into the subsequent business which he transacts on behalf of his new principal. While this particular rule is settled by a strong array of authorities, the courts show a plain determination not to extend it, but to keep it confined within narrow and necessary limits. The two essential requisites of the general rule, together with the foregoing limitation, are the results or phases of one legal conception. In order that the information obtained by an agent may be a constructive notice to his principal in any given transaction, it must be present to the agent's mind and memory while he is engaged in the transaction which is sought to be affected. This is universally true. If the agent acquired the information while acting for his principal, and *while engaged in that very same transaction*, then it is conclusively presumed that he retains the information present to his mind and in his memory; a failure of memory on his part cannot be shown, and

<sup>1</sup> *Lowther v. Carlton*, 2 Atk. 242, 1 Scott 501; *Banco de Lima v. Anglo-Peruvian Bank*, L. R. 8 Ch. Div. 160, 175; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772, H. & B. 92; *Constant v. University of Rochester*, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734.

<sup>1</sup> *The Distilled Spirits*, 11 Wall. 356; *Holden v. New York & Erie Bank*, 72 N. Y. 286, 292; *McClelland v. Saul*, 113 Iowa 208, 84 N. W. 1034, 86 Am. St. Rep. 370; *Brothers v. Bank of Kaukauna*, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932.

the principal is charged with the constructive notice. If the agent acquired the information in a former and independent transaction, then it is prima facie presumed that he does not retain it present to his mind and memory while engaged in the subsequent transaction in behalf of a principal whom it is sought to charge with notice;<sup>2</sup> but this presumption may be overcome by evidence. If, therefore, it be clearly shown by the evidence that the agent did in fact retain the previously acquired information present to his mind and memory while engaged in the subsequent transaction on behalf of his principal, then all the essential elements of the general rule are existing, and the principal is thereby charged with constructive notice. This is, as it seems to me, the true rationale of the doctrine in all its phases and applications, and is fairly deducible from the decided cases.

**§ 673. (3) The Information Material, and Such as the Agent is Bound to Communicate.**—A third requisite is, that the information acquired by the agent must be material to the transaction in which the principal's rights are to be affected by a notice, and it must be something which it is the duty of the agent, by virtue of his fiduciary and representative relation, to communicate to his principal.<sup>1</sup> It is not essential, however, that the agent should in fact have communicated the information to his principal; on the contrary, the general rule of constructive notice between agent and principal depends upon a legal presumption—absolutely conclusive except in two special instances—that the information received by the agent was communicated to his principal. The powerful motives of policy inhere in this very presumption.<sup>2</sup> Even when an agent's failure to communicate is fraudulent, provided the fraud consists merely in such concealment and failure, the conclusive presumption still arises, as will be more fully shown in the following paragraphs.

**§ 674. Exceptions.**—

**§ 675. Agent's Fraud.**—The second exception is much more im-

<sup>1</sup> *Constant v. University of Rochester*, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734; *Wittenbrock v. Parker*, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 29 L. R. A. 197.<sup>4</sup>

<sup>2</sup> *Wyllie v. Pollen*, 3 De Gex, J. & S. 596, 601; *Rolland v. Hart*, L. R. 6 Ch. 678. If the information of the agent was acquired in a previous employment as attorney for another person, and was private and confidential in its nature, a moral and legal obligation would rest upon him not to disclose it; he would be under no duty to communicate the knowledge to a subsequent client, and consequently such client could not be charged with constructive notice. *The Distilled Spirits*, 11 Wall. 356.

<sup>3</sup> *Bradley v. Riches*, L. R. 9 Ch. Div. 189, 196; *Wittenbrock v. Parker*, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197.

portant and of far wider application. It is now settled by a series of decisions possessing the highest authority, that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed. In other words, if in the course of the same transaction in which he is employed the agent commits an independent fraud for his own benefit, and designedly against his principal, and it is essential to the very existence or possibility of such fraud that he should conceal the real facts from his principal, then the ordinary presumption of a communication from the agent to his principal fails; on the contrary, a presumption arises that no communication was made, and consequently the principal is not affected with constructive notice.<sup>1</sup> The courts have carefully confined the operation of this exception to the condition described where a presumption necessarily arises that the agent did not disclose the real facts to his principal, because he was committing such an independent fraud that concealment was essential to its perpetration; it has never been extended beyond these circumstances. It follows, therefore, that every fraud of an agent in the course of his employment, and in the very same transaction, does not fall within this exception; and, most emphatically, it does not apply when the agent's fraud consists merely in his concealment of material facts within his own knowledge from his principal.<sup>2</sup>

**§ 676. True Rationale of the Rule—Based Wholly upon Policy and Expediency.**—The rule of constructive notice through agent to principal, like the doctrine of constructive notice in general, must find its ultimate foundation and only support in motives of policy and expediency. It will not aid us in the least to inquire whether

<sup>1</sup> *Cave v. Cave*, L. R. 15 Ch. Div. 639, 1 Scott 517, *Ames Trusts* 311; *American Surety Co. Pauly*, 170 U. S. 133, 18 Sup. Ct. 644; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; *Gunster v. Scranton*, etc., Co., 181 Pa. St. 327, 37 Atl. 550, 59 Am. St. Rep. 650. The same presumption that the agent's information is not communicated to his principal has been held in very many cases to arise, independently of any question of fraud, whenever the agent is dealing with the principal in his own interest, and adversely to the interest of the principal: *First Nat. Bank v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262.

<sup>2</sup> *Boursot v. Savage*, L. R. 2 Eq. 134; *Holden v. New York & Erie Bank*, 72 N. Y. 286; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698.

it should be derived from the notion that the agent is identical with his principal,—is the principal's alter ego,—or from the notion that the principal cannot be allowed to acquire and retain a benefit through means of an act or proceeding which his agent knew to be wrong. The true rationale is, as I have already shown, that the agent's knowledge of material facts,—not necessarily of the ultimate facts,—or what the law assumes to be his knowledge, must always, from considerations of expediency, be regarded and treated as the principal's knowledge; otherwise the business affairs of society could not be safely transacted. Whenever the knowledge of the agent is actual,—that is, whenever he has obtained actual information of certain facts, and has therefore received actual notice,—this imputation of his knowledge to the principal is evident and reasonable. Whenever the agent's knowledge of certain facts exists only in contemplation of law,—that is, when he has received a constructive notice,—the imputation thereof to the principal is no less reasonable and clear. If, under any circumstances, a party, while dealing for himself, must be treated, in contemplation of law, as one who has acquired certain information, and must be charged with constructive notice thereby, the same result must follow when, under like circumstances, the party is dealing by means of an agent. If that assumed information called constructive notice should affect a party acting for himself, it should equally affect him acting through an attorney. As the doctrine is thus based entirely on motives of policy, it should never in its application transcend the scope and limits of those motives. Whenever its operation in a given state of facts would produce manifest injustice, the courts should, if not absolutely compelled by express authority, withhold such operation. A tendency to restrict the doctrine—to confine it within the limits already established—is clearly exhibited by many of the recent decisions. Some of the ablest judges now on the English bench have even expressed a strong dissent from the doctrine itself, in some of its phases and applications, especially where a principal is charged with notice of information acquired by his agent in a former transaction, and which such agent is assumed to have remembered. The English cases in which this branch of the rule commonly arises are more frequent, involve a different condition of circumstances, and are consequently much more harsh in their effects, than the analogous class of cases which come before the American courts.

## SECTION VI.

## CONCERNING PRIORITIES.

## ANALYSIS.

- § 677. Questions stated.
- §§ 678-692. *First*. The fundamental principles.
- §§ 679-681. 1. Estates and interests to which the doctrine applies.
  - § 682. 11. Equitable doctrine of priority, in general.
- §§ 683-692. 111. Superior and equal equities.
  - § 683. When equities are equal.
  - §§ 684-692. Superior equities defined and described.
    - § 685. 1. From their intrinsic nature.
    - §§ 686, 687. 2. From the effects of fraud and negligence.
    - §§ 688-692. 3. From the effects of notice.
      - § 688. General rules and illustrations.
      - § 689. Notice of a prior covenant.
  - §§ 690-692. Time of giving notice, and of what it consists.
  - §§ 693-734. *Second*. Applications of these principles.
  - §§ 693-715. Assignments of things in action.
    - § 693. *Dearle v. Hall*.
    - §§ 694-696. 1. Notice by the assignee.
      - § 694. Notice to debtor not necessary as between assignor and assignee.
    - §§ 695-697. English rule, notice to debtor necessary to determine the priority among successive assignees.
    - §§ 698-702. 11. Diligence of the assignee.
      - § 698. General rules: *Judson v. Corcoran*.
    - §§ 699-701. Assignment of stock as between assignee and assignor and the company, judgment creditors of assignee, and subsequent purchasers.
      - § 702. Notice to the debtor necessary to prevent his subsequent acts.
  - §§ 703-715. 111. Assignments of things in action subject to equities.
  - §§ 704-706. 1. Equities in favor of the debtor.
    - § 704. General rule: assignments of mortgages; kinds of defenses.
  - §§ 705, 706. Provisions in codes of procedure.
  - §§ 707-713. 2. Equities between successive assignors and assignees.
    - § 707. Conflicting decisions: mode of reconciling.
  - §§ 708, 709. General rule: assignment subject to latent equities; illustrations.
  - §§ 710, 711. When the rule does not apply; effect of estoppel; true limits of the estoppel as applied to such assignments.
    - § 712. Subsequent assignee obtaining the legal title protected as a bona fide purchaser.
    - § 713. Successive assignments by same assignor to different assignees.
  - §§ 714, 715. 3. Equities in favor of third persons.
    - § 714. General rule: assignments subject to such equities.
    - § 715. Contrary rule: assignments free from all latent equities.
  - §§ 716-732. Equitable estates, mortgages, liens, and other interests.
    - § 717. Doctrine of priorities modified by recording acts.
  - §§ 718, 719. 1. Priority of time among equal equities.
    - § 719. Illustrations: simultaneous mortgages, substituted liens, etc.

- §§ 720-726. II. One equity intrinsically the superior.
- § 720. Prior general and subsequent specific lien.
- §§ 721, 722. Prior unrecorded mortgage and subsequent docketed judgment.
- § 723. Same, where judgment creditor had notice.
- § 724. Prior unrecorded mortgage and purchase at execution sale under a subsequent judgment.
- § 725. Purchase-money mortgages.
- § 726. Other illustrations.
- §§ 727-729. III. A subsequent equity protected by obtaining the legal title.
- § 728. Legal estate obtained from a trustee.
- § 729. Legal estate obtained after notice of prior equity.
- § 730. IV. Notice of existing equities.
- §§ 731, 732. V. Effect of fraud or negligence upon priorities.
- §§ 733, 734. Assignments of mortgages, rights of priority depending upon them.

**§ 678. First. The Fundamental Principles—Equitable Maxims.**

—As was stated in a former chapter, the doctrine of priorities in equity is entirely a development of two maxims: Where there are equal equities, the first in order of time shall prevail, and Where there is equal equity, the law must prevail.<sup>1</sup> It was there shown, in the language of an eminent judge, that the first of these maxims means: “As between persons having only equitable interests, if their interests are *in all other respects equal*, priority in time gives the better equity, or *qui prior est tempore, potior est jure.*”<sup>2</sup> The meaning of the second maxim is: “If two persons have equal equitable claims upon or interests in the same subject-matter, or in other words, if each is equally entitled to the protection and aid of a court of equity, *with respect of his equitable interest*, and one of them, in addition to his equity, also obtains the legal estate in the subject-matter, then he who thus has the legal estate will prevail. This precedence of the legal estate might be worked out by the court of equity simply refusing to interfere at all, and thereby leaving the parties to conduct their controversy in a court of law, or in a purely legal action, where, of course, the legal estate alone would be recognized.”<sup>3</sup> It follows from these definitions that the entire discussion upon which we are entering involves the three following inquiries: 1. To what estates and interests does the equitable doctrine of priorities not apply, so that they are left completely controlled by the order of time? 2. Under what circumstances are equities “equal,” so that they are left controlled by the order of time? and under what circumstances is one of two or more equities *superior* to the others, so that the order of time

<sup>1</sup> Ante, §§ 413-417.

<sup>2</sup> Ante, § 414; *Rice v. Rice*, 2 Drew. 73, H. & B. 23, 1 Scott 334; see the the paragraph referred to for the entire quotation.

<sup>3</sup> Ante, § 417; *Thorndike v. Hunt*, 3 De Gex & J. 563, 570, 571; *Fitzsimmons v. Ogden*, 7 Cranch, 2, 18.

may be broken in upon, and the equitable doctrine of priorities may control? 3. Under what circumstances, two or more equities being otherwise "equal," *can* the holder of one of them obtain, and *does* he obtain, the legal title, so that the order of time may be disregarded, and the equitable doctrine of priorities may prevail? The full answers to these three questions, in their combination and mutual effects, plainly constitute the entire discussion of the subject.

§ 679. **I. Estates and Interests to Which the Equitable Doctrine Applies.** 1. **Not to Legal Estates.**—Among purely legal titles to the same subject-matter, successive legal conveyances of and legal estates in the same tract of land, the equitable doctrine of priorities growing out of the presence or absence of notice, or of a valuable consideration, or of any other incident, has absolutely no application nor effect; such legal titles, estates, and interests are, in the absence of any statutory modification, completely controlled, with respect to their priority, by the order of time.<sup>1</sup> Even the mere want of a valuable consideration in the earlier conveyance would not, at the common law, affect the priority of legal right given by the priority of time.<sup>2</sup>

<sup>1</sup> *Gaines v. New Orleans*, 6 Wall. 642, 716, per Davis, J. The truth of this proposition is clearly seen from a consideration of the legal conception of estates at law and of conveyances and charges operating at law; and it will plainly appear that between two claimants of legal estates in the same land, the second one in order of time can not, in the absence of the statutes concerning registration, avail himself even of the position of bona fide purchaser for a valuable consideration and without notice. If A, being owner of a piece of land in fee, conveys it in fee to B, and afterwards executes a deed in fee of the same land to C, at law C can acquire nothing. In contemplation of law, the entire estate passed by the deed to B, and there was no interest left which could be transferred to C, and it could make no possible difference with this result whether C was wholly ignorant of the prior conveyance or was informed of it. Again, if A has no estate at all, or only a defective one, he can not by a deed convey any more or better estate than he holds himself to B, and it can make no difference whether the defect is open or hidden, or whether B buys with knowledge or in ignorance of it: *Ruckman v. Decker*, 23 N. J. Eq. 283. Again, in an action of ejectment between one who claims under deed or other paper title, and one who claims by adverse possession, the latter's notice of the outstanding paper title would not affect his right injuriously; the titles being legal, the controversy would be decided upon the completeness of the adverse possession, or the validity of the paper title. See *MacGregor v. Thompson*, 7 Tex. Civ. App. 32, 26 S. W. 649.

<sup>2</sup> If A, owning the land, should convey it as a mere gift to B, by means of a conveyance sufficient in kind and form to transfer the legal estate, and so that no trust should result to himself, and should afterwards execute a deed in fee of the same land to C, who should pay a valuable consideration therefor, C would obtain no interest whatever at the common law. The prior conveyance to B would exhaust and transfer the entire fee, as fully as though a money

**§ 680. Modifications by Statutes concerning Fraudulent Conveyances and Recording.**—This rule, otherwise universal, that among successive legal estates or interests in the same subject-matter the order of time controls, has been broken in upon by two classes of statutes, which are, within the scope of their operation, very important. The first of these classes includes that of 27 Eliz., c. 4, by which grants of lands made for the purpose of defrauding subsequent purchasers are declared to be void as against such subsequent purchasers for a valuable consideration, and their representatives; and the statute of 13 Eliz., c. 5, by which conveyances of lands or chattels made for the purpose of delaying or defrauding creditors are declared to be void as against such creditors and their representatives; provided that the act shall not extend to any conveyance made in good faith and for a valuable consideration to a person not having notice of the fraud.<sup>1</sup> The second class embraces the recording acts of the various states, by which it is generally provided that every conveyance of land which is not recorded shall be deemed void as against a subsequent conveyance of the same land, made for a valuable consideration, which shall have been first put on record;<sup>2</sup> and also the similar statutes which postpone the lien of a prior undocketed judgment to that of a subsequent one which has been duly docketed.<sup>3</sup>

**§ 681. 2. To Equitable Estates and Interests Alone.**—The equitable doctrine concerning priorities resulting from the presence or

price had been paid, and no interest would be left upon which C's deed could operate. The fact that C paid value, and was ignorant of the former conveyance, could not destroy the legal effect of the prior deed, and create an estate which would pass to C by *his* conveyance. It is entirely the result of statute that C's conveyance *may* under such circumstances obtain the precedence at law.

<sup>1</sup> See post, §§ 968–974.

<sup>2</sup> See ante, § 646, and note. It is evident that all questions concerning legal conveyances arising under the recording acts—questions depending upon the fact of recording or not recording, upon the record as notice, and upon the effect of an actual or constructive notice of a prior unrecorded deed given to a subsequent grantee—belong to the law, and do not constitute any part of equity jurisprudence. The estates are legal; the conflicting titles based upon recorded and unrecorded deeds, or involving the presence of notice in place of a record, are constantly settled by means of the legal action of ejectment. The effect of the recording acts upon mortgages, on the other hand, belongs to equity jurisprudence, since, in any theory of the mortgage, it creates an equitable estate or interest. It should be observed, however, that while the recording acts, so far as they deal with legal conveyances, have not enlarged the equitable *jurisdiction*, they have greatly enlarged the field for the application, by courts of law, of the doctrine of bona fide purchase. See post, § 758.

<sup>3</sup> See ante, §§ 642, 643.

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.<sup>1</sup>

**§ 682. II. Equitable Doctrine of Priority.**—Having thus stated the kind of interests to which alone the equitable doctrine applies, we shall next consider the nature, scope, and operation of the doctrine itself. In all of its phases, in all the instances where it may be invoked, the equitable doctrine concerning priorities is embodied in three most general and fundamental rules: 1. Among successive equitable estates or interests, where there exists no special claim, advantage, or superiority in any one over the others, the order of time controls. Under these circumstances, the maxim, Among equal equities the first in order of time prevails, furnishes the rule of decision.<sup>1</sup> 2. Between a legal and equitable title to the same subject-matter, the legal title in general prevails, in pursuance of the maxim, Where there is equal equity the law must prevail.<sup>2</sup> 3. The legal title being outstanding, and not involved in the controversy, where there are successive unequal equities in the same subject-matter, as where there is a complete or perfect equitable estate and an incomplete or imperfect one, or a mere "equity," or where, among equitable interests of a like intrinsic nature, one is affected by some incident or quality which renders it inferior to another, then the precedence resulting from order of time is defeated, and the superior equitable estate or interest prevails over the others, as is manifestly implied in the maxim, Where there are equal equities the first in order of time must prevail.<sup>3</sup>

**§ 683. III. Superior and Equal Equities.**—In determining the scope and operation of the foregoing rules, the discussion must largely consist in ascertaining when equities are equal, and when

<sup>1</sup> *Basset v. Nosworthy*, Cas. t. Finch 102, 2 Lead. Cas. Eq. 1, 31, 46, 1 Scott 340, 498; *Le Neve v. Le Neve*, Amb. 436, 2 Lead. Cas. Eq. 109, 117, 1 Scott 536; *Rice v. Rice*, 2 Drew. 73, H. & B. 23, 1 Scott 536.

<sup>2</sup> *Rice v. Rice*, 2 Drew. 73, H. & B. 23, 1 Scott 334; *Phillips v. Phillips*, 4 De Gex, F. & J. 208, 215, Ames Trusts 331, H. & B. 72, 1 Scott 331, 511, per Lord Westbury; *Berry v. Mut. Ins. Co.*, 2 Johns. Ch. 603, Sh. 104, 1 Scott 33. See post, § 718.

<sup>3</sup> *Fitzsimmons v. Ogden*, 7 Cranch 2, 18; *Forman v. Brewer*, 62 N. J. Eq. 748, 48 Atl. 1012, 90 Am. St. Rep. 475. See ante, § 417.

<sup>4</sup> *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 109, 117, 144, 1 Scott 536; *Basset v. Nosworthy*, 2 Lead. Cas. Eq. 1, 1 Scott 340, 498.

one is superior to another. It is impossible to define "equal equities" affirmatively by any exact formula. It is certainly not enough that two successive equitable interests in the same thing should be of *precisely the same nature*, for even then one might be accompanied by some collateral incident which gave it a precedence over the other without reference to their order of time. When we say that A has a better equity than B, this means 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 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.<sup>1</sup> Two persons have equal equitable interests in the same subject-matter, when each is equally entitled, with respect of his equitable interest, to the protection and aid of a court of equity. When the court is dealing with such successive equitable interests in the same subject-matter and they are all thus equal, the priority in time determines the priority in right; and the fact that the holder of the subsequent interest, under these circumstances, acquired it without notice of the prior one does not, in general, give him any right to be preferred.<sup>2</sup> The foregoing description of equal equities is not of much practical value, since it states the effects rather than the nature of equality. We shall, in fact, determine when equities are equal by ascertaining when they are unequal, by learning what qualities or incidents render one equity superior to another equity in the same subject-matter.

**§ 684. Superior Equities Defined.**—It may be stated that, so far as their intrinsic nature is concerned, a court of equity recognizes no inequality, based upon their form and mode of creation,

<sup>1</sup> See *Rice v. Rice*, 2 Drew. 73, 1 Scott 334, H. & B. 23.

<sup>2</sup> *Phillips v. Phillips*, 4 De Gex, F. & J. 208, 215, H. & B. 72, Ames Tr. 331, 1 Scott 333, 511; *Cory v. Eyre*, 1 De Gex, J. & S. 149, 167; *Newton v. Newton*, L. R. 6 Eq. 135, 140; *Jones v. Jones*, 8 Sim. 633. These decisions, and the reasoning upon which they are based, show that one who purchases an equitable estate, or acquires an equitable interest, obtains only the right of his own vendor; the facts of his paying value and of not having notice do not of themselves entitle him to take precedence over a prior vendee or encumbrancer; some quality imparting to his estate or interest an intrinsic superiority would be necessary to give him preference: *York v. McNutt*, 16 Tex. 13, 67 Am. Dec. 607; *Sumner v. Waugh*, 56 Ill. 531; *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813. The recording acts may modify the operation of the equitable rule in this country, because they give to a recorded mortgage or other equitable encumbrance the very quality which imparts to it an intrinsic superiority, under the statute, over one which is not recorded.

among all perfected equitable interests based upon a valuable consideration and arising in any manner by which, in contemplation of equity, an interest in the very thing itself—the land, the chattels, or the fund—is created. \*If there is a valuable consideration, and an equitable interest in the very subject-matter itself *has been perfected*, it does not seem to affect their qualities, whether such interest arose from a declaration of trust, from an assignment, from a contract express or implied, or from acts such as the deposit of title deeds. A valuable consideration is, however, a most important element. The whole history and scope of equity jurisprudence show that a valuable consideration is always regarded as a most essential requisite to the existence of complete equitable estates and interests of all kinds. Assuming this conclusion as generally, if not even universally, true, the various causes which will render one equity superior to another may be formulated in three general rules. It will be seen that the first of these rules relates to the intrinsic nature of the two interests which are compared; the second relates, not to their nature, but to a quality inseparably connected with them, and constituting the occasion for their existence; the third relates neither to their nature nor qualities, but to a mere external or collateral incident affecting them at their origin. These three rules are as follows:—

§ 685. 1. **Nature of the Equities.**—The equitable interest created by a trust, or by a contract in rem, made upon a valuable consideration, is superior to the equity arising from a mere voluntary transfer, a mere gift, or from a mere judgment lien. In contemplation of equity, the interest created by a trust, or by a valid executory contract of sale, or by a valid contract giving rise to a lien, or by an act in connection with such a contract constituting a lien,—as, for example, a deposit of title deeds,—is a real, beneficial interest *in the specific thing itself*,—an interest which is property, or analogous to property;<sup>1</sup> and although such interest is not recognized by the law, it is treated by courts of equity as actually subsisting, and as binding upon the conscience of the original party who held the thing and who created the interest.<sup>2</sup> On the other hand, while the interest acquired by a transfer without consideration, by a voluntary gift, *may* be protected if it does not interfere with third persons, yet the voluntary transferee or donee can only receive whatever interest the donor was actually entitled in conscience and good faith to bestow; he never obtains, even as against

<sup>1</sup>This is the fundamental distinction between the legal and the equitable view of executory contracts concerning some specific subject-matter. See ante, §§ 146-149.

<sup>2</sup>Cory v. Eyre, 1 De Gex, J. & S. 149, 167.

the donor, and much less as against third persons dealing with the donor in respect to the same thing, any paramount right of his own. The consideration on the one side, and the absence of it on the other, lie at the very bottom of the equitable theory concerning actual rights.<sup>3</sup> The lien of a judgment is analogous to the claim of a donee; it is general, not specific. The beneficiary under a trust, the vendee under an agreement, the holder of a lien created by a contract in rem, deals concerning a specific thing; he parts with the consideration upon the security of that specific thing; he obtains an equitable interest in that specific thing. The judgment creditor has not dealt with that specific thing; he has not parted with value in contemplation of it; his lien is general, and not confined to it. It is just, therefore, that, so far as their intrinsic natures are concerned, his claim should be considered as inferior to the interest arising from a trust or from a contract in rem. His lien only extends to what his debtor really has,—that is, to the thing subject to all the equities in its existing at the date of the judgment.<sup>4</sup>

**§ 686. 2. Effects of Fraud.**—The equity acquired by a party who has been misled is superior to the interest in the same subject-matter of the one who willfully procured or suffered him to be thus misled. The following example illustrates the operation of this rule, and the principle underlying it may be generalized and applied to all analogous cases. A, being about to part with value to B upon the security of B's estate, informs C. of his intention, and asks C whether he has any incumbrance on the estate; C denies that he has any, and A, relying upon this denial, parts with money or other value to B; in fact, C had at the time a mortgage or other encumbrance upon the estate; this mortgage or lien, although prior in time, would, by reason of C's fraud, be postponed to the subsequent interest acquired by A. The basis of this rule is the conduct which equity regards as constituting fraud, either an actual intention to mislead, or that gross negligence which produces all the effects and merits all the blame of intentional

<sup>3</sup>Green v. Givan, 33 N. Y. 343. See, also, post, § 691.

<sup>4</sup>It is settled in England, in accordance with this rule, that the interest of a cestui que trust, of the vendee under an executory contract, and of an equitable mortgagee by contract or by deposit of title deeds, is superior to that of a subsequent judgment against the trustee, vendor, or mortgagor, even though the legal estate may have been acquired under the judgment by means of an elegit: Whitworth v. Gaugain, 3 Hare 416, 1 Phil. Ch. 728, Ames Tr. 408. This particular rule has been modified or altered by statute in several of the states. See post, §§ 721-724, where this subject is more fully examined. In general, see Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; Gates Iron Works v. Cohen, 7 Colo. App. 341, 43 Pac. 667.

deception.<sup>1</sup> It is not, however, necessary that the party having an interest or title, under such circumstances, when applied to, should use positive misrepresentations or expressly deny the existence of his right; it is sufficient if he refrain from disclosing his claim, and suffer a third person to deal with the property as his own, or to acquire an interest in or lien upon it; he will not be permitted to set up or enforce his interest in preference to that obtained by the person whom he has suffered to be misled by his silence.<sup>2</sup>

**§ 687. And of Negligence.**—The rule extends to gross negligence, which is tantamount in its effects to fraud. An equity otherwise equal, or even prior in point of time, may, through the gross laches of its holder, be postponed to a subsequent interest which another person was enabled to acquire by means of such negligence.<sup>1</sup> To admit the operation of this rule in either of its phases, and to displace the otherwise natural order of priority, there must be intentional deceit,—that is, intentional misrepresentation or suppression of the truth,—or else gross negligence. In the one case, the party possessing the claim which it is sought to postpone must both know of his own right and also of the other person's intention to acquire, or of his acts in acquiring, an interest in the same subject-matter. In the other case there must be gross laches, for mere carelessness or ordinary negligence will not suffice according to the weight of modern authority.<sup>2</sup>

**§ 688. 3. Effects of Notice—Illustrations.**—The third, and in its practical effects by far the most important, rule is, that a party taking with notice of an equity takes subject to that equity. The full meaning of this most just rule is, that the purchaser of an estate or interest, legal or equitable, even for a valuable consideration, with notice of any existing equitable estate, interest, claim, or right, in or to the same subject-matter, held by a third person, is liable in equity to the same extent and in the same manner as the person from whom he made the purchase; his conscience is equally bound with that of his vendor, and he acquires only what his vendor can honestly transfer.<sup>1</sup> The applications of this rule

<sup>1</sup> *Storrs v. Barker*, 6 Johns. Ch. 166, 168, 10 Am. Dec. 316; *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262; *Miller v. Merine*, 43 Fed. 261. See, also, post, §§ 731, 732.

<sup>2</sup> *Nicholson v. Hooper*, 4 Mylne & C. 179; *Carr v. Wallace*, 7 Watts 294, 400.

<sup>1</sup> *Northern Counties, etc., Co. v. Whipp*, L. R. 26 Ch. Div. 482, 1 Scott 353; *In re Castell and Brown* (1898), 1 Ch. 315; *Heyder v. Excelsior B. & L. Ass'n*, 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49, H. & B. 70; *Frost v. Wolf*, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761. See, also, post, §§ 731, 732.

<sup>2</sup> *Hewitt v. Loosemore*, 9 Hare 449, 458; and see ante, §§ 606, 612. But cf. *Farrand v. Yorkshire Bkg. Co.*, 40 Ch. D. 182.

<sup>1</sup> *Le Neve v. Le Neve*, Amb. 436, 2 Lead. Cas. Eq. 4th Am. ed. 109, 1 Scott

are as numerous as are the various kinds of equitable interests. The following are some of the most important: A purchaser with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary with respect of the property, and is bound in the same manner as the original trustee from whom he purchased.<sup>2</sup> A purchaser or mortgagee with notice of the equitable lien of a vendor for unpaid purchase price takes the land subject to that lien.<sup>3</sup> A purchaser or mortgagee of the legal estate, with notice of an equitable lien created by a deposit of title deeds, or by a prior defective mortgage, or by any other means from which an equitable lien can arise, is bound by the lien.<sup>4</sup> A purchaser with notice of a prior contract to sell or to lease takes subject to such contract, and is bound in the same manner as his vendor to carry it into execution.<sup>5</sup> These examples are of ordinary occurrence.

**§ 689. Notice of a Prior Covenant.**—On the same principle, if the owner of land enters into a covenant concerning the land, concerning its use, subjecting it to easements or personal servitudes, and the like, and the land is afterwards conveyed or sold to one who has notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever, with respect to this liability in equity, whether the covenant is or is not one which in law “runs with the land.”<sup>1</sup> 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

536; see ante, § 591; *Indiana I. & I. R. Co. v. Swannell*, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290; *Widdicombe v. Childers*, 84 Mo. 382 (patentee of government land with notice of equitable right of prior locator); *Snyder v. Partridge*, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130 (purchaser with notice of mistake).

*Saunders v. Dehew*, 2 Vern. 271, *Ames Trusts* 289; *Wetmore v. Porter*, 92 N. Y. 77, *Ames Trusts* 262; *Indiana, I. & I. R. Co. v. Swannell*, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290. See, also, post, § 1048.

<sup>2</sup> *Mackreth v. Symmons*, 15 Ves. 329, 350, 1 Scott 71; *Poe v. Paxton*, 26 W. Va. 607. See, also, post, § 1253.

<sup>3</sup> *Jennings v. Moore*, 2 Vern. 609; *Dunman v. Coleman*, 59 Tex. 199, 67 Tex. 390, 3 S. W. 319.

<sup>4</sup> *Jackson's case*, Lane. 60, 1 *Ames Eq. Jur.* 143, 2 Scott 471; *Daniels v. Davison*, 16 Ves. 249, 2 Scott 472; *Union Pac. R'y v. McAlpine*, 129 U. S. 309, 314, 9 Sup. Ct. 286; *Lovejoy v. Potter*, 60 Mich. 95, 26 N. W. 844, 2 Keener 458.

<sup>5</sup> *Tulk v. Moxhay*, 11 Beav. 571, 2 Phil. Ch. 774, 1 *Ames Eq. Jur.* 147, 2 Scott 486, 2 Keener 545; *Barrow v. Richard*, 8 Paige 351, 35 Am. Dec. 713, 1 *Ames Eq. Jur.* 173, 2 Scott 521, 2 Keener 461. For a fuller treatment of this subject, see post, § 1295.

legal and equitable estates in the same thing as between successive estates or interests which are purely equitable.

§ 690. 1. **What is Notice.**<sup>1</sup>

§ 691. 2. **Time of the Notice.**—At what time must notice be given to a party so that his right may be subordinate to the equity of which he is actually or constructively informed? In answering this question, the two following rules, already stated, must constantly be borne in mind: that among purely equitable interests which are equal, the order of time controls, so that the absence of notice cannot give a subsequent equity any precedence over a prior one of equal standing; and that a trust or equity created by a contract in rem is superior to the interest acquired under a voluntary conveyance or transfer. It is plain, then, that the facts of the subsequent estate, being legal rather than equitable, and of a valuable consideration having been actually paid, must play a most important part in determining the proper time of giving the notice. In the first place, therefore, the decisions, both English and American, are all agreed that the notice received before the party has actually paid the money or parted with the other valuable consideration is a valid and binding notice, and subjects his interest to the prior equity of which he is thereby notified; and this is true even though he has already taken a conveyance of the legal title and has given security for the purchase price even by an instrument under seal.<sup>1</sup> The reason is, that the conveyance of the legal estate is, under such circumstances, a voluntary one, because the agreement to pay the price, and the security given therefor, are in reality mere nullities. Although, originally, the party might have had no defense at law against a recovery of the amount agreed to be paid, he always had ample relief in a court of equity, which would decree the surrender and cancellation of the security, and perpetually enjoin any action at law for the price. In most of the American states the defense of a total failure of the consideration, under such circumstances, would now be available at law. . . .

§ 692. 3. **Of What the Notice must Consist.**—It is not true that a notice of any kind and every species of right or claim will thus affect and subordinate the estate of the party receiving it. The notice required by the general rule under consideration must be of an actual equity, of something which equity regards as an interest in the subject-matter itself, although such may not be its nature in contemplation of the law.<sup>1</sup> Furthermore, this interest must be of

<sup>1</sup> See ante, sec. v., §§ 591–676.

<sup>1</sup> *Brown v. Welch*, 18 Ill. 343, 68 Am. Dec. 549; *Hayden v. Charter Oak Driving Park*, 63 Conn. 142, 27 Atl. 232. See post, §§ 750, 755.

<sup>1</sup> *Van Cloostere v. Logan*, 149 Ill. 588, 36 N. E. 946.

such a character, that if it were clothed, in the hands of its holder, with a legal title, it would be indefeasible. The fact that an interest is equitable shall not render it liable to be defeated by a party with notice of it, provided it would be indefeasible if legal. On the other hand, notice of a legal interest which is defeasible, or of an equitable interest, which, if legal, would be defeasible, does not bind the party receiving it, nor subordinate the estate in his hands.<sup>2</sup> The general rule as to the effect of notice must therefore include all trust estates express or implied, the equitable estate of the vendee in a contract for the sale of land, the equitable estate arising from the doctrine of conversion, equitable mortgages, liens, and charges, covenants creating equitable easements and servitudes, and the like. Notice, however, of a prior conveyance made with intent to defraud subsequent purchasers, and declared void by the statute, will not affect the rights of a subsequent purchaser for value,<sup>3</sup> nor of a prior contract which the purchaser had ab initio a right to nullify.<sup>4</sup> Prior unrecorded conveyances and mortgages may appear to be exceptions to this rule, but are not in reality.<sup>5</sup> Having thus explained the fundamental principles upon which the equitable doctrine of priorities is based, I shall now describe some of the most important classes of cases in which these principles are applied.

**§ 693. Second. Applications of These Principles—Assignments of Things in Action.**—Where the creditor party in a thing in action assigns the debt to successive assignees, where a fund being held under a trust the cestui que trust assigns his interest therein to successive assignees, and where a person entitled thereto makes successive equitable assignments of a fund to different parties, the interests acquired by the assignees in each instance are equitable.<sup>1</sup> It might therefore appear, at first blush, that, as the legal

<sup>1</sup> See Adams's Equity, 152 (323).

<sup>2</sup> Pulvertoft v. Pulvertoft, 18 Ves. 84; Buckle v. Mitchell, 18 Ves. 100.

<sup>3</sup> Lufkin v. Nun, 11 Ves. 170; Graybill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894, 17 S. E. 558, H. & B. 677.

<sup>4</sup> They are apparent exceptions, because the prior unrecorded conveyances and mortgages are declared by the statute to be void as against subsequent purchasers whose deeds or mortgages are recorded, and the estates created by them appear therefore to be defeasible. They are not real exceptions, because by the judicial interpretation, which has even been incorporated into most of the modern American statutes, the chief object of the registry is to give a constructive notice, and a notice of any other kind merely supplies the place of that prescribed by the statute. See ante, §§ 659, 660, 665.

<sup>5</sup> This is unquestionably so in every case of an assignment by a cestui que trust, and of an equitable assignment of a fund. It was also true of all assignments of ordinary choses in action, debts, etc., until recent statutes in England and in this country have had the effect to clothe the assignee of

estate is outstanding, and as the interests of all the successive assignees are similar in their essential nature, the general rule, where there are equal equities the first in order of time must prevail, should govern them, without regard to any notice which might or might not have been given to subsequent assignees; in other words, that, under these circumstances, the maxim, *Qui prior est tempore, potior est jure*, should control. There are, however, certain important elements which plainly distinguish these assignments from other kinds of successive equities, and remove them from the operation of the general rule. When an equitable interest in land is created, the holder thereof can often protect himself by a possession of the title deeds in England, or by a registration in this country. When chattels are sold and transferred, the title of the purchaser is secured against all the world by a delivery. No such safeguards inhere in the assignments above mentioned.<sup>2</sup> The legal title or right

debts, money demands, and other ordinary things in action with a legal right: See post, §§ 1273, 1274. This legislation, however, has not affected the doctrines discussed in the text. These doctrines were settled while the interests were purely equitable, and have not been abrogated by the new jurisdiction at law.

The peculiar nature of such assignments, which distinguishes them from other equitable interests, was admirably described by Sir Thomas Plumer, M. R., in the leading case of *Dearle v. Hall*, 3 Russ. 1, 12: "Where a contract respecting property in the hands of other persons who have a legal right to the possession is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of—that is, by giving notice of the contract to those in whom the legal interest is. By such notice the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the *cestui que trust* is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from encumbrance, and that the trustees are still trustees for him, and for no one else. That precaution is always taken by diligent purchasers and encumbrancers; if it is not taken, there is neglect. The consequence of such neglect is, that the trustee of the fund remains ignorant of any alteration having taken place in the equitable rights affecting it; he considers himself to be a trustee for the same individual as before, and no other person is known to him as the *cestui que trust*. The original *cestui que trust*, though he has in fact parted with his interest, appears to the world to be the complete equitable owner, and remains in the order, management, and disposition of the property as absolutely as ever, so that he has it in his power to obtain, by means of it, a false and delusive credit. He may come into the market to dispose of that which he has previously sold; and how can those who may chance to deal with him protect themselves from his fraud? Whatever diligence may be used by a subsequent encumbrancer or purchaser—whatever inquiries he may make in order to investigate the title, and to ascertain the exact state of the original right of the vendor, and his continuing right—the trustees, who are the persons to whom application for information

analogous to possession remains vested in the debtor, trustee, or holder of the fund. The assignor—the creditor or the cestui que trust—continues to be clothed with all the apparent right and power to deal with the claim, and to dispose of it to third persons, which he held prior to the assignment. Courts of the highest ability have therefore regarded such assignments as occupying a very special position, and have applied to them a special rule in determining their order of priority.<sup>3</sup>

§ 694. **I. Notice by the Assignee.**—The reasons which prevail between the assignee and the debtor or the holder of the fund on the one hand, or subsequent assignees on the other, do not prevail between him and the assignor. It is therefore settled that, to render the assignment valid and perfect *as against the assignor himself*,—that is, to give the assignee a complete claim upon the fund and right of action as against the assignor,—no notice of the assignment need be given to the debtor, trustee, or other holder of the fund.<sup>1</sup> The same is true, according to many decisions, with respect to those who “stand in the shoes of” the assignor, namely, his judgment creditors, and mere volunteers under him.<sup>2</sup>

§ 695. **English Rule.—Priority Determined by Notice to the Debtor Party.**—The rule is firmly established in England that, as against subsequent assignees for a valuable consideration, a notice to the debtor, trustee, or holder of the fund is necessary, in order to perfect the assignment and render it valid and effectual.<sup>1</sup> Among

would naturally be made, will truly and unhesitatingly represent to all who put questions to them that the fund remains the sole absolute property of the proposed vendor. [It has been decided, however, that a trustee is under no obligation to answer the inquiries of a stranger who is about to deal with the cestui que trust: *Low v. Bouverie* (1891), 3 Ch. 82, 1 Scott 565]. These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees. To give notice is a matter of no difficulty; and whenever persons, treating for a chose in action, do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons; and they become responsible, in some respects, for the easily foreseen consequences of their negligence.”

<sup>1</sup> *Methven v. Staten Island L. H. & P. Co.*, 66 Fed. 113, 13 C. C. A. 362, 35 U. S. App. 67.

<sup>2</sup> *In re Way's Trusts*, 2 De Gex, J. & S. 365.

<sup>3</sup> *Farmers' & Merchants' Bank v. Farwell*, 58 Fed. 633, 7 C. C. A. 391, 19 U. S. App. 256; *Jones v. Lowery Bkg. Co.*, 104 Ala. 252, 16 South. 11; *Walters v. Washington Ins. Co.*, 1 Iowa 404, 63 Am. Dec. 451. See, also, post, § 700.

<sup>1</sup> This rule and the reasons for it were most forcibly stated by Sir Thomas Plumer, M. R., in the leading case of *Dearle v. Hall*, 3 Russ. 1, from which a quotation has already been made. He said (pp. 20–23): “The ground of this claim is priority of time. They rely upon the known maxim, which in many cases regulates equities, *Qui prior est tempore, potior est jure*. If by

successive assignees of the same thing in action who have paid a

the first contract all the thing is given, there remains nothing to be the subject of the second contract, and priority must decide. But it can not be contended that priority in time must decide, where the legal estate is outstanding. For the maxim, as an equitable rule, admits of exception, and gives way when the question does not lie between bare and equal equities. If there appears to be, in respect of any circumstances independent of priority of time, a better title in the subsequent purchaser to call for the legal estate, than in the purchaser who precedes him in date, the case ceases to be a balance of equal equities, and the preference which priority of date might otherwise have given is done away with and counteracted. The question here is, not which assignment is first in date, but whether there is not, on the part of Hall, a better title to call for the legal estate than Dearle or Sheering can set up. Or rather, the question is: Shall these plaintiffs now have equitable relief, to the injury of Hall?" He shows that the failure of D. or S. to give notice was negligence; from this negligence all the doubt and difficulty have arisen; and it is not equitable that they should take advantage of their own negligence—should obtain a benefit as the result of their neglect. He then adds (p. 22): "They say that they were not bound to give notice to the trustees; for that notice does not form part of the necessary conveyance of an equitable interest. I admit that if you mean to rely on contract with the individual, you do not need to give notice; from the moment of the contract he with whom you are dealing is personally bound. But if you mean to go further, and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice; and unless notice is given, you do not do that which is essential in all cases of transfer of personal property. The law of England has always been, that personal property passes by delivery of possession; and it is possession which determines the apparent ownership. If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties on the hypothesis of his being the owner of that which in fact belongs to you. Possession must follow right; and if you, who have the right, do not take possession, you do not follow up the title, and are responsible for the consequences. It is true that a chose in action does not admit of tangible, actual possession. But in *Ryall v. Rowles*, 1 Ves. Sr. 348, 1 Atk. 165, the judges held that in the case of a chose in action you must do everything towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel to which he has acquired a title in the actual possession and under the absolute control of another person." This course of reasoning is, as it seems to me, completely unanswerable; the special rule concerning notice results from it as an irresistible conclusion. No other rule within the entire range of equity jurisprudence rests upon a more solid foundation of argument, or is more intrinsically just and reasonable. See, also, the admirable opinion in the recent case of *In re Phillips' Estate*, 205 Pa. St. 515, 55 Atl. 213, 97 Am. St. Rep. 746.

valuable consideration, the mere order of time does not necessarily determine the priority; the assignee in good faith and for value who first gives a notice obtains a precedence over the others, even though they may be earlier in time. The equities of the successive assignments being otherwise equal, the priority among them is determined by the order of the notices, rather than by the order of their dates. Giving notice is regarded as equivalent, or at least analogous, to the act of taking possession.<sup>2</sup> The rule thus formulated is applied to assignments of ordinary things in action by the creditor party . . . to assignments of a fund held under a trust by the cestui que trust, and to equitable assignments of a fund by the person entitled thereto, and the notice should be given, in the first class to the debtor, in the second to the trustee, and in the third to the holder of the fund.<sup>3</sup> It should be carefully observed, however, that to enable a subsequent assignee to obtain a priority in this manner, by giving the first notice to the debtor or legal holder, he must be an assignee in good faith and for a valuable consideration. If he parted with no consideration, he is a mere volunteer, and stands in the same position as his assignor. If he had notice of the earlier assignment, then he took subject thereto.<sup>4</sup> The rule thus established by the uniform course of decision in England has been adopted in a portion of the American states.<sup>5</sup> It has been rejected by the courts of other states, which hold that among successive assignments of things in action the order of time controls.<sup>6</sup>

**§ 697. The Rule does not Apply to Assignments of Equitable Interests in Land.** . . . Finally, the special rule requiring a notice to the trustee or other holder of the legal title, in order to settle the priority among successive assignees, is confined to transfers of personal property, debts, money claims arising from contracts, funds, and the like; it does not extend to nor embrace assignments of any equitable estates or interests in land. These lat-

<sup>2</sup>Third Nat. Bank of Philadelphia v. Atlantic City, 126 Fed. 413.

<sup>3</sup>*Dearle v. Hall*, 3 Russ. 1; affirmed on appeal, 3 Russ. 48-60, Ames Trusts 323. Various phases of the rule are illustrated in *In re Freshfield's Trusts*, L. R. 11 Ch. Div. 198, 200, 202, per Jessel, M. R.; *Lloyd v. Banks*, L. R. 3 Ch. 488, 490, per Lord Cairns; *Third Nat. Bank v. Atlantic City*, 126 Fed. 413 (notice of an intended assignment ineffectual; *Johnstone v. Cox*, L. R. 16 Ch. Div. 571 (simultaneous notices, etc.).

<sup>4</sup>The Elmbank, 72 Fed. 610.

<sup>5</sup>*Spain v. Hamilton's Ex'r*, 1 Wall. 604, 624; *Van Buskirk v. Hartford, etc.*, Ins. Co., 14 Conn. 141, 144, 36 Am. Dec. 473; *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26, 44 L. R. A. 632; *In re Phillips's Estate*, 205 Pa. St. 515, 97 Am. St. Rep. 746, 55 Atl. 213.

<sup>6</sup>*Thayer v. Daniels*, 113 Mass. 129; *Muir v. Schenck*, 3 Hill 228, Sh. 106, 38 Am. Dec. 633; *Meier v. Hess*, 23 Or. 599, 32 Pac. 755.

ter are governed by the more general rules concerning priority, already stated.<sup>1</sup>

**§ 698. II. Diligence of the Assignee.**—Irrespective of any requirement to give notice in order to obtain a priority, the duty rests upon all assignees of things in action to use reasonable diligence in perfecting their titles or enforcing their rights. Even where the rule concerning notice to the debtor or trustee has not been adopted, an assignee who had otherwise the priority may lose it through his laches, as against a subsequent purchaser in good faith and for value who has been injured by the negligence.<sup>1</sup> It may be said, in general, that, in order to protect himself against subsequent transfer by the assignor, where a notice is not given to the debtor or the holder of the legal interest, the assignee should obtain a delivery and possession of the written instrument, which, in ordinary language, constitutes the thing in action, which embodies and is the highest evidence of the existing demand; or when such delivery and possession are impossible from the very nature of the subject-matter, that he should take all the steps permitted by the law which are equivalent to actual possession.<sup>2</sup> The questions as to priority of right may arise between the assignee and a judgment creditor of the assignor or a subsequent purchaser from the assignor. There is a clear distinction between these two claimants, since a judgment creditor only succeeds to the rights of his debtor, while a purchaser *may* acquire higher rights.<sup>3</sup>

**§ 699. Assignment of Shares of Stock—Between Assignee and Assignor.**—The question has very frequently arisen in this country in connection with transfers of shares of stock in business corporations. The by-laws of such companies generally, and even in some states the statutes, provide that an assignment of shares shall be consummated and perfected by the assignee's surrendering the original certificate to the proper officers of the corporation, and re-

<sup>1</sup> See *Lee v. Howlett*, 2 Kay & J. 531, *Ames Trusts* 329; *McCreight v. Foster*, L. R. 5 Ch. 604, 610, 611 (contract for sale of land); *Union Bk. of London v. Kent*, 39 Ch. Div. 238 (leaseholds). But priority among assignments of an interest in land affected by the doctrine of equitable conversion is determined by the rules relating to the assignment of choses in action: *Snover v. Squire*, (N. J. Eq.), 24 Atl. 365.

<sup>2</sup> *Judson v. Corcoran*, 17 How. 612.

<sup>3</sup> *Bridge v. Wheeler*, 152 Mass. 343, 25 N. E. 612; *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26, 44 L. R. A. 632. On the same principle, if between two successive assignees of an equitable interest, otherwise equal, the subsequent one acquires the legal title or legal advantage, he thereby obtains the superiority: *Ogden v. Fitzsimmons*, 7 Cranch 1, 18; *Dueber Watch-Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589, 57 N. E. 455.

<sup>4</sup> As to judgment creditors of the assignor, see ante, § 694, and notes, and post, § 700.

ceiving a new one issued to himself, and by a record of the transaction entered in the company's transfer-books. It is the common practice, however, to effect an assignment by delivering the certificate to the assignee, with a power of attorney indorsed thereon executed by the assignor, authorizing the surrender to be made and all the other steps to be taken as prescribed by the by-laws. This method of transfer, according to the overwhelming weight of authority, clothes the assignee with a full legal ownership as against the assignor, and with an equitable title and ownership valid at least as against the corporation.<sup>1</sup> The only important questions, therefore, relate to the right and priority of such an assignee as against judgment creditors of the assignor and subsequent purchasers.

**§ 700. The Same—Between Assignee and Judgment Creditors of Assignor.**—It has been held by some courts that such a transfer of shares by a mere delivery of the certificate and power of attorney, without the further steps for completing the transaction on the transfer-books, *and without any notice thereof given to the company*, is presumptively fraudulent, and therefore invalid as against judgment creditors of the assignor.<sup>1</sup> A different rule, however, must be regarded as settled by the great majority of decisions, which hold that this mode of assignment is valid as against creditors of the assignor, and gives the assignee a precedence over their subsequent judgments, executions, and attachments.<sup>2</sup>

**§ 701. The Same—Between Assignee and Subsequent Purchasers.**—As between such an assignee and subsequent purchasers, the question is more complicated. I think that general language has sometimes been used by judges, which indicates a confusion of mind with reference to the real situation of the parties, and the possible circumstances which might arise in the transaction. If the holder of shares should deliver the certificate with a power of attorney executed by himself, it would be impossible for him to clothe a subsequent assignee with the same indicia of ownership, so that the latter should have a title apparently equal to the former. On

<sup>1</sup> N. Y., *N. H. & H. R. R. v. Schuyler*, 34 N. Y. 30, 80, per Davis, J.; *Mt. Holly Co. v. Ferree*, 17 N. J. Eq. 117; *Masury v. Arkansas Nat. Bank*, 93 Fed. 603, 35 C. C. A. 476, reversing 87 Fed. 38.

<sup>2</sup> *Pinkerton v. Manchester, etc.*, R. R., 42 N. H. 424. This protection of the judgment and attachment creditors of the assignor results from statute in many states. *White v. Rankin*, 90 Ala. 541, 8 South. 118; *Ottumwa Screen Co. v. Stodghill*, 103 Iowa 437, 72 N. W. 669; *West Coast S. F. Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622.

<sup>2</sup> See ante, § 694; *Mt. Holly Co. v. Ferree*, 17 N. J. Eq. 117; *May v. Cleland*, 117 Mich. 45, 75 N. W. 129, 44 L. R. A. 163; *Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co.*, 6 Wash. 597, 34 Pac. 155.

the other hand, if the holder of shares should assign them verbally or by a written instrument to A, but without delivering the certificate and power of attorney, and should afterwards assign them in the ordinary manner, by delivering the certificate with a power of attorney to B, the apparent title of the latter would certainly be superior to that of the former.<sup>1</sup> It does not seem possible, therefore, that a question of priority, on the assumption that their equitable interests are intrinsically equal, can arise between two successive assignees of the same shares from the same owner, where the assignment to one of them has been by a delivery of the certificate with a power of attorney. The questions of precedence among successive transfers executed in such a manner must arise in cases where the earlier assignment, apparently made by and in the name of the owner, is procured through fraud, breach of trust, or even forgery. The discussion of this particular topic properly belongs, and will be found, in the next subdivision, which treats of the equities to which assignments of things in action are subject.<sup>2</sup>

**§ 702. Notice to the Debtor Necessary to Prevent Subsequent Acts by Him.**—Diligence is also necessary on the part of the assignee, in order to protect his right, by giving prompt notice of the transfer to the debtor, trustee, or other holder of the fund. Until notice, actual or constructive, is received by the debtor or trustee, payment by him to the assignor would be a valid payment of the claim, and binding upon the assignee. The same would be true of a release from the assignor to the debtor or trustee, or any other transaction between them which would operate as a legal discharge; it would also be a discharge as against the assignee, if done before notice.<sup>1</sup> It is expressly provided in many of the states that a demand in favor of the debtor, which might be a set-off against the assignor, not existing at the date of the assignment, but arising subsequently, *and before notice to the debtor*, shall be a valid set-off against the assignee.

**§ 703. III. Assignments of Things in Action Subject to Equities.**—The doctrine, stated in its most comprehensive form, is, that an assignment of every non-negotiable thing in action, even when made without notice of the defect to the assignee, is subject, in general, to all equities existing against the assignor. This broad doctrine has three different applications: 1. Where the equities are in favor of the debtor or trustee; 2. Where they arise between

<sup>1</sup> See *Société Générale de Paris v. Walker*, L. R. 11 App. Cas. 20, affirming 14 Q. B. D. 424.

<sup>2</sup> See *infra*, §§ 707-715.

<sup>3</sup> *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 475; *Muir v. Schenck*, 3 Hill 228, 38 Am. Dec. 633, Sh. 106; *Bence v. Shearman* (1898), 2 Ch. 582.

successive assignors and assignees,—that is, in favor of some prior assignor; 3. Where they arise entirely in favor of third persons,—the two latter cases including what are often called *latent* equities. As these three applications depend upon *somewhat* different grounds, and as there is not a perfect harmony of decision concerning them, it will be expedient to discuss them separately, and thus to avoid all unnecessary doubt with respect to the settled rules.

§ 704. 1. **Equities in Favor of the Debtor Party.**—The rule is settled, by an unbroken series of authorities, that the assignee of a thing in action not negotiable takes the interest assigned subject to all the defenses, legal and equitable, of the debtor who issued the obligation, or of the trustee or other party upon whom the obligation originally rested; that is, when the original debtor or trustee, in whatever form his promise or obligation is made, if it is not negotiable, is sued by the assignee, the defenses, legal and equitable, which he had at the time of the assignment, or at the time when notice of it was given, against the original creditor, avail to him against the substituted creditor.<sup>1</sup> This rule applies to all forms of contract not negotiable, and to all defenses which would have been valid between the debtor party and the original creditor. These defenses may arise out of or be inherent in the very terms or nature of the obligation itself, as that it was conditional and the condition has not been performed by the assignor, failure or illegality of the consideration, and the like; or they may exist outside of the contract, as set-off, payment, release, the condition of accounts between the original parties, and the like. Some examples are given in the

<sup>1</sup> Callanan v. Edwards, 32 N. Y. 483, 486; Haydon v. Nicoletti, 18 Nev. 290, 3 Pac. 473. Upon the question whether the doctrine stated in the text applies to mortgages given to secure negotiable promissory notes—a form of security very common in some states—the authorities are in direct conflict. In one class of decisions it has been held that where a mortgage is given to secure a negotiable promissory note and before maturity of the note it and the mortgage are assigned to a bona fide purchaser for value, the assignment of the mortgage as well as of the note is free from all equities subsisting between the original parties in favor of the mortgagor: Carpenter v. Longan, 16 Wall. 271, 273; Lewis v. Kirk, 28 Kan. 497, 42 Am. Rep. 173; Nashville Trust Co. v. Smythe, 94 Tenn. 513, 45 Am. St. Rep. 748, 29 S. W. 903. Other cases reach exactly the opposite conclusion, and hold that the assignment of such a mortgage is governed by the general rule: Baily v. Smith, 14 Ohio St. 396, 84 Am. Dec. 385; Olds v. Cummings, 31 Ill. 188; Buehler v. McCormick, 169 Ill. 269, 48 N. E. 287. The reasoning of these Illinois decisions is, in my opinion, most in accordance with the settled doctrines of equity jurisprudence, namely, that the assignment of the mortgage, whether it be an incident of the transfer of the note, or be direct, is wholly equitable, and gives only an equitable title to the assignee, and must therefore be subject to all subsisting equities; the doctrine of bona fide purchase for a valuable consideration not applying to transfers of mere equitable interests. See, also, post, § 1210.

foot-note, by way of illustration.<sup>2</sup> It is essential, however, that the equity in favor of the debtor should exist at the time of the assignment or before notice thereof; after receiving notice, he cannot, by a payment, release, obtaining a set-off, or any other act, defeat or prejudice the right of the assignee.<sup>3</sup> The debtor who would have been entitled to equities under this rule may, by a writing, or by actual misrepresentations, or by conduct, or even by silence towards the assignee, estop himself from setting them up, and he may release them.<sup>4</sup>

**§ 707. 2. Equities between Successive Assignors and Assignees.**

—The doctrine is not confined to the case of the debtor party setting up a defense against an assignee; it also applies, when the same non-negotiable thing in action has gone through successive assignments, to the second and subsequent assignees, if there were equities subsisting between the original assignor—or *any* prior assignor—and his immediate assignee in favor of the former. The instances of this application include the following, among other circumstances: When the owner transfers the thing in action upon condition, or subject to any reservations, and this immediate assignee transfers it absolutely; when the first assignment is accomplished by a forgery of the owner's name, and this assignee afterwards transfers to an innocent purchaser for value; when the original assignment is procured by fraud, duress, or undue influence, and a second assignment is then made to a purchaser for value and without notice; when the original assignment is regular on its face, executed in the name of the owner and by means of his signature voluntarily written, but the transfer is consummated through a breach of fiduciary duty by an agent or bailee contrary to the

<sup>2</sup> *Of the Kinds of Contract.*—Non-negotiable note: *Spinning v. Sullivan*, 48 Mich. 5, 11 N. W. 758. Mortgages: see post, § 733. Contract for the sale of land: *Reeves v. Kimball*, 40 N. Y. 299. Shares and obligations of corporations: *In re China Steamship Co.*, L. R. 7 Eq. 240; *Reese v. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536; *Jennings v. Bank of California*, 79 Cal. 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233.

*Of Defenses.*—E. g., Illegality: *Robertson v. Cooper*, 1 Ind. App. 78, 27 N. E. 104. Set off in debtor's favor: *Collins v. Campbell*, 97 Me. 23, 28, 53 Atl. 837, 94 Am. St. Rep. 458, 463. Non-performance of contract by assignor: *Van Aken v. Dunn*, 117 Mich. 421, 75 N. W. 938. The assignee cannot be affected, however, by collateral transactions, secret trusts, or acts unconnected with the subject of the contract: *Kountz v. Kirkpatrick*, 77 Pa. St. 376, 13 Am. Rep. 687.

<sup>3</sup> *Schelling v. Mullen*, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; *Field v. City of New York*, 6 N. Y. (2 Seld.) 179, 57 Am. Dec. 435.

<sup>4</sup> *In re Northern, etc., Co.*, L. R. 10 Eq. 458, 463; *Grissler v. Powers*, 81 N. Y. 57, 37 Am. Rep. 475. But see *Rapps v. Gottlieb*, 142 N. Y. 164, 36 N. E. 1052, affirming 67 Hun, 115, 22 N. Y. Supp. 52.

owner's intention, and this immediate assignee transfers to an innocent holder; and finally, when the original owner assigns the same thing in action for value and without notice, first to A and afterwards to B, and the controversy is between these two claimants, or between subsequent assignees from and deriving title through them. The decisions involving the doctrine, in its application to these various circumstances, are directly conflicting. While a complete reconciliation of this conflict is impossible, there are considerations which will bring the authorities into a partial harmony. The rule which makes the right of a subsequent assignee subject to the equities subsisting in favor of the original or any prior assignor is plainly a mere expression of the general principle, that among successive equitable interests in the same thing, the order of time prevails. The decisions which uphold the equities of the prior assignor are either expressly or impliedly based upon this principle. But the principle itself is not absolute; it prevails only where the successive equitable interests are equal; indeed, the equity resulting *merely* from priority in time has been said to be the feeblest of any, and to be resorted to only when there is no other feature or incident of superiority.<sup>1</sup> Whatever creates a superior equity in one of the successive holders will disturb the order of time, and many different features or incidents will have this effect. The laches of one having an interest prior in time may confer a superior equity upon a subsequent holder; *notice* may destroy a precedence otherwise existing; absence of a valuable consideration is always a badge of inferiority; and finally, the doctrine of estoppel may be properly invoked to prevent a prior party from asserting his right. In many of the cases which *appear* to deny the doctrine that a subsequent assignee takes subject to the equities of a prior assignor or of a third person, the *decision* is in fact rested upon one or the other of these well-settled exceptions to the general principle of priority in order of time among successive equitable interests, although the opinion may not perhaps state such a ground as the *ratio decidendi*. It is possible, in this manner, to effect a partial reconciliation among the authorities; some conflict of opinion, however, still remains.

§ 708. **General Rule—Assignment Subject to Latent Equities.**—The equities of a prior assignor, or of a third person, have sometimes been called "latent." The theory that such "latent equities" cannot prevail against the title of a second or other subsequent as-

<sup>1</sup> See *supra*, vol. 1, § 414, and the opinion in *Rice v. Rice*, 2 Drew. 73, H. & B. 23, 1 Scott 334, there quoted. This description of the right resulting from a priority in time is, in my opinion, much too strong; it can hardly be reconciled with the imposing line of authorities cited in the following paragraphs.

signee, and that an assignee only takes subject to the equities in favor of the debtor party, has received some judicial support.<sup>1</sup> It is, however, unsound; it is, in effect, an extension of the peculiar qualities of negotiable instruments to things in action not negotiable.<sup>2</sup> The doctrine is sustained by the weight of authority, I think, and by principle, that the right of the second or other subsequent assignee is subject to all equities subsisting in favor of the original or other prior assignor, unless in some settled mode recognized by equity jurisprudence such assignee has obtained a superiority which gives him the precedence. This doctrine must be regarded as correct, as based upon principle, as long as the distinction between negotiable and non-negotiable obligations is preserved in our jurisprudence.<sup>3</sup> I shall describe,—1. Those classes of cases in which the doctrine has been applied; and 2. Those in which it is not applicable.

**§ 709. Illustration of This Rule.**—If the owner and holder of a thing in action not negotiable transfers it to an assignee upon condition, or subject to any reservations or claims in favor of the assignor, although the instrument of assignment be absolute on its face, this immediate assignee, holding a qualified and limited interest, cannot convey a greater property than he himself holds; and if he assumes to convey it to a second assignee by a transfer absolute in form, and for a full consideration, and without any notice to such purchaser of a defect in the title, this second assignee takes it, nevertheless, subject to all the equities, claims, and rights of the original holder and first assignor.<sup>1</sup> In the second place, where the original assignment is accomplished by a forgery of the holder's name, or where it is effected by a wrongful conversion of the security, together with a written instrument of transfer which has been signed by the owner, or where it is made upon an illegal consideration between the owner and his immediate assignee, or where it is procured by fraud, duress, or undue influence upon the owner, and in either of these cases the thing in action is afterwards trans-

<sup>1</sup> See cases *infra*, under § 715.

<sup>2</sup> *Western Nat. Bank v. Maverick Nat. Bank*, 90 Ga. 339, 16 S. E. 942, 35 Am. St. Rep. 210.

<sup>3</sup> *Schafer v. Reilly*, 50 N. Y. 61, 67; *Commercial Nat. Bank v. Burch*, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331; *Patterson v. Rabb*, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831; and see cases cited under § 709.

<sup>1</sup> *Bush v. Lathrop*, 22 N. Y. 535; *Davis v. Bechstein*, 69 N. Y. 440, 25 Am. Rep. 218; *Osborn v. McClelland*, 43 Ohio St. 284, 299-307, 1 N. E. 644. Cases of lost or stolen stock certificates: *Knox v. Eden Musée Co.*, 148 N. Y. 441, 51 Am. St. Rep. 700, 42 N. E. 988, 31 L. R. A. 779; *East Birmingham Land Co. v. Denison*, 85 Ala. 565, 5 South. 317, 7 Am. St. Rep. 73, 2 L. R. A. 836; *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349.

ferred from the first to a second or other subsequent assignee, who takes it for value and without notice, the same rule must control: the equities of the original owner must prevail over the claims of the subsequent though innocent assignee.<sup>2</sup>

§ 710. **When the Rule does not Apply—Effect of Estoppel.**—I proceed next to consider the third case, where the original assignment is regular on its face, executed in the name of the original owner and by his signature voluntarily written, but the transfer is consummated through a breach of fiduciary duty by an agent or bailee contrary to the owner's intention, and this immediate assignee may afterwards transfer to an innocent holder. In relation to this particular condition of facts, a rule has been adopted by most able courts, and may be regarded, I think, as settled, which is entirely consistent with that stated in the preceding paragraphs. It is based upon the doctrine of estoppel. This special rule may be formulated as follows: The owner of certain kinds of things in action not technically negotiable, but which, in the course of business customs, have acquired a semi-negotiable character in fact, may assign or part with them for a special purpose, and at the same time may clothe the assignee or person to whom they have been delivered with such *apparent* indicia of title, and instruments of complete ownership over them, and power to dispose of them, as to *estop* himself from setting up against a second assignee, to whom the securities have been transferred without notice and for value, the fact that the title of the first assignee or holder was not perfect and absolute. The ordinary and most important application of this rule is confined to the customary mode of dealing with certificates of stock. If the owner of stock certificates assigns them as collateral security, or pledges them, or puts them into the hands of another for any purpose, and accompanies the delivery by a blank assignment and power of attorney to transfer the same in the usual form, signed by himself, and this assignee or pledgee wrongfully transfers them to an innocent purchaser for value in the regular course of business, such original owner is *estopped* from asserting, as against this purchaser in good faith, his own higher title and the want of actual title and authority in his own immediate assignee or bailee.<sup>3</sup> This conclusion is in no respect necessarily antagonistic to the general doctrine concerning the assignment of things in action heretofore stated. The courts have simply recognized the

<sup>2</sup> Anderson v. Nicholas, 28 N. Y. 600; Mason v. Lord, 40 N. Y. 476, 487.

<sup>3</sup> McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Dueber Watch-Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455; Moore v. Moore, 112 Ind. 149, 13 N. E. 673, 2 Am. St. Rep. 170; Osborn v. McClelland, 43 Ohio St. 284, 298-307, 1 N. E. 644.

growing and universal tendency of business men, in their customary modes of dealing, to treat stock certificates as though they were in all respects negotiable instruments; and they have felt themselves bound to give validity and effect to this general practice of merchants, as far as that could be done consistently with the established doctrines of the law. It is another instance of the manner in which mercantile customs have been adopted and incorporated into the law by the progressive course of judicial legislation. The decisions announcing the rule are based exclusively upon the form of the blank assignment and power of attorney, executed by the assignor and delivered to the assignee, which clothed him with all the *apparent* rights of ownership that are recognized by business men, in their usual course of dealing with like securities, as sufficient to confer a complete title and power of disposition upon the assignee. Should the doctrine thus invoked to protect the customary modes of transacting business with certificates of stock and similar quasi negotiable securities be extended to all other things in action? Should the effect of an estoppel be produced from a *mere assignment of any security, absolute on its face, executed by the original owner, and delivered to his assignee?* There are cases which seem to have reached this result. The tendency of these decisions is towards the conclusion that whenever the owner of any non-negotiable thing in action delivers the same to another person with an assignment thereof absolute on its face, and this person transfers it to a purchaser for value, who relies upon the apparent ownership created by the written assignment, and has no notice of anything limiting that title, the original owner is estopped from asserting against such purchaser any equities existing between himself and his immediate assignee, and any interest or property in the security which he may have notwithstanding the written transfer, even when those equities might arise from fraud, coercion, violation of a fiduciary duty, absence or illegality of consideration, and the like.<sup>2</sup>

§ 711. **True Limits of Estoppel as Applied to Assignments of Things in Action.**—While the particular application of the doctrine of estoppel to the usual dealings with shares of stock, as made in *McNeil v. Tenth National Bank*<sup>1</sup> and kindred cases, is clearly a step in the interests of commerce, since it recognizes and validates mercantile customs which had become universal throughout this country, the extension of the same rule to all things in action, as described in the preceding paragraph, plainly tends to undermine, shake, and finally abrogate the well-settled doctrine which renders the assignments of non-negotiable things in action subject to the

<sup>2</sup> *Moore v. Metropolitan Bank*, 55 N. Y. 41, 46-49, 14 Am. Rep. 173.

<sup>1</sup> 46 N. Y. 325; 7 Am. Rep. 341.

equities subsisting in favor of the debtor parties, as well as those outstanding in favor of third persons; or at all events, it tends to confine the operation of that doctrine to cases in which the assignment is so drawn that it is, on its face, constructive notice to all subsequent assignees deriving title through it. In the class of decisions alluded to,—*Moore v. Metropolitan Bank*<sup>2</sup> and like cases,—the estoppel is made to arise from a mere naked transfer in writing, absolute in form; the ratio decidendi is the apparent ownership thus conferred upon the assignee; and these elements of the rule will apply to so many cases that things in action are practically rendered negotiable as between the series of successive holders,—the assignors and assignees. This point being reached, it will be an easy and almost necessary step to extend the estoppel to the debtor party himself,—the obligor or promisor who utters the security. If negotiability is produced by means of an estoppel between the assignor and assignee, arising from the fact and form of a transfer from one to another, by parity of reasoning the debtor may be regarded as estopped by the fact and form of *his issuing the undertaking and delivering it to the first holder*, and thus creating an apparent liability against himself. In short, there seems to be exactly the same reason for holding the debtor estopped from denying his liability upon a written instrument which apparently creates an absolute liability, when that instrument has passed into the hands of a purchaser who had no notice of the actual relations between the original parties, as for holding an assignor estopped from denying the completeness of a transfer made by him simply because it is absolute on its face. This result, if reached, would make all things in action practically negotiable.<sup>3</sup> According to the law merchant, “negotiability” consisted of two elements: 1. The fact that the transferee obtained the legal title and could sue at law in his own name; and 2. The fact that the transferee in good faith and for value took free from all equities and nearly all defenses subsisting in favor of prior parties to the paper. The first of these elements now belongs, in the great majority of the states, to all things in action. There is, as it seems to me, an evident *tendency*, on the part of the courts in many states, to enlarge the scope of the second element, and to extend it also to all species of things in action which are embodied in contracts or instruments in writing.

**§ 712. Subsequent Assignee Obtaining the Legal Title may be Protected as a Bona Fide Purchaser.**—In the discussions of the fore-

<sup>2</sup> 55 N. Y. 41, 14 Am. Rep. 173.

<sup>3</sup> *Osborn v. McClelland*, 43 Oh. St. 284, 306, 1 N. E. 644.

going paragraphs,<sup>1</sup> it has been constantly assumed that the assignee had acquired only an equitable title, in order that he might take subject to the equities subsisting in favor of a prior assignee or of a third person. If, in addition to his equitable interest conferred by the assignment, he has also obtained the *legal* title, or even if his situation is such that he has the best right to call for the legal title, then the doctrine of purchase for a valuable consideration and without notice may apply so as to protect him against all such outstanding equities. It should be constantly borne in mind that priority of time gives precedence of right among successive and conflicting equitable interests only when these equitable interests are *equal* in their nature or incident. An illustration may be seen in the decisions of many able courts with respect to dealings in shares of stock. Where a transfer of a certificate has been made by the owner's own signature, but procured only through the fraud, breach of duty, or conversion of the person who actually effects the first assignment, or without consideration, or upon an illegal consideration, and even where the transfer is accomplished solely by a forgery of the owner's name to the indorsement and power of attorney, and the certificate thus comes into the hands of a purchaser for a valuable consideration and without notice, and he perfects his legal title by surrendering the original certificate to the corporation and receiving a new one in his own name, and by procuring the transaction to be properly entered upon the company's transfer-books, which thereupon show him to be the legal owner of the shares, the assignee under these circumstances, as is held in many cases, obtains a complete precedence over the original owner; he is not liable to the owner for the shares nor for their value; the owner's remedy, if any exists at all, is against the corporation alone, to compel it either to issue new shares or to pay the value of the old ones.<sup>2</sup> These decisions should, on principle, apply to and protect the assignee of every other species of thing in action who has acquired the legal title.

**§ 713. Successive Assignments by Same Assignor to Different Assignees.**—The remaining case to be considered under this head, as mentioned in a former paragraph,<sup>1</sup> is that of successive transfers of the same thing in action made by the same person—the creditor party—to different assignees. The American decisions upon this particular case cannot be reconciled. I can only present those settled doctrines of equity which, it would seem, should apply to

<sup>1</sup> Viz., from §§ 707 to 711.

<sup>2</sup> *Pratt v. Taunton Copper M. Co.*, 123 Mass. 110, 112, 25 Am. Rep. 137; *Sewall v. Boston Water P. Co.*, 4 Allen 277, 81 Am. Dec. 701.

<sup>3</sup> See § 707.

and govern such a condition of circumstances. In England and in several of the states the rule giving to the assignee who first notifies the debtor party or trustee a precedence over all others, even those who are earlier in date, furnishes a certain and simple criterion for determining the priority, it being remembered that this rule is confined to pure personal things in action, and does not extend to liens and other equitable interests in real estate.<sup>2</sup> In the states where the rule referred to does not prevail, the question must turn upon other doctrines. If the interests are equitable in their nature, and the equity of no assignee is intrinsically superior to the others, the settled principle of equity should control, that the order of time determines the order of priority; or in other words, that the subsequent assignee takes subject to the rights of the one prior in time; and this principle has been applied, in such cases, by many able decisions.<sup>3</sup> On the other hand, if the subsequent assignee has acquired the legal title, and was a purchaser in good faith for a valuable consideration and without notice, he is protected; and this doctrine of bona fide purchase seems to have been extended, by some decisions, to subsequent assignees who had only obtained an equitable interest.<sup>4</sup>

§ 714. 3. **Equities in Favor of Third Persons.**—Equities in favor of third persons through whom the title to the thing in action has never passed, and those in favor of a former assignor, are intimately connected; indeed, they are only different phases of the same doctrine, and must stand or fall together. If the imperfection of an assignee's title is not confined to equities subsisting in favor of the debtor party, there is no reason, in the nature of things, why it should not extend to the equities of all other parties,—third persons as well as previous holders and assignors; in fact, the doctrine would apply with fewer exceptions in the case of third persons than in the case of prior assignors. As a third person, although having some interest or claim which constitutes his "equity," has never been an owner or holder of the chose in action, and has never transferred it, his conduct towards it cannot, in general, enable the assignee to invoke against him the doctrine of estoppel. These conclusions are fully sustained by judicial authority. Wherever the narrower view that an assignee takes subject *only* to the

<sup>2</sup> See *supra*, §§ 695-697.

<sup>3</sup> *Muir v. Schenck*, 3 Hill 228, 38 Am. Dec. 633, Sh. 106; *Farmers' Bank v. Diebold Safe & Lock Co.*, 66 Ohio St. 367, 64 N. E. 518, 90 Am. St. Rep. 586, 58 L. R. A. 620; *Fairbanks v. Sargent*, 104 N. Y. 108, 58 Am. Rep. 490, s. c. 117 N. Y. 320, 22 N. E. 1030, 6 L. R. A. 475. See, also, *supra*, last note to § 695.

<sup>4</sup> *Supra*, § 698; *Judson v. Corcoran*, 17 How. 612; *Dueber Watch-Case Mfg. Co. v. Daugherty*, 62 Oh. St. 589, 57 N. E. 455.

equities of the debtor has been rejected, and the theory of "latent" equities has been disregarded, the courts have described the assignment as subject to *all* claims existing against the assignor,—have laid down the rule in comprehensive and positive terms, that the assignee takes subject to *all* equities, latent or open, of third persons. Of course the "equity," in such a case, must be some subsisting claim to or against the thing in action itself, or the fund which it represents, which the third person held and could have enforced if it had remained in the hands of the assignor; as, for example, a lien or charge upon the fund or some part of it, or upon the security, or an equitable ownership or right to the fund or security, and the like.<sup>1</sup> The case of subsequent execution or attachment creditors of the assignor stands upon a somewhat different footing, since their equities *in* the subject-matter are not existing at the time of the assignment.<sup>2</sup>

§ 715. **Contrary Rule, that Assignments of Things in Action are Free from Latent Equities in Favor of Third Persons or Previous Assignors.**—On the other hand, the conclusions reached by this imposing line of authorities have been wholly rejected. Able judges and courts have maintained the position that assignments of things in action are subject only to equities of *the debtor* party; that they are never subject to equities in favor of third persons, and especially that they are free from that kind of prior claim often called "latent equities."<sup>3</sup> Although this direct conflict cannot be completely reconciled, yet the apparent discrepancy which exists among similar cases may be explained, and at least partly removed, by certain well-settled principles of equity which are recognized by all courts. The equity of the second assignee may, from some intrinsic element or some external incident, be "superior," and may therefore be entitled to a precedence; or the second assignee may have obtained a legal title, so that the doctrine of bona fide purchaser for a valuable consideration will apply and give him protection;<sup>2</sup> or the holder of the prior equity may have been guilty of laches or other conduct making it inequitable to subject an innocent subsequent assignee to his claim.<sup>3</sup>

<sup>1</sup> *Shropshire, etc., Ry. v. The Queen*, L. R. 7 H. L. 496, Ames Trusts 300; *Bush v. Lathrop*, 22 N. Y. 535, per Denio, J.; *Muir v. Schenck*, 3 Hill 228, 38 Am. Dec. 633, Sh. 106.

<sup>2</sup> For cases postponing the equities of the assignor's creditors, see ante, §§ 694, and note, 700, and note.

<sup>3</sup> *Murray v. Lylburn*, 2 Johns. Ch. 441, 443, 1 Scott 526; *Sumner v. Waugh*, 56 Ill. 531; *Winter v. Montgomery G. L. Co.*, 89 Ala. 544, 7 South. 773.

<sup>2</sup> As in *Western Nat. Bank v. Maverick Nat. Bank*, 90 Ga. 339, 16 S. E. 942, 35 Am. St. Rep. 210; *Winter v. Montgomery G. L. Co.*, 89 Ala. 544, 7 South. 773.

<sup>3</sup> See supra, § 698, *Judson v. Corcoran*, 17 How. 612, and other cases cited.

§ 716. **Equitable Estates, Mortgages, Liens, and Other Interests.** Having thus considered the general principles concerning priority in their effect upon assignments of pure things in action, I shall now examine their application to another group of equitable interests in property, including estates, liens, charges, and the like. The general doctrines which control these kinds of interests, and determine their order of priority, have been presented in the former part of this section, and require no further discussion; it only remains to illustrate their application under various circumstances to different conditions of fact. . . .

§ 717. **Doctrine of Priorities Greatly Modified by the Recording Acts.** . . . The scope and operation of these purely equitable doctrines throughout the United States have been greatly broken in upon and modified by the various recording acts; so that any uniformity of the practical rules has been made virtually impossible. The provisions of the recording acts differ exceedingly in the different commonwealths, as has been shown in the preceding section.<sup>1</sup> . . .

§ 718. **I. Priority of Time among Equal Equities.**—The general doctrine is well settled, as already stated,<sup>1</sup> that among successive equitable estates, liens, and interests which are equal,—that is, where neither claimant holds the legal estate or has the best right to call for it, and neither is intrinsically superior to the others, nor is affected with any collateral incident, such as negligence or fraud, —the order of time controls, even though a subsequent holder acquired his interest without any notice of the prior one. Under these circumstances the maxim, *Qui prior est tempore, potior est jure*, applies. The doctrine has been fully recognized and constantly enforced by American courts, wherever its operation has not been interfered with or modified by the recording acts.<sup>2</sup> The equities to which this rule has been most frequently applied by the English courts are equitable mortgages, especially those created by a deposit of title deeds,—a kind of security almost unknown in this country. In order to accurately appreciate the decisions upon this subject, it is important to keep in mind the peculiar rules concerning the nature of legal and equitable mortgages which prevail in the English law, and which are in many respects different from our own system.<sup>3</sup>

<sup>1</sup> See *supra*, § 646.

<sup>2</sup> See *supra*, §§ 678, 682.

<sup>3</sup> *Phillips v. Phillips*, 4 De Gex, F. & J. 208, 215, 218, H. & B. 72, Ames Trusts 331, 1 Scott 333, 511; *Cave v. Cave*, L. R. 15 Ch. Div. 639, 646, Ames Trusts 311, 1 Scott 517; *Rice v. Rice*, 2 Drew. 73, H. & B. 23, 1 Scott 334; *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. 603, Sh. 104, 1 Scott 331.

<sup>4</sup> With respect to priorities between successive *equitable* mortgages, see Brad-

§ 719. **Illustrations—Simultaneous Mortgages, Substituted Liens, etc.**—It has naturally followed, from the provisions of the recording acts, and from the quite different modes of conducting business prevailing in this country, that the questions presented to the American courts for decision have been of another character, arising from other circumstances. Among these questions, one relates to simultaneous mortgages or other liens.<sup>1</sup> Two or more mortgages having been given at the same time, or as parts of the same single transaction, with the intention that they should be simultaneous liens, they may perhaps be recorded on different days, and the court may be called upon to settle the equities between the mortgagees or their assignees. A second and most important question concerns the respective claims of precedence between a prior unrecorded mortgage or other specified equitable lien, and a subsequent docketed judgment.<sup>2</sup> Another question relates to the effect of substituting a different lien in the place of one already existing, whether the substituted lien retains the precedence which belonged to the one which it has replaced.<sup>3</sup>

§ 720. **II. One Equity Intrinsically the Superior—Prior General and Subsequent Specific Lien.**—The doctrine has already been

ley v. Riches, L. R. 9 Ch. Div. 129. With respect to such priority where there has been negligence on the part of the one first in order of time, see Hunter v. Walters, L. R. 11 Eq. 292; see ante, § 687, and notes; In re Castell & Brown (1898), 1 Ch. 315. If the legal owner of the land gives a first mortgage on it to A in the ordinary form known to the common law, of a deed with a condition, this is, of course, a legal mortgage; A obtains and holds the *legal* title and estate, if the mortgage is of the fee, then his estate is the legal fee. While this first mortgage is outstanding, all subsequent mortgages of the same land to B, C, D, etc., no matter what may be their forms, are necessarily *equitable* mortgages; even if such a subsequent mortgage be in the form of a legal conveyance, it can only convey an equitable estate, since the legal estate has already been conveyed away and is vested in the first mortgagee, A. This is the settled rule necessarily resulting from the English theory of mortgages. Again, if the legal owner of land creates a first mortgage upon it by depositing all his title deeds with A, A's interest is certainly an equitable mortgage; but since he is first in order of time, and possesses all the legal muniments of title, and has the right to call for the execution of an ordinary legal mortgage by conveyance in order to perfect his security, his position is plainly similar to that of a legal mortgagee.

<sup>1</sup> As illustrating the questions that may arise, see *Greene v. Warnick*, 64 N. Y. 220; *Clark v. Brown*, 3 Allen 509; *Walker v. Buffandeau*, 63 Cal. 312; *Utley v. Dunkelberger*, 86 Iowa 469, 53 N. W. 408.

<sup>2</sup> This particular question, which has given rise to a direct conflict of opinion, is more fully examined under the next head (*infra*, §§ 721-724).

<sup>3</sup> As illustrating the various questions that may arise, see *Jones v. Davis*, 121 Ala. 348, 25 South. 789; *Roberts v. Doan*, 180 Ill. 187, 54 N. E. 207; *Workingman's B. & S. Ass'n v. Williams* (Tenn. Ch. App.) 37 S. W. 1019; *Seeley v. Bacon* (N. J. Eq.) 34 Atl. 139, 3 Keener 387.

stated<sup>1</sup> that where one of two equities is intrinsically the superior, it is entitled to precedence;<sup>2</sup> and that an equitable interest in rem, such as that created by a mortgage, contract, trust, and the like, is superior to a mere voluntary interest, and to the general lien of a judgment. It would seem to be a general rule, at all events a correct deduction from settled principles, that where there is a prior general lien, embracing, among other things, a certain subject-matter, and a specific lien is subsequently created upon that same particular subject-matter, not voluntary, but arising from a new and valuable consideration, such subsequent specific lien would be intrinsically superior, and therefore entitled to the precedence, at least if it were acquired by the holder thereof without notice of the prior general encumbrance. This rule is certainly recognized by some decisions.<sup>3</sup>

**§ 721. Prior Unrecorded Mortgage Superior to Subsequent Docketed Judgment.**—The most important question under this head which has come before the American courts relates to the respective claims arising from a prior specific and a subsequent general lien. The doctrine is certainly established as part of the equity jurisprudence, and rests upon the solid basis of principle, that prior equitable interests in rem, including equitable liens upon specific parcels of land, have priority of right over the general statutory lien of subsequent docketed judgments, although the latter is legal in its nature. Judgment creditors are not “purchasers” within the meaning of the recording acts, and unless expressly put upon the same footing, they do not obtain the benefit which a subsequent purchaser does by a prior record. The equitable doctrine is, that a judgment and the legal lien of its docket binds only the actual interest of the judgment debtor, and is subject to all existing equities which are valid as against such debtor.<sup>1</sup> It follows, as a neces-

<sup>1</sup> See *supra*, §§ 684–692.

<sup>2</sup> As an illustration, in *Rice v. Rice*, 2 Drew. 73, H. & B. 23, 1 Scott 334, a vendor conveyed, without receiving the purchase price, but indorsing the receipt of it upon the deed, and delivering the title deeds to the grantee. This grantee then made an equitable mortgage by a deposit of the title deeds, and absconded. Held, that the vendor's lien for the unpaid price, although prior in time, must be postponed to the equitable mortgage, because the possession of the title deeds and the *fact of the indorsement of the receipt on the deed* made the mortgagee's equity superior. See, also, *Hume v. Dixon*, 37 Ohio St. 66.

<sup>3</sup> In *re Hamilton's, etc., Ironworks*, L. R. 12 Ch. Div. 707, 710, 711; *Wales v. Sammis*, 120 Iowa 293, 94 N. W. 840. See post, § 1253.

<sup>1</sup> *Beavan v. Earl of Oxford*, 6 De Gex. M. & G. 507, 517, 518; *Brown v. Pierce*, 7 Wall. 205, H. & B. 326, 1 Scott 708 (judgment lien inferior to equity of grantor whose deed was obtained through duress); *Galway v. Mulchow*, 7 Neb. 285 (inferior to mortgagee's equity to reform mortgage so as to include land omitted by mistake); *Harney v. First Nat. Bank*, 52 N. J. Eq. 697, 29 Atl.

sary consequence, that, unless prevented by express statutory provisions, the equitable lien of a prior unrecorded mortgage given upon a specific parcel of land should have precedence over the general legal lien of a subsequent docketed judgment against the owner of the mortgaged premises, even when the judgment was recovered and docketed without any notice to the judgment creditor of such outstanding mortgage. This rule, which is plainly correct, as being in accordance with principle and preserving the consistency and symmetry of the equity jurisprudence, has been adopted and firmly established by the courts in many of the states.<sup>2</sup> The general rule, wherever it thus prevails, is still susceptible to modifications and exceptions depending upon special circumstances.

**§ 722. Contrary Rule, in Some States, that the Subsequent Judgment has Precedence.**—A very different rule prevails in many states, in which it is settled that the lien of a subsequent docketed judgment prevails over that of a prior unrecorded mortgage or other prior equitable interest or lien not recorded, of which the judgment creditor had no notice at the time of recovering and docketing his judgment. This result is reached, in some of the states, from express provisions of the statutes; in others from what was deemed to be the necessary interpretation of the statutory language; and in a few, as it would seem, from an intentional rejection of the equitable doctrine which lies at the basis of the whole subject.<sup>1</sup>

**§ 723. Subsequent Judgment Creditor had Notice of the Prior Unrecorded Mortgage.**—In a large number of the states, including many of those which have adopted the rule as laid down in the last paragraph, if the judgment creditor has notice of a prior unrecorded mortgage, or other outstanding equitable lien upon or interest in the land of his judgment debtor, at the time when he recovers the judgment, the lien arising from the docket of his judgment is postponed to such prior encumbrance or equity.<sup>1</sup> In a few of the

221 (inferior to partners' equity to have lands applied to partnership debts); *Hampson v. Edelen*, 2 Har. & J. 64, 3 Am. Dec. 530, 2 Scott 708 (inferior to interest of vendee); *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670 (inferior to equity of parol vendee in possession). As to priority of grantor's lien, see post, § 1253.

<sup>2</sup> Prior unrecorded mortgage: *Vaughn v. Schmalsde*, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411. Prior unrecorded deed: *Columbia Bk. v. Jacobs*, 10 Mich. 349, 81 Am. Dec. 792.

<sup>1</sup> *Holliday v. Franklin Bank*, 16 Ohio 533; *Massey v. Westcott*, 40 Ill. 160; *Harney v. First Nat. Bank*, 52 N. J. Eq. 697, 29 Atl. 221; *Meeker v. Warren* (N. J. Eq.) 57 Atl. 421.

<sup>1</sup> *Priest v. Rice*, 1 Pick. 164, 11 Am. Dec. 156; *A. R. Beck Lumber Co. v. Rupp*, 188 Ill. 502, 59 N. E. 429, 80 Am. St. Rep. 190 (possession of tenant as notice); *Wahn v. Fall*, 55 Nebr. 547, 76 N. W. 13, 70 Am. St. Rep. 397 (possession by vendee notice of his equity).

states, however, the statutory language is regarded as so peremptory, and the necessity of recording so complete, that even notice of an unrecorded mortgage or other subsisting equity, given to the creditor before the recovery and docketing of his judgment, is held not to affect the priority of the lien acquired by the subsequent docketed judgment.<sup>2</sup>

**§ 724. Between Prior Unrecorded Mortgage and a Purchase at Execution Sale under Subsequent Judgment.**—Having thus examined the relations subsisting between unrecorded mortgages and other equities, and the *liens* of subsequent docketed judgments, it remains to consider the effects produced by a judicial sale under such judgments. Several varying conditions of fact may exist, and conflicting rules concerning them prevail to a certain extent, in different states. In the first place, it is a rule universally adopted, and in strict accordance with the general doctrine concerning bona fide purchasers as established in this country, that in all the instances heretofore mentioned, even where the *lien* of a subsequent judgment is subject to an outstanding equity, if the judgment is enforced at a sheriff's sale, and the judgment debtor's land is sold and conveyed to a bona fide purchaser for a valuable consideration and without any notice, he stands in the position of any other bona fide purchaser who acquires the legal estate, and takes the land free from any unrecorded mortgage and any outstanding equitable interest or lien *not appearing of record* which might have affected the land in the hands of the judgment debtor. In other words, such a purchaser at the execution sale is to all intents a purchaser in good faith for a valuable consideration and without notice, as is described in the succeeding section.<sup>1</sup> Secondly, where the lien of the subsequent judgment is, in pursuance of the settled doctrine of equity, subject to a prior unrecorded mortgage or other outstanding equity, even without notice thereof to the judgment creditor, and also where the lien of the judgment is thus subject because

<sup>2</sup> *Mayham v. Coombs*, 14 Ohio 428.

<sup>1</sup> *Draper v. Bryson*, 26 Mo. 108, 69 Am. Dec. 483; *Ayres v. Duprey*, 27 Tex. 593, 605, 86 Am. Dec. 657. In many states it is held that if the judgment creditor purchases at the sheriff's sale without notice, takes a conveyance, and has his bid applied in partial or full discharge of his judgment, he becomes a bona fide purchaser for value without notice, with all the rights belonging to that position: *Riley v. Martinelli*, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209, 21 L. R. A. 33; *Pugh v. Highley*, 152 Ind. 252, 53 N. E. 171, 71 Am. St. Rep. 327, 44 L. R. A. 392. But this conclusion is clearly inconsistent with the settled doctrine concerning the nature of the "valuable consideration" which entitles a purchaser to the rights of a bona fide purchaser, and has been rejected by many decisions: *Hacker v. White*, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. Rep. 945; *Williams v. Hollingsworth*, 1 Strob. Eq. (S. Car.) 103, 47 Am. Dec. 527.

the judgment creditor had received notice before its recovery, if the judgment is enforced, and the land is sold and conveyed to a purchaser who has duly received notice of the prior unrecorded mortgage or other subsisting equity, the inferiority of the judgment *lien* still remains and attaches to the conveyance which is the result of that lien. The purchaser under these circumstances is not a bona fide purchaser; he takes the *land* subject to the same encumbrances and equities which affected the lien of the docketed judgment.<sup>2</sup> Thirdly, wherever, in pursuance of the rule adopted in many states, the lien of a subsequent judgment is paramount to that of a prior unrecorded mortgage and to any outstanding equitable interest not of record, if the judgment is enforced and the land sold and conveyed to a purchaser *who has received notice* of the prior encumbrances or equities, the superiority of the lien still continues and attaches to the conveyance. The purchaser holds the land free from all such claims not of record, on the ground that when a right has once been vested and made absolute, it cannot be divested or defeated by any mere notice. The judgment creditor having obtained a complete and fixed right, any notice which he might afterwards receive could not affect that right; nor would it be affected by a transfer to a purchaser having notice.<sup>3</sup>

§ 725. **Purchase-money Mortgages.**—Another very important instance in this country, of intrinsic superiority, is that of the purchase-money mortgage. A mortgage to secure the purchase-money of land, given at the same time with the deed of conveyance, or in pursuance of agreement as a part of the same transaction, has precedence, so far as it is a charge upon the particular parcel of land, over judgments and other debts of the mortgagor.<sup>1</sup> It is a familiar rule in those states where the common-law dower exists that such a mortgage, although not executed by the wife, takes precedence over her dower right in the same land.<sup>2</sup> The statutes of some states give a purchase-money mortgage precedence over a previous judgment recovered against the mortgagor.<sup>3</sup> . . . Even in the absence of any statute, and upon the general principles of equity, a purchase-money mortgage given at the same time as the deed, or as a part of the same transaction, has precedence over any prior general lien, such as that of a prior judgment against the

<sup>1</sup> Moyer v. Hinman, 13 N. Y. 180, 2 Keener, 344; Ogden v. Haven, 24 Ill. 57; Murphy v. Green, 120 Ala. 112, 22 South. 112.

<sup>2</sup> Lusk v. Reel, 36 Fla. 418, 18 South. 582, 51 Am. St. Rep. 32; Wallace v. Campbell, 54 Tex. 87. See post, § 754.

<sup>3</sup> In many states this is expressly enacted by statute.

<sup>4</sup> Clark v. Munroe, 14 Mass. 351; Frederick v. Emig, 186 Ill. 319, 59 N. E. 883, 78 Am. St. Rep. 233.

<sup>5</sup> Hopler v. Cutler (N. J. Eq.), 34 Atl. 746.

mortgagor.<sup>4</sup> The same equitable rule applies in like manner to a mortgage given by the grantee to a third person, as security for money loaned for the purpose of being used, and which is actually used, in paying the purchase price.<sup>5</sup> . . . The purchase-money mortgage not only thus takes precedence of a prior judgment, but it also cuts off or prevents the attachment of any other lien upon the premises which might otherwise have affected them.<sup>6</sup>

**§ 726. Other Illustrations.**—In addition to these most important questions of priority between different equitable liens, there may be many other particular instances in which a subsequent interest is intrinsically superior, or an earlier one intrinsically inferior, so as to determine the precedence between them. . . . Fraud inhering in a prior mortgage, encumbrance, or other apparent claim will, of course, postpone it to a subsequent valid lien.<sup>1</sup> . . . The priority among liens may also be fixed by express agreement among the parties at the time they are created, so as even to follow them sometimes into the hands of an assignee.<sup>2</sup>

**§ 727. III. A Subsequent Equity Protected by the Legal Title.**—The case to be considered is not that merely of an equitable interest held by A, and a subsequent conveyance of the legal estate to B, in which the latter's superior right would be a simple application of the doctrine concerning bona fide purchase for a valuable consideration. The subject to be examined assumes the existence of successive equities held by different persons, equal in their nature, and acquired in such a manner that, having regard to these interests alone, the priority of right among them would depend upon their order of time. Under these circumstances, it is assumed that one of the parties acquires, in some manner, the legal title in addition to his equity. The settled doctrine is, that if a second or other subsequent holder, who would otherwise be postponed to the earlier ones, obtains the legal estate, or acquires the best right to

<sup>4</sup>Roane v. Baker, 120 Ill. 308, 11 N. E. 246; Weil v. Casey, 125 N. C. 356, 34 S. E. 506, 74 Am. St. Rep. 644; New Jersey B. L. & Inv. Co. v. Bachelor, 54 N. J. Eq. 600, 35 Atl. 745.

<sup>5</sup>Adams v. Hill, 29 N. H. 202; Rogers v. Tucker, 94 Mo. 346, 7 S. W. 414; New Jersey B. L. & Inv. Co. v. Bachelor, 54 N. J. Eq. 600, 35 Atl. 745.

<sup>6</sup>Superior to vendee's mortgage made and recorded prior to the passing of title to him: Demeter v. Wilcox, 115 Mo. 634, 22 S. W. 613, 37 Am. St. Rep. 422; see ante, § 658. Superior to mechanics' lien: Strong v. Van Deursen, 23 N. J. Eq. 369. Superior to homestead right: Austin v. Underwood, 37 Ill. 438, 87 Am. Dec. 254; Roby v. Bismarck Nat. Bank, 4 N. Dak. 166, 59 N. W. 719, 50 Am. St. Rep. 633.

<sup>1</sup>Eggeman v. Eggeman, 37 Mich. 436; Hooper v. Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262.

<sup>2</sup>Hopler v. Cutler (N. J. Eq.), 34 Atl. 746. See Loewen v. Forsee (Mo.), 35 S. W. 1138.

call for the legal estate, he thereby secures an advantage which entitles him to a priority.<sup>1</sup> It is absolutely essential, however, that he should have acquired his *equitable* interest without any notice of the prior claims, and that his subsequent procurement of the legal estate should be free from fraud and from undue negligence.<sup>2</sup> Several illustrations are placed in the foot-note.<sup>3</sup>

§ 728. **Legal Estate Obtained from a Trustee.**—Such being the general rule, there are special circumstances in which the acquisition of the legal estate, even without notice, will not confer a priority. Thus it seems now to be settled by the most recent English decisions that where the legal estate is vested in a trustee, and the holder of a subsequent equitable interest, even without notice of the prior equities, obtains a conveyance of the legal estate from the trustee, which would of itself be a breach of the trust, provided the conveyance is not so made as to constitute himself a bona fide purchaser from the trustee for a valuable consideration and without notice, he does not thereby acquire a precedence over the existing equities which are prior in time, because the act is necessarily a breach of trust.<sup>1</sup> . . .

§ 729. **Legal Estate Obtained after Notice of a Prior Equity.**—One further question remains to be examined. It has already been stated as an essential part of the general rule that the subsequent equitable lien or other interest must be completely acquired, and of course the consideration upon which it is founded fully parted with, without notice of any prior equity, in order that the holder may be protected by getting the legal estate. The question is, whether the legal estate must also be obtained before any notice is received of the prior equity. One particular case involving this question, but depending upon special reasons, is well settled. If a person becomes holder in good faith of an equitable interest without notice of an existing trust, and afterwards, upon receiving

<sup>1</sup>In this country the practical examples of this rule would generally, if not always, be instances of bona fide purchase for a valuable consideration, and governed by the doctrine on that subject; but the rule does not require such a state of facts. In other words, the rule does not require that the one who protects himself by getting the legal estate should be in all respects a bona fide purchaser of that estate for a valuable consideration and without notice. The rights of mere priority and the rights of a bona fide purchase are by no means identical.

<sup>2</sup>Dueber Watch-Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455. See §§ 731, 732.

<sup>3</sup>Cave v. Cave, L. R. 15 Ch. Div. 639, 1 Scott 517, Ames Trusts 311; Fitzsimmons v. Ogden, 7 Cranch 2.

<sup>1</sup>Mumford v. Stohwasser, L. R. 18 Eq. 556, 562, 563; Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387. See Newman v. Newman, L. R. 28 Ch. Div. 674, Ames Trusts 335.

notice of the trust, he obtains a conveyance of the legal estate from the trustee, he cannot protect himself against, nor even assert priority over, the right of the cestui que trust, for his act has necessarily made him a party to a breach of trust.<sup>1</sup> Does the same rule extend to all instances of a legal estate procured by the holders of subsequent equitable mortgages, liens, and other equitable interests? There is some conflict, or apparent conflict, of opinion upon this point, but it all arises, I think, from the failure to distinguish mere rights of priority from the more complete rights of defense belonging to the bona fide purchaser for a valuable consideration. The confounding of these two entirely distinct and separate matters can only lead to a confusion of decisions and rules.<sup>2</sup> The very object of the rule is, that a person who has in good faith become holder of an equitable lien or interest, on discovering his danger of being postponed to an outstanding equity already in the hands of another, may protect himself and secure his priority by procuring the legal title. Principle and authority seem to be agreed that such a holder of a subsequent equity, who obtained it for value and without notice, may, even after notice of an earlier equity in favor of a third person, secure the advantage given by a conveyance of the legal estate, and thus establish his own priority. By this act the subsequent holder would become entitled to *priority*. The decisions and dicta which conflict with this conclusion will be found, upon examination, to be dealing with the alleged rights of a bona fide purchaser for value, and not with a mere question of priority.<sup>3</sup>

§ 730. IV. **Notice of Existing Equities.**—The doctrine is universally settled, and has already been fully examined, that, among successive interests wholly equitable, and between an earlier equity and a subsequent legal estate, even when purchased for a valuable consideration, the one who acquires the subsequent estate or interest with notice of the earlier equity in favor of another person will hold his acquisition subject and subordinate to such outstanding interest or right; in the contest for priority between the two claimants, he must be postponed; he takes his interest burdened with the obligation of recognizing, providing for, and carrying out the

<sup>1</sup> *Mumford v. Stohwasser*, L. R. 18 Eq. 556, 563; *Saunders v. Dehew*, 2 Vern. 271; *Ames Trusts* 289; *Sharpless v. Adams*, 32 Beav. 213; *Carter v. Carter*, 3 Kay & J. 617, 1 Scott 345.

<sup>2</sup> In a case of priorities merely, the court in a proper proceeding awards the subject-matter to the various claimants in the order of precedence; in the other case it refuses any relief to the plaintiff attempting to establish his title or claim against the bona fide purchaser.

<sup>3</sup> *Brace v. Duchess of Marlborough*, 2 P. Wms. 491, 1 Scott 330, 350; *Fitzsimmons v. Ogden*, 7 Cranch. 2, 18; *Dueber Watch-Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589, 57 N. E. 455; *Taylor v. Russell* (1891), 1 Ch. 9.

previous equity according to its nature. This subordinating effect is produced alike by every species of notice; actual notice proved by direct or inferred from circumstantial evidence, and constructive notice arising from information sufficient to put the prudent man upon an inquiry,—from possession, from the contents of title deeds, from his pendens, from registration, from information given to an agent, or from any other cause,—when once established, are followed by the same consequences upon the rights of the subsequent holder or purchaser. The doctrine applies to all successive equities in the same subject-matter, even where they are equal and governed by the order of time, and in such a case it does not disturb the priority already existing. Its special and more important application is where the subsequent equitable interest is superior in its intrinsic nature or from some incident, or where the subsequent interest is a legal estate, or where it possesses the advantage resulting from the compliance with some statutory requirement, so that the holder thereof would, in the absence of notice, be entitled to the preference; and its effect is then to defeat the precedence which would otherwise have existed, and to restore the priority from order of time among the successive claimants. By far the most frequent application of the doctrine in this country has been in connection with the recording acts, where the superiority of title or of lien otherwise acquired by the recording of a conveyance, mortgage, or other instrument has been held to be lost by reason of a notice of some outstanding unrecorded estate, title, mortgage, lien, or other equitable interest. As the doctrine of notice, both with respect to its nature and its effects, has already been discussed as fully as my limits will permit, I shall add nothing further here except a few cases placed in the foot-note by way of illustration.<sup>1</sup>

§ 731. V. **Effect of Fraud or Negligence upon Priorities.**—A priority which would otherwise have existed may also be disturbed and defeated by fraud or negligence in obtaining the interest or in failing to secure it properly. It is therefore a settled doctrine, that among successive equities otherwise equal, and also between a legal title or superior equitable interest earlier in time and a subsequent equity, the holder of the interest which is prior in time and would be prior in right may lose his precedence, and be postponed to the subsequent one by his own fraud or negligence, or that of his agent. The same rule applies to the holder of a subsequent legal estate who would otherwise have the precedence over

<sup>1</sup> Greaves v. Tofield, L. R. 14 Ch. D. 653, 1 Scott 235; School District v. Taylor, 19 Kan. 287; Durant v. Crowell, 97 N. C. 362, 2 S. E. 541. See ante, § 688.

a prior equitable interest; he may be postponed by reason of his neglect or fraud. While the general rule has been fully adopted by the American courts, the cases involving it are much less frequent in this country than in England, because almost every kind of interest in land is within the operation of the recording acts, and may be protected by a record. Most instances of laches, therefore, coming before our courts have arisen from a neglect to record an instrument, or to comply with the provisions of some statute analogous to that of recording.<sup>1</sup> The effects of negligence and want of diligence in postponing or even defeating the rights of an assignee of a thing in action, earlier in point of time, have already been described.<sup>2</sup> One instance which may be regarded as an example of fraud, although no *actual* fraudulent intent is essential, is, where a prior encumbrancer, upon inquiry being made by a person interested, denies the existence of his lien, or where the owner of the legal estate denies his title under like circumstances, or even keeps silent and does not announce his title to an innocent person who is making expenditures, or advancing money upon the supposed security of the property.<sup>3</sup>

§ 732. **Effect of Gross Negligence.**—It is now settled by the English decisions, after some fluctuation, that where a person has become entitled to the precedence because he has acquired the *prior* legal estate, or because, being subsequent in time, he has fortified his equity by obtaining the legal estate, he cannot lose such precedence and be postponed, unless by himself or by his agent he is chargeable with fraud or with gross negligence; mere neglect will not suffice.<sup>1</sup> Whether the same requirement of gross negligence applies to successive interests which are all purely equitable, or whether mere negligence is sufficient to affect the priority, [was long] unsettled by the decisions.<sup>2</sup>

<sup>1</sup> Effects of fraud: See ante, § 686; *Eggeman v. Eggeman*, 37 Mich. 436; *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262. Effects of negligence: See ante, § 687; *City Council of Charleston v. Ryan*, 22 S. C. 339, 53 Am. Rep. 713; *Heyder v. Excelsior B. & L. Ass'n*, 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49, H. & B. 70.

<sup>2</sup> See ante, §§ 698-702.

<sup>3</sup> These instances may undoubtedly be referred to the doctrine of equitable estoppel; but the notion of constructive fraud lies at the foundation of that doctrine: *Stronge v. Hawkes*, 4 De Gex, M. & G. 186, 4 De Gex & J. 632; *Lee v. Munroe*, 7 Cranch, 366, 368; *Fay v. Valentine*, 12 Pick. 40, 22 Am. Dec. 397. See, also, ante, § 686; post, § 818.

<sup>1</sup> See *Hewitt v. Loosemore*, 9 Hare 449; *Northern Counties, etc., Co. v. Whipp*, L. R. 26 Ch. Div. 482, 1 Scott 353; *In re Ingham* (1893), 1 Ch. 352; *Lloyd's Bkg. Co. v. Jones*, L. R. 29 Ch. D. 221, *Ames Trusts* 272.

<sup>2</sup> The case of *Farrand v. Yorkshire Banking Co.*, L. R. 40 Ch. Div. 182, settled this question in England. It was there held that gross negligence

§ 733. **Assignments of Mortgages—Rights of Priority Depending upon.**—An assignment of a mortgage is, throughout this country, with the exception, perhaps, of a very few states, a mere transfer of a thing in action, and the assignee can acquire no higher rights as against the mortgagor than those possessed by the original mortgagee.<sup>1</sup> Such assignments are generally within the operation of the recording statutes, either in express terms, or by a judicial interpretation of the statutory language, holding that an assignment is a species of conveyance.<sup>2</sup> The record of an assignment, like that of any other instrument, does not operate as a notice retrospectively; it is not therefore a constructive notice of the assignee's interest to the mortgagor, so as to destroy the effect of payments made by him, without actual notice to the mortgagee;<sup>3</sup> but a mortgagor who obtains a discharge from the mortgagee *without any payment* is not protected as against the assignee.<sup>4</sup>

§ 734. **Unrecorded Assignment—Rights of the Assignee.**—When a mortgage duly recorded is assigned, that original record continues to be constructive notice of the existence of the lien to all subsequent purchasers and encumbrancers of the same premises, and the assignee does not lose his precedence over such parties by a failure

amounting to fraud is not necessary, but that negligence such as an omission to obtain possession of or to make inquiries concerning the title deeds may be sufficient. See, also, *Taylor v. London and County Banking Co.* (1901), 2 Ch. 231, 260; *In re Castell & Brown* (1898), 1 Ch. 315.

<sup>1</sup> *Wanzer v. Cary*, 76 N. Y. 526. See *Merchants' Bank v. Weill*, 163 N. Y. 486, 79 Am. St. Rep. 605, 57 N. E. 749. In the absence of notice of the assignment to the mortgagor, or of facts putting him on inquiry as to an assignment, he is protected in payments subsequently made by him to the mortgagee: See ante, § 702; *Towner v. McClelland*, 110 Ill. 542. It is not usually necessary for the mortgagor's protection that he should require the production of the mortgage or bond or other non-negotiable instrument secured thereby at the time of making payment: *Vann v. Marbury*, 100 Ala. 438, 14 South. 273, 46 Am. St. Rep. 70, 23 L. R. A. 325. Assignment of negotiable note secured by mortgage; see ante, § 704, note.

<sup>2</sup> *Westbrook v. Gleason*, 79 N. Y. 23; *Swasey v. Emerson*, 168 Mass. 118, 46 N. E. 428, 60 Am. St. Rep. 368; *Citizens' State Bank v. Julian*, 153 Ind. 655, 55 N. E. 1007. It necessarily follows that when a mortgage is assigned, and the assignment is not recorded, and the mortgagee afterwards satisfies the mortgage of record, the lien is thereby destroyed as against a bona fide purchaser or encumbrancer, without notice, of the premises: *Bowling v. Cook*, 39 Iowa 200; *Lewis v. Kirk*, 28 Kan. 497, 42 Am. Rep. 173.

<sup>3</sup> See ante, § 657: *Murphy v. Barnard*, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340; *Williams v. Keyes*, 90 Mich. 290, 51 N. W. 520, 30 Am. St. Rep. 438.

<sup>4</sup> See *Larned v. Donovan*, 155 N. Y. 341, 49 N. E. 942. The record of an assignment is, however, a constructive notice to subsequent purchasers and encumbrancers of the mortgaged premises: *Robbins v. Larsen*, 69 Minn. 436, 72 N. W. 456, 65 Am. St. Rep. 572.

to record the assignment.<sup>1</sup> A conveyance of the mortgaged premises to the mortgagee after he had assigned the mortgage would not work a merger, but the rights of the assignee would remain unaffected.<sup>2</sup> If the mortgagee, having thus acquired title after the assignment, should in turn convey the mortgaged premises to a third person without knowledge nor actual notice of the assignment, it is held that such grantee would be charged with constructive notice and would take subject to the rights of the assignee, because the records would give him notice of the facts sufficient to put a reasonable man upon an inquiry, and a due inquiry would necessarily lead to a discovery of the real situation.<sup>3</sup> If a second mortgagee, with notice of a prior unrecorded mortgage, assigns to a bona fide purchaser without notice, but the prior mortgage is recorded before the assignment, the assignee would fail to secure a precedence.<sup>4</sup> Since a mortgage is a thing in action, an assignee, even without notice, will be subject to all outstanding equities and claims in favor of third persons which were existing and available against the assignor, wherever the general doctrine prevails that all assignments of things in action are subject to such latent equities.<sup>5</sup> Questions of priority might arise between successive assignees of the same mortgage from the same assignor. If an assignment is perfected by an actual delivery of the mortgage itself and of the bond, note, or other evidence of debt secured, even though it be not recorded, a subsequent assignee would necessarily be put upon an inquiry, and chargeable with constructive notice, and could obtain no precedence even by a first record.<sup>6</sup> In other instances where the assignments are equal, made for a valuable consideration and without notice, if all were unrecorded, the earliest in order of time prevails; the assignee for value and without notice who first obtains a record secures thereby the title; a record when made is a constructive notice to all subsequent assignees of the same mortgage.<sup>7</sup>

<sup>1</sup> *Wilson v. Campbell*, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544.

<sup>2</sup> *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532.

<sup>3</sup> *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532; *Demuth v. Old Town Bank*, 85 Md. 315, 37 Atl. 266, 60 Am. St. Rep. 322.

<sup>4</sup> *Westbrook v. Gleason*, 79 N. Y. 23; *Butler v. Bank of Mazepa*, 94 Wis. 351, 68 N. W. 998. See *Decker v. Boice*, 83 N. Y. 215.

<sup>5</sup> See ante, §§ 708, 709, 714: *Conover v. Van Mater*, 18 N. J. Eq. 481; *Kernohan v. Durham*, 48 Oh. St. 1, 26 N. E. 982, 12 L. R. A. 41. See contra, ante, § 715: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401.

<sup>6</sup> See *Miller Brewing Co. v. Manasse*, 99 Wis. 99, 67 Am. St. Rep. 854, 74 N. W. 535; *Kernohan v. Durham*, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41.

<sup>7</sup> *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29; *Himrod v. Gilman*, 147 Ill. 293, 35 N. E. 373, affirming 44 Ill. App. 516.

## SECTION VII.

## CONCERNING BONA FIDE PURCHASE FOR A VALUABLE CONSIDERATION AND WITHOUT NOTICE.

## ANALYSIS.

- § 735. General meaning and scope of the doctrine.
- § 736. General effect of the recording acts.
- §§ 737-744. *First.* Rationale of the doctrine.
  - § 738. Its purely equitable origin, nature, and operation.
  - § 739. It is not a rule of property or of title.
- §§ 740, 741. General extent and limits; kinds of estates protected.
- §§ 742, 743. *Phillips v. Phillips*; formula of Lord Westbury.
- §§ 745-762. *Second.* What constitutes a bona fide purchase.
  - §§ 746-751. 1. The valuable consideration.
    - § 747. 1. What is a valuable consideration; illustrations.
  - §§ 748, 749. Antecedent debts, securing or satisfying; giving time, etc.
  - §§ 750, 751. 2. Payment; effect of part payment; giving security.
  - §§ 752-761. 11. Absence of notice.
    - § 753. 1. Effects of notice in general.
    - § 754. Second purchase *without* notice from first purchaser *with*, also second purchaser *with* from first purchaser *without* notice.
    - § 755. 2. Time of giving notice; English and American rules.
    - § 756. Effect of notice to a bona fide purchaser of an equitable interest before he obtains a deed of the legal estate.
  - §§ 757-761. 3. Recording in connection with notice.
    - § 758. Interest under a prior unrecorded instrument.
    - § 759. Requisites to protection from the first record by a subsequent purchaser.
    - § 760. Purchaser in good faith with apparent record title from a grantor charged with notice of a prior unrecorded conveyance.
    - § 761. Break in the record title; when purchaser is still charged with notice of a prior instrument.
    - § 762. 111. Good faith.
- §§ 763-778. *Third.* Effects of a bona fide purchase as a defense.
  - § 764. 1. Suits by holder of legal estate under the auxiliary jurisdiction of equity, discovery, etc.
  - § 765. Same; exceptions and limitations.
- §§ 766-774. 11. Suits by holder of an equitable estate or interest against a purchaser of the legal estate.
  - § 767. Legal estate acquired by the original purchase.
  - § 768. Purchaser first of an equitable interest subsequently acquires the legal estate; *tabula in naufragio*.
  - § 769. Extent and limits of this rule.
  - § 770. Purchaser acquires the legal estate from a trustee.
- §§ 771-773. This rule as applied in the United States.
  - § 774. Other instances; purchase at execution sale; purchase of things in action.
- §§ 775-778. 111. Suits by holders of an "equity."
  - § 776. For relief against accident or mistake.
  - §§ 777, 778. For relief from fraud, upon creditors, or between parties.

§§ 779-783. *Fourth.* Affirmative relief to a bona fide purchaser.

§ 779. General rule.

§§ 780-782. Illustrations.

§ 783. Removing a cloud from title.

§§ 784, 785. *Fifth.* Mode and form of the defense.

§ 784. The pleadings.

§ 785. Necessary allegations and proofs.

§ 735. **General Meaning, Scope, and Limitations of the Doctrine.**

—This section will deal with the equitable doctrine of bona fide purchase for a valuable consideration and without notice. The doctrine in its original form was exclusively equitable. Questions of priority cannot, as has already been stated, arise between successive adverse estates which are purely legal, and therefore cannot, independently of statutory permission, come before courts of law for settlement; such estates must stand or fall upon their own intrinsic merits and validity.<sup>1</sup> A contest concerning priority or precedence properly so called can only exist where one of the two claimants holds a legal and the other an equitable title, or where both hold equitable titles, and must therefore belong to the original exclusive jurisdiction of equity. Courts of equity do not have jurisdiction of suits brought merely to establish one purely legal title against another and conflicting legal title.<sup>2</sup> In the United States these elementary notions seem to have been sometimes overlooked, and the courts sometimes seem to have extended the doctrine of bona fide purchase farther than the acknowledged principles of equity would warrant. The tendency is marked and strong in the courts of many states, even when acting as tribunals of law, to make the doctrine a legal *rule of property*, and to apply it alike to persons who have acquired either a legal or an equitable title to chattels and things in action, as well as to those who have acquired any legal or equitable interest in land. A *subsequent* holder, even for a valuable consideration and without notice, has certainly no higher right than a prior holder equally innocent and with an equally meritorious ownership. American courts seem sometimes to have acted upon exactly the opposite notion, and to have assumed that a *subsequent* title was necessarily the better one. When the original legal owner has done or omitted something by which it was made possible that his property should come into the hands of a bona fide holder by an apparently

<sup>1</sup> See *supra*, § 679.

<sup>2</sup> Such suits are often called "ejectment bills." See vol. 1, §§ 176-178; *Cole v. Mette*, 65 Ark. 503, 47 S. W. 407, 67 Am. St. Rep. 945. Equity has *concurrent* jurisdiction in certain classes of suits dealing with legal titles alone, as suits for dower. In regard to them the doctrine of bona fide purchase is applied in a special and peculiar manner.

valid title, it may be just to regard him as estopped from asserting his ownership, and thus to protect the subsequent purchaser. But when the prior legal owner is wholly innocent, has done and omitted nothing, it certainly transcends, even if it does not violate, the principles of equity to sustain the claims of a subsequent and even bona fide purchaser.<sup>3</sup>

§ 736. **Effects of the Recording Acts.**—The most extensive and important change, however, in the United States has been produced by the recording acts. They have extended the doctrine of bona fide purchase to all conveyances and mortgages, and often to executory contracts, and to every instrument which can create, transfer, or affect legal estates or equitable interests, liens, and encumbrances, and have therefore brought it within the cognizance of the courts of law as a rule for determining the validity of legal titles. The greatest diversity is found in the statutory provisions of the various states, and a consequent diversity prevails among the local rules which define the resulting rights of the bona fide purchaser. In some they are conferred upon judgment creditors, upon all purchasers at execution sales, and even upon those who have secured the first record although charged with notice. It would be impossible, within any reasonable limits, to state all the results of these statutes, and to formulate all the special rules which have been derived from them in the different states. So far as the doctrine of bona fide purchase has been made a rule of *law*, either by the operation of the recording acts or by the independent action of the courts, it does not properly come within the scope of a treatise upon equity jurisprudence. I shall therefore explain the principles of the equitable doctrine as established in the United States and in England, and describe the general applications and modifications made necessary by the common American system of registration. The minute effects growing out of the differing types of legislation must be passed over, except so far as they have been mentioned in the foregoing sections upon notice and priorities. The subject will be discussed under the following heads: 1. Rationale of the doctrine; 2. What constitutes a bona fide purchase; 3. Effects of the doctrine as a defense; 4. Cases in which courts of equity give affirmative relief; 5. How the bona fide purchaser must avail himself of his position.

§ 737. **First. Rationale of the Doctrine.** . . .

§ 738. **Equitable Origin, Nature, and Operation of the Doctrine.**

—The protection given to the bona fide purchaser had its origin exclusively in equity, and is based entirely upon the fact that the

<sup>3</sup> See *MacGregor v. Thompson*, 7 Tex. Civ. App. 32, 26 S. W. 649; *Williams v. Rand*, 9 Tex. Civ. App. 631, 30 S. W. 509.

jurisdiction of equity is ancillary and supplemental to that of the law, and upon the conception that a court of chancery acts solely upon the *conscience* of litigant parties, by compelling the defendant to do what, and only what, in foro conscientiae he is bound to do. If the relations between the two contestants standing before the court of chancery are such that, in equity and good conscience, the plaintiff ought to obtain the aid which he asks, and the defendant ought to do or suffer what is demanded of him, then the court will interfere and grant the relief; if the relations are not of this character, then the court will withhold its hand, and will leave the parties to the operation of strict legal rules, and to the remedies conferred by the legal tribunals. All equitable principles and doctrines *had their origin in this conception*, however much it may sometimes be overlooked by courts at present in the administration of the doctrines which have been thus established. The protection given to the bona fide purchaser simply means, therefore, that from the relations subsisting between the two parties, especially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so, and the parties must be left to their pure legal rights, liabilities, and remedies; the court will not aid either against the other. That this is the true rationale is shown by an overwhelming weight of authority. In the vast majority of cases the protection is only given to a defendant, and as a consequence the doctrine itself is commonly spoken of, and ordinarily treated, as essentially a matter of defense. The very few instances in which affirmative relief is granted to the bona fide purchasers are exceptional; they rest upon their special facts, and arise from the fraud of the defendant against whom the relief is awarded.<sup>1</sup>

**§ 739. The Doctrine is not a Rule of Property or of Title.**—In applying the doctrine of bona fide purchase—and this is the very *essence* of the doctrine—equity does not intend to *pass upon and decide the merits of the two litigant parties*; it does not decide that the title of the defendant is valid, and therefore intrinsically the better and superior to that of the plaintiff. On the contrary, the protection given by way of defense theoretically assumes *that the title of the purchaser is really defective* as against that of his opponent; at all events, the court of equity wholly ignores the question of validity, declines to examine into the intrinsic merits of the two claims, and bases its action upon entirely different considerations.<sup>1</sup>

<sup>1</sup> See *infra*, §§ 770-783.

<sup>1</sup> This truth, so fundamental, yet so often overlooked, was well stated by Lord Eldon in the celebrated case of *Wallwyn v. Lee*, 9 Ves. 24, 33, 34.

If a plaintiff, holding some equitable interest of right, sues to enforce it against a defendant who has in good faith obtained the legal estate, the court simply refuses to interfere and do an unconscientious act by depriving him of the advantage accompanying such an innocent acquisition of the legal title. On the other hand, if the plaintiff is the legal owner, and sues to obtain some equitable relief against a defendant who is the innocent holder of some equitable estate or interest, the court in like manner simply refuses to do an unconscientious act by giving any aid to the plaintiff, but, without at all deciding or even examining the intrinsic merits of their claims, leaves him to whatever rights would be recognized and whatever reliefs granted by a court of law. It is thus seen that the doctrine of bona fide purchaser as administered by equity is not in any sense a rule of property.<sup>2</sup> Whenever the relations between the litigants are of such a nature, and the suit is of such a kind, that a court of equity is called upon to decide, and must decide, the merits of the controversy, and determine the validity and sufficiency of the opposing titles or claims, then it does not admit the defense of bona fide purchase as effectual and conclusive. The foregoing description shows that it is wholly unwarranted by the settled principles of equity for a court to sustain and enforce the subsequent legal estate acquired by A in any kind of property or thing in action, merely because he is a bona fide purchaser for a valuable consideration without notice, against the prior legal and equally innocent owner, B, or even to sustain A's defense as a bona fide purchaser in a suit brought by B.

§ 740. **General Extent and Limits—Kinds of Estates Protected.**—Such being the rationale of the doctrine, it remains to consider the general extent and limits of its operation; and this chiefly involves the question, To what kinds of estates held by the bona fide purchaser will it be applied? It has never been doubted that the protection will be extended to the defendant in a suit brought by the holder of a prior equitable estate or interest against the subsequent bona fide purchaser of a legal estate, who acquired such estate at the time of and by means of his original purchase.<sup>1</sup> It is also generally extended, in the similar suit by the holder of a prior equitable interest, to a defendant who, having originally been the bona fide purchaser of a subsequent equity, has afterwards obtained

<sup>2</sup> Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250; Knoblock v. Mueller, 123 Ill. 554, 17 N. E. 696, H. & B. 80; United States v. Detroit Timber & L. Co. (C. C. A.), 131 Fed. 668, 678.

<sup>1</sup> Post, § 767; Dickerson v. Tillinghamast, 4 Paige 215, 25 Am. Dec. 528; Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250; Home Sav. & State Bank v. Peoria Agricultural & Trotting Soc., 206 Ill. 9, 69 N. E. 17, 99 Am. St. Rep. 132.

an outstanding legal estate.<sup>2</sup> The vital question is, whether the defense will also avail on behalf of a defendant who has acquired an equitable interest merely, against a plaintiff who holds a prior legal estate; and upon this question, decisions and judicial dicta, especially the earlier ones, are in direct conflict.<sup>3</sup> . . .

§ 741. **Same—When the Doctrine does not Apply.**—Notwithstanding the numerous authorities referred to in the preceding paragraph, and the sweeping expressions of judicial opinion, it is certain that the doctrine is subject to limitation; it is settled that in some classes of suits a defendant having only an equitable interest cannot be protected by his position as a bona fide purchaser. Thus in an action for foreclosure brought by a prior legal mortgagee, holding, of course, the legal estate, against a subsequent equitable mortgagee, the fact that the latter acquired his equitable interest in good faith for a valuable consideration and without notice is no defense.<sup>1</sup> It is also a well-established and even familiar rule that in the numerous cases between the holders of successive and equal equities, where the holder of a prior equitable interest is seeking to establish or enforce his right, the defense of bona fide purchase will not avail for the holder of a subsequent equity against whom the suit is brought.<sup>2</sup>

§ 742. **Phillips v. Phillips—Formula of Lord Westbury.**—Amidst this apparent conflict and real uncertainty, various judges had attempted to find a mode of reconciliation, and to formulate a rule which should furnish a universal criterion. It remained, however, for Lord Westbury to bring order out of the confusion, and by his remarkable grasp of principles and wonderful power of generalization to reduce the doctrine into a universal formula, so accurate and comprehensive that it has been taken by most subsequent text-writers as the basis of their discussions, and has been accepted by subsequent judges almost without exception.<sup>1</sup> This formula groups the cases in which the protection of a bona fide purchaser is given to defendants into the three following classes: 1. Where an application is made to the auxiliary jurisdiction of the court by the possessor of

<sup>1</sup> See post, §§ 768–773, and cases cited.

<sup>2</sup> See e. g., *Larowe v. Beam*, 10 Ohio St. 498; *Butler v. Douglas*, 3 Fed. 612; *Basset v. Nosworthy*, Cas. t. Finch, 102, 2 Lead. Cas. Eq. 1, 1 Scott 340, 498; *Collyer v. Finch*, 5 H. L. Cas. 905, per Lord Cranworth.

<sup>3</sup> *Finch v. Shaw*, 19 Beav. 500; affirmed sub nom. *Colyer v. Finch*, 5 H. L. Cas. 905.

*Phillips v. Phillips*, 4 De Gex, F. & J. 208, 215, 216, H. & B. 72, Ames Trusts 331, 1 Scott 333, 511, per Lord Westbury. See ante, §§ 414, 682.

*Phillips v. Phillips*, 4 De Gex, F. & J. 208, 1 Scott 333, 511, H. & B. 72, Ames Trusts 331; *Peabody v. Fenton*, 3 Barb. Ch. 451, 464; *Knoblock v. Mueller*, 123 Ill. 554, 17 N. E. 696, H. & B. 80.

a *legal* title; as against a purchaser for value without notice, a court of equity *gives no assistance to the legal title*. The term "auxiliary jurisdiction" is here used in a sense somewhat broader than that commonly given to it by text-writers. To this first rule there are, however, certain most important exceptions. It does not apply to suits in which the court exercises a *legal* jurisdiction concurrently with courts of law, nor to suits in which the court gives to a holder of the legal title some equitable remedy belonging to its *exclusive general* jurisdiction.<sup>2</sup> 2. Where the plaintiff, holding an *equitable* estate or interest, is seeking to enforce it against a purchaser of the legal title, including those cases where there are several successive purchasers or encumbrancers, all equitable, and the defendant who is later in time has obtained an outstanding legal estate, or some other legal advantage, often called the "*tabula in naufragio*."<sup>3</sup> 3. Where the plaintiff is seeking to enforce some "equity" as distinguished from an equitable estate, as the reformation of a deed on account of mistake, or the setting it aside on the ground of fraud.<sup>4</sup>

§ 744. The explanation which I have thus endeavored to give of the true theory of the doctrine concerning bona fide purchase seemed to be necessary to any accurate understanding of its applications and effects. This original equitable theory has, however, been modified in some important features by the statutory system of registration which prevails in all the American states. Before proceeding to describe the application and effects of the doctrine, it is proper to ascertain who the bona fide purchaser for valuable consideration is.

§ 745. **Second. What Constitutes a Bona Fide Purchase.**—Under this head I shall state those essential elements which enter into the equitable conception and determine the peculiar position of a bona fide purchaser, so that he may come within the operation of the doctrine. The nature of the thing purchased, whether land, chattels, or securities, and of the estate acquired, whether absolute or qualified, legal or equitable, is not a part of *this* conception; it belongs wholly to the effects—the protection—produced by the purchase. The doctrine in its most general form is, that a purchaser in good faith for a valuable consideration and without notice of the prior adverse claims is protected against certain suits brought by the holders of such claims.<sup>1</sup> The essential elements which constitute

<sup>2</sup> See post, §§ 764, 765.

<sup>3</sup> See post, §§ 766-774.

<sup>4</sup> See post, §§ 775-778.

<sup>1</sup> *Basset v. Nosworthy*, 2 Lead. Cas. Eq., 4th Am. ed. 32-42, 73-96, 1 Scott 340, 498; *The Elmbank*, 72 Fed. 610; *Martin v. Bowen*, 51 N. J. Eq. 452, 26 Atl. 823.

a bona fide purchase are therefore three,—a valuable consideration, the absence of notice, and the presence of good faith.<sup>2</sup> It will be practically the more convenient and advantageous to examine these three elements separately and in the order named, although in strict theory the presence of notice may perhaps be regarded as only an indication of the want of good faith. If a person goes on and purchases after notice of another's rights, he may be considered as acting in bad faith, and this is undoubtedly the basis upon which the whole doctrine of notice and its effects was rested by the early decisions.<sup>3</sup> Practically, however, notice, especially as affected by the recording acts, is an independent element, and should be discussed by itself.

§ 746. **I. The Valuable Consideration.**—The discussion of this subject involves two inquiries, which are entirely distinct, and which should not be confounded: 1. What is a valuable consideration; and 2. Its payment. These two questions are to be examined, not at all in their general and abstract meaning, but wholly as they affect the condition of a bona fide purchaser. The first has no relation to the general law of contracts and binding promises; the second, in like manner, deals with the act and time of payment only in connection with the doctrine of bona fide purchase.

§ 747. **1. What is Valuable Consideration.**—What constitutes a valuable consideration within the meaning of the doctrine which gives protection to a bona fide purchaser? No person who has acquired title as a mere volunteer, whether by gift, devise, inheritance, post-nuptial settlement on wife or child, or otherwise, can thereby be a bona fide purchaser.<sup>1</sup> Valuable consideration means, and necessarily requires under every form and kind of purchase, something of actual value, capable, in estimation of the law, of pecuniary measurement,—parting with money or money's worth, or an actual change of the purchaser's legal position for the worse.<sup>2</sup> The amount of the purchase, if otherwise in good faith, is not generally material.<sup>3</sup> As examples of what clearly amount to valuable consideration are the following: A contemporaneous advance or

<sup>2</sup> *United States v. California & O. Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458; *Knoblock v. Mueller*, 123 Ill. 554, 17 N. E. 696, H. & B. 80.

<sup>3</sup> See ante, § 592.

<sup>1</sup> *Toole v. Toole*, 107 Ga. 472, 33 S. E. 686; *Ten Eyck v. Whitbeck*, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809.

<sup>2</sup> *Brown v. Welch*, 18 Ill. 343, 68 Am. Dec. 549; *The Elmbank*, 72 Fed. 610; *Ten Eyck v. Whitbeck*, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809.

<sup>3</sup> *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62. A grossly small and inadequate consideration may show bad faith, or put on inquiry; see ante, § 600; *Dunn v. Barnum*, 51 Fed. 355; *Ten Eyck v. Whitbeck*, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809.

loan of money, or a sale, transfer, or exchange of property, made at the time of the purchase or execution of the instrument;<sup>4</sup> the surrender or relinquishment of an existing legal right, or the assumption of a new legal obligation which is in its nature irrevocable.<sup>5</sup> Whether this species of valuable consideration embraces the discharge, or the extension of the time of payment, of an antecedent debt, is a question upon which the authorities are conflicting, and its examination is postponed to the succeeding paragraphs. In general, however, it is requisite that the money be paid or advanced, the property transferred, the right surrendered, or the obligation assumed, at the time of the conveyance, and as a part of the transaction, in order that it may be the valuable consideration which can protect the purchaser.

§ 748. **Antecedent Debts.**—Whether an antecedent debt can ever be a valuable consideration has been denied by able courts; but this general subject has been further complicated by the various modes in which such a debt may be dealt with,—secured, discharged, postponed, and the like,—and the various questions thence arising which have caused the greatest conflict of judicial opinion. In very many, and perhaps a majority, of the states it is settled that the transferee of negotiable paper as security for an antecedent debt may be a bona fide holder by the law merchant; but this rule cannot be a precedent in determining the meaning of valuable consideration within the equitable doctrine of bona fide purchase.<sup>1</sup>

§ 749. **Security for or Satisfaction of an Antecedent Debt.**—A conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a bona fide purchaser, since the creditor parts with no value, surrenders no right, and places himself in no worse legal position than before. The rule has been settled, therefore, in very many of the states, that such a transfer is not made upon a valuable consideration, within the meaning of the doctrine of bona fide purchase.<sup>1</sup> In some states, on the contrary, even the securing a pre-existing debt is

<sup>4</sup> Bowen v. Prout, 52 Ill. 354 (exchange of lands); Aden v. City of Vallejo, 139 Cal. 165, 72 Pac. 905 (reservation in deed).

<sup>5</sup> Westbrook v. Gleason, 79 N. Y. 23, 36.

<sup>1</sup>The rule concerning the transfer of negotiable instruments has been thus settled avowedly in the interests of commerce and mercantile business; these reasons do not apply to the purchase of land and chattels and non-negotiable securities. In some of the states, therefore, where it has been applied to negotiable paper, it has been rejected with respect to other conveyances and transfers.

<sup>1</sup>The Elmbank, 72 Fed. 610; Adams v. Vanderbeck, 148 Ind. 92, 45 N. E. 645, 47 N. E. 24, 62 Am. St. Rep. 497; Yong v. Guy, 87 N. Y. 462, 1 Ames Eq. Jur. 297.

held to be a valuable consideration.\* Whether the complete satisfaction or discharge or the definite forbearance of an antecedent debt, without the surrender or cancellation of any written security by the creditor, will be a valuable consideration is a question to which the courts of different states have given conflicting answers; but the affirmative seems to be supported by the numerical weight of authority.<sup>3</sup> Some legal rules ought to be settled in accordance with the results of experience and the dictates of policy, rather than by a compliance with the deductions of a strict logic. To hold that a conveyance as *security* for an antecedent debt is made without, but that one in *satisfaction* of such a debt is made with, a valuable consideration, when the fact of satisfaction is not evidenced by any act of the creditor, but depends upon mere verbal testimony, is opening the door wide for the easy admission of fraud. It leaves the rights of third persons to depend upon the coloring given to a past transaction by the verbal testimony of witnesses, after the event has disclosed to the creditor the form and nature in which it is for his interest to picture the transaction. A rule which renders it so easy for an interested party to defeat the rights of others is clearly impolitic.<sup>4</sup> It sometimes happens that rules which are the most logically correct are the ones which most readily admit the possibility of fraud and injustice. It is very generally settled, in accordance with principle, that an assignment made by a debtor in trust for the benefit of his creditors is not a conveyance upon valuable consideration, and neither the assignee nor the creditors thereby become bona fide purchasers.<sup>5</sup> The questions concerning judgment creditors and purchasers at execution sales upon judgments have already been examined in the preceding section.<sup>6</sup>

§ 750. 2. **Payment of the Consideration.**—Not only must there be a valuable consideration in fact, but it must be paid before notice of the prior claim. Notice after the agreement for the purchase is made, but before any payment, will destroy the character

<sup>3</sup> Chaffee v. Lumber Co., 43 Neb. 224, 61 N. W. 637, 47 Am. St. Rep. 753.

<sup>4</sup> State Bank v. Frame, 112 Mo. 502, 20 S. W. 620. Contra, see Sleeper v. Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377. Extension of time: See Randolph v. Webb, 116 Ala. 135, 22 South. 550; Southerland v. Fremont, 107 N. C. 565, 12 S. E. 237. If the creditor actually surrenders up or cancels some written security, such act becomes a valuable consideration, and makes him a bona fide purchaser: Franklin Sav. Bank v. Taylor, 53 Fed. 854, 4 C. C. A. 55, 9 U. S. App. 406.

<sup>5</sup> Gest v. Packwood, 34 Fed. 368.

<sup>6</sup> Clark v. Flint, 22 Pick. 231, 33 Am. Dec. 733; Martin v. Bowen, 51 N. J. Eq. 452, 26 Atl. 823; Brown v. Brabb, 67 Mich. 17, 34 N. W. 403, 11 Am. St. Rep. 549.

\* See supra, §§ 721-724.

Smithson - Me 59 C. B. 231, (book 20)

of bona fide purchaser.<sup>1</sup> The rule is settled in England that the entire price or consideration must have been paid before any notice, and the same completeness of payment is required by some American decisions.<sup>2</sup> Since the modes of transferring and dealing with real property in this country are so different from those which prevail in England, the same equitable principles which guided the English judges have led the courts in many of the states, under a change of circumstances, to adopt a necessary modification of this rule; otherwise great injustice might be wrought. These courts have held that where a part only of the price or consideration has been paid before notice, either the defendant should be entitled to the position and protection of a bona fide purchaser pro tanto; or that the plaintiff should be permitted to enforce his claim to the whole land only upon condition of his doing equity by refunding to the defendant the amount already paid before receiving the notice;<sup>3</sup> or even, when the plaintiff has been guilty of laches, or the defendant has perhaps made valuable improvements, that the land itself should remain free from any claim on the plaintiff's part, and his remedy should be confined to a recovery of the portion of purchase-money which was still unpaid when notice was given.<sup>4</sup>

§ 751. **Payment must be Actual.**—It is further settled that there must be *actual payment* before any notice, or, what in law is tantamount to actual payment, a transfer of property or things in action, or an absolute change of the purchaser's legal position for the worse, or the assumption by him of some new, irrevocable legal obligation. It follows, therefore, that his own promise, contract, bond, covenant, bond and mortgage, or other non-negotiable security for the price, will not render the party a bona fide purchaser, nor entitle him to protection; for upon failure of the consideration he can be relieved from such obligations in equity even if not at law.<sup>1</sup> Payment of actual cash, however, is not indispensable. The assumption of an irrevocable obligation, from which the purchaser could not be relieved even by a failure of the consideration arising

<sup>1</sup> Wood v. Mann, 1 Sum. 506, 578, Fed. Cas. Nos. 17,951, 17,952, 1 Scott 507; Hayden v. Charter Oak Driving Park, 63 Conn. 142, 27 Atl. 232; Trice v. Comstock, 121 Fed. 620, 61 L. R. A. 176.

<sup>2</sup> Tourville v. Naish, 3 P. Wms. 307; Wood v. Mann, 1 Sum. 506, 578, Fed. Cas. Nos. 17,951, 17,952, 1 Scott 507; Dugan v. Vattier, 3 Blackf. (Ind.) 245, 25 Am. Dec. 105. See, also, post, § 755.

<sup>3</sup> Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29.

<sup>4</sup> Frost v. Beekman, 1 Johns. Ch. 288, 1 Scott 531; Youst v. Martin, 3 Serg. & R. 423; Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380; Durst v. Daugherty, 81 Tex. 650, 17 S. W. 388.

<sup>1</sup> Jewett v. Palmer, 7 Johns. Ch. 65, 68, 11 Am. Dec. 401; Hayden v. Charter Oak Driving Park, 63 Conn. 142, 27 Atl. 232; Wyeth v. Renz-Bowles Co., 66 S. W. 825 (Ky.)

from the title being invalid, may be sufficient.<sup>2</sup> The absolute transfer of notes, bonds, or other securities made by a third person will have the same effect.

§ 752. **II. Absence of Notice.**—The nature of notice, its various forms, and its general effects have been considered in the preceding sections. The present inquiry only concerns its special effects upon a bona fide purchase, the time when it must be received in order that these effects may be produced, and the modifications and additions introduced by the recording acts. Since the doctrine of bona fide purchase requires the absence of notice,—a purchase for a valuable consideration and without notice,—the discussion of this negative element must chiefly consist of an affirmative statement of the consequences flowing from the presence of notice.

§ 753. **1. Effects of Notice.**—The rule is universal and elementary, that if a purchaser in any form receives notice of prior adverse rights in and to the same subject-matter, before he has completely acquired or perfected his own interests under the purchase, his position as bona fide purchaser is thereby destroyed, even though he may have paid a valuable consideration; on the other hand, notice given after his interests have been completely acquired or perfected produces no injurious effect.<sup>1</sup> Notice sufficient to prevent the purchase from being bona fide may inhere in the very form and kind of the conveyance itself. On this ground it is held by one group of authorities that a grantee *taking or holding* under a *quitclaim* deed cannot be a bona fide purchaser; but this conclusion is rejected by other decisions.<sup>2</sup>

<sup>1</sup> There are many forms of such obligation: 1. One of these occurs where the purchaser has given his own negotiable notes for the whole or a part of the price. Some of the cases seem to require that the note so given to the vendor should have been actually negotiated by him so as to cut off the maker's defense of a failure of the consideration: *Davis v. Ward*, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29; by others, it seems to be sufficient that such notes are given by the purchaser to the vendor, so that they *may* be negotiated and the defense cut off: *Partridge v. Chapman*, 81 Ill. 137; *Citizens' Bank v. Shaw* (N. Dak.), 84 N. W. 779. 2. Another form would be the undertaking by the purchaser to pay a debt due from the vendor to a third person, in such a manner that he was absolutely substituted as the debtor in the place of his vendor. See *Warren v. Wilder*, 114 N. Y. 215, 21 N. E. 159.

<sup>2</sup> See ante, §§ 200, 688, 740.

<sup>3</sup> Probably a majority of the adjudicated cases still support the view that a quitclaim deed is ipso facto notice of all defects in the title, and that a grantee thereunder can not claim to be a bona fide purchaser. The reasons for this view are ably presented in *American Mortgage Co. v. Hutchinson*, 19 Oreg. 334, 24 Pac. 515. See, also, *Parker v. Randolph*, 5 S. Dak. 549, 50 N. W. 772, 29 L. R. A. 33. On the other hand, in a number of jurisdictions it is held that there is no distinction in respect to the quality of imparting notice, between a quitclaim deed and any other form of conveyance: *Moelle*

**§ 754. Second Purchaser without Notice from First Purchaser with Notice—Second Purchaser with Notice from First Purchaser without.**—There are two special rules on the subject which have been settled since an early day; one being a mere application of the general doctrine, and the other a necessary inference from it. The first is, that if a second purchaser for value and without notice purchases from a first purchaser who is charged with notice, he thereby becomes a bona fide purchaser, and is entitled to protection. This statement may be generalized. If the title to land, having passed through successive grantees, and subject in the hands of each to prior outstanding equities, comes to a purchaser for value and without notice, it is at once freed from these equities; he obtains a valid title, and, with a single exception, the full power of disposition.<sup>1</sup> This exception is, that such a title cannot be conveyed, free from the prior equities, back to a former owner who was charged with notice. If A, holding a title affected with notice, conveys to B, a bona fide purchaser, and afterwards takes a reconveyance to himself, all the equities revive and attach to the land in his hands, since the doctrine requires not only valuable consideration and absence of notice, but also *good faith*.<sup>2</sup> The second rule is, that if a second purchaser with notice acquires title from a first purchaser who was without notice, and bona fide, he succeeds to all the rights of his immediate grantor. In fact, when land once comes, freed from equities, into the hands of a bona fide purchaser, he obtains

v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426; Wilhelm v. Wilken, 149 N. Y. 447, 44 N. E. 82, 52 Am. St. Rep. 743, 32 L. R. A. 370. By a third view, the effect of the quitclaim form of the deed is to put the grantee upon inquiry merely; the presumption of mala fides is not conclusive: United States v. California & O. Land Co., 49 Fed. 496, 505, 506, 7 U. S. App. 128, 1 C. C. A. 330, opinion of Hanford, D. J.; Schott v. Dosh, 49 Nebr. 187, 68 N. W. 346, 59 Am. St. Rep. 531. A large number of decisions, while adhering to the rule that a quitclaim deed implies notice to the grantee, seek to free the rule from the odium of technicality that is sometimes attributed to it, by making the "quitclaim" character of the deed depend not upon the presence or absence of technical words, but on the nature of the transaction as disclosed by construction of the instrument as a whole. If, from all the terms of the instrument, it is evident that it purports to convey a "chance of title," or the "speculative right, title and interest" of the grantor, as distinguished from the land itself, it is a quitclaim: Threadgill v. Bickerstaff, 87 Tex. 520, 29 S. W. 757.

<sup>1</sup> Wood v. Mann, 1 Sum. 506, 1 Scott 507; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772, H. & B. 92; Odum v. Riddick, 104 N. C. 515, 10 S. E. 609, 17 Am. St. Rep. 686, 7 L. R. A. 118; London v. Youmans, 31 S. C. 150, 9 S. E. 775, 17 Am. St. Rep. 17. For the same reason, a purchaser for value and without notice from a vendor who had himself acquired his title through fraud becomes bona fide free from the effects of the fraud: Zoeller v. Riley, 100 N. Y. 108, 2 N. E. 388, 53 Am. Rep. 157.

<sup>2</sup> Clark v. McNeal, 114 N. Y. 295, 21 N. E. 405, 11 Am. St. Rep. 638.

a complete *jus disponendi*, with the exception last above mentioned, and may transfer a perfect title even to volunteers.<sup>3</sup>

§ 755. 2. **Time of Giving Notice.**—We have seen that if notice is not given until after the purchaser has fully paid the consideration, received a conveyance, and completed his title, he is not in the least affected by it. If the notice is given before any or all of these steps have been taken, its consequences may be different, and are to be considered. The general rule is settled in England, that a bona fide purchase requires both the payment of all the price and the execution and delivery of the conveyance before the receipt of notice by the purchaser. In other words, if the party has received the conveyance before notice and paid the price after, or has paid the price before and received the conveyance after, in either instance the bona fides of the purchase is destroyed.<sup>1</sup> The American decisions are all agreed that a notice received before any of the purchase price has been paid, as well after the deed of conveyance has been delivered as before, will destroy the bona fides of the purchase, and many of the decisions, following the English rule, attribute the same effect to a notice after a payment of part, but before the whole is paid.<sup>2</sup> Such a payment is, by some authorities, a protection *pro tanto*.<sup>3</sup> Finally, the case of notice received after payments made, but before the deed of conveyance delivered, has given rise to a direct conflict of judicial opinion. One group of decisions adopts and lays down the English rule, that the purchase, under the circumstances, is not bona fide.<sup>4</sup>

<sup>1</sup> *Harrison v. Forth*, Prec. Ch. 51, 1 Scott 500; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772, H. & B. 92; *Peterson v. McCauley* (Tex. Civ. App.), 25 S. W. 826; *English v. Lindley*, 194 Ill. 181, 62 N. E. 522.

<sup>2</sup> *Wigg v. Wigg*, 1 Atk. 382, 384; *Sharpe v. Foy*, L. R. 4 Ch. 35, 37. The true meaning of this rule should not be misapprehended. If A purchases in the first instance a legal estate, the rule, of course, applies to him. If he purchases or acquires in the first instance an equitable estate, the rule also applies, *so far as that purchase is concerned*. For example, if A receives a first mortgage, which conveys the legal estate, and B takes a second mortgage of the same form purporting to convey the land, but which is, nevertheless, only an equitable conveyance, the rule requires that B should both have advanced the money and obtained the instrument before receiving notice, in order to be a bona fide purchaser. This rule, however, does not prevent a person who has thus acquired an equitable estate by conveyance in good faith, and who afterwards receives notice of a prior equity, from obtaining a conveyance of the outstanding legal estate and thus protecting himself from such equity. This latter power is recognized by an overwhelming array of English authority, and in fact forms one of the most frequent occasions for applying the doctrine of bona fide purchase.

<sup>3</sup> *Frost v. Beekman*, 1 Johns. Ch. 288, 1 Scott 531; *Baldwin v. Sager*, 70 Ill. 503; *Beck v. Uhrich*, 13 Pa. St. 633, 639, 53 Am. Dec. 507. See ante, § 750.

<sup>4</sup> See ante, § 750.

<sup>5</sup> *Doswell v. Buchanan*, 3 Leigh 365, 23 Am. Dec. 280.

Another line of cases holds in the most positive and general manner that where the purchaser has paid the consideration without notice of any prior claim, and after receiving notice he obtains a conveyance of the legal estate, he becomes to all intents a bona fide purchaser, and is entitled to all the protection belonging to that position. And this result seems to be applied without limitation to the acquisition of every kind of equitable estate, interest, or right.<sup>5</sup>

**§ 757. 3. Recording in Connection with Notice.—**

**§ 758. The Interest Under a Prior Unrecorded Conveyance.—**

Although the statutes pronounce unrecorded deeds and mortgages to be void as against subsequent purchasers who have complied with their provisions, yet in the practical operation of this legislation the right created by a prior unrecorded instrument is generally regarded as tantamount to an equitable interest, which may therefore be cut off by a subsequent purchaser or encumbrancer who is in all respects bona fide, and who has also obtained the first record.<sup>1</sup> The total effect of the system is thus twofold; it both enlarges the scope of the doctrine concerning bona fide purchase, by extending it to all those interests, legal or equitable, which are required or permitted to be recorded,<sup>2</sup> and it adds to the elements constituting a bona fide purchase the further requisite of a registration.

**§ 759. Requisites to the Protection from the First Record by a Subsequent Purchaser.—**It follows that, in order to obtain the benefit of the first recording, the subsequent purchase or encumbrance must be for a valuable consideration within the meaning of the general doctrine. Although the subsequent purchaser or encumbrancer had no notice of the unrecorded instrument, still, if he had not paid a valuable consideration, he would not gain

<sup>5</sup> Carroll v. Johnson, 2 Jones Eq. 120; Gibler v. Trimble, 14 Ohio 323. In Carroll v. Johnson, 2 Jones Eq. 120, the question was presented very sharply. Plaintiff held under a prior vendee, A; defendant was a subsequent vendee, who had paid part of the price before notice of A's claim; after receiving notice he obtained a conveyance from the original vendor, and was held to be a bona fide purchaser and protected. Certainly there is nothing in the settled principles of the doctrine concerning bona fide purchase which can sustain such a conclusion.

<sup>1</sup> See supra, §§ 655-664.

<sup>2</sup> Mullins v. Butte Hardware Co., 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430.

<sup>3</sup> This should not be taken to imply that the *jurisdiction* of equity has been enlarged by the recording acts; by virtue of them the doctrine has become enforceable, and is constantly enforced, by courts of law. See ante, § 680, and note.

any superior title or lien by his earlier registration.<sup>1</sup> Since the subsequent purchaser or encumbrancer must be bona fide, in order to claim the benefits of the first registration, it also follows that if such subsequent purchaser or encumbrancer was, in taking his conveyance, mortgage, or other instrument required or permitted to be recorded, chargeable with notice of a prior unrecorded conveyance or encumbrance, within the operation of the settled rules concerning the nature of notice and the time and mode of its reception, then he is not a bona fide purchaser, and does not obtain the statutory superiority of title or precedence of lien by his earliest registration. This construction was put upon the English statutes at an early day, and has been adopted in nearly all the American states.<sup>2</sup> These exceptional states are Ohio and North Carolina.

**§ 760. Purchaser in Good Faith with Apparent Record Title from a Grantor Charged with Notice of a Prior Unrecorded Conveyance.**—This rule is of very easy application under all ordinary circumstances between two consecutive deeds or mortgages where the second is recorded before the first. Circumstances may arise which present questions of great intricacy and difficulty, and occasion perhaps a conflict of judicial opinion. A grantee or mortgagee, being a purchaser in good faith, and holding a record title which appears perfect, may really have no title because a grantor or a mortgagor in the chain of title had knowledge, when he took the conveyance to himself, of a prior unrecorded deed or mort-

<sup>1</sup>*Burden of proof as to bona fide purchase:* Many cases hold that in a contest between the holder of the prior unrecorded conveyance and the subsequent grantee or mortgagee who has obtained a record, the burden of proof is on the latter of showing affirmatively that he paid a valuable consideration and had no notice; the record itself is not enough: *Bell v. Pleasant*, 145 Cal. 410, 78 Pac. 957, 104 Am. St. Rep. 61; *Seymour v. McKinstry*, 106 N. Y. 238, 12 N. E. 348, 14 N. E. 94. Many other cases hold contra, that the burden is on the one claiming under the unrecorded instrument to show either notice or a want of consideration: *Gratz v. L. & R. I. Co.*, 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393; *Anthony v. Wheeler*, 130 Ill. 128, 22 N. E. 494, 17 Am. St. Rep. 281, note. Probably the rule that has most authority and convenience in its favor is that the burden is on the one who claims protection as a bona fide purchaser to show the actual payment of a valuable consideration by evidence other than the recitals in his deed; but that when such payment is shown, the burden shifts, and it devolves upon the other party to prove that the subsequent purchaser took with notice, actual or constructive: *Lake v. Hancock*, 38 Fla. 53, 20 South. 811, 56 Am. St. Rep. 159; *Brown and Pollak I. Co. v. H.-B. I. Co.*, 105 Iowa 624, 75 N. W. 499, 67 Am. St. Rep. 319; *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863.

<sup>2</sup>*Le Neve v. Le Neve*, Amb. 436, 1 Scott 536; *Davis v. Earl of Strathmore*, 16 Ves. 419; *Galland v. Jackman*, 26 Cal. 79, 87, 85 Am. Dec. 172; *Tolbert v. Horton*, 31 Minn. 518, 18 N. W. 647. See supra, §§ 659, 660.

gage, which was, however, recorded before his own deed or mortgage to his own grantee. The essential facts giving rise to such a question are as follows: A gives a deed to B, which for a while is unrecorded. A subsequently conveys the same land to C, who pays a valuable consideration, but who has actual notice of B's prior deed, and C puts his deed on record first. B then, after the recording of C's deed, puts his own prior deed on record. After the record of B's deed, C conveys the land to D, who pays a valuable consideration, and has no *actual* notice of B's deed, and only the constructive notice given by the record. The facts might be varied by supposing mortgages in place of deeds. Which has the priority, B or D? There are earlier decisions which give the precedence to D.<sup>1</sup> These decisions, however, have been overruled in the same states in which they were given, and it is now settled by an overwhelming weight of authority that B would have the precedence over D. It is plain that C got no title by his first recording, because he had actual notice. When C conveyed to D, if B's deed had not then been on record, and D had put his own deed on record before B's deed was recorded, D would have obtained the title. But the record of B's deed prior to the conveyance to D cut off the latter's precedence, because D could claim nothing from C's *first* record, by reason of C's having actual notice.<sup>2</sup> This result evidently rests upon the fact—and there all of

<sup>1</sup> *Ely v. Wilcox*, 20 Wis. 523, 530, 91 Am. Dec. 436; *Morse v. Curtis*, 140 Mass. 112, 54 Am. Rep. 456. The reason given is, that D, on taking his deed or mortgage, and on making search, would find an unbroken chain of record title from himself through C up to A, and that he was under no obligation to go out of such a chain of record title, and search for deeds or mortgages to persons *by* or through whom he did not derive his title.

<sup>2</sup> *Flynt v. Arnold*, 2 Met. 619, Shaw, C. J.; *Parrish v. Mahany*, 10 S. Dak. 276, 73 N. W. 97, 66 Am. St. Rep. 715, reviewing the cases; s. c., 12 S. Dak. 278, 76 Am. St. Rep. 604, 81 N. W. 295 (burden of proof rests on D to show that C was a bona fide purchaser); opinion of Dixon, C. J., in *Fallass v. Pierce*, 30 Wis. 443: "Now, the reason why the purchaser from C, in the case above supposed, who buys after the recording of the prior deed to B from A, also the grantor of C, is bound to take notice of B's deed, or of the fact that the true title is or may be in B, is that such purchaser, in looking upon the statute, sees that B's prior and paramount title at common law is not to be divested, or his deed avoided, except upon the happening of three distinct events or contingencies, the absence of either of which will save the title of B, or prove fatal to that claimed by C, or which may be acquired by a purchaser from him. Those events or contingencies are: First, good faith in C, or the purchase by him without notice of the previous conveyance to B; second, the payment of a valuable consideration by C; and, third, the first recording of C's deed. The purchaser from C, looking upon the record, sees: First, the prior conveyance from A to B; and, second, the first recording of C's deed. Of these two facts the record informs him, but of the other two facts requisite, under the statute, to constitute valid title in C, as against the prior pur-

the decisions place it—that C took with an actual notice, and so could acquire no precedence by his earliest record. If this fact were otherwise, if C had no notice and first put his deed or mortgage upon record, he would then clearly obtain a perfect title or superior lien over B's prior but unrecorded deed. That being the case, and C having obtained an indefeasible title, if he should then convey to D, who had notice, the latter, by virtue of another settled rule, would succeed to *his* grantor's rights, and also acquire a like perfect title, as Chief Justice Shaw expressly states in the passage quoted. The same would be true in the succession of purchasers, each obtaining a record but each affected with notice. As soon as any one in the series purchases for value and without notice, and places his conveyance upon record, he acquires a title or lien secure as against the earliest unrecorded deed to B. This necessarily leads to another most important rule concerning notice in connection with recording, and the extent to which a record is constructive notice to subsequent purchasers and encumbrancers.

**§761. Break in the Record Title—When Purchaser is Still Charged with Notice of Prior Unrecorded Title.**<sup>1</sup>—

**§ 762. III. Good Faith Necessary.**—The most general statement of the doctrine describes the purchase as one made in good faith for a valuable consideration and without notice. It is true that in most instances the want of good faith consists in the completion of the purchase after the party has been charged with notice, for such conduct is regarded by equity as constructively fraudulent.<sup>1</sup> The requisite of good faith extends much further. A purchaser may part with a valuable consideration, may have no notice of any opposing claim, and yet lack the good faith which is essential to render his position a protection, and his defense available. It is an elementary doctrine, therefore, that, independently of notice and valuable consideration, any want of good faith on the purchaser's part, any inequitable conduct of his, such as fraud committed in the transaction against his own immediate vendor or grantor, or a participation in an intended fraud against the creditors of his vendor or grantor, or his obtaining the transfer

chaser, B, the record gives him no information. For knowledge of the other two facts, namely, the good faith of C, and valuable consideration paid by him, the purchaser from, or any one claiming title under, C, as against B or his grantees, must inquire elsewhere than by the record, and is bound, at the peril of his title, or of any right which can be granted by or claimed under C, to ascertain the existence of those facts."

<sup>1</sup> Page v. Waring, 76 N. Y. 463; Bright v. Buckman, 39 Fed. 243; Ford v. Unity Church Society, 120 Md. 498, 25 S. W. 394, 41 Am. St. Rep. 711, 23 L. R. A. 561. See supra, § 658.

<sup>1</sup> See ante, § 501.

through misrepresentations or concealments which are inequitable, although not amounting to positive fraud, and the like, will destroy the character of a bona fide purchase, and defeat the protection otherwise given to it. The party claiming to be a bona fide purchaser must come into a court of equity with absolutely clean hands.<sup>2</sup>

**§ 763. Third. Effects of a Bona Fide Purchase as a Defense.—**

**§ 764. I. Suits by Holder of the Legal Estate under the Auxiliary Jurisdiction of Equity.**—As cases falling within this class are very infrequent in the United States, no detailed discussion seems to be necessary. The kinds of suits embraced within the term "Auxiliary Jurisdiction" as here used are those for discovery proper, those for the delivery up of title deeds in connection with discovery, those to prevent a defendant in ejectment from setting up outstanding terms to defeat the action, and those to perpetuate testimony. It has been settled from an early day that no suit for a discovery can be maintained by the holder of the legal estate in order to assist him in maintaining his title against a bona fide purchaser of an equitable estate, further than as to facts relevant to the question whether the defendant had notice. After such purchaser has sufficiently denied notice, he will not be compelled to make discovery in aid of plaintiff's title.<sup>1</sup> It is equally well settled that the holder of the legal estate cannot compel a delivery up of the title deeds by a bona fide purchaser of an equitable estate—for example, an equitable mortgagee—even though some other relief, such as a foreclosure, may have been granted.<sup>2</sup> . . .

**§ 765. Exceptions and Limitations.**—There are, however, well-considered and authoritative decisions, in which the defense has not been permitted to prevail against the holder of the legal estate suing for relief. Although these decisions were not in express terms placed by the judges rendering them upon the ground now

<sup>2</sup> There are some old cases in which a so-called bona fide purchaser, through fraud or violence, was protected. See *Carter v. Carter*, 3 Kay & J. 617, 636, 637, 1 Scott 345; *Schneider v. Sellers* (Tex. Civ. App.), 81 S. W. 126.

<sup>1</sup> *Basset v. Nosworthy*, Cas. t. Finch, 102, 2 Lead. Cas. Eq. 1, 1 Scott 340, 498, per Lord Nottingham.

<sup>2</sup> *Wallwyn v. Lee*, 9 Ves. 24 (a life tenant mortgaged property in fee, fraudulently concealing the fact of his mere life estate and pretending to be owner in fee, and delivered the title deeds to the mortgagee. On his death the remainderman sued for a discovery and to have the deeds surrendered. Lord Eldon sustained the defense of bona fide purchase). Since the passage of the Judicature Act in England, these rules have been modified. The Chancery division of the High Court of Justice now have jurisdiction, on the application of the legal owner of title deeds, to order them to be delivered up by a purchaser for value without notice: *Ind, Coope & Co. v. Emmerson*, L. R. 12 App. Cas. 300.

mentioned, yet the general doctrine upon which they can alone be sustained and harmonized with the current of authority is that first explained by Lord Westbury, and already stated.<sup>1</sup> Where the suit is one belonging to the *concurrent* jurisdiction of equity and law, and is brought by the holder of a legal title to obtain a relief purely legal, the defense of bona fide purchase will not prevail, because it would not prevail at law, and to allow it in equity would simply be an abdication of its rightful jurisdiction by a court of equity, and a putting the plaintiff to the unnecessary expense and delay of a second action at law. Such suits especially are those brought to establish and recover dower, and those brought to establish tithes in England.<sup>2</sup> . . .

**§ 766. II. Suits by the Holder of an Equitable Estate or Interest against the Purchaser of the Legal Estate.**—This application of the doctrine includes not only purchasers who receive a conveyance of the legal estate at the time and as a part of their original and single purchase, but also those who, having originally purchased and acquired merely an equitable estate, afterwards obtain a conveyance of the outstanding legal title from the one in whom it was vested.<sup>1</sup> . . . The common occasions for a resort to the doctrine in England, where it is little affected by statutes of registration, are the cases of a prior equitable mortgage, and a subsequent sale and conveyance of the land by the mortgagor, he concealing the fact of such existing mortgage; of several consecutive mortgages of the same land, the later ones being taken in ignorance of the earlier; successive conveyances of his equitable estate by the same cestui que trust, the later purchaser being ignorant of the earlier transfer; and purchasers from a trustee in violation of his trust. In the United States the recording system has greatly modified the practical operation of the doctrine, since the defendant must generally show, in order to obtain protection, that he has recorded the instrument by which his title was acquired. With this additional feature, the instances most frequently coming before the American courts of equity are cases of a prior unrecorded mortgage and a subsequent recorded conveyance, a prior unrecorded and a subsequent recorded mortgage, a prior contract of sale and a subsequent recorded conveyance or mortgage, a prior vendor's lien or other equitable lien and a subsequent recorded conveyance or mortgage, and a conveyance by a trustee of land subject to a prior trust.

<sup>1</sup> See *supra*, § 742.

<sup>2</sup> *Williams v. Lambe*, 3 Brown Ch. 263, per Lord Thurlow (dower); *Collins v. Archer*, 1 Russ. & M. 284, per Sir John Leach (tithes), as explained by Lord Westbury in *Phillips v. Phillips*, 4 De Gex, F. & J. 208, 217.

<sup>3</sup> *United States v. Detroit Timber & L. Co.* (C. C. A.), 131 Fed. 668.

the trust being more often constructive or resulting than express. The case of a prior unrecorded deed purporting to convey the legal estate, and a subsequent recorded deed depending wholly upon the recording acts, does not belong to the equitable jurisdiction.<sup>2</sup>

**§ 767. Legal Estate Acquired by the Original Purchase.**—In the first place, it is the very central portion of the doctrine, to which all others have been additions, that where the defendant acquired the legal estate at the time and as a part of his original purchase, the fact of his purchase having been bona fide for value and without notice is a perfect defense in equity to any suit brought by the holder of a prior equitable estate, lien, encumbrance, or other interest, seeking either to establish and enforce his equitable estate, lien, or interest, or to obtain any other relief with respect thereto which can be given by a court of equity.<sup>1</sup> A mortgagee of land may be a bona fide purchaser within the meaning of the general doctrine. In some states every mortgagee, subsequent as well as prior, acquires the legal estate as against the mortgagor. In other states, although mortgages create only an equitable lien, they are expressly embraced within the recording acts.<sup>2</sup> The doctrine is also extended, in many of the states at least, to assignments of mortgages, the assignment being regarded as a “conveyance,” and the assignee as a “purchaser.” It should be observed that the effect of a bona fide purchase and a previous registration is applied not only between successive assignees of the mortgage from the same assignor, but also between such an assignee and a third person who has obtained some title, estate, or interest in or lien upon the mortgaged premises.<sup>3</sup>

**§ 768. Purchaser First of an Equitable Estate Subsequently Acquires the Legal Estate—Tabula in Naufragio.**—The protection is

<sup>2</sup> See ante, § 758.

<sup>1</sup> See *Pilcher v. Rawlins*, L. R. 7 Ch. 259, 268, 269, per James, L. J.; *Taylor v. London, etc., Bkg. Co.* (1901), 2 Ch. 231; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909 (an instructive case). In this country it must be remembered that the defense is only made available by the defendant's having first put his title deed upon record. Illustrations: Bona fide purchaser protected against constructive or resulting trust: *Warnock v. Harlow*, 96 Cal. 298, 31 Pac. 166, 31 Am. St. Rep. 209. Against equitable mortgage lien: *Lynch v. Murphy*, 161 U. S. 247, 16 Sup. Ct. 523. Against grantor's lien: see post, § 1253. Against express trust: *Learned v. Tritch*, 6 Colo. 432; see post, § 1048. Against the community property interest of a married woman: *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909. Against an unrecorded defeasance: *Frink v. Adams*, 36 N. J. Eq. 485; see post, § 1196. Against an unrecorded mortgage: *Saffold v. Wade's Ex'r*, 51 Ala. 216.

<sup>3</sup> *Barney v. McCarty*, 15 Iowa 510, 83 Am. Dec. 427; *Bigley v. Jones*, 114 Pa. St. 517, 7 Atl. 54.

<sup>2</sup> *Westbrook v. Gleason*, 79 N. Y. 23, 30, 31; *Economy Sav. Bank v. Gordon*, 90 Md. 486, 45 Atl. 176, 48 L. R. A. 63, H. & B. 19. See ante, §§ 733, 734.

not confined to a defendant who obtained the legal title contemporaneously with his original purchase. It includes those cases where, of several successive purchasers holding equitable estates, one of them later in time has obtained an outstanding legal estate. By far the most frequent instance in England is that of three or more successive mortgagees by conveyance, A, B, and C, where the first only would obtain the legal estate and the others an equitable one. If C, at the time of loaning his money and taking his mortgage, had no notice of B's prior encumbrance,—that is, was a bona fide purchaser of the equitable estate,—on afterwards learning of B's claim, he may buy in or procure a transfer of A's mortgage to himself, and may thus put himself in a position of perfect defense against the enforcement of B's lien; he thus acquires, in fact, not only a defense to any suit brought by B, but the absolute precedence over B in the satisfaction of the liens out of the mortgaged premises.<sup>1</sup> This particular application of the doctrine to successive mortgages is known in the English equity as the rule concerning "tacking,"—a rule which has been universally rejected by the courts of the various states.

**§ 770. The Purchaser Acquires the Legal Estate from a Trustee.**—The exception already mentioned is no less firmly settled. It has already been seen that one who obtains the legal title at the time of and as a part of his original purpose may acquire his estate from a trustee in derogation of the trust; but if he purchases in good faith and for value and without notice, he will be protected against the claims of the beneficiary, and hold the property free from the trust; and this effect extends in equity not only to conveyances of land, but to transfers of all kinds of personal property.<sup>1</sup> . . . When we pass to the other condition, of the purchaser of an equitable estate seeking to obtain protection by getting in the legal title, . . . the purchaser would not be protected; taking the legal estate from the trustee with notice of the existing trust, he would himself become a trustee. In this conclusion the decisions are unanimous, holding that the purchaser without notice and for value of an equitable estate cannot after notice protect himself and defeat the claims of the prior beneficial owner by getting a conveyance of the legal title from the trustee.<sup>2</sup>

**§ 771. The Rule as Applied in the United States.**—Although the

<sup>1</sup> *Brace v. Duchess of Marlborough*, 2 P. Wms. 491, 1 Scott, 330, 350; *Young v. Young*, L. R. 3 Eq. 801; *Bates v. Johnson*, Johns. 304, Ames Trusts 292.

<sup>2</sup> *Thorndike v. Hunt*, 3 De Gex & J. 563; *Smith v. Willard*, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313; *Coleman v. Dunton* (Me.), 58 Atl. 430.

*Saunders v. Dehew*, 2 Vern. 270, Ames Trusts 289; *Carter v. Carter*, 3 Kay & J. 617, 642, 1 Scott 345; *Taylor v. London and County Banking Co.* (1901) 2 Ch. 231.

modes of dealing with real property in the United States are entirely unlike those prevailing in England, and although the forms and species of the estates created and the circumstances of the transactions coming before the American judges are very different from those passed upon by the English chancellor, yet the courts of this country have recognized and adopted the foregoing doctrines, and have applied them when necessary to analogous cases, and under analogous conditions of fact. Indeed, the defense of bona fide purchase has sometimes been pushed to an extent, as it seems, not warranted by the established doctrines. It has been made to embrace not only those who have purchased equitable estates by means of conveyances purporting to transfer the whole title, but even to those who have intentionally acquired a mere *equitable interest or lien* by executory contract or otherwise, knowing that the legal estate was held by another, and who, upon afterwards discovering a prior and conflicting equity in favor of a third person, have taken a conveyance of that legal estate.

**§ 774. Other Instances—Purchaser at Execution Sale<sup>1</sup>—Assignee of Thing in Action.<sup>2</sup>—**

**§ 775. III. Suits by the Holder of an "Equity."**—In all the instances of the preceding subdivision, the plaintiff has held some equitable estate or interest in or lien upon the property, which he has sought to establish or enforce against the very subject-matter, either by perfecting his title and ownership, or by subjecting it to his encumbrance. The defense of bona fide purchase is not confined to such plaintiffs; it avails also against parties who claim to have some "equity" as distinguished from an equitable estate or interest,—parties, that is, who simply claim and are seeking to obtain some peculiar equitable remedy, such as reformation or cancellation, and the like. In this respect the defense is a protection alike to defendants who have a legal estate, and those who have purchased an equitable interest.<sup>1</sup>

**§ 776. Suits for Relief against Accident or Mistake.**—Thus, as against a subsequent bona fide purchaser for value, a court of equity will not relieve a prior party, on the ground of accident or mistake, by granting a remedy otherwise appropriate, such as setting aside a conveyance which had been executed by the plaintiff under a mistake or ignorance of his rights, or correcting an instrument executed under a mistake of fact.<sup>1</sup>

<sup>1</sup> See ante, § 724.

<sup>2</sup> See ante, §§ 701, 712, 713, 715.

**Phillips v. Phillips**, 4 De Gex, F. & J. 208, 218, H. & B. 72, Ames Trusts 331, 1 Scott 333, 351, per Lord Westbury.

<sup>1</sup> Bell v. Cundall, Amb. 102, 2 Scott 640; Snyder v. Grandstaff, 96 Va. 473,

**§ 777. Suits for Relief against Fraud upon Creditors or between Parties.**—The same is true with respect to the remedy of cancellation in suits to set aside conveyances or sales on account of fraud, either as against the creditors of the grantor or against the grantor himself. In the first case, where a conveyance has been made with intent to defraud creditors of the grantor, so that it would be voidable as against the grantee, but this grantee has in turn conveyed to a bona fide purchaser for value, the remedial rights of the creditors to have the original and fraudulent transfer set aside are then cut off, and the purchaser has a complete defense against their claims.<sup>1</sup> In the second case of fraud between the parties, where a conveyance has been obtained by the grantee's fraud, so that it would be set aside at the suit of the defrauded grantor, but the fraudulent grantee has in turn conveyed to a bona fide purchaser for value and without notice, the latter will take and hold the property free from all these equities, protected against the equitable remedies of the original defrauded owner.<sup>2</sup>

**§ 779. Fourth. Affirmative Relief to a Bona Fide Purchaser.**—The peculiar theory upon which equity acts toward a bona fide purchaser seems of necessity to imply that he should be a defendant. There are a few special circumstances, however, in which the theory, consistently followed out, requires that he should be aided by affirmative relief. When these circumstances are carefully examined, it will be found that the fraud, or what equity regards as fraud, of the party holding the prior title or interest, and against whom the affirmative relief is granted, is usually, if not always, the ground upon which the court interposes on behalf of the subsequent bona fide purchaser. The following are the important instances of such relief.

**§ 780. Same. Illustrations.**—When a person, A, having a prior title to property, and, knowing of such title, actively encourages another person, B, to buy the same property, concealing or not disclosing his own interest, but leading B to suppose that he is obtaining a valid title; or when, under the same circumstances, A being informed of B's intention, and being brought in contact with and made cognizant of the transaction, he simply keeps silence and permits B to buy,—in either case, B, being a bona fide purchaser for value and without notice, can compel a conveyance or release

70 Am. St. Rep. 863, 31 S. E. 647; Knoblock v. Mueller, 123 Ill. 554, 17 N. E. 696, H. & B. 80.

<sup>1</sup> Wood v. Mann, 1 Sum. 506, 1 Scott 507; Rowley v. Bigelow, 12 Pick. 307, 23 Am. Dec. 607; Zoeller v. Riley, 100 N. Y. 108, 2 N. E. 388, 53 Am. Rep. 157.

<sup>2</sup> Fish v. Benson, 71 Cal. 429, 12 Pac. 454; Indiana, etc., R. R. Co. v. Bird, 116 Ind. 217, 18, 18 N. E. 837, 9 Am. St. Rep. 842.

by A, of whatever estate, title, or interest the latter has. This relief will be granted, even though A was an infant or a married woman, since it does not depend upon a capacity to contract, but upon unrighteous conduct.<sup>1</sup>

§ 781. **Same. Illustration.**—The second important class of cases in which relief may be given to the bona fide purchaser is that of encumbrancers who have misled the purchaser by their words or acts. If a prior encumbrancer, upon being inquired of by one intending to purchase the property, deny the existence of his encumbrance, a court of equity will certainly grant affirmative relief to the bona fide purchaser who has thus been misled, either by postponing or by completely setting aside the encumbrance, as the circumstances may require.<sup>1</sup> Mere silence of an encumbrancer does not render him liable, where he has no connection with the transaction in which the purchaser is engaged, is not brought into any relations with the parties, and is not placed under any equitable obligation to make disclosure.

§ 782. **Same. Illustrations.**—In the two foregoing classes of cases the one who makes himself subject to an equity in favor of the bona fide purchaser has knowledge, or at least notice, of the title or encumbrance with respect to which he incurs liability, or against which the purchaser obtains relief; but the doctrine has been carried one step further. Where a person is actually ignorant of his own right in certain property, but under such circumstances that he might have had notice of it, or ought with reasonable care to have known of it, and he makes a representation untrue in fact to one intending to deal concerning the property, and this party, relying upon the statement, becomes a bona fide purchaser, equity will relieve such purchaser as against the one making the untrue representation, although no liability may be incurred at law.<sup>1</sup> The justice of this rule is plain, for equity often proceeds upon higher motives of morality than those which sometimes underlie legal rules. An innocent purchaser should not suffer loss from relying upon the untrue statements of another, although not made with an intent to mislead or deceive; in adjusting the loss between the two who are both innocent of an *intentional* wrong, equity properly lays it upon him who, by his acts or words, has made the loss possible.

§ 783. **Same. Removing a Cloud from a Title.**—In addition to the foregoing cases, all based upon an element of fraud, actual or

<sup>1</sup> *Savage v. Foster*, 9 Mod. 35, 1 Scott 576; *Hobbs v. Norton*, 1 Vern. 136, 1 Scott 554; *Sharpe v. Foy*, L. R. 4 Ch. 35.

<sup>1</sup> *Ibbotson v. Rhodes*, 2 Vern. 554.

<sup>2</sup> *Osborn v. Lea*, 9 Mod. 96.

<sup>1</sup> *Teasdale v. Teasdale*, Sel. Cas. Ch. 59, 1 Scott 558; *West v. Jones*, 1 Sim. N. S. 205, 207, 208; *Richardson v. Chickering*, 41 N. H. 380, 77 Am. Dec. 769.

constructive, affirmative relief may be granted to a bona fide purchaser, under some other circumstances, to remove a cloud upon his title; that is, to set aside judgments, mortgages, and the like, which are apparent liens, but in reality inoperative as against him, where the law would furnish no adequate remedy.<sup>1</sup>

§ 784. **Fifth. Mode and Form of the Defense.**—I shall conclude the discussion of this subject with a very brief consideration of the manner in which the bona fide purchaser may avail himself of the defense, the pleadings by which it may be set up, and the necessary contents of those pleadings. Under the system of procedure and pleading peculiar to a court of chancery, and in whatever tribunals that system is still preserved, the defense may be raised in three different manners. If the fact that the defendant is a bona fide purchaser for value without notice is clearly shown by the bill of complaint, the defendant may resort to a demurrer.<sup>1</sup> The usual mode of presenting the defense is by a plea; and if it contains the requisite averments, and they are established by evidence, the suit will be dismissed without the necessity of an answer on the merits. Instead of resorting to a "plea," the defendant may set out the facts constituting this defense in his answer.<sup>2</sup> If he neglects to put in a plea, and fails to insert the defense in his answer, he cannot raise it or avail himself of it in any subsequent stage of the suit.<sup>3</sup> Wherever the reformed system of procedure prevails, and all remedies, equitable as well as legal, are obtained through the single "civil action," the defense must, of course, be taken advantage of, either by demurrer or by answer. Unless the facts appear on the face of the complaint so as to permit a demurrer, there can be no doubt that in the new system as well as in the old the defense must be pleaded, in order to be available.<sup>4</sup>

§ 785. **Necessary Allegations.**—The allegations of the plea, or of the answer so far as it relates to this defense, must include all those particulars which, as has been shown, are necessary to constitute a bona fide purchase.<sup>1</sup> It should state the consideration, which must appear from the averment to be "valuable" within the meaning of the rules upon that subject, and should show that it has

<sup>1</sup> *Filley v. Duncan*, 1 Neb. 134, 93 Am. Dec. 337.

<sup>2</sup> *Mitford's Eq. Pl.* 199.

<sup>3</sup> *Rorer Iron Co. v. Trout*, 83 Va. 397, 419, 2 S. E. 713, 5 Am. St. Rep. 285.

<sup>4</sup> *Phillips v. Phillips*, 4 De Gex, F. & J. 208, H. & B. 72, *Ames Trusts* 331, 1 *Scott* 333, 511; *Rorer Iron Co. v. Trout*, 83 Va. 397, 419, 2 S. E. 713, 5 Am. St. Rep. 285.

<sup>5</sup> *Bossick Min. Co. v. Davis*, 11 Colo. 130, 17 Pac. 294; *Weber v. Rothchild*, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162.

<sup>6</sup> *Upton v. Betts*, 59 Nebr. 724, 82 N. W. 19; *Everts v. Agnes*, 4 Wis. 343, 65 Am. Dec. 314.

actually been paid, and not merely secured.<sup>2</sup> It should also deny notice in the fullest and clearest manner, and this denial is necessary, whether notice is charged in the complaint or not.<sup>3</sup> The denial must correspond with the settled rules upon the subject of notice, so as to bring the case within the operation of those rules.<sup>4</sup> . . . It should be remembered, however, in applying the doctrine, that it has been materially modified by the recording statutes. Whenever, as is commonly the case in this country, the defense of bona fide purchase arises in connection with recording, the true rule would seem to be as follows: The defendant must aver in his plea or answer that he has purchased an estate which comes within the protection of the recording acts; or in other words, that he has purchased an estate or interest, legal or equitable, of such a kind that the conveyance or instrument constituting his muniment of title *must* or *may* be recorded, so that by his recording it he can obtain the protection which the statutes give to such a bona fide purchaser who has first put his instrument of title on record.<sup>5</sup>

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## SECTION VIII.

### CONCERNING MERGER.

#### ANALYSIS.

- § 786. Origin and nature of the doctrine.
- §§ 787, 788. *First.* Merger of estates.
  - § 787. 1. The legal doctrine.
  - § 788. 11. The equitable doctrine.
- §§ 789-800. *Second.* Merger of charges.
  - § 790. 1. The owner of the property becomes entitled to the charge.
  - § 791. Same. Intention prevents a merger.
  - § 792. Time and mode of expressing the intention.
  - § 793. Conveyance to the mortgagee; assignment to the mortgagor or to his grantee.
  - § 794. Merger never prevented when fraud or wrong would result.
  - § 795. Life tenant becomes entitled to the charge.
  - § 796. 11. The owner of the land pays off a charge upon it.
  - § 797. Owner in fee personally liable for the debt pays off a charge.
  - § 798. Owner who is not liable for the debt pays off a charge.
  - § 799. Life tenant pays off a charge.
  - § 800. Priorities affected by merger.

<sup>2</sup> Upton v. Betts, 59 Nebr. 724, 82 N. W. 19; Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314. See ante, §§ 740-751.

<sup>3</sup> Upton v. Betts, 59 Nebr. 724, 82 N. W. 19; Rorer Iron Co. v. Trout, 83 Va. 307, 419, 2 S. E. 713, 5 Am. St. Rep. 285.

<sup>4</sup> See ante, §§ 752-756. McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. 892; Weber v. Rothchild, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162 (good faith should be averred).

<sup>5</sup> See ante, §§ 757-761.

§ 786. **Origin and Nature of the Doctrine.**—The applications of the equitable doctrine concerning merger, although resting upon the same general principle, are various in form, and some of them are of frequent occurrence in this country. The single principle from which the doctrine, in all its modes and forms of application, directly results is the fruitful maxim, that equity, in viewing the transactions of men, and in determining the rights and liabilities arising therefrom, looks at the *real intent* of the parties as constituting the essential substance, and not at the mere external form. In this method of viewing the affairs of mankind, equity often establishes different rules, creating different rights and duties from those which, under the same circumstances, prevail at law.<sup>1</sup> The equitable doctrine of merger is a striking illustration of this most righteous principle; and the whole discussion in fact consists in ascertaining when and how a merger, which would have been inevitable at law, will be prevented or not permitted in equity. The subject will be treated of under the two following divisions: 1. Merger of estates in the same land; 2. Merger of charges—liens and encumbrances—on the same land.

§ 787. **First. Merger of Estates.—I. The Legal Doctrine.**—The rule of the common law is well established, and of almost universal application, that where a greater and a less legal estate, held in the same right, meet in the same person, without any intermediate estate, a merger necessarily takes place. The lesser estate ceases to exist, being merged in the greater, which alone remains; as where a tenant for years acquires the fee, the term is merged. For the purposes of a merger, by the common law, every estate of freehold is greater than any term of years. Both estates, however, must be held in the same right, in order that this result may follow.<sup>1</sup> . . . The general doctrine is not confined to the union of two legal estates. Wherever, in like manner, a legal and an equal and co-extensive equitable estate, or a legal and a less equitable estate, meet in the same person, in either instance the equitable estate is merged at law, for the law regards the legal estate as the superior.<sup>2</sup> . . .

§ 788. **II. The Equitable Doctrine.**—Where the legal estate—for example, the fee—and an equal co-extensive equitable estate unite in the same person, the merger takes place in equity, in the absence of acts showing an intention to prevent it, as certainly and

<sup>1</sup> See ante, vol. 1, §§ 378–384. “Equity looks to the intent, rather than to the form.”

<sup>1</sup> Boykin v. Ancrum, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698; Forthman v. Deters, 99 Am. St. Rep. 145, 206 Ill. 159, 69 N. E. 97; 2 Black. Com. 157.

<sup>2</sup> Selby v. Alston, 3 Ves. 339; Welsh v. Phillips, 54 Ala. 309, 25 Am. Rep. 679.

as directly as at the law. Under these circumstances, merger is prima facie the equitable as well as legal rule.<sup>1</sup> . . . Where the owner of a legal estate—as, for example, the fee—acquires by purchase or in any other manner a lesser equitable estate not co-extensive and commensurate with his legal estate, or a lesser legal estate, a distinction exists; the merger, although taking place at law, does not necessarily take place in equity; indeed, it may be said that the leaning of equity is then against any merger, and that, prima facie, it does not result. The settled rule of equity is, that the intention of the one acquiring the two interests then controls. If this intention has been expressed by taking the transfer to a trustee, or by language inserted in the instrument of transfer, it will, of course, be followed. If the intention has not been thus expressed, it will be sought for and ascertained in all the circumstances of the transaction. If it appears from all these circumstances to be for the benefit of the party acquiring both interests that a merger shall not take place, but that the equitable or lesser estate shall be kept alive, then his intention that such a result should follow will be presumed, and equity will carry it into execution by preventing a merger, and by treating the equitable or lesser interest as subsisting, and by admitting all the consequences, for the protection of the party with respect to other matters, which necessarily result from the fact of the equitable estate being left in existence.<sup>2</sup> The same rule may be stated in a negative form. If from all the circumstances a merger would be disadvantageous to the party, then his intention that it should not result will be presumed and maintained. . . .

§ 789. **Second. Merger of Charges.**—Whenever the owner of the legal estate in land becomes also the holder of any charge directly resting upon it, the latter merges at law and disappears in the same manner as a lesser estate merges. The equitable doctrine preventing the merger under these circumstances is even stronger and more readily applied than in the case of two estates. The “charges” referred to include mortgages, and other liens and encumbrances, and sometimes easements, servitudes, and similar interests which are not rights of property or estates. There are two principal conditions of fact to be considered: 1. Where the legal owner of the property becomes, by bequest, devolution, or transfer, holder of the charge; 2. Where the owner of the property voluntarily pays off the charge.

<sup>1</sup> *Brydges v. Brydges*, 3 Ves. 125a; *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 475.

<sup>2</sup> *Sheehan v. Hamilton*, 2 Keyes 304, 4 Abb. App. 211; *Wettlaufer v. Ames* (Mich.), 94 N. W. 950; *Hudson, etc., Co. v. Glencoe, etc., Co.*, 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722.

§ 790. **I. The Owner of the Property Becomes Entitled to the Charge.**—When the owner of the fee becomes absolutely entitled in his own right to a charge or encumbrance upon the same land, with no intervening interest or lien, the charge will, at law, merge in the ownership and cease to exist. Under like circumstances a merger will take place in equity, where no intention to prevent it has been expressed, and none is implied from the circumstances and the interests of the party; and a presumption in such a case arises in favor of the merger.<sup>1</sup> Generally, the same result follows whether a mortgagee assigns a mortgage to the mortgagor, or the mortgagor conveys the land to the mortgagee.<sup>2</sup> The merger of a charge or encumbrance under these circumstances is, however, in most instances only a presumption, which can generally be overcome, and which sometimes does not even arise.<sup>3</sup>

§ 791. **Same. Intention Prevents a Merger.**—The equitable doctrine concerning the merger, where the owner of the fee becomes entitled to the charge or encumbrance, may be stated as follows, substantially in the language of most eminent judges. Sir William Grant says: "The question is upon the intention, actual or presumed, of the person in whom the interests are united." Sir George Jessel says: "In a court of equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee pays off or becomes entitled to a charge, the presumption is the other way, but he can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then equity will, in the absence of any declaration of his intention, destroy it; *but if there is any reason for keeping it alive*, such as the existence of another encumbrance, *equity will not destroy it.*" In short, where the legal ownership of the land and the absolute ownership of the encumbrance become vested in the same person, the intention governs the merger in equity.<sup>1</sup> If this intention has been expressed, it controls; in the absence of such an expression, the intention will be presumed from what ap-

<sup>1</sup> *Donk v. Alexander*, 117 Ill. 330, 7 N. E. 672.

<sup>2</sup> *Agnew v. R. R. Co.*, 24 S. C. 18, 58 Am. Rep. 237. See, also, *Howard v. Clark*, 71 Vt. 424, 76 Am. St. Rep. 782.

<sup>3</sup> *Adams v. Angell*, L. R. 5 Ch. Div. 634, 641, 645.

<sup>1</sup> *Agnew v. R. R. Co.*, 24 S. C. 18, 58 Am. Rep. 237.

pear to be the best interests of the party as shown by all the circumstances; if his interests require the encumbrance to be kept alive, his intention to do so will be inferred and followed; if, on the contrary, his best interests are not opposed to a merger, then a merger will take place according to his supposed intention.<sup>2</sup> This is the general rule, subject, however, to one important exception, to be mentioned in a subsequent paragraph.<sup>3</sup> If the person expressly declares his intention that the charge shall be kept on foot, no question can generally arise, for he can, with the single exception mentioned, always prevent a merger in this manner.<sup>4</sup> The presumption of an intent to preserve the encumbrance alive may, on the other hand, be inferred from the circumstances of the case, from the position of the owner's property, and especially from the fact that a merger would let in other charges or encumbrances.<sup>5</sup>

**§ 792. Time and Mode of the Intention.**—While the intention controls, it must be understood as the intention existing at the time the two interests came together. If there was then no intention to keep the encumbrance alive, a merger cannot be prevented by an intention afterwards formed and expressed, or from a subsequent change of circumstances from which an intention might be inferred.<sup>1</sup> Where the intention is expressed, it may be by the manner in which the encumbrance is transferred, as to a trustee for the owner of the land, or by recitals or other language in the assignment of the security or conveyance of the land; no particular mode is requisite, provided the intention is sufficiently declared.<sup>2</sup> If there is no expression of an intention at the time, then all the circumstances will be considered, in order to discover what is for the best interests of the party. He will be presumed to have intended that the charge should be kept alive or should merge according to the benefit resulting from either. If a merger would let in other encumbrances *which he was not already bound to pay*, this is a circumstance almost decisive of an intention not to permit a merger.<sup>3</sup> Parol evidence of all the surrounding circumstances of the trans-

<sup>1</sup> Title Guarantee Co. v. Wrenn, 35 Or. 62, 56 Pac. 271, 76 Am. St. Rep. 454.

<sup>2</sup> See post, § 797; Forbes v. Moffatt, 18 Ves. 384, per Sir William Grant; Boos v. Morgan, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237.

<sup>3</sup> Tyrwhitt v. Tyrwhitt, 32 Beav. 244; Agnew v. R. R. Co., 24 S. C. 18, 58 Am. Rep. 237.

<sup>4</sup> Tyrwhitt v. Tyrwhitt, 32 Beav. 244; Lowman v. Lowman, 118 Ill. 582, 9 N. E. 245.

<sup>5</sup> Loomer v. Wheelwright, 3 Sand. Ch. 135, 157.

<sup>6</sup> Crosby v. Taylor, 15 Gray 64, 77 Am. Dec. 352; Gresham v. Ware, 79 Ala. 192.

<sup>7</sup> Smith v. Roberts, 91 N. Y. 470; Clark v. Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223.

action and of the property is therefore admissible, for the purpose of discovering the intention, or to show that a merger must take place,<sup>4</sup> and also to show fraud, but not to prove the intention directly.<sup>5</sup>

**§ 793. Conveyance to the Mortgagee—Assignment to the Mortgagor or to his Grantee.**—Where a mortgagee takes a conveyance of the land from the mortgagor or from a grantee of the mortgagor, if the transaction is fair, the presumption of an intention to keep the security alive is very strong. It is generally for the interests of the party in this position that the mortgage should not merge, but should be preserved to retain a priority over other encumbrances. As the mortgagee acquiring the land is not the debtor party bound to pay off either the mortgage or the other encumbrances on the land, there is nothing to prevent equity from carrying out his presumed intent, by decreeing against a merger.<sup>1</sup> On the other hand, an assignment of the mortgage to the mortgagor himself raises a contrary presumption. At least, the presumption of a merger is much stronger in this case; it is generally the intention, and is often the duty, of the mortgagor to pay off and discharge the encumbrance by thus becoming the holder of it, and there is a clear distinction between the two cases.<sup>2</sup> An assignment of a mortgage to a grantee of the mortgagor, unless he has expressly assumed to pay it and thus made himself the principal debtor, does not generally create a merger.<sup>3</sup> It generally being for the interest of such grantee to keep the mortgage alive, and to maintain by its means a priority over any subsequent encumbrance or title, such an intention will be presumed and carried into effect by a court of equity.<sup>4</sup> When a mortgage upon the whole land is assigned to one of two or more tenants in common, it is not merged, but may be retained and enforced by him against his co-tenants.<sup>5</sup>

**§ 794. Merger never Prevented when Fraud or Wrong would Result.**—Whatever may be the circumstances, or between whatever parties, equity will never allow a merger to be prevented and a mortgage or other security to be kept alive, when this result would

<sup>1</sup> *Smith v. Roberts*, 91 N. Y. 470.

<sup>2</sup> *McCabe v. Swape*, 14 Allen 188.

<sup>3</sup> *Forthman v. Deters*, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97; *Factors', etc., Ins Co. v. Murphy*, 111 U. S. 738, 4 Sup. Ct. 679; *Curtis v. Moore*, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506.

<sup>4</sup> *Id.*

<sup>5</sup> *Clark v. Glos*, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; *Forthman v. Deters*, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145.

<sup>6</sup> *Savage v. Hall*, 12 Gray 363; *Liquidation Estates Purchase Co. v. Willoughby* (1898), App. Cas. 321.

<sup>7</sup> *Titsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *McDaniel v. Stroud*, 106 Fed. 486, 45 C. C. A. 446.

aid in carrying a fraud or other unconscientious wrong into effect, under the color of legal forms. Equity only interposes to prevent a merger, in order thereby to work substantial justice.<sup>1</sup>

§ 795. **Life Tenant becomes Entitled to the Charge.**—When a life tenant becomes entitled to a mortgage or other charge upon the entire inheritance, no presumption of a merger arises. The transaction is presumed to be for his own benefit. The security does not merge, but remains in his hands a valid encumbrance which he may enforce against the inheritance.<sup>1</sup> The same rule applies to every one who has only a partial interest in the land subject to a charge, such as a tenant in common or a lessee.<sup>2</sup>

§ 796. **II. The Owner of the Land Pays off a Charge upon It.**—The questions now to be considered are quite different from those already discussed. In the preceding subdivision (I.) the ownership of the land and of the charge have become united in any manner in the same person, either by the owner of the land acquiring the charge, or by the holder of the charge acquiring title to the land. Assuming it possible that the two interests *may* be kept distinct, the questions discussed are, whether the charge merges or does not merge; when it is kept alive and when it disappears. In the present division we have the single condition of fact, that the owner of the land which is subject to a charge, mortgage, or other encumbrance pays it off; whether upon so doing he takes a formal assignment or not is often immaterial. Under these circumstances the distinctive question to be now examined is, whether it is possible for the party thus paying off a charge to keep it alive as a subsisting encumbrance in any manner, by any form of proceeding; or whether the charge must necessarily merge in the ownership, and cease to exist. If it cannot possibly be kept alive, then all further questions of the party's intention, expressed or presumed, are meaningless. If a merger is not necessary, and the charge *can* be kept alive, then the questions concerning the party's intention, expressed or presumed, and of the benefit to himself, will, of course, arise, and will be governed by the rules formulated in the preceding subdivision. If a merger *can* be prevented when the owner of the land pays off a charge, the question whether there is a merger or not depends upon his intention, in the manner already explained. There are two cases to be considered: 1. When the owner in fee pays off a charge; 2. When a life tenant or other owner of a partial interest pays off a charge.

<sup>1</sup> Forthman v. Deters, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97.

<sup>2</sup> Morley v. Morley, 5 De Gex, M. & G. 610; Ohmer v. Boyer, 89 Ala. 273, 7 South. 663.

<sup>3</sup> Litsworth v. Stout, 49 Ill. 78, 95 Am. Dec. 577; Clark v. Clark, 56 N. H. 105.

§ 797. 1. **Owner in Fee Pays off a Charge.**—An owner of the fee subject to a charge, who is himself the principal and primary debtor, and is liable personally and primarily for the debt secured, cannot pay off the charge, and in any manner or by any form of transfer keep it alive. Payment by such a person and under such circumstances necessarily amounts to a discharge. The encumbrance cannot be prevented from merging by an assignment taken directly to the owner himself, or to a third person as trustee. This rule applies especially to a mortgagor who continues to be the primary and principal debtor.<sup>1</sup> The rule also applies to a grantee of the mortgagor who takes a conveyance of the land subject to the mortgage, and expressly assumes and promises to pay it as a part of the consideration. He is thereby made the principal debtor, and the land is the primary fund for payment. If he pays off the mortgage, it is extinguished.<sup>2</sup>

§ 798. **Owner Who is not Liable for the Debt Pays off the Mortgage.**—On the other hand, when an owner of the premises who is not personally and primarily liable to pay the debt secured pays off a mortgage or other charge upon it, he *may* keep the lien alive as a security for himself against other encumbrances or titles, and thus prevent a merger. Whether he does so is a question of intention, governed by the rules laid down in the previous paragraphs. When it is evidently for his benefit, the intention will be presumed. He may thus be entitled to preserve the lien, even without a formal assignment of the security to himself. Among those who are thus regarded as equitable assignees are grantees of the mortgagor not having assumed payment of the mortgage, heirs, devisees, and in fact all the parties entitled to redeem, and not personally liable as principal debtors.<sup>1</sup>

§ 799. 2. **Life Tenant Pays off a Charge.**—The rule is well settled that when a life tenant, or any other person having a partial

<sup>1</sup> *Johnson v. Webster*, 4 De Gex, M. & G. 474; *Jones v. Lamar*, 34 Fed. 454. The rule does not necessarily apply to every mortgagor. If a mortgagor has conveyed the land to a grantee, who has expressly assumed and promised to pay the mortgage as a part of the consideration, such grantee becomes the principal debtor, primarily liable, and the mortgagor assumes the position of a surety. If the mortgagor then pays off the mortgage, he may preserve its lien alive as a security against the land for his own reimbursement: *Bensieck v. Cook*, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422.

<sup>2</sup> *Russell v. Pistor*, 7 N. Y. 171; 57 Am. Dec. 509; *Forthman v. Deters*, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145. If a person who has conveyed land with a covenant warranting against encumbrances afterwards pays off or takes an assignment of a mortgage upon the premises, the same becomes extinguished; he cannot keep it alive as a subsisting lien, for to do so would be a direct violation of his own covenant; *Jones v. Lamar*, 34 Fed. 454.

<sup>1</sup> *Boos v. Morgan*, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237.

interest only in the inheritance or in the land, pays off a charge, mortgage, or encumbrance on the entire premises, he is presumed to do so for his own benefit. The lien is not discharged unless he intentionally release it. He can always keep the encumbrance alive for his own protection and reimbursement. His intention to do so will be presumed even though he has taken no assignment. In fact, his payment constitutes him an equitable assignee.<sup>1</sup> The rule is most frequently applied in this country to widows entitled to dower in premises subject to a mortgage. If they pay off the mortgage in order to protect their dower, they become equitable assignees, and may preserve and enforce the lien against the inheritance for reimbursement over and above the proportion of the debt which they are bound to contribute.<sup>2</sup> The rule extends in like manner to tenants for years<sup>3</sup> and to tenants in common.<sup>4</sup>

§ 800. **Priorities Affected by Merger.**—It is plain from the foregoing discussion that the doctrine of merger, in its application to encumbrances, has an intimate connection with the general subject of priorities. Whether a certain mortgage or other charge is still subsisting, and retains its priority, or whether it is in reality though not perhaps in form, extinguished, so as to let in subsequent liens, must often be determined by the rules concerning merger. The doctrine has therefore a twofold application,—between the immediate parties, the owner of the land or the debtor on one side, and the holder of the lien on the other, and between the holders of successive encumbrances and partial interests.

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## SECTION IX.

### CONCERNING EQUITABLE ESTOPPEL.

#### ANALYSIS.

- § 801. Nature of the rights created by estoppel.
- § 802. Origin of equitable estoppel.
- § 803. How far fraud is essential in equitable estoppels.
- § 804. Definition.
- § 805. Essential elements constituting the estoppel.
- § 806. Theory that a fraudulent intent is essential.
- § 807. Fraudulent intent necessary in an estoppel affecting the legal title to land.

<sup>1</sup> *Morley v. Morley*, 5 De Gex, M. & G. 610; *Ohmer v. Boyer*, 89 Ala. 273, 7 South. 663.

<sup>2</sup> *Davis v. Wetherell*, 13 Allen 63, 90 Am. Dec. 177.

<sup>3</sup> *Averill v. Taylor*, 8 N. Y. 44.

<sup>4</sup> See ante, § 795, and cases cited in note.

- §§ 808-812. Requisites further illustrated.
- § 808. The conduct of the party estopped.
  - § 809. Knowledge of the truth by the party estopped.
  - § 810. Ignorance of the truth by the other party.
  - § 811. Intention by the party who is estopped.
  - § 812. The conduct must be relied upon, and be an inducement for the other party to act.
  - § 813. Operation and extent of the estoppel.
  - § 814. As applied to married women.
  - § 815. As applied to infants.
- §§ 816-821. Important applications in equity.
- § 816. Acquiescence.
  - § 817. Same: as preventing remedies.
  - § 818. Same: as an estoppel to rights of property and contract.
  - § 819. As applied to corporations and stockholders.
  - § 820. Other instances of acquiescence.
  - § 821. Owner estopped from asserting his legal title to land.

§ 801. **Nature of the Rights Created by Estoppel.**—It has been said by some writers and judges that the doctrine of equitable estoppel is a branch merely of the law of evidence. This is, however, an entirely mistaken and by no means harmless view. Nothing can tend to produce more confusion of mind in the correct understanding of legal rules, and in their proper application to the affairs of life, than the exhibition of them under wrong divisions of the law, and the consequent representation of them as connected with relations which do not exist. It is undoubtedly true that authors of works on evidence intended for professional use do often treat of matters which form no legitimate part of that subject. This may be convenient, but it is not an accurate and scientific method, and should never be pursued when the purpose is to define and describe the nature of legal doctrines and of the rights and duties which flow therefrom. Rules which determine and regulate primary rights of property and of contract constitute a part of the substantive law, and do not belong to the law of evidence, which is simply a branch of the law concerning procedure.<sup>1</sup> The rights and corresponding duties created by estoppels are primary,—rights of property or of contract. This is certainly true of common-law estoppels, and it is no less true of equitable estoppels; the effect of the latter is substantially the same as that of the former, the difference being in the facts from which the estoppel arises, and not in the consequences produced by it. An estoppel determines the right which a person may enforce by action or rely on in defense, and not the mere mode and means by which those rights may be

<sup>1</sup> This truth is clearly and most conclusively shown by Sir James Fitzjames Stephen, in the introduction to his admirable work entitled a Digest of the Law of Evidence (pp. xiii., xiv.).

proved.<sup>2</sup> In fact, the principle which underlies the doctrine of the implied authority of an agent in most of its applications, and which prevents the principal from denying the authority which, by his conduct, he has held the agent out to the world as possessing, is identically the same principle which constitutes the essence of all equitable estoppels; and if the rules concerning these estoppels are merely a part of the law of evidence, we should, for the same reason and to the same extent, regard the rules concerning the nature and effects of implied agency as also belonging to evidence. Many similar illustrations might be selected from various departments of the law. Equitable estoppel is, therefore, a particular doctrine, based upon justice and conscience, which is the origin, wherever it may be invoked, of primary rights of property or of contract.

§ 802. **Origin of Equitable Estoppel.**—Estoppel was recognized by the common law at a very early day. The original legal rules concerning it were arbitrary and sometimes unjust, and are still, to a certain extent, technical and strict. Lord Coke gave a very harsh definition of estoppel as it existed in his time: "An estoppel is where a man is concluded by his own act or acceptance to say the truth." 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." His discussion shows clearly that "by matter in writing" he meant only a deed,—a writing under seal. The instances which he gave of estoppels in pais were: "By mat-

<sup>2</sup>One or two illustrations will clearly show the correctness of this statement. A tenant is estopped from denying his landlord's title. This is certainly a right of property, enabling the landlord to recover rent, or perhaps the land itself, *although he has in fact no title, and no other right of property than that created by the estoppel.* An acceptor is estopped from denying the genuineness of the prior signatures on the bill. This is a right of contract, whereby the holder may be enabled to recover the amount of the bill from the acceptor, and it may possibly be the only ground upon which a recovery can be rested. One other illustration of an estoppel, regarded as more distinctively equitable, and having more the *appearance* of being only a rule of evidence: A is owner of land. He stands by and knowingly permits B to expend money and make improvements on the land, under the innocent but mistaken assumption of a right to do so, and interposes no objection, asserts no claim of title. A is then estopped from setting up his title as against B's right to the improvement. This is clearly a right of property in B. In strictness, A has the whole title, and B has no right of property by the ordinary rules of law applicable in the absence of the estoppel. The estoppel *creates* a right in B, which is as much a right of property as though it had resulted from a conveyance, or from a statutory adverse possession; it is his only right of property; it may not be absolute, but is no less a right of property. One mode of acquiring title is by the common law estoppel resulting from a covenant of warranty. It is a pure fiction to say that the covenantee does not acquire a title by the estopped.

ter in pais, as by livery, by entry, by acceptance of rent, by partition, and by acceptance of an estate." These instances of legal estoppels in pais are not included within the "equitable estoppels" which form the subject-matter of the present section. Although the facts from which equitable estoppels arise are all matters in pais as distinguished from records and deeds, yet the whole doctrine is an expansion of and addition to the original legal estoppels in pais, and embraces rules unknown to the law when Lord Coke wrote. Equitable estoppel in the modern sense arises from the *conduct* of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything.<sup>1</sup> Its foundation is justice and good conscience. 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 the 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.<sup>2</sup> The doctrine of equitable estoppel is pre-eminently the creature of equity. It has, however, been incorporated into the law, and is constantly employed by courts of law at the present day in the decision of legal controversies. Preserving its original character, and depending upon equitable principles, it is administered in the same manner, and in conformity with the same rules, by the courts both of law and of equity, so that the decisions of either class of tribunals may be quoted as authorities in the subsequent discussion. The particular applications of the doctrine are so various and so numerous, that no attempt will be made to discuss them with any fullness.

**§ 803. How Far Fraud is Essential in Equitable Estoppels.—**There is a theory which makes the essence of equitable estoppel to consist of fraud. In accordance with this view, the language used by some courts in defining and describing the general doctrine has been so sweeping and positive that, taken literally, it does not admit the possibility of such an estoppel unless the party has been guilty of actual intentional fraud in law; and thus the whole doctrine is represented as virtually a mere instance of legal fraud. This theory is not sustained by principle, and it cannot be made universal. There are well-settled cases of equitable estoppel, familiar to courts of equity, which do not rest upon fraud, and instances are admitted, even by the courts which maintain this theory, which

<sup>1</sup> *Martin v. Maine Cent. R. Co.*, 93 Me. 100, 21 Atl. 740.

<sup>2</sup> *Horn v. Cole*, 51 N. H. 287, 289, 12 Am. Rep. 111, H. & B. 101 (a very important opinion); *Stevens v. Dennett*, 51 N. H. 324, 333, per Foster, J.

cannot be said to involve any element of fraud unless by a complete perversion and misuse of language. It is undoubtedly in accordance with the methods long pursued by courts of equity to apply the term "fraudulent" to the party estopped, in the following manner: It is in strict agreement with equitable notions to say of such party that his repudiation of his own prior conduct which had amounted to an estoppel, and his assertion of claims notwithstanding his former acts or words, would be *fraudulent*,—would be a *fraud* upon the rights of the person benefited by the estoppel. It is accurate, therefore, to describe equitable estoppel, in general terms, as such conduct by a party that it would be fraudulent, or a fraud upon the rights of another, for him afterwards to repudiate and to set up claims inconsistent with it. This use of the term has long been familiar to courts of equity, which have always treated the word "fraud" in a very elastic manner. The meaning here given to fraud or fraudulent is virtually synonymous with "unconscientious" or "inequitable." In exactly the same manner, and with exactly the same signification given to the word, the doctrine of specific enforcement of verbal contracts for the sale of land when part performed by the plaintiff has been explained by saying that it would be fraudulent for the defendant to contest his liability by setting up the statute of frauds after he had permitted the plaintiff, without objection, to go on and part perform the verbal agreement. In this explanation courts of equity do not mean that the defendant's conduct in denying the validity of the agreement is *actual* fraud,—a willful deception,—but simply that it is unconscientious; much less do they assert that there was actual fraud—willful deception—in the act of entering into the verbal contract. In exactly the same manner it is in strict accordance with equitable conceptions and equitable terminology to describe as fraud or fraudulent the act of repudiating conduct which had constituted an estoppel, and of asserting claims inconsistent therewith; it is entirely another thing to say that the conduct itself—the acts, words, or silence of the party—constituting the estoppel is an actual fraud, done with the actual intention of deceiving. . . . When all the varieties of equitable estoppel are compared, it will be found, I think, that the doctrine rests upon the following general principle: When one of two innocent persons—that is, persons each guiltless of an intentional, moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct—acts or omissions—has rendered the injury possible. This is confessedly the foundation of the rules concerning the implied authority of agents, which are declared by judges of the highest ability to be applications of the

doctrine of equitable estoppel.<sup>1</sup> This most righteous principle is sufficient, and alone sufficient, to explain all instances of such estoppel, and although fraud may be, and often is, an ingredient in the conduct of the party estopped, it is not an essential element, if the word is used in its true legal meaning.

§ 804. **Definition.**—From the foregoing general description it will appear, I think, that the following definition is accurate, and covers all phases and applications of the doctrine: 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.<sup>1</sup>

§ 805. **Essential Elements Constituting the Estoppel.**—In conformity with the principle already stated which lies at the basis of the doctrine, and upon the authority of decisions which have recognized and adopted that principle, the following are the essential elements which must enter into and form a part of an equitable estoppel in all of its phases and applications. One caution, however, is necessary, and very important. It would be unsafe and misleading to rely on these general requisites as applicable to every case, without examining the instances in which they have been modified or limited. 1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, *and at the time when it was acted upon by him.* 4. The conduct must be done with the intention, or at least with the *expectation*, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply *impossible* to ascribe any *intention* or even *expectation* to the party estopped that his conduct will be acted upon by the one who afterwards claims the

<sup>1</sup> Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125, 69 Am. Dec. 678; Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380.

<sup>1</sup> Galbraith v. Lunsford, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522, H. & B. 117. See, also, the definition in Stephen's Digest of the Law of Evidence, p. 124.

benefit of the estoppel. 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.<sup>1</sup> It will be seen that *fraud* is not given as an essential requisite in the foregoing statement. It is not absolutely necessary that the conduct mentioned in the first subdivision should be done with a fraudulent purpose or intent, or with an actual and fraudulent intention of deceiving the other party; nor is this meaning implied by any of the language which I have used. The adoption of such an element as always essential would at once strike out some of the most familiar and best established instances of equitable estoppel. Undoubtedly a fraudulent design to mislead is often present as an ingredient of the conduct working an estoppel; but this only renders the result more clearly just, and, if I may use the expression, more conclusive. There is, however, a class of cases, of which an example is given in the foot-note, where fraudulent conduct is essential,—cases in which an owner of *land* is precluded from asserting his legal title by reason of intentionally false representations or concealments, by which another has been induced to deal with the land. These cases are at the present day sometimes treated as examples of equitable estoppel. The principle, however, upon which they depend was well settled by courts of equity long before the doctrine of equitable estoppel in its modern form was first announced, and goes in its remedial operation far beyond that doctrine, as will more fully appear in subsequent paragraphs. I would again remark that although fraud is not an essential element of the original conduct working the estoppel, it may with perfect propriety be said that it would be fraudulent for the party to repudiate his conduct, and to assert a right or claim in contravention thereof. Using the term in the sense frequently given to it by courts of equity, and as explained in a preceding paragraph, this statement is not only proper, but furnishes an accurate criterion for determining the existence of an equitable estoppel.

§ 806. **Theory that a Fraudulent Intent is Essential.**—There is, as has already been mentioned, a theory approved and adopted by the courts of some states, which makes the very essence of every

<sup>1</sup> *Pickard v. Sears*, 6 Ad. & E. 469, 474; *Continental Bank v. Bank of the Commonwealth*, 50 N. Y. 575, 581, 582; *Rice v. Bunce*, 49 Mo. 231, 234, 8 Am. Rep 129; *Chase's Appeal*, 57 Conn. 236, 18 Atl. 96; *Galbraith v. Lunsford*, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522, H. & B. 117 (fraud not essential).

equitable estoppel or estoppel by conduct to consist of fraud, and affirms that an actual fraudulent intention to deceive or mislead is a necessary requisite in the conduct of the party,—whether acts, words, or silence,—in order that it may create an equitable estoppel. I cannot better state this theory than in the language of an eminent and able judge, which has frequently been adopted as being an accurate exposition of the general doctrine.<sup>1</sup> In order to estop a party by his conduct, admissions, or declarations, the following are essential requisities: It must appear,—1. That the party making his admission by his declaration or conduct was apprised of the true state of his own title; 2. That he made the admission *with the express intention to deceive*, or with such careless or culpable negligence as to amount to *constructive fraud*; 3. That the other party was not only destitute of all knowledge of the true state of the title, but of all means of acquiring such knowledge; 4. That he relied directly upon such admission, and will be injured by allowing its truth to be disproved.<sup>2</sup>

§ 807. **Fraudulent Intent Necessary in an Estoppel Affecting the Legal Title to Land.**—The particular case referred to in the foregoing foot-note requires a fuller explanation. It is a purely equitable doctrine settled long before the modern rules of equitable estoppel by conduct. It is confined to estates in land. The general rule is, that if a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled, and compelled to make his representation specifically good. It applies to one who denies his own title or encumbrance when inquired of by another who is about to purchase the land or to loan money upon its security; to one who knowingly suffers another to deal with the land as though it were his own; to one who knowingly suffers another to expend money in improvements without giving notice of his own claim, and the like. This equity, being merely an instance of fraud, requires intentional deceit, or at least that gross negligence which is evidence of an intent to deceive. In the language of a most recent decision, to preclude the owner of land from asserting his legal title or interest under such circumstance, “there must be shown either actual fraud, or fault or negligence equivalent to fraud, on his part in concealing his title; or that he was silent when the circumstances would impel an honest man to speak; or such actual intervention on his part, as in *Storrs v. Barker*, 6 Johns. Ch. 166,—

<sup>1</sup> *Boggs v. Merced Min. Co.*, 14 Cal. 279, 367, 368, per Field, J.; *Brant v. Virginia Coal Co.*, 93 U. S. 326, 335, per Field, J. See *Galbraith v. Lunsford*, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522, H. & B. 117.

<sup>2</sup> *Pocohontas Light & Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

so as to render it just that, as between him and the party acting upon his suggestion, he should bear the loss." What is the reason of this rule? It is accurately explained in the same decision. While the owner of land may by his acts in pais preclude himself from asserting his legal title, "it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. *It is opposed to the letter of the statute of frauds*, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light or doubtful character." The most important "ground of justice and equity" admitted by courts of equity to uplift and displace the statute of frauds concerning legal titles to land, by fastening a liability upon the wrong-doer, is fraud. There are many instances in which equity thus compels the owner of land to forego the benefits of his legal title and to admit the equitable claims of another, in direct contravention of the literal requirements of the statute, but they all depend upon the same principle. The rule under consideration is strictly analogous to another familiar rule that a legal owner of land cannot be turned into a trustee *ex delicto* by any *mere* words or conduct. A constructive trust *ex delicto* can never be impressed upon land as against the legal title by any verbal stipulation, however definite, nor by any mere conduct; such trust can only arise where the verbal stipulation and conduct together amount to fraud in the contemplation of equity. Both the rule under consideration and the rule concerning trusts rest upon the same reasons. The doctrine had its origin, as has been said, prior to and independently of the modern doctrine of equitable estoppel by conduct, and was confined in its operation to courts of equity. Even at the present day, this particular instance of the equitable estoppel by which the owner of land is precluded from asserting his legal title is distinctively equitable; it is not admitted and enforced at law, except in states where the principles of equity are administered through the means of legal actions and remedies, and in those where legal and equitable rights and reliefs are combined in the administration of justice under the reformed procedure.<sup>1</sup>

§ 808. **Requisites Further Illustrated—The Conduct.**—My limits of space do not permit a detailed discussion of these general requisites. I can only state them in the briefest manner, and must refer to the cases cited in the foot-note, and to treatises upon estoppel, for an ampler treatment. In fact, the more specific rules, the vary-

<sup>1</sup> *Storrs v. Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316; *Parkey v. Ramsey*, (Tenn.) 76 S. W. 812. That this species of estoppel belongs to the jurisdiction of equity, and is not available at law, see *Hayes v. Livingston*, 34 Mich. 384, 22 Am. Rep. 533.

ing phases of opinion, and the partial conflict of decision have arisen in actions at law rather than in equity. The treatment of the subject by courts of equity has generally been simple, uniform, and consistent. The conduct creating the estoppel must be something which amounts either to a representation or a concealment of the existence of facts; and these facts must be material to the rights or interests of the party affected by the representation or concealment, and who claims the benefit of the estoppel. The conduct may consist of external acts, or language written or spoken, or of silence.<sup>1</sup> The facts represented or concealed must, in general, be either existing or past, or at least represented to be so. A statement concerning future facts would either be a mere expression of opinion, or would constitute a contract and be governed by rules applicable to contracts.<sup>2</sup>

§ 809. **Same. Knowledge of the Truth by the Party Estopped.**—The truth concerning these material facts represented or concealed must be known to the party at the time when his conduct, which amounts to a representation or concealment, takes place; *or else the circumstances must be such that a knowledge of the truth is necessarily imputed to him.*<sup>1</sup> The rule has sometimes been stated as though it were universal, that an actual knowledge of the truth is always indispensable. It is, however, subject to so many restrictions and limitations as to lose its character of universality. It applies in its full force only in cases where the conduct creating the estoppel consists of silence or acquiescence. It does not apply where the party, although ignorant or mistaken as to the real facts, was in such a position that he *ought* to have known them, so that knowledge will be imputed to him. In such case, ignorance or mistake will not prevent an estoppel.<sup>2</sup> Nor does the rule apply to a party who has not simply acquiesced, but who has actively interfered by acts or words, and whose affirmative conduct has thus misled another.<sup>3</sup> Finally, the rule does not apply, even in cases of mere acquiescence, when the ignorance of the real facts was occasioned by culpable negligence.<sup>4</sup>

<sup>1</sup> By acts or words: *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111, H. & B. 101; *Hoene v. Pollak*, 118 Ala. 617, 24 South. 349, 72 Am. St. Rep. 189. By silence: *In re Lart* (1896), 2 Ch. 789.

<sup>2</sup> *Jorden v. Money*, 5 H. L. Cas. 185; *Elliott v. Whitmore*, 23 Utah 342, 65 Pac. 70, 90 Am. St. Rep. 700.

<sup>3</sup> *Bank of Hindustan v. Alison*, L. R. 6 Com. P. 54, 222; *McCaskill v. Connecticut Savings Bank*, 60 Conn. 300, 25 Am. St. Rep. 323, 22 Atl. 568, 13 L. R. A. 737.

<sup>4</sup> *Weinstein v. National Bank*, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23; *Chase's Appeal*, 57 Conn. 236, 18 Atl. 96.

<sup>5</sup> *Beaupland v. McKean*, 28 Pa. St. 124, 131, 70 Am. Dec. 115.

<sup>6</sup> *Smith v. Newton*, 38 Ill. 230.

§ 810. **Same. Ignorance of the Truth by the Other Party.**—The truth concerning these material facts must be unknown to the other party claiming the benefit of the estoppel, not only at the time of the conduct which amounts to a representation or concealment, but also at the time when that conduct is acted upon by him. If, at the time when he acted, such party had knowledge of the truth, or had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means, he cannot claim to have been misled by relying upon the representation or concealment.<sup>1</sup> If, therefore, at the time of the representation the party to whom it was made was ignorant of the real facts, but before he acted upon it the statement was contradicted by its author, or he became informed of the truth, he could not claim an estoppel.<sup>2</sup> It has been said that, in cases of alleged estoppel by conduct affecting the title to land, the record of the real title would furnish a means by which the other party might ascertain the truth, so that he could not claim to be misled, and could not insist upon an estoppel.<sup>3</sup> This conclusion, if correct at all, is correct only within very narrow limits, and must be applied with the greatest caution. It must be strictly confined to cases where the conduct creating the alleged estoppel is mere silence. If the real owner resorts to any affirmative acts or words, or makes any representation, it would be in the highest degree inequitable to permit him to say that the other party, who had relied upon his conduct and had been misled thereby, might have ascertained the falsity of his representations.<sup>4</sup>

§ 811. **Same. Intention of the Party Who is Estopped.**—It has frequently been said, in most general terms, that the conduct amounting to a representation, in order to constitute an estoppel, must be done with the intention, by the one who is to be estopped, that it shall be acted upon by the very person who claims the benefit of the estoppel, or, as is sometimes said, that it shall be acted upon by another person. In short, there must always be the intention that the conduct shall be acted upon either by some person, or by the very person who afterwards relies upon the estoppel.<sup>1</sup> While

<sup>1</sup> *Rennie v. Young*, 2 De Gex & J. 136; *Estis v. Jackson*, 111 N. C. 145, 32 Am. St. Rep. 784, 16 S. E. 7.

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

<sup>3</sup> *Wiser v. Lawler*, 189 U. S. 260, 23 Sup. Ct. 624. See *Sumner v. Seaton*, 47 N. J. Eq. 103, 19 Atl. 834.

<sup>4</sup> *Clapham v. Shillito*, 7 Beav. 146, 149, 150, per Lord Langdale; *Graham v. Thompson*, 55 Ark. 296, 18 S. W. 58, 29 Am. St. Rep. 40.

<sup>1</sup> *De Berry v. Wheeler*, 128 Mo. 84, 49 Am. St. Rep. 538, 30 S. W. 338; *Stevens v. Ludlum*, 46 Minn. 160, 24 Am. St. Rep. 210, 48 N. W. 771, 13 L. R. A. 270.

such intention must sometimes exist, and while the proposition is therefore true in certain cases, it would be very misleading as a universal rule. In many familiar species of estoppels no intention can possibly exist. The requisite, as applicable to them, is well expressed by an eminent judge in a recent decision: It is not "necessary, in equity, that the intention should be to 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 that has made them, against any one who has trusted to them and acted on them. . . . Where a man makes a statement in a manner and under circumstances such as he must understand those who heard the statement would believe to be true, and if they had an interest in the subject-matter would act on as true; and one, using his own means of knowledge with due diligence, acts on the statement as true, the party who makes the statement cannot show that his representation was false, to the injury of the party who believed it to be true, and acted on it as such; that he will be liable for the natural consequences of his representation, and cannot be heard to say that the party actually injured was not the one he meant should act."<sup>2</sup> This mode of stating the doctrine *may* in equity apply to every kind of estoppel, even to those by which an owner of land is precluded from asserting his legal title. There is, however, a large class in which not only an intention directed towards a particular individual or towards individuals in general is absent, but a contrary intention that the party's representation is not to be acted upon at all may be present. The class includes all those instances where an owner of things in action or of chattels has, either designedly or negligently, clothed a third person with the *apparent* title and power of disposition, and this person transfers them to a purchaser in good-faith who relies upon the apparent power of sale they conferred upon him.<sup>3</sup> The original owner is estopped by his conduct from asserting his right of property, and the bona fide purchaser acquires a perfect title by estoppel, in direct contravention of the rules of law which would otherwise control. It is a complete misconception to say that these instances do not depend upon the doctrine of equitable estoppel, but upon that of negligence. On the contrary, they have been uniformly rested by courts upon the theory of estoppel, and are among the strongest and most distinctive illustrations of the efficacy of that theory. In fact, *it is only by means of the doctrine of estoppel* that the original owner can be divested of his title in opposition to the rules of the law concerning the transfer and acquisition of property.

<sup>2</sup> *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111, H. & B. 101, per Perley, C. J.; *Cornish v. Abington*, 4 Hurl. & N. 549, per Pollock, C. B.

<sup>3</sup> *Morris v. Joyce*, 63 N. Y. Eq. 549, 53 Atl. 139.

*There is no rule of law or of equity by which an owner, through mere negligence, can be divested of his legal title to things in action or chattels.*<sup>4</sup> The cases where the particular intention mentioned in the general rule seems to be the most essential are those in which an owner or one having an interest in property, especially in land, deals concerning it, directly with a third person, and by his words, acts, or silence, when he ought to speak, makes representations with respect to his title or interest. In order to be estopped from asserting his title or interest, he must intend that his representation should be acted upon by the party influenced by his conduct.<sup>5</sup>

**§ 812. Same. The Conduct must be Relied upon, and be an Inducement for the Other Party to Act.**—Whatever may be the real intention of the party making the representation, it is absolutely essential that this representation, whether consisting of words, acts, or silence, should be believed and relied upon as the inducement for action by the party who claims the benefit of the estoppel, and that, so relying upon it and induced by it, he should take some action. The cases all agree that there can be no estoppel, unless the party who alleges it relied upon the representation, was induced to act by it, and thus relying and induced, did take some action.<sup>1</sup> Finally, this action must be of such a nature that it would have altered the legal position of the party for the worse; unless the estoppel is enforced. He must have placed himself in such a situation that he would suffer a loss as the consequence of his action, if the other party were allowed to deny the truth of his representation, or repudiate the effects of his conduct.<sup>2</sup> Although this action is usually affirmative, yet such affirmative action is not indispensable. It is enough if the party has been induced to *refrain* from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.<sup>3</sup>

**§ 813. Operation and Extent of the Estoppel.**—The measure of the operation of an estoppel is the extent of the representation made by one party and acted upon by the other. The estoppel is commensurate with the thing represented, and operates to put the party entitled to its benefit in the same position as if the thing represented were true.<sup>1</sup> With respect to the persons who are bound by

<sup>4</sup> *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, and see ante, § 710; *Barnard v. Campbell*, 55 N. Y. 456, 462.

<sup>5</sup> See ante, § 807, and cases cited.

<sup>1</sup> *St. Jo Mfg. Co. v. Daggett*, 84 Ill. 556; *Boylston v. Rankin*, 114 Ala. 408, 21 South. 995, 62 Am. St. Rep. 111.

<sup>2</sup> *Ketchum v. Duncan*, 96 U. S. 659; *Supreme Tent, Knights of Maccabees, v. Stensland*, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137.

<sup>3</sup> *Continental Bank v. Bank of Commonwealth*, 50 N. Y. 575; *Weinstein v. National Bank*, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23.

<sup>1</sup> *Grissler v. Powers*, 81 N. Y. 57, 37 Am. Rep. 475, per Andrews, J.

or who may claim the benefit of the estoppel, it operates between the immediate parties and their privies, whether by blood, by estate, or by contract. A stranger, who is not a party nor a privy, can neither be bound nor aided.<sup>2</sup> Since the whole doctrine is a creature of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted with good faith and reasonable diligence; otherwise no equity will arise in his favor.<sup>3</sup>

**§ 814. Same. As Applied to Married Women.**—Upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions. The tendency of modern authority, however, is strongly towards the enforcement of the estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single.<sup>1</sup> Even independently of this legislation there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right or to maintain a defense.<sup>2</sup> There are, however, decisions which hold, in effect, that since a married woman cannot be directly bound by her contracts or conveyances, even when accompanied with fraud, so she cannot be indirectly bound through means of an estoppel; and the operation of the estoppel against her must be confined to cases where she is attempting affirmatively to enforce a right inconsistent with her previous conduct, upon which the other party has relied.<sup>3</sup> These decisions seem to be in opposition to the general current of authority.

**§ 815. Same. As Applied to Infants.**—The disability of infancy seems to have limited the operation of the equitable estoppel more than that of coverture. Since an infant is not directly bound by his ordinary contracts, unless ratified after he becomes of age, so obligations in the nature of contract will not be indirectly enforced against him by means of an estoppel created by his conduct

<sup>1</sup> *Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577, per Elliott, C. J.; *Hodge v. Ludlum*, 45 Minn. 290, 47 N. W. 805.

<sup>2</sup> *Wilcox v. Howell*, 44 N. Y. 398.

<sup>3</sup> *Dobbin v. Cordiner*, 41 Minn. 165, 42 N. W. 870, 16 Am. St. Rep. 683, 4 L. R. A. 333, Sh. 130.

<sup>4</sup> *Stafford v. Stafford*, 1 De Gex & J. 193; *Connolly v. Branstler*, 3 Bush 702, 96 Am. Dec. 278, 1 Scott 583; *Galbraith v. Lunsford*, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522, H. & B. 117.

<sup>5</sup> *Lowell v. Daniels*, 2 Gray 161, 61 Am. Dec. 448; *Williamson v. Jones*, 43 W. Va. 563, 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694.

while still a minor. On the other hand, an equitable estoppel arising from his conduct may be interposed, with the same effect as though he were adult, to prevent him from affirmatively asserting a right of property or of contract in contravention of his conduct upon which the other party has relied and been induced to act.<sup>1</sup>

**§ 816. Important Applications in Equity—Acquiescence.**—In addition to the foregoing discussion of principles, I shall state very briefly some of the applications which have most frequently been made by courts of equity. Acquiescence is an important factor in determining equitable rights and remedies, in obedience to the maxims, He who seeks equity must do equity, and He who comes into equity must come with clean hands. Even when it does not work a true estoppel upon rights of property or of contract, it may operate in analogy to estoppel—may produce a quasi estoppel—upon the rights of remedy. These two effects will be described separately.

**§ 817. Acquiescence as Preventing Rights of Remedy.**—Acquiescence in the wrongful conduct of another by which one's rights are invaded may often operate, upon the principles of and in analogy to estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. This form of quasi estoppel does not cut off the party's title, nor his remedy at law; it simply bars his right to equitable relief, and leaves him to his legal actions alone. In order that this effect may be produced, the acquiescence must be with knowledge of the wrongful acts themselves, and of their injurious consequences; it must be voluntary, not the result of accident, nor of causes rendering it a physical, legal, or moral necessity, and it must last for an unreasonable length of time, so that it will be inequitable even to the wrong-doer to enforce the peculiar remedies of equity against him, after he has been suffered to go on unmolested, and his conduct apparently acquiesced in. It follows that what will amount to a sufficient acquiescence in any particular case must largely depend upon its own special circumstances. The equitable remedy to which this quasi estoppel by acquiescence most frequently applies is that of injunction, preliminary or final, when sought by a proprietor to restrain a defendant from interference with easements, from committing nuisances, from trespasses, or other like acts in derogation of the plaintiff's proprietary rights.<sup>1</sup> This effect of delay is subject to the important limitation that it is properly confined to claims for purely equitable remedies to which the party has no strict legal right. Where an injunction is asked in support of a strict

<sup>1</sup> *Wieland v. Kobick*, 110 Ill. 16, 51 Am. Rep. 876.

<sup>1</sup> See vol. 1, §§ 418, 419, and cases there cited: *Coles v. Sims*, 5 De Gex, M. & G. 1; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Powers's Appeal*, 125 Pa. St. 175, 17 Atl. 254, 11 Am. St. Rep. 882, 1 Scott 264.

*legal* right, the party is entitled to it if his legal right is established; mere delay and acquiescence will not, therefore, defeat the remedy, unless it has continued so long as to defeat the right itself.<sup>2</sup> The same rule applies, and for the same reasons, to a party seeking purely equitable relief against fraud, such as the surrender or cancellation of securities, the annulling of a transaction, and the like. Upon obtaining knowledge of the facts, he should commence the proceedings for relief as soon as reasonably possible. Acquiescence consisting of unnecessary delay after such knowledge will defeat the equitable relief.<sup>3</sup>

**§ 818. Acquiescence as an Estoppel to Rights of Property or of Contract.**—Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have been described. A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle: If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent.<sup>1</sup> A most important application includes all cases where an owner of property, A, stands by and knowingly permits another person, B, to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objection, as by expending money upon it, making improvements, erecting buildings, and the like. Of course, it is essential that B should be acting in ignorance of the real condition of the title, and in the supposition that he was rightful in his own dealing.<sup>2</sup>

**§ 819. Estoppel as Applied to Corporations and Stockholders.**—This species of estoppel, as well as other kinds which consist of affirmative acts or representations, applies to corporations in their dealings with third persons, and with their own stockholders.<sup>1</sup> Thus a corporation may be estopped by statements contained in a prospectus or circular, on behalf of a stockholder who has purchased shares upon the faith of such statements.<sup>2</sup> Conversely, stockholders

<sup>1</sup> Fullwood v. Fullwood, L. R. 9 Ch. Div. 176; Rigney v. Tacoma L. & W. Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425.

<sup>2</sup> See post, §§ 897, 917, 965: Van Beck v. Milbrath, 118 Wis. 42, 94 N. W. 657; Calhoun v. Millard, 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248, 1 Scott 388; Dennis v. Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899, 3 Keener 728.

<sup>1</sup> Mich., etc., Co. v. Parcell, 38 Mich. 475, 480, per Cooley, J.

<sup>2</sup> Crook v. Corporation of Seaford, L. R. 6 Ch. 551, L. R. 10 Eq. 678; Kessler v. Ensley Co., 123 Fed. 546; Lindsay v. Cooper, 94 Ala. 170, 33 Am. St. Rep. 105, 11 South. 325, 16 L. R. A. 813.

<sup>1</sup> Breslin v. Fries-Breslin Co. (N. J. Eq.), 58 Atl. 313; Coolidge v. Schering, 32 Wash. 557, 73 Pac. 682.

<sup>2</sup> New Brunswick, etc., Co. v. Muggeridge, 7 Jur. N. S. 132.

may be estopped by their acquiescence from objecting to the acts of the corporation which are not illegal nor mala prohibita, but ultra vires, when the rights of innocent third persons have intervened. Express assent is not necessary to estop the stockholders; "when they neglect to promptly and actively condemn the unauthorized act, and to seek judicial relief after knowledge of its being done, they will be deemed to have acquiesced, and will be estopped as against innocent third persons."<sup>3</sup>

**§ 820. Other Instances of Acquiescence.**—It is in conformity with the same principle that parties who have long acquiesced in settlements of accounts or of other mutual dealings are not permitted to reopen or disturb them; and this is true, even though the parties stood in confidential relations towards each other, as trustee and cestui que trust, principal and agent, and the like, and the settlement embraced matters growing out of such relations.<sup>1</sup> Another familiar instance of the estoppel arises from the conduct of the debtor party toward the intended assignee of a thing in action. If a mortgagor, obligor, or other debtor, by keeping silence under circumstances when he ought to speak, leads the intended assignee to believe that there is no defense, he will be estopped from afterwards setting up any defense which might otherwise be available as against the assignee who has thus been induced to purchase the demand. The estoppel will be even more obvious when the debtor, instead of simply keeping silent, resorts to affirmative and misleading acts or representations.<sup>2</sup>

**§ 821. Owner Estopped from Asserting his Legal Title to Land.**—The most striking instance of the estoppel recognized by courts of equity is that already described in a former paragraph, wherein by intentional misrepresentation, misleading conduct, or wrongful concealment a party may preclude himself from asserting his legal title to land, or from enforcing an encumbrance on or maintaining an interest in real estate.<sup>1</sup> This doctrine was established in equity long before the modern rules concerning equitable estoppel by conduct had been developed; and its operation is somewhat more extensive than the effects produced by the ordinary forms of estoppel. A person may not only be prevented from asserting his title or interest, he may even be compelled, at the suit of an innocent purchaser, to make good and specifically perform his representations. Fraud, actual or constructive, is the essential and central element.

<sup>1</sup> *Kessler v. Ensley Co.*, 123 Fed. 546; *Memphis, etc., R. R. Co. v. Grayson*, 88 Ala. 572, 7 South. 122, 16 Am. St. Rep. 69.

<sup>2</sup> *Clarke v. Hart*, 5 Jur. N. S. 447.

<sup>3</sup> *Grissler v. Powers*, 81 N. Y. 57, 37 Am. Rep. 475. See ante, § 704.

<sup>1</sup> See ante, § 807; *Sherrill v. Sherrill*, 73 N. C. 8; *Willmott v. Barber*. L. R. 15 Ch. Div. 96, 106.

## CHAPTER THIRD.

## CERTAIN FACTS AND EVENTS WHICH ARE THE OCCASIONS OF EQUITABLE PRIMARY OR REMEDIAL RIGHTS.

§ 822. **Introductory.** In the first volume, while speaking of the jurisdiction, I stated that certain facts and events were most important *occasions* of equitable rights and duties.<sup>1</sup> Since these same acts are also recognized by courts of law as giving rise to legal rights and duties within a limited extent, it has sometimes been said that they form a part of the concurrent jurisdiction of equity. The erroneous character of this theory has been shown in earlier sections.<sup>2</sup> The rights and duties of which they are the occasions, whether of property, of contract, or of remedy, belong partly to the exclusive and partly to the concurrent jurisdiction. The facts and events referred to, and which form the subject-matter of this chapter, are accident, mistake, and fraud. In the present discussion I shall not describe in an exhaustive manner all their consequences and effects, for this would produce needless confusion. I shall, in the first place, define them as they are conceived of by equity, and explain with some care the equitable notions concerning their nature, and the equitable doctrines concerning their essential elements and attributes. In the second place, I shall enumerate their effects, the instances of equitable jurisdiction of which they are the occasions, and the equitable rights and duties which are maintained and enforced by these phases of the jurisdiction. The doctrines which determine and govern the most important of these rights will be more fully discussed under subsequent and appropriate heads.<sup>3</sup>

<sup>1</sup> See ante, §§ 359, 362.

<sup>2</sup> See ante, §§ 138, 175 note, 188.

<sup>3</sup> For example, many instances of trusts by operation of law spring from fraud; their full discussion will be found in the sections on trusts. All the distinctive remedies, such as cancellation, reformation, etc., will be examined in the division which deals with remedies.

## SECTION I.

## ACCIDENT.

## ANALYSIS.

- § 823. Definition.
- § 824. Rationale of the jurisdiction.
- § 825. General limitations on the jurisdiction.
- §§ 826-829. Instances in which the jurisdiction does not exist.
  - § 826. Non-performance of contracts.
  - § 827. Supplying lost or destroyed records.
  - § 828. Other special instances.
  - § 829. Parties against whom the jurisdiction is not exercised.
- §§ 830-837. Particular instances of the jurisdiction.
  - § 831. 1. Suits on lost instruments.
  - § 832. Same; instruments not under seal.
  - § 833. 2. Accidental forfeitures.
  - § 834. 3. Defective execution of powers.
  - § 835. Powers held in trust will be enforced.
  - § 836. 4. Relief against judgments at law.
  - § 837. 5. Other special instances.

§ 823. **Definition.**—It is confessedly difficult to define accident so as to include all the elements essential to the equitable conception, and to exclude all others; and many writers have not attempted to give a definition. The following expresses, I think, the true meaning given by equity to the term as an occasion for the exercise of jurisdiction: 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, under the circumstances, to retain.<sup>1</sup> If the party's own agency is the proximate cause of the event, it is a mistake rather than an accident. This definition purposely excludes all fortuitous occurrences which do not occasion any exercise of jurisdiction, since they are not "accidents" within the equitable conception.

§ 824. **Rationale of the Jurisdiction.**—Accident is one of the oldest heads of equity jurisdiction. There is reason to believe that, at an early day, this jurisdiction was much more undefined and comprehensive than it is at present; but for a long time it has been, and is now, settled within certain and somewhat narrow

<sup>1</sup> *Kopper v. Dyer*, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742, H. & B. 166, 1 Scott 400.

limits. Its existence and exercise involve two essential requisites. The first and principal requisite is, that, by the event not expected nor foreseen, one party, A, has without fault and undesignedly undergone some legal loss or liability, and the other party, B, has acquired a corresponding legal right, which it is contrary to good conscience for him to retain and enforce against A. In other words, because of the unexpected character of the occurrence by which A's legal relations towards B have been unintentionally changed, A is in good conscience entitled to relief which shall restore those relations to their original character, and replace him in his former position. In the second place, this relief, to which A is conscientiously entitled, must be such as cannot be adequately conferred by courts of law. Upon these two essential requisites the jurisdiction was based: the party's conscientious right to relief; and the impossibility of obtaining adequate remedy at law. If the party, although clearly entitled to relief, can obtain adequate and certain remedy at law, then, in accordance with the fundamental principles of equitable jurisdiction, the concurrent jurisdiction does not exist, and the exclusive jurisdiction is not exercised.<sup>1</sup> This doctrine, it should be remembered, refers to the origin of the equity jurisdiction, and not to its subsequent and present condition. Its operation is controlled and modified by the other most important principle, fully discussed heretofore, that when the equitable jurisdiction, either concurrent or exclusive, has once been established with respect to any subject-matter, it is not destroyed or abridged by a jurisdiction subsequently acquired by the courts of law to give the same or other adequate relief under the same circumstances. The jurisdiction of equity originally existing and exercised on the occasion of accident has not, therefore, been theoretically affected by the powers given to or assumed by the courts of law to confer complete remedy in many cases which formerly belonged to the cognizance of equity alone.<sup>2</sup>

**§ 825. Limitations.**—While the jurisdiction occasioned by accident is clearly limited, and the instances in which it is and is not exercised are well defined, it is difficult to formulate any general criterion which shall consistently express the extent of the limitation, and account for all these instances. It must be conceded, I think, that the conclusions of the equity courts on this subject are somewhat arbitrary. In the very earliest period of equity jurisprudence, before doctrines had been fully developed and defined, the jurisdiction was undoubtedly understood as embracing every kind of case in which an unexpected result had been produced

<sup>1</sup> See §§ 216-222.

<sup>2</sup> See §§ 276-281, where this doctrine is fully considered.

by accident,—every kind of misfortune; and the rule is even laid down in this manner by Lord Coke.<sup>1</sup> It is now the firmly settled doctrine, with respect to many legal obligations, that there is no equitable jurisdiction to relieve parties from their non-performance caused by accident in its ordinary and popular meaning. The following are the important instances in which the jurisdiction does not exist or will not be exercised.

§ 826. **Contracts.**—As a general rule, where the obligation arises from an express contract created by the stipulations of the parties, and a non-performance is wholly the result of accident, or a party without fault has been accidentally prevented from completing the execution of the agreement, and deriving full benefits therefrom, in either case equity does not exercise its jurisdiction to give him any relief, whether by way of defense against the enforcement of the obligation, or by way of affirmative remedy. The exception is confined to agreements providing for a penalty or a forfeiture, in which the jurisdiction to relieve is settled within defined and narrow limits.<sup>1</sup>

<sup>1</sup>4 Inst. 84: "Accident, as when a servant of an obligor, mortgagor, etc., is sent to pay the money *on the day*, and he is robbed, remedy is to be had in this court against the forfeiture." This statement by Lord Coke is probably due, in great measure, to his ignorance of equity. A case in the Introduction to the Calendars of Proceedings in Chancery (vol. 1, p. cxlii.) illustrates the early view of the jurisdiction. A B had entered into a bond, with a heavy penalty, to repair certain river banks near the town of Stratford-at-Bow within a specified time. He had been prevented from completing the contract within the required time by sudden and unexpected floods; and the obligee in the bond had sued him at law to recover the penalty. He thereupon filed a bill in chancery to restrain the action of the law, and to be relieved from the consequences of the accident.

<sup>1</sup>This doctrine may be illustrated by a simple supposed case. If A has contracted to build a house by a certain day named, and in the course of completing the agreement has collected a quantity of materials all prepared and necessary for the building, and all these materials are, without A's fault, by a mere accident—a stroke of lightning and consequent fire—destroyed, so that it becomes physically impossible to replace them and to finish the house within the specified time, there is no jurisdiction in equity to relieve A in any manner from the liability caused by the non-performance of his contract. Courts of equity, as well as courts of law, say that parties must guard against the possible effect of such misfortunes by express stipulations inserted in their agreements. Among the illustrations of this doctrine the most frequent are covenants by lessees to pay rent, to keep the buildings in repair, and the like; if the premises are consumed by accidental fire, or destroyed by other inevitable accident, the lessee is not relieved from the obligation of his covenant at law or in equity: *Hallett v. Wylie*, 3 Johns. 44, 3 Am. Dec. 457. This does not at all interfere with the jurisdiction which *may* exist to relieve the lessee from a forfeiture of his estate by the non-performance of his covenant. See ante, vol. 1, §§ 453, 454. The same doctrine applies to other kinds of contracts, although both parties may be wholly and equally free from blame.

§ 827. **Supplying Lost Records.**—It has been held that there is no jurisdiction in equity to supply or establish the records of a court of law which have been lost or accidentally destroyed.<sup>1</sup> . . .

§ 828. **Other Instances in Which the Jurisdiction is not Exercised.**—The jurisdiction will not be exercised on behalf of a party when the accident is the result of his own culpable negligence or fault.<sup>1</sup> Nor will the jurisdiction ever be exercised on behalf of a person who has not a vested right, but whose only claim is a mere expectancy or hope resting upon the volition or discretion of another. As, for example, if a testator was prevented by pure accident from making an intended bequest in favor of A, equity has no jurisdiction to relieve A from the disappointment.<sup>2</sup>

§ 829. **Parties Against Whom the Jurisdiction is not Exercised.**—There are also limitations with respect to the situation of the parties against whom the jurisdiction is invoked. It will not be exercised in behalf of any person against a bona fide purchaser for a valuable consideration and without notice.<sup>1</sup> And generally, the jurisdiction will not be exercised against a party who has an equal equity, and is equally entitled to protection with the one who seeks to be relieved from the effects of an accident.<sup>2</sup>

§ 830. **Particular Instances of the Jurisdiction.**—

§ 831. **1. Suits on Lost Instruments.**—It has long been settled that courts of equity have jurisdiction of suits brought to recover the amount due on lost bonds and other sealed instruments. The original grounds of this jurisdiction were two. In the first place, by the common-law pleading and procedure, *profert* of the sealed instrument was necessary in an action at law thereon; and as no *profert* was possible when the writing was lost, the action could not be maintained. *Profert* was never necessary in a suit in equity. In the second place, the court of equity could require an indemnity from the plaintiff, and could by its decree adjust the rights of the

Illustrations: Agreements for the sale and purchase of land, where buildings thereon had been accidentally burned: *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582, 2 Keener 421, 1 Scott 425, H. & B. 173; see ante, § 368; agreements the performance of which is prevented by the death of a person upon whose act the performance depended: *White v. Nutt*, 1 P. Wms. 61, 1 Ames Eq. Jur. 226, 2 Keener 404, 2 Scott 450.

<sup>1</sup> *Welch v. Smith*, 65 Miss. 394, 4 South. 340.

<sup>2</sup> *Ex parte Greenway*, 6 Ves. 812, 1 Scott 413. For cases where the courts refuse to relieve from forfeiture caused by the negligence or fault of the party himself, see § 452.

<sup>3</sup> *Whitton v. Russell*, 1 Atk. 448. For the same reason a court of equity can not relieve by supplying the total non-execution of an ordinary power, no matter how accidental; see post, § 834.

<sup>1</sup> See ante, § 776.

<sup>2</sup> *Weal v. Lower*, 1 Eq. Cas. Abr. 266.

two litigants, by securing and indemnifying the defendant against all further liability and harm,—a power which was not possessed by the courts of law. In order to protect the defendant in this manner, the rule became settled that in all suits praying for relief, and not *merely* for a discovery,—that is, in all suits where a recovery of the amount due was sought,—the plaintiff must make an affidavit of the loss accompanying his bill of complaint, and must offer indemnity. The fact that the common-law requisite of a *profert* has long been abolished, and that actions at law may now be maintained on sealed instruments, has not theoretically affected the equitable jurisdiction.<sup>1</sup>

· § 832. **On Lost Unsealed Instruments.**—Where a negotiable bill, note, or check, whether payable to bearer, indorsed in blank, or not indorsed, is lost before maturity, it is held in England that no action at law can be maintained upon it by the real owner, and that his remedy is in equity.<sup>1</sup> According to these decisions, the only jurisdiction in such case was that in equity prior to the modern legislation which permitted actions in courts of law. Without inquiring whether this view of the jurisdiction at law be correct, the jurisdiction in equity of suits brought by the real owner to recover the amount due on lost negotiable instruments has been long and firmly settled upon the ground of the indemnity which can be given by a court of equity to the defendant, and which is a necessary feature of such suits. An offer of indemnity by the plaintiff is therefore required, as the general rule; but even without it a recovery may be had, since the defendant can always be protected by the provisions of the decree making a recovery conditional upon his being fully indemnified.<sup>2</sup> Able judges have denied that the equitable jurisdiction extends to suits upon non-negotiable instruments and other unsealed contracts, since an action at law could always be maintained, and no indemnity was necessary.<sup>3</sup> The jurisdiction is sustained, however, by the decided weight of authority in suits upon lost non-negotiable instruments and simple contracts, as well as in suits upon negotiable and sealed instruments. The reason seems to be that the remedy at law is not adequate; a court of equity alone can fully protect the defendant by its decree from all liabilities which *may* arise.<sup>4</sup> . . . All these instances

<sup>1</sup> *Ex parte Greenway*, 6 Ves. 812, 1 Scott 413; *Patton v. Campbell*, 70 Ill. 72, H. & B. 171; *Griffin v. Fries*, 23 Fla. 173, 2 South. 266, 11 Am. St. Rep. 351; *Howe v. Taylor*, 6 Oreg. 284, 291.

<sup>2</sup> *Hansard v. Robinson*, 7 Barn. & C. 90, 1 Scott 412.

<sup>3</sup> *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.

<sup>4</sup> *Mossop v. Eadon*, 16 Ves. 430, 433, 434.

<sup>5</sup> *Reeves v. Morgan*, 48 N. J. Eq. 415, 21 Atl. 1040; *Moore v. Durnam*, 63 N. J. Eq. 96, 51 Atl. 449.

of suits upon lost contracts plainly belong to the *concurrent* jurisdiction of equity, because the plaintiff's primary right of contract which is the foundation of his cause of action is purely legal, and his remedy is legal, being the ordinary judgment for the recovery of money.<sup>5</sup> Although this particular jurisdiction is theoretically unchanged, yet the cases under it are very few. Actions on lost negotiable instruments and other contracts are ordinarily brought at law, in pursuance of modern permissive statutes. This is especially true in the states which have adopted the reformed procedure; since the action, even if not professing to be based upon the statute, would be subject to the rules which govern all legal actions for the recovery of money; it would not in any way be distinguished from actions confessedly legal.

§ 833. 2. **Accidental Forfeitures.**—It was shown in a former chapter that the jurisdiction to relieve from pecuniary penalties is well settled and general;<sup>1</sup> and that it also extends to some, though not to all, cases of forfeiture as distinguished from penalties. It is, however, well settled, as a branch of the jurisdiction occasioned by accident, that, although the agreement is not wholly pecuniary, and is not one measured by pecuniary compensation, still if the party bound by it has been prevented from an exact fulfillment, so that a forfeiture is thereby incurred, by unavoidable accident, without his own negligence or fault, a court of equity will interpose and relieve him from the forfeiture so caused, upon his making compensation, if necessary, or doing everything else within his power to satisfy the equitable rights of the other party.<sup>2</sup> This

<sup>5</sup> Equity does not acquire jurisdiction *merely* because a deed of land has been lost, since in a legal action the deed and its contents could always be proved. To give rise to the equitable jurisdiction on the occasion of a lost deed, it must appear that there is no remedy at all, or else no adequate remedy at law: *Whitfield v. Fausset*, 1 Ves. Sr. 387, 392, 1 Scott 409. If the owner of land is in possession, and has lost his title deed, there is no remedy at all at law, for ejectment clearly will not lie. Equity, then, has jurisdiction by a suit in the nature of an action to quiet title, and can establish the owner's title and possession: *Dalston v. Coatsworth*, 1 P. Wms. 731, 1 Scott 407; *Lancy v. Randlett*, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169, 1 Scott 409 (but the bill must show that the loss was without plaintiff's fault). When the owner is out of possession, the action of ejectment will ordinarily furnish an adequate remedy.

<sup>1</sup> See vol. 1, §§ 432-460. It has sometimes been said by writers that this entire jurisdiction over penalties and forfeitures is based upon accident. It may be true that, in the earliest period of equity, the chancellors referred cases of relief against penalties to the general head of accident; but to explain the whole jurisdiction as is now administered, by treating it as based on accident, is to disregard the plain facts and meaning of words.

<sup>2</sup> See § 451: *Kopper v. Dyer*, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742, H. & B. 166, 1 Scott 400.

jurisdiction may be exercised in any manner, by any form of suit, and by granting any kind of relief made necessary by the circumstances of the particular case. Thus the relief may be conferred by a suit to enjoin the prosecution of an action at law brought to enforce the forfeiture, or to enjoin proceedings on the judgment recovered in such an action, or to set aside the forfeiture itself, or to redeem from it, or to obtain several of these remedies in combination.

§ 834. 3. **Defective Execution of Powers.**—This subject has already been treated of, and the grounds, extent, and limitations of the peculiar doctrine have been explained.<sup>1</sup> It is unnecessary to repeat the observations there made. It is well settled, as a general rule, that the non-execution—the entire failure to execute—of a mere power not a trust will not be aided in equity.<sup>2</sup> When, however, the party clothed with such a mere power, by a deed, settlement, or will, has attempted and begun to execute it, and the execution is defective through accident or mistake, or where he has made an agreement to execute it which is regarded as a kind of defective execution, equity may interpose its aid by decreeing a complete and perfect execution.<sup>3</sup> As has already been explained, this extraordinary jurisdiction is only exercised on behalf of classes of persons who are considered as possessing a certain meritorious or moral consideration, and against a party who has no equally meritorious equity. Its operation is confined to purchasers, including mortgagees, lessees, and creditors, wives, legitimate children, and those to whom the party executing stands in loco parentis, and charities; it does not include husbands, illegitimate children, distant relatives, nor volunteers.<sup>4</sup> As to the defects in the execution of a power which equity will thus aid and complete in proper cases, they must be in matters of form, and not of the very substance and essence of the power,—such as the want of a seal, or of witnesses, or of signatures, or omissions and imperfections in the limitations of the property.<sup>5</sup> The doctrine is confined to powers

<sup>1</sup> See ante, §§ 589, 590.

<sup>2</sup> Tollet v. Tollet, 2 P. Wms. 489, 1 Lead. Cas. Eq. 4th Am. ed. 365, 2 Ames Eq. Jur. 305, 1 Scott 420; Mitchell v. Denson, 29 Ala. 327, 65 Am. Dec. 403.

<sup>3</sup> Tollet v. Tollet, supra; Chapman v. Gibson, 3 Brown Ch. 229.

<sup>4</sup> See ante, § 589: Tollet v. Tollet, supra; Beatty v. Clark, 20 Cal. 11; American Freehold L. M. Co. v. Walker, 31 Fed. 103.

<sup>5</sup> Tollet v. Tollet, 1 Lead. Cas. Eq. 365, and notes; 2 Ames Eq. Jur. 305, 1 Scott 420. Where a power was required to be executed by means of a deed or other instrument inter vivos, an execution of it by a will is a defect which equity will aid: Tollet v. Tollet; but, conversely, when it was required to be executed only by a will, an execution by an absolute deed will not be aided: Reid v. Shergold, 10 Ves. 370. The defects which equity may aid consist either of the use of an inappropriate instrument, although it is duly executed, as

created by the voluntary act of persons in wills, deeds, and settlements; it does not extend to those created and regulated by statute. The defective execution of statutory powers, in the failure to comply with the prescribed requisites, cannot be aided by equity.\*

**§ 835. Powers in Trust will be Enforced.**—The general rule that equity refuses to aid the non-execution of powers, and only corrects their defective execution, relates only to bare, naked, or mere powers; it does not apply to powers coupled with a trust. Mere powers create no obligation resting on the donee, nor any right in a person who may be benefited by their execution. Powers in trust, or coupled with a trust, like any other trust, are imperative; they create a duty in the trustee, and a right in the beneficiary. Equity will not suffer this right of the beneficiary to be defeated, either by accident or by designs of the trustee, and will therefore carry into effect the intention of the donor, and give all needed relief to the beneficiary, whenever there has been a total or a partial failure to execute the power according to the terms of the trust.<sup>1</sup>

**§ 836. 4. Judgments of Law.**—Accident is also one of the grounds for the exercise of the most important jurisdiction with respect to actions and judgments at law. Where the defendant in an action at law has a good defense on the merits, which he is prevented by accident from setting up or making available without any negligence or inattention on his part, and a judgment is recovered against him, equity will exercise its jurisdiction on his behalf by enjoining further proceedings to enforce the judgment, or by setting it aside so that a new trial can be had on the merits.<sup>1</sup> In many states, especially in those which have adopted the reformed procedure, this particular relief is usually obtained by means of a motion for a new trial, and the necessary occasions for a resort to equity have been lessened; the equitable jurisdiction, however, has not been abrogated even in those states, and it is constantly invoked in the other commonwealths.

in *Tollet v. Tollet*; *In re Dyke's Estate*, L. R. 7 Eq. 337; or in the improper and insufficient mode of executing an appropriate kind of instrument—as, for example, omitting a seal. In order to admit the exercise of the jurisdiction and to grant relief, there must be something more than a mere verbal promise to execute the power; there must always be some writing attempting or showing an intention to execute: *Mitchell v. Denson*, 29 Ala. 327, 65 Am. Dec. 403. See, also, on the general doctrine, *Kearney v. Vaughan*, 50 Mo. 284.

\* *Kearney v. Vaughan*, 50 Mo. 284; *Williams v. Cudd*, 26 S. C. 213, 2 S. E. 14, 4 Am. St. Rep. 714.

<sup>1</sup> *Gibbs v. Marsh*, 2 Met. 243, 251; *Withers v. Yeadon*, 1 Rich. Eq. 324, 329. See, also, § 1002.

<sup>2</sup> See, also, post, § 1364.

## SECTION II.

## MISTAKE.

## ANALYSIS.

- § 838. Origin and purpose of this jurisdiction.
- § 839. I. Definition.
- §§ 840-856. II. Various kinds of mistakes which furnish an occasion for relief.
- §§ 841-851. *First.* Mistakes of law.
  - § 842. The general rule and its limitations.
  - § 843. Mistakes as to the legal import or effect of a transaction.
  - §§ 844-851. Particular instances in which relief will or will not be granted.
    - § 845. Reformation of an instrument on account of a mistake of law.
    - § 846. Mistake common to all parties: mistake of a plain rule.
    - § 847. Mistake of law accompanied with inequitable conduct of the other party.
    - § 848. Same: between parties in relations of trust.
    - § 849. Relief where a party is mistaken as to his own existing legal rights, interests, or relations.
    - § 850. Compromises and voluntary settlements made upon a mistake as to legal rights.
    - § 851. Payments of money under a mistake of law.
- §§ 852-856. *Second.* Mistakes of fact.
  - § 853. How mistakes of fact may occur.
  - § 854. In what mistakes of facts may consist.
  - § 855. Compromises and speculative contracts.
  - § 856. Requisites to relief: mistake must be material and free from culpable negligence.
- §§ 857-867. III. How mistake may be shown: when by parol evidence.
  - § 858. Parol evidence in general in cases of mistake, fraud, or surprise.
  - § 859. In suits for a reformation or cancellation: character and effect of the evidence.
  - § 860. Parol evidence in defense in suits for a specific performance.
  - § 861. Parol evidence of mistake on the plaintiff's part in suits for a specific performance: English rule.
  - § 862. Same: American rule: evidence admissible.
  - § 863. Evidence of a parol variation which has been part performed.
- §§ 864-867. Effect of the statute of frauds upon the use of parol evidence in equitable suits.
  - § 865. Two classes of cases in which the use of parol evidence may be affected by statute.
  - § 866. General doctrine: parol evidence of mistake or fraud admissible in both these classes of cases.
  - § 867. *Glass v. Hulbert*: examination of proposed limitations upon this general doctrine.
- §§ 868-871. IV. Instances of equitable jurisdiction occasioned by mistake.
  - § 868. When exercised by way of defense.
  - § 869. By way of affirmative relief: recovery of money paid by mistake.
  - § 870. Affirmative relief: reformation and cancellation.
  - § 871. Conditions of fact which are occasions for affirmative relief.

**§ 838. Origin and Purpose of This Jurisdiction.**—From the time when jurisdiction was first formally delegated to the chancellor by the crown, mistake has played a most important part as the occasion of equitable rights and duties, and for the exercise of the jurisdiction in awarding equitable remedies. In the earlier periods, when the domains of the law courts and of the court of chancery were sharply discriminated, when the common-law judges were not influenced by equitable notions, this branch of equitable jurisprudence and jurisdiction consisted entirely in the means by which certain parties were prevented from holding and enjoying legal rights, and certain other parties were relieved from the burden of legal duties and liabilities, which had originated under a mistake, and which were complete and unassailable at law. In the progress of time, as the common law became more and more conformed to equitable principles, the legal tribunals assumed a partial cognizance and gave a partial relief in cases involving mistake. All the *possible* modes in which the remedial jurisdiction occasioned by mistake can be exercised are the following: 1. Negatively, as a ground of defense either in actions at law or in suits in equity, to defeat an enforcement of and recovery upon either legal or equitable rights of action; 2. Affirmatively, as a ground for rescinding a transaction, and restoring the mistaken party to his original position by means of an appropriate legal action and a recovery therein of money or property; 3. Affirmatively, as a ground for the equitable relief of rescinding a transaction, or canceling an agreement or other written instrument; 4. Affirmatively, as a ground for the equitable relief of reforming or re-executing a written instrument. The final object of the present discussion is to ascertain when these various remedies may be obtained in equity; and incidentally to ascertain when and to what extent some of them may be conferred by courts of law. The discussion itself will be conducted under the following divisions: 1. Definition; 2. A statement of the various kinds of mistakes both of law and of fact which do or do not furnish an occasion for relief, with an examination of the equitable conception and the essential elements of a mistake in order that it may be a ground for the exercise of jurisdiction; 3. The mode of showing a mistake, and especially how far may parol evidence be resorted to for the purpose of showing mistakes in written instruments; 4. An enumeration of the instances and forms of equitable jurisdiction and reliefs occasioned by mistake.

**§ 839. I. Definition.**—It is very difficult to formulate a definition which shall contain the essential elements of the conception as distinguished from its effects, and which shall accurately discriminate between mistake and accident on the one side, and fraud

and negligence on the other. The definitions given by some American and English text-writers describe the effects of mistake,—the consequences resulting from it,—rather than its essential features. It was shown in the preceding section that accident is an unexpected occurrence *external* to the party affected by it; and its operation is ordinarily to prevent that party from doing some act whereby he becomes subjected to a liability which would not otherwise have arisen. Mistake, on the other hand, is *internal*; it is a mental condition, a 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. Its operation is ordinarily, though not always, affirmative,—the doing of some act which would not have been done in the absence of the particular conception or conviction which influenced the free action of the will. Its essential prerequisite is *ignorance*. It is distinguished from fraud, fraudulent representations, or fraudulent concealments by the absence of knowledge and intention, which in legal fraud are actually present, and in constructive fraud are theoretically present, as necessary elements. It is also distinguished from that inattention or absence of thought which are inherent in negligence. The erroneous conception or conviction of the understanding which constitutes the equitable notion of mistake has nothing in common with negligence; equity will not relieve a person from his erroneous acts or omissions resulting from his own negligence.<sup>1</sup> Mistake, therefore, within the meaning of equity, and as the occasion of jurisdiction, 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. . . .

**§ 840. II. Various Kinds of Mistakes Which Furnish an Occasion for Relief.**—We are met at the outset by a natural line of division. A party may enter into a transaction altering his legal relations for the better or the worse, with full knowledge of all the facts connected therewith, but ignorant or mistaken concerning either the general law of the land governing the case, or concerning his own personal legal rights affected by or resulting from the transaction. On the other hand, he may be cognizant of the general law and of his own legal rights, but be ignorant or mistaken as to some material fact of the transaction which forms an important factor in determining his action. All possible mistakes are there-

<sup>1</sup> *Diman v. Providence, etc., R. R. Co.*, 5 R. I. 130, 3 Keener 256; *Western R. R. Co. v. Babcock*, 6 Met. 346, 2 Keener 937. See, further, post, § 856.

fore separated into those of law and those of fact, although it is sometimes very difficult to ascertain in a particular instance whether the mistake is purely one of law, or is of law and of fact in combination. As the cases in which persons are relieved from their mistakes of law are somewhat exceptional, it will be convenient to examine them first in order.

§ 841. **First. Mistakes of Law.**—It is very important to form an accurate notion of the various conditions included within this general term; much confusion and apparent conflict of opinion have resulted from a failure to recognize these distinctions. Mistake of law may be an ignorance or error with respect to some general rules of the municipal law applicable to all persons, which regulate human conduct, determine rights of property, of contract, and the like; such as the rules making certain acts criminal, and those controlling the devolution, acquisition, and transfer of estates, and those prescribing the modes of entering into agreements. On the other hand, the term may mean 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 engages.<sup>1</sup> This application of the term may present two entirely different conditions. The person about to enter into the transaction may be ignorant of or mistaken about his own antecedent existing legal rights and interests which are to be affected by what he does, although he correctly apprehends and fully understands the legal import of the transaction itself and its true effects upon his supposed legal rights;<sup>2</sup> or the person may be correctly informed as to his existing legal rights, interests, or relations, and may be ignorant or mistaken with respect to the legal import of the transaction in which he engages, and its legal effect upon those rights, interests, or relations. Finally, in any one of the foregoing instances the ignorance or error may be confined to one party, or it may extend to both parties; all the parties may alike enter into the transaction under a common ignorance or error concerning the general rules of the law, or concerning the individual legal interests affected by or resulting from it. An ancient and familiar maxim of the common law is, *Ignorantia juris non excusat*. This maxim confessedly has its primary application to cases of the first class above described,—ignorance or error concerning the general rules of law

<sup>1</sup> *Alabama & V. R. Co. v. Jones*, 73 Miss. 110, 19 South. 105, 55 Am. St. Rep. 488.

<sup>2</sup> For example, a person about to give a release might erroneously suppose that he held only a life estate, while in fact he was the owner in fee; and might know that the legal operation of the conveyance was to release all the the interest which he had.

controlling human conduct, and especially in criminal prosecutions. The real question for discussion is, How far does it apply to the two species contained in the second class,—mistakes as to individual legal rights? The principle embodied in the maxim was derived from the Roman law; little aid, however, can be derived from the uncertain and conflicting opinions of the Roman law jurists and commentators.

§ 842. **The General Rule, and its Limitations.**—The doctrine is settled that, in general, a mistake of law, pure and simple, is not adequate ground for relief. Where a party with knowledge of all the material facts, and without any other special circumstances giving rise to an equity in his behalf, enters into a transaction affecting his interests, rights, and liabilities, under an ignorance of error with respect to the rules of law controlling the case, courts will not, in general, relieve him from the consequences of his mistake.<sup>1</sup> The reasons are obvious. The administration of justice, the law itself as a practical system for the regulation of human conduct, require that some fundamental assumptions should be made as postulates. The most important, perhaps, of all these, is the assumption that all persons of sound and mature mind are presumed to know the law. If ignorance of the law were generally allowed to be pleaded, there could be no security in legal rights, no certainty in judicial investigations, no finality in litigations. While this general doctrine prevails in equity as well as at law, its operation is not there universal; it is subject to modifications and limitations; equity *does* sometimes exercise its jurisdiction on the occasion of mistakes of law. If the mistake of law is not pure and simple, but is induced or accompanied by other special facts giving rise to an independent equity on behalf of the mistaken person, such as inequitable conduct of the other party, there can be no doubt that a court of equity will interpose its aid.<sup>2</sup> Even when the mistake of law is pure and simple, equity *may* interfere. The difficulty is to ascertain any general criterion which shall determine and include all *such* cases. Many judges have attempted to formulate a criterion for all instances of pure mistakes of law which will

<sup>1</sup> If a legal question could be settled by numbers of judicial dicta expressed in the most general terms, there could be no doubt of the universality of the doctrine stated in the text. Hunt v. Rousmaniere, 8 Wheat 174, 1 Pet. 1, 2 Mason 342, H. & B. 177, 182, 2 Ames Eq. Jur. 250, 3 Keener 6, 2 Scott 544; Kenyon v. Welty, 20 Cal. 637, 2 Ames Eq. Jur. 283; Marshall v. Westrope, 98 Iowa 324, 67 N. W. 257, H. & B. 208, 3 Keener 166; Gebb v. Rose, 40 Md. 387, 3 Keener 427; Jacobs v. Morange, 47 N. Y. 57, Sh. 153; Ottenheimer v. Cook, 10 Heisk. 309, 3 Keener 71; Proctor v. Thrall, 22 Vt. 262, 2 Ames Eq. Jur. 270.

<sup>2</sup> See post, § 847; Spurlock v. Brown, 91 Tenn. 241, 18 S. W. 868; Benson v. Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816.

be relieved in equity, but their conclusions are conflicting, and none is sustained by the authority of judicial decisions. It has been said by judges of the highest ability that the general doctrine heretofore stated, and embodied in the maxim, *Ignorantia juris non excusat*, is confined to mistakes of the general rules of law,—the first class of mistakes described in the preceding paragraph; that it has no application to the mistakes of persons as to their own private legal rights and interests,—the second class before described; that ‘*jus*,’ in the maxim, denotes the general law, the law of the country, and never means private legal rights.<sup>4</sup>

**§ 843. Mistake as to the Legal Import or Effect of a Transaction.**—That this rule, as suggested by Lord Westbury, would furnish a clear, definite, and in some respects a desirable criterion cannot be doubted; but it is not, in its full extent, sustained by authority; indeed, a portion of its conclusions is directly opposed to the overwhelming weight of judicial decisions. The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or of other inequitable conduct in the transaction, the party who knew, or had an opportunity to know, the contents of an agreement or other instrument cannot defeat its performance or obtain its cancellation or reformation because he mistook the legal meaning and effect of the whole or of any portion of its provisions. Where the parties, with knowledge of the facts, and without any equitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, then the above rule uniformly applies; equity will not allow a defense, or grant a reformation or rescission, although one of the parties—and as many cases hold, both of them—may have mistaken or misconceived its legal meaning, scope, and effect.<sup>1</sup> The principle underly-

<sup>4</sup> This view is supported by the authority of Lord Westbury, certainly one of the ablest judges that ever sat in the English court of chancery, and distinguished for the remarkable grasp and clear enunciation of principles in all his opinions. Cooper v. Phibbs, L. R. 2 H. L. 149, 170, 2 Ames Eq. Jur. 266, 2 Scott 559, 3 Keener 43, Shep. 148.

<sup>1</sup> The circumstances mentioned in the text are the same as the second species of the second class described before in § 841, where a person knowing correctly his existing legal rights and relations is mistaken as to the legal import of the transaction in which he engages, and of its legal effect upon those rights or relations. Powell v. Smith, L. R. 14 Eq. 85, 90; Hunt v. Rousmaniere, 8 Wheat. 174, 1 Pet. 1, H. & B. 177, 183, 2 Ames 250, 3 Keener 6, 2 Scott 544; Kelly v.

ing this rule is, that equity will not interfere for the purpose of carrying out an intention *which the parties did not have when they entered into a transaction*, but which they might or even would have had if they had been more correctly informed as to the law,—if they had not been mistaken as to the legal scope and effect of their transaction. If an agreement or written instrument or other transaction expresses the thought and intention which the parties had at the time and in the act of concluding it, no relief, affirmative or defensive, will be granted with respect to it, upon the assumption that their thought and intention would have been different if they had not been mistaken as to the legal meaning and effect of the terms and provisions by which such intention is embodied or expressed, even though it should be incontestably proved that their intention would have been different if they had been correctly informed as to the law. These rules are settled with perfect unanimity where one party has been mistaken in such a manner; they are also applied by very many cases where the same mistake is common to both the parties.

**§ 844. Particular Instances in Which Relief will or will not be Granted.**—Firmly settled as are the foregoing general rules, it is equally well settled that there are particular instances in which equity will grant defensive or affirmative relief from mistakes of law pure and simple, as well as from those accompanied by other inequitable incidents. The only difficulty consists, as has already been mentioned, in drawing any sharply defined lines by which all these instances may be accurately determined. I shall endeavor to state those conclusions which seem to be based upon principle as well as sustained by authority; although it must be conceded that no results can be reached which shall represent the unanimous concurrence of decisions and dicta. It is certain, however, that no mistake of law will be relieved from unless it is material, and the court is certain that the conduct of the parties has been determined by it.<sup>1</sup>

**§ 845. Reformation of an Instrument on Account of a Mistake of Law.**—The first instance which I shall mention is closely connected with the doctrine stated in the last paragraph but one. It was there was shown that if an agreement is what it was in-

Turner, 74 Ala. 513, 3 Keener 92; *Fowler v. Black*, 136 Ill. 363, 26 N. E. 596, 2 Ames Eq. Jur. 293, 3 Keener 100, 2 Scott 555; *Marshall v. Westrope*, 98 Iowa 324, 67 N. W. 257, H. & B. 208, 3 Keener 1.6; *Eldridge v. Dexter & P. R. Co.*, 88 Me. 191, 93 Atl. 974, 3 Keener 158; *Caldwell v. Depew*, 40 Minn. 528, 42 N. W. 479, 2 Keener 1000.

<sup>1</sup> *Stone v. Godfrey*, 5 De Gex, M. & G. 76, 90, per Turner, L. J. See, also, post, § 856.

tended to be, equity would not interfere with it because the parties had mistaken its legal import and effect. If, on the other hand, after making an agreement, in the process of reducing it to a written form the instrument, *by means of a mistake of law*, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement, or by cancellation, or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of *the contract actually made*; but the mistake of law prevents the real contract from being embodied in the written instrument. In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing. Among the ordinary examples of such errors are those as to the legal effect of a description of the subject-matter, and as to the import of technical words and phrases; but the rule is not confined to these instances.<sup>1</sup>

**§ 846. Mistakes Common to All the Parties—Mistake of a Plain Rule.**—It has been said that whenever a mistake of law is common to all the parties, where they all act under the same misapprehension of the law, and make substantially the same mistake concerning it, this is a sufficient ground, without any other incidents, for the interposition of equity. No such general rule, in my opinion, can be regarded as established, or even suggested, by the weight of authority; and it is certainly contradicted by well-considered decisions of most able courts. It will be found, I think, that the instances of relief where the mistake of law was mutual fall under the particular rule stated in the last preceding paragraph. It has also been asserted, as a general criterion, that where the mistake is concerning a clear, unquestioned, unequivocal rule of the law, a court of equity will relieve the party from its consequences; but

<sup>1</sup> *Hunt v. Rousmaniere*, 8 Wheat. 174, 1 Pet. 1, H. & B. 177, 182, 2 Ames Eq. Jur. 250, 3 Keener 6, 2 Scott 544; *Snell v. Ins. Co.*, 98 U. S. 85, 3 Keener 80; *Griswold v. Hazard*, 141 U. S. 26, 11 Sup. Ct. 972, H. & B. 197, 2 Ames Eq. Jur. 259, 3 Keener 107; *Park Bros & Co. v. Blodgett*, 64 Conn. 28, 29 Atl. 133, H. & B. 234, 3 Keener 150; *Wyche v. Greene*, 16 Ga. 49, 2 Ames Eq. Jur. 289; *Dinwiddie v. Self*, 145 Ill. 290; 33 N. E. 892, 3 Keener 137; *Stafford v. Fetters*, 55 Iowa 484, 8 N. W. 322, H. & B. 191, 3 Keener 86; *Lee v. Percival*, 85 Iowa 135, 52 N. W. 543, 3 Keener 135; *Canedy v. Marcy*, 13 Gray 373, 2 Ames Eq. Jur. 256, 3 Keener 35, 2 Scott 552; *Stockbridge Iron Co. v. H. I. Co.*, 107 Mass. 290, 3 Keener 54; *Pitcher v. Hennessey*, 48 N. Y. 415, 3 Keener 65; *McNaughten v. Partridge*, 11 Ohio 223, 38 Am. Dec. 731, 2 Ames Eq. Jur. 279.

where the mistake is concerning a doubtful, obscure, or unsettled rule, no relief will be granted. In the first place, this proposition, if taken as a general rule, is directly opposed to the fundamental principle upon which the entire doctrine concerning mistakes of law is based. The presumption that every person knows the law must necessarily extend to all rules of the law alike. To permit a distinction between rules said to be clear and those claimed to be doubtful would at once open the door for all the evils in the administration of justice, which the presumption itself is intended to exclude. In the second place, the proposition finds no support, as a general rule, from the decisions of authority. All the cases in which such language was originally used by the judges, either as a dictum or as the ratio decidendi, were cases arising upon family compromises and settlements,<sup>1</sup> which, as will appear hereafter, are governed by special considerations, whether they involve mistakes of law or of fact. The rule, so far as it may be called a rule, has a very restricted application, and cannot be raised to the position of a general criterion. There are undoubtedly cases, not arising out of family compromises, in which parties ignorant or mistaken concerning their *own clear legal rights* have been relieved; but these will all find another explanation more consonant with principle than the foregoing alleged general rule.

§ 847. **Mistake of Law Accompanied with Inequitable Conduct of the Other Party.**—Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided, or accompanied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements, or acts of the other party. When the mistake of law is pure and simple, the balance held by justice hangs even; but when the error is accompanied by any inequitable conduct of the other party, it inclines in favor of the one who is mistaken. The scope and limitations of this doctrine may be summed up in the proposition that a misapprehension of the law by one party, of which the others are aware at the time of entering into the transaction, but which they do not rectify, is a sufficient ground for equitable relief. A court of equity will not permit one party to take advantage and enjoy the benefit of an ignorance or mistake

<sup>1</sup> As *Naylor v. Winch*, 1 Sim. & St. 555, 2 Scott 576. See post, § 850.

of law by the other, which he knew of and did not correct. While equity interposes under such circumstances, it follows a fortiori that when the mistake of law by one party is induced, aided, or accompanied by conduct of the other more positively inequitable, and containing elements of wrongful intent, such as misrepresentation, imposition, concealment, undue influence, breach of confidence reposed, mental weakness, or surprise, a court of equity will lend its aid and relieve from the consequences of the error. The decisions illustrating this general rule are numerous, and it will be found that many of the cases in which relief has been granted contained, either openly or implicitly, some elements of such inequitable conduct.<sup>1</sup>

§ 848. **Same. Between Parties in Relations of Trust.**—A particular application of the foregoing rule requires a special mention. Where an ignorance or misapprehension of the law, even without any positive, incorrect, or misleading words or incidental acts, occurs in a transaction concerning the trust between two parties holding close relations of trust and confidence, injuriously affecting the one who reposes the confidence, equity will, in general, relieve the one who has thus been injured. The relations of trustee and cestui que trust, guardian and ward, and the like, are examples. The relief is here based upon the close confidence reposed,—upon the duty of the trustee to act in the most perfect good faith, to consult the interests of the beneficiary, not to mislead him, and not even to suffer him to be misled, when such a result can be prevented by reasonable diligence and prudence.<sup>1</sup>

§ 849. **Relief where a Party is Mistaken as to his Own Existing Legal Rights, Interests, or Relations.**—Is it possible to formulate any general rule which shall be a criterion for all cases of relief from mistakes of law pure and simple, and without other incidental circumstances, which shall be sustained by judicial authority, and which shall furnish a *principle* as guide for future decisions? In my opinion, it is possible. It has been shown that where the general law of the land—the common jus—is involved, a pure and simple mistake in any kind of transaction cannot be relieved. Also, where

<sup>1</sup> *Gee v. Spencer*, 1 Vern. 32, 2 Scott 568; *Broughton v. Hutt*, 3 De Gex & J. 501, 3 Keener 32; *Wheeler v. Smith*, 9 How. 55, 1 Scott 444; *Titus v. Rochester G. Ins. Co.*, 97 Ky. 567, 31 S. W. 127, 53 Am. St. Rep. 427, H. & B. 213; *Jordan v. Stevens*, 51 Me. 78, 81 Am. Dec. 556, H. & B. 188, 3 Keener 38; *Green v. Morris*, etc., R. Co., 12 N. J. Eq. 165, H. & B. 193, 3 Keener 25; *Haviland v. Willetts*, 141 N. Y. 35, 35 N. E. 958, 2 Ames Eq. Jur. 273, 3 Keener 144 (an instructive case); *Moreland v. Atchison*, 19 Tex. 303, Shep. 155; *Kyle v. Fehley*, 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866, 3 Keener 131.

<sup>1</sup> *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907, 3 Keener 401; *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571.

a person correctly apprehends his own legal rights, interests, and relations, a simple mistake as to the legal effect of a transaction into which he enters, in the absence of other determining incidents, is not ground for relief. There is, as shown in a former paragraph (§ 841), a third condition. A person may be ignorant or mistaken as to his own antecedent existing legal rights, interests, duties, liabilities, or other relations, while he accurately understands the legal scope of a transaction into which he enters, and its legal effect upon his rights and liabilities. It will be found that the great majority, if not indeed all, of the well-considered decisions in which relief has been extended to mistakes pure and simple fall within this class; and also, that whenever cases of this kind have arisen, *relief has almost always been granted*, although not always on this ground. Courts have felt the imperative demands of justice, and have aided the mistaken parties, although they have often assigned as the reason for doing so some inequitable conduct of the other party which they have inferred or assumed. The *real reason* for this judicial tendency is obvious, although it has not always been assigned. A private legal right, title, estate, interest, duty, or liability is always a *very complex conception*. It necessarily depends so much upon conditions of fact, that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest, or liability, separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person with respect to his own private legal rights and liabilities may be properly regarded,—as in great measure they really are,—and may be dealt with as mistakes of fact. Courts have constantly felt and acted upon this view, though not always avowedly. Lord Westbury openly declares that such misconceptions are truly mistakes of fact. Some very instructive remarks of Sir George Jessel, which I have placed in the foot-note, will, with a slight modification of his language, apply to all instances involving this kind of error or ignorance.<sup>1</sup> A general rule permitting the jurisdiction of equity

<sup>1</sup> *Eaglesfield v. Marquis of Londonderry*, L. R. 4 Ch. Div. 693, 702, 703. The master of rolls is speaking of a misrepresentation of the law affecting a person's private rights, but his language, with slight change, will apply to all cases of ignorance or error concerning one's own private legal interests. In my opinion, it suggests the true principle upon which to rest the action of the courts in all such instances. "It was put to me that this was a misrepresentation of law, and not of fact. . . . Was it a misrepresentation of law? A misrepresentation of law is this: when you state the facts, and state a conclusion of law, so as to distinguish between facts and 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 a tradesman whether he can give credit to a lady, and the answer is, 'You may; she is a single wo-

to relieve from mistakes of the law pure and simple, in all cases belonging to this species, and confining its operation to them, would at once reduce to clearness, order, and certainty a subject which has hitherto been confessedly uncertain and confused. It would work justice, for these kinds of errors stand upon a different footing from all others, and justice and good conscience demand their relief; it would conform to sound principle, for these mistakes are in part essentially errors of fact; and finally, it would explain and harmonize many decisions of the ablest courts which have hitherto seemed almost inexplicable except by violent and unnatural assumptions. I therefore venture to formulate the following general rule as being eminently just and based on principle, and furnishing a simple criterion defining the extent of the jurisdiction. The number of decisions which support it, and which it explains, is very great. 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 lia-

man of large fortune.' It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that the marriage ceremony was null and void, though it had not been declared so by any court, and it afterwards turned out 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. There is not a single fact connected with personal status that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first-born son after the marriage, or, in some countries, before. Therefore, to say it is not a representation of fact seems to arise from a confusion of ideas. It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you say that a man is in possession of an estate of ten thousand pounds a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to ten thousand pounds consols involves all sorts of law." The decision of the master of rolls in this case was reversed by the court of appeal, but only upon a different view of the evidence from that which he took, and without in the least affecting the correctness of the observations which I have quoted.

bilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact.<sup>2</sup> It should be carefully observed that this rule has no application to cases of compromise, where doubts have arisen as to the rights of parties, and they have intentionally entered into an arrangement for the purpose of compromising and settling those doubts. Such compromises, whether involving mistakes of law or of fact, are governed by special considerations.

§ 850. **Compromises and Voluntary Settlements Made upon a Mistake as to Legal Rights.**—Compromises, where doubts with respect to individual rights, especially among members of the same family, have arisen, and where all the parties, instead of ascertaining and enforcing their mutual rights and obligations which are yet undetermined and uncertain, intentionally put an end to all controversy by a voluntary transaction in the way of a compromise, are highly favored by courts of equity. They will not be disturbed for any ordinary mistake, either of law or of fact, in the absence of conduct otherwise inequitable, since their very object is to settle all such possible errors without a judicial controversy. There are, indeed, dicta to the effect that a party will be relieved from a compromise in which he has surrendered property or other rights unquestionably his own, through a misconception of a clear legal rule, or an erroneous supposition that a legal duty rested upon him,

<sup>2</sup>It is not claimed that all these cases were avowedly decided upon the above rule, although many of them seem to distinctly recognize it. In all of them the error was of the kind described in the text, and the rule will furnish a simple reason why relief was granted, which the judges sometimes failed to do: Cooper v. Phipps, L. R. 2 H. L. 149, 2 Ames Eq. Jur. 266, 3 Keener 43, 2 Scott 559, Shep. 148 (A, being ignorant that certain property belonged to himself, and supposing that it belonged to B, agreed to take a lease of it from B at a certain rent. There was no fraud, no unfair conduct, all the parties equally knew the facts. The house of lords set aside the agreement on account of the mistake. A majority of the judges called it a mistake of fact. Lord Westbury boldly acknowledged it to be what is ordinarily called a mistake of law, but held that it was really a mistake of fact, and to be dealt with as such. The mistake was clearly one to which the term "mistake of law" has ordinarily been applied; but it as clearly possessed the elements of a mistake of fact. The decision is a direct authority in support of the text); Lansdowne v. Lansdowne, 2 Jac. & W. 205, Mos. 364, 3 Keener 1, 2 Scott 540; Pusey v. Desbouvrie, 3 P. Wms. 315, 320, 3 Keener 2, 1 Scott 430; Bingham v. Bingham, 1 Ves. Sr. 126, 2 Ames Eq. Jur. 264, 3 Keener 5, 2 Scott 543; Broughton v. Hutt, 3 De Gex & J. 501, 504, 3 Keener 32; In re Saxon L. Ins. Co., 1 De Gex, J. & S. 29, 2 Johns. & H. 408, 2 Ames Eq. Jur. 265; Blakeman v. Blakeman, 39 Conn. 320, 3 Keener 72, 2 Scott 569 (striking illustration); Jeakins v. Frazier, 64 Kan. 267, 67 Pac. 864, 2 Ames Eq. Jur. 268; Renard v. Clink, 91 Mich. 1, 51 N. W. 692, 30 Am. St. Rep. 458, H. & B. 212; Gerdine v. Menage, 41 Minn. 417, 43 N. W. 91, 2 Ames Eq. Jur. 280; Goff v. Gott, 5 Sneed (Tenn.) 562, 2 Ames Eq. Jur. 281.

whereas plainly no such duty existed; but the decisions show that these dicta must be confined to circumstances which render the compromise itself a virtual surprise, or to cases in which it was induced by positive inequitable conduct of the other parties.<sup>1</sup> Voluntary settlements are so favored that if a doubt or dispute exists between parties with respect to their rights, and all have the same knowledge, or means of obtaining knowledge, concerning the circumstances involving these rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they thus voluntarily enter must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed had the controversy been brought before it for decision.<sup>2</sup> Of course, there must not only be no representation, imposition, or concealment; there must also be a full disclosure of all material facts within the knowledge of the parties, whether demanded or not by the others. In the words of a distinguished judge: "There must not only be good faith and honest intention, but full disclosure, and without full disclosure, honest intention is not sufficient." If these requisites of good faith exist, it is not necessary that the dispute should be concerning a question really doubtful, if the parties bona fide consider it so; it is enough that there is a question between them to be settled by their compromise.<sup>3</sup> The foregoing rules apply to all cases of compromise, whether the doubtful questions to be settled relate to matters of law or of fact.<sup>4</sup>

§ 851. **Payments of Money under a Mistake of Law.**—The general rule stated in the paragraph before the last, concerning mistakes as to one's own private legal rights and duties, is also subject to another important limitation. It is settled at law, and the rule has been followed in equity, that money paid under a mistake of law with respect to the liability to make payment, but with full knowledge, or with means of obtaining knowledge, of all the circumstances, cannot be recovered back.<sup>1</sup> There is an exception, as

<sup>1</sup> See *Bingham v. Bingham*, 1 Ves. Sr. 126, 2 Ames Eq. Jur. 264, 3 Keener 5, 2 Scott 543; *Naylor v. Winch*, 1 Sim. & St. 555, 2 Scott 576; *Titus v. Rochester G. Ins. Co.*, 97 Ky. 567, 31 S. W. 127, 53 Am. St. Rep. 427, H. & B. 213.

<sup>2</sup> *Ex parte Lucy*, 4 De Gex, M. & G. 356, 3 Keener 14; *Hall v. Wheeler*, 37 Minn. 522, 35 N. W. 377, 2 Ames Eq. Jur. 288, 3 Keener 99; *Gormly v. Gormly*, 130 Pa. St. 467, 18 Atl. 727, 3 Keener 184.

<sup>3</sup> *Ex parte Lucy*, 4 De Gex, M. & G. 356, 3 Keener 14.

<sup>4</sup> See post, § 855.

<sup>1</sup> *Rogers v. Ingham*, L. R. 3 Ch. Div. 351, 3 Keener 75, Sh. 157, 2 Scott 572; *Erkens v. Nicolin*, 39 Minn. 461, 40 N. W. 567, H. & B. 216, Sh. 152; but see *Mansfield v. Lynch*, 59 Conn. 320, 22 Atl. 313, 12 L. R. A. 285. If the doctrine

in the case of compromises, when the erroneous payment is induced or accompanied by a violation of confidence reposed, lack of full disclosure, misrepresentation as to liability, or other similar inequitable conduct.<sup>2</sup>

§ 852. **Second. Mistakes of Facts.**—The general doctrine is firmly settled as one of the elementary principles of the equitable jurisdiction, that a court of equity will grant its affirmative or defensive relief, as may be required by the circumstances, from the consequences of any mistake of fact which is a material element of the transaction, and which is not the result of the mistaken party's own violation of some legal duty, provided that no adequate remedy can be had at law. It has been said, "No person can be presumed to be acquainted with all matters of fact connected with a transaction in which he engages." This general doctrine is applied in a great variety of forms and under a great variety of circumstances. It presents but few *theoretical* difficulties; its practical difficulties arise from its application to particular instances of relief, and this application must be largely controlled by the circumstances of each case.

§ 853. **How Mistakes of Fact may Occur.**—All mistakes of fact in agreements executed or executory, express or implied, must be concerning either the subject-matter or the terms. In the first case, the terms are stated according to the intent of both the parties, but there is an error of one or both in respect of the thing to which these terms apply,—its identity, situation, boundaries, title, amount, value, and the like. Such a mistake may relate to any kind of subject-matter, and may occur in a verbal as well as in a written agreement. In the second case, the mistake may arise *after* the parties have verbally concluded their agreement, and may occur in reducing that agreement to writing, by erroneously adding, omitting or altering some term;<sup>3</sup> or it may arise in the very process of making the agreement, during the negotiation itself, one or both the parties misconceiving, misunderstanding, or even being entirely ignorant of some term or provision; so that, although they *appear* to have made an agreement, yet in fact their minds never met upon the same mat-

formulated in § 849 be correct, then it seems that this particular rule forbidding the recovery back of money paid under a mistake of law is based upon an erroneous conception of the principle which should govern such cases, and the opinions of those jurists which uphold the right of recovery appear to be correct in principle. This rule itself is an illustration of the disinclination of equity courts to depart from a doctrine, settled at law, when the rights and the remedies are the same in both jurisdictions.

<sup>2</sup> See *Rogers v. Ingham*, *supra*, per James, L. J.

<sup>3</sup> See *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259, 3 Keener 433; *Miles v. Miles* (Miss.), 37 South. 112.

ters.<sup>2</sup> While this latter species of error is not infrequent, it generally consists in a mistake or ignorance as to the *legal effect* of the provision, rather than as to the language in which the provision is expressed. The same description will plainly apply to all forms of mistakes of fact in transactions which are not agreements.

§ 854. **In What Mistakes of Fact may Consist.**—It would be impossible, within any reasonable limits, to enumerate the various forms in which mistakes of fact may appear. . . . The law of a foreign country or of another state is always regarded as a “fact,” within the meaning of the term as used in the foregoing description; an error or ignorance concerning such law is therefore a mistake of fact.<sup>1</sup> It necessarily follows from this description that where an act is done intentionally and with knowledge, the doing the act cannot be treated as a mistake. Thus if parties knowingly and intentionally add to or omit from their written agreement a certain provision, such adding to or omission cannot constitute a mistake, so as to be a ground for relief.<sup>3</sup>

<sup>2</sup> *Crookston Imp. Co. v. Marshall*, 57 Minn. 333, 47 Am. St. Rep. 612, 59 N. W. 294.

<sup>1</sup> *Haven v. Foster*, 9 Pick. 111, 112; 19 Am. Dec. 353; *Patterson v. Bloomer*, 35 Conn. 57, 95 Am. Dec. 218, 2 Keener 956.

<sup>3</sup> The exact import of this rule should not be misapprehended. The parties may be in error as to the *legal effect* of the addition or omission; this would be a mistake of law which, as has been shown, would not be relieved. They *might* also be mistaken as to the subject-matter of the provision added or omitted, or *possibly* as to its language, and such an error might be a mistake of fact. The rule of the text simply declares that when an act is done intentionally and knowingly, the *very doing itself* cannot be treated as a mistake entitled to relief; the elements of knowledge and intention contradict the essential conception of mistake; See *Lord Irnham v. Child*, 1 Brown Ch. 92, 2 Scott 256.

Where a verbal stipulation is made at the same time as the written contract, and is omitted intentionally on the faith of an assurance that it shall be as binding as though incorporated into the writing, the rule as generally settled does not permit such provision to be proved and enforced. It is said that, there being no fraud or mistake, to allow the verbal term to be proved by parol evidence, and the written agreement to be thereby varied, would be a violation of the statute of frauds, and would introduce all the evils which the statute was designed to prevent. The relief given in cases of fraud and mistake stands upon different grounds; although appearing to conflict with the statute, it is really carrying out the ultimate purposes of the legislature by preventing injustice. No such grounds, it is said, exist where parties have intentionally omitted provisions from their written agreements. See *Broughton v. Coffey*, 18 Gratt. 184. *Hall v. First Nat. Bank*, 173 Mass. 16, 53 N. E. 154, 73 Am. St. Rep. 255, 44 L. R. A. 319. There are cases, however, which seem to reject this conclusion, and allow the verbal stipulation to be proved and enforced, and the written agreement to be reformed, on the ground that the refusal to abide by the whole agreement, and the attempt to enforce that portion only which is written, constitute a fraud which equity ought to prohibit; See *Coger's Ex'rs v.*

§ 855. **Compromises and Speculative Contracts.**—When parties have entered into a contract or arrangement based upon uncertain or contingent events, purposely as a compromise of doubtful claims arising from them, and where parties have knowingly entered into a speculative contract or transaction,—one in which they intentionally speculated as to the result,—and there is in either case an absence of bad faith, violation of confidence, misrepresentation, concealment, and other inequitable conduct mentioned in a former paragraph, if the facts upon which such agreement or transaction was founded, or the event of the agreement itself, turn out very different from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to matters of fact, and not of law, is not such a mistake, within the meaning of the equitable doctrine, as entitles the disappointed party to any relief either by way of canceling the contract and rescinding the transaction, or of defense to a suit brought for its enforcement. In such classes of agreements and transactions, the parties are supposed to calculate the chances, and they certainly assume the risks, where there is no element of bad faith, breach of confidence, misrepresentation, culpable concealment, or other like conduct amounting to actual or constructive fraud.<sup>1</sup>

§ 856. **Requisites to Relief—Mistake must be Material and Free from Culpable Negligence.**—There are two requisites essential to the exercise of the equitable jurisdiction in giving any relief defensive or affirmative. The fact concerning which the mistake is made must be material to the transaction, affecting its substance, and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject-matter, or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case the mistake will not be ground for any relief affirmative or defensive.<sup>1</sup>

McGee, 2 Bibb, 321; 5 Am. Dec. 610. Whether affirmative relief be permitted or not, the omitted verbal portion of the entire agreement may be set up by way of defense in equity, when an attempt is made to enforce the written part alone: *Jervis v. Berridge*, L. R. 8 Ch. 351 (a very important case); and see *Murray v. Dake*, 46 Cal. 644.

<sup>1</sup> *Stapleton v. Stapleton*, 1 Atk. 2, 2 Lead. Cas. Eq., 4th Am. ed. 1676; *Baxendale v. Seale*, 19 Beav. 601, 2 Keener 943; *Chicago & N. W. R. Co. v. Wilcox*, (C. C. A.) 116 Fed. 913 (full and able discussion). As to requisite of good faith, see *Anthony v. Boyd*, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657.

<sup>1</sup> *Dambmann v. Schulting*, 75 N. Y. 55, 63, 3 Keener 202, H. & B. 227; *Simmons v. Palmer*, 93 Va. 389, 25 S. E. 6, 3 Keener 393; *Kowalke v. Milwaukee E.*

As a second requisite, it has sometimes been said in very general terms that a mistake resulting from the complaining party's own negligence will never be relieved. This proposition is not sustained by the authorities. It would be more accurate to say that where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of legal duty, a court of equity will not interpose its relief; but even with this more guarded mode of statement, each instance of negligence must depend to a great extent upon its own circumstances.<sup>2</sup> It is not every negligence that will stay the hand of the court. The conclusion from the best authorities seems to be, that the neglect must amount to the violation of a positive legal duty. The highest possible care is not demanded. Even a clearly established negligence may not of itself be a sufficient ground for refusing relief, if it appears that the other party has not been prejudiced thereby.<sup>3</sup> In addition to the two foregoing requisites, it has been said that equity would never give any relief from a mistake, if the party could by reasonable diligence have ascertained the real facts; nor where the means of information are open to both parties and no confidence is reposed; nor unless the other party was under some obligation to disclose the facts known to himself, and concealed them. A moment's reflection will clearly show that these rules cannot possibly apply to all instances of mistake, and furnish the pre-requisites for all species of relief.<sup>4</sup> Their operation is, indeed, quite narrow; it is confined to the single relief of cancellation, and even then it is restricted to certain special kinds of agreements.<sup>5</sup>

R. & L. Co., 103 Wis. 472, 79 N. W. 762, 74 Am. St. Rep. 877, 2 Scott 603 (good discussion).

<sup>2</sup> *Western R. R. v. Babcock*, 6 Met. 346, 2 Keener 937; *Diman v. Providence R. R.* 5 R. I. 130, 3 Keener 256; *Penny v. Martin*, 4 Johns. Ch. 566, 1 Scott 454; *Seeley v. Bacon* (N. J. Eq.), 34 Atl. 139, 3 Keener 139. Executing an instrument without reading it; negligence held fatal, *Kennerty v. Phosphate Co.*, 21 S. C. 226, 53 Am. Rep. 669; held not fatal; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 39, 3 Keener 378; *Palmer v. Hartford Ins. Co.*, 54 Conn. 488, 9 Atl. 248, 3 Keener 317; *Hitchens v. Pettingill*, 58 N. H. 3, 2 Ames Eq. Jur. 307, 2 Scott 627, 3 Keener 1145. Carelessness excused by illiteracy; *Kinney v. Ensmenger*, 87 Ala. 340, 6 South. 72, 2 Scott 633.

<sup>3</sup> *Kinney v. Ensmenger*, 87 Ala. 340, 6 South. 72, 2 Scott 633 (quoting text).

<sup>4</sup> *Kelly v. Solari*, 9 Mees. & W. 54; *Powell v. Heisler*, 16 Or. 412, 19 Pac. 109 (quoting text). The utter impossibility of applying such requisites in all instances of a common mistake by both the parties, and in granting the most important remedy of reformation, is evident; there is a contradiction in terms between these requirements and the very conception of a common mistake.

<sup>5</sup> Viz. to those described in § 855.

§ 858. **III. Parol Evidence in Cases of Mistake, Fraud, or Surprise.**—It is an elementary doctrine that parol evidence is not, in general, admissible between the parties to vary a written instrument, whether the same has been voluntarily adopted, or made in pursuance of a legal necessity. It is equally well settled that mistake, fraud, surprise, and accident furnish exceptions to this otherwise universal doctrine. Parol evidence may, in proper modes and within proper limits, be admitted to vary written instruments, upon the ground of mistake, fraud, surprise, and accident. This exception rests upon the highest motives of policy and expediency; for otherwise an injured party would generally be without remedy. Even the statute of frauds cannot, by shutting out parol evidence, be converted into an instrument of fraud or wrong.<sup>1</sup>

§ 859. **Parol Evidence in Suits for a Reformation or Cancellation.**—The foregoing exception embraces all suits brought expressly upon the mistake for the purpose of obtaining affirmative relief from its consequences. It is therefore settled that in the suits, whenever permitted, to reform a written instrument on the ground of a mutual mistake, parol evidence is always admissible to establish the fact of the mistake, and in what it consisted; and to show how the writing should be corrected in order to conform to the agreement which the parties actually made. Although in such cases there is often some ancillary writing to aid the court, such as a rough draught of the agreement, written instructions, and the like, yet, in the absence of these helps, the court *may* grant relief upon the strength of the verbal evidence alone. The same is true in suits brought to rescind and cancel a written agreement on the ground of a mistake by one of the parties, whereby their minds were prevented from meeting upon the same matter, and no agreement was really made; and a fortiori when the ground of the relief is fraud. Parol evidence must be admitted in these classes of cases, in order to a due administration of justice. If the general doctrine of the law or the statute of frauds was regarded as closing the door against such evidence, the injured party would be without any certain remedy, and fraud and injustice would be successful.<sup>1</sup> The authorities all require that the parol evidence of the mistake and

<sup>1</sup> *Walden v. Skinner*, 101 U. S. 577, H. & B. 238; *Patterson v. Bloomer*, 35 Conn. 57, 95 Am. Dec. 208, 2 Keener 956. As to surprise, see *Twining v. Morrice*, 2 Brown Ch. 326, 1 Ames Eq. Jur. 416; *Mason v. Armitage*, 13 Ves. 25, 1 Ames Eq. Jur. 374, 2 Keener 930, 2 Scott 270. That the statute of frauds can not be converted into an instrument of fraud, see, per Lord Westbury, in *McCormick v. Grogan*, L. R. 4 H. L. 82, 97, 1 Scott 241, quoted ante, in § 431.

<sup>1</sup> *Barrow v. Barrow*, 18 Beav. 529, 2 Ames Eq. Jur. 199; *Garrard v. Frankel*, 30 Beav. 445, 451, 3 Keener 261; and see cases in next note.

of the alleged modification must be most clear and convincing,—in the language of some judges, “the strongest possible,”—or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a *mere* preponderance of evidence, but only upon a certainty of the error.<sup>2</sup>

§ 860. **Parol Evidence in Defense in Suits for a Specific Performance.**—The second class of cases embraces those in which parol evidence of mistake is offered defensively. The equitable remedy of the specific enforcement of contracts, even when they are valid and binding at law, is not a matter of course; it is so completely governed by equitable considerations that it is sometimes, though improperly, called discretionary; it is never granted unless it is entirely in accordance with equity and good conscience. It is therefore a well-settled rule, that in suits for the specific enforcement of agreements, even when written, the defendant may by means of parol evidence show that, through the mistake of both or either of the parties, the writing does not express the real agreement, or that the agreement itself was entered into through a mistake as to its subject-matter or as to its terms. In short, a court of equity will not grant its affirmative remedy to compel the defendant to perform a contract which he did not intend to make, or which he would not have entered into had its true effect been understood. What is thus true of mistake is equally true of a defense based upon fraud or surprise.<sup>1</sup> Wherever the defendant's mistake was, either intentionally or not, induced, or made probable or even possible, by the acts or omissions of the plaintiff, then, on the plainest principles of justice, such error prevents a specific enforcement of the agreement.<sup>2</sup> Such co-operation by the plaintiff, however, is not at all essential. A mistake which is entirely the

<sup>2</sup> *Garrard v. Frankel*, 30 Beav. 445, 3 Keener 261; *Stockbridge Iron Co. v. Hudson R. Iron Co.*, 102 Mass. 45, 3 Keener 54, 397; *Canedy v. Marcy*, 13 Gray 373, 2 Ames Eq. Jur. 256, 3 Keener 35, 2 Scott 552; *Hathaway v. Brady*, 23 Cal. 122, 2 Ames Eq. Jur. 299; *Sable v. Maloney*, 48 Wis. 331, 2 Ames Eq. Jur. 310. Many dicta are collected in *Southard v. Curley*, 134 N. Y. 148, 31 N. E. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561, 3 Keener 460, 2 Scott 646, which rejects the “beyond a reasonable doubt” test.

<sup>1</sup> *Joynes v. Statham*, 3 Atk. 388, 2 Scott 253; *Manser v. Back*, 6 Hare 443, 2 Scott 274; *Falcke v. Gray*, 4 Drew. 651, H. & B. 655; *Webster v. Cecil*, 30 Beav. 62, 1 Ames Eq. Jur. 382, 2 Keener 954, 2 Scott 279; *Mansfield v. Sherman*, 81 Me. 365, 17 Atl. 300, 1 Ames Eq. Jur. 385, 2 Keener 995, 2 Scott 281.

<sup>2</sup> *Mason v. Armitage*, 13 Ves. 25, 1 Ames Eq. Jur. 374, 2 Keener 930, 2 Scott 270; *Denny v. Hancock*, L. R. 6 Ch. App. 1, 2 Keener 969; *Bascombe v. Beckwith*, L. R. 8 Eq. 100, 2 Keener 963; *Matthews v. Terwilliger*, 3 Barb. 50 (surprise).

defendant's own, or that of his agent, and for which the plaintiff is not directly or indirectly responsible, may be proved in defense, and may defeat a specific performance. This is indeed the very essence of the equitable theory concerning the nature and effect of mistake.<sup>3</sup> A mistake thus set up by the defendant is not merely a ground of defense, of dismissing the suit. If the plaintiff alleges a written agreement, and demands its specific performance, and the defendant sets up in his answer a verbal provision or stipulation, or variation omitted by mistake, surprise, or fraud, and submits to an enforcement of the contract *as thus* varied, and clearly proves by his parol evidence that the written contract modified or varied in the manner alleged by him constitutes the original and true agreement made by the parties, the court may not only reject the plaintiff's version, but may adopt that of the defendant, and may decree a specific performance of the agreement with the parol variation upon the mere allegations of his answer, without requiring a cross-bill. The court will either decree a specific execution of the contract thus varied by the defendant, or else, if the plaintiff refuses to accept such relief, will dismiss the suit.<sup>4</sup> Under the old chancery practice, the action of the court in such cases seemed to have been discretionary. Under the reformed procedure, which permits affirmative relief, either legal or equitable, to be obtained by defendants through a counterclaim, such a decree, under proper pleadings, is doubtless a matter of course and of right. Even where

<sup>3</sup> Malins v. Freeman, 2 Keen 25, 1 Ames Eq. Jur. 383, 2 Keener 933, 2 Scott 272; Manser v. Back, 6 Hare 443, 2 Scott 274; Webster v. Cecil, 30 Beav. 62, 1 Ames Eq. Jur. 382, 2 Keener 954, 2 Scott 279; Day v. Wells, 30 Beav. 220, 1 Ames Eq. Jur. 380, 2 Keener 951. In applying these rules of the text it may be laid down as a general proposition that wherever, in the description of the subject-matter or in the terms and stipulations, a written agreement is ambiguous, so that the defendant may reasonably have been mistaken as to the subject-matter or terms, or is susceptible of different constructions, so that upon one construction it would have an effect which the defendant may be reasonably supposed not to have contemplated or intended, or so that the defendant may have reasonably put a different construction upon it from that which was understood by the plaintiff, in either of these cases a specific performance will be denied at the instance of the defendant, on the ground that it is inequitable to enforce the apparent agreement, when he has shown that there was no real meeting of minds, no common assent upon the same matters: Swaissland v. Dearsley, 29 Beav. 430, 1 Ames Eq. Jur. 376; Denny v. Hancock, L. R. 6 Ch. App. 1, 2 Keener 969; Calverly v. Williams, 1 Ves. 210, 2 Scott 259. For cases where the defendant's mistake was not a defense, on account of his culpable negligence in making inquiries, or because it did not affect a vital part of the contract, see Tamplin v. James, L. R. 15 Ch. Div. 215, 1 Ames Eq. Jur. 388, 2 Keener 979, 2 Scott 277; Western R. R. Co. v. Babcock, 6 Met. 346, 2 Keener 937; Caldwell v. Depew, 40 Minn. 528, 42 N. W. 479, 2 Keener 1000.

<sup>4</sup> Redfield v. Gleason, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. Rep. 889, quoting text; Bradford v. Union Bank, 13 How. 57, Sh. 259.

there has been *no* mistake, surprise, or fraud, if in such a suit the defendant alleges and proves an *additional* parol provision or stipulation agreed upon by the parties, the court will decree a specific performance of the written contract with this verbal provision incorporated into it, or else will dismiss the suit entirely.<sup>5</sup> It is not every mistake which will defeat the enforcement of an agreement. The error must be material, and must possess all of the elements heretofore described as requisite to the existence of the equitable jurisdiction.

§ 861. **Parol Evidence of Mistake on the Plaintiff's Part in Suits for a Specific Performance—English Rule.**—We come, in the third place, to the question as to parol evidence of mistake on the part of the plaintiff in suits brought upon written agreements seeking to obtain their specific enforcement. It has been shown that parol evidence of the mistake may be used by the plaintiff in suits brought directly upon it and seeking the remedy of a reformation or a cancellation, in order to be relieved from its consequences; and also that in suits on a written contract the defendant may resort to parol evidence of a mistake by way of defense, and even that the court may decree a performance of the contract *as thus varied by means of his evidence*. The question now presented is, whether, in suits of the same nature for the enforcement of a written agreement, the plaintiff, in addition to his averment of the written contract, may allege a mistake, surprise, or fraud, and may by means of parol evidence establish the verbal modification in the terms of the contract which would result from such error or fraud, and may obtain in the same suit a specific performance of the agreement so modified or varied. The rule is well established in England that this cannot be done, unless there has been a part performance of the parol variation.<sup>1</sup> The reason originally assigned for this rule was, that the admission of parol evidence as the foundation for final relief in such suits would be a violation of the statute of frauds. If this reasoning has any force, it is difficult to see why it does not equally forbid the enforcement of written contracts as modified by parol evidence at the instance of defendants, or why it does not in fact strike at the very foundation of the doctrine of reforming written agreements by means of parol evidence.

§ 862. **Same. American Rule—Evidence Admissible.**—The American courts have pursued a more simple and enlightened course of adjudication. The doctrine is well settled in the United States that where the mistake or fraud in a written contract is such as admits the equitable remedy of reformation, parol evidence may

<sup>5</sup> *Martin v. Pycroft*, 2 De Gex, M. & G. 785.

<sup>1</sup> *Woolam v. Hearn*, 7 Ves. 221, 2 Lead. Cas. Eq., 4th Am. ed. 920, 2 Ames Eq. Jur. 297, 2 Scott 262; *May v. Platt*, (1900), 1 Ch. 616, 2 Ames Eq. Jur. 300.

be resorted to by the plaintiff in suits brought for a specific performance. The plaintiff in such a suit may allege, and by parol evidence prove, the mistake or fraud, and the modification in the written agreement made necessary thereby, and may obtain a decree for the specific enforcement of the agreement thus varied and corrected.<sup>1</sup> As in suits for a reformation alone, the evidence must be of the clearest and most convincing nature; the burden of proof is on the plaintiff, and he must prove his case beyond a reasonable doubt.<sup>2</sup> It is not sufficient merely to prove a mistake which might be ground for a rescission. The plaintiff must establish a mistake of such a character as entitles him to a reformation, and such circumstances as render a reformation possible.<sup>3</sup> . . . .

**§ 863. Evidence of a Parol Variation Which has been Part Performed.**—There is one particular case with respect to which the English and American courts are agreed,—the part performance by the plaintiff of the parol provision which he alleges in variation of the written agreement. It is the settled rule, both in England and in this country, that, in suits for a specific performance, the plaintiff may allege and prove a verbal addition or variation of the written contract, and that this additional verbal stipulation has been part performed by him, and may then obtain a decree for the specific enforcement of the entire agreement as thus modified.<sup>1</sup> There are two conditions of fact to which this rule applies: 1. The verbal modification may be contemporaneous with and a part of the original agreement;<sup>2</sup> 2. It may be a subsequent alteration of or addition to the original written agreement. The rule applies alike to each of these two cases; but in both the part performance must be of the verbal stipulation, and must conform to all requisities as settled with respect to the part performance of any verbal agreement.<sup>3</sup>

**§ 864. Effect of the Statute of Frauds upon the Use of Parol Evidence.**—

**§ 865. Two Classes of Cases in Which the Use of Parol Evidence may be Affected by the Statute.**—In contracts required by the statute of frauds to be in writing, all possible errors requiring a verbal variation, whether arising from mistake, surprise, or fraud, may be

<sup>1</sup> Keisselbrack v. Johnson, 4 Johns. Ch. 144, 148, 2 Scott 616; Smith v. Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33.

<sup>2</sup> Hunter v. Bilyeu, 30 Ill. 228, H. & B. 248. See ante, § 859.

<sup>3</sup> Tesson v. Atlantic M. Ins. Co., 40 Mo. 33, 93 Am. Dec. 293; Keisselbrack v. Livingston, 4 Johns. Ch. 144, 2 Scott 616.

<sup>1</sup> Price v. Dyer, 17 Ves. 356, 2 Scott 266, and cases in following notes.

<sup>2</sup> Moale v. Buchanan, 11 Gill & J. 314.

<sup>3</sup> Cases in preceding notes: Glass v. Hulbert, 102 Mass. 24, 28, 3 Am. Rep. 418, H. & B. 254, 3 Keener 327, Sh. 264, 2 Scott 619; Broughton v. Coffey, 18 Gratt. 184.

reduced to two general classes: 1. By means of the error the contract may include within its terms certain subject-matters—as, for example, lands—which were not intended by the parties to come within its operation, in which case the parol evidence will show that such subject-matters should be omitted, and the relief demanded will be a correction which shall exclude them, and confine the operation of the agreement to the remaining subject-matters mentioned in it, and to which alone it was intended by the parties to apply; 2. By means of the error the contract may omit certain subject-matters—as lands—which were intended by the parties to come within its operation; and in this case the parol evidence will show that such subject-matter should be included, and the relief demanded will be a modification of the writing, so that it shall embrace them, and shall thus extend its operation to particular subject-matters not mentioned in it, but to which it was originally intended to apply. So far as the statute of frauds can affect the parol variation of written instruments, it is obvious that these two classes describe all possible cases which can arise. Now, it has been asserted—and I merely *state* the position at present without inquiring into its correctness—that a reformation and enforcement based upon parol evidence in the first of these classes does not conflict with the statute of frauds, since the relief does not *make* a parol contract, but simply narrows a written one already made. On the other hand, as it is asserted, the same relief in the second class does directly conflict with the statute, since it is a virtual making of a parol contract in relation to land or other subject-matter specified in the statute. In short, it is argued, the remedy in the latter instance is a parol extension of a written contract, so that it shall embrace a subject-matter not otherwise within its scope; in the former instance it is the withdrawal, by parol evidence, of a portion of the subject-matter from the scope of a written contract which is left in full force as to the remaining portion which had been embraced within it from the beginning; one is an affirmative process of making a contract; the other is merely a negative process of limiting a contract already made. The conflict of decision before mentioned turns upon these two classes. According to the interpretation of the general doctrine maintained by one group of decisions, the admission of parol evidence is confined to cases falling within the first class;<sup>1</sup> according to the other view, the evidence is admissible alike in cases belonging to both classes.<sup>2</sup>

<sup>1</sup> *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, 3 Keener 327, 2 Scott 619, H. & B. 254, Shep. 264; *Davis v. Ely*, 104 N. C. 16, 10 S. E. 138, 17 Am. St. Rep. 667, 5 L. R. A. 810, H. & B. 262.

<sup>2</sup> *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559, 1 Scott 43; *Keisselbrack*

§ 867. . . . The principles which underlie the theory advocated by the Massachusetts court, if carried out to their legitimate results, would work a virtual revolution in equity jurisprudence, would confine its most salutary remedial functions within very narrow limits, and would overturn doctrines which have been regarded as settled since the earliest periods of the jurisdiction. They would greatly abridge the remedy of reformation; they would prevent the court from establishing and enforcing parol contracts which the defendant's actual fraud had prevented from being put into writing; and in fact, these principles cannot be reconciled with the doctrines upon which the jurisdiction of equity to enforce parol contracts in cases of part performance is rested. The statute of frauds is no real obstacle in the way of administering equitable remedies so as to promote justice and prevent wrong. Equity does not deny nor overrule the statute; but it declares that fraud or mistake creates obligations, and confers remedial rights which are not within the statutory prohibition; in respect of them, the statute is uplifted.<sup>1</sup>

§ 868. IV. Instances of Equitable Jurisdiction Occasioned by Mistake—By Way of Defense.<sup>1</sup>—

§ 869. By Way of Affirmative Relief—Recovery of Money Paid by Mistake.—The jurisdiction to confer affirmative relief will only be exercised in cases where an adequate remedy cannot be obtained at law. Whenever money has been paid, or chattels have been delivered, through mistake, the legal remedy by action will ordinarily be adequate and certain; in fact, the action to recover back money paid by mistake is a very familiar one at law. Whenever land has been conveyed, or contracted to be conveyed, through mistake, the adequate remedy of the grantor or vendor would generally require the equitable relief of a cancellation. Although an action at law will ordinarily lie to recover back money paid through mistake, still, if the circumstances are special, and such that an action at law will either not lie at all, or will furnish an inadequate relief,

v. *Livingston*, 4 Johns. Ch. 144, 2 Scott 616; *Hunter v. Bilyeu*, 30 Ill. 228, H. & B. 248; *Hitchins v. Pettingill*, 58 N. H. 386, 2 Ames Eq. Jur. 307, 3 Keener 344, 371, H. & B. 246, 2 Scott 627; *McDonald v. Yungbluth*, 46 Fed. 836, 2 Scott 624; *Noel's Ex'rs v. Gill*, 84 Ky. 241, 3 Keener 241. In *Neiminger v. State*, 50 Ohio St. 394, 34 N. E. 633, 3 Keener 358, the principle was applied to the reformation of a contract executed by a surety. The weight of authority is in favor of this view; the arguments in its favor are fully stated in 2 Pom. Eq. Jur., § 867, note 4.

<sup>1</sup> See the language of Lord Westbury in *McCormick v. Grogan*, L. R. 4 H. L. 82, 97, 1 Scott 241, quoted ante, § 431.

<sup>2</sup> See ante, § 860.

a court of equity has undoubted jurisdiction, and will entertain a suit for the recovery of the money, if in good conscience it ought to be repaid.<sup>1</sup>

§ 870. **Affirmative Relief—Reformation and Cancellation.**—The most important affirmative remedies conferred by an exercise of the equitable jurisdiction on the occasion of mistake are cancellation and reformation. Cancellation is appropriate when there is an apparently valid written agreement or transaction embodied in writing, while in fact, by reason of a mistake of both or one of the parties, either no agreement at all has really been made, since the minds of both parties have failed to meet upon the same matters, or else the agreement or transaction is different, with respect to its subject-matter or terms, from that which was intended.<sup>1</sup> Reformation is appropriate, when an agreement has been made, or a transaction has been entered into or determined upon, as intended by all the parties interested, but in reducing such agreement or transaction to writing, either through the mistake common to both parties, or through the mistake of the plaintiff accompanied by the fraudulent knowledge and procurement of the defendant, the written instrument fails to express the real agreement or transaction. In such a case the instrument may be corrected so that it shall truly represent the agreement or transaction actually made or determined upon according to the real purpose and intention of the parties.<sup>2</sup> . . .

<sup>1</sup> Bingham v. Bingham, 1 Ves. Sr. 126, 2 Ames Eq. Jur. 264, 2 Scott 543, 3 Keener 5; Rogers v. Ingham, L. R. 3 Ch. Div. 351, 356, 2 Scott 572, 3 Keener 75, Shep. 157; Gould v. Emerson, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501, 3 Keener 324.

<sup>1</sup> Cancellation granted where the subject-matter of the agreement had no existence, but both parties supposed that it existed and treated on that understanding: Hitchcock v. Giddings, 4 Price 135, 2 Ames Eq. Jur. 192; Allen v. Hammond, 11 Pet. 63, 2 Scott 582; see Riegel v. American Life Ins. Co., 140 Pa. St. 193, 23 Am. St. Rep. 225, 21 Atl. 392, 11 L. R. A. 857, 3 Keener 191; or for mistake as to the identity of the subject-matter, so that the minds of the parties never met; Crowe v. Lewin, 95 N. Y. 423, 3 Keener 283.

<sup>2</sup> Common mistake: That the mistake must occur in reducing the agreement to writing, and not in the original agreement, see Mackenzie v. Coulson, L. R. 8 Eq. 368, 3 Keener 267; Barrow v. Barrow, 18 Beav. 5, 2 Ames Eq. Jur. 199; Whittemore v. Farrington, 76 N. Y. 452, 2 Ames Eq. Jur. 208, 2 Scott 600, 3 Keener 209; Citizens' Nat. Bank v. Judy, 146 Ind. 322, 43 N. E. 259, 3 Keener 433. The mistake may be either as to the contents or the effect of the instrument; but a mistake, in order to be "common to both parties," must be in regard to the same matter: Page v. Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152. Mistake of the plaintiff accompanied by the fraudulent knowledge and procurement of the defendant: See Welles v. Yates, 44 N. Y. 525, 3 Keener 272, H. & B. 790, Shep. 247; Kilmer v. Smith, 77 N. Y. 226,

§ 871. **Conditions of Fact Which are Occasions for Affirmative Relief.**—The conditions of fact which furnish occasions for the exercise of the jurisdiction to grant affirmative relief, either of reformation, of cancellation, or of pecuniary recovery, are many and various. The following are some of the most important. The relief which equity gives in aid of a defective execution of powers may be occasioned by mistake as well as by accident.<sup>1</sup> Judgments at law recovered through mistake may be a ground for the interposition of equity in enjoining or setting aside the judgment, to the same extent and under the same limits as those recovered by accident.<sup>2</sup> . . . Equity has a very narrow jurisdiction to correct mistakes in wills, but only when the error appears upon the face of the will itself, so that both the mistake and the correction can be ascertained and supplied by the context, from a plain interpretation of the terms of the instrument as it stands. A resort to extrinsic evidence is never permitted, either to show a mistake or to ascertain the correction. Mistakes which can be thus corrected may be in the names of legatees or devisees, in the description of property, or in other terms.<sup>3</sup> The jurisdiction to grant the relief of reformation may be exercised with respect to written instruments operating inter vivos, whether they are executed contracts, such as deeds of conveyance, mortgages, leases, or executory agreements, such as bonds, policies of insurance, notes, bills of exchange, and the like.<sup>4</sup> There is, of course, no power to reform wills.<sup>5</sup> The

33 Am. Rep. 613, 3 Keener 283; *Town of Essex v. Day*, 52 Conn. 483, 3 Keener 303; *Palmer v. Hartford Fire Ins. Co.*, 54 Conn. 488, 9 Atl. 248, 3 Keener 317; *Keister v. Myers*, 115 Ind. 312, 17 N. E. 161, 3 Keener 314; *Cleghorn v. Zumwalt*, 83 Cal. 155, 23 Pac. 294, 2 Ames Eq. Jur. 197, 3 Keener 322. A mere mistake of one party, not known to or shared by the other, is not a ground for reformation, since that would be to make a new contract for the parties: *Gun v. McCarthy, L. R.*, Ir., 13 Ch. D. 304, 2 Ames Eq. Jur. 238; *Diman v. Providence, etc., R. Co.*, 5 R. I. 130, 3 Keener 1140; *Fehlberg v. Cosine*, 16 R. I. 162, 13 Atl. 110, 3 Keener 312; *Moran v. McLarty*, 75 N. Y. 25, 3 Keener 280; *Doniol v. Commercial Fire Ins. Co.*, 34 N. J. Eq. 30, 2 Ames Eq. Jur. 237. In such cases, however, the court has sometimes made the decree for cancellation conditional upon the defendant's refusal to consent to reformation: *Garrard v. Frankel*, 30 Beav. 445, 3 Keener 261; *Paget v. Marshall*, L. R. 28 Ch. D. 255, 2 Scott 610, 3 Keener 295.

<sup>1</sup> See ante, §§ 589, 590, 834, 835, where this particular instance of the jurisdiction is explained.

<sup>2</sup> See ante, § 836, post, § 1364. As to compromises and settlements, see ante, §§ 850, 855.

<sup>3</sup> *Du Bois v. Ray*, 35 N. Y. 162.

<sup>4</sup> See cases cited ante, under § 870.

<sup>5</sup> *Sherwood v. Sherwood*, 45 Wis. 357, 30 Am. Rep. 757; *Bingel v. Volz*, 142 Ill. 214, 31 N. E. 13, 34 Am. St. Rep. 64, 16 L. R. A. 321; *Sturgis v. Work*, 122 Ind. 134, 22 N. E. 996, 17 Am. St. Rep. 349.

relief of cancellation may be granted with respect to deeds of conveyance, mortgages, agreements concerning land, and other similar transactions, subject always to the important limitation that the party can obtain no adequate remedy at law.<sup>6</sup> With respect to mistakes in awards, the jurisdiction exists, but will be exercised only within very narrow limits. If a mistake appears on the face of the award itself, or in some contemporaneous writing, or is voluntarily admitted by the arbitrator, or he states circumstances which clearly show an error, equity may relieve by setting aside or perhaps correcting the award; otherwise there is no ground for interference.<sup>7</sup> A court of equity may, perhaps, under special circumstances, exercise its jurisdiction by correcting mistakes in judgments and decrees and other records, where the error is clerical or ministerial, and not judicial, and there is no other means of obtaining the relief.<sup>8</sup> Where an instrument has been surrendered or discharged, or an encumbrance or charge has been satisfied through mistake, the jurisdiction may be exercised by granting such relief as will replace the party entitled in his original position, either by setting aside the formal discharge, or by compelling a re-execution of the instrument.<sup>9</sup> The jurisdiction extends to the settlement of accounts, made according to the intention of the parties, but based upon or involving a mistake. Relief will be granted as the circumstances may require, either by setting aside the settlement, or by permitting a party to surcharge or falsify.<sup>10</sup> Finally, the equitable jurisdiction may be exercised by the relief of a pecuniary recovery for money paid under a mistake, whenever no adequate remedy can be obtained by an action at law.<sup>11</sup> The affirmative reliefs of reformation and of cancellation are, however, subject to the limitation that they are never conferred against a bona fide purchaser for value and without notice.<sup>12</sup>

<sup>6</sup> See ante, § 870, post, § 1376.

<sup>7</sup> *Brush v. Fisher*, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510; *Frick v. Christian Co.*, 1 Fed. 250. If the award is within the submission, no mistake of the arbitrator, either of law or fact, established by extrinsic evidence will be a ground for the interference of equity. The subject of awards and of the proceedings thereon has in many states been so regulated by statute that the jurisdiction of equity over them has become unimportant, if not obsolete.

<sup>8</sup> *Barnesly v. Powell*, 1 Ves. Sr. 119, 284, 289; *Greeley v. De Cotter*, 24 Fla. 475, 5 South. 239; *Smith v. Butler*, 11 Or. 46, 4 Pac. 517.

<sup>9</sup> *Riegel v. American L. Ins. Co.*, 140 Pa. St. 193, 21 Atl. 392, 23 Am. St. Rep. 225, 11 L. R. A. 857, H. & B. 221, 3 Keener 191. As to reinstatement of mortgages released by mistake, see the valuable monographic note, 58 L. R. A. 788.

<sup>10</sup> *Gething v. Keighley*, L. R. 9 Ch. Div. 547.

<sup>11</sup> See ante, §§ 851, 869.

<sup>12</sup> See ante, § 776.

SECTION III.  
ACTUAL FRAUD.

ANALYSIS.

- § 872. Objects and purposes.
- § 873. Description; essential elements.
- § 874. Four forms and classes of fraud in equity.
- § 875. Nature of actual fraud.
- §§ 876-899. *First*. Misrepresentations.
  - § 877. I. The form; an affirmation of fact.
  - § 878. Misrepresentation of matter of opinion.
  - § 879. II. The purpose for which the representation is made.
  - § 880. Presumption of the purpose to induce action.
  - § 881. False prospectuses, reports, and circulars.
  - § 882. III. Untruth of the statement.
- §§ 883-889. IV. The intention, knowledge, or belief of the party making the statement.
  - § 884. The knowledge and intention requisite at law.
  - § 885. The knowledge or intention requisite in equity.
- §§ 886-888. Six forms of fraudulent misrepresentations in equity.
  - § 889. Requisites of a misrepresentation as a defense to the specific enforcement of contracts in equity.
- §§ 890-897. V. Effect of the representation on the party to whom it is made.
  - § 890. He must rely on it.
  - § 891. He must be justified in relying on it.
  - § 892. When he is or is not justified in relying on it.
  - § 893. Information or means of obtaining information possessed by the parties receiving the representation.
  - § 894. Knowledge possessed by him; patent defects.
  - § 895. When the knowledge or information must be proved and not presumed.
  - § 896. Words of general caution.
  - § 897. Prompt disaffirmance necessary.
  - § 898. VI. Materiality of the misrepresentation.
  - § 899. Effects of a misrepresentation.
- §§ 900-907. *Second*. Fraudulent concealments.
  - § 901. General doctrine; duty to disclose.
  - § 902. When duty to disclose exists.
  - § 903. Concealments by a vendee.
  - § 904. Concealments by a vendor.
  - § 905. Non-disclosure of facts a defense to the specific enforcement of contracts in equity.
  - § 906. Concealments by buyers on credit.
  - § 907. Contracts and transactions essentially fiduciary; suretyship.
- §§ 908, 909. Liability of principals for the fraud of their agents.
- §§ 910-921. *Third*. Jurisdiction of equity in cases of fraud.
  - § 911. Fundamental principles of the jurisdiction.
  - § 912. The English doctrine.
  - § 913. Exception: fraudulent wills.
  - § 914. The American doctrine.

- § 915. Incidents of the jurisdiction and relief.
- § 916. The same; plaintiff particeps doli; ratification.
- § 917. The same; promptness; delay through ignorance of the fraud.
- § 918. Persons against whom relief is granted; bona fide purchasers.
- § 919. Particular instances of the jurisdiction; judgments; awards; fraudulent devises and bequests; preventing acts for the benefit of others; suppressing instruments.
- § 920. The same; appointment under powers; marital rights; trusts.
- § 921. The statute of frauds not an instrument for the accomplishment of fraud.

§ 872. **Objects and Purposes.**—Fraud, in some of its phases, has long been an occasion for the exercise of jurisdiction both at law and in equity. The various reliefs on the ground of fraud which are possible from the nature of the legal and the equitable modes of procedure and remedies are the following: At law: 1. The affirmative relief of rescission, whereby the defrauded party is permitted to rescind the contract or other transaction, or, more accurately, to treat it as rescinded,—to restore himself thereby to his original position of right, and by means of an appropriate action to recover back the money or other property of which he had been deprived, or which he had parted with; 2. The affirmative relief whereby the defrauded party suffers the transaction to stand, and by action recovers pecuniary damages as compensation for the injury sustained by him from the deceit; 3. Defensive relief, whereby the party sets up the fraud as a defense, and thereby defeats any action brought to enforce the apparent fraudulent obligation. In equity: 1. The affirmative relief of cancellation, whereby the defrauded party procures an instrument, obligation, transaction, or other matter affecting his rights and liabilities to be set aside and annulled, and himself to be restored to his original position of right, and as a consequence to re-establish his title, or to recover possession and enjoyment of property; 2. The affirmative relief of reformation by which a written instrument is corrected, and perhaps re-executed, when, through fraud of the other party, it failed to express the real relations which existed between the two parties; 3. The affirmative relief of a pecuniary recovery where the liability arose from the fraud of the other party, and no cancellation is necessary as the foundation of the recovery; 4. Defensive relief, whereby the fraud is set up by way of defense to defeat any suit brought to enforce an apparent obligation or liability. . . . This discussion deals with fraud in equity, and will only refer incidentally, and by way of illustration, to fraud at law. Whatever amounts to fraud, according to the legal conception, is also fraud in the equitable conception; but the converse of this statement is not true. The equitable theory of fraud is much more compre-

hensive than that of the law, and contains elements entirely different from any which enter into the legal notion.

§ 873. **Description—Essential Elements.**—It is utterly impossible to formulate any single statement which shall accurately define the equitable conception of fraud, and which shall contain all of the elements which enter into that conception; these elements are so various, so different under the different circumstances of equitable cognizance, so destitute of any common bond of unity, that they cannot be brought within any general formula. To attempt such a definition would therefore be not only useless, but actually misleading. It has been shown in a former chapter<sup>1</sup> that the jurisdiction of chancery was originally rested upon two fundamental notions, equity and conscience, or good faith. The first of these embraced all cases where a party, acting according to the rules of the law, and not doing anything contrary to conscience or good faith, might obtain an *undue* advantage over another, which, though strictly legal, equity would not permit him to retain. The second embraced all those cases where a party, although perhaps still keeping within the limits of the strict law, so as to be sustained by the law courts, had committed some unconscientious act or breach of good faith, and had thereby obtained an undue advantage over another, which advantage, even though legal, equity would not suffer him to retain. The relief given by equity in *all* cases of fraud is plainly referable to this second head of the original jurisdiction. Every fraud, in its most general and fundamental conception, consists in obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith in the broad meaning given to the term by equity,—the *bona fides* of the Roman law. Furthermore, it is a necessary part of this conception that the act or omission itself, by which the undue advantage is obtained, should be *willful*; in other words, should be knowingly and intentionally done by the party; but it is not *essential* in the equitable notion, although it *is* in the legal, that there should be a knowledge of and an intention to obtain the *undue* advantage which results. The *willfulness* of the act or omission is the element which distinguishes fraud from other matters by which an undue advantage may be obtained so as to furnish an occasion for the equitable jurisdiction. Thus it has been shown that in accident an occurrence *external* to the parties happens without any intent or other mental condition, and an undue advantage thereby accrues to one of them.<sup>2</sup> In mistake there is indeed a mental condition or conviction of the understanding, but it wholly results from ignorance or misappre-

<sup>1</sup> Vol. 1 § 55.

<sup>2</sup> See § 823.

hension, and prevents the *free* action of the will; there is, therefore, a complete absence of willfulness or intention in the due and legal meaning of those terms.<sup>3</sup> In all phases of fraud, on the other hand, there is a mental condition, a conviction of the understanding, a free operation of the will, and an intention to do or omit the very act by which the undue advantage is obtained. The following description is perhaps as complete and accurate as can be given so as to embrace all the varieties recognized by equity: Fraud in equity includes all willful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained.

§ 874. **Four Forms and Classes of Fraud in Equity.**—In the leading and celebrated case of *Earl of Chesterfield v. Janssen*, Lord Hardwicke, while not attempting to formulate any general definition, arranged all the forms of fraud recognized by equity in four classes,—a division based upon their intrinsic qualities, and which has been followed by nearly all subsequent writers and judges. These classes are: 1. Frauds which are actual, 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 parties; 4. Frauds which are an imposition and deceit on third persons not parties to the transaction.<sup>1</sup> In pursuance of the order, which seems to be simple and natural, I shall include and treat under the description of actual fraud those cases only which belong to the first of these four classes. In all of them, and this seems to be the essential distinction between actual and constructive fraud, there is the element of falsity in fact, and the knowledge of the falsity and the intention to deceive in a *modified and partial* manner at least, in equity no less than in the law. In the three other classes there is no *necessary* element of falsity in fact, and the fraud in each of them arises rather from motives of expediency and policy than from any intent of the parties.

§ 875. **Nature of Actual Fraud.**—Although it is not possible to give any complete definition of fraud, yet it is possible to describe the various elements which are essential to the conception of actual fraud. In the vast majority of instances, actual fraud occurs in negotiations or dealings which are incidents of some agreement, executed or executory. Even in transactions which are not agreements, such as the execution of a will, the operation and effect of

<sup>1</sup> See § 839.

<sup>2</sup> *Earl of Chesterfield v. Janssen*, 2 Ves. Sr. 125, 1 Atk. 301, 1 Lead. Cas. Eq. 4th Am. ed. 773, 1 Scott 455.

fraud are the same as in the case of agreements. There are undoubtedly some special transactions capable of being affected by fraud, which cannot readily be brought within this general description,—as, for example, the fraudulent obtaining of a judgment at law. These special cases will be considered by themselves. With all these varieties of external form, actual fraud in the numberless agreements, transactions, and dealings of mankind may, in its intrinsic nature, be reduced to two essential forms,—false representation and fraudulent concealments,—*suggestio falsi* and *suppressio veri*. The discussion of actual fraud mainly consists, therefore, in analyzing these two forms and in determining their necessary constituents.

§876. **First, Misrepresentations.**—A misrepresentation, in order to constitute fraud, must contain the following essential elements: 1. Its form as a statement of fact; 2. Its purpose of inducing the other party to act; 3. Its untruth; 4. The knowledge or belief of the party making it; 5. The belief, trust, and reliance of the one to whom it is made; 6. Its materiality. These elements will be examined separately.

§ 877. **I. The Form—An Affirmation of Fact.**—A misrepresentation must be an affirmative statement or affirmation of some fact, in contradistinction to a concealment or failure to disclose, and to a mere expression of opinion.<sup>1</sup> In the great majority of instances it is made by means of language written or spoken; but it may consist of conduct alone, of external acts, when, through this instrumentality, it is intended to convey the impression, or to produce the conviction, that some fact exists, and such result is a natural consequence of the acts.<sup>2</sup> A misrepresentation of the law is not considered as amounting to fraud, because, as it is generally said,

<sup>1</sup> *Hough v. Richardson*, 3 Story 659, Fed. Cas. No. 6,722; *Perkins v. Partridge*, 30 N. J. Eq. 82, Shep. 171.

<sup>2</sup> It was so held in *Lovell v. Hicks*, 2 Younge & C. 46, where fictitious and fraudulent experiments were performed, so as to induce a party to enter into a contract concerning a patent right. The point is also illustrated by *Denny v. Hancock*, L. R. 6 Ch. 1, 2 Keener 969, although the decision was rested upon misdescription rather than fraudulent misrepresentation. A purchaser was so misled as to their boundaries, by the appearance of the grounds, that the contract was not enforced. This was, of course, a mistake of his; but the mistake consisted of his obtaining from the appearance an impression which was natural, but was at the same time contrary to the real fact; the appearance thus operated as a misdescription. When two parties have made an agreement, and in reducing it to writing, one of them knowingly alters it in a material manner, and procures the other to execute or to accept the writing in ignorance of the alteration, this conduct is fraud: *Bethell v. Bethell*, 92 Ind. 318; *Kilmer v. Smith*, 77 N. Y. 226, 33 Am. Rep. 613, 3 Keener 283.

all persons are presumed to know the law; and it might perhaps be added that such a statement would rather be the expression of an opinion than the assertion of a fact.<sup>3</sup> A statement of intention *merely* cannot be a misrepresentation amounting to fraud, since such a statement is not the affirmation of any external fact, but is, at most, only an assertion that a present mental condition or opinion exists.<sup>4</sup> That the *fact*, however, concerning which the statement is made is future does not of itself prevent the misrepresentation from being fraudulent. The statement of matter in the future, if affirmed *as a fact*, may amount to a fraudulent misrepresentation, as well as a statement of a fact as existing at present.<sup>5</sup>

§ 878. **Misrepresentation of Matter of Opinion.**—Since the very corner-stone of the doctrine is that the statement must be an affirmation of a fact, it has sometimes been said, but very incorrectly, that a misrepresentation cannot be made of a matter of opinion. The true rule is, that a fraudulent misrepresentation cannot itself be the *mere expression of an opinion* held by the party making it. The reason is very simple; while the person addressed has a right to rely on any assertion of a fact, he has no right to rely upon the mere expression of an opinion held by the party addressing him, in whatever language such expression be made; he is assumed to be equally able to form his own opinion, and to come to a correct judgment in respect to the matter, as the party with whom he is dealing, and cannot justly claim, therefore, to have been misled by the opinion, however erroneous it may have been.<sup>1</sup> For this reason, the *general* praise of his own wares by a seller, commonly called “puffing,” for the purpose of enhancing them in the buyer’s estimation, has always been allowed, provided it is kept within reasonable limits; that is, provided the praise is general, and the language is not the positive affirmation of a *specific* fact affecting the quality,

<sup>1</sup> *Eaglesfield v. Marquis of Londonderry*, L. R. 4 Ch. Div. 693; *Abbott v. Treat*, 78 Me. 121, 125, 3 Atl. 44; *Jaggat v. Winslow*, 30 Minn. 263, 15 N. W. 242. See ante, § 847.

<sup>2</sup> *Grove v. Hodges*, 55 Pa. St. 504, 519; *Lawrence v. Gayetty*, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29. That a promise made with the intention in the mind of the promisor not to perform *may* be a misrepresentation of a subsisting fact, and hence a fraud, see *Edgington v. Fitzmaurice*, L. R. 29 Ch. Div. 459; *Brison v. Brison*, 75 Cal. 527, 17 Pac. 691, 7 Am. St. Rep. 189. In *Edgington v. Fitzmaurice* occurs Lord Bowen’s well-known dictum that “the state of a man’s mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man’s mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.”

<sup>3</sup> *Piggott v. Stratton*, 1 De Gex, F. & J. 33, 49; *Lobdell v. Baker*, 3 Met. 469.

<sup>4</sup> *Johnson v. National B. & L. Ass’n*, 125 Ala. 465, 28 South. 2, 82 Am. St. Rep. 257; *Suessenguth v. Bingenheimer*, 40 Wis. 370.

so as to be an express warranty, and is not the intentional assertion of a *specific* and material fact, known to the party to be false, so as to be a fraudulent misrepresentation.<sup>2</sup> The foregoing rule as to expressions of opinion cannot be pushed beyond the plain reasons upon which it rests. Wherever the statement, although relating to matter of opinion, is the affirmation of a *fact*, it may be a fraudulent representation. Such an affirmation might be made in several forms. The very fact concerning which the statement is made may be the existence of an opinion. The existence of an opinion may be a fact material to the proposed transaction, and a statement that such an opinion exists becomes an affirmation of a material fact, and if untrue, it is a misrepresentation. The opinion might either be represented as held by a third person or as held by the very party making the statement. As a single illustration, either the third person or the party himself might be an expert, and their opinion might be material, so that the representation that the opinion was held might be the affirmation of a most material fact. There is still another and perhaps more common form of such misrepresentation. Wherever a party states a matter, which might otherwise be only an opinion, and does not state it *as the mere expression of his own opinion*, but affirms it *as an existing fact* material to the transaction, so that the other party may reasonably treat it as a fact, and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation. The statements which most frequently come within this branch of the rule are those concerning value. The foregoing distinctions, which I have attempted to explain, and which have sometimes been lost sight of, will go far, I think, to harmonize whatever apparent conflict of decision may be found in some of the reported cases.<sup>3</sup>

**§ 879. II. The Purpose for Which the Representation is Made.**

—It is an essential requisite, both in equity and at law, that the representation, whatever be its form, must be made for the purpose and with the design of procuring the other party to act,—of inducing him to enter into the contract or engage in the transaction.<sup>1</sup> It must therefore be, of necessity, preliminary to the ac-

<sup>1</sup> Hunter v. McLaughlin, 43 Ind. 38.

<sup>2</sup> Statements involving value held to be mere expressions of opinion: Southern Development Co. v. Silve, 125 U. S. 247, 8 Sup. Ct. 881, H. & B. 292; held representations of fact: Haygarth v. Wearing, L. R. 12 Eq. 320, 327, 328; Jordan v. Volkenning, 72 N. Y. 300, 306; Perkins v. Partridge, 30 N. J. Eq. 82, Sh. 171. With respect to matters of opinion stated as facts, or stated as a fact to be held by a certain person, see Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Hurlbert v. Kellogg Co., 115 Wis. 225, 91 N. W. 673

<sup>3</sup> As to representations made to influence third persons, see San Antonio Nat. Bank v. Bamberger, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738.

tual conclusion of the transaction, and in the great majority of instances it is made during and forms a part of a negotiation between the parties, which terminates in the contract or other transaction.<sup>2</sup> There are, however, very important exceptions to this general statement. There are cases where the misrepresentations cannot be said to form a part of any negotiation or treaty between the parties. The false statements may be made with the design that they should be acted upon by some one, but without any design or knowledge of their being acted upon by any particular person. For example, it is now well settled that prospectuses issued by promoters or directors of companies, reports or circulars and similar publications addressed to all whom it may concern, may be fraudulent misrepresentations giving rise to any appropriate equitable or even legal relief.<sup>3</sup> Such being the object of the representation, it must relate to and be directly connected with the very contract or other transaction in question; must deal with its subject-matter or other material terms, and not be confined to other and distinct relations, transactions, or matters in which the parties are concerned. In the language of an eminent judge, a misrepresentation concerning any subject-matter "must be material in its nature,—that is to say, one which, taken as true, would add substantially to the value or promise of" that subject-matter.<sup>4</sup>

**§ 880. Presumption of the Design to Induce Action.**—In order that a statement may be a fraudulent misrepresentation, the party making it need not have any malignant feeling towards the other, nor any desire to injure, nor need he be actuated by any corrupt or wicked motive; for equity looks at the relations of the statement towards the real facts, and the results which will naturally flow from it, rather than at the mental condition, temper, and feelings of the person who makes it.<sup>1</sup> If, therefore, a representation made prior to the transaction, and directly relating to it, is of such a character that it would naturally and reasonably induce, or tend to induce, any ordinary person to act upon it, and enter into the contract or engage in the transaction, and is in fact followed by such action on the part of the other person, then it will be presumed that it was made for the purpose and with the design of inducing that person to do what he has done,—that is, to enter into the agreement or engage in the transaction. The design

<sup>2</sup> *Harris v. Kemble*, 1 Sim. 111, 122, per Sir John Leach.

<sup>3</sup> *Kisch v. Cent. Ry. of Venezuela*, 3 De Gex, J. & S. 122, L. R. 2 H. L. 99; *Rohrschneider v. Knickerbocker Ins. Co.*, 76 N. Y. 216, 32 Am. Rep. 200. See post, § 881.

<sup>4</sup> *Jennings v. Broughton*, 5 De Gex, M. & G. 126, 130. See, also, §§ 890, 898.

<sup>1</sup> *Traill v. Baring*, 4 De Gex, J. & S. 318, 326, 328.

will be inferred from the natural and necessary consequences.<sup>2</sup> It is not necessary that all the representations by which a party is induced to act should be untrue. The cases hold that where certain statements have been made all in their nature capable, more or less, of leading the party to whom they are addressed to adopt a particular line of conduct, and any one of them is untrue, the whole contract or other transaction is considered as having been obtained fraudulently; the court cannot discriminate among the different statements, nor say that the untrue representation is not the very one which induced the party to act. The foregoing general proposition, that it is sufficient if the statement is of such a character as would naturally induce any ordinary person to enter upon a particular line of conduct, and is actually followed by such conduct, is the *practical* rule by which the courts determine whether a misrepresentation possesses the particular element of fraud—the purpose or design—now under consideration.<sup>3</sup>

**§ 881. False Prospectuses, Reports, Circulars, and the Like.**—The nature of fraudulent misrepresentations, their requisite element of being designed and naturally operating to induce third persons to act, and other important features are so fully illustrated by the rules concerning the effect of prospectuses, circulars, reports, and other similar documents issued by the promoters, directors, or officers of corporations, as established by very recent decisions, that a brief statement of these rules may be proper. I do not intend at present to consider the general subject of the relations subsisting between corporations, or their directors or officers, on the one side and stockholders, creditors, or third persons dealing with them on the other, but simply to give the conclusions which have been settled by the courts concerning the effect of such documents, published by or in the name of the company, addressed to all whom they may concern, which have misled third persons, and induced them to purchase shares of stock in the corporation. These conclusions cannot be better expressed than in the very language which has been used by eminent judges: “Those who issue a prospectus, holding out to the public the great advantages which accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained,

<sup>2</sup> *Torrance v. Bolton*, L. R. 8 Ch. 118, 14 Eq. 124; *National Exch. Co. v. Drew*, 2 Macq. 103; *Reyneli v. Sprye*, 1 De Gex, M. & G. 860.

<sup>3</sup> It may be observed that the two requisite elements of a fraudulent misrepresentation which have been examined—that the representation must be an affirmation of fact, and the design of inducing the other party to act—are recognized and adopted alike by courts of law and of equity; decisions at law may therefore be properly cited to illustrate these two requisites in equity.

are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating *as fact* that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges or advantages which the prospectus holds out as inducements to take shares."<sup>1</sup> While *mere* exaggerated views of the prospects and advantages of the company contained in a prospectus, circular, or report might not be fraudulent, still all statements should be fair, bona fide, and honest.<sup>2</sup> "If it can be shown that a material representation which is not true is contained in the prospectus, or in *any* document forming the foundation of the contract between the company and the shareholder, and the shareholder comes within a reasonable time, and under proper circumstances, to be released from that contract, the courts are bound to relieve him from it. Contracts of this description between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals."<sup>3</sup> It is settled, therefore, that a person who has been induced by the misrepresentations of such documents to purchase shares of stock or to enter into a contract with the company for their purchase may, if he acts without delay upon learning the truth, obtain relief against the company, either by being struck off from the list of stockholders and contributaries in the proceeding instituted for its winding up and final settlement, or by means of an equitable suit brought against the company for the purpose of rescinding his purchase or shares, and of recovering back the money which he paid for them. He may even, in a proper case, obtain relief against the fraudulent directors personally by means of an equitable suit for an accounting and repayment of the money, or by means of an action at law for the recovery of damages on account of the deceit.<sup>4</sup> Relief against the directors personally requires a much stronger case of fraud than relief against the company. The purchase of shares may be set aside, and the purchaser relieved from his liability as a contributory, without any knowledge of the untruth on the part of those who issued the document. Recovery from the directors personally

<sup>1</sup> *New Brunswick, etc., R'y v. Mugeridge*, 1 Drew. & S. 363, 381, per Kindersley, V. C.

<sup>2</sup> *Kisch v. Cent. Ry. of Ven.*, 3 De Gex, J. & S. 122, 135, per Turner, L. J.; *Denton v. Macneil*, L. R. 2 Eq. 352.

<sup>3</sup> *In re Reese River Mining Co.*, L. R. 2 Ch. 604, 609, per Turner, L. J.

<sup>4</sup> See cases in last three notes: *Peek v. Gurney*, L. R. 13 Eq. 79; *Mulholland v. Washington Match Co.* (Wash.), 77 Pac. 497. Relief refused on ground that representations, being simply exaggerations, were not fraudulent; *Denton v. Macneil*, L. R. 2 Eq. 352.

requires knowledge of the untruth on their part, or else that the statement should be made under such circumstances that knowledge will be imputed to them.<sup>5</sup> It is also settled that the stockholder must take the requisite proceedings to be relieved against the company at once upon his discovery of the truth; any unreasonable delay, and any act on his part tending to show acquiescence, will debar him of relief.<sup>6</sup>

**§ 882. III. Untruth of the Statement.**—The statement of fact must be untrue, or else there is no *misrepresentation*. The entire doctrine of the law and of equity concerning that species of fraud which consists in *suggestio falsi* is based upon the assumption that the representation is in fact untrue, as this very name itself shows. This is the premise of fact which is assumed in every case which discusses the nature of fraud, and decides whether it does or does not exist in any particular instance. This requisite element needs, therefore, no examination and no citation of special authorities; it is not susceptible of any exception or limitation.

**§ 883. IV. The Intention, Knowledge, or Belief of the Party Making the Statement.**—This element—the mental state or condition of the party making the representation—is the most important and characteristic feature of fraud, both in equity and at law. It is, moreover, that constituent of fraud with respect to which there exists the principal difference or divergence between the theory which prevails in equity and that which forms a part of the law. It will aid us, therefore, in obtaining a more accurate notion of the equitable conception by comparison, to present a very brief summary of the doctrine on this subject which has been settled by courts of law.

**§ 884. The Knowledge and Fraudulent Intention Requisite at Law.** . . . It is now a settled doctrine of the law that there can be no fraud, misrepresentation, or concealment without some *moral* delinquency; there is no actual *legal* fraud which is not also a *moral* fraud.<sup>1</sup> This immoral element consists in the necessary guilty knowledge and consequent intent to deceive,—sometimes designated by the technical term, the *scienter*. The very essence of the legal conception is the fraudulent intention flowing from the guilty knowledge. No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under

<sup>5</sup> *Cargill v. Bower*, L. R. 10 Ch. D. 502; *Hubbard v. Weare*, 79 Iowa 678, 44 N. W. 915. See post, note to § 884.

<sup>6</sup> *Peek v. Gurney*, L. R. 13 Eq. 79; *Burgess's Case*, L. R. 15 Ch. D. 507; *Karberg's Case* (1892), 3 Ch. 1 (no laches). See, also, §§ 917, 965.

<sup>1</sup> *Ormrod v. Huth*, 14 Mees. & W. 650; *Boddy v. Henry*, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551.

such circumstances that the law must necessarily impute such knowledge to the party at the time when he makes it. It is well settled that fraudulent misrepresentations may assume the three following forms or phases at law: 1. A party making an untrue statement has at the time an actual, positive knowledge of its falsity; he states what he absolutely knows to be untrue. This is the simplest, plainest, and most direct species of fraud. 2. A party making an untrue statement does not at the time have any belief that it is true.<sup>2</sup> The making an untrue statement, of the truth of which the party of course has no knowledge, and which he does not even believe to be true, is tantamount to the making of a statement which the party knows to be untrue. 3. Finally, a party making an untrue statement, having at the time no knowledge whatever on the subject, *and no reasonable grounds to believe it to be true*, is guilty of fraud, and his claiming that he believed it to be true cannot remove its fraudulent character. A definite statement of what the party does not know to be true, where he has no reasonable grounds for believing it to be true, will, if false, have the same legal effect as a statement of what the party positively knows to be untrue.<sup>3</sup> In each of these three phases

<sup>1</sup> *Riley v. Bell*, 120 Iowa 618, 95 N. W. 170.

<sup>2</sup> *Taylor v. Ashton*, 11 Mees. & W. 401; *Ormrod v. Huth*, 14 Mees. & W. 650. This third rule of the text, at one time supposed to be well established, was overturned in the case of *Derry v. Peek*, 14 App. Cas. (H. L.) 337, reversing *Peek v. Derry*, 37 Ch. Div. 541; followed in *Angus v. Clifford* (1891), 2 Ch. 449; *Low v. Bouverie* (1891), 3 Ch. 82, 1 Scott 565 (holding that *Derry v. Peek* did not touch the law of estoppel). The house of lords, in *Derry v. Peek*, 14 App. Cas. (H. L.) 337, unanimously held that the absence of reasonable grounds for belief, while it may be evidence of a fraudulent intent, does not, of itself, constitute such fraud as will justify an action for damages either at law or in equity. Lord Bramwell remarks (p. 351): "To believe without reasonable grounds is not moral culpability, but (if there is such a thing) mental culpability." Lord Herschell, who delivered the leading opinion, sums up (p. 374): "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of it will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth." The decision, though, of course, binding on English courts, has been most severely criticised both in England and in this country: see especially an article by Sir Frederick Pollock in 5 *Law Quarterly Review*, 410. The disastrous effects anticipated from the decision, as far as company directors and promoters issuing a prospectus are concerned, were promptly averted by the Directors' Liability Act of 1890. See, also, *Nash v. Minnesota, etc., Co.*, 163 Mass. 574, 47 Am. St. Rep. 489, 40 N. E. 1039, 28 L. R. A. 753.

there is a *moral* wrong, and a very slight, if any, difference in the degree of the culpability. In each there is actual knowledge of the untruth, or else the law conclusively imputes knowledge to the party, and treats him as though actually possessing it.

§ 885. **Knowledge or Intention Requisite in Equity.**—There are undoubtedly some authorities which, taken literally, would make *moral* wrong a necessary ingredient of fraud in equity as well as at law, since they require a guilty knowledge of the untruth as an essential element. This view is, however, certainly incorrect. It is fully settled by the ablest courts, English and American, that there may be actual fraud—not merely constructive fraud—in equity without any feature or incident of *moral* culpability; that the actual fraud consisting of misrepresentation is not necessarily immoral. A person making an untrue statement, without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity.<sup>1</sup> Whatever would be fraudulent at law will be so in equity; but the equitable doctrine goes farther, and includes instances of fraudulent misrepresentations which do not exist in the law. There are, however, well-established limits to this equitable conception, which should be carefully observed. Every wrongful act, even by persons in positions of trust and confidence, which gives occasion for a remedy is not fraudulent. Breaches of their duty by persons in fiduciary relations, acts of agents in excess of their authority, and the like, are not, as such, instances of actual fraud, although they may sometimes fall within the division of “constructive fraud.”<sup>2</sup> I shall, in further illustration of this subject, enumerate and describe the different phases and forms of fraudulent misrepresentations recognized by equity, some of them being identical with those found in the law.

§ 886. **Forms of Fraudulent Misrepresentations in Equity.**—1. Where a party makes a statement which is untrue, and has at the time an actual, positive knowledge of its untruth, and the necessarily resulting intent to deceive,—the *scienter* at law. This is the most direct, and in some respects the highest form of fraud.<sup>1</sup>

*Derry v. Peek* has, of course, failed to receive universal recognition in this country; thus, in *Giddings v. Baker*, 80 Tex. 308, 16 S. W. 33, it was held that a party making false representations is liable at law if, by the exercise of ordinary diligence he could have known that his statement was not true. See, also, *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. 566, 18 Am. St. Rep. 485, 6 L. R. A. 149.

<sup>1</sup> *Traill v. Baring*, 4 De Gex, J. & S. 318, 328; *Potter's Appeal*, 56 Conn. 1, 12 Atl. 513, 7 Am. St. Rep. 272.

<sup>2</sup> *Stewart v. Austin*, L. R. 3 Eq. 299, 306, holding that an act in excess of authority by an agent is not equitable fraud.

<sup>1</sup> *Patch v. Ward*, L. R. 3 Ch. 203, 207; *Smith v. Richards*, 13 Pet. 26, 36, 3 Keener 525, 2 Scott 652.

Wherever the facts of the statement are the acts of the very party making it, which are represented as having been done by him, if the statement is untrue, the knowledge of its untruth is necessarily and conclusively imputed to the party. In all cases involving such kind of misrepresentation, if knowledge of the untruth be a requisite element of the liability, such knowledge will be conclusively presumed.<sup>2</sup> . . . 2. If a person makes an untrue statement, and has at the time no knowledge of its truth, and even has no *belief* in its truth, he is chargeable with fraud in equity as well as in law. Making a statement which the party does not believe to be true is only slightly removed in culpability from the making a statement which the party knows to be false.<sup>3</sup>

§ 887. **The Same.**—3. Where a person makes an untrue statement, and has at the time no knowledge of its truth, and there are no reasonable grounds for his believing it to be true, he is chargeable with fraud, although he had no absolute knowledge of its untruth, and may claim to have had a belief in its truth.<sup>1</sup> This is the mode in which the rule is ordinarily laid down by courts of law, and sometimes by courts of equity. The equity cases have, however, settled the rule in somewhat broader terms, omitting entirely the qualification “that there are no reasonable grounds for the person’s believing his statement to be true.” In other words, it is settled in equity by an overwhelming array of authority that where a person makes a statement of fact, which is actually untrue, and he has at the time no knowledge whatever of the matter, he is chargeable with fraud, and his claim to have believed in the truth of his statement cannot be regarded as at all material. The definite assertion of something which is untrue, concerning which the party has no knowledge at all, is tantamount in its effects to the assertion of something which the party knows to be untrue.<sup>2</sup>

§ 888. **The Same.**—4. Where a person makes a statement of fact which is untrue, but at the time of making it he honestly believes it to be true, and this belief is based upon reasonable grounds which actually exist, the misrepresentation so made is not fraudulent either in equity or at law.<sup>1</sup> This general proposition is subject, however, to the two following important limitations: 5. Where

<sup>2</sup> *Henderson v. Lacon*, L. R. 5 Eq. 249, 262.

<sup>3</sup> *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313; *Fisher v. Mellen*, 103 Mass. 503 (asserting as fact known to the party what is only opinion).

<sup>1</sup> *Jennings v. Broughton*, 5 De Gex, M. & G. 126, 130; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, H. & B. 282.

<sup>2</sup> *Rawlins v. Wickham*, 3 De Gex & J. 304; *Pulsford v. Richards*, 17 Beav. 87, 94, 2 Scott 661; *Smith v. Richards*, 13 Pet. 26, 2 Scott 652, 3 Keener 525.

<sup>1</sup> *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; *Marsh v. Falker*, 40 N. Y. 562, 566.

such an untrue statement is made in the honest belief of its truth, so that it is the result of an innocent error, and the truth is afterwards discovered by the person who has innocently made the incorrect representation, if he then suffers the other party to continue in error, and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in equity, a fraudulent representation, even though it was not so originally.<sup>2</sup> 6. Finally, if a statement of fact, actually untrue, is made by a person who honestly believes it to be true, but under such circumstances that the *duty* of knowing the truth rests upon him, which, if fulfilled, would have prevented him from making the statement, such misrepresentation may be fraudulent in equity, and the person answerable as for fraud; forgetfulness, ignorance, mistake, cannot avail to overcome the pre-existing *duty* of knowing and telling the truth.<sup>3</sup>

**§ 889. Requisites of a Misrepresentation as a Defense to the Specific Enforcement of Contracts in Equity.**—In setting up a material misrepresentation to defeat the specific performance of a contract, the element of a scienter, of knowledge, of belief with or without reasonable grounds, or of intent, is wholly unnecessary and immaterial. So far as this most essential element of a fraudulent misrepresentation is concerned, it is sufficient to defeat a specific performance that the statement is actually untrue so as to mislead the party to whom it is addressed; the party making it need not know of its falsity, nor have any intent to deceive; nor does his belief in its truth make any difference. With respect to its effect upon the specific performance of a contract, a party making a statement as true, however honestly, for the purpose of influencing the conduct of the other party, is bound to know that it is true, and must stand or fall by his representation.<sup>1</sup> The point upon which the defense turns is the *fact* of the other party having been misled by a representation calculated to mislead him, and not the existence of a design to thus mislead. It follows as a plain consequence of this general doctrine that if a party makes a misrepresentation, whereby another is induced to enter into an agreement, he cannot escape from its effects by alleging his forgetfulness at the time of

<sup>1</sup> *Traill v. Baring*, 4 De Gex, J. & S. 318, 329, 330, per Turner, L. J. Rescission for innocent misrepresentations, believed by the party who was induced by them to act, is tantamount to rescission for mutual mistake, and is freely granted; see, for example, *Weise v. Grove*, (Iowa) 99 N. W. 191, and cases cited.

1A263 <sup>2</sup> *Burrowes v. Locke*, 10 Ves. 470, 475, 1 Scott 559; *Traill v. Baring*, 4 De Gex, J. & S. 318, 329, 330; *Prewitt v. Trimble*, 92 Ky. 176, 36 Am. St. Rep. 586, 17 S. W. 356, H. & B. 287.

<sup>3</sup> *Wall v. Stubbs*, 1 Madd. 80, 1 Ames Eq. Jur. 302, 2 Scott 239; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Holmes' App.* 77 Pa. St. 50, Sh. 166.

the actual facts.<sup>2</sup> Where the misrepresentation does not extend to the entire scope of the agreement, or even to any one of its most important parts, but relates merely to some incidental, subordinate, or collateral feature of it, the court, instead of denying all relief to the plaintiff, may direct a specific performance, with an abatement of the price, or other form of compensation, to the defendant. Of course, when the representation is so coupled with knowledge, or want of belief, or intent, as to constitute actual fraud in any of its phases, it will a fortiori defeat the remedy of specific performance.

**§ 890. V. Effect of the Representation on the Party to Whom It is Made—His Reliance upon it.**—Another element of a fraudulent misrepresentation, without which there can be no remedy, legal or equitable, is, that it must be relied upon by the party to whom it is made, and must be an immediate cause of his conduct which alters his legal relations. Unless an untrue statement is believed and acted upon, it can occasion no legal injury. It is essential, therefore, that the party addressed should trust the representation, and be so thoroughly induced by it that, judging from the ordinary experience of mankind, in the absence of it he would not, in all reasonable probability, have entered into the contract or other transaction.<sup>1</sup> It is not necessary that the false representation should be the sole inducement; others may concur with it in influencing the party. Where several representations have been made, and one of them is false, the court has no means of determining, as was well said by Lord Cranworth, that this very one did not turn the scale.<sup>2</sup> The misrepresentations must, however, be concerning something really material. Statements, although false, respecting matters utterly trifling, which cannot affect the value or character of the subject-matter, so that if the truth had been known the party would not probably have altered his conduct, are not an occasion for the interposition of equity.<sup>3</sup>

**§ 891. The Party must be Justified in Relying on the Representation.**—The foregoing requisite, that the representation must be relied upon, plainly includes the supposition that the party is justified, under all the circumstances, in thus relying upon it. This branch

<sup>1</sup> *Burrowes v. Locke*, 10 Ves. 470, 476, 1 Scott 559; *Price v. Macaulay*, 2 De Gex, M. & G. 339. The same is true in suits for rescission and other relief based upon actual fraud.

<sup>2</sup> *Attwood v. Small*, 6 Clark & F. 232, 447; *Pulsford v. Richards*, 17 Beav. 87, 96, 2 Scott 661; *Slaughter's Adm'r. v. Gerson*, 13 Wall. 379, 2 Scott 721; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241, H. & B. 273, 3 Keener 615.

<sup>3</sup> See ante, § 880; *Reynell v. Sprye*, 1 De Gex, M. & G. 660, 708, 709; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241, H. & B. 273, 3 Keener 615.

<sup>4</sup> *Percival v. Harger*, 40 Iowa 286. See, also, §§ 879, 898.

of the rule presents by far the greatest practical difficulties in the decision of cases, because, although the rule is well settled, and is most clearly just, its application must depend upon the facts of each particular case, and upon evidence which is often obscure and conflicting. In determining the effect of a reliance upon representations, it is most important to ascertain, in the first place, whether the statement was such that the party was justified in relying upon it, or was such, on the other hand, that he was *bound* to inquire and examine into its correctness himself. In respect to this alternative, there is a broad distinction between statements of fact which really form a part of, or are essentially connected with, the substance of the transaction, and representations which are mere expressions of opinion, hope, or expectation, or are mere general commendations. It may be laid down as a general proposition that where the statements are of the first kind, and especially where they are concerning matters which, from their nature or situation, may be assumed to be within the knowledge or under the power of the party making the representation, the party to whom it is made has a right to rely on them, he is justified in relying on them, and in the absence of any knowledge of his own, or of any facts which should arouse suspicion and cast doubt upon the truth of the statements, he is not bound to make inquiries and examination for himself. It does not, under such circumstances, lie in the mouth of the person asserting the fact to object or complain because the other took him at his word; if he claims that the other party was not misled, he is bound to show clearly that such party did know the real facts; the burden is on him of removing the presumption that such party relied and acted upon his statements.<sup>1</sup> The rule is equally well settled with respect to the second alternative. Where the representation *consists* of general commendations, or mere expressions of opinion, hope, expectation, and the like, and where it relates to matters which, from their nature, situation, or time, cannot be supposed to be within the knowledge or under the power of the party making the statement, the party to whom it is made is not justified in relying upon it and assuming it to be true; he is bound to make inquiry and examination for himself so as to ascertain the truth; and in the absence of evidence, it will be presumed that he has done so, and acted upon the result of his own inquiry and examination.<sup>2</sup> Any representa-

<sup>1</sup> Dyer v. Hargrave, 10 Ves. 505, 1 Ames Eq. Jur. 245; Wall v. Stubbs, 1 Madd. 80, 1 Ames Eq. Jur. 362, 2 Scott 239; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241, H. & B. 273, 3 Keener 615; and especially Redgrave v. Hurd, L. R. 20 Ch. Div. 1, 13, 14 et seq., 2 Keener 896, Sh. 173.

<sup>2</sup> Trower v. Newcome, 3 Mer. 704, 2 Scott 238, 1 Ames Eq. Jur. 352, 2 Keener

tion, in order that one may be justified in relying upon it, must be, in some degree at least, reasonable; at all events, it must not be so self-contradictory or absurd that no reasonable man could believe it. It must not, also, be so vague and general in its terms that it conveys no certain meaning.<sup>3</sup>

**§ 892. When He is or is not Justified in Relying.**—As a generalization from the authorities, the various conditions of fact and circumstance with respect to the question how far a party is justified in relying upon the representation made to him may be reduced to the four following cases, in the first three of which the party is not, while in the fourth he is, justified in relying upon the statements which are offered as inducements for him to enter upon certain conduct. 1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement; 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence; 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by other parties; 4. But when the representation is concerning facts of which the party making it has, or is supposed to have, knowledge, and the other party has no such advantage, and the circumstances are not those described in the first or the second case, then it will be presumed that he relied on the statement; he is justified in doing so.<sup>1</sup>

**§ 893. Information or Means of Obtaining Information Possessed by the Party Receiving the Representation.**—I purpose to examine under this head the first two cases mentioned in the foregoing summary; they are the ones which present by far the greatest practical difficulties in the administration of justice. If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot

892; *Scott v. Hanson*, 1 Sim. 13, 1 Russ. & M. 128, 2 Keener 887, 1 Ames Eq. Jur. 353, 2 Scott 240; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, H. & B. 282.

<sup>1</sup> *Trower v. Newcome*, 3 Mer. 704, 1 Ames Eq. Jur. 352, 2 Keener 882, 2 Scott 238.

<sup>2</sup> *Clapham v. Shillito*, 7 Beav. 146, 149, 150. The author's classification is quoted in *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 3 Keener 621 by Mr. Justice Brewer. The third and fourth cases in the text above are discussed in the preceding paragraph (§ 891). The first and second are in reality only one; they involve the same principle, and the only difference between them is in the mode of proof—a fact being directly proved by direct evidence in the first, which is irresistibly inferred by a legal presumption in the second.

claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled.<sup>1</sup>

**§ 894. Knowledge Possessed by the Same Party—Patent Defects.**—The same principle is applied under a somewhat different condition of circumstances. If the party receiving a misrepresentation is, at the time when it is made, either from knowledge acquired previously or obtained at that very moment, fully aware of the truth, acquainted with the facts as they really are, he cannot claim to be misled, and cannot defeat or disaffirm or rescind the transaction on the ground that it was entered into through false representations. The case of patent defects is merely an application of this equitable doctrine. If, in a contract of sale or of leasing, representations are made by the vendor concerning some incidents, qualities, or attributes of the subject-matter which are open and visible, so that the falsity of the statement is patent to any ordinary observer, and it is made to appear that the purchaser, at or shortly before the concluding the contract, had seen the thing itself which constitutes the subject-matter, then a knowledge of the facts is chargeable upon such party; he is assumed to have made the agreement knowingly, and cannot allege that he was misled by the false representations.<sup>1</sup> This special rule concerning patent defects requires that the thing concerning which the statements are made should be seen or otherwise personally known by the purchaser, and that the defects should be plainly open and patent to any

<sup>1</sup> One ground of this latter branch of the rule is the practical impossibility in any judicial proceeding of ascertaining exactly how much knowledge the party obtained by his inquiry; and the opportunity which a contrary rule would give to a party of repudiating an agreement or other transaction fairly entered into, with which he had become dissatisfied; *Attwood v. Small*, 6 Clark & F. 232; *Jennings v. Broughton*, 5 De Gex, M. & G. 126, 17 Beav. 234; *Lowndes v. Lane*, 2 Cox 363; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, H. & B. 282; *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 3 Keener 621.

<sup>1</sup> *Dyer v. Hargrave*, 10 Ves. 505, 1 Ames Eq. Jur. 245; *Bowles v. Round*, 5 Ves. 508, 1 Ames Eq. Jur. 361, 2 Keener 853, *Slaughter's Adm'r. v. Gerson*, 13 Wall. 379.

ordinary observer, and especially that no means should be used to conceal them, or to divert the buyer's attention from them, or in any way to prevent a fair inquiry.<sup>2</sup>

**§ 895. When the Knowledge or Information must be Proved, and not Presumed.**—The principle discussed in the two preceding paragraphs<sup>1</sup> is subject, however, to the following most important qualification, which is based upon the proposition heretofore stated, that whenever a positive representation of fact is made, the party receiving it is, in general, entitled to act and rely upon it, and is not bound to verify it by an independent investigation. Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The *mere existence of opportunities* for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact.<sup>2</sup> If one party—a vendor, for example—claims that the invalidating effects of his misrepresentations are obviated, and that the purchaser was not misled by them, either because they were concerning patent defects in the subject-matter, or because he was from the outset acquainted with the real facts, or because he had made inquiry, and had thereby ascertained the truth, the foregoing qualification plainly applies; it is plainly incumbent on the vendor to prove the alleged knowledge of the purchaser by clear and positive evidence, and not to leave it a matter of mere inference or implication; *an opportunity or means of obtaining the knowledge* is not enough.<sup>3</sup> The qualification applies no less plainly to the case where the party receiving a representation has given to him an opportunity of examining into the real facts, or where his attention is directed to the sources of information. The mere opportunity or the means of investigation are not sufficient. Un-

<sup>1</sup> *Mead v. Bunn*, 32 N. Y. 275.

<sup>2</sup> That is, the principle underlying the first and second cases mentioned ante, in § 892.

<sup>3</sup> *Backer v. Pyne*, 180 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231 (vendor's statements may be relied on though vendee might have consulted the records); *Holst v. Stewart*, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442. See, also, § 810.

<sup>4</sup> *Price v. Macaulay*, 2 De Gex, M. & G. 339, 346; *Redgrave v. Hurd*, 20 Ch. Div. 1, 21, 2 Keener 896, Sh. 173; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241, H. & B. 273, 3 Keener 615.

doubtedly, if there had been no representation, they might or would have put the party upon an inquiry, and would, therefore, amount in law to a constructive notice of the facts which might have been learned by such inquiry; but the positive representation of a fact cannot be counteracted by such implication. It must be shown that the party proceeded, in some measure, to avail himself of the opportunity,—that he took some steps in making an independent investigation,—so that, although his examination might not have been complete and successful, yet he must be charged with the knowledge he would have acquired by means of a thorough investigation. In other words, it must appear that, through the opportunity and means of inquiry, he received *some* information concerning the actual facts, so that, from considerations of expediency, he should not be allowed to allege his failure to obtain *all* the knowledge which he might have acquired.<sup>4</sup>

**§ 896. Words of General Caution.**—The rule that some independent *knowledge* of the true facts must be brought home to the party receiving such a representation, in order to counteract its effects in misleading him, and to prevent his reliance upon it, is of wide application. Nothing done by the party making the statement, and no extrinsic circumstances, will avail, unless they clearly lead to the conclusion that the transaction was concluded upon the strength of information, or substantial grounds for forming

<sup>4</sup> *Attwood v. Small*, 6 Clark & F. 232; *Redgrave v. Hurd*, L. R. 20 Ch. D. 1, especially at pp. 13, 14, 17, 23, 2 Keener 896, Sh. 173; *Turner v. Houtt*, 53 N. J. Eq. 526, 33 Atl. 28, 3 Keener 646. There is no contradiction between these conclusions and the rules stated in the two preceding paragraphs (§§ 893, 894). The question is, Did the party rely on the representation, or on his own knowledge? To obviate the effect of the representation, it must be clearly and conclusively shown that he relied on *his own knowledge*. This the general doctrine and the qualification both demand. But neither of them requires that this knowledge be perfect, complete, accurate. Where there is an opportunity or means of examination, the party may decline to use it, for he has a right to rely on the representation of facts, and to remain personally in ignorance. If, however, he takes steps in an investigation, and thus obtains some independent knowledge, and afterwards concludes the agreement, he must be assumed to have concluded it upon the strength of that acquired knowledge, however partial and deceptive, and not upon the representation. Where, however, there is no investigation made after the representation, in order to test it, but the vendor claims that his statements have not misled, because the defects were patent, or because the buyer was, from the outset, acquainted with all the facts, there it is the completeness and accuracy of the purchaser's knowledge alone which counteracts the effects of the representation and shows that it was not relied upon and did not mislead; in such case, therefore, it must be shown that the purchaser's knowledge of all the material facts covered by the misrepresentation was full, accurate, and perfect. The vital question in each case, however, is, Did the party receiving the representation rely upon it in concluding the agreement or other transaction? or did he rely upon his own knowledge?

a judgment, other than the representation itself. A positive representation of fact cannot be obviated by any general statement of the party making it, or by any extrinsic circumstances which merely admit of or warrant an inference contrary to the representation, even though of themselves such statements or such circumstances might be sufficient to put the other party upon the inquiry. This is simply another application of the principle that the right of a party receiving a representation to rely upon it cannot be taken away or interfered with by inference or implication. If, therefore, the party accompanies or follows his misrepresentation by words of general caution, or by advice to the other that he consult his friends or professional advisers before concluding the agreement, he does not thereby counteract any effect upon the transaction which his untrue statement would otherwise produce.<sup>1</sup> . . .

**§ 897. Prompt Disaffirmance Necessary.**—All these considerations as to the nature of misrepresentations require great punctuality and promptness of action by the deceived party upon his discovery of the fraud. The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his own part. If after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations.<sup>1</sup>

**§ 898. VI. Materiality of the Misrepresentation.**—The last element of a misrepresentation, in order that it may be the ground for any relief, affirmative or defensive, in equity or at law, is its materiality. The statement of facts of which it consists must not only be relied upon as an inducement to some action, but it must also be so material to the interests of the party thus relying and acting upon it, that he is pecuniarily prejudiced by its falsity, is placed in a worse position than he otherwise would have been. The party must suffer some pecuniary loss or injury as the natural consequence of the conduct induced by the misrepresentation. In short,

<sup>1</sup> *Reynell v. Sprye*, 1 De Gex, M. & G. 660, 709, 710; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241, H. & B. 273, 3 Keener 615.

<sup>2</sup> *Greenwood v. Fenn*, 136 Ill. 146, 26 N. E. 487, 3 Keener 732; *Romanoff Co. v. Cameron*, 137 Ala. 214, 33 South. 864; *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. 899. See, also, ante, §§ 817-820; post, § 917.

the representation must be so material that its falsity renders it unconscientious in the person making it to enforce the agreement or other transaction which it has caused. Fraud without resulting pecuniary damage is not a ground for the exercise of remedial jurisdiction, equitable or legal; courts of justice do not act as *mere* tribunals of conscience to enforce duties which are *purely* moral.<sup>1</sup> If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury; it is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable.<sup>2</sup>

**§ 899. Effects of a Misrepresentation.**—Having thus described the elements of a fraudulent misrepresentation in equity, I will add, in order to complete the account, a brief statement of its effects upon the rights of the defrauded, and the duties of the defrauding party. Wherever an agreement or other like transaction has been procured by means of a material fraudulent misrepresentation by one of the parties, the other has an election of equitable remedies. The injured party may, at his option, compel the fraudulent party to make good his representation—that is, to carry it into operation in the nature of a specific performance—when it is of such a nature that it can be thus performed; or he may rescind the agreement, and procure the transaction to be completely canceled and set aside.<sup>1</sup> Such a fraudulent misrepresentation, even though it relates only to a portion of a contract, furnishes a complete defense to an enforcement of the whole agreement. The fraudulent party will not be permitted, against the objection of the other, to waive that particular portion with which the false statement is concerned, and to obtain a specific performance of the

<sup>1</sup> *Fellowes v. Lord Gwydyr*, 1 Sim. 63, 1 Russ. & M. 83, 2 Keener 889; *Marsh v. Cook*, 32 N. J. Eq. 262, 3 Keener 670.

<sup>2</sup> *Cadman v. Horner*, 18 Ves. 10, 2 Keener 881, 1 Ames Eq. Jur. 351, 1 Scott 284, 2 Scott 236; *Wainscott v. Occidental, etc., Ass'n*, 98 Cal. 253, 33 Pac. 88, 3 Keener 683, 2 Scott 729.

<sup>3</sup> Rescission and cancellation; see *Edwards v. McLeay*, 2 Swanst. 287, 2 Scott 718; *Neblett v. McFarland*, 92 U. S. 101, 3 Keener 693. As to compelling the fraudulent party to make good his representations, see *Pulsford v. Richards*, 17 Beav. 87, 95, 2 Scott 661; *Piper v. Hoard*, 107 N. Y. 73, 13 N. E. 626, 1 Am. St. Rep. 785. Courts of equity in administering these two principal remedies, viz., either cancellation or compelling a party to make good his representation by a specific performance, will also grant whatever additional and auxiliary relief may be necessary to render these remedies completely effective. Thus when a person has through fraud obtained the legal title to land or other property, equity constantly treats him as a trustee for the one equitably entitled, and hence has sprung the doctrine of constructive trusts. The court will also grant an injunction to restrain the fraudulent party from disposing of the property, or from enforcing an executory contract or even a judgment obtained by fraud, and the like. See §§ 221, 914, note, 1340, 1363.

remainder.<sup>2</sup> A material misstatement of fact, made innocently, and therefore not fraudulent, if it relates to the substantial terms of the agreement, to its very essence, will also constitute a complete defense to the specific execution of the contract, although it may not be a sufficient ground for any affirmative relief.<sup>3</sup> On the other hand, where the misrepresentation, though material and untrue, is innocent, made in a bona fide belief of its truth, and therefore not fraudulent, and it relates to or concerns some portion only of the contract, it is not necessarily nor generally a complete defense to the enforcement of the contract. Under such circumstances, there is no rule of equity which prevents a partial enforcement of a contract which is divisible, or the specific execution of it with compensation in respect of its portions, incidents, or features which do not correspond with the description.<sup>4</sup> The destructive effect of fraud upon any contract, conveyance, or other transaction is so essential and far-reaching that no person, however free from any participation in the fraud, can avail himself of what has been obtained by the fraud of another, unless he is not only innocent, but has given some valuable consideration.<sup>5</sup> Although the burden of the fraud thus passes by transfer even to an innocent person, the right to relief, it seems, does not necessarily pass in the same manner. The general rule that a misrepresentation must be relied upon by the party receiving it, in order that it may be a sufficient ground for impeaching or defeating a contract, extends to the assignment of an agreement which, as between the original parties, is affected by a misrepresentation. If a contract between A and B, voidable at the instance of B on account of A's

<sup>2</sup> *Viscount Clermont v. Tasburgh*, 1 Jac. & W. 112, 119, 1 Ames Eq. Jur. 358, 2 Keener 883, 2 Scott 241; *Cadman v. Horner*, 18 Ves. 10, 1 Ames Eq. Jur. 351, 2 Keener 881, 1 Scott 284, 2 Scott 236.

<sup>3</sup> See ante, § 889, and cases cited. For examples, where the vendor's untrue statement was as to his title to the whole property contracted to be sold; or where it concerned the nature of the entire estate, as representing it to be in fee when it was leasehold or for life; or where it related to some minor feature, but that feature affected the whole subject-matter alike. In such cases a partial enforcement with compensation would plainly be impossible. See *Jacobs v. Revell*, (1900) 2 Ch. 858.

<sup>4</sup> *Powell v. Elliott*, L. R. 10 Ch. 424; *Whittemore v. Whittemore*, L. R. 8 Eq. 603; *Leyland v. Illingworth*, 2 De Gex, F. & J. 248; *McMullins Adm'r v. Sanders*, 79 Va. 356, 365. Even where the misrepresentation is intentional, and the remedy of rescission would be granted, still the contract is voidable, and not void, and in accordance with the rule stated in the former part of the above paragraph, the injured party may waive his right to a complete defeat, and may insist on a partial specific performance with compensation for the defect, unless the case is such as furnishes no foundation for estimating the amount of the compensation.

<sup>5</sup> See post, § 918; *Huguenin v. Baseley*, 14 Ves. 273.

misrepresentation made to him in procuring it, is assigned by B to a third person, C, who is in no such relations with the original parties that he is affected by the fraud, and to whom no false statements are made in obtaining the transfer, the agreement thus assigned, if otherwise binding upon him, would be valid against C; at least its enforcement against him would not be hindered by A's original misrepresentations, since he had not acted upon their faith and credit.<sup>6</sup>

**§ 900. Second. Fraudulent Concealments.**—Fraudulent concealment implies knowledge and intention. Although there are some species of fraudulent misrepresentations, as has been shown, without these qualities, it is hardly possible to conceive of a fraudulent concealment without a knowledge of the fact suppressed possessed by the party, and an intention not to disclose such fact.

**§ 901. General Doctrine—Duty to Disclose.**—The general doctrine with respect to concealment as a form of actual fraud, and as distinguished from those analogous violations of fiduciary duty which do not constitute actual fraud, but may be included within the term “constructive fraud,” may be stated as follows: If either party to a transaction conceals some fact which is material, which is within his own knowledge, *and which it is his duty to disclose*, he is guilty of actual fraud.<sup>1</sup> It is very difficult to lay down any general formula which shall be more definite than this, and at the same time accurate. The difficulty consists in stating a general rule, in harmony with decisions of authority, as to the duty of either party to disclose facts which are within his knowledge. It is certain that every concealment or failure to disclose material facts known to one party is not fraud in equity or at law, whatever quality it may have before the tribunal of the individual conscience. It has never been contended, in our system of jurisprudence, that a vendor in a contract of sale is bound to disclose all facts which, if known by the buyer, would prevent or tend to prevent him from making the purchase. Much less has it ever been maintained that the buyer is bound to discover all facts known to himself which

<sup>6</sup> *Smith v. Clarke*, 12 Ves. 477, 484. Fraud only renders contracts voidable, and can be taken advantage of only by the person defrauded, his representatives and privies; the right to a remedy is personal: *Harris v. Kemble*, 5 Bligh, N. S., 730, 751. The proposition of the text assumes that the contract alone is assigned. If a cause of action on account of the fraud has accrued in B's favor, and that is expressly assigned to C with the contract,—which is permissible under modern legislation in many of the states,—the result would be different.

<sup>1</sup> *Dolman v. Nokes*, 22 Beav. 402, 3 Keener 565; *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404, 3 Keener 571; *Dambmann v. Schulting*, 75 N. Y. 55, 61, H. & B. 227, 3 Keener 202; *People's Bank v. Bogart*, 81 N. Y. 101, 37 Am. Rep. 481, 3 Keener 575; *Keen v. James*, 30 N. J. Eq. 257, 51 Am. Rep. 29, 3 Keener 590.

would enhance the value of the article sold or affect the conduct of the vendor. Even where the buyer purchases on credit, his *mere* failure to disclose his indebtedness, or his embarrassed financial condition, is not necessarily a fraudulent concealment. The same is generally true of all other species of contracts and transactions, except of those species of agreements or engagements which are in their very essential nature intrinsically fiduciary, involving a condition of absolute good faith. While the decisions admit these propositions, they are agreed, on the other hand, that it is only *silence* which is permitted. If in addition to the party's silence there is any statement, even any word or act on his own part, which tends affirmatively to a suppression of the truth, to a covering up or disguising the truth, or to a withdrawal or distraction of the other party's attention or observation from the real facts, then the line is overstepped, and the concealment becomes fraudulent. The maxim is, *Aliud est celare, aliud tacere.*<sup>2</sup>

§ 902. **When Duty to Disclose Exists.**—Concealment becomes fraudulent only when it is the duty of the party having knowledge of the facts to disclose them to the other; and this brings back the question, When does such duty rest upon either party to any transaction? All the instances in which the duty exists, and in which a concealment is therefore fraudulent, may be reduced to three distinct classes. These three classes are, in general, clearly distinct and separate, although their boundaries may sometimes overlap, or a case may fall within two of them: 1. The first class includes all those instances in which, wholly independent of the form, nature, or object of the contract or other transaction, there is a previous, existing, definite fiduciary relation between the parties, so that the obligation of perfect good faith and of complete disclosure always arises from the existing relations of trust and confidence, and is necessarily impressed upon any transaction which takes place between such persons. Familiar examples are contracts and other transactions between a principal and agent, a client and attorney, a beneficiary and trustee, a ward and guardian, and the like.<sup>1</sup> 2. The second class embraces those instances in which there is no existing special fiduciary relation between the parties, and the transaction is not in its essential nature fiduciary, but it appears that either one or each of the parties, in entering into the contract or other transaction, *expressly* reposes a trust and confidence in the other; or else from the circumstances of the case, the nature of

<sup>1</sup> *Nickley v. Thomas*, 22 Barb. 652; *Bench v. Sheldon*, 14 Barb. 66. See *Coaks v. Boswell*, 11 App. Cas. (H. of L.) 232, 3 Keener 596.

<sup>2</sup> *Tate v. Williamson*, L. R. 1 Eq. 528, 2 Ch. 55, H. & B. 337, Sh. 193; *Noyes v. Landon*, 59 Vt. 569, 10 Atl. 342.

their dealings, or their position towards each other, such a trust and confidence in the particular case is *necessarily* implied. The nature of the transaction is not the test in this class. Each case must depend upon its own circumstances. The trust and confidence, and the consequent duty to disclose, may expressly appear by the very language of the parties, or they may be necessarily implied from their acts and other circumstances.<sup>3</sup> 3. The third class includes those instances where there is no existing fiduciary relation between the parties, and no *special* confidence reposed is expressed by their words or implied from their acts, but the very contract or other transaction itself, in its essential nature, is intrinsically fiduciary, and necessarily calls for perfect good faith and full disclosure, without regard to any particular intention of the parties. The contract of insurance is a familiar example. It will be found, I think, that all cases of fraudulent concealment may be referred to one or the other of these classes.

§ 903. **Concealments by a Vendee.**—As instances of concealment are most frequent in contracts of sale, it will be proper to apply the foregoing general doctrine to the vendee and the vendor. The decisions recognize a marked difference between the two, with reference to their duty to disclose. The contract of sale is not intrinsically fiduciary, and does not fall within the third of the foregoing classes. The conclusion is clearly established, that under ordinary circumstances, there being no previously existing fiduciary relation between the parties, and no confidence being expressly reposed by the vendor in the very contract, no duty rests upon the vendee to disclose facts which he may happen to know advantageous to the vendor,—facts concerning the thing to be sold which would enhance its value, or tend to cause the vendor to demand a higher price, and the like; so that a failure to disclose will not be a fraudulent concealment.<sup>1</sup> The reason is evident. The law assumes that the owner has better opportunities than any one else to know all the material facts concerning his own property, and is thus able under all ordinary circumstances to protect his own interests. The duty to disclose can rest upon the vendee only when the case belongs either to the first or the second of the above-mentioned classes. If, therefore, there is a confidence reposed by the vendor in the vendee, by reason of some prior existing fiduciary relation between them, the vendee's failure to disclose a material fact would undoubtedly be a fraudulent concealment. Also, if,

<sup>3</sup> *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404, 3 Keener 571; *Keen v. James*, 39 N. J. Eq. 257, 51 Am. Rep. 29, 3 Keener 590.

<sup>1</sup> *Fox v. Mackreth*, 2 Cox 320, 2 Brown Ch. 400, 420; *Harris v. Tyson*, 24 Pa. St. 347, 3 Keener 561.

during the negotiation and conclusion of the sale, confidence is expressly reposed in the vendee, or if from the circumstances of the contract and the acts of the parties such confidence is necessarily implied, the vendee's silence might be a fraudulent concealment. In instances of the latter kind, a much stronger and clearer case of confidence and consequent duty to disclose is necessary against the vendee than would be required under analogous circumstances against the vendor.<sup>2</sup>

§ 904. **Concealments by a Vendor.**—A broader duty certainly rests upon the vendor; a duty rests on him to disclose material facts under far more circumstances than is true of the purchaser. This duty, however, is not universal. In ordinary contracts of sale, where no previous fiduciary relation exists, and where no confidence, expressed or implied, growing out of or connected with the very transaction itself, is reposed on the vendor, and the parties are dealing with each other at arms-length, and the purchaser is presumed to have as many reasonable opportunities for ascertaining all the facts as any other person in his place would have had, then the general doctrine already stated applies: no duty to disclose material facts known to himself rests upon the vendor; his failure to disclose is not a fraudulent concealment.<sup>1</sup> Of course, any *affirmative* act or language tending to conceal or withdraw the buyer's attention from the real facts will turn the scale and render the vendor's conduct fraudulent, as has already been shown. If, on the other hand, the case belongs to the first class mentioned in a former paragraph, the duty of disclosure becomes manifest and stringent. Whenever the vendor occupies an established fiduciary relation towards the buyer, independent of the contract, a full disclosure is demanded; any suppression or silence as to material facts, which would in any degree tend to prevent the sale, is clearly a fraudulent concealment; the utmost good faith and openness is required of vendors occupying such relations. Equity and the law go farther than this. Not only where the vendor thus occupies a fiduciary position towards the purchaser, independently of the sale, but also when, in the very contract of sale itself, or in the negotiations preliminary to it, the purchaser *expressly* reposes a trust and confidence in the vendor, and when, from circumstances of that very transaction, or from the acts or relations of the parties in connection with it, such a trust and confidence reposed by the purchaser is necessarily *implied* in the contract of sale, it is the duty

<sup>2</sup> *Tate v. Williamson*, L. R. 2 Ch. 55, 1 Eq. 528, H. & B. 337, Sh. 193; *Phillips v. Homfray*, L. R. 6 Ch. 770.

<sup>1</sup> *Haywood v. Cope*, 25 Beav. 10; *People's Bank v. Bogart*, 81 N. Y. 101, 37 Am. Dec. 481, 3 Keener 575; *Mitchell v. McDougall*, 62 Ill. 498, H. & B. 279.

of the vendor to make a like disclosure, and his failure to do so is a fraudulent concealment.<sup>2</sup>

§ 905. **Non-disclosure of Facts a Defense to the Specific Enforcement of Contracts in Equity.**—Although the discussion relates to fraudulent concealments, such as necessarily imply knowledge and an intent not to communicate the fact, it is proper to notice one other rule affecting the relations between the vendor and purchaser in equity. A fraudulent concealment, defeating a contract of sale at law, and furnishing ground for its cancellation in equity, is, of course, a complete defense to its specific performance. In addition to these concealments properly so called, the suppression of a material fact, or the failure to communicate a material fact by the vendor, without any purpose of deceiving or misleading the other party, and even without having himself any knowledge of the fact, while not affecting the validity of the agreement at law, and not being sufficient ground for its cancellation in equity, because not fraudulent, may still render the agreement so unfair, unequal, or hard, that a court of equity, in accordance with its settled principles in administering the remedy of specific performance, will refuse to enforce the contract against the party who was misled. The two contracting parties do not stand upon an equality; either one had a knowledge of important facts of which the other was ignorant, or else there was a mistake by one or perhaps by both. Such misdescriptions, consisting of omitting material particulars, however free of wrongful intent they may be, have often been held a sufficient defense to suits for specific enforcement.<sup>1</sup>

§ 906. **Concealments by Buyers on Credit.**—The particular case of the buyer on credit who conceals his bad financial condition requires a brief additional mention, because it is the most common species of fraud, and because it involves one or two special rules. As to what constitutes a false representation by such a buyer, nothing need be added, except that, in this instance especially, the statement of the buyer must be something more than the mere expression of an opinion as to his pecuniary ability. As to what constitutes a fraudulent concealment under these circumstances, there has been some uncertainty and even conflict of decision in determining what matters such buyer is bound to disclose, so that his failure to do so would be a fraud. The following rules may be regarded

<sup>2</sup> *Dolman v. Nokes*, 22 Beav. 402, 3 Keener 565; *Brown v. Montgomery*, 20 N. Y. 287, 3 Keener 571; *People's Bank v. Bogart*, 81 N. Y. 101, 37 Am. Rep. 481, 3 Keener 575.

<sup>1</sup> *Ellard v. Lord Llandaff*, 1 Ball & B. 241, 1 Ames Eq. Jur. 363, 2 Keener 854, 2 Scott 246; *Byars v. Stubbs*, 85 Ala. 256, 4 South. 755, 1 Ames Eq. Jur. 370; *Woolums v. Horsley*, 93 Ky. 582, 20 S. W. 781, 2 Keener 926, 2 Scott 251; *contra*, see *Turner v. Green* (1895), 2 Ch. 205, 1 Ames Eq. Jur. 364.

as settled by the decided weight of authority; they are certainly sustained by courts of the greatest ability and influence: 1. The purchaser when buying on credit is not bound to disclose the facts of his financial condition. If he makes no actual misrepresentation, if he is not asked any questions, and does not give thereto any untrue, evasive, or partial answers, his mere silence as to his general bad pecuniary condition, his indebtedness, or even his insolvency, will not constitute a fraudulent concealment. 2. If, however, the former *good* financial condition of the buyer has been known to the vendor through prior dealings or otherwise, and any sudden or complete change has happened to the buyer, such as his sudden loss of property by fire or other accident, or his sudden insolvency or embarrassment by the failure of others, or a general assignment which he has made of all his property, and the like, he is bound to disclose such facts to the vendor previously to the completion of the sale; his *mere* silence with respect to such changes in his condition, even when no questions are asked of him, is a fraudulent concealment. 3. Finally, if at the time he purchases the goods on credit, and fails to disclose his general insolvency, embarrassed condition, or indebtedness, the buyer forms or has in his mind the intention or design of not paying for them, this is a fraud on his part. In other words, a purchase on credit with a preconceived design on the buyer's part, formed at or before the purchase, not to pay for the thing bought constitutes a species of fraudulent concealment.<sup>1</sup>

§ 910. **Jurisdiction of Equity in Cases of Fraud.**—It is impossible, especially in the United States, to formulate any *universal* rules concerning the extent or the exercise of the equitable jurisdiction in matters of fraud, since the decisions of different courts and in different states are directly at variance with respect to its existence and extent, and since its exercise must depend, to a great extent, upon the circumstances of particular cases, and even upon the temperaments and opinions of individual judges. The jurisdiction, when it exists, may be exercised by granting reliefs which are peculiarly equitable, or reliefs which are wholly pecuniary, and therefore legal. In conferring these reliefs which are purely equitable, and therefore exclusive, the power of equity knows no limit. The court can always shape its remedy so as to meet the demands of justice in every case, however peculiar. The most important of these equitable final reliefs, to one or the other of which all special instances and forms may be reduced, are these: Rescission

<sup>1</sup> *Nichols v. Pinner*, 18 N. Y. 295, 23 N. Y. 264; *Hotchkin v. Third Nat. Bank*, 127 N. Y. 329, 27 N. E. 1050, 3 Keener 581; *Oswego Starch Factory v. Lendrum*, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53.

or cancellation, as applied to contracts, conveyances, judgments, and all fraudulent transactions, with one marked exception; reformation of written instruments improperly drawn through fraud; and specific enforcement by which the fraudulent party is compelled to perform the very specific obligation which rests upon him, and the defrauded party obtains the enjoyment of the very right of which he was deprived through the fraud. This latter class of remedies may assume an unlimited variety of forms, as the circumstances may require. It includes, among others, the compelling the fraudulent party to make good his representations; the treating him as a trustee with respect to the property which he has acquired by his fraud; the enforcing the performance of their specific duties by trustees, directors, and officers of corporations, and all others who stand in a position of trust; the compelling a written security to stand good for what is actually due upon it, and the like. These final remedies may be accompanied and aided by auxiliary reliefs, such as injunction or a receiver. The purely pecuniary relief which courts of equity may administer, as well as courts of law, in matters of fraud, are an accounting in all its various forms and conditions, and simple recoveries, without an accounting, of specific amounts of money which have been fraudulently obtained, or which are equitably and perhaps legally due on account of fraud. In administering all these remedies, pecuniary as well as equitable, the fundamental theory upon which equity acts is that of restoration,—of restoring the defrauded party primarily, and the fraudulent party as a necessary incident, to the positions which they occupied before the fraud was committed. Assuming that the transaction ought not to have taken place, the court proceeds as though it had not taken place, and returns the parties to that situation. Even in such cases, the court applies the maxim, He who seeks equity must do equity, and will thus secure to the wrong-doer, in awarding its relief, whatever is justly and equitably his due.<sup>1</sup> . . . . .

<sup>1</sup> The remedies of cancellation, reformation, and enforcing fiduciary duties are so familiar that they require no citation of examples. For examples of compelling the fraudulent party to make good his representations, see cases cited ante, under § 899. Treating a fraudulent party as a trustee; see post, section on constructive trusts. Example of ordering a security to stand for what was really due on it: *Neilson v. McDonald*, 6 Johns. Ch. 201, 1 Scott 482, 3 Keener 751. The equitable theory of restoring the parties to their original position: *Brown v. Norman*, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663, 2 Scott 747, 3 Keener 699; *Neblett v. Macfarland*, 92 U. S. 101, 3 Keener 693; *Potter v. Taggart*, 59 Wis. 1, 16 N. W. 553, 632, 3 Keener 673; *Goodrich v. Lathrop*, 94 Cal. 56, 28 Am. St. Rep. 91, 29 Pac. 329, 2 Ames Eq. Jur. 187; *Thomas v. Beals*, 154 Mass. 51, 27 N. E. 1004, 3 Keener 707. For circumstances excusing a complete restoration of the parties to their original condition, see *Hammond v.*

§ 911. **Fundamental Principles of the Jurisdiction.**<sup>1</sup>—

§ 912. **The English Doctrine.**—The doctrine is fully settled by an unbroken line of decisions extending to the present day, that, with one remarkable exception, the jurisdiction of equity exists in and may be extended over *every* case of fraud, whether the primary rights of the parties are legal or equitable, and whether the remedies sought are equitable or simple pecuniary recoveries, and even though courts of law have a concurrent jurisdiction of the case and can administer the same kind of relief. The English judges have virtually said that in every case of fraud the remedy at law, either from the nature of the legal relief itself or from the methods of legal procedure, is inadequate. The only question, therefore, presented to an English court is, not whether the equitable jurisdiction *exists*, but whether it should be exercised.<sup>1</sup> As the ablest judges have often said, 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. The law courts, on the other hand, originally had very little, if any, jurisdiction in such matters. In the early forms of action to enforce covenants, debts, and other obligations *ex contractu*, fraud was not admitted as a defense, and there was no form of action appropriate for the recovery of damages on account of fraud. The jurisdiction of the law courts in such cases was of later origin, and was of gradual growth. It was not

Pennock, 61 N. Y. 145, 3 Keener 688; *Brown v. Norman*, *Neblett v. Macfarland*, *Goodrich v. Lathrop*, *supra*. In some jurisdictions the defrauded party must return or tender the consideration received by him before suit for rescission; see *Rigdon v. Walcott*, 141 Ill. 649, 31 N. E. 158, 3 Keener 714; but in most it is held, in accordance with equitable principles, that an offer in the bill to do equity is sufficient, since the court can impose suitable terms to the granting of relief; see *Brown v. Norman*, *supra*; *Thackrah v. Haas*, 119 U. S. 490, 7 Sup. Ct. 311, 2 Scott 746, 3 Keener 697; *Carlton v. Hulett*, 49 Minn. 308, 51 N. W. 1053, 3 Keener 709; *Thomas v. Beals*, *supra*.

<sup>1</sup> See *ante*, § 222.

<sup>1</sup> *Anderson v. Eggers*, (N. J. Eq.) 49 Atl. 578; *Hill v. Lane*, L. R. 11 Eq. 215; *Ramshire v. Bolton*, L. R. 8 Eq. 294; *St. Aubyn v. Smart*, L. R. 5 Eq. 183, 3 Ch. 646; *Slim v. Croucher*, 1 De Gex, F. & J. 518. In the last case *Turner*, L. J., said (p. 528): "If we were to grant any relief upon this appeal, we should be very much narrowing an old jurisdiction of this court, by confining it to cases in which the jurisdiction has been exercised. We should, I think, be taking *the cases as the measure of the jurisdiction, instead of as the examples of that jurisdiction.*" These words contain the very essence of the true theory concerning the function of decided cases to operate as *examples* of all legal principles and doctrines, rather than as being their *sources* or fountains. They deserve to be emblazoned on the walls of every court-room in the country, so that they might be under the constant observation of all judges who are applying precedents in the work of constructing and developing the law.

until the invention of the actions of assumpsit, case, and trover, in which equitable principles could be largely admitted, that the jurisdiction at law in matters of fraud became fully developed. The full jurisdiction of equity having thus been established from the earliest time, it should not, in accordance with familiar principles, be at all affected by a subsequent growth of a similar common-law jurisdiction. To say that the full jurisdiction of equity has been any way abridged, impaired, or altered, because the law courts have gradually assumed and finally acquired a like jurisdiction, even though competent in many cases to administer adequate relief, is to violate one of the most fundamental principles regulating the general equitable jurisdiction. The sum of the English doctrine, therefore, is, that, although the jurisdiction always *exists*, whether it will be exercised depends upon the circumstances of individual cases.<sup>2</sup>

§ 913. **Exception—Fraudulent Wills.**—The marked exception to the jurisdiction referred to in the foregoing paragraph is that of canceling wills obtained by means of fraud. In a few very early decisions, the court of chancery seems to have asserted such a jurisdiction. For more than a century, however, and through a long series of cases, the judges have either refused to exercise the jurisdiction, or denied its existence; and it has finally been settled by the tribunal of last resort, that, under their general jurisdiction, courts of equity have no power to entertain suits for the purpose of setting aside or canceling a will on the ground that it was procured by fraud. The same rule has been generally adopted in the United States. Under the common system, the validity of wills of real estate could only be tested in an action at law; that of wills

<sup>2</sup>I add several cases, most of them recent, merely as examples of the exercise of the jurisdiction when some remedy might also have been obtained at law. Pecuniary recoveries; jurisdiction not exercised: *Leather v. Simpson*, L. R. 11 Eq. 398 (to recover back money paid for a forged bill). Pecuniary recoveries; jurisdiction exercised: See cases in the last note, and also *McIntosh v. Great West. R'y*, 2 Macn. & G. 74 (discovery and relief on a contract, although there was a remedy at law). Cancellation or rescission of contracts, sales, etc.: *Hoare v. Bremridge*, L. R. 14 Eq. 522, 8 Ch. 22, 2 Ames Eq. Jur. 121 (cancellation of an insurance policy; the jurisdiction certain, although the remedy at law might be better). Recovering real estate to which the plaintiff was entitled, and which he had been prevented by fraud from possessing and enjoying: *Vane v. Vane*, L. R. 8 Ch. 383 (lapse of time no bar where fraud was concealed from the plaintiff,—a remarkable case). Specific enforcement of false representations; compelling the defendant to make them good: *Hutton v. Rossiter*, 7 De Gex, M. & G. 9, 18, 19 (against an executor who had represented that the assets of the estate were sufficient, and that a certain claim would be paid). Enforcing a constructive trust against a party who has fraudulently obtained the title to land: *Rolfe v. Gregory*, 4 De Gex, J. & S. 576 (delay excused by concealed fraud).

of personal estate was established by the decree of the ecclesiastical court in the proceedings for probate. Under the statutory system generally prevailing in this country, both wills of real estate and wills of personal estate are admitted to probate; in some of the states the decree of the probate court is conclusive with respect to both kinds; in other states it is conclusive only with respect to those of personal property.<sup>1</sup>

§ 914. **The American Doctrine.**—In a few of the earlier decisions the English rule was adopted to its full extent.<sup>1</sup> This cannot, however, be regarded as the present American doctrine. As was shown in the former volume, in several of the states only a partial and very narrow equitable jurisdiction was for a long time conferred, and this was strictly limited by the courts to the very matters specified by the statutes. In other states, the equitable jurisdiction was defined by statute as embracing only those cases for which there was no adequate remedy at law. Influenced partly by the tendency of this legislation, and partly by the supposed constitutional guaranties of the jury trial, which were construed to forbid the interposition of equity in controversies which *could* be determined by law, the equity courts of the United States and of the several states have practically abandoned a large part of the jurisdiction in matters of fraud which is confessedly held by the English court of chancery. The doctrine is settled 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.<sup>2</sup>

<sup>1</sup> *Jones v. Gregory*, 2 De Gex, J. & S. 83; *In re Broderick's Will*, 21 Wall. 503; *Domestic & F. M. Soc. v. Eells*, 68 Vt. 497, 35 Atl. 463, 54 Am. St. Rep. 888. As to jurisdiction in case of a lost or destroyed will, see *Dower v. Seeds*, 28 W. Va. 113, 57 Am. Rep. 646; post, note to § 1154.

<sup>2</sup> *Bacon v. Bronson*, 7 Johns. Ch. 201, 11 Am. Dec. 449. In New Jersey; *Anderson v. Eggers*, (N. J. Eq.) 49 Atl. 578.

<sup>3</sup> *Grand Chute v. Winegar*, 15 Wall. 273, 2 Ames Eq. Jur. 116; *Insurance Co. v. Bailey*, 13 Wall. 616, 3 Keener 474; *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249, H. & B. 268, 3 Keener 487; *Miller v. Scammon*, 52 N. H. 609, H. & B. 265. *Wampler v. Wampler*, 30 Gratt. 454, 3 Keener 480. I am convinced that the practical surrender by the equity courts of this country of so large a portion of their original and most certain jurisdiction was both unfortunate and unnecessary. There are multitudes of cases, even for the recovery of money alone, in which justice could be administered and the rights of both litigants protected far better by a trained judge than by leaving everything to the rough-and-ready justice of an ordinary jury. The English courts have perceived and admitted this truth. Doubtless the influence of able courts, like those of Massachusetts, Maine, and Pennsylvania, has been very powerful in shaping the de-

The language on this subject often used by judges represents nearly the entire jurisdiction of equity in matters of fraud, whatever be the remedies granted, as concurrent with that at the law, and as not *existing* where adequate legal relief can be given. The inaccuracy of this mode of expression has been shown in the former volume.<sup>3</sup> The true doctrine is, that where the estate or interest is equitable, the jurisdiction exists and 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.<sup>4</sup> I have placed in the foot-note a number of recent decisions, arranged in groups according to the nature of their reliefs, merely as examples and illustrations of the doctrine adopted by the American courts.<sup>5</sup> The question whether equity has jurisdiction of suits merely for the recovery of money, or whether the action should be at law, has, however, ceased to be of any practical importance in those states which have adopted the reformed procedure. The codes provide that all actions, simply for the recovery of money, without making any exceptions, must be tried by a jury, and the same general rules of pleading are prescribed for all kinds of suits. It follows, therefore, that there would be no real distinction in the form, pleadings, procedure, mode of trial, judgment, and execution, in those states, whether the action is regarded as equitable or legal.

cisions of other state tribunals, the narrow and purely statutory jurisdiction of the former states not, perhaps, having been sufficiently observed.

<sup>3</sup> See §§ 138, 140, note, 175, note, 188.

<sup>4</sup> Quoted in *Buck v. Ward*, 97 Va. 209, 33 S. E. 513. See § 178.

<sup>5</sup> Cancellation, jurisdiction exercised: *Thackrah v. Haas*, 119 U. S. 501, 7 Sup. Ct. 311, 3 Keener 697, 2 Scott 746; *Commercial Mut. Ins. Co. v. McLoon*, 14 Allen 351, 3 Keener 472; *Fuller v. Percival*, 126 Mass. 381, 3 Keener 483, 2 Ames Eq. Jur. 111; *Free v. Buckingham*, 57 N. H. 95, 3 Keener 478; *Wampler v. Wampler*, 30 Gratt. 454, 3 Keener 480. Same, jurisdiction not exercised: *Insurance Co. v. Bailey*, 13 Wall. 616, 3 Keener 474; *Globe Ins. Co. v. Reals*, 79 N. Y. 202, 3 Keener 485. The rule is generally adopted that a suit will not be sustained to cancel an executory, non-negotiable, personal contract,—e. g. a policy of insurance,—when the fraud might be set up as a defense to an action on the contract, and there are no special circumstances which would prevent the defense from being available, adequate, and complete. Relief against judgments and actions at law; see post, § 1364. Pecuniary recoveries, jurisdiction exercised: *Bosher v. Richmond, etc., Co.*, 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879 (recovery of money paid on stock subscription). Same, jurisdiction not exercised: *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249, H. & B. 268, 3 Keener 487; *Miller v. Scammon*, 52 N. H. 609, H. & B. 265; *Taft v. Stewart*, 31 Mich. 367, H. & B. 271. Jurisdiction in administration matters. See post, § 1154. Impressing a trust on property acquired by fraud. See post, §§ 1053–1056.

**§ 915. Incidents of the Jurisdiction and Relief.**—There are certain incidents which are requisite to the exercise of the jurisdiction, and to the granting of any relief, and which result partly from the equitable conception of fraud itself in its effects upon the rights and liabilities of the two parties, and partly from the theory concerning remedies and their administration. These incidental requisites are referable, therefore, to the two following general principles: 1. Fraud does not render contracts and other transactions absolutely void, but merely voidable, so that they may be either confirmed or repudiated by the party who had suffered the wrong.<sup>1</sup> 2. If he elects to repudiate, and to seek for a remedy, then equity proceeds upon the theory that the fraudulent transaction is a nullity; and it administers relief by putting the parties back into their original position, as though the transaction had not taken place, and by doing equity to the defendant as well as to the plaintiff. The consequences of these two principles, which have been alluded to, and which remain to be considered, are as follows:—

**§ 916. The Same. Plaintiff Particeps Doli—Ratification.**—If the plaintiff is himself a party to the fraud, *particeps doli*, to such an extent that he is in *pari delicto* with the defendant, he can obtain no relief; equity does not, in general, relieve a person from the consequences of his own actual fraud.<sup>1</sup> The mere fact, however, that the plaintiff was a party to the wrong in any degree, and is not therefore completely innocent, will not necessarily deprive him of relief, defensive or even affirmative. If he is not in *pari delicto*, and is comparatively the more innocent of the two, he may obtain relief by doing full equity to those parties, if any, who have sustained injury by his partial wrong.<sup>2</sup> While the party entitled to relief may either avoid the transaction or confirm it, he cannot do both; if he adopts a part, he adopts all; he must reject it entirely if he desires to obtain relief.<sup>3</sup> Any material act done by him, with knowledge of the facts constituting the fraud, or under such circumstances that knowledge must be imputed, which assumes that the transaction is valid, will be a ratification.<sup>4</sup>

**§ 917. Promptness—Delay through Ignorance of the Fraud.**—The most important practical consequence of the two principles

<sup>1</sup> *Negley v. Lindsay*, 67 Pa. St. 217, 228, 5 Am. Rep. 427; *Howard v. Turner*, 155 Pa. St. 349, 26 Atl. 723, 35 Am. St. Rep. 883.

<sup>2</sup> *Roman v. Mali*, 42 Md. 513; see ante, § 401.

<sup>3</sup> *Poston v. Balch*, 69 Mo. 115; see post, § 942.

<sup>4</sup> *Potter v. Titcomb*, 22 Me. 300; *Dennis v. Jones*, 44 N. J. Eq. 513, 14 Atl. 913; 6 Am. St. Rep. 829.

<sup>\*</sup> See ante, § 897; post, § 964. *Shappirio v. Goldberg*, 192 U. S. 232, 24 Sup. Ct. 259; *Merrill v. Wilson*, 66 Mich. 232, 33 N. W. 716.

above mentioned is the requisite of promptness. The injured party must assert his remedial rights with diligence and without delay, upon becoming aware of the fraud. After he has obtained knowledge of the fraud, or has been informed of facts and circumstances from which such knowledge would be imputed to him, a delay in instituting judicial proceedings for relief, although for a less period than that prescribed by the statute of limitations, may be, and generally will be, regarded as an acquiescence, and this may be, and generally will be, a bar to any equitable remedy.<sup>1</sup> To this rule there is one limitation: it applies only when the fraud is known or ought to have been known. No lapse of time, no delay in bringing a suit, however long, will defeat the remedy, provided the injured party was, during all this interval, ignorant of the fraud. The duty to commence proceedings can arise only upon his discovery of the fraud; and the possible effect of his laches will begin to operate only from that time.<sup>2</sup>

§ 918. **Persons against Whom Relief is Granted.**—The remedy which equity gives to the defrauded person is most extensive. It reaches all those who were actually concerned in the fraud, all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice. “A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but, to use Lord Cottenham’s language, from his children and his children’s children, or, as elsewhere said, from any persons amongst whom he may have parceled out the fruits of his fraud.”<sup>3</sup> There is one limitation: if the property which was acquired by the fraud has come by transfer into the hands of a bona fide purchaser for a valuable consideration and without notice, even though his immediate grantor or assignor was the fraudulent party himself, the hands of the court are stayed, and the remedy of the defrauded party, with respect to the property itself, is gone; his only relief must be personal against those who committed the fraud.<sup>2</sup> To this limitation there is, however, an exception, where the general rule giving relief applies even as against a bona fide purchaser. Where an owner has been apparently deprived of his title by a fraudulent conveyance or assignment which

<sup>1</sup> *Badger v. Badger*, 2 Wall. 87, 2 Scott 766; *Allore v. Jewell*, 94 U. S. 506, 512, H. & B. 320, Sh. 190; *Calhoun v. Millard*, 121 N. Y. 77, 24 N. E. 27, 8 L. R. A. 248, 1 Scott 388; *Milms v. Pabst Brewing Co.* 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 890. See ante, §§ 817, 819, 820, 897.

<sup>2</sup> *Rolfe v. Gregory*, 4 De Gex, J. & S. 576; *Michoud v. Girod*, 4 How. 503, 561, Sh. 181; *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 263.

<sup>3</sup> *Vane v. Vane*, L. R. 8 Ch. 383, 397, per James, L. J. See ante, § 899.

<sup>4</sup> *Stephens v. Board*, 79 N. Y. 183, 35 Am. Rep. 511; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550. See ante, § 777.

is void, as where he was procured to execute it by the fraudulent representation and under the conviction that it was an entirely different instrument, or where it was fraudulently executed in his name without any authority express or implied, or where, after being executed by him for one purpose, it was fraudulently altered without his knowledge or authority, so as to include the property, or where it was a forgery, and he has done no collateral act with reference to it which might amount to an equitable estoppel by conduct, and the property, by means of such transfer, comes into the hands of a purchaser for value and without notice, the original defrauded owner is not barred of his remedy.<sup>3</sup> Equity will relieve by canceling the fraudulent apparent transfer, and by compelling a reconveyance or reassignment, even as against the holder who is innocent of wrong; the doctrines of equitable estoppel and of bona fide purchase do not apply under these circumstances. Such is the doctrine announced by decisions of the highest authority.

§ 919. **Particular Instances of Jurisdiction.**—I shall conclude this discussion of actual fraud by enumerating some well-settled instances of the jurisdiction which deserve a special mention. In several of them the fraud affects third persons rather than the immediate party to the transaction; but in all a fraudulent intention, or what equity regards as tantamount to such an intention, is a necessary element, and they may all, therefore, be properly grouped under the head of actual fraud. *Judgments:* When a judgment or decree of any court, whether inferior or superior, has been obtained by fraud, the fraud is regarded as perpetrated upon the court as well as upon the injured party. The judgment is a mere nullity, and it may be attacked and defeated on account of the fraud, in any collateral proceeding brought upon it or to enforce it, at least in the same court in which it was rendered.<sup>1</sup> . . . Although the fraud may thus be set up by way of defense, the equitable jurisdiction to cancel and set aside or to restrain judgments and decrees of any court which have been obtained by a fraud practiced upon the court and the losing party, is well settled and familiar.<sup>2</sup> *Awards:* The jurisdiction to set aside and cancel awards was settled at a very early day, and it still exists, except

<sup>3</sup> Taylor v. Great Indian Ry., 4 De Gex & J. 559, 574; County of Schuylkill v. Copley, 67 Pa. St. 386, 5 Am. Rep. 441.

<sup>1</sup> Hogg v. Link, 90 Ind. 346; Elting v. First Nat. Bank, 173 Ill. 368, 50 N. E. 1095. See further, as to relief against judgments obtained by fraud, post, § 1364.

<sup>2</sup> A judgment will not, however, be set aside on the ground of fraud, when the very same fraud alleged, and the same questions concerning it, were presented by the issues, litigated, and decided by the courts in the judgment which is attacked: United States v. Throckmorton, 98 U. S. 61.

so far as it has been regulated or taken away by statute.<sup>3</sup> *Fraudulent bequests.*<sup>4</sup> . . .

§ 920. **The Same. Trusts:** One of the most important effects of fraud, and most striking illustrations of the equity jurisdiction, is found in the theory of trusts arising by operation of law. When property subject to a trust is fraudulently transferred, or when one person, in fraudulent violation of his fiduciary duty, acquires property which equitably belongs to another, or when one person by his actual fraud obtains the title to property in which another is beneficially interested, equity may work out and protect the rights of the beneficial owner by regarding the property as though it were actually impressed with a trust in the hands of the one who holds the legal title, by treating such person as though he were an actual trustee, and by enforcing such trust by means of a conveyance, accounting, payment, injunction, and other appropriate remedies. There is no other effect of fraud more remarkable, and none which exhibits more clearly the power of courts of equity to deal with the substantial realities under the appearance of external forms.<sup>1</sup>

§ 921. **The Statute of Frauds not an Instrument of Fraud.**—It is a most important principle, thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud, or in the consummation of a fraudulent scheme.<sup>1</sup> This most righteous principle lies at the basis of many forms of equitable relief, among which are the specific enforcement of verbal agreements for the sale of land which have been partly performed, the reformation and enforcement of agreements and conveyances imperfect through fraud or mistake, the cancellation of fraudulent agreements and conveyances, and the like. One particular instance of relief will be mentioned as an illustration. Where an agreement has been verbally made which the statute requires to be in writing, and through the actual fraud of one party the execution of the written instrument is prevented, and the other party is induced to accept and rely upon the verbal agreement as valid and binding, a court of equity will not permit the fraudulent

<sup>1</sup> *Smith v. Whitmore*, 2 De Gex, J. & S. 297; *Hartford Fire Ins. Co. v. Bonner Co.*, 44 Fed. 151, 11 L. R. A. 623; *Brush v. Fisher*, 70 Mich. 469, 38 N. W. 416, 14 Am. St. Rep. 510.

<sup>2</sup> See post, § 1054.

<sup>3</sup> See post, the sections on constructive trusts.

<sup>4</sup> *Woodbury v. Gardner*, 77 Me. 68; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640.

party to set up the statute of frauds as a defense, but will enforce the agreement against him, although it is merely verbal. Of course, there must be actual fraud as the distinguishing feature of the transaction,—something more than the mere omission to put the contract into writing. The plaintiff must be induced through the deceit, false statements, or concealments of the other party to waive a written instrument, and to rely upon the parol undertaking. The same relief, it seems, will be given when the execution of a written contract, otherwise fully agreed upon, is prevented by an inevitable accident, as by the death of a party.<sup>2</sup>

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## SECTION IV.

### CONSTRUCTIVE FRAUD.

#### ANALYSIS.

- § 922. Definition: essential elements.
- § 923. Three principal classes.
- §§ 924-942. *First*. Constructive fraud apparent from the intrinsic nature and subject of the transaction itself.
  - § 925. 1. Inadequacy of consideration.
  - § 926. Inadequacy pure and simple.
  - § 927. Gross inadequacy amounting to fraud.
  - § 928. Inadequacy coupled with other inequitable incidents.
- §§ 929-936. *II*. Illegal contracts and transactions.
  - § 930. 1. Contracts illegal because contrary to statute: usury, gaming, smuggling.
  - §§ 931-935. 2. Transactions illegal because opposed to public policy.
    - § 931. A. Contracts interfering with the freedom of marriage; marriage brokerage; in restraint of marriage; rewards for marriage; secret contracts in fraud of marriage; secret contracts to marry; rewards for procuring wills.
    - § 932. Agreements for a separation.
    - § 933. B. Conditions and limitations in restraint of marriage.
    - § 934. C. Contracts directly belonging to and affecting business relations; restraint of trade; interfering with bidding at auctions and governmental lettings; puffers; fraudulent trade-marks; violating policy of statutes prescribing business methods; trading with alien enemies.
    - § 935. D. Contracts affecting public relations; interfering with the election or appointment of officers; interfering with legislative proceedings; ditto, executive proceedings; ditto, judicial proceedings.

<sup>2</sup> *Montacute v. Maxwell*, 1 P. Wms. 618, 1 Strange 236, 1 Eq. Cas. Abr. 19, 1 Ames Eq. Jur. 27, 2 Keener 623; *Cookes v. Mascall*, 2 Vernon 200, 2 Keener 748; *Wood v. Midgley*, 5 De Gex, M. & G. 41, 2 Keener 750, 1 Scott 462; *Peek v. Peek*, 77 Cal. 106, 11 Am. St. Rep. 244, 19 Pac. 227, 1 L. R. A. 185, 1 Scott 463, 2 Keener 756.

- § 936. 3. Contracts illegal because opposed to good morals; for illicit intercourse; champerty and maintenance; compounding with a felony or preventing a prosecution.
- §§ 937-942. III. Equitable jurisdiction in case of illegal contracts.
- § 937. In usurious contracts; usurious mortgages.
- § 938. In gaming contracts.
- § 939. In other illegal contracts; explanation of maxim, *In pari*, etc.
- § 940. *In pari delicto*, general rules.
- § 941. *In pari delicto*, limitations on general rules.
- § 942. Not in *in pari delicto*.
- §§ 943-965. *Second*. Constructive fraud inferred from the condition and relations of the immediate parties to the transaction.
- § 943. General description and divisions.
- §§ 944-954. I. Transactions void or voidable with persons wholly or partially incapacitated.
- § 945. Coverture; infancy.
- § 946. Insanity.
- § 947. Mental weakness.
- § 948. Persons in *vinculis*; ditto, illiterate or ignorant.
- § 949. Intoxication.
- § 950. Duress.
- § 951. Undue influence.
- § 952. Sailors.
- § 953. Expectants, heirs, reversioners.
- § 954. Post obit contracts.
- §§ 955-965. II. Transactions presumptively invalid between persons in fiduciary relations.
- § 955. Circumstances to which the principle applies.
- § 956. The general principle.
- § 957. Two classes of cases in which it operates.
- § 958. Trustee and beneficiary.
- § 959. Principal and agent.
- § 960. Attorney and client.
- § 961. Guardian and ward.
- § 962. Parent and child.
- § 963. Other relations; executors and administrators; physician and patient; spiritual advisors; husband and wife; partners, etc.
- § 964. Confirmation or ratification.
- § 965. Acquiescence and lapse of time.
- §§ 966-974. *Third*. Frauds against third persons who are not parties to the transaction.
- § 967. Secret bargains accompanying compositions with creditors.
- § 968. Conveyances in fraud of creditors.
- § 969. The consideration.
- § 970. The fraudulent intent.
- § 971. Modes of ascertaining the intent.
- § 972. Existing creditors.
- § 973. Subsequent creditors.
- § 974. Conveyances in fraud of subsequent purchasers.

§ 922. **Definition—Essential Elements.**—The term “constructive fraud” is not a very appropriate one, but has been used so long that any attempt to substitute another in its place would be useless.

It is important, however, to form an accurate notion of the meaning given to it in equity, and of the peculiar element or criterion which distinguishes the various classes of cases belonging to it. The distinguishing element of actual fraud, as has been shown, is always *untruth* between the two parties to the transaction, so that actual fraud may be reduced to misrepresentations and concealments. This untruth at law must be virtually intentional,—a falsehood; in equity the intention is not so essential. Untruth is not the distinguishing element of constructive fraud; it is never essential that there should be untruth between the immediate parties to a transaction, in order that it may come within the denomination of constructive fraud; in a great many instances it would be impossible to predicate untruth of the wrong-doer's conduct.<sup>1</sup> Constructive fraud is simply a term applied to a great variety of transactions, having little resemblance either in form or in nature, which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud. It covers different grades of wrong. It embraces contracts illegal, and therefore void at law as well as in equity; transactions voidable in equity because contrary to public policy; and transactions which merely raise a presumption of wrong, and throw upon the party benefited the burden of proving his innocence and the absence of fault.<sup>2</sup>

§ 923. **Three Principal Classes.**—In the great case of *Chesterfield v. Janssen*, quoted in the preceding section, Lord Hardwicke, after mentioning actual fraud, added the three other following classes: 1. That apparent from the intrinsic nature and subject of the bargain itself; 2. That presumed from the circumstances and condition of the immediate parties to the transaction; 3. That which is an imposition on third persons not parties to the transaction. As these three groups constitute the constructive fraud of

<sup>1</sup> It should be carefully observed however, that in certain instances of constructive fraud, although there is no element of untruth whatever between the two immediate parties to the transaction—the grantor and grantee, donor and donee, promisor and promisee—there is such an element, and even perhaps an intention to deceive, towards a third person, not a party to the transaction, who is the one defrauded, and who obtains relief; e. g., a conveyance by A to B with intent to defraud A's creditors. This particular species has, therefore, a strong analogy to actual fraud, and the cases belonging to it are governed, to a great extent, by the rules of actual fraud.

<sup>2</sup> The term “presumptive fraud” is sometimes used as a substitute for “constructive fraud,” but improperly. In a great number of instances there is no presumption of fraud, in the true sense of that word; and no such presumption could possibly arise.

equity, the classification of the great chancellor will be adopted in the discussions of the present section.

§ 924. **First. Constructive Fraud Apparent from the Intrinsic Nature and Subject of the Transaction Itself.**—This class includes three principal subjects: 1. Inadequacy of consideration; 2. Contracts illegal because opposed to statute, or to public policy, or to good morals; and 3. Certain transactions which, in analogy with contracts, equity regards as contrary to public policy, and therefore illegal. I shall specify these various instances with as much explanation as may be needed to exhibit the doctrines peculiar to equity, and shall then describe the equitable jurisdiction which they occasion, and the reliefs, defensive or affirmative, which may be obtained by its means.

§ 925. **I. Inadequacy of Consideration.**—Inadequacy of consideration must ordinarily occur either in conveyances, executed or executory contracts of sale, or in agreements analogous to sale where there is a subject-matter transferred or dealt with, and a price paid or to be paid. It may exist in the price or in the subject-matter, the latter case being the same as exorbitancy of price. It necessarily implies that the price is either too small or too great. The former is the condition ordinarily meant by inadequacy, and is plainly more susceptible of judicial investigation than the other. In both these forms inadequacy of consideration will be considered: 1. By itself free from any other fact; 2. As connected with other inequitable facts and circumstances.

§ 926. **Inadequacy Pure and Simple.**—The rule is well settled that where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price or in the subject-matter, unaccompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract. If the parties, being in the situation and having the ability to do so, have exercised their own independent judgment as to the value of the subject-matter, courts of equity should not and will not interfere with such valuation.<sup>1</sup> In some of the earlier decisions, mere inadequacy, either in the price or in the value of the subject-matter, was held to be a sufficient hardship which might defeat the specific performance of an executory contract when set up as a defense.<sup>2</sup> The doctrine, however, is now settled, that mere

<sup>1</sup> Seymour v. Delancey, 3 Cow. 445, 15 Am. Dec. 270, 2 Keener 772; Phillips v. Puffen, 45 N. J. Eq. 5, 16 Atl. 9, H. & B. 308; Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39, 3 Keener 493.

<sup>2</sup> Day v. Newman, 2 Cox 77, and cited 10 Ves. 300, 2 Scott 227; Seymour v. Delancey, 5 Johns. Ch. 222, 224, 225, per Kent, Ch.

inadequacy—that is, inequality in value between the subject-matter and the price—is not a ground for refusing the remedy of specific performance; in order to be a defense, the inadequacy must either be accompanied by other inequitable incidents, or must be so gross as to show fraud. In short, inadequacy as a negative defense, and as an affirmative ground for a cancellation, is governed by one and the same rule.<sup>3</sup> When a sale is made at public auction, conducted in a fair and open manner, with opportunity for real competition, the rule is even stronger, for fraud cannot then be inferred from any inadequacy in the price, without other circumstances showing bad faith.<sup>4</sup> The particular case of selling an expectancy or reversion for an inadequate price, which is in some respects an exception to the foregoing general rule, is considered in the subsequent section.<sup>5</sup>

§ 927. **Gross Inadequacy Amounting to Fraud.**—Although the actual cases in which a contract or conveyance has been canceled on account of gross inadequacy merely, without other inequitable incidents, are very few, yet the doctrine is settled, by a consensus of decisions and dicta, that even in the absence of all other circumstances, when the inadequacy of price is so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud, it will be a sufficient ground for canceling a conveyance or contract, whether executed or executory. Even then fraud, and not inadequacy of price, is the true and only cause for the interposition of equity and the granting of relief.<sup>1</sup>

<sup>1</sup> *Coles v. Trecothick*, 9 Ves. 246, 2 Keener 768; *Burrowes v. Lock*, 10 Ves. 470, 1 Ames Eq. Jur. 263; *Abbott v. Sworder*, 4 De Gex & S. 448, 2 Keener 793; *Seymour v. Delancey*, 3 Cow. 445, 15 Am. Dec. 270, 2 Keener 772.

<sup>2</sup> *White v. Damon*, 7 Ves. 30; *Carden v. Lane*, 48 Ark. 219, 2 S. W. 709, 3 Am. St. Rep. 228.

<sup>3</sup> See post, § 953.

<sup>4</sup> *Gwynne v. Heaton*, 1 Brown Ch. 1, 9, 3 Keener 505, per Lord Thurlow: "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." *Coles v. Trecothick*, 9 Ves. 234, 246, 2 Keener 768; *Summers v. Griffiths*, 35 Beav. 27, 3 Keener 509; *Falcke v. Gray*, 4 Drew. 651, H. & B. 655; *Phillips v. Pullen*, 45 N. J. Eq. 5, 16 Atl. 9, H. & B. 308; *Butler v. Haskell*, 4 Desaus. Eq. 651, 2 Scott 674.

The rule is ordinarily stated that the inadequacy must be so gross that it is *conclusive* evidence of fraud. It is so laid down by earlier judges, and by Mr. Kerr. The rule had its origin at a time when fraud was generally inferred by presumptions of law, and often by conclusive presumptions. In the present condition of the law on the subject of fraud, this mode of formulating the rule seems to be erroneous. The principle is now almost universally adopted, that fraud is a *fact*, inferred, like other conclusions of fact, from the evidence; no rule of law can therefore be laid down as to the amount of inadequacy necessary to produce the resulting fraud. Inadequacy of consideration may be evidence of fraud, slight or powerful, according to

**§ 928. Inadequacy Coupled with Other Inequitable Incidents.—**  
If there is nothing but mere inadequacy of price, the case must be

its amount, and other circumstances. When it is satisfactory and decisive evidence—when from the proof of inadequacy the court or jury are convinced that fraud as a fact did exist—then the relief is granted. Instead, therefore, of repeating the usual formula which has been handed down for generations, that the inadequacy must be conclusive evidence of fraud, I have said in the text it must be satisfactory and decisive evidence; the former mode represented fraud as the result of a conclusive legal presumption; the latter treats it as a conclusion of fact drawn from the evidence, and is therefore in perfect harmony with the theory which now prevails in most, if not all, of the states. The following seems to be the true rationale of the doctrines concerning inadequacy of price. Whenever it appears that the parties have knowingly and deliberately fixed upon any price, however great or however small, there is no occasion nor reason for interference by courts, for owners have a right to sell property for what they please, and buyers have a right to pay what they please: See *Harris v. Tyson*, 24 Pa. St. 347, 360, 64 Am. Dec. 661, 3 Keener 561. But where there is no evidence of such knowledge, intention, or deliberation by the parties, the disproportion between the value of the subject-matter and the price may be so great as to warrant the court in inferring therefrom the fact of fraud. Such a gross inadequacy or disproportion will call for explanation, and will shift the burden of proof upon the party seeking to enforce the contract, and will require him to show affirmatively that the price was the result of a deliberate and intentional action by the parties; and if the facts do prove such action, the fact of fraud will be more readily and clearly inferred. I do not mean that judges and juries are no longer, under any circumstances, aided by legal presumptions in dealing with fraud. The number of instances, however, in which legal presumptions are invoked has been very much lessened; the issue of fraud or no fraud is generally decided in the same manner as any other issue of fact.

The Roman law adopted a fixed standard by which to determine all cases of inadequacy, which was one-half of the real value of the subject-matter when that consisted of immovable property. If the price was less than one-half of the real value, the seller could compel the buyer to elect either to rescind, restore the thing and take back the price, or to affirm and make up the deficiency: Code, lib. 14, tit. 44, sec. 2; and see *Burrowes v. Lock*, 10 Ves. 470, 474, 1 Ames Eq. Jur. 263, per Sir William Grant. A like method is found in the French law. Such arbitrary rules are entirely contrary to the spirit of our law, and our methods of administering justice. If the price was less than one-half of the value of the subject-matter, and there were no circumstances showing an intention on the part of the vendor to confer a bounty or favor, the sale would doubtless be set aside. Where the circumstances show that a favor or bounty was intended, the inference of fraud is necessarily destroyed; even a pure gift would be sustained: *Whalley v. Whalley*, 1 Mer. 436. As to the time of the inadequacy, in order that it may ever be fatal, it must exist at the concluding of the contract. If there was no inadequacy at the making of the contract, none can arise from subsequent events or change of circumstances: *Batty v. Lloyd*, 1 Vern. 141, 2 Scott 672, 3 Keener 504; *Lee v. Kirby*, 104 Mass. 420, 2 Scott 300. See, however, the somewhat remarkable case of *Willard v. Tayloe*, 8 Wall. 557, 1 Ames Eq. Jur. 404, 2 Scott 33, 2 Keener 1026, Shep. 112, which was really an instance of the price becoming inadequate by subsequent events.

extreme, in order to call for the interposition of equity. Where the inadequacy does not thus stand alone, but is accompanied by other inequitable incidents, the relief is much more readily granted. But even here the courts have established clearly marked limitations upon the exercise of their remedial functions, which should be carefully observed. The fact that a conveyance or other transaction was made without professional advice or consultation with friends, and was improvident, even coupled with an inadequacy of price, is not of itself a sufficient ground for relief, provided the parties were both able to judge and act independently, and did act upon equal terms, and fully understood the nature of the transaction, and there was no undue influence or circumstance of oppression.<sup>1</sup> When the accompanying incidents are inequitable and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative. It would not be correct to say that such facts constitute an absolute and necessary ground for equitable interposition. They operate to throw the heavy burden of proof upon the party seeking to enforce the transaction or claiming the benefits of it, to show that the other acted voluntarily, knowingly, intentionally, and deliberately, with full knowledge of the nature and effects of his acts, and that his consent was not obtained by any oppression, undue influence, or undue advantage taken of his condition, situation, or necessities. If the party upon whom the burden rested should succeed in thus showing the perfect good faith of the transaction, it would be sustained; if he should fail, equity would grant such relief, affirmative or defensive, as might be appropriate.<sup>2</sup>

§ 929. II. **Illegal Contracts and Transactions.**—

§ 930. 1. **Contracts Illegal because Contrary to Statute.**—I place under this head those few instances in which the illegality is wholly or chiefly the result of statutory prohibition. Very many of the contracts illegal at the common law, because opposed to public policy or to good morals, have also been brought within the domain of positive legislation in the various states; and a very few which are illegal by the English common law are not generally

<sup>1</sup> *Harrison v. Guest*, 6 De Gex, M. & G. 424; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39, 3 Keener 39.

<sup>2</sup> *Tate v. Williamson*, L. R. 2 Ch. 65, 1 Eq. 528, H. & B. 337, Sh. 193; *Summers v. Griffiths*, 35 Beav. 27, 3 Keener 509; *Fish v. Leser*, 69 Ill. 394, H. & B. 650; *Craffam v. Burgess*, 117 U. S. 184, 6 Sup. Ct. 686, 3 Keener 512.

made so by the law of this country. The important species which fall under the present head are usurious, gaming, and smuggling contracts. The policy of prohibiting usury has been abandoned, and the statutes concerning it repealed, in England and in several of the American states. In some of the states which still adhere to the policy, the usurious contract itself, the instrument by which it is evidenced, and all its securities, are declared to be utterly void; in others, the stipulation for the usurious excess over the legal interest is alone made void; while in others a further penalty is added to this usurious excess.<sup>1</sup> Although at the common law certain kinds of contracts based upon wagers were not unlawful, while those made upon a gaming consideration were illegal, the modern legislation of England and of the United States declares all gaming and wagering agreements, and the instruments by which they are evidenced or secured, to be illegal, null, and void.<sup>2</sup> . . .

**§ 931. 2. Transactions Illegal because Opposed to Public Policy.—A. Contracts Interfering with the Freedom of Marriage.—**The law of England and our own law regard the marriage relation as the very foundation of society. Since the true conception of marriage assumes and requires a perfectly *free* consent and union of the two spouses, equity has, from its earliest periods, treated all agreements, executory or executed, between the immediate parties or between third persons, which might directly or indirectly interfere in any degree with this absolute freedom, either by promoting or restraining marriage, as opposed to public policy and illegal, and has therefore declared them null and void. Although a court of equity will apply this principle in whatever kind of agreement the illegality may appear, yet there are certain well-

<sup>1</sup> *Barker v. Vansommer*, 1 Brown Ch. 149; *Fanning v. Dunham*, 5 Johns. Ch. 122, 142, 143, 9 Am. Dec. 283, 1 Scott 271. See post, § 937.

<sup>2</sup> *Wilkinson v. Tousley*, 16 Minn. 299, 10 Am. Rep. 139; *Kuhl v. Gally Universal Press Co.*, 123 Ala. 452, 26 South. 535, 82 Am. St. Rep. 135, citing many cases (contract of sale of a gambling device or machine); and the interesting case of *Barclay v. Pearson* (1893), 2 Ch. 154, holding that a "missing word competition" was a lottery, and that the court would not administer or distribute the fund contributed by the competitors. The ordinary so-called time contracts purporting to be for the purchase of stocks, but in reality wholly speculative, and without any intention to sell or buy specific stocks, but only to gain or lose the difference resulting from the rise or fall of the market price, are clearly within the definition "gaming contracts," and therefore void: *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. 776. If they are made in good faith, with the intent of actually selling and buying certain specific stocks to be obtained by the vendor in the future, they have no element of invalidity: *Irwin v. Williar*, 110 U. S. 510, 4 Sup. Ct. 160. Business of training horses for racing purposes, legal, but betting on races illegal: *Central Trust & S. D. Co.*, 112 Ky. 606, 66 S. W. 421, 99 Am. St. Rep. 317.

defined forms of these contracts which have received judicial condemnation. The following are the most important: Marriage brokerage contracts, by which one party agrees, for a consideration, to negotiate or procure a marriage for the other. Courts of equity have condemned these agreements with an especial emphasis. They are absolutely void, without the slightest regard to the situation of the spouses or the fitness of the marriage between them in the particular case. They are so utterly null that they cannot be ratified and confirmed; and it has even been held that money paid in pursuance of them may be recovered back.<sup>1</sup> Contracts in restraint of marriage: While mutual promises by a man and a woman to marry each other are, of course, valid, although they are thereby prevented from marrying others, agreements not to marry at all, or not to marry any one unless it be the promisee, without any corresponding stipulation by that party, as well as more general forms of contract restraining the freedom and power of marriage, are void.<sup>2</sup> . . . Secret contracts in fraud of marriage: Secret agreements of any kind or form, concealed from one or both of the spouses, the object of which is to promote a particular marriage, or to induce one or both the parties to enter into a marriage, are plainly opposed to public policy and void.<sup>3</sup> . . . Analogous to marriage brokerage contracts, and depending upon the same reasons, are agreements to pay a compensation to a person for using his influence with a testator to procure a will, devise, or bequest to be made in favor of the promising party.<sup>4</sup>

§ 932. **Agreements for a Separation.**—Whatever may have been the opinion at an earlier day, it is now thoroughly settled that agreements for a separation between husband and wife, if valid in form, made upon a sufficient consideration, and executed by parties legally capable of contracting, are not illegal; they will even be specifically enforced in equity, by decreeing the execution of the proper deed, and by restraining either party from personally interfering with the other in violation of their covenants.<sup>1</sup> . . . .

<sup>1</sup> *Hall v. Potter*, Show. Parl. C. 76, 3 Lev. 411, 2 Scott 663; *Duval v. Wellman*, 124 N. Y. 158, 26 N. E. 343; *Morrison v. Rogers*, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. Rep. 95.

<sup>2</sup> *England v. Downs*, 2 Beav. 522 *White v. Equitable Nuptial Benefit Union*, 70 Ala. 251, 52 Am. Rep. 325.

<sup>3</sup> *Palmer v. Neave*, 11 Ves. 165; *Gale v. Lindo*, 1 Vern. 475, 2 Scott 732.

<sup>4</sup> *Debenham v. Ox*, 1 Ves. Sr. 276, 2 Scott 666. While such contracts are clearly void, agreements between the heirs or near relatives of a testator, in anticipation of a will, stipulating to share equally the property which may be bequeathed to them, are valid, and are rather favored by courts of equity: *Wethered v. Wethered*, 2 Sim. 183.

<sup>1</sup> *Hunt v. Hunt*, 4 De Gex, F. & J. 221, 235, 1 Ames Eq. Jur. 131; *Clark v.*

**§ 933. B. Conditions and Limitations in Restraint of Marriage.**

—Intimately connected with contracts in restraint of marriage, and depending upon the same principle, are conditions and limitations operating in like manner annexed to or forming part of testamentary dispositions, or of family settlements, or similar gifts. Although the subject, in some of its special applications and phases, is still more confused and uncertain than perhaps any other branch of equity jurisprudence, yet certain general rules have been established beyond all further controversy. Two propositions lie at the foundation, and are recognized by all the authorities: 1. It is ordinarily said that all conditions annexed to gifts which prohibit marriage *generally* and absolutely are void and inoperative. This, however, is a very inaccurate mode of statement, since a condition *precedent* annexed to a devise of land, even if in complete restraint, will, if broken, be operative and prevent the devise from taking effect. With this limitation all conditions in general restraint are void. Also, if a condition is not in absolute restraint, but is of such form that it will *probably* operate as a general prohibition, it is, under the same limitation, void.<sup>1</sup> 2. On the other hand, conditions annexed to testamentary or other gifts, in partial and reasonable restraint of marriage, are valid and operative; such, for example, as that a devisee or legatee should not marry under age, or should not marry without the consent of parents, guardians, or trustees, or should not marry a particular person, or a person belonging to a particular religious communion.<sup>2</sup> In the application of these two propositions, certain special rules have been settled with more or less certainty, depending upon the facts of the condition being precedent or subsequent, of there being, or not, a gift over upon its breach, and of the original gift to which the condition is annexed being one of real or of personal estate. The system which has been developed is a partial compromise between the technical common-law rules concerning conditions, and the doctrines of the Roman law, which made void all attempts to restrict the perfect freedom of marriage; and, like most compromises, it has some incongruous features. If a condition is precedent and annexed to a gift of land, it operates as at the common law; when

Fosdick, 118 N. Y. 14, 22 N. E. 1111, 16 Am. St. Rep. 733, 6 L. R. A. 132. An agreement by a wife to relinquish all right of support in case a divorce is granted is illegal: Birch v. Anthony, 109 Ga. 349, 34 S. E. 561, 77 Am. St. Rep. 379.

<sup>1</sup>Scott v. Tyler, 2 Brown Ch. 431, 2 Dick. 712, 2 Lead. Cas. Eq. 4th Am. ed. 429, 475.

<sup>2</sup>Scott v. Tyler, *supra*; Stackpole v. Beaumont, 3 Ves. 89; Jenner v. Turner, 16 Ch. Div. 188 (condition against marrying a domestic servant); Graydon v. Graydon, 23 N. J. Eq. 220.

broken, it prevents the estate from vesting, whatever be its nature;<sup>3</sup> when annexed to a gift of personal property, if general or unreasonable, it is wholly void, and the gift takes effect; if partial and reasonable, it is operative.<sup>4</sup> When a condition is subsequent and annexed to a gift of land, if general, it is void, and although broken, the estate of the donee continues; if partial and reasonable, it is operative, and on its breach the estate of the donee is defeated.<sup>5</sup> When a subsequent condition is annexed to a gift of personal property, if general, it is void;<sup>6</sup> if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases, and the gift over takes effect;<sup>7</sup> but if there is no gift over, then the condition is said to be in *terrorem* merely, and is inoperative.<sup>8</sup> It seems to be settled by an overwhelming weight of authority that limitations and conditions, precedent or subsequent, tending to restrain the second marriage of women are valid,<sup>9</sup> and by the most recent decisions the same rule has been applied to the second marriages of men.<sup>10</sup> . . .

<sup>3</sup> *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241, 17 Am. St. Rep. 78, 1 L. R. A. 837.

<sup>4</sup> *Young v. Furse*, 8 De Gex, M. & G. 756; *Phillips v. Ferguson*, supra.

<sup>5</sup> *Commonwealth v. Stauffer*, 10 Pa. St. 350, 51 Am. Dec. 489.

<sup>6</sup> *Bellairs v. Bellairs*, L. R. 18 Eq. 510.

<sup>7</sup> *Clarke v. Parker*, 19 Ves. 1, 13; *Hotz's Estate*, 38 Pa. St. 422, 80 Am. Dec. 49.

<sup>8</sup> *Parsons v. Winslow*, 6 Mass. 169, 4 Am. Dec. 107. See *In re Dickson's Trusts*, 1 Sim., N. S., 37, 43, 44.

<sup>9</sup> *Phillips v. Medbury*, 7 Conn. 568; *Knight v. Mahoney*, 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 573; *Beekman v. Hudson*, 20 Wend. 53.

<sup>10</sup> *Allen v. Jackson*, L. R. 1 Ch. Div. 399. *Limitations as distinguished from conditions.*—It appears to be the tendency of the English cases to draw a material distinction between conditions in restraint of marriage annexed to testamentary dispositions, and restraints on marriage contained in the very terms of the limitation of the estate given, and to hold such limitations valid although the restraint if imposed in the form of a condition might be void. See this question fully discussed in the English editor's note to *Scott v. Tyler*, 2 Lead. Cas. Eq. 483-485; *Little v. Birdwell*, 21 Tex. 597, 73 Am. Dec. 242; *Mann v. Jackson*, 84 Me. 400, 30 Am. St. Rep. 358, 24 Atl. 886, 16 L. R. A. 707. In my opinion, this theory, as maintained by the English courts, is directly opposed to the spirit of equity jurisprudence. Undoubtedly the common-law rules are well settled which establish a distinction between a *limitation* and a *condition* subsequent. If land is devised to a widow "for and during her widowhood, and if she marries," then over; and in another case land is devised to a widow "for and during her natural life, but if she marries," then over; at the common law the nature and operation of these two dispositions are quite different. These rules belong to the law of conveyancing, of future and expectant estates, of contingent remainders and conditional limitations; they are in the highest degree arbitrary and technical. To adopt them and apply them in equity, for the purpose of determining the validity of restraints imposed upon marriage, and especially in bequests of personal property, seems

§ 934. **C. Contracts Directly Belonging to and Affecting Business Relations.**—It has been the policy of the law to promote the freedom of engaging in and carrying on all kinds of business which are beneficial to the public, and to maintain fairness and honesty *towards the public* in all business transactions. The monopolies which were so frequent in the early periods of English history resulted in most instances from the exercise of the royal prerogative or from legislation. The common law and equity would prevent, as far as possible, all contrivances and means by which the public would be deprived of the skill, industry, or economic and productive labor of individual citizens, or by which the public would be deceived in business dealings. The following are the important applications of the principle: Contracts in restraint of trade: Contracts in general restraint of trade, whatever be their form or the nature and immediate object of their stipulations, are void at law as well as in equity. The term “general” is not synonymous with “universal.” The criterion is the *unreasonableness* of the restraint; and this is always a matter of law to be determined by the court. This unreasonableness may be, and often is, in respect to the amount of territory over which the restriction extends, or it may be in respect alone to the number of persons with whom the trading is debarred, or in respect to the duration of the restraint. Where the agreement is thus void, a court of equity may always exercise its jurisdiction defensively, by defeating a suit brought for the enforcement of the contract; or affirmatively, by granting the remedy of cancellation or of injunction when the defensive remedy at law would not be certain, complete, and adequate.<sup>1</sup> On the other hand, contracts in partial

to violate the spirit of equity jurisprudence in dealing with kindred questions. It is the settled and familiar policy of courts of equity, except when they are prevented by some compulsory legal dogma, to disregard the *mere form* in which the intention of parties is expressed, to ascertain that intention as correctly as possible, and then to carry out the actual intention unrestricted by technical rules which relate solely to external form. If it is considered that the common-law doctrines concerning limitations and conditions in dispositions of real estate are too firmly established to be disregarded, there is certainly no necessity for extending those rules to dispositions of personal property. Such a course of decision is not only unnecessary—it is improper; for it tends to subvert some of the fundamental principles of equity.

<sup>1</sup>Since the illegality does not depend upon the form of the agreement, it is impossible to describe the kinds of contracts which might operate in a general restraint of trade within the principle. The simplest and ordinary species is a contract between A and B, whereby B agrees not to carry on a trade within a specified territory. The principle extends to combinations among workmen for the purpose of forcing a higher rate of wages from employers, by preventing others from working or being employed, etc.; analogous combinations and agreements among employers for the purpose of forcing a lower

restraint of trade are valid. To this end, they must be partial with respect to the territory included; reasonable with respect to the amount of territory, the circumstances and rights of the party burdened and the one benefited by the restriction, and the number and interests of the public whose freedom of trading is circumscribed; and made upon a valuable and sufficient consideration. The jurisdiction of equity is generally exercised, in respect to these contracts, for the purpose of indirectly compelling their specific performance, by means of an injunction preventing their violation.<sup>2</sup> Interfering with bidding at auctions: Where property is

rate of wages, by stipulating not to carry on their business, etc.; combinations and agreements by parties engaged in the same business to enhance prices by compelling the public to deal with themselves, and preventing it from trading with others who are engaged in the same employment; combinations by two or more parties in the same business to prevent other persons from carrying on the business, and thus to create a monopoly for themselves; similar combinations and agreements between several parties, for the purpose of preventing some of them from engaging in the business, so that the other might secure a monopoly; combinations by several parties to enhance the price of an article by temporarily withdrawing it from the market and preventing any dealing with it by the public in open market, often called "making a corner"; combinations and agreements between persons engaged in the same business for the express purpose of destroying competition, and thus defeating the natural results of economic laws when left to their free operation. This last species of agreement, so common at the present day, and which is doing much to overthrow the entire system of economic science, in my opinion, falls directly within the operation of the general principle; more than any other kind, perhaps, it tends to defeat the freedom of trade which the principle protects. The following cases are illustrations: *Mitchel v. Reynolds*, 1 P. Wms. 181; 1 *Smith's Lead. Cas.* 705; *Brewer v. Marshall*, 19 N. J. Eq. 537; 97 Am. Dec. 103, 2 *Keener* 557; *Pacific Postal Tel. Cable Co. v. Western Union Tel. Co.*, 50 Fed. 493; *Chicago Gas Light Co. v. Gas Light Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; *Chapin v. Brown*, 83 Iowa 156, 48 N. W. 1074, 32 Am. St. Rep. 297, 12 L. R. A. 428.

<sup>2</sup>Such contracts are frequently made in connection with a sale of a business and good-will, the vendor stipulating that he will not carry on the same business within a specified distance from the old place, or for a specified time, or will not solicit the old customers for their trade, and the like. These kinds of stipulations, if reasonable as to territory and time, will be enforced against the vendor, often by an injunction. See *Catt v. Tourle*, L. R. 4 Ch. 654, 2 *Scott* 493; *Nordenfelt v. Maxim-Nordenfelt Co.*, [1894] App. Cas. 535; *Diamond Match Co. v. Roebur*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; *Williston's Cas. Contracts*; *Robinson v. Suburban Brick Co.*, (C. C. A.) 127 Fed. 804; *McChurg's Appeal*, 58 Pa. St. 51, H. & B. 751; *Rakestraw v. Lanier*, 104 Ga. 188, 30 S. E. 735, 69 Am. St. Rep. 154, H. & B. 310. See, also, § 1344. Analogous to the sale of a good-will is the sale of a trade-secret, or secret recipe or process of manufacture, with an agreement by the vendor not to use the secret in his business, or not to make or vend articles by its means, and the like. Such a contract will be enforced by enjoining its violation. *Bryson v. Whitehead*, 1 Sim. & St. 74, 2 *Scott* 124; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664, 2 *Keener* 241. See, also, § 1340.

to be sold at public auction, and especially where the sale is by order of a court, or is made in the course of governmental administration, a secret combination and agreement among persons interested in bidding, whereby they stipulate to refrain from bidding in order to prevent competition and to lower the selling price of the property, is illegal, according to the uniform course of decision in this country. The stipulations of the buyer to pay compensation to the others in consideration of their promise not to bid, or to share the property with them, are void, and the sale itself, made as the result of the combination, is also tainted with the frauds, and will be set aside at the suit of the vendor.<sup>3</sup> Where, in pursuance of its general policy of letting contracts for public works or for supplies to the lowest bidder, the governmental officers issue proposals for bids, a secret combination and agreement among contractors, to refrain from bidding and to prevent competition, falls under the same rule, and is equally illegal.<sup>4</sup> Employment of puffers:<sup>5</sup> The secret employment, by the vendor, of one or more persons—called “puffers”—to make fictitious and collusive bids at an auction, and thus to enhance the price by an apparent competition, is clearly a wrong against the bona fide bidders and against the one who finally becomes the purchaser. Whether it is absolutely illegal has given rise to a conflict of decision between the courts of law and of equity; and, strangely enough, the courts of law have been more equitable, more strict in maintaining good faith, than those of equity. A vendor can always protect himself against sacrifice by announcing, as one of the conditions of the sale, that he reserves

<sup>3</sup>The English courts are said to have taken a different view, and to have held such a transaction valid: *In re Carew's Estate*, 26 Beav. 187. The rule established by the American courts is certainly a reasonable and just one. A secret combination as described is intrinsically much worse than the employment of “puffers” by the vendor: *Hamilton v. Hamilton*, 2 Rich. Eq. 355, 46 Am. Dec. 58; *Camp v. Bruce*, 96 Va. 521, 70 Am. St. Rep. 873, 31 S. E. 901, 43 L. R. A. 146. In connection with this rule, there are decisions which hold that a mere agreement of persons interested in the bidding, for the purpose of having them all share in the property when bid off by one of their number, and not for the purpose of preventing competition, is not open to the objection of illegality, but is valid. This is probably all that the English courts meant to decide in the cases cited supra: *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 159. It is held that a statement made at the sale by a party in interest that tends to prevent others from bidding may vitiate the sale, although such statement is true: *Herndon v. Gibson*, 38 S. C. 357, 37 Am. St. Rep. 765, 17 S. E. 145, 20 L. R. A. 545 (statement by purchaser that she is a widow, dependent on the premises for support).

<sup>4</sup>*Weld v. Lancaster*, 56 Me. 453; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *Swan v. Chorpenning*, 20 Cal. 182.

<sup>5</sup>For a full discussion, see *McMillan v. Harris*, 110 Ga. 72, 35 S. E. 334, 78 Am. St. Rep. 93, 48 L. R. A. 345.

the right to start the bidding by naming an "upset" price as the minimum, or the right to bid generally, or the right to withdraw the property. In regard to puffing, two cases may arise: 1. Where the sale is made without any preliminary announcement at all; 2. Where it is announced to be without reserve. In the first case, the rule is settled at law that *any* puffing—the employment of even one puffer—is illegal, and renders the sale voidable, at the option of the purchaser.<sup>6</sup> Courts of equity, in this case, allowed *one* puffer; in other words, puffing to the extent of one fictitious bidder did not render the sale voidable.<sup>7</sup> If the vendor transgressed this limit, and employed more than one puffer, the transaction became illegal at equity as well as at law; the fictitious competition was a fraud upon the bona fide bidders, which rendered the sale voidable.<sup>8</sup> In the second place, where an announcement is made that "the sale will be without reserve," or words to that effect, this is a pledge by the vendor that the competition shall be absolutely free; the employment of any puffing—one or more puffers—renders the sale voidable in equity as well as at law, and of course defeats a specific performance.<sup>9</sup> The subject is now regulated in England by a recent statute.<sup>10</sup> Fraudulent trade-marks: Another illustration of frauds upon the public in business dealings consists in the use of fraudulent trade-marks. The whole doctrine of infringement of trade-marks is based upon the notion of misleading the public; but this phase of the subject I do not at present touch upon.<sup>11</sup> The fraud now referred to is that of the original proprietor of the trade-mark, whose alleged right is invaded by an infringer, and who seeks the protection of courts. If a trade-mark contains a falsehood on its face, deceiving the public, and giving the goods a character and reputation which they do not possess nor deserve, or if the business of the proprietor is itself illegal, or is knowingly carried on by him in a false and deceptive manner, the trade-mark is in fact a fraud upon the public; no protection will be given to

<sup>6</sup> *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Staines v. Shore*, 16 Pa. St. 200, 55 Am. Dec. 492.

<sup>7</sup> Although this rule was settled, it has been applied very reluctantly in recent decisions, and the tendency is evident, both in England and in the United States, to bring the equity rule into an agreement with the legal one, even in the absence of any statute: *Bramley v. Alt*, 3 Ves. 620; *Flint v. Woodin*, 9 Hare, 618.

<sup>8</sup> It is probable that most American courts of equity would *now* disregard this distinction between one puffer and more than one: See *Peck v. List*, 23 W. Va. 338, 48 Am. Rep. 398.

<sup>9</sup> *Robinson v. Wall*, 2 Phill. Ch. 372, 375; *Flannery v. Jones*, 180 Pa. St. 338, 36 Atl. 856, 57 Am. St. Rep. 648.

<sup>10</sup> 30 & 31 Vict., c. 48.

<sup>11</sup> See § 1354.

the proprietor against an infringement. It is added, however, that a false representation by the proprietor, as to a matter wholly collateral to his trade-mark, does not affect his right to a remedy either in equity or at law.<sup>12</sup> Contracts opposed to the policy of some statute prescribing modes of certain business dealings.<sup>13</sup> Contracts of trading with alien enemies.<sup>14</sup>

**§ 935. D. Contracts Affecting Public Relations.**—Contracts made for the purpose of unduly controlling or affecting official conduct, or the exercise of legislative, administrative, and judicial functions, are plainly opposed to public policy. They strike at the very foundations of government, and tend to destroy that confidence in the integrity and discretion of public official action which is essential to the preservation of civilized society. The principle is universal, and is applied without any reference to the *mere* outward form and alleged purpose of the transaction. If a contract does unduly interfere with governmental functions, or with the relations of the citizen towards his own government in any of its departments, whether the interference be direct or indirect, such agreement is illegal, whatever form it may have assumed. It is impossible, therefore, to mention all the instances which properly come within this principle. The following are some of the most important species: Contracts for the procurement of office: All agreements which interfere with the integrity, discretion, or freedom of the electing or appointing power are illegal.<sup>1</sup> Contracts interfering with legislative proceedings: . . . The doctrine

<sup>12</sup> *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 23 Sup. Ct. 161; *Lemke v. Dietz*, (Wis.) 98 N. W. 936; *McVey v. Brendel*, 144 Pa. St. 235, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377.

<sup>13</sup> Contracts opposed to the policy of the U. S. public land laws; *Dial v. Hair*, 18 Ala. 798, 54 Am. Dec. 179; *Beck v. Flournoy, etc., Co.*, 65 Fed. 30, 12 C. C. A. 497, 27 U. S. App. 618.

<sup>14</sup> *Desmare v. U. S.*, 93 U. S. 605.

<sup>1</sup> This group contains many varieties: contracts directly with the appointing power, for the purpose of obtaining the office by means of any reward, compensation, or consideration; contracts by which the applicant agrees to pay compensation to another, or to share the emoluments with him, in consideration of his procuring the office; contracts between opposing candidates, by which, in consideration that one withdraws, or aids the other, the latter stipulates to pay a compensation, or to share the emoluments. The form is immaterial wherever the purpose is to procure an office by private interference with the freedom and integrity of the appointing body. The principle applies to private offices in corporations, etc., as well as to public governmental offices: *Meguire v. Corwine*, 101 U. S. 108; *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 548; *Basket v. Moss*, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842. See, also, *West v. Camden*, 135 U. S. 507, 10 Sup. Ct. 838, (contract by director of a corporation to keep another person permanently in place as an officer of the corporation, is illegal).

finds its most important application in dealing with contracts for the purpose of *procuring* legislation. All agreements, in every possible form, for the purpose of securing or using private and personal *influence* with members of a legislature, or of securing or using *labor and services* with legislators privately, personally, and individually, for the object of obtaining legislation either public or private, are in the highest degree contrary to the fundamental theory of free legislative action.<sup>2</sup> Contracts interfering with executive proceedings: These are subject to the same general rules which apply to similar agreements concerning legislation. All agreements, whether made with officials or with third persons, which directly or indirectly control or interfere with the due exercise of executive and administrative functions as prescribed or regulated by law, are clearly illegal.<sup>3</sup> Contracts interfering with judicial proceedings: All agreements directly or indirectly preventing or controlling the due administration of justice are opposed to the universal and most elementary principles of public policy. Whatever be their form and immediate purpose, and however innocent may be the motives of the parties, they are plainly invalid.<sup>4</sup>

<sup>2</sup>Our law permits a private citizen to endeavor to influence a legislature, and to obtain the enactment of a statute, in an open, public manner, by arguments directed to the whole body or to a committee, in the same manner as arguments are presented to a court by counsel. To this end, agreements for the employment of an agent or attorney, upon a compensation, to argue before the legislature or its committees, or to collect facts, reasons, etc., and present them openly to all the legislature or to its proper committees, are valid. Agreements which go beyond this line, and stipulate for private services to be rendered by dealing with individual legislators privately and personally, have been uniformly condemned by courts of the highest authority. The varieties of such agreements are very numerous. The following cases furnish illustrations: *Marshall v. B. & O. R. R.*, 16 How. 314, (a leading case; the opinion of Grier, J., is an able discussion of the doctrine); *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213, (where the services are partly those of an attorney and partly of a lobbyist, but blended as a single employment, the entire contract is void); *Houlton v. Nichol*, 93 Wis. 393, 67 N. W. 715, 57 Am. St. Rep. 928, 33 L. R. A. 166.

<sup>3</sup>This group includes contracts with officers themselves stipulating for the omission or violation of their official duties, or stipulating for compensation other or greater than the fees provided by law for the performance of their duties; contracts with third persons stipulating for their influence in procuring administrative acts to be done or omitted, and the like: *Spence v. Harvey*, 22 Cal. 337, 83 Am. Dec. 69 (agreement by postmaster as to location of office); *Oscanyan v. Arms Co.*, 103 U. S. 261; *Woodstock Iron Co. v. Extension Co.*, 129 U. S. 643, 9 Sup. Ct. 402.

<sup>4</sup>Under this head are included agreements with judicial officers relating to and controlling their judicial action; with third persons stipulating for their personal influence in procuring judicial action; contracts to remove witnesses, or in any manner to prevent them from testifying; or to remove, con-

§ 936. 3. **Contracts Opposed to Good Morals.**—It is unnecessary to discuss the meaning of the phrase *contra bonos mores*, since the doctrine is familiar. It is enough to say that all agreements in which the consideration past or future, or the executory terms stipulating for acts to be done or omitted, are contrary to good morals, are illegal and void in equity, and with a very few exceptions at the common law. This doctrine applies in equity, whatever be the external form of the contract, or its immediate purpose, or the particular nature of its illegality. Among the most important and familiar illustrations are the following: Contracts based upon the consideration, either past or future, of illicit sexual intercourse, or stipulating for such future intercourse, or in any manner promoting or furnishing opportunities for unlawful cohabitation or prostitution;<sup>1</sup> contracts which constitute or amount to champerty or maintenance, these being highly criminal at the common law;<sup>2</sup> contracts, executed or executory, given upon the consideration of

ceal, suppress, or in any way prevent the production of documentary or other evidence at an expected trial; agreements to procure witnesses to *testify to a certain state of facts*; agreements to indemnify sheriffs and other executive officers of a court for a *willful* violation or neglect of their official duty; and a great variety of others: *Lindsay v. Smith*, 78 N. C. 328, 24 Am. Rep. 463; *Bowman v. Phillips*, 41 Kan. 364, 21 Pac. 230, 13 Am. St. Rep. 292, 3 L. R. A. 631; *Camp v. Bruce*, 96 Va. 521, 31 S. E. 901, 70 Am. St. Rep. 873, 43 L. R. A. 146.

<sup>1</sup>All contracts providing for future illicit intercourse, and all unsealed contracts upon the consideration of past intercourse, were void at law as well as in equity. On account of the arbitrary effect given to a seal, contracts based upon the consideration of past intercourse, if sealed, were not void at the common law; and this fact furnished an occasion for the exercise of the equitable jurisdiction in canceling such instruments, since there was no defense at law. In most of the states where the common-law effect of the seal has been abrogated, or where a seal is not conclusive evidence of consideration, this technical distinction can no longer exist: *Batty v. Chester*, 5 Beav. 103, 3 Keener 849; *Smyth v. Griffin*, 13 Sim. 245, 3 Keener 851; *Hill v. Spencer*, Amb. 641, 836. 2 Scott 774. In the same class are leases of premises for the purpose of being used as houses of prostitution, or for other known illegal objects: See *Chateau v. Singla*, 114 Cal. 91, 45 Pac. 1015, 55 Am. St. Rep. 63, 33 L. R. A. 750.

<sup>2</sup>The common-law rules concerning champerty and maintenance have been greatly modified in the United States, and to a large extent abrogated. Many agreements concerning litigations, legal controversies, and disputed claims, which were condemned by the ancient law, are not only sustained by the modern law of this country, but are of frequent occurrence. The good policy of the change may well be doubted. Many other ancient common-law rules, which modern civilization came to regard as merely arbitrary and oppressive, are found by experience, after their abolishment, to have been wise, and based upon the unchangeable facts of human nature: *James v. Kerr*, 40 Ch. D. 449 (an interesting case); *Casserleigh v. Wood* (C. C. A.), 119 Fed. 309 (specific performance refused, although court of law might not regard contract

or stipulating for the compounding a felony, the forbearance to prosecute for a crime, or the abandonment of a pending criminal prosecution.<sup>3</sup>

**§ 937. III. Equitable Jurisdiction in Case of Illegal Contracts—Usurious Contracts.**—Equitable relief is granted against usurious contracts, whether executory or executed, since, from considerations of public policy, the two parties are not regarded as standing in *pari delicto*. While the contract is executory, equity will not aid the creditor in enforcing it. If, therefore, suit is brought upon such an agreement, the borrower may set up the usury as a defense, without paying or offering to pay the amount actually borrowed, or legal interest thereon, and a recovery will be entirely defeated. Equity will never assist a party to carry into effect his own intentional violation of the law.<sup>1</sup> It is well settled that courts of equity will go farther, and will give all the affirmative relief which is just to the borrower. If the contract is executory, the borrower may obtain the remedy of a surrender and cancellation of the securities which he has given for the usurious loan.<sup>2</sup> If the contract is executed, he may recover back the usurious amount paid in excess of the sum actually borrowed, and legal interest thereon.<sup>3</sup> This affirmative interposition of the court is subject, however, to the principle that the plaintiff must himself do equity. It is a firmly settled rule, in the absence of contrary statutes, that where a borrower, who has not already paid the debt, brings a suit for affirmative relief against a usurious contract, he can obtain the remedy only upon the condition of repaying, or offering to repay, the sum which is justly and equitably due to his creditor,—the amount actually loaned and legal interest. The absence of such an offer is ground for defeating the suit.<sup>4</sup> Since the illegality of

as champertous); *Brown v. Bigné*, 21 Oreg. 260, 28 Pac. 11, 28 Am. St. Rep. 752, 14 L. R. A. 745 (not champertous).

<sup>1</sup>This illegality affects not only the main agreement, but all collateral securities given upon such consideration, such as notes, bonds, mortgages, etc.: *Lindsay v. Smith*, 78 N. C. 328, 24 Am. Rep. 463 (an agreement upon a single consideration to do certain acts, not of themselves illegal, and to stop a criminal prosecution, is wholly void); *Gorringe v. Reed*, 23 Utah 120, 63 Pac. 902, 90 Am. St. Rep. 692. Contract not illegal: *Barrett v. Weber*, 125 N. Y. 18, 25 N. E. 1068.

<sup>2</sup>*Fanning v. Dunham*, 5 Johns. Ch. 122, 9 Am. Dec. 283, 1 Scott 271.

<sup>3</sup>*Peters v. Mortimer*, 4 Edw. Ch. 279.

<sup>4</sup>*Bosanquett v. Dashwood*, Cas. t. Talb. 38, 41, 2 Scott 667. Wherever the usurious loan is concealed under the appearance of a pretended sale, equity will look at the real transaction, and give relief by setting aside the sale: *Barker v. Vansommer*, 1 Brown Ch. 149.

<sup>5</sup>*Fanning v. Dunham*, 5 Johns. Ch. 122, 142-4, 9 Am. Dec. 283, 1 Scott 271; *Matthews v. Warner*, 6 Fed. 461. See § 391.

usury is wholly the creature of legislation, the provisions of the statute must furnish the rule determining the extent, limits, and occasion of relief. It results from a just interpretation of the legislation that the right to complain is a personal one, belonging only to the borrower and his representatives; no other party is entitled to relief, defensive or affirmative. The doctrine is therefore generally settled, that where land subject to a usurious mortgage is conveyed to a grantee who assumes the payment thereof as a part of the consideration of the conveyance, he cannot set up the usury either as a defense to a foreclosure or as a ground for a cancellation of the security. The same is true of any transferee of property who, as a part of the transaction, assumes payment of a usurious debt. For the same reason a subsequent mortgagee or encumbrancer cannot defeat a prior encumbrance or procure it to be set aside upon allegations of its usurious character.<sup>5</sup>

§ 938. **Gaming Contracts.**—In gaming contracts, unlike usurious loans, it cannot be said that one party takes advantage of the necessities of the other, who is in *vinculis*; both act freely and are in *pari delicto*; the general maxims therefore apply. While the contract is still executory, a court of equity will not aid the creditor to enforce it, the illegality being a perfect defense in equity as well as at law. After the agreement has been executed by the loser's payment of the money, or by a conveyance of land or other property, equity will not interfere on his behalf and decree a recovery back of the money paid, or a cancellation of the conveyance or assignment, unless perhaps there were circumstances of fraud, oppression, duress, and the like, in procuring the payment or transfer, which would of themselves be a sufficient ground for equitable interposition distinct from the mere illegality.<sup>1</sup> Finally, as long as the contract is still executory, equity has jurisdiction to aid the losing party by ordering the written agreement and other securities to be surrendered up and canceled, and by granting the ancillary remedy of injunction to restrain their negotiation, transfer, or enforcement; and when the circumstances are such that the defensive remedy at law would not be equally certain, complete, and adequate, this jurisdiction ought to be and will be exercised. This

<sup>5</sup> *Lamoille Co. Nat. Bank v. Bingham*, 50 Vt. 105, 28 Am. Rep. 490; *Scanlan v. Grimmer*, 71 Minn. 351, 74 N. W. 146, 70 Am. St. Rep. 326; *Brooks v. Todd*, 79 Ga. 602, 4 S. E. 156.

<sup>1</sup> See *Solinger v. Earle*, 82 N. Y. 393, 397, 399. But by statutes in several states the loser may recover: *Jamieson v. Wallace*, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 762. As to recovery of advances made by one who has no interest in the gambling transaction, see *Hawley v. Bibb*, 62 Ala. 52; *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 15 Am. St. Rep. 159, 5 L. R. A. 200.

conclusion is sustained by the highest authority, and is in perfect accord with principle.<sup>2</sup>

§ 939. **Other Illegal Contracts.**—I purpose to explain the meaning and effect of the three maxims which limit the exercise of the equitable jurisdiction, and to ascertain and formulate, if possible, such conclusions as shall be sustained both by principle and by authority. These maxims are, *Ex turpi causa non oritur actio*, *In pari delicto melior est conditio possidentis*, or *In pari delicto melior est conditio defendentis*. What is meant by the "condition" of the possessor, or the defendant, which is so much "better"—or, as the maxim sometimes reads, "stronger" (*potior*)—that it will not be disturbed? Plainly, it is not the condition merely of an executory contract having been made and subsisting between the parties; the maxim does not refer to the condition of the executory contract which has been entered into remaining unaltered and unmolested; otherwise the setting up the illegality as a defense would be prohibited, for it would directly violate the maxim. The defense is always allowed, and this necessarily disturbs the condition of the contract. The "condition" referred to in the maxim is clearly the condition of the parties with respect to their property rights created by or resulting from the contract. If the contract is still executory, the promisor is left undisturbed in the possession of the money or other property which he agreed to pay or transfer;<sup>1</sup> if the contract has been executed, the promisee is left undisturbed in the possession of the money or other property which has been paid or conveyed to him. This is the true meaning of the maxim, and it involves no requirement that the contract, as a *mere executory instrument*, should remain unmolested; it deals solely with the rights flowing, or which would flow, from the agreement. The form, therefore, which correctly expresses the thought is, *Melior est conditio possidentis*; "defendentis" is appropriate only when regarded as equivalent to *possidentis*. The foregoing analysis is not a mere verbal discussion. Upon the true signification given to "condition," in the maxim, depends to a great extent the doctrine concerning affirmative equitable relief against illegal contracts.

§ 940. **In Pari Delicto—General Rules.**—The proposition is

<sup>2</sup>Lord Portarlington v. Soulby, 3 Mylne & K. 104, 1 Keener 12; Wynne v. Callander, 1 Russ. 293, 296, 297; Skipwith v. Strother, 3 Rand. (Va.) 214, very able dissenting opinion in Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; contra, majority opinion in case last cited, H. & B. 32, 3 Keener 859. See, also, Kuhl v. Gally, etc., Co., 123 Ala. 452, 26 South. 535, 82 Am. St. Rep. 135 (cancellation of note and mortgage given in consideration of sale of gambling machine).

<sup>1</sup>Drinkall v. Movius' State Bank, 11 N. Dak. 10, 88 N. W. 724, 95 Am. St. Rep. 693, 57 L. R. A. 341.

universal that no action arises, in equity or at law, from an illegal contract; no suit can be maintained for its specific performance, or to recover the property agreed to be sold or delivered, or the money agreed to be paid, or damages for its violation. The rule has sometimes been laid down as though it were equally universal, that where the parties are in *pari delicto*, no affirmative relief of any kind will be given to one against the other. This doctrine, though true in the main, is subject to limitations and exceptions which it is the special object of the present inquiry to determine.<sup>1</sup> As applications of this principle, the following rules may be regarded as settled, where the parties are in *pari delicto*: If the contract has been voluntarily executed and performed, a court of equity will not, in the absence of controlling motives of public policy to the contrary, grant its aid by decreeing a recovery back of the money paid or property delivered, or a cancellation of the conveyance or transfer.<sup>2</sup> As long as the contract is executory, it cannot be enforced in any kind of action brought directly upon it; the illegality constitutes an absolute defense.<sup>3</sup> As an application of the same doctrine merely in a different form, while the agreement is executory, courts of equity may relieve the debtor or promising party by ordering the written instrument and other securities to be surrendered and canceled, and by granting the ancillary remedies of injunction, discovery, and the like. Whenever

<sup>1</sup> *Bosanquett v. Dashwood*, Cas. t. Talb. 38, 2 Scott 667; *Batty v. Chester*, 5 Beav. 103, 3 Keener, 849; *Smith v. White*, L. R. 1 Eq. 626; *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707, 11 Am. St. Rep. 667, 4 L. R. A. 728, 2 Scott 787.

<sup>2</sup> *Solinger v. Earle*, 82 N. Y. 393, 397, 399; *Treadwell v. Torbert*, 119 Ala. 279, 24 South. 54, 72 Am. St. Rep. 918.

<sup>3</sup> *Ibid.* There are a few apparent exceptions or limitations: *Casserleigh v. Wood*, 119 Fed. 309, (C. C. A.); *Camp v. Bruce*, 96 Va. 521, 31 S. E. 901, 70 Am. St. Rep. 873, 43 L. R. A. 146. Where the contract has been executed, the party in possession of the proceeds or profits may be unable to set up the illegality to defeat an action for an accounting, or to recover the proceeds, brought by a *third person* entitled to the money: *Sykes v. Beadon*, L. R. 11 Ch. Div. 170, 193, 197, per Jessel, M. R.; but may, as a general rule, defeat such action by a partner or other party to the original illegal agreement: *McMullen v. Hoffman*, 174 U. S. 639, 666, 19 Sup. Ct. 839, limiting *Brooks v. Martin*, 2 Wall. 70, 2 Scott 790. It should be observed that the defense of illegality is allowed from motives of public policy, rather than from a regard for the interests of the objecting party. When a person, having actively participated in the illegal transaction, and having obtained all the benefit of it from the other party, refuses to perform his own executory undertaking, and sets up the illegality as a defense, his position, considered by itself, is unjust, but the law sustains it out of regard to the interests of society. The objection comes in appearance from the individual litigant, but in reality from society—the state—speaking through the courts.

the circumstances are such that the defensive remedy at law would not be equally certain, perfect, and adequate, this jurisdiction will be exercised. The equitable relief so conferred does not violate the general maxim concerning parties *in pari delicto*; on the contrary, it carries that maxim into effect. It has already been shown that the maxim, rightly interpreted, does not require the condition of the parties, *with respect to the subsisting executory contract*, to remain unchanged and undisturbed. The remedy of cancellation or injunction, under the circumstances, is simply the equitable proceeding identical with the setting up the illegality as a defense to defeat a recovery at law, and thus to get rid of the contract as a binding executory obligation. The parties are left undisturbed as to their property rights.<sup>4</sup>

**§ 941. In Pari Delicto—Limitation on the General Rules.**—To the foregoing rules there is an important limitation. Even where the contracting parties are *in pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity *may* aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance, or transfer, and decreeing the recovery back of money paid or property delivered in performance of the agreement. The cases in which this limitation may apply and the affirmative relief may thus be granted include the class of contracts which are intrinsically contrary to public policy,—contracts in which the illegality itself consists in their opposition to public policy, and any other species of illegal contracts in which, from their particular circumstances, incidental and collateral motives of public policy require relief.<sup>1</sup>

<sup>4</sup> *Batty v. Chester*, 5 Beav. 103, 3 Keener 849; *W— v. B—*, 32 Beav. 574; *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415; *Missouri, K. & T. Co. v. Krumseig*, 77 Fed. 32, 40 U. S. A. 620; *Basket v. Moss*, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842; *Harvey v. Linville Imp. Co.*, 118 N. C. 693, 24 S. E. 489, 54 Am. St. Rep. 749, 32 L. R. A. 265; *Booker v. Wingo*, 29 S. C. 116, 7 S. E. 49. See ante, § 938.

<sup>1</sup> *Basket v. Moss*, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842; *Duval v. Wellman*, 124 N. Y. 158, 26 N. E. 343 (marriage brokerage contract); and see *Wetmore v. Porter*, 92 N. Y. 76, Ames Trusts 262 (trustee may sue to recover trust property, although he colluded with defendant in the breach of trust). It is not asserted that in *all* contracts which are illegal because opposed to public policy relief will thus be given to a party *in pari delicto*; but simply that in this class of contracts the limitation finds its

§ 942. **Not in Pari Delicto.**—Lastly, when the contract is illegal, so that both parties are to some extent involved in illegality,—in some degree affected with the unlawful taint,—but are not in *pari delicto*,—that is, both have not, with the same knowledge, willingness, and wrongful intent, engaged in the transaction, or the undertakings of each are not equally blameworthy,—a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent, and may grant him full affirmative relief, by canceling an executory contract, by setting aside an executed contract, conveyance, or transfer, by recovering back money paid or property delivered, as the circumstances of the case shall require, and sometimes even by sustaining a suit brought to enforce the contract itself, or if this be impossible, by permitting him to recover the amount justly due, by means of an appropriate action not directly based upon the contract. Such an inequality of condition exists so that relief may be given to the more innocent party, in two distinct classes of cases: 1. It exists where the contract is intrinsically illegal, and is of such a nature that the undertakings or stipulations of each, *if considered by themselves alone*, would show the parties equally in fault, but there are collateral and incidental circumstances attending the transaction, and affecting the relations of the two parties, which render one of them comparatively free from fault. Such circumstances are imposition, oppression, duress, threats, undue influence, taking advantage of necessities or of weakness, and the like, as a means of inducing the party to enter into the agreement, or of procuring him to execute and perform it after it had been voluntarily entered into.<sup>1</sup> 2. The condition also exists where, in the absence of any incidental and collateral circumstances, the contract is illegal, but is *intrinsically* unequal; is of such a nature that one party is necessarily innocent as compared with the other; the stipulations, undertakings, and position of one are essentially less illegal and blameworthy than those of the others.<sup>2</sup>

special field of operation. The equitable remedies of borrowers in usurious contracts are a familiar illustration. Marriage-brokerage contracts are another. the cases holding that money paid in pursuance of their stipulations may be recovered back.

<sup>1</sup> Wright v. Stewart, 130 Fed. 905, 921; Harrington v. Grant, 54 Vt. 236; Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419; Gorringer v. Reed, 23 Utah 120, 63 Pac. 902, 90 Am. St. Rep. 692.

<sup>2</sup> Cases of this class must largely depend upon their own particular circumstances: Lowell v. Boston, etc., R. R., 23 Pick. 24, 32, 34 Am. Dec. 33; Tracy v. Talmage, 14 N. Y. 162, 167, 67 Am. Dec. 132, per Selden, J.; 210, per Comstock, J.—in whose opinions the subject is discussed most ably and exhaustively; Kuhl v. Gally Universal Press Co., 123 Ala. 452, 26 South. 535,

§ 943. **Second. Constructive Fraud Inferred from the Condition and Relations of the Immediate Parties to the Transaction.**—This division embraces those cases in which a transaction, although it may be perfectly regular in its external form, and valid perhaps by the original rules of the common law, is impeachable in equity because it lacks that absolute *consent* which is regarded as essential by courts of equity. The equitable conception of true consent assumes a physical power of the party, an intellectual and moral power, and that he exercised these powers freely and deliberately. While the execution of an instrument in the regular legal manner will undoubtedly, in the absence of all contrary evidence, raise a *prima facie* presumption that the consent was present, the real consent may be prevented or destroyed by surrounding physical circumstances, by the want of intellectual or moral capacity in the party himself, or by physical, intellectual, or moral force controlling the free operations of his own will. This phase of so-called constructive fraud necessarily involves a great variety of instances, and several degrees of invalidity. It includes transactions absolutely void from complete incapacity, others which are voidable,

82 Am. St. Rep. 135. The illegal contract may also be sometimes enforced *indirectly*, at the suit of the more innocent party, by an action not brought upon the very contract itself. It is a well-settled doctrine with respect to implied contracts that where an express contract does not involve a *malum in se*, but is made illegal solely by some statute, and the parties are not, from the nature of their respective stipulations or their relations, in *pari delicto*, the more innocent one may maintain an action upon implied contract, to recover back the consideration, or the money advanced, or the value of the property, etc. In such a case, the less guilty party is entitled to relief, whether the agreement has been executed on both sides, or whether it be executory on the side of the defendant. What contracts are thus unequal in their illegality, so that the doctrine of implied promise may be invoked, must depend, in great measure, upon the language of the statute creating the illegality. It may be said, in general, that if the act prohibited is in itself innocent or indifferent, and the statute imposes a penalty or loss on one party only, or addresses its prohibitions and sanctions in consequence of a violation to one party only of the contract, then the illegality of the two parties is unequal: *Bond v. Montgomery*, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119. Although the doctrine of implied promises and actions on implied contracts belongs primarily and peculiarly to the law, yet this is chiefly so as it affects the forms of action and rules of pleading. Exactly the same circumstances arise in equity, and the granting of equitable relief will then depend upon exactly the same principles, although under the equitable notions of remedies the suit may not be regarded or represented as based upon an implied promise: *Lowell v. Boston*, etc., R. R., 23 Pick. 24, 34 Am. Dec. 33. The doctrine finds one of its most important applications in the case of contracts of corporations which are made illegal by their charters, or by other statutes, and *a fortiori* in the case of their contracts which are merely *ultra vires*: *Tracy v. Talmage*, 14 N. Y. 162, 167, 210, 67 Am. Dec. 132. See, also, *Pullman Palace Car Co. v. Central Transportation Co.*, 65 Fed. 158, 3 Keener 870.

and others which are only presumptively invalid, and which throw the burden of proof upon the parties claiming their benefit to overcome this presumption.<sup>1</sup> The whole subject is therefore separated into two branches. 1. Transactions void or voidable with persons totally or partially incapacitated; 2. Transactions presumptively invalid between persons in fiduciary relations.

§ 944. 1. **Transactions Void or Voidable with Persons Totally or Partially Incapacitated.**—The incapacities embraced under this head are either total or partial. They may be created by the policy of the law, such as coverture and infancy; they may be intellectual, such as insanity, mental weakness, intoxication; they may result from external forces, physical or moral, such as duress, undue influence, pecuniary necessity; or they may inhere in the very position and circumstances of the parties, such as sailors, expectant heirs, and reversioners. In several instances, which are placed under this head because they are governed by the same doctrine and rules, it must be admitted that the term “incapacity” can be used only by way of analogy.

§ 945. **Coverture.**—At the common law, married women were without the capacity to bind themselves by contract, and their agreements were, in general, void in equity as well as at law. With respect to their equitable separate property, however, married women are regarded by equity, independently of statutes, in many respects as though they were single; they are permitted to deal with such estate, and to make contracts concerning it; and such contracts are enforced by courts of equity against the property, though not against the married women personally.<sup>1</sup> Coverture, however, is no excuse, in equity, for fraud; in other words, the fraud of a married woman will furnish an occasion for appropriate equitable relief, and the fact that the fraudulent party is a married woman will not prevent such relief.<sup>2</sup> *Infancy:* The

<sup>1</sup>Tribou v. Tribou, 96 Me. 305, 52 Atl. 795; Cowee v. Cornell, 75 N. Y. 99, 31 Am. Rep. 428, H. & B. 316 (see criticism of this opinion in Pom. Eq. Jur.).

<sup>2</sup>Hulme v. Tenant, 1 Brown Ch. 16, 1 Lead. Cas. Eq., 4th Am. ed., 679; Murray v. Barlee, 3 Mylne & K. 209, 220; Johnson v. Gallagher, 3 De Gex, F. & J. 494. The subject of married women's contracts in equity is treated in a subsequent chapter. The modern legislation concerning married women's property and contracts has made great changes in the rules which originally prevailed at law and in equity. An abstract of this legislation will be given in the subsequent chapter mentioned above.

<sup>3</sup>The relief may be defensive, by defeating a suit brought by the married woman; or it may be affirmative, as setting aside a fraudulent conveyance or agreement; pecuniary relief would not be given against her, personally, on account of her fraud, unless permitted by the modern legislation: Savage v. Foster, 9 Mod. 35, 1 Scott 576; Sharpe v. Foy, L. R. 4 Ch. 35. The American decisions are conflicting on the question, how far a married woman is estopped by fraud from alleging her coverture. See § 814.

incapacity of infants to enter into binding contracts is the same in equity as in law; but such contracts are generally voidable only, and may therefore be ratified after the infant attains his majority. Fraud, however, will prevent the disability of infancy from being made available in equity. If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce his liability as though he were adult, and may cancel a conveyance or executed contract obtained by fraud.<sup>2</sup>

§ 946. **Insanity.**—In general, a lunatic, idiot, or person completely non compos mentis is incapable of giving a true consent in equity, as at law; his conveyance or contract is invalid, and will generally be set aside.<sup>1</sup> While this rule is generally true, the mere fact that a party to an agreement was a lunatic will not operate as a defense to its enforcement, or as ground for its cancellation. A contract executed or executory made with a lunatic in good faith, without any advantage taken of his position, and *for his own benefit*, is valid both in equity and at law.<sup>2</sup> And where a conveyance or contract is made in ignorance of the insanity, with no advantage taken, and with perfect good faith, a court of equity will not set it aside, if the parties cannot be restored to their original position, and injustice would be done.<sup>3</sup> The conveyance or agreement of a monomaniac will be defeated or set aside, if it is the result of his insane delusion.<sup>4</sup> The nature and extent of mental capacity and incapacity are the same at law and in equity.

§ 947. **Mental Weakness.**—It is well settled that there may be a condition of extreme mental weakness and loss of memory, either congenital, or resulting from old age, sickness, or other cause, and not being either idiocy or lunacy, which will, *without any other incidents or accompanying circumstances*, of itself destroy the person's testamentary capacity, and a fortiori be ground for defeating or setting aside his agreements and conveyances.<sup>1</sup> It is equally certain

<sup>1</sup> *Ex parte Unity Bank*, 3 De Gex & J. 63; *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 61, 9 N. E. 420. See *Savage v. Foster*, 9 Mod. 35, 1 Scott 576.

<sup>2</sup> *Manning v. Gill*, L. R. 13 Eq. 485; *Helberg v. Schumann*, 150 Ill. 12, 37 N. E. 99, 41 Am. St. Rep. 339. As to setting aside his conveyance as against a bona fide purchaser, see *Ashcraft v. De Armond*, 44 Iowa 229; *Odom v. Riddick*, 104 N. C. 515, 10 S. E. 609, 17 Am. St. Rep. 686, 7 L. R. A. 118; *Dewey v. Allgire*, 37 Neb. 6, 55 N. W. 276, 40 Am. St. Rep. 468.

<sup>3</sup> See post, § 1300.

<sup>4</sup> *Neill v. Morley*, 9 Ves. 478, 482; *Gribben v. Maxwell*, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233; *Bank v. Sneed*, 97 Tenn. 120, 36 S. W. 716, 56 Am. St. Rep. 788, 34 L. R. A. 274.

<sup>1</sup> *Jenkins v. Morris*, L. R. 14 Ch. Div. 674; *Riggs v. American Tract Society*, 95 N. Y. 503; *Lewis v. Arbuckle*, 85 Iowa 335, 52 N. W. 237, 16 L. R. A. 677.

<sup>2</sup> It is undoubtedly difficult to formulate any rule for determining the

that *mere* weak-mindedness, whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own *free* will, is not a sufficient ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance.<sup>2</sup> If, as is frequently if not generally the case, the mental weakness and failure of memory are accompanied by other inequitable incidents, and are taken undue advantage of through their means, equity not only may but will interpose with defensive or affirmative relief.<sup>3</sup> Finally, in a case of real mental weakness, a presumption arises against the validity of the transaction, and the burden of proof rests upon the party claiming the benefit of the conveyance or contract to show its perfect fairness and the capacity of the other party.<sup>4</sup>

§ 948. **Persons in Vinculis.**—Analogous to the condition of mental

amount of this mental weakness. The following has been adopted by the highest authority, and is clearly just: "Had the testator a disposing memory? Was he able, without prompting, to recollect the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form: Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time when he executed the will?" If any of these questions must be answered in the negative, if such an amount of mind and memory does not exist, then there is no testamentary capacity. See, also, *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167. The same rule applies to conveyances and other agreements *inter vivos*: *King v. Davis*, 60 Vt. 502, 11 Atl. 727.

<sup>2</sup> If a court can see that there were no inequitable incidents, such as undue influence, great ignorance and want of advice, very inadequate price, and the like, it will not interfere merely because one party possessed very much less intelligence than the other, nor because the transaction is not one which the court in all respects approves: *Harrison v. Guest*, 6 De Gex, M. & G. 424, 8 H. L. Cas. 481; *Cowee v. Cornell*, 75 N. Y. 71, 99, 100, 31 Am. Rep. 428, H. & B. 316; *Sawyer v. White*, (C. C. A.) 122 Fed. 223.

<sup>3</sup> Where mental weakness, not of itself sufficient to destroy capacity, is accompanied by undue influence, inadequacy of price, taking advantage of pecuniary necessities, ignorance and want of advice, misrepresentation or concealments, and the like, a contract or conveyance procured by their combined means will be defeated or set aside; it is not a simple presumption of invalidity which thus arises, but the presumption has become established. Of course, in the vast majority of instances, the mental weakness is wrought upon through such inequitable instrumentalities, in order to obtain a contract or conveyance for an inadequate consideration: *Harding v. Handy*, 11 Wheat. 103 (Marshall, C. J.); *Allore v. Jewell*, 94 U. S. 506, H. & B. 320, Sh. 190 (Field, J.); *Dingman v. Romine*, 141 Mo. 466, 42 S. W. 1087; *Bennett v. Bennett*, (Neb.) 91 N. W. 409.

<sup>4</sup> *Cowee v. Cornell*, 75 N. Y. 91, 99, 100, 31 Am. Rep. 428, H. & B. 316; *Brummond v. Krause*, 8 N. Dak. 573, 80 N. W. 686. The whole subject of mental weakness is practically involved with undue influence. See following paragraphs.

weakness is that of pecuniary or other necessity and distress. Whenever one person is in the power of another, so that a free exercise of his judgment and will would be impossible, or even difficult, and whenever a person is in pecuniary necessity and distress, so that he would be likely to make any undue sacrifice, and advantage is taken of such condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration, and the like, even though there be no actual duress or treats, equity may relieve defensively or affirmatively.<sup>1</sup> *Persons illiterate or ignorant:* By the same analogy, where a person is illiterate or ignorant of the nature and extent of his own rights, or ignorant of the nature of the transaction in which he is engaging, and acts without professional or other advice, and advantage is taken of his condition to obtain a conveyance or contract upon an inadequate consideration, or otherwise unfair, equity will relieve by setting it aside or defeating its enforcement. The relief is granted on the ground that there was not an intelligent and free consent; if the circumstances show such consent, equity will not interfere.<sup>2</sup>

**§ 949. Intoxication.**—Intoxication which merely exhilarates, and

<sup>1</sup> Relief will be granted in such cases with great caution. If it appears that, notwithstanding his necessitous condition, the party acted knowingly and intelligently, with a full comprehension of the situation, of his own acts, and of their consequences, and no undue pressure was used, equity will not interpose, even though the consideration is inadequate: See ante, paragraphs on inadequacy of consideration. A presumption of invalidity arises from the circumstances, but that presumption may be overcome: *Williams v. Bayley*, L. R. 1 H. L. 200, 218, 3 Keener 773; *Neilson v. McDonald*, 6 Johns. Ch. 201, 3 Keener 751; *James v. Kerr*, 40 Ch. Div. 449.

<sup>2</sup> *Fish v. Leser*, 69 Ill. 394, H. & B. 650; *Green v. Wilkie*, 98 Iowa, 74, 66 N. W. 1046, 60 Am. St. Rep. 184, 36 L. R. A. 434, and notes; *Winfield Nat. Bank v. Croco*, 46 Kan. 620, 26 Pac. 939. Relief is granted in this case also with the greatest caution. Courts of equity have not in England, and much less in this country, adopted a rule that a conveyance or contract cannot be valid unless made with professional advice: *Lightfoot v. Heron*, 3 Younge & C. 586. In applying the rules contained in the above paragraph and in the preceding one, it should be remembered that in all of them the special circumstances—mental weakness, necessities, ignorance, etc.—are assumed to show the absence of a free consent, a free act of the will. The mere fact, therefore, that a party was very old, or illiterate, or sick, or in pecuniary necessity, will not invalidate a transaction, or be a ground for setting aside or defeating a contract, even though made upon an inadequate consideration and without advice, provided the evidence shows that he was competent to form an independent judgment, that he really knew the nature and effect of the transaction in which he was engaged, and acted in it intelligently and deliberately. To impeach such a transaction requires proof of actual fraud or coercion. Courts do not set aside conveyances and contracts simply because the judges may regard them unfavorably: *Cowee v. Cornell*, 75 N. Y. 91, 99, 100; 31 Am. Rep. 428, H. & B. 316.

does not materially affect the understanding and the will, does not constitute a defense to the enforcement of an executory agreement, and much less is it any ground for affirmative relief.<sup>1</sup> An intoxication which is absolute and complete, so that the party is for the time entirely deprived of the use of his reason, and is wholly unable to comprehend the nature of the transaction and of his own acts, is a sufficient ground for setting aside or granting other appropriate affirmative relief against a conveyance or contract made while in that condition, even in the absence of any fraud, procurement, or undue advantage by the other party.<sup>2</sup> Where the intoxication is not thus absolute and complete, but is still sufficient to materially affect and interfere with the person's reason, judgment, and will, but is not procured nor taken advantage of unfairly by the other party, the doctrine is settled that a court of equity will not interfere in behalf of either of the parties to a contract which is made while one of them is in such a condition.<sup>3</sup> Finally, although the intoxication was only partial, if the other party produced it by his contrivance, and then took advantage of it, or made it the opportunity for acts of imposition, unfairness, and a fortiori fraud, equity will grant full affirmative thereof.<sup>4</sup>

**§ 950. Duress.**—Whenever a conveyance or contract is obtained by actual duress, equity will grant relief, defensively or affirmatively, by cancellation, injunction, or otherwise, as the circumstances may require. In determining what constitutes duress,—what force

<sup>1</sup> An habitual drunkard is not necessarily an incompetent person: *Wright v. Fisher*, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886; *Burnham v. Burnham* (Wis.) 97 N. W. 176.

<sup>2</sup> *Thackrah v. Haas*, 119 U. S. 501, 7 Sup. Ct. 311, 2 Scott 746, 3 Keener 697; *Hale v. Stery*, 7 Colo. App. 165, 42 Pac. 598; *Moetzel v. Koch* (Iowa), 97 N. W. 1079. If a person is thus completely intoxicated, a party openly dealing with him must, of course, perceive his condition; it would seem that the party knowingly taking the conveyance or contract under these circumstances was necessarily chargeable with inequitable conduct.

<sup>3</sup> The court will not specifically enforce an executory contract against the intoxicated party at the suit of the other, nor will it set aside a conveyance or contract at the suit of the intoxicated party or his representatives; the parties are left to their remedies at law. This rule is an application of the maxim *in pari delicto*, etc.: *Cooke v. Clayworth*, 18 Ves. 12; *Harbison v. Lemon*, 3 Blackf. 51, 23 Am. Dec. 376.

<sup>4</sup> *Cooke v. Clayworth*, 18 Ves. 12; *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519. Courts of equity are extremely cautious in granting any relief on the ground of intoxication, and they will seldom give the remedy of cancellation, unless there was conduct plainly inequitable by the other party; to do so would require a very strong case in which the evidence was most convincing. Experience shows that a man may be very much intoxicated and still be shrewd, hard in driving a bargain, and in every way competent to manage his own business.

or threats,—equity follows the law. Courts of equity undoubtedly grant relief in many classes of instances where there is no legal duress, and where the wronged party would perhaps be remediless at the common law, but these cases properly belong to the head of “undue influence.”<sup>1</sup>

§ 951. **Undue Influence.**—Where there is no coercion amounting to duress, but a transaction is the result of a moral, social, or domestic force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction, on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances, undue influence naturally has a field to work upon in the condition or circumstances of the person influenced, which render him peculiarly susceptible and yielding,—his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessities, his ignorance, lack of advice, and the like. All these circumstances, however, are incidental, and not essential. Where an antecedent fiduciary relation exists, a court of equity will *presume* confidence placed and influence exerted; where there is no such fiduciary relation, the confidence and influence must be *proved* by satisfactory extrinsic evidence; the rules of equity and the remedies which it bestows are exactly the same in each of these two cases. The doctrine of equity concerning undue influence is very broad, and is based upon principles of the highest morality. It reaches every case, and grants relief “where influence is acquired and abused, or where confidence is reposed and betrayed.”<sup>1</sup> It is specially active and search-

<sup>1</sup> *Nicholls v. Nicholls*, 1 Atk. 409, 1 Scott 481; *Williams v. Bayley*, L. R. 1 H. L. 200, 3 Keener 773; *Louden v. Blythe*, 16 Pa. St. 532, 55 Am. Dec. 527 (acknowledgment of deed of married woman obtained by duress). Threats of prosecution against a near relative of the party: *Sharon v. Gager*, 46 Conn. 189, 2 Scott 713; *Winfield Nat. Bank v. Croco*, 46 Kan. 620, 26 Pac. 939; *City National Bank v. Kusworm*, 88 Wis. 118, 59 N. W. 564, 43 Am. St. Rep. 880, 26 L. R. A. 48, 3 Keener 795. No duress: *York v. Hinkle*, 80 Wis. 624, 50 N. W. 895, 27 Am. St. Rep. 73, 3 Keener 770; *Fulton v. Loftis*, 63 N. C. 393, 1 Scott 486 (duress after a contract is made).

<sup>1</sup> *Smith v. Kay*, 7 H. L. Cas. 750, 779, per Lord Kingsdown. In *Hall v. Hall*, 37 L. J. P. & M. 40, L. R. 1 P. & M. 481, Mr. Justice Wilde laid down the rules in a most admirable manner which apply to the execution of instruments inter vivos as well as to wills: “To make a good will, a man must be a free agent, but all influences are not unlawful. Persuasion appeals to the affections or ties of kindred, to a sentiment of gratitude for past services or pity for future destitution, or the like. These are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats such as the

ing in dealing with gifts, but is applied, when necessary, to conveyances, contracts executory and executed, and wills.

§ 953. **Expectants, Heirs, and Reversioners.**—Expectant heirs, reversioners, and holders of other expectant interests stand in a position different from that of all other persons *sui juris*, and a special jurisdiction for their protection has long been well established. This jurisdiction rests upon two distinct foundations. In the first place, heirs, reversioners, and other expectants, during the lifetime of their ancestors and life tenants, are considered as peculiarly liable to imposition, and exposed to the temptation and danger of sacrificing their future interests, in order to meet their present wants. Being sometimes in actual, but more often in imaginary, distress, they do not stand upon an equal footing with those who deal with them concerning their expectant estates, and such persons are in a position to take advantage of their condition, and to dictate inequitable and even extravagantly hard terms in any contract of loan or purchase which may be made. In the second place, the dealings of heirs and reversioners with their expectant interests are often a gross violation of the moral if not legal duties which they owe to their ancestors and life tenants who are the present owners of the property, and from or through whom their future estates will come, and may be a virtual fraud upon the rights of those parties. Equity, therefore, treats such dealings with expectant interests as a possible fraud upon the heirs and reversioners who are immediate parties to the transaction, and as a virtual fraud upon their ancestors, life tenants, and other present owners. Upon these two considerations the equitable jurisdiction is founded. The rule is well settled that all conveyances, sales, and charges, and contracts of sale or charge, of their future and expectant interests made by heirs, reversioners, and other expectants during the lifetime of their ancestors or life tenants, upon an *inadequate consideration*, will be relieved against in equity, and either wholly or partially set aside. In this instance, fraud is inferred from *mere* inadequacy of consideration. All dealings

testator has not the courage to resist; moral command asserted, and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort—these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, not driven, and his will must be the offspring of his own volition, and not that of another." See, also, *Dowie v. Driscoll*, 203 Ill. 480, 68 N. E. 56; *Leighton v. Orr*, 44 Iowa 679; *Rau v. Von Zedlitz*, 132 Mass. 164, 3 Keener 784, 1 Scott 487; *Hollocher v. Hollocher*, 62 Mo. 267 (what kind of influence is *not* undue); *Haydock v. Haydock*, 33 N. J. Eq. 494, 3 Keener 807; *Fisher v. Bishop*, 108 N. Y. 25, 2 Am. St. Rep. 357, 15 N. E. 331; *Hartman v. Strickler*, 82 Va. 225.

by such expectants are not necessarily and absolutely voidable. But in every such conveyance or contract with an heir, reversioner, or expectant, a presumption of invalidity arises from the transaction itself, and the burden of proof rests upon the purchaser or other party claiming the benefit of the contract to show affirmatively its perfect fairness, and that a full and adequate consideration was paid,—that is, the fair market value of the property, and not necessarily the value as shown by the life-tables. If he succeeds in overcoming the presumption by showing these facts, the transaction will stand; otherwise it will be set aside. It is not necessary to show as a condition of relief that the heir or reversioner was an infant, or that he was in a condition of actual distress when the bargain was made. A court of equity presumes distress. The very fact of the sale or charge shows *prima facie* that he was not in a position to make his own terms, and that he submitted to have them dictated to him by the other party. The foregoing rules assume, simply, that there was an inadequacy of consideration, without any further element of fraud. If, in addition, the circumstances show actual fraud, misrepresentations, or concealments, oppression, taking undue advantage of real necessities, or other unfair, inequitable dealing by the party who acquires the expectant interest, a court of equity will grant full relief without regard to any presumption.<sup>1</sup> Whenever a conveyance, sale, or contract for sale is set aside in this manner on the sole ground of inadequacy of consideration, the relief is granted only upon condition that the sum actually paid or loaned, with interest thereon, is refunded; and the court will so frame its decree, if necessary, that the conveyance or sale, instead of being immediately and absolutely canceled, shall stand as security for the amount which, it is adjudged, should be repaid.<sup>2</sup> . . .

**§ 954. Post Obit Contracts.**—In strict analogy to the equitable relief against sales of expectancies, and depending upon the same reasons, is that against post obit contracts. A post obit contract is an agreement made by an expectant heir, successor, devisee, or legatee, whereby, in consideration of a smaller sum loaned, he promises to pay to the creditor a much larger sum, exceeding in amount the principal and lawful interest, upon the death of the person from whom he expects the inheritance, succession, or bequest, provided he himself should survive such person. Such an

<sup>1</sup> *Fry v. Lane*, L. R. 40 Ch. Div. 315; *McClure v. Raben*, 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477, 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 558; *In re Garcelon*, 104 Cal. 584, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 953; *Read v. Mosby*, 87 Tenn. 759, 11 S. W. 940, 5 L. R. A. 122.

<sup>2</sup> *Miller v. Cook*, L. R. 10 Eq. 641; *Croft v. Graham*, 2 De Gex, J. & S. 155.

instrument is clearly an imposition upon the debtor, since it necessarily takes advantage of his actual or supposed necessities. It is also a gross fraud upon the ancestor or testator; it offers a premium upon his death; being a wagering contract, it renders the creditor's interest dependent upon his speedy death. Post obit contracts, and all other instruments essentially the same though differing in form, will be set aside. In granting this relief, as in the similar case of dealings with expectancies, where there are no special circumstances of unfairness or imposition, and the inadequacy of consideration is the sole ground of interference, the court will require a repayment to the lender of what is justly due, and may permit the security to stand for such amount until it is repaid.<sup>1</sup>

§ 955. II. Transactions Presumptively Invalid between Persons in Fiduciary Relations.—It is of the utmost importance to obtain an accurate conception of the exact *circumstances* under which the equitable principle now to be examined applies; otherwise the entire discussion of the doctrine will be confused and imperfect. In the various instances described in the preceding paragraphs there has been an *actual* undue influence consciously and designedly exerted upon a party who was peculiarly susceptible to external pressure on account of his mental weakness, old age, ignorance, necessitous condition, and the like. The existence of any fiduciary relation was unnecessary and immaterial. The undue influence being established *as a fact*, any contract obtained or other transaction accomplished by its means is voidable, and is set aside without the necessary aid of any presumption. The single circumstance now to be considered is the existence of some fiduciary relation, some relation of confidence subsisting between two parties. No mental weakness, old age, ignorance, pecuniary distress, and the like, is assumed as an element of the transaction; if any such fact be present, it is incidental, not necessary,—immaterial, not essential. Nor does undue influence form a necessary part of the circumstances, except so far as undue influence, or rather the ability to exercise undue influence, is implied in the very conception of a fiduciary relation, in the position of superiority occupied by one of the parties over the other, contained in the very definition of that relation. This is a most important statement, not a mere verbal criticism. Nothing can tend more to produce

<sup>1</sup> Gwynne v. Heaton, 1 Brown Ch. 1, 9, 3 Keener 505; Crowe v. Ballard, 3 Brown Ch. 117, 120, 2 Scott 759; Boynton v. Hubbard, 7 Mass. 112. As to fair and valid agreements among expectant heirs or successors to share the property which may come to them, see Trull v. Eastman, 3 Met. 121, 123, 37 Am. Dec. 126.

confusion and inaccuracy in the discussion of the subject than the treatment of actual undue influence and fiduciary relations as though they constituted one and the same doctrine.

**§ 956. The General Principle.**—It was shown in the preceding section that if one person is placed in such a fiduciary relation towards another that the duty rests upon him to disclose, and he intentionally conceals a material fact with the purpose of inducing the other to enter into an agreement, such concealment is an actual fraud, and the agreement is voidable without the aid of any presumption. We are now to view fiduciary relations under an entirely different aspect; there is no intentional concealment, no misrepresentation, no actual fraud. The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites and of thereby overcoming the presumption.<sup>1</sup> . . . Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists *as a fact*, in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal.

**§ 957. Two Classes of Cases.**—There are two classes of cases to be considered, which are somewhat different in their external forms, and are governed by different special rules, and which still depend upon the single general principle. The first class includes all

<sup>1</sup> See *Tate v. Williamson*, L. R. 1 Eq. 528, 536, per Page Wood, V. C. (Lord Hatherley); *Tate v. Williamson*, L. R. 2 Ch. 55, 60, 61, H. & B. 337, Sh. 193. See, also, *Rhodes v. Bates*, L. R. 1 Ch. 252, 257; *Billage v. Southee*, 9 Hare 534, 540; *Hatch v. Hatch*, 9 Ves. 292, per Lord Eldon; *Smitt v. Kay*, 7 H. L. Cas. 750; also, the following cases, among many others, in which §§ 955, 956 are quoted and followed: *Keith v. Killam*, 35 Fed. 243, 246; *Cowen v. Adams*, 78 Fed. 536, 552, 47 U. S. A. 676; *Noble's Adm'r v. Moses*, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175; *Nichols v. McCarthy*, 53 Conn. 299, 55 Am. Rep. 105, 23 Atl. 93; *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 777; *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808; *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651; *Crawford v. Crawford*, 24 Nev. 410, 56 Pac. 94; *Cheuvront v. Cheuvront*, (W. Va.) 46 S. E. 233.

those instances in which the two parties consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealing some conveyance, or contract, or gift. To such cases the principle literally and directly applies. The transaction is not necessarily voidable, it *may* be valid; but a presumption of its invalidity arises, which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action. The second class includes all those instances in which one party, purporting to act in his fiduciary character, deals with himself in his private and personal character, without the knowledge of his beneficiary, as where a trustee or agent to sell sells the property to himself. Such transactions are voidable at the suit of the beneficiary, and not merely presumptively or prima facie invalid. Nevertheless this particular rule is only a necessary application of the single general principle. The circumstances show that there could not possibly be the good faith, knowledge, and free consent required by the principle, and therefore the result which is a rebuttable presumption in the first class of transactions becomes a conclusive presumption in the second. The transactions belonging to the first class may be gifts, or agreements and conveyances upon valuable consideration. The principle is applied with great emphasis and rigor to gifts, whether they are simple bounties, or purport to be the effects of liberality based upon antecedent favors and obligations.<sup>1</sup> Contracts, executory or executed, made upon a valuable consideration are not, perhaps, scrutinized with quite so much severity as gifts, but they are subjected to the operation of the same principle, and must conform to its requirements.<sup>2</sup> Having thus explained the general nature and scope of the principle, I shall now describe its application to the most important and familiar forms of fiduciary relations, and its effects upon the rights and liabilities of the parties thereto.

**§ 958. Trustee and Beneficiary.**—As the general powers, duties, and liabilities of trustees will be more fully discussed in a subsequent chapter, I shall at present simply state in the briefest manner those rules growing out of the fiduciary relation which regulate

<sup>1</sup> *Huguenin v. Baseley*, 14 Ves. 273, 2 Lead. Cas. Eq. 1156, 1174, 1192; *Nichols v. McCarthy*, 53 Conn. 299, 55 Am. Rep. 105, 23 Atl. 93; *Shea's Appeal*, 121 Pa. St. 302, 15 Atl. 629, 1 L. R. A. 422. For the rule requiring *independent advice* to sustain gifts, see post, §§ 958, 960. Testamentary gifts stand upon a somewhat different footing; that is, they *may* be valid, while a gift *inter vivos* between the same parties might be void: *Hindson v. Weatherill*, 5 De Gex, M. & G. 301; *Bancroft v. Otis*, 91 Ala 279, 24 Am. St. Rep. 904, 8 South. 286.

<sup>2</sup> *Tate v. Williamson*, L. R. 2 Ch. 55, H. & B. 337, Sh. 193, L. R. 1 Eq. 528; *Harkness v. Fraser*, 12 Fla. 336, 341.

their dealings with their beneficiaries. In the first place, when the trustee deals with the trust property, but not directly with the cestui que trust, and without the latter's intervention: The rule is inflexibly established that where, in the management and performance of the trust, trust property of any description, real or personal property, or mercantile assets is sold, the trustee cannot, without the knowledge and consent of the cestui que trust, directly or indirectly become the purchaser. Such a purchase is always voidable, and will be set aside on behalf of the beneficiary, unless he has affirmed it, being *sui juris*, after obtaining full knowledge of all the facts. It is entirely immaterial to the existence and operation of this rule that the sale is intrinsically a fair one, that no undue advantage is obtained, or that a full consideration is paid, or even that the price is the highest which could be obtained. The policy of equity is to remove every possible *temptation* from the trustee. The rule also applies alike where the sale is private, or at auction, where the purchase is made directly by the trustee himself, or indirectly through an agent, where the trustee acts simply as agent for another person, and where the purchase is made from a co-trustee. Finally, the rule extends with equal force to a purchase made under like circumstances by a trustee from himself. A trustee acting in his fiduciary character, and without the intervention of the beneficiary, cannot sell the trust property to himself, nor buy his own property from himself for the purposes of the trust.<sup>1</sup> In the second place, where the

<sup>1</sup> *Ex parte Bennett*, 10 Ves. 381, 394; *Michoud v. Girod*, 4 How. 503, Sh. 181; *Romaine v. Hendrickson*, 27 N. J. Eq. 162; *Harrington v. Erie Co. Sav. Bk.*, 101 N. Y. 257, 4 N. E. 346; *Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095. *Purchase at auction*: *Michoud v. Girod*, 4 How. 503, Sh. 181; *Davoue v. Fanning*, 2 Johns. Ch. 252, 2 Scott 690; *Broder v. Conklin*, 121 Cal. 282, 53 Pac. 699; *Scholle v. Scholle*, 101 N. Y. 172, 4 N. E. 334 (by special permission of the court, where trustee has an interest to protect). *At judicial sale*: *Tracy v. Colby*, 55 Cal. 67 (an extraordinary case); *Powell v. Powell*, 80 Ala. 11. *Purchase made indirectly through a third person*: *Davoue v. Fanning*, 2 Johns. Ch. 252, 2 Scott 690; *Houston v. Bryan*, 78 Ga. 181, 1 S. E. 252, 6 Am. St. Rep. 252; *Wing v. Hartupee* (C. C. A.), 122 Fed. 897. *Purchase by trustee as agent for a third person*: *Gibson v. Barber*, 100 N. C. 192, 6 S. E. 766. *Purchase from a co-trustee*: *Whichcote v. Lawrence*, 3 Ves. 740. The rule is also settled, where not abrogated by statute, that a *mortgagee* or other encumbrancer with *power of sale* becomes a trustee for the sale, and, as such, can not directly or through an agent purchase the property: *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171; *Very v. Russell*, 65 N. H. 646, 23 Atl. 522. Although a trustee's purchase be set aside, still, if it was fair, the court may allow the trustee for his payments and advances and improvements when he acted in good faith: *Mulford v. Minch*, 11 N. J. Eq. 16, 64 Am. Dec. 472. After the trust has been completely ended, the former trustee may purchase: *Munn v. Burges*, 70 Ill. 604; *In re Boles & British Land Co.'s Contract* (1902), 1 Ch. 244.

trustee deals, with respect to the trust, directly with his beneficiary: A purchase by a trustee from his cestui que trust, even for a fair price and without any undue advantage, or any other transaction between them by which the trustee obtains a benefit, is generally voidable, and will be set aside on behalf of the beneficiary; it is at least prima facie voidable upon the mere facts thus stated.<sup>2</sup> There is, however, no imperative rule of equity that a transaction between the parties is necessarily, in every instance, voidable. It is possible for the trustee to overcome the presumption of invalidity. If the trustee can show, by unimpeachable and convincing evidence, that the beneficiary, being sui juris, had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge or information concerning the property possessed by himself, or which he might, with reasonable diligence, have possessed, and that he has obtained no undue or inequitable advantage, and especially if it appears that the beneficiary acted in the transaction upon the independent information and advice of some intelligent third person, competent to give such advice, then the transaction will be sustained by a court of equity.<sup>3</sup> The doctrine is enforced with the utmost stringency, when the transaction is in the nature of a bounty conferred upon the trustee,—a gift or benefit without full consideration. Such a transaction will not be sustained, unless the trust relation was for the time being completely suspended, and the beneficiary acted throughout upon independent advice, and upon the fullest information and knowledge.

§ 959. **Principal and Agent.**—Equity regards and treats this relation in the same general manner, and with nearly the same strictness, as that of trustee and beneficiary. The underlying thought is, that an agent should not unite his personal and his

**Ex parte Lacey**, 6 Ves. 625, 627; **Ingle v. Richards**, 28 Beav. 361; **Smith v. Townshend**, 27 Md. 368, 92 Am. Dec. 637; **Bertman v. Whipple** (R. I.) 57 Atl. 379.

<sup>2</sup>The independent advice of a third person does not seem to be an essential feature in purchases for a fair consideration; but it does seem to be indispensable in transactions having the nature of gifts, whereby the trustee obtains some benefit—as, for example, a release of claims against the trustee given by the cestui que trust as a bounty: **Lloyd v. Attwood**, 3 De Gex & J. 614. As to purchase by trustee from the beneficiary, see **Coles v. Trecothick**, 9 Ves. 234, 246; **Nichols v. McCarthy**, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105; **Colton v. Stanford**, 82 Cal. 351, 16 Am. St. Rep. 137, 150, 23 Pac. 16. As to absolute necessity of independent advice in case of a gift, see **Allcard v. Skinner**, 36 Ch. D. 145, 189 ff; **Powell v. Powell** (1900), 1 Ch. 243, and post, § 960.

representative characters in the same transaction; and equity will not permit him to be exposed to the temptation, or brought into a situation where his own personal interests conflict with the interests of his principal, and with the duties which he owes to his principal.<sup>1</sup> In dealings without the intervention of his principal, if an agent for the purpose of selling property of the principal purchases it himself, or an agent for the purpose of buying property for the principal buys it from himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable; it will always be set aside at the option of the principal; the amount of consideration, the absence of undue advantage, and other similar features are wholly immaterial; nothing will defeat the principal's right of remedy except his own confirmation after full knowledge of all the facts.<sup>2</sup> Passing to dealings connected with the principal's intervention, in any contract of purchase or sale with the principal, or other transaction by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome; although this presumption is undoubtedly not so weighty and strong as in the case of a trustee. The mere fact that a reasonable consideration is paid, and that no undue advantage is taken, is not of itself sufficient. Any unfairness, any underhanded dealing, any use of knowledge not communicated to the principal, any lack of the perfect good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal.<sup>3</sup> If, on the other hand, the agent imparted all his knowledge concerning the matter, and advised his principal with candor and disinterestedness, as though he himself were a stranger to the bargain, and paid a fair price, and the principal on his side acted with full knowledge of the subject-matter of the transaction and of the person with whom he was dealing, and gave a full and free consent,—if all these are affirmatively proved, the presumption is overcome, and the transaction is valid.<sup>4</sup> These general doctrines are applied under every variety of circumstances, and to every kind of transaction. As illustrations, when an agent has, during his employment, dis-

<sup>1</sup> *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Mallory v. Mallory-Wheeler Co.*, 61 Conn. 135, 23 Atl. 708 (corporation director); *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541.

<sup>2</sup> *Bentley v. Craven*, 18 Beav. 75, H. & B. 530; *Porter v. Woodruff*, 36 N. J. Eq. 174, H. & B. 296.

<sup>3</sup> *Panama, etc., Tel. Co. v. India Rubber, etc., Co.*, L. R. 10 Ch. 515. 526, 3 Keener 550 (surreptitious dealing by agent with other party); *Hegenmyer v. Marks*, 37 Minn. 6, 5 Am. St. Rep. 808, 32 N. W. 785 (non-disclosure of fact enhancing value); *Van Dusen v. Bigelow* (N. Dak.) 100 N. W. 723.

<sup>4</sup> *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203.

covered a defect in his principal's title, he cannot, after the agency is ended, use such knowledge for his own benefit; much less can he do so while the agency exists.<sup>5</sup> Nor is an agent employed to purchase or to sell, or in any other business, permitted to make profits for himself in the transaction, unless by the plain consent of his employer; for all such profits wrongfully made he must account to his principal;<sup>6</sup> and if he has taken the legal title to property in violation of his fiduciary duty, equity will treat him as a trustee thereof for his principal.<sup>7</sup> A gift by a principal to his agent may be valid and be sustained, if the absolute good faith, knowledge, and intent of both the parties is clearly established.<sup>8</sup> After the agency has been ended, and the fiduciary relation has ceased, the foregoing rules no longer operate; the parties may deal with each other in the same manner as any other persons.<sup>9</sup>

§ 960. **Attorney and Client.**—The courts of England have uniformly watched all the dealings between attorneys or barristers and their clients with the closest scrutiny, and have established very rigorous rules concerning them. It must be conceded that this equitable doctrine has been to a considerable extent ignored, and these rules have been greatly modified in their application, by the courts in several of the American states. While the fact must be admitted, it cannot be too much deplored.<sup>1</sup> In regard to

<sup>5</sup> As by acquiring a tax title to the principal's property for his own benefit: *Ringo v. Binns*, 10 Pet. 269.

<sup>6</sup> *De Bussche v. Alt*, L. R. 8 Ch. Div. 281; *Bentley v. Craven*, 18 Beav. 75, H. & B. 530; *McKinley v. Williams*, 74 Fed. 94, 20 C. C. A. 312, 36 U. S. App. 749.

<sup>7</sup> See post, § 1050: *Rose v. Hayden*, 35 Kan. 100, 10 Pac. 554, 57 Am. Rep. 145.

<sup>8</sup> The equitable rule concerning gifts between principal and agent does not seem to be as stringent as that which regulates the similar dealings of trustees and their beneficiaries: *Ralston v. Turpin*, 25 Fed. 7, 18, affirmed, 129 U. S. 663, 9 Sup. Ct. 420; also, *Adair v. Craig*, 135 Ala. 332, 33 South. 902.

<sup>9</sup> *Burwell v. Burwell* (Va.), 49 S. E. 68. Even then, however, a former agent is not permitted to use special knowledge, which he acquired by means of his agency, to benefit himself at the expense of the former principal: *Trice v. Comstock*, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; *Luddy's Trustee v. Peard*, 33 Ch. D. 500.

<sup>1</sup> 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 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. The above observations of the author are quoted with approval in *Elmore v. Johnson*, 143 Ill. 513, 525, 36 Am. St. Rep. 401, 404, 32 N. E. 413, 21 L. R. A. 366, H. & B. 343.

gifts, the rule is definitely settled, although it may not *always* have been followed by American courts, that no gift from a client to his attorney, made while the relation is still subsisting, is valid. In order that a gift from a client to his own attorney may be sustained, the donee must not only show *affirmatively* the perfect good faith of the transaction, the absence of any pressure or influence on his own part, the complete knowledge, intention, consent, and freedom of action on the donor's part, but it must also appear that, *pro hac re*,—that is, in all the dealings connected with the gift itself,—the relation of attorney and client between the two parties had been suspended, by means of independent advice furnished to the client by some disinterested and competent third person, through which the client was instructed and upon which he acted. Whatever may be the other circumstances, unless it be shown that the client, in conferring his bounty, had the benefit of such independent counsel and advice, the gift must fail.<sup>2</sup> In regard to purchases, sales, and other similar contracts between the attorney and client, the rule is not so stringent. Such species of contract made while the relation is still subsisting may be valid, and independent advice to the client from a third person is never essential, although very proper. The presumption always arises against the validity of a purchase or sale between the client and attorney made during the existence of the relation. The attorney must remove that presumption by showing affirmatively the most perfect good faith, the absence of undue influence, a fair price, knowledge, intention, and freedom of action by the client, and also that he gave his client full information and disinterested advice; in the language of Lord Eldon, "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."<sup>3</sup> If all these circumstances are proved, the contract will stand; if not, it will be defeated or set aside.<sup>4</sup> In the conduct

<sup>2</sup> *Gibson v. Jeyes*, 6 Ves. 266, 271.

<sup>3</sup> *Morgan v. Minnett*, L. R. 6 Ch. Div. 638; *Liles v. Terry* (1895), 2 Q. B. 879, 3 Keener 827; *Greenfield's Estate*, 14 Pa. St. 489, 506. A distinction exists between gifts *inter vivos* and testamentary gifts. A bequest to the testator's attorney will be held valid, even where the attorney himself draws up the will, if the testator's capacity and freedom of action be shown: *Hindson v. Weatherill*, 5 De Gex, M. & G. 301. See *Post v. Mason*, 91 N. Y. 539, 43 Am. Rep. 689.

<sup>4</sup> *Edwards v. Meyrick*, 2 Hare 60; *Hesse v. Briant*, 6 De Gex, M. & G. 623, 2 Keener 858; *Wright v. Carter* (1903), 1 Ch. 27. The American cases do not exhibit so much uniformity. While all recognize the general rule, theoretically at least, and while some apply it with firmness and rigor, others have virtually emasculated it in its application. Transactions have been sustained which an English court would hardly suffer to be discussed, and would visit the attorneys engaged in them with the severest censure: *Dunn v. Dunn*, 42 N. J. Eq. 431,

of his employment, the attorney must consult his client's interests in preference to his own. He is not permitted, therefore, to make any profit out of the employment, other than his due compensation, except with the knowledge and consent of his client; for all such profits he must account, and if necessary, will be treated as a trustee.<sup>5</sup> When an attorney has the charge of or is employed to conduct a judicial sale of property, he cannot become the purchaser without full explanation and information given to his client of his intention.<sup>6</sup> The English rules concerning compensation, and agreements with respect to payment or security of compensation, are exceedingly strict, but they have been relaxed in many if not all of the American states.<sup>7</sup> All of the foregoing rules apply not only to those who are technically attorneys, but also to all who de facto act as professional or legal advisers.<sup>8</sup>

§ 961. **Guardian and Ward.**—The equitable rules concerning dealings between guardian and ward are very stringent. The relation is so intimate, the dependence so complete, the influence so great, that any transactions between the two parties, or by the guardian alone, through which the guardian obtains a benefit, entered into while the relation exists, are in the highest degree suspicious; the presumption against them is so strong that it is hardly possible for them to be sustained. Indeed, many authorities lay down the positive rule that the parties are wholly incapacitated from contracting, and that any such transaction between them is necessarily voidable. This statement is perhaps too broad.<sup>1</sup> A

7 Atl. 842, 3 Keener 819; *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413, 21 L. R. A. 366, H. & B. 343.

<sup>5</sup>As to making a profit, etc., see *Luddy's Trustee v. Peard*, 33 Ch. D. 500 (using information gained as a solicitor); *McDowell v. Milroy*, 69 Ill. 498. Purchasing property which client desires to purchase: *Luddy's Trustee v. Peard*, supra; *Vallette v. Tedens*, 122 Ill. 607, 3 Am. St. Rep. 502, 14 N. E. 52 (holds it in trust for client). Acting for two parties, and making a contract in violation of his duty to one of them: *Hesse v. Briant*, 6 De Gex, M. & G. 623, 2 Keener 858; *Baker v. Humphrey*, 101 U. S. 494. Acting for opposing litigants: *Klabunde v. Byron-Reed Co.*, (Nebr.) 98 N. W. 182.

<sup>6</sup>This rule seems to be settled by the English decisions, and is followed by some, but not by all, of the American cases: *Olson v. Lamb*, 56 Nebr. 104, 76 N. W. 433, 71 Am. St. Rep. 670; *Pacific R. R. v. Ketchum*, 101 U. S. 289 (purchase allowed).

<sup>7</sup>See *Gresley v. Mousley*, 3 De Gex, F. & J. 433; *Cheslyn v. Dalby*, 2 Younge & C. 170; *Kidd v. Williams*, 132 Ala. 140, 31 South. 458, 56 L. R. A. 879 (independent advice not necessary).

<sup>8</sup>*Tate v. Williamson*, L. R. 1 Eq. 528, 2 Ch. 55, H. & B. 337, Sh. 193 (a friend who acted as legal adviser): *Nesbit v. Lockman*, 34 N. Y. 167 (attorney's clerk); *Vallette v. Tedens*, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502 (abstractor of titles).

<sup>1</sup>*Hatch v. Hatch*, 9 Ves. 292; *Scott v. Freeland*, 7 Smedes & M. 409, 45

will by the ward in his guardian's favor is not viewed so strictly; the presumption against it may be overcome, and the will sustained.<sup>2</sup> The general doctrine of equity applies to the parties after the legal condition of guardianship has ended, and as long as the dependence on one side and influence on the other presumptively or in fact continue. This influence is presumed to last while the guardian's functions are to any extent still performed, while the property is still at all under his control, and until the accounts have been finally settled. It follows, therefore, that any conveyance, purchase, sale, contract, and especially gift, by which the guardian derives a benefit, made after the termination of the legal relation, but while the influence lasts, is presumed to be invalid and voidable. The burden rests heavily upon the guardian to prove all the circumstances of knowledge, free consent, good faith, absence of influence, which alone can overcome the presumption.<sup>3</sup> If the legal relation has ended, and all these circumstances of good faith, full knowledge, and free consent are clearly shown, a settlement, conveyance, contract, or even gift from the former ward to his recent guardian will be as valid and as effective as the same transactions between any other competent persons.<sup>4</sup> It is not essential that a *legal* guardianship should exist; the doctrine applies wherever the relation subsists in fact.<sup>5</sup>

**§ 962. Parent and Child.**—"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 parent, soon after the child has attained twenty-one. In such cases the

Am. Dec. 310 (laches); *Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490; see, however, *Boyer v. East*, 161 N. Y. 580, 56 N. E. 114, 76 Am. St. Rep. 290.

<sup>2</sup> *Daniel v. Hill*, 52 Ala. 430 (a very instructive case).

<sup>3</sup> *Hatch v. Hatch*, 9 Ves. 292; *Waller v. Armistead*, 2 Leigh 11, 21 Am. Dec. 594; *Gillett v. Wiley*, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587; *Ashton v. Thompson*, 32 Minn. 25, 41, 42, 18 N. W. 918, 2 Scott 703; *Say v. Barnes*, 4 Serg. & R. 112, 8 Am. Dec. 679.

<sup>4</sup> *Ralston v. Turpin*, 25 Fed. 7, 18, affirmed, 129 U. S. 663, 9 Sup. Ct. 420; *Bickerstaff v. Marlin*, 60 Miss. 509, 45 Am. Rep. 418.

<sup>5</sup> For example, wherever a young person has actually been brought up in the family and under the care of a relative or friend: *Revelt v. Harvey*, 1 Sim. & St. 502; *Allfrey v. Allfrey*, 1 Macn. & G. 87, 98, 1 Scott 394; *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108. *Guardian de son tort: Town of Thornton v. Gilman*, 67 N. H. 392, 39 Atl. 900.

court views the transaction with jealousy, and anxiously interposes its protection to guard the child from the exercise of parental influence."<sup>1</sup> "The law on this subject is well settled. A child makes a gift to a parent, and such a gift is good if it is not tainted by parental influence. A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts it lies on the parent maintaining the gift to disprove the exercise of parental influence, by showing that the child had independent advice, or in some other way. When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift; and the question to be determined is, whether there was a deliberate, unbiased intention on the part of the child to give to the parent."<sup>2</sup> Where the positions of the two parties are reversed, where the parent is aged, infirm, or otherwise in a condition of dependence upon his own child, and the child occupies a corresponding relation of authority, conveyances conferring benefits upon the child may be set aside. Cases of this kind plainly turn upon the exercise of actual undue influence, and not upon any presumption of invalidity; a gift from parent to child is certainly not presumed to be invalid.<sup>3</sup>

§ 963. **Other Relations.**—The equitable doctrine applies with strictness to executors and administrators who, in common with all trustees, are prohibited from purchasing the property of the estate when sold in course of administration, and from making any personal profits by their dealings with it.<sup>1</sup> The same general principle extends, with more or less force, to dealings between a physician and patient,<sup>2</sup> a spiritual adviser and penitent,<sup>3</sup> vendor and

<sup>1</sup> Baker v. Bradley, 7 De Gex, M. & G. 597.

<sup>2</sup> Wright v. Vanderplank, 8 De Gex, M. & G. 133, 146, per Turner, L. J.; Noble's Adm'r v. Moses, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175 (a very instructive opinion); Carter v. Tice, 120 Ill. 277, 11 N. E. 529; Ashton v. Thompson, 32 Minn. 25, 41, 42, 18 N. W. 918. The gift was upheld in Farrant v. Blanchford, 1 De Gex, J. & S. 107; Knox v. Singmaster, 75 Iowa 64, 39 N. W. 183, 3 Keener 813.

<sup>3</sup> Mulock v. Mulock, 31 N. J. Eq. 594; Yeakel v. McAtee, 156 Pa. St. 600, 27 Atl. 277; Burwell v. Burwell (Va.) 49 S. E. 68. The general doctrine of the text is applied to transactions between other near relations, as gifts to a brother from a dependent sister: Gillespie v. Holland, 40 Ark. 28, 48 Am. Rep. 1.

<sup>1</sup> Elting v. First Nat. Bank, 173 Ill. 368, 50 N. E. 1095. The majority of the American cases cited ante, under § 958, are of this character.

<sup>2</sup> Unruh v. Lukens, 166 Pa. St. 324, 31 Atl. 110.

<sup>3</sup> Allcard v. Skinner, 36 Ch. Div. 145; Morley v. Loughnan, [1893] 1 Ch. 736, 3 Keener 833 (actual rather than constructive undue influence); Pironi v. Corrigan, 47 N. J. Eq. 135, 20 Atl. 218; Connor v. Stanley, 72 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. 306 (spiritualist medium).

vendee of land,<sup>4</sup> husbands and wives, and persons occupying their position,<sup>5</sup> partners,<sup>6</sup> and indeed all persons who occupy a position of trust and confidence, of influence and dependence, in fact, although not perhaps in law.<sup>7</sup> There remain to be mentioned two other important relations which are partially fiduciary, and to which the principle applies with limitations,—that of surety and creditor and principal debtor, and that subsisting between promoters and directors or trustees of corporations and the corporation itself and the stockholders.<sup>8</sup> These subjects are more fully examined in a subsequent chapter.

§ 964. **Confirmation or Ratification.**—Where a party originally had a right of defense or of action to defeat or set aside a transaction on the ground of actual or constructive fraud, he *may* lose such remedial right by a subsequent confirmation, by acquiescence, and even by mere delay or laches. Wherever a confirmation would itself be subject to the same objections and disabilities as the original act, a transaction cannot be confirmed and made binding; for confirmation assumes some positive, distinct action or language, which, taken together with the original transaction, amounts to a valid and binding agreement. In general, contracts which are void from illegality cannot be ratified and confirmed; contracts which are merely voidable because contrary to good conscience or equity may be ratified, and thus established.<sup>1</sup> If the party origi-

<sup>4</sup> *Baker v. Monk*, 4 De Gex, J. & S. 388. Mortgagor and mortgagee: *Liskey v. Snyder*, (W. Va.) 49 S. E. 515; see post, § 1193.

<sup>5</sup> *Corley v. Lord Stafford*, 1 De Gex & J. 238; *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907, 3 Keener 401. Persons betrothed: *Russell v. Russell*, 129 Fed. 434. Persons cohabiting under a void marriage: *Coulson v. Allison*, 2 De Gex, F. & J. 521. Presumption against validity of conveyance by a man to his mistress: *Shipman v. Furniss*, 69 Ala. 555, 44 Am. Rep. 528. An important application of the principle is seen in the group of cases where one spouse receives a conveyance from the other on a parol agreement to reconvey, and is held to be a constructive trustee by virtue of the confidential relation; while in the absence of such relation, and of actual fraud on the grantee's part, the statute of frauds would generally prevent a trust from attaching to the property: See *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689, and other cases post, § 1056, end of note.

<sup>6</sup> *Bentley v. Craven*, 18 Beav. 75, H. & B. 530; *Colton v. Stanford*, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137.

<sup>7</sup> *Tate v. Williamson*, L. R. 1 Eq. 528, 2 Ch. 55, H. & B. 337, Sh. 193; *Wakeman v. Dodd*, 27 N. J. Eq. 564; *Allen v. Jackson*, 121 Ill. 567, 13 N. E. 840.

<sup>8</sup> See ante, § 881; post, § 1077; *New River Mineral Co. v. Seeley*, 120 Fed. 193; *Munson v. Syracuse, G. & C. R. Co.*, 103 N. Y. 58, 8 N. E. 355, H. & B. 531; *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101, 29 Atl. 303, 42 Am. St. Rep. 159, 25 L. R. A. 90; *Oliver v. Oliver* (Ga.) 45 S. E. 232.

<sup>1</sup> Thus contracts illegal because opposed to statute, or to public policy, or to good morals, cannot be ratified, because the ratification itself would be

nally possessing the remedial right has obtained full knowledge of all the material facts involved in the transaction, has become fully aware of its imperfection and of his own rights to impeach it, or ought, and might, with reasonable diligence, have become so aware, and all undue influence is wholly removed so that he can give a perfectly free consent, and he acts deliberately, and with the intention of ratifying the voidable transaction, then his confirmation is binding, and his remedial right, defensive or affirmative, is destroyed.<sup>2</sup> If, on the other hand, the original undue influence still remains, or if the act is simply a continuation of the former transaction, or if the party wrongly supposes that the original tract or transaction is binding, or if he has not full knowledge of all the material facts and of his own rights, no act of confirmation, however, formal, is effectual; the voidable nature of the transaction is unaltered.<sup>3</sup>

§ 965. **Acquiescence and Lapse of Time.**—A second mode by which the remedial right may be destroyed, and the transaction rendered unimpeachable, is acquiescence. The term “acquiescence” is sometimes used improperly. It differs from confirmation on the one side, and from mere delay on the other. While confirmation implies a deliberate act, intended to renew and ratify a transaction known to be voidable, 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. The theory of the doctrine is, that a party, having thus recognized a contract as existing, and having done something to carry it into effect and to obtain or claim its benefits, although perhaps only to a partial extent, and having thus taken his chances, cannot afterwards be suffered to repudiate the transaction and allege its voidable nature. It follows that *mere* delay, mere suffering time to elapse without doing anything, is not acquiescence, although it may be, and often is, strong evidence of an acquiescence; and it may be, and often is, a distinct ground for refusing equitable relief, either affirmative or defensive.<sup>1</sup> As ac-

equally opposed to statute, good morals, or public policy. Contracts obtained by actual fraud, by undue influence, by breach of fiduciary duty, and the like, may be confirmed, because *the parties alone are concerned*; the state or society has no special interest, as it has in those opposed to statute, public policy, or good morals.

<sup>2</sup> *Chesterfield v. Janssen*, 2 Ves. Sr. 125, 1 Atk. 314. See, also, § 916; *Cumberland Coal Co. v. Sherman*, 20 Md. 117.

<sup>3</sup> *Crowe v. Ballard*, 3 Brown Ch. 117, 2 Cox 253, 2 Scott 759.

<sup>1</sup> See *Duke of Leeds v. Amherst*, 2 Phill. Ch. 117, 123; *De Bussche v. Alt*, L. R. 8 Ch. Div. 286, 314. The suit was brought to set aside a sale made by

quiescence is thus a recognition of and consent to the contract or other transaction as existing, the requisities to its being effective as a bar are, knowledge or notice of the transaction itself, knowledge of the party's own rights, absence of all undue influence or restraint, and consequent freedom of action; a conscious intention to ratify the transaction, however, is not an essential element. When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally im-

an agent to himself in violation of his fiduciary duty. The lord justice said: "It still remains to be considered whether, short of such ratification or adoption, the plaintiff can be held to have by his conduct in any way precluded himself from taking the present proceedings. The term 'acquiescence,' which has been applied to his conduct, is one which was said by Lord Cottenham, in *Duke of Leeds v. Amherst*, supra, ought not to be used; in other words, it does not accurately express any known legal defense, but if used at all it must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act acquiesced in is in progress or only after it has been completed. If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in the case already cited, is in the proper sense of the term 'acquiescence,' and in that sense may be defined as acquiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed, without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events as a general rule, cannot be divested without accord and satisfaction, or release under seal. *Mere submission* to the injury, for any time short of the period limited by statute for the enforcement of the right of action, cannot take away such right, although under the name of *laches* it may afford a ground for refusing relief under some peculiar circumstances; and it is clear that even an express promise by the person injured, that he would not take any legal proceedings to redress the injury done to him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding." In pursuance of this principle so admirably explained, the doctrine of "acquiescence" properly belongs to and is hereinbefore discussed in connection with equitable estoppel, ante, §§ 816-821.

peachable, becomes unimpeachable in equity.<sup>2</sup> Even where there has been no act nor language properly amounting to an acquiescence, a mere delay, a mere suffering time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of actual and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands; laches are often a defense wholly independent of the statute of limitation. Promptness in asserting a remedial right against fraud is sometimes required; but no delay will prejudice a defrauded party as long as he was ignorant of the fraud. Each case involving the defense of delay or lapse of time must, to a great extent, depend upon its own circumstances.<sup>3</sup>

**§ 966. Third. Frauds against Third Persons Who are not Parties to the Transaction.**—As a general rule, in the cases which come within this group, and, strictly speaking, none others should belong to it, the transaction is not fraudulent as to the immediate parties,—the grantor and the grantee, and the like; at least, neither of them is permitted, as against the other, to set aside the conveyance, or to defeat the enforcement of the contract if it be executory. The transaction is of such a nature that it defrauds or invades the rights of third persons, who are not its immediate parties; and they alone are, in general, entitled to impeach it and to obtain affirmative relief against it.<sup>1</sup> The only cases to be considered under this division are secret bargains in fraud of compositions with creditors, transfers in fraud of creditors, and transfers in fraud of subsequent purchasers.

**§ 967. Secret Bargains in Fraud of Compositions with Creditors.**—Where a composition is made by a debtor with his creditors upon the basis of his payment to all who join in the transaction the same proportionate share of their claims, and of being therefore discharged by them from all further liability, a secret agreement by the debtor with one of these creditors, expressly or impliedly as a condition for the latter's joining in the composition, whereby the debtor pays or secures to the favored creditor a further sum of money or amount of property, or greater advantage than that received and shared alike by all the other creditors, is a fraud upon such other creditors, and is voidable. The agreement, if executory, cannot be enforced against the debtor in equity or at law; the se-

<sup>2</sup>Wright v. Vanderplank, 8 De Gex, M. & G. 133; Allcard v. Skinner, 36 Ch. Div. 145, 173, 187; Michoud v. Girod, 4 How. 503, 561, Sh. 181 (relief after lapse of nearly thirty years); Jennings v. Broughton, 5 De Gex, M. & G. 126, 140; Denton v. McNeil, L. R. 2 Eq. 352. See, also, ante, § 881.

<sup>3</sup>See ante, § 917, §§ 418, 419.

<sup>1</sup>This is the general rule; there is, however, one important exception, mentioned in the next paragraph.

curity may be set aside by a court of equity, and the amount paid by the debtor in pursuance of the contract may be recovered back by him. The relief, defensive or affirmative, thus given to the debtor does not rest upon any consideration of favor due and shown to him, but wholly upon motives of policy, to protect the rights of the other creditors and to secure them against such frauds.<sup>1</sup> . . .

§ 968. **Conveyances in Fraud of Creditors.**—Dealings by a person with his property with intent to defraud his creditors were voidable at the common law; but the existing rules on the subject both in England and in this country are founded upon statute.<sup>1</sup> The operative statute in England, which is also the basis of all legislation and judicial decision in the United States, is the celebrated act 13 Eliz., c. 5. It enacts that all conveyances, etc., of any lands, goods, or chattels, had or made of purpose to delay or defraud creditors and others of their actions or debts, shall be taken only as against such persons and their representatives as shall or might be so delayed or defrauded, to be utterly void; provided that the act shall not extend to any conveyance or assurance made on good consideration and bona fide to a person not having notice of such fraud.<sup>2</sup> I purpose merely to state, as far as possible, the general and fundamental principles and doctrines which have been established in the judicial construction of this legislation, and the most important classes of cases to which it is applied.

§ 969. **The Consideration.**—It should be observed that the statute, by its generality of expression, being without any such limitation, applies to both existing and subsequent creditors, and to both conveyances made upon a valuable consideration and those without any consideration. It does not declare voluntary conveyances void; it only pronounces *fraudulent* conveyances void, whether they are voluntary or made upon a consideration. The validity of a conveyance, as against creditors, is made in the proviso to depend "upon its being upon a good consideration and bona fide;" either is not sufficient; consideration without good faith plainly does not displace the operation of the statute; and good faith without con-

<sup>1</sup>In *re Lenzberg*, L. R. 7 Ch. Div. 650; *Solinger v. Earle*, 82 N. Y. 393, H. & B. 351; *Miller v. Sauerbier*, 30 N. J. Eq. 71.

<sup>2</sup>The earlier statutes were 50 Edw. III., c. 6; 3 Hen. VII., c. 4.

<sup>3</sup>All the substantial provisions of this statute have been adopted by the American legislation; still the statutes in many or most of the states employ quite different language, and contain important modifications and additions. Some of them insert a general clause, in terms applying to all the other provisions, to the effect that the fraudulent intent shall always be a question of fact; in some this clause is confined to a portion only of the provisions; while in some it is entirely omitted. There is a great diversity of external form, at least, in the American legislation on this subject.

sideration does not necessarily protect a conveyance. A deed made upon a valuable consideration, but not bona fide,—that is, with a fraudulent intent,—is void against creditors of the grantor as though it were voluntary.<sup>1</sup> Although the statute speaks of a “good consideration,” yet it is fully settled that a *valuable* consideration is intended,—a consideration pecuniary in contemplation of law, of which kind marriage is an instance. The “good” consideration of love and affection does not meet the demands of the statute, and does not of itself validate a conveyance.<sup>2</sup> Voluntary conveyances are perfectly valid and binding as between the immediate parties and all persons claiming under them in privity of estate;<sup>3</sup> but they may be void as against creditors, and will be void so far as they delay or defraud creditors. A voluntary conveyance may be a strong indication of a fraudulent intent, and may sometimes raise a presumption of such intent; still the fact that a conveyance is voluntary, under the general course of legislation and decision in this country, is material only in connection with the fraudulent intent, only as it shows or tends to show the existence of such intent. A voluntary conveyance *as such* is not necessarily void even against existing creditors.

§ 970. **The Fraudulent Intent.**—The essential element required by the statute, in order to render a transfer voidable, is the fraudulent intent. There *must* be an intent to hinder, delay, or defraud creditors. All other considerations are subordinate and ancillary to the establishment of this indispensable feature. The discussion which has arisen under the statute, and the special rules which have been formulated, are chiefly concerned with the question, when, how, and by what means may this intent be sustained?<sup>1</sup> There

<sup>1</sup> For example, a conveyance made by a defendant, for full value, but with intent to defraud the plaintiff by placing the property beyond the reach of an expected judgment: *Robinson v. Holt*, 39 N. H. 557; 75 Am. Dec. 233; *Gragg v. Martin*, 12 Allen 498, 90 Am. Dec. 164.

<sup>2</sup> *Copis v. Middleton*, 2 Madd. 410, 430, 2 Scott 738; *Taylor v. Jones*, 2 Atk. 600, and all the cases arising out of voluntary conveyances, are authorities.

<sup>3</sup> If they are impeachable by such successors as assignees in bankruptcy, insolvency, and others in like position, it is because such persons are representatives of creditors more than of the parties from whom they immediately derive title.

<sup>1</sup> At an early day the intent was inferred as a *conclusive* presumption of law from many particular circumstances; as, for example, from the fact that the vendor retained possession of the property conveyed. Later, the tendency has been to abandon the notion of conclusive presumptions, and to infer the intent as a *rebuttable* presumption of law from a variety of circumstances; and this doctrine still prevails in England and in many of the states, at least in its application to some circumstances. Finally, in consequence of a statutory provision, the view has been adopted *theoretically* in several of the

are three general modes in which the intent might possibly be ascertained. Certain circumstances appearing, it might (1) be inferred therefrom as a conclusive presumption of law, or (2) as a *prima facie* or rebuttable presumption of law, or (3) as an argumentative conclusion of fact. With respect to these modes, the intent may be *express* or *actual*, which simply means that it is proved by means of ordinary evidence, either direct or circumstantial, tending to show its existence, or it may be *implied* or inferred as a presumption from certain circumstances connected with or forming a part of the transaction.<sup>2</sup> In relation to the mode of ascertaining the fraudulent intent, when, how, and from what it may be inferred, there is a great diversity and even conflict of judicial opinion, and to some extent antagonistic rules are settled in different states. Any attempt to reconcile this discrepancy would be unavailing. I shall merely formulate those general doctrines which are sustained by the consent of the highest authority, as well as by principle, and which constitute a part of the equity jurisprudence; and it will be the most convenient to state them in their connection with and relations to the most important classes of cases which occur in the actual transactions of men.

§ 971. **Mode of Ascertaining the Intent.**—In the first place, where a conveyance is made upon a valuable consideration, and is alleged to be fraudulent against the grantor's creditors, an actual and express intent to hinder, delay, or defraud is necessary to be proved. The reason for this is obvious. The transaction has one of the requisites prescribed by the statute; the voluntary character is wanting from which an inference of fraudulent intent *might* arise. On the contrary, the other requisite—the good faith—would rather be presumed. It is necessary, therefore, to overcome this presumption by *proving* the absence of good faith. In other words, the actual and express fraudulent intent must be proved by evidence tending to show its existence, and from which it legitimately results as a conclusion of fact drawn by a court or jury without the aid of legal presumptions. I describe this view as prevailing *theoretically*, because it will be found that the courts of those states, in the decision of cases, do practically have recourse to *prima facie* presumptions in determining the existence of the fraudulent intent.

<sup>2</sup> Among these circumstances, the most common and important are the insolvency of the grantor, or the extent of his indebtedness compared with the amount of his property, especially where the conveyance is voluntary, and the fact that the grantor or vendor retains possession of the property conveyed or sold. This last circumstance applies equally where the conveyance is voluntary or upon a valuable consideration. It seems impossible to decide all cases arising under the statute without having recourse, practically if not avowedly, to the doctrine of legal presumptions.

of any legal presumptions. In the second place, where a conveyance is voluntary, and is alleged to be fraudulent as against *existing* creditors, while an express actual intent to defraud may be present, it is not necessary. The fraudulent intent which will avoid the conveyance as against existing creditors may be inferred from circumstances connected with the transaction, such as the grantor's insolvency, great indebtedness compared with the amount of his property, and the like; complete insolvency, however, is clearly not a *requisite*. In this case of a voluntary deed and existing creditors, the decisions show unmistakably that the intent is more easily inferred than in any other.<sup>1</sup> In the third place, where a conveyance is voluntary, and is alleged to be fraudulent as against *subsequent* creditors, the intent to defeat or defraud is not so easily inferred as in the case of existing creditors; stronger evidence is then required to establish the intent. "If a voluntary conveyance or deed of gift be impeached by subsequent creditors whose debts had not been contracted at its date, then it is necessary to show either that the grantor made the conveyance with express intent to delay, hinder, or defraud creditors, or that after the conveyance the grantor had no sufficient means or reasonable expectation of being able to pay his then existing debts,—that is to say, was reduced to a state of insolvency,—in which case the law infers that the conveyance was made with intent to delay, hinder, or defraud creditors, and is therefore fraudulent and void."<sup>2</sup> This proposition is clearly correct, but it contains one *apparent* limitation which hardly seems to be sustained by the weight of American authority: it is not essential that the voluntary grantor should be "reduced to a state of insolvency," or in other words, that he should be left absolutely unable to pay his then existing debts. The following seems to be the true rule: If the amount of property after the voluntary conveyance was so small in comparison with the existing indebtedness that the grantor could not reasonably have contemplated his ability to perform his obligations, or in other words, he could reasonably have contemplated his inability to perform them, then an intent to defeat his creditors generally will be inferred, and the conveyance will be fraudulent against subsequent as well as against existing creditors.<sup>3</sup> Having thus ascertained the

<sup>1</sup> *Spirett v. Willows*, 3 De Gex, J. & S. 293, 302; *Freeman v. Pope*, L. R. 5 Ch. 538, 543, 544; *Skarf v. Soulby*, 1 Macn. & G. 364, 374. See post, § 972.

<sup>2</sup> *Spirett v. Willows*, 3 De Gex, J. & S. 293, 302, 303; *Kent v. Riley*, L. R. 14 Eq. 190, 194; *Carr v. Breese*, 81 N. Y. 584, 588, 590, 591. See post, § 973 and notes.

<sup>3</sup> *Carr v. Breese*, 81 N. Y. 584, 588, 590; *Van Wyck v. Seward*, 6 Paige 62; *Dunlap v. Hawkins*, 59 N. Y. 342. See post, § 973.

general rules concerning the manner of establishing or inferring the fraudulent intent, I shall apply these rules very briefly to the two classes of creditors, existing and subsequent.

§ 972. **Existing Creditors.**—Conveyances made upon a valuable consideration are not presumed to be fraudulent against existing creditors, and the extent of the grantor's indebtedness is wholly immaterial.<sup>1</sup> Conveyances upon a valuable and even full consideration are void against existing and subsequent creditors, if made with an actual express intent to hinder, delay, or defraud them; but the intent cannot be inferred by presumptions, and must be proved by evidence legitimately tending to show its existence. Each case must necessarily depend upon its own circumstances.<sup>2</sup> A voluntary conveyance, gift, or transfer, without any valuable consideration, creates a prima facie presumption of an intent to defraud existing creditors, unless statutes have declared that no such presumption ever arises, and that the intent is always a conclusion of fact. This presumption may be overcome. The mere fact that a grantor is indebted at the time he makes a voluntary conveyance does not necessarily render such conveyance fraudulent against the existing creditors.<sup>3</sup> On the other hand, since the prima facie presumption arises in such case, it is never necessary to show by affirmative evidence an actual express intent to defraud, in order to render a voluntary conveyance fraudulent and void as against existing creditors. The intent will be inferred when the grantor was or is left insolvent, or if the conveyance deprives him of the means of paying his debts, or if he was so largely indebted that it would be reasonable to suppose that he contemplated his inability to pay his debts, or, as many cases hold, if he was so largely indebted that the conveyance would materially interfere with his ability to meet his obligations.<sup>4</sup>

§ 973. **Subsequent Creditors.**—Where a person, whether indebted or not, makes a conveyance, either upon a valuable consideration or voluntary, with the express and actual intent of defrauding future creditors, it is, of course, fraudulent and void as against such future creditors. For this reason, if a person, in contemplation of a future indebtedness which he expects to accrue, makes a conveyance for the purpose of placing his property beyond the liability for such anticipated indebtedness, the transfer is fraudulent as against the future creditor when his claim arises.<sup>1</sup> A voluntary

<sup>1</sup> *Kevan v. Crawford*, L. R. 6 Ch. Div. 29.

<sup>2</sup> *Blumer v. Hunter*, L. R. 8 Eq. 46. See ante, § 969.

<sup>3</sup> *Dunlap v. Hawkins*, 59 N. Y. 342; *Sexton v. Wheaton*, 8 Wheat. 229.

<sup>4</sup> *Smith v. Cherrill*, L. R. 4 Eq. 390, 395; *French v. French*, 6 De Gex, M. & G. 95; *Crawford v. Kirksey*, 55 Ala. 282, 28 Am. Rep. 704.

<sup>5</sup> *Carpenter v. Carpenter*, 25 N. J. Eq. 194.

conveyance by one who is at the time free from debt is not presumptively fraudulent and void as against subsequent creditors; there being no prima facie presumption against its validity, the burden of proof rests upon the subsequent creditor who impeaches it, of showing either an actual fraudulent intent, or circumstances from which such intent may be inferred.<sup>2</sup> If a person, not at the time indebted, being about to engage in a new and hazardous business, makes a voluntary settlement or conveyance, whereby he places his property or a considerable portion of it beyond the reach of his creditors, such settlement or conveyance is fraudulent and void as against the subsequent creditors of the grantor.<sup>3</sup> Finally, it may be laid down as a doctrine generally accepted, that if a person, being at the time indebted, makes a voluntary conveyance of his property to such an extent that he is left actually insolvent, or wholly unable to pay his existing debts, or that it is reasonable to suppose he contemplated his consequent inability to pay, or even that it is reasonably doubtful whether he is able to meet his obligations, then the conveyance will be fraudulent and void as against his subsequent as well as his existing creditors. The inference of a fraudulent intent must always depend upon there being an amount of property remaining after the voluntary conveyance, reasonably sufficient to defray all of the grantor's existing liabilities; and each case must therefore stand upon its own particular circumstances.<sup>4</sup> As a direct result from this doctrine, the rule has been well established that a post-nuptial settlement upon a wife or children, even when the settlor is entirely free from debt, must be reasonable in its amount and not disproportioned to his whole property. If the settlement is, as originally it must have been, in the form of property conveyed to trustees for the wife's separate use, courts of equity will not aid her in enforcing it when

<sup>2</sup> Carhart v. Harshaw, 45 Wis. 340, 30 Am. Rep. 752.

<sup>3</sup> Mackay v. Douglas, L. R. 14 Eq. 106, 118-121; Mullen v. Wilson, 44 Pa. St. 413, 84 Am. Dec. 461.

<sup>4</sup> Spirett v. Willows, 3 De Gex, J. & S. 293; Dunlap v. Hawkins, 59 N. Y. 342; Rudy v. Austin, 56 Ark. 73, 35 Am. St. Rep. 85, 19 S. W. 111. If an express actual intent to hinder or defraud creditors generally is shown, subsequent as well as existing creditors are entitled to impeach the conveyance: Cramer v. Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594.

On the other hand, if there is no actual intent to defraud, the mere fact that a voluntary conveyance may be presumptively fraudulent against existing creditors does not render it fraudulent as against subsequent creditors. While a prima facie presumption against the validity of the voluntary deed may arise in favor of the grantor's existing creditors, no such presumption exists on behalf of his subsequent creditors. These latter cannot impeach such a transfer merely because the former can: Nicholas v. Ward, 1 Head 323, 73 Am. Dec. 177.

unreasonably large. If the legal title is conveyed directly to her, there is still danger lest the husband should obtain credit upon his apparent or supposed ownership.<sup>5</sup>

§ 974. **Conveyances in Fraud of Subsequent Purchasers.**—By the statute 27 Eliz., c. 4, made perpetual by 39 Eliz., c. 18, sec. 31, all conveyances of hereditaments for the intent and purpose to deceive purchasers are made void as against them; and the same provisions have been substantially enacted in the United States. The true meaning and interpretation of this statute were for a considerable period of time unsettled by the English courts. The doubt was, whether it extended to all voluntary conveyances, or whether it avoided only those which are made with a fraudulent intent, and therefore furnished protection only to subsequent bona fide purchasers without notice. The rule was finally settled, and still prevails in England, that the statute applies to and avoids all voluntary conveyances as against subsequent purchasers for a valuable consideration, even though such conveyances were made in good faith without any actual fraudulent intent, and though the subsequent purchasers for value had notice thereof.<sup>1</sup> The same interpretation of the statute and the same general doctrine have been accepted by a portion of the American decisions.<sup>2</sup> The current of American authority, however, is opposed to this broad construction, and limits the operation of the statute to prior voluntary conveyances made with a fraudulent intent, and its protection to subsequent purchasers for a valuable consideration and without notice. The doctrine which may properly be called American is as follows: Conveyances are not void under the statute merely because they are voluntary, but because they are fraudulent, and the fraudulent intent may be inferred in the same manner and under the same circumstances as against subsequent creditors. A voluntary gift of property is valid as against subsequent purchasers and all other persons, unless it was fraudulent when executed; and a subsequent conveyance for value is evidence of fraud committed in the former voluntary conveyance, but not conclusive evidence. It results that a voluntary gift made when the grantor is not indebted, in good faith, and without intent to defraud subsequent creditors or purchasers, is valid as against a subsequent purchaser for a valuable

<sup>5</sup> *Carr v. Breese*, 81 N. Y. 584, 591.

<sup>1</sup> The English theory is, that the statute conclusively presumes a fraudulent intent when the prior conveyance is voluntary: *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 86; *Bayspoole v. Collins*, L. R. 6 Ch. 228, 232. The subsequent purchaser must be one for a real valuable consideration, and bona fide, although notice does not destroy his rights under the statute.

<sup>2</sup> *Sterry v. Arden*, 1 Johns. Ch. 261, 270, 12 Johns. 536, 1 Scott 502.

consideration with notice.<sup>3</sup> What constitutes a purchase for value without notice, and what is a valuable consideration, in cases arising under this statute, are determined by the rules contained in the preceding section upon that subject. In order that the statute may apply and uphold a subsequent conveyance for value against a prior voluntary conveyance, it is necessary that both the conveyances should come from the same grantor. An heir or devisee cannot, therefore, by a conveyance for value, defeat a voluntary settlement made by his ancestor or testator.<sup>4</sup> What creditors, purchasers, and their representatives are entitled to equitable relief, and what remedies may be obtained by them, are questions which belong to subsequent chapters treating of remedies.

<sup>3</sup> *Beal v. Warren*, 2 Gray 447; *Chaffin v. Kimball*, 23 Ill. 33.

<sup>4</sup> *Parker v. Carter*, 4 Hare 400, 409; *Sterry v. Arden*, 1 Johns. Ch. 261, 1 Scott 502.

## PART THIRD.

### THE EQUITABLE ESTATES, INTERESTS, AND PRIMARY RIGHTS RECOGNIZED AND PROTECTED BY THE EQUITY JURISPRUDENCE.

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#### PRELIMINARY PARAGRAPH.

§ 975. The general nature of equitable estates and interests, as distinguished on the one side from legal estates, and on the other from mere equitable remedial rights or "equities," has been sufficiently described.<sup>1</sup> In contemplation of courts of equity, equitable estates, according to their various degrees, are as truly property or ownership as legal estates are property in contemplation of courts of law. In fact, the entire dealing of equity with the subject of equitable estates, and the fundamental distinctions between equitable and legal conceptions and modes, are based upon the notion that equitable estates are in the truest sense property, and not mere rights of action,—not mere rights to obtain certain equitable remedies. Even when the equitable estate is the result of some positive wrongdoing, when the legal estate has been vested in a third person by fraud, undue influence, breach of fiduciary duty, and the like, so that the original owner can only regain the title by means of a cancellation, he is nevertheless, in contemplation of equity, the equitable and true owner; his equitable estate in the subject-matter is a true property, capable of being devised and otherwise dealt with.<sup>2</sup> In short, the equitable estate is often regarded by a court of equity as the real, beneficial, substantial ownership, while the corresponding legal estate is a mere form and shadow. . . .

<sup>1</sup> See §§ 146-149.

<sup>2</sup> *Stump v. Gaby*, 2 De Gex, M. & G. 623, 630; *Gresley v. Mousley*, 4 De Gex & J. 78, 90, 92, 93.

## CHAPTER I.

### TRUSTS.

#### SECTION I.

#### ORIGIN OF USES AND TRUSTS.

##### ANALYSIS.

- § 976. The testament in the Roman law.
- § 977. Fidei-commissa in the Roman law.
- § 978. Origin of uses.
- § 979. The use at law.
- § 980. The use in equity.
- § 981. Resulting uses; equitable theory of consideration.
- § 982. Double nature of property in land, the use and the seisin.
- § 983. The "statute of uses."
- § 984. Kinds of uses not embraced within the statute.
- § 985. A use upon a use not executed by the statute.
- § 986. Trusts after the statute; effect of the statute in the American states.

§ 976. **The Roman Law Testament.**—To explain the nature and extent of the equitable jurisdiction and jurisprudence with respect to trusts, some historical account of trusts themselves, of their introduction into the law of England under the name of "uses," and of the enormous changes which they made in the primitive conceptions of property in land, is necessary. The *elementary* notion of trusts, like so many other doctrines of equity, was borrowed from the Roman law. The Roman testament was quite unlike the last will of our own law. Its essential feature consisted in the naming or appointing some person or persons as heir, upon whom the entire inheritance of the testator devolved. This inheritance included not only the property of the deceased, but also his liabilities. The heir thus became the "universal successor" to the testator, acquiring title to all his assets, and becoming liable for all his debts. The fundamental conception was, that the legal condition of the deceased, consisting both of rights and liabilities, was prolonged and imposed upon the heir; that death made no real break in the continuity of the testator's legal personality. Partly from rules of the ancient law, and partly from prohibitory statutes, the Roman citizen was much restricted with respect to the persons whom he

might appoint as his testamentary heir. He could not give his inheritance to an alien or peregrinus (i. e., one not strictly a citizen), nor to a person prescribed, nor to a posthumous child not belonging to his own family, nor, with certain exceptions, to a woman.<sup>1</sup> To evade these restrictions, the method was contrived, during the latter period of the republic, of appointing a qualified person as heir, upon whom the inheritance would devolve according to legal rules, and of accompanying the appointment by a direction or request that this heir would, as soon as he obtained the inheritance, transfer it to another specified person who was the real object of the testator's bounty, and who, although prohibited from being made heir, was not prohibited from receiving a transfer of property from a living person by way of gift. At first, the fulfillment of the testator's direction was left wholly to the heir's sense of honor, but in process of time the claim of the beneficiary was recognized and enforced by a magistrate.<sup>2</sup>

§ 977. **Fidei-commissa.**—The inheritance thus given to the appointed heir, in trust for another person, was termed *fidei-commissum*, the heir or trustee the *fiduciarius*, and the beneficiary the *fidei-commissarius*. As the heir trustee, although he might surrender the whole estate to the beneficiary, would still remain legally liable for all the debts of the deceased, since a transfer of the inheritance *inter vivos* would not transfer the liabilities, he was accustomed to take from the beneficiary a contract of indemnity. To obviate the necessity of such a contract, "during the reign of Nero (A. D. 62) a statute known as the *senatus consultum Trebellianum* provided that all actions which might by law be brought by or against the heir [trustee] should be permitted for or against the beneficiary. After this the praetor began to give equitable actions for or against the beneficiary as if he were the heir."<sup>1</sup> By this legislation, the equitable estate of the beneficiary was fully established and protected. Although it is plain that the conception of a "use" was borrowed from this *fidei-commissum* of the Roman law, and that the English chancellor followed in the footsteps of the Roman magistrate, yet beyond this mere elementary notion or suggestion there is little resemblance between the two species of ownership. Their essential differences are as marked as their superficial similarity; and it is a grave error to represent the entire equity jurisprudence concerning uses and trusts as derived from the Roman Law.

<sup>1</sup> Concerning the Roman testament, see *Just. Inst.*, b. 2, tit. 10, secs. 1-14; tit. 13, secs. 1-7; tit. 14, secs. 1-6; *Sandar's Trans.*, pp. 245-280.

<sup>2</sup> *Just. Inst.*, b. 2, tit. 23, sec. 1; *Sandar's Trans.*, pp. 337, 338; *Gaius's Inst.*, b. 2, secs. 246-259.

<sup>3</sup> *Just. Inst.*, b. 2, tit. 23, sec. 4.

§ 978. **Origin of Uses.**—Uses, in the ordinary meaning of the term, as designating those which are passive, seem to have been invented during the latter part of the reign of Edward III.<sup>1</sup> Like the Roman *fidei-commissa*, they were designed to evade the law; but, unlike them, they were resorted to at first for mere purposes of fraud,—by the clergy to defraud the statutes of mortmain, and by the laity to defraud creditors or feudal superiors. Being free from many heavy feudal burdens, uses grew rapidly into favor, and it is said that during the reign of Henry V. the greater part of the land in England was held in this manner.<sup>2</sup> At the very outset these conveyances to use were made for the benefit of third persons. This mode having been established, conveyances were made for the benefit of the original owner, the feoffor. Thus A, being seised in fee, would convey the land by a legal feoffment to B to the use of himself, A. In this manner the owner in fee would convert his legal estate, which was subject to all the feudal burdens and common-law liabilities, into an equitable estate unknown to the common law, which was freed from these burdens and restrictions, which could be devised by will and aliened without livery of seisin, and which, under the doctrines subsequently established by the court of chancery, gave him all the dominion, possession, rights, and powers belonging to the legal estate.<sup>3</sup>

§ 979. **The Use at Law.**—For a while the cestui que use had no means of redress in any court. The law courts, as a necessary consequence of common-law doctrines, recognized no other estate than the legal one vested in the feoffee. If the cestui que use had any legal right at all, it was neither a *jus ad rem* nor a *jus in re*, and so there was no common-law form of real action by which he could recover possession of or enforce any claim upon the land itself. His only *possible* remedy would be an action for damages, upon contract express or implied, against the feoffee for the latter's violation of the trust.<sup>1</sup> Even this action was not generally maintainable upon common-law principles, since there was no *privity* between the feof-

<sup>1</sup> 1 Spence's Eq. Jur. 439-442.

<sup>2</sup> 1 Spence's Eq. Jur. 439-442, 442-444.

<sup>3</sup> 1 Spence's Eq. Jur. 439-444, 447-449.

<sup>4</sup> All the common-law actions for the recovery of land, or for the maintenance of any interest therein, were based upon the assumption that the plaintiff either had some *property* absolute or qualified in the land (*jus ad rem*), or that he had a right to some particular use of land belonging to another,—an easement or servitude (*jus in re*). As the interest of the cestui que use was neither of these, he could enforce it by none of the common-law *real* actions, and was therefore shut up to actions *ex contractu* for damages; but, as I show, even such a personal action could only be maintained by him under one special state of facts.

fee and the cestui que use when the latter was a third person; whatever promise the feoffee had made, whatever legal obligation he had incurred, was to the feoffor, and not to the cestui que use.<sup>2</sup> It was formally decided in the fourth year of Edward IV. that the common-law courts had no jurisdiction over the use.<sup>3</sup>

§ 980. **The Use in Equity.**—There being no common-law actions to which resort could be had, the rights of the cestui que use were for a considerable time purely moral, and were protected only through the authority of the clergy, acting as confessors, upon the conscience of those who held the legal title of land for the use of others.<sup>1</sup> No traces of applications to the court of chancery have been found in the early records prior to Henry V., but during his reign the court began to entertain such suits and to decree relief. In the reigns of Henry VI. and of Edward IV. the chancery jurisdiction was fully established, and was also recognized by the courts of law. In other words, the law courts, while refusing themselves to protect the estates of cestui que user, admitted the fact that such estates existed and were protected by the court of chancery.<sup>2</sup> The passive or permanent use as established in equity is thus described by Bacon when it is created in favor of the feoffor himself, and the description would apply to the case where it is created for the benefit of a third person by a slight change of language. He says: "The use consisted of three parts: 1. That the feoffee (trustee) would suffer the feoffor (cestui que use) to receive the profits; 2. That the feoffee, upon request of the feoffor (cestui que use), would execute (i. e., convey) the estates to the feoffor (cestui que use), or his heirs, or to any other by his directions; 3. That if the feoffee were disseised, and so the feoffor (cestui que use) disturbed, the feoffee would re-enter or bring an action to recover the possession."<sup>3</sup>

<sup>1</sup>There are in the early records some traces of such actions brought in the common-law courts; but I presume it will be found that they are all confined to cases where the use was declared for the benefit of the feoffor himself, where A conveyed to B to the use of A. In such a case alone would there be any *legal* liability of the feoffee to the cestui que use. Whenever A, upon a consideration moving from B, promises B to do something for the benefit of C, the English courts have uniformly maintained the rule that C can have no action on the contract against A, because there is no privity between them. The modern rule has been settled otherwise in most of the American states.

<sup>1</sup> 1 Spence's Eq. Jur. 445, 446.

<sup>2</sup>This authority would be especially exerted where lands were conveyed to the use of religious corporations or persons.

<sup>3</sup> 1 Spence's Eq. Jur. 445, 446.

<sup>4</sup> Bacon's Reading on Uses, 9.

§ 981. **Resulting Uses—Equitable Theory of Consideration.**—In addition to these express uses created by the intentional words of parties, courts of equity soon invented another class, consisting of several different species, but all depending upon the same fundamental principle, and to which the names “implied,” “resulting,” and “constructive” have been given. The underlying principle upon which all these species were based is the equitable doctrine concerning consideration. This theory of consideration, adopted and promulgated by the chancellors, is one of the most just, most productive, and most beneficial conceptions of equity jurisprudence. It accomplished more, perhaps, than any other single doctrine in overthrowing the arbitrary dogmas of the common law concerning real property, and in building up the distinctive system of equitable estates and ownership. It is certainly very remarkable that the early chancellors, in the very infancy of equity jurisprudence, should formulate a principle so admirably comprehensive and wise, that it has been sufficient, in its subsequent development, to meet all the wants of an advancing civilization, and all the requirements of modern society. The common-law notions of title and ownership rested mainly upon the observance of external forms. Equity first introduced the principle that in all the transactions of men concerning land—their transfers and bargains—the consideration is the essential fact which determines the real beneficial ownership, wherever the legal title may be vested. The consideration draws to it the equitable right of property; the person from whom the consideration actually comes, under whatever form or appearance, is the true and beneficial owner. This grand principle extends not only to dealings which are intentional and rightful, but to those which are fraudulent, or in any manner wrongful or unconscientious. When once introduced, it was easily carried through all those branches of equity jurisprudence which relate to property, real or personal, and it underlies all the modern doctrines of resulting and constructive trusts, and all the remedies by which the beneficial owner is enabled to follow his equitable property in the hands of third persons. In its origin, the principle was applied to valuable or pecuniary consideration, but it was soon extended, with all of its legitimate results, to the good consideration of blood or love and affection between near relatives of the same family.<sup>1</sup> The

<sup>1</sup> It thus appears that the special rules which regulate resulting trusts from the payment of the purchase price between parent and child, etc., are not, as they have been regarded by some writers, exceptions to the general doctrine; they are the necessary consequences of the one universal principle which regards valuable consideration between strangers, and good consideration

theory as to consideration operated in the development of uses in the following manner: Prior to the statute of uses in the reign of Henry VIII., a gift of land to a person and his heirs accompanied by livery of seisin—that is, a transfer by feoffment—was effectual in law to convey the entire estate without any consideration. The law did not require a consideration, and moreover, if a deed or charter of feoffment was delivered, its seal raised a conclusive presumption of a consideration.<sup>2</sup> Equity broke through this doctrine by means of its principle concerning consideration. It established the rule that if a conveyance of the fee was made without any use being declared, and without any consideration, although the legal title passed to the feoffee, a use ipso facto arose and resulted in favor of the feoffor, so that, having parted with the legal estate, he remained clothed with all the equitable interests, rights, and authority which the court of chancery gave to the cestui que use; the equitable estate in fee vested in him.<sup>3</sup> This rule, however, did not apply to conveyances between parent and child, and other near family relatives, since the “good” consideration of blood or marriage relationship operated between such persons, in the same manner as valuable consideration between strangers, to transfer the whole estate, legal and equitable, free from any resulting use.<sup>4</sup> As a corollary to the foregoing rule, it was further settled that whenever an owner conveyed land to a feoffee upon some particular use declared in favor of a third person, so much of the use as had not been disposed of resulted back to himself. In other words, if the use declared in favor of the third person did not, for any reason, equal in extent and exhaust the legal estate given to or held by the feoffee, then a use for the residue or surplus of such estate resulted to the feoffor.<sup>5</sup> Carrying out the same principle of consideration in cases of *purchase*, equity also established the doctrine, that where no declaration of use was made so as to control, a use arose in favor of the person from whom the consideration came, whatever position he might occupy with respect to the legal title. In pursuance of this doctrine, where a purchase was made by one person in the name of another, the party receiving the legal title held it for the use of the one

between members of the same family, as the sources of equitable rights of ownership. A beautiful consistency runs through all the rules of equity concerning resulting trusts.

<sup>2</sup> 1 Spence's Eq. Jur. 449, 450.

<sup>3</sup> 1 Spence's Eq. Jur. 450, 453.

<sup>4</sup> 1 Spence's Eq. Jur. 450.

<sup>5</sup> 1 Spence's Eq. Jur. 451-453. This particular rule applied to every condition of circumstances, both where the use in favor of the third person *wholly* failed, for any reason, to be operative, and where it *partially* failed to exhaust the estate held by the feoffee.

who advanced or paid the price. Here, also, an apparent, but not a real, exception arose from the fact that good consideration of blood and marriage operated between near relatives in the same manner as a money consideration between strangers. In case of a purchase by a parent in the name of his child, no use was held to result for the benefit of the parent paying the price, but the purchase was presumptively regarded as an advancement.<sup>6</sup> As a second illustration of the same general doctrine, whenever an owner agreed for a valuable consideration to sell his estate, although there was no conveyance, and there were no words of inheritance in the contract, equity declared that a use was created in favor of the vendee, by means of the consideration, and that the vendor held the legal title as his trustee. The same rule was extended to cases between near relatives, where the consideration was that of marriage or blood. If a person, on consideration of marriage or blood, covenanted to settle an estate on an intended husband or wife, or on his children, or other nearest blood relatives, equity held that a use was thereby created in favor of the husband, wife, children, or relatives, and treated the covenantor as a trustee for their benefit.<sup>7</sup> Finally, the principle of consideration was extended by analogy to cases of fraud, actual or constructive, accident, and mistake.<sup>8</sup> This last application of the doctrine became, in time, the most efficient means in the hands of courts of equity for working substantial justice in disregard of legal forms. Whenever one person, through mistake or fraud, or in violation of fiduciary relations, obtained the legal title and apparent ownership of property which in justice and good conscience belonged to another, such property was immediately impressed with a use in favor of the latter equitable owner.<sup>9</sup>

**§ 982. Double Nature of Property in Land—The Use and the Seisin.**—From these doctrines concerning express uses, and especially concerning those implied from the acts or omissions of parties, it appears that equity at an early day introduced the notion of a *use* connected with and forming a part of *every* ownership of land. The very conception of property in land was thus changed from its primitive unity and simplicity, and it was made to involve, as an essential element, the notion of the use in connection with the mere legal proprietorship and seisin. According to this theory, every ownership—property itself—consisted of a legal title and of a use. These two might be combined and held by the same per-

<sup>6</sup> 1 Spence's Eq. Jur. 451-453.

<sup>7</sup> 1 Spence's Eq. Jur. 451-453.

<sup>8</sup> 1 Spence's Eq. Jur. 453, 454.

<sup>9</sup> 1 Spence's Eq. Jur. 453, 454.

son, and their union would thus constitute the highest or ideal dominion; or they might be, and often were, separated, and held by different persons; but of the two the use was the more important, since it represented the real, substantial usufructuary proprietorship, while the other might be the naked legal estate, drawing after it or conferring no beneficial rights of enjoyment whatsoever. While the legal title and seisin always existed in some person, and remained subject to the common-law dogmas, the use, being a creature of equity, was entirely free from the feudal burdens, and from the restrictions growing out of the common-law theory as to seisin. It even lacked some other common-law incidents, like dower. It was descendible like the legal estate; but this was substantially the only feature of uses in which the early chancellors applied the maxim, *Aequitas sequitur legem*.<sup>1</sup> In every other respect they disregarded the narrow dogmas of the common law, and seemed intent on building up a system of landed ownership which should, as far as practicable, satisfy the needs of commerce, and at the same time maintain the dignity of families and the supremacy of the aristocracy.<sup>2</sup>

§ 983. **The Statute of Uses.**—Several statutes were enacted, from time to time, designed to prevent some of the particular effects produced by uses, and especially the statutes of mortmain were extended so as to prohibit uses in favor of ecclesiastical corporations; but it was not until the reign of Henry VIII. that any legislative attempt was made to destroy them. That monarch became exceedingly displeased at his losses of revenue resulting from the practical abrogation of wardships and other feudal incidents, and determined to cut up the cause of the evil, as he regarded it, from the very roots. In the twenty-third year of his reign, he procured a bill to be introduced into Parliament which would have limited the power of conveying land to uses; it passed the House of Lords, but was rejected by the Commons.<sup>1</sup> In the twenty-seventh year of his reign (A. D. 1535) he introduced a second bill, which he doubtless supposed would be effectual. It was drawn up with great care by some of the most distinguished lawyers of the time. The preamble with which it opens describes the evil nature and effects of uses, from the monarch's point of view, in the most sweeping and condemnatory manner. From the vigorous denunciations of the preamble, we should naturally suppose that the enacting part would have been equally violent and sweeping; that, like statutes of many American

<sup>1</sup> See ante, vol. 1, §§ 425-427.

<sup>2</sup> 1 Spence's Eq. Jur. 454-456.

<sup>3</sup> 1 Spence's Eq. Jur. 461, 462-465.

states, it would, in express terms, have abolished all uses or confidences, and have prohibited the conveyance of land upon trust or to the use of any one, or in any other manner than by the common-law mode of feoffment and livery of seisin. For some reason, which has never been explained by the legal writers, the statute attempted no such thing. It did not forbid conveyances to uses, but, on the contrary, assumed that they would continue as before. The only change or relief which it proposed was a contrivance "to turn the equitable estates of the cestuis que usent into legal estates." This it accomplished by a provision that in certain classes of conveyances to use, a legal estate of the same kind and extent as the use should by virtue of the statute immediately pass to and vest in the cestui que use, so that he would at once acquire the legal title and ownership of the same degree, in place of the mere equitable title and ownership which he would formerly have held under the name of "the use." And, what is still more strange, the operation of this provision was confined to cases where the land was so conveyed or held that the feoffee or other holder of the legal estate was *seised* of it to the use of another,—that is, where the feoffee or other holder of the legal estate had the land in fee, fee-tail, or for life; all other possible cases were left untouched by an enactment which promised so much in its preamble.

§ 984. **Uses not Embraced within the Statute.**—Notwithstanding this statute, the equitable estates of the same nature as uses continued under the name of trusts. In the first place, many species of existing uses were wholly untouched by the statute. The general doctrine was established, that when any control or discretion is given to the feoffee or trustee in the application of the rents and profits, or where he is required to do any specific acts in regard to the land, and in all similar instances of *express active* trust, the legal estate remains in the feoffee or trustee to enable him to perform the trust reposed.<sup>1</sup> All such cases, though perhaps within the letter, were held not to be within the design and scope of the statute. Secondly, where only a term of years is conveyed, or assigned to, or is held by one person to the use of another, it was decided that the statute does not operate, but that the legal and equitable estates remain distinct; since the language is, "where any person is *seised* to the use of," and the courts gave the most technical and narrow interpretation to the word "*seised*."<sup>2</sup> Thirdly, the statute did not purport to interfere with uses or trusts of things in action, or in other kinds of personal property.<sup>3</sup> Finally, the ju-

<sup>1</sup> *Ure v. Ure*, 185 Ill. 216, 56 N. E. 1087.

<sup>2</sup> *Bacon's Reading on Uses*, 42; *Dyer*, 369a.

<sup>3</sup> *Bacon's Reading on Uses*, 43.

isdiction of chancery over the various uses which are created by implication or operation of law—the resulting and constructive uses—was held to be unaffected by the statute.<sup>4</sup> The operation of the statute was thus confined to one class of uses—passive uses in land, where the feoffee or holder of the legal title was seised of the land to the use of another—that is, held an estate in fee, fee-tail, or for life; but the use itself might be for a term of years, or for any higher interest.

§ 985. **A Use upon a Use not Executed by the Statute.**—Even the operation of the statute in this single class of express passive uses was soon defeated by the combined action of the law and equity courts. If an estate was given to A in fee, to the use of B in fee, then by the express command of the statute the legal estate passed through A as a mere conduit, and became vested in the cestui que use, B. The statute said nothing, in terms, of a conveyance in fee to A, to the use of B in fee, to the use of or in trust for C in fee. Such a form of conveyance, or one identical with it in legal import, having arisen, the courts of law, either from a narrowness of construction most astonishing, or which is probably the true explanation, from a deliberate design of interpreting the statute so as to give an opportunity for its complete evasion, held that there could be no use executed upon a use,<sup>1</sup> but that when the legal estate was carried, by virtue of the statute, to the first cestui que use, it must there remain vested in him. By virtue of this ruling, the legal estate in the case supposed passed through A and became vested in B, while C, who was intended by the conveyance to be the final and actual beneficiary, took nothing.<sup>2</sup> Here was an opportunity which the court of chancery could not overlook. It seised hold of the construction thus given by the law courts, and declared that, although the legal title was vested in B by virtue of the statute, he could not, in good conscience, hold it for his own benefit, but he must hold it for the benefit of and in trust for C, who thereby obtained an equitable estate through the conveyance, which the court of chancery would maintain and pro-

<sup>4</sup> 1 Spence's Eq. Jur. 466, 467, 493-512; Sugden's Gilbert on Uses, introd., pp. lx., lxi., 75, note 5; Rigden v. Vallier, 2 Ves. Sr. 252, 257, per Lord Hardwicke.

<sup>1</sup> It may be proper to remark that the word "executed," in these old decisions, and as a technical term in English conveyancing, simply designates the passing of the legal estate through the first holder (the trustee), and vesting it in the person described as the cestui que use, performed by operation of the statute. In this sense of the word, the use is "executed" when the legal estate is vested in the cestui que use.

<sup>2</sup> See Tyrrel's Case, Dyer, 155a; 1 Coke, 136b, 137; Hopkins v. Hopkins, 1 Atk. 581, 590, 592, per Lord Hardwicke; Sanders on Uses, 92, 93.

fect.\* This doctrine of chancery was acquiesced in at once, and has remained unquestioned by the courts to the present day. The practical result was, that by making a slight alteration in the formal language of conveyances, so that an estate should be conveyed to or held by one person, to the use of a second, to the use of or in trust for a third, this third person would acquire an equitable estate distinct from the legal estate, vested by operation of the statute in the second party; and the whole system of express passive uses was thus restored, or revived to the same extent as before the passage of the act.<sup>4</sup>

§ 986. **Trusts after the Statute.**—Although the beneficial or equi-

\*Hopkins v. Hopkins, 1 Atk. 581, 590, 591, per Lord Hardwicke; Willet v. Sandford, 1 Ves. Sr. 186, per Lord Hardwicke.

<sup>4</sup>As a matter of fact, in creating these express passive uses by conveyances inter vivos, the old form of feoffment to A, to the use of B, to the use of C, was seldom, if ever, employed after the "statute of uses," since it still required livery of seisin to be made to the feoffee, A. Other forms of conveyance became universal, in which the use upon a use was created by means of the equitable principle concerning the use arising and following the consideration. In family settlements, where the good consideration of blood or affection is sufficient, if A, the owner of land, covenanted to stand seised of it for his son B, then a use thereby arose in favor of B, and the statute executed this use by passing the *legal* estate directly to B, who thereby became seised in law. If, however, A wished to create a passive trust for his son B, he covenanted to stand seised of the land for C to the use of or in trust for his son B, and the legal estate was thereby vested by the statute in C, but was held by him simply as a trustee for the intended beneficiary, B. This came to be the universal form of deed for the purpose of creating passive trusts in family or marriage settlements. Wherever the conveyance was between strangers, so that a pecuniary consideration was requisite, another form of deed was adopted. As has already been stated, the doctrine had long been settled that if A, the owner of land, agreed to sell it to B for a valuable consideration, a use was raised by the consideration in B's favor. Carrying out this doctrine, if a deed of conveyance from A, the owner, to B recited or admitted that a consideration had been received, this recital was regarded as evidence of the fact sufficient to raise a use in B's favor. Finally, it was settled that if in a deed of conveyance the words "bargain and sell" were employed as operative words of transfer, they conclusively imported a pecuniary consideration, and a use arose therefrom in favor of the grantee. A deed, therefore, from A, by which he bargained and sold land to B, created the use in B's favor, which the statute executed by transferring the legal estate. If, however, A designed to create a passive trust for B as the beneficiary, his deed would be modified in form, so as to be a bargain and sale of the land to C to the use of or in trust for B. By operation of the statute the legal estate would thereby be vested in C, but would be held by him as a trustee for B, the intended beneficiary. This became the common form of deeds creating express passive trusts inter vivos, where the parties were not near family relatives. Wherever an estate was given by will, and the testator wished to create a passive trust which should be valid notwithstanding the statute, express words were necessary declaring or creating in some manner one use upon another.

table interests which had existed under the denomination of "uses" prior to the statute were thus kept in existence, and continued to be under the exclusive jurisdiction of chancery, it was found convenient to give them a new name. The "use" had, by virtue of the statute, passed within the cognizance of the law courts, and thenceforth it played a most important part in the English theory and practice of conveyancing; and, as such, it does not fall within the scope of a treatise upon equity jurisprudence.<sup>1</sup> The beneficial interests which equity recognized and protected—both those kinds which were held not to have been affected at all by the statute, and those which were rescued from its operation by the construction described in the last paragraph—were styled trusts; the person holding the legal title was termed the trustee; while the holder of the beneficial or equitable estate was ordinarily known as the cestui que trust, or, in more modern nomenclature, as the beneficiary.

<sup>1</sup>The foregoing account of the text shows the origin of trusts as they exist in England under the statute of uses, and its judicial interpretation. The question then arises, How far does the statute exist in this country, and affect the creation of trusts? Since the statute never applied to personal property, and under the judicial construction never embraced active uses and trusts, it follows that the question suggested practically means, how far do express *passive* trusts in lands exist in the states of this country? and how far does their creation depend upon the statute of uses? As such express passive trusts are very rare indeed in the United States, and are opposed to our prevailing notions of landed property and modes of dealing with it, this question is plainly more theoretical than practical. Still, the operation of the statute has sometimes been discussed by American courts, and in one state in particular it has been a frequent subject for judicial inquiry. In several of the states, as will more fully appear in a subsequent paragraph, all express passive trusts in land, and all express active trusts, with the exception of certain specified species, have been completely abrogated and abolished. The statute of uses clearly has no operation in those states, since it has been superseded by more destructive legislation. . . . In most of the remaining states, as Mr. Perry shows in his admirable treatise, the statute of uses has either been substantially re-enacted, or adopted and held to be in force as a part of the English legislation regarded as operative and binding in this country. See Perry on Trusts, sec 290, and note, containing abstract of statutes. See, also, *Fellows v. Ripley*, 69 N. H. 410, 45 Atl. 138; *Graham v. Whitridge*, (Md.) 58 Atl. 36; *Henderson v. Adams*, 15 Utah 30, 48 Pac. 398.

## SECTION II.

## EXPRESS PRIVATE TRUSTS.

## ANALYSIS.

- § 987. Classes of trusts.
- §§ 988-990. Express passive trusts.
  - § 989. Estates of the two parties; liability for beneficiary's debts; etc.
  - § 990. Rules of descent, succession, and alienation.
- §§ 991-995. Express active trusts.
  - § 992. Classes of active trusts.
  - § 993. Voluntary assignments for the benefit of creditors; English doctrine.
  - § 994. The same; American doctrine.
  - § 995. Deeds of trust to secure debts.
- §§ 996-999. Voluntary trusts.
  - § 997. The general doctrine; incomplete voluntary trusts not enforced.
  - § 998. When the donor is the legal owner.
  - § 999. When the donor is the equitable owner.
- §§ 1000, 1001. Executed and executory trusts.
  - § 1001. Definition and description.
  - § 1002. Powers in trust.
- §§ 1003-1005. Legislation of various states.
  - § 1004. Judicial interpretation; validity of trusts.
  - § 1005. Interest, rights, and liabilities of the beneficiary.

§ 987. **Classes of Trusts.**—Having thus explained the origin of trusts and their historical development until the jurisdiction substantially as it now exists had become firmly established, I shall now proceed to consider the various kinds and classes which are recognized by equity and form a part of its jurisprudence. All possible trusts, whether of real or of personal property, are separated by a principal line of division into two great classes: Those created by the intentional act of some party having dominion over the property, done with a view to the creation of a trust, which are express trusts; those created by operation of law, where the acts of the parties may have had no intentional reference to the existence of any trust,—implied, or resulting, and constructive trusts. Express trusts are again separated into two general classes,—private and public. Private trusts are those created by some written instrument, or in some trusts of personal property by a mere verbal declaration, for the benefit of certain and designated individuals, in which the cestui que trust is a known person or class of persons. Public, or, as they are frequently termed, charitable trusts are those created for the benefit of an unascertained, uncertain, and sometimes fluctuating body of individuals, in which the cestuis que trustent may be a portion or class of a public community,—as, for

example, the poor or the children of a particular town or parish. As a general rule, property of every kind and form, real and personal, may be made the subject of an express trust or of one arising by operation of law. All persons who have the capacity to hold and dispose of property can impress a trust upon it; and, generally, all persons capable of holding property may be made trustees.<sup>1</sup> All persons capable of holding property, even those non sui juris, and such persons only, may be beneficiaries.<sup>2</sup> Equity will enforce all lawful trusts. If a trust should be created for an illegal or fraudulent purpose, equity will not enforce it, nor, it seems, relieve the person creating it by setting aside the conveyance.<sup>3</sup> When, however, a trust is unlawful because it is one which the statute forbids, or which conflicts with the statute concerning perpetuities, and the like, the whole disposition is void.<sup>4</sup>

§ 988. **Express Passive Trusts.**—Express private trusts are of two kinds,—passive or simple, and active or special. An express passive or simple, or, as it is sometimes called, pure, trust exists when land is conveyed to or held by A in trust for B, without any power expressly or impliedly given to A to take the actual possession and management of the land, or to exercise acts of government over it except by the direction of B.<sup>1</sup> In such a case the naked legal title alone is vested in the trustee, while the equitable estate of the cestui que trust is to all intents the beneficial ownership, entitling him to the possession, the rents and profits, and the management and control, according to the extent of his estate. These pass-

<sup>1</sup>It might not be expedient to appoint married women or infants trustees; but they *may* discharge the duties of the office; see *Jevon v. Bush*, 1 Vern. 342, Ames Trusts 217; *Still v. Ruby*, 35 Pa. St. 373, Ames Trusts 219. Property subject to an express or implied trust might devolve upon a person wholly non sui juris, as an idiot; equity would either enforce the trust against the property, or appoint another trustee. The difficulty of enforcing a conveyance by the trustee in such a case (see *Pegge v. Skinner*, 1 Cox Eq. 23, Ames Trusts 218; *Hall v. Warren*, 9 Ves. 605, H. & B. 575) has been overcome by modern statutes; see *Re Wadsworth*, 2 Barb. Ch. 381, Ames Trusts 511. A corporation may be a trustee: *Att'y Gen. v. Landisfield*, 9 Mod. 286, Ames Trusts 216.

<sup>2</sup>Wherever the common-law rule prevails forbidding aliens from acquiring or holding real estate by an absolute right, they cannot be made beneficiaries, and hold the equitable interest under a trust in their favor; but this rule does not prohibit trusts of personal property on behalf of aliens: *Du Hourmelin v. Sheldon*, 4 Mylne & C. 525, 1 Beav. 79. The common-law rule also disqualifies them from being trustees: *King v. Bays*, Dyer 283b, Ames Trusts 216.

<sup>3</sup>See *Symes v. Hughes*, L. R. 9 Eq. 475; *Cross v. U. S. Trust Co.*, 131 N. Y. 330, 27 Amer. St. Rep. 597, 30 N. E. 125, 15 L. R. A. 606.

<sup>4</sup>*Johnston's Estate*, 185 Pa. St. 179, 64 Amer. St. Rep. 621, 39 Atl. 879.

<sup>1</sup>*Spence's Eq. Jur.* 495-497. See *Holmes v. Walter*, 118 Wis. 409, 95 N. W. 380.

ive trusts are considered in equity as virtually equivalent to the corresponding legal ownerships; the trust is regarded rather as fastened upon the estate than upon the person of the trustee;<sup>2</sup> it is never suffered to fail for want of a trustee, either when the designated trustee dies, or refuses to act, or is an improper person.<sup>3</sup> As a general principle, the rules of law, excepting those growing out of the doctrine of tenure, have been applied by analogy as far as practicable to these corresponding passive trust estates.<sup>4</sup> A person cannot hold property under a passive trust for himself, for generally, when the legal estate and an equal or less equitable estate unite in the same owner, a merger takes place;<sup>5</sup> but this rule is not universal, since the two estates *may* be kept separate and subsisting, in order to protect the equitable interests of the owner.<sup>6</sup> Such express passive trusts in land are certainly very infrequent in this country, although they may occasionally exist, where not prohibited by statute.<sup>7</sup> Trusts in personal property, however, which are essentially passive, are not at all uncommon.<sup>8</sup>

**§ 989. Estates of the Two Parties.**—The estate of the naked trustee in a passive trust, and a fortiori of the trustee in an active trust, is the only legal ownership,<sup>1</sup> although it must be used, in equity, only for the purposes of carrying out the trust and protecting the rights of the beneficiary.<sup>2</sup> The trustee, having the legal interest, is the proper person to bring actions at law,<sup>3</sup> and to do other things which can be done only by one having the legal estate.<sup>4</sup> The estate of the cestui que trust, while regarded in equity as the

<sup>1</sup> *Adair v. Shaw*, 1 Shoales & L. 262, per Lord Redesdale.

<sup>2</sup> See post, § 1087; *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809.

<sup>3</sup> *Watts v. Ball*, 1 P. Wms. 108, Ames Trusts 379, 1 Scott 292; *Burgess v. Wheate*, 1 Eden 177, 184, 195, per Sir T. Clarke; p. 223, per Lord Mansfield; p. 250, per Lord Northington, Ames Trusts 356, 1 Scott 58, 316.

<sup>4</sup> *Tilton v. Davidson*, 98 Me. 55, 56 Atl. 215.

<sup>5</sup> *Brydges v. Brydges*, 3 Ves. 120, 126. See ante, §§ 787, 788.

<sup>6</sup> *Dean v. Long*, 122 Ill. 447, 14 N. E. 34.

<sup>7</sup> For example, A may deposit money in a bank, in "trust for B," or may deposit in the name of B, "in trust for C," and thus create a valid trust which is really passive, since the trustee is not charged with any duties of management, such as receiving the interest and paying it over; in fact, he holds the corpus of the property in trust for the beneficiary. As illustration, see *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446, H. & B. 393.

<sup>8</sup> *Gandy v. Fortner*, 119 Ala. 303, 24 South. 425.

<sup>1</sup> *Hafner v. City of St. Louis*, 161 Mo. 34, 61 S. W. 632; *Neal v. Bleckley*, 51 S. C. 506, 29 S. E. 249.

<sup>2</sup> *Price v. Krasnoff*, 60 S. C. 172, 38 S. E. 413.

<sup>3</sup> When money is deposited in a bank to the credit of A, in trust for B, A, or upon his death his administrator, is prima facie the proper person to demand and receive payment from the bank: *Boone v. Citizens' Sav. Bank*, 84 N. Y. 83; 38 Am. Rep. 498.

real ownership, is governed, so far as practicable, by the legal rules applicable to similar estates at law. The language of the instrument creating or declaring the trust is interpreted by courts of equity in accordance with the rules followed by courts of law. The interest of the cestui que trust is alienable; if real estate, it may be conveyed by ordinary deed; if personal, it may be assigned;<sup>5</sup> but the rule is established in England that notice must be given to the trustee, in order to perfect an assignment by a cestui que trust of personalty, and to protect the assignee.<sup>6</sup> The estate cannot, by any restrictions annexed to the trust, be rendered inalienable, nor can it be stripped of other incidental rights of ownership.<sup>7</sup> It is also liable for the debts of the beneficiary.<sup>8</sup> It cannot be so created that, while it is subsisting and enjoyed by the beneficiary, it shall be absolutely free from such liability. The trust may be so limited that it shall not take effect unless the beneficiary is free from debt, or that his estate shall cease upon his becoming insolvent, or upon a judgment being recovered against him, and shall thereupon vest in another person;<sup>9</sup> but the cestui que trust cannot *hold and enjoy* his interest entirely free from the claims of creditors.<sup>10</sup> These rules are subject to a most important excep-

<sup>5</sup> See post, § 1005.

<sup>6</sup> This rule is adopted in only a portion of the American states: See ante, §§ 695-697, where the English and American cases are cited.

<sup>7</sup> *Brandon v. Robinson*, 18 Ves. 429, *Ames Trusts* 394.

<sup>8</sup> *Forth v. Duke of Norfolk*, 4 Madd. 503.

<sup>9</sup> *Bull v. Ky. Bank*, 90 Ky. 452, 14 S. W. 425, 12 L. R. A. 37.

<sup>10</sup> This is the English rule upon this subject, and the rule in about half of the states where the question has arisen: *Brandon v. Robinson*, 18 Ves. 429, *Ames Trusts* 394; *Nichols v. Levy*, 5 Wall. 433, 441; *Bland v. Bland*, 90 Ky. 400, 29 Am. St. Rep. 390, 14 S. W. 423, 9 L. R. A. 599; *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944, 57 L. R. A. 384. These trusts are commonly known by the name of "spendthrift trusts." Their validity has been sustained in many jurisdictions, however, largely on the strength of dicta in *Nichols v. Eaton*, 91 U. S. 716; see *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 179, *Ames Trusts* 397; *Leigh v. Harrison*, 69 Miss. 923, 11 South. 604, 18 L. R. A. 49; *Jackson Sq. L. & S. Ass'n v. Bartlett*, 95 Md. 661, 53 Atl. 426, 93 Am. St. Rep. 416.

All jurisdictions agree in holding that a person sui juris cannot convey his property upon trusts for himself free from the claims of his creditors: *Brown v. McGill*, 87 Md. 161, 67 Am. St. Rep. 334, 39 Atl. 613, 39 L. R. A. 806; *Ghormley v. Smith*, 139 Pa. St. 584, 23 Am. St. Rep. 215, 21 Atl. 135, 11 L. R. A. 565. When no interest is vested in the beneficiary, as where the direction of the creator of the trust is not to pay the income but to *apply* such portion of it as the trustee sees fit to the support of A; or to pay the income to A and others in such proportions as the trustee sees fit; the income is free from the reach of the beneficiary's creditors: See *In re Bullock*, 60 L. J. Rep. Ch. 341, *Ames Trusts* 401; *In re Coleman*, 39 Ch. Div. 443, *Ames*

tion in the case of the married woman's separate estate,—property held upon trust for her separate use. It is the familiar doctrine with reference to such separate estate,—the very essential element that it may be settled to her own separate use so as to be held by her entirely free from her husband's control and from the claims of his creditors. It is also the established doctrine, designed to protect her from the moral influence of her husband, that in creating the trust a clause may be inserted against "anticipation," by which her power of aliening her interest is taken away during her marriage; and, as the rule is generally accepted, the restraint of such clause may operate during any future as well as present marriage.<sup>11</sup>

§ 990. **Rules of Descent and Succession.**—The rules concerning descent, devolution, and succession, applied to the equitable estates of beneficiaries, are generally the same which regulate corresponding legal estates.<sup>1</sup> Those rules, however, which result from the doctrine of tenure do not apply, and therefore it is settled in England that the equitable estate of the beneficiary in lands held in trust for him is not subject to escheat, but the trustee holds the land absolutely.<sup>2</sup> As a consequence of the general doctrine, estates of inheritance held in trust for the wife are subject to the husband's curtesy;<sup>3</sup> but by a strange inconsistency of the English law, the wife had no dower in similar estates held in trust for her husband.<sup>4</sup>

§ 991. **Express Active Trusts.**—Active or special trusts are those in which, either from the express directions of the language created Trusts 339; *Nichols v. Eaton*, supra; *Stone v. Westcott*, 18 R. I. 685, 29 Atl. 838.

See a most interesting discussion of the whole subject in *Gray's Restraints on Alienation*, Preface and §§ 134–277. In the group of states which follow the New York legislation relating to trusts, the rights of creditors are regulated by statutes, and only that portion of the income which is not required for the beneficiary's support, education, etc., can be reached; in a few states, however, the whole income is thus exempt: *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236.

<sup>11</sup> See post, §§ 1107–1109.

<sup>1</sup> See *Burgess v. Wheate*, 1 Eden 177, *Ames Trusts* 356, 1 Scott 58, 316; *The King v. Ex'rs of Sir John Decombe*, Cro. Jac. 512, *Ames Trusts* 353; *Anonymous*, reported in *Year Book*, 5 Edw. IV, 7, pl. 18, *Ames Trusts* 352; *King's Att'y v. Sands*, *Freeman Ch. Cases* 120, *Ames Trusts* 354; *Middleton v. Spicer*, 1 Br. Ch. Cas. 201, *Ames Trusts* 364.

<sup>2</sup> *Burgess v. Wheate*, 1 Eden 177, *Ames Trusts* 356, 1 Scott 58, 316.

<sup>3</sup> *Appleton v. Rowley*, L. R. 8 Eq. 139, *Ames Trusts* 381; *Sweetapple v. Bindon*, 2 Vern. 536, *Ames Trusts* 379; *Watts v. Ball*, 1 P. Wms. 108, *Ames Trusts* 379, 1 Scott 292.

<sup>4</sup> *D'Arcy v. Blake*, 2 Schoales & L. 387, *Ames Trusts* 376; *Bottomly v. Lord Fairfax*, *Precedents in Ch.* 336, *Ames Trusts* 375.

ing the trust, or from the very nature of the trust itself, the trustees are charged with the performance of active and substantial duties with respect to the control, management, and disposition of the trust property for the benefit of the cestuis que trustent. They may, except when restricted by statute, be created for every purpose not unlawful, and, as a general rule, may extend to every kind of property, real and personal. In this class the interest of the trustee is not a mere naked legal title, and that of the cestui que trust is not the real ownership of the subject-matter. The extent and incidents of the rights held by the respective parties must, of course, vary with the nature of the trust itself and the duties which the trustee is called upon to perform. It is a universal rule, however, that the trustee's estate and power over the subject-matter are commensurate with the duties which the trust devolves upon him, and are sufficient to enable him to perform all those duties.<sup>1</sup> The trustee is generally entitled to the possession and management of the property,<sup>2</sup> and to the receipt of its rents and profits; and in many cases he has, from the very nature of the trust, authority to sell or otherwise dispose of it. The interest of the beneficiary is necessarily more limited than in passive trusts, and it sometimes cannot with accuracy be called an equitable *estate*.<sup>3</sup> He always has the right, however, to compel a performance of the trust according to its terms and intent.<sup>4</sup>

**§ 992. Classes of Active Trusts.**—Although active trusts may be created for a great number of special purposes, those which are the most frequent and important may be reduced to the four following generic classes: 1. Where the trust is simply to convey the property to some designated person, or class of persons.<sup>1</sup> 2.

<sup>1</sup> 1 Spence's Eq. Jur. 496, 497; see *In re Cole's Estate*, 102 Wis. 1, 72 Am. St. Rep. 854, 78 N. W. 402. As to the right of the beneficiary to obtain a conveyance of the trust property, although the trust has not been completed nor ceased, see *Sanders v. Vautier*, 4 Beav. 115, *Ames Trusts* 454; *Clafin v. Clafin*, 149 Mass. 19, 14 Am. St. Rep. 393, 20 N. E. 454, 3 L. R. A. 370, *Ames Trusts* 455.

<sup>2</sup> See *Tidd v. Lister*, 5 Mad. 429, *Ames Trusts* 465.

<sup>3</sup> As to provisions imposing a restraint on alienation, and freeing the interest of the beneficiary from the claims of his creditors, see ante, § 989, note.

<sup>4</sup> See post, §§ 1062-1065.

<sup>1</sup> This species is often found in connection with other kinds. Trusts for investment and accumulation almost invariably terminate with a trust to convey the accumulations to specified beneficiaries; in trusts for applying rents and profits to particular uses, there is generally a provision for conveying the capital fund, at the expiration of the period limited, to some designated persons by way of remainder. Trusts merely to convey the property, unaccompanied by any other duties of the trustee, are uncommon. Such *dispositions* are very frequent in English marriage settlements, but they are usually accomplished by means of powers, rather than by trusts.

Where the primary object is to sell or dispose of the entire trust property in some manner and to use the proceeds for some ulterior purposes.<sup>2</sup> In all the instances of this class, where the trust is to sell the corpus of the property and to distribute the proceeds among creditors, legatees, and the like, the beneficiaries plainly acquire no proper estate in the original trust fund prior to its sale; their right and interest attach to the proceeds of this fund, which are to be paid to or distributed among them. In order to make their right fully available, and to guard their interest as much as possible against the large authority given to the trustees, equity has invented in such cases the doctrine of *conversion*, by which real property is regarded as personal, and personal property as real.<sup>3</sup> 3. This class includes all those trusts where the primary object is to hold and invest the entire property and its proceeds, and thus to accumulate for some ulterior purposes.<sup>4</sup> 4. This class includes all those trusts of which the primary object is to hold the corpus of the property, receive its rents, profits, and income, and apply them to some prescribed uses.<sup>5</sup>

<sup>2</sup> Among the most important instances belonging to this class are conveyances or assignments by a debtor upon trust to sell the property and pay debts with the proceeds, including the official assignments made to assignees in bankruptcy, insolvency, and other analogous proceedings. Also, a devise or bequest of property by will, upon trust to sell, mortgage, or lease the same, and with the proceeds to pay the testator's debts, or legacies, or annuities, or other charges and liabilities, or to pay "portions" to daughters and younger sons. This last object, which is very common in England, is often found in family settlements as well as in wills. A trust to exchange lands, or to dispose of property, and with the proceeds purchase other kinds or forms, falls under the same class.

<sup>3</sup> *Greenhill v. Greenhill*, 2 Vern. 679, 1 Scott 595; *Fletcher v. Ashburner*, 1 Brown Ch. 497, 1 Lead. Cas. Eq. 1118, 1 Scott 606; *Guidot v. Guidot*, 3 Atk. 254, 256, 3 Keener 949, 1 Scott 600; *Craig v. Leslie*, 3 Wheaton 563, H. & B. 39, 1 Scott 611. See post, § 1159, et seq.

<sup>4</sup> Sometimes land or personal property is given on trust to receive the income, and continually to invest it in the purchase of other lands, or interest-bearing securities, during the period of the trust; sometimes land is given on trust to sell and to invest the proceeds in securities, and to re-invest the income in the same manner; sometimes personal property is directed to be converted into money, and the proceeds to be invested in lands, the income of which is to be accumulated by the constant purchase of other lands, etc. In all these forms provision is made for the disposition of the accumulated fund at the expiration of the period, in some manner on behalf of the beneficiaries. The periods for which such trusts may be created are now limited by statute in England and in this country, so as to prevent a "perpetuity."

<sup>5</sup> The forms of this class also are various. Real or personal property, or both, is sometimes given by will upon trust to hold the capital and apply the income to the payment of debts, legacies, annuities, etc.; property, real or personal, or both, is given by will or by deed in trust to receive the rents and profits and pay the same to, or apply them to the use of, designated bene-

More than one of these four general objects may be embraced in the same trust. In instances of the third and fourth classes, the beneficiaries may have a direct equitable interest in the trust property itself, which is plainly more than a *mere* right of action, but is not so substantial an estate as that held by the cestui que trust under a simple passive trust.

§ 993. **Assignments for the Benefit of Creditors.**—Among the active trusts which are quite frequent in this country are voluntary and general assignments by failing debtors of their property to trustees upon trust to pay the creditors of the assignor.<sup>1</sup> The doctrine is settled in England that, primarily, such assignments do not create a trust nor clothe the creditors with the character of cestuis que trustent; they rather confer a power upon the trustee, and make him an agent for the debtor to dispose of the property under the debtor's directions. It follows from this view that until the assignment has been communicated to the creditors, it may be revoked, or altered, or superseded by the assignor, at his own will.<sup>2</sup> But when the fact of such assignment has been communicated to creditors, and their position is altered by it, and especially if they have assented to it, then it becomes irrevocable as to such creditors, and they can enforce its trusts and take the benefit of its provisions in their behalf.<sup>3</sup> If creditors make themselves actual parties by executing the deed of assignment, it of course becomes irrevocable as to them; their rights under it are fixed.<sup>4</sup>

§ 994. **The American Doctrine.**—With a few exceptions, the American courts have not adopted this English theory with respect to the nature of such assignments. The doctrine is generally settled in this country that voluntary general assignments for the benefit of creditors, if otherwise valid, are not mere agencies of the debtor; they create true relations, and the creditors are true beneficiaries. When once duly executed, they are irrevocable, and the creditors, on being informed of their existence, may take advantage of the provisions in their own favor, and may enforce the trusts declared without making themselves parties, or doing any act indicating

beneficiaries during their lives, or for some specified period. In this manner provision is often made for wives in marriage settlements, and for widows and children by will.

<sup>1</sup> These general assignments are not common in England, since they interfere with the modern bankrupt laws; so far as they do not conflict with those laws they are valid. In some of the states the whole ground is covered by local insolvent laws; in others, assignments for the benefit of creditors are strictly regulated and limited by statutes.

<sup>2</sup> *Acton v. Woodgate*, 2 Mylne & K. 492.

<sup>3</sup> *Glegg v. Reese*, L. R. 7 Ch. 71.

<sup>4</sup> See *Whitmore v. Turquand*, 3 De Gex, F. & J. 107.

their own acceptance or assent.<sup>1</sup> Although the assignee is thus a trustee for the creditors, yet he is at the same time so far a representative of the debtor that he must be governed by the express terms of the trust; he cannot indirectly modify the provisions of the assignment.<sup>2</sup> The doctrine generally prevails in the American states, that unless prohibited by statutes, voluntary general assignments by failing debtors for the benefit of their creditors, even when preferring individuals or classes among the beneficiaries, are valid. The necessary delay incident to the execution of the trust is not within the meaning and scope of the statute which avoids transfers in fraud of creditors.<sup>3</sup>

**§ 995. Deeds of Trust to Secure Debts.**—A special form of trust for the benefit of creditors peculiar to the law of this country has become quite common in several of the states, and requires a brief description. A “deed of trust to secure a debt” is a conveyance made to a trustee as security for a debt owing to the beneficiary,

<sup>1</sup> *Moses v. Murgatroyd*, 1 Johns. Ch. 119, 129, 7 Am. Dec. 478; *Golden's Appeal*, 110 Pa. St. 581, 1 Atl. 660. The doctrine which generally prevails, in the absence of statutory regulations, seems to be as follows: A creditor is not bound to accept the provision made in his behalf, nor does the assignment preclude him from suing the debtor and obtaining a judgment upon his claim; but he can not reach the *assigned property* in satisfaction of his judgment, unless he is able to procure the assignment to be set aside as fraudulent against creditors. In many of the states the acceptance by the creditor of the provision made in the assignment in part payment of his demand will not prevent him from subsequently enforcing the balance of the claim against the debtor's after-acquired property, since the assignment is purely voluntary, and is not per se a composition with creditors, nor does it operate as a discharge in bankruptcy. A clause inserted in the assignment to the effect that a creditor must release and discharge his entire demand as a condition to his claiming any benefits under the trust is held in many states to render the whole assignment void, on the ground that it necessarily hinders and delays creditors. Such provisions, however, seem to be sustained as valid and operative by the courts of other states: *Clayton v. Johnson*, 36 Ark. 406, 38 Am. Rep. 40 (valid); *Collier v. Davis*, 47 Ark. 367, 58 Am. Rep. 758 (void).

<sup>2</sup> *In re Lewis*, 81 N. Y. 421.

<sup>3</sup> *Estes v. Gunter*, 122 U. S. 450, 7 Sup. Ct. Rep. 1275, 30 L. ed. 1228. The validity of the assignment depends upon the question whether it falls within the inhibitions of the statute of 13 Eliz., c. 5, and analogous statutes of the American states. If executed with an actual intent to hinder, delay, or defraud creditors, as shown by extrinsic evidence, or if it contains provisions which necessarily operate to hinder or delay creditors, and therefore raise a conclusive presumption of such an intent, the assignment will be declared void. Various provisions have been thus condemned by the courts, although there is not a perfect uniformity among the decisions. A provision which creates a trust in favor of the debtor himself, to be operative before all the creditors are fully paid, will always render the assignment void: See *Austin v. Bell*, 20 Johns. 442, 11 Am. Dec. 297; *Grover v. Wakeman*, 11 Wend. 187, 201, 203, 25 Am. Dec. 624, 4 Paige 23.

—a creditor of the grantor,—and conditioned to be void on payment of the debt by a certain time, but if not paid the trustee to sell the land and apply the proceeds in extinguishing the debt, paying over any surplus to the grantor. The object of such deeds is, by means of the introduction of trustees, as impartial agents of the creditor and debtor, to provide a convenient, cheap, and speedy mode of satisfying debts on default of payment.<sup>1</sup> A distinction, however, should be noted, in this connection, between unconditional deeds of trust to raise funds for the payment of debts, and deeds of trust in the nature of mortgages, the former being absolute and indefeasible conveyances for the purposes of the trust, while the latter are conveyances by way of security, subject to a condition of defeasance.<sup>2</sup> In many states, deeds of trust to secure debts are much favored, either on account of the intervention of disinterested third parties, whose position as trustees secures to the debtor fair dealing, or the absence of any necessity for the intervention of the courts; though in some states they are required to be judicially foreclosed, and are therefore of no practical advantage. Indeed, in a majority of the states, this form of security has come into general, and in some instances universal, use. An intimate relation exists between deeds of trust to secure debts and mortgages, especially mortgages containing powers of sale; in fact, the former are generally considered as being in legal effect mortgages.<sup>3</sup> Where a mortgage is regarded as a conveyance of the legal estate, a deed of trust can be no less a conveyance of the legal estate, and where a mortgage is considered as but a mere lien, a deed of trust is generally considered as nothing more than a lien.<sup>4</sup> A reconveyance, as a general rule, is not necessary on payment of the debt secured by a deed of trust, satisfaction being entered in the margin, as in the case of a mortgage. Statutes relating to the recording of mortgages embrace deeds of trust, without special mention of the latter, as also do those relating to powers of sale contained in mortgages. While a mortgage with power of sale may be assigned, in the absence of words restricting an assignment, and the power of sale passes thereby to the assignee, a deed of trust to secure a debt, being a confidence reposed, cannot be delegated, and no assignment is possible, without an express and positive permission in the deed.<sup>5</sup> The duties of the trustee

<sup>1</sup> *Taylor v. Stearns*, 18 Gratt. 244, 278.

<sup>2</sup> *Hoffman v. Mackall*, 5 Ohio St. 124, 130, 64 Am. Dec. 637.

<sup>3</sup> *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638; *Barth v. Deuel*, 11 Colo. 494, 19 Pac. 471.

<sup>4</sup> *Flint, etc., R'y Co. v. Auditor General*, 41 Mich. 635. See *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651.

<sup>5</sup> See *Irish v. Antioch College*, 126 Ill. 638, 9 Am. St. Rep. 638, 18 N. E. 768, where the deed provided for a successor to the trustee.

of a deed of trust require the utmost good faith and impartiality as regards both the debtor and the creditor. He is personally liable, in a suit at law for damages to the party aggrieved, for a failure to use reasonable diligence, or an abuse of his discretionary powers; and a sale may be enjoined or set aside at the instance of the injured party.<sup>6</sup> It is not necessary that the person who is to execute the power in a trust deed should join in the deed, or execute any formal writing showing his acceptance of the trust;<sup>7</sup> nor is it necessary that the beneficiary should signify his assent by any formal writing, for his assent is presumed, since the deed is for his benefit. Where a trustee has accepted the trust, he cannot renounce it without the consent of the beneficiary, or of a court of equity; and he may be compelled to discharge the trust.<sup>8</sup>

§ 996. **Voluntary Trusts.**—The particular question to be examined under this head, and which renders it one of such great practical importance, is, When will trusts, and transactions in the nature of trusts, which are purely voluntary, virtual gifts be treated as binding and enforceable in equity? The answer, it will be seen, turns upon the distinction between trusts which are executed—that is, completely created or declared—and those which are merely executory, incomplete,—that is, promises to create a trust. The full discussion of the subject also involves the difference between assignments perfect and imperfect, and declarations of trust. Underlying the whole theory of voluntary trusts is the principle that while the maxim, *Ex nudo pacto non oritur actio*, operates in equity even more strictly than at the common law, so that a promise without any valuable consideration has no binding efficacy, still a valid trust may be created without any valuable consideration; if a trust has been completely declared, the absence of a valuable consideration is entirely immaterial.<sup>1</sup> Another principle frequently applicable in cases of this kind is, that equity generally regards an imperfect conveyance or assignment as a contract to convey or assign; but whether such contract is binding or not must depend upon the circumstances.<sup>2</sup>

§ 997. **The General Doctrine—Incomplete Voluntary Trusts not**

<sup>6</sup> *Muller's Adm'r v. Stone*, 84 Va. 834, 10 Am. St. Rep. 889, and note, 6 S. E. 223.

<sup>7</sup> *Leffler v. Armstrong*, 4 Iowa 482, 68 Am. Dec. 672.

<sup>8</sup> *Com. v. Susquehanna, etc., Ry. Co.*, 122 Pa. St. 306, 15 Atl. 448, 1 L. R. A. 225.

<sup>1</sup> *Ex parte Pye*, 18 Ves. 140, *Ames Trusts* 123; *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. Rep. 382, 33 Atl. 836, 32 L. R. A. 377, H. & B. 400; *Wagoner's Estate*, 174 Pa. St. 558, 52 Am. St. Rep. 828, 32 L. R. A. 766, 34 Atl. 114.

<sup>2</sup> *Parker v. Taswell*, 2 De Gex & J. 559.

**Enforceable.**—The general doctrine is well settled. A perfect or completed trust is valid and enforceable, although purely voluntary. A voluntary trust which is still executory, incomplete, imperfect, or promissory will neither be enforced nor aided.<sup>1</sup> In order to render the voluntary trust valid and effectual, the party creating it, either by direct transfer or by declaration, must have done everything which, according to the nature of the property comprised in it, was necessary to be done in order to transfer the property and render the transaction binding upon him. A person holding property, real or personal, and intending to make a voluntary disposition thereof for the benefit of another, may do so in either one of the three modes: 1. He may make a simple conveyance or assignment of it directly to the donee, so as to vest in the latter whatever interest and title the donor has, without the intervention of any trust; 2. He may make a transfer of it to a third person upon trusts declared in favor of the donee; 3. He may retain the title, and declare himself a trustee for the donee, and thus clothe the donee with the beneficial estate. In either of these modes, if the transaction is imperfect and executory, equity will not aid nor enforce it; and if the intention of the party is to adopt one of the methods, a court of equity will not resort to either of the other methods for the purpose of carrying it into effect. Whenever the party intends to make a transfer directly to the donee, he must do all that is necessary, according to the nature of the property, to pass and vest the title, by valid conveyance in case of real property, and by valid assignment in case of personal property, and generally accompanied by an actual delivery of chattels and things in action where the donor is the legal owner. Where the donor shows an intention to adopt this first method, and thus to vest the property directly in the donee, and the act of donation is simply an assignment of any form, *but is imperfect*

<sup>1</sup> See *Milroy v. Lord*, 4 De Gex, F. & J. 264, 274, Ames Trusts 149; *Richards v. Delbridge*, L. R. 18 Eq. 11, 13, Ames Trusts 130, H. & B. 385, Shep. 204; *Ex parte Pye*, 18 Ves. 140, Ames Trusts 123; *Morgan v. Malleon*, L. R. 10 Eq. 475, Ames Trusts 129; *Colman v. Sarrel*, 3 Brown Ch. 12, 1 Ves. 50, Ames Trusts 133; *Fortescue v. Barnett*, 3 Mylne & K. 36, Ames Trusts 136; *Edwards v. Jones*, 1 Mylne & C. 226, Ames Trusts 140; *Donaldson v. Donaldson*, Kay 711, Ames Trusts 146; *Richardson v. Richardson*, L. R. 3 Eq. 686, Ames Trusts 156; *Baddeley v. Baddeley*, L. R. 9 Ch. Div. 113, Ames Trusts 170; *In re Breton's Estate*, L. R. 17 Ch. Div. 418, Ames Trusts 171; *Clark v. Clark*, 108 Mass. 522, Ames Trusts 232; *Young v. Young*, 80 N. Y. 422, 436, 36 Am. Rep. 634, H. & B. 387; *Martin v. Funk*, 75 N. Y. 134, 137, 31 Am. Rep. 446, H. & B. 393; *Estate of Webb*, 49 Cal. 541, 545, H. & B. 392; *Beaver v. Beaver*, 117 N. Y. 421, 18 Am. St. Rep. 531, 6 L. R. A. 403, 22 N. E. 940, H. & B. 396; *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. Rep. 382, 33 Atl. 836, 32 L. R. A. 377, H. & B. 400.

so that it does not pass the title, a court of equity will not treat it as a declaration of trust constituting the donor himself a trustee for the donee; an imperfect voluntary assignment will not be regarded in equity as an agreement to assign for the purpose of raising a trust. If the donor adopts the second or third mode, he need not use any technical words, or language in express terms creating or declaring a trust, but he must employ language which shows unequivocally an intention on his part to create a trust in a third person or to declare a trust in himself. It is not essential, however, that the donor should part with the possession in the cases where he thus creates or declares a trust. These conclusions are sustained by the decided weight of authority, and must be regarded as the settled rules of equity jurisprudence upon the subject. The general doctrine which has thus been explained may find its application under two different conditions of fact: 1. Where the donor is the absolute owner of the property, holding the legal and equitable title thereof; 2. Where the donor is only the equitable owner, holding only the equitable estate, the legal title being vested in some third person as his trustee. These two conditions will be examined separately.

§ 998. **Donor the Legal Owner.**—The foregoing general conclusions determine all particular questions which can arise under this condition of fact. If the donor makes a complete conveyance of real property or assignment of personal property sufficient to vest the legal title in the donee; or if he completely conveys or assigns the property to a trustee upon trusts effectually created on behalf of the donee; or if he retains the legal title, but effectually declares himself a trustee for the donee, thus clothing the donee with all of the beneficial estate,—then, in each of these instances, the gift is valid although voluntary; the donee's rights are perfect, and equity will enforce them against the donor, and all persons claiming under him as volunteers.<sup>1</sup> Where the donor has the legal title, and the property

<sup>1</sup>The practical question always is, whether the conveyance or assignment is sufficient to pass the legal title; or whether a trust *has been* effectually created or declared. While no particular express words are necessary either to create a trust in a third person, or to declare the donor a trustee, some words unequivocally showing such intent are indispensable. A mere imperfect assignment, without words indicating an intent to create a trust or to declare the donor a trustee, can not be construed as a declaration of trust, so as to raise a trust in the donee's favor, which equity may enforce. Where the subject matter is personal property, a parol declaration of trust, if otherwise sufficient, is effectual: See the cases cited in the last note. I add the facts of a few instructive cases by way of illustration.

In *Milroy v. Lord*, 4 De Gex, F. & J. 264, Ames Trusts 149, A owned fifty

is of such a nature that a legal estate can be transferred,—that is, is land, chattels, money, and some species of things in action,—

shares of stock of a bank, which stood upon the books of the bank in his name. By the charter of the bank its shares were transferable only by entry made in the transfer-books of the corporation. A executed a voluntary deed, by which he purported to assign these shares to B, in trust for the plaintiff, C, but no transfer was made upon the bank's books. Held, that, as the assignment was incomplete and inoperative to pass the legal title to the trustee, B, no trust was effectually created in C's favor; and, also, since the plain intention was to vest the trust in B, and not to constitute the donor a trustee, the assignment could not be construed as a declaration of trust binding the shares in the donor's hands. In *Richardson v. Richardson*, L. R. 3 Eq. 686, Ames Trusts 156 E, by a voluntary deed, assigned certain specific property, and "all other the personal estate, whatsoever and wheresoever," of the assignor to R absolutely. At the date of the assignment, E was owner of certain promissory notes. These notes were not mentioned in the assignment. On R's death these notes were found in his possession, *but not endorsed by E*, and there was no evidence of any delivery of the notes by E to R. Page Wood, V. C., held that although the assignment did not operate *as such* to pass the legal title to the notes, still it operated as a declaration of trust by E in R's favor, and R thereby became entitled to the notes. In *Morgan v. Malleson*, L. R. 10 Eq. 475, Ames Trusts 129, S, the owner of a certain India bond, signed the following voluntary instrument and delivered it to M, but did not deliver the bond itself: "I hereby give and make over to M an India bond, value one thousand pounds." On the death of S, a contest arose between M and the executors of S, and Lord Romilly held that the assignment was operative as an effectual declaration of trust in M's favor, and he was entitled to the bond. The judge said that the assignment was equivalent to the words: "I undertake to hold the bond for you." These two cases have been severely criticised both in England and in this country; they must be regarded as contrary to the doctrine settled by the weight of authority, and as *virtually overruled*. In *Richards v. Delbridge*, L. R. 18 Eq. 11, Ames Trusts 130, H. & B. 385, Shep. 204, D, who owned leasehold premises and a stock in trade, purported to make a voluntary transfer or gift of the whole to his grandson, E, by means of the following memorandum, which he wrote upon the lease and signed: "This deed, and all thereto belonging, I give to E from this time forth, with all the stock in trade." The lease with the memorandum was then delivered to E's mother, and the donor soon afterwards died. Held, that there was no valid assignment so as to constitute a perfected gift, and that there was no valid declaration of trust.

In *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446, H. & B. 393, Mrs. Susan B. deposited in a savings bank a sum of money belonging to her, declaring at the time that she wanted the account to be in trust for the plaintiff. The account was so entered in the books of the bank, and a pass-book was delivered to her, containing the following: "The Citizens' Saving Bank, in account with Susan Boone, in trust for Lillie Willard, five hundred dollars." Mrs. B. retained possession of the pass-book, and the money remained in the bank until her death. Plaintiff was ignorant of the deposit until after the donor's death. Held, that the transaction was an effectual declaration of trust, constituting the donor a trustee for the plaintiff, and clothing the plaintiff with the beneficial ownership of the money; that the donor's retention of the pass-book was not inconsistent with her position as a trustee, and that notice to the cestui que trust was not necessary in order to constitute a valid trust. In *Young*

*They v. consent!*  
*Assignment of*  
*choses was gft.*  
*only these were*  
*gd. assignment.*

an imperfect conveyance or assignment, which does not pass the legal title, will not be aided or enforced in equity. But if the property is not of such a nature that the legal title can be transferred, then, if nothing more remains to be done or can be done by the grantor or donor,—if, as far as he is concerned, the conveyance or assignment is complete, and he has done all that is necessary to be done, having regard to the nature of the property,—the conveyance or assignment will be effectual in equity, and will be enforced on behalf of the donee.<sup>2</sup> It should be observed, however, that by recent statutes nearly all, if not quite all, legal things in action have been rendered assignable at law, so that the cases in which the last-mentioned rule can apply have been very much limited.

**§ 999. Donor the Equitable Owner.**—Where the donor is only the equitable owner, the legal estate being vested in a third person, he may make a voluntary transfer of his interest by conveyance or assignment; and if he has done all that is within his power to pass the property directly to the donee, or to declare a trust in favor of the donee, the donee's rights will be protected and enforced by a court of equity.<sup>1</sup> Also, the donor holding the equitable estate may direct the trustee in whom is vested the legal title to hold the property in trust for the donee; and this will create a valid trust in favor of the donee, and will clothe him with the beneficial interest, even though the direction is voluntary; and it is not neces-

v. Young, 80 N. Y. 422, 36 Am. Rep. 634, H. & B. 387, Young placed certain bonds in two envelopes, and wrote on each envelope a memorandum, signed by him, that a specified number of the bonds therein belonged to his son W, and the residue to his son J, but that the interest to become due thereon was "owned and reserved" by himself during his life, and that at his death "they belong absolutely and entirely to W and J and their heirs." The donor showed these envelopes and memoranda to the wives of his sons, and made statements to them expressing his intention that the gift was to be complete and valid. The donor retained possession of the envelopes and contents until his death, about a year afterwards. Held, that there was no executed and valid gift passing the legal title, and no valid declaration of trust constituting the father a trustee for the donees. In Estate of Webb, 49 Cal. 541, H. & B. 392, a person had written a letter to his sister, in which he promised to assign some securities to her, and this was held not an executed gift nor a valid trust.

<sup>1</sup> Illustrations of the first class, where the assignment was incomplete, and the donee acquired no right: Wadd v. Hazleton, 137 N. Y. 215, 33 Am. St. Rep. 707, 21 L. R. A. 693, 33 N. E. 143. Examples of the second class, where the donor did all that the nature of the property admitted: Edwards v. Jones, 1 Mylne & C. 226, 238, Ames Trusts 140; Fortescue v. Barnett, 3 Mylne & K. 36, Ames Trusts 136.

<sup>2</sup> Donaldson v. Donaldson, Kay 711, Ames Trusts 146; Tierney v. Wood, 19 Beav. 330, Ames Trusts 182.

sary that the trustee should give his assent.<sup>2</sup> Finally, the holder of the equitable estate may, by a sufficient declaration of trust, constitute himself a trustee for the donee with respect to the property, subject to the same limitations which apply to such declarations of trust by a donor who holds the legal estate. In conclusion, it may be truly said that each case of voluntary trust or transfer depends largely upon an interpretation of the language used by the donor; whether the language operates as a complete transfer, or is an effectual declaration of trust, must always be the vital question.

**§ 1000. Executed and Executory Trusts.**—This distinction between “executory” and “executed” trusts is solely concerned with questions of construction and interpretation of the instrument creating the trust, and of enforcement of the trust thus created,—namely, whether the strict rules of law governing limitations, and especially the rule in Shelley’s case, are or are not to be applied in such construction, interpretation, and enforcement. Whenever a trust is executed, it is always construed in conformity with the strict legal rules concerning limitations of estates, and the rule in Shelley’s case is made operative if the terms of the successive trusts bring it within that rule, even though the apparent intention of the one creating the trust is thereby defeated. Wherever a trust is executory, the intention of the party is followed in its construction and enforcement, the strict legal rules concerning limitations are not invoked, and the rule in Shelley’s case is not permitted to operate. Executory trusts and questions concerning them ordinarily arise from marriage articles or inchoate marriage agreements in which a complete settlement is not made, but the party covenants that he will settle property or convey property upon trusts for the benefit of his family, and from wills in which the testator does not devise property upon completed trusts, but devises to trustees upon trusts for them to settle it. In these and similar instances a court of equity is called upon to determine the nature of the settlements to be made, and in doing so it carries out the intention of the covenantor or testator, actual or presumed, without regard to the strict legal rules of limitation. As such instruments are comparatively infrequent in this country, and the subject rarely comes before the American courts, it will be suffi-

<sup>2</sup> See, also, McFadden v. Jenkyns, 1 Phill. Ch. 153, Ames Trusts 47 (direction by creditor to debtor to hold the debt in trust for another; but see In re Caplens Estate, 45 L. J. Rep. 280, Ames Trusts 49). A receipt in the form, “Received of B, for the use of A, one hundred pounds, to be paid to A at B’s death,” a sufficient declaration of trust: Moore v. Darton, 4 De Gex & S. 517, Ames Trusts 39.

cient to state the more general doctrines as established by decisions, without going into any minute detail of special rules.

**§ 1001. Definition and Description.**—A trust is *executed* when no act is necessary to be done to give effect to it when the trust is fully and finally declared in the instrument creating it.<sup>1</sup> A conveyance of land to A in trust for B, a devise of land to A in trust to receive the rents and profits and apply them to the use of B, are examples. It is plain that all ordinary express passive or active trusts are thus executed. A trust is *executory* when some further act is directed to be done, in order to complete and perfect the trust intended to be created.<sup>2</sup> . . .

**§ 1002. Powers in Trust.**—Analogous to trusts proper, but differing from them in one essential feature, are powers in trust. In a true trust the legal title is in and by its creation always vested in the trustee, but to be held for the benefit of the beneficiary. In a trust power, as distinguished from a trust, the legal title is vested, not in the trustee, but in a third person, and the trustee has authority to convey or dispose of the property to or for or among the beneficiaries. A power generally is an authority given to A to convey or dispose of an interest which he does not himself hold, and of which the complete legal title is vested in another person, B. Where the power is not coupled with a trust, A is clothed with a complete discretion whether he will or will not execute it; courts of equity do not control that discretion; if he utterly fails to make any appointment, they do not relieve the expected beneficiaries to or among whom the disposition might have been made. Where the power is in trust, A may have some discretion with respect to the mode in which he shall exercise it, with respect to the amounts distributed among a designated class of beneficiaries, and the like; but he has no discretion as to whether he will or will not exercise it at all. It partakes so much of the nature of a trust, that an obligation rests upon him, and an equitable right is held by the beneficiaries,—a right which equity recognizes, and to a certain extent protects; so that if A does not discharge the duty resting upon him, a court of equity will, to a certain extent, discharge the duty in his stead. A trust power may therefore be defined as follows: It is an authority given to A to dispose of property of which the legal title is held by B, to or among a specified beneficiary or class of beneficiaries, conferred in such terms that a fiduciary or trust obligation rests upon A to make the disposition, although he *may* be clothed with some

<sup>1</sup> *Stratton v. Gildersleeve*, 41 Atl. 1117 (New Jersey); *Cushing v. Blake*, 30 N. J. Eq. 689.

<sup>2</sup> *Taylor v. Brown*, 112 Ga. 758, 38 S. E. 66.

discretion as to the amounts or shares which he shall confer upon the individuals constituting a class of beneficiaries, or even as to the persons whom he shall select from the class to receive the entire benefit. On the other hand, the beneficiaries may be so specified that no discretion with respect to them exists.<sup>1</sup> When the trust power is of such a nature that the donee-trustee is authorized to dispose of the property among a class, and is clothed with a discretion, a court of equity will not interfere to control that discretion, or interfere with the mode of exercising it, if he does in fact make an appointment. If, however, the donee-trustee fails to act at all, and makes no appointment, it is a settled rule that a court of equity, in enforcing the power on behalf of the beneficiaries, will always decree an equal distribution of the property among all the persons constituting the class.<sup>2</sup>

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### SECTION III.

#### HOW EXPRESS TRUSTS ARE CREATED.

##### ANALYSIS.

- § 1006. Trusts of real property; statute of frauds; writing necessary.
- § 1007. Written declaration by the grantor; ditto, by the trustee; examples.
- § 1008. Trusts of personal property may be created verbally; what trusts are not within the statute.
- § 1009. Words and dispositions sufficient to create a trust; examples.
- §§ 1010-1017. Express trusts inferred by construction, sometimes improperly called "implied trusts."
  - § 1011. 1. From the powers given to the trustee.
  - § 1012. 2. Provisions for maintenance; examples.
  - § 1013. 3. To carry out purposes of the will.
  - § 1014. 4. From "precatory" words; Knight v. Knight; examples.
  - § 1015. Modern tendency to restrict this doctrine; in the United States.
  - § 1016. What intention necessary to create the trust; the general criterion; examples.
  - § 1017. Objections to the doctrine.

**§ 1006. Trusts of Real Property—Statute of Frauds.**—Before the statute of frauds, trusts of real as well as personal property could be created or declared—technically *averred*—verbally.<sup>1</sup> The original statute of frauds provides that "all declarations or creations of trusts, or confidences in any lands, tenements, or hereditaments,

<sup>1</sup> Brown v. Higgs, 8 Ves. 561, 570.

**H**arding v. Glyn, 1 Atk. 469, 2 Lead. Cas. Eq. 4th Am. ed. 1833, 1848, 1857, Shep. 212, Ames Trusts 78; Condit v. Bigalow, 64 N. J. Eq. 504, 54 Atl. 160.

<sup>2</sup> It seems, however, that this power of declaring a trust of land verbally did not exist when the land was conveyed by a deed absolute on its face;

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"; 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 [as mentioned in § 5], or else shall likewise be utterly void." This last clause refers to assignments by the cestui que trust. Analogous statutes have been enacted in the American states.<sup>2</sup> It is the settled doctrine, in interpreting this legislation, that a trust of land need not be created nor declared by a writing; it need only be manifested and proved by some writing duly signed or subscribed by the proper party; and, as a consequence, this written evidence *may* be a separate instrument, either simultaneous with or subsequent to the deed of conveyance, and may be very informal.<sup>3</sup>

**§ 1007. Written Declaration by the Grantor, or by the Trustee.**

—The written evidence of the trust which will satisfy the statute *may* come from the grantor,—the one who intends that a trust shall be created for a certain beneficiary,—or from the trustee,—the grantee to whom the land is conveyed for the purposes of the trust, but not from the cestui que trust. The grantor may declare the trust in the will or the deed by which the land is conveyed or devised, or in an instrument separate and distinct from the conveyance; or he may declare himself a trustee, and that he holds the land in trust, without conveying the legal title.<sup>1</sup> When the trust is not created in and by the instrument of conveyance, it may be sufficiently declared and evidenced by the trustee to whom only applying to conveyances by feoffment without a deed: See *Adlington v. Cann*, 3 Atk. 141, 149, 151.

<sup>2</sup>29 Car. II., c. 3, secs. 7-9. The § 5 referred to in the clause above quoted, prescribed the mode of executing a will of land. The American statutes differ considerably from the English, and among themselves, in their language. Still, unless the terms of a particular statute are *radically* a departure from the original type, and are mandatory in form, requiring the trust to be *created* by the conveyance itself, the interpretation adopted by the English courts prevails through the American states. The various statutes are regarded as substantially the same: *Perry on Trusts*, sec. 81. The statutes of frauds in a number of the states have omitted the paragraph relating to the creation or declaration of trusts. Mr. Perry enumerates Connecticut, Delaware, Virginia, North Carolina, Texas, Tennessee, Kentucky, Ohio, and Indiana. To these should be added West Virginia: See *Perry on Trusts*, sec. 78, note.

To the effect that an express trust in lands cannot be created by parol, see *Oden v. Lockwood*, 136 Ala. 514, 33 South. 895.

<sup>3</sup>*Stratton v. Edwards*, 174 Mass. 374, 54 N. E. 886.

<sup>1</sup>*Urann v. Coates*, 109 Mass. 581, H. & B. 366; *Bates v. Hurd*, 65 Me. 180, H. & B. 368; *Tierney v. Wood*, 19 Beav. 330, *Ames Trusts* 182.

the land is conveyed, or who becomes holder of the legal title; and this may be done by a writing executed simultaneously with or subsequent to the conveyance, and such writing may be of a most informal nature.<sup>2</sup> The trustee's acceptance of the trust may be express by his executing the conveyance or other instrument, or by assenting to the will; or it may be inferred from his dealing with the property; and prima facie he is presumed to accept.<sup>3</sup> An acceptance by the trustee is necessary, in order to bind him, but not in order to validate the trust. A refusal to accept or disclaimer frees the trustee named from any duty to act under the trust, but the rights of the beneficiary do not depend upon his acceptance. A court of equity never suffers an express trust to fail from want of a trustee.<sup>4</sup>

**§ 1008. Trusts of Personal Property may be Created Verbally.**

—The provisions of the statute of frauds apply to chattels real,<sup>1</sup> but not to money secured by mortgages and other charges upon land.<sup>2</sup> Nor does the statute extend to trusts of pure personalty; and such trusts may therefore be created, declared, or admitted verbally, and proved by parol evidence, although the consensus of authorities demands clear and unequivocal evidence.<sup>3</sup> Trusts which arise by operation of law—resulting and constructive trusts—are, in express terms, excepted from the statute.

**§ 1009. Words or Dispositions Sufficient to Create a Trust.—**

What words or dispositions, either in the written or the verbal declaration, do or do not operate to create a trust? It is assumed in the present discussion that the property is directly conveyed to or is held by the person alleged to be a trustee. In the first place, as has already been shown, a mere voluntary promise to give property in trust does not create a trust, nor any right which a court of equity will enforce.<sup>1</sup> In the second place, no precise form of

<sup>2</sup> Separate written memorandum: *Bates v. Hurd*, 65 Me. 180, H. & B. 368. Letters: *De Laurencel v. De Boom*, 48 Cal. 581. Answer of defendant in an equity suit: *McVay v. McVay*, 43 N. J. Eq. 47, 10 Atl. 178, H. & B. 370.

<sup>3</sup> *Montford v. Cadogan*, 17 Ves. 485, 489, 19 Ves. 635, 638. See, also, post, § 1060.

<sup>4</sup> *Adams v. Adams*, 21 Wall. 185, Ames Trusts 227; *Sonley v. Clockmakers' Co.*, 1 Br. Ch. Cas. 81, Ames Trusts 225; *Dodkin v. Brunt*, L. R. 6 Eq. 580, Ames Trusts 226.

<sup>1</sup> *Forster v. Hale*, 3 Ves. 696.

<sup>2</sup> *Tapia v. DeMartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641.

<sup>3</sup> *McFadden v. Jenkyns*, 1 Phill. Ch. 153, 157, Ames Trusts 47; *Danser v. Warwick*, 33 N. J. Eq. 133, Ames Trusts 186 (parol trust as to a bond and mortgage).

<sup>4</sup> *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634, H. & B. 387. See ante, §§ 997, 998.

words is necessary to create a trust, but the intention must be clear. The fact that a trust of land *is created* must not only be manifested and proved by a writing properly executed, but it must also be manifested and proved by such a writing what the trust is. The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail.<sup>2</sup> No particular technical words need be used; even the words "trust" or "trustee" are not essential; any other words which unequivocally show an intention that the legal estate was vested in one person, but to be held in some manner or for some purpose on behalf of another, if certain as to all other requisites, are sufficient. On the other hand, if the words "trust" or "trustee" are employed, they do not necessarily show an intention to create or declare a trust. It sometimes happens that an express trust arises, not from any definite words, but from the entire dispositions contained in the will, deed, or other instrument, or from a construction of all its terms. Some examples of such trusts, both in real and in personal property, are given in the foot-note as illustrations.<sup>3</sup>

<sup>2</sup>It does not follow that the grantee, devisee, or legatee takes the property absolutely free from the trust in such case; if the trust attempted to be created fails for reason of uncertainty, and the instrument shows an intention that the immediate donee was not to take and hold the beneficial interest, then a trust results to the donor: See post, § 1032; *Smith v. Matthews*, 3 De Gex, F. & J. 139; *Smith v. Bowen*, 35 N. Y. 83 (the words "all my estate, both real and personal, I give to my wife, to be used and disposed of at her discretion for the benefit of herself and my daughters, M., L. and A.," held to create a trust in favor of the daughters with respect to three fourths of the property). "Trust" and "trustee" not essential, but their omission *might* be a strong evidence of the intention: *Tobias v. Ketchum*, 32 N. Y. 319, 327, 328, H. & B. 374; *Smith v. Bowen*, 35 N. Y. 83; and "trust" or "trustee" do not always show a trust; *Cleveland v. Springfield Inst. for Sav.*, 182 Mass. 110, 65 N. E. 27. Sir William Grant said in *Cruwys v. Colman*, 9 Ves. 319, 323, that three things are indispensable to constitute a valid trust: 1. Sufficient words to raise it; 2. A definite subject; and 3. A certain or ascertained object. The beneficiaries need not be named; it is sufficient if they can be ascertained, and parol evidence is, of course, admissible in case of a latent ambiguity: *Gilmer v. Stone*, 120 U. S. 586, 7 Sup. Ct. Rep. 689.

<sup>3</sup>Trust of real property: *Janes v. Throckmorton*, 57 Cal. 368. Trusts of personal property: *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 448, H. & B. 393; *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634, H. & B. 387; *Hamer*

**§ 1010. Express Trusts Inferred by Construction.**—There is another important class of express trusts, which are not directly and expressly declared by the terms of the instrument, but which are inferred by a construction of all the terms and dispositions. They are all cases where the court infers that it was the intention of the party to create an express trust for some purpose, although he has not expressed that intention in unequivocal and direct terms, and the court is forced to gather it from his general expressions, or from the objects and purposes of his gift. When such a trust is found by the court to have been intended by the party, it is in every respect *an express active trust*,—has no resemblance whatever to a resulting or a constructive trust. It is, in fact, an express trust which the donor did not unmistakably declare, but which the court has helped out by interpretation and inference. To call this class “implied” trust, as is often done, is not only erroneous, but is productive of confusion and mistake. These trusts ordinarily arise from a construction of the language of wills; but there is no reason, or principle, why they may not also arise from conveyances and agreements *inter vivos*.

**§ 1011. 1. From Powers Given to the Trustees.**—Although no trust is declared in express terms, nor even mentioned, still the intention of the donor to create the trust, and the existence of the trust itself, may be necessarily inferred from the powers and authority given to the grantee, and in case of wills, even when no estate is directly devised to the executors, but the whole estate is *apparently* given to the beneficiaries, the trust may be necessarily inferred from the powers and authority conferred upon the executors, and thus from a construction of the entire will the intention may be shown that the executors are to take the legal title as trustees of an express active trust.<sup>1</sup> The peculiarity of this case

*v. Sidway*, 124 N. Y. 538, 550, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693, *Ames Trusts* 33; *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531, H. & B. 396 (trust not inferred from a mere deposit of money in a savings bank by one person in the name of another). A deposit in bank of a sum of money does not ordinarily create a trust, but gives rise to the relation of debtor and creditor only: See *Carstair v. Bates*, 3 Camp. 301, *Ames Trusts* 12; *Ex parte Broad*, 13 Q. B. D. 740, *Ames Trusts* 19; *Shoemaker v. Hinze*, 53 Wis. 116, 10 N. W. 86, *Ames Trusts* 29. But a bank deposit may be made as a special deposit in such a way as to create a trust. A common instance is that of the deposit of a check, or draft, for collection: See *Giles v. Perkins*, 9 East. 12, *Ames Trusts* 9; *Makesey v. Ramseys*, 9 Clark & F. 818, *Ames Trusts* 13; *Commercial Nat. Bank v. Hamilton Nat. Bank*, 42 Fed. 880, *Ames Trusts* 15. See, also, *Earley v. Turner*, 26 L. J. Ch. 710, *Ames Trusts* 40; *In re Barned Banking Co.*, 39 L. J. Ch. 635, *Ames Trusts* 42.

<sup>1</sup> *Tobias v. Ketchum*, 32 N. Y. 319, 327-331, H. & B. 374.

is, that the trust arises, and the legal estate is vested in the trustees, although the will contains no disposition by which the legal estate is in terms devised to them. The doctrine is settled that, in dispositions of such a nature, although there is no devise in terms to them, the authority conferred by the will upon the executors to lease, rent, repair, insure, pay taxes, assessments, and interest, and otherwise manage the trust property, and to pay over the *net* income to the devisees or legatees, necessarily carries the legal title to the executors, and creates an express active trust in them. It is a familiar doctrine that where land is conveyed or devised to trustees, and they have active duties to perform, they take the legal estate; the converse is also generally true, that where active duties are prescribed for executors, which could not be performed unless the legal estate is vested in them, they are in fact made trustees, and necessarily take the legal estate for the purposes of the trust.<sup>2</sup>

**§ 1012. 2. Provisions for Maintenance.**—A second species of trust by inference sometimes arises when property is given to a parent, or person in loco parentis, with no trust declared in terms, but with such directions for the maintenance of his family or children as enable the court to infer an intention on the part of the donor that the property should be held in trust for the purposes of the maintenance. No definite rule can be laid down; each case must stand upon its own circumstances. If the language is sufficient for the intention to be clearly inferred, the trust will be enforced; otherwise the donee will take an absolute estate, and the provisions concerning maintenance will be regarded as mere motives for the gift and recommendations addressed to his discretion.<sup>1</sup>

**§ 1013. 3. To Carry out the Purposes of the Will.**—Trusts, or at least powers in trust, are sometimes inferred from the terms of a will, when an intention to create the same is necessary, in order to carry out the directions and purposes of the testator. For example, when a trustee is ordered to pay certain moneys, but no property is given him with which to make the payments, or when executors are ordered to sell the real estate, or the real estate is charged with the payments of the testator's debts,—in these and similar cases a trust, or a power in trust, may be inferred, in order that the trustee or executor may carry the directions into effect.<sup>1</sup>

**§ 1014. 4. Precatory Words.**—The most common and important species of trusts by inference are those which arise where a testator

<sup>2</sup> *Mott v. Buxton*, 7 Ves. 201.

<sup>1</sup> *Woods v. Woods*, 1 Mylne & C. 401; *Blouin v. Phaneuf*, 81 Me. 176, 16 Atl. 540.

<sup>1</sup> *Blatch v. Wilder*, 1 Atk. 420; *Walker v. Whiting*, 23 Pick. 313.

has given property to a devisee or legatee, and has accompanied his gift with *precatory* words or phrases, implying his desire or wish that the property should be used for the benefit of some designated person or persons, or should be applied to some designated purpose.<sup>1</sup> Words expressing direction, recommendation, entreaty, confidence, hope, expectation, desire, wish, request, and the like, are included under the denomination "precatory." As a most general statement of the rule, if such words are strong enough to indicate the intention, and this intention is not defeated by other provisions of the will, the court infers that the property was given on trust for the person or object indicated, and will enforce such trust, according to its nature, as a similar trust declared in express terms would be enforced.<sup>2</sup>

**§ 1015. Modern Tendency to Restrict the Doctrine.**—I shall not attempt any analysis and classification of the cases for the purpose of formulating more specific rules. This has been done, as far as practicable, in the various treatises upon trusts. The decisions are numerous and conflicting. Judges have for some time past shown a decided leaning against the doctrine of precatory trusts, and a strong tendency to restrict its operation within reasonable and somewhat narrow bounds; many of the earlier decisions would certainly not be followed at the present day. The courts of this country have generally adopted the doctrine substantially as settled in England, although perhaps with some caution and reserve, and they all exhibit the modern tendency to limit rather than enlarge its scope; while in a few of the states the doctrine has been accepted with great reluctance, and only to a partial extent and in a modified form.<sup>1</sup>

**1016. What Intention Necessary—The General Criterion.**—Whether or not a trust has been created in any particular case is entirely a question of interpretation and construction. The intention must be sought for not only in the precatory words themselves, but also in the terms and qualifications of the gift, the powers of disposition or enjoyment conferred upon the first taker, the

<sup>1</sup> *Knight v. Knight*, 3 Beav. 148, 172-174, 11 Clark & F. 513, per Lord Langdale.

<sup>2</sup> *Malim v. Keighley*, 2 Ves. 333, 335, Ames Trusts 83; *Stead v. Mellor*, L. R. 5 Ch. Div. 225, Ames Trusts 91; *Lambe v. Eames*, L. R. 10 Eq. 267, 6 Ch. 597, Ames Trusts 85; *Harding v. Glyn*, 1 Atk. 469, Sh. 212, Ames Trusts 78; *Harland v. Trigg*, 1 Brown Ch. 142, Ames Trusts 79; *Gregory v. Edmondson*, 39 Ch. Div. 253, Ames Trusts 95.

<sup>1</sup> *Warner v. Bates*, 98 Mass. 274, 277, H. & B. 377; *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138; *Ellis v. Ellis's Adm'rs*, 15 Ala. 296, 50 Am. Dec. 132; *Boyle v. Boyle*, 152 Pa. St. 108, 34 Am. St. Rep. 629, 25 Atl. 494.

nature of the property, the description of the supposed beneficiaries, and all the other context. Precatory words may be used which, standing alone, would, under the decisions, create a trust; but they may be qualified and controlled by other expressions showing that the gift is absolute, and that everything is left to the discretion of the devisee or legatee. Each case must therefore turn upon its own circumstances, and not a little upon the sentiments and prepossessions of individual judges. 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*, already quoted. Those essentials are the imperative nature and meaning of the precatory words, the certainty of the subject-matter or property embraced in the trust, and the certainty of the objects or intended beneficiaries. Upon the authority of the more modern decisions, the whole doctrine may be summed up in a single proposition: 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 property to hold up on a trust declared in express terms in the ordinary manner.* Unless a gift to A, with precatory words in favor of B, is in fact *equivalent in its meaning, intention, and effect* to a gift to A, "in trust for B," then certainly no trust should be inferred. The early decisions proceeded perhaps upon a more artificial rule, and saw an intention in the use of words of wish, desire, and the like, where no such intention really existed. The modern decisions have adopted a more just and reasonable rule, and require the intention to exist as a fact, and to be expressed in unequivocal language. No other conclusion can be reconciled with the general principles of construction which are based upon reason and universal experience.<sup>1</sup> It has sometimes been stated as a general rule that a prima facie presumption of an intention to create a trust arises from the use of precatory words. Whatever may have been true of the earlier cases, the modern authorities do not, in my opinion, sustain any such rule; it is contrary to their whole scope and tenor.

§ 1017. **Objections to the Doctrine.**—The doctrine of precatory trusts has never met with unanimous approval. Able judges have dissented from it on principle, have pronounced it artificial, and

<sup>1</sup>*Stead v. Mellor*, L. R. 5 Ch. Div. 225, *Ames Trusts* 91; *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572; *Colton v. Colton*, 127 U. S. 300, 9 Sup. Ct. Rep. 1164, 20 L. Ed. 420; *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155.

have described it as violating instead of carrying out the intent of parties; and undoubtedly most of the earlier decisions were open to this criticism. It does seem strange that a testator, *having a full and settled intention to create a trust*, should adopt a mode which at best seems to be a mere suggestion or possible inference, and should not employ the familiar method of creating a trust by express declaration.<sup>1</sup> On the other hand, to abrogate the doctrine altogether would be introducing a rule wholly arbitrary and technical, since it would be saying, in fact, that trusts shall not be created except by means of a certain, fixed, and technical formula or manner of expression. Justice will be done, therefore, if the doctrine is placed upon reasonable grounds, its operation confined within narrow limits, and regulated by the criterion stated in the preceding paragraph.

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## SECTION IV.

### PUBLIC OR CHARITABLE TRUSTS.

#### ANALYSIS.

§ 1018. General description.

§ 1019. A public, not a private, benefaction requisite.

§ 1020. What are charitable uses and purposes: "Statute of charitable uses."

§§ 1021-1024. Classes of charitable uses.

§ 1021. 1. Religious purposes.

§ 1022. 2. Benevolent purposes.

§ 1023. 3. Educational purposes.

§ 1024. 4. Other public purposes.

<sup>1</sup>In the important case of *Meredith v. Heneage*, 1 Sim. 542, 551, before the house of lords, Chief Baron Richards said, speaking of prior decisions: "I entertain a strong doubt whether, in many or perhaps in most of the cases, the construction was not adverse to the real intention of the testator. It seems to me very singular that a person who really meant to impose the obligation established by the cases should use a course so circuitous, and a language so inappropriate and obscure, to express what might have been conveyed in the clearest and most usual terms,—terms the most familiar to the testator himself, and to the professional or other person who might prepare his will. In considering these cases, it has always occurred to me that if I had myself made such a will as has generally been considered imperative, I should never have intended it to be imperative; but on the contrary, a mere intimation of my wish that the person to whom I had given my property should, if he pleased, prefer those whom I proposed to him, and who, next to him, were at the time the principal objects of my regard." He also says that the question in such cases "is purely a matter of intention, to be collected from the words of the instrument, as in all other cases of wills." The foregoing language of this learned judge should, as it seems to me, be present to the minds of all courts, when passing upon cases of precatory trusts, as a proper and reasonable guide in rendering a decision.

- § 1025. Creation of the trust: Certainty or uncertainty of the object and of the beneficiaries.
- § 1026. Certainty or uncertainty of the trustees.
- § 1027. The doctrine of *cy-pres*.
- § 1028. Origin and extent of the equitable jurisdiction.
- § 1029. Charitable trusts in the United States.

§ 1018. **General Description.**—In express private trusts there is not only a certain trustee who holds the legal estate, but there is a certain specified cestui que trust clearly identified or made capable of identification by the terms of the instrument creating the trust. It is an essential feature of public or charitable trusts that the beneficiaries are uncertain,—a class of persons described in some general language, often fluctuating, changing in their individual numbers, and partaking of a quasi public character. The most patent examples are “the poor” of a certain district, in a trust of a benevolent nature, or “the children” of a certain town, in a trust for educational purposes. In such a case it is evident that *all* the beneficiaries can never unite to enforce the trust; for even if all those in existence at any given time could unite, they could not include nor bind their successors. It is a settled doctrine in England and in many of the American states that personal property and real property, except when prohibited by statutes, may be conveyed or bequeathed in trust, upon charitable uses and purposes, for the benefit of such uncertain classes or portions of the public, and that if the purposes are charitable, within the meaning given to that term, a court of equity will enforce the trust. Furthermore, it is one of the most important and distinctive features of charitable trusts that however long the period may be during which they are to last, even though it be absolutely unlimited in its duration, they are not subject to nor controlled by the established doctrines, nor even the statutes which prohibit perpetuities. Indeed, it may be said that the full conception of a charitable trust includes the notion that it is or may be perpetual.

§ 1019. **A Public, and not Private, Benefaction Requisite.**—In order that a trust may be charitable, the gift must be for the benefit of such an indefinite *class* of persons that the charity is really a public, and not a mere private, benefaction. On the other hand, in a public trust the designation of the charitable use and of the beneficiaries must be sufficiently certain and descriptive to indicate the intention of the donor; the language must not be so general and vague as to leave *both the beneficiaries and the purposes and objects* completely to the judgment and choice of the trustee or of the court.<sup>1</sup>

<sup>1</sup>*Morice v. Bishop of Durham*, 9 Ves. 399, 405, 10 Ves. 522, 541, *Ames*

§ 1020. **What are Charitable Uses and Purposes**—"Statute of Charitable Uses."—It is the question of primary importance, upon which all others depend, to determine what uses and purposes are charitable, within the meaning of the doctrine, so that gifts for such purposes may be sustained as valid charitable trusts, although they may tend to create perpetuities. It has already been shown that the purpose, whatever be its particular object, must benefit some indefinite class or portion of the *public*; for mere private charities are governed by the rules which apply to ordinary private express trusts. The general objects which come within the description of "charitable uses," and which may therefore constitute a valid charitable trust, were enumerated in the statute of charitable uses, passed in the reign of Queen Elizabeth,<sup>1</sup> as follows: "The relief of aged, impotent, and poor people; the maintenance of maimed and sick soidiers and mariners; the support of schools of learning, free schools, and scholars of universities; repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; the relief, stock, and maintenance of houses of correction; marriage of poor maids; aid

Trusts 195. *Vidal v. Girard*, 2 How. 127, 11 L. ed. 205. In *Jackson v. Phillips*, 14 Allen 539, 556, H. & B. 410, Gray, J., said: "A charity is a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion; by relieving their bodies from disease, suffering, or contraint; by assisting them to establish themselves in life; or by erecting or maintaining public works; or otherwise lessening the burdens of government." This may not be an exhaustive description of charitable purposes, but it accurately states the essential element that the gift must be for an indefinite class, so that the benefit conferred upon them is in its nature public.

Trusts for private objects do not fall within the denomination of charitable trusts, nor under the jurisdiction over them, and are void if they create perpetuities; as those for the erection or repair of private tombs or monuments: *Estate of Gay*, 138 Cal. 552, 94 Am. St. Rep. 70, 71 Pac. 707. The question has often arisen on bequests to Masonic lodges, mutual benefit societies, etc. It is settled in England that a "friendly" or mutual benefit society may be a charity when, under its rules, distressed circumstances or poverty is necessary to entitle a member to the benefits: *In re Lacy* (1899), 2 Ch. 149; but where a wealthy member would be entitled to share in the benefits equally with a poor member, it is not a charity: *Cunnack v. Edwards* (1896), 2 Ch. 679.

<sup>1</sup>43 Eliz., c. 4. The "charitable trusts" now under consideration should be carefully distinguished from gifts to corporations which are authorized by their charters, or other statutes, to receive and hold property, and apply it to objects which fall within the general designation of charitable. Such gifts are permitted in the states where the peculiar doctrine of "charitable trusts" has been abrogated, and they are regulated by the general rules of law applicable to all corporations, or by the provisions of the individual charter: See *Wetmore v. Parker*, 52 N. Y. 450.

and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners and captives; aid of poor inhabitants concerning payments of fifteenths, setting out of soldiers, and other taxes." It will be seen that this list omits some most important and familiar charitable objects—as, for example, the support and propagation of religion. The English and American courts have never regarded this enumeration as exhaustive, but as designed to be merely illustrative. Numerous objects analogous to those mentioned in the statute are held to be charitable. The doctrine is settled that all particular objects embraced within the general spirit, intent, and scope of the statute are to be considered as charitable, unless they violate some rule of public policy or the provisions of some positive statute.<sup>2</sup>

§ 1021. **Classes of Charitable Uses.—1. Religious Purposes.**—In addition to the objects specifically enumerated in the statute, other purposes of a like general nature are held by the courts to be charitable, and these may all be arranged in the following classes: *Religious purposes*: The support and propagation of religion is clearly a "charitable use."<sup>1</sup> This includes gifts for the erection, maintenance, and repair of church edifices, the maintenance of worship, the support of clergymen, the promotion and propagation of religious doctrines and beliefs in any manner by the church or by associations, the aid of missionary, Bible, and other religious societies, and all other objects and purposes which are really religious. The English courts made an exception with reference to superstitious uses, but in the United States no such distinction is made. Our courts would recognize no difference among religious beliefs and opinions; but in this country, as well as in England, a gift

<sup>2</sup> In *re Foveaux* (1895), 2 Ch. 501. Many gifts for purposes confessedly charitable are defeated by the statutes of mortmain in England, and in the states where these or analogous statutes have been adopted.

<sup>1</sup> In England an exception is made of "superstitious" uses, contrary to the public policy, such as masses for the soul. In the United States no such purposes would probably be regarded as superstitious which were recognized by any religious belief and ritual: *Hoeffer v. Clogan*, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 40 L. R. A. 730; but it is sometimes held that such a bequest is invalid because for a private purpose; *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 18 South. 394, 53 Am. St. Rep. 48, 25 L. R. A. 360. It has been intimated that the promotion of infidelity is not a valid charitable purpose: See *Manners v. Philadelphia Library Co.*, 93 Pa. St. 165, 39 Am. Rep. 741. A gift "to the service of God" is not too broad to be enforceable: In *re Darling* (1896), 1 Ch. 50. A gift to "sisters of charity" is valid, but a gift to a religious society which exists solely for the spiritual improvement of its own members is one for a private purpose: *Cocks v. Manners*, L. R. 12 Eq. 574. Mere hospitality to traveling ministers and others of the donor's religious denomination has been held not to be a charitable purpose: *Kelly v. Nichols*, 17 R. I. 306, 21 Atl. 906.

could not be sustained as a charity for religious purposes when it was wholly irreligious, and its only object was to destroy all religion.

§ 1022. 2. **Benevolent Purposes.**—Numerous trusts for purposes of benevolence are upheld as charitable, although not mentioned in the statute, since they are within its spirit and intent.<sup>1</sup> Among the particular instances embraced within this class are trusts for the “poor,” the “deserving poor,” widows and orphans of a specified town, district, or country; for hospitals, asylums, and similar public institutions; for any class of persons requiring aid, as “the colored persons” of a certain state; and benevolent objects generally, without specifying the form. Even trusts established for the donor’s own “poor relations,” or “poor descendants,” as a class, are held to be true charities. The beneficiaries to be relieved, and the mode proposed for aiding them, must be *public*; a trust on behalf of a strictly private association, the benefits of which are confined to its own members, is not a “charitable trust.”

§ 1023. 3. **Educational Purposes.**—Gifts, devises, and bequests in trust for educational purposes are valid, since they are all clearly within the spirit of the statute.<sup>1</sup> This class embraces all trusts for the founding, endowing, and supporting schools and other similar institutions which are not strictly private; for the establishment of professorships, and maintenance of teachers; for the education

<sup>1</sup> It should be noticed that the word “benevolent” is here used in its popular sense, including a large number of purposes which are recognized as charitable. The words “benevolence,” or “benevolent purposes,” by themselves, have been frequently condemned by the English courts as too broad to support a valid charitable use. These English cases, however, have not been generally followed in this country: See post, notes to § 1025. Examples of valid charities: for the poor of a certain place or district: Bishop of Hereford v. Adams, 7 Ves. 324; Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491, H. & B. 438. For the donor’s “poor descendants,” as a class: Gillam v. Taylor, L. R. 16 Eq. 581. To the sick, needy or disabled members of certain mutual benefit associations: Minns v. Billings, 183 Mass. 126, 66 N. E. 593, 97 Am. St. Rep. 420. See, also, Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568, H. & B. 430.

<sup>1</sup> Clement v. Hyde, 50 Vt. 716, 28 Am. Rep. 522; In re John’s Will, 30 Ore. 494, 47 Pac. 341, 36 L. R. A. 242 (for maintenance of public school); Almy v. Jones, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414 (endowment of prizes for promotion of art). The court, in passing upon the validity of educational or religious gifts, is not concerned with the truth or falsity of the opinions sought to be propagated, so long as they are not hostile to religion, to law, or to morals: In re Foveaux (1895), 2 Ch. 201 (gift to anti-vivisection society); George v. Braddock, 45 N. J. Eq. 757, 18 Atl. 881, 14 Am. St. Rep. 754, 6 L. R. A. 511 (trust upheld for circulation of the writings of Henry George, which attacked the right of private property in land). But see Jackson v. Phillips, 14 Allen 539, H. & B. 410, which, in so far as it condemned a trust for the advancement of woman suffrage, is contrary to the current of authority.

of designated classes of persons, as the poor children of a town; for the promotion of science and scientific studies; and generally for the advancement of knowledge, learning, and education.

§ 1024. 4. **Other Public Purposes.**—Other public purposes, not in the ordinary sense *benevolent*, may be valid charities, since they are either expressly mentioned by the statute, or are within its plain intent. All of these purposes tend to benefit the public, either of the entire country or of some particular district, or to lighten the public burdens for defraying the necessary expenses of local administration which rest upon the inhabitants of a designated region.<sup>1</sup>

§ 1025. **Creation of the Trust—Certainty or Uncertainty of the Object and of the Beneficiaries.**—One of the distinguishing elements of a “charitable” as compared with an ordinary trust consists in the generality, indefiniteness, and even uncertainty which is permitted in describing the objects and purposes or the beneficiaries. From the very definition of a “charitable trust” the beneficiaries are always an uncertain body or class; but the doctrine goes further than this. If the donor sufficiently shows his intention to create a charity, and indicates its general nature and purpose, and describes in general terms the class of beneficiaries, the trust will be sustained and enforced, although there may be indefiniteness in the declaration and description, and although much may be left to the discretion of the trustees.<sup>1</sup> This uncertainty,

<sup>1</sup>Stuart v. City of Easton, 74 Fed. 854, 21 C. C. A. 146, 39 U. S. App. 238 (for erection of court-house). But to constitute a valid charity, benefit to the public must be the direct, and not a remote, object of the gift. Hence, a gift for the encouragement of a mere sport, such as yacht racing, cannot be supported as “charitable,” although the sport might be beneficial to the public, as in the particular case by tending to train sailors and encourage ship-building: *In re Nottage* (1895), 2 Ch. 649.

<sup>1</sup>See *Lewis v. Allenby*, L. R. 10 Eq. 668. It is a well-established rule of the English courts that where there is a gift of a fund, part or all of which may, at the discretion of the trustees, be applied to an indefinite purpose which is not strictly “charitable,” the whole gift fails. This highly technical rule has frequently been deplored by judges who felt themselves bound by its authority; and is the more unfortunate in its results on account of the strictness with which the English courts condemn, as incapable of creating a charity, many expressions which, in popular usage, are nearly synonymous with the word “charitable;” because, when the meaning of such expressions is closely analyzed, they are found to be capable of embracing objects which cannot be the objects of a valid charitable use. Thus, a bequest to “objects of liberality and benevolence” was invalid: *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 321, *Ames Trusts* 195. In the recent case of *In re McDuff* (1896), 2 Ch. 451, a bequest for “charitable or *philanthropic* purposes” was held bad, on the ground that the word “philanthropic” had never been defined by the courts, and might possibly include objects not strictly “charitable.”

however, must not be carried too far. The intention of the donor to create some kind of charity, religious, benevolent, educational, or otherwise, must never be left uncertain. It must sufficiently appear that he designed to establish a charity, and the purpose must be indicated with sufficient clearness, to enable the court, by means of its settled doctrines, to carry the design into effect. Such is the well-established English doctrine, and the court strives to carry out a charity if at all practicable. In this country, the doctrine has been adopted only to a partial extent. In a few of the states where the system of charitable trusts prevails, the English theory seems to have been accepted with little or no modification. In most of the states more certainty in defining the purposes of the charity and terms of the trust, or in designating the classes of persons who are intended to be the beneficiaries, is required, in order to sustain the gift, than is necessary under the methods of the English courts.<sup>2</sup>

**§ 1026. Certainty or Uncertainty of the Trustee.**—Charitable trusts also differ from private trusts in another very important feature. It is settled, as a part of the complete system prevailing in England, that not only may the beneficiaries be uncertain, but that, even where the gift is made to no certain trustee, so that the trust, if private, would wholly fail, a court of equity will carry the trust into effect, either by appointing a trustee or by acting itself in the place of a trustee—that is, by establishing a scheme for accomplishing the design of the donor, as though the legal title had vested in a certain trustee. This result may happen in various modes. In one class of instances the same rule is merely applied which would be invoked under like circumstances to regulate the administration of a private trust. Where a testator has expressly purported to give the property to a trustee, but for any cause the appointment fails, the charitable trust will still be enforced.<sup>1</sup> The

<sup>1</sup>Invalid: *Nichols v. Allen*, 130 Mass. 211, 39 Am. Rep. 445; *Levesey v. Jones* (N. J. Eq.) 35 Atl. 1064. Valid: *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491, H. & B. 438; *Grant v. Saunders*, 121 Iowa 80, 100 Am. St. Rep. 310, 95 N. W. 411; *St. James' Orphan Asylum v. Shelby*, 60 Nebr. 796, 84 N. W. 273, 83 Am. St. Rep. 553; *Goodale v. Mooney*, 60 N. H. 528, 49 Am. Rep. 334; *In re Murphy's Estate*, 184 Pa. St. 310, 39 Atl. 70, 63 Am. St. Rep. 802. It is noticeable that the American courts which profess to follow the English cases in supporting gifts of extreme uncertainty, such as gifts to "charitable objects" generally, have either repudiated the distinction between "charitable" and "benevolent" or kindred words, or at least have shown a strong inclination to infer from the context of the will that such words are used as synonymous with "charitable"; see, among other cases, *Fox v. Gibbs*, 86 Me. 87, 29 Atl. 940; *Goodale v. Mooney*, *supra*; *In re Murphy's Estate*, *supra*.

<sup>2</sup>As where a testator gives property, to be applied in charity to such person

doctrine, however, goes much farther than this simple rule, which does not permit a trust otherwise valid to fail for want of a designated trustee. It also applies where the property is given to a person or body incapable of *taking and holding in perpetuity*; or to a body uncertain, indefinite, and fluctuating in its members, such as an unincorporated society; or to a body not in legal being, as to a corporation not in existence; and even where there is no person or body indicated as the recipients of the legal title, but the property is merely directed to be applied to some designated charitable purpose, the performance of which direction might and often would necessarily create a perpetuity.<sup>2</sup> This is one of the most important points of distinction between charitable and private trusts; for it is certain that at law, and independently of the peculiar doctrine of equity on this subject, gifts to charitable uses, without a certain and competent trustee to take and hold the legal title—as to an unincorporated and fluctuating society—would be wholly void.<sup>3</sup> The doctrine, however, is rejected by the courts of several American states, which admit the existence and validity of charitable trusts only in cases where the property is given to a certain and competent trustee.

**§ 1027. The Doctrine of Cy-Pres.**—In administering charitable

as he shall hereafter in his will appoint his executor, and he neglects to appoint any one, or, having appointed one, the person dies in the testator's lifetime, and none other is named; or the testator gives his property to such person as his executor shall name, and no executor at all is appointed, or, if appointed, he dies in the testator's lifetime; or if the property is given to certain trustees, and they all die in the testator's lifetime, or the trustee named refuses to act,—in all such cases the court carries out the intended charity as stated in the text: *Att'y-Gen. v. Hickman*, 2 Eq. Cas. Abr. 193, *Ames Trusts* 224; *Sohier v. Burr*, 127 Mass. 221; *In re John's Estate*, 30 Ore. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

<sup>2</sup>*Cocks v. Manners*, L. R. 12 Eq. 574. There is a fundamental divergence between two classes of American decisions upon this question. In some states the English doctrine as stated in the text is adopted, except so far as it is enlarged by the further and distinct doctrine of cy-pres; in others, charitable trusts are sustained and enforced only when the legal title to the property is given by the donor to a certain trustee competent to take and hold in perpetuity, if the trust creates one. The following cases are given simply as examples: Gifts to unincorporated societies held valid: *Hadden v. Dandy*, 51 N. J. Eq. 154, 32 L. R. A. 625, 26 Atl. 464. Gift to a corporation not yet created, but its incorporation expected, valid: *Coit v. Comstock*, 51 Conn. 352, 50 Am. Rep. 29. Gift to the treasurer of a county and his successors in office, the income for aiding poor, held valid: *Clement v. Hyde*, 50 Vt. 716, 28 Am. Rep. 522. See, also, *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491, H. & B. 438.

<sup>3</sup>*Baptist Ass'n v. Hart's Ex.*, 4 Wheat. 1. (Gift to voluntary association for education of poor, held void for uncertainty of trustee.)

gifts the English courts have leaned so strongly in favor of sustaining the trusts, even when the donor's specified purpose becomes impracticable, that they invented at an early day, and have fully established, the so-called doctrine of *cy-pres*. The doctrine may be stated in general terms as follows: Where there is an intention exhibited to devote the gift to charity, and no object is mentioned, or the particular object fails, the court will execute the trust *cy-pres*, and will apply the fund to some charitable purposes, similar to those (if any) mentioned by the donor. "If the donor declare his intention in favor of charity indefinitely, without any specification of objects, or in favor of defined objects which happen to fail from whatever cause—even though in such cases the particular mode of operation contemplated by the donor is uncertain or impracticable—yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness, illegality, or failure of its immediate objects, be carried into effect."<sup>1</sup> In the first kind of cases, where the donor has specified no object, the court will determine upon some scheme which shall carry out the general intention; in the second kind, where the donor's specified object fails, the court will determine upon another object similar to that mentioned by the donor. A limitation upon the generality of the doctrine seems to be settled by the recent decisions, that where the donor has not expressed his charitable intention generally, but only by providing for one specific particular object, and this object can not be carried out, or the charity provided for ceases to exist before the gift takes effect, then the court will not execute the trust; it wholly fails.<sup>2</sup> The true doctrine of *cy-pres* should not be confounded, as is sometimes done, with the more general principle which leads courts of equity to sustain and enforce charitable gifts, where the trustee, object, and beneficiaries are simply *uncertain*. There is a radical distinction between the two, although the doctrine of *cy-pres* may be to some extent an expansion or enlargement of the other principle.<sup>3</sup> In the great majority of the American

<sup>1</sup> *Sinnett v. Herbert*, L. R. 7 Ch. 232; *Minot v. Baker*, 147 Mass. 348, 9 Am. St. Rep. 713, 17 N. E. 839; *Attorney-Gen. v. Briggs*, 164 Mass. 561, 42 N. E. 118.

<sup>2</sup> *Gladding v. St. Matthew's Church*, (R. I.) 57 Atl. 860; *In re White's Trusts*, 33 Ch. Div. 449.

<sup>3</sup> Some of the cases in which the court has professedly relied on the doctrine of *cy-pres*, and which are cited as illustrations of it, in a preceding note, seem to be nothing more than instances in which trusts with uncertain trustees or objects have been sustained. The suggestion of the text is not merely verbal; it has a practical importance in this country. It shows that the courts in the American states which have utterly rejected the doctrine of *cy-pres* may sustain and enforce charitable trusts which are sim-

states the courts have utterly rejected the peculiar doctrine of *cy-pres* as inconsistent with our institutions and modes of public administration. A few of the states have accepted it in a modified and partial form.<sup>4</sup>

§ 1028. **Origin and Extent of the Equitable Jurisdiction.**—Such being the general nature of charitable trusts, the origin and extent of the jurisdiction over them remains to be examined. The question is one of little practical importance in England, since the jurisdiction is there exercised as though it were entirely derived from the statute of charitable uses of Elizabeth.<sup>1</sup> The question, however, becomes of vital importance in this country—is absolutely fundamental—since the statute of Elizabeth has been held to be in force in but a very few of the states. The opinion at one time prevailed that the peculiar equitable jurisdiction over charities, except in cases where a trust valid by the ordinary rules of law and equity was created, was derived solely from the statute.<sup>2</sup> Other English judges have maintained the opinion that the jurisdiction in its full extent was possessed by the court of chancery by virtue of its general powers, and that the statute had only the effect to regulate that jurisdiction, and to define more distinctly the classes of objects which are charitable. This conclusion has been sustained, and even demonstrated as correct, by the researches of the English record commissioners.<sup>3</sup> The question has been repeatedly passed

ply uncertain in their objects or their trustees, and still be consistent with the general position which they have assumed.

\* It has generally been said that the doctrine of *cy-pres* and the power to enforce it belong to and result from the *executive* authority held by the English chancellor as a representative of the crown in its character as *parens patriae*, and are not a part of the judicial functions possessed by the *court* of chancery; while in the United States the courts are clothed with judicial functions only, the prerogative belonging to the *parens patriae* being held by the legislatures. It may well be doubted, I think, whether this view is entirely correct. In *Mormon Church v. United States*, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. ed. 478, the question was discussed, and it was held that the legislature may, at any rate, delegate such power to the court. In Massachusetts, where the *cy-pres* doctrine is more full recognized than in other states, it has been intimated that the court would in some cases exercise the functions which were traditionally ascribed to the chancellor in his executive capacity: *Minot v. Baker*, 147 Mass. 348, 9 Am. St. Rep. 713, 17 N. E. 839. See, also, *Bullard v. Town of Shirley*, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110.

<sup>1</sup> 43 Eliz., c. 4.

<sup>2</sup> *Baptist Ass'n v. Hart's Ex'rs*, 4 Wheat. 1.

<sup>3</sup> The examination of the ancient records of the court of chancery by the commissioners has disclosed a large number of cases brought in that court and decided prior to the statute, in which charities of the most indefinite and general character were sustained, thus proving that the court then exer-

upon by the American courts. Wherever the system of charitable trusts has been accepted at all, it has generally been held that the jurisdiction belongs to equity as a part of its ordinary authority over express trusts, and is not referable for its origin to the statute of Elizabeth. This conclusion was necessary to support the jurisdiction in a great majority of the states, since that statute had not been adopted as a part of their local legislation.<sup>4</sup>

§ 1029. **Charitable Trusts in the United States.**—With regard to the extent to which charitable trusts have been adopted and the jurisdiction over them exercised in the various states, there is the utmost conflict of judicial decision. It seems possible, however, without attempting any strict comparison of the cases or any minute classifications of the rules, to arrange the different states according to three general types, which shall represent with reasonable accuracy and certainty the existing condition of the law on the subject in this country. *First class.* This class includes those states in which charitable trusts have been abrogated or not adopted.<sup>1</sup> Either from a statutory abolition of all uses and trusts, with a few specified exceptions, or from the general provisions of the law against perpetuities, or from the general policy of the state legislation, "charitable trusts" do not exist at all, except where they are merely the express private trusts permitted by the

cised the same kind of jurisdiction which it has exercised since the statute: See Coop. Pub. Rec. 355.

<sup>4</sup>The position above stated is affirmed in the same positive manner by repeated and most able decisions of the United States supreme court: *Vidal v. Girard's Ex'rs*, 2 How. 127, 155, 194, 196; *Williams v. Williams*, 8 N. Y. 525.

<sup>1</sup>The excepted instances authorized by statute are generally cases where corporations may receive and hold property, in trust for some object which is charitable. The states constituting this class are the following:—New York (until statute of 1893); Wisconsin (as respects real but not as respects personal property); Michigan; Minnesota.

In all the foregoing states the same type of statute has been adopted, in terms abolishing all uses and trusts, except a few well-defined species of active express trusts which do not include any ordinary form of charitable use. The courts of these states have felt themselves compelled to hold that all charitable trusts were abolished, except such as would be valid forms, under the exceptions of the statute. No other conclusion seems to me possible, except by a judicial repeal of the legislation.

Maryland; Virginia; West Virginia. In all these states a trust for charitable purposes would be upheld, provided it possessed all the elements of a valid ordinary private trust; that is, the trustee was a certain person competent to take and hold the property, the beneficiaries were certain or capable of being made so, and no perpetuity was created. In other words, an express trust, otherwise valid, would not become invalid because the ultimate purpose was charitable.

law, or except in those particular instances authorized by statute. The equitable system of distinctively charitable trusts is abandoned. *Second class.* This class includes the larger portion of the states in which "charitable trusts" exist under a somewhat modified and restricted form.<sup>2</sup> There is not a little divergence in the views maintained by the courts of the various states composing this class. In a few of them the statute of Elizabeth is held to be in force, or one similar to it has been enacted. In the majority of them the doctrine of charitable trusts, as a part of the ordinary jurisdiction and functions of equity, has been accepted in a modified and limited form; such trusts are upheld when the property is given to a person sufficiently certain, and for an object sufficiently definite. With regard to this element of certainty in the trustee, and the objects, there is much diversity of decision. The doctrine of cy-pres is generally rejected. *Third class.* This class includes a very few states which have accepted the doctrine in its full extent.<sup>3</sup> The states composing this group have not even totally rejected the doctrine of cy-pres, although they do not apply it so freely and under such extreme circumstances as would be done in England. The general system seems, at least, to be so far adopted that when an intention to give property to charitable uses is clearly manifested, but the disposition is uncertain and indefinite, either as to the trustee or as to the objects and beneficiaries, the trust is upheld or defeated, upon the same principles as those which would be followed by the English courts.

<sup>2</sup>The following states are placed in this class; but there is a great diversity in the particular rules prevailing in the different states, and only a general resemblance in their decisions: Alabama; Arkansas; California; Colorado; Connecticut (but the cy-pres doctrine has been to some extent adopted by statute); Delaware; Georgia; Illinois; Indiana; Iowa; Kansas; Kentucky (but may belong in class third); Louisiana; Maine; Mississippi (valid as respects personalty but not realty); Missouri (possibly may belong in class third); Nebraska; New Hampshire; New Jersey; New York (since 1893); North Carolina; Ohio; Oregon; Pennsylvania; South Carolina; Tennessee; Texas; Utah (probably); Vermont; Washington; Wisconsin (as respects personal property); United States Supreme Court.

A few of the states in this list—e. g., New Jersey—might perhaps be properly placed in the third class, since their courts uphold trusts very uncertain, both as to trustee and object; but none of them, I believe, profess to accept the English doctrine in all its fullness.

<sup>3</sup>Massachusetts; Kentucky (according to most of the decisions); Missouri (cy-pres doctrine recognized by the language of the decisions); Rhode Island.

## SECTION V.

## TRUSTS ARISING BY OPERATION OF LAW—RESULTING AND CONSTRUCTIVE TRUSTS.

## ANALYSIS.

- § 1030. General nature and kinds.
- §§ 1031–1043. *First.* Resulting trusts.
- §§ 1032–1036. First form: trusts resulting to donor.
  - § 1032. 1. Property conveyed on some trust which fails.
  - § 1033. Same; essential elements.
  - § 1034. 2. A trust declared in part only of the estate conveyed.
  - § 1035. 3. In conveyances without consideration.
  - § 1036. Parol evidence.
- §§ 1037–1043. Second form: conveyance to A, price paid by B.
  - § 1038. Special rules.
  - § 1039. Purchase in name of wife or child.
  - § 1040. Admissibility of parol evidence.
  - § 1041. The same; between family relatives.
  - § 1042. Legislation of several states.
  - § 1043. Interest and rights of the beneficiary.
- §§ 1044–1058. *Second.* Constructive trusts.
  - § 1045. Kinds and classes.
  - § 1046. 1. Arising from contracts express or implied.
  - § 1047. 2. Money received equitably belonging to another.
  - § 1048. 3. Acquisition of trust property by a volunteer, or purchaser with notice.
  - § 1049. 4. Fiduciary persons purchasing property with trust funds.
  - § 1050. 5. Renewal of a lease by partners and other fiduciary persons.
  - § 1051. 6. Wrongful appropriation or conversion into a different form of another's property.
  - § 1052. 7. Wrongful acquisition of the trust property by a trustee or other fiduciary person.
  - § 1053. 8. Trusts ex maleficio.
  - § 1054. (1) A devise or bequest procured by fraud.
  - § 1055. (2) Purchase upon a fraudulent verbal promise.
  - § 1056. (3) No trust from a mere verbal promise.
  - § 1057. 9. Trust in favor of creditors.
  - § 1058. Rights and remedies of the beneficiaries.

§ 1030. **General Nature and Kinds.**—The second main division of trusts, and the one which, in this country especially, affords the widest field for the jurisdiction of equity in granting its special remedies so superior to the mere legal recoveries of damages, embraces 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. A broad distinction separates all express trusts from those which arise by operation of law. In the former class the trust relation is rightful

and permanent. In the latter, there is no such element of right and permanency. Even if the trust relation is not wholly wrongful, resulting from fraud or other unconscientious act, still a certain antagonism between the cestui que trust and the trustee is involved in the very existence of the trust; and instead of the idea of permanence, the substantial right of the beneficiary is that the trust should be ended by a conveyance of the legal title to himself.<sup>1</sup> All trusts by operation of law consist, therefore, in a separation of the legal and the equitable estates, one person holding the legal title for the benefit of the equitable owner, who is regarded by equity as the *real* owner, and who is entitled to be clothed with the legal title by a conveyance. Certain instances of this class are trusts only sub modo; they are termed trusts, because the beneficial owner is entitled to the same remedies against the holder of the legal title which are given to the beneficiary under a true trust. All trusts which arise by operation of law are, as the name indicates, excepted from the requirements of the statute of frauds.<sup>2</sup> This entire grand division consists of two general classes: resulting trusts and constructive trusts. The line of distinction between these two classes is clear and definite; the failure to observe it has produced much unnecessary confusion. I shall describe, *first*, resulting trusts, and *second*, constructive trusts, following a classification which seems to me the necessary consequence of fundamental principles.

§ 1031. **First. Resulting Trusts.**—In all species of resulting trusts, *intention* is an essential element, although that intention is never expressed by any words of direct creation. There must be a transfer, and equity infers the intention that the transferee was not to receive and hold the legal title as the beneficial owner, but that a trust was to arise in favor of the party whom equity would regard as the beneficial owner under the circumstances. The equitable theory of *consideration*, heretofore explained, is the source and underlying principle of the entire class.<sup>1</sup> Resulting trusts, therefore, are those which arise where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears or is inferred from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go or be enjoyed with the legal title. In such case a trust is implied or results in favor of the person for whom the equitable interest is assumed to have been intended, and whom equity deems to be the real owner. This person is the one from whom the con-

<sup>1</sup> See vol. 1, § 148.

<sup>2</sup> See ante, § 1008.

<sup>3</sup> See ante, § 981.

sideration actually comes, or who represents or is identified in right with the consideration; the resulting trust follows or goes with the real consideration. All true resulting trusts may be reduced to two general types: 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. In order that a case of this kind may arise, there must be a true *gift* so far as the immediate transferee, A, is concerned; the instrument must not even state any consideration, and no valid complete trust must be declared in favor of A or of any other person. Such trusts, therefore, generally arise from wills, although they may arise from deeds. If the conveyance be by a deed, the trust will result to the grantor; if it be by a will, the trust will result to the testator's residuary devisees or legatees, or to his heirs or personal representatives, according to the nature of the property and of the dispositions. 2. The second type includes the cases where a purchase has been made, and the legal estate is conveyed or transferred to A, but the purchase price is paid by B. I shall briefly examine these two forms.

§ 1032. **First Form—Trust Resulting to the Donor.**—This type includes the three following subdivisions: 1. Where property is conveyed by will or deed upon some particular trust or particular objects, and these purposes fail in whole or in part, or the particular trusts are so uncertain and indefinite that they can not be carried into effect, or they lapse, or they are illegal—in all of these cases a trust, either with reference to the whole property or to the residuum, results in favor of the grantor, or the heirs, residuary devisees or legatees, or personal representatives of the testator.<sup>1</sup> The following are illustrations: Where property is given by will or deed, stated to be *on trust*, but no trust is declared; or upon trusts thereafter to be declared, but no such declaration is made; or is given upon some trust which has wholly failed and become inoperative;<sup>2</sup> or when property is given upon a trust which is too uncertain, indefinite, and vague in its declaration to be carried into effect;<sup>3</sup> or if property is given upon a trust which is illegal, and therefore void,<sup>4</sup> or upon a trust which fails by lapse, and the property is not otherwise disposed of.<sup>5</sup>

<sup>1</sup> *Holliffe v. Wells*, 130 Mass. 221; *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728.

<sup>2</sup> *Morice v. Bishop of Durham*, 10 Ves. 537, *Ames Trusts* 195; *Onslow v. Wallis*, 1 Macn. & G. 506, *Ames Trusts* 462.

<sup>3</sup> *Nichols v. Allen*, 130 Mass. 211, 39 Am. Rep. 445; *In re Davis*, 112 Fed. 129.

<sup>4</sup> *Pawson v. Brown*, L. R. 13 Ch. Div. 202.

<sup>5</sup> *Ackroyd v. Smithson*, 1 Brown Ch. 503, 3 Keener 977, 1 Scott 621; or has

§ 1033. **The Same. Essential Elements.**—In this and all other forms belonging to the class under present consideration, there must be no pecuniary consideration coming from the grantee, for such a consideration would raise a trust in his own favor, and clothe him with the beneficial interest. Even if the conveyance merely recites a pecuniary consideration, the same effect would be produced.<sup>1</sup> Furthermore, the deed or will must contain no declaration of use covering the whole estate in favor of the grantee or devisee; such a declaration of use would raise a trust in his favor, vest in him the beneficial estate to its extent, and so far defeat any resulting trust. Resulting trusts of this type are matters of intention. There is a substantial distinction between giving property expressly *for* a particular purpose, and giving it only *subject to* a particular purpose.<sup>2</sup> If the intention appears from the whole instrument that the donee is to take the beneficial interest, even though *subject to* the particular object or purpose designated, then no trust shall result to the donor, if that object or purpose should fail.

§ 1034. **2. A Trust Declared in a Part only of the Estate Conveyed.**—A second subdivision includes those cases where the owner of both the legal and the equitable estates conveys the legal estate, but does not convey the equitable estate, or conveys only a portion of it, and a trust in the entire equitable estate in the one instance, or in the part of it undisposed of in the other, will, in gen-

terminated: *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. Ct. 401, 23 L. ed. 392. If the property, where the prior trust fails by lapse or otherwise, is given to some other person, then no trust results.

<sup>1</sup>*Methodist Episcopal Church v. Jackson Square Evangelical Church*, 84 Md. 173, 35 Atl. 8.

<sup>2</sup>The reason of this distinction lies wholly in the *intention or assumed intention* of the donor. When property is given to A expressly *for* a specific purpose, the instrument showing a clear intention that the gift is *for that purpose alone*,—e. g., land is given on trust to pay the grantor's debts,—then as to so much of the property given as is not required for the expressed purpose, a trust results to the donor. On the other hand, when property is given to A, *subject only to or charged with*, a particular purpose, the gift is held to be absolute; a beneficial interest as well as the legal estate vests in the donee; and no trust results to the donor, even though the special purpose wholly fails,—much less when there is a residuum of the property left after it is accomplished. The case is completely analogous to a conveyance or bequest to A of all the legal and beneficial interest in property, subject to or encumbered by a mortgage or any other kind of lien. It follows that where property is devised or bequeathed to A, *subject to or charged with* the payment of the testator's debts or legacies, A takes the entire interest, subject only to the lien or charge, and there is no resulting trust: *King v. Denison*, 1 Ves. & B. 260, 272.

eral, result to the grantor, or to the heirs or representatives of the testator.<sup>1</sup>

§ 1035. **3. In Conveyances without Consideration.**—It was a doctrine of the English equity, in pursuance of the ancient principle that the use followed or was raised by the consideration, that when land was conveyed by deed without any consideration, and without any use or trust being declared, a trust resulted to the feoffor, the feoffee taking only the naked legal title. This doctrine, however, had no application to conveyances which operated under the statute of uses, since a use was raised in favor of the immediate grantee by a "bargain and sale" between strangers, and by a "covenant to stand seised" between relatives. If the doctrine has any existence under the conveyancing system of this country, so that a trust should result to the grantor from the absence of a consideration, it can only be where the deed simply contains words of grant or transfer, and does not recite nor imply any consideration, and does not, in the habendum clause or elsewhere, declare any use in favor of the grantee, and the conveyance is not in fact intended as a gift.<sup>1</sup>

§ 1036. **Parol Evidence.**—In all the instances belonging to this first form of resulting trust, the intention that the donee is not to enjoy the beneficial interest, but that a trust is to result, or the contrary intention, must appear expressly or by implication from the terms of the instrument itself by which the property is conveyed. If the instrument is a will, then no extrinsic evidence is ever admissible to show the testator's meaning, nor even to show a mistake.<sup>1</sup> If the instrument is a deed, no extrinsic evidence of the donor's intention is admissible, unless fraud or mistake is alleged and shown. If, therefore, there is in fact no consideration, but the deed recites a pecuniary consideration, even merely nominal, as paid by the grantee, this statement raises a conclusive presumption of an intention that the grantee is to take the beneficial estate, and destroys the possibility of a trust resulting to the grantor, and no extrinsic evidence would be admitted to contradict the recital, and to show that there is in fact no consideration—except in a case of fraud or mistake.<sup>2</sup>

§ 1037. **Second Form. Conveyance to A—Price Paid by B.**—In pursuance of the ancient equitable principle that the beneficial

<sup>1</sup> *Longley v. Longley*, L. R. 13 Eq. 133; *Skellinger's Ex'rs v. Skellinger's Ex'r.*, 32 N. J. Eq. 659, H. & B. 442.

<sup>2</sup> *Gould v. Lynde*, 114 Mass. 336, H. & B. 446; *Russ v. Mebius*, 16 Cal. 350.

<sup>1</sup> See ante, § 871, cases in note.

<sup>2</sup> *Squire v. Harder*, 1 Paige 494, 19 Am. Dec. 446; *Ohmer v. Boyer*, 89 Ala. 273, 7 South. 663.

estate follows consideration and attaches to the party from whom the consideration comes,<sup>1</sup> the doctrine is settled in England and in a great majority of the American states, that where property is purchased and the conveyance of the legal title is taken in the name of one person, A, while the purchase price is paid by another person, B, a trust at once results in favor of the party who pays the price, and the holder of the legal title becomes a trustee for him. In order that this effect may be produced, however, it is absolutely indispensable that the payment should be actually made by the beneficiary, B, or that an absolute obligation to pay should be incurred by him, *as a part of the original transaction of purchase, at or before the time of the conveyance*; no subsequent and *entirely independent* conduct, intervention, or payment on his part would raise any resulting trust.<sup>2</sup>

§1038. **Special Rules.**—To the General doctrine are added the following more specific rules: The trust results whether the title is taken in the name of one grantee only, or of two or more grantees jointly; in the latter case there are joint trustees.<sup>1</sup> A trust also results in favor of one who pays only a part of the price. In other words, where two or more persons together advance the price, and the title is taken in the name of one of them, a trust will result in favor of the other with respect to an undivided share of the property proportioned to his share of the price.<sup>2</sup> The doctrine in all of its phases applies alike to personal and to real property.<sup>3</sup>

§1039. **Purchase in the Name of a Wife or Child.**—Wherever the real purchaser—the one who pays the price—is under a legal,

<sup>1</sup> See ante, § 981.

<sup>2</sup> This description assumes that the conveyance to A is made with the knowledge and consent, express or implied, of B, who pays the price,—that the whole transaction is in pursuance of a common understanding or arrangement. If the conveyance is taken by A secretly, contrary to B's wishes, in violation of a duty owed to him, or in fraud of his rights, the trust which arises in B's favor is not "resulting," but is "constructive." The two kinds are often confounded, but the distinction is important, and especially so in those states where the "resulting" trusts of this form have been in terms abolished by statute: *Dyer v. Dyer*, 2 Cox 92; 1 Lead. Cas. Eq. 4 Am. ed. 314, 319, 333, H. & B. 452, Sh. 208; *Kelley v. Jenness*, 50 Me. 455, 79 Am. Dec. 623; *Kline v. Ragland*, 47 Ark. 111, 14 S. W. 474; *Brainard v. Buck*, 184 U. S. 99, 22 Sup. Ct. Rep. 458, 46 L. ed. 449; *Reynolds v. Sumner*, 126 Ill. 58, 9 Am. St. Rep. 523, and note, 18 N. E. 334, 1 L. R. A. 327; *Ducie v. Ford*, 138 U. S. 587, 11 Sup. Ct. Rep. 417, 34 L. Ed. 1091; *Long v. King*, 117 Ala. 423, 23 South. 534.

<sup>3</sup> Ex parte Houghton, 17 Ves. 251, 253.

<sup>1</sup> *Wray v. Steele*, 2 Ves. & B. 388; *Sanders v. Steele*, 122 Ala. 415, 26 South. 882; *Bailey v. Hemenway*, 147 Mass. 326.

<sup>2</sup> *Rider v. Kidder*, 10 Ves. 360; *McClung v. Colwell*, 107 Tenn. 592, 89 Am. St. Rep. 961, 64 S. W. 890.

or even in some cases a moral, obligation to maintain the person in whose name the purchase is made, equity raises the presumption that the purchase is intended as an advancement or gift to such recipient, and no trust results. If, therefore, a purchase of either real or personal property is made by a husband in the name of his lawful wife, or in the joint names of himself and his wife, or such purchase is made by a father in the name of his legitimate child, or in the joint names of himself and child, no trust results in favor of the husband or father, but the transaction is presumed to be a gift or advancement to or for the benefit of the wife or child.<sup>1</sup> It appears to be now settled that the same rule applies to a mother who purchases property in the name of her child, or in the joint names of herself and child, and pays the price with her own separate funds; no trust results.<sup>2</sup> The rule also applies where the person advancing the price has placed himself in loco parentis towards the other.<sup>3</sup>

**§ 1040. Admissibility of Parol Evidence.**—Since these resulting trusts are not embraced within the statute of frauds, their existence need not be evidenced by any writing, and may, therefore, be established by parol. In cases belonging to the first form,—purchases between strangers,—if the deed does not show on its face that the price was actually paid by another, and even, according to many decisions, if the deed recites that the payment was made by the grantee therein, the real fact may always be established by parol evidence; it may be proved by parol that the purchase price was wholly or partly paid by another person, and thus a trust may be shown to result in his favor. Where the trust does not appear on the face of the deed or other instrument of transfer, a resort to parol evidence is indispensable. It is settled by a complete unanimity of decision that such evidence must be clear, strong, unequivocal, unmistakable, and must establish the fact of the payment by the alleged beneficiary beyond a doubt. Where the payment of a part only is claimed, the evidence must show, in the same clear manner, the exact portion of the whole price which was paid.<sup>1</sup> Parol evidence is also admissible on the part of the grantee to defeat a trust. Since the whole doctrine of a resulting trust depends upon an equitable presumption of an intention, so this

<sup>1</sup> *Dyer v. Dyer*, 2 Cox 92, H. & B. 452, Sh. 208; *Smithsonian Institute v. Meech*, 169 U. S. 398, 18 Sup. Ct. Rep. 396, 42 L. ed. 793; *Deck v. Tabler*, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837.

<sup>2</sup> *Cooley v. Cooley*, 172 Mass. 476, 52 N. E. 631.

<sup>3</sup> *Hamilton v. Steele*, 22 W. Va. 348.

<sup>1</sup> *Ryall v. Ryall*, 1 Atk. 59; *Baker v. Vining*, 30 Me. 121, 126, 50 Am. Dec. 617; *Brinkman v. Sunken*, 174 Mo. 709, 74 S. W. 963.

presumption may be overcome by parol evidence of an actual intention on the part of the one paying the price, that the transaction was to be a gift.<sup>2</sup>

§ 1041. **The Same. Between Family Relatives.**— In trusts of the second form, between family relatives, no evidence is necessary, in the first instance, to show the operation of the rule, since a presumption arises on the face of the transaction that a gift was intended, and that no trust results. This result, however, is merely a presumption, and may be overcome. Extrinsic evidence, either written or parol, is admissible on behalf of the husband or parent paying the price to rebut the presumption of an advancement or gift, and to show that a trust results; and conversely, such evidence may be used to fortify and support the presumption. In general, this extrinsic evidence, to defeat an advancement and establish a trust as against the party to whom the property is conveyed or transferred and those holding under him, must consist of matters *substantially contemporaneous* with the purchase, conveyance, or transfer, so as to be fairly connected with the transaction.<sup>1</sup>

§ 1043. **Interest and Rights of the Beneficiary.**—The interest of the cestui que trust in a resulting trust is not a mere "equity"; it is an equitable estate in the land or other thing of which the legal title is vested in the trustee; and as such, it may be conveyed, transferred, devised, or otherwise dealt with as property.<sup>1</sup> It is valid, and may be enforced not only against the trustee, but against his heirs, devisees, personal representatives, and all others who derive title from him as volunteers or purchasers with notice; but, being a purely equitable interest, it is cut off and destroyed as against all bona fide purchasers or mortgagees from the trustee for a valuable consideration and without notice.<sup>2</sup> The cestui que trust is entitled to the remedy of compelling a conveyance or assignment of the legal estate to himself by the trustee, or perhaps, in some instances, of compelling the trustee to hold the property for the benefit of the beneficiary, and subject to his power of enjoyment, control, and disposition.<sup>3</sup>

§ 1044. **Second. Constructive Trusts.**—Constructive trusts include all those instances in which a trust is raised by the doctrines

<sup>2</sup> *Benbow v. Townsend*, 1 Mylne & K. 506; *Ward v. Ward*, 59 Conn. 188, 22 Atl. 149.

<sup>1</sup> *Kilpin v. Kilpin*, 1 Mylne & K. 520; *Smithsonian Institute v. Meech*, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. ed. 793.

<sup>1</sup> *Dickinson v. Burrell*, L. R. 1 Eq. 337.

<sup>2</sup> *King v. Pardee*, 96 U. S. 90.

<sup>3</sup> For an important discussion of the application of the "clean hands" maxim, see *Monahan v. Monahan*, (Vt.) 59 Atl. 169, especially the dissenting opinion.

of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust.<sup>1</sup> They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed *trusts in invitum*; and this phrase furnishes a criterion generally accurate and sufficient for determining what trusts are truly "constructive." An exhaustive analysis would show, I think, that all instances of constructive trusts properly so called may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source. Even in that single class where equity proceeds upon the maxim that an intention to fulfill an obligation should be imputed, and assumes that the purchaser *intended* to act in pursuance of his fiduciary duty, the notion of fraud is not invoked, simply because it is not absolutely necessary under the circumstances; the existence of the trust in all cases of this class might be referred to constructive fraud.<sup>2</sup> This notion of fraud enters into the conception in all its possible degrees. Certain species of the constructive trusts arise from actual fraud; many others spring from the violation of some positive fiduciary obligation; in all the remaining instances there is, latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud.<sup>3</sup> Courts of equity, by thus extending the fundamental principle of trusts—that is, the principle of a division between the legal estate in one and the equitable estate in another—to all cases of actual or constructive fraud and breaches of good faith, are enabled to wield a remedial power of tremendous efficacy in protecting the rights of property; they can follow the real owner's specific property, and preserve his

<sup>1</sup> *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298.

<sup>2</sup> I refer to the class of cases where a trustee uses trust funds to pay for property purchased in his own name; equity assumes that he intended to act in accordance with his fiduciary duty, although in the majority of such instances the actual intention is undoubtedly to violate the duty. It will be seen that, in my opinion, certain kinds of so-called trusts which are often spoken of as "constructive" do not at all belong to that class.

<sup>3</sup> *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 17 South. 525, 54 Am. St. Rep. 31, 28 L. R. A. 707.

real ownership, although he has lost or even never had the legal title, and can thus give remedies far more complete than the compensatory damages obtainable in courts of law. The principle is one of universal application; it extends alike to real and to personal property, to things in action, and funds of money. Salutary and efficient as the principle is, however, many of the constructive trusts which it creates are only trusts *sub modo*; they have little resemblance, in their essential nature, to express trusts.<sup>4</sup> In applying this principle, care should be taken to distinguish between actual trusts and those relations which are only trusts by way of metaphor; between persons who are true trustees holding the legal title for a beneficial *owner*, and those who simply occupy a position which is analogous in some respects to that of a trustee. The use of these terms to designate relations and parties which have no essential element in common with actual trusts and trustees can only produce confusion and inaccuracy.<sup>5</sup>

**§ 1045. Kinds and Classes.**—The specific instances in which equity impresses a constructive trust are numberless,—as numberless as the modes by which property may be obtained, through bad faith and unconscientious acts. It is possible, however, to distinguish and describe the general groups or types under which all these instances may be arranged, and thus to present a comprehensive view of the whole subject.

**§ 1046. 1. Arising from Contract, Express or Implied.**—There are certain relations which are often spoken of as trusts, and as constituting a species of constructive trusts, but which are not, in

<sup>4</sup>The language of Lord Westbury on this point, in *Rolfe v. Gregory*, 4 De Gex, J. & S. 576, 579, is very instructive.

<sup>5</sup>The distinction is clearly stated by Lord Westbury in *Knox v. Gye*, L. R. 5 H. L. 656, 675. It was argued, according to the common mode of expression, that a surviving partner is a trustee of the share of his deceased partner; but the lord chancellor referred to the case of the vendor and vendee of land, and said that although the vendor might by a metaphor be called a trustee for the vendee, *he was trustee only to the extent of his obligation to perform the agreement* between himself and the vendee, and proceeded as follows: "In like manner here the surviving partner may be called trustee for the dead man, *but the trust is limited to the discharge of the obligation, which is liable to be barred by the lapse of time.* As between the express trustee and cestui que trust, time will not run, but the surviving partner is not a trustee in that full and proper sense. It is most important to mark this again and again, *for there is not a more fruitful source of error in law than the inaccuracy of language.* The application to a man who is improperly and by metaphor only called a trustee of all the consequences which would follow if he were a trustee by express declaration,—in other words, a complete trustee,—holding the property exclusively for the benefit of the cestui que trust, well illustrates the remark made by Lord Macclesfield, that nothing in law is so apt to mislead as a metaphor."

any true and complete sense, trusts, and can only be called so by way of analogy or metaphor. Since they lack the element of fraud, they do not, in any view, properly belong to the division of constructive trusts.<sup>1</sup> It is commonly said that a trust is created by a contract for the sale of land; that the vendor holds the legal title as a trustee for the purchaser. Whatever of truth there is in this mode of statement, whatever of a real trust relation exists, it certainly has nothing in common with constructive trusts; it rather resembles an express trust.<sup>2</sup> In like manner, the survivors of a partnership are called trustees for the estate of the deceased partner, with respect to his share of the firm property. This expression is mostly metaphorical; there is certainly nothing in the relation resembling a constructive trust.<sup>3</sup> Extending the analogy still further, courts regard partnership property, after an insolvency or dissolution of the firm, and in the proceeding for winding up its affairs, as a trust fund for the benefit of the firm creditors; and the capital stock and other property of private corporations, especially after their dissolution, is treated as a trust fund in favor of creditors. These statements may be sufficiently accurate as strong modes of expressing the doctrine that such property is a fund sacredly set apart for the payment of partnership and corporation creditors, before it can be appropriated to the use of the individual partners or corporators, *and that the creditors have a lien upon it* for their own security; but it is plain that no *constructive* trust can arise in favor of the creditors unless the partners or directors, through fraud or a breach of fiduciary duty, wrongfully appropriate the property, and acquire the legal title to it in their own names, and thus place it beyond the reach of creditors through ordinary legal means.<sup>4</sup> I have thus collected the instances which

<sup>1</sup>There is a tendency among writers to enlarge the meaning of the word "trust" beyond its legitimate signification. By some, the various equitable liens and similar rights arising from contract are made to be the most important, and with a very few exceptions the only instances of constructive trusts. As Lord Westbury shows, such a mode of treatment can produce nothing but confusion. The cases included in the first subdivision of the text are not constructive trusts, and are mentioned simply for purposes of completeness, and to distinguish between correct and mistaken conceptions. See *Hollins v. Brierfield, etc., Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113; *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 17 South. 525, 54 Am. St. Rep. 31, 28 L. R. A. 707.

<sup>2</sup>See *ante*, § 368; *post*, § 1261; *Thompson v. Thompson*, 1 Jones (N. C.) 430, 1 Ames Eq. Jur. 201.

<sup>3</sup>See *Knox v. Gye*, L. R. 5 H. L. 656, 675, per Lord Westbury.

<sup>4</sup>See *Hollins v. Brierfield, etc., Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113; *Fogg v. Blair*, 133 U. S. 534, 10 Sup. Ct. 338, 33 L. ed. 721; *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, 22 N. E. 293, 15 Am. St.

are sometimes, though improperly, classed with constructive trusts, in order the more clearly to indicate the nature of the trusts which are truly constructive, and which are described in the following paragraphs.

**§ 1047. 2. Money Received Which Equitably Belongs to Another.**—By the well-settled doctrines of equity, a constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust, or violation of fiduciary duty, and the like.<sup>1</sup> It is true that the beneficial owner can often recover the money due to him by a legal action upon an implied assumpsit;<sup>2</sup> but in many instances a resort to the equitable jurisdiction is proper and even necessary.<sup>3</sup>

**§ 1048. 3. Acquisition of Trust Property by a Volunteer, or Purchaser with Notice.**—Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee, not in the course of executing and carrying into effect the terms of an express trust, or devolves from a trustee to a third person, who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. Equity impresses the trust upon the property in the hands of the transferee or purchaser, compels him to perform the trust if it be active, and to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of positive fraud, or should actually intend a violation of the trust obligation; it is sufficient that he acquires property upon which a trust is in fact impressed, and that he is not a bona fide purchaser

Rep. 644, 5 L. R. A. 378; *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 17 South. 525, 54 Am. St. Rep. 31, 28 L. R. A. 707.

<sup>1</sup> *Robinson v. Pierce*, 118 Ala. 273, 72 Am. St. Rep. 160, 24 South. 984, 45 L. R. A. 66.

<sup>2</sup> See *Frue v. Loring*, 120 Mass. 507,—a decision based upon the narrow and statutory jurisdiction of the Massachusetts courts, and not in harmony with the general doctrines of equity.

<sup>3</sup> Com. Dig., tit. Chancery, 2, A, 1; 2 Fonbl. Eq., b. 2, c. 1, sec. 1, note d.

for a valuable consideration and without notice.<sup>1</sup> This universal rule forms the protection and safeguard of the rights of beneficiaries in all kinds of trust; it enables them to follow trust property,—lands, chattels, funds of securities, and even of money,—as long as it can be identified, into the hands of all subsequent holders who are not in the position of bona fide purchasers for value and without notice; it furnishes all those distinctively equitable remedies which are so much more efficient in securing the beneficiary's rights than the mere pecuniary recoveries of the law.<sup>2</sup> Even when the original property is placed beyond the reach of the beneficiary by a sale to a bona fide purchaser for value and without notice, the trust, as will more fully appear hereafter, attaches to the proceeds in the hands of the trustee who makes the transfer. The statement and grounds of the rule show that it does not extend to the case where the property is duly transferred or purchased in pursuance of an express trust to convey or sell, and for the purpose of carrying such trust into effect. And where the rule does apply, there is some distinction between money and other kinds of trust property. If a trustee or other fiduciary person, in violation of his own duty, uses trust money to pay an antecedent debt of his own to a creditor who has no notice of the breach of trust, or that the money is subject to the trust, in such a manner that the money is received as a general payment, and not as a distinct and separate fund, then the money becomes free from the trust, and cannot be followed by the beneficiary into the hands of the creditor, although, in general, an antecedent debt does not constitute a valuable consideration.<sup>3</sup>

<sup>1</sup> *Robinson v. Pierce*, 118 Ala. 273, 72 Am. St. Rep. 160, 24 South. 984, 991, 45 L. R. A. 66.

<sup>2</sup> *Newton v. Porter*, 69 N. Y. 133, 137, 139, 25 Am. Rep. 152, H. & B. 477, Sh. 201; *Murray v. Ballou*, 1 Johns. Ch. 566, 1 Scott 520; *Union Pacific R. Co. v. McAlpine*, 129 U. S. 305, 314, 9 Sup. Ct. Rep. 286, 32 L. ed. 673; *Wetmore v. Porter*, 92 N. Y. 77, *Ames Trusts* 262 (the trustee who has committed a breach of trust in conveying the property, may sue and recover it for the benefit of the cestui que trust); *Leake v. Watson*, 58 Conn. 332, 18 Am. St. Rep. 270, 20 Atl. 343, 8 L. R. A. 666.

<sup>3</sup> The reason given for this conclusion is, that money is not "ear-marked"; when received by the creditor and mingled with his other pecuniary assets, it cannot be distinguished and identified. Under these circumstances other kinds of property would remain subject to the trust, since the creditor would not be a bona fide purchaser for value: *Holmes v. Gilman*, 138 N. Y. at 376, 34 Am. St. Rep. 463, 34 N. E. 205, 20 L. R. A. 566. When trust money has been mingled with other funds, and the trustee has subsequently withdrawn a portion, it is presumed by the court that he has withdrawn his own money and left the trust funds; and therefore it is only necessary to show that an amount has remained on deposit that is equal to the amount of the trust

**§ 1049. 4. Fiduciary Persons Purchasing Property with Trust Funds.**—Another important form of the trust arises from the acts of persons already possessing some fiduciary character or standing in some fiduciary relation. Whenever a trustee or other person in a fiduciary capacity, acting apparently within the scope of his powers,—that is, having authority to do what he does,—purchases property with trust funds, and takes the title thereto in his own name, without any declaration of trust, a trust arises with respect to such property in favor of the cestui que trust or other beneficiary. Equity regards such a purchase as made in trust for the person beneficially interested, independently of any imputation of fraud, and without requiring any proof of an intention to violate the existing fiduciary obligation, because it assumes that the purchaser intended to act in pursuance of his fiduciary duty, and not in violation of it. This doctrine is of wide application; it extends to trustees, executors and administrators, directors of corporations, guardians, committees of lunatics, agents using money of their principals, partners using partnership funds, husbands purchasing property with money belonging to the separate estate of their wives, parents, and children, and all persons who stand in fiduciary rela-

fund. The leading case is *In re Hallett's Estate*, 13 Ch. Div. 696, in which Jessel, M. R., stated: "It seems to me perfectly plain that he (the trustee) cannot be heard to say that he took away the trust money when he had a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag, with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purpose £100, is it tolerable for anybody to allege that what he drew out was the first £100, the trust money, and that he misappropriated it, and left his own £100 in the bag? It is obvious he must have taken away that which he had a right to take away, his own £100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some other money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers?" Where the entire fund has been dissipated it has been pertinently remarked: "Knight Bruce's chest — Jessel's bag — is empty;" *Slater v. Oriental Mills*, 18 R. I. 352, 27 Atl. 443, H. & B. 466. A trustee's estate will not be held subject to the claim of the cestui unless it is shown that the trust *res* directly contributed to that portion of the estate which is held; *Monotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383, H. & B. 468. The recent case of *Ober & Sons Co. v. Cochran*, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118, is also useful for its statements of the competing rules upon this subject, and its review of the authorities.

See, also, post, § 1076.

tions towards others. Equity jurisprudence contains few more efficient doctrines than this in maintaining the beneficial rights of property.<sup>1</sup> The evidence that the purchase was made with trust funds must, however, be clear and unmistakable.

**§ 1050. 5. Renewal of Leases by Partners and Other Fiduciary Persons.**—Another special form of constructive trusts, depending upon a much more general principle to be examined in subsequent paragraphs, has been established by a unanimity of decision. One member of a partnership cannot, during its existence, without the knowledge and consent of his copartners, take a renewal lease, in his own name or otherwise, for his own benefit and to the exclusion of his fellows, of premises leased by the firm or occupied by them as tenants. A lease so taken by a partner inures to the benefit of the whole firm; it is regarded as a continuation of or as “grafted on” the old lease; a trust will be impressed upon the leasehold estate; equity will treat the partner as a trustee for the firm, and if necessary and possible, will compel him to assign the renewal lease to it; if a condition inserted in such lease against assigning should prevent the relief of an actual assignment, it will not in the least prevent the court from enforcing the trust by compelling the partner to hold the legal title for the benefit of all. This rule applies under every variety of circumstances, provided the rights of the other partners are still subsisting at the time when the renewal lease is obtained. It operates with equal force whether the renewal lease was to begin during the continuance of the firm or after its termination; whether the partnership was for an undetermined period, or was to end at a specified time, and the renewal lease was not to take effect until the expiration of that prescribed time; whether there was or was not a right in the firm, by contract, custom, or courtesy, to a renewal of the original lease from the lessor; and even whether the landlord would or would not have granted a new lease to the other partners or to the firm. All these facts are wholly immaterial to the application of the doctrine, for its operation does not in the slightest degree depend upon the terms and provisions of the original lease, nor upon the attitude of the landlord. The doctrine is not confined to partners; it extends in all its breadth and with all its effects to trustees, guardians, and all other persons clothed with a fiduciary character, who are in possession of premises as tenants on behalf of their beneficiaries, or who are in possession as tenants of prem-

<sup>1</sup> *McLarren v. Brewer*, 51 Me. 402, H. & B. 49; *Ferris v. Van Vechten*, 73 N. Y. 113, H. & B. 461; *Haney v. Legg*, 129 Cal. 619, 30 South. 34, 87 Am. St. Rep. 81.

ises in which their beneficiaries are interested.<sup>1</sup> As this rule results from the relation of trust and confidence existing between the partners or other persons interested, it might be regarded as an outgrowth of the doctrine formulated in the preceding paragraph. It is more directly, however, a particular application of a broad principle of equity, extending to all actual and quasi trustees, that a trustee, or person clothed with a fiduciary character, shall not be permitted to use his position or functions so as to obtain for himself any advantage or profit inconsistent with his supreme duty to his beneficiary.

§ 1051. 6. **Wrongful Appropriation or Conversion into a Different Form of Another's Property.**—In the foregoing fourth form of constructive trust the fiduciary person appropriates trust funds in the purchase of property, but the court imputes no wrongful intent; it *assumes* that he was acting in pursuance of his trust. In the present case the wrongful intent necessarily exists; the intended violation of a fiduciary duty and of another's beneficial right is the essential element. A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form. If one person having money or any kind of property belonging to another in his hands wrongfully uses it for the purchase of lands, taking the title in his own name; or if a trustee or other fiduciary person wrongfully converts the trust fund into a different species of property, taking to himself the title; or if an agent or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name,—in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrong-doer, but as long as it can be followed and identified in whosoever hands it may come, except into those of a bona fide purchaser for value and without notice; and the court will enforce the constructive trust for the benefit of the beneficial owner or original cestui que trust who has thus been defrauded. As a necessary consequence of this doctrine, whenever property subject to a trust is wrongfully sold and transferred to a bona fide purchaser, so that it is freed from the trust, the trust immediately attaches to the price or proceeds in the hands of the vendor, whether such price be a debt yet unpaid

<sup>1</sup> *Phyfe v. Wardell*, 5 Paige 268, 28 Am. Dec. 430; *Mitchell v. Reed*, 61 N. Y. 123, 139, 19 Am. Rep. 252, H. & B. 48; *Trice v. Comstock*, 57 C. C. A. 646, 121 Fed. 620, 61 L. R. A. 176 (general doctrine extended to case where agent for purchase makes use of information acquired in his fiduciary capacity to purchase for himself after the termination of the agency; see ante, § 959).

due from the purchaser, or a different kind of property taken in exchange, or even a sum of money paid to the vendor, as long as the money can be identified and reached in his hands or under his control.<sup>1</sup> It is not essential for the application of this doctrine that an actual trust or fiduciary relation should exist between the original wrong-doer and the beneficial owner. Wherever one person has wrongfully taken the property of another, and converted it into a new form, or transferred it, the trust arises and follows the property or its proceeds.<sup>2</sup>

§ 1052. 7. **Wrongful Acquisition of the Trust Property by a Trustee or Other Fiduciary Person.**—In several of the preceding subdivisions, the trustee, by means of trust funds, has acquired property from a third person, which thereby becomes subject to the original trust. The present species includes all the various instances in which the trustee or other fiduciary person wrongfully acquires the title and beneficial use of the very trust property itself,—the property in specie which forms the subject-matter of the trust. The doctrine may be stated in its most general form, that whenever a trustee or person clothed with any fiduciary character taking advantage of the relation, and by means of it acquires the title or use of the trust property, or makes a profit or advantage to himself out of the trust and confidence, then a constructive trust is impressed upon such property, profits, or proceeds in his hands, in favor of the original beneficiary. The following are some of the most important applications of this doctrine: When a trustee, administrator, agent, attorney, or other fiduciary person, without the knowledge or consent of his beneficiary, purchases the trust property at a public or private sale; or when, by taking advantage of the trust and confidence reposed, and of the superiority conferred upon him by the relation, he unconscientiously acquires title to the trust property by purchase or gift directly from the beneficiary; or when he uses the trust property for his own benefit, or in his own business, and by means of such use obtains additional gains and profits,—in these and all similar cases equity impresses a constructive trust upon the property purchased or obtained, and upon the profits and acquisitions so made, for the benefit of the party beneficially entitled.<sup>1</sup> This form of constructive trusts embraces

<sup>1</sup> Pennell v. Deffell, 4 De Gex, M. & G. 372, 388; Swinburne v. Swinburne, 28 N. Y. 568; McDonough v. O'Neil, 113 Mass. 92, Sh. 211; Murray v. Lylburn, 2 Johns. Ch. 441, 443, 1 Scott 526.

<sup>2</sup> Newton v. Porter, 69 N. Y. 133, 140, 25 Am. Rep. 152, H. & B. 477, Shep. 201.

<sup>1</sup> See ante, §§ 957-963; Nanty-Glo, etc., Co. v. Grave, L. R. 12 Ch. Div. 738; Davis v. Rock Creek, etc., Co., 55 Cal. 359, 36 Am. Rep. 40; Vallette v. Tedens, 122 Ill. 607, 3 Am. St. Rep. 502, 14 N. E. 52.

many particular instances, and the principle is extended to all abuses of confidence, whereby the one in whom the confidence is reposed obtains an advantage.

§ 1053. 8. **Trusts ex Maleficio.**—In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrong-doer.<sup>1</sup> While these instances are so many and various, there are certain special forms of frequent occurrence and great importance which require particular mention.

§ 1054. (1) **A Devise or Bequest Procured by Fraud.**—Whenever a person procures a devise or bequest to be made directly to himself,—and thereby preventing perhaps an intended testamentary gift to another,—through false and fraudulent representations, assurances, or promises that he will carry out the original and true purpose of the testator, and will apply the devise or bequest to the benefit of the third person who is the real object, and who would otherwise have been the actual recipient of the testator's bounty, and after the testator's death he refuses to comply with his former assurances or promises, but claims to hold the property in his own right and for his own exclusive benefit.—in such case equity will enforce the obligation by impressing a trust upon the property in favor of the one who has been defrauded of the testator's intended gift, and by treating the actual devisee or legatee as a trustee holding the mere legal title, and by compelling him to carry the trust into effect through a conveyance to the one who

<sup>1</sup>Dyer v. Dyer, 1 Lead. Cas. Eq. 4th Am. ed. 314, 350-364, H. & B. 452, Sh. 208; Cowin v. Hurst, 124 Mich. 545, 83 Am. St. Rep. 344, 83 N. W. 274; Moore v. Crawford, 130 U. S. 122, 128, 9 Sup. Ct. Rep. 447, 32 L. ed. 878.

is beneficially interested. It is not necessary that the representations, assurances, or promises of the actual devisee or legatee should be in writing; they may be entirely verbal. There are a few cases which seem to hold that a trust will arise under these circumstances from a *mere verbal promise* of the devisee or legatee to hold the property for the benefit of another person. This position, however, is clearly opposed to settled principle. The only ground upon which such a trust can be rested, and is rested by the overwhelming weight of authority, is actual intentional fraud.<sup>1</sup>

§ 1055. (2) **Purchase upon a Fraudulent Verbal Promise.**—A second well-settled and even common form of trusts *ex maleficio* occurs whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose,—as, for example, a promise to convey the land to a designated individual, or to reconvey it to the grantor, and the like,—and having thus fraudulently obtained the title, he retains, uses, and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit. Equity regards such a person as holding the property charged with a constructive trust, and will compel him to fulfill the trust by conveying according to his engagement.<sup>1</sup>

§ 1056. (3) **No Trust from a Mere Verbal Promise.**—The foregoing cases should be carefully distinguished from those in which

<sup>1</sup> *Thynn v. Thynn*, 1 Vern. 296, 1 Scott 457; *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53, H. & B.; *Curdy v. Berton*, 79 Cal. 420, 12 Am. St. Rep. 157, 21 Pac. 858, H. & B. 501.

<sup>1</sup> The trust in such cases arises wholly from the fraud; the statute of frauds requiring a written declaration of trust does not apply, since trusts *ex maleficio* are excepted from its operation: *Laing v. McKee*, 13 Mich. 124, 87 Am. Dec. 738.

The doctrine is often used with great efficacy to prevent the triumph of fraud, and to protect persons under necessities, in cases where, at execution sale, or mortgage foreclosure, or other compulsory public sale, a party buys in the land under a prior fraudulent promise made to the owner that the purchaser will take the title, hold the property for the benefit of such owner, and will reconvey to him on being repaid the amount advanced for the purchase price; and having thus by a fraudulent contrivance cut off competition, and prevented the owner from making other arrangements to protect his property, and having obtained the property perhaps for much less than its real value, he refuses to abide by his verbal promise, and retains the land or other property as absolutely his own. Equity will relieve the defrauded owner by impressing on the property a trust *ex maleficio*, and by treating the purchaser as a trustee *in invitum*. This application of the doctrine was explained and the authorities were examined in *Ryan v. Dox*, 34 N. Y. 307; 90 Am. Dec. 696, H. & B. 488. See, also, *Pope v. Dafray*, 176 Ill. 478, 52 N. E. 58; *Whitney v. Hay*, 181 U. S. 77, 21 Sup. Ct. Rep. 537, 45 L. ed. 768.

there is a *mere* verbal promise to purchase and convey land. In order that the doctrine of trusts *ex maleficio* with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute of frauds would be virtually abrogated; there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute; it endeavors to prevent and punish fraud, by taking from the wrong-doer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts.<sup>1</sup>

**§ 1057. (4) Trusts in Favor of Creditors.**—In carrying out the general principle of trusts for the purpose of working ultimate justice, and reaching property where the legal title has been parted with, and is beyond the scope of legal process, a constructive trust is said to arise in favor of judgment creditors with respect to the property of their debtors, which has been transferred with the intent to defraud the creditors of their rights, or of which the legal title is vested in third persons with a like fraudulent intent, or which is of such a nature that it cannot be taken by execution upon judgments in legal actions.<sup>1</sup>

**§ 1058. Rights and Remedies of the Beneficiary.**—The essential nature of constructive trusts have been explained in a former paragraph.<sup>1</sup> Equity regards the cestui que trust, in all instances except that last mentioned in favor of creditors, although without any legal title, and perhaps without any written evidence of interest, as the real owner, and entitled to all the rights and consequences of such ownership. Numerous important questions concerning the conduct of trustees, their relations with the trust property and with the beneficiaries, which arise from express trusts, can have no existence in connection with constructive trusts. Every act of the trustee in holding, managing, investing, or otherwise dealing

<sup>1</sup>*Seymour v. Cushway*, 100 Wis. 580, 77 N. W. 769, 69 Am. St. Rep. 957; *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162, 21 Pac. 984. If, however, the parties stood in a relation of confidence with each other, the fact that, at the time of the conveyance and promise to reconvey, there was no fraudulent intent on the part of the grantee is immaterial; a constructive trust arises: See *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640 (mother and son).

<sup>1</sup>The trust is, in reality, one in name alone; the creditor's right to reach the debtor's property is in no true sense an *interest* in that property; it is, at most, only an equitable lien on the property. See *Savage v. Murphy*, 34 N. Y. 508, 90 Am. Dec. 733.

<sup>1</sup>See ante, § 1044.

with the trust property as though he could retain it, is itself a violation of his paramount obligation to the beneficiary. If the trustee refuses or delays to convey the property to its beneficial owner, and retains it, derives benefit from its use, and appropriates its rents, profits, and income, he must account for all that he thus receives, and pay over the amount found to be due to the cestui que trust, as well as convey to him the corpus of the trust fund. The beneficiary, therefore, being the true owner, may always, by means of an equitable suit, compel the trustee to convey or assign the corpus of the trust property, and to account for and pay over the rents, profits, issues, and income which he has actually received, or, in general, which he might with the exercise of reasonable care and diligence have received.<sup>2</sup> In such a suit the plaintiff is also entitled to any additional or auxiliary remedy, such as injunction, cancellation, accounting, which may be necessary to render his final relief fully efficient. No change in the form of the trust property, effected by the trustee, will impede the rights of the beneficial owner to reach it and to compel its transfer, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it can no longer be specifically separated. If the trust property has been transferred to a bona fide purchaser for value without notice, or has lost its identity, the beneficial owner must, and under other circumstances he may, resort to the personal liability of the wrong-doing trustee.<sup>3</sup> The existence of a constructive trust, as of a resulting one, must be proved by clear, unequivocal evidence.<sup>4</sup>

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## SECTION VI.

### POWERS, DUTIES, AND LIABILITIES OF EXPRESS TRUSTEES.

#### ANALYSIS.

- § 1059. Divisions.
- § 1060. *First.* Powers and modes of acting.
- §§ 1061-1083. *Second.* Duties and liabilities.
- §§ 1062-1065. I. To carry the trust into execution.
  - § 1062. 1. The duty to conform strictly to the directions of the trust.
  - § 1063. 2. The duty to account.
  - § 1064. 3. The duty to obey directions of the court.
  - § 1065. 4. The duty to restore the trust property at the end of the trust.

<sup>2</sup> Ravenswood, S. & G. Ry. Co. v. Woodyard, 46 W. Va. 558, 33 S. E. 285.

<sup>3</sup> Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141.

<sup>4</sup> Ferchen v. Arndt, 26 Ore. 121, 46 Am. St. Rep. 603, 37 Pac. 161, 29 L. R. A. 664.

- §§ 1066-1074. II. To use care and diligence.
- § 1067. I. The duty of protecting the trust property.
  - § 1068. 2. The duty not to delegate his authority.
  - § 1069. 3. The duty not to surrender entire control to a co-trustee.
  - § 1070. 4. The amount of care and diligence required.
  - § 1071. 5. The duty as to investments.
  - § 1072. The necessity of making investments.
  - § 1073. Kinds of investments: When particular securities are expressly authorized.
  - § 1074. The same: When no directions are given.
- §§ 1075-1078. III. To act with good faith.
- § 1075. 1. The duty not to deal with the trust property for his own advantage.
  - § 1076. 2. The duty not to mingle trust funds with his own.
  - § 1077. 3. The duty not to accept any position, or enter into any relation, or do any act inconsistent with the interests of the beneficiary.
  - § 1078. 4. The duty not to sell trust property to himself, nor to buy from himself.
- §§ 1079-1083. IV. Breach of trust, and liability therefor.
- § 1080. Nature and extent of the liability.
  - § 1081. Liability among co-trustees.
  - § 1082. Liability for co-trustees.
  - § 1083. The beneficiary acquiescing, or a party to the breach of trust.
  - § 1084. *Third.* The trustee's compensation and allowances.
  - § 1085. Allowances for expenses and outlays; lien therefor.
  - § 1086. *Fourth.* Removal and appointment of trustees.
  - § 1087. Appointment of new trustees.

§ 1059. **Divisions.**—The duties and liabilities of the trustees and corresponding rights of the beneficiaries in trusts arising by operation of law have been explained in the preceding section. The discussions of the present section refer primarily and mainly to the powers, duties, and liabilities of the trustees in express trusts of all kinds and for all purposes, and the statement of their duties and liabilities necessarily includes the correlative rights and remedies of the cestuis que trustent; some of the conclusions may, however, apply to the trustees in resulting and constructive trusts. The entire subject embraces the following subdivisions: 1. The trustee's powers and modes of acting; 2. His duties and liabilities; 3. His compensation and allowances; 4. Removal and appointment of trustees.

§ 1060. **First. Powers and Modes of Acting.**—Although an acceptance by the trustee is not required in order to assure the interest and rights of the beneficiary, it is essential to the existence of any power or liability of the trustee himself; both his powers and his liabilities originate upon his acceptance.<sup>1</sup> The acceptance may be express by executing an instrument in writing,

<sup>1</sup>See ante, § 1007; *Thorne v. Deas*, 4 Johns. 84.

or implied from acts done by the trustee in carrying the trust into effect or in dealing with the trust property.<sup>2</sup> When property is given upon trust to two or more trustees, they become joint owners, and, in general, all who have accepted must unite in conveyances and similar solemn and important acts.<sup>3</sup> It results from the joint tenancy of trustees that when one dies or resigns, all the estate and powers remain the survivors or survivor; and this right of survivorship will not be affected merely because there is a power of appointing new trustees in the place of those dying or ceasing to act; it will operate until the new trustees are appointed.<sup>4</sup> Upon the death of a single trustee or a last survivor, the trust may devolve upon his heir or administrator until a new trustee is appointed.<sup>5</sup>

**§ 1061. Second. Duties and Liabilities.**—In this subdivision I shall state the general duties of express trustees, the violations of them which constitute a breach of trust, and the nature and extent of the liabilities incurred thereby. The doctrines to be examined are those which courts of equity apply in controlling the conduct of all classes of persons who are clothed with fiduciary relations towards property in which others are beneficially interested, including trustees proper, executors and administrators, guardians of infants or of persons non compotes mentis, directors or managers of corporations, and other quasi trustees.<sup>1</sup> All the various duties of actual and quasi trustees may be grouped under three general heads: 1. To carry out the trust; 2. To use care and diligence; 3. To act with good faith; and each of these contains several more specific obligations.

**§ 1062. I. To Carry the Trust into Execution.—1. The Duty to Conform Strictly to the Directions of the Trust.**—Under the general obligation of carrying the trust into execution, trustees and

<sup>2</sup>See, also, *Girard v. Flutterer*, 84 Ala. 323, 4 South. 292. As stated in § 1007, ante, a trustee's acceptance is presumed, therefore to avoid liability he should disclaim before conduct indicating acceptance, or before the cestui has acted in reliance on the presumed acceptance. The disclaimer may be either by deed or parol; see *Adams v. Adams*, 21 Wall. 185, 22 L. ed. 504, *Ames Trusts* 227.

<sup>3</sup>*Boston v. Robbins*, 126 Mass. 384; *Wilder v. Ranney*, 95 N. Y. 7, 3 Keener 992.

<sup>4</sup>*Lane v. Debenham*, 11 Hare 188, *Ames Trusts* 513.

<sup>5</sup>*Robson v. Flight*, 4 De Gex, J. & S. 608 (the heir at law in such case cannot exercise *discretionary* powers given to the trustee, although he holds the estate subject to the trust); *Dillard v. Dillard*, 97 Vt. 434, 34 S. E. 60 (containing a good statement as to the effect of the death of one trustee when a discretion was vested in three of them).

<sup>1</sup>The text is cited, as respects corporation directors, in *Bosworth v. Allen*, 168 N. Y. 157, 164, 85 Am. St. Rep. 667, 61 N. E. 163, 55 L. R. A. 751.

all fiduciary persons are bound, in the first place, to conform strictly to the directions of the trust. This is in fact the corner-stone upon which all other duties rest, the source from which all other duties take their origin. The trust itself, whatever it be, constitutes the charter of the trustee's power and duties; from it he derives the rule of his conduct; it prescribes the extent and limits of his authority; it furnishes the measure of his obligations. If the trust is express, created by deed or will, then the provisions of the instrument must be followed and obeyed. If the fiduciary relation is established by law and regulated by settled legal rules, then these legal rules must constantly guide and restrain the conduct of the one who occupies the relation. In this manner the acts, powers, duties, and liabilities of executors, administrators, guardians, and corporation directors are governed by a fixed system of legal rules which constitute their instrument or declaration of trust.<sup>1</sup> A trustee can use the property only for the purposes contemplated in the trust, and must conform to the provisions of the trust in their true spirit, intent, and meaning, and not merely in their letter. If, therefore, through non-feasance, he omits to carry the trust into execution, or through misfeasance he disobeys the directions of the trust, he renders himself in some manner liable to the beneficiary whose rights have thus been violated.<sup>2</sup> Trustees, in carrying the trust into execution, are not confined to the very letter of the provisions. They have authority to adopt measures and to do acts which, though not specified in the instrument, are implied in its general directions, and are reasonable and proper means for making them effectual. This implied discretion in the choice of measures and acts is subject to the control of a court of equity, and must be exercised in a reasonable manner.<sup>3</sup> It follows from their

<sup>1</sup> In the case of corporation directors and officers, the charters and by-laws are the primary source of the fiduciary power and duty. Even if the trust is a pure resulting or constructive one, the simple duty to convey the property and pay over all its profits to the beneficiary is marked out by the law.

<sup>2</sup> *Vyse v. Foster*, L. R. 8 Ch. 309; *Boisseau v. Boisseau*, 79 Va. 73, 52 Am. Rep. 616; *In re Cole's Estate*, 102 Wis. 1, 72 Am. St. Rep. 854, 78 N. W. 402.

<sup>3</sup> *Harvard College v. Weld*, 159 Mass. 114, 34 N. E. 175 ("to manage and invest to the best advantage" carries a power to sell); *In re New*, (1901) 2 Ch. 534 (court may sanction acts which the trustees themselves have no power to do, in case of unforeseen emergency). Whenever the instrument of trust expressly confers upon trustees a discretion as to acts and measures in carrying out the general object of the trust, a court of equity will not generally interfere to control such discretion, except to prevent its abuse or unreasonable exercise to the actual or probable prejudice of the beneficiaries: *Tabor v. Brooks*, L. R. 10 Ch. Div. 273.

An interesting illustration of such control by the court is the case of *Collister v. Fassitt*, 163 N. Y. 281, 57 N. E. 490, 79 Am. St. Rep. 586 (discretion

general duty that trustees cannot set up the adverse title of a stranger against their cestuis que trustent, and much less buy up and hold such adverse title for their own benefit.<sup>4</sup>

§ 1063. 2. **The Duty to Account.**—As a branch of the general obligation of carrying the trust into execution, a trustee is also bound to account for all the trust property. He must not only render a full account of his conduct at the time of final settlement, but it is one of his most imperative duties to keep regular and accurate accounts during the whole course of the trust of all property coming into, passing out of, or remaining in his hands. These accounts must clearly distinguish between the trust property and his own individual assets; for the two should never be mingled in the accounts nor in use; they should show all receipts and payments, and should at all times be open to the inspection, and produced at the demand of the beneficiary.<sup>1</sup>

§ 1064. 3. **The Duty to Obey Directions of the Court.**—Wherever there is any bona fide doubt as to the true meaning and intent of provisions of the instrument creating the trust, or as to the particular course which he ought to pursue, the trustee is always entitled to maintain a suit in equity, at the expense of the trust estate, and obtain a judicial construction of the instrument, and directions as to his own conduct.<sup>1</sup> Such directions he must, of course, faithfully obey, and if he does so, he will be relieved from all responsibility therefor. Wherever any suit or proceeding is instituted by the beneficiary or other person interested, and the court by its decree or order therein directs anything to be done or omitted by the trustee, such directions are imperative, and must be implicitly obeyed. A refusal or neglect to obey may render the trustee liable to summary punishment, as for a contempt, by fine and imprisonment.

§ 1065. 4. **The Duty to Restore the Trust Property at the End of the Trust.**—Finally, when the trust is ended, and the authority of the trustee as such ceases, it is his duty to restore the property to the persons who are then entitled to it by the terms of the instrument or by operation of legal rules. To accomplish this ob-

as to amount of annuity to be paid beneficiary: court named a fixed amount when the discretion had not been fairly and honestly exercised).

<sup>4</sup> *Newsome v. Flowers*, 30 Beav. 461.

<sup>1</sup> A failure to keep full or accurate accounts raises all presumptions against the trustee; it may subject him to pecuniary loss by rendering him liable to pay interest, or chargeable with moneys received and not duly accounted for: *Waterman v. Alden*, 144 Ill. 90, 32 N. E. 972, H. & B. 549; *In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74.

<sup>1</sup> *Lake View M. & M. Co. v. Hammon*, 93 Ala. 87, 9 South. 539.

ject, he is bound to make such conveyances as the parties may require, in order to vest the title in them.<sup>1</sup>

§ 1006. II. **To Use Care and Diligence.**—The second branch of the trustee's obligation is to use care and diligence in the discharge of his functions. This duty is very comprehensive; it extends through the entire range of his conduct; it is entirely independent of the question of good faith, for he will be liable for its failure even when no wrongful intent nor violation of good faith is charged upon him. He may be liable for its neglect by being held answerable for property actually lost through want of care or prudence, and also for moneys which he might have received if he had exercised due care, prudence, and judgment in his investments and other dealings with the trust estate. This head embraces the protection of trust property, the delegation of authority to third persons and to co-trustees, the amount of care and diligence requisite, and the important subject of making investments, which will be considered in the order here indicated.

§ 1067. 1. **The Duty of Protecting the Trust Property.**—The trustee is bound to protect the trust property in every reasonable manner during the continuance of the trust.<sup>1</sup> He must therefore with due diligence obtain possession of the trust property, and must then retain it securely under his own control. He cannot divest himself of the trust by conveying or assigning the property away to third persons, unless the trust itself is for the very purpose of a sale or other disposition; and even then he can only dispose of the property in pursuance of the trust, and to carry out its object.<sup>2</sup> As a mode of obtaining secure possession, the trustee must with all reasonable diligence collect debts and demands, and the amounts due on choses in action, when required to do so by the terms of the trust instrument, or by the nature and objects of the trust, and he is liable for losses resulting from his neglect or unreasonable delay in this matter.<sup>3</sup> Trust moneys may be deposited for a reasonable time in a bank having good credit, if the deposit is made to the credit of the trust estate, and not in the trustee's individual

<sup>1</sup> See Goodson v. Ellison, 3 Russ. 583, Ames Trusts 451; Saunders v. Nevil, 2 Vern. 428, Ames Trusts 449; Watts v. Turner, 1 R. & M. 634, Ames Trusts 453; In re Browne's Will, 27 Beav. 324, Ames Trusts 458.

<sup>2</sup> Carpenter v. Carpenter, 12 R. I. 544, 34 Am. Rep. 716; Tarver v. Torrance, 81 Ga. 261, 12 Am. St. Rep. 311, 6 S. E. 177.

<sup>3</sup> The trustee is, of course, liable for any loss occasioned by his undue neglect to obtain possession of the property or to retain it securely: Ex parte Ogle, L. R. 8 Ch. 711, Ames Trusts 504.

<sup>4</sup> Lawson v. Copeland, 2 Br. Ch. Cas. 156, Ames Trusts 492; compare Torrance v. Davidson, 92 N. C. 437, 53 Am. Rep. 419 (administrator not bound to sue on a debt if it would probably occasion loss to the estate).

name and account; and the trustee does not become liable for a loss occasioned by a failure of the bank under these circumstances.<sup>4</sup> He is liable, however, for a loss resulting from a failure of the bank or of a broker, when funds which ought to have been invested are left remaining on deposit, or when the deposit is in the trustee's individual account mingled with his own funds.<sup>5</sup> For wrongful payments made to third persons, or to a cestui que trust, the trustee is generally chargeable.<sup>6</sup>

§ 1068. 2. **The Duty not to Delegate his Authority.**—The office of a trustee is one of personal confidence, and can not be delegated. A trustee, therefore, unless expressly authorized by the instrument of trust, can not delegate, or transfer, or intrust, in whole or in part, his powers of discretion and management to any associate, subordinate, or assistant who takes his place and assumes his responsibility. If he does so, he remains liable to the beneficiary, and is chargeable for all acts and omissions of his delegate, and with all losses, whether occasioned by the latter's fraud, neglect, want of good faith, or other cause.<sup>1</sup> This rule does not prohibit a trustee from employing agents. He may act through agents in his administrative operations whenever such a mode of dealing is in accordance with the ordinary course of business.<sup>2</sup>

§ 1069. 3. **The Duty not to Surrender Entire Control to a Co-**

<sup>4</sup>Norwood v. Harness, 98 Ind. 134, 49 Am. Rep. 739.

<sup>5</sup>Cann v. Cann, 33 Weekly Rep. 40, Ames Trusts 481 (a deposit of fourteen months not allowed); In re Arguello, 97 Cal. 196, 31 Pac. 937, Ames Trusts 482 (deposit in name of trustee individually). As to mingling trust funds with his own, see post, § 1076.

<sup>6</sup>Each case must, to a great extent, stand upon its own circumstances. Where a payment made in good faith, and with the exercise of reasonable care and prudence, turns out to be wrong, the trustee may not be obliged to make the amount good for the benefit of the estate. See Kimball v. Norton, 59 N. H. 1, 47 Am. Rep. 171 (a stipulation between a savings bank and a depositor that his deposit may be paid to any one presenting his book does not relieve the bank from the duty of exercising reasonable care).

<sup>1</sup>Anonymous, 3 Swanston 79, Ames Trusts 508; Mortimer v. Latimer, 11 Jurist 721, Ames Trusts 508; Cooke v Crawford, 13 Simons 91, Ames Trusts 509.

<sup>2</sup>For example, he may employ a steward or manager of the estate for all matters strictly ministerial; he can, of course, employ clerks, book-keepers and the like; he can deposit trust moneys in a responsible bank, and direct clerks who collect sums to deposit them therein; he can remit moneys by bills drawn on and by responsible parties, etc. If he act in such manner according to the customary modes of doing business, in good faith and with reasonable prudence, he will not be responsible for the loss of trust funds occurring through such dealings. In re Belchier, Ambler, 218, Ames Trusts 516; Speight v. Gaunt, 22 Ch. Div. 727, Ames Trusts 518; Field v. Field (1894) 1 Ch. 425, Ames Trusts 505.

**trustee.**—As a trustee can not delegate his authority to a subordinate, so on the same principle he can not idly yield or surrender the entire control of the trust property and exercise of the trust functions to his co-trustees, when he is associated in the trust with others. A trustee is not liable under all circumstances for every act or default of his co-trustees; but still, in general, where there are several trustees, the beneficiary is entitled to that security and protection which result from the care, oversight, and co-operation of all the trustees. If, therefore, a trustee virtually abandons his active functions, neglects to interpose in the management, and leaves the whole control to his co-trustees, he will be liable for losses occasioned by their wrongful acts or neglects.<sup>1</sup>

§ 1070. 4. **The Amount of Care and Diligence Required.**—The principle is well settled that trustees are bound to exercise care and prudence in the execution of their trust, in the same degree that men of common prudence ordinarily exercise in their own affairs. A trustee, in other words, must use the same care, skill, diligence, and prudence in his management of the trust and his dealings with the trust property which a man of ordinary care, skill, and prudence would use in his own transactions and with his own property under like circumstances; and the trustee is answerable for all losses, deficiencies, and injuries which are occasioned by his affirmative or negative violation of this obligation.<sup>1</sup> The law does not cast upon the trustee an extraordinary duty, nor demand an extraordinary care, nor hold him liable for *mere* error of judgment, much less does it make him an insurer of the property. If he has exercised the care and judgment of ordinary prudent men in their own affairs, he will not be chargeable for his mere errors of judgment, nor for accidental injuries and losses. This rule concerning the extent and limits of the trustee's duty to use care, diligence, and prudence applies to all his transactions in connection with the trust, and all his dealings with the trust property, by which the interests of the beneficiary can be affected. If some of the particular rules concerning the making and retaining of investments seem to be more stringent, they will be found, upon closer examination, to be applications of the same general doctrine, varied only by the nature and situation of the subject-matter. It results

<sup>1</sup> Jones' Appeal, 8 Watts & S. 143, 147, 42 Am. Dec. 282, and note. For the relations between co-trustees and their liabilities in general, see post, §§ 1081, 1082.

<sup>1</sup> Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; H. & B. 507; Lawson v. Copeland, 2 Brown Ch. Cas. 156, Ames Trusts 493; Waterman v. Alden, 144 Ill. 90, 32 N. E. 972, H. & B. 549; Carpenter v. Carpenter, 12 R. I. 544, 34 Am. Rep. 716; King v. Talbot, 40 N. Y. 76, 50 Barb. 453, Ames Trusts 472, H. & B. 511; Speight v. Gaunt, 22 Ch. Div. 727, Ames Trusts 518.

from the duty that a trustee *may* be held accountable for more property than that which actually came into his possession. He may be charged with rents, profits, interest, income, proceeds of sales, and the like, which he never in fact received, but which he might and should have received by the exercise of due and reasonable care, diligence, and prudence in his modes of dealing. A trustee who pays the wrong party will generally be liable to pay over again to those who are really entitled.<sup>2</sup>

§ 1071. 5. **The Duty as to Investments.**—The general obligation under consideration finds its most striking and important application in the matter of the investment of trust funds. It is the trustee's duty to use diligence in investing the trust property so that it may produce as much income as possible, and also to use care and prudence in investing it in such securities as will render its loss highly improbable, even if not virtually impossible. From these somewhat antagonistic duties arise two corresponding liabilities. If the trustee suffers moneys to lie idle in his hands, producing no income, when by a proper investment an income might have been obtained, and this continues for an unreasonably long time, he will be liable for the amount of income which he might and ought to have made by an investment, and will be charged with such amount by the court in the settlement of his accounts. On the other hand, if he has made an investment in improper securities, contrary to the settled rules of equity on the subject, and the principal has been wholly or partially lost through insolvency or depreciation of value, or has failed to produce income, he will be held personally responsible for the loss or deficiency. If, however, an investment is made with the exercise of reasonable care, diligence, and business prudence, in the form, manner, and securities approved of by the rules of equity, a trustee will not be liable for losses which may occur through the destruction or depreciation of values.<sup>1</sup> The general duty involves two distinct elements, which will be separately examined—the necessity of making investments, and the proper kinds of securities in which the investments may be made.

§ 1072. **The Necessity of Making Investments.**—It is the trustee's imperative duty to render the trust property as productive as possible consistent with its *security* and with the demands of ordinary business prudence and judgment. The rule is general, therefore, that if he permits the money to remain in his own hands, un-

<sup>2</sup> *Bate v. Hooper*, 5 De G. M. and G. 338.

<sup>1</sup> *Robinson v. Robinson*, 1 De Gex, M. & G. 247, 254–257, *Ames Trusts* 495; *Brown v. Gellatly*, L. R. 2 Ch. 751, *Ames Trusts* 489; *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333.

productive, for a period which, under the circumstances, is unreasonable, then he will be personally chargeable with the lawful interest which might and should have been obtained by the exercise of reasonable care and diligence; and if the principal fund should be wholly or partially lost in consequence of such unreasonable delay, he will be compelled to make up the deficiency. Even when the instrument creating the trust prescribes a particular mode of investment—as, for example, it directs that all the personal property should be converted into cash, and the proceeds invested in the purchase of land—the trustee cannot be justified in suffering the cash to lie idle and unproductive for an unreasonable length of time.<sup>1</sup>

**§ 1073. Kinds of Investments—When Particular Securities are Expressly Authorized.**—There are two cases to be considered: 1. When the instrument creating the trust expressly authorizes investment in particular securities, or directs particular modes of investment; 2. When the instrument is wholly silent with respect to the mode of investment, and the matter is left to the judgment of the trustee. In the first case, when the instrument itself directs the mode and nature of the investment, and designates the securities, the trustee is bound to follow these directions with scrupulous care, and if any loss of trust property is the result of his obedience, he is not at all responsible. A departure from the directions will entail liability for the losses which may be occasioned thereby. Even when a general discretion in the choice of securities is expressly given, it must be exercised with reasonable care and business prudence.<sup>1</sup>

**§ 1074. The Same. When No Directions are Given.**—Where the instrument of trust is silent as to the mode of investment, the rules governing the action of trustees may appear to be somewhat arbitrary, but are in reality based upon the clearest principles of justice and expediency. The law does not give to trustees the same freedom of choice in investments which may be exercised by prudent business men in their own affairs. A business man of even more than average caution may, and often does, assume intentional risks in the investment of his own property; for the sake of obtaining a greater than ordinary income, he will often invest in such

<sup>1</sup>*Robinson v. Robinson*, 1 De Gex, M. & G. 247, Ames Trusts 495; *Cavender v. Cavender*, 114 U. S. 464, 5 Sup. Ct. 955, 29 L. Ed. 212; and see ante, § 1067.

<sup>1</sup>*Bethell v. Abraham*, L. R. 17 Eq. 24 (even when clothed with discretion they cannot invest in foreign funds or railway stocks); *Zimmerman v. Fraley*, 70 Md. 561, 17 Atl. 560 (direction to invest in landed securities does not authorize a purchase of land); *Baer's Appeal*, 127 Pa. St. 360, 18 Atl. 1, 4 L. R. A. 609 (cannot loan on personal security unless authorized).

a manner that the risk of ultimate loss is considerable, and such speculative use of his property would not be regarded as illegitimate nor as deserving of any censure. For example, he may invest in the stocks of companies which promise, and with good fortune, may pay, large dividends, but which also may utterly fail. No such risk is permitted to the trustee. In the management and investment of trust property for the benefit of the cestui que trust, the law, while requiring some income, regards the security of the fund invested and the certainty of a moderate *regular* income as of paramount—of absolutely essential—importance when compared with the amount of the income. It permits the trustee to assume no risks in his investment other than those which are inseparable from every species of property. Absolute freedom from risk is impossible. The most stable forms of property *may* lose their value; lands may depreciate; even nations may become bankrupt. From these risks which inhere in every kind of ownership the law does not pretend to save the beneficiary; but from risks growing out of the uncertainty of speculative investments the law does protect him by making the trustee personally responsible for all trust funds invested by him in such a manner. It is the settled rule of equity, in the absence of express directions in the instrument creating the trust, or of statutory permission, that trustees or executors can not invest trust property upon any mere personal security, nor upon the stocks, bonds, or other securities of private business corporations.<sup>1</sup> Where no directions are given by the instrument of trust, the well-settled rule of the English courts of equity is, that the trustee should invest trust funds, and can only escape personal risk and liability by investing, in real estate securities, or in the public, governmental securities of the British government.<sup>2</sup> In the United States, while the rules are certainly not so stringent and invariable as in England, and while different regulations may prevail to some extent in different states, based partly upon statutory legislation, and partly upon the policy of encouraging local enterprises, the same fundamental principle of requiring permanent investments in real estate or governmental securities is generally recognized by the courts—at least, all speculative risks are forbidden.<sup>3</sup> Investments in first mortgages of improved land are universally favored,

<sup>1</sup> *White v. Sherman*, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132.

<sup>2</sup> *Robinson v. Robinson*, 1 De Gex, M. & G. 247, 263, Ames Trusts 495.

<sup>3</sup> *King v. Talbot*, 40 N. Y. 76, 50 Barb. 453, Ames Trusts 472, H. & B. 511; *Harvard College v. Amory*, 9 Pick. 446, H. & B. 526; *Lamar v. Micou*, 112 U. S. 452, 465, 5 Sup. Ct. Rep. 221, 26 L. Ed. 774, H. & B. 515; *Porter v. Woodruff*, 36 N. J. Eq. 174, 185, H. & B. 296; *Simmons v. Oliver*, 74 Wis. 633, 43 N. W. 561, H. & B. 524; *Dickinson's Appeal*, 152 Mass. 184, 25 N. E. 99, Ames Trusts 478.

and the trustee is not liable for any subsequent depreciation of value if the original security was sufficient. Indeed, investments of this form are generally required to be made by public officials of trust moneys paid into court. Investments in second or other subsequent mortgages would be at the trustee's own peril. Trustees may always invest in the governmental securities of the state under whose jurisdiction they are, and in those of the United States; and perhaps an investment in the public securities of other states of the Union, of which the credit is firmly established, may be permitted; but to any greater extent than this, investments in foreign securities are a violation of the trustee's duty. In some of the states, statutes permit investments in the municipal bonds of cities, counties, and towns of the state within whose jurisdiction the trustee acts. Wherever the principles of equity jurisprudence have been fully accepted by the courts, trustees are not allowed to invest in the stocks, bonds, and other securities of private corporations—certainly not without a statutory permission. Such unauthorized investments do not ipso facto render the trustees personally liable, where no loss ensues; but if any loss results, they must make it good. Where, however, the trust provides for a transfer of the property to the beneficiaries, they are not bound to accept such unauthorized securities from the trustees, even though these securities are not at all depreciated in value. It should be carefully observed, in this connection, that if the beneficiary is sui juris and competent to bind himself, his consent to the irregular investment would be a justification of the trustee's action, and a waiver of all claim against him for resulting loss.

**§ 1075. III. To Act with Good Faith. 1. The Duty not to Deal with Trust Property for his Own Advantage.**—Absolute and most scrupulous good faith is the very essence of the trustee's obligation. The first and principal duty arising from this fiduciary relation is to act in all matters of the trust wholly for the benefit of the beneficiary. The trustee is not permitted to manage the affairs of the trust, or to deal with the trust property, so as to gain any advantage, directly or indirectly, for himself, beyond his lawful compensation. The equitable rules which govern the *personal* dealings between trustees and all other fiduciaries and their beneficiaries—their contracts, purchases, gifts, and the like—have already been examined, and this branch of their general obligation to use good faith needs no further discussion.<sup>1</sup> It is equally imperative upon the trustee, in his dealings with trust property, not to use it in his own private business, not to make any incidental profits for himself in its management, and not to acquire any pe-

<sup>1</sup> See ante, §§ 955-965.

cuniary gains from his fiduciary position. The beneficiary is entitled to claim all advantages actually gained, and to hold the trustee chargeable for all losses in any way happening, from a violation of this duty.<sup>2</sup>

§ 1076. 2. **The Duty not to Mingle Trust Funds with his Own Funds.**—This second important duty of good faith includes not only the intentional use of trust funds in the trustee's own business: it prohibits the mixing the two funds together in one amount, the depositing trust moneys in his own personal account with his own moneys in bank, borrowing trust funds or going through the form of borrowing for his own use, mingling receipts and payments of trust moneys and his own moneys in his books of account, and all similar modes of combining or failing to distinguish between the two funds. The trustee may not thus mingle trust moneys with his own, even though he eventually accounts for the whole, and nothing is lost. The rule is designed to protect the trustee from temptation, from the hazard of loss, and of being a possible defaulter. When a trustee does mingle trust moneys with his own, the right and lien of the beneficiary attach to this entire combined fund as security for all that actually belongs to the trust estate. A violation of this duty subjects the trustee to the following liabilities: 1. If the mingling is followed by actual loss, accidental or otherwise, the trustee must make good the principal sum lost, together with interest, and perhaps with compound interest; 2. Where there has been no positive loss, but the whole funds, principal, profits, and proceeds, are in the trustee's hands in their mingled condition, the burden of proof rests upon him of showing most conclusively what portion is his, and whatever of the mixed fund, including both profits and principal, he can not thus show to be his own, even though it be the whole mass, will be awarded to the

<sup>2</sup> *Docker v. Some*, 2 Mylne & K. 655. The penalty for a violation of this duty may be imposed in any form necessary to a complete indemnification of the beneficiary. Where the trustee has used trust funds in his own business, in trade, speculation, has made profits, acquired property, and the like, the beneficiary may, if he elect, claim and secure the advantage, profits, property, etc., for his own benefit. If the gains, profits, or acquisitions of such dealings cannot be ascertained with certainty, the trustee may be held liable to pay extra interest, and even compound interest. The beneficiary is not, however, permitted to claim both profits and interest; he is required to elect between the two. Finally, if the trustee uses trust funds for such improper purposes, and loses them in any manner, he will be obliged to make up the loss to an extent sufficient to give the beneficiary complete indemnity, not only for the principal, but also for the income or interest which ought to have been made by the exercise of good faith and ordinary business prudence. *Robinson v. Robinson*, 1 De Gex, M. & G. 247, 256, 257, *Ames Trusts* 495; *Davis v. Rock Creek, etc., Co.*, 55 Cal. 359, 36 Am. Rep. 40.

beneficiary. The beneficiary is always entitled to claim and receive the *actual profits* when they can be ascertained; 3. If it is difficult to distinguish the funds so as to tell the amount of profits or proceeds which is the beneficiary's share, the court may not only require the trustee to restore the principal which he has appropriated, but in place of the profits may compel him to pay interest compounded, with rests annual or semi-annual, or even more frequent, as the extent of his bad faith may seem to demand; 4. Even if the trustee voluntarily accounts for and restores all the principal that he has mingled with his own, the court will at all events charge him with interest thereon.<sup>1</sup>

**§ 1077. 3. The Duty not to Accept Any Position or Enter into Any Relation, or do Any Act Inconsistent with the Interests of the Beneficiary.**—This rule is of wide application, and extends to every variety of circumstances. It rests upon the principle that as long as the confidential relation lasts the trustee or other fiduciary owes an undivided duty to his beneficiary, and can not place himself in any other position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to the best interests of his original cestui que trust. The rule applies alike to agents, partners, guardians, executors and administrators, directors and managing officers of corporations, as well as to technical trustees. The most important phase of this rule is that which forbids trustees and all other fiduciaries from dealing in their own behalf with respect to matters involved in the trust, and this prohibition operates irrespectively of the good faith or bad faith of such dealing. It is therefore a gross violation of his duty for any trustee or director, acting in his fiduciary capacity, to enter into any contract with himself connected with the trust or its management; such a contract is voidable, and may be defeated or set aside at the suit of the beneficiary. If, however, the trustee's act, in violation of this rule, is not done in bad faith, and the beneficiary has received any benefit therefrom, it cannot be avoided without a restoration to the trustee of what has thus been received.<sup>1</sup> As another application of the general doctrine, a

<sup>1</sup> It should be observed that the trustee is liable for trust money lost while mingled with his own, or while being used in his own business, no matter how or by what cause the loss occurs. He may have used the utmost care and prudence in conducting the business, and the loss may have been the result of unforeseen, inevitable accident,—he is still liable, since he is engaged in a positive violation of duty. *Cook v. Addison*, L. R. 7 Eq. 466, 470; *White v. Sherman*, 168 Ill. 589, 604, 61 Am. St. Rep. 132, 138; 48 N. E. 128.

<sup>1</sup> *Duncomb v. N. Y., etc., R. R.*, 84 N. Y. 190, 198; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, Sh. 119; *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101,

trustee is bound to communicate to his beneficiary any knowledge or information he may have obtained affecting the beneficiary's interests so far as they are embraced in or depend upon the trust or confidential relation.<sup>2</sup>

§ 1078. 4. **The Duty not to Sell Trust Property to Himself nor to Buy from Himself.**—This particular duty has already been fully discussed. It has been shown that where a trustee deals directly with his beneficiary by way of purchase or sale, the transaction is presumptively invalid; and that where a trustee with authority to sell directly or indirectly purchases the property for himself behind his beneficiary's back, or where a trustee with authority to buy purchases the property in such a manner from himself, in each case the transaction may be avoided by the beneficiary, unless he has ratified it with full knowledge of all the facts.<sup>1</sup>

§ 1079. IV. **Breach of Trust, and Liability therefor.**—It might be supposed that the term "breach of trust" was confined to willful and fraudulent acts which have a quasi criminal character, even if they have not been made actual crimes by statute. The term has, however, a broader and more technical meaning. It is well settled that every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. The term therefore includes every omission or commission which violates in any manner either of the three great obligations already described: 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. This broad conception of breach of trust, and the liabilities created thereby, are not confined to trustees regularly and legally appointed; they extend to all persons who are acting trustees, or who intermeddle with trust property.<sup>1</sup> In order that a trustee may be personally liable for a breach of trust, he must be *sui juris*.<sup>2</sup>

§ 1080. **Nature and Extent of the Liability.**—It has already been shown that a beneficiary may always claim and reach the trust property through all its changes of form while in the hand of the

29 Atl. 303, 42 Am. St. Rep. 159, 25 L. R. A. 90; Rutland, etc., Co. v. Bates, 68 Vt. 579, 54 Am. St. Rep. 904, 35 Atl. 480.

<sup>2</sup> See §§ 902-904, § 1063.

<sup>1</sup> Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259; Davoue v. Fanning, 2 Johns. Ch. 252, 2 Scott, 690; see ante, §§ 958-965, 1049-1052.

<sup>1</sup> Oceanic Steam Nav. Co. v. Sutherland, L. R. 16 Ch. Div. 236 (breach of trust though beneficial to estate was not allowed).

<sup>2</sup> Wainford v. Heyl, L. R. 20 Eq. 321.

trustee, and that he may also follow it into the possession and apparent ownership of third persons, until it has been transferred to a bona fide purchaser for valuable consideration and without notice; and that a court of equity will furnish him with all the incidental remedies necessary to enforce his claim and to render it effective.<sup>1</sup> In addition to this claim of the beneficiary upon the trust estate as long as it exists, the trustee incurs a personal liability for a breach of trust by way of compensation or indemnification, which the beneficiary may enforce at his election, and which becomes his only remedy whenever the trust property has been lost or put beyond his reach by the trustee's wrongful act. The trustee's personal liability to make compensation for the loss occasioned by a breach of trust is a simple contract equitable debt.<sup>2</sup> It may be enforced by a suit in equity against the trustee himself, or against his estate after his death, and the statute of limitations will not be admitted as a defense unless the statutory language is express and mandatory upon the court.<sup>3</sup> The amount of the liability is always sufficient for the complete indemnification and compensation of the beneficiary.<sup>4</sup>

§ 1081. **Liability among Co-trustees.**—I do not now speak of the liability *for* the acts or defaults of a co-trustee, but assume that co-trustees have concurred in a breach of trust. The rule is firmly settled that where a breach of trust has affected two or more or all of co-trustees with a common liability, they are liable jointly and severally; 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.<sup>1</sup> Wherever two or more co-trustees are thus jointly and severally liable in the same amount for a breach of trust which is not purely tortious in its nature,—as where it consists in a failure to carry out the directions of the trust, or a failure to make proper investments, or other like acts of omission or commission which are not fraudulent, or do not involve a willful breach of good faith,—a right of contribution exists among themselves; and if one of them has paid the amount of liability, he may enforce a contribution from the others, in a suit brought for that purpose. In such cases, upon the general

<sup>1</sup> See ante, §§ 1048–1058.

<sup>2</sup> *Holland v. Holland*, L. R. 4 Ch. 449 *Ames Trusts* 236.

<sup>3</sup> *Duckett v. Bank*, 86 Md. 400, 38 Atl. 893, 63 Am. St. Rep. 513, 39 L. R. A. 84. See ante, § 419.

<sup>4</sup> *Robinson v. Robinson*, 1 De Gex, M. & G. 247, *Ames Trusts* 495; *McKim v. Hibbard*, 142 Mass. 422, 8 N. E. 152; *McCloskey v. Gleason*, 56 Vt. 264, 48 Am. Rep. 770 (simple interest; mingling of funds); *In re Hodges' Estate*, 66 Vt. 70, 44 Am. St. Rep. 820, 28 Atl. 663 (compound interest).

<sup>5</sup> *Turquand v. Marshall*, L. R. 6 Eq. 112; *Heath v. Waters*, 40 Mich. 457.

principles of equity pleading, all the trustees who are liable should be joined as defendants in a suit brought by the beneficiary; the contribution, however, cannot be *enforced* in that suit.<sup>2</sup> Where, on the other hand, the breach of trust concurred in by several co-trustees is tortious in its nature, as where it is actually fraudulent, or consists in an intentional misappropriation of trust funds to the trustee's own use, or in any other willful violation of good faith, or perhaps in gross and culpable negligence occasioning a loss, there is no right of contribution among the trustees; the beneficiary may, at his election, sue one or more of the wrong-doers without joining all who are liable.<sup>3</sup>

§ 1082. **Liability for Co-trustees.**—The general theory of equity is, that each one of several trustees has the same rights as the others with respect to the possession, control, and management of the trust property. It follows as a necessary consequence of this conception, and the general rule is well settled, that each trustee is generally liable only for his own conduct in dealing with the affairs of the trust; he is not responsible for the acts or defaults—the intentional or negligent breaches of trust—of a co-trustee, in which he has not joined or concurred, or to which he has not consented, or which he has not aided or made possible by his own negligence.<sup>1</sup> Where a trustee who is not really an acting one joins merely for the sake of conformity with his co-trustees who are acting, in receipts given for money, he is not liable with respect to such money to the beneficiary. The foregoing statement of the general doctrine shows that a trustee is not absolutely and under all circumstances free from liability with respect to his co-trustees. A trustee is responsible for the willful or negligent wrongful acts or omissions—breaches of trust—of his co-trustee to which he consented, or which by his own negligence he made it possible for his co-trustee to commit. Every trustee is, of course, liable for the defaults of his co-trustee in which he has joined or concurred, but his liability then arises from his *own* actual breaches of trust, and not from those of his fellow-trustee. “With respect to the liability of a trustee for the acts of a co-trustee, there are three modes in which he may become liable according to the ordinary rules of the court: 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 money without making due inquiry as to his dealing with it; 3. Where he becomes

<sup>1</sup> *Lingard v. Bramley*, 1 Ves. & B. 114, 117.

<sup>2</sup> *Att’y Gen. v. Wilson, Craig & P.* 1, 28.

<sup>3</sup> *Brice v. Stokes*, 11 Ves. 319, 2 Lead. Cas. Eq. 4th Am. ed., 1738, 1748–1790, 1791–1805; *Estate of Fesmire*, 134 Pa. St. 67, 19 Atl. 502, 19 Am. St. Rep. 676.

aware of a breach of trust, either committed or meditated, and abstains from taking the necessary steps to obtain restitution." It thus appears that the consent to a co-trustee's breach of trust need not be express. It may be implied from the trustee's conduct in refraining from taking reasonable and necessary steps to prevent or repair the loss.<sup>1</sup> In applying this general rule, some of the American decisions do not hold trustees to quite so rigid a responsibility for mere omissions to interfere with the wrongful acts of their fellows as is done by the English cases; but there does not appear to be any substantial difference in the modes of formulating the doctrine by the courts of the two countries.

**§ 1083. The Beneficiary Acquiescing or Concurring.**—A beneficiary who, subsequently to a breach of trust, acquiesces in it, can not maintain a suit for relief against those who would otherwise have been liable. The acquiescence, in order to produce this effect, must take place with full information by the beneficiary of all the facts, and with full knowledge of his legal rights arising from those facts; in short, it must have all the requisites of an acquiescence heretofore described, to defeat the liability of a defaulting fiduciary.<sup>1</sup> Although, in general, lapse of time is not a defense to the beneficiary's right of action, yet a great delay after knowledge of the breach of trust may be a bar. If a cestui que trust is a party to or concurs in, or even assents to, a breach of trust by the trustee, he debars himself thereby of all claim for relief.<sup>2</sup>

**§ 1084. Third. The Trustee's Compensation and Allowances.**—It is the well-settled doctrine of the English equity that the trustee's office is, as a rule of law, wholly gratuitous. In the absence of a provision for compensation contained in the instrument creating the trust, he is not entitled to make any charge for his services, trouble, or loss of time, even though great advantage had resulted therefrom to the beneficiaries.<sup>1</sup> Where the trustee is also an attorney, and acts as such on behalf of the estate, he is even not entitled to full costs or attorney's fees as against the cestui que trust, but can only be allowed for costs actually out of pocket, or disbursements.<sup>2</sup> The testator, or other person who creates a trust, may expressly provide for a salary or compensation of any

<sup>1</sup> See ante, § 1069, as to negligent surrender of entire control to a co-trustee: *Ringgold v. Ringgold*, 1 Har. & G. 11, 18 Am. Dec. 250; *Bruen v. Gillet*, 115 N. Y. 10, 21 N. E. 676, 12 Am. St. Rep. 764, 4 L. R. A. 529.

<sup>2</sup> See ante, §§ 964, 965; *Clark v. Clark*, 8 Paige 152, 35 Am. Dec. 676; *White v. Sherman*, 168 Ill. 589, 606, 61 Am. St. Rep. 132, 140, 48 N. E. 128.

<sup>3</sup> *Phipps v. Lovegrove*, L. R. 16 Eq. 80.

<sup>4</sup> *Barrett v. Hartley*, L. R. 2 Eq. 789.

<sup>5</sup> *Cradock v. Piper*, 1 Macn. & G. 664; *Ky. Nat. Bk. v. Stone*, 93 Ky. 623, 20 S. W. 1040.

form to be paid to the trustee, and such provision will be binding, and will be followed by the courts.<sup>3</sup> This stringent, and certainly unwise, rule of the English equity has not been followed in the United States. With very few, if any, exceptions among the various states, trustees, as well as executors and administrators, are allowed compensation for their services; in most of the states the right to the compensation and the amount of it have been fixed by statutory legislation. Where the instrument creating the trust provides that the trustee shall have a compensation for his services, such provision will be enforced. If the instrument declares the rate of compensation, it must be followed; if it establishes no rate, the trustee is entitled to a reasonable amount, which will be ascertained by means of a judicial investigation, as to the value of his services.<sup>4</sup> Where no provision is made by the creator of the trust, the trustee is allowed the amount fixed by statute, or in the absence of statute, the amount determined by the court to be reasonable and just.<sup>5</sup>

§1085. **Allowances for Expenses and Outlays.**—In addition to his compensation in this country, and without any compensation in England, the trustee is entitled to be allowed, as against the estate and the beneficiary, for all his proper expenses out of pocket, which include all payments expressly authorized by the instrument of trust, all reasonable expenses in carrying out the directions of the trust, and, in the absence of any such directions, all expenses reasonably necessary for the security, protection, and preservation of the trust property, or for the prevention of a failure of the trust. He is also entitled to be indemnified in respect of all personal liabilities incurred by himself for any of these purposes.<sup>1</sup> Where a trustee properly advances money for any of the above-mentioned objects, so that he is entitled to reimbursement, he also has a lien as security for the claim, either upon the corpus of the trust property, or upon the income, as the case may be; but for moneys improperly paid there is no lien. Although in general a creditor who advances money to a trustee obtains only the personal liability of

<sup>3</sup> *Bowker v. Pierce*, 130 Mass. 262.

<sup>4</sup> In the matter of *Schell*, 53 N. Y. 263, 265, H. & B. 543. The English rule is followed in a few states: *Cook v. Gilmore*, 133 Ill. 139, 24 N. E. 524, H. & B. 542.

<sup>5</sup> *Perkins' Appeal*, 108 Pa. St. 314, 56 Am. Rep. 208, Sh. 206 (trustee allowed extra compensation for services as attorney); *In re Hodges's Estate*, 66 Vt. 70, 44 Am. St. Rep. 820, 28 Atl. 663 (trustee who commits breach of trust not entitled to commissions); *Muscogee Lumber Co. v. Hyer*, 18 Fla. 698, 43 Am. Rep. 332 (allowing a reasonable compensation).

<sup>1</sup> *Worrall v. Harford*, 8 Ves. 4, 8, *Ames Trusts* 415; *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111.

the trustee, and has no demand enforceable against the estate, yet if the expenditure is authorized, and the loan is necessary, the trustee may, at the time of procuring the advance, whether money or services, by an express agreement with the creditor, make the demand a charge upon the estate, and thus create a lien in favor of the creditor; or the trustee may so deal with the estate in the first instance as to acquire a lien in his own favor, and may then assign such lien to the creditor.<sup>2</sup> It is hardly necessary to add that the foregoing rules concerning compensation, allowances, and liens do not apply to trustees in invitum. Since their paramount duty is to convey the property at once to the beneficial owner, they are clearly not entitled to be reimbursed for expenditures made, much less to be allowed compensation, while they are violating this obligation.

§ 1086. **Fourth. Removal and Appointment of Trustees.**—The power of courts of equity over the removal and appointment of trustees, independently of any statutory authority, or any directions in the instrument of trust, is well established. This power is confined to cases of actual express trusts. It cannot, in the nature of things, extend to implied trustees, or trustees in invitum; nor does it apply to those persons who stand in fiduciary relations, and are for some purposes treated as trustees. A court of equity may remove a trustee on his own application when he wishes to be discharged; and it may and will remove a trustee who has permanently changed his residence to another country, or has absconded, or has been guilty of some breach of trust, or violation of duty, or has become insolvent, or is incapable, through age or other infirmity, of performing the trust duties. The exercise of this function by a court of equity belongs to what is called its *sound judicial discretion*, and is not controlled by positive rules, except that the discretion must not be abused.<sup>1</sup>

§ 1087. **Appointment of New Trustees.**—The principle has already been stated that an express trust validly created shall not fail for want of a trustee. Courts of equity, therefore, indepen-

<sup>2</sup>New v. Nicoll, 73 N. Y. 127, 130, 131, 29 Am. Rep. 111. As to trustee's power to bind the estate, see Worrall v. Harford, 8 Ves. 4, 8, Ames Trusts 415; Strickland v. Symons, 26 Ch. Div. 245, Ames Trusts 418; In re Johnson, 15 Ch. Div. 548, Ames Trusts 426; Fairland v. Percy, L. R. 3 P. & D. 217, Ames Trusts 423; Norton v. Phelps, 54 Miss. 467, Ames Trusts 421.

<sup>1</sup>Sheppard v. McEvers, 4 Johns. Ch. 136, 8 Am. Dec. 561; In re Barker's Trusts, 1 Ch. Div. 43, Ames Trusts 223, H. & B. 54 (insolvency); McPherson v. Cox, 96 U. S. 404, 24 L. ed. 746 (inability to agree with beneficiary not a disqualification in this case); May v. May, 167 U. S. 310, 17 Sup. Ct. Rep. 824, 42 L. ed. 179 (disagreement among the trustees endangering safety of the property or its proper management).

dently of statute, possess the inherent power and jurisdiction to appoint new trustees whenever such action is necessary to protect the rights of the beneficiaries. In the absence of any other method prescribed by the instrument creating the trust, a court of equity will appoint trustees when none at all have been named by the creator of the trust, and will appoint new trustees when those originally named refuse to accept, or when a vacancy occurs by their death, resignation, permanent residence in a foreign country, or removal from office as heretofore described.<sup>1</sup> The power of appointment will be exercised on behalf of a beneficiary who has a real interest, even though it be contingent. Its exercise, as in the case of removal, is a matter of sound judicial discretion. In filling vacancies, therefore, the court is not necessarily confined to the original number of trustees. In the appointment as well as in the removal of trustees the court keeps in view and endeavors to accomplish three main objects: the wishes of the creator of the trust, the interests of *all* the beneficiaries, not *some* of them, and the effectual performance of the trust. Even when the power of appointment is conferred by the instrument of trust upon an individual, a court of equity may control its exercise so as to prevent an abuse of discretion.<sup>2</sup>

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## SECTION VII.

### CORPORATION DIRECTORS AND OTHER QUASI TRUSTEES.

#### ANALYSIS.

- § 1088. Quasi trustee; fiduciary persons.
- § 1089. Corporation directors and officers.
- § 1090. Trust relations in stock corporations.
- § 1091. Liability of directors for a violation of their trust.
- § 1092. First class: Directors guilty of fraudulent misrepresentations, etc.
- § 1093. Second class: *Ultra vires* proceedings of directors.
- § 1094. Third class: Wrongful dealing with corporate property.
- § 1095. Fourth class: The same; the corporation refuses to sue.
- § 1096. Special classes.
- § 1097. Guardians.

§ 1088. **Quasi Trustees—Fiduciary Persons.**—The conception of a trust runs through a large part of equity jurisprudence, and

<sup>1</sup> *Dodkin v. Brunt*, L. R. 6 Eq. 580, *Ames Trusts* 226; *Re Hallett's Trusts*, 18 *Weekly Rep.* 416, *Ames Trusts* 221 (husband appointed co-trustee for married woman, but not sole trustee); *Wilding v. Balder*, 21 *Beav.* 222, *Ames Trusts* 221 (person who is not a near relative is to be preferred); *Ex parte Conybeare's Settlement*, 1 *Weekly Rep.* 458, *Ames Trusts* 222 (beneficiary may be co-trustee).

<sup>2</sup> *Bailey v. Bailey*, 2 *Del. Ch.* 95.

is the source of many doctrines applicable to conditions which are not strictly trusts. Wherever there is a fiduciary relation, although the fiduciary may not hold the legal title to property in which the beneficiary has only an equitable estate, the dealings of the parties with each other and with the subject-matter of the relation are governed by the same rules which determine the duties of actual trustees towards their *cestuis que trustent*, and the beneficiaries are, in general, entitled to the same remedies which are given to *cestuis que trustent* against those who are truly express trustees.<sup>1</sup> It may be said, therefore, that the equitable obligations resting upon and the equitable remedies given against guardians, committees of persons *non compos mentis*, corporation directors, partners, agents, as well as executors and administrators, are analogous to those resting upon and given against actual trustees; they result directly from the theory of trusts, and are not *mere* applications of the doctrine concerning accounting. I purpose, in the present section, to describe the operation of the theory of trusts upon certain species of fiduciary persons, especially corporation directors and officers; some other species will be considered in subsequent chapters.<sup>2</sup>

§ 1089. **Corporation Directors and Officers.**—The directors and supreme managing officers of corporations are constantly spoken of as trustees. They are not, however, true trustees with the corporation or the stockholders as their true *cestuis que trustent*, since they hold neither the legal title to the corporate property nor that to the stock. In fact, directors are clothed at the same time with a double character—that of quasi trustees and that of agents.<sup>1</sup> It is of the utmost importance to discriminate exactly between these two characters, and to determine accurately for whom, over what subject-matter, and to what extent they are thus trustees; for upon this trust relation primarily depend the equitable remedies which may be obtained against them by the corporation or by the stockholders. With the character of agents belonging to directors, the present discussion has little or nothing to do. From their function of agency are derived their powers to act for the corporation as a legal entity; it measures the extent of these powers in the management of both the external and internal affairs; it fixes the rights and obligations of the corporation in dealings with stockholders and with third persons. The rights,

<sup>1</sup> See ante, §§ 955-965, 1044-1058, 1075-1078.

<sup>2</sup> Namely, executors and administrators, partners, and agents.

<sup>3</sup> Ex parte Chippendale, 4 De Gex M. & G. 19, 52; Hun v. Cary, 82 N. Y. 65, 70, 37 Am. Rep. 446, H. & B. 507.

duties, liabilities, and remedies which result from the directors' agency are therefore *chiefly* legal; the *equitable* rights, duties, and remedies are mainly referable to the *trust* element of the directors' functions.

§ 1090. **Trust Relations in Stock Corporations.**—The trust character of directors is involved in the very organization of a corporation, and is necessarily twofold—towards the corporation, and towards the stockholders. The doctrines are fundamental and familiar that the corporation itself is a legal personality, and holds the full title, legal and equitable, to all corporate property. Stockholders, individually and separately, hold the full title, legal and equitable, to their respective shares of stock. A stockholder does not by virtue of his stock acquire any estate, legal or equitable, in the corporate property; he obtains only a right to participate in the lawful dividends while the corporation is in being, and to his proportionate share of the net assets upon its dissolution and final settlement. Shares of stock, however, are regarded by the courts of law and of equity as a species of property, as vendible in the market, as having a pecuniary value, and as clothing their owner with proprietary rights which will be protected and enforced.<sup>1</sup> From this analysis it is obvious that, so far as the trust embraces or is concerned with the *corporate property*, the directors and managing officers occupy the position of quasi trustees towards the *corporation* only; there is no relation of beneficiary and trustee, having the corporate property for its subject-matter, between the stockholders and the directors. The directors are also agents for the corporation, but that fact does not prevent them from being in a partial sense trustees for the corporation. The important conclusion I repeat, that this phase of their trust is concerned with and confined to the corporate property: from it arise their fiduciary duties towards the corporation in dealing with such property, and the equitable remedies of the corporation for a violation of those duties. On the other hand, the directors and managing officers occupy the position of quasi trustees towards the stockholders alone, and not at all towards the corporation, with respect to their shares of stock. Since the stockholders own these shares, and since the value thereof and all their rights connected therewith are affected by the conduct of the directors, a trust relation plainly exists between the stockholders and the directors, which is concerned with and confined to the shares of stock held by the stockholders; from it arise the fiduciary duties

<sup>1</sup> Thus, for example, trover could be maintained for a wrongful conversion of shares.

of the directors towards the stockholders in dealings which may affect the stock and rights of the stockholders therein, and their equitable remedies for a violation of those duties. To sum up, directors and managing officers, in addition to their functions as mere agents, occupy a double position of partial trust; they are quasi or sub modo trustees for the corporation with respect to the corporate property, and they are quasi or sub modo trustees for the stockholders with respect to their shares of the stock.<sup>2</sup>

**§ 1091. Liability of Directors for a Violation of their Trust.**—Whenever directors or managing officers, acting within the scope of their general powers as agents, violate the rights of a stockholder, their act is binding upon the corporation; it is, in legal effect, the act of the corporation, and the stockholder has a remedy, legal or equitable, as the case may be, by suit against the corporation.<sup>1</sup> With remedies of this kind against the corporation we are not at present concerned, since they result from the directors' powers as *agents*, and not at all from their functions as quasi trustees. In regard to the various remedies against the directors or managing officers for their breaches of trust, the conclusions reached in the preceding paragraph furnish a most clear and certain criterion. Whenever the acts of the directors do not consist of any wrongful misuse of the corporate property, or wrongful exercise of the corporate franchise, but are of such a nature that they directly and primarily affect the interest of the stockholders in their shares of stock, by diminishing its value, or otherwise impairing their proprietary rights in it, then the stockholders are directly injured and are primarily interested; as the *cestuis que trustent* whose rights have been violated, they must institute and maintain any equitable suits for relief against their defaulting trustees; the remedy is for their benefit and belongs to them alone. On the other hand, whenever the breach of trust consists in a wrongful dealing of any kind or in any manner with the corporate property or with

<sup>2</sup>The conclusions of the text are fully sustained by the cases, although no *single* decision, so far as I am aware, attempts to give the complete analysis or to formulate the entire results. *Ex parte Chippendale* 4 De Gex, M. & G. 19, 52; *Jackson v. Ludeling*, 21 Wall. 616.

<sup>1</sup>As, for example, when the directors or officers improperly refuse to recognize a transfer of stock, and to issue a new certificate to the assignee, or when they otherwise refuse to admit the rights of one who is really a stockholder, and to issue to him the stock to which he is justly entitled, their conduct, though wrongful in the particular instance, falls within the scope of their proper functions. The stockholder may therefore maintain an action at law against the corporation for damages, or he may sometimes resort to a suit in equity for the purpose of compelling it to issue the stock and to register it upon the books of the company; see §§ 1411, 1412.

the corporate franchises, the corporation itself is directly injured and is primarily interested; as the cestui que trust whose rights have been violated, it must institute and maintain any equitable suit for relief against its defaulting trustees; the remedy obtained, whether pecuniary or otherwise, is for its benefit, and belongs to it alone. Under certain special circumstances in cases of this latter kind, where the suit should be brought by the corporation as plaintiff, but it becomes impossible to institute such a proceeding, in order to prevent a complete failure of justice the stockholders are permitted to set the machinery of the court in motion by commencing the action in their own names; but otherwise the suit is treated in every respect as one brought by and for the corporation. In applying these general propositions, it will be found that there are several distinct classes of cases appropriate for different conditions of fact, and governed by different rules. These various classes I shall now proceed to describe.

**§ 1092. First Class. Directors Guilty of Fraudulent Misrepresentations or Concealments.**—Where directors or managing officers issue prospectuses, circulars, or reports containing fraudulent misrepresentations or concealments concerning the company's affairs, and persons are induced by these documents to purchase shares of the stock, or to enter into contracts for their purchase, and thereby sustain a loss, such defrauded stockholders may, as has already been shown, either obtain the relief by repayment or rescission against the corporation, or may obtain relief against the fraudulent directors personally by means of an equitable suit for an accounting and repayment of the money, or by an action at law for the deceit. The equitable suits against the directors must plainly be brought by the stockholders, and not by the corporation, since the wrong is not done to the corporate property or franchises, but consists wholly in a violation of the stockholders' proprietary rights in their shares of stock.<sup>1</sup> Such a suit can not be maintained by one stockholder suing on behalf of himself and all others similarly situated; the injury is several and individual; each defrauded stockholder must sue for himself.<sup>2</sup>

**§ 1093. Second Class. Ultra Vires Proceedings of Directors.**—In a second class of cases, where the directors are not charged with any misappropriation of the corporate property for their own benefit, nor with any breach of their fiduciary duty to the corporation, but, although purporting to act for the common welfare, they have adopted, or are about to adopt, some measure which is ultra vires, or beyond the scope of their corporate powers, a suit may be prose-

<sup>1</sup> Kisch v. Cent. Ry. of Venezuela, 3 De Gex, J. & S. 122; see ante, § 881.

<sup>2</sup> Turquand v. Marshall, L. R. 4 Ch. 376, 385.

cut against them by stockholders to obtain the appropriate relief, either of rescission or of prevention.<sup>1</sup> Under some circumstances, even a single dissentient stockholder would not be bound by such an act, done by a unanimous board of directors, and approved by all the other stockholders except himself. The theory of this class of suits is, that a stockholder has a right that the operations of the corporation should be kept by the directors within the powers conferred by its charter; every measure which transcends those powers, although done in good faith, violates the rights which inhere in the ownership of stock, and puts the value of the stock itself at hazard. The suit may be brought by a single stockholder suing on his own account alone, or by a stockholder suing on behalf of himself and all others who are similarly situated. The corporation is, of course, made a co-defendant, and any other corporation or person who has joined in the *ultra vires* transaction may also be made a co-defendant.<sup>2</sup> There is also a special action strictly analogous to those properly belonging to this class. When the managing body are doing or are about to do an *ultra vires* act of such a nature as to produce *public* mischief, the attorney-general as the representative of the public and of the government, may maintain an equitable suit for preventive relief.<sup>3</sup>

**§ 1094. Third Class. Wrongful Dealing with Corporate Property.**—In this vastly most numerous and important class, the wrongful acts of the directors or officers primarily and immediately affect the corporation, either by misuse of its property or by abuse of its franchises. The kinds, forms, and modes of such wrongful acts are practically unlimited in number or variety. In general, where the directors or officers, or some of them, cause a loss of corporate property by negligence, or culpable lack of prudence, or failure to exercise their functions; or fraudulently misappropriate the corporate property in any manner, whether for their own benefit or for the benefit of third persons; or obtain any undue advantage, benefit, or profit for themselves by contract, purchase, sale, or other dealings under color of their official functions; or misuse the franchises, or violate the rules established by the charter or the by-laws for their management of the corporate affairs; or in any other similar manner commit a breach of their fiduciary obligations towards the corporation, so that it sustains an injury or loss, and a liability devolves upon themselves,—then the corporation is the party which must, as the plaintiff, bring an equitable suit for

<sup>1</sup> *Russell v. Wakefield, etc., Co.*, L. R. 20 Eq. 474, 481.

<sup>2</sup> *Ribon v. R. R. Cos.*, 16 Wall. 446; *Elyton Land Co. v. Dowdell*, 113 Ala. 177, 20 South 981, 59 Am. St. Rep. 105.

<sup>3</sup> *Atty.-Gen. v. Great Western Ry.*, L. R. 7 Ch. 767.

relief against the wrong-doers; the trust relation between itself as the cestui que trust and the defaulting directors or officers as trustees has been violated, and as in all like cases the cestui que trust is primarily the only party to sue for redress. As a general rule, courts of equity will not interfere with the internal management of corporations by means of suits *brought by stockholders* against directors, officers, or other stockholders.<sup>1</sup> In cases belonging to this class, therefore, whatever be the nature of the particular wrong, whether intentional and fraudulent, or resulting from negligence or want of reasonable prudence, and whatever be the *indirect* loss occasioned to individual stockholders, no equitable suit for relief against the wrong-doing directors or officers can be maintained by a stockholder or stockholders individually, nor by a stockholder suing representatively on behalf of all others similarly situated, *unless the special condition of circumstances exists* to be described in the next following paragraph, namely, that the corporation either actually or virtually refuses to prosecute. Even if the stockholder alleges that the value of his own stock has been depreciated by the defendant's acts, or that he has sustained other special damage, he is not thereby entitled to maintain the suit. The reasons for this doctrine have already been explained. The stockholder, having no estate, legal or equitable, in the corporate property, has no locus standi in the courts while the corporation, in which alone are vested the corporate property and franchises, is able and willing to sue for their protection.<sup>2</sup> Differing from this class merely in form, there is a special group of cases governed by the same doctrine. If the corporation has been dissolved, or is in the process of winding up, then the suit, which would otherwise have been brought in its name, may be maintained by the receiver, official liquidator, or other official representative who has succeeded to its property and franchises for the purpose of the final settlement.<sup>3</sup>

**§ 1095. Fourth Class. The Same Wrongful Dealing with Corporate Property—The Corporation Refuses to Sue.**—Although the corporation holds all the title, legal or equitable, to the corporate property, and is the *immediate* cestui que trust under the directors with respect to such property, and is theoretically the only proper

<sup>1</sup> Greaves v. Gouge, 69 N. Y. 154, 157.

<sup>2</sup> Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 42 Am. St. Rep. 159, 25 L. R. A. 90; Decatur Mineral Land Co. v. Palm, 113 Ala. 531, 21 South. 315, 59 Am. St. Rep. 141; Johns v. McLester, 137 Ala. 283, 34 South. 174, 97 Am. St. Rep. 27, and note.

<sup>3</sup> Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546, H. & B. 507.

party to sue for wrongful dealings with that property, yet courts of equity recognize the truth that the stockholders are *ultimately* the only beneficiaries; that their rights are really, though indirectly, protected by remedies given to the corporation; and that the final object of suits by the corporation is to maintain the interests of the stockholders. While, in general, actions to obtain relief against wrongful dealings with the corporate property by directors and officers must be brought by and in the name of the corporation, yet if in any such case the corporation should refuse to bring a suit, the courts have seen that the stockholders would be without any immediate and certain remedy, unless a modification of the general rule was admitted. To that end the following modification of the general rule stated in the last preceding paragraph has been established as firmly and surely as the rule itself. Wherever a cause of action exists primarily in behalf of the corporation against directors, officers, and others, for wrongful dealing with corporate property, or wrongful exercise of corporate franchises, so that the remedy should regularly be obtained through a suit by and in the name of the corporation, and the corporation *either actually or virtually refuses* to institute or prosecute such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders, either individually or suing on behalf of themselves and all others similarly situated, against the wrong-doing directors, officers, and other persons; but it is absolutely indispensable that the corporation itself should be joined as a party,—usually as a co-defendant. The rationale of this rule should not be misapprehended. The stockholder does not bring such a suit because *his* rights have been *directly* violated, or because the cause of action is *his*, or because *he* is entitled to the relief sought; he is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the court*. The stockholder, either individually or as the representative of the class, may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not the stockholder-plaintiff. The corporation is, therefore, an indispensably *necessary* party, not simply on the general principles of equity pleading in order that it may be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree. This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no interest in the

subject-matter of the controversy nor in the relief. In fact, the plaintiff has no such *direct* interest; the defendant corporation alone has any direct interest; the plaintiff is permitted, notwithstanding his want of interest, to maintain the action solely to prevent an otherwise complete failure of justice. When may such an action be brought? I have already stated the rule in its most general form, that a stockholder may thus sue whenever the corporation either actually or virtually refuses to permit a proceeding by itself. These are two distinct conditions of fact; and the circumstances must determine whether any particular case belongs to one or the other of the two conditions. In general, a case should come within the first condition; and it should appear that the board of directors or other managing body has actually refused to bring or permit an action in its own name. To this end the plaintiff should allege an application to the directors or managing body, a reasonable notice, request, or demand, that they would institute proceedings on the part of the corporation against the wrong-doers, and their refusal to do so after such reasonable request or demand. These allegations are material and issuable; if controverted by the defendant, they must be proved. If the proof of them fails, the whole foundation of the plaintiff's action is gone. This condition of fact, however, is not indispensable; the action *may* be maintainable without showing any notice, request, or demand to the managing body, or any actual refusal by them to prosecute; in other words, the refusal may be virtual. If the facts as alleged show that the defendants charged with the wrong-doing, or some of them, constitute a majority of the directors or managing body at the time of commencing the suit, or that the directors or a majority thereof are still under the control of the wrong-doing defendants, so that a refusal of the managing body, if requested to bring a suit in the name of the corporation, may be inferred with reasonable certainty, then an action by a stockholder may be maintained without alleging or proving any notice, request, demand, or express refusal.<sup>1</sup> In like manner, if the plaintiff's pleading discloses any other condition of fact which renders it reasonably certain that a suit by the corporation would be impossible, and that a demand therefor would be nugato-

<sup>1</sup>Sears v. Hotchkiss, 25 Conn. 171, 65 Am. Dec. 557; Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827; Corbus v. Alaska Treadwell Gold M. Co., 187 U. S. 455, 21 Sup. Ct. 156; Mason v. Harris, L. R. 11 Ch. Div. 97, 107, per Jessel, M. R.; Wineburgh v. U. S. etc. Co., 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261, (sufficient demand made); Ashton v. Dashaway Ass'n, 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809, (demand unnecessary); Pencille v. State F. M. H. Ins. Co., 74 Minn. 67, 76 N. W. 1028, 73 Am. St. Rep. 326.

ry, the action may be maintained without averring a demand or any other similar proceeding on the part of the stockholder-plaintiff.<sup>2</sup>

§ 1096. **Special Classes.**—In addition to the foregoing general classes of suits, there are certain special classes, analogous to the former, and, like them, based upon the conception of an existing quasi trust relation, and of a breach of the fiduciary duty growing out of such relation. These special cases should be mentioned, in order to complete the view of partial trusts connected with the existence and management of corporations. In the first place, an action may be maintained by the corporation against its promoters, to set aside a transfer, or to rescind an agreement, or to obtain other proper relief, whenever, in the organization of the company, there has been a breach of the fiduciary duty owed by the promoters to the future corporation.<sup>1</sup> Secondly, under the same general circumstances in which an action may be maintained by a stockholder against wrong-doing directors or officers, if the corporation is municipal, or the trust is public and charitable, the attorney-general may sue, as a representative of the public beneficiaries, for appropriate relief.<sup>2</sup> . . .

§ 1097. **Guardians.**—Guardians of infant wards, committees or guardians of persons non compotes mentis, and even agents where the agency is strictly fiduciary, stand in the relation of quasi trustees towards their wards or principals. It is true, they do not hold the title to the property which is the subject-matter of the relation, but their position and obligations are wholly fiduciary. Equity has, therefore, a general jurisdiction, at the suit of the wards or other beneficiaries, to compel a performance of the trust duties, to relieve against violations of these trust obligations, to direct an accounting and final settlement of the quasi trust, and to grant other special relief made requisite by the circumstances. This jurisdiction exists throughout the American states, except, perhaps, in a very few, where statutes have given exclusive control over such matters to some particular tribunal, to be exercised in some prescribed manner.<sup>1</sup>

<sup>2</sup> Eschweiler v. Stowell, 78 Wis. 316, 47 N. W. 361, 23 Am. St. Rep. 411.

<sup>1</sup> Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 42 Am. St. Rep. 159, 25 L. R. A. 90.

<sup>2</sup> Stone v. Bevans, 88 Minn. 127, 97 Am. St. Rep. 506, 92 N. W. 520.

<sup>1</sup> Cole's Com. v. Cole's Adm'r, 28 Gratt. 365.

## CHAPTER SECOND.

### ESTATES AND INTERESTS OF MARRIED WOMEN

#### SECTION I.

##### THE SEPARATE ESTATE OF MARRIED WOMEN.

###### ANALYSIS.

- § 1098. Origin and general nature.
- § 1099. Statutory legal separate estate in the United States.
- § 1100. How the separate estate is created; trustees not necessary.
- § 1101. The same: By what modes and instruments.
- § 1102. The same: What words are sufficient.
- § 1103. What property is included.
- § 1104. Her power of disposition.
- § 1105. The same, in the United States.
- § 1106. Her disposition under a power of appointment.
- § 1107. Restraints upon anticipation.
- § 1108. What words are sufficient to create a restraint.
- § 1109. Effect of the restraint.
- § 1110. End of the separate estate; its devolution on the wife's death.
- § 1111. Pin-money.
- § 1112. Wife's paraphernalia.
- § 1113. Settlement or conveyance by the wife in fraud of the marriage.

§ 1098. **Origin and General Nature.**—The married woman's separate estate, as recognized by equity, and independently of any statutory legislation, is merely a particular instance of trusts, and the jurisdiction of equity over it has been established from a very early day.<sup>1</sup> As the wife's interest in the property held to her separate use is wholly a creature of equity, the equitable jurisdiction over it is, of course, exclusive. The notion of an equitable separate estate free from the claims of the husband was avowedly introduced in order to evade the harsh and unjust dogmas of the law, and, in direct antagonism to the common-law theory which completely merges the legal personality of the wife in that of her husband, equity regards and treats the married woman, with relation to such sepa-

<sup>1</sup> See *Drake v. Storr*, 2 Freem. 205, which shows that in A. D. 1695, the wife's separate estate was a well-settled doctrine of equity.

rate property, in many respects as though she were unmarried.<sup>2</sup> This capacity or status of being as though a feme sole is, however, only partial. As regards the husband and his common-law rights over the property, it is absolute; as regards third persons, and her power of disposing and contracting, it is never absolute, and *may* be restricted to any extent by the terms of the trust and of the instrument creating the separate estate. It should be carefully observed that a wife's trust estate and her separate estate are not synonymous or convertible terms. The separate estate of a married woman must, in contemplation of equity, be a trust estate, but an estate held in trust for her, in which she is the cestui que trust, is not necessarily a separate estate. The peculiar doctrine of the wife's "separate estate" applies only to such property as, being in contemplation of equity held in trust for her, is, by the terms of the conveyance or agreement, held or agreed to be held to her *separate use*.<sup>3</sup> The separate estate may include every species of property, real or personal, and the trusts upon which it is held may, except when modified or restricted by statute, be of every extent or variety, but must, of course, be express. In all those states which have made the sweeping changes in the system of trusts, heretofore described, trusts of property held to the separate use of married women must, of course, conform to the general statutory regulations.

§ 1099. **Statutory Legal Separate Estate.**—The separate estate thus described is wholly a creature of equity; the wife's interest is purely an equitable one, since the legal title is either vested in actual trustees, or is held by the husband in the character of a trustee; and the jurisdiction over it is exclusively equitable. Modern statutes in nearly all of the states have made most radical changes in the common-law relations of married women to their property, and have incidentally enlarged the jurisdiction of equity, so far as it is concerned with the contracts of married women, by extending it to their *legal* separate estates created by statute.

<sup>2</sup> The true meaning of the doctrine is explained in *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454; *Johnson v. Gallagher*, 3 De Gex, F. & J. 494; *Taylor v. Meads*, 4 De Gex, J. & S. 597, 603, 604.

<sup>3</sup> For example, if land is conveyed to A in fee, in trust for a married woman and her heirs, or in trust for a single woman and her heirs, and she afterwards marries, thus creating an ordinary passive trust in fee, the married woman's equitable estate in the land would not be a "separate estate"; her husband would be entitled to curtesy in it; her power of conveying it and the mode of conveying would be governed by the same rules which apply to her legal estates in fee; her capacity to contract would not be enlarged: See ante, §§ 989, 990, and cases cited; *Taylor v. Meads*, 4 De Gex, J. & S. 597, 604, 605, per Lord Westbury.

These statutes do not, it is true, create any equitable estate in the property of wives; their effect is to vest a purely legal title in married women, and to free such title from the rights, interests, and claims which the common law gave to husbands. But while this legislation empowers married women to acquire and hold property separate and distinct from their husbands, and while it renders their title and estate entirely legal, and dispenses with the necessity of trustees, it does not, in most of the states, entirely remove the common-law disabilities of entering into contracts, nor clothe married women with the general capacity of making contracts which are personally binding at law, and enforceable against them by legal actions and personal pecuniary judgments. The matter of married women's contracts, and of their enforcement against the property rather than the persons of wives, is therefore left exclusively to courts of equity, and is governed by equitable doctrines. The jurisdiction of equity in the enforcement of married women's liabilities against their separate property has thus been enlarged, since it has been extended in these states to all the property which a wife may now hold by a legal title, and is not confined to such equitable estate as is held by trustees for her separate use. In a very few states the legislation has removed the statutory separate estate of married woman entirely out of the equitable jurisdiction, by conferring upon them the power of making contracts in relation to it, and by rendering these contracts personally binding upon them at law, and enforceable against them personally by ordinary legal actions, pecuniary judgments, and executions.<sup>1</sup>

**§ 1100. How the Separate Estate is Created—Trustees not Necessary.**—Although the wife's separate estate is an equitable one, being, in conception of equity, a trust estate with the legal and the equitable title separated, and although in strict theory and in every regular and formal settlement the legal title should be conveyed to or held by express trustees, yet it is well settled, whatever doubts may have once existed, that the interposition of actual trustees is unnecessary. If property is in any mode, by sufficient and apt words to express the intention, given directly to a wife, either before or after marriage, for her sole and separate use, without the intervention of trustees, equity will carry the intention into effect, will regard the property as her separate estate, and will protect it against the claims of her husband and of his creditors. Equity accomplishes this result, in the absence of express trustees, by declaring and holding the husband himself as a trustee,

<sup>1</sup> See, also, the English Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), as amended 1893 (56 & 57 Vict. c. 63).

with respect to such property, for his wife.<sup>1</sup> The rationale of this rule is very clear. By the equitable conception, in order to the existence of a trust, there must be a separation of the legal and equitable titles. Although property is given directly to a married woman in such a way that she would hold the perfect legal title if she were single, still, by the operation of common-law doctrines, the husband, by virtue of the marriage, becomes himself vested with the legal estate in such property, either absolutely or for his life. Equity does not abrogate this common-law doctrine, nor deny the legal title acquired by the husband; on the contrary, it admits *his legal title*, but declares that he shall hold it as a trustee for his wife,—impresses a trust upon it in her favor. In this manner equity effects a separation of the titles, although there are no words expressly creating a trust, or expressly vesting the legal title in a trustee.

**§ 1101. The Same. By What Modes and Instruments.**—The wife's separate estate may include any species of property, and may be created by any of the following modes or instruments: 1. By a written antenuptial agreement with her intended husband, or marriage settlement, which may embrace her own property, or that of her intended husband, or that of third persons, and may covenant to bring in after-acquired property of either herself or her husband. 2. By a post-nuptial agreement with her husband, under certain circumstances. 3. By gifts from her husband during coverture, if made absolutely, and not intended as mere paraphernalia, or to be used merely as ornaments. The two latter modes are, however, so far subject to the rights of the husband's creditors, that if made with intent to hinder, delay, or defraud such creditors, they would be void. 4. By gifts from strangers made directly to the wife during coverture. 5. By conveyance, devise, or bequest of property expressly limited to her separate use, made to her directly, either before or during coverture.<sup>1</sup>

**§ 1102. The Same: What Words are Sufficient.**—No particular

<sup>1</sup> *Slanning v. Style*, 3 P. Wms. 334, 337–339, *Ames Trusts* 164; *Richardson v. De Giverville*, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426; *Miller v. Miller's Adm'r*, 92 Va. 510, 23 S. E. 891.

<sup>1</sup> Ante-nuptial agreements and marriage settlements: *Reade v. Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520; *Lee v. Lee*, 4 Ch. Div. 175, 179; *Williamson v. Yager*, 91 Ky. 282, 15 S. W. 660, 34 Am. St. Rep. 184 and note. Post nuptial agreements, if valid against husband's creditors: *Moore v. Page*, 111 U. S. 117, 4 Sup. Ct. 388, 28 L. ed. 373; see ante, § 973. Absolute gifts from the husband: *Ogden v. Ogden*, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151; *Botts v. Gooch*, 97 Mo. 88, 11 S. W. 42, 10 Am. St. Rep. 286. Husband's assent to her use of her earnings; evidence must be clear, unequivocal, and convincing; see *Bailey v. Gardner*, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. Rep. 847. Limitations to her separate use: *Prout v. Roby*, 15 Wall. 471, 21 L. ed. 58.

form of words is necessary in order to vest property in a married woman for her separate use, and to thus create a separate estate. The intention to do so, although not expressed in terms, may be inferred from the nature of the provisos annexed to the gift. The intention, however, must be clear and unequivocal, not merely to confer the use upon the wife for her benefit, *but also to exclude the husband*. The doctrine was very concisely and accurately stated by Vice-Chancellor Malins in a recent case: "There must be, in a will, or in any other instrument, an intention shown *that the wife shall take and that the husband shall not*."<sup>1</sup> The decisions upon particular expressions are very numerous, and somewhat conflicting. From a comparison of the cases it would seem that the American courts have been more liberal than the English in giving effect to language. I have placed in the foot-note some examples of words held to be sufficient, and of those held to be insufficient.<sup>2</sup>

§ 1103. **What Property is Included.**—Property of any kind, real or personal, and any interest therein, may be conveyed, settled, or held to the wife's separate use. Her equitable separate estate may therefore include estates in fee in land, in possession or reversion, life estates, estates for years, things in action, securities, specific chattels, or money.<sup>1</sup> Where a wife has a separate estate, the rents, income, and profits thereof are, of course, her separate property; and if the savings of such income are invested by her, the investment so made will also be her separate property.<sup>2</sup> In general, when land or other property is purchased by or on behalf of the wife with proceeds of her separate estate it becomes impressed with the same character.<sup>3</sup> The wife's earnings may also, by the assent of her husband, be her separate property.<sup>4</sup> While equity thus provides a separate property for a wife free from the control of her husband, still, she may so deal with it that it will lose that character. If the wife, acting without any undue influence, expressly authorize or tacitly permit her husband to receive the income of her separate property and apply it to his own uses and purposes, or to receive it and apply it for the benefit

<sup>1</sup> In *re Peacock's Trusts*, L. R. 10 Ch. Div. 490, 495, 496; *Prout v. Roby*, 15 Wall. 471; *Carroll v. Lee*, 3 Gill & J. 504, 22 Am. Dec. 350; *Tennant v. Ex'r of Stoney*, 1 Rich. Eq. 222, 44 Am. Dec. 213; *Beaufort v. Collier*, 6 Humph. 487, 44 Am. Dec. 321.

<sup>2</sup> *Bland v. Dawes*, L. R. 17 Ch. Div. 794; *Jamison v. Brady*, 6 Serg. & R. 466, 9 Am. Dec. 460; *Massy v. Rowan*, L. R. 4 H. L. 238.

<sup>3</sup> As to property to be acquired in future embraced in the covenants of a settlement, see *Smith v. Lucas*, L. R. 18 Ch. Div. 531.

<sup>4</sup> *Askew v. Rooth*, L. R. 17 Eq. 426.

<sup>5</sup> *Justis v. English*, 30 Gratt. 565.

<sup>6</sup> *Jones v. Reid*, 12 W. Va. 350, 29 Am. Rep. 455. See, also, ante, § 1101, note.

of the family, it will thereby cease to be her separate property and become his; she can never recall it, nor claim any reimbursement.<sup>5</sup>

**§ 1104. Her Power of Disposition.**—The general doctrine long settled by the English court of chancery is, that a feme covert, acting with respect to her separate property, is competent to act in all respects as if she were a feme sole.<sup>1</sup> Among these incidents of substantial ownership is the *jus disponendi*, which is possessed and may be exercised by the married woman without her husband's assent, unless the instrument creating the separate estate contains restrictions upon the power. It is therefore well settled, that so far as the separate estate embraces personal property, money, chattels, things in action, chattels real, rents and profits of land, although no power of disposition is given to her in express terms, she may dispose of it as though she were unmarried, by acts *inter vivos* or by will.<sup>2</sup> Where the separate estate embraces land, the wife's power of disposition over her life estates therein has never been doubted, and her contracts to sell or to mortgage such life estates have always been specifically enforced against her.<sup>3</sup> With respect to estates in fee settled or held to her separate use, there had formerly been some doubt arising from conflicting authorities. The general rule is now established, however, that the wife's power of disposition as a feme sole extends to estates in fee in lands as fully as to life estates or to personal property.<sup>4</sup> It seems to have been formerly supposed that a difference existed, in the wife's power of alienation or disposition, between the case where the property is actually held by trustees to her separate use and the case where the property is conveyed directly to herself for her sole and separate use. All notion of any such difference has been abrogated; the same power of disposition belongs equally to both these conditions or forms of the separate estate.<sup>5</sup> As an incident of her general power of disposition, unless she is expressly restrained from anticipation, a married woman renders her separate property liable for a breach of trust by her trustees in which she has concurred, and for a breach of trust which she herself commits.<sup>6</sup>

**§ 1105. Her Power in This Country.**—Such being the rules con-

<sup>1</sup> *Caton v. Rideout*, 1 Macn. & G. 599, 601, 603; *Methodist Epis. Ch. v. Jaques*, 3 Johns. Ch. 77, 90-92, 1 Scott 68.

<sup>2</sup> *Peacock v. Monk*, 2 Ves. Sr. 190.

<sup>3</sup> *Farington v. Parker*, L. R. 4 Eq. 116.

<sup>4</sup> *Major v. Lansley*, 2 Russ. & M. 355, 357.

<sup>5</sup> *Taylor v. Meads*, 4 De Gex, J. & S. 597, 604-607, per Lord Westbury.

<sup>6</sup> *Essex v. Atkins*, 14 Ves. 542.

<sup>7</sup> *Jones v. Higgins*, L. R. 2 Eq. 538.

cerning the wife's *jus disponendi* as now settled in England, I shall next inquire how far these or other rules have been adopted by the courts of the various American states. One or two preliminary observations are very important in determining the present condition of the law upon this subject in our own country. In the first place, in very many of the states, under modern statutes, where property is conveyed or given to the wife directly, she now takes a full separate legal estate therein, wholly free from the interests and claims of the husband, and has over it the power of disposition given by the statute.<sup>1</sup> In the second place, in New York and the other states which have adopted the same type of legislation, where lands are given to trustees upon an express trust for the benefit of a married woman, the *cestui que trust* acquires no *estate* in the trust property, and she is prohibited from aliening, charging, or binding her own interest. With regard to the main question concerning the wife's power of disposition, there is such a divergence of opinion among the American decisions that it would be very difficult, if not in fact impossible, to formulate any general rule as established by their authority.<sup>2</sup> It may be doubtful whether in any single state all the conclusions reached by the English courts have been accepted without limitation or modification. The American states may be broadly separated into two generic classes; the decisions which mark the existence of these classes differ not in any matters of detail, but in the underlying principle. In the *first* class, the courts have accepted the *principle* of the English doctrine. They regard the wife's *jus disponendi* as resulting from the fact of an equitable separate estate over which she is, partially at least, a *feme sole*, and not as resulting from the permissive provisions of the instrument creating such separate estate. It follows, therefore,

<sup>1</sup> See ante, § 1099. In many states this statutory power is absolute, as though she were unmarried.

<sup>2</sup> Indeed, in some instances it would be a difficult task to reconcile the decisions made by the courts of the same states. In several of the states the courts seem to have regarded the wife's separate property, instead of rendering her a *feme sole* with respect to its use, as depriving her of all rights of ownership except the single one of enjoying its income. These judges have forgotten that a nominal ownership, without any of the rights incident to ownership, without the power of aliening, managing, or in any way binding the property, is in reality no ownership. A wife holding a so-called separate estate, but whose hands are tied, and who is completely debarred from dealing with it, from obtaining credit upon it, and from using it in the affairs of life, is actually in a worse position than the wife under the operation of common-law rules, whose property is subject to the control and disposition of her husband.

where the instrument creating the separate estate imposes no express restrictions, that the wife has a general power of disposing or charging it, even though no such authority is in terms conferred. This power of disposition, however, does not generally extend to the corpus of the land held for her separate use in fee; it is confined to personal property, the rents and profits of the land, and perhaps to her life estates in lands.<sup>3</sup> In the states composing the *second* class, the courts have widely departed from the principle of the English doctrine. They regard the wife's power over her separate estate as resulting, not from the existence of an equitable separate estate itself, but from the permissive provisions of the instrument creating such estate. They have accordingly adopted the general rule that a married woman has only those powers of disposing or charging her separate property which are expressly or by necessary construction conferred upon her in the instrument conveying the property or creating the trust, and that in determining the extent of these powers the terms of the instrument are to be strictly construed.<sup>4</sup>

§ 1107. **Restraint upon Anticipation.**—The large powers of dealing with her separate property as though she were single, thus given to the wife by the English courts of equity, tended in some degree to defeat the very object for which a separate estate is created. Since the wife had full power to dispose of, charge, or bind her separate property for the benefit of her husband as well as of herself or others, and since she was necessarily exposed to the moral influence of her husband, there was danger lest her separate estate should virtually be as much under his control and liable for her debts as though no settlement to her own separate use had been made, and the property were left under the operation of common-law rules. Experience showed that this danger was actual. To obviate it, the plan was contrived of inserting in the settlement or conveyance a clause in restraint of anticipation, the object of which was to prevent the wife from alienating or charging her separate property, or from assigning or exercising other acts of dominion over the income until its payment was due and actually made. The experiment proved successful. The courts gave full force and effect to the clause against anticipation, and

<sup>3</sup> Radford v. Carwile, 13 W. Va. 572; Dale v. Robinson, 51 Vt. 20, 31 Am. Rep. 669; Bradford v. Greenway, 17 Ala. 797, 805, 52 Am. Dec. 203; Burch v. Breckinridge, 16 B. Mon. 482, 63 Am. Dec. 553; Webster v. Helm, 93 Tenn. 322, 24 S. W. 488.

<sup>4</sup> Cutter v. Butler, 25 N. H. 343, 57 Am. Dec. 330; Ewing v. Smith, 3 Desaus. Eq. 417, 5 Am. Dec. 557 (the leading case of this class); MacConnell v. Lindsay, 131 Pa. St. 476, 19 Atl. 306

the rules concerning it became an established part of the doctrine concerning the wife's equitable separate estate.<sup>1</sup>

**§ 1108. What Words are Sufficient.**—In order to constitute an effective restraint, the intention must be clear from the expressions used that the wife was to be restrained from anticipation. If such intention is shown, no particular form of words is requisite, nor are express negative words essential.<sup>1</sup> In the American states which compose the first class heretofore described, the same general rule would necessarily be adopted. In the states forming the second class, however, a material modification of this rule must be made. Since the *jus disponendi* in those states is derived from the affirmative provisions of the instrument creating the separate property, the restraint upon the power of disposing or binding the property would be inferred from the whole tenor of the instrument, or from the absence of permissive language.<sup>2</sup> The subject-matter on which the restraining clause is to operate may be any kind of property, real or personal, and any estate therein, absolute, for life, or for years.<sup>3</sup>

**§ 1109. Effect of the Restraint.**—The restraint, if valid, prevents the wife from doing any act, during her coverture, which would deprive her of her interest in the separate property; she can neither alien nor charge the corpus nor future income.<sup>1</sup> With regard to the time during which they operate, the separate use itself and the restraint upon anticipation stand upon exactly the same principle, and are governed by exactly the same rules. Property may be given to a woman to her sole and separate use while she is single, and not in contemplation of any *particular* intended marriage, and the gift is valid in that form;<sup>2</sup> but the peculiar qualities of the separate estate do not, and cannot, exist until she is married. *In like manner*, and for the same reason, since they are inseparable, the restraint upon anticipation or upon the *jus disponendi* can *only* operate during coverture. If, therefore, she is single at the time of the gift of a separate estate with restraint upon anticipation, or if she becomes so afterwards, during the time when she is single or is a widow, she may alienate, dispose of, or charge the property, entirely irrespective of the clause of restraint. Her power over the property will then depend, not in the least upon the special clause of restraint, but upon the general nature of her

<sup>1</sup> For the history and original form of the restraint clause, see Hood-Barrs v. Heriot (1896), A. C. 174, speeches of Lord Herschell and Lord Macnaghten.

<sup>2</sup> Radford v. Carwile, 13 W. Va. 572.

<sup>3</sup> Nix v. Bradley, 6 Rich. Eq. 43.

<sup>4</sup> Baggett v. Meux, 1 Phill. Ch. 627.

<sup>5</sup> Pike v. Fitzgibbon, L. R. 17 Ch. Div. 454.

<sup>6</sup> Tullet v. Armstrong, 4 Mylne & C. 377.

estate in it, and of the trust upon which it is held.<sup>3</sup> It is also settled that unless clearly restricted to one coverture, the clause in restraint of anticipation annexed to a gift of property to the separate use of a woman will operate upon all her covertures and be effectual, unless it be destroyed by her own act in alienating or dealing with the property while she is discovert,—that is, before marriage or during widowhood.<sup>4</sup> The clause in restraint, however, like the trust itself for separate use, may be confined in its operation to a particular coverture, but the words must be clear and unequivocal.<sup>5</sup> The same rules have generally, though not uniformly, been adopted by the courts of this country. It follows, as a necessary consequence from the foregoing conclusions, that where property has been given to the sole and separate use of a woman, even coupled with a restraint against alienation, she may, before her marriage or during her widowhood, terminate both the separate use and the restraint, either by disposing of the property and investing its proceeds in a new form, or by settling the property in a different manner at her marriage.<sup>6</sup> A court of equity, however, has no power to disregard the restraint, nor to release a married woman from its operation, however beneficial that course might be in any particular case.<sup>7</sup>

**§ 1110. End of the Separate Estate.—Its Devolution on the Wife's Death.**—The trust for the wife's separate use, like the restraint upon alienation, may be terminated before the coverture or after it ends, by her dealings with the property, as by disposing of it, and investing the proceeds in other property.<sup>1</sup> The adultery of the wife will not, in the absence of statute, affect her rights to property settled to her own separate use.<sup>2</sup> When a married woman holding a separate estate dies without making a disposition by will, it will devolve, subject to the future limitations, if any, in the settlement, in the same manner and to the same successors as her legal estates and her other equitable estates. In the absence of statutory regulations, the real estate in fee descends to her heirs, subject to the husband's life interest as tenant by the curtesy; the cash, personal chattels, and chattels real will belong to the husband *juri mariti*; while the things in action will devolve upon him as her administrator.<sup>3</sup>

<sup>1</sup> *Tullet v. Armstrong*, 1 Beav. 1, 22, 4 Mylne & C. 377, 392.

<sup>2</sup> *Tullet v. Armstrong*, 4 Mylne & C. 377, 1 Beav. 1.

<sup>3</sup> *In re Gaffe*, 1 Macn. & G. 541, 545.

<sup>4</sup> *Campbell v. Bainbridge*, L. R. 6 Eq. 269.

<sup>5</sup> *Robinson v. Wheelwright*, 21 Beav. 214, 6 De Gex, M. & G. 535.

<sup>6</sup> See last preceding paragraph, and cases cited in note.

<sup>7</sup> *Seagrave v. Seagrave*, 13 Ves. 439, 443.

<sup>8</sup> *Appleton v. Bowley*, L. R. 8 Eq. 139, *Ames Trusts* 381; *Meacham v. Bunting*, 156 Ill. 586, 41 N. E. 175, 47 Am. St. Rep. 239, 28 L. R. A. 618.

**§ 1113. Settlement or Conveyance by the Wife in Fraud of the Marriage.**—By marriage at the common law the husband acquires large interests in the wife's property. Any alienation by her of her property in fraud of her husband's marital rights would therefore be set aside by a court of equity as null and void. In accordance with the common-law theory of marriage, and while that theory yet prevailed unmodified by statute, the doctrine on this subject was established by the English courts as follows:<sup>1</sup> "A conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is *prima facie* good, and becomes bad only upon the imputation of fraud. If a woman, *during the course of a treaty of marriage* with her, makes, without notice to the intended husband, a conveyance of any part of her property, it should be set aside, though good *prima facie*, because affected with that fraud." The rules thus established by the English court of chancery have been repeatedly approved and adopted in various states of this country, where the common-law theory concerning the effect of a marriage still prevailed.<sup>2</sup> The extensive and radical changes made by modern legislation have rendered these rules obsolete in a majority of the states.<sup>3</sup>

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## SECTION II.

### THE WIFE'S EQUITY TO A SETTLEMENT.

#### ANALYSIS.

- § 1114. [§ 389]. General nature.
- § 1115. Extent of the wife's equity; to what property and against what persons.
- § 1116. When the equity does not arise.
- § 1117. Amount of the settlement.
- § 1118. Form of the settlement.
- § 1119. Maintenance of wife.
- § 1120. Alimony.

**§ 1114. General Nature.**—[§ 389. By the common law the husband became absolute owner of all the wife's moneys, goods, and chattels, and things in action which he had reduced to possession, and estates for years, and acquired a life interest in all her freehold estates, and was entitled to their rents and profits. The only mode of securing any of her property to her own use during the

<sup>1</sup> *Countess of Strathmore v. Bowes*, 2 Brown Ch. 345, 1 Ves. 22, 1 Lead. Cas. Eq. 605, 611-617, 618-623.

<sup>2</sup> *Freeman v. Hartman*, 45 Ill. 57; 92 Am. Dec. 193.

<sup>3</sup> See ante, § 1099, note.

marriage was by a marriage settlement. Courts of equity have, from a very early period, provided the wife a remedy against these harsh doctrines of the common law, where no proper settlement had already been made by the parties, by giving her a right to a provision out of her own property, where the circumstances were such that the principle, He who seeks equity must do equity, could be applied; and this right is known as her "equity to a settlement." ] The wife's equity to a settlement does not depend upon *her* right of property in the subject-matter, for it must be enforced for the benefit of herself and her children, and the amount is wholly discretionary with the court; it is an obligation which the court fastens, not upon the property, *but upon the right to receive it*,—the right of her husband and those claiming under him to receive it, as well as that of the wife.<sup>1</sup> The doctrine was first applied to cases only where the husband resorted to the jurisdiction of equity in order to enforce his *jus mariti* and reach assets belonging to his wife. Having been established in this application, it was soon extended to cases where the general assignees in bankruptcy or insolvency of the husband sought the aid of equity in reaching property of the wife; the court imposed on them the same conditions which it would impose on the husband himself.<sup>2</sup> The next step was soon taken, and the doctrine was applied to particular assignees of the husband for a valuable consideration, whenever they attempted to enforce their assignments by a proceeding in equity.<sup>3</sup> In these early stages of the doctrine, the court was always set in motion by the husband or his assignees, and it was formerly supposed that this was essential; it is now settled, however, that the wife may herself originate the proceeding, and may maintain a suit for a settlement.<sup>4</sup> A court of equity will not, therefore, interfere with the *purely* legal rights of the husband, or of his assignees, which can be completely enforced at law, without the aid of equity, and where the property is not already in the custody or under the immediate control of the court of equity. The general doctrine may be formulated as follows: Where the husband, or some person claiming under him, is suing in equity to reach the wife's property; and where the property is already within the reach of the court,—as where it is vested in trustees, or has been paid into court, or is in any other situation which brings it under the control of the court,—the court of equity will not grant the

<sup>1</sup> *Osborn v. Morgan*, 9 Hare, 432, 434.

<sup>2</sup> *Oswell v. Probert*, 2 Ves. 680, 682.

<sup>3</sup> *Macaulay v. Philips*, 4 Ves. 15, 19.

<sup>4</sup> *Lady Elibank v. Montolieu*, 5 Ves. 737; *Sturgis v. Champneys*, 5 Mylne & C. 97; *Salter v. Salter*, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249.

relief in the first instance, nor permit the property to be removed out of its jurisdiction and control in the second, until an adequate provision is made for the wife, unless special circumstances exist which defeat her right; and under a like condition of the property, the wife may herself institute a suit and obtain the relief.<sup>5</sup>

§ 1115. **Extent of the Wife's Equity—To What Property and against What Persons.**—The rule is fundamental that the wife's equity does not exist where the husband is only exercising his *legal* right over the personalty of his wife's estate which vested in him by the marriage, or over his own joint life interest in her realty.<sup>1</sup> It only arises where the wife's interest being equitable, the property itself is originally under the control and jurisdiction of equity, or being legal, the husband or his assignees resort to courts of equity in order to enforce, protect, or perfect their claims. . . .

§ 1116. **When the Equity does not Arise.**—Although the property may be such that, under ordinary circumstances, the equity would attach, still the wife's own acts, conduct, or situation may prevent it from arising, or the husband's mode of dealing with the property may defeat it. The wife's equity to a settlement out of her things in action does not embrace those which the husband has fully "reduced into his own possession."<sup>1</sup> . . .

§ 1119. **Maintenance.**—The power of courts of equity to compel a provision to be made for the maintenance of a married woman by her husband is somewhat analogous to that of enforcing her equity to a settlement, but still not identical; it is only exercised under special circumstances of her actual need, and then without regard to any equity to a settlement on her part; it is confined to *her* property, and does not extend to the property originally and exclusively belonging to the husband. If a husband has deserted his wife, leaving her unprovided for, a court of equity will order her maintenance out of her fortune, though neither settled nor agreed to be settled,—that is, although the husband's common-law rights over it remain unrestricted.<sup>1</sup> When the husband

<sup>1</sup> *Lady Elibank v. Montolieu*, 1 Lead Cas. Eq. 623, 639-669, 670-679; *Glen v. Fisher*, 6 Johns. Ch. 33, 10 Am. Dec. 310; *Duval v. Farmers' Bank*, 4 Gill & J. (Md.) 282, 23 Am. Dec. 558; *Wiles v. Wiles*, 3 Md. 1, 56 Am. Dec. 733.

The modern legislation in so large a portion of the American states, destroying the husband's interest in his wife's property, and making it her own separate legal estate, has, of course, taken away the very foundation for this equitable doctrine, and it has thus been rendered virtually obsolete.

<sup>1</sup> *Ward v. Ward*, L. R. 14 Ch. Div. 506.

<sup>1</sup> This section is cited to this effect in *Hart v. Leete*, 104 Mo. 315, 337, 15 S. W. 976.

<sup>1</sup> *Dumond v. Magee*, 4 Johns. Ch. 318, 322.

has deserted his wife, or has by his cruelty compelled her to leave him, the court will order her maintenance out of the interest of her fortune, even though, by the marriage settlement, it was payable to him for life.<sup>2</sup> There is no jurisdiction in courts of equity to compel a husband generally to maintain his wife out of his own property or by his own labor. Such power, if it existed at all, belonged to the ecclesiastical courts, or was regulated by statute.

§ 1120. **Alimony.**—The subject of maintenance naturally suggests that of alimony, although the two have really nothing in common, except their being granted for the benefit of a wife. In its proper and only true sense, “alimony” is not a separate estate, nor is it a provision for maintenance generally, as described in the preceding paragraph. It is an incident of divorce; it is merely a provision for maintenance from day to day, decreed by a competent court to a wife legally separated from her husband, either by a divorce a mensa et thoro or ex vinculis. Under the judicial system originally prevailing in England, it was granted and regulated solely by the ecclesiastical courts, which had exclusive jurisdiction of divorce.<sup>1</sup> It is very clear that the original jurisdiction of equity did not include the power to decree alimony as an incident of divorce; nor is there any jurisdiction to grant alimony to a wife as a provision to be made by her husband for her maintenance, unconnected with proceedings for a divorce.<sup>2</sup> The American courts have generally conformed to this view, and have denied the existence of any jurisdiction to award alimony as a provision for the maintenance of a wife by her husband.<sup>3</sup> In several states, however, such a power has been asserted and exercised as belonging to the general jurisdiction of equity.<sup>4</sup>

<sup>2</sup> *Eedes v. Eedes*, 11 Sim. 569.

<sup>1</sup> In many of the states, jurisdiction over divorce has been given by statute to the courts of equity, and the suit for a divorce is treated as a suit in equity. The jurisdiction to grant alimony as an incident of divorce may, perhaps, have been sometimes confounded with the general jurisdiction of equity. This may explain some American decisions concerning alimony cited in a subsequent note.

<sup>2</sup> *Vandergucht v. De Blaquiere*, 8 Sim. 315, 5 Mylne & C. 229.

<sup>3</sup> *Parsons v. Parsons*, 9 N. H. 309, 32 Am. Dec. 362.

<sup>4</sup> In *re Popejoy*, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. Rep. 222, (at pp. 224–5); *Edgerton v. Edgerton*, 12 Mont. 122, 29 Pac. 966, 33 Am. St. Rep. 557, 16 L. R. A. 94.

## SECTION III.

## THE CONTRACTS OF MARRIED WOMEN.

## ANALYSIS.

- § 1121. The general doctrine.
- § 1122. Rationale of the doctrine.
- § 1123. Extent of the liability.
- § 1124. For what contracts her separate estate is liable.
- § 1125. The same; the American doctrine.
- § 1126. To what contracts the American doctrine applies.

§ 1121. **The General Doctrine.**—At the common law the contracts of married women are absolutely void. Equity has never attempted to invade this fundamental policy of the law; it has never clothed married women with the capacity to bind themselves personally by contract. Their contracts, as recognized by equity, are only contracts *sub modo*; the indebtedness which they create is not a legal indebtedness, but only an equitable liability, enforced in a peculiar manner by courts of equity. After it was settled that a married woman might hold property as a separate estate to her own separate use, free from the claims and interest of her husband, for some time the common-law incapacity of contracting was still applied to her. The glaring injustice of this condition soon became apparent. To permit a wife to hold separate property to her own use, to enjoy its benefits, to deal with it in many respects as though she were a *feme sole*, and thus to be clothed with many indicia of complete ownership, but at the same time to withhold from her creditors all claim against it or against her, was in the highest degree inequitable. The wife might, by her own act, directly dispose of her separate estate, and for the same reasons she ought to be able to render it liable for her obligations. Influenced by these considerations, the courts of equity gradually, by progressive steps, introduced and developed the doctrine, that although a married woman can create no *personal* liability against herself, her separate estate may be liable for her contracts made with reference to it. Her contracts thus become equitable obligations, and may be enforced in equity against her separate estate. No other doctrine of equity jurisprudence better illustrates its wonderful freedom and power in modifying legal dogmas. Without attempting to trace the progress of the general doctrine through its whole course of development as it is now settled by the English courts, it is correctly formulated as follows: “If a married woman, having separate property, enters into an engagement, which if she

was a feme sole would constitute a personal obligation against her, and in entering into such engagement she purports to contract, not for her husband [i. e., not on behalf of her husband as his agent], but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable."<sup>1</sup>

§ 1122. **Rationale of the Doctrine.**—It was once supposed that the doctrine was properly explained by regarding the wife's contract as in reality the execution of her power of appointment, so that the contract, being an appointment, created an equitable charge or lien in the nature of a disposition upon her separate estate. This theory has been abandoned as utterly untenable.<sup>1</sup> The true rationale of the doctrine is, that the liability of a wife's separate property for her engagements is a mere equitable incident of her separate estate, which is itself a creature of equity. In the language of Lord Justice James: "In equity, the liability is to have her separate estate taken from her for the benefit of a person with whom she has contracted on the faith of it. It is a special equitable remedy, arising out of a special equitable right." In the pointed language of Lord Justice Cotton: "It is not the woman, as a woman, who becomes a debtor, but her engagement has made that particular part of her property which is settled to her separate use a *debtor*; and liable to satisfy the engagement." The same theory is more fully expressed in the words of Lord Cottenham: "The view taken of the matter by Lord Thurlow in *Hulme v. Tenant* is correct. According to that view, the separate property of a married woman being a creature of equity, it follows that if she has a power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied."<sup>2</sup>

§ 1123. **Extent of the Liability.**—The restraint upon anticipation, when inserted in the instrument creating the separate estate, applies to the wife's contracts as well as to her alienations. The

<sup>1</sup> *Mrs. Matthewman's Case*, L. R. 3 Eq. 781, 787 (per Kindersley, V. C.).

<sup>2</sup> *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454, p. 461; *Shattock v. Shattock*, L. R. 2 Eq. 182, per Lord Romilly, M. R.; *Johnson v. Gallagher*, 3 De Gex, F. & J. 49., (at p. 519).

<sup>3</sup> *Owens v. Dickinson, Craig & P.* 48, 54, per Lord Cottenham.

separate property, therefore, which she holds subject to the restraint upon alienation or anticipation is not liable for any contracts or engagements which she can make.<sup>1</sup> Furthermore, it is now settled that her contracts can only be enforced against the separate estate, free from such restraint, which she held at the time of entering into the engagement, or so much thereof as remains in her ownership at the time when the judgment is rendered, and not against separate estate which she acquired after the time of making the engagement.<sup>2</sup> It is also now settled, contrary to the view which formerly prevailed, that when the wife has a life interest only to her own separate use, with power of appointment over the corpus, either by deed or by will, such separate property is liable for her contracts, as well as when her interest is absolute.<sup>3</sup> With regard to the remedy, of course no personal decree can be made against a married woman.<sup>4</sup> So far as the separate estate is personalty, its corpus may be reached by the decree, and applied in discharge of the wife's engagement; so far as it is land, the remedy was confined by the earlier cases to the rents and profits, unless the contract enforced be a specialty; and this is the ordinary form of the decree in England.<sup>5</sup>

**§ 1124. For What Contracts her Separate Estate is Liable.—**

Although the fundamental doctrine of liability is that the contract purported or was intended to be made on the credit of the separate estate, yet this intention need not be expressed in the terms of the contract itself. The rule is firmly settled, and may be regarded as the peculiar feature of the English law on this subject, which distinguishes it from that prevailing in many of our states, that the intent to contract on the credit of the separate estate is conclusively inferred from the very form and nature of many kinds of engagements, including at least all those in the form of written instruments. It is thus settled beyond dispute, by the English decisions, that the wife's separate estate is liable for her contracts under seal;<sup>1</sup> for her bills of exchange and promissory notes;<sup>2</sup> and for all her written agreements.<sup>3</sup> Finally, after some fluctuation in the decisions, the liability is extended to her ordinary general verbal engagements and implied promises, if it appear that they were made with reference to and on the faith and credit of her separate

<sup>1</sup> *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454, 459, 462, 463.

<sup>2</sup> *Crockett v. Doriot*, 85 Va. 240, 3 S. E. 128.

<sup>3</sup> *Godfrey v. Harben*, L. R. 13 Ch. Div. 216. See ante, § 1106.

<sup>4</sup> *Francis v. Wigzell*, 1 Madd. 258, 264.

<sup>5</sup> *Hulme v. Tenant*, 1 Brown Ch. 16, per Lord Thurlow.

<sup>6</sup> *Hulme v. Tenant*, 1 Brown Ch. 16.

<sup>7</sup> *Davies v. Jenkins*, L. R. 6 Ch. Div. 728.

<sup>8</sup> *Murray v. Barlee*, 3 Mylne & K. 209.

property; and whether so made, will be determined by a consideration of all the surrounding circumstances.<sup>4</sup>

§ 1125. **The American Doctrine.**—The general doctrine established by the English court of chancery, that the wife's separate estate is liable for her engagements which purport to be with reference to it, and are intended to be made upon its faith and credit, has been accepted in all the American states where the system of equity jurisprudence prevails. The divergence in many of the states from the conclusions reached by the English courts relates, not to this general doctrine, but to its applications; it is wholly confined to the question what kinds and forms of contracts *do* thus purport to be entered into with reference to the separate estate, and *are* intended to be made on its faith and credit? As described in a preceding paragraph, the equitable jurisdiction in enforcing the contracts of married women has been greatly enlarged by modern legislation in this country. Wherever the statutes have declared that the wife's property, real and personal, belonging to her in her own right, and by a legal title, shall constitute her legal or statutory separate estate, but have not further provided that her contracts shall create personal liabilities against her to be enforced by ordinary legal actions and judgments, it is settled that her contracts shall be enforced in equity against this *legal* separate estate in the same manner and subject to the same rules as against an equitable separate estate.<sup>1</sup>

§ 1126. **To What Contracts the American Doctrine Applies.**—It should be observed that, under the New York type of legislation concerning express trusts in land, where the express trust which is permitted for the benefit of a wife is created, the beneficiary takes no estate, has no power of disposition, and, as a consequence, can not charge her interest by contract, however express. With regard to the applications of the general doctrine there is a great variety of opinion and wide divergence of decision among the American cases. These cases, however, when classified according to broad lines of division, will be found to fall under three general types. *First type:* This includes a comparatively few states, in which the wife has no power of disposition over her separate estate, except such as is expressly or by necessity given in the instrument creating it. Her separate estate is liable for those contracts which are made for its benefit, and for those which benefit the wife, if expressly and in terms charged upon it or made upon its credit, but is not, in general, liable for her contracts of surety-

<sup>4</sup> *Hodgson v. Williamson*, L. R. 15 Ch. Div. 87.

<sup>1</sup> *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503, 22 N. Y. 450, 78 Am. Dec. 216, 68 N. Y. 320, and see post, § 1126, note.

ship made entirely for the benefit of another.<sup>1</sup> In order, however, that any contract may be thus enforceable, it must be within the express or necessarily implied permission of the instrument creating the estate. *Second type:* In the states belonging to this type, with perhaps a very few exceptions, the English doctrine concerning the wife's power of alienation is substantially adopted. The peculiar feature which distinguishes the type is, that the intent to contract upon the faith and credit of the separate estate, and thus to render it liable, must affirmatively and expressly appear, and will not be implied or presumed from any mere external form of the engagement. The separate property is liable for all contracts of the wife made directly for *its* benefit, for all her contracts made for her own benefit, if expressly and in terms purporting to be on its faith and credit, and for her contracts of suretyship for the benefit of another, if the intention to charge the separate property thereby is clearly and unequivocally expressed.<sup>2</sup> *Third type:* In the states of this type the conclusions reached by the English courts have been more closely followed. Its distinguishing feature is, that the intent to deal on the credit of the separate estate need not be expressed, but will be inferred from the nature or form of the contract. The wife's separate estate is liable for all her contracts entered into for its own benefit, and for all her written contracts made for her own benefit, such as her bonds, notes, bills of exchange, and the like, even though no intention to bind it is expressed in their very terms. In many and probably most of the states belonging to this class, the wife's contracts of suretyship must be expressly charged upon her separate property, in order to bind it, and her general verbal engagements must likewise appear in some affirmative manner to be made on its faith and credit; with regard to such contracts no intent is generally presumed.<sup>3</sup> . . . It has been uniformly held that the wife's equitable separate estate, and the equitable rules which govern it, do not come within the purview of the recent legislation concerning married women's property, and are not affected by its provisions. These modern statutes giving to the wife a legal separate estate have, in combination with the equitable doctrine concerning married women's contracts, created a very anomalous condition in the jurisprudence of most of the states,—an extension of

<sup>1</sup> Willard v. Easthan, 15 Gray, 328, 77 Am. Dec. 366.

<sup>2</sup> If the contract is in writing, and is not directly for the benefit of the separate estate, the intention to make it liable should appear in the writing itself: Yale v. Dederer, 18 N. Y. 265, 72 Am. Dec. 503, 22 N. Y. 450, 456, 78 Am. Dec. 216, 68 N. Y. 329.

<sup>3</sup> Bradford v. Greenway, 17 Ala. 797, 52 Am. Dec. 203.

a jurisdiction most distinctively equitable to an ordinary legal ownership of property. When the common-law dogmas were to be invaded, when the wife's legal estate and title were to be removed from all interest and control of her husband, and she was to be permitted to make contracts based upon its ownership, the better policy would have been to abrogate her common-law incapacities entirely, and to render her contracts enforceable against her as though she were single by legal actions and pecuniary recoveries of judgment. In a few states the legislatures have carried this legal reform to its logical results, and have thus produced a system which is, in my opinion, consistent with itself, and simple and practical in its operation. . . .

## CHAPTER THIRD.

### ESTATES AND INTERESTS ARISING FROM SUCCESSION TO A DECEDENT.

#### SECTION I.

##### LEGACIES.

###### ANALYSIS.

- § 1127. Jurisdiction of equity.
- § 1128. The same: where originally exclusive.
- § 1129. The same: in the United States.
- §§ 1130-1134. Kinds of legacies.
  - § 1130. Specific legacies.
  - § 1131. Ademption of specific legacies.
  - § 1132. General legacies.
  - § 1133. Demonstrative legacies.
  - § 1134. Annuities.
- §§ 1135-1143. Abatement of legacies.
  - § 1135. Abatement in general: order of appropriating assets.
  - § 1136. Nature of abatement.
  - § 1137. Abatement of specific legacies.
  - § 1138. Abatement of demonstrative legacies.
  - § 1139. Abatement of general legacies.
  - § 1140. Limitations; intention of testator.
  - § 1141. Exceptions; legacies to near relatives.
  - § 1142. The same; legacy for a valuable consideration.
  - § 1143. Appropriation of a fund.
  - § 1144. Lapsed legacies.
  - § 1145. The same; statutory changes.

§ 1127. **Jurisdiction of Equity.**—At the common law no action could be maintained to recover a legacy, unless it was a specific legacy of goods, and the executor had assented to it so that the property therein had vested in the legatee.<sup>1</sup> The power of the ancient ecclesiastical courts over the subject-matter of successions and administration was also very limited and imperfect, and was at best but a lame jurisdiction.<sup>2</sup> The court of chancery, therefore, took and exercised a concurrent jurisdiction over legacies, as a part of its broader jurisdiction over administrations. This

<sup>1</sup> *Deeks v. Strutt*, 5 Term Rep. 690.

<sup>2</sup> See *Pamplin v. Green*, 2 Cas. Ch. 95.

jurisdiction, as well over legacies as administrations, is based upon the trust relation existing between an executor or administrator and the creditors, legatees, and distributees; upon the necessity of a discovery, an accounting or a distribution of assets in order to determine the rights of all interested parties; and upon the fact that the remedies given by all other courts are inadequate, incomplete, and uncertain. The jurisdiction, originally concurrent, but necessarily exclusive in certain species of legacies, became, and still continues to be, practically exclusive in England over the entire subject of legacies.<sup>3</sup>

**§ 1128. Where Jurisdiction of Equity was Exclusive.**—Over certain species of legacies the jurisdiction of chancery was originally and necessarily exclusive, since the ecclesiastical courts possessed no jurisdiction in such cases. These were legacies charged upon land,<sup>1</sup> and legacies given in trust, or which involve the carrying into effect of a trust, either express or arising by operation of law.<sup>2</sup> In certain other cases the equitable jurisdiction was necessarily exclusive, because the relief given by the ecclesiastical courts was wholly inadequate to protect the rights of all the parties interested in the legacy or in the estate.<sup>3</sup> Among the most important of these cases were the following: Where a discovery of assets or a final settlement of the whole estate is required;<sup>4</sup> when a legacy is given to a married woman,<sup>5</sup> or is given to an infant,<sup>6</sup> and where a general legacy is given payable at a future day, since the court of equity, for purposes of security, can direct the executor to pay the amount into court, or such security to be given as the circumstances may require;<sup>7</sup> and finally, when a specific legacy is given to one person for life, and on his death to another person absolutely, since a court of equity can protect the remainderman by requiring the life owner to give security where there is waste or danger of waste and consequent loss of the property.<sup>8</sup> None of these incidents connected with a decree for the payment of legacies came within the cognizance of the ecclesiastical courts.

<sup>1</sup> *Adair v. Shaw*, 1 Schoales & L. 243, 262, per Lord Redesdale.

<sup>2</sup> *Sherman v. Sherman*, 4 Allen 392.

<sup>3</sup> *Anonymous*, 1 Atk. 491.

<sup>4</sup> In such cases the court of chancery would, as a matter of course, restrain by injunction the proceedings begun in the ecclesiastical courts.

<sup>5</sup> *Pratt v. Northam*, 5 Mason 95, 105, Fed. Cas. No. 11,376. As to discovery, see §§ 235, 236, 346.

<sup>6</sup> Because if the husband sues for it in the ecclesiastical court there was no power to compel him to make a settlement, and thus to protect the wife's equity: *Anonymous*, 1 Atk. 491.

<sup>7</sup> Because the ecclesiastical court could not provide for investing, securing, or accumulating the fund: *Horrell v. Waldron*, 1 Vern. 26.

<sup>8</sup> See *Slanning v. Style*, 3 P. Wms. 334.

<sup>9</sup> *Foley v. Burnell*, 1 Br. Ch. 274, 279.

§ 1129. **Equitable Jurisdiction in the United States.**—Such being the original jurisdiction as exercised by the English court of chancery, it exists to its full extent, unabridged by statutes, in but a few of the states; in very many states it has been largely restricted, in some it has become practically obsolete, and in a few it has been expressly abrogated. . . . The probate courts in this country . . . have generally the power to decree payment of legacies, on the application of individual legatees, during the pendency of an administration, and to call the executor to a final account, and to decree a final settlement and distribution of the estate, and therein to determine and protect the rights of legatees, at least in all ordinary cases. In such proceedings the probate courts follow the settled doctrines of equity, and are able to grant some of the remedies originally peculiar to the court of chancery. While the equitable jurisdiction is thus rendered unnecessary under ordinary circumstances, it nevertheless still exists in all those special cases which are not embraced within the legislation, and in some of the states it remains in its original extent, entirely unabridged. I purpose to add a very brief outline only of the equitable doctrines concerning legacies—doctrines which control the action of probate courts, and which are embodied in the modern statutes upon the subject enacted in several of the states.

§ 1130. **Kinds of Legacies—Specific Legacies.**—With regard to their intrinsic nature and qualities, legacies are of three kinds: specific, general, and demonstrative. A specific legacy is a bequest of a specific article of the testator's estate, distinguished from all others of the same kind; as, for example, a particular horse, or piece of plate, or money in a certain purse or chest, a particular stock in the public funds, a particular bond or other instrument for the payment of money.<sup>1</sup> Whether a legacy is specific depends wholly upon the language of the will. Unless the language described points out and identifies the particular thing given as a part of the testator's estate, distinguishing it from all other things of the same kind, then it is not specific. Although the testator may, at the time of executing the will, have an article or articles of the same kind as that which he purports to give, still, unless his language is sufficient to refer to, designate, and identify the very article itself as forming a part of his estate, which he thereby gives, the legacy is not specific, but general. Under these circumstances, the word "my" is often operative in identifying the article.<sup>2</sup> A

<sup>1</sup> *Tift v. Porter*, 8 N. Y. 516; *Farnum v. Bascom*, 122 Mass. 282.

<sup>2</sup> *Chattels*: *McFadden v. Hefley*, 28 S. C. 317, 13 Am. St. Rep. 675, 5 S. E. 812. *Stock*: Compare *Harvard Unitarian Soc. v. Tufts*, 151 Mass. 76, 23 N. E. 1006, 7 L. R. A. 390, with *Evans v. Hunter*, 86 Iowa 413, 41 Am. St. Rep. 503,

specific legacy only becomes operative in case the very article given continues to form a part of the testator's estate at the time of his death. In such case the legatee acquires a title to the article at the death, by virtue of the will, although the payment may be deferred, and must be obtained from the executor. Since his right of property is thus fixed, he is entitled to all income, profits, and proceeds arising or accruing on the article after the testator's death, and before its delivery or payment to himself.<sup>3</sup>

§ 1131. **Ademption of Specific Legacies.**—Specific legacies are governed by certain rules which distinguish them from other kinds, and which determine the rights of the legatees with respect to them. Of these rules the most particular and distinctive is that of ademption. Ademption is the taking away or removal of the legacy; or in other words, the extinguishment of it *as a legacy*, so that the legatee's rights under or claim to it are gone. The doctrine of ademption results from the very nature of a specific legacy as already defined. By its very nature, as the gift of a specific identified thing, operating as the mere gratuitous transfer of the thing without any *executory* obligation resting on the testator or his personal representatives, it follows that unless the very thing bequeathed is in existence at the death of the testator, and *then forms a part of his estate*, the legacy is wholly inoperative; the legatee has no right or claim; the executors are under no obligation to replace the thing by purchasing another one of the same kind as described in the will by means of other assets in their hands belonging to the estate.<sup>1</sup> If the testator never had the article purported to be specifically bequeathed, or if he had it at the time of making the will, but has afterwards consumed it, or used it, or sold, assigned, or otherwise parted with it, or if with his knowledge and consent its specific form and character have been wholly altered, so that the identical thing given by the will has ceased to exist, then the legacy is gone, extinguished, and the legatee's rights to it are destroyed. Whatever thus puts an end to the existence of the specific thing given by the will, so that at the testator's death it does not form a part of his estate, is an ademption of the legacy. There may be a partial as well as a total ademption, when a portion of the thing only remains in its original specific character among the testator's assets at his death.<sup>2</sup> The doctrine of ademption does

53 N. W. 277, 17 L. R. A. 308. *Debts and evidences of debts: Rogers v. Rogers*, 67 S. C. 168, 45 S. E. 176, 100 Am. St. Rep. 721. *Residuary bequests: Davies v. Fowler*, L. R. 16 Eq. 308.

<sup>1</sup> Kirby v Potter, 4 Ves. 748, 751.

<sup>2</sup> Walton v. Walton, 7 Johns. Ch. 258, 11 Am. Dec. 456.

<sup>3</sup> Blackstone v. Blackstone, 3 Watts. 335, 27 Am. Dec. 359; Rogers v. Rogers, 67 S. C. 168, 45 S. E. 176, 100 Am. St. Rep. 721 (ademption of legacy of a

not apply to demonstrative legacies, since they are payable out of the general assets if the fund out of which they are primarily payable fails. Nor does it apply to general or pecuniary legacies. The "satisfaction" of general legacies, which is sometimes improperly called their "ademption," depends upon entirely different principles, and should not be confounded with ademption proper of specific legacies.<sup>2</sup> They may, of course, be a "revocation" of demonstrative and of general legacies.

§ 1132. **General Legacies.**—The term "general" legacies comprises all those which are not either specific or demonstrative,—that is, those which are not gifts of some identical article or fund forming part of the testator's estate, nor gifts of a sum payable out of such an identified fund. They are, therefore, rather gifts of *amounts* than of things or pieces of property specially described and identified. Since all general legacies are, in their legal effect, equivalent to gifts of money equal in amount to the value of the thing actually described in the bequest, the term "pecuniary" is also sometimes used as synonymous with "general."<sup>1</sup> Gifts of sums of money, the amounts of which only are stated, are always general; as, for example, "I bequeath to A B five hundred dollars." A gift of any chattel or chattels—as a white horse, or furniture, or goods, or of any kind of securities, such as shares in any stock, or governmental bonds, and the like—*may* be general, and *will* be general, even though the testator owns at the time articles of the same kind, or even owns an article precisely answering to the description, unless the language of the bequest describes and certainly points out as *the* thing given some identical article, horse, furniture, goods, or some identical shares of stocks, bonds, or fund, existing as a part of the testator's estate.<sup>2</sup> The peculiar effect of a general legacy is, that, instead of operating as a voluntary assignment of the identical thing to the legatee, and so taking effect only when the specific thing or fund remains in existence as a part of the testator's estate, it creates an obligation resting upon the executor to pay to the legatee the amount specified, if there are sufficient assets left in the estate. It takes effect, therefore, and creates a right in the legatee to the payment, if there are sufficient assets, even though the particular thing, fund, stock, or

debt); In re Johnstone's Settlement, L. R. 14 Ch. Div. 162 (no ademption by mere change of investment of trust funds); Freer v. Freer, 22 Ch. Div. 622 (ademption by act of Lunatic's committee).

<sup>2</sup> As to "satisfaction" of general legacies, see ante, §§ 520–526, 544–564.

<sup>1</sup> "Pecuniary legacies" are, therefore, "general legacies." The term is not, however, strictly accurate as descriptive of a class, since specific legacies may be, and often are, gifts of nothing but money.

<sup>2</sup> Macdonald v. Irvine, L. R. 8 Ch. Div. 101; Bliven v. Seymour, 88 N. Y. 469.

security mentioned in the bequest is not left existing as a part of the testator's estate at his death, and even though it had never belonged to the testator during his lifetime. If the assets are not sufficient to pay the legacy in full, the legatee is entitled to a ratable portion thereof. This obligation, or executory right of the legatee, created by a general legacy, renders it in this respect much more advantageous to him than the specific legacy. For this reason it is an established rule of construction of wills to lean strongly in favor of an interpretation which makes a legacy general rather than specific.<sup>3</sup>

§ 1133. **Demonstrative Legacies.**—Demonstrative legacies are a peculiar kind which partake of the nature of both specific and general legacies, and combine the advantages of each. Demonstrative legacies are bequests of sums of money, or of quantity or amounts having a pecuniary value and measure, not in themselves specific, but made payable *primarily* out of a particular designated fund or piece of property belonging, or assumed to belong, to the testator.<sup>1</sup> Their effect is peculiar. Although made primarily payable out of a particular fund, these legacies do not fail—are not adeemed—because such fund may not exist as a part of the testator's estate at his death, but they are then payable out of his general assets, like general legacies. On the other hand, if such particular fund is in existence as a part of the testator's estate at his death, they are not liable to abatement in common with general legacies, but are entitled to payment under the circumstances in exactly the same manner as true specific legacies.<sup>2</sup>

§ 1134. **Annuities.**—An annuity, when given by will, is the bequest of some certain specified amount of money to be paid at prescribed recurring intervals of time during some period, which may be any definite number of years, or for life, or perpetual.<sup>1</sup> . . . It is ordinarily, however, made payable out of some designated fund; as, for example, out of certain stock, or the interest arising from certain mortgages, or the rents and profits of certain lands. Such an annuity is in all respects a "demonstrative" legacy, and is governed by the rules regulating that species of legacies.<sup>2</sup>

§ 1135. **Abatement of Legacies.**—The order in which the different kinds of property and funds belonging to an estate should be appropriated in the payment of debts, legacies, and other claims

<sup>1</sup> Tift v. Porter, 8 N. Y. 516.

<sup>2</sup> Robinson v. Geldard, 3 Macn. & G. 735, 744, 745; Giddings v. Seward, 16 N. Y. 365; Ives v. Canby, 48 Fed. 718.

<sup>3</sup> Giddings v. Seward, 16 N. Y. 365.

<sup>1</sup> Emery v. Batchelder, 78 Me. 233, 3 Atl. 733.

<sup>2</sup> Additon v. Smith, 83 Me. 551, 22 Atl. 470.

may, of course, be determined by the testator, and these directions contained in his will are followed in the final settlement and distribution. In the absence of any such directions by the testator, courts of equity have adopted certain fundamental principles, and have established a certain order upon the basis of these principles, by which the rights of all claimants upon the estate, as among themselves, are to be finally settled, and in accordance with which the estate is to be applied in the discharge of their claims. These fundamental principles may be stated as follows: Creditors are entitled to be paid in full out of all assets subject to their debts, in preference to all mere volunteers, whether heirs, next of kin, legatees, or devisees.<sup>1</sup> In the absence of contrary directions in the will, the personalty is the primary fund for the payment of debts and legacies. Property undisposed of by the will is primarily liable in preference to that which is expressly bequeathed or devised. By applying these principles, in combination with the general classes of directions which the testator *may* prescribe, the order has been established as given in the foot-note.<sup>2</sup>

<sup>1</sup>In the states in this country, and at present in England, the land of the deceased testator or intestate is an asset liable for his debts.

<sup>2</sup>This order has been modified to a greater or less extent by the statutes of various states. It forms, however, the *basis* of the legislation, and its fundamental principles have been *substantially* followed in the statutory system of most of the states which have legislated on the subject. In a few—as, for example, in California—all discrimination between real and personal property has been practically abrogated. So far as the statutes have not interfered, the principles and order established by the court of chancery have been followed by the American courts. The true meaning of the doctrine involved in this order should not be misapprehended. It furnishes a rule by which the rights of claimants and of those entitled to the different classes of funds, *as among themselves*, are to be adjusted in the final apportionment and distribution of the whole estate. It does not necessarily and under all circumstances compel creditors or legatees to resort to the various classes of funds in the order laid down for the satisfaction of their demands. On the contrary, so far as the rights of creditors are alone concerned, *all the classes of funds* are in general liable; and so far as the rights of general legatees are alone concerned, several of the classes are certainly liable. The doctrine simply means that whenever subsequent classes of funds (e. g., the fourth or fifth) have been appropriated for the payment of debts or legacies which are primarily chargeable upon prior classes (e. g., the first, second, or third), so that the persons properly entitled to those subsequent classes would be disappointed, then such disappointed claimants may have the assets composing those prior classes of funds *marshaled* in their own favor—in other words, they then become entitled to resort to those prior classes (first, second, or third, as the case may be) for the satisfaction of their own demands which were otherwise primarily chargeable upon the subsequent classes (the fourth or fifth). In this manner the doctrine secures, as far as possible, the *equitable* rights of all classes of claimants upon the estate, and an equitable appropriation of all the classes of funds of which it is composed. The

§ 1136. **Nature of Abatement.**—“Abatement” literally means a subtraction from the legacy, so that the full amount given by the will is not actually received by the legatee. It assumes that the total estate left by the testator is not sufficient to pay all the debts and other charges upon it, and all of the gifts which he has made in the will. If the estate is sufficient for both these purposes, there can be no place for any diminution of legacies or devises. When all the expenses and charges and debts have been paid or provided for, and there are not assets enough left to pay all the legacies and devises in full, plainly there must be some subtraction from the amounts specified in the will. Does this abatement extend to all alike? or are some entitled to a preference over others? Must *all* be diminished by a pro rata deduction? or must the abatement be first applied to a certain class, even so far as to wholly absorb and extinguish it if necessary, before resort is made to another and more favored class? There is such a preference based upon the distinction between *specific* gifts—legacies and devises—and those which are general. The doctrine of “abatement” determines the priority among the classes, and the order in which the necessary subtraction must be made, so that the preferred class shall not be abated until the assets appropriate for the legacies of the inferior class have been exhausted; and it also determines the rule by which all the legacies of the same class, as between themselves, shall be reduced, whenever a deficiency of assets occurs. This latter rule is a striking application of the maxim, Equality is equity.<sup>1</sup>

order in which the different classes of assets are to be appropriated and administered, so as to secure, if possible, the equitable rights of all claimants, creditors, and volunteers, is the following: 1. The general personal property not disposed of at all by the will, or only disposed of by being included in the residuary clause: *Davies v. Topp*, 1 Brown Ch. 524, 526. 2. Real estate expressly devised to be sold for the payment of debts, and not merely charged with the payment of debts: *Davies v. Topp*, 1 Brown Ch. 524, 527; *Harmood v. Oglander*, 8 Ves. 106, 124, 125. 3. Real estate descending to the heir, not charged with debts: *Davies v. Topp*, supra; *Harmood v. Oglander*, supra. 4. Real estate devised and personal property specifically bequeathed charged with the payment of debts; that is, specifically given to devisees or legatees subject to the payment of debts: *Harmood v. Oglander*, supra. 5. General pecuniary legacies, or, to speak more accurately, the personal property which would otherwise be needed to pay the general legacies. All the property of this class must contribute ratably. 6. Real estate devised, not charged with debts, including the real estate embraced in a residuary devise, since every devise of land is essentially specific, and personal property specifically bequeathed; that is, articles or funds given as specific legacies. These kinds of property, being *specifically* given, stand on the same footing, and they all contribute ratably with each other in case of a deficiency: *Hensman v. Fryer*, L. R. 3 Ch. 420, 2 Eq. 627. 7. Property which the testator appoints, under a general power of appointment, in favor of volunteers.

<sup>1</sup> See ante, § 411.

§ 1137. **Abatement of Specific Legacies.**—Among legacies, the specific constitute the preferred class. Specific legacies do not abate in common with general legacies; they only abate if the deficiency of assets is so great as to render a resort to them necessary when the fund representing the general legacies is exhausted. Whenever it becomes necessary to resort to the class composed of the specific legacies and devises, all the legacies and devises in that class will abate pro rata. Specific legacies and devises stand upon the same footing, are subject to the same liability, are abated together under the same circumstances, and contribute ratably for the payment of debts and charges.<sup>1</sup>

§ 1138. **Abatement of Demonstrative Legacies.**—If the fund out of which they are primarily made payable exists as a part of the testator's estate at his death, demonstrative legacies are governed by the same rules as specific legacies, and abate only with them *ratably*; but if the fund does not so exist, they become, in effect, general legacies, and must contribute pro rata with all the other general legacies.<sup>1</sup>

§ 1139. **Abatement of General Legacies.**—The rule is settled, that, with one or two particular exceptions, and in the absence of a contrary intention expressed by the testator, *all* general legacies are liable to be abated to the extent of complete obliteration, in order to pay the debts in full, before resort is had to the specific legacies and devises, if the deficiency of assets is so great as to require such an entire appropriation of the funds otherwise applicable to the payment of these legacies. When the deficiency is only partial, so that a complete abatement is unnecessary, all the general legacies must contribute ratably; in other words, they are all subject to a pro rata abatement. General annuities stand upon the same footing, and abate *pari passu* with other general legacies.<sup>1</sup>

§ 1140. **Limitations—Intention of the Testator.**—This doctrine, although nearly universal, may still be overcome by a contrary intention of the testator plainly expressed in the will. If a testator uses language sufficiently showing an intention that a certain legacy or legacies otherwise general shall have preference, and be paid in full before the others, and not abate pro rata with them, such intention will be carried out, and the legacy or legacies will be preferred, although general.<sup>1</sup> . . .

§ 1141. **Exceptions—Legacies to Near Relatives.**—It is the set-

<sup>1</sup> Powell v. Riley, L. R. 12 Eq. 175.

<sup>1</sup> Mullins v. Smith, 1 Drew. & S. 204, 210.

<sup>1</sup> Titus's Adm'r v. Titus, 26 N. J. Eq. 111.

<sup>1</sup> Appeal of Trustees Univ. Pa. 97 Pa. St. 187; Additon v. Smith, 83 Me. 551, 22 Atl. 470.

tioned rule of equity, independent of statutes, that among general legacies there is no precedence, no exemption from pro rata or complete abatement, in favor of legacies to a wife, child, or other near relative of the testator.<sup>1</sup> If, however, the testator shows an intent to give such legacies the preference, his intention will be followed; and a court of equity would easily discover such intention in favor of a widow, child, or descendant.<sup>2</sup> This general rule has been changed in several states by statutes which give legacies to near family relatives the preference over all other general legacies, and perhaps over those which are special or demonstrative.

**§ 1142. The Same. Legacy for a Valuable Consideration.**—One exception to the general rule of abatement has always been admitted by courts of equity. A general legacy given for a valuable consideration—as, for example, to a widow in lieu and satisfaction of her dower, or to a creditor in payment or discharge of a debt—has priority, and does not abate with the other legacies, provided the dower right or the debt still exists at the testator's death.<sup>1</sup>

**§ 1144. Lapsed Legacies.**—When the legatee is dead at the time of making the will, or dies afterwards during the testator's lifetime, by the common-law rule the legacy to him is said "to lapse"; the gift to him wholly fails; it does not pass to *his* personal representatives, next of kin, or heirs, nor has he the power to dispose of it by his own will. In short, the legacy becomes entirely nugatory. The same general rule of the common law applies to a devise of any real estate.<sup>1</sup> Where a gift is made to a number of persons *as a class*, such class to be ascertained and fixed as it exists at the death of the testator or at any other specified time, the predecease of any member of the class will not occasion a lapse of his share; the class as it exists at the time designated will take the whole property.<sup>2</sup> Whenever a legacy lapses, the specific property bequeathed, if it was specific, or the amount of assets which would be requisite for its payment if it was general, falls into the residue, and passes by the residuary clause, if there be one; but if there be no residuary clause, then as to such property the testator would in fact die intestate; the amount would be actually undisposed of by will. Where a devise lapsed, by the common-law rule the land given by it would not fall into any residuary clause of the testator's

<sup>1</sup> Appeal of Trustees Univ. Pa. 97 Pa. St. 187.

<sup>2</sup> Lewin v. Lewin, 2 Ves. Sr. 415.

<sup>3</sup> Brown v. Brown, 79 Va. 648.

<sup>4</sup> Appleton v. Rowley, L. R. 8 Eq. 139.

<sup>5</sup> Shuttleworth v. Greaves, 4 Mylne & C. 35.

real estate, but would descend to his heir or heirs at law. This latter rule of the common law has been altered in England and generally in the American states by statute.<sup>1</sup>

§ 1145. **The Same. Statutory Changes.**—The foregoing rules of the common law were generally adopted in this country, and still form a part of our jurisprudence, except in the particular cases or under the particular circumstances where they have been altered by statute. Such modifying legislation, within certain well-defined limits, has been extensively enacted. One common type seems to have been followed. In England the modification is confined to a legacy or devise to a child or other descendant of the testator who shall predecease leaving *issue* living at the testator's death. The gift in such case shall not lapse.<sup>1</sup> American statutes have sometimes made the alteration of the old rule a little broader in its operation, but still have confined it to gifts bestowed upon near family relatives of the testator. Under the language of the English statute, it is held that the issue are not *substituted* in place of their deceased parent, but the legacy or devise actually *vests* in the original legatee or devisee to whom the testator gave it, so that it will pass by a will made by such legatee or devisee who dies before the original testator.<sup>2</sup> It would seem, however, that the language of some of the American statutes does not admit such an interpretation.

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## SECTION II.

### DONATIONS CAUSA MORTIS.

#### ANALYSIS.

- § 1146. General nature.
- § 1147. Is not testamentary.
- § 1148. The subject-matter of a valid gift.
- § 1149. Delivery.
- § 1150. Revocation.
- § 1151. Equitable jurisdiction.

§ 1146. **General Nature.**—A donation causa mortis is a gift ab-

<sup>1</sup> 1 Vict., c. 26, sec. 25. A lapsed devise is made to fall into the residue like a lapsed legacy. The reason of the common-law rule was found in the doctrine that a will of land, unlike that of personal property, speaks as from the date of its execution, and not from the testator's death. This distinction has been generally abrogated by statute, so that in England and in most of our states wills of real and of personal property alike speak as at the time of the testator's death.

<sup>1</sup> 1 Vict., c. 26, sec. 33.

<sup>2</sup> Winter v. Winter, 5 Hare 306.

solute in form, made by the donor in anticipation of his speedy death, and intended to take effect and operate as a transfer of the title upon, and only upon, the happening of the donor's death. Between the time when the gift is made and the article donated is delivered, and the time when the donor dies, the donation is wholly inchoate and conditional; the property remains in the donor, awaiting the time of his death, and passes to the donee when the death, in anticipation of which the gift was made, happens, unless the donation has in the meantime been revoked by the donor; the donee thus becomes a trustee for the donor, with respect to the article delivered into his possession, until the gift is made perfect by the donor's death. The gift must be absolute, with the exception of the condition inherent in its nature depending upon the donor's death, as above described, and a delivery of the article donated is a necessary element; but it is subject to revocation by the act of the donor prior to death, and is completely revoked by the donor's recovery from the sickness or escape from the danger in view of which it was made.<sup>1</sup> Such a donation may be made by a donor who anticipates his speedy death because he is suffering at the time under an attack of severe illness which he supposes to be his last, or because he is exposed, or expects soon to be exposed, to some great and unusual peril of his life; as by a soldier soon before entering into battle, or by a person immediately before undergoing a dangerous surgical operation. If a gift is actually made by the donor during his last sickness, or under any other circumstances which would naturally impress him with an expectation of speedy death, it will be presumed to be a donation *causa mortis*, although the donor does not, in express terms, declare it to be such.<sup>2</sup> Although courts do not lean against gifts *causa mortis*, yet the evidence to establish them should be clear and unequivocal, and will be closely scrutinized. The burden of proof lies on the donee.<sup>3</sup>

§ 1147. **Is not Testamentary.**—A gift *causa mortis* is not a *testamentary* act; if it becomes absolute, the title of the donee is derived directly from the donor in his lifetime, and not from or through his executors or administrators.<sup>1</sup> For this reason, if a person intends to make a *testamentary* gift, which for any reason

<sup>1</sup> *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; *Johnson v. Colley*, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884, and note; *Thomas's Adm'r v. Lewis*, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170; *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; *Staniland v. Willott*, 3 Macn. & G. 664, 674-677, 680.

<sup>2</sup> *Gardner v. Parker*, 3 Madd. 184, 185.

<sup>3</sup> *Smith v. Smith's Adm'r*, 92 Va. 696, 24 S. E. 280.

<sup>1</sup> *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796.

is ineffectual, it cannot be supported as a donation *causa mortis*;<sup>2</sup> nor can an imperfect gift *inter vivos* be sustained as a valid donation *causa mortis*.<sup>3</sup> It partakes, however, so much of the nature of a testamentary bequest that it is liable for the debts of the testator in case of a deficiency of assets.<sup>4</sup> A valid gift may be made to any person, to the wife of the donor,<sup>5</sup> or to one standing in fiduciary or confidential relations to him,<sup>6</sup> as well as to all others.

§ 1148. **The Subject-matter of a Valid Gift.**—All kinds of personal property, using the word in its broad, mercantile sense, as equivalent to *assets*, which are *capable* of manual delivery, and of which the title, either legal or *equitable*, can be transferred by delivery, may be the subject-matter of a valid donation *causa mortis*. That all actual chattels, including money, either coin or bank notes, may be donated, has never been questioned. Whatever doubt may have once been entertained, the rule is now well established that all things in action which consist of the promises or undertakings of third persons, not the donor himself, of which the legal or equitable title can pass by delivery, may be the subjects of a valid gift, including promissory notes, bills of exchange, checks, bonds, mortgages, savings-bank pass-books, certificates of deposit, policies of insurance, and the like; and it is settled by the recent cases that a valid donation of negotiable instruments may thus be made without indorsement.<sup>1</sup> Debts due from the donee himself may be donated, either by giving back to him the written evidence of debt, or by canceling or destroying the same, or by delivering a receipt.<sup>2</sup> Things in action, on the other hand, in which the donor himself is the debtor party, cannot be the subject-matter of a valid gift. The reason is, that, whatever be their form, these gifts would

<sup>2</sup> *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. ed. 500.

<sup>3</sup> *Edwards v. Jones*, 1 Mylne & C. 226, *Ames Trusts* 140.

<sup>4</sup> *Borneman v. Sidlinger*, 15 Me. 429, 33 Am. Dec. 626.

<sup>5</sup> *Boutts v. Ellis*, 4 De Gex, M. & G. 249.

<sup>6</sup> In such case the evidence must be most unequivocal: *Thompson v. Heffernan*, 4 Dru. & War. 285 (to donor's spiritual adviser).

<sup>1</sup> Promissory notes of third person: *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319, *Ames Trusts* 159. Savings-bank pass books: *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; but not the pass-book of an ordinary bank of deposit; *Jones v. Weakley*, 99 Ala. 441, 12 South. 420, 42 Am. St. Rep. 84, 19 L. R. A. 700. Policy of insurance: *Williams v. Guile*, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366. Under the law of this country, with respect to the title of the assignee before transfer is made on the company's books, there seems to be no reason why a certificate of stock may not be the subject of a valid gift—certainly if it has been indorsed in blank; but in my opinion such indorsement is not necessary. See *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429, where it is held that a delivery without indorsement is valid.

<sup>2</sup> *Moore v. Darton*, 4 De Gex & S. 517, *Ames Trusts* 39.

amount to nothing more than the donor's own naked executory *promise* to pay at some further day, without any consideration to support it; and such a voluntary promise cannot be enforced against the donor nor against his executors or administrators.<sup>1</sup>

§ 1149. **Delivery.**—It is essential to the validity of a donation that the thing given be delivered to the donee or to his use. Without a delivery the transaction would only amount to a promise to give, which, being without consideration, would be a nullity. The intention to give must be accompanied by a delivery, and the delivery must be made with an intention to give. The practical question therefore is, What is a sufficient delivery?<sup>1</sup> The delivery may be made directly to the donee, or to an agent or trustee on his behalf, but not to an agent for the donor. It may be actual—a manual possession of the article itself by the donee or his agent—or constructive. If constructive, it must be more than any mere words, and more than any mere *symbolic* act. A constructive delivery must be something which completely terminates the donor's custody and control of the article donated, and which places it wholly under the donee's power, and enables him without further act on the donor's part to reduce it to his own manual possession. All the cases which hold a constructive delivery to be good, whatever be their special circumstances, will be found to conform to this criterion: that the donor parts with all control and power of exercising dominion, while the donee obtains the exclusive power of taking physical possession and custody of the article, so that it is in fact placed under his sole dominion.<sup>2</sup> As a delivery is necessary, it follows, as a further requisite to a valid donation, that the donee must accept it. Such acceptance, however, will be presumed when the gift is for his advantage, in the absence of all contrary evidence.

§ 1150. **Revocation.**—The peculiar element of the donation *causa mortis*, which distinguishes it from the one *inter vivos*, is its rev-

<sup>1</sup> *Harris v. Clark*, 3 N. Y. 93, 110, 51 Am. Dec. 352.

<sup>2</sup> Delivery of a savings-bank pass-book without any written assignment is usually held sufficient: *Pierce v. Boston Savings Bank*, 129 Mass. 425, 37 Am. Rep. 371. Previous and continuing possession of such a book by the donee, it is said, does not dispense with the necessity of actual delivery: *Drew v. Hagerty*, 81 Me. 231, 17 Atl. 63, 10 Am. St. Rep. 255, 3 L. R. A. 230. Delivery of the pass-book of an ordinary bank of deposit is not sufficient: *Jones v. Weakley*, 99 Ala. 441, 12 South. 420, 42 Am. St. Rep. 84, 19 L. R. A. 700.

<sup>3</sup> The leading case is *Ward v. Turner*, 2 Ves. Sr. 431, 1 Lead. Cas. Eq. 1205. Delivery to an agent or trustee on behalf of the donee: *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721. As to constructive delivery by delivery of the key of a trunk or other locked receptacle, compare *Thomas's Adm'r v. Lewis*, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170, with *Keepers v. Fidelity Title, etc., Co.*, 56 N. J. Law 302, 28 Atl. 585, 44 Am. St. Rep. 397, 23 L. R. A. 184.

ocable nature. Although it be absolute in its form, and although the thing must be delivered to the donee, yet the transaction is inchoate, and the property remains in the donor until his death. He may, therefore, at any time prior to his death, revoke and annul the gift by language sufficiently indicating such intent. If the donee did not, therefore, voluntarily surrender up possession of the thing, he would retain it as a trustee for the donor's executors or administrators, who could recover the same, or its value. The donor's recovery from his sickness, or his escape from the anticipated peril with his life, also operates as a revocation, and the donee would then hold the article as a trustee for the donor.<sup>1</sup> When a gift *causa mortis* is made during sickness, it is essential, in order to perfect it and prevent a revocation, that the donor should die of the very same sickness from which he is then suffering, and that there should be no intervening recovery between that illness and his final death; and it seems that the donee must affirmatively show the existence of all these facts.<sup>2</sup> . . .

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### SECTION III.

#### ADMINISTRATION OF ESTATES.

##### ANALYSIS.

- § 1152. Equitable jurisdiction in the United States.
- § 1153. The same; fundamental principle; *Rosenberg v. Frank*.
- § 1154. The jurisdiction as administered in the several states; general résumé—The states alphabetically arranged in foot-note.

**§1152. Equitable Jurisdiction in the United States.**<sup>1</sup>—

**§ 1153. The Same. The Fundamental Principle.**—One fundamental principle should be constantly kept in mind; it underlies all particular rules, and furnishes the solution for most of the special questions which can arise. In all those states which have adopted the entire system of equity jurisprudence, whatever be the legislation concerning the powers and functions of the probate courts, and whatever be the nature and extent of the subjects committed to their cognizance, the original equitable jurisdiction over administrations does and must still exist, except so far and with

<sup>1</sup> *Staniland v. Willott*, 3 Macn. & G. 664.

<sup>2</sup> But it is held that he need not die of the same disease of which he was apprehensive; as where a gift was made in anticipation of a surgical operation, which was successful, but before the donor left the hospital he died of heart disease, from which he was also suffering at the time of the gift: *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684.

<sup>1</sup> See ante, §§ 1127, 1128.

respect to such particulars as it has been abrogated by express prohibitory, *negative* language of the statutes, or by necessary implication from *affirmative* language conferring exclusive powers upon the probate tribunals. This equitable jurisdiction may be dormant, but, except so far as thus destroyed by statute, it must continue to exist, concurrent with that held by the courts of probate, ready to be exercised whenever occasion may require or render it expedient.<sup>1</sup> This general principle, so familiar, so fundamental, running through all branches of the equitable jurisdiction, but so often lost sight of by American courts in dealing with the jurisdiction as applied to administrations, was admirably stated by one of the ablest of American judges: "There is nothing in the nature of jurisdiction, as applied to courts, which renders it exclusive. It is a matter of common experience that two or more courts may have concurrent powers over the same parties and the same subject-matter. Jurisdiction is not a right or privilege belonging to the judge, but an authority or power to do justice in a given case, when it is brought before him. There is, I think, no instance in the whole history of the law where the mere grant of jurisdiction to a particular court, without any words of exclusion, has been held to oust any other court of the powers which it before possessed. Creating a new forum with concurrent jurisdiction may have the effect of withdrawing from the courts which before existed a portion of the causes which would otherwise have been brought before them; but it cannot affect the power of the old courts to administer justice when it is demanded at their hands."<sup>2</sup>

§ 1154. **The Jurisdiction as Administered in the Several States.**—The states may be *roughly* grouped into three classes, although there is still a considerable diversity among the individuals composing each class. In the states of the first class, the original equitable jurisdiction over administrations remains unabridged by the statutes, concurrent with that possessed by the probate courts. In many of them a suit for the administration, settlement, and distribution of an estate may be brought, as a matter of course, in a court of equity in the first instance, instead of in the court of probate. In most, the general principle regulating the exercise of all concurrent jurisdiction prevails, that when either court has assumed jurisdiction of a particular case, the other tribunal will not ordinarily interfere. These states are Alabama, Illinois, Iowa, Kentucky, Maryland, Mississippi, New Jersey, North Carolina, Rhode Island, Tennessee (in certain special cases), Virginia, Dis-

<sup>1</sup> Rosenberg v. Frank, 58 Cal. 387.

<sup>2</sup> Delafield v. State of Illinois, 2 Hill, 159, 164, per Bronson, J.

trict of Columbia, and the United States courts. In the states of the second class, the jurisdiction of the probate courts over everything pertaining to the regular administration and settlement of decedents' estates is virtually exclusive. The equitable jurisdiction over the subject is neither concurrent nor auxiliary and corrective. It exists only in matters which lie outside of the regular course of administration and settlement, which are of purely equitable cognizance, and which do not come within the scope of the probate jurisdiction. These states are Connecticut, Indiana, Maine, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, Oregon and Pennsylvania. In the states of the third class, the equitable jurisdiction is not concurrent, but is simply auxiliary or ancillary and corrective. The probate court takes cognizance originally of all administrations, and has powers sufficient for all ordinary purposes. Equity interposes only in special or extraordinary cases, which have either been wholly omitted from the statutory grant of probate jurisdiction, or for which its methods and reliefs are imperfect and inadequate, or where its proceedings have miscarried and require correction. This class includes Arkansas, California, Georgia, Kansas, Missouri, New York, Ohio, South Carolina, Tennessee, Texas, Vermont and Wisconsin. Among the particular instances in which it has been held by courts of states composing the third class, that equity has jurisdiction of matters belonging to administrations, the following are some of the most important, although it must not be understood that such cases have arisen and such decisions been made in all of these states. If a court of equity in those states where its jurisdiction is merely auxiliary and corrective can take cognizance of such special circumstances, then a fortiori a court of equity may do so in those states where its original jurisdiction is preserved concurrent with that of the probate tribunals. In states of the second class, however, the probate court would furnish the only relief in all these cases. Where an executor or administrator has died without rendering a final account, equity has jurisdiction of a suit to compel *his* personal representatives to account at the instance of an administrator de bonis non or other party interested in the original estate, even, as some cases hold, where there is a surviving executor or administrator, and the decree so rendered has been held to be binding upon the sureties of the deceased executor or administrator. This particular condition of fact seems to have been omitted from the statutory jurisdiction of the probate courts in several states.<sup>1</sup> When a settlement purporting to be final has been decreed in the probate court, a person interested in the estate, who

<sup>1</sup> *Chaquette v. Ortet*, 60 Cal. 594; *Bush v. Lindsey*, 44 Cal. 121.

was not a party to such proceeding, may maintain a suit in equity against the administrator or executor, and compel him to a full and final account, treating the former settlement as a nullity.<sup>2</sup> It has been held in some of these states that a court of equity may take jurisdiction in the first instance, or even after proceedings in probate have begun, of an administration, and may decree a final settlement and distribution, when there are peculiar circumstances of difficulty in the administration, and when such exercise of the equitable jurisdiction would prevent great delay, expense, inconvenience, and waste, and would thus conclude by one suit and decree a protracted and vexatious litigation.<sup>3</sup> It cannot be said that these circumstances would be regarded as sufficient grounds for exercising the equitable jurisdiction in all the states of the third class, although they would undoubtedly be sufficient in all those of the first class. It is generally held that a court of equity has jurisdiction to set aside the decree of a probate court obtained by fraud, both in states of the first and of the third classes, but not in those of the second.<sup>4</sup> A judgment creditor of the deceased may maintain a suit virtually to take the administration out of the hands of the administrator, and for a final settlement, where the intestate had, with the connivance of the person afterwards appointed administrator, made a disposition of his property fraudulent as against his creditors, and the administrator is engaged in carrying out such fraudulent scheme. It is also generally held that equity may interfere with a pending administration when the administrator has committed a devastavit, or is wasting the assets, especially if he be insolvent, or is guilty of fraud in the management of his trust.<sup>5</sup> Although the accounting by the administrator for property of the estate in his hands belongs to the probate court, yet equity has jurisdiction of personal claims between an administrator and the estate; that is, claims personal to himself, growing out of dealings with the deceased, which the administrator sets up adverse to creditors, distributees, and other persons interested in the estate; as, for example, claims set up under a deed to himself from the deceased, or under an agreement with the deceased, and the like.<sup>6</sup> Where there has been no administration, but the heirs or next of kin have settled and divided the estate by voluntary arrangement among themselves, it seems that a credi-

<sup>2</sup> *Clarke v. Perry*, 5 Cal. 58, 63 Am. Dec. 82; *Deck v. Gerke*, 12 Cal. 433, 73 Am. Dec. 555.

<sup>3</sup> *Deck v. Gerke*, *supra*.

<sup>4</sup> *Sanford v. Head*, 5 Cal. 297.

<sup>5</sup> *Ragsdale v. Holmes*, 1 S. C. 91.

<sup>6</sup> *Morse v. Slason*, 13 Vt. 296.

tor may maintain a suit in equity to compel a payment of his demand out of the property, without the necessity of taking out an administration;<sup>7</sup> and in some states it is held that equity has jurisdiction both where there has been no administrator, and when the administrator has made a final settlement and has been discharged.<sup>8</sup> By virtue of the auxiliary jurisdiction of equity, a creditor may maintain a suit, somewhat in the nature of a "creditor's bill," to reach assets which justly and equitably belong to the estate, and to bring them within the power and control of the administrator, so that they may be administered upon and distributed by him.<sup>9</sup> When a partner dies, although the probate court may have ample power to settle his estate, yet the auxiliary jurisdiction of equity still remains, and will be generally exercised in states of the first and third classes, and probably in many of the second, by means of a suit for an accounting and settlement of the partnership affairs, either brought by the representatives of the deceased partner against the survivors, or by the survivors against such representatives.<sup>10</sup> In all the states of the first and third classes, and in a great majority it seems of those belonging to the second, equity retains its jurisdiction of suits for the foreclosure of mortgages upon the lands of deceased mortgagors or other deceased owners of land encumbered by mortgage;<sup>11</sup> but in a very few of the states forming the second class, it appears that the mortgage must be enforced, like any other demand against the estate of the deceased mortgagor, in the regular course of administration pending before the probate court.<sup>12</sup> Finally, throughout all the states, the original jurisdiction of equity over trusts remains unabridged and virtually unaffected by the jurisdiction given to probate courts. It is exercised in enforcing the performance of trusts and in controlling the conduct of trustees as well when trusts of real or of personal property are created by will as by deed. The equitable jurisdiction concerning the enforcement of testamentary trusts is universally regarded as entirely separate and distinct from the jurisdiction over administrations.

<sup>7</sup> *Cameron v. Cameron*, 82 Ala. 392, 3 South. 148; *Patterson v. Allen*, 50 Tex. 23.

<sup>8</sup> *Long v. Mitchell*, 63 Ga. 769.

<sup>9</sup> *McDonald v. Alten*, 1 Ohio St. 293.

<sup>10</sup> *Griggs v. Clark*, 23 Cal. 427.

<sup>11</sup> *Meyers v. Farquharson*, 48 Cal. 190; *Willis v. Farley*, 24 Cal. 494, 500.

<sup>12</sup> *Cannon v. McDaniel*, 46 Tex. 303.

## SECTION IV.

## CONSTRUCTION AND ENFORCEMENT OF WILLS.

## ANALYSIS.

- § 1155. Origin of the jurisdiction.
- § 1156. Extent of the jurisdiction; a branch of that over trusts.
- § 1157. The same; a broader jurisdiction in some states.
- § 1158. Suit to establish a will.

§ 1155. **Origin of This Jurisdiction.**—Since in England the court of chancery possesses and exercises a full jurisdiction over the administration and settlement of decedents' estates, whether the deceased died testate or intestate, it has never been doubted that equity has there the power, as an incident of this jurisdiction, to construe and enforce wills of personal property. Under its general jurisdiction over trusts, a court of equity has also the power to construe and enforce wills of real as well as of personal property, so far as they create, or their dispositions involve the creation of, trusts. So far as a will of real property bequeaths purely legal estates, and the devisees therein obtain purely legal titles to the land given, the enforcement thereof belongs to the courts of law by means of the action of ejectment; the courts of law have full power to construe and interpret the instrument and to determine the rights of the devisees; there is no necessity, and therefore no power, of resorting to a court of equity, in order to obtain a construction of such wills. The same rules would be recognized as regulating the action of the courts in all of the states of this country which have preserved the original jurisdiction of equity over administrations, either as exclusive or as concurrent with that given to the courts of probate. In the great majority of the states, as has been shown, this original jurisdiction of equity over administrations has either been completely abrogated, or has been so curtailed and restricted that it exists merely as auxiliary to and corrective of the principal jurisdiction held by the probate tribunals. Throughout the American states there has necessarily arisen, as a supplement to the ordinary functions of the probate courts, and for the purpose of supplying the defects in their methods and remedies, a special jurisdiction of equity "for the construction of wills," which it is the object of the present section to describe.

§ 1156. **Extent of the Jurisdiction—A Branch of That over Trusts.**—Although there is not an entire uniformity in the decisions by courts of different states upon this particular subject,

yet the doctrine which seems to be both in harmony with principle and sustained by the weight of authority is, that the special equitable jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts; that a court of equity will never entertain a suit brought *solely* for the purpose of interpreting the provisions of a will without any further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations with respect to the property donated.<sup>1</sup> In the language of recent and well-considered cases, "The rule is, that to put a court of equity in motion, there must be an actual litigation in respect to matters which are the proper subjects of the jurisdiction of that court as distinguished from a court of law. It is by reason of the jurisdiction of courts of chancery over trusts that courts having equitable powers, as an incident of that jurisdiction, take cognizance of and pass upon the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, nor when only legal rights are in controversy. It is when the court is moved on behalf of an executor, trustee, or cestui que trust, and to insure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts."<sup>2</sup> Even by courts which maintain this restricted doctrine, it has been held that the jurisdiction extends to the construction of a doubtful will of personal property at the suit of the executor or of a legatee, although the instrument creates no express trust, on account of the implied trust relation always existing between the executor and the legatees.<sup>3</sup> In accordance with this doctrine, which regards a trust express or implied as essential to the jurisdiction, it necessarily follows that the suit can only be maintained by some party *directly* interested in the trust under the will; that is, by an executor or a trustee, or by a cestui que trust or a legatee; it cannot be maintained by an heir at law, or a devisee of a mere legal title, and much less by a creditor.

§ 1157. **The Same. A Broader Jurisdiction in Some States.**—It cannot be denied that there are decisions by able courts which take another and less restricted view of the jurisdiction. According to the doctrine of these cases, the jurisdiction to construe wills is not necessarily connected with the general jurisdiction over

<sup>1</sup> *Simmons v. Hendricks*, 8 Ired. Eq. 84, 85, 86, 55 Am. Dec. 439.

<sup>2</sup> *Chipman v. Montgomery*, 63 N. Y. 221, 230, per Allen, J.; *Bailey v. Briggs*, 56 N. Y. 407, per Folger, J.

<sup>3</sup> *Bowers v. Smith*, 10 Paige, 193.

trusts; the presence of a trust express or implied is not made a criterion of its existence nor of its proper exercise; it is regarded as arising wholly from the complicated character of provisions in a will, from the difficulty of understanding their meaning, or the doubt and uncertainty as to the rights and interests of the parties claiming under them. In short, the jurisdiction to construe a will exists and is exercised whenever its terms are really difficult or doubtful, or their validity is contested, without reference to the presence or absence of any trust.<sup>1</sup> It is well settled that a court will never entertain a suit to give a construction or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent, and uncertain;<sup>2</sup> nor upon a matter which is wholly past, as upon the past conduct of the executor.<sup>3</sup> The jurisdiction will not, it seems, be extended so as to permit an administrator to obtain the direction of a court of equity with regard to the proper discharge of his duties.<sup>4</sup>

<sup>1</sup> Rosenberg v. Frank, 58 Cal. 387.

<sup>2</sup> Minot v. Taylor, 129 Mass. 160.

<sup>3</sup> Sohler v. Burr, 127 Mass. 221.

<sup>4</sup> Clay v. Gurley, 62 Ala. 14.

## CHAPTER FOURTH.

### EQUITABLE ESTATES ARISING FROM CONVERSION.

#### SECTION I.

#### THE CONVERSION OF REAL ESTATE INTO PERSONAL, AND OF PERSONAL ESTATE INTO REAL.

##### ANALYSIS.

- § 1159. Definition and general nature.
- § 1160. I. What words are sufficient to work a conversion.
- § 1161. The same; under a contract of sale.
- § 1162. II. Time from which the conversion takes effect.
- § 1163. The same; in contracts of sale with option.
- § 1164. III. Effects of a conversion; land directed or agreed to be sold.
- § 1165. The same; money directed or agreed to be laid out in land.
- § 1166. Limitations on these effects.
- § 1167. Conversion by paramount authority; compulsory sale of land under statute; sale by order of court.
- § 1168. Conversion as between life tenant and remainderman.

§ 1159. **Definition and General Nature.**—The fundamental principle that equity regards that as done which ought to be done, which underlies the doctrine of equitable conversion, and of which it is the most remarkable illustration, has been fully discussed and explained in a former volume.<sup>1</sup> Conversion has been briefly and accurately defined as “that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible as such.”<sup>2</sup> No express declaration in the instrument is needed that land shall be treated as money although not sold, or that money shall be deemed land although not actually laid out in the purchase of land. The only essential requisite is an absolute expression of an intention that the land *shall* be sold and turned into money, or that the

<sup>1</sup> See ante, §§ 364–371.

<sup>2</sup> See the more full definition given by Sir Thomas Sewell, M. R., in *Fletcher v. Ashburner*, 1 Brown Ch. 497, 1 Scott 606. See, also, *Lorrillard v. Coster*, 5 Paige 172, 218, Chancellor Walworth; *Green v. Smith*, 1 Atk. 572, 1 Ames Eq. Jur. 193, 1 Scott 313; *Prentice v. Janssen*, 79 N. Y. 478, 1 Scott 639, H. & B. 163; *Moncrief v. Ross*, 50 N. Y. 431, 3 Keener 960; *Delaney v. McCormack*, 88 N. Y. 174, H. & B. 407.

money *shall* be expended in the purchase of land. If this intention is sufficiently expressed, the circumstance that the land has not yet been sold and turned into money, or that the money has not yet been laid out in land, is the very condition of fact in which the doctrine of conversion comes into play, to which the maxim, Equity regards that as done which ought to be done, applies.<sup>3</sup> The true test in all such cases is a simple one: Has the will or deed creating the trust absolutely directed, or has the contract stipulated, that the real estate be turned into personal or the personal estate be turned into real? As this doctrine of conversion is wholly a creation of equity jurisprudence, the estates or interests which result from it are purely equitable, and of equitable cognizance alone. Equity has exclusive jurisdiction of suits to maintain and protect such interests, except where, in this country, the doctrine, as it effects the devolution of property, is recognized and followed by the probate courts in the settlement and distribution of decedents' estates. The practical questions growing out of the operation of the doctrine are generally connected with the devolution—inheritance or succession—of the property converted upon the death of the person for whose benefit it was originally given, or with his transfer of it by assignment, or with the claims to it of third parties.<sup>4</sup>

<sup>3</sup> *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211, 215; *Scudamore v. Scudamore*, Prec. Ch. 543, 1 Scott 315, 596, 3 Keener 947.

<sup>4</sup> For illustration, if money had been given by will or deed to trustees upon trust to purchase land therewith and convey same to A in fee, and A died before the trustees had made the purchase, and while the money was in their hands, the important question as to A's interest would for the first time practically arise: Was that interest real estate, so that it descended to A's heirs if he died intestate? or was it personal estate, so that it devolved upon his administrator? Would it pass by a general bequest of personal property, or by a general devise of lands? If A was a married man, was his widow entitled to dower in it? If A was a married woman, was her husband entitled to curtesy? Where the parties to a contract for the sale of land die before execution, are the vendee's heirs or his personal representatives entitled to the benefit of the agreement? Does the purchase-money, when paid, belong to the heirs or to the administrators of the vendor? These are the kinds of questions which are determined by the doctrine of conversion; and their solution depends upon the nature of the estates resulting from the operation of that doctrine upon the interests of the original parties to the will, deed, or contract. No other doctrine is perhaps more important in the equity jurisprudence of England, both because such trusts by wills, deeds, and family settlements are there very frequent, and because the common-law difference between the descent of land and the succession of personal property is still preserved in all of its integrity. The applications of the doctrine to settlements often give rise to questions of great difficulty. In our own country the doctrine is theoretically adopted in all the states; but its applications are much less frequent and more simple than in England. With us, trust estates and family

§ 1160. I. What Words are Sufficient to Effect a Conversion.

—The whole scope and meaning of the fundamental principle underlying the doctrine are involved in the existence of a *duty* resting upon the trustees or other parties to do the specified act; for unless the equitable *ought* exists, there is no room for the operation of the maxim, Equity regards that as done which ought to be done.<sup>1</sup> The rule is therefore firmly settled, that in order to work a conversion *while the property is yet actually unchanged* in form, there must be a clear and imperative direction in the will, deed, or settlement, or a clear imperative agreement in the contract, to convert the property—that is, to sell the land for money, or to lay out the money in the purchase of the land. If the act of converting—that is, the act itself of selling the land or of laying out the money in land—is left to the option, discretion, or choice of the trustees or other parties, then no equitable conversion will take place, because no *duty* to make the change rests upon them.<sup>2</sup> It is not essential, however, that the direction should be *express*, in order to be imperative; it may be necessarily implied. Where a power to convert is given without words of command, so that there is an appearance of discretion, if the trusts or limitations are of a description exclusively applicable to one species of property, this circumstance is sufficient to outweigh the appearance of an option, and to render the whole imperative. Thus, if a power is given to lay out money in land, but the limitations expressed are applicable only to land, this will show an intention that the money should be so laid out, and will amount to an imperative direction to convert, for otherwise the terms of the instrument could not be carried into effect.<sup>3</sup> In fact, the whole result depends upon the

settlements are comparatively very few, and the tendency of modern legislation in many of the states is towards a uniformity in the rules of law which regulate the descent of lands and the devolution of personal property. In a few of the states the difference has been completely abolished, and both real and personal estate devolve in the same proportions to the same parties. It necessarily follows that many of the questions connected with conversion of the most frequent occurrence and of the highest importance in England are practically unknown in this country.

<sup>1</sup> See ante, §§ 364, 365.

<sup>2</sup> It should be carefully noticed that the option or discretion spoken of in this rule means an option with respect to the very act of changing the form of the property. If the option is *merely as to the time* when this shall be done, a conversion may take place, as will be more fully stated hereafter. The general rule of the text is illustrated by the following cases: *In re Cooper's Estate*, 206 Pa. St. 628, 98 Am. St. Rep. 799, 56 Atl. 67; *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117, and note. Mere discretion as to the time or manner of effecting the sale does not prevent a conversion from taking place: *Tazewell v. Smith's Adm'r*, 1 Rand. 313, 10 Am. Dec. 533.

<sup>3</sup> *Earlom v. Saunders*, Amb. 241, 1 Scott 637, 3 Keener 951.

intention. If by express language, or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion necessarily takes place.<sup>4</sup>

§ 1161. **Under a Contract of Sale.**—A contract of sale, if all the terms are agreed upon, also operates as a conversion of the property, the vendor becoming a trustee of the estate for the purchaser, and the purchaser a trustee of the purchase-money for the vendor.<sup>1</sup> In order to work a conversion, the contract must be valid and binding, free from inequitable imperfections, and such as a court of equity will specifically enforce against an unwilling purchaser.<sup>2</sup> The fact that the contract of purchase is entirely at the option of the purchaser does not prevent its working a conversion, if he avails himself of the option.<sup>3</sup>

§ 1162. **II. Time from which the Conversion Takes Effect.**—This, like all other questions of intention, must ultimately depend upon the provisions of the particular instrument. The instrument might in express terms contain an absolute direction to sell or to purchase at some specified future time; and if it created a trust to sell upon the happening of a specified event which might or might not happen, then the conversion would only take place from the time of the happening of that event, but would take place when the event happened exactly as though there had been an absolute direction to sell at that time.<sup>1</sup> Subject to this general modification, the rule is settled that a conversion takes place in wills as from the death of the testator, and in deeds, and other instruments *inter vivos*, as from the date of their execution.<sup>2</sup>

§ 1163. **Time in Contracts of Sale with Option.**—In contracts of sale upon the purchaser's option, the question whether or not a conversion is effected at all cannot, of course, be determined until the purchaser exercises his option; but the moment when he *does* exercise it, the conversion, as between parties claiming title under the vendor, *relates back* to the time of the execution of the contract.

<sup>4</sup>Thornton v. Hawley, 10 Ves. 129; In re Pforr's Estate, 144 Cal. 121, 77 Pac. 825; Lent v. Howard, 89 N. Y. 169, 3 Keener 952.

<sup>1</sup>Green v. Smith, 1 Atk. 572, 1 Ames Eq. Jur. 193, 1 Scott 313; and see ante, §§ 368, 372.

<sup>2</sup>Ante, § 368, and notes: Mills v. Harris, 104 N. C. 626, 10 S. E. 704.

<sup>3</sup>Lawes v. Bennett, 1 Cox 167, 1 Scott 602; Townley v. Bedwell, 14 Ves. 591, 2 Scott 400, 2 Keener 321. For further on the subject of such optional contracts, see post, § 1163.

<sup>1</sup>Keller v. Harper, 64 Md. 74, 1 Atl. 65, 3 Keener 964.

<sup>2</sup>Wills: Morris v. Griffiths, 26 Ch. Div. 601, 3 Keener 955; Lent v. Howard, 89 N. Y. 169, 3 Keener 952. Deeds: Griffith v. Ricketts, 7 Hare 299, 311; Clarke v. Franklin, 4 Kay & J. 257, 1 Scott 628, 3 Keener 962.

Thus where a lessee with an option to purchase—or any other purchaser with an option—duly declares his option after the death of the lessor or vendor, who is the owner in fee, the realty is thereby converted *retrospectively* as between those claiming under the lessor or vendor, or under his will; that is, as between the heir or devisee on one side and the legatees or next of kin on the other, the proceeds will go to his personal representatives, though the heir or devisee will be entitled to the rents up to the time when the option is declared.<sup>1</sup> It should be carefully observed, however, that this rule is confined to conversion as between the parties claiming title under the vendor or lessor,—his heirs or devisees, or his legatees, next of kin, and personal representatives,—and does not apply as between the vendor and purchaser themselves.<sup>2</sup>

**§ 1164. III. Effects of a Conversion—Land Directed or Agreed to be Sold.**—So far as is necessary to carry out the lawful purposes of the instrument, will, deed, settlement, or contract, and to determine the property rights of all parties claiming under or through it, equity follows the doctrine into all of its legitimate consequences, and treats the property, from the time at which the conversion takes place, as to all intents of the kind and form into which it should have been changed, and determines the rights of parties to it as in that kind and form.<sup>1</sup> Land directed or agreed to be sold, although yet unsold, is regarded and treated as money. It will not pass under a devise of land or of real estate.<sup>2</sup> It will pass under a general gift, transfer, or bequest of personalty, or under a residuary bequest of personal property.<sup>3</sup> In the absence of a will, it goes to the personal representative of the intestate who would have been or was entitled to it. It is therefore always personal assets in the hands of executors and administrators for which they are accountable.<sup>4</sup> As in the case of a corporation, so in that of an alien, a bequest of land thus converted into money is valid, although a devise of land is or may be void.<sup>5</sup> The same rules apply to the conversion wrought by contracts for the sale of land.<sup>6</sup>

<sup>1</sup> *Lawes v. Bennett*, 1 Cox 167, 1 Scott 602; *Townley v. Bedwell*, 14 Ves. 591, 2 Scott 400, 2 Keener 321; *Weeding v. Weeding*, 1 Johns & H. 424, 2 Keener 324; *Ex parte Hardy*, 30 Beav. 206, 2 Keener 327; *In re Isaacs* (1894), 3 Ch. 506, 2 Scott 402.

<sup>2</sup> *Edwards v. West*, L. R. 7 Ch. Div. 858, 862, 863, 1 Scott 604.

<sup>3</sup> See cases cited ante, under §§ 1159, 1162.

<sup>4</sup> *Elliott v. Fisher*, 12 Sim. 505.

<sup>5</sup> *Welsh v. Crater*, 32 N. J. Eq. 177, 3 Keener 990.

<sup>6</sup> *Hoddel v. Pugh*, 33 Beav. 489, 2 Scott 412; *Moncrief v. Ross*, 50 N. Y. 431, 3 Keener 960.

<sup>7</sup> *Craig v. Lealie*, 3 Wheat. 563, 1 Scott 611, H. & B. 39, Shep. 66.

<sup>8</sup> See ante, § 368, and cases cited.

**§ 1165. Money Directed or Agreed to be Laid out in Land.**—Money and other personal property directed or agreed to be laid out in the purchase of land becomes, and is regarded, as land in equity. It will therefore pass under a general devise of lands or of real estate; it will descend to the heir; and will not be included in a bequest of money or personal property.<sup>1</sup> If the heir die intestate before the purchase has been made, the fund will descend to his heir.<sup>2</sup> . . . The money of a married woman directed to be laid out in land is liable to her husband's curtesy, and without doubt, under analogous circumstances, such a fund of a husband is liable to his wife's dower.<sup>3</sup>

**§ 1166. Limitations on the Effects.**—Notwithstanding these very general effects of a conversion, they are not absolutely universal. The doctrine seems to be correctly formulated by saying that the effects extend only to those persons who claim or are entitled to the property under or through the instrument, or directly from or under the author of the instrument. . . . Two limitations appear to be well settled: one general, that the conversion does not take place as to persons whose claims or rights to the property are purely incidental, not at all connected with its devolution or transfer from the author or through the instrument;<sup>1</sup> and the other special, depending upon considerations of public policy, that the conversion shall not be permitted to take place so as to evade the statutes of mortmain, which invalidate gifts of land to charities.<sup>2</sup>

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## SECTION II.

### RESULTING TRUST UPON A FAILURE OF THE PURPOSES OF THE CONVERSION.

#### ANALYSIS.

§ 1169. The questions stated; object and extent of the doctrine.

§ 1170. A total failure of the purpose.

§ 1171. Partial failure; wills directing conversion of land into money.

§ 1172. The same; wills directing the conversion of money into land.

§ 1173. The same; deeds directing the conversion of land into money.

§ 1174. The same; deeds directing the conversion of money into land.

### § 1169. The Questions Stated—Object and Extent of the Doc-

<sup>1</sup> *Collins v. Champ's Heirs*, 15 B. Mon. 118, 61 Am. Dec. 179.

<sup>2</sup> *Scudamore v. Scudamore*, Prec. Ch. 543, 1 Scott 315, 596, 3 Keener 947.

<sup>3</sup> *Sweetapple v. Bindon*, 2 Vern. 536, Ames Trusts 379; and see ante, § 990, note 4.

<sup>1</sup> See *Wilder v. Ranney*, 95 N. Y. 7, 12, 3 Keener 992.

<sup>2</sup> *Brook v. Bradley*, L. R. 3 Ch. 672, 674, per Lord Cairns.

**trine.**—The purposes for which a conversion is directed might be unlawful, or circumstances might arise after the execution of the instrument which rendered the conversion unnecessary. In other words, the purposes of a conversion might fail totally or partially, either before the instrument had come into operation, or after the conversion had been de facto made by a sale of the land or by a laying out of the money in land. The questions would then arise, To whom will the property—the entire amount in one case, the portion undisposed of in the other—then result,—the author of the trust, his heir, or his personal representatives? and in what form will it thus result,—in its original or in its converted form, as real or as personal estate? The case of a total failure is simple; that of a partial failure presents questions of greater difficulty; and in discussing this branch of the subject it will be expedient to consider separately cases arising under wills, and those arising under deeds of settlement and other instruments inter vivos.

§ 1170. **A Total Failure.**—Where a conversion of land into money or of money into land is directed, either by a will or by an instrument inter vivos, and the purposes and objects for which such conversion was intended totally fail before the directions for a conversion are carried into effect, the property thus directed to be converted will remain in its original condition; it will result in its original unchanged form to the heirs or to the personal representatives of the testator, and to the settlor, or to his heirs or his personal representatives, as the case may be. If land is to be sold and converted into money, the property results as real estate to the heirs; if money is to be paid out in land, the fund results as personal estate to the personal representatives. This rule is universal.<sup>1</sup>

<sup>1</sup> *Ackroyd v. Smithson*, 1 Brown Ch. 503, 1 Lead. Cas. Eq., 4th Am. ed., 1171, 1181, 1197, 1 Scott 621, 3 Keener 977; *Clarke v. Franklin*, 4 Kay & J. 257, 1 Scott 628, 3 Keener 982; *Smith v. Claxton*, 4 Madd. 484, 492, 1 Scott 625, 3 Keener 979.

## SECTION III.

## RECONVERSION.

## ANALYSIS.

- § 1175. Definition: Rationale of the doctrine.
- § 1176. Who may elect to have a reconversion.
- § 1177. Mode of election.
- § 1178. Double conversion.

§ 1175. **Definition—Rationale of the Doctrine.**—By reconversion is meant “that notional or 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.”<sup>1</sup> Thus real estate is devised upon trust to sell and to pay the proceeds to A. By virtue of this absolute direction, the land is, in equity, converted into personal estate; it belongs to A as personalty. It may, however, be made A’s property as real estate; that is, A may prefer to receive it in its original unconverted form as land. In that event it is said to be reconverted, and the process is called reconversion. The rationale of this doctrine is clearly found in the right which every absolute owner or donee has to dispense with or forbid the execution of any trust in the performance of which he alone is interested. Reconversion is the result of an election expressly made or inferred by a court of equity. It depends wholly upon the right of election held by the person entitled to the property to choose whether he will take the property in its converted condition or in its original and unconverted form. The whole discussion consists of answers to the questions, Who may thus elect? and how may such an election be made?<sup>2</sup>

§ 1176. **Who may Elect to have a Reconversion.**—As to personal capacities, the party, in order to elect, must be sui juris, or at least must not be subject to any incapacity which prevents him from effectively dealing with his own property.<sup>1</sup> With regard to the

<sup>1</sup> Haynes’s Outlines of Equity, 367.

<sup>2</sup> For American authorities on the general doctrine of reconversion, see *Bank of Ukiah v. Rice*, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118.

<sup>3</sup> A person absolutely entitled and sui juris: *Prentice v. Janssen*, 79 N. Y. 478, 1 Scott 639, H. & B. 163. *Infants* cannot elect, but the court may, for their advantage. See *Seeley v. Jago*, 1 P. Wms. 389, 1 Scott 635; *Carr v. Ellison*, 2 Brown Ch. 56; *Van v. Barnett*, 19 Ves. 102; *Robinson v. Robinson*, 19 Beav. 494; *In re Harrop*, 3 Drew. 726, 734. *Lunatics* cannot. *Married Women*: In this country a married woman can doubtless elect by means of any

nature and quantity of interest which must be owned in order that the party may effect a reconversion, if he is entitled to the whole *absolute interest in possession*, either to the land to be sold for money, or to the money to be laid out in land, then he may, of course, elect, since his election could affect no other person's rights. If he owns, not the whole subject-matter but only an undivided share or a partial interest, the general rule is settled that he may elect, and can only elect, when such election could not by possibility injuriously affect the rights and interests of those who are associated with him in the total ownership as co-owners, life tenants, remaindermen, reversioners, and the like.<sup>2</sup>

§ 1177, **Mode of Election.**—It being assumed that the party entitled to the property has the capacity to elect to receive it in its unconverted form, and thus to effect a reconversion, the further question remains, how such election must or may be made. An express declaration of the intention in language is always sufficient, but is not necessary.<sup>1</sup> An election may be inferred from acts or writings. Any act or writing which shows an unequivocal intention to possess the property in its actual state and condition will amount to a valid election.<sup>2</sup>

instrument sufficient to enable her to convey real estate. See *Howell v. Tompkins*, 42 N. J. Eq. 305, 11 Atl. 333.

<sup>1</sup> *A co-owner*: When the direction is to turn land into money, one co-owner *cannot elect to keep his share in land*. The others are entitled to have their share sold so as to receive the money, and plainly the sale of an undivided share of the land would produce a comparatively less amount than would result from a sale of the whole: *Deeth v. Hale*, 2 Molloy 317, 1 Scott 641; *Fletcher v. Ashburner*, 1 Brown Ch. 497, 500, 1 Scott 606. On the contrary, when the direction is to lay out money in land for co-owners, one co-owner can elect to take his share in money; for this would plainly produce no injury to the others: *Seeley v. Jago*, 1 P. Wms. 389, 1 Scott 635.

<sup>2</sup> *Bradish v. Gee*, Amb. 229, 1 Scott 636.

<sup>2</sup> *Prentice v. Janssen*, 79 N. Y. 478, 1 Scott 639, H. & B. 163; *Bank of Ukiah v. Rice*, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118.

## CHAPTER FIFTH.

### MORTGAGES OF LAND.

#### SECTION I.

##### THE ORIGINAL OR ENGLISH DOCTRINE.

###### ANALYSIS.

- § 1179. The common-law doctrine: Statute of 7 Geo. II., c. 20.
- § 1180. Origin and development of the equity jurisdiction; the "equity of redemption."
- § 1181. The equitable theory
- § 1182. The double system at law and in equity.
- § 1183. The legal and the equitable remedies.
- § 1184. Peculiarities of the English system.
- § 1185. Subsequent mortgages equitable, not legal.

§ 1179. **The Common-law Doctrine.**—In no other department has the equity jurisprudence as administered in this country departed so widely from that administered in England as in the department which is concerned with mortgages, and the respective rights, liabilities, and remedies of the mortgagor and the mortgagee. No correct notion can be obtained of equity as it now exists within the United States without an accurate and full appreciation of these differences. At the common law the ordinary mortgage was to all intents and purposes a conveyance of the legal estate. A mortgage in fee immediately vested the mortgagee with the legal title, subject, however, to be defeated by the mortgagor's performing the condition by paying the money upon the prescribed pay-day. If on that very day the mortgagor performed the condition by paying the money, he thereby put an end to the mortgagee's estate; the legal estate was re-vested in himself, and with it he had the right at once to re-enter upon the land, and to recover its possession by an appropriate action at law. But if the mortgagor for any reason suffered the pay-day to go by without paying or tendering the amount due, all his right was utterly and forever lost; the estate of the mortgagee, which had before been upon condition, now became absolute, with all the features and incidents of absolute legal ownership. This purely legal theory of the mortgage has continued in force in England to the present day, until the existing

judicature act went into operation;<sup>1</sup> and during that interval it has constantly prevailed and been acted upon in the English courts of law without modification except that introduced by a statute passed during the reign of George II.<sup>2</sup> This statute has always been strictly construed, and held applicable only in the cases mentioned by its express terms, where a suit at law is brought by the mortgagee.<sup>3</sup>

**§ 1180. Origin and Development of the Equity Jurisdiction.—**The “**Equity of Redemption.**”—As this common-law doctrine, with all of its accompanying incidents, was exceedingly harsh in its operation, and often worked grievous wrong to mortgagors, equity interfered, and by degrees built up a distinct theory of mortgages which is one of the most magnificent triumphs of equity jurisprudence. The basis of this system was the fundamental maxim that equity looks at the intent, rather than the form, and the resulting general principle that equity could and should relieve against legal penalties and forfeitures, when the person in whose behalf they were enforced could be fairly and sufficiently compensated by an award of money.<sup>1</sup> As early as the reign of James I. the court of chancery had begun to relieve the mortgagor; and in the reign of Charles I. his right to redeem after a failure to perform the condition—that is, to come in and pay the debt and interest and recover the land after the pay-day—had become fully established and recognized as a part of the equity jurisprudence.<sup>2</sup> This equitable right of the mortgagor was termed his “equity of redemption,” which is simply an abbreviation of his “right to redeem in equity.” At first this right of the mortgagor was regarded as a mere *right* or thing in action; and at the close of the reign of Charles II. the equity of redemption was said to be a *mere right* to recover the land in equity after a failure to perform the condition, and not to be an

<sup>1</sup> See this act, 36 & 37 Vict., c. 66, secs. 24, 25, ante, § 40, note 1.

<sup>2</sup> 7 Geo. II., c. 20. This statute enacted that when an action at law was brought on the bond, or ejectment to recover possession of the land on the mortgage, the mortgagor might, pending the suit, pay to the mortgagee the debt, interest, and all costs expended in any suit at law or in equity; or in case of a refusal to accept the same, might bring such money into court where the action was pending, which moneys so paid or brought into court were declared to be a satisfaction of the mortgage, and the court was required to compel, by an order of the court, the mortgagee to assign, surrender, or reconvey the mortgaged premises to the mortgagor. This statute has been substantially re-enacted in several of the American states.

<sup>3</sup> *Shields v. Lozear*, 34 N. J. L. 496, 3 Am. Rep. 256, Kirch. 728.

<sup>1</sup> See ante, §§ 378, 381, 382, 433, where this maxim and its effects are explained.

<sup>2</sup> *Emanuel College v. Evans*, 1 Rep. in Ch. 18, 1 Scott 31, Kirch. 704; 1 *Jones on Mortgages*, secs. 6, 7.

*estate in the land.*<sup>3</sup> This narrow view, however, was soon abandoned; the equitable theory was developed and became more consistent and complete, until, in 1737, Lord Hardwicke laid down the doctrine as already established, and which has since been regarded as the very central conception of the equitable theory that an equity of redemption is (in equity) an estate in the land which may be devised, granted, or entailed with remainders; that it cannot be considered as a mere right only, but such an estate whereof there may be a seisin; and that the person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.<sup>4</sup>

§ 1181. **The Equitable Theory.**—While the mortgagee is still regarded at law as vested with the legal title followed by all of its incidents, the following general theory is established as a part of the equity jurisprudence. The mortgagor, both after and before a breach of the condition, is regarded as the real owner of the land subject to the lien of the mortgage, and liable to have all his estate, interest, and right finally cut off and destroyed by a foreclosure. Prior to such foreclosure, he is vested with an equitable estate in the land which has all the incidents of absolute ownership; it may be conveyed or devised, will descend to his heirs, may be cut up into lesser estates, and generally may be dealt with in the same manner as the absolute legal ownership, always subject, however, to the lien of the mortgage. On the other hand, the mortgage is regarded primarily as a security; 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*; it is a thing in action, and may therefore be assigned and transferred without a conveyance of the land itself; it is personal assets, and on the death of the mortgagee it passes to his executors or administrators, and not to his heirs.<sup>1</sup>

§ 1182. **The Double System at Law and in Equity.**—As these two conflicting theories have existed side by side, it follows that the rights, liabilities, and remedies of the mortgagor and mortgagee in England have been very different when administered by the courts of law or the court of chancery. In law, the mortgagee is clothed with the entire legal estate, while the mortgagor has no estate whatever, and after a default no right except that given by the statute, mentioned in a former paragraph.<sup>1</sup> In equity, the mortgagee has

<sup>1</sup> *Roscarrick v. Barton*, 1 Cas. in Ch. 217, 1 Scott 32; 1 Jones on Mortgages, sec. 6.

<sup>2</sup> *Casborne v. Scarfe*, 1 Atk. 603, 1 Scott 33, Shep. 213.

<sup>3</sup> Washburn on Real Property, c. 16, sec. 4.

<sup>4</sup> See ante, sec. 1179.

no estate, but only a lien; while the mortgagor is clothed with the equitable estate called the "equity of redemption," which is to all intents and purposes the full ownership, except that it is subject to be cut off and destroyed by a proceeding to enforce the mortgage. It should be carefully noticed that by this theory the mortgagor's estate is wholly an equitable one; *neither in equity nor at law is he regarded as retaining the legal estate*. In law, the mortgagee is entitled to possession of the land even before the condition is broken, and may recover such possession upon his legal title, either before or after condition broken, in an action of ejectment against the mortgagor, or against any other person not having a paramount title; while the mortgagor cannot maintain ejectment for the possession even against a third person, since the legal title is outstanding in the mortgagee and a plaintiff can recover in ejectment only upon the strength of his own legal title.<sup>2</sup> In equity, neither the mortgagee nor the mortgagor can maintain an action for the *mere possession*, since that remedy is wholly a legal one; but the mortgagor may maintain a suit to redeem from the mortgagee in possession, and having thus redeemed is entitled to a reconveyance and delivery of possession. In law, the mortgagee may convey the land itself by deed, or devise it by will, and on his death intestate it will descend to his heirs. In equity, his interest is a mere thing in action assignable as such, and a deed of the land by him would operate merely as an assignment of the mortgage; and in administering the estate of a deceased mortgagee, a court of equity treats the mortgage as personal assets, to be dealt with by the executor or administrator.<sup>3</sup>

§ 1183. **The Legal and Equitable Remedies.**—The mortgagee can avail himself of both legal and equitable remedies; he may sue at law for the debt, or recover possession of the land by ejectment, or resort to the equitable remedy of foreclosure. As a matter of fact, the mortgagee, in England, ordinarily enforces his security, upon the mortgagor's default, by obtaining possession of the land and appropriating the rents and profits. This possession he acquires either by voluntary surrender from the mortgagor or by a recovery in ejectment. Having obtained the possession, he may by a suit in equity cut off and destroy the mortgagor's estate or equity of

<sup>2</sup>The English law is strictly logical in these conclusions, but the American legal theory, by a curious inconsistency, rejects them. The difference between the English legal theory and the American legal theory in this respect should be carefully noted. Even in those states which have preserved the legal and the equitable theories distinct, and which have to some extent adopted the English system, the legal theory has been more or less modified by the equity doctrines.

<sup>3</sup>1 Washburn on Real Property, c. 16, sec. 4, pars. 10-14, 34; Barrett v. Hinekey, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, Kirch. 634, H. & B. 557.

redemption by a decree for a strict foreclosure. The method of foreclosing by a decree for a sale of the premises, which so generally prevails in the United States, is very seldom adopted in England. The mortgagee having obtained possession either by voluntary surrender, by entry, or by ejectment, the mortgagor may regain his title by means of the equitable suit for a redemption, whereby the mortgagee is compelled to account for the rents and profits which he has received, the amount due to him is fixed, and on its payment the interest of the mortgagee is ended, and the mortgagor becomes entitled to a reconveyance and the possession.<sup>1</sup>

§ 1184. **Peculiarities of the English System.**—The peculiarity of this double system should be remarked: that while equity has carefully built up its own theory, so different in all points from that prevailing at law, it has never attempted to interfere directly with the legal doctrines, nor have the law courts modified their own legal theory by voluntarily introducing equitable notions. The two theories have stood side by side, each administered by its own tribunals as though the other had no existence. Equity has so refrained from any direct invasion of the legal domain, that whenever a mortgagor has redeemed after a default, either by a payment of the debt voluntarily accepted or by means of a decree in a suit to redeem, the legal title does not thereby return to the mortgagor; having once been vested in the mortgagee, it can only be restored to the mortgagor by a legal conveyance. After a redemption of any kind, therefore, a deed from the mortgagee to the mortgagor is necessary to invest the latter with the full legal title, and a decree in a suit for redemption directs such a conveyance to be executed as the only means of restoring the mortgagor to his original legal estate.<sup>1</sup>

§ 1185. **Subsequent Mortgages Equitable.**—Another striking, but strictly logical, result of the system exists when the same mortgagor, being originally the legal owner, gives successive mortgages on the same land to different persons, which are all outstanding together. If the legal owner in fee gives a first mortgage in fee to A, he thereby, as has been shown, conveys the entire legal estate, and A becomes vested with the legal title; and it is then impossible for the mortgagor to convey the legal estate to other persons by any subsequent deed or mortgage while the prior mortgage to A is outstanding, for he does not himself hold such legal estate. If, therefore, the mortgagor executes any subsequent mortgage or mortgages to B, C, D, upon the same land, these subsequent mortgagees do not thereby obtain the legal estate; they are not regarded, even

<sup>1</sup> 1 Washburn on Real Property, c. 16, sec. 5, pars. 16-18.

<sup>1</sup> 1 Washburn on Real Property, c. 16, sec. 5, pars. 16-18.

by courts of law, as vested with a legal title; their estate and title are purely equitable, and such subsequent mortgages are in every sense, even in courts of law, regarded and treated as *equitable* and not legal mortgages. The same doctrine is expressed by the statement that a mortgage of the equity of redemption is necessarily an equitable mortgage.<sup>1</sup>

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## SECTION II.

### THE AMERICAN DOCTRINE.

#### ANALYSIS.

- § 1186. In general: Two methods prevailing.
- § 1187. First method: Both the legal and the equitable theories; states arranged alphabetically in foot-note.
- § 1188. Second method: The equitable theory alone; states arranged in foot-note.
- § 1189. The same: The mortgagee in possession.
- § 1190. The same: Equitable remedies of the parties.
- § 1191. Definition of mortgage.

**§ 1186. In General—Two Methods Prevailing.**—The English system, with the two theories, legal and equitable, standing so opposed to each other in every point, and each complete in itself, has not been wholly adopted in any of our states. The equitable principles have penetrated the legal theory, and more or less modified it in every state. The result is, that even in those states which preserve the legal theory at all, and regard the mortgage as in any sense conveying a legal estate, many of the incidents of such legal title are abandoned; the mortgagee is the legal owner only for certain purposes and to a certain extent,—the legal owner as between himself and the mortgagor,—clothed with the legal title only so far as is considered necessary to preserve the mortgage as a valid security; while for all other purposes, and as against all other persons not claiming under or through the mortgagee, the mortgagor is regarded, even at law, as retaining the legal estate with all of its incidents and qualities.<sup>1</sup> The courts and legislatures of nearly one-half of the

<sup>1</sup> By a strange inconsistency, this logical result of the legal theory is rejected by the courts of those states which have adopted the double system of law and of equity concerning mortgages; and they hold that in a series of prior and subsequent mortgages each and every mortgagee obtains the legal estate. This is one of the marked differences between the *legal* system in England and that prevailing in American states.

<sup>1</sup> This conception of the mortgage is undoubtedly illogical and anomalous, a hybrid union of legal and equitable doctrines, and even more confusing than the sharply defined double system of the English jurisprudence. Such a

states have taken a further step, and by adopting the equitable theory alone have completely reversed the positions occupied by the mortgagor and the mortgagee under the English system. In the jurisprudence of the various states and territories of this country, two differing conceptions of the total nature and effect of mortgages now exist,—two distinct modes of regarding and regulating the rights, liabilities, and remedies of the parties. These two methods must be separately described, and the states adopting them must be arranged in two corresponding classes.

§ 1187. **First Method—Both the Legal and the Equitable Theories.**—The essential feature of this system, adopted by the courts of all the states in which the system prevails, is the doctrine that as between the mortgagor and the mortgagee, the mortgagee acquires and holds the legal estate *at law*, while the estate of the mortgagor—his equity of redemption—is entirely an equitable estate. To this extent the system agrees with that prevailing in the English courts; but this agreement is only partial.<sup>1</sup> In all the states which have adopted the method, the mortgagor *while in possession* is considered, at law as well as in equity, both after and before a breach of the condition, to be the legal owner as against all persons except the mortgagee and those claiming under him; and in most of the states he is regarded, against all such persons, as the legal owner, and as entitled to the possession, although he may not be in actual possession. The mortgage being a conveyance of the legal estate, and not a mere lien between the immediate parties thereto, the mortgagee is entitled to the possession of the premises, at least after the condition is broken, and may recover such possession from the mortgagor by a legal action; but in many, and even in most, of these states the mortgagor may retain the possession until a default is made. In respect to the foregoing essential features there is a general agreement in the jurisprudence of all the states which compose this first class; but with regard to other and incidental matters there is a divergence in their rules which prevents any further generalization. It should be added, however, that in most of these states the equitable theory is the one which chiefly prevails in practice; mortgagors are ordinarily left in possession and treated

result necessarily follows from the action of courts in admitting equitable principles to be blended with the legal dogmas, but without accepting those principles in all their length and breadth, and abandoning wholly the legal theory maintained by the English courts of law. This last step, when taken, produces a system single, uniform, consistent, and just.

<sup>1</sup> As illustrations of this class, see *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, *Kirch*. 634, H. & B. 557; *Ewer v. Hobbs*, 5 Met. 1, 3; *Howard v. Robinson*, 5 Cush. 119, 123; *Shields v. Lozeau*, 34 N. J. L. 496, 3 Am. Rep. 256, *Kirch*. 728; *Tryon v. Munson*, 77 Pa. St. 250.

as the owners, and the common remedy of the mortgagee is a decree of foreclosure and for the sale of the mortgaged premises. In a few states, however, it is customary for the mortgagee to recover possession, by action at law if necessary, and to cut off the mortgagor's equity of redemption by a strict foreclosure. The states which have adopted this method in its substantial elements are Alabama, Arkansas, Connecticut, Delaware, Illinois, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia.

§ 1188. **Second Method—The Equitable Theory Alone.**—In this method of treating mortgages, the conflict between the legal and the equitable conceptions is entirely removed. Partly through the adoption of equitable doctrines by the law courts, and partly through the operation of statutes, the legal theory of mortgages has been abandoned, and the equity theory has been left in full force, furnishing a single and uniform collection of rules recognized and administered, so far as necessary, alike by courts of law and of equity.<sup>1</sup> The mortgage is not a conveyance, nor does it confer upon the mortgagee any estate *in* the land. It creates a lien *on* the land, or, in the apt language already quoted, a “a potentiality to follow the land by proper process, and condemn it for payment” of the debt. The debt is the principal fact, and the mortgage is wholly incidental or collateral thereto, and intended to secure its payment. The right or interest of the mortgagee from being a legal estate is changed into an equitable right enforceable by an equitable proceeding; it is for all purposes and under all circumstances personal assets; it may be assigned, and passes to the mortgagee's personal representatives on his death. The mortgagee is not entitled to possession of the mortgaged premises, and can maintain no legal action for their recovery, either before or after a breach of the condition; in fact, the mortgagor's default produces no change in the relations of the parties or in the nature of their respective interests, except that the mortgagee thereupon becomes enabled to enforce his lien by a proceeding of foreclosure. The mortgagee's interest being a mere lien, it is wholly destroyed, and the mortgagor's estate is left free and unencumbered, by a payment of the debt secured by it at any time before the premises are actually sold under a de-

<sup>1</sup> As illustrations of this class, see *McMillan v. Richards*, 9 Cal. 365, 407, 70 Am. Dec. 655, and *Dutton v. Warschauer*, 21 Cal. 609, 621, 82 Am. Dec. 765, per Field, C. J.; *Chick v. Willetts*, 2 Kan. 384, 391, H. & B. 555; *Jackson v. Bronson*, 19 Johns. 325, Kirch. 629 (before the complete adoption of the equitable theory alone); *Astor v. Hoyt*, 5 Wend. 603, Kirch. 292; *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623, Kirch. 299; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519, Kirch. 334.

cree of foreclosure; the estate does not then *revest* in the mortgagor, since it has never gone out of him. On the other hand, the mortgagor's interest, instead of being an equitable estate, or right in equity to redeem the land from the mortgagee's ownership, is, for all purposes, under all circumstances, and between all parties, the legal estate, with all the incidents and qualities of legal ownership, but at the same time encumbered by or subject to the lien of the mortgage, and liable, therefore, to be cut off and divested by a sale under a decree of foreclosure if the debt is not paid according to the terms of the mortgage. It is an entire misuse of language to apply the name "equity of redemption" to this *legal* estate of the mortgagor; and the continued employment of the phrase in the legal nomenclature of the states which have adopted this theory of the mortgage is to be regretted, since it is the occasion of constant misapprehension and confusion of thought.<sup>2</sup> It is the natural and inevitable result of this system that in all the states where it prevails the mortgagor is not *ordinarily*, under *ordinary* circumstances, compelled to apply to a court of equity for relief. Being entitled to retain possession of the premises after a default, he is generally in a position to act on the defensive, and is not obliged to bring a suit in equity for a redemption. On the other hand, the mortgagee, not being permitted to recover possession and hold the land, is compelled to enforce his lien by a suit in equity, in which he obtains a decree for a sale of the mortgaged premises. In several of the states, the remedy of a strict foreclosure has been denied to him by statute. The mode of treating the mortgage thus described has been adopted in the following states and territories: California, Colorado, Dakota, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New York, Oregon, South Carolina, Texas, Utah, and Wisconsin.<sup>3</sup>

§ 1189. **The Mortgagee in Possession under This Method.**—The foregoing system, as it is administered in many of the states, contains one apparent inconsistency which requires a brief explanation. While the mortgagee is declared to have no legal estate, and is unable to recover possession of the land against an unwilling mortgagor or owner of the fee subject to the mortgage, yet if the mortgagee, while the mortgage is still subsisting, does in any lawful manner obtain possession, the courts have established the doctrine that his interest under the mortgage enables him to retain such possession, and to defend it against the mortgagor or those succeeding to his title. In other words, the mortgagor is not permitted to recover back the possession, in an action at law, upon the strength

<sup>2</sup> See *Chick v. Willetts*, 2 Kan. 384, H. & B. 555, per Crozier, C. J.

<sup>3</sup> To these might perhaps be added Delaware, Mississippi, and Missouri.

of his own acknowledged legal estate; but his only remedy is in equity by a suit to redeem. Undoubtedly this doctrine, when first admitted, was the result of the old common-law notions still lingering in the minds of the judges before the purely equitable theory had become fully developed; but it is certainly difficult to reconcile the doctrine, *on principle*, with this theory. The more recent decisions have perceived and admitted the incongruity; and the courts, while retaining the doctrine as settled, have guarded against any inference from it that the mortgagee has acquired a legal estate by his possession; his right to retain possession does not depend upon an estate held by him; his possession is protected by his lien. It is certainly more simple and just that the mortgagor should be left in possession, and the mortgagor forced to redeem, than that the mortgagor should be permitted to recover the possession by an action at law, and be immediately liable to the consequences of a foreclosure suit in equity brought by the mortgagee.<sup>1</sup>

**§ 1190. Equitable Remedies of the Parties under This Method.**—It is plain from the foregoing outline that in the commonwealths named in the second division a complete revolution has been wrought in the equity jurisprudence concerning mortgages. According to the original theory as it has been administered in England and in a portion of the states, the estate of the *mortgagor* being wholly equitable, the jurisdiction of equity deals chiefly, almost exclusively, with *his* interests, by protecting his rights, by enabling him to redeem the land from the mortgagee, and by compelling a reconveyance of the legal title which had been forfeited by his failure to perform the condition, and by thus putting him in a position to regain the possession. On the other hand, the mortgagee, being vested with the legal estate by means of the mortgage itself, and being able to obtain possession of the land by a legal action, is clothed with all the attributes of legal ownership, deals with the land as though it were his own, is amply protected by the legal remedies, and seldom resorts to the equitable remedy of a strict foreclosure by which the mortgagor's right of redemption is extinguished. In the second class of states and territories, the change is complete; the positions of the two parties are exactly reversed. Equity deals primarily and almost exclusively with the mortgagee. His interest under the mortgage is no longer an estate; it is in all courts, of common law, of probate, and of equity, a mere lien, an appendage of the debt, personal assets, a thing in action assignable with the debt, but incapable of being separated from the debt and transferred by itself. He has no legal remedy on the mortgage,

<sup>1</sup> Hubbell v. Moulson, 53 N. Y. 225, 13 Am. Rep. 519, Kirch. 334; Speet v. Speet, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137.

no power to recover possession of the land, and can enforce the lien against the land in no legal action. The remedy which the courts of equity grant is based upon the notion that his interest is a mere equitable lien, and not an estate. The relief no longer consists in an extinguishment of the mortgagor's right, by which the absolute title is left in the mortgagee. Its primary object is an enforcement of the lien by the sale of the mortgaged premises and an application of the proceeds upon the debt. The mortgagor's estate is, of course, destroyed, or, to speak more accurately, is *transferred to the purchaser at the judicial sale*. The term "foreclosure" is still applied to this process, but is evidently a misnomer when used to describe the effect produced on the mortgagor's interest; no "equity of redemption" is foreclosed or cut off, but a legal estate is taken from the mortgagor and transferred to the purchaser. The mortgagee is permitted to buy in the land at the sale, and may thus acquire the title; but he acquires it, not as mortgagee, but as purchaser. The mortgagor, on the other hand, retaining the full legal estate, subject only to the encumbrance, and being entitled to the possession, use, rents, and profits of the land up to the time when his title is finally divested by a judicial sale in a proceeding to enforce the lien, is enabled to defend his estate and possession, not only against third persons, but against the mortgagee himself, by legal actions; and as long as he does not either expressly or impliedly *surrender* the possession to the mortgagee, he has no need nor occasion to invoke the aid of equity. There is, indeed, one situation possible in which he *must* resort to equity for relief. If, through his express consent, or through any other lawful means, the mortgagee has been permitted to obtain possession of the land, the mortgagor's only remedy is the equitable suit for a redemption, in which an account of the rents and profits received can be adjusted, the amount of the debt ascertained, the mortgage extinguished, and the mortgagor restored. The situation which requires this interposition of equity on behalf of the mortgagor is comparatively of very rare occurrence. The foregoing description of the equitable jurisdiction is especially applicable to the commonwealths which I have grouped in the second division; but it is also practically correct with reference to several of those assigned to the first division. A practical and accurate criterion, I think, would be found in the kind of remedy to enforce the mortgagee's rights which commonly prevails. In states where the remedy by strict foreclosure is the ordinary one, the double system of law and equity *must* necessarily exist in practice as well as in theory. Where the remedy by judicial sale under a decree is the usual one, the common-law notions, if they exist at all, must be virtually theoretical.

## SECTION III.

## VARIOUS FORMS AND KINDS OF MORTGAGE.

## ANALYSIS.

- § 1192. In equity, a mortgage is a security for a debt.
- § 1193. Once a mortgage, always a mortgage.
- § 1194. Mortgage, and conveyance with an agreement of repurchase, distinguished.
- § 1195. The general criterion: the continued existence of a debt.
- § 1196. A conveyance absolute on its face may be a mortgage.
- §§ 1197-1199. Mortgage to secure future advances.
  - § 1197. As between the immediate parties.
  - § 1198. As against subsequent encumbrancers and purchasers.
  - § 1199. As affected by the recording act.
- §§ 1200-1203. Mortgages to secure several different notes.
  - § 1200. As between the original parties.
  - § 1201. Assignees of the notes; order of priority among them.
  - § 1202. Effect of an assignment of the notes.
  - § 1203. Priority between an assignee and the mortgagees.

§ 1192. **In Equity, a Mortgage is a Security for a Debt.**—In the equitable view, a mortgage may be described in general terms as an assurance or pledge of or charge upon property, real or personal, for an antecedent, present, or future debt or loan, as security for and redeemable on the repayment of such debt.<sup>1</sup> The fundamental principle of equity is, that whenever a conveyance of land is given for the purpose of securing payment of an existing debt, it is a mortgage. If the fact is established that a debt exists between the parties, and the transaction did not amount to a present payment, satisfaction, or discharge of that debt, but recognized it as still continuing, to be paid at some future time, and was intended to be a security for such payment, then the instrument is always regarded in equity as a mortgage, whatever be its form.<sup>2</sup>

§ 1193. **Once a Mortgage, Always a Mortgage.**—In general, all persons able to contract are permitted to determine and control their own legal relations by any agreements which are not illegal, or opposed to good morals or to public policy; but the mortgage forms a marked exception to this principle. The doctrine has been firmly established from an early day that when the character of

<sup>1</sup> *Seton v. Slade* 7 Ves. 265, 273, 2 Scott 332.

<sup>2</sup> *Stinchfield v. Milliken*, 71 Me. 567, H. & B. 47, Shep. 62; *Campbell v. Dearborn* 109 Mass. 130, 12 Am. Rep. 671, Kirsh. 191. If the instrument be in fact a mortgage, it is entirely immaterial that there is no provision for a redemption, or no day fixed for the payment: *Joynes v. Statham*, 3 Atk. 388, 2 Scott 253.

a mortgage has attached at the commencement of the transaction, so that the instrument, whatever be its form, is regarded in equity as a mortgage, that character of mortgage must and will always continue. If the instrument is in its essence a mortgage, the parties cannot by any stipulations, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity. The debtor or mortgagor can not, in the inception of the instrument, as a part of or collateral to its execution, in any manner deprive himself of his equitable right to come in after a default in paying the money at the stipulated time, and to pay the debt and interest, and thereby to redeem the land from the lien and encumbrance of the mortgage; the equitable right of redemption, after a default is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right.<sup>1</sup>

**§ 1194. Mortgage, and Conveyance with Agreement of Repurchase, Distinguished.**—The principle that equity looks beneath the external form in determining questions connected with mortgage has frequently been applied to a particular mode of dealing with

<sup>1</sup>This doctrine is based upon the relative situation of the debtor and the creditor; it recognizes the fact that the creditor necessarily has a power over his debtor which may be exercised inequitably; that the debtor is liable to yield to the exertion of such power; and it protects the debtor absolutely from the consequences of his inferiority, and of his own acts done through infirmity of will. The doctrine is universal in its application, and underlies many special rules of equity. It extends to stipulations limiting the time of redemption, or the parties who may redeem; notwithstanding all such stipulations, the right to redeem is general: *Howard v. Harris*, 1 Vern. 33, Kirch. 430, Shep. 57. And stipulations inserted in a mortgage, giving the mortgagee a collateral advantage not properly belonging to the contract of mortgage, are invalid: *Willett v. Winnell*, 1 Vern. 488, Kirch. 469; *Jennings v. Ward*, 2 Vern. 520, Kirch. 470; *Broad v. Selve*, 9 Jur. N. S. 885, Kirch. 473; *Biggs v. Hoddinott* (1898), 2 Ch. 307, Kirch. 475; *Santley v. Wilde* (1899), 1 Ch. 747, Kirch. 488; *Noakes & Co., Ltd., v. Rice* (1902), App. Cas. 24. On the other hand, an agreement with the mortgagor that the mortgagee shall have a preference of purchasing—a pre-emption—in case of a sale by the mortgagor is valid: *Orby v. Trigg*, 2 Eq. Cas. Abr. 599, pl. 24, 9 Mod. 2, Kirch. 470. The mortgagor may, at any time after the execution of the mortgage, by a separate and distinct transaction, sell or release his equity of redemption to the mortgagee: *Trull v. Skinner*, 17 Pick 213, Kirch. 445; *Pritchard v. Elton*, 38 Conn. 434, Kirch. 458; *De Martin v. Phelan*, 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115, Kirch. 465. This is a transaction, however, which a court of equity will examine strictly, in order to be satisfied that it is a perfectly fair and independent proceeding, entirely unconnected with the original contract of mortgage: *Villa v. Rodriguez*, 12 Wall. 323, 20 L. ed. 406, Kirch. 453; *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171, Kirch. 583; *Holridge v. Gillespie*, 2 Johns. Ch. 30, Kirch. 579.

real property. Where land is conveyed by an absolute deed, and an instrument is given back as a part of the same transaction, not containing the condition ordinarily inserted in mortgages, but being an agreement that the grantee will reconvey the premises if the grantor shall pay a certain sum of money at or before a specified time, the two taken together may be what on their face they purport to be,—a mere sale with a contract of repurchase,—or they may constitute a mortgage. In the first case, where the transaction is merely a sale and a contract of repurchase, the agreement must be fulfilled according to its terms. If the grantor fails to pay the money at the stipulated time, all his rights, either at law or in equity, under the contract are gone; there is no equity of redemption.<sup>1</sup> In the second case, if the transaction be a mortgage, all the qualities and incidents of a mortgage attach, whatever be its external form, and whatever be the collateral stipulations. The maxim, Once a mortgage, always a mortgage, applies to this condition of fact with especial emphasis. The rights of the two parties are reciprocal: that of the grantor to redeem after a default in payment at the specified time is complete; that of the grantee to foreclose and cut off this equity of redemption is no less clear.<sup>2</sup>

§ 1195. **The General Criterion—The Continued Existence of a Debt.**—Whether any particular transaction does thus amount to a mortgage or to a sale with a contract of repurchase must, to a large extent, depend upon its own special circumstances; for the question finally turns, in all cases, upon the real intention of the parties as shown upon the face of the writings, or as disclosed by extrinsic evidence. A general criterion, however, has been established by an overwhelming consensus of authorities, which furnishes a sufficient test in the great majority of cases; and whenever the application of this test still leaves a *doubt*, the American courts, from obvious motives of policy, have generally leaned in favor of the mortgage. This criterion is the continued existence of a debt or liability between the parties, so that the conveyance is in reality intended as a security for the debt or indemnity against the liability. If there is an indebtedness or liability between the parties, either a debt existing prior to the conveyance, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is still left subsisting, not being discharged or satisfied by the conveyance, but the grantor is regarded as still owing and bound

<sup>1</sup> *Conway v. Alexander*, 7 Cranch 218, 3 L. ed. 321, Kirsh. 151; *Coyle v. Davis*, 116 U. S. 109, 6 Sup. Ct. 314, 29 L. ed. 583, Kirsh. 156.

<sup>2</sup> *Russell v. Southard*, 12 How. 139, 13 L. ed. 927, Kirsh. 157; *Flagg v. Mann*, 2 Sum. 486, Fed. Cas. No. 4847, Kirsh. 167; *Peterson v. Clark*, 15 Johns. 205, Kirsh. 412.

to pay it at some future time, so that the payment stipulated for in the agreement to reconvey is in reality the payment of this existing debt, then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instruments. On the contrary, if no such relation whatsoever of debtor and creditor is left subsisting, then the transaction is not a mortgage, but a mere sale and contract of repurchase.<sup>1</sup> The writings *may* show on their face that the relation of debtor and creditor still continues, and that its existence and consequences are contemplated by the parties; or they may entirely fail to show any such fact, and may consist simply of an absolute conveyance and of a naked agreement to reconvey. While in the former case parol evidence is clearly inadmissible to contradict the terms of the writings, and to destroy their necessary character as a mortgage, in the latter case extrinsic parol evidence is always admissible to show the real situation of the parties, the existence of a debt, their intention to secure payment of that debt, and the actual character of the instruments as constituting a mortgage. While each case must involve its own special facts, the following circumstances are regarded by the courts as important, and as throwing much light upon the real intent and nature of the transactions: The existence of a collateral agreement by the grantor to pay money; his liability to pay interest; where a debt existed antecedent to the conveyance, the surrender or cancellation of the evidences of such indebtedness, or the suffering them to remain outstanding and operative, or the substitution of others in their place; the price of the conveyance being inadequate; the grantor still left in possession; an application or negotiation for a loan preceding or pending the transaction.

**§ 1196. A Conveyance Absolute on its Face may be a Mortgage.**

—Any conveyance of land absolute on its face, without anything in its terms to indicate that it is otherwise than an absolute conveyance, and without any accompanying written defeasance, contract of repurchase, or other agreement, may, in equity, by means of extrinsic and parol evidence, be shown to be in reality a mortgage as between the original parties, and as against all those deriving title from or under the grantee, who are not bona fide purchasers for value and without notice. The principle which underlies this doc-

<sup>1</sup> *Cases in which the transaction has amounted to a mortgage:* Keithley v. Wood, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265; Lounsbury v. Norton, 59 Conn. 170, 22 Atl. 153; Bigler v. Jack, 114 Iowa, 667, 87 N. W. 700. *Cases of sale and contract to repurchase:* Conway's Ex'rs v. Alexander, 7 Cranch 218, Kirch. 151; Pace v. Bartles, 47 N. J. Eq. 170, 20 Atl. 352. *Antecedent debt:* If left existing, the conveyance is a mortgage; if satisfied, it is not a mortgage: Slowey v. McMurray, 27 Mo. 113, 116, 72 Am. Dec. 251.

trine is the fruitful source of many other equitable rules:<sup>1</sup> that it would be a virtual fraud for the grantee to insist upon the deed as an absolute conveyance of the title, which had been intentionally given to him, and which he had knowingly accepted, merely as a security, and therefore in reality as a mortgage. The general doctrine is fully established, and certainly prevails in a great majority of the states, that the grantor and his representatives are always allowed in equity to show, by parol evidence, that a deed absolute on its face was only intended to be a security for the payment of a debt, and thus to be a mortgage, although the parties deliberately and knowingly executed the instrument in its existing form, and without any allegations of fraud, mistake, or accident in its mode of execution. As in the last preceding case, the sure test and the essential requisite are the continued existence of a debt. If there is no indebtedness, the conveyance cannot be a mortgage; if there is a debt existing, and the conveyance was intended to secure its payment, equity will regard and treat the absolute deed as a mortgage. The presumption, of course, arises that the instrument is what it purports on its face to be, an absolute conveyance of the land; to overcome this presumption, and to establish its character as a mortgage, the cases all agree that the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail.<sup>2</sup> Whenever a deed absolute on its face is thus treated as a mortgage, the parties are clothed with all the rights, are subject to all the liabilities, and are entitled to all the remedies of ordinary mortgagors and mortgagees. The grantee may maintain an action for the foreclosure of the grantor's equity of redemption; the grantor may maintain an action to redeem and to compel a re-

<sup>1</sup> Among others, of the familiar doctrine concerning the specific performance of verbal contracts for the sale of land which have been part performed. The principle, in its broadest generality, prohibits statutes and legal rules designed to prevent fraud from being so used as to produce equitable fraud.

<sup>2</sup> There are some decisions which limit the operation of this doctrine, even in equity, to cases where the absolute form of the conveyance is the result of fraud, mistake, or accident. This narrow view seems to have resulted from an erroneous conception of the principle upon which the doctrine rests; the equitable notion of fraud in the grantee's insisting upon the conveyance as absolute, when it was given and accepted only as a security, is carried back to the inception of the instrument, and is improperly made to involve the existence of fraud in the very execution of the deed. The doctrine as stated in the text is followed by nearly if not quite all the recent decisions: *Maxwell v. Lady Mountacute*, Prec. Ch. 526, 1 Scott 461; *Cotterell v. Purchase*, Cas. t. Talb. 61, Kirch. 175; *Joynes v. Statham*, 3 Atk. 388, 2 Scott 253; *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775, Shep. 59; *Stinchfield v. Milliken*, 71 Me. 567, H. & B. 47, Shep. 62; *Knapp v. Bailey*, 79 Me. 201, 1 Am. St. Rep. 295, 9 Atl. 122, H. & B. 75; *Campbell v. Dearborn*, 109 Mass. 130; 12 Am. Rep. 671, Kirch. 191; *Odell v. Montross*, 68 N. Y. 499, Kirch. 460.

conveyance upon his payment of the debt secured. If the grantee goes into possession, he is in reality a mortgagee in possession, and as such is liable to account for the rents and profits.<sup>2</sup>

§ 1197. **Mortgages to Secure Future Advances.**—Whatever disinclination may at any time have been felt by courts to sustain this kind of security, it is now well settled that mortgages given in good faith to secure future advances, either in addition to or without a present indebtedness, are valid and binding between the parties. When no claims of subsequent encumbrancers or purchasers have intervened, there is no longer any doubt that the mortgagee can enforce the security for all the sums which he has advanced to the mortgagor, under the mortgage and within its scope, both when such advances were optional on his part, and when he was bound to make them by some collateral agreement with the mortgagor. If the advances were actually made within the scope of the mortgage, the fact that they were originally optional or obligatory would be wholly immaterial between the parties themselves.<sup>1</sup> The fact that the mortgage is given to secure future advances need not appear on the face of the instrument itself. If it purports to secure the payment of a specified amount, the mortgage need not express the intention or agreement of the parties that this amount of indebtedness is to be made up wholly or in part by future advances; the agreement to that effect may be entirely verbal.<sup>2</sup> More definiteness and certainty, however, are necessary to render the mortgage operative against subsequent purchasers and encumbrancers.

§ 1198. **The Same. As against Subsequent Encumbrancers or Purchasers.**—As such a mortgage is a valid security between the parties, it is plainly an equally valid and effective security, and gives the holder thereof a prior lien, against subsequent purchasers and encumbrancers, for all advances made *before* the execution of the subsequent conveyances or mortgages by the mortgagor, or the docketing of the subsequent judgments against him. The only real question to be considered relates to the validity of the mortgage as a security for advances made *after* the execution or recording of a subsequent mortgage by, or the docketing of a subsequent judgment against, the mortgagor; and in answering this question, there is, to some extent, a direct conflict of opinion among the American decisions. It may be regarded as established that where a mortgage has been given to secure future advances, and advances are made in pursuance thereof *after* the execution or recording of a subsequent mortgage or the docketing of a subsequent judgment, but without

<sup>1</sup> See *Morris v. Budlong*, 78 N. Y. 543, Kirch. 559.

<sup>2</sup> *Ackerman v. Hunsicker*, 85 N. Y. 43, 39 Am. Rep. 621, Kirch. 285.

<sup>3</sup> See *Kirby v. Raynes*, 138 Ala. 194, 100 Am. St. Rep. 39, 35 South. 118.

any notice to the mortgagee of such subsequent encumbrance, upon the general principles of equity, independently of the recording acts, the subsequent encumbrancer can claim no preference for his own security; in other words, the first mortgage remains prior in effect, as it is prior in time.<sup>1</sup>

**§ 1190. The Same.—As Affected by the Recording Acts.**—The general doctrine being thus established that the mortgage constitutes a prior lien for all advances made in pursuance thereof before notice of a subsequent encumbrance or conveyance, the effect of the recording acts remains to be considered. It is at this point that the diversity of opinion among the American courts has chiefly arisen. The following conclusions seem to be in harmony with established principles, and to be sustained by the weight of authority; and they may be regarded, I think, as furnishing the prevailing rule: When a mortgage to secure future advances reasonably states the purposes for which it is given, its record is a constructive notice to subsequent purchasers and encumbrances; they are thereby put upon an inquiry to ascertain what advances or liabilities have been made or incurred. The record of a subsequent mortgage or conveyance, or the docketing of a subsequent judgment, is not a constructive notice of its existence to such prior mortgagee. The prior mortgage, therefore, duly recorded, has a preference over subsequent recorded mortgages or conveyances or subsequent docketed judgments, not only for advances previously made, but also for advances made after their recording or docketing without notice thereof. As the record of the second encumbrance does not operate as a constructive notice, it requires an actual notice to cut off the lien of the prior mortgage; and the subsequent encumbrancer may, by giving actual notice, at any time prevent further advances from being made to his own prejudice.<sup>1</sup> There is a group of decisions which adopt a different view, an opposite conclusion. They seem to regard the lien for securing future advances as only arising, or at all events as only perfected, so as to be available, at and from the time when the advance is actually made. An advance, therefore, although in pursuance of a prior mortgage duly recorded, if made after the record of a subsequent mortgage or conveyance, or the docketing of a subsequent judgment, is affected with constructive notice of such subsequent encumbrance or conveyance, and its lien is consequently postponed to that of the second record. By this rule, a mortgage to secure future advances

<sup>1</sup> *Hopkinson v. Rolt*, 9 H. L. Cas. 514, 25 Beav. 461.

<sup>1</sup> The courts which adopted this rule apply it alike, whether the advances were optional or obligatory: *Ackerman v. Hunsicker*, 85 N. Y. 43, 59 Am. Rep. 621; *Robinson v. Williams*, 22 N. Y. 380, Kirch. 274.

secures a preference only for those advances actually made before the record of a subsequent encumbrance or conveyance; it loses its precedence for all advances made after such record.<sup>3</sup> The lien of the prior mortgage will, of course, prevail against all subsequent purchasers or encumbrancers whose rights do not attach until after the advances are made, and against all who are not bona fide purchasers for value without notice.<sup>3</sup> A distinction has been made, in some of the cases, between *optional* and *obligatory* advances. Where the advance is optional with the mortgagee, it has been said that the lien thereof does not attach until it is actually made; and consequently such an advance made after notice of a second encumbrance loses its preference. Here, again, the decisions are not uniform; some require an *actual* notice in order to cut off the lien even of an optional advance; with others the recording gives a constructive notice which is sufficient.<sup>4</sup> Finally, there are decisions by most able courts which give the prior mortgage to secure future advances an absolute preference; which maintain the mortgagee's supremacy, and preserve the lien of his mortgage against intervening subsequent encumbrances, even for advances made after receiving actual notice of such encumbrances.<sup>5</sup> This conclusion is based upon the doctrines that the executory agreement of the mortgagee creates a full and perfect lien in equity, effectual against all persons who are charged with notice thereof, and that the record of the mortgage furnishes such a notice affecting all subsequent encumbrances.

§ 1200. **Mortgages to Secure Several Different Notes.**—In many of the states the mortgage debt is ordinarily evidenced by a promissory note in place of a bond. A special form of security has thus become common in certain parts of this country which is probably

<sup>3</sup>The fundamental error of this view, in my opinion, consists in its mistaken conception of the nature of an equitable lien, in regarding the lien as arising at and from *the act of making the advance*, instead of from the previous *executory agreement* by which the land was bound as security for the future advances: See post, chapter on liens. *Ladue v. Detroit etc. R. R.*, 13 Mich. 380, 87 Am. Dec. 759 (the opinion of Christiancy, J., gives the ablest presentation of this rule).

<sup>4</sup>*McCarty v. Chalfant*, 14 W. Va. 531.

<sup>5</sup>*Heintze v. Bentley*, 34 N. J. Eq. 562 (first mortgagee *having knowledge* of a second encumbrance).

<sup>6</sup>*Witezinski v. Everman*, 51 Miss. 841. These decisions, it will be seen, reaffirm the ruling of Lord Chancellor Cowper in the early case of *Gordon v. Graham*, 2 Eq. Cas. Abr. 598, overruled in *Hopkinson v. Rolt*; and without entering into any discussion, I would venture to express the opinion that they are based upon the true principle, and formulate the correct doctrine, involved in and derived from the generally accepted construction of the American recording acts.

unknown in England; the mortgage debt is represented by a series of several distinct promissory notes often negotiable in form, all bearing the same date, and generally made payable in a successive order at different times,—as, for example, in one, two, three, and four years from date,—and the mortgage expressly secures the payment of these notes according to their respective tenors.<sup>1</sup> While all these notes and the mortgage remain in the hands of the mortgagee, or when they are all assigned with the mortgage to and held by the same person, plainly no questions can arise other than those presented by the ordinary form of mortgage. It is only when the mortgagee assigns the notes separately to different persons, or when he assigns a portion of them and retains the others himself, that the special questions arise which are now to be considered; and these questions relate chiefly to the rights of the respective holders, and to the order of priority among them.

**§ 1201. Rights of Assignees—Order of Priority among Them.**—Where all the notes stand on the same footing,—that is, they are all payable at the same time,—the equities of all the assignees are equal, and there is no preference or priority among them in enforcing the security of the mortgage. All the assignees are entitled to a pro rata share of the proceeds of the mortgaged premises, in case there is not sufficient to pay all the notes in full.<sup>1</sup> The notes, however, are commonly made payable at different times, in regular succession, and this condition of fact presents the real difficulty,—a difficulty apparently so great that the courts of various states have reached the most opposite conclusions, and have established several totally unlike rules. Where the notes, payable at different dates, are assigned by the mortgagee to different persons, either at the same or different times, and either with or without an accompanying assignment of the mortgage, the following may be regarded as the *prevailing* general rule determining the right of the respective assignees: Since the assignment of each note is a pro tanto assignment of the mortgage, the holders of the successive notes are regarded as being exactly in the situation of holders of successive mortgages upon the same land; their equities as among themselves, and their rights to enforce the security of the mortgage, are not equal; they are entitled to priority in the mortgage security of their respective notes according to the order of time in which such notes become due and payable. The order of maturing among the notes fixes the order of preference and

<sup>1</sup> In the Eastern states, where a bond, instead of a note, is the ordinary evidence of the debt, several separate bonds are sometimes given, payable at different times, each representing a distinct installment of the mortgage debt.

<sup>1</sup> *Schwartz's Ex'rs v. Leist*, 13 Ohio St. 419.

priority among the respective assignees.<sup>2</sup> Another rule had been adopted by the courts of several states. Upon the same condition of facts, they hold there is no preference or priority whatever among the various assignees; the terms of their respective assignments, or of the maturing of their notes, are alike immaterial; all the assignees are entitled, as among themselves, to share pro rata in the security of the mortgage and in the proceeds of the mortgaged premises, if there is not sufficient to pay all in full.<sup>3</sup> In a very few of the states, other still more special rules are adopted in preference to either of these two principal theories.<sup>4</sup> Finally, the operation of these general rules may be controlled and changed by express provisions contained in the mortgage itself. Such being the doctrines concerning the rights of assignees arising from the terms of the mortgage and notes themselves, it is generally held by courts adopting either of the two principal rules before stated that the mortgagee in assigning a note may, by express agreement with the assignee thereof, change the order of priority or equality which would otherwise exist, and may establish a different order, giving precedence of lien to a note maturing at a later time, and that such agreement would be binding upon any second or subsequent assignees of other notes.<sup>5</sup>

<sup>2</sup>This rule, which is adopted in the greatest number of states and by a large majority of the decisions, seems to be based upon a correct application of equitable principles and analogies. The rights of the holders are fixed by what expressly appears upon the face of the writings; the mortgage is a common bond uniting all the notes, and the various assignees have through it a clear notice of each other's rights. The order of the respective *assignments* is thus wholly immaterial upon the rights of priority among the assignees: *Mitchell v. Ladew*, 36 Mo. 526, 88 Am. Dec. 156; *Leavitt v. Reynolds*, 79 Iowa 348, 44 N. W. 567, 7 L. R. A. 365.

<sup>3</sup>According to this rule, it would be impossible for the holder of a note or notes first maturing to foreclose the mortgage entirely, and by a sale of the premises cut off the rights of the other holders. *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 45 Am. St. Rep. 748, 29 S. W. 903 (this case contains an extensive collection of authorities illustrating each of the three main rules stated in the text).

<sup>4</sup>According to the first of these rules, when notes maturing at different dates are assigned at different times, the assignees have priority according to *the order of the assignments*, irrespective of the order of maturing. This peculiar rule is based upon the notion that as between the mortgagee who assigns one note and retains the others, the assignee is entitled to the preference; and the first assignee having thus a priority as against the mortgagee, any subsequent assignee could only succeed to this position of the mortgagee, and so the assignees would all take in the order of their assignments: *Parsons v. Martin*, 86 Ala. 352, 5 South. 467.

<sup>5</sup>The reasons for holding such a preference binding upon subsequent assignees of other notes are well and fully stated in *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 45 Am. St. Rep. 748, 29 S. W. 903.

§ 1202. **Effect of Assigning the Note.**—Wherever the equitable theory of the mortgage is admitted, the assignment of one of the notes by itself, without any accompanying transfer of the mortgage, is an assignment of an interest pro tanto in the mortgage. Each assignee is, through the mortgage, charged with notice of the equitable interests of all the other assignees.<sup>1</sup> In the states which adopt the first general rule as given in the preceding paragraph, the assignee of the note first maturing is entitled to foreclose the mortgage and procure the mortgaged premises to be sold, when his note becomes due, and thus to cut off the liens of the other notes. The holders of the other notes, in order to protect their own interests, are entitled to redeem from him, before the final sale, in the order of their various notes.

§ 1203. **Priority between the Assignee and the Mortgagee.**—Thus far I have spoken of the rights of assignees among themselves, where all or some of the notes have been assigned to various holders; a different principle may operate between an assignee and the mortgagee. When the mortgagee assigns one or more of the notes, and retains the remainder of the series, it is generally held that the assignee is entitled to a priority of lien as against the mortgagee, with respect to the note or notes so transferred; and this rule operates without regard to the order in which the notes held by the two parties mature.<sup>1</sup>

<sup>1</sup> If the mortgagee should, therefore, assign a part of the notes to A, and the remaining notes, together with the mortgage itself, to B, B would not acquire any precedence from the fact of his holding the mortgage; *Wilson v. Eigenbrodt*, 30 Minn. 4, 13 N. W. 907.

<sup>1</sup> For example, if there was a series of three notes, and the mortgagee assigned No. 3, then the assignee, having a priority of lien, would be entitled to have his note paid in full, although it matured last, before the proceeds were applied upon the notes remaining in the mortgagee's hands, whenever the proceeds were insufficient to pay all in full. The mortgagee having transferred the note and received the consideration therefor, it would be inequitable for him to deprive the assignee of any part of its value, by insisting upon a priority or even an equality of right in sharing the insufficient proceeds. *Alden v. White*, 32 Ind. App. 671, 102 Am. St. Rep. 261, 66 N. E. 509. But the following case holds that they both share ratably; *Donley v. Hays*, 17 Serg. & R. 400.

## SECTION IV.

## INTERESTS, RIGHTS, AND LIABILITIES OF THE MORTGAGOR AND OF THE MORTGAGEE.

## ANALYSIS.

- § 1204. General interests of the mortgagor and the mortgagee.
- §§ 1205-1208. I. Conveyance by the mortgagor.
  - § 1205. Conveyance "subject to" the mortgage; effect of.
  - § 1206. Grantee "assumes" the mortgage; effect of.
  - § 1207. *Rationale* of the grantee's liability.
  - § 1208. Assumption by the mortgagee.
- §§ 1209-1214. II. Assignment of the mortgage.
  - § 1209. Assignment at law and in equity.
  - § 1210. Assignment of the debt is, in equity, an assignment of the mortgage; what operates as such assignment.
  - § 1211. Equitable assignment by subrogation.
  - § 1212. In whose favor such equitable assignments exists.
  - § 1213. In whose favor such equitable assignment does not exist.
  - § 1214. Right to compel an actual assignment.
- §§ 1215-1218. III. Rights and liabilities of mortgagee in possession.
  - § 1215. To whom the doctrine applies in different states.
  - § 1216. With what he is chargeable; rents and profits, willful default.
  - § 1217. His allowances and credits, disbursements, repairs, improvements, compensation.
  - § 1218. Liability to account.
- §§ 1219-1226. IV. Redemption from the mortgage.
  - § 1219. By the mortgagor; suit to redeem.
  - § 1220. By other persons.
  - §§ 1221-1226. Rights of contribution and of exoneration upon redemption.
    - § 1221. General doctrine; classes of cases; equities equal or unequal.
    - § 1222. 1. Where their equities are equal; titles simultaneous.
    - § 1223. 2. Where their equities are unequal, although the titles are simultaneous; tenants for life or for years and remaindermen; dowress and reversioner.
    - § 1224. 3. Inequality of equities where titles are not simultaneous; between mortgagor and his grantee of a parcel; between successive grantees; inverse order of alienation.
    - § 1225. The same; what circumstances disturb these equities and defeat this rule.
    - § 1226. 4. A release by the mortgagee of one or more parcels.
  - § 1227. V. Foreclosure; foreclosure proper or "strict foreclosure."
  - § 1228. Foreclosure by judicial sale.

§ 1204. **General Interests of Mortgagor and Mortgagee.**—The doctrines which prevail in this country concerning the respective interests of the mortgagor and the mortgagee, and their ordinary rights which arise therefrom, have been explained in the preceding section II. of the present chapter. In equity, the mortgagor's interest continues to be the substantial ownership of the land, sub-

ject only to the lien of the mortgage; and in those states where the purely equitable theory has been adopted this ownership is the legal estate; in the others it is equitable,—the equity of redemption. A mortgagor may therefore deal with the land in any lawful manner, subject only to the lien which affects it through all of his subsequent dealings and in all of its subsequent relations. Among the necessary incidents of the mortgagor's ownership are the following: Upon his death intestate, the land, if owned in fee, descends to his heirs; he may devise it by will, and it is subject to dower and to curtesy in all the states where these life estates are preserved. It is generally liable to be levied on and sold on execution issued upon a judgment against the mortgagor.<sup>1</sup> In all the states the mortgagor is entitled to possession against third persons; and in all the states which have adopted the purely equitable theory, he is entitled to possession against the mortgagee and those claiming under him, until the time when a foreclosure sale has been finally consummated. While in possession, according to either theory he may use the premises in any reasonable manner, and is not accountable to the mortgagee for the rents, profits, and income during such possession.<sup>2</sup> The interest of the mortgagee, in equity, is simply a lien, a thing in action, a mere adjunct or accessory of the debt. It is entirely personal assets, and on his death passes to his executors or administrators, may be bequeathed by will, and is not subject to dower or curtesy. Like other things in action, it is liable to be reached by the creditors of the mortgagee, and may be pledged by him, or given as collateral security for an indebtedness. In fact, the relation of the mortgagee to the mortgagor is purely a conventional one, and not fiduciary. The

<sup>1</sup> To this liability there is one most important exception. It is the prevailing rule—in some states based upon statute—that where the mortgagee, or other holder of the mortgage, elects to sue at law on the mortgage debt, and recovers a personal judgment against the mortgagor, he cannot, by his execution, levy on and sell the very land itself which is covered by the mortgage, but must satisfy his judgment out of other property (if any) of the mortgagor. The reasons of this rule are obviously just. If the mortgaged land was sold on such a judgment, the purchaser would take it *still encumbered* by the mortgage; it would not, therefore, sell for its fair value, and thus the mortgagor's property would be unjustly sacrificed. Furthermore, since the mortgagee had a *specific* lien on the particular tract by his mortgage, he ought not, in equity and justice, to obtain and enforce a *general lien* by judgment upon the very same tract: See *Palmer v. Foote*, 7 Paige, 437; *Atkins v. Sawyer*, 1 Pick. 351; 11 Am. Dec. 188; *Washburn v. Goodwin*, 17 Pick. 137; *Powell v. Williams*, 14 Ala. 476; 48 Am. Dec. 105; *Barker v. Bell*, 37 Ala. 354, 358; *Baldwin v. Jenkins*, 23 Miss. 206; *Thornton v. Pigg*, 24 Mo. 249; per contra, *Freeby v. Tupper*, 15 Ohio, 467; and see *Trimm v. Marsh*, 54 N. Y. 599; 13 Am. Rep. 623; and Cal. Code Civ. Proc., sec. 726.

<sup>2</sup> In very special cases the mortgagor may be restrained from committing waste and thereby endangering the security. See post, § 1348.

mortgage is a mere security for a debt, and imposes no duty upon the mortgagee to protect the interests of the mortgagor, unless there is some special covenant creating such a duty.<sup>2</sup>

**§ 1205. I. Conveyance by the Mortgagor Subject to the Mortgage.**—The mortgagor can convey the entire mortgaged premises to a single grantee; or he can convey them in parcels to different grantees simultaneously or successively; or he can convey a portion and retain the residue. Where the mortgagor conveys by a deed absolutely silent with respect to an outstanding mortgage, the grantee, of course, takes the land encumbered by the mortgage, if he has actual notice of it, or constructive notice by record or otherwise.<sup>1</sup> Where a mortgagor conveys by a deed which states simply that the conveyance is “subject to” a certain specified mortgage, or words to that effect, the grantee takes the land burdened with the lien. As between himself and the grantor-mortgagor, the land is the primary fund out of which the mortgage debt should be paid; he cannot claim that the mortgagor should pay off the mortgage and thus exonerate the land.<sup>2</sup> He does not, however, become personally liable for the mortgage debt, but the mortgagor remains personally liable for any deficiency arising upon a foreclosure sale of the land.<sup>3</sup> A grantee who thus takes a conveyance subject to a mortgage is presumed to have included the mortgage debt in the purchase price, and is not, therefore, permitted to dispute the validity of the mortgage; in this respect he is in the same position as one who expressly assumes the mortgage.<sup>4</sup>

**§ 1206. The Same. Grantee Assumes the Mortgage.**—The mortgagor may not only convey the premises “subject to” the mortgage; he may also convey them in such a manner that the grantee assumes the payment of the mortgage debt, and thus renders himself personally liable therefor. The element which lies at the bottom of such assumption, and which alone gives it efficacy accord-

<sup>1</sup>Cornell v. Woodruff, 77 N. Y. 203, 206, per Rapallo, J. Whether a mortgagee or his assignee out of possession can become a purchaser at a tax sale of the mortgaged premises, with the same effect as against the mortgagor and other mortgagees as if he were a stranger to the estate, is a question on which the authorities are in conflict. To the effect that he cannot, see Hall v. Wescott, 15 R. I. 373, 5 Atl. 629, Kirch. 598.

<sup>2</sup>See Boxheimer v. Gunn, 24 Mich. 372. Where the mortgage is unrecorded, the subsequent grantee may, by means of a prior record, under the operation of the recording acts, obtain a title free from the lien of the mortgage as a bona fide purchaser for the value and without notice.

<sup>3</sup>Johnson v. Zink, 51 N. Y. 333.

<sup>4</sup>Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213; Elliott v. Sackett, 108 U. S. 140, 2 Sup. Ct. 375, 27 L. ed. 680.

<sup>5</sup>Johnson v. Thompson, 129 Mass. 398; Pratt's Ex'r v. Nixon, 91 Ala. 192, 8 South. 751.

ing to the theory held by some courts, is the fact that the mortgage debt is included in the purchase price as a constituent part thereof, and the grantee actually pays or secures to his grantor only the balance of the gross price after deducting such debt. No particular form of words is necessary to create a binding assumption; it is sufficient that the language shows unequivocally an intent on the part of the grantee to assume the liability of paying the mortgage debt, but this intent must clearly appear.<sup>1</sup> When the deed executed by the grantor contains a clause sufficiently showing such an intent, the acceptance thereof by the grantee consummates the assumption, and creates a personal liability on his part, which inures to the benefit of the mortgagee as though he had himself executed the deed.<sup>2</sup> When a grantee thus assumes payment of the mortgage debt as a part of the purchase price, the land in his hands is not only made the primary fund for payment of the debt, but he himself becomes personally liable therefor to the mortgagee or other holder of the mortgage. The assumption produces its most important effect, by the operation of equitable principles, upon the relations subsisting between the mortgagor, the grantee, and the mortgagee. As between the mortgagor and the grantee, the grantee becomes the principal debtor primarily liable for the debt, and the mortgagor becomes a surety, with all the consequences flowing from the relation of suretyship. As between these two and the mortgagee, although he may treat them both as debtors and may enforce the liability against either, still, after receiving notice of the assumption, he is bound to recognize the condition of suretyship, and to respect the rights of the surety in all of his subsequent dealings with them.<sup>3</sup> Payment, therefore, by a grantee

<sup>1</sup> See *Comstock v. Hitt*, 37 Ill. 542, 546, 1 Ames Eq. Jur. 139, 2 Scott 482; *Hopper v. Calhoun*, 52 Kan. 703, 35 Pac. 816, 39 Am. St. Rep. 363 (evidence must be clear).

<sup>2</sup> *Johns v. Wilson*, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. ed. 613; *Poe v. Dixon*, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713. It is even held that a verbal promise by the grantee to pay the mortgage creates such a personal liability, even though the conveyance appears on the face of the deed to be merely subject to the mortgage: *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 63 Am. St. Rep. 892 (the agreement must be established by a clear preponderance of evidence). But this rule is denied in *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. ed. 456.

<sup>3</sup> *Calvo v. Davies*, 73 N. Y. 211, 215, 29 Am. Rep. 130; *Poe v. Dixon*, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713. Since such grantee thus becomes the principal debtor, primarily and absolutely liable for the debt, when he pays the mortgage it is completely extinguished, when he takes an assignment of it it is completely merged. He cannot by any form of assignment, legal or equitable, or by subrogation, keep the mortgage alive as against other liens on the land: *Birke v. Abbott*, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474; and see ante, § 797. On the other hand, when the mortgagor, having become a

who has assumed the entire mortgage debt completely extinguishes the mortgage; he cannot be subrogated to the rights of the mortgagee, and keep the mortgage alive for any purpose. While the mortgagee may release the mortgagor without discharging the grantee, his release of the grantee, or his valid extension of the time of payment to the grantee, without the mortgagor's consent, would operate to discharge the mortgagor. In short, the doctrines concerning suretyship must control the dealings between these three parties.<sup>4</sup> When land is thus conveyed, with an assumption of a mortgage by the grantee contained in the deed, subsequent grantees holding under the conveyance are charged with notice, and the land continues to be the primary fund for payment, as though the fact were recited in their own deeds.<sup>5</sup> In the foregoing statement of the general doctrine, it has been supposed that the grantee assumes payment of the whole mortgage. If a grantee, in purchasing a part of the mortgaged premises, assumes payment of a part of the mortgage, he becomes personally and primarily liable only for such part.<sup>6</sup> The general doctrine is well settled that a grantee who thus assumes payment, in whole or in part, of a mortgage as a portion of the purchase price of the land conveyed to him cannot contest the validity of the mortgage on any ground and thus evade the liability which he has assumed.<sup>7</sup>

surety, pays off the mortgage, he is entitled to hold it by equitable assignment or subrogation, for the purpose of reimbursement from the grantee: *Poe v. Dixon*, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713; *Rice v. Sanders*, 152 Mass. 108, 24 N. E. 1079, 23 Am. St. Rep. 804, 8 L. R. A. 315. The dealings of the mortgagee with these two parties are also governed by the doctrines of suretyship. In his dealings with the grantee, at least after notice, the mortgagee must respect the rights of the mortgagor-surety. A valid extension of the time of payment, made by the mortgagee to the grantee, without the consent of the mortgagor, will therefore discharge the mortgagor from his liability: *Calvo v. Davies*, supra; *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. ed. 118; *Merriman v. Miles*, 54 Nebr. 566, 74 N. W. 861, 69 Am. St. Rep. 731. On the question of the grantor's power to release the grantee from his assumption of personal liability, without the mortgagee's consent, there is some conflict. See *Pom. Eq. Jur.*, note, at this point; compare *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. 756, 15 Am. St. Rep. 508, 6 L. R. A. 610, with *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225.

<sup>4</sup> *Nelson v. Brown*, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755.

<sup>5</sup> Whether a remote grantee of the mortgagor is liable on his agreement to assume the debt in the case when his immediate grantor was not personally liable, is a question on which the cases disagree. Compare *Enos v. Sanger*, 96 Wis. 151, 70 N. W. 1069, 65 Am. St. Rep. 38, 37 L. R. A. 862, with *Hicks v. Hamilton*, 144 Mo. 495, 46 S. W. 432, 66 Am. St. Rep. 431.

<sup>6</sup> *Snyder v. Robinson*, 35 Ind. 311, 9 Am. Rep. 738.

<sup>7</sup> *Scanlon v. Grimmer*, 71 Minn. 351, 70 Am. St. Rep. 326, 74 N. W. 146; *Cramer v. Lepper*, 26 Ohio St. 59, 20 Am. Rep. 756; and see ante, § 937.

§ 1207. **Rationale of the Grantee's Liability.**—The ground of the grantee's liability adopted by the courts of a large majority of the states is that of contract. It is an application of the general doctrine, so widely prevailing in this country that it may properly be called an American doctrine,—where A makes a promise directly to B, for the benefit of C, upon a consideration moving alone from B, C, being the party beneficially interested, may treat the promise as though made to himself, and may maintain an action at law upon it in his own name against A, the promisor. According to this generally accepted view, the liability of the grantee who thus assumes the payment of an outstanding mortgage does not depend upon any extension of the equitable doctrine concerning subrogation; it is strictly legal, arising out of a contract binding at law; the mortgagee, instead of enforcing the liability by a suit in equity for a foreclosure, may maintain an action at law against the grantee upon his promise, and recover a personal judgment for the whole mortgage debt.<sup>1</sup> Another and entirely different rationale is adopted by the courts of certain states: that the liability of the grantee to the mortgagee does not arise from contract, and does not exist at law; but it results from an application, or more correctly an extension, of the equitable doctrine of subrogation. Since the mortgagor becomes a surety, the creditor is entitled by subrogation to all the securities which he holds from the principal debtor, and is thus entitled in equity to enforce the promise made to him by the grantee.<sup>2</sup> According to the general theory first above stated, the grantee's assumption and promise are so completely for the benefit of the mortgagee that the grantor can maintain no action thereon merely because the grantee has failed to perform his undertaking; it is only where the grantor has himself paid the mortgage that he becomes subrogated to the rights of the mortgagee, and is entitled to enforce it against the grantee.<sup>3</sup>

§ 1209. **II. Assignment of the Mortgage.**—In the few states which still retain, in the ordinary transactions of business and modes of administering justice, the strict legal theory according to which the mortgagee obtains and holds the legal estate in the land, an assignment of the mortgage fully efficient and operative must necessarily amount to a conveyance of the legal estate in the mortgaged premises. Such an assignment must, therefore, be an

<sup>1</sup> See Pomeroy on Remedies, sec. 139, and cases cited: *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Starbird v. Cranston*, 24 Colo. 20, 48 Pac. 652; *McKay v. Ward*, 20 Utah 149, 57 Pac. 1024, 46 L. R. A. 623.

<sup>2</sup> *Knapp v. Connecticut Mut. L. Ins. Co.*, 85 Fed. 329, 29 C. C. A. 171, 40 L. R. A. 861; *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577.

<sup>3</sup> *Ayres v. Dixon*, 78 N. Y. 318, 322, 323.

instrument under seal, or at least a written instrument sufficient to convey the legal title.<sup>1</sup> We are only concerned with that mode of assignment which is valid and efficient in equity, which operates to vest the assignee with all the mortgagee's interests, rights, remedies, and liabilities which are recognized and enforced in equity, and are capable of being transferred.<sup>2</sup> A formal written assignment by which the mortgagee in express terms transfers the mortgage and the debt secured thereby, and the bond, note or other evidence of the debt, is always proper, and possesses many advantages, and should always be adopted, when possible, as a matter of expediency,<sup>3</sup> but it is not essential.

**§ 1210. Assignment of the Debt Carries with it the Mortgage—What Operates as an Assignment.**—The fundamental principle upon which this doctrine of assignment rests is, that the debt is the principal thing, and the mortgage is only an accessory or incident of the debt, and can have no separate independent existence.<sup>1</sup> The doctrine is therefore universal, that any valid operative assignment of the debt, whether evidenced by a bond, note, or otherwise, is also an efficient assignment of the mortgage, and vests the assignee with all the equitable rights, interests, and remedies of the mortgagee.<sup>2</sup> In the absence of a contrary statutory requirement,

<sup>1</sup> It should be observed that in the cases involving these rules the question is, whether, in accordance with the strict legal theory, the assignment transferred the legal estate *in the land* to the assignee—a question purely legal, and wholly foreign to the equitable system of mortgage which, practically at least, prevails in the great majority of the states, even in many of those which also retain the legal view. See *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, *Kirch. 634*, H. & B. 557.

<sup>2</sup> It would, however, be very misleading to call this an "equitable" assignment, as distinguished from that first above mentioned, as though its operation were confined to courts of equity, and it conferred rights recognized only in equity. In England and in Massachusetts, and in a few other states, such an assignment is undoubtedly "equitable"; but in most of the states the rights which it confers are protected by all the courts.

<sup>3</sup> Among these advantages is the power of having the assignment recorded, with the protection which the recording acts give to the assignee. See *ante*, §§ 733, 734.

<sup>1</sup> *Carpenter v. Longan*, 16 Wall. 271, 275, 21 L. ed. 313, *Kirch. 675*.

<sup>2</sup> This proposition is *universal* in equity. In all the states adopting the *second* system, as described in the previous section II., such assignment is complete and absolute. In some of the states adopting the *first* system, such assignment is regarded as simply equitable, since the assignee does not thereby acquire the legal estate in the mortgaged premises; but in several other states of the same class, I think this form of assignment is treated as practically complete and absolute: *Page v. Pierce*, 26 N. H. 317, *Kirch. 630*; *Green v. Hart*, 1 Johns. 580, *Kirch. 622*; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72. That an assignment of a part of the debt secured carries with it a proportionate part of the mortgage has already been shown: *Ante*, § 1202, and

such assignment need not even be in writing; it may be merely verbal with delivery. It also follows, as a necessary consequence of the same principle, that an assignment of the mortgage alone, without the debt, is wholly nugatory in equity, and passes no equitable rights to the assignee. Even in the states where the legal estate in the premises may be conveyed by the mortgagee, such an assignment would only vest the assignee with the naked legal title held by him in trust for the one who owned the debt.<sup>3</sup> The rights of priority acquired by the assignee, as governed by the original doctrines of equity, and as modified by the recording acts, and how far he takes subject to or freed from existing equities in favor of the mortgagor and others, have already been considered in a previous chapter.<sup>4</sup>

see *Muller v. Wadlington*, 5 S. C. 342. A verbal assignment with delivery is sufficient, in the absence of a statutory requirement of writing: *Curtis v. Moore*, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506.

<sup>3</sup> *Carpenter v. Longan*, 16 Wall. 271, Kirch. 675.

<sup>4</sup> See ante, vol. 2, §§ 703-715. When a mortgage is given to secure a *negotiable* note, and the note and mortgage are assigned before maturity, the question whether the assignee takes the mortgage free from all equities as in the case of a bona fide transferee of such a note alone, or whether he takes it subject to all equities, is examined ante, § 704, and cases are cited reaching exactly opposite conclusions. The following case, also, maintains the rule that such assignee takes the mortgage free from all equities: *Carpenter v. Longan*, 16 Wall. 271, 21 L. ed. 313, Kirch. 675. On the other hand, the following additional case holds such assignment to be controlled by the general rule, and therefore subject to all existing equities: *Bailey v. Smith*, 14 Ohio St. 396, 84 Am. Dec. 385, Kirch. 667. The reasons for the ruling that such assignee takes free from all equities are stated with as much force as possible by Swayne, J., in *Carpenter v. Longan*, supra. Reduced to their lowest terms, they amount to this: that the debt is the principal thing, and the mortgage is a mere adjunct of the debt, and has no existence separate from the debt. Admitting the full force of this reasoning, the conclusion is, in my opinion, the result of a false analogy. The answer to it is very short, but, as it seems to me, very complete. The note *and the mortgage do not together constitute a promissory note*. The conclusion reached by this line of cases not only destroys the uniformity and consistency of the doctrines concerning mortgages, but misapprehends and misapplies the peculiar doctrines concerning negotiable instruments. The most distinctive feature of negotiability—the rule that the bona fide transferee takes a bill or note free from defenses—had its origin in the customs of merchants. It was first adopted by the courts, and has ever since been maintained, solely with a view to promote the interests of merchants, and to secure the success and freedom of mercantile and commercial dealings. A promissory note accompanied by a mortgage is not in any sense a mercantile or commercial security; all the reasons of the peculiar rule of the law merchant fail in their application to it. The courts which extend this rule to a note and mortgage are misled by a false analogy; in order to reach their conclusion, they are obliged to treat the mortgage as a nullity—not merely as an incident of the note, but as having actually no existence. I am strongly of the opinion that the

§ 1211. **Equitable Assignment by Subrogation.**—Under some circumstances, the payment of the amount due on a mortgage, when made by certain classes of persons, is held in equity to operate as an assignment of the mortgage. By means of the payment, the mortgage is not satisfied and the lien of it destroyed, but equity regards the person making the payment as thereby becoming the owner of the mortgage, at least for some definite purposes, and the mortgage as being kept alive, and the lien thereof as preserved, for his benefit and security. This equitable result follows, although no actual assignment, written or verbal, accompanied the payment, and the securities themselves were not delivered over to the person making the payment, and even though a receipt was given speaking of the mortgage debt as being fully paid, and sometimes even though the mortgage itself was actually discharged and satisfied of record. This equitable doctrine, which is a particular application of the broad principle of subrogation, is enforced whenever the person making the payment stands in such relations to the premises or to the other parties that his interests, recognized either by law or by equity, can only be fully protected and maintained by regarding the transaction as an assignment to him, and the lien of the mortgage as being kept alive, either wholly or in part, for his security and benefit.

§ 1212. **In whose Favor Such Equitable Assignment Exists.**—Equity does not admit the doctrine of equitable assignment in favor of every person who pays off a mortgage. Such relations must exist towards the mortgaged premises or with the other parties, that the payment is not a purely voluntary act, but is an equitably necessary or proper means of securing the interests of the one making it from possible loss or injury. The payment must be made by or on behalf of a person who had some interest in the premises, or some claim against other parties, which he is entitled, in equity, to have protected and secured. A mere stranger, therefore, who pays off a mortgage as a purely voluntary act can never be an equitable assignee. In general, when any person having a subsequent interest in the premises, and who is therefore entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor primarily, and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit; he is subrogated to the rights of the mortgagee to the extent necessary

cases of which the Illinois decisions are an example rest upon a true foundation of principle.

for his own equitable protection.<sup>1</sup> The doctrine is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party and for his benefit; such a person is in no true sense a mere stranger and volunteer.<sup>2</sup>

**§ 1213. In whose Favor Such Equitable Assignment does not Exist.**—On the other hand, if payment of the mortgage debt is made to the mortgagee or other holder of the mortgage, by a party who is himself personally and primarily liable for the debt, who is in any manner and by any means the actual primary debtor, whose duty it is to pay the debt absolutely, and before all others, such payment operates ipso facto as an end of the mortgage, and the lien is completely destroyed. The party so paying is not subrogated to the rights of the mortgagee; there is no equitable assignment to him of the mortgage security; even if he should receive a formal assignment, the mortgage could not be thus kept alive, but would be wholly merged and ended.<sup>1</sup>

**§ 1214. The Right to Compel an Actual Assignment.**—Whether the equitable assignee may compel an actual assignment is a question which has received conflicting answers from different courts. Some cases hold that every person who, on payment, becomes an equitable assignee is entitled to compel the execution of a formal assignment of the mortgage by the mortgagee or other holder, for the purpose of perfecting his own equitable right of subrogation.<sup>1</sup> By other cases the position is maintained that such person must,

<sup>1</sup> *Muir v. Berkshire*, 52 Ind. 149, 151; *Ellsworth v. Lockwood*, 42 N. Y. 89, 97; *Ohmer v. Boyer*, 89 Ala. 273, 7 South. 663. The class of persons coming within the description of the text who are equitable assignees, and thus subrogated to the mortgagee by the act of payment, include the grantee from the mortgagor or any subsequent grantee who has taken the land simply subject, to the mortgage; the heir or devisee of the mortgagor; the widow of the mortgagor or of any subsequent owner; a subsequent encumbrancer by mortgage, judgment, or otherwise; a subsequent lessee, and the like. The mortgagor himself who has conveyed the premises to a grantee in such manner that the latter has assumed payment of the mortgage debt becomes an equitable assignee on payment, and is subrogated to the mortgagee, *so far as is necessary to enforce his equity of reimbursement or exoneration from such grantee.*

<sup>2</sup> *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437; *Warford v. Hankins*, 150 Ind. 489, 50 N. E. 468; *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187.

<sup>1</sup> In this description are included the mortgagor himself, so long as he remains the principal debtor, and has not changed his relations by a conveyance, and also the grantee from the mortgagor who has assumed payment of the mortgage debt, and thus rendered himself the principal and primary debtor therefor: *Birke v. Abbott*, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474.

<sup>2</sup> *Twombly v. Cassidy*, 82 N. Y. 155.

in general, rely upon his equitable assignment and right of subrogation, and cannot compel the execution of a formal assignment; that only a technical surety is entitled to perfect his right of subrogation by calling for an assignment in writing.<sup>2</sup>

§ 1215. **III. Rights and Liabilities of the Mortgagee in Possession.**—It has been shown in the preceding section II. that in a portion of the states adopting the first or legal system the mortgagee is entitled to possession at once upon the execution of the mortgage; that in the remaining states of the same class he is entitled to possession only upon the mortgagor's default; and that in either case, upon thus acquiring the possession, he can retain it until the mortgage is redeemed. In all the states adopting the second system, the mortgagee is not entitled to possession, either before or after a breach of the condition. If, however, he actually acquires possession, with the consent of the mortgagor, or in any other lawful manner, although the nature of his interest is not thereby altered, he is entitled to retain such possession until the mortgage is redeemed or paid.<sup>1</sup> The rights and consequent liabilities of the mortgagee who is actually and lawfully in possession, as against the mortgagor and those claiming under or through him, are thus virtually the same in all the states, as well in those adopting the second as in those adopting the first system, as heretofore described. In order, however, that these special rights and liabilities may arise from his possession, it must be a possession taken and held by him as mortgagee.<sup>3</sup>

§ 1216. **With What He is Chargeable—Rents.**—The general duty of the mortgagee in possession towards the premises is that of the ordinary prudent owner. He must account, in general, for their rents and profits, or for their occupation value. When the land is in the occupation of tenants, he is chargeable with the gross actual rents and profits received, and with no more, unless he has been guilty of a willful default.<sup>1</sup> When the land is occupied by the mortgagee himself, he is chargeable with the fair annual value as an occupation rent.<sup>2</sup> *Willful default:* He is also chargeable with losses occasioned by his willful default.<sup>3</sup>

<sup>1</sup> *Holland v. Citizens' Sav. Bank*, 16 R. I. 734, 19 Atl. 654, 8 L. R. A. 553.

<sup>2</sup> See ante, § 1189.

<sup>3</sup> *Parkinson v. Hanbury*, L. R. 2 H. L. 1, 2 De Gex, J. & S. 450, Kirch. 550.

<sup>1</sup> *Parkinson v. Hanbury*, L. R. 2 H. L. 1, Kirch. 550; *Shaeffer v. Chambers*, 6 N. J. Eq. 548, 47 Am. Dec. 211, Kirch. 548.

<sup>2</sup> *Barnett v. Nelson*, 54 Iowa 41, 37 Am. Rep. 183, 6 N. W. 41.

<sup>3</sup> This includes losses by his willful or negligent failure to collect rent, or to obtain a better rent, or suffering the premises to remain in the possession of an insolvent tenant, and the like: *Parkinson v. Hanbury*, Kirch. 550. Also, committing or suffering acts of waste or spoliation: *Whiting v. Adams*,

§ 1217. **Allowances and Credits, Repairs, Disbursements.**—The mortgagee is allowed, and credited in his account, with the cost of all ordinary, reasonably necessary repairs made to the premises and with all reasonable disbursements and expenses necessary for their proper management and protection.<sup>1</sup> *Improvements:* The mortgagee will be allowed for permanent improvements, increasing the value of the estate, if made *with the consent* or acquiescence of the mortgagor; but he cannot be allowed for such expenditures when made *without* the mortgagor's consent. He is bound to keep the property without unreasonable deterioration, and is therefore credited with necessary repairs; but he has no right to enhance the value of the estate, and thus render it more difficult for the mortgagor to redeem.<sup>2</sup> *Compensation:* The mortgagee cannot charge any commissions or other compensation for his services, since they are rendered primarily for his own benefit.<sup>3</sup>

§ 1218. **Liability to Account.**—The mortgagee in possession is bound to account, upon the basis of charges and allowances above described, not only to the mortgagor, but to subsequent mortgagees, if he has notice of their encumbrances.<sup>1</sup> This accounting belongs exclusively to the equitable jurisdiction, and can be enforced only in a suit to redeem, brought by the mortgagor or subsequent encumbrancer.<sup>2</sup> Whenever the net amount of annual rents or occupation value received by the mortgagee exceeds the interest then due, the accounting is taken with annual rests.<sup>3</sup> If the mortgagee remains in possession after the mortgage debt has been fully paid, he becomes a trustee for the mortgagor, and is chargeable with interest on the net excess of rents received by him; but the mortgagor can only enforce his rights to the land by an equitable action for an account and to redeem.<sup>4</sup>

66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598; *Shaeffer v. Chambers*, 6 N. J. Eq. 548, 47 Am. Dec. 211, Kirch. 548.

<sup>1</sup> What repairs and expenses are reasonable must depend largely upon the circumstances of each case. The payment of taxes is a proper disbursement: *Sidenberg v. Ely*, 90 N. Y. 263, 43 Am. Rep. 163, Kirch. 564. The mortgagee in possession is only bound to make *necessary* repairs: *Godfrey v. Watson*, 3 Atk. 517, Kirch. 563; *Dexter v. Arnold*, 2 Sum. 108, Fed. Cas. No. 5608, Kirch. 522.

<sup>2</sup> *Moore v. Cable*, 1 Johns. Ch. 385, Kirch. 524; *Mickles v. Dillaye*, 17 N. Y. 80, Kirch. 526.

<sup>3</sup> *Moss v. Odell*, 141 Cal. 335, 74 Pac. 999.

<sup>4</sup> *Long v. Richards*, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281.

<sup>5</sup> Even in the states adopting the second or equitable system, the mortgagor cannot recover the land by an action of ejectment, but must sue in equity for a redemption, in which an accounting can be had: *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519, Kirch. 334; and see ante, § 1189.

<sup>6</sup> *Shaeffer v. Chambers*, 6 N. J. Eq. 548, 47 Am. Dec. 211, Kirch. 548; *Van Vronker v. Eastman*, 7 Met. 157, Kirch. 561.

<sup>7</sup> *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519, Kirch. 334.

§ 1219. IV. **Redemption—By the Mortgagor.**—As has already been shown, the right of redemption is the very essential element of the equitable conception of a mortgage. If an instrument is once a mortgage, nothing, in general, can destroy the equitable right of redemption except a valid and complete foreclosure, or the bar arising expressly or by analogy from the statute of limitations, or conduct of the mortgagor amounting to an estoppel. Strictly speaking, redemption is the “buying back” and recovering the legal estate by the mortgagor after it has passed to the mortgagee. Under the original common-law theory, the redemption by the mortgagor took place, not only after the mortgagee had acquired the legal estate by the mortgage, but after he had taken possession of the mortgaged premises. The same conditions of the redemption still substantially exist in all the states which have adopted the *first* system as described in the preceding section II.<sup>1</sup> In those states which have adopted the *second* system, the mortgagor may have the same suit and the same relief whenever the mortgagee has actually taken possession; but such cases are quite rare, for the mortgagor is generally left in possession. It is, however, a settled doctrine in all these states that the mortgagor in possession may maintain a similar equitable suit whenever, from a dispute as to the amount due or any other cause, the mortgagee refuses to accept payment and to discharge the mortgage. The mortgagor can always come into a court of equity and obtain a decree removing the lien of the mortgage. Although this suit is uniformly termed a “suit to *redeem*,” and the relief is called “redemption,” yet it is really one to free the mortgagor’s land from the encumbrance, to compel the mortgagee to accept the amount actually due, if any, and to discharge the mortgage of record.<sup>2</sup> The essential requisites of maintaining the suit are, that the mortgage debt should be due and payable, that the mortgagor should offer to pay whatever amount is due, and should pay the same when as-

<sup>1</sup> At any time before his right is cut off by foreclosure or barred by the statute of limitations, the mortgagor may maintain a suit for a redemption, in which an accounting is had, the amount of the debt still due is ascertained, and upon payment of this amount the mortgagee is decreed to reconvey. In several of the states adopting this general system, the original doctrine is so far relaxed that no reconveyance from the mortgagee is necessary, but the legal estate vests in the mortgagor ipso facto of his payment. See ante, § 1187. I would remark that in all the discussions of the text I am speaking only of the *equity* of redemption, which exists solely as a part of the equitable conception of mortgage. The *statutory* right of redeeming *after* foreclosure or execution sale, given by the legislation of certain states, forms no part of *equity* jurisprudence.

<sup>2</sup> *Daubenspeck v. Platt*, 22 Cal. 330, 335.

certained and fixed by the decree, and that the relief should be sought in equity.<sup>3</sup>

§ 1220. **The Same.—By Other Persons.**—Any person who holds a legal estate in the mortgaged premises, or in any part thereof, derived through, under, or in privity with the mortgagor, and any person holding either a legal or equitable lien on the premises, or any part thereof, under or in privity with the mortgagor's estate, may also in like manner redeem from the prior mortgage. No such redemption, however, is possible unless the mortgage debt is due and payable,<sup>1</sup> nor unless the mortgage is wholly redeemed by payment of the entire amount of the mortgage debt. The debt being a unit, no party interested in the whole premises, or in any portion of them, can compel the mortgagee to accept a part of the debt, and to relieve the property pro tanto from the lien.<sup>2</sup> Furthermore, if the person redeeming has only a partial interest in the premises, and there are other partial owners also interested in having the lien of the mortgage removed from their estates,—such as co-owners, life tenants, reversioners, remaindermen, and the like,—he cannot compel them in the first instance to advance their proportionate shares for the purpose of paying off the debt; he must himself redeem the whole mortgage, and his only equity against them consists in his right to enforce the mortgage upon *their* estates as a security for obtaining a *subsequent* contribution.<sup>3</sup>

§ 1221. **Rights of Contribution and of Exoneration upon Redemption.**—In general, whenever redemption by one of the above-mentioned persons operates as an equitable assignment of the mortgage to himself, he can keep the lien of it alive as security against others who are also interested in the premises, and who are bound to contribute their proportionate shares of the sum advanced by him, or are bound, it may be, to wholly exonerate him

<sup>1</sup> *Brown v. Cole*, 14 Sim. 427, Kirch. 698 (debt must be due and payable). If a mortgagee pays off prior encumbrances he is subrogated to the rights of the holders thereof, and when the mortgagor redeems, he must pay them also: *Harper v. Ely*, 70 Ill. 581, Kirch. 563. The right of redeeming can only be cut off by a valid, complete, strict foreclosure, or by a valid, complete foreclosure by sale. Persons otherwise entitled, who were not made parties to the suit, may therefore redeem after and notwithstanding a foreclosure and sale: *Noyes v. Hall*, 97 U. S. 34, 24 L. ed. 909.

<sup>2</sup> *Bernard v. Topfritz*, 160 Mass. 162, 35 N. E. 673, 39 Am. St. Rep. 465.

<sup>3</sup> *McGough v. Sweetser*, 97 Ala. 361, 12 South. 162, 19 L. R. A. 470; *Gibson v. Crehore*, 5 Pick. 146, Kirch. 698.

<sup>4</sup> Among the various classes of persons who may redeem are: Grantees of the mortgagor: *Howard v. Harris*, 1 Vern. 190, Shep. 57, Kirch. 430; dowress: *Davis v. Wetherell*, 13 Allen 60, 90 Am. Dec. 177 (inchoate right of dower); judgment creditor: *Mildred v. Austin*, L. R. 8 Eq. 220; subsequent mortgagee: *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553.

from and reimburse him for the entire payment. The doctrine has already been stated, that where a party interested in the premises, who is not personally and primarily liable as the principal debtor for the whole mortgage debt, pays the mortgage to the holder thereof, he is entitled to regard the transaction as an equitable assignment of the mortgage to himself, and to keep it alive as security of his own rights against others who are owners of or interested in the land.<sup>1</sup> Any such person who redeems, no matter how small a portion of the premises he may own, or how partial may be his interest, must redeem the entire mortgage by paying the whole mortgage debt. The doctrine of contribution among all those who are interested in having the mortgage redeemed, in order to refund the redemtor the excess of his payment over and above his own proportionate share, and the doctrine of equitable assignment in order to secure such contribution, are the efficient means by which equity completely and most beautifully works out perfect justice and equality of burden, under these circumstances. The right of contribution arises only *after* a redemption, and necessarily depends upon the equities subsisting between all those persons who have an interest in the premises subject to the mortgage, and who therefore have a *common*, but not necessarily an *equal*, interest in being relieved from the burden of the mortgage.

§ 1222. 1. **Where their Equities are Equal.**—It is a general doctrine of equity that where a common charge rests upon a fund which belongs to several owners, who stand upon a footing of equality with respect to their individual titles and relations with the holder of the charge, the burden should rest ratably upon each separate portion of the fund; and if the owner of one portion, for the purpose of protecting his own interest, pays off the common charge, he is entitled to call upon the other owners to contribute their proportionate shares of the amount thus paid. This doctrine is a simple application of the maxim, Equality is equity.<sup>1</sup> Whenever, therefore, a mortgage rests upon land which is owned by several persons in such a manner that their equities as between themselves are equal, and one of them redeems from the mortgage, he is entitled to a *pro rata* contribution from the other owners, and may keep the lien of the mortgage alive, by equitable assignment, as security for such contributions.<sup>2</sup> In order, however,

<sup>1</sup> See ante, §§ 1211, 1212.

<sup>2</sup> See ante, §§ 405, 406, 407, 411.

<sup>3</sup> Among the instances where the equities are equal, and which fall within this rule, are the following: Two or more persons, co-owners of land, jointly give a mortgage thereon; land covered by a mortgage, on the death of the mortgagor, descends to his several heirs, or is devised by him to several

that this liability to a ratable contribution may exist under such a condition of ownership, it is essential that the equities of all the owners should be equal.<sup>3</sup>

§ 1223. 2. **Where their Equities are Unequal—Tenants for Life or for Years.**—In the preceding case the titles of the several owners are simultaneous in their time of acquisition, and are the same in kind, the only difference being in the value of their respective interests. In the case now to be considered, the titles are also simultaneous, and the inequality consists in the fact that the estate held in the mortgaged premises by one party is only partial, while that held by the other is absolute or in fee. The particular inequality referred to exists when the land subject to the mortgage is held by A as a tenant for life or for years, and by B as a remainderman or reversioner in fee. The general doctrine of contribution applies to such owners, but is modified in its operation by the new element of inequality in the nature of their respective estates. As has already been shown, the holder of a partial interest is always compelled to redeem the whole mortgage.<sup>1</sup> By a settled rule of the law, the life tenant, A, is bound to pay the annual interest on the mortgage accruing during his own lifetime, —or if a tenant for years, during his term. This is his own debt, and for what he thus pays in keeping down the interest he is not entitled to any contribution from B, the owner in fee. When, therefore, A redeems the mortgage, a certain part of the money paid to the mortgagee would be the equivalent of the annual interest on the mortgage which A was obliged to pay at all events, and this part, being his own debt, need not be refunded to him by B; but all of the mortgage debt over and above such part equitably belongs to B to pay; it is the share which should fall upon him by virtue of his reversionary interest. The problem, then is to ascertain what portion of the total mortgage debt represents the annual interest on the mortgage which A is bound to pay during his life; subtracting that amount from the total sum, the balance is the share which B must contribute, and for which A may hold the mortgage as a lien on the land. An element of uncertainty—the duration of A's life—is inherent in the problem;

devisees, who take it as co-owners; a mortgagor conveys the premises by one deed to several grantees, who become co-owners of undivided shares; a mortgagor, by separate, similar, and simultaneous deeds, conveys all the mortgaged premises, in separate and distinct parcels, to several separate grantees, neither of whom assumes payment of the whole mortgage, nor any part thereof, so as to disturb the equality of the equities between them, and the like; *Peck v. Peck*, 110 N. Y. 64, 74, 17 N. E. 383.

<sup>1</sup> See *Zabriskie v. Salter*, 80 N. Y. 555.

<sup>3</sup> See ante, § 1220: *Gibson v. Crehore*, 5 Pick. 146, Kirch. 698.

but the courts, both of England and of this country, have adopted the standard "life tables" as the basis of calculation in all such cases. The rule is settled, that the present worth of an annuity equal to the annual interest running during the number of years which constitute his expected life represents the sum which A is liable to pay as *his* individual indebtedness; the balance, after subtracting this sum from the mortgage debt actually paid to the mortgagee, is the amount which B is liable to contribute.<sup>2</sup> When the life tenant, A, is a dowress, the present worth is calculated upon the basis of one third of the annual interest accruing on the mortgage of the entire premises. If the remainderman or reversioner, B, redeems, the rule is the exact converse of the one above stated.

§ 1224. 3. **Inequality of Equities where Titles are not Simultaneous—Between Mortgagor and his Grantee of a Parcel—Between Successive Grantees—Inverse Order of Alienation.**—Where the owners of the premises subject to the mortgage hold under the mortgagor by titles not simultaneous, but successive in order of time, an entirely different inequality of equities among them is introduced; a priority results which not only destroys the right of ratable *contribution* when one of them redeems, but even creates in favor of some a right of *exoneration* as against the others. The foundation of this doctrine is found in the equities subsisting between the mortgagor and his grantee of a part of the mortgaged premises. Whenever the mortgagor conveys a portion of the land "subject to" a mortgage by a warranty deed, and retains the residue of the land in his own hands, that portion of the land retained by the mortgagor becomes, as between himself and his grantee at all events, the fund primarily liable for the whole mortgage debt. The form of the deed shows that the grantee not only assumed payment of no portion of the mortgage debt, but did not buy his parcel even *subject to* the mortgage; and the entire burden was therefore left upon the portion of land remaining in the ownership of the mortgagor. Whatever be the rights of the mortgagee to resort to either or both of the parcels, it is plainly the equitable duty of the mortgagor to assume the whole debt, and thus to free the grantee's parcel from the lien. If, therefore, the mortgagor pays off the mortgage, its lien is ended, and he can claim no contribution from the grantee; if, on the other hand, the grantee redeems, he is entitled to keep the lien alive for the purpose of enforcing an exoneration by the mortgagor, at least to the extent of the value of the premises remaining in the mortgagor's hands

<sup>2</sup> Damm v. Damm, 109 Mich. 619, 67 N. W. 984, 63 Am. St. Rep. 601.

and subject to the encumbrance. This view of the equities subsisting between the mortgagor and his own grantee seems to be universally adopted.<sup>1</sup> The doctrine being thus established that the grantee obtains an equitable priority as against the mortgagor, and the portion of the mortgaged premises left in the mortgagor's hands is primarily chargeable with the whole mortgage, the inference is natural, even if not necessary, that the same burden follows this portion, when subsequently conveyed by the mortgagor to a second grantee. If the mortgagor conveys one half of the mortgaged premises by a warranty deed to A, his own half is equitably charged with the entire debt, and A has as against him the priority. When the mortgagor afterwards conveys his half by a similar deed to B, that transaction cannot affect A's pre-existing priority, with respect to the parcel thus conveyed as the primary fund for payment, and B cannot acquire any higher equities than those possessed by his immediate grantor; he succeeds to the exact position of the mortgagor towards the first grantee, A. As between the two grantees, therefore, the parcel conveyed to the second grantee, B, is primarily liable for the whole mortgage debt; he can claim no contribution from A, but on the other hand, A may be entitled to exoneration against the portion held by him. If this reasoning is correct, it necessarily applies to any number of successive grantees to whom the mortgagor has conveyed separate parcels of the mortgaged premises, and determines these equities among them, whether the mortgagor has conveyed away all the land covered by the mortgage, or retains a portion himself, and whether their respective parcels are of equal or unequal values. In most of the states, though not in quite all, the courts have adopted this reasoning, and have settled the equities of the parties in such a condition of fact by a general rule: Whenever the mortgagor has conveyed separate parcels of the mortgaged premises by warranty deeds to successive grantees, and there are no special provisions in any of their deeds, and no other dealings between themselves or with the mortgagor which disturb the equities otherwise existing, a priority results, depending upon the order of conveyance. As between the mortgagor and all the grantees, the parcel in his hands, if any, is primarily liable for the whole mortgage debt, and should be exhausted before having recourse to any of theirs; as between the grantees, their parcels are liable in the inverse order of their alienation, and any parcel chargeable first in order must be exhausted

<sup>1</sup> 2 Washburn on Real Property, 4th ed., p. 202, sec. 5; 2 Jones on Mortgages, secs. 1091, 1092; 2 Lead. Cas. Eq., 4th Am. ed., 291, 305, notes to Aldrich v. Cooper. The rule applies not only to the mortgagor, but also to his heir; Clowes v. Dickson, 5 Johns. Ch. 235.

before recourse is had to the second.<sup>2</sup> This inequality of equities plainly destroys all right and liability of *ratable contribution*. If the mortgagor pays off the mortgage, or if the parcel remaining in his hands is sold in full satisfaction of it, he cannot call upon his grantees for any reimbursement. In like manner, if the parcel belonging to a grantee who was a later purchaser is sold, he can claim no contribution from any grantee who was prior in time, since his parcel is itself primarily liable as between the two. In place of contribution, a right of exoneration may arise. It has already been shown how the grantee, under such circumstances, may be exonerated by the mortgagor; in like manner, a right of exoneration may arise among the successive grantees in favor of one whose conveyance was earlier against those who were later in point of time. The exoneration will be complete or partial, according to the circumstances of the case.<sup>3</sup>

**§ 1225. The Same. What Circumstances Disturb These Equities and Defeat This Rule.** The doctrine stated in the foregoing paragraph is one of purely equitable origin, and is not an absolute

<sup>2</sup>In many of these states the rule is applied directly to the mortgagee, and regulates his mode of foreclosure; either by statute, or by rule of court, or by decisions, he is compelled to frame his decree of sale, and to sell the mortgaged premises in compliance with this rule. In other states, the mortgagee is not thus directly controlled, but the rule is applied to the other parties, and regulates the mode in which their equities are worked out, as among themselves, by redemption and exoneration: *Clowes v. Dickenson*, 5 Johns. Ch. 235; *Lyman v. Lyman*, 32 Vt. 79, 76 Am. Dec. 151; *Farmers' Sav., etc., Ass'n v. Kent*, 117 Ala. 624, 23 South. 757; *Howser v. Cruikshank*, 122 Ala. 256, 25 South. 206, 82 Am. St. Rep. 76.

<sup>3</sup>It should be constantly remembered that the mortgagee possesses the absolute right to enforce the security of the mortgage for the whole amount thereof, if necessary, against all the parcels in the hands of all the grantees. A single simple case will illustrate this equity of exoneration. A mortgagor conveys one-half the premises by warranty deed to A, and afterwards the other half to B. As between the two grantees, the mortgage must be first enforced against B's parcel, but if its proceeds are not sufficient to satisfy the debt, then resort must be had to A's half. In other words, A's parcel continues liable for so much of the mortgage debt as exceeds the value of B's parcel. This liability indicates the true measure and extent of A's right of exoneration against B. If A redeems the mortgage, or if A's parcel is sold first by the mortgagee, he is not necessarily entitled to a complete exoneration by B; he is only entitled to a complete exoneration when B's parcel equals or exceeds in value the amount of the mortgage debt, so that it would have satisfied the mortgage and freed A's land from the burden. If the mortgage debt exceeds the value of B's parcel, A is entitled to exoneration from such an amount thereof as equals the value of B's land; the balance of the debt over and above that amount is A's individual burden, chargeable on his own land. The same reasoning clearly applies to any number of successive grantees and determines the rights of exoneration among them. See cases in the last preceding note.

rule of law, and if the peculiar equitable reasons on which it rests are wanting, it ceases to operate.<sup>1</sup> Whether it does or does not apply to any particular case may be certainly determined by a careful consideration of the following principles. The doctrine in its full scope and operation primarily depends upon the relation subsisting between the mortgagor, or other owner of the entire mortgaged premises, and his grantee of a parcel of the land. This relation, in turn, results from the form of conveyance, which, being a warranty deed, or equivalent to a warranty, shows conclusively an intention between the two that the grantor is to assume the whole burden of the encumbrance as a charge upon *his own* parcel, while the grantee is to take and hold his portion entirely free. Secondly, the conveyance may be of a different character; by its special provisions it may expressly show, or by its general form it may impliedly indicate, that the grantee himself either assumes the whole mortgage debt and charges his parcel with the entire burden of the mortgage, or else takes and holds his parcel subject to and chargeable with its proportionate share of the encumbrance.<sup>2</sup> Thirdly, although the deeds are warranties, so that the doctrine will otherwise apply, any particular grantee may by his subsequent omissions, or by his subsequent dealings with other grantees, disturb the order of the equities in his own favor, and create equities in behalf of other owners, and even render his own parcel primarily liable as between *all* the grantees. Finally, whenever the equities of any original grantee towards the other parties have been fixed, either by the form of his deed, or by his own omissions or dealings, then any subsequent purchaser or encumbrancer from such grantee takes the parcel subject to the same equities which originally attached to it; the same equities follow the parcel in its devolutions. The equities among successive grantees, as determined by the general doctrine of the preceding paragraph, will therefore be disturbed in the following instances: 1. Whenever a grantee of any parcel either expressly assumes the payment of the mortgage, or his deed is of such a form that he takes the parcel conveyed to himself *subject to* the mortgage as a *part of the consideration*, then, as has already been shown, the parcel thus purchased becomes, in the hands of himself and of those holding under him, primarily chargeable with the mortgage debt as against the mortgagor-grantor, and consequently as against all subsequent grantees of other parcels from the mortgagor. By such an express or implied assumption, the doctrine of liability in the

<sup>1</sup> See *Kendall v. Woodruff*, 87 N. Y. 1, 7, per Folger, C. J.

<sup>2</sup> *Stephens v. Clay* 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328.

inverse order of alienation, and all of its consequences, are defeated with respect to the mortgagor and the subsequent grantees.<sup>3</sup> 2. In like manner, when the deeds to the successive grantees are not warranty or equivalent thereto, but simply purport to convey the mortgagor's right, title, and interest in the parcels, the intention is clear that the grantees respectively assume their portions of the burdens. Their several parcels are liable ratably, and not in the inverse order.<sup>4</sup> 3. Where the conveyances were such that the rule of inverse order would otherwise have applied, a grantee of a parcel prior in point of time may, by neglecting to record his deed, lose his precedence as against the subsequent grantees of other parcels, and those holding under them, whose deeds and mortgages are recorded without any notice of his title. The absence of the record in such a case may, however, be supplied by other kind of notice, actual or constructive.<sup>5</sup> 4. Finally, any grantee otherwise entitled to precedence may, by his agreements or dealings with other grantees, render his own parcel primarily liable for the mortgage debt, as between himself and such other grantees; and the liability thus attached to the land would follow it in the hands of subsequent purchasers and encumbrancers.<sup>6</sup>

**§ 1226. 4. A Release by the Mortgagee of One or More Parcels.**—Although the equities between the subsequent owners of various parcels of the mortgaged premises, whether equal or unequal, do not prevent the mortgagee from enforcing the mortgage security, if necessary, against all these parcels, yet after the mortgagee has received notice of the subsequent conveyances, the equities affect him to such an extent that he cannot deal with the whole premises, or with any parcel thereof, or with the owner of any parcel, by release or agreement, so as to disturb the equities subsisting among the various owners, or to destroy their rights of precedence in the order of liability, or to defeat their rights of ratable contribution, or of complete or partial exoneration. No such ob-

<sup>3</sup> See ante, § 1205; *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687; *Tarbell v. Durant*, 61 Vt. 516, 17 Atl. 44.

<sup>4</sup> Quoted in *Aderholt v. Henry*, 87 Ala. 415, 6 South. 625, 6 L. R. A. 451.

<sup>5</sup> If the mortgagor conveys one-half to A, and afterwards the other half to B, and A's deed is not recorded, and B has no other notice of it, B has a right to assume that he himself is the first grantee, and that one-half of the land remains in the mortgagor's hands primarily liable for the mortgage debt. By putting his own deed on record, B thus obtains a precedence over A, which avails on behalf of purchasers and mortgagees of the same parcel holding under him. B might, however be charged with notice of A's deed, although unrecorded; and if A were in open, exclusive possession of his parcel, this would generally operate as notice: *Gray v. Lumber Co.*, 128 Mich. 427, 87 N. W. 376, 54 L. R. A. 731.

<sup>6</sup> *Aderholt v. Henry*, 87 Ala. 416, 6 South. 625, 6 L. R. A. 451.

ligation, however, rests upon the mortgagee, nor is he prevented from dealing with the mortgaged premises in any manner consistent with his general rights as a mortgagee, unless he has received notice of the conveyances to the subsequent owners whose interests could be affected by his dealings; but notice of their conveyances would be a notice of all the equities which arise therefrom. Since his mortgage is a prior lien, and creates an encumbrance alike upon all parts of the land subject to it, no subsequent change in the ownership of the mortgaged premises, of which he is ignorant, can in any degree control or limit his original rights and power conferred by the security. It is settled, therefore, that notice must be given to the mortgagee of any subsequent conveyance of a parcel of the mortgaged premises, so as to prevent him from affecting the equities of the grantee therein by his dealings with other portions of the same premises.<sup>1</sup> It is also settled, in this connection, that a record of the subsequent conveyance is not a constructive notice to the prior mortgagee, so as to prevent him from dealing in any manner with the mortgaged premises.<sup>2</sup> The effect of a partial release by the mortgagee who is charged with notice differs in the two cases where the equities of the various owners are equal and where they are unequal. In the first case, where the mortgaged premises have been conveyed to or are held by various owners, in such manner that their equities are equal, and all their parcels or shares are liable to a ratable contribution, if the mortgagee, having notice of such condition, releases one of the parcels or shares, he thereby discharges a part of the mortgage debt, equal to the ratable portion thereof chargeable upon the lot released, while the balance of the debt alone remains a burden upon the other parcels or shares of the premises. The release of one parcel or share would release all the other parcels from the same proportionate amount of their respective original liabilities which the value of the part released bears to the total value of the mortgaged premises; one owner being released, all the others are entitled to a *pro rata* abatement.<sup>3</sup> When the equities of the various owners are unequal, so that their respective parcels are liable in the inverse order of alienation, if the mortgagee, having notice of this situation, releases a parcel which is primarily liable, he thereby discharges or releases all those parcels which are subsequently

<sup>1</sup> *Guion v. Knapp*, 6 Paige 35, 20 Am. Dec. 741.

<sup>2</sup> This is a special instance of the general rule that a record is notice only to subsequent purchasers and encumbrancers, and does not operate as a notice to prior parties. See *ante*, § 657; *Lynchburg P. B. & L. Co. v. Fellers*, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851.

<sup>3</sup> *Brooks v. Benham*, 70 Conn. 92, 38 Atl. 908, 39 Atl. 1112, 66 Am. St. Rep. 87.

liable, *in the order of their several liabilities*, from an amount of the mortgage debt equal to the value of the parcel released.<sup>4</sup> If the value of the parcel released equals the mortgage debt, then all the subsequent parcels are wholly relieved from liability; if the value is less than the mortgage debt, the subsequent parcels can, at most, be liable, in their order, only for the excess of the debt over such value. In any case, this effect of a release may be obviated by the consent of the other owners, and perhaps by special equities arising from the provisions of the mortgage, to which all of their parcels are subject.

§ 1227. **V. Foreclosure.**—The only equitable remedies of the mortgagee for enforcing the lien of the mortgage when it has become due are the two actions to both of which the name “foreclosure” is ordinarily given. These two actions are the “strict foreclosure” and “foreclosure by judicial sale.” The strict foreclosure is a remedy based upon the original conception that the mortgage vests the mortgagee with the legal estate in the mortgaged premises, and its object is to carry out that conception by rendering the mortgagee’s legal estate and title absolute, and cutting off the equity of redemption held by the mortgagor and others claiming or holding under him. It is the common form of remedy in England. In this country it is confined as an ordinary remedy to states which have adopted the first or legal theory of mortgages as heretofore described; and even in many of the states belonging to this class the foreclosure by judicial sale seems to be the form

<sup>4</sup> *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687; *Turner v. Flenniken*, 164 Pa. St. 469, 30 Atl. 486, 44 Am. St. Rep. 624. This rule may be illustrated by an example: A mortgagor has conveyed all the premises in five lots, successively, to A, B, C, D, and E; these lots are liable to be sold in the order, E, D, C, B, A. If the mortgagee should release A’s lot, his right to enforce the mortgage in their order against the others would not be affected. If he should release E, and the value of his lot equaled the mortgage debt, the whole mortgage would be discharged. If the value of E’s lot was less than the mortgage debt, the mortgagee could then resort to D’s lot for the excess only, and if its proceeds equaled that excess, all the remaining lots would be free; if there was a balance still due after the sale of D’s lot, C’s could be sold *for that balance*, and so on. If the mortgagee should first release C’s lot, the situation would be more complicated. The mortgagee could still enforce the whole mortgage against E’s lot first, and then for any excess against D’s. If a balance was still due after the sale of these two lots, B’s would not be liable for all of that balance. The *value* of C’s lot which was released must be added to the proceeds of E’s and D’s, and this sum subtracted from the gross mortgage debt, and if any excess remained, B’s lot, and finally A’s, would be liable only for that excess; if there was no excess, B’s and A’s lots would be free. It should be observed that a release does not always thus operate as a discharge; it is not a technical discharge; it is a discharge only where, on principles of equity and justice, it ought to produce that effect.

of remedy most frequently used. The strict foreclosure is inconsistent with the theory which regards the mortgage as creating only an equitable lien, and as conveying no legal estate.<sup>1</sup> In some of the states which have adopted this system, it is expressly prohibited by statute; in others, it has become practically obsolete, or is resorted to only under special circumstances, where the foreclosure by sale would be insufficient or impracticable.<sup>2</sup> The strict foreclosure assumes that the mortgagee is already in possession by virtue of his legal title. The decree ascertains and fixes the amount of the debt due and payable, after an accounting, if necessary; prescribes a period—say six months—within which redemption must be made by payment of this sum; and declares that upon default of payment within the specified period, the legal estate and title of the plaintiff shall be absolute, and the equity of redemption of the mortgagor and of all other persons claiming under him, subsequent to the mortgage, who were made defendants in the suit, shall be forever barred, cut off, and foreclosed. By operation of this decree, the mortgagee's legal title to the land, acquired by the mortgage as a conveyance, is finally confirmed and established, free from all equities of redemption.

**§ 1228. Foreclosure by Judicial Sale.**—This form of remedy, which is by far the most common in our own country, is based upon the notion that the mortgage simply creates an equitable lien upon the premises, as a security for the mortgage debt, and its object is to enforce that lien by a sale of the premises, in order that the proceeds may be applied in satisfaction of the debt. The decree ascertains the amount due, and orders that the mortgaged premises be sold at public auction by judicial sale, and the proceeds be applied in payment of the amount thus ascertained, after satisfying the expenses of the sale itself. In many of the states, preparatory to the decree, the court orders an inquiry to be made into the present situation and ownership of the premises, so that the equities of the owners may be provided for, and as far as possible secured by the terms of the decree. If the land has been conveyed in suc-

<sup>1</sup> *Jefferson v. Coleman*, 110 Ind. 515, 11 N. E. 465.

<sup>2</sup> For example, where a mortgage is in the form of an absolute deed of conveyance, and the grantee-mortgagee is in possession, a strict foreclosure may be appropriate for the purpose of making his title absolute; although even in this case the foreclosure by sale is frequently adopted. The strict foreclosure is also proper in case of a land contract, in order to cut off the vendee's equitable right. See post, §§ 1260-1262. Also, where the land had been actually sold under a decree rendered in a suit for foreclosure by sale, and some subsequent encumbrancer or other person interested in the premises was not made a party defendant to that suit, so that his rights of redemption are not cut off by the sale, the purchaser may maintain an action in the nature of a strict foreclosure against such person, for the purpose of cutting off his rights, unless he comes in and redeems within a prescribed time.

cessive parcels to different owners, the decree may order that the premises be sold in such parcels in the inverse order of their alienation; even when there are no such equities among the different owners of the premises, the court may order the premises sold in parcels, and not in one gross amount, if that method will best protect the interests of the owner as well as the security of the plaintiff. When the sale is consummated, a deed is given by the sheriff, master, or other officer who conducts the sale to the purchaser, who may be the mortgagee himself, or other holder of the mortgage; and such purchaser is therefore entitled to possession, and will be put into possession, if necessary, by process of the court. The effect of this deed, when given in pursuance of a valid decree and sale, is to convey to the purchaser whatever title the mortgagor had at the time of executing the mortgage, and whatever title he may subsequently have acquired down to the time of the foreclosure. But the sale does not affect the right of any one holding by or claiming under a title paramount to that of the mortgagor. In the states where no statutory right of redemption after a sale is given, the sale under a valid decree immediately cuts off, bars, and forecloses the rights of the mortgagor, and of all subsequent grantees, owners, encumbrancers, and other persons interested, who were made parties defendant, and of all grantees, owners, and encumbrancers subsequent to the filing of a notice of *lis pendens*, although not made defendants.<sup>1</sup> Where the proceeds of the premises sold, after paying the expenses, are not sufficient to fully satisfy the amount of the debt as fixed by the decree, the deficiency, of course, remains a personal debt owing and payable by the mortgagor and by his grantee who has assumed payment of the mortgage debt, and has thus made himself personally liable therefor. When such deficiency is officially certified by the report of the officer conducting the sale, upon confirmation of the report the plaintiff is allowed, generally by statutory authority, to enter and docket a personal judgment for the amount of the deficiency, without further suit, against the mortgagor and other persons who are personally liable for the mortgage debt, and who were made defendants in the suit. This judgment, like every other legal money judgment, is enforceable by execution against the general property of the judgment debtors. On the other hand, after defraying the expense of the sale and satisfying the decree, there may be a surplus of the proceeds remaining, as shown by the report of the officer conducting the sale. If the mortgagor remains sole owner of the premises, and there were no other persons interested therein, nor encumbrances

<sup>1</sup> Quoted in *Simmons v. Burlington, C. R. & N. Ry. Co.*, 159 U. S. 278, 16 Sup. Ct. 1, 40 L. ed. 150.

thereon, this surplus would clearly belong to him. If there were subsequent encumbrances, or subsequent grantees, or owners, or persons interested in the premises, they would or *might* be entitled to the surplus in the order of their respective liens or interests. Upon the report, therefore, showing such a surplus remaining, the court directs a reference to ascertain the situation of the premises, the persons interested therein or having liens thereon, the order of their claims or liens, and to determine who are entitled to the surplus, and the several shares therein. Upon the confirmation of the referee's report, the court will make an order directing the surplus to be paid or distributed in accordance with its conclusions.

the property; and even after such sale, if there has been any element of inequitable conduct, or bad faith or fraud on the mortgagee's part, the mortgagor may maintain an equitable action for an accounting against the mortgagee, and hold him responsible for the real value of the property, or what might have been obtained for it by a fair and reasonable sale. On the other hand, although a foreclosure in equity is not necessary, yet equity has undoubted jurisdiction to entertain a suit on behalf of the mortgagee, and to decree a foreclosure by a judicial sale of the mortgaged chattels, as in the case of a mortgage of land.<sup>1</sup>

§ 1231. **Pledges.**—A like equitable jurisdiction exists in cases of pledges. As a general rule, the pledgor may undoubtedly obtain complete relief at law by a tender and by an action to recover the chattel or its value; but under special circumstances, as where an accounting or a discovery is needed, or where the pledge has been assigned, the pledgor may certainly maintain an equitable suit for a redemption.<sup>1</sup> The modern decisions have generally settled the rule that, in ordinary pledges of chattels, the pledgee may enforce his security and cut off the pledgor's right of redemption without any action, by means of a public sale of the pledged article, after a demand of payment made upon and notice of the sale given to the pledgor. The equitable jurisdiction, however, still exists, and the pledgee may enforce his security by a suit in equity for a foreclosure and judicial sale; and this mode by suit in equity must be resorted to when the pledged articles are negotiable instruments, or other things in action having no market price or value, and also, whenever, in case of any kind of article pledged, it is impossible to make demand of or give notice to the pledgor as necessary preliminaries to a foreclosure by sale.<sup>2</sup>

§ 1232. **Chattel Mortgage in California.**—By the Civil Code of California, and of the other states and territories which have adopted the same type of legislation, the common-law view of the chattel mortgage as a conditional *sale* has been wholly abandoned; the mortgage itself has been assimilated to the mortgage of lands as creating only a lien, the legal ownership and all its incidents, including the right of possession, being left in the mortgagor until the lien is enforced and his interest is extinguished either by an equitable suit for foreclosure or by a public sale. The personal mortgage, however, is only permitted to be given upon certain kinds and classes of chattels specified in the statute.

<sup>1</sup> Charter v. Stevens, 3 Denio 33, 45 Am. Dec. 444.

<sup>2</sup> Nelson v. Owen, 113 Ala. 372, 21 South. 75.

<sup>3</sup> Cleghorn v. Minnesota T. I. & T. Co., 57 Minn. 341, 47 Am. St. Rep. 615, 59 N. W. 320.

## CHAPTER SIXTH.

### MORTGAGES OF PERSONAL PROPERTY AND PLEDGES.

#### ANALYSIS.

- § 1229. General nature of, at law.
- § 1230. Jurisdiction and remedies in equity.
- § 1231. Pledges: Equitable jurisdiction and remedies.
- § 1232. Chattel mortgages in California.

§ 1229. **General Nature of, at Law.**—In most of the states, as well as in England, a personal or chattel mortgage is, at law, a conditional sale of the things mortgaged, passing the legal title to the mortgagee, which becomes absolute on the mortgagor's failure to perform the condition. As between the parties, a delivery of the possession to the mortgagee is not essential, although the absence of such delivery may raise a presumption that the transaction was a fraud upon the rights of the mortgagor's creditors, and may thus endanger the validity of the mortgagee's title as against their claims. A pledge, on the other hand, is a delivery of the thing into the actual or constructive possession of the creditor, to be retained by him until the debt is paid. The pledgee acquires only a special property, which is not enlarged by the mere fact that the pledgor fails to pay the debt at the time specified; whereas by such a failure the legal estate of the mortgagee becomes ipso facto complete and absolute.<sup>1</sup> Upon a breach of the condition contained in the mortgage, the legal title vests so completely in the mortgagee that all the rights incident to ownership and possession in law at once arise.<sup>2</sup> By taking possession of the property and selling it at public sale upon due notice, he will then extinguish every right and interest at law of the mortgagor.

§ 1230. **Jurisdiction and Remedies in Equity.**—While the legal title of the mortgagee is thus made absolute by a failure to perform the condition, the doctrine is well settled that the mortgagor retains an equity of redemption notwithstanding his default, which he may enforce by an equitable suit to redeem, even though the mortgagee has taken possession of the chattels, at any reasonable time before his right has been cut off by a valid public sale of

<sup>1</sup> As to the nature of a chattel mortgage, see *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. 334. As to its difference from a pledge: *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

<sup>2</sup> *Case v. Boughton*, 11 Wend. 106, 108.

## CHAPTER SEVENTH.

## EQUITABLE LIENS.

## SECTION I.

## THEIR GENERAL NATURE.

## ANALYSIS.

§ 1233. What are included in this term; what is an equitable lien.

§ 1234. Origin and rationale of the doctrine.

§ 1233. **What are Included in This Term—What is an Equitable Lien.**—Analogous to mortgages considered from the purely equitable point of view are the important class of interests embraced under the denomination of “equitable liens”; and I include within this general term those interests which are not regarded by the American jurisprudence as true mortgages, but which are commonly called by English writers and judges “equitable mortgages.” 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*.<sup>2</sup> It is simply a right of a special nature over the thing, which constitutes a charge or encumbrance 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

<sup>1</sup>The most important species of “equitable mortgages,” according to the English theory, are, in all the states of this country, *legal mortgages*. In England certain mortgages are called “equitable,” because no legal estate is transferred by them to the mortgagee; for example, every mortgage of the equity of redemption—that is, every second or other subsequent mortgage is “equitable,” since the legal estate has already been conveyed by the first mortgage. In this country no such distinction is recognized. In the states adopting the legal system—the first class heretofore described—*every* successive mortgage conveys a legal estate to the mortgagee; while in the states of the second class *every* mortgage simply creates a lien. In England the deposit of title deeds as security is called an “equitable mortgage.” It is better to include all cases of such liens which are not proper mortgages within the general class of “equitable liens”; this division is both simple and natural.

<sup>2</sup>See *Peck v. Jenness*, 7 How. 612, 620, 12 L. ed. 841, per Grier, J.

lien exists. It is the very essence of this condition that while the lien continues the possession of the thing remains with the debtor or the person who holds the proprietary interest subject to the encumbrance.<sup>3</sup> The equitable lien differs essentially from the common-law lien, which is simply a right to retain possession of the chattel until some debt or demand due to the person thus retaining is satisfied; and possession is such an inseparable element, that if it be voluntarily surrendered by the creditor, the lien is at once extinguished.<sup>4</sup>

§ 1234. **Origin and Rationale of the Doctrine.**—The doctrine of equitable liens is one of great importance and of wide application in administering the rights and remedies peculiar to equity jurisprudence. There is perhaps no doctrine which more strikingly shows the difference between the legal and the equitable conceptions of the juridical results which flow from the dealings of men with each other, from their express or implied undertakings. A brief explanation of the foundation and reasons upon which this branch of the equity jurisprudence rests is essential to a full understanding of the subject. It is sometimes, although I think unnecessarily and even incorrectly, spoken of as a species of implied trusts.<sup>1</sup> If any reference to the theory of trust is made, it is more accurate to describe these liens as *analogous* to trusts; for while the two have some similar features, they are unlike in their essential elements. The common-law remedies upon all contracts except those which transfer a legal estate or property, such as conveyances of land and sales or bailments of chattels ("real" contracts, contractus reales), are always mere recoveries of money; the judgments are wholly pecuniary and personal, enforced in ancient times

<sup>1</sup> *Brace v. Duchess of Marlborough*, 2 P. Wms. 491, 1 Scott 350.

<sup>2</sup> In some instances of the common-law lien the creditor acquires no right but that of simple detention—e. g., the lien of an attorney on the papers of his client. In most, however, he may have a remedy against the thing itself, and in some cases equity will aid the creditor by its more efficient remedy of foreclosure by judicial sale: *Knapp, Stout & Co. v. McCaffrey*, 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290 (bailee's lien).

<sup>3</sup> Incorrectly, in my opinion, because the very essence of every real trust, express, resulting, or constructive, is the existence of two *estates* in the same thing—a legal estate vested in the trustee, and an equitable estate held by the beneficiary. In an equitable lien there is a legal estate with possession in one person, and a special right *over* the thing held by another; but here the resemblance, which at most is external, ends. This special right is not an *estate* of any kind; it does not entitle the holder to a conveyance of the thing nor to its use; it is merely a right to secure the performance of some outstanding obligation, by means of a proceeding directed against the thing which is subject to the lien. To call this a trust, and the owner of the thing a trustee for the lien-holder, is a misapplication of terms which have a very distinct and certain meaning.

against the person of the judgment debtor by imprisonment, and in modern times against his property by means of an execution. This species of remedy is seldom granted by equity, and is opposed to its general theory. The remedies of equity are, as a class, specific. Although it is commonly said of them that they are not in rem, because they do not operate by the inherent force of the decree in an equitable suit to change or to transfer the title or estate in controversy, yet these remedies are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing,—a tract of land, personal property, or a fund,—rather than a right to recover a sum of money generally out of the defendant's assets. Remedies in equity, as well as at law, require some primary right or interest of the plaintiff which shall be maintained, enforced, or redressed thereby. When equity has jurisdiction to enforce rights and obligations growing out of an executory contract, this equitable theory of remedies cannot be carried out, unless the notion is admitted that the contract creates some right or interest in or over specific property, which the decree of the court can lay hold of, and by means of which the equitable relief can be made efficient. The doctrine of "equitable liens" supplies this necessary element; and it was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law. It follows, therefore, that in a large class of executory contracts, express and implied, which the law regards as creating no property right, nor interest analogous to property, but only a mere personal right and obligation, equity recognizes, in addition to the personal obligation, a peculiar right over the thing concerning which the contract deals, which it calls a "lien," and which, though not property, is analogous to property, and by means of which the plaintiff is enabled to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon that thing. The theory of equitable liens has its ultimate foundation, therefore, in contracts, express or implied, which either deal with or in some manner relate to specific property, such as a tract of land, particular chattels or securities, a certain fund, and the like. It is necessary to divest one's self of the purely legal notion concerning the effect of such contracts, and to recognize the fact that equity regards them as creating a charge upon or hypothecation of the specific thing, by means of which the personal obligation arising from the agreement may be more effectively enforced than by a mere pecuniary recovery at law.

## SECTION II.

## ARISING FROM EXPRESS CONTRACT.

## ANALYSIS.

- § 1235. The general doctrine; requisites of the contract.  
 § 1236. On property to be acquired in future.  
 § 1237. The form and nature of the agreement; illustrations of particular agreements; agreements to give a mortgage; defective mortgages; assignments; bills of exchange, etc.

§ 1235. **The General Doctrine—Requisites of the Contract.**—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, 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 encumbrancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property.<sup>1</sup> The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, equity regards as done that which ought to be done.<sup>2</sup> In order, however, that a lien may arise in pursuance of this doctrine, the agreement must deal with some particular property, either by identifying it, or by so describing it that it can be identified, and must indicate with sufficient clearness an intent that the property so described, or rendered capable of identification, is to be held, given, or transferred as security for the obligation.<sup>3</sup>

§ 1236. **On Property to be Acquired in Future.**—The doctrine is carried still further, and applied to property not yet in being at the time when the contract is made. It is well settled that an agreement to charge, or to assign, or to give security upon, or to affect property not yet in existence, or in the ownership of the

<sup>1</sup> Russel v. Russel, 1 Brown Ch. 269, Kirch. 110 (verbal lien on leasehold); Burdick v. Jackson, 7 Hun, 488, Kirch. 129 (agreement to mortgage); Daggett v. Rankin, 31 Cal. 321 (same); Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075 (lien on personal property).

<sup>2</sup> Daggett v. Rankin, 31 Cal. 321, 326; Farmers' L. & T. Co. v. Pennsylvania Plate Glass Co., 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710.

<sup>3</sup> Lee v. Cole, 17 Oreg. 559, 21 Pac. 819.

party making the contract, or property to be acquired by him in the future, although, with the exception of one particular species of things, it creates no legal estate or interest in the things when they afterwards come into existence or are acquired by the promisor,<sup>1</sup> does constitute an equitable lien upon the property so existing or acquired at a subsequent time, which is enforced in the same manner and against the same parties as a lien upon specific things existing and owned by the contracting party at the date of the contract.<sup>2</sup>

**§ 1237. Form and Nature of the Agreement—Illustrations of Particular Agreements.**—

The form or particular nature of the agreement which shall create a lien is not very material, for equity ~~looks at the final intent and purpose rather than at the form;~~ and if the intent appear to give, or to charge, or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows.<sup>1</sup> Among the kinds of agreement from which liens have been held to arise, the following are some important examples: Executory agreements which do not convey or transfer any legal estate in the property, but which stipulate that the property shall be security, or which pledge it, for the performance of an obligation.<sup>2</sup> As an agreement to give a mortgage creates a lien, so a mortgage which, through some informality or defect in its terms or mode of execution, is not complete and valid as a true and proper mortgage, will nevertheless generally create an equitable lien upon the property described. The intent to give a security being clear, equity will treat the instrument as an executory agreement for such security.<sup>3</sup> An assign-

<sup>1</sup>The excepted case is that of an agreement to sell chattels not yet in existence, which are of the kind said to have a "potential existence," the most familiar example of which is an expected crop: *Grantham v. Hawley*, Hob. 132, Kirch. 40.

<sup>2</sup>*Holroyd v. Marshall*, 10 H. L. Cas. 191, Kirch. 42. This subject is more fully treated in the subsequent chapter upon assignments. See post, §§ 1283, 1288.

<sup>3</sup>*Flagg v. Mann*, 2 Sum. 486, 533, Fed. Cas. No. 4847, Kirch. 167, per Story, J.: "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 [lien]."

<sup>4</sup>An agreement by which the maker incurs an obligation, and pledges the produce of certain land, or the land itself, or "gives a lien on the land" as security for the performance: *Chase v. Peck*, 21 N. Y. 581, Kirch. 124. For further illustrations of such agreements, see *Bell v. Pelt*, 51 Ark. 433, 11 S. W. 684, 14 Am. St. Rep. 57, 4 L. R. A. 247; *Perry v. Board of Missions*, 102 N. Y. 99, 6 N. E. 116, Kirch. 135.

<sup>5</sup>*Wayt v. Carwithen*, 21 W. Va. 516, 1 Scott 307; *Atkinson v. Miller*, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544, 1 Scott 308; where a mortgage purporting to be given by a corporation was not executed in its name nor attested by

ment of the rents and profits of land as security for a debt is another mode of creating an equitable lien on the land in favor of the assignee, and the assignment of a lease by way of security produces the same effect.<sup>4</sup> The assignment for a similar purpose of a contract for the purchase and sale of land may in like manner operate to create an equitable lien in favor of the assignee.<sup>5</sup> The equitable liens which arise from such assignment must largely depend upon a performance of the conditions and stipulations contained in the original contracts, whatever be their form, which are assigned. . . .

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### SECTION III.

#### ARISING FROM IMPLIED CONTRACTS.

##### ANALYSIS.

- § 1238. Nature of "implied contract" in equity.
- § 1239. General doctrine as to liens arising ex aequo et bono.
- § 1240. Expenditure by one joint owner.
- § 1241. Expenditure for the benefit of the true owner.
- § 1242. Expenditure by a life tenant.
- § 1243. In other special cases.

§ 1238. Nature of "Implied Contract" in Equity.—The term "implied contract" is a pure fiction of the common-law system of pleading, invented so that certain equitable liabilities, not arising from express promise, but recognized as existing by the courts of law, might be consistently enforced by the action of assumpsit. The phrase is not only a misnomer in equity, but it violates equitable conceptions. There is no necessity for resorting to the notion of "implied contract" to account for the existence of any equitable rights and liabilities which do not arise from express promise. The class of equitable rights and liabilities which at law are referred to the fiction of "implied contract" really exist ex aequo et bono; they arise wholly from considerations of right and justice, and from the application to particular conditions of fact of those maxims which lie at the foundation of equity jurisprudence.

its corporate seal, but was executed in the name of its officers, they having authority, however, to bind the corporation by executing the mortgage in its name, it was held to create an equitable lien: *Love v. Sierra Nevada Co.*, 32 Cal. 639, 652, 91 Am. Dec. 602.

<sup>4</sup> Ex parte Wills, 1 Ves. 162.

<sup>5</sup> A bond conditioned to convey by deed upon payment of the purchase price is in its operation tantamount to an agreement to convey, and the liens arising from it are identical with the liens of the vendor and the vendee arising from the ordinary contract for the sale of land described in a subsequent section: *Graham v. McCampbell*, Meigs 52, 33 Am. Dec. 126, 1 Ames Eq. Jur. 205; *Button v. Schroyer*, 5 Wis. 598, 1 Ames Eq. Jur. 225.

**§ 1239. General Doctrine as to Liens Arising ex Aequo et Bono.**

--In addition to the general doctrine that equitable liens are created by executory contracts which, in express terms, stipulate that property shall be held, assigned, or transferred as security for the promisor's debt or other obligation, there are some further instances where equity raises similar liens, without agreement therefor between the parties, based either upon general considerations of justice (*ex aequo et bono*), or upon the particular equitable principle that he who seeks the aid of equity in enforcing some claim must himself do equity,—that is, must recognize and admit the equitable rights of the opposite party directly connected with or arising out of the same subject-matter. I shall briefly describe the most important instances which belong to this species of equitable liens.

**§ 1240. Expenditure by One Joint Owner.**—Where two or more persons are joint purchasers or owners of real or other property, and one of them, acting in good faith and for the joint benefit, makes repairs or improvements upon the property which are permanent, and add a permanent value to their entire estate, equity may not only give him a claim for contribution against the other joint owners, with respect to their proportionate shares of the amount thus expended, but may also create a lien as security for such demand upon the undivided shares of the other proprietors.<sup>1</sup>

**§ 1241. Expenditure for the Benefit of the True Owner.**—Such an equitable lien has not always been confined to cases in which a contract to reimburse could be implied at law. The right to a contribution or reimbursement from the owner, and the equitable lien on the property benefited as a security therefor, have been extended to other cases where a party innocently and in good faith, though under a mistake as to the true condition of the title, makes improvements or repairs or other expenditures which permanently increase the value of the property, so that the real owner, *when he seeks the aid of equity* to establish his right to the property itself, or to enforce some equitable claim upon it, having been substantially benefited, is required, upon principles of justice and equity, to repay the amount expended.<sup>1</sup>

<sup>1</sup> *Lake v. Gibson*, 1 Eq. Cas. Abr. 290, pl. 3, 1 Scott 367.

<sup>1</sup> In order that there may be a claim for reimbursement and a lien as security therefor in any case of this general kind, either the aid of a court of equity must be requisite on behalf of the owner against whom the claim for reimbursement is made, so that he can be compelled to do equity, or else there must be some element of fraud in the transaction as ground of equitable interference. If, therefore, the true owner can recover his land by an action at law, equity will not, in the absence of fraud, compel him to reimburse the occupant even in good faith for disbursements made in repairs and improvements. See *ante*, §§ 807, 821; *Moore v. Cable*, 1 Johns. Ch. 385, *Kirch*.

## SECTION IV.

## ARISING FROM CHARGES BY WILL OR BY DEED.

## ANALYSIS.

§ 1244. General doctrine; nature of a charge.

§ 1245. What amounts to a charge creating such a lien.

§ 1246. The same; express charge.

§ 1247. The same; implied charge; English and American rules stated in foot-note.

§ 1248. Observations upon the rules adopted by the American courts.

§ 1244. **General Doctrine—Nature of a "Charge."**—Another species of equitable lien not growing out of contract directly between the parties arises when specific property—a lot of land, a fund of securities, or the land contained in a residuary devise—is conveyed, devised, or bequeathed subject to or charged with the payment of debts, legacies, portions, or annuities in favor of third persons given by the same instrument. The legal title to the property vests in the grantee, devisee, or other recipient, but a lien thereon is created in favor of the beneficiary named, which can be enforced in equity. Where, for example, land is devised charged with the payment of the testator's debts generally, a lien arises in favor of the creditors, and any one or more of these can enforce it against the land so devised; or where a lot is devised charged with the payment of a particular legacy, the legatee can in like manner enforce his lien against such tract in the hands of the devisee.<sup>1</sup> There is a plain distinction pointed out in the previous chapter on trusts, between a gift of property in trust merely to pay debts or legacies, and a gift of property charged with or subject to the payment of debts or legacies.<sup>2</sup>

524. See, in general, *Thomas v. Evans*, 105 N. Y. 614, 12 N. E. 571, 59 Am. Rep. 519; *Williams v. Vanderbilt*, 145 Ill. 238, 251, 36 Am. St. Rep. 486, 494, 34 N. E. 476, 21 L. R. A. 489. This rule has been changed by statute in several of the states, which allow compensation to defendants, even in actions of ejectment, when the land is recovered from them for the "betterments" which they have added to the land.

<sup>1</sup>Where the charge consists in a direction that the devisee shall pay a legacy or debt, his acceptance creates a personal liability: *Brown v. Knapp*, 79 N. Y. 136. But where there is no such direction, and the land is given simply subject to the payment, or the charge is in any manner made upon the land alone, the devisee assumes no personal liability; the remedy of the legatee or creditor, based upon such charge, is confined to his enforcement of the lien upon the land: *Cliff v. Moses*, 116 N. Y. 144, 22 N. E. 393. See, also, *Nudd v. Powers*, 136 Mass. 273.

<sup>2</sup>See ante, § 1033, note.

§ 1239. **General Doctrine as to Liens Arising ex Aequo et Bono**

--In addition to the general doctrine that equitable liens are created by executory contracts which, in express terms, stipulate that property shall be held, assigned, or transferred as security for the promisor's debt or other obligation, there are some further instances where equity raises similar liens, without agreement between the parties, based either upon general consideration of justice (ex aequo et bono), or upon the particular equities of the case. That he who seeks the aid of equity in enforcing some right of himself do equity,—that is, must recognize and admit the rights of the opposite party directly connected with the subject-matter. I shall briefly describe the most important instances which belong to this species of equitable liens.

§ 1240. **Expenditure by One Joint Owner.**—When two or more persons are joint purchasers or owners of real property, and one of them, acting in good faith and for the benefit of the whole, makes repairs or improvements upon the property which will increase and add a permanent value to their entire estate, he not only give him a claim for contribution against the other owners, with respect to their proportionate shares of the amount expended, but may also create a lien as security for the amount expended upon the undivided shares of the other parties.

When a person who is not a joint owner makes repairs or improvements upon the property of another, and adds a permanent value to the property, he may create an equitable lien in favor of himself for the amount expended, if he can show that he acted in good faith and for the benefit of the whole, and that the property benefited is his own or that of a third party.

§ 1241. **Expenditure for the Benefit of Another.**

An equitable lien has not always been considered as arising from a contract to reimburse could be implied at law. It is a contribution or reimbursement from the owner of the property benefited as a security for the amount expended. In other cases where a party innocently expends money upon a property under a mistake as to the true condition of the property, or for improvements or repairs or other expenses which will increase the value of the property, so that the party who *seeks the aid of equity* to establish his claim, or to enforce some equitable claim upon the property benefited, is required, upon principle, to repay the amount expended.<sup>1</sup>

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<sup>1</sup> Lake v. Gibson, 1 Eq. Cas. Abr. 290.

purchase price. stated or rejected; states

re. discussed. lien; great uncertainty of opinion. King other security. etc.

Metcalf v. Hutchinson,

not assignable.

I think, the English conveyed and for in a con- red possession and for the un- distinct agreement deed recites that grantor's lien exists Alabama, Arkansas, Cali- florida, Illinois, Indiana, nesota, Mississippi, Mis- nessee, Texas, Wisconsin. lien has been recognized ns, under a somewhat modi- securing payment in convey- ining states of the Union, the by the courts, or after having n abrogated by statute, or the not seem to have been finally de- s belong to this class, in which the use rejected or not adopted by the tes: Connecticut, Delaware, Georgia, ts, Nebraska, New Hampshire, North ylvania, Rhode Island, South Carolina, ington], West Virginia.<sup>2</sup>

**rationale.**—With regard to the origin and

<sup>1</sup> 15 Ves. 329, 1 Lead. Cas. Eq., 4th Am. ed., 447, 1 Johns. Ch. 308, 1 Scott 70; Chase v. Peck,

<sup>2</sup> 18 Mass. 261, 19 Am. Rep. 449, Kirch. 131.

**§ 1245. What Amounts to a Charge Creating Such a Lien.**—Since, according to the settled general doctrine, the personalty is ordinarily the primary fund for the payment of debts, and is the primary and even only fund for the payment of legacies as between the legatees and the devisees, it follows that an intention on the part of the testator to change this natural order by a charge upon lands devised, which should render them primarily or even ratably liable for the payment of all or of any particular debts or legacies, must clearly appear, either from the express language of the will or by fair and necessary implication from the various dispositions made by the testator.<sup>1</sup> A charge of debts or legacies upon lands devised may be either express or implied.

**§ 1246. The Same. Express Charge.**—A testator may in express terms charge the payment of all his debts, or any individual debt, and all his legacies, or any of them, either upon the lands devised by a residuary clause, or upon any particular lot or parcel of land specifically devised, and the charge may be upon the corpus of the land, or upon the rents and profits alone. The same is true of an express charge upon any particular fund of personal property bequeathed, or upon the residue given to the residuary legatee. What language will amount to an express charge must always be a matter of construction and interpretation, depending upon the terms employed in each individual case.<sup>1</sup>

**§ 1247. The Same. Implied Charge.**—The intention of a testator to charge debts and legacies upon the real estate devised may also be implied from the general dispositions of the will,—from the mode in which the real and the personal property are donated. The English and the American decisions all recognize this fact, but they are not all agreed upon the effects produced by particular dispositions. . . .

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## SECTION V.

### THE GRANTOR'S LIEN ON CONVEYANCE.

#### ANALYSIS.

§§ 1249–1254. The ordinary grantor's lien for unpaid purchase price.

§ 1249. General doctrine; in what states adopted or rejected; states classified in foot-notes.

§ 1250. Origin and rationale; Ahrend v. Odiorne, discussed.

§ 1251. Requisites, extent, and effects of this lien; great uncertainty and conflict in the results of judicial opinion.

§ 1252. How discharged or waived; effect of taking other security, etc.

<sup>1</sup> Hoyt v. Hoyt, 85 N. Y. 142.

<sup>1</sup> See Merritt v. Bucknam, 78 Me. 504, 7 Atl. 383; Metcalfe v. Hutchinson, L. R. 1 Ch. Div. 591.

- § 1253. Against whom the lien avails.
- § 1254. In favor of whom the lien avails; whether or not assignable.
- §§ 1255-1259. Grantor's lien by reservation.
  - § 1255. General description.
  - § 1256. What creates a lien by reservation.
  - § 1257. Essential nature of the lien.
  - § 1258. Its operation and effect.
  - § 1259. The grantor's dealing with this lien; waiver; assignment.

**§ 1249. General Doctrine—In What States Adopted or Rejected.**

—Although the grantor's and the vendor's lien are ordinarily treated of together by one and the same description and discussion, yet they are essentially different, producing different consequences, and governed in many important and practical respects by different rules. By presenting them separately, more accuracy and certainty will result, and much unnecessary confusion will, I think, be avoided. It is a firmly established doctrine of the English equity, that the grantor of land, who has sold and conveyed and delivered possession to the grantee, as well as the vendor in a contract for the sale and purchase of land who has delivered possession to his vendee, retains an equitable lien upon the land for the un-paid purchase-money, although he has taken no distinct agreement or separate security for it, and even though the deed recites that the consideration has been fully paid.<sup>1</sup> The grantor's lien exists in the following states and territories: Alabama, Arkansas, California, Colorado, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, Ohio, Tennessee, Texas, Wisconsin. In several of these commonwealths the lien has been recognized by statute; and in a few of them, it seems, under a somewhat modified form, to be the ordinary mode of securing payment in conveyances of land on credit. In the remaining states of the Union, the doctrine has either been condemned by the courts, or after having been judicially accepted, has been abrogated by statute, or the question as to its existence does not seem to have been finally determined. The following states belong to this class, in which the lien does not exist, either because rejected or not adopted by the courts, or abolished by statutes: Connecticut, Delaware, Georgia, Kansas, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, [Oregon], Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, [Washington], West Virginia.<sup>2</sup>

**§ 1250. Origin and Rationale.**—With regard to the origin and

<sup>1</sup> *Mackreth v. Symmons*, 15 Ves. 329, 1 Lead. Cas. Eq., 4th Am. ed., 447, 1 Scott 71; *Garson v. Green*, 1 Johns. Ch. 308, 1 Scott 70; *Chase v. Peck*, 21 N. Y. 581, Kirch. 124.

<sup>2</sup> *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449, Kirch. 131.

rationale of the grantor's lien, there has been a great diversity of opinion. It has been accounted for as a trust; as an equitable mortgage; as arising from a natural equity; and as a contrivance of the chancellors to evade the unjust rule of the early common law by which land was free from the claims of simple contract creditors.<sup>1</sup> Notwithstanding all these differing theories, as illustrated by the quotations in the foot-notes, the original and true ground of this lien appears to me very simple and obvious. It is clearly one of the many instances to be found in the early English jurisprudence, whether legal or equitable, of the higher importance, consideration, and value given to real than to personal property. It is a most natural judicial conception that upon the sale of *any* thing on credit, the very identical thing sold should be regarded in some sort as a special fund out of which payment of the price was to be obtained, or at least secured, and that the seller should not be considered as parting *absolutely* with his whole interest and dominion until the price was fully paid. This natural conception would undoubtedly have manifested itself in a universal rule, applicable to the sales of all things, had not other considerations and motives of policy prevented. Such considerations and motives did interfere and prevail in the case of chattels and all personal property. The interests of trade and commerce required that the transmission of these things should be free, and that ownership should go or appear to go with possession. These reasons, joined with the comparatively slight importance given to the ownership of personal property resulting from feudal institutions, prevented the application of the principle to the sale of chattels and things in action, in the same manner as, at a later day, the same reasons were applied with even greater force to the transfer of negotiable instruments. Land, however, not being looked upon as a subject of commerce, being closely associated with family interests and social distinction, its free transmission not being considered as essential, and its ownership being highly favored and surrounded with sentiments of peculiar feudal honor, it was inevitable that the natural principle which I have described should have been allowed its full force and effect upon the sale of real estate. Its ownership being so high and almost sacred a right, the proprietor selling on credit was not considered as parting with every interest or dominion over the particular tract, although he had delivered possession, until he had received full payment of the price which had been agreed upon *as a substitute* for the land itself. As the common-law rules

<sup>1</sup> The last-named opinion was maintained in *Ahrend v. Odiorne*, 118 *Mass.* 261, 266, 19 *Am. Rep.* 449, *Kirch.* 131, by Mr. Chief Justice Gray.

furnished no means for working out this idea, it was both natural and inevitable that equity should make the conception practical under the familiar form of an equitable lien.<sup>2</sup> In later times, the equity judges, attempting to give some explanation of the doctrine, invented the theories of trust, mortgage, and the like. The correctness of this rationale further appears from the fact that under some circumstances the lien has been extended by modern judges to sales of personal property.

**§ 1251. Requisites, Extent, and Effect of this Lien—Uncertain and Conflicting Results of Judicial Opinion.**—The grantor's lien, wherever recognized, is only permitted as a security for the unpaid purchase price, and not for any other indebtedness nor liability. There must be a certain, ascertained, absolute debt owing for the purchase price; the lien does not exist in behalf of any uncertain, contingent, or unliquidated demand.<sup>1</sup> No other single topic belonging to the equity jurisprudence has occasioned such a diversity and even discord of opinion among the American courts as this of the grantor's lien. Upon nearly every question that has arisen as to its operation, its waiver or discharge, the parties against whom it avails, and the parties in whose favor it exists, the decisions in different states, and sometimes even in the same state, are directly conflicting. It is practically impossible to formulate any general rules representing the doctrine as established throughout

<sup>2</sup>It is evident from the foregoing account that the theory of trust is utterly without foundation, while that lately advanced by the Massachusetts court is imperfect and unsatisfactory—substituting, in fact, an effect for a cause. The absence of any power at the common-law to make land liable for ordinary debts, instead of being the source of the grantor's lien, was itself only another instance and consequence of the same general superiority given to the ownership of land; both were incidents of one common mode of treating real estate as compared with personal. I venture the opinion that it is also obvious from the explanation of the text that the original grounds and reasons for admitting the grantor's lien do not exist in our own country, and the lien itself is not in harmony with our general real-property law. The tendency both of our legislation and of our social customs is to make land a subject of commerce, and its transmission as free as possible; while the rights of grantors can be fully protected by mortgages which, in nearly all the states, are widely different from the instrument bearing the same name in England. See *Frame v. Sliter*, 29 Oreg. 121, 45 Pac. 290, 54 Am. St. Rep. 781, 34 L. R. A. 690.

<sup>1</sup>The lien did not exist in the following cases: *Peters v. Turrell*, 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252 (agreement to support grantor for life); *Parrish v. Hastings*, 102 Ala. 414, 14 South. 783, 48 Am. St. Rep. 50 (agreement to fence the land); *Graham v. Moffett*, 119 Mich. 303, 75 Am. St. Rep. 393, 78 N. W. 132 (does not exist for unliquidated damages resulting from the vendee's fraudulent misrepresentations as to the value of personal property which formed part of the price).

the whole country. The subjects to be considered in the further treatment are: 1. When the lien is discharged or waived; 2. Against whom it avails; and 3. In favor of whom it avails.

§ 1252. How Discharged or Waived.—It is a generally settled rule that the lien, if otherwise existing, is not waived or destroyed by the grantor's giving a receipt in full for the purchase price, or by a recital to that effect in the deed, nor by the grantee's giving his own personal security—his bond, note, bill—for the price.<sup>1</sup> If, however, the grantee's own bond, note, or other promise is given, not as a security for the price, but as a substitute for or in novation of the purchase price, so that no debt for the price any longer exists, the lien is destroyed, and a fortiori this result follows where the bond, or note, or engagement of a third person is thus given.<sup>2</sup> The complementary doctrine is also generally settled, that the acceptance of distinct independent security for the purchase price, other than the grantee's own personal undertaking, destroys or discharges the lien, unless the continued existence of the lien is agreed upon by the parties. While this doctrine is generally accepted, there is much conflict of opinion in its application to particular conditions of fact.<sup>3</sup> The securities which ordinarily produce this effect are, the grantee's mortgage on the very land conveyed; his mortgage on other land; the note, bill, bond, or undertaking of a third person; the note or bill of the grantee indorsed or guaranteed by a third person, and the like; but the decisions are not unanimous.<sup>4</sup> Finally, after the lien has risen against the grantee, it may be waived as against third persons by the laches or affirmative acts of the grantor himself. In other words, the grantor may, by his negligence or other acts, postpone his lien, or estop himself from asserting it against third persons who have acquired title under the grantee.<sup>5</sup>

<sup>1</sup> Garson v. Green, 1 Johns. Ch. 308, 1 Scott 70; Maroney v. Boyle, 141 N. Y. 462, 36 N. E. 511, 38 Am. St. Rep. 821 (grantee's own note, etc.); Hood v. Hammond, 128 Ala. 569, 30 South. 540, 86 Am. St. Rep. 159 (lien held to remain, although the debt is barred by the statute of limitations).

<sup>2</sup> Williams v. McCarty, 74 Ala. 295.

<sup>3</sup> Some cases hold that the acceptance of independent security is not conclusive; that it merely raises a prima facie presumption of an intention to give up the lien, and that this presumption may be overcome and the lien established: Fonda v. Jones, 42 Miss. 792, 2 Am. Rep. 669; Woodall v. Kelly, 85 Ala. 368, 5 South. 164, 17 Am. St. Rep. 57.

<sup>4</sup> See Avery v. Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272 (mortgage by grantee); Fouch v. Wilson, 60 Ind. 64, 28 Am. Rep. 651 (but lien not defeated by a forged security); Kendrick v. Eggleston, 56 Iowa 128, 41 Am. Rep. 90, 8 N. W. 786 (lien defeated by security which was valid but proves to be worthless). Personal undertaking or indorsement of third person defeats the lien. See Rice v. Rice, 36 Fed. 858.

<sup>5</sup> Rice v. Rice, 2 Drew, 73, H. & B. 23, 1 Scott, 334.

§ 1253. **Against Whom the Lien Avails.**—The grantor's lien once arising, and not waived by any act or default of his, avails against the grantee himself, his heirs, devisees, and other immediate successors in interest.<sup>1</sup> It also avails against all subsequent purchasers and encumbrancers of the land under the grantee who are not bona fide purchasers for a valuable consideration and without notice.<sup>2</sup> It does not prevail against a subsequent bona fide purchaser or mortgagee of the land for a valuable consideration and without notice of the grantee's equity.<sup>3</sup> Whether the grantor's lien is or is not superior to that of subsequent judgments recovered against the grantee is a question upon which the American decisions are in direct conflict; nor is it possible by any interpretation to reconcile their opposing views. On principle, however,—and especially when considered in connection with the universal system of registry,—it seems to me clear that the subsequent judgment liens are entitled to precedence.<sup>4</sup>

§ 1254. **In Favor of Whom the Lien Avails.**—In England the prevailing opinion regards the lien not as merely personal to the grantor, but as an interest in land of which other parties may avail themselves by subrogation or marshaling, as legatees or judgment creditors of the grantor, or by direct assignment. In this country

<sup>1</sup> Mackreth v. Symmons, 15 Ves. 329, 1 Scott 71.

<sup>2</sup> Pylant v. Reeves, 53 Ala. 132, 25 Am. Rep. 605; Woodall v. Kelly, 85 Ala. 368, 5 South. 164, 7 Am. St. Rep. 57.

<sup>3</sup> First Nat. Bank v. Tompkins, 57 Fed. 20, 6 C. C. A. 237. As to what constitutes notice by recitals in deed, by possession, etc., see ante, §§ 626, 628.

<sup>4</sup> . . . The grantee holds the full legal title and estate, and he appears by the records to be the legal owner. The grantor's interest is purely an equitable lien, secret, undisclosed by the records. A judgment creditor of the grantee has a right to regard him as the complete owner in reliance upon the records; he has no knowledge, and ordinarily no means of knowledge, of the grantor's secret equitable lien. The judgment against the grantee is a *legal* lien upon the legal estate in his hands. It is not the case of two successive *equitable* liens of the same nature, where priority of time gives precedence. It is true that a prior equitable *estate* may sometimes prevail against a subsequent *legal* lien by judgment; but this doctrine is confined by the strong tendency of American decisions to true equitable estates. The grantor's interest is in no sense an equitable *estate*; it is a mere lien, not *essentially* of a higher nature than that of a judgment, while that of the judgment possesses the superiority of being legal. The doctrine that between a prior *equitable* interest and a subsequent *legal* interest of equal character, the legal will prevail, seems to be controlling. In my opinion, it is plain from this analysis, *on principle*, that the prior grantor's equitable lien must succumb to the subsequent legal lien of the judgment against the legal estate of the grantee, when the judgment is recovered for a valuable consideration and without notice. Giving the judgment the precedence, see Cutter v. Ammon, 65 Iowa 281, 21 N. W. 604. Giving the grantor's lien the precedence, see Walton v. Hargroves, 42 Miss. 18, 97 Am. Dec. 429.

the strong tendency of the court has been, for reasons difficult to be understood, to treat the lien as strictly personal to the grantor, and as incapable of being transferred, either by direct assignment or by equitable subrogation. It may, of course, be enforced by the grantor himself, and by his heirs or immediate successors. In England it may be enforced by an assignee, and an assignment of the debt, it seems, carries also the lien.<sup>1</sup> The English doctrine is followed in a portion of the states, but in most of them the lien is held personal to the grantor, and not assignable.<sup>2</sup> By this theory, an assignment of the debt, either with or without an express assignment of the lien, does not carry the lien so that it may be enforced by or on behalf of the assignee. Where an express assignment is thus forbidden, it necessarily follows that no equitable assignment by subrogation is possible. Notwithstanding this weight of authority, the restrictive rule seems to rest on no ground of principle.

§ 1255. **Grantor's Lien by Reservation.**—In several of the states the practice has become quite common of reserving a lien, as security to the grantor for the unpaid purchase price, by means of an express clause or stipulation in the deed of conveyance. Such a reservation creates a specific lien which in its essential nature more resembles the ordinary purchase-money mortgage given back by the grantee, than the implied equitable lien of the grantor heretofore described; for since it is contained in and recorded with the deed, it becomes notice to and takes precedence of all subsequent purchasers and encumbrancers holding under or deriving title through the same conveyance; and it generally has the same priority among other outstanding encumbrances which is accorded to the purchase-money mortgage.

§ 1256. **What Creates a Lien by Reservation.**—The provision which shall thus create a lien by reservation may be of various forms; but it must be something more than a recital that a specified amount of the purchase price remains unpaid. It must show the amount of the purchase-money due which is to be secured by the lien, and must in some manner express an intent that the payment of such amount is to be charged upon the land,—that the

<sup>1</sup> *Dryden v. Frost*, 3 Mylne & C. 670.

<sup>2</sup> Not assignable: *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153 (Field, C. J.); *Wellborn v. Williams*, 9 Ga. 86, 52 Am. Dec. 427. Assignable: *Sloan v. Campbell*, 71 Mo. 387, 36 Am. Rep. 493; *Kern v. Hazlerigg*, 11 Ind. 443, 71 Am. Dec. 360.

Whenever, by an arrangement between the parties, a note for the purchase price is given by the grantee to a third person instead of to the grantor, such person is generally held entitled to enforce the lien: *Perkins v. Gibson*, 51 Miss. 699, 24 Am. Rep. 644.

land is conveyed subject to a definite charge for the payment of the sum.<sup>1</sup>

§ 1257. **Essential Nature of This Lien.**—This peculiar species of lien differs essentially from that which equity raises by implication in favor of the grantor, since it is based upon and created by express contract. It is in all essential elements a mortgage. The deed is made to embody an informal mortgage or defeasance, and is thus prevented from being absolute so long as the price remains unpaid. The lien is made a matter of record, is thus a constructive notice to all subsequent dealers with the land, and it is in fact governed by the rules which regulate the effect of an ordinary mortgage.<sup>1</sup> It is in fact an American mode of realizing the purely equitable conception of a mortgage stripped of all its legal forms and features.

§ 1258. **Operation and Effect of This Lien.**—It follows as a necessary consequence that when such a lien is expressly reserved in the deed, the grantee's title is, in a certain sense, imperfect until the price is paid; or, to speak more accurately, the title is encumbered, and all persons holding or claiming under or through the deed are affected with notice of the lien, and their rights are necessarily subordinate to it.<sup>1</sup> On principle, the lien by reservation should give the grantor the same rights of priority over other general encumbrancers which are held by the mortgagee in a purchase-money mortgage.

§ 1259. **The Grantor's Dealing with the Lien—Waiver—Assignment.**—The grantor's powers of dealing with the lien by reservation are much more extensive than those over the equitable lien heretofore described. His acts which would destroy the implied equitable lien, such as taking other security on land from the grantee, or taking notes of third persons as security, and the like, do not thus affect the existence and validity of the express lien. The grantor may of course waive his lien; whether he does so is a matter of intention, which must appear either expressly or by acts directly inconsistent with its existence and indicating a clear intent to waive.<sup>1</sup> The doctrine is established by the great preponderance of authority, that this lien is not personal to the grantor, but may be transferred; that it passes by an assignment of the note, bond, or other evidence of debt given for the purchase price,

<sup>1</sup> *Heist v. Baker*, 49 Pa. St. 9; *Doescher v. Doescher*, 61 Minn. 326, 63 N. W. 736.

<sup>1</sup> To the general effect, that this lien is one by express contract resembling that by a mortgage: *White v. Downs*, 40 Tex. 225; *Gordon v. Rixey*, 76 Va. 694.

<sup>1</sup> *Warford v. Hankins*, 150 Ind. 483, 50 N. E. 468.

<sup>1</sup> *Coles v. Withers* 33 Gratt. 186.

and may be enforced by the assignee.<sup>2</sup> When notes given for installments of the purchase price are secured by a lien reserved in the deed, and these notes are transferable, the lien or quasi mortgage acquires some of the elements of negotiability.<sup>3</sup> This lien is enforced in equity by a suit and relief similar in all respects to those for the foreclosure of a mortgage.<sup>4</sup>

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## SECTION VI.

### THE VENDOR'S LIEN AND THE VENDEE'S LIEN ON CONTRACT FOR SALE AND PURCHASE.

#### ANALYSIS.

§§ 1260-1262. Vendor's lien under contract of sale.

§ 1260. General doctrine; vendor's lien and grantor's lien distinguished.

§ 1261. Essential nature and effects; vendor's interest determined by doctrine of equitable conversion.

§ 1262. How enforced.

§ 1263. Vendee's lien for purchase-money paid.

§ 1260. **Vendor's Lien under Contract of Sale.**—It has been said in English and American decisions, that the vendor's lien may arise before conveyance as well as after; and the interest or right of the vendor under an ordinary contract for the sale of land, or a bond conditioned to sell and convey, or whatever may be the form of the agreement, has been called a vendor's lien, and treated in the same manner as the equitable lien arising in favor of the grantor upon an actual conveyance of the land where the purchase price in whole or in part is left unpaid.<sup>1</sup> This is an unnecessary and an incorrect use of terms; it confounds legal notions which are essentially different. There is a plain distinction between the lien of the grantor after a conveyance, and the interest of the vendor before conveyance. The former is not a legal estate, but is a mere

<sup>1</sup> Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829; Dowdy v. Blake, 50 Ark. 205, 6 S. W. 897, 7 Am. St. Rep. 88 (subrogation).

<sup>2</sup> Where several notes are thus secured by a lien of reservation, the whole seems to be analogous to a mortgage given to secure several notes. If the notes are transferred to different persons, the right of the holders to participate in and enforce the lien would seem to depend upon the same rules which apply to notes secured by a mortgage. See ante, §§ 1201-1203.

<sup>3</sup> King v. Young Men's Ass'n, 1 Woods, 386, Fed. Cas. No. 7811.

<sup>4</sup> For instances of such liens, see Haughwout v. Murphy, 22 N. J. Eq. 531, Shep. 198; Florida Southern R. R. Co. v. Hill, 40 Fla. 1, 74 Am. St. Rep. 124, 23 South. 566 (vendor's lien to secure damages resulting from the tortious taking of land under the power of eminent domain).

equitable charge on the land; it is not even, in strictness, an equitable lien until declared and established by judicial decree.<sup>2</sup> In the latter, although possession may have been delivered to the vendee, and although under the doctrine of conversion the vendee may have acquired an equitable estate, yet the vendor retains the *legal title*, and the vendee cannot prejudice that legal title, or do anything by which it shall be divested, except by performing the very obligation on his part which the retention of such title was intended to secure,—namely by paying the price according to the terms of the contract. To call this complete legal title a lien, is certainly a misnomer. In case of a conveyance, the grantor has a lien, but no title. In case of a contract for sale before conveyance, the vendor has the legal title, and has no need of any lien; his title is a more efficient security, since the vendee cannot defeat it by any act or transfer even to or with a bona fide purchaser.<sup>3</sup>

§ 1261. **Essential Nature and Effects.**—In fact, the position of the vendor prior to conveyance is defined and determined by the doctrine of equitable conversion, rather than by that of mere equitable lien. He holds the legal title as security for the performance of the vendee's obligation, and as trustee for the vendee, subject to such performance, and that title may be conveyed or devised, and will descend to his heirs. In equity, his real interest is personal estate; he becomes by equitable conversion the owner of the purchase-money, of which the vendee is his trustee, and this claim for the purchase-money passes on his death to his executors or administrators. On the other hand, the vendee becomes, by conversion, the real beneficial, although equitable, owner of the land; his interest under the contract is, in equity, real estate, and descends

<sup>2</sup> *Gilman v. Brown*, 1 Mason 191, Fed. Cas. No. 5441, by Mr. Justice Story.

<sup>3</sup> See *Shaw v. Foster*, L. R. 5 H. L. 321, and especially *Lysaght v. Edwards*, L. R. 2 Ch. Div. 499, 506, 507, 2 Keener 360, by Sir George Jessel, M. R.

Practically, this lien consists in the vendor's right to enforce payment of the price, by a suit in equity against the vendee's equitable estate in the land, instead of by means of an ordinary action at law to recover the debt. In England the vendor's equitable remedy consists in a suit in the nature of a strict foreclosure, by which the vendee is decreed to pay the price within a limited time, and in default of such payment the contract is canceled, the vendee's equitable estate is foreclosed, and the vendor's legal estate becomes again absolute. In the United States the same mode of enforcing the lien by a suit in the nature of a strict foreclosure is pursued: *Button v. Nehrover*, 5 Wis. 598, 1 Ames Eq. Jur. 225. Another mode seems to be recognized, at least in some of the states, by which the vendee's equitable estate under the contract is sold in pursuance of a judicial decree. Such a sale would operate as an assignment of the vendee's rights under the contract, and would not be a cancellation of the contract itself: *Lewis v. Hawkins*, 23 Wall. 119, H. & B. 665.

to his heirs. The so-called lien of the vendor is only another mode of expressing his equitable interest thus arising from the doctrine of conversion, and so far as it has any distinctive signification, it simply means his right of enforcing his claim for the purchase-money against or out of the vendee's equitable estate by means of a suit in equity.<sup>1</sup>

§ 1262. **How Enforced.**—The equity action to enforce the so-called lien is simply an action to compel the vendee to make payment of the purchase price within a specified time, or else be barred of all rights under the contract,—that is, an action to foreclose the contract. In actions at law to recover the purchase price, it is the uniform rule that the vendor must allege and show that he has tendered a conveyance in pursuance of the terms of the contract. Whether such tender of a deed is a prerequisite to the vendor's maintaining his suit in equity, is a question upon which the American decisions are in direct conflict, and the authorities do not seem to preponderate decidedly in favor of either view.<sup>1</sup>

§ 1263. **The Vendee's Lien.**—The lien of the vendee under a contract for purchase of land for the purchase-money paid by him before a conveyance is the exact counterpart of the grantor's—or, as it is commonly called, the vendor's—lien, described in the last section but one. In the latter case, the legal title has been conveyed to the grantee, and yet the grantor retains an equitable lien upon the land as security for the purchase price agreed to be paid. In the former case, the legal title remains in the vendor, who has simply agreed to convey, while the vendee, although having as yet acquired no legal interest in the land by virtue of the contract, does obtain a lien upon it as security for the purchase-money he has paid, and for the performance of the vendor's obligation to convey.<sup>1</sup> In England, therefore, and in the American states where

<sup>1</sup> See ante, vol. 1, §§ 368, 372, and cases cited; also, cases in last preceding note: Moser v. Johnson, 88 Ala. 517, 16 Am. St. Rep. 58, 7 South. 146 (since vendor holds legal title as security, he may restrain waste by vendee in possession).

*Waiver:* It is not, in general, waived by the taking of other security for the purchase price, whether personal or on land; in this respect it differs from the "grantor's lien": Mansfield v. Dameron, 42 W. Va. 794, 57 Am. St. Rep. 884, 26 S. E. 527. *Priority:* On principle, the vendor's right should have priority over subsequent judgments recovered against the vendee, irrespective of the question of notice, since he retains the legal title; his position in this respect is entirely different from that of the grantor. See § 721. *Assignment:* When notes are given for the price, and these notes are assigned, the lien passes, and may be enforced by the assignee: Graham v. McCampbell, Meigs (Tenn.) 52, 33 Am. Dec. 126, 1 Ames Eq. Jur. 205.

<sup>1</sup> Freeson v. Bissell, 63 N. Y. 168 (no tender necessary).

<sup>1</sup> Wickman v. Robinson, 14 Wis. 493, 80 Am. Dec. 789, 1 Scott 73.

the grantor's lien has been adopted, the vendee's lien upon the lands contracted to be sold as a security for so much of the purchase price as he has paid prior to a conveyance, and for the performance by the vendor of his obligation, exists to the same extent against the same classes of persons, and governed by the same rules, as the corresponding lien of the grantor. The lien only arises, of course, when the vendor is in some default for not completing the contract according to its terms, and the vendee is not in default so as to prevent him from recovering the purchase-money paid.

*Vendee's lien = many jurisdictions say that it is personal and can not be assigned - may be defeated by bona fide purchaser*

## SECTION VII.

## ARISING FROM A DEPOSIT OF TITLE DEEDS.

## ANALYSIS.

- § 1264. The English doctrine.
- § 1265. The doctrine in the United States.
- § 1266. Distinction suggested as a conclusion from American cases.
- § 1267. How this lien is enforced.

§ 1264. **English Doctrine.**—It is a well-settled doctrine of the English equity that a deposit of title deeds as a security for the payment of money, without any agreement, either verbal or written, to give a mortgage, creates an equitable lien, or, as it is ordinarily called, an equitable mortgage, on the estate of the debtor of which the deeds constitute in whole or in part the title. The exact significance and effect of the transaction is, that the debtor thereby contracts that his estate in the land shall be liable for the debt, and that he will execute such mortgage or conveyance as may be necessary to convey the estate to the creditor as security for the payment. The lien thus created is good between the parties, and as against all subsequent purchasers or encumbrancers of the depositor who are affected with notice of the transaction, and all persons holding under him as volunteers.<sup>1</sup>

<sup>1</sup> Russel v. Russel, 1 Brown Ch. 269, 1 Lead. Cas. Eq. 4th Am. ed. 931, Kirch. 110; Ex parte Hooper, 1 Mer. 7, Kirch. 114; Ex parte Kensington, 2 Ves. & B. 79, Kirch. 111. The doctrine rests upon the peculiar law and practice of England with reference to conveyancing, and to the use of deeds as evidence of ownership. There is no general system of registration; the possession of deeds is an evidence of ownership; they or their abstracts are exhibited to the intended purchaser for examination in every negotiation for a sale; they are delivered to the grantee almost as a matter of course in all transfers of the fee; no transfer can safely be made without them; and no one is supposed to have a right to their possession unless he has some claim upon the land or estate which they represent. Whenever a supposed owner

§ 1265. **The Doctrine in the United States.**—The basis of fact which exists in England, as described in the foot-note, is not found in our law or our practice; and as the doctrine is opposed to all our modes of treating real estate, and especially to our system of registry, it was inevitable that the doctrine of an equitable lien, resulting from a mere deposit of title deeds with a creditor, should not meet with any general and practical acceptance throughout the United States. Under our system of recording, there is no necessity for the production, nor even for the preservation, of the original title deed; owners look to the records as furnishing the real evidence of title, and as exhibiting the true condition of all interests in and claims upon the land which could affect the rights of purchasers or encumbrancers; and to the records all parties go, as a matter of course, even in preference to the original deeds.<sup>1</sup> In fact, no presumption or inference would, in general, be raised from the mere possession of title deeds by a stranger. It follows that in several of the states, where the question has been judicially examined, the doctrine has been distinctly repudiated or not adopted, as being wholly inconsistent with our statutory system of registry and methods of conveyancing.<sup>2</sup>

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## SECTION VIII.

### VARIOUS STATUTORY LIENS.

#### ANALYSIS.

§ 1268. General nature and tendency of American legislation on this subject; various examples.

§ 1269. How such liens are enforced.

§ 1268. **General Nature of American Legislation on This Subject.**—In addition to the foregoing liens which belong to the general equity jurisprudence, the legislation of many states has created or allowed a variety of other liens, the enforcement of which often comes within the equity jurisdiction, and has thus enlarged its scope as administered throughout a large portion of our country. This legislation differs so much in its details that I shall not attempt to give any circumstantial description of it, nor any ab-

offers his estate for sale or mortgage, he must produce his title deeds, and their absence from his possession, when demanded, inevitably casts a suspicion on his title, and puts the other party upon an inquiry.

<sup>1</sup> See *Probasco v. Johnson*, 2 Disn. 96, 98.

<sup>2</sup> *Bloomfield State Bank v. Miller*, 55 Nebr. 243, 70 Am. St. Rep. 381, 75 N. W. 569, 44 L. R. A. 387.

stract of the statutes themselves. The liens are sometimes charged upon real estate and sometimes upon chattels. Their general object is the protection of those who, by their labor, services, skill, or materials furnished, have enhanced the value of the specific property, which thus becomes subject to the lien as security for their compensation. The most familiar instance, which may be taken as the type of the whole class, is that known as the "mechanics' lien," found under some form in nearly every state.<sup>1</sup>

§ 1269. **How Enforced.**—Many of these liens are enforced by purely legal actions, and their effect resembles that produced by a ~~legal attachment, enabling the lienor to retain or recover possession of the thing, and to sell it at execution sale upon the judgment.~~ Others are enforced by special proceedings authorized and regulated by statute. These two classes have no equitable character, and do not come within the scope of equity jurisdiction. In some of the states, however, these liens, especially those charged upon real estate, as mechanics' liens, mining liens, and the like, are enforced by ordinary equitable actions, resulting in a decree for a sale and distribution of the proceeds, identical in all their features with suits for the foreclosure of mortgages by judicial sale.<sup>1</sup> It is true that these liens, being created by statute, are *legal* in their essential nature, rather than equitable; but so far as they are enforced by equitable actions, they have added a peculiar element to the equity *jurisdiction* in several states. It is no part of my design to discuss the rules governing the existence, scope, and operation of such statutory liens; and the general reference is made to them in order to complete a survey of the liens which belong to equity jurisprudence or may fall under the equity jurisdiction.

<sup>1</sup> It has been the policy in many states to protect in this manner those employed in their peculiar local industries. In the Northwestern states, where lumbering is an important industry, a lien on logs is given to those engaged in "booming," or in cutting trees, and on lumber, to those engaged in sawing. In the mining states and territories of the Pacific coast, a system of liens exists on mines, mining-sites, and mineral products, in favor of those engaged in working, "prospecting," or "locating" them. In the Southern states, a lien on the plantations, or products thereof, is given to those who by their materials or services aid in raising crops. There is also a strong tendency, especially in the Western states, to protect all artisans, workmen, laborers, etc., by such liens.

<sup>1</sup> The text is cited in *De La Vergne, etc., Co. v. Montgomery Brewing Co.*, 46 Fed. 829 (action is equitable); *Gilchrist v. Helena Co.*, 58 Fed. 708 (labor lien on railroad; where statute provides no method of enforcing lien, remedy is in equity).

## CHAPTER EIGHTH.

### ESTATES AND INTERESTS ARISING FROM ASSIGNMENTS.

#### SECTION I.

##### ASSIGNMENTS OF THINGS IN ACTION.

###### ANALYSIS.

- § 1270. Original doctrines at law and in equity.
- § 1271. Rationale of the equitable doctrine.
- § 1272. Assignment of things in action at common law.
- § 1273. The same; under statutory legislation.
- § 1274. Interpretation of this legislation as contained in the reformed procedure.
- § 1275. What things in action are or are not thus *legally* assignable.
- § 1276. Assignments forbidden by public policy.
- § 1277. The equitable jurisdiction; under the reformed procedure.
- § 1278. The equitable jurisdiction; under the common-law procedure.
- § 1279. Incidents of an assignment.

§ 1270. **Original Doctrines at Law and in Equity.**—By the ancient common law, things in action, expectancies, possibilities, and the like, were not assignable; an assignee thereof acquired no right which was recognized by a court of law, for the act of assignment was regarded as against public policy, if not actually illegal. Lord Coke states this doctrine as one of the peculiar excellencies of the system which he called the “perfection of human wisdom,” but which was at his day in many respects semi-barbarous.<sup>1</sup> The court of chancery from an early day rejected this rule as narrow and even absurd. Acting upon the principle that a man may bind himself to do anything not impossible, and that he ought to perform his obligations when not illegal, equity has always held that the assignment of a thing in action for a valuable consideration should be enforced;<sup>2</sup> and has also given effect to assignments of every kind of future and contingent interests and possibilities in real or personal property, when made upon a valuable considera-

<sup>1</sup> *Lampet's Case*, 10 Coke, 46 b, 48a.

<sup>2</sup> *Row v. Dawson*, 1 Ves. Sr. 331; 2 Lead. Cas. Eq. 4th Am. ed. 153.

tion.<sup>3</sup> As soon as the assigned expectancy or possibility has fallen into possession, the assignment will be enforced.<sup>4</sup>

§ 1271. **Rationale of the Equitable Doctrine.**—It followed, therefore, that the assignee of an ordinary thing in action—a debt or demand arising out of contract—acquired at once an equitable ownership therein, as far as it is possible to predicate *property* or *ownership* of such a species of right, while the assignee of an expectancy, possibility, or contingency acquired at once a present equitable right over the future proceeds of the expectancy, possibility, or contingency which was of such a certain and fixed nature that it was sure to ripen into an ordinary equitable *property right* over those proceeds as soon as they came into existence by a transformation of the possibility or contingency into an interest in possession. There was an equitable ownership or property in abeyance, so to speak, which finally changed into an absolute property upon the happening of the future event. Equity permitted the creation and transfer of such an ownership, while the original common law rejected every such notion. At an early day this species of equitable ownership arising from assignments prohibited by the common law was the occasion of an extensive branch of the equity jurisdiction. This former condition has, however, been greatly modified, and the special jurisdiction based upon it has become very much diminished.

§ 1272. **Assignment of Things in Action at Common Law.**—The *essential* validity of the assignments of legal things in action, and the equitable ownership of the assignees thereunder, had long been recognized by the law courts, which permitted the assignee suing in the name of the assignor to have entire control of the action and the judgment, and treated him as the only person having an immediate interest in the recovery.<sup>1</sup> In all ordinary cases, therefore, of assignment of legal things in action—debts, and the like—the assignee had a complete and easy remedy at law, and the necessity of a resort to equity had ceased.<sup>2</sup>

§ 1273. **The Same. Under Statutory Legislation.**—Statutes both in England and in the United States have gone much further, and, by allowing the assignee of things in action to sue at law in his own name, have made his interest or ownership to be legal, and no longer equitable. The earliest English statutes were confined

<sup>1</sup> Warmstrey v. Lady Tanfield, 1 Ch. Rep. 29; 2 Lead. Cas. Eq. 1530; 1 Scott 74; Wright v. Wright, 1 Ves. Sr. 409, 411; Hobson v. Trevor, 2 P. Wms. 191; 1 Scott 75 (the mere expectancy of an heir at law).

<sup>2</sup> Holroyd v. Marshall, 10 H. L. Cas. 191, Kirch. 42.

<sup>3</sup> Master v. Miller, 4 Term. Rep. 320, 340, 341.

<sup>4</sup> Hammond v. Messenger, 9 Sim. 327, Ames Trusts 59.

to policies of insurance, permitting them to be legally assigned, so that the assignee could sue at law in his own name.<sup>1</sup> Finally, by the supreme court of judicature act, it was provided that debts and all other legal things in action may be assigned at law, if the assignment is in writing and absolute, and not by way of charge only.<sup>2</sup> The legislation in many of the American states is much broader in its effects, though less specific in its language. In all the states and territories which have adopted the reformed procedure, abolishing the distinction between legal and equitable actions, and introducing one civil action for all purposes, it is provided that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in this statute."<sup>3</sup>

**§ 1274. Interpretation of This Legislation in the Reformed Procedure.**—It is the settled interpretation of this provision in all the commonwealths where the reformed procedure prevails, that whenever a thing in action is assignable, the assignee thereof must sue upon it in his own name; and if the thing in action is itself legal, his right and interest under the assignment have been made legal. The provision itself does not render any thing in action assignable; it does not affect in any way the quality of assignability; it simply acts upon things in action which are assignable, and if they are legal in their nature, and if the assignment is one which would have been recognized in a court of law by permitting the assignee to sue in the name of the assignor, then the interest of the assignee is legal.<sup>1</sup>

**§ 1275. What Things in Action are or are not thus Assignable.**—It becomes important, then, in fixing the scope of the equity jurisdiction, to determine what things in action may thus be legally assigned. The following criterion is universally adopted: All things in action which survive and pass to the personal representatives of a decedent creditor as assets, or continue as liabilities against the representatives of a decedent debtor, are, in general, thus assignable; all which do not thus survive, but which die with the person of the creditor or of the debtor, are not assignable. The first of

<sup>1</sup> 30 & 31 Vict., c. 144; 31 & 32 Vict., c. 86.

<sup>2</sup> 36 & 37 Vict., c. 66, sec. 25, § 6.

<sup>3</sup> The exceptions referred to embrace suits by executors, administrators, trustees of an express trust, and persons in whose names contracts are made for the benefit of others.

<sup>1</sup> See Pomeroy on Remedies, secs. 125-138, where the authorities sustaining the above conclusions are fully examined: *Devlin v. The Mayor*, 63 N. Y. 8. If the thing in action is a claim purely equitable in its nature, or if the assignment is one which courts of equity alone recognized,—as, for example, an order given upon a particular fund, or an assignment of a part of a single demand,—then the assignee's interest is still equitable.

these classes, according to the doctrine prevailing throughout the United States, includes all claims arising from contract express or implied, with certain well-defined exceptions; and those arising from torts to real or personal property, and from frauds, deceits, and other wrongs, whereby an estate, real or personal, is injured, diminished, or damaged. The second class embraces all torts to the person or character, where the injury and damage are confined to the body and the feelings; and also those contracts, often implied, the breach of which produces only *direct* injury and damage, bodily or mental, to the person, such as promises to marry, injuries done by the want of skill of a medical practitioner, contrary to his implied undertaking, and the like;<sup>1</sup> and also those contracts, *so long as they are executory*, which stipulate solely for the special *personal* services, skill, or knowledge of a contracting party.<sup>2</sup>

§ 1276. **Assignments Forbidden by Public Policy.**—While large classes of things in action are thus assignable even at law, there are certain species, belonging to a class otherwise assignable, the assignment of which, either at law or in equity, is prohibited from motives of public policy. Thus in England, those emoluments which are paid by the government to certain officials, which are the rewards for past and future public services, and which are at the same time regarded as honorary, or badges of dignity, cannot be assigned.<sup>1</sup> Also, an assignment which violates the policy of the law against champerty or maintenance, as operating merely to procure or promote litigation, will not be permitted by a court of equity, even though it may not amount strictly to the criminal offense of champerty or maintenance.<sup>2</sup> For this reason, the assignment of a mere right of action to procure a transaction to be set aside on the ground of fraud is not permitted.<sup>3</sup>

§ 1277. **The Equitable Jurisdiction—Reformed Procedure.**—The following conclusions as to the equitable jurisdiction may be drawn from the foregoing analysis. In England, and in all of the Amer-

<sup>1</sup> *Zabriskie v. Smith*, 13 N. Y. 322, 333; 64 Am. Dec. 551; per Denio, J.; *Weller v. Jersey City, etc., Co.*, 66 N. J. Eq. 11, 57 Atl. 730.

<sup>2</sup> The whole subject is examined at length, with full analyses of the cases arising under the reformed procedure, in Pomeroy on Remedies, secs. 144—153, and cases cited; *Devlin v. The Mayor*, 63 N. Y. 8 (contract for street-cleaning assignable); *Griffith v. Tower Pub. Co.*, (1897) 1 Ch. 21 (agreement between author and publisher not assignable); *Bethlehem v. Annis*, 40 N. H. 34, 40, 77 Am. Dec. 700 (agreement to support not assignable).

<sup>3</sup> In this country, also, the assignment of the future salary of a public officer is generally void: See *Holt v. Thurman*, 111 Ky. 84, 63 S. W. 280, 98 Am. St. Rep. 398, and cases cited.

<sup>2</sup> *Coquillard's Adm'r v. Bearss*, 21 Ind. 479; 83 Am. Dec. 362.

<sup>3</sup> *Sanborn v. Doe*, 92 Cal. 152, 23 Pac. 105, 27 Am. St. Rep. 101.

ican states which have adopted the reformed procedure, the direct, absolute, or what may be called legal, assignment of legal things in action which are assignable confers on the assignee a purely legal interest, and he can only sue in his own name by a civil action which is to all intents *legal* in its character; so that under these circumstances there is no occasion for the equitable jurisdiction. Where the thing in action assigned is an equitable demand, and where the assignment of even a legal demand is equitable, or such as the courts of law under the former system did not recognize, it might be supposed that the interest of the assignee would be equitable, and that the suit upon it would be within the equitable jurisdiction. But even in these cases the assignee must sue in his own name; and if the remedy is merely a pecuniary judgment, and no accounting is necessary, the action would, in all its elements and features, be legal rather than equitable. If, however, an accounting were necessary, or if the demand were of such a nature that the recovery would depend upon the application of equitable doctrines, the civil action of the assignee would undoubtedly be equitable, and the equitable jurisdiction of the court would be invoked.

§ 1278. **The Equitable Jurisdiction—Common-law Procedure.**—In those states which retain the two jurisdictions and systems of procedure, whether each is administered by a separate tribunal or both are conferred upon the same court, the jurisdiction at law is complete with respect to the class of assignments first above described,—the legal transfer of a legal thing in action. If the assignee is still compelled to sue in the name of his assignor, or if, as in some states, he is permitted to sue in his own name, in either case the legal remedy is adequate, and there is no ground left for the jurisdiction of equity. It is now the settled rule that a court of equity will not take jurisdiction of a suit by an assignee of a legal thing in action, whenever he may obtain ample remedy by an action at law in the name of his assignor.<sup>1</sup> With respect, however, to assignments of the kinds secondly described above, the transfer of purely equitable demands, or the purely equitable assignment of legal demands, the jurisdiction over the things in action so assigned at the suit of the assignee continues to be exclusively equitable. As the law does not admit in the one case the existence of a legal right or demand, and in the other the existence of a valid transfer, courts of law can have no jurisdiction to entertain actions in which a recovery must be based upon the legal validity of the demand

<sup>1</sup>This rule was fully settled in England while the former systems of courts and jurisdictions still existed: Hammond v. Messenger, 9 Sim. 327, 332, Ames Trusts 59.

or of the assignment. The ancient jurisdiction of equity over the assignment of things in action has been reduced to these somewhat narrow limits.

§ 1279. **Incidents of an Assignment.**—It is a familiar doctrine that the assignee of a thing in action, unless it be negotiable, takes it subject to existing equities. It is also the settled rule in England that the assignee must give notice to the debtor party or legal holder of the fund, in order to establish and secure his right of priority over other assignees of the same demand; but this rule has not been generally adopted by the American courts. These matters have already been discussed in a previous chapter upon priorities.<sup>1</sup>

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## SECTION II.

### EQUITABLE ASSIGNMENT OF A FUND BY ORDER OR OTHERWISE.

#### ANALYSIS.

- § 1280. The general doctrine; its requisites, scope, operation, and effects.
- § 1281. Notice to the creditor-assignee, essential.
- § 1282. A mere mandate to a depository or agent, is not an equitable assignment, but is revocable; an appropriation is necessary.
- § 1283. Funds not yet in existence.
- § 1284. Operation of bills of exchange and checks.

§ 1280. **The General Doctrine—Its Requisites, Scope, Operation, and Effects.**—It is an ancient doctrine of the common law that no action of contract can be maintained unless there is privity of contract between the plaintiff and the defendant.<sup>1</sup> It follows that if B is indebted to A, or has in his hands a fund belonging to A, and A assigns such debt or fund to C, or gives him an order for it upon B, C can maintain no action at law against B to recover the amount, unless B has assented to the appropriation and promised to pay the money; and the action in such case will not be based upon any property or interest in the fund acquired by C through the assignment or order, but upon B's express or implied promise. The doctrine of equity is very different. Equity recognizes an interest in the fund, in the nature of an equitable property, obtained

<sup>1</sup>As to notice given to the debtor, see §§ 694-702; as to assignments being subject to equities in favor of the debtor, see §§ 703-706; equities in favor of third persons: §§ 707-715.

<sup>2</sup>This extremely technical rule has undoubtedly yielded somewhat to the influence of equitable notions, so that in most of the states an action at law may be maintained by A upon a promise made for his benefit to B, from whom alone the consideration moves; but this is opposed to the original theories of the common law.

through the assignment, or the order which operates as an assignment, and permits such interest to be enforced by an action, even though the debtor or depositary has not assented to the transfer.<sup>2</sup> It is an established doctrine that an equitable assignment of a specific fund in the hands of a third person creates an equitable property in such fund. If, therefore, A has a specific fund in the hands of B, or in other words, B, as a depositary or otherwise, holds a specific sum of money which he is bound to pay to A, and if A agrees with C that the money shall be paid to C, or assigns it to C, or gives to C an order upon B for the money, the agreement, assignment, or order creates an equitable interest or property in the fund in favor of the assignee, C, and it is not necessary that B should consent or promise to hold it or pay it to such assignee.<sup>3</sup> In order that the doctrine may apply, and that there may be an equitable assignment creating an equitable property, there must be a specific fund, sum of money, or debt, actually existing or to become so in futuro, upon which the assignment may operate, and the agreement, direction for payment, or order, must be, in effect, an assignment of that fund or of some definite portion of it. The sure criterion is, whether the order or direction to the drawee, if assented to by him, would create an absolute personal indebtedness payable by him at all events, or whether it creates an obligation only to make payment out of the particular designated fund.<sup>4</sup> The agreement, direction, or order being treated in equity as an assignment, it is not necessary that the entire fund or debt should be assigned; the same doctrine applies to an equitable assignment of any definite part of a particular fund.<sup>5</sup> The doctrine that the

<sup>2</sup> Some cases and books speak of the interest as merely an equitable lien or charge. That it is more than a lien, and is an equitable *property*, is plain from the remedy allowed. An equitable lien is never enforced by a suit to obtain possession, much less dominion over the thing: the remedy is, at most, a sale of the thing, so that its proceeds may be applied upon the obligation secured. In this case, however, the assignee recovers possession and dominion of the fund as his own. The only equitable feature of the transaction is, in fact, the *mode of transfer*.

<sup>3</sup> Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 315; Row v. Dawson, 1 Ves. Sr. 331, 2 Lead. Cas. Eq. 4th Am. Ed. 1531; Lowery v. Steward, 25 N. Y. 239, 82 Am. Dec. 346; Wheatley v. Strobe, 12 Cal. 92; 73 Am. Dec. 522; McDaniel v. Maxwell, 21 Oreg. 202; 27 Pac. 952; 28 Am. St. 740; Harrison v. Wright, 100 Ind. 515, 50 Am. Rep. 805.

<sup>4</sup> Brill v. Tuttle, 81 N. Y. 454, 457; 37 Am. Rep. 515.

<sup>5</sup> James v. Newton, 142 Mass. 366, 56 Am. Rep. 692, 8 N. E. 122; Harris County v. Campbell, 68 Tex. 22, 35 S. W. 243, 2 Am. St. Rep. 467. Some American courts seem to have been troubled with the common-law rule which forbids the assignment of a part of a debt, but the reasons for this rule at law have no application whatever in equity. The main reason for the legal rule is, that the debtor should not be harassed with several different suits to

equitable assignee obtains, not simply a right of action against the depositary, mandatary, or debtor but an equitable property in the fund itself, is carried out into all of its legitimate consequences. Thus the assignee may not only recover the money from the original depositary, the drawee, but may pursue it or its proceeds under any change of form, *as long as it can be certainly identified*, into the hands of third persons who have acquired possession of it from the depositary as volunteers, or with notice of the assignee's prior right. The fund in this respect resembles a fund impressed with a trust.

§ 1281. **Notice to the Creditor-Assignee Essential.**—Although whenever a debtor, in the manner above described, makes to his creditor an equitable assignment of a specific fund or debt in the hands of or owing by a third person, the assent of such *third person* is not requisite to the effect of the transfer in equity, yet the assignment, appropriation, direction, or order is not absolute, but may be revoked by the debtor-assignor at any time before the *creditor-assignee* has been notified of it, and has expressly or impliedly assented thereto. In such a case notice to and assent by the *creditor-assignee* are essential to an absolute assignment.

§ 1282. **A Mere Mandate to an Agent or Depositary is not an Assignment, but is Revokable.**—In all cases, even when the assignee was not a creditor of the assignor, the order must be delivered to the intended payee, or he must be notified of it by the drawer's procurement, in order that it may operate as an equitable assignment. A mere letter, communication, or other mandate to the agent, depositary, or debtor, directing him to pay the fund to a designated person, will not of itself operate as an assignment, but it may be withdrawn or revoked at any time before the arrangement is completed, by information given to the intended payee by or on behalf of the drawer.<sup>1</sup> What shall amount to the present appropriation which constitutes an equitable assignment is a question of intention, to be gathered from all the language, construed in the light of the surrounding circumstances. For example, while it is not essential

recover parts of one single obligation. In equity no such consequence could result. If parts of a demand are assigned to different persons, the rights of all the assignees must be settled in one suit; in a suit by any one assignee, not only the debtor and the assignor, but all the other assignees, must be made parties, so that the one decree may determine the duty of the debtor towards each claimant. There is no greater nor more unnecessary source of error than the importing *legal* notions as to parties and actions into the discussion of equitable doctrines: See for the legal rule, *Mandeville v. Welch*, 5 Wheat. 277, 286; 5 L. Ed. 87.

<sup>1</sup>*Burn v. Carvalho*, 7 Sim. 109; 4 Mylne & C. 690; *Carvalho v. Burn*, 4 Barn. & Adol. 382; 1 Ad. & E. 883.

to the existence of an equitable assignment of a fund that the debtor, agent, or depositary should be *expressly* directed to pay over the money to the assignee, the absence of such a direction may tend to show an intention not to transfer a present interest in the fund, but that the arrangement is wholly executory and prospective.<sup>2</sup>

§ 1283. **Doctrine Extends to a Fund not yet in Existence.**—The equitable doctrine with respect to the assignment of property to be acquired in future is extended to this species of equitable transfer. The fund need not be actually in being; if it exists potentially,—that is, if it will in due course of things arise from a contract or arrangement already made or entered into when the order is given,—the order will operate as an equitable assignment of such fund as soon as it is acquired, and will create an interest in it which a court of equity will enforce.<sup>1</sup> \*

§ 1284. **Bills of Exchange and Checks not, in General, Assignments.**—An ordinary bill of exchange, or draft, drawn generally, and not upon any particular fund, whether accepted or not by the drawee, does not operate as an equitable assignment. Its operation is not changed even when funds have been placed in the drawee's hands as a means of payment; for the drawee may apply these funds to another use, and although this act might violate his duty to the drawer, the payee would obtain no interest in or claim upon the specific fund.<sup>1</sup> According to the great preponderance of authority, a check is, in this respect, a bill of exchange, and does not act as an equitable assignment of a portion of the drawer's deposit equal in amount to the face of the check.<sup>2</sup> There are cases, however, which hold that, under the circumstances in which it is ordinarily given, being drawn against an actual deposit, and not expected to be paid unless a sufficient amount stands to the credit of the drawer, a check is to all intents an order upon a particular

<sup>2</sup> See *Rodick v. Gandell*, 1 De Gex, M. & G. 763, 778.

<sup>1</sup> For example, an order for the proceeds of goods which are about to be sold by an agent of the drawer under an arrangement already made; an order by an employee upon the employer whom he has agreed to serve, directing payment of future wages to be earned; an order by a contractor for future payments to become due, and the like. The fund in all such cases is particular and definite, although only potential: *Ruple v. Bindley*, 91 Pa. St. 296; *Shep. 219*; *Merchants & M. N. Bank v. Barnes*, 18 Mont. 335, 48 Pac. 218, 56 Am. St. Rep. 586, 47 L. R. A. 737.

<sup>1</sup> *Holbrook v. Payne*, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456; for instance of draft upon a particular fund, see *Lowery v. Steward*, 25 N. Y. 239, 82 Am. Dec. 346.

<sup>2</sup> *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 87, 7 Am. Rep. 314; *Fourth St. Nat. Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. ed. 855; *Cincinnati, H. & D. R. Co. v. Bank*, 54 Ohio St. 60, 42 N. E. 700, 56 Am. St. Rep. 700, 31 L. R. A. 653.

\* See *Smith v. W. 59 C. D. 381, C. P. M. (Mich. 20)*

fund within the meaning of the equitable rule, and assigns a portion of that fund to the payee equal in amount to its face.<sup>3</sup> A check may undoubtedly operate in this manner as an equitable assignment when it is so drawn as to show an unmistakable intention of the drawer to transfer his exact deposit in the bank to the payee.<sup>4</sup>

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### SECTION III.

#### ASSIGNMENT OF POSSIBILITIES, EXPECTANCIES, AND PROPERTY TO BE ACQUIRED IN FUTURE.

##### ANALYSIS.

- § 1285. Equitable jurisdiction under modern legislation.
- § 1286. Essential elements and grades of contingencies, expectancies, and possibilities.
- § 1287. Assignment of possibilities.
- § 1288. Assignment of personal property to be acquired in the future; rationale of the doctrine; *Holroyd v. Marshall*.
- § 1289. Assignment of future cargo or freight.
- § 1290. Requisites of an assignment of property to be acquired in the future.
- § 1291. Extent of the doctrine; to what property and persons it applies.

§ 1285. **Equitable Jurisdiction under Modern Legislation.**—Modern English statutes have so far changed the common law as to permit the assignment *at law* of contingent and future interests, expectancies, and possibilities coupled with an interest in real estate.<sup>1</sup> The American legislation has generally been broader, and authorizes the assignment at law of such future expectancies and possibilities, when coupled with an interest, whether connected with real or with personal estate. Neither the English nor the American statutes allow the legal assignment of mere naked possibilities or expectancies not coupled with an interest. The jurisdiction of equity continues to be exclusive over all other assignments of contingent, future, expectant interests and possibilities not embraced within this legislation.

§ 1286. **Essential Elements and Grades of Contingencies, Expectancies, and Possibilities.**—In determining the extent and limits of the two jurisdictions, legal and equitable, it is important to determine the essential elements and different grades of contingent

<sup>1</sup> *Wyman v. Fort Dearborn Nat. Bank*, 181 Ill. 279, 54 N. E. 946, 72 Am. St. Rep. 259; *Raesser v. National Exchange Bank*, 112 Wis. 591, 88 N. W. 618, 88 Am. St. Rep. 979.

<sup>4</sup> *Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805.

<sup>3</sup> 8 & 9 Vict., c. 106, sec. 6.

interests, expectancies, and possibilities. It should be carefully observed at the outset that they do not include future estates which are vested. A vested remainder is as truly a present fixed property or ownership as is an estate in possession. There may be interests or so-called estates in land or chattels, based upon some existing limitation, conveyance, or will, which are future *and contingent*, as depending upon the happening of some uncertain event, or limited to some uncertain person, but which are nevertheless *interests*, and not *mere* hopes or expectancies without any existing legal foundation. The ordinary contingent remainders, executory devises, conditional limitations, and the like are illustrations. Secondly, a lower grade of future interests may be called the *potentiality* of acquiring future property from the performance of some agreement or arrangement entered into, but which is still executory.<sup>1</sup> Of course, the mere hope of acquiring future property without any present source from which it may be obtained is neither an interest nor right, nor anything which has value or can be made the subject of legal relations. But when a party has entered into a contract or arrangement by the ordinary and legitimate and natural operation of which he will acquire property, his existing right thereunder is certainly not a *mere* naked hope; it is a possibility of acquiring property coupled with a legal interest in the contract. The cargo to be obtained or the freight to be earned by a ship on a voyage already contracted for, the wages to be earned under an existing employment, the payment to become due under an existing building contract, are familiar examples. Finally, there is a mere expectancy arising from some social or moral relation, and not based upon any limitation, trust, contract, or other legal relation, such as the hope which an heir apparent or presumptive has of inheriting his ancestor's estate, or the hope of a bequest under the will of a living friend.

§ 1287. **Assignment of Possibilities.**—Under the statutes described in a preceding paragraph, all future contingent interests in things real or personal, and also all possibilities, *coupled with an interest*, of acquiring property, real or personal, may be granted or assigned at law, so that the grantee or assignee acquires a legal right or interest, the enforcement or protection of which comes within the jurisdiction of the law. So far as this legislation has not been adopted, such interests and rights are assignable only in

<sup>1</sup>The phrase "*potential existence*" has a specific and technical meaning, in formulating the general doctrine of the law concerning the sale of personal property not yet having an *actual* existence: See ante, § 1236. As used in the text above, the word "*potentiality*" is taken in a more general sense; and in this signification it has been employed in several modern decisions.

equity; and furthermore, possibilities not coupled with an interest,—*mere* possibilities or expectancies,—which are not embraced within these statutes, are, according to the general course of decision, assignable in equity for a valuable consideration; and equity will enforce the assignment when the possibility or expectancy has changed into a vested interest or possession.<sup>1</sup> The explanation is sometimes given that the assignment operates as a contract by the assignor to convey the legal estate or interest when it vests in him, and that equity will specifically enforce such contract by decreeing a conveyance.

**§ 1288. Assignment of Personal Property to be Acquired in the Future.—Rationale of the Doctrine.**—A particular instance of this doctrine is that which deals with the assignment of property to be acquired in the future. I have already referred to this subject in one of its phases,—the equitable lien created by contract upon such property.<sup>1</sup> It is elementary, that a contract for the sale of chattels which the vendor does not own will not take effect upon the goods, when subsequently acquired, so as to pass a legal property in them to the purchaser, without some new act of the vendor after the property is acquired.<sup>2</sup> The doctrine of equity is different. A sale, assignment, or mortgage, for a valuable consideration, of chattels or other personal property to be acquired at a future time, operates as an equitable assignment, and vests an equitable ownership of the articles in the purchaser or mortgagee as soon as they are acquired by the vendor or mortgagor, without any further act on the part of either; and this ownership a court of equity will protect and maintain at the suit of the equitable assignee.<sup>3</sup> It is sometimes said that the sale, assignment, or mortgage, under these circumstances, operates in equity as a contract, which a court of equity will specifically enforce by decreeing a legal conveyance and delivery of the property to the purchaser or mortgagee, when it is subsequently acquired by the vendor or mortgagor. This view is

<sup>1</sup> Warmstrey v. Lady Tanfield, 1 Ch. Rep. 29, 2 Lead. Cas. Eq., 4th Am. ed., 1530, 1559, 1605, 1 Scott 74. The expectancy of an heir to the estate of his ancestor: Hobson v. Trevor, 2 P. Wms. 191, 1 Scott 75; In re Garcelon, 104 Cal. 570, 38 Pac. 414, 43 Am. St. Rep. 134, 32 L. R. A. 595, 1 Scott 77. The interest which one may take under the will of another who is still living: In re Wilson's Estate, 2 Pa. St. 325. See also Bayler v. Comm. 40 Pa. St. 37, 80 Am. Dec. 551; Shep. 217; Ruple v. Bindley, 91 Pa. St. 296; Shep. 219.

<sup>2</sup> See ante, § 1236.

<sup>3</sup> Moody v. Wright, 13 Met. 17, 32, 46 Am. Dec. 706; Kirch 54. Chattel mortgage on crops not sown, held void in Rochester Distilling Co. v. Rasey, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 637. With reference to the excepted case of chattels having a "*potential*" existence, see ante, note under § 1236.

<sup>4</sup> Holroyd v. Marshall, 10 H. L. Cas. 191, Kirch. 42; Smithurst v. Edmunds, 14 N. J. Eq. 408, Kirceff. 61.

certainly supported by the very high authority of most able judges, such as Lord Westbury, and it is undoubtedly true in part. In my opinion, however, it fails to wholly explain the equitable doctrine and jurisdiction, since transfers of personal property to be acquired in 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.<sup>4</sup> In other words, the doctrine of equitable assignment of property to be acquired in future is much broader than the jurisdiction to compel the specific performance of contracts. In truth, although a sale or mortgage of property to be acquired in future does not operate as an immediate alienation at law, it operates as an equitable assignment of the *present possibility*, which changes into an assignment of the *equitable ownership* as soon as the property is acquired by the vendor or mortgagor; and because this ownership thus transferred to the assignee is equitable, and not legal, the jurisdiction by which the right of the assignee is enforced, and is turned into a legal property, accompanied by the possession, must be exclusively equitable; a court of law has no jurisdiction to enforce a right which is purely equitable. This, in my opinion, is the only correct and sufficient rationale of one of the most distinctively equitable doctrines in the whole scope of the equity jurisprudence.

§ 1289. **Assignment of Future Cargo or Freight.**—A particular instance of non-existing property to be acquired in future which may be equitably assigned is the future cargo to be obtained, or the future freight to be earned, by a ship during an existing voyage, or during a contemplated voyage on which she is about to depart. If a charter-party or other form of agreement has already been entered into for the contemplated voyage, the potentiality of obtaining a cargo or of earning freight seems to be a possibility coupled with an interest, and not a bare expectancy; and as such it is probably assignable even at law under statutes and decisions of many states. Whatever may be the rule at law, it is well settled that such possibility is assignable in equity; that an equitable ownership vests in the assignee as fast as the cargo is obtained or the freight is earned; and that his interest or ownership will be protected and enforced by a court of equity.<sup>1</sup> In accordance with this doctrine, it has been held that a *mortgage of a railroad* and its franchises operates as an equitable assignment of the rolling stock,

<sup>4</sup>The theory announced by Lord Westbury in *Holroyd v. Marshall*, *supra*, was also criticised in *Tailby v. Official Receiver*, L. R. 13 App. Cas. 523.

<sup>1</sup>*Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673.

--locomotives, cars, and the like,—which are acquired or manufactured by the company after the execution of the instrument, and passes an equitable ownership in or lien on such articles to the mortgagee. Other cases take a different view, and hold that the rolling stock are fixtures, and become part of the realty as soon as acquired, and that being so annexed to the soil, the *legal* title thereto is vested in the mortgagee, or that the lien of the mortgage extends to them.<sup>2</sup> Other illustrations of the doctrine as applied to particular transactions are given in the foot-note.<sup>3</sup>

§ 1290. **Requisites of an Assignment of Property to be Acquired in the Future.**—It has been assumed through all the foregoing discussion that the instrument *does* amount to a sale, assignment, or mortgage of future-acquired property; but it should be carefully observed that every sale or mortgage dealing with future property does not necessarily have that effect; there is a plain distinction between an assignment of property to be acquired in future and a *mere power* to deal with such property. In order to create an equitable assignment, and thus let in the operation of the equitable doctrine, there must be on the face of the instrument expressly, or collected from its provisions by necessary implication, language of *present transfer* directly applying to the future as well as to the existing property, or else language importing a present *contract* or *agreement* between the parties to sell or assign the future property, or that the security of the mortgage should immediately attach to the future property, as the case may be. Where an assignment of existing chattels by way of mortgage contains a provision which simply amounts to an authority or license to the mortgagee to take possession of or to enter and seize after-acquired property, this does not operate as an equitable assignment of the after-acquired property, nor create in the mortgagee any present equitable interest in such property. It creates, at most, only a *power*; and a power is very different from an interest,—no interest in the property arises until the power has been exercised.<sup>1</sup>

<sup>1</sup> *Morrill v. Noyes*, 56 Me. 458, 471, 96 Am. Dec. 486, Kirch. 92; *Pierce v. Emery*, 32 N. H. 484, Kirch. 80.

<sup>2</sup> In some of these instances the assignments are evidently valid at law: Assignments of payments to become due from the performance of an existing contract: *Ruple v. Bindley*, 91 Pa. St. 296, Shep. 219. Assignment of future wages under existing contract of employment: *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233, 70 N. E. 564. See, also, *Tailby v. Official Receiver*, 13 App. Cas. 523, Kirch. 100 (assignment of future book-debts, though not limited to book-debts in any particular business, valid); *Collins' Appeal*, 107 Pa. St. 590, 52 Am. Rep. 474 (pledge of interest in a partnership to be subsequently formed, valid).

<sup>3</sup> *Reeve v. Whitmore*, 4 De Gex, J. & S. 1, 16-18, per Lord Westbury.

§ 1291. **Extent of the Doctrine—To What Property and Persons It Applies.**—The general doctrine concerning sales or mortgages of after-acquired property leads to the further conclusion, that when chattels which have been mortgaged or assigned as security are sold or exchanged by the owner, the lien upon the original articles will extend to the resulting fund or the substituted goods; and this lien will be valid in equity, not only against the mortgagee, but also against any person claiming title to such fund or goods under him as a volunteer. According to the general doctrine of equity established beyond any doubt by the highest judicial authority, the equitable assignment or the equitable lien upon property to be acquired in the future is valid and enforceable, not only against the contracting party himself, but also against subsequent judgment creditors, assignees in bankruptcy, and all other volunteers holding or claiming under him, and against subsequent purchasers from him with notice of the assignment or lien.<sup>1</sup> This operation of the equitable doctrine as against other persons than the immediate parties is, however, very much restricted and limited in most of the states by statutes.<sup>2</sup> The doctrine of equitable liens resulting from executory contracts, and that of equitable assignment of non-existing property, constitute two of the most remarkable and distinctive features of the equity jurisprudence. The particular rules which they involve are all drawn from the fundamental maxims or principles of equity; they exhibit in the most striking manner the opposing theories and methods of equity and of the law. . . .

<sup>1</sup> See ante, cases cited under §§ 1236, 1288.

<sup>2</sup> The statutes referred to are those concerning transfers and mortgages made with intent to hinder, delay, or defraud subsequent creditors and purchasers, and those concerning the filing or recording of chattel mortgages. The decisions giving a construction to this legislation have *virtually* abrogated the equitable doctrine in its application to subsequent creditors and purchasers. For example, in many states a chattel mortgage which purports to cover future-acquired goods in place of those which have been sold, and which thus expressly or impliedly permits the mortgagor to sell the original chattels embraced in the instrument, while the lien is extended to the newly acquired articles, is absolutely void as against subsequent creditors of the mortgagor. This statutory system and the rules created by it belong, however, to the domain of the law, rather than to equity.

MUTUAL ASSENT  
WITH  
CONSIDERATION

## CHAPTER NINTH.

### CONTRACTS IN EQUITY.

#### SECTION I.

##### GENERAL DOCTRINE CONCERNING CONTRACTS.

###### ANALYSIS.

- § 1292. Object of this chapter.
- § 1293. What constitutes a contract.
- § 1294. Equitable contract by representations and acts.
- § 1295. Effects of a contract in equity; covenant creating an equitable servitude.
- § 1296. Effects of contracts in general.
- § 1297. Enforcement of contracts in equity.

§ 1293. **What Constitutes a Contract.**—Very little need be said under this head. The essential elements of a contract are the same in equity and at law. In general, the same rules prevail in both jurisdictions as to parties and their capacity to contract, as to consideration, and as to the assent or *aggregatio mentium*. In equity, as well as at law, “an agreement is the result of the mutual assent of two parties to certain terms, and if it be clear that there is no consensus, what may have been written or said becomes immaterial.”<sup>1</sup> To this general agreement between the equitable and the legal rules there is one important exception and one modification. While a married woman is as incapable of binding herself personally in equity to the same extent as at law, her contracts relating to or made in view of her separate estate are so far valid and effectual that they are enforceable against such separate estate.<sup>2</sup> The modification mentioned relates to the requirement of a valuable consideration. Equity will never enforce an executory agreement unless there was an actual valuable consideration; and, unlike the common law, it does not permit a seal to supply the place of a real consideration. Disregarding mere forms, and looking at the reality, it requires an actual valuable consideration as essential

<sup>1</sup> Per Lord Westbury, in *Chinock v. Marchioness of Ely*, 4 De Gex, J. & S. 638, 643.

<sup>2</sup> See ante, §§ 1121-1126.

in every such agreement, and allows the want of it to be shown, notwithstanding the seal, in the enforcement of covenants, settlements, and executory contracts of every description.<sup>3</sup> In construing and applying the statute of frauds, in determining what contracts come within its scope, what memoranda are sufficient to a sale by its requirements, and all other matters of detail, courts of equity and of law adopt and follow the same rules.<sup>4</sup> Even when equity *seems* to depart from or disregard the statute, and specially in its enforcement of verbal contracts for the sale of land which have been part performed, it is only invoking the aid of its most salutary principles for the purpose of carrying out the ultimate objects of the statute. As the primary object of the statute is to prevent frauds, mistakes, and perjuries, by substituting written for oral evidence in the most important classes of contracts, courts of equity have established the principle, which they apply under various circumstances, that it shall not be used as an instrument for the accomplishment of fraudulent purposes; designed to prevent fraud, it shall not be permitted to work fraud. This principle lies at the basis of the doctrine concerning part performance, but is also enforced wherever it is necessary to secure equitable results.<sup>5</sup>

§ 1295. **Effects of a Contract in Equity—Covenant Creating an Equitable Servitude.**—Before describing the general effects of contracts, I shall notice some particular agreements which create special rights in equity, where no such rights, or perhaps no rights at all, between the same parties, exist at law. When the owner of land enters into a covenant concerning it, when in a deed the grantor or the grantee covenants, or in a lease the lessor or the lessee covenants, concerning the land, concerning its use, restricting certain specified uses, stipulating for certain specified uses, subjecting it to easements or servitudes, and the like, and the land is afterwards conveyed, or sold, or passes to one who has actual or constructive notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it, at the suit of the original covenantee or of any other person who has a sufficient equitable interest, although perhaps without any *legal* interest, in such performance. It makes no difference whatever, with respect to this equitable liability, and this right to enforce the covenant in equity, whether the covenant is or is not one which in law “runs with the land.”<sup>1</sup> Subsequent

<sup>3</sup> See ante, § 370.

<sup>4</sup> See Pomeroy on Specific Performance of Contracts, secs. 71-95, and cases cited.

<sup>5</sup> See ante, § 921; post, § 1409 et seq.

<sup>1</sup> Tulk v. Moxhay, 2 Phill. Ch. 774, 777, 1 Ames Eq. Jur. 147, 2 Keener 545,

owners deriving title under deeds containing such covenants would, of course, have constructive notice thereof. This equitable right

2 Scott 486; and see ante, § 689. This doctrine may be regarded as an equitable substitute for or addition to the legal rule concerning covenants running with the land; or it may be explained by regarding the covenant as creating an equitable easement. The latter theory has been adopted by many able American courts. In either view, the covenant confessedly creates an equitable burden on the land, which follows it into the hands of subsequent holders, with the single qualification that a subsequent owner who acquires the legal estate for value and without notice takes it free from this burden. A subsequent holder who acquires only an equitable estate takes it subject to the burden, even in the absence of any notice.

The most frequent condition of facts to which the doctrine has been applied in the United States is the following: A, the owner of a block of land, divides it into lots for sale, and sells all these lots to different grantees. In the deed of lot No. 1 are covenants of the grantee not to build nearer the street than a certain line, or not to build certain kinds of buildings, or not to use the lots for certain purposes, or not to build so as to cut off a certain prospect, or other negative or affirmative covenants. The deeds of all the other lots contain similar covenants. Finally, the whole land is sold, so that A retains no interest whatever. The lots are afterwards conveyed to subsequent grantees. Each subsequent grantee would be charged with constructive notice of the covenants in the original deed under which he claimed title. If the subsequent grantee of any lot—say No. 1—should violate the covenants in the deed of his lot, then plainly there would be no right of action at law against him in favor of the owner of any other lot; for there would be no legal privity whatsoever between them. Even if the covenants did run with the land, there would be no action at law, because the grantee of lot No. 2 would not be in any sense an assignee of the reversion,—that is, of the original covenantee's (A's) rights under the covenant. Although no action at law would lie, it is well settled that a suit in equity may be maintained by the original grantee or by the subsequent owner of any lot, to prevent a violation of the covenants by the owner of any other lot. The following cases illustrate the doctrine: *Schwoerer v. Boylston Market Ass'n.*, 99 Mass. 285, 2 Keener 483 (a covenant that a strip of land should not be subject to fences, and should be used as a way, was enforced by the subsequent grantee of other land benefited thereby); *Peck v. Conway*, 119 Mass. 546, 1 Ames Eq. Jur. 162, 2 Scott 527, 2 Keener 509 (a covenant not to erect a building on the land conveyed was enforced against a subsequent grantee of the covenantor by a subsequent grantee of the original covenantee; the defendant had constructive notice from his title deeds); *Whitney v. Union R'y*, 11 Gray, 359; 71 Am. Dec. 715, 2 Keener 547 (a covenant not to use the land in a certain manner enforced against a subsequent grantee charged with notice); *Parker v. Nightingale*, 6 Allen 341, 83 Am. Dec. 632, 2 Keener 475 (in conveyances of adjoining lots by same grantor, each grantee covenanted that the lot should only be used for dwelling-houses; held binding on all subsequent grantees, and enforceable by any subsequent grantee against another).

Where the benefit of the covenant made by the grantee of a lot or parcel is claimed by the prior or subsequent grantee of another lot or parcel, it must clearly appear, from the construction of the covenant in connection with surrounding circumstances, that it was intended for the benefit of such other

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of lands

would arise where no similar legal right, or perhaps no legal right at all, would exist between the same parties, in the following

grantees, and was not merely personal to the grantor. The covenant may explicitly state such intent: Rogers v. Rosegood (1900), 2 Ch. 388, 1 Ames Eq. Jur. 165; and in the case of a general scheme or plan for the improvement of property, like that described above, such intent will readily be inferred; see Nottingham, etc., Co. v. Butler, L. R. 16 Q. B. D. 778, 1 Ames Eq. Jur. 169, 2 Scott 530, 2 Keener 519; Collins v. Castle, L. R. 36 Ch. D. 243, 2 Keener 523; Spicer v. Martin, L. R. 14 App. Cas. 12, 2 Keener 533; Barrow v. Richard, 8 Paige 351, 35 Am. Dec. 713, 1 Ames Eq. Jur. 173, 2 Scott 521, 2 Keener 461; De Gray v. Monmouth Beach Clubhouse Co., 50 N. J. Eq. 329, 24 Atl. 388, 2 Scott 534. In the following additional cases there was sufficient evidence of intent to benefit other grantees: Child v. Douglas, Kay 560, 2 Keener 467; Tobey v. Moore, 130 Mass. 448, 2 Keener 516; Peck v. Conway, supra. In the following the evidence of such intent was not sufficient: Keates v. Lyon, L. R. 4 Ch. 218, 2 Keener 493; Renals v. Cowlshaw, L. R. 9 Ch. D. 125, 1 Ames Eq. Jur. 159, 2 Scott 501, 2 Keener, 512; Jewell v. Lee, 14 Allen 145, 92 Am. Dec. 744, 2 Keener 479; Badger v. Boardman, 16 Gray 559, 2 Keener 473; Sharp v. Ropes, 110 Mass. 381, 2 Keener 504; Lowell Inst. v. City of Lowell, 153 Mass. 530, 27 N. E. 518, 2 Keener 562.

It is not necessary that a party, to be bound by the restriction, should have actual notice thereof; constructive notice, such as that derived from his chain of title, is sufficient: Whitney v. Union Ry. Co., 11 Gray 359, 71 Am. Dec. 715, 2 Keener 547; Carter v. Williams, L. R. 9 Eq. 678, 2 Keener 565.

When a party knowingly, and against remonstrances, builds in violation of a restrictive covenant, a mandatory injunction may issue to compel the removal of such portions of the building as are in violation of the covenant, even though such violation is slight: Attorney General v. Algonquin Club, 153 Mass. 447, 27 N. E. 2, 11 L. R. A. 500, 2 Keener 319.

On the question what covenants relate so directly to the use of the land that they are capable of being attached to it, the cases are in conflict. Thus, it is held that an agreement to give to a certain railroad the exclusive privilege of transporting the products of the land does not bind a purchaser with notice: Kettle River R. Co. v. Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111, 2 Scott 489; contra, Bald Eagle Val. R. Co. v. Nittany Val. R. Co., 171 Pa. St. 284, 50 Am. St. Rep. 807, 33 Atl. 239, 29 L. R. A. 423; and that a covenant by a grantor not to open a quarry on his remaining land will not be enforced against a subsequent grantee with notice of such remaining land; Norcross v. James, 140 Mass. 188, 2 N. E. 946, 1 Ames Eq. Jur. 182, 2 Scott 504, 2 Keener 591; contra, on very similar facts, Hodge v. Sloan, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335, 1 Ames Eq. Jur. 184, 2 Scott 508, 2 Keener 585.

In Brewer v. Marshall, 19 N. J. Eq. 537, 97 Am. Dec. 679, 2 Keener 557, there was a covenant by the grantor not to sell off any marl from the premises adjoining the lot conveyed. The court fully recognized and accepted the doctrine of the text, but held that this particular covenant was one which equity would not enforce; if not absolutely illegal, it closely resembled covenants in restraint of trade, which are confessedly illegal.

The equitable jurisdiction to enforce such covenants is subject to one most important limitation. It is not absolute, but is governed by the same general rules which control the equitable relief of specific performance of contracts. If, therefore, the restrictive covenants in deeds of lots were made with evident

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instances: 1. Where the covenant is not one which runs with the land, because in such case no legal liability whatever would rest upon the subsequent grantee or owner; 2. Where the covenantee having parted with all interest in the premises, there is no legal privity of estate or of contract between the plaintiff who seeks to enforce the covenant and the subsequent owner against whom the enforcement is sought, because in such case no action at law for a breach would lie; 3. Where the stipulations of the covenant and the breach thereof are of such a nature that there is no basis upon which to estimate damages.<sup>2</sup> In all these cases, however, the cov-

reference to the continuance of the existing general condition of the property and its surroundings, but in the lapse of time there has been a complete change in the character of the neighborhood, so as to defeat the purposes of the covenants and to render their enforcement an inequitable and unjust burden on the owner of the lots, then the equitable relief will not be granted, and the plaintiff will be left to his remedy at law. For example, if the covenants restricted the grantees of lots to use for purposes of residences, and since their execution the whole neighborhood had ceased to be used for such purposes, and had been wholly given up to business, manufacturing, and the like: Trustees, etc., v. Thacher, 87 N. Y. 311, 317, 318, 41 Am. Rep. 365, 2 Keener 1038; see, also, Amerman v. Deane, 132 N. Y. 355, 28 Am. St. Rep. 584, 30 N. E. 741, 2 Keener 1050; Jackson v. Stevenson, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691, 1 Ames Eq. Jur. 179; Duke of Bedford v. British Museum, 2 Mylne & K. 552, 2 Keener 1010. The right to equitable relief may also be lost by acquiescence: Ocean City Ass'n v. Schurch, 57 N. J. Eq. 268, 41 Aft. 914, 1 Scott 215; Whitney v. Union Ry. Co., 11 Gray 359, 71 Am. Dec. 715, 2 Keener 547; Child v. Douglas, Kay 560, 2 Keener 467 (no acquiescence shown); Western v. Macdermott, L. R. 2 Ch. App. 72, 2 Scott 511 (plaintiff's violations of his own covenants, where not substantial, do not show acquiescence).

In the interesting case of Lewis v. Gollner, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81, 1 Ames Eq. Jur. 152, 2 Scott 496, 2 Keener 612, it was held that the restriction applied to land subsequently acquired by the covenantor, and bound it in the hands of a purchaser from him with notice. In the same state the courts have extended the doctrine of restrictive covenants to personal property in some instances, so that the party purchasing the chattel, with notice, becomes burdened with contracts made by its owner in reference thereto: New York Bank Note Co. v. Hamilton Bank Note Co., 83 Hun. 593, 31 N. Y. Supp. 1060, 2 Keener 618; Murphy v. Christian, etc., Co., 38 App. Div. (N. Y.) 426, 1 Ames Eq. Jur. 157, 2 Scott 000 (contract that books printed from certain plates should be sold at a specified price, binding upon a purchaser of the plates).

<sup>2</sup> "The injunction in this class of cases is granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained any pecuniary damages, are wholly immaterial. In the words of one of the ablest of modern equity judges: 'It is clearly established by authority that there is sufficient to justify the court interfering, if there has been any breach of the covenant. It is not for the court, but for the plaintiffs, to estimate the amount of damages that arises from the injury inflicted upon them. The moment the court finds that there

enant may be enforced in equity. I have, as it will be seen, continued to state the doctrine in its most general form as applying to affirmative as well as to restrictive covenants, and as rendering the owner liable to the affirmative duty of specifically performing the covenant, as well as to the negative remedy of restraint from violating it, notwithstanding the very recent decisions by the English court of appeal holding that the doctrine applies only to restrictive covenants, and does not extend to those which stipulate for affirmative acts.<sup>3</sup> In my opinion, the doctrine has been fully established, in its most general form, without such limitation, by the overwhelming weight of authority, English and American.

§ 1296. **Effects of Contracts in General.**<sup>1</sup>—

§ 1297. **Enforcement of Contracts in Equity.**—In the enforcement of contracts, equity may be governed by very different considerations from those which are indispensably requisite at law. The law holds parties strictly and literally to the very terms of their agreements, and demands from the plaintiff an exact performance of all the stipulations on his part which are essential to a recovery, or else no legal right of action can accrue to him on the contract. Also, no action at law can be maintained upon a contract which is not valid in compliance with rules of the common law or of statute. Both of these stringent requirements are relaxed in equity, and contracts may be enforced, where, from some default, or some lack

1. Strict Compliance  
2. Good Contract

has been a breach of the covenant, that is an injury, and the court has no right to measure it, and no right to refuse to the plaintiff the specific performance of his contract, although his remedy is that which I have described, namely an injunction." Pom. Eq. Jur., § 1342, and note, quoting Sir George Jessel, M. R., in *Leech v. Schweder*, L. R. 9 Ch. 463. To the same effect, see *Collins v. Castle*, L. R. 36 Ch. D. 243, 2 Keener 523; *Peck v. Conway*, 119 Mass. 546, 1 Ames Eq. Jur. 162, 2 Scott 527, 2 Keener 509.

\* *Haywood v. Brunswick, etc., Soc.*, L. R. 8 Q. B. Div. 403 (covenant to build and keep in repair some houses), 1 Ames Eq. Jur. 176, 2 Scott 515, 2 Keener 580. Earlier English cases contain no such limitation. These and American cases to the same effect, show, as it seems to me, that the rule in its general scope as stated in the text had been fully settled. I doubt whether American courts would feel themselves bound to follow these latest English decisions which put a limitation upon the rule hitherto unknown. It is proper to remark that the case in which the limitation was for the first time laid down, was an action at law for damages, decided by a court composed of judges trained in legal rather than in equitable doctrines. Finally, the limitation, in my opinion, is wholly arbitrary, for, on principle, there seems to be no distinction between the equitable operation and effect of affirmative and of restrictive covenants.

<sup>1</sup> With regard to the distinctive feature of equity jurisprudence, that an executory agreement creates specific equitable interests in the property which is its subject-matter, see ante, §§ 365-369; on conversion by contracts, ante, §§ 1159, 1161, 1163; on liens created by contract, ante, §§ 1235-1237.

of legal formality or condition, no action at law can be maintained. There are two general classes of such cases. The first embraces those contracts in which the plaintiff, by reason either of some extrinsic circumstances or of his own default, has not performed, or even cannot perform, all the conditions on his part necessary to be performed in order that an action at law may be maintained thereon, but which nevertheless a court of equity regards as binding and will enforce.<sup>1</sup> The second class embraces contracts which are not valid in law, which the law does not treat as contracts at all, but which equity regards as binding in conscience, and enforces by its remedy of specific performance. The legal invalidity may result from the non-observance of some statutory requirements concerning the mode of making the agreement, or from certain doctrines of the common law, irrespective of statute, affecting its terms or its subject-matter. By far the most important and numerous species of contracts contained in this class are those which, being void at law under the statute of frauds, have been part performed by the plaintiff, and will therefore be wholly executed in specie, at his suit and for his benefit, by courts of equity.<sup>2</sup> Among the agreements which the original common law treated as invalid, irrespective of statutes, but which equity, in the application of its conscientious principles, regards as binding, and enforces by granting its relief of specific performance, are the following: Agreements for the assignment or disposition of a possibility, expectancy, or hope of succession;<sup>3</sup> agreements to assign things in action;<sup>4</sup> executory agreements made between a man and a woman who afterwards marry, which then became absolutely void at common law, but which equity may specifically enforce against either the husband or wife at the suit of the other;<sup>5</sup> contracts made by an owner to convey his land at some future day named, who dies before the time for completion arrives.<sup>6</sup> In all of these cases, however, modern statutes have changed the legal rules, so that such contracts would be valid at law.

1. Can't perform

2. Not valid

Statute of Frauds  
partly performed

1.  
2.

<sup>1</sup> See *Mortlock v. Buller*, 10 Ves. 292, 305, 306.

See post, § 1409 et seq; *Mundy v. Jolliffe*, 5 Mylne & C. 177, 1 Ames Eq. Jur. 289; *Jervis v. Smith*, Hoff. Ch. 470, 1 Ames Eq. Jur. 313.

<sup>2</sup> See ante, § 1287.

<sup>3</sup> See post, § 1402.

<sup>4</sup> *Cannel v. Buckle*, 2 P. Wms. 243, 1 Scott 100; *Acton v. Acton*, Prec. Ch. 237, Kirch. 202.

<sup>5</sup> At common law this contract is rendered impossible; the administrator cannot convey, because he acquires no interest whatever in the land, and no legal obligation devolves upon the heir. Equity enforces the contract against the heir: *Milnes v. Gery*, 14 Ves. 400, 403, 2 Keener 111, in argument of counsel; *Newton v. Swazey*, 8 N. H. 9, 1 Scott 109.

**SECTION II.**  
**EQUITABLE DEBTS.**

**ANALYSIS.**

§ 1298. General nature.

§ 1299. Husband's liability for wife's necessaries.

§ 1300. Liability for money advanced to pay debts of a person incapable of contracting.

§ 1301. On death of one joint debtor.

§ 1302. On death of a joint surety.

**§ 1301. On Death of One Joint Debtor.—<sup>1</sup>**

**§ 1302. Death of a Joint Surety.—<sup>1</sup>**

<sup>1</sup> See ante, § 409.

<sup>1</sup> See ante, § 409.

## CHAPTER TENTH.

### PERSONS NOT SUI JURIS.

#### SECTION I.

#### INFANTS.

#### ANALYSIS.

- § 1303. Questions stated.
- § 1304. Origin of the equitable jurisdiction over infants.
- § 1305. How jurisdiction is acquired; infant made a "ward of court."
- §§ 1306-1307. Extent of the jurisdiction.
- § 1306. Appointment of guardians.
- § 1307. Custody of infants; custody of parents, when controlled.
- §§ 1308-1310. How the jurisdiction is exercised.
- § 1308. Supervision of the guardian.
- § 1309. Management of the property.
- § 1310. Marriage of infant ward.

§ 1303. **Questions Stated.**—I shall not in this chapter enter upon any discussion of the rights, powers, capacities, and liabilities of infants; nor shall I treat of the different kinds of guardians, their modes of appointment, their powers, duties, and liabilities.<sup>1</sup> I purpose merely to describe in a very brief manner the inherent original jurisdiction of equity, as a part of its general jurisprudence, and independent of the statutory legislation concerning the same subject-matters, over the persons and estates of infants, the general nature and extent of that jurisdiction, how it is acquired, and how and for what purposes it is exercised.<sup>2</sup> In England this

<sup>1</sup>The general jurisdiction of equity over all guardians as fiduciary persons, for the purpose of compelling them to account, has already been stated: Ante, § 1097.

<sup>2</sup>Throughout the United States the modes of appointing guardians, and their rights, powers, and duties, are generally regulated, and in many states very minutely regulated, by statutes. A special, and often complete, statutory jurisdiction over them is given to the probate courts, under whatever name, as a part of the general statutory system for the administration and settlement of decedents' estates. In this manner, the original jurisdiction of equity, like that over administrations, has been to a great extent superseded, and in some states probably abrogated, by the special statutory system. On the other hand, as to all matters not included within the statutes, and in many states concurrently with this statutory system, the original equity

particular jurisdiction is one of the most important branches of the equity jurisprudence, and hardly any other is more frequently exercised by the courts of chancery. In this country, by reason of statutory legislation, it is relatively of much less importance.<sup>2</sup>

§ 1304. **Origin of This Equitable Jurisdiction.**—It is also wholly unnecessary to enter upon any discussion of the mooted questions as to the origin of the jurisdiction. It may, in its very inception, have belonged to the king as a part of his executive power as *parens patriae* to protect his subjects, and may by him have been transferred to the court of chancery. It is, however, firmly established as a judicial function of the court; it does not belong to the chancellor alone as the personal delegate and representative of the crown; it is exercised by all the judges composing the court of chancery, in the same manner, and governed by the same regulations, as all other confessedly judicial functions.<sup>1</sup> The same inherent jurisdiction is possessed, although not exercised so freely and minutely, by the American courts, unless curtailed or taken away by statute,—a fact very difficult of explanation, on the assumption that the jurisdiction is a part of the executive functions of the crown.<sup>2</sup>

§ 1305. **How Acquired.**—In order that the jurisdiction may be acquired in any particular case, the infant must be made a “ward of the court.” He thus becomes a ward of the court whenever he is brought before the court for any purpose, as a party plaintiff or defendant to a suit, petition, order, application, or any other proceeding.<sup>1</sup>

§ 1306. **Its Extent—Appointment of Guardians.**—The jurisdiction having thus attached, we may next inquire as to its extent, or what acts may be done in virtue of it. In the first place, it is a firmly settled doctrine that the court of equity can and will ap-jurisdiction over infants, like that over administrations, still remains in full force, to be exercised whenever occasion calls for its being set in motion.

<sup>1</sup> For a full and detailed discussion of the jurisdiction in all its phases, see the English and American notes to *Eyre v. Countess of Shaftsbury*, 2 Lead. Cas. Eq. 4th Am. ed., 1416, 1446, 1487.

<sup>2</sup> Although the theory that the jurisdiction had its origin in the king's power as *parens patriae* has been accepted by many of the English judges, and has been constantly repeated by text-writers, English and American, there seem to be almost insuperable difficulties involved in it, and it has been rejected by some of the ablest English jurists. In this country, according to our system of government, the power of *parens patriae* belongs exclusively to the legislature of each state, and is not possessed by the courts. With regard to the nature and origin of the jurisdiction, see *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103; 2 Lead. Cas. Eq., 4th Am. ed. 1416, 1446, 1487.

<sup>2</sup> *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

<sup>1</sup> *McGowan v. Lufborrow*, 82 Ga. 523, 14 Am. St. Rep. 178, 9 S. E. 427.

point a guardian of the person and estate of the infant, when there is no other guardian, or none who will or can act.<sup>1</sup> This is ordinarily the first step which is taken, and the further control of the infant's person or property is usually exerted upon and through this guardian. . . .

§ 1307. **The Same. Custody of Infants.**—In addition to its power to appoint guardians, the court of equity will also exercise its jurisdiction, in a proper case, and to promote the highest welfare of the infant, where there is already a guardian, natural or legal, by controlling the *person* of the infant, and by removing it personally from the custody of its natural or legal guardian, even from the custody of its own parents. By the common law, as well as by the law of nature, the father is the natural guardian of his infant children. It is not only the father's right, but his imperative *duty*, to have custody of the persons of his infant children, and to educate and train them so as to promote their future well-being as members of society. The equitable jurisdiction over the persons of infants is based upon this parental duty, and is an indirect means of enforcing it by furnishing a remedy for its violation. The jurisdiction is a delicate one; it rests in the highest degree upon the enlightened discretion of the court, and will only be exercised when plainly demanded as the means of securing the infant's present and future well-being. It is well settled, therefore, that a court of equity may interfere on behalf of infants, and remove them from the custody and control of their father or mother, whenever the habits, practices, instruction, or example of the parent, exerting a personal influence on the infants, tend to corrupt their morals and undermine their principles; or when the parent is neglecting their education suitable for their condition in life; or is endangering their property; or is guilty of ill-treatment or cruelty towards them.<sup>1</sup> The court will, of course, under like circumstances, remove infants from the custody of a legal or appointed guardian. . . .

§ 1308. **How Exercised—Supervision of the Guardian.**—An infant having been made a ward of the court, and a guardian being ap-

<sup>1</sup>This power to appoint guardians exists in the American states, so far as it has not been taken away or restricted by statute. In the *Matter of Hubbard*, 82 N. Y. 90, 92.

<sup>1</sup>In this country the tendency of the decisions, and especially of the modern statutes, is to place the mother's rights upon an equality with those of the father. There is one fundamental rule, viz., that the exercise of the jurisdiction depends upon the sound and enlightened discretion of the court, and has for its sole object the highest well-being of the infant; it should never, therefore, be influenced by any *sentimental* considerations in behalf of either mother or father. See *Agar-Ellis v. Lascelles*, 24 Ch. Div. 317; *Richards v. Collins*, 45 N. J. Eq. 283, 14 Am. St. Rep. 726, 17 Atl. 831.

pointed, the further jurisdiction concerning the ward is ordinarily exercised by supervising, directing, and controlling the acts of the guardian in the management of his trust. The supervision and control may be summed up as directed chiefly to three distinct matters: 1. The intellectual, moral, and religious training of the ward; 2. The protection and management of his property, including his maintenance; 3. His marriage. . . .

§ 1309. **The Same. Management of Property.**—The court will exercise a constant supervision over the guardian in the management of the ward's property. The guardian not only may, but must, use a sound discretion in applying a reasonable amount of the income, or even, if necessary, of the principal, of the personal estate for the maintenance and education of the infant in a manner suitable to his prospects and condition.<sup>1</sup> . . . It seems to be a doctrine sustained by a preponderance of authority, that a court of equity has no power, as a part of its jurisdiction over infants, to order a sale of the infant's real estate for purpose of maintenance, education, or investment.<sup>2</sup> The powers and duties of guardians in their management of the property of infant wards, and the powers of courts to direct a sale of their lands, are so much regulated by statutes in the various states, that these general rules of the purely equitable jurisdiction can have little practical application throughout the United States.

§ 1310. **Marriage.**—The English courts of equity exercise a very strict and stern control over the marriage of their infant wards. This special phase of the jurisdiction is based upon the notion that a suitable settlement should always accompany a marriage; and especially that the property of the wife, when she is the ward, should be settled to her sole and separate use. The marriage of an infant ward, even where the parents are living, must receive the approval and sanction of the court. An apprehended marriage, of which the court does not approve, will be restrained by injunction. A marriage of an infant ward without obtaining

<sup>1</sup>The amount allowed for maintenance will depend upon the circumstances of each case. See *Pitts v. Rhode Island Hospital Trust Co.*, 21 R. I. 544, 79 Am. St. Rep. 821, 45 Atl. 553, 48 L. R. A. 783 (allowance made, though will directed an accumulation of income).

A father is, in general, bound to maintain his infant children. Where the infants have property of their own, an allowance out of it for their maintenance will not, therefore, be ordinarily allowed, even though there is a provision for their maintenance in the will or deed conferring the property; the father, if able, must maintain them out of his own estate. See as to this rule and its exceptions, *National Valley Bank v. Hancock*, 100 Va. 101, 107, 93 Am. St. Rep. 933, 938, 57 L. R. A. 729, 40 S. E. 611, and cases cited.

<sup>2</sup>See *Northwestern Guaranty Loan Co. v. Smith*, 15 Mont. 101, 48 Am. St. Rep. 662, 38 Pac. 224. Contra, see *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247, and cases cited.

the consent of the court is a gross contempt, and will be punished as such, although the marriage itself cannot be avoided. If an infant female ward is thus married, the husband and all who aided in procuring it may be punished by fine and imprisonment; and the husband will be compelled to execute a settlement on his wife, to be approved by the court, even though the wife should expressly waive her right to such settlement.<sup>1</sup> This control over the marriage of wards, if it ever existed in theory, has become practically obsolete in the American states; it is not in harmony with our social habits, customs, and modes of thought.

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## SECTION II.

### PERSONS OF UNSOUND MIND.

#### ANALYSIS.

- § 1311. Origin of this jurisdiction.
- § 1312. Mode of exercising the jurisdiction in England.
- § 1313. Jurisdiction in the United States.
- § 1314. Jurisdiction in cases of weak and unsound mind.

§ 1311. **Origin of This Jurisdiction.**—Whatever be the correct theory with respect to the jurisdiction over infants, it is absolutely certain that the corresponding jurisdiction over the person and property of lunatics and idiots, and all others who may be adjudicated non compotes mentis, was derived by delegation from the crown; it was a portion of the king's executive power as *parens patriae*, and did not belong to the court of chancery by virtue of its inherent and general judicial functions. This branch of the regal authority was delegated to the chancellor as the personal representative of the crown, by means of an official instrument called the Sign Manual, signed by the king's own signature, and sealed with his own privy seal, and was exercised by the chancellor alone, and not by the court of chancery.<sup>1</sup> After this special jurisdiction had thus been exercised in any particular case, by adjudicating an individual to be a lunatic, and by appointing a committee of his person and property, a further jurisdiction then arose in the *court of chancery* to supervise and control the official conduct of the committee; but this supplementary jurisdiction of the *court* seems to have been a part of its general authority over trusts, trustees, and fiduciary persons.<sup>2</sup> The jurisdiction in matters of

<sup>1</sup> See *Smith v. Smith*, 3 Atk. 304.

<sup>2</sup> *Hamilton v. Traber*, 78 Md. 26, 44 Am. St. Rep. 258, 27 Atl. 229.

<sup>3</sup> As to maintenance, see *In re Plenderleith* (1893), 3 Ch. 332 (creditors not paid until lunatic is provided for).

lunacy and all the proceedings thereon in England are now regulated by statute.<sup>3</sup>

§ 1313. **Jurisdiction in the United States.**—It necessarily follows from its origin that this special jurisdiction over the persons and property of lunatics is not generally possessed by the courts of equity in the United States as a part of the original inherent equitable jurisdiction. There are a few apparent exceptions, but these exceptions in reality only confirm the truth of my statement. In a very few states the constitutions or statutes, in their general grants of jurisdiction to courts of equity, confer jurisdiction over lunatics, idiots, and persons non compos mentis. The powers of the American courts are conferred and regulated by statutes. . . . They extend not only to lunatics and idiots, but to confirmed drunkards, and other persons who are so non compos mentis that they are incapable of managing their own affairs.<sup>1</sup> When the special statutory jurisdiction has been exercised, a person has been adjudged or “found” a lunatic or otherwise non compos mentis, and a committee or guardian has been appointed, the general jurisdiction of equity extends over such committee or guardian, for the purpose of calling him to an account of his trust, in the same manner as over all other strictly fiduciary persons.<sup>2</sup>

§ 1314. **Jurisdiction in Cases of Weak or Unsound Mind.**—The special jurisdiction above described is confined to persons who may be and are adjudicated or found to be lunatics, idiots, or non compos mentis. The very first step, in order that the court may, through a committee, control the person or property of the particular individual is a proceeding by which he is judicially determined to belong to the status of lunatics or non compos mentis. In addition to this peculiar authority, a court of equity may, in appropriate cases, in pursuance of its inherent general powers, protect the property of persons of weak or unsound mind, who have not been and who even cannot be judicially “found” non compos mentis.<sup>1</sup> These two jurisdictions are wholly distinct. The former is special; the latter is the general jurisdiction of equity exercised, “not by reason of the incompetency, but notwithstanding the incompetency.” The court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if he were of sound mind. \*

<sup>3</sup> See 16 & 17 Vict., c. 70; 18 & 19 Vict., c. 13; 25 & 26 Vict., c. 86. Also, Lunacy Act of 1890, 53 & 54 Vict., c. 5.

<sup>1</sup> For a brief historical sketch of the jurisdiction and procedure both in England and in New York, see *Hughes v. Jones*, 116 N. Y. 75, 15 Am. St. Rep. 386, 22 N. E. 446, 5 L. R. A. 632; in Maryland, see *Hamilton v. Traber*, 78 Md. 26, 44 Am. St. Rep. 258, 27 Atl. 229.

<sup>2</sup> See ante, § 1097.

<sup>3</sup> *Beall v. Smith*, L. R. 9 Ch. 85, 91; *Jones v. Lloyd*, L. R. 18 Eq. 265, 274, 275.

## PART FOURTH.

### THE REMEDIES AND REMEDIAL RIGHTS WHICH ARE CONFERRED BY THE EQUITY JURISPRUDENCE.

#### PRELIMINARY SECTION.

##### ANALYSIS.

§ 1315. General object.

§ 1316. Classification.

§ 1317. Remedies acting in rem or in personam.

§ 1318. Remedies in personam beyond the territorial jurisdiction.

§ 1315. **General Object.**—The general nature, kinds, and classes of equitable remedies, both those belonging to the exclusive and to the concurrent jurisdictions, have been fully described.<sup>1</sup> The main purpose of the discussions in this Part Fourth is to determine under what circumstances, for the protection of what primary rights and interests, legal or equitable, on the occasion of what wrongs or violation of duty, and between what parties, equity *will exercise its jurisdiction* by granting either those remedies which are peculiar to courts of equity, or those which are essentially legal in their nature and are administered concurrently by courts of law and of equity. In other words, my object is to show what remedies may be conferred by equity, and when its jurisdiction will be exercised by granting them. The entire discussion is based upon the general principles and doctrines which define the equitable jurisdiction and determine its exercise, as explained in a previous volume.<sup>2</sup>

§ 1316. **Classification.**—The classification presented in the former volume, and referred to in the preceding paragraph, was intended merely for purposes of general description, and in order to present the active remedial system in one body. For the discussions of this Part Fourth I shall adopt the following classification, by which all equitable remedies are collected and arranged in eight separate groups: 1. The First Group contains those remedies which are purely ancillary and provisional, which do not affect any primary right nor confer any ultimate relief.<sup>1</sup> 2. The Second Group consists of remedies purely preventive.<sup>2</sup> 3. The Third Group

<sup>1</sup> See ante, §§ 112-116, 134, 135, and 170-172.

<sup>2</sup> See pt. 1, c. 1, 2.

<sup>3</sup> These are interpleader and receivers.

<sup>4</sup> It includes injunctions for all possible purposes.

Indirectly protect interest or primary rights  
§ 1317  
Directly

consists of remedies which *indirectly* establish or protect interests and primary rights, whether those interests and rights are legal or equitable.<sup>3</sup> 4. The Fourth Group consists of remedies by which estates, interests, and primary rights, either legal or equitable, are *directly* declared, established, or recovered, or the enjoyment thereof is fully restored.<sup>4</sup> 5. The Fifth Group consists of remedies by which *equitable obligations* are specifically and directly enforced.<sup>5</sup> 6. The Sixth Group consists of remedies in which the final relief is *pecuniary*, but is obtained by the enforcement of a *lien* or *charge* upon some specific property or fund.<sup>6</sup> 7. The Seventh Group consists of remedies in which the final relief is wholly *pecuniary*, and is obtained in the form of a general pecuniary recovery.<sup>7</sup> 8. The Eighth Group contains certain additional remedies which have been created and conferred by statute in several of the states, and which therefore do not belong to the original jurisprudence of equity nor to the general equitable jurisdiction.<sup>8</sup>

§ 1317. Remedies Acting in Personam or in Rem.<sup>1</sup>—

<sup>1</sup>They are reformation and re-execution, and cancellation, surrender up or discharge of instruments.

<sup>2</sup>This entire group contains three main classes: 1. Suits by which purely legal estates are established, and the enjoyment thereof is recovered; including assignment of dower; establishment of disputed boundaries; partition of land, and partition of personal property. 2. Suits by which some general right, either legal or equitable, is established; including bills of peace; bills quia timet; quieting title; suits to establish a will; suits to construe a will. 3. Suits by which some particular estate, interest, or right, legal or equitable, is established; including statutory suit to quiet title; removing a cloud from title; strict foreclosure of a mortgage or pledge; redemption of mortgages or pledges.

<sup>3</sup>This group contains three main classes: 1. Specific performance of contracts. 2. Specific enforcement of obligations arising from trusts. 3. Specific enforcement of obligations arising from relations analogous to trusts; including suits against fiduciary persons; suits against corporations and their officers; administration suits against executors and administrators.

<sup>4</sup>Embracing foreclosure of mortgages of real and personal property and of pledges by judicial sale; enforcement of equitable liens; marshaling of securities; enforcement of the equitable contracts of married women; and creditor's suits.

<sup>5</sup>This group contains the following particular suits: By assignees of things in action, equitable assignees of a fund, etc.; by persons entitled to participate in a common fund; for contribution in general; suits growing out of suretyship, for exoneration, contribution, or subrogation; suits growing out of partnership; suits for an accounting in general; recovery of damages.

<sup>6</sup>In this statutory group should be placed suits for divorce; proceedings in the nature of an inquisition for the appointment of committees over lunatics, persons of unsound mind, and habitual drunkards; statutory suits to dissolve and wind up corporations; or to remove corporate officers for cause, or for the appointment of officers.

<sup>7</sup>On this subject, see ante, §§ 428-431.

## FIRST GROUP.

### REMEDIES PURELY ANCILLARY AND PROVISIONAL.

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## CHAPTER FIRST.

### INTERPLEADER.

#### ANALYSIS.

- § 1319. Description of this group.
- § 1320. General nature and objects of interpleader.
- § 1321. The claims, legal or equitable.
- § 1322. Essential elements.
- § 1323. *First*. The same thing, debt, or duty.
- § 1324. *Second*. Privity between the opposing claimants.
- § 1325. *Third*. Plaintiff a mere stakeholder.
- § 1326. *Fourth*. No independent liability to one claimant.
- § 1327. By bailees, agents, tenants, and parties to contracts.
- § 1328. Pleadings and other procedure.
- § 1329. Interpleader in legal actions by statute.

§ 1319. **Description of This Group.**—The distinguishing characteristic of the remedies belonging to this group is, that they determine no primary rights, and grant no final reliefs, either directly or indirectly. They are, in fact, instruments and means by which the court is enabled more conveniently and perfectly to adjudicate upon the *ultimate* rights and interests of the parties, and to award the *final* reliefs, in the further judicial proceedings to which they are auxiliary, and of which they are really the preliminary stage. These remedies are therefore, in every sense of the terms, ancillary and provisional.

§ 1320. **Interpleader—General Nature and Object.**—1 purpose in this chapter to describe the general equitable jurisdiction to grant the remedy of interpleader independent of statute; and afterwards to notice briefly the modern statutes, some of which may perhaps have enlarged that jurisdiction, but most of which have simply conferred a similar jurisdiction upon courts of law, to be exercised in certain kinds of legal actions.<sup>1</sup> Where two or more persons,

<sup>1</sup> Under the ancient common law, the relief of interpleader was allowed in two special cases in a legal action by a court of law: when two or more persons had made a joint bailment and then brought separate actions of detinue against

whose title are connected by reason of one being derived from the other, or of both being derived from a common source, claim the same thing, debt, or duty, by different or separate interests, from a third person, and he, not knowing to which of the claimants he ought of right to render the debt or duty, or to deliver the thing, fears he may be hurt by some of them, he may maintain a suit and obtain against them the remedy of interpleader. In his bill of complaint he must state his own rights and their several claims, and pray that they may interplead, so that the court may adjudge to whom the thing, debt, or duty belongs, and he may be indemnified. If any suits at law have been brought against him, he may also pray that such proceedings be restrained until the right be determined.<sup>2</sup> The object of the suit is, that the conflicting claimants

the depositary for the thing bailed; and when the thing came into the holder's possession by finding, and two or more persons claiming to be owners sued him in separate actions of detinue. Modern statutes, English and American, have enabled courts of law to grant a similar relief, in a summary manner, in certain legal actions, but this legislation has no connection with the ancient common-law jurisdiction above mentioned.

<sup>2</sup>This description is taken, with some additions and alterations to conform to later decisions, from Mitford's Equity Pleading, 58, 59. As to the general nature of the remedy, see Crawshay v. Thornton, 2 Mylne & C. 1, 2 Ames Eq. Jur. 18, 1 Keener 220; Prudential Ass. Co. v. Thomas, L. R. 3 Ch. 74, 1 Keener 287; Farley v. Blood, 30 N. H. 354, 2 Ames Eq. Jur. 4; Dorn v. Fox, 61 N. Y. 264, 1 Keener 249; Shaw v. Coster, 8 Paige 339, 35 Am. Dec. 690, 1 Keener 235; Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991, 1 Keener 262; Bassett v. Leslie, 123 N. Y. 396, 25 N. E. 386, 1 Keener 266, Shep. 319.

*Rationale of the Remedy.*—It is sometimes supposed that the remedy of interpleader is allowed to avoid the risk of two recoveries. This is entirely a mistaken view. If a party has in any way made himself liable, even for the same demand, to two claimants, he is not entitled to an interpleader. It is the essential fact that he should actually be liable to only one of the claimants. The true rationale of interpleader is, that the party thereby avoids the risk of being vexed by two or more suits. Even though there is no danger of his being compelled to pay the same demand twice, the danger of two suits against him, with the consequent trouble and expense, is the sufficient ground for the remedy: Crawford v. Fisher, 1 Hare 436, 441; Yarborough v. Thompson, 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626, 1 Keener 278. In Crawford v. Fisher, Wigram, V. C., said: "The office of an interpleading suit is, not to protect a party against a *double liability*, but against double vexation in respect of *one liability*. If the circumstances of a case show that the plaintiff is liable to both claimants, that is no case for interpleader. It is of the essence of an interpleading suit that the plaintiff shall be liable to one only of the claimants; and the relief which the court affords him is against the vexation of two proceedings on a matter which may be settled in a single suit." The supreme object of an interpleader is to protect the plaintiff—the stakeholder—and not the claimants against him; to protect him from the danger and vexation of two opposing suits for the same demand by those claimants, while he is ready and willing to pay the demand to the one who is judicially ascertained to be entitled to it: Farley v. Blood, 30 N. H. 354,

shall litigate the matter among themselves, without involving the stakeholder in their controversy, with which he has no interest. It is plain, therefore, that the plaintiff can obtain no *specific* relief. So far as he is concerned, upon his filing the bill, and surrendering up the thing or money into the custody of the court, his remedy is exhausted by the decree that the defendants do interplead with each other, and that he be freed from or indemnified against their demands, and that he recover his costs; with the result of their dispute he has no concern. The ground of the jurisdiction is plain. The party seeking the remedy is exposed to the hazard, vexation, and expense of several actions at law for the same demand, while he is ready and willing to satisfy that demand in favor of the claimant who establishes his right thereto. For this liability the law furnishes no adequate remedy, and in most instances no remedy whatever.

§ 1321. **The Claims, Legal or Equitable.**—The equitable jurisdiction exists, although both or all the conflicting claims against the stakeholder are legal,<sup>1</sup> since it depends upon the fact that distinct claims are made, rather than upon their intrinsic nature as being legal or equitable. It is not necessary, however, that all the claims should be legal; the remedy is granted when one of them is legal and the other equitable.<sup>2</sup> Indeed, if one or more

<sup>2</sup> Ames Eq. Jur. 4. Such danger must be real; a mere suspicion of risk will not be sufficient to support a bill: Baltimore & O. R. Co. v. Arthur, 90 N. Y. 234, 2 Ames Eq. Jur. 13, 1 Keener 293. That the risk may depend upon a doubtful question of law, see Dorn v. Fox and Crane v. McDonald, supra.

Such being the theory of the remedy, it is not essential that any suit should have been actually commenced by either claimant against the plaintiff: Angell v. Hadden, 15 Ves. 244, 1 Keener 214; Morgan v. Marsack, 2 Mer. 107, 1 Keener 273; Farley v. Blood, 30 N. H. 354, 2 Ames Eq. Jur. 4. It is enough that the conflicting claimants make their respective claims and threaten suit: Yarborough v. Thompson, 3 Smedes & M. 291, 41 Am. Dec. 626, 1 Keener 278.

That the plaintiff cannot interplead claimants who have reduced their claims to judgments, as this would be to increase instead of diminish the number of suits, and because of the rule (post, § 1361) that a court of equity cannot give relief when the party might have made defense at law, see Yarborough v. Thompson, supra, and Larabrie v. Brown, 26 L. J. Rep. Eq., N. S., 605, 1 Keener 284.

<sup>1</sup> Lowndes v. Cornford, 18 Ves. 299.

<sup>2</sup> Lowndes v. Cornford, supra; Morgan v. Marsack, 2 Mer. 107, 1 Keener 273; Wright v. Ward, 4 Russ. 215, 1 Keener 217; Hamilton v. Marks, 5 De Gex & S. 638, 1 Keener 280; Prudential Ass. Co. v. Thomas, L. R. 3 Ch. 74, 1 Keener 287; Farley v. Blood, 30 N. H. 354, 2 Ames Eq. Jur. 4. In England the necessity of a resort to equity is removed, although the equity jurisdiction is not at all affected, by the statute of 1 & 2 Wm. IV., c. 58, sec. 1, as amended and enlarged by the common-law procedure act (23 & 24 Vict., c. 126, sec. 12), which enabled a court of law, on motion, to direct what amounts to an interpleader in actions of debt, assumpsit, trover, and detinue. Under the present system of procedure, equitable claims may be adjudicated upon

of the conflicting claims are purely equitable, there is the stronger reason for a resort to the equity jurisdiction; and prior to recent legislation in England and in the United States, such a resort was indispensable under those circumstances.

§ 1322. **Essential Elements.**—From the description given in a previous paragraph, and from the whole course of authorities, it is clear that the equitable remedy of interpleader, independent of recent statutory regulations, depends upon and requires the existence of the four following elements, which may be regarded as its essential conditions: 1. The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; 2. All their adverse titles or claims must be dependent, or be derived from a common source; 3. The person asking the relief—the plaintiff—must not have nor claim any interest in the subject-matter; 4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stake-holder. As the original equitable jurisdiction is founded, to a great extent, upon these four propositions, I shall examine them separately.

§ 1323. **First. The Same Thing, Debt, or Duty.**—The same thing, debt, or duty must be claimed by both the parties against whom the interpleader is demanded.<sup>1</sup> This requisite results from the very nature and object of the remedy. If the subject in dispute has

in an interpleader issue connected with a legal action. Analogous statutes have been passed in many American states.

<sup>1</sup> *Desborough v. Harris*, 5 De Gex, M. & G. 439, 455. In *Glyn v. Duesbury*, 11 Sim. 139, 148, Shadwell, V. C., said: "*Where the claims made by the defendants are of different amounts, they can never be identical; but where they are the same in amount, that circumstance goes far to determine their identity. The amount, however, may not be sufficient of itself to determine the identity; for the amount may be the same and the debt may be different.*" This dictum was approved in *Pfister v. Wade*, 56 Cal. 43. In my opinion, however, that portion of the dictum which is italicized—the statement that claims of different amounts can never be identical—is incorrect; it seems alike opposed to principle and to authority. Where both defendants claim one, single, undivided *debt*, technically so called, the statement is undoubtedly true; a difference in their amounts would be fatal to their identity. But it is clearly not necessarily so where the claims are for unliquidated damages. Where, for example, a chattel is in the plaintiff's hands, to which both defendants claim title, they do not sue to recover the article itself, but allege a *technical* conversion, and seek to recover damages—the value of the chattel. Here the claim of the defendants would not be for a "thing," nor for a "debt," but it would be for a "duty"—a *chose in action*. If each defendant alleged a different value, and claimed a different amount of damages, the *duty* asserted would still be identically the same in each demand. Another instance of difference in the amounts claimed by the different defendants, where the debt or duty may still be the same, occurs in cases where a fund being in plaintiff's hands, the whole of it is claimed by one defendant, and parts of it are claimed

a bodily existence,—is a *thing*,—there can be no doubt nor question as to the identity. The difficulty in applying the rule arises where the subject is a *chose in action*; and then the identity must be determined in each particular case, not by any general rules, but by the nature, constitution, and incidents of the debt, demand, or duty itself.

§ 1324. **Second. Privity between the Opposing Claimants.**—A second requisite is, that the adverse titles of the claimants must be connected, or dependent, or one derived from the other, or both derived from a common source. It is not every instance of conflicting claims against a person for the same thing, debt, or duty which will entitle him to the remedy of an interpleader. Where there is no privity between the claimants, where their titles are independent, not derived from a common source, but each asserted as wholly paramount to the other, the stakeholder is obliged, in the language of the authorities, to defend himself as well as he can against each separate demand; a court of equity will not grant him an interpleader.<sup>1</sup>

by the others. With regard to such cases, Christiancy, J., said, in *School District v. Weston*, 31 Mich. 85: "Upon the great weight of authority, both English and American, a much more liberal and reasonable rule has been established, and bills of interpleader have been frequently 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; and the claimant being, as in the present case, virtually a stakeholder, and unable to determine to whom or in what proportions the payments should be made." In this case the plaintiff had let a contract for building a school house for a specified sum to a contractor, and portions of this contract price were claimed by subcontractors and material men, the total amount of their claims exceeding the whole contract price. Where the same property had been taxed to the owner in two counties, in some cases for different amounts, in others for the same amount, a bill of interpleader by the owner to determine which of the counties was entitled to the tax has been maintained: See *Dorn v. Fox*, 61 N. Y. 264, 1 Keener 249; but, per contra, see *Greene v. Mumford*, 4 R. I. 313. It is difficult to perceive how the tax levied by two different counties, even though the amount of each tax is the same, is one and the same debt or duty, so as to sustain a bill of interpleader.

Where a *chose in action* is the subject-matter, it is impossible to lay down any general rule by which its identity shall be determined. The circumstances of each case can alone disclose whether the same debt or duty is claimed by all the defendants. See *National Life Ins. Co. v. Pingrey*, 141 Mass. 411, 2 Ames Eq. Jur. 37, 1 Keener 250 (insurance company issued a policy on the surrender of a previous policy; question whether the company has incurred a single or double liability); *Packard v. Stevens*, 58 N. J. Eq. 489, 46 Atl. 250; *Bassett v. Leslie*, 123 N. Y. 396, 25 N. E. 386, 1 Keener 266, Shep. 319.

In other cases, one defendant claiming rent for certain premises, and the other claiming damages for their use and occupation, the demands were held not to be the same: *Johnson v. Atkinson*, 3 Anstr. 798, 2 Ames Eq. Jur. 10.

<sup>1</sup> *Pearson v. Cardon*, 2 Russ. & M. 606, 609-612; *Crawshay v. Thornton*, 2

§ 1325. **Third. Plaintiff a Mere Stake-holder.**—The person seeking the relief must not have nor claim any interest in the subject-matter. He must occupy the position of a stake-holder. He must stand entirely indifferent between the conflicting claimants, and be ready and willing to surrender the entire thing in dispute, or to pay the entire debt, or render the entire duty, without any charge, deduction, or commission as against the one rightfully entitled. He cannot mingle up a demand of his own upon the property or fund, with the demand that the other persons shall interplead. As soon as the decree is made that the defendants do interplead, and that he be indemnified, the plaintiff must be wholly without the controversy.<sup>1</sup> . . . To sum up the doctrine, the plain-

Myline & C. 1, 19-24, 2 Ames Eq. Jur. 18, 1 Keener 220; Third Nat. Bank v. Lumber Co., 132 Mass. 410, 2 Ames Eq. Jur. 27, 1 Keener 257. This doctrine, which was left somewhat doubtful by the previous cases, was finally settled by the decision of Lord Brougham in *Pearson v. Cardon*, and of Lord Cottenham in *Crawshay v. Thornton*. It finds its most frequent application in cases of a tenant interpleading his landlord and a third person claiming under paramount title, of a bailee interpleading his bailor and an adverse claimant asserting a paramount title, and of an agent interpleading his principal and an adverse paramount claimant. Examples of these cases are given in a subsequent paragraph.

Such being the doctrine, 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 which 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. See *Crane v. McDonald*, 118 N. Y. 648, 657, 23 N. E. 991, 1 Keener 262. It is not surprising, therefore, that courts have sometimes ignored this doctrine in their decisions, or have been ready to admit exceptions to its operation. In the common-law procedure act of 1860, which provides for a summary interpleader by motion in legal actions, it was enacted that the order of interpleader may be made "though the titles of the claimants have not a common origin, but are adverse to and independent of each other." In *Attenborough v. London, etc., Dock Co.*, L. R. 3 C. P. D. 450, which was an interpleader proceeding in a legal action, the court of appeal held that the statute above quoted had abrogated this doctrine as laid down in *Crawshay v. Thornton*, at all events in the proceedings authorized by the statute. Bramwell, L. J., who was one of the commissioners who drew up the statute, said (p. 456): "From my own knowledge as one of the common-law commissioners, I can say that it was intended to do away with the effect of that decision." Baggallay, L. J., a very eminent equity lawyer, said (p. 458): "I may go further, and say that, in my opinion, if, after the common-law procedure act of 1860, a bill of interpleader had been filed, raising facts like those in *Crawshay v. Thornton*, any judge of the court of chancery would have felt himself no longer bound by the somewhat narrow principle laid down by Lord Cottenham, but would have acted upon the fuller powers contained in that statute."

<sup>1</sup> Mitchell v. Hayne, 2 Sim. & St. 63, 2 Ames Eq. Jur. 12, 1 Keener 292; Shaw v. Coster, 8 Paige 339, 35 Am. Dec. 600, 1 Keener 235; Baltimore & O.

tiff can only obtain the remedy of an interpleader; and the circumstances must be such that the entire rights of both defendants to the thing, fund, debt, or duty can be fully adjusted and determined in the one suit.

§ 1326. **Fourth. No Independent Liability to One Claimant.**—

The party seeking the relief must have incurred no independent liability to either of the claimants. Such an independent liability may be incurred in two classes of cases: 1. In the first place, the agent, depository, bailee, or other party demanding an interpleader, in his dealings with one of the claimants, may have expressly acknowledged the latter's title, or may have bound himself by contract, so as to render himself liable upon such independent undertaking, without reference to his possible liability to the rival claimant upon the general nature of the entire transaction. Under these circumstances, as the plaintiff is liable at all events to one of the defendants, whatever may be their own respective claims upon the subject-matter as between themselves, he cannot call upon these defendants to interplead. He does not stand indifferent between the claimants, since one of them has a valid legal demand against him at all events.<sup>1</sup> Even if the acknowledgment or promise has

R. Co. v. Arthur, 90 N. Y. 234, 2 Ames Eq. Jur. 13, 1 Keener 293; Wing v. Spaulding, 64 Vt. 83, 23 Atl. 615, 1 Keener 308; Stone v. Reed, 152 Mass. 179, 25 N. E. 49, 1 Keener 304; Crass v. Memphis & C. R. Co., 96 Ala. 447, 11 South. 480, 1 Keener 311. A frequent application of the principle is furnished by cases where the plaintiff claims the right to retain a portion of the fund in controversy as commission or charge for his services rendered in connection with the fund: Mitchell v. Hayne, *supra* (auctioneer's commission); Baltimore & O. R. Co. v. Arthur, *supra* (freight charges); Crass v. Memphis & C. R. Co., *supra* (carrier's lien for freight). It necessarily follows from the doctrine of the text that if the plaintiff expressly denies his liability in whole or in part to one of the defendants, he strikes at the very foundation of the remedy, and shows that he is not indifferent: Williams v. Matthews, 47 N. J. Eq. 196, 20 Atl. 261, 1 Keener 301.

The stakeholder—the person in possession of the thing or fund, or from whom the debt or duty is owing, and against whom two or more conflicting claimants assert their demands—must necessarily be the plaintiff. No interpleader suit can be maintained by one of the contestants against the other contestant and the stakeholder: See Sprague v. West, 127 Mass. 471, 1 Keener 255.

<sup>1</sup> Crawshay v. Thornton, 2 Mylne & C. 1, 19-24, 2 Ames Eq. Jur. 18, 1 Keener 220; Jew v. Wood, Craig & P. 185, 1 Keener 240; Lindsay v. Barron, 60 E. C. L. 291, 2 Ames Eq. Jur. 39; Platte Valley State Bank v. National Livestock Ass'n. 155 Ill. 250, 40 N. E. 621, 2 Ames Eq. Jur. 29 (no independent undertaking, within the meaning of the text). Another instance of the doctrine is, where the plaintiff, in stating the case in his bill, is obliged to admit himself to be a wrong-doer to either one of the defendants; he thus shows an independent liability to that defendant, and is not entitled to an interpleader; Slingsby v. Boulton, 1 Ves. & B. 334, 2 Ames Eq. Jur. 33, 1 Keener 216.

been obtained by fraud or mistake, the right of the party thus deceived to be relieved in equity from his liability cannot be considered and sustained in an interpleader suit. 2. In the second class of cases, the independent liability of the plaintiff to one of the defendants arises from the very nature of the original relation subsisting between them, without reference to any collateral acknowledgment of title, or promise to be bound. The most important examples of such relations are those subsisting between a bailee and his bailor, an agent or attorney and his principal, a tenant and his landlord, and the like. In pursuance of the doctrine above stated, if a bailee is sued by his bailor, or an agent by his principal, or a tenant by his landlord, and at the same time a third person asserts a claim of title adverse and paramount to that of the bailor, principal, or landlord, a suit of interpleader cannot, in general, be maintained against the two conflicting claimants, since, from the very nature of the relation, there is an independent personal liability, with respect to the subject-matter, of the bailee to his bailor, of the agent to his principal, and of the tenant to his landlord.<sup>2</sup>

§ 1327. **By Bailees, Agents, Tenants, and Parties to Contracts.**—The general doctrine which determines the rights of bailees, agents, tenants, and contracting parties to interplead their principals, bailors, landlords, and the like, and claimants who assert antagonistic paramount titles, has been stated in the preceding paragraph.<sup>1</sup> The

<sup>2</sup> For cases illustrating this conclusion, see the next following paragraph and notes thereunder. Since the cases of bailees, agents, and tenants are so important, and since the chief difficulties connected with the remedy of interpleader have arisen in its application to such persons, I have given a separate paragraph to the examination of these relations.

<sup>1</sup> I have collected and arranged in this note some of the most important cases which deal with such classes of persons.

*Bailees and agents.*—A bailee or agent cannot maintain an interpleader suit against the bailor or the principal and a third person who asserts an independent, antagonistic, and paramount title to the fund: *Crawshay v. Thornton*, 2 Mylne & C. 1, 19-24, 2 Ames Eq. Jur. 18, 1 Keener 220; *First Nat. Bank v. Bininger*, 26 N. J. Eq. 345, 2 Ames Eq. Jur. 24. On the other hand, there are cases in which a bailee or an agent may interplead his bailor or his principal with third persons claiming adversely. Wherever the third person claims the thing, fund, debt, or duty from the bailee or agent under a title derived from the bailor or the principal, created by the latter's own act subsequently to the bailment or agency—such as his assignment, agreement, sale, mortgage, trust, or lien given by him—the bailee or agent may compel the parties to interplead. There is in such a case no denial of the original title; the only dispute is concerning the effect of the subsequent act, and as to which of the claimants is thereby entitled to the thing or fund. On this ground, where money is in the hands of an agent, and the principal has created a lien or charge on the fund, in favor of a third person, in respect to which a controversy has arisen, the agent may compel his principal and the

rule is not, however, of universal application. There are cases in which a bailee, agent, or tenant may interplead his bailor, principal,

other claimant to interplead: *Wright v. Ward*, 4 Russ. 215-220, 1 Keener 217. And where the principal has assigned the fund in the agent's hands, or the bailor has transferred his interest in the thing bailed: *Wright v. Ward*.

*Tenant and landlord.*—The general doctrine is familiar, that a tenant cannot deny his landlord's title; he cannot therefore maintain a suit for interpleader against his landlord and a stranger who claims under a title antagonistic and paramount to that of the lessor: *Dungey v. Angove*, 2 Ves. 304, 310, 1 Keener 205; *Johnson v. Atkinson*, 3 Anstr. 798, 2 Ames Eq. Jur. 10; *Crawshay v. Thornton*, supra. But the tenant is entitled to interplead his landlord and an opposing claimant wherever there is some privity between the two—when the title of the other claimant is derivative from that of the lessor—as, for example, when the relation of mortgagor and mortgagee, trustee and cestui que trust, assignor and assignee, etc., has been created between the two. In such a case the tenant does not dispute his landlord's title: *Dungey v. Angove*, supra; *Metcalf v. Hervey*, 1 Ves. Sr. 248, 1 Keener 203; *Cowtan v. Williams*, 9 Ves. 107, 2 Ames Eq. Jur. 8, 1 Keener 213; *Johnson v. Atkinson*, supra.

*Parties to contracts.*—As a general rule, where A and B are bound by express contract, A cannot maintain an interpleader suit against B or a person holding or claiming under him, and a stranger who asserts and claims under an antagonistic and paramount title. A is under an independent liability to B: Ante, § 1326. On the other hand, as in cases of bailee, agents, and tenants, a party to a contract may interplead his co-contractor and other persons in privity with him, or distinct claimants all of whom are in privity with his co-contractor—that is, may interplead his co-contractor and persons who derive their title under him, or several claimants all of whom thus hold by derivative title. As example: One owing a sum of money under a contract may interplead the legal assignee of his co-contractor with one claiming the fund either by equitable assignment from the co-contractor or by attachment levied upon the fund: *Crane v. McDonald*, 118 N. Y. 648, 23 N. E. 991. A vendor of land may interplead the husband of the deceased vendee and her heirs, where both claimed to be entitled to a conveyance: *Farley v. Blood*, 30 N. H. 354, 2 Ames Eq. Jur. 4. Insurance companies may compel opposing claimants of the insurance money to interplead when they claim by assignment from the insured, or by mortgage, or by attachment, etc.—that is, when they claim derivatively: *Hamilton v. Marks*, 5 De Gex & S. 638, 1 Keener 280; *Prudential Assur. Co. v. Thomas*, L. R. 3 Ch. 74, 1 Keener 287. A common class of interpleader suits is that where a bank, holding the relation of debtor to its depositor, interpleads the depositor and one claiming under him, or two opposing claimants under the same depositor: *Platte Valley State Bank v. National Livestock Bank*, 155 Ill. 250, 40 N. E. 621, 2 Ames Eq. Jur. 29; but if one of the claimants asserts a title superior to that of the depositor, interpleader is not allowed: *Third Nat. Bank v. Lumber Co.*, 132 Mass. 410, 2 Ames Eq. Jur. 27, 1 Keener 257. Independently of statute, it has generally been held that a sheriff levying on goods by execution against A, which are claimed by B to be his property, cannot compel the execution creditor and B to interplead: *Slingsby v. Boulton*, 1 Ves. & B. 334, 2 Ames Eq. Jur. 33, 1 Keener 216; *Shaw v. Coster*, 8 Paige 339, 35 Am. Dec. 690, 1 Keener 235. Nor can the sheriff compel the opposing claimants of a surplus in his hands after satisfying an execution to interplead; such claims can

or landlord, and a third person setting up an opposing claim to the thing, fund, or duty. These cases may be described by one general formula, as those in which the title of the opposing claimant is *derivative* under, and not antagonistic and paramount to, that of the bailor, principal, or landlord. An interpleader is allowed wherever the adverse claim originates from some act of the bailor, principal, or landlord, done or suffered after the commencement of the bailment, agency, or tenancy, and causing a dispute as to which of the parties is entitled to the thing, fund, or duty. The claim of the third person, instead of being under an independent, antagonistic, paramount title, must be made under a title *derived* from that of the bailor, principal, or landlord; it must acknowledge, and not deny, such original title.

§ 1328. **Pleadings and Other Procedure.**—The bill of complaint must contain allegations which show that all of the requisites entitling the plaintiff to the remedy exist in the case. It must allege positively that conflicting claims to substantially the same thing, fund, debt, or duty are set up by the defendants; that plaintiff claims no interest in the subject-matter; that he is indifferent between the claimants, and is ready and willing to deliver the thing or fund, or pay the debt, or render the duty to the rightful claimant, but that he is ignorant or in doubt which is the rightful one, and is in real danger or hazard by means of such doubt, from their conflicting demands.<sup>1</sup> The bill need not show an apparent title in either of the defendants. On the contrary, if the bill should show that plaintiff was fully informed of the defendant's rights and of his own liability, or if it should show that one of the defendants was certainly entitled, on the facts alleged, to the thing, debt, or duty, in either case it would be demurrable; there would be no ground for an interpleader.<sup>2</sup> It is the settled practice that the bill of complaint must be accompanied by an affidavit of the plaintiff, stating that the suit is not brought in collusion with

be adjusted by the court: *Parker v. Barker*, 42 N. H. 78, 77 Am. Dec. 789. But see *Child v. Mann*, L. R. 3 Eq. 806, 2 Ames Eq. Jur. 35, 1 Keener 246. Statutes in England and in many of the states have authorized the sheriff to interplead the claimants of property seized by him under process.

<sup>1</sup> *Farley v. Blood*, 30 N. H. 354, 2 Ames Eq. Jur. 4; *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. ed. 246, 2 Ames Eq. Jur. 47, 1 Keener 295; *Crane v. McDonald*, 118 N. Y. 648, 654, 23 N. E. 991, 1 Keener 262; *Stone v. Reed*, 152 Mass. 179, 25 N. E. 49, 1 Keener 304.

<sup>2</sup> *Crass v. Memphis & C. R. Co.*, 96 Ala. 447, 11 South. 480, 1 Keener 311; *Bassett v. Leslie*, 123 N. Y. 396, 25 N. E. 386, 1 Keener 266, Shep. 319; *Shaw v. Coster*, 8 Paige 339, 35 Am. Dec. 690, 1 Keener 235. And if the plaintiff denies his liability to either of the defendants, he is not entitled to the remedy; he destroys the very foundation on which it rests: *McHenry v. Hazard*, 45 N. Y. 580, 2 Ames Eq. Jur. 118.

either of the defendants; and the omission of such affidavit may generally be taken advantage of by demurrer.<sup>3</sup> The plaintiff must also bring or pay, or offer to bring or pay, the entire thing, fund, or money in controversy into court; an omission to do so renders the bill demurrable.<sup>4</sup> If the bill was properly filed, and if the plaintiff has acted in good faith, he is generally entitled to his costs out of the fund in controversy, which costs, as between the defendants, must ultimately be paid by the unsuccessful party.<sup>5</sup>

§ 1329. **Interpleader in Legal Actions.**—In England and in many of the American states a summary mode of interpleader by motion and order in certain legal actions is authorized.<sup>1</sup> These statutes substantially provide that in actions specified the defendant may show by affidavit that the same thing or money is claimed by another person besides the plaintiff; that he has sued or threatens to sue; that defendant is not in collusion with him; and that defendant is ready and willing to bring the thing or money into court. The court on motion may order such claimant to be substituted as defendant in the action in place of the original defendant. It is universally held that these statutes do not at all limit nor affect the equitable jurisdiction by suit; they merely furnish another special,

<sup>1</sup> Hamilton v. Marks, 5 De Gex & S. 638, 1 Keener 280; Farley v. Blood, 30 N. H. 354, 2 Ames Eq. Jur. 4. The plaintiff's affidavit is conclusive; defendants cannot contradict it, even though the plaintiff has filed supplemental affidavits: Stevenson v. Anderson, 2 Ves. & B. 407, 2 Ames Eq. Jur. 43, 1 Keener 270.

<sup>2</sup> It was held in Farley v. Blood, 30 N. H. 354, 2 Ames Eq. Jur. 4, that in a suit concerning the defendants' rights to a conveyance under a land contract, the plaintiff must offer to convey, and must have the deeds executed ready for delivery.

<sup>3</sup> Cowtan v. Williams, 9 Ves. 107, 2 Ames Eq. Jur. 8, 1 Keener, 213; Farley v. Blood, 30 N. H. 354, 2 Ames Eq. Jur. 4.

*Bill in the nature of a bill of interpleader.*—A "bill in the nature of a bill of interpleader" is one in which the complainant seeks some relief of an equitable nature concerning the fund or other subject-matter in dispute, in addition to the interpleader of conflicting claimants; as, for example, the redemption of a mortgage or other encumbrance on property where there are conflicting claimants to the debt secured. The complainant is not required, as in strict interpleader, to be an indifferent stakeholder, without interest in the subject-matter. It is essential, however, that the facts on which he relies entitle him to equitable, as distinguished from legal, relief; he is not permitted, under the guise of a bill in equity, to litigate a purely legal claim or interest in the subject-matter: Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. ed. 246, 2 Ames Eq. Jur. 47, 1 Keener 295; Aleck v. Jackson, 49 N. J. Eq. 507, 23 Atl. 760, 2 Ames Eq. Jur. 45; Crass v. Memphis & C. R. Co., 96 Ala. 447, 11 South. 480, 1 Keener 311.

<sup>4</sup> The English statute of 1 & 2 Wm. IV., c. 58, sec. 1, allowed this proceeding in actions of assumpsit, debt, trover, and detinue. For the amendment made by the common-law procedure act of 1860, see ante, note under § 1324.

cumulative, and concurrent remedy. The ordinary type of these statutes does not alter the settled doctrines concerning interpleader. The statutory remedy is a mere substitute for the equitable remedy by suit, in the kinds of actions to which it applies, and is governed by the same rules.<sup>2</sup> Of course, the statutes may change the equitable doctrines; may enlarge their scope of operation; and a few of them may have doubtless produced this effect, as in the clauses introduced by amendment into the statutes of England and California, already noticed.<sup>3</sup>

<sup>2</sup> Slaney v. Sidney, 14 Mees. & W. 800, 2 Ames Eq. Jur. 11.

<sup>3</sup> See ante, note under § 1324.

Handwritten calculations and notes:

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- 3,000
- 2,000
- 5
- 16,500
- 115,500
- 165,500
- 1320
- 16,500
- 500
- 81
- 72.0
- 50
- 120
- 5,000 - 425%
- 180
- 117
- 63
- 60
- 12
- 120

## CHAPTER SECOND.

## RECEIVERS.

## ANALYSIS.

- § 1330. Definition, general nature, and objects.
- § 1331. The appointment discretionary.
- §§ 1332-1335. Cases in which a receiver may be appointed.
  - § 1332. First class.
  - § 1333. Second class.
  - § 1334. Third class.
  - § 1335. Fourth class.
  - § 1336. Their powers, rights, duties, and liabilities.

§ 1330. **General Nature and Objects.**—I purpose in this chapter to give a mere sketch of the general doctrines concerning this peculiar subject.<sup>1</sup> A receiver is a person standing indifferent between the parties, appointed by the court as a quasi officer or representative of the court, to hold, manage, control, and deal with the property which is the subject-matter of or involved in the controversy, under the direction of the court, during the continuance of the litigation, either where there is no person entitled competent to thus hold it,—as, for example, in the case of an infant, or in the interval before an executor or administrator of a deceased owner is appointed; or where two or more litigants are equally entitled, but it is not just and proper that either of them should retain it under his control,—as, for example, in some suits between partners; or where a person is legally entitled, but there is danger of his misapplying or misusing it,—as, for example, in some suits against an executor or administrator, or, under some particular circumstances, in suits for the enforcement of a mortgage; or he is appointed in like manner and under like circumstances for the purpose of carrying into effect a decree of the court concerning the property,—as, for example, a decree for the winding up and settlement of a corporation, or the decree in a creditor's suit.<sup>2</sup>

<sup>1</sup>The subject of receivers has come to be one of great importance, owing especially to its vastly increased application of late in the winding up of corporations both in England and in this country. The remedy is so peculiar, and the rules regulating it in all its phases and applications are so special, that my limits of time and space will only permit a meager statement of its most general doctrines.

<sup>2</sup>Often cited definitions of the nature of the receiver's office are found in

§ 1331. **The Appointment Discretionary.**—The appointment of a receiver is, as a general rule, discretionary.<sup>1</sup> The discretion is not arbitrary or absolute; it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of promoting the ends of justice, and of protecting the rights of *all* the parties interested in the controversy and the subject-matter, and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding. One of the most material circumstances, without which the court would hardly make the appointment, is the reasonable probability that the plaintiff asking for a receiver will ultimately succeed in obtaining the general relief sought for by his suit.<sup>2</sup>

§ 1332. **Cases in Which a Receiver may be Appointed.**—As stated

the leading cases: *Booth v. Clark*, 17 How. 322, 331, 15 L. ed. 164; *Beverley v. Brooke*, 4 Gratt (Va.), 187, 208; *Mays v. Rose*, Freem. Ch. (Miss.) 718, Shep. 32.

<sup>1</sup>The discretion is not so absolute that it may not be reviewed, and its exercise, if improper, reversed: *Le Société Francaise v. Dist. Court*, 53 Cal. 495; *Milwaukee, etc., R. R. v. Soutter*, 2 Wall. 521.

<sup>2</sup>In *Owen v. Homan*, 3 Macn. & G. 378, 412, affirmed 4 H. L. Cas. 997, Shep. 324, the court said: "It is unnecessary to do more than to state that the granting a receiver is a matter of discretion to be governed by a view of the whole circumstances of the case; one most material of which circumstances is the probability of the plaintiff being ultimately entitled to a decree." In *Bainbrige v. Baddeley*, 3 Macn. & G. 413, 419, the court, speaking of the general grounds for the appointment of a receiver, said: "There are, I apprehend, two grounds, and two only: 1. That there is a reasonable probability of success on the part of the plaintiff; and 2. That the property, the subject of the suit, is in danger." In *Blondheim v. Moore*, 11 Md. 365, Shep. 321, the following rules controlling the exercise of the discretion were laid down, which have been frequently quoted as a correct generalization: "1. That the power of appointment is a delicate one, and is to be exercised with great circumspection; 2. That it must appear 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 clearly proved; and 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." These rules, however, must be taken with some reservations; they are certainly too strong to be of universal application, especially the fourth. There are classes of cases in which a receiver is appointed almost as a matter of course, although no fraud nor *imminent* danger is proved. See, on the general matter of discretion, *Mays v. Rose*, Freem. Ch. (Miss.) 703, Shep. 322; *American Biscuit, etc., Co. v. Klotz*, 44 Fed. 721, H. & B. 891 (will not aid improper or illegal scheme); *Simmons Hardware Co. v. Waibel*, 1 S. Dak. 488, 36 Am. St. Rep. 755, 47 N. W. 418, 814; 11 L. R. A. 267, H. & B. 817; *Bank of Florence v. U. S. S. & L. Co.*, 104 Ala. 297, 16 South. 110, H. & B. 897 (as to reasonable probability of plaintiff's success).

in a previous paragraph, the cases in which a receiver may be appointed, subject to the general rules regulating the exercise of the judicial discretion, may be reduced to four general classes. The first class contains those cases where there is no person entitled to the property who is at the same time competent to hold and manage it during the judicial proceeding. In instances of this class a receiver is appointed more readily and without proof of imminent danger, perhaps, than in any other. It includes,—1. Infants' estates.<sup>1</sup> A court of equity exercises control over the property of its infant ward, where there is no trustee, by means of a receiver, even though there is a guardian. 2. Lunatics' estates. The control of the court over the property of a lunatic is ordinarily exercised by means of a committee; but instead of a committee, and especially where no person will act as a committee, the court may appoint a receiver.<sup>2</sup> 3. Estates of decedents. During the litigation concerning the admission of a will to probate, and during the interval before an executor or administrator is appointed, a court of equity has power to appoint a receiver of the personal property and of the rents and profits of the real estate, where there is any danger of their loss, misuse, or misapplication. The necessity of such a receiver has been greatly lessened by modern statutes authorizing the probate court to appoint an administrator ad litem, and enlarging his powers.<sup>3</sup>

§ 1333. **The Same. Second Class.**—The second class of cases is based upon the fact that all of the parties are equally entitled to the possession of the property which is the subject-matter of the controversy, but it is not just and proper, from the nature of the dispute and of their relations with each other, that either one of them should be allowed to retain possession and control during the litigation. While the foundation of the remedy is, of course, the danger, yet it is not always essential that there should be any element of actual fraud or breach of trust. The most important instances which do or may belong to this class are: 1. Suits between

<sup>1</sup> Gardner v. Blane 1 Hare 381; Butler v. Freeman, Amb. 301, 303; Duke of Beaufort v. Berty, 1 P. Wms. 703. The main reason for appointing a receiver, in the absence of a trustee, was that the guardian at common law had not full power of control and management. The necessity of a receiver in such cases may have been obviated in many states by statutes enlarging the powers of guardians.

<sup>2</sup> See ante, § 1312, as to appointment of committees.

<sup>3</sup> While this jurisdiction is well settled, the recent English decisions hold that it will not be exercised if the probate court has already appointed an administrator ad litem; but if no such temporary administrator has been appointed, the court of equity will still appoint a receiver: Whitworth v. Whyddon, 2 Macn. & G. 52, 55; Veret v. Duprez, L. R. 6 Eq. 329; Parkin v. Seddons, L. R. 16 Eq. 34.

partners.<sup>1</sup> In suits for a dissolution or winding up of a partnership, and even in some very special cases without a dissolution, the court may appoint a receiver of the firm assets, when there is any misconduct on the part of the defendants, and even, perhaps, where the partners themselves are wholly unable to agree as to the management of the property and the settlement of the partnership affairs. The jurisdiction is, however, always exercised with great carefulness and caution. 2. In suits for partition between co-owners.<sup>2</sup> In suits between co-owners of mines and collieries the English courts grant a receiver upon the same grounds and under the same circumstances as in those between partners; but in all ordinary cases of partition between legal co-owners of land, a receiver is not generally appointed unless some of the parties are in sole possession, to the exclusion of the others. 3. In suits between conflicting claimants of land, especially between parties claiming under legal titles, a receiver will not ordinarily be appointed. The remedy, however, may be granted under special circumstances, in cases of gross fraud, or great danger, or where possession is maintained by violence, and the like, In such cases the court acts with great caution, only where the plaintiff's rights are reasonably certain, and the danger is apparent.<sup>3</sup>

§ 1334. **The Same. Third Class.**—The third class embraces those

<sup>1</sup> My limits do not permit a discussion of the particular circumstances under which a receiver will or will not be appointed; the cases cited furnish many illustrations. In general, a dissolution must have occurred, or must be asked; although in extreme cases of misconduct and danger therefrom, an ad interim receiver may be appointed without a dissolution. A disagreement among the partners themselves is essential: See *Allen v. Hawley*, 6 Fla. 164, 63 Am. Dec. 198 (in exceptional cases only, the business may be continued by the receiver during the pendency of the action for dissolution); *Harding v. Glover*, 18 Ves. 281; *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Const v. Harris*, Turn. & R. 517 (exclusion of partner from participation in the business a strong ground). In case of dissolution by death of a partner, the control of the surviving partner will not be wrested from him except upon a clear showing: *Huggins v. Huggins*, 117 Ga. 151, 43 S. E. 759; and the same is true where, after dissolution, one partner, by agreement, is winding up the affairs: *Walker v. Trott*, 4 Edw. Ch. 38; but in the absence of such agreement, a receiver is readily appointed after dissolution in case of a dispute between the partners: *McElvey v. Lewis*, 76 N. Y. 373.

<sup>2</sup> Mines and collieries. The working of a mine or colliery by co-owners is necessarily a business analogous to a partnership: *Jefferys v. Smith*, 1 Jacob & W. 298. Partition between ordinary co-owners: receiver is granted only in extreme cases: *Freeman Co-ten.* § 327.

<sup>3</sup> *Owen v. Homan*, 3 Macn. & G. 378, 4 H. L. Cas. 997, Shep. 324; *Bainbrigge v. Baddeley*, 3 Macn. & G. 413; *Earl Talbot v. Hope Scott*, 4 Kay & J. 96. As to receivers of mining property, the title to which is in litigation, see *Bigbee v. Summerour*, 101 Ga. 201, 28 S. E. 642; *Tornanses v. Melsing*, 106 Fed. 775, 784, 45 C. C. A. 615.

cases in which the person holding title to the property is in a position of trust or of quasi trust, and is violating his fiduciary duties by misusing, misapplying, or wasting the property, and is thereby endangering the rights of other persons beneficially interested. In many, but not in all, the instances falling within this class, the plaintiff has, and is seeking to enforce, some equitable estate or interest; but whatever be the nature of his right, the ground of the remedy is always the misconduct of the party holding the title, and the consequent danger of loss. Among the more important instances of this class in which a receiver may be appointed are the following: 1. Suits against trustees who have been guilty of a breach of trust;<sup>1</sup> 2. Suits under like circumstances against executors or administrators;<sup>2</sup> 3. Suits to enforce a mortgage when the security is inadequate, the mortgagor is insolvent, or is committing acts of waste, and the like, depreciating the value of the property;<sup>3</sup> 4. Suits under like circumstances, to enforce equitable liens, including those by judgment creditors in the nature of an equitable

<sup>1</sup>Courts will not interfere with trustees' possession by a receiver unless there is real danger from their misconduct: See *Latham v. Chafee*, 7 Fed. 525. Receiver in place of assignee for creditors, see *Haggarty v. Pitman*, 1 Paige 298, 19 Am. Dec. 434.

<sup>2</sup>In administration suits a receiver will not be appointed unless the executor or administrator has been guilty of misconduct, waste, misuse of assets, and the like, and there is real danger of loss: *Randle v. Carter*, 62 Ala. 95; *Ex parte Walker*, 25 Ala. 81.

<sup>3</sup>In England an equitable mortgagee alone was, prior to 1860, entitled to a receiver, because a legal mortgagee could at any time gain possession, and thus secure the rents and profits: *Berney v. Sewell*, 1 Jacob & W. 647. In this country no distinction is made between legal and equitable mortgages. The general rule is, that a receiver of the rents and profits will be appointed upon the commencement of a foreclosure suit, on a showing of two things: First, that the mortgaged property is an inadequate security for the payment of the debt; and second, that the mortgagor is insolvent, or beyond the jurisdiction, or of doubtful financial responsibility: *Schreiber v. Carey*, 48 Wis. 208, 4 N. W. 124; *Pasco v. Gamble*, 15 Fla. 562; *Lindsay v. American Mortgage Co.*, 97 Ala. 412, 11 South. 770. This rule is usually adhered to even under statutes entitling the mortgagor to possession after default and before the foreclosure sale: *Schreiber v. Carey*, *supra*; but see *contra*, *Wagar v. Stone*, 36 Mich. 367. Other circumstances may aid the mortgagee's application for a receiver, such as the mortgagor's neglect to pay taxes, etc.: *Schreiber v. Carey*, *supra*. As to the effect of a stipulation in the mortgage that the mortgagee may have a receiver appointed on the mortgagor's default, the cases are in conflict. See *First Nat. Bank v. Illinois Steel Co.*, 174 Ill. 140, 51 N. E. 200, H. & B. 871; *Baker v. Varney*, 129 Cal. 564, 79 Am. St. Rep. 140, 62 Pac. 100. As to receiver after the foreclosure, see *First Nat. Bank v. Illinois Steel Co.*, *supra*; as to receiver of a mortgaged homestead, *Marshall*, etc., *Bank v. Cady*, 75 Minn. 241, 77 N. W. 831, H. & B. 864; as to receiver in behalf of a chattel mortgagee, *Wiedemann v. Saun* (N. J. Eq.), 31 Atl. 211, H. & B. 867.

execution;<sup>4</sup> 5. Suits, under like circumstances, and for a like reason, by a vendor to enforce the specific performance of a contract for the sale of land against a vendee who is in possession;<sup>5</sup> 6. In suits by creditors, although not strictly creditors' actions by judgment creditors, brought to enforce their demands from the debtors' property, under some very special circumstances involving great danger of loss, such as the debtors' non-residence, insolvency, and the like;<sup>6</sup> 7. Suits for the rescission of a contract for the sale of land under special circumstances;<sup>7</sup> 8. Suits to enforce payment of the arrears of annuities;<sup>8</sup> 9. Suits for the protection of remaindermen against the life tenant or other holder of the particular estate;<sup>9</sup> 10. Suits, under many circumstances, against corporations;<sup>10</sup> 11. Suits and proceedings in bankruptcy.<sup>11</sup>

<sup>4</sup> Receiver in a creditor's suit, where execution has been returned unsatisfied (see post, § 1415), is appointed very much as a matter of course: *Bloodgood v. Clark*, 4 Paige 574; and see *Mays v. Rose*, Freem. Ch. (Miss.) 718, Shep. 322. The same is true of statutory proceedings supplementary to execution; see *Coates v. Wilkes*, 92 N. C. 376 (an admirable description of such proceedings).

<sup>5</sup> In such a suit, or in the suit by the vendor to foreclose his "lien" (see ante, § 1262), a receiver is usually appointed in accordance with the rule relating to receivers in mortgage foreclosure (see supra, note 3); *Belding v. Meloche*, 113 Mich. 223, 71 N. W. 592, H. & B. 862.

<sup>6</sup> A creditor's suit on a demand not reduced to judgment lies only in very special circumstances: See post, § 1415, note; *Blondheim v. Moore*, 11 Md. 365, Shep. 321. In a few states, however, it is authorized by statutes; for receiver under such statutes, see *Fechheimer v. Baum*, 37 Fed. 167, 2 L. R. A. 153, H. & B. 837.

<sup>7</sup> *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707, end of opinion.

<sup>8</sup> In England only when the payment cannot be enforced by distress: *Sollory v. Leaver*, L. R. 9 Eq. 22.

<sup>9</sup> See *St. Paul Trust Co. v. Mintzner*, 65 Minn. 124, 60 Am. St. Rep. 444, 67 N. W. 657, 32 L. R. A. 756.

<sup>10</sup> In appointing a receiver to displace the management of the board of directors of a corporation the court should act with great caution: *Consolidated, etc., Co. v. Consolidated, etc., Co.*, 43 Fed. 204. It cannot, unless authorized by statute, appoint a receiver on the petition of the corporation itself: *State v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; nor, without such authority, for the purpose of dissolving the corporation and winding up its affairs: *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa 313, 63 Am. St. Rep. 389, 70 N. W. 216, 38 L. R. A. 122; but see *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218. Subject to these limitations, it is now generally conceded that the court has inherent power, unaided by statute, to appoint receivers of corporations; a power which is most frequently invoked: 1. In suits by stockholders seeking a remedy for breach of fiduciary duty by the directors or officers, see ante, § 1095; *State v. Second Judicial Dist. Ct.*, 15 Mont. 324, 48 Am. St. Rep. 682, 39 Pac. 316, 27 L. R. A. 392; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 26 N. W. 184; see *Alabama Coal & C. Co. v. Shackelford*, 137 Ala. 224, 97 Am. St. Rep. 23, 34 South.

§ 1335. **The Same. Fourth Class.**—This class contains those cases in which a receiver is appointed after judgment for the purpose of carrying the decree into effect. In some instances the receiver appointed on motion pending the action is continued in his office after the decree; in others, he is appointed after the decree, when no appointment would be made before the final hearing. In all instances the object of a receiver is to carry into effect a special decree, which would not otherwise be efficiently executed by ordinary process. Among the most important cases in which a receiver may thus be appointed are creditors' suits and suits to enforce other equitable liens, suits to enforce the contracts of married women against their separate estates, and suits or proceedings generally statutory for the winding up of corporations. In the states adopting the reformed procedure, the codes of procedure generally contain provisions regulating the appointment of receivers.

§ 1336. **Powers, Rights, Duties, and Liabilities.**—The appointment of a receiver during the pendency of a suit does not determine any rights or title of the litigant parties; it is made for the benefit of

833 (no sufficient grounds for receiver). 2. After dissolution, for the purpose of winding up the affairs of the corporation, a matter which is now generally regulated by statute. 3. When the corporation has no properly constituted governing body, or there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage, a temporary receiver may be appointed: *Sternberg v. Wolff*, 56 N. J. Eq. 389, 67 Am. St. Rep. 494, 39 Atl. 397, 39 L. R. A. 762. Compare *Republican Mountain Silver Mines v. Brown*, 58 Fed. 647, 7 C. C. A. 412, 24 L. R. A. 776 (dissatisfaction of minority stockholders not sufficient ground for receiver.) 4. In suits by judgment creditors of the corporation, see *Hollins v. Brierfield, etc., Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113, and post, § 1415. 5. In suits for the foreclosure of mortgages or other liens upon the corporate property. Receivers of railroads are usually appointed as an incident of foreclosure proceedings by bondholders, on default in payment of interest. The appointment of a receiver in such proceedings has become the usual practice, for reasons explained in *Central Trust Co. v. Chattanooga, etc., Co.*, 94 Fed. 275, 36 C. C. A. 241; *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 Fed. 221, 1 L. R. A. 397; though in theory the appointment "can only be justified by the presence of an absolute necessity"; *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. 510, 17 L. ed. 860; see *Pom. Eq. Rem.* §§ 128, 129, and notes.

There is a vast mass of legislation relating to corporation receivers. Its general objects are well described in *Havemeyer v. Superior Court*, 84 Cal. 327, 363, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627 (see passage quoted, *Pom. Eq. Rem.* § 127). A common provision is that allowing the court to appoint a receiver "in the cases where a corporation has been dissolved, is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights"; a provision which has received varying interpretations; see *Havemeyer v. Superior Court*, supra; *Texas Trunk R. Co. v. State*, 83 Tex. 1, 18 S. W. 199.

<sup>2</sup> See Bankruptcy Act of 1898, sec. 2, clauses 3 & 5; *Loveland Bankruptcy*, § 77a.

all. His possession, though impartial while the controversy is undecided, is regarded as on behalf of the one who is ultimately found to be entitled to the property. He is in reality an officer of the court, and will be protected by it from interference by third persons in the discharge of his duties; indeed, such interference without permission of the court would be a contempt. The receiver, in all important matters, acts under special direction of the court. He must, in general, obtain its permission to bring suits, and suits cannot be properly brought against him without permission. Although not strictly a trustee, because the legal title to the property is not vested in him, he occupies a fiduciary position, and must act with perfect good faith, and is liable to account. The exact nature of his duties depends upon the particular case.<sup>1</sup>

<sup>1</sup> *Receiver not appointed without notice to defendant.*—By the settled practice of the court, a receiver cannot be appointed *ex parte*, before the defendant has had an opportunity to be heard in relation to his rights, except in those cases where he is out of the jurisdiction of the court or cannot be found, or where, for some other reason, it becomes absolutely necessary for the court to interfere, before there is time to give notice to the opposite party, to prevent the destruction or loss of the property: *Verplanck v. Mercantile Ins. Co.*, 2 Paige 438. See, also, *Mays v. Rose*, *Freem. Ch. (Miss.)* 703, *Shep.* 322; *Blondheim v. Moore*, 11 Md. 365, *Shep.* 321; *St. Louis, K. & S. R. Co. v. Wear*, 135 Mo. 230, 33 L. R. A. 341, 36 S. W. 357, 658, H. & B. 823; *Bank of Florence v. U. S. Sav. & L. Co.*, 104 Ala. 297, 16 South. 110, H. & B. 897.

*Who may be appointed.*—The selection of a receiver is a matter for the wise discretion of the court. As a general rule he should not be personally interested in the result of the suit. See *Merchants', etc., Nat. Bank v. Kent Cir. J.*, 43 Mich. 292, 5 N. W. 627, H. & B. 855 (partner of attorney for one of the parties); *Olmstead v. Distilling, etc., Co.*, 69 Fed. 24 (stockholder of the company). While it is preferable to take an insolvent company entirely out of the management which has resulted in its misfortune; *Finance Co. of Penn. v. Charleston, etc., R. Co.*, 45 Fed. 436; courts have frequently felt constrained to depart from the general rule and appoint an officer of the company familiar with the details of its business: *Fowler v. Jarvis-Conklin, etc., Co.*, 63 Fed. 888, 66 Fed. 14.

*The receiver's possession, and interference therewith.*—In support of the text, see *Pom. Eq. Rem.* § 154, and quotations; esp. *Morrell v. Noyes*, 56 Me. 458, 96 Am. Dec. 486. The court receives the property into its custody impressed with all the existing rights and equities, and the relative rank of claims and liens remain unaffected by the receivership (but see *infra* for an important exception to this rule in case of railroad receiverships); *American Trust, etc., Bank v. McGettigan*, 152 Ind. 582, 71 Am. St. Rep. 345, 52 N. F. 793; *McRae v. Bowers Dredging Co.*, 86 Fed. 344; *Duryee v. United States, etc., Co.*, 55 N. J. Eq. 311, 37 Atl. 155. In most proceedings, the receiver's title relates back to the time of the order appointing him; *In re Schuyler Steam Towboat Co.*, 136 N. Y. 169, 32 N. E. 623, 20 L. R. A. 391; *Connecticut River Banking Co. v. Rockbridge Co.*, 73 Fed. 709; but see *Bank of Woodland v. Heron*, 120 Cal. 614, 52 Pac. 1006. The court may order parties to the suit or their agents to surrender possession to the receiver, and treat their disobedience as a contempt: *Brandt v. Allen*, 76 Iowa 50, 40 N. W. 82, 1 L. R. A.

653; compare *Musgrove v. Gray*, 123 Ala. 376, 82 Am. St. Rep. 124, 26 South. 643. The appointing court jealously guards its exclusive authority over the fund or property in the receiver's custody. *Wiswall v. Sampson*, 14 How. 52, 65, 14 L. ed. 322, Shep. 334; any disturbance of that possession, by force, by legal proceedings, or in any other manner, without the permission of the appointing court, constitutes a contempt; *Russell v. East Anglian Ry.*, 3 Macn. & G. 104; *Ryan v. Kingsberry*, 88 Ga. 361, 14 S. E. 596; *Sercomb v. Catlin*, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606; and may be restrained by injunction; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447, H. & B. 804, Shep. 325. Thus, the property in his hands is not subject, without leave of the court, to attachment: *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1, 26 Am. St. Rep. 776, 16 S. W. 647; or garnishment; *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917, 39 N. E. 1091, 27 L. R. A. 324; or execution sale (by weight of authority, such sale, even on a lien arising prior to the receiver's appointment, not only is a contempt, but passes no title to the property; see *Wiswall v. Sampson*, 14 How. 52, 14 L. ed. 322, Shep. 334; *Ellis v. Vernon, etc., Co.*, 86 Tex. 109, 23 S. W. 858; *Pelletier v. Greenville L. Co.*, 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855; but see *State v. Superior Court*, 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354; or even to levy and sale for taxes: *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 13 L. ed. 689. The interference by striking workmen with the operation of a railroad in a receiver's hands is punishable as contempt: *Thomas v. Cincinnati, etc., R. Co.*, 62 Fed. 803.

*Suits against the receiver.*—Bringing suit against the receiver without the permission of the appointing court is a contempt of that court: *Thompson v. Scott*, 4 Dill. 508, Fed. Cas. No. 13,975; and it is even the prevailing rule that the court in which such suit is brought has no jurisdiction to hear and determine it: *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 673; contra, see dissenting opinion of Miller, J., in the last case; *St. Joseph & D. C. R. R. v. Smith*, 19 Kan. 225, 231, per Brewer, J. This rule was productive of great hardship in many cases: *Dow v. Memphis, etc., R. R. Co.*, 20 Fed. 260, 268, and was abrogated, as respects acts or transactions of federal receivers in carrying on their business, by act of congress in 1887 (1 U. S. Comp. Stat. p. 582), see *Central Trust Co. v. East Tenn., etc., Co.*, 59 Fed. 523; *Dillingham v. Hawk*, 60 Fed. 494, 9 C. C. A. 101, 23 L. R. A. 517; *Pom. Eq. Rem.* §§ 173, 174. Apart from statute, the granting or withholding of leave to sue the receiver, by petition or intervention in the suit in which he was appointed, or by an independent action, is entirely within the discretion of the court, but leave is not arbitrarily refused. See *Minot v. Mastin*, 95 Fed. 734, 37 C. C. A. 234; *Pacific Ry. Co. v. Wade*, 91 Cal. 449, 456, 25 Am. St. Rep. 201, 27 Pac. 768, 13 L. R. A. 754. The receiver's liabilities are official, not personal: *McNulta v. Lockridge*, 141 U. S. 327, 12 Sup. Ct. 11.

*Suits by the receiver*, also, can only be brought by the permission, either special or general, of the appointing court: *Screven v. Clark*, 48 Ga. 41; *Phoenix Ins. Co. v. Schultz*, 80 Fed. 337, 25 C. C. A. 453, but this rule has been changed by statute in many states. In such suit the regularity of his appointment cannot be attacked collaterally; *Barbour v. Nat. Exch. Bank*, 45 Ohio St. 133, 12 N. E. 5. A defense good against the original party whom the receiver represents is good against the receiver: *Hyde v. Lynde*, 4 N. Y. 387. As to set off, see *Colton v. Drivers' Ass'n*, 90 Md. 85, 78 Am. St. Rep. 431, 45 Atl. 23, 46 L. R. A. 388, H. & B. 899. But the statutory receiver of an insolvent corporation is usually held to represent not only the corporation, but its creditors as well: *Peabody v. New England W. Co.*, 184 Ill. 625, 75 Am. St. Rep. 195, 56 N. E. 957.

*Receiver's management of the property.*—While it is the duty of the receiver to keep and manage the property according to the directions and order of the court, he is allowed a discretion in many matters of administrative detail. See *Vanderbilt v. Little*, 43 N. J. Eq. 669, 12 Atl. 188. He has no authority to continue a business unless directed to do so by order of the court; by such order he is impliedly authorized to enter into necessary contracts; as, to hire necessary employees: *Continental Trust Co. v. Toledo, etc., R. Co.*, 59 Fed. 514. He is not bound to complete unfinished contracts, or leases, unless he sees fit to adopt them: *Dayton H. Co. v. Felsenthal*, 116 Fed. 961, 54 C. C. A. 537. As to his right to employ attorneys, see *Henry v. Henry*, 103 Ala. 582, 15 South. 916. When the interests of the parties make it desirable, a sale of the property may be ordered: *First Nat. Bank v. Shedd*, 121 U. S. 74, 7 Sup. Ct. 807, 30 L. ed. 877. Receivers of railroad corporations, which owe a peculiar duty to the public to keep their properties in operation, may be authorized to borrow money for that general purpose, and, as security, to issue "receiver's certificates," which shall constitute a lien on the property taking priority over the mortgage indebtedness: *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963; but this displacement of the mortgage priority by certificates is not allowed in case of purely private corporations: *Farmers' Loan, etc., Co. v. Grape Creek Coal Co.*, 50 Fed. 481, H. & B. 879.

*Payment of claims against the fund.*—The claim of the state for taxes is paramount to all others. See *Central Trust Co. v. New York, etc., R. Co.*, 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260. In general, necessary expenses of the administration of the receivership have priority over pre-existing mortgages or liens: *McLane v. Placerville, etc., R. Co.*, 66 Cal. 606, 6 Pac. 748. Among such expenses is his liability for injuries resulting from the negligence of his servants in the operation of the property while it is in his charge: *Bartlett v. Cicero Light, etc., Co.*, 177 Ill. 68, 69 Am. St. Rep. 206, 52 N. E. 339, 42 L. R. A. 715. Unsecured claims arising before the appointment of the receiver are, of course, inferior to the mortgage or other secured indebtedness as a general rule; but an important and remarkable exception has been made, in the last thirty years, in the case of railway receiverships. In such receiverships, priority is allowed to certain limited classes of claims for necessary operating expenses incurred within a reasonable time before the appointment of a receiver. "The controlling principle appears to be that a railroad, having public duties to discharge, must be kept a going concern while in the hands of the courts, and that to that end debts due its employees and other current debts incurred for its ordinary operations, which it is not usually practicable to pay in cash, and which are therefore payable on short terms, should be paid as they would have been paid if the court had not taken away from the corporation the control of the railroad. A cessation of the railroad's operations by failure to pay promptly the operatives or other such debts as railroads must necessarily incur for their ordinary, current operations, must be prevented." *Lackawanna, etc., Co. v. Farmers' Loan & Tr. Co.*, 79 Fed. 202. See *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, Shep. 339 (the leading case); *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950; *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, 25 Sup. Ct. 415; *National Bank of Augusta v. Carolina, etc., R. Co.*, 63 Fed. 25 (president's salary not a preferential claim); *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. ed. 458 (supplies for repairs); *Farmers' Loan & Tr. Co. v. Northern Pac. R. Co.*, 74 Fed. 431 (claim for personal injuries received prior to appointment of the receiver not entitled to preference). *Contra* to the last case, see the vig-

ous opinion in *Green v. Coast Line R. Co.*, 97 Ga. 15, 54 Am. St. Rep. 379, 24 S. E. 814, 33 L. R. A. 806.

*Receiver's compensation.*—See *Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 244, 33 L. ed. 568; *Hickey v. Parrot, etc., Co.*, 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510.

*Foreign receivers.*—As to the right of receivers to sue outside of the territorial jurisdiction of their appointment, see *Booth v. Clark*, 17 How. 322, 15 L. ed. 164, H. & B. 797, Shep. 327 (the leading case); *Wyman v. Eaton*, 107 Iowa, 217, 70 Am. St. Rep. 193, 77 N. W. 865, 43 L. R. A. 695, H. & B. 888; *Gilman v. Ketcham*, 84 Wis. 60, 36 Am. St. Rep. 899, 54 N. W. 395, 23 L. R. A. 52; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, 18 Am. St. Rep. 338, 24 N. E. 250, 8 L. R. A. 62; *Ward v. Conn. Pipe Mfg. Co.*, 71 Conn. 345, 71 Am. St. Rep. 207, 41 Atl. 1057, 42 L. R. A. 706; *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917, 39 N. E. 109, 27 L. R. A. 324; *American Waterworks Co. v. Farmers L. & T. Co.*, 20 Colo. 203, 46 Am. St. Rep. 285, 37 Pac. 269, 25 L. R. A. 338; *Robertson v. Staed*, 135 Mo. 135, 58 Am. St. Rep. 569, 36 S. W. 610, 33 L. R. A. 203; *Barth v. Backus*, 140 N. Y. 230, 37 Am. St. Rep. 545, 35 N. E. 425, 23 L. R. A. 47; *Farmers' L. & T. Co. v. Bankers' Tel. Co.*, 148 N. Y. 315, 51 Am. St. Rep. 690, 42 N. E. 707, 31 L. R. A. 403; *Castleman v. Templeman*, 87 Md. 546, 67 Am. St. Rep. 363, 40 Atl. 275, 41 L. R. A. 367; *Cushing v. Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835, 34 Atl. 447, 34 L. R. A. 737.

1. Interpretation  
2. Review

GROUP SECOND.

REMEDIES PURELY PREVENTIVE.

CHAPTER FIRST.

INJUNCTIONS.

M. M. M. M. M.

SECTION I.

TO PROTECT OR RESTRAIN THE VIOLATION OF OBLIGATIONS AND RIGHTS OF PROPERTY OR OF CONTRACT, EITHER LEGAL OR EQUITABLE.

ANALYSIS.

- § 1337. General nature and objects; Interdicts.
- § 1338. Fundamental principle.
- § 1339. To protect purely equitable estates or interests, and in aid of purely equitable remedies.
- § 1340. The same: Particular instances.
- §§ 1341-1344. To prevent the violation of contracts.
- § 1341. General doctrine.
- § 1342. 1. Restrictive covenants creating equitable easements.
- § 1343. 2. Contracts for personal services or acts.
- § 1344. 3. Other agreements generally negative in their nature.
- § 1345. Miscellaneous cases: Corporations and their officers; between mortgagor and mortgagee; public officers; eminent domain.

§ 1337. **General Nature and Object.**—The remedy of injunction was undoubtedly borrowed by the chancellors from the “interdicts” of the Roman law.<sup>1</sup> An injunction may be either a final

1. Final - Deceit  
2. Injunction - Deceit

<sup>1</sup>As to “interdicts,” see Gaius’s Inst., lib. 4, secs. 138-170; Poste’s ed., 492-520; Just. Inst., lib. 4, tit. 15, secs 1-8; Sandars’s ed., 1st Am. ed., 58, 570-580. The general definition as given by Gaius (Ibid., sec. 139) is as follows: “Under certain circumstances, chiefly when possession or quasi possession [i. e., possession of a servitude] is in dispute, the first step in the legal proceedings is the interposition of the praetor or pro-consul, who commands some performance or forbearance; which commands, formulated in solemn terms, are called interdicts.” The most general formula was “vim fieri veto, exhibeas, restituas,” “I forbid you to use violence, you must produce, you must restore.” There were thus three distinct species of interdicts: 1. The prohibitory, where the defendant was commanded to refrain or desist from some act, answering to our ordinary injunction; 2. The exhibitory, where

remedy obtained by a suit, or a preliminary and interlocutory relief granted while the suit is pending. In the first case it is a decree, in the second, an order or writ. Whatever be its form, decree or order, the remedy by ordinary injunction is wholly preventive, prohibitory, or protective. The same is true in theory and in form of a mandatory injunction, which always by its language prohibits the continuance of an act or of a structure, although in effect and in its essential nature it is wholly restorative, and compels the defendant to restore the thing to its original situation. While injunctions may thus be final, or preliminary and ancillary to other final relief, they all depend upon the same *general* principles, doctrines, and rules which determine and regulate the exercise of the jurisdiction to award them. In the states adopting the reformed procedure, the codes contain general provisions describing the cases in which an injunction may be issued, but these provisions do not materially alter the settled equitable jurisdiction, except in reference to injunctions against actions or judgments at law.

**§ 1338. Fundamental Principle.**—In determining whether an injunction will be issued to protect any right of property, to enforce any obligation, or to prevent any wrong, there is one fundamental principle of the utmost importance, which furnishes the answer to any questions, the solution to any difficulties which may arise. This principle is both affirmative and negative, and the affirmative aspect of it should never be lost sight of, any more than the negative side.<sup>1</sup> The general principle may be stated as follows: **Wherever a right exists or is created, by contract, by the ownership**

the defendant was commanded to produce and exhibit something in his possession,—exhibeas, which does not answer to any kind of injunction, but has some analogies with certain common-law writs; 3. The restorative, where the defendant was commanded to restore something to its original position, clearly resembling in its effect our mandatory injunction. Interdicts were granted where some danger was apprehended, or some injury was being done, to something of a quasi public character, as the stopping up of a highway, or to some private interest or right. One of the most common occasions of the interdict was to protect the plaintiff in his possession of a thing, in which case the interdict *uti possidetis* was used to protect possession of land and buildings, and the interdict *utrubi* for movables. In the interdict *uti possidetis*, the defendant was forbidden to interfere with the possession “*nec vi, nec clam, nec precario*.” The granting of interdicts belonged wholly to the “extraordinary” or equitable jurisdiction of the magistrate: See ante, vol. 1, § 6.

<sup>1</sup> A comparison of the English and American reports will show that our courts have dwelt too much on the negative side of this principle, and have almost ignored its affirmative aspect. While the English judges have gradually but steadily enlarged the scope of the injunction, the tendency of the American decisions has been to narrow it even within the well-established

of property or otherwise, cognizable by law, a violation of that right will be prohibited, unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise. This jurisdiction of equity to prevent the commission of wrong is, however, modified and restricted by considerations of expediency and of convenience which confine its application to those cases in which the legal remedy is not full and adequate. Equity will not interfere to restrain the breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction.<sup>2</sup> In the treatment of this twofold principle, I shall state the general rules which have been derived from it, and which regulate the exercise of the jurisdiction, and shall illustrate these rules by enumerating the more important instances to which they have been applied. The general object of the discussion will be to show when an injunction may be granted.\*

**§ 1339. To Protect Purely Equitable Estates or Interests, and in**

limits of the jurisdiction. If "an ounce of prevention is worth a pound of cure," this tendency is clearly opposed to the best interests of society.

<sup>2</sup> *Watson v. Sutherland*, 5 Wall. 74, 1 Ames Eq. Jur. 531, H. & B. 741, 1 Scott, 134, Shep. 22.

\*The general effect produced by some text-books and judicial opinions might lead the reader to suppose that the main object of the writers or the judges was to show when injunctions could not be granted. The full force and effect of this most beneficial remedy, and the freedom with which it is granted by courts of the highest authority, can only be ascertained by an actual examination of the decided cases.

*Preliminary or interlocutory injunctions* are granted to preserve the property in statu quo pending the determination of the suit—"to prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated." *City of Newton v. Levis*, 79 Fed. 715, 25 C. C. A. 561, 49 U. S. App. 266. It is "a matter resting altogether in the discretion of the court, and ought not to be granted unless the injury is pressing and the delay dangerous": *New York Printing, etc., Co. v. Fitch*, 1 Paige, 97, 1 Keener, 562. It is not necessary, however, that the court be satisfied that the plaintiff will certainly prevail on the final hearing; a probable right, and a probable danger that such right will be defeated, without the special interposition of the court, is all that need be shown. When there is grave doubt as to the complainant's right, preliminary relief will generally be denied. See *McHenry v. Jewett*, 90 N. Y. 58, H. & B. 743. See, also, post, §§ 1350a, 1352b, 1352d, 1357, n. 2, 1359.

PROVISION OF  
RIGHT WILL BE  
PROHIBITED

Legal remedy  
completely  
adequate

**Aid of Purely Equitable Remedies.**—The jurisdiction to grant injunctions restraining acts in violation of trusts and fiduciary obligations, or in violation of any other purely equitable estates, interests, or claims in and to specific property, is really commensurate with the equitable remedies given to enforce trusts and fiduciary duties, or to establish and enforce any other equitable estates, interests, or claims, with respect to specific things, whether lands, chattels, securities, or funds of money, or to relieve against mistake, or fraud done or contemplated with respect to such things. In all such cases the question whether the remedy at law is adequate cannot arise; much less can it be the criterion by which to determine whether an injunction can be granted; for there is no remedy at law. Since the estate, interest, or claim of the complainant is purely equitable, it is exclusively cognizable by equity; and if its existence is shown, a court of equity not only has the jurisdiction, but is bound to grant every kind of remedy necessary to its complete establishment, protection, and enforcement according to its essential nature. Many breaches of trust are of such a nature that, if accomplished, they would completely defeat the right of the beneficiary to the specific trust property. The equitable reliefs against mistake or fraud with respect to specific equitable property, and the equitable remedies of all kinds to enforce trusts, express or by operation of law, and fiduciary duties concerning specific property, and to enforce any other equitable estate, interest, lien, or right in or over specific property, would be of comparatively little practical value, unless the court could by injunction restrain the alienation, transfer, or encumbrance of such property, and all other modes of dealing with it which would prejudice the rights of the complainant, and prevent him from acquiring the title, or from enjoying his estate, or from enforcing his claim, or from receiving the full benefits of his final relief.<sup>1</sup> It may therefore be stated as a general proposition, that whenever the equitable relief against mistake or fraud with respect to specific property, or the equitable remedy of enforcing trusts or fiduciary duties concerning specific property, or of enforcing any other equitable estates, interests, or claims in or to specific property requires the aid of an injunction,

<sup>1</sup> It is true that in suits concerning land, the statute authorizing a notice of lis pendens to be filed affords some security to the complainant against transfers and encumbrances pending the suit. But this statute does not affect the truth nor generality of the proposition contained in the text. At the utmost, it only shows that in such cases "the aid of an injunction is not required." But the notice of lis pendens is, at best, only a partial relief; it does not prevent a transfer; it does not even obviate the necessity of an injunction in many suits concerning land; and it does not generally extend to other suits at all.

a court of equity has jurisdiction, and will exercise that jurisdiction, to grant an injunction, either pending the suit or as a part of the final decree, to restrain a breach of trust or of fiduciary duty, or to restrain an alienation, transfer, assignment, encumbrance, or other kind of dealing with the property, which would be in violation of the trust or fiduciary duty, or in fraud of the complainant's rights, and which would therefore interfere with and prejudice the ultimate remedies to which he may be entitled with respect to such property. The particular instances to which this doctrine is applied are almost numberless, and extend through the entire range of equitable remedies against mistake and fraud, or to enforce trusts and fiduciary duties, or to establish and enforce other equitable estates, interests, liens, and primary rights in and to specific property of any kind or form.

§ 1340. **The Same.—Particular Instances.**—Among the instances in which equity will grant an injunction, preliminary or final, in pursuance of the general doctrine as stated in the foregoing paragraph, the following are some of the most important, and they fully illustrate and establish the doctrine itself, in all its generality, and the grounds upon which it rests: To prevent the transfer of negotiable instruments, at the suit of the defrauded maker or acceptor, or of the party claiming to be the true owner, or to have an interest in them;<sup>1</sup> or the transfer, under like circumstances, of stocks or other securities not strictly negotiable;<sup>2</sup> or even the transfer of chattels when of a special nature and value, such as diamonds, and the like articles;<sup>3</sup> to prevent a payment of money in violation of a trust;<sup>4</sup> to restrain a breach of trust;<sup>5</sup> to prevent

<sup>1</sup> See post, chapter on cancellation.

<sup>2</sup> Id.

<sup>3</sup> The jurisdiction in such case depends upon the same reasons as the analogous jurisdiction to compel the delivery up of such unique chattels, or the specific performance of contracts for their sale: Post, § 1402.

<sup>4</sup> Drake v. Wild, 65 Vt. 611, 27 Atl. 427.

<sup>5</sup> In suits by a beneficiary against his trustee an injunction, if needed, will be granted as a matter of course. See Lee v. Simpson, 37 Fed. 12, 2 L. R. A. 659 (preliminary injunction to restrain alienation of land); Dance v. Goldingham, L. R. 8 Ch. 902 (sale with conditions attached which tend to depreciate the property).

To restrain violations of confidence, by the disclosure or unfair use of knowledge which has come to the defendant in the course of a confidential employment. Little v. Kingswood Coll. Co., L. R. 20 Ch. D. 733 (to prevent an attorney from acting against a former client); Gower v. Andrew, 59 Cal. 119, 43 Am. Rep. 242 (to prevent a confidential clerk from secretly securing for himself the renewal of the lease of his employer's business premises; see ante, § 1050); Pollard v. Photographic Co., 40 Ch. D. 345, 1 Keener, 76.

To restrain disclosure of trade secrets.—An application of the last mentioned principle is seen in the well established jurisdiction to enjoin the disclosure or

a defendant from affecting or encumbering the property in litigation by contract, conveyance, mortgage, or any other act; and, in general, in all suits to enforce an equitable right against specific property,—as to enforce an equitable estate and compel the conveyance of the legal title, to enforce a trust, or an equitable lien,<sup>7</sup> to compel the specific performance of a contract, and the like,—the court will grant an injunction to restrain a threatened transfer of the property, whether land, chattels, or securities, during the pendency of the action.

§ 1341. **To Prevent the Violation of Contracts.**—An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel specific performance. Both are governed by the same doctrines and rules; and it may be stated as a general proposition that wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit. Where the agreement stipulates that certain acts shall not be done, an injunction preventing the commission of those acts is evidently the only mode of enforcement; but the remedy of injunction is not confined to contracts whose stipulations are negative; it often extends to those which are affirmative in their provisions, where the affirmative stipulation implies or includes a negative. The universal test of the jurisdiction, admitted alike by the courts of England and of the United States, is the inadequacy of the legal remedy of damages in the class of contracts to which the particular instance belongs.<sup>1</sup> This general doctrine is fully

use of trade secrets, such as secret processes of manufacture, communicated to one in the course of a confidential employment. See *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664, 2 Keener, 241; *Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379, 1 Ames Eq. Jur. 128; *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149, 68 Am. St. Rep. 469, 72 N. W. 140, 38 L. R. A. 200, H. & B. 755. See, also, *Simmons Hardware Co. v. Waibel*, 1 S. D. 488, 36 Am. St. Rep. 755, 47 N. W. 814, 11 L. R. A. 267 (receiver appointed of a secret code).

<sup>6</sup> See ante, § 1338, note, as to preliminary injunctions.

<sup>7</sup> *Williams v. Harlan*, 88 Md. 1, 71 Am. St. Rep. 394, 41 Atl. 51; *Robinson v. Pickering*, L. R. 16 Ch. Div. 371, 660 (in suit to enforce married woman's contract against her separate estate, an injunction restraining her from aliening her property will not be granted, because her contract creates no lien or charge on her estate).

<sup>1</sup> As to enjoining breach of an affirmative stipulation which implies or includes a negative, see post, § 1343, note.

Breaches of some particular stipulation have frequently been enjoined, notwithstanding that other parts of the contract were in their nature incapable of specific performance, either affirmatively or by injunction: see, for example, *Whittaker v. Howe*, 3 Beav. 383, 2 Keener, 209; *Rolfe v. Rolfe*, 15 Sim. 88, 2

sustained by the cases cited in the succeeding paragraphs as illustrations of its application. A clearer notion of the doctrine will perhaps be obtained by considering the contracts to which it applies in three main classes: 1. Those restrictive covenants which create equitable easements; 2. Agreements stipulating for personal services or acts; 3. Other agreements, generally negative in their nature.

§ 1342. 1. Restrictive Covenants Creating Equitable Easements.<sup>1</sup>

§ 1343. 2. Contracts for Personal Services or Acts.—Where a contract stipulates for special, unique, or extraordinary personal services or acts, or for such services or acts to be rendered or done by a party having special, unique, and extraordinary qualifications, —as, for example, by an eminent actor, singer, artist, and the like, —it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person. It is, however, a familiar doctrine that a court of equity will not exercise its jurisdiction to grant the remedy of an *affirmative specific performance*, however inadequate may be the remedy of damages, whenever the contract is of such a nature that the decree for its specific performance cannot be enforced and its obedience compelled by the ordinary processes of the court. A specific performance in such cases is said to be impossible; and contracts stipulating for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel an actor to act, a singer to sing, or an artist to paint. Applying the same course of reasoning, the English courts formerly held that they could not *negatively* enforce the specific performance of such contracts by means of an injunction restraining their violation.<sup>1</sup> Those courts have, however, entirely receded from

Keener, 218; Dietrichsen v. Cabburn, 2 Phill. Ch. 52, 1 Ames Eq. Jur. 108, 2 Scott, 92, 2 Keener, 220; Lumley v. Wagner, 1 DeGex, M. & G. 604, 1 Ames Eq. Jur. 93, 2 Scott, 96, 2 Keener, 223, H. & B. 614; Donnell v. Bennett, L. R. 22 Ch. Div. 835, 1 Ames Eq. Jur. 114, 2 Scott, 114, 2 Keener, 275, H. & B. 627; Singer Machine Co. v. Union Button Hole Co., 1 Holmes, 253, Fed. Cas. No. 12, 904, 1 Ames Eq. Jur. 438, 2 Keener, 255; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664, 2 Keener 241; and see post, § 1405, note on "Mutuality." Contra, see Hills v. Croll, 2 Phill. Ch. 60, 1 Ames Eq. Jur. 427, 2 Scott, 90, 2 Keener 216; Iron Age Pub. Co. v. W. U. T. Co., 83 Ala. 498, 3 Am. St. Rep. 758, 3 South. 449, 2 Keener 834; Welty v. Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98, H. & B. 592.

<sup>1</sup> See ante, § 1295.

<sup>1</sup> Kemble v. Kean, 6 Sim. 333, 1 Ames Eq. Jur. 91; Kimberley v. Jennings,

this latter conclusion. The rule is now firmly established in England that the violation of such contracts may be restrained by injunction, whenever the legal remedy of damages would be inadequate, and the contract is of such a nature that its negative specific enforcement is possible. This rule was first applied to stipulations which were in form expressly negative, but was soon extended to affirmative contracts which implied or involved negative stipulations.<sup>2</sup>

6 Sim. 340, 2 Keener 204; among early American cases to the same effect see *Sanquirico v. Benedetti*, 1 Barb. 315, 2 Scott 85.

<sup>2</sup> The leading case is *Lumley v. Wagner*, 1 De Gex, M. & G. 604, 1 Ames Eq. Jur. 93, 2 Scott 96, 2 Keener 223, H. & B. 614, in which the defendant, a "prima donna," had agreed to sing for a certain specified period in the plaintiff's opera-house, and also that she would not sing elsewhere during that time. The opinion by Lord Chancellor St. Leonards contains a full review of the previous authorities, and a most able and convincing discussion of the principle. See, also, *Daly v. Smith*, 38 N. Y. Super. Ct. 158, 2 Keener 267; *McCaul v. Braham*, 16 Fed. 37, 2 Scott 116, H. & B. 607; *Morris v. Colman*, 18 Ves. 436, 1 Ames Eq. Jur. 89, 2 Scott 87, 2 Keener 197 (playwright enjoined from writing for another theater); *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210, 90 Am. St. Rep. 627, 51 Atl. 973, 58 L. R. A. 227 (professional baseball player enjoined from playing with any other club). In *Montague v. Flockton*, L. R. 16 Eq. 189, 1 Ames Eq. Jur. 105, 2 Scott 107, 2 Keener 246, H. & B. 622, the rule was extended to a contract by an actor that contained no negative stipulation. But in 1891 this case was overruled, and it was held that a negative stipulation will not be implied even where the defendant had agreed to give the "whole of his time" to the plaintiff's business. *Whitwood Chemical Co. v. Hardman* [1891], 2 Ch. 416, 1 Ames Eq. Jur. 117, 2 Scott 110, 2 Keener 284, Shep. 296 (see also *Clarke v. Price*, 2 Wils. Ch. 157, 2 Scott 89, 2 Keener 199, H. & B. 612, where Lord Eldon refused to enjoin the defendant from writing law books for another firm, in the absence of an express negative stipulation); but this rule of *Whitwood Chemical Co. v. Hardman* applies only to contracts for personal services; in other kinds of contracts a negative may still be implied; see *Metropolitan El. Supply Co. v. Gender*, [1901] 2 Ch. 799; also, *De Mattos v. Gibson*, 4 De Gex & J. 276, 1 Ames Eq. Jur. 102; and its restriction of the remedy to stipulations expressly negative seems to have had little influence in this country; see *Cort v. Lassard*, 18 Oreg. 221, 17 Am. St. Rep. 726, 22 Pac. 1054, 6 L. R. A. 653; *Daly v. Smith*, 38 N. Y. Sup. Ct. 158, 2 Keener 267. A 90

Where the services contracted for are neither special, extraordinary nor unique, so that the employer may readily obtain a substitute, equitable relief is refused: *Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467, 18 Am. St. Rep. 278, 7 L. R. A. 779, 2 Keener 295, H. & B. 629, Shep. 294; *Carter v. Ferguson*, 58 Hun 569, 12 N. Y. Suppl. 580 (actor); *Cort v. Lassard*, 18 Oreg. 221, 17 Am. St. Rep. 726, 22 Pac. 1054, 6 L. R. A. 653 (acrobat); *Kimberly v. Jennings*, 6 Sim. 340, 2 Keener 204. A 121

It has been held that an employee cannot restrain his employer from discharging him: *Davis v. Foreman*, [1894] 3 Ch. 654; see, also, *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98, H. & B. 592; see post, § 1405, note on Mutuality. An injunction will not be granted where the agreement is indefinite or incomplete: *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. 18, 7 L. R. A. 381, H. & B. 631; or where the employer is unable to perform his

### § 1344. 3. Other Agreements Generally Negative in their Nature.

—In all these agreements, where the stipulations are expressly negative in form, and where they belong to the class of which the specific performance would be enforced if they were affirmative in form, an injunction to restrain their violation will be granted as a general rule, and almost as a matter of course. The inadequacy of the legal remedy is the criterion; but the fact that the agreement belongs to a class which would be specifically enforced necessarily shows that the legal remedy is inadequate. The particular instances of this class are very numerous, and some of the most important examples are placed in the foot-note.<sup>1</sup>

part of the agreement: *Rice v. D'Arville*, 162 Mass. 559, 39 N. E. 180, 2 Keener 1071.

<sup>1</sup> Agreements, not illegal (see ante, § 934), not to carry on a trade. Stipulations by tradesmen selling their business not to engage in similar business within prescribed limits may be enforced by injunction, as a general rule, because of the difficulty of estimating damages for a breach of the contract: *Rolfe v. Rolfe*, 15 Sim. 88, 2 Keener 218; *Williams v. Williams*, 2 Swans. 253, 2 Keener 199; *Angier v. Webber*, 14 Allen 211, 92 Am. Dec. 748, 2 Scott 126; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419, 1 Ames Eq. Jur. 123; similar agreements between physicians: *McClurg's Appeal*, 58 Pa. St. 51, H. & B. 751; *Wilkinson v. Colley*, 164 Pa. St. 35, 30 Atl. 286, 26 L. R. A. 114, 2 Keener 300; or between lawyers: *Whittaker v. Howe*, 3 Beav. 383, 2 Keener 209.

The benefit of the stipulation may be assigned with the business, and the assignee's rights protected by injunction: *Francisco v. Smith*, 143 N. Y. 488, 38 N. E. 980, 1 Ames Eq. Jur. 186. Other agreements not to compete; as, by a rival quarry not to supply stone to a municipal corporation during a certain period: *Jones v. North*, L. R. 19 Eq. 426, 2 Keener 273. Contracts giving the plaintiff the exclusive right to buy articles manufactured or produced by the defendant, or constituting the plaintiff the sole agent for their sale, have frequently been enforced by enjoining the sale of the articles by the defendant to third parties: *Dietrichsen v. Cabburn*, 2 Phill. Ch. 52, 1 Ames Eq. Jur. 108, 2 Scott 92, 2 Keener 220; *Donnell v. Bennett*, L. R. 22 Ch. D. 835, 1 Ames Eq. Jur. 114, 2 Keener 275, 2 Scott 114, H. & B. 627; *Singer Sewing Machine Co. v. Union Button Hole Co.*, 1 Holmes 253, Fed. Cas. No. 12,904, 1 Ames Eq. Jur. 438, 2 Keener 255 (contracts making plaintiff sole agent for a patented article); *Manhattan Mfg., etc., Co. v. New Jersey, etc., Co.*, 23 N. J. Eq. 161, H. & B. 747, 2 Keener 568. On the other hand, the court refused to enjoin the breach of a contract to sell to plaintiff all the coal defendants should get from a certain mine, since coal is an article of such a common character that an ordinary contract for the sale of it would not be specifically enforced: *Fothergill v. Rowland*, L. R. 17 Eq. 132, 1 Ames Eq. Jur. 111, 2 Scott 111, 2 Keener 261, H. & B. 599. Miscellaneous contracts: agreements not to disclose trade secrets; see ante, § 1340; *Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379, 1 Ames Eq. Jur. 128; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664, 2 Keener 241; *Fralich v. Despar*, 165 Pa. St. 24, 30 Atl. 521, 2 Keener 304. Injunction against diverting water in breach of agreement: *Dickenson v. Grand Junction Canal Co.*, 15 Beav. 260, 2 Keener 312; against running trains past a station without stopping, in violation of contract: *Hood v. North Eastern Ry.*, L. R. 8 Eq. 606, 5 Ch. 525, 1 Ames Eq. Jur. 82, 2 Scott 76, 2 Keener 160.

§ 1345. *Miscellaneous Cases.*—As has already been stated, an injunction will always be granted, if necessary, to protect, aid, or enforce any equitable estate, interest, or primary right, or to secure and render efficient any purely equitable remedy. Among the most important instances in which this general doctrine is applied, in addition to those already mentioned, are the following: Against *Corporations* and their directors and officers, to restrain acts which are illegal, ultra vires, or in violation of their fiduciary duties.<sup>1</sup> While the right to membership in a corporation, or to be a corporation officer, cannot, in general, be tested by means of an injunction,<sup>2</sup> the improper or unlawful expulsion of a member from a voluntary association without good cause, or in violation of its by-laws, may be restrained by injunction.<sup>3</sup> Between *Mortgagors and mortgagees*.<sup>4</sup> Against *Public Officers*. An injunction will not be granted, in general, to restrain persons from acting as public officers;<sup>5</sup> but the illegal, unlawful, or improper acts of public offi-

<sup>1</sup>The general subject of suits against corporations, and their managing officers, based upon their trust relations, and their acts in violation thereof, has already been considered: Ante, §§ 1091-1096. In all such suits an injunction may be granted either as the sole remedy, or in connection with the remedies of rescission, cancellation, accounting, etc. In connection with the cases there cited, see also the following as illustrations: To restrain ultra vires acts: See *Attorney Gen. v. Tudor Ice Co.*, 104 Mass. 239, 6 Am. St. Rep. 227, Shep. 3; *Kean v. Johnson*, 9 N. J. Eq. 401; *Byrne v. Schuyler E. M. Co.*, 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304. To restrain unlawful acts of directors or managing officers in violation of their fiduciary duties: *Carlisle v. South Eastern Ry.*, 1 Macn. & G. 689 (payment of illegal dividends); *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 16 Am. St. Rep. 81, 7 South. 108, 7 L. R. A. 605.

<sup>2</sup>Unless the question arises incidentally in a suit of which the court has jurisdiction on other grounds: *Kean v. Union Water Co.*, 52 N. J. Eq. 813, 46 Am. St. Rep. 538, 31 Atl. 282. The proper remedy is by quo warranto.

<sup>3</sup>*Labouchere v. Earl of Wharreliffe*, L. R. 13 Ch. D. 346; *Ryan v. Cudahy*, 157 Ill. 108, 48 Am. St. Rep. 305, 41 N. E. 760, 49 L. R. A. 353 (expulsion from a board of trade without opportunity to make a defense). As to injunction to protect the property rights of conflicting factions in an ecclesiastical body, see *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666.

<sup>4</sup>To restrain mortgagee from improper sale under a power of sale, by advertisement, etc.: *Warner v. Jacob*, L. R. 20 Ch. Div. 220; *McCalley v. Otey*, 99 Ala. 584, 42 Am. St. Rep. 87, 12 South. 406. To restrain mortgagor from committing waste, under certain circumstances, or doing other acts to the property whereby the security would be imperiled. See post, under head of Waste.

<sup>5</sup>The legal remedy is, in general, adequate to test the right to a public office: *Arnold v. Henry*, 155 Mo. 48, 78 Am. St. Rep. 556, 55 S. W. 1089. Equity has no jurisdiction to control an election to office, in any of its processes or stages: *Fletcher v. Tuttle*, 151 Ill. 41, 42 Am. St. Rep. 220, 37 N. E. 683, 25 L. R. A. 143; *Alderson v. Commissioners*, 32 W. Va. 640, 25 Am. St. Rep. 840, 9 S. E. 868, 5 L. R. A. 334; nor to restrain removal from office; In re

cers may be restrained when they would produce irreparable injury, or create a cloud upon title, or when such remedy is necessary to prevent a multiplicity of suits.<sup>6</sup> To prevent a *Cloud upon Title*.

Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. ed. 402, Shep. 5; White v. Berry, 171 U. S. 366, 18 Sup. Ct. 917, 43 L. ed. 199. It may, however, protect the possession of a de facto officer against the interference of an adverse claimant, pending the establishment of the disputed title by legal proceedings: State v. Superior Court, 17 Wash. 12, 61 Am. St. Rep. 893, 48 Pac. 741.

\* See Louisiana Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; People v. Canal Board, 55 N. Y. 390, 1 Keener 100; State v. Lord, 28 Ore. 498, 43 Pac. 471, 31 L. R. A. 473. But an injunction will not issue to restrain political acts of public officers: State of Georgia v. Stanton, 6 Wall. 10, 18 L. ed. 721; nor where the suit is in effect one against the state: Ex parte Ayres, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. ed. 216.

*Injunctions against municipal corporations and their officers.* The illegal acts of municipal officials form one of the most frequent subjects for injunction. Suit may be brought on behalf of the state by the attorney general or other proper officer: State v. County Court of Saline County, 51 Mo. 350, 11 Am. Rep. 454; but more commonly, at the present day, the suit is instituted by one or more tax-payers on behalf of the whole body of tax-payers of the municipality; the fact that the illegal act of the municipal officers, involving the expenditure of public moneys or the creation of public indebtedness, will usually result in increasing the burden of taxation, is considered to give the tax-payers, as a class specially injured, a sufficient standing in a court of equity. There is some analogy between the relation of tax-payers to the municipal government, and that of stockholders to the governing body of a private corporation; see ante, §§ 1088-1096; Dillon, Mun. Corp. § 915; Russell v. Tate, 52 Ark. 541, 20 Am. St. Rep. 193, 13 S. W. 130, 7 L. R. A. 180; in general, see Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070 (a leading case); Newmeyer v. Missouri & M. R. Co., 52 Mo. 81, 14 Am. Rep. 394; Mayor, etc., of Baltimore v. Gill, 31 Md. 375; Harney v. Indianapolis, etc., R. Co., 32 Ind. 244; Pom. Eq. Rem. § 345, and quotations. Among the acts most frequently thus enjoined are, the unauthorized issue of municipal bonds in aid of the construction of railways or other public works: Newmeyer v. R. Co., supra; incurring of indebtedness in excess of a limit prescribed by law: Honaker v. Board of Education, 42 W. Va. 170, 57 Am. St. Rep. 847, 24 S. E. 544, 32 L. R. A. 413; violation of laws to the effect that contracts must be let to the "lowest" or the "lowest responsible" bidder, or the like: Adams v. Brenan, 177 Ill. 194, 69 Am. St. Rep. 222, 52 N. E. 314, 42 L. R. A. 718; other illegal expenditures of public moneys: The Liberty Bell, 23 Fed. 843; or use of public property for private purposes; Schofield v. School Dist., 27 Conn. 499 (use of vacant school house). The remedy is subject to some important limitations. It should, by the weight of authority, and as a general rule, be directed against the *enforcement* of the invalid ordinance, rather than against the legislative action of passing the ordinance: Alpers v. San Francisco, 12 Sawy. 631, 32 Fed. 503, per Field, J.; Lewis v. Denver City Waterworks Co., 19 Colo. 236, 41 Am. St. Rep. 248, 74 Pac. 993; Stevens v. St. Mary's Training School, 144 Ill. 336, 36 Am. St. Rep. 438, 32 N. E. 962, 18 L. R. A. 832; (for exceptions, see Pom. Eq. Rem. § 341; Roberts v. City of Louisville, 92 Ky. 95, 36 Am. St. Rep. 469, 17 S. W. 216, 13 L. R. A. 844); and it cannot interfere with the exercise of a discretionary power, unless tainted with fraud or manifestly abused: McCarmel v. Shaw, 155 Ill. 37, 46 Am. St. Rep. 311, 39 N. E. 584, 27 L. R. A. 580. Void municipi-

The use of the injunction to prevent acts which would create a cloud

pal ordinances are frequently enjoined on other grounds than that of injury to the plaintiff in his capacity as a tax-payer: as, where the enforcement of such ordinance would result in a multiplicity of suits: Third Ave. R. R. Co. v. Mayor, 54 N. Y. 159, 2 Ames Eq. Jur. 102, 1 Keener, 167; City of Chicago v. Collins, 175 Ill. 445, 67 Am. St. Rep. 224, 51 N. E. 907, 49 L. R. A. 408, 2 Ames Eq. Jur. 92; ante, §§ 254, 261; or in irreparable injury to the plaintiff's private rights: Manhattan Iron Works Co. v. French, 12 Abb. N. C. 446, 2 Ames Eq. Jur. 107; City of Austin v. Austin City Cemetery Assn., 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528.

Injunction against taxation.—The rules in the different states, and in the federal courts, regarding the issuing of injunctions to restrain the collection of invalid taxes are far from uniform. In general, the states may be divided into two classes. In the states of the first class, the mere illegality of the tax is not ground for equitable relief. There must be in every case of the threatened enforcement of an invalid tax, "some special circumstance which distinguishes it from a common trespass, and brings the case under some recognized head of equity jurisdiction before the extraordinary and preventive remedy of injunction can be invoked": Wells, Fargo & Co. v. Dayton, 11 Nev. 161; Dows v. City of Chicago, 11 Wall. 108, 20 L. ed. 65 (the leading case). Thus, an injunction rarely issues to prevent the collection of an invalid tax on personal property, since, if it be seized for non-payment of the tax, the officers are liable in trover or trespass, and damages are presumed to be full compensation: see White v. Stender, 24 W. Va. 615, 49 Am. Rep. 283; Shelton v. Platt, 139 U. S. 595, 11 Sup. Ct. 646, 35 L. ed. 276; otherwise where the seizure will work irreparable injury: Southern Ry. Co. v. City of Asheville, 69 Fed. 359. Fraud is often mentioned as a proper ground for equitable relief; as in case of a systematic and illegal discrimination against the complainant: Louisville Trust Co. v. Stone, 107 Fed. 305, 46 C. C. A. 299. The avoidance of a multiplicity of suits as a ground for jurisdiction has already been fully discussed; see ante. §§ 258-260, 265, 266, 270, and notes. The prevention and removal of clouds on title is a familiar ground of equity jurisdiction; inasmuch as taxes on realty, and sometimes those on personalty as well, are generally made a lien upon real estate, relief against tax proceedings not defective upon their face is frequently had upon this ground: see post, §§ 1398, 1399.

In nearly half of the states, the mere illegality of a tax is (subject to some limitations), a ground of jurisdiction for its injunction, apart from any question of irreparable injury, of multiplicity of suits, or of cloud on title. No distinction, in principle, is made between taxes on real and on personal property. Injunction is usually a matter of right when property exempt from taxation is sought to be taxed; on the other hand, where the question is one of an oppressive valuation the complainant must, as a general rule, first pursue the statutory remedy of appeal to the board of review or equalization. See Pom. Eq. Rem. § 363, ff.

In both classes of states it is a principle of general application that mere irregularities in the assessment are not sufficient to warrant the interference of equity; the defect which renders the tax invalid must be substantial; see Robinson v. City of Wilmington, 65 Fed. 856, 13 C. C. A. 177, 25 U. S. App. 144; Chicago, B. & Q. R. Co. v. Frary, 22 Ill. 34; and it is also a general rule, in application of the maxim, "He who seeks equity must do equity," that where a tax is valid in part and invalid in part, no relief will be awarded unless a payment or tender is made of the valid portion: People's Nat. Bank v. Marye,

upon title is governed by the same rules which control the remedy of removing a cloud from title.<sup>7</sup>

191 U. S. 272, 24 Sup. Ct. 68, 48 L. ed. 180, and cases cited; State Railroad Tax Cases, 92 U. S. 616, 23 L. ed. 674.

*Injunction against exercise of the power of eminent domain.*—Injunctions, in this class of cases, are not controlled by the principles which regulate injunctive relief against ordinary trespasses. The constitutional guaranty that "property shall not be taken for public use without just compensation" by agents of the state to whom this power is delegated, is deemed to establish a right of so high and sacred a character that any threatened infringement of the right should be restrained, without consideration of the adequacy of the legal remedy. "The power is so capable of abuse, and those who are invested with it are often so prone to its arbitrary and oppressive exercise, that a court of equity, without inquiring whether there is irreparable injury, or injury not susceptible of adequate redress by legal remedies, will intervene for the protection of the owner"; *East & W. R. Co. of Alabama v. E. T. V. & G. R. Co.*, 75 Ala. 280; *D. M. Osborne & Co. v. Mo. Pac. R. Co.*, 147 U. S. 248, 13 Sup. Ct. 299, 37 L. ed. 155; *Bass v. Metropolitan W. S. El. R. Co.*, 82 Fed. 857, 27 C. C. A. 147, 39 L. R. A. 711; *Bolton v. McShane*, 67 Iowa 207, 25 N. W. 135; *Lewis, Em. Dom.* § 632; *Pom. Eq. Rem.* § 465 and quotations. See, also, *Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526, 1 Scott 740, 1 Keener 654, H. & B. 767. The entry upon or appropriation of the plaintiff's land is the specific act enjoined; no injunction lies against the prosecution of condemnation proceedings when the matter which is set up as a ground for injunction may be urged as a defense in such proceedings: *Black Hills, etc., R. Co. v. Tacoma Mill Co.*, 129 Fed. 312, 63 C. C. A. 544; *Lewis, Em. Dom.* § 646. It is the rule in most states that the owner of land abutting upon a public street, who owns the fee of the land included in such street subject to the easement in the public for legitimate street purposes, can enjoin the use and occupation of the street by a steam railroad in such a manner as to create an "additional servitude" upon the street, if no compensation to such abutting owner has been ascertained or made: *Williams v. N. Y. Cent. R. Co.*, 16 N. Y. 97, 69 Am. Dec. 651, 1 Ames Eq. Jur. 521, 1 Scott 706; *Henderson v. N. Y. Cent. R. Co.*, 73 N. Y. 423, 1 Keener 623, 1 Scott 707. But in nearly all the states, if the fee in the street is vested, not in the abutting owner but in the municipality, he has no remedy by injunction for the damage or injury to the enjoyment of his property caused by the authorized construction or operation of a railroad in the street: *Stetson v. Chicago & E. R. Co.*, 75 Ill. 74, 1 Ames Eq. Jur. 595. A contrary and far more equitable rule was established in New York, as respects the elevated railroad structures of New York City, in a great series of cases, beginning with *Story v. N. Y.*, etc., R. R. Co., 90 N. Y. 122, 43 Am. Rep. 146, and including *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274, 26 Am. St. Rep. 523, 29 N. E. 315, 15 L. R. A. 287, 1 Scott 124, *Shep.* 30 (damages as incidental to relief in equity); *O'Reilly v. New York El. R. Co.*, 148 N. Y. 347, 42 N. E. 1063, 31 L. R. A. 407 (no injunction where no actual damage); *Galway v. Met. El. R. Co.*, 128 N. Y. 145, 28 N. E. 479, 13 L. R. A. 788, 1 Ames Eq. Jur. 601, 1 Keener 822 (conduct not amounting to estoppel or acquiescence). In view of the great public inconvenience that would have resulted from enjoining the operation of the elevated railroads pending condemnation proceedings, the courts in these cases determined the amount of permanent damages to which the plaintiff was entitled, and made the injunction conditional upon the refusal of the company to pay the sum so awarded. See, further, on the subject of railroads in streets, *Pom. Eq. Rem.*

## SECTION II.

## TO PREVENT OR RESTRAIN THE COMMISSION OF TORTS.

## ANALYSIS.

- § 1346. The estates and interests generally legal.
- § 1347. Kinds and classes of torts restrained.
- § 1348. Waste.
- § 1348a. Equitable waste.
- § 1348b. Waste: relief granted; parties.
- § 1349. Nuisance: Public.
- § 1350. Nuisance: Private; when restrained.
- § 1350a. Same: Interlocutory injunction; balance of injury; laches and estoppel.
- § 1350b. Same: Form of decree; complete relief, etc.
- § 1351. Same: Instances; violations of easements.
- § 1352. Patent rights and copyrights.
- § 1352a. Patent rights, continued.
- § 1352b. Same: temporary injunctions.
- § 1352c. Same: complete relief.
- § 1352d. Copyrights.
- § 1353. Literary property as distinct from copyright.
- § 1354. Trade-marks.
- § 1354a. Exclusive franchises.
- § 1355. Good-will.
- § 1356. Trespasses.
- § 1357. General doctrine; cases in which trespass may be enjoined.
- § 1358. Slander of title; libels; "right of privacy"; strikes, boycotts, etc.

§ 1346. **The Estates and Interests Generally Legal.**—The estates, interests, and primary rights to be secured by injunctions of this kind are in most instances legal; and the injunctions themselves, as a class, are frequently described as those for the protection of legal rights and interests. So far as they do thus sustain and enforce legal rights, they are, of course, supplementary to or in lieu of the legal remedies which courts of common law originally gave, and perhaps now give, by action, under the same circumstances. For this reason, the general test as stated in a former paragraph applies with special force. The inadequacy of the legal remedies is the criterion which determines the exercise of this preventive

*Generally  
legal  
remedies  
are also  
available*

§§ 467–470, and cases cited. As to injunction at the suit of abutting owner against changing the grade of a street to his injury, see *McElroy v. Kansas City*, 21 Fed. 257, per Brewer, J. As to the defense of acquiescence, in eminent domain cases, see *Galway v. Met. El. R. Co.*, supra; *City of New York v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. ed. 820.

<sup>1</sup> See post, § 1398.

jurisdiction; and the criterion is enforced, especially by the American courts, with great strictness.

§ 1347. **Kinds and Classes of Torts Restrained.**—The legal remedy is ordinarily considered as adequate in cases of torts to the person, and to property held by a legal title, and equity does not interfere.<sup>1</sup> There are, however, certain species of torts, in respect to each of which, as a class, it is settled that the legal remedy is generally inadequate, so that equity will generally interfere to prevent the wrong by injunction. There are other species of torts, in respect to each of which, as a class, the legal remedy is adequate, but may become inadequate, in individual instances, from their particular circumstances, so that in those instances an injunction will be granted. In the kind of torts for which the legal remedy is generally inadequate, so that an injunction is the proper remedy, the title of the injured party must be clear, the injury real, and not merely temporary or transient. They are waste, nuisance, including interference with easements, servitudes, and similar rights, infringements of patent rights, of copyrights, of trademarks, and of other intangible property rights, the pecuniary value of which cannot be certainly estimated, such as literary property in manuscript writings and good-will. In ordinary trespasses the injured party is left to his remedy of damages, but the circumstances of a trespass to property—especially to real pro-

<sup>1</sup> *Enjoining criminal acts.*—An injunction is not granted to restrain a criminal act, when no property right is directly endangered by such act: see Cope v. District Fair Assn., 99 Ill. 489, 39 Am. Rep. 30, 1 Ames Eq. Jur. 29 (gambling); Ocean City Assn. v. Schurch, 57 N. J. Eq. 268, 41 Atl. 914, 1 Scott 215 (violation of Sunday laws). “Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law”: In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 34 L. ed. 1092, Shep. 304. Thus, the fact that acts of intimidation by striking workmen are often criminal is no reason for not enjoining them, at the suit of an employer of labor whose property rights (often intangible rights; see post, § 1358, n.) are endangered thereby: Vegalahn v. Guntner, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722, H. & B. 773; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106, H. & B. 779. And the fact that a public nuisance is also a crime is no reason why it should not be enjoined at the suit of an individual who suffers from it some special damage different and other than that suffered by the rest of the community: Cranford v. Tyrrel, 128 N. Y. 341, 28 N. E. 514, 1 Keener 788 (house of ill-fame); or even where he does not suffer special damage, if suit by an individual is authorized by statute: Littleton v. Fritz, 65 Iowa 488, 54 Am. Rep. 19, 22 N. W. 641, 1 Ames Eq. Jur. 31 (injunction against selling liquor).

*criminal act  
if enjoined only  
with property  
rights*

party—may be such that the compensatory remedy is inadequate, and a court of equity will prevent the wrong by injunction,

§ 1348. **Waste.**—Waste is the destruction or improper deterioration or material alteration of things forming an essential part of the inheritance, done or suffered by a person rightfully in possession by virtue of a temporary or partial estate,—as, for example, a tenant for life or for years. The rightful possession of the wrongdoer is essential, and constitutes a material distinction between waste and trespass.<sup>1</sup>

[The common law "action of waste," as enlarged by early statutes, gave a remedy only in favor of one having an immediate estate of inheritance, so that a person holding any estate less than a fee,<sup>2</sup> or one whose estate in fee was preceded by a lesser, intermediate estate,<sup>3</sup> had still no remedy at law.<sup>4</sup> The remedy by injunction, established at an early day, rested partly on these defects in the common law,<sup>5</sup> but chiefly on the reason that waste is, in its nature, nearly always an irreparable injury. So far as the character of the injury is concerned, an injunction will be granted in nearly all cases where a legal action would lie to recover possession of the land wasted, or to recover damages.<sup>6</sup> To this rule there are three exceptions: Equity will not enjoin "permissive" waste, such as neglect to make repairs;<sup>7</sup> nor "ameliorating" waste, i. e., an act which is technically waste, but in fact improves the inheri-

<sup>1</sup> Many acts are not waste in this country which would be waste in England, such as cutting timber, and modes of using the soil, when done in accordance with the usual methods of good husbandry in the neighborhood: see *Winship v. Pitts*, 3 Paige 259, 1 Keener 473; *Crowe v. Wilson*, 65 Md. 479, 57 Am. Rep. 343, 5 Atl. 427. Legal waste, as defined by American courts, is nearly identical with the "equitable waste" described below.

<sup>2</sup> *Mollineux v. Powell*, 3 P. Wms. 268, n. (F), 1 Ames Eq. Jur. 468, 1 Scott 664; *Perrot v. Perrot*, 3 Atk. 94, 1 Keener, 453.

<sup>3</sup> *Anonymous*, Moore 554 pl. 798, 1 Ames Eq. Jur. 467; *Kane v. Vanderburgh*, 1 Johns. Ch. 11, 1 Keener 455, 1 Scott 661.

<sup>4</sup> 2 Blackst. Comm. 282, 283; 3 Id. 227.

<sup>5</sup> *Skelton v. Skelton*, 2 Swanst. 170, 1 Ames Eq. Jur. 473, 1 Keener, 430, 1 Scott 656.

<sup>6</sup> The commonest species of injury enjoined are, cutting timber: *Kane v. Vanderburgh*, 1 Johns. Ch. 11, 1 Keener 455, 1 Scott 661; *Hawley v. Clowes*, 2 Johns. Ch. 122, 1 Ames Eq. Jur. 484, 1 Scott 663; changing, destroying or removing buildings: *Davenport v. Magoon*, 13 Oreg. 1, 57 Am. Rep. 1; *Maddox v. White*, 4 Md. 72, 59 Am. Dec. 67 and notes; *Klie v. VonBroock*, 56 N. J. Eq. 18, 37 Atl. 469, 1 Scott 668; but see, as to erecting new buildings, *Winship v. Pitts*, 3 Paige 259, 1 Keener 473; taking minerals, stone, etc.: *Whitfield v. Bewit*, 2 P. Wms. 240, 1 Ames Eq. Jur. 460, 1 Keener 457, 1 Scott 674; but see as to working old mines, *Gaines v. Green Pond I. M. Co.*, 33 N. J. Ep. 603, 1 Keener 494.

<sup>7</sup> *Castlemain v. Craven*, 22 Vin. Abr. 523, 1 Ames Eq. Jur. 466, 1 Keener 458.

1. Permissive  
2. Ameliorating  
3. Trespass

tance;<sup>8</sup> nor trivial acts of waste, but will require that substantial damage be shown.<sup>9</sup>

[§ 1348a. **Equitable Waste.**—The doctrine as to “equitable” waste is a remarkable instance of the restraint by a court of equity of the unrighteous exercise of an admitted legal right. The words, “without impeachment of waste,” or equivalent words in a lease or other instrument creating an estate less than a fee are interpreted at law as giving the tenant an absolute power and dominion over the estate. Courts of equity from an early day, controlled him in the exercise of that power, upon the ground that they would “not permit an unconscientious use to be made of a legal power”;<sup>1</sup> finally adopting as the test of the equitable waste which will not be permitted by a tenant without impeachment of waste, “that which a prudent man would not do in the management of his own property.”<sup>2</sup> The chief instances of such acts are, the destruction or removal of buildings,<sup>3</sup> carrying away of the soil,<sup>4</sup> cutting of trees or shrubs that had been planted for ornament or shelter,<sup>5</sup> and stripping the land of timber to an extent forbidden by good husbandry.<sup>6</sup>]

[§ 1348b. **Relief Granted—Parties.**—The injunction is almost always prohibitive, but in a proper case may be mandatory, for the restoration of the thing destroyed.<sup>1</sup> The court having acquired jurisdiction for the purpose of an injunction will give complete relief by an accounting for the waste already done;<sup>2</sup> but such accounting will not be given, in cases of legal waste, if an injunc-

<sup>1</sup> Doherty v. Allman, L. R. 3 App. Cas. 709, 1 Ames Eq. Jur. 462, 1 Keener 476, 1 Scott 664; Mollineux v. Powell, 3 P. Wms. 268 n. (F.), 1 Ames Eq. Jur. 468, 1 Scott 664; Meux v. Cobley, [1892] 2 Ch. 253, 1 Scott 665.

<sup>2</sup> Mollineux v. Powell, supra; Doherty v. Allman, supra; Barry v. Barry, 1 Jac. & W. 651, 1 Keener 465.

<sup>3</sup> Micklethwait v. Micklethwait, 1 De G. & J. 504, 524.

<sup>4</sup> Turner v. Wright, 3 De Gex, F. & J. 234, 243, 1 Ames Eq. Jur. 476, 1 Keener 441.

<sup>5</sup> Williams v. Day, 2 Cas. in Ch. 32, 1 Ames Eq. Jur. 476, 1 Scott 646; Vane v. Lord Barnard, 2 Vern. 738, 1 Ames Eq. Jur. 470, 1 Keener 455; Rolt v. Lord Somerville, 2 Eq. Cas. Abr. 759, 1 Ames Eq. Jur. 471, 1 Keener 435, 1 Scott 647.

<sup>6</sup> Bishop of London v. Web, 1 P. Wms. 527, 1 Keener 434.

<sup>7</sup> Packington's Case, 3 Atk. 215, 1 Keener 459, 1 Scott 649; Coffin v. Coffin, Jac. 70, 1 Keener 468; Wombwell v. Belasyse, 6 Ves. (2d ed.) 110, a note, 1 Keener 470, 1 Scott 654. For a case not amounting to waste, see Baker v. Sebright, L. R. 13 Ch. D. 179, 1 Keener 515.

<sup>8</sup> Bishop of Winchester's Case, 1 Rolle Abr. 380 (J. 3), 1 Ames Eq. Jur. 462; Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004, H. & B. 760, 1 Keener 500.

<sup>9</sup> Vane v. Lord Barnard, 2 Vern. 738, 1 Ames Eq. Jur. 470, 1 Keener 433;

<sup>10</sup> Rolt v. Lord Somerville, 2 Eq. Cas. Abr. 759, 1 Ames 471, 1 Keener 435, 1 Scott 647; Klie v. Von Broock, 56 N. J. Eq. 18, 37 Atl. 469, 1 Scott 668.

<sup>11</sup> See ante, § 237.

tion is not demanded or is refused, since the remedy at law is then deemed to be adequate.<sup>3</sup> In cases of equitable waste, however, since there is no legal remedy, an accounting may be had without an injunction.<sup>4</sup> The proceeds of the accounting go to the remainderman in fee, though there be an intermediate remainderman for life or years,<sup>5</sup> following the legal rule that the person in whom is the fee has title to, and may bring trover for, the personalty which results from acts of waste.<sup>6</sup> In the frequent case where there is a tenancy in A for life or years, remainder to B for life, remainder to C in fee, either B<sup>7</sup> or C,<sup>8</sup> who were without common law remedy, may enjoin waste by A. A tenant in tail will not be restrained from waste, because he may at any time bar the entail and give himself a fee;<sup>9</sup> but a tenant in tail after possibility of issue extinct may be enjoined from committing equitable waste,<sup>10</sup> and the same is true of an owner in fee subject to an executory devise.<sup>11</sup> A mortgagee may enjoin waste by the mortgagor in possession which threatens to impair the sufficiency of his security;<sup>12</sup> and a similar protection is extended to the holders of other forms of security.<sup>13</sup> Any acts of waste by a tenant in common that are inconsistent with prudent management of the

<sup>3</sup> Lord Castlemain v. Lord Craven, 22 Vin. Abr. 523, 1 Ames Eq. Jur. 466, 1 Keener 458; Jesus College v. Bloom, Amb. 54, 3 Atk. 262, 1 Ames Eq. Jur. 481, 1 Keener 404, 1 Scott 115; Watson v. Hunter, 5 Johns. Ch. 169, 9 Am. Dec. 295, 1 Scott 642.

<sup>4</sup> Lansdowne v. Lansdowne, 1 Madd. 116, 1 Keener 406, 1 Scott 650; Baker v. Sebright, L. R. 13 Ch. D. 179, 1 Keener 515.

<sup>5</sup> Rolt v. Somerville, 2 Eq. Cas. Abr. 759, 1 Ames Eq. Jur. 471, 1 Keener, 435, 1 Scott 647; Gent v. Harrison, Johns. 517, 1 Keener 510.

<sup>6</sup> Skelton v. Skelton, 2 Swanst. 170, 1 Ames Eq. Jur. 473, 1 Keener 430, 1 Scott 656; Bewick v. Whitfield, 3 P. Wms. 267, 1 Keener 505.

<sup>7</sup> Mollineux v. Powell, 3 P. Wms. 268 (n. F.), 1 Ames Eq. Jur. 468, 1 Scott 664; Kane v. Vanderburgh, 1 Johns. Ch. 11, 1 Keener 455, 1 Scott 661. So may trustees to preserve contingent remainders, who are tenants per auter vie; Perrot v. Perrot, 3 Atk. 221, 1 Keener 453; Lansdowne v. Lansdowne, 1 Madd. 116, 1 Keener 406, 1 Scott 650.

<sup>8</sup> Anonymous, Moore 554, pl. 748, 1 Ames Eq. Jur. 467; Robinson v. Litton, 3 Atk. 209, 1 Keener 436. And an underlessee may be enjoined at the suit of the ground landlord: Farrant v. Lovel, 3 Atk. 723, 1 Keener 455, 1 Scott 660.

<sup>9</sup> Turner v. Wright, 2 De Gex, F. & J. 234, 1 Ames Eq. Jur. 476, 1 Keener 441; Savile's Case, Cas. temp. Talb. 16, 1 Ames Eq. Jur. 472.

<sup>10</sup> Williams v. Day, 2 Cas. in Ch. 32, 1 Ames Eq. Jur. 476, 1 Scott 646.

<sup>11</sup> Turner v. Wright, 2 De Gex, F. & J. 234, 1 Ames Eq. Jur. 476, 1 Keener 441.

<sup>12</sup> Osborne v. Osborne, Dick. 75, 1 Keener 452; King v. Smith, 2 Hare 239, 243, 1 Ames Eq. Jur. 483, note (what is a sufficient security); Brady v. Waldron, 2 Johns. Ch. 148, 1 Ames Eq. Jur. 483, 1 Scott 661.

<sup>13</sup> Thus, a vendor who retains title may enjoin waste by the vendee in possession: Crockford v. Alexander, 15 Ves. 138, 1 Ames Eq. Jur. 221, 1 Keener 549.

estate or that jeopardize the interests of his co-tenants will be enjoined.<sup>14]</sup>

*Nuisance must be clear*

§ 1349. **Nuisance—Public.**—A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney-general in England, and at the suit of the state, or the people, or municipality, or some proper officer representing the commonwealth, in this country. A public nuisance must be established by clear evidence, before the preventive remedy will be granted.<sup>1</sup> A public nuisance will also be restrained at the suit of a private person who suffers therefrom a special and particular injury distinct from that suffered by him in common with the public at large; but this injury must be real, and such that the legal remedy of damages would not be adequate.<sup>2</sup>

§ 1350. **Private Nuisance—When Restrained.**—It is a well-settled doctrine that equity will restrain a private nuisance at the suit of the injured party. This remedy will not, however, be granted in every instance of alleged nuisance. The present or threatened injury must be real, not trifling, transient or temporary;<sup>1</sup> it must be one for which, on account of its essentially irreparable nature, or its repetition or continuance, the legal remedy of damages is inadequate.<sup>2</sup> The title of the plaintiff must also be clear, or at

<sup>14</sup> Hawley v. Clowes, 2 Johns. Ch. 484; 1 Ames Eq. Jur. 484, 1 Scott 663.

<sup>1</sup> See Attorney-General v. Richards, 2 Anstr. 603, 1 Ames Eq. Jur. 615 (obstruction to navigation); Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. ed. 537, 1 Scott 729 (encroachment upon property of the state); Attorney-General v. Williams, 174 Mass. 476, 55 N. E. 77, 1 Ames Eq. Jur. 619 (enforcing statute limiting height of buildings on certain streets); State v. Ohio Oil Co., 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809, 1 Scott 731 (enjoining waste of natural gas to the detriment of the public wealth); Attorney-General v. Hunter, 1 Dev. Eq. (N. C.) 12, 1 Ames Eq. Jur. 621 (injury to public health); Attorney-General v. Fitzsimmons, 35 Am. Law Reg. 100, 1 Ames Eq. Jur. 622, 1 Scott 724 (prize-fight; an interesting case).

<sup>2</sup> Corning v. Lowerre, 6 Johns. Ch. 439, 1 Scott 734 (obstruction of street); Harness v. Bulpitt, (Cal. App.) 81 Pac. 1022, 1 Scott 738 (same); Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514, 1 Keener 788 (bawdy-house); Dempsie v. Darling, 39 Wash. 125, 81 Pac. 152, 1 Scott 735 (same).

<sup>1</sup> The court refused to enjoin temporary or occasional nuisances in Attorney-General v. Sheffield, etc., Co., 3 De Gex M. & G. 304, 1 Keener 682; Swaine v. Great N. Ry. Co., 4 De Gex, J. & S. 211, 1 Ames Eq. Jur. 569, 1 Scott 743; Cooke v. Forbes, L. R. 5 Eq. 166, 1 Keener 720.

<sup>2</sup> Since the avoidance of repeated actions at law for damages is the ground for exercising the jurisdiction to restrain continuing or recurring nuisances, it follows that the injunction should be granted in such cases though the damages recovered in any one of the actions at law would be small or even nominal. It has been frequently so held in suits to enjoin the pollution, diversion or obstruction of streams. Clowes v. Staffordshire, etc., Co., L. R. 8 Ch. 125; Dwight v. Hayes, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; Mann v. Willey, 51 App. Div. (N. Y.) 169, 64 N. Y. Sup. 589, 1 Ames Eq. Jur. 572.

least not subject to any substantial doubt or question. [According to the modern decisions, a mere denial of the plaintiff's title in the defendant's pleading will not prevent an injunction; but if the plaintiff's title is really disputed, and is in any real doubt, it must first be established by a verdict.<sup>3</sup>] The equitable jurisdiction is therefore based upon the notion of restraining irreparable mischief, or of preventing vexatious litigation, or a multiplicity of suits.

[§ 1350a. **Same—Interlocutory Injunction—Balance of Injury—Laches and Estoppel.**—Since the purpose of an interlocutory or temporary injunction is to preserve the property from irremediable injury pending the suit, it may issue at once, in a proper case, though the existence of the nuisance is disputed.<sup>1</sup> On application for a temporary injunction it is appropriate and usual for the court to “balance the inconvenience or injury” which will be likely to result to the respective parties from the granting or withholding of the injunction, and act accordingly; withholding it if the injury to the plaintiff from the continuance of the alleged nuisance during the suit will be slight in comparison with the injury to the

affirmed 168 N. Y. 664, 61 N. E. 1131. A mandatory injunction may issue to remove an obstruction, and restore the stream to its original condition: Amsterdam Knitting Co. v. Dean, 162 N. Y. 278, 56 N. E. 757, 1 Ames Eq. Jur. 573.

<sup>1</sup> Also, if the fact of the existence of a nuisance is doubtful, that fact must be established at law: see Crowder v. Tinkler, 19 Ves. 617, 1 Ames Eq. Jur. 555; Nelson v. Milligan, 151 Ill. 462, 38 N. E. 239.

“But the rule is one of expediency and policy, rather than an essential condition and basis of the equitable jurisdiction,” ante, § 252. It is, therefore, well settled, with but little dissent, that if both the plaintiff's title and the existence of the nuisance are free from doubt, a verdict is unnecessary: Bush v. Western, Prec. Ch. 530 (1720), 1 Ames Eq. Jur. 553; Turner v. Mirfield, 34 Beav. 390, 1 Ames Eq. Jur. 553; Soltau v. De Held, 2 Sim. N. S. 140, 151, 1 Keener 665, 1 Scott 717; Dwight v. Hayes, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; Gardner v. Trustees of Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526, 1 Keener 654, 1 Scott 740; Weakley v. Page, 102 Tenn. 178, 53 S. W. 551, 46 L. R. A. 552. Contra, Weller v. Smeaton, 1 Brown Ch. 532 (1784), 1 Ames Eq. Jur. 554.

In determining whether the facts complained of constitute a nuisance, equity follows the law. “There is no such thing as an equitable nuisance,” in the sense of something actionable in equity but not at law. Soltau v. De Held, 2 Sim. N. S. 133, 151, 1 Keener 665, 1 Scott 717; Baines v. Baker, 1 Amb. 158, 1 Scott 720. As to what constitutes an actionable nuisance, see, further, Lambton v. Mellish, [1894] 3 Ch. 163, 1 Scott 744; Rushmer v. Polsue, [1906] 1 Ch. 234, 1 Scott 746; Gilbert v. Showerman, 23 Mich. 448, 1 Scott 756. A threatened nuisance may be enjoined, but only on a strong case of probability that the apprehended mischief will, in fact, arise: Atty.-Gen. v. Manchester, [1893] 2 Ch. 87, 1 Scott 721; Fletcher v. Bealey, L. R. 28 Ch. D. 688, 1 Keener 754.

<sup>3</sup> Cronin v. Bloemecke, 58 N. J. Eq. 313, 43 Atl. 605, 1 Ames Eq. Jur. 560.

defendant from an improvident issuing of the temporary injunction;<sup>2</sup> and granting it, on the other hand, where that will inflict a loss or inconvenience upon the defendant slight in comparison with the injury threatened to the plaintiff while the suit is still in progress.<sup>3</sup> It has sometimes been thought that the court is invested with the discretion to apply the same process of "balancing the inconvenience" to its final decree, and should refuse a permanent injunction to a plaintiff whose interests at stake are greatly less than the defendant's;<sup>4</sup> especially in cases where the defendant's business is such that its interruption would cause great inconvenience to the public.<sup>5</sup> But this notion has been emphatically repudiated by the majority of the cases. Injunction against a proved, continuous nuisance of a serious character is not a matter of grace or discretion, but of strict right. It proceeds upon the ground that repeated actions at law to recover damages are an inadequate remedy, and upon the further ground that the acts enjoined amount to an expropriation for a private use, or, at best, for a public use not authorized by the legislature.<sup>6</sup> That the remedial right to an injunction is not a matter of grace or

<sup>2</sup> Eaden v. Firth, 1 Hen. & M. 573, 1 Ames Eq. Jur. 564; Elmhurst v. Spencer, 2 Mac. & G. 45, 1 Keener 661; Herbert v. Pennsylvania Co., 43 N. J. Eq. 21, 10 Atl. 872, 1 Keener 860.

<sup>3</sup> Pollock v. Lester, 11 Hare 837, 1 Keener 837.

<sup>4</sup> Richards's Appeal, 57 Pa. St. 105, 98 Am. Dec. 202, 1 Ames Eq. Jur. 574. In this case the court refused to enjoin the use of bituminous coal, necessary to the successful operation of defendant's extensive iron works, but the smoke from which caused material injury to plaintiff's adjacent dwelling-house and cotton factory. See, also, Mountain Copper Co. v. U. S., 142 Fed. 625, 1 Scott 759.

<sup>5</sup> Daniels v. Keokuk Waterworks, 61 Iowa 549, 16 N. W. 705, 1 Ames Eq. Jur. 585 (defendant, whose works furnished the only reliable means of extinguishing fires in the city, seriously damaged by smoke the plaintiff's adjacent dwelling-house). Frequent expressions to be found in favor of this rule in its two branches are nearly all mere dicta; see 1 Pom. Eq. Rem. § 530, n. 115.

<sup>6</sup> Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374, 1 Ames Eq. Jur. 578, 1 Keener 806, 1 Scott 752; Chestatee Pyrites Co. v. Cavenders, etc., Co., 118 Ga. 255, 45 S. E. 267, 119 Ga. 354, 46 S. E. 422, 100 Am. St. Rep. 174 ("the necessities of one man's business cannot be the standard of another man's rights"); Clowes v. Staffordshire, etc., Co., L. R. 8 Ch. App. 125, 142, 143. Cases where the public would be inconvenienced by the injunction: Attorney-General v. Birmingham, 4 K. & J. 528, 539 ("so far as this court is concerned, it is a matter of almost absolute indifference whether the decision will effect a population of 250,000 or a single individual carrying on a manufactory for his own benefit"): Shelfer v. London El. L. Co. (1895) 1 Ch. 287, 1 Ames Eq. Jur. 589 ("courts of justice are not like parliament, which considers whether proposed works will be so beneficial to the public as to justify exceptional legislation, and the deprivation of people of their rights with or without compensation"): Stock v. Jefferson, 114 Mich. 357, 72 N. W. 132, 38 L. R. A. 355.

*Actual decree of injunction is a strict right as to a nuisance*

discretion is further illustrated by the rule that the plaintiff's mere delay or laches, unaccompanied by circumstances amounting to an estoppel, constitutes no defense to the action, unless the delay has continued so long as to defeat the legal right itself.<sup>7</sup> He may, however, be estopped by conduct which has encouraged the defendant to make expenditures in reliance upon his inaction or acquiescence.<sup>8</sup>]

[§ 1350b. **Same—Form of Decree—Complete Relief, etc.**—Where, on the final hearing in a case of nuisance . . . the relief is granted compelling the defendant to remove his obstructions or erections, and to restore the plaintiff to his original condition, and thereby to end the wrong, the remedy (usually called a *mandatory* injunction) is in fact an ordinary decree for abatement<sup>1</sup> and is as much a matter of course as an ordinary prohibitive injunction.<sup>1</sup> If the defendant's business is a lawful one, but conducted in a way to cause injury to the plaintiff, the decree should be so framed, if possible, as to prohibit only that part of the thing complained of which is injurious, saving to the defendant the right to continue his business if it can be conducted in a harmless way.<sup>2</sup> As in cases of waste, the decree should include damages for the past injury;<sup>3</sup> and if, after the institution of a suit to enjoin a nuisance which is properly the subject of an injunction the defendant ceases to commit or threaten the repetition of the nuisance, the court will nevertheless retain the bill for the purpose of awarding damages, rather than put the plaintiff to the expense and trouble of an action at law.<sup>4</sup> A landlord may enjoin a nuisance if it is one which will permanently damage the reversion.<sup>5</sup> A tenant may also procure an injunction even when his tenancy is very brief or will soon terminate.<sup>6</sup>]

§ 1351. **Same. Instances—Violations of Easements.**—Among the

<sup>1</sup> See ante, § 817; *Galway v. Met. El. Ry. Co.*, 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788, 1 Ames Eq. Jur. 600, 1 Keener 822; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567, 1 Keener 748.

<sup>2</sup> See ante, § 818; for conduct not amounting to estoppel, see *Galway v. Met. El. Ry. Co.*, supra.

<sup>3</sup> *Pom. Eq. Jur.* § 1359; *Rothery v. N. Y. Rubber Co.*, 90 N. Y. 30, 1 Ames Eq. Jur. 567; *Corning v. Troy, etc., Factory*, 40 N. Y. 191, 1 Keener 814; *Troe v. Larsen*, 84 Iowa 649, 51 N. W. 179, 35 Am. St. Rep. 336. As to preliminary mandatory injunctions, see post, § 1359.

<sup>4</sup> *Lingwood v. Stowmarket Co.*, L. R. 1 Eq. 77, 336, 1 Keener 717.

<sup>5</sup> See ante, § 237.

<sup>6</sup> *Meyer v. Phillips*, 97 N. Y. 485, 49 Am. Rep. 538.

<sup>7</sup> *Shelfer v. London El. L. Co.* (1895) 1 Ch. 287, 1 Ames Eq. Jur. 589. So, where no threatened injury to the reversion is proved, he cannot have an injunction: *Jones v. Chappell*, L. R. 20 Eq. 839, 1 Keener 744.

<sup>8</sup> *Jones v. Chappell*, supra.

nuisances, or wrongs in the nature of nuisances, which equity readily prevents by injunction are those which consist in the interference with, disturbance, or destruction, actual or threatened, of easements and servitudes, whether created by grant or by covenant, or resulting from user. Some of the most common forms of such injuries which equity enjoins are the obstruction of ancient lights in England, and right of air or of prospect, by erections of any kind; the removal of the lateral support of land by excavations; the interference with water rights by diverting or polluting streams. In fact, every disturbance of an easement or servitude, existing or threatened, will be thus restrained, whenever from the essential nature of the injury, or from its continuous character, the legal remedy is inadequate.<sup>1</sup> No sufficient notion can be obtained of the scope and efficiency of this injunctive jurisdiction, except from an actual examination of the numerous and varying instances in which it has been exercised by the modern decisions.

<sup>1</sup> The jurisdiction, where equitable servitudes have been impressed upon land by covenants in deeds of conveyance, etc., has already been examined: See ante, § 1295.

*Interfering with easement of light and air:* Att'y-Gen. v. Nichol, 16 Ves. 338, 1 Ames Eq. Jur. 534, 1 Keener 651; Ryder v. Bentham, 1 Ves. Sr. 543, 1 Ames Eq. Jur. 545, 1 Keener 835; Jackson v. Duke of Newcastle, 3 De Gex, J. & S. 275, 1 Keener 707; Wilson v. Townend, 1 Drew. & Sm. 324, 1 Ames Eq. Jur. 539; Yates v. Jack, L. R. 1 Ch. App. 295, 1 Ames Eq. Jur. 541; Smith v. Smith, L. R. 20 Eq. 500, 1 Ames Eq. Jur. 543; Martin v. Price, [1894] 1 Ch. 276, 1 Ames Eq. Jur. 537; Von Joel v. Hornsey [1895], 2 Ch. 774, 1 Ames Eq. Jur. 546.

*Interference with rights of way:* See Thorpe v. Brumfitt, L. R. 8 Ch. App. 650, 1 Ames Eq. Jur. 547, 1 Keener 734; Krehl v. Burrell, 7 Ch. Div. 551, 1 Keener 850; Cadigan v. Brown, 120 Mass. 493, 1 Keener 189; Tucker v. Howard, 128 Mass. 361, 1 Keener 854, 1 Ames Eq. Jur. 548; Starkie v. Richmond, 155 Mass. 188, 29 N. E. 770, 1 Keener 871; Hart v. Leonard, 42 N. J. Eq. 416, 7 Atl. 865, 1 Ames Eq. Jur. 549, 1 Keener 856.

*Removal of lateral support of land:* Hunt v. Peake, Johns. 705; 6 Jur., N. S., 1071.

*Interfering with water rights by diverting streams, polluting streams, etc.:* The cases on this subject are very numerous. The jurisdiction is exercised alike against private persons and against public bodies, municipalities, boards, commissioners, etc. *Pollution:* see Strobel v. Kerr Salt Co., 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142, 51 L. R. A. 687; Mann v. Wiley, 51 App. Div. 169, 64 N. Y. Supp. 589, 1 Ames Eq. Jur. 572. *Diversion or Obstruction:* see Gardner v. Trustees, etc., Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526, 1 Scott 740, 1 Keener 654, H. & B. 767; Amsterdam, etc., Co. v. Dean, 162 N. Y. 278, 56 N. E. 757, 1 Ames Eq. Jur. 573; Heilbron v. Fowler, etc., Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535. *Perculating Waters:* see Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, and note, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236. *Obstruction in navigable waters, etc.:* See ante, § 1349, and note; Revell v. People, 177 Ill. 468, 69 Am. St. Rep. 257, 52 N. E. 1052, 53 L. R. A. 790.

§ 1352. **Patent Rights and Copyrights.**—When the existence of a patent right or of a copyright is conceded, or has been established by an action at law, the jurisdiction of equity to restrain an infringement is too well settled and familiar to require the citation of authorities in its support. From the nature of the right and of the wrong,—the violation being a continuous act,—the legal remedy is necessarily inadequate. The ordinary form of relief is an accounting of profits and an injunction in equity; indeed, the action at law is seldom resorted to, except for the purpose of establishing the validity of the patent or copyright by the verdict of a jury when it is really contested. Under the constitution of the United States, the cognizance of suits for the infringement of these rights belongs exclusively to the federal courts.

[§ 1352a. **Patent Rights, continued.**—A bill for a permanent injunction (as distinguished from a motion for a preliminary injunction) need not show that the plaintiff's right has been established at law<sup>1</sup> or that it has been long acquiesced in by the public.<sup>2</sup> A court of equity may, and generally will, try the question of the validity of the patent without the intervention of a jury,<sup>3</sup> because of the intricacy of the question usually involved. The defendant's abandonment of the infringement before suit is no defense unless he pleads and proves that no further infringement is intended.<sup>4</sup> Nor is the plaintiff's failure to use the patent and his refusal to allow others to use it on reasonable terms, sufficient to warrant refusal of injunctive relief.<sup>5</sup> "Unreasonable delay and the deceitful acts or silence of a patentee which induce an infringer to incur

<sup>1</sup> *Hicks v. Raincock*, 2 Dick 647, 1 Ames Eq. Jur. 626.

<sup>2</sup> *Wirt v. Hicks*, 46 Fed. Rep. 71, 1 Ames Eq. Jur. 626.

<sup>3</sup> *Bovill v. Hitchcock*, L. R. 3 Ch. App. 417; *Wyckoff v. Wagner Typewriter Co.*, 88 Fed. 515, per Lacombe, Cir. J. "When one remembers the careful study of intricate machinery, the manipulation of models, the reading and re-reading of technical evidence, the elaborate comparison of documents couched in language which certainly is not that of common speech, the close, hard thinking, sometimes prolonged for weeks, which, in the cases of a complicated patent, has to be gone through with, before a judge, however long his experience with such causes, is able to reach a conclusion on the issues of fact, which, even if erroneous, presents at least the appearance of a logical train of reasoning in its support, it seems safe to say, a priori, that the decision of such questions by an ordinary jury, imprisoned for a few hours, with naught but their vague recollections of the evidence, would be a lottery."

<sup>4</sup> *Cayuta Wheel & F. Co. v. Kennedy V. Mfg. Co.*, 127 Fed. 355, 1 Ames Eq. Jur. 638.

<sup>5</sup> *Campbell Mfg. Co. v. Manhattan Ry. Co.*, 49 Fed. 930, 1 Ames Eq. Jur. 639. A contrary rule would compel the patentee to sell his rights to an infringer at a valuation fixed by the court. But see *Smith v. Sands*, 24 Fed. 470 (where the plaintiff has a fixed license fee for the use of the invention, his legal remedy is adequate).

expenses or become liable to losses and damages which he would not otherwise have suffered, may sometimes justly induce a court of equity to stay his suit for an infringement or for an accounting before the time fixed by the analogous statute of limitations.<sup>6</sup> But delay, unaccompanied by such deceitful acts or silence of the patentee, and by such facts and circumstances as practically amount to an equitable estoppel, will warrant no such action.<sup>7]</sup>

[§ 1352b. **Patent Rights—Temporary Injunctions.**—The principles upon which preliminary injunctions issue are well settled. The purpose of the interlocutory writ is not to conclude the question of right but to protect against material injury pending the litigation. In patent cases, to warrant the writ, not only must the infringement be without reasonable doubt, but the right of the patentee must be clear.<sup>1</sup> Failing prior adjudication in favor of the validity of the patent, there must be shown such continued public acquiescence in the exclusive right asserted as raises a presumption of validity; a presumption not arising from the letters patent, unless accompanied by public acquiescence.<sup>2</sup> Where the validity of a patent has been sustained by prior adjudication, the only question open on motion for a preliminary injunction is the question of infringement, the consideration of other defenses being postponed until final hearing.<sup>3</sup> This rule is subject to exceptions, however. Where the new evidence is of such a character that if it had been introduced in the former case it probably would have led to a different conclusion, the equity court may go behind the record and consider all the facts.<sup>4</sup> Again, where the prior litigation was collusive, the judgment therein is not binding on the equity court.<sup>5</sup> The “balance of convenience” principle is often

<sup>6</sup> *Ide v. Thorlight*, 115 Fed. 137, 53 C. C. A. 341, 1 Ames Eq. Jur. 642 (no acquiescence); *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. 78. See ante, § 818.

<sup>7</sup> Since the injunction is in aid of a legal right; see ante, § 817; *Ide v. Thorlight* supra.

<sup>1</sup> Preliminary injunctions, therefore, were refused in *Plympton v. Malcolmson*, L. R. 20 Eq. 37, 1 Ames Eq. Jur. 632; *Standard Elevator Co. v. Crane El. Co.*, 56 Fed. 718, 6 C. C. A. 100, 1 Ames Eq. Jur. 663; *Parker v. Sears*, 1 Fish. Pat. Cas. 93, Fed. Cas. No. 10,748.

<sup>2</sup> *Standard El. Co. v. Crane El. Co.*, supra; *Stevens v. Keating*, 2 Ph. Ch. 333, 1 Ames Eq. Jur. 627 (public acquiescence). Or the preliminary injunction may be based on an interference suit between the same parties in the patent office, decided in plaintiff's favor: *Smith v. Halkyard*, 16 Fed. 414.

<sup>3</sup> *Edison Electric L. Co. v. Beacon, etc., Co.*, 54 Fed. 678, 1 Ames Eq. Jur. 630; *Duff Mfg. Co. v. Norton*, 92 Fed. 921; *Cary v. Lovell Mfg. Co.*, 24 Fed. 141.

<sup>4</sup> *Western El. Co. v. Keystone Tel. Co.*, 115 Fed. 809; *Lockwood v. Faber*, 27 Fed. 63.

<sup>5</sup> *Bowers Dredging Co. v. N. Y., etc., Co.*, 77 Fed. 980; *Wilson v. Consol. Store Service Co.*, 88 Fed. 286, 31 C. C. A. 533.

applied on a motion for a preliminary injunction; the motion being granted although the plaintiff's right is doubtful, upon the ground that the granting of it would injure the defendant less than the withholding of it would injure the plaintiff;<sup>6</sup> and conversely, the motion may be denied in some instances where the plaintiff's right is clear, when the injury to the defendant or the public by a preliminary injunction will far outweigh any advantage to the plaintiff therefrom.<sup>7</sup> In the latter case the defendant is usually ordered to give a bond to keep an account of sales. The plaintiff's right to preliminary relief may also be prejudiced by his delay in beginning suit.<sup>8</sup>]

[§ 1352c. **Patent Rights—Complete Relief.**—In accordance with the general principle that jurisdiction acquired for one purpose will be retained for the purpose of awarding complete relief, the court, having granted a permanent injunction against the infringement of a patent, will retain the bill to decree an account of profits,<sup>1</sup> and sometimes to award damages. "Profits are the gains or savings made by the wrong-doer by the invasion of the complainant's property-right in his patent. They are the direct pecuniary benefits received, and are capable of direct measurement."<sup>2</sup> Originally, damages could not be awarded in the equity suit; but this rule has been changed by statute, in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent.<sup>3</sup> A bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained. "Such relief is ordinarily incident to some other equity, the right to enforce which secures to the patentee his standing in court."<sup>4</sup> Where, however, during the pendency of the suit for injunction and accounting the right to an injunction fails by reason of the expiration of the patent, the suit is not determined, but the court will proceed to administer the other relief sought.<sup>5</sup> But where, in such a case, the bill is filed at so late

<sup>6</sup> *Irwin v. Dane*, 2 Biss. 442, Fed. Cas. No. 7,081.

<sup>7</sup> *Blake v. Greenwood Cemetery*, 14 Blatchf. 342, Fed. Cas. No. 1,497; *Southwestern Brush, etc., Co. v. La., etc., Co.*, 45 Fed. 893.

<sup>8</sup> *Bovill v. Crate*, L. R. 1 Eq. 388. But see *Stearns-Roger Co. v. Brown*, 114 Fed. 939 (C. C. A.).

<sup>1</sup> *Bragg v. City of Stockton*, 27 Fed. 509.

<sup>2</sup> *Head v. Porter*, 70 Fed. 498, 1 Ames Eq. Jur. 644.

<sup>3</sup> For the corresponding English statute, see *American Braided Wire Co. v. Thompson*, 44 Ch. Div. 274. The court has power to grant the further remedy of an order that the infringing articles be delivered up to be destroyed: see *American Bell Tel. Co. v. Kitsell*, 35 Fed. 521.

<sup>4</sup> *Root v. L. S. & M. S. R. Co.*, 105 U. S. 189, 26 L. ed. 975; *Lewis*, 13.

<sup>5</sup> *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. ed. 392; *Chinnock v. Paterson, etc., Co.*, 112 Fed. 531.

a date that, under the practice and rules of the court, not even a preliminary injunction can be obtained, it is held that the court may dismiss the suit.<sup>6</sup> If the right to injunctive relief fails by reason of the death of the defendant after the filing of the bill but before the decree, the case may be retained for an account of profits against the executors.<sup>7</sup>]

[§ 1352d. **Copyrights.**—The principles governing the issuance of injunctions against the infringement of copyrights are similar to those relating to patents.<sup>1</sup> It is not essential that actual damage be shown.<sup>2</sup> The plaintiff must come into equity with clean hands; if his publication is immoral or mischievous in its effects, his rights therein will not be protected by a court of equity.<sup>3</sup> As in patent cases, he may lose his right to equitable relief by acquiescence, if that has induced the infringer to incur expense, and amounts to an estoppel.<sup>4</sup> The right to a permanent injunction carries with it the right to an account of the defendant's profits.<sup>5</sup> To entitle the plaintiff to a preliminary injunction, his right and the defendant's infringement must, as a general rule, be free from serious doubt; but the court may, as in patent cases, consider the harm that would be done to the complainant by refusing a preliminary injunction, in comparison with the damage that might be sustained by the defendant in consequence of granting the same.<sup>6</sup>]

§ 1353. **Literary Property as Distinct from Copyright.**—In analogy to the protection of copyrights, a jurisdiction has become well established by modern decisions to restrain the invasion or piracy of literary property in the product of intellectual labor, which still remains in the form of manuscript, or which, if printed, has not been published, and over which, as a consequence, no statutory

<sup>6</sup> *Bragg Mfg. Co. v. City of Hartford*, 56 Fed. 292.

<sup>7</sup> *Head v. Porter*, 70 Fed. 498, 1 Ames Eq. Jur. 644.

<sup>1</sup> Among the many interesting cases defining what constitutes an infringement or piracy, see *Daly v. Palmer*, 6 Blatchf. 256, Fed. Cas. No. 3,552 (dramatic composition); *Kelly v. Morris*, L. R. 1 Eq. 697 (city directory); *Edward Thompson Co. v. American Law Book Co.*, 122 Fed. 923, 59 C. C. A. 148 (what is fair use of an existing compilation).

<sup>2</sup> *Reed v. Holliday*, 19 Fed. 325.

<sup>3</sup> *Martinetti v. Maguire*, 1 Deady 216, (immoral play); *Egbert v. Greenberg*, 100 Fed. 447 ("official form chart of races" not necessarily an immoral publication).

<sup>4</sup> *Hogg v. Scott*, L. R. 18 Eq. 444, 1 Ames Eq. Jur. 655.

<sup>5</sup> *Baily v. Taylor*, 1 Russ. & M. 73, 1 Ames Eq. Jur. 654.

<sup>6</sup> Preliminary injunctions were granted in *Bell v. Walker*, 1 Bro. C. C. 451, 1 Ames Eq. Jur. 650; *Little v. Gould*, 2 Blatchf. 165, Fed. Cas. No. 8,394; refused, in *McNeill v. Williams*, 11 Jur. 345, 1 Ames Eq. Jur. 652; *West Publishing Co. v. Lawyers' Co-op. Pub. Co.*, 53 Fed. 265.

copyright has been obtained; and to restrain an invasion of the similar right which an artist has in his pictures, and other original works of his creative art. This jurisdiction belongs to the state courts. It will be exercised to restrain the unauthorized publication of unpublished manuscript or printed matter in violation of the rights of the person entitled thereto;<sup>1</sup> the unauthorized publication, performance, representation on the stage, or other similar uses of dramatic compositions which have not been "published" by the author or proprietor;<sup>2</sup> the unauthorized publication, delivery, or other like use of lectures which have been delivered by the author, but not otherwise published;<sup>3</sup> the unauthorized making, sale, or exhibition of copies of paintings, engravings, and other works of art, even though the originals may have been publicly exhibited;<sup>4</sup> and the unauthorized publication of private letters, whether on literary topics, or on matters of private business, friendship, or family.<sup>5</sup>

§ 1354. **Trade-marks.**—Somewhat akin to the protection of patent and copy rights is that which courts of equity give, by means of the injunction, to the peculiar species of right arising from the adoption and use of "trade-marks." Although some judicial opinions and some recent statutes speak of "property" in trade-marks, or call the right to their exclusive use a kind of property, yet in strictness the remedy does not depend upon any true *property* acquired in these symbols and names, but upon the broad principle that a court of equity will not permit fraud to be practiced upon the public nor upon private individuals.<sup>1</sup> It is well settled

*Prevention  
of fraud*

<sup>1</sup> *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480, Lewis 64 (unauthorized printing of an unpublished play).

<sup>2</sup> *Palmer v. De Witt*, supra; *Thomas v. Lennon*, 14 Fed. 849 (performance of unpublished music); *Tompkins v. Halleck* 133 Mass. 32, 43 Am. Rep. 480, Lewis 69.

<sup>3</sup> *Abernethy v. Hutchinson*, 1 Hall & T. 28, 40; 3 L. J. Ch. 209; *Nichols v. Pitman*, 26 Ch. D. 374.

<sup>4</sup> *Prince Albert v. Strange*, 1 Macn. & G. 25; 1 Hall & T. 1; 2 De Gex & S. 652; and see *Pollard v. Photographic Co.*, L. R. 40 Ch. D. 345, 1 Keener 76 (plaintiff was photographed by defendant, who afterwards made for his own use, exhibited and sold likenesses taken from the negative. This was enjoined, chiefly on the ground that "the bargain between the customer and photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only").

<sup>5</sup> The restraint may be at the suit of the writer against the person written to, or his assigns, or a stranger, or at the suit of the person written to, or his personal representatives against a stranger: *Gee v. Pritchard*, 2 Swanst. 402, 1 Scott 149, 1 Keener 59, Lewis 44; *Rice v. Williams*, 32 Fed. 437 (contract of recipient to sell letters is void).

<sup>1</sup> The ground of the remedy was stated in *Farina v. Silverlock*, 6 De Gex

by modern decisions, that when a trade-mark has been duly acquired by a manufacturer or dealer, an injunction will be granted at his suit to restrain other persons from using it upon their goods, or from using such imitations of it as will tend to mislead and deceive the public.<sup>2</sup>

[§ 1354a. **Exclusive Franchises.**—An injunction is the appropriate remedy to protect a party in the enjoyment of an exclusive franchise against continuous encroachments. “Such continuous en-

M. & G. 214, 217: “This right cannot properly be described as a copyright; it is, in fact, a right which can be said to exist only, and can be tested only, by its violation; it is the right which any person designating his wares or commodities by a particular trademark, as it is called, has to prevent others from selling wares which are not his, marked with that trade-mark, in order to mislead the public, and so incidentally to injure the person who is owner of the trade-mark.”

<sup>1</sup> See *National Biscuit Co. v. Baker*, 95 Fed. 135; *Vacuum Oil Co. v. Climax Refining Co.*, 120 Fed. 254 (word descriptive of quality not a valid trade-mark); *Ford v. Foster*, L. R. 7 Ch. App. 611, Lewis 144 (what does not amount to an acquiescence in the use of the trademark by other persons or abandonment of it to the public). The protection of equity is not confined to technical trademarks. Thus, where one adopts a *trade name* so similar to that of another that confusion is sure to result and the public will thereby be deceived, an injunction will often issue at the suit of the party who first adopted the name: see *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769, 39 N. E. 490, 27 L. R. A. 42 (a person may lose the right to use his own name in business by the assignment of it with the good will of the business); *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; *Royal Baking Powder Co. v. Royal*, 122 Fed. 337, 58 C. C. A. 499 (a person may be restrained from intentionally using his own name in such a way as to deceive the public, and required to use every means reasonably possible to distinguish his goods from those of his competitor who was in the business before him); *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169 (a person's name may, by his tacit consent, become the generic and descriptive name of the article manufactured by him and thus become dedicated to the public use when the patent on the article expires; but another manufacturer, then appropriating the name as descriptive of his article must not so use it as to deceive the public); *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, 50 Am. St. Rep. 57, 42 Pac. 142, 30 L. R. A. 182, H. & B. 783 (plaintiff owned “Mechanics’ Store”; defendant established “Mechanical Store” adjoining, imitating plaintiff's architecture, etc., so as to deceive the public). And in general, imitation of the color, form or style of the packages, labels, etc., used by the plaintiff, in such a way as to deceive the public and injure the plaintiff's business, will be enjoined: *Denison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. 651, Lewis 171; but a mere deception practiced upon the public, if there is no attempt to pass off the goods as those of the plaintiff, is, it seems, not a wrong of which the plaintiff can complain: *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281 (C. C. A.) In all cases of trade-marks or of unfair competition it is essential to the plaintiff's right to equitable relief that he should not in the trade-mark, name, or advertisement be guilty of material false statements in connection with the article: *Pidding v. How*, 8 Sim. 497, Lewis 125; *Clinton E. Worden & Co. v. California Fig Syrup Co.*, 187 U. S. 516, 23 Sup. Ct. 161, 47 L. ed. 282; see ante, § 934.

croachments constitute a private nuisance which courts of equity will abate by injunction. The jurisdiction rests on the firm and satisfactory ground of its necessity to avoid a ruinous multiplicity of suits, and to give adequate protection to the plaintiff's property in his franchise."<sup>1</sup> To be entitled to relief, a plaintiff need show only that he is entitled to a franchise and that there is continuous interference therewith by the defendant.<sup>2</sup> It is not necessary that the plaintiff first establish his right at law.<sup>3</sup>]

§ 1355. **Good-will.**—Another intangible kind of property which will be protected from invasion by injunction is "good-will." The peculiar right, or rather expectancy, called "good-will," assumes that a certain business has been established and carried on at some specific place. It consists in the probability, based upon the habits of men, that the persons who have been accustomed to deal with that business at that specific place, as well as others, will continue to come to such place and deal in the future. When such a business is transferred, the good-will may be assigned with it.<sup>1</sup> If a good-will is thus assigned with a business, interference with it by the assignor will generally be restrained by injunction.<sup>2</sup>

§ 1356. **Trespasses.**—At an early day the court of chancery refused to interfere and restrain any trespasses. Lord Thurlow broke through this rule, and began to use the preventive relief against such wrongs. He was followed by Lord Eldon;<sup>1</sup> and the jurisdic-

<sup>1</sup> *Walker v. Armstrong*, 2 Kan. 198; *Boston & Lowell R. Corp. v. Salem & Lowell R. Co.*, 2 Gray, 1, 27.

<sup>2</sup> The exclusive franchises which are protected by injunction are many. In the following cases relief was granted: *For the protection of a ferry franchise.*—*Walker v. Armstrong*, 2 Kan. 198. *For the protection of a toll bridge.*—*The Binghamton Bridge*, 3 Wall. 51, 18 L. ed. 137. *For the protection of a turnpike.*—*Croton Turnpike Co. v. Ryder*, 1 Johns. Ch. 611; *Ames Eq. Jur.* 664, 1 Scott 168. *For the protection of an exclusive railroad franchise.*—*Boston & Lowell R. Corp. v. Salem & Lowell R. Co.*, 2 Gray, 1.

<sup>3</sup> For early English cases contra, see *Whitechurch v. Hide*, 2 Atk. 391; *Ames, Cas. in Eq. Jur.* 661; *Anonymous*, 2 Ves. 414, *Ames* 663, 1 Scott, 133.

<sup>1</sup> Independently of statute, a good-will by itself without the business on which it depends, cannot be assigned.

<sup>2</sup> When a person who had carried on a business at a certain locality transfers the business with its good-will, if he should set up the same business again so near the locality as to draw off the customers from the old place, this would be an infringement of the good-will. The legal remedy would be inadequate, for it would always be very difficult, if not impossible, to estimate the pecuniary damages upon any certain basis. The gist of the injury is undoubtedly the breach of an implied contract arising from the transfer; and often there is an express stipulation: See ante, under § 1344, cases concerning contracts in restraint of trade.

<sup>3</sup> The development and growth of the jurisdiction in England is illustrated by the following cases: *Coulson v. White* (1743), 3 Atk. 21, 1 Scott 679; *Mogg v. Mogg* (1786), *Dick.* 670, 1 Scott 679, 1 *Ames Eq. Jur.* 186, 1 *Keener* 532;

tion is now firmly established in its principles, although there is no little disagreement among the courts—and especially the American courts—in applying these principles.

§ 1357. **General Doctrine—Cases in Which Trespass may be Enjoined.**—If the trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere.<sup>1</sup> The *principle* determining the jurisdiction embraces two classes of cases, and may be correctly formulated as follows: If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable,—that is, if the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced, by means of compensation in money,—then the wrong will be prevented or stopped by injunction. 2. If the trespass is *continuous* in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act *if it stood alone*, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions. In both cases the ultimate criterion is the inadequacy of the legal remedy. All these cases, English and American, have professed to adopt the inadequacy of legal remedies as the test and limit of the injunctive jurisdiction; but in applying this criterion, the modern decisions, with some exceptions among the American authorities, have certainly held the injury to be irreparable and the legal remedy inadequate in many instances and under many circumstances where Chancellor Kent would probably have refused

Hamilton v. Worsfold (1786), 10 Ves. 291, note, 1 Scott 680; Mortimer v. Cottrell (1789), 2 Cox 205, 1 Scott 681; Pillsworth v. Hopton (1801), 6 Ves. 51, 1 Scott 681, 1 Ames Eq. Jur. 488, 1 Keener 543; Mitchell v. Dors (1801), 6 Ves. 147, 1 Scott 682, 1 Ames Eq. Jur. 488, 1 Keener 543; Hanson v. Gardiner (1802), 7 Ves. 305, 1 Keener 544; Smith v. Collyer (1803), 8 Ves. 89, 1 Scott 683, 1 Ames Eq. Jur. 489, 1 Keener, 547; Courthope v. Mapplesden (1804), 10 Ves. 290, 1 Scott 684, 1 Ames Eq. Jur. 490, 1 Keener 548; Crockford v. Alexander (1808), 15 Ves. 138, 1 Scott 685, 1 Ames Eq. Jur. 221; Kinder v. Jones (1810), 17 Ves. 110, 1 Ames Eq. Jur. 490, 1 Keener 550; Thomas v. Oakley (1811), 18 Ves. 184, 1 Scott 685, 1 Ames Eq. Jur. 491, 1 Keener 551; Deere v. Guest (1836), 1 Mylne & C. 516, 1 Ames Eq. Jur. 492, 1 Keener 564; Haigh v. Jaggard (1845), 2 Coll. 231, 1 Ames Eq. Jur. 494, 1 Keener 569; Davenport v. Davenport (1849), 7 Hare 217, 1 Ames Eq. Jur. 496, 1 Keener 574; Neale v. Cripps (1858), 4 Kay & J. 472, 1 Ames Eq. Jur. 498, 1 Keener 602; Lowndes v. Bettle (1864) 33 L. J. Ch. 451, 10 Jur. N. S. 226, 3 New. R. 409, 1 Scott 647, 1 Ames Eq. Jur. 499, 1 Keener 604; Goodson v. Richardson (1874), L. R. 9 Ch. 221, 1 Ames Eq. Jur. 502, 1 Keener 615.

<sup>1</sup> See Gates v. Johnstown Lumber Co., 172 Mass. 495, 52 N. E. 736, 1 Ames Eq. Jur. 520.

to interfere. It is certain that many trespasses are now enjoined which, if committed, would fall far short of *destroying* the property, or of rendering its restoration to its original condition impossible. The injunction is 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.<sup>2</sup> While the same formula is employed

<sup>2</sup>The legal remedy is not adequate simply because a recovery of pecuniary damages is possible. It is only adequate when the injured party can, *by one action at law*, recover damages which constitute a complete and certain relief for the whole wrong,—a relief virtually as efficient as that given by a court of equity. This conclusion is sustained by the consensus of modern decisions of the highest authority; although it cannot be claimed that the cases are unanimous in its acceptance. The principle, so far as it applies to the first class of trespasses—those *essentially* destructive—was stated by Chancellor Kent in two leading cases, which may be regarded as the counterparts of each other: *Livingston v. Livingston*, 6 Johns. Ch. 497, 499; 10 Am. Dec. 353, 1 Scott 689, 1 Keener 560; and *Jerome v. Ross*, 7 Johns. Ch. 315, 333; 11 Am. Dec. 484, 1 Scott 692. In *Livingston v. Livingston*, he granted an injunction. In *Jerome v. Ross*, *supra*, he refused to enjoin canal commissioners, acting under color of a state statute, from quarrying a ledge of rocks on complainant's land, it not appearing that the stone had any market value, or that its removal would injure the freehold. He cited *Stevens v. Beekman*, 1 John. Ch. 318, 1 Scott 688, 1 Keener 553. Whatever may be thought of the actual decision in *Jerome v. Ross*, it cannot be denied that the tendency of Chancellor Kent's opinion in narrowing the jurisdiction to the comparatively few trespasses of an extraordinary and specially aggravated nature is opposed to the modern decisions of the highest ability and authority.

For definitions of "irreparable" injury, substantially in accord with the text, see *Wilson v. Mineral Point*, 39 Wis. 160, H. & B. 766, Shep. 318; *Gause v. Perkins*, 3 Jones Eq. (56 N. C.) 177, 69 Am. Dec. 728, 730. An injury which destroys the substance of the estate is usually treated as per se "irreparable," without regard to the amount of damage; *Richards v. Dower*, 64 Cal. 62, 28 Pac. 113, 1 Ames Eq. Jur. 517 (running a tunnel under the land); *Walker v. Emerson*, 89 Cal. 456, 26 Pac. 968, 1 Keener 644 (digging a ditch on the land); for cases holding contra, with *Jerome v. Ross*, see 1 Pom. Eq. Rem. § 495, note 9. Thus, extracting ores from a mine is an irreparable injury: *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. ed. 1116, 1 Ames Eq. Jur. 507, 1 Scott 704, 1 Keener, 634; or the cutting of timber: *Lownds v. Bettle*, 3 New R. 409, 83 D. C. Ch. 451, 10 Jur. N. S. 226, 1 Ames Eq. Jur. 499, 1 Scott 697, 1 Keener 604; *Stanford v. Hurlestone*, L. R. 9 Ch. App. 116, 1 Keener 618; *King v. Stuart*, 84 Fed. 546, 1 Scott 712; *Griffith v. Hilliard*, 64 Vt. 248, 25 Atl. 427, 1 Keener 636, H. & B. 762, Shep. 316; *Musch v. Burkhart*, 83 Iowa 301, 32 Am. St. Rep. 305, 48 N. W. 1025, 12 L. R. A. 484; contra, in a few states, *Gause v. Perkins*, 3 Jones Eq. (56 N. C.) 177, 69 Am. Dec. 728; 1 Pom. Eq. Rem. § 495, note 12. Further examples: *Echelkamp v. Schrader*, 45 Mo. 505, 1 Ames Eq. Jur. 511 (removal of building); *Strawberry Valley Cattle Co. v. Chipman*, 13 Utah 454, 45 Pac. 348, 1 Scott 712 (grazing sheep on plaintiff's land); *Beatty v. Kurtz*, 2 Pet. 566, 7 L. ed. 521 (interference with graves). Examples of continuing or repeated trespasses, without "irreparable" injury, enjoined: *Goodson v. Richardson*, L. R. 9 Ch. 221, 1 Ames Eq. Jur. 502,

by the courts of equity in defining their jurisdiction, the jurisdiction itself has practically been enlarged; judges have been brought to see and to acknowledge—contrary to the opinion held by Chancellor Kent—that the common-law theory of not *interfering* with persons until they shall have actually committed a wrong is fundamentally erroneous, and that a remedy which *prevents* a threatened

1 Keener 615 (laying pipes through the land); *Musselman v. Marquis*, 1 Bush (Ky.) 403, 89 Am. Dec. 637, 1 Keener 193 (repeatedly throwing down and removing fences); *Warren Mills v. New Orleans Seed Co.*, 65 Miss. 391, 7 Am. St. Rep. 671, 4 South. 298 (repeated trespasses to personal property). The insolvency of the defendant, and his consequent inability to respond in damages, is often a material part of the reason for granting an injunction: *Hodgson v. Duce*, 2 Jur. N. S. 1014, 1 Ames Eq. Jur. 523, and note, 1 Pom. Eq. Rem. § 497. As to injunction in eminent domain cases, see ante, § 1345, note.

Mandatory injunctions, ordering the removal of buildings or obstructions willfully placed upon the plaintiff's land, are freely granted; *London, etc., Ry. Co. v. Lancashire, etc., Ry. Co.*, L. R. 4 Eq. 174, 1 Ames Eq. Jur. 525; *Wheelock v. Noonan*, 108 N. Y. 179, 2 Am. St. Rep. 405, 15 N. E. 67, 1 Ames Eq. Jur. 527, 1 Scott 94, 1 Keener 194, H. & B. 764 (injunction not refused on the ground that the plaintiff might himself remove the obstruction); *Baron v. Korn*, 127 N. Y. 224, 27 N. E. 804, 1 Keener 640; but in a few instances such injunction has been refused "where, by an innocent mistake, erections have been placed a little upon the plaintiff's land, and the damage caused to the defendant by a removal of them would be greatly disproportionate to the injury of which the plaintiff complains"; *Lynch v. Union Instit.*, 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842, 1 Keener 647; *Hunter v. Carroll*, 64 N. H. 572, 15 Atl. 17, 1 Ames Eq. Jur. 529; see 1 Pom. Eq. Rem. §§ 507, 508.

*Title in dispute.*—If the plaintiff's title is contested by the defendant, it is evident that a permanent injunction should not be granted until the title is established in the plaintiff's favor: *Echelkamp v. Schrader*, 45 Mo. 505, 1 Ames Eq. Jur. 511. The court of equity may at its discretion (by the weight of authority) determine the title itself; but the more usual course, from reasons of policy rather than of jurisdiction, is to send the question of title to be tried at law: see ante, § 252; 1 Pom. Eq. Rem. § 506; *Griffith v. Hilliard*, 64 Vt. 643, 25 Atl. 427, H. & B. 762, Shep. 316, 1 Keener 636. Pending the determination of the title, a temporary injunction may be granted to the plaintiff if the injury is "irreparable" in its nature; *Erhardt v. Boaro*, supra; *Shubrick v. Guerard*, 2 Desaus. (S. C.) 616, 1 Scott 687; *Duvall v. Waters*, 1 Bland Ch. (Md.) 569, 18 Am. Dec. 350, 361; *Snyder v. Hopkins*, 31 Kan. 557, 3 Pac. 367, 1 Ames Eq. Jur. 509; but not, it would seem, where the sole ground on which the equitable jurisdiction is invoked is that the trespass is continuing or repeated: *New York, etc., Establishment v. Fitch*, 1 Paige, 97, 1 Keener 502. The granting or withholding of a temporary injunction is affected by much the same considerations as to "balance of injury," laches, etc., as in cases of nuisance: see ante, § 1350a. By some decisions a stronger case of injury is required to warrant a temporary injunction where the defendant, claiming title, is in possession: *Lowndes v. Bettle*, supra; see 1 Pom. Eq. Rem. § 503, and note 57. A defendant in possession will never, while the title is undetermined, be enjoined from the mere ordinary and natural use of the premises in a manner not destructive of the substance; *Snyder v. Hopkins*, 31 Kan. 557, 3 Pac. 367, 1 Ames Eq. Jur. 509.

wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess. The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed. . . .

§ 1358. **Slander of Title—Libels—Wrongful Use of Name.**—Partly by analogy with the restraint of trespasses, and partly by analogy with the restraint of that fraud upon the public and upon the proprietor which is involved in the use of counterfeited trade-marks, the English courts have, by recent decisions, exercised the injunctive jurisdiction to restrain injurious publications concerning property which operate as a slander of the owner's title, and libelous publications which are injurious to the plaintiff's business, trade, or profession, and the wrongful use of a name by which the public would be misled, and the plaintiff injured in his business.<sup>1</sup> . . . The American courts seem, thus far, unwilling to follow the example of the recent English decisions, and they decline to extend the jurisdiction so as to restrain such torts as libels on business, slanders of title, and the like.<sup>2</sup>

<sup>1</sup>This extension of the jurisdiction resulted from a general provision of the Judicature act that "an injunction may be granted . . . by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made": 36 & 37 Vict. Ch. 66, sec. 25, subs. 8. Such publications may be restrained by preliminary as well as by final injunction. The jurisdiction is exercised with great caution, and only where the facts are clearly established, and the untruth of the publication is satisfactorily shown. The following are the most important cases: *Quartz Hill, etc., Co. v. Beall*, L. R. 20 Ch. Div. 501, 507; *Lewis* 386; *Loog v. Bean*, L. R. 26 Ch. D. 306, *Lewis* 388; *Collard v. Marshall* (1892), 1 Ch. 571, *Lewis* 392. English decisions prior to the Judicature act had denied the jurisdiction to restrain a publication on the ground that it was libellous: *Prudential Assur. Co. v. Knott* (1874), 10 Ch. 142, 1 *Keener* 53, *Lewis* 314.

<sup>2</sup>*Brandreth v. Lance*, 8 *Paige* 24, 34 *Am. Dec.* 368, 1 *Keener* 47, 1 *Scott* 228, *Lewis* 303; *Boston Diatite Co. v. Florence Mfg. Co.*, 114 *Mass.* 69, 10 *Am. Rep.* 310, 1 *Keener* 51, *Shep.* 303, *Lewis* 320; *Life Assoc. of America v. Boogher*, 3 *Mo. App.* 173, *Lewis* 323. But while a publication will not be restrained merely because it is libellous, yet where there is other legitimate ground for injunction, the fact that the publication is libellous will not prevent the injunction from being issued. A crime and a libel, in this respect, stand upon the same footing. See *Emaek v. Kane*, 34 *Fed.* 46, *Lewis* 326 (defendant enjoined from sending circulars to plaintiff's customers, not in good faith but maliciously, threatening suits for infringement by plaintiff of defendant's patent); *Casey v. Typographical Union*, 45 *Fed.* 135, 12 *L. R. A.* 193, *Lewis* 241 (boycotting circular). See 2 *Pom. Eq. Rem.* § 630, and cases cited.

*The "Right of Privacy."*—Within recent years an attempt has been made to obtain recognition for a so-called right of privacy. It has been maintained,

## SECTION III.

## MANDATORY INJUNCTIONS.

## ANALYSIS.

## § 1359. Nature and object; when granted.

§ 1359. **Nature and Object—When Granted.**—This term, in strictness, is confined to interlocutory or preliminary injunctions. Where, on the final hearing in a case of nuisance, or interference

for example, that an individual has a right not to have his portrait or representation published in any form, without his consent. As yet, this doctrine has not been generally recognized; although a few cases now sustain it, and it was repudiated by a bare majority only of the New York court of appeals in *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 89 Am. St. Rep. 828, 64 N. E. 442, 59 L. R. A. 478, 1 Scott 178, Lewis 354. See, also, *Schuyler v. Curtis*, 147 N. Y. 434, 49 Am. St. Rep. 671, 42 N. E. 22, 31 L. R. A. 286, Lewis 344 (reversing 27 Abb. N. C. 387, 15 N. Y. Supp. 787, 64 Hun, 594, 19 N. Y. Supp. 264, 1 Keener 93); *Corliss v. E. W. Walker Co.*, 57 Fed. 434, 64 Fed. 280, Lewis 337. In a very recent Georgia case, the right was clearly recognized, by a unanimous court, in a suit at law for damages. The publication of the plaintiff's portrait was the wrong: *Pavesich v. New England Life Ins. Co. (Ga.)*, 60 S. E. 68, 1 Scott 194. The cases must be carefully distinguished from those in which a property right is involved, as where a photographer in breach of trust publishes a likeness, or where a party publishes private letters; see ante, § 1353.

*Injunction in cases of strikes, boycotts, etc.*—These cases, so numerous in recent years, more frequently involve questions (often difficult and not fully settled) in the law of torts, than questions as to the propriety of the equitable remedy of injunction. It is well settled that actual or threatened violence by striking workmen to the plaintiff's employees or to persons seeking employment from him is a substantial injury to his business which will be restrained by injunction: *Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551, 1 Scott 763, Lewis 204; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307, 1 Scott 766, 1 Keener 771, H. & B. 770; *Murdock v. Walker*, 152 Pa. St. 595, 34 Am. St. Rep. 678, 25 Atl. 492, Lewis 247; *Vegalahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722, H. & B. 773; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230, 1 Scott 768. It is no objection to the exercise of the jurisdiction that the acts sought to be enjoined are crimes: see ante, § 1347, note; *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106, H. & B. 779, Lewis 276. As to interference with the employees of a receiver, see ante, § 1336, note; *United States v. Kane*, 23 Fed. 748, Lewis 212. It is generally held that no injunction will lie to restrain persons inducing others by entreaty and persuasion, without intimidation, to leave the service of the plaintiff or not enter into his service: *Reynolds v. Everett*, 144 N. Y. 189, 39 N. E. 72, 26 L. R. A. 591, Lewis 270. The jurisdiction in strike cases does not extend to preventing workman from "striking" or leaving their employment in a body by concerted action; since the effect of such a decree would be to enforce compulsory service: *Arthur v. Oakes*, 63 Fed. 310, Lewis 253.

with easements, or continued trespass analogous to nuisance, the relief is granted compelling the defendant to remove his obstructions or erections, and to restore the plaintiff to his original condition, and thereby to end the wrong, the remedy is in fact an ordinary decree for an abatement, and is in no proper sense an injunction of any kind. But in these and similar cases the *preliminary* injunction, while purporting simply to restrain the wrong, and while negative in its terms, may be so framed that it restrains the defendant from permitting his previous wrongful act to operate, and therefore virtually compels him to undo it by removing the obstructions or erections, and by restoring the plaintiff to his former condition. Such an injunction is termed mandatory, and resembles in its effect the restorative interdict of the Roman law. It is used where the injury is immediate, and pressing, and irreparable, and clearly established by the proofs, and not acquiesced in by the plaintiff, since an order directly compelling an abatement of the nuisance, or a removal of the obstructions, cannot be made upon interlocutory motion.<sup>1</sup> The rule is fully established, at least by the English de-

"The boycott is economic pressure brought to bear on those who deal, or are about to deal, in a business way with a third person to prevent them from dealing with such third person . . . —The method of persuasion used is always the threat of business harm, usually couched in the formula: If you deal with A, we won't deal with you": W. D. Lewis, in 53 Am. Law Reg. 466. A boycott of a trader by laborers has nearly always been held illegal and a proper subject for injunction: *Casey v. Cincinnati Typographical Union*, 45 Fed. 135, 12 L. R. A. 193, Lewis 241; *Gray v. Building Trades Council*, 91 Minn. 171, 103 Am. St. Rep. 477, 97 N. W. 663, 63 L. R. A. 753, Lewis 294 (but a mere notification that the trader is "unfair," without threat or intimidation, should not be enjoined). Whether a boycott directed against members of a rival labor union, to prevent members of the latter from obtaining or retaining employment may be enjoined at the suit of the latter, is a question on which the cases are sharply in conflict: compare *Erdman v. Mitchell*, 207 Pa. St. 79, 99 Am. St. Rep. 783, 56 Atl. 327, Lewis 290 (injunction granted) with *National Protective Assn. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, 58 L. R. A. 135.

An agreement or conspiracy among employers to refuse employment to certain laborers, generally carried into effect by a "blacklist" of the excluded laborers, circulated among the parties to the agreement, is in some respects the converse of the labor strike, and seems to be treated with leniency or approval by the courts: *Worthington v. Waring*, 157 Mass. 421, 34 Am. St. Rep. 294, 32 N. E. 744, 20 L. R. A. 342, Lewis 250 (no injunction).

"The primary rights which are violated by strikes and boycotts, and the remedial rights which thereby arise, are far from a condition of complete development or accurate definition. The law of this whole subject is to a large extent unsettled, and involved in dispute and difference of opinion among judges and text-writers": *Atkins v. W. & A. Fletcher Co.*, 65 N. J. Eq. 658, 55 Atl. 1074, Lewis 281, by Stevenson, V. C. (an instructive opinion).

<sup>1</sup> Preliminary mandatory injunctions have undoubtedly been granted more freely by the English courts than by the American. Indeed, it has been

cisions, and is not controverted by American authority, that in such cases, where the facts are clearly established and the injury is real, and the plaintiff acted promptly upon his acquiring knowledge of the defendant's proceeding, a preliminary mandatory injunction may be granted, although the act complained of was fully completed before the suit was commenced. It should be observed, however, that no other equitable remedy is more liable to be defeated by acquiescence, or by delay on the plaintiff's part from which acquiescence may be inferred. The cases require of the plaintiff a promptness in objecting and in taking steps to enforce his objection, upon receiving notice of the defendant's structures or erections which are sought to be restrained, if the circumstances are such that the defendant would be unnecessarily prejudiced by the plaintiff's delay.<sup>2</sup>

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#### SECTION IV.

##### TO RESTRAIN ACTIONS OR JUDGMENTS AT LAW.

###### ANALYSIS.

- § 1360. Origin of the jurisdiction.
- § 1361. When the jurisdiction is not exercised: General doctrine.
- § 1362. When the jurisdiction may be exercised: First class; exclusive equitable interests or rights involved.

said in some American decisions that a mandatory *interlocutory* injunction would never be granted. This doctrine is not only opposed to the overwhelming weight of authority, but is contrary to the principle which regulates the administration of preventive relief, and is manifestly absurd.

In Robinson v. Lord Byron, 1 Brown Ch. 588, 1 Ames Eq. Jur. 566, 1 Keener 836, Lord Eldon granted a preliminary injunction restraining defendant "from using and maintaining certain dams, gates, etc., so as to prevent water from flowing to plaintiff's mill as it had done." This was done for the express purpose of compelling defendant to remove the dams, gates, etc., which he had constructed. In Lane v. Newdigate, 10 Ves. 192, 1 Ames Eq. Jur. 74, 2 Scott 73, 2 Keener 139, Lord Eldon granted a preliminary injunction restraining defendant "from impeding plaintiff from navigating [a certain canal] by continuing to keep the canal banks and works out of repair, by diverting the water, or by continuing the removal of the stop-gate." Lord Eldon said this would have the effect of causing defendant to restore the stop-gate and repair the banks; and he avowedly granted the injunction for that express object. These two cases are among the earliest, if not the very earliest, instances of preliminary injunctions intentionally and expressly mandatory in their operation. The following cases will furnish illustrations, and will also show the limitations placed upon their use: Rogers Locomotive, etc., Works v. Erie Ry. Co. 20 N. J. Eq. 379, H. & B. 734; Longwood Val. R. Co. v. Baker, 27 N. J. Eq. 166, 1 Keener 847; Herbert v. Pennsylvania R. Co., 43 N. J. Eq. 23, 10 Atl. 872, 1 Keener 860; Baily v. Schnitzius, 45 N. J. Eq. 178, 16 Atl. 620, 1 Keener 863. See also ante, §§ 1348b, 1350b, 1357, nota.

<sup>2</sup> See ante, § 817.

- § 1363. The same: Second class; legal remedies inadequate.
- § 1364. The same: Third class; fraud, mistake, or accident in the trial at law.
- § 1365. Jurisdiction to grant new trials at law in the United States. Equitable relief against executions.

§ 1360. **Origin of the Jurisdiction.**—The use of injunctions to stay actions at law was almost coeval with the establishment of the chancery jurisdiction. Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and enforced its own jurisdiction.<sup>1</sup> It is no exaggeration to say that, during its formative periods, the equitable jurisdiction was built up through the instrumentality of the injunction restraining the prosecution of legal actions, where the defendants sought the aid of chancery, which alone could take cognizance of the equities that would defeat a recovery at law against them. This was not accomplished, however, without a long and severe opposition from the common-law judges, which continued until the reign of James I.<sup>2</sup> The jurisdiction then firmly established by judicial authority has never since been questioned.<sup>3</sup> The reasons urged by the common-law judges were frivolous. The injunction is not addressed to, nor does it operate upon, the courts of law; instead of denying or interfering with, it virtually admits and assumes, their jurisdiction. It is addressed to the litigant parties, and prohibits them from resorting to the legal jurisdiction, because their controversies, depending upon equitable principles, or involving equitable features, can only be fully and finally determined by a tribunal having the equitable jurisdiction. Injunction is the remedy which, above all others, necessarily operates in personam.

§ 1361. **When the Jurisdiction is not Exercised—General Doctrine.**—Where a court of law can do as full justice to the parties and to the matter in dispute as can be done in equity, a court of equity will not stay proceedings at law.<sup>1</sup> Equity will not restrain a legal action or judgment where the controversy would be decided by the court of equity upon a ground equally available at law, unless the party invoking the aid of equity can show some special *equitable* feature or ground of relief; and in the case as-

<sup>1</sup> See Spence's Eq. Jur. 674.

<sup>2</sup> For a full account of this memorable contest, and its settlement under James I., see 1 Lord Campbell's Lives of the Chancellors, 235; 1 Spence's Eq. Jur. 675; 1 Hallam's Const. Hist. 472.

<sup>3</sup> Ayloff v. Duke, 2 Freem. Ch. 152 (A. D. 1655); Hawkshaw v. Parkins, 2 Swanst. 539, 548; Franklyn v. Thomas, 3 Mer. 225, 234.

<sup>1</sup> Southampton Dock Co. v. Southampton, etc., Board, L. R. 11 Eq. 254.

sumed, this special feature or ground must necessarily be something connected with the mode of trying and deciding the legal action, and not with the cause of action or the defense themselves.<sup>2</sup> It is not such a special equitable ground of interference that the party has, by his own act or omission, failed to effectually avail himself of a valid defense at law, nor that the court of law has decided a question of law or of fact erroneously.<sup>3</sup> The principle is well established, and is universal in its application, that when a cause belongs to the jurisdiction of the law courts, equity will never interfere to restrain the prosecution of the action, nor to stay proceedings on the judgment or execution, *upon any mere legal grounds*, although it may be demonstrated that the complainant in equity (generally the defendant at law) had a valid legal defense,

<sup>2</sup>Because it is assumed that the ground of decision is equally available at law and in equity, and therefore the special equitable feature must be something dehors the very issues and merits of the controversy: See *Harrison v. Nettleship* 2 Mylne & K. 423.

<sup>3</sup>*Simpson v. Lord Howden*, 3 Mylne & C. 97, 108, 2 Ames Eq. Jur. 124, 1 Keener 323; *Bateman v. Willoe*, 1 Schoales & L. 201, 204, 206. In the last-named case Lord Redesdale stated this rule in language which has ever since been regarded as a correct exposition of the principle: "It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere. Because if a matter has already been investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. Rules are established, some by the legislature, some by the courts themselves, for the purpose of putting an end to litigation, and it is more important that an end should be put to litigation than that justice should be done in every case. . . . The inattention of parties in a court of law can scarcely be made a subject for the interference of a court of equity. There may be cases cognizable at law and also in equity, and of which cognizance cannot be effectually taken at law; and therefore equity does sometimes interfere, as in cases of complicated accounts, where the party has not made a defense, because it was impossible for him to do it effectually at law. So where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, which equity will put out of the way or restrain him from using. But without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law,—a matter capable of being discussed there, and over which a court of law had full jurisdiction." It should be carefully observed that the chancellor is not speaking of those cases which involve, in their very cause of action or defense, features or interests cognizable only by courts of equity; nor of the other class of cases which, in ordinary phraseology, belong to the concurrent jurisdiction both of law and equity; he refers to cases which in themselves present no equitable aspect, and properly come within the jurisdiction of the law, but which, for some reason or another, *have been wrongly tried and decided by the court of law*. There must have been some special equitable ground connected with this wrongful trial and decision, in order that equity may interfere and restrain the judgment.

which was not made available either through the error of the court in determining the law or the facts, or the omissions of himself or his counsel in presenting it, or in obtaining the evidence by which it could have been supported.<sup>4</sup>

§ 1362. **When the Jurisdiction may be Exercised—First Class—Equitable Rights.**—I pass from this negative view to consider the doctrine on its affirmative side. The cases in which, according to

<sup>4</sup> *Hendrickson v. Hinckley*, 17 How. 443, 445, 15 L. ed. 123, Shep. 292; *Yarborough v. Thompson*, 3 Smedes & M. 291, 41 Am. Dec. 626. In *Hendrickson v. Hinckley*, Mr. Justice Curtis stated the principle in a very concise manner; "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 which he was prevented from availing himself of by fraud or accident unmixed with negligence of himself or his agents."

It is immaterial whether the question or matter relied upon by the complainant in equity was considered by the law court or not. Omission to present or to make out a defense at law is not a ground for equitable relief: *Emerson v. Udall*, 13 Vt. 477, 37 Am. Dec. 604.

That the legal defense was not successful, through the ignorance, negligence, or mistake of the party's own attorney or counsel, is no ground for interference: *Payton v. McQuown*, 97 Ky. 757, 53 Am. St. Rep. 437, and note, 31 S. W. 874, 31 L. R. A. 33.

Ignorance of the facts constituting the defense does not excuse the omission of the party to make it, nor entitle him to the aid of equity, unless it can be shown that the party could not have acquired the information by the diligent and careful labor in preparing the cause for trial which he is bound to use: *Mayor of New York v. Brady*, 115 N. Y. 616, 22 N. E. 237.

By Act of Congress (Mar. 2, 1793) federal courts are prohibited from enjoining proceedings in state courts, except in matters relating to bankruptcy proceedings: 1 U. S. Comp. Stats., 1901, § 720; *U. S. v. Parkhurst, etc., Co.*, 176 U. S. 317, 20 Sup. Ct. 423, 44 L. ed. 485; see *Riverdale Cotton Mills v. Alabama, etc., Co.*, 198 U. S. 188, 25 Sup. Ct. 629 (injunction permitted when necessary to render effective the federal court's own decree).

As a general rule, a court of equity will not enjoin proceedings in another court of equity of co-ordinate jurisdiction; *Furnald v. Glenn*, 64 Fed. 49, 12 C. C. A. 27, 26 U. S. App. 202.

In general, a court of equity has no jurisdiction to enjoin criminal proceedings: *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. ed. 402, Shep. 5; *Davis v. American Society*, 75 N. Y. 362, 2 Ames Eq. Jur. 104, 1 Keener 108; *Crighton v. Dahmer*, 70 Miss. 602, 13 South. 237, 21 L. R. A. 84, Shep. 15; *Saull v. Browne*, L. R. 10 Ch. App. 64, 2 Ames Eq. Jur. 100. For exceptions in case of prosecutions under a void municipal ordinance, see ante, §§ 254, 1345, note.

Since a court of equity acts in personam, it has the power to restrain parties of whom it has jurisdiction from prosecuting suits in other states or foreign countries, and will exercise the power when necessary to prevent one citizen from obtaining an inequitable advantage over another citizen: *Lord Portarlington v. Soulbv*, 3 Mylne & K. 104, 1 Ames Eq. Jur. 24, 1 Keener 15; *Kempson v. Kempson*, 58 N. J. Eq. 94, 43 Atl. 97, 1 Ames Eq. Jur. 26; see 59 Am. St. Rep. 879 ff., note.

its original jurisdiction unaffected by statute, equity may interfere by injunction, and restrain an action at law either before or after judgment, may be reduced to three general classes: 1. Where the controversy, in addition to its legal aspect, involves some equitable estate, right, or interest which is exclusively cognizable by a court of equity, so that a complete determination of the issues cannot be made by a court of law, it is well settled that equity not only may, but must, interfere at the suit of the party in whom the equitable estate or right is vested, and restrain the action at law, and decide the whole controversy. This is so when the defendant at law has a purely equitable defense which the court of law will not recognize or enforce, and especially when he is entitled to some affirmative equitable relief which will clothe him with a legal right or title, and thus defeat the legal action brought against him. Cases of this kind belong to the first branch of the exclusive jurisdiction of equity as described in the first volume.<sup>1</sup>

**§ 1363. The Same. Second Class.**—2. The second general class includes those cases which belong to the second branch of the *exclusive* jurisdiction of equity as heretofore described;<sup>1</sup> or, in the ordinary nomenclature of the books, cases over the facts of which both courts of law and of equity have a concurrent jurisdiction to grant their respective and distinctive remedies; for example, cases involving actual fraud, such as suits upon instruments, where the defense is fraud in procuring their execution. Where the jurisdiction is thus said to be concurrent, or in other words, where the interests and primary rights of the parties are legal, and the only question between the two courts relates to the adequacy of their respective remedies, as a general rule the tribunal which first exercises jurisdiction is entitled, or at least permitted, to retain an exclusive control of the issues.<sup>2</sup> It is therefore a well-settled doctrine that in cases of this kind, where the primary rights of both parties are legal, and courts of law will grant their remedies, and courts of equity may also grant their peculiar remedies, equity will not interfere to restrain the action or judgment at law, *provided the*

<sup>1</sup> See ante, § 219, and cases cited in note. The cases to which this doctrine is applicable are numberless, and in fact cover the entire domain of equitable estates, interests, and primary rights which constitute the first branch of the exclusive jurisdiction. See *Earl of Oxford's Case*, 1 Ch. R. 1, 2 Lead. Cas. Eq. 129f; *Shep.* 26; *Greenlee v. Gaines*, 13 Ala. 198, 48 Am. Dec. 49; *Johnson v. Christian*, 128 U. S. 374, 9 Sup. Ct. 87, 31 L. ed. 820.

Under the application of this doctrine, an action at law may be enjoined, in order to avoid a multiplicity of suits, or a circuitry of action: See ante, §§ 245 et seq.

<sup>1</sup> See ante, §§ 220, 221.

<sup>2</sup> See ante, § 179.

*legal remedy will be adequate*; that is, provided the judgment at law will do full justice between the parties, and will afford a complete relief; the adequacy or inadequacy of the legal remedy is the sole and universal test.<sup>3</sup> On the other hand, in cases of this general class, equity will enjoin the action at law, and will determine the whole cause, whenever the legal remedy is inadequate; and the legal remedy is deemed to be inadequate if the ends of justice would not be satisfied by a mere judgment for the defendant in the action at law, but would require that some distinctively equitable relief, such as a cancellation or a reformation of the instrument sued upon, be conferred upon him. If any affirmative equitable relief is necessary to a full settlement of the controversy, and to a complete protection of the defendant's rights, a court of equity will interfere, entertain a suit for such relief, and enjoin the action at law.<sup>4</sup> The scope of this particular doctrine is plainly identical with that which governs the second branch of the exclusive jurisdiction of equity as described in the first volume. Whenever a court of equity exercises its jurisdiction over a case involving only *legal* interests and primary rights, for the purpose of awarding its exclusively equitable remedies, because the legal remedies would be inadequate, it will always, if necessary, enjoin an action at law which interrupts the full exercise of its jurisdiction.

§ 1364. **The Same. Third Class.—3.** In the two preceding classes of cases the ground for interference was some equitable element or feature involved in the very subject-matter of the controversy, or in the remedies appropriate thereto, which constituted an equitable defense in full or in part to the legal action, and over which the court of equity had either a concurrent or an exclusive jurisdiction. In the present class there is no such equitable element or feature of the controversy; there is no equitable defense embraced in any possible issues, no equitable right or interest of the defendant which defeats or modifies the legal cause of action; all the issues are wholly legal. The ground for the equitable jurisdiction to interfere is, therefore, something *dehors* the issues, something arising out of or connected with the *trial* itself of the legal action in the court of law. It was a settled doctrine of the equitable jurisdic-

<sup>3</sup> See *ante*, §§ 220, 221; and cases cited; *Insurance Co. v. Bailey*, 13 Wall. 616, 3 Keener 474; *Grand Chute v. Winegar*, 15 Wall. 373, 2 Ames Eq. Jur. 116; *Hoare v. Bremridge*, L. R. 8 Ch. 22; 14 Eq. 522, 2 Ames Eq. Jur. 121.

<sup>4</sup> *Hamilton v. Cummings*, 1 Johns. Ch. 517, 1 Scott 104, 1 Keener 317; *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, 215, Shep. 19.

There is some disagreement among the decisions upon the question of equity taking jurisdiction to compel the cancellation of an instrument, when the contracting party who seeks this relief might set up the same defense in an action at law and defeat a recovery. See *post*, § 1377.

tion—and is still the subsisting doctrine except where it has been modified or abrogated by statute, or has become obsolete through the enlarged powers of the law courts to grant new trials—that where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part, or on the part of his agents, then a court of equity will interfere at his suit, and restrain proceedings on the judgment which cannot be conscientiously enforced. From the very nature of the case, this interference takes place after the judgment, and not while the action at law is pending.<sup>1</sup>

<sup>1</sup>The fraud which is ground of relief against judgments does not generally fall within the definition of "actual" fraud: See ante, § 875.

Among the examples of the fraud, etc., which are a ground for this equitable jurisdiction, are the following: Where the defendant is prevented from defending by false and fraudulent promises or representations that the proceedings will not be carried on against him, and, relying thereon, he does not contest the case, as he might have done, and a judgment is thus obtained against him: See *Merriman v. Walton*, 105 Cal. 403, 45 Am. St. Rep. 50, 38 Pac. 1108, 30 L. R. A. 786; *Brooks v. Twichell*, 182 Mass. 443, 94 Am. St. Rep. 662, 65 N. E. 843. A collusive judgment in fraud of the rights of a third party may be enjoined by him: See *Warren v. Union Bank*, 157 N. Y. 259, 68 Am. St. Rep. 777, 51 N. E. 1036, 43 L. R. A. 256; *Grand Rapids, etc., Co. v. Haney*, 92 Mich. 558, 31 Am. St. Rep. 611, 52 N. W. 1009, 16 L. R. A. 721. See, also, *Platt v. Threadgill*, 80 Fed. 192 (tampering with the jury); *Baldwin v. Davidson*, 139 Mo. 118, 61 Am. St. Rep. 460, 40 S. W. 765 (fraudulent conduct on part of judge).

Perjury in obtaining the judgment is not, however, a ground for the injunction. If it were accepted as a ground for relief, litigation might be endless; the same issues would have to be tried repeatedly: *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336. The harshness of this rule has led to exceptions to its general operation in several of the states; see *Pom. Eq. Rem.* § 656.

Accident, if without any negligence on the part of the one who asks the relief, is a well recognized ground: *Kansas & A. V. R. Co. v. Fitzhugh*, 61 Ark. 341, 54 Am. St. Rep. 211, 33 S. W. 960 (after trial at law, right of appeal is cut off by the death of the judge before he can sign a bill of exceptions; relief by compelling adverse party to submit to a new trial). Mistake: see ante, § 871; *Rust v. Ware*, 6 Gratt. 507, 52 Am. Dec. 100 (mistake by jury in calculating amount due). Surprise: see *Barnes v. Milne*, 1 Rich. Eq. 459, 24 Am. Dec. 422.

Failure to summon, notify, or serve process on the defendant, so that he was ignorant of the proceedings against him, is a ground for enjoining the judgment. If the jurisdiction of the court which rendered the judgment depended upon a false return of an officer to the service of process, such false return may, by the weight of authority, be attacked in an action to set aside the judgment: *Smoot v. Judd*, 161 Mo. 673, 84 Am. St. Rep. 738, 61 S. W. 854;

**§ 1365. Jurisdiction to Grant New Trials at Law in the United States.**—How far does the doctrine of this third general class of cases operate under the modern legislation, and the principles of equity jurisprudence as administered in the United States? The jurisdiction of the English chancery to enjoin judgments at law, not by reason of any equitable right involved in the controversy itself, but on account of wrongful acts or omissions accompanying the trial at law, originated at a time when the law courts had little or no power to grant new trials for such causes. To prevent a failure of justice, a distinct head of equitable jurisdiction was admitted, that of virtually granting new trials—of entertaining suits for a new trial—when a judgment at law had been thus obtained by fraud, mistake, or accident; and the injunction against further proceedings on the judgment was a mere incident of the broader relief which set aside the judgment and granted a rehearing of the controversy in the court of chancery. The original occasion for this special jurisdiction has disappeared. In England, and in most if not all of the American states, either through statutes or through judicial action, the courts of law have acquired, and constantly exercise, full powers to grant new trials, whenever from the wrongful acts or omissions of the successful party, or from accident or the mis-

*Dowell v. Goodwin*, 22 R. I. 287, 84 Am. St. Rep. 842, 47 Atl. 693, 51 L. R. A. 873; *Kibbe v. Benson*, 17 Wall. 624, 21 L. ed. 741; contra, unless the false return was made by the procurement of the plaintiff at law: *Preston v. Kindrick*, 94 Va. 760, 64 Am. St. Rep. 777, 27 S. E. 588. Similarly, by the better rule, an unserved party may have relief against a judgment obtained upon the unauthorized appearance of an attorney in his behalf: *Handley v. Jackson*, 31 Oreg. 552, 65 Am. St. Rep. 839, 50 Pac. 915.

In general, the party seeking the aid of equity to enjoin a judgment at law against him must not only show some ground for interference, within the doctrine of the text, but must also show that he has a good and sufficient defense to the cause of action, so that on a re-examination and retrial the result would be different: See *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115; and by the prevailing view, a good defense on the merits must be shown even when the judgment is attacked for lack of jurisdiction: *Handley v. Jackson*, supra; contra, *Magin v. Lamb*, 43 Minn. 80, 19 Am. St. Rep. 216.

The party seeking the aid of equity must also show diligence. A judgment will not be enjoined for any defense or right which could be asserted in the court of law, unless such party can show,—1. That he was prevented by fraud, mistake, or accident from maintaining his legal rights; and 2. That the obstacle which prevented him could not have been overcome or avoided by any reasonable diligence or care on his part. These requisites are absolutely indispensable; the rule is inflexible, and it is enforced with special strictness when the ground relied upon for relief is newly discovered evidence, which the party had failed to obtain, through ignorance amounting to accident or through fraud: *Warner v. Conant*, 24 Vt. 351; 58 Am. Dec. 178.

take of the other party, or from error or misconduct of the judge or the jury, there has been a failure of justice. In other words, the powers of the law courts to set aside verdicts or judgments are so ample as to meet all the requirements of equity and justice, and the special equitable jurisdiction with respect to this matter has become obsolete in the very large majority of the states, if not in all of them.<sup>1</sup> The result is, in my opinion, that practically the only jurisdiction now exercised by courts of equity to enjoin judgments at law, where no equitable right or interest is involved in the controversy, on account of wrongful acts or omissions connected with the trial, is a part of and incidental to the broad jurisdiction which equity possesses to set aside and cancel judgments, deeds, contracts, and the like which have been obtained through fraud, undue influence, or mistake. A court of equity, in general, no longer assumes control over a legal judgment for the purpose of a new trial or any similar relief; it will, in a proper case of fraud or mistake, set aside such judgment; and wherever it will grant this final remedy, it will, as a preliminary and incidental relief, restrain by injunction all proceedings upon the judgment.<sup>2</sup>

<sup>1</sup> As an illustration, the California Code of Civil Procedure, sec. 657, authorizes a new trial to be granted for the following causes: 1. Irregularity in the proceedings of the court, jury, or adverse party, or misconduct of the court; 2. Misconduct of the jury; 3. Accident or surprise; 4. Newly discovered evidence; 5. Excessive damages; 6. Insufficiency of the evidence; 7. Error of law.

<sup>2</sup> The modern cases, where such judgments at law have been enjoined, will be found, on examination, to have arisen under the more general power, which equity clearly possesses, of setting aside the most solemn proceedings when tainted by fraud. The equitable jurisdiction to entertain bills for a new trial, if it exist at all, must be confined to a very few states.

*Equitable relief against executions.*—When there is reason for relief against the judgment there is, of course, ground for relief against the execution based upon the judgment. In many cases, however, a judgment may be perfectly valid and yet there may be some vice in the execution itself or in the levy which will warrant the interference of equity.

A sale of real property exempt from execution, or belonging not to the judgment debtor but to a third person, or a sale under an invalid execution, may pass no title to the purchaser, yet it casts a cloud upon the title which renders the land unsaleable, and may, therefore, generally be enjoined or set aside; see post, §§ 1398, 1399; Bishop v. Moorman, 98 Ind. 1, 49 Am. Rep. 731, 2 Ames Eq. Jur. 156. On the other hand, an injunction does not ordinarily lie to prevent the seizure or sale of personal property, since the actions of trespass, trover or replevin furnish ample relief; Parsons v. Hartman, 25 Oreg. 547, 42 Am. St. Rep. 903, 37 Pac. 61, 30 L. R. A. 98. If, however, these remedies are inadequate, as where the seizure would result in the ruin of the owner's business, injunction is proper: Watson v. Sutherland, 5 Wall. 74, 18 L. ed. 580, 1 Ames Eq. Jur. 531, 1 Scott 134, H. & B. 741, Shep. 22. An execution sale will not be enjoined or set aside for mere irregularities: Gardner v. Mobile, etc., R. Co., 102 Ala. 635, 48 Am. St. Rep. 84, 15 South. 271.

## THIRD GROUP.

### REMEDIES WHICH INDIRECTLY ESTABLISH OR PROTECT INTERESTS AND PRIMARY RIGHTS, EITHER LEGAL OR EQUITABLE.

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#### CHAPTER FIRST.

#### REFORMATION AND CANCELLATION.

##### ANALYSIS.

§ 1375. General nature and object.

§ 1376. Reformation and re-execution of instruments.

§ 1377. Cancellation, surrender up, or discharge of instruments.

§ 1375. **General Nature and Object.**—The ultimate object of the remedies belonging to this group is the establishment or protection of interests, estates, and primary rights; but this object is accomplished *indirectly*. While these remedies are not so completely ancillary as interpleader and receivership, yet they are to a certain extent auxiliary. They do not, like a specific performance, or the execution of a trust, or an assignment of dower, or partition of land, operate directly and immediately to establish the plaintiff's title, and to confer upon him the complete dominion over his estate,—the ultimate relief which he seeks. Their effect in establishing his ultimate dominion is indirect. They are often used as the preparatory step which enables him to obtain, sometimes in the same action, and sometimes in a subsequent suit, the ultimate remedy which finally establishes his rights or obligations, or restores him to the full enjoyment of his estate. The reformation of a policy of insurance is not a final remedy; but it establishes the real contract, and thus enables the assured to recover the amount actually due according to the terms of that contract. The reformation of a deed does not directly restore the grantee to the dominion and possession of the land which had been omitted; but it places him in a position which enables him, if necessary, to assert his dominion and recover the possession. The cancellation of a deed does not of itself *directly* establish the plaintiff's title and put him in possession of the land, but it enables him, if necessary, to assert his title

and obtain the possession. These remedies may be obtained on behalf of either a legal or an equitable interest, by either a legal or an equitable owner. The remedies constituting this group are the two following: reformation or re-execution of instruments, and rescission, cancellation, surrender up, or discharge of instruments.<sup>1</sup> Since they are chiefly occasioned by fraud or mistake, the general doctrines and rules determining the jurisdiction to grant them, and regulating their use, have already been fully examined in the preceding volume.<sup>2</sup>

§ 1376. **Reformation and Re-execution of Instruments.**—This subject has already been treated under the head of Mistake, and little more need here be said.<sup>1</sup> Equity has jurisdiction to reform written instruments in but two well-defined cases: 1. Where there is a mutual mistake,—that is, where there has been a meeting of minds, —an agreement actually entered into, but the contract, deed, settlement, or other instrument, in its written form, does not express what was really intended by the parties thereto; and 2. Where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties.<sup>2</sup> In such cases the instrument may be made to conform to the agreement or transaction entered into according to the intention of the parties. The condition of fact giving rise to the exercise of the jurisdiction to grant reformation are numerous. Almost all written instruments may be reformed when a proper occasion is furnished.<sup>3</sup>

<sup>1</sup> Reformation and re-execution are in fact one and the same remedy, depending upon the same rules; and the same is true of rescission, cancellation, surrender up, and discharge. The decree for cancellation generally includes a direction for a surrender up, and, if necessary, for a discharge of record, and is frequently accompanied by an injunction against a suit at law upon the instrument, or against the negotiation or transfer of the instrument to other persons: ante, § 1340.

<sup>2</sup> See ante, §§ 838-871 (on mistake); §§ 872-921 (on actual fraud); and §§ 922-974 (on constructive fraud). A large number of cases cited in these chapters illustrate the remedies of "reformation" and "cancellation." In particular, see, as to jurisdiction to grant the relief of reformation or of cancellation on account of mistake, and the conditions of fact which must exist, §§ 870, 871, and cases in notes. As to cancellation on account of fraud, see §§ 910-921; English doctrine: § 912. The American doctrine: § 914. Incidents of the relief, what is required of the plaintiff as a condition to granting the relief: §§ 915-917. Persons against whom granted: § 918. Illustrations: §§ 919-921.

<sup>1</sup> §§ 838-871.

<sup>2</sup> § 870, and cases cited.

<sup>3</sup> "If one should execute a *release* so broad in its terms as to release his rights in property, of which he was wholly ignorant, and which was not in contemplation of the parties at the time the bargain for the release was made," a court of equity may either cancel the release or by reformation, restrain its application as intended: *Cholmondeley v. Clinton*, 2 Mer. 352;

**§ 1377. Cancellation and Surrender up or Discharge of Instruments.**—The jurisdiction of equity to grant the remedy of cancellation exists and will always be exercised when it is necessary

*Dungers v. Angove*, 2 Ves. 304, 3 Keener 205; *Dambmann v. Schulting*, 75 N. Y. 55, 3 Keener 202; *Cleghorn v. Zumwalt*, 83 Cal. 155, 23 Pac. 294, 2 Ames Eq. Jur. 197, 3 Keener 322. Where the same mutual mistake has been repeated in each one of a chain of conveyances, under such circumstances as to entitle any one of the vendees to a reformation as against his immediate vendor, the equity will work back through all, and entitle the last vendee to a reformation against the original grantor: *Blackburn v. Randolph*, 33 Ark. 119, 2 Ames Eq. Jur. 183. Similarly, it has been held that if there is a mutual mistake in a mortgage in the description of property, and the same mistake is continued in the foreclosure decree and in the sheriff's deed to the foreclosure purchaser, equity will go back to the original transaction and reform the mortgage and decree as well as the deed, so as to make them conform to the intention of the parties concerned, or if such relief is impossible, the purchaser may be quieted in his possession against the mortgagor: *Waldron v. Letson*, 15 N. J. Eq. 126, 2 Ames Eq. Jur. 223. It has been held that relief will not be awarded to give a party a remedy exactly equivalent to one he has lost by his own laches: *Daggett v. Ayer*, 65 N. H. 82, 18 Atl. 169, 2 Ames Eq. Jur. 232, 3 Keener 181.

*No Reformation in Favor of a Volunteer.*—As a general rule, equity will not interfere in favor of a volunteer. Hence no relief will be awarded to a grantee in an imperfect conveyance which is not supported by either a valuable or meritorious consideration, against either the grantor or his representatives: *Else v. Kennedy*, 67 Iowa, 376, 25 N. W. 290, 3 Keener 429; *Henderson v. Dickey*, 35 Mo. 120, 2 Ames Eq. Jur. 185; *Eaton v. Eaton*, 15 Wis. 259, 2 Ames Eq. Jur. 244. The doctrine of "meritorious" consideration in equity is described, in another connection, ante, §§ 588-590. In some jurisdictions it is said that the rule is subject to the exception, that after the death of the donor equity will interfere to rectify a disposition which is clearly proved to have failed, through mistake, to carry out the donor's intention: *M'Mechan v. Warburton, L. R., Jr.*, 1 Ch. D. 435, 2 Ames Eq. Jur. 246. While reformation will not generally be granted in favor of a volunteer grantee, it will be given to a donor who shows that, through mistake, his deed does not carry out his intention: *Andrews v. Andrews*, 12 Ind. 348, 2 Ames Eq. Jur. 245.

As to plaintiff's negligence, see ante, § 856; as to his laches, see ante, § 419; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *Bloomer v. Spittle*, L. R. 13 Eq. 427, 2 Ames Eq. Jur. 309, 3 Keener 398; *Sable v. Maloney*, 48 Wis. 331, 4 N. W. 479, 2 Ames Eq. Jur. 310.

As to the defense of bona fide purchase, see ante, § 776: *Garrard v. Frankel*, 30 Beav. 445, 3 Keener 261; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259, 3 Keener 433; *Cole v. Fickett*, 95 Me. 265, 49 Atl. 1066, 2 Ames Eq. Jur. 178. As to priority between the equity for a reformation and the liens of subsequent attaching and judgment creditors of the defendant, see ante, §§ 721-724.

In states where a married woman's deed must be executed with certain formalities, no reformation on account of defects arising from non-compliance with statutory provisions will be decreed, since it would not only contravene the policy of the law but require her to make a contract which she has not made: *Hamar v. Medsker*, 60 Ind. 413, 2 Ames Eq. Jur. 228. See, also, *Gebb v. Rose*, 40 Md. 387, 3 Keener 425. A mere mistaken description in her executed

to protect or maintain equitable primary estates, interests, or rights; where, however, the estate, interest, or right is legal, the jurisdiction always *exists*, but its *exercise* depends upon the adequacy of the legal remedies,—a party being left to his affirmative or defensive remedy at law, where full and complete justice can thereby be done.<sup>1</sup> The occasions giving rise to the exercise of this jurisdiction are mistake, fraud, and other instances where enforcing instruments or agreements would be inequitable or unjust.<sup>2</sup> A doubt was formerly entertained as to whether a court of equity ought to exercise its jurisdiction to order instruments absolutely void at law, and not merely voidable, to be delivered up and canceled, since the legal remedy of a party was adequate and complete, and no case was presented for equitable interference; but it is now well settled that jurisdiction will be exercised in such cases,<sup>3</sup> except where the invalidity of the instrument is apparent on its face.<sup>4</sup>

conveyance may, however, by the preponderance of authority be corrected against her: Hamar v. Medsker, 60 Ind. 413, 2 Ames Eq. Jur. 228; and in some states where there are no disabilities upon a married woman's power to contract and convey, an instrument may be corrected as against her to the same extent as against any other person: Christman v. Colbert, 33 Minn. 509, 24 N. W. 301, 3 Keener, 428.

<sup>1</sup> See ante, §§ 911-914. In the exercise of the remedy of cancellation instruments are almost necessarily directed to be "delivered up." "Delivery up," under these circumstances, can hardly be called a distinct remedy.

<sup>2</sup> The various rules as to when jurisdiction will be exercised, and the evidence necessary, in cases of fraud and mistake, have already been discussed, and the reader is referred to the sections on those subjects. As to cancellation for mistake, see ante, § 870.

<sup>3</sup> Forged instruments: see Sharon v. Hill, 20 Fed. 1, 36 Fed. 337, 2 Ames Eq. Jur. 161.

<sup>4</sup> Simpson v. Lord Howden, 3 Mylne & C. 97, 2 Ames Eq. Jur. 124; Peirsoll v. Elliott, 6 Pet. 95, 98, Shep. 141; Town of Venice v. Woodruff, 62 N. Y. 462, 20 Am. Rep. 495, 2 Ames Eq. Jur. 133, H. & B. 794, Shep. 244.

Subject to this limitation, the remedy at law is usually inadequate, and the jurisdiction of equity exercised as a matter of course, (1) where the invalid instrument creates a cloud on title to land: See post, §§ 1398, 1399. (2) Where the instrument is negotiable and not yet mature, because in such cases if the present unlawful holder, although the legal defense to an action by him would be perfect, should transfer the security to a bona fide purchaser, such legal defense would be cut off. In this case, it is usual to enjoin the transfer of the instrument, as well as to order its surrender: Ante, § 1340; Smith v. Aykwell, 3 Atk. 566, 2 Ames Eq. Jur. 132.

Where, however, the instrument against which the complainant claims a defense does not fall within either of these classes—where it is not a cloud upon the title to land, and where there is no danger that the defense will be lost by the transfer of the instrument to a bona fide purchaser,—there is the sharpest conflict among the authorities as to the propriety of the remedy of cancellation. On the one hand it is held, in a considerable group of

cases, that the danger of loss of evidence in support of the defense, through the intentional delay of the holder of the instrument in bringing suit thereon, is sufficient to warrant the exercise of the jurisdiction: Martin v. Graves, 5 Allen, 601, 2 Ames Eq. Jur. 137; Commercial Ins. Co. v. McLoon, 14 Allen, 351, 3 Keener 322 (insurance policy); Fuller v. Percival, 126 Mass. 381, 2 Ames Eq. Jur. 111, 3 Keener 483 (promissory note, overdue, obtained by fraud); Sharon v. Hill, 20 Fed. 1, 2 Ames Eq. Jur. 161 (forged contract of marriage); (for further instances see ante, § 914); and this, too, even where the holder of the instrument has already brought suit at law upon it, since the prosecution of such suit is within his control, and may be delayed or withdrawn, and another brought at a time when an unconscionable advantage may be taken: Buxton v. Broadway, 45 Conn. 540, 2 Ames Eq. Jur. 115 ("on this question we can consider only what means of redress the law itself furnishes the petitioner, and not what he may chance to get through the indulgence of the respondent"); Andrews v. Frierson, 134 Ala. 626, 33 South. 6, 1 Scott 108. But on the whole, the majority of the cases repudiate the idea that the mere danger of loss of evidence to support a future defense is a sufficient ground for immediate relief in equity against the instrument, unless some special circumstances are shown which render such delay more than ordinarily hazardous; in many of the cases, the fact that the testimony of witnesses may be perpetuated under statutory provisions being assigned as a reason for holding that there is no danger of loss of evidence: See, in general, Globe Mut. L. Ins. Co. v. Reals, 79 N. Y. 202, 3 Keener 485 (insurance policy; suit to cancel for fraud brought after loss); Erickson v. First Nat. Bank, 44 Neb. 622, 48 Am. St. Rep. 753, 62 N. W. 1078, 38 L. R. A. 377 (altered note); Allerton v. Belden, 49 N. Y. 373, 2 Ames Eq. Jur. 113 (unauthorized municipal bonds); for further instances, see ante, § 914, but see, for cases where complainant is exposed to a multiplicity of suits, ante, § 261, note. A fortiori the court refuses to interfere where an action at law has already been begun upon the instrument, and the defense may be interposed therein: Grand Chute v. Winegar, 15 Wall. 373, 21 L. ed. 174, 2 Ames Eq. Jur. 116 (unauthorized municipal bonds); Insurance Co. v. Bailey, 13 Wall. 616, 20 L. ed. 501, 3 Keener 474; but here, too, exceptional circumstances may render a defense in the actions already brought an inadequate protection; as where several separate suits have been brought against complainant by persons claiming to be assignees of an instrument executed by him, and his defense is fraud in obtaining the instrument; interpleader cannot be had, since complainant denies any liability on the instrument; and if left to his defense at law, he must try several actions to secure a single right: McHenry v. Hazard, 45 N. Y. 580, 2 Ames Eq. Jur. 118.

In another group of cases, in many of which the complainant is a vendee of land or chattels, the question of inadequacy of the legal remedy concerns, not a legal defense in a future action against the complainant, but the alternative legal remedy that may be pursued by him, as for recovery of the purchase price, of damages for deceit, and the like. This question, in the main, depends upon the special circumstances of the individual case: See Boyce v. Grundy, 3 Pet. 210, 7 L. ed. 655, Shep. 19 (rescission at suit of defrauded vendee of land; explained in Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. ed. 451, 3 Keener 487).

For the defense of *ratification* in cases of cancellation, see ante, §§ 897, 916, 964; for the necessity of *restoration* of the defendant to the condition in which he stood before the transaction, see § 910, and note; also, §§ 391, 937, 946.

## FOURTH GROUP.

REMEDIES BY WHICH ESTATES, INTERESTS, AND PRIMARY RIGHTS, EITHER LEGAL OR EQUITABLE, ARE DIRECTLY DECLARED, ESTABLISHED, OR RECOVERED, OR THE ENJOYMENT THEREOF FULLY RESTORED.

### CHAPTER FIRST.

SUITS BY WHICH PURELY LEGAL ESTATES ARE ESTABLISHED, AND THE ENJOYMENT THEREOF RECOVERED: NAMELY, ASSIGNMENT OF DOWER, ESTABLISHMENT OF DISPUTED BOUNDARIES, PARTITION OF LAND, AND OF PERSONAL PROPERTY.

#### ANALYSIS.

- § 1378. General nature and object of this group.
- § 1379. Nature and object of the first class.
- §§ 1380-1383. Assignment of dower.
  - § 1380. Legal remedies.
  - § 1381. Origin and grounds of the equitable jurisdiction.
  - § 1382. The jurisdiction now concurrent.
  - § 1383. Exclusive jurisdiction over dower in equitable estates.
  - § 1384. Establishment of disputed boundaries.
  - § 1385. The same; equitable incidents and grounds.
- §§ 1386-1390. Partition of lands.
  - § 1386. Common law remedy.
  - § 1387. Equitable jurisdiction and remedies.
  - § 1388. The title of the plaintiff.
  - § 1389. Mode of partition.
  - § 1390. Partition by means of a sale.
  - § 1391. Partition of personal property.
  - § 1392. The same; issue of title.

§ 1378. **General Nature and Object of This Group.**—All the remedies belonging to this group have one most important distinctive feature in common, which is apparent upon even a slight examination. In all of them the estate or interest of the complaining party, whether it be legal or equitable, is *directly* established or recovered, or the enjoyment thereof is *directly* restored. These remedies are not, therefore, provisional or auxiliary, but they are, for the purposes of the complaining party, as truly

final or ultimate reliefs as is the judgment in an action of ejectment or of replevin.<sup>1</sup> The estate, interest, or primary right to be established or recovered, or fully enjoyed by their means, may be either legal or equitable; and when it is equitable, the establishment *may* consist in clothing the plaintiff with the legal estate.<sup>2</sup> The remedies composing this group are separated, by a natural line of division, into *three* general classes, namely: 1. Suits by which purely legal estates are established, and the enjoyment thereof recovered; 2. Suits by which some general right, either legal or equitable, is established; and 3. Suits by which some particular estate or interest, either legal or equitable, is established.

§ 1379. **Nature and Object of the First Class.**—Since the particular cases belonging to this class are primarily adapted to purely legal interests, the common law gives similar relief by means of appropriate legal actions. The jurisdiction of equity was based wholly upon the superiority of the equitable methods and procedure; and while the equitable jurisdiction in cases of dower and partition has become so established that it has almost displaced the legal remedies, that of settling disputed boundaries still requires the presence of some special equitable incident or circumstance.<sup>1</sup> I purpose to state the general doctrines and rules which regulate the jurisdiction to grant these remedies, and determine the circumstances under which and the parties between whom it will be exercised.

§ 1380. **Assignment of Dower—Legal Remedies.**—The right

<sup>1</sup>This is manifestly so in "assignment of dower," "settlement of disputed boundaries," and "partition of land," since in each of these instances the plaintiff establishes his individual right to and obtains sole possession of a specific tract of land, and in "partition of personal property," he procures the same with respect to specific chattels. The statement is no less true of the other suits included within this group. In a suit to construe a will, estates in specific property are directly established; in suits to quiet title, the very object of the judgment is to declare and establish the plaintiff's legal or equitable estate in some specific property, and perhaps to convert his equitable estate into a legal one. Even in suits to remove a cloud from title, although the relief is often obtained by means of a cancellation, yet from the nature of the whole proceeding, the plaintiff's estate is thereby established, and he is left in its full enjoyment. In strict foreclosure of mortgages or pledges, and in redemption of mortgages or pledges, the plaintiff plainly establishes his estate in, and secures his possession of, the specific land or chattels, free from any claim of the defendant. However much these remedies may differ in appearance, they all have this same *essential* element which brings them within the same group.

<sup>2</sup>As in some statutory suits to quiet title, and some suits to remove a cloud from title.

<sup>1</sup>Under all ordinary circumstances, the action of ejectment is an adequate remedy by which to settle disputed claims to legal titles and estates.

known as the wife's right of dower was purely legal, and was asserted at law through the writ of right of dower, and the writ of dower unde nihil habet, both of which were in the nature of real actions. As early as the reign of Queen Elizabeth, courts of equity began to assume jurisdiction over cases of dower, but only tentatively, and as ancillary to proceedings at law.<sup>1</sup> This jurisdiction, originally narrow and auxiliary, has, by the course of decision, and on familiar equitable principles, been expanded to the extent of affording complete relief between the parties.

§ 1381. **Origin and Grounds of the Equitable Jurisdiction.**—Equitable interposition in cases of dower was at first invoked for the removal of impediments in the way of recovery at law. As the title deeds to real estate were held by heirs, devisees, or trustees, it would be important, and even necessary, for the widow, in the event of a contest of her dower, to resort to equity, for the purpose of ascertaining the lands of which her husband had been seised during marriage. To accomplish this purpose, a bill of discovery would be entertained in equity; and where the land of the husband was an undivided interest in a greater portion, equity would decree a partition in aid of the assignment to the widow of her dower.<sup>1</sup> This jurisdiction was, in its earlier stages, strictly auxiliary; and if no obstacle in the way of recognition and assignment of dower at law was disclosed, the equitable proceedings would be arrested.<sup>2</sup> The equitable jurisdiction, having once attached, was not slow in maturing so as to confer full relief. When the widow came into equity for a discovery respecting the title deeds to her husband's estate, which were in the hands of the heir, it was held that she should have complete relief.<sup>3</sup> If her title to dower was denied, it would be incumbent upon her to establish such title at law. Equity would, for that purpose, retain the bill for a reasonable time, and upon the determination of the issue at law in the widow's favor, would proceed to administer final relief.<sup>4</sup>

§ 1382. **The Jurisdiction Now Concurrent.**—Although it was thus, at one time, supposed that the jurisdiction of equity was ancillary, and could not attach in the absence of impediments at

<sup>1</sup> Wild v. Wells 1 Dick. 3; Toth. 82.

<sup>2</sup> Moor v. Black, Cas. t. Talb. 126.

<sup>3</sup> Shute v. Shute, Prec. Ch. 111.

<sup>4</sup> Curtis v. Curtis, 2 Brown Ch. 620, 631, 632.

\* Curtis v. Curtis, supra. And assuming the widow's title to be established or conceded, equity will not only assist her by way of discovery and assignment, but will decree her a due share of the mesne profits, and this, not from the time of the demand merely, but from the time when her title accrued: Dormer v. Fortescue, 3 Atk. 124, 130, 1 Keener 523.

law, it is now well settled that courts of equity have concurrent jurisdiction in cases of legal dower, or dower in legal estates.<sup>1</sup> The advantages of the equitable procedure are obvious. An outstanding term could be removed and satisfied;<sup>2</sup> a partition in the case of undivided interests could be decreed, and an account could be taken;<sup>3</sup> fraudulent conveyances could be canceled;<sup>4</sup> and antagonistic claims to the subject-matter could be determined without multiplicity of suits.<sup>5</sup> Equity will also award damages which could not be recovered at law on an application for dower.<sup>6</sup>

**§ 1383. Exclusive Jurisdiction over Dower in Equitable Estates.**

—In England since the statute of 3 and 4 William IV.,<sup>1</sup> and in the United States from an early day, equity has assumed an exclusive jurisdiction over claims for dower in equitable estates. Where the husband's estate was an equity of redemption, the widow may proceed against the mortgagee by a bill in equity to redeem.<sup>2</sup> . . . If the husband should die seised of land on which a part of the purchase-money was due, the widow may resort to equity for a sale of the land in satisfaction of the unpaid balance, and for her dower in the surplus.<sup>3</sup> On the conversion of the husband's estate into money, equity will award to the widow her proportionate share.<sup>4</sup> And where the husband has sought, by fraudulent conveyances, to defeat the wife's dower, equity will, on her application, grant appropriate relief.<sup>5</sup> The widow's right of dower, while yet unmeasured and unassigned, may be transferred by her, or reached by her judgment creditors, and her voluntary transferee, or the receiver appointed in aid of the judgment creditor, may maintain a suit in equity to have the dower assigned to him.<sup>6</sup> The assignment of dower is usually effected by a reference to a master and a commission, and the share is set out by metes and

<sup>1</sup> *Mundy v. Mundy*, 2 Ves. 122; *Herbert v. Wren*, 7 Cranch 370, Shep. 132; *Badgley v. Bruce*, 4 Paige, 98.

<sup>2</sup> *Dormer v. Fortescue*, 3 Atk. 124, 130, 1 Keener 523.

<sup>3</sup> *Herbert v. Wren*, 7 Cranch, 370, Shep. 132.

<sup>4</sup> *Swaine v. Perine*, 5 Johns. Ch. 482; 9 Am. Dec. 318.

<sup>5</sup> *Goodburn v. Stevens*, 1 Md. Ch. 420.

<sup>6</sup> *Curtis v. Curtis* 2 Brown Ch. 620, 632; *Dormer v. Fortescue*, 3 Atk. 124, 130, 1 Keener 523.

<sup>1</sup> Chapter 105.

<sup>2</sup> *Gibson v. Crehore*, 3 Pick. 475; *Farwell v. Cotting*, 9 Allen 211.

<sup>3</sup> *Thompson v. Cochran*, 7 Humph. 72; 46 Am. Dec. 68.

<sup>4</sup> *Higbie v. Westlake*, 14 N. Y. 281.

<sup>5</sup> *Swaine v. Perine*, 5 Johns. Ch. 482, 9 Am. Dec. 318; *Petty v. Petty*, 4 B. Mon. 215, 39 Am. Dec. 501.

<sup>6</sup> *McMahon v. Gray*, 150 Mass. 289, 15 Am. St. Rep. 202, 22 N. E. 923, 5 L. R. A. 748 (creditors' bill); *Payne v. Becker*, 87 N. Y. 153 (receiver appointed in aid of an execution); *Strong v. Clem*, 12 Ind. 37; 74 Am. Dec. 200 (transferee).

bounds. Where an account is needed, it may be taken by means of a similar reference. In many of our states summary proceedings have been provided by statute for the assignment of dower, especially where the widow's right thereto is not contested.

§ 1384. **Establishment of Disputed Boundaries.**—Where the boundaries between two adjacent parcels of land, even when held by their respective owners under purely legal titles, have become confused or obscure, equity has, from an early period, exercised a jurisdiction to settle them.<sup>1</sup> Whether this jurisdiction originated in the consent of the parties, and proceeded by analogy to the writs de rationalibus divisis and de perambulatione facienda used at law,<sup>2</sup> or arose in avoidance of a multiplicity of suits,<sup>3</sup> has been discussed; but the determination of the question remains uncertain and conjectural. The mere fact, however, that certain boundaries are in controversy is not of itself sufficient to authorize the interference of equity; and upon such a showing, the parties would be left to their rights and remedies at law. Courts of equity will not interpose to ascertain boundaries, unless, in addition to a naked confusion of the controverted boundaries, there is suggested some peculiar equity, which has arisen from the conduct, situation, or relations of the parties.<sup>4</sup>

§ 1385. **Equitable Incidents and Grounds.**—The fraud or neglect of duty of the party against whom relief is sought by way of establishment of boundaries will afford a sufficient ground for equitable interference.<sup>1</sup> And where a settlement of the boundaries in dispute cannot be had at law without a multiplicity of suits, relief may be obtained in equity.<sup>2</sup> It may happen that such a relation exists between the parties as to make it incumbent upon one of them to preserve the boundaries. Such would be the case where one of the parties was a tenant or a copyholder; and in all such cases, equity will entertain the suit of the aggrieved party—as of a landlord—to compel the defendant—as in the example, a tenant—to preserve the boundaries from confusion.<sup>3</sup> . . . It is necessary for the complainant to show that some portion of the

<sup>1</sup> Wake v. Conyers, 1 Eden 331, 2 Lead. Cas. Eq., 4th Am. ed. 850, 853, 860.

<sup>2</sup> Speer v. Crawter, 2 Mer. 410, 417.

<sup>3</sup> Wake v. Conyers, *supra*.

<sup>4</sup> Wake v. Conyers, *supra*; Ashurst v. McKenzie, 92 Ala. 484, 9 South. 262, 1 Keener 381; Humboldt County v. Lander County, 22 Nev. 248, 58 Am. St. Rep. 750, 38 Pac. 578, 26 L. R. A. 749 (dispute between two counties); King v. Brigham, 23 Oreg. 262, 31 Pac. 601, 18 L. R. A. 361 (statutory jurisdiction in equity).

<sup>1</sup> Guice v. Barr, 130 Ala. 570, 30 South. 563; 2 Jones Eq. 470.

<sup>2</sup> Wake v. Conyers, *supra*; Beatty v. Dixon, 56 Cal. 622. See ante, § 261, note.

<sup>3</sup> Aston v. Lord Exeter, 6 Ves. 288; see Ashurst v. McKenzie, 92 Ala. 484, 9 South. 262, 1 Keener 381.

lands, in respect of which the relief of establishing their boundaries is sought, is in the possession of the defendant.<sup>4</sup>

§ 1386. **Partition of Lands—Common-law Remedy.**—At common law, the writ of partition lay only in case of lands held in coparcenary.<sup>1</sup> The remedy was afterwards extended by statute to joint tenancies and tenancies in common.<sup>2</sup> Where the tenure was copyhold, partition might be had in the lord's court by a plaint in the nature of a writ of partition. As the plaint and the writ have both been abolished by statute,<sup>3</sup> this jurisdiction of equity is now, in the absence of statutory provision, exclusive. The operation of the common-law remedy, even after its extension to joint tenancies and tenancies in common, was imperfect and narrow. The writ of partition lay only against the tenant in possession, and was incompetent to reach the remainderman or the reversioner. As the judgment at law proceeded according to the titles proved, it was necessary for the plaintiff to show the title of the defendant as well as his own. And as partition at law was made by the sheriff by actual division, it might happen that, where the undivided interests were incapable of exact apportionment, the judgment of the court would be powerless to compensate the inequalities.

§ 1387. **Equitable Jurisdiction and Remedies.**—These difficulties, illustrating the inadequacy of the legal remedy, gave rise to the equitable interference. As early as the reign of Elizabeth, partition became a matter of equitable cognizance;<sup>1</sup> and now the jurisdiction is established as of right in England and in the United States.<sup>2</sup> The remedy in equity is not confined to the tenants in possession, but extends to all persons interested, whether presently or in expectancy; and remaindermen, reversioners, infants, and persons not in esse may be bound by the decree.<sup>3</sup>

<sup>4</sup> Att'y-Gen. v. Stephens, 6 De Gex, M. & G. 111.

<sup>1</sup> The reason given was, that as tenancy in coparcenary arose by operation of law, it was only proper that the law should afford the means of severance.

<sup>2</sup> 31 Henry VIII., c. 1; 32 Henry VIII., c. 32.

<sup>3</sup> 3 & 4 Wm. IV., c. 27.

<sup>1</sup> Fonblanque's Equity, b. 1, c. 1, sec. 3, note f; Speke v. Walrond, Toth. 155.

<sup>2</sup> Agar v. Fairfax, 17 Ves. 533; 2 Lead. Cas. Eq., 4th Am. ed., 865, 880, 894; Hill v. Reno, 112 Ill. 154, 54 Am. Rep. 222; Rutherford v. Jones, 14 Ga. 521, 60 Am. Dec. 655.

<sup>3</sup> Gaskell v. Gaskell, 6 Sim. 643. But a future estate cannot be partitioned at the suit of a co-owner thereof; Baldwin v. Aldrichs, 34 Vt. 532, 80 Am. Dec. 695; Savage v. Savage, 19 Oreg. 112, 20 Am. St. Rep. 795, 23 Pac. 890; and by the weight of authority compulsory partition cannot be had against the holder of a future conditional interest: Aydlett v. Pendleton, 111 N. C. 28, 16 S. E. 8, 32 Am. St. Rep. 776, and note. Only a party having actual or constructive possession can compel partition: Nichols v. Nichols, 28 Vt. 230, 67

§ 1388. **The Title of the Plaintiff.**—The difficulty under which the complainant labored at law in proving the title as well of the defendant as of himself is, in equity, obviated by a discovery, and if need be by a reference to the master. The complainant must show title in himself, and such a title as will establish his right, as against the defendant, to a partition.<sup>1</sup> Where the complainant's legal title is disputed, courts of equity decline the jurisdiction to try this question; but, in analogy to the case of dower, they will retain the bill for a reasonable time, until the issue of title has been determined at law.<sup>2</sup> If the disputed titles are equitable, courts of equity will exercise jurisdiction to settle them, and will then grant final relief by way of partition, under the same bill.<sup>3</sup> Where the subject-matter of the suit is an equitable estate<sup>4</sup> or an incorporeal hereditament,<sup>5</sup> a partition may be had in equity.

§ 1389. **Mode of Partition—Pecuniary Compensation.**—In the original jurisdiction of equity the partition was effected by means

Am. Dec. 699, and note. A pending lease for years is no obstacle to a partition between the owners of the fee: *Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. ed. 644. The grantee of a co-tenant acquires all the rights of his grantor: *Mee v. Benedict*, 98 Mich. 260, 39 Am. St. Rep. 543, 57 N. W. 175, 22 L. R. A. 641. A co-tenant who has mortgaged his interest may have partition: *Green v. Arnold*, 11 R. 1. 364, 23 Am. Rep. 466.

In general, all the tenants in common or joint tenants of the estate in the land to be partitioned should be made parties, either plaintiff or defendant: see *Gates v. Salmon*, 35 Cal. 588, 95 Am. Dec. 139 (grantee). But the mortgagees and judgment creditors of tenants in common are not necessary parties: *Harwood v. Kirby*, 1 Paige 469; though if a mortgagee's interests require that he be joined, he may be made a party: *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163. As to the mode of binding the estates of persons not in being who may become co-owners, see *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455.

<sup>1</sup> *Agar v. Fairfax*, 17 Ves. 533, *supra*.

<sup>2</sup> *Bearden v. Benner*, 120 Fed. 690. As a general rule, the plaintiff could not have partition of property held adversely to him by his co-tenant: *Frey v. Willoughby*, 63 Fed. 865, 27 U. S. App. 417, 11 C. C. A. 463; but statutes conferring legal and equitable powers upon the same court have generally been construed to permit the adjusting of all the conflicting claims in one action: *Weston v. Stoddard* 137 N. Y. 119, 33 Am. St. Rep. 697, 33 N. E. 62, 20 L. R. A. 624; and statutes often explicitly authorize the determination of questions of title by the court of equity: see *Pillow v. Southwest, etc., Co.*, 92 Va. 144, 53 Am. St. Rep. 804, 23 S. E. 32.

<sup>3</sup> *Vreeland v. Vreeland*, 49 N. J. Eq. 322, 24 Atl. 551.

<sup>4</sup> *Aspen M. & S. Co. v. Rucker*, 28 Fed. 220.

<sup>5</sup> Equity, by reason of the flexibility of its decrees, may partition the right to the use of water in a flowing stream: *Warren v. Westbrook Mfg. Co.*, 88 Me. 58, 51 Am. St. Rep. 372, 33 Atl. 665, 35 L. R. A. 388; but the actual partition of oil and gas among co-owners who did not own the surface was beyond the power of the court, in *Hall v. Vernon*, 47 W. Va. 295, 81 Am. St. Rep. 791, 34 S. E. 764.

of mutual conveyances; and where the land was incapable of exact or fair division, the court had power to compensate for the inequality by awarding what was known as "owelty of partition," being a pecuniary compensation, or a charge upon the land by way of rent, servitude, or easement.<sup>1</sup> And if one of the joint owners or owners in common has received more than his share of the rents and profits, the court will direct an account for the purpose of decreeing a reimbursement.<sup>2</sup> And if it should appear that one of the parties had made improvements on the land of which partition is sought, he will be awarded suitable compensation.<sup>3</sup> The inconvenience or difficulty attending the partition is no ground for refusing the relief.<sup>4</sup>

§ 1390. **Partition by Means of a Sale.**—On account of the difficulty of making an equitable apportionment and division of the land, it might sometimes be expedient for the court to order a sale of the property and a division of the proceeds. By the original equitable jurisdiction, independent of any statute, if all the parties *sui juris* were willing, the court had power to decree a sale; and this, even though infants might be among the parties interested.<sup>1</sup> But where one of the parties *sui juris* refused his consent, the court had no option but to proceed with the ordinary mode of partition.<sup>2</sup> This restriction has in England been removed by a modern statute.<sup>3</sup> In the United States an unqualified power of sale has been conferred on the courts in very many of the states, the power to be exercised whenever it shall appear to the court, independently of the consent of the parties.

<sup>1</sup> *Earl of Clarendon v. Hornby*, 1 P. Wms. 446; *Udike v. Adams*, 24 R. I. 220, 96 Am. St. Rep. 711, 52 Atl. 991.

<sup>2</sup> *Lorimer v. Lorimer*, 5 Madd. 363; *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649; *Fenton v. Miller*, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384.

<sup>3</sup> *Ford v. Knapp*, 102 N. Y. 140, 55 Am. Rep. 782, 6 N. E. 283; *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911 and monographic note, 29 L. R. A. 449, 21 N. E. 746. See also ante, § 1240. The same result may be reached by setting aside to such party the portion of the premises on which he has made the improvements.

<sup>4</sup> In one case the doctrine was carried to the extent of making partition of a house by building a wall through the middle of it: *Turner v. Morgan* 8 Ves. 143. In general the right to partition is absolute: *O'Brien v. Mahoney*, 170 Mass. 200, 88 Am. St. Rep. 371, 60 N. E. 493; unless the right is waived by agreement among the co-tenants: *Martin v. Martin*, 170 Ill. 630, 62 Am. St. Rep. 411, 48 N. E. 924. Equity will, of course, refuse to decree a division where the property is charged with some trust or dedicated to some use which would be defeated by the partition: *Latshaw's Appeal*, 122 Pa. St. 142, 9 Am. St. Rep. 76, 15 Atl. 676.

<sup>1</sup> *Davis v. Turvey*, 32 Beav. 554.

<sup>2</sup> *Codman v. Tinkham* 15 Pick. 364.

<sup>3</sup> 31 & 32 Vict., c. 40.

that a sale would be more beneficial, or less injurious, than an actual division.<sup>4</sup> As between a sale and a partition, however, the courts will *favor* a partition, as not disturbing the existing form of the inheritance.

§ 1391. **Partition of Personal Property—Equitable Jurisdiction and Remedy.**—The rules and proceedings which obtained at common law and by statute on the subject of partition related exclusively to real estate.<sup>1</sup> At common law the co-owner of a chattel could maintain an action respecting the common property against his co-tenant only where a loss, destruction, or sale of the property was provable against the defendant.<sup>2</sup> However expedient the partition of chattels might appear, or however desirable it might be to the co-tenants, the common law furnished no instrumentality by which the partition could be judicially effected. There was not merely an inadequacy of legal remedy, there was an utter absence of it. The situation clearly demanded the intervention of equity. And although the inception of the equitable jurisdiction for the partition of chattels is not traceable with certainty, the jurisdiction itself is unquestioned; and where a literal partition is not practicable, the court will order a sale.<sup>3</sup>

§ 1392. **The Issue of Title.**—In the partition of real estate, the rule was well settled, that where the title of the complainant was put in issue, a court of equity would suspend its interference until the question of title had been determined at law in an action of ejectment. But no ejectment lay to try the title to personalty. A refusal, then, by a court of equity, in proceedings for the partition of chattels, to pass upon an issue of title would be tantamount to a complete failure of justice. Courts of equity, therefore, when partition of personalty is sought, have of necessity departed from the analogies of the law of real estate, and have assumed jurisdiction to determine as well the issue of title as any other issue pertinent to the case.<sup>1</sup>

<sup>4</sup> *Steedman v. Weeks*, 2 Strob. Eq. 145, 49 Am. Dec. 660; *Holley v. Glover*, 36 S. C. 404, 31 Am. St. Rep. 883, 15 S. E. 605, 16 L. R. A. 776.

<sup>1</sup> Allnatt on Partition, 48.

<sup>2</sup> *Gilbert v. Dickerson*, 7 Wend. 449, 22 Am. Dec. 592.

<sup>3</sup> *Robinson v. Dickey*, 143 Ind. 205, 52 Am. St. Rep. 417, 42 N. E. 679; *Godfrey v. White*, 60 Mich. 443, 1 Am. St. Rep. 537, 27 N. W. 593.

<sup>4</sup> *Robinson v. Dickey supra*.

## CHAPTER SECOND.

### SUITS BY WHICH SOME GENERAL RIGHT, EITHER LEGAL OR EQUITABLE, IS ESTABLISHED—BILLS OF PEACE AND BILLS QUIA TIMET QUIETING TITLE.

#### ANALYSIS.

§ 1393. Nature and object.

§ 1394. Bills of peace—Bills quia timet—Quieting title.

§ 1393. **Nature and Object.**—In all the remedies belonging to this class, some *general* right, which may be either legal or equitable, is declared and established.<sup>1</sup> The class includes suits to establish a will, suits to construe a will, and the bills of peace and bills quia timet for the purpose of quieting title, which belong to the original general jurisdiction of equity.<sup>2</sup>

<sup>1</sup>Some of the remedies of this class undoubtedly depend upon what the early chancellors called the “jurisdiction quia timet.” Since the conception of a quia timet jurisdiction is so broad and runs through so many different branches of the remedial jurisprudence, I have not adopted it as a basis of classification. The object of suits to establish and to construe wills is plainly the establishment of a general right; and the same is no less true of those suits to quiet title, bills of peace, and the like, which belong to the original jurisdiction of equity.

<sup>2</sup>All of these remedies have been fully considered in the preceding parts of this work.

For suits to establish a will, see ante, § 1158. For suits to construe a will, see ante, §§ 1155–1157. For suit quieting title, bills of peace, etc., see ante, §§ 243–275.

## CHAPTER THIRD.

SUITS BY WHICH SOME PARTICULAR ESTATE, INTEREST, OR RIGHT, EITHER LEGAL OR EQUITABLE, IS ESTABLISHED—STATUTORY SUIT TO QUIET TITLE—SUIT TO REMOVE A CLOUD FROM TITLE.

## ANALYSIS.

- § 1395. Nature and object.
- § 1396. Statutory suit to quiet title; legislation.
- § 1397. The same; essential features and requisites; possession; title.
- § 1398. Suit to remove a cloud from title; to prevent a cloud.
- § 1399. The same; when the jurisdiction is exercised; general doctrine.

§ 1395. **Nature and Object.**—In all the instances of this class, as distinguished from those of the preceding one, the direct object of the remedy is to declare and establish some particular estate, interest, or right, either legal or equitable, in the property which is the subject-matter.<sup>1</sup> The class as a whole embraces suits for the strict foreclosure of a mortgage or a pledge, suits for the redemption of a mortgage, suits for the redemption of a pledge,<sup>2</sup> statutory suits to quiet title, and suits to remove a cloud from title.

§ 1396. **Statutory Suit to Quiet Title—Legislation.**—The equity jurisdiction to quiet title, independent of statute, was only invoked by a plaintiff in possession, holding the legal title, when successive actions at law, all of which had failed, were brought against him by a single person out of possession, or when many persons asserted equitable titles against a plaintiff in possession holding the legal or an equitable title. The action has been greatly extended by statute, and in many states is the ordinary mode of

<sup>1</sup> Some of these remedies, also, have been said to depend upon the *quia timet* jurisdiction.

<sup>2</sup> These three remedies have already been considered: Strict foreclosure of a mortgage: Ante, § 1227; of a pledge: ante, § 1231. Redemption of a mortgage: Ante, §§ 1219, 1220; of a pledge: ante, § 1231. I shall in this chapter only discuss the statutory suit to quiet title, and the suit to remove a cloud from title. The former of these suits has, in many of the states, become the most important and common of equitable remedies, and has even taken the place, to some extent, of the action of ejectment. The original equitable jurisdiction to quiet title has been greatly enlarged.

trying disputed titles.<sup>1</sup> The states adopting such statutes may be separated into two classes, the first and most numerous class requiring the plaintiff to be in possession, and the second allowing the action to be brought by a plaintiff in or out of possession.<sup>2</sup> In almost every instance the statutes, either by express terms or through broad and general language, allow the action to be maintained by persons having equitable titles; in other words, a plaintiff need not have a legal title.<sup>3</sup>

§ 1397. **Essential Features and Requisites.**—The essential features of the action brought in states of the first class, wherein it differs from the ordinary equitable suit to quiet title, are that the plaintiff may in all cases take the initiative, and need not wait for proceedings to be instituted against him; the statute is an enabling act; and the action may be brought against one or more claimants without regard to the interest or title—legal or equitable—which he or the plaintiff may hold.<sup>1</sup> In addition to the foregoing differences, possession is not required in states of the second class; the action may therefore be brought here in cases where a party at common law would be left to his remedy by ejectment. Several of the statutes in express terms allow the action to be brought to remove clouds from title; others are

<sup>1</sup> The action, also known as one for the "determination of adverse claims" exists in the "Code" states and in several others including Alabama, Illinois, Louisiana, Michigan, Mississippi, New Jersey. The economic conditions which gave rise to these statutes are admirably described by Mr. Justice Field; see *Curtis v. Sutter*, 15 Cal. 263; *Holland v. Challen*, 110 U. S. 21, 3 Sup. Ct. 495, 28 L. ed. 52. The action, if brought by a plaintiff in possession, or when both parties are out of possession, is almost uniformly held to be equitable in its nature; but when brought against a defendant in possession, it is usually held that he is entitled to a jury trial: see the application of the statutes in the United States courts, ante, § 293.

<sup>2</sup> In regard to the nature of the possession requisite to maintain the action, in states of the first class, there is some conflict. It has been held on the one side that possession must be lawful,—must be accompanied by a claim of right, legal or equitable: *Stark v. Starrs*, 6 Wall. 402; and on the other, that it is immaterial how possession was obtained,—by collusion, fraud, or otherwise: *Calderwood v. Brooks*, 45 Cal. 519.

<sup>3</sup> See *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295.

<sup>1</sup> See the various statutes; *Curtis v. Sutter*, 15 Cal. 259, 263. A possessory title is held sufficient to maintain the action to quiet title to a mining claim located on public lands of the United States: *Merced Min. Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262. In states of the first class, while it is evident that a party out of possession holding a legal title must resort to ejectment, as before, to recover possession: *Curtis v. Sutter*, 15 Cal. 259, 264; it is equally evident that the statutes do not prevent a party out of possession from applying for equitable relief,—as, for example, to have a cloud removed or prevent a cloud from being cast on his title: *King v. Carpenter*, 37 Mich. 363.

sufficiently general to include this as well as other adverse claims.<sup>2</sup>

§ 1398. **Suit to Remove a Cloud from Title.**—The jurisdiction of courts of equity to remove clouds from title is well settled,<sup>1</sup> the relief being granted on the principle *quia timet*,—that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title.<sup>2</sup>

§ 1399. **When the Jurisdiction is Exercised—General Doctrine.**—Whether or not the jurisdiction will be exercised depends upon the fact that the estate or interest to be protected is equitable in its nature, or that the remedies at law are inadequate where the estate or interest is legal,—a party being left to his legal remedy where his estate or interest is legal in its nature, and full and complete justice can thereby be done.<sup>1</sup> While a court of equity will

<sup>2</sup> As to the nature of the adverse claims, the pleadings, and the decree, see 2 Pom. Eq. Rem. §§ 739-743.

<sup>1</sup> "A bill will not lie to remove a mere *verbal* claim or oral assertion of ownership in property, as a cloud upon the title. Such clouds upon title, as may be removed by courts of equity, are instruments or other proceedings in writing, which appear upon the records and thereby cast doubt upon the validity of the record title": *Parker v. Shannon*, 121 Ill. 452, 13 N. E. 155, 2 Ames Eq. Jur. 160, 1 Keener 363. Formerly there seems to have been some doubt as to the jurisdiction. Cancellation is the ordinary remedy in removing clouds. It is equally well established that equity has jurisdiction to prevent, by means of injunctions, clouds from being cast on titles: *See Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731, 2 Ames Eq. Jur. 156; *Pixley v. Hug-gins*, 15 Cal. 127, 2 Ames Eq. Jur. 153. The danger, however, in such cases must be imminent, and not merely speculative or potential: *Sanders v. Village of Yonkers*, 63 N. Y. 489. Cases for preventing and removing clouds from title depend generally upon the same principles, and will be discussed together.

<sup>2</sup> The distinction between a bill of peace and a bill to remove a cloud is stated in *Holland v. Challen*, 110 U. S. 20, 3 Sup. Ct. 495, 28 L. ed. 52, by Field, J.

<sup>1</sup> It has been held that a cloud upon the title to *personal property*, even by matter appearing of record, cannot be removed: *Loggie v. Chandler*, 95 Me. 220, 49 Atl. 1059, 2 Ames Eq. Jur. 140 (chattel mortgage); but there seems no good reason for thus restricting the jurisdiction, and the instances are not infrequent where it has been exercised, in cases of void recorded chattel mortgages, spurious issues of shares of stock, etc.: *Sherman v. Fitch*, 98 Mass. 59 2 Ames Eq. Jur. 141 (chattel mortgage); *New York and New Haven R. R. Co. v. Schuyler*, 17 N. Y. 592, 1 Keener 118.

A party who has been in adverse possession for a period of time, which, under the statute of limitations, vests him with a title against all the world, can bring his suit against a party claiming under a record title, to have the claim determined and adjudged null and void as against him, "The statute of limitations as against a party claiming under a written title would have performed but half its mission, as a statute of repose, if the party relying upon it must wait till he is attacked before he can reduce the evidence of his title

set aside a deed, agreement, or proceeding affecting real estate, where extrinsic evidence is necessary to show its invalidity, because such instrument or proceeding may be used for annoying and injurious purposes at a time when the evidence to contest or resist it may not be as effectual as if used at once, still, if the defect appears upon its face, and a resort to extrinsic evidence is unnecessary, the reason for equitable interference does not exist, for it cannot be said that any cloud whatever is cast upon the title.<sup>2</sup> . . . In the absence of statutes giving a prima facie validi-

to the form of a permanent record": Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722, 2 Ames Eq. Jur. 142.

As to whether possession by a plaintiff is necessary before he can resort to equity to remove a cloud, there appears to be some conflict of opinion arising from loose and careless statements of judges, and an overlooking of the principles of equity in regard to the exercise of its jurisdiction. When the estate or interest to be protected is equitable, the jurisdiction should be exercised whether the plaintiff is in or out of possession, for under these circumstances legal remedies are not possible; but when the estate or interest is legal in its nature, the exercise of the jurisdiction depends upon the adequacy of legal remedies. Thus, for example, a plaintiff out of possession, holding the legal title, will be left to his remedy by ejectment, under ordinary circumstances: Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. ed. 873. But where he is *in possession*, and thus unable to obtain any adequate legal relief, he may resort to equity: Dull's Appeal, 113 Pa. St. 510, 6 Atl. 540, 1 Keener 348. Where, on the other hand, a party out of possession has an equitable title, or where he holds the legal title under circumstances that the law cannot furnish him full and complete relief, his resort to equity to have a cloud removed ought not to be questioned: Echols v. Hubbard, 90 Ala. 309, 7 South. 817; Brown v. Wilson, 21 Colo. 309, 52 Am. St. Rep. 228, 40 Pac. 688; as, where the plaintiff is a remainderman or reversioner unable to recover possession: Woodstock Iron Co. v. Fullenwider, 87 Ala. 584, 13 Am. St. Rep. 73, 6 South. 197; Oppenheimer v. Levi, 96 Md. 296, 54 Atl. 74, 60 L. R. A. 729. While it cannot be said that the cases are uniform on the above propositions, still it is believed that the rule stated in the text and the above explanations are founded on principle and are sufficient to reconcile a vast majority of the conflicting, or apparently conflicting, judicial opinions and dicta on this question. In some of the cases the rule is so broadly stated as to require a plaintiff, seeking to have a cloud removed, under all circumstances to be in possession: Keane v. Kyne, 66 Mo. 216, 2 Ames Eq. Jur. 144; while, on the other hand, it is as generally stated that possession is never essential. Both of these extreme views are open to criticism, and the cases should always be considered with reference to the facts actually before the court.

Where neither party is in possession, or where the lands are wild and unoccupied, it has been generally admitted that the remedy at law is inadequate and that equity has jurisdiction to prevent or remove a cloud: see Martin v. Graves, 5 Allen 601, 2 Ames Eq. Jur. 137; O'Brien v. Creitz, 10 Kan. 202, 2 Ames Eq. Jur. 146; Holland v. Challen, 110 U. S. 19, 3 Sup. Ct. 495, 28 L. ed. 52, a statutory suit to quiet title.

<sup>2</sup> Simpson v. Lord Howden, 3 Mylne & C. 97, 102, 103, 108, and cases cited, 2 Ames Eq. Jur. 124, 1 Keener 323; Scott v. Onderdonk, 14 N. Y. 9, 67 Am.

ty to deeds or other proceedings, the following doctrine seems to be sustained by the great majority of American decisions: Where the instrument or proceeding constituting the alleged cloud is absolutely void on its face, so that no extrinsic evidence is necessary to show its invalidity, and where the instrument or proceeding is not thus void on its face, but the party claiming under it, in order to enforce it, *must necessarily* offer evidence which will *inevitably* show its invalidity and destroy its efficacy,—in each of these cases the court will not exercise its jurisdiction either to restrain or to remove a cloud, for the assumed reason that there is no cloud.<sup>8</sup> While this doctrine may be settled by the weight of

Dec. 106, 2 Ames Eq. Jur. 147, 1 Keener 331; Clark v. Davenport, 95 N. Y. 477, 1 Keener 344; Moores v. Townshend, 102 N. Y. 387, 7 N. E. 401, 1 Keener 355.

In many states, deeds, certificates, and other instruments given on sales for taxes are made prima facie evidence by statute of the regularity of proceedings connected with the assessments and sales, and it is well settled that courts of equity will set aside such instruments for defects, although such defects are apparent on the face of the proceedings leading up to the execution of the instrument; or, in a proper case, the execution of such an instrument, prima facie valid on its face, may be enjoined. Scott v. Onderdonk, 14 N. Y. 9, 67 Am. Dec. 106, 2 Ames Eq. Jur. 137, 1 Keener, 331.

<sup>8</sup> Scott v. Onderdonk, 14 N. Y. 147, 67 Am. Dec. 106, 2 Ames Eq. Jur. 147, 1 Keener 331; Washburn v. Burnham, 63 N. Y. 132, 2 Ames Eq. Jur. 150 (extreme application of principle; in suit by defendant he must, by extrinsic proof, show power of attorney to execute the instrument, and relief therefore denied to complainant).

It is a rule in many jurisdictions that where the title of both complainant and defendant are derived from a common source, but defendant's title appears by the records to have originated subsequently to the complainant's title, so that by an inspection of the whole record it appears that the defendant's title is prima facie inferior to that of the complainant, the complainant is still entitled to equitable relief, since he would be required, in an action by the defendant, to offer evidence of his own prior title in order to defeat a recovery. "The true test, as we conceive, by which the question, whether a deed would cast a cloud upon the title of the plaintiff, may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed": Pixley v. Huggins, 15 Cal. 127, 2 Ames Eq. Jur. 153, by Field, C. J. (a leading case on the whole subject); Linnell v. Battey, 17 R. I. 241, 21 Atl. 606, 1 Keener 387. In New York, however, and a few other jurisdictions, the contrary is the rule; if it appears by the whole record that the complainant's title is paramount, there is no cloud to be removed: Bockes v. Lansing, 74 N. Y. 437, 2 Ames Eq. Jur. 152 (complainant's title was derived from an assignee for benefit of creditors of G. W., and defendant's, through a sale by receiver of G. W.'s property, subsequently appointed. "Those claiming under the receiver's sale could not establish any title, without first overthrowing the plaintiff's title by showing by extrinsic evidence that the assignment made by G. W. was fraudulent and void").

authority, I must express the opinion that it often operates to produce a denial of justice. It leads to the strange scene, almost daily in the courts, of defendants urging that the instruments under which they claim *are void, and therefore that they ought to be permitted to stand unmolested*, and of judges deciding that the court cannot interfere, *because the deed or other instrument is void*, while from a business point of view every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value, and the judge himself who repeats the rule would neither buy the property while thus affected nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice and expediency.<sup>4</sup>

In pursuance of the general doctrine it is usually held that if the defendant's title is derived from a complete stranger to the complainant's title, from one who never had any connection with the property, it does not constitute a cloud; as, where an execution is levied upon lands owned by complainant, issued upon a judgment, in an action to which he was not a party, against one who never had any interest in the lands: *Lytle v. Sandefeer*, 93 Ala. 396, 9 South. 260, 1 Keener 383 (deed by widow of intestate not a cloud on title of his heirs); *Thompson v. Etowah Iron Co.*, 91 Ga. 538, 17 S. E. 663, per Lumpkin, J., and cases cited (an instructive opinion). But in several states such levy may be enjoined, on the general theory obtaining in such states that a void act under color of judicial process is subject to injunction: *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731, 2 Ames Eq. Jur. 156.

<sup>4</sup>This criticism has been adopted, and the doctrine repudiated in a few states: *Day Land & Cattle Co. v. State*, 68 Tex. 527, 4 S. W. 865, 1 Keener, 364. This passage has also been quoted in certain cases enjoining invalid execution sales, enumerated in the last note, *Linnell v. Battey*, *Bishop v. Moorman*. To the same effect are the early English case, *Bromley v. Holland*, 7 Ves. 3, 21, 22; dicta of Chancellor Kent in *Hamilton v. Cummings*, 1 Johns. Ch. 517, 1 Keener 317, 1 Scott 104, and of Chief Justice Marshall in *Piersoll v. Elliott*, 6 Pet. 98, 8 L. ed. 334, Shep. 241, to the effect that the question should be one of discretion, not of jurisdiction, where the instrument was void on its face; see further, *Pom. Eq. Rem.*, § 734.

## FIFTH GROUP.

### REMEDIES BY WHICH EQUITABLE OBLIGATIONS ARE SPECIFICALLY AND DIRECTLY ENFORCED.

#### CHAPTER FIRST.

##### SPECIFIC PERFORMANCE OF CONTRACTS.

###### ANALYSIS.

- § 1400. Nature and object.
- § 1401. Specific performance of contracts; grounds of the jurisdiction.
- § 1402. Extent of the jurisdiction; inadequacy of damages; various kinds of contracts; lands; chattels; things in action; awards; special contracts.
- § 1402a. No relief when decree would be nugatory; partnership agreements.
- § 1402b. Specific performance refused when court cannot render or enforce a decree.
- § 1402c. Same: arbitration agreements, etc.
- § 1402d. Same: contracts for personal services.
- § 1402e. Same: contracts for building or construction.
- § 1402f. Same: other contracts requiring continuous acts; railroad operating agreements.
- § 1403. Extent of the jurisdiction: Impracticability of the legal remedy.
- § 1404. The jurisdiction discretionary.
- § 1405. Essential elements and incidents: valuable consideration; certainty; mutuality; fairness; hardship; doubtful title, etc.
- § 1406. Rights under the contract; effect of events without the agency of the parties.
- § 1407. Performance by plaintiff a condition precedent.
- § 1408. Time as affecting the right to a performance.
- § 1409. Enforcement of verbal contracts part performed.
- § 1409a. Same; acts of part performance; possession; improvements.
- § 1409b. Same; payment.
- § 1409c. Same; oral promise to give.
- § 1409d. Same; marriage not part performance.
- § 1409e. Specific performance because of fraud, independent of doctrine of part performance.
- § 1409f. Partial performance with compensation.
- § 1410. Damages in place of a specific performance.

§ 1400. **Nature and Object.**—The remedies embraced in this group are all purely equitable, and the rights of the complainant

and obligations of the defendant which are enforced by their means are also equitable.<sup>1</sup> They belong, therefore, to the exclusive jurisdiction of equity. Their distinctive object is to specifically enforce the complainant's equitable right, and to compel the defendant to specifically perform the actual equitable obligation which rests upon him. This group, as a whole, contains the specific performance of contracts, including the performance of verbal contracts for the sale of land which have been part performed, and the delivery up of specific chattels; the specific enforcement of trusts, express and implied; and the specific enforcement of obligations arising from fiduciary relations analogous to trusts.<sup>2</sup>

**§ 1401. Specific Performance of Contracts—Ground of the Jurisdiction.**—The remedy of the specific performance of contracts is purely equitable, given as a substitute for the legal remedy of compensation, whenever the legal remedy is inadequate or impracticable. In the language of Lord Selborne: "The principle which is material to be considered is, that the court gives specific performance instead of damages only when it can by that means *do more perfect and complete justice.*"<sup>1</sup> The jurisdiction depending upon this broad principle is exercised in two classes of cases: 1. Where the subject-matter of the contract is of such a special nature, or of such a peculiar value, that the damages, when ascertained according to legal rules, would not be a just and reasonable substitute for or representative of that subject-matter in the hands of the party who is entitled to its benefit; or in other words, where the damages are *inadequate*; 2. Where, from some special and practical features or incidents of the contract inhering either in its

<sup>1</sup> Although contracts may also give rise to a legal right, yet when equity compels their specific performance, it enforces the equitable obligation arising from them, and not the legal duty. In most cases, it turns the vendee's equitable *estate* into a legal one.

<sup>2</sup> The indirect specific enforcement of certain contracts by means of an injunction has already been considered in a preceding chapter (§§ 1341-1344), and will not be here discussed.

<sup>1</sup> *Wilson v. Northampton, etc.*, R'y, L. R. 9 Ch. 279, 284. The foundation and measure of the jurisdiction is the desire to do justice, which the legal remedy would fail to give. This justice is primarily due to the plaintiff, but not exclusively, for the equities of the defendant are also protected. Specific performance is, therefore, a conscious attempt on the part of the court to do complete justice to both the parties with respect to all the judicial relations growing out of the contract between them: See *Buxton v. Lister*, 3 Atk. 383, 1 Ames Eq. Jur. 47, 2 Scott 21, 2 Keener 5; *Wright v. Bell*, 5 Price 325, 328, 329, 2 Keener 9; *Adderley v. Dixon*, 1 Sim. & St. 607, 610, 1 Ames Eq. Jur. 58, H. & B. 584, 2 Scott 14, 2 Keener 13; *Ord v. Johnston*, 1 Jur. N. S. 1063, 1064, 1 Scott 40. It follows, therefore, that the remedial right, if it exists at all, must be mutual; each party must be able to enforce the remedy against the other: See post, §§ 1402, n. 2, 1405, n. 3.

subject-matter, in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that *no* real compensation can be obtained by means of an action at law; or in other words, where damages are *impracticable*.<sup>2</sup>

§ 1402. **Extent of the Jurisdiction—Inadequacy of Damages.**—The object of the present discussion is to determine the general classes of contracts which come within the jurisdiction, and which may be specifically enforced. Whether any particular contract belonging to one of these classes will actually be thus enforced depends upon other equitable elements, to be described hereafter. *Lands*: Where land, or any estate therein, is the subject-matter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established.<sup>1</sup> Whenever a contract concerning real property is in its nature and incidents entirely unobjectionable,—when it possesses none of those features which, in ordinary language, influence the discretion of the court,—it is as much a matter of course for a court of equity to decree its specific performance as it is for a court of law to give damages for the breach.<sup>2</sup> *Chattels*: On the contrary, the doc-

<sup>2</sup>The ground of the jurisdiction may be practically stated thus: that an award of damages will not put the party in a situation as beneficial to him as if the agreement were specifically performed.

<sup>1</sup>The remedy of specific performance is sometimes spoken of as one of the most ancient heads of equity jurisdiction. Professor Ames, however (1 Green Bag, 26; 1 Ames, Cas. Eq. Jur. 37), is of the opinion that the cases relied on to support this belief were instances of other kinds of relief, and that with one exception, dating from 1458, no clear instance of specific performance is to be found earlier than the middle of the sixteenth century. Soon after that, however, the remedy became common, as applied to contracts concerning land. The origin and early grounds of the jurisdiction concerning land contracts are thus conjectural. The accepted explanation of the rule that specific performance of such contracts is enforced may be found in the following passages: *Adderley v. Dixon*, 1 Sim. & St. 607, 1 Ames Eq. Jur. 58, H. & B. 584, 2 Scott 14, 2 Keener 13: "Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy. Thus, a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser, to whom the land *may* have a peculiar and special value." *Cud v. Rutter*, 1 P. Wms. 570, 2 Scott 44, 1 Keener 1: "One parcel of land may vary from, and be more commodious, pleasant, or convenient than another parcel of land." It should be carefully observed, however, that the remedy in equity for the specific performance of land contracts is not refused because, in the individual case, these reasons may not hold good and damages in an action at law may be adequate relief: See ante, § 221.

<sup>2</sup>Among other contracts thus enforced are agreements to give or renew a lease: *Buckland v. Papillon*, L. R. 2 Ch. App. 67, 2 Keener 442; contracts

trine is equally well settled that equity will not, in general, decree the specific performance of contracts concerning chattels, because

for mortgages: Hermann v. Hodges, L. R. 16 Eq. 18, 1 Ames Eq. Jur. 61, 2 Scott 58, 2 Keener 56; Hicks v. Turck, 72 Mich. 311, 40 N. W. 339, H. & B. 711, 2 Keener 57; family settlements: Wistar's Appeal, 80 Pa. St. 484; bonds to convey land: Ewins v. Gordon, 49 N. H. 444; judicial sales: Gregory v. Tingley, 18 Neb. 319, 25 N. W. 88. The enforcement of contracts concerning land in another country or state is described in §§ 428 et seq., ante.

*Contract to Make a Will of Lands.*—A contract to devise land, though looked upon with some disfavor as a non-testamentary method of disposition of property at death, and consequently not subject to the statute of wills, will yet be in effect enforced by equity when the contract is clear, definite, and without doubt: Cassey v. Fitton (1679), 2 Hargrave, Judicial Arguments, 296, 1 Ames Eq. Jur. 145; Johnson v. Hubbell, 10 N. J. Eq. 332, 64 Am. Dec. 773; Bolman v. Overall, 80 Ala. 451, 60 Am. Rep. 107, 2 South. 624. It is obvious that equity cannot compel direct specific performance of the contract to devise land by ordering the promisor to make the devise before his death, as performance is not due until the time of death. But equity will do what is equivalent to giving specific performance, by fastening a trust upon the land, in the heir or devisee, and enforcing conveyance by the representative holding the legal title in favor of the purchaser under the contract to devise.

*Specific performance in favor of vendor.*—It is well settled, with scarcely any dissent, that specific performance is granted in favor of a vendor of land as freely as in favor of a vendee, though the relief actually obtained by him is usually only a recovery of money—the purchase price; “it differs from the suit to enforce a vendor’s lien in the fact that the judgment is for the recovery of the money generally, and not out of the land itself as a special fund.” 1 Pom. Eq. Jur., § 112, note 1. Three theories have been advanced to explain the rule: (1) It is said that the vendor’s remedy in law by damages is inadequate, since the measure of damages is the difference between the agreed price and the market value, whereas the vendor might for particular reasons stand in need of the whole sum agreed to be paid: Lewis v. Lechmere, 10 Mod. 503. See, also, Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87, H. & B. 585, 2 Scott 62, 2 Keener 95. The objection to this theory is, that it proves too much; since, if the same test were applied generally, damages might be an inadequate remedy in almost every instance of sale and purchase, of chattels as well as of land. (2) It is said that by the doctrine of equitable conversion the vendee is a trustee of the purchase price for the vendor, and the vendor, in obtaining specific performance, enforces this trust: ante, § 221, note; Lewis v. Lechmere, 10 Mod. 503. To this it may be answered, that it proves too little; for the doctrine of equitable conversion is not supposed to extend to contracts for the sale and purchase of chattels or things in action, yet the cases are not infrequent where such contracts have been enforced at the suit of the vendors therein: See Withy v. Cottle; Adderley v. Dixon; Cogent v. Gibson, 33 Beav. 557 (vendor of patent); Kenney v. Wexham, infra; Bumgardner v. Leavitt, 35 W. Va. 194, 13 S. E. 67, 12 L. R. A. 776, H. & B. 588. (3) The rule is more satisfactorily accounted for by reference to the doctrine of mutuality; viz., that where an equitable remedial right in the vendee is recognized, a corresponding remedial right should be admitted in favor of the vendor: Ante, § 221, note, § 1401, note 1; Lewis v. Lechmere, 10 Mod. 503; Withy v. Cottle, 1 Sim. & St. 174, 1 Ames Eq. Jur. 57 (vendor

their money value recovered as damages will enable the party to purchase others in the market of like kind and quality. *Exceptions*: Where, however, particular chattels have some special value to the owner over and above any pecuniary estimate,—the pretium affectionis,—and where they are unique, rare, and incapable of being reproduced by money damages, equity will decree a specific delivery of them to their owner, and the specific performance of contracts concerning them.<sup>3</sup> *Things in action*: Contracts for the

of annuity); Adderley v. Dixon, 1 Sim. & St. 607, 1 Ames Eq. Jur. 58, H. & B. 584, 2 Scott 14, 2 Keener 13 (vendor of debt); Cogent v. Gibson, 33 Beav. 557, 1 Ames Eq. Jur. 56, 2 Scott 147, 2 Keener 86 (vendor of patent); Kenney v. Wexham, 6 Madd. 355, 2 Keener 80 (annuity); Phillips v. Berger, 2 Barb. 608, 2 Keener 98. This is the usual explanation of the rule, and appears to reconcile most, if not all, of the cases.

<sup>3</sup> See also, ante, § 185. This class includes.—1. Articles of special value to their owner, but of no general pecuniary value; and 2. Articles of such great rarity and value that they cannot be replaced by money,—paintings, statues, etc. The jurisdiction will be exercised to compel the delivery by one who wrongfully detains them, or to compel the specific execution of a contract for their sale or delivery. In Pusey v. Pusey, 1 Vern. 273, 1 Scott 86, Shep. 278, the bill was that an ancient horn which time out of mind had gone along with the plaintiff's estate, and was delivered to his ancestors in ancient time to hold the land by, might be delivered up. In Duke of Somerset v. Cookson, 3 P. Wms. 389, 1 Ames Eq. Jur. 39, the suit was to compel the delivery of an old silver patera having a Greek inscription and dedication to Hercules, which had been dug up on plaintiff's estate. Fells v. Read, 3 Ves. 70, 2 Scott 37, was brought to recover a tobacco-box of a remarkable kind, which belonged to a club. Ld. Ch. Loughborough said: "The Pusey horn, the patera of the Duke of Somerset, were things of that sort of value that a jury might not give twopence beyond the weight. It was not to be cast to the estimation of people who had not those feelings. . . . It would be great injustice if an individual cannot have his property without being liable to the estimate of people who have not his feelings upon it." See, also, Pearne v. Lisle, Amb. 75, 77, 1 Scott 86; Falcke v. Gray, 4 Drew. 651, H. & B. 655. In analogy to this jurisdiction and for the same reasons, equity will decree the delivery up to the lawful owner of deeds, and other written muniments of title: Ante, § 185; McGowin v. Remington, 12 Pa. St. 56, 51 Am. Dec. 584, 1 Scott 90, H. & B. 637 (valuable private maps). Where, however, the party seeking to recover the property has himself fixed a value at which he has agreed to sell, he cannot subsequently come into equity to obtain the specific delivery of the chattel: Dowling v. Betjemann, 2 Johns. & R. 544, 1 Ames Eq. Jur. 40, 2 Scott 41, 2 Keener 20.

*Other grounds for relief*.—An agreement to furnish articles necessary to the vendee and which the vendor alone can supply, either because their manufacture is guarded by a patent or for any similar reason, may be enforced, for it is impossible to ascertain how much the vendee would suffer from not being able to obtain such articles for the use in his business: Adams v. Messinger, 147 Mass. 185, 6 Am. St. Rep. 679, 17 N. E. 491, 1 Ames Eq. Jur. 50, 2 Scott 48, 2 Keener 41. In Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co., 63 Md. 285, 2 Keener 35, specific performance was decreed of a contract to sell coal tar which plaintiff needed in order to fulfill existing contracts, and which it would be impossible to obtain otherwise than by purchasing "in other

sale or assignment of things in action may be enforced by the purchaser, by compelling a transfer and delivery, where the legal damages might be too uncertain and conjectural to constitute an adequate compensation. And since the remedy must be mutual, the vendor may also maintain the action in such cases.<sup>4</sup> *Awards:*

and distant cities, and transporting the same at great expense and loss, the amount of which it is impossible to estimate in advance." In *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 26 Am. St. Rep. 214, 27 N. E. 1005, 12 L. R. A. 563, 2 Keener 51, specific performance was decreed of a contract to furnish fish skins to be used in the manufacture of glue. It appeared that fish skins are of a very limited production, that most of the producers were under contract with defendant, and that unless relief were given it would be very difficult if not impossible for defendant to carry on his business. If a trust or fiduciary relation exists in reference to the chattels, if an express trust has been created by the contract or an implied trust has arisen from the acts or omissions of the parties, then equity will exercise its jurisdiction to compel the specific performance of such contract, whether the chattels are common or special, since the court will always enforce a trust. See *Wood v. Rowcliffe*, 3 Hare 304 (affirmed 2 Ph. 382), 2 Scott 40, 1 Ames Eq. Jur. 43. Insolvency of the defendant, rendering him unable to respond in damages, is recognized by dicta in a few cases as a sufficient ground for relief, although damages, if collectible, would be an adequate remedy: *Parker v. Garrison*, 61 Ill. 250, 1 Ames Eq. Jur. 44. But it is believed that in no case has insolvency alone been the ground for relief. These dicta seem in conflict with sound principle in at least two respects. In the first place, such a rule makes one under such a contract a preferred creditor. In the second place, the inadequacy of the legal relief which is the basis of equitable remedies consists ordinarily in the general nature of that relief in cases of a certain type, not in the difficulty of collection of damages in the individual instance: See *Pom. Spec. Perf.*, §§ 26, 27.

In a few cases it has been held that where a contract is to be performed in installments, that fact is sufficient to warrant relief: *Buxton v. Lister*, 3 Atk. 383, 1 Ames Eq. Jur. 47, 2 Scott 21, 2 Keener 5. There seems very little reason in support of this view, and it has been distinctly repudiated in other cases: *Fothergill v. Rowland*, 17 Eq. 132, 140, 1 Ames Eq. Jur. 111, H. & B. 599, 2 Scott 111, 2 Keener 261.

\*Accordingly, a contract for the sale of the uncertain dividends which might become payable from the estate of a bankrupt—in other words, for the sale of a debt due by a bankrupt—may be specifically enforced; for damages cannot accurately represent the value of future dividends, and to compel the purchaser to take such damages would be to compel him to sell at a conjectural price: *Wright v. Bell*, 5 Price 325, 2 Keener 9; *Adderley v. Dixon*, 1 Sim. & St. 607, 1 Ames Eq. Jur. 58, H. & B. 584, 2 Scott 14, 2 Keener 13; *Cutting v. Dana*, 25 N. J. Eq. 265, 2 Keener 60. Likewise, a contract for the sale of an annuity may be enforced in equity: *Withy v. Cottle*, 1 Sim. & St. 174, 1 Ames Eq. Jur. 57; *Kenney v. Wexham*, 6 Madd. 355, 2 Keener 80.

*Patents.*—Equity courts will take jurisdiction to compel the specific performance of contracts for the conveyance of patent rights, either at the suit of the vendor or of the vendee: *Cogent v. Gibson*, 33 Beav. 557, 1 Ames Eq. Jur. 56, 2 Keener 86, 2 Scott 147; *Corbin v. Tracy*, 34 Conn. 325, H. & B. 709, 2 Scott 46, 2 Keener 34; *Adams v. Messenger*, 147 Mass. 185, 6 Am. St. Rep.

An award is treated as the continuance of the agreement to submit. If it directs acts to be done which, if stipulated for in a contract, would render such contract capable of enforcement, then the award itself may be specifically enforced.<sup>5</sup> *Special contracts:* The jurisdiction does not depend upon the nature of the contract nor of the subject-matter, but it will be exercised wherever the legal remedy is inadequate. It has been applied to a great number of special agreements.<sup>6</sup>

679, 17 N. E. 491, 1 Ames Eq. Jur. 50, 2 Scott 48, 2 Keener 41. The grounds for the jurisdiction are two. In the first place, it is a thing which the vendor alone can supply; and we have already seen that this is treated by some authorities as sufficient to authorize relief. In the second place, damages for the breach cannot be accurately estimated, for the profits to be derived are future and conjectural.

*Shares of stock.*—The right to specific performance of contracts for the sale of corporate stock depends upon the character of the stock. In England it is held that a transfer of public stocks which are always to be had by any person who chooses to apply for them in the market will not be decreed, for damages are adequate: Cud v. Rutter, 1 P. Wms. 570, 2 Scott 44, 2 Keener 1. Shares of railway and other private corporations, which are limited in number and cannot always be had in the market, stand upon a different footing, and equity may grant its relief: Duncuift v. Albrecht, 12 Sim. 189, 1 Ames Eq. Jur. 55, 2 Scott 44, 2 Keener 15. The rules in the United States are narrower, and it would seem, more in accord with principle. Specific performance will not be decreed if the shares are readily obtainable in the open market. If, however, the shares have no market rating, and cannot easily be obtained elsewhere, damages will be inadequate and specific performance will be granted: New England Trust Co. v. Abbott, 162 Mass. 148, 154, 38 N. E. 432, 27 L. R. A. 271, H. & B. 720; Bumgardner v. Leavitt, 35 W. Va. 194, 13 S. E. 67, 12 L. R. A. 776, H. & B. 588.

<sup>5</sup>For example, awards directing the conveyance of land, etc.: Hall v. Hardy, 3 P. Wms. 187, 1 Ames Eq. Jur. 65, 2 Scott 54, 2 Keener 109; Wood v. Griffith, 1 Swanst. 43, 2 Keener 114; Bouck v. Wilber, 4 Johns. Ch. 405, 2 Keener 125; but not an award directing merely a payment of money: Hall v. Hardy, *supra*.

<sup>6</sup>Specific performance may be had of a contract to insure, the jurisdiction being based upon the complications and embarrassments incident to an action at law to enforce the contract: Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 13 L. ed. 187, 1 Ames Eq. Jur. 59, 2 Scott 31, 2 Keener 53. Relief may be had in equity either before or after loss; and when sought after loss, the bill may be retained for the purpose of awarding the amount due: Tayloe v. Merchants' Fire Ins. Co., *supra*. An agreement to execute a mortgage is of such character as to be capable of enforcement in equity: Hermann v. Hodges, L. R. 16 Eq. 18, 1 Ames Eq. Jur. 61, 2 Scott 58, 2 Keener 56; Hicks v. Turck, 72 Mich. 311, 40 N. W. 339, H. & B. 711, 2 Keener 57 ("the remedy at law, when resorted to, is liable to a very great variety of perplexities and embarrassments arising from the want of the note promised. . . . The note was liable to run five years, and complainants had the right to have the amount owing thereon during all the time it did run secured by the mortgage." See, also, Sporle v. Whayman, 20 Beav. 607, 2 Keener 55, compelling to give memorandum of terms of deposit of title deeds); as is also a contract to indemnify: Count Ranelagh v. Hayes, 1 Vern. 189, 1 Ames Eq. Jur. 64. On the other hand, a con-

**§ 1402a. No Relief When Decree Would be Nugatory—Partnership Agreements.**—“The court will not grant the remedy when by the terms of the contract itself the defendant would be entitled at any time to terminate the agreement and thus evade the decree.”<sup>1</sup> Accordingly, it is held that an agreement to enter into or carry on a partnership at will cannot be specifically enforced, for it might be terminated at any time.<sup>2</sup> The doctrine is frequently stated more broadly to the effect that as a general rule the court will not decree specific performance of an agreement to perform and carry on a partnership.<sup>3</sup> Equity may, however, secure to a partner the interests in property to which by the partnership agreement he is entitled.<sup>4</sup>

**§ 1402b. Specific Performance Refused When Court cannot Render or Enforce a Decree.**—“Although the contract is valid, and the defendant is able to do what he has undertaken to do, if, through the want of appropriate means and instrumentalities, the court is unable, while pursuing its ordinary modes of administering justice, either to render a decree or to enforce the decree when made, then the remedy will be refused. *Cases where the court cannot render a decree:* The following species of contracts will not be thus enforced: Agreements concerning the manufacture and sale of secret medicines and other secret commodities, where the contract recognizes the secret as not to be disclosed.<sup>1</sup> Contracts for the sale or transfer of a good-will, separate from or unconnected

tract to lend or to borrow money cannot be specifically enforced: Rogers v. Challis, 27 Beav. 175, 1 Ames Eq. Jur. 61, 2 Scott 60, 2 Keener 66 (agreement to borrow money not enforced, the court saying: “It is a simple money demand; the plaintiff says, I have sustained a pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is a mere matter of calculation, and a jury would easily assess the amount of the damage which the plaintiff has sustained”); Sichel v. Mosenthal, 30 Beav. 371, 2 Keener 72 (not of contract to lend money). The remedy has been applied to a great variety of special agreements, where the legal relief was inadequate: Very v. Levy, 13 How. 345, 14 L. ed. 173, 2 Keener 101 (agreement to accept goods in satisfaction of a bond and mortgage).

<sup>1</sup> Pom. Eq. Jur., § 1405, note.

<sup>2</sup> Hercy v. Birch, 9 Ves. 357. See, also, Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459, 2 Keener 78.

<sup>3</sup> Scott v. Rayment, L. R. 7 Eq. 112, 2 Keener 75; Hyer v. Richmond Traction Co., 168 U. S. 471, 18 Sup. Ct. 114, 42 L. ed. 547. It is clear that this broader statement cannot be supported on the theory stated at the beginning of the section, but rather depends upon the doctrine described in the following sections.

<sup>4</sup> Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459, 2 Keener 78. In Homfray v. Fothergill, L. R. 1 Eq. 567, 2 Keener 26, a provision in a partnership deed that the other partners should have the first opportunity to purchase the share of any partner desiring to sell was specifically enforced. See, also, England v. Curling, 8 Beav. 129, 2 Keener 68.

<sup>1</sup> Newbery v. James, 2 Mer. 446, 2 Scott 26.

with the business and premises of which it is an incident.<sup>2</sup> *Cases where the court cannot enforce its decree:* This class includes the following species of contracts, for which the equitable remedy is refused;” the more important of which, together with the exceptions to the rule of non-enforcement, are described in the following paragraphs: Agreements to submit to arbitration, and contracts for sale at a price to be fixed by valuers; contracts for personal services; contracts whose performance would be continuous, and would require protracted supervision and direction, including, especially, contracts for building and construction, for working mines, for operating railroads, and the like.

§ 1402c. **Same. Arbitration Agreements, etc.**—An agreement to submit a matter to arbitration, or to sell at a price to be fixed by valuers, if the mode of fixing the price is an essential part of the contract, will not be specifically enforced, since it is beyond the power of the court to compel arbitrators to agree; nor will the court itself fix the price, since that would be to make a new agreement for the parties.<sup>1</sup>

§ 1402d. **Same. Contracts for Personal Services.**—It is a familiar rule that contracts for personal services, where the full performance rests upon the personal will of the contracting party, will not be specifically enforced against him.<sup>1</sup> It is also generally true that they will not be enforced where the plaintiff is the one who has contracted to render the services, and there has been no full performance on his part, since mutuality in the equitable remedy is then lacking.<sup>2</sup> The indirect enforcement of contracts

<sup>1</sup> *Bozon v. Farlow*, 1 Mer. 459. But where the good-will is sold and transferred, *together with* the business and premises, the agreement may be directly enforced, or negatively enforced by an injunction: *Darbey v. Whitaker*, 4 Drew 134, 139, 140, 2 Keener 129; *Whittaker v. Howe*, 3 Beav. 383, 2 Keener 209. See, also, ante, §§ 1344, 1355.

<sup>2</sup> Pom. Eq. Jur. § 1405, n. 10.

<sup>1</sup> Pom. Spec. Perf., §§ 291, 309, 149-151; *Milnes v. Gery*, 14 Ves. 100, 2 Keener 111; *Agar v. Macklew*, 2 Sim. & St. 418, 1 Ames Eq. Jur. 67; *Vickers v. Vickers*, L. R. 4 Eq. 529, 2 Keener 132. For instance where specific performance was decreed, the court fixing the value, see *Town of Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740 (the arbitration clause held to be a subsidiary part of the agreement, and the value therefore fixed by reference to the master).

As to enforcing *awards*, see ante, § 1402, n. 5.

<sup>1</sup> *Pickering v. Bishop of Ely*, 2 Younge & C. Ch. 249; *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. 198, 7 L. R. A. 381, H. & B. 631; *Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 18 Am. St. Rep. 278, 20 Atl. 467, 7 L. R. A. 779, H. & B. 629, Shep. 294, 2 Keener 279; ante, § 1343. The opinion of Chancellor Walworth, in *De Rivafinoli v. Corsetti*, 4 Paige 270, 25 Am. Dec. 532, is a locus classicus of judicial humor.

<sup>2</sup> *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1131, 1 Ames Eq. Jur. 87, and post, § 1405, n. 3.

for services of a unique and extraordinary character, by enjoining the breach of an express or implied stipulation not to do acts inconsistent with the rendering of the services, is a subject that has been already treated.<sup>3</sup>

§ 1402e. **Same. Contracts for Building or Construction.**—The general rule has long been settled, after a period of conflict and uncertainty in the early cases,<sup>1</sup> that contracts for building and construction, and contracts to make repairs, will not be enforced *in specie*,<sup>2</sup> on account of the inconvenience of enforcing a decree by the process of attachment for contempt, when numerous questions must usually arise under the decree in such a case as to whether there has been substantial performance, whether defective performance may be excused, what compensation should be made for the deficiency, and the like. Moreover, if the building is to be done on the plaintiff's land, the remedy at law is usually adequate, since he may do the work himself and sue at law for the cost. Several exceptions have been made to the rule by the English courts.<sup>3</sup> One of these exceptions has become firmly established

<sup>3</sup> See ante, § 1343.

<sup>1</sup> In Jones v. Parker, 163 Mass. 564, 47 Am. St. Rep. 485, 40 N. E. 1044, 1 Ames Eq. Jur. 73, 2 Scott 83, 2 Keener 192, Holmes, J., makes the sweeping assertion that courts of equity "have enforced such contracts from the earliest days to the present time"; but it has been pointed out that the cases dating from the fifteenth century by which the learned judge supports his assertion are probably not cases of specific performance at all: 1 Ames Cas. Eq. Jur. 68, note 4. In the eighteenth century, however, such contracts were enforced rather frequently. Lord Hardwicke, in City of London v. Nash (1747), 3 Atk. 512, made the distinction that a covenant to build could be enforced, "for to build is one entire single thing"; but not a covenant to repair. By the end of that century, however, this distinction was abandoned: Lucas v. Comerford (1790), 1 Ves. Jr. 235, 3 Bro. C. C. 166.

<sup>2</sup> The authorities are fully reviewed in the opinion of Mr. Justice Miller in Ross v. Union Pac. Ry. Co., 1 Woolw. 26, Fed. Cas. No. 12,080, 2 Scott 65, 2 Keener 145 (a railroad construction contract). See, also, Texas & P. Ry. Co. v. Marshall, 136 U. S. 303, 407, 10 Sup. Ct. 846, 34 L. ed. 385; Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430, 1 Ames Eq. Jur. 70, 2 Keener 167, 2 Scott 79 (lessor's covenant to repair).

<sup>3</sup> See 4 Pom. Eq. Jur., § 1402, note 6. "I must confess that I cannot altogether understand the principle upon which courts of equity have acted in sometimes granting orders for specific performance in these cases and sometimes not. . . . In early times they seem to have granted decrees for specific performance in such cases. [See note 1, supra.] Then came a period in which they would not grant such decrees on the ground that the courts could not undertake to supervise the performance of the contract. Later on they seem to have attached less importance to this consideration, and returned to some extent to the more ancient practice, holding that they could order specific performance in certain cases in which the works were specified by the contract in a sufficiently definite manner"; Collins, L. J., in Mayor, etc., of Wolverhampton v. Emmons, (1901) 1 K. B. 515, 1 Ames Eq. Jur. 76.

“Where there is a definite contract, by which a person, who has acquired land in consideration thereof, has agreed to erect on the land so acquired a building [or other structure] of which the particulars are clearly specified, and the erection of which is of an importance to the other party which cannot adequately be measured by pecuniary damages . . . specific performance ought to be ordered.”<sup>4</sup>

§ 1402f. **Same. Other Contracts Requiring Continuous Acts—Railroad Operating Agreements.**—The general doctrine that equity will not affirmatively decree specific performance of a contract requiring continuous acts, especially if those acts involve skill, judgment, and technical knowledge<sup>1</sup> has been broken into, of late

<sup>4</sup> A. L. Smith, M. R., in Mayor, etc., of Wolverhampton, v. Emmons, [1901] 1 K. B. 515, 1 Ames Eq. Jur. 76; Ryan v. Mutual Tontine, etc., Assn., [1893] 1 Ch. 116, 128, 2 Keener 179. See, also, Storer v. Great Western Ry. Co., 2 Younge & C. Ch. 48, 2 Keener 141 (a leading case; contract by railway company to build archway under track which divided plaintiff's farm); Wilson v. Furness Ry. Co., L. R. 9 Eq. 28, 2 Keener 164 (agreement to build road and wharf on land conveyed; per James, V. C. “It would be monstrous if the company, having got the whole benefit of the agreement, could turn round and say, ‘This is a sort of thing which the court finds a difficulty in doing, and will not do.’ Rather than allow such a gross piece of dishonesty to go unredressed the court would struggle with any amount of difficulties in order to perform the agreement”). The American cases directly in point are not so numerous, but clearly support the foregoing exception; see, e. g., Lawrence v. Saratoga Lake Ry. Co., 36 Hun 467, 2 Keener 171 (an instructive opinion; agreement by railway to build bridges for overhead crossings, and a “neat and tasteful station building,” enforced).

The decision in Jones v. Parker, 163 Mass. 564, 47 Am. St. Rep. 485, 40 N. E. 1044, 1 Ames Eq. Jur. 73, 2 Scott 83, 2 Keener 192 (Holmes, J.), that a covenant by a lessor “reasonably to heat and light the demised premises” from the time when possession was taken by the lessee, should be specifically enforced by a decree ordering the installation of the necessary apparatus, is clearly not within the above exception, and appears to be unsupported by modern authority; see contra, e. g., Keith v. National Tel. Co., [1894] 2 Ch. 147, 2 Keener 188, infra, in next note.

<sup>1</sup> For further instances of specific performance refused because the execution of the decree would require supervision of acts, on part of plaintiff or defendant, extending over a considerable period of time; see Flint v. Branden, 8 Ves. 159, 1 Ames Eq. Jur. 69, 2 Scott 70, 2 Keener 137 (1803; working a gravel pit); Blackett v. Bates, L. R. 1 Ch. App. 117, 2 Keener 154 (1865; agreement relating to repair and use of railway); Powell Duffryn Coal Co. v. Taff Vale Ry. Co., L. R. 9 Ch. App. 331, 1 Ames Eq. Jur. 79 (1874; agreement as to operating railway); Ryan v. Mutual Tontine Westminster Chambers Assn., [1893] 1 Ch. 116, 2 Keener 179 (by landlord, to appoint a porter who should perform various services); Keith, Prowse & Co. v. Nat. Telephone Co., [1894] 2 Ch. 147, 2 Keener 188 (to maintain telephone wires and apparatus for plaintiff; but injunction against cutting wires); Rutland Marble Co. v. Ripley, 10 Wall. 339, 358, 19 L. ed. 955 (working a quarry); Texas & P. R. Co. v. Marshall, 136 U. S. 406, 10 Sup. Ct. 846, 34 L. ed. 390 (agreement by railroad,

years, by an important exception in favor of certain contracts relating to the operation of railroads. In analogy to the cases mentioned in the last section, where the company, in consideration of the conveyance to it of land, was compelled to comply with its agreement to erect certain structures for the grantor's benefit, its reasonable agreement to maintain a station on the land conveyed for the plaintiff's convenience, and to stop trains thereat, will be enforced,<sup>2</sup> if that is consistent with the company's larger duty to operate its road so as to promote the public convenience.<sup>3</sup> But the exception has taken a much wider scope than this. Track-age and operating contracts between railroads, of the utmost complexity, have recently been the subject of decrees of specific performance, although in making their decrees the courts have con-

in consideration of large gift of land and money by plaintiff town, to establish its offices and shops there); *Electric L. Co. v. Mobile & S. H. Ry. Co.*, 109 Ala. 190, 55 Am. St. Rep. 927, 19 South. 721 (agreement by plaintiff to furnish electric power, by defendant to operate cars); *Stanton v. Singleton*, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334 (plaintiff's agreement to develop and operate mines); see 68 Am. St. Rep. 753-762, for an excellent note reviewing the cases on this subject.

The objections to the exercise of the jurisdiction are forcibly stated in a leading case: "Even if the contract was sufficiently specific, so that the party, when ordered to operate the railroad, would know the manner and mode in which the order was to be obeyed, still the question of obedience to the order must necessarily be left open. And the question of obedience to such an order might come up for solution, not once, as in the case of the archway, the erection of which was ordered in *Storer v. Great Western Railway* [supra, § 1402e, note 4], but in instances innumerable, and for an indefinite time. Instead of the final order being the end of litigation, it would be its fruitful and continuous source, and that, too, of litigation not in the regular course of judicial proceedings, but irregularly, on a summary application. And such application to be made by either party, one when he conceived there had not been a faithful compliance with the order, and the other when exemption from some provision might be claimed, on the ground of inability or unforeseen events"; *Port Clinton R. R. Co. v. Cleveland & T. R. Co.*, 13 Ohio St. 544, 556. The whole opinion in this case is one of the most instructive on the general subject.

While the passage above quoted states as forcibly as possible the reason usually given in support of the rule,—viz., the inconvenience to the court,—it seems to the editor that there is some ground for conjecture that the rule really rests upon a deeper reason of public policy; a feeling, perhaps not expressed in the decisions, that the daily and hourly ordering of the affairs of an individual or a group of individuals, for an indefinite term of years, in obedience to the terms of a chancery decree, and with its personal sanction for disobedience, is, in effect, such an impairment of personal freedom as is hostile to the whole spirit of English and American institutions.

<sup>2</sup> *Hood v. North Eastern Ry. Co.*, L. R. 8 Eq. 666, 5 Ch. 525, 1 Ames Eq. Jur. 82, 2 Scott 76, 2 Keener 160 [1869]; *Lawrence v. Saratoga Lake Ry. Co.*, 36 Hun. 467, 2 Keener 171.

<sup>3</sup> *Conger v. New York, W. S. & B. R. R. Co.*, 120 N. Y. 29, 23 N. E. 983, 1 Ames Eq. Jur. 412, H. & B. 723, 2 Scott 304, 2 Keener 1046.

ceded that they would be called upon from time to time to alter and adapt to changing circumstances their regulations for carrying the decrees into effect, during a long period of years.<sup>4</sup> In the first of the series of cases an important element affecting the decision was a direct public benefit that resulted from not leaving the complainant to its remedy of damages; but no such element appears to have been present in the cases that followed this precedent. Whether this remarkable series of decisions is to be taken as a virtual abandonment, on the part of the influential courts which rendered them, of the rule against specific enforcement of continuing contracts, or merely as an arbitrary exception in favor of operating agreements among railroads, is a question on which, unfortunately, these decisions themselves shed little light.<sup>5</sup>

**§ 1403. Extent of the Jurisdiction. Impracticability of a Legal Remedy.**—This ground of the jurisdiction includes two classes of cases: 1. Where, from the lack of some legal formality or condition in the contract, no action at law can be maintained; 2. Where, from some peculiar feature of the contract, either in its

<sup>4</sup> *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. ed. 843 (1891; Blatchford, J.); *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.* 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. ed. 265 (1896; Fuller, C. J.), affirming *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309, 2 C. C. A. 174, 10 U. S. App. 98 (1892; Sanborn, Cir. J.), and *Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co.*, 47 Fed. 15 (1891; Brewer, J.); *Prospect Park & C. I. R. R. Co. v. Coney Island & B. R. R. Co.* (1894), 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610, 1 Ames Eq. Jur. 83, H. & B. 641; *Schmidt v. Louisville & N. R. Co.*, 101 Ky. 441, 41 S. W. 1015, 38 L. R. A. 809.

In *Joy v. St. Louis*, *supra*, the A. company acquired, under contract, the right to run its trains over the line of the B company, through a large public park adjacent to the city of St. Louis, with the right to numerous terminal facilities. The contract was unlimited in time, and contained complicated provisions regulating the running of trains, and prescribing the duties of superintendents, train masters, and other officers. A special reason for decreeing specific performance was found in the fact that railroads entering St. Louis from the west must cross this park and that it was desirable, in order to maintain its usefulness as a park, that they should all use a single set of tracks. Contra to these cases, see the instructive opinion in *Port Clinton R. R. Co. v. Cleveland & T. R. R. Co.*, 13 Ohio St. 544, an extract from which is given *supra*, note 1.

<sup>5</sup> Several of the opinions meet the objection to the exercise of the jurisdiction in these cases by pointing to the experience of the courts of equity in railroad management through the instrumentality of receivers; one of them (47 Fed. 26, per Brewer, J.) even indulges in frank expressions of admiration for such management; and in the Kentucky case the lower court is actually directed to place the road in the hands of a receiver "if that is deemed best" for the purpose of enforcing its orders. It hardly needs to be pointed out that a receiver has hitherto been supposed to be a provisional and temporary remedy, not one extending over a period of thirty or of nine hundred and ninety-nine years.

subject-matter or in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty.<sup>1</sup> The most important instances in which the jurisdiction is referable to this ground are,—1. Contracts which the plaintiff has not fully performed, or even cannot fully perform, on his part, but which equity enforces with compensation for his partial failure; 2. Contracts invalid at law, especially verbal contracts concerning land; 3. Contracts which are incomplete in their terms.

§ 1404. **The Jurisdiction Discretionary.**—The object of the foregoing paragraphs is to formulate the general rules which determine the classes of contracts in which the equitable jurisdiction *may* be exercised. But even when a particular contract belongs to such a class, the right to its performance is not absolute, like the right to recover a legal judgment. The granting the equitable remedy is, in the language ordinarily used, a matter of discretion, not of an arbitrary, capricious discretion, but of a sound judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case. Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach. This is the ordinary language of judges and text-writers. The term “discretionary” as thus used is, in my opinion, misleading and inaccurate. The remedy of specific performance is governed by the same general rules which control the administration of all other

<sup>1</sup>Under this head are included,—1. Contracts in which the plaintiff has not performed, or even cannot perform, all the conditions on his part, so as to maintain an action at law, but which equity still may treat as binding and enforce. In such cases, if the contract is otherwise a proper one, equity will decree a specific performance with such allowance or compensations as are just; even where the partial failure or inability results from the plaintiff's own fault: See post, § 1409f; *Day v. Hunt*, 112 N. Y. 191, 19 N. E. 414, 2 Keener 1114. 2. Contracts not valid at all at law, but which equity treats as binding on the conscience. By far the most important are verbal contracts concerning land which are invalid by the statute of frauds, but which if part performed, equity will enforce: See post, § 1409, where this subject is treated. Under this head are also included certain agreements void at the old common law, but which equity enforces; e. g., assignments of expectancies; agreements to assign things in action; contracts between a man and woman, who afterwards marry; *Cannel v. Buckle*, 2 P. Wms. 243, 1 Scott 100. 3. Contracts incomplete in their terms: *Buxton v. Lister*, 3 Atk. 383, 1 Ames Eq. Jur. 47, 2 Scott 21, 2 Keener 5.

equitable remedies. The right to it depends upon elements, conditions, and incidents, which equity regards as essential to the administration of all its peculiar modes of relief. When all these elements, conditions, and incidents exist, the remedial right is perfect in equity.<sup>1</sup> So far as these essential elements and conditions do not relate to the existence of contracts binding in equity, they are nothing but expressions and applications of the fundamental principles, he who seeks equity must do equity, and he who comes into equity must come with clean hands.<sup>2</sup>

§ 1405. **Essential Elements and Incidents.**—Assuming that a contract has been completely concluded, and that it belongs to a class capable of being enforced, it must still possess certain essential elements and incidents, in order that a court of equity may exercise the jurisdiction to compel its performance. Some of these elements affect its validity; others its equitable character. It must be upon a valuable consideration.<sup>1</sup> It must be reasonably certain as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it was made.<sup>2</sup> It must be, in general, mutual in its obligation and in its remedy.<sup>3</sup> The con-

<sup>1</sup>These elements, conditions and incidents, as collected from the cases, are the following: The contract must be concluded, certain, unambiguous, mutual, and upon a valuable consideration; it must be perfectly fair in all its parts; free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; not an unconscionable or hard bargain; and its performance not oppressive upon the defendant; and finally, it must be capable of specific execution through a decree of the court.

<sup>2</sup>For instances of the application of these maxims, see ante, §§ 392, 393, 400, 459.

<sup>1</sup>It must be a valuable, and not merely a good, consideration, as blood and affection; and a seal does not, for this purpose, import a valuable consideration: Jefferys v. Jefferys, Craig & P. 138, 1 Ames Eq. Jur. 261, 1 Scott 303, 2 Scott, 154, 2 Keener 760; Lamprey v. Lamprey, 29 Minn. 156, 12 N. W. 514. See, also, ante, §§ 370, 1293. As to *inadequacy* of the consideration as a defense, see ante, §§ 925-928.

<sup>1</sup>See Hamilton v. Harvey, 121 Ill. 469, 2 Am. St. Rep. 118 (uncertainty as to description); Russell v. Agar, 121 Cal. 396, 66 Am. St. Rep. 35, 53 Pac. 926 (promise to bequeath an undeterminable amount); as illustrating the correct use of parol evidence of surrounding circumstances to identify a subject-matter vaguely described, see Minneapolis, etc., R. R. Co. v. Cox, 76 Iowa 306, 14 Am. St. Rep. 216; R. I. & P. R. Co. v. Dimick, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105; Peay v. Seigler, 48 S. C. 496, 59 Am. St. Rep. 731, 26 S. E. 885.

<sup>1</sup>*Mutuality.*—This doctrine is constantly stated by the courts, but there are so many exceptions that the rule is far from universal. It has no application to options for the purchase or sale of lands: See McCormick v. Stephany, 57 N. J. Eq. 257, 41 Atl. 840, 1 Ames Eq. Jur. 431; O'Brien v. Bolland, 166 Mass. 481, 41 N. E. 602, 1 Ames Eq. Jur. 433; Borel v. Mead, 3 N. Mex. 84, 2 Pac. 222, 1 Ames Eq. Jur. 434; compare Graybill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894, 17 S. E. 558, 21 L. R. A. 133, H. & B. 677. Lack of mutual-

tract must be free from any fraud, misrepresentation even though not fraudulent, mistake, or illegality.<sup>4</sup> The elements which peculiarly affect the *equitable* character of the agreement and of the remedy are the following: The contract must be perfectly fair, equal, and just in its terms and in its circumstances.<sup>5</sup> The con-

ity in the obligation as well as in the remedy is illustrated by the rule that an infant cannot have specific performance of his contract, since the act of filing the bill by his next friend cannot bind him: Flight v. Bolland, 4 Russ. 299, 1 Ames Eq. Jur. 422, 2 Scott 136, 2 Keener 800; but if the infant on reaching his majority files the bill on his voidable contract, the lack of mutuality is cured; Clayton v. Ashdown, 9 Vin. Abr. 393, pl. 2, 1 Ames Eq. Jur. 421, 2 Scott 133. Similarly, where husband and wife seek to enforce their contract against the vendee, the filing of the bill makes the remedy mutual: Fennelly v. Anderson, 1 Ir. Ch. 706, 1 Ames Eq. Jur. 423, 2 Scott 137. So, it is uniformly held that specific performance may be had of a contract for the sale of lands signed only by the defendant, and therefore not binding on the plaintiff until the bill is filed: Hatton v. Gray, 2 Cas. Ch. 164, 1 Ames Eq. Jur. 421, 2 Scott 129; Forthman v. Deters, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97.

The doctrine as to mutuality of remedy finds its most frequent application in the cases where the plaintiff's promise calls for personal services, continuous acts, etc., and is therefore of such a character that a court of equity cannot conveniently enforce a decree for specific performance: See *supra*, § 1402d; Hills v. Croll, 2 Phill. Ch. 60, 1 Ames Eq. Jur. 427, 2 Scott 90, 2 Keener 216; Stocker v. Wedderburn, 3 Kay & J. 393, 2 Keener 801; Iron Age Pub. Co. v. W. U. Tel. Co., 83 Ala. 498, 3 Am. St. Rep. 758, 3 South. 449, 2 Keener 834; Marble Co. v. Ripley, 10 Wall. 339, 19 L. ed. 955, Shep. 251; or where a decree would be nugatory, because the contract is terminable at the will of the plaintiff: Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 730, 11 N. W. 265, 1 Ames Eq. Jur. 435, 2 Scott 144; Marble Co. v. Ripley, *supra*. If, however, in the first class of cases the plaintiff has already performed his unenforceable promise, the lack of mutuality in remedy existing at the inception of the contract is no defense: Howe v. Watson, 179 Mass. 30, 60 N. E. 415, 1 Ames Eq. Jur. 429. In both classes of cases, if defendant's agreement contains a negative clause, the courts have frequently found it possible to do substantial justice by enjoining violation of his agreement, and making the injunction conditional on the continued performance by the plaintiff of his own unenforceable promise; if the plaintiff then fails to perform the injunction will be dissolved: Singer Sewing Machine Co. v. Union Button-Hole Co., 1 Holmes 253, Fed. Cas. No. 12,904, 1 Ames Eq. Jur. 438, 2 Keener 255; and see *ante*, § 1343.

<sup>4</sup> The effect of these incidents upon contracts in equity, and upon the remedy of specific performance, has already been discussed. As to parol evidence of mistake, fraud, or surprise, see §§ 857-859; defense of mistake in suits for specific performance: § 860; proof of mistake on plaintiff's part in same suits: §§ 861-863; effect of statute of frauds on the proof of mistake, fraud, or surprise: §§ 864-867.

As to misrepresentations as a defense, even when not intentional or with knowledge, see § 889; also § 899. Non-disclosure of facts a defense: § 905; inadequacy of consideration as a defense: §§ 925-928; illegal contracts, in general: §§ 929-936; 937-942.

<sup>5</sup> If, then, the contract itself is unfair, one-sided, unjust, unconscionable, or

tract and the situation of the parties must be such that the remedy of specific performance will not be harsh or oppressive.<sup>6</sup> The

affected by any other inequitable feature; or if its enforcement would be oppressive or hard on the defendant, or would prevent his enjoyment of his own rights, or would work any injustice; or if the plaintiff has obtained it by sharp and unscrupulous practices, by overreaching, by trickery, by taking undue advantage of his position, by non-disclosure of material facts, or by any other unconscientious means,—then a specific performance will be refused. It necessarily follows that a *less strong case* is sufficient to defeat a suit for a specific performance than is requisite to obtain the remedy. See, also, ante, § 948, as to pecuniary distress, illiteracy, etc.; *Fish v. Leser*, 69 Ill. 394, H. & B. 650; § 949, intoxication which is not a ground for rescission may be a defense to specific performance: *Cragg v. Holme*, 18 Ves. 14, n. 12, 1 Ames Eq. Jur. 417; § 928, inadequacy of consideration coupled with other inequitable incidents: *Higgins v. Butler*, 78 Me. 520, 7 Atl. 276, 1 Ames Eq. Jur. 419; and see *Friend v. Lamb*, 155 Pa. St. 529, 34 Am. St. Rep. 672, 25 Atl. 577, 1 Ames Eq. Jur. 408, 2 Keener 1066, 2 Scott 306 (improvident contract of purchase by a married woman); *Kelley v. York Cliffs Improvement Co.*, 94 Me. 374, 47 Atl. 898, 1 Ames Eq. Jur. 402 (contract of sale which by inadvertence of the vendor, permitted the plaintiff to pay in almost worthless stock at its par value, not specifically enforced); inadvertence, as where a covenant bound trustees personally in a warranty of land sold under the trust: *Wedgwood v. Adams*, 6 Beav. 600, 1 Ames Eq. Jur. 400; or where, by the inadvertent act of a third party, there was a suppression of the bidding at an auction sale: *Twining v. Morrice*, 2 Bro. C. C. 326, 1 Ames Eq. Jur. 416.

\* This rule generally operates in favor of defendants; but may be invoked by a plaintiff when a defendant demands the remedy by counterclaim or cross-complaint. The oppression or hardship may result from unconscionable provisions of the contract itself; or it may result from the situation of the parties, unconnected with the terms of the contract or with the circumstances of its negotiation and execution; that is, from external facts or events or circumstances which control or affect the situation of the defendant. Where, by reason of events since the making of the contract, the enforcement of the equitable remedy would produce results not within the intent or understanding of the parties when the bargain was made, the court may, and frequently does, refuse specific performance: *Gotthelf v. Stranahan*, 138 N. Y. 345, 34 N. E. 286, 20 L. R. A. 455, H. & B. 706; *Willard v. Tayloe*, 8 Wall. 557, 19 L. ed. 501, 1 Ames Eq. Jur. 404, H. & B. 644, 2 Scott 33, 2 Keener 1026, Shep. 112 (a leading case; court refused to compel a vendor to accept greatly depreciated paper currency in payment). This is especially true where the plaintiff's own conduct is the cause of the hardship: *Dowson v. Solomon*, 1 Drew & S. 1, 1 Ames Eq. Jur. 418 (plaintiff allowed insurance to expire, gave no notice to defendant and the house burned). Specific performance will be refused where it would be of little benefit to the plaintiff and greatly injure defendant: *Clark v. Rochester, etc., R. Co.*, 18 Barb. 350, 1 Ames Eq. Jur. 410, 2 Scott 294; *Miles v. Dover Furnace Co.*, 125 N. Y. 294, 26 N. E. 261, 2 Keener 1048; *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741, 28 L. R. A. 584, 2 Keener 1050 (restrictive covenant not enforced, where character of neighborhood has changed: see ante, § 1295); or where it would render the defendant liable to a forfeiture: *Faine v. Brown*, 2 Ves. Sr. 307, 1 Ames Eq. Jur. 397, 2 Scott 285; *Peacock v. Penson*, 11 Beav. 355, 2 Scott 288; provided such liability is not the result of defendant's own conduct: *Helling v. Lumley*, 3 De Gex & J.

vendor's title must be free from reasonable doubt. In suits by a vendor, the purchaser will not be compelled to complete the contract, unless the title is free from any reasonable doubt.' The

493, 2 Keener 1022. But relief will not be refused because of changed circumstances which should have been in contemplation of the parties as possible contingencies, when they entered upon the agreement; *Marble Co. v. Ripley*, 10 Wall. 339, 357, 19 L. ed. 955, Shep. 251; *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. ed. 776, 2 Keener, 1055; *Prospect Park, etc., Co. v. C. I. R. Co.*, 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610, 1 Ames Eq. Jur. 83, H. & B. 641; *Adams v. Weare*, 1 Bro. C. C. 567, 1 Ames Eq. Jur. 397, 2 Scott, 286, 2 Keener, 1006; nor because the defendant has an independent claim against the plaintiff, which, by reason of the latter's insolvency, he may be unable to enforce: Ante, § 387; *Thompson v. Winter*, 42 Minn. 121, 43 N. W. 796, 6 L. R. A. 236, H. & B. 654, 2 Keener, 1044. The remedy may be refused because it would work injury to third persons: *Curran v. Holyoke Water Co.*, 116 Mass. 90; or inconvenience to the public, with no corresponding benefit to the plaintiff: *Conger v. N. Y. W. S. & B. R. Co.*, 120 N. Y. 29, 23 N. E. 983, 1 Ames Eq. Jur. 412, H. & B. 723, 2 Scott, 304, 2 Keener, 1046 (agreement by railroad to stop express trains near plaintiff's house).

' This rule should not be misunderstood. It is wholly distinct from the objection that the vendor has no title at all, or has only a partial or defective one,—an objection which may be raised by either of the parties, and which, if proved, would either totally defeat a specific performance or render it partial. The rule of the text assumes that the question whether the vendor's title is valid or imperfect is not definitely decided by the court. But if there arises, on the pleadings or from the proofs, a reasonable doubt as to the vendor's title, the court, without deciding the question between the parties then before it, regards the doubt as a sufficient reason for not compelling the purchaser to carry out the contract and accept a conveyance. Where the purchaser is plaintiff, he may elect to take a defective and partial title. The leading English case is *Pyrke v. Waddingham*, 10 Hare, 1, 1 Ames Eq. Jur. 269, 2 Scott, 361. "The rule rests upon this, that every purchaser is entitled to require a marketable title. . . . If the doubts arise upon a question connected with the general law, the court is to judge whether the general law upon the point is or is not settled, enforcing specific performance in the one case and refusing it in the other. If the doubts arise upon the construction of particular instruments, and the court is itself doubtful upon the points, specific performance must, of course, be refused. . . . If the doubts which arise may be affected by extrinsic circumstances, which neither the purchaser nor the court has the means of satisfactorily investigating, specific performance is to be refused. . . . I cannot venture to hold that, because this court is of opinion in favor of the title, a purchaser is to be compelled to accept it. I think that each case must depend upon the nature of the objection and the weight which the court may be disposed to attach to it; and that, in determining whether specific performance is to be enforced or not, it must not be lost sight of that the exercise by the court of its jurisdiction, in cases of specific performance, is discretionary; and that the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion should ultimately turn out not to be well founded." See, also, *Fleming v. Burnham*, 100 N. Y. 1, 2 Keener, 1138; *Moser v. Cochrane*, 107 N. Y. 1, 2 Keener, 1143; *Abbott v. James*, 111 N. Y. 673, 2 Keener, 1146; *Moore v. Williams*, 115 N. Y. 586, 12 Am. St. Rep. 844, 5 L. R. A. 654, 2 Keener, 1149; *Hunting v. Damon*,

remaining essential elements and incidents relate more directly to the remedy itself, to the actual performance directed by the decree, and may be briefly stated as follows: The contract must be such that its specific enforcement would not be nugatory.<sup>8</sup> Although the contract by its terms can be specifically enforced, the defendant must also have the capacity and ability to perform it by obeying the decree of the court.<sup>9</sup> Finally, the contract must be such that the court is able to make an efficient decree for its specific performance, and is able to enforce its own decree when made.<sup>10</sup>

§ 1406. **Rights under the Contract—Effect of Events without the Agency of the Parties.**—The effect of an executory contract for the sale of land, in working an equitable conversion, and in clothing the purchaser with an equitable estate in the land, and the vendor with an equitable ownership of the purchase price, has already been described.<sup>1</sup> As soon as the contract is finally *concluded*, although it is wholly executory in form, these rights and estates become fixed and vested. It follows, therefore, that the purchaser, being the equitable owner, is entitled to all the benefits and assumes all the risks of ownership.

§ 1407. **Performance by Plaintiff a Condition Precedent.**—The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts

160 Mass. 441, 2 Keener, 1156; Hedderly v. Johnson, 42 Minn. 443, 18 Am. St. Rep. 521.

<sup>8</sup> See ante, § 1402a.

<sup>9</sup> **Total inability.**—If, at the time of the inability, the defendant is totally unable to perform because he has no title at all, or a title completely defective, the remedy will not be granted. The rule applies even when the inability is caused by the defendant's own wrongful act; as where a vendor, after making the contract and before the suit, conveyed the land to a bona fide purchaser for value and without notice. A specific performance would be refused, although the court of equity *might* grant a decree for damages: See ante, § 237, n. 3. But if a vendor, after making a contract, should enter into a second agreement to sell the land to B, or should convey it to B under such circumstances that B is *not* a bona fide purchaser, etc., then the prior vendee can compel a specific performance against the vendor and B: See ante, § 688.

**Partial incapacity.**—Where the defendant's title fails as to a part of the subject-matter, or is partially defective, the plaintiff *may* elect and be entitled to a specific enforcement of the contract, so far as it can be enforced; and *may* claim and receive compensation for the deficiency: See post, § 1409 f.

<sup>9</sup> See ante, § 1402 b, et seq.

<sup>1</sup> See ante, §§ 368, 1161.

as shall be required of him in the specific execution of the contract according to its terms.<sup>1</sup> With respect to the necessity of an actual tender and a demand of performance before suit brought, the American decisions are somewhat conflicting, and different rules seem to prevail in different states. The most important of these rules are given in the foot-note.<sup>2</sup>

<sup>1</sup> In the language often used, he must show himself "ready, willing, desirous, prompt, and eager." There are two *apparent* exceptions, depending upon strictly equitable considerations: 1. A strict performance at the very stipulated time is not always necessary: See post, § 1408; and 2. Partial and immaterial failures of title or defects of the subject-matter, if admitting of compensation, may not prevent the vendor from enforcing the remainder of the agreement: See post, § 1409f.

*Failure to perform conditions precedent.*—In pursuance of this principle equity will not relieve against a failure to perform a condition precedent in a contract, however slight the failure. The right to specific performance has never vested for the party in default: *Earl of Feversham v. Watson*, *Freem. Ch. 35*, 1 *Ames Eq. Jur.* 317. Thus, equity will not enforce a contract of sale where the price is to be fixed by the parties or by arbitrators to be chosen by the parties; and for the plain reason that the contract sought to be enforced is incomplete in an essential particular: *Milnes v. Gery*, 14 *Ves.* 400, 407, 2 *Keener*, 111; and see ante, § 1402 c.

*Default in option to purchase—No relief.*—There can be no relief against a failure to exercise an option after the day named for its expiration, for an option is no more than an offer to sell, which the offerer is bound to keep open during the time set, but which expires with that time, leaving nothing for equity to operate upon: *Gannett v. Albee*, 103 *Mass.* 372, 1 *Ames Eq. Jur.* 321; *Lord Ranelagh v. Melton*, 2 *Drew & S.* 278, 1 *Ames Eq. Jur.* 319.

*Vendor as plaintiff; at what time he must furnish a good title.*—It is a familiar application of the principle, as to performance by the plaintiff, that the vendor cannot force performance upon the purchaser, unless he is able to give a good title to the subject-matter. Where, however, the vendor gets in the title before the decree, the doctrine of equity is, when time is not of the essence, a decree will be made against the purchaser, if the seller can make a good title at the time of decree, unless there has been bad faith, or an improper speculation attempted. The weight of authority supports this rule: *Langford v. Pitt*, 2 *P. Wms.* 620, 2 *Keener*, 333, 2 *Scott*, 405; *Pinke v. Curtis*, 4 *Bro. C. C.* 329, 331, 2 *Scott*, 428; *Bruce v. Tilson*, 25 *N. Y.* 194, 1 *Ames Eq. Jur.* 345, 2 *Keener*, 1180, 2 *Scott*, 355; although there are several jurisdictions which hold that, if the plaintiff could not make a good title at the time of the agreement, specific performance will be denied him on the ground of lack of mutuality: *Norris v. Fox*, 45 *Fed.* 406, 1 *Ames Eq. Jur.* 426; *Ten Eyck v. Manning*, 52 *N. J. Eq.* 47, 27 *Atl.* 900, 2 *Keener*, 849. These latter cases are inconsistent with the view of the mutuality rule that is best supported by authority and on principle; since at the time of the decree the defendant is not left in any inequitable position.

<sup>2</sup> *Tender, when necessary.*—In general, the rules of equity concerning the necessity of an actual tender are not so stringent as those of the law. The following special rules seem to be settled: 1. An actual tender by the plaintiff is unnecessary when, from the acts of the defendant, or from the situation of the property, it would be wholly nugatory. Thus, if at the time fixed the vendor

§ 1408. **Time as Affecting the Right to a Performance.**—The stipulations concerning time of performance in a contract are regarded by equity either as immaterial, or as essential, or as material. In all ordinary cases of contract, equity does not regard time as of the essence of the agreement. In all ordinary cases of contract for the sale of land, if there is nothing special in its objects, subject-matter, or terms, although a certain period of time is stipulated for its completion, or for the execution of any of its terms, equity treats the provision as formal rather than essential, and permits a party who has suffered the period to elapse to perform such acts after the prescribed date, and to compel a performance by the other party notwithstanding his own delay.<sup>1</sup> *Time essential:* Time may be essential. It is so whenever the intention of the parties is clear that the performance of its terms shall be accomplished exactly at the stipulated day. The intention must then govern. A delay cannot be excused. A performance at the time is essential; any default will defeat the right to a specific enforce-

is unable to convey, by reason of a defect in his title, etc.: *Hall v. Whittier*, 10 R. I. 530, 2 Scott, 323. 2. Where the stipulations are mutual and dependent,—that is, where the deed is to be delivered upon payment of the price,—an actual tender and demand by one party is necessary to put the other in default, and to cut off his right to treat the contract as still subsisting: *Hubbell v. Von Schoening*, 49 N. Y. 326, 331, 2 Keener, 1105, 2 Scott, 350. 3. *Time essential:* Where the time of payment by the vendee is made *essential*, and a fortiori where if his payments are not made on the exact day named, the vendor may treat the contract as at an end, the vendee must make an actual tender of the price and a demand of the deed at a specified time. The same is true of the vendor when the time of conveying is made essential. This is the very meaning of time being of the essence of the contract: *Wells v. Smith*, 2 Edw. Ch. 78, 2 Scott, 317, 2 Keener, 1082. *Time not essential:* Concerning the necessity of actual tender in contracts in which time is not essential, the American decisions are directly conflicting. According to one group of cases, the strict legal rule is enforced. Where the stipulations are mutually dependent, the plaintiff must make an actual tender, and must demand performance before bringing his suit. Some of the cases, however, dispense with the demand, and only require a tender. *Suits by the vendee:* *Hall v. Whittier*, 10 R. I. 530, 2 Scott, 323. *Suits by vendor:* *Corbas v. Teed*, 69 Ill. 205, 2 Scott, 481. Another group of decisions adopts a rule more in accordance with the principles of equity, viz., that in such contracts an actual tender or demand by the plaintiff, prior to the suit, is not essential. It is enough that he was ready and willing, and offered, at the time specified, and even that he is ready and willing at the time of bringing the suit, unless his rights have been lost by laches, and that he offers to perform in his pleading. The plaintiff's performance will be provided for in the decree, and his previous neglect will only affect his right to costs. *Suits by vendee:* *Bruce v. Tilson*, 25 N. Y. 194, 197, 203, 1 Ames Eq. Jur. 345, 2 Scott, 355, 2 Keener, 1180. *Suits by vendor:* *Rutherford v. Haven*, 11 Iowa, 687, 1 Ames Eq. Jur. 342.

<sup>1</sup> *Seton v. Slade*, 7 Ves. 265, 271, 2 Scott, 332; *Parkin v. Thorold*, 16 Beay. 59, 1 Ames Eq. Jur. 327.

ment.<sup>2</sup> *Time material*: Although time is not ordinarily essential, yet it is, as a general rule, material. In order that a default may not defeat a party's remedy, the delay which occasioned it must be explained and accounted for. The doctrine is fundamental that a party seeking the remedy of specific performance, and also the party who desires to maintain an objection founded upon the other's laches, must show himself to have been "ready, desirous, prompt, and eager."<sup>3</sup>

<sup>1</sup>"Time may be made essential by express stipulation. No particular form is necessary, but any clause will have the effect which clearly provides that the contract is to be null, if the fulfillment is not within the prescribed time." *Seton v. Slade*, 7 Ves. Jr. 265, 271, 273, 2 Scott, 332; *Sowles v. Hall*, 62 Vt. 247, 22 Am. St. Rep. 101, 20 Atl. 810, 2 Keener, 1117. "Time may become essential from the subject-matter, or object of the contract; e. g., where the value of the subject-matter necessarily fluctuates and changes with the mere lapse of time." *Taylor v. Longworth*, 14 Pet. 172, 174, 10 L. ed. 405; from the situation of the parties in relation to subject-matter; as *King v. Ruckman*, 24 N. J. Eq. 316, 351, 2 Keener, 390; the particular object of vendee; as in *Tilley v. Thomas*, L. R. 3 Ch. App. 61, 1 Ames Eq. Jur. 336, 2 Scott, 345, 2 Keener, 1091, Shep. 254; nature of property,—a lease of mines: *MacBryde v. Weekes*, 22 Beav. 533, 2 Keener, 1085. Though time was originally of the essence of the contract, yet the defendant may waive his right to insist upon strict performance, either expressly or by acquiescence in plaintiff's laches: *Webb v. Hughes*, L. R. 10 Eq. Cas. 281, 2 Keener, 1101. Time, not originally of the essence, may be made essential where one of the parties delays in fulfilling, and the other party, by a notice, prescribes a period within which the contract must be completed, or else be abandoned; but this period must be a reasonable one: *Parkin v. Thorold*, 16 Beav. 59, 1 Ames Eq. Jur. 327; *MacBryde v. Weekes*, supra; *Webb v. Hughes*, supra.

*Effect of forfeiture clause in the contract*.—Contracts often contain a clause that, if payment is not made at the day, the defaulting vendee shall forfeit all payments previously made and also lose his right to the land. In England and most of the states such a clause will, if possible, be considered as a stipulation in the nature of a penalty for security of performance, and specific performance will be decreed against the vendor with compensation for delay by interest on the purchase-money: *Vernon v. Stephens*, 2 P. Wms. 66, 1 Ames Eq. Jur. 338; *Edgerton v. Peckham*, 11 Paige, 351, 2 Scott, 337. In other jurisdictions, however, equity refuses to relieve against the forfeiture in behalf of the party thus in default: *Heckard v. Sayre*, 34 Ill. 142, 1 Ames Eq. Jur. 340; *Glock v. Howard, etc., Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 55 Pac. 713, 43 L. R. A. 199; unless the forfeiture is waived by words or conduct: *Cheney v. Libby*, 134 U. S. 68, 19 Sup. Ct. 498, 33 L. ed. 818, H. & B. 695.

<sup>2</sup>*Hubbell v. Von Schoening*, 49 N. Y. 326, 2 Scott, 350, 2 Keener, 1105; *South-eastern Co. v. Knott*, 2 Keener, 1177. To entitle the plaintiff to specific performance in general, he must not have been grossly negligent: *Hubbell v. Von Schoening*, 49 N. Y. 326, 2 Scott, 350, 2 Keener, 1105; the delay must not have been too great: *Combes v. Scott*, 76 Wis. 662, 45 N. W. 532, H. & B. 682, 2 Scott, 357, 2 Keener, 1194 (delay of six years); nor must it have seriously injured defendant's interests: *Pincke v. Curtis*, 4 Bro. C. C. 329, 331, 2 Scott, 428; and the plaintiff must show a reasonable excuse for the default: *Brown v. Guarantee Trust Co.*, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. ed. 468, 2 Keener, 1109; *Hubbell v. Von*

§ 1409. **Enforcement of Verbal Contracts Part Performed.**—The doctrine was settled at an early day in England, and has been fully adopted in nearly all the American states, that a verbal contract for the sale or leasing of land, or for a settlement made upon consideration of marriage, if part performed by the party seeking the remedy, may be specifically enforced by courts of equity, notwithstanding the statute of frauds.<sup>1</sup> The ground upon which the Schoening, 49 N. Y. 326, 2 Keener, 1105, 2 Scott, 350. Any indication of intention of abandonment of the contract by either party defeats his right to specific performance: *Benedict v. Lynch*, 1 Johns. Ch. 370, 2 Keener, 1074. Mere lapse of time may amount to evidence of such an intention: *Lloyd v. Collett*, 4 Bro. C. C. 469, 2 Scott, 329; *Benedict v. Lynch*, supra; unless there is acquiescence in the long delay: *Benedict v. Lynch*, supra. Where the delay of the vendor or vendee in seeking performance is for a speculative purpose, to await until time shall determine whether or not it is to his advantage to have the benefit of the contract, it is held by a considerable group of cases that equity will not aid him by any relief against his failure to perform, whatever the situation otherwise: *McCabe v. Matthews*, 155 U. S. 550, 556, 15 Sup. Ct. 190, 39 L. ed. 257, 2 Keener, 1199. In the following cases delay on the part of the vendor, plaintiff, was held not material: *Pincke v. Curtis*, supra (no damage to vendee, and good title could be made in a reasonable time); in the following it was held material and the remedy was refused: *Harrington v. Wheeler*, 4 Ves. Jr. 686, 2 Scott, 331 (seven years); *Lloyd v. Collett*, supra (his conduct evidence of abandonment of the contract). Delay on part of vendee, plaintiff, held not material in *Edgerton v. Peckham*, 11 Paige Ch. 351, 2 Scott, 337; *Hubbell v. Von Schoening*, supra; *Day v. Hunt*, 112 N. Y. 191, 19 N. E. 414, 2 Keener, 1114; held material, and relief refused, in *Mackreth v. Marlar*, 1 Cox, 260, 2 Scott, 328 (five years); *Benedict v. Lynch*, supra (no sufficient excuse); *McCabe v. Matthews*, supra (speculative delay of nine years).

<sup>1</sup>*Fundamental ground of the jurisdiction.*—The ground is equitable fraud; not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute as a defense. If the defendant knowingly permits the plaintiff to do acts in part performance of the verbal agreement, acts done in reliance on the agreement, which change the relations of the parties and prevent a restoration to their former condition, it would be a virtual fraud for the defendant to interpose the statute as a defense, and thus to secure for himself the benefit of the acts of part performance, while the plaintiff would be left not only without adequate remedy at law, but also liable for damages as a trespasser: See ante, §§ 864-867, 921, where this principle is discussed. It follows from this principle that the acts of part performance must be done by the party seeking to enforce the contract, and must be done in pursuance of the contract, and with the design of carrying the same into execution; and must be done with the consent, express or implied, or knowledge, of the other party. It is also an important principle of the English, and many American cases, that the act of part performance must unequivocally, and without the aid of parol testimony to explain it, point to the existence of a contract relating to the specific land in question: *Maddison v. Alderson*, L. R. 8 App. Cas. 467, 1 Ames Eq. Jur. 295, 2 Scott, 210, 2 Keener, 675, Shep. 287. "It is in general of the essence of such an act that the courts shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. . . . But

remedy in such cases rests is that of equitable fraud. It would be a virtual fraud for the defendant, after permitting the acts of part performance, to interpose the statute as a bar to the plaintiff's remedial right. The acts of part performance, therefore, in order to satisfy this principle, must be done in pursuance of the contract, and must alter the relations of the parties. The most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements, and these two combined.

**§ 1409a. Same. Acts of Part Performance—Possession—Improvements.**—The mere delivery and taking of possession in pursuance of the agreement is, by the weight of authority, sufficient part performance to warrant equity in granting relief.<sup>1</sup> This is rested upon the ground that “the acknowledged possession of a stranger on the land of another is not explicable, except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into its terms.”<sup>2</sup> The possession must be actual, notorious and exclusive,<sup>3</sup> and must be taken with the consent or acquiescence of the vendor.<sup>4</sup> Since the possession must be taken in pursuance of contract, possession taken prior to the contract or preparatory to the contract is not sufficient.<sup>5</sup> A mere holding over by a tenant after the expiration of his lease is not sufficient part performance to take the case out of the statute.<sup>6</sup> Where, however, there is a change in the terms of the tenancy, as, for instance, in an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the statute of frauds; as, for example, the payment of a sum of money alleged to be purchase money.” “The payment of a sum of money is an equivocal act, not (in itself) until the connection is established by parol testimony, indicative of a contract concerning land.”

<sup>1</sup> *Butcher v. Stapely*, 1 Vern. 363, 1 Ames Eq. Jur. 279, 2 Scott, 188, 2 Keener, 622; *Clinan v. Cooke*, 2 Schoales & L. 22, 41, 2 Scott, 182, 2 Keener, 628-(dictum); *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297, 2 Keener, 696.

<sup>2</sup> *Morphett v. Jones*, 1 Swanst. 172.

<sup>3</sup> *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297, 2 Keener, 696.

<sup>4</sup> *Purcell v. Miner*, 4 Wall. 513, 18 L. ed. 435, 2 Scott, 206, Shep. 272 (this requirement not satisfied by proof of a scrambling and litigious possession); *Nibert v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. 252, 2 Keener, 722.

<sup>5</sup> For examples of acts of preparation held insufficient, see *Clerk v. Wright*, 1 Atk. 12, 1 Ames Eq. Jur. 294; *Nibert v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. 252, 2 Keener, 722.

<sup>6</sup> Such act is not *unequivocal*, but may point to a tenancy at will equally as well as to an express agreement to renew the lease: *Smith v. Turner*, Prec. Ch. 561, 1 Ames Eq. Jur. 282; *Wills v. Stradling*, 3 Ves. 378, 1 Ames Eq. Jur. 291, 2 Scott, 201, 2 Keener, 626; *Maddison v. Alderson*, L. R. 8 App. Cas. 295, 1 Ames Eq. Jur. 295, 2 Scott, 210, 2 Keener, 675, Shep. 287 (dictum).

the amount of rent paid, or where the tenant makes substantial repairs or improvements, such circumstance in connection with the possession is sufficient to warrant relief.<sup>7</sup> Possession obtained wrongfully is, of course, no ground for relief, for it does not refer to any contract whatever.<sup>8</sup> While the weight of authority undoubtedly supports the view that possession alone is sufficient to take a case out of the operation of the statute of frauds, it will be found that in a large majority of the cases additional circumstances have been present; as, payment of the whole or part of the purchase price,<sup>9</sup> or the making of valuable improvements.<sup>10</sup>

§ 1409b. **Same. Payment.**—It is the generally accepted doctrine that payment of the whole or a part of the purchase price is not sufficient in itself to take a case out of the operation of the statute of frauds.<sup>1</sup> Therefore, a conveyance by a plaintiff in pursuance of an agreement for an exchange of lands is not sufficient part performance to warrant the court in granting equitable relief.<sup>2</sup>

<sup>7</sup> *Increased rent.*—Wills v. Stradling, 3 Ves. 378, 1 Ames Eq. Jur. 291, 2 Scott, 201, 2 Keener, 626; Nunn v. Fabian, L. R. 1 Ch. 35, 2 Keener, 636.

*Repairs and improvements.*—Mundy v. Jolliffe, 5 Mylne & C. 167, 1 Ames Eq. Jur. 289; Morrison v. Herrick, 130 Ill. 631, 20 N. E. 537, 2 Keener, 706. See, also, Wills v. Stradling, 3 Ves. 378, supra. But see Frame v. Dawson, 14 Ves. 386, 1 Ames Eq. Jur. 283, 2 Scott, 202, 2 Keener, 632.

<sup>8</sup> Cole v. White, 1 Bro. C. C. 409, 1 Ames Eq. Jur. 282; Purcell v. Miner, 4 Wall. 513, 18 L. ed. 435, 2 Scott, 206, Shep. 272.

<sup>9</sup> Pond v. Sheean, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414, 2 Keener, 715; Dunckel v. Dunckel, 141 N. Y. 427, 36 N. E. 405, 2 Keener, 735.

<sup>10</sup> Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537, 2 Keener, 706. As to the nature of the improvements, see Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297, 2 Keener, 696. Possession, coupled with both the making of improvements and the payment of part of the purchase price is, of course, sufficient: Miller v. Ball, 64 N. Y. 286, 2 Keener, 657, 2 Scott, 196.

*Modifications and rejection of the doctrine.*—The rule that delivery and acceptance of possession alone are sufficient to take a case out of the statute is not accepted by all the states. See Burns v. Daggett, 141 Mass. 368, 6 N. E. 727, 1 Ames Eq. Jur. 284 (acts must be such that adequate compensation cannot to be made except by a conveyance); Pond v. Sheean, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414, 2 Keener 715 (part payment necessary); and in a few states the doctrine of part performance is wholly rejected: Albea v. Griffin, 2 Dev. & B. 9, 1 Ames Eq. Jur. 288.

<sup>1</sup> Clinan v. Cooke, 1 Schoales & L. 22, 2 Scott, 182, 2 Keener, 628 (stating reasons for the rule); Maddison v. Alderson, L. R. 8 App. Cas. 467, 1 Ames Eq. Jur. 295, 2 Scott, 210, 2 Keener, 675, Shep. 287; Lord Pengall v. Rosa, 2 Eq. Abr. 46, 1 Ames Eq. Jur. 276; 2 Scott, 180; Peters v. Dickinson, 67 N. H. 389, 32 Atl. 154, 2 Keener, 733; Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252, 2 Keener, 722; Miller v. Ball, 64 N. Y. 286, 2 Scott, 196, 2 Keener, 657; Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297, 2 Keener, 696.

<sup>2</sup> Smith v. Hatch, 46 N. H. 146, 1 Ames Eq. Jur. 277 (dictum). Where, however, there is in addition an act of part performance by the defendant, as by taking possession of the property conveyed, the plaintiff may have specific per-

While such a conveyance is referable to a contract, it is not necessarily referable to a contract for the land sought to be recovered.

Where the consideration is paid, not in the form of money, but in the form of personal services of a character such that they do not readily admit of a pecuniary estimate or recompense, shall this be considered an act of part performance? On this question the American jurisdictions are very evenly divided. On the one hand, payment in services no more points to a contract concerning specific land than does payment in money; in fact, in the ordinary case,—domestic services by a relative or by an adopted child,—the fact of the services rendered gives rise to no inference of any contract whatever.<sup>3</sup> On the other hand, if equitable fraud be taken as the basis of the doctrine, and the impossibility of restoring the complainant to the situation in which he was before the contract was made, the rendering of services, for a long term of years, the value of which cannot be estimated by any pecuniary standard, must be considered an act of part performance of the highest character; the fraud upon the complainant is often greater than that resulting from either the taking of possession or the making of improvements.<sup>4</sup> The promise, in these cases, has nearly always been to make a will devising lands to plaintiff; the services rendered, the care of an aged or invalid relative, often coupled with an abandonment of the plaintiff's previous home or occupation; or, in a large group of cases, the entire change of situation resulting from a virtual adoption of the plaintiff, when a minor, into the promisor's family, and the discharge of the domestic duties and obligations of affection flowing from such relation.<sup>5</sup>

formance: *Bigelow v. Armes*, 108 U. S. 10, 1 Sup. Ct. 83, 27 L. ed. 631, 2 Keener, 664.

<sup>3</sup> *Maddison v. Alderson*, L. R. 8 App. Cas. (H. of L.) 467, 1 Ames Eq. Jur. 295, 2 Scott, 210, 2 Keener, 675, Shep. 287; *Pond v. Sheean*, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414, 2 Keener, 715 (adoption of child); *Shahan v. Swan*, 48 Ohio St. 25, 29 Am. St. Rep. 517, 26 N. E. 222, 2 Scott, 219, 2 Keener, 726 (adoption; but court intimates that there may be part performance by services in exceptional cases).

<sup>4</sup> See *supra*, § 1409, end of note; *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369 (but specific performance refused, since it would be hardship on promisor's wife, who married him in ignorance of the agreement); *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 78 N. W. 4, 43 L. R. A. 427; *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685, 59 N. W. 788, 25 L. R. A. 207 (adoption agreement); *Vreeland v. Vreeland*, 53 N. J. Eq. 387, 32 Atl. 3 (care of aged parent); *Lothrop v. Marble*, 12 S. D. 511, 76 Am. St. Rep. 626, 81 N. W. 885 (services consisted merely in nursing a repulsive invalid for a few days).

<sup>5</sup> *Miscellaneous acts of part performance.*—While possession, and possession coupled with payment, or the making of valuable improvements, are the most frequent acts of part performance recognized as sufficient to warrant equitable

§ 1409c. **Oral Promise to Give.**—A parol promise by one owning lands to give the same to another will be enforced in equity, when the promisee has been induced by the promise to go into possession, and, with the knowledge of the promisor, has made comparatively large expenditures in permanent improvements upon the land.<sup>1</sup> The ground of the jurisdiction is that a failure to convey after the donee has made a change of position would amount to fraud. Equity does not ordinarily interfere to enforce voluntary agreements; but in this case the courts have construed a consideration into the agreement.<sup>2</sup> Such a promise may be enforced against an executor or administrator, as well as against the original promisor.<sup>3</sup>

§ 1409d. **Same. Marriage not Part Performance.**—In cases of contracts made in consideration of marriage it is almost universally held that marriage alone is not such part performance as will take a case out of the operation of the statute of frauds.<sup>1</sup> This results from the statute itself which requires agreements in consideration of marriage to be in writing. To hold marriage alone to be sufficient would render the statute nugatory. Marriage coupled with other acts, such as the delivery and acceptance of possession, may, however, be sufficient.<sup>2</sup>

§ 1409e. **Specific Performance Because of Fraud, Independent of Doctrine of Part Performance.**—Independently of the doctrine of part performance, relief may be granted when the defendant has been guilty of fraud which leads to an irretrievable change of position. Accordingly, where a marriage is obtained under a fraudulent promise to convey property, the defendant may be ordered

relief, the courts have interfered in a few other instances. Thus, a dismissal of certain actions at law has been held sufficient, for the plaintiff could not be placed in statu quo; *Slingerland v. Slingerland*, 39 Minn. 197, 39 N. W. 146, 2 Keener, 701. Oral contract for the conveyance of easements has been enforced when, in pursuance thereof, work has been done in opening windows as directed by defendant, and he has been given employment: *East India Co. v. Vincent*, L. R. 35 Ch. D. 694, 1 Ames Eq. Jur. 310.

<sup>1</sup> *Neale v. Neale*, 9 Wall. 1, 19 L. ed. 590, 2 Keener, 647; *Seavey v. Drake*, 62 N. H. 393, 1 Ames Eq. Jur. 308; *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657, 1 Ames Eq. Jur. 306, 2 Scott, 205, 2 Keener, 654; *Young v. Overbaugh*, 145 N. Y. 158, 39 N. E. 712, 2 Keener, 743.

<sup>2</sup> *Freeman v. Freeman*, supra; *Seavey v. Drake*, 62 N. H. 393, supra. It must be noted that the courts do not here use the term "consideration" in the sense of something given for a promise; it is used rather in the sense of something done as a result of a promise.

<sup>3</sup> *Seavey v. Drake*, supra.

<sup>1</sup> *Montacute v. Maxwell*, 1 P. Wms. 618, 1 Ames Eq. Jur. 274; 2 Keener, 623; *Caton v. Caton*, L. R. 1 Ch. App. 137, 2 Keener, 641.

<sup>2</sup> *Ungley v. Ungley*, L. R. 5 Ch. D. 887, 1 Ames Eq. Jur. 281, 2 Scott, 193, 2 Keener, 661.

to carry out his contract,<sup>1</sup> although, as we have seen, marriage is not a sufficient part performance to take a case out of the statute. Likewise, where there is a fraudulent omission to have an agreement reduced to writing, which induces an irretrievable change of position, equity will grant relief.<sup>2</sup> A mere failure to fulfill a promise to have an agreement reduced to writing is not sufficient, however, in the absence of fraud.<sup>3</sup>

§ 1409f. **Partial Performance With Compensation.**—Where the vendor is unable to perform his contract in its entirety either because of a deficiency in the quantity or the quality of the estate, or because of defects in his title or interest, equity may give him a decree for specific performance with compensation or abatement to the vendee for the deficiency or defect, if the vendor can substantially perform his contract.<sup>1</sup> But specific performance will not be compelled against an unwilling vendee where the defect or deficiency is material, since that would be to force a new contract upon the parties.<sup>2</sup> Even where the vendor is unable substantially to perform his contract, the deficiency or defect being material, the vendee may, at his election, have specific performance with compensation or abatement. But where the deficiency is so great as practically to make compensation or damages the main object of the suit, the vendee will be denied specific performance with compensation.<sup>3</sup> To be entitled to specific performance with

<sup>1</sup> Mullett v. Halfpenny, Prec. in Ch. 404, 1 Ames Eq. Jur. 315; Peek v. Peek, 77 Cal. 106, 11 Am. St. Rep. 244, 19 Pac. 227, 1 L. R. A. 185, 1 Scott, 463, 2 Keener, 756.

<sup>2</sup> Wood v. Midgley, 5 De Gex, M. & G. 41, 2 Keener, 750, 1 Scott, 462 (dictum); Peek v. Peek, supra. See, also, ante, § 921.

<sup>3</sup> Wood v. Midgley, supra. For early English cases contra, see Leak v. Morrice, 2 Cas. in Ch. 135, 2 Keener, 746; Hollis v. Whiteing, 1 Vern. 151, 2 Keener, 747. See, also, Cookes v. Mascall, 1 Vern. 200; 2 Keener, 748.

<sup>1</sup> Small deficiency in amount of estate: Oldfield v. Round, 5 Ves. 508, 2 Scott, 231 (easement of footpath across meadow); Halsey v. Grant, 13 Ves. 73, 2 Scott, 379 (encumbrance of rent charge); Howland v. Norris, 1 Cox C. C. 59, 2 Scott, 371; Peers v. Lambert, 7 Beav. 546, 2 Scott, 375; Bailey v. Piper, L. R. 18 Eq. 683, 2 Keener, 343. Small deficiency in quality of estate: King v. Bardeau, 6 Johns. Ch. 38, 10 Am. Dec. 312, 2 Scott, 387; 2 Keener, 1123 (two lots sold together, and building on one lot projecting slightly on other).

<sup>2</sup> Substantial deficiency in amount or title: Drewe v. Corp., 9 Ves. 368, 2 Scott, 394; Chicago, M. & St. P. R. R. v. Durant, 44 Minn. 361, 46 N. W. 676, H. & B. 701, 2 Keener, 1211 (title to one-half defective). Substantial deficiency in quality: Perkins v. Ede, 16 Beav. 193, 1 Ames Eq. Jur. 247, 2 Scott, 376, 2 Keener, 1128 (a strip of land to which vendor could not give title lay between the house and the road). It is enough, however, if a defect in title is cured before the time for the decree: Haffey v. Lynch, 143 N. Y. 241, 38 N. E. 298, H. & B. 703, 2 Keener, 1213. See ante, § 1407, note 1.

<sup>3</sup> Durham v. Legard, 34 Beav. 611, 1 Ames Eq. Jur. 395, 2 Scott, 385, 2 Keener, 1206 (by mistake of vendor, estate of eleven thousand eight hundred

compensation, the buyer must, generally, have been aware of the deficiency at the time of the bargain.<sup>4</sup>

It is the rule in England and in several of the states that a husband's failure to convey the whole title because of any interest his wife may have, is treated as an ordinary case of defective title; he must therefore, convey his interest with compensation for the amount of her interest, whether dower or of other nature.<sup>5</sup> But in many jurisdictions specific performance with compensation against the vendor is denied in this case, on the ground that compulsion upon the husband would tend to cause him to procure his wife's conveyance of dower against her will.<sup>6</sup>

The court will refuse to make a decree with compensation or abatement, if it is unable to compute fairly the value of the deficiency or defect.<sup>7</sup>

§ 1410. **Damages in Place of a Specific Performance.**—When the impossibility of a specific performance is disclosed at the hearing, and the suit was brought by the plaintiff in ignorance of such fact, the court will award the remedy of damages.<sup>1</sup>

acres was sold as estate of twenty-one thousand seven hundred acres). *Chicago, Mil. & St. Paul R. R. v. Durant*, 44 Minn. 361, 46 N. W. 676, H. & B. 701, 2 Keener, 1211 (the part that could be conveyed would be relatively so small "that compensation or damages would apparently be the main object of the suit").

<sup>4</sup> *Castle v. Wilkinson*, L. R. 5 Ch. App. 534, 1 Ames Eq. Jur. 252, 2 Scott, 395, 2 Keener, 1208 (purchaser knowing of wife's interest cannot now compel husband to convey his own interest alone, with or without compensation, as his contract was to convey, *with* his wife, the whole estate).

<sup>5</sup> *Wilson v. Williams*, 3 Jur. N. S. 810, 2 Scott, 392; *Barnes v. Wood*, L. R. 8 Eq. 424, 1 Ames Eq. Jur. 249, 2 Scott, 395, 2 Keener, 1228.

<sup>6</sup> *Hawralty v. Warren*, 18 N. J. Eq. 124, 128, 90 Am. Dec. 613, 2 Scott, 140; *Peeler v. Levy and Wife*, 26 N. J. Eq. 330, 2 Keener, 1236; *Riggs's Appeal*, 73 Pa. St. 485, 1 Ames Eq. Jur. 254; *Sternberger v. McGovern*, 56 N. Y. 12, 2 Keener, 1232; *Graybill v. Brugh*, 89 Va. 895, 37 Am. St. Rep. 894, 17 S. E. 558; 21 L. R. A. 133, H. & B. 677. But see *Young v. Paul*, 10 N. J. Eq. 401, 64 Am. Dec. 456, 2 Keener, 1219 (collusion between husband and wife; husband decreed to give indemnity against wife's inchoate dower).

<sup>7</sup> *Sternberger v. McGovern*, 56 N. Y. 12, 2 Keener, 1232 (inchoate dower interest cannot be estimated with fairness to vendor); *Perkins v. Ede*, 16 Bay. 193, 1 Ames Eq. Jur. 247, 2 Scott, 376, 2 Keener, 1128; *Rudd v. Lascelles* (1900), L. R. 1 Ch. 815, 1 Ames Eq. Jur. 256 (restrictive covenants. The court says: "It is almost impossible to assess compensation for covenants of this nature").

<sup>1</sup> See ante, § 237, note 3, for a full statement of the rules on this subject.

## CHAPTER SECOND.

## SPECIFIC ENFORCEMENT OF OBLIGATIONS ARISING FROM TRUSTS AND FIDUCIARY RELATIONS.

## ANALYSIS.

§ 1411. General nature, kinds, and classes.

§ 1412. Suits against corporations to compel the transfer or issue of stock.

§ 1411. **General Nature, Kinds, and Classes.**—The nature and objects of the various remedies included in this division are sufficiently indicated by the title, and need no further description. The remedies belonging to the class are suits to enforce express trusts, either private or charitable; suits to enforce resulting or constructive trusts by compelling a conveyance of the legal title; suits against persons in fiduciary relations; suits against administrators and executors; and suits against corporations and their managing officers. The jurisdiction to entertain these suits and to grant these remedies has been described in previous chapters.<sup>1</sup> There remains one particular remedy to be briefly considered,—the suit by a stockholder against a corporation to compel the transfer or issue of stock,

§ 1412. **Suits against Corporations to Compel the Transfer or Issue of Stock.**—Cases frequently arise where corporations or joint-stock companies refuse to recognize the rights of assignees of stock, and make the transfers on their books and issue new certificates in place of the old ones presented, or where certificates have been presented to the company without the owner's consent and negligence, and new certificates have been issued instead thereof to others purporting to be entitled thereto. In such cases it is well settled that although the law may give some remedy, as that of damages, for the refusal, equity has jurisdiction to compel the corporation to make the transfer and issue new certificates in the one case, to the lawful assignee;<sup>1</sup> and in the other, to decree that the corporation replace the stock upon its books, and issue new certificates to the original owner, or if it is unable to do this by reason of its not having or being able to procure any shares, to pay the value of the stock.<sup>2</sup>

<sup>1</sup> See ante, concerning charitable trusts, §§ 1018–1029; express private trusts: §§ 1059–1087; resulting and constructive trusts: §§ 1030–1058; fiduciary persons, guardians, etc.; §§ 1088–1097; administration suits: §§ 1152–1154; suits against corporations and their managing officers: §§ 1089–1096.

<sup>2</sup> *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365; 32 Am. Rep. 315.

<sup>3</sup> *Pollock v. National Bank*, 7 N. Y. 274, 57 Am. Dec. 520; *Pratt v. Taunton Copper Co.*, 123 Mass. 110, 25 Am. Rep. 37; *Telegraph Co. v. Davenport*, 97 U. S. 369.

## SIXTH GROUP.

REMEDIES IN WHICH THE FINAL RELIEF IS PECUNIARY,  
BUT IS OBTAINED BY THE ENFORCEMENT OF A LIEN  
OR CHARGE UPON SOME SPECIFIC PROPERTY OR FUND.

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### CHAPTER FIRST.

FORECLOSURE SUITS—MARSHALING SECURITIES—CRED-  
ITORS' SUITS.

#### ANALYSIS.

- § 1413. Nature, kinds, and classes.
- § 1414. Suits for marshaling of securities.
- § 1415. Creditors' suits.

§ 1413. **Nature, Kinds, and Classes.**—The title of this group plainly indicates the nature and object of the remedies composing it. They are all purely equitable, and therefore belong to the exclusive jurisdiction; because, although the *final* relief is pecuniary, and so resembles the ordinary relief at law, it is obtained through preliminary proceedings, forming a part of the judgment, which belong solely to the procedure and jurisdiction of equity. The group contains the following species of remedies: Suits for the foreclosure by judicial sale of mortgages of real property; suits for the similar foreclosure of mortgages of personal property; suits for the similar foreclosure of pledges; suits to enforce the various equitable liens; suits to enforce the equitable contracts of married women upon their separate property; suits to marshal securities; and creditors' suits. The jurisdiction to entertain most of these suits—when and between what parties most of these remedies will be granted—has already been discussed as fully as my limits will permit.<sup>1</sup> I shall briefly consider in the present chapter marshaling of securities and creditors' suits.

<sup>1</sup> See ante, foreclosure of mortgages of land: § 1228; of mortgages of chattels: § 1230; of pledges: § 1231. The enforcement of equitable liens; arising from express contract: §§ 1235-37; from implied contract: §§ 1239-1243; from charges by will or deed: §§ 1245-1247; grantor's lien: §§ 1249-1258; vendor's lien: § 1262; vendee's lien: § 1263; deposit of title deeds: § 1267;

§ 1414. **Marshaling of securities.**—The equitable remedy of marshaling securities, with that of marshaling assets, depends upon the principle that a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund. The general rule is, that if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only,—as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another,—the former must seek satisfaction out of that fund which the latter cannot touch.<sup>1</sup> If, therefore, the prior creditor resorts to the doubly charged fund, the subsequent creditor will be substituted, as far as possible, to his rights.<sup>2</sup> These rules must be taken with the modifications and exceptions that in their application the paramount encumbrancer shall not be delayed or inconvenienced in the collection of his debt, for it would be unreasonable that he should suffer because some one else has taken imperfect security;<sup>3</sup> that the rights of third parties shall not be prejudiced;<sup>4</sup> and that the parties themselves are creditors of the same debtor.<sup>5</sup> The rules of marshaling securities are applied under a variety of circumstances; but generally, in this country, between mortgagees, mortgagees and judgment creditors, and between judgment creditors.

§ 1415. **Creditors' Suits.**—The jurisdiction of equity to enter statutory liens: § 1269. Suits to enforce the equitable contracts of married women upon their separate property: §§ 1121–1126. Although the late English cases hold that these contracts of married women do *not* create any lien, yet the whole remedy in form and substance is exactly the same as though there was a lien, and as though its object was to enforce that lien. Furthermore, the American courts generally hold that a lien *is* created. "Creditors' suits" belong to this group, because they are based upon the conception that an equitable lien is created upon the judgment debtor's property, by means of the judgment and execution returned unsatisfied; and this lien is in reality enforced, although the enforcement may, perhaps, require the ancillary remedies of cancellation, a receiver, etc.

<sup>1</sup> Aldrich v. Cooper, 8 Ves. 382, 395, 2 Lead. Cas. Eq. 4th Am. ed., 2280, notes; and see the cases cited in the following notes.

<sup>2</sup> Wyman v. Fort Dearborn Nat. Bank, 181 Ill. 279, 72 Am. St. Rep. 259, 54 N. E. 946, 48 L. R. A. 565; Hudkins v. Ward, 30 W. Va. 204, 8 Am. St. Rep. 22, 3 S. E. 600.

<sup>3</sup> Farwell v. Bigelow, 112 Mich. 285, 70 N. W. 579; compare Gotzian v. Shakman, 89 Wis. 52, 46 Am. St. Rep. 820, 61 N. W. 304.

<sup>4</sup> Gilliam v. McCormack, 85 Tenn. 597, 4 S. W. 521 (a well reasoned opinion). The doctrine of marshaling will not be applied so as to work an injustice to the debtor. Consequently, it is generally held that it cannot be invoked to compel a creditor to resort to a homestead in the first instance: First Nat. Bank v. Browne, 128 Ala. 557, 86 Am. St. Rep. 156, 29 South. 552; Koen v. Brill, 75 Miss. 870, 65 Am. St. Rep. 633, 23 South. 481.

<sup>5</sup> See Gotzian v. Shakman, 89 Wis. 52, 46 Am. St. Rep. 820, 61 N. W. 304.

tain suits in aid of creditors<sup>1</sup> undoubtedly had its origin in the narrowness of the common-law remedies by writs of execution. These writs, issued by courts of common law, besides being otherwise limited in their operation, were, of course, confined to those estates and interests recognized by the law, and did not extend to estates and interests equitable in their nature. Creditors' suits were therefore permitted to be brought in those instances where the relief by execution at common law was ineffectual; as for a discovery of assets;<sup>2</sup> to reach equitable and other interests not subject to levy and sale at law;<sup>3</sup> and to set aside fraudulent conveyances and obstructions.<sup>4</sup> Statutes in England and in certain American states have greatly extended the scope of writs of execution, thereby providing for adequate legal relief in cases where formerly resort to equity was necessary, and even extending the relief to instances where, perhaps, a creditor's bill would not lie.<sup>5</sup> In other states,

<sup>1</sup> Creditors' suits may be brought either while the debtor is living, or after his death against his estate. In the latter case, the suit ends in administration, if the executor or administrator does not admit assets. If assets are admitted, a decree is simply made for payment of the debt. The jurisdiction of equity to entertain suits of this latter class has been considered under the head of Administration: See ante, § 1154. The present discussion will be confined to suits of the first class.

<sup>2</sup> *Hendricks v. Robinson*, 2 Johns. Ch. 283; *Bay State Iron Co. v. Goodall*, 30 N. H. 223, 75 Am. Dec. 219; *Le Roy v. Rogers*, 3 Paige, 234.

<sup>3</sup> Such intangible property as a patent-right: *Ager v. Murray*, 105 U. S. 126, 26 L. ed. 942. The cases are in conflict on the question whether, in the absence of the authority now generally given by statute, the bill will lie to reach the *choses in action* of the judgment debtor, unless the case presents some independent ground of equity jurisdiction, such as fraud, trust, or the like; in favor of the jurisdiction, see the leading cases, *Hadden v. Spader*, 20 Johns. (N. Y.) 554; *Edmeston v. Lyde*, 1 Paige, 637, 19 Am. Dec. 454; *contra*, see *Greene v. Keene*, 14 R. I. 388, 51 Am. Rep. 400; *Harper v. Clayton*, 84 Md. 346, 57 Am. St. Rep. 407, 35 Atl. 1083, 35 L. R. A. 211. Equitable interests of the debtor may generally be reached: *Cochran v. Cochran*, 62 Neb. 450, 87 N. W. 152; subject to the important exception of the "spendthrift trusts" whose validity is recognized in many jurisdictions: see ante, § 989, note. Numerous species of property are, of course, exempt by statute (homesteads, etc.), or public policy (*e. g.*, salaries of officials; alimony: see *Romaine v. Chauncey*, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. 826, 14 L. R. A. 712).

<sup>4</sup> The creditor's legal remedies to reach and apply land fraudulently conveyed are seldom adequate. Though the conveyance may be utterly void at law, and the land subject to seizure and sale on execution, such sale will usually be at a sacrifice, since the execution purchaser receives a title clouded by the apparent title of the fraudulent grantee. *Brown v. J. Wayland Kimball Co.*, 84 Me. 492, 24 Atl. 1007; *Vasser v. Henderson*, 40 Miss. 519, 90 Am. Dec. 351; *Mann v. Appel*, 31 Fed. 381. The creditor's suit may also be directed against a fraudulent transfer of personal property; the legal remedy by replevin, however, is more usual in this case: see *O'Brien v. Stambach*, 101 Iowa, 40, 69 N. W. 1133, 63 Am. St. Rep. 368.

<sup>5</sup> In England, by the statute of frauds, 29 Car. II., c. 3, sec. 10, legal execution

statutes have increased the efficiency of creditors' suits by dealing with the subject directly. It is a necessary result from the whole theory of the creditors' suits that jurisdiction in equity will not be entertained where there is a remedy at law.<sup>6</sup> The general rule is, therefore, that a judgment must be obtained, and certain steps taken towards enforcing or perfecting such judgment, before a party is entitled to institute a suit of this character.<sup>7</sup> In this there is a uniformity of opinion, but the difficulty arises in determining exactly how far a plaintiff should proceed after he has obtained his judgment.<sup>8</sup> It is, of course, necessary for the creditor

was given against the lands, tenements, and hereditaments of a person seised in trust for the debtor at the time of execution sued out. This exception to the property capable of being reached by the ordinary writs was obviously very narrow,—extending only to real estate seised in trust at the time of execution sued out, and not embracing chattels real, trusts under which the debtor had not the whole interest, equities of redemption, or any equitable interest parted with before execution sued out. By statute 1 & 2 Vict., c. 110, the remedies of creditors by ordinary writs of execution are very complete.

<sup>6</sup> See the cases cited in the next note but one. The question has frequently arisen whether the statutory "proceedings supplementary to execution" have rendered the equitable remedy obsolete. This question should be solved by reference to the principle of § 279, ante. See, especially, *Ryan v. Maxey*, 14 Mont. 81, 35 Pac. 515 (bills to set aside fraudulent conveyances have not been supplanted by the statutory remedy): *Sabin v. Anderson*, 31 Oreg. 487, 49 Pac. 870.

<sup>7</sup> See *Ladd v. Judson*, 174 Ill. 344, 66 Am. St. Rep. 267, and monographic note, 51 N. E. 838; *Aigeltinger v. Einstein*, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669. It is impossible to state a more definite rule than this, as will subsequently appear.

<sup>8</sup> *When an execution returned unsatisfied is or is not an essential preliminary.*—Much of the conflict doubtless results from the effect judgments and writs of execution have in different states. The rule seems to be sustained by the weight of authority, that before a creditor's suit can be brought to reach choses in action and personal property in such a shape or form or under such conditions that no levy can be made at law, execution must have been issued and a return of nulla bona made, since this is the best evidence that the legal remedies are inadequate. See *State Bank v. Belk* (Neb.), 94 N. W. 617; *Menkler v. U. S. Sheep Co.*, 4 N. Dak. 507, 62 N. W. 594, 33 L. R. A. 546, and cases cited below. On the other hand, where the object of the suit is to subject to the payment of the creditor's claim property conveyed in fraud of creditors a return of the execution unsatisfied is not usually necessary. The ground of the remedy in this case is the existence of a fraudulent obstruction to the enforcement of the complainant's lien; it is therefore necessary for the complainant to proceed so far at law as to create a lien; this result, in most states, is effected as respects the debtor's land, by the docketing of the judgment. See *State Bank v. Belk*, Neb., 94 N. W. 617; *Schofield v. Ute Co.*, 92 Fed. 269, 34 C. C. A. 334; *Spooner v. Travelers' Ins. Co.*, 76 Minn. 311, 77 Am. St. Rep. 651, 79 N. W. 305. There are exceptions to the rule even that a judgment is required. Thus it is held that under certain circumstances equity will lend its aid to set aside fraudulent conveyances of property and apply it to a creditor's demands, by a proceeding that may be called "equitable attachment," without a

to allege and prove that he has taken the necessary proceedings at law before he can show a case requiring the interposition of equity. Whether an equitable suit, analogous to the creditor's suit, will be allowed in aid of the lien created by an attachment, before the recovery of judgment, is a question to which the American courts have given directly conflicting answers.

judgment having been obtained, where the debtor has absconded, or removed from or resides out of the state: *Merchants' Nat. Bank v. Paine*, 13 R. I. 592, 1 Scott, 136; *First Nat. Bank v. Eastman*, 144 Cal. 487, 103 Am. St. Rep. 95, 77 Pac. 1043. In a few of the states simple contract creditors are authorized by statute to sue in equity to set aside fraudulent conveyances; but these statutes have not been followed by the federal courts: see ante, note to § 293.

*In aid of attachment.*—An exception has been sought to be made in the case of attaching creditors, and the question has been presented whether equity will ever assist an attachment at law. It has been held, in accordance with the prevailing theory, that a creditor's suit may be maintained to reach real estate when a specific lien is created, that an attachment constitutes such a lien as to furnish ground for equitable interference to remove fraudulent obstructions or impediments on the property, real or personal, attached, without the requirement of a judgment obtained, or the steps subsequent thereto, necessary in ordinary creditors' suits: *Chicago & A. Bridge Co. v. Anglo-American, etc., Co.*, 46 Fed. 584; *Hunt v. Field*, 9 N. J. Eq. 36, 57 Am. Dec. 365. Other decisions hold that such a suit cannot be maintained: *Aigeltinger v. Einstein*, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669.

## SEVENTH GROUP.

REMEDIES IN WHICH THE FINAL RELIEF IS WHOLLY PECUNIARY, AND IS OBTAINED IN THE FORM OF A GENERAL PECUNIARY RECOVERY.

### CHAPTER FIRST.

SUITS FOR CONTRIBUTION, EXONERATION, AND SUBROGATION.

#### ANALYSIS.

- § 1416. General nature, kinds, and classes.
- § 1417. Exoneration; rights of surety against the principal debtor.
- § 1418. Contribution.
- § 1419. Subrogation.

§ 1416. **General Nature, Kinds, and Classes.**—The remedies composing this group belong to the concurrent jurisdiction of equity, since the final reliefs are the same in form and substance as that granted under like circumstances by a judgment at law,—a general pecuniary recovery,—and since the primary rights and interests of the parties are generally recognized and protected by the law. Within the group are included suits by assignees of things in action; suits by equitable assignees of a fund;<sup>1</sup> suits for contribution in general; suits for contribution, exoneration, and subrogation, growing out of suretyship; suits for an accounting in general; and suits under various circumstances, and between particular parties, in which an accounting is a necessary element of the relief,—as, for example, between partners.

§ 1417. **Exoneration—Rights of Surety against the Principal Debtor.**—When a surety has actually paid or satisfied the principal's obligation, or any part thereof, he is entitled to be reimbursed by the principal debtor, and can maintain an equitable action for that purpose.<sup>1</sup> He may also maintain a quia timet suit in equity before any payment. Y

<sup>1</sup> As to suits by assignees of things in action, see ante, §§ 1277, 1278; by equitable assignees of a fund: §§ 1280–1284.

<sup>1</sup> The right of recovery being based upon an implied contract of the prin-

§ 1418. **Contribution.**—Where there are two or more sureties for the same principal debtor, and for the same debt or obligation, whether on the same or on different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all of his co-sureties, in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens. The same doctrine applies, and the same remedy is given, between all those who are jointly, or jointly and severally, liable on contract or obligation in the nature of contract.<sup>1</sup> The right, however, may be controlled or modified by express agreement among the co-sureties or debtors.

cipal, a jurisdiction at law to give the same relief has become established, and is ordinarily resorted to in this country. The equitable jurisdiction, however, still exists. The surety is entitled to exoneration, whether his payment was voluntary or compulsory: *Beal v. Brown*, 13 Allen 114 (surety need not set up statute of frauds as defense); if compulsory, he can recover back his reasonably necessary costs and expenses: *Butler v. Butler's Adm'r*, 8 W. Va. 677. The jurisdiction extends to all those who in reality stand in a position of suretyship towards principal debtors; e. g., to a surety for a prior surety: *Hall v. Smith*, 5 How. 96, 12 L. ed. 66. If the surety satisfies the obligation at less than its full amount, he can only recover from the principal debtor what he has actually paid, or the value of the property given up: *Bonney v. Seely*, 2 Wend. 481.

*Suit before payment.*—After the obligation becomes payable, the surety, before he has paid it, and whether he has been sued by the creditor or not, may maintain a suit in equity against the debtor—in the nature of a bill quia timet—to compel him to pay the debt or perform the obligation; provided the creditor can himself enforce payment or performance, and neglects or refuses to do so. The creditor is, of course, made a co-defendant: *Dobie v. Fidelity, etc., Co.*, 95 Wis. 540, 60 Am. St. Rep. 135, 70 N. W. 482.

<sup>1</sup>The doctrine of contribution rests upon the maxim, Equality is equity: See ante, §§ 405–412. Although contribution is based upon general considerations of justice, and not upon any notion of an implied promise, a jurisdiction at law has become well settled which is sufficient in all ordinary cases of suretyship or joint liability. The equitable jurisdiction still remains, and has some most important advantages. All the co-sureties and the principal debtor being parties to the equity suit, the liabilities of each and their exoneration by the principal debtor can be adjusted and established by a single decree. If one or more of the co-sureties are insolvent, the plaintiff can in equity obtain a proportionate increase of contribution from the others who are solvent. *Bosley v. Taylor*, 5 Dana 157, 30 Am. Dec. 677. See 2 Pom. Eq. Rem. § 915. There may be contribution among sureties whose liability depends upon different instruments, or arose at different times, so long as they are sureties for the same debt or obligation of the same principal debtor: *Dering v. Earl of Winchelsea*, 1 Cox 318, 1 Lead Cas. Eq. 120, 124, 134, 1 Scott 367, Shep. 94; *Sloan v. Gibbes*, 56 S. C. 480, 76 Am. St. Rep. 559, 35 S. E. 408. There is ordinarily no contribution among tort-feasors: *Johnson v. Torpy*, 35 Nebr. 604, 37 Am. St. Rep. 447, 53 N. W. 575; but see *Farwell v. Becker*, 129 Ill. 261, 16 Am. St. Rep. 267, 21 N. E. 702, 6 L. R. A. 400 (where the complainant did the act without wrongful

§ 1419. **Subrogation.**—The surety who has paid or satisfied the principal's debt or obligation is entitled to be subrogated to and to have the benefit of all securities which may at any time have been put into the creditor's hands by the principal debtor, or which the creditor may have obtained from the principal debtor. By the fact of payment, the surety becomes an equitable assignee of all such securities, and is entitled to have them assigned and delivered up to him by the creditor, in order that he may enforce them for his own reimbursement and exoneration. If therefore, the creditor refuses to surrender up such securities, the surety may maintain an equitable suit to compel their assignment and surrender.<sup>1</sup> The doctrine and remedy of subrogation are extended

intent). As to contribution among co-trustees, see ante, § 1081; among owners of lands subject to incumbrance, §§ 1221-1226: among tenants in common, etc., §§ 1240, 1389; see also *Rindge v. Baker*, 57 N. Y. 209, 15 Am. Rep. 475, H. & B. 578, (contribution enforced by one who has constructed a party-wall). Contribution may be had though there was a good defense to the payment if the plaintiff was ignorant of that defense and acted in good faith: *Hichborn v. Fletcher*, 66 Me. 209, 22 Am. Rep. 562. As to contribution by the estate of a deceased joint surety, see ante, § 409. By the better rule, the complainant is entitled to contribution for reasonable costs and expenses incurred in a prudent defense of a suit: *Connolly v. Dolan*, 22 R. I. 60, 84 Am. St. Rep. 816, 46 Atl. 36.

<sup>1</sup>The doctrine of subrogation is of wide extent and operation in various departments of equity jurisprudence. Persons entitled to the remedy may be classified as follows: *first*, those who made the payment in performance of a legal duty, arising either by express agreement or by operation of law: including sureties: *Darrow v. Summerhill*, 93 Tex. 92, 77 Am. St. Rep. 833, 53 S. W. 680 (surety on an injunction bond); a fire insurance company that has paid a loss caused by the negligence of a third party, and is therefore subrogated to the claim of the insured against such party; *Hart v. Western R. R. Co.*, 13 Met. (Mass.) 99, 46 Am. Dec. 719; *Packham v. German Fire Ins. Co.*, 91 Md. 515, 80 Am. St. Rep. 461, 46 Atl. 1066, 50 L. R. A. 828. A surety who has paid more than his fair share is entitled to subrogation against his co-surety; see *Pace v. Pace's Admr.*, 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459. *Second*, those who, while not legally bound to pay, yet might suffer loss if the obligation is not discharged, and so pay the debt in self-protection; including subsequent encumbrancers and other owners of equities or partial interests who have paid off prior incumbrances. See ante, §§ 1211-1214. *Third*, those who have paid at the request of the debtor or some other party to the obligation; see ante, § 1212. A person who attempts in good faith, to purchase property at a void judicial sale, and whose purchase-money is used to satisfy valid claims against the property, acts on an invitation from the public, favored by public necessity and policy, and is therefore subrogated to the rights of the parties receiving the money: *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119, 20 S. W. 525; *Brewer v. Nash*, 16 R. I. 458, 27 Am. St. Rep. 749, 17 Atl. 857.

Being a doctrine of purely equitable origin and nature, its operation is always controlled by equitable principles. *Bleakley's Appeal*, 66 Pa. St. 187, Shep. 111, (one making payment to defraud another cannot have subrogation). It is, therefore, never enforced so as to defeat or interfere with the superior or equal equities of third persons, or with the legal right of third persons growing out of

also to the creditor, who is subrogated to and entitled to the benefit of all securities given to a surety for purposes of *his* indemnification by the principal debtor; and also between co-sureties, so that one surety, in enforcing his rights of exoneration and of contribution, is subrogated to securities given to his co-surety.<sup>2</sup> It necessarily follows from the surety's right of subrogation that the creditor cannot, without the surety's assent, surrender, give up, release, or discharge any such securities, or render them in any way unavailable to the surety, either by his own acts or omissions. If he does so, the surety's liability is thereby discharged, wholly or partially, as the case may be.<sup>3</sup>

express contract. *Makeel v. Hotchkiss*, 190 Ill. 311, 83 Am. St. Rep. 131, 60 N. E. 524.

The remedy of subrogation has been granted to sureties much more favorably and extensively by the American equity jurisprudence than by the English. In England, prior to modern legislation, if a surety paid a contract which he executed jointly with his principal debtor, or paid a judgment recovered against him and his principal jointly, the contract or judgment was thereby ended and discharged, and could not itself be enforced by the surety. The courts of all the American states, with very few exceptions, have extended the remedy of subrogation to such cases; they enable the surety to enforce such bond, or contract, or judgment immediately against the principal debtor, although the surety was himself directly liable. In other words, by the English doctrine, the surety became equitable assignee only of collateral securities; by the American doctrine he becomes equitable assignee, not only of collateral securities, but of the principal undertaking. See *Subiett v. McKinney*, 19 Tex. 438, Shep. 73; favoring the English doctrine, see *Peebles v. Gay*, 115 N. C. 38, 44 Am. St. Rep. 429, 20 S. E. 173.

<sup>2</sup> See *Henderson-Achert Lith. Co. v. John Shillito Co.*, 64 Ohio St. 236, 83 Am. St. Rep. 745, 60 N. E. 295.

<sup>3</sup> See *Mingus v. Daugherty*, 87 Iowa 56, 43 Am. St. Rep. 354, 54 N. W. 66.

## CHAPTER SECOND.

### SUITS FOR AN ACCOUNTING.

§ 1420. Origin of the equitable jurisdiction.

§ 1421. Extent of the equitable jurisdiction; when exercised.

§ 1420. **Origin of the Equitable Jurisdiction.**—The action of account-render was one of the most ancient actions known to the common law.<sup>1</sup> From the narrow scope and technical rules of this action, the inability of common-law courts to obtain a discovery from the defendant on his oath, the difficulty met with in cases of mutual and complicated accounts, and the impossibility of otherwise doing complete justice, it is easy to understand why the action of account-render fell into disuse, and a jurisdiction in equity to entertain suits for an accounting grew up.<sup>2</sup> The jurisdiction exists, therefore, and is well established; but the question arises, since there is a similar jurisdiction at law, When may a suit in equity for an accounting be brought? This question, of course, does not arise in those cases where an accounting is decreed as an incident to other equitable relief; nor should it arise where

<sup>1</sup> This action was exceedingly narrow in its operation; for it lay only in cases where there was either a privity in deed, as against a bailiff or receiver appointed by the party, or a privity in law, *ex provisione legis*, as against guardians in socage: Co. Lit. 90 b. By the law merchant, also, the action could be brought by a person, naming himself a merchant, against another, naming him a merchant, and charging him as a receiver: Co. Lit. 172 a. Statutes afterwards extended the action, which was strictly confined to these parties, to their executors and administrators: 3 & 4 Anne, c. 16; 13 Edw. I., c. 23; 31 Edw. III., c. 11. The method of procedure was, first, to obtain a preliminary judgment that the defendant do account, *quod computet*, before auditors, and then a second judgment that he pay the plaintiff the balance found to be due him: 3 Black. Com. 163. But if the balance was in favor of the defendant, the plaintiff could not be compelled to pay it: 1 Spence's Eq. Jur. 650. Besides this defect in the common-law procedure, the auditors had no power, prior to statute, of examining the parties on oath; and any disputes which arose before them on the items of account could only be settled by as many issues in court: Jeremy's Eq. Jur. 504. This action of account-render was the only means which the common law furnished of obtaining a settlement of an account, except that *assumpsit* might be brought for a determinate balance: 3 Black. Com. 162. But if the balance was disputed, it was necessary for the jury to investigate the items one by one, a task which was practically impossible.

<sup>2</sup> 1 Spence's Eq. Jur. 649; Mitford's Eq. Pl. 120, 123; Bacon Abr., tit. *Accompt*. The action of account-render is perfected in several states by statute.

the subject-matter is an equitable interest or estate, for here the jurisdiction should be exercised as a necessary consequence, without regard to legal remedies.<sup>3</sup> It is not in every matter of account cognizable at law that the equitable jurisdiction will be exercised, the general rule being that a proper case is presented when the remedies at law are inadequate.<sup>4</sup>

§ 1421. **Extent of the Equitable Jurisdiction—When Exercised.**—The instances in which the legal remedies are held to be inadequate, and therefore a suit in equity for an accounting proper, are: 1. Where there are mutual accounts between the plaintiff and the defendant,—that is, where each of the two parties has received and paid on account of the other;<sup>1</sup> 2. Where the accounts are all on one side, but there are circumstances of great complication, or difficulties in the way of adequate relief at law;<sup>2</sup> 3. Where a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account.<sup>3</sup> A plea of stated account

<sup>1</sup> Ante, §§ 218, 219.

<sup>2</sup> Ante, §§ 176, 178.

<sup>3</sup> The accounts must be mutual, as distinguished from matters of set-off, and accounts on one side only: Dinwiddie v. Bailey, 6 Ves. 136, 1 Ames, Eq. Jur. 442; Phillips v. Phillips, 9 Hare, 471, 1 Ames, Eq. Jur. 449; Fluker v. Taylor, 3 Drew. 183, 3 Keener 906; Garner v. Reis, 25 Minn. 475, 3 Keener 920; Haywood v. Hutchins, 65 N. C. 574, 1 Ames Eq. Jur. 459 (accounts on both sides, but having no connection with each other). For a definition of a mutual account, see Phillips v. Phillips, supra.

<sup>4</sup> Taff Vale R'y v. Nixon, 1 H. L. Cas. 110; 1 Ames Eq. Jur. 454, 3 Keener 888; Barry v. Stevens, 31 Beav. 258, 1 Ames Eq. Jur. 451, 3 Keener 910 (court will not take jurisdiction merely because the items are very numerous.) To determine what degree of complication is required before a court of equity will entertain jurisdiction for that reason, independent of other circumstances, the rule was established in England that the account should be so complicated that a court of law would be incompetent to examine it at nisi prius with the necessary accuracy: Taff Vale R'y v. Nixon, supra; Foley v. Hill, 2 H. L. Cas. 28, 46, 1 Ames Eq. Jur. 446, 3 Keener 897. But under the present practice in England, matters of account may now be referred to officers or referees, so that the rule as above stated can now hardly be followed. The facts of each particular case should govern, and if it is doubtful whether adequate relief could be obtained at law, equity should entertain jurisdiction. Foley v. Hill, supra; Marvin v. Brooks, 94 N. Y. 71, 3 Keener 924; Uhlman v. New York Life Ins. Co., 109 N. Y. 421, 433, 4 Am. St. Rep. 482, 17 N. E. 363 (relief refused when it will be of very great inconvenience and possible oppression to the defendant). In the important case of Pierce v. Equitable Life Assur. Soc., 145 Mass. 56, 12 N. E. 858, 3 Keener 929, the defendant company was compelled to account to the holder of a "tontine" policy, to show that it had complied with its promise "equitably to apportion" to the plaintiff his share in the accumulations made through the operation of the tontine provisions in his policy. Relief was granted on the ground of the extreme complexity of the accounts. But in Uhlman v. N. Y. Life Ins. Co., supra, relief was refused on similar facts.

<sup>5</sup> This will embrace suits against trustees—including directors of corporations

obviously constitutes a bar to a suit in equity for an accounting, —which, as before stated, are particularly of equitable cognizance. Also suits for an accounting between partners; see Pom. Eq. Rem. §§ 937-942. The jurisdiction of equity to compel guardians and executors and administrators to account is governed to a great extent in the United States by the powers given to courts of probate: ante, § 1154. The principal difficulty is as to when equity will take jurisdiction of an accounting between principal and agent. The mere relation of principal and agent, without more,—the relation not being really fiduciary in its nature, and no obstacle intervening to a recovery at law,—is insufficient to enable a principal to maintain the action against his agent: King v. Rossett, 2 Young & J. 33, 3 Keener, 886; Moxon v. Bright, L. R. 4 Ch. 292, 1 Ames Eq. Jur. 450, 3 Keener, 918. But where the relation is such that a confidence is reposed by 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: Makepeace v. Rogers, 11 Jur., N. S. 215, 3 Keener, 916; Mackenzie v. Johnston, 4 Madd. 373, 1 Ames Eq. Jur. 444, 3 Keener, 885; Moxon v. Bright, L. R. 4 Ch. 292, 1 Ames Eq. Jur. 452, 3 Keener, 918; Marvin v. Brooks, 94 N. Y. 71, 3 Keener, 924. While the rules are thus settled in favor of a principal, it does not follow that the reverse is true, and that an agent may come into equity for an accounting against his principal, since generally there is no trust or confidence reposed in the latter, and no duty on his part to account: Padwick v. Stanley, 9 Hare, 627, 3 Keener, 905; Smith v. Leveaux, 2 De Gex, J. & S. 1, 3 Keener, 913. But there are cases where an agent may maintain the action against his principal; as, for example, where his salary depends on the profits made by his employer: Harrington v. Churchward, 6 Jur., N. S. 576, 1 Ames Eq. Jur. 457; Channon v. Stewart, 103 Ill. 541, 3 Keener, 922; Alpaugh v. Wood, 45 N. J. Eq. 153, 16 Atl. 676, 3 Keener, 943; and persons, although not technically partners, who are to receive a certain share of the profits of an undertaking, may likewise maintain the action: Pratt v. Tuttle, 136 Mass. 233, 3 Keener, 928. The foregoing rules are applicable, for similar reasons, to part owners: Shirley v. Goodnough, 15 Oreg. 642, 16 Pac. 871; and to tenants in common and joint tenants taking more than their share of rents and profits: Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649. An action by one tenant in common against another in exclusive possession to recover a share of rents, profits, and issues, amounting in the aggregate to a certain sum, cannot be maintained in equity: Pico v. Columbet, 12 Cal. 414, 73 Am. Dec. 550. At the common law, no action of account for taking rents and profits lay against a joint tenant or tenant in common by another, unless the defendant was constituted bailiff: Co. Lit. 200 b; but this was remedied by the statute of 4 Anne, c. 16, sec. 27, and the action could be brought against the defendant as bailiff for receiving more than his share or proportion. This statute has been substantially re-enacted in many of the American states, but the equity jurisdiction exists notwithstanding. An accounting is often an incident to a suit for partition between joint tenants and tenants in common: See ante, § 1389. The relation of banker and customer is not fiduciary in its character, and unless there are other circumstances, there can be no accounting between them in equity: Foley v. Hill, 2 H. L. Cas. 28, 1 Ames Eq. Jur. 446, 3 Keener, 897.

The rule is sometimes laid down by text-writers and judges, that where accounts are all on one side, but a discovery is necessary, a proper case is presented for equitable interference, but such a rule seems to be only applicable to cases partaking of a fiduciary character: See cases ante, in this note. As to discovery enlarging the equitable jurisdiction over accounting, see ante, §§ 223 et seq.

since in that case the remedy at law is entirely adequate;<sup>4</sup> but of course, a stated account may be opened for fraud or error.<sup>5</sup> The remedy of accounting is in most instances a necessary incident and part of the relief granted in suits brought by those beneficially interested, against trustees, either express or implied, and persons standing in fiduciary relations, such as administrators, executors, guardians, directors, and the like. The equitable jurisdiction is also practically exclusive in proceedings for an account and settlement of partnership affairs, including suits for an accounting and settlement of the firm affairs between the copartners themselves; suits for a settlement of the firm affairs between the survivors and the executors or administrators of the deceased when a partner has died; and suits to settle the affairs of an insolvent firm, and to adjust the demands of the firm creditors and the creditors of the individual partners. The equitable jurisdiction over partnerships is a necessary outgrowth of the jurisdiction over accounting, and the remedies of dissolution, injunction, and receivership are incidents necessary to a final and complete relief.<sup>6</sup>

<sup>4</sup> *Weed v. Small*, 7 Paige, 573.

<sup>5</sup> *Barrow v. Rhineland*, 1 Johns. Ch. 550, 1 Scott, 469.

<sup>6</sup> The subject of partnership is so broad, requiring so much discussion for its adequate treatment, that I shall not attempt to consider it. See Pom. Eq. Rem., §§ 936-945.

**TABLE OF CASES CITED.**



## TABLE OF CASES CITED.

### A.

- Abbott v. James, 111 N. Y. 673, 2 Keener 1166, p. 895.
- Abbott v. Sworder, 4 De Gex & S. 448, 2 Keener 483, p. 483.
- Abbott v. Treat, 78 Ma. 121, 125, 3 Atl. 44, p. 445.
- Abernathy v. Hutchinson, 1 Hull & T. 28, 40, 3 L. J. Ch. 209, p. 839.
- Ackerman v. Hunsicker, 85 N. Y. 43, 47, 39 Am. Rep. 621, Kirch. 285, p. 702, 703.
- Ackroyd v. Smithson, 1 Brown Ch. 503, 1 Lead. Cas. Eq. 4th Am. ed., 1171, 1181, 3 Keener 977, 1 Scott 621, p. 587, 683.
- Acton v. Acton, Prec. Ch. 237, Kirch. 202, p. 779.
- Acton v. Woodgate, 2 Mylne & K. 492, p. 555.
- Adair v. Craig, 135 Ala. 332, 33 South. 902, p. 518.
- Adair v. Shaw, 1 Schoales & L. 243, 262, p. 550, 656.
- Adams v. Adams, 21 Wall. 185, 22 L. ed. 504, Ames Trusts, 227, p. 567, 607.
- Adams v. Angell, L. R. 5 Ch. Div. 634, 635, p. 381.
- Adams v. Brenan, 177 Ill. 194, 69 Am. St. Rep. 222, 52 N. E. 314, 42 L. R. A. 718, p. 822.
- Adams v. Hill, 29 N. H. 202, p. 345.
- Adams v. Messinger, 147 Mass. 185, 6 Am. St. Rep. 679, 17 N. E. 491, 1 Ames Eq. Jur. 50, 2 Scott 48, 2 Keener 41, p. 882, 883.
- Adams v. Rutherford, 13 Oreg. 78, 8 Pac. 896, p. 219.
- Adams v. Vanderbeck, 148 Ind. 92, 45 N. E. 645, 47 N. E. 24, 62 Am. St. Rep. 497, p. 360.
- Adams v. Weare, 1 Bro. C. C. 567, 1 Ames Eq. Jur. 397, 2 Scott 286, 2 Keener 1006, p. 895.
- Adderley v. Dixon, 1 Sim. & St. 607, 608, 610, 1 Ames Eq. Jur. 58, H. & B. 584, 2 Scott 14, 2 Keener 13, p. 879, 880, 881, 882, 883.
- Additon v. Smith, 83 Me. 551, 22 Atl. 470, p. 660, 663.
- Aden v. City of Vallejo, 139 Cal. 165, 72 Pac. 905, p. 360.
- Aderholt v. Henry, 87 Ala. 416, 6 South. 625, 6 L. R. A. 451, p. 728.
- Adlington v. Cann, 3 Atk. 141, 145, 149, 151, p. 566.
- Adsit v. Adsit, 2 Johns. Ch. 448, 451, 7 Am. Dec. 539, p. 235.
- Alden v. White, (Ind. App.) 66 N. E. 509, p. 707.
- Alderson v. Comm'rs, 32 W. Va. 640, 25 Am. St. Rep. 840, 9 S. E. 868, 5 L. R. A. 334, p. 821.
- Aldrich v. Cooper, 8 Ves. 382, 395, 2 Lead. Cas. Eq. 228, 255, 291, 305, p. 68, 725, 909.
- Aleck v. Jackson, 49 N. J. Eq. 507, 23 Atl. 760, 2 Ames Eq. Jur. 45, p. 799.
- Alexander v. Merrick, 121 Ill. 606, 13 N. E. 190, p. 180.
- Alexander v. Mortgage Co. of Scotland, 47 Fed. 131, 134, p. 80.
- Aetna Nat. Bank v. Fourth Bk. of N. Y., 46 N. Y. 82, 87, 7 Am. Rep. 314, p. 766.
- Agar v. Fairfax, 17 Ves. 533, 2 Lead. Cas. Eq., 4th Am. ed. 865-919, 880, 894, p. 67, 867, 868.
- Agar v. Macklew, 2 Sim. & St. 418, 1 Ames Eq. Jur. 67, p. 886.
- Agar-Ellis v. Lascelles, 24 Ch. Div. 317, p. 783.
- Ager v. Murray, 105 U. S. 126, 26 L. ed. 942, p. 910.
- Agnew v. R. R. Co., 24 S. C. 18, 58 Am. Rep. 237, p. 381, 382.
- Ahrend v. Odiorne, 118 Mass. 261, 19 Am. Rep. 449, Kirch. 131, p. 745, 746.

- Aigeltinger v. Einstein*, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669, p. 911, 912.
- Akin v. Kellogg*, 119 N. Y. 441, 23 N. E. 1046, p. 238.
- Alabama & Vicksburg Ry. Co. v. Jones*, 73 Miss. 110, 55 Am. St. Rep. 488, 19 South. 105, p. 415.
- Alabama Coal & C. Co. v. Shackelford*, 137 Ala. 224, 97 Am. St. Rep. 23, 34 South. 833, p. 806.
- Albany City Savings Inst. v. Burdick*, 87 N. Y. 39, 3 Keener 378, p. 429.
- Albea v. Griffin*, 2 Dev. & B. 9, 1 Ames Eq. Jur. 288, p. 902.
- Alger v. Anderson*, 92 Fed. 606, 700, 710, p. 99.
- Allcard v. Skinner*, 36 Ch. D. 145, 187, p. 516, 522, 526.
- Allen v. Allen*, 13 S. C. 512, 36 Am. Rep. 716, p. 246, 247, 248, 249.
- Allen v. Hammond*, 11 Pet. 63, 2 Scott 582, p. 437.
- Allen v. Hawley*, 6 Fla. 164, 63 Am. Dec. 198, p. 804.
- Allen v. Jackson*, 121 Ill. 567, 13 N. E. 840, p. 523.
- Allen v. Jackson*, L. R. 1 Ch. Div. 399, p. 489.
- Allen v. Poole*, 54 Miss. 323, 333, p. 284, 285, 286.
- Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568, H. & B. 430, p. 577.
- Allerton v. Belden*, 49 N. Y. 373, 2 Ames Eq. Jur. 113, p. 861.
- Allfrey v. Allfrey*, 1 Macn. & G. 87, 99, 1 Scott 394, p. 521.
- Allis v. Jones*, 45 Fed. 148, p. 174.
- Allore v. Jewell*, 94 U. S. 506, H. & B. 320, Shep. 90, p. 476, 506.
- Almy v. Jones*, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414, p. 577.
- Alpaugh v. Wood*, 45 N. J. Eq. 153, 16 Atl. 676, 3 Keener 943, p. 919.
- Alpers v. San Francisco*, 12 Sawy. 631, 32 Fed. 503, p. 822.
- Amanda Consol. G. M. Co. v. People's M. & M. Co.*, 28 Colo. 251, 64 Pac. 218, p. 222.
- American Bell Tel. Co. v. Kitsell*, 35 Fed. 521, p. 837.
- American Biscuit Co. v. Klotz*, 44 Fed. 721, H. & B. 891, p. 802.
- American Braided Wire Co. v. Thompson*, 44 Ch. Div. 274, p. 837.
- American Freehold L. & M. Co. v. Sewell*, 92 Ala. 163, 9 South. 143, 13 L. R. A. 299, p. 179.
- American Freehold L. M. Co. v. Walker*, 31 Fed. 103, p. 410.
- American Mortgage Co. v. Hutchinson*, 19 Oreg. 334, 24 Pac. 515, 517, p. 363.
- American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, p. 308.
- American Trust etc. Bank v. McGettigan*, 152 Ind. 582, 71 Am. St. Rep. 345, 52 N. E. 793, p. 808.
- American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, p. 840.
- American Waterworks Co. v. Farmers' L. & T. Co.*, 20 Colo. 203, 46 Am. St. Rep. 285, 37 Pac. 269, 26 L. R. A. 348, p. 811.
- Amerman v. Deane*, 132 N. Y. 355, 28 Am. St. Rep. 584, 30 N. E. 741, 28 L. R. A. 584, 2 Keener 1050, p. 777, 894.
- Ames v. Richardson*, 29 Minn. 330, 13 N. W. 137, Shep. 64, p. 157.
- Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437, p. 717.
- Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278, 56 N. E. 757, 1 Ames Eq. Jur. 573, p. 831, 834.
- Anderson v. Eggers*, (N. J. Eq.) 49 Atl. 578, reversing 61 N. J. Eq. 85, 47 Atl. 727, p. 471, 473.
- Anderson v. Nicholas*, 28 N. Y. 600, p. 333.
- Andrews v. Andrews*, 12 Ind. 348, 2 Ames Eq. Jur. 245, p. 869.
- Andrews v. Frierson*, 134 Ala. 626, 33 South. 6, 1 Scott 108, p. 861.
- Angell v. Angell*, 1 Sim. & St. 83, 93, 2 Ames Eq. Jur. 168, p. 84, 85.
- Angell v. Hadden*, 15 Ves. 244, 1 Keener 214, p. 791.
- Angier v. Webber*, 14 Allen 211, 92 Am. Dec. 748, 2 Scott 126, p. 820.
- Angus v. Clifford*, [1891] 2 Ch. 449, p. 451.
- Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115, p. 304.

- Anonymous**, 1 Atk. 491, p. 656.  
**Anonymous**, Moore 554 pl. 798, 1 Ames Eq. Jur. 467, p. 827, 829.  
**Anonymous**, 3 Swanston 79, n. (a), Ames Trusts 508, p. 611.  
**Anonymous**, 2 Ves. 414, 1 Ames Eq. Jur. 611, 1 Scott 168, p. 841.  
**Anonymous**, Year Book, 5 Edw. IV. 7, pl. 18, Ames Trusts 352, p. 552.  
**Anthony v. Boyd**, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657, p. 428.  
**Anthony v. Wheeler**, 130 Ill. 128, 17 Am. St. Rep. 281, 22 N. E. 494, p. 269, 270, 367.  
**Appleton v. Bowley**, L. R. 8 Eq. 139, Ames Trusts 381, p. 552, 644, 664.  
**A. R. Beck Lumber Co. v. Rupp**, 188 Ill. 562, 80 Am. St. Rep. 190, 59 N. E. 429, p. 278, 342.  
**Arguello**, In re, 97 Cal. 196, 31 Pac. 937, Ames Trusts 482, p. 611.  
**Armstrong v. Mayer**, (Nebr.) 95 N. W. 51, p. 101.  
**Arndt v. Griggs**, 134 U. S. 316, 10 Sup. Ct. 557, p. 207.  
**Arnold v. Henry**, 155 Mo. 48, 78 Am. St. Rep. 556, 55 S. W. 1089, p. 821.  
**Arnold v. Pawtuxet Val. Water Co.**, 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602, p. 76.  
**Arrington v. Wiscom**, 34 Cal. 365, 94 Am. Dec. 722, 2 Ames Eq. Jur. 142, p. 875.  
**Arthur v. Oakes**, 63 Fed. 310, Lewis 253, p. 846.  
**Ashcraft v. DeArmond**, 44 Iowa, 229, p. 505.  
**Ashton v. Dashaway Ass'n**, 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809, p. 633.  
**Ashton v. Thompson**, 32 Minn. 25, 41, 42, 2 Scott 703, p. 521, 522.  
**Ashurst v. McKenzie**, 92 Ala. 484, 9 South 262, 1 Keener 381, p. 866.  
**Askew v. Rooth**, L. R. 17 Eq. 426, p. 639.  
**Aspen Mining & S. Co. v. Rucker**, 28 Fed. 220, p. 868.  
**Aston v. Lord Exeter**, 6 Ves. 288, p. 866.  
**Astor v. Hoyt**, 5 Wend. 603, Kirch. 292, p. 693.  
**Atcheson v. Mallon**, 43 N. Y. 147, 3 Am. Rep. 678, p. 492.  
**Atkins v. W. & A. Fletcher Co.**, 65 N. J. Eq. 658, 55 Atl. 1074, p. 847.  
**Atkinson v. Leonard**, 3 Brown Ch. 218, 224, 1 Scott 138, p. 131, 132.  
**Atkinson v. Miller**, 34 Va. 115, 11 S. E. 1007, 9 L. R. A. 544, 1 Scott 308, p. 740.  
**Atlantic Cotton Mills v. Indian Orchard Mills**, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698, p. 308.  
**Attenborough v. London etc. Dock Co.**, L. R. 3 C. P. D. 450, p. 794.  
**Att'y-Gen. v. Abbott**, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251, p. 271.  
**Att'y-Gen. v. Algonquin Club**, 153 Mass. 447, 27 N. E. 2, 11 L. R. A. 500, 2 Keener 319, p. 776.  
**Att'y-Gen. v. Birmingham**, 4 Kay & J. 528, p. 832.  
**Att'y-Gen. v. Briggs**, 164 Mass. 561, 567, 42 N. E. 118, p. 581.  
**Att'y-Gen. v. Corporation of London**, 2 Macn. & G. 247, 256, 257, 13 Beav. 313, p. 80.  
**Att'y-Gen. v. Fitzsimmons**, 35 Am. Law Reg. 100, 1 Ames Eq. Jur. 622, 1 Scott 724, p. 830.  
**Att'y-Gen. v. Gaskill**, L. R. 20 Ch. Div. 519, p. 74, 75.  
**Att'y-Gen. v. Great West. R'y.**, L. R. 7 Ch. 767, p. 630.  
**Att'y-Gen. v. Hickman**, 2 Eq. Cas. Abr. 193, Ames Trusts 224, p. 580.  
**Att'y-Gen. v. Hunter**, 1 Div. Eq. (N. C.) 12, 1 Ames Eq. Jur. 621, p. 830.  
**Att'y-Gen. v. Landisfield**, 9 Mod. Rep. 286, Ames Cas. on Trusts, 216, p. 549.  
**Att'y-Gen. v. Manchester**, [1893] 2 Ch. 87, 1 Scott 721, p. 831.  
**Att'y-Gen. v. Nichol**, 16 Ves. 338, 342, 1 Ames Eq. Jur. 534, 1 Keener 651, p. 834.  
**Att'y-Gen. v. Richards**, 2 Austr. 603, 1 Ames Eq. Jur. 615, p. 830.  
**Att'y-Gen. v. Sheffield Gas. Co.**, 3 De Gex, M. & G. 304, 1 Keener 682, p. 830.  
**Att'y-Gen. v. Stephens**, 6 De Gex, M. & G. 111, 133, p. 867.

- Att'y-Gen. v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227, Shep. 3, p. 821.
- Att'y-Gen. v. Williams, 174 Mass. 476, 55 N. E. 77, 1 Ames Eq. Jur. 619, p. 830.
- Att'y-Gen. v. Wilson, Craig & P. 1, 28, p. 621.
- Attwood v. Small, 6 Clark & F. 232, 359, p. 455, 458, 460.
- Austin v. Bell, 20 Johns. 442, 11 Am. Dec. 297, p. 556.
- Austin v. Underwood, 37 Ill. 438, 87 Am. Dec. 254, p. 345.
- Aveling v. Knipe, 19 Ves. 441, p. 189.
- Averill v. Taylor, 8 N. Y. 44, p. 386.
- Avery v. Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272, p. 748.
- Aydlett v. Pendleton, 111 N. C. 28, 16 S. E. 8, 32 Am. St. Rep. 776, p. 867.
- Ayers v. Dixon, 78 N. Y. 318, 322, 323, p. 713.
- Ayloff v. Duke, 2 Freem. Ch. 152, p. 849.
- Ayres Ex parte, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. ed. 216, p. 822.
- Ayres v. Duprey, 27 Tex. 593, 605, 86 Am. Dec. 657, p. 343.
- B.**
- Backer v. Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231, p. 459.
- Bacon v. Bronson, 7 Johns. Ch. 194, 201, 11 Am. Dec. 449, p. 473.
- Baddeley v. Baddeley, L. R. 9 Ch. Div. 113, Ames Trusts 170, p. 559.
- Badger v. Badger, 2 Wall. 87, 94, 17 L. ed. 836, 2 Scott 766, p. 199, 476.
- Badger v. Boardman, 16 Gray, 559, 2 Keener 473, p. 776.
- Badgley v. Bruce, 4 Paige 98, p. 865.
- Baer's Appeal, 127 Pa. St. 360, 18 Atl. 1, 4 L. R. A. 609, p. 614.
- Baggett v. Meux, 1 Phill. Ch. 627, 1 Coll. C. C. 138, p. 643.
- Bailey v. Bailey, 2 Del. Ch. 95, p. 625.
- Bailey v. Barnes, [1894] 1 Ch. 25, 7 Reports, 9, p. 269.
- Bailey v. Briggs, 56 N. Y. 407, p. 675.
- Bailey v. Duncan, 4 Mon. 256, 2 Keener 343, 2 Scott 417, p. 162.
- Bailey v. Gardner, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. Rep. 847, p. 638.
- Bailey v. Hemenway, 147 Mass. 326, p. 590.
- Bailey v. Piper, L. R. 18 Eq. 683, 2 Keener 343, p. 905.
- Bailey v. Schnitzius 45 N. J. Eq. 178, 16 Atl. 620, 1 Keener 863, p. 848.
- Bailey v. Tillinghast, (C. C. A.) 99 Fed. 801, 807, p. 119.
- Baily v. Hornthal, 154 N. Y. 648, 661, 61 Am. St. Rep. 645, 652, 49 N. E. 56, p. 63, 68.
- Baily v. Smith, 14 Ohio St. 396, 84 Am. Dec. 385, Kirch. 667, p. 329, 715.
- Baily v. Taylor, 1 Russ. & M. 23, 1 Ames Eq. Jur. 654, p. 838.
- Bainbrigge v. Baddeley, 3 Macn. & G. 413, 419, p. 802, 804.
- Baines v. Baker, 1 Amb. 158, 1 Scott 720, p. 831.
- Baker v. Biddle, 1 Bald. 394, 403-411, p. 144.
- Baker v. Bliss, 39 N. Y. 70, 74, 78, p. 269, 270.
- Baker v. Bradley, 7 De Gex, M. & G. 597, p. 522.
- Baker v. Cunningham, 162 Mo. 134, 62 S. W. 445, 85 Am. St. Rep. 490, p. 198.
- Baker v. Humphrey, 101 U. S. 499, p. 520.
- Baker v. Mather, 25 Mich. 51, 53, p. 281.
- Baker v. Monk, 4 De Gex, J. & S. 388, p. 523.
- Baker v. Sebright, L. R. 13 Ch. D. 179, 1 Keener 515, p. 828, 829.
- Baker v. Varney, 129 Cal. 564, 79 Am. St. Rep. 140, 62 Pac. 100, p. 805.
- Baker v. Vining, 30 Me. 121, 126, 50 Am. Dec. 617, p. 591.
- Bald Eagle Val. R. Co. v. Nittany Val. R. Co., 171 Pa. St. 284, 50 Am. St. Rep. 807, 33 Atl. 239, 29 L. R. A. 423, p. 776.
- Baldwin v. Aldrichs, 34 Vt. 532, 80 Am. Dec. 695, p. 867.
- Baldwin v. Davidson, 139 Mo. 118, 61 Am. St. Rep. 460, 40 S. W. 765, p. 854.
- Baldwin v. Sager, 70 Ill. 503, p. 365.

- Ball v. Tompkins**, 41 Fed. 486, 489, p. 142.
- Ballou v. Inhabitants of Hopkinton**, 4 Gray, 324, 328, 1 Keener 174, p. 113.
- Baltimore & O. R. Co. v. Arthur**, 90 N. Y. 234, 2 Ames Eq. Jur. 13, 1 Keener 293, p. 791, 794, 795.
- Banco De Lima v. Anglo-Peruvian Bank**, L. R. 8 Ch. Div. 160, 175, p. 306.
- Bancroft v. Consen**, 13 Allen, 50, p. 295.
- Bancroft v. Otis**, 91 Ala. 279, 24 Am. St. Rep. 904, 8 South. 286, p. 514.
- Bank v. Sneed**, 97 Tenn. 120, 56 Am. St. Rep. 788, 36 S. W. 716, 34 L. R. A. 274, p. 505.
- Bank of Florence v. U. S. S. & L. Co.**, 104 Ala. 297, 16 South. 110, H. & B. 897, p. 802, 808.
- Bank of Hindustan v. Alison**, L. R. 6 Com. P. 54, 222, p. 395.
- Bank of Kentucky v. Stone**, 88 Fed. 383, 391, p. 108.
- Bank of Mendocino v. Baker**, 82 Cal. 114, 22 Pac. 1037, 6 L. R. A. 833, p. 275.
- Bank of Ukiah v. Rice**, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118, p. 684, 685.
- Bank of United States v. Davis**, 2 Hill, 451, 461, 464, p. 304.
- Bank of Utica v. Mersereau**, 3 Barb. Ch. 528, 49 Am. Dec. 189, 7 Paige, 517, p. 81.
- Bank of Woodland v. Heron**, 120 Cal. 614, 52 Pac. 1006, p. 808.
- Baptist Ass'n. v. Hart's Ex'rs**, 4 Wheat. 1, p. 580, 582.
- Barbour v. Nat. Exch. Bank**, 45 Ohio St. 133, 12 N. E. 5, p. 809.
- Barker v. Vansommer**, 1 Brown Ch. 149, p. 486, 497.
- Barker's Trusts, In re**, 1 Ch. Div. 43, Ames Trusts, 223, H. & B. 54, p. 624.
- Barnard v. Campan**, 29 Mich. 162, p. 270.
- Barnard v. Campbell**, 55 N. Y. 456, 462, 463, p. 398.
- Barned Banking Co., In re**, 39 L. J. Ch. 635, Ames Trusts 42, p. 569.
- Barned's Bank, In re**, L. R. 2 Ch. 350, p. 79.
- Barnes v. McClinton**, 3 Penr. & W. 67, 23 Am. Dec. 62, p. 264.
- Barnes v. Milne**, 1 Rich. Eq. 459, 24 Am. Dec. 422, p. 854.
- Barnes v. Sammons**, 128 Ind. 596, 27 N. E. 747, p. 133.
- Barnes v. Wood**, L. R. 8 Eq. 424, 1 Ames Eq. Jur. 249, 2 Scott 395, 2 Keener 1228, p. 906.
- Barnesly v. Powel**, 1 Vea. Sr. 284, 287, p. 439.
- Barnett v. Cline**, 60 Me. 205, p. 2757.
- Barnett v. Nelson**, 54 Iowa, 41, 37 Am. Rep. 183, 6 N. W. 41, p. 718.
- Barney v. McCarthy**, 15 Iowa, 510, 83 Am. Dec. 427, p. 372.
- Baron v. Korn**, 127 N. Y. 224, 27 N. E. 804, 1 Keener 640, p. 844.
- Barrett v. Baker**, 136 Mo. 512, 37 S. W. 130, p. 266.
- Barrett v. Hartley**, L. R. 2 Eq. 789, 795, p. 622.
- Barrett v. Hinckley**, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, Kirch. 634, H. & B. 557, p. 689, 692, 714.
- Barrett v. Weber**, 125 N. Y. 18, 25 N. E. 1068, p. 497.
- Barrier v. Kelly**, (Miss.) 33 South. 974, p. 230, 231.
- Barrow v. Barrow**, 18 Beav. 529, 2 Ames Eq. Jur. 199, p. 430, 437.
- Barrow v. Rhinelander**, 1 Johns. Ch. 550, 1 Scott 469, p. 920.
- Barrow v. Richard**, 8 Paige, 351, 35 Am. Dec. 713, 1 Ames Eq. Jur. 173, 2 Scott 521, 2 Keener 461, p. 319, 776.
- Barrow v. Trustees**, [1891] 1 Q. B. 417, p. 226.
- Barry v. Barry**, 1 Jac. & W. 651, 1 Keener 465, p. 828.
- Barry v. Stevens**, 31 Beav. 258, 1 Ames Eq. Jur. 451, 3 Keener 910, p. 918.
- Barstow v. Savage Mining Co.**, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349, p. 332.
- Barth v. Backus**, 140 N. Y. 230, 37 Am. St. Rep. 545, 35 N. E. 425, 23 L. R. A. 47, p. 811.

- Barth v. Deuel, 11 Colo. 494, 19 Pac. 471, p. 557.
- Bartle v. Coleman, 29 U. S. (4 Pet.) 184, 7 L. ed. 825, Shep. 109, p. 185.
- Bartlett v. Cicero Light etc. Co., 177 Ill. 68, 69 Am. St. Rep. 206, 52 N. E. 339, 42 L. R. A. 715, p. 810.
- Barton v. Barbour, 104 U. S. 126, 26 L. ed. 673, p. 809.
- Bascombe v. Beckwith, L. R. 8 Eq. 100, 2 Keener 963, p. 431.
- Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. ed. 500, p. 667.
- Basket v. Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842, p. 494, 501.
- Bass v. Met. W. S. El. R. Co. 82 Fed. 857, 27 C. C. A. 147, 39 L. R. A. 711, p. 824.
- Basset v. Nosworthy Cas. T. Finch, 102, 2 Lead. Cas. Eq. 1, 4, 31, 33-42, 46, 73-96, and notes, 1 Scott 340, 498, p. 196, 314, 357, 358, 370.
- Bassett v. Leslie, 123 N. Y. 396, 25 N. E. 386, 1 Keener 266, Shep. 319, p. 790, 793, 798.
- Batavia v. Wallace, 102 Fed. 240, 42 C. C. A. 310, p. 303.
- Bate v. Hooper, 5 De Gex, M. & G. 338, p. 613.
- Bateman v. Willoe, 1 Schoales & L. 201, 204, 206, p. 850.
- Bates v. American Mortgage Co., 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340, p. 303.
- Bates v. Hurd, 65 Me. 180, H. & B. 368, p. 566, 567.
- Bates v. Johnson, Johns. 304, Ames Trusts 292, p. 373.
- Bath Sav. Inst. v. Hathorn, 88 Me. 122, 51 Am. St. Rep. 382, 33 Atl. 836, 32 L. R. A. 377, H. & B. 400, p. 558, 559.
- Batty v. Chester, 5 Beav. 103, 3 Keener 849, p. 496, 500, 501.
- Batty v. Lloyd, 1 Vern. 141, 2 Scott 672, 3 Keener 504, p. 484.
- Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153, p. 750.
- Baxendale v. Seale, 19 Beav. 601, 2 Keener 943, p. 428.
- Bay City Bridge Co. v. Van Etten, 36 Mich. 210, p. 65.
- Bayler v. Comm, 40 Pa. St. 37, 80 Am. Dec. 551, Shep. 217, p. 769.
- Bayspoole v. Collins, L. R. 6 Ch. 228, 232, p. 533.
- Bay State Iron Co. v. Goodall, 39 N. H. 223, 230, 75 Am. Dec. 219, p. 910.
- Beal v. Brown, 13 Allen 114, p. 914.
- Beal v. Warren, 2 Gray, 447, p. 534.
- Beall v. Smith. L. R. 9 Ch. 85, 91, p. 786.
- Bearden v. Benner, 120 Fed. 690, p. 868.
- Beatty v. Clark, 20 Cal. 11, 30, p. 410.
- Beatty v. Dixon, 56 Cal. 622, p. 866.
- Beatty v. Kurtz, 2 Pet. 566, 584, 7 L. ed. 521, p. 843.
- Beaufort v. Collier, 6 Humph. 487, 44 Am. Dec. 321, p. 639.
- Beaupland v. McKeen, 28 Pa. St. 124, 131, 70 Am. Dec. 115, p. 395.
- Beavan v. Earl of Oxford, 6 De Gex, M. & G. 507, 517, 518, p. 341.
- Beaver v. Beaver, 117 N. Y. 421, 18 Am. St. Rep. 531, 6 L. R. A. 403, 22 N. E. 940, H. & B. 396, p. 559, 569.
- Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430, 1 Ames Eq. Jur. 70, 2 Keener 167, 2 Scott 79, p. 887.
- Beck v. Flournoy Live-Stock & R. E. Co., 65 Fed. 30, 12 C. C. A. 497, 27 U. S. App. 618, p. 494.
- Beck v. Uhrich, 13 Pa. St. 636, 639, 53 Am. Dec. 507, 16 Pa. St. 499, p. 365.
- Beck Lumber Co. v. Rupp, 188 Ill. 562, 80 Am. St. Rep. 190, 59 N. E. 429, p. 278, 342.
- Beekman v. Hudson, 20 Wend. 53, p. 489.
- Belchier, In re, Ambler, 218, Ames Trusts 516, p. 611.
- Belding v. Meloche, 113 Mich. 223, 71 N. W. 592, H. & B. 862, p. 806.
- Bell v. Cundall, Amb. 102, 2 Scott 640, p. 374.
- Bell v. Pelt, 51 Ark. 433, 11 S. W. 684, 14 Am. St. Rep. 57, 4 L. R. A. 247, p. 740.
- Bell v. Pleasant, 145 Cal. 410, 78 Pac. 957, p. 367.
- Bell v. Twilight, 22 N. H. 500, p. 282.

- Bell v. Walker, 1 Bro. C. C. 451, 1 Ames Eq. Jur. 650, p. 838.
- Bellairs v. Bellairs, L. R. 18 Eq. 510, p. 489.
- Bellamy v. Sabine, 1 De Gex & J. 566, 578, 580, 584, p. 283, 287, 288.
- Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213, p. 710.
- Belt's Estate, In re, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74, p. 609.
- Benbow v. Low, L. R. 16 Ch. Div. 93, p. 80.
- Benbow v. Townsend, 1 Mylne & K. 506, p. 592.
- Bence v. Shearman, [1898] 2 Ch. 582, p. 328.
- Bench v. Sheldon, 14 Barb. 66, p. 465.
- Benedict v. Lynch, 1 Johns. Ch. 370, 7 Am. Dec. 484, 2 Keener 1074, p. 900.
- Bennett, Ex parte, 10 Ves. 381, 393, 394, p. 515.
- Bennett v. Bennett, (Nebr.) 91 N. W. 409, p. 506.
- Bennett v. Butterworth, 11 How. 669, 674, 675, 13 L. ed. 859, p. 130.
- Bensick v. Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422, p. 385.
- Benson v. Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816, p. 416.
- Bentley v. Craven, 18 Beav. 75, H. & B. 530, p. 517, 518, 523.
- Bergman v. Bergman, 43 Oreg. 456, 72 Pac. 1086, 73 Pac. 341, 99 Am. St. Rep. 771, p. 286.
- Bernard v. Topplitz, 160 Mass. 162, 35 N. E. 673, 39 Am. St. Rep. 465, p. 721.
- Berney v. Sewell, 1 Jacob & W. 647, p. 805.
- Bernz v. Marcus Sayre Co., 52 N. J. Eq. 275, 30 Atl. 21, p. 65.
- Berry v. Mut. Ins. Co., 2 Johns. Ch. 603, 608, 1 Scott 331, Shep. 104, p. 195, 314, 339.
- Bertman v. Whipple, (R. I.) 57 Atl. 379, p. 516.
- Bethea v. Bethea, 116 Ala. 265, 22 South. 561, p. 178.
- Bethell v. Abraham, L. R. 17 Eq. 24, p. 614.
- Bethell v. Bethell, 92 Ind. 318, 327, p. 444.
- Bethlehem v. Annis, 40 N. H. 34, 40, 77 Am. Dec. 700, p. 761.
- Beverly v. Brooke, 4 Gratt. 187, 208, p. 802.
- Bewick v. Whitfield, 3 P. Wms. 267, 1 Keener 505, p. 829.
- Bickerstaff v. Marlin, 60 Miss. 509, 45 Am. Rep. 418, p. 521.
- Bidwell v. Astor Ins. Co., 16 N. Y. 263, 267, p. 100.
- Bigbee v. Summerour, 101 Ga. 201, 28 S. E. 642, p. 804.
- Bigelow v. Armes, 108 U. S. 10, 1 Sup. Ct. 83, 27 L. ed. 631, 2 Keener 664, p. 903.
- Biggs v. Hoddinott, [1898] 2 Ch. 307, Kirch. 475, p. 698.
- Rigler v. Jack, 114 Iowa, 667, 87 N. W. 700, p. 700.
- Bigley v. Jones, 114 Pa. St. 517, 7 Atl. 54, p. 372.
- Billage v. Southee, 9 Hare 534, 540, 594, p. 513.
- Bindseil v. Smith, 61 N. J. Eq. 654, 47 Atl. 456, p. 68.
- Bingel v. Volz, 142 Ill. 214, 31 N. E. 13, 34 Am. St. Rep. 64, 16 L. R. A. 321, p. 438.
- Bingham v. Bingham, 1 Ves. Sr. 126, 2 Ames Eq. Jur. 264, 3 Keener 5, 2 Scott 543, p. 424, 425, 437.
- Bingham's Appeal, 64 Pa. St. 345, p. 253.
- Binghamton Bridge, The, 3 Wall. 51, 18 L. ed. 137, p. 841.
- Birch v. Anthony, 109 Ga. 349, 34 S. E. 561, 77 Am. St. Rep. 379, p. 488.
- Birke v. Abbott, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474, p. 711, 717.
- Birmingham v. Kirwan, 2 Schoales & L. 444, 449, 450, 452, p. 235.
- Birmingham Trust & Sav. Bank v. Louisiana Nat. Bank, 99 Ala. 379, 13 South. 112, 20 L. R. A. 600, p. 303.
- Bisco v. Earl of Banbury, 1 Cas. Ch. 257, p. 280.
- Bishop v. Moorman, 98 Ind. 1, 49 Am. Rep. 731, 2 Ames Eq. Jur. 156, p. 856, 874, 877.
- Bishop v. Woodward, 103 Ga. 281, 29 S. E. 968, p. 132.

- Bishop of Hereford v. Adams, 7 Ves. 324, p. 577.
- Bishop of London v. Web, 1 P. Wms. 527, 1 Keener 434, p. 828.
- Bishop of Winchester's Case, 1 Rolle Abr. 380, 1 Ames Eq. Jur. 469, p. 828.
- Black v. Black, 26 N. J. Eq. 431, p. 77.
- Black v. Boyd, 50 Ohio St. 46, 33 N. E. 207, p. 68.
- Black v. Shreve, 7 N. J. Eq. 440, 456, 457, p. 108.
- Blackburn v. Randolph, 33 Ark. 119, 2 Ames Eq. Jur. 183, p. 859.
- Blackett v. Bates, L. R. 1 Ch. 117, 2 Keener 154, p. 888.
- Black Hills etc. R. Co. v. Tacoma Mill Co., 129 Fed. 312, 63 C. C. A. 544, p. 824.
- Blackstone v. Blackstone, 3 Watts, 335, 337, 27 Am. Dec. 359, p. 658.
- Blake v. Greenwood Cemetery, 14 Blatchf. 342, Fed. Cas. No. 1, 497, p. 837.
- Blakeman v. Blakeman, 39 Conn. 320, 3 Keener 72, 2 Scott 569, p. 424.
- Bland v. Bland, 90 Ky. 400, 29 Am. St. Rep. 390, 14 S. W. 423, 9 L. R. A. 599, p. 551.
- Bland v. Dawes, L. R. 17 Ch. Div. 794, 797, p. 639.
- Blandy v. Widmore, 1 P. Wms. 324, 2 Vern. 209, 2 Lead. Cas. Eq., 4th Am. ed. 834, 842, Shep. 126, 1 Scott 326, p. 252.
- Blatch v. Wilder, 1 Atk. 420, p. 570.
- Bleakley's Appeal, 66 Pa. St. 187, 191, H. & B. 31, Shep. 111, p. 183, 185, 186, 915.
- Blew v. McClelland, 29 Mo. 304, 1 Ames Eq. Jur. 237, p. 163.
- Biley v. Wheeler, 5 Colo. App. 287, 38 Pac. 603, p. 225.
- Bliven v. Seymour, 88 N. Y. 469, p. 659.
- Blondheim v. Moore, 11 Md. 365, Shep. 321, p. 802, 806, 808.
- Bloodgood v. Clark, 4 Paige 574, p. 806.
- Bloomer v. Henderson, 8 Mich. 395, 402, 404, 405, 77 Am. Dec. 453, p. 277.
- Bloomer v. Spittle, L. R. 13 Eq. 427, 2 Ames Eq. Jur. 309, 3 Keener 398, p. 859.
- Bloomfield State Bank v. Miller, 55 Nebr. 243, 70 Am. St. Rep. 381, 75 N. W. 569, 44 L. R. A. 387, p. 756.
- Blouin v. Phaneuf, 81 Me. 176, 46 Atl. 540, p. 570.
- Blumer v. Hunter, L. R. 8 Eq. 46, p. 531.
- Boals v. Bachman, 201 Ill. 340, 66 N. E. 336, p. 180.
- Bockes v. Lansing, 74 N. Y. 437, 2 Ames Eq. Jur. 152, p. 876.
- Boddy v. Henry, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769, p. 450.
- Bodley v. Taylor, 5 Cranch, 191, 221, 222, p. 144.
- Boggs v. Merced M. Co., 14 Cal. 279, 367, 368, 379, p. 393.
- Bohart v. Chamberlain, 99 Mo. 622, 13 S. W. 85, p. 132.
- Boisseau v. Boisseau, 79 Va. 73, 52 Am. Rep. 616, p. 608.
- Boles & British Land Co.'s Contract, In re, [1902] 1 Ch. 244, p. 515.
- Bolman v. Overall, 80 Ala. 451, 60 Am. Rep. 107, 2 South. 624, p. 881.
- Bolton v. McShane, 67 Iowa 207, 25 N. W. 135, p. 824.
- Bond v. Hopkins, 1 Schoales & L. 413, 429, 433, p. 30.
- Bond v. Montgomery, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119, p. 503, 915.
- Bonney v. Seely, 2 Wend. 481, p. 914.
- Booker v. Wingo, 29 S. C. 116, 7 S. E. 49, p. 501.
- Boone v. Citizens' Sav. Bank, 84 N. Y. 83, 38 Am. Dec. 498, p. 550.
- Boone v. Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276, p. 181.
- Boos v. Morgan, 130 Ind. 305, 30 Am. St. Rep. 237, 30 N. E. 141, p. 382, 385.
- Booth v. Clark, 17 How. 322, 331, 15 L. ed. 164, Shep. 327, p. 802, 811.
- Borel v. Mead, 3 N. Mex. 84, 2 Pac. 222, 1 Ames Eq. Jur. 434, p. 892.
- Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. 342, 348, 1 McCrary, 50, 51, 1 Fed. 274, p. 142.

- Borneman v. Sidlinger**, 15 Me. 429, 33 Am. Dec. 626, p. 667.
- Bosanquett v. Dashwood**, Cas. t. Talb. 38, 40, 41, 2 Scott 667, p. 497, 500.
- Bosher v. Richmond etc. Land Co.**, 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879, p. 118, 474.
- Bosley v. Taylor**, 5 Dana 157, 30 Am. Dec. 677, p. 914.
- Bossick Min. Co. v. Davis**, 11 Colo. 130, 17 Pac. 294 p. 377.
- Boston v. Robbins**, 126 Mass. 384, p. 607.
- Boston & Lowell R. Corp. v. Salem & L. R. Co.** 2 Gray 127, p. 841.
- Boston Diatite Co. v. Florence Mfg. Co.**, 114 Mass. 69, 19 Am. Rep. 310, 1 Keener 51, Shep. 303, Lewis 320, p. 845.
- Bostwick v. Beach**, 105 N. Y. 661, 12 N. E. 32, H. & B. 663, p. 163.
- Bosworth v. Allen**, 168 N. Y. 157, 164, 85 Am. St. Rep. 667, 61 N. E. 163, 55 L. R. A. 751, p. 607.
- Bottomly v. Lord Fairfax**, *Precedents in Ch.* 336, *Ames Trusts* 375, p. 552.
- Botts v. Gooch**, 97 Mo. 88, 11 S. W. 42, 10 Am. St. Rep. 286, p. 638.
- Bouck v. Wilbur**, 4 Johns. Ch. 405, 2 Keener 125, p. 884.
- Boursot v. Savage**, L. R. 2 Eq. 134, 142, p. 303, 308.
- Boutts v. Ellis**, 4 De Gex, M. & G. 249, p. 667.
- Bovill v. Hitchcock**, L. R. 3 Ch. App. 417, p. 835.
- Bovill v. Crate**, L. R. 1 Eq. 388, p. 837.
- Bowen v. Prout**, 52 Ill. 354, p. 360.
- Bowers v. Smith**, 10 Paige, 193, p. 675.
- Bowers Dredging Co. v. N. Y. etc. Co.**, 77 Fed. 980, p. 836.
- Bowker v. Pierce**, 130 Mass. 262, p. 623.
- Bowles v. Round**, 5 Ves. 508, 1 Ames Eq. Jur. 361, 2 Keener 853, p. 458.
- Bowling v. Cook**, 39 Iowa, 200, p. 350.
- Bowman v. Phillips**, 41 Kan. 364, 21 Pac. 230, 13 Am. St. Rep. 292, 3 L. R. A. 631, p. 496.
- Boxheimer v. Gunn**, 24 Mich. 372, p. 710.
- Boyce v. Allen**, 105 Iowa, 249, 74 N. W. 948, p. 65.
- Boyce's Ex'rs v. Grundy**, 3 Pet. 210, 215, 9 L. ed. 127, Shep. 19, p. 143, 144, 853, 861.
- Boyer v. East**, 161 N. Y. 580, 76 Am. St. Rep. 290, 56 N. E. 114, p. 521.
- Boykin v. Ancrum**, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698, p. 379.
- Boyle v. Boyle**, 152 Pa. St. 108, 34 Am. St. Rep. 629, 25 Atl. 494, p. 571.
- Boylston v. Rankin**, 114 Ala. 408, 21 South. 995, 62 Am. St. Rep. 111, p. 398.
- Boynton v. Hubbard**, 7 Mass. 112, 119, p. 512.
- Bozon v. Farlow**, 1 Mer. 459, p. 886.
- Brace v. Duchess of Marlborough**, 2 P. Wms. 491, 1 Scott 330, 350, p. 195, 347, 373, 737.
- Bradford v. Greenway**, 17 Ala. 797, 805, 52 Am. Dec. 203, p. 642, 653.
- Bradford v. Union Bank**, 13 How. 55, 57, 66, Shep. 259, p. 432.
- Bradish v. Gee**, Amb. 229, 1 Scott 636, p. 685.
- Bradley v. Riches**, L. R. 9 Ch. Div. 189, 195, 196, p. 307, 339, 340.
- Brady v. Waldron**, 2 Johns. Ch. 148, 1 Ames Eq. Jur. 483, 1 Scott 661, p. 829.
- Brage v. City of Stockton**, 27 Fed. 509, p. 837.
- Bragg Mfg. Co. v. City of Hartford**, 56 Fed. 292, p. 838.
- Brainard v. Buck**, 184 U. S. 99, 22 Sup. Ct. Rep. 458, 46 L. ed. 449, p. 590.
- Bramley v. Alt**, 3 Ves. 620, p. 493.
- Brandon v. Robinson**, 18 Ves. 429, Ames Trusts 394, p. 551.
- Brandreth v. Lance**, 8 Paige 24, 34 Am. Dec. 368, 1 Keener 47, 1 Scott 228, Lewis 303, p. 845.
- Brandt v. Allen**, 76 Iowa 50, 40 N. W. 32, 1 L. R. A. 653, p. 808.
- Brant v. Brant**, 40 Mo. 266, p. 236.
- Brant v. Virginia Coal Co.**, 93 U. S. 326, 335, p. 393.

- Braxton v. State, 25 Ind. 82, p. 191.
- Breed v. National Bank of Auburn, 68 N. Y. Supp. 68, 57 App. Div. 468; affirmed, 171 N. Y. 648, 63 N. E. 1115, p. 181.
- Breslin v. Fries-Breslin Co., (N. J. Eq.) 58 Atl. 313, p. 402.
- Breton's Estate, In re, 17 Ch. Div. 416, Ames Trusts 171, p. 559.
- Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582, H. & B. 173, 1 Scott 425, 2 Keener 421, p. 163, 407.
- Brewer v. Marshall, 19 N. J. Eq. 537, 97 Am. Dec. 679, 2 Keener 557, p. 491, 776.
- Brewer v. Nash, 16 R. I. 458, 27 Am. St. Rep. 749, 17 Atl. 857, p. 915.
- Brice v. Stokes, 11 Ves. 319, 324, 2 Lead. Cas. Eq., 4th Am. ed. 1738, 1748-1790, 1791-1805, p. 621.
- Bridge v. Wheeler, 152 Mass. 343, 25 N. E. 612, p. 326.
- Bright v. Buckman, 39 Fed. 243, p. 276, 295, 369.
- Brill v. Tuttle, 81 N. Y. 454, 457, 547, 37 Am. Rep. 515, p. 764.
- Brinkerhoff v. Brown, 6 Johns. Ch. 139 151, 156, p. 118.
- Brinkman v. Jones, 44 Wis. 498, 517, 519, 521, 523, p. 262.
- Brinkman v. Sunken, 174 Mo. 709, 74 S. W. 963, p. 591.
- Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689, p. 445, 523.
- Broad, Ex parte, 13 Q. B. D. 740, Ames Trusts 19, p. 569.
- Broad v. Selfe, 9 Jur., N. S., 885, Kirch. 473, p. 698.
- Broadbent v. State, 7 Md. 416, p. 78.
- Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504, Ames Trusts 397, p. 551.
- Brock v. Berry, 132 Ala. 95, 90 Am. St. Rep. 896, 31 South. 517, p. 101.
- Broder v. Conklin, 121 Cal. 282, 53 Pac. 699, p. 515.
- Broderick's Will, In re, 21 Wall. 503, 504, 22 L. ed. 599, p. 142, 473.
- Brodie v. Barry, 2 Ves. & B. 127, p. 233.
- Bromley v. Holland, 7 Ves. 3, 16, 18, 19-21, p. 131, 877.
- Brook v. Badley, L. R. 3 Ch. 672, 674, p. 682.
- Brooks v. Benham, 70 Conn. 92, 38 Atl. 908, 39 Atl. 1112, 66 Am. St. Rep. 87, p. 729.
- Brooks v. Martin, 2 Wall. 70, 81, 2 Scott 790, p. 500.
- Brooks v. Todd, 79 Ga. 692, 4 S. E. 156, p. 498.
- Brooks v. Twichell, 182 Mass. 443, 94 Am. St. Rep. 662, 65 N. E. 843, p. 854.
- Brothers v. Bank of Kaukauna, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932, p. 306.
- Brotzman's Appeal, 119 Pa. St. 645, 13 Atl. 483, p. 186.
- Broughton v. Coffey, 18 Gratt. 184, p. 427, 434.
- Broughton v. Hutt, 3 De Gex & J. 501, 3 Keener 32, p. 421, 424.
- Brown v. Bigné, 21 Oreg. 260, 28 Pac. 11, 28 Am. St. Rep. 752, 14 L. R. A. 745, p. 497.
- Brown v. Brabb, 67 Mich. 17, 34 N. W. 403, 11 Am. St. Rep. 549, p. 361.
- Brown v. Brown, 79 Va. 648, p. 664.
- Brown v. Cole, 14 Sim. 427, Kirch. 698, p. 721.
- Brown v. Gellatly, L. R. 2 Ch. 751, Ames Trusts 489, p. 613.
- Brown v. Guarantee Trust Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. ed. 468, 2 Keener 1109, p. 899.
- Brown v. Higgs, 8 Ves. 561, 569, 570, 574, p. 565.
- Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547, p. 184.
- Brown v. Kimball Co. 84 Me. 492, 24 Atl. 1007, p. 910.
- Brown v. Knapp, 79 N. Y. 136, 140, p. 743.
- Brown v. McDonald, 130 Fed. 964, p. 75.
- Brown v. McGill, 87 Md. 161, 67 Am. St. Rep. 334, 39 Atl. 613, 39 L. R. A. 806, p. 551.
- Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404, 3 Keener 202, p. 464, 466, 468.

- Brown v. Norman**, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663, 3 Keener 690, 2 Scott 747, p. 470, 471.
- Brown v. Pierce**, 7 Wall. 205, H. & B. 326, 1 Scott 708, p. 341.
- Brown v. Simons**, 44 N. H. 475, 45 N. H. 211, p. 281.
- Brown v. Swann**, 10 Pet. 497, p. 94.
- Brown v. Volkening**, 64 N. Y. 76, 82, 83, p. 262.
- Brown v. Welch**, 18 Ill. 343, 68 Am. Dec. 549, p. 320, 359.
- Brown v. Wilson**, 21 Colo. 309, 52 Am. St. Rep. 228, 40 Pac. 688, p. 875.
- Brown & Pollak I. Co. v. H. B. I. Co.**, 105 Iowa 624, 75 N. W. 499, 67 Am. St. Rep. 319, p. 367.
- Browne's Will, In re**, 27 Beav. 324, Ames Trusts, 458, p. 610.
- Bruce v. Tilson**, 25 N. Y. 194, 1 Ames Eq. Jur. 345, 2 Keener 1180, 2 Scott 355, p. 897, 898.
- Bruen v. Gillet**, 115 N. Y. 10, 21 N. E. 676, 12 Am. St. Rep. 764, 4 L. R. A. 529, p. 622.
- Brummond v. Krause**, 8 N. Dak. 573, 80 N. W. 686, p. 506.
- Brundage v. Biggs**, 25 Ohio St. 652, 656, p. 287.
- Bruschke v. Wright**, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813, p. 315.
- Brush v. Fisher**, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510, p. 439, 478.
- Brydges v. Brydges**, 3 Ves. 120, 125a, 126, p. 380, 550.
- Bryson v. Whitehead**, 1 Sim. & St. 74, 2 Scott 124, p. 491.
- Bubb's Case**, Freem. Ch. 38, 1 Ames Eq. Jur. 194, p. 164.
- Buck v. Buck**, 11 Paige, 170, 2 Keener 337, p. 162.
- Buck v. Ward**, 97 Va. 209, 33 S. E. 513, p. 55, 474.
- Buckland v. Papillion**, L. R. 2. Ch. 67, 2 Keener 442, p. 880.
- Buckle v. Mitchell**, 18 Ves. 100, 111, p. 321.
- Buehler v. McCormick**, 169 Ill. 269, 48 N. E. 287, p. 329.
- Bull v. Kentucky Nat. Bank**, 90 Ky. 452, 14 S. W. 425, 12 L. R. A. 37, p. 551.
- Bullard v. Town of Shirley**, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110, p. 582.
- Bullitt v. Farrar**, 42 Minn. 8, 43 N. W. 566, 18 Am. St. Rep. 485, 6 L. R. A. 149, p. 452.
- Bullivant v. Attorney-General**, [1901] App. Cas. (H. L.) 196, p. 81.
- Bullock, In re**, 60 L. J. Ch. 341, Ames Trusts 401, p. 551.
- Bumgardner v. Leavitt**, 35 W. Va. 194, 13 S. E. 67, 12 L. R. A. 776, H. & B. 588, p. 881, 884.
- Burch v. Breckinridge**, 16 B. Mon. 482, 63 Am. Dec. 553, p. 642.
- Burck v. Taylor**, 152 U. S. 634, 14 Sup. Ct. 696, p. 293.
- Burden v. Stein**, 27 Ala. 104, 62 Am. Dec. 758, p. 401.
- Burdick v. Jackson**, 7 Hun, 488, Kirch. 129, p. 739.
- Burgess v. Wheate**, 1 W. Black, 123, 129, 152, 1 Eden, 177, 184, 195, 210, 223, 256, Ames Trusts 356, 1 Scott 58, p. 58, 158, 550, 552.
- Burgess's Case**, L. R. 15 Ch. Div. 507, p. 450.
- Burgoyne v. Ohio Life Ins. etc. Co.**, 5 Ohio St. 586, 587, p. 191.
- Burn v. Carvalho**, 4 Mylne & C. 690, 702, p. 765.
- Burnes v. Scott**, 117 U. S. 582, 587, 6 Sup. Ct. 868, p. 133.
- Burnham v. Burnham**, (Wis.) 97 N. W. 176, p. 508.
- Burns v. Daggett**, 141 Mass. 368, 6 N. E. 727, 1 Ames Eq. Jur. 284, p. 902.
- Burrowes v. Lock**, 10 Ves. 470, 474, 475, 476, 1 Scott 559, 1 Ames Eq. Jur. 263, p. 266, 454, 455, 483, 484.
- Burwell v. Burwell**, (Va.) 49 S. E. 68, p. 518, 522.
- Bush v. Lathrop**, 22 N. Y. 535, 538, p. 332, 338.
- Bush v. Lindsey**, 44 Cal. 121, 125, p. 671.
- Bush v. Western**, Prec. Ch. 530, 1 Ames Eq. Jur. 563, p. 831.

- Butcher v. Stapely, 1 Vern. 363, 1 Ames Eq. Jur. 279, 2 Keener 622, 2 Scott 188, p. 267, 901.
- Butcher v. Yocum, 61 Pa. St. 168, 171, 100 Am. Dec. 625, p. 264, 267.
- Butler v. Bank of Mazepa, 94 Wis. 351, 68 N. W. 998, p. 351.
- Butler v. Butler's Adm'r, 8 W. Va. 677, p. 914.
- Butler v. Douglas, 3 Fed. 612, p. 357.
- Butler v. Freeman, Amb. 301, 303, p. 803.
- Butler v. Haskell, 4 Desaus. Eq. 651, 2 Scott 674, p. 483.
- Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108, p. 521.
- Button v. Schroyer, 5 Wis. 598, 1 Ames Eq. Jur. 225, p. 741, 753.
- Buttrick v. Holden, 13 Met. 355, 357, p. 264.
- Buxton v. Broadway, 45 Conn. 540, 2 Ames Eq. Jur. 115, p. 861.
- Buxton v. Lister, 3 Atk. 383, 1 Ames Eq. Jur. 47, 2 Scott 21, 2 Keener 5, p. 879, 883, 891.
- Buzard v. Houston, 119 U. S. 347, 351, 355, 7 Sup. Ct. 249, 30 L. ed. 451, H. & B. 268, 3 Keener 487, p. 65, 94, 143, 473, 474, 861.
- Byars v. Stubbs, 85 Ala. 254, 256, 4 South. 755, 1 Ames Eq. Jur. 370, p. 468.
- Ryers v. McAuley, 149 U. S. 616-623, 13 Sup. Ct. 908-911, p. 142.
- Byrne v. Schuyler E. M. Co., 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304, p. 821.
- C.
- Cabot v. Christie, 42 Vt. 121, 126, 1 Am. Rep. 313, p. 453.
- Cadigan v. Brown, 120 Mass. 493, 495, 1 Keener 189, p. 112, 834.
- Cadman v. Horner, 18 Ves. 10, 1 Ames Eq. Jur. 351, 2 Keener 881, 1 Scott 284, 2 Scott 236, p. 462, 463.
- Calder v. Chapman, 52 Pa. St. 359, 91 Am. Dec. 163, p. 298.
- Calderwood v. Brooks, 45 Cal. 519, p. 873.
- Caldwell v. Depew, 40 Minn. 528, 42 N. W. 479, 2 Keener 1000, p. 418, 432.
- Calhoun v. Millard, 121 N. Y. 69, 77, 24 N. E. 27, 8 L. R. A. 248, 1 Scott 388, p. 199, 401, 476.
- Callanan v. Edwards, 32 N. Y. 483, 486, p. 327.
- Calverly v. Williams, 1 Ves. 210, 2 Scott 259, p. 432.
- Calvo v. Davies, 73 N. Y. 211, 215, 29 Am. Rep. 130, 8 Hun, 222, p. 711, 712.
- Cambridge Valley Bank v. Delano, 48 N. Y. 326, 336, 339, p. 269.
- Cameron v. Cameron, 82 Ala. 392, 3 South. 148, p. 673.
- Camp v. Bruce, 96 Va. 521, 31 S. E. 901, 70 Am. St. Rep. 873, 43 L. R. A. 146, p. 492, 496, 500.
- Camp v. Ward, 69 Vt. 286, 60 Am. St. Rep. 929, 37 Atl. 747, p. 78.
- Campbell v. Bainbridge, L. R. 6 Eq. 269, p. C11.
- Campbell v. Campbell, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167, p. 506.
- Campbell v. Dearborn, 109 Mass. 130, 12 Am. Rep. 671, Kirck. 191, p. 697, 701.
- Campbell v. Rust, 85 Va. 653, 8 S. E. 664, p. 65.
- Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567, 1 Keener 748, p. 833.
- Campbell v. Sidwell, 61 Ohio St. 179, 55 N. E. 609, p. 195.
- Campbell Mfg. Co. v. Manhattan Ry. Co., 49 Fed. 930, 1 Ames Eq. Jur. 639, p. 835.
- Canedy v. Marcy, 13 Gray, 373-377, 2 Ames Eq. Jur. 256, 3 Keener 35, 2 Scott 552, p. 419, 431.
- Cann v. Cann, 33 Weekly Rep. 40, Ames Trusts, 481, p. 611.
- Cannel v. Buckle, 2 P. Wms. 243, 1 Scott 100, p. 779, 891.
- Cannon v. McDaniel, 46 Tex. 303, p. 673.
- Caplen's Estate, In re, 45 L. J. Rep. 280, Ames Trusts, 49, p. 563.
- Carden v. Lane, 48 Ark. 219, 316, 2 S. W. 709, 3 Am. St. Rep. 228, p. 483.
- Carew's Estate, In re, 26 Beav. 187, p. 492.

- Cargill v. Bower, L. R. 10 Ch. Div. 502, 514, p. 450.
- Carhart v. Harshaw, 45 Wis. 340, 30 Am. Rep. 752, p. 532.
- Carlisle v. South East. R'y, 1 Macn. & G. 689, p. 821.
- Carlton v. Hulett, 49 Minn. 308, 51 N. W. 1053, 3 Keener 709, p. 471.
- Carlton v. Newman, 77 Me. 408, 1 Atl. 194, p. 116.
- Carpenter v. Carpenter, 25 N. J. Eq. 194, p. 531.
- Carpenter v. Carpenter, 12 R. I. 544, 34 Am. Rep. 716, p. 610, 612.
- Carpenter v. Longan, 16 Wall. 271, 273, 21 L. ed. 313, Kirch. 675, p. 329, 714, 715.
- Carr v. Breese, 81 N. Y. 584, 588, 590, 591, p. 530, 533.
- Carr v. Ellison, 2 Brown Ch. 56, p. 684.
- Carrodus v. Sharp, 20 Beav. 56, 2 Keener 350, 2 Scott 421, p. 163.
- Carroll v. Johnston, 2 Jones Eq. 120, 123, p. 366.
- Carroll v. Lee, 3 Gill & J. 504, 22 Am. Dec. 350, p. 639.
- Carstair v. Bates, 3 Camp. 301, Ames Trusts, 12, p. 569.
- Carter v. Carter, 3 Kay & J. 617, 636, 637, 642, 1 Scott 345, p. 347, 370, 373.
- Carter v. Champion, 8 Conn. 548, 549, 554, 21 Am. Dec. 695, p. 293.
- Carter v. City of Portland, 4 Oreg. 339, 350, p. 263.
- Carter v. Ferguson, 58 Hun 569, 12 N. Y. Supp. 580, p. 819.
- Carter v. Tice, 120 Ill. 277, 11 N. E. 529, p. 522.
- Carter v. Williams, L. R. 9 Eq. 678, 2 Keener 565, p. 776.
- Carteret v. Petty, 2 Swans. 323, 1 Ames Eq. Jur. 21, p. 208.
- Cartwright v. Green, 8 Ves. 405, 408, p. 81.
- Carvalho v. Burn, 4 Barn. & Adol. 382, 1 Ad. & E. 883, p. 765.
- Cary v. Lovell Mfg. Co., 24 Fed. 141, p. 836.
- Casborne v. Scarfe, 1 Atk. 603, Shep. 213, 1 Scott 33, p. 173, 688.
- Casco National Bank v. Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705, p. 305.
- Case v. Boughton, 11 Wend. 106, 109, p. 734.
- Case v. Minot, 158 Mass. 577, 22 L. R. A. 536, 33 N. E. 700, p. 99.
- Casey v. Typographical Union, 45 Fed. 135, 12 L. R. A. 193, Lewis, 241, p. 845, 847.
- Cass v. Rudele, 2 Vern. 280, 2 Scott 488, p. 162.
- Casserleigh v. Wood, 119 Fed. 309, p. 496, 500.
- Cassey v. Fitton, 2 Harg. Jurid. Arg. 296, 1 Ames Eq. Jur. 145, p. 881.
- Castellain v. Preston, L. R. 11 Q. B. D. 380, 2 Keener 427, p. 163.
- Castell & Brown, In re, [1898] 1 Ch. 315, p. 318, 340, 350.
- Castle v. Wilkinson, L. R. 5 Ch. 534, 1 Ames Eq. Jur. 252, 2 Scott 395, 2 Keener 1208, p. 906.
- Castleman v. Craven, 22 Vin. Abr. 523, 1 Ames Eq. Jur. 466, 1 Keener 458, p. 827, 829.
- Castleman v. Templeman, 87 Md. 546, 67 Am. St. Rep. 363, 40 Atl. 375, 41 L. R. A. 367, p. 811.
- Cates v. Allen, 149 U. S. 451, 457, 13 Sup. Ct. 883, 977, 37 L. ed. 804, p. 142.
- Catlin v. Wilcox Silver Plate Co. 123 Ind. 477, 18 Am. St. Rep. 338, 24 N. E. 250, 8 L. R. A. 62, p. 811.
- Caton v. Caton, L. R. 1 Ch. 137, 147, 2 Keener 641, p. 904.
- Caton v. Rideout, 1 Macn. & G. 599, 601, 603, p. 640.
- Catt v. Tourle, L. R. 4 Ch. 654, 2 Scott 493, p. 491.
- Caulfield v. Sullivan, 85 N. Y. 153, p. 240.
- Cave v. Cave, L. R. 15 Ch. Div. 639, 643, 646, 1 Scott 517, Ames Tr. 311, p. 308, 339, 346.
- Cavender v. Cavender, 114 U. S. 464, 5 Sup. Ct. 955, 29 L. ed. 212, p. 614.
- Cayuta Wheel & F. Co. v. Kennedy. V. Mfg. Co., 127 Fed. 355, 1 Ames Eq. Jur. 638, p. 835.

- Central Trust Co. v. Chattanooga, etc., Co., 94 Fed. 275, 36 C. C. A. 241, p. 807.
- Central Trust Co. v. East Tenn. etc. Co. 59 Fed. 523, p. 809.
- Central Trust Co. v. New York, etc. R. Co., 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260, p. 810.
- Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387, p. 346.
- Central Trust & S. D. Co. v. Respass, 112 Ky. 606, 66 S. W. 421, 99 Am. St. Rep. 317, p. 486.
- Chaffee v. Lumber Co., 43 Nebr. 224, 61 N. W. 637, 47 Am. St. Rep. 753, p. 361.
- Chaffin v. Kimball, 23 Ill. 36, p. 534.
- Chalmers v. Storil, 2 Ves. & B. 222, p. 236.
- Chambers v. Chambers, 98 Ala. 454, 13 South. 674, p. 64.
- Champlin v. Laytin, 18 Wend. 407, 422, 31 Am. Dec. 382, 6 Paige, 189, 203, 1 Edw. Ch. 467, p. 282.
- Channon v. Stewart, 103 Ill. 541, 3 Keener 922, p. 919.
- Chapin v. Brown, 83 Iowa, 156, 48 N. W. 1074, 32 Am. St. Rep. 297, 12 L. R. A. 428, p. 491.
- Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846, p. 274, 279, 303.
- Chapman v. Gibson, 3 Brown Ch. 229, p. 410.
- Chaquette v. Ortet, 60 Cal. 591, 594, p. 671.
- Charleston & W. C. R'y Co. v. Hughes, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972, p. 175, 176, 180.
- Charter v. Stevens, 3 Denio, 33, 45 Am. Dec. 444, p. 735.
- Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 43 Am. St. Rep. 769, 39 N. E. 490, 27 L. R. A. 42, p. 840.
- Chase v. Chase, 20 R. I. 202, 37 Atl. 804, p. 198.
- Chase v. Peck, 21 N. Y. 581, 585, 586, Kirch. 124, p. 740, 745.
- Chase's Appeal, 57 Conn. 236, 18 Atl. 96, p. 392, 395.
- Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 55 Am. St. Rep. 63, 33 L. R. A. 750, p. 496.
- Cheney v. Libby, 134 U. S. 68, 19 Sup. Ct. 498, 33 L. ed. 818, H. & B. 695, p. 899.
- Cheslyn v. Dalby, 2 Younge & C. 170, p. 520.
- Chestatee Pyrites Co. v. Cavenders, etc. Co., 118 Ga. 255, 45 S. E. 267, 119 Ga. 354, 46 S. E. 422, 100 Am. St. Rep. 174, p. 832.
- Chesterfield v. Janssen, 2 Ves. Sr. 124, 125, 157, 1 Lead. Cas. Eq., 4th Am. ed., 773, 809, 825, 1 Atk. 314, p. 481, 524.
- Cheuvront v. Cheuvront, (W. Va.) 46 S. E. 233, p. 513.
- Chicago & A. Bridge Co. v. Anglo-American, etc. Co., 46 Fed. 584, p. 912.
- Chicago & N. W. R. Co. v. Wilcox, (C. C. A.) 116 Fed. 913, p. 428.
- Chicago, B. & Q. R. R. Co. v. Frary, 22 Ill. 34, p. 823.
- Chicago Gas Light Co. v. Gas Light Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124, p. 491.
- Chicago, M. & St. P. R. R. v. Durant, 44 Minn. 361, 46 N. W. 676, H. & B. 701, 2 Keener 1211, p. 905, 906.
- Chicago, R. I. & P. R. R. Co. v. Union Pac. Ry. Co., 47 Fed. 15, p. 890.
- Chick v. Willetts, 2 Kan. 384, 391, H. & B. 555, p. 693, 694.
- Child v. Douglas, 5 De Gex, M. & G. 739, 2 Keener 467, p. 776, 777.
- Child v. Mann, L. R. 3 Eq. 806, 2 Ames Eq. Jur. 35, 1 Keener 246, p. 798.
- China Steamship Co., In re, L. R. 7 Eq. 240, p. 330.
- Chinnock v. Marchioness of Ely, 4 De Gex, J. & S. 638, 643, p. 773.
- Chinnock v. Paterson, etc. Co., 112 Fed. 531, p. 837.
- Chipman v. Montgomery, 63 N. Y. 221, 230, p. 675.
- Chippendale, Ex parte, 4 De Gex, M. & G. 19, 52, p. 626, 628.
- Cholmondeley v. Clinton, 2 Mer. 352, p. 858.

- Christian v. Taylor, 11 Sim. 401, p. 82.
- Christman v. Colbert, 33 Minn. 509, 24 N. W. 301, 3 Keener 428, p. 860.
- Church v. Bull, 2 Den. 430, 43 Am. Dec. 754, 5 Hill, 270, p. 235.
- Cincinnati H. & D. R. R. Co. v. Bank, 54 Ohio St. 60, 42 N. E. 700, 56 Am. St. Rep. 700, 31 L. R. A. 653, p. 766.
- Citizens' Bank v. Shaw, 14 S. Dak. 197, 84 N. W. 779, p. 363.
- Citizens' Nat. Bank of Attica v. Judy, 146 Ind. 322, 43 N. E. 259, 3 Keener 433, p. 198, 426, 437, 859.
- Citizens' Nat. Bank of Middletown v. Trustees, 5 Del. Ch. 596, p.
- Citizens' State Bank v. Julian, 153 Ind. 655, 55 N. E. 1007, p. 350.
- City Council of Charleston v. Ryan, 22 S. C. 339, 53 Am. Rep. 713, p. 349.
- City National Bank v. Kusworm, 88 Wis. 188, 26 L. R. A. 48, 59 N. W. 564, 43 Am. St. Rep. 880, 3 Keener 795, p. 509.
- City of Albert Lea v. Nielson, 83 Minn. 246, 86 N. W. 83, p. 118.
- City of Austin v. Austin City Cem. Ass'n, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528, p. 823.
- City of Bloomington v. Smith, 123 Ind. 41, 23 N. E. 972, 18 Am. St. Rep. 310, p. 408.
- City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408, 2 Ames Eq. Jur. 92, p. 116, 117, 823.
- City of Chicago v. Union Stock Yards & Transit Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281, p. 178, 184.
- City of London v. Nash, 3 Atk. 512, 515, p. 887.
- City of London v. Perkins, 3 Brown Parl. Cas., Tomlins's ed., 602, 4 Brown Parl. Cas. 157, p. 111.
- City of Newton v. Levis, 79 Fed. 715, 25 C. C. A. 561, 49 U. S. App. 266, p. 814.
- City of New York v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. ed. 820, p. 825.
- Clafin v. Clafin, 149 Mass. 19, 14 Am. St. Rep. 393, 20 N. E. 454, 3 L. R. A. 370, Ames Trusts, 455, p. 553.
- Clapham v. Shillito, 7 Beav. 146, 149, 150, p. 396, 457.
- Clark v. Brown, 3 Allen, 509, p. 340.
- Clark v. Clark, 108 Mass. 522, Ames Trusts, 232, p. 559.
- Clark v. Clark, 56 N. H. 105, p. 384.
- Clark v. Clark, 8 Paige, 152, 35 Am. Dec. 676, p. 622.
- Clark v. Davenport, 95 N. Y. 477, 1 Keener 344, p. 876.
- Clark v. Flint, 22 Pick. 231, 33 Am. Dec. 733, p. 361.
- Clark v. Fosdick, 118 N. Y. 14, 22 N. E. 1111, 16 Am. St. Rep. 733, 6 L. R. A. 132, p. 487.
- Clark v. Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223, p. 382, 383.
- Clark v. Jetton, 5 Sneed, 229, H. & B. 155, p. 247, 248.
- Clark v. McNeal, 114 N. Y. 295, 21 N. E. 405, 11 Am. St. Rep. 638, p. 364.
- Clark v. Munroe, 14 Mass. 351, p. 344.
- Clark v. Smith, 13 Pet. 195, 203, p. 141.
- Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. ed. 392, p. 837.
- Clarke v. Clarke, 46 S. C. 230, 24 S. E. 202, 57 Am. St. Rep. 675, p. 171.
- Clarke v. Franklin, 4 Kay & J. 257, 1 Scott 628, 3 Keener 982, p. 680, 683.
- Clarke v. Hart, 5 Jur., N. S., 447, p. 402.
- Clarke v. Parker, 19 Ves. 1, 13, 15, 16, 18, 22, p. 489.
- Clarke v. Perry, 5 Cal. 58, 60, 63 Am. Dec. 82, p. 672.
- Clarke v. Price, 2 Wils. Ch. 157, 2 Scott 89, 2 Keener 199, H. & B. 612, p. 819.
- Clarke v. Ramuz, [1891] 2 Q. B. 456, 1 Ames Eq. Jur. 222, 2 Keener 380, 2 Scott 424, p. 163.
- Clarke v. Rochester etc. R. R., 18 Barb. 350, 1 Ames Eq. Jur. 410, 2 Scott 294, p. 894.

- Clay v. Fry, 3 Bibb, 248, 6 Am. Dec. 654, p. 132.
- Clay v. Gurley, 62 Ala. 14, p. 676.
- Clayton v. Akin, 38 Ga. 320, 95 Am. Dec. 393, p. 236.
- Clayton v. Ashdown, 9 Vin. Abr. 393, pl. 2, 1 Ames Eq. Jur. 421, 2 Scott 133, p. 893.
- Clayton v. Johnson, 36 Ark. 406, 38 Am. Rep. 40, p. 556.
- Cleghorn v. Minnesota T. I. & T. Co., 57 Minn. 341, 47 Am. St. Rep. 615, 59 N. W. 320, p. 735.
- Cleghorn v. Zumwalt, 83 Cal. 155, 23 Pac. 294, 2 Ames Eq. Jur. 197, 3 Keener 322, p. 438, 859.
- Clement v. Hyde, 50 Vt. 716, 28 Am. Rep. 522, p. 577, 580.
- Clements v. Tillman, 79 Ga. 451, 11 Am. St. Rep. 441, 5 S. E. 194, Shep. 194, p. 207.
- Clerk v. Wright, 1 Atk. 12, 1 Ames Eq. Jur. 294, p. 901.
- Cleveland v. Springfield Inst. for Sav., 182 Mass. 110, 65 N. E. 27, p. 568.
- Cliff v. Moses, 116 N. Y. 144, 22 N. E. 393, p. 743.
- Clinan v. Cooke, 1 Schoales & L. 22, 41, 2 Scott 182, 2 Keener 628, p. 901, 902.
- Clinton E. Worden & Co. v. Cal. Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 121, 47 L. ed. 282, p. 494, 840.
- Cloud v. Clinkinbeard, 8 B. Mon. 397, 48 Am. Dec. 397, p. 242.
- Clowes v. Dickenson, 5 Johns. Ch. 235, p. 725, 726.
- Clowes v. Staffordshire etc. Co., L. R. 8 Ch. 125, p. 830, 832.
- Coaks v. Boswell, 11 App. Cas. (H. L.) 232, 3 Keener 596, p. 465.
- Coates v. Wilkes, 92 N. C. 376, p. 806.
- Cochran v. Cochran, 62 Nebr. 450, 87 N. W. 152, p. 910.
- Cocks v. Manners, L. R. 12 Eq. 574, p. 576, 580.
- Codman v. Tinkham, 15 Pick. 344, p. 869.
- Codrington v. Lindsay, L. R. 8 Ch. 578, p. 231.
- Coffin v. Coffin, Jac. 70, 1 Keener 468, p. 828.
- Cogent v. Gibson, 33 Beav. 557, 1 Ames Eq. Jur. 56, 2 Scott 147, 2 Keener 86, p. 881, 882, 883.
- Coger's Ex'rs v. McGee, 2 Bibb, 321, 5 Am. Dec. 610, p. 427.
- Coit v. Comstock, 51 Conn. 352, 50 Am. St. Rep. 29, p. 580.
- Cole v. Fickett, 95 Me. 265, 49 Atl. 1066, 2 Ames Eq. Jur. 178, p. 859.
- Cole v. Mette, 65 Ark. 503, 47 S. W. 407, 67 Am. St. Rep. 945, p. 353.
- Cole v. White, 1 Bro. C. C. 409, 1 Ames Eq. Jur. 282, p. 902.
- Coleman, In re, 39 Ch. D. 443, Ames Trusts 339, p. 551.
- Coleman v. Dunton, (Me.) 58 Atl. 430, p. 373.
- Coles v. Sims, 5 De Gex, M. & G. 1, Kay, 56, 70, p. 401.
- Coles v. Trecothick, 9 Ves. 234, 246, 2 Keener 768, p. 483, 516.
- Coles v. Withers, 33 Gratt. 186, p. 751.
- Cole's Com. v. Cole's Adm'r, 28 Gratt. 365, p. 634.
- Cole's Estate, In re, 102 Wis. 1, 72 Am. St. Rep. 854, 78 N. W. 402, p. 553, 608.
- Colgate v. Compagnie Francaise du Telegraphe, 23 Fed. 82, p. 79.
- Collard v. Marshall, [1892] 1 Ch. 571, Lewis 392, p. 845.
- Collier v. Davis, 47 Ark. 367, 58 Am. Rep. 758, p. 556.
- Collins v. Archer, 1 Russ. & M. 234, p. 371.
- Collins v. Campbell, 97 Me. 23, 28, 53 Atl. 837, 94 Am. St. Rep. 458, 463, p. 330.
- Collins v. Castle, L. R. 36 Ch. D. 243, 2 Keener 523, p. 776, 778.
- Collins v. Champ's Heirs, 15 B. Mon. 118, 61 Am. Dec. 179, p. 682.
- Collins's Appeal, 107 Pa. St. 590, 52 Am. Rep. 479, p. 771.
- Collister v. Fassitt, 163 N. Y. 281, 57 N. E. 490, 79 Am. St. Rep. 586, p. 608.
- Colman v. Sarrel, 3 Brown Ch. 12, 1 Ves. 50, Ames Trusts 133, p. 559.
- Colton v. Colton, 127 U. S. 300, 317, 319, 320, 8 Sup. Ct. Rep. 1, 64, p. 571, 572.

- Colton v. Drover's Ass'n, 90 Md. 85, 78 Am. St. Rep. 431, 45 Atl. 23, 46 L. R. A. 388, H. & B. 899, p. 809.
- Colton v. Stanford, 82 Cal. 351, 356, 389, 16 Am. St. Rep. 137, 150, 23 Pac. 16, p. 515, 523.
- Columbia Ave. Sav. Fund etc. Co. v. City of Dawson, 130 Fed. 152, 176, p. 44.
- Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792, p. 342.
- Colyer v. Finch, 19 Beav. 500, 5 H. L. Cas. 905, 921, p. 357.
- Combs v. Fisher, 3 Bibb (Ky.) 31, 2 Scott 453, p. 163.
- Combs v. Scott, 76 Wis. 662, 45 N. W. 532, H. & B. 682, 2 Scott 357, 2 Keener 1194, p. 100, 899.
- Commercial Mutual Ins. Co. v. McLoon, 14 Allen, 351, 3 Keener 472, p. 474, 861.
- Commercial Nat. Bank v. Burch, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331, p. 332.
- Commercial Nat. Bk. v. Hamilton Nat. Bk. 42 Fed. 880, Ames Trusts 15, p. 569.
- Commonwealth v. Stauffer, 10 Pa. St. 350, 51 Am. Dec. 489, p. 489.
- Commonwealth v. Susquehanna etc. R. R. Co. 122 Pa. St. 306, 15 Atl. 448, 1 L. R. A. 225, p. 558.
- Comstock v. Hitt, 37 Ill. 542, 546, 1 Ames Eq. Jur. 139, 2 Scott 482, p. 711.
- Comstock v. Johnson, 46 N. Y. 615, H. & B. 26, Shep. 108, p. 178.
- Condit v. Bigalow, 64 N. J. Eq. 504, 54 Atl. 160, p. 565.
- Conger v. N. Y. W. S. & B. R. R. Co., 120 N. Y. 29, 23 N. E. 983, 1 Ames Eq. Jur. 412, H. & B. 723, 2 Scott 304, 2 Keener 1046, p. 889, 895.
- Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623, p. 265.
- Connecticut Mut. Life Ins. Co. v. Westerhoff, 58 Nebr. 379, 78 N. W. 724, 76 Am. St. Rep. 101, p. 218.
- Connecticut River Banking Co. v. Rockbridge Co. 73 Fed. 709, p. 808.
- Connolly v. Branstler, 3 Bush, 702, 96 Am. Dec. 278, 1 Scott 583, p. 399.
- Connolly v. Dolan, 22 R. I. 60, 84 Am. St. Rep. 816, 46 Atl. 36, p. 915.
- Connor v. Stanley, 72 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. 306, p. 522.
- Conover v. Van Mater, 18 N. J. Eq. 481, p. 351.
- Consolidated etc. Co. v. Consolidated etc. Co., 43 Fed. 204, p. 806.
- Const v. Harris, Turn. & R. 496, p. 804.
- Constant v. University of Rochester, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734, p. 306, 307.
- Continental Bank v. Bank of the Commonwealth, 50 N. Y. 575, 581, 582, p. 392, 398.
- Continental Nat. Bank v. Heilman, 66 Fed. 184, p. 75.
- Continental Trust Co. v. Toledo, etc. R. Co. 59 Fed. 514, p. 810.
- Conway's Ex'rs v. Alexander, 7 Cranch, 218, 3 L. ed. 321, Kirch. 151, p. 699, 700.
- Conybeare's Settlement, Ex parte, 1 Wkly. Rep. 458, Ames Trusts, 222, p. 625.
- Cook v. Addison, L. R. 7 Eq. 466, 470, p. 618.
- Cook v. Fountain, 3 Swanst. 585, 591, 592, 600, p. 29.
- Cook v. Gilmore, 133 Ill. 139, 24 N. E. 524, H. & B. 542, p. 623.
- Cooke v. Clayworth, 18 Ves. 12, p. 508.
- Cooke v. Crawford, 13 Sim. 91, Ames Trusts, 509, p. 611.
- Cooke v. Forbes, L. R. 5 Eq. 166, 1 Keener 729, p. 830.
- Cookes v. Mascall, 2 Vern. 200, 2 Keener, 748, p. 479, 905.
- Cooley v. Cooley, 172 Mass. 476, 52 N. E. 631, p. 591.
- Coolidge v. Schering, 32 Wash. 557, 73 Pac. 682, p. 402.
- Coons v. Coons, 95 Va. 434, 64 Am. St. Rep. 804, 28 S. E. 885, p. 98.
- Cooper v. Cooper, L. R. 6 Ch. 15, 16, 20, p. 231.
- Cooper v. Cooper, 56 N. J. Eq. 48, 38 Atl. 198, p. 236.

- Cooper v. Phibbs, L. R. 2 H. L. 149, 170, 2 Ames Eq. Jur. 266, 2 Scott 559, 3 Keener 43, Shep. 148, p. 417, 424.
- Cooper's Estate, In re, 206 Pa. St. 628, 98 Am. St. Rep. 799, 56 Atl. 67, p. 679.
- Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. ed. 537, 1 Scott 729, p. 830.
- Cope v. District Fair Ass'n, 99 Ill. 480, 39 Am. Rep. 30, 1 Ames Eq. Jur. 29, p. 826.
- Copis v. Middleton, 2 Madd. 409, 410, 428, 430, 2 Scott 738, p. 528.
- Coquillard's Ad'mr v. Bearss, 21 Ind. 479, 83 Am. Dec. 362, p. 761.
- Corbas v. Teed, 69 Ill. 205, 2 Scott 481, p. 898.
- Corbin v. Tracy, 34 Conn. 325, H. & B. 709, 2 Scott 46, 2 Keener 34, p. 883.
- Corbus v. Alaska Treadwell Gold M. Co., 187 U. S. 455, 23 Sup. Ct. 156, p. 633.
- Corby v. Bean, 44 Mo. 379, p. 179.
- Cordova v. Hood, 17 Wall. 1, 21 L. ed. 587, p. 269.
- Corley v. Lord Stafford, 1 De Gex & J. 238, p. 523.
- Corliss v. E. W. Walker Co., 57 Fed. 434, 64 Fed. 280, Lewis 337, p. 846.
- Cornell v. Woodruff, 77 N. Y. 203, 206, p. 710.
- Corning v. Lowerre, 6 Johns. Ch. 439, 1 Scott 734, p. 830.
- Corning v. Troy Iron & Nail Factory, 40 N. Y. 191, 1 Keener 814, p. 833.
- Cornish v. Abington, 4 Hurl. & N. 549, p. 397.
- Cort v. Lassard, 18 Oreg. 221, 17 Am. St. Rep. 726, 22 Pac. 1054, 6 L. R. A. 653, p. 819.
- Cory v. Eyre, 1 De Gex, J. & S. 149, 163, 167, 168, 169, L. R. 4 Ch. 143, 146, p. 315, 316.
- Cotheal v. Talmage, 9 N. Y. 551, 61 Am. Dec. 716, p. 221.
- Cotterell v. Purchase, Cas. t. Talb. 61, Kirch. 175, p. 701.
- Coulson v. Allison, 2 De Gex, F. & J. 521, p. 523.
- Coulson v. White, 3 Atk. 21, 1 Scott 679, p. 841.
- Counter v. Macpherson, 5 Moo. P. C. C. 83, 2 Keener 412, p. 163.
- Countess of Strathmore v. Bowes, 2 Brown Ch. 345, 1 Ves. 22, 1 Lead. Cas. Eq. 605, 611-617, 618-623, p. 645.
- Count Ranelagh v. Hayes, 1 Vern. 189, 1 Ames Eq. Jur. 64, p. 884.
- County of Schuylkill v. Copley, 67 Pa. St. 386, 5 Am. Rep. 441, p. 477.
- Courthope v. Mapplesden, 10 Ves. 290, 1 Scott 684, 1 Ames Eq. Jur. 490, 1 Keener 548, p. 842.
- Cousins v. Smith, 13 Ves. 542, p. 80.
- Coventry v. Barclay, 3 De Gex, J. & S. 320, 328, p. 157.
- Cowee v. Cornell, 75 N. Y. 91, 99, 100, 31 Am. Rep. 428, H. & B. 316, p. 504, 506, 507.
- Cowen v. Adams, 78 Fed. 536, 543, 552, 47 U. S. App. 676, (C. C. A.) p. 513.
- Cowin v. Hurst, 124 Mich. 545, 83 Am. St. Rep. 344, 83 N. W. 274, p. 602.
- Cowles v. Pollard, 51 Ala. 445, 447, p. 97.
- Cowper v. Cowper, 2 P. Wms. 720, 753, Shep. 84, 1 Scott 296, p. 205.
- Cowtan v. Williams, 9 Ves. 107, 2 Ames Eq. Jur. 8, 1 Keener 213, p. 797, 799.
- Coyle v. Davis, 116 U. S. 109, 6 Sup. Ct. 314, 29 L. ed. 583, Kirch. 156, p. 699.
- Cradock v. Piper, 1 Macn. & G. 664, p. 622.
- Cragg v. Holme, 18 Ves. 14, n. 12, 1 Ames. Eq. Jur. 417, p. 894.
- Craig v. Hukill, 37 W. Va. 520, 16 S. E. 363, H. & B. 60, p. 227.
- Craig v. Leslie, 3 Wheat. 563, 577, 582, 4 L. ed. 460, H. & B. 39, Sh. 66, 1 Scott 611, p. 167, 554, 681.
- Cramer v. Lepper, 26 Ohio St. 59, 20 Am. Rep. 756, p. 712.
- Cramer v. Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594, p. 532.
- Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070, p. 822.
- Crane v. Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519, p. 508.

- Crane v. McDonald**, 118 N. Y. 648, 23 N. E. 991, 1 Keener 262, p. 790, 791, 794, 797, 798.
- Cranford v. Tyrrell**, 128 N. Y. 341, 28 N. E. 514, 1 Keener 788, p. 830.
- Cross v. Memphis & C. R. Co.**, 96 Ala. 447, 11 South. 480, 1 Keener 311, p. 132, 795, 798, 799.
- Crawford v. Chicago etc. R. Co.**, 112 Ill. 314, p. 282.
- Crawford v. Crawford**, 24 Nev. 410, 56 Pac. 94, p. 513.
- Crawford v. Fisher**, 1 Hare, 436, 440, 441, p. 790.
- Crawford v. Kirksey**, 55 Ala. 282, 28 Am. Rep. 704, p. 531.
- Crawford v. Tyrrel**, 128 N. Y. 341, 28 N. E. 514, 1 Keener 788, p. 826.
- Crawshay v. Thornton**, 2 Mylne & C. 1, 19-24, 2 Ames Eq. Jur. 18, 1 Keener 220, p. 790, 793, 794, 795, 796, 797.
- Creely v. Bay State Brick Co.**, 103 Mass. 514, p. 52, 53.
- Crenshaw v. Carpenter**, 69 Ala. 572, 44 Am. Rep. 539, p. 236.
- Crighton v. Dahmer**, 70 Miss. 602, 13 South. 237, 21 L. R. A. 84, Shep. 15, p. 851.
- Crippen v. Chappel**, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187, p. 717.
- Crockett v. Doriot**, 85 Va. 240, 3 S. E. 128, p. 651.
- Crockford v. Alexander**, 15 Ves. 138, 1 Ames Eq. Jur. 221, 1 Keener 549, 1 Scott 685, p. 829, 842.
- Croft v. Goldsmid**, 24 Beav. 312, p. 224, 226.
- Croft v. Graham**, 2 De Gex, J. & S. 155, p. 511.
- Cronin v. Bloemicke**, 58 N. J. Eq. 313, 43 Atl. 605, 1 Ames Eq. Jur. 560, p. 831.
- Crook v. Corporation of Seaford**, L. R. 6 Ch. 551, L. R. 10 Eq. 678, p. 401.
- Crookston Imp. Co. v. Marshall**, 57 Minn. 333, 47 Am. St. Rep. 612, 59 N. W. 294, p. 427.
- Crosby v. Taylor**, 15 Gray, 64, 77 Am. Dec. 352, p. 382.
- Cross v. United States Trust Co.**, 131 N. Y. 330, 27 Am. St. Rep. 597, 30 N. E. 135, 15 L. R. A. 606, p. 549.
- Croton Turnpike Co. v. Ryder**, 1 Johns. Ch. 611, 1 Ames Eq. Jur. 611, 1 Scott 168, p. 841.
- Crowder v. Tinkler**, 19 Ves. 617, 1 Ames Eq. Jur. 555, p. 831.
- Crowe v. Ballard**, 3 Brown Ch. 117, 119, 120, 2 Cox, 253, 2 Scott 759, p. 512, 524.
- Crowe v. Leevin**, 95 N. Y. 423, 3 Keener 283, p. 437.
- Crowe v. Wilson**, 65 Md. 479, 57 Am. Rep. 343, 5 Atl. 427, p. 827.
- Crowell v. Young**, (Ind. T.) 64 S. W. 607, p. 99.
- Cruwys v. Coleman**, 9 Ves. 319, 322, 323, p. 568.
- Cud v. Rutter**, 1 P. Wms. 570, 571, 2 Scott 44, 2 Keener 1, p. 880, 884.
- Cumberland Coal Co. v. Sherman**, 20 Md. 117, p. 524.
- Cunnack v. Edwards**, [1896] 2 Ch. 679, [1895] 1 Ch. 489, p. 575.
- Curdy v. Berton**, 79 Cal. 420, 12 Am. St. Rep. 157, 21 Pac. 858, H. & B. 501, p. 603.
- Curran v. Holyoke W. Co.**, 116 Mass. 90, p. 895.
- Curran v. Houston**, 201 Ill. 442, 66 N. E. 228, p. 218.
- Curre v. Bowyer**, 5 Beav. 6, 1 Ames Eq. Jur. 196, p. 164.
- Curtice v. Crawford County Bank**, 118 Fed. 390, p. 305.
- Curtis v. Curtis**, 2 Brown Ch. 620, 631, 632, p. 864, 865.
- Curtis v. Moore**, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506, p. 383, 715.
- Curtis v. Sutter**, 15 Cal. 259, 263, 264, p. 873.
- Cushing v. Blake**, 30 N. J. Eq. 689, p. 564.
- Cushing v. Drew**, 97 Mass. 445, p. 219.
- Cushing v. Perot**, 175 Pa. St. 66, 52 Am. St. Rep. 835, 34 Atl. 447, 34 L. R. A. 737, p. 811.
- Cushman v. Thayer Mfg. Co.**, 76 N. Y. 365, 371, 32 Am. Rep. 315, p. 67, 907.
- Cutler v. Ammon**, 65 Iowa, 281, 21 N. W. 604, p. 749.

- Cutter v. Butler, 25 N. H. 343, 57 Am. Dec. 330, p. 642.
- Cutting v. Dana, 25 N. J. Eq. 265, 2 Keener 267, p. 883.
- Cutting v. Gilbert, 5 Blatch. 259, 261-263, p. 123.
- D.
- Daggett v. Ayer, 65 N. H. 82, 18 Atl. 169, 2 Ames Eq. Jur. 232, 3 Keener 181, p. 859.
- Daggett v. Rankin, 31 Cal. 321, 326, p. 158, 167, 739.
- Daire v. Beversham, Nelson 76, 1 Ch. Ca. 39, 1 Ames Eq. Jur. 192, p. 162.
- Dale v. Robinson, 51 Vt. 20, 31 Am. Rep. 669, p. 642.
- Dalston v. Coatsworth, 1 P. Wms. 731, 1 Scott 407, p. 409.
- Daly v. Palmer, 6 Blatchf. 256, Fed. Cas. No. 3, 552, p. 838.
- Daly v. Smith, 38 N. Y. Super. Ct. 158, 2 Keener 267, p. 819.
- Dambmann v. Schulting, 75 N. Y. 55, 61, 63, 3 Keener 202, H. & B. 227, p. 428, 464, 859.
- Damm v. Damm, 109 Mich. 619, 67 N. W. 984, 63 Am. St. Rep. 601, p. 724.
- Dance v. Goldingham, L. R. 8 Ch. 902, p. 816.
- Daniel v. Hester, 29 S. C. 147, 7 S. E. 65, p. 275.
- Daniel v. Hill, 52 Ala. 430, p. 521.
- Daniels v. Davison, 16 Ves. 249, 17 Ves. 433, 2 Scott 472, p. 276, 319.
- Daniels v. Keokuk Waterworks, 61 Iowa 549, 16 N. W. 705, 1 Ames Eq. Jur. 585, p. 832.
- Danser v. Warwick, 33 N. J. Eq. 133, Ames Trusts 186, p. 567.
- Darbey v. Whitaker, 4 Drew. 134, 139, 140, 2 Keener 129, p. 886.
- D'Arcy v. Blake, 2 Schoales & L. 387, Ames Trusts 376, p. 552.
- Dargin v. Hewlitt, 115 Ala. 510, 22 South. 128, p. 65.
- Darling, In re, [1896] 1 Ch. 50, p. 576.
- Darragh v. H. Wetter Mfg. Co., 78 Fed. 7, 23 C. C. A. 609, p. 142.
- Darrow v. Summerhill, 93 Tex. 92, 77 Am. St. Rep. 833, 53 S. W. 680, p. 915.
- Darst v. Phillips, 41 Ohio St. 514, Shep. 24.
- Daubenspeck v. Platt, 22 Cal. 330, 335, p. 720.
- Davenport v. Davenport, 7 Hare 217, 1 Ames Eq. Jur. 496, 1 Keener 574, p. 842.
- Davenport v. Magoon, 13 Oreg. 1, 57 Am. Rep. 1, p. 827.
- Davies v. Fowler, L. R. 16 Eq. 308, p. 658.
- Davies v. Jenkins, L. R. 6 Ch. Div. 728, p. 651.
- Davies v. Sear, L. R. 7 Eq. 427, 432, 433, p. 273.
- Davies v. Topp, 1 Brown Ch. 524, 526, 527, p. 662.
- Davis, In re, 112 Fed. 129, p. 587.
- Davis v. Am. Soc. etc., 75 N. Y. 362, 2 Ames Eq. Jur. 104, 1 Keener 108, p. 851.
- Davis v. Bechstein, 69 N. Y. 440, 25 Am. Rep. 218, p. 332.
- Davis v. Earl of Strathmore, 16 Ves. 419, 428, p. 289, 367.
- Davis v. Ely, 104 N. C. 16, 10 S. E. 138, 17 Am. St. Rep. 667, 5 L. R. A. 810, H. & B. 262, p. 436.
- Davis v. Foreman, [1894] 3 Ch. 654, 2 Keener, p. 819.
- Davis v. Gray, 16 Wall. 203, H. & B. 804, Shep. 325, p. 809.
- Davis v. Rock Creek etc. Co., 55 Cal. 359, 36 Am. Rep. 40, p. 601, 617.
- Davis v. Strathmore, 16 Ves. 419, p. 289, 367.
- Davis v. Turvey, 32 Beav. 554, p. 869.
- Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29, p. 295, 362, 363.
- Davis v. Wetherell, 13 Allen 60, 90 Am. Dec. 177, p. 386, 721.
- Davis v. Whitaker, 114 N. C. 279, 19 S. E. 699, 41 Am. St. Rep. 793, p. 294.
- Davis v. Williams, 130 Ala. 530, 537, 538, 89 Am. St. Rep. 55, 60, 61; 30 South. 488, 54 L. R. A. 749, p. 204.

- Davoue v. Fanning*, 2 Johns. Ch. 251, 252, 253, 258, 260, 2 Scott 690, p. 515, 619.
- Day v. Cummings*, 19 Vt. 495, 496, p. 132.
- Day v. Hunt*, 112 N. Y. 191, 19 N. E. 414, 2 Keener 1114, p. 891, 900.
- Day v. Newman*, 2 Cox, 77, 10 Ves. 300, 2 Scott 227, p. 482.
- Day v. Wells*, 30 Beav. 220, 1 Ames Eq. Jur. 380, 2 Keener 951, p. 432.
- Day Land etc. Co. v. State*, 68 Tex. 527, 4 S. W. 865, 1 Keener 364, p. 877.
- Dayton H. Co. v. Felsenthal*, 116 Fed. 961, 55 C. C. A. 537, p. 810.
- Deacon v. Smith*, 3 Atk. 323, 1 Scott 327, p. 252.
- Dean v. Long*, 122 Ill. 447, 14 N. E. 34, p. 550.
- Dean v. Robertson*, 64 Miss. 195, 1 South. 159, p. 179.
- Dean's Heirs v. Mitchell's Heirs*, 4 J. J. Marsh (Ky.) 451, 1 Ames Eq. Jur. 204, p. 163.
- Dearle v. Hall*, 3 Russ. 1, 48, Ames Trusts 323, p. 322, 323, 325.
- Deason v. Taylor*, 53 Miss. 697, 701, H. & B. 97, p. 281.
- Debell v. Foxworthy*, 9 B. Mon. 228, p. 285.
- Debenham v. Ox*, 1 Ves. Sr. 276, 2 Scott 666, p. 487.
- De Berry v. Wheeler*, 128 Mo. 84, 49, Am. St. Rep. 538, 30 S. W. 338, p. 397.
- Debs, In re*, 158 U. S. 564, 15 Sup. Ct. 900, 34 L. ed. 1092, Shep. 304, p. 826.
- De Bussche v. Alt*, L. R. 8 Ch. Div. 286, 314, p. 518, 524.
- Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 21 South. 315, 59 Am. St. Rep. 140, p. 631.
- Deck v. Tabler*, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837, p. 591.
- Deck v. Yerke*, 12 Cal. 433, 436, 73 Am. Dec. 555, p. 672.
- Decker v. Adams*, 28 N. J. Law, 511, 78 Am. Dec. 65, p. 1226.
- Decker v. Boice*, 83 N. Y. 215, p. 351.
- Deeks v. Strutt*, 5 Term Rep. 69, p. 655.
- Deere v. Guest*, 1 Mylne & C. 516, 1 Ames Eq. Jur. 492, 1 Keener 564, p. 842.
- Deeth v. Hale*, 2 Molloy, 317, 1 Scott 641, p. 685.
- De Graff, Vrieling & Co. v. Wickham*, 89 Iowa, 720, 52 N. W. 503, p. 220.
- De Gray v. Monmouth Beech Clubhouse Co.* 50 N. J. Eq. 329, 24 Atl. 398, 2 Scott 534, p. 776.
- Delafield v. State of Illinois*, 2 Hill, 159, 164, p. 670.
- Delaney v. McCormack*, 88 N. Y. 174, H. & B. 407, p. 677.
- De Laurencel v. De Boom*, 48 Cal. 581, p. 567.
- De La Vergne Refrig. Mach. Co. v. Montgomery Brewing Co.*, 46 Fed. 829, p. 757.
- De Martin v. Phelan*, 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115, Kirch. 465, p. 698.
- De Mattos v. Gibson*, 4 De Gex & J. 276, 1 Ames Eq. Jur. 102, p. 819.
- Demeter v. Wilcox*, 115 Mo. 634, 22 S. W. 613, 37 Am. St. Rep. 422, p. 345.
- Deming v. Miles*, 35 Nebr. 739, 53 N. W. 665, 37 Am. St. Rep. 464, p. 294.
- Dempsie v. Darling*, 39 Wash. 125, 81 Pac. 152, 1 Scott 735, p. 830.
- Demuth v. Old Town Bank*, 85 Md. 315, 37 Atl. 266, 60 Am. St. Rep. 322, p. 351.
- Denison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. 651, Lewis 171, p. 840.
- Dennis v. Jones*, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899, 3 Keener 728, p. 401, 475.
- Dennis v. Northern Pac. R. Co.*, 20 Wash. 320, 55 Pac. 210, p. 277.
- Denny v. Hancock*, L. R. 6 Ch. 1, 3 Keener 969, p. 431, 432, 444.
- Denton v. MacNeil*, L. R. 2 Eq. 352, p. 449, 526.
- Dering v. Earl of Winchelsea*, 1 Cox, 318, 1 Lead. Cas. Eq., 4th Am. ed., 120, 124, 134-188, Shep. 94, 1 Scott 367, p. 56, 68, 914.
- De Rivafnoli v. Corsetti*, 4 Paige, 264, 25 Am. Dec. 532, p. 886.
- Derry v. Peek*, 14 App. Cas. (H. L.) 337, p. 451, 452.

- Desborough v. Harris, 5 De Gex, M. & G. 439, 455, p. 792.
- Desmare v. United States, 93 U. S. 605, p. 494.
- Detroit Copper & Brass Rolling Mills Co. v. Ledwidge, 162 Ill. 305, 44 N. E. 751, p. 79.
- Devlin v. The Mayor, 63 N. Y. 8, p. 760, 761.
- De Walsh v. Braman, 160 Ill. 415, 43 N. E. 597, p. 177.
- Dewar v. Maitland, L. R. 2 Eq. 834, 838, p. 233.
- Dewey v. Allgire, 37 Nebr. 6, 55 N. W. 276, 40 Am. St. Rep. 468, p. 505.
- De Witt v. Yates, 10 Johns. 156, 6 Am. Dec. 326, H. & B. 144, p. 244, 245.
- Dexter v. Arnold, 2 Sum. 108, Fed. Cas. No. 3,858, Kirch. 522, p. 719.
- Dial v. Hair, 18 Ala. 798, 54 Am. Dec. 179, p. 494.
- Diamond v. Lawrence Co. Bank, 37 Pa. St. 353, 78 Am. Dec. 429, p. 286.
- Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, 1 Ames Eq. Jur. 123, p. 491, 820.
- Dickenson v. Grand Junc. C. Co., 15 Beav. 260, 270, 2 Keener 312, p. 820.
- Dickerson v. Tillinghast, 4 Paige, 215, 25 Am. Dec. 528, p. 356.
- Dickinson v. Burrell, L. R. 1 Eq. 337, p. 592.
- Dickinson's Appeal, 152 Mass. 184, 25 N. E. 99, Ames Trusts 478, p. 615.
- Dickson's Trusts, In re, 1 Sim., N. S., 37, 43, 44, 46, p. 489.
- Dietrichsen v. Cabburn, 2 Phill. Ch. 52, 1 Ames Eq. Jur. 108, 2 Scott 92, 2 Keener 220, p. 818, 820.
- Dillard v. Dillard, 97 Va. 434, 34 S. E. 60, p. 607.
- Dilley v. Love, 61 Md. 603, p. 248.
- Dillingham v. Howk, 60 Fed. 494, 9 C. C. A. 101, 23 L. R. A. 517, p. 809.
- Dillon v. Heller, 39 Kan. 599, 18 Pac. 693, 1 Ames Eq. Jur. 14, 1 Scott 246, p. 207.
- Dilly v. Doig, 2 Ves. 486, 2 Ames Eq. Jur. 58, 1 Keener 117, p. 106.
- Diman v. Providence R. R., 5 R. I. 130, 135, 3 Keener 256, p. 414, 429, 438.
- Dimmick v. Delaware, L. & W. R. R. Co., 180 Pa. St. 468, 36 Atl. 866, p. 133.
- Dineley v. Dineley, 2 Atk. 394, p. 79.
- Dingman v. Romine, 141 Mo. 466, 42 S. W. 1087, p. 506.
- Dinwidde v. Bailey, 6 Ves. 136, 1 Ames Eq. Jur. 442, p. 918.
- Dinwiddie v. Self, 145 Ill. 290, 33 N. E. 892, 3 Keener 137, p. 198, 419.
- Distilled Spirits, 11 Wall. 356, p. 302, 306, 307.
- D. M. Osborne & Co. v. Mo. Pac. R. Co., 147 U. S. 248, 13 Sup. Ct. 299, 37 L. ed. 155, p. 824.
- Dobbin v. Cordiner, 41 Minn. 165, 42 N. W. 870, 16 Am. St. Rep. 683, 4 L. R. A. 333, Shep. 130, p. 399.
- Dobie v. Fidelity etc. Co., 95 Wis. 540, 60 Am. St. Rep. 135, 70 N. W. 482, p. 914.
- Dock v. Dock, 180 Pa. St. 14, 57 Am. St. Rep. 617, 36 Atl. 411, p. 80.
- Docker v. Somes, 2 Mylne & K. 665, p. 617.
- Dodd v. Hartford, 25 Conn. 232, 238, 2 Ames Eq. Jur. 691, p. 123, 124.
- Dodkin v. Brunt, L. R. 6 Eq. 580, Ames Trusts 226, p. 567, 625.
- Doescher v. Doescher, 61 Minn. 326, 63 N. W. 736, p. 751.
- Doherty v. Allman, L. R. 3 App. Cas. 709, 1 Ames Eq. Jur. 462, 1 Keener 476, 1 Scott 664, p. 828.
- Dolman v. Nokes, 22 Beav. 402, 3 Keener 565, p. 464, 468.
- Domestic & F. Missionary Soc. of the P. E. Church v. Eels, 68 Vt. 497, 54 Am. St. Rep. 888, 35 Atl. 463, p. 473.
- Donaldson v. Donaldson, Kay, 711, 719, Ames Trusts 146, p. 559, 562.
- Doniol v. Commercial Fire Ins. Co., 34 N. J. Eq. 30, 2 Ames Eq. Jur. 237, p. 438.
- Donk v. Alexander, 117 Ill. 330, 7 N. E. 672, p. 381.
- Donley v. Hays, 17 Serg. & R. 400, p. 707.
- Donnell v. Bennett, L. R. 22 Ch. Div. 835, 1 Ames Eq. Jur. 114, 2 Scott 114, 2 Keener 275, H. & B. 627, p. 818, 820.

- Dooley v. Watson**, 1 Gray, 414, p. 222.  
**Doran v. Dazey**, 5 N. D. 167, 64 N. W. 1023, 57 Am. St. Rep. 550, p. 297.  
**Dormer v. Fortescue**, 3 Atk. 124, 130, 132, 1 Keener 523, p. 864, 865.  
**Dorn v. Fox**, 61 N. Y. 264, 1 Keener 249, p. 790, 791, 793.  
**Dorr v. Shaw**, 4 Johns. Ch. 17, p. 181.  
**Doewell v. Buchanan's Ex'rs**, 3 Leigh, 365, 381, 23 Am. Dec. 280, p. 365.  
**Dow v. Memphis etc. R. Co.**, 20 Fed. 260, 268, p. 809.  
**Dowdy v. Blake**, 50 Ark. 205, 6 S. W. 897, 7 Am. St. Rep. 88, p. 752.  
**Dowell v. Goodwin**, 22 R. I. 287, 84 Am. St. Rep. 842, 47 Atl. 693, 51 L. R. A. 873, p. 855.  
**Dower v. Seeds**, 28 W. Va. 113, 57 Am. Rep. 646, p. 473.  
**Dowie v. Driscoll**, 203 Ill. 480, 68 N. E. 56, p. 510.  
**Dowling v. Betjemann**, 2 Johns. & H. 544, 1 Ames Eq. Jur. 40, 2 Scott 41, 2 Keener 20, p. 882.  
**Dows v. Chicago**, 11 Wall. 108, 20 L. ed. 65, p. 823.  
**Dowson v. Solomon**, 1 Drew. & S. 1, 1 Ames Eq. Jur. 418, p. 894.  
**Drake v. Storr**, 2 Freem. 205, p. 635.  
**Drake v. Wild**, 65 Vt. 611, 27 Atl. 427, p. 816.  
**Draper v. Bryson**, 26 Mo. 108, 69 Am. Dec. 483, p. 343.  
**Drew v. Hagerty**, 81 Me. 231, 17 Atl. 63, 10 Am. St. Rep. 255, 3 L. R. A. 230, p. 668.  
**Drewe v. Corp.**, 9 Ves. 368, 2 Scott 394, p. 905.  
**Dreyfus v. Peruvian Guano Co.**, L. R. 41 Ch. Div. 151, p. 77.  
**Drinkale v. Movius State Bank**, 11 N. Dak. 10, 88 N. W. 724, 95 Am. St. Rep. 693, 57 L. R. A. 341, p. 499.  
**Dryden v. Frost**, 3 Mylne & C. 670, p. 750.  
**Du Bois v. Ray**, 35 N. Y. 162, p. 438.  
**Ducie v. Ford**, 138 U. S. 587, 11 Sup. Ct. 417, 34 L. ed. 1091, p. 590.  
**Duckett v. Bank**, 86 Md. 400, 38 Atl. 983, 63 Am. St. Rep. 513, 39 L. R. A. 84, p. 620.  
**Dudley v. Dudley**, Prec. Ch. 241, 244, p. 24.
- Dueber Watch-Case Mfg. Co. v. Daugherty**, 62 Ohio St. 589, 57 N. E. 455, p. 326, 333, 337, 346, 347.  
**Duff Mfg. Co. v. Norton**, 92 Fed. 921, p. 830.  
**Dugan v. Vattier**, 3 Blackf. (Ind.) 245, 25 Am. Dec. 105, p. 362.  
**Du Hourmelin v. Sheldon**, 4 Mylne & C. 525, 1 Beav. 79, p. 549.  
**Duke of Beaufort v. Berty**, 1 P. Wms. 703, p. 803.  
**Duke of Bedford v. Trustees**, 2 Mylne & K. 552, 2 Keener 1010, p. 777.  
**Duke of Dorset v. Girdler**, Prec. Ch. 531, 2 Ames Eq. Jur. 166, p. 84, 85.  
**Duke of Leeds v. Amherst**, 2 Phill. Ch. 117, 123, p. 524, 525.  
**Duke of St. Albans v. Beauclerk**, 2 Atk. 638, p. 244.  
**Duke of Somerset v. Cookson**, 3 P. Wms. 389, 1 Ames Eq. Jur. 39, p. 882.  
**Dull's Appeal**, 113 Pa. St. 510, 6 Atl. 540, 1 Keener 348, p. 875.  
**Dumars v. City of Denver**, (Colo. App.) 65 Pac. 580, p. 115.  
**Dummer v. Corp'n of Chippenham**, 14 Ves. 245, 254, p. 79.  
**Dumond v. Magee**, 4 Johns. Ch. 318, 322, p. 647.  
**Dunckel v. Dunckel**, 141 N. Y. 427, 36 N. E. 405, 2 Keener 735, p. 902.  
**Duncomb v. New York etc. R. R.**, 84 N. Y. 190, 198, p. 618.  
**Duncombe v. Felt**, 81 Mich. 332, 45 N. W. 1004, H. & B. 760, 1 Keener, 500, p. 828.  
**Duncuft v. Albrecht**, 12 Sim. 189, 1 Ames Eq. Jur. 55, 2 Scott 44, 2 Keener 15, p. 884.  
**Dungers v. Angove**, 2 Ves. 304, 310, 312, 3 Keener 205, p. 797, 859.  
**Dunlap v. Hawkins**, 59 N. Y. 342, p. 530, 531, 532.  
**Dunman v. Coleman**, 59 Tex. 199, 67 Tex. 390, 3 S. W. 319, p. 319.  
**Dunn v. Barnum**, 2 C. C. A. 265, 269, 51 Fed. 355, 359, 360, 10 U. S. App. 86, p. 265, 359.  
**Dunn v. Dunn**, 42 N. J. Eq. 431, 7 Atl. 842, 3 Keener 819, p. 519.  
**Durant v. Crowell**, 97 N. C. 367, 2 S. E. 541, p. 348.

- Durfee's Petition, 14 R. I. 47, p. 236.
- Durham v. Legard, 34 Beav. 611, 1 Ames Eq. Jur. 395, 2 Scott 385, 2 Keener 1206, p. 905.
- Durst v. Daugherty, 81 Tex. 650, 17 S. W. 388, p. 282, 362.
- Duryee v. United States etc. Co., 55 N. J. Eq. 311, 37 Atl. 155, p. 808.
- Dutton v. Warschauer, 21 Cal. 609, 621, 623, 82 Am. Dec. 765, p. 693.
- Duval v. Wellman, 124 N. Y. 158, 26 N. E. 343, p. 487, 501.
- Duval v. Farmers' Bank, 4 Gill & J. 283, 290, 23 Am. Dec. 558, p. 647.
- Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, p. 844.
- Dwight v. Hayes, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218, p. 830, 831.
- Dyer v. Dyer, 2 Cox, 92, 1 Lead. Cas. Eq., 4th Am. ed., 314, 319, 333, H. & B. 452, Shep. 208, p. 590, 591, 602.
- Dyer v. Hargrave, 10 Ves. 505, 506, 1 Ames Eq. Jur. 245, p. 456, 458.
- Dyke's Estate, In re, L. R. 7 Eq. 337, p. 411.
- Dysart v. Crow, 170 Mo. 275, 70 S. W. 689, p. 132.
- E.
- Eaden v. Firth, 1 Hen. & M. 573, 1 Ames Eq. Jur. 564, p. 832.
- Eaglesfield v. Marquis of Londonderry, L. R. 4 Ch. Div. 693, 702, 703, 709, p. 422, 445.
- Earl of Bath v. Sherwin, Prec. Ch. 261, 10 Mod. 1, 3, 4, 1 Brown Parl. Cas. 266, 270, 2 Brown Parl. Cas., Tomlin's ed., 217, 2 Ames Eq. Jur. 95, 1 Keener 153, p. 27, 105, 108.
- Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125, 1 Atk. 301, 1 Lead. Cas. Eq., Eng. ed., 773, 809-825, 4th Am. ed., 825-836, 1 Scott 455, p. 443.
- Earl of Clarendon v. Hornby, 1 P. Wms. 446, p. 869.
- Earl of Feversham v. Watson, Freem. Ch. 35, 1 Ames Eq. Jur. 317, p. 897.
- Earl of Oxford's Case, 1 Ch. Rep. 1, 2 Lead. Cas. Eq., 4th Am. ed., 1291, Shep. 26, p. 862.
- Earlom v. Saunders, Amb. 241, 1 Scott 637, 3 Keener 951, p. 679.
- Earl Spencer v. Peek, L. R. 3 Eq. 415, 2 Ames Eq. Jur. 170, p. 84, 85.
- Earl Talbot v. Hope Scott, 4 Kay & J. 96, p. 804.
- Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649, p. 869, 919.
- East & West R. Co. of Ala. v. E. T. V. & G. R. Co., 75 Ala. 280, p. 824.
- East Birmingham Land Co. v. Denison, 85 Ala. 565, 5 So. 317, 7 Am. St. Rep. 73, 2 L. R. A. 836, p. 332.
- East India Co. v. Vincent, L. R. 35 Ch. D. 694, 1 Ames Eq. Jur. 310, p. 904.
- East Moline Plow Co. v. Weir Plow Co., 95 Fed. 250, p. 221.
- Eaton v. Benton, 2 Hill, 576, 578, p. 243.
- Eaton v. Eaton, 15 Wis. 259, 2 Ames Eq. Jur. 244, p. 859.
- Echelkamp v. Schrader, 45 Mo. 505, 1 Ames Eq. Jur. 511, p. 843, 844.
- Echols v. Hubbard, 90 Ala. 309, 7 South. 817, p. 875.
- Economy Sav. Bank v. Gordon, 90 Md. 486, 45 Atl. 176, 48 L. R. A. 63, H. & B. 19, p. 197, 372.
- Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 33 Am. St. Rep. 557, 16 L. R. A. 94, p. 648.
- Edgerton v. Peckham, 11 Paige 352, 359, 2 Scott 337, p. 899, 900.
- Edgington v. Fitzmaurice, 29 Ch. Div. 459, p. 445.
- Edison Electric L. Co. v. Beacon etc. Co., 54 Fed. 678, 1 Ames Eq. Jur. 630, p. 836.
- Edison Electric Light Co. v. U. S. Electric Light Co., 45 Fed. 55, 58, p. 80.
- Edmeston v. Lyde, 1 Paige, 637, 19 Am. Dec. 454, p. 910.
- Edwards v. Hill, 59 Fed. 723, 19 U. S. App. 493, p. 140.
- Edwards v. Jones, 1 Mylne & C. 226, 235, 238, Ames Trusts 140, p. 559, 562, 667.
- Edwards v. McLeay, 2 Swanst. 287, Coop. & Eld. 308, 2 Scott 718, p. 462.

- Edwards v. Meyrick, 2 Hare, 60, 75, p. 519.
- Edwards v. Rainier's Ex'rs, 17 Ohio St. 597, H. & B. 146, p. 244, 245.
- Edwards v. Thompson, 71 N. C. 177, 179, p. 278.
- Edwards v. West, L. R. 7 Ch. Div. 858, 862, 863, 1 Scott 604, p. 681.
- Edward Thompson Co. v. American Law Book Co., 122 Fed. 923, 59 C. C. A. 148, p. 838.
- Eedes v. Eedes, 11 Sim. 569, p. 648.
- Efland v. Efland, 96 N. C. 493, 1 S. E. 858, p. 132.
- Egbert v. Greenberg, 100 Fed. 447, p. 838.
- Eggeman v. Eggeman, 37 Mich. 436, p. 345, 349.
- Eldridge v. Dexter & P. R. R. Co., 88 Me. 191, 33 Atl. 974, 3 Keener 158, p. 418.
- Electric L. Co. v. Mobile & S. H. Ry. Co., 109 Ala. 190, 55 Am. St. Rep. 927, 19 South. 721, p. 889.
- Ellard v. Lord Llandaff, 1 Ball & B. 241, 1 Ames Eq. Jur. 363, 2 Keener 854, 2 Scott 246, p. 468.
- Elliott v. Fisher, 12 Sim. 505, p. 681.
- Elliott v. Sackett, 108 U. S. 140, 2 Sup. Ct. 375, 27 L. ed. 680, p. 710.
- Elliott v. Whitmore, 23 Utah, 342, 65 Pac. 70, 90 Am. St. Rep. 700, p. 395.
- Ellis v. Ellis's Adm'rs, 15 Ala. 296, 50 Am. Dec. 132, p. 571.
- Ellis v. Lewis, 3 Hare, 310, 315, p. 236.
- Ellis v. Vernon etc. Co., 86 Tex. 109, 23 S. W. 858, p. 809.
- Ellison v. Ellison, 6 Ves. 656, 1 Lead. Cas. Eq., 4th Am. ed., 382, 389, 415, 423.
- Ellison v. Moffatt, 1 Johns. Ch. 46, 1 Scott 387, 2 Scott 758, Shep. 118, p. 198.
- Ellsworth v. Lockwood, 42 N. Y. 89, 97, p. 717.
- Elmbank, The, 72 Fed. 610, p. 325, 358, 359, 360.
- Elmhirst v. Spencer, 2 Macn. & G. 45, 1 Keener 661, p. 832.
- Elmore v. Johnson, 143 Ill. 513, 36 Am. St. Rep. 401, 404, 406, 407, 32 N. E. 413, 21 L. R. A. 366, H. & B. 343, p. 518, 520.
- Else v. Kennedy, 67 Iowa 376, 25 N. W. 290, 3 Keener 429, p. 859.
- Elting v. First Nat. Bank, 173 Ill. 368, 50 N. E. 1095, p. 477, 515, 522.
- Ely v. Wilcox, 20 Wis. 523, 530, 531, 551, 91 Am. Dec. 436, p. 368.
- Elyton Land Co. v. Dowdell, 113 Ala. 177, 20 South. 981, 59 Am. St. Rep. 105, p. 630.
- Emack v. Kane, 34 Fed. 46, Lewis 326, p. 845.
- Emanuel College v. Evans, 1 Rep. Chan. 18, 1 Scott 31, Kirch. 704, p. 687.
- Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776, p. 486.
- Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604, p. 851.
- Emery v. Batchelder, 78 Me. 233, 3 Atl. 733, p. 660.
- Emery v. Clough, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796, p. 666.
- England v. Curling, 8 Beav. 129, 2 Keener 68, p. 885.
- England v. Downs, 2 Beav. 522, p. 487.
- English v. Lindley, 194 Ill. 181, 62 N. E. 522, p. 365.
- Enos v. Sanger, 96 Wis. 151, 70 N. W. 1069, 65 Am. St. Rep. 38, 37 L. R. A., 862, p. 712.
- Equitable Gas Light Co. v. Baltimore etc. Co., 63 Md. 285, 2 Keener 35, p. 882.
- Erdman v. Mitchell, 207 Pa. St. 79, 90 Am. St. Rep. 783, 56 Atl. 327, Lewis 290, p. 847.
- Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. ed. 1116, 1 Ames Eq. Jur. 507, 1 Scott 704, 1 Keener 634, p. 843.
- Erickson v. First Nat. Bank, 44 Neb. 622, 48 Am. St. Rep. 753, 62 N. W. 1078, 38 L. R. A. 377, p. 861.
- Erkens v. Nicolin, 39 Minn. 461, 40 N. W. 567, H. & B. 216, Shep. 152, p. 425.

- Eachweiler v. Stowell, 78 Wis. 316, 47 N. W. 361, 23 Am. St. Rep. 411, p. 634.
- Espin v. Pemberton, 3 De Gex & J. 547, 554, 555, 556, 4 Drew, 333, p. 304.
- Essex v. Atkins, 14 Ves. 542, p. 640.
- Essex Co. Bank v. Harrison, 57 N. J. Eq. 91, 40 Atl. 209, p. 300.
- Estes v. Gunter, 122 U. S. 450, 7 Sup. Ct. Rep. 1275, 30 L. ed. 1228, p. 556.
- Estis v. Jackson, 111 N. C. 145, 32 Am. St. Rep. 784, 16 S. E. 7, p. 396.
- Evans v. Hunter, 86 Iowa, 413, 41 Am. St. Rep. 503, 53 N. W. 277, 17 L. R. A. 308, p. 657.
- Evans's Appeal, 51 Conn. 435, p. 238.
- Everson v. Equitable Life Assur. Co., 68 Fed. 258, p. 78.
- Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314, p. 377, 378.
- Ewer v. Hobbs, 5 Met. 1, 3, p. 692.
- Ewing v. Smith, 3 Desaus. Eq. 417, 5 Am. Dec. 557, p. 642.
- Ewins v. Gordon, 49 N. H. 444, p. 881.
- Exon v. Dancke, 24 Oreg. 110, 32 Pac. 1045, p. 277.
- Eyre v. Countess of Shaftsbury, 2 P. Wms. 103, 2 Lead. Cas. Eq., 4th Am. ed., 1416, 1446, 1487, p. 782.
- Eyre v. Everitt, 2 Russ. 381, 382, p. 131.
- F.
- Factors' etc. Ins. Co. v. Murphy, 111 U. S. 738, 4 Sup. Ct. 679, p. 383.
- Faine v. Brown, 2 Ves. Sr. 307, 1 Ames Eq. Jur. 397, 2 Scott 285, p. 894.
- Fairbanks v. Sargent, 104 N. Y. 108, 117, 9 N. E. 870, 58 Am. Rep. 490, s. c., 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475, p. 337.
- Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319, p. 302.
- Fairland v. Percy, L. R. 3 P. & D. 217, Ames Trusts, 423, p. 624.
- Falcke v. Gray, 4 Drew. 651, H. & B. 655, p. 431, 483, 882.
- Fallass v. Pierce, 30 Wis. 443, p. 368.
- Fanning v. Dunham, 5 Johns. Ch. 122, 142, 143, 144, 9 Am. Dec. 283, 1 Scott 271, p. 178, 179, 486, 497.
- Fant v. Miller, 17 Gratt. 187, p. 83.
- Farabee v. McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734, p. 294.
- Farina v. Silverlock, 6 De Gex, M. & G. 214, 217, p. 839.
- Farington v. Parker, L. R. 4 Eq. 116, p. 640.
- Farley v. Blood, 30 N. H. 354, 2 Ames Eq. Jur. 4, p. 790, 791, 797, 798, 799.
- Farley v. Turner, 26 L. J. Ch. 710, Ames Trusts 40, p. 569.
- Farmers' & Mechanics' Bank v. Butchers' etc. Bank, 16 N. Y. 125, 69 Am. Dec. 678, 14 N. Y. 623, p. 391.
- Farmers' & Merchants' Bank v. Farwell, 58 Fed. 633, 7 C. C. A. 391, 19 U. S. App. 256, p. 323.
- Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St. 367, 64 N. E. 518, 90 Am. St. Rep. 586, 58 L. R. A. 620, p. 337.
- Farmers' L. & T. Co. v. Bankers' Tel. Co., 148 N. Y. 315, 51 Am. St. Rep. 690, 42 N. E. 707, 31 L. R. A. 403, p. 811.
- Farmers' L. & T. Co. v. Denver, L. & G. R. Co., 126 Fed. 46, 60 C. C. A. 588, p. 177.
- Farmers' Loan etc. Co. v. Grape Creek Coal Co., 50 Fed. 481, H. & B. 879, p. 810.
- Farmers' L. & T. Co. v. Maltby, 8 Paige, 361, p. 298.
- Farmers' Loan & T. Co. v. Northern Pac. R. Co., 74 Fed. 431, p. 810.
- Farmers' L. & T. Co. v. Pennsylvania Plate Glass Co., 103 Fed. 132, 151, 43 C. C. A. 114, 56 L. R. A. 710, p. 739.
- Farmers' Savings & B. & L. Ass'n v. Kent, 117 Ala. 624, 23 South. 757, p. 726.
- Farmington Corp. v. Bank, 85 Me. 46, 52, 26 Atl. 965, p. 122.
- Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, p. 457, 458.
- Farnum v. Bascom, 122 Mass. 282, p. 657.
- Farrand v. Yorkshire Banking Co., L. R. 40 Ch. Div. 182, p. 318, 349.
- Farrant v. Blanchford, 1 De Gex, J. & S. 107, 119, 120, p. 522.

- Farrant v. Lovel**, 3 Atk. 723, 1 Keener 455, 1 Scott 660, p. 829.
- Farrar v. Winterton**, 5 Beav. 1, 8, p. 161.
- Farwell v. Becker**, 129 Ill. 261, 16 Am. St. Rep. 267, 21 N. E. 792, 6 L. R. A. 400, p. 914.
- Farwell v. Bigelow**, 112 Mich. 285, 70 N. W. 579, p. 909.
- Farwell v. Cotting**, 8 Allen, 211, p. 865.
- Faulkner's Adm'r v. Harwood**, 6 Rand. 125, p. 77.
- Fay v. Valentine**, 12 Pick. 40, 22 Am. Dec. 397, p. 349.
- Fechheimer v. Baum**, 37 Fed. 167, 2 L. R. A. 153, H. & B. 837, p. 806.
- Feeney v. Howard**, 79 Cal. 525, 530, 12 Am. St. Rep. 162, 21 Pac. 984, 4 L. R. A. 826, p. 604.
- Fehlberg v. Cosine**, 16 R. I. 162, 13 Atl. 110, 3 Keener 312, p. 438.
- Fellowes v. Lord Gwydyr**, 1 Sim. 63, 1 Russ. & M. 83, 2 Keener 889, p. 462.
- Fellows v. Ripley**, 69 N. H. 410, 45 Atl. 138, p. 547.
- Fells v. Read**, 3 Ves. 70, 2 Scott 37, p. 882.
- Fennelly v. Ashdown**, 1 Ir. Ch. 706, 1 Ames Eq. Jur. 423, 2 Scott 137, p. 893.
- Fenton v. Miller**, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384, p. 869.
- Ferchen v. Arndt**, 26 Oreg. 121, 46 Am. St. Rep. 603, 37 Pac. 161, 29 L. R. A. 664, p. 605.
- Ferris v. Van Vechten**, 73 N. Y. 113, H. & B. 461, p. 599.
- Fesmire's Estate**, 134 Pa. St. 67, 19 Am. St. Rep. 676, 19 Atl. 502, p. 621.
- Festorazzi v. St. Joseph's Catholic Church**, 104 Ala. 327, 18 South. 394, 53 Am. St. Rep. 48, 25 L. R. A. 360, p. 576.
- Fidelity Tr. & G. Co. v. Fowler Water Co.**, 113 Fed. 560, p. 101.
- Field v. City of New York**, 6 N. Y. (2 Seld.) 179, 57 Am. Dec. 435, p. 330.
- Field v. Field**, [1894] 1 Ch. 425, Ames Trusts 505, p. 611.
- Fifield v. Van Wyck**, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745, p. 231.
- Filley v. Duncan**, 1 Nebr. 134, 93 Am. Dec. 337, p. 377.
- Finance Co. of Penn. v. Charleston etc. R. Co.**, 45 Fed. 436, p. 808.
- Finch v. Shaw**, 19 Beav. 500, 511, 5 H. L. Cas. 905, p. 357.
- Finnegan v. Fernandina**, 15 Fla. 379, 21 Am. Rep. 292, p. 65, 201.
- First Nat. Bank v. Albertson**, (N. J. Ch.) 47 Atl. 818, p. 132.
- First Nat. Bank v. Binninger**, 26 N. J. Eq. 345, 2 Ames Eq. Jur. 24, p. 796.
- First Nat. Bank v. Browne**, 128 Ala. 557, 86 Am. St. Rep. 156, 29 South. 552, p. 909.
- First Nat. Bank v. Christopher**, 40 N. J. L. 435, 29 Am. Rep. 262, p. 308.
- First Nat. Bank v. Eastman**, 144 Cal. 487, 103 Am. St. Rep. 95, 77 Pac. 1043, p. 912.
- First Nat. Bank v. Illinois Steel Co.**, 170 Ill. 140, 51 N. E. 200, H. & B. 871, p. 805.
- First Nat. Bank v. Sarlls**, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434, 13 L. R. A. 401, p. 113.
- First Nat. Bank v. Schween**, 127 Ill. 573, 11 Am. St. Rep. 174, 20 N. E. 681, p.
- First Nat. Bank v. Shedd**, 121 U. S. 74, 7 Sup. Ct. 807, 30 L. ed. 877, p. 810.
- First National Bank v. Tompkins**, 57 Fed. 20, 6 C. C. A. 237, p. 749.
- Fish v. Benson**, 71 Cal. 429, 12 Pac. 454, p. 375.
- Fish v. Leser**, 69 Ill. 394, 395, H. & B. 650, p. 184, 485, 507, 894.
- Fisher v. Mellen**, 103 Mass. 503, p. 453.
- Fitzhugh v. Hubbard**, 41 Ark. 64, H. & B. 232, p. 232.
- Fitzsimmons v. Ogden**, 7 Cranch, 2, 18, p. 196, 311, 314, 346, 347.
- Flagg v. Mann**, 2 Sum. 486, 487, 518, 533, 534, 554, 557, 560, Fed. Cas. No. 4,847, Kirch. 167, p. 278, 699, 740.
- Flannery v. Jones**, 180 Pa. St. 338, 36 Atl. 856, 57 Am. St. Rep. 648, p. 493.

- Fleishner v. Citizens' R. E. & I. Co., 25 Oreg. 119, 35 Pac. 174, p. 98.
- Fleming v. Burnham, 100 N. Y. 1, 2 Keener 1138, p. 895.
- Fletcher, In re, L. R. 38 Ch. Div. 373, p. 242.
- Fletcher v. Ashburner, 1 Brown Ch. 497, 500, 1 Lead. Cas. Eq., 4th Am. ed., 1118, 1120, 1123, 1157, 1 Scott 606, p. 166, 167, 554, 677, 685.
- Fletcher v. Bealey, L. R. 28 Ch. D. 688, 1 Keener 754, p. 831.
- Fletcher v. Tuttle, 151 Ill. 41, 42 Am. St. Rep. 220, 37 N. E. 683, 25 L. R. A. 143, p. 821.
- Flight v. Bolland, 4 Russ. 298, 1 Ames Eq. Jur. 422, 2 Scott 136, 2 Keener 800, p. 893.
- Flint v. Brandon, 8 Ves. 159, 164, 1 Ames Eq. Jur. 69, 2 Scott 70, 2 Keener 137, p. 888.
- Flint v. Woodin, 9 Hare, 618, p. 493.
- Flint etc. R'y Co. v. Auditor-General, 41 Mich. 635, p. 557.
- Florida Southern R. R. Co. v. Hill, 40 Fla. 1, 74 Am. St. Rep. 124, 23 South. 566, p. 752.
- Fluegel v. Henschel, 7 N. Dak. 276, 66 Am. St. Rep. 642, 74 N. W. 996, p. 265.
- Fluker v. Taylor, 3 Drew. 183, 3 Keener 906, p. 918.
- Flynt v. Arnold, 2 Met. 619, p. 368.
- Fogg v. Blair, 133 U. S. 534, 10 Sup. Ct. 338, 33 L. ed. 721, p. 595.
- Foley v. Burnell, 1 Brown Ch. 274, 279, p. 656.
- Foley v. Greene, 14 R. I. 618, 51 Am. St. Rep. 419, p. 502.
- Foley v. Hill, 2 H. L. Cas. 28, 46, 1 Ames Eq. Jur. 446, 3 Keener 897, p. 918, 919.
- Follette v. Mutual Accident Ass'n, 110 N. C. 377, 14 S. E. 923, 28 Am. St. Rep. 693, 15 L. R. A. 668, p. 303.
- Fonda v. Jones, 42 Miss. 792, 2 Am. Rep. 669, p. 748.
- Fontain v. Ravenel, 17 How. 369, 384, p. 143.
- Foose v. Whitmore, 82 N. Y. 405, 37 Am. Rep. 572, p. 572.
- Forbes v. Moffatt, 18 Ves. 384, p. 382.
- Ford v. Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117, p. 679.
- Ford v. Foster, L. R. 7 Ch. 611, Lewis 144, p. 840.
- Ford v. Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902, p. 855.
- Ford v. Knapp, 102 N. Y. 140, 55 Am. Rep. 782, 6 N. E. 283, p. 869.
- Ford v. Unity Church Society, 120 Mo. 498, 25 S. W. 394, 41 Am. St. Rep. 711, 23 L. R. A. 561, p. 298, 369.
- Forman v. Brewer, 62 N. J. Eq. 748, 48 Atl. 1012, 90 Am. St. Rep. 475, p. 314.
- Fornanses v. Melsing, 106 Fed. 775, 784, 45 C. C. A. 615, p. 804.
- Forster v. Hale, 3 Ves. 696, p. 567.
- Fortescue v. Barnett, 3 Mylne & K. 36, Ames Trusts 136, p. 559, 562.
- Forth v. Duke of Norfolk, 4 Madd. 503, p. 551.
- Forthman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145, p. 379, 383, 384, 385, 893.
- Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, Shep. 339, p. 810.
- Foster v. Deacon, 3 Madd. 394, 2 Keener 341, p. 163.
- Fothergill v. Rowland, L. R. 17 Eq. 132, 141, 1 Ames Eq. Jur. 111, 2 Scott 111, 2 Keener 261, H. & B. 599, p. 820, 883.
- Fouch v. Wilson, 60 Ind. 64, 28 Am. Rep. 651, p. 748.
- Fourth Street Nat. Bank v. Yardley, 161 U. S. 634, 17 Sup. Ct. 439, 41 L. ed. 855, p. 766.
- Fouse v. Gilfillan, 45 W. Va. 213, 32 S. E. 178, 185, p. 281.
- Foveaux, In re, [1895] 2 Ch. 501, 507, p. 576, 577.
- Fowler v. Black, 136 Ill. 363, 26 N. E. 596, 2 Ames Eq. Jur. 293, 3 Keener 100, 2 Scott 555, p. 418.
- Fowler v. Jarvis-Conklin, etc. Co., 63 Fed. 888, 66 Fed. 14, p. 808.
- Fox v. Gibbs, 86 Me. 87, 29 Atl. 940, p. 579.
- Fox v. Mackreth, 2 Brown Ch. 400, 420, 2 Cox, 320, 322, 1 Lead. Cas. Eq. 188, 212, 237, 2 Dick. 689, p. 466.

- Fox v. Scard**, 33 Beav. 327, p. 222.  
**Fralich v. Despar**, 165 Pa. St. 24, 30 Atl. 521, 2 Keener 304, p. 820.  
**Frame v. Dawson**, 14 Ves. 386, 1 Ames Eq. Jur. 283, 2 Scott 202, 2 Keener 332, p. 902.  
**Frame v. Sliter**, 29 Oreg. 121, 45 Pac. 290, 54 Am. St. Rep. 781, 34 L. R. A. 690, p. 747.  
**Francis v. Wiggzell**, 1 Madd. 258, 264, p. 651.  
**Francisco v. Smith**, 143 N. Y. 488, 38 N. E. 980, 1 Ames Eq. Jur. 186, p. 820.  
**Franklin Sav. Bank v. Taylor**, 53 Fed. 854, 4 C. C. A. 55, 9 U. S. App. 406, p. 361.  
**Franklin Tel. Co. v. Harrison**, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. ed. 776, 2 Keener 1055, p. 895.  
**Franklyn v. Thomas**, 3 Mer. 225, 234, p. 849.  
**Frederick v. Emig**, 186 Ill. 319, 59 N. E. 883, 78 Am. St. Rep. 283, p. 344.  
**Frederick v. Frederick**, 1 P. Wms. 710, 1 Scott 311, p. 156, 157.  
**Free v. Buckingham**, 57 N. H. 95, 3 Keener 478, p. 474.  
**Freeman v. Cooke**, 2 Ex. 654, 661, p. 396.  
**Freeman v. Eacho**, 79 Va. 43, p. 253.  
**Freeman v. Freeman**, 43 N. Y. 34, 3 Am. Rep. 657, 1 Ames Eq. Jur. 306, 2 Scott 205, 2 Keener 654, p. 904.  
**Freeman v. Hartman**, 45 Ill. 57, 92 Am. Dec. 193, p. 645.  
**Freeman v. Pope**, L. R. 5 Ch. 538, 544, p. 530.  
**Freer v. Freer**, 22 Ch. Div. 622, p. 659.  
**Freeson v. Bissell**, 63 N. Y. 168, 170, p. 754.  
**French v. French**, 6 De Gex, M. & G. 95, p. 531.  
**French v. Macale**, 2 Dru. & War. 269, 274, p. 217, 222.  
**Frere v. Green**, 19 Ves. 320, p. 85.  
**Freshfield's Trusts**, In re, L. R. 11 Ch. Div. 198, 200, 202, p. 325.  
**Frey v. Willoughby**, 63 Fed. 865, 27 U. S. App. 417, 11 C. C. A. 463, p. 868.  
**Frick v. Christian Co.**, 1 Fed. 250, p. 439.  
**Friend v. Lamb**, 155 P. St. 529, 34 Am. St. Rep. 672, 25 Atl. 577, 1 Ames Eq. Jur. 408, 2 Keener 1066, 2 Scott 306, p. 894.  
**Frink v. Adams**, 36 N. J. Eq. 485, p. 372.  
**Frost v. Beekman**, 1 Johns. Ch. 288, 298, 1 Scott 531, p. 294, 362, 365.  
**Frost v. Wolf**, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761, p. 174, 318.  
**Frost v. Yonkers Sav. Bank**, 70 N. Y. 553, 26 Am. Rep. 627, p. 721.  
**Frue v. Loring**, 120 Mass. 501, p. 596.  
**Fry v. Lane**, L. R. 40 Ch. Div. 315, p. 511.  
**Fry v. Porter**, 1 Cas. Ch. 138, 1 Mod. 300, 307, (22 Car. II) 1 Scott 145, p. 30.  
**Fuller v. Percival**, 126 Mass. 381, 2 Ames Eq. Jur. 111, 3 Keener 483, p. 474, 861.  
**Fullwood v. Fullwood**, L. R. 9 Ch. Div. 176, p. 401.  
**Fulton v. Loftis**, 63 N. C. 393, 1 Scott 486, p. 509.  
**Furnald v. Glenn**, 64 Fed. 49, 12 C. C. A. 27, 26 U. S. App. 202, p. 851.  

G.

**Gaffee, In re**, 1 Macn. & G. 541, 545, 1 Lead. Cas. Eq. 713, p. 644.  
**Gaines v. Green Pond, etc. Co.**, 33 N. J. Eq. 603, 1 Keener 494, p. 827.  
**Gaines v. Miller**, 111 U. S. 395, 4 Sup. Ct. 426, p. 65.  
**Gaines v. New Orleans**, 6 Wall. 642, 716, p. 312.  
**Galbraith v. Lunsford**, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522, H. & B. 117, p. 391, 392, 393, 399.  
**Gale v. Lindo**, 1 Vern. 475, 2 Scott 732, p. 487.  
**Gallagher v. Gallagher**, 31 W. Va. 9, 5 S. E. 297, 2 Keener 696, p. 901, 902.  
**Galland v. Jackman**, 26 Cal. 79, 87, 85 Am. Dec. 172, p. 367.  
**Galusha v. Wendt**, 114 Iowa, 597, 87 N. W. 512, p. 65.  
**Galveston, H. & S. A. R'y Co. v. Dowe**, 70 Tex. 5, 7 S. W. 368, p. 109.

- Galway v. Malchow, 7 Nebr. 285, 289, p. 341.
- Galway v. Met. El. R. Co., 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788, 1 Ames Eq. Jur. 601, 1 Keener 822, p. 198, 824, 825, 833.
- Gandy v. Fortner, 119 Ala. 303, 24 South. 425, p. 550.
- Gannett v. Albee, 103 Mass. 372, 1 Ames Eq. Jur. 321, p. 897.
- Garber v. Gianella, 98 Cal. 527, 529, 33 Pac. 458, p. 297.
- Garcelon, In re, 104 Cal. 570, 584, 38 Pac. 414, 43 Am. St. Rep. 134, 953, 32 L. R. A. 595, 1 Scott 77, p. 511, 769.
- Gardner v. Blane, 1 Hare, 381, p. 803.
- Gardner v. Mobile, etc. R. Co., 102 Ala. 635, 48 Am. St. Rep. 84, 15 South. 271, p. 856.
- Gardner v. Newburgh, 2 Johns. Ch. 162, 165, 7 Am. Dec. 526, 1 Scott 740, 1 Keener 654, H. & B. 767, p. 824, 831, 834.
- Gardner v. Ogden, 22 N. Y. 327, 332-339, 78 Am. Dec. 192, 1 Ames Eq. Jur. 6, p. 208.
- Gardner v. Parker, 3 Madd. 184, 185, p. 666.
- Garner v. Reis, 25 Minn. 475, 3 Keener 920, p. 918.
- Garrard v. Frankel, 30 Beav. 445, 451, 3 Keener 261, p. 430, 431, 438, 859.
- Carson v. Green, 1 Johns. Ch. 308, 1 Scott 70, p. 745, 748.
- Gaskell v. Gaskell, 6 Sim. 643, p. 867.
- Gason v. Wordsworth, 2 Ves. Sr. 336, p. 85.
- Gaston v. Drake, 14 Nev. 175, 33 Am. Rep. 548, p. 494.
- Gates v. Johnstown Lumber Co. 172 Mass. 495, 52 N. E. 736, 1 Ames Eq. Jur. 520, p. 842.
- Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139, p. 868.
- Gates Iron Works v. Cohen, 7 Colo. App. 341, 43 Pac. 667, p. 317.
- Gause v. Perkins, 3 Jones Eq. 177, 69 Am. Dec. 728, p. 843.
- Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776, p. 202.
- Gay v. Parpart, 106 U. S. 679, 690, 1 Sup. Ct. 456, p. 206.
- Gay Mfg. Co. v. Camp, 65 Fed. 794, 25 U. S. App. 134, 13 C. C. A. 137, 68 Fed. 67, 25 U. S. App. 376, 15 C. C. A. 226, p. 220.
- Gay's Estate, 138 Cal. 552, 71 Pac. 707, 94 Am. St. Rep. 70, p. 575.
- Gebb v. Rose, 40 Md. 387, 3 Keener 427, p. 416, 859.
- Gee v. Pritchard, 2 Swanst. 402, 413, 414, 1 Keener 59, 1 Scott 149, Lewis 44, p. 30, 839.
- Gee v. Spencer, 1 Vern. 32, 2 Scott 568, p. 421.
- Geishaker v. Pancoast, 57 N. J. Eq. 60, 40 Atl. 200, p. 288.
- Gent v. Harrison, Johns. 517, 1 Keener 510, p. 829.
- George v. Braddock, 45 N. J. Eq. 757, 18 Atl. 881, 14 Am. St. Rep. 754, 6 L. R. A. 511, p. 577.
- Gerdine v. Menage, 41 Minn. 417, 43 N. W. 91, 2 Ames Eq. Jur. 286, p. 424.
- Gest v. Packwood, 34 Fed. 368, p. 361.
- Gething v. Keighley, L. R. 9 Ch. Div. 547, p. 439.
- Getty v. Binsee, 49 N. Y. 385, 388, 389, 10 Am. Rep. 379, p. 192.
- Ghormley v. Smith, 139 Pa. St. 584, 23 Am. St. Rep. 215, 21 Atl. 135, 11 L. R. A. 565, p. 551.
- Gibbs v. Marsh, 2 Met. 243, 251, p. 411.
- Gibler v. Trimble, 14 Ohio, 323, p. 366.
- Gibson v. Barber, 100 N. C. 192, 6 S. E. 766, p. 515.
- Gibson v. Crehore, 3 Pick. 475, 5 Pick. 146, Kirch. 698, p. 721, 723, 865.
- Gibson v. Jeyes, 6 Ves. 266, 271, 273, 277, p. 519.
- Giddings v. Baker, 80 Tex. 308, 16 S. W. 33, p. 452.
- Giddings v. Seward, 16 N. Y. 365, p. 660.
- Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756, 15 Am. St. Rep. 508, 6 L. R. A. 610, p. 712.
- Gilbert v. Dickerson, 7 Wend. 449, 22 Am. Dec. 592, p. 870.
- Gilbert v. Showerman, 23 Mich. 448, 1 Scott 756, p. 831.

- Gilchrist v. Helena H. S. & S. R. Co.,  
 58 Fed. 708, 710, 711, 712, p. 757.
- Giles v. Austin, 38 N. Y. Sup. Ct. 215,  
 62 N. Y. 486, p. 214.
- Giles v. Perkins, 9 East, 12, Ames  
 Trusts, 9, p. 569.
- Gillam v. Taylor, L. R. 16 Eq. 581,  
 584, p. 577.
- Gillespie v. Holland, 40 Ark. 28, 48  
 Am. Rep. 1, p. 522.
- Gillespie v. Moon, 2 Johns. Ch. 585,  
 7 Am. Dec. 559, 1 Scott 437, p.  
 436.
- Gillett v. Wiley, 126 Ill. 310, 9 Am.  
 St. Rep. 587, 19 N. E. 287, p. 521.
- Gilliam v. Chancellor, 43 Miss. 437,  
 448, 5 Am. Rep. 498, p. 97, 243,  
 250.
- Gilliam v. McCormack, 85 Tenn. 597,  
 4 S. W. 521, p. 909.
- Gillis v. Hall, 7 Phila. 422, 2 Brewst.  
 342, p. 219.
- Gilman v. Brown, 1 Mason, 191, 210,  
 Fed. Cas. No. 5,441, p. 753.
- Gilman v. Ketcham, 84 Wis. 60, 36 Am.  
 St. Rep. 899, 54 N. W. 395, 23 L.  
 R. A. 52, p. 811.
- Gilmer v. Stone, 120 U. S. 586, 7 Sup.  
 Ct. Rep. 689, p. 568.
- Girard v. Flutterer, 84 Ala. 323, 4  
 South. 292, p. 607.
- Gladding v. St. Matthew's Church, (R.  
 I.) 57 Atl. 860, p. 581.
- Glass v. Hulbert, 102 Mass. 24, 28, 41,  
 43, 3 Am. Rep. 418, H. & B. 254, 3  
 Keener 327, Shep. 264, 2 Scott 619,  
 p. 434, 435.
- Glegg v. Rees, L. R. 7 Ch. 71, p. 555.
- Glen v. Fisher, 6 Johns. Ch. 33, 36, 10  
 Am. Dec. 310, p. 647.
- Glengall v. Frazer, 2 Hare, 99 p. 82.
- Globe Mut. L. Ins. Co. v. Reals, 79 N.  
 Y. 202, 3 Keener 485, p. 474, 861.
- Glock v. Howard & Wilson Colony Co.,  
 123 Cal. 1, 69 Am. St. Rep. 17, 55  
 Pac. 713, 43 L. R. A. 199, p. 899.
- Gloucester Isinglass, etc. Co. v. Russia  
 C. Co., 154 Mass. 92, 26 Am. St. Rep.  
 214, 27 N. E. 1005, 12 L. R. A. 563,  
 2 Keener 51, p. 882.
- Glyn v. Duesbury, 11 Sim. 139, 147,  
 148, p. 792.
- Godfrey v. Harben, L. R. 13 Ch. Div.  
 216, p. 651.
- Godfrey v. Watson, 3 Atk. 517, Kirch.  
 563, p. 719.
- Godfrey v. White, 60 Mich. 443, 1 Am.  
 St. Rep. 537, 27 N. W. 593, p. 870.
- Goff v. Gott, 5 Sneed (Tenn.), 562,  
 2 Ames Cas. Eq. Jur. 281, p. 424.
- Golden's Appeal, 110 Pa. St. 581, 1  
 Atl. 660, p. 556.
- Goldman v. Rosenberg, 116 N. Y. 78,  
 15 Am. St. Rep. 410, 22 N. E. 397,  
 2 Keener 431, p. 163.
- Goodale v. Mooney, 60 N. H. 528, 49  
 Am. Rep. 334, p. 579.
- Goodbar v. Daniel, 88 Ala. 583, 7  
 South. 252, 254, 16 Am. St. Rep.  
 76, p. 303, 305.
- Goodburn v. Stevens, 1 Md. Ch. 420,  
 p. 865.
- Goodman v. Whitcomb, 1 Jacob & W.  
 589, p. 804.
- Goodman v. Winter, 64 Ala. 410, 38  
 Am. Rep. 13, p. 782.
- Goodrich v. Lathrop, 94 Cal. 56, 28  
 Am. St. Rep. 91, 29 Pac. 329, 2  
 Ames Eq. Jur. 187, p. 470, 471.
- Goodson v. Ellison, 3 Russ. 583, Ames  
 Trusts 451, p. 610.
- Goodson v. Richardson, L. R. 9 Ch.  
 221, 1 Ames Eq. Jur. 502, 1 Keener  
 615, p. 842, 843.
- Goodwin v. Richardson, 11 Mass. 469,  
 p. 190.
- Gordon v. Graham, 2 Eq. Cas. Abr.  
 598, pl. 16, p. 704.
- Gordon v. Rixey, 76 Va. 694, p. 751.
- Gormly v. Gormly, 130 Pa. St. 467, 18  
 Atl. 727, 3 Keener 184, p. 425.
- Gorringe v. Reed, 23 Utah, 120, 63  
 Pac. 902, 90 Am. St. Rep. 692, p.  
 497, 502.
- Gotthelf v. Stranahan, 138 N. Y. 345,  
 34 N. E. 286, 20 L. R. A. 455, H. &  
 B. 706, p. 894.
- Gotzian, In re, 34 Minn. 159, 57 Am.  
 Rep. 43, 24 N. W. 920, p. 234.
- Gotzian v. Shakman, 89 Wis. 52, 46  
 Am. St. Rep. 820, 61 N. W. 304, p.  
 909.
- Gough v. Pratt, 9 Md. 526, p. 131,

- Gould v. Emerson, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501, 3 Keener 324, p. 437.
- Gould v. Lynde, 114 Mass. 366, H. & B. 446, p. 589.
- Gould v. Murch, 70 Me. 288, 35 Am. Rep. 325, 2 Keener 426, H. & B. 661, p. 163.
- Gower v. Andrew, 59 Cal. 119, 43 Am. Rep. 242, p. 816.
- Graff v. Bonnett, 31 N. Y. 9, 88 Am. Dec. 236, p. 552.
- Graffam v. Burgess, 117 U. S. 184, 6 Sup. Ct. 686, 3 Keener 512, p. 485.
- Gragg v. Martin, 12 Allen, 498, 90 Am. Dec. 164, p. 528.
- Graham v. McCampbell, Meigs, 52, 33 Am. Dec. 126, 1 Ames Eq. Jur. 205, p. 741, 754.
- Graham v. Moffett, 119 Mich. 303, 75 Am. St. Rep. 393, 78 N. W. 132, p. 747.
- Graham v. Thompson, 55 Ark. 296, 18 S. W. 58, 29 Am. St. Rep. 40, p. 396.
- Graham v. Wintridge, (Md.) 58 Atl. 36, p. 547.
- Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26, 44 L. R. A. 312, 632, p. 325, 326.
- Grand Chute v. Winegar, 15 Wall. 373, 21 L. ed. 170, 2 Ames Eq. Jur. 116, p. 66, 143, 473, 853, 861.
- Grand Rapids, etc. Co. v. Haney, 92 Mich. 558, 31 Am. St. Rep. 611, 52 N. W. 1009, 16 L. R. A. 721, p. 854.
- Grant v. Saunders, 121 Iowa, 80, 100 Am. St. Rep. 310, 95 N. W. 411, p. 579.
- Grantham v. Hawley, Hob. 132, Kirch. 40, p. 740.
- Gratz v. Land & River Imp. Co., 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393, p. 367.
- Gray v. Building Trades Council, 91 Minn. 171, 103 Am. St. Rep. 477, 97 N. W. 663, 63 L. R. A. 753, Lewis 294, p. 847.
- Gray v. H. M. Loud & Sons' Lumber Co., 128 Mich. 427, 87 N. W. 376, 54 L. R. A. 731, p. 728.
- Grabill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894, 17 S. E. 558, H. & B. 677, p. 321, 892, 906.
- Graydon v. Graydon, 23 N. J. Eq. 229, p. 488.
- Great Falls Co. v. Worster, 23 N. H. 462, 1 Scott 241, p. 208.
- Great Western R'y v. Oxford etc. R'y, 3 De Gex, M. & G. 341, 359, p. 197.
- Greaves v. Gouge, 69 N. Y. 154, 157, p. 631.
- Greaves v. Tofield, L. R. 14 Ch. Div. 563, 577, 1 Scott 235, p. 212, 299, 348.
- Greedup v. Franklin County, 30 Ark. 101, 109, p. 116, 125.
- Greeley v. De Cottes, 24 Fla. 475, 5 South. 239, p. 439.
- Green v. Arnold, 11 R. I. 364, 23 Am. Rep. 466, p. 868.
- Green v. Coast Line R. Co., 97 Ga. 15, 54 Am. St. Rep. 379, 25 S. E. 814, 33 L. R. A. 806, p. 811.
- Green v. Givan, 33 N. Y. 343, p. 317.
- Green v. Hart, 1 Johns. 580, Kirch. 622.
- Green v. Morris, 12 N. J. Eq. 165, 170, H. & B. 193, 3 Keener 25, p. 421.
- Green v. Price, 13 Mees. & W. 695, 701, 16 Mees. & W. 346, 354, p. 220, 221.
- Green v. Rick, 121 Pa. St. 130, 6 Am. St. Rep. 670, 760, 15 Atl. 497, 2 L. R. A. 48, p. 286.
- Green v. Smith, 1 Atk. 572, 1 Ames Eq. Jur. 193, 1 Scott 313, p. 162, 677, 680.
- Green v. Stewart, 45 N. Y. Supp. 982, 19 App. Div. 201, p. 99.
- Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099, p. 713.
- Green v. Weaver, 1 Sim. 404, 427, 432, p. 81.
- Green v. Wilkie, 98 Iowa, 74, 66 N. W. 1046, 60 Am. St. Rep. 184, 36 L. R. A. 434, p. 507.
- Greene v. Keene, 14 R. I. 388, 51 Am. Rep. 400, p. 910.
- Greene v. Mumford, 4 R. I. 313, p. 793.

- Greene v. Warnick, 64 N. Y. 220, 224, 225, p. 340.
- Greenfield's Estate, 14 Pa. St. 489, 506, 507, p. 519.
- Greenhill v. Greenhill, 2 Vern. 679, 1 Scott 595, p. 554.
- Greenlee v. Gaines, 13 Ala. 198, 48 Am. Dec. 49, p. 852.
- Greenway, Ex parte, 6 Ves. 812, 813, 1 Scott 413, p. 407, 408.
- Greenwood v. Fenn, 136 Ill. 146, 26 N. E. 487, 3 Keener 732, p. 461.
- Gregg v. Landis, 19 N. J. Eq. 356, 850, 21 N. J. Eq. 494, 507, 511, 514, p. 226.
- Gregg v. Metropolitan Trust Co. 197 U. S. 183, 25 Sup. Ct. 415, p. 810.
- Gregory v. Edmondson, 39 Ch. Div. 253, Ames Trusts 95, p. 571.
- Gregory v. Tingley, 18 Neb. 319, 25 N. W. 88, p. 881.
- Gresham v. Ware, 79 Ala. 132, p. 382.
- Gresley v. Mousely, 4 De Gex & J. 78, 90, 91, 92, 93, 3 De Gex, F. & J. 433, p. 520, 535.
- Gribben v. Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233, p. 505.
- Grider v. American Freehold L. & M. Co., 99 Ala. 281, 12 South. 775, 42 Am. St. Rep. 58, p. 180.
- Griffin v. Fries, 23 Fla. 173, 2 South. 266, 11 Am. St. Rep. 351, p. 408.
- Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427, 1 Keener 636, H. & B. 762, Shep. 316, p. 843, 844.
- Griffith v. Ricketts, 7 Hare, 299, 307, 311, p. 680.
- Griffith v. Tower Pub. Co., [1897] 1 Ch. 21, p. 761.
- Griggs v. Clark, 23 Cal. 427, p. 673.
- Grissell v. Swinhoe, L. R. 7 Eq. 291, 295, p. 234.
- Grissler v. Powers, 81 N. Y. 57, 37 Am. Rep. 475, p. 330, 399, 402.
- Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380, p. 391.
- Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 999, 2 Ames Eq. Jur. 259, H. & B. 197, 3 Keener 107, p. 419.
- Groff v. State Bank, 50 Minn. 234, 52 N. W. 651, 36 Am. St. Rep. 640, p. 277.
- Grove v. Hodges, 55 Pa. St. 504, 519, p. 445.
- Grover v. Grover, 24 Pick. 261, 35 Am. Dec. 319, Ames Trusts 159, p. 667.
- Grover v. Wakeman, 11 Wend. 187, 201, 203, 25 Am. Dec. 624, 4 Paige, 23, p. 556.
- Grubb v. Sharkey, 90 Va. 831, 20 S. E. 784, H. & B. 736, p. 100.
- Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304, p. 517.
- Grus v. Evans, 1 Dak. 387, 1 Scott 546, p. 264.
- Guarantee Trust, etc. Co. v. Delta, etc. Co., 104 Fed. 5, (C. C. A.), p. 207.
- Guice v. Barr, 130 Ala. 570, 30 South. 563, p. 866.
- Guidot v. Guidot, 3 Atk. 254, 256, 1 Keener 949, 1 Scott 600, p. 167, 554.
- Guion v. Knapp, 6 Paige, 35, 42, 29 Am. Dec. 741, p. 729.
- Gun v. McCarthy, L. R., Ir. 13 Ch. D. 304, 2 Ames Eq. Jur. 238, p. 438.
- Gunster v. Scranton Illum., H. & P. Co., 181 Pa. St. 327, 37 Atl. 550, 59 Am. St. Rep. 650, p. 308.
- Gwynne v. Heaton, 1 Brown Ch. 1, 9, 3 Keener 505, p. 483, 512.

## H.

- Hacker v. White, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. Rep. 945, p. 343.
- Hadden v. Dandy, 51 N. J. Eq. 154, 32 L. R. A. 625, 26 Atl. 464, p. 580.
- Hadden v. Spader, 20 Johns. 554, p. 910.
- Hadley v. McDougall, L. R. 7 Ch. 312, p. 82.
- Haffey v. Lynch, 143 N. Y. 241, 38 N. E. 298, H. & B. 703, 2 Keener 1213, p. 905.
- Hafner v. City of St. Louis, 161 Mo. 34, 61 S. W. 632, p. 550.
- Hagar v. Buck, 44 Vt. 285, 290, 8 Am. Rep. 368, p. 215, 225.
- Haggarty v. Pitman, 1 Paige, 298, 19 Am. Dec. 434, p. 805.
- Hahn v. Concordia Soc., 42 Md. 460, p. 222.
- Haigh v. Jaggar, 2 Coll. 231, 1 Ames Eq. Jur. 494, 1 Keener 569, p. 842.

- Hale v. Allinson, 102 Fed. 790, 791, 792, 188 U. S. 56, 23 Sup. Ct. 244, 250-254, p. 122.
- Hale v. Hale, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247, p. 784.
- Hale v. Stery, 7 Colo. App. 165, 42 Pac. 598, p. 508.
- Hall v. Crowley, 5 Allen, 304, 81 Am. Dec. 745, p. 221.
- Hall v. First Nat. Bank, 173 Mass. 16, 53 N. E. 154, 73 Am. St. Rep. 255, 44 L. R. A. 319, p. 427.
- Hall v. Hall, 37 L. J. P. & M. 40, L. R. 1 P. & M. 481, p. 509.
- Hall v. Hardy, 3 P. Wms. 187, 1 Ames Eq. Jur. 65, 2 Scott 54, 2 Keener 109, p. 884.
- Hall v. Otterson, 52 N. J. Eq. 522, 28 Atl. 907, 3 Keener 401, 2 Scott 635, p. 198, 421, 523.
- Hall v. Potter, Show. Parl. C. 76, 3 Lev. 411, 2 Scott 663, p. 487.
- Hall v. Smith, 5 How. 96, 12 L. ed. 66, p. 914.
- Hall v. Vernon, 47 W. Va. 295, 81 Am. St. Rep. 791, 34 S. E. 764, p. 868.
- Hall v. Warren, 9 Ves. 605, H. & B. 575, p. 549.
- Hall v. Wescott, 15 R. I. 373, 5 Atl. 629, Kirch. 598, p. 710.
- Hall v. Wheeler, 37 Minn. 522, 35 N. W. 377, 2 Ames Eq. Jur. 288, 3 Keener 99, p. 425.
- Hall v. Whittier, 10 R. I. 530, 2 Scott 323, p. 898.
- Hallett v. Wylie, 3 Johns. 44, 3 Am. Dec. 457, p. 406.
- Hallett's Estate, In re, 13 Ch. Div. 696, p. 32, 598.
- Hallett's Trusts, In re, 18 Weekly Rep. 416, Ames Trusts 221, p. 625.
- Halsey v. Grant, 13 Ves. 73, 77, 2 Scott 379, p. 905.
- Hamaker v. Schroers, 49 Mo. 406, p. 221.
- Hamar v. Medsker, 60 Ind. 413, 2 Ames Eq. Jur. 228, p. 859, 860.
- Hamer v. Sidway, 124 N. Y. 538, 550, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693, Ames Trusts, 33, p. 568, 569.
- Hamilton v. Cummings, 1 Johns. Ch. 517, 1 Scott 104, 1 Keener 317, p. 853, 877.
- Hamilton v. Hamilton, 2 Rich. Eq. 355, 46 Am. Dec. 58, p. 492.
- Hamilton v. Harvey, 121 Ill. 469, 2 Am. St. Rep. 118, p. 892.
- Hamilton v. Marks, 5 De Gex & S. 638, 1 Keener 280, p. 791, 797, 799.
- Hamilton v. Steele, 22 W. Va. 348, p. 591.
- Hamilton v. Traber, 78 Md. 26, 44 Am. St. Rep. 258, 27 Atl. 229, p. 785, 786.
- Hamilton v. Worsfold, 10 Ves. 291, 1 Scott 680, p. 842.
- Hamilton-Brown Shoe Co. v. Saxe, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106, H. & B. 779, Lewis 276, p. 826, 846.
- Hamilton's etc. Iron Works, In re, L. R. 12 Ch. Div. 707, 710, 711, p. 341.
- Hammond v. Messenger, 9 Sim. 327, 332, Ames Trusts 59, p. 759, 762.
- Hammond v. Pennock, 61 N. Y. 145, 151, 152, 3 Keener 688, p. 470, 471.
- Hampshire Land Co., In re, [1896] 2 Ch. 743, p. 303.
- Hampson v. Edelen, 2 Harr. & J. 64, 66, 3 Am. Dec. 530, 2 Scott 708, p. 342.
- Hancock v. Carlton, 6 Gray, 39, p. 225.
- Handley v. Jackson, 31 Ore. 552, 65 Am. St. Rep. 839, 50 Pac. 915, p. 855.
- Haney v. Legg, 129 Ala. 619, 30 South. 38, 87 Am. St. Rep. 81, p. 599.
- Hansard v. Robinson, 7 Barn. & C. 90, 1 Scott 412, p. 408.
- Hanson v. Gardiner, 7 Ves. 305, 1 Keener 544, p. 842.
- Hanson v. Keating, 4 Hare, 1-6, 1 Scott 274, p. 176, 179.
- Harbison v. Lemon, 3 Blackf. 51, 23 Am. Dec. 376, p. 508.
- Harding v. Glover, 18 Ves. 281, p. 804.
- Harding v. Glyn, 1 Atk. 460, 2 Lead. Cas. Eq., 4th Am. ed., 1833, 1834-1848, 1857-1866, Ames Trusts 78, Shep. 212, p. 565, 571.

- Harding v. Handy, 11 Wheat. 103, p. 506.
- Hardy, *Ex parte*, 30 Beav. 206, 2 Keener 327, p. 680.
- Hardy v. Martin, 1 Brown Ch. 419, note, 1 Cox, 26, 2 Scott 123, p. 215, 222.
- Harkness v. Fraser, 12 Fla. 336, 341, p. 514.
- Harland v. Trigg, 1 Brown Ch. 142, Ames Trusts 79, p. 571.
- Harmood v. Oglander, 8 Ves. 106, 124, 125, p. 662.
- Harness v. Bulpitt, (Cal. App.) 81 Pac. 1022, 1 Scott 738, p. 830.
- Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221, p. 317, 341, 342.
- Harney v. Indianapolis etc. R. R. Co., 32 Ind. 244, p. 822.
- Harper v. Clayton, 84 Md. 356, 35 Atl. 1083, 35 L. R. A. 211, 57 Am. St. Rep. 407, p. 24, 910.
- Harper v. Ely, 70 Ill. 581, Kirch. 563, p. 721.
- Harrigan v. Gilchrist, (Wis.) 99 N. W. 909, 933, 981, p. 44, 202.
- Harrington v. Churchward, 6 Jur. N. S., 576, 1 Ames Eq. Jur. 457, p. 919.
- Harrington v. Erie Co. Savings Bank, 101 N. Y. 257, 4 N. E. 346, p. 515.
- Harrington v. Grant, 54 Vt. 236, p. 502.
- Harrington v. Wheeler, 4 Ves. 686, 2 Scott 331, p. 900.
- Harris v. Clark, 3 N. Y. 93, 51 Am. Dec. 352, p. 668.
- Harris v. Fergusson, 16 Sim. 308, p. 189.
- Harris v. Kemble, 1 Sim. 111, 120, 122, 5 Bligh, N. S., 730, 731, p. 447, 464.
- Harris v. Tyson, 24 Pa. St. 347, 360, 64 Am. Dec. 661, 3 Keener 561, p. 466, 484.
- Harris County v. Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467, p. 764.
- Harrison v. Forth, Prec. Ch. 51, 1 Scott 500, p. 365.
- Harrison v. Guest, 6 De Gex, M. & G. 424, 8 H. L. Cas. 481, 742, p. 485, 506.
- Harrison v. Nettleship, 2 Mylne & K. 423, p. 850.
- Harrison v. Wright, 100 Ind. 515, 50 Am. Rep. 805, p. 764, 767.
- Harrop, *In re*, 3 Drew. 726, 734, p. 684.
- Hart v. Leete, 104 Mo. 315, 15 S. W. 976, p. 647.
- Hart v. Leonard, 42 N. J. Eq. 416, 7 Atl. 865, 1 Ames Eq. Jur. 549, 1 Keener 856, p. 834.
- Hart v. Sansom, 110 U. S. 155, 3 Sup. Ct. 586, 1 Ames Eq. Jur. 11, p. 206, 207.
- Hart v. Western R. R. Co., 13 Met. 99, 46 Am. Dec. 719, p. 915.
- Hartford Fire Ins. Co. v. Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623, p. 478.
- Hartley v. Ostler, 22 Beav. 449, p. 245.
- Hartman v. Strickler, 82 Va. 225, p. 510.
- Harvard College v. Amory, 9 Pick. 446, H. & B. 526, p. 615.
- Harvard College v. Weld, 159 Mass. 114, 34 N. E. 175, p. 608.
- Harvard Unitarian Soc. v. Tufts, 151 Mass. 76, 23 N. E. 1006, 7 L. R. A. 390, p. 657.
- Harvey v. Linville Imp. Co., 118 N. C. 693, 24 S. E. 489, 54 Am. St. Rep. 749, 32 L. R. A. 265, p. 501.
- Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 15 Am. St. Rep. 159, 5 L. R. A. 200, p. 498.
- Harwood v. Kirby, 1 Paige, 469, p. 868.
- Hastings v. Cutler, 24 N. H. 481, p. 265.
- Hatch v. Cobb, 4 Johns. Ch. 559, 2 Scott 343, p. 99.
- Hatch v. Hatch, 9 Ves. 292, 297, 298, p. 513, 520, 521.
- Hatch's Estate, *In re*, 62 Vt. 300, 18 Atl. 814, 22 Am. St. Rep. 109, p. 237.
- Hathaway v. Brady, 23 Cal. 122, 2 Ames Eq. Jur. 299, p. 431.

- Hattersley v. Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, 29 Atl. 187, p. 231.
- Hatton v. Gray, 2 Cas. Ch. 164, 1 Ames Eq. Jur. 421, 2 Scott 129, p. 893.
- Haughwout v. Murphy, 22 N. J. Eq. 531, 21 N. J. Eq. 118, Shep. 198, p. 161, 162, 287, 752.
- Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075, p. 739.
- Havemeyer v. Superior Court, 84 Cal. 327, 363, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627, p. 807.
- Haven v. Foster, 9 Pick. 111, 112, 10 Am. Dec. 353, p. 427.
- Havens v. Sackett, 15 N. Y. 365, p. 233.
- Haviland v. Willetts, 141 N. Y. 35, 35 N. E. 958, 2 Ames Eq. Jur. 273, 3 Keener 144, p. 421.
- Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827, p. 631, 633.
- Hawkshaw v. Parkins, 2 Swanst. 530, 548, p. 849.
- Hawley v. Bibb, 69 Ala. 52, p. 498.
- Hawley v. Clowes, 2 Johns. Ch. 122, 1 Ames Eq. Jur. 484, 1 Scott 663, p. 827, 830.
- Hawralty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613, 2 Scott 140, p. 906.
- Hawthorne, In re, 23 Ch. D. 743, Shep. 77, p. 208.
- Hayden v. Charter Oak Driving Park, 63 Conn. 142, 27 Atl. 232, p. 320, 362.
- Haydock v. Haydock, 33 N. J. Eq. 494, 3 Keener 807, p. 510.
- Haydon v. Nicoletti, 18 Nev. 290, 3 Pac. 473, p. 329.
- Hayes v. Livingstone, 34 Mich. 384, 22 Am. Rep. 533, p. 391.
- Haygarth v. Weaving, L. R. 12 Eq. 320, 327, 328, p. 446.
- Haywood v. Brunswick etc. Soc., L. R. 8 Q. B. Div. 403, 1 Ames Eq. Jur. 176, 2 Scott 515, 2 Keener 580, p. 778.
- Haywood v. Cope, 25 Beav. 140, p. 467.
- Haywood v. Hutchins, 65 N. C. 574, 1 Ames Eq. Jur. 459, p. 918.
- Haywood v. Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184, p. 806.
- Head v. Porter, 70 Fed. 498, 1 Ames Eq. Jur. 644, p. 837, 838.
- Heard v. Stamford, Cas. t. Talb. 173, 1 Scott 293, p. 203.
- Heath v. Erie R. R., 9 Blatch. 316, p. 75.
- Heath v. Waters, 40 Mich. 457, p. 620.
- Heckard v. Sayre, 34 Ill. 142, 1 Ames Eq. Jur. 340, p. 899.
- Hedderly v. Johnson, 42 Minn. 443, 18 Am. St. Rep. 521, p. 896.
- Hedges v. Dixon County, 150 U. S. 182, 14 Sup. Ct. 71, 1 Scott 298, p. 204.
- Hegenmyer v. Marks, 37 Minn. 6, 5 Am. St. Rep. 808, 32 N. W. 785, p. 517.
- Heilbron v. Fowler, etc. Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535, p. 834.
- Heintze v. Bentley, 34 N. J. Eq. 562, p. 704.
- Heist v. Baker, 49 Pa. St. 9, p. 751.
- Helberg v. Schumann, 150 Ill. 12, 37 N. E. 99, 41 Am. St. Rep. 339, p. 505.
- Helling v. Lumley, 3 De Gex & J. 493, 2 Keener 1022, p. 894.
- Helme v. Philadelphia Ins. Co., 61 Pa. St. 107, 100 Am. Dec. 621, p. 225.
- Helme v. Strater, 52 N. J. Eq. 591, 30 Atl. 333, p. 236.
- Hempstead v. Watkins, 6 Ark. 317, 355, 368, 42 Am. Dec. 696, p. 131, 132.
- Henderson v. Adams, 15 Utah, 30, 48 Pac. 398, p. 547.
- Henderson v. Dickey, 35 Mo. 120, 2 Ames Eq. Jur. 185, p. 101, 859.
- Henderson v. Hall, 134 Ala. 455, 32 South. 840, p. 24.
- Henderson v. Lacon, L. R. 5 Eq. 249, 263, p. 453.
- Henderson v. New York Cent. R. R. Co., 78 N. Y. 423, 1 Keener 623, 1 Scott 707, p. 824.
- Henderson v. Wanamaker, 79 Fed. 736, 25 C. C. A. 181, p. 287.

- Henderson-Achert Lith. Co. v. John Shillito Co., 64 Ohio St. 236, 83 Am. St. Rep. 745, 60 N. E. 295, p. 916.
- Hendricks v. Robinson, 2 Johns. Ch. 283, p. 910.
- Hendrickson v. Hinckley, 17 How. 443, 15 L. ed. 123, Shep. 292, p. 851.
- Hennessey v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374, 1 Ames Eq. Jur. 578, 1 Keener 806, 1 Scott 752, p. 832.
- Henry v. Henry, 103 Ala. 582, 15 South. 916, p. 810.
- Henry v. Tupper 29 Vt. 358, p. 226.
- Hensman v. Fryer, L. R. 3 Ch. 420, 2 Eq. 627, p. 662.
- Herbert v. Pennsylvania Co., 43 N. J. Eq. 21, 10 Atl. 872, 1 Keener 860, p. 832, 848.
- Herbert v. Wren, 7 Cranch, 370, 378, 379, Shep. 132, p. 235, 865.
- Hercy v. Birch, 9 Ves. 357, p. 885.
- Hermann v. Hodges, L. R. 16 Eq. 18, 1 Ames Eq. Jur. 61, 2 Scott 58, 2 Keener 56, p. 881, 884.
- Herndon v. Gibson, 38 S. C. 357, 37 Am. St. Rep. 765, 17 S. E. 145, 20 L. R. A. 545, p. 492.
- Hervey v. Smith, 22 Beav. 299, p. 265.
- Hesse v. Briant, 6 De Gex, M. & G. 623, 2 Keener 858, p. 519, 520.
- Hewitt v. Loosemore, 9 Hare, 449, 456, 458, p. 318, 349.
- Heyder v. Excelsior B. & L. Ass'n, 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49, H. & B. 70, p. 318, 349.
- Hibbs v. Insurance Co., 40 Ohio St. 543, p. 240.
- Hichborn v. Fletcher, 66 Me. 209, 22 Am. Rep. 562, p. 915.
- Hickey v. Parrot, etc. Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510, p. 811.
- Hicks v. Hamilton, 144 Mo. 495, 46 S. W. 432, 66 Am. St. Rep. 431, p. 712.
- Hicks v. Raincock, 2 Dick. 647, 1 Ames Eq. Jur. 626, p. 835.
- Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241, H. & B. 273, 3 Keener 615, p. 455, 456, 459, 461.
- Hicks v. Jurek, 72 Mich. 311, 40 N. W. 339, H. & B. 711, 2 Keener 57, p. 881, 884.
- Higbie v. Westlake, 14 N. Y. 281, p. 866.
- Higgins v. Butler, 78 Me. 520, 7 Atl. 276, 1 Ames Eq. Jur. 419, p. 894.
- Hill v. Barclay, 16 Ves. 402, 403, 405, 406, 18 Ves. 36, 56, 58-64, p. 224, 226.
- Hill v. Lane, L. R. 11 Eq. 215, 219, p. 471.
- Hill v. Reno, 112 Ill. 154, 54 Am. Rep. 222, p. 867.
- Hill v. Spencer, Amb. 641, 836, 2 Scott 774, p. 496.
- Hills v. Croll, 2 Phill. Ch. 60, 1 Ames Eq. Jur. 427, 2 Scott 90, 2 Keener 216, p. 818, 893.
- Hills v. Rowland, 4 De Gex, M. & G. 430, p. 226.
- Himrod v. Gilman, 147 Ill. 293, 35 N. E. 373, p. 351.
- Hindman v. O'Connor, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490, p. 521.
- Hindson v. Wetherill, 1 Smale & G. 604, 5 De Gex, M. & G. 301, p. 514, 519.
- Hipp v. Babin, 19 How. 271, 278, 15 L. ed. 633, p. 53.
- Hitchcock v. Giddings, 4 Price, 135, 2 Ames Eq. Jur. 192, p. 437.
- Hitchins v. Pettingill, 58 N. H. 386, H. & B. 246, 2 Ames Eq. Jur. 307, 2 Scott 627, 3 Keener 1145, p. 429, 436.
- Hoare v. Bremridge, L. R. 8 Ch. 22, 14 Eq. 522, 2 Ames Eq. Jur. 121, p. 472, 853.
- Hobbs v. Norton, 1 Vern. 136, 1 Scott 554, p. 376.
- Hobson v. Trevor, 2 P. Wms. 191, 1 Scott 75, p. 759, 769.
- Hoddel v. Pugh, 33 Beav. 489, 2 Scott 412, p. 164, 681.
- Hodge v. Amerman, 40 N. J. Eq. 99, 2 Atl. 257, p. 279.
- Hodge v. Ludlum, 45 Minn. 290, 47 N. W. 805, p. 399.

- Hodge v. Sloan, 107 N. Y. 252, 1 Am. St. Rep. 816, 17 N. E. 335, 1 Ames Eq. Jur. 184, 2 Scott 508, 2 Keener 585, p. 776.
- Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87, H. & B. 585, 2 Scott 62, 2 Keener 95, p. 881.
- Hodges v. Winston, 94 Ala. 576, 10 South. 535, p. 277.
- Hodges' Estate, In re, 66 Vt. 70, 44 Am. St. Rep. 820, 28 Atl. 663, p. 620, 623.
- Hodgson v. Duce, 2 Jur. N. S. 1014, 1 Ames Eq. Jur. 523, p. 844.
- Hodgson v. Williamson, L. R. 15 Ch. Div. 87, p. 652.
- Hoeffler v. Clogan, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 46 L. R. A. 730, p. 576.
- Hoene v. Pollak, 118 Ala. 617, 24 South. 349, 72 Am. St. Rep. 189, p. 395.
- Hoffman v. Mackall, 5 Ohio St. 124, 130, 64 Am. Dec. 637, p. 557.
- Hoffman v. Postill, L. R. 4 Ch. 673, p. 75, 78.
- Hogg v. Link, 90 Ind. 346, 350, p. 477.
- Hogg v. Scott, L. R. 18 Eq. 444, 1 Ames Eq. Jur. 655, p. 838.
- Holbrook v. Ford, 153 Ill. 633, 46 Am. St. Rep. 917, 39 N. E. 1091, 27 L. R. A. 324, p. 809, 811.
- Holbrook v. Payne, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456, p. 766.
- Holden v. New York and Erie Bank, 72 N. Y. 286, 292, p. 303, 306, 308.
- Holland v. Anderson, 38 Mo. 55, 58, p. 99.
- Holland v. Brown, 140 N. Y. 344, 35 N. E. 577, p. 279.
- Holland v. Challen, 110 U. S. 15, 16, 19, 3 Sup. Ct. 495, p. 142, 873, 874, 875.
- Holland v. Citizens' Sav. Bank, 16 R. I. 734, 19 Atl. 654, 8 L. R. A. 553, p. 718.
- Holland v. Holland, L. R. 4 Ch. 449, Ames Trusts 236, p. 620.
- Holley v. Glover, 36 S. C. 404, 31 Am. St. Rep. 883, 15 S. E. 605, 16 L. R. A. 776, p. 870.
- Holliday v. Franklin Bank, 16 Ohio 533, p. 342.
- Hollins v. Brierfield etc. Iron Co. 150 U. S. 371, 379, 14 Sup. Ct. 127, 128, 37 L. ed. 1113, p. 595, 807.
- Hollis v. Whiteing, 1 Vern. 151, 2 Keener 747, p. 905.
- Hollocher v. Holl Locher, 62 Mo. 267, p. 510.
- Holmes v. Gilman, 138 N. Y. 376, 34 Am. St. Rep. 463, 34 N. E. 205, 20 L. R. A. 566, p. 597.
- Holmes v. Goghil, 7 Ves. 499, 12 Ves. 206, p. 253.
- Holmes v. Powell, 8 De Gex, M. & G. 572, p. 274, 275, 279.
- Holmes v. Walter, 118 Wis. 409, 95 N. W. 380, p. 549.
- Holmes' Appeal, 77 Pa. St. 50, p. 454.
- Holridge v. Gillespie, 2 Johns. Ch. 30, Kirch. 579, p. 698.
- Holroyd v. Marshall, 10 H. L. Cas. 191, Kirch. 42, p. 740, 759, 769, 770.
- Holst v. Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442, p. 459.
- Holt v. Thurman, 111 Ky. 84, 63 S. W. 290, 98 Am. St. Rep. 398, p. 761.
- Home Sav. & State Bank v. Peoria Agricultural & Trotting Soc., 206 Ill. 9, 99 Am. St. Rep. 132, 69 N. E. 17, p. 356.
- Homfray v. Fothergill, L. R. 1 Eq. 567, 2 Keener 26, p. 885.
- Honaker v. B'd of Education, 42 W. Va. 170, 57 Am. St. Rep. 847, 24 S. E. 544, 32 L. R. A. 413, p. 822.
- Honore's Ex'r v. Bakewell, 6 B. Mon. 67, 43 Am. Dec. 147, p. 281.
- Hood v. Hammond, 128 Ala. 569, 30 South. 540, 86 Am. St. Rep. 159 p. 748.
- Hood v. North East. R'y, L. R. 8 Eq. 666, 5 Ch. 525, 1 Ames Eq. Jur. 82, 2 Scott 76, 2 Keener 160, p. 820.
- Hood-Barrs v. Heriot, [1896] A. C. 174, p. 643.
- Hooper, Ex parte, 1 Mer. 7, Kirch. 114, p. 755.

- Hooper v. Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262, p. 175, 318, 345, 349.
- Hope v. Lyddell, 21 Beav. 183, p. 281.
- Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 23 L. ed. 392, p. 588.
- Hopkins v. Hopkins, 1 Atk. 581, 590, 591, 592, p. 545, 546.
- Hopkinson v. Rolt, 9 H. L. Cas. 514, 25 Beav. 461, p. 703, 704.
- Hopler v. Cutler, (N. J. Eq.) 34 Atl. 746, p. 344, 345.
- Hopper v. Calhoun, 52 Kan. 703, 35 Pac. 816, 39 Am. St. Rep. 363, p. 711.
- Hoppin v. Doty, 25 Wis. 573, 591, p. 265.
- Horlock, In re, [1895] 1 Ch. 516, p. 242.
- Horn v. Cole, 51 N. H. 287, 289, 12 Am. Rep. 111, H. & B. 101, p. 389, 395, 397.
- Horrell v. Waldron, 1 Vern. 26, p. 656.
- Hotchkin v. Third Nat. Bank, 127 N. Y. 329, 27 N. E. 1050, 3 Keener 581, p. 469.
- Hotz's Estate, 38 Pa. St. 422, 80 Am. Dec. 490, p. 489.
- Hough v. Richardson, 3 Story, 659, p. 444.
- Houghton, Ex parte, 17 Ves. 251, 253, p. 590.
- Houlton v. Nichol, 93 Wis. 393, 67 N. W. 715, 57 Am. St. Rep. 928, 33 L. R. A. 166, p. 495.
- House v. Dexter, 9 Mich. 246, 2 Scott 414, p. 162.
- Houston v. Bryan, 78 Ga. 181, 6 Am. St. Rep. 252, 1 S. E. 252, p. 515.
- Houston v. Timmerman, 17 Oreg. 499, 11 Am. St. Rep. 848, H. & B. 98, p. 286.
- Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077, p. 199.
- How v. Tenants of Bromsgrove, 1 Vern. 22, 2 Ames Eq. Jur. 55, 1 Keener 113, p. 104.
- Howard v. Clark, 71 Vt. 424, 45 Atl. 1042, 76 Am. St. Rep. 782, p. 381.
- Howard v. Harris, 1 Vern. 190, 2 Lead. Cas. Eq., 4th Am. ed., 1945, 1949, 1952, 1983, Kirch. 430, Shep. 57, p. 173, 698, 721.
- Howard v. Robinson, 5 Cush. 119, 123, p. 692.
- Howard v. Turner, 155 Pa. St. 349, 26 Atl. 723, 35 Am. St. Rep. 883, p. 475.
- Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 Am. Dec. 478, p. 281.
- Howe v. Taylor, 6 Oreg. 284, 291, 292, p. 408.
- Howe v. Watson, 179 Mass. 30, 60 N. E. 415, 1 Ames Eq. Jur. 429, p. 893.
- Howell v. Tompkins, 42 N. J. Eq. 305, 11 Atl. 333, p. 685.
- Hoyland v. Norris, 1 Cox C. C. 59, 2 Scott 371, p. 905.
- Howser v. Cruikshank, 122 Ala. 256, 25 South. 206, 82 Am. St. Rep. 76, p. 726.
- Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713, p. 840.
- Hoy v. Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687, p. 728, 730.
- Hoyt v. Hoyt, 85 N. Y. 142, 146, 149, p. 744.
- Hubbard, Matter of, 82 N. Y. 90, 92, p. 783.
- Hubbard v. Weare, 79 Iowa, 678, 44 N. W. 915, p. 450.
- Hubbell v. Moulson, 53 N. Y. 225, 13 Am. Rep. 519, Kirch. 334, p. 693, 695, 719.
- Hubbell v. Von Schoening, 49 N. Y. 326, 330, 2 Keener 1105, 2 Scott 350, p. 898, 899, 900.
- Hudkins v. Ward, 30 W. Va. 204, 8 Am. St. Rep. 22, 3 S. E. 600, p. 909.
- Hudson Bros. Com. Co. v. Glencoe etc. Co., 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722, p. 380.
- Huggins v. Huggins, 117 Ga. 151, 43 S. E. 759, p. 804.
- Hughes v. Jones, 116 N. Y. 75, 15 Am. St. Rep. 386, 22 N. E. 446, 5 L. R. A. 632, p. 786.
- Huguenin v. Baseley, 14 Ves. 273, 2 Lead. Cas. Eq., 4th Am. ed., 1156, 1174, 1192, 1242, p. 463, 514.
- Hulme v. Tenant, 1 Brown Ch. 16, 1 Lead. Cas. Eq. 679, p. 504, 651.

- Humboldt County v. Lander County, 22 Nev. 248, 58 Am. St. Rep. 750, 38 Pac. 578, 26 L. R. A. 749, p. 866.
- Hume v. Dixon, 37 Ohio St. 66, p. 341.
- Hun v. Cary, 82 N. Y. 65, 70, 37 Am. Rep. 546, H. & B. 507, p. 612, 626, 631.
- Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491, H. & B. 438, p. 577, 579, 580.
- Hunt v. Hunt, 4 De Gex, F. & J. 221, 1 Ames Eq. Jur. 131, p. 487.
- Hunt v. Hunt, 72 N. Y. 217, 228-230, 28 Am. Rep. 129, p. 52.
- Hunt v. Luck, [1901] 1 Ch. 45, [1902] 1 Ch. 428, p. 278.
- Hunt v. Peake, Johns. 705, 6 Jur., N. S., 1071, p. 834.
- Hunt v. Rousmaniere, 8 Wheat. 174, 212, 213, 1 Pet. 161, 2 Mason, 342, H. & B. 177, 182, 2 Ames Eq. Jur. 250, 3 Keener 6, 2 Scott 544, p. 191, 416, 417, 419.
- Hunter v. Bilyeu, 30 Ill. 228, 246, H. & B. 248, p. 434, 436.
- Hunter v. Carroll, 64 N. H. 572, 15 Atl. 17, 1 Ames Eq. Jur. 529, p. 844.
- Hunter v. McLaughlin, 43 Ind. 38, p. 446.
- Hunter v. Walters, L. R. 11 Eq. 292, p. 340.
- Hunter v. Watson, 12 Cal. 363, 377, 73 Am. Dec. 543, p. 295.
- Hunting v. Damon, 160 Mass. 441, 2 Keener 1156, p. 895.
- Hurlbert v. T. D. Kellogg Lumber & Mfg. Co., 115 Wis. 225, 91 N. W. 673, p. 446.
- Hurricane Tel. Co. v. Mohler, 51 W. Va. 1, 41 S. E. 421, p. 73, 78.
- Hutchinson v. Maxwell, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944, 57 L. R. A. 384, p. 551.
- Hutton v. Rossiter, 7 De Gex, M. & G. 9, 18, 19, 22, 23, p. 472.
- Hyde v. Lynde, 4 N. Y. 387, p. 809.
- Hyer v. Richmond Traction Co., 168 U. S. 471, 18 Sup. Ct. 114, 42 L. ed. 547, p. 885.
- Hyndman v. Hyndman, 19 Vt. 9, 46 Am. Dec. 171, Kirch. 583, p. 515, 698.
- I.
- Ibbottson v. Rhodes, 2 Vern. 554, p. 376.
- Ide v. Trorlicht Co., 116 Fed. 137, 148, 53 C. C. A. 341, 1 Ames Eq. Jur. 642, p. 198, 836.
- Illinois Central R. R. v. McCullough, 59 Ill. 166, p. 277.
- Ind, Coope & Co. v. Emerson, L. R. 12 App. Cas. 300, p. 370.
- Indiana, Bloomington & W. R. R. Co. v. Bird, 116 Ind. 217, 18 N. E. 837, 9 Am. St. Rep. 842, p. 375.
- Indiana, I. & I. R. Co. v. Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290, 297, p. 319.
- Ingham, In re, [1893] 1 Ch. 352, p. 349.
- Ingle v. Richards, 28 Beav. 361, p. 516.
- Inhab. of Cranford Tp. v. Watters, 61 N. J. Eq. 248, 48 Atl. 316, p. 68.
- Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710, p. 308.
- Ins. Co. v. Bailey, 13 Wall. 616, 620, 621, 623, 20 L. ed. 501, 3 Keener 474, p. 66, 143, 473, 474, 853, 861.
- Interstate B. & L. Ass'n v. McCartha, 43 S. C. 72, 20 S. E. 807, p. 294.
- Irish v. Antioch College, 126 Ill. 638, 9 Am. St. Rep. 638, 18 N. E. 768, p. 557.
- Iron Age Pub. Co. v. W. U. T. Co., 83 Ala. 498, 3 Am. St. Rep. 758, 3 South. 449, 2 Keener 834, p. 818, 893.
- Irwin v. Dane, 2 Biss. 442, Fed. Cas. No. 7,081, p. 837.
- Irwin v. Williar, 110 U. S. 510, 4 Sup. Ct. 160, p. 486.
- Isaacs, In re, [1894] 3 Ch. 506, 2 Scott 402, p. 681.
- Ives v. Canby, 48 Fed. 718, p. 660.
- J.
- Jackson v. Bronson, 19 Johns. 325, Kirch. 629, p. 693.
- Jackson v. Duke of Newcastle, 3 De Gex, J. & S. 275, 1 Keener 707, p. 834.

- Jackson v. Ludeling**, 21 Wall. 616, 22 L. ed. 492, p. 628.
- Jackson v. Lynch**, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246, p. 197.
- Jackson v. Phillips**, 14 Allen 539, 556, H. & B. 410, p. 575, 577.
- Jackson v. Stevenson**, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691, 1 Ames Eq. Jur. 179, p. 777.
- Jackson's Case**, Lane 60, 1 Ames Eq. Jur. 143, 2 Scott 471, p. 319.
- Jackson Square L. & S. Ass'n v. Bartlett**, 95 Md. 661, 53 Atl. 426, 93 Am. St. Rep. 416, p. 551.
- Jacob v. Revell**, [1902] 2 Ch. 858, p. 463.
- Jacobs v. Morange**, 47 N. Y. 57, Shep. 153, p. 416.
- Jacques**, In re, [1903] 1 Ch. 267, p. 248.
- Jaggat v. Winslow**, 30 Minn. 263, 15 N. W. 242, p. 445.
- James v. Kerr**, 40 Ch. Div. 449, p. 496, 507.
- James v. Morey**, 2 Cow. 246, 286, 298, 300, 313, 14 Am. Dec. 475, p. 293, 328, 380.
- James v. Newton**, 142 Mass. 366, 56 Am. Rep. 692, 8 N. E. 122, p. 764.
- Jamieson v. Wallace**, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 762, p. 498.
- Jamison v. Brady**, 6 Serg. & R. 466, 9 Am. Dec. 460, p. 639.
- Janes v. Throckmorton**, 57 Cal. 368, p. 568.
- Janney v. Buel**, 55 Ala. 408, p. 133.
- Jaques v. Weeks**, 7 Watts, 261, 270, 275, p. 298.
- Jaquith v. Hudson**, 5 Mich. 123, H. & B. 62, p. 219, 220.
- Jeakins v. Frazier**, 64 Kan. 267, 67 Pac. 864, 2 Ames Eq. Jur. 268, p. 424.
- Jefferson v. Coleman**, 110 Ind. 515, 11 N. E. 465, p. 731.
- Jefferys v. Jefferys**, Craig & P. 138, 141, 1 Ames Eq. Jur. 261, 2 Keener 760, 1 Scott 303, 2 Scott 154, p. 173, 892.
- Jefferys v. Smith**, 1 Jacob & W. 298, p. 804.
- Jenkins v. Morris**, L. R. 14 Ch. Div. 674, p. 505.
- Jenner v. Turner**, 16 Ch. Div. 188, p. 488.
- Jennings v. Bank of California**, 79 Cal 323, 21 Pac. 852, 12 Am. St. Rep. 145, 5 L. R. A. 233, p. 330.
- Jennings v. Broughton**, 5 De Gex, M. & G. 126, 17 Beav. 234, p. 447, 453, 458, 526.
- Jennings v. Moore**, 2 Vern. 609, p. 319.
- Jennings v. Ward**, 2 Vern. 520, Kirch. 470, p. 698.
- Jerome v. Ross**, 7 Johns. Ch. 315, 333, 11 Am. Dec. 484, 1 Scott 692, p. 843.
- Jersey City Printing Co. v. Cassidy**, 63 N. J. Eq. 759, 53 Atl. 230, 1 Scott 768, p. 846.
- Jervis v. Berridge**, L. R. 8 Ch. 351, p. 428.
- Jervis v. Smith**, 1 Hoff. Ch. 470, 1 Ames Eq. Jur. 313, p. 779.
- Jesson v. Jesson**, 2 Vern. 255, p. 250.
- Jesus College v. Bloom**, 3 Atk. 262, 263, Amb. 54, 1 Scott 115, 1 Ames Eq. Jur. 481, 1 Keener 404, p. 98, 829.
- Jevon v. Bush**, 1 Vern. 342, Ames Trusts 217, p. 549.
- Jew v. Wood, Craig & P.** 185, 1 Keener 240, p. 795.
- Jewell v. Lee**, 14 Allen 145, 92 Am. Dec. 744, 2 Keener 479, p. 776.
- Jewett v. Bowman**, 29 N. J. Eq. 174, p. 65.
- Jewett v. Palmer**, 7 Johns. Ch. 65, 11 Am. Dec. 401, p. 362.
- Johns v. McLester**, 137 Ala. 283, 34 South. 174, 97 Am. St. Rep. 27, p. 631.
- Johns v. Wilson**, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. ed. 613, p. 711.
- John's Will**, In re, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242, p. 577, 580.
- Johnson**, In re, 15 Ch. Div. 548, Ames Trusts, 426, p. 624.
- Johnson v. Atkinson**, 3 Anstr. 798, 2 Ames Eq. Jur., p. 793, 797.
- Johnson v. Christian**, 128 U. S. 374, 9 Sup. Ct. 87, 31 L. ed. 820, p. 852.

- Johnson v. Colley, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721, p. 666, 668.
- Johnson v. Cook, 24 Wash. 274, 64 Pac. 729, p. 221.
- Johnson v. Crook, L. R. 12 Ch. Div. 639, 649, p. 28, 33.
- Johnson v. Gallagher, 3 De Gex, F. & J. 494, 509-520, 521, p. 504, 636, 650.
- Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471, p. 294, 295.
- Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773, p. 881.
- Johnson v. National B. & L. Ass'n, 125 Ala. 465, 28 South. 2, 82 Am. St. Rep. 257, p. 445.
- Johnson v. Thompson, 129 Mass. 398, p. 710.
- Johnson v. Torpey, 35 Nebr. 604, 37 Am. St. Rep. 447, 53 N. W. 575, p. 914.
- Johnson v. Webster, 4 De Gex, M. & G. 474, p. 385.
- Johnson v. Zink, 51 N. Y. 333, p. 710.
- Johnstone v. Cox, L. R. 16 Ch. Div. 571, p. 325.
- Johnstone's Settlement, In re, L. R. 14 Ch. Div. 162, p. 659.
- Johnston's Estate, 185 Pa. St. 179, 64 Am. St. Rep. 621, 39 Atl. 879, p. 549.
- Jones v. Beach, 2 De Gex, M. & G. 886, p. 192.
- Jones v. Chappell, L. R. 20 Eq. 839, 1 Keener 744, p. 833.
- Jones v. Davis, 121 Ala. 348, 25 South. 789, p. 340.
- Jones v. Gregory, 2 De Gex, J. & S. 83, p. 473.
- Jones v. Hardy, 127 Ala. 221, 28 South. 564, 2 Ames Cas. Eq. Jur. 91, p. 122.
- Jones v. Higgins, L. R. 2 Eq. 538, 544, p. 640.
- Jones v. Jones, 8 Sim. 633, p. 315.
- Jones v. Lamar, 34 Fed. 454, p. 385.
- Jones v. Lloyd, L. R. 18 Eq. 265, 274, 275, p. 786.
- Jones v. Lowery Bkg. Co., 104 Ala. 252, 16 South. 11, p. 323.
- Jones v. MacKenzie, 122 Fed. 390, p. 64.
- Jones v. McNarrin, 68 Me. 334, 28 Am. Rep. 66, p. 286.
- Jones v. Mason, 5 Rand. 577, 16 Am. Dec. 761, p. 249.
- Jones v. North, L. R. 19 Eq. 426, 2 Keener 273, p. 820.
- Jones v. Parker, 163 Mass. 564, 47 Am. St. Rep. 485, 40 N. E. 1044, 1 Ames Eq. Jur. 73, 2 Scott 83, 2 Keener 192, p. 887, 888.
- Jones v. Reid, 12 W. Va. 350, 29 Am. Rep. 455, p. 639.
- Jones v. Smith, 1 Hare 43, 55, 60-70, 1 Phill. Ch. 244, 256, p. 266, 278.
- Jones v. Weakley, 99 Ala. 441, 12 South. 420, 42 Am. St. Rep. 84, 19 L. R. A. 700, p. 667, 668.
- Jones' Appeal, 8 Watts & S. 141, 143, 147, 42 Am. Dec. 282, p. 612.
- Jordan v. Cheney, 74 Me. 359, p. 706.
- Jordan v. Phillips & Crew Co., 126 Ala. 561, 29 South. 831, p. 64.
- Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556, H. & B. 188, 3 Keener 25, p. 421.
- Jordan v. Volkenning, 72 N. Y. 300, 306, p. 446.
- Jorden v. Money, 5 H. L. Cas. 185, p. 395.
- Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. ed. 843, p. 890.
- Joynes v. Statham, 3 Atk. 388, 2 Scott 253, p. 431, 697, 701.
- Judson v. Corcoran, 17 How. 612, p. 326, 337, 338.
- Justis v. English, 30 Gratt. 565, p. 639.

## K.

- Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203, 3 Keener 859, H. & B. 32, p. 499.
- Kane v. Vanderburgh, 1 Johns. Ch. 11, 12, 1 Keener 450, 1 Scott 661, p. 827, 829.
- Kansas & A. V. R. Co. v. Fitzhugh, 61 Ark. 341, 54 Am. St. Rep. 311, 33 S. W. 960, p. 854.
- Karberg's Case, [1892] 3 Ch. 1, p. 450.
- Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, p. 834.

- Kean v. Johnson**, 9 N. J. Eq. 401, p. 821.
- Kean v. Union Water Co.**, 52 N. J. Eq. 813, 46 Am. St. Rep. 538, 31 Atl. 282, p. 821.
- Keane v. Kyne**, 66 Mo. 216, 2 Ames Eq. Jur. 144, p. 875.
- Kearney v. Vaughan**, 50 Mo. 284, p. 411.
- Kearney Bank v. Froman**, 129 Mo. 427, 31 S. W. 769, 50 Am. St. Rep. 456, p. 305.
- Keates v. Lyon**, L. R. 4 Ch. 218, 224, 2 Keener 493, p. 776.
- Keeble v. Keeble**, 85 Ala. 552, 5 South. 149, H. & B. 68, p. 219.
- Keen v. James**, 39 N. J. Eq. 257, 51 Am. Rep. 29, 3 Keener 590, p. 464, 466.
- Keep v. Miller**, 42 N. J. Eq. 100, 6 Atl. 495, 1 Keener 328, H. & B. 157, p. 164.
- Keepers v. Fidelity Title etc. Co.**, 56 N. J. Law, 302, 28 Atl. 585, 44 Am. St. Rep. 397, 23 L. R. A. 184, p. 668.
- Keisselbrach v. Livingston**, 4 Johns. Ch. 114, 148, 2 Scott 616, p. 434, 436.
- Keister v. Myers**, 115 Ind. 312, 17 N. E. 161, 3 Keener 314, p. 438.
- Keith v. Kellam**, 35 Fed. 243, 246, p. 513.
- Keith v. Scales**, 124 N. C. 497, 32 S. E. 809, p. 550.
- Keith, Prowse & Co. v. Nat. T. Co.**, [1894] 2 Ch. 147, 2 Keener 188, p. 888.
- Keithley v. Wood**, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265, p. 700.
- Keller v. Harper**, 64 Md. 74, 1 Atl. 65, 3 Keener 964, p. 680.
- Kelley v. Boettcher**, 85 Fed. 55, 29 C. C. A. 14, 56 U. S. App. 363, p. 199.
- Kelley v. Jenness**, 56 Me. 455, 79 Am. Dec. 623, p. 590.
- Kelley v. York Cliffs Imp. Co.**, 94 Me. 374, 47 Atl. 898, 1 Ames Eq. Jur. 402, p. 894.
- Kelly v. Galbraith**, 186 Ill. 593, 58 N. E. 431, p. 100.
- Kelly v. Lehigh Min. & Mfg. Co.**, 98 Va. 405, 81 Am. St. Rep. 736, 36 S. E. 511, p. 68, 132.
- Kelly v. Morris**, L. R. Eq. 697, p. 838.
- Kelly v. Nichols**, 17 R. I. 306, 21 Atl. 906, p. 576.
- Kelly v. Solari**, 9 Mees. & W. 54, p. 429.
- Kelly v. Turner**, 74 Ala. 513, 3 Keener 92, p. 417, 418.
- Kemble v. Farren**, 6 Bing. 141, p. 221.
- Kemble v. Kean**, 6 Sim. 333, 1 Ames Eq. Jur. 91, p. 818.
- Kempson v. Kempson**, 58 N. J. Eq. 94, 43 Atl. 97, 1 Ames Eq. Jur. 26, p. 851.
- Kendall, Ex parte**, 17 Ves. 514, 520, 525, 526, 527, p. 190.
- Kendall v. New England Co.**, 13 Conn. 384, p. 181.
- Kendall v. Woodruff**, 87 N. Y. 1, 7, p. 727.
- Kendrick v. Eggleston**, 56 Iowa, 128, 41 Am. Rep. 90, 8 N. W. 786, p. 748.
- Kennedy v. Green**, 3 Mylne & K. 699, 719, 2 Lead. Cas. Eq., 4th Am. ed., 121, p. 304.
- Kennedy v. Johnson**, 65 Pa. St. 451, 3 Am. Rep. 650, p. 237.
- Kennerty v. Phosphate Co.**, 21 S. C. 226, 53 Am. Rep. 669, p. 429.
- Kenney v. Wexham**, 6 Madd. 355, 357, 2 Keener 80, p. 163, 881, 882, 883.
- Kensington, Ex parte**, 2 Ves. & B. 79, Kirch. 111, p. 755.
- Kent v. Riley**, L. R. 14 Eq. 190, 194, p. 530.
- Kentucky Nat. Bank v. Stone**, 93 Ky. 623, 20 S. W. 1040, p. 622.
- Kenyon v. Welty**, 20 Cal. 637, 81 Am. Dec. 137, 2 Ames Eq. Jur. 283, p. 410.
- Kern v. Hazlerigg**, 11 Ind. 443, 71 Am. Dec. 360, p. 750.
- Kernohan v. Durham**, 48 Ohio St. 1 26 N. E. 982, 12 L. R. A. 41, p. 351.
- Kessler v. Ensley Co.**, 123 Fed. 546, p. 401, 402.
- Kessler & Co. v. Ensley Co.**, 129 Fed. 397, p. 44.
- Ketchum v. Duncan**, 96 U. S. 659, p. 398.
- Kettle River R'y Co. v. Eastern R'y Co.**, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111, 2 Scott 489, p. 776.

- Kevan v. Crawford, L. R. 6 Ch. Div. 29, p. 531.  
 Kibbe v. Benson, 17 Wall. 624, 21 L. ed. 741, p. 855.  
 Kidd v. Williams, 132 Ala. 140, 31 South. 458, 56 L. R. A. 879, p. 520.  
 Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. ed. 246, 2 Ames Eq. Jur. 47, 1 Keener 295, p. 143, 798, 799.  
 Kilmer v. Smith, 77 N. Y. 226, 33 Am. Rep. 613, 3 Keener 283, p. 437, 444.  
 Kilpin v. Kilpin, 1 Mylne & K. 520, 532, p. 592.  
 Kimball v. Norton, 59 N. H. 1, 47 Am. Rep. 171, p. 611.  
 Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333, p. 613.  
 Kimberley v. Jennings, 6 Sim. 340, 2 Keener 204, p. 818, 819.  
 Kinder v. Jones, 17 Ves. 110, 1 Ames Eq. Jur. 490, 1 Keener 550, p. 842.  
 King v. Baldwin, 2 Johns. Ch. 554, 17 Johns. 384, 8 Am. Dec. 415, p. 63.  
 King v. Bardeau, 6 Johns. Ch. 38, 10 Am. Dec. 312, 2 Scott 387, 2 Keener 1123, p. 905.  
 King v. Bays, Dyer, 283b, Ames Cas. on Trusts, 216, p. 549.  
 King v. Brigham, 23 Oreg. 262, 31 Pac. 601, 18 L. R. A. 366, p. 866.  
 King v. Carpenter, 37 Mich. 363, p. 873.  
 King v. Davis, 60 Vt. 502, 11 Atl. 727, p. 506.  
 King v. Denison, 1 Ves. & B. 260, 272, p. 588.  
 King v. Pardee, 96 U. S. 90, p. 592.  
 King v. Portis, 77 N. C. 25, p. 294.  
 King v. Rossett, 2 Younge & J. 33, 3 Keener 886, p. 919.  
 King v. Ruckman, 24 N. J. Eq. 316, 2 Keener 390, p. 899.  
 King v. Smith, 2 Hare 239, 1 Ames Eq. Jur. 483, note, p. 829.  
 King v. Stuart, 84 Fed. 546, 1 Scott 712, p. 843.  
 King v. Talbot, 40 N. Y. 76, Ames Trusts 472, H. & B. 511, p. 612, 615.  
 King v. Young Men's Ass'n, 1 Woods, 386, Fed. Cas. No. 7,811, p. 752.  
 King, The, v. Ex'rs of Sir John Decombe, Cro. Jac. 512, Ames Trusts, 353, p. 552.  
 King's Att'y v. Sands, Freeman's Ch. Cas. 129, Ames Trusts, 354, p. 552.  
 Kinney v. Ensmenger, 87 Ala. 340, 6 South. 72, 2 Scott 633, p. 429.  
 Kinsley v. Abbott, 19 Me. 430, 434, p. 190.  
 Kirby v. Potter, 4 Ves. 750, p. 658.  
 Kirby v. Raynes, 138 Ala. 194, 100 Am. St. Rep. 39, 35 South. 118, p. 702.  
 Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, p. 275, 277, 279.  
 Kirk v. Eddowes, 3 Hare, 509, p. 248.  
 Kirkpatrick v. Clark, 132 Ill. 342, 22 Am. St. Rep. 531, 24 N. E. 71, 8 L. R. A. 511, p. 185.  
 Kirsch v. Tozier, 143 N. Y. 390, 38 N. E. 375, 42 Am. St. Rep. 729, H. & B. 77, p. 274, 295.  
 Kisch v. Cent. R'y of Venezuela, 3 De Gex, J. & S. 122, 135, L. R. 2 H. L. 99, 125, p. 447, 449, 629.  
 Klabunde v. Byron-Reed Co., (Nebr.) 98 N. W. 182, p. 520.  
 Klein v. New York Life Ins. Co., 104 U. S. 88, p. 224.  
 Klie v. VanBroock, 56 N. J. Eq. 18, 37 Atl. 469, 1 Scott 668, p. 827, 828.  
 Kline v. Ragland, 47 Ark. 111, 14 S. W. 474, p. 590.  
 Knapp v. Bailey, 79 Me. 195, 201, 205, 1 Am. St. Rep. 295, 9 Atl. 122, H. & B. 75, p. 260, 262, 263, 701.  
 Knapp v. Connecticut Mut. Life Ins. Co., 85 Fed. 329, 29 C. C. A. 171, 40 L. R. A. 861, p. 713.  
 Knapp, Stout & Co. v. McCaffrey, 178 Ill. 107, 69 Am. St. Rep. 290, 52 N. E. 898, p. 737.  
 Kneeland v. Trust Co., 136 U. S. 89, 10 Sup. Ct. 950, p. 810.  
 Knight v. Knight, 3 Beav. 148, 11 Clark & F. 513, p. 571.  
 Knight v. Mahoney, 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 573, p. 489.  
 Knoblock v. Mueller, 123 Ill. 554, 17 N. E. 696, H. & B. 80, p. 356, 357, 359, 375.

- Knox v. Eden Musee Americain Co.**, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700, p. 332.
- Knox v. Gye**, L. R. 5 H. L. 656, 675, p. 594, 595.
- Knox v. Knox**, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155, p. 572.
- Knox v. Singmaster**, 75 Iowa, 64, 39 N. W. 183, 3 Keener 813, p. 522.
- Koch v. Briggs**, 14 Cal. 256, 73 Am. Dec. 651, p. 557.
- Koehl v. Burrell**, L. R. 7 Ch. Div. 551, 1 Keener 850, p. 834.
- Koen v. Brill**, 75 Miss. 870, 65 Am. St. Rep. 633, 23 South. 481, p. 909.
- Kofka v. Rosicky**, 41 Neb. 328, 43 Am. St. Rep. 685, 59 N. W. 788, 25 L. R. A. 207, p. 903.
- Konvalinka v. Schlegel**, 104 N. Y. 125, 58 Am. Rep. 494, 9 N. E. 868, H. & B. 132, p. 236.
- Kopper v. Dyer**, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742, H. & B. 166, 1 Scott 400, p. 225, 404, 409.
- Kountz v. Kirkpatrick**, 72 Pa. St. 376, 13 Am. Rep. 687, p. 330.
- Kowalke v. Milwaukee E. R. & L. Co.**, 103 Wis. 472, 79 N. W. 762, 74 Am. St. Rep. 877, 2 Scott 603, p. 428, 429.
- Krutz v. Robbins**, 12 Wash. 7, 40 Pac. 415, 50 Am. St. Rep. 871, 28 L. R. A. 676, p. 220.
- Kuhl v. Gally Universal Press Co.**, 123 Ala. 452, 26 South. 535, 82 Am. St. Rep. 135, p. 486, 499, 502.
- Kunkle v. Wherry**, 189 Pa. St. 198, 69 Am. St. Rep. 802, 42 Atl. 112, H. & B. 61, p. 219.
- Kyle v. Fehley**, 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866, 3 Keener 131, p. 421.
- L.**
- Labouchere v. Earl of Wharnccliffe**, L. R. 13 Ch. Div. 346, p. 821.
- Lacey, Ex parte**, 6 Ves. 625, 627, p. 516.
- Lackawanna etc. Co. v. Farmers' Loan & Tr. Co.**, 79 Fed. 202, p. 810.
- Lacon v. Briggs**, 3 Atk. 105, 2 Scott 754, p. 198.
- Lacy, In re**, [1899] 2 Ch. 149, p. 575.
- Ladd v. Judson**, 174 Ill. 344, 66 Am. St. Rep. 267, 51 N. E. 838, p. 911.
- Ladue v. Detroit etc. R. R.**, 13 Mich. 380, 87 Am. Dec. 759, p. 704.
- Lady Elibank v. Montolieu**, 5 Ves. 737, 1 Lead. Cas. Eq. 623, 639-669, 670-679, p. 646, 647.
- Laing v. McKee**, 13 Mich. 124, 87 Am. Dec. 738, p. 603.
- Lake v. Gibson**, 1 Eq. Cas. Abr. 290, 294, pl. 3, 1 Lead. Cas. Eq., 4th Am. ed., 264, 268, 1 Scott 367, p. 189, 742.
- Lake v. Hancock**, 38 Fla. 53, 20 South. 811, 56 Am. St. Rep. 159, p. 367.
- Lake View M. & M. Co. v. Hannon**, 93 Ala. 87, 9 South. 539, p. 609.
- Lamar v. Micou**, 112 U. S. 452, 465, 5 Sup. Ct. Rep. 221, 26 L. ed. 774, H. & B. 515, p. 615.
- Lambe v. Eames**, L. R. 10 Eq. 267, 6 Ch. 597, Ames Trusts 85, p. 571.
- Lambton v. Mellish**, [1894] 3 Ch. 163, 1 Scott 744, p. 831.
- Lamoille Co. Nat. Bank v. Bingham**, 50 Vt. 105, 28 Am. Rep. 490, p. 493.
- Lamont v. Cheshire**, 65 N. Y. 30, 37, 38, p. 287.
- Lampet's Case**, 10 Coke, 46b, 48a, p. 758.
- Lamprey v. Lamprey**, 29 Minn. 156, 12 N. W. 514, p. 892.
- Lancey v. Randlett**, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169, 1 Scott 409, p. 75, 93, 94, 409.
- Lane v. Debenham**, 11 Hare, 188, Ames Trusts 513, p. 607.
- Lane v. Newdigate**, 10 Ves. 192, 1 Ames Eq. Jur. 74, 2 Scott 73, 2 Keener 139, p. 848.
- Lane & Bodley Co. v. Locke**, 150 U. S. 193, 14 Sup. Ct. 78, p. 836.
- Langdon v. Astor's Ex'rs**, 16 N. Y. 9, p. 247, 249.
- Langdon v. Sherwood**, 124 U. S. 74, 8 Sup. Ct. 429, Shep. 79, p. 207.
- Langford v. Pitt**, 2 P. Wms. 629, 2 Scott 405, 2 Keener 333, p. 162, 897.
- Langridge v. Payne**, 2 Johns. & H. 423, p. 218.

- Lang Syne Gold Mining Co. v. Ross, 20 Nev. 127, 19 Am. St. Rep. 337, 18 Pac. 358, p. 271.
- Lanoy v. Duke of Athol, 2 Atk. 444, 446, 1 Scott 374, p. 181.
- Lansdowne v. Lansdowne, 2 Jacob & W. 205, Mos. 364, 365, 3 Keener 1, 2 Scott 540, p. 424.
- Lansdowne v. Lansdowne, 1 Madd. 116, 1 Keener 406, 1 Scott 650, p. 829.
- Larabrie v. Brown, 26 L. J. Eq. N. S. 605, 1 Keener 284.
- Larned v. Donovan, 155 N. Y. 341, 49 N. E. 942, p. 350.
- Larrowe v. Beam, 10 Ohio 498, p. 357.
- Lart, In re, [1896] 2 Ch. 789, p. 395.
- La Societe Francaise v. Dist. Court, 53 Cal. 495, p. 802.
- Latham v. Chafee, 7 Fed. 525, p. 805.
- Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141, p. 605.
- Latshaw's Appeal, 122 Pa. St. 142, 9 Am. St. Rep. 76, 15 Atl. 676, p. 869.
- Lattin v. McCarty, 41 N. Y. 107, 109, 110, p. 101.
- Lawes v. Bennett, 1 Cox, 167, 1 Scott 602, p. 680, 681.
- Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29, p. 445.
- Lawrence v. Saratoga Lake R'y Co., 36 Hun 467, 2 Keener 171, p. 888, 889.
- Lawson v. Copeland, 2 Br. Ch. Cas. 156 Ames Trusts, 492, p. 610, 612.
- Lawton v. Estes, 167 Mass. 181, 45 N. E. 90, 57 Am. St. Rep. 450, p. 186.
- Leak v. Morrice, 2 Cas. in Ch. 135, 2 Keener 746, p. 905.
- Leake v. Watson, 58 Conn. 332, 18 Am. St. Rep. 270, 20 Atl. 343, 8 L. R. A. 666, p. 597.
- Learned v. Tritch, 6 Colo. 432, p. 372.
- Leather v. Simpson, L. R. 11 Eq. 398, p. 472.
- Leavitt v. Reynolds, 79 Iowa 348, 44 N. W. 567, 7 L. R. A. 365, p. 706.
- Lechmere v. Earl of Carlisle, 3 P. Wms. 211, 215, 222, p. 252, 678.
- Lee v. Cole, 17 Oreg. 559, 21 Pac. 819, p. 739.
- Lee v. Howlett, 2 Kay & J. 531, Ames Trusts 329, p. 326.
- Lee v. Kirby, 104 Mass. 420, 428, 2 Scott 300, p. 484.
- Lee v. Lee, 4 Ch. Div. 175, 179, p. 638.
- Lee v. Munroe, 7 Cranch, 366, 368, p. 349.
- Lee v. Percival, 85 Iowa, 135, 52 N. W. 543, 3 Keener 135, p. 419.
- Lee v. Simpson, 37 Fed. 12, 2 L. R. A. 659, p. 816.
- Leech v. Schweder, L. R. 9 Ch. 463, p. 778.
- Leffler v. Armstrong, 4 Iowa, 482, 68 Am. Dec. 672, p. 558.
- Lehigh Valley R. R. Co. v. McFarlan, 30 N. J. Eq. 135, 2 Ames Eq. Jur. 85, 31 N. J. Eq. 730, 754, 759-761, 1 Keener 133, p. 114, 122.
- Leigh v. Harrison, 69 Miss. 923, 11 South. 604, 18 L. R. A. 49, p. 551.
- Leighton v. Orr, 44 Iowa, 679, p. 510.
- Leitch v. Wells, 48 Barb. 637, 48 N. Y. 585, 602, 609, p. 288.
- Le May v. Baxter, 11 Wash. 649, 40 Pac. 122, p. 76.
- Lemke v. Dietz, (Wis.) 98 N. W. 936, p. 494.
- Le Neve v. Le Neve, Amb. 436, 2 Lead. Cas. Eq. 1-108, 109, and notes, 227, 2 Lead. Cas. Eq., 4th Am. ed., secs. 140-142, 3 Atk. 646, 1 Ves. Sr. 64, 1 Scott 536, p. 197, 256, 299, 301, 302, 303, 314, 318.
- Lent v. Howard, 89 N. Y. 169, 3 Keener 952, p. 680.
- Lenzberg, In re, L. R. 7 Ch. Div. 650, p. 527.
- Leonard v. Poole, 114 N. Y. 371, 21 N. E. 707, 11 Am. St. Rep. 667, 4 L. R. A. 728, 2 Scott 787, p. 500.
- Le Roy v. Rogers, 3 Paige, 234, p. 910.
- Levi v. Blackwell, 35 S. C. 511, 15 S. E. 243, p. 179.
- Lewin v. Lewin, 2 Ves. Sr. 415, p. 664.
- Lewis, In re, 81 N. Y. 421, p. 556.
- Lewis v. Allenby, L. R. 10 Eq. 668, p. 578.
- Lewis v. Arbuckle, 85 Iowa, 335, 52 N. W. 237, 16 L. R. A. 677, p. 505.
- Lewis v. Cocks, 23 Wall. 466, 469, 470, 23 L. ed. 70, Shep. 17, p. 64, 143.

- Lewis v. Denver City Waterworks Co.*, 19 Colo. 236, 41 Am. St. Rep. 248, 74 Pac. 993, p. 822.
- Lewis v. Gollner*, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81, 1 Ames Eq. Jur. 152, 2 Scott 496, 2 Keener 612, p. 777.
- Lewis v. Hawkins*, 23 Wall. 119, H. & B. 665, p. 753.
- Lewis v. Holdrege*, 56 Nebr. 379, 76 N. W. 890, p. 182.
- Lewis v. Kirk*, 28 Kan. 497, 42 Am. Rep. 173, p. 329, 350.
- Lewis v. Lord Lechmere*, 10 Mod. 503, p. 881.
- Lewis v. Smith*, 9 N. Y. 502, 504, 510, 511, 61 Am. Dec. 706, p. 235.
- Lewis v. Town of North Kingstown*, 16 R. I. 15, 26 Am. St. Rep. 724, 11 Atl. 173, p. 99.
- Lewis's Appeal*, 67 Pa. St. 166, p. 184.
- Leyland v. Illingworth*, 2 De Gex, F. & J. 248, 252, 254, p. 463.
- Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429, p. 666, 667.
- Liberty Bell, The*, 23 Fed. 843, p. 822.
- Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173, Lewis 323, p. 845.
- Lightfoot v. Heron*, 3 Younge & C. 586, p. 507.
- Liles v. Terry*, [1895] 2 Q. B. 679, 3 Keener 827, p. 519.
- Lindsay v. American Mortgage Co.*, 97 Ala. 412, 11 South. 770, p. 805.
- Lindsay v. Barron*, 60 E. C. L. 291, 2 Ames Eq. Jur. 39, p. 795.
- Lindsay v. Cooper*, 94 Ala. 170, 11 South. 325, 33 Am. St. Rep. 105, 16 L. R. A. 813, p. 401.
- Lindsay v. Smith*, 78 N. C. 328, 24 Am. Rep. 463, p. 496, 497.
- Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, p. 198.
- Lingard v. Bromley*, 1 Ves. & B. 114, 117, p. 621.
- Lingwood v. Stowmarket Co.*, L. R. 1 Eq. 77, 336, 1 Keener 717, p. 833.
- Linnell v. Battey*, 17 R. I. 241, 21 Atl. 606, 1 Keener 387, p. 876, 877.
- Linsey v. Platt*, 9 Fla. 150, p. 248.
- Liquidation Estates Purchase Co. v. Willoughby*, [1898] App. Cas. 321, p. 383.
- Liskey v. Snyder*, (W. Va.) 49 S. E. 515, p. 523.
- Littauer v. Houck*, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572, p. 302.
- Little v. Birdwell*, 21 Tex. 597, 73 Am. Dec. 242, p. 489.
- Little v. Gould*, 2 Blatchf. 165, Fed. Cas. No. 8,394, p. 838.
- Little v. Kingswood Coll. Co.*, L. R. 20 Ch. Div. 733, p. 816.
- Littleton v. Fritz*, 65 Iowa 488, 54 Am. Rep. 19, 22 N. W. 641, 1 Ames Eq. Jur. 31, p. 826.
- Livesey v. Jones*, 35 Atl. 1064, 55 N. J. Eq. 204, p. 579.
- Livingston v. Livingston*, 6 Johns. Ch. 497, 499, 500, 10 Am. Dec. 353, 1 Scott 689, 1 Keener 560, p. 843.
- Lloyd v. Attwood*, 3 De Gex & J. 614, 657, p. 516.
- Lloyd v. Banks*, L. R. 3 Ch. 488, 490, p. 259, 325.
- Lloyd v. Collett*, 4 Brown Ch. 469, 4 Ves. 690, 2 Scott 329, p. 900.
- Lloyd's Bank Co. v. Jones*, L. R. 29, Ch. Div. 221, 227, Ames Trusts 272, p. 349.
- Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707, p. 806.
- Lobdell v. Baker*, 3 Met. 469, p. 445.
- Lockwood v. Faber*, 27 Fed. 63, p. 836.
- Lockwood Co. v. Lawrence*, 77 Me. 297, 309, 52 Am. Rep. 763, p. 120.
- Loewen v. Forsee*, (Mo.) 35 S. W. 1138, p. 345.
- Loggie v. Chandler*, 95 Me. 220, 49 Atl. 1059, 2 Ames Eq. Jur. 140, p. 874.
- Lombard v. Chicago etc. Cong.*, 75 Ill. 271, 2 Keener 398, p. 163.
- Lombard v. Morse*, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273, p. 41.
- London & N. W. R'y v. Lancashire etc. R'y*, L. R. 4 Eq. 174, 178, 1 Ames Eq. Jur. 525, p. 844.
- Long v. King*, 117 Ala. 423, 23 South. 534, p. 590.
- Long v. Mitchell*, 63 Ga. 769, p. 673.
- Long v. Richards*, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281, p. 719.

- Longley v. Longley, L. R. 13 Eq. 133, p. 589.
- Longwood etc. R. R. v. Baker, 27 N. J. Eq. 166, 1 Keener 847, p. 848.
- Loog v. Bean, L. R. 26 Ch. D. 306, Lewis 388, p. 845.
- Loomer v. Wheelwright, 3 Sand. Ch. 135, 157, p. 382.
- Lord v. Lord, 23 Conn. 327, 331, p. 238.
- Lord & Polk Chemical Co., In re, 7 Del. Ch. 248, 44 Atl. 775, p. 192.
- Lord Irnham v. Child, 1 Brown Ch. 92, 2 Scott 256, p. 427.
- Lord Pengall v. Ross, 2 Eq. Abr. 46, 1 Ames Eq. Jur. 276, 2 Scott 180, p. 902.
- Lord Portarlington v. Soulby, 3 Mylne & K. 104, 1 Ames Eq. Jur. 24, 1 Keener 12, p. 499, 851.
- Lord Ranelagh v. Melton, 2 Drew & S. 278, 1 Ames Eq. Jur. 319, p. 897.
- Lord Tenham v. Herbert, 2 Atk. 483, 2 Ames Eq. Jur. 97, 1 Keener 191, p. 108.
- Lorillard v. Coster, 5 Paige, 172, 173, 218, p. 677.
- Losey v. Simpson, 11 N. J. Eq. 246, p. 297.
- Lothrop v. Marble, 12 S. D. 511, 76 Am. St. Rep. 626, 81 N. W. 885, p. 903.
- Louden v. Blythe, 16 Pa. St. 532, 55 Am. Dec. 527, p. 509.
- Loudon v. Youmans, 31 S. C. 150, 9 S. E. 775, 17 Am. St. Rep. 17, p. 364.
- Louisiana B'd of Liq. v. McComb, 92 U. S. 531, 23 L. ed. 623, p. 822.
- Louisville, N. A. & C. R. Co. v. Ohio Val. I. & C. Co., 57 Fed. 42, 45, p. 119.
- Louisville Tr. Co. v. Stone, 107 Fed. 305, 46 C. C. A. 299, p. 823.
- Lounsbury v. Norton, 59 Conn. 170, 22 Atl. 153, p. 700.
- Love v. Sierra Nevada Co., 32 Cal. 639, 652, 653, 654, 91 Am. Dec. 602, p. 172, 741.
- Lovejoy v. Potter, 60 Mich. 95, 26 N. W. 844, 2 Keener 458, p. 319.
- Lovell v. Galloway, 17 Beav. 1, p. 74.
- Lovell v. Hicks, 2 Younge & C. 46, p. 444.
- Loveridge v. Cooper, 3 Russ. 30, 31; affirmed on appeal, 3 Russ. 48-60, p. 194.
- Low v. Bouverie, [1801] 3 Ch. 82, 113, 1 Scott 565, p. 323, 451.
- Lowell v. Boston etc. R. R., 23 Pick. 24, 32, 34 Am. Dec. 33, p. 502, 503.
- Lowell v. Daniels, 2 Gray, 161, 61 Am. Dec. 448, p. 399.
- Lowell Inst. v. City of Lowell, 153 Mass. 530, 27 N. E. 518, 2 Keener 562, p. 776.
- Lowery v. Stewart, 25 N. Y. 239, 82 Am. Dec. 346, p. 764, 766.
- Lowman v. Lowman, 118 Ill. 582, 9 N. E. 245, p. 382.
- Lowndes v. Bettle, 33 L. J. Ch. 451, 10 Jur. N. S. 226, 3 New R. 409, 1 Scott 647, 1 Ames Eq. Jur. 499, 1 Keener 604, p. 842, 843, 844.
- Lowndes v. Cornford, 18 Ves. 299, p. 791.
- Lowndes v. Lane, 2 Cox, 363, p. 458.
- Lowther v. Carlton, 2 Atk. 242, 1 Scott 501, p. 306.
- Lucas v. Commerford, 3 Brown Ch. 166, p. 887.
- Lucy, Ex parte, 4 De Gex, M. & G. 356, 3 Keener 14, p. 425.
- Luddy's Trustee v. Peard, 33 Ch. D. 500, 519, 520, p. 518, 520.
- Ludington v. Patton, 111 Wis. 208, 86 N. W. 571, p. 421.
- Lufkin v. Nunn, 11 Ves. 170, p. 321.
- Lumley v. Wagner, 1 De Gex, M. & G. 604, 1 Ames Eq. Jur. 93, 2 Scott 96, 2 Keener 223, H. & B. 614, p. 818, 819.
- Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933, p. 225.
- Lusk v. Reel, 36 Fla. 418, 18 South. 582, 51 Am. St. Rep. 32, p. 344.
- Lutjen v. Lutjen, 64 N. J. Eq. 773, 53 Atl. 625, p. 198.
- Lyddon v. Ellison, 19 Beav. 565, 572, p. 247.
- Lyell v. Kennedy, L. R. 9 App. Cas. 81, p. 81.
- Lynch v. Metropolitan El. R'y Co., 129 N. Y. 274, 15 L. R. A. 287, 26 Am. St. Rep. 523, 29 N. E. 315, 1 Scott 124, Shep. 30, p. 98, 824.

- Lynch v. Murphy, 161 U. S. 247, 16 Sup. Ct. 523, p. 293, 372.
- Lynch v. Union Instit., 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842, 1 Keener 647, p. 844.
- Lynchburg P. B. & L. Co. v. Fellers, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851, p. 297, 729.
- Lyon, Estate of, 70 Iowa 375, 378, 30 N. W. 642, 5 L. R. A. 71, p. 248.
- Lysaght v. Edwards, L. R. 2 Ch. Div. 499, 506, 507, 515, 518, 519, 2 Keener 360, p. 164, 753.
- Lytle v. Sandefur, 93 Ala. 396, 9 South. 260, 1 Keener 383, p. 877.
- M.
- Macaulay v. Philips, 4 Ves. 15, 19, p. 646.
- McBratney v. Chandler, 22 Kan. 692, 31 Am. Rep. 213, p. 495.
- MacBryde v. Weekes, 22 Beav. 533, 2 Keener 1085, p. 899.
- McCabe v. Matthews, 155 U. S. 550, 15 Sup. Ct. 190, 39 L. ed. 257, 2 Keener 1199, p. 900.
- McCabe v. Swap, 14 Allen, 188, 191, p. 383.
- McCalley v. Otey, 99 Ala. 584, 42 Am. St. Rep. 87, 12 South. 406, p. 821.
- McCann v. Randall, 147 Mass. 81, 99, 9 Am. St. Rep. 666, 17 N. E. 75, 88, p. 206.
- McCarmel v. Shaw, 155 Ill. 37, 46 Am. St. Rep. 311, 39 N. E. 584, 27 L. R. A. 580, p. 822.
- McCarty v. Chalfant, 14 W. Va. 531, p. 704.
- McCaskill v. Connecticut Savings Bank, 60 Conn. 300, 25 Am. St. Rep. 323, 22 Atl. 568, 13 L. R. A. 737, p. 395.
- McCaul v. Braham, 16 Fed. 37, 2 Scott 116, H. & B. 607, p. 819.
- McClelland v. Saul, 113 Iowa, 208, 84 N. W. 1034, 86 Am. St. Rep. 370, p. 306.
- McCloskey v. Gleason, 56 Vt. 264, 38 Am. Rep. 770, p. 620.
- McClung v. Colwell, 107 Tenn. 592, 89 Am. St. Rep. 961, 64 S. W. 890, p. 590.
- McClure v. Raben, 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477, 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 558, p. 511.
- McClurg's Appeal, 58 Pa. St. 51, H. & B. 751, p. 491, 820.
- McConehay v. Wright, 121 U. S. 20, p. 143.
- MacConnell v. Lindsay, 131 Pa. St. 476, 19 Atl. 306, p. 642.
- McCormick v. Grogan, L. R. 4 H. L. 82, 91, 97, 1 Scott 241, p. 212, 430, 436.
- McCormick v. Stephany, 57 N. J. Eq. 257, 41 Atl. 840, 1 Ames Eq. Jur. 431, p. 892.
- McCreery v. Day, 119 N. Y. 1, 23 N. E. 198, 16 Am. St. Rep. 793, 6 L. R. A. 506, p. 174.
- McCreight v. Foster, L. R. 5 Ch. 604, 610, 611, p. 326.
- McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806, p. 220.
- McCutcheon v. Merz Capsule Co., 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415, p. 501.
- McDaniel v. Maxwell, 21 Oreg. 202, 27 Pac. 952, 28 Am. St. Rep. 740, p. 764.
- McDaniel v. Stroud, 106 Fed. 486, 45 C. C. A. 446, p. 383.
- McDonald v. Aten, 1 Ohio St. 293, p. 673.
- McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. 892, p. 378.
- Macdonald v. Irvine, 8 Ch. Div. 101, 124, p. 659.
- McDonald v. Yungbluth, 46 Fed. 836, 2 Scott 624, p. 436.
- McDonough v. O'Neil, 113 Mass. 92, Shep. 211, p. 601.
- McDowell v. Melroy, 69 Ill. 498, p. 520.
- McDuff, In re, [1896] 2 Ch. 451, p. 578.
- McElroy v. Kansas City, 21 Fed. 257, p. 825.
- McElvey v. Lewis, 76 N. Y. 373, p. 804.
- McFadden v. Hefley, 28 S. C. 317, 5 S. E. 812, 13 Am. St. Rep. 675, p. 657.

- McFadden v. Jenkyns, 1 Phill. Ch. 153, 157, Ames Trusts 47, p. 563, 567.
- McGough v. Sweetser, 97 Ala. 361, 12 South. 162, 19 L. R. A. 470, p. 721.
- McGowan v. Lufborrow, 82 Ga. 523, 14 Am. St. Rep. 178, 9 S. E. 427, p. 782.
- McGowin v. Remington, 12 Pa. St. 56, 51 Am. Dec. 584, 1 Scott 90, H. & B. 637, p. 100, 882.
- MacGregor v. Thompson, 7 Tex. Civ. App. 32, 26 S. W. 649, p. 312, 354.
- McHenry v. Hazard, 45 N. Y. 580, 2 Ames Eq. Jur. 118, p. 798, 861.
- McHenry v. Jewett, 90 N. Y. 58, H. & B. 743, p. 814.
- Macher v. Foundling Hospital, 1 Ves. & B. 187, p. 226.
- McIntosh v. Great West. R'y, 2 Macn. & G. 74, p. 472.
- Mack v. Hill, 28 Mont. 99, 72 Pac. 307, p. 176, 179.
- Mackay v. Douglas, L. R. 14 Eq. 106, 118-121, p. 532.
- McKay v. Ward, 20 Utah, 149, 57 Pac. 1024, 46 L. R. A. 623, p. 713.
- Mackenzie v. Coulson, L. R. 8 Eq. 368, 3 Keener 267, p. 437.
- Mackenzie v. Johnston, 4 Madd. 373, 1 Ames Eq. Jur. 444, 3 Keener 885, p. 919.
- McKim v. Hibbard, 142 Mass. 422, 8 N. E. 152, p. 620.
- McKinley v. Williams, 74 Fed. 94, 20 C. C. A. 312, 36 U. S. App. 749, p. 518.
- Macknet v. Macknet, 29 N. J. Eq. 54, p. 237, 238.
- Mackreth v. Marlar, 1 Cox, 260, 2 Scott 328, p. 900.
- Mackreth v. Symmons, 15 Ves. 329, 336, 349, 354, 1 Lead. Cas. Eq. 289, 1 Scott 71, p. 319, 745, 749.
- McLane v. Placerville, etc. R. Co., 66 Cal. 606, 6 Pac. 748, p. 810.
- McLarren v. Brewer, 51 Me. 402, 407, H. & B. 49, p. 599.
- McLaughlin v. McLaughlin, 20 N. J. Eq. 190, p. 180.
- MacLaury v. Hart, 121 N. Y. 636, 24 N. E. 1013, p. 133.
- McMahon v. Gray, 150 Mass. 289, 15 Am. St. Rep. 202, 22 N. E. 923, 5 L. R. A. 748, p. 865.
- McMechan v. Griffing, 3 Pick. 149, 154, 15 Am. Dec. 189, 198, p. 277.
- M'Mechan v. Warburton, L. R. Ir., 1 Ch. D. 435, 2 Ames Eq. Jur. 246, p. 859.
- McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 78 Am. St. Rep. 93, 48 L. R. A. 345, p. 492.
- McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655, p. 693.
- McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, p. 500.
- McMullin's Adm'r v. Sanders, 79 Va. 356, 365, p. 463.
- McMurphy v. Adams, 67 N. H. 440, 39 Atl. 333, p. 282.
- McNaughton v. Partridge, 11 Ohio, 223, 38 Am. Dec. 731, 2 Ames Eq. Jur. 279, p. 419.
- McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341, p. 333, 334, 398.
- McNeill v. Williams, 11 Jur. 345, 1 Ames Eq. Jur. 652, p. 838.
- McNulta v. Lockridge, 141 U. S. 327, 12 Sup. Ct. 11, p. 809.
- McPherson v. Cox, 96 U. S. 404, 24 L. ed. 746, p. 624.
- McQueen v. McQueen, 2 Jones Eq. 16, 62 Am. Dec. 205, p. 237.
- McRae v. Bowers Dredging Co., 86 Fed. 344, p. 808.
- Mactier v. Osborn, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323, p. 225.
- McTwiggan v. Hunter, 18 R. I. 776, 30 Atl. 962, 2 Ames Cas. Eq. Jur. 71, p. 116.
- McVay v. McVay, 43 N. J. Eq. 47, 10 Atl. 178, H. & B. 370, p. 567.
- McVey v. Brendel, 144 Pa. St. 235, 22 Atl. 912, 29 Wkly. Notes Cas. 1, 27 Am. St. Rep. 625, 13 L. R. A. 377, p. 494.
- Maddison v. Alderson, 8 App. Cas. (H. L.) 467, 1 Ames Eq. Jur. 295, 2 Scott 210, 2 Keener 675, Shep. 287, p. 900, 901, 902, 903.
- Maddox v. White, 4 Md. 72, 59 Am. Dec. 67, p. 827.

- Magin v. Lamb**, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216, p. 855.
- Major v. Lansley**, 2 Russ. & M. 355, 357, p. 640.
- Makeel v. Hotchkiss**, 190 Ill. 311, 83 Am. St. Rep. 131, 60 N. E. 524, p. 916.
- Makepiece v. Rogers**, 11 Jur., N. S., 215, 3 Keener 916, p. 919.
- Makesey v. Ramseys**, 9 Clark & Finnelly, 818, Ames Trusts, 13, p. 569.
- Malcolm v. Allen**, 49 N. Y. 448, p. 218.
- Malim v. Keighley**, 2 Ves. 333, 335, Ames Trusts 83, p. 571.
- Malins v. Freeman**, 2 Keen, 25, 1 Ames Eq. Jur. 383, 2 Keener 933, 2 Scott 272, p. 432.
- Mallin v. Wenham**, 209 Ill. 252, 101 Am. St. Rep. 233, 70 N. E. 564, p. 771.
- Mallory v. Mallory-Wheeler Co.**, 61 Conn. 135, 23 Atl. 708, p. 517.
- Mandeville v. Welch**, 5 Wheat. 277, 286, 5 L. ed. 87, p. 765.
- Mangold v. Barlow**, 61 Miss. 593, 48 Am. Rep. 84, p. 294.
- Manhattan Iron Works v. French**, 12 Abb. N. C. 446, 2 Ames Eq. Jur. 107, p. 823.
- Manhattan Mfg. & F. Co. v. N. J. Stock Yard etc. Co.**, 23 N. J. Eq. 161, H. & B. 747, 2 Keener 568, p. 820.
- Mann v. Appel**, 31 Fed. 378, 383, p. 144, 910.
- Mann v. Jackson**, 84 Me. 400, 30 Am. St. Rep. 358, 24 Atl. 886, 16 L. R. A. 707, p. 489.
- Mann v. Willey**, 51 App. Div. (N. Y.) 169, 64 N. Y. Supp. 589, 1 Ames Eq. Jur. 572, affirmed 168 N. Y. 664, 61 N. E. 1131, p. 830, 831, 834.
- Manners v. Phila. Library Co.**, 93 Pa. St. 165, 39 Am. Rep. 741, p. 576.
- Manning v. Gill**, L. R. 13 Eq. 485, p. 505.
- Manning v. Manning**, 1 Johns. Ch. 530, 1 Scott 147, p. 32.
- Manser v. Back**, 6 Hare, 443, 2 Scott 274, p. 431, 432.
- Mansfield v. Dameron**, 42 W. Va. 794, 57 Am. St. Rep. 884, 26 S. E. 527, p. 754.
- Mansfield v. Lynch**, 59 Conn. 320, 22 Atl. 313, 12 L. R. A. 285, p. 425.
- Mansfield v. Sherman**, 81 Me. 365, 17 Atl. 300, 1 Ames Eq. Jur. 385, 2 Keener 995, 2 Scott 281, p. 431.
- Marble Co. v. Ripley**, 10 Wall. 339, 356, 357, 19 L. ed. 955, Shep. 112, p. 184, 888, 893, 895.
- Marbury v. Ehlen**, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467, p. 282.
- Marks v. Tichenor**, 85 Ky. 536, 4 S. W. 225, 2 Keener 430, H. & B. 662, p. 162.
- Maroney v. Boyle**, 141 N. Y. 462, 36 N. E. 511, 38 Am. St. Rep. 821, p. 748.
- Marselis v. Morris Canal Co.**, 1 N. J. Eq. 31, 35-39, p. 121.
- Marsh v. Cook**, 32 N. J. Eq. 262, 3 Keener 670, p. 462.
- Marsh v. Falker**, 40 N. Y. 562, 566, p. 453.
- Marsh v. Kaye**, 168 N. Y. 196, 61 N. E. 177, 2 Ames Cas. Eq. Jur. 80, p. 65.
- Marsh v. Reed**, 10 Ohio, 347, 1 Keener 151, p. 108.
- Marshall v. Baltimore & O. R. R.**, 16 How. 314, p. 495.
- Marshall v. Westrope**, 98 Iowa, 324, 67 N. W. 257, H. & B. 208, 3 Keener 166, p. 418.
- Marshall etc. Bank v. Cady**, 75 Minn. 241, 77 N. W. 831, H. & B. 864, p. 805.
- Martin v. Bowen**, 51 N. J. Eq. 452, 26 Atl. 823, p. 358, 361.
- Martin v. Funk**, 75 N. Y. 134, 31 Am. Rep. 446, 448, H. & B. 393, p. 550, 559, 561, 568.
- Martin v. Graves**, 5 Allen, 601, 2 Ames Eq. Jur. 137, p. 861, 875.
- Martin v. Maine Cent. R. Co.**, 93 Me. 100, 21 Atl. 740, p. 389.
- Martin v. Martin**, 170 Ill. 639, 62 Am. St. Rep. 411, 48 N. E. 924, p. 869.
- Martin v. Melville**, 11 N. J. Eq. 222, p. 218.
- Martin v. Price**, [1894] 1 Ch. 276, 1 Ames Eq. Jur. 557, p. 834.

- Martin v. Pycroft, 2 De Gex, M. & G. 785, 800, p. 433.  
 Martin v. Robinson, 67 Tex. 368, 3 S. W. 550, p. 476.  
 Martinetti v. Maguire, 1 Deady 216, p. 838.  
 Marvin v. Brooks, 94 N. Y. 71, 3 Keener 924, p. 918, 919.  
 Mason v. Armitage, 13 Ves. 25, 1 Ames Eq. Jur. 374, 2 Keener 930, 2 Scott 270, p. 430, 431.  
 Mason v. Harris, L. R. 11 Ch. Div. 97, 107, p. 633.  
 Massey v. Rowen, L. R. 4 H. L. 288, 301, p. 639.  
 Massey v. Westcott, 40 Ill. 160, p. 342.  
 Massi v. Lavine, (Mich.) 102 N. W. 665, 1 Scott 286, p. 185.  
 Massie v. Watts, 6 Cranch, 148, Shep. 82, p. 208.  
 Master v. Miller, 4 Term Rep. 320, 340, 341, p. 759.  
 Masury v. Arkansas Nat. Bank, 93 Fed. 603, 35 C. C. A. 476, reversing 87 Fed. 381, p. 327.  
 Mathews v. Warner, 6 Fed. 461, p. 497.  
 Matthewman's Case, L. R. 3 Eq. 781, 787, p. 650.  
 Matthews v. Gadd, 5 South. Austr. L. R. 129, 1 Ames Eq. Jur. 193, p. 162.  
 Matthews v. Terwilliger, 3 Barb. 50, p. 431.  
 Maul v. Rider, 59 Pa. St. 167, 171, 172, p. 296.  
 Maxwell v. Hyslop, L. R. 4 Eq. 407, p. 233.  
 Maxwell v. Lady Mountacute, Prec. Ch. 526, 1 Scott 461, p. 701.  
 Maxwell v. Maxwell, 2 De Gex, M. & G. 705, 713, 16 Beav. 106, p. 233.  
 May v. Cleland, 117 Mich. 45, 75 N. W. 129, 44 L. R. A. 163, p. 327.  
 May v. May, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. ed. 179, p. 624.  
 May v. Platt, [1900] 1 Ch. 616, 2 Ames Eq. Jur. 300, p. 433.  
 Mayer v. Gowland, 2 Dick. 563, 2 Scott 408, 1 Ames Eq. Jur. 195, p. 164.  
 Mayham v. Coombs, 14 Ohio, 428, p. 343.  
 Mayor of Baltimore v. Gill, 31 Md. 375, p. 822.  
 Mayor of New York v. Brady, 115 N. Y. 616, 22 N. E. 237, p. 851.  
 Mayor of Wolverhampton v. Emmons, [1901] 1 K. B. 515, 1 Ames Eq. Jur. 76, p. 887, 888.  
 Mayor of York v. Pilkington, 1 Atk. 282, 283, 2 Ames Eq. Jur. 55, 1 Keener 114, p. 111.  
 Mays v. Rose, Freem. Ch. (Miss.) 718, Shep. 32, p. 802, 806, 808.  
 Mays v. Taylor, 7 Ga. 238, 243, 244, p. 98.  
 Meacham v. Bunting, 156 Ill. 586, 41 N. E. 175, 47 Am. St. Rep. 239, 28 L. R. A. 618, p. 644.  
 Mead v. Bunn, 32 N. Y. 275, p. 459.  
 Mead v. Mitchell, 17 N. Y. 210, 214, 72 Am. Dec. 455, p. 868.  
 Mee v. Benedict, 98 Mich. 260, 39 Am. St. Rep. 543, 57 N. W. 175, 22 L. R. A. 641, p. 868.  
 Meech v. Ensign, 49 Conn. 191, 44 Am. Rep. 225, p. 712.  
 Meehan v. Williams, 48 Pa. St. 238, p. 279.  
 Meeker v. Warren, (N. J. Eq.) 57 Atl. 421, p. 342.  
 Meguire v. Corwine, 101 U. S. 108, p. 494.  
 Meier v. Heas, 23 Oreg. 599, 32 Pac. 755, p. 325.  
 Melms v. Pabst Brewing Co., 93 Wis. 140, 153, 66 N. W. 244, 518, 57 Am. St. Rep. 899, p. 476.  
 Memphis & C. R. R. Co. v. Grayson, 88 Ala. 572, 7 South. 122, 16 Am. St. Rep. 69, p. 402.  
 Memphis & C. R. Co. v. Woods, 88 Ala. 630, 16 Am. St. Rep. 81, 7 South. 108, 7 L. R. A. 605.  
 Menkler v. U. S. Sheep Co., 4 N. Dak. 507, 62 N. W. 594, 33 L. R. A. 546, p. 911.  
 Mercantile Nat. Bank v. Parsons, 54 Minn. 56, 55 N. W. 825, 40 Am. St. Rep. 299, p. 266, 282.  
 Mercantile Trust Co. v. Missouri, K. & T. R. Co., 36 Fed. 221, 1 L. R. A. 307, p. 807.  
 Merced Min. Co. v. Fremont, 7 Cal. 317, 319, 68 Am. Dec. 262, p. 873.

- Merchants & M. N. Bank v. Barnes**, 18 Mont. 335, 48 Pac. 218, 56 Am. St. Rep. 586, 47 L. R. A. 737, p. 766.  
**Merchants' Bank v. Weill**, 163 N. Y. 486, 79 Am. St. Rep. 605, 57 N. E. 749, p. 350.  
**Merchants' etc. Nat. Bank v. Kent Cir. J.**, 43 Mich. 292, 5 N. W. 627, H. & B. 855, p. 808.  
**Merchants' Nat. Bank v. Paine**, 13 R. I. 592, 1 Scott 136, p. 912.  
**Meredith v. Heneage**, 1 Sim. 542, 550, 551, 553, p. 573.  
**Merrill v. Beckwith**, 163 Mass. 503, 10 N. E. 855, 1 Ames Eq. Jur. 19, p. 207.  
**Merrill v. Wilson**, 66 Mich. 232, 33 N. W. 716, p. 475.  
**Merrill v. Wright, (Nebr.)** 91 N. W. 697, p. 287.  
**Merriman v. Miles**, 54 Nebr. 566, 74 N. W. 861, 69 Am. St. Rep. 731, p. 712.  
**Merriman v. Walton**, 105 Cal. 403, 45 Am. St. Rep. 50, 38 Pac. 1108, 30 L. R. A. 786, p. 854.  
**Merritt v. Buchnam**, 78 Me. 504, 7 Atl. 383, p. 744.  
**Metcalf v. Hervey**, 1 Ves. Sr. 248, 1 Keener 203, p. 797.  
**Metcalfe v. Hutchinson**, L. R. 1 Ch. Div. 591, p. 744.  
**Methodist Episcopal Church v. Jackson Square Evangelical Church**, 84 Md. 173, 35 Atl. 8, p. 588.  
**Meth. Epis. Ch. v. Jaques**, 3 Johns. Ch. 77, 90-92, 1 Scott 68, p. 640.  
**Methven v. Staten Island L., H. & P. Co.**, 66 Fed. 113, 13 C. C. A. 362, 35 U. S. App. 67, p. 323.  
**Metler's Adm'rs v. Metler**, 18 N. J. Eq. 270, 19 N. J. Eq. 457, p. 73.  
**Metropolitan El. Supply Co. v. Gender**, [1901] 2 Ch. 799, p. 819.  
**Metropolitan Exhibition Co. v. Ewing**, 42 Fed. 18, 7 L. R. A. 381, H. & B. 631, p. 819, 886.  
**Meux v. Cobley [1892]** 2 Ch. 253, 1 Scott 665, p. 828.  
**Meyer v. Phillips**, 97 N. Y. 485, 49 Am. Rep. 538, p. 833.  
**Meyers v. Farquharson**, 46 Cal. 190, p. 673.  
**Mich. Paneling M. & M. Co. v. Parcell**, 38 Mich. 475, 480, p. 401.  
**Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co.**, 111 Fed. 284, 49 C. C. A. 324, p. 182, 183, 184.  
**Michoud v. Girod**, 4 How. 503, 561, Shep. 181, p. 476, 515, 526.  
**Mickles v. Dillaye**, 17 N. Y. 80, Kirch. 526, p. 719.  
**Micklethwait v. Micklethwait**, 1 De Gex & J. 504, p. 828.  
**Micklethwaite v. Atkinson**, 1 Coll. C. C. 173, p. 78.  
**Middleton v. Spicer**, 1 Br. Ch. Cas. 201, Ames Trusts 364, p. 552.  
**Mildred v. Austin**, L. R. 8 Eq. 220, p. 721.  
**Miles v. Dover Furnace Iron Co.** 125 N. Y. 294, 26 N. E. 261, 2 Keener 1048, p. 894.  
**Miles v. Miles, (Miss.)** 37 South. 112, p. 426.  
**Milhaus v. Sally**, 43 S. C. 318, 21 S. E. 268, 885, 49 Am. St. Rep. 834, p. 186.  
**Milkman v. Ordway**, 106 Mass. 232, 253, 1 Scott 119, p. 99, 100.  
**Miller v. Ball**, 64 N. Y. 286, 2 Keener 657, 2 Scott 196, p. 902.  
**Miller v. Cook**, L. R. 10 Eq. 641, p. 511.  
**Miller v. Merine**, 43 Fed. 261, p. 318.  
**Miller v. Miller's Adm'r**, 92 Va. 510, 23 S. E. 891, p. 638.  
**Miller v. Sauerbier**, 30 N. J. Eq. 71, p. 527.  
**Miller v. Scammon**, [1873] 52 N. H. 609, H. & B. 265, p. 93, 95, 473, 474.  
**Miller v. Thurgood**, 33 Beav. 496, p. 234.  
**Miller Brewing Co. v. Manasse**, 99 Wis. 99, 67 Am. St. Rep. 854, 74 N. W. 535, p. 351.  
**Mills v. Harris**, 104 N. C. 626, 10 S. E. 704, p. 680.  
**Milnes v. Gery**, 14 Ves. 400, 403, 2 Keener 111, p. 779, 886, 897.  
**Milroy v. Lord**, 4 De Gex, F. & J. 264, 274, Ames Trusts 149, p. 559, 560.

- Milwaukee & Minn. R. R. Co. v. Souter*, 2 Wall. 521, p. 802, 807.
- Miner v. Atherton's Ex'rs*, 35 Pa. St. 528, 537, p. 247.
- Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218, p. 806.
- Mingus v. Daugherty*, 87 Iowa, 56, 43 Am. St. Rep. 354, 54 N. W. 66, p. 916.
- Minneapolis, etc. R. R. Co. v. Cox*, 76 Iowa, 306, 14 Am. St. Rep. 216, p. 892.
- Minns v. Billings*, 183 Mass. 126, 97 Am. St. Rep. 420, 66 N. E. 593, p. 577.
- Minot v. Baker*, 147 Mass. 348, 17 N. E. 839, 9 Am. St. Rep. 713, p. 581, 582.
- Minot v. Martin*, 95 Fed. 734, 37 C. C. A. 234, p. 809.
- Minot v. Taylor*, 129 Mass. 160, p. 676.
- Minturn v. Seymour*, 4 Johns. Ch. 497, 1 Scott 302, p. 173.
- Missouri, K. & T. Trust Co. v. Krumsseig*, 172 U. S. 359, 19 Sup. Ct. 179, s. c., 77 Fed. 32, 23 C. C. A. 1, 40 U. S. App. 620, p. 179, 501.
- Mitchel v. Reynolds*, 1 P. Wms. 181, 1 Smith's Lead. Cas. 705, p. 491.
- Mitchell v. Denson*, 29 Ala. 327, 65 Am. Dec. 403, p. 410, 411.
- Mitchell v. Dors*, 6 Ves. 147, 1 Scott 682, 1 Ames Eq. Jur. 488, 1 Keener 543, p. 842.
- Mitchell v. Greene*, 10 Met. 101, p. 93.
- Mitchell v. Hayne*, 2 Sim. & St. 63, 2 Ames Eq. Jur. 12, 1 Keener 292, p. 794, 795.
- Mitchell v. Ladew*, 36 Mo. 526, 88 Am. Dec. 156, p. 706.
- Mitchell v. McDougall*, 62 Ill. 498, H. & B. 279, p. 467.
- Mitchell v. Reed*, 61 N. Y. 123, 139, 19 Am. Rep. 252, H. & B. 48, p. 600.
- Mitchell v. Smith*, 1 Paige, 287, Shep. 346, p. 77.
- Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673, p. 770.
- Moale v. Buchanan*, 11 Gill & J. 314, 325, p. 434.
- Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. 426, p. 363, 364.
- Moetzel & Muttera v. Koch*, (Iowa) 97 N. W. 1079, p. 508.
- Mogg v. Mogg, Dick*, 670, 1 Scott 679, 1 Ames Eq. Jur. 186, 1 Keener 532, p. 841.
- Mollineux v. Powell*, 3 P. Wms. 268, n. (F), 1 Ames Eq. Jur. 468, 1 Scott 664, p. 827, 828, 829.
- Molony v. Scanlan*, 53 Ill. 122, p. 244.
- Monahan v. Monahan*, (Vt.) 59 Atl. 169, p. 592.
- Moncrief v. Ross*, 50 N. Y. 431, 3 Keener 960, p. 677, 681.
- Monotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383, H. & B. 468, p. 598.
- Monroe v. Armstrong*, 96 Pa. St. 307, p. 226.
- Montacute v. Maxwell*, 1 P. Wms. 618, 1 Strange, 236, 1 Eq. Cas. Abr. 19, 1 Ames Eq. Jur. 27, 2 Keener 623, p. 449, 904.
- Montagu v. Earl of Sandwich*, L. R. 32 Ch. Div. 525, p. 250.
- Montague v. Flockton*, L. R. 16 Eq. 189, 1 Ames Eq. Jur. 105, 2 Scott 107, 2 Keener 246, H. & B. 622, p. 819.
- Montana Ore-Purchasing Co. v. Boston, & M. Consol. C. & S. Min. Co.*, 27 Mont. 536, 70 Pac. 1114, 71 Pac. 1005, p. 54.
- Montford v. Cadogan*, 17 Ves. 485, 489, 19 Ves. 635, 638, p. 567.
- Montgomery v. Keppel*, 75 Cal. 128, 7 Am. St. Rep. 125, 19 Pac. 178, p. 267.
- Moody v. Wright*, 13 Met. 17, 32, 46 Am. Dec. 706, Kirch. 54, p. 769.
- Moor v. Black*, Cas. t. Talb. 126, p. 864.
- Moore v. Baker*, 4 Ind. App. 115, 51 Am. St. Rep. 203, 30 N. E. 629, p. 232.
- Moore v. Cable*, 1 Johns. Ch. 385, 387, 388, Kirch. 524, p. 719, 742.
- Moore v. Crawford*, 130 U. S. 122, 128, 9 Sup. Ct. Rep. 447, 32 L. ed. 878, p. 602.
- Moore v. Darton*, 4 De Gex & S. 517, Ames Trusts 39, p. 563, 667.

- Moore v. Durnam**, 63 N. J. Eq. 96, 51 Atl. 449, p. 408.
- Moore v. McIntyre**, 110 Mich. 237, 68 N. W. 130, p. 133.
- Moore v. Metropolitan Bank**, 55 N. Y. 41, 46-49, 14 Am. Rep. 173, p. 334, 335.
- Moore v. Moore**, 112 Ind. 149, 13 N. E. 673, 2 Am. St. Rep. 170, p. 333.
- Moore v. Page**, 111 U. S. 117, 4 Sup. Ct. 388, 28 L. ed. 373, p. 638.
- Moore v. Sargent**, 117 Ind. 484, 14 N. E. 466, p. 218.
- Moore v. Williams**, 115 N. Y. 586, 12 Am. St. Rep. 844, 5 L. R. A. 654, 2 Keener 1144, p. 895.
- Moore v. Townshend**, 102 N. Y. 387, 7 N. E. 401, 1 Keener 355, p. 876.
- Moran v. McLarty**, 75 N. Y. 25, 3 Keener 280, p. 438.
- Moreland v. Atchison**, 19 Tex. 303, Shep. 155, p. 421.
- Morgan v. Malleeson**, L. R. 10 Eq. 475, Ames Trusts 129, p. 559, 561.
- Morgan v. Marsack**, 2 Mer. 107, 1 Keener 273, p. 791.
- Morgan v. Minett**, L. R. 6 Ch. Div. 638, p. 519.
- Morice v. Bishop of Durham**, 9 Ves. 399, 405, 10 Ves. 521, 522, 541, Ames Trusts 195, p. 574, 578, 587.
- Morland v. Cook**, L. R. 6 Eq. 252, 263, 265, p. 273.
- Morley v. Loughnan**, [1893] 1 Ch. 736, 3 Keener 833, p. 522.
- Morley v. Morley**, 5 De Gex, M. & G. 610, p. 384, 386.
- Mormon Church v. United States**, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. ed. 478, p. 143, 582.
- Morphett v. Jones**, 1 Swanst. 172, p. 901.
- Morrill v. Noyes**, 56 Me. 458, 471, 96 Am. Dec. 486, Kirch. 92, p. 771, 808.
- Morrill v. Weeks**, 70 N. H. 178, 46 Atl. 32, p. 220.
- Morris v. Budlong**, 78 N. Y. 543, 552, Kirch. 559, p. 702.
- Morris v. Colman**, 18 Ves. 436, 437, 1 Ames Eq. Jur. 89, 2 Scott 87, 2 Keener 197, p. 819.
- Morris v. Griffiths**, 26 Ch. Div. 601, 3 Keener 955, p. 680.
- Morris v. Joyce**, 63 N. J. Eq. 549, 53 Atl. 139, p. 397.
- Morrison v. Herrick**, 130 Ill. 631, 22 N. E. 537, 2 Keener 706, p. 902.
- Morrison v. Rogers**, 115 Cal. 252, 40 Pac. 1072, 56 Am. St. Rep. 95, p. 487.
- Morse v. Curtis**, 140 Mass. 112, 2 N. E. 929, 54 Am. Rep. 456, p. 368.
- Morse v. Slason**, 13 Vt. 296, p. 672.
- Mortimer v. Cottrell**, 2 Cox 205, 1 Scott 681, p. 842.
- Mortimer v. Latimer**, 11 Jurist. 721, Ames Trusts, 508, p. 611.
- Mortlock v. Buller**, 10 Ves. 292, 305, 306, p. 779.
- Moser v. Cochrane**, 107 N. Y. 1, 2 Keener 1143, p. 895.
- Moses v. Johnson**, 88 Ala. 517, 16 Am. St. Rep. 58, 7 South. 146, p. 754.
- Moses v. Murgatroyd**, 1 Johns. Ch. 119, 129, 7 Am. Dec. 478, p. 556.
- Mosley v. Ward**, 29 Beav. 407, p. 230.
- Moss v. Odell**, 141 Cal. 335, 74 Pac. 999, p. 719.
- Mossop v. Eadon**, 16 Ves. 430, 433, 434, p. 408.
- Mott v. Buxton**, 7 Ves. 201, p. 570.
- Mountain Copper Co. v. U. S.**, 142 Fed. 625, 1 Scott 759, p. 832.
- Mount Holly etc. Co. v. Ferree**, 17 N. J. Eq. 117, p. 327.
- Moxon v. Bright**, L. R. 4 Ch. 292, 1 Ames Eq. Jur. 450, 3 Keener 918, p. 919.
- Moyer v. Hinman**, 13 N. Y. 180, 17 Barb. 137, 2 Keener 344, p. 344.
- Muir v. Berkshire**, 52 Ind. 149, 151, p. 717.
- Muir v. Schenck**, 3 Hill, 228, 38 Am. Dec. 633, Shep. 106, p. 195, 325, 328, 337, 338.
- Mulford v. Minch**, 11 N. J. Eq. 16, 64 Am. Dec. 472, p. 515.
- Mulholland v. Washington Match Co.**, (Wash.) 77 Pac. 497, p. 449.
- Mullanphy Sav. Bank v. Schott**, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401, p. 351.
- Mullen v. Wilson**, 44 Pa. St. 413, 84 Am. Dec. 461, p. 522.
- Muller v. Wadlington**, 5 S. C. 342, p. 715.

- Muller's Adm'rs v. Stone, 84 Va. 834, 10 Am. St. Rep. 889, and note, 6 S. E. 223, p. 558.
- Mullett v. Halfpenny, Prec. in Ch. 404, 1 Ames Eq. Jur. 315, p. 905.
- Mullins v. Butte Hardware Co., 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430, p. 275, 276, 277, 366.
- Mullins v. Smith, 1 Drew. & S. 204, 210, p. 663.
- Mulock v. Mulock, 31 N. J. Eq. 594, p. 522.
- Mumford v. Stohwasser, L. R. 18 Eq. 556, 562, 563, p. 346, 347.
- Mundy v. Jolliffe, 5 Mylne & C. 167, 177, 1 Ames Eq. Jur. 289, p. 779, 902.
- Mundy v. Mundy, 2 Ves. 122, 128, p. 865.
- Munn v. Burges, 70 Ill. 604, p. 515.
- Munson v. Syracuse, G. & C. R'y Co., 103 N. Y. 58, 8 N. E. 355, H. & B. 531, p. 523.
- Murdock v. Walker, 152 Pa. St. 595, 34 Am. St. Rep. 678, 25 Atl. 492, Lewis 247, p. 846.
- Murphy v. Barnard, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29, p. 350, 351.
- Murphy v. Christian, etc. Co., 38 App. Div. (N. Y.) 426, 1 Ames Eq. Jur. 157, 2 Scott, p. 777.
- Murphy v. Green, 120 Ala. 112, 22 South. 112, p. 344.
- Murphy's Estate, In re, 184 Pa. St. 310, 39 Atl. 70, 63 Am. St. Rep. 802, p. 579.
- Murray v. Ballou, 1 Johns. Ch. 566, 576, 581, 615, 1 Scott 520, p. 284, 285, 597.
- Murray v. Barlee, 3 Mylne & K. 209, 220, 223, p. 504, 651.
- Murray v. Dake, 46 Cal. 644, p. 428.
- Murray v. Lylburn, 2 Johns. Ch. 441, 443, 1 Scott 526, p. 284, 286, 287, 338, 601.
- Musch v. Burkhart, 83 Iowa, 301, 32 Am. St. Rep. 305, 48 N. W. 1025, 12 L. R. A. 484, p. 843.
- Muscogee Lumber Co. v. Hyer, 18 Fla. 698, 43 Am. Rep. 332, p. 623.
- Musgrove v. Gray, 123 Ala. 376, 82 Am. St. Rep. 124, 26 South. 643, p. 809.
- Musselman v. Marquis, 1 Bush, 463, 89 Am. Dec. 637, 1 Keener 193, p. 844.
- Myers v. Sierra Val. Stock & Agric. Ass'n, 122 Cal. 669, 55 Pac. 689, p. 55, 65.
- N.
- Naddo v. Bardon, 51 Fed. 493, 2 C. C. A. 335, 4 U. S. App. 642, p. 198, 199.
- Nash v. Minnesota etc. Co., 163 Mass. 574, 47 Am. St. Rep. 489, 40 N. E. 1039, 28 L. R. A. 753, p. 451.
- Nashville Trust Co. v. Smythe, 94 Tenn. 513, 45 Am. St. Rep. 748, 29 S. W. 903, p. 329, 706.
- National Bank of Augusta v. Carolina etc. R. Co., 63 Fed. 25, p. 810.
- National Bank of Commerce v. Morris, 114 Mo. 255, 35 Am. St. Rep. 754, 21 S. W. 511, 19 L. R. A. 463, p. 281.
- Nat. Bank of Metropolis v. Sprague, 20 N. J. Eq. 159, p. 492.
- National Biscuit Co. v. Baker, 95 Fed. 135, p. 840.
- National Exch. Co. v. Drew, 2 Macq. 103, 125, p. 448.
- National Life Ins. Co. v. Pingrey, 141 Mass. 411, 2 Ames Eq. Jur. 37, 1 Keener 259, p. 793.
- National Park Bank v. Goddard, 62 Hun, 31, 16 N. Y. Supp. 343, 2 Ames Cas. Eq. Jur. 82, 131 N. Y. 503, 30 N. E. 566, Keener's Cas. Eq. Jur. 142, p. 118.
- National Protective Ass'n v. Cumming, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, 58 L. R. A. 135, p. 847.
- National Valley Bank v. Hancock, 100 Va. 101, 107, 93 Am. St. Rep. 933, 938, 57 L. R. A. 728, 729, 40 S. E. 611, p. 784.
- Naylor v. Winch, 1 Sim. & St. 555, 564, 2 Scott 576, p. 420, 425.
- Neal v. Bleckley, 51 S. C. 506, 29 S. E. 249, p. 550.
- Neale v. Cripps, 4 Kay & J. 472, 1 Ames Eq. Jur. 498, 1 Keener 602, p. 842.

- Neale v. Neale, 9 Wall. 1, 19 L. ed. 590, 2 Keener 647, p. 904.
- Neblett v. Macfarland, 92 U. S. 101, 3 Keener 693, p. 462, 470, 471.
- Negley v. Lindsay, 67 Pa. St. 217, 228, 5 Am. Rep. 427, p. 475.
- Neill v. Morley, 9 Ves. 478, 482.
- Neilson v. McDonald, 6 Johns. Ch. 201, 1 Scott 482, 3 Keener 751, p. 470, 507.
- Neinger v. State, 50 Ohio St. 394, 34 N. E. 633, 3 Keener 358, p. 436.
- Nelson v. Brown, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755, p. 712.
- Nelson v. Milligan, 151 Ill. 462, 38 N. E. 239, p. 831.
- Nelson v. Owen, 113 Ala. 372, 21 South. 75, p. 735.
- Nesbit v. Lockman, 34 N. Y. 167, p. 520.
- New, In re, [1901] 2 Ch. 534, p. 608.
- New v. Nicoll, 73 N. Y. 127, 130, 131, 29 Am. Rep. 111, p. 623, 624.
- Newbery v. James, 2 Mer. 446, 451, 2 Scott 26, p. 885.
- New Brunswick etc. R'y v. Muggridge, 1 Drew & S. 363, 381, p. 449.
- New England M. S. Co. v. Powell, 97 Ala. 483, 12 South. 55, p. 179.
- New England Trust Co. v. Abbott, 162 Mass. 148, 154, 38 N. E. 432, 27 L. R. A. 271, H. & B. 720, p. 884.
- New Jersey, B., L. & Inv. Co. v. Bachelor, 54 N. J. Eq. 600, 35 Atl. 745, p. 345.
- Newman v. Commercial Nat. B'k, 156 Ill. 530, 41 N. E. 156, p. 66.
- Newman v. Newman, L. R. 28 Ch. Div. 674, Ames Trusts 335, p. 346.
- Newmeyer v. Missouri etc. R. R. Co., 52 Mo. 81, 14 Am. Rep. 391, p. 822.
- New Orleans v. Louisiana Construction Co., 129 U. S. 46, 47, 9 Sup. Ct. 223, 224, p. 139.
- New Orleans v. Warner, 175 U. S. 120, 130, 20 Sup. Ct. 44, 44 L. ed. 96, p. 199.
- New River Mineral Co. v. Seeley, 120 Fed. 193, p. 523.
- Newsome v. Flowers, 30 Beav. 461, p. 609.
- Newton v. Porter, 69 N. Y. 133, 136-140, 25 Am. Rep. 152, H. & B. 477, Shep. 201, p. 597, 601.
- Newton v. Swazey, 8 N. H. 9, 11, 1 Scott 109, p. 779.
- N. Y. & N. E. R. Co. v. City of Providence, 16 R. I. 746, 19 Atl. 759, p. 225.
- New York & N. H. R. R. v. Schuyler, 17 N. Y. 592, 1 Keener 118, p. 120, 874.
- New York & T. Land Co. v. Gulf, W. T. & P. R. Co., 100 Fed. 830, 41 C. C. A. 87, p. 67.
- New York Bank Note Co. v. Hamilton, etc. Co., 83 Hun 593, 31 N. Y. Supp. 1060, 2 Keener 618, p. 777.
- N. Y., N. H., & H. R. R. v. Schuyler, 34 N. Y. 30, 80, p. 327.
- N. Y. Printing etc. Estab. v. Fitch, 1 Paige, 98, 1 Keener 562, p. 814, 844.
- Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252, 2 Keener 722, p. 901, 902.
- Nicholas v. Ward, 1 Head, 323, 73 Am. Dec. 177, p. 532.
- Nicholla v. Nicholls, 1 Atk. 409, 1 Scott 481, p. 509.
- Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445, p. 579, 587.
- Nichols v. Eaton, 91 U. S. 716, p. 551, 552.
- Nichols v. Levy, 5 Wall, 433, 441, p. 551.
- Nichols v. McCarthy, 53 Conn. 299, 55 Am. Rep. 105, 23 Atl. 93, p. 513, 514, 516.
- Nichols v. Nichols, 28 Vt. 230, 67 Am. Dec. 699, p. 867.
- Nichols v. Pinner, 18 N. Y. 295, 23 N. Y. 264, p. 469.
- Nichols v. Pitman, L. R. 26 Ch. D. 374, p. 839.
- Nickley v. Thomas, 22 Barb. 652, p. 465.
- Nix v. Bradley, 6 Rich. Eq. 43, 48, p. 643.
- Noakes & Co., Ltd., v. Rice, [1902] App. Cas. 24, p. 698.

- Noble's Adm'r v. Moses, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175, p. 513, 522.
- Noel's Ex'r v. Gill, 84 Ky. 241, 3 Keener 241, p. 436.
- Norcross v. James, 140 Mass. 188, 2 N. E. 946, 1 Ames Eq. Jur. 182, 2 Scott 504, 2 Keener 591, p. 776.
- Nordenfelt v. Maxim-Nordenfelt Co., [1894] App. Cas. 535, p. 491.
- Norris v. Fox, 45 Fed. 406, 1 Ames Eq. Jur. 426, p. 897.
- Norris v. Ile, 152 Ill. 190, 202, 203, 204, 43 Am. St. Rep. 233, 38 N. E. 762, p. 283, 285, 286.
- Northam v. Boyd, 66 Tex. 401, 1 S. W. 109, p. 285.
- Northern Assam etc., Co., In re, L. R. 10 Eq. 458, 463, p. 330.
- Northern Counties etc. Co. v. Whipp, L. R. 26 Ch. Div. 482, 1 Scott 353, p. 318, 349.
- Northwestern Guaranty Loan Co. v. Smith, 15 Mont. 104, 48 Am. St. Rep. 662, 38 Pac. 224, p. 784.
- Norton v. Phelps, 54 Miss. 467, Ames Trusts, 421, p. 624.
- Norway v. Rowe, 19 Ves. 144, 1 Mer. 346, p. 82.
- Norwood v. Harness, 98 Ind. 134, 49 Am. Rep. 739, p. 611.
- Nottage, In re, [1895] 2 Ch. 649, 657, p. 578.
- Nottingham etc. Co. v. Butler, L. R. 16 Q. B. D. 778, 1 Ames Eq. Jur. 169, 2 Scott 530, 2 Keener 519, p. 776.
- Nottley v. Palmer, 2 Drew, 93, p. 235.
- Noyes v. Anderson, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657, p. 223.
- Noyes v. Clark, 7 Paige, 179, 32 Am. Dec. 620, p. 218, 219.
- Noyes v. Crawford, 118 Iowa, 15, 96 Am. St. Rep. 363, 91 N. W. 799, p. 287.
- Noyes v. Hall, 97 U. S. 34, 38, 24 L. ed. 909, p. 721.
- Noyes v. Landon, 59 Vt. 569, 10 Atl. 342, p. 465.
- Nudd v. Powers, 136 Mass. 273, p. 743.
- Nunn v. Fabian, L. R. 1 Ch. 35, 2 Keener 636, p. 902.
- O.
- Oakley v. Taylor, 64 Fed. 245, 246, p. 142.
- O. & W. Thum Co. v. Tloczynski, 114 Mich. 149, 68 Am. St. Rep. 469, 72 N. W. 140, 38 L. R. A. 200, H. & B. 755, p. 817.
- O'Bear Jewelry Co. v. Volfer, 106 Ala. 205, 17 South. 525, 54 Am. St. Rep. 31, 28 L. R. A. 707, p. 593, 595, 596.
- Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829, p. 752.
- Ober & Sons Co. v. Cochran, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118, p. 598.
- O'Brien v. Bolland, 166 Mass. 481, 41 N. E. 602, 1 Ames Eq. Jur. 433, p. 892.
- O'Brien v. Creitz, 10 Kan. 202, 2 Ames Eq. Jur. 146, p. 875.
- O'Brien v. Stambach, 101 Iowa, 40, 69 N. W. 1133, 63 Am. St. Rep. 368, p. 910.
- Ocean City Ass'n v. Schurch, 57 N. J. Eq. 268, 41 Atl. 914, 1 Scott 215, p. 777, 826.
- Oceanic Steam Nav. Co. v. Sutherberry, L. R. 16 Ch. Div. 236, p. 619.
- Odell v. Montross, 68 N. Y. 499, Kirch. 460, p. 701.
- Oden v. Lockwood, 136 Ala. 514, 33 South. 895, p. 566.
- Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 17 Am. St. Rep. 686, 7 L. R. A. 118, p. 364, 505.
- Ogden v. Fitzsimmons, 7 Cranch, 1, 18, p. 326.
- Ogden v. Haven, 24 Ill. 57, p. 344.
- Ogden v. Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151, p. 638.
- Ogle, Ex parte, L. R. 8 Ch. 711, Ames Trusts 504, p. 610.
- O'Hara v. Dudley, 95 N. Y. 403, 47 Am. Rep. 53, H. & B., p. 603.
- Ohmer v. Boyer, 89 Ala. 273, 7 South. 663, p. 384, 386, 589, 717.
- Oil Co. v. Marbury, 91 U. S. 592, 23 L. ed. 331, Shep. 119, p. 198, 618.

- Oil Creek R. R. v. Atlantic & G. W. R. R., 57 Pa. St. 65, p. 227.
- Oldfield v. Round, 5 Ves. 508, 2 Scott 231, p. 905.
- Olds v. Cummings, 31 Ill. 188, p. 329.
- Oliffe v. Wells, 130 Mass. 221, p. 587.
- Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232, p. 523.
- Olmstead v. Distilling, etc. Co., 69 Fed. 24, p. 808.
- Olson v. Lamb, 56 Nebr. 104, 71 Am. St. Rep. 670, 76 N. W. 433, p. 520.
- Olson v. Liebpke, 110 Iowa, 504, 81 N. W. 801, 80 Am. St. Rep. 327, p. 285.
- Onslow v. Wallis, 1 Hall & Twells, 513, Ames Trusts 462, p. 587.
- Ontario Bank v. Munford, 2 Barb. Ch. 596, 615, p. 133.
- Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 889, 899, p. 461.
- Oppenheimer v. Levi, 96 Md. 296, 54 Atl. 74, 60 L. R. A. 729, p. 875.
- Orby v. Trigg, 2 Eq. Cas. Abr. 599, pl. 24, 9 Mod. 2, Kirch. 470, p. 698.
- Ord v. Johnston, 1 Jur., N. S., 1063, 1064, 1065, 2 Scott 40, p. 839.
- Ordway v. Downey, 18 Wash. 412, 51 Pac. 1047, 63 Am. St. Rep. 892, p. 711.
- O'Reilly v. New York El. R. Co., 148 N. Y. 347, 42 N. E. 1063, 31 L. R. A. 407, p. 824.
- Ormrod v. Huth, 14 Mees. & W. 650, p. 450, 451.
- Orth v. Orth, 145 Ind. 184, 57 Am. St. Rep. 185, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298, p. 593.
- Orvis v. Newell, 17 Conn. 97, p. 298.
- Osborn v. Lea, 9 Mod. 96, p. 376.
- Osborn v. McClelland, 43 Ohio St. 284, 298-307, 1 N. E. 644, p. 332, 333, 335.
- Osborn v. Morgan, 9 Hare, 432, 434, p. 646.
- Osborne & Co., D. M., v. Mo. Pac. R. Co., 147 U. S. 248, 13 Sup. Ct. 299, 37 L. ed. 155, p. 824.
- Oscanyan v. Arms Co., 103 U. S. 261, p. 495.
- Oswego Starch Factory v. Lendrum, 57 Iowa, 573, 10 N. W. 900, 42 Am. Rep. 53, p. 469.
- Oswell v. Probert, 2 Ves. 680, 682, p. 646.
- Otis v. Gregory, 111 Ind. 504, 13 N. E. 39, p. 176.
- Ottenheimer v. Cook, 10 Heisk. 309, 3 Keener 71, p. 416.
- Ottumwa Screen Co. v. Stodghill, 103 Iowa, 437, 72 N. W. 669, p. 327.
- Overton v. Banister, 3 Hare, 503, 506, p. 185.
- Owen v. Homan, 3 Macn. & G. 378, 412; affirmed 4 H. L. Cas. 997, Shep. 324, p. 802, 804.
- Owens v. Dickenson, Craig & P. 48, 53, 54, p. 650.
- Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369, p. 903.

## P.

- Pace v. Bartles, 47 N. J. Eq. 170, 20 Atl. 352, p. 700.
- Pace v. Pace's Adm'r, 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459, p. 915.
- Pacific Postal Tel. Cable Co. v. Western Union Tel. Co. 50 Fed. 493, p. 491.
- Pacific R. R. v. Ketchum, 101 U. S. 289, p. 520.
- Pacific R'y Co. v. Wade, 91 Cal. 449, 456, 25 Am. St. Rep. 201, 27 Pac. 768, 13 L. R. A. 754, p. 809.
- Packard v. Stevens, 58 N. J. Eq. 489, 46 Atl. 250, p. 793.
- Packham v. German F. Ins. Co. 91 Md. 515, 80 Am. St. Rep. 461, 46 Atl. 1066, 50 L. R. A. 828, p. 915.
- Packington's Case, 3 Atk. 215, 1 Keener 459, 1 Scott 649, p. 828.
- Padbury v. Clark, 2 Macn. & G. 298, 306, 307, p. 239.
- Padwick v. Stanley, 9 Hare, 627, 3 Keener 905, p. 919.
- Page v. Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152, p. 437.
- Page v. Pierce, 26 N. H. 317, Kirch. 630, p. 714.
- Page v. Waring, 76 N. Y. 463, 467-469, p. 369.

- Paget v. Marshall, L. R. 28 Ch. D. 255, 2 Scott 610, 3 Keener 295, p. 438.
- Paine v. Meller, 6 Ves. 349, 1 Ames Eq. Jur. 227, 2 Scott 450, 2 Keener 403, p. 162.
- Palmer v. De Witt, 47 N. Y. 532, 7 Am. Rep. 480, Lewis 64, p. 839.
- Palmer v. Hartford Ins. Co., 54 Conn. 488, 9 Atl. 248, 3 Keener 317, p. 429, 438.
- Palmer v. Neave, 11 Ves. 165, p. 487.
- Pamplin v. Green, 3 Cas. Chan. 95, p. 655.
- Panama etc. Tel. Co. v. India Rubber etc. Co., L. R. 10 Ch. 515, 526, 3 Keener 550, p. 517.
- Pankhurst v. Howell, L. R. 6 Ch. 136, p. 249.
- Parfitt v. Chambre, L. R. 15 Eq. 36, p. 217.
- Park Bros. & Co. v. Blodgett & Clapp Co., 64 Conn. 28, 29 Atl. 133, H. & B. 234, 3 Keener 150, p. 419.
- Parker v. Barker, 42 N. H. 78, 77 Am. Dec. 789, p. 798.
- Parker v. Carter, 4 Hare, 400, 409, p. 534.
- Parker v. Garrison, 61 Ill. 250, 1 Ames Eq. Jur. 44, p. 883.
- Parker v. Nightingale, 6 Allen, 341, 344, 83 Am. Dec. 632, 2 Keener 475, p. 775.
- Parker v. Randolph, 5 S. Dak. 549, 59 N. W. 722, 29 L. R. A. 33, p. 363.
- Parker v. Sears, 1 Fish. Pat. Cas. 93, Fed. Cas. No. 10,748, p. 836.
- Parker v. Shannon, 121 Ill. 452, 13 N. E. 155, 2 Ames Eq. Jur. 160, 1 Keener 363, p. 874.
- Parker v. Taswell, 2 De Gex & J. 559, p. 558.
- Parkey v. Ramsey, (Tenn.) 76 S. W. 812, p. 394.
- Parkin v. Seddons, L. R. 16 Eq. 34, p. 803.
- Parkin v. Thorold, 16 Beav. 59, 1 Ames Eq. Jur. 327, p. 898, 899.
- Parkinson v. Hanbury, L. R. 2 H. L. 1, 2 De Gex, J. & S. 450, Kirch. 550, p. 718.
- Parkist v. Alexander, 1 Johns. Ch. 394, p. 292.
- Parrish v. Hastings, 102 Ala. 414, 14 South. 783, 48 Am. St. Rep. 50, p. 747.
- Parrish v. Mahany, 10 S. Dak. 276, 73 N. W. 97, 66 Am. St. Rep. 715, p. 368.
- Parrish v. Mahany, 12 S. Dak. 278, 76 Am. St. Rep. 604, 81 N. W. 295, p. 368.
- Parry v. Rogers, 1 Vern. 441, 2 Ames Eq. Jur. 165, p. 84.
- Parsons v. Hartman, 25 Oreg. 547, 42 Am. St. Rep. 803, 37 Pac. 61, 30 L. R. A. 98, p. 856.
- Parsons v. Martin, 86 Ala. 352, 5 South. 467, p. 706.
- Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362, p. 648.
- Parsons v. Winslow, 6 Mass. 169, 4 Am. Dec. 107, p. 489.
- Partridge v. Chapman, 81 Ill. 137, p. 363.
- Pasco v. Gamble, 15 Fla. 562, p. 805.
- Patch v. Ward, L. R. 3 Ch. 203, 207, p. 452.
- Paterson etc. R. R. v. Jersey City, 9 N. J. Eq. 434, p. 108.
- Patterson v. Allen, 50 Tex. 23, p. 673.
- Patterson v. Bloomer, 35 Conn. 57, 95 Am. Dec. 218, 2 Keener 956, p. 427, 430.
- Patterson v. Hewitt, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. ed., p. 199.
- Patterson v. Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831, p. 332.
- Patton v. Campbell, 70 Ill. 72, H. & B. 171, p. 132, 408.
- Patty v. Middleton, 82 Tex. 586, 17 S. W. 909, p. 372.
- Paul v. Connersville etc. R. R., 51 Ind. 527, 530, p. 265.
- Pavesich v. New England Life Ins. Co., (Ga.), 50 S. E. 68, 1 Scott 194, p. 846.
- Pawson v. Brown, L. R. 13 Ch. Div. 202, p. 587.
- Payne v. Becker, 87 N. Y. 153, p. 865.
- Payne v. Hook, 7 Wall. 425, 430, 19 L. ed. 262, p. 142.
- Payton v. McQuown, 97 Ky. 757, 53 Am. St. Rep. 437, 31 S. W. 874, 31 L. R. A. 33, p. 851.

- Peabody v. Fenton, 3 Barb. Ch. 451, 464, 465, p. 357.
- Peabody v. New England W. Co., 184 Ill. 625, 75 Am. St. Rep. 195, 56 N. E. 957, p. 809.
- Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664, 2 Keener 241, p. 491, 817, 818, 820.
- Peachy v. Duke of Somerset, 1 Strange, 447, 452-456, Prec. Ch. 568, 2 Eq. Cas. Abr. 227, 228, p. 170, 214.
- Peacock v. Evans, 16 Ves. 512, p. 178.
- Peacock v. Monk, 2 Ves. Sr. 190, p. 640.
- Peacock v. Penson, 11 Beav. 355, 2 Scott 288, p. 894.
- Peacock's Trusts, In re, L. R. 10 Ch. Div. 490, 495, 496, p. 639.
- Pearne v. Lisle, Amb. 75, 77, 1 Scott 86, p. 882.
- Pearson v. Cardon, 2 Russ. & M. 606, 609, 610, 612, p. 793, 794.
- Pearson v. Morgan, 2 Brown Ch. 384, 388, p. 266.
- Peay v. Seigler, 48 S. C. 496, 59 Am. St. Rep. 731, 26 S. E. 885, p. 892.
- Peck v. Ashley, 12 Met. 478, 481, p. 73.
- Peck v. Conway, 119 Mass. 546, 1 Ames Eq. Jur. 162, 2 Scott 527, 2 Keener 509, p. 775, 776, 778.
- Peck v. Jenness, 7 How. 612, 620, 12 L. ed. 841, p. 736.
- Peck v. List, 23 W. Va. 338, 48 Am. Rep. 398, p. 493.
- Peck v. Peck, 110 N. Y. 64, 74, 17 N. E. 383, p. 723.
- Peebles v. Gay, 115 N. C. 38, 44 Am. St. Rep. 429, 20 S. E. 173, p. 916.
- Peek v. Gurney, L. R. 13 Eq. 79, 113, 6 H. L. 377, p. 449, 450.
- Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 11 Am. St. Rep. 214, 1 L. R. A. 185, 1 Scott 463, 2 Keener 756, p. 479, 905.
- Peeler v. Levy, 26 N. J. Eq. 330, 2 Keener 1236, p. 906.
- Peers v. Lambert, 7 Beav. 546, 2 Scott 375, p. 905.
- Pegge v. Skynner, 1 Cox. Eq. Cas. 23, Ames' Cas. on Trusts, 218, p. 549.
- Peirsoll v. Elliott, 6 Pet. 95, 98, 8 L. ed. 334, Shep. 141, p. 860, 877.
- Pelletier v. Greenville L. Co., 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855, p. 809.
- Pencille v. State F. M. H. Ins. Co., 74 Minn. 67, 76 N. W. 1026, 73 Am. St. Rep. 326, p. 633.
- Penn v. Guggenheimer, 76 Va. 839, 846, 847, 850, 851, H. & B. 123, p. 234, 239.
- Penn v. Lord Baltimore, 1 Ves. Sr. 444, 2 Lead. Cas. Eq., 4th Am. ed., 1806, 1 Keener 12, 1 Scott 236, p. 208.
- Pennell v. Deffell, 4 De Gex, M. & G. 372, 388, p. 601.
- Pennyoyer v. Neff, 95 U. S. 714, p. 207.
- Pennyoyer v. Willis, 26 Oreg. 1, 36 Pac. 568, 46 Am. St. Rep. 594, p. 304.
- Penny v. Martin, 4 Johns. Ch. 566, 569, 1 Scott 454, p. 429.
- Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39, 3 Keener 493, p. 454, 482, 485.
- Pensacola v. Lehman, 57 Fed. 324, 330, 13 U. S. App. 411, 6 C. C. A. 349, p. 43.
- People v. Canal Board, 55 N. Y. 390, 1 Keener 100, p. 822.
- People v. Chicago, 53 Ill. 424, 428, p. 98.
- People's Bank v. Bogart, 81 N. Y. 101, 108, 37 Am. Rep. 481, 3 Keener 575, p. 464, 467, 468.
- People's Nat. Bank v. Marye, 191 U. S. 272, 24 Sup. Ct. 68, 107 Fed. 570, p. 180, 824.
- Percival v. Harger, 40 Iowa, 286, p. 455.
- Perkins v. Ede, 16 Beav. 193, 1 Ames Eq. Jur. 247, 2 Scott 376, 2 Keener 1128, p. 905, 906.
- Perkins v. Gibson, 51 Miss. 699, 24 Am. Rep. 644, p. 750.
- Perkins v. Partridge, 30 N. J. Eq. 82, Shep. 171, p. 444, 446.
- Perkins v. Sterne, 23 Tex. 561, 76 Am. Dec. 72, p. 714.
- Perkins' Appeal, 108 Pa. St. 314, 56 Am. Rep. 208, Shep. 206, p. 623.
- Perrot v. Perrot, 3 Atk. 94, 1 Keener 453, p. 827, 829.
- Perry v. Board of Missions, 102 N. Y. 99, 6 N. E. 116, Kirch. 135, p. 740.

- Peters v. Dickinson, 67 N. H. 389, 32 Atl. 154, 2 Keener 733, p. 902.
- Peters v. Mortimer, 4 Edw. Ch. 279, p. 497.
- Peters v. Turrell, 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252, p. 747.
- Peterson v. Clark, 15 Johns. 205, Kirch. 412, p. 699.
- Peterson v. McCauley, (Tex. Civ. App.) 25 S. W. 826, p. 365.
- Petty v. Petty, 4 B. Mon. 215, 39 Am. Dec. 501, p. 865.
- Peugh v. Davis, 96 U. S. 332, 24 L. ed. 775, Shep. 59, p. 701.
- Pfister v. Wade, 56 Cal. 43, p. 792.
- Pfohl v. Simpson, 74 N. Y. 137, p. 103.
- Pforn's Estate, In re, 144 Cal. 121, 77 Pac. 825, p. 680.
- Phalen v. Clark, 19 Conn. 421, 50 Am. Dec. 253, p. 476.
- Phelan v. Brady, 119 N. Y. 587, 23 N. E. 1109, 8 L. R. A. 211, p. 275, 276.
- Philadelphia Ball Club v. Lajoie, 202 Pa. St. 210, 90 Am. St. Rep. 627, 51 Atl. 973, 58 L. R. A. 227, p. 819.
- Phillips v. Berger, 2 Barb. 608, 2 Keener 98, p. 882.
- Phillips v. Ferguson, 85 Va. 509, 8 S. E. 241, 17 Am. St. Rep. 78, 1 L. R. A. 837, p. 489.
- Phillips v. Homfray, L. R. 6 Ch. 770, p. 467.
- Phillips v. Medbury, 7 Conn. 568, p. 489.
- Phillips v. Phillips, 4 De Gex, F. & J. 208, 215, 216, 218, H. & B. 72, Ames Trusts 331, 1 Scott 333, 511, p. 195, 197, 314, 315, 339, 357, 371, 374, 377.
- Phillips v. Phillips, 9 Hare, 471, 1 Ames Eq. Jur. 449, p. 918.
- Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9, H. & B. 308, p. 482, 483.
- Phillips v. Sylvester, L. R. 8 Ch. 173, 2 Keener 356, p. 163.
- Phillips' Estate, In re, 205 Pa. St. 515, 55 Atl. 213, 97 Am. St. Rep. 746, p. 324, 325.
- Phinizy v. Guernsey, 111 Ga. 346, 78 Am. St. Rep. 207, 36 S. E. 796, H. & B. 671.
- Phipps v. Lovegrove, L. R. 16 Eq. 80, p. 622.
- Phoenix Ins. Co. v. Schultz, 80 Fed. 337, 25 C. C. A. 453, p. 809.
- Phyfe v. Wardell, 5 Paige, 268, 28 Am. Dec. 430, p. 600.
- Pickard v. Sears, 6 Ad. & E. 469, 474, p. 392.
- Pickering v. Bishop of Ely, 2 Younge & C. Ch. 249, p. 886.
- Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, p. 854.
- Pico v. Columbet, 12 Cal. 414, 73 Am. Dec. 550, p. 919.
- Pidding v. How, 8 Sim. 477, Lewis 125, p. 840.
- Pierce v. Boston Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371, p. 668.
- Pierce v. Emery, 32 N. H. 484, Kirch. 80, p. 771.
- Pierce v. Equitable Life Assur. Soc., 145 Mass. 56, 12 N. E. 858, 3 Keener 929, p. 918.
- Piggott v. Stratton, 1 De Gex, F. & J. 33, 49, p. 445.
- Pike v. Fitzgibbon, L. R. 17 Ch. Div. 454, p. 636, 643, 650, 651.
- Pilcher v. Rawlins, L. R. 7 Ch. 259, L. R. 11 Eq. 53, p. 372.
- Pillow v. Southwest etc. Co., 92 Va. 144, 53 Am. St. Rep. 804, 23 S. E. 32, p. 868.
- Pillsworth v. Hopton, 6 Ves. 51, 1 Scott 681, 1 Ames Eq. Jur. 488, 1 Keener 543, p. 842.
- Pinke v. Curtis, 4 Bro. C. C. 329, 331, 2 Scott 428, p. 897, 899, 900.
- Pine Mt. Iron & Coal Co. v. Bailey, 94 Fed. 258, 36 C. C. A. 229, p. 303.
- Pinkerton v. Manchester etc. R. R. 42 N. H. 424, p. 327.
- Pioneer Land Co. v. Maddux, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295, p. 873.
- Piper v. Hoard, 107 N. Y. 73, 13 N. S. 626, 1 Am. St. Rep. 785, 789, p. 462.
- Pironi v. Corrigan, 47 N. J. Eq. 135, 20 Atl. 218, p. 522.
- Pitcher v. Hennessey, 48 N. Y. 415, 3 Keener 65, p. 419.

- Pitts v. Rhode Island Hospital Trust Co.**, 21 R. I. 544, 79 Am. St. Rep. 821, 45 Atl. 553, 48 L. R. A. 783, p. 784.
- Pittsburg Min. Co. v. Spooner**, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259, p. 619.
- Pixley v. Huggins**, 15 Cal. 127, 2 Ames Eq. Jur. 153, p. 874, 876.
- Platt v. Threadgill**, 80 Fed. 192, p. 854.
- Platte Val. State Bk. v. National etc. Ass'n**, 155 Ill. 250, 40 N. E. 621, 2 Ames Eq. Jur. 29, p. 795, 797.
- Plenderleith, In re**, [1893] 3 Ch. 332, p. 785.
- Plympton v. Malcolmson**, L. R. 20 Eq. 37, 1 Ames Eq. Jur. 632, p. 836.
- Pocahontas Light & Water Co. v. Browning**, 53 W. Va. 436, 44 S. E. 267, p. 393.
- Poe v. Dixon**, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713, p. 711, 712.
- Poe v. Paxton**, 26 W. Va. 607, p. 319.
- Pokegama S. P. L. Co. v. Klamath R. L. & I. Co.**, 96 Fed. 34, 55, p. 225.
- Polhemus v. Holland Trust Co.**, 59 N. J. Eq. 93, 45 Atl. 534, p. 65.
- Pollard v. Photographic Co.**, 40 Ch. D. 345, 1 Keener 76, p. 816, 839.
- Pollock, In re**, L. R. 28 Ch. Div. 552, 556, p. 249.
- Pollock v. Lester**, 11 Hun 837, 1 Keener 837.
- Pollock v. National Bank**, 7 N. Y. 274, 57 Am. Dec. 520, p. 907.
- Pond v. Sheean**, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414, 2 Keener 715, p. 902, 903.
- Pope v. Cole**, 55 N. Y. 124, 14 Am. Rep. 198, p. 191.
- Pope v. Dafray**, 176 Ill. 478, 52 N. E. 58, p. 603.
- Popejoy, In re**, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. Rep. 222, p. 648.
- Port Clinton R. R. v. Cleveland etc. R. R.**, 13 Ohio St. 544, 549, 556, p. 889, 890.
- Porter v. Woodruff**, 36 N. J. Eq. 174, 185, H. & B. 296, p. 517, 615.
- Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co.**, 6 Wash. 597, 34 Pac. 155, p. 327.
- Post v. Mason**, 91 N. Y. 539, 43 Am. Rep. 689, p. 519.
- Post v. Toledo, C. & St. L. R. Co.**, 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86, Shep. 344, p. 77.
- Postlethwaite v. Rickman**, L. R. 35 Ch. Div. 744, p. 81.
- Poston v. Balch**, 69 Mo. 115, p. 475.
- Potter v. Ellice**, 48 N. Y. 321, 2 Scott 415, p. 164.
- Potter v. Taggart**, 59 Wis. 1, 16 N. W. 553, 632, 3 Keener 673, p. 470.
- Potter v. Titcomb**, 22 Me. 300, p. 475.
- Potter's Appeal**, 56 Conn. 1, 12 Atl. 513, 7 Am. St. Rep. 272, p. 452.
- Powell v. Elliot**, L. R. 10 Ch. 424, p. 463.
- Powell v. Heisler**, 16 Oreg. 412, 19 Pac. 109, p. 429.
- Powell v. Morisey**, 98 N. C. 426, 2 Am. St. Rep. 343, 4 S. E. 185, p. 252.
- Powell v. Powell**, 80 Ala. 11, p. 515.
- Powell v. Powell**, [1900] 1 Ch. 243, p. 516.
- Powell v. Powis**, 1 Younge & J. 159, 1 Keener 170, p. 104.
- Powell v. Riley**, L. R. 12 Eq. 175, p. 663.
- Powell v. Smith**, L. R. 14 Eq. 85, 90, p. 417.
- Powell v. Smith**, 30 Mich. 451.
- Powell Duffryn Coal Co. v. Taff Vale R'y Co.**, L. R. 9 Ch. 331, 1 Ames Eq. Jur. 79, p. 888.
- Power's Appeal**, 125 Pa. St. 175, 17 Atl. 254, 11 Am. St. Rep. 882, 1 Scott 264, p. 401.
- Powys v. Mansfield**, 3 Mylne & C. 359, 374, 376, 6 Sim. 544, p. 247, 249.
- Pratt v. Douglas**, 38 N. J. Eq. 516, p. 239.
- Pratt v. Northam**, 5 Mason, 95, 104, 105, Fed. Cas. No. 11,376, p. 96, 656.
- Pratt v. Taunton Copper Co.**, 123 Mass. 110, 25 Am. Rep. 37, p. 336, 907.
- Pratt v. Tuttle**, 136 Mass. 233, Ames Trusts, 32, 3 Keener 928, p. 919.
- Pratt's Ex'r v. Nixon**, 91 Ala. 192, 8 South. 751, p. 710.

- Prentice v. Janssen, 79 N. Y. 478, 1 Scott 639, H. & B. 163, p. 677, 684, 685.
- Preston v. Kindrick, 94 Va. 760, 64 Am. St. Rep. 777, 27 S. E. 588, p. 855.
- Prewitt v. Trimble, 92 Ky. 176, 36 Am. St. Rep. 586, 17 S. W. 356, H. & B. 287, p. 454.
- Price v. Dyer, 17 Ves. 356, 2 Scott 266, p. 434.
- Price v. Krasuoff, 60 S. C. 172, 38 S. E. 413, p. 550.
- Price v. Macauley, 2 De Gex, M. & G. 339, 346, p. 455, 459.
- Price v. McDonald, 1 Md. 403, 412, 54 Am. Dec. 657, p. 264.
- Price v. Stratton, (Fla.) 33 South. 644, p. 178.
- Pride v. Andrews, 51 Ohio St. 405, 38 N. E. 84, p. 185.
- Priest v. Rice, 18 Mass. (1 Pick.) 164, 11 Am. Dec. 156, p. 342.
- Primmer v. Patten, 32 Ill. 528, p. 78.
- Prince Albert v. Strange, 1 Macn. & G. 25, 1 Hall & T. 1, 2 De Gex, & S. 652, p. 839.
- Pringle v. Dunn, 37 Wis. 449, 460, 461, 464, 465-467, 19 Am. Rep. 772, H. & B. 92, p. 262, 263, 267, 281, 293, 294, 306, 364, 365.
- Prioleau v. United States and Andrew Johnson, L. R. 2 Eq. 659, p. 77.
- Pritchard v. Elton, 38 Conn. 434, Kirch. 458, p. 698.
- Probasco v. Johnson, 2 Disn. 96, 98, p. 756.
- Probert v. McDonald, 2 S. Dak. 495, 51 N. W. 212, 39 Am. St. Rep. 796, p. 98.
- Procter v. Cooper, 2 Drew. 1, 18 Jur. 444, 1 Jur., N. S., 149, p. 289.
- Proctor v. Thrall, 22 Vt. 262, 2 Ames Eq. Jur. 270, p. 416.
- Prospect Park & C. I. R. R. Co. v. Coney I. & B. R. R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610, 1 Ames Eq. Jur. 83, H. & B. 641, p. 890, 895.
- Prosser v. Rice, 28 Beav. 68, 74, p. 260.
- Prout v. Roby, 15 Wall. 471, 21 L. ed. 58, p. 638, 639.
- Provisional Municipality of Pensacola v. Lehman, 57 Fed. 324, 331, 13 U. S. App. 411, p. 43.
- Prudential Ass. Co. v. Knott, L. R. 10 Ch. 142, 1 Keener 53, Lewis 314, p. 845.
- Prudential Ass. Co. v. Thomas, L. R. 3 Ch. 74, 1 Keener 287, p. 790, 791, 797.
- Pryor v. Adams, 1 Coll. 382, 1 Am. Dec. 533, p. 94.
- Pugh v. Highley, 152 Ind. 252, 53 N. E. 171, 71 Am. St. Rep. 327, 44 L. R. A. 392, p. 343.
- Pullman Palace Car Co. v. Central Transportation Co., 65 Fed. 158, 3 Keener 870, p. 503.
- Pulsford v. Richards, 17 Beav. 87, 94, 95, 96, 2 Scott 661, p. 453, 455, 462.
- Pulvertoft v. Pulvertoft, 18 Ves. 84, 86, p. 321, 533.
- Purcell v. Miner, 4 Wall. 513, 18 L. ed. 435, 2 Scott 206, Shep. 272, p. 902.
- Purdy v. Huntington, 42 N. Y. 334, 1 Am. Rep. 532, p. 351.
- Pusey v. Desbouverie, 3 P. Wms. 315, 320, 3 Keener 2, 1 Scott 430, p. 424.
- Pusey v. Pusey, 1 Vern. 273, 1 Lead. Cas. Eq. 1109, 1114, 1117, H. & B. 573, 1 Scott 86, Shep. 278, p. 67, 882.
- Pye, Ex parte, 18 Ves. 140, 151, 152, 154, 2 Lead. Cas. Eq., 4th Am. ed., 741, Ames Trusts 123, p. 246, 247, 249, 558, 559.
- Pylant v. Reeves, 53 Ala. 132, 25 Am. Rep. 605, p. 749.
- Pym v. Lockyer, 5 Mylne & C. 29, 34, 46, 48, p. 246, 247.
- Pyrke v. Waddingham, 10 Hare, 1, 1 Ames Eq. Jur. 269, 2 Scott 361, p. 895.

## Q.

- Quartz Hill etc. Co. v. Beall, L. R. 20 Ch. Div. 501, 507, Lewis 386, p. 845.

## R.

- Radford v. Carwile, 13 W. Va. 572, p. 642, 643.

- Raesser v. National Exchange Bank**, 112 Wis. 591, 88 N. W. 618, 88 Am. St. Rep. 979, p. 767.
- Ragsdale v. Holmes**, 1 S. C. 91, p. 672.
- Rakestraw v. Lanier**, 104 Ga. 188, 30 S. E. 735, 69 Am. St. Rep. 154, H. & B. 310, p. 491.
- Ralston v. Turpin**, 25 Fed. 7, 18, affirmed, 129 U. S. 663, 9 Sup. Ct. 420, p. 518, 521.
- Ramshire v. Bolton**, L. R. 8 Eq. 294, p. 471.
- Randall v. Lingwall**, 43 Oreg. 383, 73 Pac. 1, p. 278.
- Randle v. Carter**, 62 Ala. 95, p. 805.
- Randolph v. Webb**, 116 Ala. 135, 22 South. 550, p. 361.
- Rankin v. Coar**, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661, p. 279.
- Rapps v. Gottlieb**, 142 N. Y. 164, 36 N. E. 1052, affirming 67 Hun, 115, 22 N. Y. Supp. 52, p. 330.
- Raritan Waters Co. v. Veghte**, 21 N. J. Eq. 463, 478, 19 N. J. Eq. 142, p. 273.
- Rau v. Von Zedlitz**, 132 Mass. 164, 3 Keener 784, 1 Scott 487, p. 510.
- Ravenswood, S. & G. R'y Co. v. Woodyard**, 46 W. Va. 558, 33 S. E. 285, p. 605.
- Rawlins v. Wickham**, 3 De Gex & J. 304, p. 453.
- Raymond v. Flavel**, 27 Oreg. 219, 40 Pac. 158, p. 262, 267.
- Rayner v. Preston**, L. R. 18 Ch. D. 1, 1 Ames Eq. Jur. 229, 2 Scott 458, p. 163.
- Read v. Mosby**, 87 Tenn. 759, 11 S. W. 940, 5 L. R. A. 122, p. 511.
- Reade v. Livingston**, 3 Johns. Ch. 481, 8 Am. Dec. 520, p. 638.
- Redfield v. Gleason**, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. Rep. 889, p. 432.
- Redgrave v. Hurd**, L. R. 20 Ch. Div. 1, 13, 14, 2 Keener 896, Shep. 173, p. 456, 459, 460.
- Red River Val. L. & I. Co. v. Smith**, 7 N. Dak. 236, 74 N. W. 194, p. 277.
- Reed v. Dickerman**, 12 Pick. 145, 146, 149, H. & B. 134, p. 233, 235, 236.
- Reed v. Equitable F. & M. Ins. Co.**, 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496, p. 303.
- Reed v. Holliday**, 19 Fed. 325, p. 838.
- Reed v. Lukens**, 44 Pa. St. 200, 84 Am. Dec. 425, 2 Scott 455, p. 163.
- Rees v. Berrington**, 2 Ves. 540, 2 Lead. Cas. Eq., 4th Am. ed., 1867, 1870, 1896, p. 174.
- Rees v. City of Watertown**, 19 Wall. 121, H. & B. 5, Shep. 53, 1 Scott 260, p. 201.
- Reese v. Bank of Commerce**, 14 Md. 271, 74 Am. Dec. 536, p. 330.
- Reese River Mining Co., In re**, L. R. 2 Ch. 604, 609, p. 449.
- Reeve v. Whitmore**, 4 De Gex, J. & S. 1, 16-18, p. 771.
- Reeves v. Kimball**, 40 N. Y. 299, 304, 311, p. 330.
- Reeves v. Morgan**, 48 N. J. Eq. 415, 21 Atl. 1040, p. 408.
- Reid v. Shergold**, 10 Ves. 370, 380, p. 410.
- Renals v. Cowlshaw**, L. R. 9 Ch. D. 125, 1 Ames Eq. Jur. 159, 2 Scott 501, 2 Keener 512, p. 776.
- Renard v. Clink**, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692, H. & B. 212, p. 424.
- Rennie v. Young**, 2 De Gex & J. 136, p. 396.
- Republican Mountain Silver Mines v. Brown**, 58 Fed. 647, 7 C. C. A. 412, 24 L. R. A. 776, p. 807.
- Revell v. People**, 177 Ill. 468, 69 Am. St. Rep. 257, 52 N. E. 1052, 53 L. R. A. 790, p. 834.
- Revett v. Harvey**, 1 Sim. & St. 502, p. 521.
- Reynell v. Sprye**, 1 De Gex, M. & G. 656, 660, 679, 688, 689, p. 185, 448, 455, 461.
- Reynolds v. Burgess Sulphite Fibre Co.**, 71 N. H. 332, 339, 341-345, 346, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535, 544-549, 1 Scott 45, p. 73, 75, 77.
- Reynolds v. Crawfordsville Bank**, 112 U. S. 410, 5 Sup. Ct. 216, p. 140.
- Reynolds v. Everett**, 144 N. Y. 189, 39 N. E. 72, 26 L. R. A. 591, Lewis 270, p. 846.

- Reynolds v. Pitt, 19 Ves. 134, 140, p. 214, 226.
- Reynolds v. Sumner, 126 Ill. 58, 9 Am. St. Rep. 523, and note, 18 N. E. 334, 1 L. R. A. 327, p. 590.
- Rhodes v. Bate, L. R. 1 Ch. 252, p. 513.
- Ribou v. R. R. Cos., 16 Wall. 446, p. 630.
- Rice v. Boston etc. Aid Soc., 56 N. H. 191, p. 245.
- Rice v. Boyer, 108 Ind. 472, 58 Am. Rep. 61, 9 N. E. 420, p. 505.
- Rice v. Bunce, 49 Mo. 231, 234, 8 Am. Rep. 129, p. 392.
- Rice v. D'Arville, 162 Mass. 559, 39 N. E. 180, 2 Keener 1071, p. 820.
- Rice v. Rice, 2 Drew. 1, 73 H. & B. 23, 1 Scott 334, p. 193, 311, 314, 315, 331, 339, 341, 748.
- Rice v. Rice, 36 Fed. 858, 860, p. 748.
- Rice v. Sanders, 152 Mass. 108, 24 N. E. 1079, 23 Am. St. Rep. 804, 8 L. R. A. 315, p. 712.
- Rice v. Williams, 32 Fed. 437, p. 839.
- Richards v. Collins, 45 N. J. Eq. 283, 14 Am. St. Rep. 726, 17 Atl. 831, p. 783.
- Richards v. Delbridge, L. R. 18 Eq. 11, 13, Ames Trusts 130, H. & B. 365, Shep. 204, p. 559, 561.
- Richards v. Dower, 64 Cal. 62, 28 Pac. 113, 1 Ames Eq. Jur. 517, p. 843.
- Richards v. Humphreys, 15 Pick. 133, 135, 136, p. 250.
- Richards v. Jackson, 18 Ves. 472, 474, p. 80.
- Richards' Appeal, 57 Pa. St. 105, 98 Am. Dec. 202, 1 Ames Eq. Jur. 574, p. 832.
- Richardson v. Chickering, 41 N. H. 380, 77 Am. Dec. 769, p. 376.
- Richardson v. De Giverville, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426, p. 638.
- Richardson v. Greese, 3 Atk. 64, 65, 68, p. 242.
- Richardson v. Richardson, L. R. 3 Eq. 686, Ames Trusts 156, p. 559, 561.
- Richi v. Chattanooga Brewing Co., 105 Tenn. 651, 58 S. W. 646, p. 98.
- Richmond v. Dubuque etc. R. R., 33 Iowa, 422, 487, 488, p. 108.
- Ridden v. Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684, p. 666, 667, 669.
- Rider v. Kidder, 10 Ves. 360, p. 590.
- Riegel v. American L. Ins. Co., 140 Pa. St. 193, 21 Atl. 392, 23 Am. St. Rep. 225, 11 L. R. A. 857, H. & B. 221, 3 Keener 191, p. 437, 439.
- Riesz's Appeal, 73 Pa. St. 485, 1 Ames Eq. Jur. 254, p. 906.
- Rigden v. Vallier, 3 Atk. 735, 2 Ves. Sr. 252, 257, 258, p. 189, 545.
- Riggs v. American Tract Society, 95 N. Y. 503, p. 505.
- Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425, 429, p. 401.
- Riley v. Bell, 120 Iowa, 618, 95 N. W. 170, p. 451.
- Riley v. Martinelli, 97 Cal. 575, 32 Pac. 599, 33 Am. St. Rep. 209, 21 L. R. A. 33, p. 343.
- Rindge v. Baker, 57 N. Y. 209, 15 Am. Rep. 475, H. & B. 578, p. 68, 915.
- Ringgold v. Ringgold, 1 Har. & G. 11, 18 Am. Dec. 250, p. 622.
- Ringo v. Binns, 35 U. S. (10 Pet.) 269, p. 518.
- Ripple v. Ripple, 1 Rawle, 386, p. 264.
- Ritchie v. Griffiths, 1 Wash. 429, 25 Pac. 341, 22 Am. St. Rep. 155, 12 L. R. A. 384, p. 294.
- Riverdale Cotton Mills v. Alabama etc. Co., 198 U. S. 188, 25 Sup. Ct. 629, p. 851.
- Roane v. Baker, 120 Ill. 308, 11 N. E. 246, p. 345.
- Robbins v. Larson, 69 Minn. 436, 72 N. W. 456, 65 Am. St. Rep. 572, p. 350.
- Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 546, 64 N. E. 442, 80 Am. St. Rep. 828, 59 L. R. A. 478, 1 Scott 178, Lewis 354, p. 25, 29, 846.
- Roberts v. City of Louisville, 92 Ky. 95, 36 Am. St. Rep. 469, 17 S. W. 216, 13 L. R. A. 844, p. 822.
- Roberts v. Doan, 180 Ill. 187, 54 N. E. 207, p. 340.
- Robertson v. Cooper, 1 Ind. App. 78, 27 N. E. 104, p. 330.

- Robertson v. Staed**, 135 Mo. 135, 58 Am. St. Rep. 569, 36 S. W. 610, 33 L. R. A. 203, p. 811.  
**Robertson v. Wheeler**, 162 Ill. 566, 44 N. E. 870, p. 300.  
**Robinson v. City of Wilmington**, 65 Fed. 856, 13 C. C. A. 177, 25 U. S. App. 144, p. 823.  
**Robinson v. Dickey**, 143 Ind. 205, 52 Am. St. Rep. 417, 42 N. E. 679, p. 68, 870.  
**Robinson v. Geldard**, 3 Macn. & G. 735, 744, 745, p. 660.  
**Robinson v. Holt**, 39 N. H. 557, 75 Am. Dec. 233, p. 528.  
**Robinson v. Litton**, 3 Atk. 209, 1 Keener 436, p. 829.  
**Robinson v. Lord Byron**, 1 Brown Ch. 588, 1 Ames Eq. Jur. 566, 1 Keener 836, p. 848.  
**Robinson v. Pickering**, L. R. 16 Ch. Div. 371, 660, p. 817.  
**Robinson v. Pierce**, 118 Ala. 273, 72 Am. St. Rep. 160, 24 South. 984, 991, 45 L. R. A. 66, p. 596, 597.  
**Robinson v. Robinson**, 19 Beav. 494, p. 684.  
**Robinson v. Robinson**, 1 De Gex, M. & G. 247, 254, 257, Ames Trusts 495, p. 613, 614, 615, 617, 620.  
**Robinson v. Suburban Brick Co.**, (C. C. A.) 127 Fed. 804, p. 491.  
**Robinson v. Wall**, 10 Beav. 61, 2 Phill. Ch. 372, p. 493.  
**Robinson v. Wheelright**, 6 De Gex, M. & G. 535, 546, 21 Beav. 214, p. 644.  
**Robinson v. Williams**, 22 N. Y. 380, Kirch. 274, p. 703.  
**Robson v. Doyle**, 191 Ill. 566, 61 N. E. 435, p. 73, 80.  
**Robson v. Flight**, 4 De Gex, J. & S. 608, p. 607.  
**Roby v. Bismarck Nat. Bank**, 4 N. Dak. 156, 59 N. W. 719, 50 Am. St. Rep. 633, p. 345.  
**Roby v. Colehour**, 135 Ill. 300, 25 N. E. 777, p. 513.  
**Rochester v. Levering**, 104 Ind. 562, 4 N. E. 203, p. 517.  
**Rochester Distilling Co. v. Rasey**, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 637, p. 769.  
**Rock Island & P. R. Co. v. Dimick**, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105, p. 892.  
**Rodgers v. Marshall**, 17 Ves. 294, p. 252.  
**Rodick v. Gandell**, 1 De Gex. M. & G. 763, p. 766.  
**Rogers v. Challis**, 27 Beav. 175, 1 Ames Eq. Jur. 61, 2 Scott 60, 2 Keener 66, p. 885.  
**Rogers v. Ingham**, L. R. 3 Ch. Div. 351, 356, 357, 3 Keener 75, Shep. 157, 2 Scott 572, p. 425, 426, 437.  
**Rogers v. Jones**, 3 Ch. Div. 688, 689, H. & B. 131, p. 230, 240.  
**Rogers v. Rogers**, 17 R. I. 623, 24 Atl. 46, p. 64.  
**Rogers v. Rogers**, 67 S. C. 168, 45 S. E. 176, 100 Am. St. Rep. 721, p. 658.  
**Rogers v. Tucker**, 94 Mo. 346, 7 S. W. 414, p. 345.  
**Rogers v. Wiley**, 14 Ill. 65, 56 Am. Dec. 491, p. 266.  
**Rogers Locomotive Works v. Erie R. R.**, 20 N. J. Eq. 379, H. & B. 734, p. 848.  
**Rogers Mfg. Co. v. Rogers**, 58 Conn. 356, 20 Atl. 467, 18 Am. St. Rep. 278, 7 L. R. A. 779, 2 Keener 295, H. & B. 629, Shep. 294, p. 819, 886.  
**Rohrschneider v. Knickerbocker Ins. Co.**, 76 N. Y. 216, 32 Am. Rep. 290, p. 447.  
**Rolfe v. Gregory**, 4 De Gex, J. & S. 576, 579, p. 472, 476, 594.  
**Rolfe v. Peterson**, 2 Brown Parl. C., Tomlin's ed. 436, p. 220.  
**Rolfe v. Rolfe**, 15 Sim. 88, 2 Keener 218, p. 817, 818, 820.  
**Roll v. Rea**, 50 N. J. Law, 264, 12 Atl. 905, p. 281.  
**Rolland v. Hart**, L. R. 6 Ch. 678, 681-683, p. 307.  
**Rolt v. Lord Somerville**, 2 Eq. Cas. Abr. 759, 1 Ames Eq. Jur. 471, 1 Keener 435, 1 Scott 647, p. 828, 829.  
**Romaine v. Chauncey**, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. 826, 14 L. R. A. 712, p. 910.  
**Romaine v. Hendrickson**, 27 N. J. Eq. 162, p. 515.  
**Roman v. Mali**, 42 Md. 513, p. 475.

- Romanoff Land & Min. Co. v. Cameron, 137 Ala. 214, 33 South. 864, p. 461.
- Rooke's Case, 5 Coke, 99b, p. 204.
- Rooney v. Michael, 84 Ala. 585, 4 South. 421, p. 132.
- Root v. L. S. & M. S. R. Co., 105 U. S. 189, 26 L. ed. 975, Lewis 13, p. 837.
- Rorer Iron Co. v. Trout, 83 Va. 397, 419, 2 S. E. 713, 5 Am. St. Rep. 285, p. 275, 377, 378.
- Roscarriek v. Barton, 1 Cas. Chan, 217, 1 Scott 32, p. 688.
- Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145, 10 Pac. 554, p. 518.
- Rosenberg v. Frank, 58 Cal. 387, p. 670, 676.
- Ross v. Union Pac. R'y, 1 Woolw. 26, 36, Fed. Cas. No. 12,080, 2 Scott 65, 2 Keener 145, p. 887.
- Rothery v. N. Y. Rubber Co., 90 N. Y. 30, 1 Ames Eq. Jur. 567, p. 833.
- Rouse v. Merchants' Nat. Bank, 46 Ohio St. 493, 22 N. E. 293, 15 Am. St. Rep. 644, 5 L. R. A. 378, p. 595.
- Row v. Dawson, 1 Ves. Sr. 331, 2 Lead. Cas. Eq., 4th Am. ed., 1531, p. 758, 764.
- Rowley v. Bigelow, 12 Pick. 307, 23 Am. Dec. 607, p. 375.
- Royal Baking Powder Co. v. Royal, 122 Fed. 337, 58 C. C. A. 499, p. 840.
- Ruckman v. Decker, 23 N. J. Eq. 283, p. 312.
- Rudd v. Lascelles, [1900] 1 Ch. 815, 1 Ames Eq. Jur. 256, p. 906.
- Rudy v. Austin, 56 Ark. 73, 35 Am. St. Rep. 85, 19 S. W. 111, p. 532.
- Ruple v. Bindley 91 Pa. St. 296, 299, Shep. 219, p. 769, 771.
- Rushmer v. Polsue, [1906] 1 Ch. 234, 1 Scott 746, p. 831.
- Russ v. Mebius 16 Cal. 350, p. 589.
- Russel v. Russel, 1 Brown Ch. 269, 1 Lead. Cas. Eq., 4th Am. ed., 931, Kirch. 110, p. 739, 755.
- Russell v. Clark's Ex'rs, 7 Cranch, 69, p. 94.
- Russell v. East Anglian R'y, 3 Macn. & G. 104, p. 809.
- Russell v. Pistor, 7 N. Y. 171, 57 Am. Dec. 509, p. 385.
- Russell v. Russell, 129 Fed. 434, p. 523.
- Russell v. Tate, 52 Ark. 541, 20 Am. St. Rep. 193, 13 S. W. 130, 7 L. R. A. 180, p. 822.
- Russell v. Wakefield Water W. Co., L. R. 20 Eq. 474, 479, 481, p. 630.
- Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265, 1 Ames Eq. Jur. 435, 2 Scott 144, p. 893.
- Rust v. Ware, 6 Gratt. 50, 52 Am. Dec. 100, p. 854.
- Rutherford v. Haven, 11 Iowa 587, 1 Ames Eq. Jur. 342, p. 898.
- Rutherford v. Jones, 14 Ga. 521, 60 Am. Dec. 655, p. 867.
- Rutland Electric L. Co. v. Bates, 68 Vt. 579, 54 Am. St. Rep. 904, 35 Atl. 480, p. 619.
- Ryall v. Rowles, 1 Ves. Sr. 348, 1 Atk. 165, 2 Lead. Cas. Eq., 4th Am. ed., 1533, 1579, p. 324.
- Ryall v. Ryall, 1 Atk. 59, p. 591.
- Ryan v. Cudahy, 157 Ill. 108, 48 Am. St. Rep. 305, 41 N. E. 760, 49 L. R. A. 353.
- Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696, H. & B. 488, p. 603.
- Ryan v. Kingsberry, 88 Ga. 361, 14 S. E. 596, p. 809.
- Ryan v. Maxey, 14 Mont. 81, 35 Pac. 515, p. 911.
- Ryan v. Mutual Tontine etc. Assn. [1893] 1 Ch. 116, 2 Keener 179, p. 888.
- Ryder v. Bentham, 1 Ves. Sr. 543, 1 Ames Eq. Jur. 545, 1 Keener 835, p. 834.

S.

- Sabin v. Anderson, 31 Oreg. 487, 49 Pac. 870, p. 911.
- Sable v. Maloney, 48 Wis. 331, 4 N. W. 479, 2 Ames Eq. Jur. 310, p. 431, 859.
- Saccharin Corporation v. Chemicals & Drugs Co., [1900] 2 Ch. 556, p. 80.
- Sackvill v. Aylesworth, 1 Vern. 105, 2 Ames Eq. Jur. 165, p. 84.
- Saffold v. Wade's Ex'r, 51 Ala. 214, p. 372.
- Safford v. Ensign Mfg. Co., (C. C. A.) 120 Fed. 480, 483, p. 93.

- Saffron etc. Soc. v. Rayner*, L. R. 14 Ch. Div. 406, 409, 415, p. 302, 305.
- St. Aubyn v. Smart*, L. R. 5 Eq. 183, 3 Ch. 646, 650, p. 471.
- St. James' Orphan Asylum v. Shelby*, 60 Nebr. 796, 84 N. W. 273, 83 Am. St. Rep. 553, p. 579.
- St. Jo. Mfg. Co. v. Daggett*, 84 Ill. 556, p. 398.
- St. Joseph & D. C. R. R. v. Smith*, 19 Kan. 225, 231, p. 809.
- St. Louis, K. & S. R. Co. v. Wear*, 135 Mo. 230, 33 L. R. A. 341, 36 S. W. 357, 658, H. & B. 823, p. 808.
- St. Paul Trust Co. v. Mintzner*, 65 Minn. 124, 60 Am. St. Rep. 444, 67 N. W. 657, 32 L. R. A. 756, p. 806.
- Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379, 1 Ames Eq. Jur. 128, p. 817, 820.
- Salter v. Salter*, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249, p. 646.
- San Antonio Nat. Bank v. Bamberger*, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738, p. 446.
- Sanborn v. Doe*, 92 Cal. 152, 23 Pac. 105, 27 Am. St. Rep. 101, p. 761.
- Sanborn v. Kittredge*, 20 Vt. 632, 636, 50 Am. Dec. 58, p. 93.
- Sanders v. Soutter*, 136 N. Y. 97, 32 N. E. 638, p. 96, 97.
- Sanders v. Steele*, 124 Ala. 415, 26 South. 882, p. 590.
- Sanders v. Vautier*, 4 Beav. 115, Ames Trusts, 454, p. 553.
- Sanders v. Village of Yonkers*, 63 N. Y. 489, p. 874.
- Sanford v. Head*, 5 Cal. 297, 298, 299, p. 672.
- Sanquirico v. Benedetti*, 1 Barb. 315, 2 Scott 85, p. 819.
- Santley v. Wilde*, [1899] 1 Ch. 747 Kirch. 488, p. 698.
- Sarles v. McGee*, 1 N. Dak. 365, 48 N. W. 231, 26 Am. St. Rep. 633, p. 297.
- Satterfield v. Malone*, 35 Fed. 445, 1 L. R. A. 35, p. 303.
- Saull v. Browne*, L. R. 10 Ch. 64, 2 Ames Eq. Jhr. 100, p. 851.
- Saunders v. Dehew*, 2 Vern. 270, 271, Ames Trusts 289, p. 319, 347, 373.
- Saunders v. Nevil*, 2 Vern. 428, Ames Trusts 449, p. 610.
- Savage v. Foster*, 9 Mod. 35 1 Scott 576, p. 376, 504, 506.
- Savage v. Hall*, 12 Gray, 363, p. 383.
- Savage v. Murphy*, 34 N. Y. 508, 90 Am. Dec. 733, 8 Bosw. 75, p. 604.
- Savage v. Savage*, 19 Oreg. 112, 20 Am. St. Rep. 795, 23 Pac. 890, p. 867.
- Savannah Nat. Bank v. Haskins*, 101 Mass. 370, 3 Am. Rep. 373, p. 408.
- Savile's Case*, Cas. temp. Talb. 16, 1 Ames Eq. Jur. 472, p. 829.
- Sawyer, In re*, 124 U. S. 200, 8 Sup. Ct. 487, 31 L. ed. 402, Shep. 5, p. 822, 851.
- Sawyer v. White*, 122 Fed. 223, (C. C. A.) p. 506.
- Saxon L. Ins. Co., In re*, 1 De Gex, J. & S. 29, 2 Johns. & H. 408, 2 Ames Eq. Jur. 265, p. 424.
- Say v. Barnes*, 4 Serg. & R. 112, 8 Am. Dec. 679, p. 521.
- Scanlon v. Grimmer*, 71 Minn. 351, 70 Am. St. Rep. 326, 74 N. W. 146, p. 498, 712.
- Schafer v. Reilly*, 50 N. Y. 61, 67, 68, p. 332.
- Scheerer v. Cuddy*, 85 Cal. 271, 24 Pac. 713, p. 279.
- Schell, Matter of*, 53 N. Y. 263, 265, H. & B. 543, p. 623.
- Schelling v. Mullen*, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475, p. 330.
- Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728, p. 587.
- Schmidt v. Louisville & N. R. Co.*, 101 Ky. 441, 41 S. W. 1015, 38 L. R. A. 809, p. 890.
- Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765, p. 713.
- Schneider v. Sellers*, (Tex.) 84 S. W. 417, p. 370.
- Schofield v. School Dist.* 27 Conn. 499, p. 822.
- Schofield v. Ute Co.*, 92 Fed. 269, 34 C. C. A. 334, p. 911.
- Scholle v. Scholle*, 101 N. Y. 172, 4 N. E. 334, p. 515.
- School District No. 1 v. Weston*, 31 Mich. 85, p. 793.
- School District No. 82 v. Taylor*, 19 Kan. 287, p. 348.

- Schott v. Dosh, 49 Nebr. 187, 68 N. Am. St. Rep. 531, p. 364.
- Schreiber v. Carey, 48 Wis. 208, 4 N. W. 124, p. 805.
- Schuyler v. Curtis, 147 N. Y. 434, 49 Am. St. Rep. 671, 42 N. E. 22, 31 L. R. A. 286, Lewis 344, reversing 27 Abb. N. C. 387, 15 N. Y. Supp. 787, 64 Hun 594, 19 N. Y. Supp. 204, 1 Keener 93, p. 846.
- Schuyler Steam Towboat Co., In re, 136 N. Y. 169, 32 N. E. 623, 20 L. R. A. 391, p. 808.
- Schwoerer v. Boylston Market Ass'n, 99 Mass. 285, 2 Keener 483, p. 775.
- Scotfield v. City of Lansing, 17 Mich. 437, p. 115.
- Scotch Lumber Co. v. Sage, 132 Ala. 598, 90 Am. St. Rep. 932, 32 South. 607, p. 297.
- Scott v. Freeland, 7 Smedes & M. 409, 45 Am. Dec. 310, p. 520.
- Scott v. Hanson, 1 Sim. 13, 1 Russ. & M. 128, 1 Ames Eq. Jur. 353, 2 Keener 887, 2 Scott 240, p. 457.
- Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 714, 35 L. ed. 358, p. 140, 142.
- Scott v. Onderdonk, 14 N. Y. 9, 67 Am. Dec. 106, 2 Ames Eq. Jur. 147, 1 Keener 331, p. 875, 876.
- Scott v. Rayment, L. R. 7 Eq. 112, 2 Keener 75, p. 885.
- Scott v. Tyler, 2 Brown Ch. 431, 2 Dick. 712, 2 Lead Cas. Eq., 4th Am. ed., 429, 475, 478-480, 483-485, 486-493, 494-499, p. 488, 489.
- Screven v. Clark, 48 Ga. 41, p. 809.
- Scribner v. Collar, 40 Mich. 375, 29 Am. Rep. 541, p. 517.
- Scudamore v. Scudamore, Prec. Ch. 543, 1 Scott 315, 598, 3 Keener 947, p. 678, 682.
- Seagrave v. Seagrave, 13 Ves. 439, 443, p. 644.
- Sears v. Hotchkiss, 25 Conn. 171, 65 Am. Dec. 557, p. 633.
- Seavey v. Drake, 62 N. H. 393, 1 Ames Eq. Jur. 308, p. 904.
- Seeley v. Bacon, (N. J. Eq.) 34 Atl. 139, 3 Keener 139, p. 340, 429.
- Seeley v. Jago, 1 P. Wms. 389, 1 Scott 635, p. 684, 685.
- Selby v. Alston, 3 Ves. 339, p. 58, 379.
- Selby v. Case, 87 Md. 459, 39 Atl. 1041, p. 173.
- Sell v. West, 125 Mo. 621, 46 Am. St. Rep. 508, 28 S. W. 969, p. 24.
- Sellon v. Braden, 13 Iowa, 365, p. 191.
- Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250, p. 356.
- Sensenderfer v. Kemp, 83 Mo. 581, p. 263.
- Sercomb v. Catlin, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606, p. 809.
- Seton v. Slade, 7 Ves. 265, 273, 2 Scott 332, p. 697, 898, 899.
- Sewall v. Boston Water Works, 4 Allen, 277, 81 Am. Dec. 701, p. 336.
- Sexton v. Wheaton, 8 Wheat. 229, 230, 1 Am. Lead. Cas., 4th Am. ed. 17, 50, 51, p. 531.
- Seymour v. Cushway, 100 Wis. 580, 7 N. W. 769, 69 Am. St. Rep. 957, p. 604.
- Seymour v. Delancey, 6 Johns. Ch. 222, 224, 225, 3 Cow. 455, 15 Am. Dec. 270, 2 Keener 772, p. 482, 483.
- Seymour v. McKinsty, 106 N. Y. 230, 238, 12 N. E. 348, 14 N. E. 94, p. 367.
- Shaeffer v. Chambers, 6 N. J. Eq. 548, 47 Am. Dec. 211, Kirck. 548, p. 718, 719.
- Shahan v. Swan, 48 Ohio St. 25, 29 Am. St. Rep. 517, 26 N. E. 222, 2 Scott 219, 2 Keener 726, p. 903.
- Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, p. 475.
- Sharon v. Gager, 46 Conn. 189, 2 Scott 713, p. 509.
- Sharon v. Hill, 20 Fed. 1, 36 Fed. 337, 2 Ames Eq. Jur. 161, p. 860, 861.
- Sharon v. Tucker, 144 U. S. 542, 12 Sup. Ct. 720, 1 Keener 392, Shep. 47.
- Sharp v. Ropes, 110 Mass. 381, 2 Keener 504, p. 776.
- Sharp v. Wightman, 205 Pa. St. 285, 54 Atl. 888, p. 244.
- Sharpe v. Foy, L. R. 4 Ch. 35, 37, 40, 41, p. 365, 376, 504.

- Sharples v. Adams, 32 Beav. 213, 216, p. 347.  
 Shattock v. Shattock, L. R. 2 Eq. 182, p. 650.  
 Shaw v. Coster, 8 Paige, 339, 35 Am. Dec. 690, 1 Keener 235, p. 790, 794, 797, 798.  
 Shaw v. Foster, L. R. 5 H. L. 321, p. 753.  
 Shea's Appeal, 121 Pa. St. 302, 15 Atl. 629, 1 L. R. A. 422, p. 514.  
 Sheehan v. Hamilton, 2 Keyes, 304, 4 Abb. App. 211, p. 380.  
 Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 579, 13 Sup. Ct. 936, 37 L. ed. 853, p. 141.  
 Sheffield Water Works v. Yeomans, L. R. 2 Ch. 8, 11, 2 Ames Eq. Jur. 67, 1 Keener 130, Shep. 39, p. 111.  
 Shelfer v. London El. L. Co., [1895] 1 Ch. 287, 1 Ames Eq. Jur. 589, p. 832, 833.  
 Shelton v. Platt, 139 U. S. 595, 11 Sup. Ct. 646, 35 L. ed. 276, p. 823.  
 Shepherd v. May, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. ed. 456, p. 711.  
 Sheppard v. McEvers, 4 Johns. Ch. 136, 8 Am. Dec. 561, p. 624.  
 Sheriden v. Andrews, 49 N. Y. 478, p. 284.  
 Sherman v. Fitch, 98 Mass. 59, 2 Ames Eq. Jur. 14, p. 874.  
 Sherman v. Lewis, 44 Minn. 107, 46 N. W. 318, p. 232.  
 Sherman v. Sherman, 4 Allen 392, p. 656.  
 Sherrill v. Sherrill, 73 N. C. 8, p. 402.  
 Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307, 1 Scott 766, 1 Keener 771, H. & B. 770, p. 846.  
 Sherwood v. Sherwood, 45 Wis. 357, 30 Am. Rep. 757, p. 438.  
 Shields v. Lozear, 34 N. J. L. 496, 3 Am. Rep. 256, Kirch. 728, p. 687, 692.  
 Shipman v. Furniss, 69 Ala. 555, 44 Am. Rep. 528, p. 523.  
 Shirley v. Goodnough, 15 Oreg. 642, 16 Pac. 871, p. 919.  
 Shoemaker v. Hinze, 53 Wis. 116, 10 N. W. 86, Ames Trusts 29, p. 569.
- Shotwell v. Smith, 20 N. J. Eq. 79, p. 77.  
 Shotwell v. Strube, 21 N. J. Eq. 31, p. 82.  
 Shreve v. Brereton, 51 Pa. St. 175, 180, p. 221.  
 Shropshire Union Railways & Canal Co. v. Reg., L. R., 7 H. L. 496, Ames Trusts 300, p. 338.  
 Shubrick v. Guerard, 2 Desaus. (S. C.) 616, 1 Scott 687, p. 844.  
 Shute v. Shute, Prec. Ch. 111, p. 864.  
 Shuttleworth v. Greaves, 4 Mylne & C. 35, p. 664.  
 Shuttleworth v. Laycock, 1 Vern. 244, 1 Scott 264, p. 178.  
 Sichel v. Mosenthal, 30 Beav. 371, 2 Keener 72, p. 885.  
 Sidenberg v. Ely, 90 N. Y. 263, 43 Am. Rep. 163, Kirch. 564, p. 719.  
 Simmons v. Burlington, C. R. & N. R'y Co., 150 U. S. 278, 16 Sup. Ct. 1, 40 L. ed. 150, p. 732.  
 Simmons v. Hendricks, 8 Ired. Eq. 84, 86, 55 Am. Dec. 439, p. 675.  
 Simmons v. Oliver, 74 Wis. 633, 43 N. W. 561, H. & B. 524, p. 615.  
 Simmons v. Palmer, 93 Va. 389, 25 S. E. 6, 3 Keener 393, p. 428.  
 Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. ed. 1063, 1 Scott 549, p. 199, 274, 279.  
 Simmons Hardware Co. v. Waibel, 1 S. Dak. 488, 36 Am. St. Rep. 755, 47 N. W. 418, 11 L. R. A. 267, H. & B. 817, p. 802, 817.  
 Simpson v. Hinson, 88 Ala. 527, 7 South. 264, p. 266.  
 Simpson v. Lord Howden, 3 Mylne & C. 97, 108, 2 Ames Eq. Jur. 124, 1 Keener 323, p. 850, 860, 875.  
 Simpson v. Pearson, 31 Ind. 1, 5, 99 Am. Dec. 577, p. 399.  
 Simpson v. Vaughan, 2 Atk. 31, 2 Scott 542, p. 191.  
 Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, p. 840.  
 Singer Sewing-Mach. Co. v. Union etc. Co., 1 Holmes, 253, Fed. Cas. No. 12,904, 1 Ames Eq. Jur. 438, 2 Keener 255, p. 818, 893.

- Sinnett v. Herbert, L. R. 7 Ch. 232, p. 581.
- Sipley v. Wass, 49 N. J. Eq. 463, 24 Atl. 233, p. 252.
- Skarf v. Soulby, 1 Macn. & G. 364, 374, p. 530.
- Skellinger's Ex'rs v. Skellinger's Ex'rs, 32 N. J. Eq. 659, H. & B. 442, p. 589.
- Skelton v. Skelton, 2 Swanst. 170, 1 Ames Eq. Jur. 473, 1 Keener 430, 1 Scott 656, p. 827, 829.
- Skinner v. Dayton, 2 Johns. Ch. 526, 534, 535, 17 Johns. 339, 357, p. 214, 224.
- Skinner v. Judson, 8 Conn. 528, 21 Am. Dec. 691, p. 81.
- Skipwith v. Strother, 3 Rand. 214, p. 499.
- Slack v. Black, 109 Mass. 496, p. 78.
- Slaney v. Sidney, 14 Mees. & W. 800, 2 Ames Eq. Jur. 11, p. 800.
- Slanning v. Style, 3 P. Wms. 334, 337-339, Ames Trusts 164, p. 638, 656.
- Slater v. Oriental Mills, 18 R. I. 352, 27 Atl. 443, H. & B. 466, p. 598.
- Slaughter's Adm'r v. Gerson, 13 Wall. 379, 2 Scott 721, p. 455, 458.
- Sleeper v. Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377, p. 361.
- Slegel v. Herbine, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547, p. 100.
- Slim v. Croucher, 1 De Gex, F. & J. 518, 523, 524, 525, 528, 2 Giff. 37, p. 471.
- Slingerland v. Slingerland, 39 Minn. 197, 39 N. W. 146, 2 Keener 701, p. 904.
- Slingsby v. Boulton, 1 Ves. & B. 334, 2 Ames Eq. Jur. 33, 1 Keener 216, p. 795, 797.
- Sloan v. Campbell, 71 Mo. 387, 36 Am. Rep. 493, p. 750.
- Sloan v. Gibbes, 56 S. C. 480, 76 Am. St. Rep. 559, 35 S. E. 408, p. 914.
- Sloman v. Walter, 1 Brown Ch. 418, 2 Lead. Cas. Eq., 4th Am. ed., 2014, 2023, 2044, p. 170, 214.
- Slowey v. McMurray, 27 Mo. 113, 116, 72 Am. Dec. 251, p. 700.
- Smith, In re, 108 Cal. 115, 40 Pac. 1037, p. 239.
- Smith v. Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33, p. 434.
- Smith v. Aykwell, 3 Atk. 566, 2 Ames Eq. Jur. 132, p. 860.
- Smith v. Bank of New England, 69 N. H. 254, 45 Atl. 1082, 2 Ames Cas. Eq. 79, p. 117, 124.
- Smith v. Bergengren, 153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768, p. 217.
- Smith v. Bowen, 35 N. Y. 83, p. 568.
- Smith v. Burgess, 133 Mass. 513, p. 280.
- Smith v. Butler, 11 Oreg. 46, 4 Pac. 517, p. 439.
- Smith v. Cherrill, L. R. 4 Eq. 390, 395, p. 531.
- Smith v. Clark, 12 Ves. 477, p. 464.
- Smith v. Claxton, 4 Madd. 484, 492, 1 Scott 625, 3 Keener, 979, p. 683.
- Smith v. Clay, 3 Brown Ch. 638, 1 Scott 379, p. 198.
- Smith v. Collyer, 8 Ves. 89, 1 Scott 683, 1 Ames Eq. Jur. 489, 1 Keener 547, p. 842.
- Smith v. East India Co., 1 Phill. Ch. 50, p. 81.
- Smith v. Halkyard, 16 Fed. 414, p. 836.
- Smith v. Hatch, 46 N. H. 146, 1 Ames Eq. Jur. 277, p. 902.
- Smith v. Kay, 7 H. L. Cas. 750, 775, 779, p. 509, 513.
- Smith v. Leveaux, 2 De Gex, J. & S. 1, 3 Keener 913, p. 919.
- Smith v. Lucas, L. R. 18 Ch. Div. 531, p. 639.
- Smith v. Matthews, 3 De Gex, F. & J. 139, p. 568.
- Smith v. Newton, 38 Ill. 230, p. 396.
- Smith v. Richards, 13 Pet. 26, 36, 3 Keener 525, 2 Scott 652, p. 452, 453, Smith v. Roberts, 91 N. Y. 470, p. 382, 393.
- Smith v. Sands, 24 Fed. 470, p. 835.
- Smith v. Smith, 3 Atk. 304, p. 785.
- Smith v. Smith, L. R. 20 Eq. 500, 1 Ames Eq. Jur. 543, p. 834.
- Smith v. Smith, 148 Mass. 1, 18 N. E. 595, 2 Ames Cas. Eq. Jur. 64, p. 117.
- Smith v. Smith's Adm'r, 92 Va. 696, 24 S. E. 280, p. 666.

- Smith v. Townshend, 27 Md. 368, 92 Am. Dec. 637, p. 516.
- Smith v. Turner, Prec. Ch. 561, 1 Ames Eq. Jur. 282, p. 901.
- Smith v. White, L. R. 1 Eq. 626, p. 500.
- Smith v. Whitmore, 2 De Gex, J. & S. 297, p. 478.
- Smith v. Willard, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313, p. 373.
- Smith v. Worster, 59 Kan. 640, 644, 54 Pac. 676, 68 Am. St. Rep. 385, 388, p. 287.
- Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167, p. 300.
- Smithsonian Institute v. Meech, 169 U. S. 398, 18 Sup. Ct. Rep. 396, 42 L. ed. 793, p. 591, 592.
- Smithurst v. Edmunds, 14 N. J. Eq. 408, Kirch. 61, p. 769.
- Smoot v. Judd, 161 Mo. 673, 84 Am. St. Rep. 738, 61 S. W. 854, p. 854.
- Smythe v. Henry, 41 Fed. 715, p. 76.
- Smythe v. New Orleans C. & B. Co., 34 Fed. 825, affirmed, 141 U. S. 656, 12 Sup. Ct. 113, p. 122.
- Snell v. Atlantic Ins. Co., 98 U. S. 85, 3 Keener 80, p. 419.
- Snover v. Squire, (N. J. Eq.) 24 Atl. 365, p. 326.
- Snowden v. General Dispensary, 60 Md. 85, p. 103.
- Snyder v. Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863, p. 367, 374.
- Snyder v. Hopkins, 31 Kan. 557, 3 Pac. 367, 1 Ames Eq. Jur. 509, p. 844.
- Snyder v. Martin, 17 W. Va. 276, 41 Am. Rep. 670, p. 342.
- Snyder v. Partridge, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130, p. 319.
- Snyder v. Robinson, 35 Ind. 311, 9 Am. Rep. 738, p. 712.
- Societe Generale de Paris v. Walker, 11 App. Cas. 20, affirming 14 Q. B. D. 424, p. 328.
- Sohier v. Burr, 127 Mass. 221, p. 580, 676.
- Solinger v. Earle, 82 N. Y. 393, 397, 399, H. & B. 527, p. 498, 500, 527.
- Sollory v. Leaver, L. R. 9 Eq. 22, p. 806.
- Soltau v. De Held, 2 Sim. N. S., 133, 1 Keener 665, 1 Scott 717, p. 831.
- Somerby v. Buntin, 118 Mass. 279, 287, 19 Am. Rep. 459, 2 Keener 78, p. 885.
- Sonley v. Clock Makers' Co., 1 Br. Ch. Cas. 81, Ames Trusts, 225, p. 567.
- Sopwith v. Mangham, 30 Beav. 235, 239, p. 238, 239.
- Sourwine v. Supreme Lodge, 12 Ind. App. 447, 452, 453, 54 Am. St. Rep. 531, 532, 536, 40 N. E. 646, 1 Scott 320, p. 44, 157, 164.
- Southard v. Curley, 134 N. Y. 148, 31 N. E. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561, 3 Keener 460, 2 Scott 646, p. 431.
- Southerland v. Fremont, 107 N. C. 565, 12 S. E. 237, p. 361.
- Southern B. & L. Ass'n v. Anniston L. & T. Co., 101 Ala. 582, 29 L. R. A. 120, 15 South. 123, 46 Am. St. Rep. 138, p. 227.
- Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, H. & B. 282, p. 446, 453, 457, 458.
- Southern R'y Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. ed. 458, p. 810.
- Southern R'y Co. v. City of Asheville, 69 Fed. 359, p. 823.
- Southwestern Brush etc. Co. v. La. etc. Co., 45 Fed. 893.
- Sowles v. Hall, 62 Vt. 247, 22 Am. St. Rep. 101, 20 Atl. 810, 2 Keener 1117, p. 899.
- Spain v. Hamilton, 1 Wall. 604, 624, p. 325.
- Sparks v. Company etc. of Liverpool Water Works, 13 Ves. 428, 433, 434, p. 227.
- Sparks v. Woodstock Iron etc. Co., 87 Ala. 294, 6 South. 195, p. 172.
- Spect v. Spect, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137, p. 695.
- Speer v. Crawler, 2 Mer. 410, 417, p. 866.
- Speight v. Gaunt, 22 Ch. Div. 727, on appeal, 9 App. Cas. (H. L.) 1, Ames Trusts 518, p. 611, 612.

- Speke v. Walrond, Toth. 155, p. 867.
- Spence v. Harvey, 22 Cal. 337, 83 Am. Dec. 69, p. 495.
- Spielmann v. Kliest, 36 N. J. Eq. 199, 202, 206, p. 293.
- Spinning v. Sullivan, 48 Mich. 5, 11 N. W. 758, p. 330.
- Spirett v. Willows, 3 De Gex, J. & S. 293, 302, 303, p. 530, 532.
- Spooner v. Travelers' Ina. Co., 76 Minn. 311, 77 Am. St. Rep. 651, 79 N. W. 305, p. 911.
- Sporle v. Whayman, 20 Beav. 607, 2 Keener 55, p. 884.
- Sprague v. West, 127 Mass. 471, 1 Keener 255, p. 795.
- Spread v. Morgan, 11 H. L. Cas. 588, p. 238, 239.
- Springhead Spin. Co. v. Riley, L. R. 6 Eq. 551, 1 Scott 763, Lewis 204, p. 846.
- Spurlock v. Brown, 91 Tenn. 241, 18 S. W. 868, p. 416.
- Squire v. Harder, 1 Paige, 494, 19 Am. Dec. 446, p. 589.
- Stackpole v. Beaumont, 3 Ves. 89, 95, 96, p. 488.
- Stafford v. Fetters, 55 Iowa, 484, 8 N. W. 322, H. & B. 191, 3 Keener 86, p. 419.
- Stafford v. Stafford, 1 De Gex & J. 193, 197, p. 399.
- Staines v. Shore, 16 Pa. St. 200, 55 Am. Dec. 492, p. 493.
- Standard El. Co. v. Crane El. Co., 56 Fed. 718, 6 C. C. A. 100, 1 Ames Eq. Jur. 663, p. 836.
- Stanford v. Hurlstone, L. R. 9 Ch. 116, 118, 119, 1 Keener 613, p. 843.
- Staniland v. Willott, 3 Macn. & G. 664, 674-677, 680, p. 666, 669.
- Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334, p. 889.
- Stapilton v. Stapilton, 1 Atk. 2, 2 Lead. Cas. Eq., and notes, 1675, 4th Am. ed., p. 428.
- Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652, p. 713.
- Stark v. Starrs, 6 Wall. 402, p. 873.
- Starkie v. Richmond, 155 Mass. 188, 29 N. E. 770, 1 Keener 871, p. 834.
- State v. County Court of Saline County, 51 Mo. 350, 11 Am. Rep. 464, p. 822.
- State v. Hall, 70 Miss. 678, 13 South. 39, p. 227.
- State v. Kittelle, 110 N. C. 560, 28 Am. St. Rep. 698, 15 L. R. A. 694, 15 S. E. 103, p. 302.
- State v. Lord, 28 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473, p. 822.
- State v. McBride, 76 Ala. 51, p. 227.
- State v. Ohio Oil Co., 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809, 1 Scott 731, p. 830.
- State v. Rosa, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534, p. 806.
- State v. Second Judicial Dist. Ct. 15 Mont. 324, 48 Am. St. Rep. 682, 39 Pac. 316, 27 L. R. A. 392, p. 806.
- State v. Superior Court, 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354, p. 809.
- State v. Superior Court, 17 Wash. 12, 61 Am. St. Rep. 893, 48 Pac. 741, p. 822.
- State Bank v. Belk, (Neb.) 94 N. W. 617, p. 911.
- State Bank v. Frame, 112 Mo. 502, 20 S. W. 620, p. 361.
- State of Georgia v. Stanton, 6 Wall. 10, 18 L. ed. 721, p. 822.
- Stead v. Mellor, L. R. 5 Ch. Div. 225, Ames Trusts 91, p. 571, 572.
- Stearns v. Perrin, 130 Mich. 456, 90 N. W. 297, p. 236.
- Stearns-Roger Co. v. Brown, 114 Fed. 939, (C. C. A.), p. 837.
- Steedman v. Weeks, 2 Strob. Eq. 145, 49 Am. Dec. 660, p. 870.
- Stephens v. Board of Education, 79 N. Y. 183, 35 Am. Rep. 511, p. 476.
- Stephens v. Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328, p. 727.
- Sternberg v. Wolff, 56 N. J. Eq. 389, 67 Am. St. Rep. 494, 39 Atl. 397, 39 L. R. A. 762, p. 807.
- Sternberger v. McGovern, 56 N. Y. 12, 2 Keener 1232, p. 906.
- Sterne v. Beck, 1 De Gex, J. & S. 595, 600, 601, 11 Week. Rep. 791, p. 218.

- Sterry v. Arden**, 1 Johns. Ch. 261, 270, 12 Johns. 536, 1 Scott 502, p. 533, 534.  
**Stetson v. Chicago & E. R. Co.**, 75 Ill. 74, 1 Ames Eq. Jur. 595, p. 824.  
**Stevens v. Beekman**, 1 Johns. Ch. 318, 1 Keener 553, 1 Scott 688, p. 843.  
**Stevens v. Dennett**, 51 N. H. 324, 330, 333, p. 389.  
**Stevens v. Grand Central Min. Co.**, (C. C. A.) 133 Fed. 23, p. 199.  
**Stevens v. Keating**, 2 Ph. Ch. 333, 1 Ames Eq. Jur. 627, p. 836.  
**Stevens v. Ludlum**, 46 Minn. 160, 24 Am. St. Rep. 210, 48 N. W. 771, 13 L. R. A. 270, p. 397.  
**Stevens v. St. Mary's Training School**, 144 Ill. 336, 36 Am. St. Rep. 438, 32 N. E. 962, 18 L. R. A. 832, p. 822.  
**Stevenson v. Anderson**, 2 Ves. & B. 407, 2 Ames Eq. Jur. 43, 1 Keener 270, p. 799.  
**Stewart v. Austin**, L. R. 3 Eq. 299, 306, p. 452.  
**Stewart v. East India Co.**, 2 Vern. 380, p. 79.  
**Still v. Ruby**, 35 Pa. St. 373, Ames Trusts 219, p. 549.  
**Stinchfield v. Milliken**, 71 Me. 567, H. & B. 47, Shep. 62, p. 697, 701.  
**Stock v. Jefferson**, 114 Mich. 357, 72 N. W. 132, 38 L. R. A. 355, p. 832.  
**Stockbridge Iron Co. v. Hudson Iron Co.**, 107 Mass. 290, 3 Keener 54, p. 419.  
**Stocker v. Wedderburn**, 3 Kay & J. 393, 2 Keener 801, p. 893.  
**Stone v. Bevans**, 88 Minn. 127, 97 Am. St. Rep. 506, 92 N. W. 520, p. 634.  
**Stone v. Godfrey**, 5 De Gex, M. & G. 76, 90, p. 418.  
**Stone v. Pratt**, 25 Ill. 25, 34 H. & B. 652, 2 Scott 293, p. 184.  
**Stone v. Reed**, 152 Mass. 179, 25 N. E. 49, 1 Keener 304, p. 795, 798.  
**Stone v. Stone**, 32 Conn. 142, p. 65.  
**Stone v. Westcott**, 18 R. I. 685, 29 Atl. 838, p. 552.  
**Storer v. Great W. R'y**, 2 Younge & C. Ch. 48, 2 Keener 141, p. 888, 889.  
**Storrs v. Barker**, 6 Johns. Ch. 166, 168, 10 Am. Dec. 316, p. 318, 394.  
**Story v. N. Y. etc. R. R. Co.**, 90 N. Y. 122, 43 Am. Rep. 146, p. 824.  
**Stout v. Philippi Mfg. & Merc. Co.**, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843, 853-878, p. 284, 285.  
**Stovall v. McCutcheon**, 107 Ky. 577, 92 Am. St. Rep. 373, 54 S. W. 969, 47 L. R. A. 287, p. 108.  
**Stratton v. Edwards**, 174 Mass. 374, 54 N. E. 886, p. 566.  
**Stratton v. Gildersleeve**, 41 Atl. 1117 (N. J.), p. 564.  
**Strickland v. Symans**, 26 Ch. Div. 245, Ames Trusts, 418, p. 624.  
**Strobel v. Kerr Salt Co.**, 164 N. Y. 303, 79 Am. St. Rep. 643, 51 L. R. A. 687, 58 N. E. 142, p. 834.  
**Strong v. Clem**, 12 Ind. 37, 74 Am. Dec. 200, p. 865.  
**Strong v. Van Deursen**, 23 N. J. Eq. 369, p. 345.  
**Strong v. Williams**, 12 Mass. 389, 7 Am. Dec. 81, H. & B. 140, Shep. 127, p. 242.  
**Stronge v. Hanks**, 4 De Gex, M. & G. 186, 4 De Gex & J. 632, p. 349.  
**Stuart v. Boulware**, 133 U. S. 78, 10 Sup. Ct. 244, 33 L. ed. 568, p. 811.  
**Stuart v. City of Easton**, 74 Fed. 854, 21 C. C. A. 146, 39 U. S. App. 238, p. 578.  
**Stump v. Gaby**, 2 De Gex, M. & G. 623, 630, p. 168, 535.  
**Sturgis v. Champneys**, 5 Mylne & C. 97, 101, 102, 106, p. 176, 646.  
**Sturgis v. Work**, 122 Ind. 134, 22 N. E. 996, 17 Am. St. Rep. 349, p. 438.  
**Stuyvesant v. Hall**, 2 Barb. Ch. 151, 158, p. 296.  
**Stuyvesant v. Hone**, 1 Sand. Ch. 419, p. 296.  
**Sublett v. McKinney**, 19 Tex. 483, Shep. 73, p. 916.  
**Suessenguth v. Bingenheimer**, 40 Wis. 370, p. 445.  
**Suisse v. Lowther**, 2 Hare, 424, 429-438, p. 244, 246.  
**Summers v. Griffiths**, 35 Beav. 27, 3 Keener 509, p. 483, 485.

- Sumner v. Seaton, 47 N. J. Eq. 103, 19 Atl. 884, p. 396.
- Sumner v. Waugh, 56 Ill. 531, 539, p. 315, 338.
- Sun Printing and Pub. Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, p. 220.
- Sunday Lake Min. Co. v. Wakefield, 72 Wis. 204, 39 N. W. 136, p. 225.
- Sunset Telephone & T. Co., v. City of Eureka, 122 Fed. 961, p. 80.
- Supreme Tent Knights of Maccabees v. Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137, p. 398.
- Svanburg v. Fosseen, 75 Minn. 350, 74 Am. St. Rep. 490, 78 N. W. 4, 43 L. R. A. 427, p. 903.
- Swaine v. Great N. R'y Co., 4 De Gex, J. & S. 211, 1 Ames Eq. Jur. 569, 1 Scott 743, p. 830.
- Swaine v. Perine, 5 Johns. Ch. 482, 490, 9 Am. Dec. 318, p. 865.
- Swaissland v. Dearsley, 29 Beav. 430, 1 Ames Eq. Jur. 376, p. 432.
- Swan v. Chorpenning, 20 Cal. 182, p. 492.
- Swartz's Ex'rs v. Leist, 13 Ohio St. 419, p. 705.
- Swasey v. Emerson, 168 Mass. 118, 46 N. E. 426, 60 Am. St. Rep. 368, p. 350.
- Sweeney v. Williams, 36 N. J. Eq. 627, 1 Scott 141, p. 66, 131, 132.
- Sweet v. Henry, 175 N. Y. 268, 67 N. E. 574, p. 281.
- Sweetapple v. Bindon, 2 Vern. 536, Ames Trusts, 379, p. 552, 682.
- Swinburne v. Swinburne, 28 N. Y. 568, p. 601.
- Sykes v. Beadon, L. R. 11 Ch. Div. 170, 183, 193, 196, 197, p. 500.
- Symes v. Hughes, L. R. 9 Eq. 475, 479, p. 549.
- T.
- Tabor v. Brooks, L. R. 10 Ch. Div. 273, p. 608.
- Taff Val. R'y v. Nixon, 1 H. L. Cas. 109, 110, 1 Ames Eq. Jur. 454, 3 Keener 888, p. 918.
- Tailby v. Official Receiver, 13 App. Cas. (H. L.) 523, Kirch. 100, p. 770, 771.
- Talbot v. Shrewsbury, Prec. Ch. 394, p. 241.
- Talmage v. Pell, 9 Paige, 410, p. 78.
- Tamplin v. James, L. R. 15 Ch. Div. 215, 1 Ames Eq. Jur. 388, 2 Keener 979, 2 Scott 277, p. 432.
- Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288, p. 567.
- Tarbell v. Durant, 61 Vt. 516, 17 Atl. 44, p. 728.
- Tarver v. Torrance, 81 Ga. 261, 12 Am. St. Rep. 311, 6 S. E. 177, p. 610.
- Tate v. Pensacola, Gulf L. & D. Co., 37 Fla. 439, 20 South. 542, 53 Am. St. Rep. 251, p. 375.
- Tate v. Williamson, L. R. 2 Ch. 55, 60, 61, 1 Eq. 528, 536, H. & B. 337, Shep. 193, p. 465, 467, 485, 513, 514, 520, 523.
- Tayloe v. Merchants' etc. Ins. Co., 9 How. 390, 13 L. ed. 187, 1 Ames Eq. Jur. 59, 2 Scott 31, 2 Keener 53, p. 884.
- Taylor v. Ashton, 11 Mees. & W. 401, p. 451.
- Taylor v. Brown, 112 Ga. 758, 38 S. E. 66, p. 564.
- Taylor v. Carroll, 89 Md. 32, 42 Atl. 920, 44 L. R. A. 479, p. 285.
- Taylor v. Great Indian R'y, 4 De Gex & J. 559, 574, p. 477.
- Taylor v. Jones, 2 Atk. 600, p. 528.
- Taylor v. Kelly, 3 Jones Eq. 240, 1 Ames Eq. Jur. 215, p. 162.
- Taylor v. Lanier, 3 Murph. 98, 9 Am. Dec. 599, p. 250.
- Taylor v. London and County Banking Co., [1901] 2 Ch. 231, 254, 259, 260ff, p. 350, 372, 373.
- Taylor v. Longworth, 14 Pet. 172, 174, 10 L. ed. 405, p. 899.
- Taylor v. Louisville & N. R. Co., 88 Fed. 350, 359, 60 U. S. App. 185, 31 C. C. A. 537, p. 119.
- Taylor v. Meads, 4 De Gex, J. & S. 597, 604-607, p. 636, 640.
- Taylor v. Russell, [1891] 1 Ch. 9, p. 347.

- Taylor v. Stearns, 18 Gratt. 244, 278, p. 557.  
 Taylor v. Stibbert, 2 Ves. 437, 440, 2 Keener 450, p. 274, 276, 281.  
 Taylor v. Times Newspaper Co., 83 Minn. 523, 85 Am. St. Rep. 473, 86 N. W. 760, p. 220.  
 Tazewell v. Smith's Adm'rs, 1 Rand. 313, 320, 10 Am. Dec. 533, p. 167, 679.  
 Teasdale v. Teasdale, Sel. Cas. Ch. 59, 1 Scott 558, p. 376.  
 Teft v. Stewart, 31 Mich. 367, H. & B. 271, p. 474.  
 Telegraph Co. v. Davenport, 97 U. S. 369, p. 907.  
 Ten Eyck v. Manning, 52 N. J. Eq. 47, 27 Atl. 900, 2 Keener 849, p. 897.  
 Ten Eyck v. Witbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809, p. 359.  
 Tennant v. Stoney, 1 Rich. Eq. 222, 44 Am. Dec. 213, p. 639.  
 Tennessee Mfg. Co. v. James, 91 Tenn. (7 Pickle) 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211, p. 226.  
 Tesson v. Atlantic Ins. Co., 40 Mo. 33, 36, 93 Am. Dec. 293, p. 434.  
 Texas & P. R'y Co. v. Marshall, 136 U. S. 393, 407, 10 Sup. Ct. 846, 34 L. ed. 385, p. 887, 888.  
 Texas Trunk R. Co. v. Lewis, 81 Tex. 1, 26 Am. St. Rep. 776, 16 S. W. 647, p. 809.  
 Thackrah v. Haas, 119 U. S. 501, 7 Sup. Ct. 311, 2 Scott 746, 3 Keener 697, p. 471, 474, 508.  
 Thayer v. Daniels, 113 Mass. 129, p. 325.  
 Third Ave. R. R. Co. v. Mayor etc. of New York, 54 N. Y. 159, 162, 163, 2 Ames Eq. Jur. 102, 1 Keener 167, p. 109, 823.  
 Third Nat. Bank v. Atlantic City, 126 Fed. 413, p. 325.  
 Third Nat. Bank v. Lumber Co., 132 Mass. 410, 2 Ames Eq. Jur. 27, 1 Keener 257, p. 797.  
 Thomas v. Beals, 154 Mass. 51, 27 N. E. 1004, 3 Keener 707, p. 470, 471.  
 Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352, 4 L. R. A. 222, H. & B. 90, p. 278.  
 Thomas v. Cincinnati etc. R. Co., 62 Fed. 803, p. 809.  
 Thomas v. Evans, 105 N. Y. 614, 12 N. E. 571, 59 Am. Rep. 519, p. 743.  
 Thomas v. Howell, L. R. 18 Eq. 198, 34 Ch. D. 166, 1 Ames Eq. Jur. 196, p. 164.  
 Thomas v. Lennon, 14 Fed. 849, p. 839.  
 Thomas v. Oakley, 18 Ves. 184, 1 Scott 685, 1 Ames Eq. Jur. 491, 1 Keener 551, p. 842.  
 Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808, p. 513.  
 Thomas's Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170, p. 666, 668.  
 Thompson v. Betts, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep. 235, p. 245.  
 Thompson v. Central Ohio R. R. Co., 6 Wall. 134, 18 L. ed. 765, p. 139.  
 Thompson v. Cochran, 7 Humph. 72, 46 Am. Dec. 68, p. 865.  
 Thompson v. Etowah Iron Co., 91 Ga. 538, 17 S. E. 663, p. 877.  
 Thompson v. Gould, 20 Pick. 134, 1 Ames Eq. Jur. 234, 2 Keener 406, p. 163.  
 Thompson v. Hefferman, 4 Dru. & War. 285, p. 667.  
 Thompson v. Hudson, L. R. 4 H. L. 1, 15, p. 216, 218.  
 Thompson v. Scott, 4 Dill. 508, Fed. Cas. No. 13,975, p. 809.  
 Thompson v. Thompson, 1 Jones (N. C.) 430, 1 Ames Eq. Jur. 201, p. 162, 595.  
 Thompson v. Winter, 42 Minn. 121, 43 N. W. 796, 6 L. R. A. 236, H. & B. 654, 2 Keener 1044, p. 895.  
 Thorndike v. Hunt, 3 De Gex & J. 563, 570, 571, p. 196, 311, 373.  
 Thorne v. Deas, 4 Johns. 84, p. 606.  
 Thornton v. Hawley, 10 Ves. 129, p. 680.  
 Thornton, Town of, v. Gilman, 67 N. H. 392, 39 Atl. 900, p. 521.

- Thorpe v. Brumfitt, L. R. 8 Ch. 650,  
 1 Ames Eq. Jur. 547, 1 Keener  
 734, p. 834.
- Threadgill v. Bickerstaff, 87 Tex. 520,  
 24 S. W. 757, p. 364.
- Thum Co. v. Tloczynski, 114 Mch. 149,  
 68 Am. St. Rep. 469, 72 N. W. 140,  
 38 L. R. A. 200, H. & B. 755, p.  
 817.
- Thynn v. Thynn, 1 Vern. 286, 296, 1  
 Scott 457, p. 603.
- Tibbetts v. Cate, 66 N. H. 550, 22  
 Atl. 559, p. 223.
- Tibbits v. Tibbits, 19 Ves. 656, 663, p.  
 238.
- Tidd v. Lister, 5 Madd. 429, Ames  
 Trusts 465, p. 553.
- Tierney v. Wood, 19 Beav. 330, Ames  
 Trusts 182, p. 562, 566.
- Tift v. Porter, 8 N. Y. 516, p. 657,  
 660.
- Tilley v. Thomas, L. R. 3 Ch. 61, 67,  
 69, 72, 1 Ames Eq. Jur. 336, 2  
 Scott 345, 2 Keener 1091, Shep.  
 254, p. 899.
- Tillinghast v. Champlin, 4 R. I. 173,  
 204, 215, 67 Am. Dec. 510, p. 265.
- Tillman v. Thomas, 87 Ala. 321, 13  
 Am. St. Rep. 42, 6 South. 151, p.  
 269.
- Tilton v. Davidson, 98 Me. 55, 56  
 Atl. 215, p. 550.
- Tinsley v. Rice, 105 Ga. 285, 31 S. E.  
 174, p. 285.
- Tipping v. Clarke, 2 Hare, 383, 389,  
 p. 82.
- Title Guarantee Co. v. Wrenn, 35  
 Oreg. 62, 56 Pac. 271, 76 Am. St.  
 Rep. 454, p. 382.
- Titworth v. Stout, 49 Ill. 78, 95 Am.  
 Dec. 577, p. 383, 384.
- Titus v. Rochester G. Ins. Co., 97 Ky.  
 567, 31 S. W. 127, 53 Am. St. Rep.  
 427, H. & B. 213, p. 421, 425.
- Titus's Adm'r v. Titus, 26 N. J. Eq.  
 111, p. 663.
- Tobey v. Moore, 130 Mass. 448, 2  
 Keener 516, p. 776.
- Tobias v. Ketchum, 32 N. Y. 319, 326,  
 327-331, H. & B. 374, p. 235, 568,  
 569.
- Tolbert v. Horton, 31 Minn. 518, 18 N.  
 W. 647, p. 367.
- Toller v. Carteret, 2 Vern. 494, 1  
 Ames Eq. Jur. 22, 1 Scott 235, p.  
 208.
- Tollet v. Tollet, 2 P. Wms. 489, 1  
 Lead. Cas. Eq., 4th Am. ed., 365,  
 2 Ames Eq. Jur. 305, 1 Scott 420,  
 p. 253, 410, 411.
- Tompkins v. Craig, 93 Fed. 885, 2  
 Ames' Cas. Eq. Jur. 87, p. 122.
- Tompkins v. Halleck, 133 Mass. 32,  
 43 Am. Rep. 490, Lewis 69, p. 839.
- Tompkins v. Hollister, 60 Mich. 470,  
 27 N. W. 651, p. 513.
- Toney v. Spragins, 80 Ala. 541, p.  
 233.
- Toole v. Toole, 107 Ga. 472, 33 S.  
 E. 686, p. 359.
- Torrance v. Bolton, L. R. 8 Ch. 118,  
 14 Eq. 124, p. 448.
- Torrance v. Bolton, L. R. 14 Eq. 124,  
 p. 448.
- Torrence v. Davidson, 92 N. C. 437,  
 53 Am. Rep. 419, p. 610.
- Toupin v. Peabody, 162 Mass. 473, 39  
 N. E. 280, p. 300.
- Tourville v. Naish, 3 P. Wms. 306,  
 307, 316, p. 362.
- Towle v. Leavitt, 23 N. H. 360, 55  
 Am. Dec. 195, p. 493.
- Towner v. McClelland, 110 Ill. 542,  
 p. 350.
- Townley v. Bedwell, 14 Ves. 591, 2  
 Scott 400, 2 Keener 321, p. 680, 681.
- Town of Bristol v. Bristol & W.  
 Waterworks, 19 R. I. 413, 34 Atl.  
 359, 32 L. R. A. 740, p. 886.
- Town of Essex v. Day, 52 Conn. 483,  
 3 Keener 303, p. 438.
- Town of Venice v. Woodruff, 62 N.  
 Y. 462, 20 Am. Rep. 495, 2 Ames  
 Eq. Jur. 133, H. & B. 794, Shep.  
 244, p. 860.
- Townsend v. Champernowne, 9 Price  
 130, 2 Scott 410, 2 Keener 335.
- Tracy v. Colby, 55 Cal. 67, p. 515.
- Tracy v. Talmage, 14 N. Y. 162, 167,  
 210, 67 Am. Dec. 132, p. 502, 503.
- Traill v. Baring, 4 De Gex, J. & S.  
 318, 326, 328, 329, 330, p. 447, 452,  
 454.
- Treadwell v. Torbert, 119 Ala. 279, 24  
 South. 54, 72 Am. St. Rep. 918, p.  
 500.

- Trenton v. Pothan, 46 Minn. 298, 24 Am. St. Rep. 225, 49 N. W. 129, p. 304.
- Tribette v. Illinois Cent. R. Co., 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, 1 Keener Cas. Eq. Jur. 148, 2 Ames Cas. Eq. Jur. 74, Shep. 36, p. 121.
- Tribou v. Tribou, 96 Me. 305, 52 Atl. 795, p. 504.
- Trice v. Comstock, 115 Fed. 765, p. 185.
- Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176, p. 362, 518, 600.
- Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623, Kirch. 299, p. 693.
- Troe v. Larsen, 84 Iowa 649, 51 N. W. 179, 35 Am. St. Rep. 336, p. 833.
- Trower v. Newcome, 3 Mer. 704, 1 Ames Eq. Jur. 352, 2 Scott 238, 2 Keener 882, p. 456, 457.
- Trull v. Eastman, 3 Met. 121, 123, 37 Am. Dec. 126, p. 512.
- Trull v. Skinner, 17 Pick. 213, Kirch. 445, p. 698.
- Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365, 2 Keener 1038, p. 777.
- Tryon v. Munson, 77 Pa. St. 250, p. 692.
- Tucker v. Howard, 128 Mass. 361, 1 Keener 854, 1 Ames Eq. Jur. 548, p. 834.
- Tulk v. Moxhay, 11 Beav. 571, 2 Phill. Ch. 774, 777, 1 Ames Eq. Jur. 147, 2 Scott 486, 2 Keener 545, p. 319, 774.
- Tullett v. Armstrong, 4 Mylne & C. 377, 392, 1 Beav. 1, 21, 22, p. 643, 644.
- Turman v. Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35, p. 277.
- Turnbull v. Crick, 63 Minn. 91, 65 N. W. 135, p. 75.
- Turner v. City of Mobile, 135 Ala. 73, 33 South. 133, 140, 141, 142, 143, p. 105.
- Turner v. Flenniken, 164 Pa. St. 469, 30 Atl. 486, 44 Am. St. Rep. 624, p. 730.
- Turner v. Green, [1895] 2 Ch. 205, 1 Ames Eq. Jur. 364, p. 468.
- Turner v. Houpt, 53 N. J. Eq. (8 Dick.) 526, 33 Atl. 28, 42, 3 Keener 646, p. 283, 286, 460.
- Turner v. Mirfield, 34 Beav. 390, 1 Ames Eq. Jur. 558, p. 831.
- Turner v. Morgan, 8 Ves. 143, p. 869.
- Turner v. Wright, 2 De Gex, F. & J. 234, 243, 1 Ames Eq. Jur. 476, 1 Keener 441, p. 828, 829.
- Turquand v. Marshall, L. R. 4 Ch. 376, 385, p. 626.
- Turquand v. Marshall, L. R. 6 Eq. 112, p. 620.
- Twining v. Morrice, 2 Brown Ch. 326, 1 Ames Eq. Jur. 416, p. 430, 894.
- Twombly v. Cassidy, 82 N. Y. 155, p. 717.
- Tyler, In re, 149 U. S. 164, 13 Sup. Ct. 785, 13 L. ed. 689, p. 809.
- Tyron v. Munson, 77 Pa. St. 250, p. 692.
- Tyrwhitt v. Tyrwhitt, 32 Beav. 244, p. 382.

## U.

- Uhlman v. New York Life Ins. Co., 109 N. Y. 421, 433, 4 Am. St. Rep. 482, 17 N. E. 363, p. 918.
- Ungley v. Ungley, L. R. 5 Ch. D. 887, 1 Ames Eq. Jur. 281, 2 Scott 193, 2 Keener 661, p. 904.
- Union Bank v. Bell, 14 Ohio St. 200, p. 179.
- Union Bank of London v. Kent, 39 Ch. Div. 238, p. 326.
- Union Cent. Life Ins. Co. v. Phillips, 102 Fed. 19, 41 C. C. A. 263, p. 100.
- Union Mutual Life Ins. Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. ed. 118, p. 712.
- Union Pacific R. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. ed. 265, affirming 51 Fed. 309, 2 C. C. A. 174, 10 U. S. App. 98, p. 44, 890.
- Union Pacific R. R. Co. v. McAlpine, 129 U. S. 305, 314, 9 Sup. Ct. Rep. 286, 32 L. ed. 673, p. 597.

- Union Pac. R'y v. McAlpine, 129 U. S. 309, 314, 9 Sup. Ct. 286, p. 319.  
 Union Trust Co. v. Illinois Midland R'y Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963, p. 810.  
 Union Trust Co. v. Olmsted, 102 N. Y. 729, 7 N. E. 822, 1 Ames Eq. Jur. 23, p. 208.  
 United States v. California & O. Land Co., 49 Fed. 496, 503, 504, 505, 506, 7 U. S. App. 128, 1 C. C. A. 330, affirmed, 148 U. S. 31, 46, 47, 13 Sup. Ct. 458, p. 359, 364.  
 United States v. Detroit Timber & L. Co., (C. C. A.) 131 Fed. 668, 678, p. 356, 371.  
 United States v. Howland, 4 Wheat. 108 115, 4 L. ed. 526, p. 140.  
 United States v. Kane, 23 Fed. 748, Lewis 212, p. 846.  
 United States v. Parkhurst etc. Co., 176 U. S. 317, 20 Sup. Ct. 423, 44 L. ed. 485, p. 851.  
 United States v. Saline Bank, 1 Pet. 100, 104, p. 80.  
 United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93, p. 854.  
 United States v. Union Pac. R. Co., 160 U. S. 1, 16 Sup. Ct. 190, p. 100.  
 United States v. Wagner, L. R. 2 Ch. 582, L. R. 3 Eq. 724, p. 79.  
 U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381, 385, p. 292.  
 Unity Bank, Ex parte, 3 De Gex & J. 63, p. 505.  
 University of Penn. Appeal, 97 Pa. St. 187, p. 663, 664.  
 Unruh v. Lukens, 166 Pa. St. 324, 31 Atl. 110, p. 522.  
 Updike v. Adams, 24 R. I. 220, 96 Am. St. Rep. 711, 52 Atl. 991, p. 869.  
 Upton v. Betts, 59 Nebr. 724, 82 N. W. 19, p. 377, 378.  
 Upton v. Prince, Cas. t. Talb. 71, p. 248.  
 Urann v. Coates, 109 Mass. 581, H. & B. 366, p. 566.  
 Ure v. Ure, 185 Ill. 216, 56 N. E. 1087, p. 544.  
 Osborne v. Osborne, Dick. 75, 1 Keen-er 452, p. 829.  
 Utley v. Dunkelberger, 86 Iowa, 469, 53 N. W. 408, p. 340.  
 Uzzell v. Mack, 4 Humph. 319, 40 Am. Dec. 648, p.  
 V.  
 Vacuum Oil Co. v. Climax Refining Co., 120 Fed. 254, p. 840.  
 Vale v. Oppert, L. R. 10 Ch. 340, 342, p. 82.  
 Vallette v. Tedens, 122 Ill. 607, 3 Am. St. Rep. 502, 14 N. E. 52, p. 520, 601.  
 Van v. Barnett, 19 Ves. 102, 109, p. 684.  
 Van Akin v. Dunn, 117 Mich. 421, 75 N. W. 938, p. 330.  
 Van Auken v. Dammeier, 27 Oreg. 150, 40 Pac. 89, p. 122.  
 Van Beck v. Milbrath, 118 Wis. 42, 94 N. W. 657, p. 401.  
 Van Buskirk v. Hartford etc. Ins. Co., 14 Conn. 141, 144, 36 Am. Dec. 473, p. 325.  
 Van Cloostere v. Logan, 149 Ill. 588, 36 N. E. 946, p. 320.  
 Vanderbilt v. Little, 43 N. J. Eq. 669, 12 Atl. 188, p. 810.  
 Vandergucht v. DeBlaquiere, 5 Mylne & C. 229, p. 648.  
 Van Dusen v. Bigelow, (N. Dak.) 100 N. W. 723, p. 517.  
 Van Dyke's Appeal, 60 Pa. St. 481, 489, 490, H. & B. 136, p. 233, 240.  
 Vane v. Lord Barnard, 2 Vern. 738, Prec. Ch. 454, 1 Ames Eq. Jur. 470, 1 Keener 455, p. 828.  
 Vane v. Vane, L. R. 8 Ch. 383, p. 472, 476.  
 Van Houten v. Post, 33 N. J. Eq. 344, p. 246, 247.  
 Van Norden v. Morton, 99 U. S. 378, 380, 25 L. ed. 455, p. 141.  
 Van Riper v. Van Riper, 2 N. J. Eq. 1, p. 242.  
 Van Steenwyck v. Washburn, 59 Wis. 483, 501, 48 Am. Rep. 532, 17 N. W. 289, p. 237.  
 Van Vronker v. Eastman, 7 Met. 157, Kirsh. 561, p. 719.  
 Van Wyck v. Seward, 6 Paige, 62, 18 Wend. 375, p. 530.

- Vann v. Hargett, 22 N. C. (2 Dev. & B. Eq.) 31, 32 Am. Dec. 689 [1838], p. 119.
- Vann v. Marbury, 100 Ala. 438, 14 South. 273, 46 Am. St. Rep. 70, 23 L. R. A. 325, p. 350.
- Vardon's Trust, In re, L. R. 31 Ch. Div. 275, Shep. 135, p. 237.
- Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351, p. 910.
- Vaughn v. Schmalsde, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411, p. 342.
- Vegalahn v. Guntner, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722, H. & B. 773, p. 826, 846.
- Vercruysse v. Williams, 112 Fed. 206, 50 C. C. A. 486, p. 295.
- Veret v. Duprez, L. R. 6 Eq. 329, p. 803.
- Vernon v. Stephens, 2 P. Wms. 66, 1 Ames Eq. Jur. 338, p. 899.
- Vernon v. Vernon, 53 N. Y. 351, 359, 362, p. 236.
- Verplank v. Mercantile Ins. Co., 2 Paige, 438, p. 808.
- Very v. Russell, 65 N. H. 646, 23 Atl. 522, p. 515.
- Vick v. Beverly, 112 Ala. 458, 21 South. 325, p. 101.
- Vickers, In re, L. R. 37 Ch. Div. 525, p. 248.
- Vickers v. Vickers, L. R. 4 Eq. 529, 2 Keener 132, p. 886.
- Vidal v. Girard's Ex'rs, 2 How. 127, 11 L. ed. 205, p. 575, 583.
- Villa v. Rodriguez, 12 Wall. 323, 20 L. ed. 406, Kirch. 453, p. 698.
- Viscount Clermont v. Tasburgh, 1 Jacob & W. 112, 119, 1 Ames Eq. Jur. 358, 2 Keener 883, 2 Scott 241, p. 463.
- Vreeland v. Vreeland, 49 N. J. Eq. 322, 24 Atl. 551, p. 868.
- Vreeland v. Vreeland, 53 N. J. Eq. 387, 32 Atl. 3, p. 903.
- Vyse v. Foster, L. R. 8 Ch. 309, p. 608.
- Wadd v. Hazleton, 137 N. Y. 215, 33 Am. St. Rep. 707, 21 L. R. A. 693, 33 N. E. 143, p. 562.
- Wadsworth, Re, 2 Barb. Ch. 381, Ames Trusts 511, p. 549.
- Wagar v. Stone, 36 Mich. 364, p. 805.
- Wagoner's Estate, 174 Pa. St. 558, 52 Am. St. Rep. 828, 32 L. R. A. 766, 34 Atl. 114, p. 558.
- Wahn v. Fall, 55 Nebr. 547, 76 N. W. 13, 70 Am. St. Rep. 397, p. 342.
- Wainford v. Heyl, L. R. 20 Eq. 321, 324, p. 619.
- Wainscott v. Occidental etc. Ass'n, 98 Cal. 253, 33 Pac. 88, 3 Keener 683, 2 Scott 729, p. 462.
- Waite v. O'Neil, 72 Fed. 348, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550, p. 100.
- Wake v. Conyers, 1 Eden, 331, 2 Lead. Cas. Eq., 4th Am. ed., 850-864, p. 866.
- Wakeham v. Barker, 82 Cal. 46, 22 Pac. 1131, 1 Ames Eq. Jur. 87, p. 886.
- Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551, p. 446, 450, 453.
- Wakeman v. Dodd, 27 N. J. Eq. 564, p. 523.
- Walden v. Skinner, 101 U. S. 577, H. & B. 238, p. 430.
- Waldman v. North British etc. Ins. Co., 91 Ala. 170, 8 South. 666, 24 Am. St. Rep. 883, p. 303.
- Waldron v. Letson, 15 N. J. Eq. 126, 2 Ames Eq. Jur. 223, p. 859.
- Wales v. Sammis, 120 Iowa, 293, 94 N. W. 840, p. 341.
- Walker, Ex parte, 25 Ala. 81, p. 805.
- Walker v. Armstrong, 2 Kan. 198, p. 841.
- Walker v. Buffandeau, 63 Cal. 312, p. 340.
- Walker v. Emerson, 89 Cal. 456, 26 Pac. 968, 1 Keener 644, p. 843.
- Walker v. Wheeler, 2 Conn. 229, 299, p. 214.
- Walker v. Whiting, 23 Pick. 313, p. 570.
- Wall v. Stubbs, 1 Madd. 80, 1 Ames Eq. Jur. 362, 2 Scott 239, p. 454, 456.

## W.

W—— v. B——, 32 Beav. 574, p. 501.

- Wallace v. Campbell, 54 Tex. 87, p. 344.
- Wallace v. Pierce-Wallace-Pub. Co., 101 Iowa, 313, 63 Am. St. Rep. 389, 70 N. W. 216, 38 L. R. A. 122, p. 806.
- Waller v. Armistead's Adm'rs, 2 Leigh, 11, 21 Am. Dec. 594, p. 521.
- Wallis v. Smith, L. R. 21 Ch. Div. 243, Shep. 141, p. 221.
- Wallis Iron Works v. Monmouth Park Ass'n, 55 N. J. L. 132, 39 Am. St. Rep. 626, 26 Atl. 140, 19 L. R. A. 456, p. 219.
- Wallwyn v. Lee, 9 Ves. 24, 33, p. 355, 370.
- Walsh v. Curtis, 73 Minn. 254, 76 N. W. 52, p. 218.
- Walters v. Washington Ins. Co., 1 Iowa, 404, 63 Am. Dec. 451, p. 323.
- Walton v. Hargroves, 42 Miss. 18, 97 Am. Dec. 429, 433, p. 749.
- Walton v. Walton, 7 Johns. Ch. 258, 11 Am. Dec. 456, p. 658.
- Wampler v. Wampler, 30 Gratt. 454, 3 Keener 480, p. 473, 474.
- Wanzer v. Cary, 76 N. Y. 526, p. 350.
- Ward v. Conn. Pipe Mfg. Co., 71 Conn. 345, 71 Am. St. Rep. 207, 41 Atl. 1057, 42 L. R. A. 706, p. 811.
- Ward v. Hudson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256, p. 219.
- Ward v. Turner, 2 Ves. Sr. 431, 1 Lead. Cas. Eq. 1205, p. 668.
- Ward v. Ward, 59 Conn. 188, 22 Atl. 149, p. 592.
- Ward v. Ward, L. R. 14 Ch. Div. 506, p. 647.
- Ward v. Ward, 40 W. Va. 611, 52 Am. St. Rep. 911, 21 N. E. 746, 29 L. R. A. 449, p. 869.
- Ware v. Lord Egmont, 4 De Gex, M. & G. 460, 473, 474, p. 269.
- Warford v. Hankins, 150 Ind. 489, 50 N. E. 468, p. 717, 751.
- Warmstrey v. Lady Tanfield, 1 Ch. Rep. 16, 29, 2 Lead. Cas. Eq., 4th Am. ed., 1530, 1 Scott 74, p. 759, 769.
- Warner v. Bates, 98 Mass. 274, 277, H. & B. 377, p. 571.
- Warner v. Conant, 24 Vt. 351, 58 Am. Dec. 178, p. 855.
- Warner v. Jacob, L. R. 20 Ch. Div. 220, p. 821.
- Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, 168, 31 Am. St. Rep. 209, p. 372.
- Warren v. Union Bank of Rochester, 157 N. Y. 259, 68 Am. St. Rep. 777, 51 N. E. 1036, 43 L. R. A. 256, p. 854.
- Warren v. Warren, 148 Ill. 61, 22 L. R. A. 393, 36 N. E. 611, p. 236.
- Warren v. Westbrook Mfg. Co., 88 Me. 58, 51 Am. St. Rep. 372, 33 Atl. 665, 35 L. R. A. 398, p. 868.
- Warren v. Wilder, 114 N. Y. 215, 21 N. E. 159, p. 363.
- Warren County v. Marcy, 97 U. S. 96, 1 Scott 529, p. 284, 287.
- Warren Mills v. N. O. Seed Co., 65 Miss. 391, 7 Am. St. Rep. 671, 4 South. 298, p. 844.
- Washburn v. Burnham, 63 N. Y. 132, 2 Ames Eq. Jur. 150, p. 876.
- Washington County v. Williams, 111 Fed. 801, 815, 49 C. C. A. 621, p. 124.
- Waterman v. Alden, 144 Ill. 90, 32 N. E. 972, H. & B. 549, p. 609, 612.
- Waterman v. McKenzie, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. 334, p. 734.
- Watson v. Hunter, 5 Johns. Ch. 169, 9 Am. Dec. 295, 1 Scott 642, p. 829.
- Watson v. Jones, 13 Wall. 679, 20 L. ed. 666, p. 821.
- Watson v. Sutherland, 5 Wall. 74, 78, 18 L. ed. 580, 1 Ames Eq. Jur. 531, H. & B. 741, Shep. 22, 1 Scott 134, p. 144, 814, 856.
- Watson v. Wells, 5 Conn. 468, p. 303.
- Watson v. Wilson, 2 Dana, 406, 26 Am. Dec. 469, p. 285.
- Watts v. Ball, 1 P. Wms. 108, Ames Trusts, 379, 1 Scott 292, p. 550, 552.

- Watts v. Turner**, 1 R. & M. 634, Ames Trusts 453, p. 610.  
**Wayt v. Carwithen**, 21 W. Va. 516, 1 Scott 307, p. 740.  
**Way's Trust**, In re, 2 De Gex, J. & S. 365, p. 323.  
**Weakley v. Page**, 102 Tenn. 178, 53 S. W. 551, 46 L. R. A. 552, p. 831.  
**Weal v. Lower**, 1 Eq. Cas. Abr. 266, p. 407.  
**Webb, Estate of**, 49 Cal. 541, 545, H. & B. 392, p. 559, 562.  
**Webb v. Hoselton**, 4 Nebr. 308, 19 Am. Rep. 638, p. 557.  
**Webb v. Hughes**, L. R. 10 Eq. Cas. 281, 2 Keener 1101, p. 899.  
**Weber v. Rothchild**, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162, p. 377, 378.  
**Webster v. Cecil**, 30 Beav. 62, 1 Ames Eq. Jur. 382, 2 Keener 954, 2 Scott 279, p. 431, 432.  
**Webster v. Helm**, 93 Tenn. 322, 24 S. W. 488, p. 642.  
**Wedgwood v. Adams**, 6 Beav. 600, 1 Ames Eq. Jur. 400, p. 894.  
**Weed v. Small**, 7 Paige, 573, p. 920.  
**Weeding v. Weeding**, 1 Johns. & H. 424, 2 Keener 324, p. 681.  
**Wehrman v. Conklin**, 155 U. S. 314, 15 Sup. Ct. 129, 132, p. 141.  
**Weil v. Casey**, 125 N. C. 356, 34 S. E. 506, 74 Am. St. Rep. 644, p. 345.  
**Weinstein v. National Bank**, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23, p. 395, 398.  
**Weinstock, Lubin & Co. v. Marks**, 109 Cal. 529, 20 Am. St. Rep. 57, 42 Pac. 142, 30 L. R. A. 182, H. & B. 783, p. 840.  
**Weisberger v. Wisner**, 55 Mich. 246, 21 N. W. 331, p. 276.  
**Weise v. Grove**, (Iowa) 99 N. W. 191, p. 454.  
**Welch v. Smith**, 65 Miss. 394, 4 South. 340, p. 407.  
**Weld v. Lancaster**, 56 Me. 453, p. 492.  
**Wellborn v. Williams**, 9 Ga. 861, 52 Am. Dec. 427, p. 750.  
**Weller v. Jersey City, H. & P. St. R'y Co.**, 66 N. J. Eq. 11, 57 Atl. 730, p. 761.  
**Weller v. Smeaton**, 1 Cox, 102, 1 Brown Ch. 573, 1 Ames Eq. Jur. 554, p. 831.  
**Welles v. Yates**, 44 N. Y. 525, 3 Keener 272, H. & B. 790, Shep. 247, p. 437.  
**Wells v. Smith**, 2 Edw. Ch. 78, 2 Scott 317, 2 Keener 1082, p. 898.  
**Wells, Fargo & Co. v. Dayton**, 11 Nev. 161, p. 823.  
**Welsh v. Crater**, 32 N. J. Eq. 177, 3 Keener 990, p. 681.  
**Welsh v. Phillips**, 54 Ala. 309, 25 Am. Rep. 679, p. 379.  
**Welty v. Jacobs**, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98, H. & B. 592, p. 818, 819.  
**West v. Camden**, 135 U. S. 507, 10 Sup. Ct. 838, p. 494.  
**West v. Jones**, 1 Sim., N. S., 205, 207, 208, p. 376.  
**West v. Mayor etc. of New York**, 10 Paige, 539, 1 Keener 161, p. 109.  
**Westbrook v. Gleason**, 79 N. Y. 23, 28, 30, 31, 36, p. 350, 351, 360, 372.  
**West Coast Safety Faucet Co. v. Wulff**, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622, p. 327.  
**Western v. Mac Dermot**, L. R. 2 Ch. 72, 75, 2 Scott 511, p. 777.  
**Western El. Co. v. Keystone Tel. Co.**, 115 Fed. 809, p. 836.  
**Western Nat. Bank v. Maverick Nat. Bank**, 90 Ga. 339, 16 S. E. 942, 35 Am. St. Rep. 210, p. 332, 338.  
**Western R. R. v. Babcock**, 6 Met. 346, 937, 2 Keener 256, p. 414, 432.  
**Weston v. Stoddard**, 137 N. Y. 119, 33 Am. St. Rep. 697, 33 N. E. 62, 20 L. R. A. 624, p. 868.  
**West Publishing Co. v. Lawyers' Co-op. Pub. Co.**, 53 Fed. 265, p. 838.  
**Wethered v. Wethered**, 2 Sim. 183, p. 487.  
**Wetmore v. Parker**, 52 N. Y. 450, p. 575.  
**Wetmore v. Porter**, 92 N. Y. 76, 77, Ames Trusts 262, p. 319, 501, 597.  
**Wettlaufer v. Ames**, (Mich.) 94 N. W. 950, p. 380.

- Whalley v. Whalley, 1 Mer. 436, p. 484.
- Wheatley v. Strobe, 12 Cal. 92, 98, 73 Am. Dec. 522, p. 764.
- Wheelock v. Noonan, 108 N. Y. 179, 2 Am. St. Rep. 405, 15 N. E. 67, 1 Ames Eq. Jur. 527, 1 Scott 94, 1 Keener 194, H. & B. 764, p. 844.
- Whichcote v. Lawrence, 3 Ves. 740, p. 515.
- White v. Damon, 7 Ves. 30, p. 483.
- White v. Downs, 40 Tex. 225, 226, p. 751.
- White v. Equitable Nuptial Benefit Union, 76 Ala. 251, 52 Am. Rep. 325, p. 487.
- White v. Foster, 102 Mass. 375, 380, p. 282
- White v. Nutt, 1 P. Wms. 61, 1 Ames Eq. Jur. 226, 2 Scott 450, 2 Keener 404, p. 163, 407.
- White v. Patterson, 139 Pa. St. 429, 21 Atl. 360, p. 162.
- White v. Rankin, 90 Ala. 541, 8 South. 118, p. 327.
- White v. Sherman, 168 Ill. 589, 606, 611, 61 Am. St. Rep. 132, 140, 48 N. E. 128, p. 615, 618, 622.
- White v. Stender, 24 W. Va. 615, 49 Am. Rep. 283, p. 823.
- White v. Warner, 2 Mer. 459, p. 224, 226.
- White v. Williams, 8 Ves. 193, p. 82.
- Whitechurch v. Hide, 2 Atk. 391, 1 Ames Eq. Jur. 661, p. 841.
- Whitehead v. Shattuck, 138 U. S. 146, 151, 11 Sup. Ct. 276, 277, 34 L. ed. 873, p. 140, 142, 875.
- White's Trusts In re, 33 Ch. Div. 449, p. 581.
- Whitfield v. Bewit, 2 P. Wms. 240, 1 Ames Eq. Jur. 460, 1 Keener 457, 1 Scott, 674, p. 827.
- Whitfield v. Fausset, 1 Ves. Sr. 387, 392, 1 Scott 409, p. 409.
- Whitfield v. Riddle, 78 Ala. 99, p. 285.
- Whiting v. Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598, p. 718, 719.
- Whitmore v. Turquand, 3 De Gex, F. & J. 107, p. 555.
- Whitney v. Hay, 181 U. S. 77, 21 Sup. Ct. Rep. 537, 45 L. ed. 758, p. 603.
- Whitney v. Union Railway, 11 Gray, 359, 364, 71 Am. Dec. 715, 2 Keener 547, p. 775, 776, 777.
- Whitridge v. Parkhurst, 20 Md. 62, 72, p. 239.
- Whittaker v. Howe, 3 Beav. 383, 2 Keener 209, p. 817, 820, 886.
- Whittemore v. Farrington, 76 N. Y. 452, 2 Ames Eq. Jur. 208, 2 Scott 600, 3 Keener 209, p. 437.
- Whittemore v. Whittemore, L. R. 8 Eq. 603, p. 463.
- Whitton v. Russell, 1 Atk. 448, p. 407.
- Whitton v. Whitton, 38 N. H. 127, 135, 75 Am. Dec. 163, p. 868.
- Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416, 1 Ames Eq. Jur. 117, 2 Scott 110, 2 Keener 284, Shep. 296, p. 819.
- Whitworth v. Gaugain, 3 Hare, 416, 1 Phill. Ch. 728, Ames Tr. 408, p. 317.
- Whitworth v. Whyddon, 2 Macn. & G. 52, 55, p. 803.
- Wickman v. Robinson, 14 Wis. 493, 494, 80 Am. Dec. 789, 1 Scott 73, p. 754.
- Widdicombe v. Childers, 84 Mo. 382, p. 319.
- Wiedemann v. Sann, (N. J. Eq.), 31 Atl. 211, p. 805.
- Wieland v. Kobick, 110 Ill. 16, 51 Am. Rep. 676, p. 400.
- Wigg v. Wigg, 1 Atk. 382, 384, p. 365.
- Wilbanks v. Wilbanks, 18 Ill. 17, H. & B. 129, p. 240.
- Wilcocks v. Wilcocks, 2 Vern. 558, 2 Lead. Cas. Eq. 833, Shep. 129, 1 Scott 324, p. 252.
- Wilcox v. Allen, 36 Mich. 160, p. 218.
- Wilcox v. Howell, 44 N. Y. 398, p. 399.
- Wild v. Wells, 1 Dick. 3, Toth. 82, p. 864.

- Wilder v. Brooks**, 10 Minn. 50, 88 Am. Dec. 49, p. 292.  
**Wilder v. Pigott**, L. R. 22 Ch. Div. 263, p. 237.  
**Wilder v. Ranney**, 95 N. Y. 7, 12, 3 Keener 992, p. 607, 682.  
**Wilding v. Balder**, 21 Beav. 222, Ames Trusts, 221, p. 625.  
**Wiles v. Wiles**, 3 Md. 1, 56 Am. Dec. 733, p. 647.  
**Wilhelm v. Eaves**, 21 Oreg. 194, 27 Pac. 1053, 14 L. R. A. 297, p. 219, 221.  
**Wilhelm v. Wilken**, 149 N. Y. 447, 44 N. E. 82, 52 Am. St. Rep. 743, 32 L. R. A. 370, p. 364.  
**Wilkinson v. Colley**, 164 Pa. St. 35, 30 Atl. 296, 26 L. R. A. 114, 2 Keener 300, p. 820.  
**Wilkinson v. Dent**, L. R. 6 Ch. 339, 340, p. 234.  
**Wilkinson v. Henderson**, 1 Mylne & K. 582, p. 191.  
**Wilkinson v. Tousley**, 16 Minn. 299, 10 Am. Rep. 139, p. 486.  
**Willard v. Eastham**, 15 Gray, 328, 77 Am. Dec. 366, p. 653.  
**Willard v. Tayloe**, 8 Wall. 557, 565, 19 L. ed. 501, 1 Ames Eq. Jur. 404, 2 Keener 1026, H. & B. 644, Shep. 112, 2 Scott 33, p. 184, 484, 894.  
**Willard v. Willard**, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. ed. 644, p. 868.  
**Willes v. Greenhill**, 4 De Gex, F. & J. 147, 150, p. 303.  
**Willet v. Sandford**, 1 Ves. Sr. 186, p. 546.  
**Willett v. Winnell**, 1 Vern. 488, Kirch. 469, p. 698.  
**Williams v. Bayley**, L. R. 1 H. L. 200, 218, 3 Keener 773, p. 507, 509.  
**Williams v. Crabb**, 117 Fed. 193, 59 L. R. A. 425, p. 142.  
**Williams v. Crary**, 5 Cow. 368, 8 Cow. 246, 4 Wend. 443, 450, p. 243.  
**Williams v. Cudd**, 26 S. C. 213, 2 S. E. 14, 4 Am. St. Rep. 714, p. 411.  
**Williams v. Day**, 2 Cas. in Ch. 32, 1 Ames Eq. Jur. 476, 1 Scott 646, p. 829.  
**Williams v. Guile**, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366, p. 667.  
**Williams v. Harlan**, 88 Md. 1, 71 Am. St. Rep. 394, 41 Atl. 51, p. 817.  
**Williams v. Hollingsworth**, 1 Strob. Eq. 103, 47 Am. Dec. 527, p. 343.  
**Williams v. Keyes**, 90 Mich. 290, 51 N. W. 520, 30 Am. St. Rep. 438, p. 350.  
**Williams v. Lambe**, 3 Brown Ch. 263, 264, p. 371.  
**Williams v. McCarty**, 74 Ala. 295, p. 748.  
**Williams v. Matthews**, 47 N. J. Eq. 196, 20 Atl. 261, 1 Keener 301, p. 795.  
**Williams v. New York Cent. R. R. Co.**, 16 N. Y. 97, 69 Am. Dec. 661, 1 Ames Eq. Jur. 521, 1 Scott 706, p. 824.  
**Williams v. Rand**, 9 Tex. Civ. App. 631, 30 S. W. 509, p. 354.  
**Williams v. Vanderbilt**, 145 Ill. 238, 251, 36 Am. St. Rep. 486, 494, 34 N. E. 476, 21 L. R. A. 489, p. 743.  
**Williams v. Williams**, 8 N. Y. 525, p. 583.  
**Williams v. Williams**, 2 Swanst. 253, 2 Keener 199, p. 820.  
**Williamson v. Brown**, 15 N. Y. 354, 360, 362, H. & B. 86, p. 260, 263, 268, 270, 279.  
**Williamson v. Jones**, 43 W. Va. 562, 563, 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694, 702, 703, p. 399.  
**Willis v. Farley**, 24 Cal. 490, 500, p. 673.  
**Willmott v. Barber**, L. R. 15 Ch. Div. 96, 106, p. 402.  
**Wills, Ex parte**, 1 Ves. 162, 2 Cox, 233, p. 741.  
**Wills v. Stradling**, 3 Ves. 378, 1 Ames Eq. Jur. 291, 2 Scott 201, 2 Keener 626, p. 901, 902.  
**Willson v. Love**, [1896] 1 Q. B. 626, p. 221.  
**Wilmot v. Woodhouse**, 4 Brown Ch. 227, p. 244.  
**Wilson v. Campbell**, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544, p. 351.

- Wilson v. Consol. Store Service Co., 88 Fed. 286, 31 C. C. A. 533, p. 836.
- Wilson v. Eigenbrodt, 30 Minn. 4, 13 N. W. 907, p. 707.
- Wilson v. Furness R'y, L. R. 9 Eq. 28, 2 Keener 164, p. 888.
- Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307, p. 734.
- Wilson v. McCullough, 23 Pa. St. 440, 62 Am. Dec. 347, p. 262, 267.
- Wilson v. Mayor etc. of Baltimore, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774, p. 219, 226.
- Wilson v. Mineral Point, 39 Wis. 160, H. & B. 766, Shep. 318, p. 843.
- Wilson v. Northampton etc. R'y, L. R. 9 Ch. 279, 284, p. 879.
- Wilson v. O'Leary, L. R. 12 Eq. 525, 527, 7 Ch. 448, p. 244.
- Wilson v. Thornbury, L. R. 10 Ch. 239, 248, 249, p. 237, 239.
- Wilson v. Townsend, 1 Drew. & Sm. 324, 1 Ames Eq. Jur. 539, p. 834.
- Wilson v. Williams, 3 Jur. N. S. 810, 2 Scott 392, p. 906.
- Wilson v. Wilson, 41 Oreg. 459, 69 Pac. 923, p. 198.
- Wilson's Estate, In re, 2 Pa. St. 325, p. 769.
- Wineburgh v. U. S. etc. Co., 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261, p. 633.
- Winfield Nat. Bank v. Croco, 46 Kan. 620, 26 Pac. 939, p. 507, 509.
- Wing v. Harvey, 5 De Gex, M. & G. 265, p. 224.
- Wing v. Spaulding, 64 Vt. 83, 23 Atl. 615, 1 Keener 308, p. 795.
- Wing & Evans v. Hartupee, 122 Fed. 897, (C. C. A.) p. 515.
- Winship v. Pitts, 3 Paige, 259, 1 Keener 473, p. 827.
- Winter v. Montgomery G. L. Co., 89 Ala. 544, 7 South. 773, p. 338.
- Winter v. Winter, 5 Hare, 306, p. 665.
- Wirt v. Hicks, 46 Fed. 71, 1 Ames Eq. Jur. 626, p. 835.
- Wiser v. Lawler, 189 U. S. 260, 23 Sup. Ct. 624, p. 396.
- Wistar's Appeal, 80 Pa. St. 484, p. 881.
- Wiswall v. Sampson, 14 How. 52, 65, 14 L. ed. 322, Shep. 334, p. 809.
- Witczinski v. Everman, 51 Miss. 841, p. 704.
- Withers v. Yeadon, 1 Rich. Eq. 324, 329, p. 411.
- Withy v. Cottle, 1 Sim. & St. 174, 1 Ames Eq. Jur. 57, p. 881, 883.
- Wittenbrock v. Parker, 102 Cal. 93, 101, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197, p. 303, 305, 307.
- Wombwell v. Belasyse, 6 Ves. (2 ed.) 110, a, note, 1 Keener 470, 1 Scott 654.
- Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62, p. 359.
- Wood v. Griffith, 1 Swanst. 43, 2 Keener 114, p. 884.
- Wood v. Hudson, 96 Ala. 469, 11 South. 530, p. 75.
- Wood v. Mann, 1 Sum. 506, 507-509, 578, Fed. Cas. Nos. 17,951, 17,952, 1 Scott 507, p. 362, 364, 375.
- Wood v. Midgley, 5 De Gex, M. & G. 41, 2 Keener 750, 1 Scott 462, p. 479, 905.
- Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640, p. 478, 604.
- Wood v. Rowcliffe, 3 Hare, 304, 308, 2 Phill. Ch. 382, 1 Ames Eq. Jur. 43, 2 Scott 40, p. 893.
- Woodall v. Kelly, 85 Ala. 368, 7 Am. St. Rep. 57, 5 South. 164, p. 748, 749.
- Woodburn's Estate, 138 Pa. St. 606, 21 Am. St. Rep. 932, 21 Atl. 16, p. 238.
- Woodbury v. Gardner, 77 Me. 68, 75, p. 478.
- Woods v. Farmere, 7 Watts, 382, 387, 388, 32 Am. Dec. 732, 772, p. 274, 277.
- Woods v. Woods, 1 Mylne & C. 401, p. 570.
- Woodstock Iron Co. v. Extension Co., 129 U. S. 643, 9 Sup. Ct. 402, p. 495.
- Woodstock Iron Co. v. Fullenwider, 87 Ala. 584, 13 Am. St. Rep. 73, 6 South. 197, p. 875.
- Woodsworth v. Tanner, 94 Mo. 124, 7 S. W. 104, p. 64.

- Woodward v. Gyles, 2 Vern. 119, 2 Scott 121, p. 222.
- Woollam v. Hearn, 2 Lead. Cas. Eq. 920, 944-1040, 4th Am. ed., 7 Ves. 211, 2 Ames Eq. Jur. 297, 2 Scott 262, p. 433.
- Woolums v. Horsley, 93 Ky. 582, 20 S. W. 781, 2 Keener 926, 2 Scott 251, p. 468.
- Worden v. California Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161, p. 494, 840.
- Workingman's B. & S. Ass'n v. Williams, (Tenn. Ch. App.) 37 S. W. 1019, p. 340.
- Worrall v. Harford, 8 Ves. 4, 8, Ames Trusts, 415, p. 623, 624.
- Worthington v. Moon, 53 N. J. Eq. 46, 30 Atl. 251, p. 227.
- Worthington v. Waring, 157 Mass. 421, 34 Am. St. Rep. 294, 32 N. E. 744, 20 L. R. A. 342, Lewis 250, p. 847.
- Wray v. Steele, 2 Ves. & B. 388, p. 590.
- Wright v. Bell, 5 Price, 325, 328, 329, 2 Keener 9, p. 879, 883.
- Wright v. Carter, [1903] 1 Ch. 27, p. 519.
- Wright v. Fisher, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886, p. 508.
- Wright v. Stewart, 130 Fed. 905, 921, p. 502.
- Wright v. Vanderplank, 8 De Gex, M. & G. 133, 137, 146, p. 522, 526.
- Wright v. Ward, 4 Russ. 215-220, 1 Keener 217, p. 791, 797.
- Wyche v. Meal, 3 P. Wms. 311, 312, p. 79.
- Wyche v. Greene, 16 Ga. 49, 2 Ames Cas. Eq. Jur. 289, p. 419.
- Wyeth v. Renz-Bowles Co., 23 Ky. Law Rep. 23, 38, 66 S. W. 825, p. 362.
- Wyllie v. Pollen, 3 De Gex, J. & S. 596, 601, p. 304, 307.
- Wyman v. Eaton, 107 Iowa, 217, 70 Am. St. Rep. 193, 77 N. W. 865, 43 L. R. A. 695, H. & B. 888, p. 811.
- Wyman v. Fort Dearborn Nat. Bank, 181 Ill. 279, 54 N. E. 946, 72 Am. St. Rep. 259, H. & B. 909, p. 181, 767.
- Wynne v. Callander, 1 Russ. 293, 296, 297, p. 499.

## Y.

- Yale v. Dederer, 18 N. Y. 265, 72 Am. Dec. 503, 22 N. Y. 450, 456, 78 Am. Dec. 216, 68 N. Y. 329, p. 652, 653.
- Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 42 Am. St. Rep. 159, 29 Atl. 303, 25 L. R. A. 90, p. 523, 618, 619, 631, 634.
- Yarborough v. Thompson, 3 Smedes & M. 291, 41 Am. Dec. 626, 1 Keener 278, p. 790, 791, 851.
- Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380, p. 362.
- Yates v. Jack, L. R. 1 Ch. App. 295, 1 Ames Eq. Jur. 541, p. 834.
- Yeakel v. McAtee, 156 Pa. St. 600, 27 Atl. 277, p. 522.
- York v. Hinkle, 80 Wis. 624, 50 N. W. 895, 27 Am. St. Rep. 73, 3 Keener 770, p. 509.
- York v. McNutt, 16 Tex. 13, 67 Am. Dec. 607, p. 315.
- Young v. Guy, 87 N. Y. 462, 1 Ames Eq. Jur. 207, p. 360.
- Young v. Overbaugh, 145 N. Y. 158, 39 N. E. 712, 2 Keener 743, p. 904.
- Young v. Paul, 10 N. J. Eq. 401, 64 Am. Dec. 456, 2 Keener 1219, p. 906.
- Young v. Young, L. R. 3 Eq. 801, p. 373.
- Young v. Young, 80 N. Y. 422, 436, 36 Am. Rep. 634, H. & B. 387, p. 559, 561, 562, 567, 568.
- Youngblood v. Sexton, 32 Mich. 406, 410, 20 Am. Rep. 654, p. 123.
- Younge v. Furse, 8 De Gex, M. & G. 756, p. 489.
- Youst v. Martin, 3 Serg. & R. 423, p. 362.

## Z.

- Zabriskie v. Salter, 80 N. Y. 555, p. 723.
- Zabriskie v. Smith, 13 N. Y. 322, 333, 64 Am. Dec. 551, p. 761.

Zeile, Estate of, 74 Cal. 127, 133, 15 Pac. 455, p. 245.	Zoeller v. Riley, 100 N. Y. 108, 2 N. E. 388, 53 Am. Rep. 157, p. 364, 375.
Zimmerman v. Fraley, 70 Md. 561, 17 Atl. 560, p. 614.	

# INDEX.



# INDEX.\*

## A

### ABATEMENT,

- order of, appropriating assets of decedents, 1135.
- what is, and nature of, 1136.
- of specific legacies, 1137.
  - demonstrative, 1133, 1138.
  - general, 1139.
- doctrine of, subject to testator's intention, 1135, 1140, 1141.
- no exemption from, of general legacies in favor legacies to near relatives, 1141.
- general legacies for valuable consideration preferred in, 1142.

### ACCIDENT,

- definition of, 823.
- rationale of equity jurisdiction over, 824.
- general limitations on equity jurisdiction over, 825.
- instances in which jurisdiction occasioned by, does not exist, 826-829.
  - non-performance of contracts occasioned by, 826.
  - supplying lost or destroyed records, 827.
  - where, is result of negligence or fault, 828.
  - where party has no vested right, but expectancy or hope, 828.
  - jurisdiction on ground of, not exercised against bona fide purchaser, 776, 829.
    - not exercised against one with equal equity, 829.
- instances in which jurisdiction occasioned by, exists, 830-837.
  - in suits on lost bonds and sealed instruments, 831.
  - in suits on lost or destroyed unsealed instruments, 832.
  - penalties incurred through, relieved against, 826, 833.
  - forfeitures occasioned by, relieved against, 451, 454, 826, 833.
  - defective execution of powers through, aided, 589, 590, 834, 835.
  - judgments set aside or enjoined, when defense prevented by, 836, 1364.

### ACCOUNTING,

- origin of equitable jurisdiction for, 1420.
- jurisdiction, when exercised; inadequacy of legal remedies, 1420, 1421.

### ADMINISTRATIONS,

- jurisdiction of equity over, 1152-1154.
  - exists where full equity jurisprudence adopted, unless expressly abrogated, 1153.
  - as administered in United States courts, 293, note.
  - as administered in the several states, 1154.

\*For a full analytical index, see Pom. Eq. Jur., 3d ed., pp. 3337-3525.

## ASSIGNMENTS,

- of things in action; estates and interests arising from, 1270-1279.
  - things in action not assignable at ancient common law, 137, 1270, 1297.
    - assignable in equity for valuable consideration, 1270, 1297.
  - assignee acquired no right at ancient common law, 137, 1270.
    - acquires an equitable ownership, 137, 168, 1271.
  - assignee finally permitted to sue in assignor's name at law, 113, 137, 1272.
  - legislation regarding, 168, 1273, 1297.
    - real party in interest to sue where reformed procedure adopted, 1274.
  - what are and are not assignable, 1275.
  - what forbidden by public policy, 1276.
  - jurisdiction of equity over, former importance, 150, 1271.
    - when exercised at present day, 1277, 1278.
    - nature of the equitable remedy given in cases of, 1416.
  - notice to debtor, holder, or trustee, requisite to establish rights of priority in, 693-702, 1279. See PRIORITIES.
  - are subject to equities in favor of debtor and third persons, 703-715, 1279. See PRIORITIES.
- of a fund by order or otherwise, 1280-1284.
  - notice to assignees essential to absolute, 1281, 1282.
  - mere mandates to agents or depositaries directing payment, not, but revocable, 1282.
  - fund need not be in existence, if it exists in potentiality, 1275, note, 1283.
  - bills of exchange and checks not in general equitable, 1284.
- of possibilities, expectancies, and property to be acquired in future, 1285-1291.
  - jurisdiction of equity over, formerly and at present, 1270, 1271, 1285, 1287.
  - grades of contingencies, expectancies, and possibilities, 1286.
  - of possibilities, 1287, 1297.
  - of personal property to be acquired in future, 1288-1291.
    - of future cargoes or freight, 1289.
    - of future wages, payments, demands, etc., 1283, 1289, note.
    - present transfer or present agreement necessary in, 1290.
    - lien extends to substituted property, 1291.
    - avail against what persons, 1291.
    - effect of statutes on, 1291, 1297.
    - mortgages of future acquired personal property, operating as, 1236, note, 1288-1291. See LIENS.
- specific performance of contracts to assign things in action when decreed, 1402, 1403, note.

## AUXILIARY JURISDICTION,

- objects and definition of, 142, 190.
- branches of; discovery; examination of witnesses, 142, 190-215.
  - discovery, 143, 144, 190-209. See DISCOVERY.
  - perpetuation of testimony, 82, 142, 190, 210-212. See PERPETUATION OF TESTIMONY.
  - testimony de bene esse, 82, 142, 190, 210, 213-215. See TESTIMONY DE BENE ESSE.

## B.

**BILLS OF PEACE,**

nature of remedy of, 1393.

rationale of, 249-251. See **MULTIPLICITY OF SUITS.**

kinds of, 246.

to establish general right between single party and numerous persons, 246.

See **MULTIPLICITY OF SUITS.**

to quiet complainant's title against ejectment suits, 246, 253, 254.  
grounds and purposes of, 248.

**BONA FIDE PURCHASER,**

general meaning, scope of, and limitations on doctrine of, 735.

effect of recording acts on doctrine of, 736, 744.

rationale of doctrine of, 737-744.

equitable origin, nature, and operation of doctrine of, 738.

doctrine not a rule of property or of title, 739.

what kinds of estates protected, 740-743.

conflicting opinions, 740, 741.

formula of Lord Westbury, 742.

what constitutes a, 745-762.

element of valuable consideration, 746-751.

what is valuable consideration: illustrations, 747-749.

antecedent debts whether valuable consideration, 747-749, 1048.

security for, or satisfaction of, antecedent debts, 749.

payment of consideration, 750, 751.

payment must be actual, 751.

element of absence of notice, 752-761.

effects of notice, 753-754.

notice inhering in form of conveyance, 753.

quitclaim deeds, 753.

second purchaser without, from first purchaser with notice, 754.

second purchaser with, from first purchaser without notice, 754.

time of giving notice, 691, 755.

recording in connection with notice, 757-761.

interest under prior unrecorded conveyance, 758.

requisites to protection from first record by subsequent purchaser, 659, 759.

burden of proof as to bona fide purchase, 759, note.

with apparent record title from grantor with notice of prior unrecorded conveyance, 760.

break in record title; when purchaser still charged with notice of prior unrecorded title, 658.

element of good faith, 754, 762.

effects of bona fide purchase as defense, 763-778.

suits by holder of legal estate against, under auxiliary jurisdiction, 742, 764.

suits by holder of legal estate against, under concurrent jurisdiction, 765.

suits by holder of equitable, against purchaser of legal estate, 766-774.  
where legal estate acquired by original purchase, 767.

**BONA FIDE PURCHASER—Continued.**

- where legal estate subsequently acquired by purchaser of equitable, 740, 768.
- where purchaser acquires legal estate from trustee, 723, 729, 770.
- rule as applied in America, 771-773.
- where purchase made at execution sale, 724.
- assignees of things in action perfecting legal title, 701, 712, 713,
- suits against, by holder of an equity, 775-778.
- for relief against accident or mistake, 776, 829, 871.
- for relief against fraud upon creditors, 777, 968.
- against conveyance obtained by fraud, 777.
- for fraud in general, 899, 918.
- when not a defense in fraud, 915, note, 918.
- affirmative relief to, 779-783.**
  - where unrighteous conduct toward, by holder of prior title, 780, 782.
  - prior encumbrancers who have misled, 781, 782.
  - in removing cloud from title, 783.
- mode and form of defense of, 784, 785.**
  - necessary allegations, 785.

**BOUNDARIES, ESTABLISHMENT OF DISPUTED,**

- origin of jurisdiction, 1384.
- special equitable incidents required for, 1379, 1384, 1385.

**C****CANCELLATION,**

- when granted 836, 870, 899, 910-974, 1377. See **ACCIDENT; MISTAKE; FRAUD.**

**CLASSIFICATION OF EQUITY,**

- according to the nature of the jurisdiction, 121.
- in the three divisions of exclusive, concurrent, and auxiliary, 121.
- plan and order of arrangements adopted in present treatise, 128.

**CLOUD ON TITLE,**

- jurisdiction to remove, well settled, 1398, 1399.

**CONCURRENT JURISDICTION,**

- what embraced in, 139-141, 173-175.
- where primary right, estate, or interest is legal, and legal and equitable remedies are alike, 139, 173, 222.
- cases how classified, 175, 184.
- fraud, accident, and mistake as occasions of, 188. See **ACCIDENT; MISTAKE; FRAUD.**
- remedies must be legal, that suits may fall within, 175, 1379, 1416.
- when does not exist, 176-179.
- when, in general, law courts can do complete justice, 176.
- limitations on rule, 176, 177.
- legal remedy must be complete, certain, and not doubtful, 176, 180.
- not exercised merely to recover possession, or try title to chattels or land, 177, 735.
- not exercised to recover money merely as debts or damages, 178.
- where law court has first taken jurisdiction, 179.

**CONCURRENT JURISDICTION—Continued.**

exists when legal remedy is inadequate, 139, 173, 176, 180, 222.  
particular instances, 180.

principal matters coming within, 184-189.

suits for recovery of lands or chattels, 185, 1379. See **PARTITION OF LAND; ASSIGNMENT OF DOWER; BOUNDARIES, ESTABLISHING DISPUTED; CHATTELS.**

for pecuniary recoveries, 186-188, 1416. See **ACCOUNTING; CONTRIBUTION; EXONERATION, etc.**

special cases, 189.

**CONTRACTS,**

essential elements of, the same as at law, 1293.

covenants creating equitable servitudes, 689, 1295.

enforcement of, 1297.

when no action at law can be maintained, 1297, 1409.

violation of, prevented by injunctions, 1341-1344. See **INJUNCTIONS.**

specific performance of. See **SPECIFIC PERFORMANCE.**

**CONTRIBUTION, 1418.****CONVERSION,**

definition and description of, 371, 1159.

is an application of maxim, Equity regards that as done which ought to be done, 371, 1159.

words sufficient to effect, 1159, 1160.

under a contract of sale of lands, 105, 368, 1161, 1260, 1261, 1263.

time from which, takes place, 1162, 1163.

in contracts of sale with option, 1163.

effects of, 1164-1166.

where land directed to be sold, 371, 992, 1159, 1164.

where money directed or agreed to be laid out in land, 371, 992, 1159, 1165.

limitations on, 1166.

resulting trust on failure of purposes of, 1169-1174.

object and extent of doctrine of, 1169.

in total failure, to whom results, 1170.

reconversion, 1175-1178.

definition of, 1175.

parties sui juris who may elect to have a, 1176.

mode of election; express or implied, 1175, 1177.

**COVENANTS,**

creating equitable servitudes enforced or violation restrained against persons having notice, 689, 692, 1295, and notes.

**CREDITORS' SUITS, 1415.****D****DIRECTORS,**

jurisdiction of equity over, 158, 1088.

are quasi trustees, 963 note, 1088, 1089.

are quasi trustees and agents, 1089, 1090.

powers of, derived from function of agency, 1089.

**DIRECTORS—Continued.**

- are quasi trustees for corporation with respect to corporate property, 1090.
- for stockholders with reference to shares of stock, 1090.
- liability of, to stockholders, as corporate agents, 1091.
- liability of, for a violation of their trust, 1091-1096.
  - where guilty or fraudulent misrepresentations or concealments, 879, 881, 1092.
  - where proceedings of, are ultra vires, 1093.
  - wrongful dealings of, with corporate property, 1094, 1095.
  - corporation when to sue, 1091, 1094.
  - stockholders when to sue, 1091-1093, 1095.
- may be restrained from committing illegal or ultra vires acts, 1345.

**DISCOVERY,**

- embraced in auxiliary jurisdiction of equity, 142, 190.
- different significations of term, 191.
- definition, and object of suit for, 191.
- origin of, 192.
- entire or practical abolition of, 142, 193, 194, 281.
- rules concerning, recognized in statutory proceedings of, 194.
- when enforced, 191, 195-209.
  - what proceedings, in what courts aided by, 196, 197.
  - relations of parties to each other, that may be granted, 191, 198-200.
    - plaintiffs in suits for, 198.
    - defendants in suits for, 199.
  - matters which may be subject of, 201-203.
    - confined to facts material to plaintiff's title or cause of action, 201.
    - defendant need not criminate himself, 197, 202.
      - bound to disclose frauds, 199, 201-203.
    - what privileged from, 203.
  - manner in which defendant must make, 204.
    - of other property, 205, note.
  - use of answer in suit for, governed by rules of evidence, 208.
- as source or occasion of equitable jurisdiction, 223-230.
  - early and modern English rules, 224-226.
  - American rule as to deciding whole controversy, where asked, 227-230, 234.
    - concurrent jurisdiction enlarged, 223, 227.
    - limitations on rule, 228, 229.
    - true meaning of rule, 230.
    - effect of legislation, 230.

**DOCTRINES OF EQUITY,**

- what are, 361. See **PENALTIES; FORFEITURES; ELECTION; NOTICE, etc.**

**DONATIONS CAUSA MORTIS. See GIFTS CAUSA MORTIS.****DOWER, ASSIGNMENT OF,**

- early origin of equitable jurisdiction, 1380.
- jurisdiction for what purpose at first invoked, 1381.
- growth of the jurisdiction, 1380, 1381.
- advantages of equitable remedy of, over legal remedy, 1382.
- exclusive jurisdiction for, in equitable estates, 1383.

## E.

**ELECTION,**

- rationale of doctrine of, 462, 465.
- foundation on maxim, He who seeks equity must do equity, 465.
- meaning, scope, and effects of, 466-470.
  - compensation made to disappointed third person, 468, 517.
  - applies to all instruments of donation, 470.
- necessity for, when does or does not arise, 471-505.
  - fundamental rule of interpretation, 472.
  - interpretation where donor has only a partial interest, 473, 488.
    - strong leaning against, by courts, 473, 488.
    - extrinsic evidence of intention, whether admissible, 473.
  - cases arising where donor gives property wholly another's, 476-486.
  - gift of specific property, 473, 477.
    - will invalid in another country or state, 484.
- cases arising where donor gives property in which he has partial interest, 487-505.
  - general doctrine, 473, 488.
  - donor owns only an undivided share, 489.
  - dower and benefits given by husband's will, 492-502.
    - general rule when widow compelled to elect, 493.
    - rule changed by statute in certain states, 494.
    - devise in trust to sell or with power of sale, 499.
    - devise to widow and others in equal shares, 502.
  - who may elect, 507-510.
    - court elects for infants, 509.
    - court elects for lunatics, 510.
  - rights and privileges of persons bound to elect, 511, 512.
  - time of, 513.
  - mode of, express or implied, conduct amounting to, 514, 515.
  - effects of, 516, 517.

**EQUITABLE ESTATES,**

- cases concerning, embraced in exclusive jurisdiction, 137, 146.
- may exist in things real and personal, 146.
- may be of various amounts and degrees, 146.
- distinction between, and "equities," 146.
- defined and described, 147-149.
  - require two estates vested in different persons, 147.
  - are regarded in equity as the real ownerships, 147, 685, 975.
  - two classes of, permanent and temporary; examples of, 148.
  - may be regarded as trusts, 149.
- distinction between certain doctrines governing, and, 150.
- enumeration of, 150.
- various, described: trusts, married women's separate property, mortgages, liens, etc., 975-1291. See TRUSTS; MARRIED WOMEN, etc.

**EQUITY,**

- necessity of an historical review of, 1.
- aequitas in the Roman law, 8-9.
- analogies and differences between growth of, in English and Roman law, 9.
- origin and growth of, in English law, 10-42.
  - primitive condition of the law and the courts, 12, 13.
  - influence of Roman law on, 15.

**EQUITY—Continued.**

- causes which made a court of, necessary, 16-23.
  - the rigid character of the common law, 16, 17.
  - the feudal origin and nature of certain laws, 18, 19.
  - the position and policy of king's parliament, and the nation to the Romish church, 20.
  - the common-law procedure, 21-23.
- statute Edw. I., concerning new writs, and limited results of same, 24-29.
- commencement and progress of jurisdiction of, 12, 30-42. See JURISDICTION OF EQUITY.
- nature of, 43-67.
  - importance of a correct notion of, 43.
  - various meanings given to the word, 44, 45.
  - true meaning of, 46, 47.
- theories of early chancellors concerning, as both supplying and correcting common law, 43, 45, 46, 48-54.
  - antagonism to the common law, 48, 50, 54.
  - chancellors guided by conscience, 49.
  - growth of precedents: effect of, 49.
  - jurisdiction extended to matters not remediable at common law; latitude of this maxim, 50.
  - jurisdiction supplementary to and corrective of common law, 48, 50.
  - unfinished work of chancellors in reform, 53, 54.
  - reform, how accomplished, 53.
- the law corrected and modified by, as now administered, 54, 101.
- source from which early chancellors took their doctrines, 55-58.
- "conscience," notions of early chancellors of, as ground of authority, 55-58, 873.
- finally established on basis of settled principles, 59-61.
- expansive and flexible nature of precedents, 59-61, 67.
- equitable jurisdiction, how determined at present day, 62.
- recapitulation, 63-67.
- how affected by moral precepts, 49, 63-67, 424.
- present relations of, with law, 68-88.
  - importance of correctly understanding, 68.
  - the law changed by statutes and decisions, 69.
- constituent parts of, 89-117.
  - rights classified and kinds embraced in, 90-117. See RIGHTS.
- classification of, 118-128. See CLASSIFICATION OF EQUITY.
- jurisdiction of, 129-358. See JURISDICTION OF EQUITY.

**ESTOPPEL,**

- nature of rights created by equitable, 801.
- equitable, arises from matters in pais, or conduct of party, 802.
- fraud, how far essential in equitable, 803, 805-807.
- definition of equitable, 804.
- essential elements constituting equitable, 805.
- requisites of equitable, illustrated, 808-812.
  - nature of conduct of party creating, 808.
  - knowledge of the truth by the party estopped, 809.
  - ignorance of truth by party claiming benefit of, 810.
  - intention of party estopped, 811.

**ESTOPPEL—Continued.**

- conduct must be relied upon and be inducement to act, 812.
- operation and extent of equitable, 813–815.
- whether applies to married women, 814.
  - to infants, 815.
- important applications of, in equity, 816–821.
  - acquiescence as working, 816–821.
    - as preventing rights of remedy, 817, 897, 917, 965, 1359, 1376, note.
    - as an, to rights of property or contract, 818.
    - corporations estopped by statements in prospectuses, 819.
    - stockholders estopped from setting up ultra vires acts, 819.
    - in settlements of accounts or other dealings, 820.
    - from conduct of debtor towards intended assignee of thing in action, 704, 820.
    - owner estopped from asserting legal title to land, 821.

**EVIDENCE,**

- parol, to show mistake, accident, or fraud, 857–867.
  - may be admitted to show mistake, accident, fraud, or surprise, 858.
  - admitted in suits for reformation and cancellation, 859.
  - admitted in defense to show fraud, surprise, or mistake, in suits for specific performance, 860.
  - by plaintiff in suits for specific performance to show fraud, surprise, or mistake, 861–863.
    - not in general admitted in England, 861.
    - admitted in America, 862.
    - admissible to prove parol variation part performed, and contract then enforced, 861, 863.
  - effect of statute of frauds upon use of, 864–867.
    - two classes of cases: omissions; insertions, 865.
    - limitations on admissibility; *Glass v. Hulbert*, 867.

**EXCLUSIVE JURISDICTION,**

- what embraced in, 137, 138, 146.
  - embraces cases where primary estate, right, or interest is equitable, 137, 146, 222.
  - cases where the remedy is purely equitable, 138, 146, 222.
- equitable estates and interests coming within, 146–169. See **EQUITABLE ESTATES.**
- remedies belonging to, 170–172. See **REMEDIES; INTERPLEADER; RECEIVERS; INJUNCTIONS; SPECIFIC PERFORMANCE, etc.**

**EXONERATION, 1417.****F.****FORFEITURES,**

- when equity will relieve against, 449–458.
  - relieved against when agreement secured is one for payment of money, 433, 450, 456.
  - whether relieved against when agreement is for performance of act in pais, 433, 450.
    - whether depends on fact that compensation can be made, 381, 433, 450.

**FORFEITURES—Continued.**

- occasioned by fraud, accident, surprise, or ignorance, 451, 454, 826, 833.
- no relief when willful, or occasioned through negligence, 452, 856, note.
- arising from covenants in leases, 450, 453, 454.
- from contracts for sale of land, 1408, note.
- from other contracts, 456.
- of shares of stock, 457.
- statutory, not relieved against, 458.
- equity will not enforce, 459.
- See PENALTIES.

**FRAUD,**

- various reliefs possible at law and in equity on ground of, 872.
- equitable theory of, how differs from legal conception, 872, 885.
- description of; essential elements, 873.
- four forms and classes of, in equity, 874.
- actual, 875-921.
  - nature of, 875.
  - misrepresentations constituting, 876-899.
    - must be affirmation of fact, 877, 878.
    - whether may be of matter of opinion, 877, 878.
    - representation, purpose for which must be made, 879-881.
      - nature of, illustrated by false prospectuses, reports, circulars, etc., 881.
    - untruth of statement necessary, 882.
    - intention, knowledge, or belief of party making statement, 883-889.
      - three forms of misrepresentations at law, 884, 886, 887.
        - rule in *Derry v. Peek*, 884, note.
      - in equity; no incident of moral culpability, 885.
      - forms of misrepresentations in equity, 886-888.
      - requisites of misrepresentation as defense to specific performance, 889.
    - reliance upon misrepresentations necessary, 890-896.
      - party must be justified in relying, 891.
      - when party is, or is not, justified in relying, 891-896.
        - when information or means of information are possessed, 893.
        - possession of knowledge; patent defects, 894.
        - when knowledge or information must be proved and not presumed, 891, 895.
        - effect of words of general caution or advice, 896.
      - prompt disaffirmance necessary for relief in general 817, 897, 917.
        - must be material, 879, 890, 898.
      - effects of; defensive and affirmative reliefs, 899.
    - concealments constituting, 900-907.
      - of material fact, when duty to disclose, constitutes, 901.
      - when duty to disclose exists, 902-904.
        - by vendee in contracts of sale, 903.
        - by vendor, 904.
      - non-disclosure of facts a defense to specific performance, 900, 905.
      - by buyers on credit, 901, 906.
      - where contract or transaction is essentially fiduciary, 902.

**FRAUD—Continued.**

- jurisdiction of equity in cases of, 910-921.
  - in England extended over every case of, 912.
    - fraudulent wills the exception, 913.
  - in America, 914.
- incidents of jurisdiction and relief, 915-918.
  - plaintiff particeps doli; no relief where in *pari delicto*, 401, 916.
  - ratification, 916, 964.
  - promptness in asserting rights necessary, 418, 419, 817, 897, 917, 965.
    - delay through ignorance, 917.
  - relief given against all participants, 899, 978.
    - bona fide purchasers universally protected, 777, 899, 918.
    - when not protected, 918.
- particular instances of, 919, 920.
  - relief against judgments obtained by, 914, note, 919, 1364.
  - relief against awards obtained by, 919.
  - in case of fraudulent devises or bequests, 1054.
  - constructive trusts, 920, 1044-1058. See TRUSTS.
- statute of frauds not an instrument for, 431, 858, 859, 921, 1293, 1409e.
- constructive, 922-974. See FRAUD, CONSTRUCTIVE.

**FRAUD, CONSTRUCTIVE,**

- what the term, means and embraces, 922.
- three principal classes of, 923.
- apparent from intrinsic nature and subject of transaction itself, 924-942.
  - inadequacy of consideration amounting to, 925-928.
    - effect of inadequacy pure and simple, 926.
    - gross inadequacy amounting to, 927.
  - inadequacy coupled with other inequitable incidents, 928, 948.
- illegal contracts and transactions permitting equitable interposition, 929-942. See ILLEGALITY.
- inferred from condition and relation of parties to transaction, 943-963.
- transactions void or voidable with persons incapacitated, 944-954.
  - with married women and infants, 945.
  - with lunatics, monomaniacs, and idiots, 946.
    - person of weak mind, 947.
    - persons in *vinculis*; illiterate or ignorant, 928, 948.
    - persons intoxicated, 949.
    - persons under duress or undue influence, 950, 951.
  - expectants, heirs, and reversioners, 953.
  - post obit contracts, 954.
- transactions presumptively invalid between persons in fiduciary relations, 955-963.
  - general principles, 956.
  - classes of cases; parties dealing with each other, and on one side only, 957.
  - trustee and beneficiary, 958, 1044-1052, 1075-1078.
    - principal and agent, 959, 1049-1052, 1075-1078.
    - attorney and client, 960, 1049-1052, 1075-1078.
    - guardian and ward, 961, 1049-1052, 1075-1078.

**FRAUD, CONSTRUCTIVE—Continued.**

- parent and child, 962.
  - miscellaneous relations, 963.
  - confirmation and ratification of transactions, preventing relief, 916, 964.
  - acquiescence and lapse of time, preventing relief, 418, 419, 817, 917, 965.
  - against third persons not parties to the transaction 960-974.
    - secret bargains in, of compositions with creditors, 967.
    - conveyances in fraud of creditors, 968.
      - consideration requisite by statute, 969.
      - fraudulent intent requisite, 970.
      - existing creditors, 971, 972.
      - subsequent creditors, 971, 973.
    - conveyances in fraud of subsequent purchasers, 974.
- See **FRAUD.**

**G.****GIFTS CAUSA MORTIS,**

- what are; general nature and essentials of, 1146.
- not testamentary: donee's title obtained directly from donor, 1147.
- property capable of being subject of, 1148.
- delivery, an essential of, 1146, 1149.
- revocation of, before death, by language indicating intent, 1146, 1150.
- by recovery from sickness or escape from peril, 1146, 1150.

**GOVERNMENT,**

- officers of, cannot be compelled to discover matters of state, 203.
- contracts interfering with functions of, illegal, 935.
  - for procurement of office, 935.
  - interfering with legislative proceedings, 935.
  - with executive and judicial proceedings, 935.

**I.****ILLEGALITY,**

- illegal contracts and transactions constituting constructive fraud, 929-942.
  - illegal because contrary to statute, 930.
  - illegal because opposed to public policy, 931-935.
    - interfering with freedom of marriage, 931.
    - for a separation, when valid, and enforcement of, 932.
    - conditions and limitations in instruments in restraint of marriage, when valid, 933.
    - in restraint of trade, 934.
    - interfering with bidding at auctions; puffing, 934.
    - use of fraudulent trade-marks, 934, 1353, note.
    - policy of statute regulating business dealings interfered with, 402, note, 934.
    - trading with alien enemies, 934.
    - interfering with governmental functions, 935. See **GOVERNMENT.**
  - illegal because opposed to good morals, 936.
    - for past or future illicit sexual intercourse, 936.
    - promoting or furnishing opportunities for unlawful cohabitation or prostitution, 936.
    - constituting champerty or maintenance, 936.
    - forbearance or abandoning of criminal prosecution, 936.

**ILLEGALITY—Continued.**

- equitable jurisdiction in case of, 937-942.
  - usurious contracts relieved against, 391, 937.
  - gaming contracts, when relieved against, 938.
  - ordinary illegal contracts, when relieved against, 939.
  - maxims limiting exercise of jurisdiction, 939-942.
    - meaning of maxim, in *pari delicto*, etc., 939.
    - in *pari delicto*, general rules, 940.
    - limitations, 941.
  - when not in *pari delicto*, 942.

**INFANTS,**

- jurisdiction of equity over persons and estates of, 1303-1310.
- importance of jurisdiction in England, 1303.
- statutory changes in America, 1303, 1304.
- origin of the jurisdiction, 1304.
- how acquired, 1305.
- extent of the jurisdiction, 1306, 1307.
  - appointment of guardians, 1306.
  - controlling the person of, 1307.
- how exercised; supervision of the guardian, 1308-1310.
- intellectual, moral, and religious education of ward, 1307, 1308.
- management of property; maintenance of ward, 1309.
- marriage of ward, 1310.
- receiver appointed of estates of, during litigation, 1332.

**INJUNCTIONS,**

- origin of; "interdicts," 1337.
- may be final, or preliminary and interlocutory, 1337.
  - general principles, doctrines, and rules the same, 1337.
- remedy of, is preventive, prohibitory, or protective, 1337.
- fundamental principles governing issue of, 1338.
- preliminary or interlocutory, 1338, note.
- to protect equitable estates or interests, and aid equitable remedies, 1339, 1340.
  - transfer of negotiable instruments restrained for fraud, etc., 221, 1340, 1377, note.
  - breach of trust prevented by, 1340.
    - violation of confidence restrained, 1340, note.
  - property in litigation protected by, 1340.
- to prevent violation of contracts, 1341-1344.
  - governed by same rules as specific performance, 1341.
  - restrictive covenants creating equitable easements, 689, 1295.
  - contracts for personal acts, 1342.
  - special agreements generally negative in nature, 1344.
- corporations and directors restrained from doing illegal or *ultra vires* acts, or violating trust duties, 1345.
  - from admitting to and expulsion from membership, 1345.
- between mortgagors and mortgagees, to restrain waste, improper sales, etc., 1345.
- public officers not restrained from acting as such, 1345.
  - illegal, improper, or unlawful acts when restrained, 1345.
    - acts of municipal corporations and their officers, 1345, note.

INJUNCTIONS—*Continued.*

- imposition or enforcement of taxes, 258-260, 265, 270, 1345, note.
- unlawful exercise of eminent domain power, 1345, note.
- cloud on title prevented by, 1345, 1398, note.
- to prevent or restrain commission of torts, 1346-1358.
  - estates and interests generally legal, 1346. ~~————~~
  - kinds and classes of torts restrained, 1347.
    - in case of waste, actual or threatened, 1348. See WASTE.
    - public and private nuisances, 1349-1351. See NUISANCES.
    - violation of easements, 1351.
    - patent rights and copyrights, 1352-1352d.
    - literary property, as distinct from copyright, 1353.
    - works of creative art, 1353.
    - trade-marks, 1354.
    - exclusive franchises, 1354a.
    - good-will, 934, note, 1355.
    - trespasses, 1347, 1356, 1357.
    - slander of title; libels, 1358.
    - the "right of privacy," 1358, note.
    - strikes, boycotts, etc., 1358, note.
- mandatory, 1359.
  - term is, in strictness, confined to interlocutory or preliminary, 1359.
- to restrain actions or judgments at law, 1360-1365.
  - origin of the jurisdiction, 1360.
  - when jurisdiction not exercised; general doctrine, 1361.
  - when jurisdiction exercised, 1362-1364.
    - equitable estate, right, or interest involved, 1362.
    - legal remedies inadequate, 1363.
      - instruments executed through fraud, 221, 914, note, 1363.
      - equitable affirmative relief necessary, 1363.
    - fraud, accident, or mistake in trial at law, 1364.
  - jurisdiction obsolete through power of granting new trials at law, 1365.
  - remaining in courts of equity, 1365.

## INTERPLEADER,

- remedy of, is ancillary and provisional, 171, 1319, 1320.
- general nature and object of, 1320.
- rationale of the remedy; the risk of being vexed by several suits, 1320, note.
- may be granted whether claims are legal or equitable, 1321.
- essential elements requisite for remedy of, 1322-1326.
  - the same thing, debt, or duty, 1323.
    - claims of different amounts, 1323, note.
  - privity between opposing claimants, 1324.
  - plaintiff a mere stake-holder, without claim or interest, 1325.
  - no independent liability to one claimant, 1326.
  - by bailees, agents, tenants, and parties to contracts, 1326, 1327.
- bill of, what allegations must contain, 1328.
- bill in the nature of a bill of, 1328, note.
- in legal actions, 1329.

## J.

## JURISDICTION OF EQUITY,

- commencement and progress of, 12, 30-42.
  - ancient office of chancellor, 12, 31.
  - early ordinary jurisdiction of chancellor, 32.
  - chancellor's extraordinary jurisdiction; grace, 33-35.
    - commencement of, 33.
    - rapid growth of; statute of 22 Edw. III., concerning, 34, 35.
    - principles upon which chancellor based decision, 35, 50.
  - development of, 36-39.
    - ill-defined in earliest periods, 36.
    - over crimes; recovery of land; trespass, 36.
    - causes tending to extend, 37, 38.
      - the power of probing consciences, 37.
        - of prevention, 37.
        - of awarding damages, by statute, 37.
      - recognition by Parliament, 37.
      - introduction of uses, 38.
      - opposition to, from Parliament, and common law judges, 39.
        - how far combined with that of law in England and America, 40-42.
    - definition of, 129, 130.
    - requisites, in order that a case may come within the, 130, 424.
    - want of, effect on judgment, 129, 130.
    - objection to, when to be raised, 130.
    - distinction between existence of, and its proper exercise, 130, note.
    - depends on existence of equitable rights and interests and equitable remedies, 133, 424.
    - threefold: exclusive, concurrent, and auxiliary, 136.
    - what embraced in exclusive, 137, 138, 146-172. See EXCLUSIVE JURISDICTION.
    - what embraced in concurrent, 139, 173-189. See CONCURRENT JURISDICTION.
    - what embraced in auxiliary, 142, 190-215. See AUXILIARY JURISDICTION.
    - rules concerning government of, 216-281.
      - inadequacy of legal remedies affecting, 132, 133, 137-139, 173, 176, 180, 216-222. See REMEDIES.
      - discovery as a source of, 223-226. See DISCOVERY.
      - when attaches for any purpose extends to whole controversy, 231-242.
        - as applied to concurrent jurisdiction, 231.
        - as applied to exclusive jurisdiction, 232.
      - illustrations of doctrine, 234-241.
        - in cases of discovery, 224-230, 234. See DISCOVERY.
          - of administration, 235, 1154.
          - of injunction, 236, 237.
        - miscellaneous cases, 238-241.
        - effect of reformed procedure on doctrine, 242.
      - exists to prevent a multiplicity of suits, 243-275. See MULTIPLICITY OF SUITS.
      - once existing, not lost by jurisdiction subsequently acquired by law courts, 276-281.
        - where jurisdiction enlarged by law courts, 277, 278.
        - where jurisdiction enlarged by statute, 279, 280.
        - where statute destroys equity jurisdiction, 281.
    - as held by the courts of the several states and the United States, 292-358.

**JURISDICTION OF EQUITY—Continued.**

- unlimited jurisdiction not held by any American tribunal, 282.
- amount of: four classes of states, 283-288.
  - first class: where expressly co-extensive with English court of chancery, 284.
  - second class: where impliedly co-extensive, 285.
  - third class: where limited by statute, 286.
  - fourth class: no distinction made between law and equity, 287.
- as established by judicial interpretation, 289-358.
  - uniformity does not exist, 290.
  - in the United States courts, 291-298. See **UNITED STATES COURTS.**
  - states where jurisdiction complete, 342-352.
    - where limited by inadequacy of legal remedies, 344.
    - extent of statutory jurisdiction, 345.
  - reformed procedure as affecting, 353-358. See **REFORMED PROCEDURE.**

**L.****LEGACIES,**

- concurrent jurisdiction of equity over, 187, 1127.
- jurisdiction of equity over, when exclusive, 1127, 1128.
  - as exists under American legislation, 1129.
- kinds of, 1130.
- specific, what are, 1130.
- ademption of, what is, and rules concerning, 1131.
- general, what are, 1132.
- demonstrative, what are, 1133.
- annuities, what are, 1134.
- abatement of, 1135-1143. See **ABATEMENT.**
- lapsed, when occur, and result, 1144, 1145.
  - statutory changes, 1145.
- equitable liens arising from charges of, on property, 1244-1248.
  - See **LIENS.**

**LIENS,**

- equitable, 165-167, 1233-1269.
  - what included within term, 1233.
  - difference between, and common law, 1233.
  - analogous to and not a species of trusts, 1234.
  - introduced to make equitable relief on executory contracts, efficient, 1234.
  - theory of, founded in contracts, express or implied, 1234.
  - arising from express contract, 1235-1237.
    - executory agreements indicating intent to charge or convey property as security, 1235.
    - agreement with reference to future-acquired property, 373, 1236, 1288, 1289.
    - form and nature of agreement immaterial if intent appears, 1237.
    - agreements to give, and defective mortgages, 383, 1237.
    - illustrations of agreements creating, 1237.
    - See **ASSIGNMENTS.**
  - arising from implied contracts, 1238-1243.
    - nature of implied contracts in equity, 1238.

**LIENS—Continued.**

- principles upon which based, 1239.
- expenditure by one joint owner, 1240.
- expenditures through mistake for true owner's benefit, 1241.
- arising from charges by will or by deed, 1244-1248.
  - intent to charge must clearly appear, 1245, 1246.
  - from express charges, 1246.
  - from implied charges, 1247.
- ordinary, in favor of grantor, on conveyance, 1249-1254.
  - adopted in England and in what states, 1249.
  - origin and rationale of, 1250.
  - permitted only for unpaid purchase price, 1251.
  - debt for purchase price must be certain, ascertained, and absolute, 1251.
  - how discharged or waived, 1252.
  - against whom avails, 1253.
  - in favor of whom, avails, 1254.
    - whether personal and not assignable, 1254.
    - assignment of debt, whether carries lien, 1254.
- in favor of grantor, where reserved, 1255, 1259.
  - what a reservation, 1256.
  - resemble purchase-money mortgages, 1255, 1257, 1258.
  - priority of, over general encumbrances, 1258.
  - how, may be discharged or waived, 1259.
  - assignable and not personal, 1259.
  - enforced by suit similar to foreclosure, 1259.
- in favor of vendor on contract of sale, 1260-1262.
  - distinction between, and grantor's liens on conveyance, 1260.
  - is a mode of expressing vendor's interest arising from conversion, 1260, note, 1261.
  - vendor's and vendee's positions determined by, and operation of, doctrine of conversion, 368, 372, 1161, 1261.
  - how enforced, 1262.
- in favor of vendee on contracts of sale, 1263.
- arising from deposit of title deeds, 1264-1267.
  - the English doctrine, 1264.
  - the doctrine in America, 1265.
- various statutory, 1268, 1269.
  - nature and object of; mechanics' liens, 1268.

**LIS PENDENS,**

- constructive notice by, 632-640. See NOTICE.

**M.****MARRIED WOMEN,**

- separate estate of, 1098-1113.
  - is a particular instance of trusts, 1098.
  - early origin of, 1098.
  - jurisdiction of equity over, exclusive, 1098, 1099.
  - legislation creating statutory estates, effect of, 1099, 1105.
  - actual trustees in creation of, unnecessary, 1100.
  - how, and by what instruments created; ante and post nuptial settlements, gifts, etc., 1101.

**MARRIED WOMEN—Continued.**

- what words showing intention to create sufficient, 1102.
- what property may be included in, 1098, 1101, 1103.
- power of disposition of, in England, 1104.
  - in America, 1105.
- restraint on anticipation, clauses in, may be inserted in settlement and conveyance, 980, 1098, 1107.
  - what words sufficient to constitute restraint, 1108.
  - effect of the restraint, 1109.
- terminated before or after coverture by wife's dealings, 1103, 1110.
- devolution in intestacy, 1110.
- settlement or conveyance by, in fraud of marriage set aside, 1113.
- equity to a settlement, 1114-1118.
  - is an application of, He who seeks equity must do equity, 1114.
    - extends to what property, 1115.
    - against whom extends, 1114, 1115.
    - when does not arise, 1116.
- maintenance of, power of equity to compel, 1119.
- alimony, what is, 1120.
  - jurisdiction of equity to award, 1120.
- contracts of, 1121-1126.
  - liability for, an incident of separate estate, 1122.
  - separate property subject to restraint on anticipation, not liable for, 1107, 1109, 1123.
  - separate property held at time of engagement only liable for, 1123.
  - life interest with power of appointment liable for, 1123.
  - personal decree cannot be obtained on, 1121, 1123.
  - separate property, how reached on, 1123.
  - separate property, for what kinds of, liable, 1124-1126.
    - in England, 1104, 1124.
    - in America, 1125, 1126.

**MARSHALING OF SECURITIES,**

- maxim, He who seeks equity must do equity, the source of doctrine of, 396.
- nature of the remedy of, 1413.
- general doctrine and rules concerning, 1414.

**MAXIMS OF EQUITY,**

- underlie the whole of equity jurisprudence, 359, 360.
- list of, and importance of, 363.
- Equity regards as done what ought to be done, 364-377.
  - importance and general operation, 364.
  - true meaning and effects, 365-377.
    - is the source of equitable property and estates, 366, 377.
    - sources of legal property or titles described, 366.
    - effect of executory contracts at law, 367.
      - in equity, 368, 372, 1161, 1260, 1261, 1263.
    - sources of equitable property described, 369.
    - equitable estates derived from, 370-377.
      - conversion, 371, 1159. See **CONVERSION**.
      - assignments of possibilities and property to be acquired in future, 369, 1235.
        - of things in action, 1270.
        - of a fund, 1270.

MAXIMS OF EQUITY—*Continued.*

See ASSIGNMENTS.

equitable liens arising from contracts, 373, 1235. See LIENS.

express trusts, 374.

trusts arising by operation of law, 375.

equity of redemption, 376.

conclusion, 377.

**Equity looks to the intent rather than to the form, 378-384.**

meaning and effect, 378.

legal requirements of form, 379.

is the source of equitable doctrines, 380-384.

of property, 380.

penalties and forfeitures, 433.

equity of redemption, 382.

effect of a seal, 379, 383.

of merger, 786.

**He who seeks equity must do equity, 385-396.**

meaning of, 385.

when applicable, 386, 387.

a general rule regulating administration of reliefs, 388.

applied to wife's equity, 1114.

equitable estoppel, 816.

relief against usury, 391, 937.

special instances, 392, 393.

is the source of certain equitable doctrines, 394-396.

of election, 461, 465.

marshaling securities, 396.

**He who comes into equity must come with clean hands, 397-404.**

meaning of, 397.

regulates the administration of reliefs, 397.

is based upon conscience and good faith, 398.

limitations upon, 399.

applied to specific performance, 400, 459, 1404.

fraud; plaintiff's claim tainted with, 401, 916.

illegality; parties in *pari delicto*, 940, 941.parties not in *pari delicto*, 942.

usury; contract tainted with, sought to be enforced, 937.

conclusion, 404.

**Equality is equity, 405-412.**

general meaning of, 405.

effect upon certain equitable doctrines, 406-411.

pro rata distribution and contribution, 406, 407.

ownership in common, 408.

joint liability, 409.

settlement of insolvent estates, 410.

marshaling of assets, 410.

abatment of legacies, 1136.

apportionment of lites, 1222.

appointment under trust powers, 1002.

**Where there are equal equities the first in time shall prevail, 413-415.**

meaning of "equities," 413.

application of, 413, 416, 591, 678, 682, 718.

true meaning of, 414, 678.

**MAXIMS OF EQUITY—Continued.**

- effect of, 415.
- Where there is equal equity the law must prevail, 416, 417.
  - application of, 416, 591, 678, 682, 741.
  - meaning and effects of, 417, 678.
- Equity aids the vigilant, not those who slumber on their rights, 418, 419.
  - meaning of, 418.
  - controls the administration of remedies, 418.
  - application and effects of, 419.
- Equity imputes an intention to fulfill an obligation, 420-422.
  - meaning and application of, 420.
  - is the source of certain equitable doctrines.
    - performance of covenants, 579.
    - trust resulting from acts of trustee, 1049.
- Equity will not suffer a wrong without a remedy, 423, 424.
  - meaning of, 423.
  - is the source of entire remedial jurisdiction, 423.
  - limitations on, 63-67, 130, 424.
- Equity follows the law, 425-427.
  - twofold meaning of, 425, 426.
    - first, in obeying the law, 425.
    - secondly, in applying legal rules to equitable estates, 426, 982.
  - narrow operation of, 425, 427.
- Equity acts in personam, and not in rem, 428-431.
  - origin and original meaning of, 428.
  - in what sense equitable remedies operate in rem, 429.
  - operation of equity on conscience of party, 430, 431.

**MERGER,**

- originates in maxim, Equity looks at intent and not at form, 786.
- of estates, 787, 788.
  - legal doctrine and rules of, of lesser in greater estate, 787.
  - equitable doctrines and rules, 788.
- of charges, 789-800.
  - owner of property becomes entitled to charge, 790-795.
    - intention prevents, 791.
    - time and mode of intention, 792.
    - when mortgagee takes conveyance of land, 734, 790, 793.
    - when mortgage assigned, 790, 793.
    - never prevented when fraud or wrong would result, 794.
    - when life tenant becomes entitled to charge, 795.
  - owner of land pays off charge, 796-799.
    - owner in fee personally liable pays off charge, 797, 1205, 1206, note, 1213.
    - owner not personally liable pays off charge, 798, 1211.
    - life tenant pays off charge, 799.
- priorities affected by, 800.

**MISTAKE,**

- early origin of equity jurisdiction concerning, 838.
- possible modes in which remedial jurisdiction occasioned by, can be exercised, 838.
- definition of, 839.
- distinction between accident and, 823, 839, 873.
- may be of law or of fact, 840.

**MISTAKE—Continued.**

- of law, 841-851.
  - various conditions included in the term, 841.
  - general rule and limitations, 842.
  - when relief will or will not be granted, 843-851.
    - no relief when, as to general rule of municipal law, 841, 842, 849.
    - nor when, as to legal import and effect of a transaction, 843.
    - relief from, of law may be granted, 842, 844.
    - no relief if agreement was as intended to be, 843, 845.
    - when written instrument does not express intention, 845, 870.
    - when common to all parties, 846.
    - attempted distinction between, of plain and doubtful rules of law, 846.
    - when accompanied with inequitable conduct of other party, 842, 847.
    - when occurs in transaction between parties in trust relations, 848.
    - relief when, as to existing legal rights, interests, or relations, 849.
    - compromises and voluntary settlements made under, as to legal rights, when relieved against, 850, 871.
    - money paid under, cannot be recovered back, 851.
- of fact, 852-856.
  - how may occur: subject-matter; terms, 853.
  - in what may consist, 854.
  - in compromises of doubtful claims, 850, 855, 871.
  - in speculative contracts, 855.
  - requisites to relief from, 856.
    - must be material, 856, 860.
    - must be free from culpable negligence, 856.
  - how shown, when by parol evidence, 857-867. See **EVIDENCE**.
  - instances of equitable jurisdiction occasioned by, 868-871.
    - by way of defense, 860.
    - by way of affirmative relief, 869-871.
      - money paid or chattels delivered by, 869.
      - cancellation and reformation when appropriate for, 870, 1376, 1377.
      - conditions of fact which are occasions of affirmative relief, 871.

**MORTGAGES OF LAND,**

- under the English doctrine, 1179-1185.
  - at the common law, 1179, 1182.
- origin and development of equity jurisdiction over, 1180.
  - equitable theory of, 1180-1182.
    - double system of, at law and in equity, 1182.
    - legal and equitable remedies of parties, 1183.
    - the two theories kept distinct, 1184.
- subsequent equitable, 1185.
  - under the American doctrine, 1186-1191.
    - where both legal and equitable theories adopted, 1187.
    - where equitable theory alone adopted, 74, 163, 1188-1190.
      - consequences of mortgagee's obtaining possession, 1189, 1190, 1215.
      - equitable remedies of the parties, 1188, 1190.
- in equity are securities for debts, 1192.
- once a mortgage always a mortgage, 1193.

**MORTGAGES OF LAND—Continued.**

mortgagor cannot, in instrument, deprive himself of rights of redemption, 382, 1193.

stipulations in, giving mortgagees advantage, invalid, 1193, note.

conveyances with agreements to repurchase distinguished from, 1194, 1195.

continued existence of debt the criterion, 1192, 1195.

conveyances absolute in form as, 1196.

to secure future advances, 1197-1199.

validity of, as between the parties, 1197.

validity of, as against subsequent encumbrancers or purchasers, 1198, 1199.

recording acts as affecting, 1199.

to secure several different notes or bonds, 1200-1203.

order of priority among assignees of notes, 1201.

assignment of note is assignment pro tanto of mortgage, 1202.

foreclosure and redemption in case of, 1202.

priority where mortgagee retains part of notes, 1203.

conveyance by mortgagor subject to, effect of, 1205-1208. See **MORTGAGOR AND MORTGAGEE.**

assignment of, by mortgagee, 1209, 1210.

assignment of debt carries, with it, 1210.

subject to equities, 704, 733, 734, 753, note, 1210, note.

equitable assignment by subrogation on payment of mortgage debt, 798, 1211-1214, 1221.

in whose favor exists, 798, 1211-1213.

See **MERGER.**

actual assignment when compelled by equitable assignee, 1214.

rights and liabilities of mortgagee in possession, 1215-1218. See **MORTGAGOR AND MORTGAGEE.**

redemption of, 1219-1226. See **REDEMPTION.**

foreclosure of, 1227, 1228.

equitable liens created by agreements to give, 1237.

by informal and defective, 383, 1237.

See **MORTGAGOR AND MORTGAGEE.**

**MORTGAGES OF PERSONAL PROPERTY,**

at law are conditional sales, 164, 1229.

jurisdiction and remedies of equity concerning, 1230.

statutory changes concerning, 164, 1232.

embracing future-acquired property are equitable liens, 1236, note, 1291.

**MORTGAGOR AND MORTGAGEE,**

interest of mortgagee, in equity, liable to be sold on execution, 1204.

of mortgagee liable to be reached by creditors, 1204.

fiduciary relation does not exist between, 1204.

conveyance by mortgagor, effect of, 1205-1208.

grantee with notice takes subject to mortgage, 1205, 1225.

liabilities of grantee assuming mortgage, in whole or in part, 1206, 1207, 1225.

rights and liabilities of, in assignment of mortgage, 1209-1214. See **MORTGAGES.**

rights and liabilities of mortgagee in possession, 1215-1218.

chargeable with rents and profits or occupation value, 1216.

repairs and disbursements, for what allowed and credited, 1217.

liability to account; rules concerning, 1190, 1218.

**MULTIPLICITY OF SUITS,**

jurisdiction of equity to prevent, 243-275.

cases to which doctrine of, may apply, classified, 245.

"bills of peace," rationale and examples of, 246-248. See **BILLS OF PEACE.**

bills "to quiet title," explained, 248.

examples of early use of, 247.

rationale of doctrine of, on principle, 249-251.

not an independent source of equity jurisdiction, 250.

what multiplicity prevented; public rights and injuries, 251.

jurisdiction not exercised when that would be ineffectual; simplifying of the issues essential, 264, note.

there must be a practical necessity for the exercise of the jurisdiction, 264, note.

examination of doctrine on authority, 252-261.

first class: where plaintiff at law obliged to bring number of similar actions against same wrong-doer, 252, 263, 267.

second class: where one defendant brings successive or simultaneous similar actions against a plaintiff, 253, 254, 263, 267.

third and fourth classes: numerous plaintiffs and defendants, 255-261, 264-266, 268-270.

privity or common interest between parties whether necessary, 251, 255-261, 264-270.

distinct proprietors injured by one wrong, 257, 264, 268, 269.

distinct proprietors relieved from illegal taxes, assessments, and public burdens, 258-260, 261, note, 265, 266, 270, 273, 1345.

miscellaneous instances, 261.

title, whether and how to be established at law, 252, 253, 256, 263, 267.

who may be plaintiffs and who defendants, 251, 267, 269.

summary of conclusions, 267-270.

**N.****NON COMPOTES MENTIS,**

jurisdiction of equity over persons and property of persons, 1311-1314.

origin of the jurisdiction, 1311.

jurisdiction in the United States, 1313.

in cases of weak and unsound mind, 1314.

**NOTICE,**

maxim, When there are equal equities the first in time shall prevail, applied to, 416, 591.

When there is equal equity the law must prevail, applied to, 416, 591. importance of doctrine of, in determining when equities are equal, 591.

general rule as regards one purchasing with, 591.

whether entire doctrine of, based upon fraud, 591, 665.

knowledge and, distinguished, 592.

kinds of, actual and constructive, 593.

definition of, 594.

actual, 595-603.

when shown by indirect evidence, 596.

vague rumors, hearsay statements, whether constitute, 597, 602.

NOTICE—*Continued.*

- information sufficient to put prudent man on inquiry constitutes, 597.
- kind and amount of information necessary to constitute, 599.
- what circumstances sufficient to constitute; relationship, intimacy, inadequacy, defective recording, etc., 600.
- by extraneous facts, 600, 610.
- effect of explaining or contradicting information given, 599, 601.
- information by whom may be given, 599, 602.
  - when must be given and received, 602.
- constructive, 604–676.
  - what is, 593, 604.
  - presumption when rebuttable, 596, note, 606, 607.
  - presumption, when conclusive, 596, note, 606, 608.
  - by extraneous facts, generally acts of fraud, negligence, or mistake, 610–613.
    - visible objects and structures, constituting, 611.
    - absence or non-production of title deeds, constituting, 606, 612.
    - information of other facts, although perfect record title, 613, 659–665.
  - by possession or tenancy, 614–625.
    - general rules as to, to purchasers and encumbrancers, 614, 615.
    - by lessee whether, of subsequent and collateral agreement, 616.
    - possession whether, of different title, where a title recorded, 616.
    - grantor remaining in possession whether, 617.
    - tenant's possession whether, of lessor's title, 618.
    - when actual, open, exclusive occupancy, 615, 620.
    - time of possession, 622.
    - presumption is rebuttable, 624.
  - by recital or reference in instruments of title, 626–631.
    - general rule as to recitals or references, 626.
    - presumption conclusive, 627.
    - extent of, 628–631.
    - by *lis pendens*, 632–640.
      - rationale of doctrine, 632.
      - general rule, 633.
      - begins with service of *subpœna* or other process, 634.
      - how long continues and when ends, 634.
      - suit must be prosecuted in good faith and with diligence, 634.
      - what allegations in pleadings necessary, 634.
      - rules should apply to counterclaims and cross-complaints under reformed procedure, 634.
      - rule extends to suits concerning land, 635.
        - how far extends to suits concerning personal property, 636.
      - who are affected by, 637, 638.
        - prior right acquired before commencement of suit, 637.
        - purchaser from either litigant party, 638.
        - not favored by courts of equity, 639.
        - statutory notice of *lis pendens*, 639, 640.
    - by judgments, 641–643.
    - by registration or recording of instruments, 644–665.
      - statutory system in England, 645.
      - in the United States, 646.

**NOTICE—Continued.**

- theory, scope, and object of legislation, 649.
- requisites of record in order to be notice, 650-654.
  - instrument must be of kind of which recording authorized, 651.
  - must be duly executed and acknowledged, 652.
  - record must be made in proper form and manner, 653.
  - record must be true copy, 654.
  - premises how must be described, 654.
- extent to which record is notice, 655.
- to whom record is notice, 656-658.
  - not to prior parties, 657.
  - to subsequent purchasers under same grantor, 656, 658, 761.
  - record of instruments made by vendor prior to vendor's record, 658.
- effect of other kind of notice in absence of record, 613, 659-665.
  - kinds of notice sufficient to produce effect, 661-665.
    - whether actual or constructive, 661.
  - rationale of notice in place of record, 665.
- between principal and agent, 666-676.
  - general rule that notice to agent is constructive notice to principal, 666.
  - rule embraces all who act for others in business relations, 667.
  - notice must be within scope of agent's authority, 668.
  - notice to agent may be actual or constructive, 669.
  - notice must be given agent during actual employment, 670.
    - must be given in same transaction sought to be affected, 671, 672.
    - when may be given in prior transaction, 672.
  - information must be material and such as agent is bound to communicate, 673.
  - presumption of communication to principal, 669, 673.
    - is generally conclusive, 669, 673.
    - when not conclusive; agent's fraud, 675.
  - rule is based upon policy and expediency, 666, 676.

**NUISANCES,**

- public, when restrained, 1349.
- private, when restrained, 1350.
  - interlocutory injunction; balance of injury; laches and estoppel, 1350a.
  - form of decree; complete relief, etc., 1350b.
- violating easements, restrained: ancient lights; excavations; polluting and diverting streams, etc., 1351.
- mandatory injunctions, when granted, in case of, 1359.

**P.****PARTITION OF LAND,**

- common-law remedy; extent and insufficiency, 1386.
- early origin and extent of equitable jurisdiction, 1387.
- complainant must show title in himself, 1386, 1388.
- accounting in, where joint owner or owner in common receives more than share of profits, 1389.
- reimbursement in, for expenditures by one of parties, 303, note, 1240, note, 1389.

**PARTITION OF LAND—Continued.**

- inconvenience or difficulty in, no ground for refusing relief, 1389.
- effected by mutual conveyances; "owelty" of partition, 1389.
- by means of sale; consent, 1390.

**PARTITION OF PERSONAL PROPERTY,**

- jurisdiction of equity to decree, or sale, 1391.
- title tried by equity where disputed in, 1392.

**PENALTIES,**

- when relieved against; general doctrine, 433.
  - form of relief against, 434.
  - what are, 435, 436, 441.
    - stipulations to secure payment of money alone, 433, 436, 441.
    - stipulations not, 437-445.
      - when in the alternative, 437.
      - for reduction of existing debt upon prompt payment, 438.
      - for acceleration of payment of existing debt, 439.
      - for liquidated damages, 440-445.
        - rules determining liquidated damages and, 441-445.
          - larger sums securing payment of smaller are, 433, 436, 441.
          - agreements for performance of single act, where damages not easily ascertainable, 442, 445.
          - agreements for performance of several acts each, 443, 445.
          - party liable in same amount, whether partial or complete default, 444.
          - agreements for performance of one of several acts, where damages not easily ascertainable, 445.
  - specific performance cannot be resisted by payment of, 446.
    - not decreed where sum to be paid is liquidated damages, 447.
- See FORFEITURES.

**PERFORMANCE,**

- definition of, 579.
- two classes of cases involving doctrine of, 579.
- presumption of, by trustees purchasing with trust funds, 1049.
- enforcing agreements partly performed, founded on meritorious or imperfect consideration, 588-590.
  - what is meritorious or imperfect consideration, 588.
  - agreements against and in favor of whom enforceable, 588.
  - surrender of copyholds against heir supplied, 588.
  - defective execution of powers when aided, 589, 590, 834, 835.

**PERPETUATION OF TESTIMONY,**

- suits for, branch of auxiliary jurisdiction of equity, 142, 190.
- nature and object of, 210, 211.
- practical abolition of, 142, 210.
- when and by whom maintainable, 211, 213.

**PLEDGES,**

- jurisdiction and remedies of equity concerning, 1231.

**PRINCIPLES OF EQUITY, 360, 363-431. See MAXIMS OF EQUITY.**

## PRIORITIES,

- dependence of doctrine of, on maxim, Where there are equal equities the first in time shall prevail, 416, 591, 678, 682, 718.
- on maxim, Where there is equal equity the law must prevail, 416, 591, 678, 682, 741.
- estates and interests to which doctrine of, applies, 679-681.
- does not apply to legal estates, 679, 735.
- modification by statutes concerning fraudulent conveyances and recording, 680.
- applies to equitable estates and interests alone, 681, 735.
- principles embodying doctrine of, in general, 682.
- superior and equal equities, 683-692.
  - superior equities defined and described, 684-692.
  - nature of the equities, 685.
  - superior equities by reason of fraud, 686, 716, 731, 732.
  - of negligence, 687, 716, 731, 732.
- effects of notice on equities, 688-692.
  - notice of trust, contract, or lien, 688.
  - of a prior covenant, 689, 692, 1295. See COVENANTS.
  - what is notice, 591-676. See NOTICE.
  - time of the notice, 691.
  - of what notice must consist, 692.
- in assignments of things in action, 693-715.
  - notice by assignee to debtor, holder, or trustee to establish, 694-697.
  - necessary in England and certain states as against subsequent assignees, 695, 713, 989, 1279.
  - extent of rule; does not apply to assignments of equitable interests in land, 697, 713.
  - diligence of assignee in perfecting title and enforcing rights necessary, 698-702.
    - questions in connection with assignment of shares of stock, 699-701.
    - as between assignee and assignor, or the company, 699.
    - between assignee's and assignor's judgment creditors, 700.
    - between prior and subsequent assignees, 701, 712, 713.
  - prompt notice to debtor necessary to prevent subsequent acts by him, 702.
- assignments of things in action subject to equities, 703-715.
  - equities in favor of debtor party, 704.
  - equities between successive assignors and assignees, 707-713.
    - assignment subject to latent equities, 708, 709.
    - effect of estoppel on application of rule, 710, 711.
    - subsequent assignee obtaining legal title protected, 701, 712, 713.
    - successive assignments by same assignor to different assignees, 713.
  - equities in favor of third person, 714, 715.
- among equitable estates, mortgages, liens, and other interests, 716-732.
  - doctrine of, greatly modified by recording acts, 717.
  - priority of time among equal equities, 718, 719.
  - simultaneous mortgages; substituted liens, etc., 719.
  - one equity intrinsically the superior, 720-726.
  - subsequent specific superior to prior general lien, 685, 720.

**PRIORITIES—Continued.**

- prior unrecorded mortgage or lien superior to subsequent docketed judgment, 719, 721, 722.
  - where judgment creditor had notice, 723.
- prior unrecorded mortgage and purchase at execution under subsequent judgment, 724.
- purchase-money mortgages, 725.
- subsequent lien superior by reason of fraud in prior, 726.
- assignee having priority where fixed by agreement, 726.
- subsequent equity protected by legal title, 727-729.
  - where legal estate is obtained from trustee, 728, 729, 770.
  - legal estate obtained after notice of prior equity, 729.
- notice of existing equities, 727, 730.
- effect of fraud or negligence upon, 716, 727, 731, 732.
- assignments of mortgages; rights of, depending upon, 733, 734.
- rights of assignee on unrecorded assignment, 734.

**Q.****QUIETING TITLE,**

- statutory suit for, 1396, 1397.

**R****RECEIVERS,**

- equitable remedy is ancillary and provisional, 1319.
- who are, 1330.
- appointment of, discretionary, 1331.
- cases in which, may be appointed, 1330, 1332-1335.
  - where no person competent to hold property during litigation, 1330, 1332.
    - infants', lunatics', and decedents' estates, 1332.
  - litigants equally entitled to property, but unjust that either should retain control, 1330, 1333.
    - suits between partners, 1333.
    - partition between co-owners, 1333.
    - suits between conflicting claimants to land, 1333.
  - suits against persons in position of trust or quasi trust, misusing property, 1330, 1334.
    - instances, 1334.
    - in mortgage foreclosure, 1334, note.
    - receivers of corporations, 1334, note.
  - after judgment to carry decree into effect, 1330, 1335.
    - creditors' suits; enforcing liens and contracts of married women; winding up corporations, 1335.
- appointment during litigation does not determine any right or title of parties, 1336.
- are quasi trustees, 1336.
- powers, rights, duties, and liabilities of, 1336.
- who may be appointed, and effect of appointment, 1336, note.
- notice, possession, suits by and against, management of the property, payment of claims, compensation, etc., 1336, note.

**REDEMPTION,**

- meaning of, 1210.

**REDEMPTION—Continued.**

- requisites of maintaining suit for, 1219.
- suit for, when maintainable by persons other than mortgagor, 1220.
- contribution and exoneration, rights of, on, 1221-1226.
  - where equities are equal, contribution pro rata, 1222.
  - where equities are unequal, 1223-1225.
    - between tenants for life or years, and remaindermen or reversioners, 1223.
    - mortgagor and grantee by warranty deed of parcel, 1224.
    - successive grantees by warranty deeds; inverse order of alienation, 1224.
    - circumstances disturbing equities and defeating rule, 1225.
- mortgagee, after notice, cannot disturb equities by release or agreement, 1226.

**REFORMATION,**

- re-execution of instruments virtually included in, 1375, note, 1376, note.
- when granted, 845-871, 1376. See **MISTAKE**.
- no reformation in favor of a volunteer, 1376, note.
- reformation of married woman's deed, 1376, note.

**REFORMED PROCEDURE,**

- as changing the relations of equity to law, 353-357.
- distinction between actions at law and suits in equity abolished by, 40, 354.
  - in what states, 40, note.
- deals with the procedure alone, 354.
- jurisdiction of equity in granting remedies, how affected by, 355, 357.
- what equitable interests affected by, 356.

**REMEDIES,**

- definition of, 90.
- remedial rights and duties, definitions of, 90.
- equity contains rules creating primary duties and rights, and conferring remedial rights and, 96-116.
  - equitable primary rights, 98-107. See **RIGHTS**.
  - equitable, generally; kinds and classes of, 108-117.
    - different from legal, although some legal in their nature, 101, 108.
    - derivation of many from primary rights, 108, 111.
    - character and number of legal and, 109, 175.
    - flexible and expansive nature of, 109, 429.
    - mode of administering, 113-116.
      - common-law rules as to parties and judgments, 113.
      - equitable rules, 114, 115.
    - how far legal and equitable, can be combined, 116.
  - specific character of, 429.
  - unlimited variety of, 111.
  - classes of, 1316.
- inadequacy of legal, how far a test of equity jurisdiction, 132, 133, 424.
- is the ground of concurrent jurisdiction, 139, 173, 176, 180.
- is the occasion only of exclusive jurisdiction, 137, 138, 139, note, 173.
- on what branch of exclusive jurisdiction principle of, operates, 219-221.
- summary of equity jurisdiction as affected by, 222.

**REMEDIES—Continued.**

as affecting jurisdiction of United States courts, 295-297, 914.  
 See **INTERPLEADER; RECEIVERS; INJUNCTIONS; SPECIFIC PERFORMANCE; CANCELLATION; ACCOUNTING, etc.**

**RIGHTS,**

primary duties and, what are, 90.  
 remedial duties and, what are, 90.  
 divisions of primary: 1. Those concerning personal status: 2. Those concerning things, 92.  
 classes of, concerned with things; real and personal; descriptions, 93.  
   real; genera embraced in, 94.  
   personal; genera embraced, 95.  
 equity contains rules creating primary duties and, and conferring remedies and remedial, 96-117.  
   equitable primary, kinds and classes of, 98-107.  
     with what primary, equity deals, 98-100.  
     are different from or additional to those existing at law, 48, 50, 51, 101.  
   equitable remedial, kinds and classes of, 108-117. See **REMEDIES.**

**S.****SATISFACTION,**

definition of, 521.  
 of debts by legacies, 527-543.  
   legacy by debtor to creditor, 527-540.  
     presumption arises of, 527.  
       what prevents presumption, 528-538.  
       payable at different time from debt, 530.  
       of different nature, or for different interest, 532.  
       legacy in pursuance of agreement or express payment, 538.  
       debt owing to a child or wife, 539.  
   legacy by creditor to debtor, 541.  
     how enforced, 543.  
 of legacies by subsequent legacies, 544-552.  
   same specific thing given by same or different instruments, 545.  
   legacies of quantity given by different instruments, 546-548.  
     second legacy regarded as cumulative, 546.  
     presumption overcome by language of testator, 548.  
   legacies of quantity by same instrument, of equal amount, 549.  
     by same instrument of unequal amounts, 550.  
 of legacies by portions and advancements, 553-564.  
   how the cases arise, 553.  
   presumption of, where legacy given and afterwards portion or advancement, 554.  
   subsequent payment less than legacy, whether complete, 555.  
   presumption applies to persons in loco parentis, 554, 556.  
   leaning of equity in favor of presumption, 557.  
     where the legacy is of uncertain amount, 558.  
     where payment is made to husband of female legatee, 559.  
     payment made to child before execution of will, 560.  
     whether two gifts should be ejusdem generis, 560.  
   effect of a codicil after portion or advancement made, 561.

**SATISFACTION—Continued.**

- when parties are strangers, 562.
- when not presumed but expressed, 564.
- of portions by subsequent legacies or other similar provisions, 565-568.
- presumption of, arises, 565.
- beneficiary has an election, 568.

**SPECIFIC PERFORMANCE.**

- ground of jurisdiction to grant remedy of; inadequacy and impracticability of legal remedies, 1401.
  - award of damages not as beneficial as, 1401, note.
- extent of jurisdiction, 1402, 1403.
  - inadequacy of damages, 1402.
    - in contracts concerning land, 1402.
    - to make a will of land, 1402, note.
    - in favor of vendor, 1402, note.
    - concerning chattels and things in action, 1402.
      - rare chattels, and those of peculiar value, 1402.
      - other grounds for relief, 1402, note.
      - assignments of debts, 1402, note.
      - patents, 1402, note.
    - awards when specifically enforced, 1402.
    - special contracts where legal remedy inadequate, 1402.
    - no relief when decree would be nugatory, 1402a.
    - refused when court cannot render or enforce a decree, 1402b.
    - arbitration agreements, 1402c.
    - contracts for personal services, 1402d.
      - for building and construction, 1402e.
      - other contracts requiring continuous acts, 1402f.
    - impracticability of legal remedies, 1403.
  - jurisdiction to grant, discretionary, 1404.
  - essential elements and incidents for, 1405.
  - valuable consideration, 1293, 1405.
    - certainty as to subject-matter, stipulations, parties, etc., 1405.
    - mutuality in obligation and remedy, 1405, and note.
  - free from mistake, misrepresentations, fraud, or illegality, 1405.
    - parol evidence to show mistake, fraud, or surprise, 860-867.
    - mistake a defense to suit for, 860, 868.
    - misrepresentations a defense to suit for, 889, 899.
    - fraudulent concealments a defense, 905.
    - mere inadequacy not ground for refusing, 926.
    - gross inadequacy may defeat, 927, note, 1405, note.
    - of contracts in restraint of trade, 934.
    - usury a defense, 937.
    - not decreed of gaming contracts, 938, 940.
    - not decreed where parties in pari delicto, 929, 940.
    - persons non compotes mentis, weak minded, intoxicated, etc., 946-949.
  - fairness, equality, and justness in terms and circumstances, 1405.
  - harshness and oppressiveness resulting from, 1405.
  - vendor's title must be free from reasonable doubt, 1405.
  - capacity and ability of defendant to obey decree, 1405.
  - rights under the contract; purchaser entitled to benefits and assumes risks of ownership, 368, 1406.

SPECIFIC PERFORMANCE—*Continued.*

- performance by plaintiff a condition precedent, 1407.
  - failure of title, 1407.
  - necessity of tender and demand of performance, 1407.
- time as affecting right to, 1408.
  - stipulations concerning time generally treated as formal, 1408.
  - time may be essential; intention, 1408.
    - effect of forfeiture clause in contract, 1408, note.
  - time generally material, delay as defeating, 1408.
- of verbal contracts part performed, 1297, 1409.
  - ground of remedy is equitable fraud, 1409.
  - acts which do and do not constitute part performance, 1409a-d.
  - possession, improvements, 1409a.
  - payment, 1409b.
  - oral promise to give, 1409c.
  - marriage not part performance, 1409d.
- partial performance with compensation, 1409f.
- damages in place of, 237, 1410.
- of obligations arising from trusts and fiduciary relations, 1411, 1412.
  - nature and object of suits, 1411.
  - suits against corporations to compel transfer or issue of stock, 1412.

## SUBROGATION,

- nature of remedy of, 1419.
- equitable assignment of mortgages by, 1211-1213.

## T.

## TESTIMONY DE BENE ESSE,

- suits for taking, branch of auxiliary jurisdiction of equity, 142, 190.
  - nature and object of, 210.
  - practical abolition of, 142, 210.
  - when and by whom maintainable, 213.
  - mode of using depositions, 213.
  - examination of witnesses in foreign countries branch of, 214.

## TRUSTS,

- theory of, borrowed from Roman law, *fidei-commissum*, 976, 977.
- uses, origin, growth, and general description of, 151, 978-985. See *USES*.
- are based on statute of uses, 984, 986.
- effect of attempt to create passive, in states abolishing passive, 986, note, 1004.
  - attempt to create active, not allowed by statute, 986, note, 1004, note.
- what property may be the subject of, 151, 987.
- who may impress property with, 987.
- what trusts equity will enforce, 987.
- trustors not relieved where, illegal or fraudulent, 987.
- void, if forbidden by statute, or law of perpetuities, 987.
- divided into express, and arising by operation of law, 987.
- express, divided into private and public, 987.
- private, divided into passive and active, 988.
- passive, 988-990.
  - estates of trustee and *cestui que trust* in, 153, 988, 989.
  - "spendthrift trusts," 989, note.

**TRUSTS—Continued.**

- rules of descent and succession generally applied to, 990.
- active, 991-995.
  - common classes of, 992.
  - assignments for benefit of creditors, as a class of, 993, 994.
  - deeds of trust to secure debts, 995.
- voluntary, when binding and enforceable, 996-999.
  - executory and incomplete, not enforceable, 997.
  - application of doctrine of; donor the legal owner, 998.
    - donor the equitable owner, 999.
- executed and executory, 1000, 1001.
- powers in trust; what are, and control of equity over, 835, 1002.
- express, how created, 1006-1017.
  - in real property; writing necessary by statute of frauds, 1006.
    - character of the writing requisite, 1006, 1007.
    - when and by whom writing executed, 1006, 1007.
  - in personal property, may be created verbally, 1008.
  - words and disposition sufficient to create, 1009.
  - may be inferred by construction, 1009, 1010-1017.
    - inferred from powers given trustees, 1011.
      - from provisions for maintenance, 1012.
      - when necessary to carry out purposes of wills, 1013.
    - from precatory words, 1014-1017.
      - tendency against doctrine, 1015, 1017.
      - what intention necessary, 1014, 1016.
      - objections to doctrine of, 1017.
- public or charitable, 1018-1029.
  - general description of, 987, 1018.
  - public, not private, beneficence requisite, 1019.
  - what are charitable uses, 1019, note, 1020-1024.
    - "statute of charitable uses," 1020.
      - religious purposes; "superstitious" uses, 1019, note, 1021.
      - benevolent purposes, 1022.
      - educational purposes, 1019, note, 1023.
      - miscellaneous public purposes, 1019, note, 1024.
  - certainty or uncertainty of object and beneficiaries, 987, 1018, 1019, 1025, 1027.
    - of the trustee, 1026.
  - cy-pres, meaning and extent of doctrine of, 1027, 1029.
  - origin and extent of equity jurisdiction over, statute of Elizabeth, 1020, 1028.
  - in the United States, 1029.
- implied, or arising by operation of law, 1030-1058.
  - general nature and kinds of, 1030.
  - resulting, 1031-1043.
    - trust resulting to donor, 1032-1036.
      - in failure of purposes; uncertainty; illegality, 1032, 1033.
      - when part only of estate, or equitable title only conveyed, 981, 1034.
      - in conveyance without consideration, 981, 1035.
      - parol evidence to show, 1036.
    - in conveyance to one, price paid by another, 1037-1042.
      - where title is taken in names of some of grantees only, 1038.

TRUSTS—*Continued.*

- part of consideration only paid, 1038.
- doctrine applies to personal and real property, 1038.
- purchase made in name of wife or child, 1039.
- parol evidence to show, 1040, 1041.
- interest and rights of beneficiary in, 369, 375, 1030, 1043.
- constructive, 1044–1058.
  - number of instances of, 1045.
  - arising from contract express or implied, 1046.
  - money received equitably belonging to another, 1047.
  - property subject to, acquired by volunteers or purchasers with notice, 630, 688, 692, 770, 920, 1048.
  - right to follow funds that have been mingled, 1048, note.
  - fiduciary persons purchasing property with trust funds, 920, 958, 1049, 1058.
  - renewal of leases by partners and other fiduciary persons, 1050.
  - wrongful appropriation or conversion of another's property, 1051.
  - trust property wrongfully acquired by trustee or other fiduciary person, 958, 1052.
  - ex maleficio, what are, and varieties of, 1030, 1053.
    - where devise or bequest procured by fraud, 430, 919, 1054.
    - legal title procured on fraudulent verbal promise, 910, 919, 1055.
    - no trust from verbal promise to purchase and convey, 1056.
  - in favor of judgment creditors where property fraudulently transferred, 1057.
  - rights and remedies of cestui que trust in, 369, 375, 1058, 1080.

## TRUSTEE AND CESTUI QUE TRUST,

- who may be in ordinary trusts, 987.
  - infants, married women, lunatics, corporations cestuis, executors, 987, note.
- trust not allowed to fail for want of trustee, 988, 1007, 1026.
- powers, duties, and liabilities of express trustees, 1059–1087.
  - acceptance by trustee unnecessary to validity of trust, 1007, 1060.
  - joint owners, when property given to two or more trustees, 1060.
  - survivorship on death of trustee, 1060.
  - duty of trustees to conform to directions of trust, 1062.
  - duty of trustees to render accounts, and nature of, 1063.
    - to obey directions of the court, 1064.
  - duty of trustees to restore trust property at end of trust, 1065.
    - to use care and diligence, 1066–1074.
    - to protect and obtain possession of trust property, 1067.
  - duty of trustees not to delegate authority, 1068.
  - duty of trustees not to surrender entire control to co-trustee, 1069, 1082.
  - amount of care and diligence required of trustees, 1070.
  - duty of trustees as to investments, 1070, 1071–1074.
    - result of unreasonable delay, 1067, 1071, 1072.
    - when particular investments are required, 1067, note, 1073.
    - when trust gives no directions, 1074.
  - duty of trustees to act with good faith, 951, 958, 1075–1078.
  - trustees cannot deal with trust property for own advantage, 1075.

**TRUSTEE AND CESTUI QUE TRUST—Continued.**

- must not mingle trust funds with their own, 1063, 1076.
- must not act inconsistent with beneficiary's interests, 1077.
- contracting with themselves, 958, 1049, 1077, 1078.
- breach of trust by trustees and liability therefor, 1079-1083.
  - personal liability of trustees, 1058, 1080.
  - statute of limitations as a defense, 418, 419.
  - liability among co-trustees: contribution, 1081.
  - liability for acts of co-trustees, 1069, 1082.
  - cestui que trust acquiescing or concurring, 1083, 1104.
- compensation and allowance to trustees, 1084.
  - for expenses and outlays, 1084, 1085.
- removal and appointment of trustees, 1086.
- appointment of new trustees, 1087.
- persons standing in fiduciary relations are quasi trustees, 1088.
- corporation directors as quasi trustees, 963, note, 1089-1096.
  - See DIRECTORS.
- guardians and agents as quasi trustees, 1097.

## U.

**UNITED STATES COURTS,**

- departments of law and equity distinct in, 41.
- jurisdiction of, in suits for administration, 293, and note.
- equity jurisdiction of, 285, 291-298.
  - uniformity of, throughout United States, 292.
  - identity of, 292.
  - extent of, 285, 294.
  - statutory provisions relating to inadequacy of legal remedies as affecting, 295-297, 914.
  - effect of state laws on, 292, note, 293, note, 297.

**UNSOUND MIND,**

- jurisdiction of equity over persons and property of, 1311-1314. See NON COMPUTES MENTIS.

**USES,**

- when invented, and growth of, 978.
- how regarded at law, 979, 980.
- jurisdiction of chancery over, when established, 980.
- resulting and constructive, invented; doctrines of, based on theory of consideration, 981.
- introduction of double nature of property in land; the use and the seisin, 982.
- description and effect of statute of, 983.
- kinds of, not embraced in statute of, 984.
- use upon a use not executed by statute of, 985.

## W.

**WASTE,**

- injunctions granted between mortgagors and mortgagees to restrain, 1345.
  - when granted in general, 1348.
- what is, and distinction between and trespass, 1348.

**WASTE—Continued.**

equitable waste, 1348a.

relief granted: parties, 1348b.

**WILLS,**

jurisdiction of equity in construction and enforcement of, 1155-1158.

generally considered incident to that over trusts, 1154-1157.

limited to, of personal property, 1155, 1156.

to, of real property involving trusts, 1155, 1156.

suits to construe, by whom maintained, 1156.

exercised in some states where terms of, are difficult or doubtful,  
1157.





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