COMMENTARIES

ON

EQUITY JURISPRUDENCE

VOLUME I

COMMENTARIES

ON

EQUITY JURISPRUDENCE

AS ADMINISTERED IN

ENGLAND AND AMERICA

By JOSEPH STORY, LL.D.

ONE OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES
AND DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY

"Chancery is ordained to supply the Law, not to subvert the Law."—Lord Bacon.

"His ergo ex partibus juris, quidquid aut ex ipsa re, aut ex simili, aut ex majore, minoreve, nasci videbitur, attendere, atque eliceré, pertentando unamquamque partem juris, oportebit."—Cic. De Invent. Lib. 2, cap. 22.

FOURTEENTH EDITION

BY

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Assistant to North Carolina Code Commission of 1905
Author and Publisher of a Civil Digest
of North Carolina Decisions

IN THREE VOLUMES

VOLUME I

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TO THE HONORABLE

WILLIAM PRESCOTT, LL.D.

SIR, — It affords me sincere gratification to be allowed to dedicate this work to you, upon your retirement from the Bar, of which you have been so long a distinguished ornament. More than one-third of a century has elapsed since, upon my first admission to practice, I had the honor of forming an acquaintance with you, which has ripened into a degree of friendship of which I may be truly proud. It has been my good fortune, through the whole intermediate period, to have been a witness of your professional labors, — labors equally remarkable for the eminent ability, untiring research, profound learning, and unsullied dignity with which they were accompanied. They have brought with them the just reward due to a life of consistent principles and public spirit and private virtue, in the universal confidence and respect which have followed you in your retreat from the active scenes of business. This is a silent but expressive praise, whose true value is not easily overestimated. I trust that you may live many years to enjoy it, for the reason so finely touched by one of the great jurists of antiquity: Quia conscientia bene actæ vitæ multorumque benefactorum recordatio jucundissima est.

JOSEPH STORY.

CAMBRIDGE, *December*, 1835.

PREFACE TO THE FOURTEENTH EDITION

DURING the thirty-two years that have elapsed since the publication of the last edition of this work, numerous and varied theories, practices, and versions have been wrought and welded into the field of Equity Jurisprudence. The general principles, however, have remained the same. It has been interesting to the editor to note the constant growth and increasing value of the peculiar forms and remedies afforded in this branch of jurisprudence in the enforcement of the rights of parties. Some of the principles stated have received but slight use and practice in the enforcement and preservation of justice, and in some, the importance of the principle, and the growth of the particular subject is readily apparent from a casual examination of the cited cases. The purpose of the editor has been to select from the great mass of decisions the leading cases directly bearing upon and illustrative of the topic or section under consideration. The editor is of the opinion that to attempt to improve upon the original utterances and writings of Mr. Justice Story would be futile, for the continued value and favor with which his expressions have been received by the courts is evidenced in the editor's search of the more recent adjudicated cases in which his expressions upon the questions under consideration have been adopted and stated by the most learned courts as the law of the land today. The additions to the text, by the present editor, are enclosed in brackets.

W. H. LYON, JR.

RALEIGH, N. C.,
February, 1918.

ADVERTISEMENT

TO THE FOURTH EDITION

THE present edition of the Commentaries on Equity Jurisprudence was prepared for the press by the late author, and will be found to be considerably enlarged from the former editions, both in the text and notes. His thorough revision and correction of the whole work has left little else to be done than to add such illustrations and citations as have grown out of the very recent cases.

W. W. STORY.

BOSTON, *April*, 1846.

PREFACE TO THE FIRST EDITION

THE present work embraces another portion of the labors devolved upon me by the founder of the Dane Professorship of Law in Harvard University. In submitting it to the profession, it is impossible for me not to feel great diffidence and solicitude as to its merits as well as to its reception by the public. The subject is one of such vast variety and extent that it would seem to require a long life of labor to do more than to bring together some of the more general elements of the system of Equity Jurisprudence as administered in England and America. In many branches of this most complicated system, composed, as it is, partly of the principles of natural law, and partly of artificial modifications of those principles, the ramifications are almost infinitely diversified, and the sources as well as the extent of these branches are often obscure and ill-defined, and sometimes incapable of any exact development. I have endeavored to collect together, as far as my own imperfect studies would admit, the more general principles belonging to the system in those branches which are of daily use and practical importance. My main object has been to trace out and define the various sources and limits of equity jurisdiction as far as they may be ascertained by a careful examination of the authorities, and a close analysis of each distinct ground of that jurisdiction as it has been practically expounded and applied in different ages. Another object has been to incorporate into the text some of the leading doctrines which guide and govern Courts of Equity in the exercise of their jurisdiction, and especially in those cases where the doctrines are peculiar to those courts or are applied in a manner unknown to the Courts of Common Law. In many cases I have endeavored to show the reasons upon which these doctrines are founded, and to illustrate them by principles drawn from foreign jurisprudence as well as from the Roman civil law. Of course the reader will

not expect to find in these Commentaries a minute or even a general survey of all the doctrines belonging to any one branch of Equity Jurisprudence, but such expositions only as may most fully explain the nature and limits of equity jurisdiction. In order to accomplish even this task in any suitable manner it has become necessary to bestow a degree of labor in the examination and comparison of authorities from which many jurists would shrink, and which will scarcely be suspected by those who may consult the work only for occasional exigencies. It will be readily seen that the same train of remark and sometimes the same illustrations are repeated in different places. As the work is designed for elementary instruction, this course seemed indispensable to escape from the inconvenience of perpetual references to other passages where the same subject is treated under other aspects.

The work is divided into three great heads: First, the Concurrent Jurisdiction of Courts of Equity; secondly, the Exclusive Jurisdiction; and, thirdly, the Auxiliary or Assistant Jurisdiction. The Concurrent Jurisdiction is again subdivided into two branches: the one, where the subject-matter constitutes the principal (though rarely the sole) ground of the jurisdiction; the other, where the peculiar remedies administered in equity constitute the principal (though not always the sole) ground of jurisdiction. The present volume embraces the first only of these branches of Concurrent Jurisdiction. The remaining subjects will be fully discussed in the succeeding volume. I hope also to find leisure to present, as a fit conclusion of these Commentaries, a general review of the Doctrines of Equity Pleading, and of the Course of Practice in Equity Proceedings.

In dismissing the work to the indulgent consideration of the profession, I venture to hope that it will not be found that more has been promised than is performed; and that if much has been omitted, something will yet be found to lighten the labors of the inquisitive, if not to supply the wants of the learned.

CAMBRIDGE, MASS.,
December, 1835.

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COMMENTARIES

ON

EQUITY JURISPRUDENCE

VOLUME ONE

CHAPTER I

THE TRUE NATURE AND CHARACTER OF EQUITY JURISPRUDENCE

§ 1. **Nature and Character.** — In treating of the subject of Equity it is material to distinguish the various senses in which that word is used. For it cannot be disguised that an imperfect notion of what, in England, constitutes Equity Jurisprudence is not only common among those who are not bred to the profession, but that it has often led to mistakes and confusion in professional treatises on the subject. In the most general sense we are accustomed to call that Equity which in human transactions is founded in natural justice, in honesty and right, and which properly arises ex æquo et bono. In this sense it answers precisely to the definition of justice, or natural law, as given by Justinian in the Pandects. "Justitia est constans et perpetua voluntas jus suum cuique tribuendi." "Jus pluribus modis dicitur. Uno modo, cum id quod semper æquum et bonum, jus dicitur, ut est jus naturale." "Juris præcepta sunt hæc; honeste vivere, alterum non lædere, suum cuique tribuere."[1] And the word "jus" is used in the same sense in the Roman law, when it is declared that "jus est ars boni et æqui",[2] where it means what we are accustomed to call jurisprudence.[3]

[1] Dig. Lib. 1, tit. 1, l. 10, 11. [2] Dig. Lib. 1, tit. 1, l. 1.

[3] Grotius, after referring to the Greek word used to signify Equity, says, "Latinis autem æqui prudentia vertitur, quæ se ita ad æquitatem habet, ut jurisprudentia ad justitiam." Grotius De Æquitate, ch. 1, § 4. This distinction is more refined than solid, as the citation in the text shows. See also Taylor's Elements of the Civil Law, pp. 90 to 98. Cicero,

§ 2. *Same.* — Now it would be a great mistake to suppose that Equity, as administered in England or America, embraced a jurisdiction so wide and extensive as that which arises from the principles of natural justice above stated. Probably the jurisprudence of no civilized nation ever attempted so wide a range of duties for any of its judicial tribunals. Even the Roman law, which has been justly thought to deal to a vast extent in matters ex æquo et bono, never affected so bold a design.[1] On the contrary it left many matters of natural justice wholly unprovided for, from the difficulty of framing any general rules to meet them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness, or even to positive engagements of parties, where they are not founded in what constitutes a meritorious consideration.[2] Thus it is well known that in the Roman law, as well as in the common law, there are many pacts, or promises of parties (nude pacts), which produce no legal obligation capable of enforcement in foro externo, but which are left to be disposed of in foro conscientiæ only.[3] "Cum nulla subest causa propter conventionem, hic constat non posse constitui obligationem. Igitur nuda pactio obligationem non parit."[4] And again: "Qui autem promisit sine causa, condicere quantitatem non potest, quam non dedit, sed ipsam obligationem."[5] And hence the settled distinction, in that law, between natural obligations, upon which no action lay, but which were merely binding in conscience, and civil obligations, which gave origin to actions.[6] The latter were sometimes called just, because of their perfect obligation in a civil sense; the former merely equitable, because of their imperfect obligation. "Et justum appellatur," says Wolfius, "quicquid fit secundum jus perfectum alterius; æquum vero, quod secundum

Topic. § 2; II. ad Heren. 13; III. ad Heren. 2. Bracton has referred to the various senses in which "jus" is used. "Item," says he, "jus quandoque ponitur pro jure naturali, quod semper bonum et æquum est; quandoque pro jure civili tantum; quandoque pro jure prætorio tantum; quandoque pro eo tantum, quod competit ex sententia." Bracton, Lib. 1, ch. 4, p. 3. See Dr. Taylor's definition of "lex" and "jus." Elem. Civ. Law, pp. 147, 148; Id. 178; Id. 40 to 43; Id. 55, 56; Id. 91.

[1] See Heinecc. Hist. Edit. L. 1, ch. 6; De Edictis Prætorum, §§ 7, 8, 9, 10, 11, 12; Id. §§ 18, 21 to 30; De Lolme on Eng. Const. B. 1, ch. 11.

[2] Ayliffe, Pand. B. 4, tit. 1, p. 420, &c.; 1 Kaims, Equity, Introd. p. 3; Francis, Maxims, Introd. pp. 5, 6, 7.

[3] Ayliffe, Pand. B. 4, tit. 2, pp. 424, 425; 1 Domat, Civ. Law, B. 1, tit. 1, § 5, arts. 1, 6, 9, 13.

[4] Dig. Lib. 2, tit. 14, l. 7, § 4. [5] Dig. Lib. 12, tit. 7, l. 1.

[6] Ayliffe, Pand. B. 4, tit. 1, pp. 420, 421.

imperfectum."[1] Cicero has alluded to the double sense of the word "Equity" in this very connection. "Æquitatis," says he, "autem vis est duplex; cujus altera directi et veri et justi, ut dicitur, æqui et boni ratione defenditur; altera ad vicissitudinem referendæ gratiæ pertinet; quod in beneficio gratia, in injuria ultio nominatur."[2] It is scarcely necessary to add that it is not in this latter sense, any more than in the broad and general sense above stated, which Ayliffe has with great propriety denominated "Natural Equity", because it depends on and is supported by natural reason, that equity is spoken of as a branch of English Jurisprudence. The latter falls appropriately under the head of "Civil Equity", as defined by the same author, being deduced from and governed by such civil maxims as are adopted by any particular state or community.[3]

§ 3. **Same.** — But there is a more limited sense in which the term is often used, and which has the sanction of jurists in ancient as well as in modern times, and belongs to the language of common life as well as to that of juridical discussions. The sense here alluded to is that in which it is used in contradistinction to strict law, or strictum et summum jus. Thus Aristotle has defined the very nature of equity to be the correction of the law wherein it is defective by reason of its universality.[4] The same sense is repeatedly recognized in the Pandects. "In omnibus quidem, maxime tamen in jure, æquitas spectanda sit. Quotiens æquitas, desiderii naturalis ratio, aut dubitatio juris moratur, justis decretis res temperanda. Placuit in omnibus rebus præcipuam esse justitiæ æquitatisque, quam stricti juris rationem."[5] Grotius and Puffendorf have both adopted the definition of Aristotle; and it has found its way, with approbation, into the treatises of most of the modern authors who have discussed the subject.[6]

[1] Wolff. Instit. Jur. Nat. et Gent. P. 1, ch. 3, § 83.

[2] Cic. Orat. Part. § 37. [3] Ayliffe, Pand. B. 1, tit. 7, p. 37.

[4] Arist. Ethic. Nicom. L. 5, ch. 14, cited 1 Wooddes. Lect. (Lect. vii.) p. 193; Taylor, Elem. of Civ. Law, pp. 91, 92, 93; Francis, Maxims, 3; 1 Fonbl. Eq. B. 1, § 2, p. 5, note (*e*). Cicero, speaking of Galba, says that he was accustomed, "Multa pro æquitate contra jus dicere." Cic. de Oratore, Lib. 1, § 57. See also other passages, cited in Taylor's Elem. of the Civ. Law, pp. 90, 91. Bracton defines equity as contradistinguished from law ("jus"), thus: "Æquitas autem est rerum convenientia, quæ in paribus causis paria desiderat jura, et omnia bene cœquiparat; et dicitur æquitas, quasi æqualitas." Bracton, Lib. 1, ch. 4, § 5, p. 3.

[5] Dig. Lib. 50, tit. 17, l. 85, 90; Cod. Lib. 3, tit. 1, l. 8.

[6] Grotius de Æquitate, ch. 1, § 3; Puffend. Law of Nature and Nat. B. 5, ch. 12, § 21, and Barbeyrac's note (1); 1 Black. Comm. 61; 1

[Fraud is a well recognized ground of equity jurisdiction, and the statement of this principle is often made without limitation, but it has its limitations nevertheless. If the fraud amounts to nothing more than a mere tort, usually expressed by the phrase, "an injury by fraud and deceit", making a case in which the remedy at law is complete and fully adequate, there is no ground of equity jurisdiction. It is much easier to state the few instances in which courts of equity decline cognizance of causes of action arising out of fraud than to enumerate the great number of instances in which it does intervene.[1]]

§ 4. **Same.** — In the Roman Jurisprudence we may see many traces of this doctrine, applied to the purpose of supplying the

Wooddes. Lect. vii. p. 193; Bac. de Aug. Scient. Lib. 8, ch. 3, Aphor. 32, 35, 45. Grotius says, "Proprie vero et singulariter æquitas est virtus voluntatis, correctrix ejus, quo lex propter universalitatem deficit." Grotius de Æquitate, ch. 1, § 2. "Æquum est id ipsum, quo lex corrigitur." Id. Dr. Taylor has with great force paraphrased the language of Aristotle. "That part of unwritten law," says he, "which is called Equity, or τὸ Ἐπιεικές, is a species of justice distinct from what is written. It must happen either against the design and inclination of the lawgiver, or with his consent. In the former case, for instance, when several particular facts must escape his knowledge; in the other, when he may be apprized of them indeed but by reason of their variety is not willing to recite them. For if a case admits of an infinite variety of circumstances, and a law must be made, that law must be conceived in general terms." Taylor, Elem. Civ. Law, 92. And of this infirmity in all laws the Pandects give open testimony. "Non possunt omnes articuli singillatim aut legibus, aut senatusconsultis comprehendi; sed cum in aliqua causa sententia eorum manifesta est, is, qui jurisdictioni præest, ad similia procedere, atque ita jus dicere debet." Dig. Lib. 1, tit. 3, l. 12; Id. l. 10.

"Equity acts in those matters only in which no remedy is afforded in ordinary course of law, and court must determine in limine whether it has jurisdiction." Wilson *v.* Sax, 21 Mont. 385, 54 Pac. 46.

[1] "Where private citizen brings action to prevent a public wrong, from which he would suffer injury peculiar to himself, an injunction may be awarded to prevent commission of threatened crime, and objection will not be heard that equity powers of court cannot be employed to aid in enforcing criminal laws by thus preventing crime about to be committed. Columbian Athletic Club *v.* State, 143 Ind. 107, 40 N. E. 914; Littleton *v.* Fritz, 65 Iowa 488, 22 N. W. 641; State *v.* Crawford, 28 Kans. 726; Carleton *v.* Rugg, 149 Mass. 555, 22 N. E. 55; Dist. Atty. etc. *v.* Lynn etc. R. Co., 16 Gray 242; Attorney-Gen. etc. *v.* Ice Co., 104 Mass. 239; Bancroft *v.* Cambridge, 126 Mass. 438.

A court of equity will entertain a bill to enjoin a proposed nuisance by one who might not be able to maintain an action at law, but the courts in such cases will act with great caution in interfering at the suit of private individuals. Pedrick *v.* Railroad, 143 N. C. 498, 55 S. E. 877.

"Courts of equity have no criminal jurisdiction, but where it is obviously necessary that a nuisance should be immediately suppressed, as in case of a powder house, or a slaughter house, or a chemical laboratory, equity will interfere, until the slower process by indictment could

defects of the customary law, as well as to correct and measure the interpretation of the written and positive code. Domat accordingly lays it down, as a general principle of the civil law, that if any case should happen which is not regulated by some express or written law, it should have for a law the natural principles of equity, which is the universal law, extending to everything.[1] And for this he founds himself upon certain texts in the Pandects, which present the formulary in a very imposing generality. "Hæc Æquitas suggerit, etsi jure deficiamur", is the reason given for allowing one person to restore a bank or dam in the lands of another, which may be useful to him, and not injurious to the other.[2]

[The ingenuity of man in devising new forms of wrong cannot outstrip equity in its development. In all situations and under all circumstances, whether new or old, the principles of equity will point the way to justice where legal remedies are infirm. Precedents will be a constant guide, but never a bar. Where a new condition exists, and legal remedies afforded are inadequate or none are afforded at all, the never failing capacity of equity to adapt itself to all situations will be found equal to the case, extending old principles, if necessary, not adopting new ones, for that purpose.[3]]

be put in motion. Swathmore Lumber Co. *v.* Parks, 72 W. Va. 625, 79 S. E. 725; Rowe *v.* Granite Bridge Co., 21 Pick. 344; People *v.* Davidson, 30 Cal. 388; Clark *v.* Lawrence, 59 N. C. 83; Baltimore *v.* Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081; Cherry *v.* Williams, 147 N. C. 459, 61 S. E. 267.

[1] Domat, Prel. Book, tit. 1, § 1, art. 23. See also Ayliffe, Pand. B. 1, tit. 7, p. 38.

[2] Dig. Lib. 39, tit. 3, l. 2, § 5. Domat cites other texts not perhaps quite so stringent; such as Dig. Lib. 27, tit. 1, l. 13, § 7; Id. Lib. 47, tit. 20, l. 7. Dr. Taylor has given many texts to the same purpose. Elem. Civ. Law, pp. 90, 91. There was a known distinction in the Roman law on this subject. Where a right was founded in the express words of the law, the actions grounded on it were denominated Actiones Directæ; where they arose upon a benignant extension of the words of the law to other cases, not within the terms, but within what we should call the equity of the law, they were denominated Actiones Utiles. Taylor, Elem. Civ. Law, 93.

It is held however that equity will not aid the doing of what would work no good to the plaintiff but only hardship to the defendant. Joliet R. Co. *v.* Healy, 94 Ill. 416. But while equity will not aid in enforcing a mere legal right in such a case, it is held that equity will not enjoin the owner of the right from proceeding to exercise it. Clinton *v.* Myers, 46 N. Y. 511

[3] Harrigan *v.* Gilchrist, 121 Wis. 235, 99 N. W. 909.

When equity interposes, it will make its interposition complete. The arm of equity is not shortened, but will reach out to secure full

§ 5. **Jurisdiction of the Prætor.** — The jurisdiction of the prætor doubtless had its origin in this application of equity, as contradistinguished from mere law. "Jus autem civile," say the Pandects, "est, quod ex legibus, plebiscitis, senatusconsultis, decretis principum, auctoritate prudentum venit. Jus prætorium est, quod prætores introduxerunt, adjuvandi, vel supplendi, vel corrigendi juris civilis gratia, propter utilitatem publicam; quod et honorarium dicitur, ad honorem prætorum sic nominatum." [1] But broad and general as this language is, we should be greatly deceived if it were to be supposed that even the prætor's power extended to the direct overthrow or disregard of the positive law. He was bound to stand by that law in all cases to which it was justly applicable, according to the maxim of the Pandects, "Quod quidem perquam durum est; sed ita lex scripta est." [2]

right in the premises, and where injunction has issued, a receiver will be appointed to effectuate judgment. Columbian Club *v.* State, 143 Ind. 110, 40 N. E. 914; Grasse *v.* H. W. Gossard Co., 152 Ill. App. 58; Sloss Iron & Steel Co. *v.* South Carolina & G. R. Co., 162 Fed. 546.

It is not necessary since the change in the constitution of our courts, the blending of the two systems of law and equity and the radical, though useful and practical innovations in pleading and in the practice and procedure of our courts, that a plaintiff who resorts to an equitable remedy for the protection of a right or the redress of a grievance should first reduce his claim to judgment and exhaust his legal remedy by execution or other appropriate process, as under the old system. This is not required to be done, but the right will be administered and full relief given in one action. Silk Co. *v.* Spinning Co., 154 N. C. 425, 70 S. E. 820; Smith *v.* White, 71 W. Va. 639, 78 S. E. 379; Bettman *v.* Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; Hotchkiss *v.* Plaster Co., 41 W. Va. 357, 23 S. E. 576; Evans *v.* Kelley, 49 W. Va. 181, 38 S. E. 497; Grubb *v.* Starkey, 90 Va. 831, 20 S. E. 784; Miller *v.* Wills, 95 Va. 337, 28 S. E. 337.

Where there has been a conveyance of land with covenants of general warranty, which is a covenant real running with the land and is never considered as broken until an ouster, equity has power, nevertheless, to enjoin the collection of the purchase money before actual ouster, if it be clearly shown that the grantor's title is defective. Harvey *v.* Ryan, 59 W. Va. 134, 53 S. E. 7, 7 L. R. A. (N. S.) 445, 115 Am. St. Rep. 897.

[1] Dig. Lib. 1, tit. 1, l. 7; Id. tit. 3, l. 10. "Sed et eas actiones, quæ legibus proditæ sunt," say the Pandects, "si lex justa ac necessaria sit, supplet prætor in eo, quod legi deest." Dig. Lib. 19, tit. 5, l. 11. Heineccius, speaking of the prætor's authority, says, "His Edictis multa innovata, adjuvandi, supplendi, corrigendi juris civilis gratia, obtentuque utilitatis publicæ." 1 Heinecc. Elem. Pand. P. 1, Lib. 1, § 42.

[2] Dig. Lib. 40, tit. 9, l. 12, § 1. See also 3 Black. Comm. 430, 431; 1 Wooddes. Lect. vii. pp. 192 to 200. Dr. Taylor (Elem. of the Civil Law, p. 214) has therefore observed, that for this reason this branch of the Roman law was not reckoned as part of the jus civile scriptum by Papinian, but stands in opposition to it. And thus, as we distinguish between common law and equity, there were with that people actiones civiles et

§ 6. **Origin of Equity.** — But a more general way in which this sense of Equity, as contradistinguished from mere law, or strictum jus, is applied, is to the interpretation and limitation of the words of positive or written laws; by construing them, not according to the letter, but according to the reason and spirit of them.[1] Mr. Justice Blackstone has alluded to this sense in his Commentaries, where he says: "From this method of interpreting laws, by the reason of them, arises what we call Equity;"[2] and more fully in another place, where he says, "Equity, in its true and genuine meaning, is the soul and spirit of all law; positive law is construed, and rational law is made by it. In this, Equity is synonymous with justice; in that, to the true and sound interpretation of the rule."[3]

§ 7. **General Rules in Equity.** — In this sense Equity must have a place in every rational system of jurisprudence, if not in name, at least in substance.[4] It is impossible that any code,

prætoriæ, et obligationes civiles, et prætoriæ. The prætor was therefore called "Custos, non conditor juris; judicia exercere potuit; jus facere non potuit; dicendi, non condendi juris potestatem habuit; juvare, supplere, interpretari, mitigare jus civile potuit; mutare vel tollere non potest." The prætorian edicts are not properly law, though they may operate like law. And Cicero, speaking of contracts bonæ fidei, says, in allusion to the same jurisdiction, "In his magni esse judicis statuere (præsertim cum in plerisque essent judicia contraria), quid quemque cuique præstare oporteret"; that is, he should decide according to equity and conscience. Cic. de Officiis, Lib. 3, cap. 17. Dr. Taylor has, in another part of his work, gone at large into equity and its various meanings in the civil law. Taylor, Elem. of Civil Law, pp. 90 to 98.

[1] Plowden, Comm. pp. 465, 466.

[2] 1 Black. Comm. pp. 61, 62.

[3] 3 Black. Comm. p. 429. See also Taylor, Elem. Civil Law, pp. 96, 97; Plowd. Comm. p. 465, Reporter's note. Dr. Taylor has observed that the great difficulty is to distinguish between that equity which is required in all law whatsoever, and which makes a very important and a very necessary branch of the jus scriptum, and that equity which is opposed to written and positive law, and stands in contradistinction to it. Taylor, Elem. Civil Law, p. 90.

Equity, for many reasons, will reform and correct facts; but as a general rule it does not correct errors of law. It is said there are exceptions to this general rule; but what are called exceptions by some writers are in fact not exceptions. When they are examined, it will be found that there is some fact, some inducement, some fraud connected with the transaction that raises the equity. Banking Co. *v.* Morehead, 124 N. C. 623, 32 S. E. 967.

Broad as the jurisdiction of a court of equity is, it is nevertheless within the statute law of the State, and the chancellor is as much bound to obey that law as is the judge in a law court. Stevens *v.* De La Vaulx, 166 Mo. 120, 65 N. W. 1003.

[4] See 1 Fonbl. Equity, B. 1, § 3, p. 24, note (*h*); Plowden, Comm. pp. 465, 466. Lord Bacon said, in his Argument on the jurisdiction of the

however minute and particular, should embrace or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them. "Neque leges, neque senatusconsulta ita scribi possunt," says the Digest, "ut omnes casus, qui quan-

Marches, "There is no law under heaven which is not supplied with Equity; for 'Summum jus summa injuria'; or as some have it, 'Summa lex summa crux.' And therefore all nations have equity." 4 Bac. Works, p. 274. Plowden, in his note to his Reports, dwells much (pp. 465, 466) on the nature of equity in the interpretation of statutes, saying, "Ratio legis est anima legis." And it is a common maxim in the law of England that "Apices juris non sunt jura." Branch's Maxims, p. 12. Co. Litt. 304 (*b*).

When language used in statute is ambiguous, it is to be taken in such sense as will conform to scope of act and effectuate its object. Fortune *v.* Commrs., 140 N. C. 322, 52 S. E. 950.

While penal statutes are to be strictly construed, their construction must not defeat the legislative intent. They should receive a reasonable interpretation, so as to effectuate that intention. Harrell *v.* Railroad, 144 N. C. 536, 57 S. E. 383.

Statutes which restrict private rights of persons, or the use of property in which the public has no concern, should be strictly construed in favor of the citizen. Nance *v.* Railroad, 149 N. C. 371, 63 S. E. 116.

Courts seek to sustain contracts of mutual insurance companies and look to substance and intention rather than adopting technical construction. Perry *v.* Ins. Assn., 139 N. C. 374, 51 S. E. 1025.

When terms used in option to buy timber are doubtful, it is construed most strongly against plaintiff who seeks to enforce option. Hardy *v.* Ward, 150 N. C. 391, 64 S. E. 171.

Courts have no more authority to amend a will than they have to amend a contract, and as men must abide the consequences of their own miscalculation when they go into a business venture, so must the beneficiaries under a will take what is given them, burdened with the conditions that the testator has seen fit to impose. Stevens *v.* De La Vaulx, 166 Mo. 120, 65 S. W. 1003.

In the interpretation of every written contract, the dominating factor is the mutual intention of the parties who made it. This is to be collected from the words of the instrument itself, and the facts and circumstances that gave it birth. When the form and substance conflict, the latter controls. Wilson *v.* Wilson, 115 Mo. App. 641, 92 S. W. 145.

A cardinal axiom in the construction of a written contract is that all of its parts must be examined, and effect given to every word and phrase, if practicable. The object is to arrive at the intention of the parties; and this is to be deduced from the language employed by them to express their intention. Plano Mfg. Co. *v.* Ellis, 68 Mich. 103, 35 N. W. 841; Shear *v.* Wright, 60 Mich. (1886) 160, 26 N. W. 871.

Courts do not regard forfeitures with favor, and they are never enforced unless the evidence is clear that such was the intention of the parties. Gallaher *v.* Herbert, 117 Ill. 170, 7 N. E. 511; Douglass *v.* Union Mut. L. Ins. Co., 127 Ill. 116, 20 N. E. 51.

The court will construe a clause as a promise or covenant rather than as a condition subsequent when a forfeiture would thereby be caused. North & South Rolling Stock Co. *v.* O'Hara, 73 Ill. App. 709.

In determining the intention of the parties to a contract, the inter-

doque inciderint, comprehendantur; sed sufficit ea, quæ plerumque accidunt, contineri." [1] Every system of laws must necessarily be defective; and cases must occur to which the antecedent rules cannot be applied without injustice, or to which they cannot be applied at all. It is the office therefore of a judge to consider whether the antecedent rule does apply, or ought, according to the intention of the lawgiver, to apply to a given case; and if there are two rules nearly approaching to it, but of opposite tendency, which of them ought to govern it; and if there exists no rule applicable to all the circumstances, whether the party should be remediless, or whether the rule furnishing the closest analogy ought to be followed. The general words of a law may embrace all cases; and yet it may be clear that all could not have been intentionally embraced, for if they were, the obvious objects of the legislation might or would be defeated. So words of a doubtful import may be used in a law, or words susceptible of a more enlarged or of a more restricted meaning, or of two meanings equally appropriate.[2] The question in all such cases must be, in what sense the words are designed to be used; and it is the part of a judge to look to the objects of the Legislature, and to give such a construction to the words as will best further those objects. This is an exercise of the power of equitable interpretation. It is the administration of equity as contradistinguished from a strict adherence to the mere letter of the law. Hence arises a variety of rules of interpretation of laws according to their nature and operation, whether they are remedial, or are penal

pretation which they themselves by their own acts put upon it is justly held to great weight. Lewiston etc. R. Co. *v.* Grand Trunk R. Co., 97 Me. 267, 54 Atl. 750; Cotton Yarn Co. *v.* Laurel Mills, 190 Mass. 53.

In construing leases, where there is any uncertainty, the tenant is favored, and not the landlord. Temple Co. *v.* Guana Co., 162 N. C. 89.

[1] Dig. Lib. 1, tit. 3, l. 10.

[2] It is very easy to see from what sources Mr. Charles Butler drew his own statement (manifestly, as a description of English Equity Jurisprudence, incorrect, as Professor Park has shown), "That equity, as distinguished from law, arises from the inability of human foresight to establish any rule which, however salutary in general, is not in some particular cases evidently unjust and oppressive, and operates beyond or in opposition to its intent, &c. The grand reason for the interference of a Court of Equity is, that the imperfection of the legal remedy, in consequence of the universality of legislative provisions, may be redressed." 1 Butler's Reminisc. 37, 38, 39; Park's Introd. Lect. 5, 6. Now Aristotle or Cicero, or a Roman prætor, or a Continental jurist, or a publicist of modern Europe, might have used these expressions as a description of general Equity; but it would have given no just idea of equity as administered under the municipal jurisprudence of England.

laws, whether they are restrictive of general right, or in advancement of public justice or policy; whether they are of universal application, or of a private and circumscribed intent. But this is not the place to consider the nature or application of those rules.[1]

§ 8. **Same.** — It is of this equity, as correcting, mitigating, or interpreting the law, that not only civilians but common law writers are most accustomed to speak;[2] and thus many persons are misled into the false notion that this is the real and peculiar duty of Courts of Equity in England and America. St. German, after alluding to the general subject of Equity, says: "In some cases it is necessary to leave the words of the law, and to follow that reason and justice requireth, and to that intent equity is ordained, that is to say, to temper and mitigate the rigor of the law, &c. And so it appeareth that equity taketh not away the very right, but only that that seemeth not to be right by the general words of the law."[3] And then he goes on to suggest

[1] See Grotius De Jure Belli ac Pacis, Lib. 3, ch. 20, § 47, pp. 1, 2; Grotius De Æquitate, ch. 1. This paragraph is copied very closely from the article "Equity", in Dr. Lieber's Encyclopædia Americana, a license which has not appropriated another person's labors. There will be found many excellent rules of interpretation of laws in Rutherforth's Institutes of Natural Law, B. 2, ch. 7; in Bacon's Abridgment, title "Statute"; in Domat on the Civil Law (Prelim. Book, tit. 1, § 2); and in 1 Black. Comm. Introduction, pp. 58 to 62.

There are yet other senses in which Equity is used, which might be brought before the reader. The various senses are elaborately collected by Oldendorpius, in his work De Jure et Æquitate Disputatio; and he finally offers what he deems a very exact definition of Equity in its general sense. "Æquitas est judicium animi, ex vera ratione petitum, de circumstantiis rerum, ad honestatem vitæ pertinentium, cum incidunt, recte discernens quid fieri aut non fieri oporteat." This seems but another name for a system of ethics. Grotius has in one short paragraph (De Æquitate, ch. 1, § 2) brought together the different senses in a clear and exact manner. "Et ut de Æquitate primum loquamur, scire oportet, æquitatem aut æquum de omni interdum jure dici, ut cum jurisprudentia ars boni et æqui dicitur; interdum de jure naturali absolute, ut cum Cicero ait, jus legibus, moribus, et Æquitate constare; alias vero de hisce rebus, quas lex non exacte definit, sed arbitrio viri boni permittit. Sæpe etiam de jure aliquo civili proprius ad jus naturale accedente, idque respectu alterius juris, quod paulo longius recedere videtur, ut jus prætorium et quædam jurisprudentiæ interpretationes. Proprie vero et singulariter Æquitas est virtus voluntatis, correctrix ejus, in quo lex propter universalitatem deficit."

[2] See Merlin Répertoire, Equité; Grounds and Rudim. of the Law (attributed sometimes to Francis), pp. 3, 5, edit. 1751; 1 Fonbl. Equity, B. 1, ch. 1, § 2, note (*e*); 1 Wooddes. Lect. vii. pp. 192 to 200; Pothier, Pand. Lib. 1, tit. 3, art. 4, § 11 to 27.

[3] Dialogue, 1, ch. 16.

the other kind of equity, as administered in chancery, to ascertain "Whether the plaintiff hath title in conscience to recover or not." [1] And in another place he states: "Equity is a rightwiseness, that considereth all the particular circumstances of the deed, which is also tempered with the sweetness of mercy." [2] Another learned author lays down doctrines equally broad. "As summum jus," says he, "summa est injuria, as it cannot consider circumstances; and as this [equity] takes in all the circumstances of the case, and judges of the whole matter, according to good conscience, this shows both the use and excellency of equity above any prescribed law." Again: "Equity is that which is commonly called equal, just, and good; and is a mitigation or moderation of the common law, in some circumstances, either of the matter, person, or time; and often it dispenseth with the law itself." [3] "The matters, of which equity holdeth cognizance in its absolute power, are such as are not remediable at law; and of them the sorts may be said to be as infinite, almost, as the different affairs conversant in human life." [4] And he adds that "equity is so extensive and various, that every particular case in equity may be truly said to stand upon its own particular circumstances; and therefore under favor I apprehend precedents not of that great use in equity, as some would contend, but that equity thereby may possibly be made too much a science for good conscience." [5]

§ 9. **Same.** — This description of equity differs in nothing essential from that given by Grotius and Puffendorf,[6] as a definition of general equity as contradistinguished from the equity which is recognized by the mere municipal code of a particular nation. And indeed it goes the full extent of embracing all things which the law has not exactly defined, but leaves to the arbitrary discretion of a judge; or, in the language of Grotius, "de hisce rebus, quas lex non exacte definit, sed arbitrio viri boni permittit." [7] So that in this view of the matter an English Court of Equity

[1] Dialogue, 1, ch. 17.
[2] Id. ch. 16.
[3] Grounds and Rudim. pp. 5, 6, edit. 1751.
[4] Id. p. 6.
[5] Grounds and Rudim. pp. 5, 6, edit. 1751. Yet Francis (or whoever else was the author) is compelled to admit that there are many cases in which there is no relief to be had either at law or in equity itself; but the same left to the conscience of the party, as a greater inconvenience would thence follow to the people in general. Francis, Max. p. 5.
[6] Grotius De Æquitate, ch. 1, §§ 3, 12; Puffend. Elem. Juris. Univ. L. 1, §§ 22, 23, cited 1 Fonbl. Eq. B. 1, ch. 1, § 2, note (*e*), p. 5.
[7] Grotius De Æquitate, ch. 1, § 2; 1 Fonbl. Equity, B. 1, ch. 1, § 2, note (*e*).

would seem to be possessed of exactly the same prerogatives and powers as belonged to the prætor's forum in the Roman law.[1]

§ 10. **The Nature of Equity.** — Nor is this description of the Equity Jurisprudence of England confined to a few text writers. It pervades a large class, and possesses the sanction of many high authorities. Lord Bacon more than once hints at it. In his Aphorisms he lays it down, "Habeant similiter Curiæ Prætoriæ potestatem tam subveniendi contra rigorem legis, quam supplendi defectum legis." [2] And on the solemn occasion of accepting the office of Chancellor, he said: "Chancery is ordained to supply the law, and not to subvert the law." [3] Finch, in his Treatise on the Law, says, that the nature of equity is to amplify, enlarge, and add to the letter of the law.[4] In the Treatise of Equity attributed to Mr. Ballow, and deservedly held in high estimation, language exceedingly broad is held on this subject. After remarking that there will be a necessity of having recourse to the natural principles, that what is wanting to the finite may be supplied out of that which is infinite, and that this is properly what is called equity, in opposition to strict law, he proceeds to state: "And thus, in chancery, every particular case stands upon its own circumstances; and although the common law will not decree against the general rule of law, yet chancery doth, so as the example introduce not a general mischief. Every matter therefore that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief here. For no man can be obliged to anything contrary to the law of nature; and indeed no man in his senses can be presumed willing to oblige another to it." [5]

§ 11. **Same.** — The Author has indeed qualified these propositions with the suggestion: "But if the law has determined a matter with all its circumstances, equity cannot intermeddle." But even with this qualification the propositions are not maintainable in the Equity Jurisprudence of England, in the general

[1] Dig. Lib. 1, tit. 1, l. 7. See also Heinecc. De Edict. Prætorum, Lib. 1, ch. 6, §§ 8 to 13; Id. §§ 18 to 30; Dr. Taylor's Elem. Civil Law, pp. 213 to 216; Id. 92, 93; De Lolme on Eng. Const. B. 1, ch. 11. Lord Kaims does not hesitate to say that the powers assumed by our Courts of Equity are in effect the same that were assumed by the Roman prætor from necessity, without any express authority. 1 Kaims, Eq. Introd. 19.

[2] Bac. De Aug. Scient. Lib. 8, ch. 3, Aphor. 35, 45.

[3] Bac. Speech, p. 4; Bac. Works, p. 488. [4] Finch's Law, p. 20.

[5] 1 Fonbl. Eq. B. 1, ch. 1, § 3. The author of Eunomus describes the original jurisdiction of the Court of Chancery as a Court of Equity, to be "the power of moderating the summum jus." Eunomus, Dial. p. 3, § 60.

sense in which they are stated. For example, the first proposition, that equity will relieve against a general rule of law, is (as has been justly observed) neither sanctioned by principle nor by authority.[1] For though it may be true that equity has in many cases decided differently from Courts of Law, yet it will be found that these cases involved circumstances to which a Court of Law could not advert, but which, in point of substantial justice, were deserving of particular consideration, and which a Court of Equity, proceeding on principles of substantial justice, felt itself bound to respect.[2]

§ 12. **Same.** — Mr. Justice Blackstone has taken considerable pains to refute this doctrine. "It is said," he remarks, "that it is the business of a Court of Equity in England to abate the rigor of the common law.[3] But no such power is contended for. Hard was the case of bond creditors, whose debtor devised away his real estate; rigorous and unjust the rule which put the devisee in a better condition than the heir; yet a Court of Equity had no power to interfere. Hard is the common law still subsisting, that land devised or descending to the heir should not be liable to simple contract debts of the ancestor or devisor, although the money was laid out in purchasing the very land; and that the father shall never immediately succeed as heir to the real estate of the son. But a Court of Equity can give no relief; though in both these instances the artificial reason of the law, arising from feudal principles, has long since ceased."[4] And illustrations of the same character may be found in every State of the Union. In some States bond debts have a privilege of priority of payment over simple contract debts, in cases of insolvent intestate estates.[5] In others judgments are a privileged lien on lands. In many, if not in all, a debtor may prefer one creditor to another, in discharging his debts, when his assets are wholly insufficient to pay all the debts.[6] And (not to multiply instances) what can be more harsh or indefensible than the rule of the common law

[1] Com. Dig. Chancery, 3, F. 8.

[2] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*g*); 1 Dane's Abridg. ch. 9, art. 1, §§ 2, 3; Kemp *v.* Prayer, 7 Ves. 249, 250.

[3] Grounds and Rudim. p. 74 (Max. 105), edit. 1751.

[4] 3 Black. Comm. 430. See Com. Dig. Chancery, 3, F. 8.

[5] McIlhenny *v.* Trust Co., 108 N. C. 311, 12 S. E. 1001; Bond *v.* Wilson, 129 N. C. 387, 40 S. E. 179; Mauny *v.* Holmes, 87 N. C. 428.

[6] The right of a creditor to make a common law assignment for the benefit of creditors exists independent of statutes. The deed is valid as between the parties and may be voidable at option of creditors. Lucy *v.* Freeman, 93 Minn. 274, 101 N. W. 168.

The preferring of a debt due to a brother may be considered by the

by which a husband may receive an ample fortune in personal estate through his wife, and by his own act or will strip her of every farthing and leave her a beggar?

§ 13. **Same.** — A very learned judge in equity, in one of his ablest judgments, has put this matter in a very strong light.[1] "The law is clear," said he, "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 as it is said in Rook's case (5 Rep. 99. b.), that discretion is a science, not to act arbitrarily, according to men's wills and private affections; so that discretion which is executed here is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion in some cases follows the law implicitly; in others assists it, and advances the remedy; in others again it relieves against the abuse, or allays the rigor of it. But in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to the 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 entrusted with." [2]

jury, but this fact, standing alone, is not sufficient evidence of fraud. Bank *v.* Bridgers, 128 N. C. 323, 38 S. E. 888.

Contra: Collier on Bankruptcy, 9th ed., page 960, sub-sec.

Voluntary assignments of all a debtor's property in trust for creditors are just as incompatible with the purposes of the bankrupt act as State insolvent systems, and for precisely the same reasons, namely, because if allowed to stand as against a trustee in bankruptcy, they defeat the most essential elements of the bankrupt law. In re Gutwillig, 90 Fed. 477; Davis *v.* Bohle, 92 Fed. 328.

Proceeding under State insolvency laws which winds up the estate judicially and discharges the debtor, is essentially a proceeding in bankruptcy, and is undoubtedly superseded by the Act of Congress. A deed of assignment derives its potency from the contract or deed of the debtor, is administered under and according to the provisions of the deed, supplemented only by salutary legislative safe-guards, and does not result in a discharge of the debtor from his obligations. This method of proceeding is not superseded by the Act of Congress in question. In re Sievers, 91 Fed. 368; Boese *v.* King, 108 U. S. 386, 27 L. Ed. 760, 2 S. Ct. Rep. 789.

Debts which by law have a priority in payment. Loveland on Bankruptcy, 2d ed., p. 561, § 190; Bankrupt Act of 1898, § 64 b.

[1] Sir Joseph Jekyll, in Cowper *v.* Cowper, 2 P. Will. 753.

[2] Sir Thomas Clarke, in pronouncing his judgment in the case of

§ 14. **Interpretation of Laws.** — The next proposition, that every matter that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief in equity, is equally untenable. There are many cases against natural justice, which are left wholly to the conscience of the party, and are without any redress, equitable or legal. And so far from a Court of Equity supplying universally the defects of positive legislation, or peculiarly carrying into effect the intent as contradistinguished from the text of the Legislature, it is governed by the same rules of interpretation as a Court of Law, and is often compelled to stop where the letter of the law stops. It is the duty of every court of justice, whether of law or of equity, to consult the intention of the Legislature. And in the discharge of this duty a Court of Equity is not invested with a larger or a more liberal discretion than a Court of Law.[1]

[In a number of the States the distinction that once existed between actions at law and suits in equity, and the various forms of pleadings used in the different actions, has long since been abolished, and in civil trials we now have but one form of action for the redress of all civil wrongs, denominated a civil action. An impression has prevailed to some extent that, because the distinction between actions at law and suits in equity has been abolished, that equitable rights and remedies are thereby destroyed, but no such result follows the change in the forms of procedure.

Burgess *v.* Wheate (1 W. Black. R. 123), has adopted this very language, and given it his full approbation. See also 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*g*). See also Fry *v.* Porter, 1 Mod. R. 300; Grounds and Rudim. p. 65 (Max. 92), edit. 1751.

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*h*).

Injunction is not a remedy which may be invoked by the citizen for the purpose of controlling public officers or tribunals in the exercise of their functions. In order to sustain it, the plaintiff must show that he has a special interest, in respect to which he will suffer a special injury. It is not enough that the community in which he resides will be injuriously affected by some governmental or legislative action. Mann *v.* County Court, 58 W. Va. 651, 52 S. E. 777; Town of Harrisburg *v.* Roller, 97 Va. 582, 34 S. E. 524; Larcom *v.* Olin, 160 Mass. 102, 35 N. E. 116; Carlton *v.* Salem, 103 Mass. 141; Baldwin *v.* Wilbraham, 140 Mass. 459, 4 N. E. 829.

A mandamus or mandatory injunction lies to compel a corporation to transfer stock and to compel election of officers. Sheppard *v.* Power Co., 150 N. C. 781, 64 S. E. 894. And to require school board to establish school upon constitutional basis. Lowery *v.* School Trustees, 140 N. C. 33, 52 S. E. 267. But not to compel commissioners to repair or build court house. Ward *v.* Commrs., 146 N. C. 536, 60 S. E. 418; State *v.* Leeper, 146 N. C. 661, 61 S. E. 585.

It is sometimes difficult to so frame issues for the jury that equitable rights and principles are presented. The purpose of the reformed procedure, sometimes called the system of code pleading and practice, certainly was not to destroy or impair those rights and remedies which the experience of the ages had shown to be essential to a system of enlightened jurisprudence.[1]

This change in the law of procedure does not destroy or merge legal or equitable rights, but as all controversies at law are to be tried by the ancient mode of trial by jury, it has been uniformly held that issues of fact raised by pleadings in actions for the enforcement of equitable rights must be tried by the jury unless waived.[2]

In the consideration of the various forms of actions and the proper pleadings to be used, recourse must be had to the decisions of the State whose practice is being considered. For instance, thirty of the States have adopted the reformed or code system of pleading and practice. In some of these States all actions are cognizable in the court of law, and in others, the distinction between the law and the equity courts has been abolished.[3]]

§ 15. **Same.** — Mr. Justice Blackstone has here again met the objection in a forcible manner. "It is said," says he, "that a Court of Equity determines according to the spirit of the rule and not according to the strictness of the letter. But so also does a Court of Law. Both, for instance, are equally bound, and equally profess, to interpret statutes according to the true intent of the Legislature. In general, all cases cannot be foreseen; or, if foreseen, cannot be expressed. Some will arise which will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the equity of an Act of Parliament; and so cases within the letter are frequently out of the equity. Here, by Equity we mean nothing

[1] Rudisill *v.* Whitener, 146 N. C. 413, 59 S. E. 995.

[2] Boles *v.* Caudle, 133 N. C. 533, 45 S. E. 835.

[3] Equity courts are still used in New Jersey, Kentucky, Alabama, Mississippi, and Tennessee; the equity courts have been abolished and principles of equity are administered by the courts of law, in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Maryland, Virginia, West Virginia, North and South Carolina, North and South Dakota, Georgia, Florida, Texas, Arkansas, Michigan, Iowa, Illinois, Oregon, Washington, Ohio, Indiana, Minnesota, Nebraska, Wisconsin, California, and Utah. California *v.* Southern Pac. Co., 157 U. S. 229, 39 L. Ed. 683, 15 S. Ct. Rep. 591.

but the sound interpretation of the law, &c. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the Courts both of Law and Equity. The construction must in both be the same; or, if they differ, it is only as one Court of Law may happen to differ from another. Each endeavors to fix and adopt the true sense of the law in question. Neither can enlarge, diminish, or alter that sense in a single title." [1]

§ 16. **Same.** — Yet it is by no means uncommon to represent that the peculiar duty of a Court of Equity is to supply the defects of the common law, and next, to correct its rigor or injustice.[2] Lord Kaims avows this doctrine in various places and in language singularly bold. "It appears now clearly," says he, "that a Court of Equity commences at the limits of the common law, and enforces benevolence where the law of nature makes it our duty. And thus a Court of Equity, accompanying the law of nature, in its general refinements enforces every natural duty that is not provided for at common law." [3] And in another place he adds, a Court of Equity boldly undertakes "to correct or mitigate the rigor, and what in a proper sense may be termed the injustice of the common law." [4] And Mr. Wooddeson, without attempting to distinguish accurately between general or natural, and municipal or civil, equity, asserts that "Equity is a judicial interpretation of laws which, presupposing the legislator to have intended what is just and right, pursues and effectuates that intention." [5]

§ 17. **Same.** — The language of judges has often been relied on for the same purpose; and from the unqualified manner in which it is laid down, too often justifies the conclusion. Thus Sir John Trevor (the Master of the Rolls), in his able judgment in Dudley *v.* Dudley,[6] says: "Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigor, hardness, and edge of the law, and is a universal truth.

[1] 3 Black. Comm. 431; 1 Dane, Abr. Ch. 9, art. 3, § 3.

[2] 1 Kaims on Equity, B. 1, p. 40.

[3] 1 Kaims on Equity, Introd. p. 12.

[4] Id. Introd. p. 15. Lord Kaims's remarks are entitled to the more consideration, because they seem to have received in some measure at least the approbation of Lord Hardwicke (Parke's Hist. of Chan. Appx. 501, 502; Id. 333, 334); and also from Mr. Justice Blackstone's having thought them worthy of a formal refutation in his Commentaries. (3 Black. Comm. 436.)

[5] 1 Wooddes. Lect. vii. p. 192.

[6] Preced. in Ch. 241, 244; 1 Wooddes. Lect. vii. p. 192.

It does also assist the law, where it is defective and weak in the constitution (which is the life of the law), and defends the law from crafty evasions, delusions, and mere subtilties, invented and contrived to evade and elude the common law, whereby such as have undoubted right are made remediless. And thus is the office of equity to protect and support the common law from shifts and contrivances against the justice of the law. Equity therefore does not destroy the law nor create it, but assists it." Now however true this doctrine may be sub modo, to suppose it true in its full extent would be a grievous error.

§ 18. **Courts of Equity not Bound by Precedents.** — There is another suggestion which has been often repeated; and that is, that Courts of Equity are not, and ought not to be, bound by precedents, and that precedents therefore are of little or no use there; but that every case is to be decided upon circumstances, according to the arbitration or discretion of the judge, acting according to his own notions ex æquo et bono.[1] Mr. Justice Blackstone, addressing himself to this erroneous statement, has truly said: "The system of our Courts of Equity is a labored connected system, governed by established rules, and bound down by precedents from which they do not depart, although the reason of some of them may perhaps be liable to objection, &c. Nay, sometimes a precedent is so strictly followed, that a particular judgment, founded upon special circumstances, gives rise to a general rule."[2] And he afterwards adds: "The system of jurisprudence in our Courts of Law and Equity are now equally artificial systems, founded on the same principles of justice and positive law, but varied by different usages in the forms and mode of their proceedings."[3] The value of precedents and the impor-

[1] See Francis, Max. pp. 5, 6; Selden, cited in 3 Black. Comm. 432, 433, 435; 1 Kaims, Eq. pp. 19, 20.

[2] 3 Black. Comm. 432, 433.

[3] 3 Black. 434; Id. 440, 441; 1 Kent, Comm. Lect. 21, pp. 489, 490 (2d edition). The value and importance of precedents in chancery were much insisted upon by Lord Keeper Bridgman, in Fry *v.* Porter (1 Mod. R. 300, 307). See also 1 Wooddes. Lect. vii. pp. 200, 201, 202. Lord Hardwicke in his letter to Lord Kaims on the subject of Equity, in answer to the question whether a Court of Equity ought to be governed by any general rules, said, "Some general rules there ought to be; for otherwise the great inconvenience of jus vagum et incertum will follow. And yet the prætor must not be so absolutely and invariably bound by them as the judges are by the rules of the common law. For if they were so bound, the consequence would follow, which you very judiciously state, 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

tance of adhering to them were deeply felt in ancient times, and nowhere more than in the prætor's forum. "Consuetudinis autem jus esse putatur id," says Cicero, "quod, voluntate omnium, sine lege, vetustas comprobarit. In ea autem jura sunt, quædam ipsa jam certa propter vetustatem; quo in genere et alia sunt multa, et eorum multo maxima pars, quæ prætores edicere consuerunt." [1] And the Pandects directly recognize the same doctrine. "Est enim juris civilis species, *consuetudo;* enimvero, diuturna consuetudo pro jure et lege, in his, quæ non ex scripto descendunt observari, solet, &c. Maxime autem probatur consuetudo ex rebus judicatis." [2]

§ 19. **Same.** — If indeed a Court of Equity in England did possess the unbounded jurisdiction which has been thus generally ascribed to it, of correcting, controlling, moderating, and even superseding the law, and of enforcing all the rights, as well as the charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the judge, acting, if you please, arbitrio boni judicis, and, it may be, ex æquo et bono, according to his own notions and conscience; but still acting with a despotic and sovereign authority. A Court of Chancery might then well deserve the spirited rebuke of Selden: "For law we have a measure, and know what to 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

that are far from being the same in every circumstance." (Parke's Hist. of Chancery, pp. 501, 506.) This is very loosely said, and the reason given equally applies to every general rule; for there can be none which will be found equally just in its application to all cases. If every change of circumstance is to change the rule in equity, there can be no general rule. Every case must stand upon its own ground. Yet Courts of Equity now adhere as closely to general rules as Courts of Law. Each expounds its rules to meet new cases; but each is equally reluctant to depart from them upon slight inconveniences and mischiefs. See Mitford, Plead. in Eq. p. 4, note (*b*); 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*k*). The late Professor Park of King's College, London, has made some very acute remarks on this whole subject in his Introductory Lecture on Equity (1832).

[1] Cicero de Invent. Lib. 2, cap. 22. My attention was first called to these passages by a note of Lord Redesdale. Mitford, Plead. Eq. p. 4, note (*b*). See Heineccius De Edictis Prætorum, Lib. 1, cap. 6, §§ 13, 30.

[2] Pothier, Pand. Lib. 1, tit. 3, art. 6, n. 28, 29; Dig. Lib. 1, tit. 3, l. 33, l. 34.

the standard for the measure the 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. It is the same thing with the chancellor's conscience."[1] And notions of this sort were, in former ages, when the Chancery Jurisdiction was opposed with vehement disapprobation by common lawyers, very industriously propagated by the most learned of English antiquarians, such as Spelman, Coke, Lambard, and Selden.[2] We might indeed under such circumstances adopt the language of Mr. Justice Blackstone, and say: "In short if a Court of Equity in England did really act, as many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case.[3] So far however is this from being true, that one of the most common maxims upon which a Court of Equity daily acts is, that equity follows the law, and seeks out and guides itself by the analogies of the law.[4]

§ 20. **Principles of Equity are Fixed and Certain.** — What has been already said upon this subject cannot be more fitly concluded than in the words of one of the ablest judges that ever sat in equity. "There are," said Lord Redesdale, "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 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 those principles. But the principles are as fixed and certain as the principles on which the Courts of Common Law proceed.[5] In confirmation of these remarks it may be added that the Courts of Common Law are, in like manner, perpetually adding to the doctrines of the old jurisprudence, and enlarging, illustrating, and applying the maxims which were at first derived from very narrow and often obscure sources. For instance, the whole law of In-

[1] Selden's Table Talk, title "Equity"; 3 Black. Comm. 432, note (*y*).

[2] See citations, 3 Black. Comm. 433; Id. 54, 55; Id. 440, 441.

[3] 3 Black. Comm. 433; Id. 440, 441, 442. De Lolme, in his work on the Constitution of England, has presented a view of English Equity Jurisprudence far more exact and comprehensive than many of the English text-writers on the same subject. The whole chapter (B. 1, ch. 11) is well worthy of perusal.

[4] Cowper *v.* Cowper, 2 P. Will. 753.

[5] Bond *v.* Hopkins, 1 Sh. & Lefr. R. 428, 429. See also Mitford on Plead. Eq. p. 4, note (*b*).

surance is scarcely a century old; and more than half of its most important principles and distinctions have been created within the last fifty years.

§ 21. **Same.** — In the early history of English Equity Jurisprudence there might have been, and probably was, much to justify the suggestion that Courts of Equity were bounded by no certain limits or rules; but they acted upon principles of conscience and natural justice, without much restraint of any sort.[1] And as the chancellors were for many ages almost universally either ecclesiastics or statesmen, neither of whom are supposed to be very scrupulous in the exercise of power, and as they exercised a delegated authority from the Crown as the fountain of administrative justice, whose rights, prerogatives, and duties on this subject were not well defined, and whose decrees were not capable of being resisted, it would not be unnatural that they should arrogate to themselves the general attributes of royalty, and interpose in many cases which seemed to them to require a remedy more wide or more summary than was adopted by the common Courts of Law.

§ 22. **Same.** — This is the view which Mr. Justice Blackstone seems to have taken of the matter; who has observed that in the infancy of our Courts of Equity, before their jurisdiction was settled, the chancellors themselves, "partly from their ignorance of the law (being frequently bishops or statesmen), partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in), but principally from the narrow and unjust decisions of the Courts of Law, had arrogated to themselves such unlimited authority as hath totally been disclaimed by their successors for now (1765) above a century past. The decrees of the Court of Equity were then rather in the nature of awards, formed on the sudden, pro re nata, with more probity of intention than knowledge of the subject, founded on no settled principles, as being never designed, and therefore never used, as precedents." [2]

§ 23. **Same.** — It was fortunate indeed that even in those early times the knowledge which the ecclesiastical chancellors had acquired of general equity and justice from the civil law enabled them to administer them with a more sound discretion than could otherwise have been done. And from the moment when principles of decision came to be acted upon and established

[1] 1 Kent, Comm. Lect. 21, pp. 490, 491, 492 (2d edit.).
[2] 3 Black. Comm. 433; Id. 440, 441.

in chancery, the Roman law furnished abundant materials to erect a superstructure at once solid, convenient, and lofty, adapted to human wants, and enriched by all the aids of human wisdom, experience, and learning. To say that later chancellors have borrowed much from these materials, is to bestow the highest praise upon their judgment, their industry, and their reverential regard to their duty. It would have been little to the commendation of such learned minds that they had studiously disregarded the maxims of ancient wisdom, or had neglected to use them, from ignorance, from pride, or from indifference.[1]

§ 24. **Same.** — Having dwelt thus far upon the inaccurate or inadequate notions which are frequently circulated as to Equity Jurisprudence in England and America, it may be thought proper to give some more exact and clear statement of it. This may be better done by explanatory observations than by direct definitions, which are often said in the law to be perilous and unsatisfactory.

§ 25. **Rights and Remedies Classified.** — In England and in the American States, which have derived their jurisprudence from that parental source, Equity has a restrained and qualified meaning. The remedies for the redress of wrongs and for the enforcement of rights are distinguished into two classes: first, those which are administered in Courts of Common Law; and secondly, those which are administered in Courts of Equity. Rights which are recognized and protected, and wrongs which are redressed, by the former courts, are called legal rights and legal injuries. Rights which are recognized and protected, and wrongs which are redressed, by the latter courts only, are called equitable rights and equitable injuries.[2] The former are said to

[1] The whole of the late Professor Park's Lecture upon Equity Jurisprudence, delivered in King's College in November, 1831, on this subject, is well deserving of a perusal by every student. There is much freedom and force in his observations; and if his life had been longer spared, he would probably have been a leader in a more masculine and extensive course of law studies by the English bar. There are also two excellent articles on the same subject in the American Jurist, one of which, published in 1829, contains a most elaborate review and vindication of the jurisdiction of Courts of Equity; and the other, in 1833, a forcible exposition of the prevalent errors on the subject (2 Amer. Jurist, 314; 10 Amer. Jurist, 227). I know not where to refer the reader to pages more full of useful comment and research.

[2] Equity has no criminal jurisdiction. Cope *v.* District Fair, 99 Ill. 489; Portis *v.* Fall, 34 Ark. 375; Taylor *v.* Pine Bluff, Ib. 603; Moses *v.* Mobile, 52 Ala. 198; Swathmore Lumber Co. *v.* Parks, 72 W. Va. 625, 79 S. E. 725. Its jurisdiction is limited to the protection of civil rights. Attorney-Gen. *v.* Tudor Ice Co., 104 Mass. 239, 240. In the case last

be rights and wrongs at common law, and the remedies therefore are remedies at common law; the latter are said to be rights and wrongs in equity, and the remedies therefore are remedies in equity. Equity Jurisprudence may therefore properly be said to be that portion of remedial justice which is exclusively administered by a Court of Equity as contradistinguished from that portion of remedial justice which is exclusively administered by a Court of Common Law.

§ 26. **Same.** — The distinction between the former and the latter courts may be further illustrated by considering the different natures of the rights they are designed to recognize and protect, the different natures of the remedies which they apply, and the different natures of the forms and modes of proceeding which they adopt, to accomplish their respective ends. In the Courts of Common Law, both of England and America, there are certain prescribed forms of action to which the party must resort to furnish him a remedy; and if there be no prescribed form to reach such a case, he is remediless; for they entertain jurisdiction only of certain actions, and give relief according to the particular exigency of such actions, and not otherwise. In those actions a general and unqualified judgment only can be given, for the plaintiff or for the defendant, without any adaptation of it to particular circumstances.[1]

cited the proceedings of a private trading corporation were objected to solely on the ground that they were not authorized by the charter of the company, and were for that reason against public policy. The court declined to grant an injunction on behalf of the State. Attorney-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. 371; People *v.* Utica Ins. Co., 15 Johns. 358; Attorney-Gen. *v.* Reynolds, 1 Eq. Cas. Abr. 131 (3d ed.). Several English cases were distinguished as cases of suits against public bodies or officers exceeding their powers, or against corporations vested with the power of eminent domain or doing acts which were deemed inconsistent with rights of the public. Attorney-Gen. *v.* Norwick, 16 Sim. 225; Attorney-Gen. *v.* Guardians of Poor, 17 Sim. 6; Attorney-Gen. *v.* Andrews, 2 Macn. & G. 225; Attorney-Gen. *v.* Great Northern Ry. Co., 1 Drew. & S. 154. It was declared that there were but two cases in Massachusetts in which informations in equity were proper: (1) public nuisances requiring immediate interposition; (2) trusts for charitable purposes when the beneficiaries are so numerous and indefinite as to make this the only efficient mode of proceeding.

[1] 1 Coleman *v.* Jaggers, 12 Idaho 125, 85 Pac. 894; Brawley *v.* Smith, 8 Kans. App. 411, 54 Pac. 804; Commission Co. *v.* Central Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; McFarland *v.* Missouri Pac. R. Co., 125 Mo. 253, 28 S. W. 590; Hopkins *v.* Washington County, 56 Neb. 596, 77 N. W. 53; New York etc. Trust Co. *v.* Saratoga etc. Light Co., 157 N. Y. 689, 51 N. E. 1092; Jordan *v.* Warner's Estate, 107 Wis. 539, 83 N. W. 946.

§ 27. **Same.** — But there are many cases in which a simple judgment for either party, without qualifications or conditions or peculiar arrangements, will not do entire justice ex æquo et bono to either party. Some modifications of the rights of both parties may be required; some restraints on one side, or on the other, or perhaps on both sides; some adjustments involving reciprocal obligations or duties; some compensatory or preliminary or concurrent proceedings to fix, control, or equalize rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights or the redress of injuries. In all these cases Courts of Common Law cannot give the desired relief. They have no forms of remedy adapted to the objects. They can entertain suits only in a prescribed form, and they can give a general judgment only in the prescribed form.[1] From their very character and organization they are incapable of the remedy which the mutual rights and relative situations of the parties, under the circumstances, positively require.

§ 28. **Variety of Pleadings and Remedies Enforced in Equity.** — But Courts of Equity are not so restrained. Although they have prescribed forms of proceeding, the latter are flexible, and may be suited to the different postures of cases. They may adjust their decrees so as to meet most if not all of these exigencies; and they may vary, qualify, restrain, and model the remedy so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties. Nay, more; they can bring before them all parties interested in the subject matter, and adjust the rights of all, however numerous; whereas Courts of Common Law are compelled to limit their inquiry to the very parties in the litigation before them, although other persons may have the deepest interest in the event of the suit. So that one of the most striking and distinctive features of Courts of Equity is that they can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest; whereas Courts of Common Law (as we have already seen) are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff or for the defendant.[2]

[1] 1 Mitford on Plead. pp. 3, 4; 1 Wooddes. Lect. vii. pp. 203 to 206; Voorhies *v.* Frisbie, 25 Mich. 476, 12 Am. Rep. 295.

[2] 1 Wooddes. Lect. vii. pp. 203 to 206; 3 Black. Comm. 438. Much of this paragraph has been abstracted from Dr. Lieber's Encyclopædia

§ 29. **Same.** — Another peculiarity of Courts of Equity is that they can administer remedies for rights, which rights Courts of Common Law do not recognize at all; or if they do recognize them they leave them wholly to the conscience and good-will of the parties. Thus what are technically called Trusts, that is, estates vested in persons upon particular trusts and confidences, are wholly without any cognizance at the common law; and the abuses of such trusts and confidences are beyond the reach of any legal process. But they are cognizable in Courts of Equity, and hence they are called equitable estates; and an ample remedy is there given in favor of the cestuis que trust (the parties beneficially interested) for all wrongs and injuries, whether arising from negligence or positive misconduct.[1] There are also many cases (as we shall presently see) of losses and injuries by mistake, accident, and fraud; many cases of penalties and forfeitures; many cases of impending irreparable injuries or meditated mischiefs; [cases where deeds and other instruments have been fraudulently procured, or where the paper was purposely mis-

Americana, article "Equity." The late Professor Park, of King's College, London, in his Introductory Lecture on Equity (1831, p. 15), has said, "The editors of the Encyclopædia Americana have stated the real case with regard to what we call Courts of Equity much more accurately than I can find it stated in any English law books"; and he thus admits the propriety of the exposition contained in the text.

[1] 3 Black. Comm. 439; 1 Wooddes. Lect. vii. pp. 209 to 213; 2 Fonbl. Equity, B. 2, ch. 1, § 1; Id. ch. 7; Id. ch. 8.

That one is below the average in intellectual capacity is not sufficient to rescind or correct contract, but mental weakness, accompanied by other inequitable incidents such as undue influence, great ignorance and want of advice, or inadequacy of consideration, equity will interfere and grant either affirmative or defensive relief. Sprinkle *v.* Wellborn, 140 N. C. 174, 52 S. E. 666; Earl of Chesterfield *v.* Janssen, 2 Ves. Sr. 125; Dilworth *v.* Carts, 139 Ill. 508; Hazen *v.* Bank, 70 Vt. 543, 41 Atl. 1046.

Where one party to contract is of unsound mind (he not having been found to be a lunatic by judicial proceedings) does not render the contract void, but, at most, only voidable, and is no ground for setting it aside, where the other party had no notice of the insanity and derived no inequitable advantage from it. West *v.* Railroad, 151 N. C. 234, 65 S. E. 979; Rhoades *v.* Fuller, 139 Mo. 179, 40 S. W. 760; Jamison *v.* Culligan, 151 Mo. 410, 52 S. W. 225; Brown *v.* Cory, 59 Pac. 1097; Coburn *v.* Raymond, 76 Conn. 484, 57 Atl. 117.

He cannot affirm in part and reject in part. He cannot escape the burdens of the contract and retain its benefits. This does not apply to cases where the other party has been guilty of fraud or bad faith in procuring the contract and the insane person has lost or squandered the consideration before he regained his mental capacity. Och *v.* Railway, 130 Mo. 27, 31 S. W. 962; Strodder *v.* Granite Co., 99 Ga. 595, 27 S. E. 174; Harley *v.* Riverside Mills, 129 Ga. 214, 58 S. E. 711; Drohan *v.* Railway, 162 Mass. 435, 38 N. E. 1116; Kelley *v.* Railroad, 45 So. 906.

read to an ignorant, or a blind man, or one who was laboring under disabilities at the time and he asked the other to read the paper to him, and it was not correctly read and explained to him, or where material changes have been made in the instrument, so that it should be either rescinded by him who has thus been imposed upon or over-reached, or else surrendered up for cancellation, or correction;[1] and there are cases where the prior creditor holds security upon all of the property of the debtor, and to allow him to first resort to that property which is doubly charged by his debt and the debt of a puisne creditor or second mortgagee, and thereby exhaust this property in the payment of the prior debt, an unnecessary hardship and great damage would be inflicted upon the subsequent lienee]; and many cases of oppressive proceedings, undue advantages and impositions, betrayals of confidence, and unconscionable bargains; in all of which Courts of Equity will interfere and grant redress, but which the common law takes no notice of or silently disregards.[2]

§ 30. **Difference between Remedies at Law and in Equity.** — Again; the remedies in Courts of Equity are often very different

[1] Where an ignorant laborer was approached by defendant's agent and surgeon, with release prepared by them without plaintiff's knowledge, in which $15 was to be paid for loss of arm through defendant's negligence, and release was mis-read and represented to plaintiff to be a paper to enable the doctors to get their money, are such things as do not ordinarily take place in open, fair, and even-handed transactions. Dorsett *v.* Mfg. Co., 131 N. C. 260, 42 S. E. 612; Harding *v.* Long, 103 N. C. 1, 14 Am. St. Rep. 775; Hayes *v.* Railroad, 143 N. C. 129, 55 S. E. 437; court will correct mistake in deed or other written instrument only when mistake appears by clear, strong, and convincing proof. Ely *v.* Early, 94 N. C. 1; Bulyer *v.* Denkle, 100 Pa. St. 113; Gray *v.* Jenkins, 151 N. C. 82, 65 S. E. 644; Cuthbertson *v.* Morgan, 149 N. C. 72, 62 S. E. 744; King *v.* Hobbs, 139 N. C. 171, 51 S. E. 910; Redgrave *v.* Hurd, 20 Ch. Div. 1; Sutton *v.* Morgan, 158 Pa. St. 204, 38 Am. St. Rep. 841; Hill *v.* Saunders, 115 Va. 60, 78 S. E. 560; Holliday *v.* Willis, 101 Va. 274, 43 S. E. 616; Bachrach *v.* Bachrach, 111 Va. 232, 68 S. E. 985; Lamm *v.* Lamm, 163 N. C. 71, 79 S. E. 290.

Contract by third party to buy land at mortgage sale and re-sell to mortgagor at reasonable profit, will stand both in law and equity, in absence of fraud or other vitiating element, and there is no equity to cancel or reform the contract. Yarborough *v.* Hughes, 139 N. C. 204, 51 S. E. 904.

Where husband sold portions of his land without joinder of wife, but retained lands which descend to the heirs, of a kind and quantity which permit that dower be assigned out of the lands descended, purchasers have a right to require that dower be allotted out of lands descended. Harrington *v.* Harrington, 142 N. C. 521, 55 S. E. 409; Wood *v.* Keys, 6 Paige (N. Y.) 478; Lawson *v.* Morton, 6 Dana (Ky.) 471.

[2] Wooddes. Lect. vii. pp. 203, 204; 3 Black. Comm. 434, 435, 438, 439; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*).

in their nature, mode, and degree from those of Courts of Common Law, even when each has a jurisdiction over the same subject matter. Thus a Court of Equity, if a contract is broken, will often compel the party specifically to perform the contract; whereas Courts of Law can only give damages for the breach of it.

[Thus, the flexible rules and remedies in equity not only tend to repair the inadequacies of the law, but they do in fact protect him whose property is about to be wrested from him through an unconscionable, oppressive, and unjust contract, the enforcement of which is not necessary to the one, and would work a needless hardship upon the other.] So Courts of Equity will interfere by way of injunction to prevent wrongs; whereas Courts of Common Law can grant redress only when the wrong is done.[1]

§ 31. **Methods of Trial in Equity.** — The modes of seeking and granting relief in equity are also different from those of Courts of Common Law. The latter proceed to the trial of contested facts by means of a jury; and the evidence is generally to be drawn, not from the parties, but from third persons, who are disinterested witnesses. But Courts of Equity try causes without a jury; and they address themselves to the conscience of the defendant, and require him to answer upon his oath the matters of fact stated in the bill, if they are within his knowledge; and he is compellable to give a full account of all such facts, with all their circumstances, without evasion or equivocation; and the testimony of other witnesses also may be taken to confirm or to refute the facts so alleged.[2] Indeed every bill in equity may be said to be in some

[1] 1 Wooddes. Lect. vii. pp. 206, 207.

[2] 3 Black. Comm. 437, 438; 1 Wooddes. Lect. vii. p. 207. The old form of action for discovery is not generally used in those States which have adopted the reformed or code system of pleading, and relief is now had by an order made by the court in the original cause, directing the adverse party to appear as a witness before the judge, clerk, or a commissioner, appointed for the purpose, and there to be examined on behalf of his adversary. The examination may be had at the trial, or before trial to enable a party to procure facts necessary to the proper preparation of his pleadings and case, and the testimony thus taken may be rebutted by other testimony. Helms *v.* Green, 105 N. C. 261, 11 S. E. 470; Tobacco Co. *v.* Tobacco Co., 144 N. C. 369, 59 S. E. 123; Bloodgood *v.* Slayback, 54 App. Div. 634, 66 N. Y. Supp. 610; Ellinger *v.* Equitable L. Ins. Co., 125 Wis. 643, 104 N. W. 811; Commercial Pub. Co. *v.* Beckwith, 57 App. Div. 574, 68 N. Y. Supp. 600; Blatchford *v.* Paine, 24 App. Div. 140, 48 N. Y. Supp. 783; Robbins *v.* Brockton St. Ry. Co., 180 Mass. 51, 61 N. E. 265; Southern R. Co. *v.* Bush, 122 Ala. 470, 26 So. 168; Gunn *v.* New York, N. H. and H. R. Co., 171 Mass. 417, 50 N. E. 1031; Hart *v.* American Cotton Co., 84 N. Y. Supp. 1065, 41 Misc. Rep. 436; Clark *v.* Ennis, 71 N. Y. Supp. 943, 35 Misc. Rep. 339; Mills *v.*

sense a bill of discovery, since it asks for the personal oath of the defendant, to purge himself in regard to the transactions stated in the bill. It may readily be perceived how very important this process of discovery may be, when we consider how great the mass of human transactions is, in which there are no other witnesses, or persons having knowledge thereof, except the parties themselves.

§ 32. **Duties of Courts of Equity.** — Mr. Justice Blackstone has in a few words given an outline of some of the more important powers and peculiar duties of Courts of Equity. He says that they are established "to detect latent frauds and concealments which the process of Courts of Law is not adapted to reach; to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a Court of Law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law."[1] But the general account of Lord Redesdale (which he admits however to be imperfect and in some respects inaccurate) is far more satisfactory as a definite enumeration. "The jurisdiction of a Court of Equity," says he,[2] "when it assumes a power of decision, is to be exercised, (1) where the principles of law, by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose; (2) where the courts of ordinary jurisdiction are made instruments of injustice; (3) where the principles of law, by which the ordinary courts are guided, give no right, but upon the principles of universal justice the interference of the judicial power is necessary to prevent a wrong and the positive law is silent. And it may also be collected that Courts of Equity, without deciding upon the rights of the parties, administer to the ends of justice by assuming a jurisdiction, (4) to remove impediments to the fair

Lumber Co., 139 N. C. 524, 52 S. E. 200; Everingham *v.* Halsey, 108 Iowa 709, 78 N. W. 220; Lockwood *v.* Carter Oil Co., 73 W. Va. 175, 80 S. E. 816; but if the main purpose of the suit is to settle title or boundary to land and no other grounds of equity exist, accounting and discovery of profits are merely incidents to the right of title, and equity has no jurisdiction of the controversy. Lockwood *v.* Carter Oil Co., Ibid.; Smith *v.* Linden Oil Co., 69 W. Va. 57, 71 S. E. 167.

[1] 1 Black. Comm. 92.

[2] Mitford, Eq. Pl. by Jeremy, pp. 111, 112.

decision of a question in other courts; (5) to provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed by those to whose care it is by law entrusted, or by persons having immediate but partial interests; (6) to restrain the assertion of doubtful rights in a manner productive of irreparable damage; (7) to prevent injury to a third person by the doubtful title of others; and (8) to put a bound to vexatious and oppressive litigation, and to prevent multiplicity of suits. And further, that Courts of Equity, without pronouncing any judgment which may affect the rights of parties, extend their jurisdiction (9) to compel a discovery, or obtain evidence which may assist the decision of other courts; and (10) to preserve testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation." [1]

§ 33. **Jurisdiction of Court of Equity.** — Perhaps the most general if not the most precise description of a Court of Equity, in the English and American sense, is that it has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence,[2] where a plain, adequate, and complete remedy cannot be had in the Courts of Common Law.[3] The remedy must be plain; for if it be doubtful and obscure at law, Equity will assert a jurisdiction.[4]

[The rule that equity will not grant relief where there is an adequate remedy at law applies only when, on the case stated, there is a legal remedy. A distinction is to be observed between a case cognizable at law, but for which the law has no adequate

[1] Dr. Dane, in his Abridgment and Digest, ch. 1, art. 7, §§ 33 to 51 (1 Dane, Abrid. 101 to 107), has given a summary of the differences between Equity Jurisdiction and Legal Jurisdiction in regard to contracts, which may be read with utility. See also Mitford, Eq. Pl. by Jeremy, 4, 5.

[2] See Elborough *v.* Ayres, L. R. 10 Eq. 367, and note at the end of this section.

[3] Cooper, Eq. Pl. 128, 129; Mitford, Eq. Pl. by Jeremy, 112, 123; 1 Wooddes. Lect. vii. pp. 214, 215.

[4] Rathbone *v.* Warren, 10 John. R. 587; King *v.* Baldwin, 17 John. R. 284.

If the remedy at law involve delay, and is inconvenient and circuitous, equity will assume jurisdiction. Clouston *v.* Shearer, 99 Mass. 209. But of course the mere fact that there is doubt in the mind of a party whether he can maintain an action at law will not give jurisdiction to equity. Allen *v.* Storer, 132 Mass. 372; Clark *v.* Jones, 5 Allen, 379. Nor will the fact that the evidence in a cause will be voluminous and tedious give equity jurisdiction. Bowen *v.* Chase, 94 U. S. 812, 24 L. Ed. 184. Damages alone cannot become a ground of equitable relief. Pickman *v.* Trinity Church, 123 Mass. 1.

remedy, and a case that can be adjudicated upon its merits only in a court of equity. In the one, the equity court is invoked only for a remedy; in the other for the adjudication of the rights of the parties on the facts.[1]

A mere allegation in the bill that a multiplicity of suits is threatened is not sufficient to induce a court of equity to take jurisdiction of the suit. The facts must be pleaded in such a manner that the court can reasonably infer that such danger is threatened, and such suits liable to be brought. Where it is admitted that plaintiffs have a plain remedy at law by resisting the enforcement of a statute, alleged by them to be unconstitutional, and on account of fines and penalties imposed they dare not pursue their legal remedy, equity has no jurisdiction.[2]] It

[1] Thorn *v.* Citizens Bank, 158 Mo. 272, 59 S. W. 109; Watson *v.* Watson, 45 W. Va. 290, 31 S. E. 939.

Where equity has acquired jurisdiction of a case, it may decide all matters incidentally connected with it, so as to make a final determination of the whole subject, but this rule does not extend to a case where only some incidental matter is of equitable cognizance, and thereby enable the court to draw in a main subject of controversy which has a direct and appropriate legal remedy of its own. Graeff *v.* Felix, 200 Pa. St. 139, 49 Atl. 758; Cecil et als. *v.* Clark et al., 44 W. Va. 663, 30 S. E. 216; Alston *v.* Lamb, 61 Neb. 488, 85 N. W. 397; Doherty *v.* Holliday, 137 Ind. 286, 36 N. E. 907; Smith *v.* Everett, 126 Mass. 306.

[2] Corbus *v.* Gold-Mining Co., 99 Fed. 338, 187 U. S. 455, 47 L. Ed. 256, 23 S. Ct. Rep. 157; Blodgett *v.* Northwestern Elev. R. Co., 80 Fed. 602, 26 C. C. A. 21; Chicago etc. R. Co. *v.* West Chicago etc. R. Co., 156 Ill. 270, 40 N. E. 1008.

A railroad company acquiring the right to lay its tracks in the streets of a city is not required to institute condemnation proceedings in respect of damages which may accrue to owners of property abutting such streets; and where no part of the land of an abutting owner is entered upon or sought to be condemned for public use, the owner is not entitled to have proceedings instituted under the eminent domain law to ascertain what damage his property may sustain in consequence of the construction and operation of a railroad, but the land-owner is remitted to his action at law to recover his damages. Ins. Co. *v.* Heiss, 141 Ill. 35, 31 N. E. 138; Chicago etc. R. *v.* Loeb, 118 Ill. 203, 8 N. E. 460; Railroad *v.* Ayres, 106 Ill. 511.

To sustain the jurisdiction in equity, it must be shown that there is no sufficient and speedy remedy at law. Whitehead *v.* Entwhistle, 27 Fed. 779; Fussell *v.* Gregg, 113 U. S. 550, 28 L. Ed. 550, 5 S. Ct. Rep. 631; Killian *v.* Ebbinghaus, 110 U. S. 568, 28 L. Ed. 246, 4 S. Ct. Rep. 232; Lewis *v.* Cocks, 90 U. S. 466, 23 L. Ed. 70.

Action to quiet title and construe deed is an action at law and chancery court will not entertain bill. M'Alpine *v.* Tourtelotte, 24 Fed. 71.

Nor will an injunction lie to prohibit the payment of moneys derived from taxes, for other purposes than the liquidation of bonds and coupons. Hausmeister *v.* Porter, 21 Fed. 355.

An error in accounting and alleging funds in the hands of a guardian can be corrected at law. Combs *v.* Shister, 47 W. Va. 374, 34 S. E. 763.

must be adequate; for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity.[1] And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief and secure the whole right of the party in a perfect manner at the present time and in future; otherwise equity will interfere and give such relief and aid as the exigency of the particular case may require.[2] The

It is well settled that if the bill on its face shows that the specific amount can be fairly determined in a court of law, and that no discovery is necessary to the relief sought, the simple fact, that the bill contains vague and general statements of complications of the account between the parties, without giving specific facts to show that such complications exist in the particular accounts to be adjusted, or a statement that the remedy at law is inadequate, or that some discovery is required from the defendant, will not support the jurisdiction of equity. In such cases such statements will be construed merely as colorable, and employed as pretexts for foisting a jurisdiction upon equity courts which does not pertain to them, and they will be disregarded, and jurisdiction declined. Van Dorn *v.* County Court, 38 W. Va. 271, 18 S. E. 579; Gratton *v.* Reed, 26 W. Va. 437; Field *v.* Village of Western Springs, 181 Ill. 186, 54 N. E. 929.

Appellant procured title to personal property of appellee, and was about to sell it, and from the order restraining the sale, he appealed. There was sufficient ground of equity jurisdiction, both in the allegations of the bill regarding the fraud and collusion of appellant, and the evidence in support thereof; but while this is true, we are inclined to the view that appellee had a complete and adequate remedy at law, which it could have presented in defence to the replevin suit. Allebone *v.* North Side Riding Academy, 108 Ill. App. 392; Barnett *v.* Hickson, 52 Fla. 457, 41 So. 606.

If one's property has been excessively taxed, or if prejudicial errors and irregularities intervened in the procedure of the county board in making the assessment, the plaintiff had a plain, adequate and speedy remedy at law. Western Union Tel. Co., *v.* Douglas County, 76 Neb. 666, 107 N. W. 985; Byers *v.* Weeks, 105 Mo. App. 72, 79 S. W. 485; Thias *v.* Siener, 103 Mo. 314, 15 S. W. 772; Shenelon *v.* Illinois Life Ins. Co., 100 Ill. App. 289; Hyer *v.* Richmond Traction Co., 168 U. S. 471, 42 L. Ed. 547, 18 S. Ct. Rep. 114; McMullen *v.* Hoffman, 174 U. S. 651, 43 L. Ed. 1122, 19 S. Ct. Rep. 839; Thompson *v.* Central etc. R. Co., 73 U. S. 134. 18 L. Ed. 765.

Where plaintiff and defendant were partners in the ranch business, and they disagreed as to the partnership matters, equity will not enjoin one partner from feeding his cattle certain of the partnership forage, as plaintiff had an adequate remedy at law, and especially as defendant is solvent. Brown *v.* Reed, 72 Neb. 167, 100 N. W. 143; Pulezer *v.* Kucharzyk, 116 Mich. 92, 74 N. W. 304, 4 Detroit Leg. N. 1074.

But where the present action has been tried in a justice's court, and if that judgment was improperly rendered, an appeal lies to the superior court, and that course was not pursued, equity will not interfere with the execution by injunction. Henion *v.* Pohl, 113 Ill. App. 102.

[1] Watson *v.* Sutherland, 72 U. S. 74, 18 L. Ed. 580; Thacher *v.* Humble, 67 Ind. 444.

[2] See Dr. Lieber's Ency. Americana, art. "Equity"; Mitford, Eq. Pl. by Jeremy, pp. 111, 112, 117, 123; 1 Wooddes. Lect. vii. pp. 214, 215;

jurisdiction of a Court of Equity is therefore sometimes concurrent with the jurisdiction of a Court of Law; it is sometimes exclusive of it, and it is sometimes auxiliary to it.[1]

Hinde's Pract. 153; Cooper, Eq. Pl. Sir James Mackintosh, in his Life of Sir Thomas More, says: "Equity, in the acceptation in which the word is used in English Jurisprudence, is no longer to be confounded with that moral equity which generally corrects the unjust operation of law, and with which it seems to have been synonymous in the days of Selden and Bacon. It is a part of laws formed from usages and determinations which sometimes differ from what is called Common Law in its subjects; but chiefly varies from it in its modes of proof, of trial, and of relief. It is a jurisdiction so irregularly formed, and often so little dependent upon general principles, that it can hardly be defined or made intelligible otherwise than by a minute enumeration of the matters cognizable by it." There is much of general truth in this statement; but it is perhaps a little too broad and undistinguishing for an accurate equity lawyer. Equity, as a science and part of jurisprudence built upon precedents as well as upon principles, must occasionally fail in the mere theoretical and philosophical accuracy and completeness of all its rules and governing principles. But it is quite as regular and exact in its principles and rules as the common law, and probably as any other system of jurisprudence established generally by positive enactments or usages or practical expositions in any country, ancient or modern. There must be many principles and exceptions in every system, in a theoretical sense arbitrary if not irrational, but which are yet sustained by the accidental institutions or modifications of society in the particular country where they exist. There are wide differences between the philosophy of law as actually administered in any country and that abstract doctrine which may in matters of government constitute in many minds the law of philosophy.

[1] Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*). *Existence of a Remedy at Law.* — How far the existence of a remedy at law in general operates to prevent jurisdiction in equity is considered in many of its features in the text; and it is there shown that there are not a few cases in which equity has a concurrent jurisdiction with Courts of Law in cases in which all needful relief may be given in those courts. Some special questions of concurrent jurisdiction remain to be considered.

In the beginnings of the distinct jurisdiction of the chancellor, — for the chancellor at first sat with the other judges in the ordinary tribunals (Bigelow's History of Procedure, 19), — that functionary held court mainly for two purposes, so far as litigation was concerned: first, for the protection of the poor and the weak against the rich and the strong, — who, when they found the king's judges unwilling to aid them sufficiently, were seldom above overawing the courts themselves; secondly, for alleviating the misfortune that had come about in the thirteenth century by the narrowing of the jurisdiction of the ordinary courts to certain specific modes of relief, as seen especially in the forms of action of the common law. Ib. 198; Bigelow, Elements of Equity, 5–7. The relief given by the Stat. of West. 2, ch. 24, authorizing actions on the case, was but partial.

The first of these grounds of jurisdiction substantially disappeared long ago, though not without leaving traces of its existence in the law of to-day. See Worthy *v.* Tate, 44 Ga. 152 (statutory law as to poverty); Frederick *v.* Groshon, 30 Md. 436, 446 (powerful corporations). It is enough now, in ordinary cases, so far as any question of poverty of the plaintiff or power

of the defendant is concerned, that the cause of action may be satisfactorily tried at law, assuming of course that it is not a case of concurrent jurisdiction in equity. The second ground is the one on which jurisdiction in equity is at this day mainly entertained. It is the case in which the plaintiff has no plain, adequate, and complete remedy at law.

Our American Courts of Equity have had much difficulty under this head, distinct from the difficulties which the English Chancery has encountered; or at least they have failed to agree upon any consistent rule of jurisdiction with regard to cases remediable at law. Many of our courts derive their powers from statute; and it is probably accurate to say that if, and in so far as, the statute has actually derogated from the powers of the common-law tribunals, the law must be strictly construed, and not taken to confer the broad jurisdiction of equity in England, unless the statute itself indicate the contrary intention. For the converse case see Lane *v.* Marshall, 1 Heisk. 30; and see State *v.* Alder, Ib. 543, 547; McGough *v.* Insurance Bank, 2 Ga. 151, 154.

But the chief difficulty arises with statutes which do not apparently derogate from the powers of the law courts. The statute of Massachusetts may be taken as a typical case for consideration. That statute in conferring equity jurisdiction upon the Supreme Court of the State declares that "the court may hear and determine in equity all causes hereafter mentioned, when the parties have not a plain, adequate, and complete remedy at the common law", and then enumerates the ordinary heads of equity. Pub. Stats. ch. 151, § 2. There the statute stopped, until in 1877 another section was added, to be noticed presently.

This statute — as it stood before 1877 — has always been strictly construed, and not as declaratory of any existing rule, or as equivalent to the adoption of the jurisdiction of the English Court of Chancery; indeed the courts have looked with scant favor upon jurisdiction in equity. Bassett *v.* Brown, 100 Mass. 355; Pratt *v.* Pond, 5 Allen, 59; Martin *v.* Graves, Ib. 601; Jones *v.* Newhall, 115 Mass. 244, 251; Suter *v.* Matthews, Ib. 253; Hubbell *v.* Courrin, 10 Allen, 333. For example, though fraud in procuring a deed to land (or of any written contract, valid on its face, Simpson *v.* Howden, 3 Mylne & C. 97; Hoare *v.* Bremidge, L. R. 8 Ch. 22; British Assur. Co. *v.* Great Western Ry. Co., 38 L. J. Ch. 132; s. c. on appeal, Ib. 314) affords in England a clear ground for jurisdiction in equity; Simpson *v.* Howden, supra; and see Holliway *v.* Holliway, 77 Mo. 392; post, § 700; — in Massachusetts, before 1877 (and perhaps still), if the aggrieved party was in a position to maintain a writ of entry, he could not have relief in equity from such a deed. It would not be treated as a cloud to be removed by equity, though after the recovery in the writ of entry the deed would still be in existence and might be on record. Bassett *v.* Brown, 100 Mass. 355, Pratt *v.* Pond, 5 Allen, 59. (But cases like this may be deemed to have fallen to some extent under the influence of special statute in relation to quieting titles.) Indeed a strict construction of the statute, consistently maintained, would virtually exclude all concurrent jurisdiction except in cases where a defective remedy at law has been perfected. Jones *v.* Newhall, 115 Mass. 244, 250, 252.

In contrast with the construction of the Massachusetts statute, the Federal Judiciary Act of 1789, ch. 20, § 16, which declares that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law", had already been repeatedly pronounced to be merely declaratory

of the pre-existing rule; it was not intended to narrow jurisdiction in equity, but on the contrary to affirm the general doctrine of Courts of Equity, as handed on from England. Mr. Justice Story directly says that the equity jurisdiction of the United States Courts does not depend upon what is exercised by Courts of Equity or Courts of Law in the several States, but upon what is a proper subject of equitable relief in Courts of Equity in England. Bean *v.* Smith, 2 Mason, 252, 270, citing Robinson *v.* Campbell, 16 U. S. 212, 4 L. Ed. 372; United States *v.* Howland, 17 U. S. 108, 4 L. Ed. 526. See also, to the effect that the act is merely declaratory of the pre-existing rule, Oelrichs *v.* Spain, 82 U. S. 211, 21 L. Ed. 43; Parker *v.* Winnipiseogee Co., 67 U. S. 545, 17 L. Ed. 333; Boyce *v.* Grundy, 28 U. S. 210, 7 L. Ed. 655; Woodman *v.* Freeman, 25 Me., 531, 541; Baker *v.* Biddle, Baldw. 394, 403. But the Supreme Court, while admitting the jurisdiction, appear to have departed from the rule in one case. Insurance Co. *v.* Bailey, 80 U. S. 616, 20 L. Ed. 501, where cancellation of a policy of insurance for fraud was refused. See infra as to this point. And as to asserting the jurisdiction but declining to exercise it, see Hoare *v.* Bremridge, L. R. 14 Eq. 522; s. c. 8 Ch. 22, 27; Shepard *v.* Brown, 4 Giff. 208, 218; In re Whitehead, 28 Ch. D. 614; also infra, near the end of this note.

The disfavor shown in Massachusetts towards enlarged jurisdiction in equity culminated with the cases of Jones *v.* Newhall, 115 Mass. 244, and Suter *v.* Matthews, Ib. 253; in the first of these cases especially, the court, by Mr. Justice Wells, defending and applying, in an elaborate judgment, the narrower view of jurisdiction which had been persistently maintained in that State. The case was a bill to enforce, in favor of the vendor, a contract for the sale of land and other property which would have been sustained, it seems, in England on the principle of mutuality of relief to vendor and purchaser. Post § 723. In the course of the opinion (p. 252), refusing jurisdiction, the court sought to fortify their position by decisions of the Supreme Court of the United States above cited; but an examination of the cases cited will show that the only one which affords the court any support is Insurance Co. *v.* Bailey, 80 U. S. 616, 20 L. Ed. 501; and that case itself would not have been held good law in Massachusetts (not to mention England) at the time of Jones *v.* Newhall. Commercial Ins. Co. *v.* McLoon, 14 Allen, 351, cited with approval in Fuller *v.* Percival, 126 Mass. 381.

The result of the two cases referred to was the passage in 1877 of a statute declaring that the Supreme Court "shall also have jurisdiction in equity of all cases and matters of equity cognizable under the general principles of equity jurisdiction, and in respect of all such cases and matters shall be a court of general equity jurisdiction." Pub. Stats. ch. 151, § 4.

It would seem that under this provision there could be no doubt that the Legislature intended to confer upon the court jurisdiction as developed in equity in England at that time (1877). See Knatchbull *v.* Hallett, 13 Ch. D. 696, 710, Jessel, M. R., quoted in note to § 56, infra. At all events it appears to have been the view of the court in Nudd *v.* Powers, 136 Mass. 273, 278, that the existence in Massachusetts of a remedy at law, though perhaps plain, adequate, and complete, was not ground for refusing jurisdiction of a case arising within the jurisdiction of the English Chancery. The bill "may be sustained," said Holmes, J., "to declare and enforce a charge, the legal remedies for which, if any, are either derived from equity . . . *or* are inadequate."

It has also been held in Massachusetts since 1877 that equity will entertain jurisdiction to decree the delivery up for cancellation of an

apparently valid overdue negotiable note, not already sued upon, to which there would be an available defence of fraud at law. Fuller *v.* Percival, 126 Mass. 381. And see the suggestion of the court in sustaining a demurrer to the bill in Anthony *v.* Valentine, 130 Mass. 119, — a bill to enjoin a suit at law upon a promissory note. "There is no allegation that it was obtained by *fraud*, accident, or mistake." And that equity will, elsewhere at least, grant relief against a forged note valid on its face, see Strafford *v.* Welch, 59 N. H. 46; Huston *v.* Roosa, 43 Ind. 517; Houston *v.* Schindler, 46 Ind. 38; Hardy *v.* Brier, 91 Ind. 91; post, §§ 700, 701. The case of Fuller *v.* Percival, supra, was clearly correct on general equity jurisdiction, if not on a narrow rule, for no remedy at law can be as adequate as cancellation; and Suter *v.* Matthews, 115 Mass. 253, though decided before 1877, may well be doubted, in any view. Before the decision of this case of Suter *v.* Matthews the same court had sustained a bill alleging that the defendant had obtained a policy of insurance by fraud, whereby an apparent cause of action had arisen against the plaintiff, and praying the court to order the policy to be given up for cancellation. Commercial Ins. Co. *v.* McLoon, 14 Allen, 351, cited with approval in Fuller *v.* Percival, supra. To the same effect, London Assur. *v.* Mansel, 11 Ch. D. 363, Jessel, M. R.; Hoare *v.* Bremridge, L. R. 14 Eq. 522; s. c. 8 Ch. 22; British Assur. Co. *v.* Great Western Ry. Co., 38 L. J. Ch. 132; s. c. on appeal, Ib. 314. But see Insurance Co. *v.* Bailey, 80 U. S. 616, 20 L. Ed. 501, supra.

And since 1877 the broad rule has been conceded that cancellation may be had of any invalid contract in the possession of a defendant, if the invalidity thereof is not apparent on the face of the paper, and if there is danger that the evidence to support a defence to it at law may be lost by the delay of the other party to sue upon it. Anthony *v.* Valentine, 130 Mass. 119. Indeed this ought to be true in any view of the statute, without the act of 1877. To an action at law upon a written instrument of any kind, apparently valid, there may indeed be a perfect and complete defence; but (1) the opportunity to make that defence may be lost by studied delay of the other party to sue, and (2) in any event mere defence, however perfect, is not relief. The relief desired is different in kind and efficiency from the defence available. Compare the language of the court in Oelrichs *v.* Spain, 82 U. S. 211, 21 L. Ed. 43, quoting Boyce *v.* Grundy, 28 U. S. 210, 7 L. Ed. 655, that the remedy at law must be "as practical and *efficient*" as the remedy in equity, to cut off equitable jurisdiction. See also Merrill *v.* Allen, 38 Mich. 487. It is conceived that where A has wrongfully obtained or wrongfully withholds from B a written instrument which, not disclosing its own invalidity, may therefore be used unjustly and harmfully against B or his privies, A should be required to surrender the same, at least if he does not bring suit upon it. See further as to cancellation, infra, § 86; infra, § 700, and the editor's note thereto.

But on the other hand the Supreme Court of Massachusetts have recently decided in Husband *v.* Aldrich, 135 Mass. 317, contrary to the rule in Hess *v.* Voss, 52 Ill. 472, that equity has no jurisdiction in that State to order partition of land between tenants in common; though equity has apparently had exclusive jurisdiction of such cases in England ever since 1835, when the writ of partition was abolished; 3 and 4 Will. 4. ch. 27, § 36; Bailey *v.* Sisson, 1 R. I. 233, 236; and before that time equity had concurrent jurisdiction. Hess *v.* Voss, supra; Burhans *v.* Burhans, 2 Barb. Ch. 398, 404; Bailey *v.* Sisson, supra; post, §§ 646 et seq. Husband *v.* Aldrich however proceeded mainly on statutes relating to partition, and the jurisdictional act of 1877 was not mentioned. See

again Dole *v.* Wooldredge, 135 Mass. 140, where the court speak hesitatingly about jurisdiction.

The result is that Equity Jurisdiction in Massachusetts is in a state of uncertainty even with the statute of 1877. Indeed while jurisdiction has certainly been enlarged, it may be difficult to determine what the statute means, though properly considered to have extended the jurisdiction to the bounds of the English Chancery. In so doing has it brought with it the nice distinctions, sometimes standing upon no clear principle, that have been adopted and are still maintained in England? See e. g. Ramshire *v.* Bolton, L. R. 8 Eq. 294, 299. However it is clear that the Legislature of Massachusetts intended, by the act of 1877, to do away with the test of a "plain, adequate, and complete remedy" to be had at law under the jurisprudence of that State, and to substitute the broader jurisdiction of the English Chancery. To admit, as was admitted in Jones *v.* Newhall, that the English courts would take jurisdiction of the case, would now be decisive, if the intention of the Legislature is fully carried out.

Cases of mutuality of relief, cancellation, and partition are not the only ones that have created confusion in regard to jurisdiction. In some States it has been held that if disclosure of the facts sought by a bill of discovery can be had in a suit at law in aid or defence of which the disclosure is desired, a bill of the kind, not seeking other proper relief, cannot be maintained. Hall *v.* Joiner, 1 S. Car. 186; Riopelle *v.* Doellner, 26 Mich. 102 ("per curiam"); post, p. 78, note (*b*). But this has been denied. Colgate *v.* Compagnie Française, 23 Fed. Rep. 82, 85. See post, p. 70, note (*b*). And except upon the narrow construction of the terms "plain, adequate, and complete remedy at law", it cannot be upheld. Shepard *v.* Brown, 4 Giff. 208, 218.

There are doubtless still other cases. With regard to the mooted question of fraud as a ground of jurisdiction in equity, it may be conceded perhaps that in a simple case in which nothing is sought in the bill but damages, equity should not in this country entertain jurisdiction. Ambler *v.* Choteau, 107 U. S. 586. 27 L. Ed. 322. 1 S. Ct. Rep. 556. And in England see Ogilvie *v.* Currie, 37 L. J. Ch. 541. But see Hill *v.* Lane, L. R. 11 Eq. 215, 220; Ramshire *v.* Bolton, L. R. 8 Eq. 294. And possibly so, as a matter of discretion *merely*, of fraud generally, where all relief asked for can clearly be given as well at law; though not where there is any doubt on that point. Green *v.* Spaulding, 76 Va. 411; Youngblood *v.* Youngblood, 54 Ala. 486; Hipp *v.* Babin, 19 How. 278; Huff *v.* Ripley, 58 Ga. 11; Ellis *v.* Lanier, 44 Ga. 9. Nor will intent to commit a fraud give jurisdiction to equity if the act to which the intent attaches is not a matter for equitable cognizance. Winegar *v.* Newland, 44 Mich. 367. And there are also special cases, as in removing clouds or quieting title to lands, and in obtaining relief from illegal taxes or assessments, in regard to which the jurisdiction of equity is deemed to have been restrained by statute.

But the test of the existence of a remedy at law, however adequate, cannot be final even upon a narrow construction of statutes creating Courts of Equity; for it may be that a remedy once incomplete at law, and therefore giving occasion for the interference of equity which has been improved, has been enlarged and made complete in the ordinary tribunals. This will not take away jurisdiction from equity. Shotwell *v.* Smith, 5 C. E. Green, 79; Sweeny *v.* Williams, 36 N. J. Eq. 627; Segar *v.* Pratt, 20 Gratt. 672; Hinchley *v.* Greany, 118 Mass. 596; Clouston *v.* Shearer, 99 Mass. 209; Pratt *v.* Pond, 5 Allen, 59; Labadie *v.* Hewitt, 85 Ill. 341; Lee *v.* Lee, 55 Ala. 590, 598; Nudd *v.* Powers, 136 Mass. 273, 278; Jones *v.* Newhall, 115 Mass. 244, 250. Contra, Hall *v.* Joiner, 1

S. C. 186, 190; Riopelle *v.* Doellner, 26 Mich. 102, 105. The last two are the cases on discovery already referred to.

Again Courts of Equity will assume jurisdiction over their own officers (e. g. solicitors) though the Common Law Courts might afford redress. Chapman *v.* Chapman, L. R. 9 Eq. 276, 294. See In re Whitehead, 28 Ch. D. 614. And, at least in England, the sovereign power may also claim relief where it will. Attorney-Gen. *v.* Tudor Ice Co., 104 Mass. 239, 243; Attorney-Gen. *v.* Galway, 1 Molloy, 95, 103. And see State *v.* Alder, 1 Heisk. 543. On the other hand it is said that the Legislature cannot give a court which acts without a jury power to determine a legal right except upon some equitable ground. Haine's Appeal, 73 Pa. St. 169. And of course equity cannot enforce supposed rights not recognized by municipal law. Elborough *v.* Ayres, L. R. 10 Eq. 367; Carlton *v.* Salem, 103 Mass. 141; Hale *v.* Cushman, 6 Met. 425; Hendricks *v.* Toole, 29 Mich. 340.

It is said however that even in courts of general chancery powers, that is, in the English Chancery, the common practice in matters of concurrent jurisdiction is to remit parties to their remedy at law if that is plain and adequate, unless there is some peculiar advantage afforded by equity or some other controlling fact. Wells, J., in Jones *v.* Newhall, 115 Mass. 244, 252, referring to Clifford *v.* Brooke, 13 Ves. 131; Whitmore *v.* Mackeson, 16 Beav. 126; Hammond *v.* Messenger, 9 Sim. 327; Hoare *v.* Bremridge, L. R. 14 Eq. 522; s. c. 8 Ch. 22. It may be conceded that equity will not enjoin proceedings pending at law which for any reason can be more suitably prosecuted there; unless on terms imposed upon and consented to by the plaintiff in equity — such as giving judgment at law — which will result in drawing the cause wholly into equity. And this, with the interesting intimation of Lord Selborne just stated (L. R. 8 Ch. at p. 27), is the extent of Hoare *v.* Bremridge, supra, the most important case upon the subject. To the same effect, that pending proceedings at law will not be enjoined in such cases, see Grand Chute *v.* Winegar, 82 U. S. 373, 21 L. Ed. 174; Payson *v.* Lamson, 134 Mass. 593; Anthony *v.* Valentine, 130 Mass. 119. That is easy to understand.

On the whole it is to be regretted that the State courts have not always taken the view maintained in the Federal courts, that the words "plain, adequate, and complete remedy at law" are merely descriptive, in a broad way, of jurisdiction in equity, and not narrowly definitive. The way is still open in some, probably in many, of the States. A statute which merely copies common language cannot be considered ordinarily to have been adopted with the careful verbal consideration and exact definition of a statute newly worked out and studiously framed. It is hardly probable that legislators in adopting the common language of the books had in mind any specific and exact limits, except where, as recently in Massachusetts, attention had been plainly and forcibly directed thereto. It cannot be seriously doubted that the broader jurisdiction is generally desired and desirable. Comp. Chapman *v.* Chapman, L. R. 9 Eq. 276, 294. "Under its improved course of practice it would seem to be the duty of this court to extend its jurisdiction as far as possible," &c. Stuart, V. C.

In an action to establish a lost deed, equity will retain the cause until the final termination of the action, though other questions arise. Coal Co. *v.* Doran, 142 U. S. 435, 35 L. Ed. 1063, 12 S. Ct. Rep. 239; Gormley *v.* Clark, 134 U. S. 347, 33 L. Ed. 909, 10 S. Ct. Rep. 554; Hopkins *v.* Grimshaw, 165 U. S. 358, 41 L. Ed. 739, 17 S. Ct. Rep. 343; Buzard *v.* Houston, 119 U. S. 347, 30 L. Ed. 451, 7 S. Ct. Rep. 249.

[In cases of concurrent jurisdiction of courts of law and equity, the fact that the legal remedy is not full, adequate and complete, is the real foundation of the jurisdiction; but the relief which a court of equity can afford need not be the same kind of relief that a court of equity could give in order that the latter should thus be in a position where it cannot take jurisdiction.[1]

§ 34. **Administration of Legal and Equitable Rights in Same Court.** — Many persons, and especially foreigners, have often expressed surprise that distinct courts should in England and America be established for the administration of equity, instead of the whole administration of municipal justice being confided to one and the same class of courts without any discrimination between law and equity.[2] But this surprise is founded almost wholly upon an erroneous view of the nature of Equity Jurisprudence. It arises from confounding the general sense of equity, which is equivalent to universal or natural justice, ex æquo et bono, with its technical sense, which is descriptive of the exercise of jurisdiction over peculiar rights and remedies. Such persons seem to labor under the false notion that Courts of Law can never administer justice with reference to principles of universal or natural justice, but are confined to rigid, severe, and

[1] Shenehon *v.* Illinois Life Ins. Co., 100 Ill. App. 290.

The chancery court will not, except in extraordinary cases, supersede the probate court in the administration of an estate. Hill *v.* Tarbel, 91 Ill. App. 277; Harding *v.* Shepard, 107 Ill. 264; Glenn's Admr. *v.* Billingslea, 64 Ala. 350.

It seems to be a general rule that where Courts of equity have concurrent jurisdiction with law courts, it is in the sound discretion of the chancellor whether he will assume jurisdiction of the particular case. Des Moines Life Ins. Co. *v.* Seifert, 112 Ill. App. 279.

Where the law court has first taken cognizance of a case, equity will not take jurisdiction, even if it is concurrent with the law, unless there is some equitable circumstance in the case which the party cannot avail himself of at the law. Cleland *v.* Campbell, 78 Ill. App. 629; Nash *v.* McCathern, 183 Mass. 345, 67 N. E. 324; Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Smith *v.* McIver, 22 U. S. 532, 6 L. Ed. 152; Byrne *v.* Brown, 40 Fla. 109, 23 So. 879.

The jurisdiction in equity attaches, unless the legal remedy both in respect to the final relief and the mode of obtaining it is as efficient as the remedy which equity would confer under the same circumstances. Kilbourne *v.* Sunderland, 130 U. S. 514, 32 L. Ed. 1005, 9 S. Ct. Rep. 594; Tyler *v.* Savage, 143 U. S. 79, 36 L. Ed. 82, 12 S. Ct. Rep. 340; Bowen *v.* Chase, 94 U. S. 812, 24 L. Ed. 184; Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341, 19 S. Ct. Rep. 77; Sullivan *v.* Portland etc. R. Co., 94 U. S. 811, 24 L. Ed. 324; Allen *v.* Hanks, 136 U. S. 311, 34 L. Ed. 414, 10 S. Ct. Rep. 961.

[2] 3 Black. Comm. 441, 442.

uncompromising rules, which admit of no equitable considerations. Now such a notion is founded in the grossest mistake of our systems of jurisprudence. Courts of Common Law, in a great variety of cases, adopt the most enlarged and liberal principles of decision, and indeed often proceed, as far as the nature of the rights and remedies which they are called to administer will permit, upon the same doctrines as Courts of Equity. This is especially true in regard to cases involving the application of the law of nations and of commercial and maritime law and usages, and even of foreign municipal law. And Mr. Justice Blackstone has correctly said, that "where the subject matter is such as requires to be determined secundum æquum et bonum, as generally upon actions on the case, the judgments of the Courts of Law are guided by the most liberal equity."[1]

§ 35. **Same.** — Whether it would or would not be best to administer the whole of remedial justice in one court, or in one class of courts, without any separation or distinctions of suits, or of the form or modes of proceeding and granting relief, is a matter upon which different minds in the same country, and certainly in different countries, would probably arrive at opposite conclusions. And whether, if distinctions in rights and remedies and forms of proceeding are admitted in the municipal jurisprudence, it would be best to confide the whole jurisdiction to the same court or courts, is also a matter upon which an equal diversity of judgment might be found to exist. Lord Bacon, upon more than one occasion, expressed his decided opinion that a separation of the administration of equity from that of the common law was wise and convenient. "All nations," says he, "have equity. But some have law and equity mixed in the same court, which is worse; and some have it distinguished in several courts, which is better."[2] And again, among his aphorisms, he says: "Apud nonnullos receptum est, ut jurisdictio, quæ decernit secundum æquum et bonum, atque illa altera, quæ procedit secundum jus strictum, iisdem curiis deputentur; apud alios autem et diversis. Omnino placet curiarum separatio. Neque enim servabitur distinctio casuum, si fiat commixtio jurisdictionum; sed arbitrium legem tandem trahet."[3] Lord Hardwicke held the same opinion;[4] and it is certainly a common opinion in countries governed by

[1] 3 Black. Comm. 436. See Eunomus, Dial. 3, § 60.
[2] Bac. Jurisd. of the Marches; 4 Bac. Works, 274.
[3] Bac. De Aug. Scient. Lib. 8, cap. 3, Aph. 45; 7 Bac. Works, p. 448.
[4] Parkes, Hist. Chan. App. pp. 504, 505.

the common law. In civil law countries the general if not the universal practice is the other way;[1] whether more for the advancement of public justice, is a matter of doubt with many learned minds.

§ 36. **Same.** — But whether the one opinion or the other be most correct in theory, it is most probable that the practical system adopted by every nation has been mainly influenced by the peculiarities of its own institutions, habits, and circumstances; and especially by the nature of its own jurisprudence and the forms of its own remedial justice. The union of equity and law in the same court, which might be well adapted to one country, or even to one age, might be wholly unfit for another country, or for another age. The question in all such cases must be a mixed question of public policy and private convenience, and never can be susceptible of any universal solution applicable to all times and all nations and all changes in jurisprudence.

§ 37. **Same.** — Accordingly we find that in the nations of antiquity different systems existed. And in Rome, with whose juridical institutions we are best acquainted, not only were different jurisdictions entrusted to different magistrates, but the very distinction between law and equity was clearly recognized.[2] Thus civil jurisdiction and criminal jurisdiction were confided to different magistrates.[3] The Roman prætors generally exercised the former only. In the exercise of this authority a broad distinction was taken between Actions at Law and Actions in Equity, the former having the name of Actiones Civiles, and the latter of Actiones Prætoriæ. And in the same way a like distinction was taken between Obligationes Civiles and Obligationes Prætoriæ, between Actiones Directæ and Actiones Utiles.[4] And in modern nations it is not uncommon for different portions of judicial jurisdiction to be vested in different magistrates or tribunals. Thus questions of state or public law, such as

[1] 1 Kaims on Eq. Introd. pp. 27 to 30.

[2] 3 Black. Comm. 50; Parkes, Hist. Chan. 28; Butler's Horæ Subsecivæ [43], p. 66; 1 Collect. Jurid. 25; Pothier, Pand. Lib. 1, tit. 2, §§ 2 to 24; Id. tit. 10, §§ 1, 2, 3; Id. tit. 11, §§ 1 to 9; Id. tit. 14, §§ 1, 2; Id. tit. 20.

[3] Taylor's Elem. Civil Law, 211, 213, 215, 216; Pothier, Pand. Lib. 2, tit. 1, art. 2, §§ 5 to 8; Id. § 10.

[4] Taylor's Elem. Civil Law, 213, 214; Id. 93, 94, 95; Pothier, Pand. Lib. 50, tit. 16; De Verb. Signif. Actio; Inst. Lib. 4, tit. 6, §§ 3, 8; Inst. Lib. 3, tit. 14, § 1; Heinecc. De Edict. Prætor. Lib. 1, cap. 6; 3 Black. Comm. 50; Parkes, Hist. Ch. 28. See 1 Collect. Jurid. 33; De Lolme on Eng. Const. B. 1, ch. 11.

prize causes and causes touching sovereignty, are generally confided to special tribunals; and maritime and commercial questions often belong to Courts of Admiralty, or other courts constituted for commercial purposes. There is then nothing incongruous, much less absurd, in separating different portions of municipal jurisprudence from each other in the administration of justice; or in denying to one court the power to dispose of all the merits of a cause, when its forms of proceeding are ill adapted to afford complete relief, and giving jurisdiction of the same cause to another court better adapted to do entire justice by its larger and more expansive authority.

CHAPTER II

THE ORIGIN AND HISTORY OF EQUITY JURISPRUDENCE

§ 38. **Origin and History.** — Having thus ascertained what is the true nature and character of Equity Jurisprudence as it is administered in countries governed by the common law, it seems proper, before proceeding to the consideration of the particulars of that jurisdiction, to take a brief review of its origin and progress in England, from which country America has derived its own principles and practice on the same subject. It is not intended here to speak of the Common Law Jurisdiction of the Court of Chancery, or of any of its specially delegated jurisdiction in exercising the prerogatives of the Crown, as in cases of infancy and lunacy; or of its statutable jurisdiction in cases of bankruptcy.[1] The inquiry will mainly relate to its equitable, or, as it is sometimes called, its extraordinary jurisdiction.[2]

§ 39. **Same.** — The origin of the Court of Chancery is involved in the same obscurity which attends the investigation of many other questions of high antiquity relative to the common law.[3] The administration of justice in England was originally confided to the Aula Regis, or great Court or Council of the King, as the Supreme Court of Judicature, which in those early times undoubtedly administered equal justice according to the rules of both law and equity, or of either, as the case might chance to require.[4] When that court was broken into pieces, and its principal jurisdiction distributed among various courts, the Common

[1] See Com. Dig. Chancery, C. 1; 1 Madd. Ch. Pr. 262; 2 Madd. Ch. Pr. 447; Id. 565; 3 Black. Comm. 426, 427, 428.

[2] 3 Black. Comm. 50; Com. Dig. Chancery, C. 2; 4 Inst. 79; 2 Inst. 552.

[3] Mitford, Pl. Equity, 1; Com. Dig. Chancery, A. 1; 4 Inst. 79; 1 Wooddes. Lect. vi.

[4] 3 Black. Comm. 50; 1 Reeves, Hist. 62, 63.

Pleas, the King's Bench, and the Exchequer, each received a certain portion, and the Court of Chancery also obtained a portion.[1] But at that period the idea of a Court of Equity as contradistinguished from a Court of Law does not seem to have subsisted in the original plan of partition, or to have been in the contemplation of the sages of the day.[2] Certain it is that among the earliest writers of the common law, such as Bracton, Glanvill, Britton, and Fleta, there is not a syllable to be found relating to the equitable jurisdiction of the Court of Chancery.[3] Fleta indeed mentions the existence of a certain office called the Chancery, and that to the office "it belongs to hear and examine the petitions and complaints of plaintiffs, and to give them, according to the nature of the injuries shown by them, due remedy by *the writs of the King*."[4]

§ 40. **Same.** — That the Court of Chancery, in the exercise of its ordinary jurisdiction, is a court of very high antiquity, cannot be doubted. It was said by Lord Hobart that it is an original and fundamental court, as ancient as the kingdom itself.[5] The name of the court, Chancery (Cancellaria), is derived from that of the presiding officer, Chancellor (Cancellarius), an officer of great distinction, whose office may be clearly traced back before the Conquest, to the times of the Saxon kings, many of whom had their chancellors.[6] Lord Coke supposes that the title "Cancellarius" arose from his cancelling (a cancellando) the king's letters patent when granted contrary to law, which is the highest point of jurisdiction.[7] But the office and name of Chancellor (Mr. Justice Blackstone has observed) was certainly known to the courts of the Roman emperors, where it originally seems to have signified a chief scribe, or secretary, who was afterwards invested with several judicial powers, and a general superintendency over

[1] 3 Black. Comm. 50; Com. Dig. Chancery, A. 1, 2, 3; 1 Collect. Jurid. 27 to 30; Parkes, Hist. Chan. 16, 17, 28, 56; 1 Eq. Abridg. 129; Courts, B. note (a); 1 Wooddes. Lect. vi. pp. 174, 175; Gilb. For. Roman. 14; 1 Reeves, Hist. 59, 60, 63; Bac. Abridg. Court of Chancery, C.

[2] 3 Black. Comm. 50. The Legal Judic. in Chanc. stated (1727), ch. 2, p. 24.

[3] Id. 50; Parkes, Hist. Chan. p. 25; 4 Inst. 82; 1 Reeves, Hist. p. 61; 2 Reeves, Hist. pp. 250. 251.

[4] Parkes, Hist. Chan. p. 25; Fleta, Lib. 2, cap. 13; 4 Inst. 78.

[5] Hobart, R. 63; Com. Dig. Chancery, A. 1, 2; 2 Inst. 551, 552; 4 Inst. 78, 79.

[6] Com. Dig. Chancery, A. 1; 4 Inst. 78; 1 Wooddes. Lect. vi. pp. 161 to 165; Prynne's Animadv. 48; 1 Coll. Jurid. 26; 1 Rep. in Chan. App. 5, 7.

[7] 4 Inst. 88; Eunomus, Dial. 3, § 60.

the rest of the officers of the prince.[1] From the Roman emperors it passed to the Roman Church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such other public instruments of the Crown as were authenticated in the most solemn manner; and therefore when seals came in use he always had the custody of the king's great seal.[2]

[1] See Parkes, Hist. Chan. 14; 1 Wooddes. Lect. vi. p. 160; Hist. of Chancery (1726), 3, 4.

[2] 3 Black. Comm. 46, 47; 1 Wooddes. Lect. vi. pp. 159, 160; 1 Collect. Jurid. 25; Parkes, Hist. Chan. p. 14; 1 Reeves, Hist. p. 61; 2 Reeves, Hist. pp. 250, 251. Camden, in his Britannia, p. 180, states the matter in this manner: "The Chancery drew that name from a chancellor, which name, under the ancient Roman emperors, was not of so great esteem and dignity, as we learn out of Vopiscus. But now-a-days a name it is of the highest honor, and chancellors are advanced to the highest pitch of civil dignity; whose name Cassiodorus fetcheth from cross-grates, or lattices, because they examined matters within places (secretum) severed apart, enclosed with partitions of such cross-bars, which the Latins called Cancelli. Regard (saith he to a chancellor) what name you bear. It cannot be hidden, which you do within lattices. For you keep your grates lightsome, your bars open, and your doors transparent as windows. Whereby it is very evident that he sat within grates, where he was to be seen on every side; and thereof it may be thought he took his name. But minding it was his part, being, as it were, the prince's mouth, eye, and ear, to strike and slash out with cross lines, lattice like, those letters, commissions, warrants, and decrees, passed against law and right, or prejudicial to the Commonwealth, which, not improperly, they called 'to cancel', some think the name of chancellor came from this cancelling. And in a glossary of a later time this we read: A chancellor is he whose office it is to look into and peruse the writings of the emperor; to cancel what is written amiss, and to sign that which is well." However antiquaries differ much upon the origin of the word "chancellor." Some derive it "a cancellis", or latticed doors, and hold that it was a denomination of those ushers who had the care of the "cancelli", or latticed doors, leading to the presence-chamber of the emperors and other great men. See 1 Wooddes. Lect. vi. pp. 159, 160; Bythewood's Eunomus, Dial. 3, § 60, note (a), p. 564; Brissonius, Voce, Cancellarius. Vicat, Vocab. Voce, Cancellarius; 1 Savigny's Hist. of Roman Law, translated by Cathcart, pp. 51 to 83.

Injunction restraining collection of taxes by Board of County Commissioners will not be sustained, where plaintiffs had the right to appeal to State Board of Equalization for redress of their grievances caused by illegal and wrongful assessment. While under our present procedure, we have but one form of action, the difference between actions at law and suits in equity having been abolished, yet the distinction between

§ 41. **Same.** — It is not so easy to ascertain the origin of the equitable or extraordinary jurisdiction of the Court of Chancery. By some persons it has been held to be as ancient as the kingdom itself.[1] Others are of a different opinion. Lambard, who (according to Lord Coke) was a keeper of the Records of the Tower, and a Master in Chancery, says that he could not find that the chancellor held any Court of Equity, nor that any causes were drawn before the chancellor for help in equity before the time of Henry IV.; in whose days, by reason of intestine troubles, feoffments to uses did first begin, as some think.[2] Lord Coke says it has been thought that this Court of Equity began in the reign

legal and equitable principles has been fully retained, and equity has no jurisdiction where there is an adequate, complete, and certain remedy at law, and it is equally well settled as a rule of a Court of Equity, which still obtains, that there will be no interference by injunction when there is a sufficient remedy at law. Wilson *v.* Green, 135 N. C. 345, 47 S. E. 469.

One of the objects in abolishing the distinction between actions at law and suits in equity, was to rid our system of a multiplicity of suits and a vexatious and cumbersome procedure and to give litigants full and complete relief in a single action, where under the old practice several suits were necessary to accomplish that result. Coleman *v.* Jaggers, 12 Idaho 125, 85 Pac. 897. And where the distinction no longer obtains, it is error to require the plaintiff to elect whether he will proceed at law or in equity. Brawley *v.* Smith, 8 Kans. App. 411, 54 Pac. 804.

It is not a ground of demurrer that the facts alleged do not constitute an action at law, but do show that the plaintiff's exclusive remedy is in equity. Bell *v.* Mendenhall, 71 Minn. 331, 73 N. W. 1087; Commission Co. *v.* Central Bank, 116 Mo. 588, 22 S. W. 813, 38 Am. St. Rep. 615; Hopkins *v.* Washington County, 56 Neb. 596, 77 N. W. 53; Staton *v.* Webb, 137 N. C. 35, 49 S. E. 55; Browder *v.* Phinney, 30 Wash. 74, 70 Pac. 266.

[1] Com. Dig. Chancery, A. 2; Jurisd. of Chancery Vind. 1 Rep. in Chan. App. 9, 10; 1 Collect. Jurid. pp. 28, 29, 30, 62: Discourses on Judicial Authority of the Master of Rolls, p. 2; Id. Edit. of 1728, Preface, cxi. to cxix. (ascribed to Lord Hardwicke); Barton, Equity, Introd. pp. 2 to 13. This was Lord Hobart's opinion (as we have seen), who added: "That part of equity being opposite to regular law, and in a manner an arbitrary discretion, is still administered by the king himself, and his chancellor in his name, ab initio, as a special trust committed to the king, and not by him to be committed to another." Hob. Rep. 63. Camden (Britannia, p. 181) says: "It is plain and manifest that chancellors were in England before the Normans' Conquest." In the Vindication of the Judgment, given by King James, in the case of the Court of Chancery (1 Collectanea Juridica, pp. 23, 61, 62), it is said: "It cannot be denied but that the chancery, as it judgeth in equity, is a part of the law of the land and of the ancient common law"; "for equity is, and always hath been, a part of the law of the land."

[2] 2 Inst. 552. But see 1 Wooddes. Lect. vi. p. 176, note (*b*); Parkes, Hist. Chan. 27; Id. 34; Jurisdiction of Chan. Vind. 1 Rep. in Chan. App. pp. 7, 8; 1 Collect. Jurid. p. 27; Legal Judic. in Chan. stated (1727), pp. 28, 29.

of Henry V., and increased in the reign of Henry VI.; but that its principal growth was during the chancellorship of Cardinal Wolsey, in the reign of Henry VIII.[1] And he adds, in another place, that we find no cases in our books reported before the reign of Henry VI.[2] Lord Coke's known hostility to the jurisdiction of the Court of Chancery would very much abate our confidence in his researches, if they were not opposed by other pressing authorities.[3]

§ 42. **Same.** — Lord Hale's account of the matter is as follows: "There were many petitions referred to the Council (meaning either the Privatum Concilium or Legale Concilium Regis) from the Parliament; sometimes the answers to particular petitions, and sometimes whole bundles of petitions in Parliament which by reason of a dissolution could not be there determined, were referred, in the close of the Parliament, sometimes to the Council in general, and sometimes to the chancellor. And this I take to be the true original of the Chancery Jurisdiction in matters of equity, and gave rise to the multitude of equitable causes to be there arbitrarily determined." And he afterwards adds: "Touching the equitable jurisdiction (in chancery), though in ancient time no such thing was known, yet it hath now so long obtained, and is so fitted to the disposal of lands and goods, that it must not be shaken, though in many things fit to be bounded or reformed. Two things might possibly give original [jurisdiction], or at least much contribute to its enlargement. (1) The usual committing of particular petitions in Parliament, not there deter-

[1] 2 Inst. 553. [2] 4 Inst. 82.

[3] 3 Black. Comm. 54; 1 Collect. Jurid. 23, &c.; Com. Dig. Chancery, A. 2; 1 Wooddes. Lect. vi. pp. 176, 177. Camden (Britannia, p. 181) says: "To this chancellor's office, in process of time, much authority and dignity hath been adjoined by authority of Parliament; especially ever since that lawyers stood so precisely upon the strict points of law, and caught men with the traps and snares of their law terms; that of necessity there was a Court of Equity to be erected, and the same committed to the chancellor, who might give judgment according to equity and reason, and moderate the extremity of law, which was wont to be thought extreme wrong."

Mr. Cooper, in his Lettres sur la Cour de la Chancellerie (Lettr. 25, p. 182), says that there is not a doubt that the jurisdiction now exercised by the chancellor to mitigate the severity of the common law has always been a part of the law of England. And he cites, in proof of it, the remark, stated in Burnet's Life of Lord Hale, p. 106, that he (Lord Hale) did look upon equity as a part of the common law, and one of the grounds of it. There is no doubt that this remark is well founded; but it may well be doubted whether Lord Hale meant anything more than a general assertion, that in the administration of the common law there often mingled equitable considerations and constructions, and not merely a strict and rigid summum jus.

mined, unto the determination of the chancellor, which was as frequent as to the Council; and such a foundation being laid for a jurisdiction, it was not difficult for it to acquire more. (2) By the invention of *uses* (that is, *trusts*), which were frequent and necessary, especially in the times of dissension touching the Crown. In these proceedings the chancellor took himself to be the only dispenser of the king's conscience; and possibly the Council was not called, either as assistants or co-judges."[1] We shall presently see how far these suggestions have been established.

§ 43. **Same.** — Lord Hardwicke seems to have accounted for the jurisdiction in another manner. The chancery is the grand Officina Justitiæ, out of which all original writs issue under the great seal, returnable into the Courts of Common Law, to found proceedings in actions competent to the Common Law Jurisdiction. The chancellor therefore (according to Lord Hardwicke) was the most proper judge whether upon any petition so referred such a writ could not be framed and issued by him as might furnish an adequate relief to the party; and if he found the common-law remedies deficient, he might proceed according to the extraordinary power committed to him by the reference: Ne Curia Regis deficeret in justitia exercenda.[2] Thus the exercise of the equitable jurisdiction took its rise from his being the proper officer to whom all applications were made for writs to ground actions at the common law; and from many cases being brought before him in which that law would not afford a remedy, and thereby being induced through necessity or compassion to extend a discretionary remedy.[3] If (Lord Hardwicke added) this account of the original of the jurisdiction in equity in England be historically true, it will at least hint one answer to the question how the forum of common law and the forum of equity came to be separated with us. It was stopped at its source, and in the first instance; for if the case appeared to the chancellor to be merely of equity, he issued no original writ, without which the Court of Common Law could not proceed in the cause, but he retained the cognizance to himself.[4] The jurisdiction then may be deemed in some sort a resulting jurisdiction

[1] Parkes, Hist. Chan. App. pp. 502, 503. See also Hist. Chan. (1726), pp. 11, 12, 13, 14; Parkes, Hist. Chan. p. 56.

[2] An account, nearly similar, of the Court of Chancery, is given in Bacon's Abridg. Court of Chancery, A. C.

[3] Parkes, Hist. Chan. App. pp. 503, 504.

[4] Id. Rex *v.* Hare, 1 Str. Rep. 150, 151. Per Yorke arguendo.

in cases not submitted to the decision of other courts by the Crown, or Parliament, as the great fountain of justice.[1]

§ 44. **Same.** — Lord King (or whoever else was the author of the treatise entitled, "The Legal Judicature in Chancery Stated")[2] deduced the jurisdiction of the Court of Chancery from the prerogative of the king to administer justice in his realm, being sworn by his coronation oath to deliver his subjects æquam et rectam justitiam. This it was impossible for him to do in person; and therefore of necessity he delegated it, by several portions, to ministers and officers deputed under him. But inasmuch as positive laws must in their nature consist of general institutions, there was of necessity a variety of particular cases still happening where no proper or adequate remedy could be given by the ordinary courts of justice. Therefore to supply this want, and correct the rigor of the positive law, recourse was had to the king as the fountain of justice, to obtain relief in such cases. The method of application was by bills or petitions to the king, sometimes in Parliament and sometimes out of Parliament, commonly directed to him and his Council; and the granting of them was esteemed not a matter of right, but of grace and favor. When Parliament met, there were usually petitions of all sorts preferred to the king; and the distinguishing of these petitions and giving proper answers to them occasioned a weight and load of business, especially when Parliament sat but a few days.[3] Accordingly in the 8th of the reign of Edward I. an ordinance passed by which petitions of this sort were to be referred, according to their nature, to the chancellor and the justices;

[1] Id. 502; Hist. of Chan (1726), pp. 9, 10, 12, 13; Parkes, Hist. of Chan. p. 56. Sir James Mackintosh, in his elegant Life of Sir Thomas More, has sketched out a history of chancery jurisdiction not materially different from that given by Lord Hardwicke, aided, as he was, by the later discoveries of the Commissioners of the Public Records, as stated in their printed reports. I would gladly transcribe the whole passage, if it might not be thought to occupy too large a space for a work like the present.

[2] Mr. Cooper, in his Lettres sur la Cour de la Chancellerie, p. 85, note (1), expresses a doubt whether Lord King was the author of this pamphlet, stating that it was written by the same person who wrote the History of the Chancery, relating to the judicial power of that court and the rights of the Masters (1726). Bishop Hurd, in his Life of Warburton, says that they were both written by Mr. Burrough, with the aid of Bishop Warburton. The discourse of the Judicial Authority of the Master of the Rolls is said to have been written by Lord Hardwicke alone, or in conjunction with Sir Joseph Jekyll. Cooper, Lettres, &c., p. 334, App. C.; Id. p. 85, note.

[3] Parkes, Hist. Chan. 56.

and in matters of grace, to the chancellor. And if the chancellor and others could not do without the king, then they were to bring the matter with their own hands before the king, to know his pleasure. So that no petitions should come before the king and his Council, but by the hands of the chancellor and other chief ministers.[1] And hence the writer deduces the conclusion that at this time all matters of grace were determinable only by the king. And he added that he did not find any traces of a Court of Equity in chancery in the time of Edward II., and that it seemed to him that the equity side of the court began in the reign of Edward III.,[2] when by proclamation he referred matters of grace to the cognizance of the chancellor.[3] And the

[1] Legal Judic. in Chan. (1727) pp. 27, 28, 29. The Ordinance (8 Edw. I.) is cited at large in the work, The Legal Judicature, &c., p. 27, and is as follows. It recites that the people who came to Parliament were often "delayed and disturbed, to the great grievance of them and of the court, by the multitude of petitions laid before the king, the greatest part whereof might be despatched by the chancellor and by the justices; therefore it is provided that all the petitions which concern the seal shall come first to the chancellor; and those which touch the exchequer, to the exchequer; and those which concern the justices and the law of the land, to the justices; and those which concern the Jews, to the justices of the Jews; and if the affairs are so great, or if they are of grace, that the chancellor and others cannot do it without the king, then they shall bring them with their own hands before the king, to know his pleasure; so that no petitions shall come before the king and his Council, but by the hands of his said chancellor and other chief ministers; so that the king and his Council may, without the load of other business, attend to the great business of his realm and of other foreign countries." The same ordinance will be found in Ryley, Placit. Parlim. p. 442, and Parkes, Hist. Chan. 29, 30.

[2] Legal Judic. in Chan. (1727), p. 28.

[3] Id. 30, 31 (22 Edw. III.). See Parkes, Hist. Chan. 35; 1 Equity Abr. Courts, B. note (*a*). The proclamation is given in the Legal Judicature, &c., pp. 30, 31, and in Parkes, History of Chancery, p. 35. It is as follows: "The King to the sheriffs of London greeting: Forasmuch as we are greatly and daily busied in various affairs concerning us and the state of our realm of England: We will, That whatsoever business, relating as well to the common law of our kingdom as our special grace, cognizable before us, from henceforth be prosecuted as followeth, viz. The common law business, before the Archbishop of Canterbury elect, our chancellor, by him to be despatched; and the other matters, grantable by our special grace, be prosecuted before our said chancellor, or our well-beloved clerk, the Keeper of the Privy Seal, so that they, or one of them, transmit to us such petitions of business which without consulting us they cannot determine, together with their advice thereupon, without any further prosecution to be had before us for the same; that upon inspection thereof we may further signify to the aforesaid chancellor or keeper our will and pleasure therein; and, that none other do for the future pursue such kind of business before us, we command you immediately, upon sight hereof, to make proclamation of the premises," &c. Mr. Lambard, in his work on the Jurisdiction of Courts, says of the Court of Chancery, that "the

jurisdiction was clearly established and acted on in the reign of Richard II.[1]

§ 45. **Same.** — Mr. Justice Blackstone seems to rely on the same general origin of the jurisdiction of chancery, as arising from the reference of petitions from the Privy Council to the chancellor; and also from the introduction of uses of land, about the end of the reign of Edward III.[2] Mr. Wooddeson deduces the jurisdiction from the same source, and lays great stress on the proclamation of 22 Edw. III.; and also on the statute of 36 Edw. III. (stat. 1, ch. 9), which he, as well as Spelman, considers as referring many things to the sole and exclusive cognizance of the chancellor.[3] And he adds, that it seems incontrovertible that the chancery exercised an equitable jurisdiction, though its practice perhaps was not very flourishing or frequent through the reign of Edward II.[4]

§ 46. **Same.** — But all our juridical antiquaries admit that the jurisdiction of chancery was established, and in full operation, during the reign of Richard II.; and their opinions are supported by the incontrovertible facts contained in the remonstrances and other acts of Parliament. At this period the extensive use or

king did at first determine causes in equity in person; and about the 20th of Edward III., the king, going beyond sea, delegated this power to the chancellor;" and then, he says, "Several statutes were made to enlarge the jurisdiction of this court, 17 Rich. II. ch. 6," &c. Bigland arguendo in Rex *v.* Standish (1 Mod. R. 59). And Bigland then adds, "But the chancellor took not upon him, ex officio, to determine matters in equity, till Edward the Fourth's time; for till then it was done by the king in person, who delegated to whom he pleased." This last remark seems, from the recent publication of the Record Commissioners, to be founded in error. 1 Cooper, Public Rec. p. 354, ch. 18.

[1] Id. 29, 32, 33; Parkes, Hist. Chan. 39 to 44, 54; Rex *v.* Standish, 1 Mod. R. 59, Bigland's Argument.

[2] 3 Black. Comm. 50 to 52; Parkes, Hist. Chan. 59.

[3] 1 Wooddes. Lect. vi. p. 176, and note (*f*); 2 Inst. 553; Parkes, Hist. Chan. 35; 1 Eq. Abr. Courts, B. note (*a*).

[4] 1 Wooddes. Lect. vi. pp. 178, 179 to 183; see also 7 Dane's Abridg. ch. 225, art. 4, § 1. Mr. Reeves, in his History of the English Law, traces the origin of the Court of Chancery to the reign of Richard II.; and refers the probable origin of its jurisdiction to the reference of petitions to the chancellor by Parliament or by the king's Council; and conjectures that he soon afterwards, as the king's adviser, began to grant redress, without any such reference, by the mere authority of the king. 3 Reeves, Hist. of English Law, pp. 188 to 191. Mr. Jeremy, in the Introduction to his Treatise on Equity Jurisdiction (pp. i. to xxi.), has given a sketch of the origin and progress of that jurisdiction in England. It is certainly a valuable though concise review of it. But it does not seem to contain any remarks important to be taken notice of, beyond what are furnished by the other authors already cited. See also Barton on Eq. Pr. Introd. pp. 2 to 13.

abuse of the powers of chancery had become an object of jealousy with Parliament, and various efforts were made to restrain and limit its authority. But the Crown steadily supported it.[1] And the invention of the writ of subpœna by John Waltham, Bishop of Salisbury, who was Keeper of the Rolls, about the 5th of Richard II., gave great efficiency, if not expansion, to the jurisdiction.[2] In the 13th of Richard II. the Commons prayed that no party might be required to answer before the chancellor or the Council of the king for any matter where a remedy is given by the common law, unless it be by writ of scire facias in the county where it is found by the common law. To which the king answered that he would preserve his royalty, as his progenitors had done before him.[3] And the only redress granted was by Stat. 17 Richard II., ch. 6, by which it was enacted that the chancellor should have power to award damages to the defendant, in case the suggestions of the bill were untrue, according to his discretion.[4] The struggles upon this subject were maintained in the subsequent reigns of Henry IV. and V. But the Crown resolutely resisted all appeals against the jurisdiction; and finally, in the time of Edward IV., the process by bill and subpœna was become the daily practice of the court.[5]

§ 47. **Same.** — Considerable new light has been thrown upon the subject of the origin and antiquity of the equitable jurisdiction of the Court of Chancery by the recent publication of the labors of the Commissioners on the Public Records. Until that period the notion was very common (which was promulgated by Lord Ellesmere) that there were no petitions of the chancery remaining in the office of record before the 15th year of the reign of Henry VI. But it now appears that many hundreds have been lately found among the records of the Tower for nearly fifty years antecedent

[1] Parkes, Hist. Chan. 39 to 44.

[2] 3 Reeves, Hist. 192 to 194; Id. 274, 379, 380, 381; 3 Black. Comm. 52; Bac. Abr. Court of Chancery, C. In the third year of the reign of Henry V., the Commons, in a petition to the king, declared themselves aggrieved by writs of subpœna sued out of chancery for matters determinable at the common law, "which were never granted or used before the time of the late King Richard, when John Waltham, heretofore Bishop of Salisbury, of his craft, made, formed, and commenced such innovations." Parkes, Hist. Chan. 47, 48; 1 Wooddes. Lect. vi. pp. 183, 184. See also Gilb. Forum Roman. 17.

[3] Parkes, Hist. Chan. 41; 4 Inst. 82.

[4] Parkes, Hist. Chan. 41, 42; 3 Black. Comm. 52; 4 Inst. 82, 83; 1 Wooddes. Lect. vi. p. 183; 3 Reeves, Hist. 194.

[5] 3 Black. Comm. 53; Parkes, Hist. Chan. pp. 45 to 57; 1 Wooddes. Lect. vi. pp. 183 to 186; 3 Reeves, Hist. pp. 193, 194, 274, 379, 380.

to the period mentioned by Lord Ellesmere, and commencing about the time of the passage of the statute of 17 Rich. II. ch. 6.[1] But there is much reason to believe that upon suitable researches many petitions or bills addressed to the chancellor will be found of a similar character during the reigns of Edward I., Edward II., and Edward III.[2]

§ 48. **Same.** — From the proceedings which have been published by the Record Commissioners it appears that the chief business of the Court of Chancery in those early times did not arise from the introduction of uses of land, according to the opinion of most writers on the subject. Very few instances of applications to the chancellor on such grounds occur among the proceedings of the chancery during the first four or five reigns after the equitable jurisdiction of the court seems to have been fully established. Most of these ancient petitions appear to have been presented in consequence of assaults and trespasses and a variety of outrages which were cognizable at common law, but for which the party complaining was unable to obtain redress in consequence of the maintenance and protection afforded to his adversary by some powerful baron, or by the sheriff, or by some officer of the county in which they occurred.[3]

[1] 1 Cooper, Pub. Rec. p. 355. I extract this statement from the Preface to the Calendars of the Proceedings in Chancery, &c., published by the Record Commissioners in 1827, and now before me. That Preface is signed by John Bayley, Sub-Commissioner. But it would seem that it was in fact drawn up by Mr. Lysons more than ten years before. Mr. Cooper, in his very valuable account of the Public Records, has published this preface verbatim, and has also extracted a letter of Mr. Lysons, written on the same subject in 1816. The preface and letter seem almost identical in language. 1 Cooper, Pub. Rec. ch. 18, p. 354; Id. 384, note (*b*); Id. 455 to 458. In the English Quarterly Jurist for January, 1828, there will be found, in a review of these Calendars, a very succinct but interesting account of the contents of the early Chancery Cases printed by the Record Commissioners.

[2] Mr. Cooper says that he "has made some inquiries which induce him to think that there still exist among the records at the Tower many petitions or bills addressed to the chancellor during the reigns of Edw. I., Edw. II. and Edw. III., similar to those addressed to that judge during the reign of Richard II., selections from which have been printed. Upon a very slight research several documents of this description are stated to have been discovered, but only one of them has been seen by the compiler. It is dated the 38th year of Edward III." 1 Cooper, Publ. Rec. Addenda, pp. 454, 455. Mr. Barton says that so early as the reign of Edward I. the chancellor began to exercise an original and independent jurisdiction, as a Court of Equity in contradistinction to a Court of Law. Barton on Eq. Pr. Introd. p. 7.

[3] This passage is a literal transcript from the Preface to the Calendars in Chancery; and it is fully borne out by the examples of those bills and

§ 49. **Same.** — If this be a true account of the earliest known exercises of equitable jurisdiction, it establishes the point that it was principally applied to remedy defects in the common-law proceedings; and therefore that equity jurisdiction was entertained upon the same ground which now constitutes the principal reason of its interference, viz., that a wrong is done, for which there is no plain, adequate, and complete remedy in the Courts of Common Law.[1] And in this way great strength is added to the opinions of Lord Hale and Lord Hardwicke, that its jurisdiction is in reality the residuum of that of the Commune Concilium or Aula Regis, not conferred on other courts, and necessarily exercisable by the Crown as a part of its duty and prerogative to administer justice and equity.[2] The introduction of Uses or Trusts [3] at a later period may have given new activity and extended operation to the jurisdiction of the court, but it did not found it. The redress given by the chancellor in such cases was merely a new application of the old principles of the court, since there was no remedy at law to enforce the observance of such uses or trusts.[4]

petitions given at large in the same work. Mr. Cooper, in his own work on the Public Records, has given an abstract or marginal note of all the examples thus given, from the reign of Richard II. to the reign of Richard III., amounting in number to more than one hundred. 1 Cooper, Pub. Rec. pp. 359, 373; Id. pp. 377 to 385. As we recede from the reign of Richard II. and advance to modern times, the cases become of a more mixed character, and approach to those now entertained in chancery.

[1] See Treatise on Subpœna, ch. 2; Harg. Law Tracts, pp. 333, 334.

[2] See Eunomus Dial. 3, § 60; 1 Eq. Abridg. Courts, B. note (*a*). Ante, § 42. See the British and Foreign Quarterly Review, No. 27, Dec. 1842, pp. 167, 168, 172, 173.

[3] Upon this subject see an article by Mr. Justice Holmes in the April, 1885, number of the Law Quarterly Review.

[4] See 3 Black. Comm. 52; 3 Reeves, Hist. 379, 381; 1 Wooddes. Lect. vi. pp. 174, 176, 178, 182; Eunomus, Dial. 3, § 60; Parkes, Hist. Chan. 28 to 31. The view which is here taken of the subject is confirmed by the remarks of the commissioners under the chancery commission, in the 50th George III., whose report was afterwards published by Parliament in 1826. The passage to which allusion is made is as follows: "The proceedings in the Courts of Common Law are simple, and generally founded on certain writs of great antiquity, conceived in prescribed forms. This adherence to prescribed forms has been considered as important to the due administration of justice in common cases. But in progress of time cases arose in which full justice could not be done in the Courts of Common Law according to the practice then prevailing. And for the purpose of obtaining an adequate remedy in such cases resort was had to the extraordinary jurisdiction of the Courts of Equity, which alone had the power of examining the party on oath, and thereby acting through the medium of his conscience, and of procuring the evidence of persons

§ 50. **Same.** — From this slight review of the origin and progress of equitable jurisdiction in England, it cannot escape observation how naturally it grew up in the same manner, and under the same circumstances, as the equitable jurisdiction of the prætor at Rome. Each of them arose from the necessity of the thing in the actual administration of justice, and from the deficiencies of the positive law (the lex scripta), or from the inadequacy of the remedies, in the prescribed forms, to meet the full exigency of the particular case. It was not an usurpation for the purpose of acquiring and exercising power, but a beneficial interposition, to correct gross injustice and to redress aggravated and intolerable grievances.[1]

§ 51. **Same.** — But be the origin of the equity jurisdiction of the Court of Chancery what it may, from the time of the reign of Henry VI. it constantly grew in importance;[2] and in the reign of Henry VIII. it expanded into a broad and almost boundless jurisdiction under the fostering care and ambitious wisdom and

not amenable to the jurisdiction of the Courts of Common Law, and whose evidence therefore it was in many cases impossible to obtain without the assistance of a Court of Equity. The application to this extraordinary jurisdiction, instead of being in the form of a writ prescribed by settled law, seems always to have been in the form of a petition of the party or parties aggrieved, stating the grievance, the defect of remedy by proceedings in the Courts of Common Law, and the remedy which it was conceived ought to be administered. This mode of proceeding unavoidably left every complaining party to state his case according to the particular circumstances, always asserting that the party was without adequate remedy at the common law." The reviewer of the Early Proceedings in Chancery, in the English Jurist for January, 1828, concludes his observations in the following manner: "It is, we think, established to demonstration, that the general jurisdiction of the court was derived from that extensive judicial power which in early times the king's ordinary council had exercised; but that it arose gradually and insensibly as circumstances occurred and occasions seemed to demand it; and that having so arisen, it afterwards settled down by equally slow degrees, and in consequence of occasional resistance, excited to its encroaching and despotic spirit, appears to us to be equally as demonstrable." 1 English Quarterly Jurist, p. 350.

[1] 1 Kaims on Equity, Introd. p. 19; Butler's Horæ Jurid. § v. 3, pp. 43 to 46; Id. App. note 3, p. 130. Those who have a curiosity to trace the origin and history of the prætor's authority in Rome, and the gradual development or assumption of jurisdiction by him, will find ample means for this purpose in Taylor's Elements of the Civil Law, pp. 210 to 216, and in Heineccius De Edictis Prætorum, Lib. 1, cap. 6, per tot. The same complaints were made at Rome as in England, of the excess and abuse of authority by the prætors, and the complaints commonly ended in the same way. The jurisdiction was occasionally restricted, but it was generally confirmed. See Butler's Horæ Jurid. § v. 3, pp. 43 to 46.

[2] Parkes, Hist. Chan. 55, 56; 3 Reeves, Hist. 379 to 382.

love of power of Cardinal Wolsey.[1] Yet (Mr. Reeves observes), after all, notwithstanding the complaints of the Cardinal's administration of justice, he has the reputation of having acted with great ability in the office of chancellor, which lay heavier upon him than it had upon any of his predecessors, owing to the too great care with which he entertained suits, and the extraordinary influx of business, which might be attributed to other causes.[2] Sir Thomas More, the successor to the Cardinal, took a more sober and limited view of Equity Jurisprudence, and gave public favor as well as dignity to the decrees of the court. But still there were clamors from those who were hostile to equity during his time, and especially to the power of issuing injunctions to judgments and other proceedings, in order to prevent irreparable injustice.[3] This controversy was renewed with much greater heat and violence in the reign of James I., upon the point whether a Court of Equity could give relief for or against a judgment at common law; and it was mainly conducted by Lord Coke against, and by Lord Ellesmere in favor of, the chancery jurisdiction. At last the matter came directly before the king, and upon the advice and opinion of very learned lawyers to whom he referred it, his Majesty gave judgment in favor of the equitable jurisdiction in such cases.[4] Lord Bacon succeeded Lord Ellesmere;

[1] 4 Reeves, Hist. 368, 369; Parkes, Hist. Chan. pp. 61, 62; 4 Inst. pp. 91, 92. It seems that the first delegation of the powers of the Lord Chancellor to commissioners was in the time of Cardinal Wolsey. It will be found in Rymer's Fœdera, tom. 14, p. 299; Parkes, Hist. Chan. pp. 60, 61. It was in the same reign that the Master of the Rolls (it is said), under a like appointment, first set apart and used to hear causes at the Rolls in the afternoon. The Master who thus first heard causes was Cuthbert Tunstall. 4 Reeves, Hist. of the Law, 368, 369; 5 Reeves, Hist. 160. But see Discourse on the Judicial Authority of the Master of the Rolls (1728), § 3, p. 83, &c.; Id. § 4, p. 110, &c., ascribed to Sir Joseph Jekyll.

[2] 4 Reeves, Hist. 370.

[3] Sir James Mackintosh's Life of Sir Thomas More; 4 Reeves, Hist. pp. 370 to 376; Parkes, Hist. Chan. pp. 63 to 65.

[4] 1 Collect. Jurid. 23, &c.; 1 Wooddes. Lect. vi. p. 186; 3 Black. Comm. 54; Parkes, Hist. Chan. p. 80. The controversy gave rise to many pamphlets, not only at the time but in later periods. The learned reader who is inclined to enter upon the discussion of these points, now of no importance except as a part of the juridical history of England, may consult advantageously the following works: Observations concerning the Office of Lord Chancellor, published in 1651, and ascribed (though it is said incorrectly) to Lord Ellesmere (Discourse concerning the Judicial Authority of the Master of Rolls, 1728, p. 51); A Vindication of the Judgment of King James, &c., printed in an Appendix to the first volume of Reports in Chancery, and in 1 Collect. Jurid. 23, &c.; the several Treatises on the Writ of Subpœna in Chancery, and the Abuses and Remedies

but few of his decrees which have reached us are of any importance to posterity.[1] But his celebrated ordinances for the regulation of chancery gave a systematical character to the business of the court; and some of the most important of them (especially as to bills of review) still constitute the fundamental principles of its present practice.[2]

§ 52. **Same.** — From this period down to the time when Sir Heneage Finch (afterwards Earl of Nottingham) was elevated to the Bench (in 1673), little improvement was made either in the principles or in the practice of chancery;[3] and none of the persons who held the seal were distinguished for uncommon attainments or learning in their profession.[4] With Lord Nottingham a new era commenced. He was a person of eminent abilities and the most incorruptible integrity. He possessed a fine genius, great liberality of views, and a thorough comprehension of the true principles of equity; so that he was enabled to disentangle the doctrines from any narrow and technical notions, and to expand the remedial justice of the court far beyond the aims of his predecessors. In the course of nine years, during which he presided in the court, he built up a system of jurisprudence and jurisdiction upon wide and rational foundations, which served as a model for succeeding judges, and gave a new character to the court;[5] and hence he has been emphatically called "the father of Equity."[6] His immediate successors availed themselves very greatly of his profound learning and judgment. But a successor was still wanted, who with equal genius, abilities, and liberality should hold the seals for a period long enough to enable him to widen the foundation and complete the structure begun and

in Chancery, in Hargrave's Law Tracts, pp. 321, 425; and 4 Reeves, Hist. of the Law, pp. 370 to 377; 2 Swanst. 24, note. There is a curious anecdote related of Sir Thomas More, who invited the judges to dine with him, and after dinner showed them the number and nature of the causes in which he had granted injunctions to judgments of the Court of Common Law; and the judges, upon full debate of the matters, confessed that they could have done no otherwise themselves. The anecdote is given at large in Mr. Cooper's Lettres sur la Cour de la Chancellerie, Lett. 25, p. 185, note 1, from Roper's Life of Sir Thomas More.

[1] 3 Black. Comm. 55.

[2] See Bacon's Ord. in Chancery, by Beames.

[3] Black. Comm. 55.

[4] See Parkes, Hist. Chan. pp. 92 to 210.

[5] Mr. Justice Blackstone has pronounced a beautiful eulogy on him, in 3 Black. Comm. 56, from which the text is with slight alterations borrowed. See also 4 Black. Comm. 442.

[6] 1 Madd. Ch. Pr. Preface, p. 13. See Parkes, Hist. Chan. pp. 211, 212, 213, 214; 1 Kent, Comm. Lect. 21, p. 492 (2d ed.).

planned by that illustrious man. Such a successor at length appeared in the person of Lord Hardwicke. This great judge presided in the Court of Chancery during the period of twenty years; and his numerous decisions evince the most thorough learning, the most exquisite skill, and the most elegant juridical analysis. There reigns throughout all of them a spirit of conscientious and discriminating equity, a sound and enlightened judgment as rare as it is persuasive, and a power of illustration from analogous topics of the law as copious as it is exact and edifying. Few judges have left behind them a reputation more bright and enduring; few have had so favorable an opportunity of conferring lasting benefits upon the jurisprudence of their country; and still fewer have improved it by so large, so various, and so important contributions. Lord Hardwicke, like Lord Mansfield, combined with his judicial character the still more embarrassing character of a statesman, and in some sort of a minister of state. Both of them of course encountered great political opposition (whether rightly or wrongly it is beside the purpose of this work to inquire); and it is fortunate for them that their judicial labors are embodied in solid volumes, so that when the prejudices and the passions of the times are passed away, they may remain open to the severest scrutiny, and claim from posterity a just and unimpeachable award.[1]

§ 53. **Same.** — This short and imperfect sketch of the origin and history of Equity Jurisdiction in England will be here concluded. It has not been inserted in this place from the mere desire to gratify those whose curiosity may lead them to indulge in antiquarian inquiries, laudable and interesting as it may be. But it seemed, if not indispensable, at least important, as an introduction to a more minute and exact survey of that jurisdiction as administered in the present times. In the first place,

[1] See 1 Kent Comm. Lect. 21, p. 494 (2d ed.), and Lord Kenyon's opinion in Goodtitle *v.* Otway, 7 T. R. 411. Mr. Charles Butler, in his Reminiscences, has given a sketch of Lord Hardwicke and Lord Mansfield, which no lawyer can read without high gratification. Few men were better qualified to judge of their attainments. 1 Butler's Reminis. § 11, n. 1, 2, pp. 104 to 116. Lord Eldon, in Ex parte Greenway, 8 Ves. R. 312, said, "He (Lord Hardwicke) was one of the greatest judges that ever sat in Westminster Hall." Those who wish to form just notions of the great chancellors of succeeding times down to our own may well consult the same interesting pages, in which Lord Camden, Lord Thurlow, Lord Roslyn, Sir William Grant, and though last, not least, the venerable Lord Eldon, are spoken of in terms of high but discriminating praise. See 1 Kent, Comm. Lect. 21, pp. 494, 495 (2d ed.).

without some knowledge of the origin and history of Equity Jurisdiction, it will be difficult to ascertain the exact nature and limits of that jurisdiction, and how it can or ought to be applied to new cases as they arise. If it be a mere arbitrary or usurped jurisdiction, standing upon authority and practice, it should be confined within the very limits of its present range; and the terra incognita and the terra prohibita ought to be the same as to its boundaries. If, on the other hand, its jurisdiction be legitimate, and founded in the very nature of remedial justice, and in the delegation of authority in all cases where a plain, adequate, and complete remedy does not exist in any other court, to protect acknowledged rights and to prevent acknowledged wrongs (that is, acknowledged in the Municipal Jurisprudence), then it is obvious that it has an expansive power to meet new exigencies; and the sole question, applicable to the point of jurisdiction, must from time to time be, whether such rights and wrongs do exist, and whether the remedies therefor in other courts, and especially in the Courts of Common Law, are full, and adequate to redress them. If the present examination (however imperfect) has tended to any result, it is to establish that the latter is the true and constitutional predicament and character of the Court of Chancery.

§ 54. **Same.** — In the next place a knowledge of the origin and history of Equity Jurisdiction will help us to understand, and in some measure to explain, as well as to limit, the anomalies which do confessedly exist in the system. We may trace them back to their sources, and ascertain how far they were the result of accidental or political or other circumstances; of ignorance or perversity or mistake in the judges; of imperfect development of principles; of narrow views of public policy; of the seductive influence of prerogative; or finally of a spirit of accommodation to the institutions, habits, laws, or tenures of the age, which have long since been abolished, but have left the scattered fragments of their former existence behind them. We shall thus be enabled to see more clearly how far the operation of these anomalies should be strengthened or widened; when they may be safely disregarded in their application to new cases and new circumstances; and when, though a deformity in the general system, they cannot be removed without endangering the existence of other portions of the fabric, or interfering with the proportions of other principles which have been moulded and adjusted with reference to them.

§ 55. **Same.** — In the next place such a knowledge will enable us to prepare the way for the gradual improvement as well of the science itself as of the system of its operations. Changes in law, to be safe, must be slowly and cautiously introduced and thoroughly examined. He who is ill-read in the history of any law must be ill-prepared to know its reasons as well as its effects. The causes or occasions of laws are sometimes as important to be traced out as their consequences. The new remedy to be applied may otherwise be as mischievous as the wrong to be redressed. History has been said to be philosophy teaching by examples; and to no subject is this remark more applicable than to law, which is emphatically the science of human experience. A sketch, however general, of the origin and sources of any portion of jurisprudence may at least serve the purpose of pointing out the paths to be explored, and by guiding the inquirer to the very places he seeks, may save him from the labor of wandering in the devious tracks, and of bewildering himself in mazes of errors as fruitless as they may be intricate.

§ 56. **Same.** — In America Equity Jurisprudence had its origin at a far later period than the jurisdiction properly appertaining to the Courts of Common Law. In many of the colonies, during their connection with Great Britain, it had either no existence at all, or a very imperfect and irregular administration.[1] Even

[1] Equity Jurisprudence scarcely had an existence, in any large and appropriate sense of the terms, in any part of New England during its colonial state. (1 Dane, Abridg. ch. 1, art. 7, § 51; 7 Dane, Abridg. ch. 225, arts. 1, 2.) In Massachusetts and Rhode Island it still has but a very limited extent. In Maine and New Hampshire more general equity powers have been, within a few years, given to their highest Courts of Law. In Vermont and Connecticut it had an earlier establishment; in the former State since the Revolution, and in the latter a short time before the Revolution. 2 Swift, Dig. p. 15, edit. 1823. In Virginia there does not seem to have been any court having chancery powers earlier than the Act of 1700, ch. 4. 3 Tucker's Black. App. 7. In New York the first Court of Chancery was established in 1701; but it was so unpopular, from its powers being vested in the Governor and Council, that it had very little business until it was reorganized in 1778. (1 John. Ch. Rep. Preface; Campb. and Camb. American Chancery Digest, Preface, 6; Blake's Chan. Introduct. viii.) In New Jersey it was established in 1705. (1 Fonbl. Eq. by Laussat, edit. 1831, p. 14, note.) Mr. Laussat, in his Essay on Equity in Pennsylvania (1826), has given an account of its origin and progress and present state in that Commonwealth (pp. 16 to 31). From this account we learn that the permanent establishment of a Court of Equity was successfully resisted by the people during the whole of its colonial existence; and that the year 1790 is the true point at which we must fix the establishment of Equity in the Jurisprudence of Pennsylvania. It has since been greatly expanded by some legislative enactments. See also 7 Dane, Abridg. ch. 225, arts. 1, 2 (*a*).

since the Revolution, which severed the ties which bound us to the parent country, it has been of slow growth and cultivation; and there are still some States in whose municipal jurisprudence it has no place at all, or no place as a separate and distinct science. Even in those States in which it has been cultivated with the most success and for the greatest length of time, it can scarcely be said to have been generally studied or administered as a system of enlightened and exact principles until about the close of the eighteenth century.[1] Indeed until a much later period, when Reports were regularly published, it scarcely obtained the general regard of the profession beyond the purlieus of its immediate officers and ministers. Even in the State of New York, whose rank in jurisprudence has never been second to that of any State in the Union (if it has not been the first among its peers) equity was scarcely felt in the general administration of justice until about the period of the Reports of Caines and of Johnson. And perhaps it is not too much to say that it did not attain its full maturity and masculine vigor until Mr. Chancellor Kent brought to it the fulness of his own extraordinary learning, unconquerable diligence, and brilliant talents. If this tardy progress has somewhat checked the study of the beautiful and varied principles of equity in America, it has on the other hand enabled us to escape from the embarrassing effects of decisions which might have been made at an earlier period, when the studies of the profession were far more limited and the benches of America were occasionally, like that of the English Chancery in former ages, occupied by men who, whatever might have been their general judgment or integrity, were inadequate to the duties of their stations, from their want of learning or from their general pursuits.[2] Indeed there were often other circumstances which greatly restricted or impeded a proper choice; such as the want of the due enjoyment of executive or popular favor by men of the highest talents, or the discouragement of a narrow and incompetent salary.

§ 57. **Same.** — The Equity Jurisprudence at present exercised in America is founded upon, co-extensive with, and in most respects conformable to, that of England. It approaches even nearer to the latter than the jurisdiction exercised by the Courts of Common Law in America approaches to the common law as administered in England. The common law was not, in many

[1] 1 Dane, Abridg. ch. 1, art. 7, § 51; 7 Dane, Abridg. ch. 225, arts. 1, 2.

[2] See 1 Quarterly Law Rev. 455. A Court of Chancery existed in Pennsylvania between the years 1720 and 1736. Ib. 456.

particulars, applicable to the situation of our country when it was first introduced. Whereas Equity Jurisprudence in its main stream flows from the same sources here that it does in England, and admits of an almost universal application in its principles. The Constitution of the United States has in one clause conferred on the National Judiciary cognizance of cases in equity as well as in law; and the uniform interpretation of that clause has been that by cases in equity are meant cases which, in the jurisprudence of England (the parent country), are so called as contradistinguished from cases at the common law.[1] So that in the Courts of the United States Equity Jurisprudence generally embraces the same matters of jurisdiction and modes of remedy as exist in England.[2]

§ 58. **Administration of Equity Jurisprudence.** — In nearly all the States in which Equity Jurisprudence is recognized it is now

[1] Robinson *v.* Campbell, 16 U. S. 212, 4 L. Ed. 372; Parsons *v.* Bradford, 28 U. S. 433, 7 L. Ed. 732; 3 Story, Comm. on Const. 506, 507; Id. 644, 645; United States *v.* Howland, 17 U. S. 108, 4 L. Ed. 526; 7 Dane, Abridg. ch. 225, art. 1.

[2] "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." Jessel, M. R. in Knatchbull *v.* Hallett, 13 Ch. D. 696, 710.

A suit in equity is not a proceeding in rem properly so called. It does not purport to summon or invite, by notice or otherwise, all the world to come in, so far as there are any adverse interests. It is more personal even than the common law, and works out its decrees by orders to the defendants. Pardee *v.* Aldridge, 189 U. S. 433, 47 L. Ed. 883, 23 S. Ct. Rep. 514.

By act of Parliament, Aug. 5, 1873, 36 and 37 Vict. ch. 66, the Courts of Chancery, Queen's Bench, Common Pleas, Exchequer, Admiralty, Probate, Divorce and Matrimonial Causes, and the London Court of Bankruptcy were consolidated into one court of two chief divisions, called Her Majesty's High Court of Justice and Her Majesty's High Court of Appeal. The act provides that if a plaintiff or a defendant claims any equitable estate or relief or defence, in any case before any judge, he shall have the same relief as ought to have been given in the Court of Chancery before the act.

administered in the modes and according to the forms which appertain to it in England; that is, as a branch of jurisprudence separate and distinct from the remedial justice of Courts of Common Law.[1] [Chancery jurisdiction is conferred on the courts of the United States with the limitation " that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." The rules of the High Court of Chancery of England have been adopted by the courts of the United States. And there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States, which has been decided against in a State court.

In exercising this jurisdiction, the courts of the Union are not limited by the chancery system adopted by any State, and they exercise their functions in a State where no court of chancery has been established. The usages of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of government, it has been observed.[2]

The jurisdiction of the courts of the United States, sitting in equity, cannot be controlled by the laws of the States or the decisions of the State courts, except that the courts of the United States, sitting in equity, may enforce new rights of an equitable nature created by such laws.

Sec. 16 of the Judiciary Act of 1789, 1 Stat. 82, ch. 20, with reference to the equity jurisdiction of courts of the United States, is merely declaratory, making no alteration whatever in the rule of equity on the subject of legal remedies, but only expressive of the law which has governed proceedings in equity ever since their adoption in the courts of England. The term " speedy " as used in the demurrer, is embraced by the terms " complete " in the statute.[3]

It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress.

[1] Fonbl. on Eq. by Laussat (edit. 1831), pp. 13 to 20; 7 Dane's Abridg. ch. 225, art. 1, 2.

[2] State of Pennsylvania *v.* Wheeling Bridge Co., 54 U. S. 563, 14 L. Ed. 249; Vattier *v.* Hinde, 32 U. S. 274, 8 L. Ed. 675; Fenn *v.* Holme, 62 U. S. 484, 16 L. Ed. 198.

[3] Rich *v.* Brexton, 158 U. S. 405, 39 L. Ed. 1022, 15 S. Ct. Rep. 1006; Whitehead *v.* Shattuck, 138 U. S. 150, 34 L. Ed. 873, 11 S. Ct. Rep. 276.

The principles of equity exist independently of and anterior to all congressional legislation, and the statutes are either annunciations of these principles or limitations upon their application in particular cases.[1]] In Pennsylvania it was formerly administered through the forms, remedies, and proceedings of the common law; and was thus mixed up with legal rights and titles in a manner not easily comprehensible elsewhere.[2] This anomaly has been in a considerable degree removed by some recent legislative enactments. In some of the States in the Union distinct Courts of Equity are established; in others the powers are exercised concurrently with the Common Law Jurisdiction by the same tribunal, being at once a Court of Law and a Court of Equity, somewhat analogous to the case of the Court of Exchequer in England. In others again no general equity powers exist; but a few specified heads of Equity Jurisprudence are confided to the ordinary Courts of Law, and constitute a limited statutable jurisdiction.[3]

[1] United States *v.* Detroit Lumber Co., 200 U. S. 339, 50 L. Ed. 499, 26 S. Ct. Rep. 282.

[2] Id. 18 to 20.

[3] Mr. Chancellor Kent, in a note to his Commentaries, has given a brief statement of the actual organization of Equity Jurisdiction in all the States; to which I gladly refer the learned reader. 4 Kent, Comm. Lect. 58, p. 163, note (*d*). A fuller account may be found in the Preface to Campbell and Cambreleng's American Chancery Digest (edit. 1828), in Mr. Laussat's edition of Fonblanque on Equity, vol. 1, pp. 11 to 20 (edit. 1831); and in Mr. Laussat's Essay on Equity in Pennsylvania, App. (1826). As the systems of the different States are in many cases subject to legislative authority, which is frequently engaged in introducing modifications, a more minute detail would scarcely be of any permanent importance to the profession. The article on Chancery Jurisdiction, in the first volume of the American Jurist, p. 314, contains many very valuable suggestions on this subject; and exhibits in a striking manner the importance of Equity Jurisprudence. See also 7 Dane's Abridg. ch. 225, arts. 1, 2.

As to the legislation of the States on the subject, see Bispham, Equity, pp. 16–23.

CHAPTER III

GENERAL VIEW OF EQUITY JURISDICTION

§ 59. **General View.** — Having traced out the nature and history of Equity Jurisprudence, we are naturally led to the consideration of the various subjects which it embraces and the measure and extent of its jurisdiction. Courts of Equity in the exercise of their jurisdiction may in a general sense be said to differ from Courts of Common Law in the modes of trial, in the modes of proof, and in the modes of relief. One or more of these elements will be found essentially to enter as an ingredient into every subject over which they exert their authority. Lord Coke has in his summary manner stated that three things are to be judged of in the Court of Conscience or Equity, — covin, accident, and breach of confidence;[1] or, as we should now say, matters of fraud, accident, and trust. Mr. Justice Blackstone has also said that Courts of Equity are established "to detect latent frauds and concealments which the process of the Courts of Law is not adapted to reach; to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a Court of Law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case than can always be obtained by the generality of the rules of the positive or common law."[2]

§ 60. **Equity Will Not Interfere in All Cases.** — These, as general descriptions, are well enough; but they are far too loose and inexact to subserve the purposes of those who seek an accurate knowledge of the actual or supposed boundaries of Equity Jurisdiction.

[1] 4 Inst. 84; Com. Dig. Chancery, Z.; 3 Black. Comm. 431; 1 Eq. Abr. Courts, B. § 4, p. 130; 1 Dane's Abridg. ch. 9, art. 1, § 3; Earl of Bath *v.* Sherwin, Prec. Ch. 261; s. c. 1 Bro. Parl. Cas. 266; Rex *v.* Hare & Mann, 1 Str. 149, 150, Yorke, arguendo; 1 Wooddes. Lect. vii. pp. 208, 209; Bac. Abridg. Court of Chancery, C.

[2] 3 Black. Comm. 92; and see 3 Black. Comm. 429 to 432.

Thus, for example, although fraud, accident, and trust are proper objects of Courts of Equity, it is by no means true that they are exclusively cognizable therein. On the contrary, fraud is in many cases cognizable in a Court of Law. Thus, for example, reading a deed falsely to an illiterate person, whether it be so read by the grantee or by a stranger, avoids it as to the other party at law.[1] And sometimes fraud, such as fraud in obtaining a will, or devise of lands, is exclusively cognizable there.[2] Many cases of accident are remediable at law, such as losses of deeds, mistakes in accounts and receipts, impossibilities in the strict performance of conditions, and other like cases. And even trusts, though in general of a peculiar and exclusive jurisdiction in equity, are sometimes cognizable at law; as, for instance, cases of bailments, and that larger class of cases where the action for money had and received for another's use is maintained ex æquo et bono.[3]

[1] Thoroughgood's Case, 2 Co. 9 a; Hobart, R. 296; Id. 126, 330, 426; Shutter's Case, 12 Co. R. 90; Jenkins' Cent. 166; Hayes *v.* Railroad, 143 N. C. 125, 55 S. E. 437.

[2] 1 Hovenden on Frauds, Introd. p. 16; Id. ch. 10, p. 252; 1 Dane, Abridg. ch. 9, art. 1, § 3; 3 Wooddes. Lect. lvi. p. 477.

[3] 3 Black. Comm. 431, 432; 1 Wooddes. Lect. vii. pp. 208, 209. While the action of assumpsit was at law, it was equitable in its nature. Comrs. *v.* Fry, 127 N. C. 262, 37 S. E. 259.

Where one party has received money to which another is entitled, the law presumes a contract if it is necessary to do so to enable the party entitled to recover the same. This enables the party having the right to the money, to an action of debt, indebitatus assumpsit, which, though an action at law, was equitable in its nature. It has been styled as "equitable action on the law side of the docket." Davidson *v.* Land Co., 126 N. C. 709, 36 S. E. 162.

Where holder of bond for title to purchase land, contracted to pay in wheat, and the quantity of bushels has been delivered, and the owner now informs him that his title to the land is defective, the proposed purchaser may recover in assumpsit for the value of the wheat. Ankeny *v.* Clark, 123 U. S. 392, 37 L. Ed. 475, 8 S. Ct. Rep. 221.

Payment of license fees for the privilege of carrying on trade in the Chicago River, imposed by the city of Chicago, in addition to the fees exacted by the government for coasting trade, is an interference with interstate commerce, and any fees so paid under protest may be recovered back, they not having been paid voluntarily. Harmon *v.* City of Chicago, 147 U. S. 396, 37 L. Ed. 219, 13 S. Ct. Rep. 306.

Whenever there is a legal liability the law creates a promise upon which an action of assumpsit will lie. Merriwether *v.* Bell, 22 Ky. L. Rep. 844, 58 S. W. 987.

An amount voluntarily paid to sheriff as his commissions on a mortgage sale, but which in fact was not a proper charge, may be recovered back. Sorderberg *v.* King County, 15 Wash. 194, 33 L. R. A. 670.

Before a third party making payment of a debt, secured by mortgage, can be subrogated to the rights of the mortgagee, he must show either that he made the payment at the request of the mortgagor, or to protect

§ 61. **Wrongs Not Relieved Against at Law or in Equity.** — On the other hand there are cases of fraud, of accident, and of trust, which neither Courts of Law nor of Equity presume to relieve or mitigate.[1] Thus a man may most unconscientiously wage his law in an action of debt; and yet the aggrieved party will not be relieved in any Court of Law or Equity.[2] And where the law

some interest he had of his own at the time of the payment. Norton *v.* Highleyman, 88 Mo. 624.

The general principle, that no one can make himself the creditor of another without his consent, or against his will, is familiar. But where one is surety for another, and pays the debt which the principal owes, the law implies that the latter requested such payment to be made, and also implies a promise to repay him. But the surety must be under some legal obligation to pay, otherwise the implication of a request to pay and promise to pay will not arise. Dawson *v.* Lee, 83 Ky. 53; Brown *v.* Chesterville, 63 Me. 241.

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 3, p. 16.

[2] Subscription to stock in a corporation, upon the promise that the subscriber was to be given a lot, will not be set aside where he was a party to the contract, which he alleges was illegal. Francis, Max. Introd. 6, 7; Cardwell *v.* Kelley, 95 Va. 570, 40 L. R. A. 242.

The authorities almost uniformly hold that when an illegal contract has been fully executed, and the interests and differences of the parties to it adjusted and agreed upon, and the money arising therefrom deposited to the credit of one or more of the respective parties, such depositary cannot, when sued by the party or parties to whom the money is due, successfully plead the illegality of the contract or transaction through which the money was originally obtained. Overholt *v.* Burbridge, 28 Utah 408, 79 Pac. 563.

The courts of this State have steadfastly refused to lend their aid to enforce contracts which are directed to the accomplishment of a fraudulent purpose, or to entertain suits to recover damages for a breach thereof, and where a decedent left all of his estate to four relatives, and excluded plaintiff's assignor, and subsequently the four devisees contracted and agreed that if no contest over the will should be made, that they would agree to divide the estate into five equal portions, and assign one-fifth to Mrs. Snook, and she assigned her interest to plaintiff, and later died, it was held that he was not entitled to recover. Wyckoff *v.* Weaver, 66 N. J. L. 648, 52 Atl. 356; Todd *v.* Rafferty's Admrs., 30 N. J. Eq. 254; Hope *v.* Assn., 58 N. J. L. 627, 34 Atl. 1070, 55 Am. St. Rep. 614; Minzesheimer *v.* Doolittle, 60 N. J. Eq. 394, 45 Atl. 611; Edwards *v.* Goldsboro, 141 N. C. 60, 53 S. E. 652.

Neither the sale of editorial columns nor services for carrying an election are cognizable in a court of justice as ground of action for a recovery of compensation. King *v.* Railroad, 147 N. C. 266, 60 S. E. 1133.

Promise to repay loss sustained in future contract is void. Burns *v.* Tomlinson, 147 N. C. 647, 61 S. E. 614.

The law will not lend its aid where contract appears to have been entered into by both contracting parties for express purpose of carrying into effect that which is prohibited by law. Sheppard *v.* Power Co., 150 N. C. 778, 64 S. E. 894.

A contract between railroad companies by which one agrees not to

has determined a matter, with all its circumstances, equity cannot (as we have seen) intermeddle against the positive rules of law.[1] And therefore equity will not interfere in such cases, notwithstanding accident or unavoidable necessity.[2] This was long ago remarked by Lord Talbot, who, after saying, "There are instances indeed in which a Court of Equity gives remedy where the law gives none", added: "But where a particular remedy is given by law, and that remedy is bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows."[3] And upon this ground relief was refused to a creditor of the wife against her husband after her death, though he had received a large fortune with her on his marriage.[4] So a man may by accident omit to make a will, appointment, or gift, in favor of some friend or relative, or he may leave his will unfinished; and

construct spur to a quarry, so as to enable one company to control the traffic, is void. Chicago etc. R. Co. *v.* Southern Indiana R. Co., 70 N. E. 843.

An agreement between publishers of rival newspapers, fixing the rates for public printing, and providing for a division of the proceeds, is an unlawful agreement, and no action lies to enforce it. Pendleton *v.* Asbury, 78 S. W. 651.

A court of equity will not aid one partner to recover his share of profits realized by partnership on account of an unlawful agreement between them to control the affairs of two railroad companies, incorporated for the purpose of stifling competition. Jackson *v.* McLean's Execrs., 100 Mo. 133, 13 S. W. 393.

An agreement of a director of a corporation to use his vote and influence to the disadvantage of the corporation, and in the interest and for the benefit of third persons, is an immoral and corrupt contract and will not be enforced. Attoway *v.* Bank, 93 Mo. 485, 5 S. W. 16; Detroit Salt Co. *v.* National Salt Co., 134 Mich. 103, 96 N. W. 1.

An action for the recovery of a deposit for stock in a company whose business is pool-selling and betting on horse races, will not be enforced when made in one State and to be performed in another, where to do so would contravene the criminal laws of the latter, or where to do so would be against the express prohibition of its laws. Comity between different States does not require a law of one State to be executed in another State when it would be against public policy of the latter State. No jurisdiction is bound to recognize or enforce contracts which are injurious to the welfare of its people, or which are in violation of its own laws. Thomas *v.* Bank, 72 N. E. 803; Pope *v.* Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568; Richardson *v.* Buhl, 77 Mich. 632, 43 N. E. 1108, 6 L. R. A. 457.

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 3; 1 Hovend. on Frauds, Introd. pp. 12, 13.

[2] Ibid.; 1 Dane's Abridg. ch. 9, art. 1, § 2.

[3] Heard *v.* Stanford, Cas. Temp. Talb. 174; Janney *v.* Buell, 55 Ala. 408, 411.

[4] Ibid.

yet there can be no relief.[1] And many cases of the non-performance of conditions precedent are equally without redress.[2] So cases of trust may exist, in which the parties must abide by their own false confidence in others, without any aid from courts of justice. Thus in cases of illegal contracts, or those in which one party has placed property in the hands of another for illegal purposes, as for smuggling, if the latter refuses to account for the proceeds and fraudulently or unjustly withholds them, the former must abide by his loss; for, "In pari delicto melior est conditio possidentis et defendentis," is a maxim of public policy equally respected in Courts of Law and Courts of Equity.[3] And on the other hand where the fraud is perpetrated by one party only, still, if it involves a public crime, a redress cannot be obtained except by a discovery of the facts from him personally, the law will not compel him to accuse himself of a crime; and therefore the case is one of irremediable injury.[4]

§ 62. **Same.** — These are but a few among many instances which might be selected to establish the justice of the remark that even in cases professedly within the scope of Equity Jurisdiction, such as fraud, accident, and trust, there are many exceptions; and that all that can be ascribed to such general allegations is general truth.[5] The true nature and extent of Equity Jurisdiction as at present administered must be ascertained by a specific enumeration of its actual limits in each particular class of cases falling within its remedial justice.[6] This will accordingly be done in the subsequent pages.

[1] See Whitten *v.* Russell, 1 Atk. 448, 449; 1 Madd. Ch. Pr. 39; Id. 45, 46; 1 Wooddes. Lect. vii. p. 214; Com. Dig. Chancery, 3 F. 8; 1 Fonbl. B. 1, ch. 3, § 7, and note (*x*); Francis, Max. M. 9, § 4.

[2] 1 Madd. Ch. Pr. 35; Popham *v.* Bamfield, 1 Vern. R. 83; Lord Falkland *v.* Bertie, 2 Vern. 333; 7 Dane's Abridg. ch. 225, art. 4, § 6.

[3] Holman *v.* Johnson, Cowper, R. 341; Armstrong *v.* Toler, 11 Wheaton, R. 258; Hannay *v.* Eve, 3 Cranch, R. 242; Grounds and Rudim. of the Law, M. 347, p. 260, edit. 1751; 7 Dane's Abridg. ch. 226, art. 18; Smith *v.* Bromley, Doug. R. 696, note. The civil law has a like maxim: "Paria delicta mutua compensatione tolluntur." Breviar. Advocat. title, Delictum. "Paria sunt non esse aliquid, bel non esse legitime." Id. Paria; Batty *v.* Chester, 5 Beavan, R. 103.

[4] Grounds and Rudim. of the Law, Introd. 6, 7; Id. M. 306, p. 225, edit. 1751; 2 Fonbl. Eq. B. 6, ch. 3, § 5. Equity has no criminal jurisdiction. Supra, note to § 25; Cope *v.* District Fair, 99 Ill. 489.

[5] See Com. Dig. Chancery, 3 F. 1 to 9; 7 Dane's Abridg. ch. 225, § 6; 1 Wooddes. Lect. vii. pp. 200 to 215.

[6] Dr. Dane, in his Abridgment and Digest, has devoted two large chapters to the consideration of the System and Practice of Equity, especially in the Courts of the United States. The diligent student will

§ 63. **Maxims of Equity.** — Before proceeding however to this distribution of the subject, it may be well to take notice of some few maxims and rules of a general nature which are of constant and tacit and sometimes of express reference in most of the discussions arising in equity, in order that we may understand the true nature and extent of the meaning attached to them.

[Certain principles in equity are established, and dominate in the administration of justice in that field with as much certainty as do principles upon the law side, so to speak, of the court. But mere precedents are of no avail except to illustrate the extent to which principles have been applied. The text-writers disagree, in some respects, in the manner of stating this, but are in harmony in this: While new principles are not to be added to those long established for the government of equitable remedies, the rules, not the precedents, are to control. There is no vitality in precedents; there is in rules. They are susceptible of expansion along every line necessary to reach new conditions. The ingenuity of man in devising new forms of wrong cannot outstrip such development.[1]]

§ 64. **Equity Follows the Law.** — In the first place it is a common maxim that equity follows the law, "Æquitas sequitur legem."[2] This maxim is susceptible of various interpretations. It may mean that equity adopts and follows the rules of law in all cases to which those rules may in terms be applicable; or it may mean that equity, in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law.[3] Now the maxim is true in both of these senses, as applied to different cases and different circumstances. It is universally true in neither sense; or rather it is not of universal application.[4] Where a rule

not fail to avail himself of this ample source of information. 7 Dane's Abridg. ch. 225, 226, from pp. 516 to 639.

[1] Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 936; Snow *v.* Blount, 182 Mass. 489, 65 N. E. 845; City of Baltimore *v.* Chesapeake & P. Tel. Co., 92 Md. 692, 48 Atl. 465; Broumel *v.* White, 87 Md. 521, 39 Atl. 1047; Deppen *v.* German-American Title Co., 24 Ky. Law Rep. 1110, 70 S. W. 868, 72 S. W. 768; Ruppel *v.* Missouri etc. Building Assn., 158 Mo. 613, 59 S. W. 1000; Springfield Grocer Co. *v.* Walton, 95 Mo. App. 526, 69 S. W. 477; German Natl. Bank *v.* First Natl. Bank, 59 Neb. 7, 80 N. W. 48; Walsh *v.* Walsh, 1 Neb. 719, 95 N. W. 1024; People *v.* Freeman, 97 N. Y. Supp. 343, 110 App. Div. 605; San Antonio & G. S. Ry. Co. *v.* San Antonio & G. R. Co., 25 Tex. Civ. App. 167, 60 S. W. 338; Frederick *v.* Douglas County, 96 Wis. 411, 71 N. W. 798.

[2] 1 Dane's Abridg. ch. 9, art. 1, § 2; Grounds and Rudim. of the Law, M. 9 (edit. 1751). See Earl of Bath *v.* Sherwin, 10 Mod. R. 1, 3; Cowper *v.* Cowper, 2 P. Will. 753.

[3] 3 Wooddes. Lect. lvi. pp. 479 to 482.

[4] Sir Thomas Clarke (Master of the Rolls), in one of his elaborate

either of the common or the statute law is direct, and governs the case with all its circumstances or the particular point, a Court of Equity is as much bound by it as a Court of Law, and can as little justify a departure from it.[1] If the law commands or prohibits a thing to be done, equity cannot enjoin the contrary or dispense with the obligation. Thus since the law has declared in England that the eldest son shall take by descent the whole undevised estate of his parent, a Court of Equity cannot disregard this canon of descent, but must give full effect and vigor to it in all controversies in which the title is asserted.[2] And yet there are cases in which equity will control the legal title of an heir, general or special, when it would be deemed absolute at law; and in which therefore, so far from following the law, it openly abandons it. Thus if a tenant in tail, not knowing the fact, should upon his marriage make a settlement on his wife, and the heir in tail should engross the settlement and conceal the fact, although at law his title would be absolute, a Court of Equity would award a perpetual injunction against asserting it to the prejudice of the settlement.[3] So if an heir-at-law should

opinions, has remarked, in regard to uses and trusts, that at law the legal operation controls the intent; but in equity the intent controls the legal operation of the deed. Burgess *v.* Wheate, 1 W. Black. R. 137. Where 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 absence of fraud, accident or mistake to so modify it as to make it legal and then enforce it. Hedges *v.* Dixon, 150 U. S. 182, 37 L. Ed. 1047, 14 S. Ct. Rep. 71.

In determining what contracts come within its scope, courts of equity and law follow the same rules, and in these matters of construction of the statute equity follows the law. Birch *v.* Baker, 81 N. J. Eq. 264, 86 Atl. 933.

A court of equity in dealing with legal rights adopts and follows the rules of law in all cases to which those rules are applicable; and, whenever there is a direct rule of law governing the case in all its circumstances, the court is as much bound by it as would be a court of law, if the controversy was there pending. Albright *v.* Albright, 228 Pa. 552, 77 Atl. 898; Dorner *v.* School District, 137 Wis. 147, 118 N. W. 353.

Whenever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim equitas sequitur legem is strictly applicable. Rambo *v.* Bank of Argentine, 88 Kans. 257, 128 Pac. 183; Allen *v.* Kitchen, 16 Idaho 133, 100 Pac. 1052; Hayes *v.* Schall, 229 Mo. 114, 129 S. W. 222.

As a general rule, equity follows rules of law governing the allowance of interest. People *v.* Dooling, 113 N. Y. Supp. 246, 61 Misc. 162.

[1] Kemp *v.* Pryor, 7 Ves. 249 to 251; 2 Bac. Abridg. Court of Chancery, C.

[2] Grounds and Rudim. of the Law, M. 9, p. 16 (edit. 1751); Doct. and Stud. Dial. 1, ch. 20.

[3] Raw *v.* Potts, Prec. Ch. 35; s. c. 2 Vern. R. 239.

by parol promise his father to pay his sisters' portions if he would not direct timber to be felled to raise them; although discharged at law, he would in equity be deemed liable to pay them in the same way as if they had been charged on the land.[1] And many cases of a like nature may be put.[2]

§ 65. **Equity Discountenances Laches.** — So in many cases equity acts by analogy to the rules of law in relation to equitable titles and estates. Thus although the Statutes of Limitations are in their terms applicable to Courts of Law only, yet equity by analogy acts upon them, and refuses relief under like circumstances. Equity always discountenances laches, and holds that laches is presumable in cases where it is positively declared at law. [Where one desires to repudiate a transaction upon the ground of mistake or fraud, he must, upon the discovery of the fraud, or upon the discovery of facts and circumstances from which such knowledge will be imputed to him, assert his remedial rights with diligence and without delay. To delay instituting judicial proceedings, 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.[3]]

[1] Dalton *v.* Poole, 1 Vent. R. 318.

[2] 1 Fonbl. Eq. B. 1, ch. 3, § 4; Hobbs *v.* Norton, 1 Vern. R. 135; Neville *v.* Robinson, 1 Bro. Ch. C. 543; Devenish *v.* Baines, Pre. Ch. 3; Oldham *v.* Litchfield, 2 Freem. R. 284; Thynn *v.* Thynn, 1 Vern. R. 296, 11 Ves. 638, 639; Gilb. Lex Prætor. 336; Sugden, Vendors (7th edit.), pp. 717, 718; 3 Wooddes. Lect. lix. pp. 479 to 482; Id. 486, 490, 491.

[3] Building & Loan Assn. *v.* Blair, 98 Va. 490, 36 S. E. 513.

It is an inherent doctrine of courts of equity to refuse relief where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights; and the principle, founded, as it is, upon considerations of natural justice and public policy, is always firmly enforced, especially in cases involving transactions to which immediate parties are dead. An action will not lie to re-open the account of a personal representative made five years before his death, and which was filed in the probate court sixteen years before suit was brought. It is a familiar doctrine of courts of equity that nothing can call forth these courts into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing. The cases do not fix any period as limiting the demand for an account. If from the delay which has taken place, it is manifest that no correct account can be rendered, that any conclusion to which the court can arrive must, at best, be conjectural, and that the original transactions have become so obscured by time and the loss of evidence and the death of the parties as to render it difficult to do justice, the court will not relieve the plaintiff. Gibboney *v.* Kent, 82 Va. 383, 4 S. E. 610; Cresap *v.* Cresap, 54 W. Va. 581, 46 S. E. 582.

Where owner of land executed a warranty deed to another to secure a loan, upon the agreement to reconvey the property when the loan was

Thus in cases of equitable titles in land, equity requires relief to be sought within the same period in which an ejectment would lie at law; and in cases of personal claims it also requires relief to be sought within the period prescribed for personal suits of a like nature.[1] And yet there are cases in which the statutes would be a bar at law, but in which equity would, notwithstanding, grant relief; and on the other hand there are cases where the statutes would not be a bar at law, but where equity, notwithstanding, would refuse relief.[2] But all these cases stand on special circumstances which Courts of Equity can take notice of when Courts of Law may be bound by the positive bar of the statutes. And there are many other cases where the rules of law and equity on similar subjects are not exactly co-extensive as to the recognition of rights

repaid, and grantor paid no attention to the property and no taxes upon it for six years, during which time it was sold to another party, who had no notice of the alleged agreement to re-convey, and he placed improvements upon the property, he was guilty of such laches as to deny the relief sought. Schradski *v.* Albright, 93 Mo. 42, 5 S. W. 807.

But where the plaintiff was not a suspicious man, nor a man who moved promptly in the assertion of his rights, and he was the sort of man who would be selected by the defendant as its victim, the laches in this case are not conclusive upon complainant's equities. Wyckoff *v.* Victor Sewing Machine Co., 43 Mich. 309, 5 N. W. 405.

A lapse of eighteen years in collecting support adjudged against the father, in favor of a minor child, in an action for divorce, will bar plaintiff's rights where the husband has since mortgaged his land, and it has been sold by the mortgagee to a third person. Matthews *v.* Wilson, 31 Ind. App. 90, 67 N. E. 280.

Laches in a general sense is such negligence in bringing an action or otherwise asserting one's right as will preclude him from obtaining equitable relief. The question of laches is to be decided upon the particular circumstances of each case. Hence it is one addressed to the sound discretion of the chancellor or trial judge in cases where the evidence is conflicting, or, if the facts be undisputed, fair-minded men might reasonably draw different conclusions therefrom. Mere delay does not constitute laches, unless the circumstances were such as to make the delay blamable. Whether the delay has been culpable or not depends upon many circumstances, such as knowledge of the facts, infancy, or other personal disability, mistake, undisturbed possession, and the consequences of the delay to others. Lloyd *v.* Simons, 97 Minn. 315, 105 N. W. 902; Great West Mining Co. *v.* Woodmas Mining Co., 14 Colo. 90, 23 Pac. 908.

[1] Blanshard on Limit. ch. 4, p. 61; Edsell *v.* Buchanan, 1 Ves. R. 83; Com. Dig. Chanc. 1; Mitford, Pl. Eq. pp. 269 to 274; 1 Madd. Ch. Pr. 79, 80; 2 Madd. Ch. Pr. 244; Smith *v.* Clay, 3 Bro. Ch. R. 640, note; Cholmondeley *v.* Clinton, 2 Jack. & Walk. 156; post, § 529.

[2] See Pickering *v.* Lord Stamford, 2 Ves. jr. 289; Id. 582; 2 Madd. Ch. Pr. 244 to 247; Mitford, Pl. Eq. pp. 269 to 274; Blanshard on Limit. ch. 4, pp. 61, 81, 82, 83; 1 Fonbl. Eq. B. 1, ch. 4, § 27, note (*q*); Stackhouse *v.* Barnstown, 10 Ves. 466; Bond *v.* Hopkins, 1 Sch. & Lef. 413; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*g*); Cowper *v.* Cowper, 2 P. Will. 753.

or the maintenance of remedy.[1] Thus a person may be tenant by the curtesy of his wife's trust estate, but she is not entitled to dower in his trust estate.[2] So where a power is defectively executed, equity will often aid it; whereas at law the act is wholly nugatory.[3]

§ 66. **Exceptions to the Rule.** — Other illustrations of the same maxim may be drawn from the known analogies of legal and trust estates. In general, in Courts of Equity the same construction and effect are given to perfect or executed trust estates as are given by Courts of Law to legal estates. The incidents, properties, and consequences of the estates are the same. The same restrictions are applied as to creating estates and bounding perpetuities and giving absolute dominion over property. The same modes of construing the language and limitations of the trusts are adopted.[4] But there are exceptions as well known as the rule itself. Thus executory trusts are treated as susceptible of various modifications and constructions not applicable to executed trusts.[5] And even at law the words in a will are or may be differently construed when applied to personal estate from what they are when applied to real estate. In short it may be correctly said that the maxim that equity follows the law is a maxim liable to many exceptions; and that it cannot be generally affirmed that where there is no remedy at law in the given case there is none in equity; or on the other hand that equity in the administration of its own principles is utterly regardless of the rules of law.[6]

[1] See Earl of Bath *v.* Sherwin, 10 Mod. R. 1, 3; s. c. 1 Bro. Parl. C. 270; Doct. and Stud. Dial. 1, ch. 20.

[2] No right of dower attaches to an estate in which the naked legal title is held in trust for a second party. Barker *v.* Smiley, 218 Ill. 68, 75 N. E. 787; King *v.* Bushnell, 121 Ill. 656, 13 N. E. 245; Kager *v.* Brenneman, 49 App. Div. 639, 30 Civ. Proc. R. 168, 62 N. Y. Supp. 341; Kaphan *v.* Toney, 58 S. W. 909; Miller *v.* Miller, 148 Mo. 113, 49 S. W. 852; Gritten *v.* Dickerson, 202 Ill. 372, 66 N. E. 1091; Sanford *v.* Sanford, 157 Ill. App. 350; Gray's Admr. *v.* Gray, 144 Ky. 603, 139 S. W. 838; Hendren *v.* Hendren, 153 N. C. 505, 69 S. E. 506; Gilmore *v.* Sellars, 145 N. C. 283, 59 S. E. 73.

[3] 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note ibid.; Id. B. 1, ch. 4, § 25, note (*h*).

[4] 3 Wooddes. Lect. lix. pp. 479 to 482; 1 Fonbl. Eq. B. 1, ch. 3, § 1, p. 147; Cowper *v.* Cowper, 2 P. Will. 753.

[5] 3 Wooddes. Lect. lix. pp. 480 to 482; 1 Fonbl. Eq. B. 1, ch. 3, § 1, p. 147.

[6] Kemp *v.* Pryor, 7 Ves. 249, 250. Equity follows the rules of law in allowing interest, and it will be allowed in cases where it could not be recovered at law. Where interest below the legal rate is charged, the legal rate will be charged after maturity. Pryor *v.* City of Buffalo, 113 N. Y. Supp. 249.

§ 67. **Where There Is Equal Equity the Law Must Prevail.** — Another maxim is, that where there is equal equity the law must prevail.[1] And this is generally true; for in such a case the defendant has an equal claim to the protection of a Court of Equity for his title as the plaintiff has to the assistance of the court to assert his title; and then, the court will not interpose on either side; for the rule there is, "In æquali jure melior est conditio possidentis."[2] And the equity is equal between persons who have been equally innocent and equally diligent. It is upon this account that a Court of Equity constantly refuses to interfere either for relief or discovery against a bona fide purchaser of the legal estate for a valuable consideration without notice of the adverse title, if he chooses to avail himself of the defence at the proper time and in the proper mode.[3] And it extends its protection equally if the purchase is originally of an equitable title without notice,[4] and afterwards with notice the party obtains or buys in a prior legal title in order to support his equitable

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note; Id. ch. 5, § 3; 2 Fonbl. Eq. B. 6, ch. 3, § 3, and note (*c*); Id. B. 3, ch. 3, § 1; Mitford, Pl. Eq. p. 274; Jeremy, Eq. Jurisd. 285; Fitzsimmons *v.* Guestier, 11 U. S. 2, 3 L. Ed. 249; Caldwell *v.* Ball, 1 T. R. 214.

[2] Mitf. Pl. Eq. p. [215] 274; 1 Fonbl. Eq. B. 1, ch. 4, § 25; Id. ch. 5, § 3; 1 Madd. Ch. Pr. 170, 171; Jeremy on Equity Jurisd. 283; Jerrard *v.* Saunders, 2 Ves. jr. 454; 2 Fonbl. Eq. B. 3, ch. 3, § 1; Pratt *v.* Clemens, 4 W. Va. 443.

It is well settled that a purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the legal estate or title at the time of his purchase, or before he has notice of such prior equity, will be entitled to priority in equity, as well as at law, according to the maxim, "Where Equities are Equal the Law Shall Prevail."

While on the one hand, notice of a prior equity, given at any time before the completion of the purchase will invalidate all steps which may be taken to complete it, yet on the other, when it is once completed, and the character of a bona fide purchaser acquired, notice will not be a bar to any future steps necessary for protecting and securing what has been purchased. He who buys an equitable title in ignorance of its nature, and under the belief that he is getting a good legal title, may, therefore, protect himself, by getting in the legal title, even where the effect is wholly to exclude equities prior to his own. Hoult *v.* Donahue, 21 W. Va. 300; Brickey *v.* Linnertz, 241 Ill. 187, 89 N. E. 342; Forman *v.* Brewer's Execrs., 62 N. J. Eq. 748, 90 Am. St. Rep. 475, 48 Atl. 1012; Conn *v.* Boutwell, 101 Miss. 353, 58 So. 105; Dean *v.* Roberts, 182 Ala. 225, 62 So. 44.

[3] See Sugden on Vendors (7th ed.), ch. 16, p. 713, &c. § 10; Id. ch. 18, pp. 757, 762, 763; Grounds and Rudim. of the Law, M. 236 (ed. 1751); Story on Eq. Pl. §§ 603, 604, 805, 806.

[4] A bona fide purchaser from a trustee, without notice of the trust, will be protected against the cestui que trust. Caskell *v.* Lathrop, 63 Ga. 96.

title.[1] This doctrine applies strictly in all cases where the title of the plaintiff seeking relief is equitable. But it yet remains a matter of some doubt whether it is applicable to the case of a plaintiff seeking relief upon a legal title.[2] The purchaser however in all cases must hold a legal title, or be entitled to call for it, in order to give him the full protection for this defence; for if his title be merely equitable, then he must yield to a legal and equitable title in the adverse party.[3] So the purchaser must have paid his purchase-money before notice, for otherwise he will not be protected,[4] and if he have paid a part only, he will be protected pro tanto only.[5]

§ 68. **He Who Is First in Time Is First in Law.**—But even when the title of each party is purely equitable, it does not always follow that the maxim admits of no preference of the one over the other. For where the equities are in other respects equal, still another maxim may prevail, which is, "Qui prior est in tempore, potior est in jure"; for precedency in time will under many circum-

[1] See Sugden on Vendors (7th ed.), ch. 16, pp. 713, 728; 1 Fonbl. Eq. B. 1, ch. 4, § 25, note (*e*); Post, §§ 108, 139, 154, 265, 381, 409, 434, 436; Grosvenor *v.* Allen, 9 Paige, R. 74, 76, 77.

[2] Sugden on Vendors, ch. 18 (7th ed.), pp. 762, 763; Id. ch. 18, 2 vol. 309, 310 (9th ed.); Jeremy, Eq. Juris. 295. It is an apparent anomaly in the general doctrine, that it should be inapplicable to a bill for relief founded on a legal title. Against such a bill Lord Thurlow decided that a plea of a bona fide purchase, without notice, was no protection. Williams *v.* Lamb, 3 Bro. Ch. C. 264. Lord Loughborough seems to have entertained a different opinion; and the point has been contested by some elementary writers, and supported by others. Mr. Belt, in his note to the case, 3 Bro. Ch. C. 264, insists on Lord Thurlow's doctrine being right; so do Mr. Roper and Mr. Beames. But Mr. Sugden treats it as incorrect. See Jerrard *v.* Saunders, 2 Ves. jr. 454, 458; Sugden on Vendors (7th ed.), pp. 762, 763; Id. ch. 18 (9th ed.), 2 vol. pp. 309, 310; Roper, Husband and Wife, 446, 447; Post, § 410, note (1); Id. §§ 436 630, 631. In Collins *v.* Archer, 1 Russ. & Mylne, 284, 292, Sir John Leach followed the case of Williams *v.* Lambe, and held that the fact that the party was a bona fide purchaser for a valuable consideration without notice was not available as a defence against a plaintiff who relies upon a legal title. On the other hand Lord Abinger, in Payne *v.* Compton (2 Y. & Coll. 457, 461), held that such a purchase was a good defence against any claim in equity by the owner of the legal estate. See also Wood *v.* Mann, 1 Sumner, R. 504.

[3] Sugden on Vendors (7th ed.), and Id. ch. 18 (9th ed.), 2 vols. pp. 309, 310; Id. ch. 18, pp. 757 to 763; Grounds and Rudim. of the Law, M. 236 (ed. 1751); Com. Dig. Chancery, 4 W. 12; Davies *v.* Austen; 1 Ves. jr. 247; Skirras *v.* Craig, 11 U. S. 34, 3 L. Ed. 260; Whitfield *v.* Faussat, 1 Ves. 387; Jeremy on Equity Jurisd. p. 286.

[4] Wood *v.* Mann, 1 Sumner, R. 506, 578; Flagg *v.* Mann, 2 Sumner, R. 487; post, § 1502.

[5] Whelan *v.* McCreasy, 64 Ala. 319.

stances give an advantage or priority in right.[1] Hence when the legal estate is outstanding, equitable incumbrances must be paid according to priority of time.[2] And whenever the equities are unequal, there the preference is constantly given to the superior equity.[3]

§ 69. **He Who Seeks Equity Must Do Equity.** — Another maxim of no small extent is that he who seeks equity must do equity.[4] This maxim principally applies to the party who is seeking relief in the character of a plaintiff in the court. Thus for instance if a borrower of money upon usurious interest seeks to have the aid of a Court of Equity in cancelling or procuring the instrument to be delivered up, the court will not interfere in his favor unless upon the terms that he will pay the lender what is really and bona fide due to him.[5] But if the lender comes into equity to assert and enforce his own claim under the instrument, there the borrower may show the invalidity of the instrument, and have a decree in his favor and a dismissal of the bill without paying the lender anything; for the court will never assist a wrong-doer in effectuating

[1] 1 Fonbl. Equity, B. 1, ch. 4, § 25; Fitzsimmons *v.* Guestier, 7 Cranch, 2; Berry *v.* Mutual Ins. Co., 2 John. Ch. R. 608; Beckett *v.* Cordley, 1 Brown, Ch. R. 358; Mackrett *v.* Symmons, 15 Ves. R. 354. See Post, § 556; Miner *v.* Schenck, 3 Hill, N. Y. R. 228. But not where the junior equity has the superior merit. Hume *v.* Dixon, 37 Ohio St. 66; Rice *v.* Rice, 2 Drew. 73; Cave *v.* Cave, 15 Ch. D. 639, 648.

[2] See Blake *v.* Hungerford, Prec. Ch. 158.

[3] Jeremy, Eq. Jurisd. 285, 286. In action for possession of land, judgment was had for want of an answer, and the court will not take away the advantage one's adversary has legitimately gained and give it to him who has been inactive and inattentive to his case. Dell School *v.* Peirce, 163 N. C. 424, 79 S. E. 687; State Bank *v.* Jennings, 138 N. Y. Supp. 606, 78 Misc. Rep. 524.

A court of equity will not interfere at the suit of the holder of a prior equitable title or claim to deprive the innocent purchaser for value of a junior equitable estate of equal strength of a legal title which he has subsequently bought or obtained after notice of the defect. It will not disarm a bona fide purchaser, or take from him the shield of any legal advantage. United States *v.* Detroit Timber etc. Co., 131 Fed. 678, 67 C. C. A. 1.

[4] Grounds and Rudim. of the Law, M. 175; Id. 179 (edit. 1751); Com. Dig. Chan. 3 F. 3; McDonald *v.* Neilson, 2 Cowp. R. 139; Smith *v.* Murphy, 58 Ala. 630 and note infra.

[5] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*h*); Id. B. 1, ch. 2, § 13; Mason *v.* Gardiner, 4 Bro. Ch. C. 435. No penalty can be recovered for usury where none is paid. Manning *v.* Elliott, 92 N. C. 48; Carver *v.* Brady, 104 N. C. 220, 10 S. E. 565; Bridgers *v.* Morris, 90 N. C. 32; Purnell *v.* Vaughan, 82 N. C. 135; Zeigler *v.* Maner, 53 S. C. 115, 30 S. E. 829, 69 Am. St. Rep. 842; People's Bank *v.* Jackson, 43 S. C. 86, 20 S. E. 786, 49 Am. St. Rep. 823, 27 L. R. A. 569; Jordan *v.* Warner, 107 Wis. 539, 83 N. W. 946; Maynard *v.* Hall, 92 Wis. 565, 66 N. W. 715.

his wrongful and illegal purpose. [But if interest is paid and the lender comes into court to assert his claim, he forfeits all interest and subjects himself to the penalties imposed for usury.[1]] And the like principles will govern in other similar cases where the transaction is not as between the parties grossly fraudulent,[2] or otherwise liable to just exception.[3] Many other illustrations of the maxim of a different nature may readily be put. As where a second incumbrancer seeks relief against a prior incumbrancer who has a claim to tack a subsequent security, he shall not have it before paying both securities. So where a husband seeks to recover his wife's property, and he has made no settlement upon her, he shall not have it without making a suitable settlement. So where an heir seeks possession of deeds in the possession of a jointress, he shall not have relief unless upon the terms of confirming her jointure. So where a party seeks the benefit of a purchase made for him in the name of a trustee who has paid the purchase-money, but to whom he is indebted for other advances, he shall not be relieved but upon payment of all the money due to the trustee.[4]

[1] Gore *v.* Lewis, 109 N. C. 541, 13 S. E. 909; Barefoot *v.* Lee, 168 N. C. 90, 83 S. E. 247; Sporrer *v.* Eifler, 1 Heisk. 633; Eslava *v.* Crampton, 61 Ala. 507; Campbell *v.* Murray, 62 Ga. 86. On the other hand if the grantee in a usurious deed comes to equity to reform it, he must abate the usury. Corby *v.* Bean, 44 Mo. 379. See post, § 424.

[2] Equity does not require one from whom a contract has been obtained by fraud to show that he has offered performance of the same as a condition to relief from it. Thomas *v.* Coultas, 76 Ill. 493.

[3] Peacock *v.* Evans, 16 Ves. 511; Grounds and Rudim. of the Law, M. 175, 179 (edit. 1751).

[4] Com. Dig. Chancery, 3 F. 3; Sturgis *v.* Champneys, 5 Mylne & Craig, 97, 101, 102. In this case Lord Cottenham said: "Undoubtedly for many purposes this court, acting upon the principle of following the law, deals with property coming under its cognizance from the legal estate being outstanding, according to the rights which would exist at law; but that is far from being universally true. Cholmondeley *v.* Clinton (2 Mer. 171; 2 J. & W. 1), and the authorities upon which that decision was founded, are instances to the contrary. There are many cases in which this court will not interfere with a right which the possession of a legal title gives, although the effect be directly opposed to its own principles as administered between parties having equitable interests only, such as in case of subsequent incumbrances without notice gaining a preference over a prior incumbrancer by procuring the legal estate."

The books are full of illustrations of this maxim. A few may be added to those of the text. If a party seek relief against interference with his water privilege, he may be required to discontinue a wrongful use of defendant's land connected with it. Comstock *v.* Johnson, 46 N. Y. 615. So an heir asking to set aside his deed to a widow, and for an account, must allow one third of the income, though her dower has not been set out. Ames *v.* Ames, 1 Cinn. Sup. Ct. 559. And a person asking for partition in equity must pay his proportion of a mortgage

§ 70. [**Maxim Applies to Parties and Privies.** — It is not necessary that the present plaintiff, against whom this equity is invoked, should have been a party to the original transaction. It is sufficient if he, or those under whom he claims, have done or forborne an act which has rendered the existing conditions such that in good conscience his pretended relief prayed would work a needless and unnecessary hardship upon innocent persons. The test is frequently illustrated in cases where an ancestor, in view of his approaching age and infirmity, has executed to a friend a contract by which he is to be supported and maintained during the declining years of his life, in payment for the services and expenses for his

paid by the other party. Campbell *v.* Campbell, 21 Mich. 438. So a widow asking for her dower must account for what she has occupied beyond her third. McLaughlin *v.* McLaughlin, 5 C. E. Green, 190. One asking for relief from an over-assessment must pay what is justly due. Morrison *v.* Hershire, 32 Iowa 271; Smith *v.* Auditor-General, 20 Mich. 398; Merrill *v.* Humphrey, 24 Mich. 170; Montgomery County *v.* Elston, 32 Ind. 27. But it must clearly appear how much is due. Dean *v.* Charlton, 23 Wis. 590. And a co-surety, seeking relief from a judgment against him from the whole debt, must pay his just proportion of the contribution. Creed *v.* Scraggs, 1 Heisk. 590. So one asking to be relieved from an invalid tax-deed as a cloud upon the title must pay all the taxes which the holder of the deed has paid. Reed *v.* Tyler, 56 Ill. 288. And the principle applies as well to a defendant as to a plaintiff. Tongue *v.* Nutwell, 31 Md. 302. The grantee of a mortgagor of land cannot, because of fraud practised by the mortgagee on the mortgagor in obtaining the mortgage, maintain a bill against an assignee of the mortgagee to restrain a sale of the mortgaged premises, without paying the entire debt secured by the mortgage, though the mortgage was assigned to the defendant as security for a smaller sum. Foster *v.* Wightman, 123 Mass. 101; Fairchild *v.* McArthur, 15 Gray, 526. It may be to be regretted, that the rights of property should thus depend upon accident, and be decided upon, not according to any merits, but upon grounds purely technical. This however has arisen from the jurisdiction of law and equity being separate, and from the rules of equity (better adapted than the simplicity of the common law to the complicated transactions of the present state of society), though applied to subjects without its own exclusive jurisdiction, not having, in many cases, been extended to control matters properly subject to the jurisdiction of the courts of common law. Hence arises the extensive and beneficial rule of this court, that he who asks for equity must do equity; that is, this court 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 this court would not otherwise enforce. If therefore this court refuses to assist a husband who has abandoned his wife, or the assignee of an insolvent husband who claims against both, in recovering property of the wife, without securing out of it for her a proper maintenance and support, it not only does not violate any principle, but acts in strict conformity with a rule by which it regulates its proceedings in other cases.

maintenance, and in consideration of the services to be rendered, the friend is to receive certain of his property at his death; and when the ancestor sometimes afterwards is induced and persuaded by his close kin to abandon the contract for maintenance, so that in fact he was not actually living with and being supported by his friend at the time of his death, as stipulated in the contract. It would be against good morals, as well as law, to allow the plaintiffs to profit by their wrongful acts although they were not parties to the contract. It is a salutary rule of law that one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance, and this rule applies with especial fitness where the moving party is impelled by personal interest.[1]]

§ 71. [**Lapse of Time Makes No Difference.** — The doctrine applies with equal force, though the time within which the act should have been performed has in fact passed, but still being treated by both parties as a real, subsisting, continued fact, as, where it was agreed that a tract of land should be sold for a given price within one year, and at the end of that time the vendee did not pay the price and demand a deed, nor did the vendor seek to terminate the contract, but permitted the vendee to occupy it for several years, during which time it has greatly increased in value, the vendor would not be permitted to set up the lapse of time, and claim an exemption of the property from sale under the contract, but he would still be required to convey the property to the vendee upon his payment of the balance due on the purchase price, together with interest. The court will treat their conduct as estopping either from taking advantage of the delay.[2]]

§ 72. [**What Does the Maxim Mean?** — "He who would have equity must do equity and give effect to all equitable rights in the other party respecting the subject-matter of the suit," means 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 had 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. 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,

[1] Harwood *v.* Shoe, 141 N. C. 161, 53 S. E. 616.
[2] Hairston *v.* Bescherer, 141 N. C. 209, 53 S. E. 845.

or consents to give, the defendant such corresponding rights as he also may be entitled to in respect of the subject-matter of the suit. Any one going into a Court of Equity, and asking its aid, whether that aid be such as could be obtained in a Court of Law, or whether it be a character obtainable only in a Court of Equity, submits himself to the jurisdiction of the court, and in asking its aid, subjects himself to the imposition of such terms as well established equitable principles would require. Especially would this be true where the relief sought by the party applying to the court is both legal and equitable in its nature.[1]]

§ 73. [**The Maxim Applies to Infants as Well as Adults.** — The maxim applies to all litigants alike. However the tender years of a litigant may move the courts to a protecting care of her property rights, they will not be allowed to prevail at the expense of the equities of the other parties; and what would have been required of an adult litigant as his own act, the court will impose on the infant as a condition of its action in her behalf.[2]]

§ 74. [**The Maxim Does Not Always Apply.**—It is not every defendant who asserts this equitable defence, who is really entitled to it. He must not have conducted himself in such a manner, or placed conditions and circumstances about the plaintiff that would make it inequitable for him to avail himself of this defence. It may be, and frequently is the case, that but for the illegal or wrongful act of the defendant, no damage would have occurred, and hence, no cause of action would have arisen; and to permit him to set up this defence would be to give him an unjust advantage by reason of his own wrong. Where a property owner brought suit against a town to remove the cloud from his title, and the record shows that the assessment and levy were invalid, it is not an essential to plaintiff's claim that he first pay the taxes assessed, and the maxim that "he who seeks equity must do equity," does not apply.[3]]

[1] Charleston and W. C. Ry. Co. *v.* Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17; Stowell *v.* Tucker, 7 Idaho 312, 62 Pac. 1033; Crandall *v.* Sorg, 99 Ill. App. 22, 198 Ill. 48, 64 N. E. 769; Wenham *v.* Mallin, 103 Ill. App. 609, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233.

[2] Bunnell *v.* Bunnell, 111 Ky. 566, 23 Ky. L. Rep. 800, 64 S. W. 420, 65 S. W. 607; Tindall *v.* Peterson, 71 Neb. 160, 99 N. W. 659.

[3] Dranga *v.* Rowe, 127 Cal. 506, 59 Pac. 944; Worthington *v.* Miller, 134 Ala. 420, 32 So. 748.

The maxim cannot be successfully invoked to overthrow a plain contract voluntarily entered into with knowledge of all the facts. Keller *v.* Orr, 106 Ind. 406, 7 N. E. 198.

The complainants cannot take the law into their own hands, acquire possession by force, and then invoke the aid of a Court of Equity to maintain them in a possession which, so far as appears from the bill, is without legal or equitable justification, and which appears by the plea to have been obtained by forcible entry and detainer.[1]

§ 75. [**When the Maxim Does Apply.**—The maxim only applies where the relief sought by the plaintiff and the right demanded by the defendant belong to or grow out of the same transaction. It has no application where the demand of the defendant is based upon a contract separate and distinct from that which forms the subject of the plaintiff's action.[2] The rule will be applied when the adverse equity grows out of the very controversy before the court, or of such circumstances as the record shows to be a part of its history, or is so connected with the cause in litigation as to be presented in the pleadings and proofs, with full opportunity afforded to the party thus recriminated to explain or refute the charges.[3]]

§ 76. [**Liability for Improvements.**—If the real owner seeks the aid of equity to establish his right to the property itself, and it appears that the estate has been substantially benefited by the improvement, he will be required to make compensation (if the improvements were made by the defendant while he was in possession under a bona fide claim of right), for the reason that he who seeks equity must do equity.[4]]

§ 77. **Equality Is Equity.** — Another maxim of general use is, that equality is equity; or, as it is sometimes expressed, equity delighteth in equality.[5] And this equality, according to Bracton, constitutes equity itself: "Æquitas est rerum convenientia, quæ paribus in causis paria jura desiderat, et omnia vere co-æquiparat, et dicitur æquitas, quasi æqualitas."[6] This maxim is variously applied; as, for example, to cases of contribution between co-

[1] David *v.* Levy, 119 Fed. 799.

[2] Mercantile Trust Co. *v.* Hensey, 21 App. D. C. 38; affirmed 205 U. S. 302, 51 L. Ed. 811, 27 S. Ct. Rep. 535; Otis *v.* Gregory, 111 Ind. 504, 13 N. E. 39; Wicks *v.* Dean, 103 Ky. 69, 44 S. W. 397, 19 Ky. L. Rep. 1708.

[3] Comstock *v.* Johnson, 46 N. Y. 621.

[4] Wakefield *v.* Van Tassel, 218 Ill. 572, 75 N. E. 1058; Card *v.* Finch, 142 N. C. 150; 54 S. E. 1009; Alston *v.* Connell, 145 N. C. 1, 58 S. E. 441; Faison *v.* Kelley, 149 N. C. 284, 62 S. E. 1086; Ford *v.* Stroud, 150 N. C. 364, 64 S. E. 1; Huckins *v.* Hunt, 138 Mass. 366; Lee *v.* Foushee, 91 Ark. 468, 120 S. W. 160.

[5] Grounds and Rudim. of the Law, M. 91 (edit. 1751); Petit *v.* Smith, 1 P. Will. 9.

[6] Bracton, Lib. 1, cap. 3, § 20; Plowden, Comm. p. 467; Co. Litt. p. 24.

contractors, sureties, and others; to cases of abatement of legacies, where there is a deficiency of assets; to cases of apportionment of moneys due on incumbrances among different purchasers and claimants of different parcels of the land; and especially to cases of the marshalling and distribution of equitable assets.[1] For although out of legal assets payment must be made of debts in the course of administration according to their dignity and priority of right, yet as to equitable assets all debts are generally deemed by Courts of Equity to stand in pari jure, and are to be paid proportionally, without reference to their dignity, or priority of right at law.[2] And here we have another illustration of the doctrine that equity does not always follow the law.[3]

§ 78. [**Equality Is Equity, and Maxim Is Favored by the Courts.** — Where a fund has been paid into court by the receiver of an insolvent corporation, it will be distributed amongst all creditors alike, in the absence of a statute making a priority in payment for different classes of debts. The maxim is very much favored by the courts, and whenever the circumstances arise to justify its application, it is never reluctant to give the desired relief. Why should one creditor, irrespective of the form or grade of his debt, be entitled to any more consideration than another? The law makes a distinction, it is true, but equity looks not so much at the form of a debt as to the good faith in which it was made or created. What matters it whether a debt is evidenced by a bond or a due bill, by a note or book account; the obligation or duty to pay it is just the same. And it is this principle that a court of equity takes into account in putting debts of all grades upon the same common level.[4]]

[1] Grounds and Rudim. of the Law, M. 91 (edit. 1751); 1 Wooddes. Lect. lvi. pp. 486, 487, 488, 490; Shepherd *v.* Guernsey, 9 Paige, R. 357.

[2] 3 Wooddes. Lect. lviii. pp. 466 to 468; Shepherd *v.* Guernsey, 9 Paige, R. 357.

[3] 1 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, and note; 1 Madd. Ch. Pr. 466; Martin *v.* Martin, 1 Ves. 211; 2 Black. Comm. 511, 512; Lewin *v.* Oakley, 2 Atk. 50; Newton *v.* Bennet, 1 Brown, Ch. Cas. 185; Silk *v.* Prime, 1 Bro. Ch. Cas. 138, note; Haslewood *v.* Pope, 3 P. Will. 322; Moses *v.* Murgatroyd, 1 John. Ch. R. 119; Livingston *v.* Newkirk, 3 John. Ch. R. 319.

[4] In re Lord & Polk Chemical Co., 7 Del. Ch. 248, 44 Atl. 778; Blum *v.* Van Vechten, 92 Wis. 378, 66 N. W. 507; International Bank *v.* Sherman, 101 U. S. 403, 25 L. Ed. 866; Shepherd *v.* Guernsey, 9 Paige, 357.

Where a receiver is appointed to hold property belonging to a partnership, in order that the status of the property may be determined, and judgment is taken against the partners, who were solvent at the time, an execution should issue upon the judgment; but otherwise if the partners were insolvent. In re Thompson, 10 App. Div. 40, 41 N. Y. Supp. 740.

§ 79. [**Fraudulent Conveyances by Husband to Wife.** — Where a husband, with the intent to defraud his creditors, gave to his wife a sum of money, and she, knowing of his insolvency, invested the money in land and took title in her own name, equity will not permit her to keep the land. If the money paid on the price of the land belonged to the debtor, equity would have compelled him to pay it to his creditor; and from this rule he cannot escape under cover of a fraudulent collusion with the owner of the land. No one can reap any advantage from a fraud. As the money, to which equity gave the husband a claim, went into the land, into the land equity will follow it.[1] The right to prefer creditors is an infirmity still remaining in the body of the common law. It is contrary to the letter and spirit of the maxim that equality is equity. It is condemned in most of our State insolvent laws. The federal bankrupt laws have never omitted to annex penalties to its exercise. Creditors may accept preferences, but they cannot accept them in consideration of promises, express or implied, to further the plans of the debtor to hinder, delay or defraud other creditors. The law favors the diligent and active creditor, but it warns him that he can enter into no bargain or plan, the object of which is not the collection of his own debt solely, but in part the defeat of some one else equally worthy with himself.[2]]

A mortgage given by an insolvent corporation upon its land to secure a present loan, does not enure to the benefit of the general creditors. The doctrine, as applied by the courts to insolvent corporations, has never been carried so far as to allow a court of equity to invade a security taken by a vendor to secure the purchase money for the property sold, and to subject this property, or its proceeds, to a ratable distribution among all the creditors of an insolvent corporation. Breed *v.* Glasgow Investment Co., 71 Fed. 903.

After the aid of a Court of Equity has been invoked, and that court has taken the assets of the insolvent into its hands, its jurisdiction becomes necessarily exclusive, and it will proceed in administering the insolvent estate upon the maxim that equality is equity. After the jurisdiction has attached, ordinarily no creditor can pursue a legal remedy, at least in such a way as to obtain for himself a preference. Rosebloom *v.* Whitaker, 132 Ill. 81, 23 N. E. 339.

But where a Court of Equity takes jurisdiction, not for the purpose of complete administration, and distribution to all parties having an interest therein, but only for the purpose of affording a specific remedy to a particular claimant, a different rule must prevail. The first attaching creditor would have the prior right to payment, the second creditor would have the next right and so on, the preference in payment depending upon the priority of action by the creditor. Russell *v.* Bank, 139 Ill. 549, 29 N. E. 37, 17 L. R. A. 345.

[1] Blair *v.* Smith, 114 Ind. 114, 5 Am. St. Rep. 593, 15 N. E. 817.

[2] Butler Paper Co. *v.* Robbins, 151 Ill. 632, 38 N. E. 153; Newell *v.* Higgins, 55 Minn. 82, 56 N. W. 577. Action to recover amount of note

§ 80. [**Owner May Follow Fund in Equity.** — In order that the beneficiary or owner of a trust fund may be able to regain it out of the estate of an insolvent trustee, he must be able to trace it into, and satisfactorily identify it in, the hands of the assignee or receiver of his estate, but where the estate has been dissipated or mixed with other property, he is not entitled to prove for it as a trust debt and obtain a preference over the other creditors of the insolvent estate.[1]]

§ 81. **Equity Looks upon That as Done Which Ought to Be Done.** — Another maxim which it seems necessary to notice is, that equity looks upon that as done which ought to have been done. The true meaning of this maxim 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, not as the parties might have executed them.[2] But equity will not thus consider things in favor of all persons, but only in favor of such as have a right to pray that the acts might be done.[3] And the rule itself is not in other respects of universal application; although Lord Hardwicke said that it holds in every case except in dower.[4] The most common cases of the application of the rule are under agreements. All agreements are considered as performed which are made for a valuable consideration in favor of persons entitled to insist upon their performance. They are to be considered as done at the time when, according to the tenor thereof, they ought to have been performed.[5] They are also deemed to have the same consequences attached to them; so that one party, or his privies, shall not derive benefit by his laches or neglect; and the other party, for whose profit the

secretly given by defendant, debtor, to plaintiff, creditor, it being for the full amount due, whereas, the other creditors and the plaintiff had agreed to a composition, cannot be sustained. Huckins *v.* Hunt, 138 Mass. 366; Brady *v.* Huber, 197 Ill. 291, 64 N. E. 264.

[1] Burnham *v.* Barth, 89 Wis. 362, 62 N. W. 96.

When one's property has been obtained from him by actionable fraud, he can follow and recover it from wrong-doer as long as he can identify and trace it, unless in hands of purchaser in good faith and for value. Manufacturing Co. *v.* Summers, 143 N. C. 102, 55 S. E. 522; Modlin *v.* Railroad, 145 N. C. 223, 58 S. E. 1075.

[2] 1 Fonbl. Eq. B. 1, ch. 6, § 9; Francis, Maxims, M. 196 (edit. 1751); 1 W. Black. 129.

[3] Burgess *v.* Wheate, 1 W. Black. 123, 129; Crabtree *v.* Bramble, 3 Atk. 687; 1 Fonbl. Equity, B. 1, ch. 6, § 9, note (*s*).

[4] Crabtree *v.* Bramble, 3 Atk. 687. The maxim will not be applied against the interests of third persons. Casey *v.* Cavaroc, 96 U. S. 467, 24 L. Ed. 779.

[5] Felch *v.* Hooper, 119 Mass. 52, 57.

contract was designed, or his privies, shall not suffer thereby.[1] Thus money covenanted or devised to be laid out in land is treated as real estate in equity and descends to the heir. And on the other hand where land is contracted or devised to be sold, the land is considered and treated as money.[2] There are exceptions to the doctrine where other equitable considerations intervene, or where the intent of the parties leads the other way;[3] but these demonstrate, rather than shake, the potency of the general rule.[4]

§ 82. [**Meaning of the Maxim.** — Equity will generally regard one's right to the title and possession of real estate, acquired by a contract performed on his part, as not a mere chose in action, but, in consequence of what Lord Hardwicke, using the dialect of the alchemists, somewhere called "transmutation" in equity, will look upon it as a present interest in real estate; and this view is taken because of the principle underlying the maxim that equity will treat as done that which ought to be done.[5] Plaintiff and his mother contracted to sell land to defendant, and they met at a certain time for the purpose of completing the sale. Plaintiff expected to sign the deed, but his attorney advised him that he had no interest in the land and nothing to convey, and it was signed only by his mother. Defendant went into possession, believing he had the entire title, and made valuable improvements. The plaintiff afterwards learned of the mistake of his counsel as to the law and his interest in the land, and in this action to recover his interest, his complaint should have been dismissed for want of equity.[6]]

[1] Grounds and Rudim. of the Law, M. 106 (edit. 1751).

[2] 1 Fonbl. Eq. B. 1, ch. 6, § 9, note (*t*); Gilbert, Lex Prætor, 243, 44; Fletcher *v.* Ashburner, 1 Bro. Ch. C. 497; Craig *v.* Leslie, 16 U. S. 563, 4 L. Ed. 460; 3 Wooddes. Lect. lviii. pp. 466, 468; Jackson *v.* Small, 34 Ind. 241; Brewer *v.* Herbert, 30 Md. 301; McCaa *v.* Wolf, 42 Ala. 389.

[3] Ibid. The whole of this doctrine was very much considered by the Supreme Court in the case of Craig *v.* Leslie, 16 U. S. 563, 4 L. Ed. 460, where a very elaborate opinion was delivered by Mr. Justice Washington.

[4] As where the sale is conditional. Douglass Co. *v.* Union Pacific R. Co., 5 Kans. 615.

[5] Ainger *v.* Webster, 85 Vt. 448, 82 Atl. 666; Doscher *v.* Wyckoff, 113 N. Y. Supp. 655; Affirmed in 116 N. Y. Supp. 389; Sanguinetti *v.* Rossen, 12 Cal. App. 623, 107 Pac. 560.

[6] Lee *v.* Foushee, 91 Ark. 468, 120 S. W. 160.

Where a town treasurer buys in orders on the town, and issues his check in payment, and under this arrangement the bank pays the money on the orders, it is entitled to the checks found by the administrator of the treasurer and issued for such orders. Town of New Haven *v.* Weston, 87 Vt. 7, 86 Atl. 996.

Where 100 lots were conveyed to trustee for purposes of sale, and all lots over 55 remaining after five years from date, should revert to grantor, he had the same title to the property as if a reconveyance were actually

§ 83. **[Property Purchased with Wife's Money and Title Taken in Name of Husband.** — Where the wife gave her money to her husband for the purpose of buying land for her, and the title, without her knowledge, was taken in his own name, and the deeds were kept from her view for a number of years and until after his death, the wife was entitled to a conveyance of the land, and where the taxes had become in arrears, they should be paid out of the husband's personalty before being charged against the wife's land.[1] Where the wife bought and paid for land and deed was taken in her name, but never registered, and after her death the husband procured the grantor to execute a new deed to him in his own name, he was a trustee for his children.[2]]

§ 84. **[Destruction of Property after Execution of Deeds, but before Delivery.** — In the application of this rule of equity, a very interesting question arises where the property has been destroyed, through no fault of either vendor or vendee, after the contract has been agreed upon, but before the deeds have been actually delivered. The old doctrine is that the loss fell upon the vendor, but the English doctrine, which is very generally held to be the law in this country, prevails. Once the contract has been made, the vendee has no legal right or title to the property, but in equity, he has an estate that will be protected. If, after the contract has been made, and in order that the vendor may carry out his contract by conveying the complete title, a loss occurs, the loss falls upon him; but where there is nothing else to be done but to pass the deeds, and the property is destroyed without the fault of either party, equity treats that as being done which ought to be done and the loss would fall on the vendee. The rule has thus been stated by Lord Eldon:

had. Montgomery *v.* Trueheart, 146 S. W. 284; Buchanan *v.* Williams, 160 S. W. 190; Western Lumber Co. *v.* City of Golden, 23 Colo. App. 461, 130 Pac. 1027; Ogden *v.* Delaware River etc. R. Co., 80 N. J. Eq. 191, 83 Atl. 991; Scott *v.* Scott, 51 Ind. App. 194, 99 N. E. 435; Marvin *v.* Stimpson, 23 Colo. 174, 46 Pac. 673; Shipman *v.* Lord, 58 N. J. Eq. 380, 44 Atl. 215, 46 Atl. 1101; National Bank *v.* Rogers, 166 N. Y. 380, 59 N. E. 922; Young *v.* Stampfler, 27 Wash. 350, 67 Pac. 721.

Where a man married a woman, upon condition that he support and treat her illegitimate son as his own child, and they married and lived together forty years, called the boy his own son and said his son would get everything he had at his death by inheritance, and there was no use to make his will, held that the boy was entitled to the land to the exclusion of the blood kin, for equity regards that as being done which ought to be done. Martin *v.* Martin, 250 Mo. 539, 157 S. W. 575.

[1] Cook *v.* Miller, 47 Ind. App. 453, 94 N. E. 783.

[2] Norcum *v.* Savage, 140 N. C. 473, 53 S. E. 289.

"As to the mere effect of the accident itself, no valid objection can be founded upon that simply, for, if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his; chargeable as his; capable of being encumbered as his; they may be devised as his; they may be assets and they would descend to his heir." [1] But where there is a delay in getting the title in such shape as to become marketable, and the improvements are destroyed by fire before the vendor is in a position to convey the legal title, and before the vendee obtains possession, the loss is that of the vendor.[2]]

§ 85. [**Equity Aids the Vigilant.**—Another important maxim is that "equity aids the vigilant, and not those who sleep on their rights." The policy of the law, as well as equity, is that when one has a claim or demand he ought to prosecute it within a reasonable time, while the facts are yet fresh in the minds of his adversary and the witnesses and may be produced before the court. It would be a great hardship upon the defendant, and inequitable for the plaintiff to claim that he was over-reached and unduly influenced to enter into an unconscionable trade, and wait for years afterwards to make known his claim, and probably when those who knew the real facts have since died. It sometimes happens that one has been defrauded and the real facts are not apparent to him for years afterwards, then he has a reasonable time from the discovery of the fraud to bring his action; but not where he knew of the alleged fraud and acquiesced in the wrongful conduct of another and deliberately refused to assert his rights until sometime afterwards when he sustained an injury. Delay in the asser-

[1] Paine *v.* Meller, 16 Ves. Jr. 349; Sewell *v.* Underhill, 197 N. Y. 168 111 N. Y. Supp. 85, 127 App. Div. 92, 90 N. E. 430; Clinton *v.* Hope, 45 N. Y. 454; Goldman *v.* Rosenberg, 116 N. Y. 78, 22 N. E. 259; McKetchnie *v.* Sterling, 48 Barb. 330; Powell *v.* Dayton etc. R. Co., 12 Oreg. 488, 8 Pac. 544; Thompson *v.* Norton, 14 Ind. 187; Brewer *v.* Herbert, 30 Md. 301; Walker *v.* Owen, 79 Mo. 563; Woodward *v.* McCollum, 16 N. Dak. 42, 111 N. W. 623; Marion *v.* Wolcott, 68 N. J. Eq. 20, 59 Atl. 242; Martin *v.* Carver, 8 Ky. L. Rep. 56, 1 S. W. 199; Marks *v.* Tichenor, 85 Ky. 536, 4 S. W. 225; Manning *v.* North British etc. Ins. Co., 123 Mo. App. 456, 99 S. W. 1095; Dunn *v.* Yakish, 10 Okla. 388, 61 Pac. 926.

[2] Good *v.* Jarrard, 93 S. C. 229, 76 S. E. 698; Hawkes *v.* Kehoe, 193 Mass. 419, 79 N. E. 766, 10 L. R. A. (N.S.) 129, 9 Ann. Cas. 1053; Wells *v.* Calnan, 107 Mass. 514, 9 Am. Rep. 65; Phinizy *v.* Guernsey, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680, 78 Am. St. Rep. 207; Gould *v.* Murch, 70 Me. 288; Wilson *v.* Clark, 60 N. H. 352; Kares *v.* Covell, 180 Mass. 206, 62 N. E. 244.

tion of a right, unless satisfactorily explained, even where it does not constitute a positive statutory bar, operates in equity as an evidence of assent, acquiescence, or waiver; and especially is such the case in suits to set aside transactions on account of fraud or infancy. Laches and neglect are always discountenanced by a court of equity. A Court of Equity, which is never active in relief against stale demands, will always refuse relief where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call into activity this court but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive and does nothing.[1]]

§ 86. [**In Whose Favor the Maxim Lies.**—One who by his own fraud has led another to his injury, cannot complain of the want of promptness of plaintiff in discovering the fraud and proceeding to rescind, since it was the defendant's concealment in violation of his duty to him and his interests which prevented the plaintiff from knowing the actual conditions at the time of the transaction. Equity rewards the diligent, but this has no application to the diligent in concealment and deceit.[2] Nor is one entitled to the aid of the court where that aid becomes necessary by his own fault.[3]]

§ 87. [**Treatment of Statute of Limitations in Equity Practice.**—Courts of Equity, although not in all cases bound by the Statute of Limitations, unless expressly brought within its provisions, have nevertheless acted in this respect in analogy to Courts of Law, and given effect to the statute in all cases of concurrent jurisdiction; and it may be said that in such cases a Court of Equity will no more disregard the statute than will a Court of Law. Courts of Equity act not so much in analogy as in obedience to statutes of limitation of legal actions, because, where the legal remedy is barred, the spirit of the statute bars the equitable remedy also. Statutes of limitation do obtain in a Court of Equity, and to the extent to which they so obtain a Court of Equity has no discretion to dispense with them, but is bound by them. True, it is said that a Court of Equity acts by analogy to these statutes; but this

[1] Bill *v.* Schilling, 39 W. Va. 108, 19 S. E. 514; Jones *v.* Rush, 156 Mo. 364, 57 S. W. 118; Holsberry *v.* Harris, 56 W. Va. 320, 49 S. E. 404; Citizens National Bank *v.* Judy, 146 Ind. 322, 43 N. E. 259; Moore *v.* Moore, 30 S. E. 535, 103 Ga. 517; Dell School *v.* Peirce, 163 N. C. 424, 79 S. E. 687.

[2] Mabry *v.* Randolph, 7 Cal. App. 421, 94 Pac. 403; United States Trust Co. *v.* David, 36 App. D. C. 555.

[3] Thompson *v.* Lindsay, 242 Mo. 56, 145 S. W. 472.

must mean that a Court of Equity is bound so to act, whenever a proper case arises.[1]]

§ 88. **[Equity Looks to the Substance Rather than the Form.** — Relief is had under this equitable doctrine very frequently in actions where the maxim that equity regards that as done which ought to be done, the relief under each maxim usually being co-extensive and similar to that sought under the other doctrine. In the construction of contracts the law looks to the agreement of the parties as it appears upon the face of the paper itself, and the action will stand or fall upon the strength or weakness of the written instrument. But the policy of equity is that where the weak has been oppressed by the strong, where a learned man has acquired an advantage over an ignorant man who had reposed trust in him, and who had believed that he would be fairly treated; where the parties are ignorant as to the law, and the purpose is to convey property as a security for debt, but in fact a deed was executed, equity in these and other such cases goes further into the transactions and dealings than to examine into the rights of the parties as they appear from written instruments, but looks into the substance of the agreement itself, and where one has been oppressed, not by his own fault, but by an inequitable advantage obtained by the other, its relief will be given. It is well established that, in a suit in equity between parties, in which fraud, oppression, and undue influence are charged, the court is not concluded by that which appears on the face of the papers, but may institute an inquiry into the real facts of the transactions.[2]]

[1] Moore *v.* Moore, 103 Ga. 517, 30 S. E. 535.

[2] Wagg *v.* Herbert, 19 Okla. 525, 92 Pac. 250, 251 U. S. 546, 54 L. Ed. 321, 30 S. Ct. Rep. 218; Frazier *v.* Frazier, 129 N. C. 30, 39 S. E. 634; Floars *v.* Ins. Co., 144 N. C. 232, 56 S. E. 915; Sikes *v.* Ins. Co., 144 N. C. 626, 57 S. E. 391; Sykes *v.* Ins. Co., 148 N. C. 20, 61 S. E. 610; Stroud *v.* Ins. Co., 148 N. C. 55, 61 S. E. 626.

Where a corporation was forbidden to acquire land for certain purposes, and land was bought for that purpose and title taken in the name of a trustee, original grantors are entitled to possession upon the doctrine that equity looks to the substance rather than the form. Walker *v.* Taylor, 252 Ill. 424, 96 N. E. 1055.

A mortgagor verbally agreed to extend the time for redemption, so that he might sell, and where the owner of the equity was induced to rely upon the representations of the creditor until the period of redemption has expired, a Court of Equity will grant relief. Ogden *v.* Stevens, 241 Ill. 556, 89 N. E. 741.

The doctrine means that equity goes behind the form of a transaction in order to give effect to the intention of the parties either to aid an act abortive at law because formally defective, or to impose a liability as

§ 88 *a*. [**The Doctrine Applied to Trusts.** — Sometimes it is of advantage to both parties that the title be taken in the name of some other person, merely as a conduit, and where this has been done, and the transfer of the title is thus taken for a legitimate purpose, the law raises a resulting trust, and he, in whose name the title has been taken, acquires no title or estate in the land, but an equity to call for execution of resulting trust by conveying the legal title.[1] And where in the division of the ancestor's estate a portion was allotted to the husband, when the inheritance came to the wife through her father, her heirs are entitled to the land and may call upon their father for a conveyance of the title.[2]]

§ 89. [**The Doctrine Applied to Contracts of Insurance.** — With the various clauses and conditions in policies of insurance, to some of which there is no explanation, a great hardship would be worked upon an innocent beneficiary, were it not for the application of the doctrine. When insurance has been procured by the wife, upon the life of her husband, and the premiums have been saved and paid by her out of her own property, and she requested

against an evasion by a formal concealment of its true character. Proebstel *v.* Trout, 60 Oreg. 145, 118 Pac. 551; McCord *v.* Bright, 44 Ind. App. 275, 87 N. E. 654; Mangold *v.* Bacon, 237 Mo. 496, 141 S. W. 650; Zeiser *v.* Cohn, 207 N. Y. 407, 101 N. E. 184, 129 N. Y. Supp. 625, 144 App. Div. 825; Fenton *v.* Tri-State Land Co., 89 Neb. 479, 131 N. W. 1038; Wood *v.* Pehrsson, 21 N. Dak. 357, 130 N .W. 1010; Standorf *v.* Shickley, 16 N. Dak. 73, 111 N. W. 622, 11 L. R. A. (N. S.) 869; In re Ledrich, 68 Hun, 396, 22 N. Y. Supp. 978; Keokuk Elec. Co. *v.* Weismann, 146 Iowa 679, 126 N. W. 60; Chicago etc. Traction Co. *v.* Chicago, 199 Ill. 579, 65 N. E. 488; Bride *v.* Baker, 37 App. D. C. 231; Moring *v.* Privott, 146 N. C. 558, 60 S. E. 509.

[1] Latta *v.* Electric Co., 146 N. C. 296, 59 S. E. 1028; Russell *v.* Wade, 146 N. C. 121, 59 S. E. 345.

[2] Sprinkle *v.* Spainhour, 149 N. C. 226, 62 S. E. 910.

Where wife mortgaged her land to secure debt of her husband, she is entitled to have mortgage cancelled if debt is not paid by her husband when debt matures, if she is simply a surety and not a principal debtor, upon the doctrine that equity searches the conscience, and looks through to the substance of things. Elkins *v.* Bank of Henry, 180 Ala. 18, 60 So. 96.

In a sale of a stock of goods, the seller agreed not to engage in that line of business in that city for a space of ten years. In a year after the contract was made, he opened up with a similar line of goods in the same city, and traded in his wife's name. The seller was enjoined from conducting the store, for Courts of Equity look to the substance and effect of transactions involved in controversy, and will not be deceived by mere words or forms, when the conduct of the parties contradicts the forms and words used as a cover to their transactions. Thompson *v.* Andrus, 73 Mich. 552, 41 N. W. 683; Newago Mfg. Co. *v.* Chicago etc. R. Co., 64 Mich. 114, 30 N. W. 910; Johnson *v.* United etc. Rys. of St. Louis, 243 Mo. 278, 152 S. W. 370.

that the proceeds be made payable to her, when in fact, under a clause in the policy, it would be payable to the general creditors of the husband, equity looks to the substance of the original contract and will decree the benefits from the policy to belong to her.[1]]

§ 90. [**Equity Acts In Personam Rather Than In Rem.** — As changes in practice and procedure are constantly being made, and new wrongs are being committed, equity likewise adjusts itself to meet the exigencies of the occasions as they arise and when an apparently new wrong has been committed, she affords a remedy if the law does not. Equity will not suffer an act to be done, or a contract to be performed in violation of law, or where it is against public policy, and allow the doer, upon a purely technical ground, to recover. Where a court declares a contract illegal and enjoins its execution, no rights against the party in whose favor the decree is made can be founded on an execution of that contract, unless the parties before or after such execution take such steps as are equivalent to the making of a new contract upon a new and lawful consideration. So that, where a city entered into an illegal contract with one to pave certain of its streets, and the contractor knew that the contract under which he claimed to be working was against public policy and void, and pending the final determination of the case upon appeal, he completed the work under the contract, he was in just such a position as if the contract had never existed. As to the property-owner, the contractor was a wrong-doer placing improvements upon plaintiff's property against the will of the latter and in spite of opposition. Under such circumstances there is no rule of equity which recognizes the defendant's right to compensation. In the early stages of equity jurisprudence decrees were enforced only in personam. This rule has long since given way to the paramount rule that equity may in all cases so frame its decrees as to make them effective to do equity, and now the forms of equitable relief are as various as the transactions investigated and regulated in equity.[2]]

§ 91. [**To What Extent Courts of One State May Enforce Conveyance of Lands in Another State.** — This proposition involves an intricate question which has been before the courts frequently, and the weight of authority, announced by the most respectable courts, seems to be that if in an action to enforce the alleged

[1] Weckerly *v.* Taylor, 77 Neb. 886, 110 N. W. 738.

[2] McMillan *v.* Paving Co., 151 Wis. 48, 138 N. W. 94; Smith *v.* Northwestern Natl. Life Ins. Co., 123 Wis. 586, 102 N. W. 57; Ward *v.* Billups, 76 Tex. 466, 13 S. W. 308; Rowell *v.* Rowell, 122 Wis. 1, 99 N. W. 473.

rights, the defendant is within the jurisdiction of the court, and personal service is had upon him, then that court may deal with him, and any judgment that might be rendered would be enforcible, under the Acts of Congress, in the State in which the land lies. This question arises most frequently in actions for divorce and alimony, and in the specific performance of contracts for the sale of land, and in these cases where substituted service is had upon the defendant in another jurisdiction, by placing a copy of the summons in the hands of the officer of that State for service, or where jurisdiction is sought by publication of process, the questions involved are not easy of determination. It is well settled that a Court of Chancery in a proper case has power to compel a conveyance of lands situated in another country or State, where the persons of the parties interested are within the jurisdiction of the court; it may prohibit the doing of an act, it may compel obedience to its decree by appropriate proceedings, and any action taken by reason of such compulsion is valid and effectual wherever it may be assailed. From the very nature of the property, land must be governed by the lex loci rei sitæ. No judgment of the court of another jurisdiction can have any effect upon the title to the property; and the power of equity in decreeing a conveyance of land is effectual only upon the person, not upon the land. The decree does not change the title to the land. It remains the same as before, until the person in whom the title resides either voluntarily or perforce obeys the decree of the court and divests himself of the title by a conveyance valid under the lex loci. The decree of chancery, then, with respect to realty beyond its jurisdiction, can have no direct operation upon the property and per se in no way affects the legal or equitable title thereto. Where substituted service was had upon a defendant in a divorce proceeding, a decree that a conveyance be made by the defendant of lands belonging to him in another State, and upon his failure to execute the conveyance, that a trustee for him be authorized to perform this act, the attempted conveyance by the trustee was a nullity.[1] But where the action was brought in one State against a defendant who resided in another, and the defendant employed counsel to represent him, and directed that he enter a voluntary appearance for him, and this was done, he and his property were bound by the judgment rendered.[2]]

[1] Fall *v.* Fall, 75 Neb. 104, 113 N. W. 175; Banco Minero *v.* Ross & Masterson, 138 S. W. 224.

[2] Arrington *v.* Arrington, 102 N. C. 514, 9 S. E. 200.

§ 92. [**Same.**—This doctrine applies with equal force in actions for divorce. Where a personal judgment has been rendered in the courts of a State against a non-resident merely upon constructive service and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another State in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is by operation of the due process clause of the Fourteenth Amendment void as against the non-resident, even in the State where rendered, and, therefore, such non-resident in virtue of rights granted by the Constitution of the United States may successfully resist even in the State where rendered, the enforcement of such a judgment.[1] But where the action is brought in the State of the domicil of the husband, and the State in which the marriage was consummated, the courts of that State have jurisdiction over the husband, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having her domicil in the State of the matrimonial domicil for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other States by virtue of the full faith and credit clause.[2]]

§ 93. [**Judgment Rendered in One State upon Substituted Service Has no Effect upon Property Rights in State of Defendant's Domicil.** — The question as to the validity of a judgment rendered in the State of the plaintiff's domicil in an action therein brought against a defendant who resided in another State, and service of process was attempted to be had upon the defendant by publication or sending it through the mails, where there was no personal appearance, is an interesting one. Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to

[1] Haddock *v.* Haddock, 201 U. S. 567, 50 L. Ed. 867, 26 S. Ct. Rep. 525.

[2] Atherton *v.* Atherton, 181 U. S. 155, 45 L. Ed. 795, 21 S. Ct. Rep. 544; Bidwell *v.* Bidwell, 139 N. C. 402, 52 S. E. 55; Harris *v.* Harris, 115 N. C. 587, 20 S. E. 187; Wilson *v.* Seligman, 144 U. S. 41, 36 L. Ed. 338, 12 S. Ct. Rep. 541.

any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.[1]

[1] Pennoyer *v.* Neff, 95 U. S. 727, 24 L. Ed. 565.

Where the parties are all citizens of the same State, service of process has been had upon them and they appeared, in an action brought to partition the interests of co-partners in an island in the Caribbean Sea, it may be that the court cannot enforce its own decree in rem by making sale of the defendant's title to the island of Sombrero, but the power of the court to decree the settlement of the accounts between the parties, and the payment of the balance, if any found due, and to enforce such decree in personam cannot be questioned. Wood *v.* Warner, 15 N. J. Eq. 84.

The decrees of courts of equity primarily and properly act in personam, and at most, collaterally only in rem. Hence, the specific performance of a contract for the sale of lands lying in a foreign country, will be decreed in equity, whenever the party is resident within the jurisdiction of the court. Olney *v.* Eaton, 66 Mo. 567; Collins *v.* Park, 93 Ky. 6.

Where a court of equity has jurisdiction of a party, it will compel him to specifically perform a contract for the sale of land located in a distant State, but no court has gone to the extent of compelling a defendant, by its decree, to go into a foreign State and specifically execute a contract there, whether the defendant be a natural person or an artificial one. Port Royal R. Co. *v.* Hammond, 58 Ga. 526.

An action to recover land, or any interest therein, must be brought in the county where the land is situate, and the fact that other questions are to be determined would make no difference. Mfg. Co. *v.* Brower, 105 N. C. 440, 11 S. E. 313.

Generally, if not universally, equity jurisdiction is exercised in personam and not in rem, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud from title, as upon a bill for the specific per-

§ 94. **[Equity Suffers No Wrong to Be without a Remedy.** — Whenever the law court can afford no remedy, or if it has a remedy but it has no power to administer it, it is said that the remedy is in equity. This is true, generally speaking, but it is not in all cases, without regard to the conditions or the facts in each particular case, that equity will afford a remedy for every conceivable wrong. It is not the province of the equity court to allow a complainant to follow a pretended claim, where the law courts have ample powers to give the complainant a full, complete, and adequate remedy, nor will the rule in its strict sense be applied to give a new cause of action where there is no cause of action at law. For instance, where the law court requires that an action be brought within a given time, or else the cause of action will be barred, laches on the part of the complainant will not excuse him. The defendant has the right to rely on the presumption that if the complainant had any pretended claim, that he would have asserted it within the time allowed by statute, and upon his failure to promptly guard his rights, however good and valid his claim may have been, still equity would not entertain his bill.[1] The

formance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment in rem, establishing a title in land, but operates in personam only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff.

It would, doubtless, be within the power of the State in which the land lies to provide by statute that, if the defendant is not found within the jurisdiction or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose. Hart *v.* Sansom, 110 U. S. 154, 28 L. Ed. 102, 3 S. Ct. Rep. 586; Pell's Revisal of 1908 (N. C.), §§ 566 to 568; Davis *v.* Rogers, 84 N. C. 412; Morris *v.* White, 96 N. C. 91; Rollins *v.* Henry, 78 N. C. 352; Smith *v.* King, 107 N. C. 273, 12 S. E. 57; Skinner *v.* Terry, 134 N. C. 305, 46 S. E. 517.

[1] Gulledge *v.* Railroad, 147 N. C. 234, 62 S. E. 732; Hall *v.* Railroad, 149 N. C. 110, 62 S. E. 899; Greene *v.* Keene, 14 R. I. 395, 51 Am. Rep. 400; Britton *v.* Supreme Council Royal Arcanum, 46 N. J. Eq. 112, 21 Atl. 754, 19 Am. St. Rep. 376; Thomson *v.* Town of Elton, 109 Wis. 589, 85 N. W. 425.

Admitting the maxim that "a court of equity will not permit a wrong without providing a remedy," the doctrine does not apply unless the court of equity has jurisdiction to hear and determine the subject matter submitted to it. Patterson *v.* People, 23 Cal. App. 479, 130 Pac. 618.

When a tax sought to be collected is alleged to be an illegal one or a discrimination against a tax-payer, his remedy is to pay the tax under protest and then seek to recover it from the municipality. A court of equity will not enjoin the sale of property for taxes on account of irregularities in the notice. If the tax is due, the party should pay it. A court of equity will not aid him in resisting the just and legal demands of the government. It will not step in for such reasons, and protect a party in not paying a tax which he admits is due. Finnegan *v.* City of Fernan-

maxims that every right has a remedy, and that where the law does not give redress equity will afford relief, however just in theory, are subordinate to positive institutions, and cannot be applied either to subvert established rules of law, or to give the courts a jurisdiction hitherto unknown.]

§ 95. [**The Maxim Is Not an Absolute Rule.**—Even though the complainant may invoke the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery, this is not an invariable rule. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the Court of Chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as is that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty alone, unconnected with legal obligations.

Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief.[1]]

dina, 15 Fla. 379, 21 Am. Rep. 292; Balch *v.* Beach, 119 Wis. 77, 95 N. W. 132.

Equity will not allow the conversion of land into money or money into land to stand in the way of doing justice. Good conscience demands that a Court of Equity recognize the rights of all parties and adjust them whenever it may be done without prejudice to any one. Tarnow *v.* Carmichael, 82 Neb. 1, 116 N. W. 1031.

The maxim applies in an action brought by a railroad company against its employees who refuse to properly perform their regular duties, because the employer hauls Pullman cars over its road and is engaged in interstate commerce. Southern Cal. R. Co., 62 Fed. 796; Gibson *v.* Board of Supervisors, 80 Cal. 363, 22 Pac. 225; Railroad *v.* Rutherford, 62 Fed. 796; Fleshman *v.* McWhorter, 54 W. Va. 161, 46 S. E. 116; Rhoten *v.* Baker, 104 Ill. App. 653; Janney *v.* Buell, 55 Ala. 408.

[1] Rees *v.* City of Watertown, 86 U. S. 107, 22 L. Ed. 72; Toledo, etc. R. *v.* Pennsylvania Co., 54 Fed. 751; Joy *v.* St. Louis, 138 U. S. 1, 34 L. Ed. 843, 11 S. Ct. Rep. 243.

§ 96. [**The Extent of the Remedy.**—Where a fraudulent grantee has so fortified himself by various muniments that a Court of Law cannot give complete and adequate relief, a Court of Equity will undertake it. In a case like the one under consideration, where the muniments of title to the same property, alleged to be fraudulently appropriated, consist of two deeds and a residuary clause in a will, it is plainly manifest that the probate court cannot give an adequate remedy, and can afford only partial, if any, relief. An adequate remedy is not a partial remedy. It is a full and complete remedy, and one that is accommodated to the wrong which is to be redressed by it. It is not enough that there is some remedy at law; it must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.[1] A Court of Equity has jurisdiction to relieve against a judgment upon the ground that it is contrary to equity where there is no other remedy upon several different grounds, and among them fraud upon the party seeking the relief by the person who obtained the judgment; such party not being guilty of any inexcusable ignorance or negligence in the matter. The jurisdiction of equity is not exercised to disturb a judgment. That can only be done according to methods provided by the Code. But it acts directly upon the party who is in a position to, and who might, if not restrained of his liberty, enforce the judgment, tying his hands so as to prevent him from doing so, thus leaving the judgment good in form but vagueless and harmless in fact. Above all and over all is the supreme principle to which the vigilant, clean-handed, but wronged, party may resort when all legal remedies fail, and even precedents for an equitable remedy also, fitting the situation with exactness as to facts — that equity suffers no wrong to go without a remedy; the wrong being of sufficient gravity to be appreciated by the conscience of the chancellor, and application being made to its jurisdiction seasonably and with clean hands. Its power and mastery of invention and the flexibility of its arm enable it to fit an infinite variety of situations successfully where otherwise wrongs would go unrighted.[2]]

§ 97. [**When the Maxim Does Not Apply.** — It does not follow that equity will always furnish a remedy for any wrong, other

[1] Sumner *v.* Staton, 151 N. C. 198, 65 S. E. 902; Gormley *v.* Clark, 134 U. S. 338, 33 L. Ed. 909, 10 S. Ct. Rep. 554; Boyce *v.* Grundy, 3 Pet. 210, 7 L. Ed. 655; Detroit Trust Co. *v.* Old Natl. Bank, 155 Mich. 61, 118 N. W. 729, 15 Detroit Leg. N. 938.

[2] Boring *v.* Ott, 138 Wis. 260, 119 N. W. 865, 19 L. R. A (N.S.) 1080.

than a mere moral transgression, if legal remedies are inadequate or do not exist at all. It is not infrequently that we see that valuable doctrine invoked where it has no proper place. It is never applicable to give a remedy for a wrong, so called, which is not a wrong at all, because the written law makes it otherwise. Such wrongs, if the injuries may be so designated at all, are not within the maxim "there is no wrong without a remedy." [1]]

§ 98. [**He Who Comes into Equity Must Come with Clean Hands.** — It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into the court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the court. The complainant ought not to be the transgressor himself, and then complain that by chance he has been injured on account of his own wrongful misconduct. When, as is sometimes the fact, the original wrong-doer is the party who sustains the greater injury by reason of his inequitable scheme or plan, he ought to bear the burden and the consequences of his own folly, and the equity court will not lend him its jurisdiction to right a wrong of which he himself is the author. Equity leaves the parties in pari delicto to fight out their own salvation and remedy their own wrongs in the law court. Equity will not assume jurisdiction where both parties are in the wrong. The purpose of equity is to afford to the complainant a full, complete, and adequate remedy, and it will not undertake to balance the equities between the parties when they are both in the wrong, nor give the complainant relief against his own vice and folly. When the plaintiff has not been guilty of a fraud which tends to producing the injury of which he seeks redress, his conscience, in equity, is void of offence, and hence it cannot, with any propriety be said that his hands are unclean, for "unclean hands", within the meaning of the maxim of equity, is a figurative description of a class of suitors to whom a Court of Equity as a court of conscience will not even listen, because the conduct of such suitors is unconscionable, *i.e.* morally reprehensible as to known facts.[2]]

[1] Pietsch *v.* Milbrath, 123 Wis. 647, 102 N. W. 342, 68 L. R. A. 945, 107 Am. St. Rep. 1017; Rowell *v.* Smith, 123 Wis. 510, 102 N. W. 1.

[2] Where one had tapped the wires of a telegraph company and for

§ 99. [**Same.** — Since it is the policy of the equity court to do even justice to all of the parties, as nearly as it can, it follows that before the court will lend its aid the complainant must show that the inequitable condition of which he complains was occasioned by the wrongful act of some one else, and not that it was brought about by his own misconduct. Courts of equity will not relieve against conditions brought about by the improper conduct of the party seeking relief. This rule applies not only to the original parties to the fraudulent transaction, or the matter of which the complainant avers is harsh and inequitable, but also to their heirs, and to all parties claiming under, or by title derived from, them, where no equitable rights intervene to protect such parties.

some time had been taking market quotations in this way, and the contract of the subscriber, whose wire was being tapped, had expired and the telegraph company cut off its service, plaintiff cannot recover for any injury which he may have sustained. Sullivan *v.* Chicago Board of Trade, 111 Ill. App. 494; Primm *v.* White, 162 Mo. App. 594, 142 S. W. 802.

A party has no standing in equity to compel his neighbor to build a fence, where the complainant purposely caused the destruction of two fences which were sufficient for all proper purposes. Auman *v.* Cunfer, 30 Pa. Super. Ct. Rep. 368.

A court of equity will not interfere to prevent what is claimed to be a trespass by an officer in complainant's restaurant, where an open and flagrant violation of the law is going on and may continue without any interruption on the part of the legal authorities. Weiss *v.* Herlihy, 49 N. Y. Supp. 81, 23 App. Div. 608; Modern Horse Shoe Club *v.* Stewart, 242 Mo. 421, 146 S. W. 1157.

Nor are plaintiffs entitled to an injunction to restrain removal of a schoolhouse, where they themselves had unlawfully moved it off of the school lot. Sanders *v.* Cauley, 52 Tex. Civ. App. 261, 113 S. W. 560; Rural Home Telephone Co. *v.* Kentucky, etc. Tel. Co., 32 Ky. L. Rep. 1068, 107 S. W. 787.

But the maxim does not apply where the parties are brought in by a third party, judgment is had against one and he appeals. Hunter *v.* Suderwski, 171 Ill. App. 533.

It is not necessary to allege fraud in order for the maxim to apply. The maxim is enforced by the chancellor ex mero motu, and because of public policy, when the facts call it into use. Houtz *v.* Hellman, 228 Mo. 655, 128 S. W. 1001; Creamer *v.* Bivert, 214 Mo. 473, 113 S. W. 1118; Lord *v.* Smith, 109 Md. 42, 71 Atl. 430; Merchants Syndicate Catalog Co. *v.* Retailers' Factory Catalog Co., 206 Fed. 545.

Equity does not adjust the differences between rogues. The complainant is first judged, and not until he has been found free from taint does equity proceed to determine whether he has been wronged. Fay *v.* Lambourne, 108 N. Y. Supp. 876, 124 App. Div. 245, 196 N. Y. 575, 90 N. E. 1158.

Where plaintiffs induced defendant, a ball player, to break his contract reserving his services for ensuing season, they cannot enjoin his now fulfilling his original contract. Weeghman *v.* Killifer, 215 Fed. 168, 215 Fed. 289; Rozell *v.* Redding, 59 Mich. 331, 26 N. W. 498; McNear *v.* Williamson, 166 Mo. 358, 66 S. W. 160; Ward *v.* Hartley, 178

It is never permissible for one to come in and seek relief under such circumstances, for to allow this rule would be to corrupt the very fountain of justice itself and encourage dishonest and unfair means and methods of transacting business, rather than to demand honorable and straightforward means.[1] Equity imperatively demands of suitors in courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief. He who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness will appeal in vain to a court of conscience, even though in his wrongdoing he may have kept himself strictly "within the law." Misconduct which will bar relief in a court of equity need not necessarily be of such a nature as to be punishable as a crime or to constitute the basis of a legal action. Under this maxim, any wilful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean. Both courts and text-writers have repeatedly spoken upon this subject in no uncertain language.[2]]

Mo. 135, 77 S. W. 302; Railroad *v.* Crothersville, 159 Ind. 330, 64 N. E. 914; Edward Thompson Co. *v.* American Law Book Co., 121 Fed. 907, 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607; Foundry Co. *v.* Reservoir Co., 111 Fed. 284, 49 C. C. A. 324; Hingston *v.* Montgomery, 121 Mo. App. 451, 97 S. W. 202; Jahn *v.* Champagne Lbr. Co., 152 Fed. 669; Vulcan Detinning Co. *v.* American Can Co., 70 N. J. Eq. 588, 67 Atl. 339; Indianapolis Northern Traction Co. *v.* Essington, 54 Ind. App. 286, 99 N. E. 757, 100 N. E. 765; Harton *v.* Little, 65 So. 951; Munn & Co. *v.* Americana Co., 82 N. J. Eq. 63, 88 Atl. 330, 91 Atl. 87; Union Central Life Ins. Co. *v.* Drake, 214 Fed. 542; Schroeder *v.* Turpin, 253 Mo. 258, 161 S. W. 716; Lovejoy *v.* Bailey, 214 Mass. 134, 101 N. E. 63; West *v.* Washburn, 138 N. Y. Supp. 230, 153 App. Div. 460; Sternberger *v.* Young, 73 N. J. Eq. 586, 75 Atl. 807; Caldwell *v.* Va. etc. Ins. Co., 124 Tenn. 593, 139 S. W. 698, Danciger *v.* Stone, 187 Fed. 853; Primeau *v.* Granfield, 180 Fed. 847, 193 Fed. 911, 225 U. S. 708, 56 L. Ed. 1267, 32 S. Ct. Rep. 839; Larscheid *v.* Hashek Mfg. Co., 142 Wis. 172, 125 N. W. 442; Downey *v.* Gove Co., 201 Mass. 251, 87 N. E. 597; Avery *v.* Central Bank, 221 Mo. 71, 119 S. W. 1106; Funck *v.* Farmers' Elevator Co., 142 Iowa 621, 121 N. W. 53; Supreme Lodge *v.* Hinsey, 138 Ill. App. 248, 241 Ill. 384, 89 N. E. 728; Seibel *v.* Higham, 216 Mo. 121, 115 S. W. 987.

[1] Wilson *v.* Wall, 99 Va. 353, 38 S. E. 181; Poling *v.* Williams, 55 W. Va. 69, 46 S. E. 704; Craig *v.* Craig, 54 W. Va. 183, 46 S. E. 371; Stout *v.* Mercantile Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843; Ryan *v.* Mitler, 236 Mo. 496, 139 S. W. 128; A. N. Chamberlain Medicine Co. *v.* H. A. Chamberlain Medicine Co., 43 Ind. App. 213, 86 N. E. 1025; Newby *v.* Laurence, 84 Neb. 622, 121 N. W. 965.

[2] Weeghman *v.* Killifer, 215 Fed. 168, 215 Fed. 289; Deweese *v.* Reinhard, 165 U. S. 386, 41 L. Ed. 757, 17 S. Ct. Rep. 340; Michigan Pipe Co. *v.* Fremont Ditch etc. Co., 111 Fed. 284, 49 C. C. A. 324.

§ 100. [**The Inequitable Conduct Complained of Must Refer to the Matter then under Consideration of the Court.** — It is not every time that one has practised an unconscionable bargain upon another, or there has been a lack of good faith and those matters that are usually present when men deal with each other at arm's length, and the parties are capable of protecting themselves and their own rights, that a court of equity will refuse its aid to a complaining party. It is only where the inequitable conduct complained of as ground for refusing its jurisdiction has actually been practised with reference to the matter then under consideration in the case at bar. It may happen that one who habitually takes an undue advantage over his customers in their business dealings, and this is a matter of common observation, at some times in his experience has dealt fairly and justly with his customers, and in the absence of evidence of an unconscionable advantage taken in the very case at bar, it is no ground for refusing jurisdiction, that the general character and conduct of the complainant has been tainted with fraudulent and unfair practice. The principle does not repel all sinners from courts of equity, nor does it disqualify any claimant from obtaining relief there who has not dealt unjustly in the very transaction concerning which he complains. The iniquity which will repel him must have an immediate and necessary relation to the equity for which he sues. It must be understood to be wilful misconduct in regard to the matter in litigation, and not to misconduct, however gross, which is unconnected therewith, and with which the opposite party in the cause has no concern.[1]]

[1] Heller & Merz Co. *v.* Shaver, 102 Fed. 888, 108 Fed. 834; Camors *v.* M'Connell, 140 Fed. 417.

The rule that one coming into a Court of Equity must come with clean hands is confined to the conduct of the party in the matter before the court, and not to matters aliunde. Courts will not refuse redress to the suitor because his conduct in other matters, not then before the court, may not be blameless. It is enough if the suitor shows he has acted justly, fairly, and legally in the subject-matter of the suit. Bonsack Machine Co. *v.* Smith, 70 Fed. 386; Liverpool & L. & G. Ins. Co. *v.* Clunie, 88 Fed. 160; Knapp *v.* S. Jarvis Adams Co., 135 Fed. 1008.

Where a woman who has formerly lived in adultery with defendant sued on a note given her by defendant, but not in consideration of future illicit intercourse, she may recover, notwithstanding their previous relations. Burton *v.* Belvin, 142 N. C. 151, 55 S. E. 71; Trice *v.* Comstock, 121 Fed. 720, 57 C. C. A. 646, 61 L. R. A. 176; Delaware Surety Co. *v.* Layton, 50 Atl. 378; Upchurch *v.* Anderson, 52 S. W. 917; Kinner *v.* Lake Shore etc. R. Co., 23 Ohio Cir. Ct. Rep. 294; Chicago *v.* Union etc. Transit Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281; John Anisfield Co. *v.* Edward B. Grossman Co., 98 Ill. App. 180.

§ 101. [**The Extent and Operation of the Inequitable Conduct.** — The alleged inequitable conduct practised by the defendant, and from which the plaintiff seeks relief, must be some act in a matter in which he is interested. If one party by and through his own fraudulent practices, for the purpose of injuring a third party and to obtain specific benefits for himself, happens to be betrayed and thereby loses the fruits from the proposed fraudulent plan, then he too ought to lose. Now that the scheme has failed, and he seeks the aid of a Court of Equity to compel his partner in the attempted fraud to restore to him property which he had suffered him to acquire for the purpose of promoting and carrying out the contemplated fraud, would be contravening the scope of the jurisdiction of equity. To obtain the relief which he seeks he is obliged to rely upon the fraud to which he was a party, and in such a case it is plain that equity will not aid him to recover what he has lost.[1] So, where one's property evaded taxation for a

The maxim that "a party must come into court with clean hands" only applies to the particular transaction under consideration; for a court will not go outside of the case for the purpose of examining the conduct of the complainant in other matters or questioning his general character for fair dealing. The wrong must have been done to the defendant himself, and must have been in regard to the matter in litigation. Cohn *v.* Pitzeli, 117 Ill. App. 342, 217 Ill. 30, 75 N. E. 392; Lurie *v.* Pinanski, 215 Mass. 229, 102 N. E. 629; Lone Star Salt Co. *v.* Blount, 49 Tex. Civ. App. 138, 107 S. W. 1163; Shotwell *v.* Stickle, 83 N. J. Eq. 188, 90 Atl. 246; McNair *v.* Benson, 63 Oreg. 66, 126 Pac. 20; Cuba Colony Co. *v.* Kirby, 149 Mich. 453, 112 N. W. 1133, 14 Detroit Leg. N. 494; Luebke *v.* Salzwedel, 157 Wis. 601, 147 N. W. 831; Chute *v.* Wisconsin Chemical Co., 185 Fed. 115; Dempster *v.* Baxmyer, 231 Pa. 28, 79 Atl. 805; Carr *v.* Craig, 138 Iowa 526, 116 N. W. 720; Huntzicker *v.* Crocker, 135 Wis. 38, 115 N. W. 340; International Land Co. *v.* Marshall, 22 Okla. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056; Cunningham *v.* Pettigrew, 169 Fed. 335, 94 C. C. A. 457; Williams *v.* Beatty, 139 Mo. App. 167, 122 S. W. 323; Mason *v.* Carrothers, 105 Me. 392, 74 Atl. 1030.

[1] Lawton *v.* Estes, 167 Mass. 181, 45 N. E. 90, 57 Am. St. Rep. 450; Bagwell *v.* Johnson, 116 Ga. 464, 42 S. E. 732; Ashe-Carson Co. *v.* Bonifay, 147 Ala. 376, 41 So. 816; Printers' Club *v.* Dr. Blosser Co., 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. Rep. 137; Baker *v.* Grand Rapids, 142 Mich. 687, 106 N. W. 208, 12 Detroit Leg. N. 879; Feld *v.* Roanoke Inv. Co., 123 Mo. 603, 27 S. W. 635; Morrison *v.* Juden, 145 Mo. 282, 46 S. W. 994; Little *v.* Cunningham, 116 Mo. App. 545, 92 S. W. 734; Nebraska Telephone Co. *v.* Western etc. Telephone Co., 68 Neb. 772, 95 N. W. 18; White *v.* Cuthbert, 71 N. Y. St. Rep. 818, 41 N. Y. Supp. 818, 10 App. Div. 220; Blount *v.* Eames, 150 Mich. 35, 113 N. W. 589, 14 Detroit Leg. N. 620; Lyons *v.* Elston, 211 Mass. 478, 98 N. E. 93; Stillwell *v.* Bell, 248 Mo. 61, 154 S. W. 85; Warfield *v.* Adams, 215 Mass. 506, 102 N. E. 706; Gilmore *v.* Thomas, 252 Mo. 147, 158 S. W. 577; Vermont Ins. Co. *v.* Fletcher, 87 Vt. 394, 89 Atl. 480; Derry *v.* Fielder, 216 Mo. 176, 115 S. W. 412.

number of years, and finally when this fact was ascertained, and it was placed upon the tax books of the wrong county, this is not coming in with clean hands for him to ask that the assessment be again stricken from the records. The established rule of equity is that it will not lend its aid to a complainant unless even-handed justice and good conscience demand that relief should be granted.[1] It is generally accepted that one who seeks the benefit of the equitable doctrine of subrogation must come into court with clean hands; that a vendee cannot have relief under the doctrine if his status is the result of his own wrongful act, or of a wrongful act in which he participated, or of the wrongful act of one under whom he claims.[2]]

§ 102. [**Same.** — The maxim applies with equal force in actions for divorce, and especially so where the parties have deliberately removed from the state of their domicil for the purpose of evading its laws and going into another State and there having the ceremony performed under the laws of that jurisdiction. The cause of separation may have been a domestic incompatibility, or the marriage may have been attended with harsh and cruel treatment by one towards the other spouse, but in the trial of actions for divorce the same principles apply and where the parties are equally in the wrong, equity leaves them where it finds them. A complainant who has permitted himself to become a drunkard, or who has frequently beat his wife, or rendered her condition intolerable, ought not to be allowed any standing in a Court of Equity when he sues for a divorce from his wife for some shortcoming directly caused by his own vicious temperament, or where he has perpetrated a fraud upon her by inducing her to enter into the marriage state with him when he had no legal right to remarry, and then allege some cause of action for divorce against his new wife for some petty reason of his own. The weight and tendency of American authority are against affording affirmative relief to a person situated as the complainant is in the instances cited. The English authorities though are the other way.[3] In seeking a divorce, the husband cannot obtain the benefit of his own wrong. Courts are ordained for the enforcement and vindi-

[1] Williams *v.* Dutton, 184 Ill. 608, 56 N. E. 868; Evans *v.* Thomas, 4 Ky. L. Rep. 629; Lumber Co. *v.* Hollingsworth, 21 Ky. L. Rep. 899, 53 S. W. 279; Smith *v.* Chilton, 84 Va. 840, 6 S. E. 142; Melbye *v.* Melbye, 15 Wash. 648, 47 Pac. 16; Raasch *v.* Raasch, 100 Wis. 400, 76 N. W. 591; Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032.

[2] Galliland *v.* Williams, 181 Ala. 173, 61 So. 291.

[3] Miles *v.* Chilton, 1 Rob. Ecc. 684.

cation of the law and legal rights. They never aid anybody in his efforts to violate law nor give him the benefit or fruit of his own violation thereof. No court of law or equity will enforce or give any right upon an illegal contract. Following the same principle, a court will not allow the use of its powers and process to obtain a benefit founded directly upon a breach of law by the applicant therefor. Courts of Equity go still further and refuse relief, even in cases of equitable right, if the applicant has been guilty of fraud or misconduct in or about the matter in respect to which he seeks relief. To obtain relief in a Court of Equity, the plaintiff must come with clean hands, and this maxim applies in divorce cases as well as in others of equitable cognizance. This is the principle underlying the defences of connivance, collusion, and recrimination, everywhere recognized and permitted.[1]]

§ 103. **Rules Governing Jurisdiction.** — There are also one or two rules as to the extent of maintaining jurisdiction, which deserve notice in this place, as they apply to various descriptions of cases, and pervade whole branches of Equity Jurisprudence, and cannot therefore with propriety be exclusively arranged under any one head.

§ 104. **Same.** — One rule is, that if originally the jurisdiction has properly attached in equity in any case, on account of the supposed defect of remedy at law, that jurisdiction is not changed or obliterated by the Courts of Law now entertaining jurisdiction in such cases, when they formerly rejected it. This has been repeatedly asserted by Courts of Equity, and constitutes in some sort the pole-star of portions of its jurisdiction.[2] The reason is that it cannot be left to Courts of Law to enlarge or to restrain the powers of Courts of Equity at their pleasure. The jurisdiction of equity, like that of law, must be of a permanent and fixed character. There can be no ebb or flow of jurisdiction dependent upon external changes. Being once vested legitimately in the court, it must remain there until the Legislature shall abolish or limit it; for without some positive act, the just inference is that the legislative pleasure is that the jurisdiction shall remain upon its old foundations. This doctrine

[1] Rooney *v.* Rooney, 54 N. J. Eq. 231, 34 Atl. 685; Kerrison *v.* Kerrison, 60 How. Pr. 56; Ewald *v.* Ewald, 219 Mass. 111, 106 N. E. 567; Hall *v.* Hall, 69 W. Va. 175, 71 S. E. 103; Maxwell *v.* Maxwell, 69 W. Va. 414, 71 S. E. 571; Bacon *v.* Bacon, 68 W. Va. 747, 70 S. E. 762.

[2] Shotwell *v.* Smith, 5 C. E. Green, 79; Hinchley *v.* Greany, 118 Mass. 595; Labadie *v.* Hewitt, 85 Ill. 341; Lee *v.* Lee, 55 Ala. 590, 598. See ante, § 33.

has been a good deal canvassed in modern times; and it has been especially the subject of commentary by some of the greatest equity judges who have ever adorned the bench.[1] Lord Eldon upon one occasion said: "Upon what principle can it be said [that] the ancient jurisdiction of this court is destroyed, because Courts of Law now very properly perhaps exercise that jurisdiction which they did not exercise forty years ago? Demands have been frequently recovered in equity which now could be without difficulty recovered at law, &c. I cannot hold that the jurisdiction is gone, merely because the Courts of Law have exercised an equitable jurisdiction." [2]

§ 105. **Complete Relief May Be Had When Jurisdiction Has Been Assumed.** — Another rule respects the exercise of jurisdiction when the title is at law and the party comes into equity for a discovery, and for relief as consequent on that discovery. In many cases it has been held that where a party has a just title to come into equity for a discovery and obtains it, the court will go on and give him the proper relief, and not turn him round to the expenses and inconveniences of a double suit at law. The jurisdiction having once rightfully attached, it shall be made effectual for the purposes of complete relief.[3] And it has accordingly been laid down by elementary writers of high reputation, that "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." [4] The ground is stated to be the propriety of preventing a multiplicity of suits; [5] a ground of itself quite reasonable and sufficient to

[1] See Atkinson *v.* Leonard, 3 Bro. Ch. R. 218; Ex parte Greenway, 6 Ves. 812; East India Company *v.* Boddam, 9 Ves. 468, 469; Bromeley *v.* Holland, 7 Ves. 19 to 21; Cooper, Eq. Pl. ch. 3, pp. 126, 129. See also Biddle *v.* Moore, 3 Barr, 161.

[2] Kemp *v.* Pryor, 7 Ves. 249, 250. A change in the law of evidence, giving the right to one party to call the adverse party as a witness, does not take away the jurisdiction of equity over discovery. Cannon *v.* McNab, 48 Ala. 99; Millsops *v.* Pfeiffer, 44 Miss. 805. See ante, § 33.

[3] Winona R. Co. *v.* St. Paul R. Co., 26 Minn. 179.

[4] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Coop. Eq. Pl. Introd. p. xxxi; Middletown Bank *v.* Russ, 3 Conn. 135.

[5] The passage from Fonblanque on Equity deserves to be quoted at large. "The concurrence of jurisdiction may, in the greater number of cases in which it is exercised, be justified by the propriety of preventing a multiplicity of suits; for as the mode of proceeding in Courts of Law requires the plaintiff to establish his case, without enabling him to draw the necessary evidence from the examination of the defendant, justice could never be attained at law in those cases where the principal facts to be proved by one party are confined to the knowledge of the other party. In

justify the relief, and one upon which Courts of Equity act, as we shall presently see, as a distinct ground of original jurisdiction.[1]

§ 106. **Same.** — It is observable that the guarded language used is, " in most cases", although it is certainly difficult to perceive any solid ground why the jurisdiction should not extend to all cases embraced by the general principle. But the qualification is made with reference to the bearing of some of the authorities. The learned author of the Treatise on Equity [2] has laid down the principle in the broadest terms. " And when," says he, " this

such cases therefore it becomes necessary for the party wanting such evidence to resort to the extraordinary powers of a Court of Equity, which will compel the necessary discovery; and the court having acquired cognizance of the suit, for the purpose of discovery, will entertain if for the purpose of relief, in most cases of fraud, account, accident, and mistake."

[1] See Jesus College *v.* Bloom, 3 Atk. 262, 263. In Pearce *v.* Creswick, 2 Hare, R. 293, Mr. Vice-Chancellor Wigrim said: "The first proposition relied upon by the plaintiff in support of the equity of his bill was this, that the case was one in which the right to discovery would carry with it the right to relief. And undoubtedly dicta are to be met with tending directly to the conclusion that the right to discovery may entitle a plaintiff to relief also. In Adley *v.* The Whitstable Company (17 Ves. 329), Lord Eldon says: "There is no mode of ascertaining what is due, except an account in a Court of Equity, but it is said the party may have discovery, and then go to law. The answer to that is, that the right to the discovery carries along with it the right to relief in equity." In Ryle *v.* Haggie (1 Jac. & Walk. 236), Sir Thomas Plumer said: "When it is admitted that a party comes here properly for the discovery, the court is never disposed to occasion a multiplicity of suits by making him go to a Court of Law for the relief." And in McKenzie *v.* Johnston (4 Madd. 373), Sir J. Leach says: "The plaintiff can only learn from this discovery of the defendants how they have acted in the execution of their agency, and it would be most unreasonable that he should pay them for that discovery if it turned out that they had abused his confidence; yet such must be the case if a bill for relief will not lie."

"Now in a case in which I think that justice requires the court if possible to find an equity in this bill, to enable it once for all to decide the question between the parties, I should reluctantly deprive the plaintiff of any remedy to which the dicta I have referred to may entitle him. But I confess the arguments founded upon these dicta appear to me to be exposed to the objection of proving far too much. They can only be reconciled with the ordinary practice of the court by understanding them as having been uttered with reference in each case to the subject-matter to which they were applied, and not as laying down any abstract proposition so wide as the plaintiff's argument requires. I think this part of the plaintiff's case cannot be stated more highly in his favor than this, that the necessity a party may be under (from the very nature of a given transaction) to come into equity for discovery, is a circumstance to be regarded in deciding upon the distinct and independent question of equitable jurisdiction; further than this I have not been able to follow this branch of the plaintiff's argument."

[2] Mr. Ballow.

court can determine the matter, it shall not be a handmaid to the other courts, nor beget a suit to be ended elsewhere." [1] There are many authorities which go to support this proposition. But there are many also which are irreconcilable with it, or at least which contain exceptions to it.

§ 107. **Exceptions to Rules.** — Mr. Fonblanque has remarked: "There are some cases in which, though the plaintiff might be relieved at law, a Court of Equity, having obtained jurisdiction for the purpose of discovery, will entertain the suit for the purpose of relief. But there certainly are other cases where, though the plaintiff be entitled to discovery, he is not entitled to relief. To strike out the distinguishing principle upon which Courts of Equity in such cases have proceeded, would be extremely useful. But after having given considerable attention to the subject, I find myself incapable of reconciling the various decisions upon it." [2] What the learned author desired to ascertain has been found equally embarrassing to subsequent inquirers; and there is a distressing uncertainty in this branch of Equity Jurisdiction in England.[3]

§ 108. **Same.** — In cases of account there seems a distinct ground upon which the jurisdiction for discovery should incidentally carry the jurisdiction for relief. In the first place the remedy at law in most cases of this sort is imperfect or inadequate. In the next place, where this objection does not occur, the discovery sought must often be obtained through the instrumentality of a master or of some interlocutory order of the court; in which case it would seem strange that the court should grant some, and not proceed to full, relief.[4] In the next place in cases not falling under either of these predicaments the compelling of the production of vouchers and documents would seem to belong peculiarly to a Court of Equity and to be a species of relief. And in the last place, where neither of the foregoing principles applies, there is a great force in the ground of suppressing multiplicity of suits, constituting, as it does, a peculiar ground for the interference of equity.[5]

[1] 2 Fonbl. Eq. B. 6, ch. 3, § 6. This is the very language of the Lord Keeper (afterwards Lord Chancellor Nottingham) in Parker *v.* Dee, 2 Ch. Cas. 200, 201.

[2] 2 Fonbl. B. 6, ch. 3, § 6, note (r).

[3] Coop. Eq. Pl. ch. 3, § 3, pp. 188, 189.

[4] 3 Black. Comm. 437; Mitf. Eq. Pl. by Jeremy, pp. 119, 120, 123; Corporation of Carlisle *v.* Wilson, 13 Ves. 278, 279.

[5] See Jesus College *v.* Bloom, 3 Atk. 262; s. c. Ambler, R. 54. The full concurrency of jurisdiction of Courts of Equity for relief in all matters of account, whether there be a remedy at law or not, seems to have been

§ 109. **Relief Granted in Actions for Discovery.** — Cases of accident and mistake furnish like reasons for extending the jurisdiction to relief where it attaches for discovery. The remedy at law is not in such cases (as we shall presently see) either complete or appropriate. And cases of fraud are least of all those in which the complete exercise of the jurisdiction of a Court of Equity in granting relief ought to be questioned or controlled; since in addition to all other reasons fraud constitutes the most ancient foundation of its power; and equity sifts the conscience of the party, not only by requiring his own answer under oath, but by subjecting it to the severe scrutiny of comparison with other competent testimony, thus narrowing the chances of successful evasion, and compelling the party to do equity, as it shall appear upon a full survey of the whole transaction. Indeed in many cases of fraud, what should be the nature and extent of the redress, whether it should be wholly legal or wholly equitable, or a mixture of both, can scarcely be decided but upon a full hearing upon all the proceedings in the cause.

§ 110. **Same.** — But there are cases, if not leading authorities, which it is not easy to reconcile with the principles already stated in matters of fraud, accident, mistake, and account.[1] Some of them may have been adjudged upon their own peculiar circumstances, or they may stand upon some ground which leaves these principles untouched. Others are not susceptible of such a classification, and must either be rejected altogether, or be admitted to a considerable extent to overturn these principles.[2]

largely insisted on by Lord Erskine, in The Corporation of Carlisle *v.* Wilson (13 Ves. 278, 279). And it was positively asserted by the Court of Errors in New York, in Ludlow *v.* Simond (2 Caines, Cas. in Err. 38, 39, 53, 54). In Ryle *v.* Haggie (1 Jac. & Walk. 234), the Master of the Rolls said: "When it is admitted that a party comes here properly for a discovery, the court is never disposed to occasion a multiplicity of suits by making him go to a Court of Law for the relief."

[1] 2 Fonbl. Eq. B. 6, ch. 3, § 6, note (*r*).

[2] In Parker *v.* Dee (2 Chan. Cas. 200), the bill was against an executor for a discovery of assets, and payment; and relief was decreed by Lord Nottingham. In Bishop of Winchester *v.* Knight (1 P. Will. 406), the bill was for a discovery and an account of ore, dug by a tenant during his life, and by his heir, against the executor and heir; and the court maintained the suit, directing a trial at law, and after the trial granted relief. In Story *v.* Lord Windsor (2 Atk. 630), the bill was for an account of the profits of a colliery, upon a legal title asserted by the plaintiff; Lord Hardwicke sustained the bill for the account, because, he said, this is not a title of land, but of a colliery, which is a kind of trade; and therefore an account of the profits may be taken here. (See also Jesus College *v.* Bloom, 3 Atk. 262.) The same learned chancellor, in Sayer *v.* Pierce (1 Ves. 232), seems to have proceeded on the same ground, holding that the party, being out of possession of lands, generally, was not entitled to maintain a bill for an

§ 111. **Same.** — But when we depart from matters of fraud, accident, mistake, and account, as the foundations of a suit in equity, it is far more difficult to ascertain the boundary where the right of a Court of Equity to entertain a bill for relief as consequent upon the jurisdiction for discovery begins, and where it ends.[1] The difficulty is increased by the recent rule adopted in the Courts of Equity in England (of which we shall have occasion to speak hereafter), that if the party seeks relief as well as discovery, and he is entitled to discovery only, a general demurrer will lie to the whole bill.[2] The effect of this rule is, that

account of profits alone; but he retained the bill in that case, directing a trial at law upon the ground that it asked to ascertain boundaries. In Lee *v.* Alston (1 Bro. Ch. R. 194), a bill for an account of timber cut by a tenant for life, impeachable for waste, was entertained by Lord Thurlow, and relief granted. In Jesus College *v.* Bloom (3 Atk. 262; s. c. Ambler, R. 54), which was a bill for an account and satisfaction for waste, in cutting down timber before the assignment, against an assignee of the lessee of the plaintiffs, Lord Hardwicke said: "Upon the opening of the case the bill seems improper, and an action of trover is the proper remedy. Where the bill is for an injunction, and waste has been already committed, the court, to prevent a double suit, will decree an account and satisfaction for what is past." And because the bill sought an account only against the assignee for waste before the assignment, and without praying an injunction, his lordship dismissed the bill. The same point was held in Smith *v.* Cooke (3 Atk. R. 378, 381). In Geast *v.* Barker (2 Bro. Ch. 61), the bill was for a discovery of the quantity of coal and coke sold from a mine let by plaintiff to defendant upon a reservation of one shilling for every stack of coal sold, &c., and prayed an issue, to try what quantity a stack should contain, and suggested a custom of the country. The Master of the Rolls (Lord Kenyon) said if it were now necessary either to decree account or dismiss the bill, he would do the latter, as he was clear the remedy was at law. (s.c. cited in Harwood *v.* Oglander, 6 Ves. 225.) Why the remedy and account should not be given in equity is not stated; and it is difficult to see, since it is clear that the bill was good for the discovery, and it was obtained. In Sloane *v.* Heatfield (Bunb. R. 18), the bill was for a discovery of treasure-trove and relief; and the court held it good for discovery, but that the plaintiff could not have relief, because he might bring trover at law. In Ryle *v.* Haggie (1 Jac. & Walk. 234) an opposite course was adopted, upon the professed ground of avoiding a multiplicity of suits, the party having a good ground to seek a discovery, and there being a remedy at law. In The Duke of Leeds *v.* New Radnor (2 Bro. Ch. R. 338, 519), Lord Thurlow reversed the decree of the Master of the Rolls, denying relief, because there was a remedy at law, upon the ground that the bill being retained for a year, the right to grant relief in equity was thus far admitted, and it ought to give entire relief. See Mr. Fonblanque's comments on this case, in 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*g*), p. 156. See Mr. Blunt's note to the case of Jesus College *v.* Bloom, Ambler, 54; 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*g*); ante, § 105 and note.

[1] See Ryle *v.* Haggie, 1 Jac. & Walk. 234; Pearce *v.* Creswick, 2 Hare, R. 243; Post, § 690.

[2] Ante, §§ 105, 112, 113, 114, and 115; Story, Eq. Plead, §§ 312, 545.

a plaintiff may be compelled, in a doubtful case, to frame his bill for a discovery in the first instance; and having obtained it, he may be compelled to ask leave to amend (which will not ordinarily be granted, unless it is clear that the proper relief is in equity), and then he may try the question whether he is entitled to relief or not.[1]

§ 112. **Same.** — In America a strong disposition has been shown to follow out a convenient and uniform principle of jurisdiction, and to adhere to that which seems formerly (as we have seen) to have received the approbation of Lord Nottingham.[2] The principle is, that where the jurisdiction once attaches for discovery, and the discovery is actually obtained, the court will further entertain the bill for relief, if the plaintiff prays it. This has been broadly asserted in many cases,[3] and certainly possesses the recommendation of simplicity and uniformity of application; and escapes from what seems to be the capricious and unintelligible line of demarcation pointed out in the English authorities. Thus it has been laid down in the courts of New York, upon more than one occasion, as a settled rule, that when the Court of Chancery has gained jurisdiction of a cause for one purpose, it may retain it generally for relief.[4] A similar doctrine has been asserted in other States,[5] and it has been affirmed in the Supreme Court of the United States. On one occasion it was laid down by the last-named court, "That if certain facts essential to the merits of a claim purely legal be exclusively within the knowledge of the party against whom that claim is asserted, he may be required in a Court of Chancery to disclose those facts; and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy."[6]

§ 113. **Exceptions to the Rule.** — This doctrine however, though generally true, is not to be deemed of universal application.[7] To

[1] Post, §§ 690, 691; Mitford, Eq. Pl. by Jeremy, pp. 183, 184, note (*n*); Cooper, Eq. Pl. ch. 1, § 3, p. 58; Id. ch. 3, § 3, p. 188; Story on Equity Pleadings, § 312, and note (1); Lousada *v.* Templer, 2 Russ. R. 564; Frietas *v.* Don Santos, 1 Y. & Jerv. 577; Severn *v.* Fletcher, 5 Sim. R. 457.

[2] Ante, § 106, note 2; Post, § 930.

[3] See Sanborn *v.* Kittredge, 20 Vt. 632; Holmes *v.* Holmes, 36 Vt. 525.

[4] Armstrong *v.* Gilchrist, 2 John. Cas. 424; Rathbone *v.* Warren, 10 John. R. 587, 596; King *v.* Baldwin, 17 John. R. 384. See also Leroy *v.* Veeder, 1 John. Cas. 417; s. c. 2 Cain. Cas. in Err. 175; Hepburn *v.* Dunlop, 14 U. S. 197, 4 L. Ed. 65; Ludlow *v.* Simond, 2 Cain, Err. 1, 38, 51, 52.

[5] Chichester's Executor *v.* Vass's Administrator, 1 Munf. R. 98; Isham *v.* Gilbert, 3 Con. 166; Ferguson *v.* Waters, 3 Bibb, 303; Middletown Bank *v.* Russ, 3 Conn. 139.

[6] Russell *v.* Clarke's Executors, 11 U. S. 69, 3 L. Ed. 271.

[7] Middletown Bank *v.* Russ, 3 Conn. 135, 140; Id. 166.

justify a Court of Equity in granting relief as consequent upon discovery in cases of this sort, it seems necessary that the relief should be of such a nature as a Court of Equity may properly grant in the ordinary exercise of its authority. If therefore the proper relief be by an award of damages, which can alone be ascertained by a jury, there may be a strong reason for declining the exercise of the jurisdiction, since it is the appropriate function of a Court of Law to superintend such trials. And in many other cases where a question arises purely of matters of fact fit to be tried by a jury, and the relief is dependent upon that question, there is equal reason that the jurisdiction for relief should be altogether declined; or, at all events, that if the bill is retained, a trial at law should be directed by the court, and relief granted or withheld according to the final issue of the trial.[1] Thus if a bill seeks the discovery of a contract for the sale of goods and chattels, or of a wrongful conversion of goods and chattels, and the breach of the contract, or the conversion of the goods and chattels, is properly remediable in damages, to be ascertained by a jury, the relief seems properly to belong to a Court of Law. In like manner questions of fraud in obtaining and executing a will of real estate, and many cases of controverted titles to real estate, dependent partly on matters of fact and partly on matters of law, are properly triable in an ejectment, and may well be left to the common tribunals.[2] And it has accordingly been laid down in some of the American courts, that under such circumstances, where the verdict of a jury is necessary to ascertain the extent of the relief, the plaintiff should be left to his action at law after the discovery is obtained.[3]

§ 114. **Jurisdiction Will Be Assumed, and Complete Relief Given, When.** — The distinction here pointed out furnishes a clear line for the exercise of Equity Jurisdiction in cases where relief is sought upon bills of discovery; and if it should receive a general sanction in the American courts, it will greatly diminish the embarrassments which have hitherto attended many investigations of the subject. In the present state of the authorities, however, little more can be absolutely affirmed than these propositions: first, that in bills of discovery seeking relief, if any part of the relief sought be of an equitable nature, the court will retain the bill

[1] As to the English practice, see Peters *v.* Rule, 5 Jur. N. S. 61; S. C. 28 L. J. Ch. 246. And see Black *v.* Lamb, 1 Beasl. 108.

[2] Jones *v.* Jones, 3 Meriv. 161.

[3] Lynch *v.* Sumrall, 1 Marsh Ky. R. 469.

for complete relief; secondly, that in matters of account, fraud, mistake, and accident, the jurisdiction for relief will generally, but not universally, be retained and favored; and thirdly, that in cases where the remedy at law is more appropriate than the remedy in equity, or the verdict of a jury is indispensable to the relief sought, the jurisdiction will either be declined, or, if retained, will be so subject to a trial at law.

§ 115. **Necessary Allegations in Bill for Discovery.** — From what has been already stated, it is manifest that the jurisdiction in cases of this sort attaches in equity solely on the ground of discovery. If therefore the discovery is not obtained, or it is used as a mere pretence to give jurisdiction, it would be a gross abuse to entertain the suit in equity when the whole foundation on which it rests is either disproved, or it is shown to be a colorable disguise for the purpose of changing the forum of litigation. Hence to maintain the jurisdiction for relief as consequent on discovery, it is necessary in the first place to allege in the bill that the facts are material to the plaintiff's case, and that the discovery of them by the defendant is indispensable as proof;[1] for if the facts lie within the knowledge of witnesses who may be called in a Court of Law, that furnishes a sufficient reason for a Court of Equity to refuse its aid. The bill must therefore allege (and if required the fact must be established) that the plaintiff is unable to prove such facts by other testimony.[2] In the next place, if the answer wholly denies the matters of fact, of which discovery is sought by the bill, the latter must be dismissed; for the jurisdiction substantially fails by such a denial.[3]

[1] As to the discovery of communications alleged in defence to be privileged, see Wheeler *v.* Le Merchant, 17 Ch. D. 675.

[2] Gelston *v.* Hoyt, 1 John. Ch. R. 543; Seymour *v.* Seymour, 4 John. Ch. R. 409; Pryor *v.* Adams, 1 Call, R. 382; Duvalls *v.* Ross, 2 Munf. R. 290, 296; Bass *v.* Bass, 4 H. & Munf. 478. See Mussbaum *v.* Heilbron, 63 Ga. 312. In Massachusetts a bill for discovery cannot be maintained, it has been held, where the discovery prayed is only incidental to the relief sought, or is obtainable at law by interrogatories. Ahrend *v.* Odiorne, 118 Mass. 261; Pool *v.* Lloyd, 5 Met. 525; Ward *v.* Peck, 114 Mass. 121. Sed qu. since 1877. See ante, § 33.

[3] Russell *v.* Clarke's Execrs., 11 U. S. 69, 3 L. Ed. 271; Ferguson *v.* Waters, 3 Bibb, R. 303; Nourse *v.* Gregory, 3 Litt. R. 378; Robinson *v.* Gilbraith, 4 Bibb, R. 184.

So in general where the equitable relief sought fails for defect of proof, or other cause, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice. Dowell *v.* Mitchell, 105 U. S. 430, 26 L. Ed. 1142; Price's Candle Co. *v.* Bauwen's Candle Co., 4 Kay & J. 727; Bailey *v.* Taylor, 1 Russ. & M. 73. See Walker *v.* Brooks, 125 Mass. 241; Pool *v.* Lloyd, 5 Met. 525; Ahrend *v.* Odiorne, 118 Mass. 261.

Jurisdiction for Discovery. — The following consideration of the grounds of Equity Jurisdiction for discovery, written by the late Chief Justice Redfield, appears in previous editions of this work (subject to some changes and abridgment now made) as § 115.

The uncertainty in the jurisdiction of equity to obtain discovery appears to have arisen chiefly from not discriminating sufficiently between that discovery which is sought in support of the bill as evidence merely, or in aid or anticipation of a suit at law (Lord Hardwicke in Lempster *v.* Pomfret, Ambl. 154; Moodalay *v.* Morton, 1 Bro. C. C. 469), and that appeal to the conscience of the defendant which is based upon some alleged misconduct either in withholding documents or in suppressing facts to which the plaintiff is entitled, — which but for the defendant's conduct he would have had, and thus have been able to obtain redress at law. Grasse *v.* H. W. Gossard Co., 152 Ill. App. 58.

In the former case the plaintiff charges no wrong upon the defendant, so far as the discovery is concerned. He asks it as a favor to enable him to obtain redress in equity if the subject-matter of the suit is appropriate for such remedy; and if not, then to enable him to obtain redress at law. And where the discovery is sought merely in aid of a suit at law, then, whether it is obtained or not, the plaintiff upon the coming in of the answer is bound to discontinue and pay the costs. Cartwright *v.* Hately, 1 Ves. Jr. 292, 293. See also Simmons *v.* Kinnaird, 4 Ves. 746; 1 Madd. Ch. Pr. 217. Though as to the matter of costs, if the defendant on reasonable request refuse to make the admission, and thus drive the plaintiff to equity, where he succeeds, the defendant will not be entitled to them. Weymouth *v.* Boyer, 1 Ves. Jr. 416, 423; Deas *v.* Harvie, 2 Barb. Ch. 448. Such costs are sometimes taxed in the action at law. 1 Madd. Ch. Pr. 217; Grant *v.* Jackson, Peake, 203. See further as to costs, Burnett *v.* Sanders, 4 Johns. Ch. 504; McElwer *v.* Sutton, 1 Hill, Ch. 32; King *v.* Clark, 3 Paige, 76; Harvey *v.* Tebbutt, 1 Jac. & W. 197; Fulton Bank *v.* New York Canal Co., 4 Paige, 127.

But in a bill for discovery merely in aid of redress, and where no wrong is charged upon the defendant in withholding documents or facts, it is not competent for the plaintiff, according to the English and the better practice, to pray relief unless his case is one which in itself is a proper subject of equitable cognizance. Walker *v.* Brooks, 125 Mass. 241; Pool *v.* Lloyd, 5 Met. 525; Ahrend *v.* Odiorne, 118 Mass. 261. If his case is not of this character, he must ask for the discovery in aid of a contemplated or a pending suit at law. And if he asks relief in a case which is not proper for the interference of equity, the bill is demurrable. He must show not only a case in which he is entitled to discovery, he must also state the true ground of such discovery, that the court may see whether the proceeding is proper. A bill, for instance, will be sustained in aid of a defence at law to a bond or other instrument based upon the ground of illegality in the consideration, while if relief had been prayed the bill must have been dismissed: the court could give no relief in such a case. Benyon *v.* Nettleford, 3 Macn. & G. 94. See however the author's observations, supra, § 111. All that is required to be alleged in a bill for discovery in aid of a suit at law is to show that the plaintiff has such a case that the discovery is needful for him. Vance *v.* Andrews, 2 Barb. Ch. 370; Deas *v.* Harvie, Ib. 448; Williams *v.* Harden, 1 Barb. Ch. 298; Welford, Eq. Pl. 99; Stainton *v.* Chadwick, 3 Macn. & G. 575.

Nor is it necessary in such a case, according to the better view, to allege that the plaintiff is unable to establish his case or defence by other witnesses, or to make any affidavit to that effect, except for the purpose of obtaining an injunction to stay proceedings at law. Vance *v.* Andrews, 2

Barb. Ch. 370; Appleyard *v.* Seton, 16 Ves. 223; March *v.* Davison, 9 Paige, 580; post, §§ 220, 222. But see Gelston *v.* Hoyt, 1 Johns. Ch. 543; Seymour *v.* Seymour, 4 Johns. Ch. 409; Leggett *v.* Postley, 2 Paige, 599, which, it is apprehended, are not sound law. As the law stood, when parties could not be witnesses, either party might claim discovery from the other to save expense, delay, or uncertainty. But the necessity for such bills having ceased, this kind of discovery has become practically obsolete. And while it was in full force it required no other check to prevent abuse than the payment of all the expenses without regard to the result.

If however discovery in the broad sense has become a recognized ground of equity jurisdiction in this country, it will not be relinquished because courts of law have advanced to the same position. But it is an American doctrine of equity entirely, springing mainly, as has already been suggested, from confusing that discovery which is merely matter of general evidence, whether sought for purposes of relief in equity or at law, with that which is necessary because of the wrongful conduct of the defendant, which alone, as where it involves a breach of confidence, may be sufficient ground for equity jurisdiction; springing partly also, it seems, from pushing beyond its just meaning the maxim that where equity obtains jurisdiction of a cause for any purpose it will retain it for final relief. Day *v.* Cummings, 19 Vt. 496; Bank of United States *v.* Biddle, 2 Pars. Ch. 54; McGowin *v.* Remington, 12 Pa. St. 63; Shallenberger's Appeal, 9 Harris, 340; Brooks *v.* Stotley, 3 McLean, 523; Traip *v.* Gould, 15 Me. 82; Boyd *v.* Hunter, 44 Ala. 705; Peoria *v.* Johnson, 56 Ill. 45; Corby *v.* Bean, 44 Miss. 379. But this maxim, it is apprehended, has no proper application where the court has no legitimate jurisdiction of the *cause* or some portion of it.

But when a party comes into equity for general discovery merely, the court acquires no general jurisdiction over the cause or any part of it. Discovery is something which a party may claim in every cause at law, whether he be plaintiff or defendant, and in every transaction which may fairly be expected to become the foundation of an action thereafter; and that too whether destitute of other evidence or not. He may claim the discovery to save expense or uncertainty in the proof of his case. Story, Eq. Pl. § 319; Stacy *v.* Pearson, 3 Rich. Eq. 148, 152; Mitford, Eq. Pl. 307, Jeremy. It follows that if such discovery were really a ground of Equity Jurisdiction for ulterior purposes, it would be sufficient to bring any case, proper only for a court of law, into equity, to call for the discovery of facts from the defendant. See Foley *v.* Hill, 2 Clark & F. 28, 37, Lord Cottenham. And see Hambrook *v.* Smith, 9 Eng. L. & E. 226.

This reductio ad absurdum has led the American courts from time to time to annex limitations to the application of the rule of giving relief as a consequence of entertaining a bill for discovery. It is laid down as necessary for a party who seeks to transfer to equity a cause appropriate for a court of law, on the ground of discovery alone, to allege in his bill, and to verify the allegation by affidavit, that he has no other means of proving his case. Gelston *v.* Hoyt, 1 Johns. Ch. 543; Merchants' Bank *v.* Davis, 3 Kelly, 112; Bank of United States *v.* Biddle, 2 Pars. Ch. 31; Emerson *v.* Staton, 3 B. Mon. 116, 118; Bullock *v.* Boyd, 2 A. K. Marsh. 322; Stacy *v.* Pearson, 3 Rich. Eq. 148, 152; Laight *v.* Morgan, 1 Johns. Cas. 429; s. c. 2 Caines' Cas. 344; Lyons *v.* Miller, 6 Gratt. 427, 428; Sims *v.* Aughtery, 4 Strobh. Eq. 103, 121. But to make any such fact as the party's want of other evidence the basis of Equity Jurisdiction, the allegation should be traversable, and the jurisdiction should fail upon its disproof. And another necessary qualification of the rule will then arise, to wit, that the existing evidence to defeat the jurisdiction must be in the knowledge, or at least within the reach, of the plaintiff; unless it be so, it is

the same to him as if it did not exist. This inquiry whether the plaintiff is destitute of other evidence would raise a collateral issue not capable of decision. The limitation in question, which was at first made to apply to all bills for discovery (Gelston *v.* Hoyt, 1 Johns. Ch. 543), has been abandoned as to bills which do not seek to transfer a merely legal cause to equity.

The only distinct ground of Equity Jurisdiction over cases of a purely legal nature, based upon mere discovery, is where, as has been stated above, the defendant has been charged with a wrong and a virtual fraud in withholding legal evidence. Sometimes such a case is founded upon the defendant's duty to disclose deeds, writings, and documents in his keeping. Madd. Ch. Pr. 199; Metcalf *v.* Hovey, 1 Ves. sr. 248. As where an heir claims under the deed withheld, or is obstructed by an attempt to set up an outstanding and false title. Bond *v.* Hopkins, 1 Sch. & L. 428, 429; Tanner *v.* Wise, 3 P. Wms. 295, 296. So a bill of this sort will lie against one who conceals a bankrupt's estate. Boden *v.* Dillow, 1 Atk. 289. Also where a confusion of boundaries has occurred through the fault of the defendant. Aston *v.* Exeter, 6 Ves. 288, 293; post, § 840. And where the defendant declines to give knowledge of the goods put on board a ship insured and lost. Le Pypre *v.* Farr, 2 Vern. 716. But see Taylor *v.* Ferguson, 4 Har. & J. 46. In these cases of trust and confidence and fraudulent breach of duty equity will retain the bill and give relief. See also Stanhope *v.* Roberts, 2 Atk. 214. But these cases are broadly distinguished from general bills of discovery. For American cases which take the distinction under consideration, see Gregory *v.* Marks, 1 Rand. 355; Burroughs *v.* McNeill, 22 N. C. 297.

In cases where Courts of Law and of Equity exercise concurrent jurisdiction, as in matters of fraud, accident, mistake, and account, there will often be occasion for the exercise of discretion. Whether this should be exercised in favor of retaining a bill for final relief must often depend upon special circumstances, such as the complication of facts, the number and variety of interests involved, and the like. But there are many cases still in which no prayer for discovery should induce equity to proceed to relief; such as the case of a mere claim to damages for a fraudulent misrepresentation. In Pearce *v.* Creswick, 2 Hare, 286, Wigram, V. C. says: "I think this part of the plaintiff's case cannot be stated more highly in his favor than this, — that the necessity a party may be under, from the very nature of the transaction, to come into a Court of Equity for discovery is a circumstance to be regarded in deciding upon the distinct and independent question of equitable jurisdiction. Further than this I have not been able to go." See Middletown Bank *v.* Russ, 3 Conn. 135; Isham *v.* Gilbert, Ib. 166; Norwich R. Co. *v.* Storey, 17 Conn. 364; Taylor *v.* Ferguson, 4 Har. & J. 46; Brown *v.* Edsall, 1 Stockt. Ch. 256; Little *v.* Cooper, 2 Stockt. 273; Skinner *v.* Judson, 8 Conn. 528; Avery *v.* Holland, 2 Tenn. 71; Laight *v.* Morgan, 1 Johns. Cas. 429; s. c. 2 Caines, Cas. 344.

CHAPTER IV

CONCURRENT JURISDICTION OF EQUITY. — ACCIDENT

§ 116. **Concurrent Jurisdiction.** — Having disposed of these matters, which may in some sort be deemed preliminary, the next inquiry which will occupy our attention is to ascertain the true boundaries of the jurisdiction at present exercised by Courts of Equity. The subject here naturally divides itself into three great heads, — the concurrent, the exclusive, and the auxiliary or supplemental jurisdiction.[1] As the concurrent jurisdiction is that which is of the greatest extent and most familiar occurrence in practice, I propose to begin with it.

§ 117. **Origin of Concurrent Jurisdiction.** — The concurrent jurisdiction of Courts of Equity may be truly said to embrace, if not all, at least a very large portion of the original jurisdiction inherent in the court from its very nature, or first conferred upon it upon the dissolution or partition of the powers of the Great Council, or Aula Regis, of the king. We have already seen that it did not take its rise from the introduction of technical uses or trusts, as has sometimes been erroneously supposed.[2] Its original foundation then may be more fitly referred to what Lord Coke deemed the true one, fraud, accident, and confidence.[3] In many cases of this sort Courts of Common Law are, and for a long time have been, accustomed to exercise jurisdiction and to afford an adequate remedy. And in many other cases in which anciently

[1] In this division I follow Mr. Fonblanque and Mr. Jeremy; and though a more philosophical division might be made, I am by no means certain that it would be more convenient. Mr. Maddock has made a different division; but upon reflection I have not been inclined to give it a preference. 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Jeremy on Eq. Jurisd. Introd. p. xxvii.

[2] Ante, §§ 42, 43; 1 Cooper's Public Records, p. 357.

[3] 4 Inst. 84; Earl of Bath *v.* Sherwin, 10 Mod. 1; 3 Black. Comm. 431.

no such remedy was allowed, their jurisdiction is now expanded so as effectually to reach them.[1] Still however there are many cases of fraud, accident, and confidence which either Courts of Law do not attempt to redress at all or if they do the redress which they afford is inadequate and defective.[2] The concurrent jurisdiction then of equity has its true origin in one of two sources: either the Courts of Law, although they have general jurisdiction in the matter, cannot give adequate, specific, and perfect relief; or under the actual circumstances of the case they cannot give any relief at all. The former occurs in all cases when a simple judgment for the plaintiff or for the defendant does not meet the full merits and exigencies of the case; but a variety of adjustments, limitations, and cross claims are to be introduced and finally acted on; and a decree meeting all the circumstances of the particular case between the very parties is indispensable to complete distributive justice. The latter occurs when the object sought is incapable of being accomplished by the Courts of Law; as for instance a perpetual injunction, or a preventive process to restrain trespasses, nuisances, or waste.[3] It may therefore be said that the concurrent jurisdiction of equity extends to all cases of legal rights where, under the circumstances, there is not a plain, adequate, and complete remedy at law.[4]

§ 118. **Where Relief Is More Perfect in Equity than at Law, but Remedy Is of Peculiar Character.** — The subject, for convenience, may be divided into two branches: (1) that in which the subject-matter constitutes the principal (for it rarely constitutes the sole) ground of the jurisdiction; and (2) that in which the peculiar remedies afforded by Courts of Equity constitute the principal (although not always the sole) ground of the jurisdiction. Of these we shall endeavor to treat successively in their order, beginning with that of the subject-matter where the relief is deemed more adequate, complete, and perfect in equity than at common law; but where the remedy is not, or at least may not be, of a peculiar and exclusive character.[5] It is proper however to add that as the grounds of jurisdiction often run into each other, any

[1] 3 Black. Comm. pp. 431, 432.

[2] See 7 Dane's Abridg. ch. 225, art. 5, § 10; art. 6, § 1; Com. Dig. Chancery, 3 F. 8.

[3] See Jeremy on Eq. Jurisd. pp. 292, 307; 3 Wooddes. Lect. lvi. p. 397, &c.; Beames, Eq. Pl. ch. 3, pp. 77, 78.

[4] Com. Dig. Chancery, 3 F. 9.

[5] See Mitford, Pl. Eq. by Jeremy, p. 111; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 12.

attempt at a scientific method of distribution of the various heads would be impracticable and illusory.

§ 119. **Accident Defined.** — And in the first place let us consider the cases where the jurisdiction arises from accident.[1] By the

[1] *Accident and Negligence.* — Accident means happening; and its consequences therefore, falling upon one who seeks relief from them, fall there without that one's intention. On this ground — the absence of intention on the part of the plaintiff — relief is granted. Some forfeiture or some final loss is about to transpire, without the intention of the sufferer, in consequence of what has merely happened.

Jurisdiction of the courts may indeed be cut off by force of the terms of a contract; as where a promise to pay rent is absolute, or a promise to do something on a certain day or within a certain time is made in such terms as to show that the understanding was, that performance on that particular day or within that time was the very thing, or one of the very things, agreed upon. That is, in common language, such performance is of the essence of the contract. See e. g. Brown *v.* Vandergrift, 80 Pa. St. 142; Gregory *v.* Wilson, 9 Hare, 683. True, the result — the non-performance — may have happened without the party's intention; but accident is excluded from consideration, because the parties have agreed that nothing of the sort shall be taken into the account. The case may still be one for equitable interference against the agreed result; but where that is the fact, it will be found that interference is based, not on the ground of accident, but of some other consideration, such as the fact that a forfeiture provided is named by way of penalty, and not of liquidated damages. See infra, §§ 1727 to 1731.

Negligence consists in failing to exercise due care, prudence, or diligence in the particular situation, — the care, prudence, or diligence, that is to say, which a good citizen would there exercise. Will negligence have the effect to bar one of relief from the consequences of accident? Clearly it will, if it shows that the particular fact came about by the intention of the party seeking relief; clearly not, in principle, if it does not substantially show that.

Now it is often said, and for certain purposes it is well enough to say, that a man is held to intend the natural consequences of his conduct. But that rule has only a particular application. It does not express the whole conception of negligence even when applied to that subject. It merely means that for the purpose of punishment or damages, or of saving another from harm and injustice, the act or omission may be deemed to have had its natural result, and the result treated as if it had been foreseen, as it ought to have been. The party must for such purpose be deemed to have intended what he should have expected. But a man does not, broadly speaking, lose his rights by mere negligence. Negligence cannot e. g. work a gift. The rule that a man intends the natural consequences of his conduct cannot be pressed into service to deprive a man arbitrarily of his property; the rule is applied only where the position of an innocent person has been influenced and changed by such conduct.

But relief from the consequences of accident is never granted where the equities of the defendant are equal — as in the case just put — to those of the plaintiff. If however the defendant stands in no position deserving the support of the court, the case of the plaintiff, negligent though he may have been, is virtually that of one who denies having made a gift, and seeks the aid of the court to recover or to retain his own. The court therefore cannot refuse its aid from a desire to protect the de-

term *accident* is here intended not merely inevitable casualty, or the act of Providence, or what is technically called vis major, or

fendant, and refusal must be in the nature of punishment to the plaintiff. Can this be proper?

A chancellor is, it is true, apt to be impatient with a party who seeks relief based even in part on his own negligence; but it is submitted that this ought never to go to the extent of refusing justice where there are no adverse interests deserving attention. It is well-settled law in England that negligence in the payment of money will not bar the payer from recovering it back if the payment was made under mistake; and this has been declared to be good law by chancellors as well as by common-law judges. Willmott *v.* Barber, 15 Ch. D. 96; Kelly *v.* Solari, 9 Mees. & W. 54; Bell *v.* Gardiner, 4 Man. & G. 11; Dails *v.* Lloyd, 12 Q. B. 531; Townsend *v.* Crowdy, 8 C. B. N. S. 477. The authorities are not so clear in this country, but it is apprehended that the rule stated is the true one. See Kilmer *v.* Smith, 77 N. Y. 226; Monroe *v.* Skelton, 36 Ind. 302; post, note to § 209. Now the situation of the defendant in such a case is generally more deserving of consideration than that of a defendant in a case of accident; besides, there has been actual intention in the case of mistake, though the intention would have been different, probably, — who can say certainly? — had the situation been understood. And the plaintiff is in the same predicament in both cases; he has been guilty of negligence.

The question of the effect of negligence may be forcibly brought out by considering the case of the loss of a negotiable instrument, in which case equity, generally speaking, grants relief upon a suitable tender of indemnity to the defendant. Can it be that the plaintiff will be barred of relief on the ground that the loss of the instrument was due to his own negligence? What if the result *was* the natural effect of the plaintiff's want of care? The defendant is no worse off for that than if the instrument had been lost without negligence; and the plaintiff did not intend to give up his right.

Take the case of pay-day passed, involving a certain proper forfeiture. If payment on the very day is of the essence of the contract, it must be made then; if not, payment on a subsequent day, within a reasonable time, will be good, in equity at least, by necessary consequence. See Hearst *v.* Pujol, 44 Cal. 230; Beecher *v.* Beecher, 43 Conn. 556. The parties have not fixed a day absolute. Tender within a reasonable time after the day named will save the forfeiture for the strongest reason, if the failure to pay on the day was due to accident; and the case cannot be different though the accident was due to negligence, or, to put the case directly, though the *failure* was due to negligence, if the neglect to pay was not wilful. So long as the other party's position has not been changed to his detriment, and there is no binding agreement for a forfeiture absolute, a forfeiture ought not to be decreed for negligence per se in the face of the tender. There has been no gift or abandonment of rights.

In the case of wilful neglect with foresight of the specific result, and with no obstacle entirely preventing performance of an obligation, no doubt equity will refuse its aid to prevent consequences made a distinct and proper part of the contract, though there may still be something short of actual intention to confer a gift. Hancock *v.* Carlton, 6 Gray, 39, 52, 57. There is something like an abandonment of a right in such a case. It will be noticed that the author usually speaks of "gross misconduct", "gross negligence", or "rashness", as barring relief. Supra,

irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or mis-

§ 119; post, § 148. He speaks very cautiously of mere negligence. "That perhaps may induce a Court of Equity to withhold its assistance"; § 131, at end. It might have that effect where attended with forecast of the result, if no sufficient obstacle prevented action; otherwise it is apprehended it would not necessarily. (Of course knowledge alone of e. g. the time of performance would not bar relief from the effect of accident. Bargent *v.* Thompson, 4 Giff. 473, where prompt performance was prevented by the weather, time not being of the essence of the contract.)

Indeed it may be that wilful negligence with forecast of the specific result will bar relief, though a preventing obstacle existed, if that preventing obstacle would not have been in the way but for the plaintiff's negligence. In the case of Bargent *v.* Thompson, just cited, it is probable that the party would not have been relieved had the performance of his contract (to make repairs) been delayed by his negligence till the bad weather at last set in and prevented the completion of what might well have been done notwithstanding the weather. But that would be because of *wilful* negligence, — negligence with forecast, not because of negligence as such, or negligence that another of better judgment might have seen would end in the particular loss. That is, there is something, if not equivalent to a gift, at all events capable of being treated as an abandonment.

There is a similar distinction with reference to negligence after the day of performance (not of the essence of the contract) has passed with knowledge on the part of the obligor. Neglect of tender in such a case will be evidence, more or less cogent according to circumstances, of acquiescence; and acquiescence with knowledge may no doubt make decisive that which otherwise would be indecisive.

There is also a case with regard to which a settled and sound public policy applies, touching accident resulting from negligence, and that is the conduct of causes. Courts are of small use if they cannot put a stop to litigation. "Interest reipublicæ ut litium finis sit"; and if litigants were allowed to upset decisions on grounds of their own negligence, causes might never be at an end. This is the case to which the rule applies, that the courts aid "vigilantibus non dormientibus"; and this is the case of the decisions referred to by the author. Penny *v.* Martin, 4 Johns. Ch. 566; Marine Ins. Co. *v.* Hodgson, 11 U. S. 332, 3 L. Ed. 362. See also Sargent *v.* Bigelow, 24 Minn. 370; Wilder *v.* Lee, 64 N. C. 50; Miller *v.* Morse, 23 Mich. 365; George *v.* Alexander, 6 Cold. 641.

Aside from this class of cases it is apprehended that the courts have nothing to do with the mere negligence of a plaintiff asking for relief from the consequences of accident. The question of rights is the only one legitimately before the court.

The following may be enumerated among recent specific cases of relief: —

Death of a sheriff before making conveyance, but after having duly made sale, received the purchase-money, and made return of his acts. Stewart *v.* Stokes, 33 Ala. 494. Destruction of the records of the court ordering a sale in a particular case. Garrett *v.* Lynch, 45 Ala. 205. Destruction of the whole record of a cause. Sproles *v.* Powell, 10 Heisk. 693. But it is held that equity cannot restore the lost records of another court. Keen *v.* Jordan, 13 Fla. 327. Loss of a mortgage deed on land to secure personal support. Lawrence *v.* Lawrence, 42 N. H. 109. Loss of a deed containing an error reformable in equity, with decree of a new and

conduct in the party.[1] Lord Cowper, speaking on the subject of accident as cognizable in equity, said: "By accident is meant, when a case is distinguished from others of the like nature by unusual circumstances"; [2] a definition quite too loose and inaccurate, without some further qualifications; for it is entirely consistent with the language, that the unusual circumstances may have resulted from the party's own gross negligence, folly, or rashness.[3]

correct deed. Hudspeth *v.* Thomason, 46 Ala. 470. Loss of sealed instrument. Patton *v.* Campbell, 70 Ill. 72. Lost negotiable paper. Hopkins *v.* Adams, 20 Vt. 407; Adams *v.* Edmunds, 55 Vt. 352; Chewning *v.* Singleton, 2 Hill, Ch. 371. Further as to the loss of negotiable paper, see Fales *v.* Russell, 16 Pick. 315; Almy *v.* Reed, 10 Cush. 421; Boston Lead Co. *v.* McGuirk, 15 Gray, 87; Tower *v.* Appleton Bank, 3 Allen, 387; Tuttle *v.* Standish, 4 Allen, 481; Smith *v.* Rockwell, 2 Hill 482; Bridgeford *v.* Masonville Mfg. Co., 34 Conn. 546; Savannah Bank *v.* Haskins, 101 Mass. 370; McGregory *v.* McGregory, 107 Mass. 543; Wright *v.* Maidstone, 1 Kay & J. 701. The last-named case shows that when the paper, though negotiable, has been *destroyed*, the jurisdiction is at law and not in equity. And where, as in some States is deemed to be the case, adequate indemnity can be required at law, the Courts of Law will entertain suits on lost as well as on destroyed negotiable instruments. Bridgeford *v.* Masonville Mfg. Co., supra; Tuttle *v.* Standish, supra; McGregory *v.* McGregory, supra. But it is held in Tuttle *v.* Standish that where the suit is against an *indorser*, a mere bond of indemnity may not afford adequate protection to the defendant, since he may need the instrument for the purpose of suit against a prior party. And in Savannah Bank *v.* Haskins, supra, it was held that such a bond would not sufficiently serve an acceptor of a bill, since he may need the paper as a voucher in settling his accounts with the drawer. But as to the maker of a note it was considered to be settled law in Massachusetts that tender of a suitable bond would justify the Law Courts in entertaining the indorsee's action. In any event, however, jurisdiction will exist in equity unless it is clear that it has been taken away by statute. Labadie *v.* Hewitt, 85 Ill. 341; Lee *v.* Lee, 55 Ala. 590, 598; Hinchley *v.* Greany, 118 Mass. 595; Clouston *v.* Shearer, 99 Mass. 209; Sweeny *v.* Williams, 36 N. J. Eq. There, it seems, all the parties to the paper can be brought before the court, and their respective rights adjusted. Compare § 28 supra.

[1] Grounds and Rudim. of the Law, M. 120, p. 81 (edit. 1781). See Jeremy on Equity Jurisd. B. 3, Pt. 2, Introd. p. 358. Mr. Jeremy defines accident, in the sense used in a Court of Equity, to be "an occurrence in relation to a contract, which was not anticipated by the parties when the same was entered into, and which gives an undue advantage to one of them over the other in a Court of Law." Jeremy on Eq. Jurisd. B. 3, Pt. 2, p. 358. Accidents, in the sense of a Court of Equity, may arise in relation to other things besides contracts, and therefore the confining of the definition to contracts is not entirely accurate. The definition is defective in another respect; for it does not exclude cases of unanticipated occurrences, resulting from the negligence or misconduct of the party seeking relief.

[2] Earl of Bath *v.* Sherwin, 10 Mod. R. 1, 3; Com. Dig. Chancery, 4 D. 10.

[3] L. Bucki Lumber Co. *v.* Atlantic Lumber Co., 116 Fed. 1, 53 C. C. A.

§ 120. **Rise of Jurisdiction.** — The jurisdiction of the court arising from accident, in the general sense already suggested, is a very old head in equity and probably coeval with its existence.[1] But it is not every case of accident which will justify the interposition of a Court of Equity.[2] The jurisdiction being concurrent will be maintained only: first, when a Court of Law cannot grant suitable relief; and secondly, when the party has a conscientious title to relief.[3] Both grounds must concur in the given case; for otherwise a Court of Equity not only may, but is bound to, withhold its aid. Mr. Justice Blackstone has very correctly observed that "Many accidents are supplied in a Court of Law; as loss of deeds, mistakes in receipts and accounts, wrong payments, deaths, which made it impossible to perform a condition literally, and a multitude of other contingencies. And many cannot be redressed even in a Court of Equity; as if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement." [4]

§ 121. **Same.** — The first consideration then is, whether there is an adequate remedy at law, not merely whether there is some

513; Vose *v.* Bradstreet, 27 Me. 162; Simpson *v.* Montgomery, 25 Ark. 365, 99 Am. Dec. 228; Kopper *v.* Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742; Herbert *v.* Herbert, 49 N. J. Eq. 70, 22 Atl. 789.

Accident, casualty and misfortune are synonymous terms. McCarty *v.* New York etc. R. Co., 30 Pa. St. 251.

Accident is known in equity as an unforeseen occurrence affecting a person injuriously, and not due to his own neglect. Engler *v.* Knoblaugh, 131 Mo. App. 481, 110 S. W. 16.

[1] See East India Company *v.* Boddam, 9 Ves. 466; Armitage *v.* Wadsworth, 1 Madd. R. 189 to 193.

[2] Whitfield *v.* Faussat, 1 Ves. 392, 393.

[3] See e. g. Hickman *v.* Painter, 11 W. Va. 386, where the plaintiff had lost a receipt given him by the defendant acknowledging possession of choses in action given him by the plaintiff for collection. The bill prayed discovery of the facts in regard to the same, and that the lost receipt might be set up. The prayer was granted, and a decree rendered for damages for moneys collected by the defendant and not paid over.

[4] 3 Black. Comm. 431; Com. Dig. Chancery, 3 F. 8. Even this language is true in a general sense only; for (as we shall presently see) omissions in a family settlement, and many other defects in private and legal proceedings, may be redressed or rather supplied in equity. 1 Fonbl. Eq. B. 1, ch. 1, § 7; Mitford, Pl. Eq. 127, 128 (4th edit.), by Jeremy. In Whitfield *v.* Faussat (1 Ves. 392), Lord Hardwicke is reported to have said: "The loss of a deed is not always a ground to come into Courts of Equity for relief; for if there was no more in the case, although he (the plaintiff) is entitled to have a discovery of that, whether lost or not, Courts of Law [sometimes] admit evidence of the loss of a deed, proving the existence of it, and the contents, just as a Court of Equity does." The other parts of his Lordship's opinion show that the word "sometimes" should be inserted as a qualification of the language.

remedy at law.[1] And here a most material distinction is to be attended to. In modern times Courts of Law frequently interfere, and grant a remedy under circumstances in which it would certainly have been denied in earlier periods. And sometimes the Legislature by express enactments has conferred on Courts of Law the same remedial faculty which belongs to Courts of Equity. Now (as we have seen) in neither case, if the Courts of Equity originally obtained and exercised jurisdiction, is that jurisdiction overturned or impaired by this change of the authority at law in regard to legislative enactments; for unless there are prohibitory or restrictive words used, the uniform interpretation is that they confer concurrent and not exclusive remedial authority.[2] And it would be still more difficult to maintain that a Court of Law by its own act could oust or repeal a jurisdiction already rightfully attached in equity.[3]

§ 122. **Relief Applies to Lost Bonds.** — One of the most common interpositions of equity under this head is in the case of lost bonds, or other instruments under seal.[4] Until a very recent period the doctrine prevailed that there could be no remedy on a lost bond in a Court of Common Law, because there could be no profert of the instrument, without which the declaration would be fatally defective.[5] At present however the Courts of Law do entertain the jurisdiction, and dispense with the profert, if an allegation of loss

[1] Cooper, Eq. Pl. 129; Ellis *v.* Davis, 109 U. S. 485, 3 S. Ct. Rep. 327, 27 L. Ed. 1006.

[2] Sweeny *v.* Williams, 36 N. J. Eq; ante, § 33.

[3] Mitf. Pl. Eq. pp. 113, 114; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), pp. 15, 16, 17; Atkinson *v.* Leonard, 3 Bro. Ch. R. 218; Ex parte Greenway, 6 Ves. 812; Bromley *v.* Holland, 7 Ves. 19, 20; East India Company *v.* Boddam, 9 Ves. 466; Walmsley *v.* Child, 1 Ves. 341; Kemp *v.* Pryor, 7 Ves. 248 to 250; Cooper, Eq. Pl. ch. 3, p. 129; Ludlow *v.* Simond, 2 Caines, Cas. in Err. 1; King *v.* Baldwin, 17 John. R. 384; Post *v.* Kimberly, 9 John. R. 470.

[4] Mr. Reeves (Hist. of English Law, vol. 3, p. 189) has remarked, that by the old common law, "When a person was to found a claim by virtue of a deed, which was detained in the hands of another, so that he was prevented from making a profert of it, he was utterly deprived of the means of obtaining justice according to the forms of law. If a deed of grant of rent, common, or annuity were lost, as these claims could only be substantiated by the evidence of a deed, they vanished together with it." Goldman *v.* Page, 59 Miss. 404. See Mitchell *v.* Chancellor, 14 W. Va. 22, where relief was refused because the bond was not payable to the plaintiff.

[5] Whitfield *v.* Faussat, 1 Ves. 392, 393; Co. Litt. 35 (*b*); Rex *v.* Arundel, Hob. R. 109; Atkins *v.* Leonard, 3 Bro. Ch. R. 218; Ex parte Greenway, 5 Ves. 812; Bromley *v.* Holland, 7 Ves. 19, 20; East India Company *v.* Boddam, 9 Ves. 466; Toulman *v.* Price, 5 Ves. 238.

by time and accident is stated in the declaration.[1] But this circumstance is not permitted in the slightest degree to change the course in equity.[2]

§ 123. **Same.** — Independent of this general ground of the inability to make a proper profert of the deed at law, there is another satisfactory ground for the interference of a Court of Equity. It is, that no other court can furnish the same remedy with all the fit limitations which may be demanded for the purposes of justice, by granting *relief* only upon the terms of the party's giving (when proper) a suitable bond of indemnity. Now a Court of Law is incompetent to require such a bond of indemnity as a part of its judgments, although it has sometimes attempted an analogous relief (it is difficult to understand upon what ground) by requiring the previous offer of such an indemnity.[3] But such an offer may in many cases fall far short of the just relief; for in the intermediate time there may be a great change of the circumstances of the parties to the bond of indemnity.[4] In joint bonds there are still stronger reasons, for the equities may be different between the different defendants.[5] And besides, a Court of Equity, before it will grant *relief* (it is otherwise where *discovery* only is sought) will insist that the defendant shall have the protection of the oath and affidavit of the plaintiff to the fact of the loss; thus requiring, what is most essential to the interests of justice, that the party should pledge his conscience by his oath that the instrument is lost.[6]

§ 124. **Same.** — We have seen that in cases of the loss of sealed instruments equity will entertain a suit for relief as well as for discovery, upon the party's making an affidavit of the loss of the instrument and offering indemnity. The original ground of granting the relief was the supposed inadequacy of a Court of Law to afford it in a suitable manner from the impossibility

[1] Read *v.* Brokman, 3 T. R. 151; Totty *v.* Nesbitt, 3 T. R. 153, note.

[2] Ibid. Walmsley *v.* Child, 1 Ves. 341; Kemp *v.* Pryor, 7 Ves. 249, 250; Cooper, Eq. Pl. 129, 130; Evans *v.* Bicknell, 6 Ves. R. 182.

[3] Ex parte Greenway, 6 Ves. 812; Pierson *v.* Hutchinson, 2 Camp. 211; s. c. 6 Esp. 126; Hansard *v.* Robinson, 7 B. & Cres. 90.

[4] East India Company *v.* Boddam, 9 Ves. 466; Ex parte Greenway, 6 Ves. 812.

[5] Ibid.

[6] Bromley *v.* Holland, 7 Ves. 19, 20; Ex parte Greenway, 6 Ves. 812; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), pp. 16, 17; Whitchurch *v.* Golding, 2 P. Will. 541; Anon. 3 Atk. 17; Mitf. Eq. Pl. by Jeremy, pp. 29, 54, 123, 124; Walmsley *v.* Child, 1 Ves. 344, 345; Cooper, Eq. Pl. ch. 3, pp. 126, 129, 130; Id. Introd. pp. xxviii, xxix; Leroy *v.* Veeder, 1 John. Cas. 417.

of making a profert.[1] But where discovery only and not relief is the object of the bill, there equity will grant the discovery without any affidavit of loss or offer of indemnity; and in a variety of cases this is all that the plaintiff may desire.[2] The ground of this distinction is, that when relief is prayed the proper forum of jurisdiction is sought to be changed from law to equity; and in all such cases an affidavit ought to be required, to prevent abuse of the process of the court. But when discovery only is sought, the original jurisdiction remains at law, and equity is merely auxiliary. The jurisdiction for discovery alone would therefore seem upon principle to be universal. But the jurisdiction for relief is special, and limited to peculiar cases; and in all these cases there must be an affidavit of the loss, and when proper, an offer of indemnity also in the bill.[3]

[1] Anon. 2 Atk. 61; Mitf. Eq. Pl. by Jeremy, pp. 113, 114.

[2] Dormer *v.* Fortescue, 3 Atk. 132; Whitchurch *v.* Golding, 2 P. Will. 541; Walmsley *v.* Child, 1 Ves. 344, 345.

[3] In Walmsley *v.* Child (1 Ves. R. 344), Lord Hardwicke is reported to have said that there are but three cases in which a bill for discovery and relief on lost instruments can be maintained in equity. The passage, however, is singularly obscure and of difficult interpretation; and I have not been able entirely to satisfy my mind what Lord Hardwicke's real doctrine was, or what were the three cases to which he alluded. Two of them are easily made out; but the perplexity is in ascertaining the third, as contradistinguished from the other two. The passage is as follows: "But there are cases upon which you may come into equity on a loss, though remedy may be at law; and one is clear upon a bill for discovery. But if you come into equity, not only for discovery, but to have relief on the foundation of loss, that changes the jurisdiction. And there are but three cases in which you are entitled to that; in every one of which you are obliged to annex an affidavit to the bill to prove the loss. If the deed or instrument upon which the demand arises is lost, and you only come for discovery, you are entitled thereto without affidavit; but if relief is prayed beyond that discovery, to have payment of the debt, affidavit of the loss must be annexed; for that changes the jurisdiction. If the deed lost concerned the title of lands, and possession prayed to be established, such affidavit must be annexed. Another case is of a personal demand, where [there is] loss of a bond, and a bill in equity on that loss, to be paid the demand; there a bill for discovery will not be sufficient, but it must be to be paid the money thereon; but an affidavit must be annexed. The reason of the difference between a bond and a note is, that in an action at law a profert in curia of the bond must itself be made; otherwise oyer cannot be demanded by the defendant; and if oyer is not given, the plaintiff cannot proceed. But that is not necessary in the case of notes; no oyer is demanded upon them, the proving the contents being sufficient; and nothing standing in the plaintiff's way. Another case in which you may come into this court on a loss is, to pray satisfaction and payment of it upon terms of giving security. In an action at law the plaintiff might offer, but the defendant could not be compelled to take; but in equity that would be a consideration whether they were reasonable. That was the case of Teresy *v.* Gorey, as Lord Nottingham has taken the name in

§ 125. **Relief Applied to Lost Deeds.** — It has been remarked by Lord Hardwicke, that the loss of a deed is not always a ground to come into a Court of Equity for relief; for if there is no more in the case, although the party may be entitled to a discovery of the original existence and validity of the deed, Courts of Law may afford just relief, since they will admit evidence of the loss and contents of a deed, just as a Court of Equity will do.[1] To enable the party therefore in case of a lost deed to come into equity for relief, he must establish that there is no remedy at all at law, or no remedy which is adequate, and adapted to the circumstances of the case. In the first place he may come into equity for payment of a lost bond; for in such a case his bill need not be for a discovery only, but may also be for relief, since the jurisdiction attached when there was no remedy at law for want of a due profert.[2] In the next place he may come into equity when a deed of land has been destroyed, or is concealed by the defendant; for then, as the party cannot know which alternative is correct, a Court of Equity will make a decree (which a Court of Law cannot) that the plaintiff shall hold and enjoy the land until the defendant shall produce the deed or admit its destruction.[3] So if a deed concerning land is lost, and the party in possession prays discovery, and to be established in his possession under it, equity will relieve; for no remedy in such a case lies at law.[4] And where the plaintiff

an authentic record I have of it; which was Easter, 28 C. 2, where a bill of exchange was drawn on the defendant, and indorsed, in the third place, to the plaintiff, by whom the bill was either lost or mislaid, as appeared by the affidavit annexed. And the bill prayed that the defendant might be decreed to pay the plaintiff the money, as last indorsee, according to the acceptance, the plaintiff first giving security to save the defendant harmless against all former assignments; which was so decreed, but without damages and costs. In a book called Finch's Reports, 301, the decree is somewhat larger, and the acceptance of the defendant was after the third indorsement, and it is in that book, though not so in the manuscript report. And indeed I do take it to be as in the book; and then there is no doubt of the plaintiff's right; but if that be material, it shall be inquired into. In that case, if the plaintiff could at law prove the contents of his bill, and the indorsement, and the loss of it, he might have brought his action at law upon that bill without coming into this court. But he was apprehensive the course of trade might stand in his way at law, and therefore came into this court upon terms, submitting it to the judgment of the court, whether they were not reasonable." See Hoddy *v.* Hoard, 2 Ind. 474. But see Graham *v.* Hookwith, 1 A. K. Marsh, 424; Purviance *v.* Holt, 3 Gilm. 395.

[1] Whitfield *v.* Faussat, 1 Ves. 392, 393; ante, § 120.

[2] Id. Walmsley *v.* Child, 1 Ves. 344, 345; post, § 88.

[3] Rex *v.* Arundel, Hob. R. 108 *b*; 1 Ves. 392; Worthy *v.* Tate, 44 Ga. 152.

[4] Walmsley *v.* Child, 1 Ves. 434, 435. See also Dalton *v.* Coatsworth, 1 P. Will. 731; Dormer *v.* Fortescue, 3 Atk. 132.

is out of possession, there are cases in which equity will interfere upon lost or suppressed title deeds, and decree possession to the plaintiff; but in all such cases there must be other equities, calling for the action of the court.[1] Indeed the bill must always lay some ground besides the mere loss of a title deed, or other sealed instrument, to justify a prayer for relief; as that the loss obstructs the right of the plaintiff at law, or leaves him exposed to undue perils in the future assertion of such right.[2]

§ 126. **Bond of Indemnity Not Essential to Relief.** — Although upon a lost bond equity will decree payment for the reason already stated, yet it has been said that it will not entertain jurisdiction for relief upon a lost negotiable note, or other unsealed security, so as to decree payment upon the mere fact of loss; for no such supposed inability to recover at law exists in the case of such a note or unsealed contract which is lost, as exists for want of a profert of a bond at law. No profert is necessary, and no oyer allowed at law, of such a note or security;[3] and a recovery can be had at law, upon mere proof of the loss.[4] But then a Court of Law cannot (as we have seen) insist upon an indemnity, or at least cannot

[1] Dormer *v.* Fortescue, 3 Atk. 132.

[2] See 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Id. ch. 3, § 3. See Mitf. Eq. Pl. by Jeremy, pp. 113, 114.

Grantor will not be required to execute a second deed where one previously executed has been lost or destroyed while in the possession of the grantee. Hoddy *v.* Hoard, 2 Ind. 474, 54 Am. Dec. 457; Griffin *v.* Fries, 23 Fla. 173, 2 So. 266, 11 Am. St. Rep. 351; McCormick *v.* Jernigan, 110 N. C. 406, 14 S. E. 971; Tyson *v.* Harrington, 41 N. C. 329; King *v.* Pillow, 90 Tenn. 287, 16 S. W. 469.

Originally there was no relief at common law or in equity to decree the re-execution of a deed, except as an ancillary remedy to some other relief as ejectment or to enjoin a recovery and the like, but in North Carolina the statute gives the right to bring an action to prevent a cloud upon title and this additional relief the plaintiffs are entitled to besides the decree for setting up and recording the deed, whether such relief is prayed for or not. Jones *v.* Ballou, 139 N. C. 526, 52 S. E. 254.

[3] Walmsley *v.* Child, 1 Ves. 345; Glynn *v.* Bank of England, 2 Ves. 38, 41.

[4] Walmsley *v.* Child, 1 Ves. 345; Glynn *v.* Bank of England, 2 Ves. 38, 41. In Hansard *v.* Robinson (7 B. & Cres. 90) it was expressly decided that no action would lie by the indorsee of a bill of exchange against the acceptor, where the bill was lost and not produced at the trial, although the loss was established to have been after it became due. The ground of the decision was, that by the custom of merchants the acceptor was entitled to the possession of the bill as his voucher for the payment; and the extreme inconvenience of requiring the acceptor to prove the loss, if he should be required so to do, in a suit by another person as holder. The court said the proper remedy was in equity, where an offer of indemnity might be made and enforced.

insist upon it in such a form as may operate a perfect indemnity.[1] In such a case therefore a Court of Equity will entertain a bill for relief and payment upon an offer in the bill to give a proper indemnity under the direction of the court, and not without. And such an offer entitles the court to require an indemnity not strictly attainable at law, and founds a just jurisdiction.[2]

§ 127. **Same.** — In the cases which we have been considering, the lost note or other security was negotiable. And according to the authorities this circumstance is most material; for otherwise it would seem that no indemnity would be necessary,[3] and consequently no relief could be had in equity. The propriety of this exception has been somewhat doubted; for the party is entitled, upon payment of such a note or security, to have it delivered up to him as voucher of the payment and extinguishment of it; and it may have been assigned in equity to a third person.[4] And although in such a case the assignee would be affected by all the equities between the original parties, yet the promisor may not always, after a great length of time, be able to establish those equities by competent proof; and at all events he may be put to serious expense and trouble to establish his exoneration from the charge. The jurisdiction of Courts of Equity under such circumstances seems perfectly within the principles on which such courts ordinarily proceed to grant relief, not only in cases of absolute loss, but of impending or probable mischief or inconvenience. And a bond of indemnity, under such circumstances, is but a just security to the promisor against the vexation and accumulated expenses of a suit.[5]

[1] Ante, § 123, 2 Camp. 211; 7 B. & Cres. 90.

[2] Walmsley *v.* Child, 1 Ves. 344, 345; Teresy *v.* Gorey, Finch, R. 301; s. c. 1 Ves. 345; Glynn *v.* Bank of England, 1 Ves. 446, 2 Ves. 38; Mossop *v.* Eadon, 16 Ves. 430, 434; Chitty on Bills (8th edit. 1833), p. 290; Bromley *v.* Holland, 7 Ves. 19 to 21; Davies *v.* Dodd, 4 Price, 176; s. c. 1 Wils. Exch. R. 110. See Savannah Bank *v.* Haskins, 101 Mass. 370.

[3] Mossop *v.* Eadon, 16 Ves. 430, 434; see Chitty on Bills (8th edit. 1833), p. 291, note.

[4] Hansard *v.* Robinson, 7 B. & Cres. 90; Story on Promissory Notes, §§ 106 to 116, §§ 243 to 245, § 445.

[5] See Hansard *v.* Robinson, 7 B. & Cres. 90; East India Company *v.* Boddam, 9 Ves. 468, 469; Davies *v.* Dodd, 4 Price, R. 176; Gordon *v.* Manning, 44 Miss. 756.

When a negotiable promissory note is stolen from the holder before it is due, the amount of it may be recovered from the maker in an action at law, on filing a sufficient bond for his indemnification. Hinckley *v.* Union Pac. R. Co., 129 Mass. 52; Tucker *v.* Tucker, 119 Mass. 81; First Natl. Bank *v.* Wilder, 104 Fed. 187.

§ 128. **Same.** — It is upon grounds somewhat similar that Courts of Equity often interfere, where the party, from the long possession or exercise of a right over property, may fairly be presumed to have had a legal title to it, and yet has lost the legal evidence of it, or is now unable to produce it. Under such circumstances equity acts upon the presumption arising from such possession as equivalent to complete proof of the legal right. Thus where a rent has been received and paid for a long time, equity will enforce the payment, although no deed can be produced to sustain the claim, or the precise lands out of which it is payable cannot from confusion of boundaries, or other accident, be now ascertained.[1]

§ 129. **Essentials to Obtain Relief upon Lost Instruments.** — In the cases of supposed lost instruments, where relief is sought, it has been seen that, as a guard upon the preliminary exercise of jurisdiction, an affidavit of the loss of the instrument, and that it is not in the possession or power of the plaintiff, is indispensable to sustain the bill.[2] And in order to maintain the suit, it is further indispensable that the loss, if not admitted by the answer of the

Promissory notes were admissible in evidence under the money counts in the old forms of pleading, and an action at law can be maintained against the maker of a promissory note which has been lost or destroyed, when a bond of indemnity will afford complete protection to the defendant; and when it will not, a suit in equity can be maintained. McCann *v.* Randall, 147 Mass. 95, 17 N. E. 75.

The authorities in this State are conclusive to the effect that a suit will lie upon a lost note, and that in such case, when the suit is upon a lost note, the proper course is for the loser to go into equity, when by a decree of the court sufficient indemnity can be required to relieve the defendant from the danger of being made liable a second time. Smith *v.* Nelson, 83 S. C. 294, 65 S. E. 261, 24 L. R. A. (N. S.) 644, 137 Am. St. Rep. 808; First Natl. Bank *v.* Wilder, 104 Fed. 187, 43 C. C. A. 461; Barrows *v.* Million, 43 Mo. App. 79.

[1] Fonbl. Eq. B. 1, ch. 3, § 3, and note (*g*); Steward *v.* Bridger, 2 Vern. 516; Collet *v.* Jaques, 1 Ch. Cas. 120; Cocks *v.* Foley, 1 Vern. 359; Eton College *v.* Beauchamp, 1 Cas. Ch. 121; Holder *v.* Chambury, 3 P. Will. 255; Duke of Leeds *v.* Powell, 1 Ves. 171; Duke of Bridgewater *v.* Edwards, 4 Bro. Parl. C. 139; Duke of Leeds *v.* New Radnor, 2 Bro. Ch. C. 338, 518; Benson *v.* Baldwin, 1 Atk. 598; Cooper, Eq. Pl. p. 130.

[2] East India Co. *v.* Boddam, 9 Ves. 466; Cooper, Eq. Pl. pp. 125, 126; Hoddy *v.* Hoard, 2 Ind. 474. But see Graham *v.* Hockwith, 1 A. K. Marsh. 424; Purviance *v.* Holt, 3 Gilm. 395.

References taken from the original judgment docket in a court of record are admissible in evidence to prove the existence of the judgment, where the original record has since been destroyed by fire. Forsyth *v.* Vehmeyer, 176 Ill. 359, 52 N. E. 55; Bundy *v.* Cunningham, 107 Ind. 361, 8 N. E. 174; Bohart *v.* Hull, 47 S. W. 306; Easdale *v.* Reynolds, 143 Mass. 126, 9 N. E. 13; In re Edwards, 58 Iowa 431, 10 N. W. 793; Headman *v.* Rose, 63 Ga. 458.

defendant, should at the hearing of the cause be established by competent and satisfactory proofs.[1] For the very foundation of the suit in equity rests upon this most material fact.[2] If therefore the plaintiff should fail at the hearing to establish the loss of the instrument, or the defendant should overcome the plaintiff's proofs by countervailing testimony of its existence, the suit will be dismissed, and the plaintiff remitted to the legal forum.[3] But if the loss is sufficiently established when it is denied by the defendant's

A court has the inherent power to establish its own records where they have been lost. Paschal *v.* Hutchinson, 119 Ga. 243, 46 S. E. 104.

Recitals in deed showing by what authority the lands were sold are admissible, where the original records have been burned or lost. Hare *v.* Hollomon, 94 N. C. 19; Varner *v.* Johnston, 112 N. C. 576, 17 S. E. 483.

Where papers in court have been loosely kept, former probate judge may testify, in absence of court records, that the case in question was instituted, and the various stages of the action. Davis *v.* Turner, 21 Kans. 136; Burnett *v.* McCluey, 78 Mo. 676; Prentiss *v.* Davis, 83 Me. 368, 22 Atl. 246; Davidson *v.* Kahn, 119 Ala. 368, 24 So. 583; Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70; State *v.* City of Pierre, 15 S. Dak. 559, 90 N. W. 1047.

But the following exceptions to the rule should be noticed.

In action upon non-negotiable note given by husband to wife, in consideration of their marriage, afterwards performed, no bond is necessary. Wright *v.* Wright, 54 N. Y. 441.

No bond is necessary in action upon a new note given in payment of an antecedent debt, evidenced by note, which was negotiable but unindorsed, and which has since been destroyed. Mackey *v.* Mackey, 16 Colo. 134, 26 Pac. 554; Hoil *v.* Rathbone, 98 Mich. 323, 57 N. W. 183.

Warehouse receipts for cotton do not stand upon the footing of negotiable paper, and where the receipts were lost, the owner of the cotton might recover the value without giving bond. Clay *v.* Gage, 1 Tex. Civ. App. 661, 20 S. W. 948; Hardeman *v.* Battersby, 53 Ga. 36.

If a check be non-negotiable, the drawer can, upon notice of loss, fully protect his interests by countermanding the order and stopping payment. If it be negotiable, and likely to reach the hands of a bona fide holder, he may insist upon indemnity before giving a new check, or otherwise paying the debt intended to be discharged by it. First Natl. Bank *v.* McConnell, 103 Minn. 340, 114 N. W. 1129, 14 L. R. A. (N. S.) 616, 123 Am. St. Rep. 336; Means *v.* Kendall, 35 Neb. 693, 53 N. W. 610; Councilman *v.* Towson Natl. Bank, 103 Md. 469, 64 Atl. 358.

[1] Stokoe *v.* Robson, 3 Ves. & B. 50; Smith *v.* Bicknell, Id. note; Cookes *v.* Hellier, 1 Ves. 234, 235; Walmsley *v.* Child, 1 Ves. 344, 345; Cooper, Eq. Pl. 239; Clavering *v.* Clavering, 2 Ves. 232; East India Co. *v.* Boddam, 9 Ves. 466.

[2] Finding the instrument after suit will not defeat jurisdiction. See Crawford *v.* Summers, 3 J. J. Marsh. 300; Miller *v.* Wells, 5 Mo. 6; Hamlin *v.* Hamlin, 56 N. C. 191.

[3] See Jeremy on Eq. Jur. pp. 359, 360, 361; Cooper, Eq. Pl. pp. 238, 293; Mitf. Eq. Pl. by Jeremy, p. 222; Armitage *v.* Wadsworth, 1 Madd. R. 192 to 194; 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*h*).

As where a bond has been destroyed or suppressed by the obligee. Davis *v.* Davis, 41 N. C. 419.

answer, the plaintiff will be entitled to relief, although he may have other evidence, competent and sufficient to establish the existence and contents of the instrument, of which he might have availed himself in a Court of Law.[1] For if the jurisdiction once attaches by the loss of the instrument, a Court of Equity will not drive the party to the hazard of a trial at law when the case is fit for its own interposition and final action, upon a claim to sift the conscience of the party by a discovery.

§ 130. **Relief Will Be Granted against Penalties.** — We have thus far been considering cases of accident founded upon lost instruments. But there are many other cases of accident where Courts of Equity will grant both discovery and relief. One of the earliest cases in which they were accustomed to interfere was where by accident a bond had not been paid at the appointed day, and it was subsequently sued; or where a part only had been paid at the day.[2] This jurisdiction was afterwards greatly enlarged in its operation, and applied to all cases where relief is sought against the penalty of a bond, upon the ground that it is unjust for the party to avail himself of the penalty when an offer of full indemnity is tendered. The same principle governs in the case of mortgages, where Courts of Equity constantly allow a redemption, although

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 17. But see ante, § 124, and note 3.

Where a grantee has, by his own fault, lost or misplaced his deed, it is proper for a court to direct a commissioner to convey the title, and not an action to compel a re-execution by the grantor. McCauley *v.* Galloway, 19 Ky. L. Rep. 1291, 43 S. W. 225.

Plaintiff's deed had not been recorded, but had been lost or mislaid, and could not be found after diligent search, and where she was deprived of the written evidence of her title, her remedy is in equity. Conlin *v.* Ryan, 47 Cal. 73.

A party whose deed has not been recorded, but which has been destroyed, can depend upon the rules of the common law to establish its contents whenever an occasion may arise, as in the course of a trial. Hopper *v.* Justice, 111 N. C. 418, 16 S. E. 626; Elliott *v.* Dycke, 78 Ala. 150.

The plaintiff must produce proper and full proof that the deed, now alleged to be lost, once existed, its legal operation, and its loss, before a decree would be made to establish it. Loftin *v.* Loftin, 96 N. C. 94, 1. S. E. 840; Harrell *v.* Enterprise Bank, 183 Ill. 538, 56 N. E. 63; McDonald *v.* Thompson, 16 Colo. 13, 26 Pac. 146; Holmes *v.* Deppert, 122 Mich. 275, 80 N. W. 1094; Towle *v.* Sherer, 70 Minn. 312; 73 N. W. 180; Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329; Matteson *v.* Hartman, 91 Wis. 465, 65 N. W. 58; Dulaney *v.* Walshe, 3 Tex. Civ. App. 174, 22 S. W. 131; Dollarhide *v.* Parks, 92 Mo. 178, 5 S. W. 3; Capell *v.* Fagan, 30 Mont. 507, 77 Pac. 55; Dagley *v.* Black, 197 Ill. 53, 64 N. E. 275; Arnold *v.* Mangan, 89 Ill. App. 327.

[2] Cary's Rep. 1, 2; 7 Ves. 273. See also Harg. Law Tracts, pp. 431, 432, Norburie on Chancery Abuses.

there is a forfeiture at law.[1] [And where the defendant wrongfully procured the mutilation of an assignment which had been executed by him to the plaintiff, its mutilation did not revest the title in the defendant, but it prevented the plaintiff from perfecting his title, which, as between the parties, had already vested. The re-execution of lost instruments is a separate and ancient head of equity jurisdiction, and the case of an instrument which has been wrongfully mutilated comes within the rule. And it may now be stated generally that where an inequitable loss or injury will otherwise fall upon a party from circumstances beyond his own control, or from his own acts done in entire good faith, and in the performance of a supposed duty, without negligence, Courts of Equity will interfere to grant him relief.]

§ 131. **Over-payment Made by Accident.** — Cases illustrative of this doctrine may easily be put. In the course of the administration of estates, executors and administrators often pay debts and legacies upon the entire confidence that the assets are sufficient for all purposes. It may turn out, from unexpected occurrences, or from debts and claims made known at a subsequent time, that there is a deficiency of assets. Under such circumstances they may be entitled to no relief at law. But in a Court of Equity, if they have acted with good faith and with due caution, they will be clearly entitled to it upon the ground that otherwise they will be innocently subject to an unjust loss from what the law itself deems an accident.[2] Indeed it has been said that in England no

[1] Seton *v.* Slade, 7 Ves. 273, 274; Lenon *v.* Napper, 2 Sch. & Lefr. 684, 685; Com. Dig. Chancery, 4 A. 5; Mitf. Pl. Ch. by Jeremy, pp. 117, 130; Cooper, Eq. Pl. pp. 130, 131; 2 Fonbl. Eq. B. 3, ch. 3, § 4, and notes. Lord Redesdale puts the relief in cases of this sort upon the ground of accident. His language is, "In many cases of accidents, as lapse of time, the Courts of Equity will also relieve against the consequences of the accident in a Court of Law. Upon this ground they proceed in the common case of a mortgage, where the title of the mortgagee has become absolute at law, upon default of payment of the mortgage money at the time stipulated for payment." Mitf. Eq. Pl. by Jeremy, p. 130. I apprehend that this is not the true ground; but that it turns upon the construction of the contract being a mere security, and time not being of the essence of the contract, and the unconscionableness of insisting upon taking the land for the money. Seton *v.* Slade, 7 Ves. 273, 274; Lenon *v.* Napper, 2 Sch. & Lefr. 684, 685; Post, §§ 1727 to 1731; Doty *v.* Whittlesey, 1 Root, 310; Crane *v.* Hancks, Ib. 468; Bostwick *v.* Stiles, 35 Conn. 195; Niles *v.* Groham, 181 Mass. 41, 62 N. E. 986.

[2] Edwards *v.* Freeman, 2 P. Will. 447; Johnson *v.* Johnson, 3 Bos. & Pull. 162, 169; Hawkins *v.* Day, Ambler, R. 160; Chamberlain *v.* Chamberlain, 2 Freem. 141. But see Coppin *v.* Coppin, 2 P. Will. 296, 297; Orr *v.* Kaines, 2 Ves. 194; Underwood *v.* Hatton, 5 Beav. R. 36.

case at law has yet decided that an executor or administrator, once become fully responsible by an actual receipt of a part of his testator's property, for the administration thereof, can found his discharge in respect thereof as against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, or destruction by fire, or loss by robbery or the like, or of reasonable confidence disappointed, or of loss by any of the other various means which afford an excuse to ordinary agents and bailees in cases of loss without any negligence on their part, and that Courts of Law are disinclined to make such a precedent.[1] If this be a true description of the actual state of the law on this subject, it would become an intolerable grievance if Courts of Equity should not be able under any circumstances to interfere in favor of executors and administrators in order to prevent such gross injustice. And in cases of this sort relief has accordingly been often granted by Courts of Equity in mitigation and melioration of the hardship of the common law.[2] But to found a good title to such relief it seems indispensable that there should have been no negligence or misconduct on the part of such executors or administrators in the payment of the assets; for if there has been any negligence or misconduct, that perhaps may induce a Court of Equity to withhold its assistance.[3]

§ 132. **Receipt of Money through Mistake and Payment to Those Apparently Entitled to It.** — Other cases may be easily put,

[1] Crosse *v.* Smith, 7 East, R. 246; Johnson *v.* Johnson, 3 Bos. & Pull. 162, 169. But see Orr *v.* Kaines, 2 Ves. 194; Hawkins *v.* Day, Ambl. R. 160. But even at law the payment of a simple contract debt without notice of a specialty debt would, in case of a deficiency of assets, protect the executor or administrator. Davis *v.* Monkhouse, Fitzgib. R. 76; Brooks *v.* Jennings, 1 Mod. R. 174; Britton *v.* Bathurst, 3 Lev. 115; Hawkins *v.* Day, Ambler, R. 160, 162.

In Brisbane *v.* Dacres (5 Taunt. R. 143, 159), Mr. Justice Chambre seems to have thought that an administrator paying money per capita, in misapplication of the effects of the intestate, might recover it back at law. But Lord Chief Justice Mansfield in the same case doubted it, and said, if he could, it would be only under the principle of æquum et bonum.

[2] Croft's Executors *v.* Lyndsey, 2 Freem. R. 1; s. c. 2 Eq. Abridg. 452; Holt *v.* Holt, 1 Cas. Ch. 190; 2 P. Will. 447; Orr *v.* Kaines, 2 Ves. R. 194; Moore *v.* Moore, 2 Ves. 600; Nelthorp *v.* Hill, 1 Cas. Ch. 135; Noel *v.* Robinson, 1 Vern. 90, 94; 2 Eq. Abridg. Execrs. K. p. 452. See Riddle *v.* Mandeville, 9 U. S. 330, 3 L. Ed. 114.

[3] See Hovenden's note to 2 Freem. R. 1 n. (3); 1 Cas. Ch. 136; 1 Fonbl. Eq. B. 1, ch. 3, § 3. In re Lux, 100 Cal. 606, 35 Pac. 345; Finley's Execrs. *v.* Pearson, 25 Ky. L. Rep. 766, 76 S. W. 375; State ex rel. Hartley *v.* Innes, 137 Mo. App. 420, 118 S. W. 1168; United States Trust Co. *v.* David, 36 App. D. C. 555.

in which an executor or administrator would be entitled to relief in equity. Thus if he should receive money supposed to be due from a debtor to the estate, and it should turn out that the debt had been previously paid, and before the discovery he had paid away the money to creditors of the estate, in such a case the supposed debtor may recover back the money in equity from the executor, and the latter may in the same manner recover it back from the creditors to whom he paid it.[1] In like manner if an executor should recover a judgment and receive the amount, and apply it in discharge of debts, and then the judgment should be reversed, he is compellable to refund the money, and may recover it back from the creditors.[2]

§ 133. **Unpaid Legatee May Compel Others Who Have Been Fully Paid to Refund in Proportion.** — Upon analogous grounds a Court of Equity will interpose in favor of an unpaid legatee to compel the other legatees who have been paid their full legacies to refund in proportion, if there was an original deficiency of assets to pay all the legacies and the executor is insolvent; but not, as it should seem, if there was not such original deficiency, and there has been a waste by the executor.[3] The reason of the distinction seems to be, that the other legatees in the first case have received more than their just proportion of the assets; but in the last case no more than their just proportion. And therefore there is nothing inequitable on their part in availing themselves of their superior diligence.[4] But legatees are always compellable to refund in favor

[1] Poole *v.* Ray, 1 P. Will. 355; 2 Eq. Abridg. Execrs. 452, pl. 5; McKnight's Execr. *v.* Walsh, 23 N. J. Eq. 136; Mallard *v.* Patterson, 108 N. C. 255, 13 S. E. 93.

An administrator who has advanced his own funds to pay debts of his intestate, has the clear right to retain out of the assets of his intestate what he has advanced, or if they have been delivered to his distributees, he could compel them to reimburse. Slaton *v.* Alcorn, 51 Miss. 75.

An administrator with the will annexed may be reimbursed for advances made by him in settling the estate. Manson *v.* Duncanson, 166 U. S. 533, 41 L. Ed. 1105, 17 S. Ct. Rep. 647; Chesson *v.* Chesson, 43 N. C. 141; Dunson *v.* Payne, 44 Tex. 539; In re Mustin, 188 Pa. St. 544, 41 Atl. 618; In re Bentley, 196 Pa. St. 497, 46 Atl. 898; Gundry *v.* Henry, 65 Wis. 559, 27 N. W. 401; Jenks' Admr. *v.* Breen, Execr., 42 N. J. Eq. 325, 5 Atl. 647; First Natl. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333; Burnett *v.* Lyford, 93 Cal. 114, 28 Pac. 855; In re Connally's Estate, 198 Pa. St. 146, 48 Atl. 489.

[2] Poole *v.* Ray, 1 P. Will. 355; 2 Eq. Abridg. Execrs. 452, pl. 5.

[3] Orr *v.* Kaines, 2 Ves. 194; Moore *v.* Moore, 2 Ves. 600; Anon. 1 P. Will. 495; Walcot *v.* Hall, Id. Cox's note; s. c. 1 Bro. Ch. R. 305, and Belt's notes; Noel *v.* Robinson, 1 Vern. 94, Raithby's note (1); Edwards *v.* Freeman, 2 P. Will. 447.

[4] Id.; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 5, note (*p*); Lupton *v.* Lupton,

of creditors, because the latter have a priority of right to satisfaction out of the assets.[1]

§ 134. **Same.** — Other illustrations of the doctrine of relief in equity upon the ground of accident may be stated. Suppose a minor is bound as apprentice to a person subject to the bankrupt laws, and a large premium is given for the apprenticeship to the master, and he becomes bankrupt during the apprenticeship; in such a case equity will interfere and apportion the premium upon the ground of the failure of the contract from accident.[2] So if stock of a government is held for the benefit of A during life, and afterwards the growing payments as well as the arrears are to be for the benefit of B, and then a revolution should occur by which the payments should be suspended for several years, and A should die before the arrears are paid, there such revolution would be treated as an accident, and the representatives of A would be entitled to the arrears, and not B, notwithstanding the language

2 John. Ch. R. 614, 626. But it seems that the executor himself cannot in a case of deficiency of assets compel the legatees to refund in favor of another legatee who is unpaid, where the executor has made a voluntary payment, but only where the payment has been compulsive. 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 5, note (*p*); Hodges *v.* Waddington, 2 Vent. 360; Newman *v.* Barton, 2 Vern. R. 205; Orr *v.* Kaines, 2 Ves. 194. And in cases of creditors he cannot compel legatees to refund if he knew of the debts at the time of the payment, but only when the debts were then unknown to him. Nelthorp *v.* Hill, 1 Ch. Cas. 136; Jewon *v.* Grant, 3 Swanst. 659; Hodges *v.* Waddington, 2 Vent. 360, 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 5, note (*p*). So that the rights of the executor himself and that of legatees and creditors are not precisely the same in all cases of a deficiency of assets. See 2 Eq. Abridg. Legacies, B. 13, p. 554, 17 Mass. 384, 385. In Massachusetts an executor who has voluntarily paid a legatee can, on the subsequent discovery of a deficiency of assets, recover back the money at law. And so if he has paid some creditors in full, and there is afterwards a deficiency of assets, he may recover back from the creditors so paid in proportion to the deficiency. Walker *v.* Hill, 17 Mass. R. 380; Walker *v.* Bradley, 3 Pick. R. 261. See Riddle *v.* Mandeville, 9 U. S. 330, 3 L. Ed. 114.

[1] Noel *v.* Robinson, 1 Vern. 90, 94; Id. 460; Newman *v.* Barton, 2 Vern. 205; Nelthorp *v.* Hill, 1 Ch. Cas. 136, 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 5, note (*p*); Lupton *v.* Lupton, 2 John. Ch. R. 614, 626; Anon. 1 Vern. 162; Hardwick *v.* Mynd, 1 Anst. R. 112.

A legatee who has received his share of the estate is not liable to account to another legatee who, by reason of a devastavit, fails to receive his share, and by some unforeseen cause, for which the executor is not responsible, it turns out upon final settlement that some legatees have been over-paid, after making good to other legatees their share, he may have relief in equity against the over-paid legatees. Sprinkle *v.* Holton, 146 N. C. 264, 59 S. E. 680; Richardson *v.* Ransom, 99 Ill. App. 258; Hullett *v.* Hood, 109 Ala. 345, 19 So. 419.

[2] Hale *v.* Webb, 2 Bro. Ch. R. 78, and Belt's note. See 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (*g*); Ex parte Sandby, 1 Atk. 149; post, § 630.

of the contract. For the arrears supposed in the contract could mean only such as might ordinarily occur, and not such as should arise from extraordinary events.[1] So if an annuity is directed by a will to be secured by public stock, and an investment is made accordingly sufficient at the time for the purpose, but afterwards the stock is reduced by an act of Parliament, so that the stock becomes insufficient, equity will decree the deficiency to be made up against the residuary legatees, as an accident.[2]

§ 135. **Relief Will Be Granted in Execution of Powers.** — In the execution of mere powers it has been said that a Court of Equity will interpose and grant relief on account of accident as well as of mistake.[3] And this seems regularly true where by accident there is a defective execution of the power. But where there is a non-execution of the power by accident there seems more reason to question the doctrine. It is true that it was said by two judges in a celebrated case that if the party appear to have intended to execute his power, and is prevented by death, equity will interpose to effectuate his intent, for it is an impediment by the act of God.[4] But it is doubtful whether this doctrine can be maintained unless the party has taken some preparatory steps for the execution, so that it may be deemed a case not of non-execution, but defective execution.[5] And it has been said that equity will also relieve

[1] Haslett *v.* Pattle, 6 Madd. R. 4.

So where a vendor reserved a lien "to be enforced within six years or stand for nought thereafter", and was prevented by war from enforcing it within that time, equity gave relief. Atkins *v.* Rison, 25 Ark. 138.

[2] Davies *v.* Wottier, 1 Sim. & Stu. 463; May *v.* Bennet, 1 Russell, R. 370.

One who receives money from an administrator, knowing its wrongful appropriation, may be compelled to answer for the amount. Caviness *v.* Fidelity Co., 140 N. C. 59, 52 S. E. 265; Barnhill *v.* Threadgill, 56 N. C. 50.

Where a creditor has received payment in full, a promise on his part to repay the administrator such an amount as he may have been overpaid, in the event of an insufficiency of assets to pay the same percentage to other creditors in the same class, is enforcible in equity. Beardsley *v.* Marsteller, 120 Ind. 319, 22 N. E. 315; Davis *v.* Perry, 96 N. C. 260, 1 S. E. 610; Francis *v.* Reeves, 137 N. C. 269, 49 S. E. 213; Camp. Mfg. Co. *v.* Liverman, 128 N. C. 52, 38 S. E. 27; Hooker *v.* Yellowley, 128 N. C. 297, 38 S. E. 889.

[3] No title or interest vests in the donee of a power until he accepts the power; and equity cannot compel him to accept even for creditors. Gilman *v.* Bell, 99 Ill. 144.

[4] Earl of Bath & Montague's Case, 3 Ch. Cas. 69, 93; 1 Fonbl. Eq. B. 1, ch. 4, § 25, note (*k*); Id. B. 1, ch. 1, § 7, note (*v*); Sugden on Powers, ch. 6, § 2, p. 378 (3d edit.).

[5] See 1 Fonbl. Eq. B. 1, ch. 4, § 25, notes (*h*), (*k*); Smith *v.* Ashton, 1 Ch. Cas. 264; 2 Chance on Powers, ch. 23, § 3, arts. 2999 to 3004; Id. § 1, arts. 2817 to 2923; Sugden on Powers, ch. 6, § 2, p. 378 (3d edit.).

in cases of a defective execution of a power where it is rendered impossible, by circumstances over which the party has no control, for him to execute it; as if he is sent abroad by the Government, and the prescribed witnesses cannot be obtained; or if the remainder man refuses to the party a sight of the deeds creating the power, so that the party cannot ascertain the proper form of executing it.[1]

§ 136. **Same.** — In regard to the defective execution of powers resulting either from accident or mistake or both, and also in regard to agreements to execute powers (which may generally be deemed a species of defective execution),[2] Courts of Equity do not in all cases interfere and grant relief, but grant it only in favor of persons in a moral sense entitled to the same, and viewed with peculiar favor, and where there are no opposing equities on the other side.[3] Without undertaking to enumerate all the qualifications of doctrine belonging to this intricate subject, it may be stated that Courts of Equity, in cases of defective execution of powers, will (unless there be some countervailing equity) interpose, and grant relief in favor of purchasers, creditors, a wife, a child, and a charity; but not in favor of the donee of the power, or a husband, or grandchildren, or remote relations, or strangers generally.[4]

§ 137. **Distinction between Powers Created by Private Parties and Those Created by Statute.** — But in cases of defective execution of powers we are carefully to distinguish between powers which are created by private parties and those which are specially created by statute; as for instance powers of tenants in tail to make leases. The latter are construed with more strictness; and whatever formalities are required by the statute must be punctually complied with, otherwise the defect cannot be helped, or at least may not perhaps be helped, in equity; for Courts of Equity cannot dispense with the regulations prescribed by a statute, at least where they constitute the apparent policy and object of the statute.[5]

[1] 1 Fonbl. Eq. B. 1, ch. 5, § 2, note (*h*); Earl of Bath & Montague's Case, 3 Ch. Cas. 68; Gilb. Lex Prætoria, pp. 305, 306.

[2] 2 Chance on Powers, ch. 23, § 1, arts. 2824, 2825, 2897 to 2915.

[3] Ibid. ch. 23, § 1, arts. 2817 to 2932.

[4] 2 Chance on Powers, ch. 23, § 1, arts. 2830 to 2858; Id. 2859 to 2863; Id. 2864 to 2873; 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note (*v*); Id. B. 1, ch. 4, § 25, notes (*h*), (*i*); Id. B. 1, ch. 5, § 2, and note (*b*).

[5] 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note (*t*); Id. B. 1, ch. 4, § 25, note (*e*); Earl of Darlington *v.* Pultney, Cowp. R. 267. But see 2 Chance on Powers, ch. 23, § 2, arts. 2985 to 2997; post, §§ 241, 251, and note 2; Bright *v.* Boyd, 1 Story, R. 478.

§ 138. **Same.** — As to the defects which may be remedied, they may generally be said to be any which are not of the very essence or substance of the power. Thus a defect by executing the power by *will* when it is required to be by a deed or other instrument, inter vivos, will be aided. So the want of a seal,[1] or of witnesses, or of a signature, and defects in the limitations of the property, estate, or interest, will be aided. And perhaps the same rule will apply to defective executions of powers by femes covert. But equity will not aid defects which are of the very essence or substance of the power; as for instance if the power be executed without the consent of parties who are required to consent to it. So if it be required to be executed by *will*, and it is executed by an irrevocable and absolute *deed;* for this is apparently contrary to the settler's intention, a will being always revocable during the life of the testator, whereas a deed would not be revocable unless expressly so stated in it.[2]

§ 139. **Failure to Execute Powers and Trusts by Accident.** — But a class of cases more common in their occurrence as well as more extensive in their operation will be found where trusts, or powers in the nature of trusts, are required to be executed by the trustee in favor of particular persons, and they fail of being so executed, by casualty or accident. In all such cases equity will interpose and grant suitable relief. Thus for instance if a testator should by his will devise certain estates to A, with directions that A should at his death distribute the same among his children and relations as he should choose, and A should die without making such distribution, a Court of Equity would interfere and make a suitable distribution; because it is not given to the devisee as a mere power, but as a trust and duty which he ought to fulfil; and his omission so to do by accident or design ought not to disappoint the objects of the bounty. It would be very different if the case were of a mere naked power, and not a power coupled with a trust.[3]

[1] See Bernards *v.* Stebbins, 109 U. S. 341, 27 L. Ed. 956, 3 S. Ct. Rep. 252; post, note to § 209.

[2] 2 Chance on Powers, ch. 23, § 1, arts. 2894 to 2896; 2930; 2980 to 2984. I have contented myself with these general statements on this confessedly involved topic, as a full investigation of all the doctrines concerning it more properly belongs to a treatise on Powers. The learned reader will find the whole subject fully examined, and all the leading authorities brought together, in 2 Chance on Powers, ch. 23, §§ 1, 2, 3, arts. 2818 to 3024, and Sugden on Powers, ch. 6, pp. 344 to 393 (3d edition), and Powell on Powers, pp. 54, 155, 243, 280. See Post, §§ 247, 248; Levy *v.* Griffis, 65 N. C. 236.

[3] Harding *v.* Glynn, 1 Atk. 469, and note by Saunders; Brown *v.* Higgs, 4 Ves. 709; 5 Ves. 495; 8 Ves. 561; 2 Chance on Powers, ch. 23, § 1.

§ 140. **Cancellation of Prior Valid Will Believing Subsequent Defective Will Valid.** — Another class of cases is where a testator cancels a former will upon the presumption that a later will made by him is duly executed, when it is not. In such a case it has been decided that the former will shall be set up against the heir in a Court of Equity, and the devisee be relieved there upon the ground of accident.[1] But this class seems more properly to belong to the head of mistake, or of a conditional presumptive revocation, where the condition has failed.[2]

§ 141. **Relief Granted in Confusion of Boundaries.** — Courts of Equity will also interfere and grant relief (as we shall presently more fully see) where there has been by accident a confusion of the boundaries between two estates.[3] So they will also grant relief where by reason of such confusion of boundaries by accident the remedy by distress for a rent charged thereon is gone.[4]

§ 142. **Material Party to Instrument Who Failed to Indorse through Accident May Be Compelled to Execute It.** — So where by accident or mistake, upon a transfer of a bill of exchange or a promissory note, there has been an omission by the party to indorse it according to the intention of the transfer in such a case, the party, or in case of his death his executor or administrator, may be compelled in equity to make the indorsement, and if the party has since become bankrupt or his estate is insolvent, his assignees will be compelled to make it; for the transaction amounts to an equitable assignment, and a Court of Equity will clothe it with a legal effect and title.[5]

§ 143. **Same.** — These may suffice as illustrations of the general doctrine of relief in equity in cases of accident. They all proceed upon the same common foundation that there is no adequate or complete remedy at law under all the circumstances; that the party has rights which ought to be protected and enforced; or that he will sustain some injury, loss, or detriment, which it would be inequitable to throw upon him.

[1] Onions *v.* Tyrer, 1 P. Will. 343, 345; s. c. 2 Vern. 751; Prec. Ch. 459.
[2] 1 P. Will. 345, Cox's note; Burtenshaw *v.* Gilbert, Cowp. R. 49.
[3] Beatty *v.* Dixon, 56 Cal. 619; Wetherbee *v.* Dunn, 36 Cal. 255.
[4] Mitf. Eq. Pl. by Jeremy, 117; post, §§ 766, 835 to 842, 615 to 622; Duke of Leeds *v.* Powell, 1 Ves. 171; post, § 842.
[5] Watkins *v.* Maule, 2 Jac. & Walk. 242; Chitty on Bills, ch. 6, p. 263 (8th edit. 1833); Bayley on Bills, ch. 5, § 2, pp. 136, 137 (5th edit. 1830); post, § 1010; Benson *v.* Abbott, 95 Ga. 69, 22 S. E. 127; Troeder *v.* Hyams, 153 Mass. 536, 27 N. E. 775.

§ 144. **Relief from Breach of Positive Contract Will Not Be Granted on Account of Mere Accident.** — And this leads us naturally to the consideration of those cases of accident in which no relief will be granted by Courts of Equity. In the first place, in matters of positive contract and obligation created by the party (for it is different in obligations or duties created by law),[1] it is no ground for the interference of equity that the party has been prevented from fulfilling them by accident, or that he has been in no default, or that he has been prevented by accident from deriving the full benefit of the contract on his own side.[2] Thus if a lessee on a demise covenants to keep the demised estate in repair, he will be bound in equity as well as in law to do so, notwithstanding any inevitable accident or necessity by which the premises are destroyed or injured; as if they are burnt by lightning or destroyed by public enemies, or by any other accident, or by overwhelming force. The reason is, that he might have provided for such contingencies by his contract if he had so chosen; and the law will presume an intentional general liability where he has made no exception.[3]

§ 145. **Relief Will Not Be Granted Where Express Covenant Has Been Breached by Accident.** — And the same rule applies in like cases where there is an express covenant (without any proper exceptions) to pay rent during the term. It must be paid, notwithstanding the premises are accidentally burnt down during the term. And this is equally true as to the rent, although the tenant has covenanted to repair except in cases of casualties by fire, and the premises are burnt down by such casualty; for, "Expressio

[1] Paradine *v.* Jane, Aleyn, R. 27. See also Story on Bailments, §§ 25. 35, 36.

[2] 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (*g*). See Com. Dig. Chan. 3 F. 5, Barrisford *v.* Done, 1 Vern. 98.

[3] Id. Dyer, R. 33 (*a*); Chesterfield *v.* Bolton, Com. R. 627; Bullock *v*, Dommitt, 6 T. R. 650; Brecknock, &c. Canal Company *v.* Pritchard. 6 T. R. 750; Paradine *v.* Jane, Aleyn, R. 27; Monk *v.* Cooper, 2 Str. R. 763; 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (*g*), p. 374, &c.; Harrison *v.* Lord North, 1 Ch. Cas. 83. Clifton *v.* Montague, 40 W. Va. 207, 21 S. E. 858, 52 Am. St. Rep. 872, 33 L. R. A. 449; Arbenz *v.* Exley, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957; Rubens *v.* Hill, 213 Ill. 523, 72 N. E. 1127; Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 852; Crawford *v.* Redding, 8 Misc. Rep. 306, 28 N. Y. Supp. 733; Huber *v.* Baum, 152 Pa. St. 626, 26 Atl. 101; Gallup *v.* Albany etc. R. Co., 65 N. Y. 1.

And where the defendant gave his note for a year's rent in advance, and at the end of thirty days the building was so badly burned, without the fault of the plaintiff, landlord, that it was of no further service to defendant, this was no defence to the payment of the note. Stafford *v.* Staunton, 88 Ga. 298, 14 S. E. 479.

unius est exclusio alterius."[1] In all cases of this sort of accidental loss by fire the rule prevails, "Res perit domino"; and therefore the tenant and landlord suffer according to their proportions of interest in the property burnt; the tenant during the term, and the landlord for the residue. [Where a contractor agrees with the owner of a lot to furnish all of the materials and build a house, and before completion the house burns, without fault of the owner, the contractor is liable to refund any money paid him on the contract and damage for its non-performance; but if the contract is not an entire one, and if the house is destroyed by fire or other inevitable accident before completion, the parties are relieved from further performance and the contractor may recover for what he has done, above the amount paid him.[2]]

§ 146. **Same.** — And the like doctrine applies to other cases of contract, where the parties stand equally innocent.[3] Thus for instance if there is a contract for a sale at a price to be fixed by an award during the life of the parties, and one of them dies before the award is made, the contract fails; and equity will not enforce it upon the ground of accident, for the time of making the award is expressly fixed in the contract according to the pleasure of the parties, and there is no equity to substitute a different period.[4]

§ 147. **Same.** — So if A should covenant with B to convey an estate for two lives in a church lease to B by a certain day, and one of the lives should afterwards drop before the day appointed for the conveyance, B would be compelled to stand by his contract and to accept the conveyance; for neither party is in any fault, and B by the contract took upon himself the risk, by not providing for the accident.[5] So if an estate should be sold by A to B for a certain sum of money and an annuity, and the agreement should be fair, equity will not grant relief, although the party

[1] Monk *v.* Cooper, 2 Str. 763; s. c. 2 Lord Raymond, 1477; Balfour *v.* Weston, 1 T. R. 310; Fowler *v.* Bott, 6 Mass. R. 63; Doe *v.* Sandham, 1 T. R. 705, 710; Hallet *v.* Wylie, 3 John. R. 44; Hare *v.* Groves, 3 Anst. 687; Holtzapffell *v.* Baker, 18 Ves. 115; Pym. *v.* Blackburn, 3 Ves. 34, 38; 1 Fonbl. Equity, B.1, ch. 5, § 8, note (*g*); Cooper, Eq. Pl. p. 131. See Wood *v.* Hubbell, 5 Barb. 601; s. c. 10 N. Y. 479. In Brewer *v.* Herbert, 30 Md. 301, a contract for the sale of a house and land was enforced though the house had burnt down. See also McKecknie *v.* Sterling, 48 Barb. 330, 335. But see Smith *v.* McCluskey, 45 Barb. 610, 613.

[2] Keel *v.* Construction Co., 143 N. C. 429, 55 S. E. 826.

[3] Com. Dig. Chancery, 3 F. 5.

[4] Blundell *v.* Brettargh, 17 Ves. 232, 240.

[5] White *v.* Nutt, 1 P. Will. 61.

should die before the payment of any annuity.[1] [When an accident occurs which was not anticipated and provided for when the contract was made, and which leaves one of the parties remediless in a Court of Law, the jurisdiction of a Court of Equity may then be invoked to give relief against the accident.[2]]

§ 148. **Relief Will Not Be Granted Where Accident Arose from Fault of Complainant.** — In the next place Courts of Equity will not grant relief to a party upon the ground of accident, where the accident has arisen from his own gross negligence or fault; for in such a case the party has no claim to come into a court of justice to ask to be saved from his own culpable misconduct. And on this account, in general, a party coming into a Court of Equity is bound to show that his title to relief is unmixed with any gross misconduct or negligence of himself or his agents.[3]

§ 149. **There Must Be a Clear, Present, Vested Right.** — In the next place Courts of Equity will not interfere upon the ground of accident where the party has not a clear vested right, but his claim rests in mere expectancy and is a matter, not of trust, but of volition. Thus if a testator intending to make a will in favor of particular persons is prevented from doing so by accident, equity cannot grant relief; for it is not in the power of the court to relieve against accidents which prevent voluntary dispositions of estates;[4] and a legatee or devisee can take only by the bounty of the testator, and has no independent right until there is a title consummated by law. The same principle applies to a mere naked power, such as a power of appointment uncoupled with any trust; if it is unexecuted by accident or otherwise, a Court of Equity will not interfere and execute it as the party could or might

[1] Mortimer *v.* Capper, 1 Bro. Ch. R. 156; Jackson *v.* Lever, 3 Bro. Ch. R. 605; see also 9 Ves. 246.

[2] City of Bloomington *v.* Smith, 123 Ind. 41, 23 N. E. 972, 18 Am. St. Rep. 310.

[3] Marine Insurance Company *v.* Hodgson, 11 U. S. 332, 3 L. Ed. 362. See Penny *v.* Martin, 4 John. Ch. R. 569; 1 Fonbl. Eq. B. 1, ch. 3, § 3; Ex parte Greenway, 6 Ves. 812. See also 7 Ves. 19, 20, 9 Ves. 467, 468.

One who, through culpable inertness, fails to make inquiry when it was his duty to do so, is not in a position to have the release of a mortgage cancelled on the ground of mistake. Farrell *v.* Bouck, 72 Neb. 875, 101 N. W. 1018; Valentyne *v.* Immigration Land Co., 95 Minn. 195, 103 N. W. 1028; Bibber *v.* Carville, 101 Me. 59, 63 Atl. 303, 115 Am. St. Rep. 303; Brown *v.* Geiger, 3 Ky. L. Rep. 239; Engler *v.* Knoblaugh, 131 Mo. App. 481, 110 S. W. 16; State ex rel. Hartley *v.* Innes, 137 Mo. App. 420, 118 S. W. 1168; Marshall *v.* Homier, 13 Okla. 264, 74 Pac. 368.

[4] Whitton *v.* Russell, 1 Atk. 448; 1 Madd. Ch. Pr. 46.

have done.[1] But if there be a trust, it will, as we have seen, be otherwise.[2]

§ 150. **Relief from Accident Will Not Be Granted Where the Equities between the Parties are Equal.** — In the next place no relief will be granted on account of accident, where the other party stands upon an equal equity and is entitled to equal protection. Upon this ground also equity will not interfere to give effect to an imperfect will against an innocent heir at law; for as heir he is entitled to protection, whatever might have been the intent of the testator, unless his title is taken away according to the rules of law.[3]

§ 151. **Same.** — So if a tenant for life or in tail have a power to raise money, and he raises money by mortgage without any reference to the power, and not in conformity to it, the mortgage will not bind the heir in tail.[4] So if a tenant in tail conveys the estate by bargain and sale, or enters into a contract of sale, and covenants to suffer a fine and recovery, and he dies before the fine or recovery is consummated, the heir in tail or remainder-man is not bound; for he is deemed a purchaser under the donor, and entitled to protection as such; and a Court of Equity will not, further than a Court of Law, carry into effect against him any act of a former tenant in tail.[5]

§ 152. **Relief from Accident Will Not Lie Against a Bona Fide Purchaser.** — And generally against a bona fide purchaser for a valuable consideration without notice a Court of Equity will not interfere on the ground of accident; for in the view of a Court of Equity such a purchaser has as high a claim to assistance and protection as any other person can have.[6] Principles of an analogous nature seem to have governed in many of the cases in which

[1] Brown *v.* Higgs, 8 Ves. 559, 561; Pierson *v.* Garnet, 2 Brown, Ch. R. 38, 226; Duke of Marlborough *v.* Godolphin, 2 Ves. 61, and Belt's Supplement, 277, 278; Harding *v.* Glyn, 1 Atk. 469, and Saunders's note; Tollet *v.* Tollet, 2 P. Will. 489; 1 Fonbl. Eq. B. 1, ch. 4, § 25, note (*h*); Id. note (*k*); 1 Madd. Ch. Pr. 46.

[2] Ante, § 139.

[3] See Com. Dig. Chancery, 3 F. pp. 6, 7, 8; 1 Fonbl. Eq. B. 1, ch. 4, § 25, notes (*k*), (*n*); Grounds and Rudim. of the Law, M. 167, p. 128 (edit. 1751).

[4] Jenkins *v.* Kemis, 1 Cas. Ch. 103; s. c. cited 2 P. Will. 667; 1 Fonbl. Eq. B. 1, ch. 4, § 25, notes (*l*), (*n*).

[5] 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note; Id. ch. 4, § 19, and note; Weal *v.* Lower, 1 Eq. Abridg. 266; Powell *v.* Powell, Prec. Ch. 278.

[6] Mitford, Eq. Pl. by Jeremy, p. 274, X.; Cooper, Eq. Pl. pp. 281 to 285; 2 Fonbl. Eq. B. 2, ch. 6, § 2, and notes; Malden *v.* Merrill, 2 Atk. 8; Newl. on Contr., ch. 19, p. 342; ante, § 67; post, §§ 226, 237, 381, 409 to 411, 416, 434, 436.

the want of a surrender of copyholds has been supplied by Courts of Equity.[1]

§ 153. [**Sufficiency of Evidence.** — Parties are not allowed to enter into solemn obligations with reference to their real estate, and then when fluctuations in price, more desirable conditions are present, or for some other reasons it is more desirable that a re-conveyance of the property be had, by the mere institution of an action for such relief. The most solemn contractual obligation that an owner can enter into ought not to be lightly set aside or trifled away from a bona fide purchaser, by a mere greater weight of the evidence in an action to set aside a deed, or to construe a deed to be a mortgage where the defeasance clause was omitted by accident or mistake. Both parties have equal rights in the premises, and before an instrument should be set aside on account of some accident, for which neither party is responsible, the evidence must be clear, strong, cogent and convincing, the burden being upon the plaintiff. If the evidence, when admitted, is not such as would move the chancellor to reform the contract or deed, the case should not be submitted to the jury without binding instructions as to its insufficiency. It is the policy of equity to effectuate the apparent intentions of the parties, yet it is not a part of its function to make new contracts or more favorable terms where the parties have dealt with each other at arm's length. It sometimes happens that an ignorant vendor, in order to claim a re-conveyance where the values have become largely enhanced from the surroundings, undertakes to claim that he executed a mortgage, rather than a deed, to permit such a claim, without requiring him to satisfy the jury by the greater weight of the evidence, and in addition, to offer proof that was of such a clear and convincing nature that the accident in the execution of the paper could readily be seen, would tend to put a premium upon illiteracy rather than to incite among the people a greater regard for our judicial system and its practices.[2]

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note (*v*).

[2] Sylvius *v.* Kosek, 117 Pa. St. 67, 2 Am. St. Rep. 648; Whitney *v.* Jasper Land Co., 119 Ala. 500, 24 So. 259; Ely *v.* Early, 94 N. C. 1; Tuttle *v.* Rainey, 98 N. C. 513, 4 S. E. 475.

Where a sale is advertised to take place at a given time, and there are very few bidders present, and property is knocked off at a sacrifice price, and through an unforeseen failure of arrangements two bidders for a much larger price were not present at the time of sale, equity will decree a new sale. Magann *v.* Segal, 92 Fed. 261.

Defendant contracted to sell certain lands to plaintiff and give possession on a certain day, but by agreement the time was extended for three months, during which time paving assessments were levied against the

It would not be necessary to prove, with the same degree of accuracy and detail, that the record or instrument in question, now alleged to have been lost or misplaced by accident, in fact existed.]

§ 154. **Same.** — Perhaps upon a general survey of the grounds of equitable jurisdiction in cases of accident it will be found that they resolve themselves into the following: that the party seeking relief has a clear right which cannot otherwise be enforced in a suitable manner; or that he will be subjected to an unjustifiable loss without any blame or misconduct on his own part; or that he has a superior equity to the party from whom he seeks the relief.[1]

lots, this was an accident as to plaintiff and he was entitled to a conveyance, free of encumbrances. Gotthelf *v.* Stranahan, 19 N. Y. Supp. 165.

Where defendant executed a deed in fee to his children by a former wife, and intended to reserve a life estate, and defeat a second wife of her dower, and after the execution of the deed it was explained to him, and he knew that it did not truly express his intention, and he failed to have it changed, this was such negligence which takes from the transaction the element of mistake, either of law or fact. Lott *v.* Kaiser, 61 Tex. 669.

[1] Many of the cases on this subject will be found collected in 1 Madd. Ch. Pr. ch. 2, § 2, p. 41, &c., Jeremy on Equity Jurid. ch. 1, p. 359, &c., and 2 Swift's Digest, ch. 6, p. 92, &c.

CHAPTER V

MISTAKE

§ 155. **Mistake.** — We may next pass to the consideration of the jurisdiction of the Courts of Equity founded upon the ground of mistake. This is sometimes the result of accident in its large sense; but as contradistinguished from it, it is some unintentional act or omission or error, arising from ignorance, surprise, imposition, or misplaced confidence.[1] Mistakes are ordinarily divided into two sorts, — mistakes in matter of law, and mistakes in matter of fact. [In the consideration of this branch of equity jurisprudence, we will consider first, the general subject of mistake, then mistakes in matter of law, and lastly, mistakes in matter of fact.]

§ 156. [**Mistake, Generally.** — A mistake is some unintentional act or omission or error arising from ignorance, surprise, imposition, or misplaced confidence.[2] Simply making an error in the entry of a judgment is not a mistake.[3] A mistake, in the

[1] Mr. Jeremy defines Mistake, in the sense of a Court of Equity, to be "that result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done." Jeremy, Eq. Jurisd. B. 3, Pt. 2, p. 358. This definition seems too narrow, and it does not comprehend cases of omission or neglect. May there not be a mistake from surprise or imposition, as well as from ignorance of law or fact?

[2] Ward *v.* City of Philadelphia, 3 Pa. Cas. 233, 6 Atl. 265; Allen *v.* Elder, 76 Ga. 764, 2 Am. St. Rep. 65; Peasly *v.* McFadden, 68 Cal. 611, 10 Pac. 179; Tazewell Coal & Iron Co. *v.* Gillespie, 113 Va. 134, 75 S. E. 757. A Court of Equity will always relieve against a mistake in granting such relief as the ends of justice may require. Norton Iron Works *v.* Moreland, 113 S. W. 481.

[3] Russell *v.* Colyar, 51 Tenn. 154; Natl. Bank *v.* Boyd, 35 S. C. 233, 14 S. E. 496; Lott *v.* Kaiser, 61 Tex. 669; Christy *v.* Scott, 31 Mo. App. 331; Breese *v.* Nelson, 35 Iowa 157; Allen *v.* Elder, 76 Ga. 764, 2 Am. St. Rep. 65; Chamberlain *v.* New Hampshire Fire Ins. Co., 55 N. H. 249.

legal sense, may be defined to be the doing of an act under an erroneous conviction, which act, but for such conviction would not have been done.[1] A mere mistake of law is not ground for relief.[2]]

§ 157. [**Same.** — Under the statutes of Illinois, the unsuccessful plaintiff in an ejectment suit might pay up the costs within a year, and by motion be given a new trial, and under the facts in this case, the plaintiff paid the costs within one year, but for some reason no new trial was ordered, and after the year had passed, he secured evidence entitling him to the land, and of which he had no notice on the former trial, it was held that he was entitled now to bring a new action, and further, that a party sued at law, having a defence of which he does not know, or of which he cannot avail himself at law, either for the reason that it is purely equitable in its nature, or because, by the rules of law, he cannot avail himself of it, may enjoin the judgment by a bill in equity. This may be likened unto the case of newly-discovered testimony on a motion for a new trial.[3]]

§ 158. [**Same.** — In equitable remedies given for fraud, accident or mistake it is the facts as found that give the right to relief, and it is often difficult to say, upon admitted facts whether the error which is complained of was occasioned by intentional fraud or by mere inadvertence or mistake. Indeed, upon the very same facts, an intelligent man, acting deliberately, might well be regarded as guilty of fraud, and an ignorant and inexperienced person might be entitled to a more charitable view. Yet the injury to the complainant would be the same in either case.[4]]

§ 159. [**Same.** — If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of a deed or re-conveyance of the land as to individuals; and if the government is the party injured, this is the proper course.[5]

[1] Cummins *v.* Bulgin, 37 N. J. Eq. 476.

[2] Cathcart *v.* Robinson, 30 U. S. 264, 8 L. Ed. 120; Bank of United States *v.* Daniel, 37 U. S. 32, 9 L. Ed. 989; Snell *v.* Ins. Co., 98 U. S. 72, 25 L. Ed. 52; Johnson *v.* Tousley, 80 U. S. 72, 20 L. Ed. 485; Prentice *v.* Stearns, 113 U. S. 435, 28 L. Ed. 1059, 5 S. Ct. Rep. 547; Ivinson *v.* Hutton, 98 U. S. 79, 25 L. Ed. 66; Wheeler *v.* Smith, 50 U. S. 55, 13 L. Ed. 44.

[3] Chicago etc. Railroad Co. *v.* Hay, 119 Ill. 493, 10 N. E. 29; Metcalf *v.* Williams, 104 U. S. 93, 26 L. Ed. 665.

[4] Wasatch Mining Co. *v.* Crescent Mining Co., 148 U. S. 293, 37 L. Ed. 454, 13 S. Ct. Rep. 600.

[5] Moore *v.* Robbins, 96 U. S. 533, 24 L. Ed. 848; Walden *v.* Skinner, 101 U. S. 577, 25 L. Ed. 963; Marquez *v.* Frisbee, 101 U. S. 473, 25 L. Ed.

Owing to the ability of the Courts of Equity not only to investigate complicated accounts, but also to compel the specific performance of agreements, and to reform or rescind the same, in case of fraud or mistake, and to restrain breaches of duty for the future, it is to them rather than Courts of Law that partners usually have recourse for the settlement of controversies among themselves. Where partners have agreed upon a dissolution of the firm affairs and just after the execution and delivery of the papers necessary to the carrying into effect the terms of the agreement of dissolution, it was ascertained that a mistake had been made as to the amount one of the partners should receive out of the firm property, the remedy to correct the mistake is in equity. Courts of Equity have jurisdiction of controversies arising out of transactions evidenced by written instruments which are lost; or if through mistake or accident the instrument has been incorrectly framed or if the transaction is vitiated by illegality or fraud, or if the instrument was executed in ignorance or mistake of facts material to its operation, the error may be corrected or the erroneous transaction may be rescinded. Where an instrument is drawn and executed which professes or is intended to carry a prior agreement into execution, whether in writing or by parol, which by mistake violates or fails to fulfil the manifest intention of the parties, equity, if the proof is clear, will correct the mistakes, so as to produce a conformity of the written instrument to the antecedent agreement of the parties.[1] And where a contract for insurance of property of the firm was written in the name of one of the partners, and the firm property was subsequently burned, the contract will be corrected in equity so as to cover the firm property.[2] Relief will be granted where a mortgage has been cancelled by mistake, for instance, where there were three lots of land, each subject to a separate mortgage, two of the lots were sold under foreclosure proceedings and by a mutual mistake

800; Smelting Co. *v.* Kemp, 104 U. S. 636, 26 L. Ed. 875; United States *v.* San Jacinto Tin Co., 125 U. S. 273, 31 L. Ed. 747, 8 S. Ct. Rep. 850; Williams *v.* United States, 138 U. S. 514, 34 L. Ed. 1026, 11 S. Ct. Rep. 457; Germania Iron Co. *v.* United States, 165 U. S. 379, 41 L. Ed. 754, 17 S. Ct. Rep. 337; Meader *v.* Norton, 78 U. S. 458, 20 L. Ed. 184; Felin *v.* Futcher, 51 Pa. Super. Ct. 233.

[1] Ivinson *v.* Hutton, 98 U. S. 82, 29 L. Ed. 66; Hunt *v.* Rousmanier, 21 U. S. 211, 5 L. Ed. 589; Elliott *v.* Sackett, 108 U. S. 132, 27 L. Ed. 678, 2 S. Ct. Rep. 375; Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 35 L. Ed. 1062, 12 S. Ct. Rep. 239; Drury *v.* Hayden, 111 U. S. 223, 28 L. Ed. 408, 4 S. Ct. Rep. 405.

[2] Snell *v.* Ins. Co., 98 U. S. 89, 25 L. Ed. 52.

of the vendors and the vendees, the description of the third tract was by inadvertence included.[1]]

§ 160. [Same. — In all cases where the means of information are open alike to both parties, and where each is presumed to exercise his own skill, diligence and judgment with regard to all the extrinsic circumstances, — in all cases where the parties act upon their own judgment in regard to matters equally open to both of them, or where the fact is equally unknown to both parties, or where each has equal and adequate means of information, — or where the fact from its own nature is doubtful, in every such case, where the parties have acted in entire good faith, a Court of Equity will not interpose between them; for in such cases the equities between the parties are equal, and when it is so, a Court of Equity is generally passive, and rarely exerts an active jurisdiction. Where each party is equally innocent, and there is no concealment of facts which the other has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference.[2] Where a builder gave the plans for a house to a lumber dealer so that he might figure upon the cost of the materials, and the estimate for the materials was furnished, and afterwards, the builder made extensive changes and additions to his original plans, and on account thereof it made the house much costlier. The builder again gave his plans to the lumber dealer and asked for his estimates, and the dealer kept the plans a few days and then stated that he would furnish the entire amount of materials for a given price. The dealer afterwards ascertained that his bid was too low by about $3000 on account of a mistake that he had made in not figuring on the additional work in the house. He then informed the builder of his mistake and he was told that no more than the contract price would be paid for the entire lot of materials, and the builder continued to furnish them, he is not entitled to a lien upon the house for the value of the improvements placed on it, nor can he sue for the difference between the actual value of the materials and the amount paid. An instrument may be reformed in cases of fraud, accident or mistake, but where the mistake was the result of the supine negligence of a party who sleeps upon his rights until other duties and obligations have grown up, the law will not help him.[3] But

[1] Vliet *v.* Cowenhoven, 83 N. J. Eq. 234, 90 Atl. 681.
[2] Shriver *v.* Garrison, 30 W. Va. 456, 4 S. E. 660.
[3] Felin *v.* Futcher, 51 Pa. Super. Ct. 240; Susquehanna Mut. Fire Ins.

where the plaintiffs, sanitary contractors, bid upon a lot of sewerage work for the defendant city, and the evidence showed that they made their estimates upon maps, profiles, and distances which were furnished by an engineer, employed by the defendant, and the engineer made an unintentional blunder in his calculation as to distance that could not have been noticed except by an expert who had carefully scaled the plans, the plaintiff was entitled to have a rescission of the contract, upon the refusal of the defendant to pay a reasonable price, in addition to the contract price, for the additional work required to be done under the contract. This erroneous estimate was the basis of the plaintiff's bid and the ground of their making the contract; it was a material element in the minds of both parties; it was given by the town both to the plaintiffs and to all other contractors who asked for information on the subject; both parties regarded it as approximately correct, and the plaintiffs relied upon it; and the errors were unknown to all parties until after the execution of the contract. The fact that it is stated in the contract that the plaintiffs are "to do the work in strict accordance with the maps, drawing, etc., which are to be considered as a part of these presents, and to be construed therewith", this has no effect upon the plaintiff's right to relief.[1]]

§ 161. [Same. — In cases where the parties deal with each other at arms' length, and there is no mistake caused by the misconduct of the other party, and especially where the parties have had ample time to consider their own business matters of importance, and a mistake is made innocently, this fact, nothing else appearing, is no reason why a Court of Equity should grant relief. The plaintiffs were engaged in the lumber business and the defendant, appellee, was about to build a house, and left at the office of the appellants an itemized list of lumber, covering a number of articles, and asked for a price for the necessary material. Plaintiffs' book-keeper added up the list, which should have been $1,867, but by a mistake made the total $1,446, and at the bottom wrote "above for $1,446", and delivered the paper to the defendant on that evening. He received bids from other lumber dealers and six days later went to the office of plaintiffs and accepted their bid,

Co. *v.* Swank, 102 Pa. 17; Rose *v.* Barclay, 191 Pa. St. 594, 43 Atl. 385, 45 L. R. A. 392; Brown *v.* Levy, 29 Tex. Civ. App. 389, 69 S. W. 255; Dzuris *v.* Pierce, 216 Mass. 132, 103 N. E. 296.

[1] Long *v.* Inhabitants of Athol, 196 Mass. 497, 82 N. E. 665, 17 L. R. A. (N. S.) 96.

and one of plaintiffs signed it. Later in the evening the mistake in addition was discovered and next morning, the defendant was notified of the mistake, and that the lumber could not be furnished for the bid quoted. A mistake which will justify relief in equity must affect the substance of the contract, and not a mere incident or the inducement for entering into it. The mistake of the appellant did not relate to the subject-matter of the contract, its location, identity or amount, and there was neither belief in the existence of a fact which did not exist or ignorance of any fact material to the contract which did exist. The contract was exactly what each party understood it to be and it expressed what was intended by each.[1] But where a contractor had put up his bond and his bid was due to have been filed at four o'clock, and in ignorance of this fact, he very hurriedly submitted his bid and he almost immediately found that he had made an error in his calculation in that he turned two leaves of a book at one time, it was held that this was such a mistake as ought to be corrected, for the bid was not the contract contemplated by the parties and the bidder never did enter into the contract.[2]]

§ 162. [**What Is a Mutual Mistake.** — The phrase "mutual mistake", as used in equity, means a mistake common to all the parties to a written contract or instrument, and it usually relates to a mistake concerning the contents, or the legal effect of the contract or instrument. A mutual mistake which will afford ground for relief from a contract by reforming it means a mistake reciprocal and common to both parties, where each alike labors under the misconception in respect to the terms of the written instrument.[3] The plaintiff, a foreigner by birth, and knowing very little of the English language, entered into negotiations with three real estate brokers for the sale of his farm and the purchase of city property, which was described in a letter by the agents to him as having "marble entrance and stairs", and "income per year $6,480", the income being based upon the assumption that

[1] Steinmeyer *v.* Schroeppel, 226 Ill. 9, 80 N. E. 564.

[2] Board of School Commrs. *v.* Bender, 72 N. E. 154; Harran *v.* Foley, 62 Wis. 584, 22 N. W. 937.

[3] Tarbox *v.* Tarbox, 111 Me. 374, 89 Atl. 194; Page *v.* Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152; Young *v.* McGown, 62 Me. 56; Andrews *v.* Andrews, 81 Me. 337, 17 Atl. 166; Brunswick & Topsham Water District *v.* Topsham, 109 Me. 334, 84 Atl. 644; Long *v.* Inhabitants of Athol, 196 Mass. 497, 82 N. E. 665, 17 L. R. A. (N. S.) 96; De Grasse *v.* H. W. Gossard Co., 152 Ill. App. 58; Shelton *v.* Ellis, 70 Ga. 297; Hume *v.* United States, 132 U. S. 406, 33 L. Ed. 393, 10 S. Ct. Rep. 838; Moffett *v.* City of Rochester, 178 U. S. 373, 44 L. Ed. 1108, 20 S. Ct. Rep. 957.

all of the tenements would be rented all the time. The brokers drove up in front of the adjoining apartment, which had marble entrance and pillars, and plaintiff thought that was the house he was exchanging for, while the house which was really exchanged was next door and very inferior. Where a conveyance has been made based upon such a misunderstanding, even though it may be innocent on both sides, equity in proper cases will grant relief. This branch of equitable relief is distinct from the reformation of contracts entered into by mistake, which must be mutual by all parties before relief can be granted. Mutual mistake in that connection means a mistake common to all the parties to the contract.[1] It seems to be the well recognized rule that, in order that a mistake may come within the cognizance of a Court of Equity, it must be shown to be, first, material; second, mutual, or shared in by both parties to the transaction; third, unintentional; and, fourth, free from negligence. Moreover, the party complaining of a mistake must move promptly on its discovery; and if he ratify the mistake, or knowingly accepts benefits therefrom, after its discovery, he will not be entitled to a correction. Nor will a contract be corrected where it was entered into by the mistake of only one of the parties, where there was no fraud or other improper conduct of the other party which induced the mistake. A Court of Equity has no power to reform an agreement between parties, except to conform it to the facts of the agreement, where these facts by mutual mistake are not made to appear, or where by the fraud of the successful party his adversary has been over-reached in the drafting of the contract. Otherwise it would be in truth a power exercised by the court to contract for the parties. It follows that the mistake which it may correct in such writing must be, as it is usually expressed, the mistake of both parties to it; that is, such a mistake in the drafting of the writing as makes it convey the intent or meaning of neither party to the contract. If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it as it was written by mistake, when it expressed exactly the agreement as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement of the parties as it was before; and the

[1] Dzuris *v.* Pierce, 216 Mass. 132, 103 N. E. 296; Loud *v.* Barnes, 154 Mass. 344, 28 N. E. 271; Duff & Oney *v.* Rose, 149 Ky. 482, 149 S. W. 884, 151 Ky. 96, 151 S. W. 22; United States Trust Co. *v.* David, 36 App. D. C. 555; Crabtree *v.* Sisk, 99 S. W. 268.

court would have engaged in the singular office, for a Court of Equity, of doing right to one party at the expense of, and precisely equal wrong to, the other.[1] And in an action for the correction of a deed executed through mistake, a direct conflict of testimony is conclusive against the reformation of the instrument.[2]]

§ 163. [**Cancellation of Mortgage Will Be Set Aside When Creditor Took Deed from Widow, instead of Her and Her Children.** — It need hardly be said, ordinarily the law affords no relief where the parties have acted upon a mistaken view of legal rights. The general rule is that equity will give no relief against mistakes of law; for without this rule, as has been often remarked, the administration of law would be impracticable because of its uncertainty. But where a mortgagor had died, and the mortgagee had arranged to cancel his debt by securing an absolute conveyance of the property, and paying cash for the value of the property over the mortgage debt, and the negotiations were conducted with unusual care, under the advice of friends and relatives, and the deeds were drawn with deliberation, and executed sometime after the negotiations, and it then occurred to all of the parties to the transaction, that the mortgaged property, upon the death of the mortgagor, descended to his children, the purchaser or mortgagee was entitled to have his mortgage re-instated and declared to be a lien upon the part of the land descending to the heirs of the mortgagor. The distinction between ignorance of law and mistake of law has always been regarded somewhat shadowy and difficult of application. In South Carolina it has been held to be founded on the fact that ignorance is a mere state of mind which could not be proved, while mistake is susceptible of proof. Indeed, it is regarded by many high authorities as rather academic than practical; for mistake of law, except in cases of inadvertence or forgetfulness, is founded on ignorance of law.[3]]

§ 164. [**Same.** — The plaintiff purchased a tract of land and withheld his deed from the record till sometime thereafter. At the time of the purchase the land was subject to mortgage. The defendant, with knowledge of plaintiff's unrecorded deed, procured a deed from plaintiff's grantor and immediately recorded his deed and paid off and cancelled the mortgage. There was no mistake

[1] Hill *v.* Pettit, 66 S. W. 188; Benting *v.* Bell, 137 Ill. App. 600; Steinmeyer *v.* Schroeppel, 226 Ill. 9, 80 N. E. 564.

[2] Coleman *v.* Illinois Life Ins. Co., 82 S. W. 617.

[3] Hutchison *v.* Fuller, 67 S. C. 280, 45 S. E. 164; Breese *v.* Nelson, 35 Iowa 160; Christy *v.* Scott, 31 Mo. App. 331.

of the facts, and he is not entitled to relief on the ground that he mistook his legal rights. Mistake of law unattended by any misunderstanding of the facts, presents, as a general rule, no ground for the interposition of equity.[1] And where a real estate firm foreclosed a number of mortgages upon lots, and included therein a fee of $25 for the attorneys for each sale, in addition to the usual cost of advertisement, whereas, in fact there was no authority to charge the attorneys' fees, although plaintiff had been charged with quite an amount of such costs, she was entitled to recover the amount. There was no mistake of fact, but one of law only. It is settled in this State that in special cases the court will relieve a party from the consequences of his mistakes of law. If nothing more than a bare mistake of law be shown, the relief will rarely, if ever, be granted. But where it further appears that a party is availing himself of the mistake to enforce an unconscionable advantage, without consideration, and the opposite party is without blame in the premises and the parties can be replaced, respectively, in their former positions, equity will interfere to relieve from such mistake of law.[2] And in a case where the plaintiff was the owner of a mortgage upon a number of town lots, described by numbers and blocks, he was afterwards told by the defendant, to whom a number of them had been sold, and a mortgage given back for the balance of the purchase price, that the block contained a surplus of land, exceeding the area specified in the plat, and that the proper proportion of this, justly pertaining to the lots described, had not been conveyed by the deed, and thereupon the plaintiff executed a deed of release and quitclaim to the defendant. It now turns out that the defendant's representations were not true, and by reason thereof, and without any consideration, plaintiff was induced to release the said lots from the operation of his mortgage. A careful consideration

[1] Errett *v.* Wheeler, 109 Minn. 157, 123 N. W. 414, 26 L. R. A. (N. S.) 818; Wadsworth *v.* Blake, 43 Minn. 509, 45 N. W. 1131; Emmert *v.* Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; Norman *v.* Norman, 26 S. C. 41, 11 S. E. 1096; Garwood *v.* Eldridge, 2 N. J. Eq. 145, 34 Am. Dec. 195.

Plaintiff purchased land which was subject to two mortgages, and before his deed was recorded and mortgages cancelled, the defendants procured judgment, which was docketed and it became a lien upon the land. In this suit to restrain the sale under execution, for that plaintiff did not intend to have the mortgages cancelled, but to obtain a release of them so that he might have the same right that his father had in the property, would not avail against the judgment and it was a prior lien. Talbott *v.* Garretson, 31 Oreg. 256, 49 Pac. 978.

[2] Truesdale *v.* Sidle, 65 Minn. 315, 67 N. W. 1004.

leads to the conclusion that the power of Courts of Equity to afford relief from the consequences of the mutual mistakes of parties to written instruments is not strictly limited to cases of mistake of fact, but extends also to mistakes of law; and while, if nothing more than the bare mistake is shown as a reason for relief, it will rarely, if ever, be granted, yet equity will interfere where it further appears that the defendant, availing himself of the opportunities afforded by the mistake, will enforce an unconscionable advantage, without consideration; the defendant being in no position entitling him to equitable protection, and the plaintiff not being blamable. But this jurisdiction will be exercised with caution, and only very clear and convincing proofs will be sufficient to overcome the presumption that the written instruments which parties have executed for the purpose of evidencing and carrying into effect their agreements are in legal effect or in terms contrary to their intention.[1]]

§ 165. [**Right to Recover When One Purchases His Own Property through Mistake.** — In our own country there has been a wide diversity of opinion as to the exception to the general rule that there is no relief against a mistake of law, but the question of the rights of the parties where one of them purchases from another property which he already owns, has not often been presented to the courts. Where a person enters into a contract for the purchase of property with the understanding that it belongs to another, when in fact it belongs to himself, he is entitled to relief unless the circumstances are such that it would be inequitable to restore the title.[2] In the case under consideration, upon the death of the mortgagor, the mortgagee secured a release of the widow's right of dower, and also a deed to the premises from the mortgagor's father, under the belief that the property descended to the latter, and cancelled the mortgage; the complainant, as against the heirs of the mortgagor, was entitled to a decree for the re-establishment and foreclosure of the mortgage. The ability of courts of equity to rectify mistakes arising from ignorance of the law is everywhere acknowledged to exist in certain instances. The propriety of exercising this power must depend upon the circumstances which surround each case. It will depend

[1] Benson *v.* Markoe, 37 Minn. 30, 33 N. W. 38; Lane *v.* Holmes, 55 Minn. 379, 57 N. W. 132; Moffett *v.* Rochester, 178 U. S. 373, 44 L. Ed. 1108, 20 S. Ct. Rep. 957; Crabtree *v.* Sisk, 99 S. W. 268; Cummins *v.* Bulgin, 37 N. J. Eq. 476.

[2] Houston *v.* Northern Pac. Ry. Co., 109 Minn. 273, 123 N. W. 922.

upon whether a party who asks relief has been negligent, whether he has been led into his belief by the other party, whether other innocent parties will be injured by a rectification of the mistake, or whether the mistake can be regarded as one of fact, although indirectly resulting from a mistaken notion of the law. All these and other features are to be considered in deciding whether it is equitable and politic to put the mistaken party in statu quo.[1]]

§ 166. [**Same.** — In this case the grantor sold and conveyed by deed her interest in a lot of land, in which she believed she had a one-third undivided interest, and her grantee had the remaining interest. She put great trust and confidence in her grantee and relied upon his representations as to her interest in the property, and after his death she ascertained that she owned a one-half instead of a one-third undivided interest, and she sought to have the deed set aside, on the ground of her mistake, and her petition was allowed. A mistake as to the ownership of land is a mistake of fact in regard to which equity will grant relief, although the mistake arose from an erroneous view of the legal effect of a deed. Private right of ownership is a matter of fact. It may be the result also of matter of law; but, if the parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. While it is the general rule that mistakes in matter of law cannot be admitted as ground of relief, it is not a rule of universal application, especially in Courts of Equity. It is not an absolute and inflexible rule, but has its exceptions, though such exceptions are few, and generally stand upon some very urgent pressure of circumstances. If the maxim is used in the sense of denoting general law, the ordinary law of the country, no exception can be admitted to its general application; but it is otherwise when the word "jus" is used in the sense of denoting a private right. If a man, through misapprehension or mistake of the law, parts with or gives up private rights of property, or assumes obligations upon grounds upon which he would not have acted, but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited

[1] Swedesboro Loan & Bldg. Assn. *v.* Gans, 65 N. J. Eq. 132, 55 Atl. 82; Lawrence County Bank *v.* Lambert, 116 Mo. App. 620, 92 S. W. 755 Linn *v.* Ziegler, 68 Kans. 528, 75 Pac. 489; White *v.* Stevenson, 144 Cal. 104, 77 Pac. 828.

by the mistake cannot in conscience retain the benefit or advantage so acquired.[1]]

§ 167. [**Complainant Must Not Have Been Negligent.** — While a Court of Equity will relieve a party from a mistake where the mistake is mutual or when brought about by the fraud of the opposite party, it will not relieve a party from a mistake which is the result of his own negligence, nor where it is the result of his own negligence when the channels of information are open to him and no fraud or deception is practiced upon him. But he ought not to wait till the rights of others have intervened, and if he intends to rely upon a mistake as a defense, he should institute his action promptly upon discovering the mistake.[2]]

§ 168. [**Mistake Influenced by Other Party.**—It is a well settled principle that equity will lend its aid to correct a mistake where it has been mutual between the parties to the transaction, and both have innocently been misled to their injury on account of a mistaken idea as to the existence or non-existence of facts which were material to and would control the actions and decisions of the parties with respect to their individual rights. But if one of the parties by his failure to speak, when occasion demands it; or by his intentional concealment of a fact which is material and would operate upon the conclusion to which the other party would reasonably reach; or if one of the parties does anything that influences the other party to enter into the transaction, through a mistake as to the true facts, the conduct of this party, whatever the spirit that may have actuated it, will not stand the scrutiny of the chancellor. Equity seeks to do justice between the parties and to make them do right as between themselves, and it discountenances the dealings between the parties when one purposely and designedly throws a stumbling block in the way of his neighbor, and thereby, through his mistake, to suffer injury.[3]]

[1] Burton *v.* Haden, 108 Va. 51, 60 S. E. 736, 15 L. R. A. (N. S.) 1038; Livingstone *v.* Murphy, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. Rep. 400; Euler *v.* Schroeder, 112 Md. 155, 76 Atl. 164; Appeal of Pennsylvania Stave Co., 225 Pa. 178, 73 Atl. 1107.

[2] National Union F. Ins. Co. *v.* John Spry Lumber Co., 235 Ill. 98, 85 N. E. 256; Benting *v.* Bell, 137 Ill. App. 600; United States Trust Co. *v.* David, 36 App. D. C. 555.

[3] May *v.* Loomis, 140 N. C. 350, 52 S. E. 728; Snell *v.* Ins. Co., 98 U. S. 85, 25 L. Ed. 52; Rhode Island *v.* Massachusetts, 40 U. S. 271, 10 L. Ed. 721; National Union F. Ins. Co. *v.* John Spry Lumber Co., 235 Ill. 98, 85 N. E. 256; Mabry *v.* Randolph, 7 Cal. App. 421, 94 Pac. 403; Untermehle *v.* Norment, 197 U. S. 40, 49 L. Ed. 655, 25 S. Ct. Rep. 291.

§ 169. [**Same.** — A contract, entered into between the parties, after a full and mature consideration of the material facts, may not be rescinded and will not be set aside by a Court of Equity, merely because the subject-matter of the contract failed to be as productive or remunerative as the purchaser had expected. Commendatory expressions or exaggerated statements as to value or prospects, by puffing up value and quality of goods, or holding out flattering prospects of gain, are not regarded as fraudulent in law. Where the plaintiff, a machinist, examined an ice plant before buying it, and he knew that the plant had been a failure and would not produce ice of the required capacity, and this was one of the principal reasons for selling it, he is liable in action for the purchase money, even though exaggerated statements as to what the plant might do were made to him and partially influenced the sale. Here there was no such mistake as would be relieved of in equity. The purchaser knew the condition and capacity of the machinery fully as well, if indeed not better than the seller, and if, after a fair trial, it failed to manufacture the necessary quantity of ice, he would have to bear the loss, for there was no mistake.[1]]

§ 170. [**Mistake of Counsel as to Rules of Court.** — Whatever an attorney does, with reference to the client's suit, is binding upon the client as much as if the act had been done by him in person. The best thing one can do when he has a case in court is to watch it like he would any other ordinary important business. It is his duty to watch it constantly up to and during the trial and he should see to the protection of his legal rights, although the client is represented by an attorney, and if an appeal in the action must be taken, it is the client's duty to see to it that his appeal is prosecuted strictly in accord with the established rules of the appellate court. If the counsel, through his mistake, fails to comply with the rules in the preparation of the appeal, it is his own folly and his client must lose.[2] And if the counsel makes a mistake in calculating the amount due his client, this, in the absence of negligence, affords no ground for a reversal of a

[1] Williamson *v.* Holt, 147 N. C. 520, 61 S. E. 384; Lyon's N. C. Digest, Vol. 1, p. 172.

[2] Davis *v.* Wall, 142 N. C. 451, 55 S. E. 350; Vivian *v.* Mitchell, 144 N. C. 472, 57 S. E. 167; White *v.* Rees, 150 N. C. 679, 64 S. E. 777; Louisville & N. Railroad Co. *v.* Paynter's Admx., 125 Ky. 520, 101 S. W. 935; Tootle-Weakley Millinery Co. *v.* Billingsley, 74 Neb. 531, 105 N. W. 85; Scroggin *v.* Grocer Co., 66 Ark. 183, 49 S. W. 820; Davis *v.* Chalfant, 81 Cal. 627, 22 Pac. 972.

judgment rendered thereon.[1] Nor would a judgment be set aside where the counsel advised the client to permit a judgment to be taken by default, where the amount claimed in the sworn complaint was more than in fact the original plaintiff was entitled to recover.[2]]

§ 171. [**Relief from Judgments Obtained through Mistake.**— When appeal is made to the Chancery Court, by a defendant in a judgment at law, to be relieved therefrom, on the ground that he had a valid legal defense to the claim, he must show not only that he had such defense, and was prevented from making it by surprise, accident, mistake, or fraud, but he must, in addition to that, show that the prevention was without fault on his part.[3] But if the judgment was procured through delay caused by the opposite party, or if the injured party was lulled by the promise or hope of a settlement of the cause of action, and thus caused a delay in the institution of an action within the time allowed, the injured party would not be precluded in his rights, but he might still bring his action and prosecute it to final judgment.[4] When one has an action pending in the courts, the best thing he can do is to watch it, and he should always remember that ignorance of the law, or a mistake as to his legal rights and remedies, whereby he suffers injury is as much his own fault when committed by his counsel as if the mistake had actually been committed by him. It is undoubtedly the rule that where errors of judgment, mistakes of law, and the like are committed by counsel, and in the matter under consideration he acted upon his own initiative, not actuated by any advice or information improperly given by his adversary, and his client is led into his injury, a judgment will not be set aside for this reason. If this were not the true rule, the titles to lands might be easily disturbed, and there could be no reliance, with any degree of safety, in judicial precedents.[5] But relief from a judgment will be given

[1] Jackson *v.* Gould, 96 Iowa 488, 65 N. W. 406.

[2] Insurance Co. *v.* Scott, 136 N. C. 157, 48 S. E. 581; Scott *v.* Life Assn., 137 N. C. 516, 50 S. E. 221.

[3] Broda *v.* Greenwald, 66 Ala. 451; Valentine *v.* Holland, 40 Ark. 338; Hambrick *v.* Crawford, 55 Ga. 335; Ketchum *v.* Harlowe, 84 Md. 225; Boston *v.* Haynes, 33 Cal. 31.

[4] Tomlinson *v.* Bennett, 145 N. C. 282, 59 S. E. 37; Brown *v.* Railroad, 147 N. C. 218, 60 S. E. 985, 16 L. R. A. (N. S.) 645.

[5] Amestoy Estate Co. *v.* City of Los Angeles, 5 Cal. App. 273, 90 Pac. 42; Peacock *v.* Feaster, 51 Fla. 269, 42 So. 889; Reich *v.* Cochran, 105 N. Y. App. 542, 94 N. Y. Supp. 404; Baker *v.* Ryan, 67 Iowa 708, 25 N. W. 890.

where the former judgment was the result of a mistake, unmixed with fraud, and not the result of the negligence of the injured party.[1]

Where a judgment as entered was unintentional on the part of the court, and not the judgment that was really rendered, and if appellant is permitted to succeed in his action, he will recover heavy penalties, to which, in right and justice, he has not the slightest claim, and respondent will be punished and perhaps ruined in consequence of an error for which he was not to blame, he is without any remedy at law, and must be relieved in equity, if at all. This is a circumstance which largely controls a court in determining whether or not it may grant equitable relief in a particular cause. While the judgment may not be corrected in this action, its enforcement ought to be enjoined.[2]]

§ 172. **[Election under Will May Be Withdrawn When Entered into through Mistake of Legal Rights.** — A widow acted under the erroneous impression that she was entitled to half of the real estate left by her husband, whereas in fact she was entitled to dower in only one-third, and she was induced to give up other rights while acting under this belief, will be allowed to withdraw her election upon the real facts being made known to her as to what property she would legally take. There are two principles involved in this case, one as to mistakes of law, and the other as to the requisite of a valid election. Here the widow not only acted respecting her rights in and to the property of her deceased husband under a mistake of law, but she also exercised her right to elect certain rights therein in preference to other rights therein while under the same misapprehension of her rights. It also appears that not only was she mistaken as to the character of her rights independent of her husband's will, but she was also mistaken as to the amount of property she would receive under the several rights between which she made her choice when she made her election. It is a general rule that a mistake of law pure and simple is not adequate ground for relief. But there are well-defined exceptions to this rule. A mistake by a party as to his antecedent existing legal right, as distinguished from a mistake as to the legal import of the act done, is one which should be and is recognized as a ground for equitable relief from the consequences

[1] Bacon *v.* Bacon, 150 Cal. 477, 89 Pac. 321; Busey *v.* Moraga, 130 Cal. 588, 62 Pac. 1081.

[2] Engler *v.* Knoblaugh, 131 Mo. App. 481, 110 S. W. 16.

of such mistake, where the mistake can be rectified without injury to others.[1]]

§ 173. **Mistakes of Law.** — And first in regard to mistakes in matter of law.[2] It is a well-known maxim, that ignorance of law

[1] In re McFarlin, 75 Atl. 281; Lansdowne *v.* Lansdowne, 2 Jacob & W. 205; Cooper *v.* Phibbs, L. A. 2 H. L. 149.

[2] *Mistake of Law.* Few subjects of the law present, at first reading of the authorities, so small an attempt at the expression of a pervading principle as the subject of mistake. Much has indeed been done of late towards reducing the mass of cases to order (Pollock, Contract, ch. 8, and Holmes, Common Law, lect. 9), but not a little remains undone. The underlying principles of relief, while seldom if ever sufficiently enunciated by the courts, are reasonably clear, so far at least as the question of relief for mistake of fact is concerned, and, as the writer thinks, of relief for mistake of law as well. These principles, in their relation to contract, may be formulated into the following propositions: —

1. Relief for mistake, either in equity or by an equitable plea at law, is based on mistake in regard to matter of the agreement as distinguished from mistake in respect of the inducements thereto, or in regard to some condition precedent to the same. Something touching the supposed contract must be asserted on the one side and denied on the other to have been agreed. In a word, relief proceeds upon the ground of want of agreement. The minds of the parties have not met. See Pollock, Contract, 409 (3d ed.).

2. The courts therefore will not interfere for mere mistake, however serious, in regard to an external matter not a subject of the agreement or a condition precedent to the existence of the same. In case of misapprehension or ignorance of such a matter interference may be expected only when there has been fraud or at least misrepresentation in regard to it by the other side.

3. On the other hand the courts will interfere (*a*) where, in any case, the minds of the parties did not meet, or (*b*) where, in the case of a written contract, they did not meet on the terms expressed in the writing, but did meet on other terms not there appearing.

In regard to all of these propositions it is probably safe to assume, in accordance with the way the first one is framed, that the rule is the same with regard to equitable pleas where fully allowed at law, as in courts of equity; the English statute at all events is held to have done away with the old differences between Courts of Law and Courts of Equity in respect of mistake. Redgrave *v.* Hurd, 20 Ch. D. 1, 12. Hence where equitable pleas are fully allowed, the enforcement of a contract can be resisted by pleading anything which would afford foundation in equity for reforming, enjoining the enforcement of, or rescinding the supposed contract.

In this connection a suggestion upon common language of the cases in regard to materiality may be noticed. The proposition is, that the ground of interference must be mistake in the very agreement, when not in regard to a condition precedent. Now where mistake is found to have been made with reference to an agreed term of a contract, the question of the materiality of the term must be excluded; the parties by making it a subject of agreement have made it material, and the courts can have no right to put a different construction upon it. The familiar case of warranties in insurance policies affords an illustration. It is worse than idle with reference to such a case to say that the subject of the alleged mistake must be material. But where the question is whether a mistake was

made, as it usually is, the apparent materiality or immateriality of the subject of the mistake may have a bearing upon the decision of the question. Grymes *v.* Sanders, 93 U. S. 55, 23 L. Ed. 798, well illustrates this. See also Chapman *v.* Coats, 26 Iowa 288. On the other hand, where it is sought to strike out a clause as not agreed upon in the preliminary negotiations, and as inserted by mistake, the materiality of the clause as interpreted by the court *will* be the test of the right to the relief sought.

The second proposition, — that the courts will not interfere for mere mistake as to an external matter not a subject of agreement or a condition precedent thereto, — is a necessary result of the first. Illustrations may be found in recent cases. Dambmann *v.* Schulting, 75 N. Y. 55; Whittemore *v.* Farrington, 76 N. Y. 452; Webster *v.* Stark, 10 Lea 406. See post, § 300. The proposition covers all that class of cases in which it is held that, in addition to the ignorance of the plaintiff, knowledge on the part of the defendant in respect of the matter in question is not sufficient to justify relief, nor, by the current of authority, even knowledge by the defendant of the plaintiff's ignorance. Laidlaw *v.* Organ, 15 U. S. 178, 4 L. Ed. 214; Smith *v.* Hughes, L. R. 6 Q. B. 597. See post, §§ 221, 293, 300. There must be some misleading act by the defendant to afford ground for relief.

The third proposition comes more frequently into operation: the courts — to repeat it — will interfere (*a*) where, in any case, the minds of the parties did not meet at all, or (*b*) where, in the case of a written contract, they did not meet on the terms expressed in the writing, but did meet on other terms. The first of these two cases in its most common form in equity is a case for injunction and rescission, to be followed, if need be, by delivery up for cancellation, though it may of course be a case for defence at law either upon an ordinary or an equitable plea. The only feature of the case that calls for remark here is the fact that in this class of cases mistake of the plaintiff is sufficient of itself to authorize relief; neither injunction, rescission, nor the equivalent equitable defence at law requires any proof of mistake or of fault on the part of the defendant so long as damages are not sought. Redgrave *v.* Hurd, 20 Ch. D. 1; Arkwright *v.* Newbold, 17 Ch. D. 301, 320; Reese Silver Mining Co. *v.* Smith, L. R. 4 H. L. 64; Paget *v.* Marshall, 28 Ch. D. 255. See Rider *v.* Powell, 28 N. Y. 310; Kilmer *v.* Smith, 77 N. Y. 226; Price *v.* Ley, 4 Giff. 235; s. c. 9 Jur. (N. S.) 295; Bridges *v.* McClendon, 56 Ala. 327, 333. A term of the written contract has been inserted or omitted which the plaintiff never agreed to have there, or to have omitted, as the case may be.

The second part (*b*) of the proposition, upon which an unexpressed term is to be introduced into the writing, or a term therein expunged, covers the case so much considered by the courts under the name of mutual mistake, — not a perfectly accurate term for the case, as the mistake is in the writing and not in the agreement, and the defendant may have intended, or not have been mistaken in regard to, the form of the writing. Rider *v.* Powell, 28 N. Y. 310. See post, note to § 209. However, in order to justify the substitution of one term for another in the writing, or the removal of a term, or the insertion of an omitted term, it is plain that, whether the defendant was mistaken or not, the original *intention* of the parties in regard to the result of the proposed change should be one. Rider *v.* Powell, supra; Kilmer *v.* Smith, 77 N. Y. 266; Diman *v.* Providence R. Co., 5 R. I. 130; Thompsonville Co. *v.* Osgood, 26 Conn. 16; Betts *v.* Gunn, 31 Ala. 219; Wright *v.* Goff, 22 Beav. 207; Metropolitan Soc. *v.* Brown, 26 Beav. 455; Schoonover *v.* Dougherty, 65 Ind. 463; Nelson *v.* Davis, 40 Ind. 366; Boyce *v.* Lorillard Ins. Co., 4 Daly, 246; s. c. 55 N. Y. 366; Dulany *v.* Rogers, 50 Md. 524; Harter *v.* Christolph, 32 Wis. 245;

Ledyard *v.* Hartford Ins. Co., 24 Wis. 496; Ramsey *v.* Smith, 32 N. J. Eq. 28; Young *v.* McGowan, 62 Me. 56. If a new term is to be added, or substituted for one in the writing, the minds of the parties must have met upon it; if it is sought to remove a term without inserting anything in its place, it is of course enough that the plaintiff never agreed to it as part of the contract.

That these propositions are applicable as a general working theory to the case of mistake of law as well as of mistake of fact, must be clear if it be conceded that relief for mistake of law can be granted at all. If relief is to be given, it must be given on the ground of want of union of minds; if the parties have agreed upon the law, then, whether right or wrong their view, there can be no relief. See Irnham *v.* Child, 1 Bro. C. C. 92; Townshend *v.* Stangroom, 6 Ves. 328; Hunt *v.* Rousmaniere, 21 U. S. 174, 5 L. Ed. 589, 26 U. S. 1, 7 L. Ed. 27.

An answer to a possible objection based on the second proposition, as to the insufficiency of an external matter, may here be made. Whatever may be said of the machinery of the law, the law itself is not a thing external to the contract; it is not like the secret mine in the vendor's land, or the unknown treaty of peace which will affect the price of a commodity. The law creates, or at least supports, the right; the right does not exist, or does not exist usefully, without the law. It is quite as proper to say, with regard to the existence of the law, that the minds of the parties have not met, as it is to say the same with regard to the existence of the subject of a bargain. That subject is what it is because the law makes it such. To show what constitutes a union of minds with regard to the question of mistake of law will now be the aim of this note.

It is too late certainly at the present day to doubt the existence of jurisdiction in equity to grant relief on the ground of a pure mistake of law; though it must be admitted that such doubt has been entertained since as well as before Mr. Justice Story wrote, and the jurisdiction sometimes directly denied. Peters *v.* Florence, 38 Pa. St. 194; Goltra *v.* Sanasack, 53 Ill. 456; Zollman *v.* Moore, 21 Gratt. 313; Brown *v.* Armistead, 6 Rand. 594. Opposed to this however there is a long line of specific authorities, most of them correct beyond question, in which relief for mistake of law has either been granted, or admitted to be a proper head of Equity Jurisdiction. These will appear throughout the rest of this note.

Want of harmony however exists in regard to the special principle on which relief is to be granted or refused; and it will be noticed upon an examination of the cases that the judges are always glad to discover some special equity, aside from the mistake of law, which with the mistake may make their course more clear. Perhaps judges have sometimes been too ready to steer away from the dangers of the subject. It may be safe with Mr. Justice Story to say, though that is not quite clear, that "where a party acts or agrees in ignorance of any title in him . . . [he] seems to labor in some sort under a mistake of fact as well as of law." Infra, § 195. That is very guarded language. Whether it would be safe to put the case in bolder and positive terms, with recent statements (Cooper *v.* Phibbs, L. R. 2 H. L. 149, 170; Beauchamp *v.* Winn, L. R. 6 H. L. 223, 234; Jones *v.* Clifford, 3 Ch. D. 779, 792; Daniell *v.* Sinclair, 6 App. Cas. 181, 190; Macknet *v.* Macknet, 29 N. J. Eq. 54; Webb *v.* Alexandria, 33 Gratt. 168, 176), is still less clear; and there surely is no need in such a case of falling back upon the law of mistake of fact. To do so seems to cast doubt upon the jurisdiction of equity altogether over mistake of law; for the case is or may be one of the clearest cases of mistake of law, as where a conveyance has been made carrying in effect curtesy, when a recent statute, unknown to the grantor, has been passed creating or reviving such an

estate. And it is proper at the outset to notice that if the terms "mistake of law" and "ignorance of law" were always used with strict propriety, it would be found that the cases in which relief is granted are cases of ignorance and not of mistake; which latter term implies some notice and consideration of the law. But the terms are commonly used as synonymous; or rather the term "mistake" has nearly usurped the other's place.

Nor will it do with Lansdowne *v.* Lansdowne, Mos. 364; s. c. 2 Jac. & W. 205; infra, § 189, and more recent expressions following in the lead of that case (Wyche *v.* Greene, 16 Ga. 58; Jacobs *v.* Morange, 47 N. Y. 57, 61), to relegate the whole maxim concerning ignorance of law to the domain of criminal jurisprudence, and so give to equity a broad and indefinite jurisdiction of relief. The jurisdiction is sufficiently delicate and dangerous when confined within limits. A pretty wide door appears to have been thrown open still, in the dicta of the judges in the cases above referred to (Cooper *v.* Phibbs, Beauchamp *v.* Winn, Macknet *v.* Macknet, and Webb *v.* Alexandria), — wide enough indeed to ease the jurisdiction somewhat, but wide enough also, it would seem, to make doubtful the validity of many contracts and to overturn a good many decisions. According to those dicta the word "jus" in the maxim "ignorantia juris haud excusat" refers only to general well-known law, as distinguished from private right generally, and rights arising e. g. from the doubtful construction of a grant. Now, not to mention the difficulty of applying the interpretation (see infra, § 189, where also the beginning of this idea of "jus" may be seen), it is just this latter class of cases to which the refusal of relief has most frequently been applied in cases of real authority, at least in the United States, as will appear in the consideration of the subject later. True it is held, and doubtless correctly, that the maxim applies only to general public, and not to private, acts of the Legislature or to the laws of another State or country. Such laws may well be treated as facts. King *v.* Doolittle, 1 Head, 77, 84; Haven *v.* Foster, 9 Pick. 112 (foreign laws); McCormick *v.* Garnett, 5 DeG. M. & G. 287 (ib.). But that is a different thing from the interpretation of "jus" above referred to.

What then is the doctrine to be extracted from the decisions of the courts? So far as the *denial* of relief is concerned, it is apprehended that the true principle is to be found in the much-quoted but sometimes misapplied case of Hunt *v.* Rousmaniere, 21 U. S. 174, 5 L. Ed. 589, 26 U. S. 1, 7 L. Ed. 27, particularly in its first phase before the Supreme Court of the United States. In that case a person lending money on the security of ships deliberately, after consulting counsel, took a letter of attorney with power to sell the property, in preference to a mortgage thereon, upon the mistake of law that the security taken would bind the property, in case of the death of the borrower, to the same extent as a mortgage. The debtor dies, and the lender attempts to have the instrument taken reformed so as to make it express the real intention of the parties (if the law should be considered against the interpretation of the counsel); and he fails.

It has sometimes been supposed that this case draws a distinction between mistake made in reducing to writing a contract already agreed upon by the parties, — the mistake being that the language of the writing has a meaning or effect in law different from the intention, — and mistake with regard to the legal meaning or effect of a written instrument agreed upon as representing the contract of the parties. The first case is accordingly supposed to be a case for relief, while the second is not. Larkins *v.* Biddle, 21 Ala. 252; Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 319. See also Stafford *v.* Fetters, 55 Iowa, 484, 8 N. W. 322; Pitcher *v.* Hennessey, 48 N. Y. 415; Nelson *v.* Davis, 40 Ind. 366; Heavenridge *v.*

Mondy, 49 Ind. 434; Laver *v.* Dennett, 109 U. S. 90, 27 L. Ed. 867, 3 S. Ct. Rep. 73 (a case of laches).

Such a distinction cannot be sound. The writing is agreed upon as stating the contract in the one case as much as in the other. It matters not whether the parties say, "Here are the facts, and here is what on deliberation we want to do", and then accept from the draftsman the written instrument and execute it as embodying their intention; or, "This writing on consideration we accept as truly expressing our intention, and fix our signatures to it accordingly." The second act may imply more deliberation concerning the writing; but in neither case may the deliberation have touched the legal difficulty which finally arises. That may not have been in the minds of the parties at all. The distinction is trifling; it does not go to the root of the matter.

But Hunt *v.* Rousmaniere draws no such distinction in either of its stages. The case in its first appearance before the Supreme Court of the United States is clearly stated by Chief Justice Marshall. In giving the opinion of the court he says: "The agreement stated in the bill is generally that the plaintiff, in addition to the notes of Rousmaniere, should have specific security in the vessels; and it alleges that the parties applied to counsel for advice respecting the most desirable mode of taking this security. On a comparison of the advantages and disadvantages of a mortgage and an irrevocable letter of attorney, counsel advised the latter instrument, and assigned reasons for his advice; the validity of which being admitted by the parties, the power of attorney was prepared and executed, and was received by the plaintiff as full security for the loans." 21 U. S. 174, 5 L. Ed. 589.

Here was the whole case; deliberation with knowledge of the safe course (though not as safe) and choice of the unsafe. True on the next page the Chief Justice, in putting the case for decision in general terms, says, "the parties deliberately, on advice of counsel, agree on a particular instrument", without adding "in preference to another before them which would have effectuated the intention", but the whole case shows that such should be understood as a governing factor in the decision. It is true also that in the second stage of the case, 1 Peters, 1, Mr. Justice Washington, who now delivered the opinion of the court, uses some expressions which, taken apart from the rest, might be thought broad enough to suggest some such distinction as that in question. He says: "Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfil, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake." See infra, § 177; Pitcher *v.* Hennessey, 48 N. Y. 415, 423. But that must be understood with reference to the case before the court, and the learned judge himself so declares. That the doctrine just quoted would not apply where the parties deliberated upon the particular terms or instrument employed, with other effectual terms or instruments before them, making choice of the ineffectual, is the very point decided. The "intention" on the evidence was "manifest" enough. Indeed the whole case is afterwards well summed up by the same judge. "We mean to say that when the parties, upon deliberation and advice, reject one species of security and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a Court of Equity will not, on the ground of such misapprehension and the insufficiency of such security . . . direct a new security." 26 U. S. 1. But the passage first quoted seems to have entirely misled the court in Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 319, 320.

The case of Hunt *v.* Rousmaniere decides then this very intelligible and sound principle, that where a particular course is taken upon deliberation, in preference to another present to the minds of the parties, that action, so far, is final. A letter of attorney was considered as preferable for the matter in hand to a mortgage. There was a choice of ends before the lender, in that both the preferable and the adopted course of action was under consideration; he elected his course; by so doing he bound himself. This affords a suggestion of the specific ground of jurisdiction of mistake.

Indeed the jurisdiction ought, on the point of "deliberation", in the ordinary sense, to be somewhat narrower; and cases to be presented will indicate that it has in truth been treated as having a somewhat narrower basis. The working principle is however still that of Hunt *v.* Rousmaniere. The test to which the question of jurisdiction should be brought is this: Was there in truth a choice of ends open to the complaining party at the time? That is, was a doubt raised in his mind whether the particular word, phrase, term, or instrument was sufficient in law to effectuate the object contemplated at that time by him, and nothing else essentially different? If there was, he was put to a choice; and the choice made, though perhaps not on such deliberation as took place in Hunt *v.* Rousmaniere, must be binding. If no doubt occurred to the party whether the object contemplated could be accomplished by the step to be taken, with nothing besides radically different, then between the intended effect of that step and the actual course of the law no choice was made, and equity should grant relief. See Stockley *v.* Stockley, 1 Ves. & B. 31, Lord Eldon; infra, §§ 194, 195. And this though the words used were the words intended. Canedy *v.* Marcy, 13 Gray, 373; Smith *v.* Jordan, 13 Minn. 264.

Other cases will now be brought to bear on the test here suggested, first as in Hunt *v.* Rousmaniere, on the refusal of jurisdiction. The recent English case of Rogers *v.* Ingham, 3 Ch. D. 351, in the Court of Appeal, though a case into which other considerations, such as laches and change of position, entered, proceeds in part at least upon the ground which governed Hunt *v.* Rousmaniere. That was a case of the payment of money by an executor to one of two legatees, on advice of legal counsel, taken by both sides to the same effect, with all questions of law under consideration; which payment, two years afterwards, and after distribution of the estate the other legatee sought to impeach for mistake of law. The decision is finally put thus by Lord Justice James: "Where people have a knowledge of all the facts, and take advice, and, whether they get proper advice or not, the money is divided and the business is settled, it is not for the good of mankind that it should be opened." Still more clearly Lord Justice Mellish puts the case as one of deliberation and choice. "Both parties", he says, "were well aware that the [legal] question was then [when the transaction took place] to be decided; the plaintiff's attention and the attention of the plaintiff's legal advisers were called to all the facts and circumstances; she took advice upon the point." See also Stone *v.* Godfrey, 5 DeG. M. & G. 76; Kitchin *v.* Hawkins, L. R. 2 C. P. 22; Preston *v.* Luck, 27 Ch. D. 497. And among cases of the compromise of rights doubtful in law, see Stewart *v.* Stewart, 6 Clark & F. 911, 967; Pullen *v.* Ready, 2 Atk. 587; Gibbons *v.* Caunt, 4 Ves. 840; Ex parte Lucy, 4 DeG. M. & G. 356; Wheeler *v.* Smith, 50 U. S. 55, 13 L. Ed. 44; infra, § 196.

The same principle may be seen in the case of Weed *v.* Weed, 94 N. Y. 243. There it appeared that a lady, with full knowledge of all the facts, but through a mistaken belief that her interest in certain real estate was not subject to execution, had lost her title through a regular sale, on judgment, execution, and conveyance of the land by the sheriff. She had taken legal

advice on the question whether the property, under a peculiar deed which had been made to her, could be taken on execution, and believing the erroneous advice given to be correct, had delayed action until the time of redemption had expired. Relief was properly refused; the party had made up her mind, with the doubt before her. So in a case in Missouri, where the defendants had taken advice concerning the validity of a judgment before purchasing under it. The parties bought, and it was held that they could not allege that the advice given was erroneous. McMurray *v.* St. Louis Oil Co., 33 Mo. 377. So too though parties have misconstrued even a doubtful statute, they must still abide by the construction they have put upon it. Bank of United States *v.* Daniel, 37 U. S. 32, 9 L. Ed. 989; Kelly *v.* Turner, 74 Ala. 513, 519, — in regard to conflicting cases of construction.

Other cases might be referred to more or less to the same effect. See Townshend *v.* Stangroom, 6 Ves. 328; Smith *v.* Hitchcock, 130 Mass. 570; Marble *v.* Whitney, 28 N. Y. 297, 308; Thompson *v.* Thompson, 18 Ohio St. 73 (mistake as to law of descents; see Huss *v.* Morris, 63 Pa. St. 367; but see Hopson *v.* Shipp, 7 Bush, 644); Davis *v.* Bagley, 40 Ga. 181; Norris *v.* Larrabee, 58 Me. 260. (In Wheeler *v.* Smith, 50 U. S. 55, 13 L. Ed. 44, the parties were not on equal footing.) And — if we except some decisions based on the distinction above criticised, especially Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 319, 320 — few cases inconsistent with this view, so far as it is applied to the refusal of relief, can be found.

A peculiar case lately decided in Connecticut may perhaps be thought to be opposed to the view here maintained. Evans's Appeal, 51 Conn. 435. A widow was there allowed to withdraw a renunciation of the provision for her in her husband's will, which renunciation had been made under advice of the Judge of Probate. The advice was wrong in law, and on discovering the error, and before any change of position, the widow asked the same judge for leave to withdraw her renunciation. The request was refused, but the Supreme Court decided that it should have been granted. The opinion is not very instructive. What the nature of the mere act of renunciation alone may be does not appear. It does not become a judgment clearly; it is not an act inter partes; whether before some action has been taken upon it, it is more than what it seems to be, a mere declaration revocable within the period of the statute, is yet to be determined. Further as to the widow's election under mistake, see Macknet *v.* Macknet, 29 N. J. Eq. 54. Also see Ellsworth *v.* Ellsworth, 33 Iowa, 164. And it may be remarked that an election made in ignorance of the existence of a law upon the subject affords a perfectly clear case for relief when asked for soon enough. Watson *v.* Watson, 128 Mass. 152, 155, and cases cited.

A recent decision of the Supreme Court of Michigan may also be noticed. Lapp *v.* Lapp, 43 Mich. 287, 5 N. W. 317. A woman, the plaintiff, had married a man who had a wife living to her knowledge, from whom however he had separated under articles of agreement. This fact was known to the plaintiff, but she professed to have supposed at the time that the articles constituted a divorce. No fraud had been practised upon her. On discovering her mistake she sued for divorce with alimony. Both were refused. Mr. Justice Campbell, speaking for the court, said that it could not be presumed (that is, believed) that any person of ordinary intelligence could suppose that marriage could be dissolved by consent of parties. But even supposing such a belief possible, — it might be quite possible in the case of a foreigner, — public policy would probably have led the court to the same conclusion with regard to a question so momentous as marriage and divorce. One should carefully look into the case before marrying a person known by one to have a husband (or wife) living.

The plaintiff must at least have been put to a doubt, and that in the view here taken is enough. So where L after the death of his wife, paid a mortgage made by her on her own property, on the mistaken belief either that the property had become his by descent or that he was bound as his wife's executor to pay it, relief was refused him. The facts show that he was in doubt as to the state of the title and made his election. Peters *v.* Florence, 38 Pa. St. 194. See also Guckian *v.* Riley, 135 Mass. 71; Moorman *v.* Collier, 32 Iowa, 138.

The court in Harner *v.* Price, 17 W. Va. 523, may be thought to have gone contrary to the doctrine of Hunt *v.* Rousmaniere. In that case the plaintiff had acknowledged judgment on a non-negotiable note barred by limitation. He did not know the law, and was induced by the defendant, but not fraudulently as it was found, to make the acknowledgment. Relief was refused. This however was a case where the plaintiff (though the fact is not brought out in the opinion printed) owed the debt in conscience and had come into a court of conscience to obtain relief from a very proper act. Compare Northrop *v.* Graves, 19 Conn. 548; Covington *v.* Powell, 2 Met. 226, 228. The equities on the defendant's side were at least equal to those on the side of the plaintiff. In this view the case is not unlike cases referred to in Hunt *v.* Rousmaniere, of joint obligors, after the death of one of them and discharge of his personal representatives, being still held to the obligee as if the bond had been joint and several, on the ground that they had received the consideration for their promise; and it was to be assumed that they intended to bind themselves severally as well as jointly. This however was treated as doubtful law in our principal case, unless the failure to make the bond several was due to mistake of fact. See infra, §§ 234, 236.

This brings us to the case of money paid under mistake of law, which in England is considered to present the one permanent exception to the right to relief for mistake (Pollock, Contract, p. 424, 3d ed.); though it must strike the observer as odd that while no amount of negligence can there bar one from the right to recover back money which one has paid under mistake of fact (Willmott *v.* Barber, 15 Ch. D. 96; Townsend *v.* Crowdy, 8 C. B. (N. S.) 477; Kelly *v.* Solari, 9 Mees. & W. 54), no case of ignorance of the law can give one a right to a return of money paid. Bilbie *v.* Lumley, 2 East, 469; Rogers *v.* Ingham, 3 Ch. D. 351; Stewart *v.* Stewart, 6 Clark & F. 911, 966; Pollock, Contract, supra. But as to the right to resist payment on a contract, see Forman *v.* Wright, 11 C. B. 481, 492. The doctrine in question has also been declared in the United States (Livermore *v.* Peru, 55 Me. 469; Peterborough *v.* Lancaster, 14 N. H. 383); but it cannot, broadly stated, be said to be settled law here. See Northrop *v.* Graves, 19 Conn. 548, and Covington *v.* Powell, 2 Met. 226, 228, showing that where the money was not in conscience or honor due, it may be recovered back.

Why should there be any difference between the case of money paid under mistake of fact and money paid under mistake of law? In the latter case as well as in the former the receiver gets what does not belong to him, what there was no intention to give him, and what there was no consideration for paying. It would be difficult to distinguish such a case from the class of cases already mentioned, in which it is held with perfect unanimity that where a party acts in entire ignorance of any title or right given him by law, or supposes that he has a title or a right when he has not, equity will take jurisdiction and save the right or grant the proper relief. Watson *v.* Watson, 128 Mass. 152; Bingham *v.* Bingham, 1 Ves. sr. 126; Cooper *v.* Phibbs, L. R. 2 H. L. 149; Beauchamp *v.* Winn, L. R. 6 H. L. 223; Jones *v.* Clifford, 3 Ch. D. 779; Cochrane *v.* Willis, 34 Beav. 368; s. c.

L. R. 1 Ch. 58; In re Saxon Life Assurance Soc., 2 Johns. & H. 408; Coward *v.* Hughes, 1 Kay & J. 443; Forman *v.* Wright, 11 C. B. 481, 492; McCarthy *v.* Decaix, 2 Russ. & M. 614; Griffith *v.* Townley, 69 Mo. 13; Blakemore *v.* Blakemore, 39 Conn. 320; Whelen's Appeal, 70 Pa. St. 410; Baker *v.* Massey, 50 Iowa, 399; infra, § 195. It has been held too in Massachusetts that an indorser of a promissory note, discharged for want of notice in due time, who on receiving notice promises to pay, under the mistake of law that he is bound, may allege his mistake. Warder *v.* Tucker, 7 Mass. 449. See May *v.* Coffin, 4 Mass. 341; Freeman *v.* Boynton, 7 Mass. 483, 488. This however is opposed to the decision of the King's Bench in Stevens *v.* Lynch, 12 East, 38, and if there was any moral duty to pay, is also opposed to the West Virginia case of Harner *v.* Price, above considered.

The doctrine in question is traced back to Bilbie *v.* Lumley, 2 East, 469; but though Lord Ellenborough is indeed there reported to have laid down the broad rule denying relief, it appears to have been unnecessary to do so, or to do so without qualification. An attempt was made in that case by an insurance company to recover back money paid under a mistake of law concerning the effect of a particular concealment by the assured. All the facts were before the underwriters, including the one in question, and they adjusted and paid the loss. The company well knew that concealment in general was ground of discharge of their liability; with such knowledge they considered the particular fact and acted. They elected their course. It may be noticed that Lord Ellenborough does not base the decision of the case upon any ground peculiar to the attempt to recover back money paid; he would, it seems, have applied the same rule to any other case of mistake of law. The distinction itself is much shaken by Daniell *v.* Sinclair, 6 App. Cas. 181.

Thus far of the doctrine in question in respect of the denial of relief. That the converse of it holds equally well, for granting relief, may not perhaps be so decisively shown; still that may be shown with reasonable clearness. From almost every case in which relief has been granted either the element of choice between means or ends — choice between the safe and the unsafe course — was absent, and but one course suggested or thought of by the parties, or some other special equity existed in favor of the plaintiff. In this state of things — a well-defined rule that the exercise of choice is final, and the fact that in the cases in which relief has been granted there has been wanting an opportunity for choice — the inference is reasonable that want of opportunity, that is, absolute ignorance, is a ground of relief. Indeed here appears to be a case for a crucial test of the proposition that want of assent is ground for relief from the consequences of mistake of law. If there is no possibility of choice, there is no true assent, and relief should be granted; that is the proposition to be tried.

Let us turn again to the authorities and apply the test. In Pitcher *v.* Hennessey, 48 N. Y. 415, it appeared that the plaintiff had leased a vessel of the defendant, assuming the "risk of navigation." A particular risk inter alia was by mistake of law supposed by the parties to be covered by this term, and the lease was reformed. No occasion for doubt appears to have arisen, and there was therefore no true choice of terms. If the words had been chosen against a doubt of their sufficiency, there would then, and only then, have been an election. The court on p. 424, it may be remarked, barely falls short of this position. The case there affords an illustration of the common missing of the point of Hunt *v.* Rousmaniere, or at least of the failure to bring that point clearly out, — the preference of one writing over another on the matter at issue.

Another case in the same volume of Reports may be mentioned. Lan-

ning *v.* Carpenter, 48 N. Y. 408. It had been agreed that the plaintiff should have a judgment against J. C., which should be a lien upon his property. By mistake of law, but without any doubt as to the proper course, so far as appears, the judgment was docketed in the wrong county, — a county which afterwards turned out to have been illegally organized. Relief was granted. But if the parties had agreed to have the judgment docketed in the particular county in the face of a doubt raised, could any court have interfered and declared the agreement immaterial?

The case of Lant's Appeal, 95 Pa. St. 279, is worthy of special notice. A will was there treated in equity as an antenuptial agreement, in order to effectuate the intention of the parties, which otherwise, by mistake of law, would have miscarried. A lady about to marry had made the will, on a valid agreement between herself and her intended husband, that she might dispose of her property by will or otherwise as she pleased; which will was revoked by operation of law on her marriage, an event not contemplated in any way. The decision seems perfectly sound; there was no choice between the effectual and the adopted course. The language of the court however is open to objection. It was said that whenever one has a legal right to dispose of property, and means to dispose of it, the form of the instrument adopted for the purpose, if in law ineffectual as it stands, will be disregarded, and equity will enforce the intention. Compare Kennard *v.* George, 44 N. H. 440; Evants *v.* Strode, 11 Ohio, 480; Clayton *v.* Freet, 10 Ohio St. 544. Now if this was intended for a broad rule of law, it is not consistent with Hunt *v.* Rousmaniere. If the particular instrument was chosen, as in that case, in preference to another, on the point at issue, equity will not interfere; but understood with this qualification, the proposition is useful. It may also be noticed that the proposition just criticised would further be too broad for the case of a mistake in the execution by a married woman of a statutory conveyance by her of her own property before the recent enabling acts. Martin *v.* Dwelly, 6 Wend. 9; Heaton *v.* Fryberger, 38 Iowa, 185, 201; Gibb *v.* Rose, 40 Md. 387. Nor would a deed of realty made by a wife directly to her husband on a mistake of law be upheld. Gibb *v.* Rose. But both of these cases stand on special grounds that do not touch the main doctrine under consideration.

In this connection a case decided by the Supreme Court of California may be noticed. Remington *v.* Higgins, 54 Cal. 620. Relief was there granted on the following facts: Land bought by A was at his request conveyed to his wife as "community" property under the laws of California. Such property is not liable for the wife's debts. The wife gave back a mortgage and notes to secure the unpaid purchase-money. The court held that the mortgagee had, without regard to any vendor's lien, an equitable mortgage on the estate for the purchase price. The case clearly falls within the principle under consideration. There was no election. (The court referred to the class of cases of instruments defectively executed, where relief is granted. Love *v.* Sierra Nev. Mining Co., 32 Cal. 639; Daggett *v.* Rankin, 31 Cal. 321. But that is a simpler matter.)

A few cases not so clear may be noticed; among them one by the Supreme Court of Alabama. Stone *v.* Hale, 17 Ala. 557. A father having a daughter unprovided for, whose husband was improvident, determined to vest property in a trustee to her sole and separate use for life, remainder to her children. Instructions were given accordingly to an attorney: but in drawing the deed he omitted the words "to her sole and separate use," whereby the estate became vested in the husband for life, and was levied upon by his creditors. The deed was reformed. This looks very much like a mistake of fact; if the omission was witting, it is hard to understand the case, — unless the attorney made a mistake of law and the father, in

not noticing the omission, a mistake of fact. There is a similar case in the same court, where the grantor had been his own draftsman and relief was granted. Larkins *v.* Biddle, 21 Ala. 252.

In the recent case of Snell *v.* Insurance Co., 98 U. S. 85, 25 L. Ed. 52, there was a special equity. It appeared that the plaintiff had been induced to act upon the superior knowledge of the defendant's agent. An agreement had been made between A and B that certain insurance should be granted by B on property of a firm of which A was a member. B's agent, but without fraud, *induces* A to have the policy made in his own name, assuring him that in that form it will protect the firm. The court decided that the policy must be reformed to meet the intention of the parties, on the ground that A had trusted B's agent concerning the proper mode of executing the policy. The case was therefore one of trust. To the same effect, Woodbury Bank *v.* Charter Oak Ins. Co., 31 Conn. 517; Longhurst *v.* Star Ins. Co., 19 Iowa, 364. See also Ben. Franklin Ins. Co. *v.* Gillett, 54 Md. 212; Farmville Ins. Co. *v.* Butter, 55 Md. 233. For the converse case of encouraging action, see Storrs *v.* Barker, 6 Johns. Ch. 166; Zollman *v.* Moore, 21 Gratt. 313, 326; Kitchin *v.* Hawkins, L. R. 2 C. P. 22, 31; not cases of agency.

It may also be that where a person by mistake of law acts to his detriment under what may be called compulsion, though compulsion might of itself be lawful, he will be entitled to relief, especially if the other party knew that in the particular case the law did not entitle him to the benefit; and this too though the injured party was seeking at the time to discover what the law required. Thus it is held that a man may have relief from a return of property for taxation when it appears that by mistake of law he included exempt property. Charlestown *v.* Middlesex, 109 Mass. 270. See Dunnell Mfg. Co. *v.* Pawtucket, 7 Gray, 277.

Certain cases of the unauthorized acts of corporations may also clearly fall without the rule in Hunt *v.* Rousmaniere. A corporation has no power beyond that conferred by the Legislature; and if such a body should e. g. issue bonds without authority, the fact that a purchaser was ignorant of the existence of a law making them absolutely void would not help his case in a suit against the corporation, even if it would in a suit against his vendor, supposing he had not bought of the company. In Rochester *v.* Alfred Bank, 13 Wis. 432, it appeared that a public statute had gone into effect, by which the authority of a town to issue bonds had been taken away, of which a purchaser alleged ignorance. But the court said that by taking notice of the time when the statute took effect, and examining the date of the bonds, the want of authority would have appeared.

A difficult question — difficult because of its close relation to deep questions of public policy — is presented by the case of a judicial decision overturning what before had been supposed to be law. If a statute is declared unconstitutional, transactions intermediate must in ordinary cases — see Harney *v.* Charles, 45 Mo. 157 —be readjusted as far as may be (no agreement, it seems, could preclude one from denying the constitutionality of a statute); and the general theory in regard to the overruling of former decisions no doubt is that the law always was what it has been declared to be by the later authority. But the courts are not agreed in the wisdom of pressing the theory to the dangerous extreme of overturning intermediate transactions founded on the earlier declaration. Against interference in such cases, Lyon *v.* Richmond, 2 Johns. Ch. 51, 60; Jacobs *v.* Morange, 47 N. Y. 57, 60; Webb *v.* Alexandria, 33 Gratt. 168; Kelly *v.* Turner, 74 Ala. 513, 520; Baker *v.* Pool, 56 Ala. 14; Kenyon *v.* Welty, 20 Cal. 637; Kitchin *v.* Hawkins, L. R. 2 C. P. 22. Contra, Jones

will not furnish an excuse for any person, either for a breach or for an omission of duty; "Ignorantia legis neminem excusat;" and this maxim is equally as much respected in equity as in law.[1] It probably belongs to some of the earliest rudiments of English Jurisprudence; and is certainly so old as to have been long laid up among its settled elements. We find it stated with great clearness and force in the "Doctor and Student," where it is affirmed

v. Munroe, 32 Ga. 181; and see Harney *v.* Charles, 45 Mo. 157; infra, § 284; and Reed *v.* White, an unreported case of the Supreme Court of Massachusetts, January term, 1877, in which the point was decided without argument, as the writer is informed. Where the decisions are in an unsettled state, and especially where a question of the true rule of law is known to be pending, parties acting may well be held to have bound themselves by the view of the law they have taken. But see Jones *v.* Munroe, supra. See Lyon *v.* Richmond, supra; Kelly *v.* Turner, supra, at pp. 519, 520; Kenyon *v.* Welty, 20 Cal. 637, 641. Perhaps this should not be invariably so where no doubt of the law had arisen at the time, and the overruling decision followed soon. If then the former situation in the particular case could be restored, there might be ground for interference upon the principle under consideration in this note. But the Legislature is always anxious concerning rights in repealing a statute, and the courts should hardly be less so in overruling former decisions.

It may be observed in concluding this note that a special public policy governs the case of mistake of law or of practice in the conduct of causes. See e. g. Thurmond *v.* Clark, 47 Ga. 500; Jacobs *v.* Morange, 47 N. Y. 57, 59. "Interest reipublicæ ut litium finis sit."

The special limitations to the right to relief, growing out e. g. of change of position, the intervention of the rights of others, the amount of evidence necessary to establish the mistake, and like cases, are considered in the editor's note on Mistake of Fact, post, § 209.

Further, Law Quart. Rev., Jan., 1886, art. "Mistake of Law Again."

[1] Bilbie *v.* Lumley, 2 East, R. 469; Doct. & Stud. Dial. 1, ch. 26, p. 92; Id. Dial. 2, ch. 46, p. 303; Stevens *v.* Lynch, 12 East, 38; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*); Hunt *v.* Rousmaniere's Adm'rs, 21 U. S. 211, 5 L. Ed. 589, 26 U. S. 1, 7 L. Ed. 27; s. c. 12 Fed. Cas., p. 938, case No. 6898; 12 Fed. Cas., p. 933, case No. 6897. Frank *v.* Frank, 1 Ch. Cas. 84. How far money paid under a mistake of law is, as the civil law phrases it, liable to *repetition*, that is, to a recovery back, has been a matter much discussed by civilians, and upon which they are divided in opinion. Pothier and Heineccius maintain the negative; Vinnius and D'Aguesseau the affirmative, the latter especially in a very masterly dissertation. Sir W. D. Evans in the Appendix to his translation of Pothier on Obligations (vol. 2, pp. 408 to 437), has given a Translation of the Dissertations of D'Aguesseau and Vinnius; and Sir W. D. Evans has prefixed to them a view of his own reasoning in support of the same doctrine. (Id. Vol. 2, p. 369.) The text of the Roman law seems manifestly on the other side, although the force of the text has been attempted to be explained away, or at least limited. The Digest (Lib. 22, tit. 6, l. 9, §§ 3, 5) says: "Ignorantia facti, non juris, prodesse; nec stultis solere succurri, sed errantibus;" and still more explicitly the Code says (Lib. 1, tit. 18, l. 10), "Cum quis jus ignorans indebitatem pecuniam solverit, cessat repetitio; per ignorantiam enim facti tantum repititionem indebiti soluti competere tibi notum est." See also 1 Pothier, Oblig. Pt. 4, ch. 3, § 1, n. 834; 1 Evans's Pothier on Oblig.

that every man is bound at his peril to take knowledge what the law of the realm is, as well the law made by statute as the common law.[1] The probable ground for the maxim is that suggested by Lord Ellenborough, that otherwise there is no saying to what extent the excuse of ignorance might not be carried.[2] Indeed one of the remarkable tendencies of the English common law upon all subjects of a general nature is, to aim at practical good rather than theoretical perfection; and to seek less to administer justice in all possible cases, than to furnish rules which shall secure it in the common course of human business. If upon the mere ground of ignorance of the law men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice from the nature and difficulty of the proper proofs.[3] The presumption is, that every person is acquainted with his own rights, provided he has had a

523, 524; Pothier, Pand. Lib. 22, tit. 6; Cujaccii Opera, Tom. 4, p. 502; Comm. ad Leg. vii. de Jur. et Fact. Ignor. Heinecc. ad Pand. Lib. 22, tit. 6, § 146; 1 Domat, Civil Law, B. 1, tit. 18, § 1, n. 13 to 17. But the question is a very different one, how far a promise to pay is a binding obligation; for a party may not be bound by the latter to pay, although he may not, if he has paid the money, be entitled to recover it back. Heineccius (ubi supra) insists on this distinction, founding himself on the Roman law. Cujaccius also insists on the same distinction. (Cujac. Opera, Tom. 4, 506, 507, edit. 1758.) D'Aguesseau denies the distinction as not founded in reason, and insists on the same right in both cases. Sir W. D. Evans holds to the same opinion, but insists at all events that a mere promise to pay under a mistake of law is not binding. 2 Evans's Pothier on Oblig. 395, &c. There is certainly great force in his reasoning. It has however been rejected by the English courts; and a promise to pay, upon a supposed liability, and in ignorance of the law, has been held to bind the party. Stevens *v.* Lynch, 12 East, R. 38; Goodman *v.* Sayers, 2 Jac. & Walk. 263; Brisbane *v.* Dacres, 5 Taunt. R. 143; East India Company *v.* Tritton, 3 B. & Cressw. 280. Mr. Chancellor Kent held a doctrine equally extensive in Shotwell *v.* Murray, 1 John. Ch. R. 512, 516. See also Storrs *v.* Barker, 6 John. Ch. R. 166; Clarke *v.* Dutcher, 9 Cowen, R. 674. In Massachusetts it has been held that money, paid under a mistake of law, may be recovered back; and at all events that a promise to pay under a mistake of law cannot be enforced. May *v.* Coffin, 4 Mass. R. 342; Warder *v.* Tucker, 7 Mass. R. 452; Freeman *v.* Boynton, 7 Mass. R. 488. See also Haven *v.* Foster, 9 Pick. R. 112, in which there is a very learned argument by counsel on each side on the general doctrine, and the opinions of civilians, as well as the common-law decisions, are copiously cited.

[1] Doct. & Stud. Dial. 2, ch. 46.

[2] Bilbie *v.* Lumley, 2 East, 469, 472.

[3] Lyon *v.* Richmond, 2 John. Ch. R. 51, 60; Shotwell *v.* Murray, 1 John. Ch. R. 512; Storrs *v.* Barker, 6 John. Ch. R. 169, 170.

reasonable opportunity to know them. And nothing can be more liable to abuse than to permit a person to reclaim his property upon the mere pretence that at the time of parting with it he was ignorant of the law acting on his title.[1] Mr. Fonblanque has accordingly laid it down as a general proposition that in Courts of Equity ignorance of the law shall not affect agreements nor excuse from the legal consequences of particular acts.[2] And he is fully borne out by authorities.[3]

§ 174. **Mistakes of Law, Illustrations.** — One of the most common cases put to illustrate the doctrine is where two are bound by a bond, and the obligee releases one, supposing by a mistake of law that the other will remain bound. In such a case the obligee will not be relieved in equity upon the mere ground of his mistake of the law;[4] for there is nothing inequitable in the co-obligor's availing himself of his legal rights, nor of the other obligor's insisting upon his release, if they have both acted bona fide, and there has been no fraud or imposition on their side to procure the release.[5]

[1] See Storrs *v.* Barker, 6 John. Ch. R. 169.

[2] 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*); 1 Madd. Ch. Pr. 60. But see Moseley's Rep. 364; 1 Ves. 127; Storrs *v.* Barker, 6 John. Ch. R. 169, 170; Hunt *v.* Rousmaniere, 21 U. S. 211, 5 L. Ed. 589.

[3] The doctrine was pushed to a great extent (as Mr. Fonblanque has remarked) in Wibdey *v.* Cooper Company, cited in a note to East *v.* Thornbury, 3 P. Will. 127, note B. and Atwood *v.* Lamprey (ibid.), in which a tenant who had paid a rent or annuity charged on land, without deducting the land tax, was not allowed to recover back the amount by a bill in equity. 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*). There is an appearance of hardship in this doctrine; but it has been fully recognized in a late case where an executor paid interest on a legacy without deducting the property tax. Currie *v.* Goold, 2 Madd. R. 163, and Smith *v.* Alsop, 1 Madd. R. 623. Lord Hardwicke also acted upon the same doctrine in Nicholls *v.* Leeson, 3 Atk. 573. The cases resolve themselves into an over-payment by mistake of law or of fact, and probably of the former. But it does not appear in any of these cases that the mistake was not mutual. It is a little difficult to reconcile these cases with the doctrine in Bingham *v.* Bingham, 1 Ves. 126, and Belt's Suppt. 79.

[4] Hunt *v.* Rousmaniere, 26 U. S. 1, 7 L. Ed. 27; Com. Dig. Chancery, 3 F. 8; Harman *v.* Cannon, 4 Vin. Abridg. 387, pl. 3; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*); Cann *v.* Cann, 1 P. Will. 723, 727. But see Ex parte Gifford, 6 Ves. 805, and the comments by Lord Denman on that case in Nicholson *v.* Revell, 6 Nev. & Mann. 192, 200; s. c. 4 Adolph. & Ellis, 675. See post, § 676.

[5] In such a case there is no doubt that the releasee is discharged at law. In Nicholson *v.* Revell, 6 Nev. & Mann. 192, 200, s. c. 4 Adolph. & Ellis, 675, a discharge of one party on a joint and several note was held to be a discharge of both. S. P. Cheetham *v.* Ward, 1 Bos. & Pull. 630; Hosack *v.* Rogers, 8 Paige, R. 229. Long *v.* Patton, 43 Tex. Civ. App. 11, 93 S. W. 519; Bradley *v.* Bush, 1 Cal. App. 516, 82 Pac. 560; Flanagan *v.* Brown, 70 Cal. 254, 11 Pac. 706; Meslin's Execrs. *v.* Hiett, 37 W. Va. 15, 16 S. E. 437.

So where a party had a power of appointment and executed it absolutely without introducing a power of revocation, upon a mistake of law that being a voluntary deed it was revocable, relief was in like manner denied.[1] If the power of revocation had been intended to be put into the appointment, and omitted by a mistake in the draft, it would have been a very different matter.

§ 175. **Same.** — The same principle applies to agreements entered into in good faith, but under a mistake of the law. They are generally held valid and obligatory upon the parties.[2] Thus where a clause containing a power of redemption, in a deed granting an annuity after it had been agreed to, was deliberately excluded by the parties upon a mistake of law that it would render the contract usurious, the Court of Chancery refused to restore the clause or to grant relief.[3] Lord Eldon, in commenting on this case, said that it went upon an indisputably clear principle; that the parties did not mean to insert in the agreement a provision for redemption, because they were all of one mind that it would be ruinous. And they desired the court to do, not what they intended, for the insertion of that provision was directly contrary to their intention; but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention.[4] So where a devise was

[1] Worrall *v.* Jacob, 3 Meriv. R. 195. See also 21 U. S. 211, 5 L. Ed. 589.

[2] Pullen *v.* Ready, 1 Atk. 591; Stockley *v.* Stockley, 1 Ves. & B. 23, 30; Frank *v.* Frank, 1 Ch. Cas. 84; Mildmay *v.* Hungerford, 2 Vern. R. 243; Shotwell *v.* Murray, 1 John. Ch. R. 512; Lyon *v.* Richmond, 2 John. Ch. R. 51; Hunt *v.* Rousmaniere, 21 U. S. 211, 5 L. Ed. 589; Storrs *v.* Barker, 6 John. Ch. R. 169, 170. Some of the cases commonly cited under this head are cases of family agreements to preserve family honor or family peace; and some of them are compromises of rights thought at the time to be doubtful by all the parties. The cases of Stapilton *v.* Stapilton, 1 Atk. 10; Stockley *v.* Stockley, 1 Ves. & B. 23; Cory *v.* Cory, 1 Ves. 19; Gordon *v.* Gordon, 3 Swanst. R. 463, 467, 471, 474, 477, and perhaps Frank *v.* Frank, 1 Ch. Cas. 84, are of the former sort. And it has been said by Lord Eldon that in family arrangements an equity is administered in equity which is not applied to agreements generally. 1 Ves. & B. 30; Neale *v.* Neale, 1 Keen, 672, 683. Compromises of doubtful rights stand upon a distinct ground; for in such cases the parties are equal, and it is for the public interest to suppress litigation. Cann *v.* Cann, 1 P. Will. 723, 1 Ves. & B. 30, 1 Atk. 10; Naylor *v.* Winch, 1 Sim. & Stu. 564, 565. But of these doctrines a more full discussion belongs to the text. Post, §§ 184, 185, 186, 190, 192, 194, 195, 196, 197.

[3] Irnham *v.* Child, 1 Bro. Ch. R. 92. See 6 Ves. 332, 333; 1 Peters, Sup. C. R. 16, 17.

[4] Marquis of Townshend *v.* Stangroom, 6 Ves. 332. See also Lord Patmore *v.* Morris, 2 Bro. Ch. R. 219; Hunt *v.* Rousmaniere, 21 U. S. 211, 5 L. Ed. 589.

given upon condition that a woman should marry with the consent of her parents, and she married without such consent, whereby a forfeiture accrued to other parties who afterwards executed an agreement respecting the estate, whereby the forfeiture was in effect waived, the court refused any relief, although it was contended that it was upon a mistake of law. Lord Hardwicke on that occasion said: "It is said, they (the parties) might know the fact and yet not know the consequence of law. But if parties are entering into an agreement, and the very will out of which the forfeiture arose is lying before them and their counsel while the drafts are preparing, the parties shall be supposed to be acquainted with the consequence of law as to this point; and shall not be relieved on a pretence of being surprised, with such strong circumstances attending it."[1] So where the plaintiff was tenant for life, with remainder to his first and other sons in tail, remainder to the defendant in fee, and his wife being then privement ensient of a son, he was advised that if he bought the reversion of the defendant and took a surrender, it would merge his estate for life and destroy the contingent remainder in his sons and give him a fee, and he accordingly bought the reversion and gave security for the purchase-money, and upon a discovery of his mistake of the law he brought a bill to be relieved against the security, it was denied, unless upon payment of the full amount.[2]

§ 176. **Same.** — Another illustration may be derived from a case most vigorously contested and critically discussed, where upon the loan of money for which security was to be given, the parties deliberately took, after consultation with counsel, a letter of attorney, with a power to sell the property (ships) in case of non-payment of the money, instead of a mortgage upon the property itself, upon the mistake of law that the security by the former instrument would, in case of death or other accident, bind the property equally as strongly as a mortgage. The debtor died, and his estate being insolvent, a bill in equity was brought by the creditor against the administrators to reform the instrument or to give him a priority by way of lien on the property in exclusion of the general creditors. The court finally, after the most deliberate examination of the case at three successive stages of the cause, denied relief, upon the ground that the agreement was for a particular security selected by the parties, and not for security

[1] Pullen *v.* Ready, 2 Atk. 587, 591.
[2] Mildmay *v.* Hungerford, 2 Vern. 243.

generally; and that the court were asked to substitute another security for that selected by the parties, not upon any mistake of fact but upon a mistake of law, when such security was not within the scope of their agreement.[1]

§ 177. **Same.** — It is manifest that the whole controversy in this case turned upon the point whether a Court of Equity could grant relief where a security becomes ineffectual not by fraud or accident, or because it is not what the parties intended it to be, but because, conforming to that intention, the parties in executing it innocently mistook the law. It was the very security the parties had deliberately selected; but by unforeseen events it was not as good a security as they might have selected. It would have been most extraordinary and unprecedented for a Court of Equity under such circumstances to grant relief; for it would be equivalent to decreeing a new agreement not contemplated by the parties, instead of executing that actually made by them. If the party who was to execute the power of attorney had refused that and offered a mortgage, could he have insisted on such a substitute? If a mortgage had been agreed on, could he have compelled the other side to have accepted a letter of attorney? Certainly not. Equity may compel parties to execute their agreements, but it has no authority to make agreements for them or to substitute one for another. If there had been any mistake in the instrument itself, so that it did not contain what the parties had agreed on, that would have formed a very different case; for where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman either as to fact or to law does not fulfil that intention, or violates it, equity will correct the mistake so as to produce a conformity to the instrument.[2] In this case the instrument was intended to serve one purpose, when through a mistake of the draftsman it was for something else that did not express the agreement of the parties, and this is such a mistake as a court of equity will always correct, but if the rights of innocent third parties have intervened and they have relied upon the authority

[1] Hunt *v.* Rousmaniere, 21 U. S. 211, 5 L. Ed. 589, 26 U. S. 1, 7 L. Ed. 27; s. c. 2 Mason, R. 342, 3 Mason, R. 294; Errett *v.* Wheeler, 109 Minn. 157, 123 N. W. 414, 26 L. R. A. (N. S.) 818; Wadsworth *v.* Blake, 43 Minn. 509, 45 N. W. 1131; Emmert *v.* Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; Norman *v.* Norman, 26 S. C. 41. 11 S. E. 1096; Garwood *v.* Eldridge, 2 N. J. Eq. 145, 34 Am. Dec. 195.

[2] Hunt *v.* Rousmaniere, 21 U. S. 211, 5 L. Ed. 589.

conferred in the instrument under consideration, their rights would first be protected.[1]

§ 178. **Contracts Made under Mistake of Law Are Generally Valid.** — In a preceding section [2] it has been stated that agreements made and acts done under a mistake of law are (if not otherwise objectionable) generally held valid and obligatory. The doctrine is laid down in this guarded and qualified manner because it is not to be disguised that there are authorities which are supposed to contradict it, or at least to form exceptions to it. Indeed in one case Lord King is reported to have said that the maxim of law, "Ignorantia juris non excusat", was, in regard to the public, that ignorance cannot be pleaded in excuse of crimes; but that it did not hold in civil cases.[3] This broad statement is utterly irreconcilable with the well-established doctrine both of Courts of Law and Courts of Equity. The general rule certainly is (as has been very clearly stated by the Supreme Court of the United States) that a mistake of the law is not a ground for reforming a deed founded on such a mistake. And whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character, and to involve other elements of decision.[4]

§ 179. **Same.** — In illustration of this remark we may refer to a case commonly cited as an exception to the general rule. In that case the daughter of a freeman of London had a legacy of £10,000 left by her father's will upon condition that she should release her orphanage share; and after her father's death she

[1] Taylor *v.* Godfrey, 62 W. Va. 677, 59 S. E. 631; Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39; Lough *v.* Michael, 37 W. Va. 679, 17 S. E. 181; Heyder *v.* Association, 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49.

[2] Ante, § 175.

[3] Lansdowne *v.* Lansdowne, Moseley, R. 364; s. c. 2 Jac. & Walk. 205.

[4] Hunt *v.* Rousmaniere, 26 U. S. 1, 7 L. Ed. 27; s. c. 21 U. S. 174, 5 L. Ed. 589. See also Hepburn *v.* Dunlop, 23 U. S. 179, L. Ed. 179, 195; Shotwell *v.* Murray, 1 John. Ch. R. 512, 515; Lyon *v.* Richmond, 2 John. Ch. R. 51, 60; Storrs *v.* Barker, 6 John. Ch. R. 169, 170. Mr. Chancellor Kent has laid down the doctrine in equally strong terms. "It is rarely," says he, "that a mistake in point of law, with a full knowledge of all the facts, can afford ground for relief or be considered as a sufficient indemnity against the injurious consequences of deception practised upon mankind, &c. It would therefore seem to be a wise principle of policy that ignorance of the law with a knowledge of the facts cannot generally be set up as a defence." Storrs *v.* Barker, 6 John. Ch. R. 169, 170; Munroe *v.* Long, 35 S. C. 354, 14 S. E. 824, 28 Am. St. Rep. 851; Brock *v.* O'Dell, 44 S. C. 22, 21 S. E. 976; Heacock *v.* Fly, 14 Pa. St. 540; Dunn *v.* City of Superior, 148 Wis. 636, 135 N. W. 145.

accepted the legacy and executed the release. Upon a bill afterwards filed by her against her brother, who was the executor, the release was set aside and she was restored to her orphanage share, which amounted to £40,000. Lord Chancellor Talbot in making the decree admitted that there was no fraud in her brother, who had told her that she was entitled to her election to take an account of her father's personal estate, and to claim her orphanage share; but she chose to accept the legacy. His Lordship said: "It is true, it appears, the son (the defendant) did inform the daughter that she was bound either to waive the legacy given by the father or release her right to the custom, and so far she might know that it was in her power to accept either the legacy or orphanage part. But I hardly think she knew she was entitled to have an account taken of the personal estate of her father; and first to know what her orphanage part did amount to, and that when she should be fully apprised of this, then and not till then she was to make her election; which very much alters the case. For probably she would not have elected to accept her legacy had she known or been informed what her orphanage part amounted unto before she waived it and accepted the legacy." [1]

§ 180. **Same.** — It is apparent from this language that the decision of his Lordship rested upon mixed considerations, and not exclusively upon mere mistake or ignorance of the law by the daughter. There was no fraud in her brother; but it is clear that she relied upon her brother for knowledge of her rights and duties in point of law, and he, however innocently, omitted to state some most material legal considerations affecting her rights and duty. She acted under this misplaced confidence and was misled by it, which of itself constituted no inconsiderable ground for relief. But a far more weighty reason is that she acted under ignorance of facts; for she neither knew, nor had any means of knowing, what her orphanage share was when she made her election. It was therefore a clear case of surprise in matters of fact as well as of law. No ultimate decision was made in the case, it being compromised by the parties.

§ 181. **Same.** — The case of Evans *v.* Llewellyn [2] is expressly put in the decree upon the ground of surprise, "the conveyance having been obtained and executed by the plaintiffs improvidently." It was admitted that there was no sufficient proof

[1] Pusey *v.* Desbouvrie, 3 P. Will. 315, 321; 2 Ball & Beat. 182. See Pickering *v.* Pickering, 2 Beavan, R. 31, 56.

[2] 2 Bro. Ch. R. 150; s. c. 1 Cox, R. 333, more full.

of fraud or imposition practised upon the plaintiff (though the facts might well lead to some doubt on that point), and the plaintiff was certainly not ignorant of any of the facts which respected his rights. The Master of the Rolls (Sir Lloyd Kenyon, afterwards Lord Kenyon) said: "The party was taken by surprise. He had not sufficient time to act with caution; and therefore, though there was no actual fraud, it is something like fraud, for an undue advantage was taken of his situation. I am of opinion that the party was not competent to protect himself; and therefore this court is bound to afford him such protection, and therefore these deeds ought to be set aside as *improvidently* obtained. If the plaintiff had in fact gone back, I should not have rescinded the transaction." [1]

§ 182. **Relief Where There Is an Independent Equity.** — But there is an exception to the general rule that equity will not grant relief, where the mistake is the simple mistake of law. Equity always relieves against a mistake of law when the surrounding facts raise an independent equity in behalf of one suffering through the mistake. The plaintiff, in an action to recover land, had executed to the defendant a contract to sell, and the defendant, an ignorant, poor, harassed, and discouraged man agreed with the plaintiff to sell all of his interest in the contract for a bare nominal sum, and believed at the time that because he had defaulted in some of his payments, that he had forfeited all of his rights in the property. A few days after his sale to the plaintiff, he realized what his rights were, and in this action for the recovery of the possession of the lands, and to enforce the deed, the instrument was not allowed to prevail against the defendant. The defendant believed that he had forfeited his interest in the place he had hoped to have owned, and that the plaintiff was about to eject him. The plaintiff in good faith confirmed his mistaken belief. His equity was substantial and to him large; he released it in consequence of his mistaken belief when in this disturbed state of mind, without consideration to himself, and thereby enriched the plaintiff at his own expense. Immediately upon learning his rights, and within a few days after he had released his interest, the defendant made his tender and demand. The plaintiff refused because he knew that the property was then worth more than it was when he sold it. It would be highly inequitable to permit the plaintiff to retain the place which the defendant has, from almost the moment of learning of his legal

[1] 1 Cox, R. 340, 341.

rights, made every effort to redeem.[1] But in actions to recover money paid through a mistake of law, this standing alone, is not ground for relief to recover the payment.[2]

§ 183. **Same.** — There is no question but that one is entitled to recover back his money, where he has innocently left it in the hands of trustees, it being a part of the trust fund, to which he was legally entitled and the payment of which he could have enforced, and in consideration thereof he has received from the trustees merely a void promise that it shall be paid to him from the trust estate in future, with interest at a fixed rate, which promise both he and the trustees believed to be valid and binding, and who thereupon has given to them a release and discharge running both to them and to the trust estate, from all liability except upon the void promise, and he can, upon discovering the invalidity of the promise avoid or rescind his release and obtain the money or the part of the trust fund which was his rightful due.[3] And where the complainant, a widow woman, agreed to exchange her town lots for stocks in an industrial corporation, whose financial standing had been investigated by her agent, with whom the trade was to be made, and in the course of the investigation a concern whose name ended with the word "company" was investigated, rather than a concern by a similar name, whose name ended with the word "corporation", and the company that was under investigation was solvent, and the client relied upon the information given and believed that the stock that she was to receive was the stock in the solvent company. She made the investigation, but was led by the conduct of the defendant, whether innocent or wrongful, to investigate the wrong corporation, and her deed ought to be set aside.[4]

§ 184. **Ignorance as to Condition of One's Title, as Ground for Relief from Mistake.** — The most general class of cases relied on as exceptions to the rule is that class where the party has acted under a misconception or ignorance of his title to the property respecting which some agreement has been made or conveyance executed. So far as ignorance in point of fact of any title in the party is an ingredient in any of these cases, they fall under a very

[1] Bronson *v.* Leibold, 87 Conn. 293, 87 Atl. 979; Usher *v.* Wadsworth, 62 Conn. 429, 26 Atl. 538; Butterfield *v.* McNamara, 54 Conn. 94, 6 Atl. 188; Reggio *v.* Warren, 207 Mass. 525, 93 N. E. 805; Diebel *v.* Diebel, 116 Minn. 168, 133 N. W. 463.

[2] Railroad *v.* Soutter, 80 U. S. 524, 20 L. Ed. 543.

[3] Reggio *v.* Warren, 207 Mass. 525, 93 N. E. 805.

[4] Hutchinson *v.* Bambas, 249 Ill. 624, 94 N. E. 987.

different consideration.[1] But so far as the party, knowing all the facts, has acted upon a mistake of the law applicable to his title, they are proper to be discussed in this place. Upon a close survey many although not all of the cases in the latter predicament will be found to have turned not upon the consideration of a mere mistake of law stripped of all other circumstances, but upon an admixture of other ingredients going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise which equity uniformly regards as a just foundation for relief.[2]

[1] See Ramsden *v.* Hylton, 2 Ves. 304; Cann *v.* Cann, 1 P. Will. 727; Farewell *v.* Coker, cited 2 Meriv. 269; McCarthy *v.* Decaix, 2 Russ. & Mylne, 614. In this last case Lord Chancellor Brougham held that where a husband renounced his title to his wife's property, from whom he had been divorced, under a mistake in point of law that the divorce was valid and he had no longer any title to her property, and under a mistake of fact as to the amount of the property renounced, the information respecting which the other party knew and withheld from him, he was entitled to relief. But the relief seems to have been granted upon mixed considerations. His Lordship in one part of his opinion said: "What he (the husband) has done was in ignorance of law, possibly of fact; but in a case of this kind that would be one and the same thing." See also Corking *v.* Pratt, 1 Ves. 400.

[2] See Willan *v.* Willan, 16 Ves. 82. Mr. Jeremy (Eq. Jurisd. Pt. 2, ch. 2, p. 366) seems to suppose that there is something technical in the meaning of the word "surprise" as used in Courts of Equity; for, speaking upon what he says is technically called a case of surprise, he adds, "which [surprise] it seems is a term for the immediate result of a certain species of mistake upon which this court will relieve", a definition or description not very intelligible, and rather tending to obscure than to clear up the subject. In another place (ch. 3, p. 383, note) he says that surprise is often used as synonymous with fraud; but that "they may perhaps be distinguished by the circumstance that in instances to which the term 'fraud' is applied, an unjust design is presupposed; but that in those to which surprise is assigned, no fraudulent intention is to be presumed. In the former case one of the parties seeks to injure the other; in the latter both of them act under an actual misconception of the law." Whether this explanation makes the matter much clearer may be doubted. The truth is that there does not seem anything technical or peculiar in the word "surprise" as used in Courts of Equity. The common definition of Johnson sufficiently explains its sense. He defines it to be the act of taking unawares; the state of being taken unawares; sudden confusion or perplexity. When a Court of Equity relieves on the ground of surprise, it does so upon the ground that the party has been taken unawares; that he has acted without due deliberation, and under confused and sudden impressions. The case of Evans *v.* Llewellyn, 2 Bro. Ch. R. 150, is a direct authority to this very view of the matter. There may be cases where the word "surprise" is used in a more lax sense, and where it is deemed presumptive of, or approaching to, fraud. (1 Fonbl. Eq. B. 1, ch. 2, § 8, p. 125; Earl of Bath and Montague's Case, 3 Ch. Cas. 56, 74, 103, 114.) But it will always be found that the true use of it is where something has been done which was unexpected, and operated to mislead or confuse the

§ 185. **Same.** — It has been laid down as unquestionable doctrine, that if a party acting in ignorance of a plain and settled principle of law is induced to give up a portion of his indisputable property to another under the name of a compromise, a Court of Equity will relieve him from the effect of his mistake.[1] But where a doubtful question arises, such as a question respecting the true construction of a will, a different rule prevails; and a compromise fairly entered into with due deliberation will be upheld in a Court of Equity as reasonable in itself to terminate the differences by dividing the stake, and as supported by principles of public policy.[2]

§ 186. **Same.** — In regard to the first proposition the terms in which it is expressed have the material qualification that the party has upon plain and settled principles of law a clear title, and yet is in gross ignorance that he possesses any title whatsoever. Thus in England, if the eldest son who is heir at law of all the undisposed-of fee-simple estates of his ancestor, should, in gross ignorance of the law, knowing however that he was the eldest son, agree to divide the estates with a younger brother, such an agreement, executed or unexecuted, would be held in a Court of Equity invalid, and relief would be accordingly granted. In a case thus strongly put there may be ingredients which would give a coloring to the case independent of the mere ignorance of the law. If the

parties on the sudden, and on that account has been deemed a fraud. See Earl of Bath and Montague's Case, 3 Ch. Cas. 56, 74, 114; Irnham *v.* Child, 1 Bro. Ch. 92; Marquis of Townshend *v.* Stangroom, 6 Ves. 327, 338; Twining *v.* Morrice, 2 Bro. Ch. R. 326; Willan *v.* Willan, 16 Ves. 81, 86, 87. In Evans *v.* Llewellyn, 1 Cox, R. 340, the Master of the Rolls, adverting to the cases of surprise where an undue advantage is taken of the party's situation, said: "The cases of infants dealing with guardians, of sons with fathers, all proceed upon the same general principles and establish this, that if the party is in a situation in which he is not a free agent and is not equal to protecting himself, this court will protect him. See 1 Fonbl. Eq. B. 1, ch. 2, § 8. See post, §§ 234, 235, and note (1), 236, 237, 238, 239, 240, 242.

See Jordan *v.* Stevens, 51 Me. 78; Freeman *v.* Curtis, Ib. 140; Forman *v.* Wright, 11 C. B. 481, 492 (innocent misrepresentation of law); Carley *v.* Lewis, 24 Ind. 23; Tyson *v.* Tyson, 31 Md. 134.

[1] Naylor *v.* Winch, 1 Sim. & Stu. 555. See also 1 Ves. 126; Moseley, R. 364; 2 Jac. & Walk. 205; Leonard *v.* Leonard, 2 B. & Beatt. 180; Dunnage *v.* White, 1 Swanst. 137. See Hunt *v.* Rousmaniere, 21 U. S. 174, 5 L. Ed. 589; s. c. 26 U. S. 1, 7 L. Ed. 27; Gudon *v.* Gudon, 3 Swanst. 400. In the very case in which this doctrine is laid down in such general terms, relief was denied because the claim was doubtful, and the compromise was after due deliberation. Naylor *v.* Winch, 1 Sim. & Stu. 555. Is there any distinction between ignorance of a principle of law and mistake of a principle of law as to this point? See 1 Madd. Ch. Pr. 61; Whelen's App. 70 Pa. St. 410.

[2] Ibid.; Pickering *v.* Pickering, 2 Beavan, R. 31, 56.

younger son were not equally ignorant, there would be much ground to suspect fraud, imposition, misrepresentation, or undue influence on his part.[1] And if he were equally ignorant, the case would exhibit such a gross mistake of rights as would lead to the conclusion of such great mental imbecility, or surprise, or blind and credulous confidence on the part of the eldest son, as might fairly entitle him to the protection of a Court of Equity upon general principles.[2] Indeed where the party acts upon the misapprehension that he has no title at all in the property, it seems to involve in some measure a mistake of fact, that is, of the fact of ownership arising from a mistake of law. A party can hardly be said to intend to part with a right or title of whose existence he is wholly ignorant; and if he does not so intend, a Court of Equity will in ordinary cases relieve him from the legal effect of instruments which surrender such unsuspected right or title.[3]

§ 187. **Same.** — One of the earliest cases on this subject is Turner *v.* Turner (in 31 Car. 2),[4] where the plaintiff's father had lent a sum on mortgage to A, who mortgaged lands to the father and his heirs with a proviso that on payment of the money to the

[1] Jeremy on Eq. Jurisd. Pt. 2, ch. 2, p. 366; Leonard *v.* Leonard, 2 B. & Beatt. 182.

[2] See Hunt *v.* Rousmaniere, 21 U. S. 174, 5 L. Ed. 589; s. c. 26 N. S. 1, 7 L. Ed. 27; s. c. 12 Fed. Cas. pp. 933, 938. See Ayliffe's Pand. B. 2, tit. 15, p. 116.

[3] See Ramsden *v.* Hylton, 2 Ves. 304, 2 Meriv. R. 269. I am aware that generally where the facts are known the mistake of the title of heirship is treated as a mistake of law. Indeed in the civil law it is put as the most prominent illustration of the distinction between ignorance of fact and ignorance of law. "Si quis nesciat se cognatum esse, interdum in jure, interdum in facto, errat. Nam si et liberum se esse, et ex quibus natus sit, sciat, jura autem cognationis habere se nesciat, in jure errat. At si quis forte expositus, quorum parentum esset, ignoret, fortasse et serviat alicui, putans se servum esse; in facto, magis quam in jure errat." Dig. Lib. 22, tit. 6, l. 1, § 2; Pothier, Pand. Lib. 22, tit. 6, § 1, n. 1; 1 Domat, Civil Law, B. 1, tit. 18, § 1, n. 4. Is ownership or heirship a conclusion of law, or of fact, or a mixed result of both? Is title to an estate a fact or not? Is ignorance of the title when all the facts on which it legally depends are known, ignorance of a fact, or of law? Mr. Powell puts the case of Lansdowne *v.* Lansdowne (Moseley, R. 364) as a case of misrepresentation of a fact, that is, that the party was not heir, when in fact he was heir. See 2 Powell on Contracts, 196. An error of law, in relation to heirship, is not, in the civil law, always fatal to the party. It will not deprive him of a right resulting from his heirship; as if a nephew accounts with an uncle for the whole effects of a deceased brother upon the mistake of law that the uncle was sole heir, he shall be restored to his rights. 1 Domat, Civil Law, B. 1, tit. 18, § 1, n. 15. The rule of the Civil Law is, "Juris ignorantia non prodest adquirere volentibus; suum vero petentibus non nocet." Dig. Lib. 22, tit. 6, l. 7.

[4] 2 Rep. in Ch. 81 [154].

father or his *heirs* the premises were to be reconveyed to A. The plaintiff was executor of his father, and claimed the mortgage as vesting in the executor and not in the heirs. The defendant was the son and heir at law of the plaintiff's eldest brother, and set up a release of this mortgage and an allotment of it to him upon an agreement made among the heirs for a division of the personal estate and a subsequent receipt of the mortgage by him. The plaintiff insisted that at the time of the release he looked on the mortgage as belonging to the defendant as heir at law, and knew not his own title thereto; and that the mortgage was worth £8,000, and the shares on the division only £250 apiece. The Lord Chancellor (Lord Nottingham) relieved the plaintiff, stating that the plaintiff had an undoubted right to the mortgaged premises. This case is reported without any statement of the grounds of the decision, so that it is impossible now to ascertain them. There may have been surprise, or imposition, or undue influence; or the defendant might have well known the plaintiff's rights, and suppressed his own knowledge of them. If it proceeded upon the naked ground of a mistake of law, it is not easily reconcilable with other cases. But if it proceeded upon the ground that the plaintiff had no knowledge of his title to the mortgage, and therefore did not intend to release any title to it, the release might well be relieved against as going beyond the intentions of the parties upon a mutual mistake of the law. It might then be deemed in some sort a mistake of fact as well as of law. It was certainly a plain mistake of the settled law; and if both parties acted under a mutual misconception of their actual rights, they could not justly be said to have intended what they did. Mutual misapprehension of rights as well as of the effect of agreements, may properly furnish in some cases a ground for relief.[1]

§ 188. **Same.** — In Bingham *v.* Bingham[2] there was a devise by A to his eldest son and heir B in fee tail, limiting the reversion to his own right heirs. B left no issue and devised the estate to the plaintiff. The defendant had brought an ejectment for the estate under the will, and the plaintiff purchased the estate of the defendant for £80, under a mistake of law that the devise to him by B could not convey the fee. Having paid the purchase-money, he now brought his bill to have it refunded, alleging

[1] Willan *v.* Willan, 16 Ves. 81.

[2] 1 Ves. 126; Belt's Sup. 79. See Leonard *v.* Leonard, 2 B. & Beatt. 183.

in the bill that he was ignorant of the law, and persuaded by the defendant, and his scrivener and conveyancer, that B had no power to make the devise. The Master of the Rolls, sitting for Lord Hardwicke, granted the relief, saying that though no fraud appeared and the defendant apprehended he had a right, yet there was a plain mistake such as the court was warranted to relieve against. It is certainly not very easy to reconcile this case with the general doctrine already stated. It is admitted by the report that the defendant supposed he had a right; and indeed it was probably a case of a family compromise upon a doubted if not a doubtful right, and a mutual claim and a mutual ignorance of the law. If so, it trenches upon that class of cases, and is inconsistent with them. If on the other hand the defendant's title was adverse and not a family controversy, still if the agreement was fairly entered into by the contending parties, it is difficult to perceive why it should have been set aside merely because in the event the title turned out to be in the plaintiff.[1] There were probably some circumstances in the case material to the decision which have not reached us; otherwise it would conflict with other cases already cited.[2]

[1] See Leonard *v.* Leonard, 2 B. & Beatt. 171, 180, 182.

[2] Mr. Belt, in his Supplement (p. 79), has given a more full account of the facts of the case, from the Register's book, which I have followed. As a family compromise, or a compromise with a stranger, claiming an adverse right under a mutual mistake, but in good faith, it is difficult to find any support for it in other authorities. See Stockley *v.* Stockley, 1 V. & B. 23; Cory *v.* Cory, 1 Ves. 19; Gordon *v.* Gordon, 3 Swanston, R. 463, 467, 471, 474, 477; Cann *v.* Cann, 1 P. Will. 723; 1 Ves. & B. 30; Naylor *v.* Winch, 1 Sim. & Stu. 564, 565; Leonard *v.* Leonard, 2 B. & Beatt. 171, 180, 182. The case of Corking *v.* Pratt (1 Ves. 400, and Belt's Supplement, 176) seems to have turned upon a mistake, not of law, but of fact. But then it does not appear that at the time either party knew what the personal estate would ultimately amount to, and it might have been a matter of great doubt, and a compromise accordingly made. If so, could it be afterwards set aside? (See Burt *v.* Barlow, 3 Bro. Ch. R. 451; Leonard *v.* Leonard, 2 B. & Beatt. 171, 180.) If the case turned upon the ground of a suppression of facts, known to the mother and not to the daughter, or upon undue influence or imposition, there could be little difficulty in supporting it. The case of Ramsden *v.* Hylton (2 Ves. 304; Belt's Supplement, 350) turned upon other considerations. How can the case of Bingham *v.* Bingham, as a case standing upon general principles, be reconciled with Mildmay *v.* Hungerford (2 Vern. 243) and Pullen *v.* Ready (2 Atk. 587, 591)? Lord Cottenham, in Stewart *v.* Stewart, 6 Clark & Finell. R. 968, said: "Bingham *v.* Bingham was not a case of compromise, but of a sale by the defendant to the plaintiff of an estate which was already his; and a return of the purchase-money was decreed at the Rolls upon the ground of mistake. That case therefore does not bear directly upon the present. If it were necessary to consider the principle of that decree, it

§ 189. **Same.** — The case of Lansdowne *v.* Lansdowne [1] was to the following effect: The plaintiff, who was heir at law and son of the eldest brother, had a controversy with his uncle (who was the youngest brother), whether he or his uncle was heir to the estate of another deceased brother of his uncle; and they consulted one Hughes, who was a schoolmaster and their neighbor, and he gave it as his opinion, upon examining the Clerk's Remembrancer, that the uncle had the right, because lands could not ascend; upon which the plaintiff and his uncle agreed to divide the lands between them, and in pursuance of this agreement they executed first a bond, and then conveyances of the shares fixed on for each. The plaintiff sought to be relieved against these instruments, alleging in his bill that he had been surprised and imposed upon by Hughes and his uncle. The uncle being dead, his son and Hughes were made defendants to the bill; and Hughes in his answer admitted that he had given the opinion, being misled by the book, and that he had recommended the parties to take further advice; but that the plaintiff had afterwards told him that if his uncle would, he would agree to share the land between them, let it be whose right it would, and thereby prevent all disputes and lawsuits. Upon which Hughes prepared the papers, and they were executed accordingly. Lord Chancellor King decreed that it appeared that the bond and conveyances "were obtained by mistake and misrepresentation of the law," and ordered them to be given up to be cancelled. It was upon this occasion that his Lordship is reported to have used the language already quoted, that the maxim that ignorance of the law was no excuse, did not apply to civil cases; but if his judgment proceeded upon that ground, it was (as has been already stated) manifestly erroneous. This case has been questioned on several occasions, and is certainly open to much criticism. It appears to have been a case of a family dispute and compromise made by parties equally innocent, and upon a doubted question of title under a mutual mistake of the law. Under such circumstances there is great difficulty in sustaining it in point of principle or authority. It was most probably decided by Lord King on the untenable ground already suggested. If indeed it proceeded

might not be easy to distinguish that case from any other purchase in which the vendor turns out to have had no title. In both there is a mistake, and the effect of it in both is, that the vendor receives and the purchaser pays money without the intended equivalent." See also Evans *v.* Llewellyn, 2 Bro. Ch. R. 150.

[1] Moseley, R. 364; s. c. 2 Jac. & Walk. 205.

upon the ground of undue confidence in Hughes's opinion, or was induced by his undue persuasions and influence, such a misrepresentation of the law by him might, under such circumstances, furnish a reason for relief.[1] But that does not appear in any report of the case.[2]

[The effect of a written contract upon the rights of the parties differs very widely sometimes from what was intended to be the real agreement, but even this affords no right to relief. A lodge contracted with the owner of the store to permit it to construct another story over the store for use as a lodge-room. The story

[1] See Fitzgerald *v.* Peck, 4 Littell, 127.

[2] The case of Lansdowne *v.* Lansdowne has been doubted on several occasions. The report in 2 Jac. & Walk. 205 is more full than that in Moseley, though to the same effect. The decree was that the agreement "was obtained by a mistake and misrepresentation of the law," which under certain circumstances might furnish a ground for relief. The case was closely criticised and doubted by the Supreme Court of the United States, in Hunt *v.* Rousmaniere, 21 U. S. 174, 5 L. Ed. 589; and 26 U. S. 1, 7 L. Ed. 27. The court seemed to think it might be explicable upon the ground that the plaintiff was ignorant of the fact that he was the eldest son; or, if he mistook his legal rights, that he was imposed upon by some unfair representations of his better-informed opponent; or that his ignorance of the law of primogeniture demonstrated such mental imbecility as would entitle him to relief. There is an apparent error in the suggestion of the Supreme Court that there was an award in the case. Hughes did not act as an arbitrator, but was merely consulted as a friend. If there had been a plain mistake of the law by an arbitrator, that would of itself in many cases have been a ground of relief. Corneforth *v.* Geer, 2 Vern. 705; Ridout *v.* Pain, 3 Atk. 494. Mr. Powell (on Contracts, Vol. 2, p. 196) puts the case of Lansdowne *v.* Lansdowne as an illustration of a mistake of a fact, that is, of heirship. In Stewart *v.* Stewart, 6 Clark & Finell. R. 966, Lord Cottenham made the following remarks: "Lansdowne *v.* Lansdowne is a very strong case of setting aside a compromise, and a conveyance in pursuance of it; but it is impossible to ascertain the facts. It appears that fraud was alleged against the younger brother; and Hughes, who had advised upon the rights of the two, was made a defendant, which could only have been done upon an imputation of fraud, and in Moseley's Report it is said that the Lord Chancellor's decree proceeded upon the ground of mistake and misrepresentation. But Mr. Jacob's extract from the Registrar's book is no doubt correct in stating the ground to be 'misrepresentation of the law.' It is however to be observed that in Moseley the eldest son is reported to have said that he would rather divide the estate than go to law, though he had the right; and that the court is represented to have said that the maxim 'ignorantia juris non excusat' did not hold in civil cases, which, it will be seen, has not been a doctrine recognized in modern cases." He afterwards added: "Bilbie *v.* Lumley is directly opposed to the doctrine upon which Lansdowne *v.* Lansdowne is stated in Moseley to have been decided; for it was held that 'money paid by one with full knowledge (or the means of such knowledge in his hands) of all the circumstances cannot be recovered back again on account of such payment having been made under an ignorance of the law.'" Stewart *v.* Stewart, 6 Clark & Finnell. 969. See note to § 173.

was built and paid for by the lodge, and when the question arose as to the proper evidence of right and ownership of the lodge-room, it was suggested by one of the lodge members that a lease for 99 years be taken, which was done. Subsequently, the entire structure needed repairs and the lodge had the work done and sued the owner of the land in assumpsit for the amount expended, whereupon he sued the lodge for a rescission of the lease, for that the legal effect of it was not what was contemplated by the parties at the time of its execution. The parties cannot be said to have been mutually mistaken as to any question of fact. They each understood fully what language was to be contained in the instrument. It is true the legal effect of that language is different from what they understood it to be or from what they intended. This cannot be said, in any sense, to be a mistake of fact. It was a mistake of law as to the legal effect of the language used and adopted by the parties and is not such a mistake as equity will relieve against. The general rule is that a mistake of law, pure and simple, is not adequate ground for relief.[1] Nor will a deed be corrected where it uses the words "heirs" instead of "children", where the grantor took the deed and read it and stated that he understood it and it suited him.[2] And where the intention was that the grantee was "to hold only during his natural life, and upon (his) death to be held in fee simple by his heirs," the word "heirs" was used and the word "children" was intended, this affords no ground for a correction of the instrument.[3] The so-called distinction between ignorance of law and a mistake of law, is rather a nicety than a reality, and the general rules as to mistake of law govern.[4]]

§ 190. **Distinction between Mistake of Plain Principle of Law, and Principle Not Plain to Persons Generally.** — The distinction between cases of mistake of a plain and settled principle of law and cases of mistake of a principle of law not plain to persons generally, but which is yet constructively certain as a foundation of title, is not of itself very intelligible, or practically speaking very easy of application considered as an independent element of decision. In contemplation of law all its rules and principles are deemed certain, although they have not as yet been recognized by public

[1] Tilton *v.* Fairmount Lodge, 149 Ill. 530, 91 N. E. 644.

[2] Atherton *v.* Roche, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591.

[3] Fowler *v.* Black, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670.

[4] Munro *v.* Long, 35 S. C. 354, 14 S. E. 824, 28 Am. St. Rep. 851; Alabama & V. Ry. Co. *v.* Jones, 73 Miss. 110, 19 So. 105, 55 Am. St. Rep. 488.

adjudications. This doctrine proceeds upon the theoretical ground that " Id certum est quod certum reddi potest;" and that decisions do not make the law but only promulgate it. Besides, what are to be deemed plain and settled principles? Are they such as have been long and uniformly established by adjudications only, or is a single decision sufficient? What degree of clearness constitutes the line of demarcation? If there have been decisions different ways at different times, which is to prevail?[1] If a majority of the profession hold one doctrine and a minority another, is the rule to be deemed doubtful, or is it to be deemed certain?

§ 191. **Same.** — Take the case commonly put on this head of the construction of a will. Every person is presumed to know the law; and though opinions may differ upon the construction of the will before an adjudication is made, yet when it is made it is supposed always to have been certain. It may have been a question at the bar whether a devise was an estate for life, or in tail, or in fee simple. But when the court has once decided it to be the one or the other, the title is always supposed to have been fixed and certain in the party from the beginning. It will furnish a sufficient title to maintain a bill for the specific performance of a contract of sale of that title.

§ 192. **Same.** — Where there is a plain and established doctrine on the subject so generally known and of such constant occurrence as to be understood by the community at large as a rule of property, such as the common canons of descent, there a mistake in ignorance of the law, and of title founded on it, may well give rise to a presumption that there has been some undue influence, imposition, mental imbecility, surprise, or confidence abused. But in such cases the mistake of the law is not the foundation of the relief, but it is the medium of proof to establish some other proper ground of relief.

§ 193. **Conveyance by Mistake to Husband and Wife.** — When a contract was made between husband and wife, and a third party, by which they were to purchase a lot of land, and it was evidently

[1] There is much masculine force in the reasoning of Mr. Chancellor Kent on this subject, in Lyon *v.* Richmond, 2 John. Ch. R. 60. "The court," says he, "do not undertake to relieve parties from their acts and deeds fairly done, though under a mistake of the law. Every man is to be charged, at his peril, with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. And to suffer a subsequent judicial decision in any one given case on a point of law to open or annul everything that has been done in other cases of the like kind for years before under a different understanding of the law, would lead to the most mischievous consequences."

intended at the time that both the husband and the wife should have an equal interest in the subject-matter of the contract as joint purchasers, the mistake in inserting the name of the wife is not such a one as will be corrected, where the original grantees have been divorced since the execution of the contract, and especially where the effect of the divorce would be to defeat any rights the wife had. It is well settled that for a bare mistake of law relief will rarely, if ever, be afforded, yet equity will interfere where it appears that the defendant, availing himself of the mistake, will take an unconscionable advantage of the plaintiff without consideration; the plaintiff being blameless, and the defendant being in no position entitling him to equitable protection.[1]]

§ 194. **Same.** — Lord Eldon, in a case of a family agreement, seems to have thought that there might be a distinction between cases where there is a doubt raised between the parties as to their rights, and a compromise is made upon the footing of that doubt, and cases where the parties act upon a supposition of right in one of the parties, without a doubt upon it, under a mistake of law. The former might be held obligatory, when the latter ought not to be.[2] But his Lordship admitted that the doctrine attributed to Lord Macclesfield was otherwise, denying the distinction, and giving equal validity to agreements entered into upon a supposition of a right, and of a doubtful right.[3] It may be gathered however from these remarks that Lord Eldon's own opinion was that an agreement made or act done not upon a doubt of title,

[1] Diebel *v.* Diebel, 116 Minn. 168, 133 N. W. 463.

[2] Stockley *v.* Stockley, 1 V. & Beames, 31.

[3] Ibid. Cann *v.* Cann, 1 P. Will. 727; Stapilton *v.* Stapilton, 1 Atk. 10. Lord Eldon was here speaking in the case of a family agreement, and not between strangers; but it is by no means certain that he meant to limit his observations to such cases. In Dunnage *v.* White, 1 Swanst. R. 137, 151, Sir Thomas Plumer said: "It is then insisted that the deed may be supported as a family arrangement, according to the doctrine of Stapilton *v.* Stapilton and Cann *v.* Cann. Undoubtedly parties entitled in different events may, while the uncertainty exists, each taking his chance, effect a valid compromise. In Stapilton *v.* Stapilton, the legitimacy of the eldest son was doubtful. That was a question proper to be so settled; and the settlement was a consideration which gave effect to the deed." In Stewart *v.* Stewart, 6 Clark & Finnell. R. 967, Lord Cottenham used the following language: "In Stapilton *v.* Stapilton, Henry, the eldest son, being illegitimate, Philip, the second son, received no consideration for the arrangement by which the estates of which Philip was tenant in tail, subject to his father's life, were divided between them; but Lord Hardwicke, approving the doctrine of Lord Macclesfield in Cann *v.* Cann, said, 'that an agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of parties;

but upon ignorance of any title in the party, ought not to be obligatory upon him, although arising solely from a mistake of law.

§ 195. **Contract in Ignorance of One's Own Title, and Supposing Clear Title in Another.** — There may be a solid ground for a distinction between cases where a party acts or agrees in ignorance of any title in him, or upon the supposition of a clear title in another, and cases where there is a doubt or controversy or litigation between parties as to their respective rights.[1] In the former cases (as has been already suggested) the party seems to labor in some sort under a mistake of fact as well as of law.[2] He supposes as a matter of fact that he has no title, and that the other party has a title to the property. He does not intend to release or surrender his title, but the act or agreement proceeds upon the supposition that he has none. Lord Macclesfield, in the very case in which the language already cited,[3] is attributed to him, is reported to

for the right must always be on the one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation for an agreement;' and he therefore maintained the arrangement, and decreed a performance of what remained to be done to carry it into effect."

[1] In Evans *v.* Llewelyn (2 Bro. Ch. R. 150; s. c. 1 Cox, R. 333), the Master of the Rolls (Lord Kenyon) did not seem to recognize any such distinction. The decree in that case seems to have been put upon the mere ground of surprise. But from Mr. Cox's Report it would seem that the party was not ignorant of the facts, or even of the law of his title. Mr. Brown represents the case a little differently. In Lang *v.* The Bank of the United States, Mr. Chief Justice Shippen, speaking of the effect of a mistake of right of a party, and that he was not barred by it, said: "The case of Penn *v.* Lord Baltimore is decisive to this point. I was present at the argument half a century ago, and heard Lord Hardwicke say, though it is not mentioned in the Report, that if Lord Baltimore had made the agreement in question, under a mistake of his right to another degree of latitude, he ought to be relieved; but that he was not mistaken." The cases of Ramsden *v.* Hylton, 2 Ves. 304, and Farewell *v.* Coker, cited 2 Meriv. R. 269, were upon mistakes of fact, not of law; or rather attempts were there made to extend the releases to property never intended by the parties. In Neale *v.* Neale, 1 Keen, R. 672, 683, A and B having an apparent title to copyhold lands as tenants in common in fee under the will of their father, entered into a parol agreement to make partition of the devised lands, and divided them accordingly, A, the elder brother, taking the larger share, a doubt being entertained whether their father had a right to devise the lands. A was in fact at the time of the agreement tenant in tail under the limitation, under a surrender made by his grandfather. After A's death, B, having discovered his own title as tenant in tail, repudiated the agreement, and brought an ejectment to recover the whole estate. On a bill filed by the devisee of A, the court, upon the ground on which it supports family arrangements, supported the partition, and decreed B to do all necessary acts to bar the entail.

[2] Ante, § 195. And see 2 Powell on Contracts, p. 196; Dunnage *v.* White, 1 Swanst. 137, 151; Harvey *v.* Cooke, 4 Russell, R. 34.

[3] Ante, § 187.

have said that if the party releasing is ignorant of his right to the estate, or if his right is concealed from him by the person to whom the release is made, there would be good reasons for setting aside the release.[1] But (he added) the mere fact that the party making the release had the right and was controverting it with the other party can furnish no ground to set aside the release; for by the same reason there could be no such thing as compromising a suit, nor room for any accommodation. Every release supposes the party making it to have a right.[2]

§ 196. **Compromises through Mistake.** — The whole doctrine of the validity of compromises of doubtful rights rests on this foundation.[3] If such compromises are otherwise unobjectionable they will be binding, and the right will not prevail against the agreement of the parties; for the right must always be on one side or the other, and there would be an end of compromises if they might be overthrown upon any subsequent ascertainment of rights contrary thereto.[4] If therefore a compromise of a doubtful right is fairly made between parties, its validity cannot depend upon any future adjudication of that right.[5] And where compromises of this sort are fairly entered into, whether the uncertainty rests upon a doubt of fact or a doubt in point of law, if both parties are in the same ignorance the compromise is equally binding, and

[1] Cann *v.* Cann, 1 P. Will. 727; Ramsden *v.* Hylton, 2 Ves. 304.

[2] 1 P. Will. 727. In Leonard *v.* Leonard (2 B. & Beatt. 180), Lord Manners takes notice of a distinction between a mere release and a deed of compromise. The former supposes that the parties know their rights, and that one surrenders his rights to the other; in the latter, that both parties are ignorant of their rights, and the agreement is founded in that ignorance, and that the party surrendering may in truth have nothing to surrender. But is it true in all cases that a release presupposes a right? Lord Redesdale has said that the accepting of a release is in no case an acknowledgment that a right existed in the releasor. It amounts only to this, — I give you so much for not seeking to disturb me. Underwood *v.* Lord Courtown, 2 Sch. & Lefr. 67.

[3] See the dictum of Lord Hardwicke in Brown *v.* Pring, 1 Ves. 407, 408, as to compromises made by parties with their eyes open and rightly informed.

[4] Cann *v.* Cann, 1 P. Will. 727; Stapilton *v.* Stapilton, 1 Atk. 10; Stockley *v.* Stockley, 1 V. & B. 29, 31; Naylor *v.* Winch, 1 Sim. & Stu. 555; Goodman *v.* Sayers, 2 Jac. & Walk. 263; Pickering *v.* Pickering, 2 Beavan, R. 31, 56; Stover *v.* Mitchell, 45 Ill. 213; Morris *v.* Munroe, 30 Ga. 630; Ex parte Lucy, 4 DeG. M. & G. 356; Stewart *v.* Stewart, 6 Clark & F. 911, 967.

[5] Leonard *v.* Leonard, 2 Ball & Beatt. 179, 180; Shotwell *v.* Murray, 1 John. Ch. R. 516; Lyon *v.* Lyon, 2 John. Ch. R. 51; Dunnage *v.* White, 1 Swanst. 151, 152; Harvey *v.* Cooke, 4 Russell, 34; Stewart *v.* Stewart, 6 Clark & Finnell. 969.

cannot be affected by any subsequent investigation and result.[1] But if the parties are not mutually ignorant, the case admits of a very different consideration, whether the ignorance be of a matter of fact or of law.[2] It has been emphatically said that no man can doubt that the Court of Chancery will never hold parties acting upon their rights to be bound unless they act with full knowledge of all the doubts and difficulties that do arise. But if parties will with full knowledge act upon them, though it turns out that one gains an advantage from a mistake in point of law, yet if the agreement was reasonable and fair at the time it shall be binding.[3] And transactions are not in the eye of

[1] Leonard *v.* Leonard, 2 B. & Beatt. 179, 180. See Gordon *v.* Gordon, 3 Swanst. 470; Pickering *v.* Pickering, 2 Beavan, R. 31, 56; Gossmour *v.* Pigge, The (English) Jurist, June 22, 1844, p. 526.

[2] Id. 180, 182; Gordon *v.* Gordon, 3 Swanst. R. 400, 467, 470, 473, 476; Stewart *v.* Stewart, 6 Clark & Finnell. 969. See also a case cited by Lord Thurlow in Mortimer *v.* Capper, 1 Bro. Ch. R. 158. In respect to compromises, it is often laid down that they must be reasonable. (Stapilton *v.* Stapilton, 1 Atk. 10.) By this we are not to understand that the consideration is adequate and there is no great inequality, but that the circumstances are such as to demonstrate that no undue advantage was taken by either party of the other. Thus in a case of compromise of doubtful rights under a will, the Master of the Rolls (Sir R. P. Arden) said: "It (the agreement) must be reasonable. No man can doubt that this court will never hold parties acting upon their rights, doubts arising as to those rights, to be bound, unless they act with a full knowledge of all the doubts and difficulties that arise. But if parties will, with full knowledge of them, act upon them, though it turns out that one gains a great advantage, if the agreement was fair and reasonable at the time it shall be binding. There was a case before the Lord Chancellor, who spoke to me upon it, in which it was held that the court will enforce such an agreement, though it turns out that the parties were mistaken in point of law, *even supposing counsel's opinion was wrong*. Gibbons *v.* Caunt, 4 Ves. 849. See Stapilton *v.* Stapilton, 2 Atk. 10; Naylor *v.* Winch, 1 Sim. & Stu. 555; Neale *v.* Neale, 1 Keen, R. 672, 683; Stewart *v.* Stewart, 6 Clark & Finnell. 969.

[3] Gibbons *v.* Caunt, 4 Ves. R. 849. See also Dunnage *v.* White, 1 Swanst. R. 137. See Stewart *v.* Stewart, 6 Clark & Finnell. 969; Pickering *v.* Pickering, 2 Beavan, R. 31, 56. In this case Lord Langdale said: "When parties whose rights are questionable have equal knowledge of facts and equal means of ascertaining what their rights really are, and they fairly endeavor to settle their respective claims among themselves, every court must feel disposed to support the conclusions or agreements to which they may fairly come at the time, and that notwithstanding the subsequent discovery of some common error; and if in this case the parties had been on equal terms, the agreement might have been supported. But the parties were not on equal terms; and moreover I am of opinion that under the circumstances it was the duty of the defendant to see that the nature of the transaction was fully explained to his mother, and to see that she was placed in a situation to have the question properly considered on her behalf; and whatever may have been his intention in this respect (for I do not think it necessary to impute to him an intentional fraud throughout

a Court of Equity to be treated as binding even as family arrangements, where the doubts existing as to the rights alleged to be compromised are not presented to the mind of the party interested.[1]

§ 197. **Same.** — There are cases of family compromises where upon principles of policy, for the honor or peace of families, the doctrine sustaining compromises has been carried further. And it has been truly remarked that in such family arrangements the Court of Chancery has administered an equity which is not applied to agreements generally.[2] Such compromises fairly and reasonably made,[3] to save the honor of a family, as in case of suspected illegitimacy, to prevent family disputes and family forfeitures, are upheld with a strong hand, and are binding when in cases between mere strangers the like agreements would not be enforced.[4] Thus it has been said that if on the death of a person seised in fee a dispute arises who is heir, and there is room for a rational doubt as to that fact, and the parties deal with each other openly and fairly, investigating the subject for themselves, and each communicating to the other all that he knows and is informed of, and at length they agree to distribute the property, under the notion that the elder claimant is illegitimate, although it turns out afterwards that he is legitimate, there the court will not disturb such an arrangement merely because the fact of legitimacy is subsequently established.[5] Yet in such a case the party acts under a mistake of fact. In cases of ignorance of title upon a plain mis-

the transaction), I am of opinion that he did not perform this duty: and on the whole it appears to me that he is not entitled to the benefit of the settled account, and that the agreement must be set aside."

[1] Henley *v.* Cooke, 4 Russell, R. 34.

[2] Stockley *v.* Stockley, 1 V. & Beames, 29. See Hurlbut *v.* Phelps, 30 Conn. 42, 50; Williams *v.* Sand, 3 Cold, 533.

[3] On full disclosure of material facts by each party to the other. Smith *v.* Pincombe, 16 Jur. 205; s. c. 10 Eng. L. & E. 50. See Groves *v.* Perkins, 6 Sim. 576.

[4] Stapilton *v.* Stapilton, 1 Atk. 210; Cann *v.* Cann, 1 P. Will. 727; Stockley *v.* Stockley, 1 V. & Beames, 30, 31; Persse *v.* Persse, 1 West, R. in House of Lords, 110; Cory *v.* Cory, 1 Ves. 19; Leonard *v.* Leonard, 2 B. & Beatt. 171, 180; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*); Gordon *v.* Gordon, 3 Swanst. 463, 470, 473, 476; Dunnage *v.* White, 1 Swanst. 137, 151; Harvey *v.* Cooke, 4 Russell, R. 34. Frank *v.* Frank (1 Ch. Cas. 84) is generally supposed to have been decided upon this head. But it was apparently a case of misrepresentation; and Lord Manners has doubted its authority. Leonard *v.* Leonard, 2 B. & Beatt. R. 182, 183. Cory *v.* Cory, 1 Ves. 19, is very difficult to maintain; for the party was drunk at the time of the agreement.

[5] Gordon *v.* Gordon, 3 Swanst. R. 476; Id. 463.

take of the law there seems little room to distinguish between family compromises and others.

§ 198. **Same.** — Thus where a father, being heir presumptive to A B, who was then supposed to be a lunatic, and being under an apprehension that unfair means might be resorted to, in the then state of mind of A B, to deprive the family of the succession to the estate, agreed with his eldest son that the son should sue out a commission of lunacy against A B, and carry on such other suits and law proceedings as should be necessary in the name of the father, at the expense of the son, in consideration of which agreement and natural love and affection the father covenanted that after the death of A B the estates which should thereupon descend to him should be conveyed to himself for life, remainder to his son for life, with remainder to his first and other sons in tail male. The son at his own expense and in the name of his father sued out the commission under which A B was found a lunatic, who soon afterwards died; whereupon the father succeeded as heir to the lunatic's estate. Upon a bill filed by the son to carry into effect this agreement, a specific performance was decreed; and it was held that the agreement was not voluntary, void for champerty or maintenance, or illegal either for want of mutuality or as being a fraud upon the great seal in lunacy; and considering the ages and situations of the parties, the father being sixty-two and the lunatic forty, and the objects to be gained by the prosecution of the commission of lunacy, that the consideration for the deed was not inadequate, but that deeds for carrying into effect family arrangements are exempt from the rules which affect other deeds, the consideration being composed partly of value and partly of love and affection.[1]

§ 199. **Same.** — And where there is a mixture of mistake of title, gross personal ignorance, liability to imposition, habitual intoxication, and want of professional advice, there has been manifested a strong disinclination of Courts of Equity to sustain even family settlements. It was upon this sort of mixed ground that it was held in a recent case that a deed executed by the members of a family to determine their interests under the will and partial intestacy of an ancestor ought not to be enforced. It appeared on the face of the deed that the parties did not understand their rights or the nature of the transaction, and that the heir sur-

[1] Persse *v.* Persse, 1 West, Rep. in H. of Lords, p. 110; s. c. 7 Clark & Finnell. R. 279.

rendered an unimpeachable title without consideration. Evidence was also given of his gross ignorance, habitual intoxication, and want of professional advice. But there was no sufficient proof of fraud or undue influence, and there had been an acquiescence of five years.[1]

§ 200. **Contracts Made through Surprise and Mistake of Law Are Generally Invalid.** — Cases of surprise, mixed up with a mistake of law, stand upon a ground peculiar to themselves and independent of the general doctrine. In such cases the agreements or acts are unadvised and improvident, and without due deliberation; and therefore they are held invalid upon the common principle adopted by Courts of Equity to protect those who are unable to protect themselves, and of whom an undue advantage is taken.[2] Where the surprise is mutual there is of course a still stronger ground to interfere; for neither party has intended what has been done. They have misunderstood the effect of their own agreements or acts, or have presupposed some facts or rights existing as the basis of their proceedings which in truth did not exist. Contracts made in mutual error, under circumstances material to their character and consequences, seem upon general principles invalid.[3] "Non videntur, qui errant, consentire", is a rule of the civil law;[4] and it is founded in common sense and common justice. But in its application it is material to distinguish between error in circumstances which do not influence the contract, and error in circumstances which induce the contract.[5]

§ 201. **Money Retained by Mortgagee through Mistake May Be Recovered.** — There are also cases of peculiar trust and confidence, and relation between the parties, which give rise to a qualification of the general doctrine. Thus where a mortgagor had mortgaged an estate to a mortgagee who was his attorney, and in settling an account with the latter he had allowed him a poundage

[1] Dunnage *v.* White, 1 Swanst. R. 137.

[2] See Evans *v.* Llewellyn, 1 Cox, R. 333; s. c. 2 Bro. Ch. 150; Marquis of Townshend *v.* Stangroom, 6 Ves. 333, 338; Chesterfield *v.* Janssen, 2 Ves. 155, 156; Ormond *v.* Hutchinson, 13 Ves. 51.

[3] Willan *v.* Willan, 16 Ves. 72, 81; Cowes *v.* Higginson, 1 Ves. & Beames, 524, 527; Ramsden *v.* Hylton, 2 Ves. 304; Farewell *v.* Coker, 2 Meriv. R. 269.

[4] Dig. Lib. 50, tit. 17, l. 116, § 2.

[5] 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*t*); Id. note (*x*). Mr. Fonblanque has remarked that the effect of error in contracts is very well treated by Pothier, in his Treatise on Obligations, Pt. 1, ch. 1, art. 3, §§ 1, 16. See also 1 Domat, Civil Law, B. 1, tit. 1, § 5, n. 10; Id. tit. 18, § 2; and ante, § 173, note 2.

for having received the rents of the estate in ignorance of the law that a mortgagee was not entitled to such an allowance, which was professionally known to the attorney, it was held that the allowance should be set aside. But the Master of the Rolls upon that occasion put the case upon the peculiar relation between the parties, and the duty of the attorney to have made known the law to his client, the mortgagor. He said that he did not enter into the distinction between allowances in accounts from ignorance of law and allowances from ignorance of fact; that he did not mean to say that ignorance of law will generally open an account; but that, the parties standing in this relation to each other, he would not hold the mortgagor, acting in ignorance of his rights, to have given a binding assent.[1]

§ 202. **Mistake as to Proper Execution of Instrument.** — There are also some other cases in which relief has been granted in equity apparently upon the ground of mistake of law. But they will be found upon examination rather to be cases of defective execution of the intent of the parties from ignorance of law as to the proper mode of framing the instrument. Thus where a husband upon his marriage entered into a bond to his wife, without the intervention of trustees, to leave her a sum of money if she should survive him; the bond, although released at law by the marriage, was held good as an agreement in equity, entitling the wife to satisfaction out of the husband's assets.[2] And so, e contra, where a wife before marriage executed a bond to her husband, to convey all her lands to him in fee, it was upheld in favor of the husband after the marriage as an agreement defectively executed, to secure to the husband the land as her portion.[3]

§ 203. **Same.** — We have thus gone over the principal cases which are supposed to contain contradictions of or exceptions to the general rule, that ignorance of the law with a full knowledge of the facts furnishes no ground to rescind agreements or to set aside solemn acts of the parties. Without undertaking to assert that there are none of these cases which are inconsistent with the rule, it may be affirmed that the real exceptions to it are very few, and generally stand upon some very urgent pressure of circumstances.[4] The rule prevails in England in all cases of compromises of doubt-

[1] Langstaffe *v.* Fenwick, 10 Ves. R. 405, 406.

[2] Acton *v.* Pearce, 2 Vern. R. 480; s. c. Prec. Ch. 237.

[3] Cannel *v.* Buckle, 2 P. Will. 243; Newl. on Contr. ch. 19, pp. 345, 346; 1 Fonbl. Eq. B. 1, ch. 1, § 7.

[4] See Eden on Injunct. ch. 2, pp. 8, 9, 10, and note (*b*).

ful and perhaps in all cases of doubted rights, and especially in all cases of family arrangements.[1] It is relaxed in cases where there is a total ignorance of title founded in the mistake of a plain and settled principle of law, and in cases of imposition, misrepresentation, undue influence, misplaced confidence, and surprise.[2] In America the general rule has been recognized as founded in sound wisdom and policy, and fit to be upheld with a steady confidence. And hitherto the exceptions to it (if any) will be

[1] Stewart *v.* Stewart, 6 Clark & Finnell. R. 911, 966 to 971; Pickering *v.* Pickering, 2 Beavan, R. 31, 56.

[2] Stewart *v.* Stewart, 6 Clark & Finnell. R. 911, 966 to 971. The English Elementary writers on this subject treat it in a very loose and unsatisfactory manner, laying down no distinct rules when mistakes of the law are or are not relievable in equity, but contenting themselves for the most part with mere statements of the cases. Thus Mr. Maddock, after saying that a mistake of parties as to the law is not a ground for reforming a deed founded on such mistake, and that it has been doubted whether ignorance of law will entitle a party to open an account, proceeds to add that there are several cases in which a party has been relieved from the consequences of acts founded on ignorance of the law. He afterwards states that in general agreements relating to real or personal estate, if founded on mistake (not saying whether of law or fact), will for that reason be set aside. 1 Madd. Ch. Pr. 60, 61, 62. Mr. Jeremy says: "That Ignorantia juris non excusat, ignorance of the law will not excuse, is a maxim respected in equity as well as at law." "A knowledge of the law is consequently presumed, and therefore no mutual explanation of it is prima facie required between the parties to a compact. If one of them should in truth be ignorant of a matter of law involved in the transaction, and the other should know him to be so, and should take advantage of the circumstance, he would, it is conceived, be guilty of a fraud (see Cooke *v.* Nathan, 16 Barb. 342, editor's note to § 269 post); and although, if both should be ignorant thereof, it would be what is technically called a case of surprise, it does not appear that this court will in any other case interfere upon a mistake of law." Jeremy on Eq. Jurisd. 366. Mr. Fonblanque has collected many of the cases in his valuable notes; but he has not attempted to expound the true principles on which they turn or the reason of the differences. 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*). Mr. Cooper (Eq. Plead. p. 140) disposes of the whole subject with the single remark: "On the ground of mistake, or misconception of parties, Courts of Equity have also frequently interfered in a variety of cases." Lord Redesdale leaves it in the same unsatisfactory manner. Mitford, Eq. Pl. by Jeremy, p. 129 (ed. 1827). Mr. Newland (on Contracts in Equity, ch. 28, p. 432) says: "Cases of plain mistake or misapprehension, though not the effect of fraud or contrivance, are entitled to the interference of the court", without making any distinction as to law or fact, and he cites Turner *v.* Turner, 2 Ch. R. 81, Bingham *v.* Bingham, 1 Ves. 126, and Lansdowne *v.* Lansdowne, Moseley, 364. He then adds that it is different in compromises of doubtful rights. Lord Hardwicke is reported to have said in Langley *v.* Brown, 2 Atk. 202, "that [if] a person puts a groundless and unguarded confidence in another, [it] is not a foundation in a Court of Equity to set aside a deed." This is true in the abstract. But groundless and unguarded confidence often constitutes, with other circumstances, a most material ingredient for relief.

found not to rest upon the mere foundation of a naked mistake of law, however plain and settled the principle may be, nor upon mere ignorance of title founded upon such mistake.[1]

§ 204. **Mere Mistake of Law Is No Ground for Relief.** — It is matter of regret that in the present state of the law it is not practicable to present in any more definite form the doctrine respecting the effect of mistakes of law, or to clear the subject from some obscurities and uncertainties which still surround it. But it may be safely affirmed upon the highest authority as a well-established doctrine, that a mere naked mistake of law, unattended with any

[1] The general rule is affirmed in Shotwell *v.* Murray, 1 John. Ch. R. 512, 515, and Lyon *v.* Richmond, 2 John. Ch. R. 51, 60, and Storrs *v.* Barker, 6 John. Ch. R. 169, 170. In Hunt *v.* Rousmaniere, 21 U. S. 174, 5 L. Ed. 589, the court said: "Although we do not find the naked principle that relief may be granted on account of ignorance of the law asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." But when the case came again before the court upon appeal, in 26 U. S. 1, 7 L. Ed. 27, the court (as has been already stated in the text) said: "We hold the general rule to be that a mistake of this character (that is, a mistake arising from ignorance of the law), is not a ground for reforming a deed founded on such mistake. And whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters." (Ante, § 178.) But the court added that it was not their intention to lay it down that there may not be cases in which a Court of Equity will relieve against a plain mistake arising from ignorance of law. Id. p. 17. In the case of Marshall *v.* Collet, 1 Younge & Coll. 238, Lord Ch. Baron Abinger said, that for mistake of law equity would not set aside a contract. See also Cockerill *v.* Cholmeley, 1 Russ. & Mylne, 418, and McCarthy *v.* Decaix, 2 Russ. & Mylne, R. 614. The question again came under the review of the Supreme Court of the United States in the case of the Bank of the United States *v.* Daniel, 37 U. S. 32, 9 L. Ed. 989, where the main question was whether a mistake of law was relievable in equity, it being stripped of all other circumstances; and the court held that it was not. On that occasion the court said: "The main question on which relief was sought by the bill, that on which the decree below proceeded, and on which the appellees relied in this court for its affirmance, is, Can a Court of Chancery relieve against a mistake of law? In its examination we will take it for granted that the parties who took up the bill for ten thousand dollars included the damages of a thousand dollars in the eight thousand dollar note; and did so, believing the statute of Kentucky secured the penalty to the bank, and that in the construction of the statute the appellees were mistaken. Vexed as the question formerly was, and delicate as it now is from the confusion in which numerous and conflicting decisions have involved it, no discussion of cases can be gone into without hazarding the introduction of exceptions that will be likely to sap the direct principle we intend to apply. Indeed the remedial power claimed by Courts of Chancery to relieve against mistakes of law is a doctrine rather grounded upon exceptions than upon established rules. To this course of adjudication we are unwilling to yield. That mere mistakes of law are not remediable is well established, as was declared by this court in Hunt *v.* Rousmaniere, 26 U. S. 1, 7 L. Ed. 27; and we can only

such special circumstances as have been above suggested, will furnish no ground for the interposition of a Court of Equity; and the present disposition of Courts of Equity is to narrow rather than to enlarge the operation of exceptions.[1] It may however be added that where a judgment is fairly obtained at law upon a contract, and afterwards upon more solemn consideration of the subject, the point of law upon which the cause was adjudged is otherwise decided, no relief will be granted in equity against the judgment upon the ground of mistake of the law; for that would be to open perpetual sources for renewed litigation.[2]

§ 205. [**Mere Ignorance of Law No Ground for Relief.** — Mere ignorance of law, standing alone, constitutes no excuse or defence against its enforcement. It would be impossible to administer

repeat what was there said, 'that whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character', and to involve other elements of decision. (1 Story's Eq. Jurisp. § 178.) What is this case, and does it turn upon any peculiarity? Griffing sold a bill to the United States Bank at Lexington for ten thousand dollars, indorsed by three of the complainants and accepted by the other, payable at New Orleans; the acceptor, J. D., was present in Kentucky when the bill was made, and there accepted it; at maturity it was protested for non-payment and returned. The debtors applied to take it up, when the creditors claimed ten per cent damages by force of the statute of Kentucky. All the parties bound to pay the bill were perfectly aware of the facts; at least, the principals, who transacted the business, had the statute before them, or were familiar with it, as we must presume, they and the bank earnestly believing (as in all probability most others believed at the time) that the ten per cent damages were due by force of the statute, and, influenced by this opinion of the law, the eight thousand dollar note was executed, including the one thousand dollars claimed for damages. Such is the case stated and supposed to exist by the complainants, stripped of all other considerations standing in the way of relief. Testing the case by the principle 'that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into with a full knowledge of the facts', and under circumstances repelling all presumptions of fraud, imposition, or undue advantage having been taken of the party, none of which are chargeable upon the appellants in this case, the question then is, Were the complainants entitled to relief? To which we respond decidedly in the negative." So far then as the Courts of the United States are concerned, the question may be deemed finally at rest.

[1] Lord Cottenham, in his elaborate judgment in Stewart *v.* Stewart, 6 Clark & Finnell. 964 to 971, critically examined all the leading authorities upon this subject, and arrived at the same conclusion; and his opinion was confirmed by the House of Lords. Mr. Burge shows, in his learned Commentaries on Colonial and Foreign Law (Vol. 3, p. 742, &c.), that the like rule prevails in the Civil Law, and in foreign countries on the Continent of Europe where the Civil Law prevails. Kelly *v.* Solari, 9 Mees. & Wels. R. 54, 57, 58, contains a like recognition of the doctrine by Lord Abinger. Upton, Assignee *v.* Tribilcock, 91 U. S. 45, 23 L. Ed. 203.

[2] Mitf. Pl. Eq. by Jeremy, pp. 131, 132; Lyon *v.* Richmond, 2 John. Ch. R. 51.

the law if ignorance of its provisions were a defence thereto. There are cases, undoubtedly, where ignorance of the law, united with fraudulent conduct on the part of others, or mistakes of fact relating thereto, will be regarded as a defence, but there must be some element, other than a mere mistake of law, which will afford an excuse. Where plaintiff in error took under the will of his grandfather, with knowledge of the facts that only a very small part of a very valuable estate had been left to him, and he assented to the probate of the will, and years later he found that the will had in fact been procured by other devisees by fraud and undue influence, and as a matter of law the will was really void, his mistake of the law as to his rights in the premises gave no right to sustain his caveat to the will.[1] The ignorance of evidence to substantiate what he knew were his rights is a very different thing from ignorance of the rights themselves. And where an instrument is drawn and executed, which professes, or is intended, to carry into execution, an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfil, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement.[2] The rule that a mistake of law does not avail prevails in equity as well as at common law.[3]]

§ 206. [**Exceptions to Rule.** — The case in which relief will be granted where there has been a mistake of law are rare and the doctrine may be invoked only in exceptional instances. It is not the policy of the government to receive money from one man who pays for what he believes to be land which may be lawfully sold to him by the land office, and where the decision of that office is conclusive everywhere, in the absence of fraud or mistake, yet in this class of cases, as in all others, there exists in the Courts of Equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have, by a mistake of the law, given to one man the land which on the

[1] Untermehle *v.* Norment, 197 U. S. 40, 49 L. Ed. 655, 25 S. Ct. Rep. 291; Bank *v.* Daniel, 37 U. S. 32, 9 L. Ed. 989; United States *v.* Edmondston; 181 U. S. 500, 45 L. Ed. 971, 21 S. Ct. Rep. 718; Lamborn *v.* County Commissioners, 97 U. S. 185, 24 L. Ed. 926; United States *v.* Ames, 99 U. S. 47, 25 L. Ed. 295; Treadwell *v.* Clark, 124 App. Div. 260, 108 N. Y. Supp. 733; Medical Society of South Carolina *v.* Gilbreth, 208 Fed. 899.

[2] Hunt *v.* Rousmaniere, 26 U. S. 1, 7 L. Ed. 27; Griswold *v.* Hazard, 141 U. S. 260, 35 L. Ed. 678, 11 S. Ct. Rep. 972.

[3] Upton, Assignee *v.* Tribilcock, 91 U. S. 50, 23 L. Ed. 203.

undisputed facts belonged to another, to give appropriate relief.[1] And if a purchaser of land, under a confiscation proceeding, failed to get as good a title or as much land as he expected to buy, he cannot recover the payment as being made under a mistake of law;[2] nor is a retired army officer compelled to refund to the United States salary paid him while he was acting at the same time in the diplomatic service;[3] but where the postmaster-general through a mistake paid money to plaintiff in error for carrying the mails, the principle that parties receiving moneys illegally paid by a public officer are liable ex æquo et bono to refund them, applies.[4]]

§ 207. [**Relief Must Be Sought Promptly.** — The relief to which one claims he is entitled, by reason of his being injured through his mistake as to the law, ought to be promptly sought, upon his learning of the mistake; otherwise, from the lapse of time, and the attendant circumstances, he may be altogether precluded. Where one leads another to his injury and directly causes the mistake or brings about the condition complained of, equity will relieve against the mistake, if the action is brought within a reasonable time after discovery. But where a mistake has occurred and either party has been negligent in seeking the enforcement of his rights, the jurisdiction will not attach.[5]]

§ 208. **Where Equities Are Equal and Both Parties Have Acted under a Mistake of Law, No Action Lies.** — Where a bona fide purchaser for a valuable consideration without notice is concerned, equity will not interfere to grant relief in favor of a party, although he has acted in ignorance of his title upon a mistake of law; for in such a case the purchaser has at least an equal right to protection with the party laboring under the mistake.[6] And where the equities are equal, the court withholds itself from any interference between the parties.[7]

[1] Moore *v.* Robbins, 96 U. S. 535, 24 L. Ed. 848; Marquez *v.* Frisbie, 101 U. S. 476, 25 L. Ed. 800; Griswold *v.* Hazard, 141 U. S. 260, 35 L. Ed. 678, 11 S. Ct. Rep. 972; Snell *v.* Ins. Co., 98 U. S. 85, 25 L. Ed. 52; Bristol *v.* Morganton, 125 N. C. 365, 34 S. E. 512.

[2] Waples *v.* United States, 110 U. S. 630, 28 L. Ed. 272, 4 S. Ct. Rep. 225.

[3] Badeau *v.* United States, 130 U. S. 439, 32 L. Ed. 997, 9 S. Ct. Rep. 579.

[4] Wisconsin Central Railroad Co. *v.* United States, 164 U. S. 190, 41 L. Ed. 399, 17 S. Ct. Rep. 45.

[5] Untermehle *v.* Norment, 197 U. S. 40, 49 L. Ed. 655, 25 S. Ct. Rep. 291; Hutchinson *v.* Bambas, 249 Ill. 624, 94 N. E. 987; Jones *v.* Foster, 175 Ill. 459, 51 N. E. 862; Thwing *v.* Lumber Co., 40 Minn. 184, 41 N. W. 815.

[6] Ante, §§ 64, 152; post, §§ 226, 237, 510, 542, 573, 575.

[7] See Malden *v.* Merrill, 2 Atk. 8; Storrs *v.* Barker, 6 John. Ch. R. 166, 169, 170. In the Civil Law there is much discussion as to the effect of error

§ 209. **Mistake of Fact Distinguished from Mistake of Law.** — In regard to the other class of mistakes, that is, mistakes of fact, there is not so much difficulty.[1] The general rule is, that

of law; and no inconsiderable embarrassment exists in stating in what cases of error in law the party is relievable and in what not. It is certain that a wide distinction was made between the operation of errors of law and errors of fact. "In omni parte error in jure non eodem loco, quo facti ignorantia, haberi debebit; cum jus finitum et possit esse, et debeat; facti interpretatio plerumque etiam prudentissimos fallat." Dig. Lib. 22, tit. 6, l. 2. Hence in many cases error of law will prejudice a party in regard to his rights; but not error of fact unless in cases of gross negligence. Dig. Lib. 22, tit. 6, l. 7. The general rule of the Civil Law seems to be, that error of law shall not profit those who are desirous of acquiring an advantage or right, nor shall it prejudice those who are seeking their own right. "Juris ignorantia non prodest adquirere volentibus; suum vero petentibus non nocet." Dig. Lib. 22, tit. 6, l. 7; Pothier, Pand. Lib. 22, tit. 6, § 2, n. 2, 3. But then this text is differently interpreted by different civilians. See 2 Evans's Pothier on Oblig. Appendix, No. xviii. pp. 408 to 447; Ayliffe, Pand. B. 2, tit. 15, p. 116; 1 Domat, B. 1, tit. 8, § 1, arts. 13 to 16. Domat, after saying that error of law is not sufficient as an error in fact is to annul contracts, says, that error or ignorance of law hath different effects in contracts; and then he lays down the following rules: (1) If error or ignorance of law be such that it is the only cause of a contract in which one obliges himself to a thing to which he is otherwise not bound, and there be no other cause for the contract, the cause proving false, the contract is null. (2) This rule applies not only in preserving the person from suffering loss, but also in hindering him from being deprived of a right which he did not know belonged to him. (3) But if by an error or ignorance of the law one has done himself a prejudice which cannot be repaired without breaking in upon the right of another, the error shall not be corrected to the prejudice of the latter. (4) If the error or ignorance of the law has not been the only cause of the contract, but another motive has intervened, the error will not annul the contract. And he proceeds to illustrate these rules. 1 Domat, B. 1, tit. 18, § 1, arts. 13 to 17. See also Ayliffe, Pand. B. 2, tit. 15; Id. tit. 17; 2 Evans's Pothier on Oblig. Appendix, No. xviii. p. 408; Id. 437; Pothier, Pand. Lib. 22, tit. 6, per tot. Ante, § 173, and note.

[1] *Mistake of Fact.* — In the note on Mistake of Law appended to § 173, it is stated that relief from the consequences of mistake touching contracts is based on the consideration that the mistake relates to matter of the agreement as distinguished from inducements thereto, or to some condition precedent to the agreement; that is, on the ground that the minds of the parties have not met. It is not enough that there has been a mistake, however serious, in regard to an external matter not made a subject of the agreement or not a condition precedent thereto. See Dambmann *v.* Schulting, 75 N. Y. 55; Whittemore *v.* Farrington, 76 N. Y. 452; Laidlaw *v.* Organ, 15 U. S. 178, 4 L. Ed. 109; post, § 300.

It is there stated accordingly that the courts will interfere (*a*) where the minds of the parties did not meet at all, or (*b*) where they met on terms differing from those stated in the written embodiment of their contract. The first of these cases, (*a*), is a case for injunction and cancellation of the written instrument, and requires no proof of mistake or fault on the part of the defendant, if damages are not sought. Redgrave *v.* Hurd, 20 Ch. D. 1; Arkwright *v.* Newbold, 17 Ch. D. 301, 320; Reese Silver Mining

Co. *v.* Smith, L. R. 4 H. L. 64; Rawlins *v.* Wickham, 3 DeG. & J. 304; Paget *v.* Marshall, 28 Ch. D. 255. See Rider *v.* Powell, 28 N. Y. 310; Kilmer *v.* Smith, 77 N. Y. 226; Bridges *v.* McClendon, 56 Ala. 327, 333; Price *v.* Ley, 4 Giff. 235.

The second case, (*b*), is the case commonly spoken of as mutual mistake; so spoken of because usually the case is in fact one of mistake on both sides, if there is any mistake at all. This circumstance has often led courts to say that there must be mutual mistake to authorize the reformation of a contract, when it was only necessary to say that the *intention* with regard e. g. to a term sought to be imported into the writing must be mutual; that is, that that term must have been part of the contract actually made. It is clear that it need not be shown as necessary to this result either that the *defendant* was mistaken concerning the written instrument, or that he was guilty of fraud in putting it or having it put into the improper form. He merely may have seen that it was not in conformity with the agreement and kept silent; but this will not prevent rectification on satisfactory evidence of what was agreed. Rider *v.* Powell, 28 N. Y. 310. Comp. Cundy *v.* Lindsay, 3 App. Cas. 459. Upon the general proposition that the intention of the parties in regard to the term to be inserted or substituted should be one, see also Kilmer *v.* Smith, 77 N. Y. 226; Diman *v.* Providence R. Co., 5 R. I. 130; Thompsonville Co. *v.* Osgood, 26 Conn. 16; Ramsey *v.* Smith, 32 N. J. Eq. 28; Boyce *v.* Lorillard Ins. Co., 55 N. Y. 366; Dulany *v.* Rogers, 50 Md. 524; Young *v.* McGown, 62 Me. 56; Schoonover *v.* Dougherty, 65 Ind. 463; Wright *v.* Goff, 22 Beav. 207; Metropolitan Soc. *v.* Brown, 26 Beav. 455; Paget *v.* Marshall, 28 Ch. D. 255. Of course a term in excess of the agreement, that is, not assented to by one side, may be struck out, though nothing is to be put into its place.

Equity will sometimes annex to a decree for the reformation of a contract a term or a condition not in the contemplation of the parties when they executed the contract, where this appears to be necessary to justice in the now altered situation. Thus where by mistake in drawing a lease the rent was put at a lower rate than that agreed and the lessee had entered, the court on a bill to set the matter right gave the lessee an election to continue the tenancy at the higher rate, or abandon and pay for use and occupation during occupancy at the higher rate, receiving in turn compensation for repairs of a permanent nature, but not for the expense of taking possession and getting established in business on the premises. Garrard *v.* Frankel, 30 Beav. 445; s. c. 8 Jur. N. S. 985. For another example see Mining Co. *v.* Coal Co., 8 W. Va. 406, infra. And see Burr *v.* Hutchinson, 61 Me. 514, concerning protection in the decree of the interests of third persons, — a point considered infra.

But this right of reforming a written contract supposes that the situation has remained substantially unchanged. If on the contrary the parties cannot be put in statu quo substantially, equity will generally refuse relief. Crosier *v.* Acer, 7 Paige, 137, 143 (mistake of law); Eastman *v.* St. Anthony Falls Co., 24 Minn. 437. So if the fact about which the mutual mistake occurred was in its nature doubtful. Eastman *v.* St. Anthony Falls Co., supra.

Laches in the sense only of delay, though considerable, will not be a fatal objection to relief, especially in the case of a grantor who has remained in possession, and no change of position by the defendant has taken place. Hutson *v.* Furness, 31 Iowa, 145; Farmers' Bank *v.* Detroit, 12 Mich. 445; McIntosh *v.* Saunders, 68 Ill. 128. The second and third of these cases show that the rule holds against a grantee in possession.

Even change of position by the defendant since the mistake may not always be a fatal obstacle to rectification, for the change itself may be a

result, easily rectified, of the same mistake. Thus notwithstanding the fact that a lot of land conveyed by mistake, instead of an adjoining lot supposed to have been conveyed, has since been mortgaged back to the grantor under the same mistake, equity may, it seems, correct the first conveyance at the suit of the grantee, on his offering to transfer the mortgage to the lot intended. See Weston *v.* Wilson, 31 N. J. Eq. 51; Burr *v.* Hutchinson, 61 Me. 514. It is also to be inferred from Grymes *v.* Sanders, 93 U. S. 55, 23 L. Ed. 798, that equity may sometimes, in the clearest and strongest cases, grant relief, though the parties cannot be put in statu quo. And see Beauchamp *v.* Winn, L. R. 6 H. L. 223, that *difficulty* in restoring the parties to their former position is not an objection to relief.

If the rights of innocent third persons would be (materially?) affected by reforming a written instrument, equity will, generally speaking, refuse its aid. Malony *v.* Rourke, 100 Mass. 190; Burr *v.* Hutchinson, 61 Me. 514; Trustees of Schools *v.* Otis, 85 Ill. 179; Tabor *v.* Cilley, 53 Vt. 487; Mining Co. *v.* Coal Co., 8 W. Va. 406; Gray *v.* Robinson, 90 Ind. 527. Indeed the rule may probably be stated in broader terms, — that mistake, whether arising upon a written or a verbal contract, will not be corrected against an innocent third person who has acquired a title or a right in reliance upon the outward aspect of the contract; such right or title arising out of the same as though there were no mistake.

Some difficult questions however grow out of this rule. Does this put mistake on a footing with fraud or misrepresentation? That is, is there a contract notwithstanding the mistake, — a contract voidable between the parties, but valid towards innocent purchasers? Has the rule referred to a broad application, or may it be limited to cases in which the action of the third person has been induced by the action of the party aggrieved by the mistake?

To consider the last question first: Suppose A has purchased a horse from B, the title to which, by reason of mistake in regard to the identity of the animal on a sale by C to B, did not in the ordinary sense pass, cannot C recover the horse or its value from A? See Burr *v.* Hutchinson, 61 Me. 514, a case of land. But if in any case he can, it is not broadly true that mistake cannot be set up against the rights of innocent third persons, and here is then a case where mistake does not stand on the same footing with fraud or misrepresentation, which in their ordinary aspect make a contract voidable only, not void. There is however a settled principle of equity that where the equities of the parties are equal there can be no interference, and the equity of the innocent purchaser for value in general at least is considered equal to that of the party injured by the mistake. Infra, § 237. But that principle too must be limited if the case put would in any phase stand in equity as well as at law, as it probably would. Compare Burr *v.* Hutchinson, supra. The only limitation upon the principle which can be admitted and still leave the principle good, appears to be this: that it cannot apply to the case of a mistake not due in any way to the mistaken plaintiff. E. g. suppose in the case above put the horse had without fault jumped fence into the field supposed to be occupied by the horse intended, and that the latter had also without fault of the owner escaped his enclosure. Now if (still without fault of the owner) the horse not intended to be sold or bought should be led away and sold before the mistake could be made known to the purchaser, it would seem clear that the owner could recover his property; the rule concerning the equality of equities either would not apply, or it would be considered that the equities were not equal, the plaintiff's equity being the greater.

It seems then that it is because of some act of the mistaken party, inno-

cent and proper it may be, such as subscribing a contract containing a mistake unknown to the party at the time, by which the third person has been induced to change his position materially, that relief is refused, if refused at all (see Burr *v.* Hutchinson, 61 Me. 514, where relief was granted on terms, without prejudice to third persons), and that where such an act is absent from the particular case, nothing but mistake remaining, relief will be granted. It follows that mistake pure and simple differs from (ordinary) fraud or misrepresentation in that it prevents the very existence of a contract, not simply making the contract voidable. And then it may well be considered between the original parties to the mistake, if that should become material, that the supposed contract had never come into being, the inducing "act" in the case of the third person not coming into play. See Cundy *v.* Lindsay, 3 App. Cas. 459.

The answer to the third question appears therefore to answer the other two. There is no contract in the case of mistake under consideration; there is only towards third persons an act which has the effect of precluding the mistaken plaintiff from alleging his mistake.

"Ordinary" fraud or misrepresentation has been spoken of here; for there is clearly a kind of fraud or misrepresentation which will be equivalent to mistake, so far as the present consideration is concerned. Thus if a person in obtaining insurance on risk A should represent it to be risk B, it would be clear that the minds of the parties had not met; there would be no contract, not merely a voidable contract. Goddard *v.* Monitor Ins. Co., 108 Mass. 56; Carpenter *v.* American Ins. Co., 1 Story, 57; Holmes *v.* Common Law, 311. But fraud or misrepresentation which touches only the inducements to a contract is by the authorities deemed consistent with the existence of such contract; the contract however being voidable at the election of the injured party if that election is made before the rights of innocent persons have intervened.

Mistake will of course be corrected, where possible, against subsequent purchasers without value or with notice actual or constructive. Willcox *v.* Foster, 132 Mass. 320; Young *v.* Cason, 48 Mo. 259; Rhodes *v.* Outcalt, Ib. 367; Farmers' Bank *v.* Detroit, 12 Mich. 445; Adams *v.* Stevens, 49 Me. 362; Ruhling *v.* Hackett, 1 Nev. 360; infra, §§ 237, 250. Thus it has lately been decided that where a mortgage of land after being assigned has been discharged by the mortgagee by mistake, the assignee, though he has not recorded his assignment, is entitled in equity to have the discharge cancelled against a person claiming under a subsequent mortgage, which was in terms subject to the prior mortgage and was executed before that mortgage was discharged. Willcox *v.* Foster, 132 Mass. 320. And the same rule was held to apply against a person claiming under a mortgage made after the discharge, who knew of the mistake (see Childs *v.* Stoddard, 130 Mass. 110), though he was advised by counsel before taking his mortgage that the prior incumbrance would not be reinstated; and also against an assignee of the mortgage last executed, who took the assignment after the note secured by the mortgage assigned had passed its maturity, though in ignorance of the mistake. Willcox *v.* Foster, supra. And one who seeks to avoid a conveyance for mistake, against a subsequent grantee, must allege that the grantee was a volunteer or that he purchased with notice. Malony *v.* Rourke, 100 Mass. 190.

A deed may also be reformed against an attaching or a judgment creditor. Berry *v.* Sowell, 72 Ala. 14; Milmine *v.* Burnham, 76 Ill. 362; Lowe *v.* Allen, 68 Ga. 225. In the first case cited a creditor had attached the land conveyed by the deed as the property of the grantor, the deed being apparently a voluntary conveyance, — it purported to have been made on the ground only of love and affection, — but evidence was received that

there was also a valuable consideration from the grantee to the grantor, and that this fact was omitted by mistake from the recitals.

Mere mistake of title on the part of a tenant in taking a lease of land and receiving possession from the lessor will not justify him in disputing the title of his lessor without surrendering the possession, unless the tenant has been evicted by or attorned to a title paramount. The tenant cannot set up an outstanding title against his landlord, from whom he received possession. Bigelow, Estoppel, p. 398 (3d ed.). The reason is that the landlord has parted with his possession in reliance upon the tenant's (implied) acknowledgment of his title.

But if the tenant did not receive possession from his landlord or from one under whom the landlord derives title, he may show that his acknowledgment of tenancy or attornment was made under mistake of fact as to the title. Ib. 399 et seq. So too the tenant may, at least on offering to surrender possession to his lessor, show a mutual mistake of the parties with regard to the title. Mays *v.* Dwight, 82 Pa. St. 462.

To justify the reformation of a written instrument for mistake, the mistake must be shown by evidence full, clear, and decisive, and the real intention of the parties must be clearly established. German Ins. Co. *v.* Davis, 131 Mass. 316; Alexander *v.* Coldwell, 55 Ala. 517, 522; Campbell *v.* Hatchett, Ib. 548; Harter *v.* Christolph, 32 Wis. 245; Peck *v.* Arehart, 95 Ill. 113; Ivinson *v.* Hutton, 98 U. S. 79, 25 L. Ed. 66; Howland *v.* Blake, 97 U. S. 624, 24 L. Ed. 1027. The mistake indeed, according to the current of authority, must be established beyond reasonable doubt. Hervey *v.* Savery, 48 Iowa, 313; Muller *v.* Rhuman, 62 Ga. 332; Fuchs *v.* Treat, 41 Wis. 404; Hinton *v.* Citizens Ins. Co., 63 Ala. 488; Tufts *v.* Larned, 27 Iowa, 330; Edmond's Appeal, 59 Pa. St. 220; Hudson Iron Co. *v.* Stockbridge Iron Co., 107 Mass. 290; Shattuck *v.* Gay, 45 Vt. 87; Miner *v.* Hess, 47 Ill. 170; Ruffner *v.* McConnell, 17 Ill. 212; Douglas *v.* Grant, 12 Ill. App. 273; Tucker *v.* Madden, 44 Me. 206; Hileman *v.* Wright, 9 Ind. 126; Linn *v.* Barkey, 7 Ind. 69; Davidson *v.* Greer, 3 Sneed, 384; Lake *v.* Meacham, 13 Wis. 355; Fowler *v.* Adams, Ib. 458. See Coale *v.* Merryman, 35 Md. 382; Bunse *v.* Agee, 47 Miss. 270; Hamlon *v.* Sullivant, 11 Ill. App. 423.

But equity may still reform the deed on parol evidence though the defendant denies the alleged mistake, if the court is fully satisfied on the evidence that there was a mistake. See § 228, infra; Stines *v.* Hays, 36 N. J. Eq. 364; Allen *v.* Yeater, 17 W. Va. 128. And if the mistake and the true intention are satisfactorily made out, equity will, as follows from what is said earlier in this note, interfere and change the most important terms of the contract. Ivinson *v.* Hutton, 98 U. S. 79, 25 L. Ed. 66; Snell *v.* Ins. Co., 98 U. S. 85, 25 L. Ed. 52. In a case not deemed within the Statute of Frauds, the contract may then, and in the same suit, be specifically enforced if the subject be one for such a measure. Monroe *v.* Skelton, 36 Ind. 302 (under the Code). But see Mills *v.* Evansville Seminary, 47 Wis. 354.

Not only may a contract be reformed for mistake on parol evidence apart from the statute; it may be reformed on the evidence of the plaintiff alone, if other evidence cannot be had. Hanley *v.* Pearson, 13 Ch. D. 545. But it is said that it must be an extreme case that will justify relief on such evidence. Harter *v.* Christolph, 32 Wis. 245; Kent *v.* Lasley, 24 Wis. 654; McClellan *v.* Sanford, 26 Wis. 595. On the other hand it is held that a deed may be reformed for mistake apparent on its face, such as the omission of a seal or a granting clause, without resort to parol evidence, if the true intention can be supplied from the deed itself. Michel *v.* Finsley, 69 Mo. 442; Huss *v.* Morris, 63 Pa. St. 367.

It is settled by a constant line of authorities in England that relief based on mistake of fact, or, it seems, on mistake of law (Beauchamp *v.* Winn, L. R. 6 H. L. 223, 233), is not to be refused either in equity or at law on the ground that the plaintiff had the means of knowledge at the time of the mistake; the doctrine of laches as to that point does not apply to such a case. Willmott *v.* Barber, 15 Ch. D. 96; Townsend *v.* Crowdy, 8 C. B. N. S. 477; Dails *v.* Lloyd, 12 Q. B. 531; Bell *v.* Gardiner, 4 M. & G. 11; Kelly *v.* Solari, 9 Mess. & W. 54. The cases in this country, without sufficient discrimination concerning the meaning of the text, infra, § 218, are not so clear; though a recent decision of the Court of Appeals of New York appears to be in accord with the English authorities. Kilmer *v.* Smith, 77 N. Y. 226. See Monroe *v.* Skelton, 36 Ind. 302. And see Webb *v.* Parker, 41 Ga. 478, where it is held that failing to inquire, in the case of one put on inquiry, where a fact stated on the other side has led to such failure, is not fatal to relief. That proposition would be universally accepted. See Hitchins *v.* Pettingill, 58 N. H. 3. But see as to the simpler case of means of knowledge not availed of, Brown *v.* Fagan, 71 Mo. 563; Grymes *v.* Sanders, 93 U. S. 55, 23 L. Ed. 798. And it is generally held in this country that where the mistake or ignorance was the result of gross negligence no relief will be granted. Conner *v.* Welch, 51 Wis. 431; Troops *v.* Snyder, 70 Ind. 554; Wood *v.* Patterson, 4 Md. Ch. 335; Voorhis *v.* Murphy, 11 C. E. Green, 434; Kearney *v.* Sascer, 37 Md. 264, where the plaintiff shut his eyes to the facts.

It is conceived that the English rule is the correct one, so far as the mere question of failing to inquire is concerned; for how can a man be entitled to property by an unintended gift simply on the ground that the "giver" was negligent? There are no doubt cases where neglect of the means of safety at hand is and should be fatal. The administration of justice requires such a rule, — "interest reipublicæ ut litium finis sit"; and what the author chiefly alluded to in this connection was probably the case of negligence in the trial of an action. He gives, it will be seen, as an example of his rather too general proposition, a case of that kind, which, it may be presumed, was the foundation of the proposition itself. "If," says the text, "a party has lost his cause at law from the want of proof of a fact which by ordinary diligence he could have obtained, he is not relievable in equity." § 218. Compare the editor's note on Accident, ante, § 119.

Concerning the old controversy on the operation of the Statute of Frauds when reformation is sought of a deed which by mistake conveys less than was agreed and paid for, it has lately been held that the case should not stand, with reference to the statute, as if there was no deed. The position is accordingly reaffirmed that the error may be corrected without proof of such part performance as would be necessary for a decree of specific performance of a contract for the sale of the whole tract when no part of it was conveyed. Hitchins *v.* Pettingill, 58 N. H. 386, citing a cloud of cases. But see contra Glass *v.* Hulbert, 102 Mass. 24, and cases there reviewed; the court holding that there must be part performance, or the defendant must in some way, other than by reason of mistake or even of fraud, be estopped to avail himself of the statute. See Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 321.

It should be noticed that the mistake which equity takes cognizance of is not mistake of judgment. Where one who has an election between two courses of action makes choice of one with full knowledge of the facts, he cannot afterwards have relief in equity on the ground that he made a mistake in his calculation. Childs *v.* Stoddard, 130 Mass. 110; Thomas *v.* Bartow, 48 N. Y. 193. See Durant *v.* Bacot, 2 Beasl. 201. Compare the note on Mistake of Law, ante, § 173. Nor is the case different where the

mistake of judgment is the mistake of (the plaintiff's) legal counsel. Winchester *v.* Grosvenor, 48 Ill. 517; Hunt *v.* Rousmaniere, 21 U. S. 174, 5 L. Ed. 589; 26 U. S. 1, 7 L. Ed. 27.; s. c. 1 Peters, 1. If an agent of the defendant advises and induces the mistake, however innocently, the defendant will not be permitted to take advantage of it to the injury of the plaintiff. Snell *v.* Insurance Co., 98 U. S. 85, 25 L. Ed. 52, a case of mistake of law. See also Woodbury Bank *v.* Charter Oak Ins. Co., 31 Conn. 517.

Before the recent enabling acts concerning married women, it was held that mistake in a deed by a married woman conveying her own property could not be corrected against her. Martin *v.* Dwelly, 6 Wend. 9; Carr *v.* Williams, 10 Ohio, 105; Grapengether *v.* Fejervary, 9 Iowa, 163, 173. That may still be the rule in many states. Holland *v.* Moon, 39 Ark. 120; Leonis *v.* Lazzarovich, 55 Cal. 52. But see Carper *v.* Munger, 62 Ind. 481; Wedel *v.* Herman, 59 Cal. 507 (as to defective certificate of acknowledgment). Infra, § 251.

Concerning the right to relief against a minor who has received the purchase price for land, see Segee *v.* Thomas, 3 Blatchf. 11. But see Dickey *v.* Beatty, 14 Ohio St. 389.

Equity will not reform a voluntary deed for mistake, at the suit of the donee. Mulock *v.* Mulock, 31 N. J. Eq. 594; Conaway *v.* Gore, 24 Kans. 389; Wait *v.* Smith, 92 Ill. 385; Brown *v.* Kenny, 9 Jur. (N. S.) 1163; s. c. 33 Beav. 133; Eaton *v.* Eaton, 15 Iowa, 259; Hunt *v.* Frazier, 59 N. C. 290; Henderson *v.* Dickey, 35 Mo. 120; Hout *v.* Hout, 20 Ohio St. 119. See Morse *v.* Martin, 34 Beav. 500; post, § 250. Secus at suit of the grantor, when he can show that the deed does not in a material respect conform to his intention, or that he executed it under a total misapprehension of its effect. Mulock *v.* Mulock, supra. Secus too of defective execution of powers in favor of wives and children. Infra, § 242. But equity will take jurisdiction between different volunteers, even in favor of grandchildren of a grantor. Huss *v.* Morris, 63 Pa. St. 367.

It is also held that equity will not insert a condition subsequent omitted from a written instrument by mistake, and then declare a forfeiture for breach thereof. Mills *v.* Evansville Seminary, 47 Wis. 354. But compare Monroe *v.* Skelton, 36 Ind. 302, infra; § 233, infra.

It is held that demand and refusal of correction are necessary before equity will interfere, unless satisfactory excuse is offered for failing to show those facts, such e. g. as the death of the vendor of land and the infancy of his heir. Harold *v.* Weaver, 72 Ala. 373. See Axtel *v.* Chase, 83 Ind. 546.

The following cases may be enumerated from late decisions in which equity has granted relief for mistake or ignorance of fact: —

Mistake in the description of land in a deed. Dozier *v.* Mitchell, 65 Ala. 511; Mills *v.* Lockwood, 42 Ill. 111; Wilcox *v.* Lucas, 121 Mass. 21; Jones *v.* Clifford, 3 Ch. D. 779, 792; Dwight *v.* Tyler, 49 Mich. 614; Fuchs *v.* Treat, 41 Wis. 404; Turner *v.* Kelly, 70 Ala. 85. So of gross error in the amount conveyed when not conveyed by name of lot or by clear and understood bounds. Ladd *v.* Pleasants, 39 Tex. 415; Noble *v.* Googins, 99 Mass. 231; Winston *v.* Browning, 61 Ala. 80. Mistake in the vendor's interest. Irick *v.* Fulton, 3 Gratt. 193; Okill *v.* Whittaker, 1 DeG. & S. 83. See Colyer *v.* Clay, 7 Beav. 188. The use of the term "more or less" in describing the quantity conveyed is not a fatal objection to interference except where the discrepancy is slight. If it is considerable, such as to imply fraud or to show gross mistake, equity will relieve. Paine *v.* Upton, 87 N. Y. 327; Belknap *v.* Sealey, 14 N. Y. 143; s. c. 2 Duer, 579; Noble *v.* Googins, 99 Mass. 231. See however Ketchum *v.* Stout, 20 Ohio St. 455;

Stall *v.* Hart, 9 Gill, 446. The same is true of the terms "about" or "probably" so much. Yost *v.* Mallicote, 77 Va. 610. But it is held that a tax deed will not be corrected for error of description. Keepfer *v.* Force, 86 Ind. 81. The vendor, and not merely the purchaser, may have relief for mistake in description operating against him. Fuchs *v.* Treat, 41 Wis. 404; Mining Co. *v.* Coal Co., 8 W. Va. 406. And if the purchaser will not pay for the excess conveyed by mistake on the basis of the purchase price, equity will rescind the whole contract of sale. Mining Co. *v.* Coal Co., supra. The purchaser has the option to rescind or pay for excess. Ib. Compare the converse cases of Hill *v.* Buckley, 17 Ves. 394; Paine *v.* Upton, 87 N. Y. 327. And the right to relief exists as well after the deed has been executed as before, if the facts were not then known. Paine *v.* Upton, supra, showing that there is no distinction between executed and executory contracts in regard to relief for mistake. See Noble *v.* Googins, 99 Mass. 231, 233.

A mortgage of land which by mistake does not cover all that was intended may be rectified even against the wife who released dower. Chapman *v.* Field, 70 Ala. 403. It is held in this case that such rectification may be made, though the wife (afterwards widow claiming dower) is not a party to the suit, the correction taking effect against her only from the time of the decree. Sed qu.

Of course there may be rescission if it turn out that the vendor of land had no title at all (Quivey *v.* Baker, 37 Cal. 465), and this though he honestly supposed he had title; fraud is not necessary to relief. Baptiste *v.* Peters, 51 Ala. 158; Lanier *v.* Hill, 25 Ala. 554; Diman *v.* Providence R. Co., 5 R. I. 130; Fane *v.* Fane, L. R. 20 Eq. 698.

Mistake in the location of land wholly or in part. Spurr *v.* Benedict, 99 Mass. 463; Watts *v.* Cummins, 59 Pa. 84; Best *v.* Stow, 2 Sandf. Ch. 298; McKelway *v.* Armour, 2 Stockt. 115; Quivey *v.* Baker, 37 Cal. 465; Fuchs *v.* Treat, 41 Wis. 404; Allen *v.* Yeater, 17 W. Va. 128. As where the conveyance includes a warehouse or a storehouse and lot. Fuchs *v.* Treat, supra; Allen *v.* Yeater, supra. Misdescription in a mortgage of the mortgage note. Prior *v.* Williams, 2 Keyes, 530. Omission of a granting clause in a deed. Michel *v.* Tinsley, 69 Mo. 442. Or of a reservation. Wells *v.* Yates, 44 N. Y. 525; Wilcox *v.* Lucas, 121 Mass. 21. Or of a limitation of the use of the property, as that it was conveyed for use as a road. Stines *v.* Hays, 36 N. J. Eq. 364. Mistake in the existence or duration of a leasehold interest, as in the sale of a reversionary interest which has already fallen in by the death of the prior owner without the knowledge of the parties. Colyer *v.* Clay, 7 Beav. 188; Okill *v.* Whittaker, 1 DeG. & S. 83. Defective execution of a deed. Stark *v.* Starr, 94 U. S. 477, 24 L. Ed. 276; Love *v.* Sierra Nev. Mining Co., 32 Cal. 639; Remington *v.* Higgins, 54 Cal. 620. Thus where the seal of a party, necessary to make an instrument valid and effectual, has been omitted by mistake, equity will treat the instrument, in favor of those entitled to its benefits, as sealed. It will either compel the affixing a seal or enjoin a defence based on the want of one. Bernards *v.* Stebbins, 109 U. S. 341, 27 L. Ed. 956, 3 S. Ct. Rep. 252. See Draper *v.* Springport, 104 U. S. 501, 26 L. Ed. 812; Neal *v.* Gregory, 19 Fla. 356; Michel *v.* Tinsley, 69 Mo. 442; Probate Court *v.* May, 52 Vt. 182.

But where by statute the use of a seal is mandatory — "an essential part of the transaction" — it is suggested that the case may be different. Bernards *v.* Stebbins and Draper *v.* Springport, supra. See infra, § 251. These cases were cases of town bonds, and relief was granted on the principle upon which equity has relieved against the want of livery or of enrolment or other ceremony of the common law or statute, not positively

an act done or contract made under a mistake or ignorance of a material fact is voidable and relievable in equity. The ground of this distinction between ignorance of law and ignorance of fact seems to be, that as every man of reasonable understanding is presumed to know the law, and to act upon the rights which it confers or supports, when he knows all the facts, it is culpable negligence in him to do an act or to make a contract, and then to set up his ignorance of law as a defence. The general maxim here is, as in other cases, that the law aids those who are vigilant, and not those who slumber over their rights. And this reason is recognized as the foundation of the distinction, as well in the civil law as in the common law.[1] But no person can be presumed to be acquainted

essential. Nor will equity affix a seal to a voluntary instrument, though necessary and agreed upon. Eaton *v.* Eaton, 15 Iowa, 259.

On the other hand attaching a seal to a partnership note by mistake will be corrected. Lyman *v.* Califer, 64 N. C. 572. Discharge of a mortgage or lien. Bruce *v.* Bonney, 12 Gray, 107; French *v.* DeBow, 38 Mich. 708. Allowing judgment to go by default on a mistaken cause of action. Young *v.* Morgan, 9 Neb. 169. Satisfaction of an execution. National Bank *v.* Rogers, 22 Minn. 224. Mistake in the date of a policy of insurance. Mercantile Ins. Co. *v.* Jaynes, 87 Ill. 199. And in the name of the person intended to be insured. Keith *v.* Globe Ins. Co., 52 Ill. 518. Misdescription of premises in a policy of insurance. Home Ins. Co. *v.* Meyer, 93 Ill. 271. Misdescription of property in a bill of sale of personalty. Menominee Co. *v.* Langworthy, 18 Wis. 444. Omission of interest clause from a promissory note. Gump's Appeal, 65 Pa. St. 476. Omission of a necessary indorsement of a note. Hughes *v.* Nelson, 29 N. J. Eq. 547, treating the title in such a case as having passed in equity. Giving a guardian bond to a judge out of office. Hall *v.* Hall, 43 Ala. 488. Mistake of an executor, administrator, or other person bound to account, in charging too much against himself in making up his accounts. Brandon *v.* Brown, 106 Ill, 519. Omission of the name of a trustee in a trust deed may be supplied. especially where a blank was left with authority to fill. Burnside *v.* Wayman, 49 Miss. 356; Exchange Bank *v.* Russell, 50 Mo. 551. So of the character in which by mistake a magistrate has taken an acknowledgment of an instrument. Simpson *v.* Montgomery, 25 Ark. 365. Mistake of a magistrate in failing to mark the name of counsel to the defence of a suit resulting in judgment against him. Brewer *v.* Jones, 44 Ga. 71. Mistake of a trivial nature in the time for making a tender to save a forfeiture. Atkins *v.* Chilson, 11 Met. 112. Generally mistake of a scrivener will be corrected. Huss *v.* Morris, 63 Pa. St. 367; Van Douge *v.* Van Douge, 23 Mich. 321; Hartford Ore Co. *v.* Miller, 41 Conn. 112; Drury *v.* Hayden, 111 U. S. 223, 28 L. Ed. 408, 4 S. Ct. Rep. 405; Elliott *v.* Sackett, 108 U. S. 133, 27 L. Ed. 678, 2 S. Ct. Rep. 375; Clemens *v.* Drew, 55 N. C. 314; Stone *v.* Hale, 17 Ala. 557; Wilcox *v.* Lucas, 121 Mass. 21; Allen *v.* Brown, 6 R. I. 386; Sowler *v.* Day, 58 Iowa, 252.

But if a term or condition was omitted purposely, then it matters not that there was an oral understanding that the term or condition should be complied with; equity will not grant relief. Andrew *v.* Spurr, 8 Allen, 412; Betts *v.* Gunn, 31 Ala. 219.

[1] See Pothier, Pand. Lib. 22, tit. 6, § 3, n. 4, 5, 6, 7; § 4, n. 10, 11;

with all matters of fact; neither is it possible, by any degree of diligence, in all cases to acquire that knowledge; and therefore an ignorance of facts does not import culpable negligence. The rule applies not only to cases where there has been a studied suppression or concealment of the facts by the other side which would amount to fraud, but also to many cases of innocent ignorance and mistake on both sides.[1] So if a party has bona fide entirely forgotten the facts, he will be entitled to relief, because under such circumstances he acts under the like mistake of the facts as if he had never known them.[2] Ignorance of foreign law is deemed to be ignorance of fact; because no person is presumed to know the foreign law, and it must be proved as a fact.[3]

§ 210. **Essentials to Relief from Mistake of Fact.** — The rule as to ignorance or mistake of facts entitling the party to relief has this important qualification, that the fact must be material to the act or contract; that is, that it must be essential to its character, and an efficient cause of its concoction. For though there may be an accidental ignorance or mistake of a fact, yet if the act or contract is not materially affected by it, the party claiming relief will

Ayliffe's Pand. B. 2, tit. 15, p. 116; 1 Domat, B. 1, tit. 18, § 1; Doct. & Stud. Dial. 2, ch. 47; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*); Pooley *v.* Ray, 1 P. Will. 355; Corking *v.* Pratt, 1 Ves. 406; Hitchcock *v.* Giddings, 4 Price, R. 135; Leonard *v.* Leonard, 2 Ball & Beatt. 171, 180 to 184; Pearson *v.* Lord, 6 Mass. R. 81; Garland *v.* Salem Bank, 9 Mass. R. 408; 1 Madd. Ch. Pr. 60 to 64; Daniell *v.* Mitchell, 1 Story, R. 172; Barrielli *v.* Betterman, 199 Fed. 838; Vinal *v.* Improvement Co., 53 Hun, 247, 6 N. Y. Supp. 595; Wood *v.* Roeder, 50 Neb. 476, 70 N. W. 27; Rosenbaum *v.* Credit System Co., 64 N. J. L. 34, 44 Atl. 966.

[1] Ignorance of facts and mistake of facts are not precisely equivalent expressions. Mistake of facts always supposes some error of opinion as to the real facts; but ignorance of facts may be without any error, but result in mere want of knowledge or opinion. Thus a man knowing that he has some interest in a parcel of land may suppose it to be a life estate, when it is a fee. That is an error or mistake. But if he is ignorant that there exists any such land, and that he had any title to it, that very ignorance may lead him to form no opinion whatever on the subject. It may be a case of sheer negation of thought. The phrases are however commonly used as equivalent in legal discussions. Canal Bank *v.* Bank of Albany, 1 Hill, N. Y. R. 287.

[2] Kelly *v.* Solari, 9 Mees. & Wels. 54, 58.

[3] Leslie *v.* Bailie, 2 Younge & Coll. N. R. 91, 96; Haven *v.* Foster, 9 Pick. 113, 130; Raynham *v.* Canton, 3 Pick. R. 293; Kenny *v.* Clarkson, 1 Johns. R. 385; Trith *v.* Sprague, 14 Mass. 455; Consequa *v.* Willings, 1 Peters, Circ. R. 229. McCormick *v.* Garnett, 5 DeG. M. & G. 278; Haven *v.* Foster, 9 Pick. 112, 19 Am. Dec. 353; Vinal *v.* Improvement Co., 53 Hun, 246, 6 N. Y. Supp. 595; Bank of Chillicothe *v.* Dodge, 8 Barb. 233; Wood *v.* Roeder, 50 Neb. 476, 70 N. W. 27; Rosenbaum *v.* Credit System Co., 64 N. J. L. 34, 44 Atl. 966; King *v.* Doolittle, 1 Head, 77, 84.

be denied it. This distinction may be easily illustrated by a familiar case. A buys an estate of B, to which the latter is supposed to have an unquestionable title. It turns out upon due investigation of the facts, unknown at the time to both parties, that B has no title (as if there be a nearer heir than B, who was supposed to be dead, but is in fact living); in such a case equity would relieve the purchaser and rescind the contract.[1] But suppose A were to sell an estate to B, whose location was well known to each, and they mutually believed it to contain twenty acres, and in point of fact it contained only nineteen acres and three fourths of an acre, and the difference would not have varied the purchase in the view of either party, in such a case the mistake would not be a ground to rescind the contract.[2]

§ 211. **The Mutuality of the Mistake.** — In cases of mutual mistake going to the essence of the contract it is by no means necessary that there should be any presumption of fraud. On the contrary equity will often relieve, however innocent the parties may be. Thus if one person should sell a messuage to another, which was at the time swept away by a flood or destroyed by an earthquake without any knowledge of the fact by either party, a Court of Equity would relieve the purchaser upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract. It constituted therefore the very essence and condition of the obligation of their contract.[3] So if a person should execute a release to another party upon the supposition founded in a mistake that a certain debt or annuity had been discharged, although both parties were innocent, the release would be set aside upon the ground of the mistake.[4] The civil law holds the same principle. "Domum emi, cum eam et ego et venditor combustam ignoraremus. Nerva, Sabinus, Cassius, nihil venisse, quamvis area maneat, pecuniamque solutam condici posse, aiunt."[5]

[1] See 1 Evans, Pothier on Oblig. Pt. 1, ch. 1, art. 9, n. 17, 18; Bingham *v.* Bingham, 1 Ves. 126; 1 Fonbl. Eq. B. 1, ch. 2, § 7. See also Calverley *v.* Williams, 1 Ves. Jr. 210, 211.

[2] See Smith *v.* Evans, 6 Binn. 102; Mason *v.* Pearson, 2 John. R. 37.

[3] Hitchcock *v.* Giddings, 4 Price, R. 135, 141; s. c. Daniel's R. 1; 2 Kent, Comm. Lect. 39, p. 469 (2d ed.). But see Sugden on Vendors, p. 237, and note 1, 7th ed.; Stent *v.* Bailis, 2 P. Will. 220; Colyer *v.* Clay, 7 Beav. 188.

[4] Howe *v.* Brether, 12 Simons, R. 465; Fane *v.* Fane, L. R. 20 Eq. 698; Strickland *v.* Turner, 7 Exch. 208; Cochran *v.* Willis, L. R. 1 Ch. App. 58.

[5] Dig. Lib. 18, tit. 1, l. 57; 2 Kent, Comm. Lect. 39, pp. 468, 469 (2d ed.); Grotius De Jure Belli, B. 2, ch. 11, § 7. If the house were partially

§ 212. **Mistake as to an Existing Fact.** — The same principle will apply to all other cases where the parties mutually bargain for and upon the supposition of an existing right. Thus if a purchaser should buy the interest of the vendor in a remainder in fee, expectant upon an estate tail and the tenant in tail had at the time, unknown to both parties, actually suffered a recovery, and thus barred the estate in remainder, a Court of Equity would relieve the purchaser in regard to the contract purely upon the ground of mistake.[1] [Where an executor sold what he thought was the land of his testator, executed a deed for same and received the purchase price, and before it was distributed it was ascertained that the testator had no title, and the deed conveyed nothing, equity will decree a re-payment of the amount to the purchaser.[2]]

§ 213. **Same.** — It will make no difference in the application of the principle, that the subject-matter of the contract be known to both parties to be liable to a contingency which may destroy it immediately; for if the contingency has, unknown to the parties, already happened, the contract will be void, as founded upon a mutual mistake of a matter constituting the basis of the contract. Thus if a life estate should be sold, and at the time of the sale the estate is terminated by the death of the party in whom the estate is vested, and that fact is unknown to both parties, a Court of Equity would rescind the contract upon the ground of a mutual mistake of the fact which constituted the basis of the contract.[3] So if a horse should be purchased, which is by both parties believed to be alive, but is at the time of the purchase in fact dead, the purchaser would upon the same ground be relieved by rescinding the contract if the money was not paid, and if paid, by decreeing the money to be paid back.[4] [Where parties entered into a contract under the mistaken belief that there was coal underlying the premises, when in fact there was no coal, the contract will be annulled;[5] and where defendant

burnt, the civilians seemed to have entertained different opinions, whether the vendor was bound by the contract, having an abatement of the price or allowance for the injury, or had an election to proceed or not with the contract, with such an abatement or allowance. See 2 Kent, Comm. Lect. 39, p. 469 (4th ed.); Pothier De Vente, n. 4. Grotius has made some sensible remarks upon the subject of error in contracts, Grotius De Jure Belli, B. 2, ch. 11, § 6.

[1] Hitchcock *v.* Giddings, 4 Price, R. 135; s. c. Daniel's R. I.

[2] In re Mulholland's Estate, 224 Pa. 536, 73 Atl. 932.

[3] Allen *v.* Hammond, 36 U. S. 63, 9 L. Ed. 633. [4] Ibid.

[5] Fritzler *v.* Robinson, 70 Iowa 500, 31 N. W. 61; Bluestone Coal Co. *v.* Bell, 38 W. Va. 297, 18 S. E. 493.

entered into a contract with the government to carry the mails from Galveston to Velasco. Before the bid was accepted, and without notice to the defendant, the post office at Velasco had been abolished, so that it became necessary that the mail be carried further on and across a wide river to Quintana. The defendant refused to carry the mail to Quintana and in this action he was relieved of the contract.[1] Plaintiffs sold to defendant a tract of land, supposed by both to contain several million feet of timber. Defendant sent a man to estimate the timber, and he examined the wrong land, and acting under this mistake, reported his findings to the defendant. Defendant pleaded the mistake of fact as a defence to this action to recover the purchase price, and the contract was annulled.[2] And where plaintiff sued to recover the purchase price of a flouring mill to be manufactured and built for the defendant, which would produce 60% patent flour, or 5% more than a given mill, and after the manufacture of the mill in question, an investigation revealed the fact that the standard mill, supposed to produce 55% patent flour, did not exist, the plaintiff is entitled to recover. Here, he contracted to furnish a mill that will produce a result measured by a stated standard assumed to exist, when in fact no such standard did exist, the contract is impossible of fulfillment.[3] The rule also applies where the plaintiff, creditor, procured insurance of $6,000 upon the life of a debtor, and the continued payment of premiums having become burdensome, plaintiff's intestate surrendered the policy and accepted instead a paid-up policy for $2,500. The plaintiff did not know until ten days after the exchange had been made, that, at the time of the cancellation of the $6,000 policy, the insured was then dead, and in this action she was entitled to recover because of the mistake of material facts.[4] An English case upon this same principle arose out of the sale of a quantity of corn, which was in transit by boat. The owners of the corn sold it, but it was afterwards ascertained that the corn had heated during the voyage and was not the subject of sale by the plaintiff at the time, and therefore the contract was void.[5]]

[1] United States *v.* Charles, 74 Fed. 142, 20 C. C. A. 346; Geib *v.* Reynolds, 35 Minn. 331, 28 N. W. 923.

[2] Thwing *v.* Lumber Co., 40 Minn. 184, 41 N. W. 815.

[3] Nordyke & Marmon Co. *v.* Kehlor, 155 Mo. 643, 56 S. W. 287, 78 Am. St. Rep. 600.

[4] Riegel *v.* American Life Ins. Co., 153 Pa. 134, 25 Atl. 1030, 19 L. R. A. 166.

[5] Couturier *v.* Hastie, 5 H. L. Cas. 673.

§ 214. **Same.** — The same principle has been applied to the case of a contract between two persons whereby one contracted for a large sum as a contingent compensation for his services in prosecuting a claim of the other against a foreign government for an illegal capture if it should be successful, and at the time of the contract the claim had, unknown to both parties, been allowed by the foreign government with a stipulation for a due payment thereof; for the very basis of the contract was future services to be rendered in prosecuting the claim, and unless such services were rendered there was no consideration to support it.[1]

§ 215. **Mistake as to Existence of Thing Sold.** — The same principle will apply to cases of purchases where the parties have been innocently misled under a mutual mistake as to the extent of the thing sold. Thus if one party thought that he had bona fide purchased a piece of land as parcel of an estate, and the other thought he had not sold it under a mutual mistake of the bargain, that would furnish a ground to set aside the contract; because (as has been said) it is impossible to say that one shall be forced to give that price for part only which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only.[2] [So that when the plaintiff was shown a lot of land by defendant, who stated that the line ran to a certain point and the block contained about 25 acres, and after plaintiff purchased upon this representation and built his house, he then found that the tract contained only about half of what he thought it contained, and the most valuable part, which went to the certain point above mentioned, was the property of another, he was entitled to a rescission of the trade. It is well settled that a vendee of land, when it is sold in gross, or with the description "more or less", or "about", does not thereby, ipso facto, take all risk of quantity of the tract, and relief will be granted when the mistake is so material that, if the truth had been known to the parties, the trade would not have been made.[3] There are differences in sales in gross, such as are evidenced by the expressions "more or less", "about", "by estimate", and sales at "hazard", when quantity is not regarded material or estimated. In the first class of cases relief will be granted. In the latter it will not.[4]]

[1] Allen *v.* Hammond, 36 U. S. 63, 9 L. Ed. 633.

[2] Calverley *v.* Williams, 1 Ves. Jr. 210, 21.

[3] Bigham *v.* Madison, 103 Tenn. 358, 52 S. W. 1074, 47 L. R. A. 267; Rogers *v.* Pattie, 96 Va. 498, 31 S. E. 897.

[4] Pratt *v.* Bowman, 37 W. Va. 715, 17 S. E. 210.

§ 216. **Mistake as to Quantity of Land, Where Boundaries Are Certain.** — But here the nature of the purchase often constitutes a material ingredient. Thus if a purchase is made of a thing in gross, as for example of a farm, as containing in gross by estimation a certain number of acres (such a sale is called in the Roman law a sale per aversionem) by certain boundaries; then if the transaction be bona fide, and both parties be equally under a mistake as to the quantity but not as to the boundaries, the sale will be binding on both parties, whether the farm contain more or fewer acres.[1]

§ 217. **Release of One's Property in Ignorance as to Ownership.** — It is upon the same ground that a Court of Equity proceeds where an instrument is so general in its terms as to release the rights of the party to property to which he was wholly ignorant that he had any title, and which was not within the contemplation of the bargain at the time when it was made. In such cases the court restrains the instrument to the purposes of the bargain, and confines the release to the right intended to be released or extinguished.[2]

§ 218. **Loss of Right by Failure to Use Due Diligence to Learn the Facts, Not Actionable.** — It is not however sufficient in all cases to give the party relief that the fact is material, but it must be such as he could not by reasonable diligence get knowledge of when he was put upon inquiry. For if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence. Thus if a party has lost his cause at law from the want of proof of a fact which by ordinary diligence he could have obtained, he is not relievable in equity; for the general rule is that if the party becomes remediless at law by his own negligence, equity will leave him to bear the consequence.[3]

[1] Morris Canal Co. *v.* Emmatt, 9 Paige, R. 168; Stebbins *v.* Eddy, 4 Mason, R. 414; post, § 276. See Dig. Lib. 18, tit. 6, l. 35, § 5. See Noble *v.* Googins, 99 Mass. 231; note to § 209.

[2] Farewell *v.* Coker, cited 2 Meriv. 352; Ramsden *v.* Hylton, 2 Ves. 304.

[3] Fonbl. Eq. B. 1, ch. 3, § 3; Penny *v.* Martin, 4 John. Ch. R. 566. The rule of the civil law is the same. "Sed facti ignorantia ita demum cuique non nocet, si non ei summa negligentia objiciatur. Quod, enim si omnes in civitate sciant, quod ille solus ignorat? Et recte Labeo definit, scientiam neque curiossimi neque negligentissimi hominis accipiendam; verum ejus, qui eam rem diligenter inquirendo notam habere possit." Dig. Lib. 22, tit. 6, l. 9, § 2; Pothier, Pand. Lib. 22, tit. 6, § 4, n. 11.. In the late case of Bell *v.* Gardiner, 4 Mann. & Granger, 11, 24, it was held that at law a promise to pay a note under ignorance of facts, but where the party had the *means* of knowledge, and might have made inquiry, did not bind him.

§ 219. **Rights Where Material Fact Is Mistaken by One Party and Known by the Other.** — Nor is it in every case where even a material fact is mistaken or unknown without any default of the parties that a Court of Equity will interpose. The fact may be unknown to both parties, or it may be known to one party and unknown to the other. If it is known to one party and unknown to the other, that will in some cases afford a solid ground for relief, as for instance where it operates as a surprise or a fraud upon the ignorant party.[1] But in all such cases the ground of relief is not the mistake or ignorance of material facts alone, but the unconscientious advantage taken of the party by the concealment of them.[2] For if the parties act fairly, and it is not a case where one is bound to communicate the facts to the other upon the ground of confidence or otherwise, there the court will not interfere. Thus if A, knowing that there is a mine in the land of B of which he knows that B is ignorant, should buy the land without disclosing the fact to B, for a price in which the mine is not taken into consideration, B would not be entitled to relief from the contract, because A, as the buyer, is not obliged from the nature of the contract to make the discovery.[3] [And where plaintiff pur-

The same point was decided in Kelly *v.* Solari, 9 Mees. & Welsb. 54, and Lucas *v.* Worswick, 1 Mood. & Rob. 293. All these cases at law proceed upon the ground that a mistake of material facts will avoid a promise made on the foundation of that mistake, even when he had the means of knowledge within his reach. But Courts of Equity proceed upon a somewhat differently modified doctrine. If relief can be given at law, then there is no ground for any application to a Court of Equity for relief. But if a Court of Equity is asked to give relief in a case not fully remediable at law, or not remediable at all at law, then it grants it upon its own terms and according to its own doctrines. It gives relief only to the vigilant and not to the negligent; to those who have not been put upon their diligence to make inquiry, and not to those who, being put upon inquiry, have chosen to omit all inquiry which would have enabled them at once to correct the mistake or to obviate all ill effects therefrom. In short it refuses all its aid to those who by their own negligence, and by that alone, have incurred the loss or may suffer the inconvenience. It is one thing to act under a mistake of fact, having the means of inquiry but without being aware of the necessity of ascertaining the facts, and quite a different thing to omit all inquiry in due season, when the party is aware of the necessity, and the mode of the inquiry is pointed out to him or is within his reach. See post, §§ 400, 400 *a*. See note to § 297.

[1] Jeremy on Eq. Jurisd. B. 3, ch. 2, pp. 366, 367; Id. ch. 3, p. 387; Leonard *v.* Leonard, 2 Ball & Beatt. 179, 180, and the case cited in Mortimer *v.* Capper by the Lord Chancellor, 4 Brown, Ch. R. 158; 6 Ves. 24; Gordon *v.* Gordon, 3 Swanst. 462, 467, 471, 473, 476, 477.

[2] See East India Company *v.* Donald, 9 Ves. 275; Earl of Bath and Montague's Case, 3 Ch. Cases, 56, 74, 103, 114.

[3] Post, § 295, note.

chased of a stock broker the note of a third party, and there was no representation made as to the financial condition of the maker of the paper, but at the time the maker had in fact made a deed of assignment. It is a general rule that where parties assume to contract, and there is a mistake as to the existence of identity of the subject-matter, there is no contract, because of the want of the mutual assent necessary to create one; so that, in the case of a contract for the sale of personal property, if there is such mistake, and the thing delivered is not the thing sold, the purchaser may refuse to receive it, or, if he receives it, may, upon discovery of the mistake, return it, and recover the price he has paid. But to produce this result the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality, or other collateral attributes, is not sufficient if the thing delivered is existent, and is the identical thing in kind which was sold.[1] The plaintiff may not recover the value of a rough stone, which she sold to a jeweller, neither of whom knew at the time its real value, but which subsequently turned out to be worth $1,000, she having sold it for one dollar.[2] But the purchaser of land cannot rescind his contract, when he thought the property contained valuable minerals, when this was not the fact.[3] The case of Sherwood *v.* Walker[4] is an apparent exception to the rule. Here the plaintiff purchased from the defendants a fine blooded cow, at the price of $80, because it was supposed by her breeders that she was barren. The fact is that she was not barren, and was therefore worth at least $750. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. The mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was.]

§ 220. **There Must Be Some Obligation to Inform Ignorant Party of the Mistake, in Order to Obtain Relief.** — And it is essential, in order to set aside such a transaction, not only that

[1] Hecht *v.* Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708.
[2] Wood *v.* Boynton, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610.
[3] Hood *v.* Todd, 58 S. W. 783.
[4] Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531.

an advantage should be taken, but it must arise from some obligation in the party to make the discovery; not from an obligation in point of morals only, but of legal duty. In such a case the court will not correct the contract merely because a man of nice morals and honor would not have entered into it. It must fall within some definition of fraud or surprise.[1] For the rules of law must be so drawn as not to affect the general transactions of mankind, or to require that all persons should in all respects be upon the same level as to information, diligence, and means of judgment. Equity as a practical system, although it will not aid immorality, does not affect to enforce mere moral duties; but its policy is to administer relief to the vigilant and to put all parties upon the exercise of a searching diligence.[2] Where confidence is reposed or the party is intentionally misled, relief may be granted; but in such a case there is the ingredient of what the law deems a fraud. Cases falling under this predicament will more properly come in review in a subsequent part of this work.[3]

§ 221. **No Relief Granted Where Means of Information Are Open to Both Parties.** — A like principle applies to cases where the means of information are open to both parties, and where each is presumed to exercise his own skill, diligence, and judgment in regard to all extrinsic circumstances. In such cases equity will not relieve. Thus if the vendee is in possession of facts which will materially enhance the price of the commodity, and of which he knows the vendor to be ignorant, he is not bound to communicate those facts to the vendor, and the contract will be held valid.[4] It has been justly observed that it would be difficult to circumscribe the contrary doctrine within proper limits, where the intelligence is equally accessible to both parties.[5] And where it is not, the same remark applies with the same force if it is not a case of mutual confidence or of a designed misleading of the

[1] Fox *v.* Mackreth, 2 Bro. Ch. R. 420; 1 Madd. Eq. Pl. pp. 63, 64; 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (*n*); Earl of Bath and Montague's Case, 3 Ch. Cases, 56, 74, 103, 114.

[2] 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (*h*).

[3] See Leonard *v.* Leonard, 2 Ball & Beatt. R. 179, 180; Gordon *v.* Gordon, 3 Swanst. 463, 467, 470, 473, 476, 477. See, on this subject, 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (*n*); Jeremy on Eq. Jurisd. 383, &c.; 1 Madd. Eq. Pr. 294, &c.; Laidlaw *v.* Organ, 15 U. S. 178, 4 L. Ed. 214; Pothier De Vente, n. 233 to 241, 5 U. S. 178, 4 L. Ed. 214; Smith *v.* Bank of Scotland, 1 Dow. Parl. R. 294; Pidcock *v.* Bishop, 3 B. & Cres. 605; Etting *v.* Bank of U. S., 24 U. S. 59, 6 L. Ed. 419, and cases there cited; post, §§ 371 to 385, 431 to 452.

[4] Laidlaw *v.* Organ, 15 U. S. 17, L. Ed. 28, 414. [5] Ibid.

vendor.[1] Thus if a vendee has private knowledge of a declaration of war or of a treaty of peace or of other political arrangements (in respect to which men speculate for themselves) which materially affect the price of commodities, he is not bound to disclose the fact to the vendor at the time of his purchase; but, at least in a legal and equitable sense, he may innocently be silent. For there is no pretence to say that upon such matters men repose confidence in each other any more than they do in regard to other matters affecting the rise and fall of markets.[2] The like principle applies to all other cases where the parties act upon their own judgment in matters mutually open to them. Thus if an agreement for the composition of a cause is fairly made between parties with their eyes open and rightly informed, a Court of Equity will not overhaul it, although there has been a great mistake in the exercise of their judgment.[3]

§ 222. **Same.** — In like manner where the fact is equally unknown to both parties, or where each has equal and adequate means of information, or where the fact is doubtful from its own nature; in every such case if the parties have acted with entire good faith, a Court of Equity will not interpose.[4] For in such cases the equity is deemed equal between the parties; and when it is so, a Court of Equity is generally passive and rarely exerts an active jurisdiction. Thus where there was a contract by A to sell to B for £20 such an allotment as the commissioners under an enclosure act should make for him, and neither party at the time knew what the allotment would be, and were equally in the dark as to the value, the contract was held obligatory, although it turned out upon the allotment to be worth £200.[5] The like

[1] Pothier, in his Treatise on the subject of Sales, has treated this subject with great ability, and has cited the doctrines of the civil law and the discussions of civilians and writers upon natural law on this subject. While he contends strenuously for the doctrine of good faith and full discovery in all cases, he is compelled to admit that the doctrines in foro conscientiæ have had little support in judicial tribunals, and indeed are not easily applicable to the common business of life. Indeed he admits that though concealment of material facts by the vendee, which may enhance the price, is wrong in foro conscientiæ, yet that it would too much restrict the freedom of commerce to apply such a rule in civil transactions. See Pothier, Traité de Vente, Pt. 2, ch. 2, n. 233 to 242; Id. Pt. 3, § 2, n. 294 to 298; 15 U. S. 178, 4 L. Ed. 214.

[2] Ibid. See Abbott *v.* Dermott, 34 Ga. 227.

[3] Brown *v.* Pring, 1 Ves. 408.

[4] 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*); 1 Powell on Cont. 200; 1 Madd. Ch. Pr. 62 to 64.

[5] Cited in Mortimer *v.* Capper, 2 Bro. Ch. R. 158; 6 Ves. 24; 1 Madd. Eq. Pr. 63; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*). See also Pullen *v.*

rule will apply to all cases of sale of real estate or personal estate made in good faith, where material circumstances affecting the value are equally unknown to both parties.

§ 223. **No Relief Lies Where Both Parties Were Equally Innocent and in Absence of Surprise or Imposition.** — The general ground upon which all these distinctions proceed is, that mistake or ignorance of facts in parties is a proper subject of relief only when it constitutes a material ingredient in the contract of the parties and disappoints their intention by a mutual error, or where it is inconsistent with good faith and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly damnum absque injuria.[1]

§ 224. **Reformation of Written Instruments Executed by Mistake.** — One of the most common classes of cases in which relief is sought in equity on account of a mistake of facts is that of written agreements either executory or executed. Sometimes by mistake the written agreement contains less than the parties intended, sometimes it contains more, and sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent.[2] In all such cases if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent until the contrary is established beyond reasonable controversy.[3]

§ 225. **Same.** — It has indeed been said that where there is a written agreement the whole sense of the parties is presumed to be

Ready, 2 Atk. R. 592; Gordon *v.* Gordon, 3 Swanst. 463, 467, 470, 471, 473, 476, 477; Ainslie *v.* Medlycott, 9 Ves. 13.

[1] See Jeremy on Eq. Jur. B. 3, Pt. 2, p. 358.

[2] See Durant *v.* Durant, 1 Cox, R. 58; Calverley *v.* Williams, 1 Ves. Jr. 210.

[3] Shelburne *v.* Inchiquin, 1 Bro. Ch. R. 338, 341; Henkle *v.* Royal Assur. Company, 1 Ves. 317; Davis *v.* Symonds, 1 Cox, R. 404; Townshend *v.* Stangroom, 6 Ves. 332 to 338; Woolam *v.* Hearn, 7 Ves. 217, 218; Gillespie *v.* Moon, 2 John. Ch. R. 585; Lyman *v.* United Ins. Co., 2 John. Ch. R. 630; Graves *v.* Boston Marine Insur. Co., 6 U. S. 442, 2 L. Ed. 324.

comprised therein; that it would be dangerous to make any addition to it in cases where there does not appear to be any fraud in leaving out anything; and that it is against the policy of the common law to allow parol evidence to add to, or vary the terms of, such an agreement.[1] As a general rule there is certainly much to recommend this doctrine. But however correct it may be as a general rule, it is very certain that Courts of Equity will grant relief upon clear proof of a mistake, notwithstanding that mistake is to be made out by parol evidence.[2] Lord Hardwicke upon an occasion of this sort said: "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts; so that if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified."[3] And this doctrine has been recognized upon many other occasions.[4]

§ 226. **Same.** — It is difficult to reconcile this doctrine with that rule of evidence at the common law which studiously excludes the admission of parol evidence to vary or control written contracts. The same principle lies at the foundation of each class of decisions, that is to say, the desire to suppress frauds and to promote general good faith and confidence in the formation of contracts. The

[1] 1 Fonbl. Eq. B. 1, ch. 3, § 11, and note (*o*); Irnham *v.* Child, 1 Bro. Ch. 92, 93; Woolam *v.* Hearn, 7 Ves. 211; Rich *v.* Jackson, 4 Bro. Parl. R. 514; s. c. 6 Ves. 334, note; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, p. 432; Davis *v.* Symonds, 1 Cox, R. 402, 404.

[2] Marquis of Townshend *v.* Stangroom, 6 Ves. 332, 333; 1 Fonbl. Eq. B. 1, ch. 3, § 11; Shelburne *v.* Inchiquin, 1 Bro. Ch. R. 338, 350; Simpson *v.* Vaughan, 2 Atk. 31; Langley *v.* Brown, 2 Atk. 203.

[3] Henkle *v.* Royal Assur. Co., 1 Ves. 314. See Townshend *v.* Stangroom, 6 Ves. 332 to 339; Shelburne *v.* Inchiquin, 1 Bro. Ch. R. 338, 350; Sugden on Vendors, pp. 146 to 159 (7th ed.); Hunt *v.* Rousmaniere, 21 U. S. 174, 5 L. Ed. 589; s. c. 26 U. S. 1, 7 L. Ed. 27.

[4] Ibid.; Motteux *v.* London Assur. Co., 1 Atk. 545; Gillespie *v.* Moon, 2 John. Ch. R. 585; Lyman *v.* United Insur. Co., 2 John. Ch. R. 630; Simpson *v.* Vaughan, 2 Atk. 33; Langley *v.* Brown, 2 Atk. 203; Bust *v.* Barlow, 3 Bro. Ch. R. 454; 5 Ves. 595; Irnham *v.* Child, 1 Bro. Ch. R. 94; Baker *v.* Paine, 1 Ves. 457; Crosby *v.* Middleton, Pr. Ch. 309; Wiser *v.* Blachley, 1 John. Ch. R. 607; South Sea Co. *v.* D'Oliffe, cited 1 Ves. 317; 2 Ves. 377; 5 Ves. 601; Pitcairne *v.* Ogbourne, 2 Ves. 375; 1 Fonbl. Eq. B. 1, ch. 3, § 11, and note (*o*); Mitf. Pl. pp. 127, 128; Clowes *v.* Higginson, 1 Ves. & Beames, 524; Ball *v.* Storie, 1 Sim. & Stu. R. 210; Marshall on Insurance, B. 1, ch. 8, § 4; Clinan *v.* Cooke, 1 Sch. & Lefr. 32, &c. See Sugden on Vendors, pp. 146 to 159 (7th ed.); Andrews *v.* Essex F. Ins. Co., 3 Mason, R. 10; Chapman *v.* Hurd, 67 Ill. 234; Parsons *v.* Bignold, 13 Sim. 518; Murray *v.* Dake, 46 Cal. 644; Rider *v.* Powell, 4 Abb. Dec. 63; New *v.* Wamback, 42 Ind. 456; Worth *v.* Stewart, 122 N. C. 258, 29 S. E. 579; Wiseman *v.* Green, 122 N. C. 288, 31 S. E. 668.

danger of setting aside the solemn engagements of parties when reduced to writing, by the introduction of parol evidence substituting other material terms and stipulations, is sufficiently obvious.[1] But what shall be said where those terms and stipulations are suppressed or omitted by fraud or imposition? Shall the guilty party be allowed to avail himself of such a triumph over innocence and credulity to accomplish his own base designs? That would be to allow a rule introduced to suppress fraud to be the most effectual promotion and encouragement of it. And hence Courts of Equity have not hesitated to entertain jurisdiction to reform all contracts where a fraudulent suppression, omission, or insertion of a material stipulation exists, notwithstanding to some extent it breaks in upon the uniformity of the rule as to the exclusion of parol evidence to vary or control contracts; wisely deeming such cases to be a proper exception to the rule, and proving its general soundness.[2]

§ 227. **Innocent Omission or Insertion of Material Matter by Mistake.** — It is upon the same ground that equity interferes in cases of written agreements where there has been an innocent omission or insertion of a material stipulation contrary to the intention of both parties and under a mutual mistake. To allow it to prevail in such a case would be to work a surprise, or fraud, upon both parties; and certainly upon the one who is the sufferer. As much injustice would to the full be done under such circumstances as would be done by a positive fraud or an inevitable accident.[3] A Court of Equity would be of little value if it could

[1] See Woolam *v.* Hearn, 7 Ves. 219.

[2] Newl. Eq. Cont. ch. 19; 1 Eq. Abridg. 20, pl. 5; Filmer *v.* Gott, 4 Bro. Parl. Cas. 230; 1 Fonbl. Eq. B. 1, ch. 2, § 8; Id. ch. 3, § 4, and note (*n*); Irnham *v.* Child, 1 Bro. Ch. R. 92; Portmore *v.* Morris, 2 Bro. Ch. R. 219; 1 Eq. Abridg. 19; Id. 20, Agreements, B.; Hunt *v.* Rousmaniere, 21 U. S. 174, 5 L. Ed. 589; 26 U. S. 1, 7 L. Ed. 27. In cases of this sort it is often said, that the admission of the parol evidence to establish fraud or circumvention is not so much to vary the contract as to establish something collateral to it, which shows that it ought not to be enforced. Davis *v.* Symonds, 1 Cox, R. 402, 404, 405. But in cases of mistake the party often seeks to enforce the contract after insisting upon its being reformed. See 3 Starkie on Evid. Pt. 4, pp. 1015, 1016, 1018; Pitcairne *v.* Ogbourne, 2 Ves. 375, 376; Baker *v.* Paine, 1 Ves. 456. See also Attorney-Gen. *v.* Sitwell, Younge & Coll. 559, 582, and the remarks of Mr. Baron Alderson against the admission of parol evidence in such cases. Post, § 233. Log Co. *v.* Coffin, 130 N. C. 436, 37 S. E. 998; Brown *v.* Hobbs, 147 N. C. 76, 60 S. E. 716; Typewriter Co. *v.* Hardware Co., 143 N. C. 97, 55 S. E. 417.

[3] Joynes *v.* Statham, 3 Atk. 388; Ramsbottom *v.* Colden, 1 Ves. & Beames, R. 168; 1 Fonbl. Eq. B. 1, ch. 2, § 8, note (*z*); Id. § 7, note (*v*).

suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischiefs contrary to the intention of parties. It would be to allow an act originating in innocence to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice under the shelter of a rule framed to promote it.[1] In a practical view there would be as much mischief done by refusing relief in such cases as there would be introduced by allowing parol evidence in all cases to vary written contracts.

§ 228. **Same.** — We must therefore treat the cases in which equity affords relief, and allows parol evidence to vary and reform written contracts and instruments upon the ground of accident and mistake, as properly forming, like cases of fraud, exceptions to the general rule which excludes parol evidence and as standing upon the same policy as the rule itself.[2] If the mistake should be admitted by the other side, the court would certainly not overturn any rule of equity by varying the deed; but it would be an equity dehors the instrument.[3] And if it should be proved by other evidence entirely satisfactory and equivalent to an admission, the reasons for relief would seem to be equally cogent and conclusive.[4] It would be a great defect in the moral jurisdiction of the court if under such circumstances it were incapable of administering relief.[5]

§ 229. **Same.** — And this remark naturally conducts us back again to the qualification of the doctrine (already stated) which is insisted upon by Courts of Equity. Relief will be granted in cases of written instruments only where there is a plain mistake clearly made out by satisfactory proofs.[6] It is true that this in

[1] Townshend *v.* Stangroom, 6 Ves. 336, 337; Gillespie *v.* Moon, 2 John. Ch. R. 596; Joynes *v.* Statham, 3 Atk. 385; 3 Starkie, Evid. Pt. 4, pp. 1018, 1019; Pitcairne *v.* Ogbourne, 2 Ves. R. 377, and South Sea Company *v.* D'Oliffe, there cited; Peacock *v.* Barnes, 139 N. C. 193, 51 S. E. 926.

[2] Joynes *v.* Statham, 3 Atk. 388; Ramsbottom *v.* Golden, 1 Ves. & Beam. R. 168; 1 Fonbl. Eq. B. 1, ch. 2, § 11, note (*o*); Mitf. Eq. Pl. by Jeremy, p. 129; Clowes *v.* Higginson, 1 Ves. & Beam. R. 526, 527; Ball *v.* Storie, 1 Sim. & Stu. 210.

[3] Davis *v.* Symonds, 1 Cox, R. 404, 405.

[4] Irnham *v.* Child, 1 Bro. Ch. R. 92, 93.

[5] See Townshend *v.* Stangroom, 6 Ves. 336, 337; Gillespie *v.* Moon, 2 John. Ch. R. 596.

[6] Gillespie *v.* Moon, 2 John. Ch. R. 595 to 597; Lyman *v.* United Insurance Company, 2 John. Ch. R. 630; Henkle *v.* Royal Assurance Company, 1 Ves. 317; Jeremy on Eq. Jurisd. Pt. 2, ch. 2, p. 368; Id. ch. 4, pp. 490, 491; Townshend *v.* Stangroom, 6 Ves. 328, 339; King *v.* Hobbs, 139 N. C. 173, 51 S. E. 911; Roberts *v.* Derby, 68 Hun, 299, 23 N. Y. Supp. 34, 52 N. Y.

one sense leaves the rule somewhat loose, as every court is still left free to say what is a plain mistake, and what are proper and satisfactory proofs. But this is an infirmity belonging to the administration of justice generally; for in many cases different judges will differ as to the result and weight of evidence, and consequently they may make different decisions upon the same evidence.[1] But the qualification is most material, since it cannot fail to operate as a weighty caution upon the minds of all judges;[2] and it forbids relief whenever the evidence is loose, equivocal, or contradictory, or it is in its texture open to doubt or to opposing presumptions.[3]

§ 230. **Same.** — Many of the cases included under this head have arisen under circumstances which brought them within the reach of the Statute of Frauds (as it is commonly called), which requires certain contracts to be in writing. But the rule as to rejecting parol evidence to contradict written agreements is by no means confined to such cases. It stands as a general rule of law independent of that statute.[4] It is founded upon the ground that the written instrument furnishes better evidence of the deliberate intention of the parties than any parol proof can supply.[5] And the exceptions to the rule originating in accident and mistake have been equally applied to written instruments within and without the Statute of Frauds.[6] Thus for instance relief has

St. 95; Palmer *v.* Hartford Fire Ins. Co., 54 Conn. 488, 9 Atl. 248; Parker *v.* Hull, 71 Wis. 368, 37 N. W. 351; Thayer *v.* Seep, 168 Pa. St. 414, 31 Atl. 1072; Herring *v.* Peaslee, 92 Iowa, 391, 60 N. W. 650; Murphy *v.* First Natl. Bank, 95 Iowa, 325, 63 N. W. 702.

[1] See Lord Eldon's Remarks in Townshend *v.* Stangroom, 6 Ves. 333, 334.

[2] See Hall *v.* Claggett, 2 Md. Ch. 151, 153.

[3] Lord Thurlow in one case said that the final evidence must be strong irrefragable evidence. Shelburne *v.* Inchiquin, 1 Bro. Ch. R. 347. If by this language his Lordship only meant that the mistake should be made out by evidence clear of all reasonable doubt, its accuracy need not be questioned. But if he meant that it should be in its nature or degree incapable of refutation, so as to be beyond any doubt and beyond controversy, the language is too general. See Attorney-General *v.* Sitwell, 1 Younge & Coll. 583.

[4] Woolam *v.* Hearn, 7 Ves. 218; 1 Fonbl. Eq. B. 1, ch. 2, § 11, note (*v*); Clowes *v.* Higginson, 1 Ves. & Beames, R. 526; Pitcairne *v.* Ogbourne, 2 Ves. 375; Sugden on Vendors, ch. 3, § 3; Parteriche *v.* Powlet, 2 Atk. 383, 384; 3 Starkie on Evid. Pt. 4, tit. Parol Evid. pp. 995 to 1020; Davis *v.* Symonds, 1 Cox, R. 402, 404, 405.

[5] Ibid.

[6] As to cases of land where the intention was to convey more than the deed covers, see Glass *v.* Hulbert, 102 Mass. 24. But see contra Hitchins *v.* Pettingill, 58 N. H. 386; ante, note to § 209.

been granted or refused according to circumstances in cases of asserted mistakes in policies of insurance[1] even after a loss has taken place.[2] And in the same manner equity has interfered in other cases of contract, not only of a commercial nature but of any other nature.[3]

§ 231. **Conveyances and Other Solemn Contracts May Be Reformed.** — The relief granted by Courts of Equity in cases of this character is not confined to mere executory contracts by altering and conforming them to the real intent of the parties, but it is extended to solemn instruments which are made by the parties in pursuance of such executory or preliminary contracts. And indeed if the court acted otherwise there would be a great defect of justice, and the main evils of the mistake would remain irremediable. Hence in preliminary contracts for conveyances, settlements, and other solemn instruments the court acts efficiently by reforming the preliminary contract itself, and decreeing a due execution of it as reformed, if no conveyance or other solemn instrument in pursuance of it has been executed. And if such conveyance or instrument has been executed, it reforms the latter also by making it such as the parties originally intended.[4]

§ 232. **Reformation of Contract Where Written Memorandum Shows the Mistakes.** — There is less difficulty in reforming written instruments where the mistake is mainly or wholly made out by other preliminary written instruments or memoranda of the agreement. The danger of public mischief or private inconvenience is

[1] National Ins. Co. *v.* Crane, 16 Md. 260; Keith *v.* Globe Ins. Co., 52 Ill. 518; Oliver *v.* Mutual Ins. Co., 2 Curt. 277. See Mackenzie *v.* Coulson, L. R. 8 Eq. 368; Parker *v.* Benjamin, 53 Ill. 255.

[2] Motteux *v.* London Assur. Co., 1 Atk. 545; Henkle *v.* Royal Ex. Assur. Co., 1 Ves. 317; Lyman *v.* United Ins. Co., 2 John. Ch. R. 630; Head *v.* Boston Ins. Co., 2 Cranch, 419, 444; Marsh. on Insurance, B. 1, ch. 8, § 4; Id. Andrews *v.* Essex Fire Ins. Co., 3 Mason, R. 10; Delaware Ins. Co. *v.* Hogan, 2 Wash. Cir. R. 5.

[3] Baker *v.* Paine, 1 Ves. 456; Getman's Executors *v.* Beardsley, 2 John. Ch. R. 274; Simpson *v.* Vaughan, 2 Atk. 30; Bishop *v.* Church, 2 Ves. 100, 371; Thomas *v.* Frazer, 3 Ves. 399; Finley *v.* Lynn, 6 Cranch, 238; Mitf. Pl. Eq. by Jeremy, pp. 129, 130; Pitcairne *v.* Ogbourne, 2 Ves. 375, and South Sea Company *v.* D'Oliffe, there cited, p. 377; 3 Starkie, Evid. Pt. 4, p. 1019; Underhill *v.* Harwood, 10 Ves. 225, 226; Edwin *v.* East India Company, 2 Vern. 210; Edwards *v.* Child, 2 Vern. 727.

[4] See Newland on Cont. ch. 19, pp. 338 to 347; Mitf. Eq. Pl. by Jeremy, pp. 128, 129, 130; Sugden on Vendors, pp. 146 to 150 (7th ed.); South Sea Company *v.* D'Oliffe, cited 2 Ves. 377; 2 Atk. 525; Henkle *v.* Royal Ex. Assurance Comp., 1 Ves. 417, 318; Baker *v.* Paine, 1 Ves. 456. But see Attorney-Gen. *v.* Sitwell, 1 Younge & Coll. 559, 582; post, § 233.

far less in such cases than it is in cases where parol evidence is admitted. And accordingly Courts of Equity interfere with far less scruple to correct mistakes in the former than mistakes in the latter.[1] Thus marriage settlements are often reformed and varied so as to conform to the previous articles; and conveyances of real estate are in like manner controllable by the terms of the prior written contract.[2] Memoranda of a less formal character are also admissible for the same purpose.[3] But in all such cases it must be plainly made out that the parties meant in their final instruments merely to carry into effect the arrangements designated in the prior contract or articles. For as the parties are at liberty to vary the original agreement if the circumstances of the case lead to the supposition that a new intent has supervened, there can be no just claim for relief upon the ground of mistake.[4] The very circumstance that the final instrument of conveyance or settlement differs from the preliminary contract affords of

[1] Jeremy on Eq. Jurisd. Pt. 2, ch. 2, pp. 368, 369; ch. 4, § 5, pp. 490, 491; Durant *v.* Durant, 1 Cox, R. 58; Grounds and Rudim. of the Law, M. 113, p. 81 (ed. 1751); Toth. 229 [131].

[2] The cases on this head are exceedingly numerous. Many of them will be found collected in Newland on Cont. ch. 19, p. 337; Com. Dig. Chancery, 3 Z. 11, 12; 1 Fonbl. Eq. B. 1, ch. 3, § 11, note (*p*); Id. ch. 6, § 7, and notes; 2 Bridg. Dig. Marriage, ii. p. 300; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*); Chitty, Eq. Dig. Settlement on Marriage, ix.; Randall *v.* Randall, 2 P. Will. 464; Randall *v.* Willis, 5 Ves. 275; West *v.* Erissey, 2 P. Will. 349, and Mr. Cox's note (1), p. 355; Jeremy, Eq. Jurisd. Pt. 2, ch. 2, p. 378 to 382; 3 Starkie, Evid. tit. Parol Evid. 10, 19; Barstow *v.* Kilvington, 5 Ves. 592. In cases of marriage articles the court will frequently give a construction to the words more favorable to the presumed intent of the parties than it does in some other cases. Thus in marriage articles, if there be a limitation to the parents for life, with remainder to the heirs of their bodies, the latter words are in equity generally construed to be words of purchase; and accordingly the court will carry such articles into effect by way of a strict settlement. Newland on Cont., ch. 19, p. 337; Fearne on Con. Rem. pp. 90 to 113 (7th ed. by Butler); 1 Fonbl. Eq. B. 1, ch. 3, § 11, note (*p*); Id. ch. 6, § 7, and notes, § 16, note (*e*); Randall *v.* Willis, 5 Ves. 275; West *v.* Erissey, 2 P. Will. 349; and Mr. Cox's note, Ibid. (1); Heneage *v.* Hunloke, 2 Atk. 455, and Sanders's note, Id. 457 (1); Jeremy on Eq. Jurisd. Pt. 2, ch. 2, pp. 378 to 382; Taggart *v.* Taggart, 1 Sch. & Lef. 84; Blackburn *v.* Staples, 2 V. & Beam. 368, 369; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 377, 378, 379.

[3] Motteux *v.* London Assurance Company, 1 Atk. 545; Baker *v.* Paine, 1 Ves. 456.

[4] 1 Fonbl. Eq. B. 1, ch. 3, § 11, note (*p*); Id. ch. 6, §§ 1, 13; Legg *v.* Goldwire, Cas. Temp. Talb. 20; West *v.* Erissey, 2 P. Will. 349, and Mr. Cox's note (1), 355; Beaumont *v.* Bromley, 1 Turn. & Russ. R. 41; Jeremy on Eq. Jurisd. Pt. 2, ch. 2, pp. 379, 380; Id. pp. 50, 51, 52, 53; ch. 4, § 5, pp. 490, 491; Id. 1 Madd. Eq. Pr. 85 (3d ed.).

itself some presumption of an intentional change of purpose or agreement, unless there is some recital in it or some other attendant circumstance which demonstrates that it was merely in pursuance of the original contract.[1] It is upon a similar ground that Courts of Equity as well as Courts of Law act, in holding that where there is a written contract all antecedent propositions, negotiations, and parol interlocutions on the same subject are to be deemed merged in such contract.[2]

§ 233. **Reformation Where Evidence of the Mistake Depends on Parol Testimony.** — In cases of asserted mistake in written contracts where the mistake is to be established by parol evidence, the question has often been mooted how far a Court of Equity ought to be active in granting relief by a specific performance in favor of the party seeking to reform the contract upon such parol evidence, and to obtain performance of it when it shall stand reformed. It is admitted that a defendant against whom a specific performance of a written agreement is sought may insist by way of answer upon the mistake as a bar to such a bill; because he may insist upon any matter which shows it to be inequitable to grant such relief. A Court of Equity is not, like a Court of Law, bound to enforce a written contract; but it may exercise its discretion when a specific performance is sought, and may leave the party to his remedy at law.[3] It will not therefore interfere to sustain a bill for a specific performance when it would be against conscience and justice so to do. On the other hand it seems equally clear that a party may as plaintiff have relief against a written contract by having the same set aside and

[1] 1 Fonbl. Eq. B. 1, ch. 3, § 11, note (*p*); Id. ch. 6, §§ 1, 13; Legg *v.* Goldwire, Cas. Temp. Talb. 20; West *v.* Erissey, 2 P. Will. 349, and Mr. Cox's note (1), 335; Beaumont *v.* Bromley, 1 Turn. & Russ. R. 41; Jeremy on Eq. Jurisd. Pt. 2, pp. 379, 380; Id. pp. 50, 51, 52, 53; ch. 4, § 5, pp. 490, 491; Id. 1 Madd. Eq. Pr. 85 (3d ed.).

[2] Rich *v.* Jackson, 4 Bro. Ch. R. 513; s. c. 6 Ves. 334, note; Pickering *v.* Dawson, 4 Taunt. 786; Kain *v.* Old, 2 B. & Cres. 634; Parkhurst *v.* Van Cortlandt, 1 John. Ch. R. 273; s. c. 14 John. R. 15; 1 Fonbl. Eq. B. 1, ch. 3, §§ 8, 11; Davis *v.* Symonds, 1 Cox, R. 402, 404; Vandervoort *v.* Smith, 2 Cain. R. 155.

[3] Com. Dig. Chancery, 2 C. 16; Joynes *v.* Statham, 3 Atk. 388; Garrard *v.* Grinling, 2 Swanst. R. 257; Pitcairne *v.* Ogbourne, 2 Ves. 375; Legal *v.* Miller, 2 Ves. 299; Mason *v.* Armitage, 13 Ves. 25; Clark *v.* Grant, 14 Ves. 519; Hepburn *v.* Dunlop, 14 U. S. 197, 4 L. Ed. 65; Clowes *v.* Higginson, 1 Ves. & B. 524; Winch *v.* Winchester, 1 Ves. & B. R. 375; Ramsbottom *v.* Golden, 1 Ves. & B. 165; Flood *v.* Finley, 2 Ball & B. 53; Clark *v.* Grant, 14 Ves. 519; Gillespie *v.* Moon, 2 John. Ch. R. 585, 598; Townshend *v.* Stangroom, 6 Ves. 328; Price *v.* Dyer, 17 Ves. 357.

cancelled or modified, whenever it is founded in a mistake of material facts, and it would be unconscientious and unjust for the other party to enforce it at law or in equity.[1] But the case intended to be put differs from each of these. It is where the party plaintiff seeks not to set aside the agreement, but to enforce it when it is reformed and varied by the parol evidence. A very strong inclination of opinion has been repeatedly expressed by the English courts not to decree a specific performance in this latter class of cases; that is to say, not to admit parol evidence to establish a mistake in a written agreement, and then to enforce it as varied and established by that evidence. On various occasions such relief has under such circumstances been denied.[2] But it is extremely difficult to perceive the principle upon which such decisions can be supported consistently with the acknowledged exercise of jurisdiction in the court to reform written contracts and to decree relief thereon.[3] In America

[1] See Ball *v.* Storie, 1 Sim. & Stu. R. and the cases there cited. Davis *v.* Ely, 104 N. C. 16, 10 S. E. 138, 17 Am. St. Rep. 667, 5 L. R. A. 810; Newsome *v.* Bufferlow, 16 N. C. 379; Davis *v.* Terry, 114 N. C. 27, 18 S. E. 947; Hughes *v.* Payne, 22 S. Dak. 293, 117 N. W. 363; Tossini *v.* Donahoe, 22 S. Dak. 277, 117 N. W. 148; Nutall *v.* Nutall, 26 Ky. L. Rep. 671, 82 S. W. 377; Goff *v.* Jones, 70 Tex. 572, 8 S. W. 525; Sampson *v.* Mudge, 13 Fed. 260; Fishback *v.* Ball, 34 W. Va. 644, 12 S. E. 856; French *v.* Chapman, 88 Va. 317, 13 S. E. 479; Clute *v.* Frazier, 58 Iowa 268, 12 N. W. 327.

[2] See Woolam *v.* Hearn, 7 Ves. 211; Higginson *v.* Clowes, 15 Ves. 516; Clinan *v.* Cooke, 1 Sch. & Lef. 38, 39; Clowes *v.* Higginson, 1 Ves. & B. 524; Winch *v.* Winchester, 1 Ves. & B. 375; Clark *v.* Grant, 14 Ves. 519; Rich *v.* Jackson, 6 Ves. 335; 4 Bro. Ch. R. 514; Ogilvie *v.* Foljambe, 3 Meriv. R. 53, 63; Townshend *v.* Stangroom, 6 Ves. 328; Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 4, § 1, p. 432; Clark *v.* Grant, 14 Ves. 519; Baker *v.* Paine, 1 Ves. 457; Gordon *v.* Uxbridge, 2 Madd. R. 106; Attorney-Gen. *v.* Sitwell, 1 Younge & Coll. 559, 582; Woolam *v.* Hearn, 7 Ves. 211, 6 RC *v.* Rep. 113, 32 Eng. Reprint 86; Higginson *v.* Clowes, 15 Ves. 513, 516, 10 Rev. Rep. 112, 33 Eng. Reprint 850; Attorney-Gen. *v.* Sitwell, 5 L. J. Exch. 86, 1 Y. & C. Exch. 559.

[3] Mr. Baron Alderson, in Attorney-Gen. *v.* Sitwell (1 Younge & Coll. 559, 582, 583), expressed a strong opinion against the reforming of a contract and then decreeing the performance of it in equity. In that case the question was whether by a memorandum of agreement to sell a certain manor of the Crown "with the appurtenances", an advowson appurtenant or appendant thereto passed; the statute of 17 Edward 2, ch. 13, having distinctly provided that the king shall not convey an advowson without express words to that effect. Mr. Baron Alderson in delivering his judgment said: "The second objection is upon the terms of the contract. The plaintiffs professed to sell the manor of Eckington 'with the appurtenances'; and as the appurtenances of a manor ordinarily include an advowson appendant or appurtenant, the defendant contends that he is not bound to take the property unless there be a conveyance to him in the terms of the memorandum in which the plaintiffs executed the

Mr. Chancellor Kent, after a most elaborate consideration of the subject, has not hesitated to reject the distinction as unfounded in justice, and has decreed relief to a plaintiff standing in the precise predicament.[1] [But in some of the States there is a hopeless conflict of authority upon the question, whether a court of equity will correct an executory contract on the ground of fraud or mis-

contract; and that the Crown must either give him the manor without excluding the advowson, or otherwise that the contract ought not to be performed. If the question was one between subject and subject, there would, I think, be great difficulty in decreeing the execution of the contract upon any other terms than those for which the defendant contends. It appears to me quite clear that the memorandum of agreement would carry this advowson under the general words 'with the appurtenances.' There are various authorities to that effect, and I may more particularly refer to Viner's Abridgment, tit. Prerog. (C. c.) 9. This would have been clear therefore as between subject and subject. And in that case the next question which would have arisen would have been, — whether or not, on the ground of mistake, one party not intending to sell, and the other not intending to purchase the advowson, I could have reformed the agreement and have directed the specific performance of it when so reformed. I confess I should have had great difficulty in holding that this could be done; because I cannot help feeling that in the case of an executory agreement, first to reform and then to decree an execution of it would be virtually to repeal the Statute of Frauds. The only ground on which I think the case could have been put would have been that the answer contained an admission of the agreement as stated in the bill; and the parties mutually agreeing that there was a mistake, the case might have fallen within the principle of those cases at law where there is a declaration on an agreement not within the statute, and no issue taken upon the agreement by the plea; because in such case it would seem as if, the agreement of the parties being admitted by the record, the case would no longer be within the statute. I should then have taken time to consider whether, according to the dicta of many venerable judges, I should not have been authorized to reform an executory agreement for the conveyance of an estate, where it was admitted to have been the intention of both parties that a portion of the estate was not to pass. But in my present view of the question it seems to me that the court ought not in any case, where the mistake is denied or not admitted by the answer, to admit parol evidence, and upon that evidence to reform an executory agreement."

[1] Gillespie *v.* Moon, 2 John. Ch. R. 585; Keisselbrack *v.* Livingston, 4 John. Ch. R. 144. See also Baker *v.* Paine, 1 Ves. 456; Shelburne *v.* Inchiquin, 1 Bro. Ch. R. 339; Joynes *v.* Statham, 3 Atk. 388; 6 Ves. 337, 338; Ball *v.* Storie, 1 Sim. & Stu. 210; Burn *v.* Burn, 8 Ves. 573, 583; 1 Eq. Abridg. p. 20, Pl. 5; Sims *v.* Urrey, 2 Ch. Cas. 225; s. c. Freem. R. 16; Jalabert *v.* Chandos, 1 Eden, R. 372; Pember *v.* Matthews, 1 Bro. Ch. R. 52; Jones *v.* Sheriff, cited 9 Mod. 88; The Hiram, 14 U. S. 444, 4 L. Ed. 131; Hunt *v.* Rousmaniere, 21 U. S. 174, 5 L. Ed. 589, 26 U. S. 1, 7 L. Ed. 27; Hogan *v.* Delaware Ins. Co., 1 Wash. C. C. R. 422; Shelburne *v.* Inchiquin, 3 Bro. Ch. R. 338; Walker *v.* Walker, 2 Atk. 98. But see 1 Sch. & Lefr. 39; Kekewick, Dig. Ch. Equity, I. The distinction stated in the text is certainly of a very artificial character, and difficult to be reconciled with the general principles of Courts of Equity.

take, and enforce it with the variation. Where such executory contracts, within the statute of frauds, are corrected and enforced, there is a further diversity — some courts holding that they will only exercise the power where the object is to restrict the subject-matter of the contract, while others hold that the contract will be corrected, although its subject is enlarged. In North Carolina, so far from correcting such executory contracts, within the statute, so as to enlarge their terms, the tendency of

It is in effect a declaration that parol evidence shall be admissible to correct a writing as *against* a plaintiff, but not in *favor* of a plaintiff, seeking a specific performance. There is therefore no mutuality or equality in the operation of the doctrine. The ground is very clear that a Court of Equity ought not to enforce a contract where there is a mistake against the defendant, insisting upon and establishing the mistake; for it would be inequitable and unconscientious. And if the mistake is vital to the contract there is a like clear ground why equity should interfere at the instance of the party as plaintiff and cancel it; and if the mistake is partial only, why at his instance it should reform it. In these cases the remedial justice is equal; and the parol evidence to establish it is equally open to both parties to use as proof. Why should not the party aggrieved by a mistake in an agreement have relief in all cases, where he is plaintiff as well as where he is defendant? Why should not parol evidence be equally admissible to establish a mistake, as the foundation of relief in each case? The rules of evidence ought certainly to work equally for the benefit of each party. Mr. Chancellor Kent has forcibly observed, "That it cannot make any difference in the reasonableness and justice of the remedy whether the mistake was to the prejudice of one party or the other. If the court has a competent jurisdiction to correct such mistakes (and that is a point understood and settled), the agreement, when corrected and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement perfect in the first instance. It ought to have the same efficacy and be entitled to the same protection when made accurate under the decree of the court as when made accurate by the act of the parties. 'Res accendent lumina rebus.'" Keisselbrack *v.* Livingston, 4 Johns. Ch. R. 148, 149. It may be added that if the doctrine be founded upon the impropriety of admitting parol evidence to contradict a written agreement, that rule is not more broken in upon by the admission of it for the plaintiff than it is by the admission of it for the defendant. If the doctrine had been confined to cases arising under the Statute of Frauds, it would, if not more intelligible, at least have been less inconvenient in practice. But it does not appear to have been thus restricted, although the cases in which it has been principally relied on have been of that description. It will often be quite as unconscientious for a defendant to shelter himself under a defence of this sort against a plaintiff seeking the specific performance of a contract and the correction of a mistake, as it will be to enforce a contract against a defendant, which embodies a mistake to his prejudice. See Comyns, Dig. Chancery, 2 C. 4; 2 X. 3; 4 L. 2; Attorney-Gen. *v.* Sitwell, 1 Younge & Coll. R. 583. Hitchins *v.* Pettingill, 58 N. H. 386, and cases cited. See however Osborne *v.* Phelps, 19 Conn. 62; Elder *v.* Elder, 10 Maine, 80; Thomas *v.* McCormick, 9 Dana, 108; Climer *v.* Hovey, 15 Mich. 18; Glass *v.* Hulbert, 102 Mass. 24.

the decisions is to confine such corrective relief to executed contracts alone.[1]]

§ 234. **Evidences of a Mistake.** — Courts of Equity will grant relief in cases of mistake in written contracts, not only when the fact of the mistake is expressly established, but also when it is fairly implied from the nature of the transaction. Thus in cases where there has been a joint loan of money to two or more obligors, and they are by the instrument made jointly liable, but not jointly and severally, the court has reformed the bond and made it joint and several, upon the reasonable presumption from the nature of the transaction that it was so intended by the parties and was omitted by want of skill or by mistake.[2] The debt being joint, the natural if not the irresistible inference in such cases is, that it is intended by all the parties that in every event the responsibility should attach to each obligor and to all equally. This can be done only by making the bond several as well as joint; for otherwise, in case of the death of one of the obligors the survivor or survivors only would be liable at law for the debt.[3] Indeed it seems now well established as a general principle, that every contract for a joint loan is in equity to be deemed as to the parties borrowing a joint and several contract, whether the transaction be of a mercantile nature or not; for in every such case it may fairly be presumed to be the intention of the parties that the creditor should have the several as well as the joint security of all the borrowers for the repayment of the debt.[4] Hence if one of the borrowers should die, the creditor has a right to proceed for immediate relief out of the assets of the deceased party, without claiming any relief against the surviving joint contractors, and without showing that the latter are unable to pay by reason of their insolvency.[5]

[1] Davis *v.* Ely, 104 N. C. 16, 10 S. E. 138, 17 Am. St. Rep. 667, 5 L. R. A. 810.

[2] Simpson *v.* Vaughan, 2 Atk. 31, 33; Bishop *v.* Church, 2 Ves. 100, 371; Thomas *v.* Frazer, 3 Ves. 399; Devaynes *v.* Noble, Sleech's case, 1 Meriv. R. 538, 539; Sumner *v.* Powell, 2 Meriv. 30, 35; Howe *v.* Contencin, 1 Bro. Ch. R. 27, 29; Ex parte Kendall, 17 Ves. 519, 520; Underhill *v.* Howard, 10 Ves. 209, 227; Hunt *v.* Rousmaniere, 21 U. S. 174, 5 L. Ed. 589, s. c. 26 U. S. 1, 7 L. Ed. 27; Weaver *v.* Shryork, 6 Serg. & R. 262, 264; Ex parte Symonds, 1 Cox, R. 200; Burn *v.* Burn, 3 Ves. 573, 583; Ex parte Bates & Henckill, 3 Ves. R. 400, note; Gray *v.* Chiswell, 9 Ves. 118.

[3] Weaver *v.* Shryork, 6 Serg. & R. 262, 264; Gray *v.* Chiswell, 9 Ves. 118; Ex parte Kendall, 17 Ves. 525.

[4] Thorpe *v.* Jackson, 2 Younge & Coll. 553; Wilkinson *v.* Henderson, 1 Mylne & Keen, 582. But see Richardson *v.* Horton, 6 Beav. R. 185.

[5] Ibid. But in all such cases the surviving partners are properly to

§ 235. **A Mistake Will Not Be Presumed.** — But where the inference of a joint original debt or liability is repelled, a Court of Equity will not interfere; for in such a case there is no ground to presume any mistake.[1] This doctrine has been very clearly expounded by Sir William Grant. "When," says he, "the obligation exists only in virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each partner, although at law it is only the joint debt of all.[2] But there all the partners have had a benefit from the money advanced or the credit given, and the obligation of all to pay exists independently of any instrument by which the debt may have been secured. So where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It is not the bond that first created the liability." [3]

§ 236. **Same.** — It is upon the same ground that a Court of Equity will not reform a joint bond against a mere surety, so as to make it several against him upon the presumption of a mistake from the nature of the transaction; but it will require positive proof of an express agreement by him that it should be several as well as joint.[4] And in other cases where the obligation or covenant is purely matter of arbitrary convention, not growing out of any antecedent liability in all or any of the obligors or covenanters to do what they have undertaken (as for example a bond or covenant of indemnity for the acts or debts of third persons) a Court of Equity will not by implication extend the

be made parties, as they have a right to contest the demand, and are interested in taking the account. Ibid.

[1] See Hunt *v.* Rousmaniere, 21 U. S. 174, 5 L. Ed. 589; s. c. 26 U. S. 1, 7 L. Ed. 27. See Richardson *v.* Horton, 6 Beav. R. 185.

[2] Post, § 919.

[3] Sumner *v.* Powell, 2 Meriv. R. 35, 36. See also Underhill *v.* Harwood, 10 Ves. 227; Thorpe *v.* Jackson, 2 Younge & Coll. 553; Ex parte Kendall, 17 Ves. 525; Cowell *v.* Sykes, 2 Russ. R. 191.

[4] Ibid.; Weaver *v.* Shryork, 6 Serg. & R. 262, 264, 265. So where an obligee of a joint and several bond elected to take a joint judgment against all the obligors, and thus at law lost his right to a several remedy, equity refused him a remedy against the personal assets of a deceased obligor, who was only a surety. United States *v.* Price, 50 U. S. 83, 13 L. Ed. 56, where the cases are reviewed. See Wright *v.* Russell, 3 Wils. 530; Waters *v.* Riley, 2 Har. & G. 310; Harrison *v.* Field, 2 Wash. 136; Weaver *v.* Shryork, 6 Serg. & R. 262; Kennedy *v.* Carpenter, 2 Whart. 361; United States *v.* Cushman, 2 Sum. 426; Higgens's Case, 6 Coke, 44; Lechmere *v.* Fletcher, 1 Cromp. & M. 623; Sheehy *v.* Mandeville, 10 U. S. 253, 3 L. Ed. 215; Prior *v.* Williams, 3 Abb. Dec. 626.

responsibility from that of a joint, to a joint and several undertaking.[1] But if there be an express agreement to the effect that an obligation or other contract shall be joint and several, or to any other effect, and it is omitted by mistake in the instrument, a Court of Equity will under such circumstances grant relief as fully against a surety or guarantee as against the principal party.[2]

§ 237. **Relief Will Be Given Only to Original Parties or Their Privies.** — In all cases of mistake in written instruments Courts of Equity will interfere only as between the original parties, or those claiming under them in privity; such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the facts.[3] As against bona fide purchasers for a valuable consideration without notice, Courts of Equity will grant no relief, because they have at least an equal equity to the protection of the court.[4]

[1] Sumner *v.* Powell, 2 Meriv. R. 30, 35, 36; Harrison *v.* Mirge, 2 Wash. R. 136; Ward *v.* Webber, 1 Wash. R. 274; Thomas *v.* Frazer, 3 Ves. 399, 402; Burn *v.* Burn, 3 Ves. 573, 582; Richardson *v.* Horton, 6 Beav. R. 186.

[2] Ibid.; Wiser *v.* Blachley, 1 John. Ch. R. 607; Crosby *v.* Middleton, Prec. Ch. 309; s. c. 2 Eq. Abridg. 188 F.; Berg *v.* Radcliffe, 6 John. Ch. R. 302, 307, &c.; Rawstone *v.* Parr, 3 Russell, R. 424; s. c. Id. 539. Equity also will decree the surrender of a bond for cancellation where it has not been executed by all who were expected to become jointly bound as co-sureties. Thus where the creditor had prepared the deed so as to show on its face that it was intended to contain a joint and several covenant by two sureties, and had sent it in that form to be executed by one of such sureties, but had not procured the execution of it by the other, and had not informed the surety who had executed it of this fact, but on the contrary had afterwards written to him as "one of the sureties", the principal debtor having become insolvent, — in this state of things it was held that the surety who had executed the instrument was in equity entitled to relief from all liability upon it. Evans *v.* Bremridge, 2 Kay & J. 174. See Keith *v.* Goodwin, 31 Vt. 268. The relief is granted in such a case because a condition precedent, complete execution and delivery, never having been performed, the deed has not taken effect. See Black *v.* Lamb, 1 Beasl. 108.

[3] Warwick *v.* Warwick, 3 Atk. 293; Com. Dig. Chancery, 2 C. 2; 4 J. 4; Whitehead *v.* Brown, 18 Ala. 682; Rhodes *v.* Outcalt, 48 Mo. 367; Baskins *v.* Calhoun, 45 Ala. 582; Simpson *v.* Montgomery, 25 Ark. 365; Wall *v.* Arvington, 13 Ga. 93; White *v.* Wilson, 6 Blackf. 448; Stone *v.* Hale, 17 Ala. 564; Burke *v.* Anderson, 40 Ga. 535; Young *v.* Cason, 48 Mo. 259; Adams *v.* Stevens, 49 Me. 362.

[4] 1 Fonbl. Eq. B. 1, ch. 1, § 7, and notes; Id. ch. 3, § 11, note; Newland on Contracts, pp. 344, 345; Davis *v.* Thomas, Sugden on Vend. ch. 3, pp. 143, 159 (7th ed.); Warwick *v.* Warwick, 3 Atk. 290, 293; Malden *v.* Merrill, 2 Atk. 13; West *v.* Erissey, 2 P. Will. 349; Powell *v.* Price, 2 P. Will. 535; ante, §§ 67, 159, 208; post, §§ 409, 434, 436, 510, 542, 573, 575.

§ 238. **Omission of Material Matters from Instrument by Mistake.** — In like manner as equity will grant relief in cases of mistake in written instruments to prevent manifest injustice and wrong and to suppress fraud, it will also grant relief and supply defects where by mistake the parties have omitted any acts or circumstances necessary to give due validity and effect to written instruments. Thus equity will supply any defect of circumstances in conveyances occasioned by mistake;[1] as of livery of seisin in the passing of a freehold, or of a surrender in case of a copyhold or the like; so also misprisions and omissions in deeds, awards, and other solemn instruments whereby they are defective at law.[2] It will also interfere in cases of mistake in judgments, and other matters of record injurious to the rights of the party.[3] [A mistake in the description in a deed may be corrected by a subsequent deed, executed by a commissioner, under order of court, in action in which all parties in interest are made parties plaintiff or defendant, provided no new rights have intervened. The new deed then relates back to the time of the original conveyance.[4] But when a title has once been conveyed, it cannot be lessened by a subsequent conveyance, if the property described by the first deed can be determined; but where the description in a deed is so vague and uncertain that one of the boundaries cannot be ascertained, and a subsequent deed,

[1] Commonwealth *v.* Reading Bank, 137 Mass. 431, 443; Batesville Institute *v.* Kauffman, 85 U. S. 151, 21 L. Ed. 775; Morris *v.* Bacon, 123 Mass. 58.

[2] 1 Fonbl. Eq. B. 1, ch. 1, § 7; Id. ch. 3, § 1, and the cases there cited; Id. ch. 2, § 7, and notes; Grounds and Rudim. of the Law, M. 112, p. 81 (ed. 1751); Com. Dig. Chancery, Z.; Kekewick, Dig. Ch. Equity, 1; Newland on Contracts, ch. 19, pp. 342 to 350; Jeremyon Eq. Jurisd. B. 3, Pt. 2, ch. 2, pp. 367, 368, 369; Id. ch. 4, § 5, pp. 489, 490, 494, 495; Thorne *v.* Thorne, 1 Vern. R. 141; Com. Dig. Chancery, 2 T. 1 to 2 T. 7; 1 Madd. Ch. Pr. 42; Id. 55, 65; Fothergill *v.* Fothergill, 2 Freeman, R. 256, 257.

[3] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 5, p. 492; Barnsley *v.* Powell, 1 Ves. R. 119, 284, 289; Com. Dig. Chancery, 3 W. See Quivey *v.* Baker, 37 Cal. 465; Gump's Appeal, 65 Pa. St. 476; Calwell *v.* Warner, 36 Conn. 224; Loss *v.* Obry, 7 C. E. Green, 52; Byrne *v.* Edmonds, 23 Gratt. 200; Bartlett *v.* Broderick, 34 Iowa, 517; Kearney *v.* Sacer, 37 Md. 264; Wheeler *v.* Kirtland, 23 N. J. Eq. 15; Palmer *v.* Bethard, 66 Ill. 529; Chapman *v.* Hurd, 67 Ill. 234; Wardlaw *v.* Wardlaw, 50 Ga. 544.

[4] Pittsburg, C. C. & St. L. Ry. Co. *v.* Beck, 152 Ind. 421, 53 N. E. 439; Kemper Dry Goods Co. *v.* Kennard Grocery Co., 68 Mo. App. 290; McCartney *v.* McCartney, 53 S. W. 388; reversed, 93 Tex. 359, 55 S. W. 310; Walters *v.* Mitchell, 6 Cal. App. 410, 92 Pac. 315; Builders Mortgage Co. *v.* Berkowitz, 134 App. Div. 136, 118 N. Y. Supp. 804.

accepted and acted upon by the parties, makes that boundary definite and certain, the latter deed will determine the property transferred.][1]

§ 239. **Same.** — The same principle applies to cases where an instrument has been delivered up or cancelled under a mistake of the party, and in ignorance of the facts material to the rights derived under it. A Court of Equity will in such cases grant relief, upon the ground that the party is conscientiously entitled to enforce such rights, and that he ought to have the same benefit as if the instrument were in his possession with its entire original validity.[2] [And where one was the owner of two pieces of property, upon the same street, upon which there was a lien for unpaid taxes due a city for two years, and in paying the taxes due upon one of the lots, the city tax collector gave a receipt against the line filed, but by mistake the receipt applied to the wrong lot. There is no doubt of the power of the court upon notice, to strike off the entry of satisfaction upon the wrong judgment, or upon a judgment not intended to be paid.[3] The same rule applies where a surety has paid the debt of his principal, and by mistake has had the judgment cancelled on the record instead of taking an assignment to a third party for his benefit, and to be held as a charge against the original principal. If a mistake was made in entering the judgment satisfied, and the principal has not repaid the surety what he justly and incontestably owed him on the judgment if no third party will be injuriously affected by the entry being stricken out, and if the court has the power to strike it out, why should the relief sought be denied? That the court has, upon such an application as this, the undoubted power to grant the relief asked, if the facts justify it, cannot be disputed.[4] If the cancellation of the judgment is procured by the giving of a worthless deed to the land upon which the judgment was a lien, and where it is perfectly apparent that no title was received by the judgment creditor, and he got nothing for his debt, equity

[1] Town of Babylon *v.* Darling, 63 Misc. Rep. 553, 117 N. Y. Supp. 250.

[2] East India Co. *v.* Donald, 9 Ves. 275; East India Co. *v.* Neave, 5 Ves. 173. See Lemon *v.* Phœnix Ins. Co., 38 Conn. 294; Scholefield *v.* Templer, Johns. (Eng. Ch.) 155.

[3] City of Philadelphia *v.* Simon, 12 Pa. Super. Ct. 159.

[4] Wilmer *v.* Brice, 91 Md. 71, 46 Atl. 322; Hay *v.* Alexander & W. R. Co., Fed. Cas. No. 6254, 1 Hughes 168; Kerr *v.* Kerr, 81 Ill. App. 35; Bailey *v.* Buchanan, 126 Mo. App. 190, 102 S. W. 36; Summerville *v.* Galey, 45 Pa. Super. Ct. 62; Van Sickle *v.* Harmeyer, 172 Ill. App. 218.

will not allow debts to be paid in this way, and the cancellation will not be allowed to stand.[1]]

§ 240. **Relief Will Be Granted though Instrument Be Inartificially Drawn.** — And for the same reason equity will give effect to the real intentions of the parties as gathered from the objects of the instrument and the circumstances of the case, although the instrument may be drawn up in a very inartificial and untechnical manner. For however just in general the rule may be, "Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est";[2] yet that rule shall not prevail to defeat the manifest intent and object of the parties, where it is clearly discernible on the face of the instrument, and the ignorance or blunder or mistake of the parties has prevented them from expressing it in the appropriate language.[3] Thus if one in consideration of natural love should execute a feoffment, or a lease and release, or a bargain and sale, it would, notwithstanding the use of the technical words, be held to operate as a covenant to stand seised.[4] And the same rule would be applied if, under the like circumstances, instead of the words "bargain and sell", the words "give and grant", or "enfeoff, alien, and confirm", should be used in a deed.[5]

[A liberal construction is to be given to deeds inartificially and untechnically drawn. Whenever the language used is susceptible of more than one interpretation, the court will look at the circumstances existing at the time of the transaction, such as the situation of the parties, etc.[6] The technical rules of the common

[1] Reed *v.* Fisher, 90 Neb. 697, 134 N. W. 409.

[2] Co. Litt. 147 a.

[3] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, pp. 367, 368; Smith *v.* Packhurst, 3 Atk. 136; Stapilton *v.* Stapilton, 1 Atk. 8; 1 Fonbl. Eq. B. 1, ch. 6, §§ 11, 13, and note (*d*); Id. § 16, and note (*e*); Id. § 18, and note (*n*).

[4] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, pp. 376, 368; Thompson *v.* Attfield, 1 Vern. R. 40; Stapilton *v.* Stapilton, 1 Atk. 8; Thorne *v.* Thorne, 1 Vern. 141; Brown *v.* Jones, 1 Atk. 190, 191.

[5] Jeremy, ibid.; Harrison *v.* Austin, 3 Mod. R. 237. The same point was recognized in Doungsworth *v.* Blair, 1 Keen, R. 795, 801, where the Master of the Rolls said: "An indenture, which is intended to be an indenture of release, but cannot operate as such, may for the purpose of carrying into effect the intention of the parties, and if there be a proper consideration, be construed as a covenant to stand seised."

[6] Shartenberg *v.* Ellbey, 27 R. I. 414, 62 Atl. 979; West *v.* Hermann, 47 Tex. Civ. App. 131, 104 S. W. 428; Falk *v.* Graham, 82 S. C. 66, 62 S. E. 1106; Soria *v.* Harrison County, 96 Miss. 109, 50 So. 443; White *v.* Bailey, 65 W. Va. 573, 64 S. E. 1019; Seery *v.* City of Waterbury, 82 Conn. 567, 74 Atl. 908; Gudger *v.* White, 141 N. C. 514, 54 S. E. 386;

law as to the division of deeds into formal parts will not prevail as against a manifest intention of the parties, ascertained by an examination of the whole deed.[1] The effect of an informal instrument transferring an interest in real estate depends, not on any particular words or phrases, found in it, but on the intention of the parties collected from the whole instrument. In this case the word "heirs" was omitted in the conveyance, but from the attendant circumstances, and the fact that the scrivener intended to write an instrument that would convey the fee, and this was the intent of the parties, equity will construe it according to the professed intention.[2]]

§ 241. **Equity Supplies Defect upon Attempted Execution of Power.** — There is also another marked instance of the application of the remedial authority of Courts of Equity, and that is, in regard to the execution of powers. In no case will equity interfere where there has been a non-execution of a power as contradistinguished from a trust;[3] for if a trust be coupled with a power there (as we shall presently see)[4] the trust will be enforced, notwithstanding the force of the power does not execute it. But if there be a defective execution or attempt at execution of a mere power, there equity will interpose and supply the defect, not universally indeed, but in favor of parties for whom the person entrusted with the execution of the power is under a moral or legal obligation to provide by an execution of the power. Thus such a defective execution will be aided in favor of persons standing upon a valuable or a meritorious consideration; such as a bona fide purchaser for a valuable consideration, a creditor, a wife, and a legitimate child,[5] unless indeed such aid of the defec-

Featherston *v.* Merrimon, 148 N. C. 205, 61 S. E. 675; Price *v.* Griffin, 150 N. C. 527, 64 S. E. 372; Beverlin *v.* Casto, 62 W. Va. 158, 57 S. E. 411; Cook *v.* Hensler, 57 Wash. 392, 107 Pac. 178; Bell *v.* Gardner etc. Lumber Co., 85 S. C. 182, 67 S. E. 151; Kentucky Diamond & Dev. Co. *v.* Kentucky Transvaal Diamond Co., 141 Ky. 97, 132 S. W. 397; Coomes *v.* Frey, 141 Ky. 740, 133 S. W. 758; Weaver *v.* Osborne, 154 Ia. 10, 134 N. W. 103.

[1] Holloway *v.* Green, 167 N. C. 92, 83 S. E. 243.

[2] Lemon *v.* Graham, 131 Pa. 447, 19 Atl. 48, 6 L. R. A. 663; Abercrombie *v.* Simmons, 71 Kans. 538, 81 Pac. 208, 1 L. R. A. (N. S.) 806.

[3] See Brown *v.* Higgs, 8 Ves. 570; Holmes *v.* Coghill, 7 Ves. 499; s. c. 12 Ves. 206; Tollet *v.* Tollet, 2 P. Will. 489; 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*v*); Id. ch. 4, § 25, notes (*h*) and (*k*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, pp. 376, 377; Sugden on Powers, ch. 6, § 3; post, § 250.

[4] Post, § 250, and note; Burrough *v.* Philcox, 5 Mylne & Craig, 73, 92.

[5] 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*v*); Id. ch. 3, § 25, and notes (*h*), (*i*), (*m*); Id. ch. 5, § 2, and notes; Fothergill *v.* Fothergill, 2 Freem. R.

tive execution would under all the circumstances be inequitable to other persons, or it is repelled by some counter equity.[1] Indeed if a general power to raise money for any purposes be given so that the donee of the power may if he choose execute it in his own favor, and he should execute it in favor of mere volunteers, there a Court of Equity will in favor of creditors deem the money assets against the volunteers, upon the ground that the donee of the power has an absolute dominion over the power and the property.[2]

§ 242. **Reason of the Rule.** — The reason for this distinction between the non-execution of a power and the defective execution of it has been stated with great clearness and precision by a learned judge. "The difference," he said, "is betwixt a non-execution and a defective execution of a power. The latter will always be aided in equity under the circumstances mentioned, it being the duty of every man to pay his debts, and of a husband or father to provide for his wife or child. But this court will not help the non-execution of a power which is left to the free will and election of the party whether to execute or not; for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do for himself." [3] [It is now well

256, 257; Com. Dig. Chan. 4 H. 1, to 4 H. 4; 4 H. 6; Gilbert, Lex Pretoria, pp. 300 to 306; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 372.

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note (*v*).

[2] Post, § 250, and note.

[3] The Master of the Rolls, in Tollet *v.* Tollet, 2 P. Will. 490. See also Lassells *v.* Cornwallis, 2 Vern. 465; Crossling *v.* Crossling, 2 Cox, R. 396; 1 Fonbl. Eq. B. 1, ch. 4, § 25, and notes; Id. ch. 1, § 7, and notes; Sugden on Powers, ch. 6, § 3, p. 315. Sir William Grant, in Holmes *v.* Coghill (7 Ves. 506), and Lord Erskine in the same case on appeal (12 Ves. 212), have expressed dissatisfaction with this distinction, as not quite consistent with the principles of law or equity, though fully established by authority. The former, in reasoning on the case of a power to charge an estate with £2000 by deed or will, which had not been executed, and of which creditors sought the benefit, as if executed, said: "To say that, without a deed or will, this sum shall be raised, is to subject the owner of the estate to a charge in a case in which he never consented to bear it. The chance that it may never be executed, or that it may not be executed in the manner prescribed, is an advantage he secures to himself by the agreement, and which no one has a right to take from him. In this respect there is no difference between a non-execution and a defective execution of a power. By the compact the estate ought not to be charged in either case. It is difficult therefore to discover a sound principle for the authority, this court assumes, for aiding a defective execution in certain cases. If the intention of the party possessing the power is to be regarded, and not the interest of the party to be affected by the execution, that intention ought to be executed wherever it is manifested; for the owner of the estate has nothing to do with the purpose. To him it

settled that the mere power of appointment is wholly ineffective until the power be executed; and in case of a limitation of one for life, with power of appointment and in default of appointment, to his right heirs, the remainder limited to the right heirs will become an executed fee in the taker for life, under the Rule in Shelley's case, subject to be divested by the execution of the power.[1] The insured under a benefit certificate has the power to designate to whom the benefit should be paid, and also the power to substitute a new beneficiary. A mere power of appointment is not an asset in the donee of the power and conveys no title to or interest

is indifferent whether it is to be exercised for a creditor or a volunteer. But if the interest of the party to be affected by the execution is to be regarded, why in any case exercise the power, except in the form and manner prescribed? He is an absolute stranger to the equity between the possessor of the power and the party in whose favor it is intended to be executed. As against the debtor, it is right that he should pay. But what equity is there for the creditor to have the money raised out of the estate of a third person, in a case in which it was never agreed that it should be raised? The owner is not heard to say it will be a grievous burthen, and of no merit or utility. He is told the case provided for exists; it is formally right; he has nothing to do with the purpose. But upon a defect which this court is called upon to supply, he is not permitted to retort this argument, and to say it is not formally right: the case provided for does not exist; and he has nothing to do with the purpose. In the sort of equity upon this subject there is some want of equality. But the rule is perfectly settled; and though perhaps with some violation of principle, with no practical inconvenience."

There is much strength in this reasoning; but after all it is open to some question. The party possessing the power intends to execute it; he proceeds to do an act which he supposes to be a perfect act of execution. He possesses the right to do it in a formal manner; he has failed, by mistake, against his intention. But the objects in whose favor it is to be executed possess a high moral and equitable claim for its execution. Under such circumstances why should a mere mistake, contrary to the intention, defeat the bounty or the justice of the possessor of the power? If the case were one of an absolute property in the party, a Court of Equity would not fail to correct the mistake in favor of persons having such merits. Why should it hesitate when the possessor of the power has done an act intended to reduce it to the case of absolute property? There is no countervailing equity in such a case in favor of the other side. The case stands dryly upon a mere point of strict law. The difficulty in the argument is, that it deals with the power as a mere naked authority to act, without considering that when the party elects to act, an interest attaches to him in the execution of the power; and that the election thus made is defeated, and the interest thus created fails, by mere mistake, from the defective execution, against parties, standing on a strong equity, and in favor of others having none. See 1 Fonbl. Eq. B. 1, ch. 4, § 25.

[1] Cook *v.* Councilman, 109 Md. 622, 72 Atl. 404; In re Van Brocklin's Estate, 74 Ia. 412, 38 N. W. 119; Hooper *v.* Hooper, 203 Mass. 50, 89 N. E. 161; Loosing *v.* Loosing, 85 Neb. 66, 122 N. W. 707, 25 L. R. A. (N. S.) 920.

in the property conveyed, and, unexercised by the donee prior to his death, becomes wholly inoperative.[1]] Indeed a Court of Equity by acting otherwise in the case of a non-execution of a power would in effect deprive the party of all discretion as to the exercise of it, and would thus overthrow the very intention manifested by the parties in the creation of the power. On the contrary when the party undertakes to execute a power, but by mistake does it imperfectly, equity will interpose to carry his very intention into effect, and that too in aid of those who are peculiarly within its protective favor; that is, creditors, purchasers, wives, and children.[2] [As a general rule, the entire failure to execute a power will not be aided in equity. Where however a party has begun to execute, and the execution is defective through accident or mistake, equity may interpose its aid by decreeing a complete and perfect execution. This is an extraordinary jurisdiction, and is only exercised in behalf of those who are considered as possessing meritorious equities or against those who have no equally meritorious defences. Its operation affects, among others, purchasers, including mortgagees, lessees and creditors. As to the defects of execution of a power which will be corrected, they are not such defects as are of the substance and essence of the power, but are matters of form, such as the want of a seal, witnesses, or of signatures, etc.[3] Purchasers for a valuable consideration, under a defectively executed power, may have the right to the protection of the statute which allows them the same relief in equity that would be accorded to such a purchaser claiming under a defective deed from the owner; but that remedy cannot be made available in an action for specific performance.[4] Nor

[1] Supreme Colony United Order of Pilgrim Fathers *v.* Towne, 87 Conn. 644, 89 Atl. 264.

[2] Moody *v.* Reid, 1 Madd. R. 516; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, pp. 369, 370, 371, 372, 375; Darlington *v.* Pulteney, Cowp. 266, 267; Ellis *v.* Nimmo, Lloyd & Gould's Rep. 348. There seems a distinction in this respect between cases of the defective execution of powers and cases of voluntary contracts, covenants and settlements, of which specific performance is sought. See Jefferys *v.* Jefferys, 1 Craig & Phillips, 138, 141; post, § 647, note; §§ 955, 956. Equity reformed the execution of a power by inserting a hotchpot clause, in Wilkinson *v.* Nelson, 7 Jur. N. S. 480. Concerning volunteers under deeds, see note to § 209.

[3] American Freehold Land Mortgage Co. *v.* Walker, 31 Fed. 103; Kemp *v.* Kemp, 36 Misc. Rep. 79, 72 N. Y. Supp. 617; Ward *v.* Stanard, 82 App. Div. 386, 81 N. Y. Supp. 906; Thomas *v.* Board of Trustees of Ohio State University, 70 Ohio St. 92, 70 N. E. 896; Watkins *v.* Watkins, 82 N. J. Eq. 483, 89 Atl. 253.

[4] Correll *v.* Lauterbach, 14 Misc. Rep. 469, 36 N. Y. Supp. 615.

will equity lend its aid in favor of a volunteer, nor give any assistance where both the remainder-man and the appointee are volunteers.[1]]

§ 243. [**Essentials to Be Shown before Jurisdiction Will Be Assumed.** — Defective execution of powers constitutes a ground for equitable relief. The elements necessary for its exercise are that there should be a fixed intent to execute the power upon a sufficient consideration and an attempt to effectuate that intent, partial in its nature and falling short of accomplishing the purpose by reason of some defect in the instrument by which the attempt is made. Where these elements exist equity will compel complete performance of the power, provided no rights of other persons with superior equities have intervened.[2]]

§ 244. **What Is an Attempted Execution of a Defective Power?** — What shall constitute an execution or preparatory steps or attempts towards the execution of a power entitling the party to relief in equity on the ground of a defective execution, has been largely and liberally interpreted. It is clear that it is not sufficient that there should be a mere floating and indefinite intention to execute the power,[3] without some steps taken to give it a legal effect.[4] Some steps must be taken or some acts done with this sole and definite intention, and be such as are properly referable to the power.[5] Lord Mansfield at one time contended that whatever is an equitable ought to be deemed a legal execution of a power, because there should be a uniform rule of property; and that if Courts of Equity would presume that a strict adherence to the precise form pointed out in the creation of the power was not intended, and therefore not necessary, the same rule should prevail at law.[6] But this doctrine has been overruled. And indeed Courts of Equity do not deem the power well executed unless the form is adhered to; but in cases of a meritorious consideration they supply the defect.[7]

§ 245. **Intention to Create the Power Should Clearly Appear.** — And relief will be granted not only when the defect arises

[1] In re Roger's Estate, 31 Pa. Super. Ct. 620, 218 Pa. 431, 67 Atl. 762.

[2] Coates *v.* Lunt, 210 Mass. 314, 96 N. E. 685.

[3] The intention to execute the power must be distinct. Garth *v.* Townsend, L. R. 7 Eq. 220.

[4] See 2 Chance on Powers, ch. 23, § 3, arts. 3005, 3011.

[5] See Sugden on Powers, ch. 6, § 2. See Mitchell *v.* Denson, 29 Ala. 327. A contract to sell is sufficient to indicate an intention to execute a power of sale. In re Dyke's Estate, L. R. 7 Eq. 337.

[6] Darlington *v.* Pulteney, Cowp. R. 267.

[7] Sugden on Powers, ch. 6, § 1, p. 344; Id. § 359; Id. §§ 361 to 370.

from an informal instrument not within the scope of the power, but also when the defect arises from the improper execution of the appropriate instrument. All that is necessary is, that the intention to execute the power should clearly appear in writing. Thus if the donee of a power merely covenant to execute it, or by his will desire the remainder-man to create the estate, or enter into a contract not under seal to execute the power, or by letters promise to grant an estate which he can execute only by the instrumentality of the power, — in all these and the like cases equity will supply the defect.[1] And even an answer to a bill in equity stating that the party does appoint and intends by a writing in due form to appoint the fund, will be an execution of the power for this purpose.[2]

§ 246. [**When Power Will Be Executed.** — The rule adopted by the courts seems to be that there are three classes of cases in which it may be said that the power has been executed: (1) where there is a reference to the power in the instrument; (2) where there is a reference to the property on which it is subject to be executed, and (3) where the provisions of the deed or will executed by the donee would otherwise be ineffectual — that is, would have no operation except as an execution of the power. But if upon the whole will it appeared that the testator intended to execute the power of appointment, a general residuary clause will be held sufficient, although there may be no reference in the will to the power.[3] When the circumstances are so equivocal as to leave the mind in doubt whether an execution of the power was at all intended, it must be held that it was not executed.[4] The intention to execute the power must be apparent and clear, so that the transaction is not susceptible of any other interpretation, and, if it be doubtful under all of the circumstances, that doubt will prevent it from being deemed an execution of the power. It is not necessary, therefore, that the intention to execute the power should appear by express terms or recitals in the instrument, but it is sufficient that it appears by words which when

[1] Ibid. Herring *v.* Williams, 158 N. C. 1, 73 S. E. 218, reversing same case in 153 N. C. 231, 69 S. E. 140, 138 Am. St. Rep. 659; Brown *v.* Nelms, 86 Ark. 368, 112 S. W. 373.

[2] Carter *v.* Carter, Moseley, R. 365.

[3] Arnold *v.* Southern Pine Lumber Co., 123 S. W. 1162; Pepper *v.* Cutter, 78 Misc. Rep. 532, 139 N. Y. Supp. 976; Grayson *v.* Germania Bank, 140 Ga. 467, 79 S. E. 124; Hill *v.* Conrad, 91 Tex. 341, 43 S. W. 789.

[4] Crampton *v.* Rutledge, 157 Ala. 141, 47 So. 214, 50 So. 900; In re Huddy's Estate, 236 Pa. 276, 84 Atl. 909.

fairly construed indicate the intention of the donee to execute the power.[1]

§ 247. **Rule Where Instrument Selected Is Not That Prescribed by Power.** — The like rule prevails where the instrument selected is not that prescribed by the power, provided it is not in its own nature repugnant to the true object of the creation of the power. Thus if the power ought to be executed by a deed, but it is executed by a will, the defective execution will be aided.[2] But if the power ought to be executed by a will, and the donee of the power should execute a conveyance of the estate by an absolute deed, it will be invalid; because such a conveyance, if it avail to any purpose, must avail to the immediate destruction of the power, since it would no longer be revocable as a will would be. The intention of the power in its creation was to reserve an entire control over its execution until the moment of the death of the donee; and this intention would be defeated by any other instrument than a will.[3] An act done not strictly according to the terms of the power, but consistent with its intent, may be upheld in equity; but an act which violates the very purpose for which the power was created, and the very control over it which it meant to vest in the donee, is repugnant to it, and cannot be deemed in any just sense to be an execution of it.[4]

§ 248. **Same.** — But in other respects there is no difference between a defective execution of a power by a will and by a deed, for in each case the remedial interposition of equity will be applied. Thus if a power is required to be executed in the presence of three witnesses, and it is executed in the presence of two only, equity will interfere in such a case. So if the instrument, whether it be a deed or a will, is required to be signed and sealed, and it is without seal or signature, equity will relieve.[5] And where

[1] Carraway *v.* Moseley, 152 N. C. 351, 67 S. E. 765; Rhode Island Hospital Trust Co. *v.* Dunnell, 34 R. I. 394, 83 Atl. 858, 84 Atl. 740; Hankins *v.* Columbia Trust Co., 142 Ky. 206, 134 S. W. 498; Payne *v.* Johnson's Execrs., 95 Ky. 175, 24 S. W. 238, 15 Ky. L. Rep. 522; Barbot *v.* Thompson, 94 S. C. 3, 77 S. E. 716; Rembert *v.* Vetoe, 89 S. C. 198, 71 S. E. 959.

[2] Smith *v.* Ashton, 1 Freeman, R. 308; s. c. 1 Ch. Cas. 269 Sugden on Powers, ch. 6 (4th ed.), pp. 362 to 367; Follett *v.* Follett, 2 P. Will. 489; 2 Chance on Powers, ch. 23, § 1, pp. 507, 508; Id. 513 to 516; Com. Dig. Chancery, 4 H. 6.

[3] Reid *v.* Shergold, 10 Ves. R. 378, 380.

[4] See Bainbridge *v.* Smith, 8 Sim. R. 86; ante, § 138; Kirkman *v.* Wadsworth, 137 N. C. 453, 49 S. E. 962, 69 L. R. A. 403.

[5] Sugden on Powers, ch. 6 (4th ed.), pp. 369, 370; 2 Chance on Powers, ch. 23, pp. 507 to 510; Wade *v.* Paget, 1 Bro. Ch. R. 363. See Bernards *v.*

a power is required to be executed by a will by way of appointment, there the appointment will be aided, although the will is not duly executed according to the Statute of Frauds; for it takes effect not under the will, but under the instrument creating the power.[1] Equity will also in many cases grant relief where by mistake a different kind of estate or interest is given from that which is authorized by the power, or where there is an excess of the power.[2]

§ 249. **Same.** — In all these cases it is to be understood that the intention and objects of the power are not defeated or put aside, but that they are only attempted by the party to be carried in-

Stebbins, 109 U. S. 341, 349; ante, note, p. 157. But equity will not relieve in the case of a deed given by an attorney who has no power under seal. That is a case of a defective power, not of a defective execution of a power. Piatt *v.* McCullough, 1 McLean, 69.

[1] Wilkes *v.* Holmes, 9 Mod. 487, 488; Shannon *v.* Bradstreet, 1 Sch. & Lefr. 60; Sugden on Powers, ch. 6 (4th ed.), pp. 362 to 367; 2 Chance on Powers, ch. 23, § 1, pp. 507, 508. But see Gilb. Lex Pretoria, p. 301; Duff *v.* Dalzell, 1 Bro. Ch. R. 147; Wagstaff *v.* Wagstaff, 2 P. Will. 259, 260; Longford *v.* Eyre, 1 P. Will. 741; Com. Dig. Chancery, 4 H. 7. Where an attempt is made to execute a power by a will (the power authorizing an execution by will), and the will is left imperfect, the same reason does not seem to exist, as may in other cases, to carry it into effect; for it may have been thus left intentionally imperfect, from a change of purpose. Lord Eldon, in remarking upon the difficulties of some of the cases, has said: "If, in the instance of a want of a surrender of copyhold estate, the circumstance of the devise being to a child is considered, the more natural conclusion is, that the testator, whatever his purpose was, going only so far towards it, and not proceeding to make it effectual, had dropped it. So the attempt to execute a power is no more than an intimation that the party means to execute it. But if all the requisite ceremonies have not been complied with, it cannot be supposed that the intention continued until his death." Finch *v.* Finch, 15 Ves. 51.

[2] Sugden on Powers, ch. 6, § 1, art. 2; Id. ch. 9, § 8, art. 2; 2 Chance on Powers, ch. 23, § 7, pp. 610, 613; Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 2, pp. 373, 374. Where one had a power to appoint "by his will or any writing in the nature of or purporting to be his will, or any codicil thereto", and on his death the third and fourth sheets of a will were alone discovered, these being in his hand and signed by him with the attestation of two witnesses, and one of the sheets contained a perfect appointment, it was held in equity, after refusal of probate, that this could not be regarded as a valid execution of the power. Gullan *v.* Grove, 26 Beav. 64. See Pomfret *v.* Perring, 5 DeG. M. & G. 775. In another case it appeared that the testator had in the will given his wife several powers of appointment; one by deed or will, and others by "deed or deeds, instrument or instruments, in writing, sealed and delivered." The donee executed a deed of appointment reciting only the power by "deed or deeds", &c., which included only that particular estate; and it was held that this estate was well appointed, but that the appointment did not extend to any others. And the same person having afterwards by will appointed the same estate, it was held not to revoke the first appointment by deed, but to be wholly inoperative. Cooper *v.* Martin, 12 Jur. N. S. 887; S. C. L. R. 3 Ch. 47.

formally into effect. But where there is a defect of substance in the execution of the power, such as the want of co-operation of all the proper parties in the act, there equity will not aid the defect.[1]

§ 250. **Equity of Complainant Must Be Superior to That of Party against Whom He Asks It.** — But in all these cases of relief by aiding and correcting defects or mistakes in the execution of instruments and powers, the party asking relief must stand upon some equity superior to that of the party against whom he asks it. If the equities are equal, a Court of Equity is silent and passive.[2] Thus equity will not relieve one person claiming under a voluntary defective conveyance against another claiming also under a voluntary conveyance, but will leave the parties to their rights at law.[3] For regularly equity is remedial to those only who come in upon an actual consideration; and therefore there should be some consideration, equitable or otherwise, express or

[1] See 2 Chance on Powers, ch. 23, § 2, pp. 540 to 543; Com. Dig. Chancery, 4 H. 7. See however Thorp *v.* McCallum, 1 Gilman, 614. So where the power is improperly exercised. Buckley *v.* Howell, 29 Beav. 546. As where the time for exercising it, being of the essence of the power, has elapsed. Cooper *v.* Martin, L. R. 3 Ch. 47. Ceremonials intended for the protection of a married woman are essential. Thackwell *v.* Gardiner, 5 DeG. & S. 58.

[2] See Sugden on Powers, ch. 6 (4th ed.), pp. 353, 358; 2 Chance on Powers, ch. 23, § 1, pp. 502, 504, 507; Anderson *v.* Tydings, 8 Md. 427; Smith *v.* Turrentine, 55 N. C. 253.

[3] 1 Fonbl. Eq. B. 1, ch. 1, § 7, and notes; Id. ch. 4, § 25, and notes; Id. ch. 5, § 2, and notes; Goodwin *v.* Goodwin, 1 Rep. Chan. 92 [173]; Mitf. Eq. Pl. by Jeremy, 274; Moody *v.* Reid, 1 Madd. R. 516; 1 Madd. Eq. Pr. 45, 46, 47; Sugden on Powers, ch. 6 (4th ed.), pp. 353 to 358; 2 Chance on Powers, ch. 23, § 1, pp. 502, 504, 507; Com. Dig. Chancery, 4 H. 7, 4 H. 9, 2 T. 9, 2 T. 10, 2 C. 8, 4 O. 7; post, § 572. There is one peculiarity as to the execution of powers which may be here taken notice of, although for obvious reasons this is not the place to discuss the nature and effects of powers generally. It is this. If a party possesses a general power to raise money for any purposes, so that, if he pleases, he may execute it in his own favor, and he executes it in favor of mere volunteers, in such a case it will be deemed assets in favor of creditors, upon the ground of his absolute dominion over the power. But if he does not execute the power at all, there equity will not deem it assets. 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*c*); Id. § 25, note (*n*); Harrington *v.* Harte, 1 Cox, R. 131; Townsend *v.* Windham, 2 Ves. 1; Troughton *v.* Troughton, 3 Atk. 656; Lassels *v.* Cornwallis, 2 Vern. 465; George *v.* Milbank, 9 Ves. 189; Holloway *v.* Millard, 1 Madd. R. 414, 419, 420; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, pp. 376, 377 (*b*). The distinction is a nice one, and not very satisfactory. Why, when the party executes a power in favor of others, and not of himself, a Court of Equity should defeat his intention, although within the scope of the power, and should execute something beside that intention, and contrary to it, is not very intelligible. If it be said that he ought to be just before he is generous, that addresses itself merely to his sense of morals. The power enabled him to give, either

implied.[1] But there are excepted cases even from this rule, for a defective execution has been aided in favor of a volunteer where a strict compliance with the power has been impossible from circumstances beyond the control of the party; as where the prescribed witnesses could not be found, or where an interested party having possession of the deed creating the power, has kept it from the sight of the party executing the power, so that he could not ascertain the formalities required.[2]

§ 251. **Same.** — For the same reason equity will not supply a surrender or aid the defective execution of a power to the disinheritance of the heir at law. Neither will it supply such a surrender in favor of creditors where there are otherwise assets sufficient to pay their debts,[3] nor against a purchaser for a valuable consideration without notice.[4] And there are other cases of the defective execution of powers where equity will not interfere; as for instance in regard to powers which are in their own nature statutable, where equity must follow the law, be the consideration ever so meritorious. Thus the power of a tenant in tail to make leases under a statute, if not executed in the requisite form prescribed by the statute, will not be made available in equity, however meritorious the consideration may be.[5] And indeed it may be

to himself, or to his creditors, or to mere voluntary donees. Why should a Court of Equity restrict this right of election, if bona fide exercised? Is not this to create rights, not given by law, rather than to enforce rights secured by law? If the power was bona fide created, why should a Court of Equity interpose to change its objects or its operations? See Sugden on Powers, ch. 6, § 3; Hunt *v.* Hunt, 20 Ohio St. 119; ante, § 209.

[1] 1 Fonbl. Eq. B. 1, ch. 5, § 2, and the cases there cited, note (*h*); 1 Madd. Eq. Pr. 44, 45; Sugden on Powers, ch. 6, §1. See Ellis *v.* Nimmo, Lloyd & Gould's Rep. 333; Fortescue *v.* Barnett, 3 Mylne & Keen, 36, 42, 43; post, § 500. In Morse *v.* Morse, 34 Beav. 500, defective execution in favor of a sister was aided against brothers otherwise provided for. See also Huss *v.* Morris, 63 Pa. St. 367; Clapp *v.* Ingraham, 126 Mass. 200; Commonwealth *v.* Duffield, 12 Pa. St. 277; Johnson *v.* Cushing, 15 N. H. 298; Fleming *v.* Buchanan, 3 DeG. M. & G. 976. The bona fide execution of such a power by a married woman does not in England fall within the rule. Clapp. *v* Ingraham, supra; Vaughan *v.* Vandersteegen, 2 Drew. 165, 363; Shattock *v.* Shattock, L. R. 2 Eq. 182; s. c. 35 Beav. 489.

[2] 1 Fonbl. Eq. B. 1, ch. 5, § 2, and note (*h*); Gilbert, Lex Pretoria, pp. 305, 306.

[3] 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*v*); Id. ch. 4, § 25, note (*c*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, pp. 369, 370, 371.

[4] 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*v*); Id. ch. 4, § 25, and note (*f*); Id. B. 6, ch. 3, § 3. But see Id. B. 1, ch. 1, § 7, note (*t*).

[5] Darlington *v.* Pulteney, Cowp. R. 267; 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (*l*). But see 2 Chance on Powers, ch. 23, § 2, pp. 541 to 545. See Gilbert, Lex Pretoria, pp. 304, 305, the difference of a power created by the parties. See also 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (*l*).

stated as generally although not universally true, that the remedial power of Courts of Equity does not extend to the supplying of any circumstance for the want of which the Legislature has declared the instrument void; for otherwise equity would in effect defeat the very policy of the legislative enactments.[1]

§ 252. **Same.** — Upon one or both of these grounds, to wit, that there is no superior equity, or that it is against the policy of the law, the remedial power of Courts of Equity does not extend to the case of a defective fine as against the issue, or of a defective recovery as against a remainder-man,[2] unless indeed there is something in the transaction to affect the conscience of the issue or the remainder-man.[3]

§ 253. **Correction of Mistake Apparent upon Face of Will.** — In regard to mistakes in wills there is no doubt that Courts of Equity have jurisdiction to correct them when they are apparent upon the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words. [So that, where the will was not legibly written, and it is difficult to determine whether a legacy thereunder is $200 or $1,000, it is not competent for the scrivener to testify that he was directed to write $200 as the legacy. The law is practically settled that the meaning of the will must be ascertained from the will itself, and, when the language is not uncertain or doubtful, parol evidence is not admissible to contradict it.[4] Nor do the cases which permit parol evidence to fix and determine the person or corporation intended by the use of an inaccurate or incomplete description, go so far as to permit the supplying of a name for a legatee wholly omitted from the will.[5] When the meaning of the words used in a will is ambiguous, the court, in order to arrive

[1] Ante, § 137, 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*t*); Hibbert *v.* Rolleston, 3 Bro. Ch. R. 571, and Mr. Belt's note, ibid.; Ex parte Bulteel, 2 Cox, R. 243; Duke of Bolton *v.* Williams, 2 Ves. Jr. 138; Curtis *v.* Perry, 6 Ves. R. 739, 745, 746, 747; Mestaer *v.* Gillespie, 11 Ves. 621, 624, 625; Dixon *v.* Ewart, 3 Meriv. R. 321, 332; Thompson *v.* Leake, 1 Madd. R. 39; Thomson *v.* Smith, 1 Madd. R. 395; Bright *v.* Boyd, 1 Story, R. 478. Quære, how it would be, where a due execution was prevented by fraud, accident, or mistake. See 11 Ves. 625; 1 Madd. 39; Id. 395.

[2] 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*u*); Id. ch. 5, § 2, and note (*h*).

[3] 1 Fonbl. Eq. B. 1, ch. 4, § 25, note (*k*); Id. 15; Com. Dig. Chancery, 2 T. 4. and 2 T. 8, 2 T. 10, 3 N. 2.

[4] In re Lyden's Estate, 64 Misc. Rep. 597, 119 N. Y. Supp. 973; In Matter of Keleman, 126 N. Y. 78, 26 N. E. 969; Brown *v.* Quintard, 177 N. Y. 83, 69 N. E. 227.

[5] In re Knoblauch's Will, 31 Misc. Rep. 418, 65 N. Y. Supp. 658; In re Wheeler's Will, 32 App. Div. 183, 52 N. Y. Supp. 943.

at the intention of the testator, must be put as near as may be in his environment, "stand in his shoes, and look with his perspective through his eyes", and to enable the court to do this parol evidence of the conditions and circumstances surrounding the parties and the execution of the instrument is always admissible.[1]] But then the mistake must be apparent on the face of the will, otherwise there can be no relief; for at least since the Statute of Frauds, which requires wills to be in writing (whatever may have been the case before the statute),[2] parol evidence, or evidence dehors the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity.[3]

[When there is a gift to a society for charity, without clearly

[1] Winfree *v.* Winfree, 139 S. W. 36; Reformed Presbyterian Church of North America, General Synod *v.* McMillan, 31 Wash. 643, 72 Pac. 502.

[2] Lord Harwicke, in Milner *v.* Milner (1 Ves. R. 106), remarked that in the early ecclesiastical law, in accordance with the civil law, it was held that errors in legacies might be corrected by the intention of the testator, contrary to his words; and he cited Swinburne on Wills, p. 7, ch. 5, § 13, and Godolphin, pp. 3, 477, and the text of the civil law, and the commentary of Cujacius on the Digest, Lib. 30, tit. 1, l. 15; Cujacii Opera (ed. 1758), tom. 7. Comment. ad. id. Leg. pp. 993, 994. He then added: "Indeed at the time some of these books were written, the Statute of Frauds had not taken place; and as the law [was] then held, parol evidence might be given in all courts to explain a will. And perhaps some contrariety of opinions may have been on this subject, where the intention appears on the face of the will, and where not; almost all the authorities in the civil law agreeing in the first case that the intention shall prevail against the words. But some have thought otherwise in the latter case, where the intention appeared, not on the face of the will, but only by matter dehors; although the better opinion even there is, that the intention shall prevail. However that difficulty cannot be here, as the intention appears on the face of the will."

[3] Milner *v.* Milner, 1 Ves. R. 106; Ulrich *v.* Litchfield, 2 Atk. 373; Hampshire *v.* Peirce, 2 Ves. R. 216; Bradwin *v.* Harper, Ambler, R. 374; Stebbing *v.* Walkey, 2 Bro. Ch. R. 85; s. c. 1 Cox, R. 250; Danvers *v.* Manning, 2 Bro. Ch. R. 18; s. c. 1 Cox, R. 203; Campbell *v.* French, 3 Ves. 321; 1 Fonbl. Eq. B. 1, ch. 11, § 7, note (*v*); 1 Madd. Ch. Pr. 66, 67. Equity will not interfere, at least in this country, to correct alleged mistakes in the execution of wills as to the statutory requisites thereto. Nutt *v.* Nutt, 1 Freem. Ch. 128; Erwin *v.* Hanmer, 27 Ala. 296; Alter's Appeal, 67 Pa. St. 341. Nor to correct mistakes in the writing, as by inserting the name of another legatee in lieu of one which had been written by the mistake of the scrivener. Yates *v.* Cole, 54 N. C. 110. Nor in a case not one of ambiguity is evidence admissible that, where a society made the subject of a bequest is named as being in L., when there is not society of that name there, the testator meant a society of the same name elsewhere. In re Clergy Society, 2 Kay & J. 615.

In Box *v.* Barrett, L. R. 3 Eq. 244, a testator showed an intention in his will of giving his property equally among his four daughters, but recited that two of them, A and B, would become entitled to settled estates after his death, and that he had taken that into account in making his will, and

describing the particular society, and there are two or more societies carrying on the same charity, a latent ambiguity exists, and extrinsic evidence is admissible for the purpose of determining the society or institution intended by the donor at the time of the execution of the will. The rule also applies where there is a mistake in the name or description of the legatee or devisee, whether an individual or corporation.[1]]

§ 254. [**Omission of Legacy or Bequest from Will by Mistake.**— Statutes have been enacted in some of the States permitting

had not given them as large a share as he otherwise would have done. He devised much more to the other two than to A and B, when in fact all his daughters were equally entitled to share in the settled estates, and in consequence of this mistake of the testator A and B would receive in the whole much less than the other two. But the will did not attempt to disturb the settled estates, and the court held that relief could not be granted. "Because the testator," said Romilly, M. R., "has made a mistake, you cannot afterwards remodel the will, and make it that which you suppose he intended, and as he would have drawn it if he had known the incorrectness of his supposition." See further as to the want of jurisdiction in equity to reform a will, Chambers *v.* Watson, 56 Iowa, 676; Sherwood *v.* Sherwood, 45 Wis. 351; § 260, note 5; Best *v.* Berry, 189 Mass. 510, 75 N. E. 743, 109 Am. St. Rep. 651.

[1] Hitchcock *v.* Board of Home Missions, 259 Ill. 288, 102 N. E. 741; Woman's Union Missionary Society *v.* Mead, 131 Ill. 33, 23 N. E. 603; Tilton *v.* American Bible Society, 60 N. H. 377, 49 Am. Rep. 321; Bowman *v.* Domestic and Foreign Society, 100 App. Div. 29, 90 N. Y. Supp. 898; affirmed, 182 N. Y. 494, 75 N. E. 535; Faulkner *v.* National Soldiers' Home, 155 Mass. 458, 29 N. E. 645; Abbott *v.* Lewis, 77 N. H. 94, 88 Atl. 98; In re Slivey's Will, 81 Misc. Rep. 389, 143 N. Y. Supp. 351; Cornwell *v.* Mount Morris Methodist Epis. Church, 73 W. Va. 96, 80 S. E. 148; Ostenton *v.* Elliott, 73 W. Va. 519, 81 S. E. 837; In re Cowell's Estate, 139 Pac. 82; In re Glasgow's Estate, 243 Pa. 613, 90 Atl. 332; In re Collins, 124 App. Div. 929, 109 N. Y. Supp. 1127; Gilchrist *v.* Corliss, 155 Mich. 126, 118 N. W. 938, 15 Detroit Leg. N. 971; Gano *v.* Gano, 239 Ill. 539, 88 N. E. 146; McMahon *v.* Hubbard, 217 Mo. 624, 118 S. W. 481; Myher *v.* Myher, 224 Mo. 631, 123 S. W. 806; Suman *v.* Harvey, 114 Md. 241, 79 Atl. 197; Hettinger *v.* Safe Deposit & Trust Co., 114 Md. 241, 79 Atl. 205; In re Hansen, 72 Misc. Rep. 610, 132 N. Y. Supp. 257; McLeod *v.* Jones, 157 N. C. 74, 74 S. E. 733; In re Donellon's Estate, 164 Cal. 14, 127 Pac. 166; Bullard *v.* Leach, 213 Mass. 117, 100 N. E. 57; In re Raale's Will, 79 Misc. Rep. 185, 139 N. Y. Supp. 869; Missionary Society of M. E. Church *v.* Cadwell, 69 Ill. App. 280; Wilson *v.* Stevens, 59 Kan. 771, 51 Pac. 903; Second United Presbyterian Church *v.* First United Presbyterian Church, 71 Neb. 563, 99 N. W. 252; Jay *v.* Lee, 41 Misc. Rep. 13, 83 N. Y. Supp. 579; In re Welch's Will, 78 Vt. 16, 61 Atl. 145; Gordon *v.* Burris, 141 Mo. 602, 43 S. W. 642; In re Wheeler, 32 App. Div. 183, 52 N. Y. Supp. 943; Union Trust Co. *v.* St. Luke's Hospital, 175 N. Y. 505, 67 N. E. 1090; affirming 74 App. Div. 330, 77 N. Y. Supp. 528; In re Miller's Estate, 26 Pa. Super. Ct. 443; Giger *v.* Busch, 122 Ill. App. 13; In re Pearson's Estate, 52 Misc. Rep. 273, 102 N. Y. Supp. 965; In re Dominici's Estate, 151 Cal. 181, 90 Pac. 448; In re Dickinson's Estate, 56 Misc. Rep. 232, 107 N. Y. Supp. 386.

children, who have been left out of the will, to show that the omission of a legacy or bequest to them was unintentional, but it will readily be seen that where one claims under such a statute, a very interesting question for the jury is presented, and especially in view of the contrariety of dicta of the several courts. It is not easy to reconcile the doctrine of either line of authorities with the rule which requires the courts to give effect to the intentions of the testator, because in either case a finding that the omission of a child or grandchild from the will was unintentional is equivalent to a finding that the will does not reflect the intentions of the testator. When such fact is once established, what his intentions actually were becomes a matter of conjecture, because, had he made provision in the will for the pretermitted child, such provision of necessity would have resulted in a modification of the provisions made for the objects of his bounty, and then, those who were left out of the will have the burden of showing that their omission from the will was unintentional and the result of accident or mistake.[1]]

§ 255. **Mistake Should Be Clear and Evidenced by the Will.** — But the mistake, in order to lead to relief, must be a clear mistake or a clear omission, demonstrable from the structure and scope of the will.[2] Thus if in a will there is a mistake in the computation of a legacy, it will be rectified in equity.[3] So if there is a mistake in the name or description or number of the legatees intended to take,[4] or in the property intended to be bequeathed,[5] equity will correct it.[6]

[1] Affirmative: Wilson *v.* Fosket, 6 Metc. 400, 39 Am. Dec. 736; Peters *v.* Siders, 126 Mass. 135, 30 Atl. 671; Stebbins *v.* Stebbins, 94 Mich. 304, 54 N. W. 159; Brown *v.* Brown, 71 Neb. 200, 98 N. W. 719, 115 Am. St. Rep. 568, 8 A. & E. Ann. Cas. 632; In re O'Connor, 21 R. I. 465, 79 Am. St. Rep. 814, 44 Atl. 591; Conlan *v.* Doull, 4 Utah, 267, 9 Pac. 568, 133 U. S. 216, 33 L. Ed. 596, 10 S. Ct. Rep. 253.

Negative: Estate of Stevens, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252; Pounds *v.* Dale, 48 Mo. 270; Chace *v.* Chace, 6 R. I. 407, 78 Am. Dec. 446; Boman *v.* Boman, 1 C. C. A. 274, 7 U. S. App. 63, 49 Fed. 329; Bower *v.* Bower, 5 Wash. 225, 31 Pac. 598.

[2] Mellish *v.* Mellish, 4 Ves. 49; Phillips *v.* Chamberlain, Id. 51, 57; Del Mare *v.* Rebello, 3 Bro. Ch. R. 446; Purse *v.* Snaplin, 1 Atk. R. 415; Holmes *v.* Custance, 12 Ves. 279.

[3] Milner *v.* Milner, 1 Ves. R. 106; Danvers *v.* Manning, 2 Bro. Ch. R. 18; Door *v.* Geary, 1 Ves. R. 255, 256; Giles *v.* Giles, 1 Keen, 692.

[4] Stebbing *v.* Walkley, 2 Bro. Ch. R. 85; River's Case, 1 Atk. R. 410; Parsons *v.* Parsons, 1 Ves. Jr. R. 266; Beemont *v.* Fell, 2 P. Will. 141; Hampshire *v.* Peirce, 2 Ves. 216; Bradwin *v.* Harper, Ambler, R. 374.

[5] Selwood *v.* Mildmay, 3 Ves. 306; Door *v.* Geary, 1 Ves. 250.

[6] A mistake in the date of the will may be shown by parol. Reffell *v.*

§ 256. **Same.** — But in each of these cases the mistake must be clearly made out, for if it is left doubtful, equity will not interfere.[1] And so if the words of the bequest are plain, evidence of a different intention is inadmissible to establish a mistake.[2] Neither will equity rectify a mistake if it does not appear what the testator would have done in the case if there had been no mistake.[3]

§ 257. **Same.** — The same principle applies where a legacy is revoked or is given upon a manifest mistake of facts. Thus if a testator revokes legacies to A and B, giving as a reason that they are dead, and they are in fact living, equity will hold the revocation invalid and decree the legacies.[4] So if a woman gives a legacy to a man, describing him as her husband and in point of fact the marriage is void, he having a former wife then living, the bequest will in equity be decreed void.[5]

§ 258. **Same.** — But though it is clear that a legacy given to a person in a character which the legatee does not fill, and by the fraudulent assumption of which character the testator has been deceived, will not take effect, yet if the testator is not deceived although a false character is in fact assumed, the legacy will be good. A fortiori it will be good if both parties not only know the actual facts, but are designedly parties to the assumption of the false character. Thus where the testator and the legatee A. G. were married, both knowing at the time that the legatee had a prior husband alive, and afterwards the testator gave all the residue of his estate to the legatee, describing her as his wife A. G., it was held that the legacy was good; for as both parties had a guilty knowledge of the facts, no fraud was committed on the testator. And it was then said, that however criminal the conduct of the parties might be, it was no part of the duty of Courts of Equity to punish parties for immoral conduct by depriving them of their civil rights.[6]

Reffell, L. R. 1 P. & M. 139. But words will not be struck out on evidence that the scrivener inserted them inadvertently, where the testator, being a capable person, had the will read over to him. Guardhouse *v.* Blackburn, L. R. 1 P. & M. 109.

[1] Holmes *v.* Custance, 12 Ves. 279.

[2] Chambers *v.* Minchin, 4 Ves. R. 676. But see Tonnereau *v.* Poyntz, 1 Bro. Ch. R. 472, 480; Powell *v.* Mouchett, 6 Madd. R. 216; Smith *v.* Streatfield, 1 Meriv. R. 358.

[3] See Smith *v.* Maitland, 1 Ves. 363; Box *v.* Barrett, L. R. 3 Eq. 244; supra, § 255, note.

[4] Campbell *v.* French, 3 Ves. 321.

[5] Kennell *v.* Abbott, 4 Ves. R. 808.

[6] Giles *v.* Giles, 1 Keen, R. 685, 692, 693.

§ 259. **Same.** — But a false reason given for a legacy or for the revocation of a legacy is not always a sufficient ground to avoid the act or bequest in equity. To have such an effect, it must be clear that no other motive mingled in the legacy, and that it constituted the substantial ground of the act or bequest.[1] The civil law seems to have proceeded upon the same ground. The Digest[2] says: "Falsam causam legato non obesse, verius est; quia ratio legandi legato non cohæret. Sed plerumque doli exceptio locum habebit, si probetur, alias legaturus non fuisse." The meaning of this passage is, that a false reason given for the legacy is not of itself sufficient to destroy it. But there must be an exception of any fraud[3] practised, from which it may be presumed that the person giving the legacy would not, if that fraud had been known to him, have given it.[4] And the same reasoning applies to a case of clear mistake.

[1] Kennell *v.* Abbott, 4 Ves. R. 802. See Wilkinson *v.* Joughin, 12 Jur. N. S. 330; In re Pitts's Will, 5 Jur. N. S. 1235.

[2] Dig. Lib. 35, tit. 1, l. 72, § 6. See also Swinburne on Wills, Pt. 7, § 22, p. 557.

[3] The term "doli exceptio" merely means a plea of fraud; and the passage means that such a plea will be proper where the gift would not have been made had the truth been known.

[4] Kennell *v.* Abbott, 4 Ves. 808.

CHAPTER VI

ACTUAL OR POSITIVE FRAUD

§ 260. **Actual or Positive Fraud.** — Let us now pass to another great head of concurrent jurisdiction in equity, that of Fraud. And here it may be laid down as a general rule subject to few exceptions, that Courts of Equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with and sometimes exclusive of other courts.[1] It has been already stated that in a

[1] Barker *v.* Ray, 2 Russ. R. 63; post, §§ 238, 252, 264, 440. Mr. Fonblanque in his note (B. 1, ch. 2, § 3, note *u*) says: "Whether Courts of Equity could interpose and relieve against fraud practised in the obtaining of a will, appears to have been formerly a point of considerable doubt. In some cases we find the Court of Chancery distinctly asserting its jurisdiction; as in Maundy *v.* Maundy, 1 Ch. Rep. 66; Well *v.* Thornagh, Pre. Ch. 123; Goss *v.* Tracy, 1 P. Wms. 287; 2 Vern. 700; in other cases disclaiming such jurisdiction, though the fraud was gross and palpable; as in Roberts *v.* Wynne, 1 Ch. Rep. 125; Archer *v.* Moss, 2 Vern. 8; Herbert *v.* Lownes, 1 Ch. Rep. 13; Thynn *v.* Thynn, 1 Vern. 296; Devenish *v.* Barnes, Pre. Ch. 3; Barnesly *v.* Powel, 1 Ves. 287; Marriott *v.* Marriott, Str. 666. That an action at law will lie upon a promise that if the devisor would not charge the land with a rent-charge, the devisee would pay a certain sum to the intended legatee of the rent. See Rockwood *v.* Rockwood, 1 Leon. 192; Cro. Eliz. 163. See also Dutton *v.* Poole, 1 Vent. 318, 332; Beringer *v.* Beringer, 16 June, 26 Car. II.; Chamberlain *v.* Chamberlain, 2 Freem. 34; Leicester *v.* Foxcroft, cited Gilb. Rep. 11; Reech *v.* Kenningall, 26 October, 1748. But since the cases of Kerrich *v.* Bransby, 3 Brown's P. C. 358, and Webb *v.* Cleverden, 2 Atk. 424, it appears to have been settled that a will cannot be set aside in equity for fraud and imposition, because a will of personal estate may be set aside for fraud in the Ecclesiastical Court and a will of real estate may be set aside at law; for in such cases, as the animus testandi is wanting, it cannot be considered as a will. Bennet *v.* Vade, 2 Atk. 324; Anon. 3 Atk. 17. Though equity will not set aside a will for fraud nor restrain the probate of it in the proper court, yet if the fraud be proved it will not assist the party practising it, but will leave him to make what advantage he can of it. Nelson *v.* Oldfield, 2 Vern. 76. But if the validity of the will has been already determined and acted upon, equity will restrain proceedings in the Prerogative Court to controvert its validity. Sheffield *v.* Duchess

of Buckingham, 1 Atk. 628. Lord Hardwicke, having admitted that a Court of Equity cannot set aside a will for fraud, observes, in the above case of Sheffield *v.* Duchess of Buckingham, that "the admission of a fact by a party concerned, and who is most likely to know it, is stronger than if determined by a jury; and facts are as properly concluded by an admission as by a trial." That the party prejudiced by the fraud may file a bill for a discovery of all its circumstances is unquestionable. Supposing then the defendant to admit the fraud, if the admission is to have the effect ascribed to it by Lord Hardwicke, it still remains to be determined how a Court of Equity ought to proceed. If it could not relieve, it would follow, as a consequence, that so much of the bill as seeks relief would be demurrable; but the invariable practice in such cases is to seek relief, and the issue directed is to furnish the ground upon which the court is to proceed in giving such relief." But the question whether a Court of Equity will interpose and grant relief in cases of wills obtained or suppressed by fraud has been much litigated since the note of Mr. Fonblanque was written, and it is now well settled that a Court of Equity will not entertain jurisdiction to set aside a will obtained by fraud, or establish a will suppressed by fraud, whatever relief it may otherwise grant under special circumstances. See Allen *v.* Macpherson, 5 Beav. R. 469; s. c. on appeal, 1 Phillips, Ch. R. 133. In this case, upon the appeal Lord Cottenham discussed the authorities at large and said, "The testator in this case had bequeathed a considerable property to the plaintiff by his will and subsequent codicils. He afterwards by a further codicile (the ninth) revoked these bequests, and in lieu of them made a small pecuniary provision in his favor. It was alleged by the bill that this alteration was procured by false and fraudulent representations made by an illegitimate son of the testator, and by the defendant Susannah Evans, his daughter, as to the character and conduct of the plaintiff, Susannah Evans being the residuary legatee. To this bill the defendants demurred. The Master of the Rolls overruled the demurrer, and from this judgment the defendants have appealed. The question is one of considerable importance. The same objection of fraud, founded upon the same facts, was made in the Ecclesiastical Court upon the application for probate. It did not however prevail. This then is in substance an attempt to review the proceedings in that court; for a sufficient case of imposition and fraud practised on the testator would have been a ground for refusing the probate. There are undoubtedly cases where, fraud being proved, this court has declared the party committing the fraud a trustee for the person against whom the fraud was practised; but none of these cases appear to me to go so far as the present. The case of Seagrave *v.* Kirwan has no very close application to the question now before the court. The Chancellor of Ireland, Sir Anthony Hart, declared the executor a trustee as to the residue for the next of kin. But in that case the testator never intended that the executor should take any benefit under the will. The rule which then prevailed, that the executor was entitled to the residue unless otherwise disposed of, except where a legacy was bequeathed to him by the will, was a rule of interpretation or construction. The learned judge considered that it was the duty of the executor who prepared the will, and who was a gentleman of the bar, to have informed the testator that such was the rule. He was not allowed to profit from this omission, and was therefore decreed to be a trustee for the next of kin. The Ecclesiastical Court had no authority to order this. They had no power to do what the justice of the case required. So in Kennell *v.* Abbott (4 Ves. 802). There a fraud had been practised, and the question was one of intention. The testatrix

intended the legacy for her husband. The legatee had fraudulently assumed that character. The Master of the Rolls, Sir Pepper Arden, came to the conclusion that the character he had so assumed was the only motive for the gift. The law therefore, he said, would not permit him to avail himself of the testatrix's bounty. In the case of Marriot *v.* Marriot, which is mentioned in Strange (p. 666), and also in Chief Baron Gilbert's Reports (p. 203; see p. 209), it does not appear what was the nature of the imputed fraud. The cause was compromised, and the judgment, according to the report in Gilbert, was written by the learned judge, but not delivered. He says that a Court of Equity may, according to the real intention of the testator, declare a trust upon a will, although it be not contained in the will itself, in these three cases. First, in the case of a notorious fraud upon a legatee; as if the drawer of a will should insert his own name instead of the name of the legatee, no doubt he would be a trustee for the real legatee. Secondly, where the words imply a trust for the relations, as in the case of a specific devise to the executors, and no disposition of the residue. Thirdly, in the case of a legatee promising the testator to stand as a trustee for another. And nobody, he adds, has thought that declaring a trust in these cases is an infringement upon the ecclesiastical jurisdiction. These are the only positions laid down in the intended judgment which are applicable to the present question. They do not admit of dispute, but are very distinguishable from the case now under consideration. It is sufficient to observe that in none of these instances would the Ecclesiastical Court be competent to afford relief. The same remarks will apply to the case also of Kennel *v.* Abbott, which I have already mentioned. But in Plume *v.* Beale (1 P. Wms. 188), where a legacy was introduced by forgery, Lord Chancellor Cowper refused to interfere, saying it might have been proved in the Ecclesiastical Court with a particular reservation as to that legacy. There the interference of the Court of Equity was unnecessary. The question might have been settled by the Ecclesiastical Court. In the case of Barnesly *v.* Powel (1 Ves. Sr., p. 284), Lord Hardwicke says that fraud in making or obtaining a will must be inquired into and determined by the Ecclesiastical Court, but that fraud in procuring a will to be established in that court — fraud, not upon the testator, but upon the person disinherited thereby — might be the subject of inquiry in this court. Fraud, he says, in obtaining the will infects the whole, but the case of a will in which the probate has been obtained by fraud upon the next of kin is of another consideration; and Lord Apsley, in the case of Meadows *v.* The Duchess of Kingston (Amb. 762), recognizes this distinction. But the case which has the closest resemblance to this is Kerrich *v.* Bransby, decided in the House of Lords (7 Bro. P. C. 457). It was alleged in that case that the will had been obtained by fraud and imposition practised on the testator; and the chancellor, Lord Macclesfield, was of that opinion, and pronounced a decree the effect of which was to deprive the legatee of all benefit under it. It is true that the prayer of the bill was that the will might be cancelled; but the decree did not do more than direct the legatee to account for the testator's personal estate, and that what should appear to be in his hands should be paid over to the plaintiff, and that if necessary the plaintiff should be at liberty to use the legatee's name to get in the debts or other personal estate of the testator; in substance declaring him a trustee for the plaintiff. But this judgment was reversed on appeal in the House of Lords. It was suggested at the bar upon the argument in the present case that the decree might perhaps have been reversed on the merits. That however has not been the understanding of the profession, and Lord Hardwicke, who probably was acquainted with the

history of the case, expressly states in Barnesly *v.* Powel that it was decided on the question of jurisdiction. Lord Eldon also, in Ex parte Fearon (5 Ves. 633; see p. 647), observes that it was determined in Kerrich *v.* Bransby that this court could not take any cognizance of wills of personal estate as to matters of fraud. I am of opinion therefore, as well on authority as on principle, that the demurrer was proper, and ought to have been sustained." Again in Price *v.* Dewhurst, 4 Mylne & Craig, R. 76, 80, 81, Lord Cottenham said: "The first question which occurs is, How can this court in administering a testator's property take any notice of a will of which no probate has been obtained from the Ecclesiastical Court of this country? This court knows nothing of any will of personalty except such as the Ecclesiastical Court has by the probate adjudged to be the last will." The same question occurred before the Supreme Court of the U. S. in the case of Gaines and wife *v.* Chew and others, 2 Howard, S. Ct. R. 619, 645, 546. In that case Mr. Justice McLean, in delivering the opinion of the court, said: "In cases of fraud, equity has a concurrent jurisdiction with a court of law, but in regard to a will charged to have been obtained through fraud, this rule does not hold. It may be difficult to assign any very satisfactory reason for this exception. That exclusive jurisdiction over the probate of wills is vested in another tribunal is the only one that can be given. By art. 1637 of the Civil Code it is declared that 'no testament can have effect unless it has been presented to the judge', &c. And in Clappier et al. *v.* Banks, 11 Louis. Rep. 593, it is held that a will alleged to be lost or destroyed, and which has never been proved, cannot be set up as evidence of title in an action of revendication. In Armstrong *v.* Administrators of Kosciusko, 12 Wheat. 169, this court held that an action for a legacy could not be sustained under a will which had not been proved in this country before a Court of Probate, though it may have been effective as a will in the foreign country where it was made. In Tarver *v.* Tarver et al., 9 Peters, 180, one of the objects of the bill being to set aside the probate of a will, the court said, 'The bill cannot be sustained for the purpose of avoiding the probate. That should have been done, if at all, by an appeal from the Court of Probate, according to the provisions of the law of Alabama.' The American decisions on this subject have followed the English authorities. And a deliberate consideration of the question leads us to say that both the general and local law require the will of 1813 to be proved before any title can be set up under it. But this result does not authorize a negative answer to the second point. We think, under the circumstances, that the complainants are entitled to full and explicit answers from the defendants in regard to the above wills. These answers being obtained may be used as evidence before the Court of Probate to establish the will of 1813 and revoke that of 1811. In order that the complainants may have the means of making, if they shall see fit, a formal application to the Probate Court for the proof of the last will and the revocation of the first, having the answers of the executors, jurisdiction as to this matter may be sustained. And indeed circumstances may arise on this part of the case which shall require a more definite and efficient action by the Circuit Court. For if the Probate Court shall refuse to take jurisdiction, from a defect of power to bring the parties before it, lapse of time, or on any other ground, and there shall be no remedy in the higher courts of the State, it may become the duty of the Circuit Court, having the parties before it, to require them to go before the Court of Probates and consent to the proof of the will of 1813 and the revocation of that of 1811. And should this procedure fail to procure the requisite action on both wills, it will be a matter for grave consideration whether

great variety of cases fraud is remediable, and effectually remediable, at law.[1] Nay, in certain cases, such as fraud in obtaining a will, whether of personal estate or real estate, the proper remedy is exclusively vested in other courts; in wills of personal estate,

the inherent powers of a Court of Chancery may not afford a remedy where the right is clear, by establishing the will of 1813. In the case of Barnesly *v.* Powel, 1 Ves. Sen. 119, 284, 287, above cited, Lord Hardwicke decreed that the defendant should consent in the Ecclesiastical Court to the revocation of the will in controversy and the granting of administration, &c. If the emergencies of the case shall require such a course as above indicated, it will not be without the sanction of Louisiana law. The twenty-first article of the Civil Code declares that 'in civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages where positive law is silent.' This view seemed to be necessary to show on what ground and for what purpose jurisdiction may be exercised in reference to the will of 1813, though it has not been admitted to probate." See also Gengell *v.* Horne, 9 Simons, R. 539, 548; Smith *v.* Spencer, 1 Younge & Coll. N. R. 75; Tucker *v.* Phipps, 3 Atk. R. 360; Tremblestown *v.* Lloyd, 1 Bligh (N. S.), R. 429; Cann *v.* Cann, 1 P. Will. 723; Dalston *v.* Coatsworth, 1 P. Will. 733; Hampden *v.* Hampden, cited 1 P. Will. 733; s. c. 1 Bro. Parl. Cas. 250; Jones *v.* Jones, 3 Meriv. R. 161; s. c. 7 Price, R. 663; Bennet *v.* Vade, 2 Atk. R. 264; Webb *v.* Claverden, 2 Atk. 424; Mitf. Eq. Pl. by Jeremy, 257; Belt's Supplt. to Vesey, 74, 143. I use the qualified language of the text, though broader language is often used by elementary writers, who assert that Courts of Equity have jurisdiction to relieve against all frauds except in cases of wills. (See Cooper on Eq. Pl. 125; 1 Hovenden on Frauds, Introd. p. 17.) Lord Hardwicke, in Chesterfield *v.* Jannsen, 2 Ves. 155, said: "This court has an undoubted jurisdiction to relieve against every species of fraud." Yet there are some cases of fraud in which equity does not ordinarily grant relief, as in warranties, misrepresentations, and frauds, on the sale of personal property, but leaves the parties to their remedy at law. So also in cases of deceitful letters of credit. See Russell *v.* Clark's Ex'ors, 7 Cranch, 89. But Lord Eldon has intimated that in such cases relief might also be had in equity; Evans *v.* Bicknell, 6 Ves. 182; and Mr. Chancellor Kent has affirmed the same doctrine; Bacon *v.* Bronson, 7 John. Ch. 210. In Hardwick *v.* Forbes's Admrs. (1 Bibb, Ky. R. 212) the court said: "It is a well-settled rule of law, that wherever a matter respects personal chattels, and lies merely in damages, the remedy is at law only, and for these reasons: 1st because courts of law are as adequate as a Court of Chancery to grant complete and effectual reparation to the party injured; 2d because the ascertainment of damages is peculiarly the province of a jury." And the court farther suggested that the same principle applied to a ratable deduction for fraud in like cases, but that a Court of Equity might properly interfere in such cases to set aside and vacate the *whole* contract at the instance of a party injured in a case of suppressio veri, or suggestio falsi, not entering into the point of damages. See Waters *v.* Mattinglay, 1 Bibb, R. 244.

[1] Ante, §§ 59, 60; 3 Black. Comm. 431; 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*r*); Inst. 84; Bright *v.* Eynor, 1 Burr. R. 396; Jackson *v.* Burgott, 10 John. R. 457, 462. See editor's note to § 33, ante.

in the Ecclesiastical Courts, and in wills of real estate, in the Courts of Common Law.[1] But there are many cases in which fraud is utterly irremediable at law; and Courts of Equity in relieving against it often go not only beyond but even contrary to the rules of law.[2] And with the exception of wills, as above stated, Courts of Equity may be said to possess a general and perhaps a universal concurrent jurisdiction with Courts of Law in cases of fraud cognizable in the latter; and exclusive jurisdiction in cases of fraud beyond the reach of the Courts of Law.[3]

§ 261. **Same.** — The jurisdiction in matters of fraud is probably coeval with the existence of the Court of Chancery; and it is equally probable that in the early history of that court it was principally exercised in matters of fraud not remediable at law.[4] Its present active jurisdiction took its rise in a great measure from the abolition of the Court of Star Chamber, in the reign of Charles the First;[5] in which court the plaintiff was not only relieved, but the defendant was punished for his fraudulent conduct. So that the interposition of chancery before that period was generally unnecessary.[6]

§ 262. **Positive Fraud Defined.** — It is not easy to give a definition of Fraud in the extensive signification in which that term is used in Courts of Equity; and it has been said that these courts have, very wisely, never laid down as a general proposition what shall constitute fraud,[7] or any general rule beyond which they will not go upon the ground of fraud, lest other means of avoiding the

[1] 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*u*); 3 Black. Comm. 431; Webb *v.* Cleverden, 2 Atk. 424; Kerrich *v.* Bransby, 3 Bro. Parl. Cas. 358; s. c. 7 Bro. Parl. Cas. by Tomlins, p. 437; Bennet *v.* Vade, 2 Atk. 324; Andrews *v.* Pavis, 2 Bro. Parl. Cas. 476; Jeremy Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 5, pp. 488, 489; Pemberton *v.* Pemberton, 13 Ves. 297; 1 Hovenden on Frauds, Introd. 17; Cooper, Eq. Pl. 125. See Ellis *v.* Davis, 109 U. S. 485, 3 S. Ct. Rep. 327, 27 L. Ed. 1006; Broderick's Will, 88 U. S. 503, 22 L. Ed. 599; Trexler *v.* Miller, 41 N. C. 248; Allen *v.* McPherson, 1 H. L. Cas. 191. Secus as to a will which has been suppressed or fraudulently destroyed. Buchanan *v.* Matlock, 8 Humph. 390; Tucker *v.* Phipps, 3 Atk. 360; post, § 363. But see Myers *v.* O'Hanlon, 13 Rich. 196.

[2] Garth *v.* Cotton, 3 Atk. 755; Man *v.* Ward, 2 Atk. 229; Trenchard *v.* Wanley, 2 P. Will. 167.

[3] Colt *v.* Wollaston, 2 P. Will. 156; Stent *v.* Bailis, 2 P. Will. 220; Bright *v.* Eynor, 1 Burr. 396; Chesterfield *v.* Jannsen, 2 Ves. 155; Evans *v.* Bicknell, 6 Ves. 132. See Ramshire *v.* Bolton, L. R. 8 Eq. 294; Hill *v.* Lane, L. R. 11 Eq. 215; Hoare *v.* Bremridge, L. R. 14 Eq. 522; s. c. L. R. 8 Ch. 22; Jones *v.* Bolles, 76 U. S. 364, 19 L. Ed. 734.

[4] 4 Inst. 84.

[5] Stat. 16 Car. 1, ch. 10.

[6] 1 Fonbl. Eq. B. 1, ch. 2, § 12; 1 Madd. Ch. Pr. 89.

[7] Mortlock *v.* Buller, 10 Ves. 306.

equity of the courts should be found out.[1] Fraud is even more odious than force; and Cicero has well remarked: "Cum autem duobus modis, id est, aut vi, aut fraude, fiat injuria; fraus, quasi vulpeculæ, vis, leonis videtur. Utrumque homine alienissimum; sed fraus odio digna majore."[2] Pothier says that the term "fraud" is applied to every artifice made use of by one person for the purpose of deceiving another.[3]

§ 263. **Same.** — This definition is beyond doubt sufficiently descriptive of what may be called positive, actual fraud, where there is an intention to commit a cheat or deceit upon another to his injury.[4] But it can hardly be said to include the large class of implied or constructive frauds which are within the remedial jurisdiction of a Court of Equity. Fraud indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.[5] And Courts of Equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done.[6]

§ 264. **Different Kinds of Fraud Stated.** — Lord Hardwicke, in a celebrated case,[7] after remarking that a Court of Equity has an undoubted jurisdiction to relieve against every species of fraud, proceeded to give the following enumeration of the different kinds

[1] Lawley *v.* Hooper, 3 Atk. 279. Lord Hardwicke, in his letter to Lord Kaimes, of the 30th of June, 1759 (Parke's Hist. of Chan. p. 508), says: "As to relief against frauds, no invariable rules can be established. Fraud is infinite; and were a Court of Equity once to lay down rules how far they would go, and no farther, in extending their relief against it or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes, which the fertility of man's invention would contrive." See also 1 Domat, Civil Law, B. 1, tit. 18, § 3, art. 1.

[2] Cic. de Offic. Lib. 1, ch. 13.

[3] 1 Pothier on Oblig. by Evans, Pt. 1, ch. 1, § 1, art. 3, n. 28, p. 19.

[4] Mr. Jeremy has defined fraud to be a device by means of which one party has taken an unconscientious advantage of the other. Jeremy on Eq. Jurisd. B. 3, Pt. 2, p. 358.

[5] See 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*r*); Chesterfield *v.* Janssen, 2 Ves. 155, 156; Taylor *v.* Atwood, 47 Conn. 498, 503; Gale *v.* Gale, 19 Barb. 249, 251; Smith *v.* Richards, 38 U. S. 26, 10 L. Ed. 43; Dailey *v.* Kastell, 56 Wis. 444, 452.

[6] Middleton *v.* Middleton, 1 Jac. & Walk. 96; Lord Waltham's case, cited 11 Ves. 638.

[7] Chesterfield *v.* Janssen, 2 Ves. 155.

of fraud: First. Fraud which is dolus malus may be actual, arising from facts and circumstances of imposition, which is the plainest case. Secondly. It may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are inequitable and unconscientious bargains, and of such even the common law has taken notice.[1] Thirdly. Fraud which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is that it must be proved, not presumed. But it is wisely established in the Court of Chancery to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance. Fourthly. Fraud which may be collected and inferred in the consideration of a Court of Equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons, not parties to the fraudulent agreement. Fifthly. Fraud in what are called catching bargains with heirs, reversioners, or expectants in the life of the parents, which indeed seems to fall under one or more of the preceding heads.

§ 265. **Same.** — Fraud then being so various in its nature and so extensive in its application to human concerns, it would be difficult to enumerate all the instances in which Courts of Equity will grant relief under this head. It will be sufficient if we here collect some of the more marked classes of cases in which the principles which regulate the action of Courts of Equity are fully developed, and from which analogies may be drawn to guide us in the investigation of other and novel circumstances.

§ 266. **Fraud Is Not to be Presumed.** — Before however proceeding to these subjects, it may be proper to observe that Courts of Equity do not restrict themselves by the same rigid rules as Courts of Law do in the investigation of fraud, and in the evidence and proofs required to establish it. It is equally a rule in Courts of Law and Courts of Equity, that fraud is not to be presumed, but it must be established by proofs.[2] Circumstances of

[1] See James *v.* Morgan, 1 Lev. 111.

[2] In 10 Coke, R. 56, it is laid down that covin shall never be intended or presumed at law, if it be not expressly averred: "Quia odiosa et inhonesta non sunt in lege præsumenda, et, in facto, quod se habit ad bonum et malum, magis de bono, quam de malo, præsumendum est." And this is in conformity to the rule of the civil law. "Dolum ex indiciis perspicuis probari convenit." Cod. Lib. 2, tit. 21, l. 6.

mere suspicion leading to no certain results will not in either of these courts be deemed a sufficient ground to establish fraud.[1] On the other hand neither of these courts insists upon positive and express proofs of fraud; but each deduces them from circumstances affording strong presumptions. But Courts of Equity will act upon circumstances as presumptions of fraud, where Courts of Law would not deem them satisfactory proofs. In other words Courts of Equity will grant relief upon the ground of fraud established by presumptive evidence, which evidence Courts of Law would not always deem sufficient proof to justify a verdict at law. It is in this sense that the remark of Lord Hardwicke is to be understood, when he said that "fraud may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is that fraud must be proved, not presumed."[2] And Lord Eldon has illustrated the same proposition by remarking that a Court of Equity will, as it ought, in many cases order an instrument to be delivered up as unduly obtained, which a jury would not be justified in impeaching by the rules of law, which require fraud to be proved, and are not satisfied though it may be strongly presumed.[3]

§ 267. [**Same.** — It has been said that fraud cannot be exactly defined so as to fit every case, but, generally speaking, fraud is

[1] Trenchard *v.* Wanley, 2 P. Will. 166; Townsend *v.* Lowfield, 1 Ves. 35; 3 Atk. 534; Walker *v.* Symonds, 3 Swanst. R. 61; Bath and Montague's Case, 3 Ch. Cas. 85; 1 Madd. Ch. Pr. 208; 1 Fonbl. Eq. B. 1, ch. 11, § 8.

[2] Chesterfield *v.* Janssen, 2 Ves. 155, 156. King *v.* Moon, 42 Mo. 551; Jackson *v.* King, 4 Cowen, 207; Smith *v.* Harrison, 2 Heisk. 230. Compare Kline *v.* Baker, 106 Mass. 61; Reed *v.* Noxon, 48 Ill. 323; Bullock *v.* Narrot, 49 Ill. 62; Waddingham *v.* Loker, 44 Mo. 132; In re Vanderveer, 5 C. E. Green, 463; Mahony *v.* Hunter, 30 Ind. 246; Parker *v.* Phetteplace, 2 Cliff. 70. The doctrine of the text has been directly challenged. Marksbury *v.* Taylor, 10 Bush, 519. The true rule, it is apprehended, is (not that a chancellor may find fraud on less evidence than a jury could in the same case, but) that such evidence should be required by all courts as to overcome the presumption of innocence. Ib. In cases of constructive fraud equity will be more easily satisfied than could a jury of *actual* fraud; but that is another thing. Equity itself would be more easily satisfied in the one case than in the other. A Law Court cannot presume (it may *infer*) fraud, because such a court has not jurisdiction of constructive frauds. See Bigelow, Fraud, 472; Jackson *v.* King, 4 Cowen, 207, 220. In all cases not between persons in relations of confidence or the like, the evidence of fraud should be clear and convincing. Lavassar *v.* Washburne, 50 Wis. 200; Martyn *v.* Westbrook, 7 Law T. N. S. 449; Bryan *v.* Hitchcock, 43 Mo. 527. See also Torrance *v.* Bolton, L. R. 8 Ch. 118.

[3] Fullager *v.* Clark, 18 Ves. 483.

any act, omission, or concealment which involves a breach of legal duty, trust, or confidence, justly reposed, and is injurious to another, or by which an undue and unconscientious advantage is taken of another.[1] The law looks through form to substance. Fraud must be predicated on material existing facts and be alleged and proven, but it need not be established by any particular kind or class of evidence. Conduct, as well as words, must be considered along with the relation and situation of the parties to the transaction. In applying the law, the particular facts and circumstances of each case must be weighed and considered in the light of the relation and situation of the parties to the transaction.[2] The law is sometimes said to abhor fraud; and fraud will never be presumed. It has been defined as the successful employment of cunning, deception, or artifice used to circumvent, cheat, or defraud another. It is the doing by one's self, or inducing another to do, such things as lead the opposite party into error. The intention to deceive is one of its main characteristics. It is generally brought about by misrepresentation, either by word or deed as to material facts by which the confiding party is misled to his injury. It may be perpetrated by the concealment of material facts which the party to be benefited was, in good conscience and equity, bound to disclose. When fraud is proven, it vitiates all contracts upon the principle that the party deceived never consented.[3]]

§ 268. [**Ingredients of Fraud.** — Fraud is a wilful, malevolent act, directed to perpetrating a wrong to the rights of another, and in order to sustain an action founded upon fraud, usually five things must be shown, viz.: first, there must have been a

[1] Missouri, Kansas & Texas Ry. Co. *v.* Maples, 162 S. W. 426; Horton *v.* Smith, 145 S. W. 1088; Ferrell *v.* Millican, 156 S. W. 230; Great Northern Mfg. Co. *v.* Brown, 113 Me. 51, 92 Atl. 993.

[2] Firebaugh *v.* Trough, 57 Ind. App. 421, 107 N. E. 301; Del Vecchio *v.* Savelli, 10 Cal. App. 79, 101 Pac. 32; Stewart *v.* Joyce, 201 Mass. 301; Remmers *v.* Remmers, 217 Mo. 541, 117 S. W. 1117; Southern Express Co. *v.* Fox & Logan, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270; Cooper *v.* Fort Smith & W. R. Co., 23 Okla. 139, Scarsdale Pub. Co. *v.* Carter, 63 Misc. Rep. 271, 116 N. Y. Supp. 731; Wadsworth *v.* Board of Sup'rs. of Livingstone County, 115 N. Y. Supp. 8; Hock *v.* Jorgeson, 137 Ill. App. 199, 85 N. E. 296; Whitehurst *v.* Life Ins. Co. of Va., 149 N. C. 267, 62 S. E. 1067; Gurney *v.* Tenney, 197 Mass. 457, 84 N. E. 428.

[3] Bretthauer *v.* Foley, 15 Cal. App. 19, 113 Pac. 356; Tysowski *v.* F. H. Smith Co., 35 App. D. C. 403; Thayer *v.* Schley, 137 App. Div. 166, 121 N. Y. Supp. 1064; Alvin Fruit & Truck Assn. *v.* Hartman, 146 Mo. App. 155, 123 S. W. 957; Adams *v.* Collins, 196 Mass. 422, 82 N. E. 498.

material representation made by the defendant to the plaintiff; second, the representation must have been false; third, the representation must have been made with knowledge of its falsity, or with reckless indifference as to whether it was true or false; fourth, the representation must have been made with the purpose and intent that the plaintiff should act upon it, or that it was made to a class or collection of individuals and that he was a member of that class; he must have acted upon the representation, and fifth, he must have been injured by it.[1]]

§ 269. **Misrepresentation of a Material Matter.** — One of the largest classes of cases in which Courts of Equity are accustomed to grant relief is where there has been a misrepresentation or suggestio falsi.[2] It is said indeed to be a very old head of equity, that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false.[3] To justify however an interposition in such cases, it is not only necessary to establish the fact of misrepresentation, but that it is in a matter of substance, or important to the interests of the other party, and that it actually does mislead him.[4] For if the misrepresentation was of a trifling or immaterial thing, or if the other party did not trust to it or was not misled by it, or if it was vague and inconclusive in its own nature, or if it was upon a matter of opinion or fact equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other, — in these and the like cases there is no reason for a Court of Equity to interfere to grant relief upon the ground of fraud.[5]

[1] Greene *v.* Mercantile Trust Co., 60 Misc. Rep. 189, 111 N. Y. Supp. 802; 128 App. Div. 914, 112 N. Y. Supp. 1131; Tooker *v.* Alston, 159 Fed. 599, 86 C. C. A. 425; Tyner *v.* United States, 23 App. D. C. 324; Belding *v.* King, 159 Fed. 411, 86 C. C. A. 391; Urtz *v.* New York Central etc. Railroad Co., 202 N. Y. 170, 95 N. E. 711; reversing 140 App. Div. 915, 124 N. Y. Supp. 1132; Omaha Elec. Light & Power Co. *v.* Union Fuel Co., 88 Neb. 423, 129 N. W. 989; Marietta Fertilizer Co. *v.* Beckwith, 4 Ga. App. 245, 61 S. E. 149; Judd *v.* Walker, 215 Mo. 312, 114 S. W. 979; Eastern Trust & Banking Co. *v.* Cunningham, 103 Me. 455, 70 Atl. 17; Jones *v.* Stewart, 62 Neb. 207, 87 N. W. 12.

[2] Broderick *v.* Broderick, 1 P. Will. 240; Jarvis *v.* Duke, 1 Vern. 20; Evans *v.* Bicknell, 6 Ves. 173, 182.

[3] Evans *v.* Bicknell, 6 Ves. 173, 182.

[4] Neville *v.* Wilkinson, 1 Bro. Ch. R. 546; Turner *v.* Harvey, Jacob, Rep. 178; 1 Fonbl. Eq. B. 1, ch. 2, § 8; Small *v.* Atwood, 1 Younge, R. 407, 461; s. c. in Appeal, 6 Clark & Finnell. 232, 395.

[5] See 1 Domat, B. 1, tit. 18, § 3, art. 2; Trower *v.* Newcome, 3 Meriv. R. 704; 2 Kent, Comm. Lect. 39, p. 484 (2d ed.); Atwood *v.* Small,

6 Clark & Finnell. 232, 233; s. c. Small *v.* Atwood, in Court of Exchequer, 1 Younge, R. 407. *Relievable Misrepresentation.* — Speaking in reference to a claim for damages based on deceit, it is commonly laid down that to entitle the plaintiff to recover, he must be prepared to show (1) that the defendant has made a false representation, (2) that he made it with knowledge of its falsity, (3) that the plaintiff believed the representation made to be true, (4) that it was made with intent that it should be acted upon, (5) that it was acted upon to the plaintiff's damage. Pasley *v.* Freeman, 3 T. R. 51.

The second, third, and fourth of these elements of liability, whether at law or in equity, are true only with important qualifications; the first and fifth are true as they stand. Each of them will now be taken into consideration. And first, of the representation itself.

The representation, generally speaking, must be of such a nature, or at least made under such circumstances, as to carry conviction to a man of average intelligence. It may be in acts or conduct as well as in words; it may be in a newspaper advertisement even. Richardson *v.* Silvester, L. R. 9 Q. B. 34; Bradbury *v.* Barding, 35 Conn. 577. But in whatever way it is conveyed, it must be sufficient to produce effect. If uncertain, indefinite, or vague, it cannot be made the basis of a demand or a defence. Wakeman *v.* Dalley, 51 N. Y. 27, 30; Smith *v.* Chadwick, 20 Ch. D. 27; Dimmock *v.* Hallett, L. R. 2 Ch. 21, 30; Arnold *v.* Bright, 41 Mich. 207.

But language or conduct which taken alone is vague and indecisive may be made certain by evidence from attending circumstances. Thus of doubtful language in the prospectus of a company the fact that the defendant has used language to others which would tend to show that the scheme in question was fraudulent, as e. g. that he has said that he was "rigging the market", will have a tendency to show that the language of the prospectus was used in a sense to make it false. Moore *v.* Burke, 4 Fost. & F. 258.

Whether conduct or particular acts amount to a representation that may be translated into a statement of fact which is false and actionable is to be determined by the natural import of the conduct or acts under the particular circumstances. In a recent case it was urged that a direction to a bank to honor the checks of a company "signed by two of the directors, and countersigned by the secretary", was equivalent to a representation by those who gave the direction that checks so signed were duly authorized by the company. But the court declined to adopt this view, and held that the direction was simply an indication in regard to the particular form in which drafts would be drawn by the company. Beattie *v.* Ebury, L. R. 7 H. L. 102. It was also laid down in this case (p. 126) that the mere fact of an agent's drawing a check on behalf of his principal does not amount to a representation on the part of the drawer that his principal has assets in hand or available sufficient to answer the draft, so as to make the agent liable for a false representation in case that is not the fact. Cases of actionable concealment of part, on a partial statement of the truth, as in Brewer *v.* Brown, 28 Ch. D. 309, are closely related to this subject. See infra, p. 296.

On the other hand the mere fact that A assumes to act for B is of itself a representation, or rather a warranty, that he has such authority. May *v.* Western Union Tel. Co., 112 Mass. 90; Richardson *v.* Williamson, L. R. 6 Q. B. 276; Collen *v.* Wright, 8 El. & B. 647; Randell *v.* Trimen, 18 C. B. 786; White *v.* Madison, 26 N. Y. 117, 124; Mahurin *v.* Harding, 28 N. H. 128; Noyes *v.* Loring, 55 Me, 408; Indiana R. Co. *v.* Tyng, 63 N. Y. 653. Indeed in Massachusetts this rule has been applied to the case of a telegraph company delivering a particular message to the

plaintiff never authorized by the supposed sender. This was deemed a false representation by the telegraph company of its authority to deliver the message. May *v.* Western Union Tel. Co., supra. But this would not be so in England. Playford *v.* United Kingdom Tel. Co., L. R. 4 Q. B. 706.

There are many other examples of acts amounting to implied warranties of the existence of facts. Thus the acceptance of a bill of exchange is a binding assertion of the genuineness of the drawer's signature, within certain limits. Price *v.* Neal, 3 Burr. 1354; Ellis *v.* Ohio Life Ins. Co., 4 Ohio St. 628; National Bank *v.* Bangs, 106 Mass. 441. So acceptance asserts the drawer's capacity to draw and the payee's capacity to indorse. Smith *v.* Marsack, 6 C. B. 486; Hallifax *v.* Lyle, 3 Ex. 446. And indorsement asserts the genuineness of prior signatures and the capacity of the prior parties. State Bank *v.* Fearing, 16 Pick. 533; Erwin *v.* Down, 15 N. Y. 575. But the mere failure of an indorser of a note to disclose to his indorsee the fact that the maker is an infant is not a fraud. People's Bank's Appeal, 93 Pa. St. 107.

Again though there may be a clear and certain representation in language, it may still be wanting in its very nature of strength to carry conviction. Opinion is a familiar example. But opinion may be of several kinds. It may be expressed of a fact not capable of being known, in which case it matters not that it is expressed in the form of a positive statement, as that "the centre of the earth is a molten mass"; or it may be expressed of a fact capable of being known, in which case it is opinion only when it is stated in the way of opinion and not as a fact. In the first of these two cases it is clear that no liability can attach, though every other element of liability were present, unless possibly some weak-minded person were made the victim of a meditated fraud. In the second case, where the opinion relates to a fact capable of being known, there can be no liability, provided no fact is known to the speaker to make the opinion false. If a fact of the kind is known to him, the "opinion" is no opinion at all, but a fraudulent disguise intended to prevent liability. If still there is clear indication that it was intended to be acted upon, acting upon it will, it seems, create liability, at least if it was of a nature to induce belief and action in the average man. Where this is true, however, it is true, not because opinion amounts to a representation within the rule of liability, but because the opinion implies — that is, states by inference — the nonexistence of the fact which makes the statement false. In other words the liability rests as in other cases on misrepresentation of fact, — of something capable of carrying conviction. Thus if a person, intending to deceive, should state that in his opinion a certain piece of land was a good dairy tract, that would by clear inference imply — as much so as if he had said it in words — that he knew of nothing to make the statement false; and if at the time he knew that something poisonous to cattle grew with the grass there, he has made a false representation and incurred liability. It seems to be enough, notwithstanding the fact that the statement is put in the form of an opinion, that with the scienter there was an actual intent that it should take effect. Birdsey *v.* Butterfield, 34 Wis. 52; Pike *v.* Fay, 101 Mass. 134, 137; Picard *v.* McCormick, 11 Mich. 68; Kost *v.* Bender, 25 Mich. 515. See also Haygarth *v.* Wearing, L. R. 12 Eq. 320; Hubbell *v.* Meigs, 50 N. Y. 480; Wakeman *v.* Dalley, 51 N. Y. 27; Martin *v.* Jordan, 60 Maine, 531; Holbrook *v.* Connor, Ib. 578; infra, § 281.

Besides while a falsely expressed opinion may not always be attended with liability in *damages*, it does not follow that a contract entered into upon the basis of an opinion can be enforced, at least in equity, when it

is shown that the opinion was falsely, especially if it was also fraudulently, expressed. That would be to make fraud successful by the aid of the courts. The courts may decline to give the injured party damages because of his want of prudence; but they ought not on the other hand to aid a flagrant wrong-doer. Compare Redgrave *v.* Hurd, 20 Ch. D. 1; Arkwright *v.* Newbold, 17 Ch. D. 301, 320, on representations of fact. Indeed the wrong-doer might well be enjoined from attempting to enforce his contract. All this however is delicate ground.

Representations of the law, like statements of opinion, may also be definite and clear, and, though false to the knowledge of the party who makes them and in other respects like actionable statements of fact, possibly not attended with any legal consequences. This if true proceeds upon the ground that all men are presumed to know the law; the plaintiff knew or ought to have known what the law was. But the proposition must be taken with much qualification. Even if it be quite true in any case between laymen on equal footing that a false and fraudulent statement of the law is not actionable (see Cooke *v.* Nathan, 16 Barb. 342, which implies the contrary), it is not true that such a representation would not be actionable, or a ground of defence or of relief in equity, according to circumstances, if made to a person standing on an inferior footing to that of him who makes it; as where it is made by an attorney to his client, by a trustee to his cestui que trust with regard to the trust property, by a person of average intelligence to a weak-minded person, by a citizen to a foreigner, or perhaps by any one whose advice is sought because of his supposed knowledge on the particular point. In any such case if the statement concerning the law is false and fraudulent, there should be redress. And the same should probably be true of most cases of the statement of opinion; if such were falsely and fraudulently made to a person in one of the situations named, liability should follow though no fact were known by the wrong-doer to make his opinion false; that is, though he had made it recklessly, without knowing whether it had any foundation or not. In the case of trustee and cestui que trust far less than this would suffice to justify relief to the latter. Indeed it will probably be found, when a particular misrepresentation has been dismissed, with discriminations, as a misrepresentation of law, that the case is one where the representation, had it been a representation of fact, as of authority to act for another, would have been actionable without proof of any scienter; when in such a case the representation has been declared to be a mere statement of law, the meaning is, or may be, that the representation is not actionable because it was not fraudulent. Compare Beattie *v.* Ebury, L. R. 7 Ch. 777, 800; s. c. L. R. 7 H. L. 102; Rashdall *v.* Ford, L. R. 2 Eq. 750; Eaglesfield *v.* Londonderry, L. R. 4 Ch. 693, 702.

Representations of value stand upon a special footing; "simplex commendatio non obligat." The vendor of property may indeed know that the property is not worth what he says it is worth; but the very fact that the representation is made by the owner is enough to put any person of average intelligence on his guard. But there may be cases where a statement of value may be attended with legal consequences. It might be worth inquiring if this would not be the case where a stranger has been asked his advice with regard to property of some peculiar kind the value of which he knows better than others; and where the value of property is falsely and fraudulently overstated, by the vendor even, to a person of weak mind, or by a trustee to his cestui que trust, it is probable that the law would take cognizance of the fraud. See Wise *v.* Fuller, 29 N. J. Eq. 262; Suessenguth *v.* Bingenheimer, 40 Wis. 370; infra, § 279. It is clear that where a false statement of value, such e. g. as the value

of an invention, is connected with a misrepresentation of some clear matter of fact calculated to impose upon the plaintiff, to put him off his guard and to cause him to credit the statement of value, the law will give him all needed relief. Miller *v.* Barber, 66 N. Y. 558, 567.

Another class of representations commonly unattended with legal consequences is that of promissory statements. Because they look to the future for their fulfilment, it is considered that men of prudence will not confide in them. See Maddison *v.* Alderson, 8 App. Cas. 467, 473. If however a representation that a particular fact shall be true is fraudulently made, that is, with intent that it shall not be so, or with knowledge of facts that make it impossible that it shall be so, there is a case for the courts. Kimball *v.* Ætna Ins. Co., 9 Allen, 540. This probably proceeds, as in the case of opinion supra, on the ground that the representation is of a nature to imply a statement of fact, to wit, the existence of a present intent to have the result transpire, or that no fact is known to prevent the result expected.

But a plain statement of fact, in terms true, may be false and actionable; enough that it was likely under the circumstances to produce a false impression of the actual state of things. Clarke *v.* Dickson, 6 C. B. N. S. 453; Tapp *v.* Lee, 3 Bos. & P. 367; Moore *v.* Burke, 4 Fost. & F. 258; Peek *v.* Gurney, L. R. 6 H. L. 377; Corbett *v.* Brown, 8 Bing. 33; Arkwright *v.* Newbold, 17 Ch. D. 301; Brewer *v.* Brown, 28 Ch. D. 309. If a man e. g. while professing to answer a question as to the pecuniary standing of another were to select those facts only which would be likely to result in producing a favorable impression of the individual's credit, keeping back facts which would if known change the complexion of those stated, he might well be called a more artful knave than the man who tells a direct falsehood. Tapp *v.* Lee, supra, at p. 371; Peek *v.* Gurney, supra; New Brunswick Ry. Co. *v.* Muggeridge, 1 Dru. & S. 381; Central Ry. *v.* Kisch, L. R. 2 H. L. 99, 113. A good example of the rule is also found in Corbett *v.* Brown, supra. The plaintiff, being about to furnish the defendant's son with goods on credit, inquired of the defendant if the son, as the latter had asserted, had property of £300 value. The defendant answered in the affirmative, stating that he had advanced that sum to his son, but failed to state the fact that the son had given his promissory note for the amount. It was held that this was a false representation though it was true in a literal sense, and though money lent in this way by a parent was often intended as a gift.

Indeed the obvious meaning of the plainest language may be enlarged or modified by the situation or circumstances in which it was used. Thus a representation that a vessel is seaworthy may be shown, in connection with the very purpose for which it was sold, to mean seaworthy for the purpose of a specially hazardous voyage. Milne *v.* Morwood, 15 C. B. 778. In a word whatever the character of the language, all the fact of every kind bearing upon its sensible meaning in the particular case should be taken into account. See e. g. Cleveland Iron Co. *v.* Stephenson, 4 Fost. & F. 428; New Brunswick Ry. Co. *v.* Conybeare, 9 H. L. Cas. 711.

The meaning of the representation is to be taken of course from the representation itself, that is, from the language or act interpreted by the light of attending facts, and not from the purpose of the party making it when that purpose would if received defeat the relief sought. Phelps *v.* White, 7 L. R. Ir. 160. In Arkwright *v.* Newbold, 17 Ch. D. 301, 322, Cotten, L. J., said that a person who issued a statement was answerable not only for what he actually intended to represent, but also for what any one might reasonably suppose to be the meaning of his language. Quoted with approval in Smith *v.* Chadwick, 20 Ch. D. 27, 79. See also

Match *v.* Hunt, 38 Mich. 1. It will be observed that what the party actually intended may be accepted as distinguished from what the statement in itself imported.

The truth of the statement further is to be judged of as of the time when it is acted upon, if the party to whom it was made is still reasonably, or to the knowledge of him who made it, laboring under the impression created by it. Thus it is the duty of a person who knows that another is contracting with him upon the faith of a statement made by him which, though true when it was made, has become untrue at the time of executing the contract, to disclose to such person the change of fact. Arkwright *v.* Newbold, 17 Ch. D. 301, 310, Fry, J.; Reynell *v.* Sprye, 1 DeG. M. & G. 591; Henderson *v.* Lacon, L. R. 5 Eq. 249.

But in any case, speaking in reference to the result, the representation must have been adequate to produce it; that is, if towards the result it was not material, the courts will not take cognizance of it on behalf of the person to whom it was made. Smith *v.* Chadwick, 20 Ch. D. 27; Slaughter *v.* Gerson, 80 U. S. 379, 20 L. Ed. 627; McAleer *v.* Horsey, 35 Md. 439; Bowman *v.* Carruthers, 40 Ind. 90; supra, § 266.

Verbal representations are not merged in written ones so as to be excluded from consideration in questions of fraud. Match *v.* Hunt, 38 Mich. 1.

Knowledge of defendant. — To enable one who complains of misrepresentation by another to recover damages for any loss he may have sustained thereby, it is necessary for him to show, whether his demand is preferred at law or in equity, what is or virtually amounts to moral fraud, — that the supposed wrong-doer made the representation either (1) with actual knowledge of its falsity, or (2) under circumstances showing that he ought to have had such knowledge, or (3) recklessly without knowing whether it was true or false. Joliffe *v.* Baker, 11 Q. B. D. 255; Arkwright *v.* Newbold, 17 Ch. D. 301, 320; Reese Silver Mining Co. *v.* Smith, L. R. 4 H. L. 64; Redgrave *v.* Hurd, 20 Ch. D. 1; Rawlins *v.* Wickham, 3 DeG. & J. 304; Collins *v.* Evans, 5 Q. B. 820, 826; Ormrod *v.* Huth, 14 Mees. & W. 651, 664; Behn *v.* Kemble, 7 C. B. N. S. 260; Barley *v.* Walford, 9 Q. B. 197, 208; Childers *v.* Wooler, 2 El. & E. 287; Mahurin *v.* Harding, 28 N. H. 128; Evertson *v.* Miles, 6 Johns. 138; Case *v.* Boughton, 11 Wend. 106, 108; Carley *v.* Wilkins, 6 Barb. 557; Edick *v.* Crim, 10 Barb. 445; Lobdell *v.* Baker, 1 Met. 193, 201; Bennett *v.* Judson, 21 N. Y. 138.

Of these three forms of the scienter only the second and third call for remark. Indeed the third is but a special form of the first, to make a positive statement of fact, without knowledge whether it is true or false, in fact implies what is false to the party's own knowledge, to wit, that he *has* information on the subject. It is well settled that such a representation is actionable. Evans *v.* Edmonds, 13 C. B. 777, 786; Phelps *v.* White, 7 L. R. Ir. 160, 170; Morse *v.* Dearborn, 109 Mass. 593, 595; Twitchell *v.* Bridge, 42 Vt. 68; Beebe *v.* Knapp, 28 Mich. 53; Stone *v.* Covell, 29 Mich. 359; infra, § 272.

What circumstances are such as to show, under the second form of the scienter, that a man making a representation ought to know that it is false cannot be exactly defined. It is commonly said, and perhaps that is all that can be said in the way of a general proposition, that a man is bound to know the state of facts within his special means of knowledge. Jarrett *v.* Kennedy, 6 C. B. 319, 322; Doyle *v.* Hort, 4 L. R. Ir. Ex. D. 661; Morse *v.* Dearborn, 109 Mass. 593.

This lacks precision, and just what it means must in the nature of things be left to particular cases, or at most to particular classes of cases.

The implied assertion and warranty of one's authority to act for another for whom he assumes to act appears to be an example of the proposition. Collen *v.* Wright, 8 El. & B. 647; May *v.* Western Union Tel. Co., 112 Mass. 90; Mahurin *v.* Harding, 28 N. H. 128; Indiana R. Co. *v.* Tyng, 63 N. Y. 653. So probably of all other implied warranties.

Again under ordinary circumstances, that is, excluding cases of sudden or general commercial disturbances, a man not engaged in speculation or trade must know whether he is worth for example $10,000 or nothing. See Morse *v.* Dearborne, 109 Mass. 593. But probably one could not be presumed to know whether he was worth $10,000 or $9,000. That is, it would not be wrongful for a man to say that he was worth $10,000 when he was worth within a thousand or two of that sum, unless he actually knew that he was telling a falsehood, or made the statement recklessly without knowing anything about the facts. And the discrepancy would have to be material to make him liable in any case.

Indeed what a person in making a statement is bound to know must have regard to his particular means of knowledge and to the nature of the representation; and then be subject to the test of the knowledge which a man paying that attention which every man owes to his neighbor in making a representation would have acquired in the particular case by the use of such means. Doyle *v.* Hort, 4 L. R. Ir. Ex. D. 661, 670, Palles, C. B.

When however the party who has suffered from misrepresentation seeks, not damages, but the protection of the courts against the other party, to prevent him from deriving advantage from the misrepresentation he has made, as in obtaining a contract, it matters not whether such act was with knowledge of any sort or was done in perfect good faith and innocence, with full and just belief in its truth; the courts will grant the protection sought. To refuse to do so would virtually be to lend their aid to what now on the allegation that the representation was false, would be a known wrong; for the party complained of is now at all events apprised of the untruth of his representation, and he cannot press his advantage any longer without being guilty of fraud. Arkwright *v.* Newbold, 17 Ch. D. 301, 320 (C. A.); Redgrave *v.* Hurd, 20 Ch. D. 1 (C. A.); Reese Silver Mining Co. *v.* Smith, L. R. 4 H. L. 64; Rawlins *v.* Wickham, 3 DeG. & J. 304; Smith *v.* Land Corporation, 49 Law Times, 532; Carpenter *v.* American Ins. Co., 1 Story, 57.

This rule though always distinctly maintained in equity (infra, § 272) has not been so fully recognized at law, and cases could be found in which Courts of Law have enforced contracts founded on misrepresentation where the misrepresentation was innocent when made. Cornfoote *v.* Fowke, 6 Mees. & W. 358. This has been the result in some cases perhaps of a confusion; the tests of a right of action for *damages* on account of misrepresentation have been applied to the case of a defence against the enforcement of a contract. But this is clearly wrong; the contract cannot be enforced, after the falsity of the representation has been brought to the knowledge of the plaintiff, without allowing, as we have seen, the perpetration upon the defendant of what is now at all events a fraud. But if a distinction between the views of Courts of Law and Courts of Equity on this question has become fixed in a particular State, as was at one time the case in England, — if at law a contract can be enforced notwithstanding a material misrepresentation by the plaintiff, where that misrepresentation was innocent, — then at all events the distinction must be deemed to have been done away in those States in which equitable pleas are fully allowed at law. Redgrave *v.* Hurd, 20 Ch. D. 1, 12.

Under what circumstances in the case of a claim for damages will the

knowledge of an agent affect an innocent principal? The question of agency is of course immaterial in a case in which the principal is seeking to enforce a contract or is resisting an effort to have the contract annulled or an action upon it enjoined. In such a case the contract will be repudiated by the courts, agency or no agency (Houldsworth *v.* Glasgow Bank, 5 App. Cas. 317); assuming that the rights of innocent persons have not intervened. See e. g. Mullens *v.* Miller, 22 Ch. D. 194 (a suit for specific performance); Bell's Case, 22 Beav. 35 (defrauded party held not liable as a contributory to a company for stock in which he had subscribed); Ayre's Case, 25 Beav. 513 (the same sort of case); Scholefield *v.* Templer, Johns. (Eng.) 155; Fitzsimmons *v.* Joslin, 21 Vt. 129; Carpenter *v.* American Ins. Co., 1 Story, 57. If however others have in good faith acquired rights in reliance upon the contract, especially if it has been acted upon by the defrauded party, and benefits received under it, the courts will, for *their* protection, uphold it. Thus where a party has been induced by the fraudulent representations of the agents of a company to subscribe to the same, and he has received dividends thereon, and his subscription has been followed by that of innocent persons, it is obvious that to excuse him from liability to contribute to the payment of claims against the company according to his contract would be to cast a burden on the later subscribers which they did not undertake to carry. Their rights must be protected, and his contract must therefore be held binding, — this however entirely irrespective of the innocence of the company in respect of the fraud. See Mixer's Case, 4 DeG. & J. 575 (overruling Brockwell's Case, 4 Drew. 205); Dodgson's Case, 3 DeG. & S. 85; Bernard's Case, 5 DeG. & S. 289. But if there be no one whose rights would be unjustly affected by releasing such party from liability to contribute, his demand for relief will be granted. Parbury's Case, 3 DeG. & S. 43; Bell's Case, 22 Beav. 35; Ayre's Case, 25. Beav. 513. Unless he purchased his shares not from the company but from a third person. Bell's Case, supra.

Indeed it seems sufficient in principle to disentitle the defrauded party to rescission that innocent persons have since his subscription become creditors of the company or subscribed to its stock, without any showing that the defrauded party had recognized his engagement, as by receiving benefits under it; for his engagement is valid until repudiated. See Oakes *v.* Turquand, L. R. 2 H. L. 325, 348. When as in Houldsworth *v.* Glasgow Bank, 5 App. Cas. 317, 322, 330, rescission of the contract is stated to be the proper course in the case of a "going" company, where fraud has been practised upon the plaintiff, the limitation here stated must doubtless be understood.

But the question whether the innocent principal is liable in damages for the fraudulent representations of the agent not as such authorized by the principal, but within the scope of the agent's authority, is not so easily answered. The English courts have had frequent occasion to consider the question in recent times, and have found great difficulty in answering it. It appears to be agreed however that where the principal has derived a benefit from his agent's act, he will be liable in damages for the agent's fraud in the transaction. Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259 (Ex. Ch.); Mackay *v.* Commercial Bank, L. R. 5 P. C. 394; Udell *v.* Atherton, 7 Hurl. & N. 172; National Exchange Co. *v.* Drew, 2 Macq. 103; Ranger *v.* Great Western Ry. Co., 5 H. L. Cas. 72; Fuller *v.* Wilson, 3 Q. B. 58; Swift *v.* Winterbotham, L. R. 8 Q. B. 244; s. c. sub nom. Swift *v.* Jewsbury, L. R. 9 Q. B. 301, reversing L. R. 8 Q. B. 244; Swire *v.* Francis, 3 App. Cas. 106; Weir *v.* Bell, 3 Ex. D. 238; Houldsworth *v.* Glasgow Bank, 5 App. Cas. 317.

Indeed in the first two of these cases it is thought to be enough to make the principal liable that the act of the agent within the general scope of his authority was *done* for the principal's benefit; though in fact the principal had there received the benefit. It was considered in those cases that there was no distinction in respect of the liability of the employer between cases of fraud and other cases of wrong. See also Houldsworth *v.* Glasgow Bank, at p. 327. Swift *v.* Winterbotham, supra, appears to have gone still further in the Queen's Bench, and to have held the principal liable irrespective of benefit derived or sought; though the court said that the representations in question "were, and were intended to be, communications between the" principals. But on this point the case was reversed. L. R. 9 Q. B. 301. In the Exchequer Chamber, Lord Coleridge, who delivered the principal opinion, now said: "There can be no doubt that a different set of principles altogether applies where an agent of a corporation or a joint-stock company, at any rate in carrying on its business, does something of which the company takes advantage, or by which it profits or may profit, and it turns out that the act of the agent is fraudulent." (See Houldsworth *v.* Glasgow Bank, 5 App. Cas. 317, 324, 329.) And the case was considered to be in accord with Barwick *v.* English Joint-Stock Bank, supra. See Mackay *v.* Commercial Bank, L. R. 5 P. C. 394, 412.

The House of Lords had held in Western Bank *v.* Addie, L. R. 1 H. L. Scotch, 145, in a suit to rescind a contract for the purchase of shares and for restitution in integrum or in the alternative for damages, that in the absence of evidence of fraud on the part of the defendants, the action could not be maintained, though the defendants' agent had been guilty of fraud in securing the contract. The Lord Chancellor (Chelmsford) declared that an action for deceit could not be maintained against the company in such a case; the remedy was against him who committed the fraud. And Lord Cranworth said that an attentive consideration of the cases had convinced him that the true principle was that corporate bodies could be made responsible for the frauds of their agents to the extent to which the principals had profited from the fraud, but that they could not be sued as wrong-doers by imputing to them the misconduct of those whom they had employed.

Later in Swire *v.* Francis, 3 App. Cas. 106, another question arose in the Privy Council, of the defendants' liability for their agent's fraud committed in the course of his business, that is, in the course of a transaction within his authority as an agent. The defendants were innocent, and derived no actual benefit from the transaction, though the agent's act was professedly and ostensibly for their benefit; but they were held liable on the principle of Barwick *v.* English Joint-Stock Bank and Mackay *v.* Commercial Bank, supra. About the same time the Court of Appeal reached a contrary conclusion on a similar case. Weir *v.* Bell, 3 Ex. D. 238, Cotten, L. J., dissenting. And this — the non-liability to damages, of an innocent principal who had derived no benefit from his agent's fraud — is now the prevailing doctrine in England with regard to the one case of buying into a company by the purchase of shares from it. Houldsworth *v.* Glasgow Bank, 5 App. Cas. 317 (House of Lords, A. D. 1880), where the law is well explained. See especially pp. 329, 330, Lord Selborne. Whether the broader dicta in Barwick *v.* English Joint-Stock Bank, and in some of the other cases, are to prevail, making the principal liable in damages in other cases, though he was innocent and received no benefit from the agent's fraud in the course of his employment, is expressly left an open question in Houldsworth *v.* Glasgow Bank. See pp. 339–341, Lord Blackburn. (In this connection may be noticed the

decision in Miles *v.* McIlwraith, 8 App. Cas. 120, in the Privy Council, where an innocent principal was held not liable to certain penalties of statute incurred if at all by the fraud of his agents. But the court held that there had been no transaction on behalf of the principal.)

It is thought however by a learned writer that, with the exception of the one case of buying into a company (supra, Houldsworth *v.* Glasgow Bank), the prevailing rule in England is that laid down in Barwick *v.* English Joint-Stock Bank, denying any distinction, in cases of agency, between fraud and trespass, and holding the principal liable regardless of benefit received. F. Pollock in April No., 1885, of Law Quarterly Review, p. 218. But see Weir *v.* Bell, 3 Ex. D. 238, 244, Lord Bramwell, where however the old but unfortunate distinction in regard to *wilful* wrongs of a servant is repeated.

It is equally clear in this country, that the principal is liable in damages where he has derived a benefit from his agent's fraud. Jeffrey *v.* Bigelow, 13 Wend. 518; Bennett *v.* Judson, 21 N. Y. 238; Allerton *v.* Allerton, 50 N. Y. 670; Craig *v.* Ward, 3 Keyes, 393; Elwell *v.* Chamberlin, 31 N. Y. 619; Chester *v.* Dickerson, 52 Barb. 349; Davis *v.* Bemis, 40 N. Y. 453, note; Durst *v.* Burton, 47 N. Y. 167; s. c. 2 Lans. 137; Sandford *v.* Handy, 23 Wend. 260; Locke *v.* Stearns, 1 Met. 560; Cook *v.* Castner, 9 Cush. 266; White *v.* Sawyer, 16 Gray, 586. Nor according to several of these cases is the principal's liability limited to the benefit received, but extends to the amount of damage done. Jeffrey *v.* Bigelow; White *v.* Sawyer. These cases are therefore inconsistent with the view sometimes suggested, that the action against the principal when innocent may be treated as an action for money had and received. Barwick *v.* English Joint-Stock Bank, L. R. 2 Ex. 259; Mackay *v.* Commercial Bank, L. R. 5 P. C. 394, 414.

It would seem to follow that the principal would be held liable for the fraud of his agent in the course of his employment though he had derived no benefit whatever from the transaction; and this view is strengthened by the fact that our courts, adopting language of Lord Holt in the nisi prius case of Hern *v.* Nichols, 1 Salk. 289, commonly rest the liability of the principal on the ground that he has held the agent out as a person entitled to confidence. Sandford *v.* Handy, 23 Wend. 260; Davis *v.* Bemis, 40 N. Y. 453, note; Locke *v.* Stearns, 1 Met. 560. But see Kennedy *v.* McKay, 43 N. J. 288. This view however appears to have lost ground in recent times in England, otherwise there could not have been that hesitancy and refusal to hold an innocent principal liable which the cases above cited show. But in Weir *v.* Bell, 3 Ex. D. 238, 245, supra, Bramwell, L. J., reasserts, or rather restates, apparently in stronger terms, the old doctrine of Hern *v.* Nichols, supra. The learned Lord Justice there says that the true ground is that every person who authorizes another to act for him in making a contract undertakes for the absence of fraud in that person in the execution of his authority; though he holds to the doctrine that liability for damages in deceit broadly is based on moral fraud. He considered the defendant, a director, as not the true principal of the agent.

While however it appears to be a just interpretation of the situation to say that one who holds another out as having authority to act for him holds that person out as an honest man, it is probably contrary to the fact in nearly every case to say that he has intended to *warrant* the honesty of his agent. If inquired of in advance, the principal would in most cases probably say that he intended nothing of the kind, though he would doubtless say that he *believed* his agent an honest man. If this is the true interpretation, the principal ought not to be liable in damages, apart

from advantage derived, unless he was himself guilty of fraud or of negligence in holding out his agent as honest, — in the absence of strong public policy to the contrary. To go further is virtually to say that when a man's business is such as to demand the employment of help, he ought to be held to a stricter accountability than he would be held to if he could do the business alone. Nothing short of urgent public policy should be sufficient to extend a doctrine of this kind beyond its recognized bounds; to extend to new cases the rule that one man may be held liable for another man's wrongs can be justified only by the strongest reasons. It may not yet be too late to urge the point.

The directors of a company — to pass on — are not agents of each other so as to bind each other by fraudulent acts not authorized or participated in by those whom it is sought to bind. Thus a director is not liable merely because he is a director, for the fraudulent issuance of a prospectus by his co-directors, or by any other agent of the company. Cargill *v.* Bower, 10 Ch. D. 502.

Knowledge of Plaintiff. — But the plaintiff's right to relief, or the defendant's right of defence, based on misrepresentation depends upon his ignorance of the true state of facts and his belief in the representation made. In other words, if such party knew or under the circumstances ought to have known that the representation was false, his case or defence will fail. Pasley *v.* Freeman, 3 T. R. 51; s. c. Bigelow's L. C. Torts, 1; Salem Rubber Co. *v.* Adams, 23 Pick. 256; Ely *v.* Stewart, 2 Md. 408; Camberwell Building Soc. *v.* Holloway, 13 Ch. D. 754; Delaine Co. *v.* James, 94 U. S. 207, 24 L. Ed. 112.

The only difficulty in the situation is to determine when the plaintiff ought to have known the facts. The rule cannot here be always applied that applies to the converse case of knowledge on the part of the one who made the misrepresentation, to wit, that he is supposed to know all facts within his special means of knowledge, for the plaintiff notwithstanding his means of knowledge may well have been prevented from availing himself of the same by the very misrepresentation in question; it is well settled that the plaintiff need not inquire in the face of a plain representation of fact, though the truth thereof might easily be ascertained. Negligence is no bar to relief. Redgrave *v.* Hurd, 20 Ch. D. 1, 13, Jessel, M. R.; David *v.* Park, 103 Mass. 501; Keller *v.* Equitable Ins. Co., 28 Ind. 170; Parham *v.* Randolph, 4 How. (Miss.) 435; Kiefer *v.* Rogers, 19 Minn. 32; Holland *v.* Anderson, 38 Mo. 55; Mead *v.* Bunn, 32 N. Y. 275, 280; McClellan *v.* Scott, 24 Wis. 81, 87; Webster *v.* Bailey, 31 Mich. 36; Matlock *v.* Todd, 19 Ind. 130; Phelps *v.* White, 7 L. R. Ir. 160; Stanley *v.* McGauran, 11 L. R. Ir. 314.

Doubtless when the means of ascertaining the truth were directly before the plaintiff's eyes, it may require strong evidence to convince the court that he relied upon the defendant's statements or acts and refrained from making inspection. See e. g. Salem Rubber Co. *v.* Adams, 23 Pick. 256, the language in which appears however to be rather too strong against the plaintiff, in the light of the later cases. It seems clear that the plaintiff may rest satisfied with the defendant's representations however easily he might have tested their truth.

Where however the opposite party has said or done nothing having a tendency to prevent inquiry, as where he has remained silent, the failure to inquire will be fatal to relief in ordinary cases. Thus the fact that a married woman did not read a mortgage executed by her upon her separate estate to secure a debt of her husband will not entitle her to relief against the instrument in the absence of fraud. Thacher *v.* Churchill, 118 Mass. 108. See also on the failure to read an instrument, Hardy *v.*

Brier, 91 Ind. 91; Watts *v.* Burnett, 56 Ala. 341; Rogers *v.* Place, 35 Ind. 577; Bacon *v.* Markley, 46 Ind. 116; Hawkins *v.* Hawkins, 50 Cal. 558; Craig *v.* Hobbs, 44 Ind. 363; Watson *v.* Planters' Bank, 22 La. An. 14; Miller *v.* Sawbridge, 29 Minn. 442. So too it is no defence to a bill to set aside for fraud a conveyance made on exchange for other property that the plaintiff's property was encumbered, if the plaintiff did nothing to conceal the fact of the incumbrance, and was under no duty to disclose the same. Knowlton *v.* Amy, 47 Mich. 204.

But there are cases in which a man cannot justify himself in being silent, as where he stands in a relation of confidence towards the party dealing with him. Infra, §§ 431 et seq.

In cases of the sale of personalty, the rule of caveat emptor requires the buyer to investigate all questions about which no actual representation has been made by the vendor, unless indeed there is an implied warranty in the case, such as that of the title of a vendor in possession, or that an article is suitable for the purpose for which it is expressly sold.

There is no implied warranty of title in the sale of realty, or of the fitness of the estate for the purpose for which it is sold or leased. Keats *v.* Cadogan, 10 C. B. 591. There must either be a warranty or an actual misrepresentation to justify relief to the vendor, unless there has been a prior written contract of sale. See In re Gloag, 23 Ch. D. 320, infra; Camberwell Building Soc. *v.* Holloway, 13 Ch. D. 754. And even where there has been the one or the other in a previous contract for the sale of the land, with an agreement that error or misstatement by the vendor shall entitle the purchaser to compensation, there has been considerable doubt whether the law requires the purchaser to make all investigation before the completion of the contract by conveyance, or permits him to claim compensation on discovering error or misstatement afterwards. Vice-Chancellor Malins has more than once insisted, against decisions by Jessel, M. R., and other judges, that the investigation of title must be made before conveyance. Manson *v.* Thacker, 7 Ch. D. 620; Besley *v.* Besley, 9 Ch. D. 103; Allen *v.* Richardson, 13 Ch. D. 524. But this cuts short the natural import of the agreement, and the contrary view has prevailed. In re Turner, 13 Ch. D. 132; Palmer *v.* Johnson, 13 Q. B. D. 351; s. c. 12 Q. B. D. 32; Cann *v.* Cann, 3 Sim. 447; Bos. *v.* Helsham, L. R. 2 Ex. 72; Phelps *v.* White, 7 L. R. Ir. 160, 165.

Indeed in the case last cited it is held that taking a conveyance with knowledge of error in the description of the land is not evidence of substituted performance of the prior contract of sale where there is a clause providing for compensation. See In re Gloag, 23 Ch. D. 320, to the same effect. On the other hand it is laid down that if the prior contract of sale, providing for a good title, contains no stipulation in regard to possession, and the purchaser takes possession before completion of the contract, with knowledge of defects which the vendor cannot remove, the taking possession is a waiver of the right to require the removal of the defects or to repudiate the contract. If the defects are removable by the vendor, taking possession is no waiver. In re Gloag, 23 Ch. D. 320. And if the prior contract for sale is silent concerning the title to be made, then, though the presumption is that a good title is to be made, this presumption may be rebutted by evidence that the purchaser had notice, before such contract was executed, of defects in the vendor's title. Ib. But compare Camberwell Building Soc. *v.* Holloway, 13 Ch. D. 754, Jessel, M. R., denying Madeley *v.* Booth, 2 DeG. & S. 718, 722. These were cases in which the contract itself, being silent as to the title to be made, showed on its face, in the particulars and conditions of sale, the defect.

In like manner if in a contract of sale it has been declared that the

purchaser "shall assume and admit that everything (if anything were necessary) was done and performed", he cannot afterwards maintain an action against the vendor based on a discovery that the vendor's title was defective. Such a clause does not merely mean that the purchaser shall not require the vendor to prove that everything has been done; the purchaser cannot avail himself of facts which he himself has discovered. Best *v.* Hamand, 12 Ch. D. 1 (C. A.). Baggalay, L. J., here alluded to the settled distinction between cases in which the vendor is not bound to produce evidence of a fact, — there of course the purchaser might do so, — and cases in which the fact is to be accepted without question. Hume *v.* Bentley, 5 DeG. & S. 520; Waddell *v.* Wolfe, L. R. 9 Q. B. 515.

It is however laid down by the same court that a condition of sale is bad as misleading, first if it requires the purchaser to assume what the vendor knows is false, or secondly if it declares that the state of the title is not accurately known, when in fact it *is* known to the vendor. In re Banister, 12 Ch. D. 131 (C. A.).

Again mere knowledge that fraud is being perpetrated on one will not bar relief if one were unable to prevent the result. Where e. g. a corporation is in the hands of unfaithful directors, the mere fact that stockholders are aware of wrong-doing by them will not prevent the corporation afterwards, when such directors have been retired, from proceeding to obtain relief from their acts. The corporation cannot be concluded by the failure of any number of its stockholders to act unless a case is shown of such acquiescence, assent, or ratification as would make it inequitable to permit what has been done to be set aside, or unless the rights of innocent purchasers have so intervened as to create an equitable bar to relief. Pacific R. Co. *v.* Missouri Pacific Ry., 111 U. S. 505, 520, 28 L. Ed. 498, 4 S. Ct. Rep. 583.

It is not to be supposed however that stockholders are entirely at the mercy of the directors during their term of office. Even while wrong-doing is going on and before it has been fully consummated, stockholders, though a minority of the whole, in a proper case may proceed on behalf of themselves and others, or alone, against the corporation and its officers, and those participating in the fraud, for relief. Brewer *v.* Boston Theatre, 104 Mass. 378; Peabody *v.* Flint, 6 Allen, 52. See Dousman *v.* Wisconsin Mining Co., 40 Wis. 418. The bill however should show that the plaintiffs are powerless of redress through the corporation. Brewer *v.* Boston Theatre.

A word may be added concerning notice to the plaintiff. Probably in no case of fraud is an injured party to be deemed affected with notice thereof, so as to be considered as having consented to the same, merely because some very prudent and cautious person, on having his attention called to a particular fact, would be apt to seek an explanation of it. Thus it has been said of a question of notice of a defective title that "there must be some neglect to inquire after actual notice that the title is in some way defective, or some fraudulent and wilful blindness as distinguished from mere caution." Briggs *v.* Rice, 130 Mass. 50; Jones *v.* Smith, 1 Hare, 43, 55; Ware *v.* Egmont, 4 DeG. M. & D. 460. But this is not to say that a man is not affected with notice by facts which would cause a man of fair average prudence to inquire; such would be a case of notice clearly, and equivalent, as a bar, to knowledge. Warren *v.* Swett, 31 N. H. 332; Cambridge Bank *v.* Delano, 48 N. Y. 326; Willis *v.* Vallette, 4 Met. (Ky.) 186; Kennedy *v.* Green, 3 Mylne & K. 718. See further, post, § 530, and notes.

Intention That the Representation Should Be Acted Upon. — This may always be shown by the outward manifestation of the case. It matters

§ 270. **Misrepresentation Which Amounts to a Positive Fraud.** — Where the party intentionally or by design misrepresents a material fact or produces a false impression [1] in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, — in every such case there is a positive fraud in the truest sense of the terms.[2] There is an evil act with an evil intent, — dolum malum ad circumveniendum. And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as well as by positive assertions.[3] The civil law

not what the party's actual intention may have been; if the representation in connection with the circumstances attending it reasonably indicate that the party who made it made it with a view to its being acted upon, that is enough so far as intention is concerned. See e. g. among many cases, Collins *v.* Denison, 12 Met. 549; Bigelow, Torts, 31 (Student Series). And the implication of intention from the outward aspect, if on the whole to arise, is conclusive; the defendant cannot then say that he in fact had no such intention in his mind. See Holmes, Common Law, 134.

Any actual intention, however, as by declarations at the time or by admissions, may be shown, it seems, without relying upon the nature and circumstances of the transaction. Indeed it is probable that evidence of actual intention that the representation should be acted upon would be admissible where the language and circumstances were such as to leave the question of intention, as judged from the external aspect, in doubt; assuming that the representation was such as to justify one in acting upon it.

It is hardly necessary to add that the injured party is not required in any case to prove a motive of personal benefit to himself on the part of the defendant. Pasley *v.* Freeman, 3 T. R. 51; s. c. Bigelow's L. C. Torts, 1; Foster *v.* Charles, 6 Bing. 396; s. c. 7 Bing. 1051. Nor an intention to harm. Leddell *v.* McDougal, 29 Week. R. 403 (C. A.).

Acting on the Representation. — Unless the representation has been acted upon, no case for relief can arise; and unless it has been acted upon to one's loss, no damages can be awarded, though if a contract was executed under the influence of misrepresentation, the contract may be set aside, or its enforcement enjoined or successfully resisted, as we have seen.

With regard to proof that the representation was acted upon, it is laid down of cases of contract that if the representation was of a nature to induce or tend to induce a person to enter into a contract, the inference from entering into the contract is that he acted on the inducement so held out; no direct evidence that he did so act is in the first instance necessary. The defendant however may, to overturn this inference, show that the plaintiff knew the truth before he entered into the contract, and hence could not have relied upon the representation, or he may show that the plaintiff avowedly did not rely upon it whether he knew the facts or not.

[1] See Laidlaw *v.* Organ, 15 U. S. 178, 4 L. Ed. 214; Pidlock *v.* Bishop, 3 B. & Cressw. 605; Smith *v.* The Bank of Scotland, 1 Dow, Parl. R. 272; Evans *v.* Bicknell, 6 Ves. 173, 182.

[2] Atwood *v.* Small, 6 Clark & Finnell. R. 232, 233; s. c. in Court of Exchequer, 1 Younge, R. 407; Taylor *v.* Ashton, 11 Mees. & Welsb. 401.

[3] 3 Black. Comm. 165; 2 Kent, Comm. Lect. 39, p. 484 (2d ed.); Laidlaw *v.* Organ, 15 U. S. 178, 4 L. Ed. 214; 1 Dow, Parl. R. 272.

has well expressed this when it says, "Dolo malo pactum fit, quotiens circumscribendi alterius causa, aliud agitur, et aliud agi simulatur." [1] And again, "Dolum malum à se abesse præstare venditor debet, qui non tantum in eo est, qui fallendi causa obscure loquitur, sed etiam, qui insidiose obscure dissimulat." [2] The case here put falls directly within one of the species of frauds enumerated by Lord Hardwicke, to wit, fraud arising from facts and circumstances of imposition.[3]

§ 271. [**The Materiality of the Statement.** — The materiality of the alleged fraudulent statement, or non-disclosure, in actions to rescind or set aside a contract entered into through fraud, is one of the necessary ingredients of the offence. It is difficult at times to determine whether a stated representation is of such importance as will aid in the vitiating of the contract, and it is generally a question for the jury, upon the facts and the surrounding circumstances, to pass upon the real effect and importance of the alleged misrepresented fact as a controlling element in the consummation of the agreement. Whether the misstatement is material or not, depends sometimes upon the relationship existing between the parties, and general conditions, and while a dealer is permitted to puff his wares, or the owner may boost up the real value of his lands to a legitimate extent, yet where the seller purposely misstates to the buyer the real cost price of the property, and this fact largely controls in arriving at the agreed purchase price, it is material [4]; or where at the time of the issue

[1] Dig. Lib. 2, tit. 14, l. 7, § 9.

[2] Dig. Lib. 18, tit. 1, l. 43, § 2; Pothier De Vente, n. 234, 237, 238.

[3] Chesterfield *v.* Janssen, 2 Ves. 155. In Neville *v.* Wilkinson, 1 Bro. Ch. R. 546, the Lord Chancellor (Thurlow) said: "It has been said, here is no evidence of actual fraud on R.; but only a combination to defraud him. A court of justice would make itself ridiculous if it permitted such a distinction. Misrepresentation of circumstances is admitted, and there is positively a deception." And he added: "If a man upon a treaty for any contract will make a false representation by means of which he puts the party bargaining under a mistake upon the terms of the bargain, it is a fraud. It misleads the parties contracting, on the subject of the contract."

[4] Van Slochem *v.* Villard, 101 N. E. 467, 207 N. Y. Supp. 587, 138 N. Y. Supp. 852, 154 App. Div. 161; Kincaid *v.* Price, 82 Ark. 20, 100 S. W. 76; Dotson *v.* Kirk, 180 Fed. 14, 103 C. C. A. 368; Adams *v.* Burton, 107 Me. 223, 77 Atl. 835; Furchin *v.* Sheffield Plate etc. Co. 117 N. Y. Supp. 137; Westra *v.* Roberts, 156 Wis. 230, 145 N. W. 773; Gullett *v.* Leaverton, 188 Ill. App. 166; Ross *v.* Reynolds, 112 Me. 223, 91 Atl. 952; Cole *v.* Smith, 26 Colo. 506, 58 Pac. 1086; Dinwiddie *v.* Stone, 21 Ky. L. Rep. 584, 52 S. W. 814; Stoney Creek Woolen Co. *v.* Smalley, 3 Det. Leg. N. 676, 69 N. W. 722.

of a policy of fire insurance upon an automobile, the owner stated that it was unincumbered, whereas, it was mortgaged, together with other personal property, and the mortgage was paid off three days later, and four days thereafter the automobile was destroyed by fire, this was not a material misrepresentation of fact. No injury had been suffered by the insurance company on account of the statement at the time of the cancellation of the mortgage, but if the fire had occurred before the cancellation of the mortgage, this would be a material statement.[1] The statement by an agent that a merchant in a neighboring town had on hand but three sewing machines out of a large order previously made, when in fact he had a hundred machines on hand, is a material misstatement of a fact when made to induce another merchant to buy.[2] The statement by an agent that a truck has been thoroughly tested in mud, slush and snow, and can be depended upon to run the year round, when no such a test had been made, is material when made to an inexperienced buyer of automobiles;[3] or that the book given the agent for sale, is the only work extant upon the subject,[4] and the representation by a medical college that it has the authority to grant the degree of D. M. D., after three years of successful work pursued in the college, when in fact it had no such authority, and was one of the main inducements whereby the plaintiff enrolled himself as a student, is a material misrepresentation of a fact.[5]]

§ 272. **Misrepresentation Is Actionable though Made without Knowledge of Its Falsity.** — Whether the party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false.[6] And even if the party innocently misrepresents a material fact by mistake,

[1] Cottingham *v.* Ins. Co., 168 N. C. 259, 84 S. E. 274.

[2] White Sewing Machine Co. *v.* Bullock, 161 N. C. 1, 76 S. E. 634.

[3] Hall *v.* Duplex-Power Car Co., 168 Mich. 634, 135 N. W. 118; Garry *v.* Garry, 187 Mass. 62, 72 N. E. 335; Gerner *v.* Yates, 61 Neb. 100, 84 N. W. 596; Brown *v.* Honiss, 74 N. J. L. 501, 68 Atl. 150; Rollins *v.* Quimby, 200 Mass. 162, 86 N. E. 350.

[4] Horne *v.* John A. Hertel Co., 184 Mo. App. 725, 171 S. W. 598.

[5] Kerr *v.* Shurtleff, 218 Mass. 167, 105 N. E. 871.

[6] Ainslie *v.* Medlycott, 9 Ves. 21; Graves *v.* White, Freem. R. 57. See also Pearson *v.* Morgan, 2 Bro. Ch. R. 389; Foster *v.* Charles, 6 Bing. R. 396; s. c. 7 Bing. R. 105; Taylor *v.* Ashton, 11 Mees. & Welsb. 401.

it is equally conclusive; for it operates as a surprise and imposition upon the other party.[1]

§ 273. [**Alleged Fraudulent Statement Must Have Been Purposely and Designedly Made.** — Another requirement essential to establish the charge of fraud, is that the alleged fraudulent statement must have been purposely and designedly made, or carelessly made with reckless indifference as to whether the statement was true or false. In purchasing land, according to statements made in an abstract of title, which is a true abstract according to the records, but in fact there is a material mistake in the records, and this was not known at the time, either to the plaintiff or defendant, evidence of this character is not alone sufficient to charge the defendant with fraud. The abstract purported to epitomize the contents of these records, and in no instance to assert any fact alieunde. This being so, the defendant, in the absence of evidence to the contrary, must be assumed in handing the abstract to plaintiff to have represented no more than what the abstract indicated; i. e., that the record was as stated therein. Whether he knew of the recitals therein or that the actual acreage was less than as shown by the book of the original entry could make no difference, save as these circumstances might be considered a part of a scheme to deceive, for, even though known, this did not impinge on the verity of the abstract.[2]]

§ 274. **Same.** — These principles are so consonant to the dictates of natural justice that it requires no argument to enforce or support them. The principles of natural justice and sound morals do indeed go further, and require the most scrupulous good faith, candor, and truth in all dealings whatsoever. But courts of justice generally find themselves compelled to assign limits to the exercise of their jurisdiction far short of the principles deducible ex æquo et bono; and with reference to the concerns of human

[1] See Pearson *v.* Morgan, 2 Bro. Ch. R. 389; Burrows *v.* Locke, 10 Ves. 475; De Manville *v.* Compton, 1 Ves. & B. 355; Ex parte Carr, 3 Ves. & B. 111; 1 Marsh. on Insur. B. ch. 10, § 1; Carpenter *v.* American Ins. Co., 1 Story, R. 57. In Pearson *v.* Morgan, 2 Bro. Ch. R. 385, 388, the case was that A, being interested in an estate in fee, which was charged with £8000 in favor of B, was applied to by C, who was about to lend money to B, to know if the £8000 was still a subsisting charge on the estate. A stated that it was, and C lent his money to B accordingly; it appearing afterwards that the charge had been satisfied, it was nevertheless held that the money lent was a charge on the lands in the hands of A's heirs, because he either knew or ought to have known the fact of satisfaction, and his representation was a fraud on C.

[2] Lundy *v.* Surls, 144 Iowa 670, 123 N. W. 337.

life they endeavor to aim at mere practical good and general convenience. Hence many things may be reproved in sound morals which are left without any remedy except by an appeal in foro conscientiæ to the party himself.[1] Pothier has expounded this subject with his usual force and sterling sense. "As a matter of conscience," says he, "any deviation from the most exact and scrupulous sincerity is repugnant to the good faith that ought to prevail in contracts. Any dissimulation concerning the object of the contract, and what the opposite party has an interest in knowing, is contrary to that good faith; for since we are commanded to love our neighbor as ourselves, we are not permitted to conceal from him anything which we should be unwilling to have had concealed from ourselves under similar circumstances. But in civil tribunals a person cannot be allowed to complain of trifling deviations from good faith in the party with whom he has contracted. Nothing but what is plainly injurious to good faith ought to be there considered as a fraud sufficient to impeach a contract, such as the criminal manœuvres and artifices employed by one party to induce the other to enter into the contract. And these should be fully substantiated by proof. "Dolum non nisi perspicuis indiciis probari convenit." [2]

§ 275. [**Fraudulent Concealment as an Element of Fraud.** — There is no stronger fiduciary relation known to the law than that of a partnership, where one man's property and property rights are subject to a large extent to the control and administration of another. There is no doubt but that equity will entertain jurisdiction where two brothers engaged in a business venture, and subsequently one of them became infirm and not able to actively look after the partnership affairs, the other brother sought to purchase his interest in the business, and was informed that the partnership was heavily indebted and constantly losing money, whereas, the fact was that the concern was making money and worth $60,000. In this relation is established the requirement of utmost good faith, and it follows that no partner may deceive his copartners for his benefit and their injury, either by false representations or by concealment.[3]]

§ 276. **Illustrations of Actionable Misrepresentation.** — The doctrine of law as to misrepresentation being in a practical view

[1] Pothier De Vente, n. 234, 235, 239.

[2] 1 Pothier on Oblig. by Evans, p. 19, n. 30; Cod. Lib. 2, tit. 21, l. 6.

[3] Salhinger *v.* Salhinger, 56 Wash. 134, 105 Pac. 236; Roby *v.* Colehour, 135 Ill. 337, 25 N. E. 778.

such as has been already stated, it may not be without use to illustrate it by some few examples. In the first place the misrepresentation must be of something material, constituting an inducement or motive to the act or omission of the other party and by which he is actually misled to his injury.[1] Thus if a person owning an estate should sell it to another, representing that it contained a valuable mine, which constituted an inducement to the other side to purchase, and the representation were utterly false, the contract for the sale and the sale itself, if completed, might be avoided for fraud; for the representation would go to the essence of the contract.[2] But if he should represent that it contained twenty acres of wood-land or meadow, and the actual quantity was only nineteen acres and three quarters, there, if the difference in quantity would have made no difference to the purchaser in price, value, or otherwise, it would not on account of its immateriality have avoided the contract.[3] So if a person should sell a ship to another, representing her to be five years old, of a certain tonnage, coppered and copper-fastened, and fully equipped, and found with new sails and rigging, either of these representations, if materially untrue so as to affect the essence or value of the purchase, would avoid it. But a trifling difference in either of these ingredients in no way impairing the fair value or price, or not material to the purchaser, would have no such effect. Thus for instance if the ship was a half ton less in size, was a week more than five years old, was not copper-fastened in some unimportant place, and was deficient in some trifling rope, or had some sails which were in a very slight degree worn, — these differences would not avoid the contract; for under such circumstances the differences must be treated as wholly inconsequential.[4] The rule of the civil law would here apply, "Res bona fide vendita, propter minimam causam inempta fieri non debet."[5] Indeed it may be laid down as a general rule that when the sale is fair and the parties are equally innocent, and the thing is sold in gross, by the quantity, by estimation and not by measurement, a deficiency will not ordinarily entitle a party to relief either by an allowance for the deficiency or by a rescission

[1] Phillips *v.* Duke of Bucks, 1 Vern. 227; 1 Fonbl. Eq. B. 1, ch. 2, § 8.

[2] See Lowndes *v.* Lane, 2 Cox, R. 363.

[3] See the Morris Canal Co. *v.* Emmett, 9 Paige, R. 168; Stebbins *v.* Eddy, 4 Mason, R. 414; 2 Freem. R. 107; Twypont *v.* Warcup, Finch, R. 310; Winch *v.* Winchester, 1 Ves. & Beam. 375.

[4] See 1 Domat, B. 1, tit. 2, § 11, art. 12.

[5] Dig. Lib. 18, tit. 1, l. 54; 1 Domat, B. 1, tit. 2, § 11, art. 3.

of the contract.[1] Thus for example the sale of a farm by known boundaries, containing by estimation a certain number of acres, will bind both parties whether the farm contains more or less.[2]

§ 277. [**Alleged Fraudulent Promise Must Refer to Present Conditions.** — Another element necessary to be shown in order to prove fraud, is that the alleged fraudulent promise must refer to present existing matters, and not future expressions of an opinion. And where it was represented that stock "would pay immense dividends",[3] and "would pay 6 % interest on the investment", are not statements of fact, but mere expressions of opinions as to future profits, which, if not realized, afford no basis for recovery. But a statement that a note will be met promptly at maturity, when made in good faith, will not support an action for fraud,[4] but a promise to do an act in the future which is the medium of a deception, and which the promisor has no present intention to perform, will support an action of deceit.[5]]

§ 278. **Same.** — So if an executor of a will should obtain a release from a legatee upon a representation that he had no legacy left him by the will, which was false,[6] or if a devisee should obtain a release from the heir at law upon a representation that the will was duly executed[7] when it was not, in each of these cases the release might be set aside for fraud. But if in point of fact in the first case the legacy though given in the will had been revoked by a codicil, or in the second case if the will had been duly executed, although not at the time or in the manner or under the circumstances stated by the devisee, the misrepresentation would not avoid the release because it is immaterial to the rights of either party.

[1] Stebbins *v.* Eddy, 4 Mason, R. 414; Morris Canal Co. *v.* Emmett, 9 Paige, R. 168.

[2] Ibid.; ante, § 215. See ante, § 209.

[3] Wegerer *v.* Jordan, 10 Cal. App. 362, 101 Pac. 1066; Gordon *v.* Butler, 105 U. S. 553, 26 L. Ed. 1166; Robertson *v.* Parks, 76 Md. 118, 24 Atl. 411; Deming *v.* Darling, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; Cash Register Co. *v.* Townsend, 137 N. C. 652, 50 S. E. 306, 70 L. R. A. 349; Hill *v.* Gettys, 135 N. C. 375, 47 S. E. 449, Williamson *v.* Holt, 147 N. C. 522, 61 S. E. 384, 17 L. R. A. (N. S.) 240; Frey *v.* Lbr. Co., 144 N. C. 760, 57 S. E. 464; May *v.* Loomis, 140 N. C. 350, 52 S. E. 728; Whitehurst *v.* Life Ins. Co. of Va., 149 N. C. 267, 62 S. E. 1067.

[4] Ray County Savings Bank *v.* Hutton, 224 Mo. 42, 123 S. W. 47.

[5] Sallies *v.* Johnson, 85 Conn. 77, 81 Atl. 974; Rogers *v.* Virginia C. C. Co., 149 Fed. 1, 78 C. C. A. 615; Barnes *v.* Starr, 64 Conn. 136, 28 Atl. 980; Spencer's Appeal, 77 Conn. 638, 60 Atl. 289; Dunham *v.* Cox, 81 Conn. 268, 70 Atl. 1033; Edington *v.* Fitzmaurice, 29 L. R. 483.

[6] Jarvis *v.* Duke, 1 Vern. 19.

[7] Broderick *v.* Broderick, 1 P. Will. 239, 240; Pusey *v.* Desbouvrie, 3 P. Will. 318, 320.

§ 279. **Misrepresentation Must Have Been Made by One in Whom the Other Party Had Trust and Confidence.** — In the next place the misrepresentation must not only be in something material, but it must be in something in regard to which the one party places a known trust and confidence in the other.[1] It must not be a mere matter of opinion equally open to both parties for examination and inquiry where neither party is presumed to trust to the other, but to rely on his own judgment. Not but that misrepresentation even in a matter of opinion may be relieved against as a contrivance of fraud in cases of peculiar relationship or confidence, or where the other party has justly reposed upon it and has been misled by it. But ordinarily matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against, because they are not presumed to mislead or influence the other party when each has equal means of information. Thus a false opinion, expressed intentionally by the buyer to the seller, of the value of the property offered for sale, where there is no special confidence or relation or influence between the parties, and each meets the other on equal grounds, relying on his own judgment, is not sufficient to avoid a contract of sale.[2] In such a case the maxim seems to apply, — " Scientia, utrinque par, pares contrahentes facit." [3]

[1] See Smith *v.* The Bank of Scotland, 1 Dow, Parl. R. 272; Laidlaw *v.* Organ, 15 U. S. 178, 4 L. Ed. 214; Evans *v.* Bicknell, 6 Ves. 173, 182 to 192.

[2] But see Wall *v.* Stubbs, 1 Madd. R. 80; Cadman *v.* Homer, 18 Ves. 10; 2 Kent, Comm. Lect. 39, p. 485 (4th ed.). A mistaken opinion of the value of property, if honestly entertained, and stated as opinion merely, unaccompanied by any assertion or statement untrue in fact, can never be considered as a fraudulent misrepresentation. Hepburn *v.* Dunlop, 14 U. S. 189, 4 L. Ed. 65.

[3] 1 Marshall on Insur. B. 1, ch. 11, § 3, p. 473; 1 Domat, B. 1, tit. 2, § 11, art. 3, 11, 12. Mr. Chancellor Kent has expounded the doctrine on this subject with admirable clearness and strength in the following passage of his Commentaries. (Vol. 2, Lect. 39, pp. 484, 485, 4th ed.) "When however the means of information relative to facts and circumstances affecting the value of the commodity are equally accessible to both parties, and neither of them does or says anything tending to impose upon the other, the disclosure of any superior knowledge which one party may have over the other as to those facts and circumstances is not requisite to the validity of a contract. There is no breach of any implied confidence that one party will not profit by his superior knowledge as to facts and circumstances open to the observation of both parties, or equally within the reach of their ordinary diligence; because neither party reposes in any such confidence unless it be specially tendered or required. Each one in ordinary cases judges for himself, and relies confidently and perhaps presumptuously upon the sufficiency of his own knowledge, skill, and diligence. The common law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity

§ 280. [**Mere Expressions of Opinion Are Not Unlawful.** — A statement that land is worth a given price per acre, without more is nothing more than an expression of an opinion.[1] But where the representation as to the value of the land per acre was expressly made as a statement of a fact, and the plaintiff traded her millinery store in exchange for the land, believing it to be worth what it was represented to be, and she had never seen the land and relied entirely upon the value of the land as it was represented by the defendant, this was not the expression of an opinion, but the misrepresentation of a fact.[2] In such case, whether the representation was an expression of an opinion, or an affirmation of a fact, is a question for the jury. The rule that no one is liable for an expression of an opinion is applicable only when the opinion stands by itself as a distinct thing. If it is given in bad faith, with knowledge of its untruthfulness, to defraud others, the person making it is liable, especially when it was as to a fact affecting quality or value, and was peculiarly within the knowledge of the person making it.[3]]

against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience with the duties of good faith to every extent compatible with the interests of commerce. This it does by requiring the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment, and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting of attention to these points where attention would have been sufficient to protect him from surprise or imposition, the maxim 'caveat emptor' ought to apply. Even against this maxim he may provide by requiring the vendor to warrant that which the law would not imply to be warranted; and if the vendor be wanting in good faith, 'fides servanda' is a rule equally enforced at law and in equity." See also 1 Domat, B. 1, tit. 2, § 11.

[1] Kincaid *v.* Price, 82 Ark. 20, 100 S. W. 76; Bosley *v.* Monahan, 137 La. 650, 112 N. W. 1102; Hansen *v.* Kline, 136 La. 101, 113 N. W. 50, 4; Frey *v.* Middle Creek Lumber Co., 144 N. C. 759, 57 S. E. 464; Kerwin *v.* Friedman, 127 Mo. App. 519, 105 S. W. 1102; Johnson *v.* Withers, 98 Pac. 42, 9 Cal. App. 52; State Bank of Iowa Falls *v.* Brown, 142 Iowa 190; Olston *v.* Oregon Water Power & Ry. Co., 96 Pac. 1095, 97 Pac. 538, 52 Oreg. 343, 20 L. R. A. (N. S.) 915; Central Life Assurance Society of United States *v.* Mulford, 45 Colo. 240, 100 Pac. 423; Blumenfeld *v.* Wagner, 63 Misc. Rep. 69, 116 N. Y. Supp. 500; Saxby *v.* Southern Land Co., 109 Va. 196, 63 S. E. 423.

[2] Mattanch *v.* Walsh, 136 La. 225, 113 N. W. 818; Simons *v.* Cissna, 52 Wash. 115, 100 Pac. 200; Wegerer *v.* Jordan, 10 Cal. App. 362, 101 Pac. 1066; Hodgkins *v.* Dunham, 10 Cal. App. 690, 103 Pac. 351; Corey *v.* Boynton, 82 Vt. 257, 72 Atl. 987; Belka *v.* Allen, 82 Vt. 456, 74 Atl. 91; Fitzgerald *v.* Frankel, 109 Va. 603, 64 S. E. 941.

[3] Hetland *v.* Bilstad, 140 La. 411, 118 N. W. 422; Boltz *v.* O'Connor,

§ 281. **Misrepresentation of Collateral Facts Will Not Avoid Contract.** — But it would be otherwise where a party knowingly places confidence in another and acts upon his opinion, believing it to be honestly expressed. Thus if a man of known skill and judgment in paintings should sell a picture to another, representing it to have been painted by some eminent master, as for instance by Rubens, Titian, or Correggio, and it should be false, there can be no doubt that it would be a misrepresentation for which the sale might be avoided.[1] And the same principle would apply in a like case if he should falsely state his opinion to be that it was a genuine painting of a great master, with an intent to influence the buyer in the purchase, and the latter, placing confidence in the skill and judgment and assertion of the seller, should complete the purchase on the faith thereof. But if the seller should truly represent the painting to be of such a master, and add that it once belonged to a nobleman, or was fixed in a church (which circumstances he knew to be untrue), in such a case, if the representation of these collateral circumstances had no real tendency in the mind of the buyer to enhance or influence the purchase, it would not avoid the contract.[2]

§ 282. **It is Not Misrepresentation for One Party to State a Fact that the Other Had No Right to Rely Upon.** — Nor is it every

45 Ind. App. 178, 90 N. E. 496; Romaine *v.* Excelsior Carbide & Gas Machine Co., 54 Wash. 41, 103 Pac. 32; Henry *v.* Continental Building & Loan Assn., 156 Cal. 667, 105 Pac. 960; Crompton *v.* Beedle, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748; Carr *v.* Sanger, 122 N. Y. Supp. 593, 138 App. Div. 32; Parker *v.* Raleigh Savings Bank, 152 N. C. 253, 67 S. E. 492; Sheer *v.* Hoyt, 13 Cal. App. 662, 110 Pac. 477; Davis *v.* Reynolds, 107 Me. 61, 77 Atl. 409; Stone *v.* Pentecost, 206 Mass. 505, 92 N. E. 1021; Boasberg *v.* Walker, 11 Minn. 445, 127 N. W. 467; Dresher *v.* Becker, 88 Neb. 619, 130 N. W. 275; Woodson *v.* Winchester, 16 Cal. App. 472, 117 Pac. 565; George *v.* Ford, 36 App. D. C. 315; Stauffer *v.* Hulwick, 176 Ind. 410, 96 N. E. 154, 31 Ann. Cas. 951; Wegner *v.* Herkimer, 167 Mich. 587, 133 N. W. 623; Allan *v.* Steinbrecher, 116 Minn. 174, 133 N. W. 477; Brown *v.* Andrews, 116 Minn. 150, 133 N. W. 568; Van der Wiele *v.* Garbade, 60 Oreg. 585, 120 Pac. 752; Stewart *v.* Puck Soap Co., 154 Iowa 411, 135 N. W. 70; Breese *v.* Hunt, 67 Wash. 398, 121 Pac. 853; Bradley *v.* Oviatt, 86 Conn. 63, 84 Atl. 321; Beck *v.* Goar, 180 Ind. 81; Ginn *v.* Almy, 212 Mass. 486, 99 N. E. 276; Littlejohn *v.* Sample, 173 Mich. 419, 139 N. W. 38; Williamson *v.* Harris, 167 Mo. App. 347, 151 S. W. 500; Murphy *v.* Murphy, 78 Misc. Rep. 178, 137 N. Y. Supp. 872; Ohlwine *v.* Plaffman, 52 Ind. App. 357, 100 N. E. 777; Van Slochem *v.* Villard, 207 N. Y. 587, 101 N. E. 467, 154 App. Div. 161, 138 N. Y. Supp. 852.

[1] See 1 Pothier on Oblig. n. 17 to 20, and note (*a*); Atwood *v.* Small, 6 Clark & Finnell. 232, 233; s. c. 1 Younge, R. 407.

[2] See 2 Kent, Comm. Lect. 39, pp. 482, 483 (4th ed.); Hill *v.* Gray, 1 Starkie, R. 352.

wilful misrepresentation, even of a fact, which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it; for Courts of Equity, like Courts of Law, do not aid parties who will not use their own sense and discretion upon matters of this sort.[1] This may be illustrated by a case at law, where a party upon making a purchase for himself and his partners falsely stated to the seller, to induce him to the sale, that his partners would not give more for the property than a certain price. It was held that no action would lie at law for a deceitful representation of this sort. Lord Ellenborough on this occasion expressed himself in the following language, which presents many suggestions applicable to the subject now under consideration. "If," said he, "an action be maintainable for such a false representation of the will and purpose of another with reference to the purposed sale, should not an action be also at least equally maintainable for a false representation of the party's own purpose? But can it be contended that an action might be maintained against a man for representing that he would not give, upon a treaty of purchase, beyond a certain sum, when it could be proved that he had said he would give much more than that sum? And supposing also that he had upon such treaty added, as a reason for his resolving not to give beyond a certain sum, that the property was in his judgment damaged in any particular respect; and supposing further that it could be proved he had, just before the giving such reason, said he was satisfied it was not so damaged; would an action be maintainable for this untrue representation of his own purpose, backed and enforced by this false reason given for it? And in the case before us, does the false representation made by the defendant of the determination of his partners amount to anything more than a falsely alleged reason for the limited amount of his own offer? And if it amount to no more than this, it should be shown, before we can deem this to be the subject of an action, that in respect of some consideration or other existing between the parties to the treaty, or upon some general rule or principle of law, the party treating for a purchase is bound to allege truly, if he state at all, the motives which operate with him for treating or for making the offer he in fact makes.

[1] See Trower *v.* Newcome, 3 Meriv. R. 704; Scott *v.* Hanson, 1 Simons, R. 13; Fenton *v.* Browne, 16 Ves. 144; 2 Kent, Comm. Lect. 39, pp. 484, 485 (4th ed.); Id. 486, 487, note (*b*); Davis *v.* Meeker, 5 John. R. 354; Hervey *v.* Young, Yelv. R. 21, and Metcalf's note; 1 Domat, B. 1, tit. 2, § 11, art. 11, 12; Sherwood *v.* Salmon, Day, R. 128.

A seller is unquestionably liable to an action of deceit if he fraudulently represent the quality of the thing sold to be other than it is in some particulars which the buyer has not equal means with himself of knowing, or if he do so in such a manner as to induce the buyer to forbear making the inquiries which for his own security and advantage he would otherwise have made. But is a buyer liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers? I am not aware of any case or recognized principle of law upon which such a duty can be considered as incumbent upon a party bargaining for a purchase. It appears to be a false representation in a matter merely gratis dictum by the bidder, in respect to which the bidder was under no legal pledge or obligation to the seller for the precise accuracy and correctness of his statement, and upon which therefore it was the seller's own indiscretion to rely; and for the consequences of which reliance therefore he can maintain no action." [1]

§ 283. **Court of Equity Would Refuse Specific Performance of Contract Thus Induced.** — A Court of Equity would, under the like circumstances, probably hold a somewhat more rigorous doctrine, at least if the party appeared to have been materially influenced by the representation to his disadvantage; and if it did not avoid the contract, it would refuse a specific performance of it.[2] If the seller of a farm should falsely affirm at the sale that it had been valued by two persons at the price, and the assertion had induced the buyer to purchase it, the contract would certainly not be enforced in equity, and upon principle it would seem to be void. So if a vendor on a treaty for the sale of property should make representations which he knows to be false, the falsehood of which however the purchaser has no means of knowing, but he relies on them, a Court of Equity will rescind the contract entered into upon such treaty, although the contract may not contain the misrepresentations.[3] [If the seller of land had made no representations as to what objects were included in the boundaries of the land to be conveyed, then it might be necessary for the proposed purchaser to inquire as to where the lines run, but

[1] Vernon *v.* Keys, 12 East, 637, 638; Sugden on Vendors (7th ed.), p. 6. See also Davis *v.* Meeker, 5 John. R. 354; 2 Kent, Comm. Lect. 39, p. 486, and note (*b*); Id. 487 (4th ed.).

[2] 2 Kent, Comm. Lect. 39, pp. 486, 497, and note (*b*), (4th ed.); Buxton *v.* Lister, 3 Atk. 386.

[3] Atwood *v.* Small, 6 Clark & Finnell. 232, 233.

where the seller stated as a fact that the line runs to a certain fence, the purchaser has a right to rely upon that statement as a fact.[1]] But then in all such cases the court will not rescind the contract without the clearest proof of the fraudulent misrepresentations, and that they were made under such circumstances as show that the contract was founded upon them.[2]

§ 284. **Doctrine of Caveat Emptor Applies.** — On the other hand if the purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or his agents, he cannot be heard to say that he was deceived by the vendor's misrepresentations; for the rule is "Caveat emptor", and the knowledge of his agents is as binding on him as his own knowledge.[3] It is his own folly and laches not to use the means of knowledge within his reach, and he may properly impute any loss or injury in such a case to his own negligence and indiscretion. Courts of Equity do not sit for the purpose of relieving parties, under ordinary circumstances, who refuse to exercise a reasonable diligence or discretion.

§ 285. [**Extent of Investigation.** — While it is generally the rule that one should examine and see what he is buying, the circumstances of the parties, the physical conditions of the property and other things may make it practically impossible for a very extended search to be made. For instance, where plaintiff purchased a stock of goods upon the representation that all goods in the store were in good condition, and the goods in the back of the shelves were precisely as good as those on the front, when in fact the best and most salable goods were placed in front and the goods in the back of the shelves were very inferior. To go over the entire store to ascertain whether or not this representation was true or false would be a great undertaking, and he had a right to rely upon the statement as a fact.[4] And where the subject

[1] Roberts *v.* Holliday, 10 S. Dak. 576, 74 N. W. 1034; O'Neill *v.* Conway, 88 Ct. 651, 92 Atl. 425; Martin *v.* Hutton, 90 Neb. 34, 132 N. W. 727.

[2] Ibid.

[3] Atwood *v.* Small, 6 Clark & Finnell. 232, 233; Brown *v.* Kansas City So. Ry. Co., 187 Mo. App. 104, 173 S. W. 73; Gratz *v.* Schuler, 25 Cal. App. 117, 142 Pac. 899; Osborne *v.* Mo. Pac. R. Co., 71 Neb. 180, 98 N. W. 685; Anderson Foundry & Machine Works *v.* Myers, 15 Ind. App. 385, 44 N. E. 193; City of Tacoma *v.* Tacoma Light & Water Co., 17 Wash. 458, 50 Pac. 55; Mulholland *v.* Washington Match Co., 35 Wash. 315. 77 Pac. 497; Gullett *v.* Leaverton, 188 Ill. App. 66; Muller *v.* Rosenblath, 157 App. Div. 513, 142 N. Y. Supp. 602; Jordan *v.* Walker, 115 Va. 109, 78 S. E. 643; Wilks *v.* Wilks, 176 Ala. 151, 57 So. 776.

[4] Harlow *v.* Perry, 113 Me. 239, 93 Atl. 544.

matter of the contract is distantly located from the parties, representations as to value, general surroundings, yearly rental and the like, may be relied upon without going from one State to another to actually view the land, before entering into the contract. If the facts, under such circumstances are untruly stated, the fact that no actual examination was made will make no difference.[1]]

§ 286. [**Failure to Make Proper Investigation.** — It can make no difference to the defendant that the plaintiff failed to make as careful and full an investigation as to the truth of the matters of fact as he should have made. This would not minimize his wrongful conduct, but would affect the extent of recovery. And where the plaintiff resided in a city and owned apartment property, which he was about to exchange for a farm, some distance away, the plea that it was foolish for plaintiff to rely upon defendant's statement as to the rental value of the farm, is no defence at all. The law does not permit the guilty party to escape the consequences of his fraud merely upon the ground that the other party was negligent or foolish in believing and relying upon the false statements made.[2]]

§ 286 *a*. [**Relief from Fraud Should Be Promptly Sought.** — When one has been imposed upon through the fraud of another, it is not only sufficient that he discover the fraudulent imposition within a reasonable time, but he ought to diligently bring his action for relief, and return what he has received under the contract. If he retained the fruits of the contract and collected large sums due under the terms of the contract, all of which was after he acquired knowledge of its fraudulent character, the length of time before bringing action for damages caued by the fraud will largely determine the question of a waiver and ratification.[3] But

[1] Scott *v.* Burnight, 131 Iowa 507, 107 N. W. 422; Rogers *v.* Rosenfeld, 158 Wis. 285, 149 N. W. 33; Baker *v.* Becker, 153 Wis. 369, 141 N. W. 304; Hecht *v.* Metzler, 14 Utah 408, 48 Pac. 37, 60 Am. St. Rep. 906.

[2] Thaler *v.* Niedermeyer, 185 Mo. App. 257, 170 S. W. 378; Handy *v.* Waldron, 19 R. I. 618, 35 Atl. 884; Tillis *v.* Smith & Sons Lbr. Co., 188 Ala. 122, 65 So. 1015; Pallister *v.* Camenisch, 21 Colo. App. 79, 121 Pac. 958; Turner *v.* Kuhnle, 70 N. J. Eq. 61, 62 Atl. 327; Chamberlin *v.* Fuller, 59 Vt. 256, 9 Atl. 832; Maxfield *v.* Schwartz, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606; Graham *v.* Thompson, 55 Ark. 299, 18 S. W. 58; Warder *v.* Whitish, 77 Wis. 430, 46 N. W. 540.

[3] McKinley *v.* Warren, 218 Mass. 310, 105 N. E. 990; Summers *v.* Carpenter, 156 Ky. 332, 160 S. W. 1064; Talcott *v.* Friend, 179 Fed. 676, 103 C. C. A. 80; Driggs *v.* Hendrickson, 89 Misc. Rep. 421, 151 N. Y. Supp. 858; Mahoney *v.* O'Neill, 59 N. Y. Supp. 378, 28 Misc. Rep. 437, reversed, 61 N. Y. Supp. 69, 29 Misc. Rep. 619; see § 65 and notes, ante.

where the plaintiff was required to work for a period of six months in order to inform himself as to the true conditions and that he had really been defrauded, this is no waiver.[1] Nor is there a waiver of the fraud, where in the sale of a stock of goods the buyer was induced not to make a thorough examination as to the condition of the stock, and then signed a contract in which he represented that he had examined the stock and that it was in good condition.[2]]

§ 287. **Puffing of Wares Is Not Sufficient Evidence of Fraud.** — To the same ground of unreasonable indiscretion and confidence may be referred the common language of puffing and commendation of commodities, which, however reprehensible in morals as gross exaggerations or departures from truth, are nevertheless not treated as frauds which will avoid contracts. In such cases the other party is bound, and indeed is understood, to exercise his own judgment if the matter is equally open to the observation, examination, and skill of both. To such cases the maxim applies, — "Simplex commendatio non obligat." The seller represents the qualities or value of the commodity, and leaves them to the judgment of the buyer.[3] The Roman law adopted the same doctrine. "Ea quæ commendandi causa in venditionibus dicuntur, si palam appareant, venditorem non obligant; veluti si dicat servum speciosum, domum bene ædificatam." [4] But if the means of knowledge are not equally open, the same law pronounced a different doctrine. "At si dixerit, hominem literatum, vel artificem, præstare debet; nam hoc ipso pluris vendidit." [5] The misrepresentation enhances the price. The same rule will apply if any artifice is used to disguise the character or quality of the commodity,[6] or to mislead the buyer at the sale; such as using puffers and underbidders at an auction or other sale, or holding out false colors and thereby taking the buyer by surprise.[7]

[1] Charbonnel *v.* Seabury, 23 R. I. 543, 51 Atl. 208.
[2] Strand *v.* Griffith, 97 Fed. 854, 38 C. C. A. 444.
[3] 2 Kent, Comm. Lect. 39, p. 485 (4th ed.).
[4] Dig. Lib. 18, tit. 1 l. 43. [5] Ibid.
[6] 2 Kent, Comm. Lect. 39, pp. 482, 483, 484 (4th ed.); Turner *v.* Harvey, Jacob, R. 178.
[7] Bromley *v.* Alt, 3 Ves. 624; Smith *v.* Clarke, 12 Ves. 483; Twining *v.* Morrice, 2 Bro. Ch. R. 330; Marquis of Townshend *v.* Stangroom, 6 Ves. 338; Bexwell *v.* Christie, Cowper, R. 385; 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (*x*); Pickering *v.* Dawson, 4 Taunt, R. 785. See Tomlinson *v.* Savage, 41 N. C. 430; Latham *v.* Morrow, 6 B. Mon. 630; Veazie *v.* Williams, 3 Story, 610, 623.

§ 288. **The Party Must Be Misled by the Misrepresentation.** — In the next place the party must be misled by the misrepresentation; for if he knows it to be false when made, it cannot be said to influence his conduct, and it is his own indiscretion, and not any fraud or surprise, of which he has any just complaint to make under such circumstances.[1]

§ 289. **He Must Have Been Misled to His Injury.** — And in the next place the party must have been misled to his prejudice or injury; for Courts of Equity do not, any more than Courts of Law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts, which are followed by no loss or damage. It has been very justly remarked, that to support an action at law for a misrepresentation there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff.[2] And it has been observed with equal truth by a very learned judge in equity, that fraud and damage coupled together will entitle the injured party to relief in any court of justice.[3]

§ 290. [**Fraudulent Conduct Must Result in Injury.** — In order to sustain an action on a fraudulent contract, it is necessary that there be both allegation and proof of damage, at least to some extent. Fraud must concur with damage to be actionable. However grievous the fraudulent conduct may have been, no action will ordinarily lie if the defrauded party ratified the fraudulent act, whether with or without injury; and so, if he was not cognizant of the real facts until the transaction was entirely consummated, he cannot complain that a fraud has been perpetrated, if he has not been the loser thereby. It is fundamental, that no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action. If the deceit does not end in the making of the contract, but still further influences a party to the contract in his conduct under it, it is obviously a deceit of a continuous nature, of which the injured party may justly complain.[4] Nor can the vitiating effect

[1] See Pothier De Vente, n. 210.

[2] Vernon *v.* Keys, 12 East, 637, 638.

[3] Bacon *v.* Bronson, 7 John. Chan. R. 201; Fellows *v.* Lord Gwydyr, 1 Simons, R. 63.

[4] Edward Barron Estate Co. *v.* Woodruff Co., 163 Cal. 561, 126 Pac. 351; Stacey *v.* Robinson, 184 Mo. App. 54, 168 S. W. 261; Donaldson *v.* Donaldson, 249 Mo. 228, 155 S. W. 791; Winkler *v.* Jerrue, 20 Cal. App. 555, 129 Pac. 804; McCarrell *v.* Hayes, 186 Ala. 323, 65 So. 62; Kuper *v.* Snethen, 96 Neb. 34, 146 N. W. 991; Morrison *v.* Martin, 84 Ct. 628, 80 Atl. 716; Wesselhoeft *v.* Schanze, 153 Ill. App. 443; Woodson *v.* Winchester, 16 Cal. App. 472, 117 Pac. 565; Blumenfeld *v.* Stine, 42 Misc.

of a fraudulent action (if established) be negatived or neutralized by the assumption that no apparent injury attended the wrongful conduct. The measure and consequence of such a wrong is found in the act, fraudulently motived, not in the result therefrom.[1] And if a patient is induced by the fraud of another, to submit to certain medical treatment, by means of which the patient suffers serious physical injury, his cause of action is good, although he has never paid anything for the treatment.[2]]

§ 291. **Fraudulent Conduct May Be Ratified by Injured Party.** — In the next place the defrauded party may, by his subsequent acts with full knowledge of the fraud, deprive himself of all right to relief as well in equity as at law.[3] Thus for example, if with full knowledge of the fraud he should settle the matter in relation to which the fraud was committed, and give a release to the party who has defrauded him, he would lose all title to legal and equitable relief.[4] The like rule would apply if he knew all the facts, and with such full information continued to deal with the party.[5]

[If one become advised of the fraud perpetrated upon him in season to recede from his engagement, and yet, with knowledge of the falsity of the representations which had induced the contract, elects to perform, and clearly manifests his intention to abide by the contract, he condones the fraud and is without a remedy. The contract, being against conscience because of the fraud, is not obligatory upon him, if he shall so elect; but if, when fully informed of the fraud, he voluntarily confirms, ratifies and performs and exacts performance of the contract, he condones

Rep. 411, 87 N. Y. Supp. 81; Alletson *v.* Powers, 72 Vt. 417, 48 Atl. 647; Tregner *v.* Hazen, 116 App. Div. 829, 102 N. Y. Supp. 139; Lewis *v.* Corbin, 195 Mass. 520, 81 N. E. 248; Badger *v.* Pond, 120 App. Div. 619, 105 N. Y. Supp. 546; Spreckels *v.* Gorrill, 152 Cal. 383, 92 Pac. 1011; Brackett *v.* Perry, 201 Mass. 502, 87 N. E. 903; Musconetcong Iron Works *v.* Delaware L. & W. R. Co., 78 N. J. L. 717, 76 Atl. 971; Anderson *v.* Smitley, 141 App. Div. 421, 126 N. Y. Supp. 25; Noble *v.* Libby, 144 Wis. 632, 129 N. W. 791; Morgan *v.* Hodge, 145 Wis. 143, 129 N. W. 1083; Bailey *v.* Oatis, 85 Kans. 339, 116 Pac. 830; Clark *v.* East Lake Lumber Co., 158 N. C. 139, 73 S. E. 793; Pickett *v.* Wrenn, 187 Mo. App. 83, 174 S. W. 156; Reynolds *v.* Evans, 123 Mo. 365, 91 Atl. 564.

[1] Hall *v.* Santangelo, 178 Ala. 447, 60 So. 168.

[2] Flaherty *v.* Till, 119 Minn. 191, 137 N. W. 815.

[3] See Ex parte Briggs, L. R. 1 Eq. 483.

[4] Parsons *v.* Hughes, 9 Paige, R. 591.

[5] Vigers *v.* Pike, 3 Clark & Finnell. R. 545, 630. But the party wronged is allowed a reasonable time after the discovery of the fraud before taking action. Neblett *v.* Macfarland, 92 U. S. 101, 23 L. Ed. 471; Gatling *v.* Newell, 9 Ind. 572.

the fraud, and such ratification, like the ratification, of the unauthorized act of an agent, relates to the time of the contract, confirming it from its date and purging it of fraud.[1]]

§ 292. **Undue Concealment as Evidence of Fraud.** — Another class of cases for relief in equity is where there is an undue concealment, or suppressio veri, to the injury or prejudice of another.[2] It is not every concealment, even of facts material to the interest of a party, which will entitle him to the interposition of a Court of Equity. The case must amount to the suppression of facts which one party under the circumstances is bound in conscience and duty to disclose to the other party, and in respect to which he cannot innocently be silent. It has been said by Cicero, "Aliud est celare, aliud tacere. Neque enim id est celare, quidquid reticeas; sed cum, quod tu scias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire." [3] It has been remarked by a learned author that this definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void in favor of either party who is misled by his ignorance of the thing concealed.[4] And Cicero proceeds to denounce such concealment in terms of vehement indignation. "Hoc autem celandi genus quale sit, et cujus hominis, quis non videt? Certe non aperti, non simplicis, non ingenui, non justi, non viri boni; versuti potius, obscuri, astuti, fallacis, malitiosi, collidi, veteratoris, vafri." [5]

§ 293. **Same.** — But this statement is not borne out by the acknowledged doctrines either of Courts of Law or of Courts of Equity in a great variety of cases. However correct Cicero's view may be of the duty of every man in point of morals to disclose all facts to another with whom he is dealing, which are material to his interest,[6] yet it is by no means true that courts of

[1] Kingman & Co. *v.* Stoddard, 85 Fed. 740, 29 C. C. A. 413; McDonough *v.* Williams, 77 Ark. 261, 92 S. W. 783, 8 L. R. A. (N. S.) 452; Schmidt *v.* Mesmer, 116 Cal. 267, 48 Pac. 54; Kelly *v.* Delaney, 136 App. Div. 604, 121 N. Y. Supp. 241; Minnesota Thresher Mfg. Co. *v.* Gruben, 6 Kans. App. 665, 50 Pac. 67; Brown *v.* South Joplin Lead & Zinc Mining Co., 231 Mo. 166, 132 S. W. 693; Summers *v.* Carpenter, 156 Ky. 332, 160 S. W. 1064.

[2] 1 Fonbl. Eq. B. 1, ch. 2, § 8, and note (*z*); Id. ch. 3, § 4, and notes; Jarvis *v.* Duke, 1 Vern. R. 19; Evans *v.* Bicknell, 6 Ves. 173, 182. Sometimes, as in the case of Broderick *v.* Broderick (1 P. Will. 239, 240), there may occur both a suppressio veri and a suggestio falsi.

[3] Cic. de Offic. Lib. 3, ch. 12, 13. See also Pothier De Vente, n. 242, 243.

[4] Marshall on Insur. B. 1, ch. 11, § 3, p. 473.

[5] Cic. de Offic. Lib. 3, ch. 13.

[6] Dr. Paley adopts Cicero's doctrine in its full extent as a duty of moral

justice generally, or at least in England and America, undertake the exercise of such a wide and difficult jurisdiction.[1] Thus it has been held by Lord Thurlow (and the case falls precisely within the definition by Cicero of undue concealment), that if A, knowing there is a mine in the land of B of which he knows B to be ignorant, should, concealing the fact, enter into a contract to purchase the estate of B for a price which the estate would be worth without considering the mine, the contract would be good; because A, as the buyer, is not obliged, from the nature of the contract, to make the discovery. In such cases the question is not whether an advantage has been taken which in point of morals is wrong, or which a man of delicacy would not have taken. But it is essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but also that there should be some obligation on the party to make the discovery. A Court of Equity will not correct or avoid a contract merely because a man of nice honor would not have entered into it. The case must fall within some definition of fraud, and the rule must be drawn so as not to affect the general transactions of mankind.[2] And this in effect is the conclusion to which Pothier arrived, after a good deal of struggle, in adjusting the duties arising from moral obligation with the necessary freedom and convenience of the common business of human life.[3]

§ 294. **Same.** — Mr. Chancellor Kent, in his learned Commentaries, after admitting the doctrine and authority of Lord Thurlow

and religious obligation. "To advance," says he, "a direct falsehood in recommendation of our wares by ascribing to them some quality which we know they have not, is dishonest. Now compare with this the designed concealment of some fault which we know they have. The motives and the effects of actions are the only points of comparison in which their moral quality can differ. But the motives in these two cases are the same, namely, to produce a higher price than we expect otherwise to obtain; the effect, that is, the prejudice to the buyer, is the same." Paley, Moral Philos. B. 3, ch. 7, p. 116. The question, What degree of concealment is unjust in a legal or moral sense? has been often mooted by distinguished jurists, as well upon the cases put by Cicero as in other cases. See Grotius, B. 2, ch. 12, § 9; Puffendorf, Law of Nature, B. 5, ch. 3, § 4; Pothier De Vente, n. 233 to 242; Id. n. 297, 298; 2 Kent, Comm. Lect. 39, pp. 485 to 491 (4th ed.), and notes; 1 Ruth. Inst. B. 1, ch. 13, §§ 11 to 19.

[1] See Pothier, Contract. de Vente, n. 234, 239, 242, 243; 1 Domat. B. 1, tit. 2, § 11; 2 Kent, Comm. Lect. 39, pp. 484, 485, 490, 491, and note (c) (4th ed.).

[2] Fox *v.* Mackreth, 2 Bro. Ch. R. 420; Turner *v.* Harvey, 1 Jacob, 178.

[3] Pothier De Vente, n. 234 to 242; Id. n. 295 to 299; ante, § 274.

in the case above stated, concludes with the following acute and practical reflections: "From this and other cases it would appear that human laws are not so perfect as the dictates of conscience, and the sphere of morality is more enlarged than the limits of civil jurisdiction. There are many duties that belong to the class of imperfect obligations, which are binding on conscience, but which human laws do not and cannot undertake directly to enforce. But when the aid of a Court of Equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway; and a purchase made with such a reservation of superior knowledge would be of too sharp a character to be aided and forwarded in its execution by the powers of the Court of Chancery. It is a rule in equity that all the material facts must be known to both parties, to render the agreement fair and just in all its parts; and it is against all the principles of equity, that one party, knowing a material ingredient in an agreement, should be permitted to suppress it and still call for a specific performance."[1] The importance and value of the distinction here pointed out will be made more apparent when we come to the consideration of the cases in which Courts of Equity refuse to decree a specific performance of contracts which yet they will not undertake to set aside.[2]

§ 295. **Undue Concealment Which Amounts to Fraud Defined.** — The true definition then of undue concealment which amounts to a fraud in the sense of a Court of Equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other; and which the latter has a right, not merely in foro conscientiæ, but juris et de jure, to know.[3] Mr. Chancellor Kent has avowed a broader doctrine. "As a general rule," says he, "each party is bound in every case to communicate to the other his knowledge of material facts provided he knows the other to be ignorant of them, and they be not open and naked,

[1] 2 Kent, Comm. Lect. 39, pp. 490, 491 (4th ed.); Parker *v.* Grant, 1 John. Ch. R. 630; Ellard *v.* Llandaff, 1 B. & Beatt. 250, 251.

[2] See 2 Story on Eq. Jur. §§ 934, 1055 to 1057.

[3] Fox *v.* Mackreth, 2 Bro. Ch. R. 420; 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (*n*). Mr. Justice Buller, in Pearson *v.* Morgan, 2 Bro. Ch. 390, said: "In cases where it [fraud] is a question of fact, it is always considered as a constructive fraud where the party knows the truth and conceals it; and such constructive fraud always makes the party liable." But in that case the party when applied to misrepresented the fact and concealed the truth; and the language must be limited to such circumstances. See Fox *v.* Mackreth, 2 Bro. Ch. R. 420; Turner *v.* Harvey, Jacob, R. 178.

or equally within the reach of his observation." [1] This doctrine in this latitude of expression may perhaps be thought not strictly maintainable, or in conformity with that which is promulgated by Courts of Law or Equity. For many most material facts may be unknown to one party and known to the other and not equally accessible, or at the moment within the reach of both; and yet contracts founded upon such ignorance on one side and knowledge on the other, may be completely obligatory.[2] Thus if one party has actual knowledge of an event or fact from private sources not then known to the other party from whom he purchases goods, and which knowledge would materially enhance the price of the goods, or change the intention of the party as to the sale, the contract of sale of the goods will nevertheless be valid.[3]

§ 296. **Same.** — Even Pothier himself, strongly as he inclines in all cases of this sort to the principles of sound morals, declares that the buyer cannot be heard to complain that the seller has not informed him of circumstances extrinsic of the thing sold, whatever may be the interest which he has to know them.[4] So that the doctrine of Mr. Chancellor Kent would seem to require some qualification by limiting it to cases where one party is under

[1] 2 Kent, Comm. Lect. 39, p. 482 (4th ed.), and note, ibid., where it is now qualified.

[2] The case of the unknown mine, already put, in the case of Fox *v.* Mackreth, 2 Bro. Ch. R. 420, seems to fall within this predicament; and in Turner *v.* Harvey, Jacob, R. 178, Lord Eldon said: "The court in many cases has been in the habit of saying that where parties deal for an estate they may put each other at arm's length; the purchaser may use his own knowledge, and is not bound to give the vendor information of the value of the property. As in the case that has been mentioned, if an estate is offered for sale, and I treat for it, knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it. He acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the application of the principle. If a single word is dropped which tends to mislead the vendor, that principle will not be allowed to operate." See also ante, §§ 219 and 220.

[3] See Laidlaw *v.* Organ, 15 U. S. 178, 4 L. Ed. 214; Fox *v.* Mackreth, 2 Bro. Ch. R. 20. In Laidlaw *v.* Organ, 15 U. S. 178, 4 L. Ed. 214, the question was put in this general form: "Whether the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor?" And on this question, so put, the court expressed an opinion, "that he was not bound to communicate it", without adding any qualification. But the court added: "It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties." Ante, § 221.

[4] Pothier De Vente, n. 242, 298, 299.

some obligation to communicate the facts, or where there is a peculiar known relation, trust, or confidence between them, which authorizes the other party to act upon the presumption that there is no concealment of any material fact. Thus if a vendor should sell an estate knowing that he had no title to it, or knowing that there were incumbrances on it of which the vendee was ignorant, the suppression of such a material fact, in respect to which the vendor must know that the very purchase implied a trust and confidence on the part of the vendee that no such defect existed, would clearly avoid the sale on the ground of fraud.[1]

§ 297. **Same.** — The like reason would apply to a case where the vendor should sell a house, situate in a distant town, which he knew at the time to be burnt down, and of which fact the vendee was ignorant; for it is impossible to suppose that the actual existence of the house should not be understood by the vendee, as implied on the part of the vendor, at the time of the bargain.[2] The same doctrine prevails in the civil law. "Sin autem venditor quidem sciebat domum esse exustam, emptor autem ignorabat, nullam venditionem stare." [3]

§ 298. **[The Existence of Actual Fraud Is Always a Question of Fact.** — The existence of actual fraud is always a question of fact, and may consist of any of the following acts committed by the party to the contract with the intent to deceive the other party thereto, or to induce him to enter into a contract, viz.: (1) the suggestion as a fact of that which is not true by one who does not believe it to be true; (2) the positive assertion in a manner not warranted by the opinion of the person making it of that which is not true, though he believes it to be true; (3) the suppression of that which is true by one having knowledge or belief of the fact; (4) any other act fitted to deceive. It will thus be seen that fraud may be predicated upon the suppression of the material facts of a transaction. It may be inferred from the circumstances of the transaction and the condition of the parties, and when a confidential relation exists, either in fact or in contemplation of law, it is the duty of the person in whom the confidence is reposed to fully and fairly disclose every material matter within his knowledge of which he knows the other party to be ignorant. Failing to do so, the party in whom the confidence reposes is guilty of

[1] Arnott *v.* Biscoe, 1 Ves. 95, 96; Pothier De Vente, n. 240; Pillage *v.* Armitage, 12 Ves. 78; ante, §§ 211, 212.

[2] See Pothier De Vente, n. 4; ante, § 211.

[3] Dig. Lib. 18, tit. 1, l. 57, § 1; ante, § 211.

fraud and is liable in damages for the resulting loss to the other party.[1]]

§ 299. [**If One Offers Information, He Should Speak the Truth.** — Although a party may keep absolute silence and violate no rule of law or equity, yet, if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to discover the whole truth. A partial statement, then, becomes a fraudulent concealment and even amounts to a false and fraudulent representation.[2] It does not necessarily follow that the seller must disclose every minute detail connected with or related to the matter in question, but it is usually the non-disclosure of those matters and facts that would control the decision of the buyer. When one buys a dwelling house, there is a presumption, nothing else appearing, that it is fit for occupancy, and if the seller causes the sewer to empty into a large pit, dug under the house, it is his duty to disclose this fact to his purchaser, and if he failed to state this fact, and the buyer took without knowledge of this condition, and he has since been unable to keep the property tenanted on account of the odors arising from the pit, the seller is liable. To sell such a house without disclosing the situation, when the purchaser would have no means of knowing the facts from the pit being covered up as it was, was to practise a fraud upon him.[3]]

§ 300. **Distinction between Intrinsic and Material Circumstances.** — These latter cases are founded upon circumstances intrinsic in the contract, and constituting its essence. And there is often a material distinction between circumstances which are intrinsic and form the very ingredients of the contract, and circumstances which are extrinsic and form no part of it, although they may create inducements to enter into it, or affect the value or price of the thing sold.[4] Intrinsic circumstances are properly

[1] Bacon *v.* Soule, 19 Cal. App. 428, 126 Pac. 62; Colton *v.* Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137; Oakes *v.* Mitter, 11 Colo. App. 374, 55 Pac. 193; Fenley *v.* Moody, 104 Ga. 790, 30 S. E. 1002; Hecht *v.* Metzler, 14 Utah, 408, 48 Pac. 37, 60 Am. St. Rep. 906; Kronfeld *v.* Missal, 87 Ct. 491, 89 Atl. 95; Clearwater *v.* Forrest, 72 Oreg. 312, 143 Pac. 998; Miller *v.* Wissert, 38 Okla. 808, 134 Pac. 62; Morgan *v.* Hodge, 145 Wis. 143, 129 N. W. 1083; Firestone *v.* Werner, 1 Ind. App. 293, 27 N. E. 623.

[2] Gidney *v.* Chapple, 26 Okla. 737, 110 Pac. 1099; Cherry *v.* Brizzolara, 89 Ark. 309, 116 S. W. 668.

[3] Weikel *v.* Stearns, 142 Ky. 513, 134 S. W. 908, 34 L. R. A. (N. S.) 1035.

[4] 2 Kent, Comm. Lect. 39, p. 482 (4th ed.); Pothier, n. 242, 243; Id. n. 203 to 210; 1 Domat, B. 1, tit. 2, § 8, art. 11; Id. § 11, art. 2, 3, 5, 15.

those which belong to the nature, character, condition, title, safety, use, or enjoyment, &c., of the subject-matter of the contract, such as natural or artificial defects in the subject-matter. Extrinsic circumstances are properly those which are accidentally connected with it, or rather bear upon it at the time of the contract, and may enhance or diminish its value or price, or operate as a motive to make or decline the contract; such as facts respecting the occurrence of peace or war, the rise or fall of markets, the character of the neighborhood,[1] the increase or diminution of duties, or the like circumstances.

§ 301. **Same.** — In regard to extrinsic as well as to intrinsic circumstances the Roman law seems to have adopted a very liberal doctrine, carrying out to a considerable extent the clear dictates of sound morals. It required the utmost good faith in all cases of contracts involving mutual interests; and it therefore not only prohibited the assertion of any falsehood, but also the suppression of any facts touching the subject-matter of the contract of which the other party was ignorant, and which he had an interest in knowing. In an especial manner it applied this doctrine to cases of sales, and required that the vendor and vendee should disclose, each to the other, every circumstance within his knowledge touching the thing sold, which either had an interest in knowing. The declaration in regard to the vendor (as we have seen) is, " Dolum malum a se abesse præstare venditor debet; qui non tantum in eo est, qui fallendi causa obscure loquitur; sed etiam, qui insidiose, obscure dissimulat; " and the same rule was applied to the vendee.[2] According to these principles the vendor was by the Roman law required not only not to conceal any defects of the thing sold, which were within his knowledge, and of which the other party was ignorant, whenever those defects might, as vices upon the implied warranty created by the sale, entitle him to a redhibition or a rescission of the contract, but also all other defects which the other party was interested in knowing.[3]

§ 302. **Doctrine of Caveat Emptor Applies.** — In regard to intrinsic circumstances the common law however has in many cases adopted a rule very different from that of the civil law, and especially in cases of sales of goods. In such cases the maxim " caveat emptor " is applied; and unless there be some misrepresentation

[1] Pothier De Vente, n. 236.

[2] Dig. Lib. 18, tit. 1, l. 43, § 2; Pothier De Vente, n. 233 to 241; Id. n. 296; ante, § 270; Laidlaw *v.* Organ, 15 U. S. 178, 4 L. Ed. 214; Pothier De Vente, cited in note *c*, p. 185.

[3] Pothier De Vente, n. 235.

or artifice to disguise the thing sold, or some warranty as to its character or quality, the vendee is understood to be bound by the sale, notwithstanding there may be intrinsic defects and vices in it, known to the vendor and unknown to the vendee, materially affecting its value. However questionable such a doctrine may be in its origin, in point of morals or general convenience (upon which many learned doubts have at various times been expressed), it is too firmly established to be now open to legal controversy;[1] and Courts of Equity as well as Courts of Law abstain from any interference with it.

§ 303. **Same.** — In regard to intrinsic circumstances generally Courts of Equity as well as Courts of Law seem to adopt the same maxim to a large extent, and relax its application only when there are circumstances of peculiar trust or confidence or relation between the parties.[2]

§ 304. **Silence as a Direct Affirmation.** — But there are cases of intrinsic circumstances in which Courts of Law and Courts of Equity both proceed upon a doctrine strictly analogous to that of the Roman law, and treat the concealment of them as a breach of trust and confidence justly reposed. Indeed in most cases of this sort the very silence of the party must import as much as a direct affirmation, and be deemed equivalent to it.[3]

§ 305. **Same.** — Thus if a party taking a guaranty from a surety conceals from him facts which go to increase his risk and suffers him to enter into the contract under false impressions as to the real state of the facts, such a concealment will amount to a fraud, because the party is bound to make the disclosure; and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist.[4] So if a party know-

[1] See 2 Kent, Comm. Lect. 39, pp. 478, 479 (4th ed.); 2 Black. Comm. 451.

[2] The case of Martin *v.* Morgan, 1 Brod. & Bing. R. 289, is a strong application of the doctrine of concealment, avoiding a payment. In that case there was no special confidence between the parties; but a post-dated check being paid to the holder by a banker, at a time when the latter had no funds of the drawer, and the holder knew that the drawer had become insolvent, of which the banker was ignorant, the amount was allowed to be recovered back on account of the concealment.

[3] See Martin *v.* Morgan, 1 Brod. & Bing. 289; Pidlock *v.* Bishop, 3 B. & Cressw. 605; 2 Kent, Comm. Lect. 39, p. 483; Id. 488, note (4th ed.); Smith *v.* Bank of Scotland, 1 Dow, Parl. R. 292, 294; Etting *v.* Bank of United States, 24 U. S. 59, 6 L. Ed. 419.

[4] Pidlock *v.* Bishop, 3 B. & Cressw. 605; post, § 512. See Carew's Case, 7 DeG. M. & G. 43. If a surety has by his conduct reasonably led a co-surety to believe that he is a principal, equity will not give him relief against the co-surety. Coleman *v.* Norman, 10 Heisk. 590.

ing himself to be cheated by his clerk, and concealing the fact, applies for security in such a manner and under such circumstances as holds the clerk out to others as one whom he considers as a trustworthy person, and another person becomes his security, acting under the impression that the clerk is so considered by his employer, the contract of suretyship will be void;[1] for the very silence under such circumstances becomes expressive of a trust and confidence held out to the public equivalent to an affirmation.[2]

§ 306. **Silence as Affecting Insurance Risk.** — Cases of insurance afford a ready illustration of the same doctrine. In such cases the underwriter necessarily reposes a trust and confidence in the insured as to all facts and circumstances affecting the risk which are peculiarly within his knowledge, and which are not of a public and general nature, or which the underwriter either knows or is bound to know.[3] Indeed most of the facts and circumstances which may affect the risk are generally within the knowledge of the insured only, and therefore the underwriter may be said emphatically to place trust and confidence in him as to all such matters. And hence the general principle is, that in all cases of insurance the insured is bound to communicate to the underwriter all facts and circumstances material to the risk, within his knowledge; and if they are withheld, whether the concealment be by design or by accident, it is equally fatal to the contract.[4]

§ 307. **Silence by One Whose Duty Is to Disclose Facts.** — The same principle applies in all cases where the party is under an obligation to make a disclosure and conceals material facts. Therefore if a release is obtained from a party in ignorance of

[1] Maltby's Case, cited 1 Dow, Parl. Cas. 294; Smith *v.* Bank of Scotland, 1 Dow, Parl. Cas. 272. See Etting *v.* Bank of United States, 24 U. S. 59, 6 L. Ed. 419.

[2] It is held that there is no such duty of disclosure towards a surety as there is towards one in a relation of confidence, though very little said or done may vitiate the surety's contract. Davies *v.* London Ins. Co., 8 Ch. D. 469. See post, § 448, and note.

[3] Marshall on Insur. B. 1, ch. 11, § 3.

[4] Ibid.; Lindenau *v.* Desborough, 8 B. & Cressw. 586, 592; 2 Kent, Comm. Lect. 39, p. 488, note (4th ed.). It has been remarked by Lord Eldon, that concealment is of different natures; an intentional concealment, and an actual concealment, where there may be an obligation not to conceal, even if a disclosure is not required. Walker *v.* Symonds, 3 Swanst. R. 62; Cottingham *v.* Ins. Co., 168 N. C. 259, 84 S. E. 274; Gardner *v.* North State Mut. Life Ins. Co., 163 N. C. 367, 79 S. E. 806; Ætna Life Ins. Co. *v.* Conway, 11 Ga. App. 557, 75 S. E. 915; Continental Ins. Co. *v.* Ford, 140 Ky. 406, 131 S. W. 189; Vaughan *v.* United States Fidelity & Guaranty Co., 137 App. Div. 623, 122 N. Y. Supp. 393.

material facts which it is the duty of the other side to disclose, the release will be held invalid.[1] So in cases of family agreements and compromises, if there is any concealment of material facts, the compromise will be held invalid upon the ground of mutual trust and confidence reposed between the parties.[2] And in like manner if a devisee, by concealing from the heir the fact that the will has not been duly executed, procures from the latter a release of his title, pretending that it will facilitate the raising of money to pay the testator's debts, the release will be void on account of the fraudulent concealment.[3]

§ 308. **Undue Concealment as Affecting Fiduciary Relationship.** — But by far the most comprehensive class of cases of undue concealment arises from some peculiar relation or fiduciary character between the parties. Among this class of cases are to be found those which arise from the relation of client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and cestui que trust, executors or administrators and creditors, legatees, or distributees, appointor and appointee under powers, and partners, and part-owners. In these and the like cases the law, in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost degree of good faith (uberrima fides) in all transactions between the parties. If there is any misrepresentation, or any concealment of a material fact, or any just suspicion of artifice or undue influence, Courts of Equity will interpose and pronounce the transaction void, and as far as possible restore the parties to their original rights.[4]

§ 309. **Concealment by an Attorney.** — This subject will naturally come in review in a subsequent page, when we come to consider what may be deemed the peculiar equities between parties in these predicaments, and the guards which are interposed by the law by way of prohibition upon their transactions.[5] It may suffice here, merely by way of illustration, to suggest a few applications of the doctrine. Thus for instance if an attorney employed

[1] Bowles *v.* Stewart, 1 Sch. & Lefr. 209, 224; Broderick *v.* Broderick, 1 P. Will. 240; ante, §§ 219, 220, 278, 279; Lee *v.* Pearce, 68 N. C. 76.

[2] Gordon *v.* Gordon, 3 Swanst. R. 399, 463, 467, 470, 473, 476, 477; Leonard *v.* Leonard, 2 B. & Beatt. R. 171, 180, 181, 182.

[3] Broderick *v.* Broderick, 1 P. Will. 239, 249.

[4] See Ormond *v.* Hutchinson, 13 Ves. 51; Beaumont *v.* Boultbee, 5 Ves. 485; Gartside *v.* Isherwood, 1 Bro. Ch. R. App. 558, 560, 561.

[5] Post, §§ 431 to 452.

by the party should designedly conceal from his client a material fact or principle of law by which he should gain an interest not intended by the client, it will be held a positive fraud, and he will be treated as a mere trustee for the benefit of his client and his representatives. And in a case of this sort it will not be permitted to the attorney to set up his ignorance of law, or his negligence, as a defence or an excuse. It has been justly remarked that it would be too dangerous to the interests of mankind to allow those who are bound to advise, and who ought to be able to give good and sound advice, to take advantage of their own professional ignorance to the prejudice of others.[1] Attorneys must, from the nature of the relation, be held bound to give all the information which they ought to give, and not be permitted to plead ignorance of that which they ought to know.[2]

§ 310. **Suppression of Facts by Trustee.** — In like manner a trustee cannot by the suppression of a fact entitle himself to a benefit to the prejudice of his cestui que trust. Thus a creditor of the husband concealing the fact cannot, by procuring himself by such concealment to be appointed the trustee of the wife, entitle himself to deduct his debt from the trust fund against the wife or her representatives, or even against the person in whose favor and at whose instance he has made the suppression.[3] So if a partner who exclusively superintends the business and accounts of the concern should by concealment of the true state of the accounts and business purchase the share of the other partner for an inadequate price by means of such concealment, the purchase will be held void.[4]

§ 311. [**Duty of Partner to Disclose Information as to Partnership Business.** — Each partner occupies a dual relation; he is a trustee in respect to his dealings with the firm assets, and a cestui que trust in respect to the dealings of his copartner with the assets. Out of this dual relation arises the reciprocal duty on the part of all the partners to refrain from all concealment in their transactions affecting the community interests; and, if any one or more

[1] See Lord Eldon's Judgment in the House of Lords, in Bulkley *v.* Wilford, 2 Clark & Finnell. R. 102, 177 to 181, 183; post, § 434; Weil *v.* Fineran, 78 Ark. 87, 93 S. W. 568; In re Egan, 22 S. Dak. 355, 117 N. W. 874; Cooper *v.* Keys & Bell, 127 Tenn. 142, 153 S. W. 844; In re Flannery, 150 App. Div. 369, 135 N. Y. Supp. 612.

[2] Citizens Loan Fund & Savings Assn. *v.* Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320.

[3] Dalbiac *v.* Dalbiac, 16 Ves. 115, 124; Neville *v.* Wilkinson, 1 Bro. Ch. R. 543; post, § 446.

[4] Maddeford *v.* Austwick, 1 Sim. R. 89. See Smith In re Hay, 6 Madd. R. 2.

of them, by fraud or concealment, derive a benefit to the exclusion of his associates, equity will treat the offender as a trustee for the firm, and compel him to account to it.[1]]

§ 312. **Improper Advantages Taken over Persons of Infirmity, Age, Lunacy, and the Like.** — Having taken this general notice of cases of fraud arising from the misrepresentation or concealment of material facts, we may now pass to the consideration of some others which in a moral as well as in a legal view seem to fall under the same predicament, — that of being deemed cases of actual intentional fraud as contradistinguished from constructive or legal fraud. In this class may properly be included all cases of unconscientious advantages in bargains obtained by imposition, circumvention, surprise, and undue influence over persons in general, and in an especial manner all unconscientious advantages, or bargains obtained over persons disabled by weakness, infirmity, age, lunacy, idiocy, drunkenness, coverture, or other incapacity, from taking due care of or protecting their own rights and interests.[2]

§ 313. **Mental Capacity Sufficient to Execute Contract.** — The general theory of the law in regard to acts done and contracts made by parties affecting their rights and interests is, that in all such cases there must be a free and full consent to bind the parties. Consent is an act of reason accompanied with deliberation, the mind weighing as in a balance the good and evil on each side.[3] And therefore it has been well remarked by an able commentator upon the law of nature and nations, that every true consent supposes three things: first a physical power, secondly a moral power, and thirdly a serious and free use of them.[4]

[1] Krebs *v.* Blankenship, 73 W. Va. 539, 80 S. E. 948; McKinley *v.* Lynch, 58 W. Va. 44, 51 S. E. 4; Wiggins *v.* Markham, 131 Iowa 102, 108 N. W. 113; Ledford *v.* Emerson, 143 N. C. 527, 55 S. E. 969; 10 L. R. A. (N. S.) 362; Edwards *v.* Johnson, 90 S. C. 90, 72 S. E. 638; Whitney *v.* Dewey, 158 Fed. 385, 86 C. C. A. 21; Yost *v.* Critcher, 112 Va. 870, 72 S. E. 594; McPherson *v.* Swift, 22 S. Dak. 165, 116 N. W. 76; Llewelyn *v.* Levi, 157 Cal. 31, 106 Pac. 219; Dorr *v.* Dewing, 36 W. Va. 466, 15 S. E. 93; Thorne *v.* Brown, 63 W. Va. 603, 60 S. E. 614; White *v.* Jouett, 147 Ky. 197, 144 S. W. 55; Miller *v.* Ferguson, 107 Va. 249, 57 S. E. 649, 122 Am. St. Rep. 840, 13 Ann. Cas. 138.

[2] See Gartside *v.* Isherwood, 1 Brown, Ch. R. 358, 360, 361. See Connelly *v.* Fisher, 3 Tenn. Ch. 382; Simonton *v.* Bacon, 49 Miss. 582; Cadwallader *v.* West, 48 Mo. 483; Joest *v.* Williams, 42 Ind. 565; Musselman *v.* Cravens, 47 Ind. 1; Reinskoff *v.* Rogge, 37 Ind. 207; Killian *v.* Badgett, 27 Ark. 166; Phelan *v.* Gardner, 43 Cal. 306.

[3] 1 Fonbl. Eq. B. 1, ch. 2, § 3; Grotius De Jure Belli, Lib. 2, ch. 11, § 5.

[4] Puffendorf, Law of Nat. and Nations, Barbeyrac's note, 1, B. 3, ch. 6, § 3, cited 1 Fonbl. Eq. B. 1, ch. 2, § 1, note (*a*).

And Grotius has added that what is not done with a deliberate mind does not come under the class of perfect obligations.[1] And hence it is that if consent is obtained by meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind. For although the law will not generally examine into the wisdom or prudence of men in disposing of their property or in binding themselves by contracts or by other acts, yet it will not suffer them to be entrapped by the fraudulent contrivances, or cunning or deceitful management, of those who purposely mislead them.[2]

§ 314. **Contracts of Idiots and Persons Non Compos Mentis Are Generally Invalid.** — It is upon this general ground, that there is a want of rational and deliberate consent, that the contracts and other acts of idiots, lunatics, and other persons non compotes mentis, are generally deemed to be invalid in Courts of Equity. Grotius has with great propriety insisted that it is a part of the law of nature; for, says he, the use of reason is the first requisite to constitute the obligation of a promise, which idiots, madmen, and infants are consequently incapable of making. The civil law has emphatically adopted the same principle.[3]

§ 315. **Same.** — Yet clear as this doctrine appears in common sense and common justice, it has met with a sturdy opposition from the common lawyers, who have insisted (as has been justly remarked), in defiance of natural justice and the universal practice of all the civilized nations in the world,[4] that according to a known maxim of the common law, no man of full age should be admitted to disable or stultify himself; and that a Court of Equity could not relieve against a maxim of the common law.[5]

[1] Grotius De Jure Belli et Pacis, Lib. 2, ch. 11, § 4.

[2] See Fonbl. Eq. B. 1, ch. 2, § 3, notes (*r*), (*u*); Id. § 8.

[3] De Jure Belli, Grotius, B. 2, ch. 11, § 5. See Waring *v.* Waring, 12 Jur. 947; s. c. 6 Moore, P. C. 341; Creagh *v.* Blood, 2 Jones & L. 509; Davis Machine Co. *v.* Barnard, 43 Mich. 379; Rogers *v.* Blackwell, 49 Mich. 192. The last case declares that the deed of an insane person is void, and not merely voidable. But as to that see Carrier *v.* Sears, 4 Allen, 336; Allis *v.* Billings, 6 Met. 415; Arnold *v.* Richmond Iron Works, 1 Gray, 434; 2 Kent, 451; Ashcraft *v.* De Armond, 44 Iowa, 299; Riggan *v.* Green, 80 N. C. 236.

[4] 1 Fonbl. Eq. B. 1, ch. 2, § 1.

[5] See Sugden on Powers, ch. 7, § 1. The best defence of the maxim which I have seen is in 3 Bac. Abridg. Idiots and Lunatics, F., where it is put upon the ground of public policy to favor alienations. Yet it seems wholly unsatisfactory in principle. Mr. Evans has exposed the absurdity of the maxim in a few striking remarks, in his note to Pothier on Oblig. vol. 2, App. No. 3, p. 28.

And a distinction has been taken between the party himself and his privies in blood (heirs) and privies in representation (executors and administrators). For it has not been doubted that privies in blood and privies in representation might after the death of the insane party avoid his contract or other acts upon the ground that he was non compos mentis.[1] How so absurd and mischievous a maxim could have found its way into any system of jurisprudence professing to act upon civilized beings, is a matter of wonder and humiliation.[2] There have been many struggles against it by eminent lawyers in all ages of the common law; but it is perhaps somewhat difficult to resist the authorities which assert its establishment in the fundamentals of the common law,[3] a circumstance which may well abate the boast, so often and so rashly made, that the common law is the perfection of human reason. Even the Courts of Equity in England have been so far regardful of the maxim that they have hesitated to retain a bill to examine the point of lunacy,[4] although when a

[1] Co. Litt. 247, a. b.; Beverley's Case, 4 Co. R. 123, 124; 2 Black. Comm. 291, 292; 1 Fonbl. Eq. B. 1, ch. 2, § 1, and note (h); Shelford on Lunatics, ch. 6, § 2, pp. 255, 263; Newland on Contracts, ch. 1, p. 19; Sugden on Powers, ch. 7, § 1.

[2] See Evans's note, 2 Pothier on Oblig. App. No. 3, p. 28.

[3] 3 Black. Comm. 291, 292; 1 Fonbl. Eq. B. 1, ch. 2, § 1, and note (d); Co. Litt. 247; Beverley's Case, 4 Co. R. 123; Yates v. Boen, 2 Str. R. 1104. See Shelford on Lunatics, ch. 6, § 2, p. 263; ch. 9, § 2, p. 407, &c.; Baxter v. Portsmouth, 7 Dowl. & Ryl. 618; s. c. 5 Barn. & Cressw. 170; Brown v. Joddrell, 3 Carr. & Payne, 30; Newland on Contracts, ch. 1, pp. 15 to 21. The subject is a good deal discussed by Mr. Justice Blackstone in his Commentaries, who does not attempt to disguise its gross injustice. (2 Black. Comm. 291, 292.) It is also fully discussed by Mr. Fonblanque, in his learned notes (1 Fonbl. Eq. B. 1, ch. 2, § 1, and notes (a) to (k); and by Lord Coke in his Commentary on Littleton (Co. Litt. 247, a. and b.), who adheres firmly to it (as we should expect) as a maxim of the Common Law. See also Beverley's Case (4 Co. R. 123, and Shelford on Lunatics, ch. 6, §§ 1, 2, pp. 242, 255; ch. 9, § 2, p. 407, &c.). In America this maxim has not been of universal adoption in the State Courts, if indeed it has ever been recognized as binding in any of the Courts of Common Law. See Somes v. Skinner, 16 Mass. R. 348; Webster v. Woodford, 3 Day, R. 90, 100; Mitchell v. Kingman, 5 Pick. R. 431. In modern times the English Courts of Law seem to be disposed, as far as possible, to escape from the maxim. Baxter v. Earl of Portsmouth, 5 Barn. & Cressw. 170; s. c. 7 Dowl. & Ryl. 614; Ball v. Mannin, 3 Bligh, R. (new series) 1. And even in England, although the party himself could not set aside his own act, yet the king, as having the general custody of idiots and lunatics, might, by his attorney-general, on a bill, set aside the same acts. See 1 Fonbl. Eq. B. 1, ch. 2, § 2; Co. Litt. 247; Newland on Contracts, ch. 1, pp. 15 to 21; Buller, N. Prius, 172.

[4] 1 Fonbl. Eq. B. 1, ch. 2, § 1, note (e); cites Tothill, R. 130. See also 1 Eq. Abridg. 278, B. 1.

party has been found a lunatic under an inquisition they will entertain a bill by his committee or guardian to avoid all his acts from the time at which he has been found non compos.[1] And formerly they were so scrupulous in adhering to the maxim, that cases have occurred in which a lunatic was not allowed to be a party to a bill to be relieved against an act done during his lunacy.[2] But this rule is now with great propriety abandoned.[3]

§ 316. **Civil Liability of Lunatic.** — The true and only rational exposition of the maxim (which has been adopted by Courts of Equity) is, that the maxim is to be understood of acts done by the lunatic in prejudice of others, as to which he shall not be permitted to excuse himself from civil responsibility on pretence of lunacy; and it is not to be understood of acts done to the prejudice of himself, for this can have no foundation in reason and natural justice.[4]

§ 317. **Contracts of Idiots, Lunatics, and Persons Non Compos Mentis Set Aside for Fraud.** — The ground upon which Courts

[1] 1 Fonbl. Eq. B. 1, ch. 2, § 1, note (*e*); 1 Eq. Abridg. 278, B. 2; Addison *v.* Dawson, 2 Vern. 678; s. c. 1 Eq. Abridg. B. 4; Newland on Contracts, ch. 1, pp. 17 to 21.

[2] Attorney-General *v.* Parkhurst, 1 Cas. Ch. 112. See also Attorney-General *v.* Woolrich, 1 Cas. Ch. 153. Some acts of a lunatic are, by the Common Law, deemed voidable, and some void. Where the estate passes by his own hand, as by livery of seisin, there it is voidable; where by a deed, and the conveyance does not pass by his own hand, it is void. For example a surrender by deed of a non compos tenant for life will not bar a contingent remainder. 1 Fonbl. Eq. B. 1, ch. 2, § 1; 1 Eq. Abridg. 278, B. 3; Thompson *v.* Leach, 3 Mod. R. 301; 1 Ld. Ray. 313; 2 Salk. 427; Shower, Parl. Cas. 150; 3 Lev. R. 284. See Shelford on Lunatics, ch. 6, § 2, p. 255, &c.

[3] See Ridler *v.* Ridler, 1 Eq. Abridg. 278, 279, B. 5; Addison *v.* Dawson, 2 Vern. R. 678; Clerk *v.* Clerk, 2 Vern. R. 412; Shelford on Lunatics, ch. 10, § 2, p. 415, &c.; Newland on Contracts, ch. 1, p. 17 to 19; 1 Fonbl. Eq. B. 1, ch. 2, § 2, and note (*n*).

[4] 1 Fonbl. Eq. B. 1, ch. 2, § 2; Ridler *v.* Ridler, 1 Eq. Abridg. 279, B. 5; 3 Bac. Abridg. Idiots and Lunatics, C. F. In discussing the subject of idiots and lunatics and persons non compotes mentis in this place it is important to state that it is not intended to examine the nature and history of the jurisdiction of the Court of Chancery, or rather of the Chancellor personally, as the special delegate of the Crown over idiots, lunatics, and other persons non compotes generally. That is a subject of a widely different character from the one now before us; for here the Court of Chancery acts upon its general principles in setting aside the contracts and acts of such persons upon the ground of fraud, circumvention, imposition, and undue advantage taken of them. The jurisdiction of the Crown, as parens patriæ, to take care of idiots, lunatics, and other persons non compotes, is given at considerable length in Jeremy on Equity Jurisd. B. 1, ch. 4, p. 210; 2 Madd. Ch. Pr. ch. 4, p. 565; 2 Fonbl. Eq. Pt. 2, ch. 2, § 1, and note (*a*); 1 Fonbl. Eq. B. 1, ch. 2, § 2, and note (*e*). See also Beverley's case, 4 Co. R. 124; 2 Story on Equity Jurisp. §§ 1785 to 1788.

of Equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics, and otherwise non compotes mentis, is fraud. Such persons being incapable in point of capacity to enter into any valid contract or to do any valid act, every person dealing with them, knowing their incapacity, is deemed to perpetrate a meditated fraud upon them and their rights. And surely if there be a single case in which all the ingredients proper to constitute a genuine fraud are to be found, it must be a case where these unfortunate persons are the victims of the cunning, the avarice, and corrupt influence of those who would make an inhuman profit from their calamities. Even Courts of Law now lend an indulgent ear to cases of defence against contracts of this nature, and if the fraud is made out will declare them invalid.[1]

§ 318. **Contracts with Person Non Compos Mentis Should Be Evidenced by Utmost Good Faith.** — But Courts of Equity deal with the subject upon the most enlightened principles, and watch with the most jealous care every attempt to deal with persons non compotes mentis. Wherever from the nature of the transaction there is not evidence of entire good faith (uberrimæ fidei), or the contract or other act is not seen to be just in itself or for the benefit of these persons, Courts of Equity will set it aside or make it subservient to their just rights and interests. Where indeed a contract is entered into with good faith and is for the benefit of such persons, such as for necessaries, there Courts of Equity will uphold it as well as Courts of Law.[2] And so if a purchase is made in good faith without any knowledge of the incapacity, and no advantage has been taken of the party, Courts of Equity will not interfere to set aside the contract if injustice will thereby be done to the other side, and the parties cannot be placed in statu quo, or in the state in which they were before the purchase.[3]

[1] Yates *v.* Boen, 2 Str. R. 1104; Baxter *v.* Earl of Portsmouth, 5 B. & Cressw. 170; s. c. 7 Dowl. & Ryland, 618; Faulder *v.* Silk, 3 Camp. R. 126; Brown *v.* Joddrell, 1 Mood. & Malk. 105; s. c. 3 Carr. & Payne, 30; Levy *v.* Barker, 1 Mood. & Malk. 106, and note (*b*); Hanley *v.* National Loan & Investment Co., 44 W. Va. 450, 29 S. E. 1002; Anderson *v.* Hicks, 150 App. Div. 289, 134 N. Y. Supp. 1018; Ralph *v.* Taylor, 33 R. I. 503, 82 Atl. 279; Church *v.* Rosenstein, 85 Ct. 279, 82 Atl. 568; Rooney *v.* People's Trust Co., 61 Misc. Rep. 159, 114 N. Y. Supp. 612; Ratliff *v.* Baltzer's Admr., 13 Idaho, 152, 89 Pac. 71.

[2] Baxter *v.* Earl of Portsmouth, 5 B. & Cressw. 170; s. c. 7 Dow. & Ryl. R. 614, 618. See also ex parte Hall, 7 Ves. 264.

[3] Niell *v.* Morley, 9 Ves. 478, 482; Sergeson *v.* Sealy, 2 Atk. 412;

§ 319. [**Estate of Incompetent Is Liable for His Necessaries.** — An insane person is not competent to enter into a valid contract on his own behalf, but from his dependent condition, and the extra care and attention that his unfortunate disease demands, the law implies a contract on his part and makes his estate liable for the reasonable value of actual necessaries furnished to him. The wife of an incompetent drunkard may engage board for her husband, and his estate would be bound; and he is also liable for board for his family. They should be provided for out of his estate as he would provide for them if he were sane.[1]]

§ 320. [**Parties Should Be Placed in Statu Quo before Voidable Contract Is Set Aside.** — When a party deals with a man whom he knows to be of weak intellect, and the good faith of such dealings are challenged, the burden of proof is with the party who has dealt with the weak-minded person to show that no undue advantage was taken. The law throws its protecting shield around mentally incompetent persons, from whatever cause, and while in some cases it is permitted them to make contracts so long as they are not under the restraint of guardianship, these are binding only so far as they rest upon adequate considerations, and are free from fraud, or overreaching. Distinctions have been recognized between cases of insanity and mere weakness of intellect or imbecility. Contracts made with insane persons have pretty generally been held void, and the latter voidable merely. Where the contracts have been executed by one party, and are executory upon the part of the imbecile, they can only be set aside at his instance by his doing equity. The maxim applies here, that he who seeks equity must do equity.[2] And where one has loaned his money, and taken a mortgage securing its repayment, from a man who is now mentally incompetent, but this fact was not known to the lender and he had no evidence of or reason to believe that the borrower was imbecile, the contract

Riggan *v.* Green, 80 N. C. 236; Ashcraft *v.* De Armond, 44 Iowa, 229, and cases cited in note to § 223, to the effect that the contracts of insane persons are only voidable at most. But see Rogers *v.* Blackwell, 49 Mich. 192. As to the effect of lapse of time see Stedman *v.* Hart, Kay, 607; Edson *v.* Munsell, 10 Allen, 557; Allore *v.* Jewell, 94 U. S. 506, 24 L. Ed. 260.

[1] Hartley *v.* Hartley's Estate, 173 Mo. App. 18, 155 S. W. 1099; In re Stiles, 64 Misc. Rep. 658, 120 N. Y. Supp. 714; In re Tarr's Estate, 10 Pa. Super. Ct. 554; Borum *v.* Bell, 132 Ala. 85, 31 So. 454; Ratliff *v.* Baltzer's Admr., 13 Idaho, 152, 89 Pac. 71.

[2] Gates *v.* Cornett, 72 Mich. 420, 40 N. W. 740; Merry *v.* Bergfeld, 264 Ill. 84, 105 N. E. 758; West *v.* Railroad, 151 N. C. 231, 65 S. E. 979.

may be set aside, but where the proceeds of the moneys furnished by the lender are still intact, he must be placed in statu quo.[1]]

§ 321. [**Return of Consideration.** — The contracts of an infant are voidable, as a general rule, and he may ratify or disaffirm the bargain within a reasonable time after attaining his majority, but the maxim that "he who seeks equity must do equity", fully applies to the advantage of the opposite party. If the infant sees fit to disaffirm his contract, he must return the consideration received by him, if he has it, as a condition precedent to the maintenance of his action. Otherwise, an untold hardship would be imposed upon the other party to the contract, and to allow an infant to trade and either profit or lose at the bargain, and then upon attaining his majority disaffirm the entire transaction and keep the spoils of the venture, would not only be a harsh and inequitable practice, but it would put a premium upon dishonesty and the wickedness of the infant. Courts of Equity are established for the protection of the rights of the minor from the possible artful contrivances of the matured trader; but, at the same time, the forum that helps him to preserve and keep intact his heritage will not allow him to practise a fraud upon his neighbor, and then reap the benefits of the trade. If the consideration received has been wasted or lost by him, so that no part of it nor the proceeds of it are available, of course he would have nothing to return. But if he has any part of the consideration, or the proceeds of it, he ought first to offer to return what he has before attempting to disaffirm his contract.

The same is true of the contracts of an insane person. When his estate has been enriched by the consideration paid him by the other party, who at the time was without notice as to any mental deficiency, and the subject-matter and terms of the agreement were such that an ordinary mind would understand, and the transaction was conducted in good faith, equity will not suffer the one party to thus supplement his estate and enhance the value of his property, and then disaffirm the contract and plead a forfeiture of what the other party has paid, unless the imbecile returns so much of the consideration as remains, or satisfactorily accounts for its waste, dissipation, or loss.[2] Where a minor took

[1] Parker *v.* Marco, 76 Fed. 510; D. M. Smith's Committee *v.* Forsyth, 28 Ky. L. Rep. 1034, 90 S. W. 1075.

[2] Millsops *v.* Estes, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496; Scott *v.* Battle, 85 N. C. 184; Hodge *v.* Powell, 96 N. C. 64, 2 S. E. 182; Roberts *v.* Roberts, 61 Ohio St. 96, 55 N. E. 411; Succession of Sallier, 115 La. 97, 38 So. 929; Evants *v.* Taylor, 18 N. Mex.

a deed for a lot and entered into a contract with a builder, the grantor, to erect a house on the premises, and the minor at the same time executed a mortgage upon the property for money with which to build the house, he cannot, upon arriving of full age, affirm his contract in which he received the deed, and disaffirm his contract in which he executed the mortgage upon the property.[1]

Courts of equity have gone to a considerable extent in the direction of requiring minors, who seek to avoid their contracts on the ground of infancy, to make restitution of what they have received from those who were in ignorance of the disability at the time the contract was made, but in every one of these cases it was made to appear that the infant still retained in his possession, or under his control, that which he had received, or some part of it. If he has disposed of it, spent or even squandered the money or other consideration received, this right to disaffirm has no limit or effect. It makes no difference that the contract was entered into by the infant through his own fraud, or that the money obtained by him on his mortgage has been spent on his own mortgaged property. This refers to the infant's power to enter into a valid contract, rather than to his civil liability for his own fraud.[2]]

371, 137 Pac. 583; Merry *v.* Bergfeld, 264 Ill. 84, 105 N. E. 758; Bowen *v.* Marston, 134 La. 298, 64 So. 118; Foy *v.* Salzano, 152 App. Div. 47, 136 N. Y. Supp. 699; Ronan *v.* Bluhm, 173 Ill. 277, 50 N. E. 694; Eldredge *v.* Palmer, 185 Ill. 618, 57 N. E. 770, 76 Am. St. Rep. 59; Lacy *v.* Pixler, 120 Mo. 383, 25 S. W. 206; Ætna Life Ins. Co. *v.* Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; Bunn *v.* Postell, 107 Ga. 490, 33 S. E. 707; Scott *v.* Hay, 90 Minn. 304, 97 N. W. 106; Haines *v.* Scott, 35 App. Div. 515, 54 N. Y. Supp. 844; Welton *v.* Malcolm, 264 Ill. 389, 106 N. E. 211; Ipock *v.* Railroad, 158 N. C. 445, 74 S. E. 352; National Metal Edge Box Co. *v.* Vanderveer, 85 Vt. 488, 82 Atl. 837; Jordan *v.* Kirkpatrick, 159 Ill. App. 231, 95 N. E. 1079; Willis *v.* Mason, 140 Ky. 88, 130 S. W. 964; Covault *v.* Nevitt, 157 Wis. 113, 146 N. W. 1115; Smith *v.* Ryan, 191 N. Y. 452, 84 N. E. 402; Merritt *v.* Merritt, 27 App. Div. 208, 50 N. Y. Supp. 604; Hughes *v.* Murphy, 5 Ga. App. 328, 63 S. E. 231; Alfrey *v.* Colbert, 168 Fed. 231; Webb *v.* Reagin, 160 Ala. 537, 49 So. 580; Beauchamp *v.* Bertig, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; Putnal *v.* Walker, 61 Fla. 720, 55 So. 844, 36 L. R. A. (N. S.) 33.

If suit is brought upon the original cause of action, and the consideration received is not returned, the amount will be deducted from any verdict won. Hayes *v.* Southern Ry. Co., 143 N. C. 125, 55 S. E. 437.

[1] Ready *v.* Pinkham, 181 Mass. 351, 63 N. E. 887; Smith *v.* Cole, 148 Ky. 138, 146 S. W. 30; Benson *v.* Tucker, 212 Mass. 60, 98 N. E. 589, 41. L. R. A. (N. S.) 1102.

[2] New York Building, Loan & Banking Co. *v.* Fisher, 23 App. Div. 363, 48 N. Y. Supp. 152; Kane *v.* Kane, 13 App. Div. 544, 43 N. Y. Supp. 662; Allen *v.* Lardner, 78 Hun, 603, 29 N. Y. Supp. 213.

§ 322. [**Duty of Other Party to Receive the Returned Consideration.** — If the infant becomes dissatisfied with his bargain and seeks to disaffirm upon reaching full age he may have the contract cancelled upon his return of the condition, and when he offers to return the consideration to the other party to the contract, the duty to restore then becomes the right to restore and the other party has no right to refuse to receive what he has paid the infant. While the contracts of an infant are usually voidable at his option upon reaching his maturity, the refusal of the other party to the contract to receive the consideration which he has paid cannot thereby convert an otherwise voidable contract into a valid one.[1]]

§ 323. **Fine Suffered by Person non Compos Will Be Set Aside for Fraud.** — And not only may contracts and deeds of a person non compos be thus set aside for fraud, but other instruments and acts of the most solemn nature, even of record, such as fines levied and recoveries suffered by such a person, may in effect be overthrown in equity, although held binding at law.[2] For although Courts of Equity will not venture to declare such fines and recoveries utterly void and vacate them, yet they will decree a reconveyance of the estate to the party prejudiced, and hold the conusee of the fine, and the demandant in the recovery, to be a trustee for the same party.[3]

§ 324. **Classes of Persons Denominated "Non Compos Mentis."** — Lord Coke has enumerated four different classes of persons who are deemed in law to be non compotes mentis. The first is an idiot or fool natural; the second is he who was of good and sound memory, and by the visitation of God has lost it; the third is a lunatic, "lunaticus, qui gaudet lucidis intervallis",

[1] Evants *v.* Taylor, 18 N. Mex. 371, 137 Pac. 583.

[2] See Mansfield's Case, 12 Co. R. 123, 124. But at law the king might avoid the fine or recovery by a scire facias during the lifetime of the idiot. 1 Fonbl. Eq. B. 1, ch. 2, § 2; Beverley's Case, 4 Co. R. 124, 126 *b*; Tourson's Case, 8 Co. R. 338; 3 Bac. Abridg. Idiots and Lunatics, C. and F.

[3] See Addison *v.* Dawson, 2 Vern. 678; Welby *v.* Welby, Tothill, R. 164; Wright *v.* Booth, Tothill, R. 166; Shelford on Lunatics, ch. 6, § 1, p. 252; 1 Fonbl. Eq. B. 1, ch. 2, § 2, and note (*k*); Wilkinson *v.* Brayfield, 2 Vern. 307. See Clark *v.* Ward, Preced. Chan. 150; Ferres *v.* Ferres, 2 Eq. Abridg. 695; 3 Bac. Abridg. Idiots and Lunatics, F. What circumstances afford proofs or presumptions of insanity are not fit topics for discussion in this place, but more properly belong to a treatise on Medical Jurisprudence. There are many reported cases in which the subject is discussed with great ability and acuteness. See Shelford on Lunatics, ch. 2, pp. 35 to 74; Attorney-Gen. *v.* Parnther, 3 Bro. Ch. R. 441; 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*x*). See also Mr. Evans's note to 2 Pothier on Oblig. No. 3, p. 25.

and sometimes is of good and sound memory, and sometimes non compos mentis; and the fourth is a non compos mentis by his own act, as a drunkard.[1] In respect to the last class of persons, although it is regularly true that drunkenness doth not extenuate any act or offence committed by any person against the laws, but it rather aggravates it, and he shall gain no privilege thereby,[2] and although in strictness of law the drunkard has less ground to avoid his own acts and contracts than any other non compos mentis,[3] yet Courts of Equity will relieve against acts done and contracts made by him while under this temporary insanity, where they are procured by the fraud or imposition of the other party.[4] For whatever may be the demerit of the drunkard himself, the other party has not the slightest ground to claim the protection of Courts of Equity against his own grossly immoral and fraudulent conduct.[5]

§ 325. **Degree of Mental Incapacity in Drunken Person.** — But to set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case there can in no just sense be said to be a serious and deliberate consent on his part, and without this no contract or other act can or ought to be binding by the law of nature.[6] If there be not that degree of

[1] Beverley's case, 4 Co. R. 124; Co. Litt. 247, a.

[2] Ibid.; 4 Black. Comm. 25; 3 Bac. Abridg. Idiots and Lunatics, A.

[3] 3 Bac. Abridg. Idiots and Lunatics, A.

[4] 1 Fonbl. Eq. B. 1, ch. 2, § 3; Johnson *v.* Medlicott, cited 3 P. Will. 130 note (A); O'Conner *v.* Rempt, 29 N. J. Eq. 156; Storrs *v.* Scongale, 48 Mich. 387; Lavette *v.* Sage, 29 Conn. 577.

[5] See Cook *v.* Clayworth, 18 Ves. 12. The maxim has sometimes been laid down, "Qui peccat ebrius, luat sobrius." Hendricks *v.* Hopkins, Cary, R. 93. But even at law drunkenness is a good defence against a deed, executed by a party when so drunk that he does not know what he is doing. Cole *v.* Robins, Bull. N. P. 172. See 2 Shelford on Lunatics, ch. 7, p. 276; Id. 304.

[6] 1 Fonbl. Eq. B. 1, ch. 2, § 3; Cook *v.* Clayworth, 18 Ves. 12; Reynolds *v.* Waller, 1 Wash. R. 207; Rutherford *v.* Ruff, 4 Desaus. R. 350; Wade *v.* Colvert, 2 Rep. Const. Ct. 27; Peyton *v.* Rawlins, 1 Hayw. 77. Sir Joseph Jekyll is said to have intimated an opinion that the having been in drink is not any reason to relieve a man against any deed or agreement gained from him to encourage drunkenness. Secus, if through the management or contrivance of him who gained the deed, &c., the party from whom the deed has been gained was drawn in to drink. Johnson *v.* Medlicott, 1734, cited 3 P. Will. 130, note (A). But this distinction seems wholly unsatisfactory; for in each case it is the fraud of the party who obtained the deed or agreement which constitutes the ground of declaring it invalid; and the fraud

excessive drunkenness, then Courts of Equity will not interfere at all unless there has been some contrivance or management to draw the party into drink,[1] or some unfair advantage taken of his intoxication to obtain an unreasonable bargain or benefit from him.[2] For in general Courts of Equity, as a matter of public policy, do not incline on the one hand to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and on the other hand they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or some imposition practised.[3]

§ 326. **Contracts of Intoxicated Person, Fairly Entered into, Will Be Sustained.** — It is upon this special ground that Courts of Equity have acted in cases where a broader principle has sometimes been supposed to have been upheld. They have indeed indirectly, by refusing relief, sustained agreements which have been fairly entered into although the party was intoxicated at the time.[4] And especially they have refused relief where the agreement was to settle a family dispute and was in itself reasonable.[5] But they have not gone the length of giving a positive sanction to such agreements, so entered into, by enforcing them against the party, or in any other manner than by refusing to interfere in his favor against them.[6]

§ 327. **Contracts Made by Intoxicated Person are Generally Void.** — In regard to drunkenness the writers upon natural and

is in morals and common sense the same, whether the drunken party has been enticed into the drunkenness, or becomes the victim of the cunning of another, who takes advantage of his mental incapacity. The case of Cook *v.* Clayworth (18 Ves. 12) requires no such distinction, where the circumstances indicate fraud. In this last case Sir William Grant said: "As to that extreme state of intoxication that deprives a man of his reason, I apprehend that even at law it would invalidate a deed obtained from him while in that condition." See also Cole *v.* Robins, Buller, N. P. 172; Wigglesworth *v.* Steers, 1 Hen. & Munf. 70.

[1] O'Conner *v.* Rempt, 29 N. J. Eq. 156.

[2] Cook *v.* Clayworth, 18 Ves. 12; Say *v.* Barwick, 1 Ves. & Beames, 195; Campbell *v.* Ketcham, 1 Bibb, R. 406; White *v.* Cox, 3 Hayw. R. 82; Wigglesworth *v.* Steers, 1 Hen. & Munf. 70; Taylor *v.* Patrick, 1 Bibb, R. 168.

[3] Cook *v.* Clayworth, 18 Ves. 12; Newland on Contracts, ch. 22, p. 365; Rich *v.* Sydenham, 1 Ch. Cas. 202.

[4] Cook *v.* Clayworth, 18 Ves. 12. See also 5 Barn. & Cressw. 170.

[5] Cory *v.* Cory, 1 Ves. R. 19. See Stockley *v.* Stockley, 18 Ves. R. 30; Dunnage *v.* White, Swanst. R. 137, 150.

[6] See Cragg *v.* Holme, cited 18 Ves. 14, and note (C) at the Rolls, 1811.

public law adopt it as a general principle, that contracts made by persons in liquor, even though their drunkenness be voluntary, are utterly void, because they are incapable of any deliberate consent in like manner as persons who are insane or non compotes mentis. The rule is so laid down by Heineccius [1] and Puffendorf.[2] It is adopted by Pothier, one of the purest of jurists, as an axiom which requires no illustration.[3] Heineccius, in discussing the subject, has made some sensible observations. "Either," says he, "the drunkenness of the party entering into a contract is excessive or moderate. If moderate, and it did not quite so much obscure his understanding as that he was ignorant with whom or for what he had contracted, the contract ought to bind him. But if his drunkenness was excessive, that could not fail to be perceived; and therefore the party dealing with him must have been engaged in a manifest fraud; or at least he ought to impute it to his own fault that he had dealt with a person in such a situation.[4] The Scottish law seems to have adopted this distinction, for by that law persons in a state of absolute drunkenness and consequently deprived of reason cannot bind themselves by any contracts. But a lesser degree of drunkenness which only darkens reason has not the effect of annulling contracts."[5]

§ 328. [**Contracts of a Drunkard Made after His Adjudication of Incompetency Are Void.** — Habitual drunkenness does not always include necessarily insanity in a legal sense whether or not it would fall within the definition in a medical sense. Yet the effect of an adjudication of incompetency by reason of habitual drunkenness is largely the same as to subsequent acts of the incompetent while the adjudication remains in force, and subsequent contracts made by the incompetent so far as they affect his property, are void, even though made in a temporary period of sobriety.[6] And where a drunkard, in a sane and lucid moment, undertook to convey his property by deed, with the consent of his trustee, the contract was void so long as he was a ward of the court. It stands upon the sound footing before the law, as deeds

[1] Heinecc. Elem. Jur. Natur. Lib. 1, ch. 14, § 392, and note ibid.

[2] Puffend. Law of Nat. and Nat. B. 1, ch. 4, § 8.

[3] Pothier, Traité des Oblig. n. 49. See also 2 Evans, Pothier on Oblig. No. 3, p. 28.

[4] Heinecc. Juris. Nat. Lib. 1, ch. 14, § 392, note.

[5] Erskine, Inst. B. 1, tit. 1, § 15, p. 485; 1 Madd. Ch. Pr. 239; 1 Stair, Inst. B. 1, tit. 10, § 13; 2 Stair, Inst. B. 4, tit. 20, § 49.

[6] Anderson *v.* Hicks, 150 App. Div. 289, 134 N. Y. Supp. 1018; Wadsworth *v.* Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499.

of insane persons under guardianship, and is not merely voidable, but void.[1]]

§ 329. **One Must Not Necessarily Be Non Compos Mentis to Avoid Contract.** — Closely allied to the foregoing are cases where a person, although not positively non compos or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition or to resist importunity or undue influence. And it is quite immaterial from what cause such weakness arises; whether it arises from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions which result from sudden fear or constitutional despondency or overwhelming calamities. For it has been well remarked that although there is no direct proof that a man is non compos or delirious, yet if he is a man of weak understanding, and is harassed and uneasy at the time, or if the deed is executed by him in extremis or when he is a paralytic, it cannot be supposed that he had a mind adequate to the business which he was about, and he might be very easily imposed upon.[2]

§ 330. **Same.** — It has indeed been said by a learned judge, that if a weak man give a bond, and there be no fraud or breach of trust in the obtaining of it, equity will not set aside the bond only for the weakness of the obligor, if he be compos mentis; neither will a Court of Equity measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity where there is a legal capacity.[3] But whatever weight there may be in this remark in a general sense, it is obvious that weakness of understanding must constitute a most material ingredient in examining whether a bond or other contract has been obtained by fraud or imposition or undue influence; for although a contract made by a man of sound mind and fair understanding may not be set aside merely from its being a rash, improvident, or hard bargain, yet if the same contract be made with a person of weak understanding, there does arise a natural inference that it was obtained by fraud or circumvention or undue influence.[4]

[1] Pinkston *v.* Semple, 92 Ala. 564, 9 So. 329; Cockrill *v.* Cockrill, 79 Fed. 143; Philadelphia Trust, Safe Deposit & Ins. Co. *v.* Allison, 108 Me. 326, 80 Atl. 833, 39 L. R. A. (N. S.) 39.

[2] 1 Fonbl. Eq. B. 1, ch. 2, § 3.

[3] Sir Joseph Jekyll, in Osmond *v.* Fitzroy, 3 P. Will. 129, 130. See also Ex parte Allen, 15 Mass. R. 58.

[4] 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*r*); Blackford *v.* Christian, 1 Knapp, R. 73, 77; Clarkson *v.* Hanway, 2 P. Will. 203; Gartside *v.* Isherwood, 1

§ 331. [**General View of Transactions between Persons in Confidential Relations.** — Transaction between the agent, confidential friend and adviser of elderly women, raises a presumption of fraud as to any transaction between them, which is evidence of fraud to be considered by the jury and imposes upon the agent the burden of showing that the transaction was fair and honest. With reference to the fiduciary relations from which presumptions of fraud or undue influence are raised, that of principal and agent is thus classified: 1. When one is the general agent of another and has entire management of his affairs, so as in effect to be as much his guardian as the regularly appointed guardian of an infant, a presumption of fraud, as matter of law, arises from a transaction between the agent and his principal for the latter's benefit, and it will be decisive of the issue in favor of the principal unless it is rebutted. 2. When the only relation is that of friendly intercourse and habitual reliance for advice and assistance and occasional employment in matters of business as agent, a presumption of fact only is raised from such a transaction, which may be strong or slight according to circumstances. When a party, complaining of a particular transaction, such as a gift, sale, or contract, has shown to the court the existence of a fiduciary or confidential relation between himself and the defendant, and that the defendant occupied the position of trust or confidence therein, the law raises a suspicion or, it is often said, a presumption of fraud — a suspicion or presumption, arising as matter of law, that the transaction brought to the notice of the court was effected through fraud or, what comes to much the same thing, undue influence by reason of his occupying a position affording

Bro. Ch. R. Appendix, 559, 560, 561. Lord Thurlow is said to have remarked, in Griffin *v.* De Veulle (3 Wooddes. Lect. App. 16), that he admitted, "That this court would not set aside the voluntary deed of a weak man who is not absolutely non compos, nor any deed of improvidence or profuseness, for these reasons merely, where no fraud appears, as was laid down by Sir Joseph Jekyll, in Osmond *v.* Fitzroy, 3 P. Will. 130. But he said that Sir Joseph Jekyll might have been pleased to add, that from these ingredients there might be made out and evidenced a collection of facts, that there was fraud and misrepresentation used. The case of Osmond *v.* Fitzroy cannot be supported but upon the mixed ground of Lord Southampton's extreme weakness of understanding, as well as the situation of Osmond." And in Mr. Cox's note to 3 P. Will. 131, he is represented to have stated, "That in almost every case upon this subject a principal ingredient was a degree of weakness short of a legal incapacity." Mr. Maddock seems to think that Osmond *v.* Fitzroy went principally upon the ground of the relation between the parties (servant and master); and he holds the doctrine of Sir Joseph Jekyll the most conformable to the authorities. 1 Madd. Ch. Pr. 224, 225. See Stock on Lunacy.

him peculiar opportunities for taking advantage of the complaining party.[1]]

§ 332. **Fraud or Undue Influence Must Be Shown Where One of Indiscretion Knowingly Enters into Bargain.** — It has been asserted by another eminent judge, that it is not sufficient to set aside an agreement in a Court of Equity, to suggest weakness and indiscretion in one of the parties who has engaged in it; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing only, unless he can show fraud in the party contracting with him, or some undue means made use of to draw him into such an agreement.[2] But this language, if maintainable at all, requires many qualifications; for if a person is of a feeble understanding and the bargain is unconscionable, what better proof can one wish of its being obtained by fraud or imposition or undue influence, or by the power of the strong over the weak?[3]

§ 333. [**Persons in Confidential Relations Can Have No Secret Profits to Detriment of Principal.** — As between parties who stand in the relation of confidence one to the other, it is the duty

[1] Smith *v.* Moore, 142 N. C. 295, 55 S. E. 275; 7 L. R. A. (N. S.) 684; Moseley *v.* Johnson, 144 N. C. 268, 56 S. E. 922; Balthrop *v.* Todd, 145 N. C. 113, 58 S. E. 996; Smith *v.* Moore, 145 N. C. 271, 59 S. E. 63.

[2] Lord Hardwicke in Willis *v.* Jernegan, 2 Atk. R. 251.

[3] See Malin *v.* Malin, 2 John. Ch. R. 238; Shelford on Lunatics, ch. 6, § 3, pp. 258, 267, 268, 272; White *v.* Small, 2 Ch. Cas. 103; Bridgman *v.* Green, 2 Ves. 627; Clarkson *v.* Hanway, 2 P. Will. 203; Bennet *v.* Vade, 2 Atk. 325, 529; Nantes *v.* Corrick, 9 Ves. 181, 182; Willan *v.* Willan, 16 Ves. 72; Blackford *v.* Christian, 1 Knapp, R. 73 to 87; Griffith *v.* Robins, 3 Madd. R. 191; Ball *v.* Mannin, 3 Bligh, R. 1 (N. S.); S. C. 1 Dow, R. 392 (N. S.); 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*r*); Filmer *v.* Gott, 7 Bro. Par. R. 70; Dodds *v.* Wilson, 1 Rep. Const. Ct. of S. Car. 448; Newland on Contracts, ch. 22, p. 362; Gartside *v.* Isherwood, 1 Bro. Ch. R. 558, 560, 561. In truth there was not the slightest proof of any weakness of understanding of the party in the case of Willis *v.* Jernegan, 2 Atk. 251, but merely of a sanguine and ardent temper and imagination, speculating with rashness upon the hope of imaginary profits. And indeed it appears that the speculation might have been profitable, but for the party's insisting upon an exorbitant premium for the lottery tickets until the market had fallen. The weakness alluded to in this case by Lord Hardwicke was probably not so much incapacity of mind as credulity or want of judgment; for he expressly negatives any fraud or imposition. See Lord Eldon's Remarks in Huguenin *v.* Basley, 14 Ves. 290; Fox *v.* Mackreth, 2 Bro. Ch. R. 420; 2 Hovend. Suppt. 113, note to 9 Ves. 182; Shelford on Lunatics, Introd. § 2, p. 36, &c.; Id. ch. 6, § 3, pp. 265, 267, 268, 272. See also Lewis *v.* Pead, 1 Ves. Jr. 19; 1 Fonbl. Eq. B. 1, ch. 2, § 3, and note (*r*). To influence a weak-minded person to do what is just and lawful cannot be termed undue influence. Dailey *v.* Kastell, 56 Wis. 444.

of the one to fully disclose the true condition of the property and every circumstance affecting a transaction that might influence the mind of the other. The agent can have no secret as against the principal, and where the agent was instructed to sell lands for all cash, and he had an offer of part cash, which carried with it an additional compensation to the agent if he could induce his principal to accept it, rather than to insist on all cash, which in any event would have been paid, he is guilty of a breach of his duty. The relation between the agent and the principal being of a fiduciary nature, it results that there must always be the exercise of good faith by the former towards the latter. The principal reposes confidence in his agent and is entitled to receive in return perfect loyalty to himself and unselfish attention to his business. There should be no conflict between their interests, as the agent must always be free and untrammelled in order to serve his employer with undivided devotion and fidelity to his trust and an unremitting endeavor to promote the success of the matters committed to his charge.[1]]

§ 334. [**Not Every Confidential Relationship Will Avoid Deed or Will.** — A mere confidential relation existing between the testator and a beneficiary under a will, or the opportunity of such beneficiary to exercise undue influence over the testator, is not enough to avoid a will. The fraud or undue influence that will suffice to set aside a will must be such as to overcome the free volition or conscious judgment of the testator, and to substitute the wicked purposes of another instead, and must be the efficient cause, without which the obnoxious disposition would not have been made. Influence arising from gratitude, affection, or esteem is not undue, nor can it become such unless it destroys the free agency of the testator at the time the instrument is executed, and shows that the disposition which he attempted to make of his property therein results from the fraud, imposition and restraint of the person whose superior will prompts the execution of the testament in the particular manner which the testator adopts.[2]

[1] Trust Co. *v.* Adams, 145 N. C. 165, 58 S. E. 1008; Humphrey *v.* Robinson, 134 N. C. 437, 46 S. E. 953; Phinney *v.* Hall, 101 Mich. 451, 59 N. W. 814; Jansen *v.* Williams, 36 Neb. 869, 55 N. W. 262, 20 L. R. A. 207; Wadsworth *v.* Adams, 138 U. S. 380, 34 L. Ed. 984, 11 S. Ct. Rep. 303.

[2] In re Turner's Will, 51 Oreg. 1, 93 Pac. 416; Struth *v.* Decker, 100 Md. 368, 59 Atl. 727; Bacon *v.* Soule, 19 Cal. App. 428, 126 Pac. 384; In re Ball's Estate, 153 Wis. 27, 141 N. W. 8; In re Weedman's Estate, 254 Ill. 504, 98 N. E. 956; Succession of Jones, 120 La. 986, 45 So. 965; Caughey *v.* Bridenbagh, 208 Pa. 414, 57 Atl. 821; Scott *v.* Barker, 129 App. Div. 241, 113 N. Y. Supp. 695; In re Sperl's Estate, 94 Minn. 421,

There is a broad distinction between the effect of a confidential relation of a legatee to the testator as suggestive of undue influence when that legatee is a stranger, and when he is a child. In the latter case, both the relation of confidence and some participation in the estate is natural.[1] Nor is it improper for the wife to urge the husband to make a suitable provision for her support in his will, and where the attorney who prepared the will had been the legal adviser of the testator for years, and a small legacy was left to him, this was no evidence of an undue influence.[2]]

§ 335. [**Will Is Vitiated Where Confidence Is Abused.** — Where the trusted friend and adviser of two aged ladies, who knew what a note was and understood the computation of interest, and when it was due, but who were otherwise practically children in financial matters, availed himself of their trust and confidence in him to lead them to act, for his own benefit and advantage and to their hazard and detriment, with reference to the fiduciary relations and obligations which he owed to them, his dealings as such are subject to review in a court of equity. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached, if no such confidential relation had existed.[3] And where a son overreached his aged father in the making of his will to such an extent that it was the will of the son speaking through the handwriting of the testator, the paper ought not to stand. Where a will is written, or procured to be written, by a person largely benefited by it, such circumstance excites stricter scrutiny, and requires stricter proof of volition and capacity. The proof required in

103 N. W. 502; Bingham *v.* Sheldon, 101 App. Div. 48, 91 N. Y. Supp. 917; Adams *v.* First Methodist Episcopal Church of Irving Park, 251 Ill. 268, 96 N. E. 253; In re Packer's Estate, 164 Cal. 525, 129 Pac. 778; Johnson *v.* Johnson, 105 Md. 81, 65 Atl. 918; Lancaster *v.* Alden, 26 R. I. 170, 58 Atl. 638; Robinson *v.* Duvall, 27 App. D. C. 535.

[1] In re Lockwood, 80 Ct. 513, 69 Atl. 8.

[2] Pettit *v.* Pettit, 149 App. Div. 485, 134 N. Y. Supp. 133. Nor will the fact that the testatrix, who was described as an eccentric, erratic old woman, be set aside for undue influence simply because she gave part of her property to her legal adviser. Farnum *v.* Boyd, 56 N. J. Eq. 766, 41 Atl. 422.

[3] Hawkes *v.* Lackey, 207 Mass. 424, 93 N. E. 828.

such cases must be such as to fully satisfy the court or jury that the testator was not imposed upon, but knew what he was doing, and what disposition he was making of his property, when he made his will. The active agency of a beneficiary of a will in procuring it to be drawn, especially in the absence of those who have at least equal claims upon the justice of the testator, and where the testator is enfeebled by old age and disease, is a circumstance which indicates the probable exercise of undue influence. Where the mind is wearied and debilitated by long-continued and serious and painful sickness, it is susceptible to undue influence, and is liable to be imposed upon by fraud and misrepresentation.[1]]

§ 336. **Equity Will Not Aid Competent Person to Avoid Improvident Bargain.** — The language of another eminent judge in a very recent case is far more satisfactory and comprehensive, and applies a mode of reasoning to the subject compatible at once with the dictates of common sense and legal exactness and propriety. "The law," said Lord Wynford, "will not assist a man who is capable of taking care of his own interest, except in cases where he has been imposed upon by deceit, against which ordinary prudence could not protect him. If a person of ordinary understanding, on whom no fraud has been practised, makes an imprudent bargain, no court of justice can release him from it. Inadequacy of consideration is not a substantial ground for setting aside a conveyance of property. Indeed from the fluctuation of prices, owing principally to the gambling spirit of speculation that now unhappily prevails, it would be difficult to determine what is an adequate price for anything sold. At the time of the sale the buyer properly calculates on a rise in the value of the article bought, of which he would have the advantage. He must not therefore complain if his speculations are disappointed, and he becomes a loser instead of a gainer by his bargain. But those who from imbecility of mind are incapable of taking care of themselves are under the special protection of the law. The strongest mind cannot always contend with deceit and falsehood. A bargain therefore into which a weak one is drawn under the influence of either of these ought not to be held valid; for the law requires that good faith should be observed in all transactions between man and man."[2] And, ad-

[1] England *v.* Fawbush, 204 Ill. 384, 68 N. E. 526.

[2] See Allore *v.* Jewell, 94 U. S. 506, 24 L. Ed. 260; Wooley *v.* Drew, 49 Mich. 290; Connelly *v.* Fisher, 3 Tenn. Ch. 382; Dalton *v.* Dalton, 14 Nev. 419; Mann *v.* Betterly, 21 Vt. 326; Aiman *v.* Stout, 42 Penn. St.

dressing himself to the case before him, he added: "If this conveyance could be impeached on the ground of the imbecility of F only, a sufficient case has not been made out to render it invalid; for the imbecility must be such as would justify a jury under a commission of lunacy in putting his property and person under the protection of the chancellor. But a degree of weakness of intellect far below that which would justify such a proceeding, coupled with other circumstances to show that the weakness such as it was had been taken advantage of, will be sufficient to set aside any important deed." [1]

§ 337. **Contracts of Weak-minded Person, Induced by Fraud or Artifice, Are Void.** — The doctrine therefore may be laid down as generally true, that the acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in Courts of Equity if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, or artifice, or undue influence.[2] The rule of the common law seems to have gone further in cases of wills (for it is said that perhaps it can hardly be extended to deeds without circumstances of fraud or imposition), since the common law requires that a person, to dispose of his property by will, should be of sound and disposing memory,[3] which imports that the testator should have understanding to dispose of his

114; Darnell *v.* Rowland, 30 Ind. 342; Cain *v.* Warford, 33 Md. 23; Beverley *v.* Walden, 20 Gratt. 147; Gass *v.* Mason, 4 Sneed, 497; Hunt *v.* Hunt, 2 Beasl. 161.

[1] Blackford *v.* Christian, 1 Knapp, R. 77. See Gartside *v.* Isherwood, 1 Bro. Ch. R. App. 560, 561.

[2] See Gartside *v.* Isherwood, 1 Bro. Ch. R. App. 560, 561. In the treatise on Equity (1 Fonbl. Eq. B. 1, ch. 2, § 3) it is laid down that the protection of Courts of Equity "is not to be extended to every person of a weak understanding, unless there be some fraud or surprise; for Courts of Equity would have enough to do if they were to examine into the wisdom and prudence of men in disposing of their estates. Let a man be wise therefore, or unwise, if he be legally compos mentis he is a disposer of his property, and his will stands instead of a reason. S. P. Bath and Montague's case, 3 Ch. Cas. 107. Nor will lapse of time, even for six years, bar a weak-minded grantor from the right to have his grant set aside where the same was obtained from him by imposition, unless during the time, from the death of witnesses or other cause, a full presentation of the case by the defendant has become impossible. And this too though valuable improvements, not exceeding a reasonable rent of the property, have meantime been put upon the land to the knowledge all along of the plaintiff. Allore *v.* Jewell, 94 U. S. 506, 24 L. Ed. 260, three judges dissenting; Davis *v.* Denny, 94 Md. 390, 50 Atl. 1037.

[3] See Waring *v.* Waring, 6 Moore, P. C. 341.

estate with judgment and discretion; and this is to be collected from his words, actions, and behavior at the time, and not merely from his being able to give a plain answer to a common question.[1] But as fraud in regard to the making of wills of real estate belongs in a peculiar manner to Courts of Law, and fraud in regard to personal estate to the Ecclesiastical Courts, although sometimes relievable in equity, that part of the subject seems more proper to be discussed in a different treatise.[2]

§ 338. [**Wills Made When Testator Was in Feeble Health.** — The fact that the testator, at the time of the making of his will, was enfeebled with approaching age has little to do with his testamentary capacity. It is not essential that a man's mind should be as bright as it had been in his youth, or that he is in the best of health. Neither old age nor feeble health constitutes mental incapacity, nor do both together, though combined with a defective memory and mental sluggishness. It is sufficient if the testator knew what he was about, that he was making a will and disposing of his property, and what he got in return for it, if anything, and to whom he gave his property. In determining whether or not there was an undue influence exerted in the making of the will by an aged or feeble testator, the circumstances surrounding the making of the will, together with the internal evidence furnished by the will itself, should be resorted to. It sometimes happens that an old man is a much better trader than a younger man, or that his mind is brighter and more active along certain lines, and in order to set aside an instrument executed by an aged or infirm party, more than this one fact must be shown in order to prove undue influence.[3]]

§ 339. **Contracts Made through Duress or Extreme Necessity May Be Avoided.** — Cases of an analogous nature may easily be put where the party is subjected to undue influence, although in other respects of competent understanding.[4] As where he does

[1] 1 Fonbl. Eq. B. 1, ch. 2, § 3, and notes (*u*) and (*x*); Donegal's Case, 2 Ves. R. 407, 408; Attorney-Gen. *v.* Parmenter, 3 Brown, Ch. R. 441; Id. 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*x*).

[2] 1 Fonbl. Eq. B. 1, ch. 2, § 3, and notes (*u*) and (*x*); ante, § 184; Allen *v.* Macpherson, 5 Beav. R. 469; s. c. on appeal, 1 Phillips, Ch. R. 133.

[3] Geiger *v.* Bardwell, 255 Ill. 320, 99 N. E. 582; Graham *v.* Deuterman, 244 Ill. 124, 91 N. E. 61; In re Duffy's Will, 127 App. Div. 174, 111 N. Y. Supp. 491; In re D'Arschot's Will, 82 Misc. Rep. 16, 143 N. Y. Supp. 732; Phillips *v.* Flagler, 82 Misc. Rep. 500, 143 N. Y. Supp. 798.

[4] See Debenham *v.* Ox, 1 Ves. 276; Cory *v.* Cory, 1 Ves. 19; Young *v.* Peachey, 2 Atk. 254, 1 Madd. Ch. Pr. 245, 246.

an act or makes a contract when he is under duress or the influence of extreme terror or of threats, or of apprehensions short of duress. For in cases of this sort he has no free will, but stands in vinculis. And the constant rule in equity is, that where a party is not a free agent and is not equal to protecting himself, the court will protect him.[1] The maxim of the common law is, "Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur."[2] On this account Courts of Equity watch with extreme jealousy all contracts made by a party while under imprisonment, and if there is the slightest ground to suspect oppression or imposition, in such cases they will set the contracts aside.[3] Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may in like manner so entirely overcome his free agency as to justify the court in setting aside a contract made by him on account of some oppression or fraudulent advantage or imposition attendant upon it.[4]

[1] Evans *v.* Llewellyn, 1 Cox, R. 340; Crome *v.* Ballard, 1 Ves. Jr. 215, 220; Hawes *v.* Wyatt, 3 Bro. Ch. R. 158; Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 3, § 1; Eq. Abridg. 183, pl. 2; Gilb. Eq. R. 9; 3 P. Will. 294, note *E*; Attorney-Gen. *v.* Sothen, 2 Vern. R. 497.

[2] 3 Co. R. 78.

[3] Roy *v.* Duke of Beaufort, 2 Atk. 190; Nichols *v.* Nichols, 1 Atk. 409; Hinton *v.* Hinton, 2 Ves. 634, 635; Falkner *v.* O'Brien, 2 B. & Beatt. 214; Griffith *v.* Spratley, 1 Cox, R. 333; Underhill *v.* Harwood, 10 Ves. 219; Attorney-Gen. *v.* Sothen, 2 Vern. R. 497.

[4] See Gould *v.* Okeden, 3 Bro. Parl. R. 560; Bosanquet *v.* Dashwood, Cas. Temp. Talbot, 37; Proof *v.* Hines, Cas. T. Talb. 111; Hawes *v.* Wyatt, 3 Bro. Ch. R. 156; Picket *v.* Loggon, 14 Ves. 215; Beasley *v.* Maggreth, 2 Sch. & Lefr. 31, 35; Carpenter *v.* Elliot, cited 2 Ves. Jr. 494; Wood *v.* Abrey, 3 Madd. R. 417; Ramsbottom *v.* Parker, 6 Madd. R. 6; Fitzgerald *v.* Rainsford, 1 B. & Beatt. R. 37, note (*d*); Underhill *v.* Harwood, 10 Ves. 219; 1 Fonbl. Eq. B. 1, ch. 2, § 9, note (*e*); Crowe *v.* Ballard, 1 Ves. jr. 215, 220; Huguenin *v.* Baseley, 14 Ves. 273; Newland on Contracts, ch. 22, p. 362, &c.; Ib. p. 365, &c. The doctrine of the common law upon the subject of avoiding contracts upon the ground of mental weakness, or force, or undue influence, does not seem in any essential manner to differ from that adopted in the Roman law, or in the law of modern continental Europe. Thus we find in the Roman law that contracts may be avoided, not only for incapacity, but for mental imbecility, the use of force, or the want of liberty in regard to the party contracting. "Ait prætor, Quod metus causa gestum erit, ratum non habebo." Dig. Lib. 4, tit. 2, l. 1. But then the force or fear must be of such a nature as may well overcome a firm man. "Metum accipiendum, Labeo dicit, non quemlibet timorem, sed majoris malitatis." Dig. Lib. 4, tit. 2, l. 5. The party must be intimidated by the apprehension of some serious evil of a present and pressing nature. "Metum non vani hominis, sed qui merito et in hominem constantissimum cadat." Dig. Lib. 4, tit. 2, l. 6. He must act, "Metu majoris malitatis"; and feel that it is immediate, — "Metum

§ 340. [**Parties Must Be Placed in Statu Quo before Contract Procured through Duress Will Be Set Aside.** — If a party seeks to avoid a contract for duress, he must place the parties in statu quo, and void the whole contract. Contracts induced by duress are ordinarily voidable, not void, and to avoid them the party so seeking must place the parties in statu quo either by tender beforehand or in the bill in equity. He cannot ratify two-thirds of the compromise agreement because beneficial to himself, and repudiate the other third because against himself. He must repudiate as a whole. In this there is a difference between actions for fraud and deceit, and actions to cancel a contract for duress. In fraud and deceit, the party ratifies the contract as made, but says, because the thing delivered is not up to the contract representations, I have been damaged by deceit and fraud. To cancel a contract by reason of duress the contract must of necessity be repudiated, and not only so, but the parties must be placed in statu quo.[1] But as a rule, duress will not prevail to invalidate a contract entered into with full knowledge of all the facts, with ample time and opportunity for investigation, consideration, consultation, and reflection.[2]]

presentum accipere debemus, non suspicionem inferendi ejus." See Dig. Lib. 4, tit. 2, l. 9; 1 Domat, Civil Law, B. 1, tit. 18, § 2, art. 1 to 10. Pothier gives his assent to this general doctrine; but he deems the civil law too rigid in requiring the menace or force to be such as it might intimidate a constant or firm man, and very properly thinks that regard should be had to the age, sex, and condition of the parties. Pothier on Oblig. n. 25. Mr. Evans thinks that any contract produced by the actual intimidation of another ought to be held void, whether it were the result of personal infirmity merely, or of such circumstances as might ordinarily produce the like effect upon others. 1 Evans, Pothier on Oblig. n. 25, note (*a*), p. 18. The Scottish law seems to have followed out the line of reasoning of the Roman law with a scrupulous deference and closeness. Ersk. Instit. B. 4, tit. 1, § 26. The Scottish law also puts the case of imposition from weakness upon a clear ground. "Let one be ever so subject to imposition, yet if he has understanding enough to save himself from a sentence of idiocy, the law makes him capable of managing his own affairs; and consequently his deeds, however hurtful they may be to himself, must be effectual, unless evidence be brought that they have been drawn or extorted from him by unfair practices. Yet where lesion (injury) in the deed and facility in the grantor concur, the most slender circumstances of fraud or circumvention are sufficient to set it aside." Ersk. Inst. B. 4, tit. 1, § 27. Mr. Bell has also stated the same principle in the Scottish law with great clearness. There may be in one of perfect age a degree of weakness, puerility, or prodigality, which, although not such as to justify a verdict of insanity, and place him under guardianship as insane, may yet demand some protection for him against unequal or gratuitous alienation. 1 Bell, Comm. 139.

[1] Wood *v.* Kansas City Home Telephone Co., 223 Mo. 537, 123 S. W. 6.

[2] Clement *v.* Buckley Mercantile Co., 172 Mich. 243, 137 N. W. 657.

§ 341. [**Threats May Be Made by Others than Defendant Himself.** — In order to have a contract set aside for duress, it is not necessary that the threats should have been made by the defendant, but it is sufficient if they were made by his agents or servants, or any one else acting for him and with his knowledge. He cannot allow or permit another man to perpetrate a fraud, from which he has been benefited, without being liable for the mischief.[1] The plea of duress is a personal one, and to be available as a defence, it must have been exercised upon the person who sets it up as a defence by the person who claims the benefit of the contract, or by some one acting in his behalf or with his knowledge.[2] But if the threats were made by a third party, not connected with the defendant, and the contract was taken by him without any knowledge on his part of any vitiating circumstances or defence of duress, the contract would be valid as to him.[3]]

§ 342. [**Contracts Entered Into through Duress Are Not Generally Enforceable.** — It is an elementary principle that to make a valid contract there must be parties capable of contracting, they must contract with reference to legal relations and there must be a meeting of the minds upon the same subject-matter, and the agreement must be entered into voluntarily. Sometimes from bare circumstances and conditions man may willingly make a contract that does not appeal to his better judgment, and it would be valid, but if he is unduly forced and coerced to make a contract, either by threats or actual fear of imprisonment or impending bodily harm, his agreement will not be enforced. So, where the father of an embezzler executed a mortgage and note upon his home, for the purpose of securing the fund squandered, while the contract may have been freely entered into by him, yet the surrounding circumstances, the state of his mind, and the effect upon his physical condition produced by the threats of imprisonment of his son unless he should secure the amount taken, are competent for the consideration of the jury. If there was no free will in the execution of the notes and mortgage, there is no contract, nor any binding obligation. Under the modern theory, duress is to be tested, not by the nature of the acts or threats, but rather by the state of the mind of the victim induced by such acts and threats. The making of a contract requires the free

[1] Kaus *v.* Gracey, 162 Iowa, 671, 144 N. W. 625; Guinn *v.* Sumpter Valley Ry. Co., 63 Oreg. 368, 127 Pac. 987.

[2] Mullin *v.* Leamy, 80 N. J. L. 484, 79 Atl. 257.

[3] Ely *v.* Hartford Life Ins. Co., 33 Ky. L. Rep. 272, 110 S. W. 265.

exercise of the will power of the contracting parties, and the free meeting and blending of their minds. In the absence of that, the essential of a contract is wanting; and, if such absence be produced by the wrongful conduct of one party to the transaction, or conduct for which he is responsible, whereby the other party, for the time being, through fear, is bereft of his free will power, for the purpose of obtaining the contract, and it is thereby obtained, such contract may be avoided on the ground of duress. There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself. The question in each case is: Was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or his property, or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained.[1]]

§ 343. [**An Act Done because of a Threat to Do a Lawful Thing Is Not Duress.** — Where one has a just claim against another for money obtained by the commission of a crime, it is not unlawful for the creditor to threaten to prosecute if the claim is not paid; and a contract cannot be avoided which the debtor enters into to secure payment of the claim, unless the creditor attempts by such threat to accomplish an unlawful purpose. In other words, a threat of lawful imprisonment is not duress, unless it is made for an unlawful purpose, such, for instance, as compelling the satisfaction of a debt by payment in money, or by the execution of an obligation to secure it. If, in connection with the threat, it appears that the creditor declared that he would prosecute if the claim was not paid, with other evidence showing that his intention was to use the criminal process to collect the debt, or to accomplish any unlawful purpose, a jury might well find that such was the purpose of the creditor in making the threat; and

[1] Williamson-Halsell, Frazier Co. *v.* Ackerman, 77 Kans. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484; Galusha *v.* Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417; Piekenbrock *v.* Smith, 43 Okla. 585, 143 Pac. 675; Meech *v.* Lee, 82 Mich. 274, 46 N. W. 383; O'Toole *v.* Lamson, 41 App. D. C. 276; McCormick Harvesting Mach. Co. *v.* Hamilton, 73 Wis. 486, 41 N. W. 727; Fountain *v.* Bigham, 235 Pa. 35, 84 Atl. 131, Ann. Cas. 1913 D, 1185; Baker *v.* Morton, 79 U. S. 150, 20 L. Ed. 162; United States *v.* Holland-America Line, 205 Fed. 943; Price *v.* Bank of Poynette, 144 Wis. 190, 128 N. W. 895.

that therefore it was duress.[1] And if a borrower is in distress and urgent need of money and in order to secure it conveys a large and valuable estate, this alone is not sufficient to avoid the contract for duress.[2] Or where one party is being sued for damages for breach of contract of marriage, and in order to escape the prosecution for a criminal offence charged by another party, he entered into a new contract to marry, and in default of his carrying out his contract, agreed to pay a certain sum, there was no duress.[3] So, where the plaintiff and defendant entered into a contract by which the defendant was to produce certain plays, upon which the plaintiff was supposed to have the prior right of production, but which subsequently proved to be untrue, there was no duress in the execution of the contract.[4] And a threat to institute foreclosure proceedings upon the failure to renew past due paper, is not duress.[5]]

§ 344. [**Duress Is a Personal Defence and Must Be Proved.** — When a party seeks to avoid a contract because of duress by imprisonment, it is not enough to simply show that he was imprisoned. He must go further, and show that the imprisonment was unlawful, or, if lawful, that while imprisoned he was subjected to some coercion which deprived him in some respect at least of his free agency;[6] and the alleged acts constituting duress must have been exercised upon the person who sets it up as a defence by the person who claims the benefit of the contract, or by some one acting in his behalf, or with his knowledge.[7] A surety company having given an undertaking to discharge a mechanic's lien filed upon a building, cannot raise the question that the plaintiff had intentionally exaggerated his claim and that it secured from the builder a contract by fraud and duress, consisting of threats to abandon the work on the premises, and to induce others to abandon the work thereon. A contract procured by duress exercised by means of threats is not void, but voidable; and

[1] Fountain *v.* Bigham, 235 Pa. 35, 84 Atl. 131, Ann. Cas. 1913 D, 1185; Harrison Tp. *v.* Addison, 176 Ind. 389, 96 N. E. 146; Guinn *v.* Sumpter Valley Ry. Co., 63 Oreg. 368, 127 Pac. 987; Mullin *v.* Leamy, 80 N. J. L. 484, 79 Atl. 257; Goos *v.* Goos, 57 Neb. 294, 77 N. W. 687; Pease *v.* Francis, 25 R. I. 226, 55 Atl. 686; Beston *v.* Hickey, 71 Ct. 181, 41 Atl. 555.

[2] Colonial Trust Co. *v.* Hoffstot, 219 Pa. 497, 69 Atl. 52.

[3] McCarthy *v.* Tanska, 84 Ct. 377, 80 Atl. 84.

[4] Hart *v.* Walsh, 84 Misc. Rep. 421, 146 N. Y. Supp. 235.

[5] Stout *v.* Judd, 10 Kans. App. 579, 63 Pac. 662.

[6] Harrison Tp. *v.* Addison, 176 Ind. 389, 96 N. E. 146; Clement *v.* Buckley Mercantile Co., 172 Mich. 243, 137 N. W. 657.

[7] Mullin *v.* Leamy, 80 N. J. L. 484, 79 Atl. 257.

as a general rule only the party upon whom the duress was exercised may take advantage of it to avoid the contract. The right of avoidance is purely personal to the party coerced. It is true that it has also been held that a surety upon a contract coerced by duress may plead the defence, if he was ignorant of the duress when he became surety; but this exception does not apply to the appellant surety company, because it was not a surety upon the voidable contract.[1]]

§ 345. [**What Acts Will Amount to Duress.** — Duress may be defined as a condition of mind resulting from such improper pressure that the will is overcome and an involuntary act or contract induced, — a condition of mind produced by an unlawful intimidation, and which results in the doing of an act which is not required by law,[2] or where one takes a grossly oppressive and unfair advantage of another's necessities or distress.[3] The test of duress is not so much the means by which the party was compelled to execute the contract as it is the state of mind induced by the means employed — the fear which made it impossible for him to exercise his own free will. The threat must be of such a nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of the threatened person, and must have that effect; and the act sought to be avoided must be performed by such person while in such condition.[4] A person is disposed to possess ordinary firmness unless it is shown that by reason of age or other sufficient cause he is weak or infirm. The constraint that takes away free agency and destroys the power of withholding assent to a contract must be one that is imminent and without immediate means of protection, and such as would operate upon the mind of a person of reasonable firmness. Ordinarily, when no proceedings have been commenced, threats of arrest, prosecution, or imprisonment do not constitute legal duress to avoid a contract. The threats must be made under such circumstances that they excite the fear of imminent and immediate imprisonment.[5]]

[1] George Colon & Co. *v.* East 189th St. Building & Const. Co., 141 App. Div. 441, 126 N. Y. Supp. 226.

[2] O'Toole *v.* Lamson, 41 App. D. C. 276; International Harvester Co. *v.* Voboril, 187 Fed. 973, 110 C. C. A. 311; Rees *v.* Schmits, 164 Ill. App. 250.

[3] Snyder *v.* Rosenbaum, 215 U. S. 261, 54 L. Ed. 186, 30 S. Ct. Rep. 73.

[4] Fountain *v.* Bigham, 235 Pa. 35, 84 Atl. 131, Ann. Cas. 1913 D, 1185; Clement *v.* Buckley Mercantile Co., 172 Mich. 243, 137 N. W. 657; Ball *v.* Ward, 73 N. J. Eq. 440, 74 Atl. 158.

[5] Sulzner *v.* Cappeau-Lemley & Miller Co., 234 Pa. 162, 83 Atl. 103, 39 L. R. A. (N. S.) 421.

§ 346. [**Same.** — Duress will be inferred where the majority stockholder in a corporation, the president and managing director, for purposes of his own, and in order to eliminate the complainant as a stockholder and member of the corporation, and while he is in great distress and in urgent need of funds, submitted to complainant a proposition by which he should either surrender to the defendant a one-half interest in his holdings in the corporation, or else face certain ruin. Equity will not thus permit the strong to crush the weak. In order that the defendant might carry out his threats to wreck the corporation and thus make the stock of complainant's worthless, he permitted several suits to be instituted against the company, and made no effort to pay the outstanding debts and prevent the necessity of a receivership. The complainant, in order to save his stock, agreed to give up one-half of what he had to the defendant, without consideration, other than to prevent a total loss of the company's property. The doctrine appears to be well founded that where one party has possession or control of the property of another, and refuses to surrender it to the control and use of the owner, except upon compliance with an unlawful demand, a contract made by the owner under such circumstances to emancipate the property is to be regarded as made under compulsion and duress. To constitute duress, it is sufficient if the will be constrained by the unlawful presentation of a choice between comparative evils, as inconvenience and loss by the detention of property, loss of property altogether, or compliance with an unconscionable demand.[1] But where a mine was owned by three brothers, two of whom furnished practically all of the moneys used in the development of the property, and they had a contract by which the two were to hold all of the property until they were first paid the amounts furnished by them, and the contract was freely entered into by the other partner, and thereafter, he further consented to the new arrangement by accepting large payments for carrying on the business, there was no duress shown, and if there had been, it was waived.[2]]

§ 347. **Contracts of Infants Are Voidable.** — The acts and contracts of infants, that is, of all persons under twenty-one years of age (who are by the common law deemed infants), are a fortiori treated as falling within the like predicament. For infants are by law generally treated as having no capacity to bind themselves, from the want of sufficient reason and discernment of understand-

[1] Harris *v.* Cary, 112 Va. 362, 71 S. E. 551, Ann. Cas. 1913 A, 1350.
[2] Connolly *v.* Bouck, 174 Fed. 312, 98 C. C. A. 184.

ing, and therefore their grants and those of lunatics are in many respects treated as parallel both in law and reason.[1] There are indeed certain excepted cases in which infants are permitted by law to bind themselves by their acts and contracts. But these are all of a special nature; as for instance infants may bind themselves by a contract for necessaries suitable to their degree and quality,[2] or by a contract of hiring and services for wages,[3] or by some act which the law requires them to do. And generally infants are favored by the law as well as by equity in all things which are for their benefit, and are saved from being prejudiced by anything to their disadvantage.[4] But this rule is designed as a shield for their own protection; it is not allowed to operate as a fraud or injustice to others, at least not where a Court of Equity has authority to reach it in cases of meditated fraud.[5]

§ 348. **Some Contracts of Infants Are Void.** — In regard to the acts of infants some are voidable and some are void; and so also in regard to their contracts, some are voidable and some are void. Where they are utterly void, they are from the beginning mere nullities and incapable of any operation. But where they are voidable, it is in the election of the infant to avoid them or not, which he may do when he arrives at full age. In this respect he is by law differently placed from idiots and lunatics; for the latter, as we have seen, are not, or at least may not, at law be allowed to stultify themselves. But an infant may at his coming of age avoid or confirm any voidable act or contract at his pleasure. In general where a contract may be for the benefit or to the prejudice of an infant, he may avoid it as well at law as in equity. Where it can never be for his benefit, it is utterly void.[6] And in

[1] 1 Fonbl. Eq. B. 1, ch. 2, § 4.

[2] Zouch *v.* Parsons, 3 Burr. 1801; 1 Fonbl. Eq. B. 1, ch. 2, § 4, and notes (*y*) and (*a*); Co. Litt. 172 a.

[3] Woode *v.* Fenwick, 10 Mees. & Welsb. 195.

[4] 1 Fonbl. Eq. B. 1, ch. 2, § 4, and notes (*y*) and (*a*).

[5] See 1 Fonbl. Eq. B. 1, ch. 2, § 4, note (*z*); Zouch *v.* Parsons, 3 Burr. 1802. It is well settled that no liability in damages can be fixed upon an infant by reason of a false representation that he is of age, whereby a credit has been given him. Johnson *v.* Pye, 1 Sid. 258; s. c. 1 Keb. 913; Bartlett *v.* Wells, 1 Best & S. 836; Merriam *v.* Cunningham, 11 Cush. 40; Burley *v.* Russell, 10 N. H. 184. But this is not saying that an infant may always retain the fruits of a contract obtained by him through a false representation of that kind. A lease e. g. obtained in that way by an infant may be declared void and possession ordered given up. Lamprière *v.* Lange, 12 Ch. D. 675, Jessel, M. R.; Langdon *v.* Clayson, 75 Mich. 204, 42 N. W. 805; Pritchett *v.* Fife, 8 Ala. App. 462, 62 So. 1001.

[6] 1 Fonbl. Eq. B. 1, ch. 2, § 4, notes (*y*), (*z*), (*b*); Zouch *v.* Parsons, 3 Burr. 1801, 1807; Grievance Committee *v.* Ennis, 84 Ct. 594, 80 Atl. 767;

respect to the acts of infants of a more solemn nature, such as deeds, gifts, and grants, this distinction has been insisted on, that such as do take effect by delivery of his hand are voidable; but such as do not so take effect are void.[1]

§ 349. **Contracts of Infant, Induced by Fraud of Other Party, Are Void.** — But independently of these general grounds it is clear that contracts made and acts done by infants in favor of persons knowing their imbecility and want of discretion, and intending to take advantage of them, ought upon general principles to be held void, and set aside on account of fraud, circumvention, imposition, or undue influence. And it is upon this ground of an inability to give a deliberate and binding consent, that the nullity of such acts and contracts is constantly put by publicists and civilians.[2] "Infans non multum a furioso distat."

§ 350. **Effect of Contracts of Femes Covert.** — In regard to femes covert the case is still stronger; for, generally speaking, at law they have no capacity to do any acts or to enter into any contracts, and such acts and contracts are treated as mere nullities. And in this respect equity generally follows the law.[3] This disability of married women proceeds, it is said, upon the consideration that if they were allowed to bind themselves, the law having vested their property in their husbands, they would be liable on their engagements without the means of answering them. And if they were allowed to bind their husbands, they might, by the abuse of such a power, involve their husbands and families in ruin.[4] But perhaps the more exact statement would be, that it is a fundamental policy of the common law to allow no diversity of interests between husband and wife; and for this purpose it is necessary to take from the wife all power to act for herself without his consent, and to disable her, even with his consent (for her own protection against his influence), from becoming personally bound by any act or contract whatsoever done in pais.[5] Courts of Equity have indeed broken in upon this doctrine, and have in many respects treated the wife as capable of disposing

Hollinger *v.* York Rys. Co., 225 Pa. 419, 74 Atl. 344; Aborn *v.* Janis, 62 Misc. Rep. 95, 113 N. Y. Supp. 309; Pennsylvania Co. *v.* Purvis, 128 Ill. App. 367.

[1] Zouch *v.* Parsons, 3 Burr. R. 1794; Perkins, § 12. See 8 American Jurist, 327 to 330.

[2] See ante, §§ 313, 314; Ayliffe, Pand. B. 2, tit. 38, pp. 216, 217.

[3] 1 Fonbl. Eq. B. 1, ch. 2, § 6.

[4] 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*h*).

[5] See Comyns, Dig. Baron and Feme, D. 1, E. to 3, H. N. O. P. Q.; Id. Chancery, 2 M. 1 to 16.

of her own separate property and of doing other acts, as if she were a feme sole.[1] In cases of this sort the same principles will apply to the acts and contracts of a feme covert as would apply to her as a feme sole, unless the circumstances give rise to the presumption of fraud, imposition, unconscionable advantage, or undue influence.[2]

§ 351. **Effect of Contracts of Unconscionable Nature.** — Of a kindred nature to the cases already considered are cases of bargains of such an unconscionable nature and of such gross inequality as naturally lead to the presumption of fraud, imposition, or undue influence. This is the sort of fraud to which Lord Hardwicke alluded in the passage already cited,[3] when he said that they were such bargains as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other, being inequitable and unconscientious bargains.[4] [The right to the relief depends very largely upon the conditions and circumstances of the parties, and the nature of the contract entered into. If both parties to the contract deal with each other at arm's length, and there is no trick, artifice, contrivance, deception, or fraudulent practice that will throw the opposite party off of his guard, the fact that a bargain is a hard one does not necessarily give a court of equity jurisdiction to intervene. But if one of the parties is suffering from disease or injury, in poor mental condition, in a position of confidence with the other party to the contract, or if the contract and the attendant circumstances give evidence of an undue or over-reaching influence exerted over the complainant, equity will give relief. It must be understood, however, that the rule requires that there should be more than a mere inadequate consideration, for a man who is sui juris may make a valid contract for the sale of his property at a great sacrifice. A consideration that is so entirely inadequate as to shock the moral senses of right doing is always an evidence

[1] See on this subject the learned notes of Mr. Fonblanque in 1 Fonbl. Eq. B. 1, ch. 2, § 6, notes (*h*) to (*s*); Chancy on Rights, &c. of Husband and Wife, and Roper on Husband and Wife; Com. Dig. Chancery, 2 M. 1 to 16; Sprague *v.* Rooney, 104 Md. 349, 16 S. W. 505; Ewing *v.* Cottman, 9 Pa. Super. Ct., 444, 43 W. N. C. 525; Cropper *v.* Bowles, 150 Ky. 393, 150 S. W. 380; Wagner *v.* Mutual Life Ins. Co. of New York, 88 Ct. 536, 91 Atl. 1012.

[2] See 1 Fonbl. Eq. B. 1, ch. 2, § 8; Dalbiac *v.* Dalbiac, 16 Ves. 115.

[3] Ante, § 264; Mitf. Pl. Eq. by Jeremy, 132, 133, 134; Roosevelt *v.* Fulton, 2 Cowen, R. 129; M'Donald *v.* Neilson, 2 Cowen, R. 139.

[4] Chesterfield *v.* Janssen, 2 Ves. 155; 1 Fonbl. Eq. B. 1, ch. 2, § 9, note (*e*).

of an unconscionable bargain, and in an action to set aside a contract for fraud, the attending circumstances and conditions leading up to and surrounding the execution of the contract are competent evidence.[1]] Mere inadequacy of price or any other inequality in the bargain is not however to be understood as constituting, per se, a ground to avoid a bargain in equity.[2] For Courts of Equity as well as Courts of Law act upon the ground that every person who is not from his peculiar condition or circumstances under disability is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable or otherwise, are considerations not for courts of justice but for the party himself to deliberate upon.

§ 352. [**Same.** — Equity will not lend its aid to the foreclosure of a mortgage securing a note for borrowed money, where to do so the contract upon its face would be unconscionable. The courts do not make contracts for parties litigant. It is the province of the courts to enforce the contracts that they have made and interpret their terms in the light of the adjudicated authorities; but

[1] Hanson *v.* Neal, 215 Mo. 256, 114 S. W. 1073; Storthz *v.* Williams, 86 Ark. 460, 113 S. W. 1015; Gargano *v.* Pope, 184 Mass. 571, 69 N. E. 343, 100 Am. St. Rep. 575.

[2] Griffith *v.* Spratley, 1 Cox, R. 383; Copis *v.* Middleton, 2 Madd. R. 409; Collier *v.* Brown, 1 Cox, R. 428; Low *v.* Barchard, 8 Ves. 133; Western *v.* Russel, 3 Ves. & Beam. R. 180; Naylor *v.* Winch, 1 Sim. & Stu. R. 565; 1 Fonbl. Eq. B. 1, ch. 2, § 9, note (*d*); Osgood *v.* Franklin, 2 John. Ch. R, 1; Borell *v.* Dann, 2 Hare, R. 440, 450. In this case Mr. Vice-Chancellor Wigram said: "Now with respect to the adequacy of the consideration alone, considered apart from the alleged improvidence in the manner of selling, I certainly understand the rule of the court to be that, even in ordinary cases, and a fortiori in cases of sales by public auction, mere inadequacy of consideration is not a ground even for refusing a decree for specific performance of an unexecuted contract (White *v.* Damon, Ex parte Latham), and still less can it be a ground for rescinding an executed contract. The only exception which I believe can be stated is, where the inadequacy of consideration is so gross as of itself to prove fraud or imposition on the part of the purchaser. Fraud in the purchaser is of the essence of the objection to the contract in such a case. The case must however be strong indeed in which a court of justice shall say that a purchaser at a public auction between whom and the vendors there has been no previous communication affecting the fairness of the sale, is chargeable with fraud or imposition only because his bidding did not greatly exceed the amount of the vendor's reserved bidding. I am perfectly satisfied that the plaintiff's case cannot be sustained upon the ground of mere inadequacy. Another principle must be introduced. It must be made out that the assignees were guilty of a breach of trust in fixing so low a reserved bidding as £900, and (as I have already observed) that the purchaser was bound to have ascertained that a breach of trust had not been committed in that respect before he accepted the conveyance."

a court of equity will intervene and prevent a palpable hardship upon a distressed mortgagor who has already paid more than the face of the debt, and that at the rate of twelve per cent interest. When the mortgagor comes into court and asks the cancellation of his paper because of its being tainted with usury, equity will require him to first do equity and pay the legal rate of interest; but where the mortgagee comes in and seeks to foreclose, equity requires that he come in with clean hands and he forfeits all interest paid, and in some jurisdictions, a penalty for having charged, reserved, or collected more than the legal rate.[1]]

§ 353. [**Same.** — The master will not be allowed to take advantage of an ignorant servant, who has received serious injuries, while in the line of his employment, through the negligence of the master, although a general release has been executed. In this case the master's physician and the superintendent of the mill went to plaintiff's home and in the absence of his wife or friends, prevailed upon him to execute a release, which they represented to be an order for $15 to pay a special physician who had also attended plaintiff, and $80 was to be paid to the physician seeking the release. Eliminating the question of the false reading of the paper, the fact that the plaintiff wanted to see his wife and talk with her about the paper, and then taunted by being asked if he wasn't 21 years old, and the gross inadequacy of the consideration paid, were facts sufficient for the consideration of the jury. But as stated in the preceding section, the court will not set aside a contract upon the ground of the inadequacy of consideration alone, but there must be some evidence that the transaction is such as does not ordinarily take place in open, fair, and even-handed bargains. Inadequacy of consideration alone is not sufficient to set aside a written instrument unless the consideration is so inadequate as to shock the moral senses and cause reasonable persons to say that the plaintiff got nothing for it. It is proper evidence to be considered upon an issue of fraud and may, in connection with other evidence and circumstances tending to show fraud, be sufficient to establish the fraud and to set aside the instrument.[2]]

§ 354. **Inadequacy of Consideration Alone Not Sufficient Evidence of Fraud.** — Inadequacy of consideration is not then of itself a distinct principle of relief in equity. The common law knows no such principle. The consideration, be it more or less, supports

[1] Interstate Savings & Loan Assn. *v.* Badgley, 115 Fed. 390.
[2] Dorsett *v.* Clement-Ross Mfg. Co., 131 N. C. 254, 42 S. E. 612.

the contract. Common sense knows no such principle. The value of a thing is what it will produce; and it admits of no precise standard. It must be in its nature fluctuating and will depend upon ten thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances which may induce him to part with it at a particular time. If Courts of Equity were to unravel all these transactions, they would throw everything into confusion and set afloat the contracts of mankind.[1] Such a consequence would of itself be sufficient to show the inconvenience and impracticability if not the injustice of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief. [Mere inadequacy of consideration, without other proof, is not sufficient evidence upon which to base an action of fraud, but is competent as an element of fraud for the consideration of the jury.[2]]

§ 355. **Same.** — Still however there may be such an unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or some undue influence, and in such cases Courts of Equity ought to interfere, upon the satisfactory ground of fraud.[3] But then such unconscionableness or such inadequacy should be made out as would (to use an expressive phrase) shock the conscience and amount in itself to conclusive and decisive evidence of fraud.[4] And where there are other ingredients in the case of a suspicious nature or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud.[5]

[1] Per Lord Ch. Baron Eyre in Griffith *v.* Spratley, 1 Cox, R. 383; 1 Madd. Ch. Pr. 213, 214.

[2] Perry *v.* Ins. Co., 137 N. C. 406, 49 S. E. 890; Goddard *v.* King, 40 Minn. 164, 41 N. W. 659.

[3] Gartside *v.* Isherwood, 1 Bro. Ch. R. App. 558, 560, 561.

[4] Coles *v.* Trecothick, 9 Ves. 246; Underhill *v.* Harwood, 10 Ves. 219; Copis *v.* Middleton, 2 Madd. R. 409; Stillwell *v.* Wilkinson, Jacob, R. 280; Peacock *v.* Evans, 16 Ves. 512; Gwynne *v.* Heaton, 1 Bro. Ch. R. 9; Osgood *v.* Franklin, 2 John. Ch. R. 1, 23; s. c. 14 John. R. 527. See Ray *v.* Womble, 56 Ala. 32; Irwin *v.* Parham, 12 How. 197 (dissenting opinion of Nelson, J.); Wright *v.* Wilson, 2 Yerg. 294; Deaderick *v.* Watkins, 8 Humph. 520; Howard *v.* Edgell, 17 Vt. 9; Mayo *v.* Carrington, 19 Gratt. 74; Weld *v.* Rees, 48 Ill. 428.

[5] 1 Fonbl. Eq. B. 1, ch. 2, § 9, note (*e*); Id. § 10, and notes (*g*) and (*h*); Id. § 11; Id. ch. 4, § 26; 1 Madd. Ch. Pr. 212, 213, 214; Howe *v.* Wheldon, 2 Ves. 516, 518; Com. Dig. Chancery, 3 M. 1; Huguenin *v.* Basley, 14 Ves. 273; Wooley *v.* Drew, 49 Mich. 290; Allore *v.* Jewell, 94 U. S. 506, 24 L. Ed. 260; Holliway *v.* Holliway, 77 Mo. 392; Butler *v.* Haskell, 4 Dessaus. 651.

§ 356. **Same.** — The difficulty of adopting any other rule which would not in the common intercourse and business of human life be found productive of serious inconvenience and endless litigation is conceded by civilians and publicists; and for the most part they seem silently to abandon cases of inadequacy in bargains where there is no fraud to the forum of conscience and morals and religion. Thus Domat, after remarking that the law of nature obliges us not to take advantage of the necessities of the seller to buy at too low a price, adds: "But because of the difficulties in fixing the just price of things, and of the inconveniences which would be too many and too great if all sales were annulled in which the things were not sold at their just value, the laws connive at the injustice of buyers, except in the sale of lands where the price given for them is less than half of their value."[1] So that in the civil law sales of personal property are usually without redress, and even sales of immovable property are in the same predicament, unless the inadequacy of price amounts to one-half the value; a rule purely artificial, and which must leave behind it many cases of gross hardship and unconscionable advantage. The civil law therefore in fixing a moiety and confining it to immovable property admits in the most clear manner the impracticability of providing for all cases of this nature.[2]

§ 357. **Same.** — Pothier too, of whom it has been remarked that he is generally swayed by the purest morality, says: "Equity ought to preside in all agreements. Hence it follows that in contracts of mutual interest where one of the contracting parties gives or does something for the purpose of receiving something else as a price and compensation for it, an injury suffered by one of the contracting parties, even when the other has not had recourse to any artifice to deceive him, is alone sufficient to render such contracts vicious. For as equity in matters of commerce consists in equality, when that equity is violated, as when one of the parties gives more than he receives, the contract is vicious for want of the equity which ought to preside in it." He immediately adds: "Although any injury whatever renders contracts inequitable and consequently vicious, and the principle of moral duty (le for interieur) induces the obligation of supplying the just price, yet

[1] 1 Domat, Civil Law, B. 1, tit. 2, §§ 3, 9, art. 1. See also Heineccius, Elem. I. N. et G. § 352; Id. § 340.

[2] Cod. Lib. 4, tit. 44, l. 2; Id. l. 9; Heinecc. Elem. J. N. and N. § 340, 352. Post, § 347.

persons of full age are not allowed in point of law to object to their agreements as being injurious unless the injury be excessive; a rule wisely established for the security and liberty of commerce, which requires that a person shall not be easily permitted to defeat his agreements, otherwise we should not venture upon making any contract for fear that the other party, imagining himself to be injured by the terms of it, would oblige us to follow it by a lawsuit. That injury is commonly deemed excessive which amounts to more than a moiety of the just price. And the person who has suffered such an injury may within ten years obtain letters of rescission for annulling the contract." [1]

§ 358. **Same.** — After such concessions we may well rest satisfied with the practical convenience of the rule of the common law, which does not make the inequality of the bargain depend solely upon the price, but upon the other attendant circumstances which demonstrate imposition or some undue influence.[2] The Scottish law has adopted the same practical doctrine.[3]

§ 359. **Relief Will Not Be Granted Where Parties Cannot Be Placed in Statu Quo.** — This part of the subject may be concluded by the remark that Courts of Equity will not relieve in all cases even of very gross inadequacy, attended with circumstances which might otherwise induce them to act, if the parties cannot be placed in statu quo; as for instance in cases of marriage settlements, for the court cannot unmarry the parties.[4]

§ 360. **Effect of Contracts Induced through Surprise.** — Cases of suprise and sudden action without due deliberation may properly be referred to the same head of fraud or imposition.[5]

[1] Pothier on Oblig., n. 33, 34, by Evans; ante, § 356.
[2] 1 Fonbl. Eq. B. 1, ch. 2, § 10.
[3] Erskine, Inst. B. 4, tit. 1, § 27.
[4] 1 Madd. Ch. Pr. 215; North *v.* Ansall, 2 P. Will. 619.
[5] See ante, § 184, note 2; Howe *v.* Wheldon, 2 Ves. 516. Mr. Baron Powel, in the Earl of Bath and Montague's Case (3 Ch. Cas. 56), used the following language: "It is said that this is a deed that was obtained by surprise and circumvention. Now I perceive this word 'surprise' is of a very large and general extent. They say that if the deed be not read to or by the party, that is a surprise; nay, the mistake of a counsel that draws the deed either in his recitals or other things, that is a surprise of a counsel, and the surprise of counsel must be interpreted the surprise of the client, &c. If these things be sufficient to let in a Court of Equity, to set aside deeds found by the verdict to be good in law, then no man's property can be safe. I hardly know any surprise that should be sufficient to set aside a deed after a verdict, unless it be mixed up with fraud, and that expressly proved." Lord Chief Justice Treby in the same case (p. 74) said: "As to the first point of surprise, &c., I confess I am still at a loss for the very notion of surprise, for I take it to be either falsehood or forgery, that is,

An undue advantage is taken of the party under circumstances which mislead, confuse, or disturb the just result of his judgment, and thus expose him to be the victim of the artful, the importunate, and the cunning. It has been very justly remarked by an eminent writer that it is not every surprise which will avoid a deed duly made. Nor is it fitting; for it would occasion great uncertainty, and it would be impossible to fix what is meant by surprise; for a man may be said to be surprised in every action which is not done with so much discretion as it ought to be.[1] The surprise here intended must be accompanied with fraud and circumvention,[2] or at least by such circumstances as demonstrate that the party had no opportunity to use suitable deliberation, or that there was some influence or management to mislead him. If proper time is not allowed to the party and he acts improvidently, if he is importunately pressed, if those in whom he places confidence make use of strong persuasions, if he is not fully aware of the consequences but is suddenly drawn in to act, if he is not permitted to consult disinterested friends or counsel before he is called upon to act in circumstances of sudden emergency or unexpected right or acquisition, — in these and many like cases, if there has been great inequality in the bargain, Courts of Equity will assist the

— though I take it they would not use the word in this case, — fraud; if that be not the meaning of it, to be something done unawares, nor with all the precaution and deliberation, as possibly a deed may be done. Here was a case cited not long ago, &c., out of the Civil Law about surprise, &c. A man was informed by his kinsman that his son was dead, and so got him to settle his estate upon him. This is called, in the Civil Law, surreptio, &c. Now the civilians define that thus: 'Surreptio est cum per falsam rei narrationem aliquid extorquetur', when a man will by false suggestion prevail upon another to do that which otherwise he would not have done. And I make no doubt that equity ought to set aside that; but then this is probably called a fraud." See Lord Holt's opinion in the same case (p. 103). The Lord Keeper (Lord Somers) in the same case said (p. 114): "Now for this word 'surprise', it is a word of a general signification, so general and so uncertain that it is impossible to fix it. A man is surprised in every rash and indiscreet action, or whatsoever is not done with so much judgment as it ought to be. But I suppose the gentlemen who use that word in this case mean such surprise as is attended and accompanied with fraud and circumvention. Such a surprise may indeed be a good ground to set aside a deed so obtained in equity, and hath been so in all times. But any other surprise never was, and I hope never will be, because it will introduce such a wild uncertainty in the decrees and judgments of the court as will be of greater consequence than the relief in any case will answer for." See ante, § 184, note 2.

[1] 1 Fonbl. Eq. B. 1, ch. 2, § 8.

[2] Ibid.; 1 Madd. Ch. Prac. 212, 213, 214.

party upon the ground of fraud, imposition, or unconscionable advantage.[1]

§ 361. **Cases within Rule of Positive Fraud.** — Many other cases might be put, illustrative of what is denominated actual or positive fraud.[2] Among these are cases of the fraudulent suppression or destruction of deeds and other instruments in violation of or injury to the rights of others,[3] fraudulent awards with an intent to do injustice,[4] fraudulent and illusory appointments and revocations under powers,[5] fraudulent prevention of acts to be done for the benefit of others under false statements or false promises,[6] frauds in relation to trusts of a secret or special nature,[7] frauds in verdicts, judgments, decrees, and other judicial proceedings,[8] frauds in the confusion of boundaries of estates and matters of partition and dower,[9] frauds in the administration of charities,[10] and frauds upon creditors and other persons standing upon a like equity.[11]

§ 362. **Same.** — Some of the cases falling under each of these heads belong to that large class of frauds commonly called con-

[1] Evans *v.* Llewellyn, 1 Cox, R. 439, 440; s. c. 1 Bro. Ch. R. 150; Irnham *v.* Child, 1 Bro. Ch. R. 92; Townshend *v.* Stangroom, 6 Ves. 338; Picket *v.* Loggon, 14 Ves. 215; Bean *v.* Western N. C. R. Co., 107 N. C. 731, 12 S. E. 600; Chesapeake & Ohio R. Co. *v.* Howard, 14 App. D. C. 262, 178 U. S. 153, 44 L. Ed. 1015, 20 S. Ct. Rep. 880.

[2] See Com. Dig. Chancery, 3 M. 1, &c.

[3] 1 Madd. Ch. Pr. 255 to 260; Bowles *v.* Stewart, 1 Sch. & Lefr. 222, 225; Dormer *v.* Fortescue, 3 Atk. 124; Eyton *v.* Eyton, 2 Vern. 280; Dalton *v.* Coatsworth, 1 P. Will. 733.

[4] 1 Madd. Ch. Pr. 233, 234; Brown *v.* Brown, 1 Vern. 157, and Mr. Raithby's note (1), 159; Com. Dig. Chancery, 2 K. 6; Champion *v.* Wenham, Ambl. R. 245.

[5] 1 Madd. Ch. Pr. 246 to 252.

[6] 1 Madd. Ch. Pr. 252, 253; Luttrell *v.* Lord Waltham, 14 Ves. 290; Jones *v.* Martin, 6 Bro. Parl. Cas. 437; 5 Ves. 266, note; 1 Fonbl. Eq. B. 1, ch. 2, § 13, note (*q*); Id. B. 1, ch. 4, § 25, and notes; 2 Chance on Powers, ch. 23, § 3, arts. 3015 to 3025; Sugden on Powers, ch. 6, § 2, pp. 377, 387 (3d ed.).

[7] 2 Madd. Ch. Pr. 97, 98; 1 Hovenden on Frauds, ch. 13, p. 468, &c.; Dalbiac *v.* Dalbiac, 16 Ves. 124.

[8] 1 Madd. Ch. Pr. 236, 237; Com. Dig. Chancery, 3 M. 1, 3 N. 1, 3 W. Actual as distinguished from constructive fraud is necessary to sustain a bill to set aside a judgment or decree. Patch *v.* Ward, L. R. 3 Ch. 203. It must be shown that there was a good defence to an action resulting in a judgment alleged to have been obtained by fraud. White *v.* Crow, 110 U. S. 183, 28 L. Ed. 113, 4 S. Ct. Rep. 71.

[9] 1 Madd. Ch. Pr. 237; Mitf. Eq. Pl. 117; 1 Hovenden on Frauds, ch. 8, p. 239; Id. ch. 9, p. 244.

[10] 2 Hovenden on Frauds, ch. 28, p. 288.

[11] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 411, &c.; 1 Fonbl. Eq. B. 1, ch. 4, §§ 12, 13, 14, and notes; Com. Dig. Chancery, 3 M. 4; Jones *v.* Martin, 6 Bro. Parl. Cas. 437; 5 Ves. 266, note.

structive frauds, which will naturally find a place in our future pages. But as it is the object of these commentaries not merely to treat of questions of relief, but also of principles of jurisdiction, a few instances will be here adduced as examples of both species of fraud.

§ 363. **Suppression or Destruction of Muniments of Title, as a Fraud.** — In the first place as to the suppression and destruction of deeds and wills and other instruments. If an heir should suppress them in order to prevent another party as a grantee or a devisee from obtaining the estate vested in him thereby, Courts of Equity upon due proof by other evidence would grant relief, and perpetuate the possession and enjoyment of the estate in such grantee or devisee.[1] For cases for relief against spoliation

[1] See ante, § 260, and note; post, § 579; 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*u*); Hunt *v.* Matthews, 1 Vern. R. 408; Wardour *v.* Binsford, 1 Vern. R. 452; 2 P. Will. 748, 749; Dalton *v.* Coatsworth, 1 P. Will. 731; Woodreff *v.* Barton, 1 P. Will. 734; Finch *v.* Newnham, 2 Vern. 216; Hampden *v.* Hampden, 1 Bro. Parl. Cas. 250; s. c. cited, 1 P. Will. 733; Barnesly *v.* Powel, 1 Ves. R. 119, 284, 289; Tucker *v.* Phipps, 3 Atk. R. 360. In this last case Lord Hardwicke said: "In this court the rule is not to allow a suit against an executor for a legacy before a probate of the will; but in the present case the plaintiff ought not to be put to the difficulty of going into the spiritual court to cite the defendant, because that would be giving the defendant a great advantage from his own bad acts in destroying or suppressing the will; for here the spoliation is, I think, proved so sufficiently as to entitle the plaintiff to come here in the first instance for a decree. As to the spoliation, consider it generally as a personal legacy where the will is destroyed or concealed by the executor, and I think in such a case if the spoliation is proved plainly (though the general rule is to cite the executor into the Ecclesiastical Court), the legatee may properly come here for a decree upon the head of spoliation and suppression. There are several cases where if spoliation or suppression is proved it will change the jurisdiction and give this court a jurisdiction which it had not originally; as in the case of Lord Hunsdon, Hob. 109, where the title was a title merely at law, yet there being a suppression of the deeds under which that title accrued, the plaintiff had a decree here for possession and quiet enjoyment. As the jurisdiction may be changed with regard to a court of law, why may it not with regard to the Spiritual Court; and I think the case of Weeks *v.* Weeks, which came before me some time ago, an authority that it may; here the spoliation or suppression is certainly fraudulent, voluntary, and malicious, and therefore differs from the case of Pascall *v.* Pickering, where the spoliation did by no means appear to be fraudulent or malicious, but rather inadvertently done, and without any bad design. I think in such cases of malicious and fraudulent spoliations the court will not put the plaintiff under the difficulty of going into the Ecclesiastical Court, where he must meet with much more difficulty than proving the contents of a deed at law which has been lost or secreted. For in the Spiritual Court the plaintiff must prove it a will in writing, and must likewise prove the contents in the very words, which will be a difficulty almost insuperable, and which Courts of Law do not put a person upon doing; the plaintiff must also

come in a favorable light before Courts of Equity, "in odium spoliatoris"; and where the contents of a suppressed or destroyed instrument are proved, the party (as he ought) will receive the same benefit as if the instrument were produced.[1]

§ 364. **Frauds in Regard to Power of Appointment.** — In the next place, frauds in regard to powers of appointment. A person having a power of appointment for the benefit of others shall not by any contrivance use it for his own benefit. Thus if a parent has a power to appoint to such of his children as he may choose, he shall not by exercising it in favor of a child in a consumption gain the benefit of it himself,[2] or by a secret agreement with a child in whose favor he makes it derive a beneficial interest from

prove the whole will, though the remainder of it does not at all belong to or regard his legacy. I think if this had been a mere personal legacy, the court under the circumstances of this case ought to interpose; and the rather, because in bringing suits against an executor this court goes further in requiring a probate than courts at law. But here the case is stronger to entitle the plaintiff to a decree, because the legacy is out of real and personal estate both; and as to the real estate there is no occasion to prove the will in the Spiritual Court to entitle the legatee to recover his legacy out of the real estate. This would be clearly the case where the charge is only upon the real estate; and though the heir is entitled to have the personal estate to exonerate his real, yet if he is made executor, and has, by a voluntary and fraudulent act, put the legatee under such difficulties as make it almost impossible for him to prove the will, it is reasonable to let in the legatee to have his legacy, and leave the executor to pay himself out of the personal estate." Miser Gold Min. & Mill. Co. *v.* Moody, 37 Colo. 310, 86 Pac. 335; Albright *v.* Albright, 70 Wis. 528, 36 N. W. 254; In re Thomas' Will, 76 Minn. 237, 79 N. W. 104, 77 Am. St. Rep. 639; Metropolitan Trust & Savings Bank *v.* Perry, 259 Ill. 183, 102 N. E. 218; King *v.* Fragley, 19 Cal. App. 735, 127 Pac. 813.

[1] Saltern *v.* Melhuish, Ambler, R. 247; Cowper *v.* Cowper, 2 P. Will. 748, &c.; Rex *v.* Arundel, Hob. R. 109; Hampden *v.* Hampden, 1 P. Will. 733; 1 Bro. Parl. Cas. 250; Bowles *v.* Stewart, 1 Sch. & Lefr. 225. But laches may bar relief in such cases. Chatham *v.* Hoare, L. R. 9 Eq. 571.

[2] Topham *v.* Portland, 11 H. L. Cas. 32; s. c. L. R. 5 Ch. 40; Williams's Appeal, 73 Penn. 249, 284; Hinchinbrooke *v.* Seymour, 1 Bro. C. C. 395, — a case explained and denied in Henty *v.* Wrey, 21 Ch. D. 332, 343, 344, so far as it may be thought to decide that a power for children shall not be raised until wanted. See also Wellesley *v.* Mornington, 2 Kay & J. 143; Keily *v.* Keily, 4 Dru. & W. 38; s. c. 2 Con. & L. 334. In Henty *v.* Wrey, supra, Lindley, L. J., says, at p. 359, that appointments vesting portions charged on land in children of tender age who die soon afterwards are looked upon with suspicion, and that very little additional evidence of improper motive will induce the courts to set aside the appointment or treat it as invalid; but that without some additional evidence this will not be done. Nor will the mere fact that the appointer may derive some benefit with the appointees be fatal necessarily to the exercise of the power. In re Huish, L. R. 10 Eq. 5; Cooper *v.* Cooper, L. R. 5 Ch. 203.

the execution of it.[1] The same rule applies to cases where a parent, having a power to appoint among his children, makes an illusory appointment by giving to one child a nominal and not a substantial share; for in such a case Courts of Equity will treat the execution as a fraud upon the power.[2]

§ 365. **Fraudulent Prevention of Acts Done for Benefit of Third Persons.** — In the next place the fraudulent prevention of acts to be done for the benefit of third persons. Courts of Equity hold themselves entirely competent to take from third persons, and a fortiori from the party himself, the benefit which he may have derived from his own fraud, imposition, or undue influence in procuring the suppression of such acts.[3] Thus where a person had fraudulently prevented another upon his death-bed from suffering a recovery at law with a view that the estate might devolve upon another person with whom he was connected, it was adjudged that the estate ought to be held as if the recovery had been perfected, and that it was against conscience to suffer it to remain where it was.[4] So if a testator should communicate his intention to a devisee of charging a legacy on his estate, and the devisee should tell him that it is unnecessary and he will pay it; the legacy being thus prevented, the devisee will be charged with the payment.[5] And where a party procures a testator to make a new will, appointing him as executor, and agrees to hold the property in trust for the use of an intended legatee, he will be held a trustee for the latter upon the like ground of fraud.[6]

§ 366. [**Essentials to Establish the Trust.** — A testator may make a gift to a legatee solely for the purpose of enabling him,

[1] McQueen *v.* Farquhar, 11 Ves. 479; Meyn *v.* Belcher, 1 Eden, R. 138; Palmer *v.* Wheeler, 2 Ball & Beatt. 18; Sugden on Powers, ch. 7, § 2; Morris *v.* Clarkson, 1 Jac. & Walk. 111.

[2] Sugden on Powers, ch. 7, § 2; ch. 9, § 4; Butcher *v.* Butcher, 9 Ves. 382; 2 Hovenden on Frauds, ch. 23, p. 220, &c.; 1 Madd. Ch. Pr. 246 to 252; Campbell *v.* Horne, 1 Younge & Coll. N. R. Ch. 664.

[3] Bridgman *v.* Green, 2 Ves. R. 627; Huguenin *v.* Baseley, 14 Ves. 289; ante, § 361; post, § 1054.

[4] Luttrell *v.* Lord Waltham, cited 14 Ves. 290; s. c. 11 Ves. 638.

[5] Cited in Mestaer *v.* Gillespie, 11 Ves. 638. See Goss *v.* Tracey, 1 P. Will. 288; 2 Vern. 700; Thynn *v.* Thynn, 1 Vern. 296; Reach *v.* Kennigate, Ambler, R. 67; Chamberlain *v.* Agar, 2 Ves. & B. 259; Drakeford *v.* Walker, 3 Atk. 539.

[6] Thynn *v.* Thynn, 1 Vern. 296; Reach *v.* Kennigate, Ambler, R. 67, Devenish *v.* Barnes, Prec. Ch. 3; Oldham *v.* Litchfield, 2 Vern. R. 504; Barrow *v.* Greenough, 3 Ves. 152; Chamberlain *v.* Agar, 2 Ves. & B. 262; Whitton *v.* Russell, 1 Atk. R. 448. See also cases in note (*a*) to 3 Ves. 39.

if he sees fit, to dispose of it in a particular way, but if there is no promise by him, express or implied, to so dispose of it, and the matter is left wholly to his will and discretion, no secret trust is created, and he may, if he chooses, apply the legacy to his own use. When it clearly appears that no secret trust was intended, even if it is equally clear that the testator expected that the gift would be applied in accordance with his known wishes, the legatee, if he has made no promise, and none has been made in his behalf, takes an absolute title, and can do what he pleases with the gift. Whatever moral obligation there may be, no legal obligation rests upon him.[1] But to create such a trust in opposition to the terms of the will it was necessary that the testator should have communicated his intention to the legatee, the legatee should have assented to the same, and the testator should have acted upon such assent.[2] And where the request made by the testator to his wife was that she should live comfortably and in the same style that she had been accustomed " and at the end of the year I want you to divide the surplus among my people ", this was not a sufficient designation of the property in order for the trust to be enforced in equity. If there is such uncertainty that it cannot be known who is to take as beneficiary, the trust will fail; or if the property which is attempted to be put in trust is so uncertain that it cannot be separated or distinguished from the individual property of the trustee the trust will be void for uncertainty.[3] But where the testator had made a provision in his will for his executrix to have a certain sum, and afterwards changed his mind and wanted her to receive only the income from the amount, and that she will the residue to his brothers and sisters, and she replied to the request of the

[1] O'Donnell *v.* Murphy, 17 Cal. App. 625, 120 Pac. 1076; Edson *v.* Barstow, 10 App. Div. 104, 41 N. Y. Supp. 723, 75 N. Y. St. 1115, 48 N. E. 541, 61 Am. St. Rep. 609, 154 N. Y. 199; In re Small's Will, 27 App. Div. 438, 50 N. Y. Supp. 341, 52 N. E. 723, 158 N. Y. 128; Rutherford *v.* Carpenter, 134 App. Div. 881, 119 N. Y. Supp. 790; Casey *v.* Casey, 161 App. Div. 427, 146 N. Y. Supp. 348; Golland *v.* Golland, 84 Misc. Rep. 299, 147 N. Y. Supp. 263; Smith *v.* Smith, 54 N. J. Eq. 1, 32 Atl. 1069; Yearance *v.* Powell, 55 N. J. Eq. 577, 37 Atl. 735.

[2] Nash *v.* Bremner, 84 N. J. Eq. 131, 92 Atl. 938.

[3] Smullin *v.* Wharton, 73 Neb. 667, 103 N. W. 288; and a request that "my wife if she should not require the whole of my estate as a support, that she will will at her death the remainder to the children of my brother, Charles A. Bryan." Bryan *v.* Milby, 6 Del. Ch. 208, 24 Atl. 333, 13 L. R. A. 563; Bills *v.* Bills, 80 Iowa 269, 45 N. W. 748, 8 L. R. A. 696, 20 Am. St. Rep. 418; Cornwell *v.* Wulff, 148 Mo. 542, 50 S. W. 439, 45 L. R. A. 53; Orth *v.* Orth, 145 Ind. 184, 42 N. E. 277, 44 N. E. 17; Howard *v.* Carusi, 109 U. S. 731, 27 L. Ed. 1089, 3 S. Ct. Rep. 575.

testator and wrote in substance, "Tell Uncle Willis that everything will be all right, and I will do as he wishes me to do," this was a sufficient promise to create the trust, and there being no uncertainty as to the amount of the property to be given, or to whom it was intended.[1]]

§ 367. **Fraudulent Withholding of Consent to Marriage, upon Which Legacy Depends, as Ground for Relief.** — We may close this head of positive or actual fraud by referring to another class of frauds of a very peculiar and distinct character. Gifts and legacies are often bestowed upon persons upon condition that they shall not marry without the consent of parents, guardians, or other confidential persons. And the question has sometimes occurred how far Courts of Equity can or ought to interfere where such consent is fraudulently withheld by the proper party for the express purpose of defeating the gift or legacy, or of insisting upon some private and selfish advantage, or from motives of a corrupt, unreasonable, or vicious nature. The doctrine now firmly established upon this subject is that Courts of Equity will not suffer the manifest object of the condition to be defeated by the fraud, or dishonest, corrupt, or unreasonable refusal of the party whose consent is required to the marriage.[2] It is indeed a very delicate and difficult duty to be performed by such courts. But to permit a different rule to prevail would be to encourage frauds and to enable a party to withhold consent upon grounds utterly wrong or upon motives grossly corrupt and unreasonable.

[1] Belknap *v.* Tillotson, 82 N. J. Eq. 271, 88 Atl. 841.

[2] Peyton *v.* Bury, 2 P. Will. 625, 628; Eastladd *v.* Reynolds, 1 Dick. R. 317; Goldsmid *v.* Goldsmid, 19 Ves. 368; Strange *v.* Smith, Ambler, R. 263; Clarke *v.* Parkins, 19 Ves. 1, 12; Mesgrett *v.* Mesgrett, 2 Vern. R. 580; Merry *v.* Ryves, 1 Eden, R. 1, 4.

CHAPTER VII

CONSTRUCTIVE FRAUD

§ 368. **Constructive Fraud.** — Having thus considered some of the most important cases of actual or meditated and intentional fraud in which Courts of Equity are accustomed to administer a plenary jurisdiction for relief, we may now pass to another class of frauds, which, as contradistinguished from the former, are treated as legal or constructive frauds. By constructive frauds are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law as within the same reason and mischief as acts and contracts done malo animo. Although at first view the doctrines on this subject may seem to be of an artificial if not of an arbitrary character, yet upon closer observation they will be perceived to be founded in an anxious desire of the law to apply the principle of preventive justice so as to shut out the inducements to perpetrate a wrong, rather than to rely on mere remedial justice after a wrong has been committed. By disarming the parties of all legal sanction and protection for their acts, they suppress the temptations and encouragements which might otherwise be found too strong for their virtue.

§ 369. **Nature of Constructive Frauds.** — Some of the cases under this head are principally so treated because they are contrary to some general public policy or to some fixed artificial policy of the law. Others again rather grow out of some special confiden-

tial or fiduciary relation between all the parties or between some of them, which is watched with especial jealousy and solicitude because it affords the power and the means of taking undue advantage or of exercising undue influence over others. And others again are of a mixed character, combining in some degree the ingredients of the preceding with others of a peculiar nature; but they are chiefly prohibited because they operate substantially as a fraud upon the private rights, interests, duties, or intentions of third persons, or unconscientiously compromit, or injuriously affect the private interests, rights, or duties of the parties themselves.

§ 370. [**Constructive Fraud Defined.** — What is called constructive fraud does not necessarily negative integrity of purpose. It has been defined as an act which the law declares fraudulent without inquiry into its motive. Or, such contracts or acts as, though not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead, or to violate confidence, are prohibited by law. The use of the phrase "constructive fraud" has been severely criticized by the courts and law-writers as being misleading and unscientific, but it has become so fixed in the literature and terminology of the law that any attempt to substitute a more fitting name to the thing to which it is applied would result in confusion. The necessity of considering this phase of the law arises most frequently in controversies which grow out of dealings between persons when one occupies fiduciary or confidential relations to the other. As between such persons, a contract by which the one having the advantage of position profits at the expense of the other will be held presumptively fraudal and voidable, and the burden is placed upon him who claims the benefits thereof to rebut that presumption by an affirmative showing that such contract was fairly procured without undue influence or other circumstance tending to impeach its fairness. Though strictly of differing signification, the phrases "fiduciary relations" and "confidential relations" are ordinarily used as convertible terms and have reference to any relationship of blood, business, friendship, or association in which the parties repose special trust and confidence in each other and are in a position to have and exercise, or do have and exercise, influence over each other. The rule or presumption to which we have referred is more particularly applicable where one of the parties to such relation has by reason of his stronger character, greater ability, and wider experience, or by his hold upon the

affection, trust, and confidence of the other, obtained a dominating influence over him.[1]]

§ 371. **Cases of Contracts against Public Policy.** — And in the first place let us consider the cases of constructive fraud which are so denominated on account of their being contrary to some general public policy or fixed artificial policy of the law.[2] Among these may properly be placed contracts and agreements respecting marriage (commonly called marriage brokage contracts), by which a party engages to give another a compensation if he will negotiate an advantageous marriage for him. The civil law does not seem to have held contracts of this sort in such severe rebuke; for it allowed proxenetæ, or match-makers, to receive a reward for their services, to a limited extent.[3] And the period is comparatively modern in which a different doctrine was engrafted into the common law and received the high sanction of the House of Lords.[4]

§ 372. **Same.** — The ground upon which Courts of Equity interfere in cases of this sort is not upon any notion of damage to the individuals concerned, but from considerations of public policy.[5] Marriages of a suitable nature and upon the fairest

[1] Lampman *v.* Lampman, 118 Iowa 140, 91 N. W. 1042; Rodes *v.* Bate, L. R. 1 Ch. 252; Frost *v.* Latham & Co., 181 Fed. 866; Mott *v.* Mott, 49 N. J. Eq. 192, 22 Atl. 997; Cole *v.* Getzinger, 96 Wis. 559, 71 N. W. 75; Madden *v.* Caldwell Land Co., 16 Idaho 59, 100 Pac. 358, 21 L. R. A. (N. S.) 332.

[2] See Mr. Cox's note to Osmond *v.* Fitzroy, 3 P. Will. 131; Newland on Contracts, ch. 33, p. 469, &c. By being contrary to public policy we are to understand that in the sense of the law they are injurious to, or subversive of, the public interests. See Chesterfield *v.* Janssen, 1 Atk. 352; s. c. 2 Ves. 125.

[3] Cod. Lib. 5, tit. 1, l. 6.

[4] Hall and Kean *v.* Potter, 3 P. Will. 76; 1 Eq. Cas. Abridg. 89, F; s. c. 3 Lev. 411; Show. Parl. Cas. 76; 1 Fonbl. Eq. B. 1, ch. 4, § 10; Grisley *v.* Lother, Hob. R. 10; Law *v.* Law, Cas. temp. Talb. 140, 142; Vauxhall Bridge Company *v.* Spencer, Jac. R. 67. In Boynton *v.* Hubbard, 7 Mass. R. 112, Mr. Chief Justice Parsons said: "We do not recollect a contract which is relieved against in chancery as originally against public policy which has been sanctioned in Courts of Law as legally obligatory on the parties. For although it has been said in chancery that marriage brokage bonds are good at law but void in equity, yet no case has been found at law in which those bonds have been holden good." But see Grisley *v.* Lother, Hob. R. 10, and a case cited in Hall *v.* Potter, 3 Levinz, R. 411, 412; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*r*).

[5] 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*r*); Newland on Contracts, ch. 33, pp. 469 to 472. "Marriage brokage bonds which are not fraudulent on either party are yet void because they are a fraud on third persons, and a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles, and without the advice of friends, and they are relieved against as a general mischief for the sake of the public." Per Parsons, Ch. Just. in Boynton *v.* Hubbard, 7 Mass. 112.

choice are of the deepest importance to the well-being of society; since upon the equality and mutual affection and good faith of the parties much of their happiness, sound morality, and mutual confidence must depend. And upon these only can dependence be placed for the due nurture, education, and solid principles of their children. Hence every temptation to the exercise of an undue influence or a seductive interest in procuring a marriage should be suppressed; since there is infinite danger that it may, under the disguise of friendship, confidence, flattery, or falsehood, accomplish the ruin of the hopes and fortunes of most deserving persons, and especially of females. The natural consequence of allowing any validity to contracts of marriage brokage would be to introduce improvident, ill-advised, and often fraudulent matches, in which advantage would be taken of youth and inexperience and warm and generous affections. And the parties would be led on until they would become the victims of a sordid cunning, and be betrayed into a surrender of all their temporal happiness; and thus perhaps be generally prepared to sink down into gross vice and an abandonment of conjugal duties. Indeed contracts of this sort have been not inaptly called a sort of kidnapping into a state of conjugal servitude;[1] and no acts of the parties can make them valid in a Court of Equity.[2]

§ 373. **Same.** — The public policy of thus protecting ignorant and credulous persons from being the victims of secret contracts of this sort would seem to be as perfectly clear as any question of this nature well can be. And the surprise is not that the doctrine should have been established in a refined, enlightened, and Christian country, but that its propriety should ever have been made matter of debate. It is one of the innumerable instances in which the persuasive morality of Courts of Equity has subdued the narrow, cold, and semi-barbarous dogmas of the common law. The Roman law, while it admitted the validity of such contracts in a qualified form, had motives for such an indulgence founded upon its own system of conjugal rights, duties, and obligations, very different from what in our age would be deemed either safe or just or even worthy of toleration.

§ 374. **Marriage Brokage Contracts Are Void.** — Be the foundation of the doctrine however what it may, it is now firmly established that all such marriage brokage contracts are utterly

[1] Drury *v.* Hooke, 1 Vern. 412.

[2] Shirley *v.* Martin, cited by Mr. Cox, in 3 P. Will. 75; s. c. 1 Ball Beatty, 357, 358.

void, as against public policy;[1] so much so that they are deemed incapable of confirmation,[2] and even money paid under them may be recovered back again in a Court of Equity.[3] Nor will it make any difference that the marriage is between persons of equal rank and fortune and age; for the contract is equally open to objection upon general principles, as being of dangerous consequence.[4] Indeed some writers treat contracts of this sort as involving considerations of turpitude, and entitled to be classed with others of a highly vicious nature.[5]

§ 375. [**Same.** — The pernicious tendency of such contracts is so great that enforcement of them by the courts will be refused regardless of the propriety or expediency of the particular marriage, and the fact that the agreement was that the defendant was to be introduced to a certain woman by the plaintiff, whether the marriage was consummated or not, there was no valid obligation.[6] An agreement whereby the plaintiff gave to the defendant a mortgage upon his land to secure a debt, in consideration of a third person to marry plaintiff's daughter, and the debt was to be cancelled if the husband lived with the wife as much as six years and was a faithful husband to her, otherwise the amount was to be held in trust for the wife, is void, although the third person had already made an independent contract with the daughter to marry her. A contract to hasten an intended marriage is just as obnoxious to the objection as a contract to bring about a marriage between strangers.[7] The same rule applies as

[1] Arundel *v.* Trevillian, 1 Rep. Ch. 47 [87]; Drury *v.* Hooke, 1 Vern. R. 412; Hall *v.* Potter, 3 Lev. 411; s. c. Shower, Parl. Cas. 76; Cole *v.* Gibson, 1 Ves. 507; Debenham *v.* Ox, 1 Ves. 276; Smith *v.* Aykerill, 3 Atk. 566; Hylton *v.* Hylton, 2 Ves. 548; Stribblehill *v.* Brett, 2 Vern. 446; s. c. Prec. Ch. 165; 1 Bro. Parl. Cas. 57; Roberts *v.* Roberts, 3 P. Will. 74, note (1); Id. 75, 76; Law *v.* Law, 3 P. Will. 391, 394; Williamson *v.* Gihon, 2 Sch. & Lefr. 357; 1 Eq. Cas. Abridg. 98, F.

[2] Cole *v.* Gibson, 1 Ves. 503, 506, 507; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*s*); Roberts *v.* Roberts, 3 P. Will. 74, and Cox's note (1).

[3] Smith *v.* Bruning, 2 Vern. 392; 1 Fonbl. Eq. B. 1, ch. 4, § 10; Goldsmith *v.* Bruning, 1 Eq. Abridg. 89, F; Jordan *v.* Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836; Place *v.* Conklin, 34 App. Div. 191, 54 N. Y. Supp. 532, 51 N. Y. Supp. 407, 23 Misc. Rep. 40; In re Mathiot's Estate, 243 Pa. 375, 90 Atl. 139; Delbridge *v.* Beach, 66 Wash. 416, 119 Pac. 856.

[4] 1 Fonbl. Eq. B. 1, ch. 4, § 10; Newland on Contracts, ch. 33, pp. 470, 471.

[5] Newland on Contracts, ch. 33, p. 469.

[6] Hellen *v.* Anderson, 83 Ill. App. 506; In re Grobe's Estate, 127 Iowa 121, 102 N. W. 804; Morrison *v.* Rodgers, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. Rep. 95.

[7] Jangraw *v.* Perkins, 76 Vt. 127, 56 Atl. 532, 104 Am. St. Rep. 917.

to any agreement with reference to securing a divorce, or that the defendant will not make any defence, or having for its object the dissolution of a marriage contract, or designed to promote and facilitate divorce. And no recovery can be had upon a note given by the defendant and another to plaintiffs' attorneys employed for the purpose of securing a divorce for the wife of defendant. The suit in question was upon two notes, one for $500 and one for $1000, and there was indorsed upon each note an agreement by the plaintiffs, payees, that the notes were not to be collectible unless they should sue defendant and procure from him a divorce for his wife within six months from date. The reason of this rule is that the law views with repugnance all contracts, the purpose or direct tendency of which, as gathered from its terms, is to dissolve the marriage tie, because of its regard for virtue, the good order of society, the welfare of the children as the fruit of the union, and the peculiar sanctity of the marriage relation.[1] There are some contracts, however, which relate to the marital relation, that will be enforced, for instance, where the defendant agreed with the plaintiff that he would support her if he could induce his son, who had brought about her downfall, to marry her. A contract to pay money upon, but not in consideration of, the marital infidelity of the promisor, is not invalid, when its object is to benefit the injured spouse. And an agreement to support the mother of one's illegitimate children, upon condition that she will not prosecute him for bastardy, is valid. In this case there was no contract for future illicit relations, but an agreement to support the mother and her illegitimate offspring.[2]]

§ 376. **Same.** — The doctrine has gone even further; and, with a view to suppress all undue influence and improper management, it has been held that a bond given to the obligee as a remuneration for having assisted the obligor in an elopement and marriage without the consent of friends is void, even though it is given voluntarily after the marriage, and without any previous agreement for the purposes; for it may operate an injury to the wife, as well as give encouragement to a grossly iniquitous transaction, calculated to disturb the peace of families and to involve them in irremediable distress.[3] It approaches indeed very nearly to the case of a premium in favor of seduction.

[1] Peirce *v.* Cobb, 161 N. C. 300, 77 S. E. 350; McDonald *v.* McDonald, 175 Md. App. 513, 161 S. W. 850.

[2] Wright *v.* Wright, 114 Iowa 748, 87 N. W. 709, 55 L. R. A. 261; Burton *v.* Burton, 142 N. C. 152, 55 S. E. 71.

[3] Williamson *v.* Gihon, 2 Sch. & Lefr. 356, 362.

§ 377. **Instruments Given to Procure Influence of Obligee Are Void.** — Of a kindred nature, and governed by the same rules, are cases where bonds are given or other agreements made as a reward for using influence and power over another person to induce him to make a will in favor of the obligee, and for his benefit; for all such contracts tend to the deceit and injury of third persons, and encourage artifices and improper attempts to control the exercise of their free judgment.[1] But such cases are carefully to be distinguished from those in which there is an agreement among heirs or other near relatives to share the estate equally between them whatever may be the will made by the testator; for such an agreement is generally made to suppress fraud and undue influence, and cannot truly be said to disappoint the testator's intention if he does not impose any restriction upon his devisee.[2]

§ 378. **Contracts Controlling Right of Marriage Are Void.** — Upon a similar ground secret contracts made with parents or guardians or other persons standing in a peculiar relation to the party, whereby, upon a treaty of marriage, they are to receive a compensation or security or benefit for promoting the marriage, or giving their consent to it, are held void. They are in effect equivalent to contracts of bargain and sale of children and other relatives, and of the same public mischievous tendency as marriage brokage contracts.[3] They are underhand agreements, subversive of the due rights of the parties, and operating as a fraud upon those to whom they are unknown, and yet whose interests are controlled or sacrificed by them. And as marriages are of public concern and ought to be encouraged, so nothing can more promote this end than open and public agreements on marriage treaties, and the discountenance of all others which secretly impair them.[4]

§ 379. **Same.** — Thus where a bond was taken by a father from his son upon his marriage, it was held void as being obtained by undue influence or undue parental awe.[5] So where a party upon

[1] Debenham *v.* Ox, 1 Ves. 276.

[2] Beckley *v.* Newland, 2 P. Will. 181; Harwood *v.* Tooker, 2 Sim. R. 192; Wethered *v.* Wethered, Id. 183; post, § 1074.

[3] 1 Fonbl. Eq. B. 1, ch. 4, § 10; Keat *v.* Allen, 2 Vern. R. 588; s. c. Prec. Ch. 267; 1 Madd. Ch. Pr. 231, 232.

[4] Roberts *v.* Roberts, 3 P. Will. 74, and Mr. Cox's note (1); Payton *v.* Bladwell, 1 Vern. R. 240; Redman *v.* Redman, 1 Vern. R. 348; Gale *v.* Lindo, 1 Vern. R. 475; Cole *v.* Gibson, 1 Ves. 503; Morrison *v.* Arbuthnot, 1 Bro. Ch. R. 547, note; s. c. 8 Bro. Parl. Cas. 247 (by Tomlins); 1 Fonbl. Eq. B. 1, ch. 4, §§ 10, 11.

[5] 1 Fonbl. Eq. B. 1, ch. 4, §§ 10, 11; Williamson *v.* Gihon, 2 Sch. & Lefr. 362; Anon. 2 Eq. Abr. 187.

his marriage with the daughter of A, gave the latter a bond for a sum of money (in effect a part of his wife's portion on the marriage) in order to obtain his consent to the marriage, it was held utterly void.[1] So where upon a marriage a settlement was agreed to be made of certain property by relations on each side and after the marriage one of the parties procured an underhand agreement from the husband to defeat the settlement in part, it was set aside, and the original settlement carried into full effect.[2] In all these and the like cases Courts of Equity proceed upon the broad and general ground that that which is the open and public treaty and agreement upon marriage shall not be lessened or in any way infringed by any private treaty or agreement.[3] The latter is a meditated fraud upon innocent parties, and upon this account properly held invalid. But it has a higher foundation in the security which it is designed to throw round the contract of marriage, by placing all parties upon the basis of good faith, mutual confidence, and equality of condition.[4]

§ 380. **Same.** — The same principle pervades the class of cases where persons, upon a treaty of marriage, by any concealment or misrepresentation mislead other parties, or do acts which are by other secret agreements reduced to mere forms or become inoperative. In all cases of such agreements relief will, upon the same enlightened public policy, be granted to the injured parties. For equity insists upon principles of the purest good faith; and nothing could be more subversive of it than to allow parties, by holding out false colors, to escape from their own solemn engagements.[5]

§ 381. **Same.** — Thus where a parent declined to consent to a marriage with the intended husband on account of his being in debt, and the brother of the latter gave a bond for the debt to procure such consent, and the intended husband then gave a secret counter bond to his brother to indemnify him against the first, and the marriage proceeded upon the faith of the extinguishment of the debt, the counter bond so given was treated as a

[1] Keat *v.* Allen, 2 Vern. R. 588; 1 Fonbl. Eq. B. 1, ch. 4, § 11; 1 Eq. Cas. Abr. 90, F. 5.

[2] Payton *v.* Bladwell, 1 Vern. R. 240; Stribblehill *v.* Brett, 2 Vern. R. 445; Prec. in Ch. 165.

[3] 1 Fonbl. Eq. B. 1, ch. 4, § 11; 1 Eq. Cas. Abr. 90, F. 5, 6.

[4] Lamlee *v.* Hanman, 2 Vern. 499, 500; Pitcairne *v.* Ogbourne, 2 Ves. 375; Neville *v.* Wilkinson, 1 Bro. Ch. R. 543, 547; 1 Fonbl. Eq. B. 1, ch. 4, § 11, and note (*x*).

[5] 1 Fonbl. Eq. B. 1, ch. 4, § 11, and note; Lamlee *v.* Hanman, 2 Vern. 499; McNeil *v.* Cahill, 2 Bligh, R. 228; England *v.* Downs, 2 Beav. R. 522.

fraud upon the marriage (contra fidem tabularum nuptialium), and all parties were held entitled as if it had not been given.[1]

§ 382. **Same.** — So where a parent upon a marriage of his son made a settlement of an annuity or rent charge upon the wife in full of her jointure, and the son secretly gave a bond of indemnity, of the same date, to his parent, against the annuity or rent charge, it was held void as a fraud upon the faith of the marriage contract; for it affected to put the female party contracting for marriage in one situation by the articles, and in fact put her in another and worse situation by a private agreement.[2] So where a brother on the marriage of his sister let her have a sum of money privately, that her fortune might appear to be as much as was insisted on by the other side, and the sister gave a bond to the brother to repay it, the bond was set aside.[3]

§ 383. **Same.** — And where upon a treaty of marriage a party to whom the intended husband was indebted concealed his own debt and misrepresented to the wife's father the amount of the husband's debts, the transaction was treated as a fraud upon the marriage, and the creditor was prevented by injunction from enforcing his debt, although it did not appear that there was any actual stipulation on the part of the wife's father in respect to the amount of the husband's debts.[4] Upon this occasion the Lord Chancellor said: "The principle on which all these cases have been decided is that faith in such contracts is so essential to the happiness both of the parents and children, that whoever treats fraudulently on such an occasion shall not only not gain but even lose by it.[5] Nay he shall be obliged to make his representation good; and the parties shall be placed in the same situation as if he had been scrupulously exact in the performance of his duty."[6]

[1] Redman *v.* Redman, 1 Vern. 348; Scott *v.* Scott, 1 Cox, R. 366; Turton *v.* Benson, 1 P. Will. 496; Morrison *v.* Arbuthnot, 8 Brown, Parl. Cases, p. 247, by Tomlins; 1 Bro. Ch. R. 447, note.

[2] Palmer *v.* Neave, 11 Ves. 165; Scott *v.* Scott, 1 Cox, R. 366, 378; Lamlee *v.* Hanman, 2 Vern. 466.

[3] Gale *v.* Lindo, 2 Vern. 475; Lamlee *v.* Hanman, 2 Vern. 499; 1 Fonbl. Eq. B. 1, ch. 2, § 11.

[4] Neville *v.* Wilkinson, 1 Bro. Ch. R. 543; s. c. 3 P. Will. 74, Mr. Cox's note; 1 Fonbl. Eq. B. 1, ch. 4, § 11, note (*x*); 3 Ves. 461; 16 Ves. 125.

[5] Ibid. See also Montefiori *v.* Montefiori, 1 W. Black. R. 363; s. c. cited 1 Bro. Ch. R. 548.

[6] Ibid. See also Thompson *v.* Harrison, 1 Cox, R. 344; Eastabrook *v.* Scott, 3 Ves. 461; Scott *v.* Scott, 1 Cox, R. 366; Hunsden *v.* Cheyney, 2 Vern. R. 150; Beverley *v.* Beverley, 2 Vern. 133; Montefiori *v.* Montefiori, 1 W. Black. R. 363; 1 Fonbl. Eq. B. 1, ch. 4, § 11, note (*x*); Vauxhall Bridge *v.* Spencer, Jac. R. 67.

§ 384. **Same.** — In all these cases and those of a like nature the distinct ground of relief is the meditated fraud or imposition practised by one of the parties upon third persons by intentional concealment or misrepresentation. And therefore if the parties act under a mutual innocent mistake, and with entire good faith, the concealment or misrepresentation of a material fact will not induce the court to compel the party concealing it or affirming it to make it good, or to place the other party in the same situation as if the fact were as the latter supposed.[1] There must be some ingredient of fraud, or some wilful misstatement or concealment which has misled the other side.

§ 385. **Conveyance of Property in Derogation of Marital Rights of Intended Spouse Are Void.** — Upon a similar ground a settlement secretly made by a woman in contemplation of marriage of her own property to her own separate use without her intended husband's privity will be held void, as it is in derogation of the marital rights of the husband,[2] and a fraud upon his just expecta-

[1] Merewether *v.* Shaw, 2 Cox, R. 124; Scott *v.* Scott, 1 Cox, R. 366; 1 Fonbl. Eq. B. 1, ch. 4, § 11; Pitcairne *v.* Ogbourne, 2 Ves. 375.

[2] 1 Fonbl. Eq. B. 1, ch. 4, § 11, and note (*z*); Id. ch. 2, § 6, note (*o*); Jones *v.* Martin, 3 Anst. R. 882; s. c. 5 Ves. 266, note; Fortescue *v.* Hennah, 19 Ves. 66; Bowes *v.* Strathmore, 2 Bro. Ch. R. 345; s. c. 2 Cox, R. 28; 1 Ves. Jr. 22; 6 Bro. Par. Cas. (by Tomlins) 427; Ball *v.* Montgomery, 2 Ves. Jr. 194; Carlton *v.* Earl of Dorset, 2 Vern. 17; Gregor *v.* Kemp, 3 Swanst. R. 404, nóte; Goddard *v.* Snow, 1 Russell, R. 485; England *v.* Downs, 2 Beavan, R. 522. On this occasion Lord Langdale said: "Joan Mason was a widow with three children, and, under the will of her first husband, she was entitled to some freehold and leasehold property, to some furniture, and to the stock in trade with which she carried on business as a victualler. Contemplating a second marriage, she considered that she ought to make a provision for her children by the first, and being informed that a will which she had made would upon her marriage become ineffectual, she made a settlement, and thereby provided that a portion of her freehold property should be subjected to her own power of appointment, but that subject to such power of appointment that part of her estate over which the power extended, together with all the rest of her property, should be limited to her own separate use for her life, with remainder for her three daughters in the manner therein mentioned. In the execution of this settlement so far as it made provision for her children, she was performing a moral duty; in the circumstances in which she was placed it was clearly her duty, before she placed herself and her property in the power of her second husband, to secure a provision for her children by her first husband, from whom her property was derived; but in performing a duty towards her children she had no right to act fraudulently towards her second husband. If a woman, entitled to property, enters into a treaty for marriage, and during the treaty represents to her intended husband that she is so entitled that upon the marriage he will become entitled jure mariti, and if, during the same treaty, she clandestinely conveys away the property in such manner as to defeat his marital

tions.[1] And a secret conveyance made by a woman under like circumstances in favor of a person for whom she is under no moral obligation to provide would be treated in the like manner. But if she should only reasonably provide for her children by a former marriage, under circumstances of good faith, it would be other-

right and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt but that a fraud is thus practised on the husband, and he is entitled to relief. The equity which arises in cases of this nature depends upon the peculiar circumstances of each case as bearing upon the question whether the facts proved do or do not amount to sufficient evidence of fraud practised on the husband. It is not doubted that proof of direct misrepresentations, or of wilful concealment with intent to deceive the husband, would entitle him to relief; but it is said that mere concealment is not, in such a case, any evidence of fraud, and that if a man without making any inquiry as to a woman's affairs and property thinks fit to marry her, he must take her and her property as he finds them, and has no right to complain if in the absence of any care on his part she has taken care of herself and her children without his knowledge. This proposition however cannot be admitted as stated; and clearly a woman in such circumstances can only reconcile all her moral duties by making a proper settlement on herself and her children, with the knowledge of her intended husband. If both the property and the mode of its conveyance, pending the marriage treaty, were concealed from the intended husband, as was the case in Goddard *v.* Snow, there is still a fraud practised on the husband. The non-acquisition of property of which he had no notice is no disappointment, but still his legal right to property actually existing is defeated, and the vesting and continuance of a separate power in his wife over property which ought to have been his, and which is, without his consent, made independent of his control, is a surprise upon him, and might, if previously known, have induced him to abstain from the marriage. Nevertheless cases have occurred in which concealment, or rather the non-existence of communication to the husband, has not been held fraudulent, and whether fraud is made out must depend on the circumstances of each case; as an unmarried woman has a right to dispose of her property as she pleases, and as a conveyance made immediately before her marriage is prima facie good, it is to be impeached only by the proof of fraud." Taylor *v.* Pugh, 1 Hare, R. 608, 613, 616; De Manneville *v.* Crompton, 1 Ves. & Beam. 354.

[1] Lance *v.* Norman, 2 Ch. Rep. 41 [79]; Blanchet *v.* Foster, 2 Ves. 264; England *v.* Downs, 2 Beav. R. 522. See Lewellin *v.* Cobbold, 1 Smale & G. 376; Wrigley *v.* Swainson, 3 DeG. & S. 458; Chambers *v.* Crabbe, 34 Beav. 457; Goddard *v.* Snow, 1 Russ. 485; Baker *v.* Jordan, 73 N. C. 145; Williams *v.* Carle, 2 Stockt. 543; Duncan's Appeal, 43 Penn. St. 67; Jordan *v.* Black, Meigs, 142; McAfee *v.* Ferguson, 9 B. Mon. 475; Goodson *v.* Whitfield, 40 N. C. 475; Tisdale *v.* Bailey, 41 N. C. 358; Logan *v.* Simmons, 38 N. C. 487. So of the converse case of an antenuptial conveyance by a man with intent to defeat his intended wife of her rights in his property after marriage. Kelly *v.* McGrath, 70 Ala. 75; Littleton *v.* Littleton, 1 Dev. & B. 327; Leach *v.* Duvall, 8 Bush, 201; Petty *v.* Petty, 4 B. Mon. 215. Also of the case of conveyances by a husband in fraud of his wife pending proceedings for divorce. Blenkinsopp *v.* Blenkinsopp, 1 DeG. M. & G. 495; Smith *v.* Erwin, 26 Ky. L. Rep. 760, 82 S. W. 411.

wise.[1] In like manner if previous to her marriage a woman should represent herself to her intended husband to be possessed of property, which she should secretly convey away before the marriage, the husband would be entitled to relief against such conveyance.[2] [The wife is within the protection of the statute against conveyances made with intent to defraud, and if the conveyance is purely voluntary it is not necessary that the grantee shall participate in the intent of the grantor. It is as much a fraud for a man, on the eve of his marriage, unknown to his wife, to make a voluntary conveyance of property to defeat the interests which she would acquire in the property by virtue of her marriage, as it is for a debtor who contemplates contracting a debt to voluntarily dispose of his property in order to defeat the interest of future creditors.[3]] However circumstances may occur which may deprive the husband of any remedy, as if before the marriage he acquires a knowledge of the prior settlement, or if he has so conducted himself after the settlement that the wife cannot without dishonor to herself live with him.[4]

[1] King *v.* Cotton, 2 P. Will. 357, 674; St. George *v.* Wake, 1 Mylne & Keen, 610; England *v.* Downs, 2 Beav. R. 522; De Manneville *v.* Compton, 1 Ves. & Beam. 354.

[2] England *v.* Downs, 2 Beav. R. 542.

[3] Higgins *v.* Higgins, 219 Ill. 146, 76 N. E. 86, 109 Am. St. Rep. 316; Bookout *v.* Bookout, 150 Ind. 63, 49 N. E. 824, 65 Am. St. Rep. 350; Willis *v.* Robertson, 121 Iowa 380, 96 N. W. 900; Hatch *v.* Rollins, 158 Mo. 182, 59 S. W. 232; Collings *v.* Collings, 29 Ky. L. Rep. 51, 92 S. W. 577; Ward *v.* Ward, 63 Ohio St. 125, 57 N. E. 1095, 51 L. R. A. 858, 81 Am. St. Rep. 621; Goff *v.* Goff, 60 W. Va. 9, 53 S. E. 769; Deke *v.* Huenkemeier, 260 Ill. 131, 102 N. E. 1059; Dunbar *v.* Dunbar, 254 Ill. 281, 98 N. E. 563.

[4] Antenuptial conveyances by the intended wife are however presumptively valid. Strathmore *v.* Bowes, 1 Ves. Jr. 22, 38. Such conveyances or settlements are invalid if it appear (1) that intermarriage was in the contemplation of the parties at the time, (2) that the woman executed the same in contemplation of the future marriage, and (3) that she concealed the same from her husband. If the husband establish these facts, the conveyance or settlement will not stand against his marital rights. Goddard *v.* Snow, 1 Russ. 485; Strathmore *v.* Bowes, 2 Cox, 28; s. c. 2 Brown, C. C. 345. If then the husband had sufficiently early notice before the marriage of the purpose of the intended wife to execute a settlement, he cannot afterwards object, assuming that nothing afterwards passed to justify the husband in supposing that the purpose would not be carried out. Wrigley *v.* Swainson, 3 DeG. & S. 458.

In Strathmore *v.* Bowes, supra, it was laid down by Buller, J., as the result of the authorities as to conveyances by women not previously married, or by widows without children, that if the wife were guilty of any fraud, as e. g. by professing to the husband that there was nothing to interfere with his rights, any conveyance executed by her in prejudice of such representation would be invalid. That however was deemed the extent

§ 386. **Contracts in Restraint of Marriage Are Void.** — It is upon the same ground of public policy that contracts in restraint of marriage are held void.[1] A reciprocal engagement between a man and a woman to marry each other is unquestionably good.[2] But a contract which restrains a person from marrying at all, or from marrying anybody except a particular person, without enforcing a corresponding reciprocal obligation on that person, is treated as mischievous to the general interests of society, which are promoted by the encouragement and support of suitable marriages.[3] Courts of Equity have in this respect followed, although not to an unlimited extent, the doctrine of the civil law that marriage ought to be free.[4]

of the cases; the mere non-disclosure of an antenuptial conveyance would not of itself make the transaction impeachable. Nor when provision was made by a widow for the children of a former marriage would the deed be invalid. Contra where the conveyance was made with intent to deceive the husband, though the grantees are innocent. Tisdale *v.* Bailey, 41 N. C. 358; Goodson *v.* Whitfield, 40 N. C. 163; Logan *v.* Simmons, 38 N. C. 487.

Though a settlement then by an intended wife be voluntary, and not disclosed to the husband, it is not for that reason necessarily fraudulent. The courts will consider the nature of the provision, the situation of the husband in point of pecuniary means, and any other facts which tend to show that no fraud could reasonably be considered to have been intended. The equity which arises in cases of this kind depends upon the peculiar circumstances of each case. Gregory *v.* Winston, 23 Gratt. 102; Bigelow, Fraud, 49–51.

Actual intent to deceive the husband appears to be unnecessary; it is enough, so far, if after the commencement of a treaty of marriage the intended wife should have disposed of her property without the knowledge of her intended husband. Taylor *v.* Pugh, 1 Hare, 608; supra, pp. 273, 274, note. Indeed it appears to be no good objection to the husband's claim that he did not know that his wife had the particular property until after the marriage. Ib. But it is said that if the husband had made retirement from the treaty of marriage impracticable, as by inducing the wife to cohabit with him before marriage, he could not object to her antenuptial conveyances. Ib.

An obligation founded on a valuable consideration entered into by the wife pending a treaty of marriage cannot be set aside by the husband merely because it was concealed from him; though if it was fraudulently entered into by the wife, with knowledge in the other party, it would be void against the husband. Gregory *v.* Winston, 23 Gratt. 102, 123; Blanchet *v.* Foster, 2 Ves. Sr. 264.

[1] Hartley *v.* Rice, 10 East, R. 22; Lowe *v.* Peers, 4 Burr. 2225; Woodhouse *v.* Shipley, 2 Atk. 539, 540; Newland on Contracts, ch. 33, pp. 472 to 476.

[2] Cock *v.* Richards, 10 Ves. 438; Key *v.* Bradshaw, 2 Vern. 102.

[3] 1 Fonbl. Eq. B. 1, ch. 4, § 10; Baker *v.* White, 2 Vern. 215; Woodhouse *v.* Shipley, 2 Atk. 595; Lowe *v.* Peers, 4 Burr. 2225; Cock *v.* Richards, 10 Ves. 429; Key *v.* Bradshaw, 2 Vern. 102; Atkins *v.* Farr, 1 Atk. R. 287; s. c. 2 Eq. Abridg. 247, 248.

[4] Dig. Lib. 35, tit. 1, l. 62, 63, 64; Key *v.* Bradshaw, 2 Vern. 102; 1

Fonbl. Eq. B. 1, ch. 4, § 10. *Conditions in Restraint of Marriage.* — Notwithstanding the many expressions of the books, it is doubtful whether much now remains of the once generally accepted rule that conditions in restraint of marriage in gifts and contracts are void. In the first place all the exceptions of the Roman law, from which the doctrine was derived, were admitted by the Ecclesiastical Courts, and the Courts of Common Law and of Equity have always looked upon the doctrine with disfavor, and have been continuously narrowing its application. See e. g. Stackpole *v.* Beaumont, 3 Ves. Jr. 89; Jones *v.* Jones, 1 Q. B. D. 279; Commonwealth *v.* Stauffer, 10 Barr, 350; Cornell *v.* Lovett, 35 Penn. St. 100; Hogan *v.* Curtin, 88 N. Y. 162. Swinburne enumerates ten exceptions to the doctrine. Wills. part 4, § 12.

The English Ecclesiastical Courts, having jurisdiction of the distribution of the personal estate of decedents, early adopted, apparently with little regard to difference of circumstances (Stackpole *v.* Beaumont, 3 Ves. Jr. 89, 96; infra, § 278), the rule of the Roman law that, subject to the familiar exceptions, conditions imposing restraint upon marriage were of no effect and would be disregarded. And it appears to have been a matter of no consequence whether the condition was precedent or subsequent; the distinction of the English law upon this subject was not taken by the Roman law, and the ecclesiastical judges did not, at first at least, adopt it.

The Courts of Common Law and of Equity however were restless under the views of the ecclesiastical judges; and the Law Courts having jurisdiction of the real estate of decedents, and the Court of Chancery having in various ways to treat both of the personalty and the realty of decedents, while both of these courts had jurisdiction, to the exclusion of the Ecclesiastical Courts, over contracts, it resulted that every opportunity was improved of laying down exceptions or qualifications to a doctrine which the courts were not quite bold enough to repudiate altogether. To this end the intention of the testator or donor came to be looked into more and more, and if possible to be allowed effect. This alone would seem to have been a virtual abandonment of the Roman rule; that rule apparently looked to the effect of the gift, and then governed regardless of the giver's intention.

The Courts of Common Law and of Equity began to say that the question whether the donor had made a gift over to a third person on breach of the condition concerning marriage might be taken into account; that is, the existence or non-existence of a gift over would have a bearing upon the question whether the donor really *intended* to have the condition enforced, or, as it was rather blindly said, to have it act merely in terrorem (what fear could there be if the condition was not to be enforced?). Though sometimes it was said that the reason why a condition with a gift over was good was because of the interest of the donee over; but this was only another way of saying that the donor's intention would be respected. The first donee could not take a larger interest, to the detriment of the donee over, in the absence of evidence of any purpose in the giver to enlarge the gift in any case. 2 Jarman, Wills, 44, note (Bigelow's ed.). "Different reasons," said Sir William Grant, in Lloyd *v.* Branton, 3 Mer. 108, "have been assigned for allowing this operation to a bequest over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of forfeiture merely in terrorem, which might otherwise have been presumed. Others have said it was the interest of the legatee over, which made the difference, and that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation, to which the court was bound to give effect." See Dickson's Trust, 1 Sim. N. S. 37, 45. Whether the one or the other or neither of these views be

correct, the passage shows that the judges were feeling for the donor's intention.

At the same time the distinction which had grown up in other cases between conditions precedent and conditions subsequent began to be drawn into the question; and it was said by Courts of Law and by Courts of Equity alike that if the condition was precedent, especially if followed by a gift over, it was binding, though the rule of the ecclesiastical judges was allowed to have greater play if the condition was subsequent. But even in this case if there was a gift over, the judges sometimes considered that the condition was intended to be binding and must be respected, as the case before Sir William Grant just cited shows. The adoption therefore of the distinction between conditions precedent and conditions subsequent was further indication of the desire of the courts to put the case as far as possible upon the ground of intention.

Indeed this is manifested as much by the cases in which the condition is declared to be in terrorem only as by those in which it is held binding. This will be seen by the following propositions of Mr. Jarman: He submits that conditions *precedent* to marry with consent, unaccompanied by a bequest over in default, are in terrorem, except in three cases: (1) Where the legatee takes a provision or a legacy in the alternative of marrying without consent. Creagh *v.* Wilson, 2 Vern. 573; 1 Eq. Cas. Abr. 111, pl. 5; Gillet *v.* Wray, 1 P. Wms. 284. The principle in Creagh *v.* Wilson, Jarman says, is that the testator did not intend the gift to be in terrorem only. (2) Where marriage with consent is but one of two events on either of which the legatee will be entitled to the legacy. Hemmings *v.* Munckley, 1 Bro. C. C. 303; s. c. 1 Cox, 39; Scott *v.* Tyler, 2 Bro. C. C. 431. See Gardiner *v.* Slater, 25 Beav. 509, case of a gift over. (3) Where marriage with consent is confined to minority. Stackpole *v.* Beaumont, 3 Ves. 89; 2 Jarman, Wills, 46, 47 (5th Am. ed.). See also Hogan *v.* Curtin, 88 N. Y. 162. It may be added that in Younge *v.* Furse, 8 DeG. M. & G. 756, a condition precedent not to marry under twenty-eight was held valid, though there was no gift over and nothing else to bring the matter within any of the three cases of Jarman.

When at last English judges reached the point of declaring that the real question in a particular case was whether a testator intended to discourage marrying or not (Jones *v.* Jones, 1 Q. B. D. 279, 281, Blackburn, J.), and to decide the case, as in Jones *v.* Jones, upon the answer to that question, a step only remained to declaring that the donor's intention should govern. That step however cannot be said to have been taken until the courts — going further than to say that if no intention to discourage marrying appears, the donor's purpose must prevail — declare that a direct attempt to persuade a donee not to marry at all, and providing a forfeiture if the donor's will is not complied with, must be respected. Mr. Justice Blackburn seems all but prepared to take the step. He says, "There is, I *admit*, strong authority that when the object of the will is to restrain marriage and promote celibacy," the condition is not good. Jones *v.* Jones, supra.

Perhaps among the chief English authorities the case is nowhere put more strongly than long ago by Powell in the 7th ed. of Swinburne on Wills, p. 483 (part 4, § 12), where he says of a condition requiring assent to marriage that the law of England, in disregarding the condition, "does not proceed upon the ground that the condition is unlawful, and therefore to be rejected, for," he declares, "there are three sorts of conditions only to be rejected: first, such as are repugnant; secondly, such as are impossible in their creation; thirdly, such as are mala in se; and this condition of marrying with consent does not come under any one of these three heads. It therefore seems merely a rule of construction or legal presumption that

such clauses annexed to absolute legacies of personal property are merely cautionary." And he adds that if the gift is not absolute, but is followed by a gift over, the presumption that it was meant to be cautionary is overturned. This he considers as the result of all the old authorities.

Turning to the American cases, quite as strong a disposition will be found to prevail against adopting broadly the doctrine that conditions in restraint of marriage are void. Many of the courts have, in cases of *personalty*, followed the in terrorem doctrine; but it will generally be found that the decisions to that effect proceed upon the ground that there was no intention to make the condition effective. Bannerman *v.* Weaver, 8 Md. 517; Gough *v.* Manning, 26 Md. 347, 362; Waters *v.* Tazewell, 9 Md. 292. If however there is a gift over, the condition is effective (see Hogan *v.* Curtin, 88 N. Y. 162), at least in the case of a gift to the husband or wife of the donor. Hawkins *v.* Skeggs, 10 Humph. 31; Gough *v.* Manning, supra; Duddy *v.* Gresham, 2 L. R. Ir. 442, 464, 465. And this too probably even in the case of a condition subsequent. The condition is not treated in any of these cases as a thing to be repudiated in itself; it is either treated as no condition at all, for want of the manifestation of a sufficient purpose in omitting a gift over, or it is held valid. If the question should arise for the first time, a gift of personalty to the donor's wife or widow on condition of remaining single might well be upheld, though followed by no gift over.

With regard to gifts of *realty*, over which the Ecclesiastical Courts never had jurisdiction, a condition in a gift in restraint of marriage is valid (Hogan *v.* Curtin, 88 N. Y. 162, where there was no gift over), at least in the case of a gift to the donor's widow. Duddy *v.* Gresham, 2 L. R. Ir. 442, 465; Commonwealth *v.* Stauffer, 10 Barr, 350; Cornell *v.* Lovett, 35 Penn. St. 100; Luigart *v.* Ripley, 19 Ohio St. 24; Clark *v.* Tennison, 33 Md. 85; Duncan *v.* Philips, 3 Head, 415; Hughes *v.* Boyd, 2 Sneed, 512; Vaughan *v.* Lovejoy, 34 Ala. 437; Snider *v.* Newsom, 24 Ga. 139; Chapin *v.* Marvin, 12 Wend. 538; Pringle *v.* Dunkley, 14 Smedes & M. 16; Dumey *v.* Schoeffler, 24 Mo. 170; Allen *v.* Jackson, 1 Ch. D. 399. The same rule applies to a condition in a gift to a husband in restraint of another marriage by him. Allen *v.* Jackson, supra; Bostick *v.* Blades, 59 Md. 231. And the condition is good though there be no gift over. Ib.; Cornell *v.* Lovett, 35 Penn. St. 100, 104; Commonwealth *v.* Stauffer, supra.

Another way by which our courts, following the suggestions of English judges, have sought to escape the doctrine of the ecclesiastical judges, and to carry out the donor's purpose, has been by construing the gift, when possible, as a limitation of the estate of the donee rather than as a condition against marriage. Thus it is held that where land is given to A "until marriage", or to A "and in the event of marriage" then over, the gift is good, because a man may give as small an estate as he will. Otis *v.* Prince, 10 Gray, 581; Selden *v.* Keen, 27 Gratt. 576; Maddox *v.* Maddox, 11 Gratt. 804; Lloyd *v.* Branton, 3 Mer. 108; Morley *v.* Rennoldson, 2 Hare, 570; Harmon *v.* Brown, 53 Ind. 207; Randall *v.* Marble, 69 Maine, 310; Dawson *v.* Oliver-Massey, 2 Ch. D. 753. But in Jones *v.* Jones, 1 Q. B. D. 279, 282, it is declared by Blackburn, J., that the validity of a gift of land cannot turn upon the question whether the disposition amounts to a limitation or not, though it might be otherwise of a gift of personalty. See 4 Kent, 127. It has been held of a condition subsequent, in the case of a gift not to the donor's wife or husband, that the limitation over must be good *as such* for the purpose of cutting down the prior estate on marriage. Otis *v.* Prince, and Randall *v.* Marble, supra, where the limitation over was to "heirs", who would have taken anyhow. There was not sufficient

indication that the condition was intended to be effective; though if the gift over had been held good, the courts would perhaps have veiled their real meaning by saying that it was the interest of the donee over that governed, rather than the purpose to restrain marriage.

The result is that where the courts can discover in the written instrument — that must govern, it seems — any other intention than that of a clearly designed discouragement of marriage, they will respect that intention. It appears to make no difference that the nature of the gift may have an obvious tendency that way, as indeed has been the case in nearly every instance in which the provision of the donor has been held absolute; if there is no clear design to prevent marriage, the intention will be upheld. And in almost every case the courts either find the want of any such design, and hence uphold the condition, as where it is precedent, or they find that the supposed condition is no condition at all but only a wish, which, like a precatory trust, need not be complied with. See Duddy *v.* Gresham, 2 L. R. Ir. 442, 464, 465.

When it has come to this, that nothing is left of the Roman rule except where a clear design to discourage marrying is expressed, as held in Jones *v.* Jones, — where, though the obvious and natural effect of a particular gift is to prevent marriage, that fact is disregarded unless there is a plain and real intent, — it seems quite time, with Powell, ut supra, to drop a rule altogether which never had a sufficient reason for its existence in the English law, and to permit the case to stand on the donor's intention, whatever it may be. Indeed the reasoning of the better authorities comes quite to this result. Stackpole *v.* Beaumont, 3 Ves. Jr. 89; Commonwealth *v.* Stauffer, 10 Barr, 350. In working out the question of intention, when not clearly expressed, the consideration whether there is a gift over, and whether the condition is precedent or subsequent, might have a bearing. If there is no gift over, and the condition is subsequent, with nothing more, it might be inferred that it was not intended to make the condition absolute; if on the other hand there is a gift over, or if the condition is precedent, the contrary might well be inferred. But the mere circumstance that there is or is not a gift over should not be *decisive*. See 4 Kent, 127; Dickson's Trust, 1 Sim. N. S. 37; Parsons *v.* Winslow, 6 Mass. 169, 181; Cornell *v.* Lovett, 35 Pa. St. 100, 104. See Hogan *v.* Curtin, 88 N. Y. 162. When however the intention is found, it is submitted as a legitimate conclusion of the reasoning of the judges against the Roman rule, if not as the natural effect of the cases themselves, that that intention should be allowed to prevail, though it be considered of a particular gift that the donor clearly designed to discourage the donee, not merely from marrying without consent (as to which see Hogan *v.* Curtin, supra), but from marrying altogether. Such a case as the last indeed can hardly arise except where there is a provision either (1) for the wife or the husband of a grantor or a testator, or (2) for a person who is desired to enter monastic life (in what other case would a premium be avowedly offered to perpetual singleness?); and in the first of these cases the better authorities agree, as we have seen, that the intention of the grantor or testator to have the condition effective will be upheld if clear, though, at least in a case of realty, there be no gift over. Nor is there any real ground in this country why the same rule should not apply to personalty. The second case does not appear to have arisen except in regard to the widow of a donor (Duddy *v.* Gresham, 2 L. R. Ir. 442), and is not very likely to arise. If however it should arise, and it should appear that the donor has made a clear gift over, in case his will be not respected, to another not as "heir", his intention will probably be allowed to prevail. The whole question seems therefore within the control of the grantor or testator.

§ 387. **Effect of Contract Where Marriage Is to Be Deferred to Some Future Time.** — Where indeed the obligation to marry is reciprocal, although the marriage is to be deferred to some future period, there may not be as between the parties any objection to the contract in itself, if in all other respects it is entered into in good faith and there is no reason to suspect fraud, imposition, or undue influence.[1] But even in these cases, if the contract is designed by the parties to impose upon third persons, as upon parents, or friends standing in loco parentis or in some other particular relation to the parties, so as to disappoint their bounty or to defeat their intentions in the settlement or disposal of their estates, there, if the contract is clandestine and kept secret for this purpose, it will be treated by Courts of Equity as a fraud upon such parents or other friends, and as such be set aside; or the equities will be held the same as if it had not been entered into.[2] The general ground upon which this doctrine is sustained is, that parents and other friends standing in loco parentis are thereby induced to act differently in relation to the advancement of their children and relatives from what they would if the facts were known; and the best influence which might be exerted in persuading their children and relatives to withdraw from an unsuitable match is entirely taken away. To give effect to such contracts would be an encouragement to persons to lie upon the watch to procure unequal matches against the consent of parents and friends, and to draw on improvident and clandestine marriages to the destruction of family confidence and the disobedience of parental authority.[3] These are objects of so great importance to the best interests of society that they can scarcely be too deeply fixed in the public policy of a nation, and especially of a Christian nation.

§ 388. **Conditions in Restraint of Marriage Are Void.** — In the civil law a strong desire was manifested to aid in the establishment of marriages, as has been already intimated.[4] And hence all conditions annexed to gifts, legacies, and other valuable in-

Query whether hostility to monasticism may not have influenced the Protestant ecclesiastics in adopting the Roman rule? Or was that rule adopted before the Reformation?

[1] Lowe *v.* Peers, 4 Burr. 2229, 2230; Key *v.* Bradshaw, 2 Vern. 102.

[2] Woodhouse *v.* Shipley, 2 Atk. 535, 539; Cock *v.* Richards, 10 Ves. 436, 438.

[3] Woodhouse *v.* Shipley, 2 Atk. 539; Cock *v.* Richards, 10 Ves. 438, 439; Newland on Contracts, ch. 33, p. 476; Brown *v.* Adill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914.

[4] Ante, § 371.

terests which went to restrain marriages generally were deemed inconsistent with public policy and held void. A gift therefore to a woman of land, if she should not marry, was held an absolute gift. "Mæviæ, si non nupserit, fundum, quum morietur, lego; potest dici, et si nupserit, eam confestim ad legatum admitti.[1] Si testator rogasset hæredem ut restituat hæreditatem mulieri, si non nupsisset, dicendum erit compellendum hæredem, si suspectam dicat hæreditatem, adire et restituere eam mulieri, etiamsi nupsisset." [2] So a gift to a father, if his daughter who is under his authority (in potestate) should not marry, was treated as an absolute gift, the condition being held void.[3] The avowed ground of these decisions was, that all such conditions were a fraud upon the law which favored marriage: "Quod in fraudem legis ad impediendas nuptias scriptum est, nullam vim habet." [4]

§ 389. **Distinction between General and Special Restraint of Marriage.** — But a distinction was taken in the civil law between such general restraints of marriage and a special restraint as to marrying or not marrying a particular person, the latter being deemed not unjustifiable. Thus a gift upon condition that a woman should not marry Titius, or not marry Titius, Seius, or Mævius, was held valid.[5] And the distinction was in some cases even more refined; for if a legacy was given to a wife upon condition that she should not marry while she had children ("si a liberis ne nupserit"), the condition was nugatory; but if it was that she should not marry while she had children in puberty ("si a liberis impuberibus ne nupserit"), it was good.[6] And the reason given is that the care of children rather than widowhood might be enjoined: "Quia magis cura liberorum, quam viduitas, injungeretur." [7]

§ 390. **Same.** — Courts of Equity in acting upon cases of a similar nature have been in no small degree influenced by these doctrines of the civil law.[8] But it has been doubted whether the same grounds upon which the Roman law acted can or ought to be acted on in a Christian country under the common law. Lord Rosslyn has endeavored to account for the introduction of these

[1] Pothier, Pand. Lib. 35, tit. 1, n. 33; Dig. Lib. 35, tit. 1, l. 72, § 5.
[2] Pothier, Pand. Lib. 35, tit. 1, n. 33; Dig. Lib. 36, tit. 1, l. 65, § 1.
[3] Pothier, Pand. Lib. 35, tit. 1, n. 35.
[4] Pothier, Pand. Lib. 35, tit. 1, n. 35; Dig. Lib. 35, tit. 1, l. 79, § 4.
[5] Pothier, Pand. Lib. 35, tit. 1, n. 34; Dig. Lib. 35; tit. 1, l. 63, l. 64.
[6] Pothier, Pand. Lib. 35, tit. 1, n. 34; Dig. Lib. 35, tit. 1, l. 62, § 2.
[7] Ibid.
[8] 1 Fonbl. Eq. B. 1, ch. 4, § 10; Stackpole *v.* Beaumont, 3 Ves. Jr. 96.

doctrines into the English Courts of Equity, from the desire of the latter to adopt, upon legatary questions, the rules of the Ecclesiastical Courts, which were borrowed directly from the civil law. And speaking upon the subject of the rule of the civil law as to conditions in restraint of marriage he said:[1] "How it should ever have come to be a rule of decision in the Ecclesiastical Court is impossible to be accounted for, but upon this circumstance, that in the unenlightened ages, soon after the revival of letters, there was a blind, superstitious adherence to the text of the civil law. They never reasoned, but only looked into the books and transferred the rules, without weighing the circumstances, as positive rules to guide them. It is beyond imagination, except from that circumstance, how in a Christian country they should have adopted the rule of the Roman law with regard to conditions as to marriage. First, where there is an absolute unlimited liberty of divorce, all rules as to marriage are inapplicable to a system of religion and law where divorce is not permitted. Next, the favor to marriage and the objection to the restraint of it were a mere political regulation applicable to the circumstances of the Roman Empire at that time, and inapplicable to other countries. After the civil war the depopulation occasioned by it led to habits of celibacy. In the time of Augustus the Julian law, which went too far, and was corrected by the Lex Papia Poppæa, not only offered encouragement to marriage but laid heavy impositions upon celibacy. That being established as a rule in restraint of celibacy (it is an odd expression), and for the encouragement of all persons who would contract marriage, it necessarily followed that no person could act contrary to it by imposing restraints directly contrary to the law. Therefore it became a rule of construction that these conditions were null. It is difficult to apply that to a country where there is no law to restrain individuals from exercising their own discretion as to the time and circumstances of the marriage which their children or objects of bounty may contract. It is perfectly impossible now, whatever it might have been formerly, to apply that doctrine, not to lay conditions to restrain marriage under the age of twenty-one, to the law of England; for it is directly contrary to the political law of the country. There can be no marriage, under the age of twenty-one, without the consent of the parent."

[1] Stackpole *v.* Beaumont, 3 Ves. Jr. 96, per Lord Rosslyn. See also Lord Thurlow's Judgment, in the case of Scott *v.* Tyler, 2 Bro. Ch. R. 487; s. c. 2 Dick. R. 712.

§ 391. **Same.** — It is highly probable that this view of the origin of the English doctrine as to conditions in restraint of marriage, annexed to gifts, legacies, and other conveyances of interests, is historically correct.[1] But whether it be so or not, it may be

[1] See Scott *v.* Tyler, 2 Bro. Ch. R. 487; s. c. 2 Dick. R. 712; Clarke *v.* Parker, 19 Ves. 13; Reynish *v.* Martin, 3 Atk. 330, 331, 332; 1 Roper on Legacies, by White, ch. 13, § 1, p. 654. Lord Thurlow, in Scott *v.* Tyler (2 Dick. R. 716 to 721), has traced out with much learning and ability the gradual introduction and progress of the civil-law doctrine, through the instrumentality of the canon law, into the law of England. I gladly extract a portion of his statements, as they may tend to instruct the student more exactly in a branch of the law confessedly not without some anomalies. "The earlier cases," said he, "refer in general terms to the Canon law as the rule by which all legacies are to be governed. By that law undoubtedly all conditions which fell within the scope of this objection, the restraint of marriage, are reputed void;" and, as they speak, "pro non adjectis." But those cases go no way towards ascertaining the nature and extent of the objection. Towards the latter end of the last and beginning of the present century the matter is more loosely handled. The Canon law is not referred to (professedly at least) as affording a distinct and positive rule for annulling the obnoxious conditions. On the contrary they are treated as partaking of the force allowed them by the law of England. But in respect of their imposing a restraint of marriage they are treated at the same time as unfavorable and contrary to the common weal and good order of society. It is reasoned that parental duty and affection are violated when a child is stripped of its just expectations; that such an intention is improbably imputed to a parent, particularly in those instances where there was no misalliance, as in marriage with the houses of Bellases, Bertie, Cecil, and Semphile, which the parent, if he had been alive, would probably have approved. These ideas apply indifferently to bequests of lands and of money, and were in fact so applied in one very remarkable case. Nay, to avoid the supposed force of these obnoxious conditions, strained constructions were made upon doubtful signs of consent, and every mode of artificial reasoning was adopted to relax their rigor. This was thought more practicable by calling them conditions subsequent; although if that had made such difference, they were and indeed must have been generally conditions precedent, as being the terms on which the legacy was made to vest. At length it became a common phrase that such conditions were only in terrorem. I do not find it was ever seriously supposed to have been the testator's intention to hold out the terror of that which he never meant should happen, but the court disposed of such conditions so as to make them amount to no more. On the other hand some provisions against improvident matches, especially during infancy, or to a certain age, could not be thought an unreasonable precaution for parents to entertain. The custom of London has been found reasonable, which forfeits the portion on the marriage of an infant orphan without consent. The Court of Chancery is in the constant habit of restraining and punishing such marriages. And the Legislature has at length adopted the same idea, as far as it was thought general regulation could in sound policy go. In this situation the matter was found about the middle of the present century, when doubts occurred which divided the sentiments of the first men of the age. The difficulty seems to have consisted principally in reconciling the cases, or rather the arguments on which they proceeded. The better opinion, or at least that which pre-

affirmed without fear of contradiction that the doctrine on this subject at present maintained and administered by Courts of Equity (for it has undergone some important changes) is far better adapted to the exigencies of modern society throughout Christendom than that which was asserted in the Roman law. While it upholds the general freedom of choice in marriages, it at the same time has a strong tendency to preserve a just control and influence in parents in regard to the marriages of their children, and a reasonable power in all persons to qualify and restrict their bounty in such a manner and on such conditions as the general right of dominion over property in a free country justifies and protects upon grounds of general convenience and safety.

§ 392. **Conditions Annexed to Gifts in Restraint of Marriage Are Not Void, When Reasonable in Themselves.** — The general result of the modern English doctrine on this subject (for it will

vailed, was, that devises of land, with which the canon law never had any concern, should follow the rule of the common law, and that legacies of money, being of that sort, should follow the rule of the canon law. Lands devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in lands (though I do not find this yet resolved), follow the rule of the common law; and such trusts are to be executed with analogy to it. Mere money legacies follow the rule of the canon law, and all trusts of that nature are to be executed with analogy to that. But still, if I am not mistaken, the question remains unresolved, What is the nature and extent of that rule as applied to conditions in restraint of marriage? The canon law prevails in this country only so far as it hath been actually received with such ampliations and limitations as time and occasion have introduced, and subject at all times to the municipal law. It is founded in the civil law; consequently the tenets of that law also may serve to illustrate the received rules of the canon law. By the civil law the provision of a child was considered as a debt of nature, of which the laws of civil society also exacted the payment; insomuch that a will was regarded as inofficious, which did not in some sort satisfy it. By the positive institutions of that law, it was also provided, "Si quis cælibatus vel viduitatis conditionem hæredi legatariove injunxerit; hæres legatariusve e conditione liberi sunto; neque eo minus delatam hæreditatem, legatumve, ex hac lege, consequantur." In ampliation of this law it seems to have been well settled in all times, that if instead of creating a condition absolutely enjoining celibacy or widowhood, the same be referred to the advice or discretion of another, particularly an interested person, it is deemed a fraud on the law, and treated accordingly; that is, the condition so imposed is holden for void. Upon the same principle, in further ampliation of the law, all distinction is abolished between precedent and subsequent conditions; for it would be an easy evasion of such a law if a slight turn of the phrase were allowed to put it aside. It has rather therefore been construed that the condition is performed by the marriage, which is the only lawful part of the condition, or by asking the consent, for that also is a lawful condition; and for the rest the condition, not being lawful, is holden "pro non adjecta."

not be found easy to reconcile all the cases)[1] may be stated in the following summary manner. Conditions annexed to gifts, legacies, and devises in restraint of marriage are not void if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then indeed as a condition against public policy and the due economy and morality of domestic life it will be held utterly void.[2] And so if the condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature or so tied up to peculiar circumstances that the party upon whom it is to operate is unreasonably restrained in the choice of marriage, it will fall under the like consideration.[3] Thus where a legacy was given to a daughter on condition that she should not marry without consent, or should not marry a man who was not seised of an estate in fee simple of the clear yearly value of £500, it was held to be a void condition, as leading to a probable prohibition of marriage.[4]

§ 393. [**Same.** — A contract by the defendant to pay to his former sweetheart $5,000 in cash, and a similar amount three years later, provided she did not marry within that time, is void and cannot be sustained, but the plaintiff's remedy for breach of contract of marriage might nevertheless be enforced if it were not barred by the statute of limitations. It is elementary law that contracts in restraint of marriage are illegal, as a rule, and it makes no difference how long the restraint. In some cases it is held that if the restraint be reasonable, it is not inimical to public policy, but here no benefit or advantage to the defendant is shown, but, for reasons known only to him, he made his promise conditional on the fact that his former fiancee should not marry during the three years. The immediate tendency of this promise was to discourage marriage, and, as a rule, that tendency stamps such contracts illegal.[5] But a gift of property by will for the widowhood of the wife, where she married again shortly after the death of

[1] Scott *v.* Tyler, 2 Bro. Ch. R. 487; 2 Dick. R. 718; Stackpole *v.* Beaumont, 3 Ves. 95; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*q*).

[2] Keily *v.* Monck, 3 Ridgw. Parl. R. 205, 244, 247, 261; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*q*); Pratt *v.* Tyler, 2 Bro. Ch. R. 487; Harvey *v.* Aston, Com. Rep. 726; s. c. 1 Atk. 361.

[3] Keily *v.* Monck, 3 Ridgw. Parl. R. 205, 244, 247, 261; 1 Eq. Abridg. p. 110, Condition, C. in Marg.; Morley *v.* Rennaldson, 2 Hare, R. 570.

[4] Keily *v.* Monck, 3 Ridgw. Parl. R. 205, 244, 247, 261; 1 Chitty, Eq. Dig. Marriage, W.

[5] McCoy *v.* Flynn, 169 Iowa 622, 151 N. W. 465.

her first husband, is a valid condition.[1] And where a will gives more to one daughter, if she will not marry, than is given to her other brothers and sisters, the provision is void as to her.[2] And so, a contract entered into between the plaintiff and defendant, relatives of one Benedict, whereby they were to try to break up an illegitimate relationship between Benedict and some women of questionable character, upon whom he was squandering his fortune, and one of whom he was about to marry, and further, that if said relationship could be broken up that the plaintiff and defendant would divide equally whatever legacy might be left by Benedict, the contract was void and without regard to the character of the women in question. It is immaterial that no injury or detriment to the public resulted from this contract. The validity of such contracts is determined by their general tendency at the time they are made, and, if this general tendency is opposed to the interests of the public, such contracts are invalid, however good the intent of the parties to them, and even though no harm to any one resulted, or would result in the particular case.[3]]

§ 394. **Same.** — But the same principles of public policy which annul such conditions when they tend to a general restraint of marriage, will confirm and support them when they merely prescribe such reasonable and provident regulations and sanctions as tend to protect the individual from those melancholy consequences to which an over-hasty, rash, or precipitate match would probably lead.[4] If parents, who must naturally feel the deepest solicitude for the welfare of their children, and other near relatives and friends, who may well be presumed to take a lively interest in the happiness of those with whom they are associated by ties of kindred or friendship, could not, by imposing some restraints upon their bounty, guard the inexperience and ardor of youth against the wiles and delusions of the crafty and the corrupt who should seek to betray them from motives of the grossest selfishness, the law would be lamentably defective, and would, under the pretence of upholding the institution of marriage, subvert its highest purposes. It would indeed encourage the young and the thoughtless to exercise a perfect freedom of

[1] Knight *v.* Mahoney, 52 Mass. 523, 25 N. E. 971, 9 L. R. A. 573; Gibbens *v.* Gibbens, 140 Mass. 102, 3 N. E. 1, 54 Am. Rep. 453; Gaven *v.* Allen, 100 Mo. 293, 13 S. W. 501.

[2] Knost *v.* Knost, 229 Mo. 170, 129 S. W. 665.

[3] Sheppey *v.* Stevens, 177 Fed. 484.

[4] 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*g*).

choice in marriage; but it would be at the expense of all the best objects of the institution, the preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality and filial obedience and reverence. Such a reproach does not belong to the common law in our day; and least of all can it be justly attributed to Courts of Equity.

§ 395. **Same.** — Mr. Fonblanque has with great propriety remarked: "The only restrictions which the law of England imposes are such as are dictated by the soundest policy and approved by the purest morality. That a parent, professing to be affectionate, shall not be unjust; that, professing to assert his own claim, he shall not disappoint or control the claims of nature nor obstruct the interests of the community; that what purports to be an act of generosity shall not be allowed to operate as a temptation to do that which militates against nature, morality, or sound policy, or to restrain from doing that which would serve and promote the essential interests of society: [these] are rules which cannot reasonably be reprobated as harsh infringements of private liberty, or even reproached as unnecessary restraints on its free exercise. On these considerations are founded those distinctions which have from time to time been recognized in our Courts of Equity respecting testamentary conditions with reference to marriage." [1]

§ 396. **Same.** — Godolphin also has very correctly laid down the general principle: "All conditions against the liberty of marriage are unlawful. But if the conditions are only such as whereby marriage is not absolutely prohibited but only in part restrained, as in respect to time, place, or person, then such conditions are not utterly to be rejected." [2] Still this language is to be understood with proper limitations; that is to say, that the restraints upon marriage, in respect to time, place, or person, are reasonably asserted. For it is obvious that restraints as to time, place, and person may be so framed as to operate a virtual prohibition upon marriage, or at least upon its most important and valuable objects. As for instance a condition that a child should not marry until fifty years of age; [3] or should not marry any person inhabiting in the same town, county, or state; or should not marry any person who was a clergyman, a physician, or a lawyer, or any

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*q*).
[2] Godolphin's Orphan's Legacy, Pt. 1, ch. 15, § 1.
[3] But see 1 Roper on Legacies, ch. 13, § 2, p. 716, ed. by White.

person except of a particular trade or employment; for these would be deemed a mere evasion or fraud upon the law.[1]

§ 397. **Conditions Restraining Improvident Marriages during Minority Are Not Unreasonable.** — On the other hand some provisions against improvident matches, especially during infancy, or until a certain age of discretion, cannot be deemed an unreasonable precaution for parents and other persons to affix to their bounty.[2] Thus a legacy given to a daughter to be paid her at twenty-one years of age if she does not marry until that period, would be held good; for it postpones marriage only to a reasonable age of discretion.[3] So a condition, annexed to a gift or legacy, that the party should not marry without the consent of parents or trustees or other persons specified, is held good, for it does not impose an unreasonable restraint upon marriage; and it must be presumed that the person selected will act with good faith and sound discretion in giving or withholding consent.[4] The civil law indeed seems on this point to have adopted a very different doctrine; holding that the requirement of the consent of a third person, and especially of an interested person, is a mere fraud upon the law.[5]

§ 398. [**Same.** — A provision in a will for certain property to be held in trust for three unmarried daughters, so long as they remain unmarried, with remainder over in the event of all marrying, is valid. Here, provision is made for the support of daughters as long as they continue unmarried and need support, and the evident intention *is* not to restrain marriage, but to provide support.[6] But a provision that a daughter should hold under the devise only so long as she should remain unmarried, is a general restraint upon marriage, and these, as well as conditions that not only actually prohibit, but also any such as lead to probable

[1] See Scott *v.* Tyler, 2 Dick. R. 721, 722; 2 Brown, Ch. R. 488.

[2] Scott *v.* Tyler, 2 Dick. R. 719.

[3] See Stackpole *v.* Beaumont, 3 Ves. 96, 97; Scott *v.* Tyler, 2 Dick. R. 721, 722, 724; Beaumont *v.* Squire, 21 L. J. Q. B. 123; Younge *v.* Furse, 8 DeG. M. & G. 756. In the last case marriage was to be postponed until the age of twenty-eight.

[4] Desbody *v.* Boyville, 2 P. Will. 547; Scott *v.* Tyler, 2 Bro. Ch. R. 431, 485; 2 Dick. R. 712; Clarke *v.* Parker, 19 Ves. 1; Lloyd *v.* Branton, 3 Meriv. R. 108; Dashwood *v.* Bulkley, 10 Ves. 229.

[5] Lord Thurlow in Scott *v.* Tyler, 2 Dick. R. 720; Ayliffe, Pand. B. 3, tit. 21, p. 374.

[6] Trenton Trust & Safe Deposit Co. *v.* Armstrong, 70 N. J. Eq. 572, 62 Atl. 456; In re Alexander's Estate, 149 Cal. 146, 85 Pac. 308; Ellis *v.* Birkhead, 30 Tex. Civ. App. 529, 71 S. W. 31; Ruggles *v.* Jewett, 213 Mass. 167, 99 N. E. 1092; Maddox *v.* Yoe, 121 Md. 288, 88 Atl. 225.

restraint are void.[1] And where the devisee is to travel only on the continent of Europe, or unless she shall be divorced from her husband a vinculo and she shall remain so divorced from him, are conditions that tend toward the separation of the devisee from her husband and against public policy.[2] But a condition that if plaintiff, who was then living separate and apart from her husband, should rejoin or subsequently live with her husband, then the devise as to her should go to trustees, who were to hold for her benefit, will be sustained. Here the condition does not tend to separate husband and wife, but is an indirect way of providing for the necessities of the wife.[3] A condition that the home place of devisor shall be occupied by her four children and not sold for 21 years after the death of her husband and herself, is a valid restriction upon the sale of the property, but a further condition that if either of her sons should marry a "common woman", then he should lose his interest in her estate, is void for uncertainty. The class of women included in this expression is too large to distinguish between any particular individuals.[4]]

§ 399. **Same.** — Other cases have been stated which are governed by the same principles. Thus it has been said that a condition not to marry a widow is no unlawful injunction; for it is not in general restraint of marriage. So a condition that a widow shall not marry is not unlawful, neither is an annuity during widowhood only.[5] A condition to marry, or not to marry, Titius or

[1] Kennedy *v.* Alexander, 21 App. D. C. 424.

[2] Cruger *v.* Phelps, 21 Misc. Rep. 252, 47 N. Y. Supp. 61.

[3] Wright *v.* Mayer, 47 App. Div. 604, 62 N. Y. Supp. 610; Snorgrass *v.* Thomas, 166 Mo. App. 603, 150 S. W. 106.

[4] Watts *v.* Griffin, 137 N. C. 572, 50 S. E. 218.

[5] Conditions requiring widowhood were generally void by the civil law when the legacy was to the party herself, but not where it was to a third person. Ayliffe, Pand. B. 3, tit. 21, p. 374. "Legatum alii sub conditione sic relictum; Si uxor nuptui se post mortem mariti non collocaverit, contractis nuptiis, conditione deficit, ideoque peti nequaquam potest." Cod. Lib. 6, tit. 40, l. 1; Pothier, Pand. Lib. 35, tit. 1, n. 35. In Parsons *v.* Winslow (6 Mass. R. 169), where the legacy was during widowhood and life, without any bequest over, the court held the condition to be in terrorem only; and that the legatee took, notwithstanding a second marriage. But see Scott *v.* Tyler, 2 Dick. R. 721, 722; s. c. 2 Brown, Ch. R. 488; Harvey *v.* Aston, 1 Atk. 379; Marples *v.* Bainbridge, 1 Madd. R. 590; Richards *v.* Baker, 2 Atk. 321; 1 Roper on Legacies, by White, ch. 13, § 2, p. 721, 722; In re Holbrook's Estate, 213 Pa. 93, 62 Atl. 368, 2 L. R. A. (N. S.) 545, 110 Am. St. Rep. 537; Herd *v.* Catron, 97 Tenn. 662, 37 S. W. 551, 37 L. R. A. 731; Overton *v.* Lea, 108 Tenn. 505, 68 S. W. 250; Chapin *v.* Cooke, 73 Conn. 72, 46 Atl. 282, 84 Am. St. Rep. 139; Bennett *v.* Packer, 70 Conn. 357; 39 Atl. 739, 66 Am. St. Rep. 112.

Mævia is good. So a condition prescribing due ceremonies and a due place of marriage is good. And so any other conditions of a similar nature, if not used evasively as a covert purpose to restrain marriage generally.[1]

§ 400. **Conditions in Restraint of Marriage Are Not Favored.** — But Courts of Equity are not generally inclined to lend an indulgent consideration to conditions in restraint of marriage;[2] and on that account (being in no small degree influenced by the doctrines of the civil and canon law) they have not only constantly manifested an anxious desire to guard against any abuse to which the giving of one person any degree of control over another might eventually lead, but they have on many occasions resorted to subtleties and artificial distinctions in order to escape from the positive directions of the party imposing such conditions.

§ 401. **Same.** — One distinction is between cases where in default of a compliance with the condition there is a bequest over, and cases where there is not a bequest over, upon a like default of the party to comply with the condition. In the former case the bequest over becomes operative upon such default, and defeats the prior legacy.[3] In the latter case (that is, where there is no bequest over) the condition is treated as ineffectual, upon the ground that the testator is to be deemed to use the condition in terrorem only, and not to impose a forfeiture, since he has failed to make any other disposition of the bequest upon default in the condition.[4]

[1] Scott *v.* Tyler, 2 Bro. Ch. R. 448; 2 Dick. R. 721, 722; Godolp. Orp. Leg. Pt. 3, ch. 17, §§ 1 to 10; Ayliffe, Pand. B. 3, tit. 21, p. 374.

[2] See Long *v.* Dennis, 4 Burr. R. 2052 at 2055. In this case Lord Mansfield, 2055, said, "Conditions in restraint of marriage are odious, and are therefore held to the utmost rigor and strictness." Lord Eldon seems to have disapproved of this generality of expression, in Clarke *v.* Parker, 19 Ves. 19.

[3] Clarke *v.* Parker, 19 Ves. 13; Lloyd *v.* Branton, 3 Meriv. R. 108, 119; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*q*); Wheeler *v.* Bingham, 3 Atk. 368; Malcolm *v.* O'Callaghan, 2 Madd. R. 350; Chauncey *v.* Graydon, 2 Atk. 616. But where the condition of a devise was the giving a bond not to marry or cohabit with certain persons, with a devise over, the court refused to enforce the condition because it tended to inquiries that might disturb the peace of another family. Poole *v.* Bott, 11 Hare, 33.

[4] Harvey *v.* Aston, 1 Atk. 361, 375, 377; Reynish *v.* Martin, 3 Atk. 330; 1 Wilson, R. 130; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*q*); Pendarvis *v.* Hicks, 2 Freeman, R. 41; Pullen *v.* Ready, 2 Atk. R. 587; Long *v.* Dennis, 4 Burr. 2055; 1 Eq. Abridg. 110, C.; Parsons *v.* Winslow, 6 Mass. R. 169; 1 Roper on Legacies by White, ch. 13, § 1, pp. 654 to 660; Id. § 2, pp. 687, 715 to 727; Eastland *v.* Reynolds, 1 Dick. R. 317. But see Dickson's Trust, 1 Sim. N. S. 37.

§ 402. **Same.** — Another distinction is taken between conditions in restraint of marriage annexed to a bequest of personal estate, and the like conditions annexed to a devise of real estate, or to a charge on real estate, or to things savoring of the realty, in the latter cases (touching real estate) the doctrine of the common law as to conditions is strictly applied. If the condition be precedent, it must be strictly complied with in order to entitle the party to the benefit of the devise or gift. If the condition be subsequent, its validity will depend upon its being such as the law will allow to devest an estate. For if the law deems the condition void as against its own policy, then the estate will be absolute, and free from the condition. If on the other hand the condition is good, then a non-compliance with it will defeat the estate in the same manner as any other condition subsequent will defeat it.[1]

§ 403. **Same.** — But if the bequest be of personal estate, a different rule seems to have prevailed, founded in all probability upon the doctrines maintained in the Ecclesiastical Courts, and derived from the canon and civil law.[2] If the condition in restraint of marriage be subsequent and general in its character it is treated as the like condition is at law in regard to real estate, as a mere nullity, and the legacy becomes pure and absolute.[3] If it be only a limited restraint (such as to a marriage with the consent of parents, or not until the age of twenty-one) and there is no bequest over upon default, the condition subsequent is treated as merely in terrorem, and the legacy becomes pure and absolute.[4] But if the restraint be a condition precedent, then it admits of a very different application from the rule of the common law in similar cases as to real estate. For if the condition regard real

[1] Co. Litt. 206, a & b; Id. 217, a; Id. 237, Harg. and Butler's note (152); Bertie *v.* Faulkland, 3 Ch. Cas. 130; s. c. 2 Freeman, R. 220; 2 Vern. R. 333; 1 Eq. Cas. Abridg. 108, margin; Harvey *v.* Aston, Com. R. 726; s. c. 1 Atk. 261; Reynish *v.* Martin, 3 Atk. 330, 332, 333; Fry *v.* Porter, 1 Mod. R. 300; Long *v.* Rickets, 2 Sim. & Stu. R. 179; Popham *v.* Bamfield, 1 Vern. R. 83; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*q*); Graydon *v.* Hicks, 2 Atk. 16; Peyton *v.* Bury, 2 P. Will. 626; 1 Roper on Legacies, by White, ch. 13, § 1, pp. 650, 666; Id. § 2, pp. 687 to 727; post, § 404. See 2 Jarman, Wills, 44 et seq. (5th Am. ed.).

[2] 1 Roper on Legacies, by White, ch. 13, § 1, pp. 650 to 660; Scott *v.* Tyler, 2 Bro. Ch. R. 487; 2 Dick. R. 712; Stackpole *v.* Beaumont, 3 Ves. 96.

[3] 2 Jarman, Wills, 48 (5th Am. ed.).

[4] Lloyd *v.* Branton, 3 Meriv. R. 117; Marples *v.* Bainbridge, 1 Madd. R. 590; 1 Roper on Legacies, by White, ch. 13, § 1, p. 654, &c.; Id. § 2, pp. 715, 747; Garret *v.* Pretty, 2 Vern. R. 293; Wheeler *v.* Brigham, 3 Atk. 364.

estate and be in general restraint of marriage, there, although it is void, yet, as we have seen, if there is not a compliance with it, the estate will never arise in the devisee. But if it be a legacy of personal estate under like circumstances, the legacy will be held good and absolute as if no condition whatsoever had been annexed to it.

§ 404. **Same.** — Whether the same rule is to be applied to legacies of personal estate upon a condition precedent not in restraint of marriage generally, but of a limited and qualified and legal character, where there is no bequest over, and there has been a default in complying with the condition, has been a question much vexed and discussed in Courts of Equity, and upon which some diversity of judgment has been expressed. There are certainly authorities which go directly to establish the doctrine that there is no distinction in cases of this sort between conditions precedent and conditions subsequent. In each of them if there is no bequest over, the legacy is treated as pure and absolute, and the condition as made in terrorem only. The civil law and ecclesiastical law recognize no distinction between conditions precedent and conditions subsequent as to this particular subject.[1] On the other hand there are authorities which seem to inculcate a different doctrine, and to treat conditions precedent as to legacies of this sort upon the same footing as any other bequests or devises at the common law; that is to say, that they are to take effect only upon the condition precedent being complied with, whether there be a bequest over or not.[2]

[1] See Harvey *v.* Aston, 1 Atk. 375; s. c. Com. Rep. 738; Reynish *v.* Martin, 3 Atk. R. 332.

[2] The former doctrine (that is, that there is no difference between conditions precedent and conditions subsequent as to this point) was maintained by Lord Hardwicke in Reynish *v.* Martin, 3 Atk. 330, and was recognized by Lord Clare in Keily *v.* Monck, 3 Ridgw. R. 263, and by Sir Thomas Plumer in Malcolm *v.* O'Callaghan, 2 Madd. R. 349, 353. See also Garbut *v.* Hilton, 1 Atk. 381. But the contrary doctrine is indicated in Hemmings *v.* Munckley, 1 Bro. Ch. 303; Scott *v.* Tyler, 2 Bro. Ch. R. 488; 2 Dick. R. 723, 724; Stackpole *v.* Beaumont, 3 Ves. 89. See also Knight *v.* Cameron, 14 Ves. 388; Clarke *v.* Parker, 19 Ves. 13; Elton *v.* Elton, 1 Ves. 4. Mr. Roper, in his work on Legacies (1 Roper on Leg. by White, ch. 13, § 1, pp. 654 to 660; Id. § 2, pp. 715 to 727), is of opinion that the weight of authority is with the latter doctrine; and so is Mr. Hovenden in his Supplement to Vesey, Jr., Vol. 1, p. 353, note to 3 Ves. 89. See also Mr. Saunders's note to Harvey *v.* Aston, 1 Atk. 381. A distinction has also been taken between cases of personal legacies and cases of portions charged on land. In the former, the condition may perhaps be dispensed with, at least under some circumstances; in the latter, the condition must be complied with, to entitle the party to take, although there may be no devise over. See Harvey *v.* Aston, 1 Atk. R. 361; s. c. Com. Rep. 726; Cas. T. Talb. 212.

§ 405. **Same.** — But whichever of these opinions shall be deemed to maintain the correct doctrine, there is a modification of the strictness of the common law as to conditions precedent in regard to personal legacies which is at once rational and convenient, and promotive of the real intention of the testator. It is, that where a literal compliance with the condition becomes impossible, from unavoidable circumstances and without any default of the party, it is sufficient that it is complied with as nearly as it practically can be, or (as it is technically called) cy pres. This modification is derived from the civil law and stands upon the presumption that the donor could not intend to require impossibilities, but only a substantial compliance with his directions as far as they should admit of being fairly carried into execution. It is upon this ground that Courts of Equity constantly hold, in cases of personal legacies, that a substantial compliance with the condition satisfies it, although not literally fulfilled. Thus if a legacy upon a condition precedent should require the consent of three persons to a marriage, and one or more of them should die, the consent of the survivor or survivors would be deemed a sufficient compliance with the condition.[1] And a fortiori this doctrine would be applied to conditions subsequent.[2]

§ 406. [**Same.** — A general discussion of the doctrine of cy pres will be taken up later on, but it may be well at this time to consider some cases which bear upon the subject, and while we cannot go into an extended discussion of what conditions in deeds and wills will be upheld, and what will not, we simply lay down the general rule. The doctrine of approximate application, or

[1] Swinburne on Wills, Pt. 4, § 7, n. 4, p. 262; 1 Roper on Legacies, by White, ch. 13, § 2, pp. 691, 692. See Clarke *v.* Parker, 19 Ves. 1, 16, 19.

[2] See 1 Roper on Legacies, ch. 13, § 2, p. 691; Peyton *v.* Bury, 2 P. Will. 626; Graydon *v.* Hicks, 2 Atk. 16, 18; Aislabie *v.* Rice, 3 Madd. R. 256; Worthington *v.* Evans, 1 Sim. & Stu. R. 165. A condition in a devise that if the devisee "shall marry contrary to the order and established rules of the people called Quakers, such devise" shall cease and be void is held valid. Haughton *v.* Haughton, 1 Molloy, 611. So a condition is lawful requiring the donee not to marry a Scotchman. Perrin *v.* Lyon, 9 East, 170. Or a papist. Duggan *v.* Kelly, 10 Irish Eq. 295; 1 Eq. Cas. Abr. 110, pl. 2. So of a gift by a father to his daughter "during her separation from her husband", the parties at the time living separate. Cooper *v.* Remsen, 5 Johns. Ch. 459. On the reconciliation of the parties and the return of the wife before the father's death it was held that the gift did not take effect, though there was a separation again after the death of the father. But a condition intended to induce husband and wife to separate or to get divorced is void on grounds of public policy. Wren *v.* Bradley, 2 DeG. & S. 49; Brown *v.* Peck, 1 Eden, 140; Tennant *v.* Braie, Tothill, 141 (p. 78 of 2d ed.).

cy pres, is not enforced in all of the States of the Union, nor is it enforced every time when the apparent intention of the grantor or devisor has failed, or where his intention as expressed is incapable of actual execution in the minutest degree. A grant of land "to be used for a free gospel tabernacle and pastor's residence", is a condition subsequent and must be performed within a reasonable time, or else, under the deed, the estate will revert, and the erection of a house used for a boarding house is not a substantial compliance with the condition.[1] In this case the grant was to certain trustees of the Methodist denomination, and when not occupied by them then the premises might be used by any other orthodox or Christian church for public worship, and the condition here was fully complied with. Absent provisions to the contrary, a gift to charity is forever. It is on such premises that the general rule is deduced that when lands have been donated to charity and the title has been vested absolutely in trustees for charitable uses, as here, they are inalienable for any other purposes.[2] And a provision for the establishment of a home for "poor and destitute children" is not such a condition as is impossible to be performed, and whether or not children come within this class is for the trustees of the institution.[3]]

§ 407. **Contracts in Restraint of Trade are Void.** — Another class of constructive frauds, and so deemed because inconsistent with the general policy of the law, is that of bargains and contracts made in restraint of trade.[4] And here the known and established distinction is between such bargains and contracts as are in general

[1] Norton *v.* Valentine, 151 App. Div. 392, 135 N. Y. Supp. 1084; Board of Trustees of Albany College *v.* Monteith, 64 Oreg. 356, 130 Pac. 633.

[2] Mott *v.* Morris, 155 S. W. 434; Board of Administration *v.* Stead, 259 Ill. 194, 102 N. E. 173.

[3] Hagen *v.* Sacrison, 19 N. Dak. 160, 123 N. W. 518, 26 L. R. A. (N. S.) 724.

[4] An association of carriers or forwarders to regulate the price of freight and passage, with provisions prohibiting the members from engaging in similar business out of the association, is considered within the mischief of general restraints upon trade. Stanton *v.* Allen, 5 Denio, 434. See Oregon Nav. Co. *v.* Winsor, 87 U. S. 64, 22 L. Ed. 315. So of combinations among workmen and employers to demand or to pay only certain prices for labor with a penalty on breach. Hilton *v.* Eckersley, 6 El. & B. 47, 66. See Bowen *v.* Matheson, 14 Allen, 499; Carew *v.* Rutherford, 106 Mass. 1; Morris Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173. A contract by a municipality not to license more than one market is void. Gale *v.* Kalamazoo, 23 Mich. 344. So of an agreement by a lessee of a coal mine not to give or accept any order on any store except that of a lessor. Crawford *v.* Wick, 18 Ohio St. 190. So of an agreement for a "corner" in stocks. Sampson *v.* Shaw, 101 Mass. 145.

restraint of trade and such as are in restraint of it only as to particular places or persons. The latter, if founded upon a good and valuable consideration, are valid. The former are universally prohibited. The reason of this difference is, that all general restraints upon trade have a tendency to promote monopolies and to discourage industry, enterprise, and just competition, and thus to do mischief to the party by the loss of his livelihood and the subsistence of his family, and mischief to the public by depriving it of the services and labors of a useful member.[1] But the same reasoning does not apply to a special restraint not to carry on trade in a particular place,[2] or with particular persons, or for a

[1] Mitchell *v.* Reynolds, 1 P. Will. 181, where the subject is most elaborately considered. See also Pierce *v.* Fuller, 8 Mass. R. 223; Morris *v.* Colman, 18 Ves. 436.

[2] Ropes *v.* Upton, 125 Mass. 258 (that equity will restrain a violation of the agreement); Morgan *v.* Perhamus, 36 Ohio St. 517 (same effect); Guerand *v.* Dandelet, 32 Md. 561; Warfield *v.* Booth, 33 Md. 63; Boutelle *v.* Smith, 116 Mass. 111; Dean *v.* Emerson, 102 Mass. 480; McClurg's Appeal, 58 Pa. St. 51; Doty *v.* Martin, 32 Mich. 468; Hubbard *v.* Miller, 27 Mich. 15. Secus by some cases if it apply to a whole State. More *v.* Bonnet, 40 Cal. 251; Wright *v.* Rider, 36 Cal. 342. Contra, if reasonable, Beal *v.* Chase, 31 Mich. 490, in which the subject is ably and exhaustively considered.

A person selling a copyright, a patent right, or a goodwill, or the like, may clearly impose upon himself such restriction as may be necessary to protect the purchaser, so long as it is reasonable, though the restriction be not local. Morse Twist Co. *v.* Morse, 103 Mass. 73; Taylor *v.* Blanchard, 13 Allen, 370; Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345; Beal *v.* Chase, supra. But see Allsopp *v.* Whistcroft, L. R. 15 Eq. 59.

Indeed it has been declared in England that there is no absolute rule that a contract in restraint of trade without limit of space is invalid. The question is whether the restraint extends further than is reasonably necessary to protect the party in whose favor the restriction is made. Rousillon *v.* Rousillon, 14 Ch. D. 351; Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345. See Hitchcock *v.* Coker, 6 Ad. & E. 438, 454; Ward *v.* Byrne, 5 Mees. & W. 548, 561; Tallis *v.* Tallis, 1 El. & B. 391; Mallan *v.* May, 11 Mees. & W. 653, 667. To the same effect, Beal *v.* Chase, 31 Mich. 490. In the first case cited, Fry, J., denied Allsopp *v.* Whistcroft, L. R. 15 Eq. 59, upon this point. He also denied that where from its terms a contract in restraint of trade might be either good or bad, it was to be presumed, prima facie, bad, as had been declared to be the rule by the court in Mitchel *v.* Reynolds, 1 P. Wms. 181, 191.

However if the terms of a contract in restraint of trade are hard or complex, equity may refuse to aid in the enforcement of it though it would be good at law. Keeler *v.* Taylor, 53 Pa. St. 467.

The fact that a plaintiff has not attempted to prevent certain unimportant breaches of a contract not to carry on a certain trade, will not prevent his obtaining an injunction in a case otherwise proper. Richards *v.* Revett, 7 Ch. D. 224.

In regard to the right of the seller of the business to solicit the old customers after the sale, see Walker *v.* Mottram, 19 Ch. D. 355; Leggott *v.*

limited reasonable time,[1] for this restraint leaves all other places and persons and times free to the party to pursue his trade and employment.[2] And it may even be beneficial to the country that a particular place should not be overstocked with artisans or other persons engaged in a particular trade or business,[3] or a particular trade may be promoted by being for a short period limited to a few persons, especially if it be a foreign trade recently discovered and it can be beneficial but to a small number of adventurers.[4] And for a like reason a person may lawfully sell a secret in his trade or business and restrain himself from using that secret.[5]

§ 408. [**Contracts in Total Restraint of Trade Are Void.** — In the consideration of this subject, it must be borne in mind that under certain restrictions a man may sell his business, or refrain from exercising his talents in a given direction, or cease the manufacture of certain articles of commerce, but in all of these cases reference must first be had to the sort of commodity in question, and the extent to which the restraint is to be carried. An agreement not to engage in a certain kind of business, in a restricted

Barrett, 15 Ch. D. 306 (overruling Ginesi *v.* Cooper, 14 Ch. D. 596, which extended the prohibition in Labouchere *v.* Dawson, L. R. 13 Eq. 322, against such solicitation); Dawson *v.* Beeson, 22 Ch. D. 504.

[1] The restraint may be without limit as to time if it relates only to a particular place, and is not unreasonable. Catt *v.* Tourle, L. R. 4 Ch. 654; Perkins *v.* Clay, 54 N. H. 518; Hubbard *v.* Miller, 27 Mich. 15.

[2] Rannie *v.* Irvine, The Jurist (1844), Vol. 8, p. 1051. See Sainter *v.* Ferguson, 7 C. B. 716; Hartley *v.* Cummings, 5 C. B. 247; Mallan *v.* May, 11 Mees. & W. 653; Hastings *v.* Whitby, 2 Ex. 611; Nichols *v.* Stratton, 10 Q. B. 346; Green *v.* Price, 13 Mees. & W. 695, 698; Rannie *v.* Irvine, 7 Man. & G. 969; Lange *v.* Work, 2 Ohio St. 519; Gilman *v.* Dwight, 13 Gray, 356; Dean *v.* Emerson, 102 Mass. 480; Harms *v.* Parsons, 32 Beav. 328; Benwell *v.* Inns, 24 Beav. 307; Edmonds *v.* Plews, 6 Jur. N. S. 1091. So of an agreement not to make a particular article. Gillis *v.* Hall, 2 Brewst. 342. But see Taylor *v.* Blanchard, 13 Allen, 370. So of a covenant by a vendor of land not to sell marl off his adjacent land. Brewer *v.* Marshall, 4 C. E. Green, 537, court not unanimous.

[3] Ibid.; Davis *v.* Mason, 5 T. R. 118; Chesman *v.* Nainby, 3 Bro. Parl. Cas. 349; Shackle *v.* Baker, 14 Ves. 468; Crutterell *v.* Lye, 17 Ves. 336; Harrison *v.* Gardner, 2 Madd. R. 198; Pierce *v.* Fuller, 8 Mass. R. 223; Perkins *v.* Lyman, 9 Mass. R. 522; Stearns *v.* Barrett, 1 Pick. R. 443; Palmer *v.* Stebbins, 3 Pick. R. 188; Pierce *v.* Woodward, 6 Pick. R. 206.

[4] Perkins *v.* Lyman, 9 Mass. R. 522, 530.

[5] Bryson *v.* Whitehead, 1 Sim. & Stu. 94; Peabody *v.* Norfolk, 98 Mass. 452; Hildreth *v.* Thibodeau, 124 Fed. 892, 60 C. C. A. 78, 63 L. R. A. 480; C. F. Simmons Medicine Co. *v.* Simmons, 81 Fed. 163; S. Jarvis Adams Co. *v.* Knapp, 121 Fed. 34, 58 C. C. A. 1; O. & W. Thum Co. *v.* Tloczynski, 114 Mich. 149, 72 N. W. 140, 4 Detroit Leg. N. 527, 38 L. R. A. 200, 68 Am. St. Rep. 469; Magnolia Metal Co. *v.* Price, 65 App. Div. 276, 72 N. Y. Supp. 792.

area, might be valid, but a restriction that the one party shall not either upon his own account, or as a member of a corporation or in any advisory capacity or otherwise, during a period of ten years from date, manufacture paper receptacles anywhere in the United States of America, is too general and void.[1] And a contract by which one party secures the control of the entire territory in which is produced a given article, so that it really produces a monopoly, is too general.[2] A contract will not be upheld where the restriction is for too great a period of time, as, where the defendant bound himself not to engage in the paper business anywhere in the State of Illinois for 25 years.[3] Where the merchants in a town have agreed to close their places of business at a certain hour, beginning on a certain day, this is a legitimate subject for contract and will be enforced.[4]]

§ 409. [**Contracts in Partial Restraint May Be Valid.** — The owner of a business may sell it and at the same time agree to purchase materials for a building that he was then about to erect, from the other party to his contract, and further that he will not engage in the same business for a period of five years. The good will of a trade or business is a species of property. It possesses a market value and may be sold and disposed of as other property. The seller may enter into a contract to refrain from engaging in the business of which the good will was incident, and the courts have invariably sustained such contracts when the restraints placed upon the future engagements of the seller and the extent of the territory were reasonable.[5] For instance, an agreement not to engage in the livery business in Chicago for five

[1] Lanzit *v.* J. W. Sefton Mfg. Co., 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171; Sutton *v.* Head, 86 Ky. 156, 5 S. W. 410, 9 Ky. L. Rep. 453, 9 Am. St. Rep. 274; Hursen *v.* Gaven, 162 Ill. 377, 44 N. E. 735; Mallinckrodt Chemical Works *v.* Nemnick, 169 Mo. 388, 69 S. W. 355; Sell *v.* Branen, 70 Ill. App. 471; Fisheries Co. *v.* Lennen, 130 Fed. 533, 65 C. C. A. 77.

[2] Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738.

[3] Union Strawboard Co. *v.* Bonfield, 193 Ill. 420, 61 N. E. 1038, 86 Am. St. Rep. 340.

[4] Stovall *v.* McCutcheon, 107 Ky. 577, 54 S. W. 969, 21 Ky. L. Rep. 1317, 47 L. R. A. 287, 92 Am. St. Rep. 373.

[5] Trentman *v.* Wahrenburg, 30 Ind. App. 304, 65 N. E. 1057; Espenson *v.* Koeppe, 93 Minn. 278, 101 N. W. 168; Yazoo *v.* Miss. Valley R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A. 715; Camors-McConnell Co. *v.* McConnell, 140 Fed. 412, Affirmed 140 Fed. 987, 72 C. C. A. 681; Cleaver *v.* Lenhart, 182 Pa. St. 285, 37 Atl. 811; Bullock *v.* Johnson, 110 Ga. 486, 35 S. E. 703; Eisel *v.* Hayes, 141 Ind. 41, 40 N. E. 119.

years,[1] or not to engage in the newspaper business in a certain city for five years,[2] and a stipulation in a contract that the defendant would not, either directly or indirectly, in his individual capacity or through a corporation, engage in the growing or importing tropical fruits, in competition with plaintiff, is valid. The test of the legality and validity of this covenant is whether the main contract is legal. If the contract is illegal, affirmative relief against it will not be granted. The fact that trade and commerce might be indirectly affected is not sufficient. The effect must be direct and proximate. The indirect effect of the contract under consideration might be to enhance the price of tropical fruit, but the contract itself would not directly or necessarily for that reason be in restraint of interstate trade or commerce. While it might tend to restrain such trade, the restraint would be an indirect result.[3]]

§ 410. [**Exceptions to the Rule.** — The rule that contracts in partial restraint of trade, when controlled within a limited area, or within a reasonable time, are usually valid, is not without exceptions. The cases just considered are ones in which the public may not be directly dependent and in which they may not have an absolute right, as whether other goods, of equal grade, may be had of other merchants, but where the contract deals with a public utility, the policy of the law is not to enforce the agreement. A clear distinction must be taken between the class of cases binding one who has sold out a mercantile or other kind of business, and the good will connected therewith, not to again engage in that business within a given territory, and that class of cases binding one to desist from the practice of a learned profession. So where the defendant contracted not to engage in the practice of medicine within a given territory, the agreement is void, for the reason that the public have an interest in the professional skill and ability of the physician, — his stock in trade differing from the business of a merchant.[4] The closing of one hotel, in a town of 5,000 inhabitants, upon condition that the

[1] Hursen *v.* Gaven, 162 Ill. 377, 44 N. E. 735.

[2] Andrews *v.* Kingsbury, 212 Ill. 97, 72 N. E. 11, 112 Ill. App. 518.

[3] Camors-McConnell Co. *v.* McConnell, 140 Fed. 412, Affirmed 140 Fed. 987, 72 C. C. A. 681; Hopkins *v.* United States, 171 U. S. 578, 43 L. Ed. 290, 19 S. Ct. Rep. 40; Harrison *v.* Glucose Sugar Refining Co., 116 Fed. 307, 53 C. C. A. 484, 58 L. R. A. 915; National Enameling & Stamping Co. *v.* Haberman, 120 Fed. 415; United States *v.* Addyston P. & S. Co., 85 Fed. 281, 29 C. C. A. 141, 46 L. R. A. 122.

[4] Rakestraw *v.* Lanier, 104 Ga. 188, 30 S. E. 735, 69 Am. St. Rep. 154.

other hotel-keeper pay $100 a month for three years, is against public policy. When a hotel agrees not to perform a duty imposed upon it by law, and agrees not to serve the public, with a view of giving a competitor in business a monopoly of the hotel business, its act is in contravention of sound public policy. The contract relied upon in this case is plainly in restraint of trade, the only consideration being the payment of money for such an agreement. No property is sold or good will transferred. The business is destroyed, not continued for the benefit of the public. The laborers that were necessary to run the hotel are thrown out of employment, and the public is deprived of the benefits which would accrue should the competition continue.[1] The same is true where one company contracts to allow its machinery for generating electricity, or for the manufacture of ice, to remain idle for ten and five years respectively, upon the payment of a given rental. To say the least, it is against public policy to monopolize in this way any commodity of common utility, or of common consumption among the people, or even of considerable utility or consumption, whether it be one of the necessaries of life or not.[2]]

§ 411. **Contracts Suppressing Bidding at Auction Sales Are Void.** — Upon analogous principles agreements whereby parties engage not to bid against each other at a public auction, especially in cases where such auctions are directed or required by law, as in cases of sales of chattels or other property on execution, are held void; for they are unconscientious and against public policy, and have a tendency injuriously to affect the character and value of sales at public auction and to mislead private confidence. They operate virtually as a fraud upon the sale.[3] So if under-

[1] Clemons *v.* Meadows, 29 Ky. L. Rep. 619, 94 S. W. 13, 6 L. R. A. (N. S.) 847.

[2] Keene Syndicate *v.* Wichita Gas, Electric Light & Power Co., 69 Kans. 284, 76 Pac. 834, 67 L. R. A. 61, 105 Am. St. Rep. 164; Tuscaloosa Ice Mfg. Co. *v.* Williams, 127 Ala. 110, 28 So. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125.

[3] Jones *v.* Caswell, 3 John. Cas. 29; Doolin *v.* Ward, 6 John. R. 194; Wilbur *v.* Howe, 8 John. 444; 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (*x*). But persons who wish to make a joint purchase may authorize one to bid for them, if there is no agreement not to compete. National Bank *v.* Sprague, 5 C. E. Green, 159. Contra of an agreement between two bidders for a public contract, to divide the profits whichever was successful. Atcheson *v.* Mallon, 43 N. Y. 147. An agreement to pay a mail contractor for repudiating his bargain is void. Weld *v.* Lancaster, 56 Maine, 453; Stevens *v.* Perrier, 12 Kans. 297.

A note given in consideration of an agreement not to bid at a sale

bidders or puffers are employed at an auction to enhance the price [1] and deceive other bidders, and they are in fact misled, the sale will be held void as against public policy.[2]

§ 412. **Contracts Affecting Legislation.** — So where contracts are entered into between parties pending a bill in Parliament for the charter of a corporation for private purposes (as for example a railway), and the agreement is to be concealed from Parliament in order to procure the bill to be passed without the knowledge thereof, and thereby to produce a false impression or to mislead or suppress inquiry, or to withdraw public opposition thereto on grounds of public or private general interest, such contracts will

under a chattel mortgage, is unenforceable in the hands of the payee. McClelland *v.* Citizens Bank, 60 Neb. 90, 82 N. W. 319.

And where stock was about to be sold and defendant told plaintiff that he expected to bid on it at the sale, whereupon plaintiff promised defendant that if he would not bid that he would buy in all of the stock, one-half on the account of each. Defendant agreed to this and gave his check in payment, which was afterwards returned, plaintiff claiming that he bought all of the stock upon his own account. The contract is void. Fletcher *v.* Johnson, 139 Mich. 51, 102 N. W. 278; 11 Detroit Leg. N. 753, 111 Am. St. Rep. 401.

An agreement by which plaintiff, an auctioneer, was to sell property and employ assistants who would bid on property and puff up its value so as to get better prices, is against public policy. Dealey *v.* East San Mateo Land Co., 21 Cal. App. 39, 130 Pac. 1066.

A contract is void which is intended for the purpose of keeping bidders away from a sale, or which induces by-bidding, or which inflates the price of property and makes innocent purchasers bid against themselves. Owens *v.* Wright, 161 N. C. 127, 76 S. E. 735; Daily *v.* Hallis, 27 Tex. Civ. App. 570, 66 S. W. 586; Bolling *v.* Mullins, 111 Va. 97, 68 S. E. 982; Nitrophosphate Syndicate, Limited, of London, England *v.* Johnson, 100 Va. 774, 42 S. E. 995; Ralphsnyder *v.* Shaw, 31 S. E. 953, 45 W. Va. 680.

[1] Secus if the object is not to enhance the price, but to prevent a sacrifice of the property, or if there is any other honest or reasonable purpose. Phippen *v.* Stickney, 3 Met. 387. See Veazie *v.* Williams, 8 How. 134; Latham *v.* Morrow, 6 B. Mon. 630. As to one by-bidder qu. See Mortimer *v.* Bell, L. R. 1 Ch. 10.

[2] See Howard *v.* Castle, 6 T. R. 642; Bramlet *v.* Alt, 3 Ves. 619, 623, 624; Conolly *v.* Parsons, Id. 624, note; Smith *v.* Clarke, 12 Ves. 577. But see Bexwell *v.* Christie, Cowp. R. 395; Twining *v.* Morrice, 2 Bro. Ch. R. 326; 1 Madd. Ch. Pr. 257; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 1, p. 390; 2 Kent, Comm. Lect. 39, pp. 537, 538 (5th ed.); Steele *v.* Ellmaker, 11 Serg. & Rawle, 86. Where property is advertised to be sold "without reserve", the announcement is understood to exclude any interference by the vendor, direct or indirect, which under any circumstances can affect the right of the highest bidder, whatever the amount of his bid, to be declared the purchaser. Robinson *v.* Wall, 2 Phill. Ch. 372. See further Green *v.* Baverstock, 14 C. B. N. S. 204; National Bank *v.* Sprague, 5 C. E. Green, 159; Mortimer *v.* Bell, L. R. 1 Ch. 10; Dimmock *v.* Hallett, L. R. 2 Ch. 21.

be held void as a constructive fraud upon Parliament as well as upon the public at large.[1]

§ 413. [**Same.** — A lawyer may be entitled to compensation for writing a petition or even for making a public argument before the legislature or a committee thereof; but the law should not help him or any other person to a recompense for exercising any personal influence in any way in any act of the legislature. It is certainly important to just and wise legislation, and therefore, to the most essential interests of the public, that the legislature be perfectly free from any extraneous influence which may either corrupt or deceive the members or any of them. Where the contract in question provided that plaintiff should use her endeavors in interviewing the members of both branches of the legislature, and showed them the merits, legality, and justice of the bill in which she was interested and which was proposed to be enacted as a law, and which was subsequently enacted largely

[1] Lord Howden *v.* Simpson, 10 Adolph. & Ell. 743; Simpson *v.* Lord Howden, 1 Keen, R. 583; s. c. 3 Mylne & Craig, R. 97; The Vauxhall Bridge Co. *v.* Earl Spencer, 2 Madd. R. 356; s. c. Jac. R. 64. See Petre *v.* Eastern Counties Ry., 1 Railw. Cas. 462; Shrewsbury *v.* North Staff. Ry. Co., L. R. 1 Eq. 593; Caledonian Ry. Co. *v.* Helmsburgh Trustees, 2 Macq. 391. In like manner a contract to procure the passage of an act of the Legislature by any sinister means, or by exerting personal influence with the members, is invalid. Clippinger *v.* Hepbaugh, 5 Watts & S. 315; Wood *v.* McCann, 6 Dana, 366; Pingry *v.* Washburn, 1 Aik. 264; Edwards *v.* Grand Junc. Ry. Co., 1 Mylne & C. 650; Marshall *v.* Baltimore & O. R. Co., 57 U. S. 314, 14 L. Ed. 953; Smith *v.* Applegate, 3 Zabr. 352. See Mills *v.* Mills, 40 N. Y. 543; Frost *v.* Belmont, 6 Allen, 152; Trist *v.* Child, 88 U. S. 441, 22 L. Ed. 623. So of an agreement to perform services in obtaining a contract from an executive department. Tool Co. *v.* Norris, 69 U. S. 45, 17 L. Ed. 868. Or of an agreement by an officer of a foreign government to use his influence in obtaining contracts with his government. Oscanyan *v.* Arms Co., 103 U. S. 261, 26 L. Ed. 539. See Cappell *v.* Hall, 74 U. S. 42, 19 L. Ed. 244; Meguire *v.* Corwine, 101 U. S. 108, 25 L. Ed. 899; Hope *v.* Hope, 8 DeG. M. & G. 731. Of the same objectionable nature is a contract to procure signatures and obtain a pardon for a criminal. Hatfield *v.* Gulden, 7 Watts, 152. But perhaps the case would be different if the agreement is only for the use of proper means to obtain signatures. Formby *v.* Pryor, 15 Ga. 258. A contract to abandon the prosecution of a petition presented to the House of Commons against the return of a member accused of bribery is illegal. Coppock *v.* Bower, 4 Mees. & W. 361. So where a city charter prohibited any member of the council from being interested in any contract payment for which was to be made by vote of such council, and a member by secret arrangement with a contractor became interested in such a contract, it was held that a note given by the contractor to the member for his share of the profits was void even in the hands of an innocent assignee. Bell *v.* Quinn, 2 Sandf. 146. See Bowes *v.* Toronto, 11 Moore, P. C. 463; Miles *v.* McIlwraith, 8 App. Cas. 120.

through her efforts, was against public policy. The contract, if ever made, was vicious and illegal, and there could be no recovery under it, nor as upon an implied contract, nor upon a quantum meruit.[1] It must be remembered that there is a marked difference between contracts to influence legislative action, and contracts involving purely professional services. It is entirely legitimate for an attorney to make a contract by which he is to collect facts, and prepare and submit to a tribe of Indians and the proper authorities of the United States an argument for a rebate and reduction of the unpaid balance due the government for lands held under the terms of sale to the defendant. By comparison of the services to be rendered in this case, and the services rendered in the case of Richardson *v.* Scotts Bluff County, supra, it will readily be seen that the two cases are not in the same class. That one is a legitimate contract for professional services, where legislative action is not contemplated or contracted for, while the other is an agreement to procure legislative action, to-wit: the passage of an appropriation bill, by drafting the bill itself, having it introduced in the legislature, and doing all things necessary, including lobbying, to procure its passage.[2] A note given to secure funds with which to carry on a lobbying business cannot be collected, for the note, like the services to be performed, is tainted with corruption, and a contract which is against public policy, good morals or the express mandate of the law cannot be made the basis of an action, legal or equitable.[3] The same principle applies as well to influencing the action of members of a city council as it does to members of a legislative body.[4]]

§ 414. **Contracts Looking to Violation of Public Trust Are Void.**'— In like manner agreements which are founded upon violations of public trust or confidence or of the rules adopted by

[1] Richardson *v.* Scotts Bluff County, 59 Neb. 400, 81 N. W. 309, 48 L. R. A. 294; Veazey *v.* Allen, 173 N. Y. 359, 66 N. E. 103, 62 L. R. A. 362, 61 App. Div. 119, 70 N. Y. Supp. 457; Owens *v.* Wilkinson, 20 App. D. C. 51; Hazleton *v.* Sheckles, 202 U. S. 71, 50 L. Ed. 939, 26 S. Ct. Rep. 567; Colusa County *v.* Welch, 122 Cal. 428, 55 Pac. 243; Globe Works *v.* United States, 45 U. S. Ct. Cl. 497; Dunham *v.* Hastings Pavement Co., 56 App. Div. 244, 67 N. Y. Supp. 632.

[2] Stroemer *v.* Van Orsdel, 74 Neb. 132, 107 N. W. 125, 4 L. R. A. (N. S.) 212.

[3] Le Tourneux *v.* Gilliss, 1 Cal. App. 546, 82 Pac. 627; Owens *v.* Wilkinson, 20 App. D. C. 51; Colusa County *v.* Welch, 122 Cal. 428, 55 Pac. 243; Alston *v.* Hill, 165 N. C. 255, 81 S. E. 291; McDonald *v.* Buckstaff, 56 Neb. 88, 76 N. W. 476; Greer *v.* Severson, 119 Iowa 84, 93 N. W. 72.

[4] Crichfield *v.* Bermudez Asphate Paving Co., 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347.

courts in furtherance of the administration of public justice are held void. Thus an agreement made for a remuneration to commissioners appointed to take testimony and bound to secrecy by the nature of their appointment upon their disclosure of the testimony so taken is void.[1] So an assignment of the half-pay of a retired officer of the army is void; for it operates as a fraud upon the public bounty.[2] So an assignment of the fees and profits of the office of keeping a house of correction and of the profits of the tap-house connected with it is void; for the former plainly tends to oppression and extortion, and the latter to increase riot and debauchery among the prisoners.[3] Agreements founded upon the suppression of criminal prosecutions fall under the same consideration. They have a manifest tendency to subvert public justice.[4] [A contract by which one undertakes to influence the action of the grand jury in refusing to find a bill of indictment is void, and any act which is designed to impede the usual course of procedure, and prevent the orderly inquiry into the alleged commission of an offence is contrary to good morals. Public policy requires that all offences against the law shall be

[1] Cooth *v.* Jackson, 6 Ves. 12, 31, 32, 35.

[2] Stone *v.* Liddledale, 2 Anst. 533; M'Carthy *v.* Goold, 1 Ball & Beatty, R. 389. See Davis *v.* Duke of Marlborough, 1 Swanst. R. 74, 79; Osborne *v.* Williams, 18 Ves. 379. See Price *v.* Lovett, 20 L. J. Ch. 270; s. c. 4 Eng. L. & E. 110; Ex parte Huggins, 21 Ch. D. 85. A pension given an officer upon retiring from office is property, and is subject to the claims of creditors, at least where they offer a reasonable allowance to the pensioner out of the fund. Ex parte Huggins, supra.

"There are no doubt some salaries and pensions which are not assignable. But when this is so, it is always referable to one of two grounds. It is said to be contrary to public policy that payments made to induce persons to keep themselves ready for the service of the Crown, as the half-pay of officers in the army or navy, or payments for actual service rendered to the Crown, should be assigned. The other class is that of pensions, like the retiring allowance of a beneficed clergyman, which are by statute expressly made not assignable." Ib. Jessel, M. R. p. 91. See Gibson *v.* East India Co., 5 Bing. N. C. 262; Innes *v.* East India Co., 17 C. B. 351; Ex parte Hawker, L. R. 7 Ch. 214; Wells *v.* Foster, 8 Mees. & W. 149; Ex parte Wicks, 17 Ch. D. 70; Cooper *v.* Regina, 14 Ch. D. 311.

[3] Methwold *v.* Walbank, 2 Ves. 238. So of an agreement by a party to a suit to pay a witness a certain sum for his attendance, and more if the party promising succeeds in the suit. Dawkins *v.* Gill, 10 Ala. 206; Patterson *v.* Donner, 48 Cal. 369, 379. Or of an agreement to pay a board of public officers, for their personal benefit, a certain sum for doing an act in their official duty. Odineal *v.* Barry, 24 Miss. 9. So also of a contract by a deputy sheriff to pay the sheriff a certain sum as the price of his appointment. Ferries *v.* Adams, 23 Vt. 136.

[4] Johnson *v.* Ogilby, 3 P. Will. 276, and Cox's note (1); Newland on Contr. ch. 8, p. 158.

punished, and all contracts which tend to suppress legal investigations concerning them are immoral and void and cannot be enforced.[1] And so a contract with a widow to have a will set aside and thus make her the sole heir at law, she to pay in that event one-fourth of her inheritance, is against public policy.[2] Contracts to pay for procuring and collecting testimony to be used in evidence coupled with the condition that the contractee's right to compensation depends upon the character of the testimony produced or upon the result of the suit in which it is to be used have been universally condemned by the courts as against public policy. A contract is void as against public policy if by it one of the parties agrees to secure such testimony as will enable the other to win an existing or contemplated suit. It is not necessary that the contract should contemplate the production of perjured testimony. It is void because its tendency is to promote unlawful acts.[3] The courts will not aid one to collect the amount agreed upon upon the condition that he persuade a prosecuting witness to leave the State and to absent herself until the case has been finally disposed of. It makes no difference whether the case be of a civil or criminal nature, it is equally objectionable.][4] So wager contracts which are contrary to sound morals, or injurious to the feelings or interests of third persons, or against the principles of public policy or duty, are void.[5] So are contracts which have a tendency to encourage champerty.[6]

§ 415. [**A Champerty Contract Will Not Be Enforced.** — Champerty was an offence at common law, and a contract savoring of champerty or maintenance was unenforceable. The modern tendency is not to construe all contingent contracts for professional employment to be champertous, but whether a given contract is thus tainted depends largely upon the facts being considered.

[1] Weber *v.* Shay, 56 Ohio St. 116, 46 N. E. 377, 37 L. R. A. 230, 60 Am. St. Rep. 743.

[2] Gugolz *v.* Gehrkens, 164 Cal. 596, 130 Pac. 8; Cochran *v.* Zachary, 137 Iowa 585, 115 N. W. 486, 16 L. R. A. (N. S.) 235, 126 Am. St. Rep. 307, 15 Ann. Cas. 297; Conklin *v.* Conklin, 165 Mich. 571, 131 N. W. 154.

[3] Manufacturers and M. I. Bureau *v.* Everwear Hosiery Co., 152 Wis. 73, 138 N. W. 624; Hughes *v.* Mullins, 36 Mont. 267, 92 Pac. 758, 13 Ann. Cas. 209; Neece *v.* Joseph, 95 Ark. 552, 129 S. W. 797, 30 L. R. A. (N. S.) 278, Ann. Cas. 1912 A. 655; Quirk *v.* Muller, 14 Mont. 467, 36 Pac. 1077, 25 L. R. A. 87, 43 Am. St. Rep. 647.

[4] Small *v.* Lowery, 166 Mo. App. 108, 148 S. W. 132.

[5] De Costa *v.* Jones, Cowp. 729; Atherford *v.* Beard, 2 T. Rep. 610; Gilbert *v.* Sykes, 16 East, R. 150; Hartley *v.* Rice, 10 East, 22; Allen *v.* Hearn, 1 T. Rep. 56; Shirley *v.* Shankey, 2 Bos. & Pull. 130.

[6] Power *v.* Knowler, 2 Atk. 224.

An agreement between a man who is not a member of the profession, with a regularly licensed attorney, whereby the one party is to urge and persuade possible suitors to employ the services of the attorney, and in the event of recoveries or collections of fees by the attorney he was to pay plaintiff one-fourth for his services, any such a contract is against public policy and no recovery can be had upon it. The recognition of contracts of this character would be the introduction of all sorts of fraud and deception in proceedings before courts of justice, in order that parties might receive compensation out of the results of their successful manufacture of proofs to be presented to the court, thus holding out a premium upon subornation.[1] But a contract "to do everything proper and legitimate, and to aid them in every way to recover said estate; that he will give all and true evidence, etc." is not void as being champertous, and especially where one has an interest in the estate or acts in the bona fide belief that he has.[2]]

§ 416. **Contract for Purchase or Sale of Public Office Is Void.** — Another extensive class of cases falling under this head of constructive fraud respects contracts for the buying, selling, or procuring of public offices. It is obvious that all such contracts must have a material influence to diminish the respectability, responsibility, and purity of public officers, and to introduce a system of official patronage, corruption, and deceit, wholly at war with the public interests.[3] The confidence of officers may thereby not only be abused and perverted to the worst purposes, but mischievous arrangements may be made to the injury of the public, and persons may be introduced or kept in office who are utterly unqualified to discharge the proper functions of their stations.[4] Such contracts are justly deemed contracts of moral turpitude,[5] and are calculated to betray the public interests into the administration of the weak, the profligate, the self-

[1] Langdon *v.* Conlin, 67 Neb. 243, 93 N. W. 389, 60 L. R. A. 429, 108 Am. St. Rep. 643; Sherman *v.* Burton, 165 Mich. 293, 18 Detroit Leg. N. 156, 130 N. W. 667; Phelps *v.* Manicko, 119 Mo. App. 139, 96 S. W. 221; Taylor *v.* Rosenberg, 219 Mass. 113, 106 N. E. 603.

[2] Smith *v.* Hartsell, 150 N. C. 77, 63 S. E. 172, 22 L. R. A. (N. S.) 203.

[3] 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (*u*); Chesterfield *v.* Janssen, 1 Atk. 352; s. c. 2 Ves. 124, 156; Boynton *v.* Hubbard, 7 Mass. R. 119; Hartwell *v.* Hartwell, 4 Ves. 811, 815; Hunter *v.* Nolf, 71 Pa. St. 282.

[4] Chesterfield *v.* Janssen, 1 Ves. 155, 156; s. c. 1 Atk. 352; Newland on Contracts, ch. 33, pp. 477 to 482.

[5] Morris *v.* McCulloch, 2 Eden, R. 190; s. c. Ambler, R. 435; Law *v.* Law, 3 P. Will. 391; s. c. Cas. T. Talb. 140; Harrington *v.* Du Chastel, 2 Swanst. 167, note; s. c. 1 Bro. Ch. R. 124.

ish, and the cunning. They are therefore held utterly void as contrary to the soundest public policy, and indeed as a constructive fraud upon the government.[1] It is acting against the spirit of the constitution of a free government, by which it ought to be served by fit and able persons, recommended by the proper officers of the government for their abilities and from motives of disinterested purity.[2] It has been strongly remarked that there is no rule better established (it should be added, in law and reason, for unfortunately it is often otherwise in practice) respecting the disposition of every office in which the public are concerned than this, "deter digniori." On principles of public policy no money consideration ought to influence the appointment to such offices.[3] It was observed of old that the sale of offices accomplished the ruin of the Roman Republic. "Nulla alia re magis Romana Respublica interiit, quam quod magistratus officia venalia erant."[4]

§ 417. [**Same.** — In order to obtain the appointment as collector of delinquent taxes and water rents, the defendant contracted and agreed with the mayor that if he would make the appointment he would accept in full satisfaction of his commissions the sum of $6,000 a year, it being much less than the actual amount of commissions authorized by the ordinance, which commissions were called "excessive" in the contract for employment. It was further agreed that this difference should be paid over to the city treasurer. The contract is clearly against public policy and will not be enforced, nor is the city entitled to recover the amounts retained by the defendant over and above the stipulated salary.[5] So, a contract between plaintiffs, a firm of lawyers, and the defendant, by which they were to furnish half of expenses for conducting

[1] Bellamy *v.* Burrow, Cas. T. Talb. 97; Harrington *v.* Du Chastel, 1 Bro. Ch. R. 124; s. c. 2 Swanst. R. 167, note; Garforth *v.* Fearon, 1 H. Black. 327, 329; Palmer *v.* Bate, 6 Moore, R. 28; s. c. 2 Bro. & Bing. 673; Waldo *v.* Martin, 4 B. & Cressw. R. 319; Parsons *v.* Thompson, 1 H. Black, 322, 326.

[2] Morris *v.* McCulloch, 2 Eden, R. 190; s. c. Ambler, R. 432, 435; Ive *v.* Ash, Prec. Ch. 199; Co. Litt. 234 a; East India Company *v.* Neave, 4 Ves. 173, 181, 184; Hartwell *v.* Hartwell, 4 Ves. 811.

[3] Lord Kenyon in Blackford *v.* Preston, 8 T. Rep. 92; Newland on Contracts, 478. An agreement to share the emoluments of an office is illegal. Martin *v.* Wade, 37 Cal. 168.

[4] Cited Co. Litt. 234 a.

[5] City of Pittsburg *v.* Goshorn, 230 Pa. 212, 79 Atl. 505; Wishek *v.* Hammond, 10 N. Dak. 72, 84 N. W. 587; Ward *v.* Hartley, 178 Mo. 135, 77 S. W. 302; Edwards *v.* Randle, 63 Ark. 318, 38 S. W. 343, 36 L. R. A. 174, 58 Am. St. Rep. 108.

a campaign in which defendant was a candidate for office, for which he gave his note, no recovery can be had on it. The written contract discloses the fact that defendant was to employ plaintiffs as his attorneys when he was appointed state revenue agent, they to do the legal work connected with the office, and to accept as payment in full for their services one-half of the income of the office. The law requires of a public officer that he shall use his best skill and judgment for the protection of the public interest, and an agreement before his appointment to divide the fees of the office with an attorney, if sustained might seriously cripple the public service. The agreement being one which the law will not tolerate, cannot be enforced.[1] An action for recovery of value of newspaper articles published by plaintiff for defendant, looking to his nomination for Congress, cannot be sustained, where the articles were inserted for this particular purpose to influence votes, rather than as mere news articles.[2] So, a contract by plaintiff that, if defendants would procure his appointment as cotton weigher, he would not exercise the duties of his office, but that he would appoint only such deputies as might be named by defendants, and they to pay plaintiff a given salary. If he did not desire to exercise its duties, he should have tendered his resignation. The personal trust was reposed in him as a suitable person for the place; and, having violated the trust thus imposed, the courts will not enforce in his behalf the contract.[3]]

§ 418. **Contracts Against Morality Are Void.** — Another class of agreements which are held to be void on account of their being against public policy are such as are founded upon corrupt considerations or moral turpitude, whether they stand prohibited by statute or not; for these are treated as frauds upon the public or moral law.[4] The rule of the civil law on this subject speaks but the language of universal justice. "Pacta quæ contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati juris est."[5] It is but applying a preventive

[1] Campbell *v.* Offutt, 151 Ky. 229, 151 S. W. 403.

[2] Livingstone *v.* Page, 74 Vt. 356, 52 Atl. 965, 59 L. R. A. 336, 93 Am. St. Rep. 901.

[3] Burck *v.* Abbott, 22 Tex. Civ. App. 216, 54 S. W. 314; Horstman *v.* Adamson, 101 Mo. App. 119, 74 S. W. 398; Schneider *v.* Local Union No. 60 United Assn. Journeymen Plumbers etc., 116 La. 270, 40 So. 700, 5 L. R. A. (N. S.) 891, 114 Am. St. Rep. 549; Conner *v.* Canter, 15 Ind. App. 690, 44 N. E. 656.

[4] Newland on Contracts, ch. 32, p. 469, &c.; 1 Fonbl. Eq. B. 1, ch. 4, § 5.

[5] Cod. Lib. 2, tit. 3, l. 6.

check by withholding every encouragement from wrong and aiming thereby to enforce the obligations of virtue. For although the law as a science must necessarily leave many moral precepts without due enforcement as rules of imperfect obligation only, it is most studious not thereby to lend the slightest countenance to the violations of such precepts. Wherever the divine law, or the positive law, or the common law prohibits the doing of certain acts or enjoins the discharge of certain duties, any agreement to do such acts or not to discharge such duties is against the dearest interests of society, and therefore is held void; for otherwise the law would be open to the just reproach of winking at crimes and omissions or tolerating in one form what it affected to reprobate in another.[1] Hence all agreements, bonds, and securities, given as a price for future[2] illicit intercourse (præmium pudoris), or for the commission of a public crime, or for the violation of a public law, or for the omission of a public duty,[3] are deemed incapable of confirmation or enforcement upon the maxim "Ex turpi contractu non oritur actio."[4]

§ 419. **Prayer for Relief Must Not Be Contaminated with Original Immoral Purpose.** — But where a party to an illegal or immoral contract comes himself to be relieved from that contract or its obligations, he must distinctly and exclusively state such grounds of relief as the court can legally attend to; and he must not accompany his claim to relief, which may be legitimate, with other claims and complaints which are contaminated with the original immoral purpose; for if he sets up as a ground of relief the non-fulfilment of the illegal contract on the other side, and thereby that he is released from his obligation to perform it, that shows that he still relies upon the immoral contract and its terms for relief, and therefore the court will refuse it.[5]

[1] 1 Fonbl. Eq. B. 4, ch. 4, § 4, and notes (*s*), (*y*).

[2] Or for past illicit intercourse if not under seal. Beaumont *v.* Reeve, 8 Q. B. 483. See Vallance *v.* Blagdon, 26 Ch. D. 353.

[3] A contract to indemnify an office for *past* neglect of duty is held lawful. Hall *v.* Huntoon, 17 Vt. 244.

[4] 1 Fonbl. Eq. B. 1, ch. 4, § 4, and notes (*s*), (*y*); Walker *v.* Perkins, 3 Burr. 1568; Franco *v.* Bolton, 3 Ves. 370; Clarke *v.* Perrain, 2 Atk. 333, 337; Whaley *v.* Norton, 1 Vern. R. 483; Robinson *v.* Gee, 1 Ves. R. 251, 254; Gray *v.* Mathias, 5 Ves. 286; Ottley *v.* Browne, 1 Ball & Beatt. 360; Battersley *v.* Smith, 3 Madd. R. 110; Thompson *v.* Thompson, 7 Ves. 470; Nuckols *v.* Andrews, 6 Ala. App. 275, 60 So. 592; Pitts *v.* Rivers, 112 Ga. 850, 38 S. E. 109.

[5] Bates *v.* Chester, 5 Beav. R. 103. Where property is sold absolutely and unconditionally, mere knowledge on the part of the vendor that the property will thereafter be sold illegally, or applied to some illegal or

§ 420. **Contracts against Public Policy Are Void.** — Other cases might be put to illustrate the doctrine of Courts of Equity in setting aside the agreements and acts in fraud of the policy of the law. Thus if a devise is made upon a secret trust for charity in evasion of the statutes of mortmain, it will be set aside.[1] So if a parent grant an annuity to his son to qualify him to kill game, he will not be permitted by tearing off the seal to avoid the conveyance.[2] So if a person convey an estate to another to qualify him to sit in Parliament or to become a voter, he will not be permitted to avoid it upon the ground of its having been done by him in fraud of the law, and upon a secret agreement that it shall be given up.[3] So conveyances made of estates in trust, in order to secure the party from forfeitures for treason or felony, will be set aside against the Crown, but they will be good against the party. So contracts affecting public elections are held void; so are assignments of rights or property, pendente lite, when they amount to or partake of the character of maintenance or champerty, and are reprehended by the law.[4]

§ 421. **Same.** — And here it may be well to take notice of a distinction, often but not universally acted on in Courts of Equity, as to the nature and extent of the relief which will be granted to persons who are parties to agreements or other transactions against public policy, and therefore are to be deemed participes criminis. In general (for it is not universally true),[5] where parties are con-

immoral use, will not bar an action to recover the purchase price, unless it is a part of the contract of sale that the property shall be so sold or used, or unless the vendor aids or participates in the illegal objects otherwise than by the mere act of making the sale. Washington Liquor Co. *v.* Shaw, 38 Wash. 398, 80 Pac. 536; Mitchell *v.* Branham, 104 Mo. App. 480, 79 S. W. 739.

Contract to support mother and her illegitimate children in consideration of her not prosecuting the father, is enforceable. Burton *v.* Belvin, 142 N. C. 151, 55 S. E. 71; Doty's Admr. *v.* Doty's Guardian, 118 Ky. 204, 26 Ky. L. Rep. 63, 80 S. W. 803, 2 L. R. A. (N. S.) 713; and even though the parties lived together in a state of concubinage a part of the time, but the consideration of the contract was the actual labor done in house-keeping. Lytle *v.* Newell, 24 Ky. L. Rep. 188, 68 S. W. 118; Baumeister *v.* Markham, 101 Ky. 122, 19 Ky. L. Rep. 308, 41 S. W. 816, 72 Am. St. Rep. 397.

[1] Strickland *v.* Aldrich, 9 Ves. 516; Muckleston *v.* Bruen, 6 Ves. 52.

[2] 1 Madd. Ch. Pract. 242; Curtis *v.* Perry, 6 Ves. 747; Birch *v.* Blagrave, Ambler, R. 264, 265.

[3] See The Duke of Bedford *v.* Coke, 2 Ves. 116, 117; 3 P. Will. 233; 1 Madd. Ch. Pr. 243.

[4] Waller *v.* Duke of Portland, 3 Ves. 494; Stevens *v.* Bagwell, 15 Ves. 139; Strachan *v.* Brander, 1 Eden, R. 303; 18 Ves. 127, 128.

[5] The relief granted in Courts of Equity in cases of usury constitutes

cerned in illegal agreements or other transactions, whether they are mala prohibita or mala in se, Courts of Equity, following the rule of law as to participators in a common crime,[1] will not at present interpose to grant any relief; acting upon the known maxim, "In pari delicto potior est conditio defendentis, et possidentis."[2] But in cases where the agreements or other trans-

an exception. Smith *v.* Bromley, Doug. R. 695, note; Id. 697, 698. In this case Lord Mansfield said: "If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action [to recover back the money]; for where both parties are equally criminal against such general laws, the rule is 'Potior est conditio defendentis.' But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover. And it is astonishing that the Reports do not distinguish between the violation of the one sort and the other." Id. p. 697, Astley *v.* Reynolds, 2 Str. R. 915. See 1 Fonbl. Eq. B. 1, ch. 2, § 13, and note (*r*); 1 Madd. Ch. Pr. 241, 242; Browning *v.* Morris, Cowp. R. 790. Party seeking relief must pay legal interest, Churchill *v.* Furnage, 122 N. C. 426, 30 S. E. 122; but he who collects usury forfeits all interest. Faison *v.* Grandy, 126 N. C. 827, 36 S. E. 276; Cheek *v.* Iron Belt Bldg. & Loan Assn., 126 N. C. 242, 35 S. E. 463.

[1] Buller, N. P. 131, 132.

[2] See Bromley *v.* Smith, Doug. R. 697, note; Id. 698; Vandyck *v.* Herritt, 1 East, R. 96; Hanson *v.* Hancock, 8 T. Rep. 575; Browning *v.* Morris, Cowp. R. 790; Osborne *v.* Williams, 18 Ves. 379; Buller, N. P. 131, 132; 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (*y*); Bosanquet *v.* Dashwood, Cas. T. Talb. 37, 40, 41. I say, *at present;* for there has been considerable fluctuation of opinion, both in Courts of Law and Equity, on this subject. The old cases often gave relief both at Law and in Equity, where the party would otherwise derive an advantage from his iniquity. But the modern doctrine has adopted a more severely just and probably politic and moral rule, which is, to leave the parties where it finds them, giving no relief and no countenance to claims of this sort. See the cases at law, Tompkins *v.* Bernet, 1 Salk. 22; Bromley *v.* Smith, Doug. R. 695, note; Collins *v.* Blantern, 2 Wils. R. 347; Lowry *v.* Bourdieu, Doug. R. 468; Marak *v.* Abel, 3 Bos. & Pull. 35; Vandyck *v.* Herritt, 1 East, R. 96; Lubbock *v.* Potts, 7 East, R. 449, 456; Browning *v.* Morris, Cowp. R. 750; Hanson *v.* Hancock, 8 T. Rep. 575; McCullum *v.* Gourley, 8 John. R. 147; Buller, N. P. 181; 1 Fonbl. Eq. B. 1, ch. 4, § 4, and note (*y*); Buller, N. P. 131, 132; Inhab. of Worcester *v.* Eaton, 11 Mass. R. 368, 376, 377; Phelps *v.* Decker, 10 Mass. R. 267, 274. And in equity see the cases of Neville *v.* Wilkinson, 1 Bro. Ch. R. 543, 547, 548; Jacob, R. 67; Watts *v.* Brooks, 3 Ves. Jr. R. 612; East India Company *v.* Neave, 5 Ves. 173, 181, 184; Thompson *v.* Thompson, 7 Ves. 469; Knowles *v.* Haughton, 11 Ves. 168; St. John *v.* St. John, 11 Ves. 535, 536; Osborne *v.* Williams, 18 Ves. 379; Bosanquet *v.* Dashwood, Cas. T. Talb. 37; Rider *v.* Kidder, 10 Ves. 366; Rawdon *v.* Shadwell, Ambler, R. 269, and Mr. Blunt's notes. In the case of Phelps *v.* Decker (10 Mass. R. 274), it was broadly laid down that "by the common law deeds of conveyance or other deeds made contrary to the provisions of a general statute, or for an unlawful consideration, or to carry into effect a contract unlawful

actions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is particeps criminis is not in equity material. The reason is that the public interest requires that relief should be given, and it is given to the public through the party.[1] And in these cases relief will be granted, not only by setting aside the agreement or other transaction, but also in many cases by ordering a repay-

in itself, or in consequence of any prohibitory statute, are void, ab initio, and may be avoided by plea; or on the general issue, non est factum, the illegality may be given in evidence." But in a later case the doctrine was qualified; and the court took the distinction between bonds and contracts sought to be enforced, and actual conveyances of lands or other property. The former might be avoided; the latter were treated as actual transfers, and governed by the same rule as the payment of money or the delivery of a personal chattel. Inhabitants of Worcester *v.* Eaton, 11 Mass. 375 to 379.

As in the case of a contract executed on Sunday. Berry *v.* Planters' Bank, 3 Tenn. Ch. 69. So of participation in a devastavit. Halsley *v.* Fultz, 76 Va. 671. And of profits from illegal trading. Dunham *v.* Presley, 120 Mass. 285; Snell *v.* Dwight, Ib. 9. For further illustration see Blasdel *v.* Fowle, 120 Mass. 447; Pettiton *v.* Hipple, 90 Ill. 420 (wagers); Smith *v.* White, L. R. 1 Eq. 626 (lease of premises for prostitution); De Wolf *v.* Pratt, 42 Ill. 198; Olin *v.* Bate, 98 Ill. 53 (college degrees); Marlatt *v.* Warwick, 4 C. E. Green, 439; Cutter *v.* Tuttle, Ib. 549, 562; Compton *v.* Bunker Hill Bank, 96 Ill. 301. But equity will enforce a naked declaration of *trust* between parties to a deed executed in fraud of creditors, though it will not enforce a contract of the kind. Ownes *v.* Ownes, 8 C. E. Green, 60; Harvey *v.* Varney, 98 Mass. 118. See Eyre *v.* Eyre, 4 C. E. Green, 42; infra, § 499. Still the distinction between an attempt to enforce a contract, as in the cases cited, and an attempt to get relief from one, either before or after the contract has been performed, as in the cases now to be mentioned in the text, is to be noticed.

So, where a will left property to four children, and another one threatened to have will set aside, a contract to give her one-fifth of the estate if she would not make the fight to set aside the will, is void and will not be enforced. Wyckoff *v.* Weaver, 66 N. J. L. 648, 52 Atl. 356.

The rule has been declared to be that, when either party to an illegal contract or transaction applied to a court for aid, if the plaintiff cannot open his case without showing he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant. Pendleton *v.* Asbury, 104 Mo. App. 723, 78 S. W. 651; Hanover National Bank *v.* First National Bank, 109 Fed. 421, 48 C. C. A. 482; Owens *v.* Eaton, 5 Ind. Ter. 275, 82 S. W. 746; Detroit Salt Co. *v.* National Salt Co., 134 Mich. 103, 96 N. W. 1, 10 Detroit Leg. N. 366.

Money borrowed for purpose of carrying on an illegitimate business, and which was intended to be repaid out of the profits arising from such business, when known to and participated in by the lender, cannot be recovered. Richardson *v.* Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; Jackson *v.* McLean's Execrs., 100 Mo. 130, 13 S. W. 393; Drake *v.* Lauer, 93 App. Div. 86, 86 N. Y. Supp. 986, 182 N. Y. 533, 75 N. E. 1129.

[1] St. John *v.* St. John, 11 Ves. 535, 536; Bromley *v.* Smith, Doug. R. 695, 697, 698; Hatch *v.* Hatch, 9 Ves. 292, 298; Roberts *v.* Roberts, 3

ment of any money paid under it.[1] Lord Thurlow indeed seems to have thought that in all cases where money had been paid for an illegal purpose it might be recovered back, observing that if courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before.[2] But this is pushing the doctrine to an extravagant extent, and effectually subverting the maxim, "In pari delicto potior est conditio defendentis." The ground of reasoning upon which his Lordship proceeded is exceedingly questionable in itself; and the suppression of illegal contracts is far more likely in general to be accomplished, by leaving the parties without remedy against each other, and by thus introducing a preventive check naturally connected with a want of confidence, and a sole reliance upon personal honor. And so accordingly the modern doctrine is established. Relief is not granted where both parties are truly in pari delicto, unless in cases where public policy would thereby be promoted.[3]

P. Will. 66, 74, and note (1); Browning *v.* Morris, Cowp. R. 790; Morris *v.* McCulloch, 2 Eden, R. 190, and note Id. 193; Reynell *v.* Sprye, 1 DeG. M. & G. 660; Cox *v.* Donnelly, 34 Ark. 762; Hale *v.* Sharpe, 4 Cold. 275; Breathwit *v.* Rogers, 32 Ark. 758.

[1] See Goldsmith *v.* Bruning, 1 Eq. Abridg. Bonds, &c. F. 4, p. 89; 1 Fonbl. Eq. B. 1, ch. 2, § 13, and note; Smith *v.* Bruning, 2 Vern. R. 392; Morris *v.* McCulloch, Ambler, R. 432; s. c. 2 Eden, R. 180. Money paid will not in all cases be ordered to be paid back. For instance a bond given for future illicit intercourse will be decreed to be set aside; but money paid under the bond will not, under all circumstances, be directed to be repaid. See Newland on Contracts, ch. 33, pp. 483 to 492; Hill *v.* Spencer, Ambler, R. 641, and Id. App. 836 (Blunt's edition); Nye *v.* Mosely, 6 B. & Cressw. 133; Dig. Lib. 12, tit. 5, l. 4, § 3. See also cases of gaming before the statute in Chesterfield *v.* Janssen, 2 Ves. 137, 138. See also Inhabitants of Worcester *v.* Eaton, 11 Mass. 376, 377. Or a cancellation of instruments. Breathwit *v.* Rogers, 32 Ark. 758; Darst *v.* Brockway, 11 Ohio, 462, 471.

[2] Neville *v.* Wilkinson, 1 Bro. Ch. R. 547, 548; 18 Ves. 238.

[3] See the remarks of Lord Eldon in Rider *v.* Kidder, 10 Ves. 366; Smith *v.* Bromley, Doug. R. 696, note. The fact that an assignment is *intended* for an illegal purpose not carried into execution will not prevent the assignor from recovering back the property. Symes *v.* Hughes, L. R. 9 Eq. 475. Nor can the Statute of Frauds be set up as a defence to such a case. Lincoln *v.* Wright, 4 DeG. & J. 16; Haigh *v.* Kaye, L. R. 7 Ch. 469.

Where the directors of a corporation invest its funds in an illegal manner, though with the assent of the corporation, the corporation may follow the funds in equity, the consent being ultra vires. Great Eastern Ry. Co. *v.* Turner, L. R. 8 Ch. 149. But where money illegally borrowed by a corporation has been applied to its benefit, with the consent of the shareholders, the corporation cannot set up the illegality. In re Magdalena Nav. Co., Johns. 690; In re Cork Ry. Co., L. R. 4 Ch. 748.

§ 422. **Same.** — Even in cases of a præmium pudicitiæ, the distinction has been constantly maintained between bills for restraining the woman from enforcing the security given, and bills for compelling her to give up property already in her possession under the contract. At least there is no case to be found where the contrary doctrine has been acted on, except where creditors were concerned. And in this respect the English law seems to have had a steady regard to the policy of the Roman Jurisprudence.[1]

§ 423. **Degrees of Guilt.** — And indeed in cases where both parties are in delicto, concurring in an illegal act, it does not always follow that they stand in pari delicto; for there may be, and often are, very different degrees in their guilt.[2] One party may act under circumstances of oppression, imposition,[3] hardship,

[1] Rider *v.* Kidder, 10 Ves. 366. The Roman law has stated some doctrines and distinctions upon this subject which are worthy of consideration. I shall quote them without commenting upon them. They are partially cited in 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (*y*). Three cases are put. (1) Where the turpitude is on the part of the receiver only; and there the rule is, "Quod si turpis causa accipientis fuerit, etiamsi res secuta sit, repeti potest." Dig. Lib. 12, tit. 5, l. 1, § 2. (2) Where the turpitude is on the part of the giver alone; and there the rule is the contrary. "Cessat quidem condictio, quum turpiter datur." Pothier, Pand. Lib. 12, tit. 5, art. 8. (3) Where the turpitude affects both parties; and there the rule is, "Ubi autem et dantis et accipientis turpitudo versatur, non posse repeti dicimus; veluti si pecunia detur, ut male judicetur." Dig. Lib. 12, tit. 5, l. 3; Pothier, Pand, Lib. 12, tit. 5, n. 7. The reason given is, "In pari causa possessor potior haberi debet." Dig. Lib. 50, tit. 17, l. 128; Pothier, Pand. Lib. 12, tit. 5, n. 7. Several other examples are given under this head. "Idem, si ob stuprum datum sit; vel si quis, in adulterio deprehensus, redemerit se, cessat enim repetitio. Item, si dederit fur, ne proderetur; quoniam utriusque turpitudo versatur, cessat repetitio." Dig. Lib. 12, tit. 5, l. 4; Pothier, Pand. Lib. 12, tit. 5, n. 7. "Cum te propter turpem causam contra disciplinam temporum meorum, domum adversariæ dedisse profitearis; frustra eam tibi restitui desideras; cum in pari causa possessoris conditio melior habeatur." Cod. Lib. 4, tit. 7, l. 2; Pothier, Pand. Lib. 12, tit. 5, l. 7. "Sed quod meretrici datur, repeti non potest. Sed nova ratione, non ea, quod utriusque turpitudo versatur, sed solius dantis"; a new reason, which Pothier as well as Ulpian seems to doubt. See Dig. Lib. 12, tit. 5, l. 4, § 3; Pothier, Pand. Lib. 12, tit. 5, n. 7, and nota (6). On the other hand, when the money had not been paid or the contract fulfilled, the Roman law deemed the contract void. "Quamvis enim utriusque turpitudo versatur, ac solutæ quantitatis cessat repetitio, tamen ex hujusmodi stipulatione, contra bonos mores interposita, denegandas esse actiones juris auctoritate demonstratur." Cod. Lib. 4, tit. 7, l. 5; Pothier, Pand. Lib. 12, tit. 5, n. 9.

[2] Smith *v.* Bromley, Doug. R. 696; Browning *v.* Morris, Cowp. R. 790; Osborne *v.* Williams, 18 Ves. 379.

[3] An agreement executed under a threat of prosecuting the plaintiff's son for forgery was ordered to be delivered up for cancellation in Bayley *v.* Williams, 4 Giff. 638.

undue influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the offence.[1] And besides, there may be on the part of the court itself a necessity of supporting the public interests or public policy in many cases, however reprehensible the acts of the parties may be.[2]

§ 424. **Usury Contracts Are Void.** —In cases of usury this distinction has been adopted by courts of equity. All such contracts being declared void by the statute against usury, Courts of Equity will follow the law in the construction of the statute. If therefore the usurer or lender come into a Court of Equity seeking to enforce the contract, the court will refuse any assistance and repudiate the contract.[3] But on the other hand if the borrower comes into a Court of Equity seeking relief against the usurious contract, the only terms upon which the court will interfere are that the plaintiff will pay the defendant what is really and bona fide due to him, deducting the usurious interest; and if

[1] Bosanquet *v.* Dashwood, Cas. T. Talb. 37, 40, 41; Chesterfield *v.* Janssen, 2 Ves. 156, 157; Osborne *v.* Williams, 18 Ves. 379. See Pincks-ton *v.* Brown, 56 N. C. 494; Poston *v.* Balch, 69 Mo. 115; Harrington *v.* Grant, 54 Vt. 236; Davidson *v.* Carter, 55 Iowa, 117.

[2] See Woodhouse *v.* Meredith, 1 Jac. & Walk. 224, 225; 1 Fonbl. Eq. B. 1, ch. 4, § 4 note (*y*); Bosanquet *v.* Dashwood, Cas. T. Talb. 37, 40, 41; Smith *v.* Bromley, Doug. R. 696, note; Browning *v.* Morris, Cowp. R. 790; Morris *v.* McCulloch, 2 Eden, 190, and note 193. In W—— *v.* B——, 32 Beav. 574 a daughter concurred with her father in a covenant to surrender copyholds by way of mortgage to one who had loaned money to the father; part of the consideration being the permission of the father to the mortgagee to continue visits to the daughter, whom he was seducing or had seduced. Upon bill and cross-bill to enforce and to set aside the contract the court at first considered that it could not interfere for either party, but ultimately ordered the deed to be cancelled, the grantee to pay costs in both cases. In another case a man being deserted by his wife, and not having heard of her for two years, supposed her to be dead, and married another. Subsequently learned that his first wife was alive, and supposing that he was liable to be prosecuted for bigamy, he conveyed his lands to another, with the understanding that the grantee should hold it for his use. The grantee finally refused to reconvey, though the grantor had remained in possession four years and had paid off a mortgage on the premises. The court now held the transaction not illegal, and that the grantor was entitled to a reconveyance both on the ground of a resulting trust in his favor and the fraud of the grantee. Davies *v.* Otty, 35 Beav. 208. So equity will enforce between the parties a naked declaration of trust by the grantee of a deed executed in fraud of creditors. Ownes *v.* Ownes, 8 C. E. Green, 60. See Harvey *v.* Varney, 98 Mass. 118; post, § 499.

[3] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*h*); Fanning *v.* Dunham, 5 John. Ch. R. 142, 143, 144; Churchill *v.* Turnage, 122 N. C. 426, 30 S. E. 122; collecting usury forfeits all interest; Faison *v.* Grandy, 126 N. C. 827, 36 S. E. 276; Cheek *v.* Iron Belt Building & Loan Assn., 126 N. C. 242, 35 S. E. 463.

the plaintiff do not make such offer in his bill, the defendant may demur to it, and the bill will be dismissed.[1] The ground of this distinction is, that a Court of Equity is not positively bound to interfere in such cases by an active exertion of its powers; but it has a discretion on the subject, and may prescribe the terms of its interference, and he who seeks equity at its hands may well be required to do equity. And it is against conscience that the party should have full relief, and at the same time pocket the money loaned, which may have been granted at his own mere solicitation.[2] For then a statute made to prevent fraud and oppression would be made the instrument of fraud. But in the other case, if equity should relieve the lender who is plaintiff, it would be aiding a wrong-doer who is seeking to make the court the means of carrying into effect a transaction manifestly wrong and illegal in itself.[3]

§ 425. **Rights of a Borrower in a Usurious Transaction.** — And upon the like principles, if the borrower has paid the money upon an usurious contract, Courts of Equity (and indeed Courts of Law also) [4] will assist him to recover back the excess paid be-

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*h*); Id. B. 1, ch. 4, § 7, note (*k*); Mason *v.* Gardner, 4 Bro. Ch. R. 436; Rogers *v.* Rathbun, 1 John. Ch. R. 367; Fanning *v.* Dunham, 5 John. Ch. R. 142, 143, 144; Sporrer *v.* Eifler, 1 Heisk. 633; Williams *v.* Fitzhugh, 37 N. Y. 444; Ruddell *v.* Ambler, 18 Ark. 369; Noble *v.* Walker, 32 Ala. 456; Uhlfelder *v.* Carter, 64 Ala. 527; Ware *v.* Thompson, 2 Beasl. 66. Contra in Wisconsin. Cooper *v.* Tappan, 4 Wis. 362. And see Bissell *v.* Kellogg, 60 Barb. 617. But where the party setting up the usury is acting on the defensive, it seems he need not offer to pay what is justly due. Union Bank *v.* Bell, 14 Ohio St. 200; Kuhner *v.* Butler, 11 Iowa, 419. See Spain *v.* Brent, 68 U. S. 604, 17 L. Ed. 619; Hart *v.* Goldsmith, 1 Allen, 145; Smith *v.* Robinson, 10 Allen, 130.

[2] Scott *v.* Nesbit, 2 Bro. Ch. R. 641; s. c. 2 Cox, R. 183; Benfield *v.* Solomons, 9 Ves. 84; Thomas *v.* Cooper, 31 Eng. L. & E. 526.

[3] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*h*); Id. B. 1, ch. 4, § 7, and note (*k*).

[4] 1 Fonbl. Eq. B. 1, ch. 4, § 7, and note (*k*); Smith *v.* Bromley, Doug. R. 696, note; Browning *v.* Morris, Cowp. R. 792; Bond *v.* Hays, Ex'r, 12 Mass. R. 34. The taking of interest in excess of the legal rate is tantamount to an implied promise to repay the amount unlawfully exacted. Yates *v.* First National Bank, 42 Okla. 408, 140 Pac. 1174; Lee *v.* Hillman, 74 Wash. 408, 133 Pac. 583; Cheek *v.* Iron Belt Building & Loan Assn., 126 N. C. 242, 35 S. E. 463; Carter *v.* Life Insurance Company of Virginia, 122 N. C. 338, 30 S. E. 341; Baum *v.* Thoms, 150 Ind. 378, 50 N. E. 357, 65 Am. St. Rep. 368; Commercial Bank *v.* Auze, 74 Miss. 609, 21 So. 754; Harper *v.* Middle States Loan, Building & Construction Co., 55 W. Va. 149, 46 S. E. 817; Kennedy *v.* Baggarley, 15 Ga. App. 811, 84 S. E. 211; Chase & Baker Co. *v.* National Trust & Credit Co., 215 Fed. 633.

But in some States this rule is not enforced, and in others they have no statutes authorizing the recovery of usurious interest paid. Citizens State Bank *v.* Frazee, 9 Kans. App. 889, 58 Pac. 280; Matz *v.* Arick, 76

yond principal and lawful interest; but not further.[1] For it is no just objection to say that he is particeps criminis, and that "volenti non fit injuria." It would be absurd to apply the latter maxim to the case of a man who from mere necessity pays more than the other can in justice demand, and who has been significantly called the slave of the lender. He can in no just sense be said to pay voluntarily. And as to being particeps criminis, he stands in vinculis, and is compelled to submit to the terms which oppression and his necessities impose on him.[2] Nor can it be said, in any case of oppression, that the party oppressed is particeps criminis; since it is that very hardship which he labors under, and which is imposed upon him by another, that makes the crime.[3]

§ 426. **Gaming Contract Is Discountenanced in Court of Equity.** — In regard to gaming contracts it would follow, a fortiori, that Courts of Equity ought not to interfere in their favor, but ought to afford aid to suppress them, since they are not only prohibited by statute, but may justly be pronounced to be immoral, as the practice tends to idleness, dissipation, and the ruin of families.[4] No one has doubted that under such circumstances a bill in equity might be maintained to have any gaming security delivered up and cancelled.[5] [There can be no recovery upon a note given in the State of Virginia, but sought to be enforced in the State of North Carolina, the consideration being a gambling

Conn. 388, 56 Atl. 630; and while in a proper suit the debtor was entitled to have the usurious interest set off as against the debt, yet where the interest was voluntarily paid it cannot be recovered in an independent action for the purpose. Albeitz *v.* d'Arcambol, 109 Ill. App. 505.

[1] The borrower may maintain a bill to compel the return of securities left as collateral to a usurious debt, though he might defend the debt at law. Peters *v.* Mortimer, 4 Edw. Ch. 279.

[2] Smith *v.* Bromley, Doug. 696, note; Bosanquet *v.* Dashwood, Cas. Temp. Talb. 39; Browning *v.* Morris, Cowp. R. 790; Rawden *v.* Shadwell, Ambler, R. 269, and Mr. Blunt's notes; 1 Fonbl. Eq. B. 1, ch. 4, § 8, note (*k*).

[3] Lord Chancellor Talbot in Bosanquet *v.* Dashwood, Cas. Temp. Talb. 41. The same principle applies to cases of annuities set aside for want of a memorial duly registered; and an account of the consideration paid, and payments made, will be taken, and the balance only will be required to be paid upon a decree to give up the security. Holbrook *v.* Sharpey, 19 Ves. 131.

[4] 1 Fonbl. Eq. B. 1, ch. 4, § 6, and note (*c*). See Robinson *v.* Bland, 2 Burr. 1077.

[5] Rawden *v.* Shadwell, Ambler, R. 269, and Mr. Blunt's notes; Woodroffe *v.* Farnham, 2 Vern. 291; Wynne *v.* Callendar, 1 Russ. R. 23; Baker *v.* Williams, cited in Blunt's note to Ambler, R. 269; Portarlington *v.* Soulby, 3 Mylne & Keen, 104.

debt created in Virginia.[1] As a general rule, anything paid in furtherance of an illegal contract cannot be recovered, but in some exceptional cases, and especially where the contract is executed on the part of the injured party, and executory as to the other party, any part of the fund or property that is in hand may be recovered back, but in all of these cases relief depends very largely upon the knowledge of the illegal character of the subject-matter and the extent of his active participation in its probable results.[2]] But it was at one time held that if the money were actually paid in a case of gaming, Courts of Equity ought not to assist the loser to recover it back upon the ground that he is particeps criminis. Lord Talbot on one occasion said: "The case of gamesters, to which this (of usury) has been compared, is no way parallel; for there both parties are criminal. And if two persons will sit down and endeavor to ruin one another, and one pays the money, if after payment he cannot recover it at law I do not see that a Court of Equity has anything to do but to stand neuter; there being in that case no oppression upon the party as in this." [3]

[1] Gooch *v.* Faucett, 122 N. C. 270, 29 S. E. 362; Snyder *v.* Nelson, 101 Ill. App. 619.

[2] Davis *v.* Hinman, 73 Neb. 850, 103 N. W. 668.

So, where plaintiff has placed money in defendant's hands for purpose of effectuating a fraud upon his creditors, the law will leave the transaction where it finds them, where both are culpable. Bryant *v.* Wilcox, 137 Mich. 669, 100 N. W. 918, 11 Detroit Leg. N. 405.

And where a year's rent was paid in advance by complainant, pending her appeal to the supreme court, and a stipulated sum each month for rent and until the decision finally came down, she was not entitled to recover the amounts paid, where the amounts were paid for the purpose of enabling her to conduct a bawdy house, although the supreme court adjudged the title to be in complainant. McDonald *v.* Born, 135 Mich. 177, 97 N. W. 693, 10 Detroit Leg. N. 759.

Where a contract, although it be illegal, has been fully executed between the parties so that nothing remains thereof for completion, if the plaintiff can recover from the defendant moneys received by him without resorting to the contract, the court will permit a recovery in such case. McMullen *v.* Hoffman, 174 U. S. 639, 43 L. Ed. 1117, 19 S. Ct. Rep. 839, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410; Benton *v.* Singleton, 114 Ga. 548, 40 S. E. 811, 58 L. R. A. 181.

[3] Bosanquet *v.* Dashwood, Cas. Temp. Talb. 41; 1 Fonbl. Eq. B. 1, ch. 4, § 6; Rawden *v.* Shadwell, Amb. R. 269; Wilkinson *v.* L'Eaugier, 2 Y. & Coll. 366. It has been recently held in England that money knowingly lent to game is not recoverable. McKimell *v.* Robinson, 3 Mees. & Welsb. 434; Thomas *v.* Cronie, 16 Ohio, 54. See also Raguert *v.* Cowles, 14 Ohio, 38; White *v.* Buss, 3 Cush. 448; Machir *v.* Morse, 2 Gratt. 257; Brua's Appeal, 55 Pa. St. 294; Spalding *v.* Preston, 21 Vt. 9; Adams *v.* Gay, 19 Vt. 358. But in some of the States statutes give the loser a right to recover back money paid. See also Diggle *v.* Higgs, 2 Ex. D. 422; Tremble *v.* Hill, 5 App. Cas. 342.

§ 427. **Same.** — But it is difficult to perceive why upon principle the money should not be recoverable back, in furtherance of a great public policy, independently of any statutable provision. It has been decided that if money is paid upon a gaming security it may be recovered back, for the security is utterly void.[1] Why is not the original gaming contract equally void? And if it be, why is it not equally within the rule, and the policy on which the rule is founded?

§ 428. **Same.** — The civil law contains a most wholesome enforcement of moral justice upon this subject. It not only protects the loser against any liability to pay the money won in gaming, but if he has paid the money, he and his heirs have a right to recover it back at any distance of time; and no presumption or limitation of time runs against the claim.[2] Thirty years was the general limitation of rights in other cases.

§ 429. **Void Contract Is Incapable of Confirmation.** — Questions are also often made as to how far contracts which are illegal by some positive law, or which are declared so upon principles of public policy, are capable, as between the parties, of a substantial confirmation. This subject has been already alluded to, and will be again touched in other places. The general rule is that wherever any contract or conveyance is void either by a positive law or upon principles of public policy, it is deemed incapable of confirmation upon the maxim, "Quod ab initio non valet, in tractu temporis non convalescit."[3] But where it is merely voidable, or turns upon circumstances of undue advantage, surprise, or imposition, there, if it is deliberately and upon full examination confirmed by the parties, such confirmation will avail to give it an ex post facto validity.[4]

§ 430. **Frauds Arising from a Fiduciary Relationship.** — Let us in the next place pass to the consideration of the second head of constructive frauds, namely, of those which arise from some

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 6, and note (*c*); Johnson *v.* Clark, 23 Misc. Rep. 346, 51 N. Y. Supp. 238; See *v.* Runzi, 105 Mo. App. 435, 79 S. W. 992; Stewart *v.* Wright, 130 Fed. 905, 147 Fed. 321, 77 C. C. A. 499; Quillian *v.* Johnson, 122 Ga. 49, 49 S. E. 801; Hobbs *v.* Boatright, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906, 113 Am. St. Rep. 709; Parsons *v.* Wilson, 94 Minn. 416, 103 N. W. 163.

[2] Cod. Lib. 3, tit. 43, l. 1; 1 Fonbl. Eq. B. 1, ch. 4, § 6, note (*c*).

[3] Vernon's case, 4 Co. R. 2, b.

[4] Newland on Contracts, ch. 25, pp. 496 to 503; Chesterfield *v.* Janssen, 2 Ves. 125; S. C. 1 Atk. 301; Roberts *v.* Roberts, 3 P. Will. 74, Mr. Cox's note; Cole *v.* Gibson, 1 Ves. 507; Crone *v.* Ballard, 3 Bro. Ch. R. 120; Cowen *v.* Milner, 3 P. Will. 292, note (C); Cole *v.* Gibbons, 3 P. Will. 289;

peculiar confidential or fiduciary relation between the parties.[1] In this class of cases there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which Courts of Equity act in regard thereto stands independent of any such ingredients, upon a motive of general public policy; and it is designed in some degree as a protection to the parties against the effects of overweening confidence and self-delusion, and the infirmities of hasty and precipitate judgment. These courts will therefore often interfere in such cases, where but for such a peculiar relation they would either abstain wholly from granting relief or would grant it in a very modified and abstemious manner.[2]

§ 431. **Duties Required Where the Relation Exists.** — It is undoubtedly true, as has been said, that it is not upon the feelings which a delicate and honorable man must experience, nor upon any notion of discretion to prevent a voluntary gift or other act of a man whereby he strips himself of his property, that Courts of Equity have deemed themselves at liberty to interpose in cases of this sort.[3] They do not sit, or affect to sit, in judgment upon cases as custodes morum, enforcing the strict rules of morality. But they do sit to enforce what has not inaptly been called a technical morality. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish

1 Fonbl. Eq. B. 1, ch. 2, § 13, note (r); Id. ch. 2, § 14, note (v), and the note to § 263; Whiting v. Hill, 23 Mich. 399; Davis v. Henry, 4 W. Va. 571; Morris v. Morris, 41 Ga. 271.

[1] A relation of confidence between the parties appears to be sufficient, in most cases at least, to found jurisdiction in equity in favor of the party in the dependent position. See Pratt v. Tuttle, 136 Mass. 233; Badger v. McNamara, 123 Mass. 117; Makepiece v. Rogers, 11 Jur. (N. S.) 314; S. C. 34 L. J. Ch. 396, as to principal and agent. But as to that see Barry v. Stevens, 31 Beav. 258, and Phillips v. Phillips, 9 Hare, 471, which is regretted by Lord Justice Turner, so far as it is opposed to Makepiece v. Rogers, supra. See post, § 462, note.

[2] See Goddard v. Carlisle, 9 Price, R. 169; Gallatiani v. Cunningham, 8 Cowen, R. 361. But equity will not do injustice; and if the case is not one of actual fraud, equity may impose the strongest terms as a condition of relief. Thus in setting aside a sale where there was no actual fraud, equity will require the return of the purchase-money, or that the conveyance shall stand as security therefor. Coiron v. Millaudon, 19 How. 113; Tompkins v. Sprout, 55 Cal. 31; Bean v. Smith, 2 Mason, 296.

[3] Huguenin v. Baseley, 14 Ves. 290. In the absence of fraud, mistake, or undue influence, equity will not set aside a gift where no relation of confidence exists between the parties. Willamin v. Dunn, 93 Ill. 511.

interests, and cunning and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good.

Courts of Equity will not therefore arrest or set aside an act or contract merely because a man of more honor would not have entered into it. There must be some relation between the parties which compels the one to make a full discovery to the other or to abstain from all selfish projects. But when such a relation does exist, Courts of Equity, acting upon this superinduced ground in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance; for it is founded in a breach of confidence.[1] The general principle which governs in all cases of this sort is, that if a confidence is reposed and that confidence is abused, Courts of Equity will grant relief.[2] [The rule is not enforced for the purpose of defeating the contract between parties merely because confidential relationship exists, but it is enforced solely for the purpose of discovering what the real intention of the parties was, and to prevent one occupying such a relation of trust from securing an unfair advantage by reason thereof.[3] The presumption may be reversed, where the parent is of weaker intellect, and is suffering with a fatal and progressing disease, the child would have the burden of showing that she had not exercised a forbidden influence.[4]]

§ 432. **The Relation of Parent and Child.** — In the first place, as to the relation of parent and child.[5] The natural and just influence which a parent has over a child renders it peculiarly

[1] Fox *v.* Mackreth, 2 Bro. Ch. R. 407, 420.

[2] Gartside *v.* Isherwood, 1 Bro. Ch. R. App. 560, 562; Osmond *v.* Fitzroy, 3 P. Will. 129, 131, Cox's note. See The English Quarterly Magazine for May, 1843, Vol. 29, Pt. 2, pp. 362 to 378. See Taylor *v.* Taylor, 49 U. S. 200, 12 L. Ed. 1040; Thornber *v.* Sheard, 12 Beav. 589; Hoghton *v.* Hoghton, 15 Beav. 278; Blandy *v.* Kimber, 24 Beav. 148; Leavitt *v.* LaForce, 71 Mo. 353. And the presumptions are all in favor of the party in the dependent position. Smith *v.* Kay, 7 H. L. Cas. 750.

[3] Mackall *v.* Mackall, 135 U. S. 167, 34 L. Ed. 84, 10 S. Ct. Rep. 705; Turner *v.* Turner, 31 Okla. 272, 121 Pac. 616; Powers *v.* Powers, 46 Oreg. 479, 80 Pac. 1058; Hawthorne *v.* Jenkins, 182 Ala. 255, 62 So. 505.

[4] Allen *v.* La Vaud, 213 N. Y. 322, 107 N. E. 570; Slack *v.* Rees, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393.

[5] As to cases of other blood relationships, see Beauland *v.* Bradley, 2 Smale & G. 339; Hewitt *v.* Crane, 2 Halst. Ch. 159; Van Meter *v.* Jones, 2 Green's Ch. 520; Fish *v.* Cleland, 33 Ill. 238; Cleland *v.* Fish, 43 Ill. 282; Sears *v.* Shafer, 2 Seld. 268; Todd *v.* Grove, 33 Md. 188; Ranken *v.* Patton, 65 Mo. 378; Boyd *v.* De la Montagnie, 73 N. Y. 498 (husband

important for courts of justice to watch over and protect the interests of the latter; and therefore all contracts and conveyances whereby benefits are secured by children to their parents are objects of jealousy, and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third persons have acquired an interest under them; especially where the original purposes for which they have been obtained are perverted, or used as a mere cover.[1] But we are not to indulge undue suspicions of jealousy, or to make unfavorable presumptions as a matter of course in cases of this sort. "It is undoubtedly the duty of courts carefully to watch and examine the circumstances attending transactions of this kind when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance. But to consider a parent disqualified to take a voluntary deed from his child without consideration, on account of their relation-

and wife); White *v.* Smith, 51 Ala. 405; Taylor *v.* Johnston, 19 Ch. D. 603. It was held in Taylor *v.* Johnston that in the absence of evidence of the exercise of control or influence on the part of the donee, or of the existence of the relation of guardian and ward between the donor and the donee, a gift of her property within a month before her death by an infant of twenty years, of business habits, firm will, and ability to manage her own affairs, to a relative with whom she had been living from the time of her father's death till her own death, five months, was not invalid.

On the other hand where three brothers induced their sister, who had a reversionary interest in land devised by their father to the brothers for life, to release her interest to them without consideration, but upon a belief, induced by the brothers, that the father intended to devise the land to the brothers in fee, the release was set aside; it appearing that the sister was in feeble health, and had always relied on her brothers for advice. Sears *v.* Shafer, 2 Seld. 268. See also Boney *v.* Hollingsworth, 23 Ala. 690; Hewitt *v.* Crane, 2 Halst. Ch. 159, 631.

It is apprehended that all such cases are to be distinguished from gifts by children to parents, in that there can be no presumption or suspicion of unfairness on the mere relationship, such as may arise on the relation of parent and child.

[1] Young *v.* Peachey, 2 Atk. 254; Glissen *v.* Ogden, Ibid. 258; Corking *v.* Pratt, 1 Ves. 400; Hawes *v.* Wyatt, 3 Bro. Ch. R. 156; 1 Madd. Ch. Pract. 244, 245; Carpenter *v.* Heriot, 1 Eden, R. 338; Blackborn *v.* Edgely, 1 P. Will. 607; Blunden *v.* Barker, 1 P. Will. 639; Morris *v.* Burroughs, 1 Atk. 402; Tendril *v.* Smith, 2 Atk. 85; Heron *v.* Heron, 2 Atk. R. 160. See Jenkins *v.* Pye, 37 U. S. 241, 9 L. Ed. 1070. See Baker *v.* Tucker, 17 Jur. 771; Wood *v.* Rabe, 96 N. Y. 414; Miller *v.* Simonds, 72 Mo. 669; Ranken *v.* Patton, 65 Mo. 378; Bainbrigge *v.* Browne, 18 Ch. D. 188; Maitland *v.* Irving, 15 Sim. 437; Archer *v.* Hudson, 7 Beav. 551; Berdoe *v.* Dawson, 34 Beav. 603; Bury *v.* Oppenheim, 26 Beav. 594; Turner *v.* Collins, L. R. 7 Ch. 329; Wright *v.* Vanderplank, 8 DeG. M. & G. 133; Hoghton *v.* Hoghton, 15 Beav. 278; Kempson *v.* Ashbee, L. R. 10 Ch. 15, 21. The rule applies equally to a person who has put himself in loco parentis. Archer *v.* Hudson, supra.

ship, is assuming a principle at war with all filial as well as parental duty and affection; and acting on the presumption that a parent, instead of wishing to promote the interest and welfare, would be seeking to overreach and defraud his child. Whereas the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view; and to presume the existence of circumstances conducing to that result. Such a presumption harmonizes with the moral obligations of a parent to provide for his child, and is founded upon the same benign principle that governs cases of purchases made by parents in the name of a child. The prima facie presumption is that it was intended as an advancement to the child, and so not falling within the principle of a resulting trust. The natural and reasonable presumption in all transactions of this kind is, that a benefit was intended the child, because in the discharge of a moral and parental duty. And the interest of the child is abundantly guarded and protected by keeping a watchful eye over the transaction to see that no undue influence was brought to bear upon it." [1]

[1] Jenkins *v.* Pye, 37 U. S. 241, 9 Ed. 1070. The opinion of the court in this case was delivered by Mr. Justice Thompson, and immediately preceding the passage cited in the text, he said: "But the grounds mainly relied upon to invalidate the deed were, that being from a daughter to her father rendered it, at least prima facie, void; and if not void on this ground, it was so because it was obtained by the undue influence of paternal authority. The first ground of objection seeks to establish the broad principle that a deed from a child to a parent conveying the real estate of the child ought, upon considerations of public policy growing out of the relation of the parties, to be deemed void: and numerous cases in the English chancery have been referred to which are supposed to establish this principle. We do not deem it necessary to travel over all these authorities; we have looked into the leading cases, and cannot discover anything to warrant the broad and unqualified doctrine contended for on the part of the appellees. All the cases are accompanied with some ingredient showing undue influence exercised by the parent, operating upon the fears or hopes of the child, and sufficient to show reasonable grounds to presume that the act was not perfectly free and voluntary on the part of the child; and in some cases, although there may be circumstances tending in some small degree to show undue influence, yet if the agreement appears reasonable, it has been considered enough to outweigh light circumstances, so as not to affect the validity of the deed. It becomes the less necessary for us to go into a critical examination of the English chancery doctrine on this subject, for should the cases be found to countenance it, we should not be disposed to adopt or sanction the broad principle contended for, that the deed of a child to a parent is to be deemed, prima facie, void."

It is laid down that when a deed conferring a benefit on a father is executed by a child not emancipated, if the deed is afterwards impeached by the child the onus is on the father to show that the child had independent advice, and that he executed the deed with full knowledge of its

§ 433. **The Relation of Client and Attorney.** — In the next place, as to the relation of client and attorney or solicitor. It is obvious that this relation must give rise to great confidence between the parties, and to very strong influences over the actions and rights and interests of the client.[1] The situation of an attorney or solicitor puts it in his power to avail himself not only of the necessities of his client, but of his good nature, liberality, and credulity to obtain undue advantages, bargains, and gratuities. Hence the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void which between other persons would be held unobjectionable.[2] It does not so much consider the bearing or hardship of its doctrine upon particular cases, as it does the importance of preventing a general public mischief which may be brought about by means, secret and inaccessible to judicial scrutiny, from the dangerous influences arising from the confidential relation of the parties.[3] By establishing the prin-

contents, and with free intention to give the father the benefit conferred. Bainbrigge *v.* Browne, 18 Ch. D. 188. And this rule operates equally against volunteers and purchasers with notice. Ib. But not against others. Ib.; Kempson *v.* Ashbee, L. R. 10 Ch. 15, 21. See further in regard to the general doctrine that a child's gift to a parent will be narrowly scrutinized. Wallace *v.* Wallace, 2 Dru. & W. 470; Rhodes *v.* Cook, 2 Sim. & S. 489; Baker *v.* Bradley, 2 Smale & G. 531; Wright *v.* Vanderplank, 2 Kay & J. 1; s. c. 8 DeG. M. & G. 133. Family arrangements have been looked upon with more indulgence in favor of the grantee than other cases. Wallace *v.* Wallace, supra; Baker *v.* Bradley, supra; Hartopp *v.* Hartopp, 21 Beav. 259. See Head *v.* Godlee, Johns. 536; Jenner *v.* Jenner, 2 DeG. F. & J. 359; Field *v.* Evans, 15 Sim. 375. The converse case of a gift or conveyance from parent to child may, on a reversal of the duties of the parties, equally require scrutiny. Comstock *v.* Comstock, 57 Barb. 453; Deem *v.* Phillips, 5 W. Va. 168; Day *v.* Day, 84 N. C. 408; Thorn *v.* Thorn, 51 Mich. 167; McKinney *v.* Hensley, 74 Mo. 326; Harrington *v.* Grant, 54 Vt. 236; Highberger *v.* Stiffler, 21 Md. 352; Simpler *v.* Lord, 28 Ga. 52; Glover *v.* Hayden, 4 Cuch. 580; Belcher *v.* Belcher, 10 Yerg. 121; Martin *v.* Martin, 1 Heisk. 644. But presumptively such a gift is perfectly good. Millican *v.* Millican, 24 Tex. 424, 446; Sanfley *v.* Jackson, 16 Tex. 579; Leddel *v.* Starr, 5 C. E. Green, 274.

[1] Walmesley *v.* Booth, 2 Atk. R. 25; 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*k*). See also Barnesly *v.* Powel, 1 Ves. 284; Bulkley *v.* Wilford, 1 Clark & Finn. R. 102, 177 to 181; Id. 183; ante, § 308; Edwards *v.* Meyrick, 2 Hare, R. 260, 268; Klein *v.* Borchert, 89 Minn. 377, 95 N. W. 215; Thweatt *v.* Freeman, 73 Ark. 575, 84 S. W. 720; Robinson *v.* Sharp, 103 Ill. App. 239, 201 Ill. 86, 66 N. E. 299; United States *v.* Coffin, 83 Fed. 337.

[2] 1 Madd. Ch. Pr. 94; Welles *v.* Middleton, 1 Cox, R. 112, 125; 3 P. Will. 131, Cox's note (1); Wright *v.* Proud, 13 Ves. 136; Wood *v.* Downes, 18 Ves. 126; ante, § 219.

[3] Wood *v.* Downes, 18 Ves. 126; ante, § 219; De Montmorency *v.* Devereux, 7 Clark and Finn. 188.

ciple that while the relation of client and attorney subsists in its full vigor the latter shall derive no benefit to himself from the contracts, or bounty, or other negotiations of the former,[1] it supersedes the necessity of any inquiry into the particular means, extent, and exertion of influence in a given case; a task often difficult, and ill-supported by evidence which can be drawn from any satisfactory sources.[2] This doctrine is not necessarily limited to

[1] Wood *v.* Downes, 18 Ves. 126; Jones *v.* Tripp, Jac. Rep. 322; Goddard *v.* Carlisle, 9 Price, R. 169; Edwards *v.* Meyrick, 2 Hare, R. 68; Tomson *v.* Judge, 3 Drew. 306; In re Holmes, 3 Giff. 337; O'Brien *v.* Lewis, 4 Giff. 221; Walker *v.* Smith, 29 Beav. 394; Morgan *v.* Minett, 6 Ch. D. 638; Savery *v.* King, 5 H. L. Cas. 627; McMahan *v.* Smith, 6 Heisk. 167; Mason *v.* Ring, 3 Abb. App. Dec. 210; Polson *v.* Young, 37 Iowa, 136; Zeigler *v.* Hughes, 55 Ill. 288. See further Salmon *v.* Cutts, 4 DeG. & S. 128; Robinson *v.* Briggs, 1 Smale & G. 188; Brock *v.* Barnes, 40 Barb. 521; Pearson *v.* Benson, 28 Beav. 598; Williamson *v.* Moriarty, 19 Week. R. 818; Corley *v.* Stafford, 1 DeG. & J. 238; Hobday *v.* Peters, 6 Jur. N. S. 794; Cowdry *v.* Day, 5 Jur. N. S. 1199; Reickhoff *v.* Brecht, 51 Iowa, 633; Pearce *v.* Gamble, 72 Ala. 341.

[2] See Welles *v.* Middleton, 1 Cox, R. 125; Wright *v.* Proud, 13 Ves. 137. See Cheslyn *v.* Dalby, 2 Younge & Coll. 194, 195. In the case of Hunter *v.* Atkins (3 M. & Keen, 113), Lord Brougham made the following remarks on this subject: "There is no dispute upon the rules which, generally speaking, regulate cases of this description. Mr. Alderman Atkins is either to be regarded in the light of an agent confidentially entrusted with the management of Admiral Hunter's concerns, a person at least in whom he reposed a very special confidence, or he is not. If he is not to be so regarded, then a deed of gift or other disposition of property in his favor must stand good, unless some direct fraud were practised upon the maker of it; unless some fraud either by misrepresentation or by suppression of facts misled him, or he was of unsound mind when the deed was made. If the alderman did stand in a confidential relation towards him, then the party seeking to set aside the deed may not be called upon to show direct fraud; but he must satisfy the court, by the circumstances, that some advantage was taken of the confidential relation in which the alderman stood. If the alderman stood towards the admiral in any of the known relations of guardian and ward, attorney and client, trustee and cestui que trust, &c., then in order to support the deed he ought to show that no such advantage was taken; that all was fair; that he received the bounty freely and knowingly on the giver's part, and as a stranger might have done. For I take the rule to be this: There are certain relations known to the law as attorney, guardian, trustee; if a person standing in these relations to client, ward, or cestui que trust takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short the rule rightly considered is, that the person standing in such relation must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in; so that he may gain no advantage whatever from his relation to the other party beyond what may be the natural and unavoidable consequence of kindness arising out of that relation. A client, for example, may naturally entertain a kindly feeling towards an

cases where the contract or other transaction respects the rights or property in controversy, in the particular suit in respect to which the attorney or solicitor is advising or acting for his client; but it may extend to other contracts and transactions disconnected therefrom, or at least where from the attendant circumstance there is reason to presume that the attorney and solicitor possessed some marked influence, ascendency, or other advantage over his client in respect to them.[1]

attorney or solicitor by whose assistance he has long benefited; and he may fairly and wisely desire to benefit him by a gift, or without such an intention being the predominating motive, he may wish to give him the advantage of a sale or a lease. No law that is tolerable among civilized men — men who have the benefits of civility without the evils of excessive refinement and overdone subtlety — can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to show that deception was practised, or that the attorney or solicitor availed himself of his situation to withhold any knowledge or to exercise any influence hurtful to others and advantageous to himself. In a word, standing in the relation in which he stands to the other party, the proof lies upon him (whereas in the case of a stranger it would lie on those who opposed him) to show that he has placed himself in the position of a stranger; that he has cut off, as it were, the connection which bound him to the party giving or contracting; and that nothing has happened which might not have happened had no such connection subsisted. The authorities mean nothing else than this when they say, as in Gibson *v.* Jeyes (6 Ves. 277), that attorney and client, trustee and cestui que trust, may deal, but it must be at arm's length; the parties putting themselves in the situation of purchasers and vendors, and performing (as the court said, and I take leave to observe, not very felicitously or even very correctly) all the duties of those characters. The authorities mean no more, taken fairly and candidly towards the court, when they say, as in Wright *v.* Proud (15 Ves. 138), that an attorney shall not take a gift from his client while the relation subsists, though the transaction may be not only free from fraud but the most moral in its nature; a dictum reduced in Hatch *v.* Hatch (9 Ves. 296) to this, that it is almost impossible for a gift from client to attorney to stand, because the difficulty is extreme, of showing that everything was voluntary and fair, and with full warning and perfect knowledge; for in Harris *v.* Tremenheere (15 Ves. 40) the court only held that in such a case a suspicion attaches on the transaction and calls for minute examination."

[1] See Edwards *v.* Meyrick, 2 Hare, R. 60, 68. Mr. Vice-Chancellor Wigram here said: "It was not insisted in argument that a solicitor is under an actual incapacity to purchase from his client. There is not in that case the positive incapacity which exists between a trustee and his cestui que trust; but the rule the court imposes is, that inasmuch as the parties stand in a relation which gives or may give the solicitor an advantage over the client, the onus lies on the solicitor to prove that the transaction was fair. Montesquieu *v.* Sandys, 18 Ves. 302; Cane *v.* Lord Allen, 2 Dow, 289. The rule is expressed by Lord Eldon (6 Ves. 278. See also Sugden, Vend. & Pur. Vol. 3, p. 238, ed. 10) to be, that if the attorney "will mix with the character of attorney that of vendor, he shall, if the propriety of the transaction comes in question, manifest that he has given

§ 434. Not Necessary for Client to Prove That He Was Imposed Upon. — On the one hand it is not necessary to establish that his client all that reasonable advice against himself that he would have given him against a third person." It was argued that the rule I have referred to has no application unless the defendant was the plaintiff's solicitor in hac re, and this argument is no doubt well founded. Jones *v.* Thomas, 2 Y. & Coll. 498; Gibson *v.* Jeyes, 6 Ves. 266, 278. It appears to me however that the question whether Meyrick was the solicitor in hac re is one rather of words than of substance. The rule of equity which subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary transactions is not an isolated rule, but is a branch of a rule applicable to all transactions between man and man in which the relation between the contracting parties is such as to destroy the equal footing on which such parties should stand. In some cases, as between trustee and cestui que trust, the rule goes to the extent of creating a positive incapacity; the duties of the office of trustee requiring on general principles that that particular case should be so guarded. The case of solicitor and client is however different. In the case of Gibson *v.* Jeyes there was evidence that the client was of advanced age and of much infirmity, both in mind and body, that the consideration was inadequate, and of various other circumstances. Lord Eldon there shows how each of those circumstances gave rise to its appropriate duty on the part of the attorney. In other cases where an attorney has been employed to manage an estate, he has been considered as bound to prove that he gave his employer the benefit of all the knowledge which he had acquired in his character of manager or professional agent, in order to sustain a bargain made for his own advantage. Cane *v.* Lord Allen, 2 Dow, 294. But as the communication of such knowledge by the attorney will place the parties upon an equality, when it is proved that the communication was made, the difficulty of supporting the transaction is quoad hoc removed. If on the other hand the attorney has not had any concern with the estate respecting which the question arises, the particular duties to which any given situation of confidence might give rise cannot of course attach upon him, whatever may be the other duties which the mere office of attorney may impose. If the attorney, being employed to sell, becomes himself the purchaser, his duties and his interests are directly opposed to each other, and it would be difficult — and without the clearest evidence that no advantage was taken by the attorney of his position, and that the vendor had all the knowledge which could be given him in order to form a judgment, it would be impossible — to support the transaction. In other cases the relation between the parties may simply produce a degree of influence and ascendency, placing the client in circumstances of disadvantage, as where he is indebted to the attorney and is unable to discharge the debt. The relative position of the parties in such a case must at least impose upon the attorney the duty of giving the full value for the estate, and the onus of proving that he did so. If he proves the full value to have been given, the ground for any unfavorable inference is removed. The cases may be traced through every possible variation until we reach the simple case where, though the relation of solicitor and client exist in one transaction, and therefore personal influence or ascendency may operate in another, yet, the relation not existing in hac re, the rule of equity to which I am now adverting may no longer apply. The nature of the proof therefore which the court requires must depend upon the circumstances of each case according as they may have placed the attorney in a

there has been fraud or imposition upon the client;[1] and on the other hand it is not necessarily void throughout, ipso facto.[2] But the burthen of establishing its perfect fairness, adequacy, and equity is thrown upon the attorney, upon the general rule that he who bargains in a matter of advantage with a person placing a confidence in him is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other.[3] If no

position in which his duties and his pecuniary interests were conflicting, or may have given him a knowledge which his client did not possess or some influence or ascendency or other advantage over his client, or, notwithstanding the existence of the relation of attorney and client, may have left the parties substantially at arm's length and on an equal footing: this seems deducible from the cases. Gibson *v.* Jeyes; Hatch *v.* Hatch, 9 Ves. 292; Welles *v.* Middleton, 1 Cox. 112; s. c. cited 18 Ves. 127; Wood *v.* Downes, 18 Ves. 120; Bellew *v.* Russell, 1 Ba. & Be. 96; Montesquieu *v.* Sandys; Cane *v.* Lord Allen; Hunter *v.* Atkins, 3 Myl. & K. 113. I have therefore to consider the position in which these parties actually stood to each other. And I certainly am not treating the case of the plaintiff too strictly when I exclude all considerations which the bill does not state as having existed; and according to the statements in the bill, it does not appear that the defendant had any peculiar or exclusive knowledge of these particular farms or the value of them or that he had undertaken any particular duties respecting them which were opposed to his becoming a purchaser. No equity appears to me to arise except that which might arise from the mere possibility of the relation of attorney and client giving the attorney some influence or ascendency over the client, and the circumstance that the plaintiff was pressed by him to pay his bill of costs. On the evidence in the cause I am satisfied that the only ground upon which I can proceed is this bare relation between the parties. Taking the obligations of the defendant to stand as high as the relative position of the parties enables me to place them, — admitting the defendant to be the attorney in hac re, — I cannot consider that he is bound to do more than prove that he gave the full value for the estate." Post, § 313.

[1] In Morgan *v.* Minett, 6 Ch. D. 638, Bacon, V. C., decided, that while the relation exists the attorney *cannot* take a gift from his client, though there be no fraud, misrepresentation, or even suspicion; following Tomson *v.* Judge, 3 Drew. 306, and commenting on Hunter *v.* Atkins, 3 Mylne & K. 113. But that is too strong.

[2] For cases in which the transaction between attorney and client was upheld see Moss. *v.* Bainbrigge, 6 DeG. M. & G. 292; Blagrave *v.* Routh, 2 Kay & J. 509; Clanricarde *v.* Henning, 30 Beav. 175; Johnson *v.* Fesemeyer, 3 DeG. & J. 13; Porter *v.* Peckham, 44 Cal. 204; Howell *v.* Ransom, 11 Paige, 538; Evans *v.* Ellis, 5 Denio, 640; Nesbit *v.* Lockman, 34 N. Y. 167.

[3] Gibson *v.* Jeyes, 6 Ves. 278; Montesquieu *v.* Sandys, 18 Ves. 313; Bellew *v.* Russell, 1 B. & Beatty, R. 104, 107; Harris *v.* Tremenheere, 15 Ves. 34, 39; Cane *v.* Lord Allen, 2 Dow. R. 289, 299; Edwards *v.* Meyrick, 2 Hare, R. 60. The like rule applies to counsel employed as a confidential adviser; for he is disabled from purchasing for his own benefit charges on his client's estate without his permission, and the disability will continue as long as the reason exist, although the confidential employment may have

such proof is established, Courts of Equity treat the case as one of constructive fraud.[1] In this respect there is said to be a distinction between the case of an attorney and client, and that of a trustee and cestui que trust.[2] [While in contracts between counsel and client, even when the relation is only inchoate, as it was in the present case at the time of the execution of the contract in controversy, the utmost fairness is required, and doubt should be resolved, where reasonable doubt exists, against the contention of the counsel; yet an allegation of wrongdoing on the part of one now deceased, which in all probability could neither be proved nor disproved under the law, must be received with disfavor.[3]] In the former, if the attorney, retaining his connection, contracts with his client, he is subject to the onus of proving that no advantage has been taken of the situation of the latter. But in the case of a trustee it is not sufficient to show that no advantage has been taken; but the cestui que trust may set aside the transaction at his own option.[4] The reason of this distinction, which savors somewhat of nicety if not of subtilty, seems to be that in the case of clients the rule is general, and applicable to all contracts, conveyances, and negotiations between the attor-

ended. Carter *v.* Palman, 8 Clark & Finn. 657, 706. See Smith *v.* Kay, 7 H. L. Cas. 750; Holmes's Estate, 3 Giff. 337; Walker *v.* Smith, 29 Beav. 394; Spencer *v.* Topham, 22 Beav. 573; Lewis *v.* Hillman, 3 H. L. Cas. 706; Nesbit *v.* Lockman, 34 N. Y. 167; Jennings *v.* McConnell, 17 Ill. 148; Bayliss *v.* Williams, 6 Coldw. 440. The attorney should show that his client had competent and independent (or at least sufficient) advice. Rhodes *v.* Bate, L. R. 1 Ch. 257. And so doubtless of all other cases of special relations of confidence. Tyrrell *v.* Bank of London, 8 Jur. N. S. 849; S. C. 31 L. J. Ch. 369.

[1] See Jones *v.* Thomas, 2 Y. & Coll. 498. In this case it was held that where an account is decreed to be taken between an attorney and his client, in the course of which the attorney has taken securities from the client, the attorney must not only prove the securities, but the consideration for which they were given. Champion *v.* Rigby, 1 Russ. & Mylne, 539; Faris *v.* Briscoe, 78 Ill. App. 242.

[2] See however Morgan *v.* Minett, 6 Ch. D. 638.

[3] Whiting *v.* Davidge, 23 App. D. C. 156. But where the transaction was fairly conducted by the attorney, he paying a fair and full consideration for the land, and there is no evidence that he used or attempted to use any undue influence, the transaction will be upheld. Tibbett *v.* Brooks, 95 Tex. 335, 67 S. W. 512, 28 Tex. Civ. App. 107; Myers *v.* Luzerne County, 124 Fed. 436; Shropshire *v.* Ryan, 111 Iowa 677, 82 N. W. 1035.

[4] Cane *v.* Lord Allen, 2 Dow. 289, 299; post, § 446. See the remarks of Lord Brougham, in Hunter *v.* Atkins, 3 Mylne & Keen, R. 113; ante, § 310, note, where he seems to put the cases of client and attorney, guardian and ward, trustee and cestui que trust, upon the same general footing, and governed by the same rule. The same distinction is stated in Edwards *v.* Meyrick, 2 Hare, R. 60, 68, 69; ante, § 433.

ney and client, and is not limited to the property about which the attorney is retained, or the suit in which he is acting. In the case of a trustee the rule giving the cestui que trust an option is limited to the purchase of the trust property, and as to other property it would seem that the rule is the same as in other fiduciary relations; that is, at most it only shifts the burthen of proof from the seller to the buyer, to show the entire fairness of the transaction, or leaves the seller to establish presumptively that there has been some irregularity in the bargain, or some influence connected with the relation under which it has been made.[1]

§ 435. **Same.** — Thus if a bond is obtained by an attorney from a client who is poor and distressed, and it does not appear to be for a full and fair consideration, it will be set aside as obtained by undue influence from his station.[2] Upon a like ground a bond taken by an attorney from his client for a specific sum will not be allowed to stand as a security, except for the amount of fees and charges due to the attorney; for it is the general policy of courts of justice in cases between client and attorney to protect the suitors, and not to suffer any advantage to be taken of them by securities of this sort.[3] And for the same reason a judgment obtained by a solicitor against his client for security for costs will be overhauled even after a considerable lapse of time.[4] So a gift made to an attorney, pendente lite (for it would be otherwise if the relation had completely ceased), will be set aside as

[1] See post, § 436; Montesquieu *v.* Sandys, 18 Ves. R. 302, 318.

[2] Proof *v.* Hines, Cas. T. Talb. 111; Walmesley *v.* Booth, 2 Atk. 29. So of all securities. Brown *v.* Bulkley, 1 McCart. 451. As to lapse of time and acquiescence see Blagrave *v.* Routh, 8 DeG. M. & G. 620; Shaw *v.* Neale, 20 Beav. 157. The same weight ought not to be given perhaps to lapse of time as in ordinary cases, while the relation continues. Gresley *v.* Mousley, 5 Jur. N. S. 583; S. C. 4 DeG. & J. 78; 3 DeG. F. & J. 433. If a solicitor propose to take any contract from his client for compensation beyond what the law provides, he should inform his client on the point. Lyddon *v.* Moss, 5 Jur. (N. S.) 637; S. C. 4 DeG. & J. 104; Morgan *v.* Higgins, 5 Jur. (N. S.) 236; S. C. 1 Giff. 270; Eysaman *v.* Nelson, 79 Misc. Rep. 304, 140 N. Y. Supp. 183; Wagner *v.* Phillips, 78 N. J. Eq. 33, 78 Atl. 806.

[3] Newman *v.* Payne, 4 Bro. Ch. R. 350; S. C. 2 Ves. Jr. 200; Langstaffe *v.* Taylor, 14 Ves. 262; Wood *v.* Downes, 18 Ves. 120, 127; Pitcher *v.* Rigby, 9 Price, R. 79. The transfer of property from a client to his attorney is not to be viewed as a mere commercial transaction where ordinarily each must beware of the trading ability of the other and the advantage would remain with the more skilful bargainer, nor does the rule of caveat emptor obtain. Manheim *v.* Woods, 213 Mass. 537, 100 N. E. 747; Holmes *v.* Culver, 89 Kans. 698, 133 Pac. 164; Ward *v.* Yancey, 78 Ill. App. 368.

[4] Draper's Company *v.* Davis, 2 Atk. 295.

arising from the exercise of improper influence;[1] for it has been said with great force that there would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hand, if it were not so.[2] And sales made and annuities granted to attorneys under similar circumstances will upon the same principles of public policy be set aside, at least unless they are[2] established to have been transacted uberrima fide.[3]

§ 436. **Where Relation Has Been Completely Dissolved the Rule Ceases.** — Indeed the general principle is so well established, that Lord Eldon on one occasion said: "It is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and cestui que trust, that a transaction shall stand, purporting to be bounty for the execution of an antecedent duty."[4] But where the relation is completely dissolved, and the parties are no longer under the antecedent influence, but deal with each other at arm's length, there is no ground to apply the principle, and they stand upon the rights and duties common to all other persons.[5] And the same rule will or may apply where the transac-

[1] Oldham *v.* Hand, 2 Ves. 259; Welles *v.* Middleton, 1 Cox, 112, 125; Harris *v.* Tremenheere, 15 Ves. 34; Wood *v.* Downes, 18 Ves. 120, 127; Morse *v.* Royal, 12 Ves. 371.

[2] Welles *v.* Middleton, 1 Cox, R. 125; Hatch *v.* Hatch, 9 Ves. 292, 296.

[3] Harris *v.* Tremenheere, 15 Ves. 34; Gibson *v.* Jeyes, 6 Ves. 266; Wood *v.* Downes, 18 Ves. 120; Bellew *v.* Russell, 1 Ball & Beatt. 104. But testamentary dispositions stand on a better footing towards the donee. Hindson *v.* Weatherill, 5 DeG. M. & G. 301; Walker *v.* Smith, 29 Beav. 394. Compare however § 320, note, as to guardian and ward.

[4] Hatch *v.* Hatch, 9 Ves. 296, 297. Mr. Maddock, in 1 Madd. Ch. Pr. 95, note (*f*), has suggested that what is said as to an attorney, in Morse *v.* Royal, 12 Ves. 371, and in Wright *v.* Proud, 13 Ves. 138, does not seem warranted by the authorities. I confess myself at a loss precisely to understand what Mr. Maddock intended by this remark. Surely he could not mean to say that a gift to an attorney, while that relation continued, could not be avoided unless fraud or imposition were proved, for that would be contradicted by the doctrine maintained in several cases. Welles *v.* Middleton, 1 Cox, R. 125; Hatch *v.* Hatch, 9 Ves. 296, 297; Gibson *v.* Jeyes, 6 Ves. 276; Wood *v.* Downes, 18 Ves. 123; Oldham *v.* Hand, 2 Ves. 259; Montesquieu *v.* Sandys, 18 Ves. 313. See also Bellew *v.* Russell, 1 Ball & Beatt. R. 104, 107; Harris *v.* Tremenheere, 14 Ves. 34, 42; Walmesley *v.* Booth, 2 Atk. 29, 30. See also Wendell *v.* Van Rensselaer, 1 John. Ch. R. 350; Hylton *v.* Hylton, 2 Ves. 547, as cited by Lord Eldon, 18 Ves. 126; Newland on Contracts, ch. 31, p. 453, &c.; Welles *v.* Middleton, 1 Cox, R. 125; 18 Ves. 126. The rule does not touch small gifts. Rhodes *v.* Bate, L. R. Ch. 257. But it applies to a solicitor's clerk as well as to the solicitor himself. Hobday *v.* Peters, 28 Beav. 349; s. c. 6 Jur. N. S. 794. See Nesbit *v.* Lockman, 34 N. Y. 167, where a gift to a clerk was held good.

[5] Gibson *v.* Jeyes, 6 Ves. 277; Oldham *v.* Hand, 2 Ves. 259; Montesquieu *v.* Sandys, 18 Ves. 313; Walmesley *v.* Booth, 2 Atk. 29, 30; Wood

tion is totally disconnected with the relation, and concerns objects and things not embraced in, or affected by, or dependent upon, that relation,[1] and there is an absence of all other circumstances which may create a just suspicion as to the integrity and fairness of the transaction.

§ 437. **The Relation of Physician and Patient.** — Similar considerations apply to the case of a medical adviser and his patient. For it would be a meagre sort of justice to say that the sort of policy which has induced the court to interfere between client and attorney should be restricted to such cases; since as much mischief might be produced, and as much fraud and dishonesty be practised, if transactions were permitted to stand which arose between parties in equally confidential relations.[2]

§ 438. **The Relation of Principal and Agent.** — In the next place, the relation of principal and agent. This is affected by the same considerations as the preceding, founded upon the same enlightened public policy.[3] In all cases of this sort the principal contracts for the aid and benefit of the skill and judgment of the agent, and the habitual confidence reposed in the latter makes all his acts and statements possess a commanding influence over the former. Indeed in such cases the agent too often so entirely misleads the judgment of his principal, that while he is seeking his own peculiar advantage he seems but consulting the advantage and interests of his principal; placing himself in the odious predicament so strongly stigmatized by Cicero: "Totius autem injustitiæ nulla capitalior est, quam eorum qui, cum maxime fallunt, id agunt, ut viri boni esse videantur."[4] It is therefore for the common security of all mankind that gifts procured by agents and purchases made by them from their principals should be scru-

v. Downes, 18 Ves. 126, 127. If a solicitor has obtained leave to bid at his client's sale, that does away with the fiduciary relation, and he is no longer bound to disclose all material facts. Boswell *v.* Coaks, 23 Ch. D. 302.

[1] Montesquieu *v.* Sandys, 18 Ves. 313; Newland on Contracts, ch. 31, pp. 456, 457, 458; Howell *v.* Baker, 4 John. Ch. R. 118; Edwards *v.* Meyrick, 2 Hare, R. 60, 68; Jones *v.* Thomas, 2 Younge & Coll. 498; Gibson *v.* Jeyes, 6 Ves. R. 266, 278; ante, § 433.

[2] Dent *v.* Bennett, 2 Keen, R. 539; s. c. 4 Mylne & Craig, 269, 276, 277; Gibson *v.* Russell, 2 Younge & Coll. N. R. 104; s. c. The Jurist (English), Oct. 7, 1843, p. 875. But see Pratt *v.* Barker, 1 Sim. R. 1. Bellage *v.* Souther, 9 Hare, 534. See however Dogget *v.* Lane, 12 Mo. 215. Evans *v.* Evans, 196 Mo. 1, 93 S. W. 969.

[3] 1 Fonbl. Eq. B. 1, ch. 3, § 12, note (*k*); Benson *v.* Heathom, 1 Younge & Coll. N. R. 326.

[4] Cic. de Offic. Lib. 1, ch. 13; Huguenin *v.* Baseley, 14 Ves. 284; Prince *v.* Dupuy, 163 Ill. 417, 45 N. E. 298.

tinized with a close and vigilant suspicion. And indeed considering the abuses which may attend any dealings of this sort between principals and agents, a doubt has been expressed whether it would not have been wiser for the law in all cases to have prohibited them, since there must almost always be a conflict between duty and interest on such occasions.[1] Be this as it may, it is very certain that agents are not permitted to become secret vendors or purchasers of property which they are authorized to buy or sell for their principals;[2] or by abusing their confidence to acquire unreasonable gifts or advantages;[3] or indeed to deal validly with their principals in any cases, except where there is the most entire good faith and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition.[4] [Courts of Equity will closely scrutinize such transactions, and see that the agent shall not, by reason of the confidence

[1] Dunbar *v.* Tredennick, 2 Ball & Beatt. R. 319; Norris *v.* Le Neve, 3 Atk. R. 38.

[2] See Parker *v.* Nickerson, 112 Mass. 195; s. c. 137 Mass. 487, 497; Kimber *v.* Barber, L. R. 8 Ch. 56; Tyrell *v.* Bank of London, 10 H. L. Cas. 26; Lewis *v.* Hillman, 3 H. L. Cas. 607; Jeffries *v.* Wiester, 2 Sawy. 135; Ingle *v.* Hartman, 37 Iowa, 274; Ruckman *v.* Bergholz, 37 N. J. 437; Bain *v.* Brown, 56 N. Y. 285; Tynes *v.* Grimstead, 1 Tenn. Ch. 508; Uhlrich *v.* Muhlke, 61 Ill. 499. So of purchasers from the agent with notice. Young *v.* Hughes, 32 N. J. Eq. 372; McHarry *v.* Irvine's Execr. 85 Ky. 322, 3 S. W. 374; Hodgson *v.* Raphael, 105 Ga. 480, 30 S. E. 416.

[3] See Church *v.* Mar. Ins. Co., 1 Mason, R. 341; Barker *v.* Mar. Ins. Co., 2 Mason, R. 369; Woodhouse *v.* Meredith, 1 Jac. & Walk. 204, 222; Massey *v.* Davies, 2 Ves. Jr. 318; Crowe *v.* Ballard, 3 Bro. Ch. R. 120; Lees *v.* Nuttall, 1 Russ. & Mylne, 53; s. c. 1 Tamlyn, R. 282. See Gower *v.* Andrew, 59 Cal. 119.

[4] See Crowe *v.* Ballard, 3 Bro. Ch. R. 117; Purcell *v.* Macnamara, 14 Ves. 91; Huguenin *v.* Baseley, 14 Ves. 273; Watt *v.* Grove, 2 Sch. & Lefr. 492; Fox *v.* Mackreth, 2 Bro. Ch. R. 400; s. c. 2 Cox, R. 320; Coles *v.* Trecothick, 9 Ves. 246; Lowther *v.* Lowther, 13 Ves. 102, 103; Seley *v.* Rhodes, 2 Sim. & Stu. R. 49; Morret *v.* Paske, 2 Atk. 53; Green *v.* Winter, 1 John. Ch. R. 27; Parkist *v.* Alexander, 1 John. Ch. R. 394. The case of Cray *v.* Mansfield, 1 Ves. R. 379, has been very justly doubted by Mr. Belt, as not consistent with established principles. See Belt's Supplement, 167. See Cleveland Ins. Co. *v.* Reed, 1 Biss. 180; Krutz *v.* Fisher, 8 Kans. 90; s. c. 9 Kans. 501; White *v.* Ward, 26 Ark. 445; Glenwaters *v.* Miller, 49 Miss. 150; Condit *v.* Blackwell, 7 C. E. Green, 481; McMahon *v.* McGraw, 26 Wis. 614; Beck *v.* Kantorowicz, 3 Kay & J. 230. Where a partnership or joint-stock company is in contemplation, and a promoter purchases property to sell to the associates, he acts as quasi agent, and cannot sell at an advance without full disclosure. Short *v.* Stevenson, 63 Penn. St. 95; Densmore Oil Co. *v.* Densmore, 9 Am. Law Reg. N. S. 96; Beck *v.* Kantorowicz, supra. But persons about to enter into partnership do not ordinarily stand in a situation of confidence. Uhler *v.* Semple, 5 C. E. Green, 288.

reposed in him by the principal, secure to himself an undue advantage from the contract. The transaction must be reasonably challenged, and, when this is done, the onus is upon the agent to show that the bargain was fair and equitable.[1]]

§ 439. **The Rule Applies until the Relation Has Terminated.** — Upon these principles if an agent sells to his principal his own property as the property of another, without disclosing the fact, the bargain, at the election of the principal, will be held void.[2] So if an agent employed to purchase for another purchases for himself, he will be considered as the trustee of his employer.[3] [The agent has the burden of proving that the contract, now sought to be enforced against the principal, was obtained after the fiduciary relationship between the parties had terminated.[4]] Therefore if a person is employed as an agent to purchase up a debt of his employer, he cannot purchase the debt upon his own account, for he is bound to purchase it as at low a rate as he can, and he would otherwise be tempted to violate his duty.[5] The same rule applies to a surety who purchases up the debt of his principal. And therefore in each case if a purchase is made of the debt, the agent or surety can entitle himself, as against his principal, to no more than he has actually paid for the debt.[6] So if an agent discover a defect in the title of his principal to land, he cannot misuse it to acquire a title for himself; if he do, he will be held a trustee for his principal.[7]

§ 440. **Utmost Good Faith Is Required in Dealings between Principal and Agent.** — In all cases of purchases and bargains respecting property directly and openly made between principals and agents the utmost good faith is required. The agent must conceal no facts within his knowledge which might influence the judgment of his principal as to the price or value; and if he does,

[1] Drefahl *v.* Security Savings Bank, 132 Iowa 563, 107 N. W. 179; Jackson *v.* Pleasanton, 95 Va. 654, 29 S. E. 680; Evans *v.* Evans, 196 Mo. 1, 93 S. W. 969.

[2] Gillett *v.* Peppercorne, 3 Beav. R. 78, 83, 84.

[3] Lees *v.* Nuttall, 1 Russ. & M. 53; s. c. 1 Tamlyn, R. 282; post, § 451; Taylor *v.* Salmon, 2 Mees. & Cromp. 139; s. c. 4 Mylne & Craig, 139; Torrey *v.* Bank of New Orleans, 9 Paige, R. 619; Van Epps *v.* Van Epps, 9 Paige, R. 327; post, §§ 1597, 1611.

[4] Evans *v.* Evans, 196 Mo. 1, 93 S. W. 969; Bemis *v.* Plato, 119 Iowa 127, 93 N. W. 127; Lamb Knit-Goods Co. *v.* Lamb, 119 Mich. 568, 78 N. W. 646, 5 Detroit Leg. N. 919. Wentworth *v.* Lloyd, 32 Beav. 467; s. c. 10 H. L. Cas. 589.

[5] Reed *v.* Norris, 2 Mylne & Craig, 361, 374.

[6] Ibid.

[7] Ringo *v.* Binns, 35 U. S. 269, 9 L. Ed. 421.

the contract will be set aside.[1] The question in all such cases does not turn upon the point whether there is any intention to cheat or not; but upon the obligation, from the fiduciary relation of the parties, to make a frank and full disclosure. Of course, upon the principles already stated, if the relation of principal and agent has wholly ceased, the parties are restored to their common competency to deal with each other. It is also to be understood, as a just qualification of the whole doctrine, that the principal may, at his election, deem the bargain made or act done by his agent valid or not, and that the agent cannot himself avoid it on that ground.[2]

§ 441. **The Relation of Guardian and Ward.** — In the next place, as to the relation of guardian and ward. In this most important and delicate of trusts the same principles prevail, and with a larger and more comprehensive efficiency. It is obvious that during the existence of the guardianship the transactions of the guardian cannot be binding upon the ward if they are of any disadvantage to him; and indeed the relative situation of the parties imposes a general inability to deal with each other.[3] [Not only are the cases all to the effect that no contract between a cestui que trust and his trustee, or ward and guardian, can stand where the guardian gets a benefit at the expense of the ward, or where the ward is in the least overreached on the facts, but the courts go further, and lay it down as a positive rule, that no such contract will be allowed to stand if the ward is not informed as to his legal rights. It must appear that the ward was then aware of his rights, and knew that the first transaction was at least impeachable, and meant to make that valid which he did not before consider so.[4]]

[1] Farnam *v.* Brooks, 6 Pick. R. 212; Tyrell *v.* Bank of London, 10 H. L. Cas. 26; Kimber *v.* Barber, L. R. 8 Ch. 56; Parker *v.* Nickerson, 112 Mass. 195; s. c. 137 Mass. 487, 497.

[2] Story on Agency, § 210, and cases there cited.

[3] See 3 P. Will. 131, Cox's note 1; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (*k*); 1 Madd. Ch. Pr. 102, 103; Dawson *v.* Massey, 1 Ball & Beatt. R. 226; Everitt *v.* Everitt, L. R. 10 Eq. 405; Sullivan *v.* Blackwell, 28 Miss. 737. To entitle a ward to set aside a conveyance made by him after majority to his guardian he must repay the sum given for the property. Wickiser *v.* Cook, 85 Ill. 68. But a purchaser of ward's land under a void decree of sale obtained by the guardian cannot insist upon the ward's returning to him the purchase-money as a condition to setting aside the sale, when the money never went into the ward's hands, but was fraudulently appropriated by the guardian. Reynolds *v.* McCurry, 100 Ill. 356.

[4] Fidelity Trust Co. *v.* Butler, 28 Ky. L. Rep. 1268, 91 S. W. 676; and an instrument reciting faithful care and attention, and love and affection for guardian, is void. Williams *v.* Davison's Estate, 133 Mich. 344, 94 N. W. 1048, 10 Detroit Leg. N. 220.

But Courts of Equity proceed yet farther in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward, and the most abundant good faith (uberrima fides) on the part of the guardian.[1] For in all such cases the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased; as if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian.[2]

§ 442. **Same.** — Lord Hardwicke has expounded the general ground of this doctrine in a clear manner. "Where," says he, "a man acts as guardian, or trustee in nature of a guardian, for an infant, the court is extremely watchful to prevent that person's taking any advantage immediately upon his ward's coming of age, and at the time of settling accounts, or delivering up the trust because an undue advantage may be taken. It would give an opportunity, either by flattery or force, by good usage unfairly meant or by bad usage imposed, to take such an advantage. And therefore the principle of the court is of the same nature with relief in this court on the head of public utility; as in bonds obtained from young heirs, and rewards given to an attorney pending a cause, and marriage brokage bonds. All

[1] See Ranken *v.* Patton, 65 Mo. 378. But there is no absolute disability on the part of the guardian to take a gift or conveyance from the ward. Doe *v.* Hassell, 68 N. C. 213; Lee *v.* Howell, 69 N. C. 200; Meek *v.* Perry, 36 Miss. 190. If the guardian can show that he dealt with the ward in perfect fairness, taking no advantage of the relation or of his superior knowledge, exercising no influence, and giving the ward all needful information, the transaction will stand, if the ward was able to act intelligently for himself. Meek *v.* Perry, supra. Disinterested advice appears necessary in all these relations of trust. McClure *v.* Lewis, 72 Mo. 314; Hart *v.* Cannon, 133 N. C. 10, 45 S. E. 351; Baylor *v.* Fulkerson's Execrs. 96 Va. 265, 31 S. E. 63; Taylor *v.* Calvert, 138 Ind. 67, 37 N. E. 531; Patterson *v.* Griffith, 23 Ky. L. Rep. 334, 62 S. W. 884.

[2] Dawson *v.* Massey, 1 Ball & Beatt. R. 229; Wright *v.* Proud, 13 Ves. 136; Wedderburn *v.* Wedderburn, 4 Mylne & Craig, 41; Hylton *v.* Hylton, 2 Ves. 548; Maitland *v.* Backhouse, 16 Sim. 58; Revett *v.* Harvey, 1 Sim. & S. 502; Waller *v.* Armistead, 2 Leigh, 11; Eberts *v.* Eberts, 55 Pa. St. 110. See Kittredge *v.* Betton, 14 N. H. 401; Tucke *v.* Buchholz, 43 Iowa, 415.

depends upon public utility; and therefore the court will not suffer it, though perhaps in a particular instance there may not be an actual unfairness." [1] His Lordship afterwards added: "The rule of the court as to guardians is extremely strict, and in some cases does infer some hardship; as where there has been a great deal of trouble, and he has acted fairly and honestly, that yet he shall have no allowance. But the court has established that, on great utility, and on necessity, and on this principle of humanity, that it is a debt of humanity that one man owes to another, as every man is liable to be in the same circumstances." [2]

§ 443. **Transactions between Guardian and Ward Are Watched with Jealousy.** — Lord Eldon has expressed himself even in a more emphatic manner on this subject. "There may not be," says he, "a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future than if a trustee having done his duty, the cestui que trust, taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the court cannot permit it, except quite satisfied that the act is of that nature for the reason often given; and recollecting that in discussing whether it is an act of rational consideration, an act of pure volition uninfluenced, — that inquiry is so easily baffled in a court of justice, — that, instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness or forced by oppression, and the difficulty of getting property out of the hands of the guardian or trustee thus increased. And therefore if the court does not watch these transactions with a jealousy almost invincible in a great majority of cases, it will lend its assistance to fraud, where the connection is not dissolved, the account not settled, everything remaining pressing upon the mind of the party under the care of the guardian or trustee." [3] The same principles are applied to persons standing in the situation of quasi guardians or confidential advisers.[4]

§ 444. **Rule Continues for Reasonable Time after Ward's Maturity.** — In the cases to which these principles have been applied

[1] Hylton *v.* Hylton, 2 Ves. 548, 549; Pierce *v.* Waring, cited ibid. and in 1 Ves. 380; 1 P. Will. 120, Cox's note; 1 Cox, R. 125; Wright *v.* Proud, 13 Ves. 136, 138; Wood *v.* Downes, 18 Ves. 126. See Sullivan *v.* Blackwell, 28 Miss. 737; Hawkins's Appeal, 32 Pa. St. 263.

[2] Hylton *v.* Hylton, 2 Ves. 548, 549.

[3] Hatch *v.* Hatch, 9 Ves. 297.

[4] Revett *v.* Harvey, 1 Sim. & Stu. R. 502; Tucke *v.* Buchholz, 43 Iowa, 415. Quinton *v.* Frith, L. R. 2 Ir. Eq. 396; Espey *v.* Lake, 10 Hare, 260.

in order to set aside grants and other transactions[1] between guardian and ward, two circumstances of great importance have generally concurred: first, that the grants and transactions have taken place immediately upon the ward's attaining age; and secondly, that the former influence of the guardian has been demonstrated to exist to an undue degree; or, in other words, that the parties have not met upon equal terms.[2] If therefore the relation has entirely ceased, not merely in name but in fact,[3] and if sufficient time has elapsed to put the parties in complete independence as to each other, and if a full and fair settlement of all transactions growing out of the relation has been made, there is no objection to any bounty or grant conferred by the ward upon his guardian.[4] Indeed in such cases it is only the performance of a high moral duty recommended as well by law as by natural justice.

§ 445. **The Relation of Trustee and Cestui Que Trust.** — In the next place, with regard to the relation of trustee and cestui que trust, or rather beneficiary, or fide-commissary, as we could wish the person beneficially interested might be called, to escape from the awkwardness of a barbarous foreign idiom.[5] In this class of cases the same principles govern as in cases of guardian and ward, with at least as much enlarged liberality of application,

[1] Testamentary dispositions in favor of a guardian by his ward have been held to fall within the same category. Meek *v.* Perry, 36 Miss. 190; Garvin *v.* Williams, 50 Mo. 206. But compare § 435, note, as to cases of attorney and client.

[2] See Dawson *v.* Massey, 1 Ball & Beatt. 229, 232, 236; Aylward *v.* Kearney, 2 Ball & Beatt. R. 463.

[3] Kittredge *v.* Betton, 14 N. H. 401.

[4] Hylton *v.* Hylton, 2 Ves. 547, 549.

[5] The phrase "cestui que trust" is a barbarous Norman law French phrase; and is so ungainly and ill adapted to the English idiom, that it is surprising that the good sense of the English legal profession has not long since banished it and substituted some phrase in the English idiom furnishing an analogous meaning. In the Roman law the trustee was commonly called "hæres fiduciarius"; and the cestui que trust, "hæres fidei commissarius", which Dr. Halifax has not scrupled to translate "fide-committee." (Halifax, Anal. of Civil Law, ch. 6, § 16, p. 34; Id. ch. 8, §§ 2, 3, pp. 35, 46.) I prefer fide-commissary as at least equally within the analogy of the English language. But "beneficiary", though a little remote from the original meaning of the word, would be a very appropriate word, as it has not as yet acquired any general use in a different sense. Hæres fidei commissarius was sometimes used in the civil law to denote the trustee. See Vicat, Vocab. voce, Fidei commissarius, The French law calls the cestui que trust, fidei commissaire. See Ferriere Dict. voce, Fidei commissaire. Merlin, Repertoire, voce, Substitution, et Substitution fidei commissaire. Dr. Brown uses the word, "fidei commissary." 1 Brown, Civil Law, 190, note.

and upon grounds quite as comprehensive. Indeed the cases are usually treated as if they were identical.[1] A trustee is never permitted to partake of the bounty of the party for whom he acts, except under circumstances which would make the same valid, if it were a case of guardianship. A trustee cannot purchase of his cestui que trust, unless under like circumstances; or, to use the expressive language of an eminent judge, a trustee may purchase of his cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, and it is clear that the cestui que trust intended that the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as trustee.[2] But it is difficult to make out such a case where the exception is taken, especially when there is any inadequacy of price or any inequality in the

[1] Hatch *v.* Hatch, 9 Ves. 292, 296, 297; Newland on Contracts, ch. 32, p. 459, &c.; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 3, p. 142, &c.; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (*k*); Farnam *v.* Brooks, 9 Pick. R. 212. See also Bulkley *v.* Wilford, 2 Clark & Finn. R. 102, 177 to 183; ante, §§ 441, 444.

Only the care of an ordinarily prudent business man is required of a trustee. Winder *v.* Nock, 104 Va. 759, 52 S. E. 561, 3 L. R. A. (N. S.) 415; Taft *v.* Smith, 186 Mass. 31, 70 N. E. 1031.

Where there are a number of suspicious circumstances attending a transaction, the clearer and more satisfactory the explanations should be. Minneapolis Trust Co. *v.* Menage, 73 Minn. 441, 76 N. W. 195.

[2] See Morse *v.* Hill, 136 Mass. 60; Julian *v.* Reynolds, 8 Ala. 680; Stallings *v.* Freeman, 2 Hill, Ch. 401; Pratt *v.* Thornton, 28 Maine, 355; McCartney *v.* Calhoun, 17 Ala. 301; Marshall *v.* Stephens, 8 Humph. 159; Beeson *v.* Beeson, 9 Barr. 279; McKinley *v.* Irvine, 13 Ala. 681; Franks *v.* Bollans, L. R. 3 Ch. 717; Hamilton *v.* Young, 7 L. R. Ir. 289, 299. Part only of the cestuis que trust may avoid the sale. Morse *v.* Hill, supra.

The rule which disables one occupying a confidential or fiduciary relation in respect to property, the subject of sale, from purchasing for his own benefit, and regarding him as a trustee if he do so purchase, is absolute, and looks to no other facts than the relation and the purchase. St. Paul Trust Co. *v.* Strong, 85 Minn. 1, 88 N. W. 256; Bourquin *v.* Bourquin, 110 Ga. 440, 35 S. E. 710.

Where trust property is sold under decree of court, permission is sometimes given trustee to purchase, but only after notice, upon hearing all parties interested, and when it appears that such a course will be advantageous to the trust. Hayes *v.* Hall, 188 Mass. 510, 74 N. E. 935.

And an absolute conveyance by one set of trustees to another set of trustees, stands upon the same footing. Harris *v.* Brown, 124 Ga. 310, 52 S. E. 610, 2 L. R. A. (N. S.) 828.

But courts do not set aside purchases of trust property by trustees at their instance as a matter of course, because the rule is intended for the protection of beneficiaries. Benson *v.* Benson, 97 Mo. App. 460, 71 S. W. 360.

bargain.[1] And therefore if a trustee, though strictly honest, should buy for himself an estate of his cestui que trust, and then should sell it for more, according to the rules of a Court of Equity, from general policy, and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not to be permitted to sell to or for himself.[2]

§ 446. **Trustee Is Not Allowed to Obtain Any Private Advantage Out of Trust Estate.** — But we are not to understand, from this last language, that to entitle the cestui que trust to relief it is indispensable to show that the trustee has made some advantage where there has been a purchase by himself; and that, unless some advantage has been made, the sale to the trustee is good. That would not be putting the doctrine upon its true ground, which is, that the prohibition arises from the subsisting relation of trusteeship.[3] The ingredient of advantage made by him would only go to establish that the transaction might be open to the strong imputation of being tainted by imposition or selfish cunning.[4] But the principle applies, however innocent the purchase may be in a given case.[5] It is poisonous in its consequences. The cestui que trust is not bound to prove, nor is the court bound to decide, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, and yet the party not be able to show it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the

[1] Ante, § 433; Coles *v.* Trecothick, 9 Ves. 246; Fox *v.* Mackreth, 2 Bro. Ch. R. 400; Gibson *v.* Jeyes, 277; Whichcote *v.* Lawrence, 3 Ves. 740; Campbell *v.* Walker, 5 Ves. 678; Ayliffe *v.* Murray, 2 Atk. R. 59; Hawley *v.* Cramer, 4 Cowen, R. 717; Van Epps *v.* Van Epps, 9 Paige, R. 207; Scott *v.* Davis, 4 Mylne & Craig, 87.

[2] See Fox *v.* Mackreth, 2 Brown, Ch. R. 400; s. c. 2 Cox, R. 320, 327; Prevost *v.* Gratz, 1 Peters, Cir. R. 367, 368; s. c. 6 Wheat. R. 481; Hamilton *v.* Wright, 6 Clark & Finn. 111, 133; Edwards *v.* Meyrick, 2 Hare, R. 60, 68; Hawley *v.* Cramer, 4 Cowen, R. 717. Quære, does the doctrine extend to all purchases made by a trustee from the cestui que trust, or is it limited to purchases of the trust estate? But after a fair and honest sale to a third person the trustee may in good faith, after the lapse of considerable time at least, buy from him. Baker *v.* Peck, 9 Week R. 472; Stephen *v.* Beall, 89 U. S. 329, 22 L. Ed. 786; Board of Trustees of Oberlin College *v.* Blair, 45 W. Va. 812, 32 S. E. 203.

[3] See Newland on Contracts, ch. 32, p. 461; Ex parte Lacey, 6 Ves. 625, 626; 1 Madd. Ch. Pr. pp. 93; Chesterfield *v.* Janssen, 2 Ves. 138.

[4] See Campbell *v.* Walker, 5 Ves. 678; 13 Ves. 601.

[5] Ex parte James, 8 Ves. 337, 345; Ex parte Bennett, 10 Ves. 381, 385; Cane *v.* Lord Allen, 2 Dow, R. 289, 299; ante, § 434.

cestui que trust to come, at his own option and without showing essential injury, to insist upon having the experiment of another sale.[1] So that in fact, in all cases where a purchase has been made by a trustee on his own account of the estate of his cestui que trust, although sold at public auction, it is in the option of the cestui que trust to set aside the sale, whether bona fide made or not.[2] So a trustee will not be permitted to obtain any profit or advantage to himself in managing the concerns of the cestui que trust, but whatever benefits or profits are obtained will belong exclusively to the cestui que trust.[3] In short it may be laid down as a general rule that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which have a tendency to interfere with his duty in discharging it.[4] And this doctrine applies not only to trustees strictly so called, but to other persons standing in like situation;

[1] Davoue *v.* Fanning, 2 John. Ch. R. 252, where Mr. Chancellor Kent has examined the cases with a most exemplary diligence. Ex parte Bennett, 10 Ves. 381, 385, 386; ante, § 434. See Hamilton *v.* Young, 7 L. R. Ir. 289, 299; Brookman *v.* Rothschild, 3 Sim. 153; Gillett *v.* Peppercorne, 3 Beav. 78; Newcomb *v.* Brooks, 16 W. Va. 32.

The guardian ought not to take from the wards, shortly after attaining their majority, receipts in full, and directions in writing to the probate judge directing his discharge as on final account. He must show that he dealt fairly, made full communication to them of every fact within his knowledge calculated to influence their conduct, and that he obtained nothing from them without their free consent, given after receiving information of all facts bearing on their rights and the extent of them. Willis *v.* Rice, 157 Ala. 252, 48 So. 397.

[2] Campbell *v.* Walker, 5 Ves. 678, 680; 13 Ves. 601; Ex parte Lacey, 6 Ves. 625; Ex parte Bennett, 10 Ves. 381, 385, 386; Morse *v.* Royal, 12 Ves. 355; Whitcomb *v.* Minchin, 5 Madd. R. 91; Belt's Supplement, pp. 11, 12.

[3] Saagar *v.* Wilson, 4 Serg. & Watts, 102.

[4] Hamilton *v.* Wright, 9 Clark & Finn. R. 111, 123. A trustee of a leasehold interest who obtains a renewal of the lease must hold the same in trust for the cestui que trust. Gabbett *v.* Lawder, 11 L. R. Ir. 295, 299; O'Brien *v.* Egan, 5 L. R. Ir. 633. And this is true of a purchase by the trustee of the reversion. Ib., distinguishing Randall *v.* Russell, 3 Mer. 190, Hardman *v.* Johnson, 3 Mer. 347, and Norris *v.* Le Neve, 3 Atk. 26, as not being purchases by parties in a fiduciary situation. See also Giddings *v.* Giddings, 3 Russ. 241; Buckley *v.* Lavauze, Lloyd & G. t. Plunk. 327; Trumper *v.* Trumper, L. R. 14 Eq. 295; s. c. L. R. 8 Ch. 870. In O'Brien *v.* Egan, supra, this doctrine of graft was extended and applied to the case of a new lease obtained some time after the expiration of the first, and after the right of the party entitled as cestui que trust had ceased. And the only fiduciary relation in the case consisted in the fact that if the lessee died before the first lease ran out, the plaintiff would be entitled in remainder. The event did not happen. See also Gower *v.* Andrew, 59 Cal. 119, employer and employee, and renewal of lease by the latter.

such as assignees and solicitors of a bankrupt or insolvent estate, who are never permitted to become purchasers at the sale of the bankrupt or insolvent estate.[1] It applies in like manner to executors and administrators,[2] who are not permitted to purchase up the debts of the deceased on their own account; but whatever advantage is thus derived by them, by purchases at an undue value, is for the common benefit of the estate.[3] Indeed the doctrine may be more broadly stated, that executors or administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate.[4] And if a trustee misapply the funds of his cestui que trust or beneficiary,

[1] Ex parte Lacey, 6 Ves. 625; Ex parte James, 8 Ves. 337; Ex parte Bennett, 10 Ves. 381; Davoue *v.* Fanning, 2 John. Ch. R. 252; Lady Ormond *v.* Hutchinson, 13 Ves. 47; Farnam *v.* Brooks, 9 Pick. 202. Nor can an assignee buy in a debt of the bankrupt. Pooley *v.* Quilter, 2 DeG. & J. 327.

[2] Gabbett *v.* Lawder, 11 L. R. Ir. 295, renewal of lease. An attorney of an executor in going on the executor's behalf and advising is in the same situation. Reed *v.* Peterson, 91 Ill. 288, 295.

[3] Ex parte Lacey, 6 Ves. 628; Ex parte James, 8 Ves. 346; Green *v.* Winter, 1 John. Ch. R. 27; Forbes *v.* Ross, 2 Bro. Ch. R. 430; Hawley *v.* Mancius, 7 John. Ch. R. 174.

Claims against the estate which have been bought in by the executor at a discount, can only be allowed him in his account for the amounts actually paid out. In Rainforth's Estate, 40 Misc. Rep. 609, 83 N. Y. Supp. 57; Luther *v.* Hunter, 7 N. Dak. 544, 75 N. W. 916.

But where testator had received moneys as guardian and agent of the plaintiffs, his executor might purchase for less than the actual amount due, claims against the estate, and where none of the guardian funds ever came into the hands of the executor. Murray *v.* Barden, 132 N. C. 136, 43 S. E. 600.

[4] Schieffelin *v.* Stewart, 1 John. Ch. R. 620; Brown *v.* Brewerton, 4 John. Ch. R. 303; 4 Dow, Parl. R. 131; Evartson *v.* Tappan, 1 John. Ch. R. 497; Hawley *v.* Mancius, 7 John. Ch. R. 174; Cook *v.* Coolingridge, Jac. R. 607, 621; Jeremy on Equity Jurisd. B. 1, ch. 1, § 3, p. 142, &c.; 1 Fonbl. Eq. B. 2, ch. 7, § 6, note (*p*); Id. § 7, and note (*r*). Trustees are not voluntarily allowed a compensation in England for their services, unless specially provided for in the creation of the trust; but their duties and services are treated as gratuitous and honorary. A different rule prevails in many if not all of the States of this Union. See post, § 1676. Moses *v.* Moses, 50 Ga. 9; Goodwin *v.* Goodwin, 48 Ind. 584; Sheldon *v.* Rice, 30 Mich. 296; Green *v.* Sargent, 23 Vt. 466; Ebelmesser *v.* Ebelmesser, 99 Ill. 541; Kruse *v.* Steffens, 47 Ill. 112; Ives *v.* Ashley, 97 Mass. 198; Saeckel *v.* Litchfield, 13 Allen, 417; Harper *v.* Mansfield, 58 Mo. 17; Lytle *v.* Beveridge, 58 N. Y. 593; Staples *v.* Staples, 24 Gratt. 225; Crubb *v.* Bray, 36 Wis. 336; Humphreys *v.* Burleson, 72 Ala. 1. See however for some qualification of the rule, Wilson *v.* Miller, 30 Md. 82; Frazer *v.* Lee, 42 Ala. 25; and especially Stallings *v.* Foreman, 2 Hill, Ch. 401, establishing the right of an administrator to buy at his own sale at a fair price. Huger *v.* Huger, 9 Rich. Eq. 217, 224, 225.

and purchase a judgment or other security therewith, the latter has an election to take such judgment or security, or to call upon the trustee to make good the original fund.[1]

§ 447. **Other Classes of Confidential Relations.** — There are many other cases of persons standing in regard to each other in the like confidential relations in which similar principles apply. Among these may be enumerated the cases which arise from the relation of landlord and tenant,[2] of partner and partner,[3] of principal and surety, and various others, where mutual agencies, rights, and duties are created between the parties by their own voluntary acts or by operation of law.[4] But it

[1] Steele *v.* Babcock, 1 Hill R. 527. And releases and confirmations of the acts of trustees even after the termination of the trust will be narrowly scrutinized; unless the cestui que trust was fully informed of the facts, such acts will not be binding. Burrows *v.* Walls, 5 DeG. M. & G. 233. See also Lloyd *v.* Atwood, 3 DeG. & J. 614. But if with full knowledge the cestui que trust has acquiesced for a long time, e. g. in improper investments of the trust fund, the trustee will not be chargeable with losses arising thereby. Griffiths *v.* Porter, 25 Beav. 236; Liddell *v.* Norton, 21 Beav. 183; West *v.* Sloan, 3 Jones Eq. 102. But this supposes of course that the beneficiary was of capacity to understand, and did understand, what was going on.

[2] Matthew's Appeal, 104 Pa. St. 444.

[3] Tyrrell *v.* Bank of London, 10 H. L. Cas. 26; s. c. 8 Jur. (N. S.) 849; 31 L. J. Ch. 369; Brown *v.* Kennedy, 9 Jur. (N. S.) 1163; s. c. 33 L. J. Ch. 71, and 33 Beav. 133; Jones *v.* Dexter, 130 Mass. 380; Freeman *v.* Freeman, 136 Mass. 260; Dean *v.* McDowell, 8 Ch. D. 345 (C. A.). But the mere fact that a partner secretly engages in some business in violation of the partnership articles, and derives a profit therefrom, will not entitle his associates to treat the same as belonging to the partnership. Whether they can do so will depend upon the question whether the obnoxious trade is within the scope of the partnership business. Dean *v.* McDowell, supra. And this rule covers the case not merely of using the partnership funds in the secret trade, it covers the case of making use of information which the partnership is entitled to, and it covers the case of profits got by means of the position in the partnership. Ib.

An administrator of a deceased partner may call upon the surviving partner for an account in equity of the profits received by him since the death of his associate from the sale of patents belonging to the partnership. Freeman *v.* Freeman, 136 Mass. 260; Yates *v.* Finn, 13 Ch. D. 839. See Willett *v.* Blanford, 1 Hare, 253; Watney *v.* Wells, L. R. 2 Ch. 250. Partners: — Mattern *v.* Canavan, 3 Cal. App. 493, 86 Pac. 618; Grafton *v.* Paine, 7 App. D. C. 255; Deaver *v.* O'Hara, 36 Colo. 476, 85 Pac. 1123.

[4] The relation of mortgagor and mortgagee falls within the category. See Prees *v.* Coke, L. R. 6 Ch. 645; Villa *v.* Rodriguez, 79 U. S. 323, 20 L. Ed. 406; Morris *v.* Nixon, 42 U. S. 118, 11 L. Ed. 69, 4 Kent, 143. A mortgagee cannot, in exercising a power of sale, purchase the property on his own account (except perhaps under circumstances which would be proper in the case of a purchase by a trustee). Nor can the agent of the mortgagee buy for him or for himself. Martinson *v.* Clowes, 21 Ch. D. 857. So of the case of pledgor and pledgee. See Hayward *v.* Elliott Natl.

would occupy too much space to go over them at large, and most of them are resolvable into the principles already com-

Bank, 96 U. S. 611, 24 L. Ed. 855; Chouteau *v.* Allen, 70 Mo. 290. A director of a company stands also in a fiduciary situation. He cannot retain a consideration received by him from the promoters as an inducement to become a director. And if the consideration has been a gift of fully paid-up shares, he may be compelled not only to restore the shares but to account to the company for the highest value they have reached since he received them. McKay's Case, 2 Ch. D. 1; Pearson's Case, 5 Ch. D. 336; Bagnall *v.* Carlton, 6 Ch. D. 371; Nant-y-glo Iron Works Co. *v.* Grave, 12 Ch. D. 738 (Bacon, V. C. doubting Hall *v.* Hallett, 1 Cox, 134).

But contracts made by a director in his own interest and contrary to his duty are voidable only, and will stand until repudiated by the company. Thomas *v.* Brownville R. Co., 109 U. S. 522, 27 L. Ed. 1018, 3 S. Ct. Rep. 315; Twin Lick Co. *v.* Marbury, 91 U. S. 587, 23 L. Ed. 328; Union Pacific R. Co. *v.* Credit Mobilier, 135 Mass. 367. And if the stockholders seek directly to impeach the transaction, as by cross bill, they must still do equity by those with whom the contract was made, making compensation for all honest outlay of which the company will have the benefit. Ib.: Wardell *v.* Union Pacific R. Co., 4 Dillon, 339; s. c. 103 U. S. 651, 26 L. Ed. 509. As to the jurisdiction of equity over directors misapplying the funds of the company, see Lyman *v.* Bonney, 118 Mass. 222; s. c. 101 Mass. 562; Brewer *v.* Boston Theatre, 104 Mass. 378.

And where a contract is entered into between a corporation and a third person, and the control of the contract secured by a director of the company, to the knowledge of all for a purpose not improper, to be carried out by an assignment to others, which purpose has been carried out as intended and the contract performed in good faith by the assignees, the circumstance that the contract was at first entered into or controlled by a director will not be ground for avoiding it in the hands of the assignees. Union Pacific R. Co. *v.* Credit Mobilier, 135 Mass. 367, 376. Further as to the invalidity of transactions of directors having an interest in contracts of the company with third persons, see Pearson *v.* Concord R. Co., 16 Reporter, 463; Gilman R. Co. *v.* Kelly, 77 Ill. 426, 432–434; Flagg *v.* Manhattan Ry. Co., 21 Am. Law Reg. N. S. 785, and note; In re Ambrose Tin Co., 14 Ch. D. 390, 394; Cumberland Coal Co. *v.* Sherman, 8 Law Reg. 333.

An individual who has bargained for the purchase of patents, upon an undertaking to make payment for the same out of the net profits to arise from selling the patented articles, becomes thereby a quasi trustee towards the vendor, and can be called to account in equity for the profits so received. Pratt *v.* Tuttle, 136 Mass. 233; Badger *v.* McNamara, 123 Mass. 117, 119; Foley *v.* Hill, 2 H. L. Cas. 28, 35; Padwick *v.* Stanley, 9 Hare, 627, 628; Hemings *v.* Pugh, 4 Giff. 456, 459; Moxon *v.* Bright, L. R. 4 Ch. 292, 295; Mackenzie *v.* Johnston, 4 Madd. 373. But this is not true of a corporation (or it should seem of any company or person) acting merely as agent for the purchaser, though the purchaser may own most of the stock therein. Pratt *v.* Tuttle, supra.

Again though there be nothing in the relation of the parties tending to show influence on the one side and dependence on the other, it may still be shown that confidence existed and was betrayed; and the court will look upon the transaction in the same light as if it had grown out of one of the special relations. Smith *v.* Kay, 7 H. L. Cas. 750. On the relation of pastor and parishioner see Ford *v.* Hennessey, 70 Mo. 580; In re Welsh, 1 Redf. 238; Lyon *v.* Home, L. R. 6 Eq. 655.

mented on.[1] On the whole the doctrine may be generally stated that wherever confidence is reposed, and one party has it in his power in a secret manner for his own advantage to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage.[2]

§ 448. **Good-faith Required between Principal and Surety.** — The case of principal and surety however, as a striking illustration of this doctrine, may be briefly referred to. The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts,[3] or any undue advantage taken of the surety by the creditor either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract.[4] Upon the same ground the creditor is in all subsequent transactions with the debtor bound to equal good faith to the surety.[5] If any stipulations therefore are made between

In all cases of relations of confidence the burden of proof is upon the party standing in the superior situation; he must make out the perfect fairness of the transaction. Smith *v.* Kay, supra; Rhodes *v.* Bate, L. R. 1 Ch. 252; Tomson *v.* Judge, 3 Drew. 306; supra, § 434.

[1] See 1 Hovenden on Frauds, ch. 6, pp. 199, 209; Id. Vol. 2, ch. 20, p. 153, ch. 21, p. 171; Maddeford *v.* Anstwick, 1 Sim. R. 89; 1 Chitty, Dig. Fraud, vii; Oliver *v.* Court, 8 Price, R. 127; Farnam *v.* Brooks, 9 Pick. R. 212. See Bentley *v.* Craven, 18 Beav. 75; Perens *v.* Johnson, 3 Smale & G. 419; Richie *v.* Cowper, 28 Beav. 344; Clegg *v.* Edmonson, 8 DeG. M. & G. 787; Clements *v.* Hall, 2 DeG. & J. 173.

[2] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 2, p. 395; Griffiths *v.* Robins, 3 Madd. R. 191. See Storrs *v.* Scougale, 48 Mich. 388; Schultz's Appeal, 80 Pa. St. 396; Leavitt *v.* La Force, 71 Mo. 353; Gower *v.* Andrew, 59 Cal. 119.

[3] It is not clear whether, to discharge the surety, the misrepresentation or the concealment should have been fraudulent or not. Perhaps the better view is that if the creditor was aware of the truth concerning the matter misrepresented to or concealed from the surety, the latter will be discharged whether there was fraud or not; but contra if he was not aware of it, unless there was fraud. 2 Story, Contracts, § 1125 (5th ed.), where the cases are examined. See Davies *v.* London Ins. Co., 8 Ch. D. 469 (ante, § 305, and note); Pidcock *v.* Bishop, 3 Barn. & C. 605; Stone *v.* Compton, 5 Bing. N. C. 142; Railton *v.* Mathews, 10 Clark & F. 935; Hamilton *v.* Watson, 12 Clark & F. 119; Phillips *v.* Foxall, L. R. 7 Q. B. 666; Campbell *v.* Moulton, 30 Vt. 667; Denison *v.* Gibson, 24 Mich. 186; Dawson *v.* Lawes, Kay, 280.

[4] A collusive and fraudulent confession of judgment by the principal debtor will be void as to the surety. Wright *v.* Hake, 38 Mich. 525.

[5] Boschert *v.* Brown, 72 Pa. St. 372. See Cecil *v.* Plaistow, 1 Anstr. R. 202; Leicester *v.* Rose, 4 East, R. 372; Pidcock *v.* Bishop, 3 B. & Cres. 605; Smith *v.* Bank of Scotland, 1 Dow, R. 272; Bank of United States *v.* Etting, 24 U. S. 59, 6 L. Ed. 419.

the creditor and the debtor which are not communicated to the surety and are inconsistent with the terms of his contract, or are prejudicial to his interests therein, they will operate as a virtual discharge of the surety from the obligation of his contract.[1] And on the other hand if any stipulations for additional security or other advantages are obtained between the creditor and the debtor, the surety is entitled to the fullest benefit of them.[2]

§ 449. **Same.** — Indeed the proposition may be stated in a more general form, that if a creditor does any act injurious to the surety or inconsistent with his rights, or if he omits to do any act [3] when required by the surety which his duty enjoins him to do, and the omission proves injurious to the surety, — in all such cases the latter will be discharged, and he may set up such conduct as a defence to any suit brought against him, if not at law, at all events in equity.[4] [If the obligee in a bond obtains control of money or property of the principal to which he is not otherwise entitled, and which he may lawfully apply to the discharge of the principal's obligation to him, and then voluntarily surrenders or releases it, so that the surety loses the benefit of the security

[1] See King *v.* Baldwin, 2 John. Ch. R. 554, and the cases there cited; s. c. 17 John. R. 384; Nisbet *v.* Smith, 2 Bro. Ch. R. 583; Kuhlman *v.* Leavens, 5 Okla. 562, 50 Pac. 171; Williams *v.* Gooch, 73 Ill. App. 557; Sawyer *v.* Campbell, 107 Iowa, 397, 78 N. W. 56; Hall *v.* First Natl. Bank of Hayes City, 5 Kans. App. 493, 47 Pac. 566.

[2] Hayes *v.* Ward, 4 John. Ch. R. 123; Mayhew *v.* Crickett, 2 Swanst. R. 186, and the authorities cited, p. 191, note (*a*); Boultbee *v.* Stubbs, 18 Ves. 23; Ex parte Rushforth, 10 Ves. 409, 421; post, § 676.

[3] It is held in Camp *v.* Bostwick, 20 Ohio St. 337, that the omission of a creditor to sue a surety until the Statute of Limitations has run out will not discharge a co-surety, on the ground that the latter may still have contribution. But Shelton *v.* Farmer, 9 Bush, 314, contra, is better law.

[4] See Watts *v.* Shuttleworth, 29 L. J. Ex. 229, 234; Ex parte Agra Bank, L. R. 9 Eq. 725; Henderson *v.* Huey, 45 Ala. 275; Petty *v.* Cooke, L. R. 6 Q. B. 790; Oriental Co. *v.* Overend, L. R. 7 Ch. 142; post, §§ 676, 677. In Dawson *v.* Lawes, Kay, 280, an official bond had been given for faithful administration, and it was held that the surety was not discharged by the neglect of the proper parties to exercise that supervision over the official conduct of the principal which by statute it was their duty to exercise. The proposition is thus qualified, because in a variety of cases it is certainly very questionable whether the defence can be asserted at law, though there is no doubt that it can be asserted in all cases in equity. It has indeed been said by a learned court, that there is nothing in the nature of a defence by a surety to make it peculiarly a subject of equity jurisdiction; and that whatever would exonerate a surety in one court, ought to exonerate him in the other. The People *v.* Janssen, 7 John. Rep. 332; S. P. 2 John. Ch. R. 554, 557. But this doctrine does not seem to be universally adopted; and certainly it has not been acted upon in England to the extent which its terms seem to import. See Theobald on Principal and Surety, pp. 117 to 138.

which it furnishes, the latter is discharged from liability on the bond to the extent of the value of the property thus surrendered.[1]]

§ 450. **New Contract with Principal without Assent of Surety, Relieves the Surety.** — It is upon this ground that if a creditor without any communication with the surety and assent on his part should afterwards enter into any new contract with the principal inconsistent with the former contract, or should stipulate in a binding manner upon a sufficient consideration for further delay and postponement of the day of payment of the debt, that will operate in equity as a discharge of the surety.[2] But there is no positive duty incumbent on the creditor to prosecute measures

[1] Wood *v.* Brown, 104 Fed. 203, 43 C. C. A. 474; Beacon Trust Co. *v.* Robbins, 173 Mass. 261, 53 N. E. 868; Pierce *v.* Atwood, 64 Neb. 92, 89 N. W. 669; Evans *v.* Kister, 92 Fed. 828, 35 C. C. A. 28; Finnegan *v.* Janeway, 85 Minn. 384, 89 N. W. 4; State Bank *v.* Bartle, 114 Mo. 276, 21 S. W. 816.

[2] Skip *v.* Huey, 3 Atk. 91; Boultbee *v.* Stubbs, 18 Ves. 20; Ludlow *v.* Simond, 2 Cain. Cas. Err. 1; King *v.* Baldwin, 2 John. Ch. R. 554; 17 John. R. 384; Ex parte Gifford, 6 Ves. 805; Rees *v.* Berrington, 2 Ves. jr. 540; Blake *v.* White, 1 Younge & Coll. 420. Quære, whether a surety on a bond for the fidelity of a party for an indefinite period can by notice to the obligee terminate his liability. See Gordon *v.* Gordon, 2 Sim. R. 253; s. c. 4 Russ. R. 581; Bonser *v.* Cox, 6 Beav. R. 379.

Reservation of Rights. — The text assumes that the surety's rights against his principal have for a time at least been interfered with. Tucker *v.* Laing, 2 Kay & J. 745. A creditor may however save his rights against the surety by expressly reserving them. Pannell *v.* McMechen, 4 Har. & J. 598; Clagett *v.* Salmon, 6 Gill & J. 314; Sohier *v.* Loring, 6 Cush. 537; Morse *v.* Huntington, 40 Vt. 488; Hagey *v.* Hill, 75 Pa. St. 108; Overend *v.* Oriental Corp., L. R. 7 H. L. 348; Nichols *v.* Norris, 3 Barn. & Ad. 41; Kearsley *v.* Cole, 16 Mees. & W. 127; Boaler *v.* Mayor, 19 C. B. N. S. 76; Webb *v.* Hewitt, 3 Kay & J. 438; Green *v.* Wynn, L. R. 7 Eq. 28; s. c. 4 Ch. 204. Nor need the creditor communicate the arrangement to the surety. Webb *v.* Hewitt. But when the agreement to extend the time is in writing, the reservation must be embraced in it or in some writing which can be connected with it under the rule concerning parol evidence. Hagey *v.* Hill, supra.

It may result from such an arrangement that the principal debtor may get little benefit out of it; for by the agreement the creditor may call upon the surety for payment at the maturity of the debt, and the surety, not having assented, may thereupon sue the principal debtor. But that is the latter's own affair; he has made the arrangement and must abide by it. Sohier *v.* Loring; Hagey *v.* Hill; Webb *v.* Hewitt; Clagett *v.* Salmon. Hence the surety, not being injured, is bound by the reservation.

If however the creditor has given the principal debtor a full technical release, and not merely agreed not to sue him, or not to sue him before a stated time (that will be a question of construction), there can be no reservation of rights, as such a release is a conveyance of the creditor's property, and he has nothing left to sue upon. See Sohier *v.* Loring, supra; Nicholson *v.* Revill, 4 Ad. & E. 675; Kearsley *v.* Cole, 16 Mees. & W. 128; Webb *v.* Hewitt, supra. And though he may have agreed only

of active diligence; and therefore mere delay on his part (at least if some other equity does not interfere), unaccompanied by any valid contract for such delay, will not amount to laches so as to discharge the surety.[1] On the other hand if the creditor has any security from the debtor and he parts with it without communication with the surety, or by his gross negligence it is lost,[2] that will operate at least to the value of the security to discharge the surety.[3]

§ 451. **Sureties May Compel Debtor to Exonerate Them upon Their Payment of the Debt.** — Sureties also are entitled to come into a Court of Equity, after a debt has become due, to compel the debtor to exonerate them from their liability by paying the debt.[4] And although (as we have seen) the creditor is not bound

not to sue, still if he has agreed to indemnify the principal debtor from liability, the same result will of course transpire; for if on payment by the surety the surety should sue his principal, the creditor would be bound under the agreement to assume the defence.

But the agreement, though there be no reservation, must be valid to discharge the surety. McLemore *v.* Powell, 25 U. S. 554, 6 L. Ed. 726. Even then the surety will not be discharged if the agreement was made with a stranger. Frazer *v.* Jordan, 8 El. & B. 303. Or with a principal debtor in bankruptcy. Tiernan *v.* Woodruff, 5 McLean, 350.

There can of course be no reservation such as will hold the surety if the creditor has, without his consent, surrendered any security to the principal debtor to the right to which the surety on payment would be subrogated. Hagey *v.* Hill, 75 Pa. St. 108; Mayhew *v.* Boyd, 5 Md. 102. But perhaps if the security was for a less sum than the debt, the creditor could reserve for the difference.

Many of the cases above cited are cases of bills or notes, but the rule as to arrangements with the acceptor or maker is, in regard to its effect upon indorsers, the same as in ordinary cases of principal and surety. Sohier *v.* Loring, 6 Cush. 537.

[1] Wright *v.* Simpson, 6 Ves. 734; Heath *v.* Hay, 1 Y. & Jerv. 434; United States *v.* Kirkpatrick, 22 U. S. 720, 6 L. Ed. 199; McLemore *v.* Powell, 25 U. S. 554, 6 L. Ed. 726; Joslyn *v.* Smith, 3 Weston (Verm.), R. 353. Unless the Statute of Limitations has run out against a co-surety of a surety who is now sued. See supra, § 449, note (*a*).

[2] But see Lang *v.* Brevard, 3 Strob. Eq. 59, where it was held that the neglect of the creditor to record a mortgage given by the principal debtor did not discharge the surety. See also Pickens *v.* Finney, 12 Smedes & M. 468.

See also Schroeppell *v.* Shaw, 3 Comst. 460. Even where the security is parted with under misapprehension, the result appears to be the same. Ex parte Wilson, 11 Ves. 410 (as to which see Scholefield *v.* Templer, Johns. 155). See also Maquoketa *v.* Willey, 35 Iowa, 232; Pleasanton's Appeal, 75 Pa. St. 344; Harriman *v.* Egbert, 36 Iowa, 270; Hayes *v.* Little, 52 Ga. 555.

[3] Mayhew *v.* Crickett, 2 Swanst. R. 185, 191, and note (*a*); Law *v.* East India Company, 4 Ves. 833; Capel *v.* Butler, 2 Sim. & Stu. R. 457.

[4] Nisbet *v.* Smith, 2 Bro. Ch. R. 579; Lee *v.* Brook, Moseley, R. 318; Cox *v.* Tyson, 1 Turn. & Russ. R. 395; Wilson *v.* Carrico, 50 W. Va. 336.

by his general duty to active diligence in collecting the debt, yet it has been said that a surety, when the debt has become due, may come into equity and compel the creditor to sue for and collect the debt from the principal, at least if he will indemnify the creditor against the risk, delay, and expense of the suit.[1] But whether the surety can thus compel the creditor to sue the principal or not, he has a clear right, upon paying the debt to the principal, to be substituted in the place of the creditor as to all securities held by the latter for the debt, and to have the same benefit that he would have therein.[2] This however is not the place to consider at large the general rights and duties of persons standing in the relation of creditors, debtors, and sureties, and we shall have occasion again to advert to the subject when considering the marshalling of securities in favor of sureties.[3]

§ 452. **Fraud in Procuring an Oppressive Bargain.** — Let us now pass to the consideration of the third class of constructive frauds, combining in some degree the ingredients of the others, but prohibited mainly because they unconscientiously compromit or injuriously affect the private rights, interests, or duties of the parties themselves, or operate substantially as frauds upon the private rights, interests, duties, or intentions of third persons.

40 S. E. 439; Dobie *v.* Fidelity & Casualty Co. of New York, 95 Wis. 540, 70 N. W. 482.

[1] Hayes *v.* Ward, 4 John. Ch. R. 123, 131, 132; King *v.* Baldwin, 2 John. Ch. R. 554; s. c. 17 John. Rep. 384; Wright *v.* Simpson, 6 Ves. 734; Bishop *v.* Day, 13 Vt. 81. See Gilliam *v.* Esselman, 5 Sneed, 86.

[2] See Langthorne *v.* Swinburne, 14 Ves. 162; Wright *v.* Morley, 11 Ves. 12, 22; Hayes *v.* Ward, 4 John. Ch. R. 123.

[3] Post, § 858. Contracts of suretyship limited by time are usually construed strictly in favor of the surety, on a question of liability where there has been a renewal or prolongation of the contract. Thus two bankers carried on business under articles of partnership, which provided that if at the end of five years (the term fixed also for the suretyship), either should wish to carry on the business and should not take the share of the other at a valuation, the assets should be realized, the debts paid, and the surplus divided. One of the partners had procured a surety to indemnify the other against all loss in respect of the partnership, and the business of the bank was continued for upwards of a year after the expiration of the term above mentioned. It was held that the surety's liability expired with the five years, at least in equity. Small *v.* Currie, 5 DeG. M. & G. 141. See also Watson *v.* Allcock, 4 DeG. M. & G. 242; Bonar *v.* McDonald, 3 H. L. Cas. 226; Railton *v.* Mathews, 10 Clark & F. 934; Chelmsford Co. *v.* Demarest, 7 Gray, 1; Middlesex Mfg. Co. *v.* Lawrence, 1 Allen, 339; Dedham Bank *v.* Chickering, 3 Pick. 341; Amherst Bank *v.* Root, 2 Met. 522; Lexington R. Co. *v.* Elwell, 8 Allen, 371. Subject to the rule of strict construction in favor of the surety, the whole question is of course one of interpretation. See 2 Story, Contracts, § 1123 (5th. ed.), where many cases are stated.

§ 453. **Same.** — With regard to this last class much that has been already stated under the preceding head of positive or actual fraud as to unconscionable advantages, overreaching, imposition, undue influence, and fiduciary situations, may well be applied here, although certainly with diminished force, as the remarks there made did not turn exclusively upon constructive fraud.

§ 454. **Enforcement of Parol Contract, though It Be Required To Be in Writing.** — To this same class may also be referred many of the cases arising under the Statute of Frauds,[1] which requires certain contracts to be in writing in order to give them validity. In the construction of that statute a general principle has been adopted that, as it is designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. Hence in a variety of cases where from fraud, imposition, or mistake a contract of this sort has not been reduced to writing, but has been suffered to rest in confidence or in parol communications between the parties, Courts of Equity will enforce it against the party guilty of a breach of confidence who attempts to shelter himself behind the provisions of the statute.[2] Some instances of this sort have been already mentioned, and others again will occur in the subsequent pages.[3]

§ 455. **Strict Rules of Law Will Not Generally Prevent Equitable Interference.** — And here we may apply the remark that the proper jurisdiction of Courts of Equity is to take every one's act according to conscience, and not to suffer undue advantage to be taken of the strict forms of law or of positive rules.[4] Hence it is that even if there be no proof of fraud or imposition, yet, if upon the whole circumstances the contract appears to be grossly against conscience or grossly unreasonable and oppressive, Courts of Equity will sometimes interfere and grant relief,[5] although they certainly are very cautious of interfering, unless upon very strong circumstances.[6] But the mere fact that the bargain is a very

[1] Stat. 29 Charles 2d, ch. 3, §§ 1, 4.

[2] See 3 Wooddes. Lect. 57, pp. 431, 432; Montecute *v.* Maxwell, 1 P. Will. 619, 620; 1 Eq. Abridg. 19; Attorney-Gen. *v.* Sitwell, 1 Younge & Coll. 583; ante, §§ 157, 161, and note.

[3] Ante, § 230; post, §§ 502, 752 to 766.

[4] Chesterfield *v.* Janssen, 2 Ves. 137, arguendo.

[5] Nott *v.* Hill, 1 Vern. R. 167, 211; s. c. 2 Vern. 26; Bearry *v.* Pitt, 2 Vern. 14; Chesterfield *v.* Janssen, 2 Ves. 145, 148, 154, 155, 158; Twistleton *v.* Griffith, 1 P. Will. 310; Cole *v.* Gibbons, 3 P. Will. 290; Bowes *v.* Heaps, 3 Ves. & B. 117; Gwynne *v.* Heaton, 1 Bro. Ch. R. 1; Collins *v.* Hare, 2 Bligh, R. 106, N. S.

[6] In some cases of grossly unreasonable contracts relief may be had, even

hard or unreasonable one is not generally sufficient per se to induce these courts to interfere.[1] And indeed it will be found that there are very few cases not infected with positive or actual fraud in which they do interfere, except where the parties stand in some very peculiar predicament, and in some sort under the protection of the law from age, or character, or relationship.[2]

§ 456. **Assignment of Wages by Sailor Viewed with Suspicion.** — One of the most striking cases in which the courts interfere is in favor of a very gallant but strangely improvident class of men, who seem to have mixed up in their character qualities of very opposite natures, and who seem from their habits to require guardianship during the whole course of their lives; having at the same time great generosity, credulity, extravagance, heedlessness, and bravery. Of course it will be at once understood that we here speak of common sailors in the mercantile and naval service. Courts of Equity are always disposed to take an indulgent consideration of their interests, and to treat them in the same light with which young heirs and expectants are regarded. Hence it is that contracts of seamen respecting their wages and prize-money are watched with great jealousy, and are generally relievable whenever any inequality appears in the bargain or any undue advantage has been taken. It has been remarked by a learned judge that this title to relief arises from a general head of equity, partly on account of the persons with whom the transaction is had, and partly on account of the value of the thing purchased.[3] And he added that he was warranted

at law; as in the case of a contract to pay for a horse a barleycorn a nail, doubling it every nail, and there were thirty-two nails in the shoes of the horse. James *v.* Morgan, 1 Lev. 111, cited 2 Ves. 155; 1 Atk. 351, 352; Whalley *v.* Whalley, 3 Bligh, R. 1.

[1] Willis *v.* Jernegan, 2 Atk. 251, 252. See 1 Fonbl. Eq. B. 1, ch. 2, § 10, and note (*h*); Proof *v.* Hines, Cas. T. Talb. 111; Ramsbottom *v.* Parker, 6 Madd. R. 5; 2 Swanst. R. 147, note (*a*), and especially under page 150, the Reporter's citation from Lord Nottingham's MSS. of the case of Berney *v.* Pitt, and the remarks of Lord Hardwicke on this case, in 1 Atk. R. 352, and 2 Ves. 157; Freeman *v.* Bishop, 2 Atk. 39.

[2] See Huguenin *v.* Baseley, 14 Ves. 271. And see Mr. Swanston's valuable note to Davis *v.* Duke of Marlborough, 2 Swanst. 147, note (*a*); Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 399; Thornhill *v.* Evans, 2 Atk. 330.

[3] Sir Thomas Clarke, in Howe *v.* Wheldon, 2 Ves. 516, 518; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (*k*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 1, p. 401; 3 P. Will. 131, Cox's note 1; Taylor *v.* Rochfort, 2 Ves. 281; Baldwin *v.* Rochfort, 1 Wils. R. 229. Yet it is obvious that Lord Hardwicke in Chesterfield *v.* Janssen, 2 Ves. 137, did not contemplate them as entitled to such peculiar protection; for he puts their case as not relievable.

in saying that they were to be viewed in as favorable a light as young heirs are, by what has been often said in cases of this kind, and what has been done by the Legislature itself, which has considered them as a class of men loose and unthinking, who will almost for nothing part with what they have acquired, perhaps with their blood.[1]

§ 457. **Contracts Made in Behalf of Other Persons Must Be in Good Faith.** — But the great class of cases in which relief is granted under this third head of constructive fraud is that where the contract or other act is substantially a fraud upon the rights, interests, duties, or intentions of third persons. And here the general rule is, that particular persons in contracts and other acts shall not only transact bona fide between themselves, but shall not transact mala fide in respect to other persons who stand in such a relation to either as to be affected by the contract or the consequences of it.[2] And as the rest of mankind besides the parties contracting are concerned, the rule is properly said to be governed by public utility.[3]

§ 458. **Contracts with Heirs, Reversioners and Expectants Viewed with Suspicion.** — It is upon this ground that relief has been constantly granted in what are called catching bargains with heirs, reversioners, and expectants, during the life of their parents or other ancestors.[4] Many and indeed most of these cases (as has been pointedly remarked by Lord Hardwicke) "have been mixed cases, compounded of almost every species of fraud, there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting, from weakness on one side and usury on the other, or extortion or advantage taken of that weakness. There has always been an appearance of fraud from the nature of the bargain, even if there be no proof of any circumvention, but merely from the intrinsic unconscionableness

"The contracts of sailors, selling their shares before they knew what they were, could not be set aside here." But see the cases in 1 Wilson, R. 229; 2 Ves. 218.

[1] Howe *v.* Wheldon, 2 Ves. 516. See also the admirable opinion of Lord Stowell, in the Juliana, 2 Hagg. Adm. Rep. 504. But see Griffith *v.* Spratley, 1 Cox, R. 383.

[2] Per Lord Hardwicke, in Chesterfield *v.* Janssen, 2 Ves. 156, 157.

[3] Chesterfield *v.* Janssen, 2 Ves. 156, 157; 1 Madd. Ch. Pr. 97, 98, 99, 214; 1 Eq. Abridg. 90, &c.

[4] 1 Fonbl. Eq. B. 1, ch. 2, § 12, and note (*k*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 397, &c.; Davis *v.* Duke of Marlborough, 2 Swanst. R. 147, 151, 152, 165, 174.

of the bargain. In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement. The father, ancestor, or relation from whom was the expectation of the estate has been kept in the dark. The heir or expectant has been kept from disclosing his circumstances and resorting to them for advice which might have tended to his relief and also reformation. This misleads the ancestor who has been seduced to leave his estate not to his heir or family, but to a set of artful persons who have divided the spoil beforehand." [1]

§ 459. **Same.** — Strong as this language may appear, it is fully borne out by the general complexion of the cases in which relief has been afforded. Actual fraud indeed has not unfrequently been repelled.[2] But there has always been constructive fraud, the nature and circumstances of the transaction being an imposition and deceit upon third persons who were not parties to it. The relief is founded in part upon the policy of maintaining parental and quasi parental authority and preventing the waste of family estates. It is also founded in part upon an enlarged equity flowing from the principles of natural justice; upon the equity of protecting heedless and necessitous persons against the designs of that calculating rapacity which the law constantly discountenances; of succoring the distress frequently incident to the owners of unprofitable reversions; and of guarding against the improvidence with which men are commonly disposed to sacrifice the future to the present, especially when young, rash, and dissolute.[3]

[1] Lord Hardwicke, in Chesterfield *v.* Janssen, 2 Ves. 157; Earl of Aldborough *v.* Frye, 7 Clark & Finn. 436.

[2] Bowes *v.* Heaps, 3 Ves. & Beam. 117, 119; Peacock *v.* Evans, 16 Ves. 512.

[3] See Davis *v.* Duke of Marlborough, 2 Swanston, 147, 148, the Reporter's note; Twistleton *v.* Griffith, 1 P. Will. 310; Cole *v.* Gibbons, 1 P. Will. 293; Baugh *v.* Price, 1 Wils. R. 320; 2 Ves. 144, 155; Barnardiston *v.* Lingood, 2 Atk. 135, 136; Bowes *v.* Heaps, 3 Ves. & Beam. 117, 119, 120; Walmesley *v.* Booth, 2 Atk. 27, 28; 1 Madd. Ch. Pr. 97, 98, 99; Hall *v.* Hall, 153 Ky. 379, 155 S. W. 755.

This species of assignment at law conveys nothing, and in equity it must be founded upon a valuable, not merely a good, consideration. In re Lennig's Estate, 182 Pa. St. 485, 38 Atl. 466, 38 L. R. A. 378, 61 Am. St. Rep. 725; Hall *v.* Hollon, 90 Tex. 427, 39 S. W. 287, 36 L. R. A. 75, 59 Am. St. Rep. 819.

The assignment might be ratified by the heir upon reaching his majority, and thus make the voidable estate certain. Dunham *v.* Bentley, 103 Iowa, 136, 72 N. W. 437.

But the fact that the ancestor was insane and knew nothing of the giving of the deed by plaintiff, her heir, to defendant, can make no difference. All such contracts are regarded by the law with disfavor, and are

§ 460. **Burden of Proof to Show Absence of Fraud Is upon Party Who Deals with Heir.** — Indeed in cases of this sort Courts of Equity have extended a degree of protection to the parties approaching to an incapacity to bind themselves absolutely by any contract, and, as it were, reducing them to the situation of infants in order to guard them against the effects of their own conduct.[1] Hence it is that in all cases of this sort it is incumbent upon the party dealing with the heir, or expectant, or reversioner, to establish not merely that there is no fraud, but (as the phrase is) to make good the bargain; that is, to show that a fair and adequate consideration has been paid.[2] For in cases of this sort (contrary to the general rule) mere inadequacy of price or compensation is sufficient to set aside the contract.[3] The relief is granted upon the general principle of mischief to the public, without re-

presumed to be founded in fraud or oppression, so much so that one who attempts the enforcement of such a contract must allege and prove that there was neither fraud nor oppression before he is entitled to any consideration. McClure *v.* Raben, 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 558.

There are cases in some of the States in conflict with this rule. See Gatzert *v.* Lucey, 218 Fed. 395; Blackwell *v.* Harrison, 99 S. C. 264, 84 S. E. 233.

The courts are generally disposed to uphold these contracts, when they are evidenced by writing, signed by the parent, and fairly executed, free from any resemblance of fraud or over-reaching. Elliott *v.* Leslie, 124 Ky. 553, 99 S. W. 619, 124 Am. St. Rep. 418; In re Garcelon's Estate, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 597, 43 Am. St. Rep. 134; McCall's Admr. *v.* Hampton, 98 Ky. 166, 32 S. W. 406, 56 Am. St. Rep. 335, 33 L. R. A. 266; Clendening *v.* Wyatt, 54 Kans. 523, 38 Pac. 792, 33 L. R. A. 278. See Butler *v.* Duncan, 47 Mich. 94; Godfray *v.* Godfray, 12 Jur. N. S. 397, in the Privy Council. The relief is grantable not only in the case of an heir; it may equally be given in the case of a younger son in England who has no expectancy except as founded upon his father's position; as where money has been loaned to a younger son without thought of repayment by him, but on the credit of such general expectancy and in the hope of extorting money from the father to prevent having his son made a bankrupt. Nevill *v.* Snelling, 15 Ch. D. 679.

[1] Gwynne *v.* Heaton, 1 Bro. Ch. R. 1, 9; Peacock *v.* Evans, 16 Ves. 512, 514.

[2] Earl of Aldborough *v.* Frye, 7 Clark & Finn. 436, 456. In this case Lord Cottenham said: "It appears to be established by several cases, that where a party deals with an expectant heir, the onus is upon him to show that he gave a fair price."

[3] Peacock *v.* Evans, 16 Ves. 512, 514; Gowland *v.* De Faria, 17 Ves. 20; Bernal *v.* Donegal, 1 Bligh (N. S.), 594; Hincksman *v.* Smith, 3 Russ. R. 433; Earl of Aldborough *v.* Frye, 7 Clark & Finn. 436; Bacon *v.* Bonham, 33 N. J. Eq. 614; Edwards *v.* Browne, 2 Colly, 100; Boothby *v.* Boothby, 15 Beav. 212; St. Albyn *v.* Harding, 27 Beav. 11. Slight inadequacy is enough to justify interference. Foster *v.* Roberts, 7 Jur. (N. S.) 400; S. C. 29 Beav. 467; Jones *v.* Ricketts, 8 Jur. (N. S.) 1198; S. C. 31 Beav. 130;

quiring any particular evidence of imposition, unless the contract is shown to be above all exception.[1] But it is not necessary in cases of this sort to establish in evidence that the full value of the reversionary interest or other expectancy has been given according to the ordinary tables for calculations of this sort. It will be sufficient to make the purchase unimpeachable, if a fair price or the fair market price be given therefor at the time of the dealing.[2]

§ 461. **Frauds upon Expectant Heirs under Pecuniary Embarrassment.** — The doctrine applies, as we have seen, not merely to heirs dealing with their expectancies, but to reversioners and remainder-men dealing with property already vested in them but of which the enjoyment is future, and is therefore apt to be underestimated by the giddy, the necessitous, the improvident, and the young.[3] According however to the decisions, age does not seem to make much difference as to the protection afforded to expectant heirs; since the aim of the rule is chiefly directed to prevent deceit and imposition upon parents and other ancestors.[4] And in regard to reversioners and remainder-men, if they are at the time necessitous, and laboring under pecuniary distress and embarrassment, an equally indulgent protection will also be afforded to them.[5]

Perfect *v.* Lane, 30 Beav. 197; Nesbitt *v.* Berridge, 9 Jur. (N. S.) 1044; S. C. 32 Beav. 282; Clark *v.* Malpas, 31 Beav. 80; Baker *v.* Monk, 10 Jur. (N. S.) 624; S. C. 33 Beav. 419; Douglas *v.* Culverwell, 3 Giff. 251, aff. 6 Law T. (N. S.) 272.

[1] Walmesley *v.* Booth, 2 Atk. 28; 1 Madd. Ch. Pr. 97, 98; Sir John Strange, in Chesterfield *v.* Janssen, 2 Ves. 149; Gwynne *v.* Heaton, 1 Bro. Ch. R. 1, 9; Hincksman *v.* Smith, 3 Russ. R. 433; Ryle *v.* Brown and Swindell, 1 M'Clel. R. 519; S. C. 13 Price, R. 758; Earl of Aldborough *v.* Frye, 7 Clark & Finn. 436, 456.

[2] Headen *v.* Rosher, M'Clel. & Younge, R. 89; Potts *v.* Curtis, 1 Younge, R. 543; Earl of Aldborough *v.* Frye, 7 Clark & Finn. 436, 458 to 461.

[3] Gowland *v.* De Faria, 17 Ves. 20; Peacock *v.* Evans, 16 Ves. 512; Mr. Swanston's note, 2 Swanston, 147, 148; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (*k*). But see Nichols *v.* Gould, 2 Ves. 422.

[4] Davis *v.* Duke of Marlborough, 2 Swanst. R. 151; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (*k*); Ormond *v.* Fitzroy, 3 P. Will. 131; Wiseman *v.* Beake, 2 Vern R. 121.

[5] Ibid.; Wood *v.* Abrey, 3 Madd. R. 418, 422; Chesterfield *v.* Janssen, 2 Ves. 157, 158; 1 Atk. 353; Gwynne *v.* Heaton, 1 Bro. Ch. R. 1, 9. It is declared to be the imperative duty of the purchaser of a reversion from an expectant heir to preserve evidence of the bona fides of the transaction, and that the sale was for a full consideration, on pain of having the same set aside. Salter *v.* Bradshaw, 5 Jur. (N. S.) 831; S. C. 26 Beav. 161. See also Lowry *v.* Spear, 7 Bush, 451; Bowes *v.* Heaps, 3 Ves. & B. 117; Edwards *v.* Burt, 2 DeG. M. & G. 55; Hannah *v.* Hodson, 5 Law T. (N. S.)

§ 462. **Same.** — The ground of the interposition of Courts of Equity in cases of reversioners and remainder-men has been commented on by a late learned judge with great clearness. "At law and in equity also," says he, "generally speaking, a man who has a power of disposition over his property, whether he sells to relieve his necessities or to provide for the convenience of his family, cannot avoid his contract upon the mere ground of inadequacy of price. A Court of Equity however will relieve expectant heirs and reversioners from disadvantageous bargains. In the earlier cases it was held necessary to show that undue advantage was actually taken of the situation of such persons. But in more modern times it has been considered not only that those who were dealing for their expectations, but those who were dealing for vested remainders also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose upon all who

42. And this rule has been applied to a charge as well as to sales, in one case where the heir was of full age and perfectly understood the nature and extent of the transaction. Bromley *v.* Smith, 5 Jur. (N. S.) 833; S. C. 28 Beav. 644. The rule applies also to the case of a lease. Grosvenor *v.* Sherratt, 28 Beav. 659. And to a mortgage. Tottenham *v.* Emmet, 14 Week. R. 3. But a person entitled to a present income out of which an annuity is payable is not within the rule. Webster *v.* Cook, L. R. 2 Ch. 542. And equity has refused to set aside the sale of a legacy of fixed amount payable at a fixed time, though made several years before it was due, and though the legatee was a dissipated, improvident, and weak-minded young man, and the price inadequate. Parmelee *v.* Cameron, 41 N. Y. 392.

The sale of reversionary and the like interests for the purposes of real family settlements appears to be regarded with little or no suspicion. Talbot *v.* Staniforth, 1 Johns. & H. 484; S. C. 7 Jur. (N. S.) 961, and 8 Jur. N. S. 757; Jenner *v.* Jenner, 2 DeG. F. & J. 359. See Firmin *v.* Pulham, 2 DeG. & S. 99; Willoughby *v.* Brideoke, 13 Week. R. 515; Shafts *v.* Adams, 4 Giff. 492; S. C. 10 Jur. (N. S.) 121. But to establish the validity of a transaction, not otherwise valid, on the ground that it is a family arrangement, the facts should be fully disclosed whether asked for or not. Greenwood *v.* Greenwood, 2 DeG. J. & S. 28.

If a creditor obtain security for a debt by a conveyance from the debtor's son, it is held to be incumbent upon him to show that the son understood the transaction, and that he did not execute the instrument by reason of any undue influence from the father. Berdoe *v.* Dawson, 11 Jur. (N. S.) 254; S. C. 34 Beav. 603. And in Chambers *v.* Crabbe, 11 Jur. (N. S.) 277; S. C. 34 Beav. 457, an assignment by a daughter for the benefit of her mother, the daughter at the time contemplating marriage, and the conveyance being made without the knowledge of the intended husband, was set aside both on the ground of undue influence and of fraud upon the husband's marital rights. But the sale will not be set aside if not unfair. Potts *v.* Surr, 34 Beav. 543. See also Rhodes *v.* Bate, 11 Jur. (N. S.) 803; S. C. L. R. 1 Ch. 252; Williams *v.* Williams, 2 Drew. & S. 378.

deal with expectant heirs and reversioners the onus of proving that they had paid a fair price, and otherwise to undo their bargains and compel a reconveyance of the property purchased.[1] The principle and the policy of the rule may both be equally questionable. Sellers of reversions are not necessarily in the power of those with whom they contract, and are not necessarily exposed to imposition and hard terms. And persons who sell their expectations and reversions from the pressure of distress are thrown by the rule into the hands of those who are likely to take advantage of their situation, for no person can securely deal with them. The principle of the rule cannot however be applied to sales of reversions by auction.[2] There being no treaty between the vendor and the purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser. The vendor is in no sense in the power of the purchaser. The sale at auction is evidence of the market price." This language however, correct as it may be in its application to the case before the court, where the purchaser had no knowledge of the vendor or his circumstances, or even knew his name, until after the purchase at public auction he applied for an abstract of the title, must not be interpreted to extend to all cases of sales at public auction; and especially where there had been a previous treaty in negotiation between the vendor and the purchaser, or a private sale, and the embarrassment and distress of the vendor is fully known, and

[1] S. P. Bowtree *v.* Watson, 3 Mylne & Keen, 340; Newton *v.* Hunt, 5 Sim. R. 511; Edwards *v.* Burt, 2 DeG. M. & G. 55.

[2] Sir John Leach, in Shelley *v.* Nash, 3 Madd. 232. And see Peacock *v.* Evans, 16 Ves. 514, 515; 1 Madd. Ch. Pr. 98, 99. Mr. Swanston is of opinion that though the principle of the relief afforded to reversioners by its generality seems to extend to every description of persons, dealing for or with a reversionary interest, yet it may be doubted whether, in order to constitute a title to relief, the reversioner must not also combine the character of heir. He has collected and compared the cases. Mr. Fonblanque manifestly does not contemplate any such limitation of the doctrine. He says: "The real object which the rule proposes, being to restrain the anticipation of expectancies, which must, from its very nature, furnish to designing men an opportunity to practise upon the inexperience or passion of a dissipated man, its operation is not confined to heirs, but extends to all persons the pressure of whose wants may be considered as obstructing the exercise of that judgment which might otherwise regulate their dealings." 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*k*). In Wood *v.* Abrey, 3 Madd. Rep. 423, the Vice-Chancellor said: "The policy of this rule as to reversions may be well doubted; and if the cases were looked into it might be found that the rule was *originally* referred only to expectant heirs and not to reversioners." See also Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, pp. 398, 399; Hincksman *v.* Smith, 3 Russell, R. 433. See also Newton *v.* Hunt, 5 Sim. R. 511.

the public auction is resorted to by the parties, either by design or by management, to cover up the transaction or to disguise its true character from the public. To make the sale and the purchase of the reversion valid under any circumstances, it should clearly appear that the auction is free, fair, and with the ordinary precautions.[1] The reason is plain. Where the sale at public auction is free, fair, and with the ordinary precautions, the fair market price is presumed to be obtained. But if the sale at public auction be obtained under circumstances which establish clearly that the fair market value has not been obtained, and that reasonable precautions and advertisements have not been used for this purpose, and that the parties have connived in such a manner as to make the sale appear to be a public and a free sale when it is in fact a mere cover of a private arrangement, then no such inference can arise in favor of the bona fides of the auction.[2]

§ 463. **Rule Does Not Apply Where Parent Has Stood by and Consciously Allowed Son to Obtain an Undue Advantage.** — The whole doctrine of Courts of Equity with respect to expectant heirs and reversioners, and others in a like predicament, assumes that the one party is defenceless and is exposed to the demands of the other under the pressure of necessity. It assumes also that there is a direct or implied fraud upon the parent or other ancestor who from ignorance of the transaction is misled into a false confidence in the disposition of his property. Hence it should seem that one material qualification of the doctrine is the existence of such ignorance. If therefore the transaction has been fully made known at the time to the parent or other person standing in loco parentis,[3] as for example to the person from whom the spes successionis is entertained, or after the expiration of whose present estate the reversionary interest is to become vested in possession, and it is not objected to by him, the extraordinary protection generally afforded in cases of this sort by Courts of Equity will be withdrawn. A fortiori, it will be withdrawn if the transaction is expressly sanctioned or adopted by such parent, or other person standing in loco parentis.[4]

[1] Ibid.; post, § 347; Earl of Aldborough *v.* Frye, 7 Clark & Finn. 436, 456, 460, 461, 466.

[2] Ibid.

[3] See Jenkins *v.* Stetson, 9 Allen, 128; McBee *v.* Myers, 4 Bush, 356.

[4] King *v.* Hamlet, 4 Sim. R. 182; s. c. 2 Mylne & Keen, 473, 474. The judgment of Lord Brougham in this case, on this point, is very able, and deserves a thorough examination. His lordship on this occasion said: "Two propositions I take to be incontestable as applicable to the doctrines

And it has been strongly said, that it would be monstrous to treat the contracts of a person of mature age as the acts of an infant, when his parent was aware of his proceedings and did nothing to prevent them. The parent might thus lie by and suffer his son to obtain the assistance which he ought himself to

of this court upon the subject of an expectant heir dealing with his expectancy and as governing more especially the present question. First, that the extraordinary protection given in the general case must be withdrawn if it shall appear that the transaction was known to the father or other person standing in loco parentis, — the person, for example, from whom the spes successionis was entertained, or after whom the reversionary interest was to become vested in possession, — even although such parent or other person took no active part in the negotiation; provided the transaction was not opposed by him, and so carried through in spite of him. Secondly, that if the heir flies off from the transaction and becomes opposed to him with whom he has been dealing and repudiates the whole bargain, he must not in any respect act upon it so as to alter the situation of the other party or his property; at least that if he does so, the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing. Still more fatal to his claim of relief will it be if the father, or person in loco parentis, shall be found to have concurred in this adoption of the repudiated contract. Either of these propositions would be decisive of the present question, if they are well founded in law and if the facts allow of their application to it. I shall examine each of them in both respects. The whole doctrine with respect to an expectant heir assumes that the one party is defenceless, and exposed, unprotected, to the demands of the other, under the pressure of necessity. It would be monstrous to treat the contracts of a person of mature age as the acts of an infant, when his parent was aware of his proceedings and did nothing to prevent them. The parent might thus lie by and suffer his son to obtain the assistance which he ought himself to have rendered; and then only stand forward to aid him in rescinding engagements which he had allowed him to make and to profit by. If all the cases be examined from the time of Lord Nottingham downwards, no trace will be found in any one of them of the father's or other ancestor's privity. On the contrary wherever the subject is touched upon his ignorance is always assumed as part of the case; and its being so seldom mentioned either way shows clearly that the privity of the father or ancestor never was contemplated. It is however several times adverted to in a manner demonstrative of the principle. In Cole *v.* Gibbons (3 P. Wms. 290) the ground of this whole equity is said to be the policy of the law to prevent the heir being seduced from a dependence upon the ancestor who probably would have relieved him. In the same spirit Lord Cowper, in Twistleton *v.* Griffith (1 P. Wms. 310), had before stated, as one effect of the law, its tendency, by cutting off relief at the hands of strangers, to make the heir disclose his difficulties at home. So in The Earl of Chesterfield *v.* Janssen (1 Atk. 339), Mr. Justice Burnett treats such transactions as things done behind the father's back, and as it were a fraud upon him; a view of the subject also adopted by Lord Hardwicke in the same case (1 Atk. 333, 334). It is as well to mention these cases, because there has been no decision upon the point; but it is quite a clear one, and only new because the facts never afforded a case for decision, the proposition having apparently never been questioned."

have rendered, and then only stand forward to aid him in rescinding engagements which he had allowed him to make and to profit by.[1]

§ 464. **The Contract Must Be Made under the Pressure of Necessity.** — The other qualification of the doctrine is not less important. The contract must be made under the pressure of some necessity; for the main ground of the doctrine is the pressure upon the heir, or the distress of the party dealing with his expectancies, who is therefore under strong temptations to make undue sacrifices of his future interests.[2] Both of these qualifications need not indeed in all cases and under all circumstances concur to justify relief. It may be sufficient that either of them forms so essential an ingredient in the case as to give rise to a just presumption of constructive fraud.[3]

§ 465. **Same.** — The doctrine of Courts of Equity upon this subject, if it has not been directly borrowed from, does in no small degree follow out the policy of the Roman law in regard to heirs and expectants. By the Macedonian Decree (so called from the name of the usurer who gave occasion to it) all obligations of sons, contracted by the loan of money while they were living in subjection to the paternal authority and jurisdiction, were de-

[1] King *v.* Hamlet, 2 Mylne & Keen, 473, 474; s. c. 4 Sim. R. 185.

[2] King *v.* Hamlet, 4 Sim. R. 182; s. c. 2 Mylne & Keen, 473, 474.

[3] Earl of Portmore *v.* Taylor, 4 Sim. R. 182; Davis *v.* Duke of Marlborough, 2 Swanst. 139, 154. See also King *v.* Hamlet, 2 Mylne & Keen, 473, 474, 480. Lord Brougham on this occasion, addressing himself to this point, said: "The whole ground of the doctrine is the pressure upon the heir, or the distress of the party dealing with his expectancies. While he continues under that pressure the law (as Lord Thurlow said in Gwynne *v.* Heaton, 1 Bro. C. C. 1) treats him as an infant. But the infancy is determined when the pressure is removed. The protection which Sir William Grant well describes in Peacock *v.* Evans (16 Ves. 512) as approaching nearly to incapacity of contracting, must cease when the exigency of the case is at an end. When the expectant heir has himself thrown off the trammels which necessity had imposed on him, or rather had induced him to fetter himself withal, and has placed himself in an adverse attitude towards the other party, of whom he had become really independent, he must no longer be treated differently from other persons. From the rule to which all are subject he cannot be exempt, — the rule which forbids a party to repudiate a dealing of which he voluntarily and freely is availing himself. Least of all shall he be permitted to use for his own benefit, or, which is the same thing, to make away with, or in any manner place out of his reach, for his present benefit, the property of another, and then to repudiate the contract by which that property came into his possession. To hold that he was entitled to do this after the pressure of his circumstances had been removed, and merely because he owed the possession originally to the pressure of former difficulties, would be an extravagant stretch of the doctrines of this court."

clared null without distinction. And they were not allowed to be valid even after the death of the father; not so much out of favor to the son, as out of odium to the creditor who had made an unlawful loan, which was vicious in its origin as well as in its example. "Verba Senatusconsulti Macedoniani hæc sunt, &c. Placere, ne cui, qui filiofamilias mutuam pecuniam dedisset, etiam post mortem parentis ejus, cujus in potestate fuisset, actio petitioque daretur; ut scirent, qui pessimo exemplo fænerarent, nullius posse filiifamilias bonum nomen, expectata patris morte, fieri."[1] Upon this decree Lord Hardwicke has remarked that the Senate and law-makers in Rome were not so weak as not to know that a law to restrain prodigality, to prevent a son's running in debt in the life of his father, would be vain in many cases. Yet they made laws to this purpose; namely, the Macedonian Decree already mentioned, happy if they could in some degree prevent it: "Est aliquod prodire tenus."[2]

§ 466. **Post Obit Bonds Are Not Favored.** — It is upon similar principles that post obit bonds and other securities of a like nature are set aside when made by heirs and expectants. A post obit bond is an agreement, on the receipt of money by the obligor, to pay a larger sum, exceeding the legal rate of interest, upon the death of the person from whom he (the obligor) has some expectations, if he should survive him.[3] Such bonds operate as a virtual fraud upon the bounty of the ancestor, and disappoint his intentions generally by design, and usually in the event.

§ 467. **Sale of Inheritance in Lifetime of Ancestor Is Not Favored.** — A case of a very similar character is a contract by which an expectant heir, upon the present receipt of a sum of money, promises to pay over to the lender a large though an uncertain proportion of the property which might descend to him upon the death of his parent or other ancestor, if he should survive him. It is a fraud upon such parent or other ancestor, and introductive of the worst public mischiefs; for the parent or ancestor is thereby induced to submit in ignorance to the disposition which

[1] Dig. Lib. 14, tit. 6, l. 1; 1 Domat, Civil Law, B. 1, tit. 6, § 4, and art. 1, 2; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (*l*).

[2] Chesterfield *v.* Janssen, 2 Ves. 158.

[3] Boynton *v.* Hubbard, 7 Mass. R. 119; Chesterfield *v.* Janssen, 2 Ves. 157; 1 Atk. R. 352; Fox *v.* Wright, 6 Madd. R. 111; Wharton *v.* May, 5 Ves. 27; Cushing *v.* Townshend, 19 Ves. 628; Earl of Aldborough *v.* Frye, 7 Clark & Finn. 436. The right to relief against unconscionable interest on loans secured by mortgages of expectancies is not affected by a repeal of usury laws. Miller *v.* Cook, L. R. 10 Eq. 641; Tyler *v.* Yates, L. R. 11 Eq. 265; s. c. 6 Ch. 665.

the law makes of his estate, upon the supposition that it will go to his heir, when in fact a stranger is, against his will, made the substituted heir.[1] It might be very different if there was a fair although a secret agreement between all the heirs to share the estate equally; for such an agreement would have a tendency to suppress all attempts of one or more to overreach the others, as well as to prevent all exertions of undue influence.[2]

[1] Boynton *v.* Hubbard, 7 Mass. R. 112.

[2] Beckley *v.* Newland, 2 P. Will. 182; Wethered *v.* Wethered, 2 Sim. R. 183; Harwood *v.* Tooke, 2 Sim. R. 192; Hyde *v.* White, 5 Sim. R. 524. Mr. Chief Justice Parsons, in Boynton *v.* Hubbard (7 Mass. R. 112), expounded this whole subject with admirable fulness and force, and held that even at law such securities could be relieved against. I gladly extract the following passages from his opinion: "Another case is, where the deceit is upon persons not parties to the contract, as a deceit on a father or other relation, to whom the affairs of an heir or expectant are not disclosed; so that they are influenced to leave their fortunes to be divided amongst a set of dangerous persons and common adventurers, in fact, although not in form. This deceit is relieved against as a public mischief, destructive of a well-regulated authority or control of persons over their children or others having expectations from them, and as encouraging extravagance, prodigality, and vice. From the forms of proceeding in Courts of Equity, it must be admitted that these principles may often be more correctly applied there than in Courts of Law. Chancery may compel a discovery of facts which a Court of Law cannot; and from facts disclosed, a chancellor, as a judge of facts, may infer other facts, whence deceit, public or private, may be irresistibly presumed. Whereas at law fraud cannot be presumed, but must be admitted or proved to a jury. But when a Court of Law has regularly the fact of fraud admitted or proved, no good reason can be assigned why relief should not be obtained there, although not always in the same way in which it may be obtained in equity. A case in which an heir or expectant is frequently relieved against his own contract is a post obit bond. This is an agreement, on the receipt of a sum of money by the obligor, to pay a larger sum, exceeding the legal rate of interest on the death of the person from whom he has some expectation, if the obligor be then living. This contract is not considered as a nullity, but it may be made on reasonable terms, in which the stipulated payment is not more than a just indemnity for the hazard. But whenever an advantage is taken of the necessity of the obligor to induce him to make this contract, he is relieved as against an unconscionable bargain, on payment of the principal and interest. This contract may be made on data whence its reasonableness may be ascertained; for the lives of the obligor and of the person on whose death the payment is to be made are subject to be valued, as is done in insurances upon lives. But the covenant declared on in the case at bar is not in the nature of a post obit contract. Another case in which an heir is relieved is when he is entitled to an estate in reversion or remainder, expectant on the death of some ancestor or relative, and he contracts to sell the same for present money. All these cases are not relieved against as fraudulent, because a reasonable and sufficient consideration may be paid, as ascertained by the annual value of the estate, and of the intervening life. But, as in post obit contracts, when an advantage is taken by the purchaser of the necessity of the seller, he will be relieved against the sale on repaying the principal and interest, and sometimes paying for reason-

§ 468. **Contracts for Purchase from Heir Expectant Are Good as a Security for the Amount Paid.** — From what has been already said, it follows, as a natural inference, that contracts of this sort are not in all cases utterly void; but they are subject to all real and just equities between the parties, so that there shall be no inadequacy of price and no inequality of advantages in the bargain. If in other respects these contracts are perfectly fair, Courts of Equity will permit them to have effect as securities for the sum to which ex æquo et bono the lender is entitled; for he

able repairs made by the purchaser. This relief is granted on the ground that the contract of sale was unconscionable. In unconscionable post obit contracts, Courts of Law may, when they appear, in a suit commenced upon them, to have been against conscience, give relief by directing a recovery of so much money only as shall be equal to the principal received and the interest. But in sales of remainders and reversions, by grants executed, I know of no relief that Courts of Law can give, unless the grants shall appear to have been fraudulently obtained of the grantor; in which case the fraud will vitiate and render null the grants so infected. The contract before us is not a sale of a remainder or reversion, but is different from any noticed in the Reports that have been cited. There is one case of a contract between presumptive heirs, respecting their expectancies from the same ancestor. It is the case of Beckley *v.* Newland. The parties had married two sisters, presumptive heirs of Mr. Turgis. The husbands agreed that whatever should be given by Mr. Turgis should be equally divided between them. After Turgis's death the defendant, who had the greater part given to him, was compelled to execute the agreement. The reciprocal benefit of the chance was a sufficient consideration. The tendency of the agreement was to guard against undue influence over the testator; and it could not be unreasonable to covenant to do what the law would have done if Turgis had died intestate. The covenant declared on in the case at bar is an agreement by an heir, having two ancestors then living, an uncle and an aunt, that if he survive them, or either of them, he will convey to a stranger one-third part of all the estate, real and personal, which shall come to him from those ancestors or either of them, by descent, distribution, or devise. And it is found by the jury that this contract was not obtained from the heir by the fraud of the purchaser. If therefore this covenant is void, it must be on the principle that it is a fraud, not on either of the parties, for that the jury have negatived, but on third persons not parties to it, productive of public mischief, and against sound public policy. If the contract had this effect, it is apparent to the court from the record, the whole contract being a part of the record. And that a contract of this nature had this effect we cannot doubt. The ancestor, having no knowledge of the existence of the contract, is induced to submit his estate to the disposition of the law, which had designated the defendant as an heir. The defendant's agreement with the plaintiff is to substitute him as a co-heir with himself to his uncle's estate. The uncle is thus made to leave a portion of his estate to Boynton, a stranger, without his knowledge, and consequently without any such intention. This Lord Hardwicke calls a deceit on the ancestor. And what is the consequence of deceits of this kind upon the public? Heirs, who ought to be under the reasonable advice and direction of their ancestor, who has no other influence over them than what arises from a fear of his displeasure, from

who seeks equity must do equity; and therefore relief will not be granted upon such securities, except upon equitable terms.[1]

§ 469. **The Rule Ceases to Apply Where Pressure of Necessity Has Been Removed.** — And where, after the contemplated events have occurred, and the pressure of necessity has been removed, the party freely and deliberately and upon full information confirms the precedent contract or other transaction, Courts of Equity will generally hold him bound thereby;[2] for if a man is fully informed and acts with his eyes open, he may by a new agreement bar himself from relief.[3] But if the party is still acting under the

which fear the heirs may be induced to live industriously, virtuously, and prudently, are, with the aid of money speculators, let loose from this salutary control, and may indulge in prodigality, idleness, and vice, and taking care by hypocritically preserving appearances not to alarm their ancestor, may go on trafficking with his expected bounty, making it a fund to supply the wastes of dissipation and extravagance. Certainly the policy of the law will not sanction a transaction of this kind, from a regard to the moral habits of the citizens." An heir expectant may covenant, with the consent of his ancestor, to convey the estate to come to him from such ancestor, a fair consideration being paid. Fitch *v.* Fitch, 8 Pick. 480. See Trull *v.* Eastman, 3 Met. 123. The familiar case of title by estoppel may also be noticed. See Bigelow, Estoppel, ch. 11 (p. 322, 3d ed.).

[1] Boynton *v.* Hubbard, 7 Mass. R. 112, 120; Curling *v.* Townshend, 19 Ves. 628; Bernal *v.* Donegal, 3 Dow, R. 133; s. c. 1 Bligh, Rep. (N. S.) 594; Wharton *v.* May, 5 Ves. 27; 1 Fonbl. Eq. B. 1, ch. 2, § 13, and note (*p*); Evans *v.* Cheshire, Belt's Supplement, 300; Crowe *v.* Ballard, 3 Bro. Ch. R. 120; Gwynne *v.* Heaton, 1 Bro. Ch. R. 1, 9, 10; Davis *v.* Duke of Marlborough, 2 Swanst. 174; Earl of Aldborough *v.* Frye, 6 Clark and Finn. 436, 462, 464. See Pennell *v.* Millar, 23 Beav. 172; Tottenham *v.* Emmet, 13 Week. R. 123, and 14 Week. R. 3; Benyon *v.* Fitch, 35 Beav. 570; Aylesford *v.* Morris, L. R. 8 Ch. 484.

[2] Bacon *v.* Bonham, 33 N. J. Eq. 614, 617.

[3] Chesterfield *v.* Janssen, 2 Ves. 125; 1 Atk. R. 354; Crowe *v.* Ballard, 3 Bro. Ch. R. 150; Coles *v.* Gibbon, 3 P. Will. 293, 294; Cole *v.* Gibson, 1 Ves. 503, 506, 507; Cann *v.* Cann, 1 P. Will. 723. Mr. Fonblanque has remarked, that Lord Hardwicke, in Chesterfield *v.* Janssen (2 Ves. 125; 1 Atk. 351), has brought together and classed all the cases upon the subject of confirmation; and the result seems to be that if the original contract be illegal or usurious, no subsequent agreement or confirmation of the party can give it validity. But if it be merely against conscience, then if the party, being fully informed of all the circumstances of it, and of the objections to it, voluntarily comes to a new agreement, he thereby bars himself of that relief which he might otherwise have had in equity. Not so if the confirmation be a continuance of the original fraud or imposition. 1 Fonbl. Eq. B. 1, ch. 2, § 13, note (*r*). See also Id. § 14, note (*v*). Whether this statement will be found fully borne out by the authorities, is perhaps not beyond doubt. Where a contract is utterly void, as from illegality, or as being contrary to good morals, or as contrary to public policy, there seems the strongest reason to say that it cannot acquire any validity from any confirmation; for the original taint attaches to it through every change. To give it efficacy would contradict two well-established maxims of the common law: "Quod contra legem fit, pro

pressure of the original transaction or the original necessity, or if he is still under the influence of the original transaction, and of the delusive opinion that it is valid and binding upon him, then, and under such circumstances, Courts of Equity will hold him not barred from relief by any such confirmation.[1]

§ 470. **If Expectant Heir Seeks to Disaffirm Bargain, He Must Not Injuriously Affect Rights of Other Party.** — Similar principles will govern in cases where the heir or other expectant is relieved from his necessities and becomes opposed to the person with whom he has been dealing, and seeks to repudiate the bargain. In such cases he must not do any act by which the rights or property of the other party will be injuriously affected, after he is thus deemed to be restored to his general capacity. If he does, he becomes affected with the ordinary rule which governs in other cases, and forbids a party to repudiate a dealing, and at the same time to avail himself fully of all the rights and powers resulting therefrom, as if it were completely valid.[2]

infecto habetur." "Quod ab initio non valet, in tractu temporis non convalescet; et quæ malo sunt inchoata principio, vix est, ut bono peragantur exitu." 4 Co. R. 2; Id. 31; 1 Fonbl. Eq. B. 1, ch. 4, § 11, note (*y*). But where the contract is merely voidable, it seems upon general principles capable of confirmation. The difficulty is not so much in stating that it is capable of confirmation, but under what circumstances the confirmation ought to be held conclusive. The remarks of Lord Hardwicke, in Chesterfield *v.* Janssen, 2 Ves. 158, 159; 1 Atk. R. 354; and Cole *v.* Gibson, 1 Ves. R. 506, 507, compared with those of Lord Thurlow in Crowe *v.* Ballard, 3 Bro. Ch. R. 120; s. c. 1 Ves. 219, 220; s. c. 2 Cox, R. 257, and of Lord Eldon, in Wood *v.* Downes, 18 Ves. 123, 124, 128; and of Lord Erskine, in Morse *v.* Royal, 12 Ves. 373, 374, have not wholly relieved the doctrine from difficulty. In Cole *v.* Gibson, 1 Ves. 503, 506, 507, Lord Hardwicke seemed to hold a marriage brokage bond capable of confirmation, though held void upon public policy. But in Shirley *v.* Martin, in 1779, the Court of Exchequer held that contracts avoided on account of public inconvenience would not admit of subsequent confirmation by the party, and therefore that a marriage brokage bond was incapable of confirmation. Cited 1 Fonbl. Eq. B. 1, ch. 2, § 14, note (*u*); Id. ch. 4, § 10, note (*s*); s. c. cited 1 Ball & B. 357, 358; 3 P. W. 75, Cox's note. See also Say *v.* Barwick, 1 Ves. & B. 195. See Gwynne *v.* Heaton, 1 Bro. Ch. R. 1, and Mr. Belt's note (1), ibid. See also ante, §§ 263, 374, and Newland on Contracts, ch. 25, pp. 496 to 503.

[1] Wood *v.* Downes, 18 Ves. 123, 124, 128; Crowe *v.* Ballard, 3 Bro. Ch. R. 120; s. c. 1 Ves. 214, 219, 220; s. c. 2 Cox, R. 253, 257; Taylor *v.* Rochfort, 2 Ves. 281; Murray *v.* Palmer, 2 Sch. & Lefr. 486; Roche *v.* O'Brien, 1 B. & Beatt. R. 338, 339, 340, 353, 354, 356; Morse *v.* Royal, 12 Ves. 373, 374; Gowland *v.* De Faria, 17 Ves. 20; Dunbar *v.* Tredennick, 2 Ball & B. 316, 317, 318. As to delay in seeking relief, see Sibbering *v.* Balcarras, 3 DeG. & S. 735; Lord *v.* Jeffkins, 35 Beav. 7.

[2] King *v.* Hamlet, 2 Mylne & Keen, R. 474, 480. See also Gwynne *v.* Heaton, 1 Bro. Ch. R. 1; Peacock *v.* Evans, 16 Ves. 512; ante, §§ 463, 464.

§ 471. **Sale of Post Obit Bond at Auction Does Not Give It Validity.** — Even the sale of a post obit bond at public auction will not necessarily give it validity, or free it from the imputation of being obtained under the pressure of necessity. For the circumstances may be such as to establish that the expectant is acting without any of the usual precautions to obtain a fair price, and is in great distress for money, and is really in the hands and under the control of those who choose to become bidders for the purpose of fleecing him.[1] The case is not like the case of an ordinary sale of a reversion at public auction, where the usual precautions are taken; for there it may be perfectly proper not to require the purchaser to show that he has given the full value.[2] Where the sale is public, and free and fair, it may be justly presumed that the fair market price is obtained, and there seems no reason to call in question its general validity; but it should be specially impeached. In sales of reversions at public auction there is not usually any opportunity, as there is upon a private treaty, for fraud and imposition upon the seller. The latter is in no just sense in the power of the purchaser. The sale by public auction is, under ordinary circumstances, evidence of the market price.[3] But the sale of post obit bonds at auction carries with it generally a presumption of distress and pecuniary embarrassment; and if the ordinary precautions are thrown aside, there is a violent presumption of extravagant rashness, imprudence, or circumvention.

§ 472. **Securities Given for Extravagant Trades with Infants Will Be Reduced.** — Contracts of a nature nearly resembling post obit bonds have in cases of young and expectant heirs been often relieved against upon similar principles. Thus where tradesmen and others have sold goods to such persons at extravagant prices, and under circumstances demonstrating imposition or undue advantage, or an intention to connive at secret extravagance and profuse expenditures unknown to their parents or other ancestors, Courts of Equity have reduced the securities, and cut down the claims to their reasonable and just amount.[4] [And an agree-

[1] Fox *v.* Wright, 6 Madd. R. 77; Earl of Aldborough *v.* Frye, 7 Clark & Finn. 436.

[2] Earl of Aldborough *v.* Frye, 7 Clark & Finn. 436; ante, § 462.

[3] Lord *v.* Jeffkins, 35 Beav. 7; Shelly *v.* Nash, 3 Madd. R. 125; Fox *v.* Wright, 6 Madd. R. 77; Earl of Aldborough *v.* Frye, 7 Clark & Finn. 436, 456 to 461.

[4] Bill *v.* Price, 1 Vern. R. 467, and Mr. Raithby's note (1); Ibid. 1 Eq. Abr. 91, G. pl. 3; Lamplugh *v.* Smith, 2 Vern. 77; Witley *v.* Price, 2 Vern.

ment made by an infant devisee whereby her part of the estate was charged with a supposed advancement made by the testator to her mother, will not be enforced, and especially when made without consideration.[1] The theory of voidable contracts of infants is that they may be sustained for the advantage of the minor, but that they cannot be enforced during infancy if not beneficial to the infant, and, if beneficial, they can be enforced only to the extent that they are beneficial.[2]]

§ 473. **Agreements in Fraud of Rights of Creditors.** — Another class of constructive frauds upon the rights, interests, or duties of third persons embraces all those agreements and other acts of parties which operate directly or virtually to delay, defraud, or deceive creditors.[3] Of course we do not here speak of cases of express and intentional fraud upon creditors, but of such as virtually and indirectly operate the same mischief by abusing their confidence, misleading their judgment, or secretly undermining their interest. It is difficult in many cases of this sort to separate the ingredients which belong to positive and intentional fraud from those of a mere constructive nature which the law pronounces fraudulent upon principles of public policy. Indeed they are often found mixed up in the same transaction; and any attempt to distinguish between them or to weigh them separately would be a task of little utility, and might perhaps mislead and perplex the inquiries of students.

§ 474. **Same.** — It must be a fundamental policy of all enlightened nations to protect and subserve the rights of creditors; and a great anxiety to afford full relief against frauds upon them has been manifested, not only in the civil law, but from a very early period in the common law also. In the civil law it was declared

R. 78; Brook *v.* Gally, 1 Atk. 34, 35, 36; Berkley *v.* Bishop, 1 Atk. R. 39; Gilbert, Lex Prætor, 291. But see Barney *v.* Beak, 2 Ch. Cas. 136; Gwynne *v.* Heaton, 1 Bro. Ch. R. 9, 10.

[1] In re Cumming's Estate, 120 Iowa, 421, 94 N. W. 1117.

[2] Covault *v.* Nevitt, 157 Wis. 113, 146 N. W. 1115.

[3] Whether a conveyance, devise, or gift of personalty, made in good faith by A to B to hold in trust to pay the income to C (C not being a married woman), so as to prevent the creditors of C from reaching the principal, can be upheld, query. Nichols *v.* Levy, 72 U. S. 433, 18 L. Ed. 596; Sparhawk *v.* Cloon, 125 Mass. 263. In these cases all the authorities are stated. Where however the effect of the deed or gift is to vest the legal title to property and a simple trust in the trustee, and the right to receive the whole income and the jus disponendi in the cestui que trust, the property is liable in equity for the latter's debts. Sparhawk *v.* Cloon, supra, distinguishing Perkins *v.* Hays, 3 Gray, 405, Hall *v.* Williams, 120 Mass. 344, and Russell *v.* Grinnell, 105 Mass. 425.

that whatever was done by debtors to defeat their creditors, whether by alienation or by other disposition of their property, should be revoked or null, as the case might require. "Ait prætor: Quæ fraudationis causa gesta erunt, cum eo qui fraudem non ignoraverit; de his curatori bonorum, vel ei cui de ea re actionem dare oportebit, intra annum, quo experiundi potestas fuerit, actionem dabo. Idque etiam adversus ipsum, qui fraudem fecit, servabo. Necessario prætor hoc edictum proposuit; quo edicto consuluit creditoribus, revocando ea, quæcunqué in fraudem eorum alienata sunt.[1] Ait ergo prætor: Quæ fraudationis causa gesta erunt. Hæc verba generalia sunt, et continent in se omnen omnino in fraudem factam, vel alienationem vel quemcunque contractum. Quodcunque igitur fraudis causa factum est, videtur his verbis revocari, qualecunque fuerit. Nam, late ista verba patent. Sive ergo rem alienavit, sive acceptilatione vel pacto aliquem liberavit.[2] Idem erit probandum. Et si pignora liberet, vel quem alium in fraudem creditorum præponat." [3] And the rule was not only applied to alienations, but to fraudulent debts, and indeed to every species of transaction or omission prejudicial to creditors. "Vel ei præbuit exceptionem, sive se obligavit fraudandorum creditorum causa, sive numeravit pecuniam, vel quodcunque aliud fecit in fraudem creditorum; palam est, edictum locum habere, &c. Et qui aliquid fecit, ut desinat habere, quod habet, ad hoc edictum pertinet. In fraudem facere videri etiam eum, qui non facit, quod debet facere, intelligendum est; id est, si non utitur servitutibus." [4]

§ 475. **Voluntary Conveyances Are Voidable as to Creditors.** — Hence all voluntary dispositions made by debtors upon the score of liberality were revocable, whether the donee knew of the prejudice intended to the creditors or not. "Simili modo dicimus, et si cui donatum est, non esse quærendum, an sciente eo cui donatum gestum sit; sed hoc tantum, an fraudentur creditores." [5] And the like rule was applied to purchasers even for a valuable consideration, if they knew the fraudulent intention at the time of their purchases, and thus became partakers of it that they might profit by it.[6] "Quae fraudationis causa gesta erunt,

[1] Dig. Lib. 42, tit. 8, l. 1, § 1.
[2] Dig. Lib. 42, tit. 8, l. 1, § 2; Pothier, Pand. Lib. 44, tit. 8, n. 2.
[3] Id. l. 2; 1 Domat, B. 2, tit. 10, art. 7.
[4] Dig. Lib. 42, tit. 8, l. 3, §§ 1, 2; Id. l. 4; Pothier, Pand. Lib. 42, tit. 8, n. 1 to 36; 1 Domat, B. 2, tit. 10, art. 1, pr. tot.; Id. art. 8.
[5] Dig. Lib. 42, tit. 8, l. 6, § 11; 1 Domat, B. 2, tit. 10, art. 2.
[6] Dig. Lib. 42, tit. 8, l. 1; Pothier, Pand. Lib. 42, tit. 8, n. 1.

cum eo qui fraudem non ignoraverit, de his, &c., actionem dabo. Si debitor in fraudem creditorum minore pretio fundum scienti emptori vendiderit; deinde hi, quibus de revocando eo actio datur, eum petant; quæsitum est, an prætium restituere debent? Proculus existimat, omnimodi restituendum esse fundum, etiamsi pretium non solvatur; et rescriptum est secundum Proculi sententiam." [1]

§ 476. [**Requisites for Setting Aside Deed for Fraud.** — In order to constitute presumptive fraud, or fraud in law, in such a case, three elements must be proven: First, there must be a voluntary gift; second, there must be a then existing or contemplated indebtedness against the donor; and, third, it must appear that the donor did not retain sufficient property to pay his indebtedness, and to this may be added, knowledge on part of donee of donor's insolvency, and intent on his part to make the conveyance with a fraudulent intent. No creditor without a lien has any right to complain that his debtor is giving away property to his wife or children, unless such creditor can establish the fact that he has not retained enough to satisfy existing debts. Such grantor must make himself insolvent by such gifts or conveyances, and, to impeach them, fraud must be charged and proved.[2] While it is true that a change of property made in good faith to secure an antecedent debt is not necessarily fraudulent, the mere proof that it was so given does not, as a matter of law, disprove the existence of fraudulent intent on the part of the debtor. This is clearly so when other circumstances exist which indicate that real purpose of the transfer was to hinder creditors in the collection of their just claims, and enable the assignor or vendor to still control and make use of such property for his own benefit.[3]]

§ 477. **Statutes against Fraudulent Conveyances Are Liberally Construed.** — The common law adopted similar principles at an early period. These principles however have been more fully carried into effect by the statutes of 50 Edward III., ch. 6, and 3 Henry VII., ch. 4, against fraudulent gifts of goods and chattels; by the statute of 13 Elizabeth, ch. 5, against fraudulent conveyances of lands to defeat or delay creditors; and by the statute of 27 Elizabeth, ch. 4, against fraudulent or voluntary conveyances

[1] Dig. Lib. 42, tit. 8, l. 1; Id. l. 7; 1 Domat, B. 2, tit. 10, art. 4.

[2] State Bank *v.* Barnett, 250 Ill. 312, 95 N. E. 178; Ainsworth *v.* Roubal, 74 Neb. 723, 105 N. W. 248, 2 L. R. A. (N. S.) 988; Rownd *v.* Davidson, 113 La. 1047, 37 So. 965; Gray *v.* Atlantic Trust & Deposit Co., 113 Va. 580, 75 S. E. 226.

[3] Youngs *v.* Wedderspoon, 70 Misc. Rep. 171, 126 N. Y. Supp. 375.

of lands to defeat subsequent purchasers. These statutes have always received a favorable and liberal interpretation, in all the courts both of law and equity, in suppression of fraud.[1] Indeed the principles and rules of the common law as now universally known and understood are so strong against fraud in every shape, that Lord Mansfield has remarked that the common law would have attained every end proposed by these statutes.[2] This is perhaps stating the matter somewhat too broadly, at least in regard to the statute of 27 Elizabeth, ch. 4, as it is now construed; for the latter, in favor of subsequent purchasers, applies to cases of voluntary conveyances, whether they are fraudulent or not.[3] Courts of Equity, from the enlarged principles upon which they act to protect the rights and interests of creditors, give full effect to all the provisions, and exert their jurisdiction

[1] Cadogan *v.* Kennett, Cowp. R. 439; Jeremy on Eq. Jurisd. B. 3, P. 2, ch. 3, § 4, pp. 410, 411, 412; Newland on Contracts, ch. 23, pp. 370, 371; Com. Dig. Covin, B. 2, 3.

[2] Ibid.; Hamilton *v.* Russell, 5 U. S. 309, 2 L. Ed. 118; Com. Dig. Covin, B. 2. The statutes of 50 Edward III., ch. 6, and 3 Henry VII., ch. 4, expressly declare all gifts, &c. of goods and chattels, intended to defraud creditors, to be null and void. 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*c*); Com. Dig. Covin, B. 2. In Hamilton *v.* Russell (5 U. S. 309, 2 L. Ed. 118) the Supreme Court of the United States said, that the statute of 13 Eliz. and 27 Eliz. are considered as only declaratory of the principles of the Common Law. See 1 Fonbl. Eq. B. 1, ch. 4, § 13, and note (*d*); Co. Litt. 290, *b*.

[3] See Buckle *v.* Mitchill, 18 Ves. 110; Doe *v.* Manning, 9 East, R. 59; Townshend *v.* Windham, 2 Ves. 10, 11; Walker *v.* Burroughs, 1 Atk. 93, 94; Cathcart *v.* Robinson, 30 U. S. 264, 8 L. Ed. 120. There is a distinction made in England between the statute of 13 Eliz. ch. 5, and the statute of 27 Eliz. ch. 4, which should be here borne in mind, though it will naturally come under consideration in a subsequent page. All voluntary conveyances are not void against creditors, equally the same as they are against subsequent creditors. It is necessary on the statute of 13 Eliz. to prove that the party was indebted at the time, or immediately after the execution of the deed, or otherwise it would be attended with bad consequences, because the statute extends to *goods* and chattels; and such construction would defeat every provision for children and families, though the father was not indebted at the time. Walker *v.* Burroughs, 1 Atk. 93; Battersbee *v.* Farringdon, 1 Swanst. R. 106, 113. But upon the statute of 27 Eliz. ch. 4, subsequent purchasers for a valuable consideration may set aside the former voluntary conveyance, though bona fide made, even though such purchasers had full notice of such voluntary conveyance. Doe *v.* Routledge, Cowp. R. 711, 712; Gooch's Case, 5 Co. R. 60, 61; Twyne's Case, 3 Co. R. 83; Doe *v.* Manning, 9 East, R. 59; Buckle *v.* Mitchill, 18 Ves. 110; Holloway *v.* Millard, 1 Madd. R. 227, 228, 229. The statute of 27 Eliz. ch. 4, does not apply to goods and chattels, but to lands and other real estate only. Jones *v.* Croucher, 1 Sim. & Stu. 315; Atherley on Marr. Sett. ch. 13, p. 207; post, §§ 481 to 492 and 562 to 573.

upon the same construction of these statutes which is adopted by Courts of Law.[1] They go even further; and (as we shall presently see) extend their aid to many cases not reached by these statutes.[2]

§ 478. **Alleged Fraudulent Conveyance Must Have Been Made with Good Consideration and Bona Fide.** — And in the first place let us consider the nature and operation of the statute of 13 Elizabeth, ch. 5, as to creditors, which has been universally adopted in America as the basis of our jurisprudence on the same subject. The object of the Legislature evidently was to protect creditors from those frauds which are frequently practised by debtors under the pretence of discharging a moral obligation; that is, under the pretence of making suitable provisions for wives, children, and other relations. Independently of the statute, no one can reasonably doubt that a gift or conveyance, which has neither a good nor a meritorious consideration to support it, ought not to be valid against creditors; for every man is bound to be just before he is generous;[3] and the very fact that he makes a voluntary gift or conveyance to mere strangers to the prejudice of his creditors affords a conclusive ground that it is fraudulent. The statute, while it seems to protect the legal rights of creditors against the frauds of their debtors, anxiously excepts from such imputation the bona fide discharge of moral duties. It does not therefore declare all voluntary conveyances to be void, but only all fraudulent conveyances to be void.[4] And whether a conveyance

[1] Waddell *v.* Lanier, 62 Ala. 347; Flewellen *v.* Crane, 58 Ala. 627. It is not necessary for the creditor first to exhaust his legal remedies. Fellows *v.* Lewis, 65 Ala. 343; Pharis *v.* Leachman, 20 Ala. 662; Bibb *v.* Freeman, 59 Ala. 612; Case *v.* Beauregard, 101 U. S. 688, 25 L. Ed. 1004; Thurmond *v.* Reese, 3 Ga. 449; Cornell *v.* Radway, 22 Wis. 260; Saunderson *v.* Stockdale, 11 Md. 563. But a deficiency of legal assets should be shown. Halfman *v.* Ellison, 51 Ala. 543; Ellis *v.* State Bank, 30 Ala. 478. The creditor need not have a lien to subject land fraudulently conveyed. McAnally *v.* O'Neal, 56 Ala. 299.

[2] An executor or an administrator of an insolvent estate can maintain a bill in equity to set aside a conveyance made by his testator or intestate in fraud of his creditors. Parker *v.* Flagg, 127 Mass. 28; Gilson *v.* Hutchinson, 120 Mass. 27; Welsh *v.* Welsh, 105 Mass. 229. Of course an assignee in bankruptcy can by statute set aside fraudulent conveyances of the debtor. Kent *v.* Riley, L. R. 14 Eq. 190; Bartholomew *v.* McKinstry, 2 Allen, 448; post, § 502. Whether an assignee can, independently of statute, sue in equity to recover property fraudulently conveyed, was made a question but was not decided in Verselius *v.* Verselius, 9 Blatchf. C. C. 189.

[3] Copis *v.* Middleton, 2 Madd. R. 428; Partridge *v.* Gopp, 1 Eden, R. 166, 167, 168; s. c. Ambler, R. 598, 599.

[4] 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*); Doe *v.* Routledge, Cowp. R. 708; Cadogan *v.* Kennett, Cowp. R. 432, 434; Holloway *v.* Millard, 1

be fraudulent or not, is declared to depend upon its being made "upon good consideration and bona fide." [1] It is not sufficient that it be upon good consideration or bona fide. It must be both. And therefore if a conveyance or gift be defective in either particular, although it is valid between the parties and their representatives, yet it is utterly void as to creditors.

§ 479. [**Intent of Grantor Gives Character To Transaction.** — It is the motive of the grantor that gives character to the transaction and where he has two motives, one fraudulent and the other legal, equity will not undertake to separate the one from the other and determine which is the controlling factor. It is contrary to public policy that one should undertake to defeat a claim for alimony about to be asserted against him through the machinery of the law by conveying his property in secret trust to another. The intent to make a fraudulent conveyance is now sufficient. It must be shown to have existed at the time of the transfer and that the grantee knew of the fraudulent character of the conveyance and the insolvency of the grantor.[2] But a secured creditor or an execution creditor has no right to so fraudulently use his security or his judgment as to deprive other creditors of their rights in the debtor's property.[3] It is not necessary that the debtor should intend to entirely defeat the creditor in the collection of his claim. A purpose to delay and hinder a creditor is therefore fraudulent, although the debtor may honestly intend that all his debts shall ultimately be paid.[4]]

§ 480. **What Constitutes a Good Consideration.** — This leads us to the inquiry, what are deemed good considerations in the contemplation of the statute. A good consideration is some-

Madd. R. 227; Sagitary *v.* Hide, 2 Vern. 44. Many of the succeeding remarks upon this subject I have taken, almost literally, from Mr. Fonblanque's very able notes; and I desire this general acknowledgment to be taken as an expression of my very great obligations to him in every part of my work. 1 Fonbl. Eq. B. 1, ch. 4, § 12, and note (*a*). The word "voluntary" is not to be found either in the statute of 13 Elizabeth, ch. 5, or in the statute of 27 Elizabeth, ch. 4. Holloway *v.* Millard, 1 Madd. R. 227, 228. A voluntary conveyance to a stranger, made bona fide by a party not indebted at the time, would be good against subsequent creditors. Holloway *v.* Millard, 1 Madd. R. 227, 228; Walker *v.* Burroughs, 1 Atk. 93.

[1] Ibid.; Bacon, Abridg. Fraud, C.; Lenhardt *v.* Ponder, 64 S. C. 354, 42 S. C. 169.

[2] Hill *v.* Taylor, 125 Mo. 331, 28 S. W. 599; Shamo *v.* Benjamin's Admr., 155 Ky. 373, 159 S. W. 798; Corbitt *v.* Cutcheon, 79 Mich. 41, 44 N. W. 163.

[3] Sweet *v.* Clay, 88 Mich. 1, 49 N. W. 899.

[4] Edgell *v.* Smith, 50 W. Va. 349, 40 S. E. 402.

times used in the sense of a consideration which is valid in point of law, and then it includes a meritorious as well as a valuable consideration.[1] But it is more frequently used in a sense contradistinguished from valuable, and then it imports a consideration of blood or natural affection; as when a man grants an estate to a near relation merely founded upon motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems as an equivalent given for the grant; and it is therefore founded upon motives of justice.[2] [A deed founded upon a good, but not upon a valuable, consideration is considered merely voluntary, and, while binding between the parties, is void as to creditors. For a moral obligation to be sufficient to sustain a promise or conveyance, it must be one which has once been a valuable consideration, but which on account of some rule of law was not binding upon or enforceable against the party, e. g. from infancy or like cause, or which had ceased to be binding from some supervenient cause, as the act of limitations, the intervention of bankruptcy, and the like. But a past consideration, other than of the class referred to, which imposed no legal obligation at the time it arose, will support no promise whatever.[3]] Deeds made upon a good consideration only are considered as merely voluntary; those made upon a valuable consideration are treated as compensatory. The words "good consideration", in the statute may be properly construed to include both descriptions; for it cannot be doubted that it meant to protect conveyances made bona fide and for a valuable consideration, as well as those made bona fide upon the consideration of blood or affection.[4] [If the instrument was actually fraudulent it would make no difference that the grantee paid full value for the property.[5] But if the conveyance was made in good faith, and not for the purpose of delaying or hindering creditors mere inadequacy of purchase price would not alone be sufficient to set the instru-

[1] Hodgson *v.* Butts, 7 U. S. 140, 2 L. Ed. 391; Copis *v.* Middleton, 2 Madd. R. 430; Twyne's Case, 3 Co. R. 81; Taylor *v.* Jones, 2 Atk. 601; Newland on Contracts, ch. 23, p. 386; Partridge *v.* Gopp, Ambler, R. 598, 599; s. c. 1 Eden, R. 167, 168; Atherley on Marr. Sett. ch. 13, pp. 191, 192.

[2] Black. Comm. 297; 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*).

[3] Davis *v.* Anderson, 99 Va. 620, 39 S. E. 588.

[4] Doe *v.* Routledge, Cowp. R. 708, 710, 711, 712; Copis *v.* Middleton, 2 Madd. R. 430, Hodgson *v.* Butts, 7 U. S. 140, 2 L. Ed. 391; Twyne's Case, 3 Co. R. 81.

[5] Matthews *v.* Converse, 83 Conn. 511, 77 Atl. 961.

ment aside.[1] Nor will a Court of Equity presume a fraud when the transaction under investigation is equally susceptible of two explanations, one of which is consistent with a fraudulent intent, and the other with good faith and fair dealing. In such cases, that construction of the acts of the parties which is consistent with good faith and fair dealing will be preferred.[2]]

§ 481. **Voluntary Conveyances Are Protected When They Do Not Affect Rights of Creditors.** — In regard to voluntary conveyances they are unquestionably protected by the statute in all cases where they do not break in upon the legal rights of creditors. But when they break in upon such rights, and so far as they have that effect, they are not permitted to avail against those rights. If a man therefore who is indebted conveys property to his wife or children, such a conveyance is, or at least may be, within the statute; for although the consideration is good as between the parties, yet it is not in contemplation of law bona fide; for it is inconsistent with the good faith which a debtor owes to his creditors, to withdraw his property voluntarily from the satisfaction of their claims;[3] and no man has a right to prefer the claims of affection to those of justice. This doctrine however (as we shall presently see) requires or at least may admit of some qualification in relation to existing creditors where the circumstances of the indebtment and the conveyance repel any possible imputa-

[1] Jones *v.* Dunbar, 52 Neb. 151, 71 N. W. 976. But gross inadequacy of consideration is a circumstance, especially where the purchaser never took active possession of the property, but left the grantor to manage it. Eldred *v.* McIlheran, 164 Ill. App. 227; Hopkins *v.* White, 20 Cal. App. 234, 128 Pac. 780; Ball *v.* Danton, 64 Oreg. 184, 129 Pac. 1032; Tyson *v.* Southern Cotton Oil Co., 181 Ala. 256, 61 So. 278.

[2] Ball *v.* Danton, 64 Oreg. 184, 129 Pac. 1032.

[3] 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*); Twyne's Case, 3 Co. R. 81; Townshend *v.* Windham, 2 Ves. 10, 11; Doe *v.* Routledge, Cowp. R. 711; Russell *v.* Hammond, 1 Atk. 15, 16; Tynham *v.* Mullens, 1 Madd. R. 119; Holloway *v.* Millard, 1 Madd. R. 227, 228; Bayard *v.* Hoffman, 4 John. Ch. R. 450; Reade *v.* Livingston, 3 John. Ch. R. 481; Taylor *v.* Jones, 2 Atk. 600, 601; Townshend *v.* Windham, 2 Ves. 10; Copis *v.* Middleton, 2 Madd. R. 425. See Seward *v.* Jackson, 5 Cowen, R. 406; Wickes *v.* Clarke, 8 Paige, R. 160, 165. See post, § 497; Sayre *v.* Fredericks, 1 C. E. Green, 205; Kane *v.* Roberts, 40 Md. 590; Patten *v.* Casey, 57 Mo. 118; In re Johnson, 20 Ch. D. 389. The difference between a voluntary conveyance and a conveyance based on a good consideration with regard to the rights of creditors is, that in the case of a voluntary conveyance it is enough for the creditor to show an intent to defraud on the part of the grantor alone. Laughton *v.* Harden, 68 Maine, 208. In the other case fraud in both parties to the conveyance must be shown. In re Johnson, supra; Beurmann *v.* Van Buren, 44 Mich. 496; 2 Kent, 441, note (13th ed.). Compare note to § 565, post.

tion of fraud; as where the conveyance is of a small property by a person of great wealth, and his debts bear a very small proportion to his actual means.

§ 482. **Same.** — But at all events the same doctrine does not apply to a man not indebted at the time, or in favor of subsequent creditors. There is nothing inequitable or unjust in a man's making a voluntary conveyance or gift, either to a wife or to a child or even to a stranger, if it is not at the time prejudicial to the rights of any other persons or in furtherance of any meditated design of future fraud or injury to other persons.[1] If indeed there is any design of fraud or collusion, or intent to deceive third persons in such conveyances, although the party be not then indebted, the conveyance will be held utterly void as to subsequent[2] as well as to present creditors, for it is not bona fide.[3]

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*); Townshend *v.* Windham, 2 Ves. 11; Walker *v.* Burroughs, 1 Atk. 93; Bac. Abridg. Fraud, C.; Doe *v.* Routledge, Cowp. R. 710, 711; Russell *v.* Hammond, 1 Atk. 15, 16; Holloway *v.* Millard, 1 Madd. R. 227, 228; Battersbee *v.* Farringdon, 1 Swanst. R. 106, 113; Reade *v.* Livingston, 3 John. Ch. R. 481; Mattingly *v.* Nye, 75 U. S. 370, 19 L. Ed. 380. See also McLane *v.* Johnson, 43 Vt. 48; infra, § 500, and note.

To impeach a voluntary conveyance by a debtor prior to the creation of the debt of the subsequent creditor, actual intent to defraud must be shown; but a voluntary conveyance, made with actual intent to cheat, hinder, or defraud either existing or subsequent creditors is void as to the creditors, both prior and subsequent. May *v.* State National Bank, 59 Ark. 614, 28 S. W. 431.

A voluntary conveyance made by the father to his daughter, when he was not indebted, will not be set aside by a subsequent creditor, where grantor had no idea of contracting the debt sought to be collected at the time he made the conveyance. Dugan's Exec. *v.* Daugherty, 146 Ky. 187, 142 S. W. 232; Bauer Grocery Co. *v.* Smith, 74 Mo. App. 419.

Voluntary conveyance made by mother to her son, delivered in escrow and not to be delivered to him or recorded until her death, is void as to subsequent creditors, and when set aside, all creditors whether antecedent or subsequent, may come in for the satisfaction of their claims. Levi *v.* Levi, 156 Iowa 297, 136 N. W. 696; Schreyer *v.* Scott, 134 U. S. 405, 33 L. Ed. 955, 10 S. Ct. Rep. 579.

Voluntary conveyance is good as against subsequent creditors, unless executed as a cover for future schemes of fraud. Horbach *v.* Hill, 112 U. S. 144, 28 L. Ed. 670, 5 S. Ct. Rep. 81; Clark *v.* Killian, 103 U. S. 766, 26 L. Ed. 607; Graham *v.* Railroad Co., 102 U. S. 148, 26 L. Ed. 106.

The rule as now established is, that prior indebtedness is only presumptive and not conclusive proof of fraud, and this presumption may be explained and rebutted. Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud, there is no infirmity in the deed. The vital question is always the good faith of the transaction. There is no other test. Lloyd *v.* Fulton, 91 U. S. 479, 23 L. Ed. 363.

[2] The better view is that the conveyance is void as to subsequent

§ 483. **Rule Does Not Apply Where Grantor Was Not Indebted at Time Conveyance Was Made.** — It has been justly remarked that the distinction between cases where the party is indebted, and those where he is not indebted, is drawn from considerations too obvious to require illustration from cases. For if a man indebted were allowed to divest himself of his property in favor of his wife or his children, his creditors would be defrauded. But if a man not indebted, and not meaning to commit a fraud, could not make an effective settlement in favor of such objects because by possibility he might afterwards become indebted, it would destroy those family provisions which are under certain restrictions a benefit to the public as well as to the individual objects of them.[1]

§ 484. **Rule Stated Where Debtor Retained Sufficient Property but Subsequently Lost It.** — In regard to voluntary conveyances there is an intermediate case touching creditors which requires consideration. Suppose a party possessed of a large estate and

creditors only where there was an intent to hinder, delay, or defeat *them*. Infra, § 360, note (*a*). Limited by this suggestion, one cannot convey property subject to a secret trust in one's favor, though for value, as against the rights of creditors. Moore *v.* Wood, 100 Ill. 451; Lukin *v.* Aird, 73 U. S. 78, 18 L. Ed. 750; Griffin *v.* First National Bank, 74 Ill. 259; Annis *v.* Bonar, 86 Ill. 128; Jones *v.* King, Ib. 225; Power *v.* Alston, 93 Ill. 587; Robinson *v.* Stewart, 10 N. Y. 195; Macomber *v.* Peck, 39 Iowa, 354. It matters not what the actual purpose or intent of the vendor may be in such a case. Moore *v.* Wood; Lukin *v.* Aird; Phelps *v.* Curts, 80 Ill. 112; Power *v.* Alston, supra.

[2] Stillman *v.* Ashdown, 2 Atk. 481; Reade *v.* Livingston, 3 John. Ch. R. 481; Richardson *v.* Smallwood, Jac. R. 552. As to subsequent creditors, it cannot be presumed that a voluntary conveyance is fraudulent, unless the party at the time is deeply indebted. Lord Alvanley, in Lush *v.* Wilkinson (5 Ves. 387), said: "A single debt will not do. Every man must be indebted for the common bills of his house, though he pays them every week. It must depend upon this, whether he was in insolvent circumstances at the time." Mr. Chancellor Kent, in Reade *v.* Livingston (3 John. Ch. R. 498), said: "Such a loose dictum, one would suppose, was not of much weight, as there is no preceding case which gives the least countenance to it." But Lord Alvanley probably meant no more than this; that, as to subsequent creditors, there could scarcely arise a presumption that the conveyance was intentionally fraudulent (without which such subsequent creditors could have no case for relief), unless the party were deeply indebted at the time, and contemplated a fraud upon his creditors. In this view there is much force in his lordship's remarks. Indeed this seems to be the view of the matter entertained by Mr. Chancellor Kent in the same case. Ibid. 301. See also the remarks of Sir William Grant, in Kidney *v.* Coussmaker, 12 Ves. 155, and Sir Thomas Plumer, in Holloway *v.* Millard, 1 Madd. R. 414. See the Jurist, Jan. 6, 1844, p. 461.

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 12, note.

indebted at the same time to a considerable amount, but his debts bearing a small proportion to his actual property, should make a settlement or other voluntary conveyance in favor of his wife or children of a part of his estate, which should still leave a large surplus in his own hands beyond the assets necessary to pay his debts, and afterwards at a distance of time he should lose or spend so much of his property as not to leave enough to discharge such debts. The question would then arise whether in regard to such creditors the settlement or other conveyance would be void or not. To such a case it is somewhat difficult to apply the preceding reasoning so as to avoid the settlement or other conveyance, because there is no pretence to say that upon the posture of the facts any actual fraud could be intended, or that the creditors were prejudiced except by their own voluntary delay.

§ 485. **Same.** — Upon this question a learned judge (Mr. Chancellor Kent) has pronounced an opinion which, from his acknowledged ability and sagacity in sifting the authorities, is entitled to very great weight. His language is: "The conclusion to be drawn from the cases is, that if the party is indebted at the time of the voluntary settlement it is presumed to be fraudulent in respect to such debts (that is, those antecedently due), and no circumstance will permit those debts to be affected by the settlement or repel the legal presumption of fraud. The presumption of law in this case does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such line of distinction set up or traced in any of the cases. The attempt would be embarrassing if not dangerous to the rights of creditors, and prove an inlet to fraud. The law has therefore wisely disabled the debtor from making any voluntary settlement of his estate to stand in the way of existing debts. This is the clear and uniform doctrine of the cases." [1]

[1] Mr. Chancellor Kent, in Reade *v.* Livingston, 3 John. Ch. R. 500, 501. See also 2 Sch. & Lefr. 714; Fitzer *v.* Fitzer, 2 Atk. 511, 513; Taylor *v.* Jones, 2 Atk. 602; Bayard *v.* Hoffman, 4 John. Ch. R. 450; Richardson *v.* Smallwood, Jac. R. 552. But see contra, Verplanck *v.* Sterry, 12 John. R. 536, and Jackson *v.* Town, 4 Cowen, R. 603, 604. See Seward *v.* Jackson, 8 Cowen, R. 406; Wickes *v.* Clarke, 8 Paige, R. 161, 165. That there is very great weight in this reasoning cannot be questioned. That it is, upon principle, entirely satisfactory as the true exposition of the statute of 13 Elizabeth, ch. 5, or of the common law as to creditors, may admit of some diversity of judgment. Lord Mansfield has justly remarked, in Cadogan *v.* Kennett, Cowp. 434, upon the statute of 13 Elizabeth: "Such a construction is not to be made in support of creditors as will

§ 486. **Same.** — This doctrine is certainly strictissimi juris, and assumes as a principle of law that the mere indebtment of a party constitutes per se conclusive evidence of fraud in a voluntary conveyance in all cases where the creditors to whom he is then indebted are concerned.[1] Nay, it seems to go farther; for upon the same reasoning subsequent creditors have been allowed to participate in the same relief, even though as to them alone without such antecedent debts there could be no relief.[2] The doctrine was

make third persons sufferers. Therefore the statute does not mitigate against any transaction bona fide made, and where there is *no imagination* of fraud. And so is the common law." "A fair, voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstance of a man being indebted at the time of his making a voluntary conveyance is an *argument* of fraud. The question in every case therefore is, whether the act done is a bona fide transaction, or whether a trick or contrivance to defeat creditors." If this language contains a true exposition of the law on this subject, then the question of fraud or not is open in all cases where a man is indebted as a matter of *fact;* and the law does not absolutely pronounce that the indebtment per se makes the settlement fraudulent. Lord Mansfield used language to a like effect in Doe *v.* Routledge, Cowp. R. 708, 709, 710, 711. The doctrine (as we have seen) in Hinde's Lessee *v.* Longworth (11 Wheat. R. 199) stands upon grounds analogous to those of Lord Mansfield, and is not easily reconcilable with that in Reade *v.* Livingston, 3 John. Ch. R. 500, 501. See also Holloway *v.* Millard, 1 Madd. R. 414 ; Jones *v.* Boulter, 1 Cox, R. 288, 294, 295. In Richardson *v.* Smallwood (Jac. Rep. 552), the subject was considerably discussed by the Master of the Rolls; but from his reasoning I should not draw any other conclusion than that an indebtment at the time was a circumstance presumptive of a fraudulent intent.

[1] In Townshend *v.* Windham (2 Ves. 10, 11), Lord Hardwicke said: "I know no case on the statute of 13 Eliz., where a man, indebted at the time, makes a voluntary conveyance to a child, without consideration, and dies indebted, but that it shall be considered as a part of his estate for the benefit of his creditors," &c. "A man actually indebted and conveying voluntarily, always means it to be in fraud of creditors, as I take it." Belt's Supp. pp. 243, 247. But this language, though so very general, ought not, on that very account, to have more than general truth ascribed to it, where the indebtment is of a nature and extent that makes it presumptive of fraud, or the conveyance is a direct and immediate interference with the rights of creditors. See Richardson *v.* Smallwood, Jac. Rep. 552.

[2] Reade *v.* Livingston, 3 John. Ch. R. 498, 499; Walker *v.* Burroughs, 1 Atk. 94; 1 Madd. Ch. Pr. 220, 221. In England subsequent creditors may avoid a conveyance for fraud if existing creditors could. Freeman *v.* Pope, L. R. 5 Ch. 538. This is true also to some extent in America. Redfield *v.* Buck, 35 Conn. 328; McLane *v.* Johnson, 43 Vt. 48. But the more general rule in this country is that subsequent creditors cannot object unless there was an intent to hinder, delay, or defraud *them*. Davidson *v.* Lanier, 51 Ala. 318; Miner *v.* Jackson, 101 Ill. 550; Harlan *v.* Maglaughlin, 90 Pa. St. 293; Belford *v.* Crane, 1 C. E. Green, 265; Matthai *v.* Heather, 57 Md. 483; Kane *v.* Roberts, 40 Md. 590; Carter

certainly not understood by Lord Alvanley as going to this extent, for he put the case upon the proof of fraud arising from previous insolvency.[1]

§ 487. **Rights of Subsequent Creditors Where Voluntary Conveyance Was Made in Good Faith.** — Where the conveyance is intentionally made to defraud creditors, it seems perfectly reasonable that it should be held void as to all subsequent as well as to all prior creditors on account of ill faith.[2] But where the conveyance is bona fide made, and under circumstances demonstrative of the non-existence of any intention to defraud any creditor, there seems some difficulty in perceiving how the subsequent creditors can make out any right as against the voluntary grantees through the equity of the antecedent creditors.[3] Mr. Chancellor

v. Grimshaw, 49 N. H. 100; Baker *v.* Gilman, 52 Barb. 26; Savage *v.* Murphy, 34 N. Y. 508; Laughton *v.* Harden, 68 Maine, 208. See infra, § 488; and see Ex parte Russell, 19 Ch. D. 588; Ware *v.* Gardner, L. R. 7 Eq. 317, among English cases of the like nature in point of fact. But the intent of the grantor alone to hinder such creditors is enough. Laughton *v.* Harden.

On the other hand it has been declared that a voluntary conveyance cannot be avoided by subsequent creditors if it would be good against existing creditors. Thacher *v.* Phinney, 7 Allen, 147, 150, citing Sexton *v.* Wheaton, 21 U. S. 229, 5 L. Ed. 603; Norton *v.* Norton, 5 Cush. 524, 529. But that may be doubted. Case *v.* Phelps, 39 N. Y. 164; 2 Kent, 441, note (13th ed.).

For other cases in which settlements affecting subsequent creditors have been considered, see Vance *v.* Smith, 2 Heisk. 343; Irion *v.* Mills, 41 Texas, 310; Pike *v.* Miles, 23 Wis. 164; Townsend *v.* Marquard, 45 Penn. St. 198; Lyman *v.* Cessford, 15 Iowa, 229; Holmes *v.* Clark, 48 Barb. 237; Ogden *v.* Prentice, 33 Barb. 160; Childs *v.* Connor, 38 N. Y. Sup. Ct. 471; Therasson *v.* Hickok, 37 Vt. 454.

[1] Lush *v.* Wilkinson, 5 Ves. 387; s. c. cited in Kidney *v.* Coussmaker, 12 Ves. 150, 155. See also Copis *v.* Middleton, 2 Madd. R. 430; Reade *v.* Livingston, 3 John. Ch. R. 501; Stephens *v.* Olive, 2 Bro. Ch. R. 90.

[2] See Reade *v.* Livingston, 3 John. Ch. R. 499, 501; 1 Hovend. Supp. to Vesey, Jr., p. 124 (7); Richardson *v.* Smallwood, Jac. Rep. 552; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 413; Newland on Contracts, ch. 33, p. 389.

[3] See Holloway *v.* Millard, 2 Madd. R. 419; Walker *v.* Burroughs, 1 Atk. R. 94. In Taylor *v.* Jones (2 Atk. 600), the Master of the Rolls manifestly proceeded upon the ground that the conveyance was fraudulent in fact. In Stephens *v.* Olive (2 Bro. Ch. R. 92), where there were prior debts, but secured by mortgage, Lord Kenyon held the settlement good. See also George *v.* Milbanke, 9 Ves. 194, that a settlement containing a provision for payment of debts would be good against all future creditors. Lord Eldon there said: "In general cases, prima facie a voluntary settlement will be taken to be fraudulent." But this supposes that it is not conclusive of fraud, but that it is open to be rebutted. In Kidney *v.* Coussmaker (12 Ves. 136, 155), Sir William Grant said: "Though there has been much controversy and a variety of decisions upon the question

Kent, in the case above referred to, after having remarked that "there is no doubt in any case as to the safety and security of the then existing creditors," proceeded to state: "No voluntary post-nuptial settlement was ever permitted to affect them. And the cases seem to agree that the *subsequent* creditors are let in only in particular cases, as where the settlement was made in contemplation of future debts,[1] or where it is requisite to interfere and set aside the settlement in favor of the prior creditors, or where the subsequent creditor can impeach the settlement as fraudulent by reason of the prior indebtment."[2] And he finally arrived at the conclusion that "fraud in a voluntary settlement was an inference of law, and ought to be so, so far as it concerned existing debts, but that as to subsequent debts there is no such necessary legal presumption, and there must be proof of fraud in fact; and the indebtment at the time, though

whether such a settlement (a voluntary settlement) is fraudulent as to any creditors except such as were creditors at the time, I am disposed to follow the latest decision, that of Montague *v.* Lord Sandwich, which is, that the settlement is fraudulent only as against such creditors as were creditors at the time." Montague *v.* Lord Sandwich is nowhere reported at large. It was decided in 1797, by Lord Rosslyn, and is referred to in 5 Ves. 386, and 12 Ves. 148. Mr. Chancellor Kent has said that in this case "Lord Rosslyn declared a settlement void as to creditors prior to its date. There was no question of insolvency made; but it was clearly held by Lord Rosslyn in this case (see 12 Ves. 156, note), that if the settlement be affected, as fraudulent against such prior creditors, the subject is thrown into assets, and all subsequent creditors are let in." He manifestly founds this remark upon the Reporter's note (*a*) in 12 Ves. 156. But I have not been able to ascertain that Lord Rosslyn gave any such relief in this case to subsequent creditors. The note in 5 Ves. 586, and 12 Ves. 148, would rather lead my mind to an opposite conclusion, that he gave relief only to *prior* creditors pro tanto. Mr. Atherley (Marr. Sett. ch. 13, p. 213, note 1) has expressed an unqualified dissent from this supposed opinion of Lord Rosslyn, and in my judgment with very great reason. Where the settlement is set aside as an intentional fraud upon creditors, there is strong reason for holding it so as to subsequent creditors, and to let them into the full benefit of the property. Richardson *v.* Smallwood, Jac. Rep. 532. See also Holloway *v.* Millard, 1 Madd. R. 414. But see Walker *v.* Burroughs, 1 Atk. 94, on this point.

[1] See Ware *v.* Gardner, L. R. 7 Eq. 317; § 488.

[2] Reade *v.* Livingston, 3 John. Ch. R. 497, 501. See Richardson *v.* Smallwood, Jac. Rep. 552. See on the point whether a subsequent creditor can set aside a post-nuptial settlement, a learned dissertation in the English Jurist for January, 1844, No. 365, pp. 461, 462. In Ede *v.* Knowles, 2 Younge & Coll. N. R. 172, 178, Mr. Vice-Chancellor Bruce said: "The plaintiff does not allege by his bill that he was a creditor at the time of the settlement. I apprehend that a deed can only be set aside as fraudulent against creditors at the instance of a person who was a creditor at the time, though when it shall have been set aside subsequent creditors may be let in."

not amounting to insolvency, must be such as to warrant that conclusion." [1]

§ 488. **Voluntary Conveyance Made in Good Faith Cannot Be Impeached by Subsequent Creditors.** — The same subject has undergone repeated discussions in the Supreme Court of the United States. The doctrine established in that court is, that a voluntary conveyance made by a person not indebted at the time in favor of his wife or children, cannot be impeached by subsequent creditors upon the mere ground of its being voluntary. It must be shown to have been fraudulent, or made with a view to future debts.[2] And on the other hand the mere fact of indebtment at the time does not per se constitute a substantive ground to avoid a voluntary conveyance for fraud even in regard to prior creditors. The question whether it is fraudulent or not is to be ascertained, not from the mere fact of indebtment at the time alone, but from all the circumstances of the case. And if the circumstances do not establish fraud, then the voluntary conveyance is deemed to be above all exception. The language of the court upon the occasion alluded to was as follows: "A deed from a parent to a child for the consideration of love and affection is not absolutely void as against creditors. It may be so under circumstances. But the mere fact of being indebted to a small amount would not make the deed fraudulent if it could be shown that the grantor was in prosperous circumstances and unembarrassed, and that the gift to a child was a reasonable provision according to his state and condition in life, and leaving enough for the payment of the debts of the grantor. The want of a valuable consideration may be a badge of fraud; but it is only presumptive and not conclusive evidence of it, and may be met and rebutted by evidence on the other side." [3] And this language (it should be remembered) was used in a case where the conveyance was

[1] Reade *v.* Livingston, 3 John. Ch. R. 497, 501. See Richardson *v.* Smallwood, Jac. Rep. 552.

[2] Sexton *v.* Wheaton, 21 U. S. 229, 5 L. Ed. 603; Hinde's Lessee *v.* Longworth, 24 U. S. 199, 6 L. Ed. 454; Bennett *v.* Bedford Bank, 11 Mass. R. 421. Supra, § 360, and note. See Ware *v.* Gardner, L. R. 7 Eq. 317; McLaughlin *v.* Bank of Potomac, 48 U. S. 220, 12 L. Ed. 675; Offutt *v.* King, 1 McArth. 312; Sparkman *v.* Place, 5 Ben. 184; Summers *v.* Hoover, 42 Ind. 153; Rickets *v.* McCully, 7 Heisk. 712; In re Cornwall, 9 Blatchf. C. C. 116.

[3] Hinde's Lessee *v.* Longworth, 11 Wheat. R. 199. See also Verplank *v.* Sterry, 12 John. R. 536, 554, 556, 557; Partridge *v.* Gopp, Ambler, R. 597, 598; s. c. 1 Eden, R. 167, 168, 169; Gilmore *v.* North Am. Land Co., Peters, C. R. 461.

sought to be set aside by persons claiming as judgment creditors upon antecedent debts.[1]

§ 489. **Same.** — The same doctrine seems now well established in England.[2] In a recent case, where the very point was before the

[1] The doctrine of the Supreme Court seems an entire coincidence with that held by Lord Mansfield, in Cadogan *v.* Kennett, Cowp. R. 432, 434, and Doe *v.* Routledge, Cowp. R. 705, 710, 711, 712. See also Lush *v.* Wilkinson, 5 Ves. 387; Holloway *v.* Millard, 1 Madd. R. 414; Kidney *v.* Coussmaker, 12 Ves. 155; Sagitary *v.* Hide, 2 Vern. 44. It approaches very nearly to the doctrine held in the Supreme Court of the United States as to the construction of the statute of 27th of Elizabeth, as to subsequent purchasers; for in the other case the voluntary conveyance is not held absolutely void, but only the burthen of proof to repel fraud is thrown upon the claimants under it. Cathcart *v.* Robinson, 30 U. S. 277, 8 L. Ed. 120. See also Verplank *v.* Sterry, 12 John. R. 536, 554, 556, 557, 558. In this last case Mr. Justice Spencer, in delivering his opinion in the Court of Errors, held the doctrine maintained in the Supreme Court of the United States, as to creditors, in the broadest terms. "If," said he, "the person making a settlement is insolvent, or in doubtful circumstances, the settlement comes within the statute (of 13th of Elizabeth, ch. 5). But if the grantor be not indebted to such a degree as that the settlement will deprive the creditors of an ample fund for the payment of their debts, the consideration of natural love and affection will support the deed, although a voluntary one, against his creditors; for, in the language of the decisions it is free from the imputation of fraud." Ibid. 557. Mr. Newland maintains the same opinion with great strength. Newland on Contracts, ch. 23, pp. 384, 385. Mr. Fonblanque has remarked that, "If a conveyance or gift be of the whole or of the greater part of the grantor's property, such conveyance or gift would be fraudulent; for no man can voluntarily divest himself of all or the most of what he has, without being aware that future creditors will probably suffer by it." 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*).

[2] "With regard to creditors being so at the time, it is established that it is not necessary to show from anything actually said or done by the party that he had the express design by the deed to defeat creditors; but if he includes in it property to such an amount that, having regard to the state of his property, and to the amount of his liabilities, its effect might probably be to delay or defeat creditors, — if the court is satisfied of that, — the deed is within the meaning of the statute." Jenkyn *v.* Vaughan, 3 Drew. 419, Kindersley, V. C., quoted with approval in Crossley *v.* Elworthy, L. R. 12 Eq. 158. See also Freeman *v.* Pope, L. R. 5 Ch. 538 (qualifying Spirett *v.* Willows, 3 DeG. J. & S. 293); Kent *v.* Riley, L. R. 14 Eq. 190; Cornish *v.* Clark, Ib. 184.

If insolvency follow shortly after the settlement, the fact must be satisfactorily explained or the settlement will be deemed fraudulent. Crossley *v.* Elworthy, supra; Mackay *v.* Douglas, L. R. 14 Eq. 106. And where the settler is about to embark in hazardous business, it is not it seems sufficient in England to justify the settlement against creditors who become such in the course of that business that he was then solvent, and that the settlement covered but a small part of his property. Mackay *v.* Douglas, supra; Ex parte Russell, 19 Ch. D. 588, 598. But see Kent *v.* Riley, L. R. 14 Eq. 190; Babcock *v.* Eckline, 24 N. Y. 623. To make a settlement on the eve of embarking in trade affords however only presumptive evidence of fraud. Mackay *v.* Douglas. See Tanguery *v.*

court,[1] Lord Langdale said: "There has been a little exaggeration in the arguments on both sides as to the principle on which the courts act in such cases as these; on one side it has been assumed that the existence of any debts at the time of the execution of the deed would be such evidence of a fraudulent intention as to induce the court to set aside a voluntary conveyance, and oblige the court to do so under the statute of Elizabeth. I cannot think the real and just construction of the statute warrants that proposition, because there is scarcely any man who can avoid being indebted to some amount; he may intend to pay every debt as soon as it is contracted and constantly use his best endeavors to have ample means to do so, and yet may be frequently, if not always, indebted in some small sum; there may be a withholding of claims contrary to his intention by which he is kept indebted in spite of himself; it would be idle to allege this as the least foundation for assuming fraud or any bad intention. On the other hand it is said that something amounting to insólvency must be proved, to set aside a voluntary conveyance; this too is inconsistent with the principle of the act and with the judgments of the most eminent judges. The evidence as to Westacott's property when he executed the settlement I cannot rely on; it is brought forward many years after the witnesses had known it, and they speak to the value of the property without taking into consideration any charges that might be upon it; and I am not in a situation of knowing whether there were any charges upon it."

§ 490. **Same.** — The same doctrine has been asserted by the Supreme Court of Connecticut in a recent case which hinged exclusively upon the same point. It was there laid down as the unanimous opinion of the court, and there is much persuasiveness as well as reasonableness and equity, in the doctrine that "Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor

Bowles, L. R. 14 Eq. 51; Cornish *v.* Clark, Ib. 184; Kent *v.* Riley, Ib. 190.

A mere surety is within the statute as well as an absolute debtor. The case must be looked at as if the surety's undertaking had already become fixed by the failure of his principal to pay. Nor will the fact that the surety can show that his principal was able to pay the debt when the suretyship was undertaken justify a voluntary settlement of all the surety's estate. In re Ridler, 22 Ch. D. 74.

A settlement of leaseholds may equally be within the statute. In re Ridler, 22 Ch. D. 74; Price *v.* Jenkins, 5 Ch. D. 619. See Ex parte Hillman, 10 Ch. D. 622; Ex parte Dohle, 26 Week. R. 407.

[1] Townsend *v.* Westacott, 2 Beav. R. 340, 345.

is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unencumbered for the payment of his debts, then such conveyance will be valid against conveyances (debts) existing at the time. But though there be no fraudulent intent, yet if the grantor was considerably indebted and embarrassed at the time, and on the eve of bankruptcy, or if the value of the gift be unreasonable considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts, then such conveyance will be void as to creditors." [1]

[1] Salmon *v.* Bennett, 1 Connect. Rep. 525, 548 to 551; S. P. Newland on Contracts, ch. 23, pp. 384, 385. Mr. Chancellor Kent, in commenting on this case, says: "I have not been able to find the case in which a mere voluntary conveyance to a wife or child has been plainly or directly held good against the creditor at the time. The cases appear to me to be, upon the point, uniformly in favor of the creditor." (Reade *v.* Livingston, 3 John. Ch. R. 504.) Mr. Atherley (Marr. Sett. ch. 13, pp. 212 to 219) maintains the same doctrine. He holds that if the party is in debt at the time of settlement, it is void as to subsequent as well as to prior creditors; and this without any reference to the amount of the debts. See note to Bigelow's Dig. (2d ed.), p. 200, title, Conveyance. On the other hand it may be asserted with some confidence that there is no English case which pointedly decides that such a conveyance is void merely from the circumstance that the party was indebted at the time, if the debts bore no proportion to his assets, and there was no presumption of meditated fraud. The cases cited by Mr. Chancellor Kent do not appear to me to reach the point, at least not in a form free from difficulty and obscurity. The case of St. Amand *v.* The Countess of Jersey, 1 Comyn, R. 255, is quite obscurely reported; but it may be gathered from that report that the grantor was deeply indebted at the time, and probably there was a strong presumption of fraud in fact. The case of Fitzer *v.* Fitzer, 2 Atk. R. 511, was the case of a subsequent creditor having an assignment under the insolvent act of 2 Geo. II. ch. 2, to compel an execution of the trusts of a deed of separation in favor of a wife. It was not the case of a voluntary conveyance held void. In Taylor *v.* Jones, 2 Atk. 600, 602, the reasoning of the Master of the Rolls certainly goes to the maintenance of the doctrine. But the judgment seems ultimately to have turned upon the point that the conveyance was fraudulent, and there was a trust in it in favor of the grantor *for life*. Some part of the doctrine of the Master of the Rolls would not now be held maintainable. The doctrine of Lord Hardwicke, in Russell *v.* Hammond, 1 Atk. 35, by no means warrants so general a conclusion. His Lordship's language in Walker *v.* Burroughs, 1 Atk. 39, though broad and sweeping, does not come up to it; and the case turned on the Statute of Bankruptcy, 21 Jac. I. ch. 15. Townshend *v.* Windham, 2 Ves. 1, 10, 11, was the case of the execution of a power; and Lord Hardwicke held the property assets for the payment of the debts of existing creditors. The question did not arise whether the debtor had other estate at the time sufficient to pay his debts; and Lord Hardwicke treated the case as an intentional execution of the power to defraud

§ 491. **Same.** — The same doctrine has been expressly held on different occasions by the judges of the Supreme Court of New York; and in the latest case on this subject it has been expressly affirmed that neither a creditor nor a purchaser can impeach a conveyance, bona fide made, founded on natural love and affection, and free from the imputation of fraud, and where the grantor had, independent of the property granted, an ample fund to satisfy

creditors. On the other hand the case of Stephens *v.* Olive, 2 Bro. Ch. R. 90, shows that the fact of indebtment is not sufficient to set aside the conveyance if the debt is actually secured by mortgage. Now it is somewhat difficult to distinguish between the case of a specific security for debts and a general security founded upon an ample fortune in the grantor. Each operates, if at all, to repel the same imputation of fraudulent intent: and if the law makes the mere fact of indebtment per se a fraud as to existing creditors, the security in either case cannot control the presumption. The doctrine too of Lord Alvanley in Lush *v.* Wilkinson, 5 Ves. 383, trenches upon the conclusiveness of the presumption. And notwithstanding Mr. Chancellor Kent's doubts on this case in Reade *v.* Livingston, 3 John. Ch. R. 497, 498, it has been repeatedly recognized in later cases. 12 Ves. 150, 155; 2 Madd. R. 430. It must therefore be admitted that there is some difficulty in reconciling the language of the English cases, although the cases themselves may be all distinguishable from each other. The question really resolves itself into this, whether a voluntary conveyance is void against creditors because it ultimately operates to defeat the debts of existing creditors, or whether it is void only when from the circumstances the presumption fairly arises that it either was intended to defraud or did necessarily defraud such creditors. Sir Thomas Plumer, in Holloway *v.* Millard, 1 Madd. R. 417, 419, manifestly treated the statute of 13th of Eliz. as only applying to fraudulent conveyances. "This conveyance is not one of that description (i. e. to defraud creditors). It is not fraudulent merely because it is voluntary. A voluntary conveyance may be made of real or personal property without any consideration whatever, and cannot be avoided by subsequent creditors, unless it be of the description mentioned in the statute, &c. Its being voluntary is prima facie evidence" (he does not say *conclusive*) "where the party is *loaded* with debt at the time, of an intent to defeat and defraud his creditors; but if unindebted his disposition is good." He afterwards added, — "A voluntary disposition, even in favor of a child is not good, if the party is indebted at the time." But this must be taken in connection with his preceding remarks as applying to a case of being *loaded* with debts. See also Copis *v.* Middleton, 2 Madd. R. 426, 428, 430. In Jones *v.* Boulter (1 Cox, R. 288, 294), Lord Ch. B. Skinner said: "There is no mention in the act (Stat. 13 Eliz.) of voluntary conveyances; and the question has always been whether in the transaction there has been fraud or covin. *Here were creditors at the time*, and this is said always to have been a badge of fraud. It is true that this circumstance is always strong evidence of fraud. *But if there are other circumstances in the case, that alone will not be sufficient.*" Eyre, B. is still more explicit. He said: "The 13th of Elizabeth is a wholesome law, plainly penned, and I wonder how artificial reason could puzzle it. An artificial construction has entangled courts of justice, namely, that a voluntary conveyance of a person indebted at the time is to be deemed fraudulent." See also 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*).

his creditors. This qualification however was then annexed to the doctrine, that if a fraudulent use is made of such a settlement, it may be carried back to the time when the fraud was commenced.[1]

§ 492. **Same.** — Under this apparent diversity of judgment it would ill become the commentator to interpose his own views as to the comparative weight of the respective judicial opinions. It may probably be found in the future, as it has been in the past, that professional opinions will continue somewhat divided upon the subject, until it shall have undergone a more searching judicial examination, not upon authority merely, but upon principle. If the question were now entirely freed from the bearing of dicta and opinions in earlier times, there is much reason to believe that it would settle down into the proposition (certainly most conformable to the language of the statute of 13th of Eliz.) that mere indebtment would not per se establish that a voluntary conveyance was void, even as to existing creditors, unless the other circumstances of the case justly created a presumption of fraud actual or constructive, from the condition, state, and rank of the parties, and the direct tendency of the conveyance to impair the rights of creditors.[2] In the latest English case touch-

[1] Jackson *v.* Town, 4 Cowp. R. 604; Verplank *v.* Sterry, 12 John. R. 536. See also Huston's Admr. *v.* Cantril, 11 Leigh, R. 136. See Laid *v.* Scott, 5 Heisk. 314.

[2] See Jones *v.* Boulter, 1 Cox, R. 288, 294, 295; Stephens *v.* Olive, 2 Bro. Ch. R. 90. See also 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, pp. 412, 413; Twyne's case, 3 Co. R. 81 b.; Newland on Contr. ch. 23, pp. 383, 384, 385, where the learned author asserts the opinion intimated in the text in a positive manner, and maintains it by very cogent reasoning. Mr. Chancellor Kent, in his learned opinion already noticed (3 John. Ch. R. 506), has traced out some of the analogies between the English law and the continental law on this subject, and I gladly refer the learned reader to his citations. Voet has discussed the subject in his Commentaries, 1 Voet. ad Pand. Lib. 39, tit. 5, § 20; Pothier, in his Traité des Donations entre Vifs, § 2; and Grenier, in his Traité des Donations, Tom. 1, Partie 1, ch. 2, § 2, p. 253, &c. Voet holds that the donee is liable to the existing but not to the future debts of the donor, when he is donee of all or of the major part of the donor's property; "utrum donatis omnibus bonis, aut majore eorum parte"; Pothier says that the donee of particular things is not bound to pay the existing debts of the donor unless he knows that the donor was insolvent at the time, or that he will not have sufficient left to pay his creditors, and the donation is in fraud of his creditors. But those who are technically called "universal donees", donataires universels (which embrace not only donees of the whole property of the donor, but of the whole of a particular kind, as movables, &c.), are liable for the existing debts of the donor but not for his future debts. See Gridley *v.* Watson, 53 Ill. 186; Johnson *v.* West, 43 Ala. 689; Pomeroy *v.* Bailey,

ing this subject it was unequivocally held that a voluntary deed made in consideration of love and affection is not necessarily void as against the creditors of the grantor upon the common law or the statute of Elizabeth, but that it must be shown from the actual circumstances that the deed was fraudulent and necessarily tended to delay or defeat creditors.[1]

§ 493. **Nature of Estate Conveyed.** — There is another qualification of the doctrine respecting the rights of creditors which deserves attention in this place, not only from its practical importance in regard to the jurisdiction of Courts of Equity, but also from the fact that it has given rise to some diversity of judicial opinion. The point intended to be suggested is this: whether in order to make a conveyance void as against existing creditors it is indispensable that it should make a transfer of property which could be taken in execution by the creditors or compulsorily applied to the payment of the debts of the grantor, or whether the rule equally applies to the conveyance of any property whatsoever of the grantor, although not directly so applicable to the discharge of debts.

§ 494. [**Property Conveyed Should Be Capable of Sale under Execution.** — It is not the conveyance of every form or species of property passing between an insolvent or embarrassed debtor, that can be set aside by creditors. The property ought to be of such a nature as to be susceptible of levy, and the interest of the debtor therein should be such as could be reached by an execution. A conveyance by husband and wife of his property, while he was free of debt, to the wife, and subsequently upon the husband's becoming indebted, and conveyance by him and his wife to one preferred creditor, to the exclusion of the general creditors, is not

43 N. H. 118; Thacher *v.* Phinney, 7 Allen, 146; Winchester *v.* Charter, 12 Allen, 606; s. c. 97 Mass. 140, and 102 Mass. 272; Lerow *v.* Wilmarth, 9 Allen, 382; Babcock *v.* Eckler, 24 N. Y. 623; Stevens *v.* Robinson, 72 Maine, 381; Spence *v.* Dunlap, 6 Lea, 457; Churchill *v.* Wells, 7 Coldw. 364; Carpenter *v.* Carpenter, 25 N. J. Eq. 194; Rumbolds *v.* Parr, 51 Mo. 592; Kuhn *v.* Stansfield, 28 Md. 210; Boone *v.* Hardie, 83 N. C. 470; Westmoreland *v.* Powell, 59 Ga. 259. These cases are to the effect that the question of fraud is a question of fact on all the circumstances. See however Fink *v.* Denny, 75 Va. 663; Morrison *v.* Clark, 55 Tex. 437; Gear *v.* Schrel, 57 Iowa, 666; Kerrigan *v.* Rantigan, 43 Conn. 17. And see 2 Kent, 441, notes (13th ed.).

[1] Gale *v.* Williamson, 8 Mees. & Welsb. R. 405, 409, 410, 411. See Cornish *v.* Clark, L. R. 14 Eq. 184, where the children in whose favor a father had made a voluntary distribution knew that it would interfere with the claims of creditors. The distribution was held void. As to laches of the creditor see Cranson *v.* Smith, 47 Mich. 189.

fraudulent; nor will a conveyance by husband and wife, of property purchased by the wife with her separate estate during the solvency of her husband, be set aside where they both convey it after he has become indebted.[1] The proceeds for insurance policies made payable to the wife, or her children, cannot be reached by the creditors of the husband, though while insolvent he paid premiums upon the insurance. The object of the statute of Elizabeth was to prevent debtors from dealing with their property in any way to the prejudice of their creditors; but dealing with that which creditors, irrespective of such dealing, could not have touched, is within neither the letter nor the spirit of the statute.[2] While the law for good and sufficient reasons refuses to permit an express trust to be added to or ingrafted upon a deed absolute in form by parol evidence alone, yet when property is conveyed by a grantor by absolute deed, with directions that it be held in trust for some lawful purpose, there is a moral obligation on the part of the grantee to perform his trust or surrender the property, though the law will not compel him. A conveyance of the trust property by the beneficiary under such circumstances would not be a fraud upon his creditors, for the creditors have no legal right to ask him to hold property to which he has no moral right. This is especially so where the lien of the judgment creditor had expired before the conveyance complained of.[3] So, where a judgment debtor owned a land contract upon which he had made a small payment, and upon a sale of his property his interest in the contract was purchased by another creditor, who in turn paid the balance due on the contract and took a deed. The small interest of the judgment debtor was not such an interest in property, the conveyance of which was void as to creditors.[4]]

§ 495. **Same.** — The English doctrine upon this subject, after various discussions, has at length settled down in favor of the former proposition; namely, that in order to make a voluntary conveyance void as to creditors, either existing or subsequent, it is indispensable that it should transfer property which would be liable to be taken in execution for the payment of debts. The reasoning by which this doctrine is established is, in substance,

[1] Stewart *v.* Platt, 101 U. S. 731, 25 L. Ed. 816; Davis *v.* Fredericks, 104 U. S. 618, 26 L. Ed. 849; Mishler *v.* Finch, 104 Md. 183, 64 Atl. 945; Matador Land & Cattle Co. *v.* Cooper, 39 Tex. Civ. App. 99, 87 S. W. 235.

[2] Washington Central Bank *v.* Hume, 128 U. S. 195, 32 L. Ed. 370, 9 S. Ct. Rep. 41.

[3] Smith *v.* Ellison, 80 Ark. 447, 97 S. W. 666.

[4] Cutcheon *v.* Buchanan, 88 Mich. 594, 50 N. W. 756.

that the Statute of 13th of Elizabeth did not intend to enlarge the remedies of creditors, or to subject any property to execution which was not already, in law or equity, subject to the rights of creditors; that a voluntary conveyance of property not so subject could not be injurious to creditors, nor within the purview of the statute, because it would not withdraw any fund from their power which the law had not already withdrawn from it. And that would be a strange anomaly to declare that to be a fraud upon creditors which in no respect varied their rights or remedies.[1] Hence it has been decided that a voluntary settlement of stock, or of choses in action, or of copyholds, or of any other property not liable to execution, is good, whatever may be the state and condition of the party as to debts.[2]

§ 496. **Same.** — Mr. Chancellor Kent, in a very elaborate argument, has discussed the same subject, and doubted the soundness of the reasoning by which that doctrine is attempted to be established. He maintains that in cases of fraudulent alienations of this sort Courts of Equity ought to interfere and grant remedial justice, whether the property could be reached by an execution at law or not; for otherwise a debtor under shelter of it might convert all his property into stock and settle it upon his family in defiance of his creditors and to the utter subversion of justice. And he further insists that the cases antecedent to the time of Lord Thurlow, and especially in the time of Lord Hardwicke and Lord Northington, do sustain his own doctrine.[3]

[1] See Castle *v.* Palmer, 6 Allen, 401, 404; Silloway *v.* Brown, 12 Allen, 30, 33; Winchester *v.* Guddy, 72 N. C. 115; Fellows *v.* Lewis, 65 Ala. 343; Lishy *v.* Perry, 6 Bush, 515; Cox *v.* Wilder, 2 Dill. 45.

[2] See Dundas *v.* Dutens, 1 Ves. Jr. 196; s. c. 2 Cox, R. 196; McCarthy *v.* Gould, 1 B. & Beatt. 390; Grogan *v.* Cooke, 2 B. & Beatt. 233; Caillard *v.* Estwick, 1 Anst. R. 381; Nantes *v.* Conork, 9 Ves. 188, 189; Rider *v.* Kidder, 10 Ves. 368; Guy *v.* Pearkes, 18 Ves. 196, 197; Cochrane *v.* Chambers, 1825; MSS. cited in Mr. Blunt's note to Horn *v.* Horn, Ambler, R. 79; Matthews *v.* Feaver, 1 Cox, R. 278. Judgment debtor will not be permitted to clandestinely donate the wages of his infant son, and services of his horses, in order to defeat creditors. Tuckey *v.* Lovell, 8 Idaho, 731, 71 Pac. 122; but where the father, who is heavily indebted, allows his infant son to collect his own wages, and the son purchases stock in a corporation, creditors cannot complain. Wisner *v.* Osborne, 64 N. J. Eq. 614, 55 Atl. 51; Blackburn *v.* Holley, 9 Ky. L. Rep. 620.

An agreement between the employee and employer by which salary was to be paid in advance, so that attaching creditors could have nothing upon which to levy, the agreement was void as to any part of salary that was not exempted by law in favor of the head of a family, but valid as to the ten per cent secured to the householder by statute. Barnes *v.* William Waltke Co., 135 Mo. App. 488, 116 S. W. 7.

[3] Bayard *v.* Hoffman, 4 John. Ch. R. 452 to 459; Edgell *v.* Haywood,

§ 497. **Bona Fides Not Alone Sufficient.** — But whatever may be the true doctrine as to these critical and nice questions, it is certain that a conveyance, even if for a valuable consideration, is not under the statute of 13th of Elizabeth valid in point of law from that circumstance alone. It must also be bona fide; for if it be made with intent to defraud or defeat creditors, it will be void although there may in the strictest sense be a valuable, nay an adequate consideration. This doctrine was laid down in Twyne's Case (3 Co. R. 81), and it has ever since been steadily adhered to.[1] Cases have repeatedly been decided in which persons have given a full and fair price for goods, and where the possession has been actually changed; yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent and therefore set aside.[2] Thus where a person with knowl-

3 Atk. 352. See also Mitf. Pl. by Jeremy, 115, and 1 Jac. & Walk. 371; M'Durmut *v.* Strong, 4 John. Ch. R. 687; Spader *v.* Davis, 5 John. Ch. R. 280; s. c. 20 John. R. 554. The cases cited by Mr. Chancellor Kent go very far to establish the doctrine which he contends for. Taylor *v.* Jones (2 Atk. R. 600) is a decision of the Master of the Rolls directly in point. The case of King *v.* Dupine, cited in Mr. Saunders's note to 2 Atk. 603, note 2, and reported 3 Atk. R. 192, 200, is strong the same way; and so is Horn *v.* Horn, Ambl. R. 79. Upon this latter case Lord Thurlow is reported to have said: "The opinion in Horn *v.* Horn is so anomalous and unfounded, that forty such opinions would not satisfy me. It would be preposterous and absurd to set aside an agreement, which, if set aside, leaves the stock in the name of a person where you could not touch it." Grogan *v.* Cooke, 2 B. & Beatt. 233. In Partridge *v.* Gopp, Ambl. R. 596, s. c. 1 Eden, R. 163, Lord Chancellor Northington made the donees of £500 each refund in favor of creditors. But he seems to have been impressed with the opinion that the transaction was fraudulent, or, to use his own words, that the transaction smelt of craft and experiment. The transaction was secret; and, "Dona clandestina sunt semper suspiciosa." Twyne's Case, 3 Co. R. 81. Whatever may be the true doctrine on this subject, a distinction may perhaps exist between cases where a party indebted actually converts his existing *tangible property* into stock to defraud creditors, and cases where he becomes possessed of stock without indebtment at the time, or, if indebted, without having obtained it by the conversion of any other tangible property. Where tangible property is converted into stock to defraud existing creditors, there may be a solid ground to follow the fund, however altered.

[1] Newland on Contr. ch. 23, pp. 370, 371; 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*); Cadogan *v.* Kennett, Cowp. R. 434; Worseley *v.* De Mattos, 1 Burr. 474, 475.

[2] Cadogan *v.* Kennett, Cowp. R. 434; Bridge *v.* Eggleston, 14 Mass. R. 245; Harrison *v.* Trustees of Phillips Academy, 12 Mass. R. 456. Supra, § 481, and note; Clements *v.* Moore, 6 Wall. 299, 312; In re Johnson, 20 Ch. D. 389, 393; Holmes *v.* Penney, 3 Kay & J. 90; Wadsworth *v.* Williams, 100 Mass. 126; Chapel *v.* Clapp, 29 Iowa, 191; Schaferman *v.* O'Brien, 28 Md. 565; Tompkins *v.* Sprout, 55 Cal. 31; Robinson *v.* Holt, 39 N. H. 557. See Harrison *v.* Jaquess, 29 Ind. 208; Pulliam *v.* New-

edge of a decree against the defendant bought the house and goods belonging to him and gave a full price for them, the court said that the purchase being with a manifest view to defeat the creditor was fraudulent, and, notwithstanding the valuable consideration, void.[1] So if a man should know of a judgment and execution, and with a view to defeat it should purchase the debtor's goods, it would be void, because the purpose is iniquitous.

§ 498. **Distinction between Conveyances Intended as an Assignment.** — But cases of this sort are carefully to be distinguished from others where a sale or assignment or other conveyance merely amounts to giving a preference in payment to another creditor, or where the assignment or conveyance is made for the benefit of all creditors; for such a preference[2] or such a gen-

berry, 41 Ala. 168; Carny *v.* Palmer, 2 Coldw. 35; Stein *v.* Herman, 23 Wis. 132.

As to partial considerations, see Mead *v.* Combs, 4 C. E. Green, 112; Cunningham *v.* Dwyer, 28 Md. 299. Fraudulent purpose in the grantor alone is enough to avoid a voluntary conveyance; secus in the case of a conveyance for value. Ante, § 481, note. Bender *v.* Kingman, 64 Neb. 766, 90 N. W. 886, and where evidence of fraud is not sufficient to set aside deed absolutely, but does excite a well founded suspicion as to adequacy of consideration and fairness of transaction, the conveyance will stand only as security for the consideration actually given. Withrow *v.* Warner, 56 N. J. Eq. 795, 40 Atl. 721, 67 Am. St. Rep. 501.

[1] Worseley *v.* De Mattos, 1 Burr. 474, 475. But if the purchase was made in good faith, without intent to defeat the creditor, it may be upheld. Wood *v.* Dixie, 7 Q. B. 892; Hale *v.* Saloon Omnibus Co., 4 Drew. 492; Darvill *v.* Terry, 6 Hurl. & N. 807. See Hill *v.* Ahern, 135 Mass. 158; Ricker *v.* Ham, 14 Mass. 137; Clapp *v.* Leatherbee, 18 Pick. 131. The insolvent may e. g. sell to get money to pay his debts. In re Coleman, L. R. 1 Ch. 128; Kent *v.* Riley, L. R. 14 Eq. 190; Lowry *v.* Howard, 35 Ind. 170.

[2] York Bank *v.* Carter, 38 Penn. St. 446; Davidson *v.* Lanier, 51 Ala. 318; Wilkerson *v.* Cheatham, 45 Ala. 337; Heidingsfelder *v.* Slade, 60 Ga. 396; Lampson *v.* Arnold, 19 Iowa, 479; Gormbel *v.* Arnett, 100 Ill. 34; Hessing *v.* McCloskey, 37 Ill. 341; Mayfield *v.* Kilgour, 31 Md. 240; Carpenter *v.* Muren, 42 Barb. 300. And if a creditor has sought out and discovered through the courts concealed property of his debtor, he is *entitled* of right to a preference over other creditors in regard to such property. Rappleye *v.* International Bank, 93 Ill. 396. Preference to a bona fide creditor is not invalid because of intent participated in by such creditor to defeat other creditors. Banfield *v.* Whipple, 14 Allen, 13. See Gray *v.* St. John, 35 Ill. 222; Walden *v.* Murdock, 23 Cal. 540; Young *v.* Dumas, 39 Ala. 60; Chase *v.* Walters, 28 Iowa, 460; Bear's Estate, 60 Penn. St. 430. The motive of preference is immaterial. Crawford *v.* Austin, 34 Md. 49. But it must not be a mere cover for benefit to the debtor. Banfield *v.* Whipple, supra. A reservation of the surplus however is proper. Beach *v.* Bestor, 47 Ill. 521. And a husband indebted to his wife may treat her as a preferred creditor. Davidson *v.* Lanier, 51 Ala. 318; infra, § 500. But see Kuhn *v.* Stansfield, 28 Md. 210.

But some courts hold that if the transaction is intended by the debtor

eral assignment or conveyance[1] is not treated as mala fide, but as merely doing what the law admits to be rightful. A sale, assignment, or other conveyance is not necessarily fraudulent because it may operate to the prejudice of a particular creditor.[2] But secret preferences made to induce particular creditors to sign a general assignment, and unknown to the other creditors who execute the assignment, are treated as frauds upon such creditors.[3]

§ 499. **Voluntary Conveyances Are Valid as between the Parties.** — It may be added that although voluntary conveyances are or may be void as to existing creditors, they are perfect and effectual as between the parties, and cannot be set aside by the grantor if he should become dissatisfied with the transaction.[4] It is his own folly to have made such a conveyance. They are

to hinder or delay other existing creditors, and the preferred creditor is in any way aware of a purpose to that effect, the preference may be upset by them. Foster *v.* Grigsby, 1 Bush. 86. So a general assignment is probably void against a particular creditor whom it was the special motive of the assignment to hinder. Stickney *v.* Crane, 35 Vt. 89.

Under the English Bankrupt Act a preference made without pressure, and in contemplation of bankruptcy, is fraudulent. Ex parte Craven, L. R. 10 Eq. 648. As to pressure see Ex parte Tempest, L. R. 6 Ch. 70. The preference need not be the sole motive of the act, to make it fraudulent in England. Ex parte Hill, 23 Ch. D. 695. But it should be the dominant one, it seems. Ib. That is enough at any rate. Ib.

The transfer by way of preference may be of the debtor's entire estate. Alton *v.* Harrison, L. R. 4 Ch. 622; Hobbs *v.* Davis, 50 Ga. 213; Thornton *v.* Tandy, 39 Texas, 544.

The right of an executor or administrator to retain for a debt due to him from the decedent, so far as it exists, is of course a right of preference. See post, note at end of § 782.

[1] See Lee *v.* Green, 35 Eng. L. & E. 261; Wolverhampton Bank *v.* Marston, 7 Hurl. & N. 148; Johnson *v.* Osenton, L. R. 4 Ex. 107. But see Dalton *v.* Currier, 40 N. H. 237, where a general assignment for creditors to save the property from attachments, not made under the statute but depending upon common-law principles for its validity, was held void against the attachment laws. See also Edwards *v.* Mitchell, 1 Gray, 239; Stanfield *v.* Simmons, 12 Gray, 442. But see Adams *v.* Blodgett, 2 Woodb. & M. 233. Such assignments are against the policy of the Bankrupt Act and invalid. In re Pierce, 3 Bank. Reg. 61; In re Spicer, Ib. 127; In re Catlin. Ib. 134; Hull *v.* Evans, 22 Ky. L. Rep. 1118, 59 S. W. 851.

[2] Holbird *v.* Anderson, 5 T. R. 235; Pickstork *v.* Lyster, 3 M. & Selw. R. 371.

[3] Post, § 507.

[4] Petre *v.* Espinasse, 2 Mylne & Keen, 496; Bill *v.* Cureton, Id. 510, 530; Dunaway *v.* Robertson, 95 Ill. 419, holding this to be true though the conveyance (having been recorded) had not been delivered. Between the parties a naked declaration of *trust* by the grantee in favor of the grantor may be enforced. Ownes *v.* Ownes, 8 C. E. Green, 60; Harvey *v.* Varney, 98 Mass. 118. And see supra, § 421.

not only valid as to the grantor, but also as to his heirs and all other persons claiming under him in privity of estate with notice of the fraud.[1] A conveyance of this sort (it has been said with great truth and force) is void only as against creditors, and then only to the extent in which it may be necessary to deal with the conveyed estate for their satisfaction. To this extent and to this only it is treated as if it had not been made. To every other purpose it is good. Satisfy the creditors and the conveyance stands.[2] But the assignees of a bankrupt or an insolvent debtor are entitled to the same rights and stand in the same predicament as the creditors themselves, and are deemed to represent them.[3]

§ 500. **Effect of a Post-nuptial Settlement.** — The circumstances under which a conveyance will be deemed purely voluntary, or will be deemed affected by a consideration valuable in itself or in furtherance of an equitable obligation, are very important to be considered; but they more properly belong to a distinct treatise upon the nature and validity of settlements. It may not however be useless to remark in this place, that a settlement made upon a wife after marriage is not to be treated as wholly voluntary where it is done in performance of a duty which

[1] Randall *v.* Phillips, 3 Mason, R. 378. A creditor of a decedent's estate may have a sale of such estate set aside for fraud though he was a party to judicial proceedings which authorized the sale, if he was not a party to the fraud and was ignorant of it at the time of the sale. Johnson *v.* Waters, 111 U. S. 640, 28 L. Ed. 547, 4 S. Ct. Rep. 619.

[2] Sir W. Grant, in Curtis *v.* Price, 12 Ves. 103; Worseley *v.* De Mattos, 1 Burr. 474; 1 Madd. Ch. Pr. 222, 223; 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4; Malin *v.* Garnsey, 16 John. R. 189; Reichart *v.* Castelor, 5 Binn. 109; Drinkwater *v.* Drinkwater, 4 Mass. R.; Scholey *v.* Worcester, 4 Hun, 302; Dietrich *v.* Koch, 35 Wis. 618; Harman *v.* Harman, 63 Ill. 572; O'Neil *v.* Chandler, 42 Ind. 471; Clemens *v.* Clemens, 28 Wis. 637; Noble *v.* Noble, 26 Ark. 317. If a creditor is a party to such a deed, or acquiesces in one, he cannot afterwards avoid it, nor can any one claiming under him with notice or as a volunteer. Olliver *v.* King, 8 DeG. M. & G. 110; Baldwin *v.* Cawthorne, 19 Ves. 164; Steel *v.* Brown, 1 Taunt. 381; Ex parte Harvey, 27 Eng. L. & E. 272. As to acquiescence by the creditor, see Rapelee *v.* Stewart, 27 N. Y. 310; Richards *v.* White, 7 Minn. 345; Phillips *v.* Wooster, 36 N. Y. 412; French *v.* Mehan, 56 Penn. St. 286. One who purchases the equity of redemption on foreclosure sale must in like manner accept the mortgage, and must on redeeming pay what is justly due. Russell *v.* Dudley, 3 Met. 147; Taylor *v.* Dean, 7 Allen, 251. Secus if an assignee of an insolvent clearly manifests an intention to avoid the mortgage, and sells all his interest in the estate. Freeland *v.* Freeland, 102 Mass. 475.

[3] Doe *v.* Ball, 11 Mees. & Welsb. 531, 533. See ante, § 446, note; Bartholomew *v.* McKinstry, 2 Allen, 448; Verselius *v.* Verselius, 9 Blatchf. C. C. 189. So of executors and administrators. Parker *v.* Flagg, 127 Mass. 28; Welsh *v.* Welsh, 105 Mass. 229.

a Court of Equity would enforce.[1] Thus if a man should contract a marriage by stealth with a young lady having a considerable fortune in the hands of trustees, and he should afterwards make a suitable settlement upon her in consideration of that fortune, the settlement would not be set aside in favor of the creditors of the husband, since a Court of Equity would not suffer him to take possession of her fortune without making a suitable settlement upon her.[2] It has been said that a post-nuptial voluntary agree-

[1] See Davidson *v.* Lanier, 51 Ala. 318. But see Kuhn *v.* Stansfield, 28 Md. 210, infra.

[2] A settlement upon an intended wife, for her support and that of the children of the marriage, where the wife has already advanced considerable sums of money to the husband in contemplation of the marriage, is valid against the husband's creditors though the husband was then in very embarrassed circumstances to the knowledge of the wife, and was declared a bankrupt not long afterwards for an act subsequent to the marriage. Frazer *v.* Thompson, 5 Jur. (N. S.) 669; s. c. 1 Giff. 49. But it was here intimated that the case might be different if the ceremony had been resorted to as a mere pretence and cloak for fraud. Except in such a case as that it was said that there was no case in which any settlement of property made before and in consideration of marriage had been set aside on the ground of the insolvency or embarrassed circumstances of the husband, or as a fraud upon creditors on a subsequent bankruptcy. Campion *v.* Cotton, 17 Ves. 268. The case of Colombine *v.* Penhall, 1 Smale & G. 228, was referred to as within the exception.

Where however a husband voluntarily executed a bill of sale of his property to secure to his wife a sum of money constituting her separate estate, which he had received and invested in his business with her knowledge and consent, and without any promise at the time to refund the same, it was held in Kuhn *v.* Stansfield, 28 Md. 210, that the conveyance was void as to existing creditors, the husband having no other property to satisfy their claims. See Gardner *v.* Short, 4 C. E. Green, 341; Smith *v.* Vreeland, 1 C. E. Green, 198. But see Davidson *v.* Lanier, 51 Ala. 318.

In another case a trader sold his stock in trade, and as part of the consideration secured an annuity during the joint lives of himself and wife, equal to one-fourth the profits, and a contingent annuity to the wife if she survived him equal to one-sixth of the profits. The trader died, and on a creditors' bill it was held that the annuity to the wife was invalid, though the rest of the transaction was not attacked. French *v.* French, 6 DeG. M. & G. 95; Moor *v.* Rycault, Prec. Ch. 22, and other cases cited in 1 Fonbl. Eq. B. 1, ch. 4, § 12, and note (*b*); Id. ch. 2, § 6, note (*k*); Jones *v.* Marsh, Cas. T. Talb. 64; Wheeler *v.* Caryl, Amb. R. 121; Jewson *v.* Moulton, 2 Atk. 417; Middlecome *v.* Marlow, 2 Atk. 519; Ward *v.* Shallet, 2 Ves. 16; Ramsden *v.* Hylton, 2 Ves. 304; Arundel *v.* Phipps, 10 Ves. 139; Russell *v.* Hammond, 1 Atk. 13; Wickes *v.* Clarke, 8 Paige, R. 161; Russell *v.* Russell, 134 Fed. 840, 67 C. C. A. 436.

Marriage is a sufficient consideration to support an antenuptial contract which controls the descent of property of the parties thereto. Such contracts, when freely entered into and when not unjust or inequitable, are favored and enforced, and are liberally construed to give effect to the intent of the parties thereto. Henry *v.* Butler, 87 Kans. 122, 123 Pac. 742; Hessick *v.* Hessick, 169 Ill. 486, 48 N. E. 712; Murdock *v.* Mur-

ment by a father to make a provision for a child will be specifically enforced in equity, as founded in moral duty.[1] But this doctrine, although it has the support of highly respectable authorities, seems now entirely overthrown.[2]

§ 501. **Badges of Fraud Surrounding a Conveyance.** — In like manner what circumstances connected with voluntary or valuable conveyances are badges of fraud or raise presumptions of intentional bad faith, though very important ingredients in the exercise of equitable jurisdiction, fall rather within the scope of treatises on evidence than of discussions touching jurisdiction.[3] It may however be generally stated that whatever would at law be deemed badges of fraud or presumptions of ill faith will be fully acted upon in Courts of Equity. But on the other hand it is by no means to be deemed a logical conclusion that because a transaction could not be reached at law as fraudulent, therefore it would be equally safe against the scrutiny of a Court of Equity; for a Court of Equity requires a scrupulous good faith in transactions which the law might not repudiate. It acts upon conscience, and does not content itself with the narrower views of legal remedial justice.[4]

§ 502. **Conveyance after Marriage Pursuant to a Prior Valid Written Agreement Is Effectual against Creditors.** — The question has been much discussed how far a settlement made after marriage in pursuance of an asserted parol agreement before marriage is valid, as against creditors in cases affected by the Stat-

dock, 219 Ill. 123, 76 N. E. 57; Fisher *v.* Koontz, 110 Iowa 498, 80 N. W. 551.

A contract will not be enforced where a young girl, inexperienced in business matters, married a man of mature years and of much business experience, and when the contract gives her practically no part of the husband's estate. Ellis *v.* Ellis, 1 Tenn. Ch. App. 198; but where two old people marry, they having known each other for a number of years and each knowing what property the other owned, the fact that the wife gave up practically all of her property rights in the contract is not alone sufficient to set it aside. Daniels *v.* Banister, 146 Ky. 48, 141 S. W. 393.

[1] Ellis *v.* Nimmo, Lloyd & Goold, R. 333. Post, §§ 955, 956, 1077, 1081, 1313. See also that a voluntary assignment of a bond is a conclusive title to the assignee against the estate of the assignor. Fortescue *v.* Barnett, 3 M. & Keen, 36, 42, 43; ante, § 250; post, § 572, note (1); Jefferys *v.* Jefferys, 1 Craig & Phillips, 138, 141.

[2] See Holloway *v.* Headington, 8 Sim. R. 324, 325; and Jefferys *v.* Jefferys, 1 Craig & Phillips, 138, 141; post, §§ 572, 955, 956, 1077, 1081, 1313.

[3] See 1 Eq. Abridg. 148 E.; 3 Stark on Evid. Pt. 4, pp. 615 to 622; Twyne's Case, 3 Co. R. 80.

[4] See 1 Fonbl. Eq. B. 1, ch. 2, § 8, notes; Id. ch. 3, § 4; Id. ch. 4, §§ 12, 13, and notes.

ute of Frauds. There is no doubt that such a settlement made in pursuance of a prior valid written agreement would be completely effectual against creditors.[1] But the difficulty is, whether such a settlement executed in pursuance of a parol contract obligatory in foro conscientiæ ought to be protected when made, although it might not be capable of being enforced if not made. It is certain that the mere performance of a moral duty even of the most meritorious nature has not been deemed sufficient to protect a voluntary conveyance, even in favor of a deeply injured party to whom it is designed to be a compensation for injustice and deceit.[2] And hence the difficulty is increased of giving effect to a contract which in its own character, although founded upon an intrinsic valuable consideration, is yet in contemplation of law deemed to be a nudum pactum. There have been some struggles in Courts of Equity to maintain the efficacy of such a post-nuptial settlement against creditors, where it purported to be founded upon a parol agreement before marriage recited in the settlement. But the strong inclination of these courts now seems to be to consider such a settlement incapable of support from any evidence of a parol contract, since it is in effect an attempt to supersede the Statute of Frauds, and to let in all the mischiefs against which that statute was intended to guard the public generally, and especially to guard creditors.[3]

[1] Concerning the sufficiency of a memorandum under the English statute see Skelton *v.* Cole, 1 DeG. & J. 587.

[2] Gilham *v.* Locke, 9 Ves. 612; Lady Cox's case, 3 P. Will. 339; Priest *v.* Parrot, 2 Ves. 160.

[3] See Atherley on Marr. Sett. ch. 9, p. 149. According to Mr. Cox's Report of Dundas *v.* Dutens (2 Cox, R. 235), Lord Thurlow actually held such a settlement valid, asserting that it could not be deemed fraudulent, and that the cases, though they had gone a great way in treating settlements after marriage as fraudulent, had never gone to such a length as that. Mr. Cox having been of counsel in that case, his report is probably accurate. The point is not quite so strongly stated in the report of the same case in 1 Ves. Jr. 196. But Lord Thurlow is there made in effect to say: "If the husband made an agreement before marriage that he would settle, and then in fraud of the agreement got married, that he would be bound by the agreement; and he thought there was a case in point; that it would be a kind of fraud against which the court would relieve. If there was a *parol* agreement for a settlement upon marriage, after marriage a suit upon the ground of part performance would not do, because the statute is expressed in that manner. And he then asked the question whether there was any case where in the settlement the parties recite an agreement before marriage in which it has been considered as within the statute." The distinction between cases of fraud and a mere reliance upon a parol agreement for a settlement before marriage, and in consideration thereof, is expressly taken in Lady Montacute *v.* Maxwell (1 P. Will.

§ 503. **Same.** — The same policy of affording protection to the rights of creditors pervades the provisions of the statute of 3d and 4th of William & Mary, ch. 14, respecting devises in fraud of creditors, and of the statutes made in the American States in pari materia.[1] There is an apparent anomaly in Equity Jurisprudence upon this subject not easily reconcilable with sound principles. The statute of William & Mary is confined to fraudulent devises, and therefore fraudulent conveyances, whether voluntary or not, are not reached by it. And hence it has been adjudged in England that if a man makes a conveyance of lands in his lifetime in order to defraud his creditors and dies, his bond creditors have no right to set aside the conveyance, for the statute (it is said) was only designed to secure such creditors against any imposition which might be supposed in a man's last sickness. But if he gave away his effects in his lifetime, this prevented the descent of so much to the heir, and consequently took away their remedy against the heir, who was liable only in respect to land descended. And as a bond is no lien whatever on lands in

619, 620); s. c. Prec. in Ch. 526; 1 Str. R. 236; 1 Eq. Cas. Abr. p. 19, pl. 4, where the Lord Chancellor said: "In cases of fraud equity should relieve even against the words of the statute, &c. But where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making these promises void, equity will not interfere." 1 Ves. Jr. 199, note (*a*). Post, § 768. This may be correct in cases of parol promises in consideration of marriages, for the Statute of Frauds (29 Car. 2, ch. 3, § 4) expressly declares that no action shall be brought whereby "to charge any person upon an agreement made in consideration of marriage", unless the agreement shall be in writing and signed by the party to be charged therewith; for in such a case it seems to have been held that the marriage is not a part-performance to take the case out of the statute. See Montacute *v.* Maxwell, Ibid.; Dundas *v.* Dutens, 1 Ves. Jr. 196; s. c. 2 Cox, R. 235; Redding *v.* Wilkes, 3 Bro. Ch. R. 400, 401; Taylor *v.* Buck, 1 Ves. R. 297, 298. All this seems perfectly correct. But suppose the party to have fulfilled his parol promise after marriage, ought a Court of Equity to disturb the settlement in favor of creditors? The marriage in such a case is not the less a valuable consideration because a parol promise was relied on; and if relied on as valid, and the marriage is had on the faith thereof, is not the non-fulfilment of it a fraud upon the other party, whether intentional or not? Mr. Chancellor Kent, in Reade *v.* Livingston (3 John. Ch. R. 481), after reviewing the authorities, has come to a conclusion unfavorable to the validity of such a settlement. Sir William Grant, in Randall *v.* Morgan (12 Ves. 67), seemed to think the question not settled. An anonymous case in Preced. in Ch. 101, is in favor of such a settlement. See also Ramsden *v.* Hylton, 2 Ves. 308, the remarks of Lord Hardwicke. See also Lavender *v.* Blackstone, 2 Lev. R. 146, 147; 1 Vent. 194; Guchenback *v.* Rose, 4 Watts & Serg. 546. See Warden *v.* Jones, 2 DeG. & J. 76.

[1] See 1 Roberts on Wills, ch. 1, § 20; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, pp. 415, 416; 1 Fonbl. Eq. B. 1, ch. 4, § 14, note (*i*).

the hands of the obligor, much less can it be so when they are given away to a stranger.[1] This doctrine has been strongly questioned, and at the time when it was promulgated gave great dissatisfaction.[2] And hence we may see the reason why voluntary conveyances of lands cannot be set aside except by creditors who have reduced their debts to judgment before the death of the party; for until that time they constitute no lien on the land.[3]

§ 504. [**Conveyance by Testator to Defraud One to Whom He Had Contracted to Devise the Property.** — There is no more reason why conveyances made by a debtor for the purpose of defrauding his creditors should be sustained than a solemn promise and contract entered into between the testator and another party, to whom the testator promised to devise his property, but which he subsequently conveyed so as to defeat the rights of the proposed devisee. It is true that the policy of the law is that a man should be untrammelled in his right to make the final disposition of his property, but at the same time where he has incurred obligations to others upon the strength of their claims being protected and paid upon the death of the owner, he ought not to be free to convey his property and thereby perpetrate a fraud upon creditors by will, a thing which he could not do in his lifetime by deed. Equity will fasten a trust upon the property in the hands of the person who has promised to dispose of it by will in favor of the promisee and will follow it in the hands of personal representatives or grantees without consideration. Nor is it necessary that the agreement be in express terms to make a will. A promise that the promisee shall receive the property, or that it shall be left to him, at the death of the promisor, is sufficient.[4]]

§ 505. **Real Assets Subject to Payment of Debts though Personal Assets Fraudulently Conveyed.** — In America however the policy of the Legislature has taken a much wider and more effectual range to attain its objects. Generally, if not universally, lands and other hereditaments are with us made assets for the

[1] Parslow *v.* Weaden, 1 Eq. Abridg. 14, Pl. 7; 1 Fonbl. Eq. B. 1, ch. 4, §§ 12, 14, and note (*l*).

[2] Ibid.; and Jones *v.* Marsh, Cas. T. Talb. 64.

[3] 1 Fonbl. Eq. B. 1, ch. 4, § 12; Gilb. Lex Prætoria, pp. 293, 294; Colman *v.* Croker, 1 Ves. Jr. 160. See Bean *v.* Smith, 2 Mason, R. 282 to 285. See Mitf. Pl. Eq. by Jeremy, 126, 127; Jackson *v.* Caldwell, 1 Cowen, R. 622.

[4] Teske *v.* Dittberner, 70 Neb. 544, 98 N. W. 57, 101 Am. St. Rep. 614; Smith *v.* Pierce, 65 Vt. 200, 25 Atl. 1092; Whiton *v.* Whiton, 179 Ill. 32, 53 N. E. 722; In re Wescott, 34 App. Div. 239, 54 N. Y. Supp. 545.

payment of debts as auxiliary to the personal property of the deceased. And if the party in his lifetime has fraudulently conveyed his estate with a view to defeat his creditors upon his decease, the real assets are subject to the same disposition as if no such conveyance had been made.[1] The French law seems to have proceeded upon a policy equally broad and salutary, and has enabled creditors in cases of insolvency to rescind alienations either voluntary or in fraud of their rights.[2]

§ 506. **Powers of Equity Court in Cases of Fraud.** — These cases of interposition in favor of creditors being founded upon the provisions of positive statutes, a question was made at an early day whether they were exclusively cognizable at law, or could be carried into effect also in equity. The jurisdiction of Courts of Equity is now firmly established, for it extends to cases of fraud whether provided against by statute or not. And indeed the remedial justice of a Court in Equity, in many cases arising under these statutes, is the only effectual one which can be administered, as that of Courts of Law must often fail from the want of adequate powers to reach or redress the mischief.[3]

§ 507. **Secret Compositions Obtained by Some Creditors to the Disadvantage of General Creditors Are Not Favored.** — There are other cases of constructive frauds against creditors which the wholesome moral justice of the law has equally discredited and denounced. We refer to that not unfrequent class of cases in which upon the failure or insolvency of their debtors some creditors have by secret compositions obtained undue advantages, and thus decoyed other innocent and unsuspecting creditors into signing deeds of composition which they supposed to be founded upon the basis of entire equality and reciprocity among all the creditors, when in fact there was a designed or actual imposition upon all but the favored few. The purport of a composition or trust deed in cases of insolvency usually is that the property of the debtor shall be assigned to trustees and shall be collected and distributed by them among the creditors according to the order and terms prescribed in the deed itself. And in con-

[1] See Drinkwater *v.* Drinkwater, 4 Mass. R. 354; Wildbridge *v.* Paterson, 15 Mass. R. 148.

[2] Pothier on Oblig. n. 153.

[3] Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 3, § 4, pp. 408, 409; Id. ch. 4; 1 Fonbl. Eq. B. 1, ch. 4, § 12, and note (*c*); Id. § 14, notes (*i*) and (*k*); 1 Eq. Abridg. 149, E. 6; White *v.* Hussey, Preced. Ch. 14. See Bartholmew *v.* McKinstry, 2 Allen, 448; Welsh *v.* Welsh, 105 Mass. 229; ante, § 477, and note.

sideration of the assignment, the creditors who become parties generally agree to release all their debts beyond what the funds will satisfy. Now it is obvious that in all transactions of this sort the utmost good faith is required; and the very circumstance that other creditors of known reputation and standing have already become parties to the deed, will operate as a strong inducement to others to act in the same way. But if the signatures of such prior creditors have been procured by secret arrangements with them more favorable to them than the general terms of the composition deed warrant, those creditors really act, as has been said by a very significant although a homely figure, as decoy ducks upon the rest. They hold out false colors to draw in others to their loss or ruin.[1]

§ 508. **Same.** — In modern times the doctrine has been acted upon in Courts of Law as it has long been in Courts of Equity, that such secret arrangements are utterly void and ought not to be enforced even against the assenting debtor or his sureties or his friends.[2] There is great wisdom and deep policy in the doctrine; and it is found in the best of all protective policy, that which acts by way of precaution rather than by mere remedial justice; for it has a strong tendency to suppress all frauds upon the general creditors by making the cunning contrivers the victims of their own illicit and clandestine agreements. The relief is granted, not for the sake of the debtor, for no deceit or oppression may have been practised upon him, but for the sake of honest and humane and unsuspecting creditors. And hence the relief is granted equally whether the debtor has been induced to agree to the secret bargain by the threats or oppression of the favored creditors, or whether he has been a mere volunteer, offering his services and aiding in the intended deception. Such secret bargains are not only deemed incapable of being enforced or confirmed, but even money paid under them is recoverable back, as it has been obtained against the clear principles of public policy.[3]

[1] Fosdyke *v.* Nixon, 107 Ind. 138, 8 N. E. 11; Dansby *v.* Frieberg, 76 Tex. 463, 13 S. W. 331.

[2] Chesterfield *v.* Janssen, 1 Atk. 352; 1 Ves. 155, 156; 3 P. Will. 131, Cox's note; Spurrett *v.* Spiller, 1 Atk. 105; Jackman *v.* Mitchell, 13 Ves. 581; Smith *v.* Bromley, Doug. 696, note; Jones *v.* Barkley, Id. 695, note; Cockshott *v.* Bennett, 2 T. Rep. 763; Jackson *v.* Lomas, 4 T. R. 166; Fawcett *v.* Gee, 3 Anst. 910.

[3] Smith *v.* Bromley, Doug. R. 696, note; Jones *v.* Barkley, Id. 695, note; Jackman *v.* Mitchell, 13 Ves. 581; Ex parte Sadler and Jackson, 15 Ves. 55; Mawson *v.* Stork, 6 Ves. 300; Yeomans *v.* Chatterton, 9 John. R. 294; Wiggin *v.* Bush, 12 John. R. 306.

And it is wholly immaterial whether such secret bargains give to the favored creditors a larger sum, or an additional security or advantage, or only misrepresent some important fact; for the effect upon other creditors is precisely the same in each of these cases. They are misled into an act to which they might not otherwise have assented.[1]

§ 509. **Secret Advantageous Agreement between Insolvent Debtor and His Assignee Is Void.** — For the like reasons any agreement made by an insolvent debtor with his assignee by which the estate of the insolvent is to be held in trust by the assignee to secure certain benefits for himself and his family, such as to pay certain annuities to himself and his wife out of the rents or proceeds of the property assigned, and to apply the surplus to the extinction of a debt due to the assignee, will be held void, and be rescinded upon the ground of public policy whenever it comes before a Court of Equity, even though the suit happen to be at the instance of the insolvent himself. For it is a contrivance in fraud of creditors to which the assignee, who is or ought to be a trustee for them, is a party.[2]

§ 510. **Bona Fide Purchasers for Value and without Notice of Fraudulent Conveyance Are Protected.** — In concluding this discussion so far as it regards creditors, it is proper to be remarked that although voluntary and other conveyances in fraud of credi-

[1] Eastabrook *v.* Scott, 3 Ves. 456; Constantine *v.* Blache, 1 Cox, 287; 1 Fonbl. Eq. B. 1, ch. 4, § 11, note (*x*); Cullingworth *v.* Lloyd, 2 Beav. R. 385, and the learned note of the Reporter, p. 390; Leicester *v.* Rose, 4 East R. 372. In Cullingworth *v.* Lloyd, Lord Langdale said: "It must be observed that Edmund Grundy was winding up the business under a power of attorney, which enabled him to pay the debts by an equal pound rate; but it does not appear that there was any general meeting of the creditors or any agreement entered into by the creditors generally. The advertisements however show a proposition to the creditors at large to pay them all a composition on certain terms; and although every creditor was at liberty to refuse the composition, it is established by a series of decisions that a creditor cannot ostensibly accept such composition and sign the deed which expresses his acceptance of the terms, and at the same time stipulate for or secure to himself a peculiar and separate advantage which is not expressed upon the deed; and in the case of Leicester *v.* Rose (4 East R. 372) it is stated by Mr. Justice Le Blanc that in the consideration of cases of this nature it is not material whether the agreement be entered into at a meeting of all the creditors assembled for the purpose, or impliedly by their affixing their signatures to the same deed carried round or produced to each separately, and signed by them; those who by executing the deed hold out that they come in under the general agreement are not permitted to stipulate for a further partial benefit to themselves."

[2] McNeill *v.* Cahill, 2 Bligh, R. 228, Old Series.

tors are thus declared to be utterly void, yet they are so far only as the original parties and their privies and others claiming under them who have notice of the fraud are concerned. For bona fide purchasers for a valuable consideration, without notice of the fraudulent or voluntary grant, are of such high consideration that they will be protected, as well at law as in equity, in their purchases.[1] It would be plainly inequitable that a party who has bona fide paid his money upon the faith of a good title should be defeated by any creditor of the original grantor who has no superior equity, since it would be impossible for him to guard himself against such latent frauds. The policy of the law therefore which favors the security of titles as conducive to the public good would be subverted if a creditor having no lien upon the property should yet be permitted to avail himself of the priority of his debt to defeat such a bona fide purchaser. Where the parties are equally meritorious and equally innocent, the known maxim of Courts of Equity is: "Qui prior est in tempore, potior est in jure"; he is to be preferred who has acquired the first title.[2] This point however will naturally present itself in other aspects, when we come to the consideration of the general protection afforded by Courts of Equity to purchasers standing in such a predicament.

§ 511. **Conveyances Which Operate as a Fraud upon a Covenant.** — Other underhand agreements which operate as a fraud upon third persons may easily be suggested to which the same remedial justice has been applied. Thus where a father upon the marriage of his daughter entered into a covenant that upon his death he would leave her certain tenements, and that he would also by his will give and leave her a full and equal share with her brother and sister of all his personal estate, and he afterwards during his life transferred to his son a very large portion of his personal property, consisting of public stock, but retained the dividends for his life, it was held that the transfer was void, as a fraud upon the marriage articles; and the son was compelled to account for the same.[3] Covenants of this nature are proper

[1] Ante, §§ 64 *c*, 152, 208, 237; post, §§ 542, 573, 575. See Hubbell *v.* Currier, 10 Allen, 333.

[2] See Dame Burg's Case, Moore, R. 602; Woodcock's Case, 33, H. 6, 14; Predgers *v.* Langham, 1 Sid. R. 133; Wilson and Wormal's Case, Godbolt, R. 161; Bean *v.* Smith, 1 Mason, R. 272 to 282; Anderson *v.* Roberts, 18 John. R. 513; Fletcher *v.* Peck, 10 U. S. 133, 3 L. Ed. 162; Daubeney *v.* Cockburn, 1 Meriv. 638, 539; Ledyard *v.* Butler, 9 Paige, R. 132.

[3] For a case of fraud on marital rights see McKeogh *v.* McKeogh, 4

in themselves, and ought to be honorably observed. They ought not to be, and indeed are not, construed to prohibit the father from making during his lifetime any dispositions of his personal property among his children more favorable to one than another. But they do prohibit him from doing any acts which are designed to defeat and defraud the covenant. He may if he pleases make a gift bona fide to a child; but then it must be an absolute and unqualified gift which surrenders all his own interest, and not a mere reversionary gift which saves the income to himself during his own life.[1]

§ 512. **Procuring Funds by Suppressing Material Facts.** — So if a friend should advance money to purchase goods for another, or to relieve another from the pressure of his necessities, and the other parties interested should enter into a private agreement over and beyond that with which the friend is made acquainted, such an agreement will be void at law as well as in equity; for the friend is drawn in to make the advance by false colors held out to him, and under a supposition that he is acquainted with all the facts.[2] So the guaranty of the payment of a debt procured from a friend upon the suppression by the parties of material circumstances is a virtual fraud upon him, and avoids the contract.[3]

§ 513. **One Who Knowingly Produces a False Impression upon Another, Is Liable for the Mischief.** — Another class of constructive frauds of a large extent, and over which Courts of Equity exercise an exclusive and very salutary jurisdiction, consists of those where a man designedly or knowingly produces a false impression upon another, who is thereby drawn into some act or contract injurious to his own rights or interests.[4] This subject has been partly treated before; but it should be again brought under our notice in this connection.[5] No man can reasonably doubt that if a party, by the wilful suggestion of a falsehood, is the cause of prejudice to another who has a right to a full and cor-

L. R. Ir. Eq. 338; Jones *v.* Martin, 3 Anst. R. 882; s. c. 5 Ves. 265. See also Randall *v.* Willis, 5 Ves. 261; 8 Brown, Parl. R. 242, by Tomlins; McNeill *v.* Cahill, 2 Bligh, R. 228. See Stocker *v.* Stocker, 4 Mylne & Craig, R. 95.

[1] Ibid.

[2] Jackson *v.* Duchaise, 3 T. R. 551.

[3] Pidcock *v.* Bishop, 3 B. & Cressw. 605; Smith *v.* Bank of Scotland. 1 Dow, Parl. R. 272; ante, § 305.

[4] Com. Dig. Chancery, 4 W. 28; Bean *v.* Smith, 2 Mason, R. 285, 286; 1 Madd. Ch. Pr. 256, 257; ante, § 269.

[5] Ante, §§ 270 to 292.

rect representation of the fact, his claim ought in conscience to be postponed to that of the person whose confidence was induced by his representation. And there can be no real difference between an express representation and one that is naturally or necessarily implied from the circumstances.[1] The wholesome maxim of the law upon this subject is, that a party who enables another to commit a fraud is answerable for the consequences;[2] and the maxim so often cited, "Fraus est celare fraudem," is, with proper limitations in its application, a rule of general justice.

§ 514. **One Is Liable for Fraud Induced by His Silence.** — In many cases a man may innocently be silent; for, as has often been observed, "Aliud est tacere, aliud celare." But in other cases a man is bound to speak out; and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction.[3] Thus if a man having a title to an estate which is offered for

[1] 1 Fonbl. Eq. B. 1, ch. 3, § 4, notes (*m*) and (*n*); Sugden on Vendors, ch. 16. See ante the title on Misrepresentation.

[2] Bac. Max. 16.

[3] 1 Fonbl. Eq. B. 1, ch. 3, § 4, and notes (*m*) and (*n*); Savage *v.* Foster, 9 Madd. R. 35; Com. Dig. Chancery, 4 I. 3, 4 W. 28; Hanning *v.* Ferrers, 1 Eq. Abridg. 356, pl. 10; ante, §§ 285 to 310. *Equitable Estoppel.* — The subject here introduced by the author, equitable estoppels, is made the occasion of some notes of cases near the end of this work, by the late Chief Justice Redfield. Ch. XLIV.

The doctrine of equitable estoppel, called also estoppel by conduct, though probably originating in equity (Evans *v.* Bicknell, 6 Ves. 174, 182), finds even more frequent expression in Courts of Law. This has been true ever since the decision in England in the well-known case of Pickard *v.* Sears, 6 Ad. & E. 469; though that was by no means the first case at law in which the doctrine was applied. Mildway *v.* Smith, 2 Wms. Saund. 343; Graves *v.* Key, 3 Barn. & Ad. 318, note; Heane *v.* Rogers, 9 Barn. & C. 586; Stephens *v.* Baird, 9 Cowen, 274; Welland Canal Co. *v.* Hathaway, 8 Wend. 480.

Equitable estoppel is merely the converse of the action of deceit, of which Pasley *v.* Freeman, 3 T. R. 51, is the typical example. See ante, p. 204, note. The same features enter into the estoppel that belong to the action for damages. The property held by the person claiming the benefit of the estoppel represents the damages in an action of deceit; that property can be held or not in accordance with rules of the same nature as those which govern the question whether an action of deceit for the misrepresentation might or might not be maintained if the situation were one for such an action. There must have been (1) a false representation, actual or implied, by the party to be estopped, made (2) with knowledge by him, actual or implied, of its falsity, to the person claiming the benefit of the estoppel, or to some one under whom such person claims, that person (3) being ignorant of the facts and believing the representation to be true, and it must have been made (4) with intention, actual or implied, that the representation should be acted upon, and followed (5) by action upon the same with a material change of position. Stevens *v.* Dennett, 51 N. H.

sale, and knowing his title, stands by and encourages the sale or does not forbid it, and thereby another person is induced to purchase the estate under the supposition that the title is good, the former, so standing by and being silent, will be bound by the sale; and neither he nor his privies will be at liberty to dispute the validity of the purchase.[1] So if a man should stand by and

324; People *v.* Brown, 67 Ill. 435; Martin *v.* Zellerbach, 38 Cal. 300, 315; Turnipseed *v.* Hudson, 50 Miss. 429; Bigelow, Estoppel, 484 (3d ed.).

The doctrine, like that of the action for damages, rests on the ground of fraud in the person to be estopped, or on his negligence in a situation where negligence was a breach of his duty towards the person whose action he has changed. See Slim *v.* Croucher, 1 DeG. F. & J. 518; s. c. 2 Giff. 37, as to negligence. It is apprehended that no estoppel can arise against a person whose conduct has been perfectly innocent; unless indeed there has been a warranty by him, such as the warranty of genuineness of the signature of the drawer of a bill by an acceptance thereof, which (with some qualifications) has the effect to preclude the acceptor from alleging a want of genuineness of such signature. Price *v.* Neal, 3 Burr. 1354; Ellis *v.* Ohio Life Ins. Co., 4 Ohio St. 628; National Bank *v.* Bangs, 106 Mass. 441; Bigelow, Estoppel, 437 et seq. (3d ed.). It may be doubted indeed if cases of warranty are proper cases of estoppel at all; but even these cases rest on the ground that the warranting party was, under the circumstances, bound to know the facts; as a prudent or careful man he ought to have known them. Price *v.* Neal, supra. That a perfectly innocent misrepresentation as is here meant will not work an estoppel, see infra, § 451; Blake Crusher Co. *v.* New Haven, 46 Conn. 473; Gray *v.* Agnew, 95 Ill. 315; Follansbee *v.* Parker, 70 Ill. 11; Decorah Mill Co. *v.* Greer, 49 Iowa, 490; Hager *v.* Burlington, 42 Iowa, 661; Wright *v.* Newton, 130 Mass. 552; Charlestown *v.* County Commissioners, 109 Mass. 270; Hudson *v.* Densmore, 68 Ind. 391; Bell *v.* Elliott, 5 Blackf. 113; Smith *v.* Hutchinson, 61 Mo. 83. As to this and the further case of facts which ought to have been known see Bigelow, Estoppel, 519 et seq. (3d ed.), and ante, pp. 209, 210. And as to the estoppel of infants and married women, see infra, note at end of this section. Gregmoore Orchard Co. *v.* Gilmour, 159 Mo. App. 204, 140 S. W. 763; Burdick *v.* Daughters of Protection, 75 Neb. 460, 106 N. W. 466; Douglas *v.* Morrisville, 84 Vt. 302, 79 Atl. 391; Farber *v.* Mott Lbr. Co. 20 Idaho 354, 118 Pac. 664.

[1] Storrs *v.* Barker, 6 John. Ch. R. 166, 169 to 172; Wendell *v.* Van Rensselaer, 1 John. Ch. R. 354. Courts of law now act upon the same enlightened principles in regard to personal property, in the transfer of which no technical formalities usually intervene to prevent the application of them. Thus where it appeared that certain goods of the plaintiff were seized on an execution against a third person (in whose possession they were), and sold to the defendant, and the plaintiff made no objection to the sale, though he had full notice of it; it was held that the facts ought to be left to the jury to consider whether he had not assented to the sale and ceased to be owner of the property. On this occasion Lord Denman, in delivering the opinion of the court, said: "The rule of law is clear that, where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things as existing at

see another person as grantor execute a deed of conveyance of land belonging to himself, and knowing the facts should sign his name as a witness, he would in equity be bound by the conveyance.[1] So if a party having a title to an estate should stand by and allow an innocent purchaser to expend money upon the estate without giving him notice, he would not be permitted by a Court of Equity to assert that title against such purchaser, at least not without fully indemnifying him for all his expenditures.[2] The same rule has been applied, both at law and in equity, where the owner of chattels with a full knowledge of his own title has permitted another person to deal with these chattels as his own in his transactions with third persons who have bargained and acted in the confidence that the chattels were the property of the person with whom they dealt;[3] for in cases where one of two innocent persons must suffer a loss, and a fortiori in cases where one has misled the other, he who is the cause or occasion of that confidence by which the loss has been caused or occa-

the same time; and the plaintiff might have parted with his interest in the property by verbal gift or sale without any of those formalities that throw technical obstacles in the way of legal evidence. And we think his conduct, in standing by and giving a sort of sanction to the proceedings under the execution, was a fact of such a nature that the opinion of the jury ought, in conformity to Heane *v.* Rogers (9 B. & Cressw. 586), and Graves *v.* Key (3 Barn. & Adol. 318, note (*a*), to have taken, whether he had not in point of fact ceased to be the owner." Pickard *v.* Sears, 6 Adolph. & Ellis, R. 474.

The real owner is estopped to claim the title as his own, where he stands by and sees it sold as the property of another, and he makes no objection; nor is he entitled to the proceeds from the sale. Allen *v.* Lott-Lewis Co., 8 Ga. App. 313, 68 S. E. 1073; Helwig *v.* Fogelsong, 166 Iowa 15, 148 N. W. 990.

Or where the wife actively participates in the sale of property, as that of her husband, she is estopped to afterwards claim that it was her own estate. Overcast *v.* Lawrence, 141 Ky. 25, 131 S. W. 1029.

The estoppel is the same whether the transaction be a sale or mortgage. Gaddes *v.* Pawtucket Institution for Savings, 33 R. I. 177, 80 Atl. 415.

So where the defendant, a tenant in possession, aided in the sale of the property and made no present claim to fixtures placed by him on the land, he too was estopped. Pabst *v.* Ferch, 126 Minn. 58, 147 N. W. 714.

[1] Teasdale *v.* Teasdale, Sel. Cas. Ch. 59; 1 Fonbl. Eq. B. 5, ch. 3, § 4, note (*m*). Hale *v.* Skinner, 117 Mass. 474; Stevens *v.* Dennett, 51 N. H. 324. See infra, § 390.

[2] See Cawdor *v.* Lewis, 1 Younge & Coll. 427; post, § 453.

[3] Howland *v.* Woodruff, 60 N. Y. 73; Anderson *v.* Armistead, 69 Ill. 452; Stewart *v.* Munford, 91 Ill. 58; Bobbitt *v.* Shryer, 70 Ind. 513; Angell *v.* Johnson, 51 Iowa, 625; Morris *v.* Shannon, 12 Bush, 89; Chapman *v.* Pingree, 67 Maine, 198; Sebright *v.* Moore, 33 Mich. 92; Ford *v.* Loomis, ibid. 121; Redman *v.* Graham, 80 N. C. 231; Rumball *v.* Metropolitan Bank, 2 Q. B. D. 194.

sioned ought to bear it.[1] Indeed cases of this sort are viewed with so much disfavor by Courts of Equity, that neither infancy nor coverture will constitute any excuse for the party guilty of the concealment or misrepresentation; for neither infants nor femes covert are privileged to practise deceptions or cheats on other innocent persons.[2]

[1] Nicholson *v.* Hooper, 4 Mylne & Craig, R. 179; Pickard *v.* Sears, 6 Adolph. & Ellis, 474, supra.

[2] 1 Fonbl. Eq. B. 1, ch. 3, § 4; Savage *v.* Foster, 9 Mod. R. 35; Evroy *v.* Nichols, 2 Eq. Abridg. 489; Clare *v.* Earl of Bedford, cited 2 Vern. 150, 151; Becket *v.* Cordley, 1 Bro. Ch. R. 357; Sugden on Vendors, ch. 16, p. 262, 9th ed.; post, secs. 452 to 455. See Bright *v.* Boyd, 1 Story, Cir. R. 478. This is rather too broadly stated. An infant is not liable in damages for a fraudulent representation that he is of age. Johnson *v.* Pye, 1 Sid. 258; s. c. 1 Keb. 913; Bartlett *v.* Wells, 1 Best & S. 836; Merriam *v.* Cunningham, 11 Cush. 40; Burley *v.* Russell, 10 N. H. 184; Conrad *v.* Lane, 26 Minn. 389. But see Kilgore *v.* Jordan, 17 Texas, 341. Nor is a married woman liable for a fraudulent representation that she is single. Liverpool Assoc. *v.* Fairhurst, 9 Ex. 422; Wright *v.* Leonard, 11 C. B. N. S. 258; Keen *v.* Coleman, 39 Penn. St. 299; Klein *v.* Caldwell, 91 Penn. St. 140.

Whether an infant or a married woman may be estopped in any case is not agreed. Neither, according to American authority, can be estopped by covenants or other contracts. Lowell *v.* Daniels, 2 Gray, 161, 168; Bemis *v.* Call, 10 Allen, 512, 517; Merriam *v.* Boston R. Co., 177 Mass. 241, 244; Unfried *v.* Heberer, 63 Ind. 67. But see Nelson *v.* Stocker, infra. And the same cases deny the application of the doctrine of estoppel to infants and to married women (not made sui juris) altogether. But there are many cases both at law and in equity in which the contrary is held, where there is no relation of contract between the parties to the estoppel in question. Sugden, Vendors, 743 (14th ed.); Overton *v.* Banister, 3 Hare, 503; Esron *v.* Nicholas, 1 DeG. & S. 118; Hall *v.* Timmons, 2 Rich. Eq. 120; Carpenter *v.* Carpenter, 10 C. E. Green, 194; Patterson *v.* Lawrence, 90 Ill. 174; Connolly *v.* Branstler, 3 Bush, 702; Rusk *v.* Fenton, 14 Bush, 490; Davis *v.* Zimmerman, 40 Mich. 24; Jones *v.* Kearney, 1 Dru. & War. 134; In re Lush, L. R. 4 Ch. 591; Nelson *v.* Stocker, 5 Jur. (N. S.) 262; s. c. 28 L. J. Ch. 751; Whittington *v.* Wright, 9 Ga. 23; Thompson *v.* Simpson, 2 Jones & L. 110. See also Stokeman *v.* Dawson, 1 DeG. & S. 90; Telegraph Co. *v.* Davenport, 97 U. S. 369; Bigelow, Estoppel, 513–517 (3d ed.). This appears to be the better view. There is just as good reason for applying the doctrine of estoppel against a person not sui juris, where to do so would not be equivalent to enforcing a contract made with such an one, as there is for allowing an action for trespass or trover. Indeed there was little authority for the broad dicta in Lowell *v.* Daniels, supra.

The estoppel has in England been applied to cases of contract. Nelson *v.* Stocker, supra. In the case cited an infant in contemplation of marriage represented himself to be of age (in ignorance as he claimed), and entered into a covenant by way of settlement upon his intended wife to pay to trustees named the agreed value of stock in business belonging to her, for her separate use and that of her children by a former marriage. He took possession of the stock and continued the business some years after he became of age, when his wife died. The trustees now required

§ 515. **Silence Is Not Actionable If It Does Not Mislead.** — In order however to justify the application of this cogent moral principle, it is indispensable that the party so standing by and concealing his rights should be fully apprized of them and should by his conduct or gross negligence encourage or influence the purchase; for if he is wholly ignorant of his rights, or the purchaser knows them,[1] or if his acts or silence or negligence do not mislead, or in any manner affect the transaction, there can be no just inference of actual or constructive fraud on his part.[2]

§ 516. **But If Fraudulent Representation Is Made without Regard to Real Facts, the Seller Is Liable.** —There are indeed cases where even ignorance of title will not excuse a party; for if he actually misleads the purchaser by his own representations although innocently, the maxim is justly applied to him, that where one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and the loss.[3] Thus where a tenant in tail under a settlement encouraged a stranger to purchase an annuity charged on the land by his father's will from a younger brother, and said that he believed his brother had a good title, he was compelled to make good the annuity, notwithstanding his ignorance of his own title under the settlement, and of the annuity's being invalid; for under the circumstances of the case there was negligence on his part in not instituting proper inquiries, he having heard that there had been a settlement.[4] So where a mother who was a tenant in tail, and absolute owner of a term of years, was present at a treaty for her son's marriage, and heard her son declare that the term was to come to him after the death of the mother, and she became a witness to

performance of the covenants, which he refused on the ground that he was an infant when the settlement was made. The court however refused to allow the defence, though partly on the ground of ratification. So too a married woman has been held bound by an election under a decree against her husband in a suit by her next friend, on the ground that the contrary doctrine would enable her to turn her disability to a fraudulent advantage. Barrow *v.* Barrow, 4 Kay & J. 409.

[1] Supra, § 449, note. [2] See 2 Hovend. on Frauds, ch. 22, p. 184.

[3] See Neville *v.* Wilkinson, 1 Bro. Ch. R. 546; 3 P. Will. 74, Mr. Cox's note; Scott *v.* Scott, 1 Cox, R. 378, 379, 380; Evans *v.* Bicknell, 6 Ves. 173, 182, 183, 184; Pearson *v.* Morgan, 2 Bro. Ch. R. 388; Com. Dig. Chancery, 4 W. 28.

[4] Hobbs *v.* Norton, 1 Vern. R. 136; 1 Eq. Abridg. 356, Pl. 8. See also Slim *v.* Croucher, 1 DeG. F. & J. 518; s. c. 2 Giff. 37. But forgetfulness of title was held excusable under the circumstances, in Spencer *v.* Carr, 45 N. Y. 406. See Bigelow, Estoppel, 532–536 (3d ed.).

a deed whereby the son took upon himself to settle the reversion of the term expectant on his mother's death upon the issue of the marriage, and the mother did not insist upon more than a life estate therein, she was held bound to make good the title, notwithstanding it was insisted that she was ignorant that as tenant in tail she had an absolute power to dispose of it.[1]

§ 517. **Improvements Put upon Land of Another through Mistake, with Knowledge of Real Owner.** — Another case illustrative of the same doctrine may be put, arising from the expenditure of money upon another man's estate through inadvertence or a mistake of title.[2] As for instance if a man supposing he has an absolute title to an estate should build upon the land with the knowledge of the real owner, who should stand by and suffer the erections to proceed without giving any notice of his own claim, he would not be permitted to avail himself of such improvements without paying a full compensation therefor; for in conscience he was bound to disclose the defect of title to the builder.[3] Nay, a Court of Equity might under circumstances go further, and oblige the real owner to permit the person making such improvements on the ground to enjoy it quietly and without disturbance.[4]

[1] Hudson *v.* Cheyney, 2 Vern. R. 150; Storrs *v.* Barker, 6 John. Ch. R. 166, 168, 173, 174. See also Beverley *v.* Beverley, 2 Vern. 133; Redman *v.* Redman, 1 Vern. 347; Scott *v.* Scott, 1 Cox. R. 366, 378; Raw *v.* Potts, 2 Vern. 329; Savage *v.* Foster, 9 Mod. 35; 1 Madd. Ch. Pr. 210, 211; Bac. Abridg. I, Fraud, B.; Raw *v.* Potts, Prec. Ch. 35; Brinckerhoff *v.* Lansing, 4 John. Ch. R. 65, 70.

[2] Com. Dig. Chancery, 4, I. 3; ante, § 514; post, §§ 799 *a*, 799 *b*, 1237, 1238, 1239.

[3] Pillage *v.* Armitage, 12 Ves. 84, 85. See Wells *v.* Banister, 4 Mass. R. 514; Bright *v.* Boyd, 1 Story, Cir. R. 478; Succession of White, 51 La. Ann. 1702, 26 So. 428.

But where defendant took deed of trust for property, to be used for purpose of illegal sale of beer, and the next year the building was burned, and later a very costly building erected in place of the old one, the grantor's assignee, the plaintiff, is entitled to recover the entire property, without paying the value of the improvements, under a statute of Iowa that makes void a conveyance of property for such a purpose. Lindt *v.* Uihlein, 116 Iowa 48, 89 N. W. 214.

The value of improvements put upon property that one knows is not his own, or not included in his deed, cannot be recovered. Vaccaro *v.* Pigniolo, 130 La. 162, 57 So. 787.

Improvements made by son upon land deeded to his father, both having the same name, cannot be recovered by son in action brought by the father against him to quiet the title, when the son knew at the time that the father claimed that he was the real grantee. Dehn *v.* Dehn, 170 Mich. 407, 136 N. W. 453.

[4] East India Company *v.* Vincent, 2 Atk. 83; Davor *v.* Spurrier, 7 Ves. 231, 235; Jackson *v.* Cator, 5 Ves. 688; Storrs *v.* Barker, 6 John. Ch. R.

§ 518. **Same.** — And upon the like principle if a person having a conveyance of land keeps it secret for several years, and knowingly suffers third persons afterwards to purchase parts of the same premises from his grantor, who remains in possession and is the reputed owner, and to expend money on the land without notice of his claim, he will not be permitted afterwards to assert his legal title against such innocent and bona fide purchasers. To allow him to assert his title under such circumstances would be to countenance fraud and injustice; and the conscience of the party is bound by an equitable estoppel, for in such a case it is emphatically true: "Qui tacet, consentire videtur; qui potest et debet vetare, jubet si non vetat." [1]

§ 519. [**Owner is Estopped When He Allows His Property to Be Improved by Another Who Was Mistaken as to His Title.** — The same rule applies with equal force where the real owner allows another man to build up and improve property which he mistakenly believes is his own. If one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person.[2] The purchaser of one of two lots at a judicial sale went into possession of the lot that was pointed out to him by the execution debtor, and which he assumed was covered by his deed. There is no equity in the claim of the heirs of the execution debtor to now assert title to defendant's lot, where their ancestor participated in his mistake and saw him erect buildings upon a lot which was not covered by his deed.[3] Nor is there any equity in the claim of an adjoining

168, 169; Shannon *v.* Bradstreet, 1 Sch. & Lefr. 73. The civil law carried its doctrine in cases of this sort much further; for in all cases where improvements were bona fide made upon any estate by a purchaser or other person innocently, and under a belief that he was the true owner of the estate, he was entitled to a compensation for the benfit actually conferred upon the estate. On the other hand one who buys land from one not the owner, with notice of the equities of the real owner, is not entitled to payment for improvements made without the express or implied consent of such owner. Witt *v.* Grand Gros, 55 Wis. 376.

[1] Wendell *v.* Van Rensselaer, 1 John. Ch. R. 354; 2 Inst. 146, 305; Branch's Max. 181, 182; Hanning *v.* Ferrers, 1 Eq. Abridg. 357; Storrs *v.* Barker, 6 John. Ch. R. 166, 168; Bright *v.* Boyd, 1 Story, Cir. R. 478; ante, § 514.

[2] Coram *v.* Palmer, 63 Fla. 116, 58 So. 721; Hagan *v.* Ellis, 39 Fla. 463, 22 So. 727, 63 Am. St. Rep. 167; Himmelberger-Harrison Lumber Co. *v.* Craig, 248 Mo. 319, 154 S. W. 73.

[3] Barton *v.* Johnson, 137 Ga. 332, 73 S. E. 516.

owner who worked for defendants in the erection of their dam, which plaintiff knew cost a very large sum of money and which, when completed, would probably pond water on his land, and he failed to object to the building of the dam so that when an injury occurred he could make defendant buy his land at his own price. The remedy by injunction is exclusively equitable, and the party applying therefor must show himself entitled to the same, under the rules of Courts of Equity. Acquiescence is an important factor in determining equitable rights and remedies, and may be shown from mere silence. Mere submission to an injury would not constitute acquiescence, but it may arise from knowledge of the transaction, knowledge of the party's rights, absence of any restraint, and consequent freedom of action. There need not be any intention to ratify the transaction.[1]]

§ 520. **Rights of Second Mortgagee Who Advances Money through Mistake, to the Knowledge of Prior Mortagee.** — A more common case illustrative of the same doctrine is where a person having an incumbrance or security upon an estate suffers the owner to procure additional money upon the estate by way of lien or mortgage, concealing his prior incumbrance or security. In such a case he will be postponed to the second incumbrancer; for it would be inequitable to allow him to profit by his own wrong in concealing his claim, and thus lending encouragement to the new loan.[2] Thus if a prior mortgagee who knows that another person is about to lend money on the mortgaged property should deny that he had a mortgage, or

[1] Reitzer *v.* Medina Valley Irrigation Co., 153 S. W. 380; Roberts *v.* Northern Pacific Ry. Co., 158 U. S., 1, 39, L. Ed. 873, 15 S. Ct. Rep. 756.

[2] Draper *v.* Borlau, 2 Vern. 370; Clare *v.* Earl of Bedford, cited 2 Vern. R. 150, 151; Mocatta *v.* Murgatroyd, 1 P. Will. 393, 394; Berrisford *v.* Milward, 2 Atk. 49; Beckett *v.* Cordley, 1 Bro. Ch. R. 353, 357; Evans *v.* Bicknell, 6 Ves. 173, 182, 183; Pearson *v.* Morgan, 2 Bro. Ch. R. 385, 388; Plumb *v.* Fluitt, 2 Anst. R. 432; 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (*u*); Sugden on Vendors, ch. 16.

The rule applies where there is a purpose to defraud, so where the plaintiff bank wrote the defendant bank as to the financial condition of a man, and in the reply, defendant failed to state that it had a mortgage upon the property of the party inquired about, it would not lose its priority unless this information were fraudulently withheld. First National Bank *v.* Marshall & Ilsley Bank, 83 Fed. 725, 28 C. C. A. 42.

One who owns a recorded deed of trust, advised intimate business associates of his to purchase property, he being a judge and application having been made to him to have another mortgage securing school funds, foreclosed. His failure to inform the intending purchasers of his own mortgage is an estoppel against his trustee in bankruptcy. Palmer *v.* Welch, 171 Mo. App. 580, 154 S. W. 433.

should assert that it was satisfied, he would be postponed to the second mortgagee, who should lend his money on the faith of the representations so made.[1] So if a prior mortgagee whose mortgage is not registered should be a witness to a subsequent mortgage or conveyance of the same property, knowing the contents of the deed, and should not disclose his prior incumbrance, he would be postponed or barred of his title.[2] Such transactions may well explain the maxim: "Fraus est celare fraudem." [3]

§ 521. **Relief Will Not Be Granted if Injured Party Has Been Negligent.** — In all this class of cases the doctrine proceeds upon the ground of constructive fraud, or of gross negligence, which in effect implies fraud. And therefore where the circumstances of the case repel any such inference, although there may be some degree of negligence, yet Courts of Equity will not grant relief.[4] It has accordingly been laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment or negligence, so gross as to amount to constructive fraud.[5] And if the intention be fraudulent, although not exactly pointing to the object accomplished, yet the party will be bound to the same extent as if it had been exactly so pointed.[6]

§ 522. **Effect of Bond Given in Aid of Marriage.** — Upon the same principles if a trustee should permit the title deeds of the estate to go out of his possession for the purpose of fraud, and intending to defraud one person he should defraud another, Courts of Equity will grant relief against him.[7] So if a bond should be given upon an intended marriage and to aid it, and the marriage with that person should afterwards go off, and another

[1] Lee *v.* Munroe, 11 U. S. 366, 3. L. Ed. 373.

[2] Brinckerhoff *v.* Lansing, 4 John. Ch. 65. See supra, § 514.

[3] In like manner where a creditor puts the evidence of a lien of his into the debtor's hands, to enable the debtor to represent that it has been extinguished and gain further credit, the lien will be postponed to such credit if obtained. Perry-Herrick *v.* Attwood, 2 DeG. & J. 21. This of course assumes that the party whose action has been affected had no notice of the facts. Comp. Young *v.* Cason, 48 Mo. 259. See also Taylor *v.* Great Indian Ry. Co., 5 Jur. (N. S.) 1087, where a person who had purchased shares of stock was held to have been affected with notice of fraud perpetrated by the selling broker by having seen the transfers in blank.

[4] Tourle *v.* Rand, 2 Bro. Ch. R. 652; 1 Madd. Ch. Pr. 256, 257.

[5] Evans *v.* Bicknell, 6 Ves. 190, 191, 192; Merewether *v.* Shaw, 2 Cox, R. 124; Sugden on Vendors, ch. 16, pp. 262, &c. (9th ed.).

[6] Evans *v.* Bicknell, 6 Ves. 191, 192; Beckett *v.* Cordley, 1 Bro. Ch. R. 357; 1 Fonbl. Eq. B. 1, ch. 3, § 4; Plumb *v.* Fluitt, 2 Anst. 432, 440.

[7] Evans *v.* Bicknell, 6 Ves. 174, 191; Clifford *v.* Brooke, 12 Ves. 132.

marriage should take place upon the credit of that bond, the bond would bind the party in the same way as it would if the original marriage had taken effect.[1]

§ 523. **Evidences of an Undue Concealment.** — What circumstances will amount to undue concealment or to misrepresentation in cases of this sort is a point more fit for a treatise of evidence than for one of mere jurisdiction. But it has been held that a first mortgagee's merely allowing the mortgagor to have the title deeds, or a first mortgagee's witnessing a second mortgage deed, but not knowing the contents, or even concealing from a second mortgagee information of a prior mortgage when he made application therefor, the intention of the party applying to lend money not being made known, are not of themselves sufficient to affect the first mortgagee with constructive fraud.[2] [But if the first mortgagee was present when a loan was being consummated upon the property, and he knew that the lender was making the loan upon condition that his mortgage be the first lien, and the first mortgagee endorsed upon the paper the receipt of so much money, he cannot in law or in equity maintain his priority, though his mortgage was duly recorded, where he saw this transaction going on and helped to consummate the trade and failed to dis-

[1] See Evans *v.* Bicknell, 6 Ves. 191.

[2] Jeremy on Eq. Jurisd. B. 1, ch. 2, § 2, pp. 193, 194, 195; 1 Madd. Ch. Pr. 429 to 431; Id. 256; Plumb *v.* Fluitt, 2 Anst. R. 432; Evans *v.* Bicknell, 6 Ves. R. 174; Cothay *v.* Sydenham, 2 Bro. Ch. R. 391; West *v.* Reid, 2 Hare, R. 249, 259. In this last case Mr. Vice-Chancellor Wigram said: "In short let the doctrine of constructive notice be extended to all cases (it is in fact more confined, Plumb *v.* Fluitt, Evans *v.* Bicknell, Cothay *v.* Sydenham and other cases), but let it be extended to all cases in which the purchaser has notice that the property is affected, or has notice of facts raising a presumption that it is so, and the doctrine is reasonable, though it may sometimes operate with severity. But once transgress the limits which that statement of the rule imposes, — once admit that a purchaser is to be affected with constructive notice of the contents of instruments not necessary to nor presumptively connected with the title, only because by possibility they *may* affect it (for that may be predicated of almost any instrument), and it is impossible, in sound reasoning, to stop short of the conclusion that every purchaser is affected with constructive notice of the contents of every instrument of the mere existence of which he has notice, — a purchaser must be presumed to investigate the title of the property he purchases, and may therefore be presumed to have examined every instrument forming a link, directly or by inference, in that title; and that presumption I take to be the foundation of the whole doctrine. But it is impossible to presume that a purchaser examines instruments not directly nor presumptively connected with the title, because they may by possibility affect it." See Jackson *v.* Rowe, 2 Sim. & Stu. 472; Hodgson *v.* Dean, 2 Sim. & Stu. 221; and see also Jones *v.* Smith (per Lord Chancellor, on appeal), 7 Jur. 431.

close the fact that he had a prior mortgage until the lender sought to foreclose, he will lose his priority. When under such circumstances, one hides his claim in silence, to his own advantage, and to the hurt of another, acting plainly in ignorance of it, courts of justice, at law or in equity, will not afterwards admit the claim against the person thus injured.[1] There must be other ingredients to give color and body to these circumstances; for they may be compatible with entire innocence of intention and object.[2] Nothing but a voluntary, distinct, and unjustifiable concurrence on the part of the first mortgagee, in the mortgagor's retaining the title deeds, is now deemed a sufficient reason for postponing his priority. And in regard to the other acts above stated, they must be done under circumstances which show a like concurrence and co-operation in some deceit upon the second mortgagee.[3]

§ 524. **Same.** — It is curious to trace how nearly the Roman law approaches that of England on this subject; thus demonstrating that if they had not a common origin, at least each is derived from that strong sense of justice which must pervade all enlightened communities. It is an acknowledged principle of the Roman Jurisprudence, that a creditor who consents to the sale, donation, or other alienation of the property of his debtor which is pledged or mortgaged for his debt, cannot assert his title against the purchaser unless he reserves it; for his loss of title cannot under such circumstances be asserted to be to his prejudice, since it is by his consent; and otherwise the purchaser would be deceived into the bargain. "Creditor, qui permittit rem venire, pignus dimittit."[4] "Si consensit venditioni creditor, liberatur hypotheca."[5] "Si in venditione pignoris consenserit creditor, vel ut debitor hanc rem permutet, vel donet, vel in dotem det, dicendum erit pignus liberari, nisi salva causa pignoris sui

[1] Kuhn *v.* Morrison, 78 Fed. 16, 23 C. C. A. 619; Churchill *v.* Hohn, 20 Ky. L. Rep. 200, 45 S. W. 498; Harris *v.* American Building & Loan Assn., 122 Ala. 545, 25 So. 200; Ashurst *v.* Ashurst, 119 Ala. 219, 24 So. 760.

[2] See 1 Fonbl. Eq. B. 1, ch. 3, § 4, and notes (*m*) and (*n*); Evans *v.* Bicknell, 6 Ves. 172, 182, 190, 191, 192; Ibbotson *v.* Rhodes, 2 Vern. R. 554; Plumb *v.* Fluitt, 2 Anst. R. 432; Barrett *v.* Weston, 12 Ves. 133; Berry *v.* Mutual Ins. Co., 2 John. Ch. R. 603, 608; Tourle *v.* Rand, 2 Bro. Ch. R. 650, and Mr. Belt's note; Peter *v.* Russell, 2 Vern. 726, and Mr. Raithby's note (1).

[3] 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (*n*); Peter *v.* Russell, 2 Vern. 726, and Mr. Raithby's note (1); 1 Madd. Ch. Pr. 256, 257.

[4] Dig. Lib. 50, tit. 17, l. 158.

[5] Dig. Lib. 20, tit. 6, l. 7; Pothier, Pand. Lib. 20, tit. 6, art. 2, n. 21.

consensit, vel venditioni, vel cæteris." [1] But as to what shall be deemed a consent the Roman law is very guarded. For it is there said that we are not to take for a consent of the creditor, to an alienation of the pledge, the knowledge which he may have of it; nor the silence which he may keep after he knows it; as if he knows that his debtor is about selling a house which is mortgaged to him, and he says nothing about it. But in order to deprive him of his right, it is necessary that it should appear by some act that he knows what is doing to his prejudice and consents to it; or that there is some ground to charge him with dishonesty for not having declared his right when he was under an obligation to do it, by which the purchaser was misled. Thus if upon the alienation the debtor declares that the property is not incumbered, and the creditor knowingly signs the contract as a party or witness, thereby rendering himself an accomplice in the false affirmation, he will be bound by the alienation. But the mere signature of the creditor as a witness to a contract of alienation will not of itself bind him, unless there are circumstances to show that he knew the contents, and acted disingenuously and dishonestly by the purchaser.[2] "Non videtur consensisse creditor, si, sciente eo, debitor rem vendiderit, cum ideo passus est venire, quod sciebat, ubique pignus sibi durare. Sed si subscripserit forte in tabulis emptionis, consensisse videtur, nisi manifeste appareat deceptum esse." [3]

§ 525. **Purchase with Notice of Legal or Equitable Title of Another.** — Another class of constructive frauds consists of those where a person purchases with full notice of the legal or equitable title of other persons to the same property. In such cases he will not be permitted to protect himself against such claims, but his own title will be postponed, and made subservient to theirs.[4] It would be gross injustice to allow him to defeat the

[1] Dig. Lib. 20, l. 4, § 1.

[2] 1 Domat. B. 3, tit. 1, § 7, art. 15, and Strahan's note.

[3] Dig. Lib. 20, tit. 6, l. 8, § 15; Pothier, Pand. Lib. 20, tit. 6, art. 2, n. 26, 27.

[4] Com. Dig. Chancery, 4 O. 1; Sugden on Vendors, ch. 16, §§ 5, 10; ch. 17, §§ 1, 2. An admitted exception (which is more fully adverted to in a subsequent note) is the case of a dowress. A person purchasing with a notice of her title may yet by getting in a prior legal title or term protect himself against her title. This is an anomaly; but it is now so firmly established that it cannot be shaken. See Swannock *v.* Lefford, Ambler, R. 6, and Mr. Blunt's note, and the note of Lord Hardwicke's judgment in Co. Litt. 208 a; Radnor *v.* Vanderberdy, Show. Parl. Cas. 69; Maundrell *v.* Maundrell, 10 Ves. 271, 272; Winn *v.* Williams, 5 Ves. 130; Male *v.* Smith, Jacob, R. 497; ante, § 57; post, § 543.

just rights of others by his own iniquitous bargain. He becomes by such conduct particeps criminis with the fraudulent grantor; and the rule of equity as well as of law is, "Dolus et fraus nemini patrocinari debent." [1] And in all such cases of purchases with notice Courts of Equity will hold the purchaser a trustee for the benefit of the persons whose rights he has thus sought to defraud or defeat.[2] Thus if title deeds should be deposited as a security for money (which would operate as an equitable mortgage), and a creditor knowing the facts should subsequently take a mortgage of the same property, he would be postponed to the equitable mortgage of the prior creditor, and the notice would raise a trust in him to the amount of such equitable mortgage.[3] So if a mortgagee with notice of a trust should get a conveyance from the trustee in order to protect his mortgage, he would not be allowed to derive any benefit from it; but he would be held to be subject to the original trust in the same manner as the trustee. For it has been significantly said, that although a purchaser may buy an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking of a conveyance from a trustee with notice of the trust; for he thereby becomes a trustee, and he must not, to get a plank to save himself, be guilty of a breach of trust.[4]

§ 526. **Privy to Contract Bound Like Original Party.** — The same principle applies to cases of a contract to sell lands or to grant leases thereof. If a subsequent purchaser has notice of the contract, he is liable to the same equity, and stands in the same place, and is bound to do the same acts, which the person who contracted and whom he represents would be bound to do.[5]

§ 527. **Registration of Instruments.** — It is upon the same ground that in countries where the registration of conveyances is required in order to make them perfect titles against subsequent purchasers, if a subsequent purchaser has notice at the time

[1] 2 Fonbl. Eq. B. 2, ch. 6, § 3; 3 Co. R. 78.

[2] Ibid.; 1 Fonbl. Eq. B. 2, ch. 6, § 2; Murray *v.* Ballou, 1 John. Ch. R. 566; Murray *v.* Finster, 2 John. Ch. R. 158; Maundrell *v.* Maundrell, 10 Ves. 260, 261, 270.

[3] Birch *v.* Ellames, 2 Anst. 427; Plumb *v.* Fluitt, 2 Anst. R. 433. See Agra Bank *v.* Barry, 6 Ir. L. R. Eq. 128.

[4] Saunders *v.* Dehaw, 2 Vern. R. 271; 2 Fonbl. Eq. B. 2, ch. 6, § 2; post, §§ 546, 547, 554. See also Foster *v.* Blackstone, 1 Mylne & Keen, 297; Timson *v.* Ramsbottom, 2 Keen, R. 35.

[5] Taylor *v.* Stibbert, 2 Ves. Jr. 438; Davis *v.* Earl of Strathmore, 16 Ves. 419, 428, 429; Underwood *v.* Courtown, 2 Sch. & Lefr. 64; Macreath *v.* Symmons, 15 Ves. 350; Jeremy on Eq. Jurisd. B. 1, ch. 2, § 2, p. 192, &c.; Com. Dig. Chancery, 4 C. 1.

of his purchase of any prior unregistered conveyance, he shall not be permitted to avail himself of his title against that prior conveyance.[1] This has been long the settled doctrine in Courts of Equity; and it is often applied in America, although not in England, in Courts of Law, as a just exposition of the Registry Acts.[2] The object of all acts of this sort is to secure subsequent purchasers and mortgagees against prior secret conveyances and incumbrances. But where such purchasers and mortgagees have notice of any prior conveyance, it is impossible to hold that it is a secret conveyance by which they are prejudiced. On the other hand the neglect to register a prior conveyance is often a matter of mistake or of overweening confidence in the grantor; and it would be a manifest fraud to allow him to avail himself of the power by any connivance with others to defeat such prior conveyance.[3] The ground of the doctrine is (as Lord Hardwicke has remarked) plainly this: "That the taking of a legal estate after notice of a prior right makes a person a mala fide purchaser; and not that he is not a purchaser for a valuable consideration in every other respect. 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 title.[4] And this exactly agrees with the definition of the civil law of dolus malus."[5] "Now if a person does not stop his hand but gets the legal estate when he knows the equity was in another, machinatur ad circumveniendum."[6]

[1] Sugden on Vendors, ch. 16, §§ 5, 10; ch. 17, §§ 1, 2; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*h*); 1 Madd. Ch. Pr. 260; Bushnell *v.* Bushnell, 1 Sch. & Lefr. 99 to 103; Eyre *v.* Dolphin, 2 B. & Beatt. 302; Blades *v.* Blades, 1 Eq. Abridg. 358; Worseley *v.* De Mattos, 1 Burr. 474, 475; Forbes *v.* Dennister, 1 Bro. Par. Cas. 425; Sheldon *v.* Coxe, 2 Eden, R. 224; Le Neve *v.* Le Neve, 3 Atk. 646; s. c. 1 Ves. 64; Amb. R. 436; Chandos *v.* Brownlow, 2 Ridg. Parl. R. 428; Bean *v.* Smith, 2 Mason, R. 285; Coppinger *v.* Fernyhough, 2 Bro. Ch. R. 291; Sugden on Vendors, ch. 16; Benham *v.* Keane, 1 Johns. & H. 685; Rolland *v.* Hart, L. R. 6 Ch. 678.

[2] Doe d. Robinson *v.* Alsop, 5 B. & Ald. 142; Norcross *v.* Widgery, 2 Mass. 506; Bigelow's Dig. Conveyance, P. and note; Jackson *v.* Sharp, 9 John. 163; Jackson *v.* Burgott, 10 John. 457; Jackson *v.* West, 10 John. 466; Johnson's Dig. Deed, VIII.; Farnsworth *v.* Childs, 4 Mass. 637. See as to the Registry Acts, 4 Kent, Comm. Lect. 58, pp. 168 to 194, 4th ed.

[3] Le Neve *v.* Le Neve, 3 Atk. 646; 1 Ves. 64; Ambler, 436, and Blunt's note, ibid.; Belt's Suppl. 50; Bushnell *v.* Bushnell, 1 Sch. & Lefr. 98, 99, 100, 101, 102; Eyre *v.* Dolphin, 2 Ball & Beatt. 299, 300, 302; 1 Madd. Ch. Pr. 260, 261; Toulman *v.* Steree, 3 Meriv. 209, 224.

[4] Le Neve *v.* Le Neve, 3 Atk. 646, and cases before cited.

[5] Dig. Lib. 4, tit. 3, l. 2; Id. Lib. 2, tit. 14, § 9.

[6] Ibid.

§ 528. **Same.** — This doctrine, as to postponing registered to unregistered conveyances upon the ground of notice, has broken in upon the policy of the Registration Acts in no small degree; for a registered conveyance stands upon a different footing from an ordinary conveyance. It has indeed been greatly doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance. But they have said that fraud shall not be permitted to prevail. There is however this qualification upon the doctrine, that it shall be available only in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of the other party.[1]

§ 529. **Kinds of Notice.** — What shall constitute notice, in cases of subsequent purchasers, is a point of some nicety, and resolves itself sometimes into matter of fact, and sometimes into matter of law.[2] Notice may be either actual and positive, or it may be implied and constructive.[3] Actual notice requires no definition; for in that case knowledge of the fact is brought directly home to the party. Constructive notice is in its nature no more than evidence of notice the presumption of which is so violent that the court will not even allow of its being controverted.[4]

[1] Wyatt *v.* Barwell, 19 Ves. 439; Sugden on Vendors, ch. 16, §§ 5, 10. There are some cases in which notice does not affect a purchaser. Thus where an estate is limited to such uses as A shall appoint, and a judgment is obtained against him, and he then appoints the estate to B, who has notice of the judgment, B will, notwithstanding the notice, take the estate free from the lien of the judgment; for he takes under the deed of appointment and of course by a title prior to the judgment. Skelles *v.* Shearley, 8 Sim. 156, 157; s. c. 3 Mylne & Craig, 112. See, as to the effect of this notice by an assignee of an equitable interest, to the legal holder of the property to give priority of right over prior assignees who have given no notice, Timson *v.* Ramsbottom, 2 Keen, R. 35; Foster *v.* Blackstone, 1 Mylne & Keen, R. 297; post, § 421 *a*, § 1035 *a.* (*c*).

[2] Com. Dig. Chancery, 4 C. 2. See Day *v.* Dunham, 2 John. Ch. R. 190; Jones *v.* Smith, 1 Hare, R. 43; post, §§ 1035, 1047, 1057. The burden of proof is on him who asserts notice. Bartlett *v.* Varner, 56 Ala. 580.

[3] Sugden on Vendors, ch. 17, §§ 1, 2. In a treatise like the present it is impracticable to do more than to glance at topics of this nature. The learned reader will find full information on the subject in treatises which profess to examine it at large. See Sugden on Vendors, ch. 16 and 17 (9th ed.); Newland on Contracts, ch. 36, pp. 504 to 516.

[4] Plumb *v.* Fluitt, 2 Anst. R. 438, Per Eyre, C. B; 4 Kent, Comm. Lect. 58, pp. 179, 180 (4th ed.). See also Jones *v.* Smith, 1 Hare, R. 43; Meux *v.* Bell, 1 Hare, R. 73. In Jones *v.* Smith, 1 Hare, R. 43, Mr. Vice-Chancellor Wigram examined the cases as to constructive notice very largely, and upon that occasion said: "It is indeed scarcely possible to

§ 530. **Illustrations of Constructive Notice.** — An illustration of this doctrine of constructive notice is, where the party has possession or knowledge of a deed, under which he claims his title, and it recites another deed which shows a title in some other person; there the court will presume him to have notice of the contents of the latter deed, and will not permit him to introduce evidence to disprove it.[1] And generally it may be stated as a

declare, a priori, what shall be deemed constructive notice, because unquestionably that which would not affect one man may be abundantly sufficient to affect another. But I believe I may with sufficient accuracy for my present purpose, and without danger, assert that the cases in which constructive notice has been established resolve themselves into two classes: First, cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice; and secondly, cases in which the court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiry from the very purpose of avoiding notice. How reluctantly the court has applied and within what strict limits it has confined the latter class of cases, I shall presently consider. The proposition of law upon which the former class of cases proceeds is not that the party charged had notice of a fact or instrument which in truth related to the subject in dispute without his knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law upon which this second class proceeds is not that the party charged had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries for the purpose of avoiding knowledge, — a purpose which, if proved, would clearly show that he had a suspicion of the truth and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of the facts which the res gestæ would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser, — then the doctrine of constructive notice will not apply; there the purchaser will in equity be considered, as in fact he is, a bona fide purchaser without notice. This is clearly Sir Edward Sugden's opinion (Vend. & Purch. Vol. 3, pp. 471, 472, Ed. 10); and with that sanction I have no hesitation in saying it is mine also." Hewitt *v.* Loosemore, 9 Hare, 449; Rogers *v.* Jones, 8 N. H. 264; Griffith *v.* Griffith, 1 Hoff. 153; Ogilvie *v.* Jeaffreson, 6 Jur. (N. S.) 970; Gibson *v.* Ingo, 6 Hare, 112; Farrow *v.* Rees, 4 Beav. 18; Taylor *v.* Baker, 5 Price, 306; Penny *v.* Watts, 1 Macn. & G. 150; Kennedy *v.* Green, 3 Mylne & K. 718; Warren *v.* Sweet, 31 N. H. 332; Cambridge Bank *v.* Delano, 48 N. Y. 326; Acer *v.* Wescott, 46 N. Y. 384; Woodworth *v.* Paige, 5 Ohio St. 70; Chadwick *v.* Turner, L. R. 1 Ch. 310; Rolland *v.* Hart, L. R. 6 Ch. 678; 1 Phil. 244. See Kettlewell *v.* Watson, 21 Ch. D. 685, 706, where Fry, J., says that the notice derived from shutting one's eyes to facts is attributable to a design not to know any more, and is therefore an indication that the person knew that of which he desired to avoid the evidence.

[1] Cuyler *v.* Brandt, 2 Cain Cas. in Err. 326; Eyre *v.* Dolphin, 2 B. & Beatt. 301. A person is of course supposed to know the contents of

rule on this subject that where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact.[1] So the purchaser is

instruments executed or held by himself. Rogers *v.* Place, 35 Ind. 577; Bacon *v.* Markley, 46 Ind. 116; New Albany R. Co. *v.* Fields, 10 Ind. 187; Russell *v.* Branham, 8 Blackf. 277; Starr *v.* Bennett, 5 Hill, 303; Hawkins *v.* Hawkins, 50 Cal. 558. This is said to be true of documents referred to in such instruments, though the contents are misrecited. McGavock *v.* Drery, 1 Cold. 265. But that needs qualification. One who can read only with difficulty may rely upon the reading of the instrument by the opposite party, and perhaps even upon a statement of its contents. See Keller *v.* Equitable Ins. Co., 28 Ind. 170. The same would a fortiori be true if a relation of confidence existed between the parties.

[1] 2 Fonbl. Eq. B. 3, ch. 3, § 1, note (*b*); Mertins *v.* Jolliffe, Ambler, R. 311, 314; Marr *v.* Bennett, 2 Ch. Cas. 246; Sugden on Vendors, ch. 16; 2 Fonbl. Eq. B. 2, ch. 6, § 3, and note (*m*); Com. Dig. Chancery, 4 C. 2. This doctrine however is to be received with some qualifications. For if a man purchases an estate under a deed which happens to relate also to other lands not comprised in that purchase, and afterwards he purchases the other lands, to which an apparent title is made, independent of that deed, the former notice of the deed will not itself affect him in the second transaction; for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about to make, nor to take notice of more of the deed than affected his then purchase. Hamilton *v.* Royal, 2 Sch. & Lefr. 327. In short he is bound to take notice of those things only in the deed which affect his present purchase, not any future purchase. Mertins *v.* Jolliffe, Ambler, R. 311.

Upon the general doctrine of notice see Kennedy *v.* Green, 3 Mylne & K. 699; Jones *v.* Williams, 24 Beav. 47; Ware *v.* Egmont, 4 DeG. M. & G. 460; Willis *v.* Vallette, 4 Met. (Ky.) 186; Tiernan *v.* Thurman, 14 B. Mon. 279; Shorter *v.* Frazer, 64 Ala. 74. Some special illustrations of the rule and its limitations may be given.

Upon an agreement to sell part of the vendor's land the vendor and purchaser entered into mutual covenants prohibiting building, except in a specified manner, on the unsold part. It was held that a subsequent owner of the unsold part, claiming through the grantor by means of deeds one of which referred to the deed containing the prohibitory clause, but not to the clause, was bound in equity by the prohibition. Coles *v.* Sims, 5 DeG. M. & G. 1. But though a deed disclosing a trust is in a party's chain of title, and would have to be shown in defence of an action at law, the defence of purchaser without notice will avail in equity where knowledge was fraudulently withheld. Pitcher *v.* Rawlins, L. R. 7 Ch. 259; s. c. 11 Eq. 53.

In a case before Vice-Chancellor Wood it appeared that a purchaser of shares was induced to make the purchase by representations in the prospectus which were false and fraudulent; but though the prospectus referred to the articles of association, where the truth appeared, it was held that the purchaser was not bound to go "upon an errand of inquiry whether the statements were correct or not." Smith *v.* Reese Mining Co., 12 Jur. N. S. 616; s. c. L. R. 2 Eq. 264; L. R. 2 Ch. 604; L. R. 4 H. L. 64. But see an intimation to the contrary by Lord Romilly in the case of Ex parte Briggs, 12 Jur. (N. S.) 322; s. c. L. R. 1 Eq. 483. In

in like manner supposed to have knowledge of the instrument under which the party with whom he contracts, as executor, or

Jones *v.* Williams, 24 Beav. 47, the Master of the Rolls says of the much-quoted case of Kennedy *v.* Green, 3 Mylne & K. 699: "It is always the first case cited in all causes depending on questions of notice; but in truth it rarely has any application to any one of them."

The rule in regard to the consequences of abstaining from inquiry after actual knowledge of a fact does not depend upon the existence of a fraudulent motive, such as wilfully refusing to pursue inquiry or shutting one's eyes to the result. What Wigram, V. C., says in Jones *v.* Smith, 1 Hare, 43, as quoted by the author, supra, with the similar statements of Fry, J., in Kettlewell *v.* Watson, 21 Ch. D. 685, 706, does not apply, as Vice-Chancellor Wigram shows, to the case of actual knowledge of a fact which if pursued would lead to knowledge of the fact in question. If a man is put upon inquiry he must inquire; and it will be no excuse for him that his failure was due merely to heedlessness or to stupidity. But if he makes reasonable inquiry, and is deterred or put off the track by a false answer, he will be excused if it be such as might delude a man of average intelligence, as where the party is told by the person putting him on inquiry that a deed has no effect upon the particular property about which he is dealing. Williams *v.* Williams, 17 Ch. D. 437, 442. See Wilson *v.* Hart, L. R. 1 Ch. 463; Jones *v.* Smith, 1 Hare, 43; s. c. 1 Phil. 244. But see Patman *v.* Harland, 17 Ch. D. 353, 356, explaining Carter *v.* Williams, L. R. 9 Eq. 678. The party however can seldom say that if he *had* inquired, he would have got a false answer. Jones *v.* Williams, 24 Beav. 47; Ware *v.* Egmont, 4 DeG. M. &. G. 460. But where it is reasonably certain that inquiry would lead to nothing, it seems that the party is not to be treated as having notice by failing to inquire. Carter *v.* Williams, supra; Patman *v.* Harland, supra.

So too if the fact upon which the supposed notice is founded would not *naturally* lead, upon inquiry on the part of a prudent man, to the particular fact in question, it is apprehended that the doctrine of constructive notice will not apply; see e. g. Bassett *v.* Daniels, 136 Mass. 547; and this too though the fact is clear and definite, — something more than rumor or idle talk. Thus a party should not be charged with notice of an advertisement in a newspaper, under ordinary circumstances, in the absence of statutory provision, merely because he is a subscriber to or a regular reader of the newspaper. Watkins *v.* Peck, 13 N. H. 360; Clark *v.* Ricker, 14 N. H. 44; Lincoln *v.* Wright, 23 Pa. St. 76. But see King *v.* Paterson R. Co., 5 Dutch. 82. The rule as to such a case may clearly be varied by circumstances; but it cannot be applied where it would be unreasonable. Indeed in any case the question whether the doctrine of notice applies must depend upon all the facts taken together, in connection with the subject-matter, the situation of the parties, means of knowledge, and any other circumstances bearing upon the supposed necessity of inquiry. Strong *v.* Jackson, 123 Mass. 60.

See further as to the rule of notice Briggs *v.* Taylor, 28 Vt. 180 (where the subject is considered at length); Wormald *v.* Maitland, 35 L. J. Ch. 69; Briggs *v.* Rice, 130 Mass. 50; Warren *v.* Swett, 31 N. H. 332; Cambridge Bank *v.* Delano, 48 N. Y. 326; Baynard *v.* Norris, 3 Gill, 468; Dahl *v.* Page, 2 Green, Ch. 143; Russell *v.* Ranson, 76 Ill. 167; Watt. *v.* Scofield, Ib. 261; Dickey *v.* Lyon, 19 Iowa, 544; Bigelow, Fraud, 288–300. The doctrine of course is not confined to the case of notice of the contents of a document, as the cases cited show. See note at end of the

trustee, or appointee, derives his power.[1] Indeed the doctrine is still broader; for whatever is sufficient to put a party upon inquiry (that is, whatever has a reasonable certainty as to time, place, circumstances, and persons), is, in equity, held to be good notice to bind him.[2] Thus notice of a lease will be notice of its contents.[3] So if a person should purchase an estate from the owner, knowing it to be in the possession of tenants, he is bound to inquire into the estate which these tenants have; and therefore he is affected with notice of all the facts as to their estates.[4]

present section; also Watt *v.* Scofield, supra; Willis *v.* Vallette, 4 Met. (Ky.)186; Attorney-Gen. *v.* Smith, 31 Mich. 359; Connihan *v.* Thompson, 111 Mass. 270; Fielden *v.* Slater, L. R. 7 Eq. 523; Carter *v.* Williams, L. R. 9 Eq. 678.

[1] 2 Fonbl. Eq. B. 2, ch. 6, § 3, note (*m*); Id. B. 3, ch. 3, § 1, note (*b*); Mead *v.* Lord Orrery, 3 Atk. 238; Draper's Company *v.* Yardloy, 2 Vern. R. 662; Daniel *v.* Kent, 1 Vern. R. 319; Jackson *v.* Nealy, 10 John. R. 374; Sugden on Vendors, ch. 17, § 2. One who takes as a pledge stock standing in the name of "A. B. Trustee" must ascertain the nature and limitations of the trust at his peril. Shaw *v.* Spencer, 100 Mass. 382; Comp. Ashton *v.* Atlantic Bank, 3 Allen, 217; 2 Perry, Trusts, §§ 814, 815.

[2] 2 Fonbl. Eq. B. 2, ch. 6, § 3, and note (*m*); B. 3, ch. 3, § 1, and note (*b*); Smith *v.* Low, 1 Atk. 490; Ferrars *v.* Cherry, 2 Vern. R. 384; Daniels *v.* Davison, 16 Ves. 250; Howarth *v.* Deem, 1 Eden, R. 351, and Mr. Eden's note, ib.; Sterry *v.* Arden, 1 John. Ch. R. 267; Surman *v.* Barlow, 2 Eden, R. 167; Parker *v.* Brooke, 9 Ves. 583; Green *v.* Slayter, 4 John. Ch. R. 38; Eyre *v.* Dolphin, 2 B. & Beatt. 301, 302; Com. Dig. Chancery, 4 C. 2. See Coy *v.* Coy, 15 Minn. 119.

[3] Hall *v.* Smith, 14 Ves. 426.

[4] Taylor *v.* Stibbert, 2 Ves. Jr., 440; Daniels *v.* Davison, 16 Ves. 249, 252; Smith *v.* Low, 1 Atk. 489; Allen *v.* Anthony, 1 Meriv. R. 262; 2 Fonbl. Eq. B. 2, ch. 6, § 3, and note (*m*); Meux *v.* Maltby, 2 Swanst. 281; Chesterman *v.* Gardner, 5 John. Ch. R. 29; Hanbury *v.* Litchfield, 2 Mylne & Keen, 629, 632, 633. In this last case the Master of the Rolls (Sir C. C. Pepys) said: "It is true that where a tenant is in possession of the premises a purchaser has implied notice of the nature of his title. But if at the time of his purchase the tenant in possession is not the original lessee but merely holds under a derivative lease, and has no knowledge of the covenant contained in the original lease, it has never been construed want of due diligence in the purchaser, which is to fix him with implied notice, if he does not pursue his inquiries through every derivative lessee until he arrives at the person entitled to the original lease, which can alone convey to him information of the covenant." See also Flagg *v.* Mann, 2 Sumner, R. 486, 554, 555. Fishel *v.* Browning, 145 N. C. 71, 58 S. E. 759.

And where a person buys property with a visible state of things which could not legally exist without the property being subject to some burden he is taken to have notice of the extent and nature of that burden. Allen *v.* Seckham, 11 Ch. D. 790, 795, Brett, L. J. See further Hendricks *v.* Kelly, 64 Ala. 388; Seager *v.* Cooley, 44 Mich. 14; Daily *v.* Kastel, 56 Wis. 444; Baynard *v.* Norris, 3 Gill. 468; Dahl. *v.* Page, 2 Green, Ch. 143; James *v.* Lichfield, L. R. 9 Eq. 51. A tenant is held fixed with notice

§ 531. **Rumor or Suspicion Not Sufficient Evidence of Notice.** — But in a great variety of cases it must necessarily be matter of no inconsiderable doubt and difficulty to decide what circumstances are sufficient to put a party upon inquiry. Vague and indeterminate rumor or suspicion is quite too loose and inconvenient in practice to be admitted to be sufficient.[1] But there will be found almost infinite gradations of presumption between such rumor or suspicion and that certainty as to facts which no mind could hesitate to pronounce enough to call for further inquiry, and to put the party upon his diligence. No general rule can therefore be laid down to govern such cases. Each must depend upon its own circumstances.[2] There is no case which goes the length of saying that a failure of the utmost circumspection shall have the same effect of postponing a party as if he were guilty of fraud, or wilful neglect, or had positive notice.[3] And although a mistake of law upon the construction of a deed or contract will not alone discharge a purchaser from the legal effects of notice of such deed or contract, yet there may be a case of such doubtful equity, under the circumstances, that it ought not to be enforced against such a purchaser.[4] The

of all covenants of his landlord. Feilden *v.* Slater, L. R. 7 Eq. 523. But see Carter *v.* Williams, L. R. 9 Eq. 678. The condition of the premises may be notice of a right of way. Davies *v.* Sears, L. R. 7 Eq. 427.

[1] Sugden on Vendors, ch. 17; Wildgrove *v.* Wayland, Godb. R. 147; Jolland *v.* Stainbridge, 3 Ves. 478; Maul *v.* Rider, 59 Pa. St. 167; Richardson *v.* Smith, 11 Allen, 134; Colquitt *v.* Thomas, 8 Ga. 258; James *v.* Drake, 3 Sneed, 340. It is not necessary however that notice should come from a party to the transaction or from his agent. It is enough if it is of a kind to create belief. Rawbone's Bequest, 3 Kay & J. 300. Smith *v.* Smith, 2 Cromp. & M. 231; Lloyd *v.* Banks, L. R. 3 Ch. 488; s. c. 4 Eq. 222; In re Tichener, 35 Beav. 317; Martel *v.* Somers, 26 Texas, 551. But see In re Brown, L. R. 5 Eq. 88. It is said that general reputation and belief to the knowledge of a person should put him upon inquiry. James *v.* Drake, 3 Sneed, 340.

As to the time at which one must receive notice to affect him in equity, it is in general sufficient if it be received before he has parted with his money or placed himself in a position where he cannot resist the payment, as where the rights of third persons have intervened. Collinson *v.* Lister, 20 Beav. 356; s. c. 7 DeG. M. & G. 634; Bennett *v.* Titherington, 6 Bush, 192; Wells *v.* Morrow, 38 Ala. 125; Wilson *v.* Hunter, 30 Ind. 466.

[2] See 2 Fonbl. Eq. B. 3, ch. 3, § 1, note (*b*); Eyre *v.* Dolphin, 2 B. & Beatt. 301; Hine *v.* Dodd, 2 Atk. 275. See Jones *v.* Smith, The (English) Jurist, May 27, 1845, p. 431; Flagg *v.* Mann, 2 Sumner, R. 489, 549, 560.

[3] Plumb *v.* Fluitt, 2 Anst. R. 433, 440. See Dey *v.* Dunham, 2 John. Ch. R. 190, 191.

[4] Cordwill *v.* Mackrill, 2 Eden, R. 344, 348; Parker *v.* Brooke, 9 Ves. 583, 588; 2 Fonbl. Eq. B. 2, ch. 6, § 3, and note; Bovey *v.* Smith, 1 Vern. 144, 149; Walker *v.* Smallwood, Amb. R. 676.

mere fact that the assignees of an insolvent debtor have made a sale of the estate at auction, under circumstances of negligence on their part, will not affect the purchaser with notice, as such circumstances are collateral to the question of title. Even if before he takes the conveyance he have notice of such circumstances, yet if he have purchased bona fide, his title is not necessarily voidable.[1] But the question must depend in a great measure upon this, whether the conduct of the assignee be such a gross and palpable breach of duty as ought justly to avoid the sale.[2]

§ 532. **Registered Title Is Superior to Notice of Prior Unregistered Title.** — How far the registration of a conveyance in countries where such registration is authorized and required by law shall operate as constructive notice to subsequent purchasers by mere presumption of law, independent of any actual notice, has been much discussed both in England and in America. It is not doubted in either country that a prior conveyance, duly registered, operates to give full effect to the legal and equitable estate conveyed thereby, against subsequent conveyances of the same legal and equitable estate.[3] But the question becomes important as to other collateral effects, such as defeating the right of tacking of mortgages, and other incidentally accruing equities between the different purchasers. For if the mere registry in such cases, without actual knowledge of the conveyance, operates as constructive notice, it shuts out many of those equities which otherwise might have an obligatory priority.[4] It has been truly remarked that there is a material difference between actual notice and the operation of the Registry Acts. Actual notice may bind the conscience of the parties; the operation of the Registry Acts may bind their title, but not their conscience.[5]

§ 533. **Rule as to Notice in England.** — In England the doctrine seems at length to be settled that the mere registration of a conveyance shall not be deemed constructive notice to subsequent purchasers, but that actual notice must be brought home to the

[1] Compare Hill *v.* Ahern, 135 Mass. 158; Ricker *v.* Ham, 14 Mass. 137; Clapp *v.* Leatherbee, 18 Pick. 131. In the first of these cases this distinction is taken on a question of priority of mortgages; the test applied being whether the later one was taken by the plaintiff as a real and not as a feigned mortgage.

[2] Borell *v.* Dunn, 2 Hare, 450 to 455; Attorney-Gen. *v.* Stephens, 6 DeG. M. & G. 111, 148; Montefiore *v.* Browne, 7 H. L. Cas. 241, 269.

[3] Wrightson *v.* Hudson, 2 Eq. Abr. 609, Pl. 7.

[4] Newland on Contracts, ch. 36, p. 508.

[5] Underwood *v.* Courtown, 2 Sch. & Lefr. 66. See Latouche *v.* Dunsany, 1 Sch. & Lefr. 137; Dey *v.* Dunham, 2 John. Ch. R. 190, 191.

party, amounting to fraud.[1] The subject certainly is attended with no inconsiderable difficulty. Some learned judges have expressed a doubt whether Courts of Equity ought not to have said that in all cases of a public registry which is a known depository for conveyances, a subsequent purchaser ought to search or be bound by notice of the registry in the same way as he would be by a decree in equity or by a judgment at law.[2] Other learned judges have intimated a different opinion; assigning as a reason, that if the registration of the conveyance should be held constructive notice, it must be notice of all that is contained in the conveyance and then subsequent purchasers would be bound to inquire after the contents, the inconveniences of which cannot but be deemed exceedingly great.[3] The question seems first to have arisen in a case of the tacking of mortgages about the year 1730; and it was then decided by Lord Chancellor King that the mere registration of a second mortgage did not prevent a prior mortgagor from tacking a third mortgage when he had no actual notice of the existence of the second mortgage.[4] This decision has ever since been steadily adhered to, perhaps more from its having become a rule of property than from a sense of its intrinsic propriety.

§ 534. **Registration Is Constructive Notice to All Subsequent Purchasers.** — In America however the doctrine has been differently settled; and it is uniformly held that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate legal or equitable in the same property.[5] The reasoning upon which this doctrine is founded is the obvious policy of the Registry Acts, the duty of the party purchasing under such circumstances to search for prior incumbrances, the means of which search are within his power, and the danger (so forcibly alluded to by Lord Hardwicke) of letting in parol proof of notice or want of notice of the actual existence of the conveyance.[6] The American doctrine certainly

[1] Wyatt *v.* Barwell, 19 Ves. 435; Jolland *v.* Stainbridge, 3 Ves. 477; Com. Dig. Chancery, 4 C. 1. See now 45 and 46 Vict. Ch. 39, § 3.

[2] Morecock *v.* Dickens, Amb. R. 480; Hine *v.* Dodd, 2 Atk. 275; Parkhurst *v.* Alexander, 1 John. Ch. R. 399; Sugden on Vendors, ch. 16, 17.

[3] Latouche *v.* Dunsany, 1 Sch. & Lefr. 157; Underwood *v.* Courtown, 2 Sch. & Lefr. 64, 66; Pentland *v.* Stokes, 2 B. & Beatt. 75.

[4] Bedford *v.* Backhouse, 2 Eq. Abridg. 615, Pl. 12; S. P. Wrightson *v.* Hudson, 2 Eq. Abridg. 609, Pl. 7; Cator *v.* Cooley, 1 Cox, R. 182; Wiseman *v.* Westland, 1 Y. & Jerv. 117.

[5] Parkhurst *v.* Alexander, 1 John. Ch. 394.

[6] Hine *v.* Dodd, 2 Atk. 275.

has the advantage of certainty and universality of application; and it imposes upon subsequent purchasers a reasonable degree of diligence only in examining their titles to estates.[1]

§ 535. **De Facto Registration as Color of Title.** — But this doctrine as to the registration of deeds being constructive notice to all subsequent purchasers is not to be understood of all deeds and conveyances which may be de facto registered, but of such only as are authorized and required by law to be registered, and are duly registered in compliance with law. If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, the act of registration is treated as a mere nullity; and then the subsequent purchaser is affected only by such actual notice as would amount to a fraud.[2]

[1] Johnson *v.* Strong, 2 John. 510; Frost *v.* Beekman, 1 John. Ch. 288, 299; s. c. 18 John. R. 544; Parkhurst *v.* Alexander, 1 John. Ch. R. 394. The better opinion also seems to be that the registration of an equitable mortgage or title or incumbrance is notice to a subsequent purchaser as much as if it were a legal security or title. Parkhurst *v.* Alexander, 1 John. Ch. 398, 399, and the cases there cited.

[2] Underwood *v.* Courtown, 2 Sch. & Lefr. 68; Latouche *v.* Dunsany, 1 Sch. & Lefr. 157; Astor *v.* Wells, 4 Wheat. R. 466; Frost *v.* Beekman, 1 John. Ch. R. 300; Lessee of Heister *v.* Fortner, 2 Binn. R. 40; Farmer's Loan Trust Co. *v.* Maltby, 8 Paige, R. 361; Digman *v.* McCollum, 47 Mo. 372.

So of the registration of an unacknowledged or defectively acknowledged deed, where acknowledgment is a statutory prerequisite to recording. Stevens *v.* Hampton, 46 Mo. 404; Bishop *v.* Schneider, Ib. 472; Wood *v.* Cochrane, 39 Vt. 544; Polk *v.* Cosgrove, 4 Biss. 437. So of a deed not sealed. Racouillat *v.* Sansevain, 32 Cal. 376; Racouillat *v.* Rene, Ib. 450. See St. John *v.* Conger, 40 Ill. 535. The record of a deed from a grantor whose title deed is not on record is not constructive notice to subsequent purchasers from the record owner. Ely *v.* Wilcox, 20 Wis. 523. See Maul *v.* Rider, 59 Pa. St. 167. So also a mortgage is not affected by the subsequent recording of deeds by his mortgagor. George *v.* Wood, 9 Allen, 80; Cooper *v.* Bigley, 13 Mich. 463; Ely *v.* Wilcox, supra. Indeed the record of an instrument is notice, not to all the world, but only to those who are bound to search for it. Maul *v.* Rider, supra. Misdescription of premises in some particulars however does not destroy the effect of recording as notice. Partridge *v.* Smith, 2 Biss. 133.

One who has purchased land at void judicial sale may still be entitled to claim for improvements made by him, notwithstanding the fact that the probate records would have shown that the sale was not legal, if he was not a party to or connected with the probate suit, and did not know or have ground to suspect that the sale would not be legal. Cole *v.* Johnson, 53 Miss. 94; Canal Bank *v.* Hudson, 111 U. S. 66, 80. See Green *v.* Biddle, 21 U. S. 79, 1 L. Ed. 79.

The registration of a copy of a contract of sale, which is not authorized by law to be recorded, is not notice. Mack *v.* McIntosh, 181 Ill. 633, 54 N. E. 1019.

The registration of a mortgage in the deed record book is sufficient notice. Cawthon *v.* Stears Culver Lumber Co., 60 Fla. 313, 53 So. 738.

§ 536. **Rights of One Who Purchases Property during Litigation about the Title.** — It is upon similar grounds that every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. And therefore a purchase made of property actually in litigation, pendente lite, for a valuable consideration and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit.[1]

Unacknowledged mortgage, though properly recorded, has been held to be no notice, Nordman *v.* Rau, 86 Kans. 19, 119 Pac. 351; but the better opinion seems to be that actual notice as the expression is used, is not necessary, but any knowledge of facts and circumstances so pertinent in character as to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts, is a sufficient notice. Pope *v.* Nichols, 61 Kans. 230, 59 Pac. 257.

Unless a deed is duly proved, the registration is ineffectual to pass the title as against creditors and purchasers, but might be sufficient as color of title. Witherell *v.* Murphy, 154 N. C. 82, 69 S. E. 748.

[1] Com. Dig. Chancery, 4 C. 3 and 4; 2 Fonbl. Eq. B. 2, ch. 6, § 3, note (*n*); Sorrell *v.* Carpenter, 2 P. Will. 482; Worsley *v.* Earl of Scarborough, 3 Atk. 392; Bishop of Winchester *v.* Paine, 11 Ves. 194; Garth *v.* Ward, 2 Atk. 175; Mead *v.* Lord Orrery, 3 Atk. 242; Gaskeld *v.* Durdin, 2 B. & Beatt. 169; Moore *v.* Macnamara, 2 B. & Beatt. 186; Murray *v.* Ballou, 1 John. Ch. R. 566. See Tilton *v.* Cofield, 93 U. S. 163, 23 L. Ed. 858; Lewis *v.* Mew, 1 Strobh. Eq. 180; Price *v.* White, 1 Bail. Eq. 244; Haven *v.* Adams, 8 Allen, 363; Allen *v.* Morris, 5 Vroom, 159; McPherson *v.* Housel, 2 Beasl. 301; Davis *v.* Christian, 15 Gratt. 1; Hall *v.* Jack, 32 Md. 253; Porter *v.* Barclay, 18 Ohio St. 546; Allen *v.* Atchison, 26 Texas, 616; August *v.* Seeskind, 6 Cold. 166; In re Barned's Banking Co., L. R. 2 Ch. 171. Mere service of subpœna is not lis pendens if the case goes no further; but when the bill or declaration is filed, the rule of lis pendens relates to the service of the writ. Sugden, Vendors, 534 (Perkins's ed.). And filing a bill without subpœna is lis pendens. Drew *v.* Norbury, 9 Ir. Eq. 171, 176; Leitch *v.* Wells, 48 N. Y. 585.

In accordance with the author's rule during the pendency of a suit in equity for a specific estate in land any interest a third person may acquire in it without sanction of court will be bound by the decree, regardless of his prior right or title. Thus a claimant, no matter how good his title, shall not by his own act acquire possession, held adversely by the defendant in a suit to subject the property to the payment of his debts, so as to compel the plaintiff to bring another suit. Chapman *v.* Gibbs, 51 Ala. 502; Creighton *v.* Paine, 2 Ala. 158; Kershaw *v.* Thompson, 4 Johns. Ch. 609; Murray *v.* Ballou, 1 Johns. Ch. 566.

An injunction may be had to restrain a sale, though the purchaser would take pendente lite. London Banking Co. *v.* Lewis, 21 Ch. D. 490 (C. A.); Spiller *v.* Spiller, 3 Swab. 556.

The law is, that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever it may be, as if he had been a party to it from the outset. Tilton *v.* Cofield, 93 U. S. 163, 23 L. Ed. 858; Merillat *v.* Hensey, 34 App. D.

§ 537. **Lis Pendens Is Notice to the World.** — Ordinarily it is true that the decree of a court binds only the parties and their privies in representation or estate. But he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired, and such purchaser need not be made a party to the suit.[1] Where there is a real and fair purchase without any notice, the rule may operate very hardly.[2] But it is a rule founded upon a great public policy; for otherwise alienations made during a suit might defeat its whole purpose, and there would be no end to litigation.[3] And hence arises the maxim, "Pendente lite, nihil innovetur;" the effect of which is, not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation.[4] As to the rights of these parties, the conveyance is treated as if it never had any existence, and it does not vary them.[5] A lis pendens however being only a general notice of an equity to all the world, it does not affect any particular person with a fraud, unless such person had also special notice of the

C. 398; Hale's Heirs *v.* Ritchie, 142 Ky. 424, 134 S. W. 474; Bell *v.* Diesem, 86 Kans. 364, 121 Pac. 335; Fletcher *v.* Wireman, 152 Ky. 565, 153 S. W. 982.

Party to equity suit, brought for purpose of subject land to satisfaction of judgment, cannot convey the standing timber upon the land, where it constitutes a large part of the security, and purchaser who had notice of the suit would acquire no title, even though no lis pendens were filed. Goff *v.* McLain, 48 W. Va. 445, 37 S. E. 566, 86 Am. St. Rep. 64.

In actions to recover land, the filing of the complaint in which the property is described and the purpose of the action stated, operates as a lis pendens. Simmons *v.* Fleming, 157 N. C. 385, 72 S. E. 1082; Jones *v.* Williams, 155 N. C. 179, 71 S. E. 222, 36 L. R. A. (N. S.) 426.

Notice of lis pendens does not apply to personal property, but where an action is brought for the recovery of specific property, an injunction forbidding the transfer of possession of it is valid though defective in form, and when a creditor has sequestered property by appointment of receiver, it has practically same effect as filing lis pendens against land. Osborne *v.* Glasscock, 39 W. Va. 749, 20 S. E. 702.

[1] Bishop of Winchester *v.* Paine, 11 Ves. 197; Metcalf *v.* Pulvertoft, 2 V. & Beam. 205.

[2] 2 P. Will. 483; Story on Equity Plead. §§ 156, 351.

[3] Co. Litt. 224, *b*; Metcalf *v.* Pulvertoft, 2 V. & Beam. 199; Gaskeld *v.* Durdin, 2 B. & Beat. 169.

[4] Ibid.

[5] Ibid.; Bishop of Winchester *v.* Paine, 11 Ves. 197; Murray *v.* Ballou, 1 John. Ch. R. 566; Murray *v.* Finster, 2 John. Ch. R. 155. It matters not, it seems, that lands in suit are located in another county than that of the litigation. Wickliffe *v.* Breckenridge, 1 Bush, 427. As to the duration of the incapacity by virtue of lis pendens, see Dudley *v.* Witter, 46 Ala. 664. And see 2 & 3 Vict. ch. 11, § 7; 30 & 31 Vict. ch. 47, § 2.

title in dispute in the suit.[1] If therefore the right to relief in equity depends upon any supposed coöperation in a fraud, it is indispensable to establish an express or direct notice of the fraudulent act. And although, as we have seen, a registered deed will be postponed to a prior unregistered deed where the second purchaser had actual notice of the first purchase, yet the doctrine has never been carried to the extent of making a lis pendens constructive notice of the prior unregistered deed, but actual notice is required.[2]

§ 538. [**Amendment of Pleading as Affecting Purchasers and Incumbrancers.** — Considerable difficulty may be experienced in determining to what extent notice of the pendency of an action affecting given property will have where the pleadings have been amended, or the nature of the cause of action changed so materially as to be misleading to subsequent purchasers or incumbrancers. It may be that an action was originally brought for one purpose, and subsequently the complaint might be amended so as to plead lis pendens. Wherever a question is raised between a purchaser or incumbrancer and the parties to the action, the pleadings in the original cause, and the issues arising thereon, are competent evidence and the most reliable guide in ascertaining the rights of the parties. It must be borne in mind that it is not the simple institution of an action by one man against another that will put a third party on notice. The pleadings, though inartificially drafted, should convey at least intelligent information as to the nature of the alleged cause of action, what property if any will be affected, its location, etc.[3] In order for the plaintiff to be entitled to file a notice of lis pendens, the subject of his action ought to be the recovery of specific property, but where he sets up claim to real property, in an action to enforce a mere personal judgment, so as to keep the defendant from conveying his estate pending the action, or where the action is to set aside a sale of a drug business, and subsequently the defendant sells other property of his, an amended complaint covering this other property would not be sufficient to affect one with notice. The amendment to a complaint would not validate a notice of the pendency of an

[1] Mead *v.* Lord Orrery, 3 Atk. 242, 243; 2 Fonbl. Eq. B. 2, ch. 6, § 3, note (*n*); Id. B. 3, § 1, note (*b*).

[2] Wyatt *v.* Barwell, 19 Ves. 439. The doctrine of lis pendens is not applied to the injury of rights previously acquired, as by a mortgage. See e. g. Wiggin *v.* Heywood, 118 Mass. 514.

[3] Letcher *v.* Reese, 24 Tex. Civ. App. 537, 60 S. W. 256; Cornell University in Parkinson, 59 Kans. 365, 53 Pac. 138.

action which was unauthorized by the complaint as it existed when such original notice was filed, the amendment to the complaint being notice only from the date of its filing.[1] And there is no power to amend the notice of lis pendens so as to make it operate as constructive notice to parties whose rights may have accrued in the interval.[2]]

§ 539. **One Not a Party to a Decree Is Bound if He Have Notice of Its Contents.** — In general a decree is not constructive notice to any persons who are not parties or privies to it, and therefore other persons are not presumed to have notice of its contents. But a person who is not a party to a decree, if he has actual notice of it will be bound by it, and if he pays money in opposition to it, he will be compelled to pay it again.[3] And a purchaser having notice of a judgment will be bound by it, although it has not been docketed so as to secure the priority of lien and satisfaction attached to judgments.[4]

§ 540. **Constructive Notice to Agent or Attorney Will Bind Principals.** — To constitute constructive notice it is not indispensable that it should be brought home to the party himself. It is sufficient if it is brought home to the agent, attorney, or counsel of the party; for in such cases the law presumes notice in the principal, since it would be a breach of trust in the former not to communicate the knowledge to the latter.[5] But in all these cases notice to bind the principal should be notice in the same

[1] Brox *v.* Riker, 56 App. Div. 388, 67 N. Y. Supp. 772, 9 N. Y. Ann. Cas. 78.

[2] Van Tuyl *v.* New York Real Estate Sec. Co., 153 App. Div. 409, 138 N. Y. Supp. 541.

[3] 2 Fonbl. Eq. B. 2, ch. 6, § 3, note (*n*); Harvey *v.* Montague, 1 Vern. R. 57; Sugden on Vendors, ch. 17, §§ 1, 2.

[4] Davis *v.* Earl of Strathmore, 16 Ves. 419, but see now 27 and 28 Vict. ch. 112.

[5] Com. Dig. Chancery, 4 C. 5 and 6; 2 Fonbl. Eq. B. 2, ch. 6, § 4; Sheldon *v.* Cox, 2 Eden, R. 224, 228; Jennings *v.* Moore, 2 Vern. R. 609; Sugden on Vendors, ch. 17; Astor *v.* Wells, 17 U. S. 466, 4 L. Ed. 616.

The presumption of communication does not, according to some cases, arise where the agent's or partner's interest is opposed to communication, as where he has obtained knowledge by his own fraud. See Williamson *v.* Barbour, 9 Ch. D. 529, 535; Cave *v.* Cave, 15 Ch. D. 639; Kettlewell *v.* Watson, 21 Ch. D. 685, 705; Wilde *v.* Gibson, 1 H. L. Cas. 605; Dillaway *v.* Butler, 135 Mass. 479. But see the same cases for qualification of the rule; and see especially Ogilvie *v.* Jeaffreson, 6 Jur. (N. S.) 970. In other cases it has been held immaterial that it was against the agent's interest to communicate to his principal. Espin *v.* Pemberton, 5 Jur. (N. S.) 157; S. C. 28 L. J. Ch. 311. Still where the agent would have to communicate his own fraud, notice to the principal can hardly be imputed. Kennedy *v.* Green, 3 Mylne & K. 699; In re European Bank, L. R. 5 Ch.

transaction or negotiation; for if the agent, attorney, or counsel was employed in the same thing by another person or in another business or affair and at another time, since which he may have forgotten the facts, it would be unjust to charge his present principal on account of such a defect of memory.[1] It was significantly observed by Lord Hardwicke that if this rule were not adhered to, it would make the titles of purchasers and mortgagees depend altogether upon the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as being less likely to have notice of former transactions.[2]

§ 541. **Exceptions to Rule that Notice to Agent Is Notice to Principal.** — Although the general rule that notice to the agent is notice to the principal is well established, yet there are some nice cases which may arise in the application of the rule. Thus for example suppose the case of a corporation acting by a board of directors, or trustees, or other officers or agents, the question may arise whether notice to one of the board of facts unknown to all the others will bind the corporation, or whether the notice should be offered to the board itself or a majority of them. The authorities on this point do not seem entirely in harmony.[3]

358. See also Hunt *v.* Elmes, 7 Jur. (N. S.) 200. The rule of care and watchfulness both on the particular occasion and in the selection of the agent is declared in Ogilvie *v.* Jeaffreson, supra. See Hart *v.* Farmers' Bank, 33 Vt. 272. By this rule if the principal employ an agent known by him to have an interest against making communication, he will be bound by notice to the agent; secus if the principal was not at fault.

[1] Com. Dig. Chancery, 4 C. 5 and 6, and cases before cited; Fitzgerald *v.* Falconberg, Fitz Gibb. R. 211. McCormick *v.* Wheeler, 36 Ill. 114. See however Wythes *v.* Labouchere, 3 DeG. & J. 593; Ogilvie *v.* Jeaffreson, 6 Jur. (N. S.) 970; Bramlett *v.* Henderson, 19 Ky. L. Rep. 692, 41 S. W. 575; Taylor *v.* Young, 56 Mich. 285, 22 N. W. 799; Coombs *v.* Barker, 31 Mont. 526, 76 Pac. 1; Neal *v.* Pender-Hyman Hardware Co., 122 N. C. 104, 29 S. E. 96. But only when one is acting in the scope of his employment, Commercial Bank of Danville *v.* Burgwyn, 110 N. C. 267, 14 S. E. 623.

[2] Warwick *v.* Warwick, 3 Atk. 294; Worsley *v.* Earl of Scarborough, 3 Atk. 392; Lowther *v.* Carlton, 2 Atk. 242, 392. But notice to a solicitor in one transaction, which is closely followed by and connected with another, so as clearly to give rise to a presumption that the prior transaction was present in his mind, and that he could not have forgotten it, is constructive notice to his client. A fortiori, if it is clear that at the time of the second transaction the first was fully in his mind. Hargraves *v.* Rothwell, 2 Keen, R. 154, 159. Jones *v.* Bamford, 21 Iowa, 217. Compare Saffron Building Soc. *v.* Rayner, 14 Ch. D. 406. So where both parties employ the same counsel. Rolland *v.* Hart, L. R. 6 Ch. 678; 1 Perry, Trusts, § 222.

[3] See Story on Agency, §§ 140 *a*, 140 *b*; Commercial Bank *v.* Cunning-

§ 542. **Doctrine Applies to Every Purchaser Who Acquires Title with Such Notice.** — The doctrine which has been already stated in regard to the effect of notice is strictly applicable to every purchaser whose title comes into his hands affected with such notice. But it in no manner affects any such title derived from another person, in whose hands it stood free from any such taint. Thus a purchaser with notice may protect himself by purchasing the title of another bona fide purchaser for a valuable consideration without notice; for otherwise such bona fide purchaser would not enjoy the full benefit of his own unexceptionable title.[1] Indeed he would be deprived of the marketable value of such a title, since it would be necessary to have public notoriety given to the existence of a prior incumbrance, and no buyer could be found, or none except at a depreciation equal to the value of the incumbrance. For a similar reason if a person who has notice sells to another who has no notice and is a bona fide purchaser for a valuable consideration, the latter may protect his title although it was affected with the equity arising from notice in the hands of the person from whom he derived it; for otherwise no man would be safe in any purchase, but would be liable to have his own title defeated by secret equities of which he could have no possible means of making a discovery.

§ 543. **The Doctrine in England.** — This doctrine in both of its branches has been settled for nearly a century and a half in England; and it arose in a case in which A purchased an estate with notice of an incumbrance, and then sold it to B who had no notice, and B afterwards sold it to C who had notice; and the question was whether the incumbrance bound the estate in the hands of C. The then Master of the Rolls thought that although the equity of the incumbrance was gone while the estate was in the hands of B, yet it was revived upon the sale to C. But the Lord Keeper reversed the decision; and held that the estate in the hands of C was discharged of the incumbrance notwithstanding the notice of A and C.[2] This doctrine has ever since been adhered to as an

ham, 24 Pick. R. 278. See Whelan *v.* McCreary, 64 Ala. 319, 329; Tirrell *v.* Branch Bank of Mobile, 12 Ala. 502; Porter *v.* Bank of Rutland, 19 Vt. 410; In re European Bank, L. R. 5 Ch. 358; Perry *v.* Porter, 124 Mass. 338.

[1] 1 Fonbl. Eq. B. 2, ch. 6, § 2, note (*i*); Mitf. Plead. by Jeremy (1827), p. 278 (4th ed.); Com. Dig. Chancery, 4 A. 10; 4 I. 3; 4 I. 4; 4 I. 11. See Perry, Trusts, § 222; Bartlett *v.* Verner, 56 Ala. 580; Horton *v.* Smith, 8 Ala. 73; Daniel *v.* Sorrels, 9 Ala. 436.

[2] Harrison *v.* Forth, Prec. Ch. 61; s. c. 1 Eq. Abridg. Notice, A. 6, p. 331.

indispensable muniment of title.[1] And it is wholly immaterial of what nature the equity is, whether it is a lien, or an incumbrance, or a trust, or any other claim; for a bona fide purchase of an estate for a valuable consideration purges away the equity from the estate in the hands of all persons who may derive title under it, with the exception of the original party, whose conscience stands bound by the violation of his trust and meditated fraud. But if the estate becomes revested in him, the original equity will re-attach to it in his hands.[2]

[1] 2 Fonbl. Eq. B. 2, ch. 6, § 2, note (*i*); Brandlyn *v.* Ord, 1 West, R. 512; s. c. 1 Atk. 571; Lowther *v.* Carlton, 2 Atk. 242; Ferrars *v.* Cherry, 2 Vern. 383; Mertins *v.* Jolliffe, Ambl. R. 313; Sweet *v.* Southcote, 2 Bro. Ch. R. 66; McQueen *v.* Farquhar, 11 Ves. 477, 478; Bracken *v.* Miller, 4 Watts & Serg. 102; Bell *v.* Twilight, 18 N. H. 159, 164; Webster *v.* Van Steenbergh, 46 Barb. 211. See Bigelow's Bills and Notes, 439. It seems that a tenant in common with notice cannot avail himself of his co-tenant's want of notice, on deriving title from him by partition. Blatchley *v.* Osborn, 33 Conn. 226. In New Jersey an assignee of a mortgage takes subject to equities, though without notice. Conover *v.* Van Mater, 3 C. E. Green, 481. Contra in Massachusetts. Welch *v.* Priest, 8 Allen, 165.

[2] 2 Fonbl. Eq. B. 2, ch. 6, § 2, note (*i*), and cases before cited; and Kennedy *v.* Daly, 1 Sch. & Lefr. 379; Bumpus *v.* Plattner, 1 John. Ch. R. 219, Jackson *v.* Henty, 10 John. R. 185; Jackson *v.* Given, 8 John. R. 573; Demarest *v.* Wyncoop, 3 John. Ch. R. 147; Alexander *v.* Pendleton, 8 Cranch, R. 462; Ingram *v.* Pelham, Ambl. R. 153; Fitzsimmons *v.* Ogden, 7 Cranch, 218. The rule adopted in equity in favor of bona fide purchasers without notice not to grant any relief against them is founded, as we have seen, upon a general principle of public policy. Wallwyn *v.* Lee, 9 Ves. R. 24. It is not however absolutely universal, for it has been broken in upon in two classes of cases. In the first place it is not allowed in favor of a judgment creditor, who has no notice of the plaintiff's equity. This appears to proceed upon the principle that such judgment creditor shall be deemed entitled merely to the same rights as the debtor had, as he comes in under him, and not through him; and upon no new consideration like a purchaser. Burgh *v.* Burgh, Rep. Temp. Finch. 28. In the second place it is not allowed in favor of a bona fide purchaser without notice against the claims of a dowress as such. Williams *v.* Lambe, 3 Brown, Ch. Rep. 264. This last exception is apparently anomalous, and has been established upon the distinction that the protection of a bona fide purchaser does not apply against a party plaintiff seeking relief upon the ground of a legal title (such as dower is), but only against a party plaintiff seeking relief upon an equitable title. The propriety of the distinction has been greatly questioned. It has been impugned by Lord Rosslyn in Jerrard *v.* Saunders (2 Ves. Jr. 454). The cases of Burlare *v.* Cook (2 Freem. R. 24) and Parker *v.* Blythmore (2 Eq. Abridg. 79, pl. 1) are against it. Rogers *v.* Leele (2 Freeman, R. 84), and the above case of Williams *v.* Lambe are in its favor. Mr. Sugden doubts the correctness of the distinction. Sugden on Vendors, ch. 18, sub finem (9th ed.). On the other hand Mr. Belt maintains its correctness. Belt's note (1) to 3 Brown, Ch. R. 264. So does Mr. Beames (Beam. Pl. Eq. 244, 245), and Mr. Roper also in his work on Husband and Wife, Vol. 1,

§ 544. **Bona Fide Purchaser for Value and without Notice May Buy in Outstanding Incumbrance for His Protection.** — Indeed purchasers of this sort are so much favored in equity that it may be stated to be a doctrine now generally established, that a bona fide purchaser for a valuable consideration without notice of any defect in his title at the time of his purchase may lawfully buy in any statute, mortgage, or other incumbrance upon the same estate for his protection.[1] If he can defend himself by any of them at law, his adversary will have no help in equity to set these incumbrances aside; for equity will not disarm such a purchaser, but will act upon the wise policy of the common law, to protect and quiet lawful possessions and strengthen such titles.[2] We shall have occasion hereafter in various cases to see the application of this doctrine.

§ 545. **The Doctrine of Tacking, Stated.** — And this naturally leads us to the consideration of the equitable doctrine of tacking, as it is technically called; that is, uniting securities given at different times so as to prevent any intermediate purchasers from claiming a title to redeem or otherwise to discharge one lien which is prior, without redeeming or discharging the other liens also which are subsequent to his own title.[3] Thus if a third mortgagee without notice of a second mortgage should purchase in the first mortgage by which he would acquire the legal title, the second mortgagee would not be permitted to redeem the first mortgage without redeeming the third mortgage also; for in such a case equity tacks both mortgages together in his favor. And in such

446, 447. Mr. Hovenden, in his note to 2 Freem. R. 24, acquiesces in it. See also Medlicott *v.* O'Donel, 1 B. & Beatt. 171. See also Mitf. Plead. Eq. by Jeremy, p. 274, note (*d*) (4th ed.). The same distinction was expressly affirmed in Collins *v.* Archer, 1 Russ. & Mylne, 292. There is a peculiarity in the case of a dowress which operates against her, and upon this point of notice is proper to be mentioned. Though notice of the title will protect every other interest in the inheritance, it will not protect hers. Maundrell *v.* Maundrell, 10 Ves. 271, 272; Wynn *v.* Williams, 5 Ves. 130; Mole *v.* Smith, Jacob, R. 497; Swannock *v.* Lifford, Ambl. R. 6; s. c. Co. Litt. 208 a, Butler's note (105); Radner *v.* Vanderbendy, Show. Parl. Cas. 69; ante, § 57, post, §§ 573, 576, 850, 851. See Ely *v.* Wilcox, 26 Wis. 91; Church *v.* Rutland, 64 Pa. St. 432.

[1] Gjerness *v.* Mathews, 27 Minn. 320. But an equitable incumbrancer cannot, after receiving notice of a prior incumbrance, obtain priority over it by getting in a legal estate from a bare trustee. Harpham *v.* Shacklock, 19 Ch. D. 207.

[2] 2 Fonbl. Eq. B. 3, ch. 2, § 3; Com. Dig. Chancery, 4 A. 10; 4 I. 3; 4 I. 11; 4 W. 29.

[3] Jeremy on Equity Jurisd. B. 1, ch. 2, § 1, pp. 188 to 191. Spencer *v.* Pearson, 24 Beav. 266. As to consolidation of mortgages, see In re Raggett, 16 Ch. D. 117, in editor's note to § 1369.

a case it will make no difference that the third mortgagee at the time of purchasing the first mortgage had notice of the second mortgage; for he is still entitled to the same protection.[1]

§ 546. **Same.** — There is certainly great apparent hardship in this rule, for it seems most conformable to natural justice that each mortgagee should in such a case be paid according to the order and priority of his incumbrances.[2] The general reasoning by which this doctrine is maintained is this: "In æquali jure melior est conditio possidentis." Where the equity is equal, the law shall prevail; and he that hath only a title in equity shall not prevail against a title by law and equity in another.[3] But however correct this reasoning may be when rightly applied, its applicability to the case stated may reasonably be doubted. It is assuming the whole case to say that the right is equal and the equity is equal. The second mortgagee has a prior right and at least an equal equity; and then the rule seems justly to apply, that where the equities are equal, that title which is prior in time shall prevail: "Qui prior est in tempore, potior est in jure."[4]

§ 547. **Same.** — It has been significantly said that it is a plank gained by the third mortgagee in a shipwreck, "tabula in naufragio." But independently of the inapplicability of the figure, which can justly apply only to cases of extreme hazard to life and

[1] 2 Fonbl. Eq. B. 3, ch. 2, § 2, and notes (*b*), (*c*); Com. Dig. Chancery, 4 A. 10; Marsh *v.* Lee, 2 Vent. R. 337, 338; s. c. 1 Ch. Cas. 162; Maundrell *v.* Maundrell, 10 Ves. 260, 270; Morret *v.* Parke, 2 Atk. 53, 54; Matthews *v.* Cartwright, 2 Atk. 347; Robinson *v.* Davison, 1 Bro. Ch. R. 63; Newland on Contracts, ch. 36, p. 515; Sugden on Vendors, ch. 16, 17; Powell on Mortgages, Vol. 2, p. 454, Mr. Coventry's note (A); Wormald *v.* Maitland, 35 L. J. Ch. 69.

[2] Brace *v.* Duchess of Marlborough, 2 P. Will. 492; Lowthian *v.* Hasel, 3 Bro. Ch. R. 163.

[3] Jeremy on Equity Jurisd. B. 1, ch. 2, § 1, pp. 188 to 192 (4th ed.); 2 Fonbl. Eq. B. 3, ch. 3, § 1, and notes.

[4] Mr. Chancellor Kent in his learned Commentaries has expressed a strong disapprobation of the doctrine of tacking. "There is," says he, "no natural equity in tacking, and when it supersedes a prior incumbrance it works manifest injustice. By acquiring a still more antecedent incumbrance, the junior party acquires, by substitution, the rights of the first incumbrancer over the purchased security, and he justly acquires nothing more. The doctrine of tacking is founded on the assumption of a principle which is not true in point of fact; for as between A, whose deed is honestly acquired and recorded to-day, and B, whose deed is with equal honesty acquired and recorded to-morrow, the equities upon the estate are not equal. He who has been fairly prior in point of time has the better equity, for he is prior in point of right." 4 Kent, Comm. Lect. 58, pp. 178, 179 (4th ed.).

[5] Marsh *v.* Lee, 2 Vent. 337; Wortley *v.* Birkhead, 2 Ves. 574; Brace *v.* Duchess of Marlborough, 2 P. Will. 491. See post, § 421 *a*.

not to mere seizures of property, it is obvious that no man can have a right in consequence of a shipwreck to convert another man's property to his own use, or to acquire an exclusive right against a prior owner. The best apology for the actual enforcement of the rule is, that it has been long established, and that it ought not now to be departed from, since it has become a rule of property.

§ 548. **Origin of the Doctrine of Tacking.** — Lord Hardwicke has given the following account of the origin and foundation of the doctrine: "As to the equity of this court, that a third incumbrancer having taken his security or mortgage without notice of the second incumbrance, and then being puisne, taking in the first incumbrance shall squeeze out and have satisfaction before the second; that equity is certainly established in general, and was so in Marsh *v.* Lee by a very solemn determination by Lord Hale, who gave it the term of the creditor's 'tabula in naufragio.' That is the leading case. Perhaps it might be going a good way at first, but it has been followed ever since, and I believe was rightly settled only on this foundation by the particular constitution of the law of this country. It could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates. And therefore as Courts of Equity break in upon the common law where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore where there is a legal title and equity on one side, this court never thought fit that by reason of a prior equity against a man who had a legal title that man should be hurt; and this, by reason of that force, this court necessarily and rightly allows to the common law and to legal titles. But if this had happened in any other country, it could never have made a question; for if the law and equity are administered by the same jurisdiction, the rule, 'Qui prior est in tempore, potior est in jure,' must hold." [1]

[1] Wortley *v.* Birkhead, 2 Ves. 573. The same quotation is in 2 Fonbl. Eq. 304, B. 3, ch. 2, § 2, in note (*e*). Mr. Coventry, in his valuable notes to Powell on Mortgages (Vol. 2, p. 454, note), supposes that the English law on this subject is sanctioned by the civil law. In this view of the matter he is entirely mistaken. The civil law admits no such principle as tacking; the general rule is, "Qui prior est in tempore, potior est in jure." There are two acknowledged exceptions: one, where the first incumbrancer consents to the second pledge, so as to give a priority; another is, where the second pledge is for money to preserve the property. The doctrine of the civil law, referred to by Mr. Coventry, simply gives

§ 549. **Doctrine Applies to Original Bona Fide Purchaser for Value.** — Indeed so little has this doctrine of tacking to commend itself, that it has stopped far short of the analogies which would seem to justify its application; and it has been confined to cases where the party in whose favor it is allowed is originally a bona fide purchaser of an interest in the land for a valuable consideration. Thus if a puisne creditor by judgment, or statute, or recognizance, should buy in a prior mortgage, he would not be allowed to take his judgment to such a mortgage so as to cut out

to a third mortgagee, paying off a first mortgage, the same priority, by way of substitution, which the first mortgagee had. It does not change the rights of the third mortgagee as to his own mortgage. So the doctrine is stated in the Pandects (incorrectly referred to by Mr. Coventry), and so is the doctrine of Domat in the passages cited. See Dig. Lib. 20, tit. 4, l. 16; 1 Domat. B. 3, tit. 1, § 3, art. 7, and Id. § 6, art. 6, 7; Pothier Pand. Lib. 20, tit. 4, § 1, n. 1 to 32, and especially n. 10, 11, Cod. Lib. 8, tit. 18, l. 1, 5. The language in the civil law in the principal passage cited is: "Plane, cum tertius creditor primum de sua pecunia dimisit, in locum ejus substituitur in ea quantitate quam superiori exsolvit." Dig. Lib. 20, tit. 4, l. 16. In Fonblanque's equity (2 Fonbl. B. 3, ch. 1, § 9, p. 272) it is said in the text: "By the civil law the mortgage is properly a security only for the debt itself for which it was given, and the consequences of it, as the principal sum and interest, and the costs and damages laid out in preserving it." The passage on which reliance is had for this purpose is the Dig. Lib. 13, tit. 7, l. 8, § 5. "Cum pignus ex pactione venire potest, non solum ob sortem non solutam venire poterit, sed ob cætera quoque, veluti usuras, et quæ in id impensa sunt." Mr. Brown, in his Treatise on the Civil Law (Vol. 1, B. 2, ch. 4, p. 202), deduces the conclusion that Mr. Fonblanque intended to say that it did not involve such effects as that the heir of a mortgagor, also indebted by a bond to the mortgagee, should not redeem without also paying the bond debt, and such like provisions known to our Courts of Equity. In this Mr. Brown thinks Mr. Fonblanque is incorrect; and he relies on the text of the Code (Cod. Lib. 8, tit. 27, l. 1): "At si in possessione fueris constitutus, nisi ea quoque pecunia tibi a debitore reddatur vel offeratur, quæ sine pignore debetur, eam restituere propter exceptionem doli mali non cogeris. Jure enim contendis, debitores eam solam pecuniam cujus nomine ea pignora obligaverunt, offerentes audiri non oportere, nisi pro illa etiam satisfecerint quam mutuam simpliciter acceperunt. Quod in secundo creditore locum non habet; nec enim necessitas ei imponitur chirographarium etiam debitum priori creditori offerre." It is apparent that this passage merely respects the right of a mortgagee to tack, as against his own debtor, a second loan, without security, when his debtor seeks to redeem. It does not touch the case of tacking so as to cut out an intermediate incumbrancer. Domat supports the text of Fonblanque (1 Domat, B. 1, tit. 1, § 3, art. 4, 7, 8). That by the civil law there can be a tacking of debts so as to cut out an intermediate incumbrance seems contrary to the Dig. Lib. 20, tit. 4, l. 20; Pothier, Pand. Lib. 20, tit. 4, n. 10. See 2 Story on Eq. Jurisp. § 1010, note, where this subject is examined more at large. But see 1 Brown, Civil Law, 208, and 4 Kent, Comm. Lect. 58, p. 136, note (a); Id. 175, 176 (4th ed.). That is, it is consolidation. See In re Raggett, 16 Ch. D. 117, Cotton, L. J.

a mesne mortgagee.[1] The reason is said to be that a creditor can in no just sense be called a purchaser, for he does not advance his money upon the immediate credit of the land, and by his judgment he does not acquire any right in the land. He has neither jus in re nor jus ad rem, but a mere lien upon the land which may or may not afterwards be enforced upon it.[2] But if instead of being a judgment creditor he were a third mortgagee and should then purchase in a prior judgment, statute, or recognizance, in such case he would be entitled to tack both together. The reason for the diversity is, that in the latter case he did originally lend his money upon the credit of the land, but in the former he did not, but was only a general creditor trusting to the general assets of his debtor.[3]

§ 550. **Same.** — The same principle applies to a first mortgagee lending to the mortgagor a further sum upon a statute or judgment. In such a case he will be entitled to retain against the mesne mortgagee till both his mortgage and statute or judgment are paid, for he lent his money originally upon the credit of the land; and it may well be presumed that he lent the further sum upon the statute or judgment upon the same security, although it passed no present interest in the land, but gave a lien only.[4]

§ 551. **What Incumbrances and Estates May Be Tacked.** — And yet such a prior mortgagee having a bond debt has never been permitted to tack it against any intervening incumbrancers of a superior nature between his bond and mortgage, nor against other specialty creditors, nor even against the mortgagor himself, but only against his heir, to avoid circuity of action.[5] The reason given is, that the bond debt, except in the

[1] 2 Fonbl. Eq. B. 3, ch. 3, § 1, note (*a*); Id. B. 3, ch. 1, § 9, and note (*n*); Brace *v.* Duchess of Marlborough, 2 P. Will. 492 to 495; Anon. 2 Ves. 262; Morret *v.* Paske, 2 Atk. 52, 53; Ex parte Knott, 11 Ves. 617; Belchier *v.* Butler, 1 Eden, R. 522, and Mr. Eden's note. But see Wright *v.* Pilling, Prec. Ch. 499. See Brecon *v.* Seymour, 26 Beav. 548.

[2] Averall *v.* Wade, Lloyd & Goold's Rep. 252, 262.

[3] Higgen *v.* Lyddal, 1 Cas. Ch. 149; Mackreth *v.* Symmons, 15 Ves. 354.

[4] Shepherd *v.* Titley, 2 Atk. 352; Ex parte Knott, 11 Ves. 617. A fortiori the same principle applies to the first mortgagee's lending on a second mortgage; for in such case he positively lends on the credit of the land, and will be allowed to tack against a mesne incumbrancer. Morret *v.* Paske, 2 Atk. 53, 54. And even sums subsequently lent on notes, if distinctly agreed at the time to be on the security of the mortgaged property, will be allowed to be tacked. Matthews *v.* Cartwright, 2 Atk. 347; 2 Story on Eq. Jurisp. § 1354.

[5] Where there is a further advance on a parol agreement that the same shall be secured by the existing mortgage, equity will not aid the mortgagor, or one having no better title, to redeem without repaying such

hands of the heir, is not a charge on the land, and tacking takes place only when the party holds both securities in the same right. For if a prior mortgagee takes an assignment of a third mortgage as a trustee only for another person, he will not be allowed to tack two mortgages together to the prejudice of intervening incumbrancers.[1] Neither is a mortgagee permitted to tack where the equity of redemption belongs to different persons when the mortgagee's title to both estates occurs.[2]

§ 552. **The English Doctrine Stated.** — It cannot be denied that some of these distinctions are extremely thin, and stand upon very artificial and unsatisfactory reasoning. The account of the matter given by Lord Hardwicke [3] is probably the true one. But it is a little difficult to perceive how the foundation could support such a superstructure, or rather why the intelligible equity of the case upon the principles of natural justice should not be rigorously applied to it. Courts of Equity have found no difficulty in applying it where the puisne incumbrancer has bought in a prior equitable incumbrance; for in such cases they have declared that where the puisne incumbrancer has not obtained the legal

advance. Stone *v.* Lane, 10 Allen, 74. Parvis *v.* Corbet, 3 Atk. 556; Lowthian *v.* Hasel, 3 Brown, Ch. R. 163; Morret *v.* Paske, 2 Atk. 52, 53; Shuttleworth *v.* Laycock, 1 Vern. 245; Coleman *v.* Winch, 1 P. Will. 775; Price *v.* Fastnedge, Ambler, R. 685, and Mr. Blunt's note; Houghton *v.* Troughton, 1 Ves. 86; Heams *v.* Bance, 3 Atk. 630; Jones *v.* Smith, 2 Ves. Jr. 376; Adams *v.* Claxton, 6 Ves. 229; 2 Fonbl. Eq. B. 3, ch. 1, § 11; Id. § 9, note (*u*). In the Roman law rules somewhat different prevailed. While, as we have seen, tacking was not allowed against intermediate incumbrancers, the creditor himself was, as against his debtor, allowed to tack a subsequent debt contracted by his debtor after the mortgage. Ante, § 415, note, and post, § 420; 2 Story on Eq. Jurisp. § 1010, and note. See also 1 Brown, Civil Law, 202, and note 5; Id. 20, 8; 4 Kent, Comm. Lect. 58, p. 136, and note; Id. 175, 176 (2d and 3d ed.).

[1] Morret *v.* Paske, 2 Atk. 53; 2 Fonbl. Eq. B. 3, ch. 1, § 9, and note (*u*).

[2] White *v.* Hillacre, 5 Younge & Coll. 597, 609. See Mills *v.* Jennings, 13 Ch. D. 638, and Harter *v.* Coleman, 19 Ch. D. 630, in editor's note to § 1369.

[3] Wortley *v.* Birkhead, 2 Ves. 574; ante, § 415, p. 443. See Berry *v.* Mutual Ins. Co., 2 John. Ch. R. 603, 608. Lord Rosslyn, in Jones *v.* Smith (2 Ves. Jr. 377), said: "Why a bond is not upon the same footing I do not know. It is impossible to say why a bond may not be tacked to a mortgage, as well as one mortgage to another." The asserted ground doubtless is, that a bond debt is no lien on the land, whereas a mortgage and judgment are. This may be still more distinctly shown by the rule that a mortgagee of a copyhold estate cannot tack a judgment to his mortgage; the reason is, that a judgment does not affect or bind copyhold estates. Heir of Carmore *v.* Park, 6 Vin. Abridg. p. 222, pl. 6; cited 2 Fonbl. Eq. B. 3, ch. 1, § 9, and note (*u*); Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, pp. 190, 191.

title, or where the legal title is vested in a trustee, or where he takes in autre droit, the incumbrances shall be paid in the order of their priority in point of time, according to the maxim above mentioned.[1] The reasonable principle is here adopted, that he who has the better right to call for the legal title or for its protection shall prevail.[2]

§ 553. **In the United States the Registration Laws Prevail over the Doctrine of Tacking.** — The civil law has proceeded upon a far more intelligible and just doctrine on this subject. It wholly repudiates the doctrine of tacking, and gives the fullest effect to the maxim, "Qui prior est in tempore, potior est in jure"; excluding it only in cases of fraud or of consent, or of a superior equity.[3]

§ 554. **Good Faith and Purchase without Notice of Prior Incumbrance Is Essential.** — But whatever may be thought as to the foundation of the doctrine of tacking in Courts of Equity, it is now firmly established. It is however to be taken with this most important qualification, that the party who seeks to avail himself of it is a bona fide purchaser without notice of the prior incumbrance at the time when he took his original security; for if he then had such notice, he has not the slightest claim to the protection or assistance of a Court of Equity, and he will not be allowed by purchasing in such prior incumbrance to tack his own tainted mortgage or other title to the latter.[4]

[1] Brace *v.* Duchess of Marlborough, 2 P. Will. 495; Ex parte Knott, 11 Ves. 618; Berry *v.* Mutual Ins. Co., 2 John. Ch. R. 608; Frere *v.* Moore, 8 Price, R. 475; Barrett *v.* Weston, 12 Ves. 130; Price *v.* Fastnedge, Ambler, R. 685, and Mr. Blunt's note; Jeremy on Eq. Jurisd. B. 1, ch. 2, §§ 1, 2, pp. 191, 193, 194; 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (*e*); Pomfret *v.* Windsor, 2 Ves. 472, 486; Brandly *v.* Ord, 1 Atk. 571.

[2] Ibid.; Medlicott *v.* O'Donel, 1 B. & Beatt. 171; 2 Fonbl. Eq. B. 2, ch. 6, § 2. In America the doctrine of tacking is never allowed as against mesne incumbrances which are duly registered; for the plain reason that the Registry Acts are held not only to be constructive notice, but the acts themselves, in effect, declare the priority to be fixed by the registration. Grant *v.* Bissett, 1 Caines' Cas. in Err. 112; Frost *v.* Beekman, 1 John. Ch. R. 298, 299; Parkhurst *v.* Alexander, 1 John. Ch. R. 398, 399; St. Andrew's Church *v.* Tomkins, 7 John. Ch. R. 14 (*a*). The same doctrine exists in other registry countries. Latouche *v.* Lord Dunsany, 1 Sch. & Lefr. 137, 157. As to tacking in cases of personal property, see 2 Story, Eq. Jurisp. §§ 1382, 1383.

[3] See Dig. Lib. 20, tit. 4, l. 16; Pothier, Pand. Lib. 20, tit. 4, § 1, n. 1 to 32; 1 Domat. B. 3, tit. 1, § 6, art. 6; ante, §§ 483, 486; 2 Story on Eq. Jurisp. § 1354, and note; Chandler *v.* Dyer, 37 Vt. 345.

[4] 2 Fonbl. Eq. B. 3, ch. 3, § 1, note (*b*); Id. B. 2, ch. 6, § 2, and note (*i*); Brace *v.* Duchess of Marlborough, 2 P. Will. 491, 495; Sugden on Vendors, ch. 16, 17; Green *v.* Slater, 4 John. Ch. R. 38; Toulman *v.* Steere, 3 Meriv.

§ 555. [**Simple Debt Cannot Be Tacked to Mortgage Debt.** — The tacking of a simple debt, or demand upon a scire facias, to a mortgage debt, is not favored in the law. There is no natural equity in tacking debts, and, where it interferes with the rights of others, it is most unjust. The mortgagee has no right to tack an unsecured debt to the mortgage debt and demand payment of both as a condition to redemption. If this were allowed, a creditor who had the prior mortgage debt might purchase outstanding simple debts or demands against his debtor and thus the unsecured creditors would have preference in payment to subsequent mortgagees.[1] The date of the registration of an instrument is the important determining factor in regard to priority, and the bare fact of the granting of an extension of time of payment by the first mortgagee, when done in good faith, will not prefer the puisne mortgage creditor by reason thereof. Nor does it make any difference that subsequent mortgagees did not know of the agreement for extension of time of payment, or that the agreement was not of record.[2]]

§ 556. **Rights Analogous to the Doctrine of Tacking.** — Questions bearing a close analogy to that of tacking have also arisen, involving equities between parties asserting adverse rights. Thus for example where a mortgagee took a mortgage and a covenant from sureties to pay the mortgage money, and afterward he advanced an additional sum to the mortgagor and took a second mortgage therefor on the premises, and subsequently he brought his action against the sureties and recovered the amount of the first mortgage debt from them, but he refused to give up the first mortgage or to assign it to the sureties without being paid the second advance, and they brought a suit against him to compel an assignment to them of the first mortgage, the question arose whether they had a right to an assignment of the first mortgage without paying the second advance. It was held that they had no priority, and before they could compel an assignment they must pay the second advance.[3]

R. 210; Powell on Mortgages, by Coventry, Vol. 2, p. 454, note A; Com. Dig. Chancery, 4 A. 10, 4 I. 3, 4 I. 4, 4 W. 28; 4 Kent, Comm. Lect. 58, pp. 176 to 179 (4th ed.); post, § 434; Redfearn *v.* Ferrier, 1 Dow, R. 50. But see Davis *v.* Austin, 1 Ves. Jr. 228; Johnson *v.* Brown, 2 Younge & Coll. N. R. 268.

[1] Dorrow *v.* Kelley, 1 U. S. 153, 1 L. Ed. 73; Rich *v.* Morissey, 149 N. C. 147, 62, S. E. 762.

[2] Kraft *v.* Holzmann, 206 Ill. 548, 69 N. E. 574; Sheridan First Natl. Bank *v.* Citizens State Bank, 11 Wyo. 32, 70 Pac. 726, 100 Am. St. Rep. 925.

[3] Williams *v.* Owens, The (English) Jurist, 30 Dec. 1843, p. 1145; post, §§ 499, 499 *a*. But see Smith *v.* Day, 23 Vt. 656.

§ 557. **Same.** — There are other cases standing indeed upon a firmer ground than that of the mere right of tacking, where a subsequent assignee or incumbrancer of equitable property may acquire a priority over an elder assignee or incumbrancer of the same property by his exercise of superior diligence and doing acts which will give him a better claim or protection in equity.[1] Thus for example a second incumbrancer upon equitable property, who has given notice of his title to the trustees of the property, will be preferred to a prior incumbrancer who has omitted to give the like notice of his title to the trustees; for the notice is an effectual protection against any subsequent dealing on the part of the trustees.[2] So a second assignee of the interest of the

[1] Foster *v.* Blackstone, 1 Mylne & Keen, 297; Timson *v.* Ramsbottom, 2 Keen, R. 35; ante, § 399, note.

[2] Ante, § 464, note; post, §§ 1035 *a*, 1047, 1057; Etty *v.* Bridges, 2 Younge & Coll. 488, 492. In this case Mr. Vice-Chancellor Bruce said: "That notice should be given to the trustee of a fund upon dealing with an equitable interest in it is not, I apprehend, so much a rule as an example, or instance, or effect of a rule. In Dearle *v.* Hall (3 Russ. R. 1) we find Lord Lyndhurst thus expressing himself: 'In cases like the present, the act of giving the trusted notice is, in a certain degree, taking possession of the fund; it is going as far towards equitable possession as it is possible to go; for after notice given, the trustee of a fund becomes a trustee for the assignee who has given him notice.' Sir Thomas Plumer's previous observations in the same case, which occur between the 20th and the 28th pages of the same volume are, with more minuteness of detail, to the same effect. The opinions of the judges in Ryall *v.* Rowles (1 Ves. R. 348, 1 Atk. R. 165), of which that of Mr. Justice Burnett has been reported from his note-book by Mr. Bligh (9 Bligh (N. S.), 578), contain recognitions of the same principle. So the opinion in Foster *v.* Cockrell (9 Bligh, R. N. S. 332), of Lord Lyndhurst, upon advising the House of Lords to affirm Sir John Leach's decision in Foster *v.* Blackstone (1 Mylne & Keen, R. 297), in which case the latter learned judge had before thus expressed himself: 'A better equity is, where a second incumbrancer, without notice, takes a protection against a subsequent incumbrancer which the prior incumbrancer has neglected to take. Thus a declaration of trust of an outstanding term accompanied by delivery of the deeds creating and continuing the term, gives a better equity than the mere declaration of trust to a prior incumbrancer.' These authorities, though not the only authorities, are, I apprehend, more than sufficient to show the rule to be that to perfect a transaction of the description now in question the purchaser or incumbrancer must, if he cannot acquire possession, go as near it as he can, — as the circumstances of the case will permit, — must in a sense, if the expression may be used, set his mark upon the property, or do everything reasonably practicable to prevent it from being dealt with in fraud of an innocent purchaser afterwards. The law has held that generally where there are trustees this is done sufficiently, upon dealing with an equitable interest in the fund, by giving them notice; because, although the notice does not necessarily prevent such a fraud, it renders its commission much less likely, and gives an increased probability, or an increased chance of redress, if the fraud shall be committed, supposing reasonable diligence

assignor in the residuary estate of a testator who has given notice to the executors thereof will be preferred to a prior assignee who has given no such notice.[1] So it is said to be a better equity where a second incumbrancer takes a protection against a subsequent incumbrancer, which the prior incumbrancer neglected to take. Thus a declaration of trust of an outstanding term, accompanied by a delivery of the deeds creating and continuing the term, will give a better equity than a mere declaration of trust taken by a prior incumbrancer.[2]

§ 558. **The Rule in the United States.** — A different doctrine is maintained in some of the States of America; for it is there held that as between different assignees of a chose in action he who is first in time is first in right, notwithstanding he has given no notice to the debtor or the subsequent assignee. The debtor will however be protected if he has made payment to the second assignee before notice of the prior assignment.[3]

§ 559. **Collusion with Executors and Trustees to Violate Their Trusts.** — Another instance of the application of this wholesome doctrine of constructive fraud arising from notice may be seen in the dealings with executors and other persons holding a fidu-

to be used; inasmuch as not only the trustees, if asked, be likely to give the information of the notice, but if they shall fail to do so, they may be liable to make good the loss. It is obvious however that unfairness or forgetfulness, or negligence on a trustee's part, or his death or infirmity, may render the notice, as a prevention of fraud, useless."

So a mortgagee of a life insurance policy, who gives notice even after the death of the assured, will be preferred to an assignee in bankruptcy who has not given notice. In re Russell, L. R. 15 Eq. 26; Stuart *v.* Cockerell, L. R. 8 Eq. 607. But see Ex parte Caldwell, L. R. 13 Eq. 188. Of course one who has a contract for the purchase of land may assign it, and the assignee by giving notice to trustees who hold the legal title will be entitled to performance. Shaw *v.* Foster, L. R. 5 H. L. 321; s. c. 5 Ch. 604. But notice of intent to assign is not enough. Ib., Ponder *v.* Scott, 44 Ala. 241. And see Smith *v.* Gibson, 15 Minn. 89.

[1] Timson *v.* Ramsbottom, 2 Keen, R. 35; post, §§ 1035 *a*, 1047, 1057.

[2] Foster *v.* Blackstone, 1 Mylne & Keen, 297. But it will not create a prior equity in a subsequent incumbrancer, that he claims by a legal title and the prior incumbrancer claims by an equitable title; for if notice has been duly given by the latter, his title will prevail. Ibid. It is now also settled that an inquiry of the legal holder of equitable property as to the state of the title is not necessary to give effect to a notice by a subsequent assignee, so as to entitle him to a priority over a prior assignee who has given no notice. Timson *v.* Ramsbottom, 2 Keen, R. 35.

[3] Muir *v.* Schenck, 3 Hill, R. 228. See Story on Conflict of Laws, §§ 328, 330. See also Murray *v.* Lichburn, 2 John. Ch. Cas. 441, 443; post, § 1392; Redfearn *v.* Ferrier, 1 Dow, R. 550; Davis *v.* Austin, 1 Ves. Jr. R. 228; Story on Conflict of Laws, §§ 395, 396; James *v.* Morey, 2 Cowen, R. 246.

ciary character, and third persons colluding with them in violation of their trust.[1] Thus purchases from executors of the personal property of their testator are ordinarily obligatory and valid notwithstanding they may be affected with some peculiar trusts or equities in the hands of the executors. For the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator, for which they are legally bound before all other claims.[2] But if the purchaser knows that the executor is wasting and turning the testator's estate into money the more easily to run away with it, or for any other unlawful purpose, he will be deemed particeps criminis, and his purchase set aside as fraudulent.[3]

§ 560. **Same.** — The reason for this diversity of doctrine has

[1] No one can be permitted to purchase an interest where he has a duty to perform that is inconsistent with the character of the purchaser. A trustee and the attorney of a trustee cannot deal with trust property in any manner for his own benefit. Bank of Pine Bluff *v.* Levi, 90 Ark. 166, 118 S. W. 250.

The law will not permit one, in anticipation of becoming administrator, to make a contract with the heir at law which is adverse to her interest. In re Mallalien's Estate, 42 Pa. Super. Ct. 101.

The short scaling of a lot of timber, owned by the executor and his testator, will not be allowed to stand, when done by the executor purposely. Porter *v.* Long, 124 Mich. 584, 83 N. W. 601, 7 Detroit Leg. N. 337.

[2] 2 Fonbl. Eq. B. 2, ch. 6, 2, and notes (*k*) and (*l*); Humble *v.* Bill, 2 Vern. R. 444; Ewer *v.* Corbet, 2 P. Will. 148; McLeod *v.* Drummond, 14 Ves. 359; s. c. 17 Ves. 154, 155; Hill *v.* Simpson, 7 Ves. 166; Scott *v.* Tyler, 2 Dick. 712, 725; Newland on Contracts, ch. 36, pp. 512, 513, 514; Com. Dig. Chancery, 4 W. 29; Rayner *v.* Pearsall, 3 John. Ch. R. 578. This doctrine was overthrown in the case of Humble *v.* Bill (or Savage), upon appeal to the House of Lords. 1 Bro. Parl. Cas. 71. It was however reasserted in Ewer *v.* Corbet, 2 P. Will. 148; Nugent *v.* Clifford, 1 Atk. 463; Elliot *v.* Merryman, 2 Atk. 42; Ithell *v.* Beane, 1 Ves. R. 215; Mead *v.* Lord Orrery, 3 Atk. 235; Dickinson *v.* Lockyer, 4 Ves. 36; Hill *v.* Simpson, 7 Ves. 152; Taylor *v.* Hawkins, 8 Ves. 209; McLeod *v.* Drummond, 14 Ves. 352; s. c. 17 Ves. 153. In this last case the whole of the authorities were examined at large by Lord Eldon, and commented on with his usual acuteness. See also Andrews *v.* Wrigley, 4 Bro. Ch. R. 125.

[3] Worseley *v.* De Mattos, 1 Burr. 475; Ewer *v.* Corbet, 2 P. Will. 148; Mead *v.* Lord Orrery, 3 Atk. 235, 237; Benfield *v.* Solomons, 9 Ves. 86, 87; Hill *v.* Simpson, 7 Ves. 152; McLeod *v.* Drummond, 14 Ves. 359; s. c. 17 Ves. 153; Newland on Contracts, ch. 36, p. 513; 1 Madd. Ch. Pr. 228, 229, 230; Drohan *v.* Drohan, 1 Ball & Beatt. 185; Com. Dig. Chancery, 4 W. 28; Scott *v.* Tyler, 2 Bro. Ch. R. 431; 2 Dick. 712, 725; Bonney *v.* Ridgard, cited 2 Bro. Ch. R. 438; 4 Bro. Ch. R. 130; Scott *v.* Nesbit, 2 Bro. Ch. R. 641; s. c. 2 Cox, R. 183. So if the sale was made under circumstances such that the purchaser as a prudent man must have known that it was for the executor's own benefit. Walker *v.* Taylor, 4 Law T. (N. S.) 845; Shaw *v.* Spencer, 100 Mass. 382, 393; 2 Perry, Trusts, §§ 814, 815.

been fully stated by Sir William Grant. "It is true," said he, "that executors are, in equity, mere trustees for the performance of the will; yet in many respects and for many purposes third persons are entitled to consider them absolute owners. The mere circumstance that they are executors will not vitiate any transaction with them, for the power of disposition is generally incident, being frequently necessary; and a stranger shall not be put to examine whether in the particular instance that power has been discreetly exercised. But from that proposition that a third person is not bound to look to the trust in every respect and for every purpose, it does not follow that dealing with the executor for the assets he may equally look upon him as absolute owner, and wholly overlook his character as trustee, when he knows the executor is applying the assets to a purpose wholly foreign to his trust. No decision necessarily leads to such a consequence." [1] The same doctrine is applied to the cases of executors or administrators colluding with the debtors to the estate either to retain or to waste the assets; for in such cases the creditors will be allowed to sue the debtors directly in equity, making the executor or administrator also a party to the bill, although ordinarily the executor or administrator only can sue for the debts due to the deceased.[2] So in cases of collusion between a mortgagor and mortgagee, a creditor or annuitant of the mortgagor may have a right to redeem and to call for an account, although ordinarily such a right belongs only to the mortgagor and his heirs and privies in estate.[3] Indeed the doctrine may be even more generally stated, that he who has voluntarily concurred in the commission of a fraud by another shall never be permitted to obtain a profit thereby against those who have been thus defrauded.

§ 561. **Pecuniary and Residuary Legatees May Question Disposition of Estate.** — It seems at one time to have been thought that no person but a creditor or a specific legatee of the property could question the validity of a disposition made of assets by an executor, however fraudulent it might be. But that doctrine is so repugnant to true principles, that it could scarcely be maintained

[1] Hill *v.* Simpson, 7 Ves. 166.

[2] Holland *v.* Prior, 1 Mylne & Keen, 240; Newland *v.* Champion, 1 Ves. 106; Doran *v.* Simpson, 4 Ves. 651; Alsager *v.* Rowley, 6 Ves. 748; Beckley *v.* Dorrington, West, R. 169; post, § 581, note, § 828; Story on Equity Pleadings, §§ 178, 514; Burroughs *v.* Elton, 11 Ves. 29; Benfield *v.* Solomons, 9 Ves. 86.

[3] White *v.* Parnther, 1 Knapp, 179, 229; Troughton *v.* Binkes, 6 Ves. 572.

whenever it came to be thoroughly sifted.[1] It is now well understood that pecuniary and residuary legatees may question the validity of such a disposition; and indeed residuary legatees stand upon a stronger ground than pecuniary legatees generally; for in a sense they have a lien on the fund and may go into equity to enforce it upon the fund.[2]

§ 562. **Validity of Voluntary Conveyances as to Subsequent Purchasers.** — The last class of cases which it is proposed to consider under the present head of Constructive Fraud is that of voluntary conveyances of real estate in regard to subsequent purchasers.[3] This class is founded in a great measure, if not altogether, upon the provisions of the statute of 27th of Eliz. ch. 4, which has been already alluded to. The object of that statute was to give full protection to subsequent purchasers from the grantor against mere volunteers under prior conveyances. As between the parties themselves such conveyances are positively binding and cannot be disturbed; for the statute does not reach such cases.[4]

§ 563. **The Doctrine of Stare Decisis Applied.** — It was for a long period of time a much-litigated question in England, whether the effect of the statute was to avoid all voluntary conveyances (that is, all such as were made merely in consideration of natural love or affection, or were mere gifts), although made bona fide

[1] Mead *v.* Lord Orrery, 3 Atk. 235, 14 Ves. 361, 17 Ves. 169.

[2] Hill *v.* Simpson, 7 Ves. 152; McLeod *v.* Drummond, 14 Ves. 359; s. c. 17 Ves. 169; Bonney *v.* Ridgard, cited 2 Bro. Ch. R. 438; 4 Bro. Ch. R. 130; 17 Ves. 165. Mr. Maddock (1 Madd. Ch. Pr. 230) states, that "Residuary and general legatees, and, as it seems, co-executors, are never permitted to question the disposition which the executors have made of the assets. But creditors and specific and pecuniary legatees may follow either legal or equitable assets into the hands of third persons to whom fraud is imputable." It appears to me that the cases above cited, and especially that of McLeod *v.* Drummond, 14 Ves. 353, s. c. 17 Ves. 153, establish a different conclusion.

[3] The statute does not extend to conveyances of personal property, but only to conveyances of real property. Jones *v.* Croucher, 1 Sim. & Stu. R. 315 (*a*).

[4] Petre *v.* Espinasse, 2 Mylne & Keen, 496; Bill *v.* Claxton, Id. 503, 510.

A deed to property will not be set aside and a re-conveyance ordered, where the object of the conveyance was to defeat the rights of creditors, and where the rights of creditors are no longer in the way. Hildebrand *v.* Willig, 64 N. J. Eq. 249, 53 Atl. 1035; Elmore *v.* Elmore, 22 Ky. L. Rep. 856, 58 S. W. 980; Lefmann *v.* Brill, 142 Fed. 44, 73 C. C. A. 230.

A deed made by husband to wife, and mortgage by them, for purpose of defrauding creditors are valid, until the conveyances are avoided by creditors. Pierce *v.* Le Monier, 172 Mass. 508, 53 N. E. 125; Barwick *v.* Moyse, 74 Miss. 415, 21 So. 238, 60 Am. St. Rep. 512.

in favor of all subsequent purchasers with or without notice, or whether it applied only to conveyances made with a fraudulent intent and to purchasers without notice. After no inconsiderable diversity of judicial opinion the doctrine has at length been established in England (whether in conformity to the language or intent of the statute is exceedingly questionable) that all such conveyances are void as to subsequent purchasers, whether they are purchasers with or without notice, although the original conveyance was bona fide, and without the slightest admixture of intentional fraud, upon the ground that the statute in every such case infers fraud, and will not suffer the presumption to be gainsaid.[1] The doctrine however is admitted to be full of difficulties; and it has been confirmed, rather upon the pressure of authorities and the vast extent to which titles have been acquired and held under it, than upon any notion that it has a firm foundation in reason and a just construction of the statute. The rule "stare decisis" has here been applied to give repose and security to titles fairly acquired, upon the faith of judicial decisions.[2]

[1] Doe *v.* Manning, 9 East, R. 58; Pulvertoft *v.* Pulvertoft, 18 Ves. 84, 86; Buckle *v.* Mitchell, 18 Ves. 100; Com. Dig. Chancery, 4 C. 7; Sterry *v.* Arden, 1 John. Ch. R. 261, 267 to 271; Com. Dig. Covin, B. 3, 4; Sugden on Vendors, ch. 16, § 1, art. 1, 2. The elaborate judgment of Lord Ellenborough, in Doe *v.* Manning (9 East, R. 58), contains a large survey of the authorities, to which the learned reader is referred. See also 1 Madd. Ch. Pr. 421 to 427; 1 Fonbl. Eq. B. 1, ch. 4, § 3, and notes (*f*) and (*g*); Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, pp. 188 to 192; Newland on Contracts, ch. 34, p. 391; 2 Hovenden on Frauds, ch. 18, p. 73, &c.; Belt's Suppt. to Vesey, 25, 26; Atherley on Marr. Sett. ch. 13, pp. 187, &c.; 193, 194; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, pp. 408 to 411; Pulvertoft *v.* Pulvertoft, 18 Ves. 84, 86, 111; Doe *v.* Routledge, Cowper, R. 711, 712. Mr. Fonblanque has assailed the doctrine that a purchaser with notice should still be entitled to prevail against the bona fide voluntary conveyance, with great force of reasoning. He asserts that it amounts to an encouragement on the part of the purchaser of a breach of that respect which is morally due to the fair claims of others; and that it may render the provisions of a statute, intended by the Legislature to be preventive of fraud, the most effectual instrument of accomplishing it. 1 Fonbl. Eq. B. 1, ch. 4, § 13, note (*g*). To which it may be added that it affords a temptation, nay, a premium and justification, on the part of the grantor, to violate those obligations which his own voluntary conveyance imports, and which, in conscience and sound morals, he is bound to hold sacred.

[2] See Bohn *v.* Headley, 7 Har. & J. 257; Jones *v.* Hall, 58 N. C. 26.

See Dolphin *v.* Aylward, L. R. 4 H. L. 486, that a voluntary settlement cannot be defeated by the settlor's suffering a judgment. And see Pelham *v.* Aldrich, 8 Gray, 515. It seems too that one who has made a voluntary conveyance cannot compel a subsequent purchaser to take the title. Peter *v.* Nicolls, L. R. 11 Eq. 391. A voluntary conveyance made without power of revocation will be set aside if it is not clear that the settlor intended it to be irrevocable. Hall *v.* Hall, L. R. 14 Eq. 365.

§ 564. **Voluntary Conveyance Not Originally Fraudulent Is Valid as to Subsequent Creditors.** — In America a like diversity of judicial opinion has been exhibited. Mr. Chancellor Kent has held the English doctrine obligatory, as the true result of the authorities. But at the same time he is strongly inclined to the opinion that where the purchaser has had actual (and not merely constructive) notice, it ought not to prevail.[1] When the same case in which this opinion was declared came before the Court of Errors of New York, Mr. Chief Justice Spencer delivered an elaborate opinion against the English doctrine, and asserted that no voluntary conveyance not originally fraudulent was within the statute. The Court of Errors on that occasion left the question open for future decision.[2] But the doctrine of Mr. Chief Justice Spencer has been asserted in the Supreme Court of the same State at a later period.[3]

§ 565. **The Same Rule Is Enforced in Massachusetts.** — The question does not seem positively to have been adjudged in Massachusetts. But in an important case of a voluntary conveyance (which was adjudged to be intentionally fraudulent) the court said: "That deed conveyed his (the grantor's) title to the plaintiff as against the grantor and *every other person,* unless it was *fraudulent* at the time of its execution; in which case it was void against creditors and subsequent purchasers."[4] From this language it is certainly a just inference that voluntary conveyances, bona fide made, are in that State valid against subsequent purchasers.[5]

[1] Sterry *v.* Arden, 1 John. Ch. R. 261, 270, 271; s. c. 12 John. R. 536.

[2] Sterry *v.* Arden, 12 John. R. 536, 554 to 559.

[3] Jackson *v.* Town, 4 Cowen, R. 603, 604. See Seward *v.* Jackson, 8 Cowen, R. 406; Wilkes *v.* Clarke, 8 Paige, R. 165.

[4] Ricker *v.* Ham, 14 Mass. 139. And see Mr. Bigelow's note, Big. Dig. Conveyance, p. 200.

[5] The point is now settled in Massachusetts as stated in the text. Beal *v.* Warren, 2 Gray, 446, where the authorities are examined; Putnam *v.* Story, 132 Mass. 205, 212; Trafton *v.* Hawes, 102 Mass. 533, 541; 4 Kent, 463, note. Beal *v.* Warren decided that a gift when the grantor was not indebted, made in good faith, and without intent to defraud future creditors or subsequent purchasers, is good against a subsequent purchaser for value *with notice.* See also Stone *v.* Hackett, 12 Gray, 227; Trafton *v.* Hawes, supra; Black *v.* Thornton, 31 Ga. 641; Duhine *v.* Young, 3 Bush, 343; Enders *v.* Williams, 1 Met. (Ky.) 347 (distinguishing between a voluntary conveyance to children and one to a stranger); Howard *v.* Snelling, 32 Ga. 195; Aiken *v.* Bruen, 21 Ind. 137; Chaffin *v.* Kimball, 23 Ill. 36. Whether the same rule applies to cases of intended fraud on the part of the grantor is not agreed. In Wyman *v.* Brown, 50 Maine, 139, it is held that conveyances so made are not good against subsequent purchasers for value, though with notice. Contra, Stevens *v.* Morse, 47 N. H. 532; Gregory *v.* Haworth, 25 Cal. 653. The question whether the fraudu-

§ 566. **The Same Rule Has Been Announced by the United States Supreme Court.** — The Supreme Court of the United States have come to the same conclusion; and it may be fit here to state the grounds of that opinion as given by the Chief Justice in delivering the judgment of the court. "The statute of Elizabeth is in force in this District [of Columbia]. The rule which has been uniformly observed by this court in construing statutes is, to adopt the construction made by the courts of the country by whose Legislature the statute was enacted. This rule may be susceptible of some modification when applied to British statutes which are adopted in any of these States. By adopting them they become our own as entirely as if they had been enacted by the Legislature of the State. The received construction in England at the time they were admitted to operate in this country, indeed to the time of our separation from the British Empire, may very properly be considered as accompanying the statutes themselves and forming an integral part of them. But however we may respect subsequent decisions (and certainly they are entitled to great respect), we do not admit their absolute authority. If the English courts vary their construction of a statute which is common to the two countries, we do not hold ourselves bound to fluctuate with them.

§ 567. **Same.** — "At the commencement of the American Revolution the construction of the statute of 27th of Elizabeth seems not to have been settled. The leaning of the courts towards the opinion that every voluntary settlement should be deemed void as to a subsequent purchaser was very strong, and few cases are to be found in which such a conveyance has been sustained. But these decisions seem to have been made on the principle that such subsequent sale furnished a strong presumption of a fraudulent intent, which threw on the person claiming under the settlement the burthen of proving it from the settlement itself, or from extrinsic circumstances, to be made in good faith, rather than as furnishing conclusive evidence not to be repelled by any circumstances whatever.

lent conveyance was for value or not may in such a case be deemed material. Coppage *v.* Barnett, 34 Miss. 621. See Wyman *v.* Brown, supra. Comp. ante, § 481.

It is clear that a purchaser for value without notice may avoid an actually fraudulent conveyance though for value, and a fortiori if voluntary. See Beal *v.* Warren, supra; Trafton *v.* Hawes, supra; Pelham *v.* Aldrich, 8 Gray, 515; Reynolds *v.* Vilas, 8 Wis. 471; Gardner *v.* Cole, 21 Iowa, 205; Howard *v.* Snelling, 32 Ga. 195.

§ 568. **Same.** — "There is some contrariety and some ambiguity in the old cases on the subject. But this court conceives that the modern decisions establishing the absolute conclusiveness of a subsequent sale to fix fraud on a family settlement made without valuable consideration — fraud not to be repelled by any circumstances whatever — go beyond the construction which prevailed at the American Revolution, and ought not to be followed.

§ 569. **Same.** — "The universally received doctrine of that day unquestionably went as far as this. A subsequent sale without notice, by a person who had made a settlement not on a valuable consideration, was presumptive evidence of fraud, which threw on those claiming under such settlement the burthen of proving that it was made bona fide. This principle therefore, according to the uniform course of this court, must be adopted in construing the statute of 27th of Elizabeth, as it applies to this case." [1]

§ 570. [**Who Are Creditors.** — It is not every conveyance by a designing person that may be set aside in equity, as violating the rights of creditors, but it may be stated that it is the conveyance of property which should be applied to the satisfaction of demands that one may have against another. It is not necessary that the demand be a present liability, nor that it be a liability actually reduced to judgment, but it is sufficient if it be a debt, duty, liability, or demand which may be reduced to judgment and which is now or about to be evidenced in this manner and enforced. The term "debt" should be liberally construed and includes any sort of obligation to pay money. An attorney is a creditor of his client to the extent of professional services rendered, even though there were no specific contract as to the actual amount to be paid for the service rendered.[2] And so the plaintiff in an action for injury to character or property, is a creditor of the defendant's, and as such entitled to sue to set aside a fraudulent conveyance of property so as to defeat the plaintiff's collection of his judgment.[3] A landlord holding a claim for unliquidated

[1] Cathcart *v.* Robinson, 30 U. S. 268, 8 L. Ed. 120.

[2] Smith *v.* Cook, 10 App. D. C. 487.

[3] Chalmers *v.* Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62; McInnis *v.* Wiscasset Mills, 78 Miss. 52, 28 So. 725; Seed *v.* Jennings, 47 Oreg. 464, 83 Pac. 872; one who has been assaulted is a creditor, Carrell *v.* Meek, 155 Mo. App. 337, 137 S. W. 19; M'Cartney *v.* Titsworth, 142 App. Div. 292, 126 N. Y. Supp. 905; Anglin *v.* Conley, 114 Ky. 741, 24 Ky. L. Rep. 1551, 71 S. W. 926.

damages against his tenant, by reason of a renewal of the lease and upon an increased rental, which was subsequently agreed upon by arbitrators appointed for the purpose, is a creditor and entitled to enforce his judgment out of such property as the tenant might have at the time, or such as he may have conveyed for the purpose of hindering his creditors.[1] The rights of a surety will be protected too, he being an existing creditor, and a fraudulent conveyance made by his co-surety at any time subsequent to the execution of the common obligation, may be set aside.[2] But as a prerequisite to maintaining his action, he must show that he has paid the principal's debt, the issue of an execution and a return nulla bona. He can never attack an alleged fraudulent conveyance of the principal's until he has paid the debt and pursued his legal remedies.[3]]

§ 571. [**The Effect of Fraudulent Conveyances upon Pre-existing Creditors.** — It may be stated that pre-existing creditors, that is, those parties whose rights of action have not actually become claims, demands, or liabilities against the fraudulent grantor, have the same rights to prevent the fraudulent disposition by the debtor that are given to subsequent creditors. The fact that one is a surety upon the principal's bond, and while the time for payment has not yet arrived, but it is apparent that the principal debtor is insolvent and the bond will have to be paid by the surety, this does not affect his right to have the conveyance set aside for he is to all intents and purposes a creditor.[4] The claims of judgment creditors will be protected and the property ratably divided, where their rights were in existence at the time the voluntary conveyance was made, but their claims had not actually been reduced to judgment; and it seems to be well settled that where a conveyance is set aside at the instance of existing creditors, subsequent creditors may also share in the fruits of the litigation.[5] And likewise, where since the debt sued upon was contracted, but before the commencement of the

[1] O'Brien *v.* Whigam, 9 App. Div. 113, 41 N. Y. Supp. 40, 75 N. Y. St. Rep. 495.

[2] Washington *v.* Norwood, 128 Ala. 383, 30 So. 405; Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240; Hanna *v.* Hurley, 162 Mich. 601, 71 Detroit Leg. N. 659, 127 N. W. 710; Eddleman *v.* Lentz, 158 N. C. 65, 72 S. E. 1011.

[3] Ellis *v.* Southwestern Land Co., 108 Wis. 313, 84 N. W. 417, 81 Am. St. Rep. 909.

[4] Smith *v.* Young, 173 Ala. 190, 55 So. 425.

[5] O'Brien *v.* Stambach, 101 Iowa, 40, 69 N. W. 1133, 63 Am. St. Rep. 368.

suit, the defendant had in his own name the title to the real estate which has been subsequently conveyed, the plaintiff is nevertheless a creditor and entitled to resist the conveyance of the property.[1]]

§ 572. **The Rule as Applied in England.** — The doctrine as to subsequent conveyances of the grantor avoiding prior voluntary conveyances applies in England only to purchasers strictly and properly so called; for as between voluntary conveyances the first prevails, unless the last be for the payment of debts which indeed can scarcely under such circumstances be called voluntary.[2] The doctrine is also to be understood with this qualification, that the first conveyance is bona fide; for if it is fraudulent the second will prevail.[3] But then in cases between different volunteers a Court of Equity will generally not interfere, but will leave the parties where it finds them as to title. It will not aid one against another, neither will it enforce a voluntary contract.[4] It has

[1] American Agricultural Chemical Co. *v.* Huntington, 99 Me. 361, 59 Atl. 513.

In action for tort plaintiff who subsequently succeeds is a creditor and may resist conveyance by defendant. Papan *v.* Nahay, 152 S. W. 107.

[2] 1 Fonbl. Eq. B. 1, ch. 4, § 12; Id. B. 1, ch. 5, § 2, and note (*h*); Jeremy on Equity Jurisd. B. 2, ch. 3, p. 283, § 25; Atherley on Marr. Sett. ch. 13, p. 185; Goodwin *v.* Goodwin, 1 Ch. Rep. 92 [173]; Clavering *v.* Clavering, 2 Vern. R. 473; s. c. Prec. Ch. 235; s. c. 1 Bro. Parl. Cas. 122; Villiers *v.* Beaumont, 1 Vern. 100; Allen *v.* Arne, 1 Vern. 365; Earl of Bath and Montague's case, 3 Ch. Cas. 88, 89, 93; Chadwill *v.* Dollman, 2 Vern. 530, 531; Boughton *v.* Boughton, 1 Atk. 625; Worral *v.* Worral, 3 Meriv. 256, 269; Sear *v.* Ashwell, 3 Swanst. 411, note; Doe d. Richards *v.* Lewis, 5 Eng. L. & E. 400. See also Ledyard *v.* Butler, 9 Paige, 132; Ridgway *v.* Underwood, 4 Wash. 129.

[3] Naldred *v.* Gilham, 1 P. Will. 580, 581; Colton *v.* King, 2 P. Will. 359; Cecil *v.* Butcher, 2 Jac. & Walk. 573 to 578; 1 Fonbl. Eq. B. 1, ch. 4, § 25; Viers *v.* Montgomery, 8 U. S. 177, 2 L. Ed. 587; ante, § 498.

[4] Pulvertoft *v.* Pulvertoft, 18 Ves. 91, 93, 99; Coleman *v.* Sarrel, 1 Ves, Jr. 52, 54; Ellison *v.* Ellison, 6 Ves. 656; Antrobus *v.* Smith, 12 Ves. 39; Ex parte Pye, 18 Ves. 140; Minturn *v.* Seymour, 4 John. Ch. R. 500; Atherley on Marr. Sett. ch. 13, p. 186; Id. ch. 5, pp. 125, 131 to 145; 1 Fonbl. Eq. B. 1, ch. 4, § 25, and notes (*e*) and (*i*); Id. B. 1, ch. 5, § 2, and note (*h*), § 3; Ex parte Pye, 18 Ves. 149. This doctrine however is to be understood with proper qualifications. If there be a voluntary contract, inter vivos, and something remains to be done to give it effect, as for example if there be a voluntary contract to transfer stock, and the stock is not transferred, a Court of Equity will not enforce the transfer. But if the stock is actually transferred, then a Court of Equity will enforce all the rights growing out of the transfer against anybody. Ellison *v.* Ellison, 6 Ves. 662; Coleman *v.* Sarrel, 1 Ves. Jr. 50; Pulvertoft *v.* Pulvertoft, 18 Ves. 91, 93, 99. So in the case of a voluntary assignment of a bond, even where the bond is not delivered, but is kept in possession of the assignor, a Court of Equity, in the administration of the assets of the assignor, would consider the bond as a debt due to the assignee, no further act remaining to

been said that there are exceptions, and that they stand upon special grounds; such as the interference of Courts of Equity in favor of settlements upon a wife and children for whom the

be done by the assignor. There is a plain distinction between an assignment of stock where the stock has not been transferred, and an assignment of bond. In the former case the material act (the transfer) remains to be done by the grantor; and nothing is in fact done which will entitle the assignee to the aid of the court until the stock is transferred; whereas the court will admit the assignee of a bond as a creditor. Upon this ground where A made a voluntary assignment of a policy upon his own life to trustees for the benefit of his sister and her children if they should outlive him, and he delivered the deed of assignment to one of the trustees, but he kept the policy in his own possession, and afterwards surrendered the policy to the office for a valuable consideration, and afterwards a bill was brought against A by the surviving trustee in the deed to have the policy replaced, it was decreed accordingly. The court said that the gift of the policy was complete without a delivery; that no act remained to be done by the grantor to complete the title of the trustees; and therefore it was not a case where the court was called upon to assist a volunteer. Fortescue *v.* Barnett, 3 Mylne & Keen, 36. On the other hand if something remains to be done to give effect to the voluntary act or contract, a Court of Equity will not interfere to aid the party. Thus where a testator had indorsed upon the back of a bond of his debtor, "I do hereby forgive the said A. B. the sum of £700, part of the within sum of £1200, for which he is indebted to me", and afterwards died, and a suit was brought against the debtor at law for the full amount of the bond, and a bill was brought by him against the executor for an injunction to restrain further proceedings in the action on payment of all the sums due on the bond except the £700, the court refused to interfere, saying that the plaintiff gave no consideration for the alleged release, and that as the plaintiff was a mere volunteer he had no right to come into equity for relief. In truth there was no technical valid release at law, and the court was asked to supply this defect. Tuffnell *v.* Constable, 8 Sim. R. 69. See Folwer *v.* Marten, 2 Mylne & Craig, 459, 474, 475; post, §§ 706, 706 *a*. Upon similar grounds where an obligee of a bond, five days before her death, signed a memorandum not under seal, which was indorsed on the bond, and which purported to be an assignment of the bond without any consideration, and at the same time delivered the bond to the assignee, it was held by the Lord Chancellor that the circumstances of the case did not constitute it a donatio mortis causa, because it was unconditional; and that the gift was incomplete as an absolute gift; and as it was without consideration, it could not be enforced by the assignee. Edward *v.* Jones, 1 Mylne & Craig, 226; s. c. 7 Sim. R. 325. See Antrobus *v.* Smith, 12 Ves. R. 39. See also Duffield *v.* Elwes, 1 Bligh, R. 493, 529, 530 (N. S.), where Lord Eldon said: "The principle which is applied in the decision of this case is the principle upon which Courts of Equity refuse to complete voluntary conveyances. No Court of Equity will compel a completion of them, and throughout the whole of what I have now read the donor is considered as a party who may refuse to complete the intent he has expressed. But I think that is a misapprehension; because nothing can be more clear than that this donatio mortis causa must be a gift made by a donor in contemplation of the conceived approach of death; that the title is not complete till he is actually dead; and that the question therefore never can be what the donor can be compelled to do, but what the donee, in the case of a donatio mortis

party is under a natural and moral obligation to provide.[1] But although the doctrine in favor of such exceptions has been maintained by highly respectable authority, yet it must be now deemed entirely overthrown by the weight of more recent adjudications in which it has been declared that the court will not execute a voluntary contract, and that the principle of the court to withhold its assistance from a volunteer applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement.[2]

§ 573. **Rule Does Not Apply When Property Has Been Conveyed by Fraudulent Grantee to a Purchaser for Value.** — But although voluntary conveyances and covenous conveyances may thus, although good between the parties, be set aside and held void as to creditors and purchasers and others whom they may injure

causa, can call upon the representatives, real or personal, of that donor to do. The question is this, whether the act of the donor being, as far as the act of the donor itself is to be viewed, complete, the persons who represent that donor in respect of personality, the executor, and in respect of realty, the heir-at-law, are not bound to complete that which as far as the act of the donor is concerned in the question was incomplete. In other words where it is the gift of a personal chattel, or the gift of a deed, which is the subject of the donatio mortis causa, whether after the death of the individual who made that gift the executor is not to be considered a trustee for the donee; and whether, on the other hand, if it be a gift affecting the real interest, — and I distinguish now between a security upon land and the land itself, — whether if it be a gift of such an interest in law the heir at law of the testator is not, by virtue of the operation of the trust, which is created, not by indenture but a bequest, arising from operation of law, a trustee for that donee. I apprehend that really the question does not turn at all upon what the donor could do or what the donor could not do. But if it was a good donatio mortis causa, what the donee of that donor could call upon the representatives of the donor to do after the death of that donor." Young *v.* Young, 80 N. Y. 422. As e. g. a voluntary contract for the creation of a trust so long as it remains executory. Secus if it has become executed by a conveyance in trust. Stone *v.* Hackett, 12 Gray, 227; Kekewich *v.* Manning, 1 DeG. M. & G. 176. In Otis *v.* Beckwith, 49 Ill. 121, a voluntary assignment of a policy of life assurance in trust in favor of children was upheld against the administrator of the assured though the policy and assignment had been retained by the assured assignor.

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (*c*); Id. B. 1, ch. 5, § 2; Atherley on Marr. Sett. ch. 3, pp. 131 to 139; 1 Fonbl. Eq. B. 4, ch. 1, § 7, and note (*v*); Ellis *v.* Nimmo, Lloyd & Goold, R. 348. But see contra Holloway *v.* Headington, 8 Simons, R. 325, and Jefferys *v.* Jefferys, 1 Craig & Phillips, 138, 140; in both which cases Ellis *v.* Nimmo seems shaken, if not entirely overthrown. See ante, §§ 95, 169; post, §§ 706, 706 *a*, 787 *a*, 793 *b*, 973, 987, 1040 *b*; Otis *v.* Beckwith, 49 Ill. 121.

[2] Lord Cottenham in Jefferys *v.* Jefferys, 1 Craig & Phillips, R. 138, 141; S. P. Holloway *v.* Headington, 8 Simons, R. 325. See also Tuffnell *v.* Constable, 8 Sim. R. 69; Meek *v.* Kettlewell, before Lord Lyndhurst in the (English) Jurist, 23 Dec. 1843, p. 1121. But see Gale *v.* Gale, 6 Ch. D. 144, 148; Price *v.* Jenkins, 4 Ch. D. 483; s. c. 5 Ch. D. 219.

in their rights and interests, yet we are not to understand that Courts of Equity grant this relief and interpose in favor of the latter under all circumstances. On the contrary they never do interpose at all where the property has been conveyed by the voluntary and covenous grantee to a bona fide purchaser for a valuable consideration without notice. Such a person is a favorite in the eyes of Courts of Equity, and is always protected (as has been already intimated) against claims of this sort.[1] Indeed in every just sense his equity is equal to that of any other person, whether he be a creditor or a purchaser of the grantor; and where the equity is equal we have seen that the rule applies, "potior est conditio possidentis."[2] And where there is a bona fide purchaser from the voluntary or fraudulent grantor, and another from the voluntary or fraudulent grantee, the grantees will have preference according to the priority of their respective titles.[3]

[1] Com. Dig. Chancery, 4 I. 3, 4 I. 11, 4 W. 29; ante, § 381; Atherley on Marr. Sett. ch. 5, p. 128; ch. 14, p. 238; 2 Fonbl. Eq. B. 3, ch. 3, § 1, and notes; Id. B. 2, ch. 6, § 2; Com. Dig. Covin, B. 3, 4; Chancery, 4 I. 3, 4 I. 4, 4 W. 29; Sugden on Vendors, ch. 16, § 10; Prodgers *v.* Langham, 1 Sid. R. 123; Parr *v.* Eliason, 1 East, 92, 95; Sterry *v.* Arden, 1 John. Ch. R. 261, 271; s. c. 12 John. R. 536; Roberts *v.* Anderson, 3 John. Ch. R. 377, 378; s. c. 18 John. R. 513; Bean *v.* Smith, 2 Mason, R. 278, 279, 280; Gore *v.* Brazier, 3 Mass. R. 541; State of Connecticut *v.* Bradish, 14 Mass. R. 296; Trull *v.* Bigelow, 16 Mass. R. 406; ante, §§ 64 *c*, 108, 139, 381, 477.

[2] 2 Fonbl. Eq. B. 3, § 1; Id. B. 2, ch. 6, § 2; 1 Fonbl. B. 1, ch. 4, § 25; Fletcher *v.* Peck, 6 Cranch, 87, 133; ante, § 298.

[3] Anderson *v.* Roberts, 18 John. R. 513; s. c. 3 John. Ch. R. 377, 378; Sands *v.* Hildreth, 14 John. R. 498. But see Preston *v.* Croput, 1 Connect. R. 527, note; Sugden on Vendors, ch. 16, § 10. Another limitation to the general doctrine concerning the Stat. 27 Eliz. has been laid down, to wit, that in order that a subsequent conveyance to a purchaser for value should have the effect to defeat a prior voluntary conveyance, it is necessary that both conveyances should be made by the same person. Hence where a voluntary conveyance had been made by an ancestor in his lifetime, and afterwards his devisee conveyed the same property to a bona fide purchaser for value, it was held that the first conveyance was valid. The court declared that the principle upon which a voluntary conveyance was invalid against subsequent purchasers for value was that by the second sale the vendor so entirely repudiated the former conveyance as to make it conclusive that the intention to sell existed when he made the voluntary conveyance, and that it was made to defeat the subsequent purchaser (a principle, it should be added, probably false in fact in most cases); which principle could not apply where the two conveyances were by different persons. Doe d. Newman *v.* Rusham, 17 Q. B. 723; s. c. 9 Eng. L. & E. 410, overruling Jones *v.* Whittaker, 1 Longf. & T. (Ir.) 14. See Bell *v.* McCawley, 29 Ga. 355. But a purchaser for value from the administrator of a person who had made a voluntary conveyance may, it is held, avoid the former deed under the statute. Clapp *v.* Leatherbee, 18 Pick. 131; Walp *v.* Lampkin & Foster, 76 Conn. 515, 57 Atl. 277; Adelberg *v.* Horowitz, 32 App. Div. 408, 52 N. Y. Supp. 1125.

§ 574. **Same.** — The civil law proceeded upon the same enlightened policy. In the case of alienations of movables and immovables bona fide purchasers for a valuable consideration having no knowledge of any fraudulent intent of the grantor or debtor were protected. Ait prætor: "Quæ fraudationis causa gesta erunt, cum eo qui fraudem non ignoraverit, actionem dabo." [1] Upon this there follows this comment: "Hoc Edictum eum coercet, qui sciens eum in fraudem creditorum hoc facere, suscepit, quod in fraudem creditorum fiebat. Quare, si quid in fraudem creditorum factum sit, si tamen is, qui cepit, ignoravit, cessare videntur verba Edicti." [2] And the very case is afterwards put of a bona fide purchaser from a fraudulent grantee, the validity of whose purchase is unequivocally affirmed. "Is qui a debitore cujus bona possessa sunt, sciens rem emit, iterum alii bona fide menti vendidit; quæsitum sit, an secundus emptor conveniri potest? Sed verior est Sabini sententia, bona fide emptorem non teneri; quia dolus ei duntaxat nocere debeat, qui eum admisit; quemadmodum diximus, non teneri eum, si ab ipso debitore ignorans emerit. Is autem qui dolo malo emit bona fide autem menti vendidit, in solidum pretium rei, quod accepit, tenebitur." [3] The same doctrine is fully recognized by Voet.[4] And its intrinsic justice is so persuasive and satisfactory, that whether derived from Roman sources or not it would have been truly surprising not to have found it embodied in the jurisprudence of England.[5]

§ 575. **Same.** — Indeed the principle is broader and more comprehensive; and although not absolutely universal (for we have seen that there are anomalies in the case of judgment creditors and the case of dower),[6] yet it is generally true, and applies to cases of every sort where an equity is sought to be enforced against a bona fide purchaser of the legal estate without notice, or even against a bona fide purchaser not having the legal estate, where he has a better right or title to call for the legal estate than the

[1] Dig. Lib. 42, tit. 8, l. 1.

[2] Dig. Lib. 42, tit. 8, l. 6, § 8; 1 Domat, B. 2, tit. 10, § 1, art. 3.

[3] Dig. Lib. 42, tit. 8, l. 9; Pothier, Pand. Lib. 42, tit. 8, art. 3, § 25.

[4] 2 Voet, Comm. Lib. 42, tit. 8, § 10, p. 195.

[5] Wilson *v.* Wormal, Godb. 161; Bean *v.* Smith, 2 Mason, 279 to 281; Anderson *v.* Roberts, 18 John. R. 513.

[6] See ante, §§ 58, 152, 510, 543, 410, note; post, §§ 630, 631; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note, p. 22; 2 Fonbl. Eq. B. 2, ch. 6, § 2, notes (*h*) and (*i*); Id. B. 3, ch. 3, § 1, note (*a*); Id. B. 6, ch. 3, § 3, note (*i*); 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*u*); Id. B. 1, ch. 1, § 3, note (*f*), p. 22; Id. B. 1, ch. 5, § 4; Jeremy on Eq. Jurisd. B. 2, ch. 3, p. 283; Mitford, Pl. Eq. by Jeremy, 274, note (*d*).

other party.[1] It applies therefore to cases of accident and mistake as well as to cases of fraud, which, however remediable between the original parties, are not relievable as against such purchasers under such circumstances.[2]

§ 576. **Equity Adapts Itself to Administering Such Relief as Each Particular Case Requires.** — We have thus gone over the principal grounds upon which Courts of Equity grant relief in matters of accident, mistake, and fraud. In all these cases (to recur to a train of remark already suggested) it may be truly asserted that the remedy and relief administered in Courts of Equity are in general more complete, adequate, and perfect than they can be at common law. The remedy is more complete, adequate, and perfect, because equity uses instruments and proofs not accessible at law, such as an injunction operating to prevent future injustice, and a bill of discovery addressing itself to the conscience of the party in matters of proof. The relief also is more complete, adequate, and perfect, inasmuch as it adapts itself to the special circumstances of each particular case, adjusting all cross equities, and bringing all the parties in interest before the court so as to prevent multiplicity of suits and interminable ligitation.[3] Courts of Law on the other hand cannot do more than pronounce a positive judgment in a set formulary for the plaintiff or for the defendant, without professing or attempting to qualify that judgment according to the relative equities of the parties. Thus if a deed is fraudulently obtained without consideration, or for an inadequate consideration, or if by fraud, accident, or mistake a deed is framed contrary to the intention of the parties in their contract on the subject, the forms of proceeding in the Courts of Common Law will not admit of such an investigation of the matter in those courts as will enable them to do justice. The parties claiming under the deed have therefore an advantage in proceeding in a Court of Common Law which it is against conscience they should use. Courts of Equity will (as we have seen) on this very ground interfere to restrain proceedings at

[1] 2 Fonbl. Eq. B. 2, ch. 6, § 2, and note (*h*); 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (*e*); Id. B. 1, ch. 1, § 7; Sugden on Vendors, ch. 16; 2 Chance on Powers, ch. 23, § 1, art. 2859 to 2863; Pomfret *v.* Windsor, 2 Ves. 472, 486; Medlicott *v.* O'Donel, 1 B. & Beatt. 171; Ex parte Knott, 11 Ves. 618; Brace *v.* Duchess of Marlborough, 2 P. Will. 495; ante, §§ 69, 152, 510, 542, 544.

[2] Ante, §§ 69, 152, 510, 542, 543, 573, 850, 851.

[3] See Mitf. Pl. Eq. by Jeremy, pp. 111, 112, 113, 128, 129.

law until the matter has been properly investigated. And if it finally appears that the deed has been improperly obtained, or that it is contrary to the intention of the parties in their contract, these courts will in the first case compel a delivery and cancellation of the deed, or order it to be deposited with an officer of the court, and will further direct a reconveyance of the property if it has been so conveyed that a reconveyance may be necessary. In the second case they will either rectify the deed according to the intention of the parties, or they will restrain the use of it in the points in which it has been framed contrary to, or it has gone beyond, their intention in the original contract.

§ 577. **Relief Granted against Release Improperly Obtained.** — In like manner Courts of Equity will (as we have seen) aid defective securities under like circumstances. They will also interfere not only to relieve against instruments which create rights, but against those which destroy rights, such as a release fraudulently or improperly obtained.[1] And finally they will not only prevent the unfair use of any advantage in proceeding in a court of ordinary jurisdiction gained by fraud, accident, or mistake, but they will also, if the consequences of the advantage have been actually obtained, restore the injured party to his rights.

§ 578. **Jurisdiction to Cancel Instrument Fraudulently Obtained.** — The flexibility of Courts of Equity too in adapting their decrees to the actual relief required by the parties, in which their proceedings form so marked a contrast to the proceedings at the common law, is illustrated in a striking manner in cases of accident, mistake, and fraud. If a decree were in all cases required to be given in a prescribed form, the remedial justice would necessarily be very imperfect, and often wholly beside the real merits of the case. Accident, mistake, and fraud are of an infinite variety in form, character, and circumstances, and are incapable of being adjusted by any single and uniform rule. Of each of them one might say, "Mille trahit varios adverso sole colores." The beautiful character or pervading excellence, if one may so say, of Equity Jurisprudence is, that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes. Thus (to present a summary of what has been already stated)

[1] Mitf. Pl. Eq. by Jeremy, 129, 130. For a statement of the principles upon which equity takes jurisdiction in such cases see Rolfe *v.* Gregory, 4 DeG. J. & S. 579; 1 Perry, Trusts, § 166.

if conveyances or other instruments are fraudulently or improperly obtained, they are decreed to be given up and cancelled.[1] If they are money securities on which the money has been paid, the money is decreed to be paid back. If they are deeds or other muniments of title detained from the rightful party, they are decreed to be delivered up.[2] If they are deeds suppressed or spoliated, the party is decreed to hold the same rights as if they were in his possession and power.[3] If there has been any undue concealment or misrepresentation or specific promise collusively broken, the injured party is placed in the same situation, and the other party is compelled to do the same acts as if all had been transacted with the utmost good faith.[4] If the party says nothing, but by his expressive silence misleads another to his injury, he is compellable to make good the loss; and his own title, if the case requires it, is made subservient to that of the confiding purchaser.[5] If the party by fraud or misrepresentation induces another to do an act injurious to a third person he is made responsible for it.[6] If by fraud or misrepresentation he prevents acts from being done, equity treats the case as to him as if it were done, and makes him a trustee for the other.[7] If a will is revoked by a fraudulent deed, the revocation is treated as a nullity.[8] If a devisee obtains a devise by fraud, he is treated as a trustee of the injured parties.[9] In all these and many other cases which might be mentioned Courts of Equity undo what has been done if wrong, and do what has been left undone if right.

§ 579. **Concurrent Jurisdiction of Court of Equity in All Cases Except for Fraud in Obtaining a Will.** — We may conclude this head by calling the attention of the reader to the remark (which has been necessarily introduced in another place) that Courts of Equity will exercise a concurrent jurisdiction with Courts of

[1] See 1 Madd. Ch. Pr. 208, 211, 212, 261; Mitf. Pl. Eq. by Jeremy, 127, 128, 132.

[2] Mitf. Pl. Eq. by Jeremy, 124.

[3] Mitf. Pl. Eq. 117, 118; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, §§ 1, 385, &c.; 1 Madd. Ch. Pr. 211, 258.

[4] 1 Madd. Ch. Pr. 209, 210; 1 Fonbl. Eq. B. 1, ch. 3, § 4, and notes.

[5] 1 Madd. Ch. Pr. 211; 1 Fonbl. Eq. B. 1, ch. 3, § 4, and notes (*m*) and (*n*).

[6] 3 P. Will. 131, note; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, pp. 388, 389.

[7] 1 Madd. Ch. Pr. 552; 1 Jac. & Walk. 96; 11 Ves. 638.

[8] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 13; Id. B. 1, ch. 2, § 13, note (*q*). But see Ambler, R. 215; 3 Bro. Ch. R. 156, note; 7 Ves. 373, 374.

[9] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 13; 2 Fonbl. B. 4, Pt. 1, ch. 1, § 3, and note (*g*); Mitf. Pl. Eq. by Jeremy, 257.

Law in all matters of fraud, excepting only of fraud in obtaining a will, which if of real estate is constantly referred to a Court of Law to decide it, in the shape of an issue of devisavit, vel non,[1] and which if of personal estate is in England cognizable in the Spiritual or Ecclesiastical Courts.[2] But even in this case the bill may be retained to abide the decision in the proper court, and relief be decreed according to the event.[3] No other excepted case is known to exist; and it is not easy to discern the grounds upon which this exception stands in point of reason or principle, although it is clearly settled by authority.[4] But where the fraud does not go to the whole will, but only to some particular clause, or where the fraud is in unduly obtaining the consent of the next of kin to the probate, Courts of Equity will lay hold of these circumstances to declare the executor a trustee for the next of kin.[5]

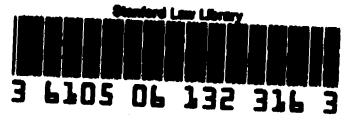
[1] See Broderick's Will, 21 Wall. 503; Ellis *v.* Davis, 109 U. S. 485, 27 L. Ed. 1006, 3 S. Ct. Rep. 327; Gould *v.* Gould, 3 Story, 516, 537; Archer *v.* Meadows, 33 Wis. 167; Meluish *v.* Milton, 3 Ch. D. 27.

[2] Ante, §§ 260, 337; Allen *v.* Macpherson, 5 Beav. R. 469; s. c. on appeal, 1 Phillips, Ch. R. 133. Now the Court of Probate.

[3] See ante, § 260, note; and Gaines & Wife *v.* Chew, 2 Howard, Sup. Ct. R. 619, 645.

[4] Ante, §§ 260, 337, 361, 363, 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 13; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 3, and note (*e*); Kerrick *v.* Bransby, 3 Brown, Parl. Cas. 358; 7 Bro. Parl. Cas. by Tomlins, p. 437. See Wild *v.* Hobson, 2 Ves. & B. 108; Mitf. Pl. Eq. by Jeremy, 257; Barnesly *v.* Powel, 1 Ves. 284; Id. 119; 1 Madd. Ch. Pr 206; Jones *v.* Jones, 7 Price, R. 663; Allen *v.* Macpherson, 1 Phill. Ch. R. 133.

[5] Mitf. Pl. Eq. by Jeremy, 257; Barnesly *v.* Powel, 1 Ves. 284; Tucker *v.* Phipps, 3 Atk. R. 360; Allen *v.* Macpherson, 1 Phill. Ch. R. 133. In this last case many of the former decisions are collected in which Courts of Equity have granted relief in cases of fraud in wills. See the opinion cited at large, ante, § 184, note; and also the other authorities cited in the same note.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